

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Application of the Duke Energy Ohio, Inc., for an Increase in Electric Distribution Rates.)	Case No. 21-887-EL-AIR
In the Matter of the Application of Duke Energy Ohio, Inc., for Tariff Approval.)	Case No. 21-888-EL-ATA
In the Matter of the Application of Duke Energy Inc., for Approval to Change Accounting Methods.)	Case No. 21-889-EL-AAM

**INTERLOCUTORY APPEAL,
REQUEST FOR CERTIFICATION TO THE PUCO COMMISSIONERS
AND
APPLICATION FOR REVIEW
BY
OFFICE OF THE OHIO CONSUMERS' COUNSEL**

Bruce Weston (0016973)
Ohio Consumers' Counsel

Angela D. O'Brien (0097579)
Counsel of Record
Ambrosia E. Wilson (0096598)
John Finnigan (0018689)
Connor D. Semple (0101102)
Assistant Consumers' Counsel

Office of the Ohio Consumers' Counsel
65 East State Street, Suite 700
Columbus, Ohio 43215
Telephone [O'Brien]: (614)-466-9531
Telephone [Wilson]: (614)-466-1292
Telephone [Finnigan]: (614) 466-9585
Telephone [Semple]: (614) 466-9565
angela.obrien@occ.ohio.gov
ambrosia.wilson@occ.ohio.gov
john.finnigan@occ.ohio.gov
connor.semple@occ.ohio.gov
(willing to accept service by e-mail)

September 26, 2022

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Application of the)	
Duke Energy Ohio, Inc., for an Increase)	Case No. 21-887-EL-AIR
in Electric Distribution Rates.)	

In the Matter of the Application of Duke)	
Energy Ohio, Inc., for Tariff Approval.)	Case No. 21-888-EL-ATA

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Energy Inc., for Approval to Change)	Case No. 21-889-EL-AAM
Accounting Methods.)	

**INTERLOCUTORY APPEAL,
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The PUCO Commissioners should modify¹ the September 20th ruling of Attorney Examiner Walstra, which denies a fair and due process for the Office of the Ohio Consumers' Counsel ("OCC"), on behalf of Duke's 640,000 residential electric consumers, to contest the non-unanimous settlement filed by Duke, the PUCO Staff and others. The settlement, if adopted by the PUCO, will result in a \$23.1 million electric rate increase for consumers.² OCC's recommendation is for a \$1.5 million rate *decrease*.³

The Attorney Examiner's ruling denies OCC adequate time for case preparation (including discovery and testimony) to oppose the settlement and to recommend an

¹ O.A.C. 4901-1-15.

² Case No. 21-887-EL-AIR, et al. Entry (September 20, 2022) at 7 (*See* attachment).

³ *See* Direct Testimony of John Defever, CPA on behalf of the Ohio Consumers' Counsel (September 2, 2022) at 6-7.

appropriate result for consumers. The lack of time is exacerbated by the PUCO's use of a standard for judging settlements that OCC considers to unfairly favor utilities.

At the non-transcribed pre-hearing, OCC sought a schedule for more preparation time. For testimony opposing the settlement, OCC sought a deadline of 30 days (October 28, 2022) after the filing of testimony by those supporting the settlement (including PUCO Staff-meaning they should not get an additional opportunity to provide testimony in response to any objections as permitted by the Entry).⁴

OCC will be severely prejudiced under the schedule the Attorney Examiner has adopted. OCC will have only one week to review, analyze, and possibly conduct discovery and present testimony and evidence opposing the Settlement following the filing of testimony in support of the Settlement. An adequate and sufficient time for OCC to prepare its testimony is especially important in this case. That's because the settlement parties have favored business customers by proposing that residential consumers should pay over 90% of Duke's revenue increase.

An immediate determination is needed, per O.A.C. 4901-1-15(B), to avoid undue prejudice to OCC, residential consumers, and to the public. The Attorney Examiner's ruling greatly and unduly prejudices OCC's rights to full and ample discovery in PUCO proceedings under R.C. 4903.082 and case preparation under O.A.C. 4901-1-16 et seq. And the Attorney Examiner's ruling greatly and unduly prejudices the public's interest in a full investigation of whether the proposed settlement is just and reasonable under the PUCO's three-prong settlement standard (a standard that we consider unfair).

