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

REPLY MEMORANDUM IN SUPPORT OF DUKE ENERGY OHIO, INC.'S MOTION TO QUASH SUBPOENA

The resolution of Duke Energy Ohio, Inc.'s ("Duke") Motion to Quash the Subpoena issued by Interstate Gas Supply, Inc.'s ("IGS") will have consequences not only for this proceeding but also for proceedings in the future. As many frequent parties to Commission proceedings should, Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company (collectively, the "Companies") have serious concerns if the Commission does not quash the subpoena issued to Duke by IGS. Therefore, the Companies submit this Reply Memorandum in accordance with Rule 4901-1-12(B)(2), Ohio Administrative Code ("O.A.C.").

Although IGS accuses both the Companies and Duke in engaging in "gamesmanship" that is "unparalleled in Commission practice,"[1] it is IGS who is seeking an unparalleled ruling from this Commission. Most importantly, IGS fails to mention that it has already been given ICF International's quarterly price forecasts. As IGS already has these ICF forecasts, it can already meet its stated goal of "evaluating the accuracy of Mr. Rose's forecast in this proceeding."[2] Given that IGS has already been given access to ICF forecasts from the same

[1] IGS Memo Contra at 4.
[2] *Id.* at 9.

period as the Duke testimony sought here, there is simply no reason to grant IGS access to Duke's confidential information.

In short, when one gets past the bluster, smoke and mirrors of IGS's Memo Contra, IGS is asking the Attorney Examiner:

- To overturn the ruling of a fellow Attorney Examiner who previously granted protective treatment of Duke's confidential information, orders which were subsequently upheld by the Commission;
- To subject a non-party, Duke, to disclose its confidential information in a proceeding that it did not initiate;
- To extend the discovery deadline only for IGS when IGS had every opportunity to seek this information prior to the closure of the discovery period;
- To force the Companies potentially to defend an expert report prepared using Duke's confidential information and assumptions, when the Companies have no background or information on the facts included in the expert report;
- To unduly prolong this proceeding.

As discussed below, the practical consequences of the Commission denying Duke's Motion to Quash are severe.

There are many reasons why the Commission should grant Duke's Motion to Quash. First, denying the Motion to Quash will set a dangerous precedent. Second, the Commission has already found that Duke's information is confidential. Third, denying the Motion to Quash will unduly prolong this proceeding. Last, granting the Motion to Quash will not prejudice IGS. For all of those reasons, the Companies urge the Commission to grant Duke's Motion to Quash.

I. PROVIDING THIS INFORMATION TO IGS, EVEN UNDER PROTECTIVE STATUS, WILL SET A DANGEROUS PRECEDENT.

IGS seeks disclosure of the confidential testimony of Judah L. Rose filed by Duke in Duke's 2010 and 2011 standard service offer applications ("Rose Testimony").[3] Duke neither initiated the instant proceeding nor voluntarily made Mr. Rose's past projections a part of it. The mere fact that Duke happened to use the same expert as the Companies in this case should not force it to disclose its confidential information. A ruling requiring Duke to produce the Rose Testimony in this case (when it has nothing to do with this case) would set a precedent that any party's confidential information may be required to be disclosed any time a witness testifies in a wholly unrelated case even years later – and even if it has nothing to do with that case and the custodian of information is a non-party. This will result in at least two negative outcomes: first, uncertainty will result as parties will never know when their information would truly ever be held confidential even if protective status is given; and second, the record will be less complete as parties become concerned about the release of their confidential information.

The fact that IGS is "willing" to sign a confidentiality agreement to obtain this information does not negate the need for the Commission to quash the subpoena. Duke is not a party to this proceeding and did not put any of its confidential information at issue in this case. It would be unfair to require Duke to enter into a confidential agreement with IGS against its will. Moreover, even if IGS signs a protective agreement, Duke will inevitably be forced to disclose its confidential information to all parties in this case that signed a confidentiality agreement since all the parties to this case will want the Rose Testimony once it is given to IGS.

