

**BEFORE  
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Application of Duke	)	
Energy Ohio for Authority to Establish a	)	Case No. 14-841-EL-SSO
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	)	Case No. 14-842-EL-ATA
Certified Supplier Tariff, P.U.C.O.	)	
No. 20.	)	

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**MEMORANDUM CONTRA OEG’S MOTION TO ESTABLISH  
PROTECTIVE AGREEMENT  
BY  
OFFICE OF THE OHIO CONSUMERS’ COUNSEL**

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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.<sup>1</sup> On June 10, Duke sent OCC its proposed confidentiality agreement.<sup>2</sup> Later that day, OCC advised Duke that it could not sign the protective agreement.<sup>3</sup> 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

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<sup>1</sup> See Attachment A.

<sup>2</sup> See Exhibit 2.

<sup>3</sup> See Attachment A.

damages in event of breach.<sup>4</sup> 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.<sup>5</sup> 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.<sup>6</sup> 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

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<sup>4</sup> Id.

<sup>5</sup> Exhibit 1 at ¶¶13, 14.

<sup>6</sup> Exhibit 1 at ¶16.

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.<sup>7</sup>

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.

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<sup>7</sup> 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.

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."<sup>8</sup> 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.

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<sup>8</sup> Exhibit 2 at ¶6(b).

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.<sup>9</sup> 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.<sup>10</sup> 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,<sup>11</sup> 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.<sup>12</sup> 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."

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<sup>9</sup> 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.

<sup>10</sup> Exhibit 2 at ¶8.

<sup>11</sup> See OEG Motion at 4.

<sup>12</sup> Exhibit 2 at ¶2.

Sections 4 and 6 of Duke’s proposed confidential agreement unreasonably limit OCC’s use of the information.<sup>13</sup> 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<sup>14</sup> 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 ...”<sup>15</sup> Such treatment is not workable and is unnecessary.<sup>16</sup>

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<sup>17</sup> and provisions specifying that OCC does not waive sovereign immunity.<sup>18</sup>

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.

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<sup>13</sup> Exhibit 2 at ¶¶4,6.

<sup>14</sup> OEG Motion at 3.

<sup>15</sup> Exhibit 2 at ¶3.

<sup>16</sup> See for example Exhibit 1, ¶6.

<sup>17</sup> Exhibit 1 at ¶14.

<sup>18</sup> Exhibit 1 at ¶19.

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

Maureen R. Grady, Counsel of Record

Joseph P. Serio

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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 18<sup>th</sup> day of June, 2014.

/s/ Maureen R. Grady

Maureen R. Grady  
Assistant Consumers' Counsel

## **SERVICE LIST**

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In the Matter of the Application of Duke	)	
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In the Matter of the Application of Duke	)	
Energy Ohio for Authority to Amend its	)	Case No. 14-842-EL-ATA
Certified Supplier Tariff, P.U.C.O.	)	
No. 20.	)	

**PROTECTIVE AGREEMENT**

This Protective Agreement (“Agreement”) is entered into by and between **Duke Energy Ohio** (“Utility]” or “Company”) and the Office of the Ohio Consumers’ Counsel (“OCC”) (collectively, “the Parties”). This Agreement is designed to facilitate and expedite the exchange with OCC of all information in the discovery process in this proceeding, as this “Proceeding” is defined herein. It reflects agreement between the Company and OCC as to the manner in which “Protected Materials,” as defined herein, are to be treated. This Agreement is not intended to constitute any resolution of the merits concerning the confidentiality of any of the Protected Materials.

1. The purpose of this Agreement is to permit prompt access to and review of such Protected Materials in a controlled manner that will allow their use for the purposes of this Proceeding while protecting such data from disclosure to non-participants, without a prior ruling by an administrative agency of competent jurisdiction or court of competent jurisdiction regarding whether the information deserves protection.

2. “Proceeding” as used throughout this document means the above-captioned case(s), including any appeals, remands and other cases related thereto.

3. “Protected Materials” means documents and information furnished subject to the terms of this Agreement and so designated by the Company by conspicuously marking each document or written response as confidential. Protected Materials do not include any information or documents contained in the public files of any state or federal administrative agency or court and do not include documents or information which at, or prior to, commencement of this Proceeding, is or was otherwise in the public domain, or which enters into the public domain.

4. Protected Materials provided in the context of this Proceeding will be provided to OCC for use by OCC in conjunction with this Proceeding. Nothing in this Agreement precludes the use of any portion of the Protected Materials that becomes part of the public record or enters into the public domain. Nothing in this Agreement precludes OCC from filing Protected Materials under seal or otherwise using Protected Material in ways, such as *in camera* proceedings, that do not disclose Protected Materials.

