

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Complaint of Citizens)	
Against Clear Cutting, et al.)	
)	
Complainants,)	
)	
v.)	Case No. 17-2344-EL-CSS
)	
Duke Energy Ohio, Inc.,)	
)	
Respondent.)	

**MEMORANDUM CONTRA DUKE ENERGY OHIO, INC.'S MOTION TO COMPEL
AND RESPONSE TO DUKE ENERGY OHIO, INC.'S
MOTION TO CONTINUE HEARING**

I. INTRODUCTION

Pursuant to Ohio Adm. Code 4901-1-12(C), Complainants hereby submit this memorandum contra Duke Energy Ohio, Inc.'s ("Duke") Motion to Compel Complainants' Depositions and to Continue Hearing, and Request for Expedited Hearing ("Duke's Motion to Compel").

Duke asks the Commission for an order "compelling Complainants to appear for their depositions after March 20, 2018."¹ To date, Duke has filed 110 Notices of Deposition² and Requests for Production of Documents for the Complainants in this proceeding, totaling over 438

¹ Duke's Motion to Compel at 1.

² On March 8, 2018, the Commission dismissed 17 Complainants. See Entry at ¶¶40, 57 (March 8, 2018). While that Entry is subject to rehearing, Duke nonetheless has 110 Notices of Deposition still pending. Thus, while Duke's Motion to Compel seems to be focused on 55 Complainants who "simply refuse to be deposed," Duke's Motion to Compel at 4, Complainants are obligated to address all 110 of which remain pending. Given the 110 notices of depositions, it is not even clear which 55 Complainants Duke is referencing as refusing to be deposed.

pages (the “Notices”).³ As of the date of this filing, Complainants have held a total of 20 depositions. To date, the depositions alone have resulted in approximately 25 hours of deposition time and over 112 photographs and documents produced.

Nevertheless, Duke’s Motion to Compel grossly misrepresents the nature of this discovery dispute. While Complainants agree that the parties have reached an impasse,⁴ Complainants take serious issue with Duke’s framing of the dispute and Duke’s claimed attempt to exhaust all efforts to resolve the dispute. Supported by out-of-context emails which were conveniently cherry-picked to misrepresent the nature of Duke’s actions, Duke’s Motion to Compel attempts to present Duke as the innocent victim in this dispute.⁵ Attached hereto are additional emails, which will give you a more complete picture.⁶ Complainants believe that by evaluating all of the correspondence between the parties, the Commission will be better served to evaluate the nature of this dispute. Upon review of these emails, the Commission will see that Duke’s “woe is me” articulation of the facts could not be further from the truth. In reality, Duke has deliberately manufactured this dispute in an effort to drive up litigation costs for Complainants. Duke’s behavior is unjust and unreasonable, and now Duke is attempting to abuse the Commission’s rules to further bully Complainants in this proceeding. Duke must be stopped from engaging in its abusive practices.

³ See Notices of Deposition (January 29, 2018).

⁴ See Complainants’ Motion for Protective Order (March 14, 2018).

⁵ See Duke’s Motion to Compel, at 3 (“[T]he Company tried in vain...without adequate cooperation from Complainants and their counsel.”) (“Complainants...blatantly disregard the Rules...”), 4 (“Duke Energy Ohio has exhausted its efforts to resolve this dispute.”); 5 (“Duke Energy Ohio does not want to depose both people...”); (“Duke Energy is forced to seek the Commission’s intervention...”); (“Duke Energy Ohio certainly did not choose to have more than 80 property owners and, in many instances, their spouses join in the Second Amended Complaint. Complainants and their attorneys chose [to do so]...”); 7 (Noting that Duke did not “[choose] to file the Second Amended Complaint and join all of these Complainants as parties to this action.”) (“Duke Energy Ohio has been trying to depose Complainants since the end of January, but to no avail. As of March 13th, the parties have completed a mere two days of depositions....”).

⁶ See Email exchanges between counsel for Complainants and counsel for Duke, from February 5, 2018 to March 13, 2018, collectively attached hereto as Exhibits A-P.

For the reasons discussed below, and those reasons discussed in Complainants' Motion for Protective Order, Duke's Motion to Compel should be denied.

II. BACKGROUND

Complainants initiated this complaint proceeding against Duke on November 14, 2017. On November 22, 2017 and January 5, 2018, Complainants amended their initial Complaint⁷ (hereinafter, generally, "the Complaint"). In the Complaint, Complainants collectively raised several issues concerning the reasonableness and lawfulness of Duke's vegetation management policies, practices, and plan, and the implementation of Duke's vegetation management policies, practices, and plan. All Complainants are directly affected by Duke's vegetation management policies, practices, and plan and how Duke is currently implementing such. All Complainants are also directly affected by the misleading and deceptive practices that Duke has engaged in, which violated the Commission's rules. The issues raised by the Complaint apply to the Complainants as a whole, as they are all impacted by Duke's unlawful, unjust, and unreasonable practices, policies, activities, and vegetation management plan.

Specifically, Complainants alleged issues related to: the adequacy and lawfulness of Duke's vegetation management plan; the unjust and unreasonable vegetation management practices and policies of Duke; the unjust, unreasonable, and unlawful implementation of Duke's vegetation management practices, policies, and plan, which includes the clear cutting of trees and vegetation on Customers' properties and the use of dangerous herbicides; and defects in how Duke's vegetation management plan was modified, including deceptive and misleading statements and filings by Duke. The number of Complainants in this proceeding is simply a reflection of the

⁷ Entry at ¶4 (November 28, 2017); Entry at ¶11 (January 25, 2018).

extent of Duke's unlawful, unjust, and unreasonable vegetation and management practices throughout several communities.

On January 29, 2018, only four days after the Second Amended Complaint was filed, Duke filed 109 Notices for Complainants' depositions in this proceeding, with a 110th deposition notice subsequently filed on February 27, 2018.⁸ Despite Duke's assurances in its Motion to Compel that it did not seek to depose both spouses who jointly own the same property and are both on the Second Amended Complaint,⁹ Duke actually did notice the depositions for both spouses and they remain pending.¹⁰ After receiving the Notices, Complainants worked in good faith to obtain the information Duke requested concurrently with responding to over a thousand pages of discovery requests and admissions.¹¹ To date, Complainants have produced 20 deponents for Duke.¹² Now, Duke has moved the Commission to compel depositions for the remaining Complainants in this proceeding, including spouses.

III. LEGAL ARGUMENTS

A. Duke Has Failed to Satisfy the Requirements for Filing a Motion to Compel.

Under Rule 4901-1-23, Ohio Adm. Code, a motion to compel is not appropriate unless the party seeking discovery "has exhausted all other reasonable means of resolving any differences with the party or person from whom discovery is sought."¹³ Duke has not exhausted all reasonable

⁸ See Notices of Deposition (January 29, 2018).

⁹ See Duke's Motion to Compel at 5.

¹⁰ See Notices of Deposition (January 29, 2018).

¹¹ See Exhibits A-R.

¹² To date, the following Complainants have been deposed: Kim Wiethorn; Olga Staios; Barbara Casper; Jonathan Mackey; Mike Priessler; Paul Smith; Melisa Kuhne; Joe Grossi; March Wahlquist; Karen Daboub; John Gump; Dennis Baker; Ken Bryant; Mark Thompson; Dennis Mitman; Eric Hatfield; Fred Vonderhaar; Peter Broome; Nicole Menkhaus; and Randall Fick. Duke, on the other hand, has not allowed Complainants to depose any of its witnesses.

¹³ Rule 4901-1-23(C), Ohio Adm. Code.

means to resolve this dispute as required by the Rule. The essence of Duke's Motion to Compel is its contention that Duke's efforts to pursue discovery have been "thwart[ed]" by Complainants at every turn in this proceeding.¹⁴ Specifically, Duke bemoans Complainants' "recalcitrance" and argues that "[t]he Commission should not tolerate Complainants' unilateral attempt to limit [Duke's] discovery."¹⁵

Duke ultimately concludes that it "has exhausted its efforts to resolve this dispute."¹⁶ That said, Duke's Motion to Compel only devotes one sentence to explaining the efforts Duke has actually put towards resolving this dispute, noting that "[t]he parties' attorneys discussed the disputed issues following the second round of depositions on March 2, 2018, and have also engaged in related email communications."¹⁷ Duke's Motion to Compel does not discuss the nature or substance of those conversations, nor does it address the basis for Complainants' disagreement with Duke. In support, Duke's Motion only produces four emails between counsel, choosing to omit dozens of other emails – including some which would provide key context for the emails which Duke chose to produce. These omissions are telling.

Duke's Motion to Compel, and the accompanying Affidavit of Robert A. McMahon which accompanies it, fail to explain Complainants' attempts to narrow or limit the depositions and provide accommodations to the deponents. Duke also neglects to explain how it has failed to accommodate Complainants' schedules,¹⁸ refused to conduct any depositions via telephone, refused to conduct any depositions outside of traditional business hours, and refused to withdraw

¹⁴ Duke's Motion to Compel at 3.

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ Duke's Motion to Compel at 4-5.

¹⁸ See, e.g., Exhibits A, B to Duke's Motion to Compel.

deposition notices for spouses owning the same property as Complainants that Duke did depose. Duke could have and should have agreed to limit or narrow its 110 deposition notices, but it chose not to. Duke could have accommodated Complainants' schedules and been willing to conduct depositions outside of regular work hours. But Duke did not. Duke could have been willing to conduct depositions via telephone in order to depose more Complainants and more quickly. But, except for one exception, Duke did not.

Duke also could have relied on other means of discovery; expensive depositions are not required and are not always necessary. To this end, Duke conveniently omits any mention of the incredible amount of discovery it has sought to date, attempting instead to discuss its depositions in a vacuum. During the four months that this case has been pending, Duke has served 74 rounds of individual discovery on numerous complainants (including multiple rounds on the same Complainants), totaling 1,365 pages, noticed 110 depositions, filed three motions to dismiss that require responsive pleadings, and issued 21 letters disputing discovery responses that requested substantive responses and explanations and rewrites of discovery responses. As a result of all of this discovery, Complainants have produced over 3,861 pages of discovery responses, photographs, and documents, and 20 deponents.

While Duke's request to depose each and every Complainant is itself unreasonable, Duke has made matters worse by being wholly uncooperative throughout the discovery process. After Duke served its 400+ pages of Notices of Deposition, Complainants promptly worked to identify the primary Complainants to be deposed. After an incredible amount of work behind the scenes (of which Duke was fully aware), Complainants identified those primary Complainants to be deposed and worked diligently to coordinate everyone's schedules to accommodate Duke's

requests.¹⁹ Nevertheless, disregarding the work that was completed, Duke imposed a litany of unreasonable demands on the depositions and the deponents, including, but not limited to: (a) that all depositions must be conducted in-person, as Duke repeatedly refused to conduct any depositions by phone (until one recent exception);²⁰ (b) that depositions must be scheduled more quickly and more regularly than Complainants are able, in willful ignorance of the logistical nightmare of coordinating various individuals' professional, personal, medical, and travel schedules;²¹ (c) that all depositions must take place during the work week, as Duke refuses to participate in depositions on the weekend (although Duke recognized the possible necessity of Saturday depositions at the prehearing conference);²² (d) that all depositions must take place promptly at 9:00 or 9:30 a.m., ignoring Complainants' request for a 10:00 a.m. start time (which was requested due to prior scheduling conflicts, travel, and so that Complainants could adequately prepare for the depositions);²³ (e) that all depositions must take place in Cincinnati, at Duke's outside counsel's offices that could not accommodate all Complainants and that had no meeting space;²⁴ (f) that the number of Complainants that must be deposed each day of depositions be six to eight Complainants;²⁵ and (g) that certain Complainants be offered for depositions in the first two or three rounds of depositions, or on a particular day, over other previously selected Complainants, in willful disregard of the various individuals' professional, personal, medical, and

¹⁹ See, e.g., Exhibit A; Exhibit C, email from Bob McMahon (February 9, 2018); Exhibit G, email from Bob McMahon (February 15, 2018); Exhibit I, email from Bob McMahon (February 20, 2018).

²⁰ See, e.g., Exhibit A; Exhibit P, email from Bob McMahon (March 13, 2018).

²¹ See, e.g., Exhibits G, K, P.

²² See, e.g., Exhibit A; Exhibit B, email from Bob McMahon (February 7, 2018); Exhibit P.

²³ See, e.g., Exhibits A, K.

²⁴ See, e.g., Exhibit B; Exhibit C; Exhibit D, email from Bob McMahon (February 9, 2018); Exhibit E, email from Bob McMahon (February 9, 2018).

²⁵ See, e.g., Exhibit A.

travel schedules.²⁶ To date, Complainants have cooperated with many of Duke's demands, but it has come at enormous expense.²⁷ When confronted about the harassing emails and expense that Duke's demands have inflicted on Complainants, Duke's counsel rudely dismissed Complainants' concerns, and continued to harass and threaten Complainants, complaining that counsel was not moving quick enough to meet his demands and arbitrary deadlines.²⁸

It is now clear that Duke's ultimate goal has never been to put forth a good faith approach to discovery, or to actually resolve the dispute it has created, but rather to bury Complainants in discovery to increase their litigation costs and thwart Complainants' preparation for hearing.

Duke's bad faith approach has plagued the discovery process. Duke's contention that it has "exhausted its efforts" is particularly hollow when one also considers the extent to which Duke has constrained the depositions that it seeks to conduct and when itself has refused to sufficiently respond to standard written discovery. Indeed, Duke repeatedly cites an undue burden, due to the number of Complainants, to excuse its insufficient discovery responses.²⁹ Duke is simultaneously insisting that all of the property owners must appear in person for time-consuming and expensive depositions, but Duke cannot be bothered to produce standard written discovery as it relates to each of the property owners, because Duke claims those responses would be too burdensome. It should go without saying that responding to written discovery is less time-consuming and expensive than depositions of 110 Complainants.

²⁶ See, e.g., Exhibit I; Exhibit J, email from Bob McMahon (February 21, 2018).

