

FILE

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Application of)
Duke Energy Ohio for Approval of an) Case No. 08-920-EL-SSO
Electric Security Plan.)

In the Matter of the Application of)
Duke Energy Ohio for Approval to) Case No. 08-921-EL-AAM
Amend Accounting Methods.)

In the Matter of the Application of)
Duke Energy Ohio, Inc., for Approval of)
a Certificate of Public Convenience and) Case No. 08-922-EL-UNC
Necessity to Establish an Unavoidable)
Capacity Charge(s).)

In the Matter of the Application of)
Duke Energy Ohio, Inc., for Approval to) Case No. 08-923-EL-ATA
Amend its Tariff.)

**MOTION TO STRIKE PARTS OF PAUL SMITH'S SECOND SUPPLEMENTAL
TESTIMONY FOR DUKE ENERGY-OHIO
BY
THE OFFICE OF THE OHIO CONSUMERS' COUNSEL**

The Office of the Ohio Consumers' Counsel ("OCC") moves the Public Utilities Commission of Ohio ("PUCO" or "Commission") to strike portions of the Second Supplemental Testimony of Paul G. Smith filed by Duke Energy-Ohio ("Duke" or the "Company"), for multiple reasons that include the inappropriate disclosure of confidential settlement discussions.¹ Duke's Second Supplemental Testimony of Paul Smith includes both inaccurate representations and revelations of statements that, if made in any form at all, would have been made during negotiations. Such uses of settlement discussions are not permitted under Ohio Adm. Code 4901-1-26(E) and Ohio Rule of

¹ Ohio Adm. Code 4901-1-12.

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Evidence 408. Furthermore, these portions of Duke's Second Supplemental Testimony of Paul Smith should also be stricken from the record because such evidence is barred by the parol-evidence rule and certain portions should be stricken according to the rule against hearsay, Ohio Rule of Evidence 802.

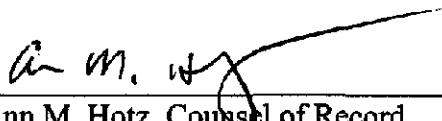
Specifically, OCC moves to strike the following portions of Duke's Second Supplemental Testimony of Paul Smith:

1. Page 10, lines 11-13: At the sentence beginning with "This provision was...."
2. Page 12, lines 20-22, through page 13, lines 1-15: At the sentence on page 12 beginning "OCC does not dispute...."
3. Page 14, lines 8-12: At the sentence beginning with "All Parties to...."

The reasons why this Motion to Strike should be granted are fully set forth in the attached Memorandum in Support.

Respectfully submitted,

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In the Matter of the Application of Duke Energy Ohio for Approval to Amend Accounting Methods.)	Case No. 08-921-EL-AAM
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In the Matter of the Application of Duke Energy Ohio, Inc., for Approval of a Certificate of Public Convenience and Necessity to Establish an Unavoidable Capacity Charge(s).)	Case No. 08-922-EL-UNC
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In the Matter of the Application of Duke Energy Ohio, Inc., for Approval to Amend its Tariff.)	Case No. 08-923-EL-ATA
)	

MEMORANDUM IN SUPPORT

I. INTRODUCTION

Duke filed a stipulation, signed by OCC, Duke, the PUCO Staff and others, on October 27, 2008. The stipulation includes footnote 11 that states:

The Parties agree that OCC shall have the right to carve out for litigation the issue of by-passability of charges and shopping credits for residential government aggregation customers.²

On October 28, 2008, Duke filed the Second Supplemental Testimony of Paul G. Smith, with the purpose of discussing and supporting “the reasonableness of a Stipulation and

² Stipulation at 32, fn 11.

