

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Complaint of)	
Jeffrey Pitzer)	Case No. 15-298-GE-CSS
)	
Complainant,)	
)	
v.)	
)	
Duke Energy Ohio, Inc.)	
)	
Respondent.)	

**MEMORANDUM CONTRA DUKE ENERGY OHIO, INC.'S
MOTION TO COMPEL DISCOVERY
BY
THE OFFICE OF THE OHIO CONSUMERS' COUNSEL**

I. INTRODUCTION

The Office of the Ohio Consumers' Counsel ("OCC") provided discovery responses to the discovery requests of Duke Energy Ohio, Inc. ("Duke") on October 20, 2015, and served supplemental responses on November 2, 2015. On November 3, 2015, Duke filed a motion with the Public Utilities Commission of Ohio ("PUCO" or "Commission") to compel OCC to submit additional responses to the discovery requests.

II. SUMMARY OF ISSUES AND OCC POSITION

Duke asserts that OCC failed to respond to discovery requests because of improper objections, inapplicable privileges, and its intention to cause delay. These baseless assertions fail for many reasons. First, many of the documents and information Duke seeks from OCC are already in Duke's possession. OCC does not have independent access to bills, statements, and

Duke-provided notices. All documents in OCC's possession were produced through discovery by Duke, the Complainant, or by non-parties pursuant to subpoenas issued in this matter. It is unreasonable to expect OCC to produce documents that have already been shared with all litigants in the case. It is similarly unreasonable to expect OCC to serve as fact finder of discovery responses based on an analysis of the documents that Duke has produced. It is also unreasonable to make determinations regarding evidence OCC may or may not use at hearing, particularly because discovery is ongoing and the hearing was not scheduled to commence for approximately six weeks when OCC issued its first responses, and more than four weeks when OCC provided supplemental responses.¹

Second, Duke cannot argue that OCC's objections are improper and OCC should be compelled to respond when OCC did in fact respond to various requests notwithstanding the objections. Third, OCC does not have access to necessary information to properly respond to some of the requests because discovery is still ongoing. Specifically, all of the pertinent Duke employees have not yet been identified or deposed,² which should provide OCC with more information about the case. Fourth, other requests for admission seek to unduly burden OCC rather than to find information reasonably calculated to lead to admissible evidence. In sum, Duke improperly moves to compel additional responses merely because Duke does not agree with or like the responses that OCC properly provided.

¹See, for example, Duke's RFA Nos. 14-17 and 20-22 (and related requests for production of documents) where Duke asks OCC to admit or deny the existence of evidence. As Duke has acknowledged in responsive pleadings and at the November 10, 2015 prehearing discovery conference, it is improper for Duke to request that evidence intended to be used at hearing be disclosed and produced during the discovery phase of the proceeding. Duke's Response to Complainant's Motion To Compel at 12 (August 27, 2015).

²See Complainant's Second Motion to Compel at 1-3 (August 28, 2015); Complainant's Third Motion to Compel at 1-2 (November 3, 2015).

The PUCO should deny Duke's Motion to Compel. The Commission should (1) refuse to burden any party with the reproduction of documents already produced; (2) refuse to require OCC to produce information and documents that Duke requested merely to unduly burden OCC; (3) refuse to demand admissions from OCC that are genuine issues for the hearing or otherwise outside the scope of Ohio Adm. Code 4901-1-16 pursuant to Ohio Adm. Code 4901-1-22(A); and (4) refuse to demand alternative or supplemental admissions merely because Duke disagrees with or is dissatisfied with the response provided.

III. ARGUMENT

A. OCC is not required to reproduce documents already discovered in the litigation or to serve as fact finder by analyzing produced documents.

In its motion to compel, Duke bemoans OCC's failure to make factual and legal determinations based on documents produced thus far in discovery and on its failure to produce documents which have already been shared through discovery. Duke brings up this alleged improper withholding by OCC in its discussion of Requests for Admission ("RFA") Nos. 1, 3-8, 12, 13, 18, 19, 27, 28, 31, 33; and Interrogatory No. 14.

OCC is not the custodian of the documents in this case. Instead, OCC must rely on documents produced by the Complainant, Duke, and other non-parties subpoenaed by those parties. For example, OCC does not have (and could not have) independent documentation of the actual notices provided by Duke, Duke's billing records, or Duke's employee dispatch records, as those are Duke's business records. OCC must derive its knowledge with regard to these issues on the documents and testimony, or lack thereof, from Complainant and Duke. Duke's motion relies on the assumption that, for many of its requests, OCC has independent sources of documentation besides the produced documents, witness testimony, or public records.

OCC cannot provide what it does not have, it is not required to create what it does not have, and it is unreasonable for Duke to expect OCC to reproduce documents already shared between parties through discovery in order to comply with discovery requirements. Additionally, Duke's requests for admission run afoul of Ohio Adm. Code 4901-1-22(A) to the extent that the requests seek information that is otherwise outside the scope of Ohio Adm. Code 4901-1-16.

