

FILE

BEFORE THE PUBLIC UTILITIES COMMISSION OF OHIO

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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. 08-711-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, INC.'S MEMORANDUM CONTRA APPLICATION OF  
ALBERT E. LANE FOR REHEARING

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I. INTRODUCTION

After his eleventh hour participation in this case, Mr. Albert E. Lane now seeks rehearing of the Public Utilities Commission of Ohio's (Commission) approval of the Stipulation and Recommendation (Stipulation) submitted by Duke Energy Ohio, Inc. (Duke Energy Ohio) and all but two of the Intervening Parties. The Stipulation represents a compromise that was negotiated by capable, knowledgeable and sophisticated Parties representing diverse interests. The Parties, including the Ohio Consumers' Counsel, the Ohio Energy Group, the City of Cincinnati, People Working Cooperatively, the Greater Cincinnati Health Counsel, the Ohio Cable Telecommunications Association, The Kroger Company, and the Ohio Partners for Affordable Energy, hereinafter (Parties), represent commercial and industrial customers,

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low income customers, residential customers and competitive business interests. All of these Parties are represented by experienced counsel, (except Mr. Albert E. Lane who is *pro se*) and the Parties represent a very wide range of interests.

The settlement was beneficial to Duke Energy Ohio consumers in that it avoided protracted litigation and the risks that are inherent in litigation and represented a commonality of interests that resolved the concerns of all of the Parties in a fair, just and reasonable result.

Despite the development of a lengthy record to support the Company's Application and the Stipulation, Mr. Albert E. Lane now seeks a rehearing of this matter and seeks to raise issues not relevant to the proceeding as well as to claim that due process did not take place with respect to the matter. Mr. Lane's Application for Rehearing is inaccurate and completely irrelevant and for these reasons must be denied.

## **II. STATEMENT OF THE CASE**

On July 25, 2008, Duke Energy Ohio filed its Application to increase its electric distribution rates (Application) with the Commission. The Staff of the Commission (Staff), as well as other Parties, immediately began their investigation, audit and discovery of the Company's application. On August 21, 2008, Duke Energy Ohio held a technical conference further describing its Application. The Staff filed its Staff Report of Investigation (Staff Report) on January 27, 2009 and the Parties submitted objections to the Staff Report on February 26, 2009.<sup>1</sup> Thereafter, Duke Energy Ohio and the Parties engaged in further discovery and otherwise prepared for litigation while simultaneously

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<sup>1</sup> Mr. Albert Lane, individual intervenor, submitted a document which he refers to as Objections to the Entire Staff Report on February 3, 2009.

engaging in settlement discussions. Mr. Lane received notice of these settlement discussions and chose not to participate.<sup>2</sup>

Settlement discussions occurred in several ways. First, all Parties were invited to the first discussion, which was held on March 17, 2009, after the prehearing conference. Thereafter, the Parties met collectively on a weekly basis while at the same time Duke Energy Ohio and individual Parties worked to resolve respective issues. All Parties were given the opportunity to actively participate in group discussions in addition to requesting individual meetings to discuss resolution of the issues in the Application. Despite being invited to attend settlement discussions, Mr. Lane chose, in the alternative, to send materials to the docket in this case indicating his general disagreement.<sup>3</sup>

The Parties spent many hours discussing the issues in the case and each of the Parties' respective positions. The Parties were represented by seasoned regulatory counsel and many subject matter experts were also present in the discussions and contributed significantly to the resolution of the issues. Despite Mr. Lane's misunderstanding of the regulatory/legal process, this case was thoroughly documented and supported in Duke Energy's Application, testimony, objections and supplemental testimony. The Staff performed a thorough investigation and audit of Duke Energy's Application and issued a Staff Report<sup>4</sup> and provided written testimony on many of the subjects contained in the Report.<sup>5</sup> And the Parties clearly analyzed all of the above, including discovery documents, and filed Objections to the Staffs Report.. The

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<sup>2</sup> See Application for Rehearing by Intervener Albert Lane in this docket, e-mail attachment on page 17.

