

FILE

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.)

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**APPLICATION FOR REVIEW
 AND
 INTERLOCUTORY APPEAL**

**FILED JOINTLY BY
 DUKE ENERGY OHIO, INC.
 AND
 DUKE ENERGY INDIANA, INC.**

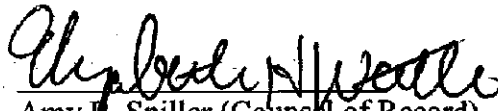
Pursuant to Rule 4901-1-15, Ohio Administrative Code (O.A.C.), Duke Energy Ohio, Inc., (Duke Energy Ohio) and its affiliate, Duke Energy Indiana, Inc., (Duke Energy Indiana) hereby jointly file an Application for Review and Interlocutory Appeal of the May 25, 2010, attorney examiner ruling that denies a motion to quash two subpoenas *duces tecum* that were issued on May 20, 2010. The ruling improperly allows the Ohio Consumers' Counsel (OCC) to require the attendance of witness(es) representing Duke Energy Indiana, an out-of-state utility that is not under the regulatory power of this Commission, and to question such witnesses concerning the rates and rate-making strategies of that affiliate.

For the reasons explained in the memorandum in support attached hereto, Duke Energy Ohio and Duke Energy Indiana respectfully request that the Commission act on this Application for Review and Interlocutory Appeal and, in so doing, modify the attorney examiners' ruling to be consistent with Ohio law. In addition, Duke Energy Ohio and Duke

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Energy Indiana also request that the hearing schedule be continued until a date after the Commission has ruled on this application and appeal.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Amy B. Spiller", is written over the printed name.

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.
and
Duke Energy Indiana, Inc.

MEMORANDUM IN SUPPORT

Introduction and Facts

Duke Energy Ohio, Inc., (Duke Energy Ohio) 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. On May 20, 2010, the OCC submitted two motions for subpoenas *duces tecum*, requesting that Duke Energy Ohio and its affiliate, Duke Energy Indiana, Inc., (Duke Energy Indiana) produce a witness or witnesses to testify as to matters concerning Duke Energy Indiana costs and rates. Those subpoenas were signed and issued on May 20, 2010. On May 21, 2010, Duke Energy Ohio filed, on behalf of itself and its affiliate, a motion to quash the subpoenas.

The hearing in this proceeding commenced on May 25, 2010, as scheduled. The attorney examiners allowed oral argument on the motion to quash and, ultimately, denied the motion, giving rise to this interlocutory appeal.

Legal Requirements for the Filing of an Interlocutory Appeal

Rule 4901-1-15, O.A.C. addresses the right of parties to Commission proceedings to appeal rulings issued in writing or orally by attorney examiners. Specifically, the rule provides that any party who is adversely affected by such a ruling may take an immediate interlocutory appeal to the Commission if the ruling falls within certain designated categories, including the

denial of a motion to quash a subpoena. Rule 4901-1-15(A)(3), O.A.C. Thus, certification to the Commission is not required. Rule 4901-1-15(B), O.A.C.

The governing rule goes on to require that interlocutory appeals must begin with an application for review that is filed with the Commission within five days after the ruling is issued. The application must set forth the basis of the appeal and citations of authorities relied upon. A copy of the ruling or the portion of the record that contains the ruling must be attached to the application; however, if the record is unavailable, the application may "set forth the date the ruling was issued and must describe the ruling with reasonable particularity." Rule 4901-1-15(C), O.A.C.

The Ruling

The OCC, as noted above, filed two motions for the issuance of subpoenas *duces tecum*, one compelling Duke Energy Indiana to produce witness(es) and one compelling Duke Energy Ohio to produce witness(es). The Duke Energy Indiana subpoena directs that Indiana public utility to provide witnesses who are "knowledgeable about Duke [Energy] Indiana's incurrence and collection of Hurricane Ike storm restoration costs." Further, the subpoena directs those witnesses to provide "all documents in the possession or control of Duke Indiana that contain information about Duke [Energy] Indiana's incurrence and collection of Hurricane Ike storm restoration costs." The second subpoena is similar to the first, but is directed at Duke Energy Ohio. It requires Duke Energy Ohio to provide witnesses who are "knowledgeable regarding the incurrence and collection of Hurricane Ike storm restoration costs by Duke's affiliate in Indiana" Such witnesses are directed to provide "all documents in the possession or control of Duke [Energy Ohio] that contain information about the incurrence and collection of Hurricane Ike storm restoration costs by Duke's affiliate in Indiana."

The day after the subpoenas were issued, Duke Energy Ohio filed, for its own benefit and that of its affiliate, a motion to quash both subpoenas, on several grounds, including that such subpoenas call for testimony that is entirely irrelevant to this proceeding.¹

The attorney examiners assigned to this proceeding called for oral argument from the parties with regard to the motion to quash. At the conclusion of the argument by the parties, the examiners denied the motion with regard to both subpoenas, noting their belief that “the subpoenas may lead to the discovery of some information that would be admissible at the hearing” Therefore, they concluded, the irrelevancy of such testimony is “a matter to be decided at hearing and [is] not the basis for quashing the subpoena[s].” (Tr. at 35. See, also, Tr. at 36.) A copy of the portion of the transcript that contains the ruling is attached hereto, as required by the applicable administrative rule.