Recommendation.”³

In that testimony Mr. Smith made references to statements, whether or not accurately presented, that would have been made during the negotiations. This testimony appears on page 10, lines 11-13, regarding what Mr. Smith claims were reasons supposedly for what was “specifically negotiated....” This testimony also appears on page 12, lines 20-22, through page 13, lines 1-15, regarding what Mr. Smith claims “was thoroughly discussed during negotiations...” and “Specifically, it was discussed...”—which are quoted in the footnote below.⁴ This testimony further appears on page 14, lines 8 through 12, where Mr. Smith claims what supposedly “All Parties to the Stipulation ...recognized....”⁵ These statements in Duke’s Second Supplemental Testimony of Paul Smith are the subject of this motion and the Commission should strike those lines from the record. This written motion should serve convenience and efficiency in resolving this matter at the hearing on November 10, 2008.

³ Second Supplemental Testimony of Paul G. Smith at 1 (October 28, 2008).

⁴ Mr. Smith’s specific statement beginning on page 12, line 20, is “OCC does not dispute the market price which returning residential governmental aggregation consumers must pay, but does dispute the price that residential governmental aggregation consumers must pay while served by the alternative supplier (as specified in footnote 11 of the Stipulation).” On page 13, beginning on line 3, the question “Does the Stipulation and/or the other Stipulating Parties Support The OCC’s Position?” is answered with “No, they do not. This issue was thoroughly discussed during negotiations, and although the Stipulating Parties ultimately agreed to specific terms and conditions for non-residential consumers, it was decided by all Stipulating Parties except OCC that similar terms would not be in the best interest of DE-Ohio’s residential consumers. Specifically, it was discussed that the benefit to residential consumers of avoiding Rider SRA-SRT and receiving the shopping credit would provide minimal financial benefit that does not outweigh the risks of price volatility and system reliability that could occur should the residential consumers desire to return to DE-Ohio for supply service. The imbalance of benefits and risks associated with the OCC’s proposal was considered unacceptable to all of the other Stipulating Parties.”

⁵ Mr. Smith’s statement on those lines is “All parties to the Stipulation, excluding OCC, recognized that because the potential risks to system reliability so significantly outweighed the benefits of avoiding a relatively small charge, it was in the best interests of residential consumers that they not be allowed to fall into that unenviable position.”

II. ARGUMENT

A. Duke Should Not Be Permitted to Testify Regarding Offers to Compromise under Ohio Adm. Code 4901-1-26(E) and Ohio Rule of Evidence 408.

Even if Mr. Smith's characterization of OCC's position was accurate (which it is not), Mr. Smith's characterization of what OCC said—or what other parties said or thought—during the negotiations is not admissible evidence. Ohio Adm. Code 4901-1-26(E) provides that:

Evidence of (1) furnishing or offering or promising to furnish, or (2) accepting or offering or promising to accept a valuable consideration in compromising or attempting to compromise a disputed matter in a commission proceeding is not admissible to prove liability for or invalidity of the dispute. Evidence of conduct or statements made in compromise negotiations is likewise not admissible. This rule does not require the exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations. This rule also does not require exclusion when the evidence is offered for another valid purpose.

In addition, Ohio Rule of Evidence 408 precludes admission of "Evidence of conduct or statements made in compromise negotiations."

Ohio Adm. Code 4901-1-26(E) and Ohio Rule of Evidence 408 codify the expectation of confidentiality that parties rely upon to make candid statements about their positions. Parties' ability to rely upon that confidentiality is necessary for productive negotiations to occur. Duke's statements beginning constitute a breach of the confidentiality that is crucial for negotiations. In order to encourage negotiations as a means of resolving controversies among parties in the future, the Commission should certainly censure and be disapproving of breaches of confidentiality in testimony.

B. The Commission Should Strike Portions of the Second Supplemental Testimony of Paul G. Smith Based on the Parol-Evidence Rule.

