

BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

Kim Wiethorn, Karen Dabdoub, Jeff and Linda)
Sims, Fred Vonderhaar, Donald and Nancy Jacob,)
James Johnson, Majid Qureshi, Keith Donovan,)
Julie Reynolds, John Lu, Robert Schneider,)
Amanda Sachs, John Hasselbeck, Lawrence Hug,)
Dennis Mitman, Nicole Hiciu, Jason Mayhall,)
James and Shelley Hoyer, Theresa Reis, Gary)
Balser, David Siff and the Symmes Township)
Trustees, *et al.*,)

Case No.17-2344-EL-CSS

Complainants.)

v.)

Duke Energy Ohio, Inc.,)

Respondent.)

**MEMORANDUM CONTRA THE MOTION TO CONSOLIDATE, REQUEST FOR
STAY AND REQUEST FOR EXPEDITED RULING OF STAY**

I. INTRODUCTION

Comes now Duke Energy Ohio, Inc., (Duke Energy Ohio or Company) and for its memorandum contra the Motion to Consolidate Cases, Request for Stay, and Request for Expedited Ruling of Stay (Motion), hereby states as follows.

The Motion is procedurally defective in that it fails to acknowledge procedural deficiencies and rulings issued in this case and for which further appeals are or will be sought. The Motion, therefore, fails to articulate a credible basis for the requests set forth therein.

II. DISCUSSION

A. Request for Consolidation

The twenty-two individual complainants (Complainants), are seeking to rush consolidation, notwithstanding the procedural deficiencies affecting the complaints that each of the individual complainants has certified and filed, as well as deficiencies affecting at least ten of the other complainants seeking to join. Specifically, at least three of the complainants in Case No. 17-2344-EL-CSS do not own property on which Duke Energy Ohio actively seeks to engage in authorized vegetation management activities and, as such, these complainants lack standing to assert any claims related to the Company's actions as necessary to maintain and operate a high-voltage transmission line. Until such time as Duke Energy Ohio files its response to the complaint docketed in Case No. 17-2344-EL-CSS and complainants who lack standing are dismissed, consolidation is premature.

Similarly and as evident from Duke Energy Ohio's Motion to Dismiss, filed of record on November 9, 2017, ten other complaints must be dismissed as those individual complainants similarly lack standing. These complaints have been docketed under the following case numbers:

- 17-2170-EL-CSS
- 17-2172-EL-CSS
- 17-2180-EL-CSS
- 17-2196-EL-CSS
- 17-2197-EL-CSS
- 17-2205-EL-CSS
- 17-2224-EL-CSS
- 17-2267-EL-CSS
- 17-2269-EL-CSS
- 17-2270-EL-CSS

These ten complaints should not proceed and Complainants' attempt to mask the deficiencies in a larger, consolidated action cannot be permitted. Rather, the Public Utilities Commission of Ohio (Commission) should first address these pending motions and, as appropriate, dismiss these actions as having been improvidently filed. In the interim, Complainants have not demonstrated that these ten proceedings satisfy the criteria for consolidation as mandated under Civ.R. 42(A)¹ and the Motion cannot be granted as to these complaints. Indeed, consolidation of proceedings for which a motion to dismiss will be, or has been, filed in other proceedings will not yield any efficiencies and Complainants point to none in the Motion.

Duke Energy Ohio further submits that in the Motion, the Complainants gloss over the applicable criteria for consolidation and, instead, emphasizes that efficiencies will be gained and prejudice avoided as no procedural schedules have been issued. But this is not the standard under Civ.R. 42, the application of which has been recognized by the Commission. Critically, there must be common issues of fact or law. Here, however, not all Complainants dispute the Company's right to act in accordance with its approved Program for Inspection, Maintenance, Repair and Replacement of Distribution and Transmission Lines (Program). (See, *e.g.*, Case No. 17-2172-EL-CSS). The burden rests with the Movant and, here, Movant has failed to articulate proper grounds for consolidation.

Further, consolidation will not result in efficiencies. As these matters progress and discovery is conducted, there is substantial potential for further dispositive motions to be filed. For illustrative purposes only, and based upon the bare allegations in the complaints, there is

¹ See, *e.g.*, *In the Matter of the Application of Columbus Southern Power Company and Ohio Power Company, Individually, and if Their Proposed Merger is Approved, as a Merged Company for an Increase in Electric Distribution Rates*, Case No. 11-351-EL-AIR, *et al.*, 2011 PUC LEXIS 1182, at *9 (November 1, 2011)(denying consolidation given failure to meet criteria under the Civil Rules of Procedure).

potential for jurisdictional challenges to be made as certain Complainants have asserted allegations predicated upon aesthetic concerns. But the Commission's jurisdiction here is limited to the services provided by Duke Energy Ohio and whether such services are consistent with its approved Program related to the maintenance of its high-voltage transmission system. Such focused dispositive motions, when litigated in the context of a larger, consolidated action, will not yield efficiencies but, instead, prolong the disposition of matters and delay the Company's ability to engage in those activities necessary to advance public and employee safety and enable the ongoing provision of safe and reliable service. The Motion is deficient and consolidation cannot be permitted at this time.

B. Request for Stay

Complainants have simply failed to timely review the dockets for those cases sought to be consolidated and, in doing so, inject inefficiencies into this process. Significantly, on November 16, 2017, the attorney examiner issued an order directing Duke Energy Ohio to stay the clear cutting of trees on the properties listed in the complaint. There is no need, therefore, for Complainants to seek similar relief at this time. For those complaints for which the response period has not expired, Duke Energy Ohio should be afforded due process, the right to oppose the requests for failure to satisfy the criteria for stay and the Commission's lack of jurisdiction over matters of equity. In that regard, Duke Energy Ohio observes that Complainants fail to even acknowledge such criteria in the Motion and, as such, the Motion is deficient and cannot be granted.

III. CONCLUSION

Complainants seek prematurely to consolidate these matters without any recognition of the differences and variations of the individual complaints. Under the circumstances, there is no administrative economy to be served by consolidation in these cases. The Complainants' motion is premature and without good cause. For the reasons set forth above, the Complainants' motion should be denied.

Respectfully submitted,

DUKE ENERGY OHIO, INC.

/s/ Elizabeth H. Watts

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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 21st day of November, 2017, to the following:

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in

Case No(s). 17-2344-EL-CSS

Summary: Memorandum Contra the Motion to Consolidate, Request for Stay and Request for Expedited Ruling of Stay electronically filed by Ms. Emily Olive on behalf of Duke Energy Ohio and Spiller, Amy B. Ms. and Watts, Elizabeth H. Ms. and McMahon, Robert A. Mr.