

FILE

BEFORE  
THE PUBLIC UTILITIES COMMISSION OF OHIO

RECEIVED-DOCKETING DIV  
2009 MAR 24 PM 3:54

Consolidated Duke Energy Ohio, Inc., Rate	)	Case Nos. 05-91-EL-ATA
Stabilization Plan Remand and Rider	)	03-2079-EL-AAM
Adjustment Cases.	)	03-2081-EL-AAM
	)	03-2080-EL-ATA
	)	05-724-EL-UNC
	)	05-725-EL-UNC
	)	06-1068-EL-UNC
	)	06-1069-EL-UNC
	)	06-1085-EL-UNC

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MEMORANDUM CONTRA MOTION FOR EXTENSION OF TIME TO  
RESPOND TO OCC'S MOTION TO MODIFY PROTECTIVE ORDER  
BY  
THE OFFICE OF THE OHIO CONSUMERS' COUNSEL

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I. INTRODUCTION

The Office of the Ohio Consumers' Counsel ("OCC"), on behalf of the residential consumers of Duke Energy Ohio, Inc. ("Company" or "Duke Energy," including its predecessor The Cincinnati Gas and Electric Company) moved on March 13, 2009 to modify a protective order ("Motion to Modify") that was previously approved in the Second Entry on Rehearing ("October Entry") issued by the Public Utilities Commission of Ohio ("PUCO" or "Commission") on October 1, 2008.<sup>1</sup> The OCC stated that that the Commission's protective order and the associated treatment of information that restricts public access to public records in the above-captioned cases should be changed according to the statement of law contained in the October Entry and based upon the fact that much

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<sup>1</sup> The October Entry also states that "any additional modifications to the protective order, due to any subsequent releases, should be addressed by motion." October Entry at 4, ¶(10) (October 1, 2008).

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of the information that is subject to the existing protective order has been released to the public as part of an action in federal court.<sup>2</sup>

On March 19, 2009, Duke Energy and its affiliated companies Cinergy Corp. and Duke Energy Retail Sales, LLC. (collectively, "Duke") moved for a twenty-day extension to their deadline to file a responsive pleading and for modification of the expedited timetable set for pleadings in these cases. The OCC opposes the twenty-day extension, supports the motion to modify the expedited deadlines for pleadings, and encourages the PUCO to set the date for responsive pleadings (i.e. for all parties) and any replies to such pleadings based upon the standard timeframes stated in Ohio Adm. Code 4901-1-12(B).

**II. ARGUMENT: The Standard Timeframes for Pleadings Set in Ohio Adm. Code 4901-1-12(B) Should Govern Pleadings Connected with the OCC's Motion to Modify and All Future Pleadings in these Cases.**

There no longer appears to be a compelling reason to continue the expedited pleading practice in the above-captioned cases, and the OCC supports the use of the timeframes for pleadings set out in Ohio Adm. Code 4901-1-12(B).<sup>3</sup> Standard timeframes should be used for all additional pleadings in these cases. However, Duke's motion ("Motion for Extension") does not provide "good cause shown"<sup>4</sup> for any time period other than that stated in Ohio Adm. Code 4901-1-12(B).

The reasons given by the Duke-affiliated companies for an extension reveal their steadfast refusal to recognize Ohio law regarding trade secrets and the Commission's

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<sup>2</sup> Motion to Modify at 1.

<sup>3</sup> Such deadlines should include, of course, a deadline for replies based upon seven days. Ohio Adm. Code 4901-1-12(B)(2).

<sup>4</sup> Ohio Adm. Code 4901-1-13(A).

earlier rulings regarding the public release of documents. Duke asks for additional time to “review the protected materials” and to “take action in the *Williams* matter to further protect these materials.”<sup>5</sup> The information that requires review is that located in the *Williams* docket that was filed six months ago in a case that involves Duke-affiliated companies. Actions to protect such information in federal court would be futile at this time. Duke’s argument before the PUCO regarding what the Duke-affiliated companies should have done in federal court or what the federal court should have done are irrelevant to the PUCO’s determination of the actions required in the above-captioned cases after the additional information was released to the public. The extension requested by Duke should not be granted since Duke simply seeks to re-assert arguments that the PUCO has consistently rejected in these cases.

