

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)	Case No. 14-841-EL-SSO
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.)	

**DUKE ENERGY OHIO INC.'S MEMORANDUM CONTRA MOTION
FOR SANCTIONS AND REQUEST FOR FORFEITURE
BY THE OFFICE OF THE OHIO CONSUMERS' COUNSEL**

Comes now Duke Energy Ohio, Inc., (Duke Energy Ohio or Company) and for its memorandum contra the Office of the Ohio Consumers' Counsel's (OCC) Motion for Sanctions and Request for Forfeiture (Motion) hereby states as follows.

I. Introduction

A near unanimous stipulation from 2011, which was approved by the Public Utilities Commission of Ohio (Commission) and implemented without challenge, should not be pertinent to the current proceedings. However, the OCC has attempted, over the last year, to create ambiguity in the stipulation in Duke Energy Ohio's second electric security plan (ESP) proceeding¹ and retreat from its commitments as confirmed therein. And the sole motivation for

¹ *In the Matter of the Application of Duke Energy Ohio, Inc., for Authority to Establish a Standard Service Offer Pursuant to R.C. 4928.143 in the Form of an Electric Security Plan, Accounting Modifications, and Tariffs for Generation Service*, Case No. 11-3549-EL-SSO, *et al.*, Stipulation and Recommendation (October 25, 2011)(hereinafter ESP II).

these tactics is to wage an assault on the Company's proposal to mitigate its customers' exposure to an admittedly volatile wholesale market. In addition to its grossly inaccurate recitation of its prior agreements, the OCC now resorts to mischaracterizing the orders of this Commission. The OCC's Motion serves no purpose but to unnecessarily divert Commission resources and attention away from pending, legitimate requests and the overall management of its office. As discussed further herein, the Motion must be denied.

II. Argument

A. The absence of prior agreements related to Duke Energy Ohio's contractual undertakings.

On May 29, 2014, Duke Energy Ohio instituted these proceedings by filing an application for approval of a standard service offer in the form of an ESP (Application).² Therein, among other proposals, Duke Energy Ohio sought Commission approval of a price stabilization rider – Rider PSR – that utilized the Company's 9 percent ownership interest in the Ohio Valley Electric Corporation (OVEC).³ Notwithstanding the limited scope of the Company's Application insofar as its OVEC entitlement is concerned, the OCC used the captioned docket to re-cast its prior agreements with the Company. To appreciate the OCC's efforts in this regard, it is necessary to first understand that which the OCC has already accepted.

In 2011, Duke Energy Ohio, the OCC, and twenty-nine other intervenors entered into a stipulation serving to establish the terms and conditions of Duke Energy Ohio's ESP II⁴. Among other matters, that stipulation addressed the transfer of Duke Energy Ohio's direct ownership in its generating assets by the end of 2014. Specifically, the stipulation provided that "the Parties

² *In the Matter of the Application of Duke Energy Ohio, Inc., for Authority to Establish a Standard Service Offer Pursuant to R.C. 4928.143 in the Form of an Electric Security Plan, Accounting Modifications, and Tariffs for Generation Service*, Case No. 14-841-EL-SSO, *et al.*, Application (May 29, 2014)(hereinafter ESP III).

³ *Id.* at pgs. 13-14, See also Duke Energy Ohio Exhibit 6, Direct Testimony of William Don Wathen Jr., at pg. 10.

⁴ ESP II, Stipulation and Recommendation (October 25, 2011).

agree that Duke Energy Ohio will transfer title, at net book value, to all of the Generation Assets out of Duke Energy Ohio.”⁵ Significantly, “Generation Assets,” as used in the stipulation, was a defined term. And as agreed by the OCC and other parties, Duke Energy Ohio’s Generation Assets meant “all generation assets currently, **directly** owned by Duke Energy Ohio, whether operating or retired, but shall not include any generation assets currently owned by an affiliate or subsidiary of Duke Energy Ohio.”⁶ The Commission approved the stipulation, with slight modification, and it was thereafter implemented.⁷ At no time subsequent to the Commission’s 2011 order in the ESP II proceeding has the OCC alleged, in that docket, that Duke Energy Ohio was violating the order.

