

**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) Case No. 14-1297-EL-SSO
Edison Company for Authority to Provide)
for a Standard Service Offer Pursuant to)
R.C. 4928.143 in the Form of an Electric)
Security Plan)

**INTERSTATE GAS SUPPLY, INC.'S MEMO CONTRA
DUKE ENERGY OHIO, INC.'S MOTION TO QUASH**

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I. INTRODUCTION

On April 2, 2015, Interstate Gas Supply, Inc. (“IGS”) served a subpoena deuces tecum on third party Duke Energy Ohio, Inc. (“Duke”). IGS requested that Duke produce confidential information that is likely to lead to admissible evidence. Because the information is solely in the possession of Duke, IGS cannot obtain it through any other means without undue hardship.

On April 10, 2015, Duke filed a Motion to Quash (“Motion”) the subpoena. As discussed below, Duke’s arguments lack merit. Thus, the Public Utilities Commission of Ohio (“Commission”) should deny Duke’s Motion.

II. BACKGROUND

In their application to establish an electric security plan (“ESP”), Ohio Edison Company, Toledo Edison Company, and Cleveland Electric Illuminating Company (collectively “FirstEnergy”) request approval of the deceptively named Retail Rate Stability (“RRS”) Rider. The RRS would insulate FirstEnergy’s affiliate, FirstEnergy Solutions (“FES”), and its shareholders from the risk of the competitive market associated with FES’s investment in four power plants.

FirstEnergy alleges that the Commission should approve its proposal to prop up the earnings of its affiliate through the RRS because it will provide benefits to customers over the long term. Its claim largely rides on a forecast of future natural gas and electricity prices produced by witness Judah Rose. If Mr. Rose’s forecast is wrong, customers could be on the hook for several billion dollars. Given the significance of Mr. Rose’s testimony, the Commission should consider all relevant

information, including whether Mr. Rose's prior representations to *this Commission* regarding future prices were correct.

As recently as 2011, Mr. Rose looked into his crystal ball and provided a long-term forecast of natural gas and electricity prices for Duke. Since that time, a space of four years, natural gas prices and power prices have crashed twice. While IGS does not suggest any individual can perfectly predict the future, the Commission should at least evaluate whether Mr. Rose's projections were even close.

One would expect that such an important piece of information would be produced quite early in the discovery process. Indeed, IGS requested this information in discovery *nearly six months ago*.¹ In that span of time, IGS has left no procedural stone unturned. But, FirstEnergy and then Duke have pulled out all of the stops to prevent Mr. Rose's 2011 forecast from seeing the light of day.² As discussed further below, the gamesmanship that precedes this latest installment is unparalleled in Commission practice.

IGS first requested Mr. Rose's 2011 forecast on November 6, 2014 from FirstEnergy, given that FirstEnergy presented Mr. Rose to testify in this case.³

¹ IGS Energy's Motion to Compel or in the Alternative Motion to Strike and Request for Expedited Treatment, Attachment 1 (RDP 6) (Dec. 10, 2014).

² See Duke Energy Ohio's Memorandum in Opposition to IGS Energy's Motion to Compel Or, In the Alternative, Motion to Strike (Dec. 15, 2014); Ohio Edison Company, Cleveland Electric Illuminating Company, and Toledo Edison Company's Memo Contra IGS Energy's Motion to Compel (Dec. 16, 2014). See Notice of withdrawal by Duke Energy Ohio, Inc. (Dec. 18, 2014).

³ IGS Energy's Motion to Compel or in the Alternative Motion to Strike and Request for Expedited Treatment, Attachment 1 (RDP 6) and Attachment 4 (Dec. 10, 2014).

