

**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
)

**DUKE ENERGY OHIO, INC.'S REPLY TO
THE OFFICE OF THE OHIO CONSUMERS' COUNSEL'S
REPLY TO DUKE ENERGY OHIO'S MOTION TO COMPEL**

On September 22, 2014, Duke Energy Ohio, Inc., (Duke Energy Ohio or Company) filed a motion with the Public Utilities Commission of Ohio (Commission) for an order, pursuant to O.A.C. 4901-1-23, compelling the Office of the Ohio Consumers' Counsel (OCC) to respond to discovery requests (Motion). The basis for the motion is that the OCC has refused to provide substantive responses to certain discovery requests propounded upon it by Duke Energy Ohio, claiming that such responses are privileged from discovery under the joint defense or common interest doctrine. More specifically, Duke Energy Ohio maintains that the OCC has failed to demonstrate a legitimate interest to support its claim of privilege. In responding to the Motion, the OCC criticizes Duke Energy Ohio's reliance upon allegedly outdated and thus presumably unpersuasive decisions. But as discussed herein, the authority cited by the OCC does not alter the fact that it has not demonstrated the existence of the requisite interest. The claim that the OCC, the

Ohio Manufacturers' Association (OMA) and the Ohio Partners for Affordable Energy (OPAE) are united in the desire for lower utility bills¹ cannot, under applicable law, support a claim of privilege.

In its Memorandum in Opposition to the Motion, the OCC argues that Duke Energy Ohio has misstated the law and, in doing so, would lead the Commission to believe that there is not a common interest doctrine in Ohio. The OCC further maintains that Duke Energy Ohio has ignored established Ohio precedent in an effort to persuade the Commission that there is only an identical interest doctrine. The OCC misreads the Motion.

Duke Energy Ohio does not dispute the existence of the common interest doctrine. What is critical to the existence of the doctrine, however, is the interest that supports it. As Ohio courts have found, the doctrine is to be applied narrowly.² And, contrary to the OCC's suggestion, the decision in *Libbey Glass, Inc. v. Oneida*, 197 F.R.D. 342 (N.D. Ohio 1999) is significant to the acceptance of this doctrine in Ohio as this is the case in which a federal district court recognized the common interest arrangement. In doing so, the federal court first accepted the definition of the common interest arrangement as one that "permits the disclosure of a privileged communication without waiving the privilege, provided the parties have 'an identical legal interest with respect to the subject matter of the communication.'"³ And from this definition, the court further observed that there were two different views – one adopting a more expansive view of the arrangement⁴ and another reflecting a more narrow view.⁵ The Ohio federal court adopted

¹ In its Memorandum in Opposition to its Motion to Compel, the OCC confirms that the purported interest that binds it to the OMA and OP AE is reasonably priced electric service and a reasonable procedural schedule. See Memorandum in Opposition, at pg. 6.

² See generally, *Libbey Glass, Inc.*, 197 F.R.D. 342, 348 (N.D. Ohio 1999); *Cigna Ins. Co., v. Cooper Tires and Rubber, Inc.*, 2001 U.S. Dist. LEXIS 7546, *5 (N.D. Ohio 2001); and *Buckeye Corrugated, Inc., v. The Cincinnati Ins. Co.*, 2013-Ohio-3508, ¶16 (Summit Cty. 2013).

³ *Libbey Glass, Inc. v. Oneida*, 197 F.R.D. at 347.

⁴ *Id.*, at 348.

⁵ *Id.*

the narrow view, finding that “confidential communications can be shared only if both parties have more than ‘merely *concurrent* legal interests.’ Instead, the parties must have ‘a *common legal*, as opposed to commercial interest.”⁶ As the court reasoned, the narrow, or restrictive, view “accommodates the objective of continued confidentiality more effectively than the expansive unrestrictive approach....”⁷

Ohio court’s continued adherence to the narrow view of the common interest arrangement has not changed. *See generally, North American Rescue Products, Inc., v. Bound Tree Medical, LLC*, 2010 U.S. Dist. LEXIS 45302, *11 (S.D. Ohio 2010)(commercial interest “insufficient to establish the applicability of the common interest exception”); and *Cigna Ins. Co. v. Cooper Tires and Rubber, Inc.*, 2001 U.S. Dist. LEXIS 7546, *4-5 (N.D. Ohio 2001). Indeed, even the Dayton Power & Light proceeding to which the OCC refers in a footnote confirms that broad claims of a common interest against the utility are insufficient when reviewing a claim of privilege.⁸

The cases on which the OCC relies do not alter this conclusion. The OCC offers the decision of *State ex rel. Bardwell v. Cordray*, 181 Ohio App.3d 661 (10th Dist. 2009) only for the purpose of defining what the federal magistrate called the “so-called ‘common interest privilege.’”⁹ The federal magistrate did not reject the narrow view of this doctrine, as adopted by members of the federal bench. Another case on which the OCC relies in criticizing Duke Energy Ohio’s legal interpretations is *Buckeye Corrugated, Inc. v. The Cincinnati Insurance Company*, 2013-Ohio-3508 (Summit Cty. 2013). This case is yet just another to define the common interest doctrine in general terms and does not erode the Ohio courts’ prior pronouncements. Notably,

⁶ *Id.* Internal citations omitted.