<sup>3</sup> See Correspondence from Mr. Albert Lane in this docket on March 4, 2009 and March 26, 2009.

<sup>4</sup> *In re Duke Energy Ohio's Distribution Rate Case*, Case No. 08-709-EL-AIR, (Staff Report) (January 27, 2009).

<sup>5</sup> *In re Duke Energy Ohio's Distribution Rate Case*, Case No. 08-709-EL-AIR, (see testimony for 16 witnesses on behalf of the Staff) (March 30, 2009).

settlement negotiations that the Parties engaged in were the culmination of many months of work and research. Mr. Lane cannot support an argument that the Commission's Opinion and Order was unreasonable or unlawful and his Application for Rehearing should be denied.

### III. ARGUMENT

Ohio Revised Code 4903.10 and Ohio Administrative Code (O.A.C.) 4901-1-35 both direct parties filing applications for rehearing to state the grounds upon which the Commission's decision was unreasonable or unlawful. Mr. Lane has not shown the Commission's Opinion approving the Stipulation to be either unreasonable or unlawful and therefore Mr. Lane's Application for Rehearing should be denied.

In his Application for Rehearing, Mr. Lane continues his quixotic crusade to re-litigate moot and irrelevant issues long since determined by the Commission, namely the Commission December 2005 approval of the merger of Duke Energy Corporation and Cinergy Corp. Mr. Lane asserts that "the Commissioners erred when they wrote within the 7/8/2009 opinion and order that the content of my filings on Case # 05-0732-EI-MER (*sic*) merger case are "long since passed". This statement in the Application for Rehearing documents Mr. Lane's persistent effort to raise issues not relevant to this case. And Mr. Lane apparently still wishes to argue that the Commission should consider age old issues in this docket despite the Commission's admonishment to the contrary.

Mr. Lane next argues that the Commissioners erred when they ignored Mr. Lane's "request for a full and complete outside neutral audit of Duke Oh at Duke Oh expense as part of my request for discovery within the above filings." Mr. Lane seems to misunderstand the Staff's role in performing its audit function and its investigation in the

case. Mr. Lane has presented no evidence whatsoever that Staff was incapable of performing its statutorily-mandated role in investigating a utility's application for an increase in rates. Mr. Lane has presented no evidence that the Commission's audit and review was deficient in this case. It is abundantly clear that Mr. Lane misunderstands the nature of the regulatory process in general and this request again fails to show a basis upon which the Commission's Opinion could be found to be either unreasonable or unlawful and therefore Mr. Lane's motion should be denied.

Finally, it is difficult to discern the remaining issues specifically raised by Mr. Lane but to the extent his issues can be gleaned from the Application filed, they seem to fall into some broad categories. Mr. Lane seems to feel that something related to the Cinergy/Duke Energy merger was improper, that Duke Energy Ohio's books and records are in some way deficient, and that his views were not adequately represented by the Ohio Consumers' Counsel after the Stipulation was submitted.

The Commission plainly heard Mr. Lane's argument regarding the Cinergy merger, both in 2005 when it first approved the merger and again when it addressed his ongoing concerns in its Opinion and Order in this case. Thus, this argument raises no new grounds and has already been addressed. Rehearing would not change the fact that the merger case has been a closed matter before the Commission for a period of years and that the time for opposing the merger has long since past. Mr. Lane's ability to seek rehearing regarding the Commission's approval of the Cinergy/Duke merger expired more than three years ago. He is therefore barred under the doctrine of collateral estoppel

from attempting to re-litigate merger approval issues.<sup>6</sup> The Commission should deny Mr. Lane's Application for Rehearing.

