



Office of the Ohio Consumers' Counsel

Janine L. Migden-Ostrander
Consumers' Counsel

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Your Residential Utility Advocate
2007 MAR 15 PM 4:37
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DOCKETING DIV

March 15, 2007

Ms. Renee Jenkins, Secretary
Public Utilities Commission of Ohio
180 East Broad Street, 13th Floor
Columbus, Ohio 43215-3793

Re: "Duke Energy" Letters Dated March 7, 2007 in Consolidated Cases
03-93-EL-ATA, et al.

Dear Ms. Jenkins:

This letter responds to letters dated March 7, 2007 that were filed by Duke Energy Ohio, Inc. ("Duke Energy Ohio") and Duke Energy Retail Sales, LLC ("DERS," and collectively with Duke Energy Ohio, "Duke"). Both letters were placed on "Duke Energy" letterhead and are identical other than the identification of the Duke affiliate and the counsel signing the letters ("Letters"). In filing the Letters with the Public Utilities Commission of Ohio ("Commission") in the above-captioned cases, Duke essentially claims that OCC distributed to the case service list documents not authorized for distribution except to parties on the service list that have certain protective agreements in place.

The Letters distort both the events of March 5, 2007 and the nature of the agreements between the Duke-affiliated companies and the OCC. As the OCC's e-mail (attached) at 7:42 p.m. points out, the documents were transmitted electronically by the OCC in response to a Duke Energy Ohio discovery request. The documents that OCC obtained from a third party, pursuant to a subpoena *duces tecum*, are clearly not "protected" by the terms of OCC's protective agreements with Duke regardless of whether Duke may also have provided duplicates of the documents in protected discovery. The documents were absolutely not, as claimed by Duke, obtained "pursuant to a protective agreement." Each of OCC's protective agreements in this case state: "Nothing in this Agreement is intended to preclude the use of any portion of the Protected Material that becomes part of the public record or enters into the public domain." The documents in question entered into the public domain before the deposition on February 8, 2007 from a non-Duke source.

Regarding OCC's use of the word "inadvertent" in the attached email, the OCC did not use the word "inadvertent" in its e-mail due to any obligation attendant to its protective agreements with Duke. The OCC sought to comply with Ohio Adm. Code 4901-1-18 regarding the service of discovery responses upon all parties, but did not intend to widely distribute documents electronically. The OCC's second e-mail at 7:42 p.m. elicited an outpouring of courteous, professional responses by persons who did not have protective agreements with Duke. Those e-mails stated that recipients of the discovery responses deleted the OCC's e-mail without opening its contents.

This is to certify that the images appearing are an accurate and complete reproduction of a case file document delivered in the regular course of business technician *[Signature]* Date processed 3-16-07

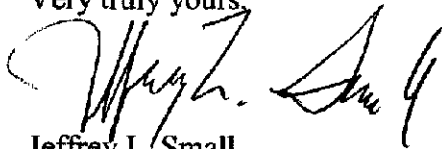
Ms. Renee Jenkins

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Finally, no Attorney Examiner "order" or other instruction, other than the command for a deponent to comply with a subpoena *duces tecum*, applies to the documents referenced in the Letters.

Very truly yours,

A handwritten signature in black ink, appearing to read "Jeffrey L. Small". The signature is stylized with a large, sweeping initial "J" and a long, horizontal stroke extending to the right.

Jeffrey L. Small,
OCC Trial Counsel

Cc: Persons on electronic service list

From: JEFF SMALL

To: anita.schafer@duke-energy.com; Anne.Hammerstein@puc.state.oh.us;
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WTTPLC@aol.com

Date: 3/5/2007 7:42:04 PM

Subject: Re: Remand Cases 03-93 et al. - OCC's Response to Duke 2nd Set Disc. 2 of 2

The e-mail transmitted at 5:27 p.m. (i.e. "2 of 2 e-mails") contains an OCC response to Duke Energy's discovery request for documents that were provided to the OCC by John Deeds pursuant to a subpoena *duces tecum*. The materials attached to the e-mail were inadvertently provided to all the parties to these cases. *The OCC would like for parties that do not have an applicable protective agreement to delete the pdf attachments (i.e. attachments to "2 of 2 e-mails") from their files as an inadvertent transmission by counsel.*

The OCC's position is that the documents are not "protected" within the meaning of any protective agreement. Nonetheless, the OCC understands that the Duke-affiliated companies take the position that the documents should be treated as confidential.

Your cooperation regarding the deletion of the material from your records, as appropriate to your situation, is appreciated.

Jeffrey Small
Assistant Consumers' Counsel

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>>> Debra Bingham 3/5/2007 5:27 PM >>>
2 of 2 emails.

Attached is the 2nd and final email with attachments regarding OCC's response to Duke's 2nd set discovery request.

Thank you.

Deb Bingham
Administrative Assistant

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CC: HOTZ, ANN; SAUER, LARRY