⁷ *Id.*, at 349. Emphasis in original.

⁸ *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, *et al.*, Transcript of Proceedings, at pg. 90.

⁹ *State ex rel. Bardwell*, 181 Ohio App.3d at 680.

and as referenced in Duke Energy Ohio's Motion, this case confirms that the common interest doctrine must be narrowly applied. And in reaching this conclusion as to the narrow application, the Summit County Court of Appeals relied upon *Cigna Ins. Co. v. Cooper Tires and Rubber, Inc.*, a case in which the federal district court stated that, "[t]o be found to have such 'common interest,' the claimant of the privilege must show that it and the party to whom it made disclosure have 'an identical legal interest with respect to the subject matter of the communication.'"¹⁰ Thus, even the case upon which the OCC relies has its basis in prior decisions, that are not outdated and of no importance here.

The remaining cases cited by the OCC again generally speak to the existence of the doctrine, which Duke Energy Ohio has acknowledged in its Motion, and the fact that the doctrine is limited in its application, which Duke Energy Ohio has also acknowledged.

In its Memorandum in Opposition, the OCC maintains that the Commission has rejected the contention that parties must have an identical legal interest on which to rely for purposes of the common interest doctrine. In doing so, the OCC cites to a FirstEnergy proceeding in which a motion to compel was filed against it. In that proceeding, it was determined that any communications signed before the execution of a joint defense agreement were not privileged from discovery. The attorney examiner in that proceeding did not address documents that may have been generated after a joint defense agreement was signed as they were not the subject of the discovery dispute and related appeals.¹¹ Therefore, the decisions in the FirstEnergy proceeding do not confirm that a more expansive view of the common interest doctrine has been

¹⁰ *Cigna Ins. Co., v. Cooper Tires and Rubber, Inc.*, 2001 U.S. Dist. LEXIS 7546, *4 (N.D. Ohio 2001).

¹¹ *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 to an Existing Rider*, Case No. 10-176-EL-ATA, The OCC's Interlocutory Appeal, Attachment A, Transcript of Proceedings (Jan. 12, 2011). See also, Entry, at pg. 8 (Jan. 27, 2011)(Commission's reference to a joint defense agreement concerns documents produced prior to the execution of same).

adopted by the Commission. Indeed, the FirstEnergy decisions do not provide guidance on what interest may be sufficient to support the claimed privilege as that issue simply was not before the Commission.

Contrary to the OCC's argument, the common interest doctrine is not broadly construed. In fact, no Ohio cases cited by the OCC support such a conclusion and the overwhelming consensus in Ohio is one that adopts a narrow application.

With this narrow application in mind, it is apparent that the OCC has not demonstrated an identical legal interest or even the existence of a common legal strategy as between counsel for residential and non-residential customers. It has, instead, suggested that the common thread sufficient to establish a privilege from discovery is the desire of three customer groups for lower prices.¹² Given that rate design and rate allocations as between and among various classes of customers can have different impacts (*e.g.*, a higher allocation to residential customers results in non-residential customers paying less), this generic statement about wanting to pay less for power is insufficient in supporting the application of the common interest doctrine. It reflects nothing more than a general desire of any customer to want to pay less for any product or service than they may otherwise be asked to pay.

The OCC is the proponent of a privilege here. It is claiming that certain communications are shielded from discovery because of the existence of a joint defense agreement. But as Ohio courts have found, the common interest doctrine requires the existence of more than "concurrent legal interests."¹³ And such a requirement is especially important where the parties to a joint defense agreement represent different customer classes and thus likely have divergent views on

¹² OCC Memorandum in Opposition, at pp. 6-7.

¹³ *Cigna Ins. Co., v. Cooper Tires and Rubber, Inc.*, 2001 U.S. Dist. LEXIS 7546, *4 (N.D. Ohio 2001).

some issues in these proceedings. The OCC, however, has failed to establish a privilege and, as such, should be compelled to answer discovery.

For the reasons stated herein and in its Motion to Compel, Duke Energy Ohio respectfully requests that the Commission grant its Motion.

Respectfully submitted,

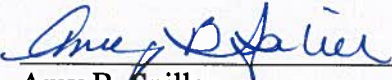
DUKE ENERGY OHIO, INC.