²⁷ Id. While Duke's demands are unreasonable on their own, the attached emails, Exhibits A-R, also demonstrate the harassing and threatening tone that Duke's counsel has adopted throughout the discovery process.

²⁸ See Exhibit K ("I'm not sure how my 5 ½ line email can 'drain' so much of 'complainants' resources,' but you're the one who chose to respond with a small treatise.").

²⁹ See, e.g., Exhibit S, at CACC-RFA-01-009 ("This Request is overly broad and unduly burdensome in that there are more than 85 properties and property owners at issue in the Second Amended Complaint."); Exhibit T, at CAC-INT-01-006 ("This Request is overly broad and unduly burdensome in that there are more than 85 properties and property owners at issue in the Second Amended Complaint.").

Of course, these facts were not discussed in Duke's Motion to Compel. Instead, Duke submitted a one sentence summary, and four out-of-context emails in support, to conclude that it has "exhausted its efforts" in this proceeding. To be clear, Duke has not exhausted its efforts – it has only attempted to exhaust Complainants' resources in an attempt to bully its way to victory. Because Duke has manufactured this dispute, and it has not exhausted its efforts to resolve it, Duke is not entitled to the relief it seeks under Rule 4901-1-23(C), Ohio Adm. Code.

B. Deposing Additional Complainants Will Only Produce Cumulative Testimony and Evidence and Will Not Lead to the Discovery of Admissible Evidence.

As the Commission is well aware, the purpose of the Commission's rules of discovery, Rules 4901-1-16 to 4901-1-24, Ohio Adm. Code, is "to encourage the prompt and expeditious use of prehearing discovery in order to facilitate thorough and adequate preparation for participation in commission proceedings. The [] rules are also intended to minimize commission intervention in the discovery process."³⁰

To further this purpose, the Commission limits discovery only to that which is "reasonably calculated to lead to the discovery of admissible evidence."³¹ Indeed, the Commission denies parties the right to seek discovery where that discovery is not reasonably calculated to lead to the discovery of admissible evidence.³² Here, Complainants have already allowed Duke to depose 20 Complainants. Indeed, those who have been deposed to date were those who are most likely to

³⁰ Rule 4901-1-16(A), Ohio Adm. Code.

³¹ Rule 4901-1-16(B), Ohio Adm. Code.

³² See, e.g., *In the Matter of Application of Duke Energy Ohio, Inc. for Approval of A Mkt. Rate Offer to Conduct A Competitive Bidding Process for A Std. Serv. Offer Elec. Generation Supply, Accounting Modifications, & Tariffs for Generation Serv.*, Panel Case No. 10-2586-EL-SSO, Entry at * 3 (December 13, 2010) ("In considering the requests for production and interrogatories contained in Category 4, the attorney examiner agrees with Duke, that these requests are not reasonably calculated to lead to the discovery of evidence that is admissible in the current proceeding.") (emphasis added); *In the Matter of the Complaint of Ps Executive Centers, Inc.*, Panel Case No. 01-2771-TP-CSS, Entry (November 14, 2002) (Denying a motion to compel where discovery requests "should be viewed as irrelevant and not reasonably calculated to lead to the discovery of admissible evidence.") (emphasis added).

testify at the upcoming hearing, scheduled for April 17, 2018.³³ Several of the deponents were selected specifically at Duke's request.

As Duke is well aware, Complainants can – and intend to – substantiate their claims in the Complaint at the upcoming hearing with the testimony of only some Complainants, all of whom have already been deposed by Duke. The fact is, the additional, cumulative testimony is not pertinent to the legal issues which underlie this case, which include: the adequacy and lawfulness of Duke's vegetation management plan; the unjust and unreasonable vegetation management practices and policies of Duke; the unjust, unreasonable, and unlawful implementation of Duke's vegetation management practices, policies, and plan, which includes the clear cutting of trees and vegetation on Customers' properties and the use of dangerous herbicides; and defects in how Duke's vegetation management plan was modified, including deceptive and misleading statements and filings by Duke. Those are the issues raised in the Second Amended Complaint, and it is a waste of time, effort, and resources to allow Duke to overwhelm the record with duplicative testimony from property owners who will not further the determination of those issues.

The number of deponents that Complainants have made available to Duke exceeds the number of witnesses that Complainants will rely upon when this matter is heard by the Commission. Through the 20 depositions conducted to date, it has become abundantly clear that no other Complainants will be necessary or will provide any new information that either party will need to present at the upcoming hearing, regarding the unreasonable and unlawful vegetation and management practices and activities that Duke is engaging in on Complainants' properties that

³³ Complainants do not intend to offer all 20 individuals who have been deposed by Duke at the upcoming Commission hearing, but Complainants have agreed to not offer the testimony of any additional Complainants without first providing Duke the opportunity to depose those additional Complainants.

result in the mass removal or leveling to the ground of the trees and vegetation on Complainants' properties through the use of clear cutting or herbicides.

As explained in the Second Amended Complaint, Duke's easements are similar if not identical, Duke's door hangers explaining their intended activities on the Complainants' properties are similar if not identical, and Duke's vegetation management materials provided to Complainants are identical. Duke is asking the same questions through the depositions and eliciting the same responses. Duke is asking for the deponents to opine on the same legal issues. Duke is reviewing the exact same easements, door hangers, and Duke vegetation management materials with each deponent. The only differences have been a review of pictures provided by Complainants, all of which have been or could be produced in written discovery, and the discussions with Duke's employees, which Duke can and should obtain from its own employees.

Given the nature of this proceeding, additional deponents that will not be testifying have nothing to add that would not result in cumulative evidence, and future deponents will simply regurgitate the same generalized facts which Duke has heard time and time again.

Duke has purposefully created and perpetuated this discovery dispute in an ongoing attempt to overwhelm Complainants in litigation costs, knowing full well that deposing additional Complainants and/or forcing all Complainants to testify will only produce cumulative testimony and evidence. Duke's noticed depositions are not reasonably calculated to lead to the discovery of admissible evidence. Rather, Duke's Notices of Deposition are calculated to impose an unlawful and unjust burden on Complainants.

C. Complainants Are Not Dictating Duke's Defense Strategy.

Duke has complained that "Complainants are under the mistaken belief that they have the right to dictate [Duke's] defense strategy, choose the witnesses who will testify for both sides at

the hearing, and otherwise dictate which of the Complainants may be deposed by the Company.”³⁴ Clearly, Complainants have made no effort to dictate Duke’s defense strategy. To the contrary, Complainants have gone above and beyond to comply with Duke’s discovery requests, to ensure that Duke has more than enough information to adequately prepare for the upcoming hearing. Because Duke has received all of the information it could need, its defense strategy has not been impeded in any way.

That said, Duke’s argument misses an even greater point. Ohio law does not require every Complainant to testify in order to reach the ultimate issues in this case. Complainants are permitted, and in fact encouraged, to consolidate and coordinate litigation efforts wherever possible. The Commission’s rules allow for, and encourage the filing of, joint complaints and coordination of litigation, cross examination, and witnesses to prevent the presentation of cumulative evidence and repetitious and cumulative cross examination to “assure that the hearing proceeds in an orderly and expeditious manner.”³⁵ In fact, on January 25, 2018, the Attorney Examiner granted Complainants’ motion to amend the complaint for this very reason.³⁶

Complainants have chosen to do such in this proceeding and have come together to agree on facts, causes of actions, and claims, and filed a joint complaint against Duke. Complainants have crafted a joint litigation strategy to efficiently and effectively present their case to the Commission.

³⁴ Duke’s Motion to Compel at 3.

³⁵ See Rule 4901-1-27(B), Ohio Adm. Code (“[T]he presiding hearing officer may, without limitation:…[t]ake such actions as are necessary to…[p]revent the presentation of irrelevant or cumulative evidence.”); Rule 4901-1-11(D)(2), Ohio Adm. Code (“[T]he commission…may…[r]equire parties with substantially similar interests to consolidate their examination of witnesses or presentation of testimony.”); see also Ohio Rule of Evidence 403(B) (“[E]vidence may be excluded if its probative value is substantially outweighed by considerations of undue delay, or needless presentation of cumulative evidence.”).

³⁶ See Entry (January 25, 2018) (“Upon review, the attorney examiner finds Complainants’ January 5, 2018, motion to amend the first amended complaint reasonable because, as Complainants note, **this will allow the Commission to streamline its docket and consider all claims regarding Duke’s vegetation management plan in one proceeding.**”) (emphasis added).

The Commission should similarly encourage the joint effort of the Complainants to bring their concerns to the Commission on a consolidated, joint basis to conserve time and resources of the Complainants, as well as the Commission. It is not in the Complainants' or Commission's best interest to have 68 or 110 Complainants testify. Rather, it is in everyone's best interest to "streamline [the Commission's] docket and consider all claims regarding Duke's vegetation management plan in one proceeding."³⁷ It was pointless spending hours coordinating efforts to streamline the complaints and file one joint complaint, containing specific claims for all Complainants, if Complainants are, nonetheless, going to be required to produce every Complainant for deposition and for hearing. If Duke intended to move forward on an individual-by-individual complaint basis, then it should have objected to the motion to consolidate and motions to amend the Complaint to add Complainants, but it did not. Rather, Duke itself recognized the value of, and benefited from, a consolidated approach to this litigation.

Duke's argument fails against this backdrop. Indeed, it is actually Duke which has no right to dictate how Complainants present their joint case, which includes mandating that all Complainants need to testify. Indeed, it is curious why Duke would encourage Complainants to bolster the evidence against it, unless Duke was simply trying to overwhelm Complainants with burdensome and expensive depositions. Regardless, Duke cannot force every Complainant to testify. To the extent that Duke believes that Complainants "voluntarily chose to file complaints against [Duke], thereby entitling [Duke] to conduct discovery about their claims," as Duke's counsel has insisted via email,³⁸ Duke is incorrect. While Duke certainly has a right to conduct discovery about Complainants' collective claims, it has done so. Having conducted discovery

³⁷ Id.

³⁸ Exhibit A.

about Complainants' claims, Duke does not now have the right to pester the additional Complainants simply because the additional property owners all have a shared grievance.

The Commission has long held that, where multiple complainants file sufficiently similar complaints, only a fraction of the complainants need to testify.³⁹ In *In the Matter of the Complaint of Distributors Associates, Inc., and Numerous Other Petitioners v. General Telephone Company of Ohio*, Case Nos. 79-543-TP-CSS, 79-543-TP-CSS, etc. In that proceeding, the Commission considered two complaints; one complaint had 112 signatories, and the other complaint had 97 signatories.⁴⁰ The complaints were consolidated for public hearing, at which only 16 witnesses testified – despite having 209 complainants in the proceeding.⁴¹ The Commission held:

While it is true that those testifying at public hearing represented only a fraction of those signing the petitions, and even a smaller percentage of the entire Chatham subscribers body, the similarity in certain of the complaints is sufficient to infer that these problems may well be common throughout the exchange area. **It certainly is not necessary that each petition or Chatham exchange subscriber testify in order to reach the conclusion that certain common problems relating to telephone service may exist. An adequate cross-section of Chatham subscribers has testified to similar type problems to support such a conclusion in these cases.**⁴²

The Commission held that “the complainants herein presented sufficient evidence” to support their claims.⁴³ Here, Complainants have and will do the same, if not more, as they have presented a more-than-adequate cross-section of property owners to testify to their similar problems stemming

³⁹ See *In the Matter of the Complaint of Distributors Associates, Inc., and Numerous Other Petitioners v. General Telephone Company of Ohio*, Case Nos. 79-543-TP-CSS, 79-543-TP-CSS, etc., Opinion and Order at 5 (April 1, 1981) (“It is certainly not necessary that each petitioner or Chatham exchange subscriber testify in order to reach the conclusion that certain common problems relating to telephone service may exist. An adequate cross section of Chatham subscribers has testified to similar type problems to support such a conclusion in these cases.”).

⁴⁰ *Id.* at 1.

⁴¹ *Id.*

⁴² *Id.* at *3 (bold emphasis added; underline in original).

⁴³ *Id.* at *12.

from Duke's vegetation management plan, practices, policies, and activities in the neighborhoods and communities where Complainants reside.

The Commission has accepted testimony of a few representative complainants in other similar cases, because the Commission only looks to the substance of the testimony; how many complainants testify is wholly irrelevant.⁴⁴ In *In the Matter of the Complaint of Mary E. Cogswell, et al., Complainants*, for example, the Commission carefully explained that its consideration of the complaint at issue was solely based on the evidence provided – not on the fact that only two out of 16 complainants testified:

Accordingly, based upon the evidence of record, the Commission finds that the relief requested by the complainants should be denied and that the complaint should be dismissed. Having found that this case should be dismissed based upon the evidence presented, the Commission finds the company's motion to dismiss certain complainants from the case for not appearing at the hearing to be moot.⁴⁵

Likewise, here, the Commission should only look to the evidence which Complainants present.

If Complainants do not present enough evidence to support their complaint, then their complaint should be dismissed. That should be Complainants' concern, not Duke's. The Commission should not allow Duke to dictate how Complainants present their evidence in this proceeding, when more than enough evidence will be provided to support Complainants' claims.

⁴⁴ See, e.g., *In the Matter of the Complaint of Steve Bowman, et al., Complainants, v. Columbia Gas of Ohio, Inc. & Columbia Gas Transmission Corp., Respondents, Relative to the Allegations of Improper Maintenance of Gas Pipelines & Improper Termination of Serv.*, 1 Case No. 83-1328-GA-CSS, Opinion and Order (Feb. 17, 1988) (In which the Commission accepted the testimony of eight complainants on behalf of six other complainants who did not testify); *In the Matter of the Complaint of Mary E. Cogswell, et al., Complainants*, Case No. 91-1421-EL-CSS, Supplemental Opinion and Order (July 22, 1993) (In which fourteen out of sixteen complainants declined to testify at hearing, but the complaint was dismissed based on the evidence presented, not the number of testifying complainants.).

⁴⁵ *In the Matter of the Complaint of Mary E. Cogswell, et al., Complainants*, Panel Case No. 91-1421-EL-CSS, Supplemental Opinion and Order, *5 (July 22, 1993).

