BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Complaint of )

Jeffrey Pitzer )

)

Complainant, ) Case No. 15-298-GE-CSS

)

v. ) )

Duke Energy Ohio, Inc. )

)

Respondent. )

**DUKE ENERGY OHIO, INC.’S MOTION TO COMPEL DISCOVERY RESPONSES BY THE OFFICE OF THE OHIO CONSUMERS’ COUNSEL AND**

**REQUEST FOR EXPEDITED RULING**

**AFFIDAVIT OF ROBERT A. MCMAHON ATTACHED**

1. **Introduction**

As a party in this proceeding, the Office of the Ohio Consumers’ Counsel (OCC) is subject to discovery, including the obligations imposed upon a responding party as provided in the Public Utilities Commission of Ohio’s (Commission) administrative regulations. Here, however, the OCC has failed to provide appropriate responses to the discovery requests issued by Duke Energy Ohio, Inc. (Duke Energy Ohio or Company). Rather, as discussed herein, it has asserted improper and curiously conflicting objections. It has claimed inapplicable privileges. And it has engaged in a pattern likely intended to prompt delay. The Company thus respectfully requests an order deeming admitted certain requests for admission and otherwise compelling the OCC to respond to certain interrogatories and requests for the production of documents. Further, with the hearing scheduled to commence on December 2, Duke Energy Ohio requests an expedited ruling on this motion. The OCC easily can respond fully and promptly to the Company’s discovery requests, thereby avoiding the need to delay the scheduled hearing.

1. **Discussion**
2. Duke Energy Ohio has exhausted its efforts to resolve its discovery disputes with the OCC.

The facts surrounding the Company’s discovery dispute with the OCC are set forth in the attached Affidavit of Robert A. McMahon, one of Duke Energy Ohio’s attorneys in this proceeding. Briefly, the facts are as follows.

On September 30, 2015, Duke Energy Ohio propounded specific and narrow requests for admissions, interrogatories, and requests for production of documents on the OCC in an effort to identify, among other things, the allegedly disputed facts in the case and relevant information and documents in the OCC’s possession. After all, the OCC chose to intervene in this action and has been actively assisting Complainant and his attorneys throughout the case, including recently signing a joint defense agreement with Complainant. Accordingly, Duke Energy Ohio is entitled and needed to conduct discovery with the OCC in preparation for the hearing scheduled to start on December 2, 2015.

Unfortunately, the OCC chose to engage in obstructionist tactics by asserting baseless objections to multiple discovery requests and otherwise not providing substantive responses to those requests. Duke Energy Ohio’s attorneys spoke with OCC’s counsel on October 21, 2015, regarding those deficiencies and sent a letter the following day to explain in detail how the OCC had failed to comply with and answer Duke Energy Ohio’s reasonable discovery requests. With the impending hearing date, Duke Energy Ohio requested in its attorney’s letter that the OCC amend its discovery responses or provide a written response by the close of business on Monday, October 26.

Even though the OCC chose to intervene in this case, thereby subjecting itself to the case schedule as well as the right and obligation to conduct discovery, the OCC claimed in a letter dated October 26 that it did not have time to respond to Duke Energy Ohio’s concerns. The OCC indicated in that letter that it “should be able to respond fully by the end of the week.”[[1]](#footnote-1) But that deadline came and went without any further communication from the OCC, even though Duke Energy Ohio confirmed by letter dated October 29 that it expected to receive the OCC’s substantive and complete discovery responses by Friday, October 30. The OCC provided purported supplemental responses on November 2, 2015. However, such responses are similarly deficient and, as evident from the OCC’s communication of November 2, any further efforts to resolve the discovery dispute would be futile at this time. As a result, Duke Energy Ohio is forced to seek the Commission’s intervention to protect its rights and interests given the OCC’s refusal to comply with the discovery rules.

1. The OCC’s objections to and inadequate responses to Duke Energy Ohio’s discovery requests do not comply with the law.
   1. Requests for Admission

The Commission’s regulations detail the scope of discovery, including requests for admission. As an initial matter, discovery may be had of any matter, not privileged, that is relevant to the proceeding.[[2]](#footnote-2) Further, discovery is permitted of any matter that is reasonably calculated to lead to the discovery of admissible evidence.[[3]](#footnote-3)

Insofar as requests for admission are concerned, the Commission’s regulations provide, in pertinent part, as follows:

If an objection is made, the reasons therefor shall be stated. The answer shall specifically deny the matter or set forth in detail the reasons why the answering party cannot truthfully make an admission or denial. A denial shall fairly meet the substance of the requested admission, and when good faith requires that a party qualify his or her answer or deny only part of the matter of which an admission is requested, the party may not give lack of information as a reason for failure to admit or deny a matter unless the party states that he or she has made reasonable inquiry and that information known or readily obtainable is insufficient to enable him or her to make an admission or denial. A party who considers the truth of a matter of which an admission has been requested to be a genuine issue for the hearing may not, on that basis alone, object to the request, but may deny the matter or set forth reasons why an admission or denial cannot be made.

