

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Application of Duke)	
Energy Ohio for Authority to Establish a)	Case No. 14-841-EL-SSO
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.)	

In the Matter of the Application of Duke)	
Energy Ohio for Authority to Amend its)	Case No. 14-842-EL-ATA
Certified Supplier Tariff, P.U.C.O.)	
No. 20.)	

**MEMORANDUM CONTRA
DUKE'S INTERLOCUTORY APPEAL
BY
OFFICE OF THE OHIO CONSUMERS' COUNSEL**

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August 25, 2014

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I. INTRODUCTION

Since Duke filed its Electric Security Plan ("ESP III) on May 29, 2014, to increase charges for its 686,000 customers, Duke has pursued tactics of litigiousness and delay (over alleged issues of confidentiality) that have threatened the transparency and fairness of this public proceeding. Duke's contentious pursuit of confidentiality has compromised a fair opportunity for customer representatives to develop recommendations for the PUCO to consider that differ from Duke's application. Duke has withheld sharing the information it alleges to be confidential until parties have reached a protective agreement that satisfies Duke's new strategies for confidentiality.

The PUCO should be far from convinced that Duke's objectives are simply about protecting alleged trade secrets, considering that for nearly a decade (starting before this utility became "Duke") the utility and OCC operated under a comprehensive resolution of

protective issues per a negotiation that was intended to avoid the massive waste of state and private resources that the PUCO is now, unfortunately, witnessing. Indeed, Attorney Examiner Pirik, in a teleconference on August 21, 2014, indicated she was “perplexed” over Duke’s allegations of immediate harm from using a protective agreement that was to be altered consistent with her rulings at the earlier pre-hearing conference.

Many hours have been spent in efforts with Duke to reach such an agreement. But there are still unresolved issues, even after the parties sought PUCO involvement and received rulings at a pre-hearing conference on August 12, 2014. That pre-hearing conference was followed up with an August 21, 2014 teleconference to resolve further disputes. The PUCO Attorney Examiner has devoted good attention toward resolving these issues. The unresolved issues are the subject of Duke’s interlocutory appeal.

Under the Attorney Examiner’s ruling, Duke’s Motion for a Protective Order adopting its proposed Protective agreement was granted in part, with the Attorney Examiner adopting Duke’s protective agreement, but appropriately modifying it. The Attorney Examiner ruled that after the current proceeding is over, parties should be able to maintain a single copy of confidential documents, contrary to Duke’s proposal otherwise (§ 8). Tr. 48-49. The Attorney Examiner also ruled that, contrary to Duke’s proposal (§ 6, 6a), parties should not be required to waive their ability to make arguments in subsequent cases relying on confidential information obtained in this proceeding. Tr. 48-49. Duke’s interlocutory appeal requests that the PUCO reverse these Attorney Examiner’s rulings.

Duke’s appeal should not be heard. If it’s heard, it should be denied. The PUCO should not hear the interlocutory appeal because Duke lacks a right to an appeal under

4901-1-15(A) and Duke failed to seek the needed certification under 4901:1-15(B). The PUCO should find that Duke's appeal is thus defective and should be dismissed.

II. ARGUMENT

A. Standard of Review

Ohio Admin. Code 4901-1-15, governs interlocutory appeals taken from a ruling issued by an Attorney Examiner. A party may take an interlocutory appeal to the PUCO, under certain limited conditions. Under Ohio Admin. Code 4901-1-15(A), an immediate interlocutory appeal, without certification, may be taken only if the ruling addresses one of four matters. One of the four matters includes a denial of a protective order.

