

**BEFORE THE
PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Application of Duke)
Energy Ohio, Inc. for a Waiver.) Case No. 16-1096-EL-WVR

**REPLY OF DUKE ENERGY OHIO, INC., TO
THE OHIO PARTNERS FOR AFFORDABLE ENERGY'S
MOTION TO DISMISS**

Comes now Duke Energy Ohio, Inc., (Duke Energy Ohio or Company) and for its reply to Ohio Partners for Affordable Energy's (OPAE) motion to dismiss (Motion), states as follows.

I. Introduction

In its Motion, OPAE provides an incorrect recitation of the facts, hoping to convince the Public Utilities Commission of Ohio (Commission) that prior decisions bar the Company's Application in this proceeding. OPAE's deliberate misstatements are discussed herein so as to enable an accurate review of its Motion and the legal theories on which it is predicated.

In In the Matter of the Application of Duke Energy Ohio, Inc. for a Waiver of Certain Sections of the Ohio Administrative Code for SmartGrid Pilot Program, Case No. 10-249-EL-WVR (2010 Waiver Case), the Company sought waivers from specific sections of the Ohio Administrative Code for purposes of a pilot program to include no more than 250 residential customers.¹ Included therein was a request for waiver of the requirements set forth in O.A.C

¹ *In the Matter of the Application of Duke Energy Ohio, Inc. for a Waiver of Certain Sections of the Ohio Administrative Code for SmartGrid Pilot Programs*. Case No. 10-249-EL-WVR, Application, at pp. 2-3 (February 26, 2010).

4901:1-18-05(A)(5).² However, no such request is made in the Application currently before the Commission.³ Duke Energy Ohio did, in the 2010 Waiver Case, also seek a waiver of the requirement under O.A.C. 4901:1-18-05(A) to conduct a premises visit on the day of disconnection for the pilot participants. Specifically, the Company proposed to satisfy this requirement via alternate means of either an electronic message or a text message, with each participating customer electing their preferred form of communication.⁴

In the prior proceeding, the Commission did not grant a waiver of the requirement to conduct a premises visit on the day of disconnection.⁵ In doing so, the Commission noted that additional forms of notification (*e.g.*, via telephone) had been raised by intervenors but not fully addressed by the Company.⁶ The Commission then concluded that adherence to its then-existing regulation would not be excused, but, importantly, it was amenable to exploring such additional notification forms in the future.⁷

In its Motion, OPAE states that the Commission also directed the Company “to commence discussions with Staff regarding alternative notice procedures.”⁸ OPAE infers from this language that Duke Energy Ohio was obligated to have such discussions before filing its Application in this proceeding and, further, that it was required to document such discussions in its initial filing. But the Commission’s entry contains no such commitment. Indeed, there is no prerequisite that the Company was to have satisfied prior to renewing its waiver request. And, importantly, the waiver request here does incorporate an alternate form of communication –

² *Id.*, at 7.

³ *In the Matter of the Application of Duke Energy Ohio, Inc. for a Waiver*, Case No.16-1096-EL-WVR, Application, at pg. 5 (May 13, 2016).

⁴ *Id.*, at 5-6.

⁵ *In the Matter of the Application of Duke Energy Ohio, Inc. for a Waiver of Certain Sections of the Ohio Administrative Code for SmartGrid Pilot Programs*. Case No. 10-249-EL-WVR, Entry, at pg. 8 (June 2, 2010).

⁶ *Id.*, at 8.

⁷ *Id.*, at 7.

⁸ *Id.*, at 8.

telephonic communication – identified by an intervenor in the 2010 Waiver Case and later found to be acceptable by the Commission.⁹

OPAE contends that the Commission’s decision in the 2010 Waiver Case forever bars Duke Energy Ohio from seeking a waiver of the requirement to complete a premises visit on the day of disconnection for nonpayment.¹⁰ But had there been any truth to this statement, Duke Energy Ohio’s willingness to forego a subsequent request for waiver of this very requirement for a time certain would have been pointless and OPAE’s support of that position similarly worthless.¹¹ But the Company did make a concession to which OPAE agreed. Specifically, Duke Energy Ohio agreed that it would not seek a waiver of O.A.C. 4901:1-18-05(A) before January 1, 2016, and OPAE accepted this concession as part of a stipulated settlement in which it joined.¹² And, in assessing the merits of this stipulation, the Commission considered all bargained-for exchanges included therein. The concession made by the Company and affirmatively supported by OPAE cannot now be said to be meaningless.¹³

⁹ *In the Matter of the Application of Duke Energy Ohio, Inc. for a Waiver of Certain Sections of the Ohio Administrative Code for SmartGrid Pilot Programs*. Case No. 10-249-EL-WVR, OCC Motion to Intervene and Opposition to Waiver and Comments, at pg. 6 (March 10, 2010); *In the Matter of Ohio Power Company for a Limited Waiver of Ohio Adm. Code 4901:1-18-06(A)((2))*, Case No. 13-1938-EL-WVR, Entry, at pp. 12-13 (March 18, 2015).