5. As used in this Agreement, the term “Authorized Representative” includes OCC’s counsel of record in this Proceeding and other attorneys, paralegals, economists, statisticians, accountants, consultants, or other persons employed or retained by OCC and engaged in this Proceeding.

6. Access to Protected Materials is permitted to OCC’s Authorized Representatives who are either a signatory to this Agreement or who have executed a Non-Disclosure Certificate in the form attached hereto as Exhibit A prior to any access. OCC must treat all Protected Materials, copies thereof, information contained therein, and writings made therefrom as proprietary and confidential, and will safeguard such Protected Materials, copies thereof,

information contained therein, and writings made therefrom so as to prevent voluntary disclosure to any persons other than OCC's Authorized Representatives.

7. If any OCC Authorized Representative ceases to be engaged in this Proceeding, access to any Protected Materials by such person will be terminated immediately and such person must promptly return Protected Materials in his or her possession to another Authorized Representative of OCC and if there is no such Authorized Representative, such person must treat such Protected Materials in the manner set forth in Paragraph 16 hereof as if this Proceeding herein had been concluded. Any person who has signed the foregoing Non-Disclosure Certificate will continue to be bound by the provisions of this Agreement even if no longer so engaged.

8. In this proceeding, OCC may disclose Protected Materials or writings regarding their contents to any individual or entity that is in possession of said Protected Materials or to any individual or entity that is bound by a Protective Agreement or Order with respect to the Protected Materials. OCC may also disclose Protected Materials to employees or persons working for or representing the Public Utilities Commission of Ohio in connection with this Proceeding.

9. OCC may file Protected Materials under seal in this Proceeding whether or not OCC seeks a ruling that the Protected Materials should be in the public domain. If OCC desires to include, utilize, refer, or copy any Protected Materials in such a manner, other than in a manner provided for herein, that might require disclosure of such material, then OCC must first give notice (as provided in Paragraph 15) to the Company, specifically identifying each of the Protected Materials that could be disclosed in the public domain. The Company will have five (5) business days after service of OCC's notice to file, with an administrative agency of competent jurisdiction or court of competent jurisdiction, a motion and affidavits with respect to

each of the identified Protected Materials demonstrating the reasons for maintaining the confidentiality of the Protected Materials. The affidavits for the motion must set forth facts delineating that the documents or information designated as Protected Materials have been maintained in a confidential manner and the precise nature and justification for the injury that would result from the disclosure of such information. If the Company does not file such a motion within five (5) business days of OCC's service of the notice, then the Protected Materials will be deemed non-confidential and not subject to this Agreement.

10. The Parties agree to seek *in camera* proceedings by the administrative agency of competent jurisdiction or court of competent jurisdiction for arguments or for the examination of a witness that would disclose Protected Materials. Such *in camera* proceedings will be open only to the Parties, their counsel, other OCC Authorized Representatives, and others authorized by the administrative agency or court to be present; however, characterizations of the Protected Materials that do not disclose the Protected Materials may be used in public.

11. Any portion of the Protected Materials that the administrative agency of competent jurisdiction or court of competent jurisdiction has deemed to be protected and that is filed in this Proceeding will be filed in sealed confidential envelopes or other appropriate containers sealed from the public record.

12. It is expressly understood that upon a filing made in accordance with Paragraph 9 or Paragraph 13 of this Agreement, the burden will be upon the Company to show that any materials labeled as Protected Materials pursuant to this Agreement are confidential and deserving of protection from disclosure.

13. OCC will give the Company notice (as provided in Paragraph 15) if OCC receives a public records request for Protected Materials. The Company will have five (5) business days after service of OCC's notice to file a pleading before a court of competent jurisdiction to

prevent disclosure of the Protected Materials in question. If the Company files such a pleading, OCC will continue to protect the Protected Materials as required by this Agreement pending an order of the court. If the Company does not file at a court of competent jurisdiction within five (5) business days of service of OCC's notice, then such Protected Materials can be deemed by OCC to be non-confidential, not a trade secret and not subject to this Agreement. Alternatively, the Company may provide notice to OCC that the Protected Materials may be disclosed in response to a public records request.

14. If, under Ohio's public records law, a court awards a relator or person or party attorney's fees or statutory damages or court costs in connection with OCC's non-disclosure or delayed disclosure of Protected Materials, then the Company will pay such awarded fees, statutory damages, and/or court costs to the relator or person or party so that the State of Ohio, OCC and OCC's employees and officials are held harmless.

15. All notices referenced in Paragraphs 9 and 13 must be served by the Parties on each other by one of the following methods: (1) sending the notice to such counsel of record herein via e-mail; (2) hand-delivering the notice to such counsel in person at any location; or (3) sending the notice by an overnight delivery service to such counsel.

