

**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. 12-1682-EL-AIR
	)	
In the Matter of the Application of Duke Energy Ohio, Inc., for Tariff Approval.	)	Case No. 12-1683-EL-ATA
	)	
In the Matter of the Application of Duke Energy Ohio, Inc., for Approval to Change Accounting Methods.	)	Case No. 12-1684-EL-AAM
	)	
In the Matter of the Application of Duke Energy Ohio, Inc. for an Increase in Gas Rates.	)	Case No. 12-1685-GA-AIR
	)	
In the Matter of the Application of Duke Energy Ohio, Inc., for Tariff Approval.	)	Case No. 12-1686-GA-ATA
	)	
In the Matter of the Application of Duke Energy Ohio, Inc. for Approval of an Alternative Rate Plan for Gas Distribution Service.	)	Case No. 12-1687-GA-ALT
	)	
In the Matter of the Application of Duke Energy Ohio, Inc., for Approval to Change Accounting Methods.	)	Case No. 12-1688-GA-AAM
	)	

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**INTERLOCUTORY APPEAL FROM THE  
MARCH 8, 2013 ATTORNEY EXAMINER'S ENTRY  
REGARDING DUKE'S MOTION TO COMPEL  
BY  
THE OFFICE OF THE OHIO CONSUMERS' COUNSEL**

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The Office of the Ohio Consumers' Counsel ("OCC" or "Appellant"), pursuant to Ohio Adm. Code Rules 4901-1-14 and 4901-1-15(A)(1), hereby requests a review by the Public Utilities Commission of Ohio ("PUCO" or "the Commission") for an interlocutory order. This order should reverse the March 8, 2013 Entry ("Entry") by Attorney

Examiner Stenman, in the above-captioned proceedings. The Entry granted Duke Energy Ohio's Motion to Compel regarding its notice to depose OCC's witnesses, despite that notice being filed nearly six weeks after the deadline in the PUCO's rules.

Appellant has attached a copy of the March 8, 2013 Entry, in accordance with the provisions of Ohio Adm. Code 4901-1-15(C). There is not a need for certification of this appeal (per Ohio Adm. Code 4901-1-15), because the ruling granted a motion to compel. (Exhibit 1). While this filing is technically an appeal, this appeal is OCC's first opportunity to address Duke's motion to compel to take the (untimely) depositions, as the Entry granting Duke's Motion was issued without a fair opportunity for OCC to respond.

The reasons for this Interlocutory Appeal are explained in the attached Memorandum in Support.

Respectfully submitted,

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*/s/ Larry S. Sauer*

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**MEMORANDUM IN SUPPORT**

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**I. BACKGROUND**

OCC files this Interlocutory Appeal with the Commission in regards to the Attorney Examiner's granting of Duke's Motion to Compel all of OCC's witnesses in the

electric distribution rate case<sup>1</sup> and the gas distribution rate case<sup>2</sup> to appear for depositions. The Entry was issued one day after Duke filed a Motion to Compel, without finding good cause for granting the Motion, and without allowing time for OCC to respond to Duke's Motion. At this time in the proceedings and with the press of business otherwise for OCC, the fair approach is what is in the PUCO's rule—Duke is out of time with its notice.

Duke sought to compel the depositions of all seven witnesses in the electric case and all nine of OCC's witnesses in the natural gas proceeding. Duke issued a notice to take the depositions of OCC's witnesses on February 28, 2013. However, under Ohio Adm. Code 4901-1-17, the discovery deadline was January 18, 2013. Duke did not dispute the fact that it missed this deadline by nearly six weeks. In fact, Duke's request to extend the discovery deadline, six weeks after the fact, only serves to emphasize the point that Duke was aware of the discovery deadline and simply failed to act within the deadline to preserve its rights to take depositions.

OCC, the statewide advocate for Ohio's residential utility consumers, is an intervenor in these cases. In accordance with the PUCO's discovery deadlines, OCC conducted its discovery between July 11, 2013, the date of OCC's intervention, and January 18, 2013, the date of discovery cut-off.<sup>34</sup> Included in OCC's discovery were

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<sup>1</sup> Duke Notice of Deposition, Case No. 12-1682-EL-AIR (February 28, 2013) ("Specifically, Duke Energy intends to depose : Bruce M. Hayes, Beth E. Hixon, James E. Gould, Scott J. Rubin, David E. Effron, Daniel J. Duann, PhD., Ibrahim Soliman.").

<sup>2</sup> Duke Notice of Deposition, Case No. 12-1685-GA-AIR (February 28, 2013) ("Specifically, Duke Energy intends to depose : Bruce M. Hayes, James R. Campbell, James E. Gould, Steven B. Hines, Kathy L. Hagans, Scott J. Rubin, David E. Effron, Daniel J. Duann, PhD., Ibrahim Soliman.")

