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. 14-482-EL-ATA

DUKE ENERGY OHIO, INC.'S
INTERLOCUTORY APPEAL

Pursuant to O.A.C. 4901-1-15(A)(1), Duke Energy Ohio, Inc., (Duke Energy Ohio or Company) hereby seeks review of the Attorney-Examiner's August 12th oral ruling granting in part and denying in part the Company's July 8, 2014, Motion for Protective Order. Duke Energy Ohio had moved the Public Utilities Commission of Ohio (Commission) to adopt a confidentiality agreement, to allow the Company to produce its confidential, trade secret, and proprietary information (Confidential Information) in discovery. A copy of that agreement is attached as Exhibit A. To ensure that the Company's Confidential Information would be safeguarded properly, and that those safeguards would be practically enforceable, the Company's agreement required other parties to use any Confidential Information produced in these proceedings only **for** these

proceedings. It also required those parties to return or destroy that Confidential Information after these proceedings conclude.

The Attorney-Examiner, however, held that parties may retain the Company's Confidential Information indefinitely, and use that Confidential Information in future proceedings as they see fit, subject only to future evidentiary objections. A transcript of the Attorney-Examiner's oral ruling is attached as Exhibit B.

The Attorney-Examiner's holding is contrary to the typical practice in Ohio and at the Commission and would provide inadequate protection to the Company's Confidential Information, needlessly increasing the risk of disclosure. For these reasons, as further explained in the attached Memorandum in Support, Duke Energy Ohio asks the Commission to reverse this portion of the Attorney-Examiner's ruling and affirm the Company's reasonable proposed restrictions on the use of its Confidential Information.

Respectfully submitted,

DUKE ENERGY OHIO, INC.

/s/ Amy B. Spiller
Amy B. Spiller (Counsel of Record) (0047277)
Deputy General Counsel
Rocco O. D'Ascenzo (0077651)
Associate General Counsel
Jeanne W. Kingery (0012172)
Associate General Counsel
Elizabeth H. Watts (0031092)
Associate General Counsel
139 E. Fourth Street, 1303-Main
P.O. Box 961
Cincinnati, Ohio 45201-0960
(513) 287-4359 (telephone)

(513) 287-4385 (facsimile)
(willing to accept service by fax)
Amy.Spiller@duke-energy.com (e-mail)
(willing to accept service by e-mail)

MEMORANDUM IN SUPPORT

I. INTRODUCTION

Duke Energy Ohio files this interlocutory appeal to ensure that the Confidential Information it produces in these proceedings will receive the protection to which that information is entitled under law. Because the Attorney-Examiner's oral ruling denied in part the Company's motion for protective order, Duke Energy Ohio is entitled to an immediate interlocutory appeal, without prior certification to the Commission.[1]

The proposed confidentiality agreement provisions at issue in this appeal impose two basic and related requirements. First, Paragraph 6 states that recipients of Duke Energy Ohio's Confidential Information[2] may reveal or disclose that information "only for the purpose of the Proceeding."[3] Second, Paragraph 8 requires the recipients of Confidential Information to "either return *** or destroy *** the Confidential Information ***, together with all copies and summaries ***, and *** all materials generated by the Recipient or the Recipient's Representatives that include or refer to any part of the Confidential Information[,]" at the conclusion of these proceedings.[4]

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[1] *See* O.A.C. 4901-1-15(A)(1); *see also, e.g., Westside Cellular, Inc. v. GTE Mobilnet Inc.*, Case No. 93-1758-RC-CSS, Entry, ¶¶3-4, 1998 Ohio PUC LEXIS 606, *1-2 (Nov. 19, 1998) (finding that an interlocutory appeal from an entry granting in part and denying in part a motion for a protective order and a motion to compel was "appropriately before the Commission").

[2] The Confidentiality Agreement actually refers to two categories of protected information, "Confidential Information" and "Highly Confidential Information." To simplify, this Interlocutory Appeal will refer to both as "Confidential Information."

[3] Duke Energy Ohio Confidentiality Agreement, ¶6 (Exhibit A). A related provision, ¶6.a., states that the recipient agrees not to oppose any motion to strike by Duke Energy Ohio if any recipient of the Company's Confidential Information attempts to introduce that Information in a later proceeding.

[4] *Id.* ¶8.

These provisions of Duke Energy Ohio's proposed confidentiality agreement, which the Company provided to the other parties in June 2014, were not immediately controversial, although other provisions of the agreement proved to be. The Company's efforts to reach consensus with the other parties to this litigation on an acceptable confidentiality agreement were only partly successful. Three parties – the Ohio Energy Group (OEG), the Office of the Ohio Consumers' Counsel (OCC), and Duke Energy Ohio – filed motions asking the Commission to resolve the parties' remaining disputes.[5] OEG later reached agreement with Duke Energy Ohio on a protective order and withdrew its motion.

In one of its filings, OCC asserted that the requirement to return or destroy the Company's confidential information would "violate[ ] Ohio law regarding records retention, R.C. 149.351."[6] Duke Energy Ohio responded that the confidentiality agreement it had proposed to OCC allowed OCC to retain "[o]ne copy of the Confidential Information or Highly Confidential Information *** for record purposes only," in order to address OCC's concerns.[7] The remaining filings in support of, or in opposition to, the parties' various discovery-related motions did not address the provisions at issue here.

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[5] *See* Motion to Establish Protective Agreement of the Ohio Energy Group (June 13, 2014); Duke Energy Ohio, Inc.'s Motion for Protective Order (July 8, 2014); Motion to Compel Responses to Discovery by the Office of the Ohio Consumers' Counsel (July 18, 2014); Motion to Hold in Abeyance a Ruling on Duke's Motion for Protection by the Office of the Ohio Consumers' Counsel (July 18, 2014); Joint Motion for a Prehearing Conference to Address Pending Motions and Request for Expedited Ruling (July 28, 2014).

[6] Memorandum Contra OEG'S Motion to Establish Protective Agreement by Office of the Ohio Consumers' Counsel at 6 (June 18, 2014).

[7] Duke Energy Ohio's Response to Ohio Consumers' Counsel's Memorandum Contra at 4 (June 23, 2014).

On August 12, 2014, the Attorney-Examiner held a prehearing conference in order to hear argument on the pending motions.[8] At that hearing, OCC did not mention any continuing concerns with Paragraph 8 of Duke Energy Ohio's proposed confidentiality agreement. However, one party that had not filed any motions relating to the confidentiality agreement – Interstate Gas Supply, Inc. (IGS) – raised new arguments. IGS objected to the requirements of Paragraphs 6 and 8, arguing that all parties should be able to retain "at least one copy" of Duke Energy Ohio's Confidential Information.[9] In particular, IGS argued that keeping a copy of the Company's Confidential Information would allow a party to check the "consisten[cy]" of the Company's statements in different proceedings and also serve as "a basis for requesting information from past cases in discovery [in future proceedings]."[10]

In response, Duke Energy Ohio raised two concerns. First, the Company noted that it would be unable to respond effectively if parties could indefinitely retain Confidential Information and then use it to cross-examine witnesses, without advance notice, in future proceedings.[11] Second, the Company noted that it would be unable to monitor other parties' use of its Confidential Information if they could "keep an active file and continually root through [it] ***."[12] In short, the Company pointed out that its restrictions were necessary to ensure its Confidential Information remains confidential.

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[8] Entry, ¶16 (Aug. 5, 2014).

[9] Hearing Tr. at 27 (Aug. 12, 2014).

[10] *Id.*

[11] *See id.* at 53.

[12] *Id.* at 54.

After hearing argument on these issues, the Attorney-Examiner agreed with IGS that parties should be allowed "to retain *** at least one copy," because "there are always subsequent cases that relate to previous cases, and there's always information that is needed *** in subsequent cases referring to previous cases."[13] The Attorney-Examiner, first, rejected Duke Energy Ohio's concerns about being "caught flat-footed without a prior [confidentiality] agreement to which to refer when previously produced confidential information [is] produced."[14] The Attorney-Examiner stated that she "anticipated" that, if a party were to attempt to rely on confidential information from a previous proceeding, an attorney-examiner would give Duke Energy Ohio "sufficient time *** to ensure that proper questions were *** presented and that everyone was given their due process rights with regard to that information."[15] Next, with regard to Duke Energy Ohio's inability "to police what 25 parties and their experts and consultants may do with [the Company's] Confidential Information,"[16] the Attorney-Examiner responded that it is "really important" for the Company "to be very strict in what they consider confidential," so that "parties are aware of what they can and cannot disclose."[17]

Duke Energy Ohio now asks the Commission to reverse the Attorney-Examiner's ruling on these issues. The Attorney-Examiner's ruling is contrary to typical practice in the Commission and beyond, and would leave the Company without adequate protection.

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[13] *Id.* at 49.

[14] *Id.* at 53.

[15] *Id.* at 54.

[16] *Id.*

[17] *Id.* at 55.

II. ARGUMENT

Because parties often request sensitive business information in discovery, protective orders and confidentiality agreements are common. "[I]n traditional trade secret and other cases, courts routinely require disclosure of relevant and material information, even though asserted to be a trade secret and even though the parties are direct competitors, subject to protective orders restricting use of the information acquired in discovery strictly for purposes of the litigation and frequently recognizing different levels of confidential information, subject to different access ***."[18]

Moreover, confidentiality agreement provisions like the ones at issue are common. Even the OEG, which originally opposed several other provisions of the Company's proposed confidentiality agreement in these proceedings, acknowledged that "many confidentiality agreements specifically set forth how the confidential information provided can be used, give a utility the opportunity to request that intervenors destroy the confidential information at the close of a given proceeding, and allow a utility to seek appropriate remedies in the event that the agreement is breached."[19]

Yet, even OEG's statement understates the ubiquity of provisions like the ones the Attorney-Examiner declined to adopt. Numerous legal treatises recognize that the inclusion of such language in protective orders is necessary to adequately protect confidential information, and examples of the adoption of such provisions abound, both in Ohio and federal civil case law and in the Commission's own opinions and orders.

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[18] 3-14 MILGRIM ON TRADE SECRETS § 14.02.

