

**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.)	

**MOTION FOR SANCTIONS AND REQUEST FOR FORFEITURE
BY
THE OFFICE OF THE OHIO CONSUMERS' COUNSEL**

The Office of the Ohio Consumers' Counsel' ("OCC"), an intervenor in the above-captioned cases,¹ moves the Public Utilities Commission of Ohio ("PUCO" or "Commission") to require Duke Energy Ohio ("Duke") to comply with the PUCO order issued in this proceeding on April 2, 2015 ("Order").² Specifically, the Order required Duke to "pursue transfer of the OVEC contractual entitlement or to otherwise pursue divestiture of the OVEC assets," and to file a status report of its efforts by June 30 of each year.³ By "status report" filed in this proceeding on June 30, 2015, Duke refused to comply with the PUCO's Order and informed the PUCO that Duke "is not now in the process of attempting to divest its interest in OVEC."⁴

¹ OCC intervened on behalf of Duke Energy Ohio's 600,000-plus residential customers, pursuant to its authority under R.C. Chapter 4911.

² OCC files this motion pursuant to OAC 4901-1-12.

³ Order at 48.

⁴ See Attachment A.

Duke's disregard of the PUCO's order is a matter of grave concern. If left unchecked, a message will be sent to Ohio's consumers that utilities can pick and choose the portions of PUCO order they will accept. It is for this reason that Ohio's General Assembly armed the PUCO with the authority to enforce its orders and to assess substantial forfeitures in the event of non-compliance. The PUCO should require immediate compliance and should consider imposing forfeitures as the General Assembly intended.

Specifically, considering Duke's admission of the violation, OCC moves the PUCO to (1) find that Duke has violated its Order, (2) order Duke to take immediate steps to pursue the transfer or divestiture of its OVEC entitlement, (3) order Duke to file legitimate status reports of its efforts on a monthly basis, (4) seek forfeitures against Duke pursuant to R.C. 4905.54, and (5) take whatever other steps deemed necessary to enforce its Order.

Respectfully submitted,

BRUCE J. WESTON.
OHIO CONSUMERS' COUNSEL

/s/ Maureen R. Grady
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MEMORANDUM IN SUPPORT

I. BACKGROUND

Two issues were intertwined in the litigation of this electric security plan (“ESP”) proceeding: (1) Duke Energy Ohio’s (Duke) commitment in its prior ESP proceedings to transfer or divest its interest in the Ohio Valley Electric Company (“OVEC”), and (2) Duke’s proposed Price Stabilization Rider (“PSR”), under which it sought to retain its interest in OVEC. Specifically, Duke proposed to enter into a purchase power agreement with OVEC under which it would purchase its share of OVEC power produced (the “OVEC Entitlement”) and sell it into PJM Interconnection, LLC. Duke then would charge all of its distribution customers, through the PSR, the difference between the PJM market value of its OVEC Entitlement and its share of OVEC costs.

The PUCO rejected Duke’s proposed PSR, finding that the rider’s benefits were not commensurate with its costs. However, the PUCO also found that such a rider, in theory, could potentially provide a benefit to consumers, and invited Duke to make a

future filing consistent with certain guidelines under which the PUCO could properly evaluate the proposal.⁵ Duke has not made a subsequent filing.

In addressing whether Duke had committed in its ESP II proceeding to transfer or divest its OVEC entitlement, the PUCO found that it had not intended to exempt Duke from this commitment. It specifically found:

Therefore, at this time, we direct Duke to pursue transfer of the OVEC contractual entitlement or to otherwise pursue divestiture of the OVEC asset. Duke should file a status report regarding the transfer or divestiture of the OVEC asset, in these dockets, by June 30 of each year of the ESP, with the first such filing to occur by June 30, 2015.⁶

The PUCO entered the Order into its Journal on April 2, 2105.

Duke and numerous intervenors filed applications for rehearing of the Order on May 1 and May 4, 2015. Duke's application for rehearing contested the PUCO's denial of the proposed PSR and the directive to take steps to transfer or divest its OVEC Entitlement.

Duke did not seek to stay the Order. Rather, on May 19, 2015, as corrected by filings of May 21 and May 28, 2015, Duke filed its compliance rates and tariffs. By Entry of May 28, 2015, the PUCO approved the new rates and tariffs as compliant with the Order.

By Entry of May 28, 2015, the PUCO also granted all parties' applications for rehearing, but only for the limited purpose of further consideration of the matters specified in the applications. To this date, the applications for rehearing remain pending, and the Order remains effective.

⁵ Order at 46-47.

⁶ Order at 48.

