BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of Duke Energy Ohio, Inc. 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, Inc. 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
OHIO PARTNERS FOR AFFORDABLE ENERGY'S MEMORANDUM CONTRA

I. Introduction

The Office of the Ohio Consumers' Counsel (OCC) submitted an interlocutory appeal of an Attorney Examiner's ruling on October 27, 2014. The Ohio Partners for Affordable Energy (OPAE) having missed the time for filing its own interlocutory appeal, has submitted a "Memorandum Contra" that purports to oppose Duke Energy Ohio's application for an electric security plan. However, this confusing reference is nothing more than OPAE's effort to overcome its own negligence. OPAE exaggerates the scope of the Attorney Examiner's ruling on Duke Energy Ohio, Inc.'s (Duke Energy Ohio) September 22, 2014, Motion to Compel and ignores the Attorney Examiner's clear directive that states as follows:

> So as not to make any kind of precedent with regard to our ruling here, that is the only reason why we're saying that [the Office of Ohio Consumers' Counsel] needs to turn over that information unredacted to [Duke Energy Ohio]. **So this is not a precedent to be set for any other type of case. It is just in this situation**

> **what we saw in the redacted information was information that is already in the open record in the docket in this case[.]**[1]

None of the reasons OPAE cites in its memorandum justifies disturbing the Attorney Examiner's carefully limited ruling that allows disclosure of certain redacted documents that she reviewed *in camera* and determined not to contain any privileged information that had not already been disclosed.

II. Argument

A. OPAE's Memorandum Contra Is A Time-Barred Interlocutory Appeal That Should Be Dismissed Out-of-Hand.

At the outset, Duke Energy Ohio provides this reply to OPAE's "Memorandum Contra" submitted on October 29, 2014, even though such submission is a thinly veiled attempt to submit its own Interlocutory Appeal beyond the time permitted by the rules. Rule 4901-1-15, OAC states, in relevant part:

> (A) **Any party** who is adversely affected thereby may take an immediate interlocutory appeal to the commission from any ruling [that]: Grants a motion to compel * * * .
>
> ***
>
> (C) Any party wishing to take an interlocutory appeal from any ruling must file the interlocutory appeal with the commission **within five days after the ruling is issued.**[2]

Because OPAE suggests that it will be adversely affected by the Attorney Examiner's ruling, it should have filed its appeal within five days of that ruling, or by October 27, 2014. It did not. Styling its submission as a "memorandum contra" is of no consequence since the submission is

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[1] *See* the Office of Ohio Consumers' Counsel Interlocutory Appeal and Application for Review (OCC Appeal) at Attachment A, p. 3 (Transcript at 47:17-24) (emphasis added).

[2] Rule 4901-1-14(A), OAC (emphasis added).

not in opposition to any other submission. As a matter of law, then, OPAE's filing should be dismissed or stricken from the record.[3]

B. The Attorney Examiner Did Not Order The Discovery Of All Confidential E-mail Communications And Does Not Threaten Future Collaboration Among Intervenors

Even assuming that OPAE's submission is procedurally proper, its positions are factually and legally unsound. First, contrary to OPAE's suggestion that the Attorney Examiner required OCC "to disclose all confidential e-mail communications among attorneys whose clients . . . entered into a joint defense agreement,"[4] the Attorney Examiner could not be any clearer. Her ruling was limited to the documents she reviewed *in camera* review. For those limited documents, she determined they contained only information that had already been disclosed in OCC's public filings. The Public Utilities Commission of Ohio has noted that "[t]he examiner, as a fact-finder, is accorded deference and respect in her rulings; and her motion rulings were reasonable and lawful."[5]

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[3] *See, e.g., In the Matter of the Regulation of the Purchased Gas Adjustment Clause Contained Within the Rate Schedules of Vectren Energy Delivery of Ohio, Inc. and Related Matters*, Pub. Util. Comm. No. 02-220-GA-GCR, 2005 Ohio PUC LEXIS 311, at *7 (Jun. 14, 2005) ("Interlocutory appeals must be filed within five days after the ruling is issued."); *In the Matter of the Complaint of Columbus Voice Partners dba Voice-Tel v. The Ohio Bell Tel. Co.*, Pub. Util. Comm. No. 93-981-TP-CSS, 1993 Ohio PUC LEXIS 939, at *2-3 (Oct. 22, 1993) (the Commission squashed Ohio Bell's attempt to disguise its own interlocutory appeal as an "application for rehearing" in an attempt to bootstrap itself into meeting the lengthier deadline for such an application, stating, "Ohio Bell's filing is clearly an untimely request for interlocutory appeal of the Attorney Examiner's determination that Ohio Bell has not set forth sufficient grounds for dismissal of the case. * * * Thus, based on the procedural requirements of the Ohio Administrative Code, Ohio Bell's September 23, 1993 filing is without merit and should be denied.") (Citation omitted).

[4] OPAE Memo Contra at p. 2.

[5] *In the Matter of the Complaint of Brothers Century 21, Inc. v. The East Ohio Gas Company*, Pub. Util. Comm. No. 84-866-GA-CSS, 1986 Ohio PUC LEXIS 760, at *9 (Jul. 22, 1986).