[19] Motion to Establish Protective Agreement of the Ohio Energy Group at 4 (June 13, 2014).

A. The preeminent treatises on trade secret protection and civil practice recommend protective order restrictions like those the Attorney-Examiner declined to adopt.

Numerous treatises provide guidance on the laws governing the production of confidential business information in discovery and the crafting of protective orders. All of the most prominent treatises in these fields recommend that courts, or parties, include provisions in protective orders (i) limiting the use of confidential information to the litigation in which that information is produced and (ii) requiring the return or destruction of that information at the conclusion of the limitation.

Milgrim on Trade Secrets, a treatise commonly cited by courts at all levels of the state and federal court systems,[20] counsels that a typical protective order typically has "several basic strands. Access to the information is closed is strictly limited, often in tiered levels ***, and is to be used **solely for the purposes of the litigation.**"[21] Thus, *Milgrim*'s recommends that the typical stipulated protective order contain the language, "any information obtained pursuant to pretrial discovery in this Action *** may be used and disclosed only for purposes of this Action."[22] "If a more elaborate form of protective order is desired, dealing with such issues as the right of third parties to produce information subject to the protective order, and designating different levels of

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[20] *See, e.g., Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1002 (1984); *BDT Prods. v. Lexmark Int'l, Inc.*, 602 F.3d 742, 755 (6th Cir. 2010); *CPG Products Corp. v. Mego Corp.*, Case No. C-1-79-582, 1981 U.S. Dist. LEXIS 17657, *30 (S.D. Ohio Jan. 12, 1981); *State ex rel. Besser v. Ohio State Univ.*, 89 Ohio St.3d 396, 402, 732 N.E.2d 373 (2000); *Pyromatics, Inc. v. Petruziello*, 7 Ohio App.3d 131, 137 (Cuyahoga App. 1983); *Gardner Denver, Inc. v. Cochrane Fin. Co.*, Lucas C.P. No. CI 09-1279, 2009 Ohio Misc. LEXIS 542, *54 (Sept. 30, 2009).

[21] (Emphasis added.) 3-14 MILGRIM ON TRADE SECRETS § 14.02.

[22] *Id.* § 14.02[4][g][i].

confidentiality with the consequence of narrowing the class of individuals to whom access will be given," *Milgrim*'s recommends (among other additional language) that the protective order also contain a requirement that confidential information be destroyed at the end of the litigation:

> Within 30 days after Termination of this Action, the original and all copies of each document and thing produced, by a Producing Party, to a Receiving Party or given to any other person pursuant to this Order, which contains Confidential Information or Superconfidential Information, and all notes, summaries, digests and synopses of the Confidential Information or Superconfidential Information, shall be returned for destruction to be certified by counsel ***.[23]

This advice is echoed by two of the standard treatises on civil litigation in Ohio, *Baldwin's Ohio Practice* and Matthew Bender's *Ohio Forms of Pleading and Practice*. Both treatises, like *Milgrim's*, offer form Stipulated Protective Orders. And both treatises, like *Milgrim's*, suggest that those protective orders allow the use of confidential information produced in discovery "only for purposes of this litigation," and require that any confidential materials "be returned" or "be destroyed."[24] Thus, in rejecting Duke Energy Ohio's request for these standard protections for confidential information, the Attorney-Examiner deviated from the recommendations of the preeminent treatise on trade secret protection and two top Ohio litigation treatises.

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[23] *Id.* § 14.02[4][g][ii].

[24] 3 BALDWIN'S OHIO PRACTICE: CIVIL PRACTICE FORMS §10.13, ¶¶3, 4, and 6 (2013) (attached as Exhibit C). *See also* William W. Milligan, OHIO FORMS OF PLEADING AND PRACTICE, Form 26:10C, ¶¶(e) and (h) (LexisNexis Matthew Bender 2014) (attached as Exhibit D) (requiring that the recipient of the confidential information use it "solely for the purposes of this litigation" and return or destroy all documents containing confidential information "[w]ithin five days after the entry of a final judgment in this litigation").

B. Protective orders that restrict the use of confidential information to the current proceeding and require its return or destruction are common in Ohio and federal courts.

The Attorney-Examiner also deviated from common Ohio and federal practice, which the treatises correctly reflect. In *State ex rel. Conkle v. Sadler* (2003), for example, the Supreme Court of Ohio considered whether the Franklin County Court of Common Pleas retained jurisdiction to consider a post-dismissal motion for contempt alleging violation of an agreed protective order. As described by the Court, the protective order at issue in that case contained both of the requirements at issue here:

> In this agreed protective order, Judge Sadler directed that "all documents containing or reflecting confidential material which are produced in discovery by any party or nonparty in this action in accordance with this Protective Order **shall be used solely in connection with this judicial proceeding** and shall not be used for any other purposes except as otherwise ordered by this Court." Judge Sadler further ordered that "within sixty (60) days of the entry of the final order concluding this judicial proceeding, all confidential documents; any copies, summaries, and abstracts thereof, or notes relating thereto, **shall be returned to the producing party or non-party**, except as otherwise ordered by the Court."[25]

State ex rel. Conkle is not unique. Other Ohio courts affirming the inclusion of such restrictions in protective orders include *Armstrong v. Marusic* (11th Dist. 2004), which held that the trial court's inclusion of language in a protective order that stated, "the use of any discoverable information shall be limited to the instant action," "adequately protect[ed] the disclosure of trade secrets" and was "consistent with the

[25] (Emphasis added.) *State ex rel. Conkle v. Sadler*, 99 Ohio St. 3d 402, 2003-Ohio-4124, ¶2. *See also Yates v. Applied Performance Techs., Inc.*, 205 F.R.D. 497, 501 (S.D. Ohio 2002) (discussing the same protective order and holding that the court of common pleas "retained jurisdiction to modify [it]" after "the termination of the underlying litigation.").

protection afforded trade secrets under Ohio's Uniform Trade Secrets Act"[26]; and *Majestic Steel Serv. v. DiSabato* (8th Dist. 1999), which reversed the trial court's denial of a motion for protective order and stated that, on remand, the trial court "would be well within its discretion *** to restrain, under penalty of contempt, use of the disputed information for any purpose other than the instant litigation."[27]

Indeed, this approach to preserving the confidentiality of sensitive information is not even limited to trade secret information in Ohio. Ohio statute provides that the physician-patient privilege does not apply to communications that are relevant to questions of competency in litigation over a deceased patient's estate.[28] Yet, the statute, like the protective orders discussed above, prohibits the use of that "protected health information" "for any purpose other than the litigation or proceeding for which the information was requested" and requires that the information be returned or destroyed "at the conclusion of the litigation or proceeding."[29]

This approach is also common practice in the federal court system.[30] The United States District Court for the Northern District of Ohio offers a form Stipulated Protective Order that states that confidential information "shall not be used or disclosed *** for any

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[26] *Armstrong v. Marusic*, 11th Dist. Lake No. 2001-L-232, 2004-Ohio-2594, ¶¶4, 18.

[27] *Majestic Steel Serv. v. DiSabato*, 8th Dist. Cuyahoga No. 76521, 1999 Ohio App. LEXIS 6047, *6-7.

[28] R.C. 2317.02(B)(1)(e)(i).

[29] R.C. 2317.02(B)(1)(e)(v).

[30] *See* MOORE'S FEDERAL PRACTICE 3D, § 26.105[8][b] ("[t]he courts have employed a number of protective procedures when fashioning a protective order to guard against the improper disclosure of trade secrets or other confidential information," such as "[a] protective order requiring that materials containing trade secrets and other confidential proprietary information not be made public, be returned to the disclosing party after the litigation has ended, and not be retained for use in any other case").

purpose whatsoever other than to prepare for and to conduct discovery and trial in this action [adversary proceeding], including any appeal thereof."[31] The document further states that confidential information "shall be returned to the producing party" or destroyed "[w]ithin thirty days after dismissal or entry of final judgment not subject to further appeal," unless the information has been introduced into evidence "without restriction as to disclosure[.]"[32]

As another example, in a 2006 case, *United States v. University Hospital Inc.*, a magistrate judge of the Southern District of Ohio issued a protective order containing restrictions much like those in the Northern District of Ohio's form order. The protective order stated, in part: "The Plaintiff shall not use the Confidential Information for any purpose other than the preparation or prosecution in this case of any claim or defense."[33] It further stated that, "Upon the conclusion of this litigation and all appeals, copies of all documents containing Confidential Information shall be (a) returned to counsel for the producing party, or (b) destroyed by the parties and their counsel," except where required to comply with the U.S. Department of Justice's record retention policy.[34]

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[31] United States District Court, Northern District of Ohio, Local Civil Rules, Appendix L, Stipulated Protective Order, §5.(a) (*available at* http://www.ohnd.uscourts.gov/assets/Rules_and_Orders/Local_Civil_Rules/AppendixL.pdf).

[32] *Id.* ¶10.(b).

[33] *United States v. Univ. Hosp., Inc.*, Case No. 1:05-cv-445, 2006 U.S. Dist. LEXIS 52159, *12 (S.D. Ohio 2006).

[34] *Id.* at *16.

Thus, the Attorney-Examiner's order is not only inconsistent with the recommendations of top treatises, the requirements of Ohio statute, and the practice of several Ohio courts; it is also inconsistent with practice in the local federal courts as well.

C. Protective orders that restrict the use of confidential information to the current proceeding and require its return or destruction are common at the Commission.

Most importantly, the Attorney-Examiner's order is inconsistent with the Commission's own past practice. In numerous proceedings for almost thirty years, attorney-examiners and the Commission itself have recognized that the best way to balance the legitimate confidentiality interests of producing parties and the discovery interests of requesting parties is to limit the use of confidential information to the proceeding in which it was produced, and require the return or destruction of documents containing confidential information, with limited exceptions for OCC. Examples include:

- *In the Matter of the Application of Cincinnati Bell Telephone Company for Authority to Increase and Adjust its Rates and Charges and to Change Regulations and Practices Affecting the Same*, Case No. 84-1272-TP-AIR, Protective Order, 1985 Ohio PUC LEXIS 789, ¶¶3-8 (Apr. 18, 1985): Attorney-Examiner Stephen Howard issued a protective order stating that confidential documents "will be used solely for this proceeding"; that OCC will "promptly return" those documents "[u]pon the conclusion of this proceeding, *** provided that OCC may retain one copy *** under seal"; and that OCC will "either maintain under seal or destroy all notes, calculations, computations or memoranda which *** refer to the confidential information ***."

