

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 Commission 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 granted the motion filed by the Ohio Consumers' Counsel (OCC) and four other intervenors, thus, extending 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 OCC to produce witnesses for deposition. Duke also requested an expedited ruling on its motion. In its motion, Duke explained 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 further explained 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 had passed, Duke explained that OCC relied 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 asserted 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. Duke argued that it had no way of knowing which experts it needed to depose until after the filing of testimony. Duke further explained that its actions were in the interest of administrative economy. To illustrate the inefficiency of serving notices of deposition too far in advance, Duke noted that OCC filed its notices of deposition on July 20, 2012, but had not, as of its filing, identified which of Duke’s witnesses it intends to depose. In further support of its motion, Duke argued 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 production of documents, which is distinguishable from a notice of deposition filed pursuant to Rule 4901-1-21, O.A.C. Accordingly, Duke requested 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) Pursuant to paragraph (F) of Rule 4901-1-12, O.A.C., the attorney examiner elected to issue an expedited ruling on Duke’s request on March 8, 2013. The attorney examiner found 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 agreed 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, any notices of deposition equate to mere placeholder filings. Further, the attorney examiner recognized that, 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. Therefore, the attorney examiner found it appropriate to, *sua sponte*, waive 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. This waiver was granted for the limited purpose of allowing parties to submit notices of depositions to 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 found that this limited waiver should be extended until March 11, 2013, two weeks after the testimony deadline.

- (7) Rule 4901-1-15(A)(1), O.A.C, provides that any party who is adversely affected may take an immediate interlocutory appeal to the Commission from a ruling granting a motion to compel discovery.
- (8) On March 13, 2013, OCC filed an interlocutory appeal of the attorney examiner's entry granting Duke's motion to compel. In its appeal, OCC argues that Duke misrepresented the facts of this dispute. OCC states that, despite Duke's representations that it did not know the identity of OCC's witnesses, Duke did not attempt to ascertain the identity of its witnesses prior to the discovery deadline, but was, contrary to Duke's assertions, informed of the identity of OCC's witnesses in a discovery request issued February 8, 2013. OCC argues that, even after this disclosure, Duke took no action to indicate that it would depose OCC's witnesses at an earlier date than February 28, 2013. Instead, OCC argues that Duke further complicated the issue by waiting until the filing of actual testimony to file its notices of deposition. In further support of its position, OCC explains that it is harmed by the attorney examiner's entry because it places an additional strain on OCC's resources during a time of high volume case activity.

Instead, OCC asserts that, if Duke had filed its notices earlier, it could have planned for the depositions Duke sought to schedule. OCC argues that the discovery deadline set forth in Rule 4901-1-17(B), O.A.C., should be enforced, unless a timely waiver or extension of the Commission's rules is requested. Furthermore, OCC disagrees with the attorney examiner's conclusion that no substantial right of any party was adversely affected by an expedited ruling. In contrast, OCC states that it would have appreciated an opportunity to explain how Duke's noncompliance with the rules would negatively impact OCC. OCC states that the substantial right in question is to be able to rely on the Commission to enforce its rules, in this case, that there be timely notice of deposition. OCC further argues that there was no good cause shown for granting the waiver *sua sponte*. OCC asserts that failure by Duke to take minimal action to preserve its rights does not amount to good cause. As a final matter, OCC also asserts that the attorney examiner entry represents a departure from past Commission precedent, as the entry was issued without waiting for a responsive pleading. Therefore, OCC requests that its interlocutory appeal be granted and the attorney examiner's ruling be reversed.

- (9) On March 18, 2013, Duke filed memoranda contra in both the gas and electric rate cases. In its memoranda contra, Duke argues that it had demonstrated good cause for extending the discovery deadline, in that all parties should have an ample opportunity to conduct discovery. Duke also argues that, because the attorney examiner entry in this case granted motions to extend discovery, the appeal is not automatically certifiable to the Commission. As a final matter, Duke asserts that no substantial right of OCC was adversely affected by the issuance of the expedited ruling. Duke explains that parties practicing before the Commission are accustomed to a strain on resources and a strain does not amount to a substantial right.

- (10) Before addressing the minutiae of OCC's arguments, the Commission notes that the process of deposing witnesses prior to a hearing has proven resourceful in proceedings because it enables parties cross-examining witnesses to focus their questions at the hearing to those issues relevant to the proceeding. With this in mind, as well as OCC's point that parties' resources are strained due to the high case volume, it seems counterproductive for OCC to continue to argue against the deposition mechanism that, in fact, could assist with the efficiency of the overall proceedings. While the Commission agrees that Duke should have filed placeholder deposition notices in compliance with Rule 4901-1-17(B), O.A.C, and that Duke should have sought a waiver of the deadline for the filing of deposition notices at an earlier point in the proceedings, we do not believe that Duke's delay negates the reasonableness of requesting that depositions be allowed at this point in the proceedings. Although Duke's course of action is not how the Commission would have preferred Duke proceed, the Commission agrees with the ruling of the attorney examiner that granting the waiver and the motion to compel were the appropriate outcome. The issuance of the entry in this case, without the filing of a responsive pleading, did not affect a substantial right of OCC. OCC was aware that these depositions may be a possibility from the time they were initially scheduled on February 28, 2013. Moreover, the Commission believes that Duke's ability to depose OCC's witnesses will lead to a full and expeditious processing of these cases, despite any inconvenience, which is good cause for extending the time period for discovery to allow for the taking of depositions. OCC also fails to mention that it has already requested, and received, a continuance for the filing of its testimony in these proceedings, which only served to exacerbate the problem at issue here. Accordingly, as the Commission agrees that good cause existed for the *sua sponte* extension of the discovery deadline, the Commission finds that OCC's interlocutory appeal should be denied and the attorney examiner's entry granting the motion to compel should be affirmed.

It is, therefore,

ORDERED, That OCC's interlocutory appeal be denied and the attorney examiner's granting of the motion to compel is affirmed. It is, further,

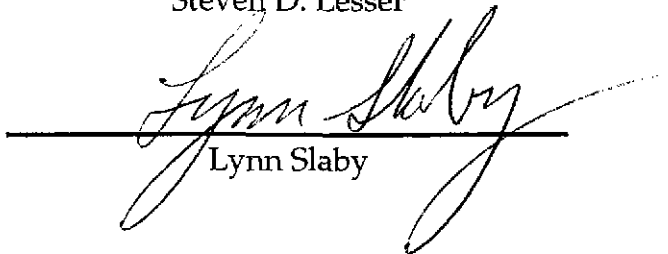
ORDERED, That a copy of this entry be served upon all parties of record in the above-captioned cases.

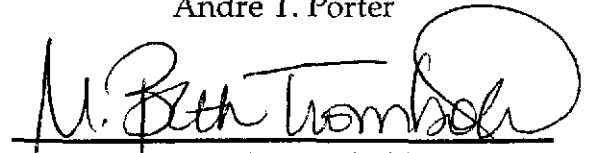
THE PUBLIC UTILITIES COMMISSION OF OHIO


Todd A. Britchler, Chairman


Steven D. Lesser


Andre T. Porter


Lynn Slaby


M. Beth Trombold

CMTP/KLS/sc

Entered in the Journal

MAR 20 2013



Barcy F. McNeal
Secretary