Even leaving aside the problems associated with forced disclosure of a non-party's confidential information, there are additional problems with the subpoena. It's very possible that

[3] *See* Case Nos. 10-2586-EL-SSO and 11-3549-EL-SSO.

after reviewing the Rose Testimony, further confidential information from Duke would be requested related to the Rose Testimony. For example, in order for the Companies to defend against the attack on Mr. Rose's credibility, the Companies may need to discover the assumptions Duke provided to Mr. Rose in developing the Rose Testimony, including confidential information about the plants analyzed by Mr. Rose. Further complicating matters, Duke may no longer even own the plants analyzed by Mr. Rose, adding an additional complication by requiring disclosure of information belonging to a different non-party not even named in the subpoena. This is an unfair result and the Commission should grant the Motion to Quash.

IGS's attempt to exploit a ruling in Duke's last ESP case, Case No. 14-841-EL-SSO, in which the Commission upheld a certain version of a protective agreement[4] shows how unprecedented IGS's subpoena truly is. It appears that IGS is referring to either the Commission's October 22, 2014 Entry on Rehearing or August 27, 2014 Order on Duke's Interlocutory Appeal. Those orders, however, simply required Duke to enter into a protective agreement that did not contain standard language that confidential information in one case cannot be used in another case. Notably, the Commission stated "any attempted use of such information in a subsequent proceeding will be ruled upon within the context of that proceeding."[5] Thus, the Commission did not find that confidential information in one case can be used in another case. Any ruling requiring Duke to provide IGS confidential information involuntarily would be a new and dangerous precedent that should not be permitted.[6] Parties

[4]IGS Memo Contra at 11. IGS fails to cite to the case or order to which it is referring.
[5] Case No. 14-841-EL-SSO, Entry on Rehearing at 5 (October 22, 2014).
[6] Another example of IGS's exploitation of previous rulings is apparent in the December 18, 2014 prehearing transcript whereby IGS attempted to utilize precedent from a DP&L case. The Attorney Examiner properly found that "just because Duke may have made one decision or Dayton Power and Light may have made one decision as to what they felt was proper, I don't think it's binding on FirstEnergy." December 18, 2014 Transcript at 35.

appearing before the Commission and entering into protective agreements that limit the use of the underlying confidential information should not have to worry about whether the rules for the use of such information will change, especially when they are not parties to the matters in which the information is sought to be used improperly.

Last, as Duke pointed out, in their 2010 and 2011 previous ESPs, IGS was not a party to the protective agreement that permitted other parties to have the Rose Testimony. And, in those cases, the parties agreed to not utilize that confidential information in other cases. Denying Duke's motion to quash would effectively negate those agreements. This is a further reason why allowing the subpoena to proceed would be a bad precedent – one the Commission should avoid.

II. THE COMMISSION HAS ALREADY FOUND THAT THE INFORMATION IGS SEEKS FROM DUKE IS PROTECTED CONFIDENTIAL INFORMATION AND THOSE DECISIONS SHOULD BE MAINTAINED.

In Case No. 10-2586-EL-SSO, the Commission granted protective treatment of certain portions of Rose's testimony.[7] Duke also promptly filed two motions to extend the protective treatment of that testimony. In Case No. 11-3549-EL-SSO, the Commission likewise granted protective treatment of certain portions of Rose's testimony.[8] In that case, Duke also promptly filed two motions to extend the protective treatment of that testimony. As the Commission has not yet ruled on those motions, the protective order remains in place. OAC 4901-1-24(D)-(F).

Here, IGS's subpoena effectively requests that this Attorney Examiner overturn the prior rulings of another Attorney Examiner and the Commission's Orders granting protective treatment to the Rose Testimony. As Duke has indicated in its Motion to Quash, the Rose Testimony is still confidential and contains trade secret information. Its protective status should be maintained. Other than its bald assertions that the Rose Testimony is of no value to Duke

[7] *See* Case No. 10-2586-EL-SSO, Opinion and Order at 8, February 23, 2011 (Volume II).
[8] *See* Case No. 11-3589-EL-SSO, Opinion and Order at 5, November 22, 2011 (Exhibit 6).

because Duke has sold its generation assets, IGS has not demonstrated that the information contained in the Rose Testimony is no longer confidential and no longer contains trade secret information. Therefore, IGS has not shown any reason, or any change in facts or circumstances, for the Commission to overturn its previous ruling giving protective treatment to this information.