- *Belmont Electric Cooperative, Inc. v. Ohio Power Co.*, Case No. 87-922-EL-CSS, 1988 Ohio PUC LEXIS 1256, ¶¶6-7 (Mar. 31, 1988): The Ohio Department of Industrial Relations, Division of Mines filed an application for rehearing from the Commission's Entry denying the Division's motion to quash a subpoena duces tecum for the Division's mine maps. The Commission denied the application for rehearing. The Commission stated it would issue a protective order restricting the use of the subpoenaed maps "to the preparation for the hearing and the hearing in this matter," requiring their return "[u]pon final determination of this case," and requiring all "notes or other form of material containing confidential information from the maps" to be "returned or destroyed." The Commission found such a protective order would "properly balance the interest of the Division to restrict the accessibility of the maps with the interest that the Commission and the parties to this proceeding have in a fair and thorough hearing of the issues in this proceeding."
- *In the Matter of the Application of The River Gas Company for Authority to Amend Its Filed Tariffs to Increase the Rates and Charges for Gas Service,* Case No. 90-395-GA-AIR, 1990 Ohio PUC LEXIS 1318, *3-4 (Dec. 4, 1990): Attorney-Examiner Ann Reinhard granted the River Gas Company's motion for protective order with regard to certain attachments to a witness's supplemental direct testimony. The protective order stated, in relevant part, that the confidential information could be used only "to prepare for or to try this case" and had to be "returned or destroyed" "upon final determination of this matter *** ."

- *In the Matter of the Application of Cincinnati Bell Telephone Company for Approval of a Retail Pricing Plan Which May Result in Future Rate Increases and For a New Alternative Regulation Plan*, Case No. 96-899-TP-ALT, Opinion and Order, 1998 Ohio PUC LEXIS 326, *128-129 (Apr. 9, 1998): The Commission approved a stipulated protective agreement, under which confidential information made available by Cincinnati Bell would be used only to ensure compliance with the company's alternative regulation plan and would have to be returned or destroyed "[u]pon termination of the [plan] ***."
- *In re Triennial Review Regarding Local Circuit Switching*, Case No. 03-2040-TP-COI, Entry, ¶9, (Oct. 28, 2003), and *In re Triennial Review Regarding High Capacity Loops and Dedicated Transport*, Case No. 03-2041-TP-COI, Entry, ¶7 (Nov. 6, 2003): In both of these proceedings, the Commission created "managed discovery process[es]" with "standardized protective agreement[s] ***." Those protective agreements stated that parties receiving confidential information could use that information only for "this Proceeding and [/] or other proceedings to be conducted by this Commission in connection with or arising from this Proceeding." The agreements also stated: "Upon the completion of Commission proceedings and any appeals thereof, Confidential Information received by the parties and all copies thereof, except for materials made a part of the record in this Proceeding, or relied upon in the Commission's orders in this Proceeding, shall be returned to the producing party or destroyed, at the option of the producing party, absent a contrary order of the Commission or agreement of the parties."

- *In the Matter of the Commission's Investigation into Intrastate Carrier Access Reform Pursuant to Sub. S.B. 162*, Case No. 10-2387-TP-COI, Entry (Mar. 22, 2011): Attorney-Examiner Jay Agronoff proposed a protective agreement for the participants in that proceeding. The proposed protective agreement contained the language quoted above from the standardized protective agreements in Case Nos. 03-2040-TP-COI and 03-204I-TP-COI.

The above list does not summarize every protective order issued by the Commission in the last three decades, nor could it. It does demonstrate, however, that the Commission has routinely prepared and issued protective orders that provide the same protections for confidential information that the Attorney-Examiner declined to provide in this proceeding. The Attorney-Examiner's oral ruling fails to provide any justification for giving Duke Energy Ohio's confidential information less protection than the Commission has provided to numerous other public utilities over the last thirty years.

D. The Company's requested restrictions are necessary to protect its confidential business information.

The Attorney-Examiner's ruling also fails to give proper consideration to the purpose that discovery is meant to serve, and the purpose that protective orders are meant to serve. The purpose of discovery, as expressed in the Commission's rules, is to "facilitate thorough and adequate preparation for participation in commission proceedings."[35] The state's trade secret policies, on the other hand, are intended to

[35] O.A.C. 4901-1-16(A).

"maintain standards of commercial ethics and invention, as well as the protection of the substantial investment of employers in their proprietary information."[36]

These important purposes conflict, and protective orders help keep them in balance. As the United States Supreme Court held in *Seattle Times Co. v. Rhinehart* (1984), "[l]iberal discovery is provided for the sole purpose of assisting in the preparation and trial, or the settlement, of litigated disputes. Because of the liberality of pretrial discovery permitted by Rule 26(b)(1), it is necessary for the trial court to have the authority to issue protective orders conferred by Rule 26(c)."[37] Ohio courts, too, have held that "the liberal discovery philosophy embedded in Ohio's Civil Rules is to be balanced with Civ.R. 26(C), which vests the trial court with the authority to limit pretrial discovery in order to prevent an abuse of the discovery process."[38] "Thus, a trial court must balance competing interests to be served by allowing discovery to proceed against the harm which may result."[39]

Ohio's trade secret laws, such as R.C. 1333.65,[40] balance these competing interests by allowing discovery of trade secret information, but only "provided its secrecy is preserved."[41] The Commission's rules, too, recognize the protection that must be given

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[36] *Valco Cincinnati, Inc. v. N & D Machining Service, Inc.*, 24 Ohio St.3d 41, 48 (1986).

[37] *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 34 (1984).

[38] *Doe v. University of Cincinnati, d.b.a., Paul I. Hoxworth Blood Center*, 42 Ohio App.3d 227, 231 (10th Dist. 1988).

[39] *Id.*

[40] R.C. 1333.65 states, in relevant pat: "In an action under [the Uniform Trade Secrets Act], a court shall preserve the secrecy of an alleged trade secret by reasonable means that may include granting protective orders in connection with discovery proceedings ***."

[41] *Armstrong*, 2004-Ohio-2594, at ¶23.

to "trade secret[s] or other confidential research, development, commercial, or other information," by permitting parties to seek protective orders providing that such information "not be disclosed or be disclosed only in a designated way."[42]

Yet, the Attorney-Examiner's ruling would expand some parties' discovery rights at the expense of other parties' legitimate interests in maintaining the confidentiality of their trade secrets. The Commission's discovery rules permit "discovery of any matter, not privileged, which is relevant to the subject matter **of the proceeding**."[43] The Attorney-Examiner's ruling, however, effectively expands the discovery process to include matters which may be relevant to the subject matter of future proceedings. In this regard, the ruling fails to mandate the adoption of restrictions necessary to maintain the ongoing protections that are afforded confidential material.

Most importantly, the Attorney-Examiner's ruling prevents Duke Energy Ohio from reasonably safeguarding its Confidential Information and creates a risk of disclosure. Duke Energy Ohio cannot police what happens to its Confidential Information that is in the possession of third parties and is, therefore, constantly at risk of having them review, discuss, use, and disclose its trade secrets. Requiring other parties to return or destroy that Confidential Information when these proceedings conclude will prevent any party from choosing, at some later date, to ignore its obligations under the protective order issued in this case. This happened in a recent Duke Energy Ohio proceeding, when an intervenor was allowed to use the Company's confidential

[42] O.A.C. 4901-1-24(A)(7).

[43] O.A.C. 4901-1-16(B). (Emphasis added.)

information from a prior proceeding, over the Company's objection and contrary to a prior confidentiality agreement, in cross-examining a Company rebuttal witness who had neither authored, reviewed, nor evaluated the document and played no role in the decisions it discussed.[44]

It will also reduce the likelihood of accidental or inadvertent disclosure. Employees and counsel change. Confidentiality agreements can be misplaced. Files may be moved. And over time, the reasons why particular documents are kept under seal, in a secure location, or even the fact that those documents are supposed to be kept separate and under seal, fade from memory. The Attorney-Examiner's ruling places responsibility squarely on the shoulders of Duke Energy Ohio, by requiring it to be deliberate in the designation of material as confidential. Yet, it fails to impose a commensurate obligation on the recipients of that Confidential Information to be scrupulous in their handling of that information. Thus, if parties are allowed to retain Duke Energy Ohio's Confidential Information after the end of these proceedings, even parties with the best of intentions may accidentally use or disclose that information at some point in the future. Requiring those parties to return or destroy the Company's Confidential Information, as the Commission has required in so many other proceedings, will prevent such accidental disclosures from occurring.

The ruling also threatens the discovery process, inviting more disputes as to what information is material to a pending proceeding and deterring parties from recording

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[44] *See In the Matter of the Application of Duke Energy Ohio, Inc., for the Establishment of a Charge Pursuant to Revised Code Section 4909.18*, Case No. 12-2400-EL-UNC, Tr. Vol. XI – Rebuttal, at 2802-2807 (May 21, 2013).

confidential information due to the risk it may be requested in the future. Ohio statute guarantees "[a]ll parties and intervenors *** ample rights of discovery."[45] "The Commission's rules," in turn, "are designed to allow broad discovery of material that is relevant **to the proceeding in question** and to allow the parties to prepare thoroughly and adequately for hearing."[46] Under the Attorney-Examiner's ruling, however, litigants, empowered to pursue a fishing expedition, will be encouraged to propound discovery on matters only marginally relevant to the issues at hand, and then file away Duke Energy Ohio's unneeded Confidential Information for potential future use. At the very least, the Attorney-Examiner's ruling gives weight to an interest the Commission's discovery rules do not contemplate – the interest in stockpiling another company's business information for possible use in later Commission proceedings – at the expense of an interest the Commission's discovery rules and Ohio law expressly contemplate: the interest in preserving parties' confidential and trade secret information.