16. Once OCC has complied with its records retention schedule(s) pertaining to the retention of the Protected Materials and OCC determines that it has no further legal obligation to retain the Protected Materials and this Proceeding (including all appeals and remands) is concluded, OCC must return or dispose of all copies of the Protected Materials unless the Protected Materials have been released to the public domain or filed with a state or federal administrative agency or court under seal. OCC may keep one copy of each document designated as Protected Material that was filed under seal and one copy of all testimony, cross-

examination, transcripts, briefs and work product pertaining to such information and will maintain that copy as provided in this Agreement.

17. By entering into this Protective Agreement, OCC does not waive any right that it may have to dispute the Company's determination regarding any material identified as confidential by the Company and to pursue those remedies that may be available to OCC before an administrative agency or court of competent jurisdiction. Nothing in this Agreement precludes OCC from filing a motion to compel.

18. By entering into this Protective Agreement, the Company does not waive any right it may have to object to the discovery of confidential material on grounds other than confidentiality and to pursue those remedies that may be available to the Company before the administrative agency of competent jurisdiction or court of competent jurisdiction.

19. This Agreement represents the entire understanding of the Parties with respect to Protected Materials and supersedes all other understandings, written or oral, with respect to the Protected Materials. No amendment, modification, or waiver of any provision of this Agreement is valid, unless in writing signed by both Parties. Nothing in this Agreement should be construed as a waiver of sovereign immunity by OCC.

20. This Agreement will be governed by and construed in accordance with the laws of the State of Ohio.

**Duke Energy Ohio**

BY:

\_\_\_\_\_  
Counsel

\_\_\_\_\_  
Date

Office of the Ohio Consumers' Counsel  
BY:

\_\_\_\_\_  
Counsel

\_\_\_\_\_  
Date

**Exhibit A**

**BEFORE  
THE PUBLIC UTILITIES COMMISSION OF OHIO**

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Certified Supplier Tariff, P.U.C.O. )  
No. 20. )

**NON-DISCLOSURE CERTIFICATE**

I certify my understanding that Protected Materials may be provided to me pursuant to the terms and restrictions of the Protective Agreement, last executed \_\_\_\_\_ 200\_, and certify that I have been given a copy of and have read the Protective Agreement, and that I agree to be bound by it. I understand that the contents of Protected Materials, and any writings, memoranda, or any other form of information regarding or derived from protected materials will not be voluntarily disclosed to anyone other than in accordance with the Protective Agreement and will be used only for the purposes of this Proceeding as defined in paragraph two of the Protective Agreement.

Name: \_\_\_\_\_

Company: \_\_\_\_\_

Address: \_\_\_\_\_

Telephone: \_\_\_\_\_



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**CONFIDENTIALITY AGREEMENT**  
**BETWEEN**  
**DUKE ENERGY OHIO, INC.**  
**AND**  
**THE OFFICE OF OHIO CONSUMERS' COUNSEL**

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This Confidentiality Agreement (Agreement) is made and entered into by and between Duke Energy Ohio, Inc., (Duke Energy Ohio) and the Office of the Ohio Consumers' Counsel (Recipient) (each individually a Party and, collectively, the Parties), effective as of June 10, 2014.

**Recitals**

- A. Duke Energy Ohio is an Ohio public utility, as defined in Revised Code (R.C.) 4905.02 and an electric utility, as defined in R.C. 4928.01(A)(11). As such, Duke Energy Ohio is subject to the jurisdiction of the Public Utilities Commission of Ohio (Commission).
- B. Recipient is the Office of the Ohio Consumers' Counsel and has filed a motion seeking leave to intervene in the Proceeding, as defined herein, which motion has not been denied.

- C. Certain written, verbal, and electronic information anticipated to be disclosed by Duke Energy Ohio to Recipient contains proprietary, confidential, and competitive information of Duke Energy Ohio and, potentially, third parties.

Now, therefore, in consideration of the premises and the mutual covenants hereinafter set forth, the Parties, intending to be legally bound, agree as follows:

### **Agreement**

#### **1. Definitions**

For purposes of this Agreement, the term “Confidential” means that counsel for Duke Energy Ohio deems, in good faith, the information to which the term refers to be subject to protection either under Rule 26(c) of the Federal or Ohio Rules of Civil Procedure or under Rule 4901-1-24(D) of the Ohio Administrative Code because it constitutes a trade secret or other confidential business information of Duke Energy Ohio or Duke Energy Ohio’s customers or Duke Energy Ohio’s affiliates, including but not limited to plant and product specifications, data, know-how, formulae, compositions, processes, designs, sketches, photographs, graphs, drawings, samples, inventions and ideas, research and development, customer lists, current and anticipate customer requirements, price lists, market studies, business plans, computer software and programs (including object code and source code), databases (including technologies, systems, structures, and architectures), contracts, or any other information, however documented, that is a trade secret within the meaning of applicable law and including other commercial information and/or confidential information that is subject to a further confidentiality provision with a third party. However, the term “Confidential” does not refer to any information or document that is either (i) contained in the public files of any state or federal administrative agency or court or (ii) at or prior to the commencement of the Proceeding is or was otherwise in the public domain, or enters into the public domain as a result of publication by Duke Energy Ohio.

