

THE PUBLIC UTILITIES COMMISSION OF OHIO

IN THE MATTER OF THE REVIEW OF DUKE
ENERGY OHIO, INC.'S DISTRIBUTION
CAPITAL INVESTMENT RIDER.

CASE NO. 23-549-EL-RDR

ENTRY

Entered in the Journal on July 15, 2024

{¶ 1} Duke Energy Ohio, Inc. (Duke) is an electric distribution utility (EDU) as defined in R.C. 4928.01(A)(6) and a public utility as defined in R.C. 4905.02, respectively. As such, Duke is subject to the jurisdiction of this Commission.

{¶ 2} R.C. 4928.141 provides that an EDU shall provide consumers within its certified territory a standard service offer (SSO) of all competitive retail electric services necessary to maintain essential electric services to customers, including a firm supply of electric generation services. The SSO may be either a market rate offer in accordance with R.C. 4928.142 or an electric security plan (ESP) in accordance with R.C. 4928.143.

{¶ 3} On April 2, 2015, the Commission issued an Opinion and Order modifying and approving Duke's third ESP application (ESP III) for the period of June 1, 2015, through May 31, 2018. *In re the Application of Duke Energy Ohio, Inc.*, Case No. 14-841-EL-SSO, et al. (*ESP III Case*), Opinion and Order (April 2, 2015). As part of the approved ESP III, the Commission authorized the establishment of the distribution capital investment rider (Rider DCI) to allow for the recovery of capital costs for distribution infrastructure investments. Further, the Commission found that a compliance audit of Rider DCI is to be completed annually for accounting accuracy, prudence, and to ensure conformance with the Opinion and Order.

{¶ 4} By Entry issued on May 30, 2018, in the *ESP III Case*, the Commission granted Duke's request to extend the ESP, including Rider DCI, until a new application for an ESP was approved. Thereafter, on December 19, 2018, the Commission issued an Opinion and

Order modifying and approving an amended stipulation establishing Duke's fourth ESP that extended Rider DCI through May 31, 2025, subject to certain conditions. *In re the Application of Duke Energy Ohio, Inc.*, Case No. 17-1263-EL-SSO, et al., Opinion and Order (Dec. 19, 2018) at ¶ 113-116, 201-202.

{¶ 5} On June 14, 2023, the Commission issued an Entry directing Staff to issue a request for proposal for audit services to assist with the annual audit of Duke's Rider DCI costs for the period of July 1, 2022, through June 30, 2023.

{¶ 6} The audit report was filed on January 16, 2024.

{¶ 7} Thereafter, by Entry issued May 13, 2024, a procedural schedule was established wherein: (A) discovery was permitted until May 31, 2024; (B) testimony on behalf of Duke was to be filed by June 27, 2024; (C) testimony on behalf of Staff and intervenors was to be filed by July 9, 2024; and (D) an evidentiary hearing is to commence on July 16, 2024.

{¶ 8} On June 18, 2024, Ohio Consumers' Counsel (OCC) filed a motion for an *in camera* review and a request for an expedited ruling regarding discovery responses from Duke.

{¶ 9} On June 25, 2024, Duke filed a memorandum contra OCC's motion.

{¶ 10} By Entry issued June 26, 2024, the administrative law judge (ALJ) scheduled a prehearing conference to be held at the Commission's offices on July 1, 2024, to discuss the discovery issues raised in the June 18, 2024 motion.

{¶ 11} By email on June 27, 2024, the parties notified the ALJ of an agreement between the parties where, in the event that an *in camera* review of the emails was deemed necessary, then OCC would be amenable to limit the scope of the *in camera* review such that the ALJ would only review emails for which no attorney is listed as a sender or recipient (non-attorney emails). OCC did not waive its right to subsequently request an *in camera*

review of emails for which an attorney is listed (attorney-emails), and Duke did not waive its right to oppose such a request in the future. The ALJ requested that Duke produce a privilege log at the prehearing conference that consists of documents that align with the above agreement.