IGS has also not cited any Commission precedent suggesting the Attorney Examiners in this case can overrule rulings of prior Attorney Examiners and the Commission that this information is confidential. Instead, IGS lamely attempts to avoid these rulings by stating that it would agree to sign a confidentiality agreement to protect this information. IGS misses the point. IGS, just like any other member of the public who did not sign the confidentiality agreement in those earlier cases, has no right to view the previously redacted portions of confidential testimony. IGS is not entitled to special treatment or an "exception" from those prior orders, and has not cited ay authority to the contrary.

III. IGS IS SEEKING TO UNDULY PROLONG THESE PROCEEDINGS.

The original discovery deadline in this case was December 1, 2014. Duke intervened as a party on October 1, 2014. IGS had two months to serve Duke with a discovery request seeking this information. IGS did not.[9] While IGS did request the Rose Testimony from the Companies, as indicated in its December 10, 2014 Motion to Compel, it never sought this information directly from Duke, prior to the December 18, 2014 prehearing. IGS does not and has not provided any explanation for this omission.

Despite its unexplained delay in serving Duke with discovery at the December 18, 2014 prehearing, IGS was granted an extension of the discovery deadline to serve limited discovery on

[9] *See also* December 18, 2014 Transcript at 40-41.

Duke related to the Rose Testimony.[10] Duke, as was its right, orally withdrew from the case on that same day.[11] At that point, and as subsequently affirmed by the Attorney Examiner[12] (although not necessary), Duke was no longer a party and IGS should have commenced with serving a subpoena on Duke – it did not.[13]

It was not until April 1, 2015 (more than three months later) that IGS served a subpoena on Duke. No explanation has been given for IGS's delay in serving the subpoena on Duke after Duke orally withdrew on December 18, 2014. IGS's efforts to unduly prolong this proceeding should not be condoned.

Moreover, if the subpoena is not quashed, the proceeding will be further delayed by any follow-up discovery that might need to take place as a result of the production of the Rose Testimony (and planned use by IGS of the Rose Testimony) at the hearing on this matter. Because the Companies were not a party to Duke's previous ESPs, and have no idea what the Rose Testimony contains, they very likely will need to conduct non-party discovery from Duke in order to obtain the bases for Mr. Rose's testimony. For example, when IGS uses this information at the hearing (as IGS has indicated it will), the Companies must be able to test the assumptions behind the Rose Testimony in order to adequately defend against IGS's plans to attempts to discredit Mr. Rose. All of this follow-up discovery may unnecessarily prolong this case. For all of those reasons, and to prevent any further delay in this proceeding, the Commission should grant the Motion to Quash.

[10] *Id.* at 54.
[11] *Id.* at 110-112.
[12] March 31, 2015 Transcript at 15.
[13] Indeed, the Attorney Examiner suggested to IGS that it serve a subpoena at this point. December 18, 2014 Transcript at 112.

IV. GRANTING THE MOTION TO QUASH WILL NOT PREJUDICE IGS.

IGS claims that it needs Duke's information because it wants to check the accuracy of Mr. Rose's projections. However, this claim is invalid, because IGS has already been provided with ICF's past forecasts of energy and capacity prices. IGS can compare these past forecasts to actual prices to check the accuracy of Mr. Rose's projections. The Companies also disclosed 19 publications, 113 speeches and 122 past testimonies that IGS could have explored and utilized to discuss with Mr. Rose. Moreover, Mr. Rose has already been deposed and IGS could have explored the accuracy of Mr. Rose's forecasts during that time. IGS could utilize public portions of Mr. Rose's testimony in Duke's 2010 and 2011 cases to explore his past forecasts. Put simply, there is no need for IGS to have the Duke specific information in this case as IGS has other means to test Mr. Rose's credibility.

