

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Application of Ohio)	
Edison Company, The Cleveland Electric)	
Illuminating Company and The Toledo)	
Edison Company for Authority to Provide)	Case No. 14-1297-EL-SSO
for a Standard Service Offer Pursuant to)	
R.C. 4928.143 in the Form of an Electric)	
Security Plan)	

**DUKE ENERGY OHIO'S MEMORANDUM IN OPPOSITION TO IGS ENERGY'S
MOTION TO COMPEL OR, IN THE ALTERNATIVE, MOTION TO STRIKE**

Duke Energy Ohio, Inc., (Duke Energy Ohio) hereby submits its memorandum in opposition to IGS Energy's motion to compel or, in the alternative, to strike certain testimony in this proceeding. Specifically, Duke Energy Ohio opposes that aspect of the motion that seeks production of its confidential material, which was filed in connection with an unrelated proceeding. For the reasons discussed herein, this request must be denied.

IGS Energy's only claimed justification for seeking to compel the confidential material of an entity unrelated to the applicants in this proceeding is credibility. More specifically, IGS Energy contends that it is entitled to test the credibility of FirstEnergy's witness, Judah Rose, by comparing the forecasts that he prepared for purposes of this proceeding against any and all prior forecasts Mr. Rose prepared under other, unrelated circumstances.¹ IGS Energy alleges that it can access this prior, unrelated material because the scope of discovery is broad. So broad, in fact in IGS Energy's opinion, that it can ignore the undeniable conclusion that such other, unrelated material is confidential and, more disturbingly, that it accepted prior limitations regarding the use of such other, unrelated material.

¹ IGS Energy Motion to Compel, at pp. 5-7.

On the general topic of credibility, Duke Energy Ohio defers, at this time, to the applicants in this proceeding to address whether IGS Energy's claimed justification has merit, observing only that it will invite an inefficient series of mini-trials with regard to each and every forecast and the many assumptions upon which they are predicated. Rather, for purposes of this written reply, Duke Energy Ohio focuses on the undeniable facts and prior commitments that IGS Energy now seeks to evade.

The purpose of discovery, as set forth in the Commission's rules, is to "facilitate thorough and adequate preparation for participation in commission proceedings."² But this purpose is not without appropriate protections.³ It has limitations. Significantly, as the Commission has instructed, "any party to a commission proceeding may obtain discovery of any matter, **not privileged, which is relevant** to the subject matter of the proceeding."⁴ And relevant evidence is "evidencing having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."⁵

All courts – federal and state – recognize the need to guard against abuses of the discovery process. "Because of the liberality of pretrial discovery permitted by [Federal] Rule 26(b)(1), it is necessary for the trial court to have the authority to issue protective orders conferred by Rule 26(c)."⁶ And "a trial court must balance competing interests to be served by allowing discovery to proceed against the harm which may result."⁷ The Commission has adopted a consistent approach, implementing a process that strikes a balance between the need

² O.A.C. 4901-1-16(A).

³ See, e.g., *Board of Education of the Columbus City Schools v. Franklin Board of Revision*, 2005 Ohio Tax LEXIS 984, at *3 (July 29, 2005)(discovery process not intended to enable a fishing expedition).

⁴ O.A.C. 4901-1-16(B)(emphasis added).

⁵ Evid.R. 401.

⁶ *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 34 (1984). See, also, *Doe v. University of Cincinnati, d.b.a., Paul I. Hoxworth Blood Center*, 42 Ohio App.3d 227, 231 (10th Dist. 1988).

⁷ *Id.*

for discovery related to non-privileged, relevant matters and the need to protect litigants and non-litigants alike from potential abuses.⁸

This need for balance is perhaps most critical where the items sought to be discovered reflect statutorily protected trade secret information. As Ohio law clearly confirms, discovery of trade secret information is permitted, “provided its secrecy is preserved.”⁹ The prior testimony and related work papers of Judah Rose, as filed in the unrelated Case No. 11-3549-EL-SSO, were produced consistent with these well-established protections regarding trade secret information. Indeed, the Commission granted such material protection and that protection exists today.¹⁰

The trade secret designation applicable to the submissions in Case No. 11-3549-EL-SSO is not the only pertinent consideration here. Rather, in assessing the contentions of IGS Energy here, the Commission must consider the fact that IGS Energy was a party to that prior proceeding and thus had the opportunity to gain access to Duke Energy Ohio’s confidential material by entering into a confidentiality agreement with Duke Energy Ohio. But IGS did nothing – it did not sign a confidentiality agreement, it did not challenge the terms or conditions that Duke Energy Ohio attached to the limited disclosure of its confidential material, and IGS Energy was not provided Duke Energy Ohio’s confidential material.¹¹ Had IGS Energy entered into a confidentiality agreement with Duke Energy Ohio, it would have undertaken two commitments that are critical to its current motion here. In exchange for receiving Duke Energy Ohio’s confidential information, IGS Energy would have agreed to use that material only for

⁸ O.A.C. 4901-1-24.