In doing so, the ruling increases the likelihood that Duke Energy Ohio will be unfairly surprised by the introduction of its Confidential Information at future proceedings. The discovery rules are intended, in part, to prevent surprise to any party at hearing.[47] As the Company noted at hearing, however, parties routinely refuse to provide advance notice of the exhibits they intend to introduce into evidence or use for cross-

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[45] R.C. 4903.082.

[46] (Emphasis added.) *In the Matter of the Application of Duke Energy Ohio, Inc., for Approval of an Electric Security Plan*, Case No. 08-920-EL-SSO, Entry, at 3 (Oct. 1, 2008).

[47] *See Jones v. Murphy*, 12 Ohio St. 3d 84, 86 (1984) (holding, "One of the purposes of the Rules of Civil Procedure is to eliminate surprise.").

examination purposes, citing the protections of the work-product doctrine.[48] Assuming such objections to be valid, which will have to be determined on a document-by-document basis, nothing in the Attorney-Examiner's ruling guards against the prejudice to Duke Energy Ohio in having to defend against the introduction of documents that were not disclosed for purposes of the proceeding at hand and may not have been part of any existing evidentiary record. Without advance notice, Duke Energy Ohio will inevitably confront situations in which another party attempts to introduce or rely upon Confidential Information in a future proceeding, and Duke Energy Ohio's counsel will be (i) unfamiliar with the prior proceeding in which it was produced, (ii) unfamiliar with the confidentiality agreement or protective order in that prior proceeding, and/or (iii) uncertain as to the prior protective order's continuing application. In response to this likelihood, the Attorney-Examiner's ruling offers only the assurance that a future attorney-examiner will halt the hearing and give Duke Energy Ohio sufficient time to get the information it requires to protect its Confidential Information. Given the vicissitudes and time pressures of trial, and the potential that necessary information will be difficult or time-consuming to locate, this is little comfort.

III. CONCLUSION

As shown above, Ohio courts, federal courts, and the Commission routinely fashion protective orders that properly balance the need for relevant information in discovery with the need to protect confidential information, all the while avoiding abuses

[48] Hearing Tr. at 52-53 (Aug. 12, 2014). Each assertion of an objection predicated upon work product will, therefore, prompt discovery disputes, which may include *in camera* review of allegedly privileged material, as necessary to prevent surprise at hearing.

of the discovery process. They reach this balance, in part, by limiting the use of confidential information to the proceeding in which it is produced and requiring the return or destruction of that information at the conclusion of that proceeding. Consistent with the Commission's and the courts' typical practice, Duke Energy Ohio offered a protective agreement that would enable legitimate discovery of its trade secret information, for use in the current proceedings, while enabling Duke Energy Ohio to effectively preserve its secrecy. The Attorney-Examiner's oral ruling, however, fails to provide Duke Energy Ohio the means by which companies traditionally protect their trade secrets and confidential information in litigation. The provisions that Duke Energy Ohio originally proposed, and which the Commission has included in protective orders for decades, best protect all parties' interests. For the reasons provided above, Duke Energy Ohio respectfully requests that the Commission reverse the Attorney-Examiner's oral entry of August 12, 2014, denying in part the Company's Motion for Protective Order, and adopt paragraphs 6, 6.a., and 8 of Duke Energy Ohio's proposed Confidentiality Agreement.

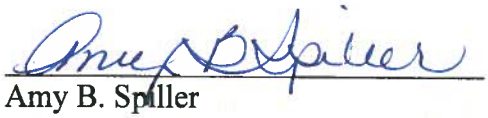
Respectfully submitted,

DUKE ENERGY OHIO, INC.

/s/ Amy B. Spiller
Amy B. Spiller (Counsel of Record) (0047277)
Deputy General Counsel
Rocco O. D'Ascenzo (0077651)
Associate General Counsel
Jeanne W. Kingery (0012172)
Associate General Counsel
Elizabeth H. Watts (0031092)
Associate General Counsel
139 E. Fourth Street, 1303-Main
P.O. Box 961
Cincinnati, Ohio 45201-0960
(513) 287-4359 (telephone)
(513) 287-4385 (facsimile)
(willing to accept service by fax)
Amy.Spiller@duke-energy.com (e-mail)
(willing to accept service by e-mail)

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 18th day of August, 2014, to the parties listed below.



Amy B. Spiller

Steven Beeler
Thomas Lindgren
Ryan ORourke
Assistant Attorneys General
Public Utilities Section
180 East Broad St., 6th Floor
Columbus, Ohio 43215
Steven.beeler@puc.state.oh.us
Thomas.lindgren@puc.state.oh.us
Ryan.orouke@puc.state.oh.us

Counsel for Staff of the Commission

David F. Boehm
Michael L. Kurtz
Jody M. Kyler Cohn
Boehm, Kurtz & Lowry
36 East Seventh Street, Suite 1510
Cincinnati, Ohio 45202
dboehm@BKLlawfirm.com
mkurtz@BKLlawfirm.com
jkylercohn@BKLlawfirm.com

Counsel for the Ohio Energy Group

Kevin R. Schmidt
88 East Broad Street, Suite 1770
Columbus, Ohio 43215
schmidt@sppgrp.com

Counsel for the Energy Professionals of Ohio

Mark A. Hayden
Jacob A. McDermott
Scott J. Casto
FirstEnergy Service Company
76 South Main Street
Akron, Ohio 44308
haydenm@firstenergycorp.com
jmcdermott@firstenergycorp.com
scasto@firstenergycorp.com

Counsel for FirstEnergy Solutions Corp.

Maureen R. Grady
Joseph P. Serio
Edmund "Tad" Berger
Office of the Ohio Consumers' Counsel
10 West Broad Street, Suite 1800
Columbus, Ohio 43215-3485
Maureen.grady@occ.ohio.gov
Joseph.serio@occ.ohio.gov
Edmund.berger@occ.ohio.gov

Counsel for the Ohio Consumers' Counsel

Judi L. Sobecki
The Dayton Power and Light Company
1065 Woodman Drive
Dayton, Ohio 45432
Judi.sobecki@aes.com

Counsel for The Dayton Power and Light Company

Kimberly W. Bojko
Mallory M. Mohler
Carpenter Lipps & Leland LLP
280 Plaza, Suite 1300
280 North High Street
Columbus, Ohio 43215
Bojko@carpenterlipps.com
Mohler@carpenterlipps.com

Counsel for the Ohio Manufacturers' Association

Joseph Oliker
Matthew White
6100 Emerald Parkway
Dublin, Ohio 43016
joliker@igsenergy.com
mswhite@igsenergy.com

Counsel for Interstate Gas Supply, Inc.

Joseph M. Clark
Direct Energy
21 East State Street, 19th Floor
Columbus, Ohio 43215
joseph.clark@directenergy.com

Counsel for Direct Energy Services, LLC and Direct Energy Business, LLC

Gerit F. Hull
Eckert Seamans Cherin & Mellot, LLC
1717 Pennsylvania Avenue, N.W.
12th Floor
Washington, DC 20006
ghull@eckertseamans.com

Counsel for Direct Energy Services, LLC and Direct Energy Business, LLC

Samuel C. Randazzo
Frank P. Darr
Matthew R. Pritchard
McNees Wallace & Nurick LLC
21 East State Street, 17th Floor
Columbus, Ohio 43215
sam@mwncmh.com
fdarr@mwncmh.com
mpritchard@mwncmh.com

Counsel for Industrial Energy Users-Ohio

Trent Dougherty
1207 Grandview Avenue, Suite 201
Columbus, Ohio 43212-3449
tdougherty@theOEC.org

Counsel for the Ohio Environmental Council

Andrew J. Sonderman
Margeaux Kimbrough
Kegler Brown Hill & Ritter LPA
Capitol Square, Suite 1800
65 East State Street
Columbus, Ohio 43215-4294
asonderman@keglerbrown.com
mkimbrough@keglerbrown.com

Counsel for People Working Cooperatively, Inc.

Colleen L. Mooney
Ohio Partners for Affordable Energy
231 West Lima Street
Findlay, Ohio 45839-1793
cmooney@ohiopartners.org

Counsel for Ohio Partners for Affordable Energy

Steven T. Nourse
Matthew J. Satterwhite
Yazen Alami
American Electric Power Service Corporation
1 Riverside Plaza 29th Floor
Columbus, Ohio 43215
stnourse@aep.com
mjsatterwhite@aep.com
yalami@aep.com

Counsel for Ohio Power Company

Christopher J. Allwein
Todd M. Williams
Williams Allwein and Moser, LLC
1500 West Third Avenue, Suite 330
Columbus, Ohio 43212
callwein@wamenergylaw.com
toddm@wamenergylaw.com

Counsel for the Sierra Club

Rebecca L. Hussey
Carpenter Lipps & Leland LLP
280 Plaza, Suite 1300
280 North High Street
Columbus, Ohio 43215
Hussey@carpenterlipps.com

Counsel for The Kroger Company

Douglas E. Hart
441 Vine Street
Suite 4192
Cincinnati, Ohio 45202
dhart@douglasehart.com

Counsel for The Greater Cincinnati Health Council

M. Howard Petricoff
Michael J. Settineri
Gretchen L. Petrucci
Vorys, Sater, Seymour, and Pease, LLP
52 East Gay Street
P.O.Box 1008
Columbus, Ohio 43216-1008
mhpetricoff@vorys.com
mjsettineri@vorys.com
glpetrucci@vorys.com

Counsel for Constellation NewEnergy, Inc. and Exelon Generation Company, LLC

Cynthia Fonner Brady
Exelon Business Services Company
4300 Winfield Road
Warrenville, Illinois 60555
Cynthia.brady@constellation.com

For Constellation NewEnegy, Inc.

David I. Fein
Vice President, State Government
Affairs - East
Exelon Corporation
10 South Dearborn Street, 47th Floor
Chicago, Illinois 60603
David.fein@exeloncorp.com

For Exelon Corporation

Lael Campbell
Exelon
101 Constitution Avenue, NW
Washington, DC 2001
Lael.Campbell@constellation.com

For Constellation NewEnergy, Inc.