D. Duke's Request Would Have Absurd Real-World Consequences, and Proper Judicial Administration Favors Protecting Complainants from Duke's Unreasonable Discovery Requests.

In addition to the legal deficiencies discussed above, Duke's Motion to Compel fails common sense as Duke has not thought out the real-world consequences of its arguments. After presuming (with no support) that Complainants "seem to think (in error) that this action is akin to a class action in state court," Duke cites an Entry from the Commission to suggest that "[i]n the event that a Complainant is successful, the Commission would apply its findings on a prospective basis to each customer similarly situated to the Complainant."⁴⁶

Such a suggestion is outrageous, as it would require any similarly grieved Complainants who did not get deposed and testify, but who have already retained counsel in this proceeding, to: (a) withdraw from the current Complaint proceeding and forego their rights to be vindicated as Complainants in this proceeding; (b) again hire counsel as "similarly situated customers;" (c) immediately initiate a separate proceeding; (d) apply for an immediate stay in the separate, new proceeding; (e) have that stay granted; and (f) seek to have the Commission's Order issued in this proceeding enforced as it applies to that complainant. While that itself is plainly unreasonable and unworkable, creating more unjust and unreasonable expense for Complainants and the Commission, it does not even take into account the reality that, in the interim, those individuals would **lose the stay** when they withdraw from this proceeding, which the Commission has already granted to them in this proceeding. At that point, Duke would be able to immediately remove or level to ground all of the trees and vegetation on their properties through the use of clear cutting and/or herbicides, thus mooting those Complainants-turned-similarly-situated-customers' rights altogether.

⁴⁶ Duke's Motion to Compel at 6, citing *Weiss v. Cleveland Electric Illuminating Company*, Case No. 97-876-EL-CSS, Entry (November 6, 1997).

As Duke has noted in a previous proceeding, “[t]here is a fundamental maxim of jurisprudence, rooted in common sense, that the law does not require “useless,” “vain,” or “futile” acts.⁴⁷ Good judicial administration is not furthered by insistence on futile procedure.⁴⁸” In this instance, because conducting additional depositions and obtaining cumulative testimony is wholly unnecessary to the Commission’s determination of this proceeding, Duke is simply insisting on a futile procedure, and the Commission should reject Duke’s efforts.

E. Complainants Do Not Object to Duke’s Motion to Continue Hearing.

While Complainants take umbrage with the basis for Duke’s request for a continuance – that is, that it is “Complainants’ unreasonable posture toward discovery” which leaves Duke with a “wholly insufficient” amount of time to prepare for the hearing – Complainants do not object to Duke’s request.⁴⁹ Rather, it is Duke’s unreasonable posture toward discovery and harassing, unduly burdensome behavior that is interfering with Complainants’ ability to complete discovery and adequately prepare for hearing. As detailed above, Complainants have been overwhelmed with thousands of pages of written discovery requests to date and numerous depositions. However,

⁴⁷ *In the Matter of the Application of Duke Energy Ohio, Inc., for Approval of its Energy Efficiency and Peak Demand Reduction Program Portfolio Plan*, Case No. 16-576-EL-POR, Duke Energy Ohio’s Memorandum Contra The Motion to Compel Responses to Discovery at 3, n.3 (December 19, 2017) (“Stated in various ways, the ancient maxim “*lex non cogit ad inutilia*,” or “the law does not know useless acts,” has been a fundamental tenet in Anglo-American jurisprudence for centuries. See *Seaconsar Far East, Ltd. v. Bank Markazi Jomhouri Islami Iran*, [1999] 1 Lloyd’s Rep. 36, 39 (English Court of Appeal 1998); *People v. Greene Co. Supervisors*, 12 Barb. 217, 1851 WL 5372, at *3 (N.Y. Sup. Ct. 1851); see also *Ohio v. Roberts*, 448 U.S. 56, 74 (1980) (“The law does not require the doing of a futile act.”); *Cary v. Curtis*, 44 U.S. 236, 246 (1845) (“[T]he law never requires ... a vain act.”); N.Y., *New Haven & Hartford R.R. Co. v. Iannotti*, 567 F.2d 166, 180 (2d Cir. 1977) (“The law does not require that one act in vain.”); *Terminal Freight Handling Co. v. Solien*, 444 F.2d 699, 708 (8th Cir. 1971) (“The law does not and should not require the doing of useless acts.”); *Stevens v. U.S.*, 2 Ct. Cl. 95, 101 (U.S. Ct. Cl. 1866) (“[T]he law does not require the performance of a useless act.”); *Bohnen v. Harrison*, 127 F. Supp. 232, 234 (N.D. Ill. 1955) (“It is fundamental that the law does not require the performance of useless acts.”); *In re Anthony B.*, 735 A.2d 893, 901 (Conn. 1999) (“It is axiomatic that the law does not require a useless and futile act.”); *Wilmette Partners v. Hamel*, 594 N.E.2d 1177, 1187 (Ill.App. 1992) (“[I]t is a basic legal tenet that the law never requires a useless act.”).”).

⁴⁸ *In the Matter of the Application of Duke Energy Ohio, Inc., for Approval of its Energy Efficiency and Peak Demand Reduction Program Portfolio Plan*, Case No. 16-576-EL-POR, Duke Energy Ohio’s Memorandum Contra The Motion to Compel Responses to Discovery at n.3 (December 19, 2017) (citing *Wade v. Mayo*, 334 U.S. 672, 681 (1948)).

⁴⁹ Duke’s Motion to Compel at 7-8.

as mentioned, Duke has thus far failed to produce any of its witnesses for deposition and it has failed to adequately respond to written discovery requests over the objection of Complainants. Given that there are multiple discovery disputes outstanding and motions pending, including the opportunity to seek rehearing on the Commission's entry dismissing certain Complainants and sua sponte dismissal of certain claims that was issued a little over a week ago, Complainants agree that a continuance is not only warranted, but necessary. Of course, for the reasons stated above, Complainants object to Duke's suggestion that the Commission should dismiss the claims of any Complainants who do not appear for deposition.

IV. CONCLUSION

For the reasons discussed above, and those reasons discussed in Complainants' Motion for Protective Order, the Commission should deny Duke's Motion to Compel in its entirety and protect the Complainants from the unduly burdensome and harassing discovery sought by Duke. Additionally, given the many outstanding issues that need to be resolved, Complainants do not object to Duke's request for a continuance.

Respectfully submitted,

/s/ Kimberly W. Bojko
Kimberly W. Bojko (0069402) (Counsel of Record)
Stephen E. Dutton (0096064)
Brian W. Dressel (0097163)
Carpenter Lipps & Leland LLP
280 Plaza, Suite 1300
280 North High Street
Columbus, Ohio 43215
Telephone: 614.365.4100
bojko@carpenterlipps.com
dutton@carpenterlipps.com
dressel@carpenterlipps.com
(Will accept service via email)

Counsel for Complainants

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and accurate copy of the foregoing reply was filed and served on March 20, 2018, by electronic mail upon all parties of record.

/s/ Kimberly W. Bojko

Kimberly W. Bojko

Counsel for Complainants

718311

Kimberly W. Bojko

From: Bob McMahon <bmcMahon@emclawyers.com>
Sent: Tuesday, February 06, 2018 11:40 AM
To: Kimberly W. Bojko
Cc: Brian Dressel; Watts, Elizabeth H; Olive, Emily A.
Subject: FW: 17-2344-EL-CSS Depositions

Kim,

I'm following up on your email to Elizabeth (below) and our discussions at the Commission.

I can depose complainants on February 19, but we need to get more than four done that day. Please identify which of the four complainants listed in your email will be available in person for their deposition on 2/19/18, and also identify 2-4 other complainants for deposition that day.

I suggest that we start at 9 am in my office. The depositions must take place in person, as we do not agree to conduct these depositions by telephone. I can host them at my office but we only have room for 6 people, including the court reporter, at any given time.

I also can be available to depose complainants on the following dates: February 21, 22, 23, 26, 28, and March 2, 5, 6, 8, 9. Please reach out to your clients ASAP and let's get these depositions lined up. As you can see, we are providing a lot of dates and flexibility to accommodate all of the complainants. While I understand that some of your clients may not want to take off work to be deposed, they voluntarily chose to file complaints against Duke Energy Ohio, thereby entitling my client to conduct discovery about their claims. We can work with them to a certain extent (hence providing 10 dates in addition to your suggested date of 2/19/18) but they need to work with us, too.

I look forward to hearing from you at the earliest convenience.

Regards,

Bob

Robert A. McMahon
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2321 Kemper Lane, Suite 100
Cincinnati, OH 45206
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(513) 460-5490 (mobile)
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bmcMahon@emclawyers.com

From: Kimberly W. Bojko [<mailto:bojko@CarpenterLipps.com>]
Sent: Monday, February 05, 2018 8:59 AM
To: Watts, Elizabeth H
Cc: Brian Dressel
Subject: 17-2344-EL-CSS Depositions



***** Exercise caution. This is an EXTERNAL email. DO NOT open attachments or click links from unknown senders or unexpected email. *****

Liz,

Per our discussion and your request last week, we have selected 6 complainants for the initial round of depositions. Those complainants are: Kim Wiethorn, Joe Grossi, Jonathan Mackey, Fred Vonderhaar, Barbara Casper and Marc Wahlquist. Four of these complainants are available either in person or by phone on February 19, 2018 to be deposed. We are working on finding a time that is open for the other two.

Please let us know if this date works for you.

Thank you,
Kim

Kimberly W. Bojko
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From: Brian Dressel [<mailto:dressel@CarpenterLipps.com>]
Sent: Wednesday, February 07, 2018 5:22 PM
To: Bob McMahon <bmcMahon@emclawyers.com>; Kimberly W. Bojko <bojko@CarpenterLipps.com>
Cc: Watts, Elizabeth H <Elizabeth.Watts@duke-energy.com>; Olive, Emily A. <Emily.Olive@duke-energy.com>
Subject: RE: 17-2344-EL-CSS Depositions

Bob,

We have 7 Complainants to be deposed on 2/19/2018. These seven are: Kim Wiethorn, Olga Staños, Barbara Casper, Jonathan Mackey, Mike Priessler, Paul Smith, and Melisa Kuhne. We will provide a schedule as to the order of the depositions prior to the 19th (i.e. who will go first, second, etc.).

You mentioned that your office has limited space. How many people do you anticipate having present on behalf of Duke?

Thank you,

Brian W. Dressel
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From: Bob McMahon [<mailto:bmcMahon@emclawyers.com>]
Sent: Tuesday, February 06, 2018 11:40 AM
To: Kimberly W. Bojko
Cc: Brian Dressel; Watts, Elizabeth H; Olive, Emily A.
Subject: FW: 17-2344-EL-CSS Depositions

Kim,

I'm following up on your email to Elizabeth (below) and our discussions at the Commission.

I can depose complainants on February 19, but we need to get more than four done that day. Please identify which of the four complainants listed in your email will be available in person for their deposition on 2/19/18, and also identify 2-4 other complainants for deposition that day.

I suggest that we start at 9 am in my office. The depositions must take place in person, as we do not agree to conduct these depositions by telephone. I can host them at my office but we only have room for 6 people, including the court reporter, at any given time.

I also can be available to depose complainants on the following dates: February 21, 22, 23, 26, 28, and March 2, 5, 6, 8, 9. Please reach out to your clients ASAP and let's get these depositions lined up. As you can see, we are providing a lot of dates and flexibility to accommodate all of the complainants. While I understand that some of your clients may not want to take off work to be deposed, they voluntarily chose to file complaints against Duke Energy Ohio, thereby



Kimberly W. Bojko

From: Bob McMahon <bmcMahon@emclawyers.com>
Sent: Friday, February 09, 2018 11:15 AM
To: Kimberly W. Bojko; Brian Dressel
Cc: Watts, Elizabeth H; Olive, Emily A.
Subject: RE: 17-2344-EL-CSS Depositions

Kim,

We are happy to start the depositions at 10 am on 2/19 and approve your suggested order for those depositions, but we do not agree to conduct the depositions at Symmes Township's office. We are entitled to depose opposing parties in our office. My office and the parties are located in Hamilton County so it's not as if we are asking your clients to travel for their depositions, or even leave the county for that matter. Plus I am concerned that conducting the depositions at a governmental office may create unnecessary issues, and I do not want to turn this discovery process into a 3-ring circus. The complainants' depositions will take place in my office. Call or email if you would like to discuss the matter further.

Regards,

Bob

Robert A. McMahon
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(513) 460-5490 (mobile)
(513) 533-3554 (fax)
bmcMahon@emclawyers.com

From: Kimberly W. Bojko [mailto:bojko@CarpenterLipps.com]
Sent: Thursday, February 08, 2018 5:26 PM
To: Bob McMahon <bmcMahon@emclawyers.com>; Brian Dressel <dressel@CarpenterLipps.com>
Cc: Watts, Elizabeth H <Elizabeth.Watts@duke-energy.com>; Olive, Emily A. <Emily.Olive@duke-energy.com>
Subject: RE: 17-2344-EL-CSS Depositions

Bob,

Per my voicemail, we appreciate the offer to use your office for the depositions scheduled for 2/19/18; however, we would prefer to host the depositions at Symmes Twp's offices--9323 Union Cemetery Road, Symmes Township, Ohio 45140-9386. It is my understanding that the Township has a conference room for the depositions, as well as additional space, which will be useful. Additionally, due to scheduling issues, we need to begin the depositions at 10:00 a.m.

At this time, we intend to proceed in this order, beginning at 10:00 a.m.:

Jonathan Mackey
Mike Priessler
Melisa Kuhne



Olga Staios
Paul Smith
Barbara Casper
Kim Wiethorn

Let me know if you have any questions. Thank you.
Kim

Kimberly W. Bojko
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From: Bob McMahon [<mailto:bmcMahon@emclawyers.com>]
Sent: Thursday, February 08, 2018 8:10 AM
To: Brian Dressel; Kimberly W. Bojko
Cc: Watts, Elizabeth H; Olive, Emily A.
Subject: RE: 17-2344-EL-CSS Depositions

Brian,

We are confirmed for those 7 depositions in my office starting at 9 am on February 19. I do not believe that anyone else from Duke Energy Ohio will attend those depositions, but I will confirm and get back to you.

