# 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 DUKE ENERGY OHIO INC.’S MOTION FOR PROTECTIVE ORDER**

**BY**

**THE OFFICE OF THE OHIO CONSUMERS’ COUNSEL**

I. INTRODUCTION

This proceeding involves Duke Energy Ohio Inc.’s (“Duke” or “Utility”) request for the Public Utilities Commission of Ohio (“PUCO” or “Commission”) to approve its proposed Electric Security Plan (“ESP”). That ESP will affect the rates that its customers pay for electric service beginning June 1, 2015.

Duke has failed to provide responses to some of OCC’s discovery requests because it alleges that those responses contain information that is a trade secret. Additionally, OCC has been denied access to information redacted in Duke Witness Arnold’s testimony, including Schedules MWA-2, 3, 4, and 7. That redacted information is the subject of Duke’s May 29, 2014 Motion for Protection.[[1]](#footnote-2) That Motion for Protection has not been ruled upon.

But instead of agreeing to enter into a reasonable protective agreement—which has been used in many PUCO cases by OCC/Duke—Duke seeks to have the PUCO force OCC to sign its preferred “confidentiality agreement”[[2]](#footnote-3) in order to obtain access to the information.

OCC files this Memorandum Contra Duke’s July 8, 2014 Motion for Protection. The PUCO should deny Duke’s Motion because it would require OCC to execute an agreement that is unreasonable, unlawful, and contrary to the public interest in order to obtain responses to discovery that Duke alleges to be trade secret. Additionally, Duke has failed to show that any of the information is deserving of protection or that the terms and conditions of its proposed confidentiality agreement are just and reasonable.

Instead, as explained in OCC’s Memorandum Contra OEG’s Motion,[[3]](#footnote-4) the PUCO should require Duke to provide OCC the information sought under the terms of the time-honored OCC/Duke protective agreement (attached to this pleading and labeled Exhibit 1). The attached OCC/Duke protective agreement was negotiated by Duke and OCC years ago, after much effort and compromise. It is an agreement that has been accepted by numerous utilities over the years. And it is an agreement that the PUCO itself has

found to be adequate (in a number of cases) to protect the rights and interests of both OCC and the utility from whom discovery is being sought.[[4]](#footnote-5)

It is an agreement that OCC can execute. It is an agreement that provides for information to be provided to OCC (subject to certain rights) without the PUCO determining whether that information is trade secret information. Duke’s new and revised confidentiality agreement is not an agreement that affords adequate protections to a state agency—like OCC. And it should be noted that it is likely that OCC may not accept any information that is subject to Duke’s proposed confidentiality agreement if Duke’s Motion is granted.

# II. ARGUMENT

The OCC/Duke protective agreement was intended to and did serve (for many years) as the ongoing template that avoided continual time-wasting re-negotiations between Duke and OCC. The protective agreement resulted in part from a PUCO order that was needed to resolve differences between Duke and OCC. Exhibit 1 is the protective agreement that OCC presented to Duke on June 2, 2014. The 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.

But, now after a month of negotiations, Duke continues to insist on reinventing the wheel, and by its Motion for Protection, seeks to force OCC to execute its proposed confidentiality agreement, albeit with some limited revisions that have been made during negotiations. Why?

Duke claims in its July 8, 2014 Motion for Protection that “given changed circumstances,” the OCC/Duke agreement “fails to provide adequate assurance that the Company’s confidential information will be properly protected or alternatively, that affords sufficient remedies should the agreement be breached.”[[5]](#footnote-6) But Duke does not explain what the changed circumstances are, nor does it explain how the OCC/Duke former protective agreement fails to properly protect it or afford it sufficient remedies.

Duke has thus failed to show good cause as to why its motion should be granted. Under Ohio Admin. Code 4901:1-12 (A), Duke must show good cause before the PUCO

can grant a motion. Additionally, Duke has failed to show that any of the information is deserving of protection.

And while Duke claims that it has “tailored” its new confidentiality agreement to accommodate OCC, it also admits that its revisions do not address all of the concerns that OCC identified in its negotiations with it.[[6]](#footnote-7) Indeed, OCC discussed the following concerns it had with Duke’s proposed agreement during the two and a half hour negotiation session (initiated by OCC) on June 26, 2014 that are not addressed by Duke’s proposed agreement:

For example, Section 2 of Duke’s revised protective agreement remains unchanged from its earlier form. That provision requires OCC to acknowledge that the information provided subject to the terms of the agreement *is* “confidential” and that any disclosure *will injure* Duke.[[7]](#footnote-8) As such it establishes concessions that the information is confidential and disclosure will cause injury to Duke.

