

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Application of Duke)	
Energy Ohio, Inc. for an Increase in)	Case No. 17-32-EL-AIR
Electric Distribution Rates)	
)	
In the Matter of the Application of Duke)	Case No. 17-33-EL-ATA
Energy Ohio, Inc. for Tariff Approval.)	
)	
In the Matter of the Application of Duke)	
Energy Ohio, Inc. for Approval to Change)	Case No. 17-34-EL-AAM
Accounting Methods)	

**REPLY IN SUPPORT OF
MOTION TO COMPEL RESPONSES TO DISCOVERY
BY
THE OFFICE OF THE OHIO CONSUMERS' COUNSEL**

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Duke Energy's memorandum contra the Ohio Consumers' Counsel's motion to compel relies almost exclusively on the Utility's assertion that inquiries about \$143 million in charges to its consumers are irrelevant. But the Ohio Supreme Court determined that the discovery rules are to be "liberally construed to allow for broad discovery,"¹ thereby setting an expansive standard for relevance. OCC easily meets that standard. OCC's discovery requests are not just relevant but go to the heart of essential matters to be determined in this case—namely, whether Duke's current property is used and useful for consumers and whether Duke should replace current infrastructure with new infrastructure that will cost consumers \$143 million. The PUCO should reject Duke's efforts to withhold information and should require Duke to respond in full to each of

¹ *Ohio Consumers' Counsel v. PUC*, 111 Ohio St.3d 300 (2006).

OCC's discovery requests. To protect consumers from possible unwarranted charges, the PUCO should grant OCC's Motion to Compel.

A. The discovery rules are liberally interpreted in favor of requiring the utility to respond in full to parties' discovery requests.

In its Memo Contra, Duke misstates the legal standard and cites a PUCO case that was superseded by the Ohio Supreme Court. Duke argues—wrongly—that "the rules applicable to discovery will not be liberally interpreted."² In support, Duke cites a 2002 PUCO complaint case, *In re Complaint of David Wellman*,³ in which the complainants sought more lenient treatment from the PUCO regarding discovery because they were representing themselves *pro se*.

But this case is inapplicable for at least two reasons. First, OCC is not a *pro se* litigant in a complaint case and is not seeking special treatment under the discovery rules. OCC is represented by counsel and asks only that the discovery rules be followed as written and as interpreted by controlling legal precedent. Second, Duke's citation to this PUCO case is improper because more than four years after *Wellman* was decided, the Ohio Supreme Court came to the opposite conclusion in *Ohio Consumers' Counsel v. PUC*.⁴ In *Ohio Consumers' Counsel*, the court found that the discovery rules are in fact "liberally construed."⁵ OCC cited this case in its Motion to Compel,⁶ so Duke should have known that its reliance on *Wellman* is improper. *Ohio Consumers' Counsel* is

² Memo Contra at 6.

³ *In re Complaint of David Wellman v. Ameritech Ohio*, Case No. 99-768-TP-CSS, 2002 Ohio PUC LEXIS 634, at *2, *5 (July 17, 2002).

⁴ 111 Ohio St. 3d 300.

⁵ *Id.* at 320.

⁶ Motion to Compel at 4.

Supreme Court precedent that the PUCO must follow. The PUCO must liberally construe the discovery rules in favor of requiring the utility to respond in full to OCC's relevant discovery requests.

B. OCC's discovery requests seek relevant information.

1. Duke's claim that its smart grid proposal in this case is "entirely forward-looking" is both false and irrelevant.

Duke claims that it does not need to respond to OCC's discovery requests because its smart grid proposal in this case "is entirely forward-looking."⁷ This is false because Duke proposes to include its current smart grid infrastructure in rate base, which is backward-looking.⁸ It is also irrelevant. Even if part of Duke's smart grid proposal is forward-looking, OCC is not prohibited from discovering information about Duke's current system and capabilities. Duke disclosed in this case that it is currently replacing approximately 23,700 obsolescent communication nodes, 80,000 Echelon smart meters, and 48,800 Badger natural gas communication modules.⁹

a. OCC's discovery requests are relevant in determining whether Duke's current smart grid infrastructure is used and useful under R.C. 4909.15(A)(1).

By law, Duke may only include in its rate base property that is "used and useful."¹⁰ In this case, Duke seeks to include its current smart grid infrastructure in its

⁷ Memo Contra at 6. *See also* Memo Contra at 3 ("The plan is forward-looking.").

⁸ *See* R.C. 4909.15(A)(1) (providing for valuation of property used and useful as of the date certain, which in this case is June 30, 2016).

⁹ Direct Testimony of Donald Schneider on Behalf of Duke Energy Ohio, Inc. at 10 (Mar. 16, 2017).