For example, in its Motion to Compel, Duke challenges OCC's response to Interrogatory No. 14. In that interrogatory, Duke asked whether OCC claims that Duke failed to comply with the 2011 Winter Reconnection Order and if so, asks OCC to "identify every fact and document that support this claim." Among other objections, OCC stated in its supplemental response, "Duke seeks the disclosure of information that is publicly available or already in the Company's possession, custody, or control." As discussed above, OCC is not required to produce documents that are already in Duke's possession or that are in the public domain. Ohio Adm. Code 4901-1-16(G) and 4901-1-20(D). Additionally, OCC is not required to provide documents and information not in OCC's possession, custody, or control or could be more easily obtained through third parties or other sources. Ohio Adm. Code 4901-1-20(A)(1).

Furthermore, OCC is not required to produce privileged communications between attorney and client, attorney work product, or trial preparation documents. Ohio Adm. Code 4901-1-16(B). The purpose of discovery is to "elicit facts, data, or other information known or readily available to the party upon whom the interrogatories are served."³ Nonetheless, many of

³Ohio Adm. Code 4901-1-19(B).

Duke's requests seek a legal conclusion or opinion or legal strategy, all of which are more appropriate for briefing and argument by counsel, not discovery.⁴

Duke also seemingly assumes that it can force OCC to serve as fact finder. Take, for example, Duke's challenge in its Motion to Compel to OCC's response to RFA No. 18. The request for admission asked, "Admit that [Duke] did not disconnect the gas service at the Property on November 4, 2011." Among additional objections, OCC properly answered in its supplemental response that "the information known or readily obtainable by OCC at this time is insufficient to enable OCC to admit or deny this request." Neither OCC nor any of its agents have personal knowledge of whether Duke disconnected the natural gas service at the Property on November 4, 2011. But in its Motion to Compel, Duke states "OCC knows—from sworn deposition testimony of the Complainant and his family members—that there is no conflict [about whether the gas service was disconnected]." Even if "no conflict" exists regarding whether natural gas service was disconnected at the Property, OCC would not have personal knowledge as to whether natural gas service was actually disconnected at the Property on November 4, 2011. In fact, it is possible that the natural gas service could have been disconnected and then reconnected.

To further detail Duke's claim that "OCC knows" that there is no conflict based on sworn deposition testimony, in Duke's deposition of the Complainant, Jeffrey Pitzer, Duke's attorney

⁴ Although "an interrogatory *which is otherwise proper* is not objectionable merely because it calls for an opinion, contention, or legal conclusion," "the attorney examiner may direct that such interrogatory need not be answered until certain designated discovery has been completed, or until some other designated time." Ohio Adm. Code 4901-1-19(B) (emphasis added). Here, Duke seeks information that is privileged or that is not yet known because discovery is ongoing. Duke has acknowledged in responsive pleadings and at the November 10, 2015 prehearing discovery conference that it is improper for Duke to request information that seeks legal conclusions or interpretations during the discovery phase of the proceeding. Duke's Response to Complainant's Motion To Compel at 6, 12 (August 27, 2015). See also Duke's responses to OCC-INT-02-002 through OCC-INT-02-009 and OCC-POD-02-001 through OCC-POD-02-005 (attached hereto as Attachment A).

never asked Mr. Pitzer about the natural gas disconnection, and Mr. Pitzer never testified about a natural gas disconnection. In the deposition of Gail Lykins, Duke's attorney only referenced a natural gas disconnection once. The attorney stated:

Q: I believe in the Complaint you allege that the electric and gas services were disconnected, correct?

A: Correct.

See Lykins Deposition at 56:1-4. There was no further discussion of natural gas disconnections.

In the deposition of Jack Easterling, Duke's attorney asked:

Q: Is it fair to say that, based on your condition, you have no personal knowledge about any of the gas and electric bills sent by Duke Energy to the property during the fall of 2011?

A: Just the ones that were marked paid on top of the refrigerator. I never looked at them, but you could see it was a Duke Energy bill.

See Easterling Deposition at 14:20-15:1. There was no discussion of a natural gas disconnection and no further discussion of natural gas bills. None of these depositions include proof that the natural gas at the Property was not disconnected. In fact, the sworn testimony reveals relatively nothing about whether the natural gas service was disconnected. The filed Complaint, however, does allege that natural gas service was disconnected as Duke's attorney recognized. See Lykins Deposition at 56:1-4. Accordingly, it is a completely false statement that "OCC knows" about natural gas disconnection based on "sworn deposition testimony of the Complainant and his family members." OCC cannot know for certain as there is conflicting information in the docket to date.

Even if Duke had access to the testimony it claims to have from one of the deposed individuals, it is improper to expect that OCC would serve as fact finder to determine the reliability of that testimony at this early stage of the proceeding. If Duke has clear evidence on a disputed issue, then Duke can present that evidence at the evidentiary hearing, or should have

raised it in a motion to dismiss the complaint.⁵ It is improper for Duke to expect OCC to serve as fact finder in its discovery responses, particularly given that discovery is ongoing (including outstanding depositions of Duke employees). Additional testimony and documents may surface that would create a conflict with existing documentation. The Commission should deny Duke's motion to compel and find that OCC's objections to RFA Nos. 1, 3-8, 12, 13, 18, 19, 27, 28, 31, 33, and Interrogatory No. 14, are proper and the responses sufficient.

