

THE PUBLIC UTILITIES COMMISSION OF OHIO

**CITIZENS AGAINST CLEAR CUTTING, ET
AL.,**

CASE NO. 17-2344-EL-CSS

COMPLAINANTS,

v.

DUKE ENERGY OHIO, INC.,

RESPONDENT.

ENTRY

Entered in the Journal on August 24, 2018

{¶ 1} Duke Energy Ohio, Inc. (Duke or the Company) is a public utility, pursuant to R.C. 4905.02, and is, therefore, subject to the jurisdiction of this Commission.

{¶ 2} Pursuant to R.C. 4905.26, the Commission has authority to consider written complaints filed against a public utility by any person or corporation regarding any rate, service, regulation, or practice relating to any service furnished by the public utility that is in any respect unjust, unreasonable, insufficient, or unjustly discriminatory.

{¶ 3} On November 14, 2017, Citizens Against Clear Cutting (Complainants) filed a complaint against Duke. On November 16, 2017, the attorney examiner granted Complainants' request to stay Duke from clear cutting trees on their properties. On November 22, 2017, Complainants filed an amended complaint and on January 5, 2018, Complainants filed a second amended complaint. Duke filed its answer to the second amended complaint on January 25, 2018.

{¶ 4} By Entry issued January 25, 2018, the attorney examiner scheduled a hearing in this matter to commence on February 26, 2018. On February 7, 2018, the parties filed a joint motion seeking a continuance of the procedural schedule. Upon review, the attorney examiner granted the joint motion for continuance and rescheduled the hearing to commence on April 17, 2018.

{¶ 5} On March 13, 2018, Duke filed a motion to compel Complainants' depositions and a request to continue the hearing and for an expedited ruling. In the motion, Duke indicated that it exhausted its efforts in attempting to depose every single Complainant in the proceeding.

{¶ 6} On March 14, 2018, Complainants filed a motion for protective order to prevent further depositions. In the motion, Complainants indicated that they had either produced or agreed to produce 20 Complainants for depositions and that Duke had refused to hold telephonic depositions to expedite the process. Moreover, Complainants argued that Duke's desire to depose all Complainants, instead of a select few, was not reasonably calculated to lead to the discovery of admissible evidence.

{¶ 7} On March 20, 2018, Complainants filed a memorandum contra Duke's motion to compel. On March 21, 2018, Duke filed a memorandum contra Complainants' motion for protective order.

{¶ 8} Due to the parties' inability to complete depositions in a timely fashion, the attorney examiner rescheduled the hearing a second time to commence on May 14, 2018.

{¶ 9} On May 1, 2018, the attorney examiners held a prehearing conference regarding a motion to compel discovery filed by Complainants on April 20, 2018, and granted the motion to compel, in part. The attorney examiners additionally ruled that Duke was required to provide a privilege log for any documents that were redacted due to privilege. During the conference, Duke indicated that it would produce all outstanding discovery to Complainants by May 7, 2018.

{¶ 10} On May 11, 2018, Duke filed a motion to adjust the procedural schedule. In the motion, Duke stated that it required additional time to produce discovery to Complainants, as ordered during the May 1, 2018 prehearing conference. Duke also indicated that based on telephone and email communications amongst counsel, no parties objected to the motion.

{¶ 11} By Entry dated May 14, 2018, the attorney examiner granted Duke's unopposed motion and directed Duke to produce all discovery, including the privilege log, to Complainants by May 23, 2018. Further, in order to provide sufficient time to prepare for the hearing, including reviewing the discovery responses and conducting depositions, the attorney examiner rescheduled the hearing a third time to commence on June 18, 2018.

{¶ 12} On May 29, 2018, during a teleconference, counsel for Complainants indicated that despite the attorney examiners' rulings on May 1, 2018, and May 14, 2018, Duke had failed to provide a privilege log for numerous documents that had been redacted.