M. Howard Petricoff
Special Assistant Attorney General
Vorys, Sater, Seymour, and Pease, LLP
52 East Gay Street
P.O. Box 1008
Columbus, Ohio 43216-1008
mhpetricoff@vorys.com

M. Howard Petricoff
Michael J. Settineri
Gretchen L. Petrucci
Vorys, Sater, Seymour, and Pease, LLP
52 East Gay Street
P.O.Box 1008
Columbus, Ohio 43216-1008
mhpetricoff@vorys.com
mjsettineri@vorys.com
glpetrucci@vorys.com

Counsel for Miami University and the University of Cincinnati

Justin Vickers
Environmental Law & Policy Center
35 East Wacker Drive, Suite 1600
Chicago, Illinois 60601
jvickers@elpc.org

Counsel for the Retail Energy Supply Association

Gregory J. Poulos
EnerNOC, Inc.
471 E. Broad Street, Suite 1520
Columbus, Ohio 43215
gpoulos@enernoc.com

Counsel for the Environmental Law & Policy Center

Counsel for EnerNOC, Inc.

Samantha Williams
Natural Resources Defense Council
20 N. Wacker Drive, Suite 1600
Chicago, Illinois 60606
swilliams@nrdc.org

Counsel for the Natural Resources Defense Council

Thomas J. O'Brien
Bricker & Eckler LLP
100 South Third Street
Columbus, Ohio 43215-4291
tobrien@bricker.com

Counsel for the City of Cincinnati

Rick D. Chamberlain
Behrens, Wheeler, & Chamberlain
6 N.E. 63rd Street, Suite 400
Oklahoma City, OK 73105
rchamberlain@okenergylaw.com

Counsel for Wal-Mart Stores East, LP and Sam's East, Inc.

Donald L. Mason
Michael R. Traven
Roetzel & Andress, LPA
155 E. Broad Street, 12th Floor
Columbus, Ohio 43215
dmason@ralaw.com
mtraven@ralaw.com

Counsel for Wal-Mart Stores East, LP and Sam's East, Inc.

EXHIBIT

A

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

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

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 _____.

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 representative of residential customers of Duke Energy Ohio and has filed (or expects to file) 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; provided, however, that the Parties may agree in writing, pursuant to Section 9(c), below, to modify this definition such that other legal proceeding(s) may be included with the definition of the term "Proceeding" and, provided further, that the specific reference to the ability of the Parties to agree in writing to modify such definition does not alter the Parties' ability to modify other provisions of this Agreement or the requirement that such other modification requires written agreement.

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 other party is included on a list of parties so bound, which list will be maintained and updated as necessary by the Company. Furthermore, the Recipient shall abide by any restrictions that are set forth on such list and shall, also, ensure that all individual party representatives to whom disclosure is made have signed the Nondisclosure Certificate required by this Confidentiality Agreement and have returned such certificate to Duke Energy Ohio.

3) In connection with the Proceeding, the Recipient may also disclose Confidential Information to (a) employees of the Commission or (b) counsel for the Commission or for Commission employees.

4) In the event the Commission requires disclosure of Confidential Information, the Recipient shall follow the procedures set forth in paragraph 6, below.

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 other party is included on a list of parties so bound, which list will be maintained and updated as necessary by the Company. Furthermore, the Recipient shall abide by any restrictions that are set forth on such list and shall, also, ensure that all attorneys to whom disclosure is made have

signed the Nondisclosure Certificate required by this Confidentiality Agreement and have returned such certificate to Duke Energy Ohio.

3) In connection with the Proceeding, the Recipient may also disclose Confidential Information to (a) employees of the Commission or (b) counsel for the Commission or for Commission employees.

4) In the event the Commission requires disclosure of Highly Confidential Information, the Recipient shall follow the procedures set forth in paragraph 6, below.

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 in any legal proceeding (whether before the Commission or any other court or agency) 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 public records officer, the Recipient is legally compelled to disclose. A copy of such written opinion shall be provided to Duke Energy Ohio.

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, but the measure of such damage is difficult to quantify. The Parties stipulate and agree that monetary damages would therefore 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. In addition to any legal remedies and any sanctions that may be imposed by the Commission or a court of competent jurisdiction 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. Thus, Duke Energy Ohio may, in addition to any other remedies that might otherwise be available to it, seek 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 Commission issues a final order in the Proceeding, assuming it is not appealed to the Ohio Supreme Court.

b. If appealed to the Ohio Supreme Court, such Court issues its opinion, assuming it is not remanded to the Commission.

c. 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 after it has complied with its records retention schedule(s) pertaining to the Confidential Information or Highly Confidential Information, either return to Duke Energy Ohio or destroy (as instructed by Duke Energy Ohio) the 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. Furthermore, the terms of this Agreement shall remain in full force and effect after the final conclusion of the Proceeding.

The Recipient shall, within 15 days of the conclusion of its required record retention period, provide written, notarized and sworn certification of its compliance with this section. The Parties acknowledge that failure to abide by the requirements of this section may result in Duke Energy Ohio not being willing to enter into similar confidentiality agreements in future cases.

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 _____: _____

_____

_____

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.

_____

_____

_____

_____

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

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: _____

EXHIBIT

B

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 §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

PROCEEDINGS

before Ms. Christine M. T. Pirik and Mr. Nick Walstra, Hearing Examiners, at the Public Utilities Commission of Ohio, 180 East Broad Street, Room 11-A, Columbus, Ohio, called at 1:30 p.m. on Tuesday, August 12, 2014.

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ARMSTRONG & OKEY, INC.
222 East Town Street, 2nd Floor
Columbus, Ohio 43215
(614) 224-9481 - (800) 223-9481
FAX - (614) 224-5724

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Tuesday Afternoon Session,

August 12, 2014.

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EXAMINER PIRIK: This is in the Matter of the Application of Duke Energy Ohio, Inc. for Authority to Establish a Standard Service Offer Pursuant to Section 4928.143 of the Revised Code in the Form of an Electric Security Plan, Accounting Modifications and Tariffs for Generation Service, and for Authority to Amend its Certified Supplier Tariff, PUCO No. 20., Case Nos. 14-841-EL-SSO and 14-842-EL-ATA.

My name is Christine Pirik, and with me is Nick Walstra, and we are the Attorney Examiners assigned to hear this case.

At this time I will take appearances on behalf of the parties. On behalf of the company.

MS. SPILLER: Good afternoon, your Honor. Amy Spiller, Elizabeth Watts, and Jeanne Kingery for Duke Energy Ohio.

EXAMINER PIRIK: We'll go right around the table.

MR. VICKERS: Good afternoon. Justin Vickers for the Environmental Law and Policy Center.

MS. GRADY: Thank you, your Honors. On

behalf of the Ohio Consumers' Counsel, Bruce J. Weston, Maureen R. Grady, Joseph P. Serio, and Tad Berger.

MR. HART: On behalf of the Greater Cincinnati Health Council, Douglas E. Hart.

MS. BOJKO: Thank you, your Honors. On behalf of the Ohio Manufacturers' Association, Kimberly W. Bojko and Mallory M. Mohler with Carpenter, Lipps & Leland, 280 North High Street, Suite 1300.

MR. HOWARD: Thank you, your Honors. On behalf of the Retail Energy Supply Association, Constellation NewEnergy, Inc., Exelon Generation Company, LLC, Miami University, and The University of Cincinnati, please show the appearance of the law firm of Vorys, Sater, Seymour, and Pease, 52 East Gay Street, Columbus, Ohio 43215, by M. Howard Petricoff, Michael J. Settineri, Gretchen L. Petrucci, and Stephen M. Howard. Thank you.

MR. ALLWEIN: Good afternoon, your Honors. On behalf of the Sierra Club, Christopher J. Allwein, Williams, Allwein and Moser, 1500 West Third Avenue, Suite 330, Columbus, Ohio 43212.

MR. OLIKER: Thank you, your Honor. One more try. Thank you, your Honor. On behalf of

Interstate Gas Supply, Inc., Joseph Oliker and Matt White, 6100 Emerald Parkway, Dublin, Ohio 43106.

MR. DARR: On behalf of IEU-Ohio, Frank Darr and Matt Pritchard.

MR. DOUGHERTY: Thank you, your Honor. On behalf of the Ohio Environmental Council, Trent Dougherty, 1207 Grandview Avenue, Suite 200, Columbus, Ohio 43212.

MR. O'BRIEN: Good afternoon, your Honors. On behalf of the City of Cincinnati, Bricker & Eckler, LLP, by Thomas J. O'Brien, 100 South Third Street, Columbus, Ohio 43215. Thank you.

MR. BOEHM: Good afternoon, your Honors. Kurt Boehm, appearing on behalf of the Ohio Energy Group.

MS. MOONEY: On behalf of Ohio Partners for Affordable Energy, I'm Colleen Mooney.

MR. CASTO: Thank you, your Honor. On behalf of FirstEnergy Solutions, Corp., Scott Casto.

MS. HUSSEY: Good afternoon, your Honors. Rebecca Hussey, on behalf of the Kroger Company.

MR. BEELER: On behalf of the Staff of the Public Utilities Commission of Ohio, Ohio Attorney General Mike DeWine, Steven Beeler, Ryan O'Rourke, and Thomas Lindgren, Assistant Attorneys

General, 180 East Broad Street, Columbus, Ohio.

EXAMINER PIRIK: Thank you. Is there anybody else who's not sitting at the table?

MR. CLARK: Your Honor, on behalf of Direct Energy Services, LLC, and Direct Energy Business, LLC, Joseph M. Clark.

EXAMINER PIRIK: It's our understanding that there are several motions that are pending. I will list the motions as I understand that are pending and then we will take them one at a time.

The first motion we have is a May 29th, 2014, motion that was filed with the application, regarding Mr. Arnold's testimony.

The second motion I have is one that was filed on July 8th, 2014, which is a Duke motion for protective order regarding a protective agreement.