Discussion

On January 14, 2009, the Commission issued a Finding and Order, in Duke Energy Ohio’s application under Section 4909.18, Revised Code, for an increase in its distribution rates,² concluding that it was reasonable for Duke Energy Ohio to defer incremental operation and maintenance expenses associated with the September 14, 2008, wind storm, together with carrying costs. In issuing that order, the Commission also stated that the determination of the reasonableness of the deferred amounts and the decision to allow recovery thereof would occur in a future proceeding. This is that future proceeding. Hence, the testimony in this case, if it is to be relevant and therefore admissible, must be directed at the question of whether the amounts

¹ Although the motion to quash addressed other issues as well as the irrelevancy of the mandated testimony and documents, this Application for Review and Interlocutory Appeal will focus on this most egregious issue.

² *In the Matter of the Application of Duke Energy Ohio, Inc., for an Increase in Electric Rates*, Case No. 08-709-EL-AIR *et al.*

deferred are reasonable and whether the recovery of such amounts by Duke Energy Ohio is reasonable.

Duke Energy Ohio and Duke Energy Indiana do not disagree that the Commission can properly demand that Duke Energy Indiana, as a registered foreign corporation, appear at a Commission hearing and produce documents in its possession. However, a subpoena to require such appearance and production should only be issued if there is any testimony or documentary evidence to be obtained that is relevant to this proceeding. Is there any information to be obtained from Duke Energy Indiana, or from Duke Energy Ohio but relating to Duke Energy Indiana, that is relevant and therefore admissible in this case? There is not.

Looking first at the subpoenas themselves, Duke Energy Indiana and Duke Energy Ohio are to provide witness(es) who are knowledgeable about the storm costs that Duke Energy Indiana incurred and about the storm costs that Duke Energy Indiana might or might not collect from its ratepayers. Looking first at the issue of costs incurred by Duke Energy Indiana, nothing in Title 49 of the Ohio Revised Code allows the Commission to base a decision regarding utility rates on costs incurred by an out-of-state affiliate. Duke Energy Ohio's rates, which are under the jurisdiction of this Commission, must be based on costs incurred only by Duke Energy Ohio, not by its affiliates. Nothing that Duke Energy Ohio has proposed in the application in this proceeding would suggest otherwise.

It will be clear, from the Commission's ultimate review of the evidence appropriately submitted in this proceeding, that only Duke Energy Ohio's costs form the basis of the Rider DR rate that is proposed. Duke Energy Indiana's costs, whatever they may have been, form no part of Rider DR. It does not require a witness who has knowledge of Duke Energy Indiana's costs – which are not a part of this application – to determine what costs are a part of this application.

Indeed, how could costs incurred by a separate corporate entity be included for recovery in Duke Energy Ohio's rates? Would the OCC be asking for testimony of an unaffiliated corporate entity if that entity had similarly provided assistance during the storm cleanup and Duke Energy Ohio had similarly compensated that entity for its efforts? Would the OCC be claiming that Duke Energy Ohio's costs should not be recoverable based on that other entity's internal treatment of its expenses and the payments it received from Duke Energy Ohio? Certainly public utilities' rates are not determined by this Commission on the basis of how a utility's payments are treated by the recipient. If internal treatment, by a service provider, of payments from a public utility were relevant to ratemaking, such evidence would be considered in every rate case before the Commission. This is precisely what is being required of Duke Energy Ohio and Duke Energy Indiana through the subpoenas in question.

In addition to information concerning costs incurred by Duke Energy Indiana, the OCC's subpoenas also seek information concerning Duke Energy Indiana's collection of those costs. Duke Energy Indiana recovers its costs from Indiana ratepayers through rates established by the Indiana Utility Regulatory Commission (IURC) pursuant to Indiana law, just as this Commission establishes rates to allow Duke Energy Ohio to recover its distribution costs from Ohio ratepayers. Ohio distribution rates are in no way based on costs collected by any corporation than Duke Energy Ohio, whether affiliated or not. No costs recovered by Duke Energy Indiana – or any other company other than Duke Energy Ohio – have ever formed the basis of any Duke Energy Ohio rate that has been considered or approved by this Commission, and such cost recovery certainly does not form the basis of the proposed rate for Rider DR. Again, competent testimony from Duke Energy Ohio witnesses, addressing Duke Energy Ohio's own actions and costs, clearly establishes the justification for the proposed Rider DR rate.

During oral argument on the motion to quash, counsel for the OCC addressed the issue of relevance by stating as follows:

“Second, Duke Energy Indiana’s incurrence and collection of Storm Ike restoration costs is relevant in this case in two ways: First, Duke Indiana will be recovering storm restoration costs from Ohio customers and Duke Indiana’s decision to collect or not collect costs from Indiana customers is relevant to Duke Ohio’s decision to collect all costs from Ohio customers. . . . Duke Ohio states that it is reimbursing Duke Indiana for the regular time, overtime, and supplemental pay for the hours they spent working in Ohio, therefore, Duke Indiana is likely getting double recovery for at least most of the regular time and possibly some of the overtime and supplemental pay.”

(Tr. at 22.) With this argument, the OCC misses the point in multiple ways.

First, the OCC fails to differentiate between costs and recovery by Duke Energy Ohio on one hand and costs and recovery by Duke Energy Indiana on the other. Duke Energy Ohio has expenses. Those expenses are to be recovered by Ohio ratepayers. Similarly, Duke Energy Indiana has expenses that are to be recovered from Indiana ratepayers. The OCC argued that Duke Energy Indiana would be recovering storm restoration costs from Ohio customers. It is true that Duke Energy Indiana incurred costs as a result of its assistance with the Ohio cleanup efforts. However, Duke Energy Indiana is not “recovering” those costs from Ohio ratepayers. It may seem a trivial distinction, but the difference is enormous. Rather than Duke Energy Indiana incurring and then “recovering” those costs from Ohio ratepayers as if it had ratepayers in Ohio, Duke Energy Indiana employees charged their time to Duke Energy Ohio, thereby giving rise to costs that are appropriately before this Commission as a portion of the basis for the Rider DR rate. It is by incurring those labor costs that Duke Energy Ohio is in a position to recover the costs. The costs are Duke Energy Ohio’s costs, not Duke Energy Indiana’s costs, and it is Duke Energy Ohio that should recover the costs from Ohio ratepayers, not Duke Energy Indiana.

