

BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

Kim Wiethorn, Karen and Majeb Dabdoub, Jeff and)
Linda Sims, Fred Vonderhaar, Donald and Nancy)
Jacob, James Johnson, Majid Qureshi, Keith)
Donovan, Julie Reynolds, John Lu, Robert Schneider,)
Amanda Sachs, John Hasselbeck, Lawrence Hug,)
Dennis Mitman and Susan Shorr, Nicole Hiciu, Jason)
Mayhall, James and Shelley Hoyer, Theresa Reis,)
Gary Balser, David Siff, Carrie and Dan Gause,)
Phyllis Wahl, Susan Falick, Dan and Vicki)
Kemmeter, Kim Carrier, Dan and Michele Reece,)
Deloris Reese, Darrelle Reese, Julie Carnes, Todd)
and Michelle Bacon, Patricia Lohse, Dennis Baker,)
Jenny and Charlie Gast, Robb and Kathleen Olsen,)
Nancy Steinbrink, John and Barbara Collins,)
Jonathan Mackey, Valerie Van Iden, Joseph Grossi,)
Fu Wong and Peony Lo, Melissa and Peter Broome,)
Melisa Kuhne, Jim and Laura Haid, Olga Staios,)
Shana Berge, Gregory Hoeting, Richard and Carol)
Tenenholtz, R. Allen Pancoast, Paul and Karen)
Smith, Jason Dimaculangan, John D. Gump, Brian)
and Melissa Weiss, Evelyn and Tom King, Anne)
Wymore, John and Sally Riester, Philip Griggs,)
Sharon M. Felman, Anita Deye, Clifford W. Fauber,)
Nicole Menkaus, James Wulker, Timothy Wilson,)
Sandra Nunn, Sanford T. and Barbara L. Casper,)
Mark and Calissa Thompson, Mike Preissler, Patricia)
McGill, Dana and Joy Steller, Marc Wahlquist, Gary)
Pauly, Steve and Nanci Schmidt, Kathleen Danner,)
Randall J. Fick, Greg Chtelmakh, Wayne and Bertha)
Davis, Eric Hatfield, John Kilgore, Rob and Karen)
Ripp, Shuku Nishihata, Mark Lykins, Jerry and Lou)
Ullrich, and the Symmes Township Trustees.)

Case No.17-2344-EL-CSS

Complainants.)

v.)

Duke Energy Ohio, Inc.,)

Respondent.)

**DUKE ENERGY OHIO, INC.'S MEMORANDUM CONTRA
MOTION TO AMEND THE AMENDED COMPLAINT**

I. INTRODUCTION

Duke Energy Ohio, Inc. (Duke Energy Ohio or the Company) files this memorandum contra to respond to incorrect legal and factual assertions, as well as *ad hominem* attacks, set forth in Complainants' Motion to Amend the Amended Complaint and Expedited Request to Extend Stay (Motion to Amend). Because the Public Utilities Commission of Ohio (Commission) has already allowed Complainants to file an Amended Complaint,¹ the Company does not necessarily oppose Complainants' procedural request to file a Second Amended Complaint that adds certain Complainants and withdraws others from this proceeding. And Duke Energy Ohio will oppose the so-called merits and substance of Complainants' claims when it responds to the Second Amended Complaint at the appropriate time through an answer and/or motion to dismiss. However, nothing in the proposed Second Amended Complaint cures the legal defects inherent in the claims asserted by those Complainants whose property is not adjacent to Duke Energy Ohio's high-voltage transmission lines.² Nor does the Second Amended Complaint overcome the hurdle confronting Complainants given the undeniable facts that (a) Duke Energy Ohio has express grants of easement and rights-of-way on every property through which its transmission lines run and (b) the Commission approved the Company's Programs for Inspection, Maintenance, Repair and Replacement of Distribution and Transmission Lines, Section (f), as of June 13, 2016. Again, although Duke Energy Ohio will

¹ See Entry (November 28, 2017).

² See Motion to Dismiss (December 4, 2017).

address the merits of those issues in an answer, the defects set forth in the motion seeking leave to file a proposed Second Amended Complaint must be addressed now.

II. LEGAL ARGUMENT

Complainants' ability to amend their complaint is governed by O.A.C. 4901-1-06, not Ohio Civ. R. 20(A). Their reliance on that rule and "permissive joinder," therefore, is misplaced.

Similarly inappropriate is Complainants' attempt to paint Duke Energy Ohio in a negative light with false accusations about the Company's alleged "desire to bury individual complainants in a mound of legal paperwork."³ In support of that unfounded claim, Complainants point to the "numerous pleadings that Duke has filed in the multiple cases" as well as the Company's decision "to issue numerous interrogatories and requests for admission on individual complainants."⁴

As authorized by O.A.C. 4901-1-16 through 4901-1-22, Duke Energy Ohio is conducting written discovery to investigate the facts and evidence relating to each Complainant's claims. The Company will also depose each Complainant and any other witness with relevant knowledge and information. The use of written discovery and depositions is both reasonable and appropriate and, indeed, is advised by the Commission through its rules.⁵ Nevertheless, in response, Complainants have asserted baseless objections in an effort to stonewall Duke Energy Ohio and force the Company to expend unnecessary time and resources in discovery. While Duke Energy Ohio will continue working to resolve these discovery disputes, thus far Complainants are not acting in good faith or consistent with the discovery rules. Duke Energy Ohio notes this issue now because Complainants have falsely and hypocritically accused the

³ See Motion to Amend, at 6 and fn 5 (January 5, 2018).