B. Duke cannot succeed on a claim that OCC improperly asserted privilege when OCC answered the request.

Duke asserts that OCC improperly responded to RFA Nos. 1, 3-5, 14-17, 20-22, and 43-45 despite the fact that *OCC answered those requests* notwithstanding the objections.⁶ Duke states that those "responses fall well short of compliance with Ohio Adm. Code 4901-1-22" because OCC included an objection to attorney client and work product privilege. Indeed, OCC did object to the requests on the grounds of privilege, but in its supplemental responses, OCC also gave clear answers to those requests. In OCC's response to each of these requests, OCC stated "this is a genuine issue for the hearing.... Nonetheless, OCC has not identified any evidence at this time" or "OCC denies this statement." Despite proper objections, these statements are certainly responsive to Duke's requests – either OCC had inadequate evidence

⁵In essence, Duke appears to be arguing a summary judgment motion. A party may argue that "the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact, if any, timely filed in the action, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Ohio Civ. R. 56. However, Duke already argued that the complaint should be dismissed as it failed to state reasonable grounds for complaint. Duke's Answer at 5-9 (February 27, 2015). The Attorney Examiner rejected those arguments and set the matter for hearing pursuant to R.C. 4905.26. Duke attempts to take a second bite at the proverbial apple.

⁶Additionally, Duke's RFA Nos. 14-17 and 20-22 (and related requests for production of documents) request that OCC admit or deny the existence of evidence. As Duke has acknowledged in responsive pleadings and at the November 10, 2015 prehearing discovery conference, it is improper for Duke to request that evidence intended to be used at hearing be disclosed and produced during the discovery phase of the proceeding. Duke's Response to Complainant's Motion to Compel at 12 (August 27, 2015).

and cannot answer at this time or OCC denies the request. Providing objections with substantive responses is not only appropriate during the discovery phase of a proceeding, but required or objections are otherwise waived. See *Chuparkoff v. Farmers Ins. of Columbus, Inc.* (Ohio App. 9 Dist., Summit, 12-22-2004), No. CIV.A. 22083, 2004-Ohio-7185, 2004 WL 3017222 (party waived privilege by failing to object). As Duke is well aware, just because something is discoverable, it does not mean that it will meet the higher standard for admission at hearing and become evidence in the proceeding. Ohio Adm. Code 4901-1-16(B) (“It is not a ground for objection that the information sought would be inadmissible at the hearing, if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.”); see also Ohio Civ. R. 26(B)(1). The Commission should overrule Duke’s baseless allegations as to RFA Nos. 14-17, 20-22, and 43-45, and deny its motion to compel.

C. OCC operates with limited information because discovery is still ongoing.

Duke asserts that OCC improperly failed to answer a number of interrogatories. What Duke does not seem to understand is that discovery is ongoing in this case.⁷ In fact, depositions and written discovery are outstanding. OCC properly noted that it cannot answer certain requests at this point in the proceeding.

For example, after asserting appropriate objections, OCC responds to the overly-broad and vague Interrogatory No. 2 by stating that to the extent the question asks about potential witnesses, “it has not yet made a determination regarding who OCC may call as a fact witness.”⁸

⁷ See Complainant’s Motion to Compel (June 16, 2015); Complainant’s Second Motion to Compel (August 28, 2015); Complainant’s Third Motion to Compel (November 3, 2015), which were resolved at the November 10, 2015 prehearing conference. Resolution included additional discovery to be completed, including depositions. OCC has also issued a third set of discovery to Duke, but responses are not yet due.

⁸OCC properly objected to answering interrogatories about potential witnesses. A party is not required to disclose lay witness identities under Rule 4901-1-16(C), O.A.C. *In the Matter of the Complaint of David Wellman v. Ameritech Ohio*, Case No. 99-768-TP-CSS, *et al.*, Entry at 5 (June 21, 2002) (motion to compel denied because there is no requirement to disclose lay witnesses).

OCC responses in this regard are not uncommon in PUCO proceedings. In fact, Duke provided objections and responded similarly to Complainant's discovery request, stating: "which witnesses may be called at hearing necessarily depends on the nature of [the] case and the mental impressions of [a party]'s attorney regarding legal strategy."⁹ See also Duke's responses to OCC-INT-02-002 through OCC-INT-02-009 and OCC-POD-02-001 through OCC-POD-02-005 (attached hereto as Attachment A).

In response to Interrogatory No. 5, OCC properly answers that it "is still compiling information in this case," and further supplemented its response by directing Duke to the supplemental responses provided in the document given that many of Duke's interrogatories were duplicative of the requests for admission already answered by OCC. By supplementing numerous responses to the requests for admission, OCC's responses to interrogatories eliciting similar, if not identical, information would also be supplemented in a like manner, which is what OCC referenced in its answer.

In Interrogatory No. 6, Duke asks for every document and fact that supports OCC's claim that Duke disconnected natural gas service to the Property in November 2011 and each person with relevant knowledge on that point. Duke's arguments are curious given that when Complainant asked similar discovery requests, Duke stated: "Duke Energy Ohio is not required to disclose its trial strategy to Complainant or otherwise tell Complainant now what documents it will use in defending this claim.... Complainant is not entitled to a proverbial 'road map' of Duke Energy Ohio's defense."¹⁰ See also Duke's responses to OCC-INT-02-010 and OCC-

⁹Duke's Response to Complainant's Motion to Compel at 6 (August 27, 2015). As Duke has acknowledged in responsive pleadings and at the November 10, 2015 prehearing discovery conference, it is improper for Duke to request that evidence intended to be used at hearing be disclosed and produced during the discovery phase of the proceeding.