The Commission’s Entry dated May 28, 2008 recognizes that “information that is or already has been made public cannot be treated as a trade secret under Section 1333.61.”<sup>6</sup> The Entry on Rehearing contains essentially the same analysis.<sup>7</sup> The October Entry again states this treatment: “Where information that may previously have met the trade secret test has now been released to the public, we will not maintain a protective order prohibiting its release.”<sup>8</sup> Information regarding the option agreements that are part of the record in these cases before the PUCO was filed in federal court on September 18,

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<sup>5</sup> Motion for Extension at 3. The reference to “*Williams*” is to *Williams v. Duke Energy International, Inc.*, Case No. 1:08-CV-00046 (U.S. Dist. Ct., Southern Dist. of Ohio) (hereinafter, “*Williams*”).

<sup>6</sup> Entry at 4, ¶(10) (May 28, 2008).

<sup>7</sup> Entry on Rehearing at 4. (July 31, 2008).

<sup>8</sup> October Entry at 4, ¶(10) (October 1, 2008).

2008 (i.e. in *Williams*) without any protection from release to the public.<sup>9</sup> Assuming that Duke does not contest this factual matter, Ohio law regarding trade secrets and the Commission's earlier rulings require the release of additional information in the above-captioned cases.

Duke argues that additional time should be granted due to the "sheer volume of the materials" that it must review from the release in *Williams*.<sup>10</sup> The documents in question were transmitted to the Duke-affiliated companies six months ago. The documents are familiar to the active parties in the above-captioned cases. The OCC, which is not involved in *Williams*, determined in a short period of time (certainly less time than required to draft a small pleading) that all the documents contained in Attachments Ex. 6 (pages 266-272 in the PUCO's numbering system), Ex. 8 (pages 277-281), Ex. 9 (pages 282-288), Ex. 10 (289-295), and Ex. 17 (pages 323-641) to the testimony of OCC Witness Hixon were released in federal court, and that the documents do not contain redactions.<sup>11</sup> The time for Duke to submit a responsive pleading stated in Ohio Adm. Code 4901-1-12(B) are sufficient for the task at hand.

The Motion for Extension seeks additional time to "consider all attachments," which apparently means that Duke intends to argue matters of law that are well settled in these cases. The Motion for Extension should be denied to the extent that it seeks time beyond that stated in Ohio Adm. Code 4901-1-12(B).

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<sup>9</sup> OCC Motion to Modify at 5-6.

<sup>10</sup> Motion for Extension at 3.

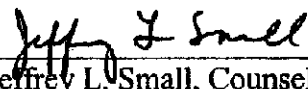

<sup>11</sup> Motion to Modify at 6.

### III. CONCLUSION

Documents that have been released elsewhere to the public cannot continue under a protected status in the PUCO's files. OCC supports Duke's request that the Commission should permit pleadings in these cases according to the timing in its rules of practice instead of according to the expedited schedule--which means here that Duke would receive more time for its filing than under the expedited schedule that Duke seeks to end. But additional time for Duke beyond what is allowed in the PUCO's rules would unnecessarily delay, without good purpose, the release of information to the public pursuant to Ohio law and the consistent holdings by the Commission.

Respectfully submitted,

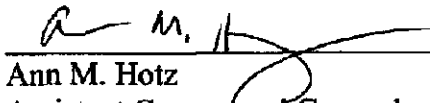
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## CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing *Memorandum Contra to Duke's Motion for Extension* has been served upon the below-named persons (pursuant to the Attorney Examiners' instructions) via electronic transmittal this 24th day of March, 2009.

  
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