Are you working on the other offered dates? I know that process can take some time, but we need to start locking in deponents, dates and times ASAP.

Regards,

Bob

Robert A. McMahon
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bmcMahon@emclawyers.com

Kimberly W. Bojko

From: Bob McMahon <bmcMahon@emclawyers.com>
Sent: Friday, February 09, 2018 11:31 AM
To: Kimberly W. Bojko; Brian Dressel
Cc: Watts, Elizabeth H; Olive, Emily A.
Subject: RE: 17-2344-EL-CSS Depositions

Kim,

The deponents and my firm are located in Hamilton County. This situation is not remotely similar to your efforts to have Duke Energy Ohio employees and witnesses travel to Columbus for their depositions, so I don't understand your point. It is not as if I will be deposing a third-party witness employed by Symmes Township—the 7 complainants to be deposed on 2/19 are individuals who live in this county. Having them drive to another city in the same county is not an unreasonable inconvenience.

Regards,

Bob

Robert A. McMahon
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(513) 533-3441 (direct)
(513) 460-5490 (mobile)
(513) 533-3554 (fax)
bmcMahon@emclawyers.com

From: Kimberly W. Bojko [mailto:bojko@CarpenterLipps.com]
Sent: Friday, February 09, 2018 11:24 AM
To: Bob McMahon <bmcMahon@emclawyers.com>; Brian Dressel <dressel@CarpenterLipps.com>
Cc: Watts, Elizabeth H <Elizabeth.Watts@duke-energy.com>; Olive, Emily A. <Emily.Olive@duke-energy.com>
Subject: RE: 17-2344-EL-CSS Depositions

Your request is not appropriate. Our approach is consistent with the PUCO practice. It is typical for the party requesting the deposition to travel to the deponent.

Just as Duke requires us to travel to its Cincinnati office to depose its witness, Duke is required to travel to our designated location to depose our witnesses. This is standard practice that Duke is well aware. We would not be allowed to order Duke's witnesses in this case to travel to our offices in Columbus and Duke has in fact refused in the past to do just that in other proceedings. From a google search, your offices are 29 minutes away from Symmes Township and in what appears to be a residential neighborhood. There is no meeting room or space for our witnesses. Further your offices are not downtown so we have no ability to use other facilities for our witnesses. We will not further burden our witnesses by requiring them to drive 30 minutes away to your offices.

Kimberly W. Bojko
CARPENTER LIPPS & LELAND LLP
Columbus • New York • Chicago



Kimberly W. Bojko

From: Bob McMahon <bmcMahon@emclawyers.com>
Sent: Friday, February 09, 2018 1:09 PM
To: Kimberly W. Bojko; Brian Dressel
Cc: Watts, Elizabeth H; Olive, Emily A.
Subject: RE: 17-2344-EL-CSS Depositions

Kim,

I assure you that you could not force us to travel to Columbus to depose complainants who live in Hamilton County. But we don't need to argue over that non-issue, or this one for that matter. I will depose your clients at the Symmes Township office on February 19th based on your assurance that my concerns about a 3-ring circus are unfounded. If that situation changes, we will deal with it accordingly at the time.

Regards,

Bob

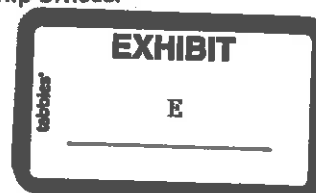
Robert A. McMahon
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Cincinnati, OH 45206
(513) 533-3441 (direct)
(513) 460-5490 (mobile)
(513) 533-3554 (fax)
bmcMahon@emclawyers.com

From: Kimberly W. Bojko [mailto:bojko@CarpenterLipps.com]
Sent: Friday, February 09, 2018 12:04 PM
To: Bob McMahon <bmcMahon@emclawyers.com>; Brian Dressel <dressel@CarpenterLipps.com>
Cc: Watts, Elizabeth H <Elizabeth.Watts@duke-energy.com>; Olive, Emily A. <Emily.Olive@duke-energy.com>
Subject: RE: 17-2344-EL-CSS Depositions

I disagree. If I wanted to have my witnesses come to my offices and be deposed here and have you travel here, that would be standard practice at the PUCO. Historically, unless there is an out of state witness and it is done by telephone or there is a space issue, each party's witness is deposed at their counsel's office. We need to have resources available to us, just as if it was being done in our offices, including access to meeting rooms. There is no meeting room or space for our witnesses at your office. Further we researched the issue yesterday to determine if we could access your offices easily if we utilized such a space in downtown Cincinnati. Given the location of your office, that is not feasible. We have no ability to use other facilities for our witnesses. Your concerns of some 3 ring circus is unfounded. We need to have meeting rooms and office space available to meet with our witnesses and conduct our business. We have already agreed to your two requests to have only in-person witnesses on that day and to increase the number of witnesses from 6 to 7. I think our request is not unreasonable and is in fact standard PUCO practice.

We will agree to depose the witnesses at the Symmes Township offices.

Thanks.



Kim

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From: Bob McMahon [<mailto:bmcMahon@emclawyers.com>]
Sent: Friday, February 09, 2018 11:31 AM
To: Kimberly W. Bojko; Brian Dressel
Cc: Watts, Elizabeth H; Olive, Emily A.
Subject: RE: 17-2344-EL-CSS Depositions

Kim,

The deponents and my firm are located in Hamilton County. This situation is not remotely similar to your efforts to have Duke Energy Ohio employees and witnesses travel to Columbus for their depositions, so I don't understand your point. It is not as if I will be deposing a third-party witness employed by Symmes Township—the 7 complainants to be deposed on 2/19 are individuals who live in this county. Having them drive to another city in the same county is not an unreasonable inconvenience.

Regards,

Bob

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From: Kimberly W. Bojko [<mailto:bojko@CarpenterLipps.com>]
Sent: Friday, February 09, 2018 11:24 AM
To: Bob McMahon <bmcMahon@emclawyers.com>; Brian Dressel <dressel@CarpenterLipps.com>
Cc: Watts, Elizabeth H <Elizabeth.Watts@duke-energy.com>; Olive, Emily A. <Emily.Olive@duke-energy.com>
Subject: RE: 17-2344-EL-CSS Depositions

Kimberly W. Bojko

From: Bob McMahon <bmcMahon@emclawyers.com>
Sent: Thursday, February 15, 2018 10:34 AM
To: Kimberly W. Bojko
Cc: Brian Dressel; Watts, Elizabeth H; Olive, Emily A.
Subject: RE: 17-2344-EL-CSS: overdue discovery responses

Kim,

Are you seriously taking this position? Those complainants were served personally with discovery requests in their individual cases and never responded. Their claims were consolidated into this case at their request. Under your theory, Duke Energy Ohio would have to serve new discovery every time someone amended a complaint because a prior complaint would be "withdrawn" and superseded. You know full well that is not the standard governing discovery before the Commission. Please confirm that you will not be responding to the discovery requests served on those Complainants so that we may decide how to proceed with respect to the Attorney Examiner.

Regards,

Bob

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2321 Kemper Lane, Suite 100
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(513) 533-3441 (direct)
(513) 460-5490 (mobile)
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bmcMahon@emclawyers.com

From: Kimberly W. Bojko [mailto:bojko@CarpenterLipps.com]
Sent: Thursday, February 15, 2018 10:23 AM
To: Bob McMahon <bmcMahon@emclawyers.com>
Cc: Brian Dressel <dressel@CarpenterLipps.com>; Watts, Elizabeth H <Elizabeth.Watts@duke-energy.com>; Olive, Emily A. <Emily.Olive@duke-energy.com>
Subject: RE: 17-2344-EL-CSS: overdue discovery responses

Good morning, Bob.

We have reviewed our files and searched our emails and we do not know what requests you are referencing. To date, we have timely responded to all of Duke's discovery requests served upon us in the above-captioned case (17-2344) pursuant to Ohio law and the Commission's rules. Upon review of our files regarding the specific Complainants listed below, we have not been served with any discovery requests related to those Complainants. Duke has not propounded any discovery related to these Complainants in the complaint case pending before the PUCO in case no. 17-2344.

To the extent that you are referring to other complaint cases brought by these Complainants, neither myself nor anyone else at our firm represented the Complainants in those cases and were not served with any discovery. Furthermore, complaints brought by these Complainants relating to Duke's vegetation management activity were voluntarily withdrawn upon the Commission's acceptance of the Second Amended Complaint. Therefore, any discovery related to those cases is moot.

EXHIBIT

tabbles

F

Thank you,

Kim Bojko

Kimberly W. Bojko
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From: Bob McMahon [<mailto:bmcMahon@emclawyers.com>]
Sent: Tuesday, February 13, 2018 2:33 PM
To: Kimberly W. Bojko <bojko@CarpenterLipps.com>
Cc: Brian Dressel <bdressel@CarpenterLipps.com>; Watts, Elizabeth H <Elizabeth.Watts@duke-energy.com>; Olive, Emily A. <Emily.Olive@duke-energy.com>
Subject: 17-2344-EL-CSS: overdue discovery responses

Kim,

Duke Energy Ohio, Inc. previously served written discovery requests on the following Complainants, who originally were *pro se* but who subsequent became represented by your firm:

1. Shana Berge
2. Melissa and Peter Broome
3. Barbara and Sanford Casper
4. Kathleen Danner
5. Anita Deye
6. Jason Dimaculangan
7. Clifford Fauber
8. Philip Griggs
9. John Gump
10. Jim and Laura Haid
11. Gregory Hoeting
12. Tom and Evelyn King
13. Melisa Kuhne
14. Patricia McGill
15. Nicole Menkaus
16. Olga Staios
17. Richard and Carol Tenenholtz
18. R. Allen Pancoast
19. Paul and Karen Smith
20. Brian and Melissa Weiss
21. Anne Wymore

22. Sharon M. Felman
23. Timothy Wilson
24. Mike Preissler
25. Dana and Joy Steller
26. Marc Wahlquist
27. Gary Pauly
28. Steve and Nanci Schmidt
29. Kathleen Danner
30. James Wulker

We served these requests back in early December, but none of them have responded. Obviously these requests are now long overdue. I realize that you were not their counsel of record at the time, but you are now. Therefore, we need their responses ASAP and definitely before they get deposed. In other words, the 20-day clock does not start to run again because these responses are 6+ weeks late already. I look forward to getting their written responses and all responsive documents forthwith.

Regards,

Bob

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(513) 460-5490—mobile
(513) 533-3554—fax
bmcMahon@emclawyers.com
www.emclawyers.com

Kimberly W. Bojko

From: Bob McMahon <bmcMahon@emclawyers.com>
Sent: Thursday, February 15, 2018 10:41 AM
To: Kimberly W. Bojko; Brian Dressel
Cc: Watts, Elizabeth H; Olive, Emily A.
Subject: FW: 17-2344-EL-CSS Depositions

Kim/Brian,

A week has gone by and you have not gotten back to us with dates for the depositions of other Complainants. If your clients do not want to prosecute their claims, which necessarily requires them to participate in discovery, then I suggest that you promptly dismiss them from the case. If not, we need dates for their depositions ASAP. We cannot wait any longer, nor will we allow Complainants to drag this process out in the hopes of justifying another continuance. If I don't hear from you by tomorrow with a list of some deponents and available dates, we will re-notice depositions for dates, times and locations convenient to us. I do not expect dates for everyone by tomorrow but we have to keep this process moving forward. Your immediate attention to this matter is both appreciated and anticipated.

Regards,

Bob

Robert A. McMahon
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(513) 460-5490 (mobile)
(513) 533-3554 (fax)
bmcMahon@emclawyers.com

From: Bob McMahon
Sent: Thursday, February 08, 2018 8:10 AM
To: 'Brian Dressel' <dressel@CarpenterLipps.com>; Kimberly W. Bojko <bojko@CarpenterLipps.com>
Cc: Watts, Elizabeth H <Elizabeth.Watts@duke-energy.com>; Olive, Emily A. <Emily.Olive@duke-energy.com>
Subject: RE: 17-2344-EL-CSS Depositions

Brian,

We are confirmed for those 7 depositions in my office starting at 9 am on February 19. I do not believe that anyone else from Duke Energy Ohio will attend those depositions, but I will confirm and get back to you.

Are you working on the other offered dates? I know that process can take some time, but we need to start locking in deponents, dates and times ASAP.

Regards,

Bob



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bmcMahon@emclawyers.com

From: Brian Dressel [<mailto:dressel@CarpenterLipps.com>]
Sent: Wednesday, February 07, 2018 5:22 PM
To: Bob McMahon <bmcMahon@emclawyers.com>; Kimberly W. Bojko <bojko@CarpenterLipps.com>
Cc: Watts, Elizabeth H <Elizabeth.Watts@duke-energy.com>; Olive, Emily A. <Emily.Olive@duke-energy.com>
Subject: RE: 17-2344-EL-CSS Depositions

Bob,

We have 7 Complainants to be deposed on 2/19/2018. These seven are: Kim Wlethorn, Olga Staios, Barbara Casper, Jonathan Mackey, Mike Priessler, Paul Smith, and Melisa Kuhne. We will provide a schedule as to the order of the depositions prior to the 19th (i.e. who will go first, second, etc.).

You mentioned that your office has limited space. How many people do you anticipate having present on behalf of Duke?

Thank you,

Brian W. Dressel
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280 N. High Street
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(614) 365-4131
dressel@carpenterlipps.com

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From: Bob McMahon [<mailto:bmcMahon@emclawyers.com>]
Sent: Tuesday, February 06, 2018 11:40 AM
To: Kimberly W. Bojko
Cc: Brian Dressel; Watts, Elizabeth H; Olive, Emily A.
Subject: FW: 17-2344-EL-CSS Depositions

Kim,

I'm following up on your email to Elizabeth (below) and our discussions at the Commission.

