

**BEFORE THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Application of Duke Energy Ohio, Inc. for an Increase in Electric Distribution Rates	) ) )	Case No. 08-709-EL-AIR
In the Matter of the Application of Duke Energy Ohio, Inc. for Tariff Approval	) )	Case No. 08-710-EL-ATA
In the Matter of the Application of Duke Energy Ohio, Inc. for Approval to Change Accounting Methods	) ) )	Case No. 08-710-EL-AAM
In the Matter of the Application of Duke Energy Ohio, Inc for Approval of its Rider BDP, Backup Delivery Point Rider	) ) )	Case No. 06-718-EL-ATA

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**DUKE ENERGY OHIO'S MEMORANDUM CONTRA  
MR. ALBERT LANE'S CORRESPONDENCE  
AND MOTION TO STRIKE**

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**I. INTRODUCTION**

The Stipulation and Recommendation (Stipulation) submitted by Duke Energy Ohio, Inc. (DE-Ohio) and the Intervening Parties (Parties) in this case represents a negotiated settlement of all the issues raised in DE-Ohio's application. All of the intervening Parties except Mr. Albert Lane and tw telecom of Ohio LLC, agreed to the terms set forth in the Stipulation. This settlement is beneficial to DE-Ohio consumers in that it avoids protracted litigation and the risks which are inherent in litigation and represents a commonality of interests that resolves the diverse concerns of all of the Parties in a fair, just and reasonable result. Furthermore, all Parties were afforded the opportunity to actively participate in the process that culminated in the submission of the

Stipulation. And there is no reason to delay the proceedings further. DE-Ohio respectfully requests that Mr. Lane's request be denied.

Mr. Albert Lane moved to intervene in this case on January 13, 2009 and was granted intervention as a Party on February 5, 2009. Despite Mr. Lane's subsequent contributions to the docket in this case, Mr. Lane did not offer any expert testimony, did not attend any of the settlement discussions that resulted in the aforementioned Stipulation and Recommendation, and did not submit any evidence into the record at the March 31, 2009 evidentiary hearing. In fact, Mr. Lane chose not to even attend the publicly noticed evidentiary hearing. By Entry dated March 31, 2009, Mr. Lane (and tw Telecom, the only other Party that did not sign the Stipulation and Recommendation) had yet another opportunity to participate and cross examine witnesses regarding the Stipulation and Recommendation. Yet again, Mr. Lane chose not to take advantage of such opportunity.

Now, at this very late date, Mr. Lane seeks to delay the proceedings without justification. Such delay is not likely to yield any additional evidence that would contribute to the record in this case. Indeed, based upon his recent filing, Mr. Lane seeks a delay so that he may inquire into matters that concern a non-regulated affiliate of DE-Ohio that does not operate in this state. But such inquiries do not support a delay as they are irrelevant and wholly unrelated to the current case. Based upon past practice, it is unlikely that Mr. Lane even intends to appear for the hearing which is presently proposed, even if he requested such a hearing. For these reasons, Mr. Lane's request to delay this case must be denied and the Commission should proceed as set forth in the Attorney Examiner's Entry of May 29, 2009.

## II. ARGUMENT

The sole purpose of the above-styled case was to determine a just and reasonable rate for Duke Energy Ohio's electric distribution service under Revised Code Chapter 4909. A detailed procedural schedule was established in accordance with the relevant portions of the Ohio Revised Code and the Ohio Administrative Code. Following lengthy discovery, a full and complete Commission audit, the filing of expert testimony, and several lengthy settlement discussions, of which Mr. Lane was invited to attend, the participating parties reached a full and complete settlement.

The settlement resolved all contested and relevant issues in this proceeding and established a revenue requirement that was agreed to by all active participants, representing all customer classes and interests. The Stipulation did not explicitly contain the supporting data needed by the Commission for the agreed upon revenue requirement as required by R.C. 4909.15. Therefore, the Parties that had submitted the Stipulation and Recommendation agreed to provide an amended Schedule A-1 to demonstrate to the Commission the mathematical support to arrive at the appropriate values, to reach the agreed upon revenue requirement.<sup>1</sup> This submission contained a misleading footnote indicating erroneously that the numbers were for illustration purposes only.<sup>2</sup> Subsequently, the Commission Staff provided one more memorandum intending to clarify that the amended A-1 Schedule was more than for illustrative purposes.<sup>3</sup> The Ohio Consumers' Counsel, (OCC) declined to sign to this last

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<sup>1</sup> See *Motion for Admission of Late Filed Exhibit and Memorandum in Support*, May 8, 2009.

