

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Application of Duke)	
Energy Ohio, Inc. for an Increase in Gas)	Case No. 07-589-GA-AIR
Rates.)	

In the Matter of the Application of Duke)	
Energy Ohio, Inc. for approval of an)	Case No. 07-590-GA-ALT
Alternative Rate Plan for its Gas)	
Distribution Service)	

In the Matter of the Application of Duke)	
Energy Ohio, Inc. for Approval to Change)	Case No. 07-591-GA-AAM
Accounting Methods)	

**MOTION TO COMPEL DISCOVERY DEPOSITIONS
AND REQUEST FOR EXPEDITED RULING
BY
THE OFFICE OF THE OHIO CONSUMERS' COUNSEL**

The Office of the Ohio Consumers' Counsel ("OCC"), on behalf of the residential utility consumers of Duke Energy Ohio Inc. ("Duke" "DE-Ohio" or the "Company"), moves the Public Utilities Commission of Ohio ("Commission" or "PUCO") to compel Duke to make its witnesses available for depositions that Duke has delayed and refused to arrange. OCC seeks to take these depositions, as allowed by law and rule, as part of its preparation for the hearing involving Duke's proposal to increase the rates customers pay by more than \$34 million per year.¹ This motion is supported by the accompanying Affidavit of OCC counsel and the reasons set forth in the Attached Memorandum in

¹ Ohio Adm. Code 4901-1-12 and 4901-1-23; R.C. 4903.082.

Support. OCC requests an expedited ruling on this motion pursuant to Ohio Adm. Code 4901-1-12(C).

Respectfully submitted,

JANINE L. MIGDEN-OSTRANDER
CONSUMERS' COUNSEL

/s/ Larry S. Sauer

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MEMORANDUM IN SUPPORT

I. INTRODUCTION

This motion to compel is in response to Duke's refusal to allow OCC to conduct discovery depositions of three of Duke's expert witnesses in this case, completing a sort of trilogy of Duke's misuse of the PUCO's discovery process with the resultant delay or inconvenience for OCC.² Regarding two of the witnesses, Mr. William D. Wathen, Jr., and Mr. Gary J. Hebbeler, Duke previously made these witnesses available to be deposed in September 2007, regarding their testimony and knowledge associated with the issue of

² The case began with Duke refusing to sign a typical protective agreement to facilitate efficient discovery between it and OCC, leading to a two month delay prior to the PUCO's rejection of Duke's tactic and only after the PUCO and OCC's resources were imposed upon. Entry at 3 (October 26, 2007). Duke next pressed for depositions of OCC's witnesses after it disregarded the PUCO's discovery cut-off, which depositions it succeeded in obtaining despite the PUCO finding Duke "has not shown good cause" and with the effect now of causing unplanned inconveniences for OCC staff during negotiations and hearing preparation when OCC is also trying to complete its own planned case preparation. Entry at 8 (February 15, 2008).

natural gas risers, service lines and recovery of the costs associated with risers and service lines as part of Duke's Accelerated Mains Replacement program ("AMRP").

OCC conducted those depositions related to gas risers with the clear understanding that the depositions of those witnesses regarding other aspects of their testimony and supporting Schedules would resume at a later date. As OCC counsel Larry Sauer states in his attached affidavit, "On at least two occasions, I had conversations with John Finnigan, once before the depositions, and again, on September 28, 2007, at the depositions, regarding OCC's intent to depose both Gary J. Hebbeler and Don Wathen, Jr. at a later time regarding issues in their testimony other than the riser replacement program. During those conversations, there was no objection raised by Duke regarding a second deposition of these two witnesses." See Attachment A (with Exhibits 1-5), Affidavit of OCC counsel, Larry Sauer, paragraphs 5-6. The depositions of Mr. Hebbeler, Mr. Wathen and Dr. Morin were arranged by notice on January 3, 2008. See Attachment A (with Exhibits 1-5), Affidavit of Larry Sauer, paragraph 6 and Exhibit 3.

Between January 3, 2008 and February 3, 2008, Duke raised no objections to OCC's reservation of its right to take a second deposition of Mr. Hebbeler and Mr. Wathen. Moreover, Duke only recently made its claim for OCC to pay Dr. Morin's hourly fee for his time being deposed, without having made this claim in the month that followed OCC's deposition notice. See Attachment A (with Exhibits 1-5), at paragraph 7. In fact, on January 8, 2008, during a meeting of the parties in which OCC's deposition notices were discussed, Duke indicated that it would cooperate with OCC regarding the exact times and dates of each of the depositions OCC noticed. See Attachment A (with Exhibits 1-5) at paragraph 8.

Now, Duke is refusing to allow OCC to complete the depositions of Mr. Wathen and Mr. Hebbeler that began on September 28, 2007.³ Regarding the third witness, Dr. Roger Morin, Duke has refused to make Dr. Morin available for deposition unless OCC agrees, up front, to pay his \$375 hourly fee. Duke has not sought the authority from the Commission to require such payment much less a “reasonable fee,” as addressed in Ohio Adm. Code 4901-1-16(C).

Duke’s refusal to allow OCC to conduct these properly scheduled depositions is in apparent retaliation for OCC’s opposition to Duke’s recent and untimely request to conduct its own depositions, submitted well beyond the discovery request deadline set forth in Ohio Adm. Code 4901-1-17 (“Time periods for discovery”). On February 15, 2008, upon Duke’s motion to compel and despite the PUCO’s finding that Duke “has not shown good cause” under the PUCO’s rules, the PUCO ordered, on its own motion, that Duke shall be allowed to depose OCC’s witnesses.⁴ Thus, after effectively waiving its discovery rights and while standing in violation of the Commission’s discovery rules by denying OCC the opportunity to depose witnesses that OCC properly noticed, Duke will be allowed to depose OCC’s witnesses.

OCC, which at all times has complied with the Commission’s discovery rules, now seeks a Commission order requiring Duke to comply with OCC’s timely discovery deposition requests and to do so on a schedule set forth by OCC, while also prohibiting Duke from implementing a “pay to play” threshold for discovery in regulatory matters. Sound public policy and fundamental due process rights are trampled if Duke, or any other

³ Exhibit 1 Affidavit of Larry Sauer.

⁴ Entry at 8 (February 15, 2008).

participant, is able to impose additional costs upon parties who attempt to implement their statutory discovery rights.

