

BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of Duke)
Energy Ohio for Authority to Establish a)
Standard Service Offer Pursuant to Section)
4928.143, Revised Code, in the Form of) Case No. 14-841-EL-SSO
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.)

**DUKE ENERGY OHIO'S MEMORANDUM CONTRA
MOTION TO HOLD RULING IN ABEYANCE**

Pursuant to the provisions of O.A.C. 4901-1-12(B)(1) and the attorney examiner's schedule for these proceedings, Duke Energy Ohio, Inc., (Duke Energy Ohio or Company) hereby files its memorandum contra (Memorandum Contra) a Motion to Hold in Abeyance a Ruling on Duke's Motion for Protection (Motion to Hold in Abeyance), filed with the Public Utilities Commission of Ohio (Commission) on July 18, 2014, by the Office of the Ohio Consumers' Counsel (OCC).

Duke Energy Ohio respectfully submits that the Commission should deny the Motion.

I. INTRODUCTION

OCC seeks, in the Motion to Hold in Abeyance, to stop the Commission from ruling on a Motion for Protective Order that OCC says was filed by the Company on May 20, 2014.¹ It is unclear whether the OCC filed its motion in the wrong case docket or whether it simply identified the wrong case. Duke Energy Ohio did not file its application in these proceedings, with a corresponding motion for a protective order, until May 29, 2014.

Proceeding on the assumption that OCC's error was only the filing date, the Motion to hold in Abeyance is an untimely, duplicative, and unnecessary motion. As such, it should be denied.

II. ARGUMENT

The Motion is Untimely.

Although much of the discussion in OCC's Motion to Hold in Abeyance actually relates to the dispute over terms of a confidentiality agreement, OCC's stated justification for this motion is to allow OCC to "assess whether the information constitutes a trade secret," "decipher whether non-disclosure of the materials will be consistent with the purposes of Title 49," and "weigh in on whether the confidential material can reasonably be redacted."² In summary, OCC asks the Commission not to rule on the Company's motion for a protective order until the confidential information is in OCC's hands and OCC has been afforded an opportunity to "comment" on the motion.

Unfortunately for OCC's argument, this request is made far beyond the time during which it had any merit. The Company's motion for a protective order was filed on

¹ Motion to Hold in Abeyance, pg. 1.

² Motion to Hold in Abeyance, pg. 4.

May 29, 2014. Under the requirements of O.A.C. 4901-1-12(B)(1),³ OCC's right to oppose that motion expired on June 13, 2014. If OCC needed access to the confidential information in order to file such opposition, it could have sought an abeyance and extension at that time. Waiting until a month later to do so would make a mockery of the Commission's procedural rules.

The Motion is Duplicative.

OCC uses its Motion to Hold in Abeyance as a vehicle by which it can, again, press its argument concerning the disputed confidentiality agreement. In footnote 2, for example, OCC attempts to mislead the Commission into believing that Duke Energy Ohio is at fault for not having agreed to sign OCC's unrequested draft of a confidentiality agreement. OCC has made this argument before.

- On June 18, 2014, OCC filed a memorandum "contra" a motion by Ohio Energy Group to establish a protective agreement. In that document, OCC recited its version of the events that had transpired to that date, with regard to negotiating terms of an agreement. It said that "Duke has now declined to sign [OCC's draft] agreement."⁴ Of course, OCC did not mention, in this sentence, that it had declined to sign the Company's draft.
- On July 14, 2014, OCC filed a memorandum contra the Company's (second) motion for a protective order. This time, OCC described the situation by saying that "now after a month of negotiations, Duke continues to insist on reinventing the wheel, and . . . seeks to force OCC to

³ As of the relevant date, the attorney examiner had not yet issued an entry establishing case-specific deadlines.

⁴ Memorandum Contra OEG's Motion to Establish Protective Agreement by Office of the Ohio Consumers' Counsel, pg. 2.

execute its proposed confidentiality agreement, albeit with some limited revisions that have been made during negotiations.”⁵ And, as the Commission has seen, OCC continues to insist on signing only an agreement that the Company has found to be unsatisfactory. And, as the Commission has also seen, the Company’s revisions were hardly “limited.”

- On July 17, 2014, OCC (together with a small number of other parties) filed a memorandum contra the Company’s reply to their motion to reject the entire filing. Therein, OCC asserted that “[i]t is Duke which [*sic*] has been unwilling to move off of its unreasonable demands and positions”⁶ The Company has unarguably been more than willing to compromise and negotiate as to terms of the agreement.
- On July 18, 2014, OCC redoubled its efforts by filing both the Motion to Hold in Abeyance and, also, a motion to compel responses to discovery. The latter, almost entirely focused on the confidentiality agreement dispute, again insinuates that Duke Energy Ohio is at fault: “Duke has been unwilling to sign the protective agreement that OCC presented” and “Negotiations . . . dragged on for nearly a month and were unsuccessful.”⁷ But OCC does not explain that it is the only party that refused to move away from its initial position.

⁵ Memorandum Contra Duke Energy Ohio’s Motion for Protective order by the Office of the Ohio Consumers’ Counsel, pp. 3-4.

⁶ Joint Reply to Duke Energy Ohio’s Memorandum Contra by the Kroger Company, Ohio Manufacturers’ Association, Ohio Partners for Affordable Energy, and the Office of the Ohio Consumers’ Counsel, pg. 9.

⁷ Motion to Compel Responses to Discovery by the Office of the Ohio Consumers’ Counsel, pg. 2.

It is entirely unnecessary for OCC to make its arguments over and over again. These duplicative filings cause extra work for the Commission, its Staff, and the Examiner. A motion to strike the filing at issue is tempting, but for the undue burden that would result from another round of motion practice.

The Motion is Unnecessary.

In addition to being late and a duplicative waste of time, the Motion to Hold in Abeyance is entirely unnecessary. The Commission is certainly aware of the ongoing dispute and the fact that OCC has not yet had access to the confidential information that was the subject of the (first) motion for a protective order. The Commission is more than capable of concluding that the issue may not be ripe at this time.

The Commission acts – or does not act – based on its own evaluation of circumstances. No motion from a party is needed and, indeed, no motion from a party can compel the Commission to act or not act. OCC appears to view the situation differently. In reciting the background of the dispute over the confidentiality agreement, OCC described the situation as follows:

Recently, OCC filed a Motion to Compel the PUCO to order Duke to enter into a protective agreement⁸

Indisputably, a motion to compel is a motion asking the PUCO to compel a party to do something. It is most definitely not a motion seeking to compel the PUCO to act or not act in a particular way.

OCC should simply allow the Commission to handle this case appropriately, without burdening it with yet another motion to address.

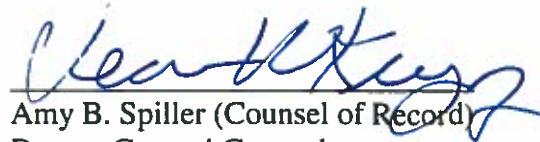
⁸ Motion to Hold in Abeyance, pg. 2 (emphasis added).

III. CONCLUSION

Duke Energy Ohio respectfully submits that the Commission should deny the Motion to Hold in Abeyance.

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, or electronic mail, on this 23rd day of July, 2014, to the parties listed below.


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