But the OCC decided, three years later, that it was no longer satisfied with its commitments in the ESP II proceeding and it wanted to void certain of them. So, the OCC embarked on an effort, in these proceedings, to rewrite the ESP II stipulation. It subpoenaed, here, OVEC’s chief financial officer to talk about any Sponsoring Company’s efforts to transfer its interest in OVEC, it offered testimony by an individual who had no involvement in the ESP II case to comment on what he thought the prior stipulation to say, and it submitted post-hearing briefs that reflected a revised view of the stipulation’s terms.⁸ And through the substantial amount of resources directed to rewriting the ESP II stipulation, the OCC hoped to convince the

⁵ *Id.*, at page 25, Section VIII.A.

⁶ *Id.*, at page 9, footnote 4 (emphasis added). See also Duke Energy Ohio Exhibit 24, Direct Testimony of Charles R. Whitlock, at pp. 4-6, Attachment CRW-1 and Attachment CRW-2, wherein Mr. Whitlock defines, with specificity, the generating assets directly owned by Duke Energy Ohio.

⁷ *Id.*, Opinion and Order (November 22, 2011).

⁸ ESP III, Motion for Subpoena *Duces Tecum* to Ohio Valley Electric Corporation by the Office of the Ohio Consumers’ Counsel and Memorandum in Support, at pg. 4 (October 17, 2014); Transcript, Vol. XI, pgs. 3119, 3131; Reply Brief by The Office of the Ohio Consumers’ Counsel, at pgs. 7, 53 (December 29, 2014); OCC Exhibit 43, Direct Testimony of James F. Wilson, at pg. 4 (September 26, 2014). As provided for in IEU Exhibit 5, the Inter-Company Power Agreement (ICPA), a “Sponsoring Company” is a company listed on page 1 of the ICPA as being a party thereto.

Commission that, in 2011, Duke Energy Ohio agreed to transfer of its contractual interest in OVEC.

But on April 2, 2014, the Commission rejected the OCC's arguments. The Commission found that "it was not necessary for [it] to evaluate the intent of the stipulating parties in the *ESP II Case*."⁹

As it has the right to do, the OCC filed an application for rehearing of the Commission's April 2 order. In so doing, it did not challenge the Commission's determinations in respect of the *ESP II*.¹⁰ But now, having missed its opportunity to seek rehearing, the OCC continues to perpetuate its misinterpretation of the *ESP II* stipulation and resulting order. Indeed, the OCC begins its memorandum in support of its Motion by contending that one of two related issues in these proceedings is the Company's "commitment in its prior *ESP* proceedings to transfer or divest its interest in [OVEC]."¹¹ This statement, which is false, underscores the pretense in the OCC's motion. It wants Duke Energy Ohio punished for its alleged failure to comply with the Commission's order, yet it also wants the ability to freely misquote the Commission's findings for its own purposes. The OCC's continued efforts, through untimely and ill-conceived motions, to re-write a prior stipulation and, by extension, a Commission order, should be rejected. At this juncture, the Commission has found the OCC's alleged and unstated intention to be irrelevant. And just as it was irrelevant for purposes of the April 2 order, it is irrelevant for purposes of a motion attacking the Company's undeniable adherence to same.

B. Duke Energy Ohio has complied with the *ESP III* order.

The Commission, in its April 2 order, did provide further instruction to Duke Energy

⁹ *Id.* Opinion and Order, at pg. 48 (April 2, 2015).

¹⁰ *Id.* Application for Rehearing by The Office of the Consumers' Counsel (May 14, 2015)

¹¹ *Id.* Memorandum in Support of Motion, at pg. 1 (August 24, 2015).

Ohio relative to its contractual entitlement in OVEC. As the Commission stated:

...[A]t 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, 2015.¹²

As the OCC is well aware, Duke Energy Ohio filed for rehearing on this directive and the Commission granted the Company's rehearing request on May 28, 2015.¹³ Thereafter, and as provided for in the April 2 order, Duke Energy Ohio filed its status report regarding the OVEC entitlement. The OCC, intentionally overlooking the words in the document, contends that the status report reflects an admission, on the part of Duke Energy Ohio, that it is blatantly disobeying the Commission. But reading the status report as a whole, as one reasonably should do, and taking into consideration the Company's pending application for rehearing, it is abundantly clear that Duke Energy Ohio is not violating the order.

As an initial matter, the Commission's order did not affix a date certain by which Duke Energy Ohio must undertake to or complete the transfer or divestiture. Any inclusion of temporal references in the April 2 order serves only to distinguish the prior ESP and unstated intentions concerning same from the Commission's express determinations in these proceedings. Thus, to the extent the OCC believes Duke Energy Ohio was compelled to undertake specific actions on April 2, 2015, it is mistaken. And this mistake confirms why there was no reason for Duke Energy Ohio to seek a stay of any part of the April 2 order. As no express deadlines were imposed upon the Company, it was not necessary to seek immediate relief.