II. ARGUMENT

Under R.C. 4903.082, “All parties and intervenors shall be granted ample rights of discovery” and “[t]he present rules of the public utilities commission should be reviewed regularly by the Commission to aid full and reasonable discovery by all parties.” Under Ohio Adm. Code 4901-1-16(A) the Commission identified the purpose of the discovery rules:

The purpose of rules 4901-1-16 to 4901-1-24 of the Administrative Code is to encourage the prompt and expeditious use of prehearing discovery in order to facilitate thorough and adequate preparation for participation in commission proceedings. These rules are also intended to minimize commission intervention in the discovery process.

In the present case, Duke’s refusal to allow the depositions of Mr. Hebbeler and Mr. Wathen, and Duke’s demand of Dr. Morin’s fee, violate the purpose of the discovery rules. Without the opportunity to depose these Duke witnesses, OCC is unable to adequately prepare for and present the AMRP, rates and tariffs, rate base, operating income, return on equity and rate of return portions of its case.

In order to achieve the goals of R.C. 4903.082 and the Commission’s discovery rules set forth in Ohio Adm. Code 4901-1-16 to 4901-1-24, Ohio Adm. Code 4901-1-23 provides for motions to compel discovery. Specifically, Ohio Adm. Code 4901-1-23(A)(3) provides that a party is permitted to move for an order compelling a discovery deposition if another party fails to allow a witness to appear or answer questions propounded under Ohio Adm. Code 4901-1-21.

Under Ohio Adm. Code 4901-1-23(C), a party must first exhaust all reasonable means of resolving differences with the party or person from whom discovery is sought before filing a motion to compel. Also under Ohio Adm. Code 4901-1-23(C), a motion to compel must be accompanied by a memorandum in support that identifies the basis of the motion, an explanation as to how the information sought is relevant to the proceeding, and responses to any objections raised by the party from whom discovery is sought. The motion to compel must be further accompanied by copies of any specific discovery requests, as well as an affidavit of counsel or of the party seeking to compel discovery identifying the efforts that he or she has made to resolve differences with the party from whom discovery is sought.

In the present case, the basis of OCC's motion to compel is Duke's refusal to allow OCC to conduct discovery depositions of three of Duke's expert witnesses. OCC's deposition of the three Duke witnesses is necessary to determine the accuracy, reliability and weight of their expert testimony. The attached affidavit of OCC Counsel, Larry Sauer, documents the repeated efforts OCC has made to resolve its differences with Duke regarding discovery. To date, Duke continues to oppose OCC's resumption of the depositions of Mr. Wathen and Mr. Hebbeler, and continues to demand that OCC pay Dr. Morin's fee prior to making him available for deposition.

A. The PUCO's Rule Does Not Limit the "Frequency of Using... Discovery Methods."

Ohio Adm. Code 4901-1-16, "General Provisions and Scope of Discovery," subpart (B), provides, in pertinent part:

Discovery may be obtained through interrogatories, requests for the production of documents and things or permission to enter upon land or other property, **depositions**, and requests for admission. **The**

frequency of using these discovery methods is not limited unless the commission orders otherwise under rule 4901-1-24 of the Administrative Code. (Emphasis added.)

Under this rule, and absent an order otherwise by the Commission, OCC is entitled to resume the depositions of Mr. Wathen and Mr. Hebbeler.

In prior cases involving contested discovery matters, the Commission has held that a party may require a second deposition of a witness. For example, in a 2005 Dominion East Ohio gas cost recovery (“GCR”) case, the Commission granted OCC’s motion to compel discovery, requiring a utility to allow OCC to depose a witness a second time.⁵ The Commission stated, “Under the Commission’s procedural rules contained in Chapter 4901-1-21, O.A.C. there is no prohibition on conducting a deposition of a witness more than one time.”⁶ In an analogous situation before the Commission, GTE argued that its witness, Ms. Patterson, should not be compelled to submit to a second deposition and that, in fact, Ms. Patterson was not the person most qualified to testify concerning the pertinent subject.⁷ Allowing that another person might be more qualified to testify than Ms. Patterson, the Commission emphasized that Cellnet was entitled to have GTE produce a witness who could address the subject matter specified by Cellnet, and stated:

The Commission reserves the right to require Joan Patterson to still submit to deposition in the event that the identified individuals are unable to satisfactorily respond to the discovery requests or if there are additional matters to which Ms. Patterson can respond.⁸

⁵ *In the Matter of the Regulation of the Purchased Gas Adjustment Clause Contained Within the Rate Schedules of The East Ohio Gas Company d.b.a. Dominion East Ohio and Related Matters*, Case No. 05-219-GA-GCR, Entry (August 22, 2006), see July 28, 2006, Entry at 19.

⁶ *Id.* Entry at 19 (July 19, 2006).

⁷ *In the Matter of the Complaint of Westside Cellular d.b.a. Cellnet of Ohio Inc., Complainant, v. GTE Mobilnet Inc., et. al., Respondents*, Case No. 93-1758-RC-CSS, Entry at 5-6 (Dec. 30, 1998).

⁸ *Id.*, Entry at 6.

In PUCO cases not involving contested discovery, second depositions of witnesses are not uncommon.⁹

Regarding Mr. Wathen and Mr. Hebbeler, whose depositions were begun on September 28, 2007, Larry Sauer's affidavit demonstrates that the parties had a clear understanding that the initial depositions of Mr. Wathen and Mr. Hebbeler were to be limited to issues relating to natural gas risers, service lines and recovery of those costs. The depositions would not cover other areas of their testimony or expertise and coverage of those areas would occur at a later time in the future.

B. Duke Mistakenly Wants a State Office to Pay \$375 Per Hour to Depose the Witness that Duke Chose.

Regarding Dr. Morin, Duke has repeatedly indicated that OCC can only depose this witness in this proceeding, if OCC is able and willing to pay his \$375 per hour fee. See Attachment A, Affidavit of Larry Sauer and Exhibit 1 to the Affidavit. As to this demand by Duke, only the Commission can order a party to pay "a reasonable fee" for an expert's "time spent responding to discovery requests." Ohio Adm. Code 4901-1-16(C). Without such an order from the Commission, which Duke has not sought, Duke should not be allowed to prohibit OCC from deposing Dr. Morin. Even if Duke seeks such a PUCO order, the PUCO should not require a consumer party such as OCC to reimburse Duke's cost of litigating its \$34 million rate increase proposal.