Amy B. Spiller
Deputy General Counsel
Elizabeth Watts
Associate General Counsel
Jeanne W. Kingery
Associate General Counsel
Rocco D'Ascenzo
Associate General Counsel
Duke Energy Business Services, Inc.
139 Fourth Street, 1303-Main
P. O. Box 960
Cincinnati, Ohio 45202-0960
(513) 287-4359

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Motion of Duke Energy Ohio, Inc., to Compel Discovery was served on the following parties this 1st day of Oct 2014, by regular U.S. mail, overnight delivery or electronic delivery.



Amy B. Spiller

Steven Beeler
Thomas Lindgren
Ryan O'Rourke
Assistant Attorneys General
Public Utilities Section
180 East Broad St., 6th Floor
Columbus, Ohio 43215
Steven.beeler@puc.state.oh.us
Thomas.lindgren@puc.state.oh.us
Ryan.orouke@puc.state.oh.us

Counsel for Staff of the Commission

Kevin R. Schmidt
88 East Broad Street, Suite 1770
Columbus, Ohio 43215
schmidt@sppgrp.com

**Counsel for the Energy Professionals
of Ohio**

David F. Boehm
Michael L. Kurtz
Jody M. Kyler Cohn
Boehm, Kurtz & Lowry
36 East Seventh Street, Suite 1510
Cincinnati, Ohio 45202
dboehm@BKLawfirm.com
mkurtz@BKLawfirm.com
jkylercohn@BKLawfirm.com

Counsel for the Ohio Energy Group

Mark A. Hayden
Jacob A. McDermott
Scott J. Casto
FirstEnergy Service Company
76 South Main Street
Akron, Ohio 44308
haydenm@firstenergycorp.com
jmcdermott@firstenergycorp.com
scasto@firstenergycorp.com

**Counsel for FirstEnergy Solutions
Corp.**

Maureen R. Grady
Joseph P. Serio
Edmund "Tad" Berger
Office of the Ohio Consumers' Counsel
10 West Broad Street, Suite 1800
Columbus, Ohio 43215-3485
Maureen.grady@occ.ohio.gov
Joseph.serio@occ.ohio.gov
Edmund.berger@occ.ohio.gov

Dane Stinson
Dylan F. Borchers
Bricker & Eckler LLP
100 S. Third Street
Columbus, Ohio 43215
dstinson@bricker.com
dborchers@bricker.com

**Counsel for the Ohio Consumers'
Counsel**

**Counsel for the Ohio Consumers'
Counsel**

Kimberly W. Bojko
Jonathan A. Allison
Carpenter Lipps & Leland LLP
280 Plaza, Suite 1300
280 North High Street
Columbus, Ohio 43215
Bojko@carpenterlipps.com
Allison@carpenterlipps.com

Joseph Oliker
Matthew White
6100 Emerald Parkway
Dublin, Ohio 43016
joliker@igsenergy.com
mswhite@igsenergy.com

**Counsel for the Ohio Manufacturers'
Association**

Counsel for Interstate Gas Supply, Inc.

Joseph M. Clark
Direct Energy
21 East State Street, 19th Floor
Columbus, Ohio 43215
joseph.clark@directenergy.com

Gerit F. Hull
Eckert Seamans Cherin & Mellot, LLC
1717 Pennsylvania Avenue, N.W.
12th Floor
Washington, DC 20006
ghull@eckertseamans.com

**Counsel for Direct Energy Services,
LLC and Direct Energy Business, LLC**

**Counsel for Direct Energy Services,
LLC and Direct Energy Business, LLC**

Samuel C. Randazzo
Frank P. Darr
Matthew R. Pritchard
McNees Wallace & Nurick LLC
21 East State Street, 17th Floor
Columbus, Ohio 43215
sam@mwncmh.com
fdarr@mwncmh.com
mpritchard@mwncmh.com

**Counsel for Industrial Energy Users-
Ohio**

Trent Dougherty
1207 Grandview Avenue, Suite 201
Columbus, Ohio 43212-3449
tdougherty@theOEC.org

**Counsel for the Ohio Environmental
Council**

Andrew J. Sonderman
Margeaux Kimbrough
Kegler Brown Hill & Ritter LPA
Capitol Square, Suite 1800
65 East State Street
Columbus, Ohio 43215-4294
asonderman@keglerbrown.com
mkimbrough@keglerbrown.com

**Counsel for People Working
Cooperatively, Inc.**

Colleen L. Mooney
Ohio Partners for Affordable Energy
231 West Lima Street
Findlay, Ohio 45839-1793
cmooney@ohiopartners.org