The third one I have is a July 18th, 2014, motion filed by OCC, requesting abeyance of our ruling on Duke's motion for protective order.

And the fourth one I have is a July 18th, 2014, OCC motion to compel responses to discovery.

Are there any other filed motions that I haven't listed on this item that we need to discuss today?

Okay. So we'll start with the July 8th,

2014, Duke motion for protective order. I'm going to ask the parties, even though we have filings, I'm going to ask the parties to make their arguments and anything that they have to say on the record at this time.

So I'll look to you, Ms. Spiller.

MS. SPILLER: Thank you, your Honor. Actually, Ms. Kingery will be arguing the motion on the Company's behalf.

EXAMINER PIRIK: Ms. Kingery.

MS. KINGERY: Thank you, your Honor.

EXAMINER PIRIK: I don't think your microphone is on. There you go.

MS. KINGERY: How's that?

EXAMINER PIRIK: It's good.

MS. KINGERY: All right. Thank you, your Honor.

It's important, as we think about the confidentiality agreement today, to keep in mind that the information in question is proprietary information that belongs to Duke Energy Ohio. We are happy to share it in this proceeding under appropriate protections, but we are interested in protecting the company against the financial harm that it would incur by the unauthorized release of

this information.

There was a prior agreement -- is this still working? Yes.

There was a prior agreement that we have used in previous years, and we do not, at this point, feel that it's appropriate at this time. We don't feel that it protects the company appropriately under today's circumstances. This is a different world than it was some years ago when that agreement was evaluated by the Commission and approved for some specific purposes.

At this point, we have a market out there that's well developed and much competition and there are numerous ways in which that competitive market can impact the company and ways in which the confidential information can indeed also affect that market.

So we've drafted a new agreement that is intended to still be fair and still allow people the opportunity to get this information and use it in this proceeding, but we want to have it a little tighter than it's been in the past.

When we first put this agreement out into the hands of the intervenors in this proceeding, we heard a number of concerns, not from all parties but

any...breach." So you're talking about breach in the context of the Commission having some jurisdiction, but then, at the end, you're excluding Commission jurisdiction and stating that everything has to be dealt with in Hamilton County.

EXAMINER PIRIK: Okay. Any other party?

Mr. Howard.

MR. HOWARD: Your Honors, RESA, Constellation and Exelon asked for this last week, and we just got ours -- our copy last night. So I haven't had a chance to review it. We would be concerned with assumptions of injury, indemnification provisions. And for RESA's sake, I'm not sure that, as a trade association, we're able -- we may or may not be able to sign this type of thing because I think this deals primarily with individual parties. Thank you.

EXAMINER PIRIK: Any other party?

Mr. Oliker.

MR. OLIKER: Thank you, your Honor. I would reiterate many of the points that Ms. Grady said, as well as Mr. Howard.

Additionally, I would note that provision 6.a. could be potentially problematic regarding motions to strike and retention of documents that

only OCC, I believe, is allowed to retain a copy under public records law.

The purpose of this agreement is to protect confidential information, and to the extent the information is being held confidential, it shouldn't be a problem if a party were to retain it, at least one copy. If you look back to the Duke MRO case, that's the way Duke's confidentiality agreement read.

And, by doing that, that allows a party to determine, at a later date, if Duke is not making statements that are necessarily consistent between applications, and we know this has been a problem with this company if you look at the capacity case and the Duke MRO case.

Whether or not the information can be used in each case is a different question, but at least it provides a basis for requesting information from past cases in discovery.

So I would note that parties should be allowed to retain at least one copy.

EXAMINER PIRIK: Anyone else?

MR. ALLWEIN: Just a couple things, your Honor. One, I would support the comments of the previous parties, in particular their comments

may get different agreements?

MS. KINGERY: That has not happened yet.

MR. ALLWEIN: Okay. All right. I'm sorry.

MS. KINGERY: We only have one. But if there were any --

MR. ALLWEIN: I see.

MS. KINGERY: -- then it would be listed on that list. And the goal here was to avoid having you have the burden to come to us and say is it okay if I talk with whoever.

MR. ALLWEIN: All right. Thank you. That's all I have, your Honors. Thank you.

MS. KINGERY: Then, your Honors, I would like to respond at some point to various comments.

EXAMINER PIRIK: I want to be sure that we're all on the same page and we're talking about the same number of issues and the exact issues before we move on and have any responses of any kind.

So I find, based upon the conversation and the discussion and the motions and replies that we've just had, that there are seven issues before us right now that we need to help resolve with regard to the protective order.

The first one being the Section 2 issue

with regard to the confidentiality language. It's on page 3, Section 2, the "will injure" language. That's No. 1.

No. 2 is found in Section 7, page 7. The first issue in that paragraph has to do with the language: "would likely damage"; "would likely be material"; and "will suffer irreparable harm." That's what I'm considering the second issue.

The third issue is the concern that OCC has with regard to indemnification. And, Mr. Howard, you mentioned indemnification --

MR. HOWARD: Yes.

EXAMINER PIRIK: -- as well.

The fourth issue has to do with the sovereign immunity issue raised by OCC.

The fifth issue has to do with the issue brought up on page 6, Section 6.a., Ms. Bojko brought up with regard to the opposition of the motion, and the concern that I believe Mr. Oliker brought up that parties should be able to retain at least one copy of documents for other proceedings.

The sixth issue is what Ms. Bojko brought up on page 7. The last part with regard to the bond issue and the limitation of the penalty.

And the seventh issue has to do, on page

9, Section 9.e., with regard to the Hamilton County court and whether or not that excludes Commission jurisdiction.

Are we all on the same page? Did I miss anything? And my intent is, then, to go down the list and actually make decisions based upon those items and have the protective agreement revised according to whatever our rulings are.

Ms. Bojko.

MS. BOJKO: Your Honor, I would just -- you talked about Section 2, page 3, the "will injure" But I think embedded in that, as well as Section 7, there's the idea that there's a presumption of confidentiality. I'm not sure you said that.

EXAMINER PIRIK: I believe that I encompassed that actually in the Section 7, the beginning, the first part of that Section 7 issue.

MS. BOJKO: Thank you.

EXAMINER PIRIK: And to the extent that that would affect that paragraph in general, our ruling would apply equally.

Okay. Ms. Kingery.

MS. KINGERY: Thank you, your Honor.

First of all, with regard to the major issue of the presumption of confidentiality and

So that's what the language is there for. It's not there as part of some unlimited level of damages that might be assessed. There was no effort in here to either limit or not limit monetary damages. Indeed, the old agreement that OCC wants to use had nothing in it about damages; therefore, all damages are unlimited. There's no cap under that agreement as to damages and the level that might be calculated.

No. 3 was indemnification. I understand that it's in the old agreement. That doesn't make it right. We certainly have a right to attempt to change agreements that we've signed, going forward, as they relate to other cases, and this is one that we think is reasonable to change. There's no reason why Duke Energy Ohio should be indemnifying OCC's compliance with the public records laws.

As to the sovereign immunity, we're happy to add that provision. That's not a problem.

Your fifth item, this related to Section 6.a. and the question of whether parties, other than the OCC, should get to retain a copy. And this is very interesting. It goes to the crux of confidentiality agreements and how they are generally structured, including the old one that we have

previously used.

Confidential information is released by the utility to the parties in a case for purposes of that case only. If the information is returned to the utility or if it's destroyed, then we can be confident that it's not going to be inappropriately used.

Now, we understand that OCC is under statutory requirements to maintain records for certain lengths of time. We understand that. That's not a problem. Other parties are not.

And the suggestion that other parties would want to keep a copy of our confidential information so they could look at it in the context of another case and make decisions about how to represent their clients and oppose us in that subsequent case on the basis of old confidential information is astonishing, absolutely astonishing, because they all have signed documents that say we will use this information only in this proceeding.

Just because they don't plan to admit it into or attempt to admit it into the record in a subsequent case, doesn't mean that they're not using it. So it must be returned or destroyed. It's critical. That was No. 5.

No. 6 was the bond. And the suggestion was made that this would be contrary to state law because there's a bond requirement of the Supreme Court. But we're not talking about the Supreme Court. We're not talking about appeals here.

We're talking about original actions where there's been a breach of a contract and we're trying to get an injunction. And Duke Energy Ohio should not be out the money for the bond just because it's trying to prevent continued breach of its contract.

The Hamilton County court issue has also been blown out of proportion here. The Commission has what jurisdiction it has. Our contract cannot, under any circumstances, change the Commission's jurisdiction nor are we attempting to.

But the Commission generally does not have jurisdiction over breach of contract cases. There are aspects of this confidential information dispute that the Commission certainly has jurisdiction over. There are others that it may not. Where we would end up in a court of competent jurisdiction outside of the Commission, that is where we wish to have it take place, in Hamilton County.

One other point that I would add as to

using information from one case in determining strategy in another case, I am fairly sure that if you would compare our agreement with the agreements that are signed with other utilities in the state of Ohio, I doubt there are other utilities that would allow confidential information to be used in that way, in subsequent proceedings. That's all, your Honor. Thank you.

EXAMINER PIRIK: Thank you. I believe we received the replies that we needed on one through four, but I think we still, I think I will allow the other parties to respond with regard to No. 5, No. 6, and No. 7. Beginning with Section 6.a., the second part of Section 7, and Section 9.e. So does anyone have any response to what Ms. Kingery said?

MS. BOJKO: Yes, your Honor.

I would say I appreciate Counsel's explanation in representations that the agreement wasn't intended to do certain things, but the words are in the agreement and they actually require that.

It says a bond by a competent -- court of competent jurisdiction. That would be a Supreme Court -- the Supreme Court. So although it wasn't the intent, that's what the words say. The words say you can't oppose a motion in another proceeding or a

venue and implies the permanency of such confidential treatment. I think that that's problematic.

The words say it provides exclusive jurisdiction in the last paragraph in e., and it requires the parties to consent to that court. So even though there may be some issues that are under the Commission's jurisdiction, that's not what you're agreeing to under this context.