⁴ *Id.*

⁵ See O.A.C. 4901-1-16(A).

Company of engaging in pleading and discovery abuses when, in fact, Complainants are themselves doing exactly that.

Duke Energy Ohio welcomes any effort by Complainants or the Commission to narrow the scope of this proceeding. To that end, the Company notes that the Second Amended Complaint improperly includes claims by Complainants who do not own property on which Duke Energy Ohio has grants of easement and rights-of-way for its high-voltage transmission lines at issue in this proceeding. The Commission should grant Duke Energy Ohio's Motion to Dismiss filed December 4, 2017, and dismiss such Complainants from this proceeding, thereby precluding them from joining in the proposed Second Amended Complaint. If not, Complainants inevitably are inviting another motion to dismiss by the Company because those Complainants, as a matter of law, cannot state reasonable grounds for a complaint under R.C. 4905.26⁶ and, by definition, do not have the requisite standing⁷ to assert claims on behalf of other property owners.⁸

Another issue that must be addressed at this time is Complainants' reference to "the reasonableness and lawfulness of Duke's vegetation management policies, practices, and plan, including the plan's adequacy" and "defects in how it was modified."⁹ Similar language and allegations are found in the proposed Second Amended Complaint. Both the Commission and Complainants are fully aware that Duke Energy Ohio's Programs for Inspection, Maintenance, Repair and Replacement of Distribution and Transmission Lines were filed with the Commission

⁶ See, e.g., *Ohio Utilities Co. v. Public Utilities Com.*, 58 Ohio St.2d 153, 156-157 (1979)

⁷ See, e.g., *Util. Serv. Partners v. PUC* (2009), 2009-Ohio-6764 ¶49, 124 Ohio St.3d 284, citing *N. Canton v. Canton*, 114 Ohio St.3d 253, 2007-Ohio-4005 ¶11.

⁸ *Id.*

⁹ See Complainants' Memorandum, at 6 (January 5, 2018).

and approved as of June 13, 2016.¹⁰ Apparently Complainants intend to use this proceeding as a collateral attack on the approval of that plan, as Complainants must believe that Commission Staff failed to review or take action in response to the Company's filing of its vegetation management plan and policies. Duke Energy Ohio is not aware of any legal authority for that collateral attack but, again, will address the issue on the merits at an appropriate time.

III. CONCLUSION

For all of these reasons, Duke Energy Ohio does not oppose Complainants' filing of a Second Amended Complaint. However, the Commission should grant the Company's motion to dismiss the claims of Amanda Sachs, David Siff, Carrie Gause, Dan Gause, Susan Falick, Jerry Ullrich, Lou Ullrich, Darrelle Reese, Julie Carnes, Todd Bacon, Michelle Bacon, Patricia Lohse, Robb Olson, Kathleen Olson, John Collins, Barbara Collins, Valerie Van Iden, Joe Zukor, and the Symmes Township Trustees from this proceeding, with prejudice.

¹⁰ See *In the Matter of the Application of Duke Energy Ohio, Inc. for Approval of Revised Paragraph (f) of its Programs for Maintenance, Repair and Replacement of Distribution and Transmission Lines*, Case No. 16-0915-EL-ESS.

Respectfully submitted,

/s/ Elizabeth H. Watts

Elizabeth H. Watts (0031092)

Associate General Counsel

Rocco O. D'Ascenzo (0077651)

Associate General Counsel

Jeanne W. Kingery (0012172)

Associate General Counsel

DUKE ENERGY OHIO, INC.

139 East Fourth Street

1303-Main

P.O. Box 960

Cincinnati, Ohio 45202

Telephone: (513) 287-4359

Elizabeth.Watts@duke-energy.com (e-mail)

Rocco.D'Ascenzo@duke-energy.com (email)

Jeanne.Kingery@duke-energy.com (e-mail)

Robert A. McMahon (0064319)

Eberly McMahon Copetas LLC

2321 Kemper Lane, Suite 100

Cincinnati, Ohio 45206

(513) 533-3441 (telephone)

(513) 533-3554 (fax)

bcmahon@emclawyers.com (e-mail)

Attorneys for Duke Energy Ohio, Inc.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and accurate copy of the foregoing document was served this 22nd day of January, 2018, by electronic transmission or U.S. mail, postage prepaid, upon the persons listed below.

/s/ Elizabeth H. Watts

Kimberly W. Bojko, Esq.
Stephen E. Dutton, Esq.
Brian W. Dressel, Esq.
Carpenter Lipps & Leland LLP
280 Plaza, Suite 1300
280 North High Street
Columbus, OH 43215
bojko@carpenterlipps.com
Dutton@carpenterlipps.com
dressel@carpenterlipps.com

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Summary: Memorandum Duke Energy Ohio, Inc.'s Memorandum Contra Motion to Amend the Amended Complaint electronically filed by Carys Cochern on behalf of Watts, Elizabeth H. Ms.