

FILE

10

BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

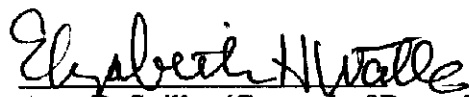
In the Matter of the Application of Duke)
Energy Ohio, Inc. to Establish and) Case No. 09-1946-EL-RDR
Adjust the Initial Level of its Distribution)
Reliability Rider.)

DUKE ENERGY OHIO, INC.'S
MOTION TO QUASH
THE SUBPOENA *DUCES TECUM*
OF THE OHIO CONSUMERS' COUNSEL
AND
REQUEST FOR EXPEDITED TREATMENT

Pursuant to Rule 4901-1-25(C), Ohio Administrative Code (O.A.C.), Duke Energy Ohio, Inc. (Duke Energy Ohio or Company) moves this Commission to quash the two subpoenas *duces tecum* issued on May 20, 2010, pursuant to the motion by the Ohio Consumers' Counsel. The subpoenas are improper for reasons set forth more fully in the Memorandum accompanying this motion.

Duke Energy Ohio also requests expedited treatment of this motion to quash, pursuant to Rule 4901-1-12(C), O.A.C.

Respectfully submitted,


Amy B. Spiller (Counsel of Record)
Associate General Counsel
Elizabeth H. Watts
Assistant General Counsel
Duke Energy Business Services LLC
139 East Fourth Street
Atrium II, 25th Floor
Cincinnati, Ohio

Counsel for Duke Energy Ohio, Inc.

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 82 Date Processed 5-21-2010

RECEIVED-DOCKETING DIV

2010 MAY 21 PM 4:16

PUCO

MEMORANDUM IN SUPPORT

Introduction and Facts

Duke Energy Ohio, Inc. (Duke Energy Ohio or Company) submitted its Application to the Public Utilities Commission of Ohio (Commission) on December 11, 2009, seeking to adjust and set the initial level of Rider DR to recover the extraordinary costs incurred in restoring service to over 492,002 customers subsequent to the storm that tore through Duke Energy Ohio's service territory on September 14, 2008. The Ohio Consumers' Counsel (OCC) moved to intervene on December 14, 2009, and that motion was granted by the Commission on February 9, 2010. Since its intervention, the OCC has conducted eleven rounds of discovery and deposed three Duke Energy Ohio witnesses. Now, in a Hail Mary pass, the OCC seeks to raise irrelevant issues to shore up its astonishing and unsupportable position that Duke Energy Ohio is not entitled to recovery of any of the costs incurred as a result of statewide disaster. The OCC has submitted two motions for subpoenas *duces tecum* which request that Duke Energy Ohio and Duke Energy Indiana, Inc., (Duke Energy Indiana) produce a witness to testify as to matters relevant only to Duke Energy Indiana. The OCC's motion is legally and factually unsupportable.

Discussion

In its motions, the OCC requests that Duke Energy Ohio and Duke Energy Indiana be compelled to produce a witness who can testify to the incurrence and collection of costs related to the Hurricane Ike storm restoration efforts by Duke Energy Ohio's affiliate, Duke Energy Indiana. There are certain issues concerning only one or the other subpoena, and some issues concerning both.

Subpoena Directed at Duke Energy Indiana

The most obvious problem with this subpoena is that the Commission does not have jurisdiction over an Indiana utility. The Commission's jurisdiction is statutory and is based entirely on Ohio law. Thus, the Commission has no power to command attendance by a person who is not found within Ohio. Duke Energy Indiana, although a public utility in Indiana, is not a public utility in Ohio, as it is not engaged in the business of supplying electricity for light, heat, or power purposes to consumers within this state. Section 4905.03, Revised Code. *See In the Matter of the Complaint of S.G. Foods, Inc., et al. v. The Cleveland Electric Illuminating Company, et al.*, Case No. 04-28-EL-CSS, *et al.*, Entry (Mach 7, 2006) at findings (48) to (51).

Subpoenas Directed at Both Duke Energy Ohio and Duke Energy Indiana

As summarized by the attorney examiner in her initial entry in this proceeding, the Commission approved a stipulation in Duke Energy Ohio's last electric rate case, which set Rider DR "as a mechanism to recover reasonable and prudently incurred storm restoration costs associated with the September 2008 wind storm related to Hurricane Ike." Thus, this proceeding concerns a calculation of the reasonable and prudent costs incurred by Duke Energy Ohio in dealing with the windstorm. Only testimony that is relevant to that calculation, and the determination that such costs were indeed reasonable and prudent, is admissible at the hearing in this case.

