

In compliance with that schedule, Duke Energy Ohio filed its testimony on March 1, 2013. Now certain of the intervenors¹ (Movants) seek to change their part of the schedule and delay the hearing. This request should be denied; it is procedurally improper, organizationally unnecessary, and substantively inequitable.

Movants assert four concerns, seeking to justify their motion: They are worried about overlapping cases. They want to allow the Commission additional time to consider their motion to dismiss the entire proceeding. They want more time between the Company's filing of its testimony and the deadline for filing their own testimony. And they want more time for discovery. All of these purported justifications should be rejected.

Potential for Overlapping Hearings

All of the parties in these proceedings have experienced numerous occasions where multiple large proceedings were ongoing at the same time, with substantially identical sets of intervenors. This is not a new issue. Parties are most welcome to hire additional counsel to assist with conflicting obligations. There is nothing in the law or the regulations governing the Commission's processes that would condone delaying consideration of one utility's case in order that attorneys could focus on another utility first.

It is also important to note that all of the Movants are represented by multiple attorneys, or even by multiple law firms. It is inconceivable that such parties cannot find a way to address more than one hearing at a time. While the Company is cognizant of the problems, this is not "good cause" for a delay. Indeed, during 2012, the FirstEnergy utilities' standard service offer hearing was held at a time when the AEP Ohio standard service offer was ongoing. Just as here,

¹ FirstEnergy Solutions Corp.; Ohio Energy Group; the Office of the Ohio Consumers' Counsel; Industrial Energy Users-Ohio; Constellation NewEnergy, Inc.; and Exelon Generation Company, LLC.

most of the attorneys in one case were likewise involved in the other. The Commission did not delay the FirstEnergy hearing in order to accommodate schedules.

Furthermore, if the Commission is concerned about problems relating to multiple hearings occurring at the same time, it should be cognizant of the order in which such schedules were issued. The hearing date in these proceedings was on the calendar as of October 3, 2012. On the other hand, the Dayton Power & Light Company (DP&L) standard service offer case received its most recent delay – to March 18, 2013 – only one week ago, on February 28, 2013. When that DP&L delay (hardly the first in that case) was granted, the Commission was fully aware of the other cases already on its schedule. Counsel for the Movants were also fully aware of the other, Duke Energy Ohio, cases on their schedules.

The potential for overlapping hearings cannot justify a delay.

Time to Rule on Motion to Dismiss

The Movants also note, offhandedly, that delaying the hearing date would give the Commission “additional time” to consider granting their motion to dismiss the case. This is a meritless argument. The motion they refer to was, as noted, filed on October 4, 2012. The Company filed its memorandum contra on October 19, 2012, and the movants on that pleading replied on October 26, 2012. Thus, the motion has been ripe for consideration for more than four months. Indisputably, the Commission has had sufficient time “to consider” the motion and would have issued a ruling if it had wished to do so.

Arguing that a delay is merited in order to allow the Commission more time for its consideration is a red herring.

Time to Prepare Testimony

The Movants were satisfied with the schedule issued by the Commission in October of last year. As noted above, neither Staff nor any intervening party filed an interlocutory appeal with regard to that scheduling entry. That schedule – still in place today – allowed those entities a particular period of time to prepare responsive testimony. The Movants knew that. Nevertheless, only now that the Company has met its obligation are the Movants asking to change the rules. Only now have they apparently noticed that they have to write testimony by March 19. But now is not the time to complain about the substance of an entry. If the Movants didn't agree with the schedule, they were obligated to seek reconsideration of the schedule through the interlocutory appeal process. They did not do so.

Moreover, the ability to prepare testimony by the existing March 19 deadline does not appear problematic for many of the Movants. Indeed, as set forth in the affidavit² attached hereto, the Ohio Energy Group (OEG) has already retained their expert, Lane Kollen, and agreed to reserve March 25 for the taking of his deposition. Mr. Kollen is undeniably well versed in the issues in these proceedings, having testified for OEG in respect of the AEP Ohio proceeding on a state compensation mechanism.³ Additionally, Industrial Energy Users-Ohio (IEU-Ohio) does not know whether they will even retain a witness, conceding that their arguments in the case are, by and large, of a legal nature.⁴ Further, FirstEnergy Solutions Corp. (FES) is already projecting three witnesses, and thus must know of the subject matters on which such witnesses will testify.⁵ And the Office of the Ohio Consumers' Counsel has already given consideration to necessary

² Affidavit of Amy B. Spiller (March 7, 2013). See also e-mail to Ms. Spiller from Jody Kyler Cohn (March 5, 2013) and Notice of Deposition *Duces Tecum* filed by Ohio Energy Group (March 5, 2013), both of which are attached to the Affidavit.

³ *In the Matter of the Commission Review of the Capacity Charges of Ohio Power Company and Columbus Southern Power Company*, Case No. 10-2929-EL-UNC.

⁴ Affidavit of Amy B. Spiller (March 7, 2013). See also e-mail correspondence between Ms. Spiller and Joseph Olikier (March 6, 2013), attached to the Affidavit.