<sup>3</sup> Motion at 3.

<sup>4</sup> Ohio Adm. Code 4901-1-17(B).

Notices of Deposition for Duke's witnesses in these cases, which were issued on January 18, 2013. As noted in Duke's Motion, OCC has not yet conducted any depositions. Nevertheless, no matter which deponents OCC decides to depose (if any), OCC has taken the appropriate steps under the Commission's rules to preserve its right to conduct the depositions of any/all of Duke witnesses it deems necessary. Issuing a "John Doe" Notice of Deposition was a precautionary step that Duke should have taken in these cases, but one which Duke neglected to take. And by not taking such a step Duke failed to alert OCC to Duke's intentions with regard to depositions.

The Commission's rules do not permit discovery after the discovery cut-off, unless a party can show good cause. The Company did not show good cause in its Motion. And the Attorney Examiner correctly rejected Duke's argument that deposition notices do not fall within the scope of discovery. However, the Examiner Entry waived the requirement of Rule 4901-1-17(B), when the rules called for Duke to not depose at this point of the proceedings.

## **II. APPLICATION FOR REVIEW**

Under Ohio Adm. Code 4901-1-15(A), there are certain circumstances adversely affecting a party that allow the party to take an interlocutory appeal to the Commission without the need for the appeal to be certified to the Commission by the Attorney Examiner. Appeals can be taken without certification when an Attorney Examiner has granted a motion to compel discovery.<sup>5</sup> Because the March 8, 2013 Attorney Examiner's

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<sup>5</sup> Ohio Adm. Code 4901-1-15(A)(1).

Entry granted Duke's Motion to Compel Discovery, OCC has the right to take this direct interlocutory appeal to the Commission.

### **III ARGUMENT**

The facts in this case are simple. The discovery deadline in this case was January 18, 2013. Duke did not issue discovery nor request extension of the discovery deadline prior to the date of discovery cutoff. Duke did not have knowledge of the identity of OCC's witnesses prior to the discovery deadline, given that Duke did not ask. Even so, this circumstance would not have precluded Duke from issuing "John Doe" deposition notices to preserve its rights. However, Duke chose not to take that routine and prudent precautionary step.

OCC's objections to the Staff Report in these proceedings, filed on February 4, 2013, named the witnesses whom OCC anticipated would submit testimony to support the objections. On February 8, 2013, OCC served Duke with responses to Duke's First Set of Discovery, and therein OCC identified all nine OCC witnesses and the subject of their testimony. In both instances, Duke took no action to indicate it would depose the witnesses. Instead, Duke waited until after OCC's testimony was filed, on February 28, 2013, to issue its notices of deposition. On March 1, 2013, OCC informed Duke that its witnesses would not be presented for depositions because Duke had failed to adhere to the Commission's rules. Duke then filed its Motion on March 7, 2013. These facts demonstrate why Duke could not show good cause for granting a motion to compel or granting a waiver to extend the discovery deadline to allow Duke to depose OCC's witnesses. Therefore, OCC's Interlocutory Appeal should be granted, and the Entry allowing depositions should be reversed.



The Attorney Examiner found that there is no reason to believe that her Entry will adversely affect a substantial right of any party. The harm is to OCC that relies on the PUCO's rules for the rate case process. From OCC's perspective, the harm arises because the lack of early notice to OCC places a further strain on OCC resources at a time of high volume case activity ongoing at the PUCO. The OCC is especially resource-constrained with Duke's two rate case proceedings<sup>6</sup> and capacity case,<sup>7</sup> and Dayton Power & Light Company's electric security plan case,<sup>8</sup> in addition to all the other active cases that are presently confronting OCC for consumers.

Had Duke followed the Commission's discovery rule, and timely noticed its depositions, that courtesy would have allowed OCC to plan for the depositions Duke sought to schedule. If a Commission Rule creates a deadline, that deadline should be enforced unless it is waived or extended under a timely and appropriate application of the Commission's rules. That was not the case with Duke's proposal.

Indeed, the Commission has previously expressed concern with this utility and its noncompliance (which the PUCO called "disdain") with the Commission's rules. In an Entry the PUCO stated:

Turning now to Duke's waiver request, the Commission is mindful of its initial directive to Duke. Specifically, we directed Duke to file a memorandum supporting any waiver request that explained, in detail, why the application, as filed, despite the proposed stipulation, warrants a waiver. Instead, **Duke spent a significant amount of time attempting to justify its noncompliance with the rules** contained in Chapter 4901:1-39, O.A.C, and then generically asked for a waiver of Rules 4901:1-39-04 and 4901:1-39-05, O.A.C. **Duke's continued refusal to comply with the**

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<sup>6</sup> Case No. 12-1682-EL-AIR, et al. and Case No. 12-1685-GA-AIR, et al.