The OCC's second error in this quoted argument is its failure to recognize that a decision concerning recovery in Indiana is made on the basis of Indiana law and the facts and circumstances relating to the Indiana utility. None of this information has any relevance whatsoever to a decision concerning recovery in Ohio. The states and the utilities are not comparable.

Further, the OCC is apparently concerned about double recovery by Duke Energy Indiana: once from Duke Energy Ohio and once from Indiana ratepayers through rates established by the IURC. This is not an issue for the Commission or the OCC. This is an issue that is within the jurisdiction of the IURC. The OCC would more appropriately address this issue in an IURC proceeding, if it feels that its clients have any interest in that issue.

More to the point in this Ohio proceeding is the question of whether Duke Energy Ohio prudently paid for the Duke Energy Indiana labor costs in question. Evidence already admitted into the record in this case addresses the prudence of the activities undertaken by Duke Energy Ohio, regardless of the identity persons who performed the activities or their actual employer. Evidence already admitted into the record in this case also addresses the calculation of the costs incurred by Duke Energy Ohio. The only remaining question that could possibly be relevant to the Commission's decision is whether or not Duke Energy Ohio had any obligation to pay for the cost of employees provided by Duke Energy Indiana. As the Commission is well aware, affiliated utilities are subject to affiliate pricing rules under the jurisdiction of the Federal Energy Regulatory Commission, making payment for this labor not subject to Duke Energy Ohio's discretion. Code of Federal Regulations, Title 18, Chapter I, Part 35. Just as the Ohio Commission would appropriately review, in a rate proceeding, the question of whether Duke Energy Ohio was properly compensated by an affiliate for labor provided by Duke Energy Ohio,

the IURC will no doubt review, in an appropriate proceeding, the question of whether Duke Energy Indiana was properly compensated by an affiliate (that is, Duke Energy Ohio) for labor that it provided in this cleanup effort. The only issue for the Commission to consider is whether Duke Energy Ohio was properly charged for labor costs, whether such labor costs were prudently incurred by Duke Energy Ohio, and whether the costs of such labor costs were actually paid by Duke Energy Ohio. All of such information is available from Duke Energy Ohio's witnesses, who have testified concerning Duke Energy Ohio's costs, and is appropriately in the record. None of this information relates to Duke Energy Indiana's incurrence of costs or recovery of costs, as would be addressed under the subpoenas in question.

Duke Energy Ohio and Duke Energy Indiana are aware that the examiners' ruling suggests that the inadmissibility of evidence relating to Duke Energy Indiana's costs and recovery would be addressed during the testimony of the subpoenaed witness(es) and is therefore not properly the basis for quashing the subpoenas themselves. (Tr. at 35.) Duke Energy Ohio and Duke Energy Indiana certainly appreciate the examiners' assurance that the irrelevance of required testimony may properly form the basis of objections to questions posed by the OCC. However, Duke Energy Ohio and Duke Energy Indiana strongly believe that the fact that testimony may yet be found to be irrelevant does not mean that the subpoenas should not be quashed. Rule 4901-1-25, O.A.C., provides, in paragraph (C), that a subpoena may be quashed if it is unreasonable or oppressive. While the Commission may require the attendance of a witness to testify, as long as that witness can be found within the state of Ohio, is it not oppressive to require such attendance if the witness has nothing to say that is relevant to the proceeding at hand? Is it not oppressive to require such a witness to locate and be ready to produce all documents in its possession that relate to irrelevant topics, when those documents

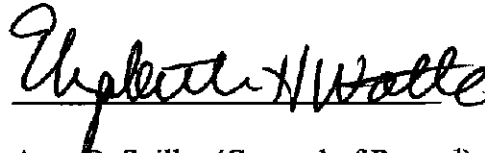
will clearly be found to be inadmissible? These subpoenas are unreasonable and oppressive and should be quashed.

In addition to the irrelevancy of the testimony and document sought by the subpoenas in question, the information sought by the OCC is highly privileged and confidential. The OCC made it quite clear that it is interested in exploring the different treatment of storm recovery costs in Indiana and Ohio and the rationale for such differences. "Duke Indiana's collection or non-collection of Storm Ike restoration activities from its Indiana customer is relevant to the reasonableness of Duke Ohio's proposal" (Tr. at 23.) The OCC referenced the Commission's consideration of facts in other jurisdictions in its determination of the reasonableness of certain telephone recoveries. However, of critical importance is that the cases referenced by the OCC related to comparisons with publicly available facts. This is in stark contrast with the present circumstance in which the OCC is seeking highly sensitive, confidential information concerning the rationale for business decisions. Such information would not even properly be before the Commission with regard to a utility over which it does have jurisdiction. This Commission should make it clear that, in addition to being irrelevant, business information such as OCC is seeking is confidential and privileged and not subject to disclosure in this proceeding, even if it were to occur under a protective order.

