

FILE

BEFORE THE PUBLIC UTILITIES COMMISSION OF OHIO

In The Matter of the Complaint of)
Ohio Power Company,)
)
Complainant,)
)
v.)
)
Consolidated Electric Cooperative, Inc.,)
)
Respondent,)
)
Relative to Violations of the)
Certified Territory Act.)

Case No. 06-890-EL-CSS

CONSOLIDATED ELECTRIC COOPERATIVE, INC.'S MEMORANDUM
CONTRA TO OHIO POWER'S MOTION TO COMPEL DISCOVERY

I. INTRODUCTION

This is a motion that concerns a discovery dispute that should have never involved the Commission. Ohio Power Company ("Ohio Power") filed this motion, with no advance notice, during the middle of a winter storm and one day after the date by which Consolidated Electric Cooperative, Inc.'s ("Consolidated") counsel indicated that he would "do his best" to serve his client's supplemental responses. Such a motion is premature under Rule 4901-1-23(C) because Ohio Power did not exhaust all reasonable means of resolving discovery differences. Giving credence to this motion only encourages the Commission's involvement in more discovery disputes where the movant has not employed reasonable efforts to resolve the dispute through extra-judicial means.

The motion is also not properly before the Commission because Consolidated served its Supplemental Production on Ohio Power two days after the Motion was filed (a service that, but for the winter storm, would have take place earlier in the week). Thus, because Consolidated has complied with the relief requested in Ohio Power's Motion, the Motion is moot. While Ohio

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Power may still object to the sufficiency of the supplemental documentation, it must do so pursuant to the Commission's Rules and first use extra-judicial efforts to resolve any such objection. Thus, its anticipatory motion to compel is improper.

Even if the Motion were properly before the Commission, it should be denied. First, Ohio Power has not sufficiently explained **how** the documentation withheld from the Supplemental Production "is relevant to the pending proceeding" as required by Rule 4901-1-23(C)(1)(b). Finally, even assuming *arguendo* that the motion were properly before the Commission and Ohio Power's theory of relevancy were adequately explained, the documents withheld from the Supplemental Production consist of confidential and propriety information and are not reasonably calculated to lead to admissible evidence. Consolidated believes they are being sought for competitive purposes and other reasons that have nothing to do with this lawsuit.

For all of these reasons, the Commission should deny Ohio Power's Motion.

II. FACTUAL BACKGROUND

A. Ohio Power requests supplemental discovery responses and Consolidated undertakes an effort to comply with that request.

Ohio Power served Consolidated its First Set of Interrogatories, Request for Production, and Requests for Admission (collectively "Discovery Requests") on January 4, 2007.

Consolidated's attorney, William R. Case, served Consolidated's responses and objections to the Discovery Requests on January 26, 2007. (Affidavit of William R. Case, ¶ 2).

On or about February 1, 2007, Ohio Power's counsel, Daniel P. Conway, contacted Mr. Case to discuss the substance of Consolidated's responses and objections and to request additional documentation. (Case Affidavit, ¶ 3). Mr. Case asked Mr. Conway to state his

reasons for the additional documentation he requested. (Case Affidavit, ¶ 3). Mr. Conway stated that he needed the information in an attempt to demonstrate how widespread Consolidated's alleged practice of violating the Certified Territory Act is, in Ohio Power's opinion. (Case Affidavit, ¶ 3). After Mr. Case's February 1, 2007 conversation with Mr. Conway, he contacted his client and requested that it gather, copy, and provide him with additional documentation. (Case Affidavit, ¶ 4). His client did so. (Case Affidavit, ¶ 4).