On June 30, 2015, Duke filed the “status report” of its efforts to the transfer or divest the OVEC asset. Duke reported, in part:

Subsequent to the issuance of the Commission's Opinion and Order, Duke Energy Ohio filed an application for rehearing. Therein, among other issues, Duke Energy Ohio questioned the Commission's ability to direct the Company's contractual investments or undertakings, including its investment in OVEC. On May 28, 2015, the Commission granted Duke Energy Ohio's application for rehearing.^{17]} Because Duke Energy Ohio believes that the Commission cannot dictate its investment in, or contractual relationship with, OVEC and future litigation may result so as to resolve the scope of the Commission's authority in this regard, ***Duke Energy Ohio is not now in the process of attempting to divest its interest in OVEC.*** [Emphasis supplied.]⁸

Thus, even though the PUCO’s Order in this proceeding remains effective, and even though Duke is collecting the new rates authorized in that Order from its customers, it has deliberately and admittedly disobeyed the PUCO’s order to pursue the transfer or divestiture of its OVEC Entitlement.

II. APPLICABLE LAW

The Ohio General Assembly explicitly provided that the PUCO’s orders are effective immediately when entered into its Journal. R.C. 4903.15 provides:

Unless a different time is specified therein or by law, ***every order made by the public utilities commission shall become effective immediately upon entry thereof upon the journal of the public utilities commission.*** Every order shall be served by United States mail in the manner prescribed by the commission. No utility or railroad shall be found in violation of any order of the commission until notice of said order has been received by an officer of said utility or railroad, or an agent duly designated by said utility or railroad to accept service of said order. [Emphasis supplied.]

⁷ This statement is misleading. As stated above, the PUCO granted Duke’s application for rehearing only for the limited purpose of further consideration of the issues. It did not, as Duke’s statement might suggest, grant Duke’s application on the merits.

⁸ See Attachment A.

Ohio's consumers are painfully aware of the effect of this language, which requires a utility to collect rate increases approved by a PUCO order, even though the increases are contested on rehearing or appeal. See, *e.g.*, *Keco Industries, Inc. v. Cincinnati & Suburban Bell Telephone Co.*, 166 Ohio St., 254, 258, 141 N. E.2d, 465 (1957) (“***under the statutes of Ohio the utility has no choice but to collect the rates set by the order of the commission, in the absence of a stay of execution pursuant to Section 4903.16, Revised Code.”). Indeed, this statute has been construed such that, even if the PUCO's order increasing rates is subsequently reversed, the utility has no obligation to refund over-payments received from the time the order was entered, which in some cases amount to hundreds of millions of dollars.⁹

The statute equally applies to utilities, and requires them to abide by the PUCO's order immediately when entered. The PUCO has recognized as much, recently affirming that its orders are effective during the pendency of an appeal to the Ohio Supreme Court.¹⁰

Further recognizing the gravity of a utility's disregard of a PUCO order, the Ohio General Assembly permits the PUCO to impose strict sanctions on a utility violating its orders, including forfeitures of up to \$10,000 per day.

R.C. 4905.54 provides:

Every public utility or railroad and every officer of a public utility or railroad shall comply with every order, direction, and

⁹ Id. See, also, *In Re Columbus Southern Power Company, et al*, 138 Ohio St.3d 448, 8 N.E.3d 863 (under the interpretation that R.C. 4903.15 prevents retroactive ratemaking, the utility was permitted to retain \$368 million in over-collections after an order's rates were found to be unlawful.) (“*Columbus Southern*”).

¹⁰ *In the Matter of the Application of Ohio Power Company for a Limited Waiver of Ohio Adm. Code 4901:1-35-10*, Case No. 15-386-EL-WVR, Entry (April 22, 1015) (“*Ohio Power*”). See, also, *In the Matter of the Fuel Adjustment Clauses for Columbus Southern Power Company and Ohio Power Company*, Case Nos. 09-872-EL-FAC, et al, Entry on Rehearing (April 11, 2012) (finding the PUCO's order effective when entered regardless of the pendency of other proceedings).

requirement of the public utilities commission made under authority of this chapter and Chapters 4901., 4903., 4907., and 4909. of the Revised Code, so long as they remain in force.

Except as otherwise specifically provided in section 4905.95 of the Revised Code, the public utilities commission may assess a forfeiture of not more than ten thousand dollars for each violation or failure against a public utility or railroad that violates a provision of those chapters or that after due notice fails to comply with an order, direction, or requirement of the commission that was officially promulgated. Each day's continuance of the violation or failure is a separate offense. All forfeitures collected under this section shall be credited to the general revenue fund. [Emphasis supplied.]

III. ARGUMENT

A. Because Duke has refused to pursue transfer or divestiture of its OVEC entitlement, the PUCO should find that Duke violated the PUCO's order and direct that it comply forthwith.

The facts related above show that the PUCO's Order became effective immediately when it was entered in the PUCO's Journal on April 2, 2015. Duke has not sought to stay the Order and, indeed, seized the opportunity to receive the Order's benefits by filing compliance tariffs, which were approved on May 28, 2015. Even though several parties, including Duke, filed applications for rehearing of the Order, the PUCO has not finally ruled on them. Thus, the Order to pursue transfer or divestiture of the OVEC assets remains effective – whether Duke likes it or not – despite the pendency of an entry on rehearing, or even a subsequent appeal. R.C. 4903.15. See also, *Keco* and *Ohio Power*.

