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

MEMORANDUM CONTRA DUKE'S MOTION TO COMPEL DISCOVERY
BY
THE OFFICE OF THE OHIO CONSUMERS' COUNSEL

I. INTRODUCTION

The Office of the Ohio Consumers' Counsel ("OCC") has followed a commonplace practice in this case of working with certain parties--made possible by a Joint Defense Agreement for protecting attorney confidentiality--toward providing the Public Utilities Commission of Ohio ("PUCO" or "Commission") with high quality and, in some respects, shared recommendations for resolving issues affecting the Applicant's 695,000 customers. This potential result of shared recommendations benefits the PUCO through administrative efficiency and the parties' development of broader positions for case resolution. But Duke Energy Ohio, Inc. ("Duke" or "the Utility") seeks to subvert this process by filing, on September 23, 2014, a Motion to Compel OCC to reveal communications that are intended to be confidential under the JDA.

The discovery requested does not involve seeking information that goes to the merits of this case, but only communications between certain intervening parties. The information sought has not been provided to Duke, because it is protected by a Joint Defense Agreement ("JDA") among OCC and other Intervenors in these proceedings. Duke does not dispute the existence of the JDA, but essentially asserts that the JDA should not be honored. In sum, Duke has inappropriately requested that OCC produce information that is clearly covered by the JDA doctrine and thus not discoverable.

II. SUMMARY OF ISSUES AND OCC POSITION

Duke asserts that OCC is required to produce information covered by the JDA because as it claims, "there is no proper common legal interest and thus no permissible bar from discovery."[1] However, as discussed below, the protection of a JDA applies to the communications between OCC and the other signatory parties to the JDAs. There is significant case law that recognizes that a JDA shields the information at issue from discovery if a sufficient common interest exists among OCC and the other signatory parties.

More importantly in the absence of any Ohio Supreme court precedent, there is precedent from the Public Utilities Commission of Ohio ("PUCO") that enforces a JDA and protection of communications between parties when those parties share a common interest. In addition to relying on improper and unpersuasive authority, Duke takes out of context the holdings in the cases it cites, to argue misleadingly that the parties to the JDA in this case have only a commercial interest and not a legal interest.[2]

[1] Duke Motion to Compel at 1.

[2] Duke Motion to Compel at II.

Duke overstates its case by asserting that if it cannot find out what the intervening parties have been saying to each other, "the discovery process will be upended" and Duke "will be deprived of its right to participate in discovery." [3] This is incorrect, revealed by the fact that Duke is challenging only a handful of responses to many discovery requests. Duke is free to continue down the many other avenues of discovery it has already started to pursue.

The PUCO should deny Duke's Motion to Compel and uphold the protection of communications between the parties to a JDA, because (1) overwhelming precedent specifically allows privileged information to be shared pursuant to a JDA, (2) the parties have a valid common interest here, and (3) public policy encourages the broad application of the common interest doctrine.

III. ARGUMENT

A. PUCO Precedent Indicates That The Common Interest Doctrine Requires Only A Common Legal Interest, Not An Identical Legal Interest.

In its Motion to Compel, Duke argues that the common interest doctrine requires the parties to a JDA to have an identical legal interest, rather than only a common one.[4] There are a number of problems with this view.

First, Ohio courts do not recognize an "identical interest doctrine," which is essentially what Duke is advocating. Rather, Ohio Courts have recognized a "Common Interest Doctrine." *State ex rel. Bardwell v. Cordray*, 181 Ohio App. 3d 661, 680, 2009-

[3] Duke Motion to Compel at II.

[4] Duke Motion to Compel at II.A, (Sept. 23, 2014). (citing *Libbey Glass, Inc. v. Oneida*, 197 F.R.D. 342, 347 (N.D. Ohio 1999) ("*Libbey Glass*").