<sup>7</sup> *In re Duke Capacity Case*, Case No. 12-400-EL-UNC, et al.

<sup>8</sup> *In re DP&L ESP II Case*, Case No. 12-426-EL-SSO, et al.

**dictates of the rules is inexplicable.** Duke's noncompliance contravenes the purpose of the statute, especially in light of the fact that the rules specifically mandate certain review criteria, such as that found in Rule 4901:1-39-03(B), O.A.C, which requires that, from programs that have technical, economic, and market potential, the utility is to design a portfolio of programs considering the criteria listed therein. Regardless of Duke's continued disdain for the established rules and processes, in the interest of moving forward with our consideration of this case, the Commission finds that Duke's request for a waiver should be granted, conditioned upon Duke providing the necessary detailed information at the hearing \* \* \*.<sup>9</sup>

This circumstance of Duke's noncompliance with the PUCO's rules should once again cause the Commission concern. There was no excuse for Duke's inaction in this case, and for that reason Duke could not demonstrate good cause for granting its Motion.

**A. The Entry Departs from PUCO's Rules and Denies OCC the Benefit and Rights of Those Rules.**

The Attorney Examiner notes that the Commission's Rules provide for an expedited ruling without the filing of memoranda.<sup>10</sup> Ohio Adm. Code 4901-1-12(F) states:

Notwithstanding paragraphs (B) and (C) of this rule, the commission, the legal director, the deputy legal director, or the attorney examiner may, upon their own motion, issue an expedited ruling on any motion, with or without the filing of memoranda, where the issuance of such a ruling will not adversely affect a substantial right of any party.

The Attorney Examiner stated "[g]iven the purpose of the motion" she found that no substantial right of any party will be adversely affected by an expedited ruling.<sup>11</sup> That is

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<sup>9</sup> *In the Matter of the Application of Duke Energy Ohio, Inc. for an Energy Efficiency Cost Recovery Mechanism and for Approval of Additional Programs for Inclusion in its Existing Portfolio*, Case No. 11-4393-EL-RDR, Entry at 3 (May 9, 2012) (emphasis added).

<sup>10</sup> Entry at 3.

<sup>11</sup> *Id.*

mistaken. OCC would have appreciated an opportunity to file a memorandum contra to explain its concerns about how Duke's noncompliance would negatively impact OCC's rights.

The purpose of Duke's Motion was to seek an order from the Commission to compel OCC to produce its witnesses for depositions despite the fact that Duke had failed to take minimal precautionary steps to arrange for such depositions under the Commission's Rules. Identification of the purpose does not illuminate the right that is being adversely affected in this case. The substantial right in question in this case is the right of a party to rely on the Commission to enforce its rules—in this case that there will be notice about depositions. In addition, as argued previously, the harm in this case is to the PUCO case management process and the inability of a party to adequately plan its resource allocation for settlement and litigation. With the passage of the discovery deadline, OCC expected there to be no depositions of its witnesses. OCC's expectation was not unreasonable, and should have been supported by denying Duke's Motion to Compel.

A closer view of the facts of this case before issuing the expedited ruling is appropriate. The Attorney Examiner stated:

Therefore, in the instant cases, the attorney examiner finds that a waiver of the requirement of Rule 4901-1-17(B), O.A.C., that discovery end 14 days after the filing and mailing of the staff report is reasonable and appropriate, for the limited purpose of allowing parties to submit notices of depositions.<sup>12</sup>

The waiver was presumably granted under Ohio Adm. Code 4901-1-38(B) which states:

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<sup>12</sup> Id. at 4.

The commission may, upon its own motion or **for good cause shown**, waive any requirement, standard, or rule set forth in this chapter or prescribe different practices or procedures to be followed in a case. (Emphasis added).

The waiver rule includes the same good cause standard that is included in the Commission's Rules that Duke relied upon to extend the discovery deadline in this case. However, under the facts in these cases, Duke struggled to show good cause in its Motion. Therefore, the Interlocutory Appeal should be granted, and the Entry reversed.

The Commission's Rules provide for an extension of the discovery deadline; for "good cause shown."<sup>13</sup> Ohio Adm. Code 4901-1-17(G) states:

Notwithstanding the provisions of paragraphs (B), (C), (D), and (E) of this rule, the commission, the legal director, the deputy legal director, or an attorney examiner may shorten or enlarge the time periods for discovery, upon their own motion or upon motion of any party **for good cause shown**. (Emphasis added).