¹⁰Duke's Response to Complainant's Motion to Compel at 12 (August 27, 2015). Duke confirmed its position at the November 10, 2015 prehearing discovery conference.

POD-02-006 (attached hereto as Attachment B). Duke hypocritically seeks the same information from OCC that it refuses to provide to other parties through discovery requests. Nonetheless, OCC has not yet had the opportunity to discover whether a Duke employee actually provided personal notice at the Property on the date of disconnection. That deposition will presumably provide OCC with additional information on that subject. Before the deposition of key Duke employees, and given conflicting documents in the docket to date, OCC is not in a position to be able to provide substantive responses to such a request.

Furthermore, in response to Interrogatory Nos. 7, 8, 9, 10, and 14, OCC supplemented its responses by directing Duke to the supplemental responses provided for similar requests for admissions. Again, Duke elicited duplicative information, which was responded to in OCC's supplemental responses. OCC also noted that Duke's requests in Interrogatory Nos. 7 and 8 set forth incorrect assumptions, requirements, and interpretations of the Commission's rules and orders. OCC disagrees with Duke's underlying assertions in its questions, and thus, cannot respond in the manner that Duke desires. Duke should not be allowed to debate OCC's properly provided responses through the discovery process just because it disagrees with OCC's response.

Interrogatory Nos. 2, 5, 6, 7-10, and 14, and Request for Production No. 4 simply cannot be responded in the manner that Duke would like because the docket is void of the information necessary to respond appropriately. Duke opposed OCC's responses arguing that it is too close to the hearing date for OCC to be able to give such an answer.¹¹ Duke's arguments are meritless and not based in law. OCC is not required to have its case completely prepared one week prior to the commencement of the hearing, let alone six weeks prior to the commencement of the hearing. Currently, OCC's testimony is not even required to be filed until one week before the

¹¹Duke's Motion to Compel at 11 (November 3, 2015).

hearing.¹² Duke's objections and unfounded dictates as to when it believes a party should have its case prepared for litigation highlight the very concern raised by the objections in OCC's responses. Duke is attempting to ascertain information prevented from disclosure by Ohio Adm. Code 4901-1-16(B).¹³

The discovery rules do not require OCC to produce information that is privileged by statute or common law, including privileged communications between attorney and client or attorney work product.¹⁴ Notwithstanding privilege objections, OCC simply cannot answer many of these requests, as insufficient information existed at the time of its response. The Commission should reject Duke's arguments and deny Duke's request to compel OCC to produce additional information that is either privileged or that is not yet known. OCC properly objected and responded to Interrogatory Nos. 2, 5, 6, 7-10, and 14 Request for Production No. 4.

Additionally, OCC provided all of the information that it currently possesses, and cannot agree with Duke's underlying assumptions or desire for OCC to produce information that it just does not have or for OCC to draw legal conclusions about Duke's behavior and practices when the analysis has not yet been completed.¹⁵ Duke should not have access to the very information that it refuses to provide to other parties: "By its very nature, Complainant's request that Duke Energy Ohio 'produce each and every document you intend to refer to, rely on, or admit as an

¹² Attorney Examiner Entry at 2 (April 29, 2015).

¹³ Ohio Adm. Code 4901-1-16(B) states: "Except as otherwise provided in paragraphs (G) and (I) of this rule, any party to a commission proceeding may obtain discovery of any matter, *not privileged*, which is relevant to the subject matter of the proceeding." (Emphasis added.)

¹⁴ Duke has acknowledged in responsive pleadings and at the November 10, 2015 prehearing discovery conference that it is improper for Duke to request information that seeks legal conclusions or interpretations during the discovery phase of the proceeding. Duke's Response to Complainant's Motion to Compel at 6, 12 (August 27, 2015). See also Duke's responses to OCC-INT-02-002 through OCC-INT-02-009 and OCC-POD-02-001 through OCC-POD-02-005 (attached hereto as Attachment A).

¹⁵ *Id.*

exhibit at hearing of this matter’ necessarily goes to the heart of the Work Product Doctrine.”¹⁶

See also Duke’s response to OCC-INT-01-027 (attached hereto as Attachment C).

D. OCC properly objected to requests for communications with complainant.

Duke alleges that OCC failed to properly respond to requests about its communications with Complainant in Interrogatory No. 17 and Request for Production No. 3. Duke does not challenge the Joint Defense Agreement (“JDA”), but instead alleges that it only creates a privilege on the date of the agreement and after – that all communications before that date are discoverable. Duke’s arguments are flawed.

At the outset, it is important to note that OCC properly provided other objections to these requests, in addition to the privilege afforded to parties with a common interest or operating under a JDA. The availability of discovery is broad, though not unlimited. “[A]ny party to a commission proceeding may obtain discovery of any matter, not privileged, which is relevant to the subject matter of the proceeding [so long as it] appears reasonably calculated to lead to the discovery of admissible evidence.” Ohio Adm. Code 4901-1-16(B).