¹⁰ *In the Matter of the Application of Duke Energy Ohio, Inc., for a Waiver*, Case No. 16-1096-EL-WVR, Ohio Partners for Affordable Energy’s Motions to Intervene and Dismiss and Memoranda in Support, at pg. 3 (June 2, 2016)

¹¹ *In the Matter of the Application of Duke Energy Ohio, Inc. to Adjust and Set Its Gas and Electric Recovery Rate for 2010 SmartGrid Costs Under Riders AU and Rider DR-IM and Mid-deployment Review of AMI/SmartGrid Program*. Case No. 10-2326-GE-RDR, Stipulation and Recommendation, at pg. 12 (February 24, 2012).

¹² *Id.* at 19.

¹³ *In the Matter of the Application of Duke Energy Ohio, Inc. to Adjust and Set Its Gas and Electric Recovery Rate for 2010 SmartGrid Costs Under Riders AU and Rider DR-IM and Mid-deployment Review of AMI/SmartGrid Program*. Case No. 10-2326-GE-RDR, Opinion and Order at pp. 26, 27 (June 13, 2012).

II. Discussion

A. Duke Energy Ohio's Application is not barred by the doctrines of *res judicata* or collateral estoppel.

OPAE argues that the Company's Application must be dismissed as it is barred by the doctrines of *res judicata* and collateral estoppel. In advancing this argument, however, OPAE provides no discussion of these legal theories or an analysis of how such theories are persuasive here. Rather, it merely renders a conclusory statement that a prior Commission decision is the "genesis" for its argument that the doctrines apply.¹⁴ The lack of argument on OPAE's behalf should sufficiently demonstrate the fallacy in its contention. Had OPAE truly thought the doctrines to have merit, it would have provided a cohesive discussion of them. Its oversight notwithstanding, the Company responds to OPAE's unconvincing conclusory remarks below.

Res judicata encompasses two concepts commonly referred to as claim preclusion and issue preclusion. As to the first, "[t]he claim preclusion concept holds that a valid, final judgment rendered upon the merits bars all subsequent actions based upon any claim arising out of the transaction or occurrence that was the subject matter of the previous action."¹⁵ Additionally, "[a] judgment or decree in a former action does not bar a subsequent action where the causes of action are not the same, even though each action relates to the same subject matter."¹⁶

The concept of claim preclusion is not applicable here. Neither the 2010 Waiver Case nor the instant proceeding reflects an occurrence (*i.e.*, event) or a transaction (*i.e.*, events that arise from a common nucleus of operative fact¹⁷). And because there is no occurrence or transaction, there can be no cause of action or claim arising therefrom. It is undeniable that OPAE has failed

¹⁴ *In the Matter of the Application of Duke Energy Ohio, Inc., for a Waiver*, Case No. 16-1096-EL-WVR, Ohio Partners for Affordable Energy's Motions to Intervene and Dismiss and Memoranda in Support, at pg. 4 (June 2, 2016).

¹⁵ *Fort Frye Teachers Assn. OEA/NEA v. State Employment Relations Board*, (1998), 81 Ohio St.3d 392, at p. (internal citations omitted).

¹⁶ *Grava v Parkman Township*, (1995), 73 Ohio St.3d 379, at pg. 6 (internal citations omitted).

¹⁷ *Id.*, at 382.

to prove the existence of an occurrence or transaction for which final judgment has been rendered and that bars the Company's request. At best, there are similar subject matters – requests for waiver. But the grant or denial of one waiver request cannot and does not forever bar every subsequent request for waiver. OPAE's reliance on claim preclusion is simply wrong.

The second concept – issue preclusion – is also known as collateral estoppel. Successful application of this concept requires proof that “an issue...had been actually and necessarily litigated and determined in a prior action that was based upon a different cause of action.”¹⁸ And “[w]hen an issue is not actually litigated and decided in the previous proceeding, collateral estoppel does not preclude the issue from being litigated in a subsequent proceeding.”¹⁹ “Where the judgment...is not dispositive on issues which a party later seeks to litigate, *res judicata* is not applicable. This is true even if the prior...decision has discussed the issues that are the subject of the current litigation.”²⁰ Where a point of law or fact was not passed upon in prior proceeding, collateral estoppel is inapplicable.²¹

The concept of collateral estoppel does not apply here. In the one prior proceeding to which OPAE refers, the Commission addressed a waiver request in the context of a very small pilot program. In that earlier request, Duke Energy Ohio proposed replacing the day-of-disconnection premises visit with either an electronic or text message, as elected by the participating customer. And in its review, the Commission acknowledged that alternate forms of communication had been identified but not resolved. Further, the Commission expressly acknowledged its willingness to consider, in the future, alternate forms of communication that

¹⁸ *State ex rel. Davis et al. v Pub. Employees Retirement Board et. al*, 120 Ohio St.3d 386, at pg. 982 (internal citations omitted).

