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 Form of an Electric Security Plan, Accounting Modifications and Tariffs for Generation Service.	)	Case No. 14-841-EL-SSO
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. 14-842-EL-ATA

DUKE ENERGY OHIO'S RESPONSE
TO OHIO CONSUMERS' COUNSEL'S MEMORANDUM CONTRA

Duke Energy Ohio, Inc., (Duke Energy Ohio or Company) hereby files its response (Response) to a document filed on June 18, 2014, by the Office of the Ohio Consumers' Counsel (OCC), entitled "Memorandum Contra OEG's Motion to Establish Protective Agreement by Office of the Ohio Consumers' Counsel" (OCC Filing).

Prior to the OCC Filing, Ohio Energy Group (OEG) had moved the Public Utilities Commission of Ohio (Commission) for an order establishing a confidentiality agreement with terms other than those offered by the Company. Among other things, OEG complained that the Company's proffered agreement differs from the one used in prior proceedings. In the OCC Filing, OCC asserts that it needs a different agreement than one that might work for other parties, but otherwise does not disagree with OEG's arguments. Like OEG, OCC argues in favor of using a confidentiality agreement used in prior, unrelated proceedings.

Duke Energy Ohio opposes OCC's arguments, just as it opposed those of OEG. However, as OCC styled the OCC Filing as a memorandum contra OEG's motion, the Commission's procedural rules do not provide a mechanism by which opposition is possible. Thus, Duke Energy Ohio respectfully requests that the Commission treat the OCC Filing as a motion, such that Duke Energy Ohio can file this Response as a memorandum contra. In the alternative, the Commission could treat the OCC Filing as memorandum contra and allow this Response as a reply.

Use of Prior Version of Agreement

OCC argues strenuously that, because Duke Energy Ohio was previously willing to release confidential material under certain terms, those terms should not now be changed. Likewise, OCC complains that Duke Energy Ohio "declined" to sign a confidentiality agreement that **OCC** drafted with regard to safety of the **Company's** information. OCC asserts that, because it drafted its agreement on the basis of prior proceedings' agreements, Duke Energy Ohio should have been willing to use it again.

To support this assertion, OCC cites to no law or regulation, no term of any prior agreements, and no case precedent. It cites to absolutely no justification for its belief that the prior terms under which Duke Energy Ohio was willing to release confidential information must continue into the future. And, even according to its own recitation of the events, Duke Energy Ohio had offered to discuss the terms but OCC failed to respond to that offer. Instead, it simply prepared the OCC Filing, asking the Commission to spend its time resolving the dispute even before negotiations had been attempted.

The information in question belongs to Duke Energy Ohio. It is Duke Energy Ohio's business interests that are, under the law, to be protected. It is not for OCC to

prepare an agreement, setting forth terms under which it is willing to protect the confidentiality of that information, and to demand that the Company sign the agreement and willingly turn over its sensitive information. Duke Energy Ohio has made a determination that the terms of the prior agreement do not adequately protect the confidential information that may be sought by intervenors in these proceedings. It has, therefore, revised those terms to protect its business interests more fully. OCC should not be heard to complain about the change, just because it is a change.

Legality of Terms

OCC asserts that the Ohio public records laws would be violated by Section 6(b) of the Company's proposed agreement. It points out that OCC has the duty to determine whether or not it must disclose information that is sought through a public records request. The decision whether to disclose, it argues, "cannot be subject to Duke's approval." But OCC misreads the proposed agreement. As quoted by OCC, the agreement would allow OCC to disclose, under a public records request, "that portion . . . that, in the written opinion of its counsel (reasonably acceptable to Duke Energy Ohio), the [OCC] is legally compelled to disclose." Thus, Duke Energy Ohio would only have the right to approve of OCC's choice of counsel. The agreement would not give the Company the right to approve of the counsel's determination as to the disclosure. While Duke Energy Ohio believes that this is clear, it would not object to a wording change. The parenthetical could simply be revised to read: "(which counsel is reasonably acceptable to Duke Energy Ohio)." And Duke Energy Ohio would note that this apparent misinterpretation by OCC certainly did not necessitate the involvement of the Commission. But OCC chose not to negotiate.

OCC also asserts that it "cannot engage in efforts to control the disclosure of information obtained by a third party under a public records request." But it cites no law to support that statement. Nor is there any public policy reason why OCC could not, along with its disclosure of documents that Duke Energy Ohio had deemed confidential, ask that the Company's request be taken into consideration by the recipient.

