

**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) Case No. 14-841-EL-SSO
Pursuant to Section 4928.143, Revised)
Code, in the Form of an Electric Security)
Plan, Accounting Modifications and)
Tariffs for Generation Service.)

) Case No. 14-842-EL-ATA

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.)

**DUKE ENERGY OHIO, INC.'S MEMORANDUM CONTRA
THE OHIO CONSUMERS' COUNSEL INTERLOCUTORY APPEAL
AND APPLICATION FOR REVIEW
(EXPEDITED RULING REQUESTED)**

I. Introduction

On October 22, 2014, after compelling the Office of the Ohio Consumers' Counsel (OCC) to produce documents that it claimed were protected from disclosure by its Joint Defense Agreement with Ohio Manufacturers' Association (OMA) and Ohio Partners for Affordable Energy (OPAE) in the above-captioned matter, the Attorney Examiner stated:

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 OCC needs to turn over that information unredacted to [Duke Energy Ohio, Inc.]. 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

Nevertheless, despite the explicit disclaimer of any precedential authority, OCC professes concern over how "the ruling will impact other parties who practice before the PUCO and work

¹ See OCC's Interlocutory Appeal and Application for Review (OCC Appeal) at Attachment A, p. 3 (Transcript at 47:17-24).

jointly in coalitions to represent common and joint interests.”² That is mere pretext. OCC really wishes for the Public Utilities Commission of Ohio (Commission) to substitute its own judgment for that of the Attorney Examiner, who reviewed *unredacted* copies of the documents in question before making her determination that no privileged information would be compromised, and render a decision based on *redacted* documents, which include correspondence to third-parties’ counsel. The Attorney Examiner’s ruling should be undisturbed and OCC’s interlocutory appeal should be dismissed because the ruling does not allow Duke Energy Ohio, Inc. (Duke Energy Ohio) to discover any information protected from disclosure that has not already been disclosed.

II. Argument

A. The Joint-Defense And Common Interest Doctrine Privileges Do Not Apply Where The Supposedly “Confidential” Information Has Already Been Disclosed In Public Filings.

The Attorney Examiner conducted an *in camera* review of the documents that OCC seeks to withhold from production, and determined that the redacted information does not include any information that has not already been disclosed in OCC’s public filings. Such a determination is entitled to the Commission’s deference.³ Affirming the Attorney Examiner’s decision in *In re Brothers Century*, the Commission reasoned that “[t]he examiner, as a fact-finder, is accorded deference and respect in her rulings; and her motion rulings were reasonable and lawful.”⁴

² *Id.* at p. 2-3.

³ *In the Matter of the Complaint of Brothers Century 21, Inc., Complainant, v. The East Ohio Gas Company*, Pub. Util. Comm. No. 84-866-GA-CSS, 1986 Ohio PUC LEXIS 760, at *9 (1986). See also *In the Matter of the Amendment of Chapter 4901-1 of the Ohio Administrative Code and the Rescission of Certain Provisions of Chapter 1551:1-7 of the Ohio Administrative Code*, Pub. Util. Comm. No. 87-84-AU-ORD, 1987 Ohio PUC LEXIS 49, at *7-8 (Oct. 14, 1987) (describing the great deference accorded by the PUCO to a presiding hearing officer’s rulings requiring the consolidation of interests).

⁴ *In re Brothers Century*, 1986 Ohio PUC LEXIS 760 at *9.

OCC asks the Commission to ignore the Attorney Examiner's conclusion without so much as offering one example of what the Attorney Examiner supposedly overlooked or describing the manner in which her decision was anything but reasonable and lawful. Relying solely on their insinuations, OCC does not even identify the redacted document that contains information that is not already part of the public record, or provide any evidence that the Attorney Examiner exercised her judgment in a flawed, erroneous or abusive manner.

Indeed, OCC has neither included unredacted documents—nor offered to make such documents available—for this Commission to make its own independent assessment and comparison with the numerous documents already on file, even though such determination is best made by the Attorney Examiner who has already reviewed such documents and has greater familiarity with this case. Simply put, OCC has not set forth any reason why the Attorney Examiner's judgment should be disturbed or that either the joint defense or common interest privilege applies.

B. Even if the Joint Defense Or Common Interest Privilege Attached, It Has Been Waived By Communications With Counsel Outside The Purported Joint Defense Group

The joint defense and common interest privileges are, as OCC notes, extensions of the attorney-client privilege and attorney work product doctrines. They are not independent privileges, but rather operate as “an exception to the general rule that the attorney-client privilege is waived when privileged information is disclosed to third parties,” and they “assume[] the existence of an underlying privilege.”⁵ As the attorney-client privilege is itself “in derogation of the search for truth,” courts have held to the principle that any exceptions to its requirements—

⁵ *Falana v. Kent State Univ.*, No. 5:08 CV 720, 2012 U.S. Dist. LEXIS 173114, at *11 (N.D. Ohio Dec. 6, 2012); *see also United States v. Suarez*, No. 5:13 CR 420, 2014 U.S. Dist. LEXIS 63687, at *16-19 (N.D. Ohio May 8, 2014).

including the joint defense privilege—must be strictly confined and narrowly interpreted.⁶ This exception applies “only where necessary to achieve its purpose,” and is “limited strictly to those communications made to further an ongoing enterprise.”⁷ Although OCC may insist that it “does not need to prove that the [Joint Defense Agreement] Signatories’ legal interests are identical,”⁸ they must, at the very least, share a legal interest. Instead, the only interest OCC shares with the other signatories—namely, Ohio Manufacturers’ Association (OMA) and Ohio Partners for Affordable Energy (OPAE)⁹—is a commercial motivation to “control[] litigation costs” and seek “administrative efficiency” in opposing Duke Energy Ohio’s application.¹⁰ Yet the interest in controlling litigation costs and seeking administrative efficiency motivates (or should motivate) every party to an adversarial proceeding. In other words, the common interest of “controlling costs” cannot be used as a justification to avoid participating in discovery under the veil of a joint defense privilege or common interest doctrine, particularly when such privileges are to be narrowly interpreted.¹¹

Additionally, in one case relied upon by OCC, the court enforced the privilege only after noting that “the attorneys scrupulously avoided any contact that would potentially waive the

⁶ *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.”).