Mr. Lane voluntarily waived any right to participate in the evidentiary hearing of this matter. By choice, he did not attend the noticed and scheduled March XXX evidentiary hearing. At the evidentiary hearing, the Parties announced on the record that a Stipulation resolving all issues had been reached. Mr. Lane was then afforded the opportunity to cross-examine witnesses regarding the Stipulation at a subsequent hearing. Once again, he chose not to attend. Therefore, there is no evidence admitted in the record from anyone opposing the Stipulation and Recommendation.

Mr. Lane did, however, decide to participate in a narrow evidentiary hearing regarding a late-filed exhibit to support the Stipulation. Mr. Lane was given the opportunity at this final hearing regarding the late-filed Schedule A-1, to question Mr. William Don Wathen, Jr., who is Director in the Rates Department of Duke Energy Ohio. Mr. Lane questioned Mr. Wathen for several hours on many different subjects related to the Schedule A-1 and to Duke Energy's bookkeeping methods and sufficiency. Despite having this opportunity, Mr. Lane continues to assert that Duke Energy Ohio's Application was somehow "fudged." Indeed, Mr. Lane included a line of cross examination dealing with this term in his Application for Rehearing. Yet, despite Mr. Lane's fondness for this "legal term," he has failed to assert a rational argument that there is any impropriety with anything filed by Duke Energy Ohio or any of the other Parties to

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<sup>6</sup> In Ohio, "[t]he doctrine of res judicata encompasses the two related concepts of claim preclusion, also known as res judicata or estoppel by judgment, and issue preclusion, also known as collateral estoppel." *O'Nesti v. DeBartolo Realty Corp.*, 113 Ohio St.3d 59, 2007 Ohio 1102, 862 N.E.2d 803, P 6. "Claim preclusion prevents subsequent actions, by the same parties or their privies, based upon any claim arising out of a transaction that was the subject matter of a previous action." *Id.* The previous action is conclusive for all claims that were or that could have been litigated in the first action. See *Holzemer v. Urbanski* (1999), 86 Ohio St.3d 129, 133, 1999 Ohio 91, 712 N.E.2d 713.

this case. Mr. Lane failed to provide any analysis, accounting, or expert opinion that supported his position. In fact, Mr. Lane failed to offer any credible evidence whatsoever, other than his own innuendo of baseless allegations to substantiate his dubious claims. Moreover, the Commission responded fully to this subject in its Opinion and Order when it noted that these concerns were addressed by the Staff in the Staff Report and that there is no evidence to cause the Commission to reach a different conclusion. Duke Energy Ohio strongly objects to the assertion that its Application has been improperly manipulated in any manner. Mr. Lane has not raised any grounds upon which to assert that the Commission's Opinion and Order was unreasonable or unlawful and his Application should be denied.

The Stipulation in this case met each element of the three-part test for consideration and approval of a Stipulation and is well supported by the evidence. The Commission found that the Stipulation met the requirements it has adopted. Mr. Lane was given an opportunity to fully participate in this case as a full party intervenor despite the fact that residential consumers are ably represented by the Ohio Consumers' Counsel. Mr. Lane became involved in the case very early in its development,<sup>7</sup> and failed to raise any relevant or rational questions concerning the integrity of the Stipulation and its underpinnings.

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<sup>7</sup> *In re Duke Energy Ohio's Distribution Rate Case*, Case No. 08-709-EL-AIR, (Motion to Intervene) (January 13, 2009) and (Filed Comments & asked to be placed on service list) (December 31, 2008).

#### IV. CONCLUSION

For the reasons more fully discussed above Duke Energy Ohio respectfully requests that the Commission deny Mr. Lane's Application for Rehearing in its entirety.

Respectfully submitted,



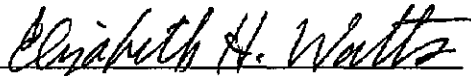
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**CERTIFICATE OF SERVICE**

I certify that a copy of the foregoing was served via ordinary mail or overnight delivery on the following parties this 31 day of July 2009.

  
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