

BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of Application of Duke)
Energy Ohio, Inc. for Authority to)
Establish a Standard Service Offer)
Pursuant to R.C. 4928.143 in the Form of) Case No. 14-841-EL-SSO
an Electric Security Plan, Accounting)
Modifications, and Tariffs for Generation)
Service.)

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

ENTRY

The attorney examiner finds:

- (1) Duke Energy Ohio, Inc. (Duke) is a public utility as defined in R.C. 4905.02 and, as such, is subject to the jurisdiction of this Commission.
- (2) On May 29, 2014, Duke filed an application for a standard service offer pursuant to R.C. 4928.141. This application is for an electric security plan in accordance with R.C. 4928.143 that will begin on June 1, 2015.
- (3) By Entry issued August 5, 2014, the attorney examiner, inter alia, granted the motions to intervene in these matters filed by numerous entities, including the Ohio Consumers' Counsel (OCC), Direct Energy Services, LLC and Direct Energy Business, LLC (Direct Energy), Ohio Manufacturers' Association (OMA), Ohio Partners for Affordable Energy (OPAE), and the Sierra Club.
- (4) Gov.Bar R. XII(2)(A) provides rules governing eligibility to practice pro hac vice in Ohio. Pursuant to Gov.Bar R. XII(2)(A)(6), motions for admission pro hac vice must be accompanied by a certificate of pro hac vice registration furnished by the Supreme Court Office of Attorney Services.

- (5) On September 26, 2014, a motion to practice pro hac vice and certificate of pro hac vice registration were filed on behalf of Tony G. Mendoza to represent the Sierra Club. No one filed memoranda contra to the motion. The attorney examiner finds that the motion for admission pro hac vice should be granted.
- (6) On October 16, 2014, the Ohio Development Services Agency (ODSA) filed a motion to intervene in these cases. ODSA is aware that the motion is filed well past the deadline for intervention established in these cases, but submits that intervention should be permitted due to extraordinary circumstances that have occurred since the deadline. ODSA explains that Direct Energy injected a new proposal into these proceedings, namely that Duke's entitlement to Ohio Valley Electric power be used to serve percentage of income payment plan (PIPP) customers. According to ODSA, as the agency charged with administering the electric PIPP program, Direct Energy's proposal directly affects: ODSA's ability to aggregate the PIPP load; the price of affordable service to PIPP customers; and the provision of PIPP service consistent with state policy in R.C. Chapter 4928. ODSA offers that its intervention will contribute to the resolution of this issue and it will not unduly delay or unjustly prejudice any party, as it is not requesting an extension of the discovery deadlines or the filing of direct testimony. Rather, ODSA wishes to reserve the right to cross examine witnesses and brief the issue relevant to Direct Energy's alternative recommendation.
- (7) Upon consideration of ODSA's motion to intervene, the attorney examiner finds that ODSA has stated reasonable grounds to support its intervention at this time. Therefore, ODSA's motion to intervene should be granted.
- (8) On September 23, 2014, Duke filed a motion to compel discovery from OCC. According to Duke, OCC has refused to provide substantive responses to certain discovery requests, because OCC claims that such responses are privileged from discovery under the joint defense or common interest doctrine. Duke explains that the discovery requested OCC to identify all communication that it has had with any other intervenor and all agreements into which it had entered with other intervenors in these proceedings. Duke argues that the joint defense

agreement, which OCC has entered with OMA and OP AE, confirms that there is no proper common legal interest; thus, there is no permissible bar from disclosure. Duke submits the common interest that allegedly binds the parties to the joint defense agreement of OCC, OMA, and OP AE is administrative efficiency. According to Duke, the common interest doctrine relied on by OCC only extends to identical legal interests and not commercial interests. Duke maintains there is no identical legal interest between OCC, OMA, and OP AE. Duke asserts the information requested is relevant or reasonably calculated to lead to the discovery of admissible evidence; therefore, OCC should be compelled to provide the information.