⁴ Case No. 21-887-EL-AIR, et al. Entry (September 20, 2022) at 7 (*See* attachment).

Per O.A.C. 4901-1-15, OCC asks that the legal director, deputy legal director, attorney examiner, or presiding hearing officer certify this appeal to the PUCO. Upon consideration of the interlocutory appeal the PUCO should reverse or modify the Attorney Examiner's September 20, 2022 ruling on an expedited basis. Intervenor testimony in opposition of the settlement is otherwise due this week on September 29, 2022. (*See attached.*)

The reasons for granting this interlocutory appeal are more fully stated in the following memorandum in support.

Respectfully submitted,

Bruce Weston (0016973)
Ohio Consumers' Counsel

/s/ Ambrosia E. Wilson
Angela D. O'Brien (0097579)
Counsel of Record
Ambrosia E. Wilson (0096598)
John Finnigan (0018689)
Connor D. Semple (0101102)
Assistant Consumers' Counsel

Office of the Ohio Consumers' Counsel

65 East State Street, Suite 700
Columbus, Ohio 43215
Telephone [O'Brien]: (614)-466-9531
Telephone [Wilson]: (614)-466-1292
Telephone [Finnigan]: (614) 466-9585
Telephone [Semple]: (614) 466-9565
angela.obrien@occ.ohio.gov
ambrosia.wilson@occ.ohio.gov
john.finnigan@occ.ohio.gov
connor.semple@occ.ohio.gov
(willing to accept service by e-mail)

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MEMORANDUM IN SUPPORT

I. INTRODUCTION

This appeal should be certified to the Commission. The PUCO should reverse or modify the Attorney Examiner’s proposed procedural schedule ruling to allow OCC an adequate amount of time to prepare testimony for the hearing. Granting this interlocutory appeal would be consistent with Ohio law and rules for discovery and case preparation, as well as the PUCO rules and precedent. Granting this appeal would also be protective of the consumers who will be asked to pay over 90% of the charges Duke is requesting for its rate increase

II. STANDARD OF REVIEW

The PUCO will review an attorney examiner’s ruling if the attorney examiner (or other authorized PUCO personnel) certifies the appeal.⁵ The standard applicable to certifying an appeal is that “the appeal presents a new or novel question of interpretation,

⁵ O.A.C. 4901-1-15(B).

law, or policy, or is taken from a ruling which represents a departure from past precedent and an immediate determination by the commission is needed to prevent the likelihood of undue prejudice or expense to one or more of the parties, should the commission ultimately reverse the ruling in question.”⁶ Upon consideration of an appeal, the PUCO may affirm, reverse, or modify the ruling or dismiss the appeal.⁷

III. REQUEST FOR CERTIFICATION

- A. **The Attorney Examiner’s ruling is a departure from past precedent and an “...immediate determination by the PUCO is needed to prevent the likelihood of undue prejudice or expense to one or more of the parties, should the Commission ultimately reverse the ruling in question...”.**

This appeal should be certified by the legal director, deputy legal director, attorney examiner, or presiding hearing officer, per O.A.C. 4901-1-15(B). The Attorney Examiner improperly ordered an expedited procedural schedule that prejudices OCC and the residential consumers it represents. Allowing a mere nine days to (from the date of the September 20, 2022 Entry) prepare intervenor testimony opposing the proposed settlement is highly prejudicial against OCC and the affected residential consumers.⁸

And aggravating this problem is that discovery responses are due a mere five days from receiving the discovery request. Even though OCC was able to send additional discovery requests on September 20, 2022—when the Entry was issued, the responses were not due back to OCC until September 26, 2022 (today). That leaves three days for

⁶ *Id.*

⁷ O.A.C. 4901-1-15(E).

⁸ Entry at 7.

OCC to review the discovery (and assuming useful answers are provided), and to use the discovery responses to finalize testimony.

