

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Application of Duke)	
Energy Ohio for Authority to Establish a)	Case No. 14-841-EL-SSO
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.)	

In the Matter of the Application of Duke)	
Energy Ohio for Authority to Amend its)	Case No. 14-842-EL-ATA
Certified Supplier Tariff, P.U.C.O.)	
No. 20.)	

**THE OFFICE OF THE OHIO CONSUMERS' COUNSEL'S
REPLY TO DUKE ENERGY OHIO'S MEMORANDUM CONTRA
MOTION FOR SANCTIONS AND REQUEST FOR FORFEITURE**

I. INTRODUCTION

In its Motion for Sanctions and Request for Forfeiture ("Motion") filed in these proceedings on August 24, 2015, the Office of the Ohio Consumers' Counsel ("OCC") relied on two simple, and settled, legal principles:

1. The Public Utilities Commission of Ohio's ("PUCO" or "Commission") orders are effective immediately when entered into its journal. R.C. 4903.15.
2. A public utility shall comply with a PUCO order, direction or requirement as long as they remain in force, or be subject to sanctions and forfeitures for failure to do so. R.C. 4905.54.

The facts underlying OCC's Motion are equally clear and settled:

1. On April 2, 2015, the PUCO entered in its journal an order from this proceeding ("Order"). The Order required Duke Energy Ohio ("Duke") to "pursue transfer of the OVEC contractual entitlement or to otherwise pursue divestiture of

the OVEC assets,” and to file a status report of its efforts by June 30 of each year.¹

2. Although Duke filed a “status report” on June 30, 2015, it admitted in the report that it “is not now in the process of attempting to divest its interest in OVEC.” In addition, it gave its reasoning: “Because Duke Energy Ohio believes that the Commission cannot dictate its investment in, or contractual relationship with, OVEC...”²

Duke’s “status report” makes clear that it did not pursue divestiture by June 30, 2015 – and that it has no intention of doing so. Meanwhile, Duke is accepting all of the Order’s benefits that inure to it. Duke’s violation is a matter of grave concern for the PUCO and Ohio’s ratepayers. The PUCO simply cannot permit a public utility under its jurisdiction to pick and choose the portions of a Commission order with which it willing to comply. That’s precisely why the General Assemble empowered the PUCO to impose sanctions and forfeiture on a utility that does not comply with its orders.

Accordingly, OCC renews its request that the PUCO (1) find that Duke has violated its Order, (2) order Duke to take immediate steps to pursue the transfer or divestiture of its OVEC entitlement, (3) order Duke to file status reports of its efforts on a monthly basis, (4) seek forfeitures against Duke pursuant to R.C. 4905.54, and (5) take whatever other steps deemed necessary to enforce its Order.

¹ Order at 48.

² See Motion, Att. A.

II. DUKE IS NOT COMPLYING WITH THE PUCO'S ORDER AND SEEKS AN INDIVIDUAL EXCEPTION FROM R.C. 4903.15 AND 4905.54.

In its memorandum contra OCC's Motion, Duke does not argue that the OCC has misstated the applicable law (for good reason), or that it actually has pursued transfer or divestiture of the OVEC assets (it hasn't). Rather, it contends that it should be excepted from R.C. 4903.15 and 4905.54 because (1) it has an application for rehearing pending, and (2) the PUCO "did not affix a date certain by which Duke Energy Ohio must undertake to or complete the transfer or divestiture."³ Neither argument has merit.

A. The Duty to Comply Immediately with a Commission Order is Not Stayed by Filing an Application for Rehearing, and Duke is Not Entitled to Special Treatment under the Law.

In its Motion, OCC succinctly explained the long-settled law regarding a public utility's duty to comply with a PUCO order immediately, even during the pendency of rehearing or appeal, despite the hardships it may cause.⁴ See, e.g., *Keco Industries, Inc. v. Cincinnati & Suburban Bell Telephone Co.*, 166 Ohio St., 254, 258, 141 N. E.2d, 465 (1957) ("***under the statutes of Ohio the utility has no choice but to collect the rates set by the order of the commission" absent a stay of execution). Duke certainly is aware of *Keco* and its progeny,⁵ but did not seek to obtain a stay – thus, the Order became effective on April 2, 2015, and remains in force. R.C. 4905.54

Despite this black letter law, Duke complains that compliance with the Order will jeopardize its plans to implement its proposed Rider PSR and, further, will prejudice its

³ Duke Memorandum Contra at 5.