Where the responding party fails to comply with the requirements of O.A.C. 4901-1-22, the requesting party may seek an order deeming the request for admission admitted.[[4]](#footnote-4)

Here, the OCC has provided responses that, at first blush, are intended to follow the applicable Commission requirements. But on closer examination, it is apparent that the OCC has merely provided evasive, non-substantive responses, refusing to identify even information indisputably in its possession given its participation in discovery. The most egregious of the OCC’s responses to requests for admission[[5]](#footnote-5) are addressed herein and it is the responses to these requests that should be deemed admitted.

Request for Admission No. 1

When it first answered this request, the OCC clearly had no trouble understanding the phrase, “customer of record.” Rather, it remarkably claimed that it could not admit the truthfulness of this response because the information necessary to do so was solely in the possession of Duke Energy Ohio. It further contended that it had made a reasonable inquiry, but did not possess sufficient information to enable a response. In its allegedly good faith effort at engaging in discovery, the OCC then claimed that the request was vague. The OCC’s responses are inadequate and, given its unjustified responses that cannot be supported under O.A.C. 4901-1-22, its answer should be deemed admitted.

The information needed to answer this request, which necessarily include billing statements, are in the possession of the OCC. By the time the OCC served those objections and “responses” on October 20, the OCC had received discovery responses and documents from Duke Energy Ohio; engaged in multiple communications and meetings with Complainant and his attorney; and participated in the depositions of Gail Lykins (the original Complainant), Jeff Pitzer (the current Complainant), and Jack Easterling (Complainant’s brother-in-law). Because the OCC has billing records, account notes and other customer-related documents in its possession, and has participated in three depositions, it is more than capable of admitting or denying key facts in this case, just as it did in response to Request Nos. 29 and 30.

The claim of vagueness is similarly inappropriate. The OCC understood the question the first time it responded to it. The OCC cannot now manufacture objections in an attempt to support a denial. The request should be deemed admitted.

Request for Admission Nos. 3, 4, and 5.

The OCC objected to these requests, again initially claiming that the information needed to answer these requests was solely in the possession of Duke Energy Ohio. It then continued, claiming that it had made a reasonable inquiry and could neither admit nor deny the requests based upon the information known by it. In its purported supplemental response, the OCC claimed that the issue was outside the scope of discovery. The OCC denied the requests, over its claimed objections. But the objections are not proper.

Whether Dorothy Easterling was a customer of Duke Energy Ohio, as defined under Commission regulation, is indeed relevant to this proceeding given the obligations owing to, and owed by, customers. Further, as confirmed above, the OCC has in its possession information as to the identity of the Duke Energy Ohio customer during all times relevant to the allegations in this proceeding. Thus, to contend that it was, and remained, unable to obtain information sufficient to respond to the truth of the matter set forth in this request is inaccurate and contrary to O.A.C. 4901-1-22. Further, the OCC failed to provide a response that meets the substance of the requested admission in that it does not address whether, in the OCC’s view, Dorothy Easterling was a customer in respect of the utility account at issue in this proceeding. The requests should be deemed admitted for purposes of this proceeding.

Request for Admission Nos. 6, 7, and 8

The OCC again claimed that “the information known to or readily obtainable by OCC is insufficient to enable OCC to admit or deny” those requests. The OCC also claimed that “the truth or falsity of the matter asked to be admitted can only be determined from documents or other materials solely or exclusively within Duke’s possession.” Neither response is accurate or justified under OAC 4901-1-22, as discussed above, given the pertinent information in the possession of the OCC. The responses here also confirm the OCC’s evasive behavior. Seemingly, for two individuals, the OCC was purportedly able to examine their status as an alleged customer of Duke Energy Ohio, but it could not for a third. As the same information would have been relied upon by the OCC, its responses here cannot be reconciled with its prior responses and the OCC’s failure to properly respond to relevant requests should result in those requests being deemed admitted.