For example, in its supplemental response to Interrogatory No. 17, OCC states that the interrogatory “is overly broad and unduly burdensome and inquires into matters that are not relevant to the subject matter of the proceeding and are not ‘reasonably calculated to lead to discovery of admissible evidence.’” Furthermore, the Commission can protect “a party or person from annoyance, embarrassment, oppression, or undue burden or expense” regarding discovery. *Fifth Third Bank v. Jones-Williams*, 2005-Ohio-4070, ¶ 14; see also *Fagerholm v. Gen. Elec.*

¹⁶Duke’s Response to Complainant’s Motion to Compel at 12 (August 27, 2015).

Co., 2009-Ohio-2390, ¶ 12.¹⁷

In Interrogatory No. 17, Duke asked for (1) an identification of all of OCC's communications with Complainant and Complainant's counsel, including; (2) the names of all who attended those meetings; (3) the dates of the meetings; (4) detail of all conversations; (5) a production of all notes, letters, emails, etc.; (6) a production of "all documents exchanged or provided by anyone;" and (7) a production of "all documents reviewed by anyone." This request is the epitome of an overly broad and unduly burdensome request – it is not reasonably calculated to lead to the discovery of admissible evidence. Instead, it is likely intended to serve as a burden to OCC rather than as a tool to gather relevant information. The Commission should deny Duke's motion to compel and accept OCC's proper objections to Interrogatory No. 17 and Request for Production No. 3.

Even if the request was narrowly tailored, the JDA entered into between OCC and the Complainant is valid and protects confidential information subject to the parties' trial preparation privileges, attorney-client privileges, and all other applicable doctrines or privileges.¹⁸ The JDA is a written embodiment of the understanding entered into by and among the signatory parties. The parties entered into the agreement in order to share information in confidence for their common purpose and benefit. The purpose and benefit includes, but is not limited to, "enabling the [p]arties to monitor the direction of the litigation in cases and to minimize the aggregate and individual-case costs of legal representation and consulting services during the litigation of any

¹⁷ In *Fagerholm*, the plaintiff sued a former employer for intentional tort and sought discovery about all products manufactured and produced by the companies, and the court restricted that discovery to products manufactured in the plant where plaintiff worked.

¹⁸ "The 'common interest privilege' of the attorney-client privilege is another step beyond the joint client situation, where two or more clients, each represented by their own lawyers, meet to discuss matters of common interest-commonly called a joint defense agreement or pooled information situation. Such communications among the clients and their lawyers are within the privilege. Although it originated in the context of criminal cases, the doctrine has been applied in civil cases and to plaintiffs in litigation as well as defendants." *Bardwell v. Attorney General*, Case No. 181 Ohio App. 3d 661 (March 19, 2009), HN 12.

of the above mentioned actions or subsequently added proceedings, and to make the most efficient use of the resources available to the Parties.”¹⁹

As discussed above, OCC is not required to produce documents that are already in Duke’s possession. Ohio Adm. Code 4901-1-16(G). In its Motion to Compel, Duke states that it already received what it believes to be responsive documents from the Complainant.²⁰

Moreover, Ohio Courts have recognized a “Common Interest Doctrine.” *State ex rel. Bardwell v. Cordray*, 181 Ohio App. 3d 661, 680, 2009-Ohio-1265 (10th Dist.), quoting McCormick, Evidence, Section 91.1, at 413-414 (6th Ed.2006)(“Another step beyond the joint client situation is the instance where two or more clients, each represented by their own lawyers, meet to discuss matters of common interest- commonly called a joint defense agreement or pooled information situation. Such communications among the clients and their lawyers are within the privilege. Although it originated in the context of criminal cases, the doctrine has been applied in civil cases and to plaintiffs in litigation as well as defendants.”); see also *Buckeye Corrugated, Inc. v. Cincinnati Ins. Co.*, 9th Dist. C.A. No. 26634, 2013-Ohio-3508, ¶ 14 (Aug. 14, 2013) (same). See also, *Condos. at Stonebridge Owners’ Ass’n v. K&D Group, Inc.*, 8th Dist. No. 100261, 2014-Ohio-503, ¶ 15 (Feb. 13, 2014), quoting *William F. Shea, LLC v. Bonutti Research, Inc.*, S.D. Ohio No. 2:10-CV-615, 2013 U.S. Dist. LEXIS 48819, *5-6 (Apr. 4, 2013)(“The common interest doctrine operates as an exception to the general rule that disclosure of privileged materials to a third party waives the privilege. This exception typically arises when

¹⁹JDA at 2 (effective October 7, 2015).

²⁰Duke’s Motion to Compel at 12 (November 3, 2015).

parties ‘are either represented by the same attorney or are individually represented, but have the same goal in litigation.’”).²¹

“The purpose of the ‘common interest’ doctrine is to permit persons with *similar legal interests* to enjoy the same ability to communicate confidentially about their *common interests* with multiple attorneys that each client enjoys separately.” *William F. Shea, LLC*, at *6 (citation omitted; emphasis added). “A communication is privileged under the common interest doctrine ‘as long as it deals with a matter on which parties have agreed to work toward a mutually beneficial goal, even if those parties are in conflict on some points.’” *Id.*(quoting *Cooley v. Strickland*, 269 F.R.D. 643, 652 (S.D. Ohio 2010).