¹⁰ R.C. 4909.15(A)(1). *See also Indus. Energy Users-Ohio v. PUC*, 117 Ohio St. 3d 486, 492 (2008) ("R.C. 4909.15 provides that any property sought to be included in the calculation of utility rates must be used and useful in rendering the public-utility service ...").

rate base.¹¹ Thus, Duke has the burden of proving that its current smart grid infrastructure is used and useful.

OCC's discovery requests are related to Duke's current smart grid infrastructure, including (i) questions about the types of meters that Duke has installed and their capabilities,¹² (ii) the costs that Duke incurred to install various parts of its smart grid distribution system,¹³ (iii) the type of data that Duke's current system provides to Duke and to customers,¹⁴ (iv) Duke's deployment of smart meters using, in part, U.S. Department of Energy Investment Grant funds,¹⁵ and (v) the effect that Duke's current system has had on reliability.¹⁶

This information is relevant in determining whether Duke's current smart grid infrastructure is used and useful, as required by law. OCC has a right to discovery regarding whether property is used and useful. The PUCO should reject Duke's claim that this information is irrelevant.

b. Information responsive to OCC's discovery requests on the current capabilities of Duke's smart grid is relevant because it informs analysis of Duke's proposal to replace it with new infrastructure.

As explained above, Duke's smart grid proposal in this case is hardly forward looking because Duke seeks to include smart grid infrastructure in its rate base. But

¹¹ See Direct Testimony of James P. Henning on Behalf of Duke Energy Ohio, Inc. at 7 (Mar. 16, 2017) ("the revenue requirement for SmartGrid would be incorporated into base rates via this anticipated rate case"); Direct Testimony of William Don Wathen Jr. on Behalf of Duke Energy Ohio, Inc. at 5 (Mar. 16, 2017) ("the Company requests, as part of this case, that the revenue requirement for its SmartGrid investment be 'rolled into' base rates").

¹² OCC RPD 02-007; OCC INT 06-146.

¹³ OCC INT 02-011; OCC INT 02-045.

¹⁴ OCC INT 02-031; OCC INT 06-129.

¹⁵ OCC RPD 02-006.

¹⁶ OCC INT-04-099.

OCC's discovery requests are also relevant and related to Duke's proposal to install new smart meters and other distribution infrastructure.

Duke proposes that customers be charged \$143 million for new smart grid infrastructure, including replacing substantially all recently-installed residential electric smart meters, communications infrastructure, and gas meter reading equipment.¹⁷ For parties to analyze this proposal, it is essential to understand the capabilities of the current smart grid infrastructure. For example, in its Memo Contra, Duke states that its forward-looking proposal "will ultimately save customers' money."¹⁸ It is impossible to know whether the new distribution system will save customers' money without knowing how the proposed system compares to the current system, both in terms of cost and functionality. In its Memo Contra, Duke similarly claims that its proposal for new smart meter infrastructure will "enable customers to have more control over their own data."¹⁹ But again, there is no way to know if customers will have more control in the future without knowing how much control they have now.

The fundamental question regarding Duke's smart grid proposal is: should Duke replace its current smart grid system with a new system at a cost of \$143 million to customers? It is impossible to answer this question without detailed information about the state of the current system.

Neither OCC nor the PUCO can determine whether it is prudent for Duke to replace its current smart grid infrastructure with new infrastructure unless they can meaningfully compare and contrast the costs and capabilities of both the old and new

¹⁷ See Direct Testimony of Donald L. Schneider, Jr. on Behalf of Duke Energy Ohio, Inc. at 9, 13 (Mar. 16, 2017).

¹⁸ Memo Contra at 3.

¹⁹ Memo Contra at 3.

systems. This is what OCC is aiming to do through discovery. And in fact, when OCC attempted to address this issue in another case, Duke argued that OCC should be prohibited from doing so because the issue is being address here in the rate case, and the Attorney Examiner in that case agreed.²⁰

Duke is impeding OCC's investigation by repeatedly contending that information related to Duke's current distribution system is irrelevant. Information about Duke's current smart grid system, its costs, and its capabilities is directly related to any evaluation of Duke's proposal to replace that system. It is therefore relevant and discoverable.

2. OCC seeks to understand the savings that customers may have achieved from Duke's current smart grid infrastructure, and a previous settlement specifically contemplated that this analysis would take place in this rate case.

As Duke's witnesses acknowledge, Duke filed this rate case primarily because it was required to under the terms of an approved settlement in a recent rider case (Case No. 10-2326-GE-RDR).²¹ In that case, Duke and other parties, including OCC, signed a

²⁰ *In re Application of Duke Energy Ohio, Inc. for Authority to Adjust Rider AU for 2016 Grid Modernization Costs*, Case No. 17-690-GA-RDR, Entry (Sept. 14, 2017) (finding that this rate case "is the proper venue for the discussion of issues relating to Duke's proposal to implement new or updated AMI technology").