Request for Admission Nos. 12, 13, 28, 31, and 33

These requests are undeniably unambiguous, seeking an admission that the account was in arrears at the time the electric service was disconnected and that no payment had been made between a specific, limited period of time. Despite these rather simple requests, the OCC again objected on the basis that the information needed to answer was solely in the Company’s possession and, after reasonable inquiry, it did not have sufficient information to either admit or deny the truthfulness of the matter. The objections are baseless. When the OCC provided these responses on October 20, it possessed all relevant billing records and it had participated in the depositions of the Complainant, his wife and her brother – depositions in which it was confirmed that the account was in arrears.[[6]](#footnote-6) The objections are improper and the responses should be deemed admitted.

Request for Admission Nos. 14, 15, 20, and 21

In responding to these requests, the OCC erroneously asserted the claim of privilege – both attorney-client and work product. In attempting to cure these deficient answers, the OCC supplemented its responses. In doing so, however, it renewed its objection predicated upon privilege and further objected on the basis that the matters address genuine issues for hearing. The OCC also objected on the grounds that Duke Energy Ohio failed to respond to some undefined discovery requests. These responses fall well short of compliance with O.A.C. 4901-1-22.

As an initial matter, the OCC has not identified for the Commission the relevant requests that Duke Energy Ohio purportedly failed to answer or its efforts in seeking responses thereto. The OCC has, yet again, ignored the account information and deposition testimony in its possession. The objections are improper and the requests should be deemed admitted.

Request for Admission Nos. 16 and 17 and 22

In responding to these requests, the OCC also erroneously asserted the claim of privilege--both attorney-client and work product. When the OCC supplemented its responses, it claimed once again that Duke Energy Ohio allegedly “failed to respond to discovery and produce requisite documents” without providing any support for those conclusions. Finally, the OCC cited to the deposition transcript of Gail Lykins in denying Request Nos. 16 and 17 and also to the deposition transcript of Jeff Pitzer in denying Request No. 22. The problem for the OCC, however, is that the deposition testimony of Ms. Lykins and Mr. Pitzer does not remotely support the OCC’s baseless denials—neither person has personal knowledge that anyone *ever* contacted Duke Energy Ohio during the relevant time periods.[[7]](#footnote-7) In other words, they know nothing, but the OCC questionably cites to their deposition testimony to support its denials.[[8]](#footnote-8) These requests should be deemed admitted.

Request for Admission Nos. 18 and 19

The responses here reflect the OCC’s constant refrain–that only Duke Energy Ohio possessed the information needed to answer and, despite its efforts, the OCC did not have information sufficient to answer. The OCC’s alleged supplemental responses are no better – claiming the matters concern a genuine issue for hearing and that there is conflicting information. But the OCC knows–from sworn deposition testimony of the Complainant and his family members–that there is no conflict. Moreover, the claimed lack of information in respect of Request for Admission No. 19 cannot be reconciled with the OCC’s response to Request for Admission 43, wherein it alleges that Duke Energy Ohio did not provide electric service between November 15 and November 20. The answers do not comply with the rule and the responses should be deemed admitted.

Request for Admission No. 25

The objections are unfounded. The question here does not address the requirements that must be met before disconnection for non-payment may occur. The question is simply **whether** a utility company is authorized, under Commission regulation to disconnect for non-payment of services provided. The objection is merely a ruse, intended to avoid an admission of something the OCC knows to be true. The response should be deemed admitted.

Request for Admission No. 27

The OCC again objected on the basis that Duke Energy Ohio alone possessed the needed information, it had tried to obtain the information but the Company failed to respond to requests, and it is incapable of answering. The OCC also hopes to avoid this question by claiming that it is a genuine issue for hearing. The objections are unfounded. Again, the OCC has not identified for the Commission the relevant requests that Duke Energy Ohio purportedly failed to answer or its efforts in seeking responses. The OCC has, yet again, ignored the account information and deposition testimony in its possession. Quite simply, the OCC possesses the written notices and it is more than capable of admitting that they were provided. The objections are improper and the request should be deemed admitted.

Request for Admission No. 35

The OCC’s efforts to evade discovery are particularly evident here. The request is simple, seeking a comparison between a partial payment and the amount needed to prevent a disconnection. Whether the OCC believes that second amount is provided for under an unidentified Commission order on which it is relying is immaterial. Either the partial payment is equal to or greater than the amount needed to avoid disconnection for non-payment or it is not. The response should be deemed admitted.