For purposes of this Agreement, the term “Highly Confidential” means that counsel for Duke Energy Ohio deems, in good faith, the information to which the term refers to be “Confidential” and also to be information that, if disclosed, might damage the Company’s current or prospective business or any current or prospective financial position and is, therefore, disclosed only for review by attorneys representing the Recipient.

For purposes of this Agreement, the term “Confidential Information” or “Highly Confidential Information” means information that is designated as “Confidential” or “Highly Confidential – Attorneys’ Eyes Only” by Duke Energy Ohio in writing or, if recorded as part of a deposition or transcribed testimony, orally. “Confidential Information” and “Highly Confidential Information” shall refer to such designated information whether revealed during deposition, in a document, by production of tangible evidence, in a hearing or oral testimony of

any sort, or otherwise. "Confidential Information" and "Highly Confidential Information" shall also include all copies or reproductions, in any medium, or any so designated information. In addition, "Confidential Information" and "Highly Confidential Information" shall include all notes, analyses, compilations, studies, summaries, and other material prepared by the Recipient or the Recipient's Representatives (as defined below) containing or based, in whole or in part, on any Confidential Information or "Highly Confidential Information" provided from or on behalf of Duke Energy Ohio. Where reasonably possible, "Confidential Information" or "Highly Confidential Information" shall bear a legend to that effect, record or affixed on it in such a way as to be obvious to a reasonable examiner.

For purposes of this Agreement, the term "Proceeding" means the Commission proceeding or proceedings captioned above, including any appeal to the Ohio Supreme Court that stems directly from the Commission's decision therein and any remand by the Ohio Supreme Court to the Commission. **The term "Proceeding" does NOT include any cases that may be substantively or procedurally related but are not captioned above, other than appeals and remands.**

2. Identification of Confidential Information and Highly Confidential Information

Duke Energy Ohio will conspicuously mark all written and electronic data containing Confidential Information or Highly Confidential Information as "Confidential" or "Highly Confidential – Attorneys' Eyes Only." In the event that Duke Energy Ohio notifies the Recipient after providing Confidential Information or Highly Confidential Information that such information was not appropriately so marked, the Recipient shall add such marking to the Confidential Information or Highly Confidential Information and shall treat it as such under the terms of this Agreement.

By entering into this Agreement, the Recipient acknowledges the Confidential or Highly Confidential nature of the Confidential Information or Highly Confidential Information and that any unauthorized disclosure or unauthorized use thereof by the Recipient will injure Duke Energy Ohio's business and/or the business of the customer(s) and/or affiliate(s) of Duke Energy Ohio; provided, however, that the Recipient shall retain the right to dispute, at the Public Utilities Commission of Ohio, the confidentiality of the Confidential Information or Highly Confidential Information.

3. Protection of Confidential Information

The Recipient agrees that (i) it will hold all Confidential Information and Highly Confidential Information as required by this Agreement and will not, without the specific prior written consent of Duke Energy Ohio, disclose any Confidential Information or Highly Confidential Information (including the fact that the Confidential Information or Highly

Confidential Information has been made available to the Recipient or that the Recipient has inspected any portion of the Confidential Information or Highly Confidential Information) to any person other than as allowed hereunder, (ii) it will not use any of the Confidential Information or Highly Confidential Information for any reason or purpose other than the Proceeding, and (iii) in the event the Recipient has a need to publicly file any document containing Confidential Information or Highly Confidential Information, with the Confidential Information or Highly Confidential Information redacted, the Recipient shall ensure that the redacted information cannot, technologically, be obtained by third parties.

All Confidential Information and Highly Confidential Information shall be held by the Recipient in separate and identifiable files, with access to such files restricted to persons to whom disclosure is permitted hereunder.

The Recipient is fully responsible for enforcing, with regard to its Representatives (including legal counsel), the obligations of this Agreement and for taking such action, legal or otherwise (including all actions that the Recipient would take to protect its own confidential information and trade secrets), as may be necessary to cause its Representatives (including legal counsel) to comply with such obligations.

