BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of Duke Energy Ohio for Authority to Establish a Standard Service Offer Pursuant to Section 4928.143, Revised Code, in the Form of an Electric Security Plan, Accounting Modifications and Tariffs for Generation Service.	)	Case No. 14-841-EL-SSO
In the Matter of the Application of Duke Energy Ohio for Authority to Amend its Certified Supplier Tariff, P.U.C.O. No. 20.	)	Case No. 14-842-EL-ATA

REPLY TO
DUKE ENERGY OHIO INC.'S MEMORANDUM CONTRA
BY
THE OFFICE OF THE OHIO CONSUMERS' COUNSEL

I. INTRODUCTION

In this proceeding, Duke Energy Ohio Inc. ("Duke" or "Utility") seeks expedited approval of its proposed Electric Security Plan ("ESP") (filed May 29, 2014) that may impose increases in the electric rates all customers pay. And, with the current procedural schedule intact (no ruling on the Joint Motion for a Continuance)[1] an evidentiary hearing on Duke's application is scheduled in a little over a month (Sept. 8, 2014). Yet, despite efforts of both Duke and OCC, there still is no agreement that would govern the treatment

[1] On June 18, 2014, OCC, IGS Energy, Ohio Manufacturers' Association, and the Ohio Partners for Affordable Energy filed a Joint Motion for a Continuance, seeking a two month continuance.

of information (that Duke alleges to be trade secret) that is needed by OCC in order to adequately represent the interest of residential customers. Since June 2, 2014, OCC has sought to establish a protective agreement that will enable it to obtain responses to discovery that Duke alleges are trade secret. Full and complete discovery in the expedited time frame ordered in this proceeding[2] is crucial to being able to meet the upcoming deadlines for filed intervenor testimony (August 26, 2014) while adequately representing the residential consumer interests.

Unfortunately, Duke has been unwilling to agree to a reasonable protective agreement with OCC—an agreement with the same terms that Duke has agreed to many times in the recent years. This has led to the filing of several pleadings— including OCC's Memo Contra OEG's Motion To Establish a Protective Agreement and Duke's Motion for a Protective Order. And with an impasse in executing a protective agreement, and discovery being withheld, OCC, on July 18, 2014 filed to compel responses to discovery.

All of these pleadings are pending. Each one of these pleadings has had a common purpose: to seek a PUCO ordered protective agreement that both the utility and OCC can sign. These pleadings underscore the fact that despite good faith efforts, OCC

[2] On June 6, 2014, an Attorney Examiner Entry was issued establishing an expedited schedule with intervenor testimony due August 26, 2014 and the evidentiary hearing to begin on September 8, 2014.

and Duke have been unable to resolve the protective agreement issues, and now must rely on the PUCO to do so.

No one can dispute that the lack of a protective agreement has impeded discovery. Duke has withheld certain discovery from OCC because there is no protective agreement executed between it and OCC.[3] OCC is entitled to receive responses to its discovery in accordance with Ohio law and the PUCO's rules. For this reason, OCC's Motion to Compel should be granted.

II. ARGUMENT

On July 23, 2014, Duke filed a Memorandum Contra OCC's Motion to Compel. Duke broadly alleges that OCC has not provided any factual or legal basis for its motion. Duke is wrong.

Initially, it claims that there is no existing dispute in need of PUCO resolution. This claim just doesn't make sense. OCC identified specific discovery responses that are being withheld from it because Duke will not sign the same agreement that it has signed many times before. Withholding responses until a protective agreement is executed, when it is clear that parties cannot agree on the protective agreement, has the same force and effect as a party not answering an interrogatory, not producing a document, or

[3] The discovery withheld from OCC includes the following: OCC Interrogatories 2- 036, 2-037, 2-038, 2-041, 3-75, 4-93 and 4-95; and OCC Requests for Production of Documents 2-013, 2-015, and 2-018, and 3-42. See OCC Ex. 3.

providing an evasive or incomplete answer. All of these reasons support the filing of a motion to compel under the PUCO's rules.

Duke appears to interpret the rules of discovery to preclude OCC's Motion to Compel. It alleges that it has not failed to answer discovery –it has merely insisted that a protective agreement be issued. Thus, it claims there is no cause of action under the rules for OCC's motion. But Duke's interpretation makes little practical sense. The bottom line is that OCC cannot receive responses to the discovery responses it moved to compel on because there is no protective agreement. Duke wants to force OCC to sign its preferred agreement. OCC cannot sign that agreement for the numerous reasons set forth in, inter alia, its Motion to Compel.