After giving his client time to assemble the requested documentation, Mr. Case called Mr. Conway on or about February 9, 2007. (Case Affidavit, ¶ 5). Mr. Case informed Mr. Conway in that telephone conversation that: (1) the parties were not at an impasse with respect to the discovery issue; (2) he would be reviewing the additional documentation supplied by his client and producing any such documentation that is relevant to Mr. Conway's stated reasons for additional documentation; and (3) he would "do [his] best" to provide the additional documentation by February 13, 2007. (Case Affidavit, ¶ 5). Mr. Case specifically told Mr. Conway that while he would work hard to provide the documents by February 13, 2007, he was getting ready to start a trial that was dominating his time. (Case Affidavit, ¶ 6). The referenced trial is a jury trial set to begin on February 20, 2007 in Fairfield County, Ohio, which could be two weeks in duration. (Case Affidavit, ¶ 6). At no time did Mr. Conway inform Mr. Case that if he did not receive the documentation by February 13, 2007, he would file a motion to compel. (Case Affidavit, ¶ 7).

By the morning of February 13, 2007, Mr. Case had begun reviewing and assembling the documents to be produced by Consolidated (the "Supplemental Production"), arranging bates labelling, and dictating a letter to Mr. Conway. (Case Affidavit, ¶ 8). The letter described the documents that were being produced and the documents that were being withheld, and gave an

explanation as to why those documents were being withheld (the "Withheld Documentation"). (Case Affidavit, ¶ 8).

B. A severe snow storm closes Consolidated's law firm for a day and a half and delays Consolidated's production.

On February 13, 2007, a significant snow storm arrived in Ohio, dumping several inches of snow on Columbus. (Case Affidavit, ¶ 9). To make matters worse, at some point in the afternoon, the snow turned to ice. (Case Affidavit, ¶ 9). Given the dangerous road conditions and the authorities' call for drivers to stay off the road unless absolutely necessary, the partner in charge of Consolidated's law firm made a decision to close its Columbus office on the afternoon of February 13, 2007. (Case Affidavit, ¶ 9). As a consequence, Mr. Case was without the secretarial, paralegal, and copying support staff necessary to prepare the dictated letter, organize and bates label the documents, make enough copies for all parties involved, and physically serve the documents on Mr. Conway. (Case Affidavit, ¶ 9). Given the weather conditions, the Columbus office of Consolidated's firm was also closed all day Wednesday, February 14, 2007. (Case Affidavit, ¶ 10). Mr. Case was, therefore, without the aforementioned support staff necessary to facilitate production on that day as well. (Case Affidavit, ¶ 10).

C. One day after the target date for the Supplemental Production, during the middle of a severe winter storm, and without any communication or warning, Ohio Power abandons extra-judicial efforts and files a motion to compel.

Even though Mr. Conway's affidavit acknowledges that "weather might have affected Consolidated's ... ability to respond," Ohio Power chose to file a motion to compel on February 14, 2007, during weather conditions that forced Consolidated's law firm to close its Columbus office, one day after a day by which Mr. Case indicated he would "do [his] best" to serve the

Supplemental Production, and without so much as a telephone call or email to determine whether the weather conditions had caused a delay in production. (Case Affidavit, ¶ 11).

D. Two days after the motion to compel is filed, Consolidated serves the Supplemental Production on Ohio Power – the same production that would have been served earlier had the snow storm not caused a delay.

On February 16, 2007, Mr. Case's office hand delivered to Mr. Conway the Supplemental Discovery and enclosure letter (the "Transmittal Letter") describing the Supplemental Production, Withheld Documentation, and including an explanation as to the basis for withholding certain documents. (Case Affidavit, ¶ 12). A true and accurate copy of the Supplemental Production and Transmittal Letter is attached to Mr. Case's Affidavit as Exhibit A. (Case Affidavit, ¶ 12). Except for the portion of the Transmittal Letter addressing the motion to compel and Mr. Case's disappointment that it was filed, the Transmittal Letter and Supplemental Production served on February 16, 2007 were identical in content to what Mr. Case was preparing to serve on Mr. Conway prior to the snow storm and motion to compel being filed. (Case Affidavit, ¶ 12).