Prior to rendering a decision on the Motion to Compel, good cause should have been reviewed. Duke neglected to cite Ohio Adm. Code 4901-1-17(B) and its "good cause" standard, or explain how good cause exists for granting its motion. Similarly, the Entry, in granting the waiver, did not contain a cite to Ohio Adm. Code 48901-1-38(B), nor did it explain how good cause exists for granting Duke's motion to extend the discovery deadline. Duke did not address the good cause standard in its Motion because good cause does not exist in these cases. Therefore, the Interlocutory Appeal should be granted, and the Entry reversed.

The Commission's Rule regarding discovery deadlines in rate case proceedings is clear.

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<sup>13</sup> Ohio Adm. Code 4901-1-17(G).

In general rate proceedings, no party may serve a discovery request later than fourteen days after the filing and mailing of the staff report of investigation required by section 4909.19 of the Revised Code.<sup>14</sup>

In this proceeding, the PUCO Staff filed its report (“Staff Report”) on January 4, 2013. Pursuant to Ohio Adm. Code 4901-1-17(B), the discovery cutoff – which the Attorney Examiner recognized applies to deposition notices – was fourteen days later, or January 18, 2013, by Ohio Adm. Code 4901-1-17(B). This rule is abundantly clear, and Duke cannot place responsibility on OCC for Duke’s own failure to put forth the necessary minimum amount of effort that would have been required to preserve its rights to depose OCC’s witnesses (i.e., a “John Doe” deposition notice).

Failure to take such minimal action does not equate to good cause, and the Commission should not have reward Duke for its failure to adhere to the Commission’s rules and to act in a timely manner at this stage of the proceedings. To have done so is in direct conflict with the Commission’s own rule.

The Commission’s Rule regarding the discovery deadline -- Ohio Adm. Code 4901-1-17(B) -- has been in place for decades. Other utilities have successfully issued notices of deposition within the discovery deadline.<sup>15</sup> This rule is well known to Duke, that has practiced in Ohio for many years. Furthermore, all of Duke’s arguments, in its Motion, should have been viewed as unavailing because the use of a timely “John Doe” deposition notice is a routine practice before the Commission (“The notice shall state the

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<sup>14</sup> Ohio Adm. Code 4901-1-17(B).

<sup>15</sup> *In Re Dominion East Ohio Natural Gas Rate Case*, Case No. 07-829-GA-AIR, et al. Staff Report (May 23, 2008) 14 days later a “John Doe Notice of Depositions was issued (June 6, 2008). See also *In re Vectren Energy Delivery of Ohio, Inc. Natural Gas Rate Case*, Case No. 07-1080-GA-AIR, et al. Staff Report (June 16, 2008) 2 days later a “John Doe” Notice of Depositions was issued (June 18, 2008).

time and place for taking the deposition and the name and address of each person to be examined, **if known, or if the name is not known, a general description sufficient for identification.**)<sup>16</sup> and would have without question preserved Duke’s right to conduct depositions of any/all OCC witnesses at Duke’s discretion.

The Attorney Examiner agreed with Duke on an important issue in this case. The Attorney Examiner states:

However, the attorney examiner agrees that, if the deadline for the filing of the notice of depositions falls well before the deadline for the filing of witness testimony, as it did in these cases, **then any notices of deposition equate to mere placeholder filings.**<sup>17</sup>

Nevertheless, such placeholder filings will preserve a party’s right under the rules and are generally understood by parties practicing before the Commission to be a prudent action, albeit an action that Duke didn’t take in this case. To disregard such a placeholder filing should have resulted in Duke losing its right to depose OCC’s witnesses. The Attorney Examiner instead bailed out Duke and unreasonably granted its Motion.

Duke obfuscated the issue by inappropriately arguing that the Commission’s Rules are problematic. Duke stated: “Further the discovery deadline for noticing depositions is administratively ineffective and, as implemented, prevents parties from issuing decisive notices of deposition to opposing parties.”<sup>18</sup> Duke’s arguments should not have been deemed persuasive. First, the discovery rules do not require “decisive

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<sup>16</sup> Ohio Adm. Code 4901-1-12 (B) (emphasis added).

<sup>17</sup> Entry at 3-4 (emphasis added).

<sup>18</sup> Motion at 2.

notices.” Issuing a timely “John Doe” notice would have preserved Duke’s right to depose OCC’s witnesses.

Second, if Duke was concerned about the ability to issue “decisive notices”, then it would have been prudent for the Utility to file a Motion to extend the discovery deadline prior to the actual discovery deadline, and not six weeks after the deadline. Duke, however, took neither of these actions, and after-the-fact, sought Commission assistance to compel OCC’s witnesses to depositions, because Duke failed to act in a manner that would have protected its rights.