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.” For instance, the OCC/Duke

protective agreement treats the information as confidential, but does not resolve the merits concerning the confidentiality of any of the protected material. [[8]](#footnote-9)

And although under Duke’s proposed agreement as revised, OCC still has the ability to challenge the characterization of materials as “confidential,” such a challenge would likely be very difficult. This is because the concessions created under the Duke newly proposed protective agreement is that the information *is confidential* and unauthorized disclosure *will injure Duke*. Thus any claim by OCC to the contrary (that the information is not confidential or disclosure does not injure Duke) would be unlikely to succeed given the concessions assumed in Duke’s protective agreement. OCC would have to overcome this concession of confidentiality, making it difficult to prevail. Such an agreement (to the confidential nature of the information) shifts the burden of proof from the utility to the party seeking disclosure. In this sense it is contrary to PUCO rules which squarely place the burden of proving confidentiality of materials on the utility that is resisting disclosure.[[9]](#footnote-10)

Similarly, Duke’s proposed protective agreement, at Section 7, establishes concessions that make it unreasonable and inconsistent with the burden of proof in a breach of contract action. In that proposed section, the Parties would be required to agree that disclosure of information without protection “*would likely damage* Duke Energy Ohio, [and] such damage *would likely be material*.”[[10]](#footnote-11) The Parties to such provision would also be required to agree that Duke “*will suffer irreparable harm* because of any breach of the agreement.” This wording, like Section 2, establishes inappropriate concessions. Those concessions are that disclosure (1) will likely damage Duke, (2) the damage will likely be material, and (3) Duke will suffer irreparable harm because of the breach. Thus any defense mounted by OCC with respect to a claim of breach of the agreement will be greatly diminished by these provisions. And any opposition to Duke recovering damages and equitable relief will be thwarted as well. Like Section 2, this section appears to impose strict liability upon OCC in regard to any claim that Duke would have for damages and equitable relief if there was any disclosure. Thus, the language appears to be contrary to the burden of proof borne by a litigant in a breach of contract action.[[11]](#footnote-12)

The language included in Section 7 is also inconsistent with the general rule that that under Ohio law (R.C. 4901.12) all proceedings of the PUCO and all documents and record in its possession are public records. Duke also failed to include in its revised confidentiality agreement other provisions that OCC insists upon, for appropriate protection as a state agency subject to Ohio’s Public Records Law. These provisions include providing indemnification of OCC in regard to a public records request[[12]](#footnote-13) and provisions specifying that OCC does not waive sovereign immunity.[[13]](#footnote-14) These provisions are appropriate protections for a state agency, and were provisions included in the previous Duke/OCC protective agreements.

In light of these concerns, it is not reasonable or lawful to force OCC to execute Duke’s new and revised confidentiality agreement in order to obtain the full and complete discovery rights OCC is entitled to under R.C. 4903.82. Duke’s new and revised agreement should not be adopted and its Motion for Protection should be denied.

Duke has not shown good cause to grant its Motion.[[14]](#footnote-15) Instead it has merely alleged that there are undisclosed changed circumstances that require a new agreement to assure that its confidential information will be protected. It claims that the prior OCC/Duke protective agreement “is no longer acceptable” but does not explain why.[[15]](#footnote-16) And it has failed to show that a new agreement is necessary to enable discovery to proceed under terms that are fair, reasonable, and unduly burdensome to it *and OCC*.

In contrast, Exhibit 1, the OCC/Duke 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.[[16]](#footnote-17) The OCC is the only party to this case (besides the PUCO) that is a state agency and any protective agreement entered into must be consistent with the requirements of Ohio’s Public Records Laws in regard to requests for public records. Second, the protective agreement also addresses the OCC’s legal obligation to comply with records retention requirements mandated by Ohio law.[[17]](#footnote-18) 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 OCC proposes cannot be “mutual” as Duke proposes -- owing to the difference between the obligations of public entities such as the OCC and private entities such as Duke. Nonetheless, Duke is provided protection from disclosure of its alleged proprietary information under OCC’s proposed protective agreement. OCC cannot release Duke’s claimed protected information without first following the processes for public disclosure required by the agreement, including prior notification to Duke. This notification would allow Duke to seek a ruling from the PUCO, or other body of competent jurisdiction, as to whether the information deserves protection. OCC’s agreement would protect the information whose alleged confidentiality is at stake

unless (a) an authority of competent jurisdiction determines that the information could be disclosed publically or (B) the utility fails to seek a Commission or Court ruling.

The protective agreement offered by OCC had its beginnings in 2003 after extensive research and consultation with the Ohio 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. OCC appreciates the administrative efficiency and fairness of the various and similar protective agreements that OCC has achieved with others.

