**BEFORE**

**THE PUBLIC UTILITIES COMMISSION OF OHIO**

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| In the Matter of the Application of Duke  Energy Ohio for Authority to Establish a  Standard Service Offer Pursuant to Section 4928.143, Revised Code, in the Form of an Electric Security Plan, Accounting Modifications and Tariffs for Generation Service.  In the Matter of the Application of Duke  Energy Ohio for Authority to Amend its  Certified Supplier Tariff, P.U.C.O.  No. 20. | )  )  )  )  )  )  )  )  )  )  ) | Case No. 14-841-EL-SSO  Case No. 14-842-EL-ATA |

**MEMORANDUM CONTRA OEG’S MOTION TO ESTABLISH**

**PROTECTIVE AGREEMENT**

**BY**

**OFFICE OF THE OHIO CONSUMERS’ COUNSEL**

The Office of the Ohio Consumers’ Counsel (“OCC”)--as a state agency that is differently situated than other parties--files this Memorandum Contra the motion of the Ohio Energy Group (“OEG”) to establish a protective agreement. OCC files to preserve its unique obligations to the Ohio public regarding its records and regarding transparency in Ohioans’ government. And OCC files to preserve for purposes of administrative efficiency the protective agreement that was painstakingly negotiated years ago by Duke and OCC to serve as the ongoing template and to avoid continual time-wasting re-negotiations. That protective agreement resulted in part from a PUCO order that was needed to resolve differences between Duke and OCC.

Ohio Energy Group’s motion, though well intended, might leave the impression with the PUCO that a one-size-fits-all protective agreement should be ordered to allow parties to review alleged protective materials. This would not be appropriate.

OCC strongly agrees that Duke’s proposed terms are so onerous and unreasonable (and in certain respects far-fetched) that parties cannot sign. But it must also be said that, OEG’s proposed solution, for a protective agreement, does not work for OCC. This is because OCC’s unique status as a state agency requires a protective agreement that acknowledges its duties and responsibilities regarding records and transparency under Ohio law. Thus, OCC requests that the PUCO establish a separate Protective Agreement for OCC to obtain alleged confidential information from Duke. OCC has attached as Exhibit 1, a satisfactory protective agreement for the PUCO to adopt that pertains to OCC’s unique needs as a public agency and that reflects the prior agreements Duke and OCC reached after negotiating terms to the smallest detail.

Exhibit 1 is an OCC tailored protective agreement that OCC presented to Duke on June 2, 2014. The draft agreement is essentially what Duke and OCC have cooperatively signed for the better part of a decade, without needing to impose upon the PUCO for a result. Duke has now declined to sign that agreement. Duke informed that it prefers to use a new confidentiality agreement that it had drafted.[[1]](#footnote-1) On June 10, Duke sent OCC its proposed confidentiality agreement.[[2]](#footnote-2) Later that day, OCC advised Duke that it could not sign the protective agreement.[[3]](#footnote-3) Duke responded that its document is the document being sent to parties that request access to its confidential information. Duke offered to discuss specific provisions that OCC considered objectionable, other than those relating to damages in event of breach.[[4]](#footnote-4) OCC again asks Duke, though this pleading, to use the template that Duke and OCC resolved over the years.

Exhibit 1, OCC’s proposed protective agreement, is designed to address the legal requirements placed on the OCC as a public agency and designed to address a rational, fair basis for document protection. First, the OCC has proposed a protective agreement recognizing that public records requests could be directed to it regarding information provided by Duke in this case.[[5]](#footnote-5) The OCC is the only party to this case that is public in nature, and the protective agreement with it must recognize this situation. Second, the protective agreement also addresses the OCC’s legal obligation to comply with records retention requirements that have been approved by the Ohio Department of Administrative Services.[[6]](#footnote-6) Third, the prior OCC-Duke protective agreement recognizes OCC’s need, as a public agency, to have transparency in the proceedings of government that affect Ohioans. Fourth, the protective agreement we propose is not mutual, as Duke proposes -- owing to the difference between the obligations of public entities such as the OCC and private entities such as Duke.