In addition, it would be poor public policy to implement such a fee threshold upon parties in regulatory matters. Such a requirement could have the effect of limiting parties'

⁹ See, for example, In the Matter of the Application of Ameritech Communications for Authority to Provide Competitive Telecommunication Services in the State of Ohio; In the Matter of the Application of Ameritech Communications for a Certificate of Public Convenience to Provide Local Telecommunication Services Throughout the State of Ohio, Entry at n.1, Case No. 96-327-CT-ACE; Case No 96-658-TP-ACE (June 9, 1997).

ability to participate in a regulatory process that is supposed to be open and available to all parties, not just ones with deep pockets. This requirement is particularly burdensome for consumer parties.

In the past, the Commission generally has been disinclined to allow requests for the reimbursement of expert witnesses.¹⁰ In a commission inquiry (“COI”) case, OCC and other intervening parties sought the approval of the Commission to require Cleveland Electric Illuminating Company to pay experts the intervenors were consulting in order to respond to requests for admissions by that company. The Commission first noted the purpose of Ohio Adm. Code 4901-1-16, stating:

This rule is designed to meet the objection that it is unfair to permit one side to obtain without cost, the benefit of an expert's work for which the other side has often paid a substantial sum. Federal Rules Advisory Committee Notes to Federal Rule of Civil Procedure 26.¹¹

The Commission then found that the facts of the case did not suit the objective of the rule, and declined the request, stating:

However, in this case CEI does not seek the benefit of the work of OCC's or GCWRO's experts. CEI does not seek facts or opinions to which these experts may testify. CEI seeks only to identify the specifics of the positions of the parties. Under these circumstances, the application of Rule 4901-1-16, O.A.C., is not proper.¹²

Commenting further, the Commission noted that it was reluctant to begin allowing reimbursement of employing parties in general, stating:

Further, the Commission is not inclined, in the situation presented, to start down the slippery road of requiring one party to pay

¹⁰ *In the Matter of Investigation into the Perry Nuclear Power Station*, Case No. 85-0521-EL-COI, Entry at 19-20 (March 17, 1987)

¹¹ *Id.* Entry at 21 (March 17, 1987).

¹² *Id.*

unknown amounts of another party's expert fees. It is not at all difficult to envision the numerous requests which would be forthcoming should we do so under these circumstances.¹³

In a 2006 case, the Commission also declined a motion for recovery of expert costs in a combined complaint ("CSS") and application for tariff approval ("ATA") case.¹⁴ The City of Huron had produced an expert to interpret various Federal and State statutes. The Commission noted that the key issue in the case was a legal question and declared:

Although Rule 4901-1-16, O.A.C. provides that a party who has retained or specially employed an expert may recover a reasonable fee for time spent responding to discovery requests from the party conducting discovery, such recovery is subject to approval of the Commission.

* * * Given the unique nature of this case and of Mr. Straus's testimony, recovery of expert costs should not be approved. The motion for recovery of expert costs should be denied.¹⁵

In a 2001 COI case involving Ameritech's violation of the Commission's Minimum Telephone Service Standards ("MTSS"), the Commission considered a request from the American Association of Retired Persons ("AARP") for reimbursement for its work in the case, which included the fees of an expert witness.¹⁶ AARP requested reimbursement under R.C. 4903.24, which allows the Commission to levy expenses.¹⁷

¹³ Id.

¹⁴ *In the Matter of the Complaint of the City of Huron, Complainant, v. Ohio Edison Company, Respondent; In the Matter of the Applications of the Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company for Retail Transition Cost Recovery of Nonbypassable Generation Transition Charges and Regulatory Transition Charges*, Case No. 03-1238-EL-CSS; Case No. 03-1445-EL-ATA; Case No. 03-1446-EL-ATA; Case No. 03-1447-EL-ATA, Opinion and Order at 32-33 (May 10, 2006).

¹⁵ Id.

¹⁶ *In the Matter of the Commission-Ordered Investigation of Ameritech Ohio Relative to its Compliance with Certain Provisions of the Minimum Telephone Service Standards Set Forth in Chapter 4901:1-5, Ohio Administrative Code*, Case No. 99-938-TP-COI, Entry at 11 (July 12, 2001).

¹⁷ R.C. 4903.24.

The Commission declined AARP's request for reimbursement under the statute, but ordered that AARP should be reimbursed from other funds that the PUCO controlled in the case, noting AARP's "major contribution" to the case and that it "provided benefits" to telephone customers beyond its own membership.¹⁸ These facts for obtaining an unique fee reimbursement have no resemblance to the facts presented by Duke in its request. Indeed, the PUCO wanted to "stress" that its arrangement for payment of [AARP's] fees "is unique to the circumstances of this case."¹⁹

Consistent with these precedents, the Attorney Examiner already ruled, on February 11, 2008, regarding a similar request for payment of consultant fees that the PUCO staff had propounded to OCC. The Attorney Examiner's ruling (which was not by Entry) followed OCC's objection to the Staff's request that OCC pay the hourly rate of the Staff's consultant, Blue Ridge Consulting Services, Inc. ("Blue Ridge"), in order for OCC to conduct the depositions of three Blue Ridge representatives. The Attorney Examiners allowed OCC to depose the Blue Ridge representatives without paying the witness fees to the PUCO Staff. Consistent with that ruling, the Attorney Examiners should not allow Duke to demand a fee from OCC for deposing Duke's expert witness, Dr. Morin.

Duke seeks the payment of Dr. Morin's fees in apparent retaliation for OCC's opposition to recent and untimely demands by Duke for discovery depositions of OCC witnesses. Duke sought these depositions after ignoring the discovery deadlines in Ohio Adm. Code 4901-1-17, "Time Periods for Discovery."

¹⁸ *Ameritech Ohio*, Entry at 14 and Order at 4 (July 12, 2001).

¹⁹ *Id.*, Entry at 14.

This Commission should not establish a new precedent that requires consumer parties to pay expensive expert witness fees as a condition to the opportunity to conduct discovery depositions. Such a precedent would create a substantial hurdle for consumer parties wishing to fully participate and attempting to exercise their due process rights in Commission proceedings, and greatly complicate the Commission's administration of those proceedings.

OCC requests an expedited ruling on this motion pursuant to Ohio Adm. Code 4901-1-12(C). OCC has not determined whether Duke objects to an expedited ruling on this motion, however, under Ohio Adm. Code 4901-1-12(F), the Commission may, upon its own motion, issue an expedited ruling on any motion "where the issuance of such a ruling will not adversely affect a substantial right of any party." In this instance, given the recent ruling by the Commission granting Duke's motion to compel, an expedited ruling granting OCC's motion to compel will serve the ends of justice and will not adversely affect a substantial right of Duke.