Conclusion

Duke Energy Ohio and Duke Energy Indiana respectfully request that, upon review, the Commission should quash the subpoenas issued on May 20, 2010, and should, therefore, require no testimony concerning costs incurred by Duke Energy Indiana or the recovery of such costs by Duke Energy Indiana. In addition, Duke Energy Ohio and Duke Energy Indiana also request that the Commission clarify that testimony regarding the considerations behind business decisions as

to potential recovery of costs not be required in any event. Finally, Duke Energy Ohio and Duke Energy Indiana also request that the hearing schedule be continued until after the Commission has ruled on this interlocutory appeal.

A handwritten signature in black ink, appearing to read "Elizabeth H. Watts", is written over a horizontal line.

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 and
Duke Energy Indiana

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

ATTACHMENT TO APPLICATION FOR REVIEW
AND
INTERLOCUTORY APPEAL
FILED JOINTLY BY DUKE ENERGY OHIO AND DUKE ENERGY INDIANA

The following is the portion of the transcript, from the hearing in this proceeding held on May 25, 2010, in which the examiners ruled on the motion to quash that was filed with regard to the subpoenas issued on May 20, 2010:

MS. SPILLER: Thank you, your Honor.

20 I will address both of these subpoenas
21 first turning my attention to what we believe to be
22 procedural deficiencies with the request for
23 subpoenas and then turning to the substantive
24 objections with which Duke Energy Ohio has as to
25 these documents.

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1 First and foremost with respect to the
2 subpoena that has been requested with respect to Duke
3 Energy Ohio, I would note that this Commission's
4 jurisdiction is purely statutory in nature and in
5 Case No. 04-28 concerning the 2003 blackout, this
6 Commission specifically addressed that jurisdiction
7 insofar as it concerned entities located outside of
8 this state and entities that did not engage in
9 business within this state.

10 And importantly, the Commission there
11 held that its jurisdiction extended to intra-Ohio
12 business activities.

13 Duke Energy Indiana is not a public
14 utility engaged in the business of supplying
15 electricity to customers here in Ohio. As such, this
16 Commission is without jurisdiction to compel the
17 attendance of a witness from Duke Energy Indiana to
18 come and testify as to the rate structure, cost
19 recovery, and other regulatory issues concerning that
20 entity that is in fact regulated by another
21 regulatory body.

22 For that reason we believe that the Duke
23 Energy Indiana subpoena -- I'm sorry, the subpoena
24 directed to Duke Energy Indiana is procedurally
25 defective.

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1 The subpoena that was issued to Duke
2 Energy Ohio we also believe to be defective in that
3 it was not issued -- it was not filed and timely
4 served upon counsel consistent with the five day
5 requirement set forth in this Commission's rules.

6 Turning to the substantive arguments, I
7 believe that the OCC is attempting to discover in
8 this proceeding decisions and the reasons for
9 decisions that were made by another entity located
10 outside of this state.

11 The reasons why that decision was made
12 are both irrelevant and highly confidential,
13 privileged, and thus shielded from discovery. Indeed
14 I believe that the OCC's attempt here is really to
15 seek to discover an explanation as to why Duke Energy
16 Indiana made a particular decision regarding cost
17 recovery.

18 As Mr. Yankel has testified, he wants
19 Duke Energy Corporation to come and explain itself to
20 this Commission. But this case is about Duke Energy
21 Ohio's cost recovery from the wind storm of 2008.
22 Why Duke Energy Indiana made that decision that it
23 may have had is irrelevant.

24 Furthermore, the underpinnings or the
25 rationale for that decision would require a

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1 disclosure, an improper disclosure of attorney/client
2 information, business and strategic decisions that
3 have been made by an entity outside of this
4 jurisdiction.

5 So to the extent the OCC is really
6 attempting to discover the rationale for a decision
7 made in Indiana, we believe that's highly improper in
8 this forum.

9 That decision is also irrelevant from the
10 standpoint that there is no regulation in Ohio that
11 would tie Duke Energy Ohio's cost recovery for a
12 discrete event and relative to a discrete issue to
13 the business decisions of an entity located outside
14 of this state.

15 The OCC in its motions indicate that it
16 needs this information regarding the occurrence and
17 recovery of the Duke Energy Indiana restoration costs
18 to determine whether or not any of the costs for
19 which Duke Energy Ohio seeks recovery in this
20 proceeding are already recovered in Duke Energy
21 Ohio's rates.

22 Clearly a witness from Duke Energy Ohio
23 is not the competent witness to testify on what costs
24 may already be recovered through Duke Energy Ohio's
25 rates, and this Commission granting the deferral in

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1 the storm cost for Duke Energy Ohio instructed Duke
2 Energy Ohio to establish a regulatory asset for the
3 purpose of recording the Ohio storm costs, which Duke
4 Energy Ohio did.

5 And Mr. Wathen, who is a witness in this
6 case, is competent to testify as to whether or not
7 the Duke Energy Ohio storm costs are already
8 recovered through Duke Energy Ohio's rates. There is
9 no need for a witness from Indiana to come and
10 testify on that particular issue.

11 The OCC further argues that they need a
12 witness from Duke Energy Indiana to testify as to
13 whether or not the storm costs related to the Ohio
14 restoration effort are recovered already through Duke
15 Energy Indiana's rates.

16 This case is about a discrete amount for
17 which Duke Energy Ohio is seeking cost recovery from
18 this Commission. The amount in that regulatory asset
19 and the current request is \$28.5 million. Those are
20 the costs at issue in this proceeding.

21 To the extent the OCC believes that there
22 are other costs outside of that established
23 regulatory asset that are being recovered through
24 Duke Energy Indiana's rates, that issue is relevant
25 only if that cost recovery somehow funnels back to

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1 Ohio and would work as a credit to Ohio customers.
2 And again, Mr. Wathen is here competent to testify on
3 whether there is some credit flowing from Indiana to
4 Ohio.