OCC and the Complainant have similar legal interests in the case at bar, and the parties have worked jointly in this case on those issues of common concern, which extend beyond the JDA. Coordinating litigation efforts among parties with common interests benefits the PUCO through administrative efficiency. Such trial preparation efforts are privileged, and attorney confidentiality must be protected. Duke does not dispute the existence of the JDA, but essentially asserts that the JDA or common interest doctrine should not be honored in their entirety. Duke seeks to subvert this process by moving to compel OCC to reveal communications that are intended to be confidential under the common interest doctrine or JDA. The discovery requested by Duke is seeking either legal strategies between the parties to the JDA, or communications between the parties that are not relevant to the merits of this case. The Commission has previously recognized the common interest doctrine and upheld JDAs, requiring the production of documents only “to the extent the documents requested do not include information reflecting

²¹ Contrary to Duke’s arguments, the common interest doctrine goes beyond the four corners of the JDA and extends prior to the effective date of the JDA when parties with similar legal interests can demonstrate common interests. The case at bar can be distinguished from *In the Matter of the Application of the Ohio Edison Co.*, Case No. 10-176-EL-ATA as the parties have demonstrated that they have similar legal interests, represent residential consumers in this utility matter, and have been working toward a mutually beneficial goal.

the parties to the joint defense agreement's legal strategies in these cases.”²² The Commission should recognize the common interest doctrine, as well as the JDA, and protect privileged communications between OCC and the Complainant, including correspondence reflecting the parties' legal strategies, as nondiscoverable.

E. Duke's other allegations are baseless.

Duke alleged that OCC failed to provide meaningful responses to RFA Nos. 3-5 regarding which individuals are customers/consumers within the meaning of the applicable rules.²³ Duke states that OCC “is more than capable of admitting or denying key facts in this case” because they have “received discovery responses and documents from Duke” and participated in depositions. But Duke fails to recognize that OCC disputes Duke's characterization and interpretation of the term “customer” and “consumer” as defined in Ohio Adm.Code 4901:1-18-01(F)-(H). Duke also fails to recognize that OCC disagrees with Duke's interpretation of the applicability of certain terms to the case at bar and that discovery that has been produced to date has resulted in conflicting and disputed facts. Accordingly, OCC properly objected by stating that “this is a genuine issue for the hearing.” Nonetheless, notwithstanding the objections, OCC responded substantively, denying RFA Nos. 3-5. Duke is now arguing with OCC's substantive responses through its Motion to Compel.

Duke also alleged that OCC was untruthful in its responses to RFA Nos. 16, 17, and 22 because Ms. Lykins and Mr. Pitzer's depositions do not reveal personal knowledge of anyone contacting Duke during the relevant time period. See Motion to Compel at 8 (November 3,

²²*In the Matter of Application of Duke Energy Ohio, Inc. for Authority to Establish a Standard Service Offer Pursuant to R.C. 4928.143 in the Form of an Electric Security Plan, Accounting Modifications, and Tariffs for Generation Service*, Case No. 14-841-EL-SSO, et al., Entry at 3 (October 20, 2014).

²³Duke's Motion to Compel at 5-6 (November 3, 2015).

2015). But Ms. Lykins did communicate with a Duke employee during the fall of 2011, and Mr. Pitzer did testify to that fact. Although OCC mistakenly referred to the Lykins Deposition in its supplemental response, Mr. Pitzer testified about his wife's communication with a Duke employee in the fall of 2011. See Pitzer Deposition at 13:19-14:19. He states that even though he does not have personal knowledge about the communications, his wife told him about her communications with a Duke employee who installed a smart meter in the fall of 2011. Additionally, Complainant's discovery responses to Duke also state that Ms. Lykins had a discussion with a Duke service technician at the Property. Complainant-RFA-34.

IV. CONCLUSION

OCC has fully answered or otherwise properly responded to the discovery requests propounded by Duke, and therefore, Duke's motion should be denied. The Commission should refuse to compel additional responses or demand alternative answers. Material facts are clearly in dispute and OCC is not Duke's fact finder. If Duke has evidence that contradicts OCC's assertions, then it should provide it at hearing.

Duke should not be allowed to argue with OCC's substantive responses through the discovery process or burden OCC with the reproduction of documents already produced. Furthermore, Duke improperly moves for this Commission to compel answers that OCC has already answered notwithstanding objections. Duke's improper attempt to compel additional

responses from OCC merely because Duke does not agree with or like the responses that OCC properly provided is without merit and should be rejected.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing was served upon the following parties via electronic mail on November 10, 2015.



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Attachment A

**Duke Energy Ohio
Case No. 15-298-GE-CSS
OCC Second Set of Interrogatories
Date Received: July 28, 2015**

OCC-INT-02-002

REQUEST:

Identify each person whom Duke intends to call to testify at the hearings in the above-captioned matter. To the extent Duke claims that it has not made a final determination as to which witnesses it intends to call, please supplement this response as soon as a determination is made.

RESPONSE:

Objection. This Interrogatory exposes Duke Energy Ohio to speculation and guesswork in that it seeks information about persons who have not been identified. Answering further, this interrogatory seeks to elicit privileged and confidential information that is protected by the attorney work product doctrine or the attorney client privilege. See, generally, O.A.C. 4901-1-29, which establishes deadlines for the submission of testimony in complaint proceedings.