4. Permitted Disclosure

a. Disclosure of Confidential Information is permitted only as follows:

- 1) The Recipient may disclose Confidential Information to those representatives of the Recipient (including directors, officers, employees, agents, consultants, advisors, legal counsel, paralegals, economists, statisticians, accountants, and financial advisors (Representatives)) who (a) in the judgment of the Recipient, require access to such material for the purpose of assisting the Recipient in performing work directly associated with the Proceeding; (b) are informed by the Recipient and/or Duke Energy Ohio of the Confidential nature of the Confidential Information and the obligations of this Agreement and agree to be bound by all the provisions hereof; and (c) have executed a Nondisclosure Certificate in the form attached hereto and have returned a copy of such executed Nondisclosure Certificate to Duke Energy Ohio prior to obtaining access to Confidential Information.
- 2) The Recipient may also disclose Confidential Information to any party to the Proceeding that is bound by the terms of a similar Confidentiality Agreement with Duke Energy Ohio; provided that such similar Confidentiality Agreement is applicable only to the Proceeding and, provided further, that, prior to such disclosure by the Recipient, the Recipient has received from Duke Energy Ohio written permission for the

disclosure of Confidential Information to such other party to the Proceeding.

- 3) As described more fully in paragraph 6, below, the Recipient may disclose Confidential Information as ordered by the Commission or its personnel; provided, however, that the Recipient shall provide notice to Duke Energy Ohio that such an order has been received, at least three business days prior to disclosure, and, provided further, that the Recipient shall not disclose Confidential Information pursuant to such an order if Duke Energy Ohio has informed the Recipient that it has initiated an effort (through a formal filing or otherwise) to appeal that order or otherwise to petition the Commission or its personnel to change the order.
- b. Highly Confidential Information is disclosed by Duke Energy Ohio under this Agreement, for attorneys' eyes only. Disclosure of Highly Confidential Information is permitted only as follows:
- 1) The Recipient may not disclose Highly Confidential Information to any Representative other than legal counsel of record in the Proceeding, and may only do so provided such counsel (a) is informed by the Recipient and/or Duke Energy Ohio of the Highly Confidential nature of the Highly Confidential Information and the obligations of this Agreement and agrees to be bound by all the provisions hereof, including the obligation not to disclose the Highly Confidential Information other than as permitted herein, and (b) has executed a Nondisclosure Certificate in the form attached hereto and has returned a copy of such executed Nondisclosure Certificate to Duke Energy Ohio prior to obtaining access to Highly Confidential Information.
  - 2) The Recipient may also disclose Highly Confidential Information to legal counsel of record in the Proceeding, which legal counsel represents any party to the Proceeding that is bound by the terms of a similar Confidentiality Agreement with Duke Energy Ohio; provided that such similar Confidentiality Agreement is applicable only to the Proceeding and, provided further, that, prior to such disclosure by the Recipient, the Recipient has received from Duke Energy Ohio written permission for the disclosure of Highly Confidential Information to such legal counsel for such other party to the Proceeding.
  - 3) As described more fully in paragraph 6, below, the Recipient may disclose Highly Confidential Information as ordered by the Commission or its personnel; provided, however, that the Recipient shall provide at least

three business days' prior notice to Duke Energy Ohio that such an order has been received and, provided further, that the Recipient shall not disclose Highly Confidential Information pursuant to such an order if Duke Energy Ohio has informed the Recipient that it has initiated an effort (through a formal filing or otherwise) to appeal that order or otherwise to petition the Commission or its personnel to change the order.

5. Ownership

All Confidential Information and Highly Confidential Information shall remain the property of Duke Energy Ohio. No license or other rights under any patents, trademarks, copyrights, or other proprietary rights is granted or implied by this Agreement or the disclosure of the Confidential Information or Highly Confidential Information.

6. Limited Use of Confidential Information

The Recipient shall not reveal Confidential Information or Highly Confidential Information or otherwise disclose such information other than as expressly authorized in this Agreement and only for the purpose of the Proceeding.

- a. If the Recipient or any one or more of the Recipient's Representatives attempts to use the Confidential Information or Highly Confidential Information for any purpose other than this Proceeding, neither Recipient nor any of its Representatives shall oppose a motion by Duke Energy Ohio to strike such use or any other such motion deemed appropriate by counsel for Duke Energy Ohio and the Recipient shall be responsible for reimbursing Duke Energy Ohio for any and all costs that incurs in defending the Confidentiality of such Confidential Information or Highly Confidential Information. Similarly, if the Recipient is a party to a subsequent legal proceeding in any administrative agency or court (which subsequent proceeding is not included in the definition of the Proceeding) and another entity or person (that was also a party to the Proceeding and had executed a confidentiality agreement with Duke Energy Ohio with regard to the Proceeding) attempts to use Confidential Information or Highly Confidential Information in that subsequent proceeding, the Recipient agrees not to oppose any motion by Duke Energy Ohio to strike or otherwise prevent such unauthorized use of the Confidential Information or Highly Confidential Information.
- b. If the Recipient is legally compelled (by oral questions, interrogatories, requests for information or documents, subpoenas, civil or criminal investigative demands, regulatory requirements, or other similar processes) to make any disclosure that is prohibited or otherwise constrained by this Agreement, the Recipient will provide Duke Energy Ohio notice, within three business days' of the receipt thereof, so

that Duke Energy Ohio may determine whether to seek an appropriate protective order or other appropriate remedy. Subject to the foregoing, the Recipient 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.