Request for Admission Nos. 43 through 45

In responding to these requests, the OCC initially claimed, albeit improperly, the attorney-client and attorney work product privileges. As Duke Energy Ohio explained in its attorney’s letter to the OCC on October 22, the Company is entitled to inquire about evidence in the possession of and known to the OCC. None of these discovery requests call for the disclosure of information protected by the attorney-client privilege or work product doctrine. Hoping to cure its prior objections, the OCC provided supplemental responses. But the responses cannot be reconciled. If the Company were not providing electric service, as the OCC contends, it could not have violated laws pertaining to the provision of the service. The responses should be deemed admitted.

* 1. Interrogatories

The Commission should compel the OCC’s full and complete response to the following Interrogatories.

Interrogatory No. 2

Duke Energy Ohio is entitled to use interrogatories to “elicit facts, data, or other information known or readily available to” the OCC.[[9]](#footnote-9) That includes using interrogatories to ascertain the identity of people with knowledge of facts relevant to the proceedings. Asking a party to identify those people does not in any way invade confidential attorney-client communications, nor does it call for the disclosure of attorney work product. And, contrary to the OCC’s supplemental response, the OCC cannot confine its response to its witnesses and avoid providing a substantive response. To the extent the OCC knows, whether through discovery, its association with the Complainant’s counsel, or otherwise, of persons with relevant information, it must identify them here.

Interrogatory No. 5

The OCC cannot hide behind a baseless claim of privilege and have it both ways by stating that “Duke unlawfully disconnected electric service to the account in November 2011” without identifying any fact or document supporting that contention. Either the OCC has knowledge of relevant facts and documents or it does not. Duke Energy Ohio is entitled to know. And the supplemental response does not cure this deficiency – it merely references the otherwise non-substantive responses of the OCC.

Interrogatory No. 6

The OCC may not answer, only weeks before the hearing is scheduled the start, that “is still compiling information” and that “it is unclear whether Duke unlawfully disconnected gas service to the account in November 2011.” Neither the current nor former Complainant has provided any evidence that the gas service was disconnected, nor do any account-related documents in Duke Energy Ohio’s possession suggest otherwise. There is no actual conflict and the OCC must answer this interrogatory truthfully as required by O.A.C. 4901-1-19.

Interrogatory Nos. 7-10

In response to these narrow and specific interrogatories, the OCC actually claims that “Duke **may** have violated” the referenced provisions of the O.A.C. and Commission rules yet refuses to identify any facts and documents in support of those contentions. Duke Energy Ohio is entitled to all such information in the possession of the OCC now so that the Company may properly prepare for hearing.

Interrogatory No. 14

In this interrogatory, Duke Energy Ohio reasonably is trying to ascertain what facts support the OCC’s contention that “Duke did not follow all of the PUCO’s directives in the 2011 Winter Reconnection Order.” The OCC refuses to respond, claiming that the information is protected by attorney-client privilege and work product. This information has nothing to do with attorney-client communications or the thoughts and mental impressions of the OCC’s attorneys, meaning their work product. The OCC claims, in its purported supplemental response, that Duke Energy Ohio has the information or it is of public record. Such a response, however, confirms the OCC’s refusal to engage, in good faith, in the discovery process. Rather, as this response confirms, when the Company seeks admissions from the OCC on issues relevant to the proceeding, the OCC refuses to provide a substantive response, claiming it does not have the information and is otherwise incapable of answering. Yet when the Company seeks what information supports the claims of the OCC, the OCC maintains that information exists to support its claims but the Company needs to ascertain that information for itself. Duke Energy Ohio is entitled to a full and complete answer to this interrogatory.

Interrogatory No. 17

The OCC and Complainant apparently signed a joint defense agreement on October 7, 2015, and produced that written agreement in discovery. However, based on Complainant’s discovery responses, Duke Energy Ohio knows that Complainant and the OCC have communicated for months about this case. The OCC may not use a joint defense agreement dated October 7, 2015, to conceal discoverable information that predates the signing of that agreement. Further, it cannot hide behind such an agreement to refuse to identify meetings and persons in attendance at those meetings. Such information does not tread upon any privilege. See *In the Matter of the Application of the Ohio Edison Co.,* Case No. 10-176-EL-ATA, Entry, at (20) (January 27, 2011) (finding that a joint defense agreement signed by the OCC and other parties did not apply to documents gathered by parties or communications prior to its date of execution). Moreover, the OCC’s response that “[a] privilege log does not exist” does not suffice. The OCC should produce such a log so that the Commission and Duke Energy Ohio may inquire into the merits of the privilege claims, just as the OCC has done in other cases. *Id*. at (19).

* 1. Requests for Production of Documents

The Commission should compel the OCC’s full and complete responses to the following requests for production of documents.