Kimberly W. Bojko

From: Bob McMahon <bmcMahon@emclawyers.com>
Sent: Thursday, February 15, 2018 3:06 PM
To: Kimberly W. Bojko
Cc: Brian Dressel; Watts, Elizabeth H; Olive, Emily A.
Subject: RE: 17-2344-EL-CSS: overdue discovery responses
Attachments: Baker Discovery Responses Case No. 17-2344-EL-CSS.DOCX.PDF

Kim,

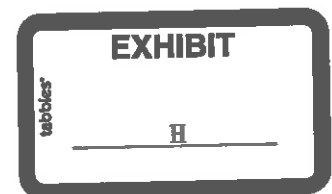
My short response was not remotely "outrageous," nor were any of my comments "unfounded and offensive." It is interesting how you go to great lengths to demonstrate how reasonable you've acted in discovery (see highlighted portion below) when, in reality, some of your clients claimed that certain of Duke Energy Ohio's discovery requests were "nonsensical" because "the Complainant was not a named Complainant to the initial Complaint referenced in Interrogatory No. 5." See, e.g., Dennis and Amelia Baker's Answers to Interrogatory Nos. 5, 7, 8, 21-27. Yes, those answers demonstrated such good faith.

Regardless, I am not inclined to argue with you via emails. Duke Energy Ohio is entitled to discovery from every Complainant. Therefore, we will direct new discovery requests to those Complainants who were previously *pro se* and are now represented by your firm, and you can respond separately on behalf of each such Complainant.

Regards,

Bob

Robert A. McMahon
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Cincinnati, OH 45206
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(513) 460-5490 (mobile)
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bmcMahon@emclawyers.com



From: Kimberly W. Bojko [mailto:bojko@CarpenterLipps.com]
Sent: Thursday, February 15, 2018 12:12 PM
To: Bob McMahon <bmcMahon@emclawyers.com>
Cc: Brian Dressel <dressel@CarpenterLipps.com>; Watts, Elizabeth H <Elizabeth.Watts@duke-energy.com>; Olive, Emily A. <Emily.Olive@duke-energy.com>
Subject: RE: 17-2344-EL-CSS: overdue discovery responses

I truly am mystified by your outrageous response. First, we have NO discovery. We cannot respond to discovery that we do NOT have and that was never served upon us. You are required by the PUCO rules to serve counsel of record for discovery issued in the case that you are seeking discovery on.

Second, the individual cases were NOT consolidated. In fact, Duke opposed the consolidation on 11/21/17 and the AE Entry issued 1/25/18 specifically stated that the Motion for consolidation was moot. The cases were not consolidated and the cases were subsequently withdrawn. The cases have DIFFERENT case numbers and the cases had DIFFERENT complaints filed. How could discovery on the withdrawn complaints that are in different cases and that are with regard

to different complaints even be relevant to the pending joint complaint? The issues in the joint complaint are set forth in the joint complaint. Discovery may be had on the joint complaint. The PUCO practice is to allow discovery on the issues pending in the case. Just as I may not ask discovery in a separate case that Duke is involved in and use it against Duke in this case, neither can you. Duke has argued this point previously in several cases. Thus, even if discovery was propounded and answered by Complainants in a separate case, you could not use that discovery in this case.

As for the amendments to the joint complaint, which were all made in the SAME case number and which were similar in allegations, you are just incorrect. We did not take the position that you had to reissue discovery. In fact, we did the exact opposite. We responded to discovery requests in the joint complaint case that were served prior to an amendment to the complaint and came due after an amendment was accepted. See Discovery requests served on Nov. 22 and responded to on Dec. 12. The First Amended Complaint was accepted on Nov. 28. We have also supplemented your discovery requests even after amendments were accepted. We have been operating in good faith with regard to the amendments and your comments implying the opposite are unfounded and offensive. Duke has had incorrect references in its discovery and we have gone out of our way to attempt to answer the questions as if they were asked with the correct citations.

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From: Bob McMahon [<mailto:bmcMahon@emclawyers.com>]
Sent: Thursday, February 15, 2018 10:34 AM
To: Kimberly W. Bojko <bojko@CarpenterLipps.com>
Cc: Brian Dressel <dressel@CarpenterLipps.com>; Watts, Elizabeth H <Elizabeth.Watts@duke-energy.com>; Olive, Emily A. <Emily.Olive@duke-energy.com>
Subject: RE: 17-2344-EL-CSS: overdue discovery responses

Kim,

Are you seriously taking this position? Those complainants were served personally with discovery requests in their individual cases and never responded. Their claims were consolidated into this case at their request. Under your theory, Duke Energy Ohio would have to serve new discovery every time someone amended a complaint because a prior complaint would be "withdrawn" and superseded. You know full well that is not the standard governing discovery before the Commission. Please confirm that you will not be responding to the discovery requests served on those Complainants so that we may decide how to proceed with respect to the Attorney Examiner.

Regards,

Bob

Robert A. McMahon
Eberly McMahon Copetas LLC

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bmcMahon@emclawyers.com

From: Kimberly W. Bojko [<mailto:bojko@CarpenterLipps.com>]
Sent: Thursday, February 15, 2018 10:23 AM
To: Bob McMahon <bmcMahon@emclawyers.com>
Cc: Brian Dressel <dressel@CarpenterLipps.com>; Watts, Elizabeth H <Elizabeth.Watts@duke-energy.com>; Olive, Emily A. <Emily.Olive@duke-energy.com>
Subject: RE: 17-2344-EL-CSS: overdue discovery responses

Good morning, Bob.

We have reviewed our files and searched our emails and we do not know what requests you are referencing. To date, we have timely responded to all of Duke's discovery requests served upon us in the above-captioned case (17-2344) pursuant to Ohio law and the Commission's rules. Upon review of our files regarding the specific Complainants listed below, we have not been served with any discovery requests related to those Complainants. Duke has not propounded any discovery related to these Complainants in the complaint case pending before the PUCO in case no. 17-2344.

To the extent that you are referring to other complaint cases brought by these Complainants, neither myself nor anyone else at our firm represented the Complainants in those cases and were not served with any discovery. Furthermore, complaints brought by these Complainants relating to Duke's vegetation management activity were voluntarily withdrawn upon the Commission's acceptance of the Second Amended Complaint. Therefore, any discovery related to those cases is moot.

Thank you,

Kim Bojko

Kimberly W. Bojko
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From: Bob McMahon [<mailto:bmcMahon@emclawyers.com>]
Sent: Tuesday, February 13, 2018 2:33 PM
To: Kimberly W. Bojko <bojko@CarpenterLipps.com>
Cc: Brian Dressel <dressel@CarpenterLipps.com>; Watts, Elizabeth H <Elizabeth.Watts@duke-energy.com>; Olive, Emily

A. <Emily.Olive@duke-energy.com>

Subject: 17-2344-EL-CSS: overdue discovery responses

Kim,

Duke Energy Ohio, Inc. previously served written discovery requests on the following Complainants, who originally were *pro se* but who subsequent became represented by your firm:

1. Shana Berge
2. Melissa and Peter Broome
3. Barbara and Sanford Casper
4. Kathleen Danner
5. Anita Deye
6. Jason Dimaculangan
7. Clifford Fauber
8. Philip Griggs
9. John Gump
10. Jim and Laura Haid
11. Gregory Hoeting
12. Tom and Evelyn King
13. Melisa Kuhne
14. Patricia McGill
15. Nicole Menkaus
16. Olga Stalos
17. Richard and Carol Tenenholtz
18. R. Allen Pancoast
19. Paul and Karen Smith
20. Brian and Melissa Weiss
21. Anne Wymore
22. Sharon M. Felman
23. Timothy Wilson
24. Mike Preissler
25. Dana and Joy Steller
26. Marc Wahlquist
27. Gary Pauly
28. Steve and Nanci Schmidt
29. Kathleen Danner
30. James Wulker

We served these requests back in early December, but none of them have responded. Obviously these requests are now long overdue. I realize that you were not their counsel of record at the time, but you are now. Therefore, we need their responses ASAP and definitely before they get deposed. In other words, the 20-day clock does not start to run again because these responses are 6+ weeks late already. I look forward to getting their written responses and all responsive documents forthwith.

Regards,

Bob

Robert A. McMahon
Eberly McMahon Copetas LLC

Kimberly W. Bojko

From: Bob McMahon <bmcMahon@emclawyers.com>
Sent: Tuesday, February 20, 2018 9:14 AM
To: Kimberly W. Bojko; Brian Dressel
Cc: Watts, Elizabeth H; Olive, Emily A.
Subject: RE: 17-2344-EL-CSS Depositions

Kim/Brian,

We did not hear back from you on Thursday, as promised. Therefore, we selected the following 8 Complainants for deposition on March 2nd: Joseph Grossi, Fred Vonderhaar and Marc Wahlquist (all 3 were originally offered for yesterday's session), along with Randall Fick, Shana Berge, John or Sally Riester, Mark or Carissa Thompson, and Amanda Sachs.

I do not necessarily care about the order, but these are the individuals that we want to depose on March 2nd. Accordingly, these complainants need to make themselves available that day. If we start at 9 am, or even 9:30 am, we can complete 3 depositions before a short lunch break and then finish the remaining 5 depositions the remainder of the day. I am happy to conduct them at the same location as yesterday's depositions. Please get back to us ASAP so that we can issue the appropriate notices and schedule the court reporter.

Regards,

Bob

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bmcMahon@emclawyers.com

From: Kimberly W. Bojko [mailto:bojko@CarpenterLipps.com]
Sent: Thursday, February 15, 2018 11:34 AM
To: Bob McMahon <bmcMahon@emclawyers.com>; Brian Dressel <dressel@CarpenterLipps.com>
Cc: Watts, Elizabeth H <Elizabeth.Watts@duke-energy.com>; Olive, Emily A. <Emily.Olive@duke-energy.com>
Subject: RE: 17-2344-EL-CSS Depositions

Yes, we are working on it and intended to get you a list today. As you can imagine, scheduling has been a bit difficult but I will assure you that we have no interest in delaying the case.

Kimberly W. Bojko
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From: Bob McMahon [<mailto:bmcMahon@emclawyers.com>]
Sent: Thursday, February 15, 2018 10:41 AM
To: Kimberly W. Bojko <bojko@CarpenterLipps.com>; Brian Dressel <dressel@CarpenterLipps.com>
Cc: Watts, Elizabeth H <Elizabeth.Watts@duke-energy.com>; Olive, Emily A. <Emily.Olive@duke-energy.com>
Subject: FW: 17-2344-EL-CSS Depositions

Kim/Brian,

A week has gone by and you have not gotten back to us with dates for the depositions of other Complainants. If your clients do not want to prosecute their claims, which necessarily requires them to participate in discovery, then I suggest that you promptly dismiss them from the case. If not, we need dates for their depositions ASAP. We cannot wait any longer, nor will we allow Complainants to drag this process out in the hopes of justifying another continuance. If I don't hear from you by tomorrow with a list of some deponents and available dates, we will re-notice depositions for dates, times and locations convenient to us. I do not expect dates for everyone by tomorrow but we have to keep this process moving forward. Your immediate attention to this matter is both appreciated and anticipated.

Regards,

Bob

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bmcMahon@emclawyers.com

From: Bob McMahon
Sent: Thursday, February 08, 2018 8:10 AM
To: 'Brian Dressel' <dressel@CarpenterLipps.com>; Kimberly W. Bojko <bojko@CarpenterLipps.com>
Cc: Watts, Elizabeth H <Elizabeth.Watts@duke-energy.com>; Olive, Emily A. <Emily.Olive@duke-energy.com>
Subject: RE: 17-2344-EL-CSS Depositions

Brian,

We are confirmed for those 7 depositions in my office starting at 9 am on February 19. I do not believe that anyone else from Duke Energy Ohio will attend those depositions, but I will confirm and get back to you.

Are you working on the other offered dates? I know that process can take some time, but we need to start locking in deponents, dates and times ASAP.

Kimberly W. Bojko

From: Bob McMahon <bmcMahon@emclawyers.com>
Sent: Wednesday, February 21, 2018 7:49 AM
To: Brian Dressel; Kimberly W. Bojko
Cc: Watts, Elizabeth H; Olive, Emily A.
Subject: RE: 17-2344-EL-CSS Depositions

Brian,

As I indicated we would do, we selected deponents because we were promised a list on Thursday (never happened) and then again promised in your email on that a list would be forthcoming (never happened). We never agreed to start at 10 am on March 2nd. Please reach out to the Riesters, Thompsons and Ms. Sachs and arrange for one of them to be deposed starting at 9 or 9:30 am. Assuming that happens, we are otherwise OK with the remaining list and order.

Regards,

Bob

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www.emclawyers.com



From: Brian Dressel [mailto:dressel@CarpenterLipps.com]
Sent: Tuesday, February 20, 2018 9:42 PM
To: Bob McMahon <bmcMahon@emclawyers.com>; Kimberly W. Bojko <bojko@CarpenterLipps.com>
Cc: Watts, Elizabeth H <Elizabeth.Watts@duke-energy.com>; Olive, Emily A. <Emily.Olive@duke-energy.com>
Subject: RE: 17-2344-EL-CSS Depositions

Bob,

We did email you back last week, you must have missed it. As we stated in that email, the March 2 date works for us. We will not, however, be able to start at 9 am. We felt that the 10 am start time worked well yesterday and think it could be good to use that time again. We are amenable to taking a shorter lunch break in order to not have the day run too long.

Referencing our email from last week, the reason that we did not have a list of names included is that we are still working with people's schedules in an attempt to confirm these dates. However, we do have a tentative list in place. As you will see, many of the names on our list are reflected on yours as well.

These Complainants have made arrangements to attend on March 2, based on our understanding that we would provide you with a full roster of complainants for that day. These arrangements include working around medical procedures that

complainants will be performing, adjusting work schedules, and adjusting weekend plans. We are not prepared, therefore, to ask those not on your list to rearrange their schedules again. We selected a group of seven, mirroring the first round. Those seven are:

- Joe Grossi
- Marc Wahlquist
- Fred Vonderhaar
- Karen Dabdoub
- John Gump
- Dennis Baker
- Ken Bryant (Symmes Township Trustee)

We are prepared to proceed with the depositions of the listed individuals on March 2. Please let us know if you have any questions.