The protective agreement offered by the OCC had its beginnings in 2003 after extensive research and consultation with the Attorney General’s office. Versions of agreements that recognize the public nature of the OCC have been used in various cases before the Commission. Parties executing similar agreements with the OCC include FirstEnergy, AEP Ohio, SBC Ohio, Dayton Power & Light, and Columbia Gas. We appreciate the administrative efficiency and fairness of the various and similar protective agreements that we have achieved with others.

CG&E, Duke Energy Ohio’s predecessor, was compelled by the PUCO to execute a protective agreement proposed by the OCC in a post-market development service case. See *In re CG&E Post-MDP Service*, Case No. 03-93-EL-UNC et al., Entry at 4, ¶(9) (May 13, 2004). In that case, Attorney Examiner Kingery found OCC’s proposed protective agreement to be a “reasonable and appropriate method for protecting the CG&E information.”

AEP Ohio was also compelled by the PUCO to execute a substantially similar protective agreement proposed by OCC. *In re: Columbus Southern Power Company*, Case No. 05-376-EL-UNC, Entry at ¶7 (July 21, 2005); see also *In re: Embarq*, Case No. 07-760-TP-BLS, Entry at ¶7 (Aug. 10, 2007). AEP was required to accept protective agreement provisions related to OCC’s responsibilities re: public records matters.

Moreover, OCC and Duke have executed protective agreements on many occasions. The agreements typically contain the same protections offered by the OCC in the attached protective agreement.[[7]](#footnote-7)

The OCC’s proposed protective agreement has been applied as well in cases that involve the proposed merger of telephone companies where there were documents deemed to be highly confidential by the utilities. See *In re SBC/AT&T Merger*, Case No. 05-269-TP-ACO; also *In re Verizon/MCI Merger*, Case No. 05-497-TP-ACO.

The OCC is willing to execute its attached and time-honored protective agreement that recognizes the legal responsibilities of the OCC as a public office (that Duke has recognized for years in agreements). The OCC will treat the utility’s documents with the appropriate care under the protective agreement that Duke should have executed, but instead rejected this time. There is nothing in the present case that is more compelling or distinctive that warrants treatment different than that which has satisfied numerous other Ohio utilities.

And yet, Duke has insisted upon an alternative protective agreement (unlike other Ohio utilities) that contains provisions that are unlawful. Duke’s protective agreement would violate Ohio Public Records Laws and Ohio law with respect to records retention. Moreover, its provisions are unreasonable and harmful to the OCC.

Specifically, in ¶6 (b) of Duke’s proposed protective agreement (attached hereto as Exhibit 2), Duke sets out a process that violates Ohio Public Records Law (R.C. 149.43). In that section Duke requires that if OCC receives a subpoena or a public records request, OCC “may furnish that portion (and only that portion) of the Confidential Information or Highly Confidential Information that, in the written opinion of its counsel (reasonably acceptable to Duke Energy Ohio), the Recipient is legally compelled to disclose. In addition, the Recipient shall use reasonable efforts to obtain reliable assurances that confidential treatment will be accorded any Confidential Information or Highly Confidential Information so disclosed.”[[8]](#footnote-8) But the Public Records Laws of Ohio require a public agency such as OCC to allow the public to inspect and copy all records unless those records fall within one of the enumerated exceptions to R.C. 149.43. The duty to determine whether the OCC is legally compelled to disclose the information lies with OCC, not with Duke. It cannot be subject to Duke’s approval.[[9]](#footnote-9) Additionally, OCC cannot engage in efforts to control the disclosure of information obtained by a third party under a public records request.

Additionally, Duke’s proposed protective agreement violates Ohio law regarding records retention, R.C. 149.351. Paragraph 8 of Duke’s proposed protective agreement states that Duke can require the return or destruction of records provided under the terms of the proposed agreement.[[10]](#footnote-10) In contrast, R.C. 149.351 states that records of a public office shall not be removed or destroyed except as provided by law or under the rules adopted by the records commission.

Duke’s proposed protective agreement is also unreasonable and will harm OCC. As OEG has noted,[[11]](#footnote-11) section 7(a) of Duke’s proposed protective agreement contains a damages provision that subjects parties to the greater of actual damages or $1 million. Such a provision is on its face arbitrary, unreasonable, and unprecedented.

