

FILE

**BEFORE THE
PUBLIC UTILITIES COMMISSION OF OHIO**

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PUCO

In the Matter of the Commission's Review and)
Adjustment of the Fuel and Purchased Power)
and the System Reliability Tracker Components)
of Duke Energy Ohio, Inc., and Related Matters.)

Case No. 07-723-EL-UNC

In the Matter of the Application of Duke)
Energy Ohio, Inc. to Adjust and Set its)
2008 System Reliability Tracker.)

Case No. 07-975-EL-UNC

**REPLY TO DUKE ENERGY'S MEMORANDUM CONTRA MOTION TO HOLD
RULING IN ABEYANCE
BY
THE OFFICE OF THE OHIO CONSUMERS' COUNSEL**

I. INTRODUCTION

Pursuant to Ohio Adm. Code 4901-1-12, the Office of the Ohio Consumers' Counsel ("OCC"), on behalf of all of the residential utility consumers of Duke Energy Ohio, Inc. ("Duke Energy" or "Company"), submits this Reply to Duke Energy's Memorandum Contra Motion to Hold Ruling in Abeyance ("Reply" to "Memo Contra"). The "ruling" sought from the Public Utilities Commission of Ohio ("PUCO" or "Commission") in the present sequence of pleadings would decide the Motion for Protective Order ("Motion for Protection") filed by Duke Energy on September 4, 2007. As stated in the OCC's Motion to Hold Ruling in Abeyance ("Motion for Abeyance"), Duke Energy has not provided the OCC with an unredacted version of Duke Energy's filings (containing the information that Duke Energy wants the PUCO to keep from public disclosure) due to a dispute regarding the form that a protective agreement should take. The consequence of Duke Energy's approach is that the OCC is not able, on behalf

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of residential customers, to respond to Duke Energy's Motion for the PUCO to deny public access to the information that the Company has submitted in support of its rate proposals. Moreover, Duke Energy failed to initially serve the Motion for Protection on the OCC.

The PUCO's ruling on Duke Energy's Motion for Protection should be held in abeyance until such time that Duke Energy provides the information over which it seeks confidential treatment to parties willing to enter into a reasonable protective agreement. The OCC attached a reasonable protective agreement, structured to address the OCC's needs as a governmental entity, to the OCC's Motion to Compel.¹ The ruling should also be held in abeyance until the Commission is able to consider any arguments by OCC about public access to the documents over which Duke Energy seeks protection. This will require that the ruling be held in abeyance until the PUCO rules on the OCC's Motion to Compel and the OCC receives the information that Duke Energy has withheld.

II. STATEMENT OF FACTS

On September 4, 2007, Duke Energy filed a Motion for Protection covering both of the above-captioned cases ("Case 07-723" and "Case 07-975"). Duke Energy explained in its Motion for Protection that it seeks a Commission determination that its filings contain confidential, trade secret information.²

Duke Energy's Memo Contra states that an "undetected copying error" occurred that resulted in the detachment of its Motion for Protection from another pleading (an

¹ OCC Motion to Compel Discovery (August 30, 2007).

² See, e.g., Motion for Protection at 3.

Application) that included a certificate of service.³ The Company states that it intended to use a single certificate of service to accompany both pleadings.⁴ However, Duke Energy asserts that it included its Motion for Protection in mailings that transmitted the Application.⁵ Duke Energy states that it has confirmed that two of the five persons upon which it says it served the Motion for Protection have confirmed that they received the packet that the Company describes in its Memo Contra.⁶

As revealed in the OCC's Motion for Abeyance and other pleadings in Case 07-723 regarding the OCC's Motion to Compel filed on August 30, 2007,⁷ the OCC has no reason to believe that Duke Energy will release to the OCC the information that is the subject of its Motion for Protection without an order by the Commission.

III. ARGUMENT

A. The Commission Should Reserve Its Judgment Concerning the Company's Motion for Protection

Duke Energy states its desire for an early ruling on its Motion for Protection,⁸ but fails to explain any compelling need for such a ruling. Ohio Adm. Code 4901-1-24(E) states:

³ Id.

⁴ Memo Contra at 3. The certificate of service on the other pleading, an application, reads: "I hereby certify that a copy of the foregoing Application was served via over night delivery" Application at 7 (September 4, 2007). The certificate makes no reference to the Motion for Protection. A certificate of service is required on all pleadings, pursuant to Ohio Adm. Code 4901-1-5(A).

⁵ Id..

⁶ Id.. The parties are the Ohio Energy Group and the Industrial Energy Users - Ohio. Id.

⁷ The Motion to Compel is fully briefed. The OCC filed its Reply to Duke Energy's Memo Contra on September 27, 2007.

⁸ Memo Contra at 3.

Pending a ruling on a motion [for protective order] . . . , the information filed under seal will not be included in the public record of the proceeding or disclosed to the public until otherwise ordered.

Pursuant to the above-stated rule, the information that Duke Energy seeks to protect from public view should not be part of the “public record of the proceeding or disclosed to the public” unless a proper order is issued by a representative of the Commission or a court.⁹

Barring special circumstances, Duke Energy is required to serve the entirety of its pleadings on the OCC, and the OCC is provided an opportunity to respond to the Motion for Protection pursuant to Ohio Adm. Code 4901-1-12(B)(1). Without qualification, Duke Energy states: “There is no requirement that DE-Ohio provide this information [that is the subject of the Motion for Protection] to the OCC, or any party, prior to the Commission’s determination.”¹⁰ Whether correctly recognizing its obligations, or expressing what the Company considers a courtesy, Duke Energy states that it “is willing to provide the information to any Intervening Party who signs a reasonable protective agreement.”¹¹ The OCC has offered to sign a reasonable protective agreement – an agreement that is based on arrangements that Duke Energy negotiated and signed in the past -- but the Company has now interposed delay by rebuffing the OCC in these efforts and forcing the OCC to submit a Motion to Compel to resolve the impasse.¹² The Motion to Compel attached the OCC’s proposed protective agreement. The Commission’s

⁹ The intervention of a court would likely be appropriate only if a public records request was made for the information.