III. CONCLUSION

For the reasons set forth above, OCC's Motion to Compel should be granted and Duke should be ordered to permit the discovery depositions of its witnesses, Mr. Wathen, Mr. Hebbeler and Dr. Morin, at a time of OCC's scheduling convenience. In the interest of administrative fairness under the PUCO's rules, OCC should be allowed to depose Mr. Morin without paying a fee of \$375 an hour.

Respectfully submitted,

JANINE L. MIGDEN-OSTRANDER
CONSUMERS' COUNSEL

/s/ Larry S. Sauer

Larry S. Sauer, Counsel of Record

Joseph P. Serio

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CERTIFICATE OF SERVICE

It is hereby certified that a true copy of the foregoing *Motion to Compel Discovery by The Office of the Ohio Consumers' Counsel*, was served via electronic mail, this 20th day of February, 2008.

/s/ Larry S. Sauer
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Attachment A

Affidavit of Larry S. Sauer
(With Exhibits 1 – 5)

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Application of Duke)	
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In the Matter of the Application of Duke)	
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Accounting Methods)	

**AFFIDAVIT OF LARRY S. SAUER
(WITH EXHIBITS 1 – 5)**

I, Larry S. Sauer, counsel for the Office of the Ohio Consumers' Counsel, being first duly sworn, deposes and says:

1. On September 14, 2007, I contacted Duke Counsel, John Finnigan, by e-mail (attached hereto as Exhibit 1) to schedule depositions for two of Duke witnesses, Gary J. Hebbeler and William Don Wathen, Jr. in Case No. 07-589-GA-AIR.
2. These depositions were scheduled for the sole purpose of inquiring into the issue of Duke's gas riser replacement program.
3. These depositions were noticed on September 18, 2007, and scheduled for September 28, 2007 (Notice of Deposition attached hereto as Exhibit 2).
4. On at least two occasions, I had conversations with John Finnigan, once before the depositions, and again, on September 28, 2007, at the depositions, regarding OCC's intent to depose both Gary J. Hebbeler and William Don Wathen, Jr. at a later time regarding issues in their testimony other than the riser replacement program.

5. During these conversations, there was no objection raised by Duke regarding a second deposition of these two witnesses.
6. On January 3, 2008 OCC reserved its right to depose Duke's witnesses in Case No. 07-589-GA-AIR by noticing the deposition of all sixteen Duke witnesses, including Gary J. Hebbeler and William Don Wathen, Jr. (attached hereto as Exhibit 3 are notice of depositions of Gary J. Hebbeler, William Don Wathen, Jr., and Dr. Roger A. Morin).
7. Between January 3, 2008 and February 3, 2008, there was no objection raised by Duke in opposition to OCC's reservation of its right to take a second deposition of Gary J. Hebbeler and Don Wathen. During that same time period, Duke did not raise the matter of Dr. Morin's fee as a condition of his deposition.
8. During a January 8, 2008 meeting, OCC and Duke discussed OCC's notices of deposition and Duke indicated its willingness to cooperate with OCC regarding the exact dates on which OCC's depositions of Duke's witnesses would occur.
9. On February 1, 2008, Duke counsel, John Finnigan, requested to take the depositions of all OCC witnesses in Case No. 07-589-GA-AIR, (e-mail attached hereto as Exhibit 4); however, because Duke had failed to reserve its rights to take these depositions prior to the discovery cut-off, I responded negatively to the request.
10. During the same conversation, on February 4, 2008, as a result of my refusal to agree to allow Duke's to take the depositions of OCC's witnesses, for the first time I was informed that Duke objected to OCC taking the depositions of Duke's witnesses Gary J. Hebbeler and William Don Wathen, Jr. a second time, and that if OCC wanted to depose Duke's rate of return expert, Dr. Roger A. Morin, OCC would be required to pay Dr. Morin's \$375 hourly fee.
11. Despite OCC's continuing protest of Duke's demand that OCC pay Dr. Morin's hourly fee for his appearance at a deposition, Duke has responded that the scheduling of Dr. Morin's deposition is contingent on resolving the fee payment dispute (e-mail attached hereto as Exhibit 5). On February 11, 2008, at the Office of the Ohio Consumers' Counsel, Duke's counsel, John Finnigan, reiterated that position.
12. OCC has exhausted all reasonable means of resolving its discovery differences with Duke and is at an impasse regarding Duke's

refusal to honor OCC's deposition requests of Gary J. Hebbeler,
William Don Wathen, Jr., and Dr. Roger A. Morin.

13. Further Affiant sayeth naught.

STATE OF OHIO

COUNTY OF FRANKLIN

The undersigned, being of lawful age and duly sworn on oath, hereby certifies, deposes
and stated the following:


I have caused to be prepared the attached written affidavit for OCC
in the above referenced docket. This affidavit is true and correct to
the best of my knowledge, information, and belief.

Further Affiant sayeth not.

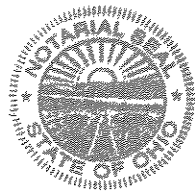


Larry S. Sauer, Affiant

Subscribed and sworn to before me this 20th day of February, 2008.



Notary Public



Bonnie Morava
Notary Public, State of Ohio
My Commission Expires 09-18-2011

Exhibit 1

From: LARRY SAUER
To: john.finnigan@duke-energy.com
Date: 9/14/2007 5:18:00 PM
Subject: Discovery Depositions

John,

OCC would like to depose Gary Hebbeler and Don Wathen, Jr. regarding their testimony on the riser issue in DE-Ohio's rate case (07-589-GA-AIR, et al.). It is our feeling that the deposition will bring closure to the riser issue more efficiently and in a more timely manner than the necessary back and forth of additional discovery. Please consult with Mr. Hebbeler and Mr. Wathen and let me know if any of the following dates/times are acceptable to your witnesses:

Monday September 24 (all day)
Tuesday September 25 (PM)
Wednesday September 26 (PM)
Thursday September 27 (all day)
Friday September 28 (PM).

We think that we would need 2 hours to depose Mr. Hebbeler, and 1 hour to depose Mr. Wathen. Please let me know on Monday which of the above times are acceptable, and I will prepare a Notice.

Thank you.