⁴ Motion at 4.

⁵ See, also, *In the Matter of the Application of Ohio Power Company for a Limited Waiver of Ohio Adm. Code 4901:1-35-10*, Case No. 15-386-EL-WVR, Entry (April 22, 1015) ("Ohio Power"). See, also, *In the Matter of the Fuel Adjustment Clauses for Columbus Southern Power Company and Ohio Power Company*, Case Nos. 09-872-EL-FAC, et al, Entry on Rehearing (April 11, 2012) (finding the PUCO's order effective when entered regardless of the pendency of other proceedings).

position in this and related appellate proceedings. *Keco* and the Ohio Supreme Court find no sympathy with arguments of hardship, as R.C. 4903.15 consistently has been strictly enforced. Indeed, R.C. 4903.15 has been construed such that, even if the PUCO's order increasing rates is subsequently reversed, the utility has no obligation to refund over-payments received from the time the order was entered, which in some cases amount to hundreds of millions of dollars.⁶

The facts are straightforward: Duke proposed Rider PSR. The Commission conditionally approved it. Duke was ordered to pursue the transfer or divestiture of the OVEC assets. Duke did not seek to stay the Order. The Order remains effective during rehearing⁷ and appeal. The law provides Duke no special treatment.

B. Duke's Obligation to "Pursue" Transfer or Divestiture of the OVEC Assets was Fixed Immediately Upon the Entry of the Order in the Commission's Journal.

Duke argues that the Commission "did not affix a date certain by which Duke Energy Ohio must undertake to or complete the transfer or divestiture." Duke is wrong.

A PUCO order is effective immediately, as provided in R.C. 4903.15.

Accordingly, Duke's obligation to "pursue transfer of the OVEC contractual entitlement

⁶ See, *In Re Columbus Southern Power Company, et al*, 138 Ohio St.3d 448, 8 N.E.3d 863 (under the interpretation that R.C. 4903.15 prevents retroactive ratemaking, the utility was permitted to retain \$368 million in over-collections after an order's rates were found to be unlawful.) Short on law, Duke claims in its memorandum contra that OCC's Motion is motivated by "retribution." Duke Memorandum Contra at 6. To the contrary, OCC is motivated to avoid the precedential effect of Duke's actions – which would permit public utilities to decide for themselves which portions of an order to obey.

⁷⁷ Duke faults OCC for not seeking rehearing on the OVEC issues. Duke Memorandum Contra at 4. But OCC prevailed on this issue when the PUCO ordered Duke to pursue transfer or divestiture. It was Duke that was required to seek rehearing of the Commission's determination, which it did – but rehearing does not stay the Order entered.

Duke rehashes its interpretation of the stipulation in its second electric security plan case, Case No. 11-3549-EL-SSO ("ESP II"). See Duke Memorandum Contra at 2-4. Its interpretation was not accepted in the Order and is irrelevant at this point. In this proceeding, the PUCO found that it did not intend, in approving the stipulation in ESP II, to exempt the OVEC facilities from Duke's commitment to transfer or divest its generating facilities. Order at 48. The Order then directed Duke to pursue transfer or divestiture and report on its efforts by June 30 of each year. Duke has failed to pursue transfer or divestiture as ordered.

or to otherwise pursue divestiture of the OVEC assets” attached immediately. Duke was required to begin pursuing the transfer or divestiture on April 2, 2015, the date of the Order, and was explicitly required to report on its progress beginning June 30, 2015. Duke’s argument must be rejected out of hand.⁸

III. CONCLUSION

This Motion is not a difficult one to resolve. The Commission’s Order directed Duke to pursue the transfer or divestiture of OVEC assets effective April 2, 2015 and to report on its efforts by June 30, 2015. Duke timely filed its “report,” but failed to comply with the Commission’s directive, stating that “Duke Energy Ohio believes that the Commission cannot dictate its investment in, or contractual relationship with, OVEC.”⁹

OCC is greatly concerned with the precedential effect of Duke’s actions, and the ability of public utilities to choose which portions of a PUCO order they will respect. Considering Duke’s non-compliance with the Order, OCC renews its request for the PUCO to (1) find that Duke has violated its Order, (2) order Duke to take immediate steps to pursue the transfer or divestiture of its OVEC entitlement, (3) order Duke to file status reports of its efforts on a monthly basis, (4) seek forfeitures against Duke pursuant to R.C. 4905.54, and (5) take whatever other steps deemed necessary to enforce its Order.