The Entry recites basic facts that are incorrect. The Entry states: “Duke asserts that OCC did not identify the experts that would testify on its behalf in the electric rate case until it filed witness testimony on February 19, 2013, and not until February 25, 2013 in the gas rate case.”<sup>19</sup> This is not the case. In both cases, OCC identified its witnesses in its objections to the Staff Report filed on February 4, 2013<sup>20</sup> and in discovery responses served on Duke on February 8, 2013.

Duke took every opportunity, in its Motion, to cast itself as a victim in the presentation of its argument. For example, in its Motion, Duke stated: “OCC’s decision not to produce its witnesses for deposition, set forth in its March 1, 2013 letter to the Company, contravenes the policy considerations guiding discovery and **unfairly prejudices Duke Energy Ohio in the development of its case.**”<sup>21</sup> However, Duke’s inability to develop its case rested squarely on its own shoulders. If Duke is a victim, then it is a victim of its own decision not to serve discovery requests earlier in the process

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<sup>19</sup> Entry at 3.

<sup>20</sup> See OCC Objections (February 4, 2013) at 2.

<sup>21</sup> Motion at 2 (emphasis added).

or not to issue timely “John Doe” deposition notices. On January 18, 2013, the deadline for discovery under the PUCO’s Rules, Duke served OCC (and other parties and Staff) in the case with a first set of discovery. Duke neglected to preserve its right to conduct depositions of OCC’s witnesses by issuing a “John Doe” deposition notice on (or before) the same date. And that means Duke did not extend to OCC the courtesy of the notice that the rules require for planning purposes. Had Duke done so, this controversy would have been averted.

And Duke mistakenly relied on R.C. 4903.082 to support its arguments. Duke stated: “Under this broad framework, the Company is entitled to complete responses, whether in paper or in person, to its discovery inquiries. Additionally, Section 4903.082, R.C., directs the Commission to ensure that parties are allowed full and reasonable discovery **under its rules**.”<sup>22</sup> Under the Commission’s Rules, discovery deadlines can be extended for good cause. But Duke’s disregard of the Commission’s Rules, and failure to take minimal necessary action (i.e., issuing a timely “John Doe” deposition notice) did not constitute the required good cause for the Attorney Examiner to grant the Motion.

It should also be noted that the appropriate time for Duke to seek an extension of the discovery deadline was **prior** to the passage of that deadline to allow it additional time to contemplate the necessity of deposing OCC’s witnesses, and not six weeks later. Again, Duke failed to take such actions, and its arguments to the Commission do not constitute good cause; therefore, the Motion should have been denied.

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<sup>22</sup> Id. at 4 (emphasis added).



In a related argument, Duke attempted to rationalize its actions (or lack thereof) were legitimate. Duke stated:

As mentioned above OCC's witness testimony was not filed until February 25, 2013. In the interests of administrative efficiency, therefore, the Company waited to serve and file its Notice until it was clear which of OCC's witnesses it needed to depose. **Issuing a sweeping deposition request earlier in the proceeding would have been disingenuous**, as the Company had no particular intention or rationale for noticing for deposition any/all OCC witnesses until their testimony, and thus, contentions had been filed.<sup>23</sup>

The Attorney Examiner should have found Duke's arguments to be disingenuous. After waiting six weeks for OCC's testimony to be filed, Duke noticed all nine of OCC's witnesses in the gas case and all seven witnesses in the electric case for deposition. Thus, Duke's own actions show that the additional information of the identity and testimony from OCC witnesses resulted in the exact same outcome as if Duke had filed timely "John Doe" deposition notices -- because all of OCC's witnesses were noticed. The claimed "administrative efficiency" is just an effort to rationalize Duke's realization, after the fact, that its decision not to issue "John Doe" deposition notices was not a good decision. However, having made that decision, Duke should be held accountable to it. Contrary to Duke's arguments, following the Commission's rules and not avoiding them will create administrative efficiency.

Therefore, for all the reasons argued above, the Interlocutory Appeal should be granted, and the Entry reversed.

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<sup>23</sup> Motion at 6.

**B. The Attorney Examiner Entry Departs from Commission Precedent.**

The Entry was issued under Ohio Adm. Code 4901-1-12 (F). This Commission

Rule states:

Notwithstanding paragraphs (B) and (C) of this rule, the commission, the legal director, the deputy legal director, or the attorney examiner may, upon their own motion, issue an expedited ruling on any motion, with or without the filing of memoranda, where the issuance of such a ruling will not adversely affect a substantial right of any party.