This ruling is a departure from the procedural schedule granted in Duke's last base rate case (a departure from past precedent). In Duke's last rate case, the PUCO Staff requested an extension to the procedural schedule—but only for signatories and non-opposing parties.⁹ OCC and others argued that Staff's proposed schedule would prejudice the non-settling parties. Fortunately for consumers, the attorney examiner in that case adopted a schedule which accepted the non-settling parties' request to extend the procedural schedule for non-settling parties by five days as well (which results in a total of 19 days for non-settling parties to provide testimony opposing the settlement).¹⁰

OCC on behalf of consumers is entitled to a more reasonable extension in this case. Specifically, OCC's opposing testimony should not be due until 19 days after testimony supporting the settlement is filed, *at the earliest*, to be consistent with the previous rate case. But optimally, OCC seeks a procedural schedule that gives parties opposing the settlement at least 28 days to provide opposing testimony (as OCC requested in the pre-hearing). Doing otherwise is a departure from past precedent. And permitting the ruling to stand would establish a limitation on parties' statutory right under R.C. 4903.082 to full and ample discovery in PUCO proceedings. It could then force the PUCO to reach a conclusion in this proceeding based upon a potentially incomplete record.

⁹ Case No. 17-32-EL-AIR, Entry (May 23, 2018) at 4.

¹⁰ *Id.*

Therefore, the criteria in O.A.C. 4901-1-15(B) are met for finding a departure from past precedent.

B. An immediate determination is needed to prevent undue prejudice.

This appeal should be certified to the PUCO. An “immediate determination” by the PUCO is needed to prevent undue prejudice¹¹ to OCC, Ohio consumers, and the public at large. Prejudice would occur because parties opposing the settlement would only have three days to review additional discovery responses before opponent testimony is due. This is an insufficient amount of time to prepare testimony. Accordingly, even if the PUCO ultimately reverses the Attorney Examiner’s rulings after this matter is heard and briefed, OCC and consumers will be greatly prejudiced because the relief requested (for a longer procedural schedule) will be moot. OCC will have suffered the denial of (1) their ample discovery rights under R.C. 4903.082 and O.A.C. 4901-1-16 et seq. And (2) they will not have sufficient time to receive and review discovery, and prepare testimony as explained above.

IV. APPLICATION FOR REVIEW

A pre-hearing was held remotely on September 20, 2022.¹² During this pre-hearing, OCC requested a procedural schedule that would allow it reasonable and sufficient time to request and receive discovery responses (on an expedited five-day schedule); would allow OCC reasonable time to prepare testimony in opposition of the proposed settlement (filed on September 19, 2022); and would allow reasonable time to prepare for the hearing. OCC requested that the schedule be as follows:

¹¹ O.A.C. 4901-1-15(B).

¹² See Entry (September 19, 2022).

1. Testimony in support of the proposed settlement (including PUCO Staff):
September 30, 2022;
2. Testimony in opposition to the proposed settlement: October 28, 2022;
and
3. The hearing commences: November 14, 2022.

Unfortunately, the Attorney Examiner denied OCC's request and set the following unreasonable and prejudicial procedural schedule:

1. Testimony in support of the proposed settlement (including PUCO Staff):
September 22, 2022;
2. Testimony in opposition to the proposed settlement: September 29, 2022;
3. PUCO Staff testimony on objections: October 2, 2022; and
4. The hearing: October 4, 2022.

OCC is further concerned by the fact that PUCO Staff is being given a "second bite of the apple," because Staff is permitted to provide testimony in support of the settlement and then an additional testimony opportunity (to apparently address objections). This in effect would permit Staff an improper rebuttal opportunity.

The PUCO Commissioners should reverse this ruling by the PUCO's Attorney Examiner, per O.A.C. 4901-1-15 (B). The Examiner incorrectly precluded or will preclude OCC's *ample* discovery rights with the procedural schedule issued by the Examiner. Justice is being denied for OCC, residential consumers, and the public.

The problem for justice with the Attorney Examiner's ruling is that it fails to give adequate weight to OCC's need to discover underlying facts that form the basis for the PUCO's review of the proposed settlement.

OCC should be able to explore the underlying facts involving the proposed settlement, which OCC is not a party to. But under the schedule established by the Attorney Examiner, OCC's case preparation will be cut short. That is unreasonable, and unlawful as inconsistent with the ample discovery rights that are afforded to all parties in PUCO proceedings.¹³

V. CONCLUSION

OCC's interlocutory appeal of the PUCO Examiner's September 20, 2022 ruling meets the legal standards for certification and for reversing the rulings. For millions of Ohio consumers who deserve energy justice and just and reasonable rates, the PUCO should promptly reverse the Attorney Examiner's ruling and thereby protect due process. The PUCO should allow OCC *reasonable* time for full and complete discovery for fact-finding to continue. The PUCO should permit OCC to have sufficient time to submit further discovery, receive discovery responses, and finalize testimony in light of the discovery responses.