FirstEnergy and Mr. Rose, however, indicated that Mr. Rose had contractually transferred the proprietary rights to that forecast to Duke; thus, neither Mr. Rose nor FirstEnergy could provide the requested information in discovery.⁴ Following this discovery disagreement, IGS filed a Motion to Compel Mr. Rose's 2011 forecast, as well as Mr. Rose's other past forecasts.⁵

In a discovery conference, the Attorney Examiner agreed that Mr. Rose's past forecasts are subject to discovery as they may lead to admissible evidence.⁶ But, rather than fully granting the Motion to Compel, the Attorney Examiner indicated that IGS should request the Duke forecast from Duke as it was, at the time, a party to the case.⁷

Sensing that IGS's discovery was forthcoming, Duke withdrew orally to avoid responding,⁸ despite the fact that the Attorney Examiner had just ruled that Mr. Rose's 2011 forecast may lead to relevant evidence and that IGS may seek it in discovery from Duke "through any means necessary."⁹ Duke's gamesmanship and

⁴ *Id.* at Attachment 3 (containing a letter authored by FirstEnergy attorney Carrie Dunn.). Ms. Dunn stated, Mr. Rose's "previous forecasts that are unrelated to this litigation and were performed pursuant to confidentiality agreements that ICF and Mr. Rose have with third parties. Moreover, Mr. Rose is contractually prohibited from disclosing forecasts done for previous clients." *Id.*

⁵ IGS Energy's Motion to Compel or in the Alternative Motion to Strike and Request for Expedited Treatment (Dec. 10, 2014).

⁶ Transcript of Hearing held on December 18, 2014 before Attorney Examiners Gregory Price and Megan Addison at 53 (Jan. 15, 2015) (hereinafter "Dec. 18 Tr."). See Dec. 18, 2014 Tr. at 46 identifying Mr. Rose's 2011 forecast as potentially leading to admissible evidence.

⁷ *Id.* at 54.

⁸ *Id.* at 110-112 (Jan. 5, 2015). Duke formally filed a notice of withdrawal later that afternoon on December 18, 2014 after IGS served discovery on Duke.

⁹ *Id.* at 54.

intention to frustrate the development of the record is quite clear from the transcript.¹⁰ IGS opposed Duke's request to withdraw, which was contrary to Duke's Commitment in its Motion to Intervene to assist in the development of the record.

Subsequently, the Attorney Examiner ruled that Duke's oral motion to withdraw eliminated Duke's obligation to respond to IGS's discovery.¹¹ But, at the same discovery conference, the Attorney Examiner granted IGS's motion for a subpoena to obtain the information from Duke as a non-party.¹² In that subpoena, IGS indicated that it has no other way to obtain the information. And, in lieu of presenting a witness for deposition, IGS would accept a copy Mr. Rose's forecast.¹³ IGS previously indicated that it would enter into a suitable confidentiality agreement with Duke and protect the information from disclosure.¹⁴

¹⁰ *Id.* at 110-112.

¹¹ Transcript of Hearing held on March 31, 2015 before Attorney Examiners Gregory Price and Megan Addison at 15 (Apr. 3, 2015) (hereinafter "March 31, 2015 Tr.").

¹² *Id.* at 15-16. Subsequently approved in writing on April 1, 2015.

¹³ Motion for a Third Party Subpoena Duces Tecum Directed to Duke Energy Ohio and Memorandum in Support at fn 3 (Apr. 1, 2015) ("IGS is willing to accept delivery of the requested documents in lieu of Duke presenting a witness for deposition.").

¹⁴ Dec. 18, 2014 Tr. at 43 ("Examiner Price: What I thought I heard Mr. Oliker say he would sign the confidentiality agreement today. Mr. Oliker: Absolutely, your Honor.").

Despite the fact that Duke no longer owns generating assets that could potentially utilize the requested information,¹⁵ Duke filed a Motion to Quash on April 10, 2015. Duke claims that its Motion should be granted for the following reasons:

- The confidential information in question is irrelevant to the FirstEnergy’s proceeding and is not reasonably calculated to lead to the discovery of admissible evidence;
- Precedent from numerous jurisdictions agrees that confidential information released in one case should not be available for use in another;
- IGS should not be able to use the subpoena process to avoid its actions and the confidentiality agreement in a prior case;
- Civil Rule 45 requires that a subpoena be quashed, where:
 - It seeks information that is confidential and protected by statute;
 - It seeks the information that relates to work done by an expert in a different proceeding.

