BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of Duke Energy Ohio for Authority to Establish a Standard Service Offer Pursuant to Section 4928.143, Revised Code, in the Form of an Electric Security Plan, Accounting Modifications and Tariffs for Generation Service.	)	Case No. 14-841-EL-SSO
In the Matter of the Application of Duke Energy Ohio for Authority to Amend its Certified Supplier Tariff, P.U.C.O. No. 20.	)	Case No. 14-842-EL-ATA

DUKE ENERGY OHIO, INC.'S REPLY TO
THE OFFICE OF THE OHIO CONSUMERS' COUNSEL'S
REPLY TO DUKE ENERGY OHIO'S MOTION TO COMPEL

On September 22, 2014, Duke Energy Ohio, Inc., (Duke Energy Ohio or Company) filed a motion with the Public Utilities Commission of Ohio (Commission) for an order, pursuant to O.A.C. 4901-1-23, compelling the Office of the Ohio Consumers' Counsel (OCC) to respond to discovery requests (Motion). The basis for the motion is that the OCC has refused to provide substantive responses to certain discovery requests propounded upon it by Duke Energy Ohio, claiming that such responses are privileged from discovery under the joint defense or common interest doctrine. More specifically, Duke Energy Ohio maintains that the OCC has failed to demonstrate a legitimate interest to support its claim of privilege. In responding to the Motion, the OCC criticizes Duke Energy Ohio's reliance upon allegedly outdated and thus presumably unpersuasive decisions. But as discussed herein, the authority cited by the OCC does not alter the fact that it has not demonstrated the existence of the requisite interest. The claim that the OCC, the

Ohio Manufacturers' Association (OMA) and the Ohio Partners for Affordable Energy (OPAE) are united in the desire for lower utility bills[1] cannot, under applicable law, support a claim of privilege.

In its Memorandum in Opposition to the Motion, the OCC argues that Duke Energy Ohio has misstated the law and, in doing so, would lead the Commission to believe that there is not a common interest doctrine in Ohio. The OCC further maintains that Duke Energy Ohio has ignored established Ohio precedent in an effort to persuade the Commission that there is only an identical interest doctrine. The OCC misreads the Motion.

Duke Energy Ohio does not dispute the existence of the common interest doctrine. What is critical to the existence of the doctrine, however, is the interest that supports it. As Ohio courts have found, the doctrine is to be applied narrowly.[2] And, contrary to the OCC's suggestion, the decision in *Libbey Glass, Inc. v. Oneida*, 197 F.R.D. 342 (N.D. Ohio 1999) is significant to the acceptance of this doctrine in Ohio as this is the case in which a federal district court recognized the common interest arrangement. In doing so, the federal court first accepted the definition of the common interest arrangement as one that "permits the disclosure of a privileged communication without waiving the privilege, provided the parties have 'an identical legal interest with respect to the subject matter of the communication.'"[3] And from this definition, the court further observed that there were two different views – one adopting a more expansive view of the arrangement[4] and another reflecting a more narrow view.[5] The Ohio federal court adopted

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[1] In its Memorandum in Opposition to its Motion to Compel, the OCC confirms that the purported interest that binds it to the OMA and OPAE is reasonably priced electric service and a reasonable procedural schedule. See Memorandum in Opposition, at pg. 6.

[2] *See generally, Libbey Glass, Inc.*, 197 F.R.D. 342, 348 (N.D. Ohio 1999); *Cigna Ins. Co., v. Cooper Tires and Rubber, Inc.*, 2001 U.S. Dist. LEXIS 7546, *5 (N.D. Ohio 2001); and *Buckeye Corrugated, Inc., v. The Cincinnati Ins. Co.*, 2013-Ohio-3508, ¶16 (Summit Cty. 2013).

[3] *Libbey Glass, Inc. v. Oneida*, 197 F.R.D. at 347.

[4] Id, at 348.

[5] Id.

the narrow view, finding that "confidential communications can be shared only if both parties have more than 'merely *concurrent* legal interests.' Instead, the parties must have 'a *common legal*, as opposed to commercial interest.'"[6] As the court reasoned, the narrow, or restrictive, view "accommodates the objective of continued confidentiality more effectively than the expansive unrestrictive approach...."[7]

Ohio court's continued adherence to the narrow view of the common interest arrangement has not changed. *See generally, North American Rescue Products, Inc., v. Bound Tree Medical, LLC*, 2010 U.S. Dist. LEXIS 45302, *11 (S.D. Ohio 2010)(commercial interest "insufficient to establish the applicability of the common interest exception"); and *Cigna Ins. Co. v. Cooper Tires and Rubber, Inc.*, 2001 U.S. Dist. LEXIS 7546, *4-5 (N.D. Ohio 2001). Indeed, even the Dayton Power & Light proceeding to which the OCC refers in a footnote confirms that broad claims of a common interest against the utility are insufficient when reviewing a claim of privilege.[8]