OPAE's sweeping assertions that this limited ruling will "impede coalitions of those intervenors who have common and joint interests"[6] and "prevent joint pleadings of intervenors who will no longer be able to work together efficiently to find common ground"[7] are unsupported. OPAE does not offer to explain how disclosure of these documents can have a chilling effect on future collaboration when the information contained therein has already been disclosed. OPAE neither points to an example, nor identifies a redacted document that contains information that is not already part of the public record. OPAE further fails to elaborate how exactly the ruling will "fundamentally change how parties practice and participate in proceedings before the Commission"[8] even though the Attorney Examiner explicitly said her ruling would have no precedential value.

C. OPAE Admits That It Does Not Share Anything Other Than A Commercial Interest With OCC.

Finally, as extensions of the attorney-client privilege and attorney work product doctrines, the joint defense and common interest privileges must be strictly confined and narrowly interpreted.[9] Such doctrines do not apply when the parties seeking to invoke privilege share no common legal interest. By its own admission, OPAE shares no common legal interest with OCC:

> OPAE is a unique organization that represents a group of interests: low-income residential customers, community action agencies, other non-profit agencies, and other energy efficiency service providers. **This group of interests does not coincide with any**

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[6] OPAE Memo Contra at p. 2.

[7] *Id.*

[8] *Id.* at p. 3.

[9] *Suarez*, 2014 U.S. Dist. LEXIS 63687, at *18-19; *Cigna Ins. Co. v. Cooper Tires & Rubber, Inc.*, No. 3:99CV7397, 2001 U.S. Dist. LEXIS 7546, at *4-5 (N.D. Ohio May 24, 2001) ("Because privileges are not favored * * * the 'common interest' extension of the privilege should be construed narrowly, rather than expansively.").

other intervenor interest, including OCC, which represents all residential customers, or [Ohio Manufacturers' Association's] client interests.[10]

Privileges necessarily result in withholding of evidence from opposing litigants and from courts. As such, courts have repeatedly noted that they are "in derogation of the search for truth"[11] and are to be cautiously applied "only to the very limited extent that * * * excluding relevant evidence has a public good transcending the normally predominant principle of utilizing all rational means for ascertaining truth."[12] The only purported public good or benefit to the public cited by OPAE is administrative efficiency, and the ability of attorneys practicing before the Commission to "discuss joint interests among themselves without fear that their communications will be disclosed[.]"[13] These are not cognizable policy bases for such an ambitious extension of the attorney-client privilege, a privilege whose stated goal is merely to "promote loyalty between lawyers and clients and to encourage full disclosure by clients to their attorneys."[14] In short, the attorney-client privilege exists so that a client may communicate with an attorney without fear of disclosure, *not* so that parties in litigation may join into temporary and shifting alliances for the purpose of reducing their expenses. OPAE's stated basis for

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[10] OPAE Memo Contra at p. 3.

[11] *E.g.*, *United States v. Nixon*, 418 U.S. 683, 709-10 (1974); *United States v. Suarez*, No. 5:13 CR 420, 2014 U.S. Dist. LEXIS 63687, at *16-19 (N.D. Ohio May 8, 2014) (joint defense privilege is in "derogation of the search for truth" and is therefore "strictly confined"); *Cooey v. Strickland*, 269 F.R.D. 643, 648 (S.D. Ohio 2010) (application of the privilege "stands in derogation of the search for truth" and courts permit its application only where necessary); *United States ex rel. Sanders v. Allison Engine Co.*, 196 F.R.D. 310, 312 (S.D. Ohio 2000), *rev'd on other grounds*, 471 F.3d 610 (6th Cir. 2006).

[12] *Trammel v. United States*, 445 U.S. 40, 50 (1980)

[13] OPAE Memo Contra at pp. 2-3.

[14] *Brown v. Voorhies*, No. 2:07-cv-0013, 2010 U.S. Dist. LEXIS 121788, at *7 (S.D. Ohio Oct. 26, 2010); *accord Cooey*, 269 F.R.D. at 648.

claiming privilege cannot trump the Supreme Court's reminder that the predominant principle of litigation is "utilizing all rational means for ascertaining truth."[15]

III. Conclusion

For the foregoing reasons, the Attorney Examiner's ruling on Duke Energy Ohio's Motion to Compel should be affirmed and OPAE's Memorandum Contra be stricken from the record or dismissed.

Respectfully submitted,

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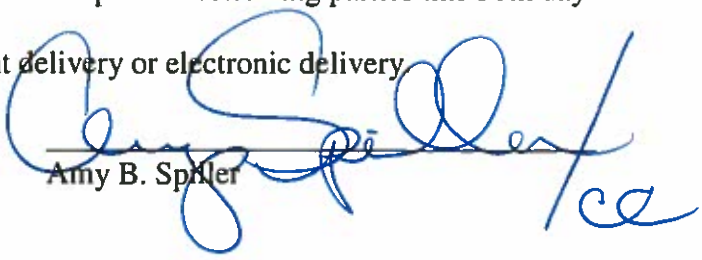
[15] *Trammel*, 445 U.S. at 50.

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing *Duke Energy Ohio Inc.'s Reply to Ohio Partners for Affordable Energy's Memorandum Contra* was served upon the following parties this 30th day of October, 2014, by regular U.S. Mail, overnight delivery or electronic delivery.



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