CONFIDENTIAL NOTICE:

THIS COMMUNICATION IS INTENDED ONLY FOR THE PERSON OR ENTITY TO WHICH IT IS ADDRESSED AND MAY CONTAIN CONFIDENTIAL AND/OR PRIVILEGED LEGAL, GOVERNMENTAL MATERIAL. ANY UNAUTHORIZED REVIEW, USE, DISCLOSURE OR DISTRIBUTION IS PROHIBITED. IF YOU ARE NOT, OR BELIEVE YOU ARE NOT, THE INTENDED RECIPIENT OF THIS COMMUNICATION, DO NOT READ IT. PLEASE REPLY TO THE SENDER ONLY, AND STATE THAT YOU HAVE RECEIVED THIS MESSAGE. THEN IMMEDIATELY DELETE THIS COMMUNICATION AND ALL COPIES OF THIS COMMUNICATION. THANK YOU.

Larry S. Sauer
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CC: SERIO, JOE

FILE

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

RECEIVED-DOCKETING DIV

2007 SEP 18 PM 3:59

PUCO

In the Matter of the Application of Duke Energy Ohio, Inc. for an Increase in Gas Rates.)	Case No. 07-589-GA-AIR
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In the Matter of the Application of Duke Energy Ohio, Inc. for Approval of an Alternative Rate Plan for its Gas Distribution Service.)	Case No. 07-590-GA-ALT
)	
In the Matter of the Application of Duke Energy Ohio, Inc. for Approval to Change Accounting Methods.)	Case No. 07-591-GA-AAM
)	

**NOTICE TO TAKE DEPOSITION UPON ORAL EXAMINATION OF
WILLIAM DON WATHEN, JR.
AND REQUEST FOR PRODUCTION OF DOCUMENTS**

Pursuant to Ohio Adm. Code Rule 4901-1-21(B), please take notice that the Ohio Consumers' Counsel ("OCC") will take the oral deposition of all individuals for whom testimony is filed or will be filed in the above-captioned matters or who have contact with the subject matter of these proceedings on behalf of the Duke Energy Ohio, Inc. ("DE-Ohio") including, but not limited, to William Don Wathen, Jr., Director, Revenue Requirements. The deposition will take place at the offices of DE-Ohio, Room 2500, Atrium II, 221 East Fourth Street, Cincinnati, Ohio and will begin at 3:30 p.m. on September 28, 2007 or such other place and time as are mutually agreed upon by DE-Ohio and the OCC. Parties are invited to attend and cross-examine.

The depositions will be taken of the aforementioned deponent on relevant topics within the scope of these proceedings, including but not limited to, the subject matter of

This is to certify that the images appearing are an accurate and complete reproduction of a case file document delivered in the regular course of business.

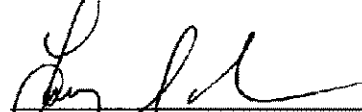
Technician *go* Date Processed 9-18-07

their testimony or their contact with the subject matter of this proceeding. The depositions will be taken upon oral examination (as upon cross-examination) before an officer authorized by law to take depositions and will continue from day to day, except for holidays and weekends, until completed.

Pursuant to Ohio Adm. Code Rules 4901-1-21(E) and 4901-1-20, the deponent is requested to produce at the time of his or her deposition all documents relating to his or her testimony or their contact with the subject matter of these proceedings and/or their responses to discovery, including, but not limited to, the results of any studies done for these proceedings and any backup documentation, including raw data, for those studies.

Respectfully submitted,

JANINE L. MIGDEN-OSTRANDER
CONSUMERS' COUNSEL



Larry S. Sauer, Counsel of Record

Joseph P. Serio

Michael E. Idzkowski

Assistant Consumers' Counsel

Office of the Ohio Consumers' Counsel

10 West Broad Street, Suite 1800

Columbus, Ohio 43215-3485

(614) 466-8574 (Telephone)

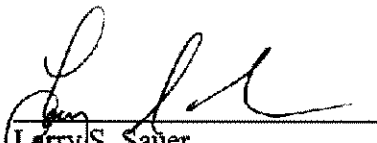
sauer@occ.state.oh.us

serio@occ.state.oh.us

idzkowski@occ.state.oh.us

CERTIFICATE OF SERVICE

I hereby certify that a copy of the OCC's Notice to Take Deposition and Request for Production of Documents was served via first class U.S. mail, postage pre-paid, to the persons listed below this 18th day of September, 2007.


Larry S. Sauer
Assistant Consumers' Counsel

Paul A. Colbert
John Finnigan
Associate General Counsel
Duke Energy Ohio
139 Fourth Street, Room 25 ATII
Cincinnati, Ohio 45202

Thomas Lindgren
William Wright
Attorney General's Office
Public Utilities Section
180 East Broad Street, 9th Floor
Columbus, Ohio 43215

David F. Boehm
Michael L. Kurtz
Kyrt J. Boehm
Boehm, Kutz & Lowry
36 East Seventh Street, Suite 1510
Cincinnati, Ohio 45202-4454

David C. Rinebolt
Ohio Partners for Affordable Energy
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P.O. Box 1793
Findlay, Ohio 45839-1793

John M. Dosker
General Counsel
Stand Energy Corporation
1077 Celestial Street, Suite 110
Cincinnati, Ohio 45202-1629

Sally W. Bloomfield
Thomas J. O'Brien
Bricker & Eckler LLP
100 South Third Street
Columbus, Ohio 43215-4219

John W. Bentine
Mark S. Yurick
Chester, Willcox & Saxbe LLP
65 East State Street, Suite 1000
Columbus, Ohio 43215-4213

FILE

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

RECEIVED-DOCKETING DIV

2007 SEP 18 PM 3:58

In the Matter of the Application of Duke)
Energy Ohio, Inc. for an Increase in Gas) Case No. 07-589-GA-AIR
Rates.)

PUCO

In the Matter of the Application of Duke)
Energy Ohio, Inc. for Approval of an) Case No. 07-590-GA-ALT
Alternative Rate Plan for its Gas)
Distribution Service.)

In the Matter of the Application of Duke)
Energy Ohio, Inc. for Approval to Change) Case No. 07-591-GA-AAM
Accounting Methods.)