In the Transmittal letter, Mr. Case identified the Withheld Documentation by category and bates number. (Case Affidavit, ¶ 13). He also informed Mr. Conway of Consolidated's position that none of the withheld documents are relevant to Mr. Conway's stated reasons for requesting additional documentation. Rather, those documents relate to the mechanics of providing service; updates on construction of service as it progressed; information relative to bidding on aspects of the service provided; metering issues; substation site selection; planning and acquisition; rate information and projections; zoning issues; land acquisition for substation; AEP reaction and objections to service to AHP (and what to do in response to those objections); consideration of information for contract discussions with AHP; easements; problems with

temporary service; contract execution issues; port authority financing for AHP; load expectations; acquisition of transformers; coordination with AHP personnel; consumers' counsel data relative to AEP under spending; discussion of the filing of the Ohio Power complaint and strategy for reaction; and potential rallying of political support. (Case Affidavit, ¶ 13).

E. After the Supplemental Production, Ohio Power refuses to withdraw its Motion and does not identify any basis for the discoverability of the Withheld Documentation.

Despite Consolidated's request contained in the Transmittal Letter that Ohio Power withdraw its Motion in light of the Supplemental Production and Consolidated's indication of a willingness to continue to work with Ohio Power should it have further objections after reviewing the Supplemental Production, Ohio Power has continued to unnecessarily burden the Commission by refusing to withdraw its motion. Ohio Power communicated this refusal in a February 19, 2007 email from Mr. Resnik to Consolidated's attorneys. (Affidavit of Thomas E. Lodge, attached as Exhibit B, ¶ 2).

III. LAW & ARGUMENT

A. This Motion is not properly before the Commission because Ohio Power failed "exhaust all other reasonable means of resolving" the discovery dispute as required by Rule 4901-1-23(C).

Rule 4901-1-23(C) provides "[n]o motion to compel discovery shall be filed under this rule until the party seeking discovery has exhausted all other reasonable means of resolving any differences with the party or person from whom discovery is sought." The only extra-judicial action taken by Ohio Power was Mr. Conway's February 1, 2007 telephone call to Mr. Case requesting additional documentation. (Case Affidavit, ¶ 3). After this telephone conversation, Consolidated expeditiously began responding to Ohio Power's request. Mr. Case contacted his client and requested that it gather, copy, and provide him with additional documentation. (Case

Affidavit, ¶ 4). Mr. Case then spoke to Mr. Conway on February 9, 2007 (**a call which Mr. Case initiated**) and informed him that (1) the parties were not at a discovery impasse; (2) he would be producing additional documentation; and (3) he would “do [his] best” to provide the additional documentation by February 13, 2007. (Case Affidavit, ¶ 5).

It is clear that Ohio Power had no intention of using extra-judicial efforts to resolve the discovery issue. With regard to the February 14, 2007 filing, Mr. Resnik states “[b]ecause of the weather conditions we waited until early afternoon the following day before filing our motion.” (February 19, 2007 email from Mr. Resnik, attached as Exhibit A to the Lodge Affidavit). That email confirms what Consolidated suspected when it received the Motion: Ohio Power had the Motion drafted and ready to file **before** the date on which Mr. Case indicated he would do his best to provide the Supplemental Production. Ohio Power never intended to use any extra-judicial means to resolve the discovery dispute, much less the “reasonable means” required by Rule 4901-1-23(C). It had a motion to compel ready to file before the date by which it expected to receive the requested Supplemental Production.

Consolidated respectfully submits that if the Commission gives any credence to the Motion, it is effectively nullifying Rule 4901-1-23(C). That Rule was enacted for a reason - to prevent the Commission from being inundated with discovery motions until the movant has employed “reasonable means” to resolve any dispute without involving the Commission. If the Commission finds Ohio Power’s actions constitute “reasonable means,” then it has set such a low threshold for extra-judicial resolution efforts that Rule 4901-1-23(C) would be rendered meaningless.

B. Because Consolidated provided the discovery Ohio Power sought to compel two days after Ohio Power filed its Motion, the Motion is moot.

Mr. Conway's Affidavit notes that Ohio Power had "not received supplemental responses or additional documents" by February 14, 2007. Consolidated's Supplemental Production (which was delayed by weather) was served two days after Ohio Power's Motion and now moots that Motion. Ohio Power has already received the exact relief its Motion seeks (the Supplemental Production), which is the same response it would have received two or three days earlier if there had not been weather delays and it had not filed its Motion. (Case Affidavit, ¶ 12).