Most of Duke’s arguments are recycled versions of arguments the Commission already rejected in either this proceeding or in Duke’s electric security plan case. Regardless, the Commission should reject Duke’s arguments again here.

The only novel argument Duke has submitted relates to Civil Rule 45. The Commission, however, is not bound by the civil rules. Regardless, Duke has incorrectly applied the rule. And, it has does so in a manner that conflicts with

¹⁵ *Dynegy Resources I, LLC*, EC14-141-000, 150 FERC ¶ 61,232, Order Authorizing Acquisition and Disposition of Jurisdictional Facilities (Mar. 27, 2015). Duke still owns an interest in the Ohio Valley Electric Corporation (“OVEC”), though the Commission has directed Duke to use all means necessary to divest this interest as soon as practicable. See *In the Matter of Application of Duke Energy Ohio, Inc. for Authority to Establish a Standard Service Offer Pursuant to R.C. 4928.143 in the Form of an Electric Security Plan, Accounting Modifications, and Tariffs for Generation Service*, Case Nos. 14-841-EL-SSO, *et al.*, Opinion and Order at 48 (Apr. 2, 2015) (hereinafter “*Duke ESP III*”).

precedent in this proceeding where the Commission required non-party FES to produce confidential information subject to certain limitations. Therefore, as discussed further below, Duke's arguments lack merit and thus the Motion should be denied.

III. ARGUMENT

A. The Commission has already determined that the 2011 forecast may lead to admissible evidence

Duke claims that the subpoena should be quashed because Mr. Rose's 2011 forecast is not likely to lead to admissible evidence in this proceeding. Duke claims that there *may* be differences between the assumptions Mr. Rose used in the forecast he prepared for Duke and the assumptions Mr. Rose used in the forecast that he prepared for FirstEnergy.¹⁶ Duke's argument lacks merit.

Initially, the Attorney Examiner already rejected the argument that Mr. Rose's prior forecasts are not relevant when it granted, in part, IGS's Motion to Compel production of ICF International's quarterly forecast reports. *Indeed, the Attorney Examiner specifically authorized IGS to serve discovery on Duke regarding the forecast at issue.*¹⁷ Thus, the Attorney Examiner has already determined that the 2011 forecast may potentially lead to the discovery of admissible evidence.

Moreover, the Commission should not be swayed by Duke's claim that Mr. Rose's 2011 forecast *may* have relied upon different assumptions or

¹⁶ Motion to Quash at 3-7.

¹⁷ Dec. 18, 2014 Tr. at 54; Dec. 18, 2014 Tr. at 45.

circumstances. If that is the case, IGS will not deprive Mr. Rose the opportunity to explain how or why his forecast may have been influenced by different assumptions. But, regardless of what assumptions Mr. Rose relied upon, it is important that he be held accountable for the price projections that he included in his forecast. For example, if Mr. Rose overstated final zonal capacity clearing prices by 200% for the 2017/2018 delivery year, the Commission should have the ability to consider that information in evaluating the accuracy of Mr. Rose's forecast in this proceeding. And, to the extent that he relied upon faulty or unreliable assumptions, it speaks volumes to Mr. Rose's credibility and the weight the Commission should place on the forecast he provided to FirstEnergy.

If there is any doubt, the Ohio Rules of Evidence further support producing the 2011 forecast. Under Ohio Rule of Evidence 401, relevant evidence is any "evidence 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." Future electric prices are clearly relevant to this proceeding. Mr. Rose's past forecasts provide insight into the accuracy and reliability of the forecast presented by Mr. Rose in this proceeding. Indeed, portions of these forecasts relate to the same years and could be compared. Thus, the 2011 forecast may have the tendency of demonstrating that Mr. Rose's forecast in this proceeding is not reliable.