Moreover, in the status report, Duke Energy Ohio succinctly stated why, as of June 30, 2015, it was not in the process of attempting to divest its interest in OVEC – a contractual

¹² *Id.*, Opinion and Order, at pg. 48 (April 2, 2015).

¹³ *Id.*, Entry, at page 2 (May 28, 2015).

entitlement that has not been included in Duke Energy Ohio's rate base or rates. Very simply, Duke Energy Ohio would prejudice its litigation position in these and related appellate proceedings if it were to have initiated, and perhaps completed, a process to divest its contractual commitments. It is further worth noting that divestiture of the contractual entitlement reasonably eliminates the potential for Rider PSR for Duke Energy Ohio's customers, who are undeniably exposed to the restructuring of PJM Interconnection, L.L.C.'s wholesale capacity market, the federal government's Clean Power Plan (CPP) and the manner in which the state implements the CPP requirements. Just as the genie cannot be returned to the bottle, Duke Energy Ohio cannot undo a transaction that, if complete, would prejudice its legal positions. And it should not be forced into such a predicament now.

As it is prone to do, the OCC has intentionally ignored the totality of the circumstances here. It has ignored relevant language in the Commission's order. It has ignored the Company's legitimate reasons for not immediately initiating efforts to seek to divest its interest in OVEC. And it has unilaterally assigned deadlines to the Company where none exist. Duke Energy Ohio is not randomly selecting which aspects of the order by which it will abide – it is adhering to the order in its entirety.

The OCC posits that the Company should be harshly sanctioned, suggesting that daily fines could be appropriate given the alleged misconduct of Duke Energy Ohio. In so claiming, the OCC argues that customers have been over-paying utilities "hundreds of millions of dollars in some cases."¹⁴ With this statement, the true motivation of the OCC emerges – retribution. Through its Motion, the OCC is hoping to recover dollars for customers who it believes were overcharged by utilities other than Duke Energy Ohio in cases other than these proceedings. And

¹⁴ Id. Memorandum in Support of Motion, at pg. 6. Notably, the OCC cites to decisions concerning AEP Ohio that are unrelated to any action taken by Duke Energy Ohio and, obviously, unrelated to this case.

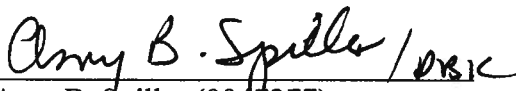
there can be no other motivation on the part of the OCC, as the Company's continued contractual entitlement in OVEC cannot benefit or harm customers. Indeed, although the Commission recognized the value of a price stabilization mechanism and approved a placeholder Rider PSR, it did not allow Duke Energy Ohio to establish rates under that rider. Thus, until the Commission authorizes the inclusion of the Company's contractual entitlement in OVEC in Rider PSR, Duke Energy Ohio's ownership interest in OVEC has no impact on customers. The OCC should not be permitted to abuse motion practice solely for pointless political expediency.

The OCC's requests for monthly status reports and a proceeding to initiate sanctions are both unsubstantiated. The Commission's entry on rehearing will influence the potential for further litigation on the Commission's directive that Duke Energy Ohio seek to divest its contractual entitlement in OVEC. In the intervening period, monthly status reports serve no legitimate purpose. And, as discussed herein, there is no basis on which to sanction Duke Energy Ohio. It has complied with the order and it will continue to do so.

III. Conclusion

The OCC's Motion reflects a wasteful misuse of Commission resources and motion practice. Through this Motion, the OCC is hoping to settle a score with another utility – to recoup some dollars because it believes ratepayers, other than those served by Duke Energy Ohio, were treated unfairly. Had the OCC truly been concerned with the Company's continued, 9 percent interest in OVEC, it would have acted much sooner than it did. But given its delay in connection with a request for the imposition of daily monetary fines, it is clear the OCC's true intentions are elsewhere. The Commission should reject the Motion, as there is no real and certainly no legitimate basis on which to find that Duke Energy Ohio has not complied with the April 2 order.

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 / *ds*

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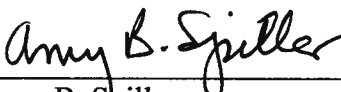
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CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing was delivered by U.S. mail (postage prepaid), personal, or electronic mail, on this 28th day of August 2015, to the parties listed below.



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