¹³ See R.C. 4903.082 and O.A.C. 4901-1-16 et seq.

Respectfully submitted,

Bruce Weston (0016973)
Ohio Consumers' Counsel

/s/ Ambrosia E. Wilson

Angela D. O'Brien (0097579)
Counsel of Record
Ambrosia E. Wilson (0096598)
John Finnigan (0018689)
Connor D. Semple (0101102)
Assistant Consumers' Counsel

Office of the Ohio Consumers' Counsel

65 East State Street, Suite 700
Columbus, Ohio 43215
Telephone [O'Brien]: (614)-466-9531
Telephone [Wilson]: (614)-466-1292
Telephone [Finnigan]: (614) 466-9585
Telephone [Semple]: (614) 466-9565
angela.obrien@occ.ohio.gov
ambrosia.wilson@occ.ohio.gov
john.finnigan@occ.ohio.gov
connor.semples@occ.ohio.gov
(willing to accept service by e-mail)

CERTIFICATE OF SERVICE

I hereby certify that a copy of this Interlocutory Appeal, Request for Certification to the PUCO Commissioners and Application for Review was served on the persons stated below via electric transmission this 26th day of September 2022.

/s/ Ambrosia E. Wilson

Ambrosia E. Wilson

Assistant Consumers' Counsel

The PUCO's e-filing system will electronically serve notice of the filing of this document on the following parties:

SERVICE LIST

robert.eubanks@ohioAGO.gov
shaun.lyons@ohioAGO.gov
werner.margard@ohioAGO.gov
mkurtz@BKLlawfirm.com
kboehm@BKLlawfirm.com
jkylerncohn@BKLlawfirm.com
mwarnock@bricker.com
khernstein@bricker.com
ktreadway@oneenergyllc.com
jdunn@oneenergyllc.com
dborchers@bricker.com
khernstein@bricker.com
Fdarr2019@gmail.com
paul@carpenterlipps.com
rdove@keglerbrown.com
trent@hubaydougherty.com

Attorney Examiners:

matthew.sandor@puco.ohio.gov
nicholas.walstra@puco.ohio.gov

Rocco.dascenzo@duke-energy.com
Jeanne.kingery@duke-energy.com
Larisa.vaysman@duke-energy.com
elyse.akhbari@duke-energy.com
ebrama@taftlaw.com
Bethany.allen@igs.com
Joe.oliker@igs.com
Evan.betterton@igs.com
Stacie.cathcart@igs.com
michael.nugent@igs.com
jlang@calfee.com
gjewell@calfee.com
gwhaling@calfee.com
sfranson@calfee.com
dromig@nationwideenergypartners.com
Bojko@carpenterlipps.com
Wygonski@carpenterlipps.com
cgrundmann@spilmanlaw.com
dwilliamson@spilmanlaw.com
cpirik@dickinsonwright.com
todonnell@dickinsonwright.com
mmcdonnell@dickinsonwright.com

THE PUBLIC UTILITIES COMMISSION OF OHIO

IN THE MATTER OF THE APPLICATION OF
DUKE ENERGY OHIO, INC., FOR AN
INCREASE IN ITS ELECTRIC
DISTRIBUTION RATES.

CASE NO. 21-887-EL-AIR

IN THE MATTER OF THE APPLICATION OF
DUKE ENERGY OHIO, INC., FOR TARIFF
APPROVAL.

CASE NO. 21-888-EL-ATA

IN THE MATTER OF THE APPLICATION OF
DUKE ENERGY OHIO, INC., FOR
APPROVAL TO CHANGE ACCOUNTING
METHODS.

CASE NO. 21-889-EL-AAM

ENTRY

Entered in the Journal on September 20, 2022

{¶ 1} Duke Energy Ohio, Inc. (Duke) is an electric light company and public utility as defined by R.C. 4905.03(C) and R.C. 4905.02, respectively. As such, Duke is subject to the Commission's jurisdiction pursuant to R.C. 4905.04, 4905.05, and 4905.06.