⁷ *Id.* at *19 (quoting *United States v. BDO Seidman, LLP*, 492 F.3d 806, 815 (7th Cir. 2007)).

⁸ OCC Appeal at p. 11.

⁹ *Id.* at p. 3

¹⁰ Duke Energy Ohio’s Motion to Compel, dated Sept. 22, 2014 at pp. 6-7.

¹¹ See *North Am. Rescue Prods. v. Bound Tree Med., LLC*, No. 2:08-cv-101, 2009 U.S. Dist. LEXIS 118316, at * 21 (S.D. Ohio Nov. 19, 2009) (declining to extend common interest privilege when parties claiming privilege have nothing more than a shared commercial interest).

privilege.”¹² Nothing approaching such meticulous caution was exercised by OCC here. Among the redacted documents that have been withheld are communications with counsel for IGS Energy, counsel for AEP, and counsel for Kroger Company.¹³ OCC claims to withhold these documents on the basis of a joint defense privilege, but none of these parties is described by OCC as a signatory to its Joint Defense Agreement or a participant in any other joint defense agreement, written or unwritten; as such, they cannot be encompassed by the privileges that OCC claims.¹⁴ Moreover, other emails produced by OCC make it clear that draft motions were circulated outside of the joint defense signatories, clearly waiving any privilege as to those drafts.¹⁵ Far from taking care to avoid disclosure of privileged information, the participants in the Joint Defense Agreement appear to have only done so when it suited them, and now seek the protections of the joint defense privilege even when it was unambiguously waived.

The Attorney Examiner in this matter, after reviewing the unredacted documents *in camera*, correctly concluded that that such “information . . . is already in the open record” and “has essentially been disseminated to everyone.”¹⁶ This is doubly true, because not only is the

¹² *Cooey v. Strickland*, 269 F.R.D. 643, 653 (S.D. Ohio 2010).

¹³ Attachment B to OCC Appeal, at 000005-07 (emails dated June 17, 2014 between Maureen O’Grady for OCC and Joseph Olikier for IGS); *id.* at 000021 (emails dated June 26, 2014 between Ms. O’Grady and Mr. Olikier); *id.* at 000032-33 (email dated June 27, 2014 between Ms. O’Grady and Steven Nourse for AEP); *id.* at 000046 (emails dated July 8, 2014 between Edmund Berger for OCC and Rebecca Hussey, responding on behalf of Kroger).

¹⁴ See OCC Appeal at p. 3 (listing the JDA Signatories as OCC, OMA, and OP AE only); *Little Hocking Water Ass’n v. E.I. du Pont de Nemours & Co.*, No. 2:09-cv-1081, 2013 U.S. Dist. LEXIS 22213, at *63-64 (S.D. Ohio Feb. 19, 2013) (finding no waiver by disclosure to an attorney who was part of the joint defense agreement, but noting that the doctrine “applies only when all attorneys and clients have agreed to take a joint approach in the matter at issue”).

¹⁵ *E.g.*, *id.* at 00064 (email dated July 28, 2014 from Andrew Sonderman, counsel for People Working Cooperatively, stating his anticipation of receiving a draft motion, though his client is not a signatory to the agreement); *id.* at 00065 (similar exchange with Douglas Hart, counsel for Greater Cincinnati Health Council).

¹⁶ Attachment A to OCC Appeal at 47:23-48:4.

information effectively contained in the publicly filed documents, but it was circulated freely by the Joint Defense Agreement signatories when it suited them. This Commission should not disturb the Attorney Examiner's limited holding on such facts.

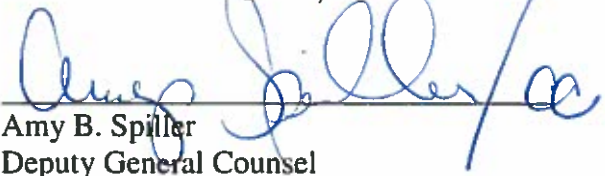
Finally, Duke Energy Ohio requests an expedited ruling on this interlocutory appeal. Given that the hearing is already underway, an expedited ruling is necessary to allow Duke Energy Ohio a fair opportunity to review and prepare its cross-examination of OCC witnesses based on OCC's unredacted discovery responses.

III. Conclusion

For the foregoing reasons, the Attorney Examiner's ruling on Duke Energy Ohio's Motion to Compel should be affirmed and OCC's Interlocutory Appeal and Application for Review be dismissed.

Respectfully submitted,

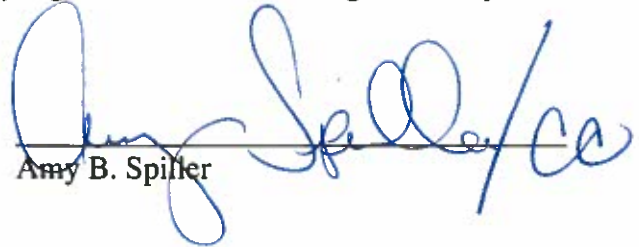
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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing *Duke Energy Ohio Inc.'s Memorandum Contra Ohio the Consumers' Counsel Interlocutory Appeal and Application for Review* was served upon the following parties this ^{29th} day of October, 2014, by regular U.S. Mail, overnight delivery or electronic delivery.


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