It is unusual to issue an Entry without awaiting memoranda contra. A review of all rate cases before the Commission between today and 2003 illuminates no cases in which a Motion to Compel was granted prior to the filing of a responsive pleading. In one case, Columbia Gas of Ohio, Inc. (“Columbia”) filed a Motion to Compel against OCC and sought expedited treatment.<sup>24</sup> However in that case, Columbia withdrew its Motion five days later -- prior to OCC filing a responsive pleading and prior to the Attorney Examiner issuing a ruling. OCC understands that the Entry was apparently issued so quickly given the timeline of the case, but that timeline was Duke’s own doing for its deposition intentions—and thus not a reason to deny OCC an opportunity to make its points or to grant Duke’s Motion.

In a Suburban Natural Gas Company (“Suburban”) Case, Suburban filed a motion for extension to file a prefiling notice. Suburban requested an expedited ruling, and certified that no other parties had intervened in the proceeding and represented that Staff

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<sup>24</sup> *In re Columbia Gas Rate Case*, Case No. 08-72-GA-AIR, et al, Motion to Compel (September 10, 2010), Notice to Withdraw Motion to Compel (September 15, 2010).

did not object.<sup>25</sup> In this case, Duke did not certify that no other party objected to the issuance of such a ruling without the filing of memoranda.

In a 1988 PUCO investigation case, OCC filed a Motion requesting local public hearings. Five days later, the Ohio Telephone Association filed a memo contra to OCC's Motion. Subsequently OCC filed a second Motion ("Second Motion") for an extension of time to file its reply and asked for expedited ruling. The basis of OCC's Second Motion was to delay filing its reply until such time as all memo contras were filed, inasmuch as OCC's reply to the Ohio Telephone Association would be due before other memo contras were due. The Attorney Examiner found: "in accordance with Rule 4901-1-12(F), O.A.C. an expedited ruling is appropriate in this matter because no substantial right of another party will be harmed."<sup>26</sup> The Attorney Examiner accepted OCC's argument that in the interest of fairness and efficiency OCC should be granted an extension of time to allow OCC to answer the Ohio Telephone Association memo contra, as well, as any other memoranda contra that may be filed.

In the 2008 Dominion East Ohio Rate Case, the Staff filed a Motion to terminate the expedited response times previously established in the case by the Attorney Examiner.<sup>27</sup> On March 31, 2009, OCC and other parties filed a motion to stay the implementation of the stage two GSS and ECTS tariffs in these cases. OCC did not

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<sup>25</sup> In the Matter of the Application of Suburban Natural Gas Company to Adjust its Infrastructure Replacement Plan Rider Charge and Related Matters, Case No. 10-763-GA-RDR, Entry at 2 (June 14, 2010).

<sup>26</sup> *In the Matter of the Commission's Investigation into the Continued Feasibility of Extended Area Service*, Case No. 88-1454-TP-COI, Entry at 2 (May 17, 1991).

<sup>27</sup> *In re Dominion East Ohio Rate Case*, Case No. 07-829-GA-AIR, et al., Entry at 4 (April 7, 2009). (In a March 19, 2008 Entry, the Attorney Examiner concluded that good cause existed to modify response times for motions in these cases).

request an expedited ruling because of a previous Attorney Examiner Entry that shortened the response times. The Staff filed its Motion because it wanted additional time to respond and asked for expedited treatment of its Motion. Staff supported its position by stating:

Staff states that the circumstances that justified the reduction of the response times no longer exist. According to Staff, absent the expedited response times required by the examiner in these cases, memoranda contra the Consumer Groups' March 31, 2009, motion would be due April 15, 2009, and the replies would be due April 22, 2009, in accordance with Rule 4901-1-12(B), O.A.C. Staff explains that the Consumer Groups had four months to consider and prepare the arguments set forth in their March 31, 2009, motion. However, Staff points out that, with the abbreviated response schedule, those parties who wish to contest the Consumer Groups' motion would be prejudiced because they would have little more than a week to review, research, and respond to the arguments set forth in the motion. Therefore, Staff requests that the expedited response times be terminated.<sup>28</sup>

The Attorney Examiner granted Staff's Motion to extend the response time relying upon Ohio Adm. Code 4901-1-12(F). The Examiner noted (1) the examiner agrees that present circumstances no longer require that an abbreviated response schedule be required for all motions;<sup>29</sup> and (2) given the nature and import of the March 31, 2009, motion filed by the Consumer Groups, the attorney examiner does not believe that it is reasonable to expect interested parties to respond on an expedited basis.

While this filing is technically an appeal, this appeal is OCC's first opportunity to address Duke's motion to compel to take depositions. OCC's Interlocutory Appeal should be granted, and the Attorney Examiner's Entry reversed.

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<sup>28</sup> Id at 3.

<sup>29</sup> Id. at 3.