{¶ 2} On October 1, 2021, Duke filed an application for an increase in electric distribution rates, for approval of tariff modifications, and for approval to changes in certain accounting methods.

{¶ 3} The Commission caused an investigation to be made of the facts set forth in the rate increase application by Duke, the exhibits attached thereto, and other matters connected with the application. On May 19, 2022, Staff filed a written report of its investigation (Staff Report). Copies of the Staff Report were mailed to Duke and other persons deemed to be interested in the case.

{¶ 4} By Entry issued May 20, 2022, the attorney examiner set forth the procedural schedule. Thereafter, the attorney examiner granted several requests to adjust the procedural schedule. In response to a motion to modify the procedural schedule filed by Staff, on September 2, 2022, the attorney examiner issued an Entry vacating the procedural

schedule, including postponing the September 19, 2022 evidentiary hearing. Also, the attorney examiner directed Duke to file a status update every week indicating the status of negotiations and whether a hearing should be scheduled.

{¶ 5} On September 19, 2022, Duke filed a Joint Stipulation and Recommendation (Stipulation) signed by certain parties to the case.

{¶ 6} On the same date, Duke filed an unopposed expedited motion for prehearing conference. Pursuant to a September 19, 2022 Entry granting the request, a prehearing was held on September 20, 2022, and a procedural schedule was discussed.

{¶ 7} Accordingly, the procedural schedule will be as follows:

- The evidentiary hearing in this proceeding will commence on October 4, 2022, at 10:00 a.m. in Hearing Room 11-A at the offices of the Commission, 180 East Broad Street, 11th Floor, Columbus, Ohio 43215.
- All testimony in support of the Stipulation is to be filed by September 22, 2022.
- All testimony in opposition to the Stipulation is to be filed by September 29, 2022.
- Staff testimony in response to objections is to be filed by October 3, 2022.

{¶ 8} In the event that any motion is made in these proceedings prior to the issuance of the Commission's order, any memorandum contra shall be filed within three business days after the service of such motion, and a reply memorandum to any memorandum contra shall be filed within two business days. Parties shall provide service of pleadings via hand delivery or e-mail.

{¶ 9} In addition, consistent with Ohio Adm.Code 4901-1-16(D) and (E), the response time for supplemental discovery is five calendar days. Unless otherwise agreed to by the parties, discovery requests and replies shall be served by hand delivery or e-mail. An attorney serving a discovery request shall attempt to contact, in advance, the attorney upon whom the discovery request will be served to advise the attorney that a request will be forthcoming.

{¶ 10} It is, therefore,

{¶ 11} ORDERED, That the procedural schedule be established as set forth in Paragraph 7. It is, further,

{¶ 12} ORDERED, That all persons comply with the procedural directives as set forth above in Paragraphs 8 and 9. It is, further,

{¶ 13} That a copy of this Entry be served upon all parties of record.

THE PUBLIC UTILITIES COMMISSION OF OHIO

/s/Nicholas J. Walstra

By: Nicholas J. Walstra
Attorney Examiner

GAP/hac

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in

Case No(s). 21-0887-EL-AIR, 21-0888-EL-ATA, 21-0889-EL-AAM

Summary: Attorney Examiner Entry ordering that the procedural schedule will be as follows: evidentiary hearing will commence on October 4, 2022, at 10:00 a.m. in Hearing Room 11-A at the offices of the Commission, 180 East Broad Street, 11th Floor, Columbus, Ohio 43215; all testimony in support of the Stipulation is to be filed by September 22, 2022; all testimony in opposition to the Stipulation is to be filed by September 29, 2022; staff testimony in response to objections is to be filed by October 3, 2022; and, that all persons comply with the procedural directives as set forth above in Paragraphs 8 and 9 electronically filed by Heather A. Chilcote on behalf of Nicholas Walstra, Attorney Examiner, Public Utilities Commission

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Case No(s). 21-0887-EL-AIR, 21-0888-EL-ATA, 21-0889-EL-AAM

Summary: Request Interlocutory Appeal, Request for Certification to the PUCO
Commissioners and Application for Review by Office of the Ohio Consumers'
Counsel electronically filed by Ms. Alana M. Noward on behalf of Wilson, Ambrosia
E.