OCC, in its motion requesting a subpoena directed at Duke Energy Ohio, asserts that testimony concerning Duke Energy Indiana's costs incurred and recovery of those costs from its ratepayers is relevant to whether Duke Energy Ohio's costs are "already being recovered in rates established by this Commission or other jurisdictions." To assist with evaluation, Duke Energy Ohio will break the OCC's assertion into its two parts: The OCC states that it is seeking testimony concerning whether Duke Energy Ohio's costs are either (1) already being recovered

in rates established by this Commission – that is, by Duke Energy Ohio – or (2) already being recovered in rates established by other jurisdictions – that is, by Duke Energy Indiana.

With regard to the first assertion, this Commission has just reviewed Duke Energy Ohio's costs in its recent rate case. This Commission is well aware that neither Duke Energy Ohio's storm restoration costs related to the 2008 windstorm nor Duke Energy Indiana's storm restoration costs are already included in Duke Energy Ohio's rates. Even if Duke Energy Ohio's costs were already included, a witness from Duke Energy Indiana would be of no assistance in uncovering that fact. Is the OCC suggesting that there are Duke Energy Indiana costs that are being included in rate recovery authorized by this Commission? Duke Energy Ohio's rates are thoroughly reviewed by this Commission and most certainly do not include recovery of Duke Energy Indiana's costs. Additionally, if Duke Energy Indiana's costs were somehow already included in Duke Energy Ohio's authorized rates, a witness from Duke Energy Indiana would certainly not be aware of this fact, as Duke Energy Indiana employees have no input into the process of establishing Duke Energy Ohio's rates. If the OCC thinks that Duke Energy Indiana costs may be included in the costs supporting the application to set the rate for Rider DR, a witness from Duke Energy Indiana is entirely unnecessary to substantiate that fact and, indeed, would have no knowledge of the application in this proceeding.

Regarding the second assertion, how could Duke Energy Ohio's costs be already included in rate recovery authorized by this Commission's counterpart in Indiana? Certainly, the Indiana Utility Regulatory Commission reviews Duke Energy Indiana's rates as thoroughly as this Commission reviews Duke Energy Ohio's rates. Beyond that, if Duke Energy Ohio's costs were so included, how would the rates of a separate legal entity, in a different jurisdiction, have any relevance whatsoever to the Rider DR rate being established in this proceeding? Such recovery, if it existed, would create income for Duke Energy Indiana that would have no way to

Doc. No. 343469 Page 4

funnel back to Duke Energy Ohio without Duke Energy Ohio employees being aware of that Duke Energy Ohio income. Existing witnesses in this proceeding, who are aware of Duke Energy Ohio's rate structure and the financials that give rise to Duke Energy Ohio's rates, are already available and, to the extent the information is actually relevant, able to testify to any questions that the OCC might pose with regard to income that could theoretically be channeled from Duke Energy Indiana to Duke Energy Ohio.

Significantly, the impact of this catastrophic event in Indiana has no bearing on the determination of costs that are recoverable by Duke Energy Ohio in restoring power to its customers. Accordingly, testimony concerning Duke Energy Indiana's incurrence and collection of storm restoration costs would therefore be entirely irrelevant. And the testimony sought under both subpoenas is also irrelevant.

Duke Energy Ohio would also point out that the subpoena power of the Commission should not be allowed to be used by the OCC to avoid standard discovery requirements and processes. Questions concerning Duke Energy Indiana have been addressed by the OCC during discovery and Duke Energy Ohio has, not surprisingly, objected to this discovery as irrelevant. The OCC did not challenge this response, either through informal dialogue between counsel or through a motion to compel. Moving for the issuance of subpoenas at this late date, in order to avoid filing a motion to compel, is an abuse of the procedural rules of this Commission and should not be condoned or rewarded.

Subpoena Directed at Duke Energy Ohio

Rule 4901-1-25 (E), O.A.C., states that, unless otherwise ordered for good cause shown, all motions for subpoenas requiring the attendance of witnesses at a hearing must be filed with the commission no later than five days prior to the commencement of a hearing. The motion for

Doc. No. 343469

a subpoena that is directed at Duke Energy Ohio bears a docketing stamp indicating that it was docketed on May 20, 2010, and the attached certificate of service claims it was served on that same day, via e-mail. However, counsel for Duke Energy Ohio was in fact only served with this motion on May 21, 2010. A copy of the service e-mail received on May 21, 2010, at 10:12 a.m., is attached, together with an additional email noting this error, received at 10:26 a.m. Rule 4901-1-05(A), O.A.C., requires that all pleadings or papers filed with the Commission be served on parties no later than the date of filing. The OCC neglected to serve Duke Energy Ohio with its motion on a timely basis and therefore the motion should have been denied and the resulting subpoena should be quashed.