The cases on which the OCC relies do not alter this conclusion. The OCC offers the decision of *State ex rel. Bardwell v. Cordray*, 181 Ohio App.3d 661 (10th Dist. 2009) only for the purpose of defining what the federal magistrate called the "so-called 'common interest privilege.'"[9] The federal magistrate did not reject the narrow view of this doctrine, as adopted by members of the federal bench. Another case on which the OCC relies in criticizing Duke Energy Ohio's legal interpretations is *Buckeye Corrugated, Inc. v. The Cincinnati Insurance Company*, 2013-Ohio-3508 (Summit Cty. 2013). This case is yet just another to define the common interest doctrine in general terms and does not erode the Ohio courts' prior pronouncements. Notably,

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[6] Id. Internal citations omitted.
[7] Id, at 349. Emphasis in original.
[8] *In the Matter of the Application of The Dayton Power and Light Company for Approval of its Electric Security Plan*, Case No. 12-426-EL-SSO, *et al.*, Transcript of Proceedings, at pg. 90.
[9] *State ex rel. Bardwell*, 181 Ohio App.3d at 680.

and as referenced in Duke Energy Ohio's Motion, this case confirms that the common interest doctrine must be narrowly applied. And in reaching this conclusion as to the narrow application, the Summit County Court of Appeals relied upon *Cigna Ins. Co. v. Cooper Tires and Rubber, Inc.*, a case in which the federal district court stated that, "[t]o be found to have such 'common interest,' the claimant of the privilege must show that it and the party to whom it made disclosure have 'an identical legal interest with respect to the subject matter of the communication.'"[10] Thus, even the case upon which the OCC relies has its basis in prior decisions, that are not outdated and of no importance here.

The remaining cases cited by the OCC again generally speak to the existence of the doctrine, which Duke Energy Ohio has acknowledged in its Motion, and the fact that the doctrine is limited in its application, which Duke Energy Ohio has also acknowledged.

In its Memorandum in Opposition, the OCC maintains that the Commission has rejected the contention that parties must have an identical legal interest on which to rely for purposes of the common interest doctrine. In doing so, the OCC cites to a FirstEnergy proceeding in which a motion to compel was filed against it. In that proceeding, it was determined that any communications signed before the execution of a joint defense agreement were not privileged from discovery. The attorney examiner in that proceeding did not address documents that may have been generated after a joint defense agreement was signed as they were not the subject of the discovery dispute and related appeals.[11] Therefore, the decisions in the FirstEnergy proceeding do not confirm that a more expansive view of the common interest doctrine has been

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[10] *Cigna Ins. Co., v. Cooper Tires and Rubber, Inc.*, 2001 U.S. Dist. LEXIS 7546, *4 (N.D. Ohio 2001).

[11] *In the Matter of the Application of Ohio Edison Company, The Cleveland Electric Illuminating Company, and the Toledo Edison Company for Approval of a New Rider and Revision to an Existing Rider*, Case No. 10-176-EL-ATA, The OCC's Interlocutory Appeal, Attachment A, Transcript of Proceedings (Jan. 12, 2011). See also, Entry, at pg. 8 (Jan. 27, 2011)(Commission's reference to a joint defense agreement concerns documents produced prior to the execution of same).

adopted by the Commission. Indeed, the FirstEnergy decisions do not provide guidance on what interest may be sufficient to support the claimed privilege as that issue simply was not before the Commission.

Contrary to the OCC's argument, the common interest doctrine is not broadly construed. In fact, no Ohio cases cited by the OCC support such a conclusion and the overwhelming consensus in Ohio is one that adopts a narrow application.

With this narrow application in mind, it is apparent that the OCC has not demonstrated an identical legal interest or even the existence of a common legal strategy as between counsel for residential and non-residential customers. It has, instead, suggested that the common thread sufficient to establish a privilege from discovery is the desire of three customer groups for lower prices.[12] Given that rate design and rate allocations as between and among various classes of customers can have different impacts (*e.g.*, a higher allocation to residential customers results in non-residential customers paying less), this generic statement about wanting to pay less for power is insufficient in supporting the application of the common interest doctrine. It reflects nothing more than a general desire of any customer to want to pay less for any product or service than they may otherwise be asked to pay.

The OCC is the proponent of a privilege here. It is claiming that certain communications are shielded from discovery because of the existence of a joint defense agreement. But as Ohio courts have found, the common interest doctrine requires the existence of more than "concurrent legal interests."[13] And such a requirement is especially important where the parties to a joint defense agreement represent different customer classes and thus likely have divergent views on

[12] OCC Memorandum in Opposition, at pp. 6-7.
[13] *Cigna Ins. Co., v. Cooper Tires and Rubber, Inc.*, 2001 U.S. Dist. LEXIS 7546, *4 (N.D. Ohio 2001).

some issues in these proceedings. The OCC, however, has failed to establish a privilege and, as such, should be compelled to answer discovery.

For the reasons stated herein and in its Motion to Compel, Duke Energy Ohio respectfully requests that the Commission grant its Motion.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Motion of Duke Energy Ohio, Inc., to Compel Discovery was served on the following parties this 1st day of Oct 2014, by regular U.S. mail, overnight delivery or electronic delivery.

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