

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.)

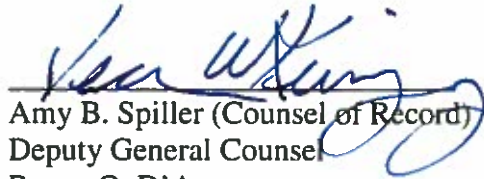
**DUKE ENERGY OHIO, INC.'S
MOTION TO QUASH OR LIMIT SUBPOENAS**

Duke Energy Ohio, Inc., (Duke Energy Ohio or Company), pursuant to O.A.C. 4901-1-12 and 4901-1-25, hereby moves the Public Utilities Commission of Ohio (Commission) to quash or limit certain subpoenas issued in these proceedings on October 17, 2014. Specifically, the Company seeks to quash in its entirety the subpoena duces tecum issued to Duke Energy Ohio, commanding it to produce an unnamed witness or witnesses to testify with regard to itemized but irrelevant issues. Further, with regard to those subpoenas duces tecum issued to Charles Whitlock, Bryan Dougherty, Dr. Ben Zhang, and Kenneth Jennings, the Company moves to quash the subpoenas entirely or to limit the subpoenas with regard to the production of documents required thereby. A memorandum in support of this motion is attached.

Duke Energy Ohio respectfully seeks an order so limiting or quashing the subpoenas.

Respectfully submitted,

DUKE ENERGY OHIO, INC.

A handwritten signature in blue ink, appearing to read "Amy B. Spiller", is written over a horizontal line. The signature is stylized and cursive.

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MEMORANDUM IN SUPPORT

O.A.C. 4901-1-25 provides a procedure whereby a party to a proceeding may move for the issuance of a subpoena directing a person to give testimony at a deposition or a hearing and to produce documents as set forth in the subpoena. If the party seeks to compel the attendance of a witness at a hearing, paragraph (E) requires such a motion to be filed no later than ten days prior to the commencement of the hearing, unless expedited treatment is requested. Paragraph (C) of the rule allows the Commission or an Attorney Examiner to quash a subpoena if it is “unreasonable or oppressive . . .” The subpoenas issued in these proceedings are unreasonable and oppressive and, from the face thereof, were not filed on a timely basis.

The Subpoenas

The Office of the Ohio Consumers’ Counsel (OCC) filed a motion seeking the issuance of five subpoenas directed at the Company or its personnel.

The first subpoena was directed to Charles Whitlock (Whitlock Subpoena). In addition to his presence on the first day of hearing, the Whitlock Subpoena would require Mr. Whitlock to carry with him to the hearing a number of documents related to any request by the Company, since January 1, 2012, for consent to sell or transfer ownership of its interest in Ohio Valley Electric Corporation (OVEC). The documents that are specifically mentioned include minutes of the OVEC Board of Directors, communications between OVEC and its owners, communications between OVEC’s owners, and evidence of the vote on the Company’s request for consent.

The second subpoena was directed to Bryan Dougherty (Dougherty Subpoena). In addition to his presence on the first day of hearing, the Dougherty Subpoena would require Mr. Dougherty to carry with him to the hearing all documents related to discovery requests for which he is responsible and all documents showing assumptions, calculations, and workpapers

estimating “the economic value of [the Company’s] share of the capacity and energy from OVEC to its retail customers” for the duration of Duke Energy Ohio’s entitlement” and estimating “the net cost or benefit to customers and projected rate impacts of the Price Stabilization Rider.”

The third subpoena was directed to Ben Zhang (Zhang Subpoena). In addition to his presence on the first day of hearing, the Zhang Subpoena would require Dr. Zhang to carry with him to the hearing a number of documents related to discovery requests for which he is responsible and all documents showing assumptions, calculations, and workpapers estimating “the economic value of [the Company’s] share of the capacity and energy from OVEC to its retail customers” for the duration of Duke Energy Ohio’s entitlement” and estimating “the net cost or benefit to customers and projected rate impacts of the Price Stabilization Rider.”

The fourth subpoena was directed to Kenneth Jennings (Jennings Subpoena). In addition to his presence on the first day of hearing, the Jennings Subpoena would require Mr. Jennings to carry with him to the hearing a number of documents related to discovery requests for which he is responsible and all documents showing assumptions, calculations, and workpapers estimating “the economic value of [the Company’s] share of the capacity and energy from OVEC to its retail customers” for the duration of Duke Energy Ohio’s entitlement” and estimating “the net cost or benefit to customers and projected rate impacts of the Price Stabilization Rider.”

The fifth and final subpoena was directed to the Company itself (Corporate Subpoena). The Corporate Subpoena requires the Company to produce witnesses with “knowledge and expertise” concerning those matters that were specified in the Whitlock Subpoena, the Dougherty Subpoena, the Zhang Subpoena, and the Jennings Subpoena. OCC explains the Corporate Subpoena, in two footnotes, as a backup plan “in the event that [the four, specified

witnesses] lack the necessary knowledge and expertise to testify regarding this subject.”¹

The Subpoenas are Unreasonable and Oppressive

OCC has deposed all of these witnesses. Additionally, OCC has issued and received timely responses to copious discovery. OCC now seeks another opportunity to conduct discovery, apparently having not found the previous responses to its satisfaction. Such conduct should not be permitted.