⁵ Affidavit of Amy B. Spiller (March 7, 2013).

witnesses, having agreed to a deposition date of March 26 for such persons.⁶ For the Movants to contend that it is “*nearly impossible* to identify appropriate, qualified, and non-conflicted expert witnesses” is disingenuous.⁷

Duke Energy Ohio must also mention the Movants’ suggestion that the pending Duke Energy Ohio rate cases are part of their scheduling problem. A quick review of each Movant’s situation in that regard reveals its lack of merit. FES, IEU-Ohio, Constellation NewEnergy and Exelon Generation are not even parties in the Duke Energy Ohio rate cases. OEG is a party, but it does not appear to have a substantial difficulty with this alleged conflict, as the date it has offered for deposing its witness here is the same day when the hearing in one of the rate cases is scheduled to commence. OCC is also a party in the rate cases, but the cases are being handled by different counsel. Thus, any possible conflict with the rate cases is simply an argument manufactured to support the motion under consideration.

From a substantive standpoint too, the purported difficulty in preparing testimony is unjustified. Although the Movants list the topics covered by the Company’s witnesses as if they are surprised, that is certainly not the case. These parties were also active participants in the recent proceeding to determine capacity charges for AEP Ohio.⁸ They are fully aware of the topics that were addressed in that proceeding as well as the duration of the hearing. The issues here are substantially analogous. The Movants cannot now claim surprise.

The memorandum supporting the motion implies that the Movants did not – and could not – even start considering their witnesses and their testimony until after the Company’s testimony was filed. But the parties were all aware of the issues in the case from the time the

⁶ *Id.*

⁷ Motion, at pp. 5-6 (March 6, 2013)(emphasis added).

⁸ *In the Matter of the Commission Review of the Capacity Charges of Ohio Power Company and Columbus southern Power Company*, Case No. 10-2929-EL-UNC.

Application was filed. And beyond that, the Company filed a memorandum in opposition to the motion to dismiss on October 19, 2012, and responsive comments on February 1, 2013, wherein issues in the case were identified. To the extent that any party did not understand the issues at bar prior to February 1, 2013, there was certainly no mystery as of the Company's filing of responsive comments.

The Movants simply attempt to avoid the Commission's procedural requirements, having not filed an interlocutory appeal last October, and attempt to justify a need for more time to write testimony, having apparently not used their time wisely to date.

Time for Discovery

Much like their assertion that they need more time to write testimony, the Movants argue that they need more time for the discovery process. And much like that assertion, this one should also be rejected.

The Movants have had since the filing of the Application to issue discovery. Only one has taken advantage of that opportunity to any degree; all of the others have either issued one single set of questions or none at all. Only one Movant has issued a notice of depositions, with no other intervenor having filed a similar notice. On the basis of the prior AEP Ohio proceeding, the Application, and the Reply Comments, all intervenors had a sufficient understanding of the case to draft discovery requests. That they have not done so previously should not be rewarded through the granting of a delay.

This rationale for a delay is also analogous to the need to write testimony in that it was apparent from as long ago as last October, when the schedule was issued. Again, the Movants did not appeal the decision at that time. And they did not seek to expedite the discovery process

or appeal the fact that it was not expedited by the Commission. They cannot be allowed to do so now.

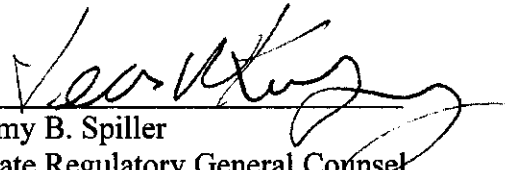
Conclusion

Duke Energy Ohio is prepared to proceed on April 2. It has complied with the procedural schedule and honored the Commission's deadlines. The Movants, however, have been largely ignoring the case and only now want to correct their oversight through a requested extension. They claim that "good cause" exists for a delay. However, their scheduling conflicts – created by their own decisions to intervene – do not provide any such justification. And the purported conflicts they identify certainly do not entitle the Movants to substantially more time than the Company to prepare for hearing and witness examination.

The Movants ask this Commission to delay the resolution of Duke Energy Ohio's Application for 27 days. The request is improper, as it seeks, in essence, to change the substance of a procedural entry without compliance with the Commission's interlocutory appeal process. The request is unnecessary, as the Movants have had since last October to solicit responses to discovery requests, to find witnesses, and to prepare testimony; and both the Commission and the parties are fully capable of addressing more than one proceeding at the same time. And, perhaps most importantly, the request is inequitable. The Company has filed an Application, comments, and testimony, all showing a negative return on equity with regard to its noncompetitive capacity service and all on the schedule that had been ordered. This schedule has been in place for several months. Adherence to it should not be optional.

Duke Energy Ohio respectfully requests that the Commission that the Commission issue an order denying the intervenors' motion to continue the schedule.

Respectfully submitted,

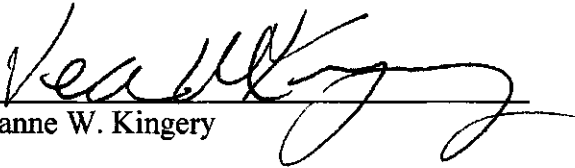


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CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing was delivered by U.S. mail (postage prepaid), personal, or electronic mail, on this 7th day of March, 2013, to the parties listed below.