So while I appreciate the explanations, I think that we just need to work to make sure the agreement says exactly what the intent is with regard to acknowledging confidentiality, and what you can or cannot oppose, and who has jurisdiction in which context. Thank you, your Honor.

EXAMINER PIRIK: Anything else from anyone?

MR. OLIKER: Just a short follow-up, your Honor. If I understand Duke's position, it's if it makes statements in discovery or testimony, sworn statements, and they're are under seal, then it gets a clean slate in a new case. I don't think that's the case. That's not the purpose of a confidentiality agreement. It's to protect those statements from disclosure.

And to allow one party to hold onto those

statements and potentially ask for them to be reproduced later, I don't think that that is unreasonable. So long as they give the appropriate safeguards to these statements, it shouldn't be damaging Duke's business interests, and, if anything, it will keep the record more clear for the Commission in these proceedings.

EXAMINER PIRIK: Anything else?

MR. CASTO: Yes, your Honor. I didn't get a chance to have any initial comments. I haven't seen the agreement between Duke and OEG. I had some communication problems with Ms. Kingery. So I think that our issues can be resolved if I can just see that and probably agree to it. I don't know if I'm going to have a chance because your Honor said you're going to rule from the Bench, but, for what it's worth, I think our issues are resolved with the agreement that was signed between OEG and Duke.

EXAMINER PIRIK: Okay. Anything further?

Let me start by saying it's difficult to, and I think OCC brings this up in one of their filings, it's difficult to understand a protective agreement and how it's going to be applied unless you're actually looking at the information. I think this Bench especially, I've been very consistent

through all of the cases that I've presided over, and intend on being very consistent with this case as far as what the Bench believes is confidential, and that's extremely limited items and documents.

And so, it concerns me that while I understand the need, perhaps, to tighten up some of the issues that the company's concerned about in a protective agreement, and I appreciate that, and I look at the protective agreement and I see where the company is coming from because of the market changes and things that have progressed since the last time these agreements have been entered into.

You know, I have concerns about what the company is marking confidential and what they're going to be proposing as confidential in the record. And I think that's evidenced by the attachments to Mr. Arnold's testimony. The documents that I looked at are far from what we had discussed in previous cases, including the MGP and the capacity case, as far as what is confidential.

And I was disappointed, I guess I should say, to see the documents, in whole, trying to be put in the record as a confidential document when in fact we had many conversations about what's confidential. So I was really disappointed when I looked at the

document.

Of course, given the fact that it is marked confidential, and I understand the parties haven't gotten to see it yet, you know, obviously we're not going to rule on that today, but I bring up that motion is still pending and we'll rule on that at the hearing itself. And once I finish resolving the issues that we have before us right now, these seven issues we have, then we'll talk more about what the process can be for alleviating the Bench's concern with regard to those documents.

That being said, I do understand that the documents you're providing parties are part of discovery, may or may not be put into the record, may or may not be something that the Bench will ultimately see; however, you know, I would expect that the company would use the same diligence in redacting out of those documents, so that it's very limited, so everyone really understands what's confidential.

And I'm not so certain that it would be so difficult signing a confidentiality agreement, holding people to a higher standard, if in fact that very limited scope was put on the documents that you were turning over in discovery just like you were

turning over to the Bench.

So, you know, that being said, to expect parties to sign, you know, kind of a document that holds them in breach of items that may or may not be confidential, is a concern. I just don't see how that would work.

In other words, they could be held in breach for releasing something that was determined by the Bench not to be confidential just because it was marked confidential by the company and handed over during discovery.

So that is a concern and I don't see how that really works in the whole scheme of really what, at least this Bench, has been trying to resolve as far as documents that are brought forth in Duke cases.

And I understand that there are other examiners that deal with AEP and FirstEnergy, and you all have probably experienced different rulings from other Benches, but this Bench, at least, has been really consistent.

So, that being said, let's go through each of the items and we'll make our rulings on those items.

I'll take the first item which is Section

And we have our processes, which I believe are set forth in the agreements, as what would be followed if you were requested the information. But I don't think that it is appropriate to put that kind of indemnification into the protective agreement, at least what's before us right now.

That takes care of issues one through four. We turn to No. 5. We're looking at paragraph 6.a.

This is one of those issues that, again, is made very difficult because I do know, I do remember and I do recall what happened last year with regard to the gas rate case and exactly the difficulty that was had with the information in trying to recall and trying to rebuild that information.

But it's also made more difficult by the fact that I think confidentiality and what's provided in discovery, again as I said, has turned into a broad spectrum as opposed to the more narrow spectrum that the Commission at least considers confidential and that ultimately may or may not be considered confidential by other courts of competent jurisdiction.

So, I mean, this is a difficult -- this is a difficult call. But I don't think that parties should be required to -- I think there should be a limit on parties not being able to divulge confidential information.

And if it's important to limit those individuals because it's highly confidential and, perhaps, only the attorneys should see the information and, therefore, they're also subject to the attorney requirements as far as ethics go on highly confidential information, then I can see that that would be appropriate.

But I don't see, if parties receive information via discovery in a case, there are always subsequent cases, there are always subsequent cases that relate to previous cases, and there's always information that is needed for the client in subsequent cases referring to previous cases.

I think this language needs to -- needs to allow parties to retain some information, at least one copy, and I think there should be the ability, you know, I do not think that the parties should be required to sign away their ability to make arguments in subsequent cases. I mean, those decisions will be made by the Bench in a given proceeding.

MS. SPILLER: Your Honor, if I may just, I guess some clarity because I'm trying to understand practically how that may play out. And I think, as the Bench is fully aware, discovery, particularly in Commission proceedings, is voluminous and broad, and we have endeavored, particularly in this case, to be mindful of what truly we believe to be confidential.

All told, we probably have 250 discovery requests that we've answered, another 130 in the pipeline from the OCC alone. Of those, 11 of the responses have been marked confidential. So we've been pretty thoughtful, I believe.

So that I understand the Bench's ruling, if I produce confidential information in this case, information that may never see the light of day in respect of the hearing or what may ultimately be offered into evidence, a party may, three, four years down the road, pull out that confidential information from this ESP proceeding and use it in, hypothetically, an electric distribution rate case.

I'm just trying to understand sort of the import of the ruling and what the parties are being allowed in respect of information in this case that they may want to seek discovery of, knowing that, oftentimes, we may object to relevance, but then

answer over that objection in producing discovery in a good-faith effort to comply with the spirit of the rules.

EXAMINER PIRIK: So, I'm not sure that I am making it clear, but I hear what you're saying, but, obviously, all arguments, including the fact that that information was provided in this proceeding not for the purpose of that subsequent proceeding, and any motion to strike that you would like in that subsequent proceeding, of course, you know, I'm not aware of what that would be, but those issues would be resolved in that subsequent proceeding.

Whether or not in that proceeding that information would be allowed to be presented, whether or not you would argue to strike that information, if it's relevant or, in discovery situations, likely to lead to relevant information, if it's relevant information for the proceeding at hand, as long as all the parties are aware and the company is aware that that information is being presented, then I don't -- and the company has sufficient time to review the information, I don't see what the problem is with it.

And I understand what you're saying is that there's only 11 documents so far that you've

marked as confidential. But, again, it could be, I don't know -- it's alleged confidential, I don't know whether it's confidential or not, and we may never see it here in this case.

But to say that the information was provided, and to determine, here and now, that it's not a relevant document for a subsequent proceeding, I just -- I don't think that's appropriate for this Bench to make that decision. I think those arguments need to be made at a later time.

MS. SPILLER: And would you envision, then, your Honor, intervenors disclosing, beforehand, previously-produced confidential information that they intend to use in a subsequent proceeding?

EXAMINER PIRIK: I think there are obviously different avenues that parties can go through to determine what information is and what information is not being used, by way of requests for documents, by way of interrogatories and so forth that you do during the course of discovery.

MS. SPILLER: And the response, I will tell you, your Honor, we've asked the question, it's attorney work product. Documents to be used at trial, evidence to be introduced at the hearing has yet to be determined. Typically, and I think it's

customary in litigation, the response that you get is that that's attorney work product.

And I ask the question, because as the Bench recalls, I mean we were caught flat-footed without a prior agreement to which to refer when previously-produced confidential information was offered last year.

So I just want to be sure that there is an opportunity for equity. So that if parties intend to pull out three-year-old confidential information, we have the opportunity to be prepared to respond to that.

And so, you know, I feel like we're somewhat between a rock and a hard place if people aren't going to tell us. And they may not know right away, but if they're not going to tell us what documents they're going to use to cross-examine a witness, I don't know how I bring in every single case record in which we may have shared confidential information so that we're doing the best we can to protect our client's interests.

EXAMINER PIRIK: And, again, I guess, you know, I don't recall necessarily all the specifics of the information that we looked at in the last proceeding, but I know that not all of it was deemed

confidential that was presented even in that context.

So I would say that sufficient time was given in that proceeding, even though the information had been received in a previous proceeding, to ensure that proper questions were allowed the company to be presented and that everyone was given their due process rights with regard to that information. And I would anticipate that that would be the same in any subsequent proceeding to this one. Any rights that you have, any due process rights that any party has, will likewise be found in subsequent proceedings.

MS. SPILLER: I would assume, your Honor, I guess a final question if I may, in connection with your comments with regard to paragraph 6, is to the extent future use may be contemplated, it's controlled. I have no way to police what 25 parties and their experts and consultants may do with my information, and that is a concern.

And so, to the extent that parties can keep an active file and continually root through our confidential information, I don't know what they're doing, how they may be using it. And so, that really is one of the drivers, based upon some recent past experience, for why we had asked for the information to be destroyed or returned.

EXAMINER PIRIK: I do understand that. And, again, I understand that it's alleged confidential information, that's why I think it behooves the company to be very strict in what they consider confidential so that you're aware specifically of what's out there and all parties are aware of what they can and cannot disclose. I think that's really important. I think it's really important.

MS. BOJKO: Your Honor --

EXAMINER PIRIK: Yes.

MS. BOJKO: May I?

EXAMINER PIRIK: Ms. Bojko.