<sup>2</sup> *Id.*

<sup>3</sup> See *Memorandum stating clarification on late filed exhibit docketed May 8, 2009, the settlement numbers represent the actual agreed to dollar amounts for rate base, current operating income, rate of return, etc. filed on behalf of Attorney General Staff by S. Reilly*. May 29, 2009.

memorandum, however, all of the remaining Stipulating Parties did agree.<sup>4</sup> OCC later filed notice that it did not oppose the Commission's reliance upon the numbers set forth in the amended schedule A-1.<sup>5</sup>

Correspondence seeking approval of the Parties with respect to each of these post-Stipulation filings were provided to Mr. Lane for his consideration via email. Mr. Lane did not respond to counsel with respect to either of these filings. Although Mr. Lane has been provided with all of the information received by all of the other Parties in this case, he has chosen to limit his participation to letters filed in the docket. Apparently Mr. Lane now seeks answers to certain questions which he claims to repeat in his more recent correspondence. Mr. Lane's May 30, 2009, filing contains a series of informal questions propounded upon, among others, the Commission Staff and the Attorney Examiners in this matter. Mr. Lane is continuing to seek information that is wholly irrelevant to this proceeding and is clearly intended to cause further delay and harassment to Duke Energy Ohio. Mr. Lane, among other dubious demands related to the Commission-approved merger between Duke Energy Corporation and Cinergy Corp in 2005, is now advocating that DE-Ohio justify its requested and the agreed upon rate increase through the employ of a third party auditor, tasked to examine the Company's books and records going back more than an decade. Such a request is not only overly burdensome and intended to harass, but is contrary to the statutory rate-making formula provided in Revised Code Chapter 4909 as enacted by the General Assembly. Mr. Lane is asking this Commission to not only ignore its own rules, but act in a manner that is contrary to Ohio law.

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<sup>4</sup> *Id.*

<sup>5</sup> See Letter from OCC dated June 1, 2009.

Additionally, Mr. Lane's references to matters clearly outside the scope of this case should be stricken as irrelevant. Specifically, Mr. Lane refers vaguely to practices outside the state of Ohio, and to subsidiaries of Duke Energy Corporation which have no relationship to Duke Energy Ohio or the issues relevant to this matter. Such irrelevant, unsupported and negligent references are improper and should not remain as part of the record in this matter. DE-Ohio hereby moves to strike the portions of Mr. Lane's correspondence beginning with the sentence: "I have not been satisfied..." and ending with "The 1935 PUHA if left active would have killed the Cinergy merger (if Duke would not divest itself of Crescent Resources.)"

Due process was afforded to Mr. Lane. To date, Mr. Lane has been afforded multiple opportunities to participate in this proceeding. DE-Ohio responded to Mr. Lane's earlier Discovery Requests, despite the fact that the majority of such requests were irrelevant, not directed to the Company and not in compliance with the Commission's procedural rules.<sup>6</sup> Mr. Lane provided lay witness testimony at the March 19, 2009 public hearing in City Hall in downtown Cincinnati. Mr. Lane chose not to participate in any settlement discussion. Mr. Lane had two opportunities to cross-examine witnesses, first at the March 31, 2008 evidentiary hearing regarding the Company's filing and then on April 7, 2009 regarding the Stipulation and Recommendation that he chose not to participate in the discussions. Mr. Lane chose not to avail himself of either opportunity. Now, Mr. Lane has yet another opportunity to present his case through the cross examination of witnesses regarding the post Stipulation and Recommendation filings. There is no reason for further delay.

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<sup>6</sup> See email to Mr. Lane from Rocco O. D'Ascenzo dated March 30, 2009 attached.

This Commission has provided Mr. Lane with ample opportunity to present his case. Further delay is not necessary. Since most of Mr. Lane's questions are not capable of response, it would not serve any purpose to delay the hearing that is presently scheduled for June 8, 2009. Mr. Lane should be required to comply with the Attorney Examiner's Entry filed on May 30<sup>th</sup>, and like the other Parties to the case, request a hearing and specify a witness for cross examination. In so doing, Mr. Lane should be required to verify that he will actually appear at the Commission's offices on June 8<sup>th</sup>. Otherwise, such delay will be unjustified and administratively burdensome.

### **III. CONCLUSION:**

For the reasons set forth above, DE-Ohio respectfully requests that the Commission proceed with a hearing, if necessary, on June 8, 2009.

Respectfully submitted,

/s/ Elizabeth H. Watts

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## **CERTIFICATE OF SERVICE**

I certify that a copy of the foregoing was served via ordinary mail or overnight delivery on the following parties this 2<sup>nd</sup> day of June, 2009.

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Summary: Memorandum Duke Energy Ohio's Memorandum Contra Mr. Albert Lane's Correspondence and Motion to Strike electronically filed by Ms. Elizabeth H Watts on behalf of Duke Energy Ohio, Inc.