But if the ruling does not address any of the four areas enumerated in subsection (A), a party may seek certification of the appeal to the Commission, under subsection (B). Subsection (B) allows the PUCO the discretion to hear appeals if certain narrow bases are met. Certification cannot be granted unless it is determined that the appeal presents a new or novel question of interpretation, law, or policy or represents a departure from past precedent. Additionally, the party must show that an immediate determination is needed to prevent the likelihood of undue prejudice or expense, should the PUCO reverse the ruling. If subsection (A) is inapplicable and certification is not granted under subsection (B), the Commission must not hear the appeal.¹

Even if the PUCO can hear the appeal, under subsection (E) of 4901-1-15, the PUCO has the discretion to "[a]ffirm, reverse or modify the ruling" or to "[d]ismiss the appeal if the commission is of the opinion that the issues presented are moot, the party

¹ See 4901:1-15(B) which states that "except as provided in paragraph A of this rule, no party may take an interlocutory appeal from any ruling dissuaded during***a prehearing conference unless the appeal is certified to the commission."

taking the appeal lacks the requisite standing to raise the issues presented or *has failed to show prejudice as a result of the ruling in question*, or the issues presented should be deferred and raised at some later point in the proceeding.”²

B. Duke’s Appeal Is Not Properly Before The Commission Under Ohio Admin. Code 4901-1-15(A). The Commission Should Not Hear Duke’s Interlocutory Appeal.

Duke’s does not satisfy Ohio Admin. Code 4901-1-15(A) or (B) for having interlocutory appeals heard by the Commission. The PUCO should not hear Duke’s appeal.

Duke asserts that the Attorney Examiner’s oral ruling denied in part its motion for a protective order. Thus, it argues that it is entitled to an immediate interlocutory appeal under 4901-1-15(A)(1), without prior certification to the Commission.³ Duke is wrong.

Duke was granted its request that parties be required to sign its protective agreement. The Attorney Examiner expressly ruled that Duke’s protective agreement would be used, but modified in certain respects. The Attorney Examiner’s ruling that modified the protective agreement does not amount to a denial of Duke’s motion for protection. Thus, Duke may not seek an immediate interlocutory appeal under Ohio Admin. Code 4901:1-15(A).

² Ohio Admin. Code 4901-1-15(E) (emphasis added).

³ Duke Interlocutory Appeal at 1.

C. Duke's Appeal Is Not Properly Before The Commission Under Ohio Admin. Code 4901-1-15(B). The Commission Should Not Hear Duke's Interlocutory Appeal.

As stated, Ohio Admin. Code 4901-1-15(B) only allows the PUCO to hear interlocutory appeals when the appellant shows that the appeal presents a new or novel question of law or represents a departure from past precedent. And Duke must show that an immediate determination is needed to prevent undue prejudice or expense.

But Duke did not even address 4901-1-15(B). Duke relies only on 4901:1-15(A). Duke thus fails to qualify its appeal under subsection (B). Its appeal cannot be heard, since Duke also does not qualify for an appeal under subsection (A).

Even if Duke had requested certification under subsection (B), Duke's appeal could not be heard by the Commission. The Attorney Examiner did not deny protection for Duke in this case. The part of the Attorney Examiner's ruling that Duke complains of is about how the protected information may be used in *future* proceedings. Subsection (B) of 4901:1-15, requires among other things, that the party show that an immediate determination is needed to prevent undue prejudice or expense. There is no undue prejudice or expense to the parties if the PUCO ultimately reverses the ruling. Any prejudice or expense will only come to fruition in the future when parties seek to use alleged confidential information in related proceedings. Duke's appeal does not qualify as an exemption from the certification requirements of Rule 4901:1-15(B).

The PUCO, thus, should reject Duke's appeal because it does not comply with either 4901-1-15(A) or (B).

D. If The Commission Accepts Duke's Appeal Under Ohio Admin. Code 4901-1-15(A) or (B), It Should Nonetheless Dismiss The Appeal Because Duke Has Failed To Show Any Prejudice From The Attorney Examiner's Ruling.

Under Ohio Admin. Code 4901-1-15(E)(2), the PUCO has the discretion to dismiss an interlocutory appeal if a party has failed to show prejudice from the ruling. So even if the PUCO accepts Duke's appeal under 4901:1-15(A) or (B), the PUCO has discretion to dismiss Duke's appeal. In that event, the PUCO should exercise that discretion.