MS. BOJKO: There's an underlying assumption from the company that once something is confidential, it's always confidential. And I think the concern that I have with removing this language of never being able to oppose that is just that. You have to be able to oppose that it is subsequently confidential. It could become public if it's been out there for two or three years. It's not always confidential. And we saw that with marketing data, for instance, in previous cases.

So, you know, the company is worried about a concern of ongoing confidentiality. I would

just add that the concern from the other side is that it may no longer be confidential and we should have the right to challenge it.

EXAMINER PIRIK: Those determinations -- well, we'll make the determination in this case as to what comes before us as alleged relevant information and, subsequently, that will be made in those subsequent cases.

But, at this time, the Bench finds that this paragraph, 6.a., should be revised in accordance with the ruling, and you should work with the parties as far as the language goes.

With regard to the second part, it's issue No. 7 that I listed. The posting of a bond.

I just don't see why that language needs to be within here. I mean, I understand, I'm not really looking at either the Supreme Court argument about a bond or not a bond, but just in general, I think the bond issue is something that the courts will determine, and what the parties argue with regard to that, the parties should be allowed to make whatever arguments they view is appropriate, and the court should be allowed to make that determination.

And, finally, with regard to issue No. 7, which is in paragraph 9.e. I do understand where the

company is coming from with that, but I don't think it's clear in this language. So I think the language needs to be clarified to recognize the jurisdiction of the Commission and, you know, make sure that it's the appropriate -- whatever the appropriate forum is, whatever the appropriate venue is. And as long as it's clarified within that context, I think it should be fine.

Are there any questions with regard to the rulings on No. 5, 6, or 7?

MS. KINGERY: Your Honor, on No. 7. So what you're saying is that that language should just identify that the governing law and venue, it would either be here at the Commission, or, if jurisdiction is found in a court, then in Hamilton County.

EXAMINER PIRIK: The Bench would be fine with that.

MS. KINGERY: Thank you.

EXAMINER PIRIK: Are there any questions with regard to the rulings on one through seven?

It's our hope that, at least by the end of this week, that the parties, who are trying to resolve the confidentiality agreements, will be able to come to some resolution of those issues.

I think the company understands where

we're going with this, and I think that they will use their best efforts to look at the agreement and revise it, and hopefully the parties will be able to resolve this, and the information can be provided as soon as possible.

Are there any other issues to come before us?

MR. DARR: Your Honor, one question.

EXAMINER PIRIK: Mr. Darr.

MR. DARR: Thank you, your Honor. If there remain to be sticking points, how would you like us to proceed? Since we haven't definitively drafted the language at this point.

EXAMINER PIRIK: Actually, I think the Bench has been pretty clear. I'm really pushing the parties to resolve the issues. I'm really pushing the parties because the only other option would be to delay the proceeding. I don't know what else to say. And that would be problematic from the Bench's perspective because we understand our timeline as far as getting a decision out of the Commission, and I think everyone understands the situation with regard to the proposed auction schedule. So I guess I am anticipating that the company is going to work with parties to resolve the issue.

EXHIBIT

C

§ F10:13 Stipulated protective order: Confidential business information and trade secrets

[*Caption, §§F4:5 to F4:24*]

STIPULATED PROTECTIVE ORDER

During the course of this action, the parties hereto may seek discovery of information which the other party considers to constitute trade secrets or confidential or proprietary financial, business, or commercial information or know-how, and the parties having stipulated to the entry of this protective order pursuant to Civil Rule 26(C), and good cause appearing, it is hereby ordered as follows:

1. For the purposes of this Order, "Confidential Information" shall mean all material or information which a party considers to contain or to constitute trade secrets or confidential or proprietary financial, business, or commercial information or know-how, and which has been so designated by a party in the manner set forth hereinafter. If a party desires to designate as "Confidential Information" information contained in documentary form or in an object, such party shall stamp or affix thereto, or alternatively on the portion thereof containing the "Confidential Information," the legend: "Confidential Information," or "Confidential Information, Subject to Protective Order in Case No. [*number*], Court of Common Pleas for [*name of county*] County, Ohio." Any information contained in any document or object so designated shall be handled in accordance with this Order.

2. All "Confidential Information" not reduced to documentary, tangible, or physical form or which cannot be conveniently designated pursuant to Paragraph 1, shall be designated by the party by so informing the other party in writing. Information testified to during a deposition may be brought within the protection of this Order by making a statement to that effect at the deposition, or by thereafter informing the other party to that effect in writing within thirty days of the day that the party seeking protection receives the transcript of the deposition in question.

3. All "Confidential Information" shall be retained by counsel receiving same and shall be used by them only for purposes of this litigation and not for any business or commercial purpose.

4. [*Alternative 1:*] All "Confidential Information" shall be made available and disclosed only to counsel's office staff, to counsel's client, and to persons retained to assist in the preparation for trial of this lawsuit, and only on condition that such office staff, client, or retained person be shown a copy of this Protective Order and agrees to use the "Confidential Information" only for purposes of this litigation and not for any business or commercial purpose and agrees not to disclose the "Confidential Information" to any other person.

[*Alternative 2:*] All "Confidential Information" shall be made available and disclosed only to counsel's office staff and to persons retained to assist in the preparation for trial of this lawsuit, provided that under no circumstances is any "Confidential Information" to be

made available or be disclosed to any officers, directors, or employees of counsel's client, and disclosure to counsel's office staff and such retained persons is to be made only on condition that such office staff or retained person be shown a copy of this Protective Order and agrees to use the "Confidential Information" only for purposes of this litigation and not for any business or commercial purpose and agrees not to disclose the "Confidential Information" to any other person.

5. All documents of any nature, including briefs, motions, transcripts, etc., which are filed with the Court for any purpose and which contain "Confidential Information" shall be filed in sealed envelopes or other sealed containers marked with the caption and title of this action, and identifying each document and thing therein and bearing a statement substantially in the following form:

CONFIDENTIAL

BY ORDER OF THE COURT, THIS ENVELOPE CONTAINING THE ABOVE-IDENTIFIED [*PAPERS/THINGS*] FILED BY [*NAME OF PARTY*] IS NOT TO BE OPENED NOR THE CONTENTS THEREOF DISCLOSED OR REVEALED TO ANY PERSON OTHER THAN THE COURT OR ATTORNEYS OF RECORD FOR THE PARTIES EXCEPT UPON FURTHER COURT ORDER

6. Upon final disposition of this action or once participation in this action by a party or any person representing or retained by the party has been concluded, all materials which have been designated or marked in accordance with this Protective Order shall be returned to the party which designated or marked same, and all notes, memoranda, and other papers containing "Confidential Information," except correspondence, memoranda of counsel, and such materials as have become part of the official record of this action, shall be destroyed. All materials which are subject to this Protective Order and which are not returned or destroyed shall nonetheless remain subject to the provisions of this Protective Order.

7. If a party desires relief from this Order or desires a modification of this Order, they may file an appropriate motion, which will be given due consideration.

It is so ordered.

_____ _____

Date Judge

Stipulated and agreed to by:

_____

Attorney for Plaintiff

_____

Attorney for Defendant

EXHIBIT

D

LexisNexis(R) Forms FORM 502-26:10C

Litigation
Agreement
Ohio

Form 26:10C Stipulation for Entry of Protective Order Governing Documents Containing Commercial and Financial Information

CIVIL RULE 26(C)

COURT OF COMMON PLEAS, ...COUNTY, OHIO

(*Title of action*) No. .....

1. This stipulation follows defendants' objections to the production of all or portions of the following documents (the "confidential commercial documents") requested by the plaintiffs on the ground that they contained confidential commercial or financial information. Defendants, however, stated their willingness to produce the documents for copying and review under "an appropriate protective order." Plaintiffs thereupon informed the Court that they would not press their motion to compel with respect to these documents, but would first attempt to agree on a protective order with defendants.

2. it is, accordingly, hereby agreed and stipulated:

(a) Plaintiffs' counsel is defined to mean outside counsel retained by plaintiffs in this litigation and those employees of outside counsel necessary to assist in this litigation. Plaintiffs' counsel is defined to expressly exclude house counsel or any other employee of the plaintiffs.

(b) Confidential commercial document is defined to mean any document enumerated above or subsequently enumerated.

(c) Defendants will produce for inspection and use one copy of each confidential commercial document for each plaintiff's counsel within two days after approval by the Court of this stipulation. Plaintiffs' counsel are prohibited from making their own copy of any confidential commercial document or portions thereof given to plaintiffs' counsel pursuant to this stipulation, except for use as an exhibit to a paper filed in this litigation under paragraph (i).

(d) Defendants shall indicate what portions of each document consist of confidential commercial material to be protected by this stipulation.

(e) Plaintiffs' counsel will use the confidential commercial documents and information contained therein solely for the purposes of this litigation, and shall not, without defendants' prior consent, make the confidential commercial documents or the information contained therein available to any person other than the Court or plaintiffs' counsel.

(f) Each plaintiffs' counsel shall maintain a list which shows the name of such counsel and the date upon which such counsel used the documents. This list will be made available to defendants upon agreement of all counsel; in the absence of such agreement, the list will be made available to defendants upon order of this Court.

(g) Within one week after the production to plaintiffs' counsel of the confidential commercial documents, plaintiffs' counsel shall return to defendants any documents that they believe they do not need for use in this litigation.

(h) Within five days after the entry of a final judgment in this litigation (including appeals or petitions for review), plaintiffs' counsel shall (i) return all remaining confidential commercial documents produced pursuant to this stipulation; (ii) destroy all notes, summaries, digests, and synopses of the confidential commercial documents. Notice of such destruction shall be given to counsel for defendants immediately thereafter.

(i) In the event that a party wishes to use a confidential commercial document or any confidential commercial or fi nancial information) shall be filed under seal and maintained under seal by the Court.

(k) The restrictions stated herein may be extended to additional documents by agreement of the parties, filed in this Court, without further order.

(l) Persons to whom confidential commercial documents are made available under this stipulation are bound by the restrictions contained herein.

(*Signature, office, and P.O. address of attorney for defendant*)

ERIC GALLON

(Signature, office, and P.O. address of attorney for plaintiff)