- (9) On September 29, 2014, OCC filed a memorandum contra Duke's September 23, 2014 motion to compel discovery, stating that the information requested by Duke does not involve seeking information that goes to the merits of these cases, but only communications between certain intervening parties. The information requested is protected by a joint defense agreement and, therefore, OCC argues it is not discoverable. According to OCC, there is overwhelming precedent that supports its position, claiming that the parties have a valid common interest and public policy encourages the broad application of the common interest doctrine. Moreover, OCC submits that, contrary to Duke's assertions, Commission precedent indicates that the common interest doctrine requires only a common legal interest and not an identical interest. OCC insists OCC, OMA, and OP AE share a valid legal interest, i.e., reasonably priced electric service and a reasonable procedural schedule.
- (10) On October 1, 2014, Duke filed a reply to OCC's memorandum contra Duke's September 23, 2014 motion to compel.
- (11) Upon consideration of the arguments set forth by Duke and OCC, as well as a review of the joint defense agreement, the attorney examiner finds that Duke's motion to compel should be granted to the extent the documents requested do not include information reflecting the parties to the joint defense agreement's legal strategies in these cases. Accordingly, by noon on Tuesday, October 21, 2014:

- (a) OCC shall provide Duke with responses to the discovery requests.
 - (b) In the event OCC claims that some of the documents that are responsive to Duke's discovery request are protected under the agreement because they reflect the signatory parties' legal strategies in these cases, OCC shall provide Duke and the attorney examiner with a privilege log of the information withheld. In addition, OCC shall provide the attorney examiner with the withheld information for an in camera review of the documents.
- (12) On October 16, 2014, OCC filed a motion to compel discovery from Duke, stating that Duke has failed to provide OCC with the side agreements that may exist between Duke's affiliates and third parties, as required by R.C. 4928.145. OCC notes that Duke objected to providing the information on the side deals between the affiliates and third parties for a number of reasons, including that Duke is not in possession of the information. Moreover, OCC submits that Duke has failed to establish that responding to OCC's discovery is unduly burdensome and Duke's claim that the information is proprietary in nature should be rejected.
- (13) On October 17, 2014, Duke filed a memorandum contra OCC's October 16, 2014 motion to compel, emphasizing that Duke is not in possession of the information requested by OCC and Duke has no knowledge of any documents responsive to the request. Duke acknowledges that the statute requires Duke to make available contracts or agreements between the utility or any of its affiliates and certain third parties; however, Duke can only do so to the extent it either has knowledge or possession of any such agreements. Duke points out that OCC neglects to mention that Duke did respond to discovery that was similar in nature and provided the requested information with regard to agreements between Duke and third parties.
- (14) Upon consideration of OCC's motion to compel and Duke's response, the attorney examiner finds that the motion should be granted, to the extent Duke has knowledge or possession of the responsive contracts or agreements between its affiliates and third parties. However, from Duke's response it appears

Duke does not have such information. Therefore, if OCC continues to seek such information and Duke does not have such information, OCC will need to seek to obtain the information in another manner. If this is the case, the attorney examiner expects Duke to work cooperatively with OCC and support OCC's efforts to obtain the requested information from Duke's affiliates in accordance with the statute.

It is, therefore,

ORDERED, That the motion for admission of Tony G. Mendoza pro hac vice be granted. It is, further,

ORDERED, That the motion to intervene filed by ODSA be granted. It is, further,

ORDERED, That Duke's September 23, 2014 motion to compel is granted to the extent set forth in finding (11). It is, further,

ORDERED, That, in accordance with finding (11), OCC provide the documents required by noon on Tuesday, October 21, 2014. It is, further,

ORDERED, That OCC's October 16, 2014 motion to compel be granted to the extent set forth in finding (14). It is, further,

ORDERED, That a copy of this Entry be served upon all parties of record.

THE PUBLIC UTILITIES COMMISSION OF OHIO

s/Christine M.T. Pirik

By: Christine M.T. Pirik
Attorney Examiner

JRJ/dah

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in

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

Summary: Attorney Examiner Entry that the motion for admission of Tony G. Mendoza pro hac vice be granted; that the motion to intervene filed by ODSA be granted; that Duke's September 23, 2014 motion to compel is granted; that OCC provide the documents required by noon on Tuesday, October 21, 2014; and that OCC's October 16, 2014 motion to compel be granted; electronically filed by Debra Hight on behalf of Christine M. T. Pirik, Attorney Examiner.