7. Remedies

The Parties stipulate and agree that disclosure of such information without the protection of this Agreement would likely damage Duke Energy Ohio, such damage would likely be material, and the measure of such damage is difficult to quantify. Therefore, the Parties agree to the following remedies:

- a. The Parties agree that the damage shall be calculated at the greater of actual damages to Duke Energy Ohio or \$1,000,000. In addition, the Recipient breaching this Agreement shall be responsible for reimbursing Duke Energy Ohio for all costs of pursuing its legal and/or equitable remedies hereunder; including, but not limited to, attorneys' fees, court costs, and expert witnesses.
- b. Furthermore, the Parties stipulate and agree that monetary damages would not be an adequate remedy for a breach of this Agreement by the Recipient or any of its Representatives and that Duke Energy Ohio will suffer irreparable harm because of any such breach. Therefore, in addition to any legal remedies and any sanctions that may be imposed by the Commission for a violation of this Agreement, the Parties agree that Duke Energy Ohio may, without the requirement that it post a bond or other security, take any actions available at law or at equity for a breach of this Agreement. Duke Energy Ohio shall thus be entitled, in addition to any other remedies that might otherwise be available to it, to specific performance and injunctive or other equitable relief in the courts of Ohio or any other court of competent jurisdiction as a remedy for the commission or continuance of any such breach or anticipated breach.

8. Return and/or Destruction of Confidential Information or Highly Confidential Information

If any individual Representative of the Recipient ceases to be employed by the Recipient or otherwise engaged in the Proceeding, access to any Confidential Information will be

terminated immediately and such individual shall (a) promptly return all Confidential Information and Highly Confidential Information in his or her possession to another Representative of the Recipient who has signed the Nondisclosure Certificate or, (2) if there is no such other Representative of the Recipient, treat the Confidential Information and Highly Confidential Information as described below, as if the Proceeding had been concluded. Any person who has signed the Nondisclosure Certificate will continue to be bound by the provisions of this Agreement even if no longer employed by the Recipient or engaged in the Proceeding.

Confidential Information or Highly Confidential Information provided under the terms of this Agreement must be returned to Duke Energy Ohio or destroyed, as described in this section, under the following circumstances:

- a. The Recipient's intervention in the Proceeding is denied by the Commission or its personnel.
- b. The Recipient determines that it does not wish to continue its participation in the Proceeding and files a notice of such withdrawal.
- c. The Commission issues a final order in the Proceeding, assuming it is not appealed to the Ohio Supreme Court.
- d. If appealed to the Ohio Supreme Court, such Court issues its opinion, assuming it is not remanded to the Commission.
- e. If remanded to the Commission, the Commission issues a final order in the Proceeding.

In any of the above-listed circumstances, the Recipient shall, within 15 days from its receipt of notification from Duke Energy Ohio, either return to Duke Energy Ohio or destroy the Confidential Information and Highly Confidential Information, as instructed by Duke Energy Ohio in such notification. In that event, the Recipient shall promptly deliver to Duke Energy Ohio any Confidential Information and Highly Confidential Information furnished by Duke Energy Ohio, together with all copies and summaries thereof in the possession or under the control of the Recipient or its Representatives and shall destroy all materials generated by the Recipient or the Recipient's Representatives that include or refer to any part of the Confidential Information or Highly Confidential Information. One copy of the Confidential Information or Highly Confidential Information may be retained by the Recipient for record purposes only, but only if the Recipient is a governmental entity and such retention is mandated by law. If such a record is retained by the Recipient, it shall under no circumstances be used for any purpose other than the Proceeding. Furthermore, the terms of this Agreement shall remain in full force and



effect after the final conclusion of the Proceeding, regardless of whether the Recipient retained a record copy of the Confidential Information or Highly Confidential Information or not.

The Recipient shall, within 15 days from its receipt of notification from Duke Energy Ohio to return to Duke Energy Ohio or destroy the Confidential Information and Highly Confidential Information, the Recipient shall also provide written, notarized and sworn certification of its compliance with this section.