¹⁰ Memo Contra at 3.

¹¹ Id. at 5.

¹² Motion to Compel (August 30, 2007).

resolution of the dispute over the protective agreement appears to be the linchpin of a resolution of the dispute over the Motion to Protect.

Duke Energy's actions prejudice the OCC in its efforts to evaluate the merits of the Motion for Protection. The Company states that, absent a ruling on the Motion for Protection, "OCC has not been harmed."¹³ That situation would change in the event that the Motion for Abeyance is not granted and the Motion for Protection is granted without providing the OCC with an opportunity to make appropriate arguments. The Motion for Abeyance should be granted.

B. Duke Energy Should Correct Its Document Delivery Problems.

Duke Energy states that the OCC's statements concerning service constitute an "unfounded . . . allegation."¹⁴ In support, the Company answers all but the critical question: Did Duke Energy transmit a detached Motion for Protection along with the Application? Duke Energy and the OCC disagree on the answer to this question. Unfortunately, the Duke-affiliated companies are the only entities with which the OCC has had recurring problems regarding the transmittal of information by both mail and by e-mail.

A few examples of communications problems regarding Case No. 03-93-EL-ATA (*Post-MDP Pricing Case*) and its progeny illustrate the situation involving the Duke affiliated companies with which the OCC grapples. 1) Duke Energy notified all parties electronically, except the OCC, regarding an initial settlement conference held in the

¹³ Memo Contra at 3.

¹⁴ Id.

Post-MDP Pricing Case.¹⁵ 2) - 6) Duke Energy and its affiliates served all parties electronically, except the OCC, regarding five motions filed in the *Post-MDP Pricing Case* (on remand) that were directed at preventing the OCC from presenting its evidence at hearing.¹⁶ 7) Duke Energy provided all parties to Case No. 06-986-EL-UNC, except the OCC, with an electronic communication that attached information related to settlement discussions.¹⁷ 8) Duke Energy Retail Sales (“DERS”) apparently served all parties electronically, except the OCC, with its Memorandum in Response to the Attorney Examiner’s August 8, 2007 Entry in the *Post-MDP Pricing Case*.¹⁸ 9) Duke Energy apparently served two parties, but not the OCC, with its Motion for Protection.¹⁹ Duke Energy should correct the communications problems and comply with its obligations under the Commission’s rules.

¹⁵ Tr. Vol. V at 165 (May 27, 2004) (Mr. Colbert: “the e-mail in question was in error”).

¹⁶ See *Post-MDP Pricing Case*, Letter Regarding Failures to Serve Motions (February 6, 2007). Duke Energy’s paralegal apologized for the incident, explaining that she mistakenly used an e-mail list that did not include OCC counsel. The OCC does not maintain an e-mail distribution list that excludes the Duke-affiliated companies.

¹⁷ The OCC learned of the electronic communication from an off-hand remark by counsel for another party. The OCC investigated the matter further, and eventually obtained the information from Duke Energy.

¹⁸ See *Post-MDP Pricing Case*, Letter Regarding Failures to Properly Serve Pleadings, footnote 1 (September 24, 2007). The Letter notes DERS’ August 16, 2007 filing. DERS counsel apologized (by voicemail) for the incident and acknowledged that service had been an issue in the case. He conjectured (incorrectly) that the OCC e-mail addressees had changed. DERS counsel did not provide details regarding his success in delivering the e-mail to other parties.

¹⁹ Only service upon two parties is addressed by Duke Energy. Memo Contra at 3. As noted, many instances in related cases illustrate that other parties received information when the OCC did not. The OCC has also observed improper forms of service that have involved all parties. These instances result in confusion regarding deadlines for responsive pleadings. See, e.g., *Post-MDP Pricing Case*, Letter Regarding Failures to Properly Serve Pleadings at 1 (September 24, 2007).

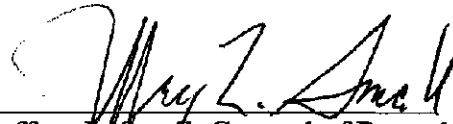
IV. CONCLUSION

The Commission should not rule on the Motion for Protection until such time as Duke Energy provides the entire information (i.e. over which it seeks confidential treatment) to the OCC. Duke Energy should provide the documents to the OCC subject to the reasonable protective agreement that is attached to the OCC's Motion to Compel.

The OCC, on behalf of residential customers, should be provided a reasonable period after receiving the documents to submit its views regarding the Motion for Protection. The OCC's Motion for Abeyance should be granted.

Respectfully submitted,

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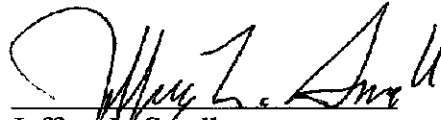
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing Reply to Memorandum Contra Motion for Abeyance has been served upon the below-stated counsel, via regular U.S. Mail, postage prepaid, this 4th day of October, 2007.


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