Moreover, under Rule of Evidence 611(B), "cross-examination is available as to all matters that relate to credibility." The 2011 forecasts may potentially

undermine Mr. Rose's credibility; thus, it should be produced. Among other things, IGS specifically indicated in its Motion that Mr. Rose's prior forecast should be produced as it may relate to his credibility and the development of the record:

Due to the significant economic consequences of Rider RRS for FirstEnergy's customers, *parties are entitled to the best available information to forecast costs and revenues, including information that relates to the credibility of Mr. Rose and his forecasts.* In order to more fully develop the record in this case, IGS seeks to depose person (s) from Duke and receive relevant documents from Duke.¹⁸

Accordingly, there is no question that Mr. Rose's prior forecast may lead to admissible evidence. Thus, Commission should deny the Motion to Quash.

B. Precedent holds that confidential information released in one case can be used in another case; regardless, Duke's argument is irrelevant to this subpoena

Duke claims that confidential information submitted in its ESP case should be protected from disclosure in future cases in accordance with the terms of its confidentiality agreement.¹⁹ Duke also claims that because IGS did not enter into a confidentiality agreement in its ESP case, it would be unfair to allow IGS to access the information now.²⁰

Initially, Duke's argument largely relates to an issue that is not even before the Commission—can a party use proprietary information already in its possession in a future case? The Commission has answered that question with an emphatic yes. Here, the question is whether a non-party should be required to produce

¹⁸ Motion for a Third Party Subpoena Duces Tecum Directed to Duke Energy Ohio and Memorandum in Support at 6 (Apr. 1, 2015) (emphasis added).

¹⁹ Motion to Quash at 12-15.

²⁰ *Id.* at 15.

proprietary information pursuant to an appropriate confidentiality agreement. The Commission has already determined that issue in this proceeding when it required non-party FES to produce a witness to provide testimony regarding the Davis-Besse, Sammis, and OVEC plants. Likewise the Commission approved a subpoena to non-party OVEC in Duke's ESP case that related to confidential and proprietary information. Because IGS has no other manner of obtaining the confidential information—a forecast that is likely to lead to admissible evidence—the Commission should require Duke to produce it.

Putting the real issue aside, IGS will address Duke's claim that confidential information submitted in one case cannot be used in future cases. The Commission has already rejected Duke's argument several times in its ESP case. Thus, IGS will only address this argument briefly.²¹ As the Commission has previously recognized, a substantial body of case law favors the elimination of duplicative discovery in different proceedings.²² Issues and testimony in one case may often relate to issues in another case.

²¹ A more thorough discussion of this issue is contained in the pleadings submitted by IGS (and the Commission's) orders in Duke's ESP Case.

²² *Duke ESP III*, Entry on Rehearing at 4-7 (Oct. 22, 2014); *Duke ESP III*, Entry at 3-6 (Aug. 27, 2014). See *Garcia v. Peebles*, 734 S.W.2d 343 (Supreme Court of Texas) (1987); *Wilk v. Amer. Med. Assoc.*, 635 F.2d 1295, 1299 (1980) (7th Cir.) (citing *Olympic Refining Co. v. Carter*, 332 F.2d 260, 265-66 (9 Cir.), cert. denied, 379 U.S. 900, 85 S.Ct. 186, 13 L.Ed.2d 175 (1964) (holding "[w]e therefore agree with the result reached by every other appellate court which has considered the issue, and hold that where an appropriate modification of a protective order can place private litigants in a position they would otherwise reach only after repetition of another's discovery, such modification can be denied only where it would tangibly prejudice substantial rights of the party opposing modification.")); *Comes v. Microsoft*, Case No. No. 07-2063 (Supreme Court of Iowa) (Nov. 22, 2009); *Raymond Handling Concepts Corp. v. Zuelzke*, 39 Cal.App.4th 584, 589 (Cal. Ct.