Section 2 of Duke’s protective agreement requires OCC to acknowledge that the information provided subject to the terms of the agreement is “confidential” and that any disclosure will injure Duke.[[12]](#footnote-12) As noted by OEG, this is different from most protective agreements under which parties agree to protect alleged confidential information, and yet maintain their rights to challenge the characterization of the information as “confidential.”

Sections 4 and 6 of Duke’s proposed confidential agreement unreasonably limit OCC’s use of the information.[[13]](#footnote-13) Under Duke’s protective agreement OCC would have to obtain written permission from Duke to discuss the confidential information with other intervenors who have already signed a confidentiality agreement. OCC agrees with OEG[[14]](#footnote-14) that this is an unreasonable and restrictive provision that will interfere with trial preparation efforts.

Section 3 of Duke’s protective agreement mandates that the information be maintained by OCC “in separate identifiable files, with access to such files restricted to person whom disclosure is permitted …”[[15]](#footnote-15) Such treatment is not workable and is unnecessary.[[16]](#footnote-16)

Other provisions that OCC insists upon, for its own protection, are missing from Duke’s protective agreement. These provisions include providing indemnification of OCC in regard to a public records request[[17]](#footnote-17) and provisions specifying that OCC does not waive sovereign immunity.[[18]](#footnote-18)

For these reasons OCC urges the PUCO to require party-specific protective agreements that are reasonable, lawful, and do not present harm to either party to the protective agreement. In this regard OCC proposes Exhibit 1 as an agreement that works for it, and presents a balanced approach to this discovery issue.

It protects the needs of the utility and the needs of OCC. It will allow for OCC to have reasonable access to the data and will protect Duke. It is a protective agreement that has been used with many utilities in many cases. It was a protective agreement, in fact, that Duke signed in its last two cases. It should be adopted by the PUCO as a means for OCC to obtain alleged protective information, in lieu of Duke’s unlawful, unreasonable, and harmful protective agreement.

Respectfully submitted,

BRUCE J. WESTON

OHIO CONSUMERS’ COUNSEL

*/s/ Maureen R. Grady*\_\_\_\_\_\_\_\_\_\_\_\_

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**CERTIFICATE OF SERVICE**

I hereby certify that a copy of this *Memorandum Contra Motion to Establish Protective Agreement* was served on the persons stated below *via* electronic transmission, this 18th day of June, 2014.

*/s/ Maureen R. Grady*\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

Maureen R. Grady

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1. See Attachment A. [↑](#footnote-ref-1)
2. See Exhibit 2. [↑](#footnote-ref-2)
3. See Attachment A. [↑](#footnote-ref-3)
4. Id. [↑](#footnote-ref-4)
5. Exhibit 1 at ¶¶13, 14. [↑](#footnote-ref-5)
6. Exhibit 1 at ¶16. [↑](#footnote-ref-6)
7. See e.g. *In the Matter of the Application of Duke Energy Ohio, Inc., for an Increase in its Natural Gas Distribution Rates*, Case No. 12-1645-GA-AIR et al.; *In the Matter of the Application of Duke Energy Ohio, Inc., for the Establishment of a Charge Pursuant to Section 4909.18, Revised Code*, Case No. 12-2400-EL-UNC, et al. [↑](#footnote-ref-7)
8. Exhibit 2 at ¶6(b). [↑](#footnote-ref-8)
9. In Exhibit 1, see ¶13, which outlines a process whereby OCC notifies Duke that a public records request has been made. Duke then has five business days to seek to prevent disclosure of the materials in question. If Duke then seeks protection, OCC agrees to protect the materials pending an order of the Court. [↑](#footnote-ref-9)
10. Exhibit 2 at ¶8. [↑](#footnote-ref-10)
11. See OEG Motion at 4. [↑](#footnote-ref-11)
12. Exhibit 2 at ¶2. [↑](#footnote-ref-12)
13. Exhibit 2 at ¶¶4,6. [↑](#footnote-ref-13)
14. OEG Motion at 3. [↑](#footnote-ref-14)
15. Exhibit 2 at ¶3. [↑](#footnote-ref-15)
16. See for example Exhibit 1, ¶6. [↑](#footnote-ref-16)
17. Exhibit 1 at ¶14. [↑](#footnote-ref-17)
18. Exhibit 1 at ¶19. [↑](#footnote-ref-18)