{¶ 12} On July 1, 2024, the ALJ convened the prehearing conference during which each party presented arguments as to the necessity of needing an *in camera* review of the non-attorney emails, and both parties reiterated the agreement described in the June 27, 2024 email. Duke also provided the ALJ with the privilege log requested by the ALJ. Additionally, both parties presented arguments supporting their positions as to the validity or non-validity of the assertions of attorney-client and/or work-product privileges pertaining to the non-attorney emails.

{¶ 13} By Entry issued July 2, 2024, the ALJ granted OCC's motion for *in camera* review as to the non-attorney emails. Further, after conducting an *in camera* review, the ALJ found that several of the documents were not privileged under the work-product doctrine and, therefore, ordered Duke to produce those items. The ALJ also found that the vast majority of the emails and documents were work product and protected by the work-product privilege; moreover, the ALJ found that OCC failed to state good cause to overcome the assertions of privilege regarding these remaining items under Civ.R. 26(B)(4), and, therefore, Duke should not produce them.

{¶ 14} By email between the parties and ALJ, OCC requested that a second *in camera* review be conducted regarding the attorney-emails. The ALJ directed OCC to file a renewed motion for an *in camera* review by July 8, 2024, and Duke to file a response by July 10, 2024.

{¶ 15} On July 8, 2024, OCC filed a second motion for an *in camera* review and a request for expedited ruling. In its motion, OCC largely reiterates the same points and reasoning provided in its June 18, 2024 motion for an *in camera* review as to why an *in camera* review should be conducted. OCC argued that its primary issue in this proceeding centers on Duke's stated accumulated deferred income tax (ADIT) in this Rider DCI review case

which was adjusted in response to an error Duke made during its most recent base rate case, Case No. 21-887-EL-AIR, et al., where it overestimated ADIT. This overestimate resulted in a lower rate base and lower electric rates than if ADIT was correctly stated. OCC agrees with the auditor's recommendation to disallow the adjustment made by Duke. Pertaining to Duke's assertions of privilege related to one of its discovery requests, OCC broadly argues that these assertions are "overstated." OCC believes emails and documents related to this ADIT issue are highly relevant since they may lead to information about the \$14 million error in the last rate case that Duke now seeks to change. OCC believes that the Ohio Supreme Court has held in *Peyko v. Frederick*, 25 Ohio St.3d 164, 495 N.E.2d 918 (1986) requires an ALJ to hold an *in camera* review when a party withholds documents from discovery on privilege grounds. OCC also believes an *in camera* review is required under Commission precedent as well. Finally, OCC asserts that, in certain circumstances, the courts and the Commission have ordered that documents be produced even where an attorney is listed on an email.

{¶ 16} On July 10, 2024, Duke filed its memorandum contra. In its filing, Duke outlines the law pertaining to attorney-client and work-product privileges and argues that a party requesting an *in camera* review must make some threshold showing that such review is appropriate since parties are not permitted to engage in groundless fishing expeditions. *MD Auto Group LLC v. Nissan North America Inc*, N.D. Ohio, Case No. 1:21-CV-01584-CEF, 2023 WL 4181295, at *1-2 (June 26, 2023). Duke also requests that the Commission consider several factors when deciding whether to conduct the *in camera* review, as set forth in the above case citation, and notes that, after weighing these factors, an *in camera* review is not warranted. Duke further states that the fact that OCC did not provide an argument that would call into question the withholding of these communications is reason alone to deny OCC's request. Finally, Duke argues that the caselaw and Commission precedent cited by OCC are distinguishable from this case.

{¶ 17} Upon review of the filings, the ALJ denies OCC's second motion for an *in camera* review. The ALJ agrees with Duke that the party seeking an *in camera* review must