Duke appeals the Attorney Examiner's determination that "parties may retain the Company's Confidential Information indefinitely, and use that Confidential Information in future proceedings as they see fit, subject only to future evidentiary objections."⁴ Duke contends that the Attorney Examiner's holding "is contrary to the typical practice in Ohio and at the Commission and would provide inadequate protection to the Company's Confidential Information, needlessly increasing the risk of disclosure."⁵

But Duke is wrong about the "typical practice in Ohio." As Duke knows, the typical practice is to allow confidential information to be used in "related proceedings." This provision was contained in numerous Duke/OCC agreements negotiated over the years, and was in fact included in the protective agreement Duke signed with OCC in the most recent Duke MGP proceeding.⁶ And it has been a provision the PUCO has adopted

⁴ Interlocutory Appeal at 2.

⁵ Interlocutory Appeal at 2.

⁶ *In the Matter of the Application of Duke Energy Ohio, Inc. for an Increase in Gas Rates*, Case No. 12-1685-GA-AAM.

in numerous proceedings where the OCC protective agreement was ordered to be used in lieu of other proposed protective agreements.⁷

Moreover, Duke fails to show that the rulings would prejudice⁸ or harm it. Duke would still have the opportunity in subsequent forums to object to the use of the alleged confidential information. In such instances Duke would be aware of the information being presented, and would have sufficient time to review the information and offer arguments against its use. Tr. 52. As noted by Attorney Examiner Pirik, Duke (and others) would retain due process rights with respect to addressing such information in the subsequent proceeding. Tr. 54.

So long as Duke is provided an opportunity to defend its interests in that subsequent proceeding, there is no harm or prejudice to it. Duke's legal right to oppose the use of the information in subsequent proceedings is unaffected by the Attorney Examiner's ruling. What Duke wrongly seeks is the unbalanced result where it, on an *a priori* basis, forecloses others from presenting the PUCO with information in future proceedings that may be relevant to the ratemaking that can increase customers' rates. This is not just or reasonable and will prejudice others in prosecuting future cases. The PUCO should dismiss Duke's appeal.

E. The Attorney Examiner's Ruling Was Just, Reasonable, And Lawful. It Should Be Affirmed.

In support of its position, Duke points to treatises that provides form protective orders and a few state and federal cases and federal rules in the federal district court for

⁷ See, e.g., *In re: Columbus Southern Power Company*, case No. 05-375-EL-UNC, Entry at ¶7 (July 21, 2005)(granting OCC's Motion to Compel the utility to sign OCC's protective agreement).

⁸ Black's Law Dictionary defines prejudice as damage to one's legal rights or claims.

the Northern District of Ohio.⁹ Duke also refers to previous PUCO decisions addressing protective agreements or orders.¹⁰ And it notes its experience in Case No. 12-2400-EL-UNC is evidence of why it needs to preclude parties from using protected information from prior proceedings.

But nowhere in Duke's 20 pages of argument does it claim that the Attorney Examiner ruling was unjust, unreasonable, or violated the law. Rather Duke argues that the ruling differs from how some Ohio and federal courts have treated protected information. This however does not amount to a claim that the Attorney Examiner's ruling is unjust, unreasonable, or violated the law.

To the contrary, the Attorney Examiner's ruling was just and reasonable. The Attorney Examiner's ruling recognized the practicalities of litigation efforts before the PUCO. The rulings provides parties with much needed flexibility in using alleged confidential information in related proceedings, for the benefit of the PUCO's decision-making on issues of great import to the Ohio public. The rulings also provide Duke an opportunity to address issues of confidentiality in those future proceedings where the confidential information is sought to be used. The rulings of the Attorney Examiner recognize that what is relevant for purposes of future litigation cannot be determined at the present time. The Attorney Examiner's ruling should be affirmed.

⁹ Duke Memorandum in Support of Interlocutory Appeal at 6-11.

¹⁰ Duke Memorandum in Support of Interlocutory Appeal at 11-14.

F. Duke Relies On Cases And Treatises Applicable To Civil Litigation—Litigation That Is Not Germane To The PUCO Practice.

In Duke's pleading, it relies heavily on authority derived from civil litigation. Duke makes no distinction between civil litigation and PUCO proceedings. But the differences are significant.