PERSON RESPONSIBLE: Legal

**Duke Energy Ohio
Case No. 15-298-GE-CSS
OCC Second Set of Interrogatories
Date Received: July 28, 2015**

OCC-INT-02-003

REQUEST:

For each person identified in response to Interrogatory No. 2-002 above, please state the following:

- (a) the subject matter upon which the witness is expected to testify;
- (b) the facts to which each witness is expected to testify;
- (c) the opinions to be rendered by each witness;
- (d) a summary of the witness's qualifications to provide the testimony; and
- (e) a summary of each witness's testimony.

To the extent that Duke claims it has not made a final determination as to witnesses it intends to call to testify, please supplement this response as soon as such a determination is made.

RESPONSE:

See response to OCC-INT-02-002.

PERSON RESPONSIBLE: Legal

**Duke Energy Ohio
Case No. 15-298-GE-CSS
OCC Second Set of Interrogatories
Date Received: July 28, 2015**

OCC-INT-02-004

REQUEST:

Identify each consultant that Duke has retained to assist it in the above-captioned proceeding. If the consultant is an organization, please identify each individual employed by the organization who is assisting Duke. If Duke has not yet retained a particular consultant, please promptly identify the consultant (and the individuals employed by the consultant if the consultant is an organization) as soon as Duke retains the consultant.

RESPONSE:

Objection. This Interrogatory exceeds the permissible scope of O.A.C. 4901-1-16 and further seeks information protected by the attorney work product doctrine and/or attorney client privilege. Testifying witnesses will be identified consistent with applicable Commission regulation and after Duke Energy Ohio has determined same.

PERSON RESPONSIBLE: Legal

**Duke Energy Ohio
Case No. 15-298-GE-CSS
OCC Second Set of Interrogatories
Date Received: July 28, 2015**

OCC-INT-02-005

REQUEST:

For each consultant identified in response to Interrogatory No. 2-004 above, please describe in detail the scope and purpose of the consultant's engagement, including the subject matters, issues, and positions on which the consultant will analyze and advise Duke. If Duke has not yet determined a particular subject matter, issue, or position on which the consultant will analyze and advise Duke, please promptly provide a description as soon as it is determined.

RESPONSE:

See response to OCC-INT-02-004.

PERSON RESPONSIBLE: Legal

**Duke Energy Ohio
Case No. 15-298-GE-CSS
OCC Second Set of Interrogatories
Date Received: July 28, 2015**

OCC-INT-02-006

REQUEST:

Please identify each expert whom Duke has retained or is in the process of retaining to testify in the above-captioned proceedings. If Duke has not yet made this decision, please supplement the response as soon as the decision is made.

RESPONSE:

Objection. This Interrogatory exceeds the permissible scope of O.A.C. 4901-1-16 and further seeks information protected by the attorney work product doctrine and/or attorney client privilege. Testifying witnesses will be identified consistent with applicable Commission regulation and after Duke Energy Ohio has determined same.

PERSON RESPONSIBLE: Legal

**Duke Energy Ohio
Case No. 15-298-GE-CSS
OCC Second Set of Interrogatories
Date Received: July 28, 2015**

OCC-INT-02-007

REQUEST:

For each expert identified in response to Interrogatory 2-006 above, please state the following:

- (a) the subject matter upon which the witness is expected to testify;
- (b) the facts to which each expert is expected to testify;
- (c) the opinions to be rendered by each expert; and
- (d) a summary of each expert's testimony.

RESPONSE:

See response to OCC-INT-02-006.

PERSON RESPONSIBLE: Legal

**Duke Energy Ohio
Case No. 15-298-GE-CSS
OCC Second Set of Interrogatories
Date Received: July 28, 2015**

OCC-INT-02-008

REQUEST:

For each witness identified in response to Interrogatory Nos. 2-002, 2-004, and 2-006 above, please identify all proceedings in all jurisdictions in which the witness has offered evidence, including but not limited to, pre-filed testimony, sworn statements, and live testimony. For each response, please provide the following:

- (a) the jurisdiction in which the testimony or statement was pre-filed, offered, given, or admitted into the record;
- (b) the administrative agency and/or court in which the testimony or statement was pre-filed, offered, admitted, or given;
- (c) whether the witness was cross-examined; and
- (d) the custodian of the transcripts and pre-filed testimony or statement for each proceeding.

RESPONSE:

Objection. This Interrogatory is overly broad and unduly burdensome. Moreover, it seeks information that is irrelevant and not likely to lead to the discovery of admissible evidence. Furthermore, the information requested herein is public record and thus equally accessible to the OCC. Without waiving said objections, to the extent discoverable, and in the spirit of discovery, see responses to OCC-INT-02-002, OCC-INT-02-004, and OCC-INT-02-006.

PERSON RESPONSIBLE: Legal

**Duke Energy Ohio
Case No. 15-298-GE-CSS
OCC Second Set of Interrogatories
Date Received: July 28, 2015**

OCC-INT-02-009

REQUEST:

For each expert identified in Interrogatory No. 2-006 above, please identify all documents relating to the anticipated expert testimony, including, without limitation:

- (a) documents, correspondence, or communications exchanged between Duke and the witness; and
- (b) any documents received, generated, or relied upon by the witness.

To the extent that Duke contends that any such documents are privileged, please provide a privilege log for these documents.

RESPONSE:

Objection. This Interrogatory seeks to elicit privileged and confidential information that is protected by the attorney work product doctrine or the attorney client privilege. Without waiving said objection, to the extent discoverable, and in the spirit of discovery, see response to OCC-INT-02-008.