5 I believe at the end, your Honor, my
6 greatest concern with this motion and the request for
7 the subpoena from the OCC is it's really an attempt
8 to discover why a business decision of an entity not
9 Duke Energy Ohio was made.

10 I believe the rationale for that decision
11 is indeed confidential, privileged, shielded from
12 disclosure, and it would be highly prejudicial for
13 this Commission to extend its jurisdiction to solicit
14 testimony on that particular issue.

15 Thank you.

16 EXAMINER STENMAN: Let's hear from OCC at
17 this time and then I believe the Bench has some
18 questions for both parties.

19 MS. HOTZ: OCC filed two subpoena duces
20 tecum with the PUCO on May 20, 2010 under Ohio
21 Administrative Code 4901.1-25, five days before the
22 hearing. OCC served them on Duke Energy Ohio and
23 Duke Energy Indiana, both of which are duly
24 registered with the Ohio Secretary of State as
25 corporations doing business in Ohio and have

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1 statutory agents in Ohio.

2 The next day Duke Energy Ohio filed a
3 motion to quash stating that our motion for subpoenas
4 are not supported by Ohio law. Essentially in that
5 pleading they made poor, faulty arguments that the
6 motions are invalid.

7 First, they stated that the subpoenas
8 served on Duke Energy Indiana is invalid because the
9 PUCO does not have authority over Duke Energy
10 Indiana.

11 Second, the costs Duke Energy Indiana
12 incurred during the Storm Ike restoration and the
13 costs collected by Duke Energy Indiana is not
14 relevant in this case.

15 Third, Duke states OCC's use of the
16 subpoena in this discovery process is inappropriate.

17 Fourth, they stated that because OCC
18 served the parties late with regard to the Duke
19 Energy Ohio subpoena, it is invalid.

20 In the current oral arguments they added
21 that we are looking to discover the business reasons
22 behind Duke Energy Indiana's decisions about storm
23 restoration costs, and that's not true. We're
24 looking for much more clear facts than that.

25 Additionally, they're stating that Duke

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1 Energy Indiana's decision about collection of costs
2 is protected information, where I would say it is not
3 because it was published in a newspaper article and I
4 think that it has lost any privileged status that it
5 may have had at one time.

6 I will address our perspective of each of
7 these four items that Duke identified in its motion
8 to quash.

9 First, whether the PUCO has regulatory
10 authority over Duke Energy Indiana has nothing to do
11 with its authority to compel a person in Ohio to
12 testify under its subpoena power under Revised Code
13 4903.04.

14 Second, Ohio Administrative Code
15 4901-1-25 does not limit the parties that may be
16 compelled to testify at the PUCO. Ohio
17 Administrative Code 4901-1-25 states a subpoena may
18 be served at anyplace within the state.

19 Second, the OCC served the statutory
20 agent for Duke Energy Indiana that was listed on the
21 Ohio Secretary of State's website as, quote, CT
22 Corporation System, unquote, with an address of 1300
23 East Ninth Street, Cleveland, Ohio 44114. Therefore,
24 the subpoena to Duke Energy Indiana, that was valid
25 and the PUCO should enforce it.

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1 Second, Duke Energy Indiana's incurrence
2 and collection of Storm Ike restoration costs is
3 relevant in this case in two ways: First, Duke
4 Indiana will be recovering storm restoration costs
5 from Ohio customers and Duke Indiana's decision to
6 collect or not collect costs from Indiana customers
7 is relevant to Duke Ohio's decision to collect all
8 costs from Ohio customers.

9 A large portion of the costs that Duke
10 Ohio proposes to collect from Ohio customers are
11 regular time, overtime, and supplemental pay for Duke
12 Indiana employees that assisted in Storm Ike
13 restoration activities in Ohio.

14 As Duke Indiana employees, Duke Indiana
15 is already recovering the regular time pay for these
16 employees and possibly overtime and supplemental pay
17 through its base rates.

18 Duke Ohio states that it is reimbursing
19 Duke Indiana for the regular time, overtime, and
20 supplemental pay for the hours they spent working in
21 Ohio, therefore, Duke Indiana is likely getting
22 double recovery for at least most of the regular time
23 and possibly some of the overtime and supplemental
24 pay.

25 For that reason Duke Indiana's

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1 inoccurrence of costs from storm Ike restoration
2 activities and its collection of costs for Storm Ike
3 restoration activities is relevant in this case.

4 The discovery responses received that
5 made us interested included the fact that Duke Ohio
6 employees apparently did not work in Indiana, so
7 money is only flowing from Ohio to Indiana. And Duke
8 Ohio refused to provide us any information about
9 storm restoration efforts in which Duke Ohio
10 employees assisted Duke Indiana in any storm
11 restoration efforts.

12 Duke Indiana's collection or
13 non-collection of Storm Ike restoration activities
14 from its Indiana customer is relevant to the
15 reasonableness of Duke Ohio's proposal to collect all
16 restoration costs from it's Ohio customers even
17 though those customers have already lost as a group
18 from the outages related to the storm far more in
19 value than the total cost of Ohio storm restoration.

20 The Commission frequently looks to the
21 treatment of customers by utilities in other states
22 to gauge reasonableness. For example, in Cincinnati
23 Bell, Case No. 96-899-TP-ALP Opinion and Order issued
24 November 4, 1999, the Commission stated at 168
25 although CBT attempts to discount the relevance of DA

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1 costs in other jurisdictions, we believe a review of
2 the publicly available information from other states
3 can be an important indicator of the reasonableness
4 of CBT's proposal in this case. As set forth above,
5 the difference in the level of costs for these
6 services between CBT and those in New York and Texas
7 are substantial.