The Ohio Supreme Court has always held that “The intent of the parties to a contract is presumed to reside in the language they chose to employ in the agreement.”⁶ The parol-evidence rule is a principle of common law providing that “a writing intended by the parties to be a final embodiment of their agreement cannot be modified by evidence of earlier or contemporaneous agreements that might add to, vary, or contradict the writing.”⁷ The rule “operates to prevent a party from introducing extrinsic evidence of negotiations that occurred before or while the agreement was being reduced to its final written form,”⁸ and it “assumes that the formal writing reflects the parties’ minds at a point of maximum resolution and, hence, that duties and restrictions that do not appear in the written document * * * were not intended by the parties to survive.”⁹

Accordingly, OCC’s only agreement with regard to residential aggregation customers is that which is literally spelled out in the stipulation. The only language in that agreement addressing residential aggregation is in footnote 11 on page 32:

The Parties agree that OCC shall have the right to carve out for litigation the issue of by-passability of charges and shopping credits for residential government aggregation customers.

⁶ *Kelly v. Medical Life Insurance Company*, 31 Ohio St. 3d 130 (June 24, 1987) Paragraph 1 of Syllabus.

⁷ *Bellman v. American International Group, et al.*, 113 Ohio St. 3d 323, 2007-Ohio-2071, 865 N.E.2d 853, ¶7, quoting Black’s Law Dictionary (8th Ed.2004) 1149; see, also, *Galmish v. Cicchini* (2000), 90 Ohio St.3d 22, 26, 2000 Ohio 7, 734 N.E.2d 782, quoting 11 Williston on Contracts (4th Ed.1999) 569-570, Section 33:4.

⁸ Id. quoting Black’s Law Dictionary at 1149; see, also, *Ed Schory & Sons, Inc. v. Francis* (1996), 75 Ohio St.3d 433, 440, 1996 Ohio 194, 662 N.E.2d 1074,

⁹ Id. quoting Black’s Law Dictionary at 1150.

But Mr. Smith did not simply rely on that language. Rather he asserted that “OCC does not dispute the market price which returning residential governmental aggregation customers must pay.”¹⁰ Because the clear language of the stipulation does not speak to that issue, the Commission should not rely upon one party’s view of an opposing party’s position and therefore Mr. Smith’s assertion about OCC’s view of the market price should be stricken.

C. Duke’s Discussion of Other Parties’ Interpretation Of The Terms Of a Stipulation Is Inadmissible as Hearsay Evidence, Especially When a Party Did Not Make the Statement.

Mr. Smith’s statements are hearsay under Ohio Rule of Evidence 802 because it is:

A statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.¹¹

In particular, Mr. Smith’s assertions about other stipulating parties’ decisions or negotiations, appearing on: page 10, lines 11-13; page 13, lines 3-15; and page 14, lines 8-12, are hearsay under Ohio Rule of Evidence 802. Thus, the testimony should be stricken for that reason as well.

III. CONCLUSION

The Commission should not countenance revelations of confidential negotiations, and all the more should disapprove such disclosures that are not even accurate characterizations. Duke’s use of statements made during compromise should be stricken from Mr. Smith’s testimony as not admissible under Ohio Adm. Code 4901-1-26(E) and

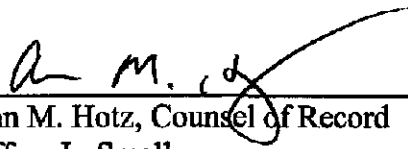
¹⁰ Second Supplemental Testimony of Paul G. Smith (October 28, 2008) at 12.

¹¹ Ohio Rule of Evidence 801(C).

Ohio Rule of Evidence 408. Moreover, the Commission should strike the portions of the Mr. Smith's testimony referenced above that would have the Commission interpret the stipulation outside its clear language, which is contrary to the parole-evidence rule as established by Ohio case law. Finally, Duke's testimony about other parties' views and perspectives of the stipulation are hearsay and not admissible under Ohio Rule of Evidence 802.

Respectfully submitted,

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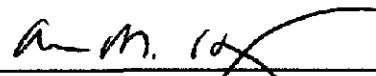


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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Motion to Strike by the Office of the Ohio Consumers' Counsel was served electronically and by first class United States Mail, postage prepaid, to the persons listed below, on this 10th day of November, 2008.



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