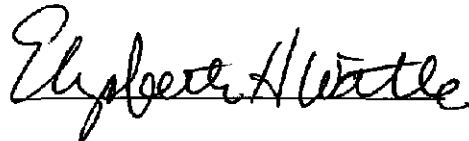
Request for Expedited Treatment

Rule 4901-1-12(C), O.A.C. provides that a moving party may request expedited treatment of a motion. Duke Energy Ohio requests such expedited treatment, as the hearing in this proceeding is scheduled for May 25, 2010, only four calendar days from the date on which Duke Energy Ohio was served with notice of the subpoenas. Duke Energy Ohio must know, prior to the hearing date, whether or not it must provide additional witnesses and have them available, in Columbus, on that date. Attendance by such witnesses at a hearing, where the subpoena would ultimately be quashed or their testimony found to be inadmissible, would only increase the ultimate costs borne by ratepayers. Duke Energy Ohio has contacted all other parties to determine whether they object to expedited treatment. While counsel for Commission Staff does not object, the OCC has not returned our telephone call.

Conclusion

The subpoenas issued pursuant to the motion of the OCC on May 20, 2010, call for testimony that is entirely irrelevant, as discussed above. In addition, the subpoena that is directed at Duke Energy Indiana is outside of the Commission's jurisdiction. Therefore, these

subpoenas are unreasonable and oppressive. Duke Energy Ohio respectfully requests that the Commission quash both subpoenas, on an expedited basis.

A handwritten signature in black ink, appearing to read "Elizabeth H. Watts". The signature is fluid and cursive, with the first name "Elizabeth" being more prominent than the last name "Watts".

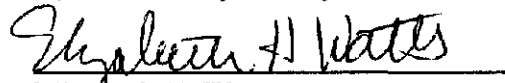
Amy B. Spiller (Counsel of Record)
Associate General Counsel
Elizabeth H. Watts
Assistant General Counsel
Duke Energy Business Services LLC
Counsel for Duke Energy Ohio

Cincinnati Office:
2500 Atrium II
139 East Fourth Street
PO Box 960
Cincinnati, Ohio 45201

Columbus Office:
155 East Broad Street,
21st Floor
Columbus, Ohio 43215

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was served via ordinary mail, postage prepaid, on the all parties of record, and also emailed to all Parties, this 21st day of May, 2010.


Elizabeth H. Watts

Ann M. Hotz
Michael Idzkowski
Office of the Ohio Consumers' Counsel
10 West Broad Street
18th Floor
Columbus, Ohio 43215-3485

Stephen Reilly
William Wright
Assistant Attorney Generals
Public Utilities Section
180 East Broad Street
Columbus, Ohio 43215

Matthew S. White
John W. Bentine
Mark S. Yurick
Chester, Wilcox & Saxbe, LLP
65 East State Street
Suite 1000
Columbus, Ohio 43215

Watts, Elizabeth H

From: MARY EDWARDS [EDWARDS@occ.state.oh.us]
Sent: Friday, May 21, 2010 10:12 AM
To: Albert Lane; Schafer, Anita M; John Bentine; Matthew White; Mark Yurick; Spiller, Amy B; Watts, Elizabeth H; Michael Dortch; Stephen A. Reilly; William Wright
Subject: OCC's Motion for Subpoena Duces Tecum (Case No. 09-1946-EL-RDR)
Attachments: Duke-Ohio.pdf; Duke-Indiana.pdf

Concerning the above-referenced, please find electronic copies of the OCC's Motion(s) for Subpoena Duces Tecum.

Please feel free to contact Ann Hotz at 614-466-8574 or via email at hotz@occ.state.oh.us should you have any questions regarding the attached materials.

Thanks.

Mary V. Edwards
Case Team Coordinator
Office of the Ohio Consumers' Counsel
10 West Broad Street, Suite 1800
Columbus, OH 43215-3485
614/466-9575 (Direct)
edwards@occ.state.oh.us

CONFIDENTIALITY NOTICE: This communication is intended only for the person or entity to which it is addressed and may contain confidential and/or privileged legal governmental material. Any unauthorized review, use, disclosure or distribution is prohibited. If you are not or believe that you are not the intended recipient of this communication, do not read it. Please reply to the sender only and indicate that you have received this message, then immediately delete it and all other copies of it. Thank you.

Watts, Elizabeth H

From: ANN HOTZ [HOTZ@occ.state.oh.us]
Sent: Friday, May 21, 2010 10:26 AM
To: Watts, Elizabeth H
Subject: Motion for Subpoena-Duke 09-1946
Attachments: Motion for Subpoena Duke Ohio.pdf; Motion for Subpoena Duke Indiana.pdf

Please disregard the email you received earlier today from Mary Edwards. Attached please find a pdf of the Motion for Subpoena etc. by the Office of the Ohio Consumers' Counsel filed yesterday in Case No. 09-1946-EL-RDR. The document's Certificate of Service states that it was served via electronic service on 5/20/10. Due to administrative oversight please accept service of this document on this date.

CONFIDENTIALITY NOTICE: This communication is intended only for the person or entity to which it is addressed and may contain confidential and/or privileged material. Any unauthorized review, use, disclosure or distribution is prohibited. If you are not the intended recipient, please contact the sender at (614) 466-8574 and destroy all copies of this communication.