9. Miscellaneous

a. Notices

Notices required or permitted by this Agreement shall be served by certified mail, return receipt requested, or reputable overnight courier service to the following addresses:

To Duke Energy Ohio: Amy B. Spiller, Deputy General Counsel  
139 East Fourth Street, 1303-Main  
Cincinnati, OH 45202

To Office of the Ohio Consumers' Counsel: Maureen R. Grady, Counsel of Record  
Joseph P. Serio  
Edmund "Tad" Berger  
Assistant Consumers' Counsel  
10 West Broad Street, Suite 1800  
Columbus, Ohio 43215

b. Authority

The undersigned individuals represent that they are authorized to sign this Agreement on behalf the respective Parties.

c. Entire Agreement, Severability, and Waiver

This Agreement constitutes the entire Agreement among the Parties with respect to the subject matter hereof, supersedes any prior understandings or representations among all of the Parties to this Agreement relating to the confidential treatment of the Confidential Information and Highly Confidential Information, and shall not be modified except by a written agreement signed by all Parties.

All provisions of this Agreement are severable and the unenforceability of any of the Provisions of this Agreement shall not affect the validity or enforceability of the remaining provisions of this Agreement.

The failure of any Party to insist upon strict performance of any of the terms and conditions shall not be deemed to be a waiver of those or any other terms and conditions of this Agreement.

d. Assignability

This Agreement may not be assigned by any Party without the prior written consent of the other Party.

e. Governing Law and Venue

This Agreement shall be construed and enforced in accordance with the laws of the state of Ohio. Any action to enforce the terms of this Agreement shall be brought in a court located within Hamilton County, Ohio, and both Parties hereby consent to the jurisdiction of such court.

f. Counterparts and Facsimile or Electronic Signatures

This Agreement may be executed in counterparts and, in the absence of an original signature, faxed signatures (or signatures transmitted by other electronic media) will be considered the equivalent of an original signature.

IN WITNESS WHEREOF, each of the Parties hereto has caused this Agreement to be executed on its behalf by an appropriate officer or other person thereunto duly authorized, as of the date set forth at the beginning of this Agreement.

DUKE ENERGY OHIO, INC.

\_\_\_\_\_  
Amy B. Spiller

OFFICE OF OHIO CONSUMERS' COUNSEL

\_\_\_\_\_  
Maureen R. Grady

**BEFORE**  
**THE PUBLIC UTILITIES COMMISSION OF OHIO**

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 ) Case No. 14-841-EL-SSO  
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 ) Case No. 14-842-EL-ATA  
Certified Supplier Tariff, P.U.C.O. No. )  
20. )

**NONDISCLOSURE CERTIFICATE**

I certify my understanding that Confidential Information or Highly Confidential Information may be provided to me, but only pursuant to the terms and restrictions of the Confidentiality Agreement executed on \_\_\_\_\_, and certify that I have been given a copy of and have read such Confidentiality Agreement, and that I agree to be bound by it (including the definitions therein of any terms in this certificate). I understand that the contents of Confidential Information or Highly Confidential Information, and any writings, memoranda, or any other form of information regarding or derived from Confidential Information or Highly Confidential Information, shall not be voluntarily disclosed to anyone other than in accordance with such Confidentiality Agreement. Furthermore, I understand that the Confidential Information and Highly Confidential Information shall only be used for purposes of the above-captioned Proceeding.

Name: \_\_\_\_\_

Company: \_\_\_\_\_

Address: \_\_\_\_\_

Telephone: \_\_\_\_\_

Date: \_\_\_\_\_



## Grady, Maureen

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**From:** Kingery, Jeanne W <Jeanne.Kingery@duke-energy.com>  
**Sent:** Tuesday, June 10, 2014 3:10 PM  
**To:** Grady, Maureen  
**Cc:** Spiller, Amy B; Berger, Edmund; Serio, Joseph; Kuhnell, Dianne B  
**Subject:** RE: Confidentiality Agreement- 14-841 Duke Energy Ohio ESP

Maureen –

We recognize that our new standard confidentiality agreement has been strengthened in some areas. As you may recall, our recent experience revealed that there was actually no “balance” between our needs and those of the intervenors, as the one intervenor blatantly violated the terms of that agreement by offering into evidence, over our objection, certain confidential information that had been produced in a previous case. That information was inappropriately used, in direct contravention of the terms of the agreement, in a case other than the one in which it was produced and had obviously not been returned or destroyed.

A new “balance” is critical. From our perspective, the agreement must empower us to enforce the terms of the arrangement and ensure that confidential business information is appropriately protected. From yours, you may appreciate that adherence to the terms will insulate your client from damages. Thus, while the agreement is not the same as prior ones, we fail to appreciate why any party intending to comply would refuse to sign.