make some threshold showing that such review is appropriate and that a party is not permitted to engage in a groundless fishing expedition. *MD Auto Group LLC v. Nissan North America Inc*, N.D. Ohio, Case No. 1:21-CV-01584-CEF, 2023 WL 4181295, at *1-2 (June 26, 2023). Outside of broadly claiming that Duke's assertions of privilege are "overstated," OCC failed to provide sufficient or really any reasoning that calls into question the attorney-client and work product privileges asserted by Duke related to the attorney-emails. Following the July 1, 2024 prehearing conference, the ALJ conducted an *in camera* review requested by OCC of hundreds of communications and documents pertaining to the non-attorney emails where the work-product privilege was asserted. As noted in the July 2, 2024 Entry, the ALJ directed Duke to produce only a handful of emails/documents out of the hundreds reviewed due to them not being privileged. Entry at ¶ 13. The ALJ found the remainder to be properly catalogued as privileged work product; moreover, the ALJ rejected OCC's overly broad argument of good cause to overcome the assertion of work-product privilege. Entry at ¶ 14-15. Now, OCC reiterates the same reasoning provided in the June 18, 2024 motion for an *in camera* review, that essentially it believes the documents are relevant to this proceeding, with the added caveats that Duke's assertions of privilege are overstated and that Ohio courts have before required production of documents even though attorney-client privilege was asserted. However, the fact that this type of production has been required in certain instances is not a sufficient reason in this case to again conduct an *in camera* review of potentially hundreds of more emails and documents without providing grounds beyond general claims that the privilege assertions are "overstated." Additionally, the ALJ notes that Duke did provide a privilege log to OCC and the ALJ, meaning OCC was not confronted with vague, blanket privilege assertions, so OCC was armed with references to specific documents upon which it could base its arguments.

{¶ 18} Further, this second motion focuses on the attorney-emails for which attorney-client privilege is asserted in addition to the attorney work-product privilege, with Duke representing that the communications are largely between Duke's counsel made in the anticipation of litigation and related to the provision of legal services. Work-product

privilege can be overcome by an opposing party pursuant to Civ.R. 26(B)(4); however, a showing to overcome attorney-client privilege and attorney work-product, if valid, would be much more stringent. Despite OCC's little to no reasoning supporting its questioning of Duke's assertions of work-product privilege pertaining to the non-attorney emails, a patina of doubt existed for the ALJ to conduct the first *in camera* review because the emails were largely between non-attorneys, potentially bringing into question the privilege assertions, as well as the fact that OCC could overcome valid work-product privilege assertions with a sufficient demonstration of need under the civil rules. OCC now asks to conduct an expanded *in camera* review of documents that would possess a more stringent level of protection without any additional reasoning as to why an *in camera* review may be warranted. At this point, OCC's motion appears to engage in a fishing expedition. Additionally, the ALJ adopts the reasoning set forth in Paragraph 15 of the July 2, 2024 Entry concerning the ADIT issue being primarily a legal one and that numerous filings already set forth the facts and data supporting and or probing Duke's position regarding the ADIT issue, negating the importance and relevance of the information OCC seeks.

{¶ 19} OCC cites the Ohio Supreme Court decision in *Peyko* and a Commission order to support its request for an *in camera* review, but these cases are distinguishable. The ALJ agrees with Duke that the unique procedural posture of *Peyko* distinguishes it from the situation here. The Commission decision in Case No. 10-176-EL-ATA, which relies in part on *Peyko*, is distinguishable, as well. In that case, specific parties asserted a blanket privilege claim on a broad array of documents which were not specifically identified, and a privilege log was not produced, all of which is not the case here—a privilege log was produced and specific documents identified upon which OCC could and should have made a more robust argument as to why it questioned the validity of the privilege assertions. *In re the Application of Ohio Edison Co., The Cleveland Elec. Illum. Co., and The Toledo Edison Co, for Approval of a New Rider and Revision of an Existing Rider*, Case No. 10-176-EL-ATA, Entry (Jan. 27, 2011) at ¶ 18-19. Considering the above, the ALJ denies OCC's second motion for an *in camera* review.

{¶ 20} It is, therefore,

{¶ 21} ORDERED, That OCC's July 9, 2024 motion for an *in camera* review be denied. It is, further,

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

THE PUBLIC UTILITIES COMMISSION OF OHIO

/s/ Matthew J. Sandor

By: Matthew J. Sandor
Administrative Law Judge

MJA/js

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Case No(s). 23-0549-EL-RDR

Summary: Administrative Law Judge Entry ordering that OCC's July 9, 2024 motion for an in camera review be denied electronically filed by Jennie Schneider on behalf of Matt Sandor, Administrative Law Judge, Public Utilities Commission of Ohio.