Under Rule 4901-1-23(C), Ohio Power must first use "reasonable means" to resolve any objection it has to the sufficiency of Consolidated's Supplemental Production. Ohio Power cannot circumvent the Rule by filing what is, in effect, an anticipatory motion to compel. To the extent its Motion challenges the **sufficiency** of the Supplemental Production, it does so before Ohio Power received and reviewed the Supplemental Production. The Commission's Rules do not authorize such a course of action. Consolidated remains willing to work with Ohio Power should Ohio Power object to the sufficiency of Consolidated's Supplemental Production and **explain the grounds** for its position that the Withheld Documentation is discoverable. (Case Affidavit, ¶ 14).

C. Ohio Power has not satisfied the Rule 4901-1-22(C)(1)(B) standard for explaining how the information withheld from the Supplemental production is relevant to the pending proceeding.

Rule 4901-1-22(C)(1)(B) states that a motion to compel shall be accompanied by "[a] brief explanation of how the information sought is relevant to the pending proceeding." Because, as aforementioned, the Motion is an improper anticipatory motion to compel as to the

sufficiency to the Supplemental Production, it is impossible for Ohio Power's Motion to comply with this Rule. Additionally, even assuming post-motion communications could satisfy the Rule, the only such communication, Mr. Resnik's February 19, 2007 email, falls well short of an **"explanation of how"** the information sought is relevant. Mr. Resnik identifies the categories of the Withheld Documentation described in the Transmittal letter but only states, without elaboration, that the Withheld Documentation "can all be relevant to this proceeding." (February 19, 2007 email from Mr. Resnik, attached as Exhibit A to the Lodge Affidavit).

Rule 4901-1-23(C) requires more than simply asserting the conclusion that the requested discovery "can be relevant." The moving party must articulate **"how** the information sought is relevant." In either its Motion or subsequent correspondence, Ohio Power has not done so.

D. The Withheld Documentation is either confidential and proprietary or not reasonably calculated to lead to admissible evidence in this proceeding.

In his February 1, 2007 telephone request for additional documentation, Mr. Conway stated that he was seeking additional documentation relevant to how widespread Consolidated's alleged practice of violating the Certified Territory Act is, in Ohio Power's opinion. (Case Affidavit, ¶ 3). Consolidated produced documentation relevant to that request, and in the Transmittal Letter stated that it is withholding documents that are not relevant to that request. The Withheld Documents are instead only probative of other topics, such as: the mechanics of providing service; updates on construction of service as it progressed; information relative to bidding on aspects of the service provided; metering issues; substation site selection; planning and acquisition; rate information and projections; zoning issues; land acquisition for substation; AEP reaction and objections to service to AHP (and what to do in response to those objections); consideration of information for contract discussions with AHP; easements; problems with


temporary service; contract execution issues; port authority financing for AHP; load expectations; acquisition of transformers; coordination with AHP personnel; consumers' counsel data relative to AEP under spending; discussion of the filing of the Ohio Power complaint and strategy for reaction; and potential rallying of political support. (Case Affidavit, ¶ 13).

While Consolidated reiterates its willingness to further discuss the issue with Ohio Power, the Withheld Documentation (identified by category above) is simply irrelevant to this proceeding. Ohio Power has not articulated any reason in its Motion or subsequent correspondence that has shed any light on its theory as to how the Withheld Documentation is relevant. Therefore, Consolidated suspects that Ohio Power's desire to receive the Withheld Documentation is motivated by business reasons, competition, and general inquisitiveness, rather than any relevancy to this proceeding.

IV. CONCLUSION

For the foregoing reasons, Consolidated respectfully requests that Ohio Power's Motion to Compel Discovery be denied in its entirety.

Respectfully submitted,



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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing was served upon the following persons, via regular U.S. mail, postage prepaid, this 21st day of February, 2007:

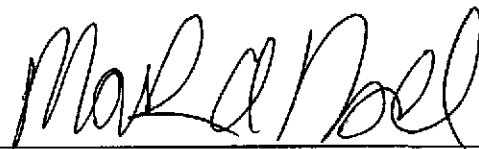
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