8 In C -- in SBC Ohio TELRIC cost case,
9 Case No. 02-1280-TP-UNC, the entry on reappearing
10 date April 21, 2004 at 1112 the Commission stated we
11 do not agree with OCC. The TELRIC trends in other
12 states, especially the former Ameritech states, have
13 no relevance whatsoever.

14 Most ironic is what joint applicants in
15 their exuberance to obtain merger approval included
16 in their comments in the Duke merger case, Case No.
17 05-732-EL-MER, et al., filed on December 1, 2005 at
18 11:00. Quote, all transactions between CG&E and it's
19 affiliates will remain subject to the Commission's
20 ratemaking authority. And, quote, CG&E will provide
21 access to affiliates' books and records to the extent
22 necessary to verify transactions with CG&E.

23 Accordingly, Duke Indiana's occurrence of
24 costs and collection of costs associated with Storm
25 Ike restoration is relevant to the reasonableness of

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1 Duke Ohio's proposal.

2 Now we'll address Duke Ohio's third
3 argument, that OCC's reliance on the subpoena process
4 in discovery is inappropriate. OCC did discuss with
5 Duke Ohio about its unwillingness to provide OCC any
6 data responses relating to its affiliates' collection
7 of storm restoration costs. On May 18, OCC asked
8 counsel for Duke Ohio if she believed that the issue
9 could not be resolved without Commission assistance,
10 and Duke stated that it did not believe it could.

11 The Commission's rules do not support
12 Duke's claim that the subpoena process is an
13 extraordinary discovery process that should be used
14 only after all else fails. Therefore, OCC's reliance
15 on the subpoena process is appropriate in this case.

16 Duke Ohio's fourth argument that the Duke
17 Energy Ohio subpoena should be quashed because it was
18 served to parties one day late is not consistent with
19 Commission precedent. Only in cases involving
20 statutory pleadings such as applications for
21 rehearing does the Commission disregard pleadings
22 when parties' filings do not conform to the rules
23 unless the complaining party can show harm.

24 An example is American Municipal Power,
25 Ohio 2007, Ohio PUC Lexus 486, quote, Amp Ohio has

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1 not demonstrated that it was prejudiced by the fact
2 that it was not served with a copy of the staff's
3 letter, end quote.

4 The service to parties was due on
5 May 20th at 5:30 p.m. OCC served the parties
6 May 21st at 10:26 a.m. A total of 17 hours and a
7 total of 2.5 business hours late. It is hard to see
8 how Duke could have suffered prejudice by that delay.

9 For those reasons the Commission should
10 allow the subpoenas to stand. Thank you.

11 EXAMINER STENMAN: Before we give Duke an
12 opportunity to respond, is there anything from staff
13 or Kroger on this matter?

14 MR. REILLY: Staff has nothing, your
15 Honor.

16 EXAMINER STENMAN: Kroger?

17 MR. YURICK: No, Your Honor.

18 MS. SPILLER: Thank you, your Honor.

19 Very briefly, with respect to the argument that Duke
20 Energy Indiana, that and perhaps by extension Duke
21 Energy Ohio has waived any right to claim privilege
22 with respect to this decision, I would just like to
23 clarify the argument and the concern that Duke Energy
24 Ohio has is with the disclosure of the rationale for
25 that decision or why it was made.

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1 Again, the OCC through their only witness
2 in this case is asking for an explanation by Duke
3 Energy Corporation as to why a decision was made for
4 an entity unrelated to Duke Energy Ohio.

5 The rationale for the decision is indeed
6 confidential and I do not believe that the disclosure
7 of a particular decision waives any confidentiality
8 or privileged treatment to which the underlying
9 rationale must be afforded.

10 With respect to the authority cited by
11 the OCC in attempting to demonstrate the relevance of
12 Indiana rates and cost recovery and the decision
13 related to Indiana rates and cost recovery, I would
14 note that reference to the case law was about a
15 comparison of particular rates that were publicly
16 available and already in the public domain.

17 This is a completely different issue in
18 that they are asking for discovery of Indiana's rate
19 structure on particular issues unrelated to the issue
20 in this case as to whether Duke Energy Ohio's costs
21 for storm restoration in Ohio were both reasonable
22 and prudently incurred.

23 With respect to counsel's argument that
24 it is properly using its request for a subpoena here,
25 I would note that discovery commenced in this

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1 proceeding in December of 2009 and it was on
2 May 18th of 2010 for the first time that counsel
3 for OCC approached counsel for Duke Energy Ohio
4 regarding the objections that had been asserted for
5 the prior five to six months in the discovery
6 responses.

7 That discussion was not in the context of
8 an anticipated request for subpoenas but more so a
9 motion to compel which in the past six months has not
10 been filed by the OCC in this proceeding.

11 Again, your Honor, I would, with respect
12 to the disclosure of the affiliates of the documents
13 and agreements with Duke Energy Ohio and those
14 agreements that it may have with its affiliates, Duke
15 Energy Ohio routinely provides that information to
16 this Commission and in fact has done that most
17 recently in connection with an audit of corporate
18 separation under Case No. 09-495.

19 So we are not reluctant to provide
20 information regarding affiliates as well as the
21 affiliate code of conduct, and in fact have done that
22 consistently throughout our history of dealing with
23 this Commission.