Request No. 3

As noted above in connection with Interrogatory No. 17, documents that pre-date the signing of the joint defense agreement between Complainant and the OCC are clearly discoverable. Those documents do not fall under any attorney-client privilege. To the extent the OCC claims otherwise, must provide a privilege log and bear the burden of demonstrating how each document withheld from production is protected by a recognized privilege. Only then can the Commission adequately rule on the OCC’s baseless objections.

Request No. 4

The OCC cannot conceal relevant recorded or written witness statements under the guise of an objection based on attorney-client privilege, attorney work product doctrine, or that the request is “vague” or “overly broad.” Duke Energy Ohio is entitled to discover what documents, if any, the OCC possesses. Again, if the OCC contends certain witness statements are privileged, the OCC must overcome its burden of demonstrating how the privilege applies and produce a privilege log so that Duke Energy Ohio may ascertain the grounds upon which the privilege objection is based.

The foregoing information requested by Duke Energy Ohio is the proper subject of specific discovery requests propounded by the Company to the OCC. The information is directly relevant to the facts and issues in these proceedings and, therefore, is discoverable from the OCC, another party which chose to intervene. See *In the Matter of the Complaint of Chad Kister*, Case No. 11-3467-TP-CSS, Entry, at p.2 (February 11, 2013) (granting motion to compel discovery); *In the Matter of the Complaint of Sherron Neal-Putman*, Case No. 07-690-EL-CSS, Entry, at p.3 (January 18, 2008)(ordering complainant to answer respondent’s interrogatories and that requests for admission to be partially deemed admitted). If the OCC fails to comply with and respond to the Company’s discovery requests, the Commission should dismiss the OCC and bar the OCC from participating in these proceeding. O.A.C. 4901-1-23(F)(4). See, *In the Matter of the Complaint of Lewis C. Zajac*, Case No. 10-2310-EL-CSS, Entry, at p.2 (July 11, 2011)(granting motion to compel discovery); *In the Matter of Sandra Kanieski dba Iron Horse Saloon*, Case No. 11-755-EL-CSS, Entry, at p. 2 (May 18, 2011)(granting motion to compel discovery).

WHEREFORE, Duke Energy Ohio, Inc. respectfully moves that the Commission grant the following relief:

1. Compel the Office of the Ohio Consumers’ Counsel to respond fully to Request for Admission Nos. 1, 3-8, 12-22, 25, 27-28, 31, 33, 35, 43-45, or deem those requests admitted as a matter of law for purposes of these proceedings;
2. Compel the Office of the Ohio Consumers’ Counsel to respond fully to Interrogatory Nos. 2, 5, 6, 7-10, 14 and 17;
3. Compel the Office of the Ohio Consumers’ Counsel to respond fully to Request for Production of Documents Nos. 3 and 4; and
4. Grant Duke Energy Ohio such other, further and different relief as the Commission deems just and proper.

Respectfully submitted,

/s/ Robert A. McMahon

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**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing was served via email on this 3rd day of November, 2015, upon the following counsel of record:

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| --- | --- |
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/s/ Robert A. McMahon

1. Notably, the OCC was too busy to respond to Duke Energy Ohio’s legitimate discovery issues but had ample time to prepare and file a ten-page reply memorandum in support of Complainant’s Second Motion to Amend the Complaint. See, Reply to Duke’s Memorandum in Opposition to Complainant’s Second Motion to Amend by the Office of the Ohio Consumers’ Counsel, filed 10/30/15. [↑](#footnote-ref-1)
2. O.A.C. 4901-1-16. [↑](#footnote-ref-2)
3. Id. [↑](#footnote-ref-3)
4. O.A.C. 4901-1-22(C). [↑](#footnote-ref-4)
5. The OCC’s initial and supplemental discovery responses are attached as Exhibits A and E, respectfully, to the Affidavit of Robert A. McMahon. [↑](#footnote-ref-5)
6. See, Gail Lykins depo. at 20, 23, 54; Jeffrey Pitzer depo. at 27, 38 [↑](#footnote-ref-6)
7. See, Gail Lykins depo. at 81; Jeffrey Pitzer depo. at 43 [↑](#footnote-ref-7)
8. Notably, the OCC never cites to a specific page of either deposition transcript. The Commission should not accept the OCC’s unsubstantiated deposition citations without question because the deposition testimony of both the current and former Complainant flatly refutes the OCC’s arguments and demonstrates that Complainant does not have any evidence to support his claims against Duke Energy Ohio. [↑](#footnote-ref-8)
9. O.A.C. 4901-1-19(B). [↑](#footnote-ref-9)