The subpoenas issued on October 17, 2014, are, initially, unreasonable in that they demand the production of documents – and presumably testimony, as well – concerning issues that are unrelated to the substance of the Company’s proposed standard service offer. OCC’s statements attempting to show relevance are mere fabrications or miscomprehensions. Whether the Company tried to transfer or sell its interest in OVEC is of no consequence to the Commission’s consideration of whether the proposed electric security plan is more favorable than the expected results of a market rate offer. This fact alone should be sufficient to quash all five of the subpoenas.

This motion to quash should be granted on other grounds, as well. As noted above, since the commencement of these proceedings five months ago and prior to the issuance of the subpoenas, OCC has engaged in various other forms of discovery. It has propounded 19 sets of written discovery, comprising 442 interrogatories and 95 requests for the production of documents. It has deposed, pursuant to notices of deposition *duces tecum*, six witnesses for Duke Energy Ohio, including all four of the individuals subject to the subpoenas in dispute. The very documents identified as ones to be presented to OCC thirty minutes prior to the hearing have already been requested and produced in the course of this discovery. There is no reason to allow OCC to require the Company to produce, at hearing, the same documents already produced

¹ OCC Motion for Subpoena Duces Tecum, at pg. 3, fn. 2 and 3 (Oct. 17, 2014).

in discovery.

The last of the written discovery questions were required to be served on September 22, 2014.² Depositions were to be completed by October 10, 2014.³ Apparently, however, OCC was not done with its discovery efforts by these dates. Even with all of the material that was produced over these several months, OCC is apparently unsatisfied. It is once again asking for OVEC documentation, although Duke Energy Ohio has produced information responsive to prior questions, which information is either relevant or likely to result in the discovery of relevant information, and is not privileged. Having produced the information once, it is uncontrovertibly unreasonable and oppressive to have to produce it again. OCC must do its own hearing preparation and bring its own relevant documents for cross examination. It is unconscionable that OCC now expects the Company to support the OCC's hearing preparation.

In addition, it should be noted that the legal process at the Commission requires a cross-examining party to provide to the witness those documents that the cross-examiner thinks relevant and important to its case. There is no requirement that a witness appear at a hearing, bearing all documents that the other parties might wish to refer to or discuss. Such a requirement would be – and, in this situation, is – unreasonable and oppressive.

The Company has produced all of the relevant documents and should not be required to re-produce that which is already in OCC's possession.

Furthermore, the Company would note that the individual subpoenas require attendance as of the start of the hearing. As OCC is well aware, the Examiners have requested the development of a proposed witness schedule, to account for the many conflicts of various individual witnesses. Under that proposed schedule, these four individuals would not testify

² Entry, at pg. 6 (Aug. 5, 2014).

³ Prehearing Transcript, at pp. 66-68 (Aug. 12, 2014).

until the sixth and tenth days of the hearing. To ask such a waste of these individuals' time doesn't demonstrate even an attempt at reasonableness. If not quashed, the subpoenas should be limited to allow their presence on a date to be determined, on the basis of the progression of the hearing and the schedules of the individuals in question.

The corporate subpoena is even more unreasonable and oppressive. OCC's notices of deposition already requested testimony from persons with knowledge of the issues described by OCC in the Corporate Subpoena. The Company has provided knowledgeable persons, as requested, on four separate occasions. And, even more oppressive as the fact that OCC already has had an opportunity, with each of the subpoenaed individuals, to determine the extent of his knowledge. There should be no need for OCC to move for the issuance of the Corporate Subpoena, just in case the other four witnesses don't know the answers to OCC's questions. There is no mystery here. OCC has already deposed the witnesses and has had an opportunity to inquire of their knowledge and of the knowledge of others in the organization. Discovery has concluded. If OCC does not now have the answers it needs to prepare its case, it may not continue fishing at the Company's expense. Such conduct, in addition to being unreasonable and oppressive, is wasteful of the Commission's time and resources, as well as those of other intervenors.

The Corporate Subpoena should be quashed in its entirety.

The Subpoenas are Procedurally Flawed

O.A.C. 4901-1-25 specifically allows for the issuance of a subpoena to "command the person to whom it is directed to attend and give testimony . . ." (Emphasis added.) Nothing in the Commission's rules allow the issuance of a subpoena to a corporate entity. Surely the Corporate Subpoena should be quashed on the ground that no rule allows the Commission to

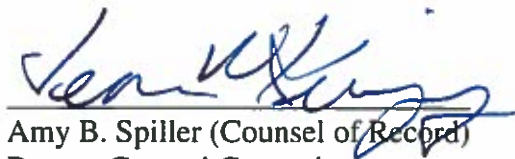
issue such a mandate.

Finally, O.A.C. 4901-1-25(E) requires motions for subpoenas calling for attendance at a hearing to be filed no later than ten days prior to the commencement of the hearing. There are two exceptions. First, good cause can be shown as to why the motion is late. OCC makes no attempt to show such cause. And, second, expedited treatment may be “requested.” There is nothing on the face of the motion to indicate that OCC was attempting to “request” expedited treatment. Thus, from the evidence available to the Company, the five subpoenas were requested after the deadline for doing so and should, therefore, not have been issued.

Duke Energy Ohio respectfully requests that the Commission or an Attorney Examiner quash the subpoenas issued on October 17, 2014, with regard to Duke Energy Ohio itself and its personnel.

Respectfully submitted,

DUKE ENERGY OHIO, INC.



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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 20th day of October, 2014, to the parties listed below.


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