²¹ Direct Testimony of William Don Wathen Jr. on Behalf of Duke Energy Ohio, Inc. at 3 (Mar. 16, 2017) ("the primary reason for filing the case, at this time ... is to fulfill a requirement in Case No. 10-2326-GE-RDR"); Direct Testimony of James P. Henning on Behalf of Duke Energy Ohio, Inc. at 7 (Mar. 16, 2017) ("Duke Energy Ohio agreed, as part of a prior stipulation, that it would file a base electric distribution rate case within one year of the Commission Staff finding that the Company had completed its SmartGrid deployment.") (citing Case No. 10-2326-GE-RDR).

settlement addressing certain issues related to Duke's smart grid deployment.²² The PUCO approved that settlement.²³

Under the 2012 Settlement, Duke would recover smart grid costs through Rider DR-IM and customers would receive a reduction in the revenue requirement to reflect operational savings from the smart grid deployment.²⁴ Duke agreed that after full deployment of the new smart grid infrastructure, it would file a base rate case, and "the revenue requirement requested in that case will reflect actual level of benefits attributable to SmartGrid achieved to date."²⁵ This is the base rate case, and OCC is attempting, through discovery, to determine the "actual level of benefits attributable to SmartGrid achieved to date."

But despite the plain language of the 2012 Settlement, Duke now claims that information about its current smart grid system and the benefits it may or may not provide to customers is irrelevant and not subject to discovery. Duke is wrong. The PUCO should enforce the approved 2012 Settlement and should require Duke to respond to OCC's discovery requests regarding Duke's current smart grid infrastructure.

C. Duke's reliance on discovery rules regarding business records is misplaced.

Duke suggests that it need not respond to OCC's discovery requests because OCC "has the same access to the same information that [Duke] has."²⁶ This is false. In several

²² *In re Application of Duke Energy Ohio, Inc. to Adjust & Set its Gas & Elec. Recovery Rate for 2010 SmartGrid Costs Under Riders AU & Rider DR-IM & Mid-deployment Review of AMI/SmartGrid Program*, Case No. 10-2326-GE-RDR, Stipulation & Recommendation (Feb. 24, 2012) (the "2012 Settlement").

²³ *Id.*, Opinion & Order (June 13, 2012).

²⁴ See 2012 Settlement § II.

²⁵ 2012 Settlement § II.d, e.

²⁶ Memo Contra at 7.

instances, Duke responded to OCC's discovery requests with citations to public PUCO documents or other discovery requests, and upon inspection by OCC, it was determined that these documents were nonresponsive.²⁷

Moreover, in support of this contention, Duke cites Ohio Administrative Code 4901-1-19(D), which does not apply. Rule 4901-1-19(D) provides that a party responding to a discovery request may, in lieu of providing a response, offer the asking party an opportunity to examine the responding party's business records. But Duke cannot rely on this rule for at least two reasons.

First, by its plain language, Rule 4901-1-19(D) only applies to interrogatories.²⁸ This rule does not apply to requests for production of documents, and many of the OCC discovery requests that Duke failed to respond to are such requests. The corresponding rule regarding production of documents (4901-1-20) does not include a business records provision.²⁹

Second, and again by its plain language, Rule 4901-1-19(D) only applies when the party responding to the interrogatory (Duke) contends that the information in question can be found in its business records.³⁰ But in its Memo Contra, Duke states that OCC has equal access to publicly-available documents in PUCO dockets and information provided in discovery in past cases—not documents that are found in Duke's business records.³¹

²⁷ See, e.g., Duke's response to OCC INT 2-31 (reference to publicly-filed testimony that is non-responsive); Duke's response to OCC INT 2-45 (same).

²⁸ Ohio Adm. Code 4901-1-19(D) ("Where the answer to an interrogatory may be derived or ascertained from the business records of the party upon whom the interrogatory has been served ...") (emphasis added).

²⁹ Ohio Adm. Code 4901-1-20.

³⁰ *Id.* ("Where the answer to an interrogatory may be derived or ascertained from the business records of the party upon whom the interrogatory has been served ...") (emphasis added).

³¹ Memo Contra at 7-8.