Thank you,

Brian Dressel

Brian W. Dressel
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From: Bob McMahon [<mailto:bmcMahon@emclawyers.com>]
Sent: Tuesday, February 20, 2018 9:14 AM
To: Kimberly W. Bojko <bojko@CarpenterLipps.com>; Brian Dressel <dressel@CarpenterLipps.com>
Cc: Watts, Elizabeth H <Elizabeth.Watts@duke-energy.com>; Olive, Emily A. <Emily.Olive@duke-energy.com>
Subject: RE: 17-2344-EL-CSS Depositions

Kim/Brian,

We did not hear back from you on Thursday, as promised. Therefore, we selected the following 8 Complainants for deposition on March 2nd: Joseph Grossi, Fred Vonderhaar and Marc Wahlquist (all 3 were originally offered for yesterday's session), along with Randall Fick, Shana Berge, John or Sally Riester, Mark or Carissa Thompson, and Amanda Sachs.

I do not necessarily care about the order, but these are the individuals that we want to depose on March 2nd. Accordingly, these complainants need to make themselves available that day. If we start at 9 am, or even 9:30 am, we can complete 3 depositions before a short lunch break and then finish the remaining 5 depositions the remainder of the day. I am happy to conduct them at the same location as yesterday's depositions. Please get back to us ASAP so that we can issue the appropriate notices and schedule the court reporter.

Regards,

Bob

Robert A. McMahon
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bcmcmahon@emclawyers.com

From: Kimberly W. Bojko [<mailto:bojko@CarpenterLipps.com>]
Sent: Thursday, February 15, 2018 11:34 AM
To: Bob McMahon <bcmcmahon@emclawyers.com>; Brian Dressel <dressel@CarpenterLipps.com>
Cc: Watts, Elizabeth H <Elizabeth.Watts@duke-energy.com>; Olive, Emily A. <Emily.Olive@duke-energy.com>
Subject: RE: 17-2344-EL-CSS Depositions

Yes, we are working on it and intended to get you a list today. As you can imagine, scheduling has been a bit difficult but I will assure you that we have no interest in delaying the case.

Kimberly W. Bojko
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From: Bob McMahon [<mailto:bcmcmahon@emclawyers.com>]
Sent: Thursday, February 15, 2018 10:41 AM
To: Kimberly W. Bojko <bojko@CarpenterLipps.com>; Brian Dressel <dressel@CarpenterLipps.com>
Cc: Watts, Elizabeth H <Elizabeth.Watts@duke-energy.com>; Olive, Emily A. <Emily.Olive@duke-energy.com>
Subject: FW: 17-2344-EL-CSS Depositions

Kim/Brian,

A week has gone by and you have not gotten back to us with dates for the depositions of other Complainants. If your clients do not want to prosecute their claims, which necessarily requires them to participate in discovery, then I suggest that you promptly dismiss them from the case. If not, we need dates for their depositions ASAP. We cannot wait any longer, nor will we allow Complainants to drag this process out in the hopes of justifying another continuance. If I don't hear from you by tomorrow with a list of some deponents and available dates, we will re-notice depositions for dates, times and locations convenient to us. I do not expect dates for everyone by tomorrow but we have to keep this process moving forward. Your immediate attention to this matter is both appreciated and anticipated.

Regards,

Kimberly W. Bojko

From: Bob McMahon <bcmcmahon@emclawyers.com>
Sent: Wednesday, February 21, 2018 2:41 PM
To: Kimberly W. Bojko; Brian Dressel
Cc: Watts, Elizabeth H; Olive, Emily A.
Subject: RE: 17-2344-EL-CSS Depositions

Kim,

I'm not sure how my 5 ½ line email can "drain" so much of "complainants' resources," but you're the one who chose to respond with a small treatise.

I suggest that you go back and read our email exchange from 2/15/18, which I've highlighted below. I indicated that I needed a list of deponents and available dates by the next day, or that we would select the deponents and notice their depositions. You responded within an hour or so that you intended to send that list the same day. Whether or not the list was to be "immediately forthcoming" is not relevant because we never received one from you the following day as requested, over the weekend or on Monday, nor did either of us raise the issue on Monday during the 7 depositions taken that day. Yes, I knew about March 2nd, as I proposed the date and had received Brian's email on Friday. But it was not until yesterday morning that we decided whom to depose, as I indicated would be the case in Thursday's email, at which time I promptly sent the email.

I'm not interested in a meaningless move from 10 am to 9:45 am on March 2nd. We can start at 10 am on March 2nd. But I am interested in accelerating the deposition schedule. Doing a day of depositions every 12 days does not cut it. We need to lock in more deposition dates ASAP, and then you need to start contacting your clients and scheduling the depositions in a more expedited manner. Yes, there are a lot of complainants but, once again, you chose to file the Second Amended Complaint with more than 100 complainants.

Regards,

Bob

Robert A. McMahon
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(513) 460-5490 (mobile)
(513) 533-3554 (fax)
bcmcmahon@emclawyers.com

From: Kimberly W. Bojko [mailto:bojko@CarpenterLipps.com]
Sent: Wednesday, February 21, 2018 10:13 AM
To: Bob McMahon <bcmcmahon@emclawyers.com>; Brian Dressel <dressel@CarpenterLipps.com>
Cc: Watts, Elizabeth H <Elizabeth.Watts@duke-energy.com>; Olive, Emily A. <Emily.Olive@duke-energy.com>
Subject: RE: 17-2344-EL-CSS Depositions

Bob,



First, we stated that we hoped to provide you with a list by the end of the day on Thursday. Although we were unable to confirm schedules by Thursday, we did email you with a date on Friday (one that you selected) so that you could plan accordingly. We were unable to confirm schedules when we emailed you the date and it made no sense to email you a list that was not yet confirmed. We never said the list would be immediately forthcoming. If you recall, the next business day (which was a holiday for most), we were with you in Cincinnati for the entire day plus drive time. We could not possibly speak to the complainants and email you when we were sitting in seven depositions with you for 8.5 hours. You could have inquired about this on Monday if this was an issue. We were with you for 8.5 hours yet you chose not to raise the issue during that period. Rather, you wanted to wait and email so that you could drain more of the complainants' resources.

Due to other commitments and previously arranged schedules on your chosen date, we are unable to begin at 9 or 9:30 am. We could potentially try to begin at 9:45, but that is the earliest. Also, please note that the list that we provided you was not in the order of witnesses as they will appear. We are still attempting to work around people's schedules as I am sure you can appreciate. One gentleman is a surgeon and he is providing his time between surgeries. Again, this is the exact reason why we did not want to email you a list until schedules and time slots were confirmed.

At least one of the additional witnesses that you listed is not available on the selected date. We will attempt to contact the other two per your request, but they will not be deposed at 9 or 9:30. We will provide you the order of witnesses after we have confirmed times with them. Although not our preference, if your preference is to start at 9:45 am on 3/2, we will commit to make that happen and ask a complainant to arrive earlier for his deposition than previously discussed.

Thanks,
Kim

Kimberly W. Bojko
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From: Bob McMahon [<mailto:bmcmahon@emclawyers.com>]
Sent: Wednesday, February 21, 2018 7:49 AM
To: Brian Dressel <dressel@CarpenterLipps.com>; Kimberly W. Bojko <bojko@CarpenterLipps.com>
Cc: Watts, Elizabeth H <Elizabeth.Watts@duke-energy.com>; Olive, Emily A. <Emily.Olive@duke-energy.com>
Subject: RE: 17-2344-EL-CSS Depositions

Brian,

As I indicated we would do, we selected deponents because we were promised a list on Thursday (never happened) and then again promised in your email on that a list would be forthcoming (never happened). We never agreed to start at 10 am on March 2nd. Please reach out to the Riesters, Thompsons and Ms. Sachs and arrange for one of them to be deposed starting at 9 or 9:30 am. Assuming that happens, we are otherwise OK with the remaining list and order.

Regards,

Kimberly W. Bojko

From: Bob McMahon <bmcMahon@emclawyers.com>
Sent: Monday, February 26, 2018 9:38 AM
To: Kimberly W. Bojko; Brian Dressel
Cc: Watts, Elizabeth H; Olive, Emily A.
Subject: FW: 17-2344-EL-CSS Depositions

Kim/Brian,

It is now (business) Day 3 since our email exchange on 2/21/18 (below). Do you have additional dates for other Complainants' depositions after March 2? Do you have the finalized order for the depositions on March 2? Please get back to me ASAP. Thanks

Bob

Robert A. McMahon
Eberly McMahon Copetas LLC
2321 Kemper Lane, Suite 100
Cincinnati, OH 45206
(513) 533-3441 (direct)
(513) 460-5490 (mobile)
(513) 533-3554 (fax)
bmcMahon@emclawyers.com



From: Bob McMahon
Sent: Wednesday, February 21, 2018 2:41 PM
To: 'Kimberly W. Bojko' <bojko@CarpenterLipps.com>; Brian Dressel <dressel@CarpenterLipps.com>
Cc: Watts, Elizabeth H <Elizabeth.Watts@duke-energy.com>; Olive, Emily A. <Emily.Olive@duke-energy.com>
Subject: RE: 17-2344-EL-CSS Depositions

Kim,

I'm not sure how my 5 ½ line email can "drain" so much of "complainants' resources," but you're the one who chose to respond with a small treatise.

I suggest that you go back and read our email exchange from 2/15/18, which I've highlighted below. I indicated that I needed a list of deponents and available dates by the next day, or that we would select the deponents and notice their depositions. You responded within an hour or so that you intended to send that list the same day. Whether or not the list was to be "immediately forthcoming" is not relevant because we never received one from you the following day as requested, over the weekend or on Monday, nor did either of us raise the issue on Monday during the 7 depositions taken that day. Yes, I knew about March 2nd, as I proposed the date and had received Brian's email on Friday. But it was not until yesterday morning that we decided whom to depose, as I indicated would be the case in Thursday's email, at which time I promptly sent the email.

I'm not interested in a meaningless move from 10 am to 9:45 am on March 2nd. We can start at 10 am on March 2nd. But I am interested in accelerating the deposition schedule. Doing a day of depositions every 12 days does not cut it. We need to lock in more deposition dates ASAP, and then you need to start contacting your clients and scheduling

Kimberly W. Bojko

From: Bob McMahon <bcmcmahon@emclawyers.com>
Sent: Tuesday, February 27, 2018 11:44 AM
To: Brian Dressel; Kimberly W. Bojko
Cc: Watts, Elizabeth H; Olive, Emily A.
Subject: RE: 17-2344-EL-CSS Depositions

OK, thanks

What about the next round of depositions? Where do you stand in response to my several requests to line up days and deponents after March 2? We need to schedule depositions more quickly and more regularly than once every 10 days.

Regards,

Bob

Robert A. McMahon
Eberly McMahon Copetas LLC
2321 Kemper Lane, Suite 100
Cincinnati, OH 45206
(513) 533-3441 (direct)
(513) 460-5490 (mobile)
(513) 533-3554 (fax)
bcmcmahon@emclawyers.com

From: Brian Dressel [mailto:dressel@CarpenterLipps.com]
Sent: Tuesday, February 27, 2018 11:23 AM
To: Bob McMahon <bcmcmahon@emclawyers.com>; Kimberly W. Bojko <bojko@CarpenterLipps.com>
Cc: Watts, Elizabeth H <Elizabeth.Watts@duke-energy.com>; Olive, Emily A. <Emily.Olive@duke-energy.com>
Subject: RE: 17-2344-EL-CSS Depositions

Hi Bob,

Here is the schedule for Friday. Fred Vonderhaar got called out of town for work so we replaced him with Mark Thompson, who was one of the ones you asked for.

10 am – Karen Dabdoub
11 am – Dennis Baker
12 pm – Mark Thompson
2 pm – Joe Grossi
3 pm – Ken Bryant
4 pm – Marc Wahlquist
5 pm – John Gump

Thank you,

Brian W. Dressel
CARPENTER LIPPS & LELAND LLP



Columbus ▪ New York ▪ Chicago
280 Plaza, Suite 1300
280 N. High Street
Columbus, OH 43215
(614) 365-4131
dressel@carpenterlipps.com

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From: Bob McMahon [<mailto:bmcMahon@emclawyers.com>]
Sent: Monday, February 26, 2018 9:38 AM
To: Kimberly W. Bojko <bojko@CarpenterLipps.com>; Brian Dressel <dressel@CarpenterLipps.com>
Cc: Watts, Elizabeth H <Elizabeth.Watts@duke-energy.com>; Olive, Emily A. <Emily.Olive@duke-energy.com>
Subject: FW: 17-2344-EL-CSS Depositions

Kim/Brian,

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(513) 460-5490 (mobile)
(513) 533-3554 (fax)
bmcMahon@emclawyers.com

From: Bob McMahon
Sent: Wednesday, February 21, 2018 2:41 PM
To: 'Kimberly W. Bojko' <bojko@CarpenterLipps.com>; Brian Dressel <dressel@CarpenterLipps.com>
Cc: Watts, Elizabeth H <Elizabeth.Watts@duke-energy.com>; Olive, Emily A. <Emily.Olive@duke-energy.com>
Subject: RE: 17-2344-EL-CSS Depositions

Kim,

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Kimberly W. Bojko

From: Bob McMahon <bmcMahon@emclawyers.com>
Sent: Wednesday, February 28, 2018 11:16 AM
To: 'Etter, Terry (Terry.Etter@occ.ohio.gov)'
Cc: Watts, Elizabeth H; Olive, Emily A.; Kimberly W. Bojko; Brian Dressel
Subject: FW: Duke 17-2344-EL-CSS - OCC's Notices to Take Depositions
Attachments: Notice to Take Deposition - Burton - 17-2344-EL-CSS - 2.27.18.pdf; Notice to Take Deposition - Holton - 17-2344-EL-CSS - 2.27.18.pdf

Terry,

We object to the separate Notices to Take Deposition of Bryce Burton and Steve Holton that your office served yesterday afternoon because: (a) we're not available March 7; (b) depositions of Duke Energy Ohio's agents, employees and witnesses must take place in Cincinnati where they reside or work; and (c) as set forth in O.A.C. 4901-1-21(E), your notices do not comply with O.A.C. 4901-1-20. We will make both witnesses available for deposition on dates convenient to all parties and counsel, but keep in mind that we previously noticed the depositions of all Complainants and have been trying in vain to schedule any of those depositions after March 2nd. Those previously noticed depositions remain a priority for scheduling purposes.