In this proceeding, Mr. Rose has provided a forecast of future electricity prices. Mr. Rose also provided a long-term forecast of future electricity prices to Duke. Duke submitted Mr. Rose's 2011 forecast to demonstrate that its ESP was a good deal for customers over the long term: "Between 2012 and 2021, the wholesale and retail power market prices delivered to Duke Energy Ohio will increase. . . . A second basis is ICF computer model-based forecasts for the period beyond which ICE and PJM data are available."²³ And Mr. Rose claimed the proposed ESP "results in a reasonable expectation of a revenue stream to Duke Energy Ohio in exchange for providing a hedge against volatile electric energy and capacity prices."²⁴ In other words, Mr. Rose has already tried to sell the Commission a long-term ESP based upon the promise of future benefits related to rising electricity prices.

Access to Mr. Rose's prior *sworn statements* which relate to the same subject matter at issue in this case is necessary to develop the record and to promote accountability and transparency. Conversely, prohibiting access to Mr. Rose's prior statements would represent poor public policy; it would potentially allow witnesses to change their story from case to case so long as their opinions are filed under seal.

Ap. 1st Dist.) (1995) ("This rule allows sharing of information in similar cases in order to ease the tasks of courts and litigants in the discovery process.").

²³ 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 Nos. 11-3549-EL-SSO, *et al.*, Direct Testimony of Judah Rose at 9-10 (Jun. 20, 2011).

²⁴ *Id.* at 25.

Duke also argues that IGS should not have access to the information because IGS did not enter into a confidentiality agreement in Duke's prior ESP case. Duke reasons that, had IGS signed the confidentiality agreement in its 2011 ESP case, IGS would be contractually prohibited from using the information in later cases. This argument is largely an extension of its claim that confidential information cannot be used in later cases. As discussed above, the Commission has already rejected Duke's argument. Moreover, Duke cannot bind IGS with an agreement it did not sign.

C. The Civil Rules do not require the Commission to quash the subpoena

Duke claims that Civil Rule 45(C)(3)(b) and (c)²⁵ require the Commission to quash the subpoena. Duke's claim is twofold. First, it claims that that the civil rules require the Commission to quash a subpoena that requests confidential information and information protected by statute.²⁶ Second, Duke claims that the Commission must quash a subpoena that requests information prepared by an expert when he was not retained in this case.²⁷ As discussed below, a plain reading of the civil rule and precedent do not support Duke's claim.

Civil Rule 45(C)(3) states (emphasis added):

On timely motion, the court from which the subpoena was issued shall quash or modify the subpoena, ***or order appearance or production only under specified conditions, if the subpoena does any of the following:***

²⁵ Duke cites to the federal version of 45(B)(2)(c).

²⁶ Motion to Quash at 7-10.

²⁷ *Id.* at 10-11.

- (a) Fails to allow reasonable time to comply;
- (b) Requires disclosure of privileged or ***otherwise protected matter and no exception or waiver applies***;
- (c) Requires disclosure of a fact known or opinion held by an expert ***not retained or specially employed by any party*** in anticipation of litigation or preparation for trial as described by Civ.R. 26(B)(5), ***if the fact or opinion does not describe specific events or occurrences in dispute*** and results from study by that expert that was not made at the request of any party.

Initially, as the preamble to 45(C)(3) states, a court need not necessarily quash a subpoena that may otherwise fall under the rule. Rather, the court may “order appearance or production only under specified conditions.” In this case, IGS has agreed to enter into a confidentiality agreement with Duke and to protect the documents from disclosure.²⁸ Indeed, at an earlier stage of this proceeding, the Attorney Examiner certified a subpoena to non-party FirstEnergy Solutions Corp., which required FES to produce confidential information pursuant to a similar condition.²⁹ And, while IGS does not believe the limitation is necessary, IGS would consent to use the confidential documents in this case only. Thus, even if Duke is correct that the requested documents fall under the criteria of 45(C)(3), the Commission may require Duke to produce the documents subject to appropriate conditions.