If there are specific provisions that you find objectionable, other than those relating to damages in the event of breach, we can certainly discuss those. However, this is the document that we are forwarding to parties that request access to the Company’s confidential information.

Jeanne

**Jeanne W. Kingery**  
Associate General Counsel  
Duke Energy Business Services LLC  
155 East Broad Street, 21st Floor  
Columbus, Ohio 43215  
(614) 222-1334  
(614) 593-1401 cell



 please consider the environment before printing this email

### CONFIDENTIAL NOTIFICATION:

The information in this email may be confidential and/or privileged. This email is intended to be reviewed by only the individual or organization named above. If you are not the intended recipient or an authorized representative of the intended recipient, you are hereby notified that any review, dissemination or copying of this email or its attachments, if any, or the information contained herein is prohibited. If you have received this email in error, please immediately notify the sender by return mail and delete this email from your system. Thank you.

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**From:** Grady, Maureen [mailto:Maureen.Grady@occ.ohio.gov]  
**Sent:** Tuesday, June 10, 2014 11:29 AM

**To:** Kuhnell, Dianne B  
**Cc:** Kingery, Jeanne W; Spiller, Amy B; Berger, Edmund; Serio, Joseph  
**Subject:** RE: Confidentiality Agreement- 14-841 Duke Energy Ohio ESP

Thank you for your response. However, the Confidentiality Agreement you have attached is not acceptable, and cannot serve as a basis for any protective agreement we would sign.

The protective agreement we sent to you on June 2, 2014 is the same protective agreement you signed with OCC for the past two cases over the last year —the capacity case and the MGP case. In both of those cases, we used the protective agreement to protect information that Duke Energy Ohio deemed to be confidential. We believe that protective agreement strikes the correct balance between your needs for protection and our need to have access to data. We have used this very same agreement with numerous other utilities. It has been carefully developed over the years and represents a fair solution to the issues. Given the tight timeframe ordered for this proceeding (at your request), we will need to resolve this issue as soon as possible. I look forward to hearing from you.

---

**From:** Kuhnell, Dianne B [<mailto:Dianne.Kuhnell@duke-energy.com>]  
**Sent:** Tuesday, June 10, 2014 9:19 AM  
**To:** Grady, Maureen  
**Cc:** Kingery, Jeanne W; Spiller, Amy B  
**Subject:** Confidentiality Agreement- 14-841 Duke Energy Ohio ESP

Maureen,  
Please find attached a copy of the Confidentiality Agreement in this case per Amy's e-mail below.

Thank you,  
Dianne

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**From:** Spiller, Amy B  
**Sent:** Monday, June 09, 2014 5:41 PM  
**To:** 'Grady, Maureen'  
**Cc:** Kingery, Jeanne W; Kuhnell, Dianne B  
**Subject:** RE: Protective Agreement

Maureen

I apologize for the delay in responding and do appreciate your time in preparing a confidentiality agreement for our ESP proceeding. However, as we will be sharing information that Duke Energy Ohio deems to be confidential, we prefer to use a confidentiality agreement that we have drafted. We will provide you tomorrow with a copy of our confidentiality agreement, via e-mail from our paralegal, Dianne Kuhnell.

Thank you.

**Amy B. Spiller**  
Deputy General Counsel  
Duke Energy Business Services  
139 E. Main Street, 1303-Main  
Cincinnati, Ohio 45202  
(513) 287-4359 (telephone)  
(513) 287-4385 (facsimile)

CONFIDENTIAL NOTIFICATION:

The information in this e-mail may be confidential and/or privileged. This e-mail is intended to be reviewed only by the individual or organization named above. If you are not the intended recipient or an authorized representative of the intended recipient, you are hereby notified that any review, dissemination, or copying of this e-mail or its attachments, if any, or the information contained herein is prohibited. If you have received this e-mail in error, please immediately notify the sender by return mail and delete this e-mail from your system. Thank you.

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**From:** Grady, Maureen [<mailto:Maureen.Grady@occ.ohio.gov>]

**Sent:** Monday, June 09, 2014 4:10 PM

**To:** Spiller, Amy B

**Subject:** Protective Agreement

Amy, still waiting to hear from you with respect to the protective agreement I proposed for the Duke ESP case. It was sent to you on June 2. If you could let me know where you are on that, I would appreciate it. Thank you.

**This foregoing document was electronically filed with the Public Utilities**

**Commission of Ohio Docketing Information System on**

**6/18/2014 5:05:16 PM**

**in**

**Case No(s). 14-0841-EL-SSO, 14-0842-EL-ATA**

Summary: Memorandum Memorandum Contra OEG's Motion to Establish Protective Agreement by the Office of the Ohio Consumers' Counsel electronically filed by Ms. Deb J. Bingham on behalf of Grady, Maureen R. Ms.