⁹ *Armstrong v. Marusic*, 2004-Ohio-2594, at ¶ 23.

¹⁰ *In the Matter of the Application of Duke Energy Ohio, Inc., 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. 11-3549-El-SSO, *et al.*, Opinion and Order, at pp. 5-6 (November 22, 2011). See, also, Motion to Extend Protective Order (April 4, 2013) and Motion to Extend Protective Order (August 12, 2014).

¹¹ See, Affidavit of Amy B. Spiller, a copy of Attachment A.

purposes of Case No. 11-3549-EL-SSO and it would have agreed to either destroy or return to Duke Energy Ohio the confidential material upon the conclusion of Case No. 11-3549-EL-SSO.¹² These commitments are relevant as they detail the balance that was struck in Case No. 11-3549-EL-SSO between the parties' right to engage in appropriate discovery and Duke Energy Ohio's right to protect its confidential information consistent with Ohio law.

The reasons why IGS Energy did not enter into a confidentiality agreement with Duke Energy Ohio should be immaterial at this point. What is relevant is that IGS Energy now seeks, in an unrelated docket, to lodge a ill-timed collateral attack on the conditions associated with Duke Energy Ohio's production, for purposes of its filing in Case No. 11-3549, of admittedly confidential material. Such a request cannot be permitted, as it undermines the integrity of the discovery process and the contractual commitments associated with such a process. Additionally, IGS Energy's request threatens to erode the expectations pursuant which confidential material is shared.

Perhaps hoping to deflect the discussion away from the existing protections related to Duke Energy Ohio's confirmed confidential information, IGS Energy references two Commission decisions. As discussed herein, however, neither supports its motion.

IGS Energy first wrongly summarizes a past Commission decision, broadly concluding that any and all prior testimony is within the bounds of discovery and thus disclosure. Specifically, IGS Energy contends that the Commission has previously found that "past testimony is relevant and [has] compelled parties to produce discovery related to prior testimony and opinions."¹³ IGS Energy misreads the relevant filings. The underlying motion to compel in *In the Matter of the Commission's Investigation into the Implementation of Section 276 of the*

¹² *Id.*

¹³ IGS Motion to Compel, at pg. 6.

Telecommunications Act of 1996 Regarding Pay Telephone Services, Case No. 96-1310-TP-CIO, sought the production of the published work of expert witnesses and a listing of the dates on which each expert testified before a state or federal commission.¹⁴ The party responding to these requests did not object on the grounds of privilege or trade secret. It merely provided insufficient information regarding published or public information.¹⁵ Additionally, the party against whom the motion to compel was filed admitted that it was gathering the responsive information.¹⁶ Thus, the Commission understandably compelled the production of published information or case name identifications. The Commission did not, however, compel the production of prior testimony and did not make any determinations as to the relevance of same. Those issues were not raised in the subject motion to compel.

IGS Energy next suggests that the FirstEnergy companies must be compelled to produce the confidential information belonging to unrelated parties, as such an outcome is consistent with existing precedent.¹⁷ Again, IGS Energy is wrong. The case on which IGS Energy relies concerned the production of material by one party to the proceeding, where that material had been prepared at the request of that party and included confidential information of another entity with whom that party had a contract.¹⁸ That is, the material requested to be produced belonged to the producing party and was the subject of a contract to which the producing party was subject. In requiring production, the Tax Board merely found that the producing party failed to prove the existence of its contractual obligations.¹⁹ Here, however, IGS Energy is not asking FirstEnergy

¹⁴*In the Matter of the Commission's Investigation into the Implementation of Section 276 of the Telecommunications Act of 1996 Regarding Pay Telephone Services*, Case No. 96-1310-TP-CIO, Motion to Compel, at pg. 5 and Attachment A, Interrogatory Nos. 9 and 10.

¹⁵ *Id.*

¹⁶ *Id.*, Entry, at ¶47 (June 1, 2001).