#### **IV. CONCLUSION**

The Attorney Examiner's Entry should be reversed because Duke has failed to adhere to the PUCO's rules for conducting discovery. Under rule and precedent, Duke has failed to show good cause for the Commission to grant its Motion to Compel for deposing OCC's witnesses. The Company had ample opportunity to timely preserve its rights to give notice to OCC (and extend that courtesy to OCC for its planning in these busy times of multiple utility requests for rate increases) of an intention to depose. Nearly six weeks after the discovery deadline, Duke's Motion to Compel should have been denied. OCC's technical personnel and counsel must focus their constrained resources on the time-consuming imperatives of settlement negotiations and litigation preparation. And OCC (like other parties) is fulfilling duties in multiple other pending major cases affecting millions of Ohio residential consumers.

Therefore, the Commission should grant OCC's Interlocutory Appeal and reverse the Attorney Examiner's Entry.

Respectfully submitted,

BRUCE J. WESTON  
OHIO CONSUMERS' COUNSEL

*/s/ Larry S. Sauer*

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## CERTIFICATE OF SERVICE

I hereby certify that a copy of this Interlocutory Appeal was served by electronic service to the counsel identified below this 13<sup>th</sup> day of March 2013.

/s/ Larry S. Sauer

Larry S. Sauer  
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BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of Duke ) Energy Ohio, Inc., for an Increase in its ) Electric Distribution Rates. )	Case No. 12-1682-EL-AIR
In the Matter of the Application of Duke ) Energy Ohio, Inc., for Tariff Approval. )	Case No. 12-1683-EL-ATA
In the Matter of the Application of Duke ) Energy Ohio, Inc., for Approval to ) Change Accounting Methods. )	Case No. 12-1684-EL-AAM
In the Matter of the Application of Duke ) Energy Ohio, Inc., for an Increase in its ) Natural Gas Distribution Rates. )	Case No. 12-1685-GA-AIR
In the Matter of the Application of Duke ) Energy Ohio, Inc., for Tariff Approval. )	Case No. 12-1686-GA-ATA
In the Matter of the Application of Duke ) Energy Ohio, Inc., for Approval of an ) Alternative Rate Plan for Gas ) Distribution Service. )	Case No. 12-1687-GA-ALT
In the Matter of the Application of Duke ) Energy Ohio, Inc., for Approval to ) Change Accounting Methods. )	Case No. 12-1688-GA-AAM

ENTRY

The attorney examiner finds:

- (1) Duke Energy Ohio, Inc. (Duke), is an electric company as defined by Section 4905.03, Revised Code, a natural gas company as defined by Section 4905.03, Revised Code, and a public utility as defined by Section 4905.02, Revised Code, and, as such, is subject to the jurisdiction of this Commission, pursuant to Sections 4905.04, 4905.05, and 4905.06, Revised Code.



- (2) On July 9, 2012, Duke filed an application seeking Commission authority to increase electric distribution rates, to update its tariffs, and to change certain accounting methods in Case Nos. 12-1682-EL-AIR, 12-1683-EL-ATA, and 12-1684-EL-AAM (electric rate case) and an application seeking Commission approval to increase gas distribution rates, for tariff approval, for approval of an alternative rate plan, and to change accounting methods in Case Nos. 12-1685-GA-AIR, 12-1686-GA-ATA, 12-1687-GA-ALT, and 12-1688-GA-AAM (gas rate case).
- (3) On January 4, 2013, Staff filed its report of investigation in both the gas and electric rate cases.
- (4) By entry issued January 10, 2013, the attorney examiner, *inter alia*, set February 4, 2013, as the deadline for Duke and intervenors to file testimony. Subsequently, by entry issued January 18, 2013, the attorney examiner revised the procedural schedule and extended the filing deadline for the testimony of Duke and intervenors to February 19, 2013, for the electric rate case and to February 25, 2013, for the gas rate case.
- (5) On March 7, 2013, Duke filed near identical motions in the gas and electric rate cases to extend the discovery deadline and to compel the Ohio Consumers' Counsel (OCC) to produce witnesses for deposition. Duke also requested an expedited ruling on its motion. In its motion, Duke explains that, on February 28, 2013, it filed a notice of deposition for a number of OCC witnesses to occur on March 11, 2013. According to Duke, on March 1, 2013, OCC sent a letter claiming that Duke's notice was filed nearly six weeks after the end of the discovery period and alerting Duke that it did not intend to make its witnesses available for deposition as requested. Duke avers that, on March 5, 2013, it contacted OCC in an attempt to resolve the dispute, but the parties were unable to reach agreement. In maintaining that the deadline for discovery has passed, Duke explains that OCC relies on Rule 4901-1-17(B), Ohio Administrative Code (O.A.C.), which provides "in general rate proceedings, no party may serve a discovery request later than fourteen days after the filing