Finally, OCC claims that the agreement proposed by the Company is illegal in that it does not allow OCC to retain a copy of the confidential information after completion of the case. Again, a discussion between OCC and the Company would have been helpful, as OCC has failed to read the document fully. Section 8 does indeed demand return or destruction of the information under certain identified circumstances. However, it also includes the following sentence:

> 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.

This sentence was designed and included specifically for OCC and specifically to avoid the problem that OCC complains about. Its complaint is unfounded.

Issues Concerning Other Terms

OCC also raises a concern about the liquidated damages provision. OCC's initial rationale for this concern is that the provision is unprecedented. But nothing in the law prohibits "unprecedented" terms in agreements. And OCC thinks this term will "harm" it. The flaw in its thinking is obvious: The existence of a provision allowing for agreed-upon damages for violation of a contract does not, in itself, have any impact whatsoever on the parties. The impact – that is, any "harm" – would only come from the party's own violation of that agreement. So if OCC were, in the end, harmed, the cause of the harm

would be its own choice to breach the contract, NOT the existence of a liquidated damages provision.

OCC next raises an argument concerning Section 2 of the agreement. It suggests that its concern is just like OEG's, but this is wrong. OEG filed its motion on the basis of a different version of the agreement than the one that the Company presented to OCC. As noted in the Company's memorandum contra OEG's motion, the Company has agreed to add a proviso that would allow the recipient to dispute the confidentiality of the information. OCC's concern is moot.

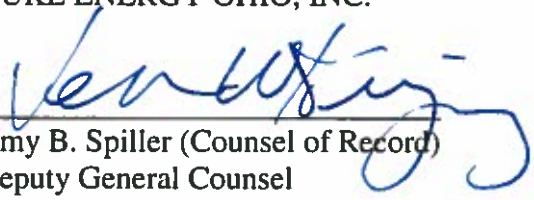
For its next argument, OCC suggests that Sections 4 and 6 of the agreement would "unreasonably limit OCC's use of the information." But when OCC goes on to detail this issue, it only complains that it would have to get the Company's permission if it wishes to discuss confidential information with other intervenors. From the Company's viewpoint, it may or may not sign precisely identical confidentiality agreements with the various intervenors. Does OCC propose that it would compare its agreement with that signed by each other intervenor, before discussing confidential information? This is not an unreasonable provision. Furthermore, as to whether the provision would "interfere with trial preparation," it is noteworthy that OCC would have no basis on which to refuse to answer a discovery question asking whether it had entered into any joint defense agreement with other intervenors. Finally, if OCC had only been willing to discuss the matter before filing its opposition, the Company would have offered to maintain a list of intervenors who had signed confidentiality agreements, together with any limitations on the intervenors' ability to receive confidential information, and to provide that list to the parties proactively.

The OCC also complains about being required to keep confidential information separate from other information in the proceedings, and to restrict access to those persons who have signed a nondisclosure certificate. OCC fails to explain why and how this requirement is "not workable." And it fails to suggest why it is unnecessary. Does OCC believe that, once the Company's proprietary information is in OCC's possession, it should be able to allow any and all OCC employees to have access to it? Is it truly reasonable to allow confidential and non-confidential information to be shuffled together, such that no special treatment would be accorded the confidential documents? It is noteworthy that even the OCC's own proposed version of a confidentiality agreement includes a requirement that access to the confidential material is permitted only where an OCC representative has signed the agreement or a non-disclosure certificate. And if access to this material is limited, OCC must necessarily keep that material separate from material as to which access is not so limited.

Duke Energy Ohio respectfully requests that the Commission deny OCC's request to mandate the continued use of a prior form of confidentiality agreement.

Respectfully submitted,

DUKE ENERGY OHIO, INC.



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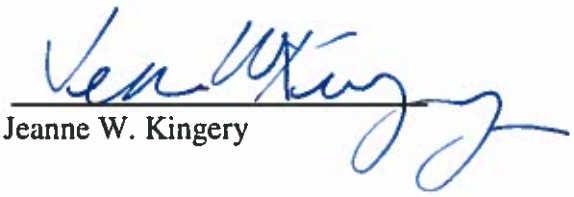
CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing was delivered by U.S. mail (postage prepaid), personal, or electronic mail, on this 23rd day of June 2014, to the following parties.



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Summary: Response Duke Energy Ohio's Repsonse to Ohio Consumers' Counsel Memorandum Contra electronically filed by Carys Cochern on behalf of Kingery, Jeanne W Ms.