**NOTICE TO TAKE DEPOSITION UPON ORAL EXAMINATION OF
GARY J. HEBBELER
AND REQUEST FOR PRODUCTION OF DOCUMENTS**

Pursuant to Ohio Adm. Code Rule 4901-1-21(B), please take notice that the Ohio Consumers' Counsel ("OCC") will take the oral deposition of all individuals for whom testimony is filed or will be filed in the above-captioned matters or who have contact with the subject matter of these proceedings on behalf of the Duke Energy Ohio, Inc. ("DE-Ohio") including, but not limited, to Gary J. Hebbeler, General Manager, Gas Engineering. The deposition will take place at the offices of DE-Ohio, Room 2500, Atrium II, 221 East Fourth Street, Cincinnati, Ohio and will begin at 1:30 p.m. on September 28, 2007 or such other place and time as are mutually agreed upon by DE-Ohio and the OCC. Parties are invited to attend and cross-examine.

The depositions will be taken of the aforementioned deponent on relevant topics within the scope of these proceedings, including but not limited to, the subject matter of

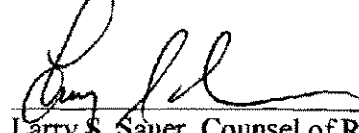
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Technician *[Signature]* Date Processed 9-18-07

their testimony or their contact with the subject matter of this proceeding. The depositions will be taken upon oral examination (as upon cross-examination) before an officer authorized by law to take depositions and will continue from day to day, except for holidays and weekends, until completed.

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Respectfully submitted,

JANINE L. MIGDEN-OSTRANDER
CONSUMERS' COUNSEL



Larry S. Sauer, Counsel of Record

Joseph P. Serio

Michael E. Idzkowski

Assistant Consumers' Counsel

Office of the Ohio Consumers' Counsel

10 West Broad Street, Suite 1800

Columbus, Ohio 43215-3485

(614) 466-8574 (Telephone)

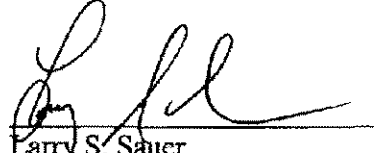
sauer@occ.state.oh.us

serio@occ.state.oh.us

idzkowski@occ.state.oh.us

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Assistant Consumers' Counsel

Paul A. Colbert
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Associate General Counsel
Duke Energy Ohio
139 Fourth Street, Room 25 ATII
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Thomas Lindgren
William Wright
Attorney General's Office
Public Utilities Section
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Columbus, Ohio 43215-4219

John W. Bentine
Mark S. Yurick
Chester, Willcox & Saxbe LLP
65 East State Street, Suite 1000
Columbus, Ohio 43215-4213

FILE

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

RECEIVED-DOCKETING DIV
2008 JAN -3 PM 4:19
PUCO

In the Matter of the Application of Duke Energy Ohio, Inc. for an Increase in Gas Rates.)	Case No. 07-589-GA-AIR
In the Matter of the Application of Duke Energy Ohio, Inc. for Approval of an Alternative Rate Plan for its Gas Distribution Service.)	Case No. 07-590-GA-ALT
In the Matter of the Application of Duke Energy Ohio, Inc. for Approval to Change Accounting Methods.)	Case No. 07-591-GA-AAM

**NOTICE TO TAKE DEPOSITION UPON ORAL EXAMINATION OF
WILLIAM DON WATHEN, JR.
AND REQUEST FOR PRODUCTION OF DOCUMENTS**

Pursuant to Ohio Adm. Code Rule 4901-1-21(B), please take notice that the Ohio Consumers' Counsel ("OCC") will take the oral deposition of all individuals for whom testimony is filed or will be filed in the above-captioned matters or who have knowledge and expertise with the subject matter of these proceedings on behalf of Duke Energy Ohio, Inc. including, but not limited to, William Don Wathen, Jr., Director, Revenue Requirements. The deposition will take place at the offices of OCC, 10 West Broad Street, 18th Floor, Columbus, Ohio and will begin at 10:00 a.m. on Friday, February 1, 2008, or such other place and time as are mutually agreed upon by Duke Energy Ohio, Inc. and the OCC. Deponent will appear at designated time with documents at OCC and remain present until deposed. Parties are invited to attend and cross-examine.

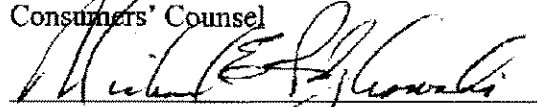
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Technician TM Date Processed 1/3/2008

The deposition will be taken of the aforementioned deponent on relevant topics within the scope of these proceedings, including but not limited to, the subject matter of the deponent's testimony or the deponent's knowledge and expertise with the subject matter of this proceeding. The deposition will be taken upon oral examination (as upon cross-examination) before an officer authorized by law to take depositions and will continue from day to day, except for holidays and weekends, until completed.

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Respectfully submitted,

Janine L. Migden-Ostrander
Consumers' Counsel

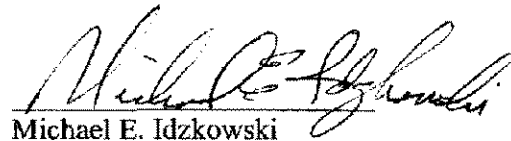


Larry S. Sauer, Attorney of Record
Joseph P. Serio
Michael E. Idzkowski
Assistant Consumers' Counsel

Office of the Ohio Consumers' Counsel
10 West Broad Street, Suite 1800
Columbus, Ohio 43215-3485
614-466-8574 (Telephone)
sauer@occ.state.oh.us
serio@occ.state.oh.us
idzkowski@occ.state.oh.us

CERTIFICATE OF SERVICE

I hereby certify that a that a true copy of the foregoing *Notice To Take Deposition Upon Oral Examination of William Don Wathen, Jr. and Request for Production of Documents by the Office of the Ohio Consumers' Counsel* was served by Regular U.S. Mail Service (also electronically as a courtesy copy, where possible), postage prepaid, to all parties this 3rd day of January, 2008.



Michael E. Idzkowski
Assistant Consumers' Counsel

PARTIES OF RECORD

Paul A. Colbert
John Finnigan
Associate General Counsel
Duke Energy Ohio
139 Fourth Street, Room 25 ATII
Cincinnati, Ohio 45202

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William Wright
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Public Utilities Section
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Mark S. Yurick
Chester, Willcox & Saxbe LLP
65 East State Street, Suite 1000
Columbus, Ohio 43215-4213

FILE

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

RECEIVED-DOCKETING DIV
2008 JAN -3 PM 4:18
PUCO

In the Matter of the Application of Duke)
Energy Ohio, Inc. for an Increase in Gas) Case No. 07-589-GA-AIR
Rates.)