24 Again, your Honor, I would simply focus
25 that this case is about cost recovery in Ohio, not

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1 cost recovery in Indiana or any other jurisdiction,
2 and for that reason believe the request from the OCC
3 in addition to being an attempt to discover
4 privileged information, to discover information that
5 clearly is irrelevant to the proceeding.

6 EXAMINER STENMAN: I think the Bench has
7 a couple of questions for the parties.

8 Ms. Spiller, are you counsel for Duke
9 Energy Indiana, do you legally act as counsel?

10 MS. SPILLER: No, your Honor.

11 EXAMINER STENMAN: And with that
12 admission do you believe you have standing to move to
13 quash that subpoena or do you think it would be more
14 appropriate for counsel from Duke Energy Indiana to
15 come in?

16 MS. SPILLER: I do not, your Honor, I do
17 not regularly practice for Duke Energy Ohio. I'm an
18 employee of Duke Energy Business Services. And for
19 that in that capacity I can work for the affiliates
20 of Duke Energy Ohio. I am not, your Honor, admitted
21 to practice law in the state of Indiana.

22 EXAMINER STENMAN: And with respect to
23 the Duke Energy Indiana subpoena, how do you sort of
24 get past the fact that Duke Energy Indiana is
25 registered here in the state of Ohio, does have an

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1 address designated for service, they were served, we
2 did get a return of service I believe yesterday or it
3 ended up in my mailbox this morning.

4 MS. SPILLER: Your Honor, with respect to
5 the fact that Duke Energy Indiana may have an agent
6 for service of process in the state of Ohio, I'm not
7 disputing that fact. The dispute, if you will, is
8 with the extent of the Commission's jurisdiction with
9 respect to Duke Energy Indiana which does not engage
10 in intra-Ohio business activities.

11 EXAMINER STENMAN: For example, and this
12 is just a hypothetical, if there was just a random
13 person that was subpoenaed in a Commission proceeding
14 even though they're not a utility within the
15 Commission's jurisdiction, in your point would they
16 be in the subpoena power with the Commission?

17 MS. SPILLER: If they were an Ohio
18 resident, your Honor?

19 EXAMINER STENMAN: Yes.

20 MS. SPILLER: I believe that Ohio
21 residents are within the subpoena power and that the
22 rules provide that the Commission may issue a
23 subpoena anywhere in the state of Ohio.

24 The objection goes beyond that particular
25 issue and extends to a jurisdictional issue insofar

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1 as this particular case and the issue through which
2 the OCC is seeking to compel a witness to come and
3 testify is about an activity in which Duke Energy
4 Indiana is not engaged in this state.

5 EXAMINER STENMAN: But if Duke Energy
6 Indiana engaged in storm cleanup here in Ohio, does
7 that change things?

8 MS. SPILLER: I don't think, your Honor,
9 from the standpoint that the OCC's interest in their
10 focus is cost incurrence and cost recovery in the
11 state of Indiana.

12 That issue as to whether a Duke Energy
13 Indiana provided restoration services in Ohio, that
14 would be addressed within this filing and there was
15 in fact discovery in that regard, as Ms. Hotz noted,
16 in terms of the Duke Energy Indiana employees who
17 provided assistance here in Ohio.

18 Our witnesses and certainly all of the
19 discovery that's been produced to date concerns that
20 particular issue related to Ohio.

21 EXAMINER PIRIK: Ms. Spiller, you said
22 that as part of the service organization you can
23 represent Duke Indiana. Are you representing Duke
24 Indiana in the capacity of the motion to quash?

25 MS. SPILLER: Your Honor, to the extent

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1 that motion is here in Ohio, I am an Ohio attorney
2 duly registered and I believe I can represent them
3 with respect to matters here in Ohio.

4 My point as to the Indiana status is that
5 I am not licensed to practice law in Indiana but this
6 particular request for subpoena and the motion that
7 has been filed are in Ohio before an Ohio
8 administrative body.

9 EXAMINER PIRIK: So has Duke of Indiana
10 engaged you to represent them in this capacity before
11 the Public Utilities Commission of Ohio?

12 MS. SPILLER: Your Honor, I would submit
13 that to the extent we have filed the motion to quash
14 on their behalf, yes, ma'am.

15 EXAMINER PIRIK: Are they aware you filed
16 the motion to quash on their behalf?

17 MS. SPILLER: Yes, ma'am.

18 EXAMINER PIRIK: Hypothetically if the
19 entity that OCC issued a subpoena on was a billing
20 agent, not a utility company but a billing agent or
21 perhaps one of the contractors that came out of
22 Indiana but had foreign corporation status in a
23 service location within the state of Ohio and OCC had
24 served within the state of Ohio, that service entity
25 or that non-utility entity that resides in Indiana,

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1 does the Commission have jurisdiction to issue a
2 subpoena over that type of an entity?

3 MS. SPILLER: I think, your Honor, to the
4 extent that the person, perhaps an entity is found in
5 Ohio, there is the authority to issue the subpoena.
6 But we are going beyond that in the motion to quash
7 is really to the merits of the particular request.

8 And in your hypothetical if that entity
9 did not engage in business, intra-Ohio business, then
10 I would submit that the Commission is without
11 jurisdiction to compel that particular entity here.

12 I would also argue, as we have, the
13 relevance or what is the reason for which the
14 subpoena has been requested to be issued. The
15 Commission certainly has the authority to put
16 parameters around the scope of any subpoena. To the
17 extent that this request we believe is irrelevant to
18 the ultimate determination of the issues in this
19 case, we again submit that it's improper to be
20 issued.