Regardless, Duke has not established that the documents at issue fit within the criteria set forth in 45(C)(3)(b). Duke must demonstrate that the subpoena

²⁸ Dec. 18, 2014 Tr. at 43.

²⁹ “We are going to go ahead and deny the motion to quash and FirstEnergy is -- Solutions is directed to produce a witness and any documents which you have not yet produced” Dec. 18, 2014 Tr. at 72.

“[r]equires disclosure of privileged or otherwise protected matter and no exception or waiver applies.” First, the documents are not privileged as they were disclosed to several external parties in Duke’s ESP Case. Second, no statute prohibits disclosure of the documents, unlike the scenario identified in *B.F.G. Employees Credit Union v. Ireland* incorrectly relied upon by Duke, 2002-Ohio-2202 at ¶14-20 (Ct. App. Ninth App. Dist., Lorain Co.) (2002). In that case, a party requested that a non-party governmental entity produce confidential documents. The appellate court determined that the subpoena should have been quashed because a statute specifically prohibited disclosure of the documents and an exception did not apply.³⁰

Even assuming the 2011 forecast contains trade secrets, Ohio’s trade secret statute does not prohibit disclosure of trade secrets in all circumstances. Indeed, the Commission’s rules contain specific exceptions that allow access to trade secrets under seal pursuant to a confidentiality agreement. Rule 4901-1-24 allows protective treatment for trade secrets but the Commission may allow trade secrets to “be disclosed only in a designated way.” Accordingly, the Commission allows parties to access confidential trade secrets on a regular basis pursuant to confidentiality agreements that protect the information from unauthorized disclosure. Because there is an exception—rather than an express statutory

³⁰ *Id.* The court relied upon R.C. 1733.32, which states: “Information obtained by the superintendent of credit unions and the superintendent’s employees as a result of or arising out of the examination or independent audit of a credit union, from required reports, or because of their official position, shall be confidential. Such information may be disclosed only in connection with criminal proceedings or, subject to [R.C. 1733.32.7], [**6] when it is necessary for the superintendent to take official action pursuant to [R.C. Chapter 1733] and the rules adopted thereunder regarding the affairs of the credit union examined.” *Id.* at ¶ 16.

prohibition against disclosure—Duke has not demonstrated that 45(C)(3)(b) applies. See also *Bickel v. Cochran*, 2014-Ohio-5862 at ¶23 (Ct. Appeals Tenth App. Dist., Franklin Co.) (2014)(upholding denial of motion to quash because statute contains exception that allows disclosure for “purpose of carrying out the duties of the court.”).

Additionally, Duke has not demonstrated that 45(C)(3)(c) applies. That Section prohibits disclosure of a fact or opinion known by a non-retained expert “if the fact or opinion does not describe specific events or occurrences in dispute.” Clearly, Mr. Rose has been retained by a party to this proceeding; thus, the rule does not apply. Moreover, the 2011 Forecast relates to specific events in dispute—the future energy prices during a period of time at issue during this proceeding.³¹

Precedent further explains that the purpose of this rule is to prevent a party from eliciting testimony from an expert witness without providing sufficient compensation.³² Indeed, the federal counterpart, Rule 45(c)(3)(B)(ii), identifies that it was created for this reason:

A growing problem has been the use of subpoenas to compel the giving of evidence and information by unretained experts. Experts are not exempt from the duty to give evidence even if they cannot be compelled to prepare themselves to give effective testimony but compulsion to give evidence may threaten the intellectual property of experts denied the opportunity to bargain for the value of their

³¹ Mr. Rose’s forecast in this proceeding and the Duke proceeding relate to overlapping time periods.

³² *Melcher v. Ryan*, 2006-Ohio-4609 at ¶ 14 (Ct. Appeals, Seventh Dist., Belmont Co.) (2006) (“The trial court determined on the record that Smith was an expert witness, not a fact witness, and therefore couldn’t be ordered to testify without first being compensated.”).

services. Arguably the compulsion to testify can be regarded as a “taking” of intellectual property.