In the Matter of the Application of Duke)
Energy Ohio, Inc. for Approval of an) Case No. 07-590-GA-ALT
Alternative Rate Plan for its Gas)
Distribution Service.)

In the Matter of the Application of Duke)
Energy Ohio, Inc. for Approval to Change) Case No. 07-591-GA-AAM
Accounting Methods.)

**NOTICE TO TAKE DEPOSITION UPON ORAL EXAMINATION OF
GARY J. HEBBELER
AND REQUEST FOR PRODUCTION OF DOCUMENTS**

Pursuant to Ohio Adm. Code Rule 4901-1-21(B), please take notice that the Ohio Consumers' Counsel ("OCC") will take the oral deposition of all individuals for whom testimony is filed or will be filed in the above-captioned matters or who have knowledge and expertise with the subject matter of these proceedings on behalf of Duke Energy Ohio, Inc. including, but not limited to, Gary J. Hebbeler, General Manager, Gas Operations. The deposition will take place at the offices of OCC, 10 West Broad Street, 18th Floor, Columbus, Ohio and will begin at 10:00 a.m. on Friday, February 8, 2008, or such other place and time as are mutually agreed upon by Duke Energy Ohio, Inc. and the OCC. Deponent will appear at designated time with documents at OCC and remain present until deposed. Parties are invited to attend and cross-examine.

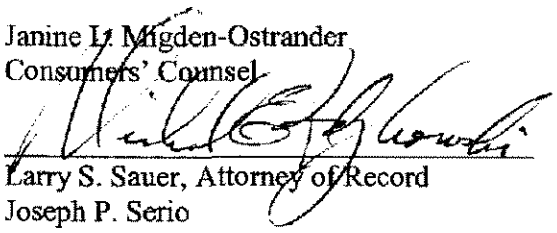
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The deposition will be taken of the aforementioned deponent on relevant topics within the scope of these proceedings, including but not limited to, the subject matter of the deponent's testimony or the deponent's knowledge and expertise with the subject matter of this proceeding. The deposition will be taken upon oral examination (as upon cross-examination) before an officer authorized by law to take depositions and will continue from day to day, except for holidays and weekends, until completed.

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Respectfully submitted,

Janine L. Migden-Ostrander
Consumers' Counsel



Larry S. Sauer, Attorney of Record

Joseph P. Serio

Michael E. Idzkowski

Assistant Consumers' Counsel

Office of the Ohio Consumers' Counsel

10 West Broad Street, Suite 1800

Columbus, Ohio 43215-3485

614-466-8574 (Telephone)

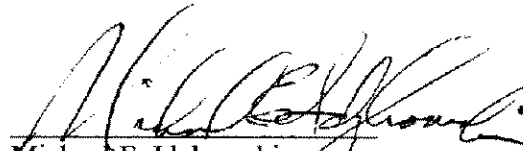
sauer@occ.state.oh.us

serio@occ.state.oh.us

idzkowski@occ.state.oh.us

CERTIFICATE OF SERVICE

I hereby certify that a that a true copy of the foregoing *Notice To Take Deposition Upon Oral Examination of Gary J. Hebbeler and Request for Production of Documents* by the Office of the Ohio Consumers' Counsel was served by Regular U.S. Mail Service (also electronically as a courtesy copy, where possible), postage prepaid, to all parties this 3rd day of January, 2008.


Michael E. Idzkowski
Assistant Consumers' Counsel

PARTIES OF RECORD

Paul A. Colbert
John Finnigan
Associate General Counsel
Duke Energy Ohio
139 Fourth Street, Room 25 ATII
Cincinnati, Ohio 45202

Thomas Lindgren
William Wright
Attorney General's Office
Public Utilities Section
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Columbus, Ohio 43215

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Michael L. Kurtz
Kyril J. Boehm
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Findlay, Ohio 45839-1793

John M. Dosker
General Counsel
Stand Energy Corporation
1077 Celestial Street, Suite 110
Cincinnati, Ohio 45202-1629

Sally W. Bloomfield
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Bricker & Eckler LLP
100 South Third Street
Columbus, Ohio 43215-4219

John W. Bentine
Mark S. Yurick
Chester, Willcox & Saxbe LLP
65 East State Street, Suite 1000
Columbus, Ohio 43215-4213

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

RECEIVED-DOCKETING
2008 JAN -3 PM 4:09
PUCO

In the Matter of the Application of Duke)
Energy Ohio, Inc. for an Increase in Gas) Case No. 07-589-GA-AIR
Rates.)

In the Matter of the Application of Duke)
Energy Ohio, Inc. for Approval of an) Case No. 07-590-GA-ALT
Alternative Rate Plan for its Gas)
Distribution Service.)

In the Matter of the Application of Duke)
Energy Ohio, Inc. for Approval to Change) Case No. 07-591-GA-AAM
Accounting Methods.)

**NOTICE TO TAKE DEPOSITION UPON ORAL EXAMINATION OF
DR. ROGER A. MORIN
AND REQUEST FOR PRODUCTION OF DOCUMENTS**

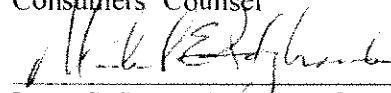
Pursuant to Ohio Adm. Code Rule 4901-1-21(B), please take notice that the Ohio Consumers' Counsel ("OCC") will take the oral deposition of all individuals for whom testimony is filed or will be filed in the above-captioned matters or who have knowledge and expertise with the subject matter of these proceedings on behalf of Duke Energy Ohio, Inc. including, but not limited to, Dr. Roger A. Morin. The deposition will take place at the offices of OCC, 10 West Broad Street, 18th Floor, Columbus, Ohio and will begin at 10:00 a.m. on Wednesday, January 23, 2008, or such other place and time as are mutually agreed upon by Duke Energy Ohio, Inc. and the OCC. Deponent will appear at designated time with documents at OCC and remain present until deposed. Parties are invited to attend and cross-examine.

The deposition will be taken of the aforementioned deponent on relevant topics within the scope of these proceedings, including but not limited to, the subject matter of the deponent's testimony or the deponent's knowledge and expertise with the subject matter of this proceeding. The deposition will be taken upon oral examination (as upon cross-examination) before an officer authorized by law to take depositions and will continue from day to day, except for holidays and weekends, until completed.