¹⁷ IGS Energy Motion to Compel, at pp. 9-10.

¹⁸ *Cincinnati Gas & Electric Company v. Clermont County Board of Revision*, 2000 Ohio Tax LEXIS 493, at *4 (April 4, 2000).

¹⁹ *Id.*, at *6-7.

to produce **its** confidential, trade secret information. It is asking FirstEnergy to produce the confidential, trade secret information of an **unrelated utility company**.

There is no existing precedent that compels the release of confidential, trade secret information, produced for and in connection with one proceeding, in another, unrelated proceeding. Indeed, the result sought by IGS Energy would undermine the discovery process and, in this instance, the Commission's undisturbed grant of protection afforded Duke Energy Ohio's confidential material. Further, the result sought by IGS Energy would effectively negate the purpose for which parties enter into confidentiality agreements and eliminate any justified reliance on another's representations. Denying IGS Energy's motion will not unfairly prejudice its participation in this proceeding. As evident from the papers filed in connection with IGS Energy's Motion to Compel, there already exists information on which it can rely in testing Mr. Rose's credibility. Apparently, counsel for IGS Energy already has in its possession the inputs used by Mr. Rose, as well as the quarterly ICF forecasts on power prices, natural gas prices, coal prices, emission allowance price, and renewable energy prices.²⁰ Thus, IGS Energy possesses relevant information to enable it to ascertain whether Judah Rose's work in this proceeding is properly supported.

The discovery process is one that requires a balance between the need for non-privileged, relevant information and the need to protect confidential, trade secret information. The Commission previously struck this balance when it afforded Duke Energy Ohio confidential treatment of material in Case No. 11-3549-EL-SSO. This protection exists today. But IGS Energy seeks to upset this balance, injecting claims in an unrelated docket under the veiled claim of credibility. Because it already has relevant information concerning the issues in this

²⁰ IGS Energy Motion to Compel, Attachment 3.

proceeding, it cannot now be allowed to upset this existing balance. Its Motion to Compel or, In the Alternative, to Strike Testimony, should be denied.

Respectfully submitted,

DUKE ENERGY OHIO, INC.

A handwritten signature in blue ink, appearing to read "Amy B. Spiller", is written over a horizontal line.

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CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing was delivered by U.S. mail (postage prepaid), personal, or electronic mail, on this 15th day of December, 2014, to the following parties.


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1. I was the attorney of record for Duke Energy Ohio, Inc., (Duke Energy Ohio) in Case No. 11-3549-EL-SSO, *et al.* (Duke Energy Ohio ESP II Case).
2. In initiating the Duke Energy Ohio ESP II Case, I caused to be filed an application and supporting testimony, which included the confidential testimony and work papers of Judah Rose. The Commission has afforded Duke Energy Ohio confidential treatment of its information and Duke Energy Ohio continues to treat such information as confidential.
3. In the course of prosecuting the Duke Energy Ohio ESP II Case, confidentiality agreements were entered into between Duke Energy Ohio, through its counsel, and those intervenors that, through their counsel, requested access to confidential material. Among other terms and conditions, the confidentiality agreement in the Duke Energy Ohio ESP II Case provides that information produced pursuant to that agreement would be used only for purposes of the Duke Energy Ohio ESP II Case and further provides that recipients of the confidential information would destroy or return to Duke Energy Ohio the confidential information after the conclusion of the case.
4. Based upon a review of existing records, IGS Energy did not sign a confidentiality agreement with Duke Energy Ohio in connection with the Duke Energy Ohio ESP II Case and also did not challenge the terms associated with the production of Duke Energy Ohio's confidential material.

FURTHER AFFIANT SAYETH NAUGHT.


Amy B. Spiller

Sworn to and subscribed before me, a Notary Public for the state of Ohio, on this the 15TH day
of December 2014.


ADELE M. FRISCH
Notary Public, State of Ohio
My Commission Expires 01-05-2019


Notary Public

My commission expires: 1/5/2019

This foregoing document was electronically filed with the Public Utilities

Commission of Ohio Docketing Information System on

12/15/2014 4:49:14 PM

in

Case No(s). 14-1297-EL-SSO

Summary: Memorandum Duke Energy Ohio's Memorandum in Opposition to IGS Energy's Motion to Compel Or, In the Alternative, Motion to Strike electronically filed by Dianne Kuhnell on behalf of Duke Energy Ohio, Inc. and Spiller, Amy B. and Kingery, Jeanne W.