{¶ 13} By email dated May 29, 2018, counsel for Duke indicated that, given the focus on producing responsive documents to Complainants' counsel, it was impossible for Duke to simultaneously prepare a privilege log for the nearly 20,000 documents that the Company produced. Moreover, counsel indicated that the Company did not have internal personnel who could be dedicated to producing a privilege log, as ordered. If Duke were to retain an outside vendor, the Company estimated that it would need approximately 30 days to prepare the required privilege log.

{¶ 14} By email dated June 8, 2018, counsel for Duke indicated that they would be able to provide the privilege log to Complainants by July 6, 2018.

{¶ 15} Based on representations from both parties, on June 11, 2018, the attorney examiner rescheduled the hearing for a fourth time to commence on September 10, 2018, and directed Duke to provide the privilege log to Complainants by July 6, 2018. Testimony in this matter was directed to be filed by August 27, 2018.

{¶ 16} On August 10, 2018, Complainants filed a motion to compel discovery, to enforce Commission orders, for forfeitures and sanctions, and a request for expedited treatment. In the motion, Complainants allege that Duke provided an insufficient privilege log to them on July 6, 2018. Complainants raise several issues, including that Duke is improperly asserting attorney-client and work product privilege for communications and

documents which do not involve an attorney and that it is asserting attorney-client and work product privilege for documents solely because they are attached to privileged emails. Finally, Complainants urge the Commission to impose forfeitures and sanctions pursuant to R.C. 4905.54 for Duke's failure to provide a proper privilege log despite the attorney examiner's May 1, 2018 ruling.

{¶ 17} On August 17, 2018, Duke filed a memorandum contra Complainants' motion. In the memorandum, Duke requests that the Commission deny Complainants' motion in its entirety because a majority of the documents which are in dispute were created in anticipation of litigation and are consequently privileged. Duke urges the Commission to enter a protective order pursuant to Ohio Adm.Code 4901-1-23(D) to prevent Complainants from obtaining these documents. Duke also states that the Commission, if necessary, should conduct an in camera review of the documents in dispute to affirm their privileged status.

{¶ 18} Upon review, the attorney examiner finds that the current procedural schedule should be suspended in order to more thoroughly consider the arguments raised by Complainants and Duke in their respective filings. Duke is instructed to deliver all documents in dispute to the attorney examiner's office by September 4, 2018, to allow the attorney examiners assigned to this matter an opportunity to conduct an in camera review of the documents. The parties will appear for a prehearing conference regarding the motion to compel discovery on September 10, 2018, at 10:00 a.m., at the Commission offices, Hearing Room 11-D, 180 East Broad Street, 11th Floor, Columbus, Ohio 43215. During the conference, the parties should be prepared to respond to questions regarding the documents and present their arguments regarding the discovery dispute. Lastly, the parties should also be prepared to discuss rescheduling the hearing in this matter for a fifth time. The attorney examiner will establish a new procedural schedule at the time of the conference or by subsequent entry.

{¶ 19} It is, therefore,

{¶ 20} ORDERED, That the procedural schedule in this matter be suspended. It is, further,

{¶ 21} ORDERED, That Duke deliver all documents in dispute to the attorney examiner's office by September 4, 2018, in accordance with Paragraph 18. It is, further,

{¶ 22} ORDERED, That a prehearing conference be set in the matter in accordance with Paragraph 18. It is, further,

{¶ 23} ORDERED, That a copy of this Entry be served upon all parties of record.

THE PUBLIC UTILITIES COMMISSION OF OHIO

/s/Anna Sanyal

By: Anna Sanyal
Attorney Examiner

SJP/mef

This foregoing document was electronically filed with the Public Utilities

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in

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

Summary: Attorney Examiner Entry suspending the procedural schedule, ordering production of documents, and setting a prehearing conference for 9/10/18 at 10:00am electronically filed by Ms. Mary E Fischer on behalf of Anna Sanyal, Attorney Examiner, Public Utilities Commission