In civil proceedings there are generally single claims for redress of specified harm, not continuous related litigation. In contrast, at the PUCO factual and legal disputes from one regulatory proceeding are often revisited in subsequent regulatory proceedings involving the same utility. Because of the potential for interrelated proceedings before the PUCO, it is essential for parties to be able to use information obtained in one proceeding in related proceedings.

For example, the very protective agreement cited by Duke in Case No. 03-2040-TP-COI AND 03-2041-TP-COI, to supposedly aid its cause here, undercuts Duke's points. That protective agreement allows for confidential information to be used for "this proceeding and [/] or other proceedings to be conducted by this Commission in connection with or arising from this Proceeding."¹¹ This language would allow parties that are involved in related proceedings to avoid duplicating discovery obtained previously with respect to the same utility.

With respect to the state case law relied upon by Duke, these cases again addressed discrete civil litigation-related issues. Specifically, *State ex rel. Conkle v. Sadler*¹² concerned the enforcement of a non-competition agreement. *Armstrong v.*

¹¹ Duke Memorandum in Support of Interlocutory Appeal at 13, citing *In re Triennial Review Regarding Local Circuit Switching*, Case No. 03-2040-TP-COI, Entry, ¶9 (Oct. 28, 2003) and *In Re Triennial Review Regarding High Capacity Loops and Dedicated Transport*, 03-2041-TP-COI, Entry, ¶7 (Nov. 6, 2003).

¹² 99 Ohio St. 3d 402, 2003-Ohio-4124.

Marusic and Majestic Steel Serv. v. DiSabato addressed other confidential information between employers and former employees involved in addressing tort claims between the parties. Again, the subject matter of these disputes was limited to a distinct tort claim. Such case law should not be relied upon. Civil litigation does not generally address interrelated proceedings with the same litigants.

Duke's reference to an Ohio statute that requires the return of protected health information disclosed in the context of "litigation over a deceased patient's estate" is even further afield.¹³ The use of such information clearly has as its only purpose the singular issue of competency, with no interrelated cases.

Duke also cites to a rule in the federal district court for the Northern District of Ohio and to a case in the federal district court for the Southern District of Ohio.¹⁴ Again, these generic rules pertain to civil litigation.

Even so, the Northern District Rule does not support Duke's arguments. The Northern District rule does not require return of a document offered into evidence in a proceeding, or for other reasons.¹⁵ Nor would the Northern District rule have prevented the offering of such document into evidence in the subsequent proceeding either.

Duke also relies on a 2006 case before the Southern District of Ohio.¹⁶ That case pertained to protecting healthcare information in the context of a tax-related investigation by the Department of Justice. Again, this discrete use of healthcare did not present a

¹³ Duke Memorandum in Support of Interlocutory Appeal at 9, *citing* R.C. 2317.02(B)(1)(e)(i) and (v).

¹⁴ Duke Memorandum in Support of Interlocutory Appeal at 10.

¹⁵ United States District Court, Northern District of Ohio, Local Civil Rules, Appendix L, Section 10(b).

¹⁶ *United States v. Univ. Hosp. Inc.*, Case No. 1:05-cv-445, 2006 U.S. Dist. LEXIS 52159, *12 (S.D. Ohio 2006).

reasonable basis for retaining information for any other proceeding, except to comply with the U.S. Department of Justice's record retention policy – as Duke notes.¹⁷

Duke does eventually attempt to argue case law germane to the PUCO proceedings. It cites to a number of PUCO cases, many pre-dating Ohio's public records law.¹⁸ But cases pre-dating the public records law (2004), or those which pertain to a discrete issues unlikely to be revisited in future regulatory proceedings,¹⁹ should not be used to justify overturning the Attorney Examiner's rulings.

G. The PUCO Should Order Parties To Use The Prior Duke/OCC Protective Agreement.

In this case, the Attorney Examiner addressed seven specific issues that OCC and other intervening parties had specifically raised with respect to Duke's proposed protective agreement. The Attorney Examiner then issued rulings on these seven issues, finding in favor of the intervening parties in large part but directing the parties to work to resolve the issues, "anticipating that the company is going to work with parties to resolve the issue."²⁰ But, as of the writing of this pleading, there is no resolution, and Duke has informed the parties it will not change its protective agreement prior to the PUCO ruling on its interlocutory appeal.