The applicable rules for publicly-available documents and previously-produced discovery responses are Ohio Administrative Code 4901-1-19(C) and 4901-1-20(D). As OCC explained in its Motion to Compel,³² if Duke contends that responsive information can be found in a publicly-filed document, Duke must "specify the title of the document, the location of the document ..., and the page or pages from which the answer may be derived or ascertained."³³ Duke has either (i) completely failed to do so³⁴ or (ii) pointed OCC to publicly-filed documents that do not respond to OCC's discovery requests.³⁵

Likewise, if Duke wants to direct OCC to discovery responses provided in other cases, it can only do so if those responses were provided in the past 12 months.³⁶ If responses to OCC discovery requests in this case can be found in discovery responses from another case that are over a year old, Rules 4901-1-19(C) and 4901-1-20(D) require Duke to reproduce them now in this case. Duke has not done so, and instead has told OCC, effectively, look at every piece of discovery you've received from Duke in the last nine years in every case related to smart grid, and you might find it somewhere. This type of response is not permitted under the PUCO's discovery rules.

³² Motion to Compel at 7-8.

³³ Ohio Adm. Code 4901-1-19(C). *See also* Ohio Adm. Code 4901-1-20(D) (party responding must "specify the location of the document").

³⁴ *See, e.g.*, Duke's response to OCC INT 2-45 (Duke providing wholesale references to testimony from six previous cases without any additional details).

³⁵ *See, e.g.*, Duke's response to OCC INT 2-31 (Duke responding by citing testimony that is non-responsive).

³⁶ Ohio Adm. Code 4901-1-19(C) ("Where the answer to an interrogatory may be derived or ascertained ... from documents which the party served with the interrogatory has furnished to the party submitting the interrogatory within the preceding twelve months ..."). Ohio Adm. Code 4901-1-20(D) ("Where a request calls for the production of ... a document which the party upon whom the request is served has furnished to the party submitting the request within the preceding twelve months ...").

D. Duke's response to OCC INT 2-31 is incomplete.

Duke states that it has responded in full to OCC INT 2-31.³⁷ It has not. In this interrogatory, OCC asks Duke whether Echelon and Itron meters provide billing quality interval data.³⁸ Duke responded by citing the testimony of Scott B. Nicholson, which states: "Each hourly interval indicates whether the data in that interval is of billing quality or not."³⁹ OCC wants to know whether the interval data is in fact billing quality. Duke's response simply tells OCC that the meters are capable of providing that information. This response is incomplete and therefore constitutes a failure to answer under the PUCO's rules.⁴⁰ The PUCO should order Duke to answer OCC's actual interrogatory and explain whether and to what extent Echelon and Itron meters provide billing quality data.

E. Duke's response to OCC INT 4-103 is incomplete.

Duke states that it has responded in full to OCC INT 4-103.⁴¹ It has not. In this interrogatory, OCC asks Duke whether it has implemented any self-optimizing grid pilot programs.⁴² Duke responded by providing general information on its self-healing teams and on self-optimizing grids.⁴³ Duke's response does not mention pilot programs. Has Duke implemented self-optimizing grid *pilot programs* or not? Duke's response should either be, "Yes, Duke has implemented self-optimizing grid pilot programs" or, "No,

³⁷ Memo Contra at Exhibit.

³⁸ See Motion to Compel Exhibit 2 at 7.

³⁹ Direct Testimony of Scott B. Nicholson on Behalf of Duke Energy Ohio, Inc. at 4:4-5 (Mar. 16, 2017).

⁴⁰ Ohio Adm. Code 4901-1-23(B) (for purposes of a motion to compel, "an evasive or incomplete answer shall be treated as a failure to answer").

⁴¹ Memo Contra at Exhibit.

⁴² See Motion to Compel Exhibit 2 at 13.

⁴³ *Id.* The performance level of self-healing teams has been an issue that has been raised in Ohio, and Duke's experience in implementing these types of technologies is crucial in evaluating the effectiveness of proposals made by Duke. See *In re Application of Duke Energy Ohio, Inc. to Adjust Rider DR-IM & Rider AU for 2013 SmartGrid Costs*, Case No. 14-1051-GE-RDR, Opinion and Order at 7-8 (Apr. 8, 2015).

Duke has not implemented self-optimizing grid pilot programs." Duke's current response does not include either of these statements (or any similar statements conveying the same information) and therefore it is a failure to answer under the PUCO's rules.⁴⁴

F. Conclusion

In this case, Duke seeks to include its current smart grid infrastructure in its rate base and to charge customers a return thereon. Duke also seeks authority to replace a substantial portion of that same infrastructure and to charge customers an additional \$143 million for new smart meters and related technology. OCC has a right to discover information about Duke's property to determine whether it is used and useful. And OCC has a right to discover information about Duke's property to determine whether that property should be discarded and replaced by new property at customers' cost, as Duke proposes. OCC's discovery requests are relevant. The PUCO should grant OCC's Motion to Compel.

⁴⁴ Ohio Adm. Code 4901-1-23(B).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of this Reply in Support of Motion to Compel was served on the persons stated below via electronic transmission, this 25th day of September 2017.

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