⁸ Duke attempts to justify its position that the PUCO set no date for Duke to pursue transfer or divestiture of the OVEC assets by stating:

Any inclusion of temporal references in the April 2 order serves only to distinguish the prior ESP and unstated intentions concerning same from the Commission’s express determinations in these proceedings. [Duke Memorandum Contra at 5.]

Notwithstanding this incomprehensible assertion, OCC trusts the Commission will recognize that the only issue in this proceeding is the Commission’s directive in its Order. Duke’s prior ESP is irrelevant. The Order required Duke to pursue transfer or divestiture of the OVEC assets, its obligation attached effective April 2, 2015.

⁹ Motion at Att. A.

Respectfully submitted,

BRUCE J. WESTON.
OHIO CONSUMERS' COUNSEL

/s/ Maureen R. Grady
Maureen R. Grady, Counsel of Record
(Reg. No. 0020847)
Joseph P. Serio
(Reg. No. 0036959)
Assistant Consumers' Counsel

Office of the Ohio Consumers' Counsel
10 West Broad Street, Suite 1800
Columbus, Ohio 43215-3485
(614) 466-9567 — Grady
(614) 466-9565 — Serio
Maureen.grady@occ.ohio.gov
(will accept service via email)
Joseph.serio@occ.ohio.gov
(will accept service via email)

CERTIFICATE OF SERVICE

I hereby certify that a copy of this Reply to Duke Energy Ohio's Memorandum Contra was served on the persons stated below via electronic transmission, this 4th day of September 2015.

/s/ Maureen R. Grady
Maureen R. Grady
Assistant Consumers' Counsel

SERVICE LIST

Steven.beeler@puc.state.oh.us
Thomas.lindgren@puc.state.oh.us
Ryan.orourke@puc.state.oh.us
dboehm@BKLawfirm.com
mkurtz@BKLawfirm.com
jkylercohn@BKLawfirm.com
Schmidt@sppgrp.com
Judi.sobecki@aes.com
Bojko@carpenterlipps.com
cmooney@ohiopartners.org
stnourse@aep.com
mjsatterwhite@aep.com
yalami@aep.com
asonderman@keglerbrown.com
mkimbrough@keglerbrown.com
hussey@carpenterlipps.com
mhpetricoff@vorys.com
mjsettineri@vorys.com
glpetrucci@vorys.com
dmason@ralaw.com
mtraven@ralaw.com
rchamberlain@okenergylaw.com
mcastiglione@stblaw.com
bchisling@stblaw.com

Attorney Examiner:

Christine.pirik@puc.state.oh.us
Nicholas.walstra@puc.state.oh.us

Amy.Spiller@duke-energy.com
Elizabeth.watts@duke-energy.com
Rocco.dascenzo@duke-energy.com
Jeanne.Kingery@duke-energy.com
haydenm@firstenergycorp.com
jmcdermott@firstenergycorp.com
scasto@firstenergycorp.com
joliker@igsenergy.com
mswhite@igsenergy.com
joseph.clark@directenergy.com
sam@mwncmh.com
fdarr@mwncmh.com
mpritchard@mwncmh.com
tdougherty@theOEC.org
dhart@douglasshart.com
cloucas@ohiopartners.org
schler@carpenterlipps.com
gpoulos@enernoc.com
swilliams@nrdc.org
tobrien@bricker.com
ghull@eckertseamans.com
jvickers@elpc.org
tony.mendoza@sierraclub.org
rsahli@columbus.rr.com
dstinson@bricker.com
dborchers@bricker.com

This foregoing document was electronically filed with the Public Utilities

Commission of Ohio Docketing Information System on

9/4/2015 4:16:33 PM

in

Case No(s). 14-0841-EL-SSO, 14-0842-EL-ATA

Summary: Reply Office of the Ohio Consumers' Counsel's Reply to Duke Energy Ohio's Memorandum Contra Motion for Sanctions and Request for Forfeiture electronically filed by Ms. Deb J. Bingham on behalf of Grady, Maureen R. Ms.