OCC appreciates the Attorney Examiner's optimistic view (aired at the pre-hearing conference) that a new protective agreement *could* be worked out using Duke's proposed protective agreement. While parties attempted to negotiate a new protective agreement consistent with the rulings received during the pre-hearing conference, Duke's

¹⁷ Duke Memorandum in Support of Interlocutory Appeal at 10.

¹⁸ Duke Memorandum in Support of Interlocutory Appeal at 11-14.

¹⁹ See *Belmont Electric Cooperative, Inc. v. Ohio Power Co.*, Case No. 87-922-EL-CSS, 1988 Ohio PUC LEXIS 1256, ¶¶6-7 (Mar. 31, 1988).

²⁰ Tr. 58.

approach to negotiating was inflexible and largely inconsistent with the rulings issued at the pre-hearing conference. Consequently, OCC, OMA, IGS Energy, and OPAE jointly requested a teleconference with the Attorney Examiners to discuss the lack of progress on the protective agreement. Attorney Examiner Pirik held an untranscribed teleconference on August 21, 2014.

But at that August 21 teleconference it became evident that Duke was unwilling to work toward a mutually agreeable protective agreement. There, Duke informed Attorney Examiner Pirik instead that it would not alter its agreement to comply with directives she issued during the August 21 teleconference. Instead Duke asserted that it would await the PUCO's ruling on its interlocutory appeal. Duke's position was perplexing since the only issues of debate concerned *future use* of alleged confidential information and parties agreed to placeholder language to alter the agreement if Duke prevailed in its appeal.

Duke's actions for delay have once again led OCC to now urge the PUCO to instead adopt the time-honored agreement used by Duke and OCC in past proceedings. That agreement was negotiated nearly ten years ago between OCC and Duke to reach, among other things, a fair result for transparency (not secrecy) in PUCO proceedings and for OCC's timely access to relevant information for case preparation without the administrative quagmire in which the parties and PUCO now find themselves. That agreement reflected a reasonable balancing of the interests of the parties. And Duke did not present a single valid reason why the Duke/OCC agreement should not again be used.

And further, Duke knew or should have known that its changes to the usual protective agreement would result in considerable debate over much time, which suggests

that Duke should have started the process of renegotiation much earlier than the filing of its new ESP. That Duke didn't start this time-intensive process much earlier is suggestive of motives that reflect, at the very least, Duke's insensitivity to fair processes for case preparation that all parties rely upon.

For the sake of fairness and time, the PUCO should order Duke to use the tried and true Protective Agreement that has been executed time and time again since OCC and Duke negotiated it nearly ten years ago. Indeed, that document became the basis of agreements with other utilities that have saved the parties—and the PUCO—vast amounts of time over the years in litigation. Duke's proposed rewrite may be the spark that ignites new litigation about protective agreements in other cases and in other industries regulated by the PUCO.

For these reasons, the PUCO should adopt the time-honored Duke/OCC agreement. The PUCO should not further indulge Duke's unfair and protracted effort (or strategy) to reinvent the wheel of protective agreements at the same time that Duke has sought that its rate plan be considered in the express lane.

As a result of Duke's (largely successful) efforts to expedite this case faster than the statutory timeline in Senate Bill 221, intervenor testimony is now due on September 26, 2014 – just over a month away. Duke's own delaying tactics have made that timeline even less fair than when Duke originally proposed expedition. For the sake of resolving these issues, the PUCO should reject the Duke protective agreement altogether and adopt the time-honored Duke/OCC agreement.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing *Memorandum Contra* has been served electronically upon those persons listed below this 25th day of August 2014.

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This foregoing document was electronically filed with the Public Utilities

Commission of Ohio Docketing Information System on

8/25/2014 2:52:00 PM

in

Case No(s). 14-0841-EL-SSO, 14-0842-EL-ATA

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