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**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Application of Duke)
Energy Ohio, Inc., for the Establishment of a)
Charge Pursuant to Revised Code Section) Case No. 12-2400-EL-UNC
4909.18.)

In the Matter of the Application of Duke)
Energy Ohio, Inc., for Approval to Change) Case No. 12-2401-EL-AAM
Accounting Methods.)

In the Matter of the Application of Duke)
Energy Ohio, Inc., for the Approval of a) Case No. 12-2402-EL-ATA
Tariff for a New Service.)

AFFIDAVIT OF AMY B. SPILLER

Comes now affiant, Amy B. Spiller, after having been duly cautioned and sworn, and states as follows.


1. I am engaged as Deputy General Counsel for Duke Energy Business Services and am counsel for record for Duke Energy Ohio, Inc., (Duke Energy Ohio or Company) relative to the captioned matter.
2. On March 5, 2013, I contacted counsel for FirstEnergy Solutions Corp., Mark Hayden, regarding the desire to reserve a date for the taking of the depositions of his client's witnesses. At that time, Mr. Hayden offered that he was anticipating

perhaps having three witnesses in connection with these proceedings and that consideration would have to be given to availability as such witnesses were involved in the proceedings involving Dayton Power and Light. I acknowledged the need for flexibility but agreed with Mr. Hayden to a tentative deposition date of March 27, 2013. Consistent therewith, a notice of deposition *duces tecum* was filed on March 5, 2013.

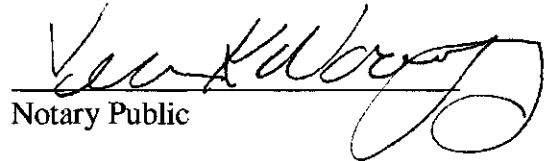
3. On March 5, 2013, I also contacted counsel for Ohio Energy Group (OEG), Jody Kyler Cohn, about the availability of her client's witnesses for deposition. Ms. Cohn responded with the e-mail attached hereto as Attachment A, confirming both the identification of OEG's witness and his availability. Consistent therewith, a notice of deposition *duces tecum* was filed on March 5, 2013.
4. On March 5, 2013, I also contacted counsel for Industrial Energy Users-Ohio (IEU-Ohio), Joseph Olikier, regarding the availability of IEU-Ohio's witnesses for deposition. Mr. Olikier advised me that IEU-Ohio had yet to confirm whether they would retain a witness, further informing me that their arguments are largely legal. See Attachment B, which reflects the written confirmation of the March 5, 2013, conversation with Mr. Olikier.
5. Also on March 5, 2013, I spoke with counsel for the Ohio Consumers' Counsel (OCC), Maureen Grady and Kyle Kern, about a tentative date for the deposition of OCC's witnesses. During the conversation with Ms. Grady and Ms. Kern, there was no indication that the OCC would not be able to meet the existing deadlines. Rather, during the conversation, we agreed to the date of March 26 as a tentative

date for the taking of such depositions. And consistent therewith, a notice of deposition *duces tecum* was filed on March 5, 2013.

FURTHER AFFIANT SAYETH NAUGHT.


Amy B. Spiller

Sworn to and subscribed before me, a notary public for the state of Ohio, on this the 7th day of March 2013.


Notary Public

JEANNE K. WOODRUFF
NOTARY PUBLIC, STATE OF OHIO
MY COMMISSION HAS NO EXPIRATION DATE

My commission expires: _____

Attachment A

Spiller, Amy B

From: Jody Kyler Cohn [jkylercohn@bkllawfirm.com]
Sent: Tuesday, March 05, 2013 1:26 PM
To: Spiller, Amy B
Cc: Michael Kurtz
Subject: Case No. 12-2400

Amy,

The witness that OEG currently intends to call in the Duke capacity case, Lane Kollen, will be available for a deposition on March 25th.

Thanks,

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Attachment B

Spiller, Amy B

From: Joe Oliker [joliker@mwncmh.com]
Sent: Wednesday, March 06, 2013 8:34 AM
To: Spiller, Amy B
Cc: Kingery, Jeanne W
Subject: RE: Duke Energy Ohio Capacity Case (12-2400)

Amy,

We will let you know as soon as we make that determination.

Joe

Joseph E. Oliker

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From: Spiller, Amy B [<mailto:Amy.Spiller@duke-energy.com>]
Sent: Wednesday, March 06, 2013 8:14 AM
To: Joe Oliker
Cc: Kingery, Jeanne W
Subject: Duke Energy Ohio Capacity Case (12-2400)

Joe

I just wanted to confirm our telephone conversation from yesterday regarding depositions of IEU-Ohio's witnesses in the referenced matter. When we spoke, you indicated that a decision had yet to be made with regard to whether IEU-Ohio would have any witnesses. As such, we did not reserve a tentative date for depositions. Rather, once you have made the decision regarding witnesses, we can revisit the issue of depositions and the scheduling of same.

Thank you.

Amy B. Spiller

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