Fed. R. Civ. P. 45(c)(3)(B)(ii) Advisory Committee's Note-1991 Amendment
(citations omitted).

The case cited by Duke, *Friedland v. TIC*, further reinforces this point, Civil Action No. 04-cv-01263-PSF-MEH, 2006 U.S. Dist. LEXIS 66613 (US Dist. Ct., Dist. CO). In that case, a party learned in the course of litigation that the expert it retained had performed a prior analysis for another client that it desired to use in its case. Rather than paying the expert to reproduce the analysis, the party attempted to subpoena it from a nonparty. The Court concluded that the witness should be treated as a non-retained expert because “[t]o ignore the protection [he] would have received over his formerly completed work product simply because GeoSyntec has now retained him in the current lawsuit would be to subvert the intention of Rule 45(c)(3)(B)(ii) and deny [him] the right to bargain for the value of the services he has previously performed.” *Id.* at 2. This is not a case where IGS is attempting to obtain free testimony from an expert that is not participating in this proceeding.

Moreover, the testimony that IGS seeks from that expert is no longer his intellectual property; thus, disclosing his prior testimony will not frustrate the purpose of the rule, which is to allow an expert to bargain for the value of his services. Accordingly, Duke’s argument lacks merit.

For sake of argument, IGS has also demonstrated that it would be entitled to information from a nonparty expert. The Civil Rules specifically state that a

subpoena shall not be quashed if “the party on behalf the subpoena is issued shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship and assures that the person to whom the subpoena is addressed will be reasonably compensated.” Civ. R. 45(C)(5). IGS has attempted to obtain Mr. Rose’s 2011 forecast from FirstEnergy and Mr. Rose, but they do not have access to that information. It is the exclusive property of Duke. IGS cannot reproduce the information (even with undue hardship), because it is based upon Mr. Rose’s individual analysis. Therefore, the Commission should require Duke to produce Mr. Rose’s 2011 forecast pursuant to subpoena.

D. The 2011 Forecast is of questionable value to Duke

Duke claims that the harm of disclosing Mr. Rose’s 2011 forecast to IGS is magnified because generation service is competitive in Ohio and IGS is a direct competitor. Duke’s claim is off base. Neither Duke, nor its affiliates compete with IGS. Duke transferred its legacy generating assets and retail affiliate assets to Dynegy on April 2, 2015. *Dynegy Resources I, LLC*, EC14-141-000, 150 FERC ¶ 61,232, Order Authorizing Acquisition and Disposition of Jurisdictional Facilities (Mar. 27, 2015).

The only asset that Duke retained is OVEC, and Duke does not use that asset to provide generation to retail customers. It bids OVEC’s output into the daily energy markets. Moreover, the Commission has directed Duke to divest its interest in OVEC. Thus, Duke is one step away from being a strictly non-competitive wires company, without an affiliate owning generation or pursuing retail customers within

the state of Ohio. Given Duke's shift in focus to non-competitive operations, it begs the question—what value could Mr. Rose's forecast have to Duke? The answer is simple: it has none. Indeed, the Commission could remove all confidential protections from the 2011 forecast without harming Duke at all. Balancing the interests of non-party Duke and the need for IGS to access the 2011 forecast in order to develop the record in this proceeding, IGS urges the Commission to deny the Motion to Quash.

IV. CONCLUSION

The Commission's determination in this proceeding may impact customers and businesses for more than a decade. The Commission should not make that decision lightly. It should consider all relevant information, including Mr. Rose's prior forecasts and representations to this Commission. Therefore, the Commission should deny Duke's Motion, which would frustrate the development of the record in this proceeding.

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CERTIFICATE OF SERVICE

I certify that *Interstate Gas Supply, Inc.'s Memo Contra Duke Energy Ohio, Inc.'s Motion to Quash* was electronically served on the following parties this 27th day of April, 2015:

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Summary: Memorandum Contra Motion to Quash electronically filed by Mr. Joseph E. Oliker on behalf of IGS Energy