Ohio-1265 (10th Dist.), quoting McCormick, Evidence, Section 91.1, at 413-414 (6th Ed.2006)("Another step beyond the joint client situation is the instance where two or more clients, each represented by their own lawyers, meet to discuss matters of common interest- commonly called a joint defense agreement or pooled information situation. Such communications among the clients and their lawyers are within the privilege. Although it originated in the context of criminal cases, the doctrine has been applied in civil cases and to plaintiffs in litigation as well as defendants."); see also *Buckeye Corrugated, Inc. v. Cincinnati Ins. Co.*, 9th Dist. C.A. No. 26634, 2013-Ohio-3508, ¶ 14 (Aug. 14, 2013) (same). See also, *Condos. at Stonebridge Owners' Ass'n v. K&D Group, Inc.*, 8th Dist. No. 100261, 2014-Ohio-503, ¶ 15 (Feb. 13, 2014) (quoting *William F. Shea, LLC v. Bonutti Research, Inc.*, S.D. Ohio No. 2:10-CV-615, 2013 U.S. Dist. LEXIS 48819, *5-6 (Apr. 4, 2013))("The common interest doctrine operates as an exception to the general rule that disclosure of privileged materials to a third party waives the privilege. This exception typically arises when parties 'are either represented by the same attorney or are individually represented, but have the same goal in litigation.'"

"The purpose of the 'common interest' doctrine is to permit persons with ***similar legal interests*** to enjoy the same ability to communicate confidentially about their ***common interests*** with multiple attorneys that each client enjoys separately." *William F. Shea, LLC*, at *6 (citation omitted; emphasis added). "A communication is privileged under the common interest doctrine 'as long as it deals with a matter on which parties have agreed to work toward a mutually beneficial goal, even if those parties are in conflict on some points.'" *Id.* (quoting *Cooey v. Strickland*, 269 F.R.D. 643, 652 (S.D. Ohio 2010).

Other jurisdictions are in accord -- that only a common interest is required.[5] The Restatement (Third) of the Law Governing Lawyers § 76(1) ("Restatement) also recognizes that privileged communications may be exchanged without waiving privilege "[i]f two or more clients with a common interest in a litigated * * * matter are represented by separate lawyers and they agree to exchange information concerning the matter."

Ignoring this settled case law, Duke cites an outdated federal decision in support of an "identical interest doctrine." In a case before the PUCO, FirstEnergy argued that OCC and Citizens for Keeping the All-Electric Promise ("CKAP") could not claim privilege over their communications made pursuant to a JDA because their interests were not identical.[6] The PUCO rejected FirstEnergy's argument, finding that communications between OCC and CKAP were protected if made after the execution of the JDA.[7]

While the court in *Libbey Glass* used the term "identical," it is not a ruling from an Ohio state court and is not controlling authority at the PUCO. As such, it should have no control in the outcome of the instant case where the overwhelming case law is against

[5] *See, e.g., O'Boyle v. Borough of Longport*, 218 N.J. 168, 187, 94 A.3d 299 (2014) (holding that "disclosure of work product to third parties with a common interest may not destroy the privileged character of the work product"); *Niagara Mohawk Power Corp. v. Megan-Racine Assocs., Inc.*, 189 B.R. 562, 573 (Bankr. N.D.N.Y. 1995) (holding that parties have a common legal interest where they are "co-parties to litigation or reasonably believed that they could be made a party to litigation"); *United States v. American Tel. & Tel. Co.*, 642 F.2d 1285, 1299-1300 (D.C. Cir. 1980) (holding that the common interest doctrine should not be construed narrowly, but enforced where parties have a common adversary and common interest in sharing their efforts in trial preparation).

[6] *In the Matter of the Application of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company for Approval of a New Rider and Revision of an Existing Rider* ("*FirstEnergy*"), Case. No. 10-176-EL-ATA, Memorandum Contra Interlocutory Appeal and Application for Review at 11 (January 14, 2011).

[7] *FirstEnergy*, Entry at 8 (January 27, 2011). Even absent a JDA, the PUCO has denied a Motion to Compel where the parties claiming privilege shared a common interest. *See In the Matter of the Application of the Dayton Power and Light Company for Approval of its Electric Security Plan*, Case No. 12-426-EL-SSO, Transcript at 78-79, 145 (February 13, 2013).

what Duke argues. In fact, as even *Libbey Glass* does not stand for what Duke argues, Duke has cited literally no authority in support of its "identical interest doctrine."