CG&E, Duke Energy Ohio’s predecessor, was compelled by the PUCO to execute a protective agreement proposed by the OCC not once but twice—first in a post-market development service case, and second in a 2007 system reliability tracker 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 the Matter of the Commission’s Review and Adjustment of the Fuel and Purchased Power and System Reliability Tracker Components of Duke Energy Ohio, Inc.*, Case No. 07-723-EL-UNC et al., Entry at 3, ¶7 (Oct. 29, 2007). In the 2004 case, Attorney Examiner Kingery found OCC’s proposed protective agreement to be a “reasonable and appropriate method for protecting the CG&E information.” In the 2007 case, Attorney Examiner Farkas found that OCC’s protective agreement “should adequately protect the confidentiality of Duke’s 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 Ohio 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 contain the same protections offered by the OCC in the attached protective agreement.[[18]](#footnote-19)

OCC is willing to execute its attached and time-honored protective agreement that recognizes the legal responsibilities of the OCC as a public agency (that Duke has recognized for years in agreements) without the PUCO first determining whether each document is trade secret under Ohio law. 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.

The OCC/Duke agreement protects the needs of the utility and the needs of OCC. It will allow for OCC to have reasonable access to information alleged to be trade secret and will protect Duke. Duke should be required to provide OCC with information (alleged to be trade secret) in accordance with its terms.

Duke’s proposal would improperly create a potentially legally binding concession that information is to be kept from the public, contrary to Ohio law. It also improperly imposes strict liability for disclosure (inadvertent or otherwise), rather than requiring proof of such harm. The PUCO should deny Duke’s Motion for Protection, and instead rule that the OCC/Duke protective agreement that has been repeatedly utilized, and approved by the PUCO in previous cases, must be executed by Duke.

Respectfully submitted,

BRUCE J. WESTON

OHIO CONSUMERS’ COUNSEL

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**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing *Memorandum Contra* has been served electronically upon those persons listed below this 14th day of July 2014.

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

Maureen R. Grady

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1. Duke’s May 29, 2014 Motion for Protection, which is pending with no ruling to date, allowed Duke to redact Witness Arnold’s Schedules MWA 2,3,4, and 7, and portions of his direct testimony. [↑](#footnote-ref-2)
2. OCC has attached Duke’s proposed confidentiality agreement as Exhibit 2a. [↑](#footnote-ref-3)
3. OCC’s Memorandum Contra was filed on June 23, 2014. [↑](#footnote-ref-4)
4. See, e.g., *In re CG&E Post-MDP Service*, Case No. 03-93-EL-UNC et al., Entry at 4, ¶(9) (May 13, 2004); *In the Matter of the Commission’s Review and Adjustment of the Fuel and Purchased Power and System Reliability Tracker Components of Duke Energy Ohio, Inc.*, Case No. 07-723-EL-UNC et al., Entry at 3, ¶7 (Oct. 29, 2007); *In re: Columbus Southern Power Company*, Case No. 05-376-EL-UNC, Entry at ¶7 (July 21, 2005); *In re: Embarq*, Case No. 07-760-TP-BLS, Entry at ¶7 (Aug. 10, 2007). [↑](#footnote-ref-5)
5. Duke Motion for Protection at 2. [↑](#footnote-ref-6)
6. Duke Motion for Protection, Memorandum in Support at 1 (unnumbered). [↑](#footnote-ref-7)
7. Exhibit 2a at ¶2. [↑](#footnote-ref-8)
8. See Exhibit 1 at 1, ¶17 (OCC does not waive any right to dispute Duke’s determination regarding any material identified as confidential.) [↑](#footnote-ref-9)
9. See Ohio Admin. Code 4901-1-24(A). [↑](#footnote-ref-10)
10. Exhibit 2a at Section 7. [↑](#footnote-ref-11)
11. But see Exhibit 1, which contains no provisions pertaining to damages to Duke from breach of contract. [↑](#footnote-ref-12)
12. Exhibit 1 at ¶14. [↑](#footnote-ref-13)
13. Exhibit 1 at ¶19. [↑](#footnote-ref-14)
14. See Ohio Admin. Code 4901-1-12(A) which provides that a motion shall be granted upon good cause shown. [↑](#footnote-ref-15)
15. Duke Motion for Protection, Memorandum Contra at 1. [↑](#footnote-ref-16)
16. Exhibit 1 at ¶¶13, 14. [↑](#footnote-ref-17)
17. Exhibit 1 at ¶16. [↑](#footnote-ref-18)
18. 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-19)