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Respectfully submitted,

Janine L. Migden-Ostrander
Consumers' Counsel

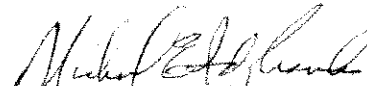


Larry S. Sauer, Attorney of Record
Joseph P. Serio
Michael E. Idzkowski
Assistant Consumers' Counsel

Office of the Ohio Consumers' Counsel
10 West Broad Street, Suite 1800
Columbus, Ohio 43215-3485
614-466-8574 (Telephone)
sauer@occ.state.oh.us
serio@occ.state.oh.us
idzkowski@occ.state.oh.us

CERTIFICATE OF SERVICE

I hereby certify that a that a true copy of the foregoing *Notice To Take Deposition Upon Oral Examination of Dr. Roger A. Morin and Request for Production of Documents by the Office of the Ohio Consumers' Counsel* was served by Regular U.S. Mail Service (also electronically as a courtesy copy, where possible), postage prepaid, to all parties this 3rd day of January, 2008.



Michael E. Idzkowski
Assistant Consumers' Counsel

PARTIES OF RECORD

Paul A. Colbert
John Finnigan
Associate General Counsel
Duke Energy Ohio
139 Fourth Street, Room 25 ATII
Cincinnati, Ohio 45202

Thomas Lindgren
William Wright
Attorney General's Office
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Columbus, Ohio 43215-4219

John W. Bentine
Mark S. Yurick
Chester, Willcox & Saxbe LLP
65 East State Street, Suite 1000
Columbus, Ohio 43215-4213

Exhibit 4

From: "Finnigan, John" <john.finnigan@duke-energy.com>
To: "LARRY SAUER" <SAUER@occ.state.oh.us>
Date: 2/1/2008 11:09:24 AM
Subject: dial-in

Larry,

Here is the dial-in number for our 1:00 p.m. meeting. Perhaps you and I can talk for a few minutes when the meeting is over, to pick depo dates for your depositions of our witnesses, and our depositions of your witnesses. Also, if you can let us know which witnesses you'll want to appear live at the hearing vs. stipulating to their testimony, this would be helpful.

Thanks,

John

Dial-in number:

866-385-2663

Participant code: 302289

John J. Finnigan, Jr.
Associate General Counsel
Duke Energy Shared Services, Inc.
(513) 419-1843
(513) 419-1846 fax
John.Finnigan@duke-energy.com

Confidentiality Notice:

The preceding e-mail message (including any attachments) contains information that may be confidential, may be protected by the attorney-client or other applicable privileges, or may constitute non-public information. It is intended to be conveyed only to the designated recipient(s). If you are not an intended recipient of this message, please notify the sender by replying to this message and then delete it from your system. Use, dissemination, distribution, or reproduction of this message by unintended recipients is not authorized and may be unlawful.

Exhibit 5

From: "Finnigan, John" <john.finnigan@duke-energy.com>
To: "LARRY SAUER" <SAUER@occ.state.oh.us>
Date: 2/5/2008 6:03:14 PM
Subject: RE: depositions

Larry,

Mohler's telephone depo on 2/19 is fine. I don't want to schedule Morin's though, until we resolve the issue of payment for his time.

Our estimate of rate case expense includes only his projected fees to us and does not include anything for additional expenses due to depositions. So we wouldn't recover this through rate case expense.

The PUCO generally follows the Ohio Rules of Civil Procedure, so we believe the OCC must pay.

Thanks,
John

John J. Finnigan, Jr.
Associate General Counsel
Duke Energy Shared Services, Inc.
(513) 419-1843
(513) 419-1846 fax
John.Finnigan@duke-energy.com

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-----Original Message-----

From: LARRY SAUER [mailto:SAUER@occ.state.oh.us]
Sent: Tuesday, February 05, 2008 5:03 PM
To: Finnigan, John
Cc: Mike Idzkowski; JOE SERIO
Subject: Re: depositions

John,

I believe the depositions you scheduled on 2/15 will work. Will Morin be available for a telephone deposition on 2/14 at 10:00 AM and Mohler for a telephone deposition at 9:00 AM on 2/19? If these times are good, I will send amended notices and arrange for the court reporter for the depositions. Please let me know the address where the court reporter must go for Morin's and Mohler's depositions.

I am still trying to understand why you believe the OCC should pay Morin's fee. I don't believe the Commission's rules provide for it, and

Duke isn't responsible for these costs because they can be recovered through the amortization of rate case expense. If I am missing something here, please advise which Commission rule you believe places this burden on OCC, and I will take the request to OCC management.

Thank you.

CONFIDENTIAL NOTICE:

THIS COMMUNICATION IS INTENDED ONLY FOR THE PERSON OR ENTITY TO WHICH IT IS ADDRESSED AND MAY CONTAIN CONFIDENTIAL AND/OR PRIVILEGED LEGAL, GOVERNMENTAL MATERIAL. ANY UNAUTHORIZED REVIEW, USE, DISCLOSURE OR DISTRIBUTION IS PROHIBITED. IF YOU ARE NOT, OR BELIEVE YOU ARE NOT, THE INTENDED RECIPIENT OF THIS COMMUNICATION, DO NOT READ IT. PLEASE REPLY TO THE SENDER ONLY, AND STATE THAT YOU HAVE RECEIVED THIS MESSAGE. THEN IMMEDIATELY DELETE THIS COMMUNICATION AND ALL COPIES OF THIS COMMUNICATION. THANK YOU.

Larry S. Sauer
Assistant Consumers' Counsel
10 West Broad Street
Suite 1800
Columbus, Ohio 43215-3485
(614) 466-1312

>>> "Finnigan, John" <john.finnigan@duke-energy.com> 2/5/2008 3:04 PM
>>>
Larry,

Turns out that Feb. 15th is the best date for depositions for us and all three Cincinnati witnesses can be available this date.

I suggest:

Storck - 10:00 a.m.

Riddle - 1:00 p.m.

Smith - 3:00 p.m.

If you would like different time periods, let me know. Please confirm whether this schedule is OK with you. We can do the depositions in our

conference room on the 25th floor of the Atrium II building.

Thanks,

John

John J. Finnigan, Jr.
Associate General Counsel
Duke Energy Shared Services, Inc.
(513) 419-1843
(513) 419-1846 fax
John.Finnigan@duke-energy.com

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Summary: Motion Motion to Compel Discovery Depositions and Request for Expedited Ruling and Attachment A - Affidavit of Larry S. Sauer electronically filed by Mrs. Bonnie C Morava on behalf of Office of the Ohio Consumers' Counsel