BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of Duke Energy Ohio, Inc., for Approval of its Energy Efficiency and Peak Demand Reduction Program Portfolio Plan.	))))	Case No. 16-576-EL-POR

DUKE ENERGY OHIO'S MEMORANDUM CONTRA THE MOTION TO COMPEL RESPONSES TO DISCOVERY

I. INTRODUCTION

The Public Utilities Commission of Ohio (Commission) issued an Opinion and Order (Order) in this proceeding, approving a stipulation with modifications. The modifications provided for a cap on program spending, and included a provision allowing the Company to seek approval to exceed the cap for program year 2017 only after seeking a waiver. The Office of the Ohio Consumers' Counsel (OCC), disregarding these facts and findings, now seeks to improperly conduct discovery even though the evidentiary record is closed. For the reasons set forth by Duke Energy Ohio, Inc., (Duke Energy Ohio or Company) herein, the Commission should deny OCC's motion to compel.

II. DISCUSSION

This case was resolved with most of the intervening parties through a stipulation that was filed with the Commission on December 22, 2016, and then amended on January 27, 2017. The OCC did not join in the stipulation. A hearing was held on March 15, 2017, and the Commission issued its Order on September 27, 2017. In that Order, the Commission approved the stipulation but modified it to limit the Company's annual recover of program costs and shared savings for 2018 and 2019. The Commission's Order then provided that the Company may exceed the cap on spending

for 2017 for program costs only. The Commission further directed the Company to scale back but not suspend programs to avoid exceeding its Portfolio Plan budget for 2017 and stated that the Company should not exceed the Portfolio Plan budget for programs for 2017 without having obtained a waiver from the Commission.[1] The Company submitted a motion for a waiver and that waiver was granted by the Commission in the Commission's Entry on Rehearing.

The OCC did not agree with this Order and filed an application for rehearing and a memorandum contra the Company's motion for a waiver on October 27, 2017. The Commission granted the applications for rehearing for further consideration and also specifically addressed the OCC's memorandum contra the motion for a waiver by imposing additional conditions for such waiver.[2] Despite the Commission's issuance of its Order and the Entry on Rehearing, the OCC has inexplicably issued additional discovery to the Company, seeking discovery on matters that have already been addressed by the Commission. Further discovery is inappropriate in this case.

Rule 4901-1-17, O.A.C., provides that discovery may begin immediately after a proceeding is commenced and should be completed as expeditiously as possible. Unless otherwise ordered for good cause shown, discovery must be completed prior to the commencement of a hearing. The OCC is well aware of this rule, but chooses to disregard the delineated procedure to give itself another opportunity to raise arguments already addressed by the Commission. In this proceeding, OCC's motion to compel should be seen as bordering on harassment of the Company. There is no further procedural record to be had in this case. The gathering of any evidence by OCC cannot lead to any additional litigation. The OCC has raised its arguments in the hearing of these matters, on application for rehearing and on motion to compel. Still, the OCC persists in seeking information

[1] Opinion and Order at p.16.
[2] Entry on Rehearing at p.2

that cannot serve any purpose other than to waste administrative resources of both the Company and the Commission.

There is a fundamental maxim of jurisprudence, rooted in common sense, that the law does not require "useless," "vain," or "futile" acts.[3] Good judicial administration is not furthered by insistence on futile procedure.[4] In this instance, since the evidentiary record was closed on March 15, 2017, after the attorney examiner stated that the matter would be submitted upon the record,[5] the OCC's untimely and irresponsible effort to re-litigate this case should be rejected by the Commission.

III. CONCLUSION

The OCC improperly seeks to compel responses and production of documents when there is no pending proceeding before the Commission. Actions such as this should not be condoned by the Commission as they merely cause undue waste of administrative resources and serve to prolong litigation, unnecessarily. Moreover, discovery has concluded in this case. Responding to the OCC at this juncture would be useless and futile. For this reason, the Commission should reject the OCC's motion.

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[3] Stated in various ways, the ancient maxim *"lex non cogit ad inutilia,"* or "the law does not know useless acts," has been a fundamental tenet in Anglo-American jurisprudence for centuries. *See Seaconsar Far East, Ltd. v. Bank Markazi Jomhouri IslamiIran,* [1999] I Lloyd's Rep. 36, 39 (English Court of Appeal 1998); *People v. Greene Co. Supervisors,* 12 Barb. 217, 1851 WL 5372, at *3 (N.Y. Sup. Ct. 1851); *see also Ohio v. Roberts,* 448 U.S. 56, 74 (1980) ("The law does not require the doing of a futile act.");*Cary v. Curtis,* 44 U.S. 236, 246 (1845) (" [T]he law never requires ... a vain act."); *N.Y., New Haven & Hartford R.R. Co. v. lannoti,* 567 F.2d 166, 180 (2d Cir. 1977) ("The law does not require that one act in vain."); *Terminal Freight Handling Co. v. Solien,* 444 F.2d699, 707 (8th Cir. 1971) ("The law does not and should not require the doing of useless acts."); *Stevens v. U.S.,* 2 Ct. **Cl.** 95 (U.S. Ct. **Cl.** 1866) ("[T]he law does not require the performance of a useless act."); *Bohnen v. Harrison,* 127 F. Supp. 232, 234 (N.D. Ill**.**1955) ("It is fundamental that the law does not require the performance of useless acts.");*In re Anthony B.,* 735 A.2d 893, 901 (Conn. 1999) ("It is axiomatic that the law does not require a useless and futile act."); *Wilmette Partners v. Hamel,* 594 N.E.2d 1177, 1187 (II1.App. 1992) (" [I]t is a basic legal tenet that the law never requires a useless act.").

[4] *Wade v. Mayo,* 334 U.S. 672, 681 (1948).

[5] Transcript Vol.II at p.221.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing was delivered by U.S. mail (postage prepaid), personal delivery, or electronic mail, on this 19th day of December, 2017, to the following parties:

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Summary: Memorandum Duke Energy Ohio's Memorandum Contra the Motion to Compel Responses to Discovery electronically filed by Carys Cochern on behalf of Watts, Elizabeth H. Ms.