Regards,

Bob McMahon

Robert A. McMahon
Eberly McMahon Copetas LLC
2321 Kemper Lane, Suite 100
Cincinnati, OH 45206
(513) 533-3441 (direct)
(513) 460-5490 (mobile)
(513) 533-3554 (fax)
bmcMahon@emclawyers.com

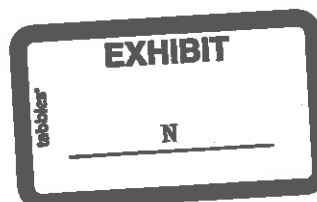
From: Debra.Bingham@occ.ohio.gov [mailto:Debra.Bingham@occ.ohio.gov]
Sent: Tuesday, February 27, 2018 3:35 PM
To: Rocco.D'Ascenzo@duke-energy.com; Elizabeth.Watts@duke-energy.com; Bob McMahon <bmcMahon@emclawyers.com>; Bojko@carpenterlipps.com; Dutton@carpenterlipps.com; Dressel@carpenterlipps.com; Anna.Sanyal@puco.ohio.gov
Subject: Duke 17-2344-EL-CSS - OCC's Notices to Take Depositions

Attached please find 2 Notices to Take Depositions and Requests for Production of Documents by the Office of the Ohio Consumers' Counsel that have been electronically filed today with the PUCO. If you have any questions, please contact Terry Etter with our office.

Below are the e-filing confirmations.

Thank you.

Deb Bingham
Administrative Assistant



Office of the Ohio Consumers' Counsel
65 East State Street, 7th Floor
Columbus, Ohio 43215
(614) 466-1311
Debra.bingham@occ.ohio.gov

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URL: <http://dis.puc.state.oh.us/DocumentRecord.aspx?DocID=5bce6daa-50d2-4ea1-a3a1-549a58a4262c>
Date & Time: 2/27/2018 at 15:23:56.5820456 EST
Case Number(s): 17-2344-EL-CSS
Summary: Notice of Deposition Notice to Take Deposition and Requests for Production of Documents by the Office of the Ohio Consumers' Counsel electronically filed by Ms. Deb J. Bingham on behalf of Etter, Terry L.
Confirmation Number: 9d5ddf91-b4a8-46a9-8e03-9988f289fa6e
Official PDF File: 9d5ddf91-b4a8-46a9-8e03-9988f289fa6e_Official_dbingham227201832242PM_Notice to Take Deposition - Burton - 17-2344-EL-CSS - 2.27.18.pdfSecure.pdf
Source File(s): 9d5ddf91-b4a8-46a9-8e03-9988f289fa6e_dbingham227201832308PM_Notice to Take Deposition - Burton - 17-2344-EL-CSS - 2.27.18.doc

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You should print or save this notice confirming that the following document was electronically filed.

URL: <http://dis.puc.state.oh.us/DocumentRecord.aspx?DocID=b1a7f8d2-1650-4e28-941d-4b202c2ceb5d>
Date & Time: 2/27/2018 at 15:30:37.4056069 EST
Case Number(s): 17-2344-EL-CSS
Summary: Notice of Deposition Notice to Take Deposition and Requests for Production of Documents by the Office of the Ohio Consumers' Counsel electronically filed by Ms. Deb J. Bingham on behalf of Etter, Terry L.
Confirmation Number: 6cb506be-ccfd-43a4-b0af-8ec5bf02edcc
Official PDF File: 6cb506be-ccfd-43a4-b0af-8ec5bf02edcc_Official_dbingham227201833009PM_Notice to Take Deposition - Holton - 17-2344-EL-CSS - 2.27.18.pdfSecure.pdf
Source File(s): 6cb506be-ccfd-43a4-b0af-8ec5bf02edcc_dbingham227201833017PM_Notice to Take Deposition - Holton - 17-2344-EL-CSS - 2.27.18.doc

From: Brian Dressel <dressel@CarpenterLipps.com>

Sent: Wednesday, March 7, 2018 12:43 PM

To: Kimberly W. Bojko <bojko@CarpenterLipps.com>; Bob McMahon <bmcMahon@emclawyers.com>; Terry.Etter@occ.ohio.gov

Cc: Watts, Elizabeth H <Elizabeth.Watts@duke-energy.com>; Olive, Emily A. <Emily.Olive@duke-energy.com>; Kimberly W. Bojko <bojko@CarpenterLipps.com>

Subject: RE: Duke 17-2344-EL-CSS - OCC's Notices to Take Depositions

Bob,

We are writing following up on our conversation last Friday where you refused to conduct depositions on Saturdays in order to accommodate Complainants' schedules. Although we believe this is contrary to Commission practice, we have worked diligently to reschedule the depositions we offered for Saturday 3/10. As such, we can offer the below-listed Complainants for depositions on Tuesday, March 20, 2018. We also await your response regarding a phone deposition of Fred Vonderhaar.

Nicole Menkhaus

James Wulker

Dennis Mitman

Eric Hatifeld

Randall Fick

Thank you,

Brian W. Dressel

CARPENTER LIPPS & LELAND LLP

Columbus ▪ New York ▪ Chicago

280 Plaza, Suite 1300

280 N. High Street

Columbus, OH 43215

(614) 365-4131

dressel@carpenterlipps.com



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From: Kimberly W. Bojko

Sent: Thursday, March 01, 2018 6:41 PM

To: 'Bob McMahon' <bmcMahon@emclawyers.com>; Terry.Etter@occ.ohio.gov

Cc: Watts, Elizabeth H <Elizabeth.Watts@duke-energy.com>; Olive, Emily A. <Emily.Olive@duke-energy.com>; Brian Dressel <dressel@CarpenterLipps.com>

Subject: RE: Duke 17-2344-EL-CSS - OCC's Notices to Take Depositions

Bob,

I am writing in response to a few of your emails and issues that you have raised in this case.

First, for tomorrow's depositions, we have a minor change in scheduling due to a work emergency of one complainant. We would like to switch the order of 2 depositions. Both Complainants have agreed to the switch. That change is John Gump would move up and be deposed from 4-5 pm and Marc Wahlquist would move back and be deposed from 5-6 pm. We hope that you are amenable to this minor change.

We have worked diligently to schedule the numerous depositions that you have requested and do not appreciate your comments otherwise. It is very difficult to work around the various schedules and conflicts.

To that end, we have an additional date for depositions. Given that Duke has refused to conduct certain depositions by phone, we are proposing a date of Saturday, March 10, beginning at 11:00 a.m., to depose certain Complainants that cannot appear during the work day due to already scheduled business travel out of state and other work commitments. On that date, we would be prepared to proceed with the depositions of Fred Vonderhaar, Randall Fick, and Jim Wulker. Those Complainants have been confirmed for March 10th. We are also making efforts to coordinate with Amanda Sachs, who was another Complainant you had named in earlier correspondence, and Nicole Menkhaus, who we believe may be available that day as well. We hope to confirm these two individuals soon.

With that said, after the completion of the depositions on Saturday, March 10, 2018, that should bring us to a total of 19 depositions, deposing 19 Complainants. At this time, we do not agree to conduct further depositions beyond Saturday, March 10th. The Commission's rules limit discovery to that which is admissible at hearing or is reasonably calculated to lead to the discovery of admissible evidence (Ohio Adm. Code 4901-1-16(B)). While we have not made final determinations as to which Complainants will testify at hearing, by the conclusion of the depositions that we have agreed to, we can state that Duke will have deposed all Complainants currently under consideration. If that assessment changes unexpectedly, we would of course make any additional Complainants that will testify and have not been deposed available for depositions. Given those facts, proceeding with the depositions of additional Complainants serves no other purpose but to harass Complainants and drain their resources, which is not a permissible use of the discovery process. We are, therefore, requesting that you agree to withdraw your remaining notices of depositions.

Finally, we also do not agree with your response to Mr. Etter regarding the depositions of Duke's employees. The notices were proper under the Commission's rules. Additionally, parties have a right to notice depositions just as you did. There is no reason that those depositions cannot be scheduled concurrently and in coordination with the Complainants' depositions.

Thank you,

Kim Bojko

Kimberly W. Bojko
CARPENTER LIPPS & LELAND LLP
Columbus • New York • Chicago
280 Plaza, Suite 1300
280 N. High Street
Columbus, OH 43215
(614) 365-4124
bojko@carpenterlipps.com

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From: Bob McMahon [<mailto:bmcmahon@emclawyers.com>]

Sent: Wednesday, February 28, 2018 9:01 PM

To: Terry Etter [etter@occ.ohio.gov]

Cc: Watts, Elizabeth H <Elizabeth.Watts@duke-energy.com>; Olive, Emily A. <Emily.Olive@duke-energy.com>; Kimberly

W. Bojko <bojko@CarpenterLipps.com>; Brian Dressel <dressel@CarpenterLipps.com>
Subject: RE: Duke 17-2344-EL-CSS - OCC's Notices to Take Depositions

Sure, it's simple: you noticed the depositions for next week and included requests for production of documents without providing sufficient time (20 days) for Duke Energy Ohio to respond to the document requests.

I will look into dates and get back to you. But our priority now is scheduling Complainants' depositions, which apparently is going to require a motion to compel at this stage.

Bob

Robert A. McMahon
Eberly McMahon Copetas LLC
2321 Kemper Lane, Suite 100
Cincinnati, OH 45206
(513) 533-3441—direct
(513) 460-5490—mobile
(513) 533-3554—fax
bmcMahon@emclawyers.com
www.emclawyers.com

From: Terry.Etter@occ.ohio.gov [<mailto:Terry.Etter@occ.ohio.gov>]
Sent: Wednesday, February 28, 2018 4:00 PM
To: Bob McMahon <bmcMahon@emclawyers.com>
Cc: Watts, Elizabeth H <Elizabeth.Watts@duke-energy.com>; Olive, Emily A. <Emily.Olive@duke-energy.com>; Kimberly W. Bojko <bojko@CarpenterLipps.com>; Brian Dressel <dressel@CarpenterLipps.com>
Subject: RE: Duke 17-2344-EL-CSS - OCC's Notices to Take Depositions

Bob: Thanks for your response. I understand that the depositions of complainants are progressing and that the biggest problem has been scheduling them around complainants' work schedules. Can you provide us with dates that would be workable for Duke? We will be glad to come to Cincinnati. As for your assertion that our notices do not comply with 4901-1-20, please explain.

Terry Etter
Office of the Ohio Consumers' Counsel
65 East State Street, 7th Floor
Columbus, Ohio 43215-4213
614-466-7964

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From: Bob McMahon [<mailto:bmcMahon@emclawyers.com>]
Sent: Wednesday, February 28, 2018 11:16 AM
To: Etter, Terry
Cc: Watts, Elizabeth H; Olive, Emily A.; Kimberly W. Bojko; Brian Dressel
Subject: FW: Duke 17-2344-EL-CSS - OCC's Notices to Take Depositions

Terry,

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Regards,

Bob McMahon

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(513) 533-3441 (direct)
(513) 460-5490 (mobile)
(513) 533-3554 (fax)
bmcMahon@emclawyers.com

From: Debra.Bingham@occ.ohio.gov [mailto:Debra.Bingham@occ.ohio.gov]
Sent: Tuesday, February 27, 2018 3:35 PM
To: Rocco.D'Ascenzo@duke-energy.com; Elizabeth.Watts@duke-energy.com; Bob McMahon
<bmcMahon@emclawyers.com>; Bojko@carpenterlipps.com; Dutton@carpenterlipps.com;
Dressel@carpenterlipps.com; Anna.Sanyal@puco.ohio.gov
Subject: Duke 17-2344-EL-CSS - OCC's Notices to Take Depositions

Attached please find 2 Notices to Take Depositions and Requests for Production of Documents by the Office of the Ohio Consumers' Counsel that have been electronically filed today with the PUCO. If you have any questions, please contact Terry Etter with our office.

Below are the e-filing confirmations.

Thank you.

Deb Bingham
Administrative Assistant
Office of the Ohio Consumers' Counsel
65 East State Street, 7th Floor
Columbus, Ohio 43215
(614) 466-1311
Debra.bingham@occ.ohio.gov

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You should print or save this notice confirming that the following document was electronically filed.

URL: <http://dis.puc.state.oh.us/DocumentRecord.aspx?DocID=5bce6daa-50d2-4ea1-a3a1-549a58a4262c>

Date & Time: 2/27/2018 at 15:23:56.5820456 EST

Case Number(s): 17-2344-EL-CSS

Summary: Notice of Deposition Notice to Take Deposition and Requests for Production of Documents by the Office of the Ohio Consumers' Counsel electronically filed by Ms. Deb J. Bingham on behalf of Etter, Terry L.

Confirmation Number: 9d5ddf91-b4a8-46a9-8e03-9988f289fa6e

Official PDF File: 9d5ddf91-b4a8-46a9-8e03-9988f289fa6e_Official_dbingham227201832242PM_Notice to Take Deposition - Burton - 17-2344-EL-CSS - 2.27.18.pdfSecure.pdf

Source File(s): 9d5ddf91-b4a8-46a9-8e03-9988f289fa6e_dbingham227201832308PM_Notice to Take Deposition - Burton - 17-2344-EL-CSS - 2.27.18.doc

Filings received after 5:30 p.m. Eastern Time will be deemed to be filed the following business day. All filings and document information is subject to review by the PUCO Docketing Division.