In its “status report” filed in this proceeding on June 30, 2015, Duke informed the PUCO that it was not going to comply with the directive to transfer or divest its OVEC Entitlement. Considering this admission, the PUCO must find that Duke has violated the Order. OCC moves the PUCO to so find in accordance with law, but also in fairness to

Ohio's consumers. Ohio's consumers have been required to comply with R.C. 4903.15, *Keco*, and its progeny, and over-pay utilities hundreds of millions of dollars in some cases¹¹ when rate increases, later found to be unlawful, were reversed. It is unlawful (and unreasonable) to allow Duke to pick and choose which portion of a PUCO order it chooses to accept. Therefore, OCC requests the PUCO to direct Duke to comply immediately with its Order and provide legitimate status reports of its active efforts to transfer or divest its OVEC Entitlement on monthly basis.

B. Because Duke has violated the PUCO's Order, the PUCO should initiate proceedings under R.C. 4905.54 to impose sanctions.

The Ohio General Assembly considers a utility's violation of a PUCO Order to be a matter of grave concern, by arming the PUCO with the ability to impose sanctions of up to \$10,000 a day. Duke's refusal to comply with the PUCO's Order is a violation of the Order and R.C. 4903.15. Ohio's consumers rely on the PUCO to fairly enforce its orders under the law, and apply R.C. 4903.15 to utilities, just as it is applied to consumers. See, *Columbus Southern*. Fairness demands that the PUCO send a strong signal to utilities that they cannot pick and chose which portions of an order to respect. Therefore, OCC moves the PUCO to initiate a proceeding under R.C. 4905.54 to impose sanctions on Duke for its violation of the PUCO's Order.

IV. CONCLUSION

For the foregoing reasons, OCC moves the PUCO to (1) find that Duke has violated its Order, (2) order Duke to take immediate steps to pursue the transfer or

¹¹ See, *Columbus Southern*.

divestiture of its OVEC entitlement, (3) order Duke to file a legitimate status reports of its efforts on a monthly basis, (4) seek forfeitures against Duke under R.C. 4905.54, and (5) take whatever other steps deemed necessary to enforce its Order.

Respectfully submitted,

BRUCE J. WESTON.
OHIO CONSUMERS' COUNSEL

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CERTIFICATE OF SERVICE

I hereby certify that a copy of this Motion was served on the persons stated below via electronic transmission, this 24th day of August 2015.

/s/ Maureen R. Grady

Maureen R. Grady

Assistant Consumers' Counsel

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June 30, 2015

VIA ELECTRONIC FILING

Public Utilities Commission of Ohio
PUCO Docketing Division
180 E. Broad Street
10th Floor
Columbus, OH 43215

Re: *In the Matter of the Application of Duke Energy Ohio, Inc., for
Authority to Establish a Standard Service Offer
Case Nos. 14-841-EL-SSO and 14-842-EL-ATA*

Dear Docketing Division:

Please accept this correspondence as providing a status report to the Public Utilities Commission of Ohio (Commission) in respect of its April 2, 2015, Opinion and Order in the captioned matter. Specifically, in that Opinion and Order, the Commission directed Duke Energy Ohio, Inc., (Duke Energy Ohio or Company) to pursue the divestiture or transfer of its contractual investment in the Ohio Valley Electric Corporation (OVEC). The Commission further directed the Company to inform the Commission, on an annual basis, of such efforts, with the first such report to be filed by today's date.

Subsequent to the issuance of the Commission's Opinion and Order, Duke Energy Ohio filed an application for rehearing. Therein, among other issues, Duke Energy Ohio questioned the Commission's ability to direct the Company's contractual investments or undertakings, including its investment in OVEC. On May 28, 2015, the Commission granted Duke Energy Ohio's application for rehearing. Because Duke Energy Ohio believes that the Commission cannot dictate its investment in, or contractual relationship with, OVEC and future litigation may result so as to resolve the scope of the Commission's authority in this regard, Duke Energy Ohio is not now in the process of attempting to divest its interest in OVEC.

Please do not hesitate to contact me with any questions or concerns.

Very truly yours,

A handwritten signature in blue ink, appearing to read "Amy B. Spiller", written over a horizontal line.

Amy B. Spiller

cc: Parties of Record

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in

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

Summary: Report Duke Energy Ohio, Inc.'s Status Report electronically filed by Dianne Kuhnell on behalf of Duke Energy Ohio, Inc. and Spiller, Amy B. and Watts, Elizabeth H. and Kingery, Jeanne W.

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in

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

Summary: Motion Motion for Sanctions and Request for Forfeiture by the Office of the Ohio Consumers' Counsel electronically filed by Ms. Deb J. Bingham on behalf of Grady, Maureen R. Ms.