**Counsel for Ohio Partners for
Affordable Energy**

Steven T. Nourse
Matthew J. Satterwhite
Yazen Alami
American Electric Power Service
Corporation
1 Riverside Plaza 29th Floor
Columbus, Ohio 43215
stnourse@aep.com
mjsatterwhite@aep.com
yalami@aep.com

Counsel for Ohio Power Company

Christopher J. Allwein
Todd M. Williams
Williams Allwein and Moser, LLC
1500 West Third Avenue, Suite 330
Columbus, Ohio 43212
callwein@wamenergylaw.com
toddm@wamenergylaw.com

Counsel for the Sierra Club

Rebecca L. Hussey
Carpenter Lipps & Leland LLP
280 Plaza, Suite 1300
280 North High Street
Columbus, Ohio 43215
Hussey@carpenterlipps.com

Douglas E. Hart
441 Vine Street
Suite 4192
Cincinnati, Ohio 45202
dhart@douglasshart.com

Counsel for The Kroger Company

Counsel for The Greater Cincinnati Health Council

M. Howard Petricoff
Michael J. Settineri
Gretchen L. Petrucci
Vorys, Sater, Seymour, and Pease, LLP
52 East Gay Street
P.O.Box 1008
Columbus, Ohio 43216-1008
mhpetricoff@vorys.com
mjsettineri@vorys.com
glpetrucci@vorys.com

Cynthia Fonner Brady
Exelon Business Services Company
4300 Winfield Road
Warrenville, Illinois 60555
Cynthia.brady@constellation.com

Counsel for Constellation NewEnergy, Inc. and Exelon Generation Company, LLC

For Constellation NewEnergy, Inc.

David I. Fein
Vice President, State Government
Affairs - East
Exelon Corporation
10 South Dearborn Street, 47th Floor
Chicago, Illinois 60603
David.fein@exeloncorp.com

Lael Campbell
Exelon
101 Constitution Avenue, NW
Washington, DC 2001
Lael.Campbell@constellation.com

For Exelon Corporation

For Constellation NewEnergy, Inc.

M. Howard Petricoff
Special Assistant Attorney General
Vorys, Sater, Seymour, and Pease, LLP
52 East Gay Street
P.O. Box 1008
Columbus, Ohio 43216-1008
mhpetricoff@vorys.com

**Counsel for Miami University and the
University of Cincinnati**

Justin Vickers
Environmental Law & Policy Center
35 East Wacker Drive, Suite 1600
Chicago, Illinois 60601
jvickers@elpc.org

**Counsel for the Environmental Law &
Policy Center**

Samantha Williams
Natural Resources Defense Council
20 N. Wacker Drive, Suite 1600
Chicago, Illinois 60606
swilliams@nrdc.org

**Counsel for the Natural Resources
Defense Council**

M. Howard Petricoff
Michael J. Settineri
Gretchen L. Petrucci
Vorys, Sater, Seymour, and Pease, LLP
52 East Gay Street
P.O. Box 1008
Columbus, Ohio 43216-1008
mhpetricoff@vorys.com
mjsettineri@vorys.com
glpetrucci@vorys.com

**Counsel for the Retail Energy Supply
Association**

Gregory J. Poulos
EnerNOC, Inc.
471 E. Broad Street, Suite 1520
Columbus, Ohio 43215
gpoulos@enernoc.com

Counsel for EnerNOC, Inc.

Thomas J. O'Brien
Bricker & Eckler LLP
100 South Third Street
Columbus, Ohio 43215-4291
tobrien@bricker.com

Counsel for the City of Cincinnati

Rick D. Chamberlain
Behrens, Wheeler, & Chamberlain
6 N.E. 63rd Street, Suite 400
Oklahoma City, OK 73105
rchamberlain@okenergylaw.com

Donald L. Mason
Michael R. Traven
Roetzel & Andress, LPA
155 E. Broad Street, 12th Floor
Columbus, Ohio 43215
dmason@ralaw.com
mtraven@ralaw.com

**Counsel for Wal-Mart Stores East, LP
and Sam's East, Inc.**

**Counsel for Wal-Mart Stores East, LP
and Sam's East, Inc.**

Judi L. Sobecki
The Dayton Power and Light Company
1065 Woodman Drive
Dayton, Ohio 45432
Judi.sobecki@aes.com

**Counsel for The Dayton Power and
Light Company**

This foregoing document was electronically filed with the Public Utilities

Commission of Ohio Docketing Information System on

10/1/2014 3:19:45 PM

in

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

Summary: Reply Duke Energy Ohio, Inc.'s Reply to the Office of the Ohio Consumers' Counsel's Reply to Duke Energy Ohio's Motion to Compel electronically filed by Brenda S. Carnahan on behalf of Duke Energy Ohio, Inc. and Spiller, Amy B. and Watts, Elizabeth H.