¹⁹ *Id.*, at 393

²⁰ *Ameigh v Baycliffs Corporation*, (1998) 81 Ohio St.3d 247. (internal citations omitted).

²¹ *Vectren Energy Delivery of Ohio, Inc. v Public Utilities Commission of Ohio*, 2007-Ohio-1386, ¶30 (doctrine inapplicable where Commission did not reach any conclusion on issue).

would support a waiver of the premises visit. To maintain, as OPAE does now, that the Commission conclusively disposed of the issue in the prior proceeding cannot be reconciled with the Commission's order. The Commission left open the potential for subsequent requests to waive O.A.C. 4901:1-18-05(A).²² Nor can OPAE's contention here be reconciled with its own past conduct. If OPAE truly believed that the Commission had issued an irrevocable decision in the 2010 Waiver Case, it would have not agreed to Duke Energy Ohio's commitment to forego renewing its waiver request through a time certain. It would have found the commitment to ring hollow and devoid of any incentive for it to participate in a stipulation. But OPAE did so participate and cannot now credibly claim that the Company's request is estopped. Duke Energy Ohio's right to seek a waiver of O.A.C. 4901:1-18-05(A) and implement a pilot program for all residential electric customers served by certified advanced metering infrastructure has not been forever barred.

B. AEP Ohio's Pilot Program Cannot Nullify this Proceeding.

OPAЕ's alternative argument, albeit imaginative, has no place in the regulatory arena. OPAЕ claims that "there is no need for two pilots on the same issue."²³ Indeed, OPAЕ protests that "one pilot is enough."²⁴ But to accept OPAЕ's contention, the Commission would have to adopt a myopic view of every pilot program. As a consequence of OPAЕ's ill-advised position, a pilot program that yields benefits for one electric distribution utility's customers could not similarly afford benefits to any of the customers of Ohio's other electric distribution companies.

²² *In the Matter of Ohio Power Company for a Limited Waiver of Ohio Adm. Code 4901:1-18-06(A)((2))*, Case No. 13-1938-EL-WVR, Entry, at pp. 12-13 (March 18, 2015).

²³ *In the Matter of the Application of Duke Energy Ohio, Inc., for a Waiver*, Case No. 16-1096-EL-WVR, Ohio Partners for Affordable Energy's Motions to Intervene and Dismiss and Memoranda in Support, at pg.4 (June 2, 2016).

²⁴ *Id.*

A pilot program that is limited to scope²⁵ would deprive the Commission of the ability to evaluate meaningful data collected across geographically different areas and reflecting evolving circumstances. But utility regulation is not discriminatory and Duke Energy Ohio must be allowed to pursue a pilot program through which important data will be obtained, reviewed, and available for the Commission and its Staff to reconcile against the data acquired under the more limited AEP Ohio pilot program. Importantly, data anticipated under the Duke Energy Ohio pilot will be informative in enhancing future processes and procedures intended to reduce residential disconnections for nonpayment and, ultimately, the financial burden imposed upon all customers via uncollectible expense riders. OPAE's desire to preclude such an outcome is indeed unfortunate.

III. CONCLUSION

For the reasons stated above, Duke Energy Ohio respectfully requests that the Commission deny the Ohio Partners for Affordable Energy's Motion to Dismiss.

²⁵ *In the Matter of Ohio Power Company for a Limited Waiver of Ohio Adm. Code 4901:1-18-06(A)((2)*, Case No. 13-1938-EL-WVR, Entry, at pg. 9 (March 18, 2015).

Respectfully submitted,

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Handwritten signature of Amy B. Spiller in blue ink.

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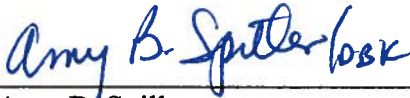
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CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing was delivered by U.S. mail (postage prepaid), personal delivery, or electronic mail, on this 9th day of June, 2016, to the following parties.



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Summary: Reply Reply of Duke Energy Ohio, Inc., to the Ohio Partners for Affordable Energy's Motion to Dismiss electronically filed by Dianne Kuhnell on behalf of Duke Energy Ohio, Inc. and Spiller, Amy B. and Watts, Elizabeth H.