B. OCC, The Ohio Manufacturer's Association, And The Oho Partners For Affordable Energy Share A Valid Legal Interest.

Duke argues that the common interest shared by OCC, the Ohio Manufacturer's Association ("OMA"), and the Ohio Partners for Affordable Energy ("OPAE") is invalid to invoke the common interest doctrine because the interest is not a legal one but a commercial one.[8] In making this argument, Duke fails yet again to use controlling precedent to support its argument. Duke further weakens its argument by ignoring that court's distinction between a legal interest and a commercial interest.

The court in *Libbey Glass* defined a commercial interest as "communications shared during a business undertaking," while a common legal interest requires parties to "show that the disclosures are made in the course of formulating a common legal strategy."[9] Here, OCC, OMA, and OPAE did not exchange communications during a business transaction that happened to result in litigation. Rather, the parties here joined together during the course of litigation and for the purpose of formulating a common legal strategy by sharing resources and information. Indeed, "formulating a common legal strategy" is the essential purpose of any JDA, which is why Duke is pushing so hard to invade the JDA -- it wants to learn the common legal strategy of the parties to the JDA.

OCC has sufficiently identified the common legal interest among the parties to the JDA -- reasonably priced electric service and a reasonable procedural schedule. Put

[8] Duke Motion to Compel at II.B (September 23, 2014).

[9] *Libbey Glass*, 197 F.R.D. at 348.

differently, the JDA participants want lower prices and Duke wants higher prices. A common legal interest can also have commercial implications without it becoming a pure commercial interest. In fact, every legal interest eventually has a commercial impact, but that does not mean there is no legal interest.

OCC, OMA, and OPAE share a valid legal interest and the communications between the parties must remain privileged.

C. Policy Dictates That The Common Interest Doctrine Should Be Interpreted Broadly.

The common interest doctrine allows attorneys whose clients share a common purpose to freely exchange information.[10] The sharing of information results in better representation as it makes more information available for creating a legal strategy and making decisions.[11] Duke overstates the effect that will be felt by the PUCO affirming its prior ruling and not allowing Duke to discover the communications requested. The common interest doctrine does not create privilege; it merely prevents the waiver of already privileged information that is shared with other parties engaged in a JDA.[12] Enforcing the JDA and upholding the application of the common interest doctrine here will preserve the privileged nature of the communications between two or more parties formulating a common legal strategy. It will also serve to encourage parties in future cases to join together and confidently share information, contributing to significant administrative efficiency and judicial economy.

[10] *O'Boyle*, 218 N.J. at 197.

[11] Id.

[12] Id.

The balance of the non-privileged discovery field is wide open to Duke and it remains free to roam that field. But it cannot use discovery to unfairly and improperly gain access to the common litigation strategy of the parties to the JDA, just as it cannot invade the privilege between the parties and their counsel. Such limits are well-established. Allowing Duke to invade the protected communications between parties with common interests would truly "upend" discovery and would disrupt settled precedent.

IV. CONCLUSION

OCC, OMA and OPAE have followed a commonplace practice in this case of working jointly --made possible by a Joint Defense Agreement for protecting attorney confidentiality--toward providing PUCO with high quality and, in some respects, shared recommendations for resolving issues affecting the Applicants' 695,000 customers. This potential result of shared recommendations benefits the PUCO through administrative efficiency and the development of broader positions for case resolution.

Duke's attempt to compel discovery from OCC is without merit as it ignores PUCO precedent, misconstrues the common interest involved here, and exaggerates the policy.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing *Memorandum Contra* has been served upon the below-stated counsel, via electronic transmission, this 29th day of September, 2014.

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Summary: Memorandum Memorandum Contra Duke's Motion to Compel Discovery by the Office of the Ohio Consumers' Counsel electronically filed by Ms. Deb J. Bingham on behalf of Serio, Joseph P. Mr.