21 MS. HOTZ: Your Honor, Duke Energy
22 Indiana is not listed on this motion to quash.

23 EXAMINER PIRIK: Ms. Hotz, are you
24 referring to the statement with regard to who counsel
25 is representing in the motion to quash? Can you

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1 specifically --

2 MS. HOTZ: Yes. If you look at the front
3 page, it says Duke Energy Ohio, Inc.'s motion to
4 quash. Then you look -- if you look at the last page
5 it says counsel for Duke Energy Ohio. Does not say
6 counsel for Duke Energy Indiana.

7 EXAMINER STENMAN: At this point we're
8 going to take a brief break, probably 5 to 10
9 minutes, to give the Bench time to consider what's
10 before us. We should be back around 11:00.

11 MS. SPILLER: Thank you, your Honor.

12 EXAMINER STENMAN: Thank you.

13 (Recess taken.)

14 EXAMINER STENMAN: Let's go back on the
15 record.

16 At this point I think we're ready to
17 address the motion to quash and I'd like to address
18 the two subpoenas separately, even though the motion
19 to quash was just one motion.

20 With respect to the subpoena for Duke
21 Energy Ohio, the motion to quash will be denied.
22 That subpoena, actually both subpoenas were properly
23 filed with the Commission five days before the
24 hearing. I know they weren't served on parties but
25 the rule only requires that they be filed with the

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1 Commission.

2 And the Bench doesn't believe that any
3 prejudice has occurred anyway. We didn't require
4 Duke to have people available to testify today. We
5 will at the end of this ruling talk about the
6 procedure for getting people in here to comply with
7 those subpoenas.

8 So really we feel that it was properly
9 served, and in accordance with the rule, the
10 subpoenas were filed with the Commission five days in
11 advance of the hearing.

12 With respect to Duke Energy Ohio, there's
13 also no jurisdictional question in terms of the
14 Commission and although I understand that you're
15 saying, Ms. Spiller, with respect to the fact the
16 subpoenas may lead to the discovery of some
17 information that would not be admissible at the
18 hearing, that's really a matter to be decided at
19 hearing and not the basis for quashing the subpoena,
20 because it does sound like there's the potential for
21 OCC to discover some information that is relevant to
22 the subject matter of the proceeding.

23 With respect to the subpoena issued to
24 Duke Energy Ohio, the motion to quash there will also
25 be denied. That subpoena was also properly served on

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1 a company that is a registered foreign company within
2 the state of Ohio at their service address -- did I
3 say -- I meant Duke Energy Indiana.

4 It was properly served on a registered
5 foreign company with a business address within the
6 state of Ohio and it appears that it was served
7 properly. We did receive a return of service either
8 yesterday afternoon or this morning that indicates
9 that it was received and properly served. That
10 subpoena also may lead to the discovery of
11 information that is rule to the subject matter of the
12 proceeding.

13 And just as a side note, it does appear
14 that Ms. Spiller is properly counsel for Duke Energy
15 Indiana and moving forward will be able to represent
16 Duke Energy Indiana before the Commission.

17 With respect to getting those witnesses
18 here, clearly we'll move on today with the witnesses
19 that we have, but with respect to the subpoenaed
20 witnesses, we're looking to probably continue the
21 hearing until next Friday or the following Monday,
22 depending on the availability of all the parties.

23 After lunch or after the afternoon break
24 we'd like to hear from Duke Energy Ohio concerning
25 when those witnesses would be available and how long

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1 it's going to take you to ascertain who they would
2 be.

3 Before we move on with our first witness,
4 is there anything else to come before us?

5 MS. SPILLER: Your Honor, yes. With
6 respect to the decision this morning, Duke Energy
7 Ohio will be filing a request for interlocutory
8 appeal as to the extent that the discovery concerns
9 the business decision and rationale behind that
10 business decision of Duke Energy Indiana.

11 So certainly wanted to advise the Bench
12 of that intended filing. And we will file that most
13 likely today, your Honor, renewing the objections
14 that we have verbalized this morning relative to both
15 subpoenas.

16 EXAMINER STENMAN: That information is
17 noted for the record. And pursuant to Ohio
18 Administrative Code Rule 4901-1-15, Section D, any
19 memorandum contra, the interlocutory appeal filed by
20 Duke would be due two business days after the filing
21 of the interlocutory appeal. Just so that we can
22 keep this moving.

23 And pending the outcome of the
24 interlocutory appeal we'd still like to hear from
25 Duke this afternoon about when witnesses would

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- 1 hypothetically be available.
- 2 EXAMINER PIRIK: Also we should note that
- 3 the rule does not require for reply to the memorandum
- 4 contra; we're not allowing for that time frame, we
- 5 only are to the memoranda contra themselves.

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was served via ordinary mail, and also emailed to all Parties, postage prepaid, on the all parties of record this 26th day of May, 2010.

Amy B. Spiller

Will Reisinger
Ohio Environmental Council
1207 Grandview Ave, Ste 201
Columbus, OH 43212

Henry Eckhart
Natural Resources Defense Council
50 West Broad St, Ste 2117
Columbus, OH 43215

Terry Etter
Ohio Consumers Counsel
10 West Broad St, Ste 1800
Columbus, OH 43215

David Rinebolt
Ohio Partners for Affordable Energy
231 West Lima St
PO Box 1793
Findlay, OH 45839

Michael E. Heintz
Environmental Law and Policy Center
1207 Grandview Ave, Ste 2021
Columbus, OH 43212

Joe Clark
Industrial Energy Users of Ohio
21 East State St, 17th Floor
Columbus, OH 43215