PERSON RESPONSIBLE: Legal

**Duke Energy Ohio
Case No. 15-298-GE-CSS
OCC Second Set Production of Documents
Date Received: July 28, 2015**

OCC-POD-02-001

REQUEST:

For each witness identified in response to Interrogatory No. 2-002, please produce copies of all workpapers and other backup documentation supporting that witness's testimony. Each workpaper should be identified in a manner that links it to the particular witness's testimony that it supports and to the particular issue addressed by, or to the specific schedule/exhibit attached to, that witness's testimony. Please produce the workpapers no later than contemporaneously with the filing of the witness's testimony.

RESPONSE:

See response to OCC-INT-02-002.

PERSON RESPONSIBLE: Legal

**Duke Energy Ohio
Case No. 15-298-GE-CSS
OCC Second Set Production of Documents
Date Received: July 28, 2015**

OCC-POD-02-002

REQUEST:

Please produce any and all documents relating to the testimony of any of Duke's witnesses, consultants, and/or expert witnesses identified in response to Interrogatory Nos. 2-002, 2-004, and 2-006 above. This production may include, but is not limited to, any and all *curricula vita*, reports, papers, statements, notes, other documents, and any correspondence, communications, or other documents exchanged between Duke and the witnesses, consultants, and/or expert witnesses.

RESPONSE:

See responses to OCC-INT-02-002, OCC-INT-02-004, and OCC-INT-02-006.

PERSON RESPONSIBLE: Legal

**Duke Energy Ohio
Case No. 15-298-GE-CSS
OCC Second Set Production of Documents
Date Received: July 28, 2015**

OCC-POD-02-003

REQUEST:

For each witness identified in response to Interrogatory No. 2-004 above, please produce copies of the following:

- (a) Any requests for proposals that you issued or have issued for the retention of any consultants for this proceeding; and/or
- (b) Any contracts that you will enter into or have entered into with any such consultants.

RESPONSE:

See response to OCC-INT-02-004.

PERSON RESPONSIBLE: Legal

**Duke Energy Ohio
Case No. 15-298-GE-CSS
OCC Second Set Production of Documents
Date Received: July 28, 2015**

OCC-POD-02-004

REQUEST:

For each witness identified in response to Interrogatory No. 2-006 above, please produce any and all contracts for services between Duke and any expert retained or consulted to provide opinions, testimony, evidence, or analysis in relation to the above-captioned proceedings.

RESPONSE:

See response to OCC-INT-02-006.

PERSON RESPONSIBLE: Legal

**Duke Energy Ohio
Case No. 15-298-GE-CSS
OCC Second Set Production of Documents
Date Received: July 28, 2015**

OCC-POD-02-005

REQUEST:

Please provide copies of any transcripts of depositions of witness testimony that occurred in the proceedings identified in Interrogatory No. 2-008. If a transcript is not available, please provide the name, address, and telephone number of the court reporting service used for purposes of each deposition.

RESPONSE:

See response to OCC-INT-02-008.

PERSON RESPONSIBLE: Legal

Attachment B

**Duke Energy Ohio
Case No. 15-298-GE-CSS
OCC Second Set of Interrogatories
Date Received: July 28, 2015**

OCC-INT-02-010

REQUEST:

Identify all documents or other evidence that Duke may seek to introduce as exhibits or for purposes of witness examination in any proceeding related to the above-captioned matter. To the extent that Duke contends that any such documents are privileged, please provide a privilege log for these documents.

RESPONSE:

Objection. This Interrogatory seeks to elicit privileged and confidential information that is protected by the attorney work product doctrine or the attorney client privilege. Answering further, Duke Energy Ohio states that this Interrogatory, as written, is overly broad, vague, and confusing given its reference to "any proceeding related to the above-captioned matter." Additionally, Commission regulation does not require the disclosure requested herein.

PERSON RESPONSIBLE: Legal

**Duke Energy Ohio
Case No. 15-298-GE-CSS
OCC Second Set Production of Documents
Date Received: July 28, 2015**

OCC-POD-02-006

REQUEST:

Please produce any and all documents that Duke may introduce as exhibits or use for purposes of witness examination at any hearing related to the above-captioned matter identified in response to Interrogatory No. 2-010.

RESPONSE:

See response to OCC-INT-02-010.

PERSON RESPONSIBLE: Legal

Attachment C

**Duke Energy Ohio
Case No. 15-298-GE-CSS
OCC First Set of Interrogatories
Date Received: June 22, 2015**

OCC-INT-01-027

REQUEST:

Were Duke's credit and collection policies and procedures that were in effect on November 4, 2011 impacted as a result of the PUCO Order in Case No. 11-4913-GE-UNC?

RESPONSE:

Objection. This Interrogatory seeks information that is irrelevant or not reasonably calculated to lead to the discovery of admissible evidence. Furthermore, this Interrogatory impermissibly seeks legal conclusions and interpretations.

PERSON RESPONSIBLE: Legal

This foregoing document was electronically filed with the Public Utilities

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in

Case No(s). 15-0298-GE-CSS

Summary: Memorandum Contra Duke Energy Ohio, Inc.'s Motion To Compel Discovery By
The Office Of The Ohio Consumers' Counsel electronically filed by Mrs. Kimberly W. Bojko on
behalf of The Ohio Consumers' Counsel