and mailing of the staff report of investigation.” In response, Duke asserts OCC did not identify the experts that would testify on its behalf in the electric rate case until it filed witness testimony on February 19, 2013, and not until February 25, 2013, in the gas rate case. Duke argues that it had no way of knowing which experts it needed to depose until after the filing of testimony. Duke further explains that its actions were in the interest of administrative economy. To illustrate the inefficiency of serving notices of deposition too far in advance, Duke notes that OCC filed its notices of deposition on July 20, 2012, but has not, to date, identified which of Duke’s witnesses it intends to depose. In further support of its motion, Duke argues that Rule 4901-1-17(B), O.A.C. applies to the service of a discovery request, including such things as interrogatories and requests for productions of documents, which is distinguishable from a notice of deposition filed pursuant to Rule 4901-1-21, O.A.C. Accordingly, Duke requests that the Commission extend the discovery deadline for the purposes of taking depositions until two weeks following the filing of all testimony and grant its motion to compel.

- (6) Paragraph (F) of Rule 4901-1-12, O.A.C., provides that an expedited ruling may be issued by the attorney examiner on any motion without the filing of memoranda, where the issuance of such ruling will not adversely affect a substantial right of any party. Given the purpose of the motion, the attorney examiner finds that no substantial right of any party will be adversely affected by an expedited ruling. Therefore, in light of the timing of the motion to compel and the date set for the depositions, the attorney examiner finds that an expedited ruling is necessary.
- (7) Initially, contrary to the inference by Duke, the attorney examiner notes that depositions do fall within the scope of discovery envisioned in Rule 4901-1-17(B), O.A.C.; thus, the 14-day timeframe after the filing of the staff report in general rate cases does apply to notices of depositions. However, the attorney examiner agrees that, if the deadline for the filing of the notice of depositions falls well before



the deadline for the filing of witness testimony, as it did in these cases, then any notices of deposition equate to mere placeholder filings. While other types of discovery in these types of proceedings, i.e., interrogatories and requests for admission, can be served before the 14-day deadline, such is not always the case for the requests for depositions when the actual witnesses to be presented at hearing are not shared before the testimony deadline. In this case the staff reports in these cases were filed on January 4, 2013, and the testimony was filed on February 19, 2013 and February 25, 2013, well beyond the 14-day timeframe. Therefore, in the instant cases, the attorney examiner finds that a waiver of the requirement of Rule 4901-1-17(B), O.A.C., that discovery end 14 days after the filing and mailing of the staff report is reasonable and appropriate, for the limited purpose of allowing parties to submit notices of depositions. This waiver will allow the parties to conduct full discovery prior to the start of the hearing. The final testimony deadline, which occurred in the gas rate case, fell on February 25, 2013; therefore, the attorney examiner finds that this limited waiver should be extended until March 11, 2013, two weeks after the testimony deadline. Accordingly, Duke's motion for an extension of the discovery deadline should be granted to the extent set forth herein.

- (8) With respect to Duke's motion to compel the attendance of OCC's witnesses at the March 11, 2013, deposition, the attorney examiner finds that Duke's motion is reasonable and should be granted. However, the attorney examiner encourages Duke to work with OCC to accommodate its witnesses' schedules given the limited time between the issuance of this entry and March 11, 2013.

It is, therefore,

ORDERED, That Duke's motion for an extension of the discovery deadline be granted, to the extent set forth in finding (7). It is, further,

ORDERED, That Duke's motion to compel be granted. It is, further,

ORDERED, That a copy of this entry be served upon all parties of record in the above-captioned cases.

THE PUBLIC UTILITIES COMMISSION OF OHIO

s/Katie Stenman

By: Katie L. Stenman  
Attorney Examiner

SEF/sc

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**Case No(s). 12-1682-EL-AIR, 12-1683-EL-ATA, 12-1684-EL-AAM, 12-1685-GA-AIR, 12-1686-GA-ATA,**

Summary: Attorney Examiner Entry granting Duke's motion for an extension of the discovery deadline as set forth in finding (7) and granting Duke's motion to compel. - electronically filed by Sandra Coffey on behalf of Katie Stenman, Attorney Examiner, Public Utilities Commission of Ohio

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**Case No(s). 12-1682-EL-AIR, 12-1683-EL-ATA, 12-1684-EL-AAM, 12-1685-GA-AIR, 12-1686-GA-ATA,**

Summary: Request Interlocutory Appeal from the March 8, 2013 Attorney Examiner's Entry Regarding Duke's Motion to Compel by the Office of the Ohio Consumers' Counsel electronically filed by Patti Mallarnee on behalf of Sauer, Larry S.