Duke and OCC have sought PUCO intervention to resolve the dispute over the terms of a protective agreement. That dispute flows over into Duke's responses to OCC's discovery requests. Duke maintains that it will not provide OCC with confidential responses unless OCC executes the new Duke-revised protective agreement. But as Duke knows, OCC cannot sign Duke's proposed agreement.

Duke also alleges that OCC has misstated the parties' resolution efforts.[4] OCC stands by its statements. Here are the alleged misstatements:

(1) "Duke has been steadfast in its belief that its newly revised protective agreement should be the basis for agreement." True. Otherwise it would

[4] Duke Memorandum Contra at 3.

not have filed a Motion for Protection to force OCC to sign its protective agreement.

(2) The Company has been willing to negotiate some, but not all, terms. True. While the Company characterizes its document as "heavily revised,"[5] it still will not negotiate key terms which OCC objects to.

(3) OCC has been "persistent." True. While Duke characterizes OCC as being ultimately unwilling to compromise, this does not refute the fact that OCC has pursued compromise with Duke for over a month.

While Duke attempts to address some of the issues OCC raised with regard to the confidentiality agreement, in doing so it does it misstates the facts. It claims that the provisions that OCC seeks for protection as a state agency "were never fully addressed between the parties, as OCC refused to sign the document before it even reviewed the modifications that Duke Energy Ohio agreed to." [6]

There are two problems with this allegation. First, OCC did include these provisions (indemnity, and sovereign immunity) in its proposed agreement that was sent to Duke on June 2, 2014.[7] Additionally, in the two and half hour conversation with

[5] Duke Memorandum Contra at 3.

[6] Id. at 4.

[7] See OCC Motion to Compel, Exhibit 1.

Duke, on June 27, 2014, these items were raised by OCC. Second, OCC did not refuse to sign Duke's revised protective agreement before it reviewed the modifications Duke had made. OCC received the revised modifications on July 2, 2014.[8] It reviewed those modifications and after review advised Duke (on July 8, 2014) that the confidentiality agreement was not acceptable.[9]

Instead, OCC seeks to have the PUCO order Duke to sign the OCC/Duke protective agreement that the PUCO has sanctioned in the past.[10] Having a consistent and established protective agreement such as the OCC/Duke agreement provides needed continuity that facilitates an understandable and workable process for treating alleged confidential information by OCC Staff and its consultants.

Duke also accuses OCC of "disregarding the Commission rules" and not endeavoring to resolve the dispute in good faith.[11] Duke complains that OCC did not try to amicably resolve its motion to compel on the discovery responses at issue. This allegation is misplaced.

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[8] OCC Motion to Compel, Attachment E.

[9] Id.

[10] See *In re: CG&E Post-MDP Service*, Case No. 03-93-EL-UNC et al., Entry at 4, ¶9 (May 13, 2004*); In the Matter of the Commission' Review and Adjustment of the Fuel and Purchased Power and System Reliability Tracker Components of Duke Energy Ohio, Inc*., Case No. 02-723-EL-UNC et al., Entry at 3, ¶7 (Cot. 29, 2007).

[11] Duke Memo Contra at 4-5.

OCC and Duke cannot agree on a mutually agreeable protective agreement. Duke in fact filed a Motion for Protective Order to force OCC to sign its preferred protective agreement. OCC's Motion to Compel merely formalizes the disagreement, just like Duke's Motion. With testimony due in less than a month, and an evidentiary hearing soon thereafter, OCC has little time to waste over a matter that clearly OCC and Duke do not see eye to eye on. OCC has exhausted reasonable means to resolve the differences between it and Duke.

III. CONCLUSION

OCC's Motion to Compel should be granted. OCC should be able to get responses to its discovery through a protective agreement that recognizes OCC's unique needs as a public agency. That protective agreement should be in the form of the time honored OCC/Duke protective agreement that has been used for numerous years, after being painstakingly negotiated. Without a protective agreement, OCC will not receive responses to numerous discovery requests. This will impair OCC in its efforts to prepare for this case, which is proceeding down an expedited track, with intervenor testimony due August 23, 2014 and an evidentiary hearing shortly thereafter (Sept. 8, 2014).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing *Reply* has been served electronically upon those persons listed below this 28th day of July 2014.

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Summary: Reply Reply to Duke Energy Ohio Inc.'s Memorandum Contra by the Office of the Ohio Consumers' Counsel electronically filed by Ms. Deb J. Bingham on behalf of Grady, Maureen R. Ms.