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URL: <http://dis.puc.state.oh.us/DocumentRecord.aspx?DocID=b1a7f8d2-1650-4e28-941d-4b202c2ceb5d>

Date & Time: 2/27/2018 at 15:30:37.4056069 EST

Case Number(s): 17-2344-EL-CSS

Summary: Notice of Deposition Notice to Take Deposition and Requests for Production of Documents by the Office of the Ohio Consumers' Counsel electronically filed by Ms. Deb J. Bingham on behalf of Etter, Terry L.

Confirmation Number: 6cb506be-ccfd-43a4-b0af-8ee5bf02edcc

Official PDF File: 6cb506be-ccfd-43a4-b0af-8ee5bf02edcc_Official_dbingham227201833009PM_Notice to Take Deposition - Holton - 17-2344-EL-CSS - 2.27.18.pdfSecure.pdf

Source File(s): 6cb506be-ccfd-43a4-b0af-8ee5bf02edcc_dbingham227201833017PM_Notice to Take Deposition - Holton - 17-2344-EL-CSS - 2.27.18.doc

Kimberly W. Bojko

From: Bob McMahon <bmcMahon@emclawyers.com>
Sent: Tuesday, March 13, 2018 11:21 AM
To: Kimberly W. Bojko; Brian Dressel; Terry.Etter@occ.ohio.gov
Cc: Watts, Elizabeth H; Olive, Emily A.
Subject: RE: Duke 17-2344-EL-CSS - OCC's Notices to Take Depositions

Kim,

Yes, you still have not answered the key question: in what city will Fred Vonderhaar be on March 20? I've asked twice yet you respond only with information that I already know ("he is working off-site, out of state"). We need to arrange for a court reporter and conference room in the city in which Mr. Vonderhaar is working. The court reporter at Symmes Township's office for the other depositions cannot do his deposition from another state. Rather than lecture me about Saturday depositions and your alleged understanding about how telephonic depositions are conducted, please answer the question so that we may accommodate your client's request.

Regards,

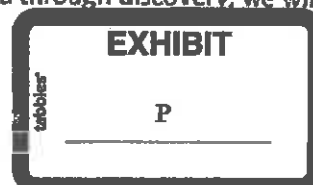
Bob

Robert A. McMahon
Eberly McMahon Copetas LLC
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bmcMahon@emclawyers.com

From: Kimberly W. Bojko [mailto:bojko@CarpenterLipps.com]
Sent: Tuesday, March 13, 2018 11:09 AM
To: Bob McMahon <bmcMahon@emclawyers.com>; Brian Dressel <dressel@CarpenterLipps.com>; Terry.Etter@occ.ohio.gov
Cc: Watts, Elizabeth H <Elizabeth.Watts@duke-energy.com>; Olive, Emily A. <Emily.Olive@duke-energy.com>
Subject: RE: Duke 17-2344-EL-CSS - OCC's Notices to Take Depositions

Bob,

Thank you for your email. Rest assured, we are working on all of your requests and have been upon receipt. We are well aware of the process, especially the typical PUCO process. We are also well aware of how depositions are conducted, including the need for a telephone to conduct the telephonic deposition. As you know, Mr. Vonderhaar is working off-site, out of state. He has limited availability and access. Due to this limited availability and access because of previously-scheduled work commitments and after Duke initially refused a telephonic deposition, we attempted to schedule his deposition in-person last Saturday to eliminate some of these difficulties, but Duke refused. His deposition and the other 6 could have already been completed had Duke not refused a Saturday deposition date (which by the way, I believe you agreed to during the prehearing conference with the attorney examiners). If and when we receive additional documents that have not already been produced to you through discovery, we will provide them to you per the discovery rules.



Please let me know if you have any questions.
Thank you.
Kim

Kimberly W. Bojko
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From: Bob McMahon [<mailto:bmcMahon@emclawvers.com>]
Sent: Monday, March 12, 2018 3:35 PM
To: Brian Dressel <dressel@CarpenterLipps.com>; Kimberly W. Bojko <bojko@CarpenterLipps.com>;
Terry.Etter@occ.ohio.gov
Cc: Watts, Elizabeth H <Elizabeth.Watts@duke-energy.com>; Olive, Emily A. <Emily.Olive@duke-energy.com>
Subject: RE: Duke 17-2344-EL-CSS - OCC's Notices to Take Depositions

Kim/Brian,

As I indicated by email last Wednesday (see highlighted portion below), we need to know where Fred Vonderhaar will be located on March 20 so that we can arrange for a court reporter and conference room in that location. We cannot use the court reporter in Ohio for a deposition in another state, meaning Mr. Vonderhaar cannot simply dial into the Symmes Township conference room that day. We also will need a conference line at Symmes Township for purposes of conducting Mr. Vonderhaar's deposition so please make those arrangements since we are accommodating your client's request to conduct his deposition by telephone. In addition, we need to get the exhibits to the out-of-state court reporter in advance so that the court reporter may present the exhibits to Mr. Vonderhaar in person. Therefore, if Mr. Vonderhaar intends to produce additional documents for his deposition in response to the previously filed and served notice of deposition, please produce them to us before Friday. Please call or email if you have any questions.

Regards,

Bob

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From: Bob McMahon

Sent: Wednesday, March 07, 2018 8:16 PM

To: Brian Dressel <bdressel@CarpenterLipps.com>; Kimberly W. Bojko <bojko@CarpenterLipps.com>; Terry.Etter@occ.ohio.gov

Cc: Watts, Elizabeth H <Elizabeth.Watts@duke-energy.com>; Olive, Emily A. <Emily.Olive@duke-energy.com>

Subject: RE: Duke 17-2344-EL-CSS - OCC's Notices to Take Depositions

Brian/Kim,

I was meaning to email you earlier today but did not have a chance before having to leave for a day-long meeting, so thanks for following up and having a date available.

Regarding Fred Vonderhaar: based on your representations that Mr. Vonderhaar is on a long-term project out of state through the end of April and is not present in Ohio during the Mon-Friday work days, we are willing to make an exception for him and conduct his deposition telephonically. We need to know where Mr. Vonderhaar is working so that we can make arrangements for a court reporter, conference room, etc. in his location. As for the date of his deposition and the other depositions, we are willing to do all depositions on March 20, assuming we can make arrangements wherever Mr. Vonderhaar is located. While I don't think it is appropriate to delay the depositions another two weeks, we are not inclined to argue about that issue.

As for the other Complainants, you previously indicated by email and when we spoke on Friday that you will not make any other Complainants available for deposition even though Duke Energy Ohio previously noticed all Complainants' depositions without objection. While you may want to characterize this joint complaint as being similar to a class action, "Commission practice does not provide for class action complainants. In the event that a Complainant is successful, the Commission would apply its findings on a prospective basis to each customer similarly situated to the Complainant." *Weiss v. Cleveland Electric Illuminating Company*, Case No. 97-876-EL-CSS, (November 6, 1997, Entry); see also, *In the Matter of the Complaint of the City of Solon, Ohio on behalf of itself, and Certain Named Residential and Commercial Residents of the City of Solon v. The Cleveland Electric Illuminating Company*, Case No. 03-1407-EL-CSS (December 17, 2003, Entry). There simply is no need to keep more than 85 Complainants in this case, as we've explained in the past. But, if you choose to proceed with all named Complainants, Duke Energy Ohio has the right to depose every person who has asserted a claim against the company regardless of whether you intend to call them in your case. If you hold firm in your refusal to make all Complainants available for deposition, Duke Energy Ohio will move to dismiss them from this case. Therefore, please confirm in writing by close of business tomorrow whether you will produce all remaining Complainants for deposition.

Regards,

Bob

Robert A. McMahon

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From: Brian Dressel <dressel@CarpenterLipps.com>
Sent: Wednesday, March 7, 2018 12:43 PM
To: Kimberly W. Bojko <bojko@CarpenterLipps.com>; Bob McMahon <bmcmahon@emclawyers.com>; Terry.Etter@occ.ohio.gov
Cc: Watts, Elizabeth H <Elizabeth.Watts@duke-energy.com>; Olive, Emily A. <Emily.Olive@duke-energy.com>; Kimberly W. Bojko <bojko@CarpenterLipps.com>
Subject: RE: Duke 17-2344-EL-CSS - OCC's Notices to Take Depositions

Bob,

We are writing following up on our conversation last Friday where you refused to conduct depositions on Saturdays in order to accommodate Complainants' schedules. Although we believe this is contrary to Commission practice, we have worked diligently to reschedule the depositions we offered for Saturday 3/10. As such, we can offer the below-listed Complainants for depositions on Tuesday, March 20, 2018. We also await your response regarding a phone deposition of Fred Vonderhaar.

Nicole Menkhaus
James Wulker
Dennis Mitman
Eric Hatifeld
Randall Fick

Thank you,

Brian W. Dressel
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From: Kimberly W. Bojko
Sent: Thursday, March 01, 2018 6:41 PM
To: 'Bob McMahon' <bmcmahon@emclawyers.com>; Terry.Etter@occ.ohio.gov
Cc: Watts, Elizabeth H <Elizabeth.Watts@duke-energy.com>; Olive, Emily A. <Emily.Olive@duke-energy.com>; Brian Dressel <dressel@CarpenterLipps.com>
Subject: RE: Duke 17-2344-EL-CSS - OCC's Notices to Take Depositions

Bob,

I am writing in response to a few of your emails and issues that you have raised in this case.

First, for tomorrow's depositions, we have a minor change in scheduling due to a work emergency of one complainant. We would like to switch the order of 2 depositions. Both Complainants have agreed to the switch. That change is John Gump would move up and be deposed from 4-5 pm and Marc Wahlquist would move back and be deposed from 5-6 pm. We hope that you are amenable to this minor change.

Kimberly W. Bojko

From: Brian Dressel
Sent: Sunday, March 18, 2018 4:21 PM
To: 'Bob McMahon'
Cc: Kimberly W. Bojko; Watts, Elizabeth H; Olive, Emily A.; Terry.Etter@occ.ohio.gov
Subject: Schedule for Tuesday

Hi Bob,

Below is the order of deponents for Tuesday 3/20/2018. We will also have Mr. Vonderhaar's documents to you shortly.

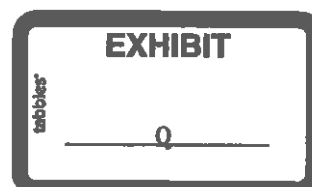
10:00 AM: Dennis Mitman
11:00 AM: Eric Hatfield
12:00 PM: Randall Fick
2:00 PM: James Wulker
3:00 PM: Nicole Menkhaus
4:00 PM: Fred Vonderhaar (by phone)

Thank you,

Brian W. Dressel
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Kimberly W. Bojko

From: Brian Dressel
Sent: Monday, March 19, 2018 5:53 PM
To: Bob McMahon
Cc: Kimberly W. Bojko; Watts, Elizabeth H
Subject: Tomorrow's Depositions

Hi Bob,

We have an unfortunate last-minute situation for tomorrow. We just learned that Jim Wulker, who was scheduled to be deposed at 2 pm tomorrow, has had a family emergency arise and will be unable to be deposed tomorrow. Because we had promised 6 Complainants for tomorrow and are cognizant of your desire to have a full day of depositions, we have diligently worked to find a replacement. Peter Broome has graciously made himself available for that same slot tomorrow and will be prepared to be deposed at that time. We apologize for this last-minute change, but hope you will be satisfied as you desire to depose more witnesses. Please let us know if you have any questions or concerns.

Thank you,

Brian W. Dressel
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Duke Energy Ohio
Case No. 17-2344-EL-CSS
Citizens Against Clearcutting First Set of Requests for Admission
Date Received: January 25, 2018

CACC-RFA-01-009

REQUEST:

Please admit that ~~Duke has not engaged in an individualized assessment of each tree or~~ vegetation that it seeks to remove on properties owned by one or more of the Complainants to determine the threat to safety and reliability.

RESPONSE:

Objection. This Request is overly broad and unduly burdensome in that there are more than 85 properties and property owners at issue in the Second Amended Complaint. Furthermore, this Request seeks information that would require Duke Energy Ohio to engage in impermissible speculation and guesswork concerning future events and the condition of any particular property, especially when Complainants requested and obtained a stay of all vegetation management activities by Duke Energy Ohio along the transmission lines at issue in the Second Amended Complaint. Finally, this Request is vague and ambiguous as to the definition and meaning of the phrase "individualized assessment of each tree or vegetation."

PERSON RESPONSIBLE: Legal



Duke Energy Ohio
Case No. 17-2344-EL-CSS
Citizens Against Clear Cutting First Set of Interrogatories
Date Received: January 25, 2018

CACC-INT-01-006

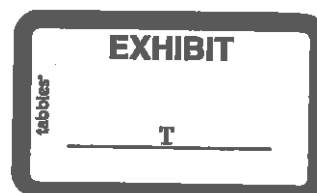
REQUEST:

Does Duke ~~intend to engage in the removal of trees or other vegetation on any of the~~ properties owned by any of the Complainants to the Second Amended Complaint in this case?

RESPONSE:

Objection. This Interrogatory is overly broad and unduly burdensome in that there are more than 85 properties and property owners at issue in the Second Amended Complaint. Furthermore, this Interrogatory seeks information that would require Duke Energy Ohio to engage in impermissible speculation and guesswork concerning future events and the condition of any particular property, especially when Complainants requested and obtained a stay of all vegetation management activities by Duke Energy Ohio along the transmission lines at issue in the Second Amended Complaint. Finally, to the extent this Interrogatory seeks information unrelated to the transmission lines at issue in the Second Amended Complaint, it seeks information that is irrelevant or otherwise not reasonably calculated to lead to the discovery of admissible evidence.

PERSON RESPONSIBLE: Legal



This foregoing document was electronically filed with the Public Utilities

Commission of Ohio Docketing Information System on

3/20/2018 5:18:33 PM

in

Case No(s). 17-2344-EL-CSS

Summary: Memorandum Contra Duke Energy Ohio, Inc.'s Motion To Compel And Response To Duke Energy Ohio, Inc.'s Motion To Continue Hearing electronically filed by Mrs. Kimberly W. Bojko on behalf of Complainants