V. CONCLUSION

IGS seeks an unprecedented ruling from this Commission. In balancing the interests of the Companies, IGS and non-party Duke, the Commission should grant Duke's Motion to Quash.

Respectfully submitted,

/s/ Carrie M. Dunn

James W. Burk (0043808)
Counsel of Record
Carrie M. Dunn (0076952)
FIRSTENERGY SERVICE COMPANY
76 South Main Street
Akron, OH 44308
Telephone: (330) 384-5861
Fax: (330) 384-8375
Email: burkj@firstenergycorp.com
Email: cdunn@firstenergycorp.com

David A. Kutik (0006418)
JONES DAY
901 Lakeside Avenue
Cleveland, OH 44114
Telephone: (216) 586-3939
Fax: (216) 579-0212
Email: dakutik@jonesday.com

James F. Lang (0059668)
N. Trevor Alexander (0080713)
CALFEE, HALTER & GRISWOLD LLP
The Calfee Building
1405 East Sixth Street
Cleveland, OH 44114
Telephone: (216) 622-8200
Fax: (216) 241-0816
Email: jlang@calfee.com
Email: talexander@calfee.com

ATTORNEYS FOR OHIO EDISON COMPANY, THE CLEVELAND ELECTRIC ILLUMINATING COMPANY, AND THE TOLEDO EDISON COMPANY

CERTIFICATE OF SERVICE

On May 4, 2015, the foregoing document was filed on the Public Utilities Commission of Ohio's Docketing Information System. The PUCO's e-filing system will electronically serve notice of the filing of this document and the undersigned has served electronic copies to the following parties:

/s/ *Carrie M. Dunn*

cmooney@ohiopartners.org
drinebolt@ohiopartners.org
tdougherty@theoec.org
joseph.clark@directenergy.com
ghull@eckertseamans.com
sam@mwncmh.com
fdarr@mwncmh.com
mpritchard@mwncmh.com
mkurtz@BKLlawfirm.com
kboehm@BLKlawfirm.com
jkylercohn@BKLlawfirm.com
larry.sauer@occ.state.oh.us
Kevin.moore@occ.state.oh.us
joliker@igsenergy.com
mswhite@igsenergy.com
myurick@taftlaw.com
Schmidt@sppgrp.com
ricks@ohanet.org
tobrien@bricker.com
stnourse@aep.com
mjsatterwhite@aep.com
yalami@aep.com
callwein@wamenergylaw.com
jfinnigan@edf.org
wttpmlc@aol.com
mkl@bbrslaw.com
gas@bbrslaw.com
ojk@bbrslaw.com
lhawrot@spilmanlaw.com
dwilliamson@spilmanlaw.com
meissnerjoseph@yahoo.com
trhayslaw@gmail.com
lesliekovacik@toledo.oh.gov

Christopher.miller@icemiller.com
Gregory.dunn@icemiller.com
Jeremy.grayem@icemiller.com
athompson@taftlaw.com
Marilyn@wflawfirm.com
Blanghenry@city.cleveland.oh.us
hmadorsky@city.cleveland.oh.us
kryan@city.cleveland.oh.us

ccunningham@akronohio.gov
bojko@carpenterlipps.com
Allison@carpenterlipps.com
hussey@carpenterlipps.com
gkrassen@bricker.com
dborchers@bricker.com
asonderman@keglerbrown.com
mfleisher@elpc.org
jscheaf@mcdonaldhopkins.com
mitch.dutton@fpl.com
matt@matthewcoxlaw.com
todonnell@dickinson-wright.com

Jeffrey.mayes@monitoringanalytics.com
toddm@wamenergylaw.com
sechler@carpenterlipps.com
gpoulos@enernoc.com
mhpetricoff@vorys.com
Thomas.mcnamee@puc.state.oh.us
Ryan.orourke@puc.state.oh.us
sfisk@earthjustice.org
msoules@earthjustice.org
tony.mendoza@sierraclub.org

Cynthia.brady@exeloncorp.com
David.fein@exeloncorp.com
Lael.campbell@exeloncorp.com
dstinson@bricker.com

Summary: Reply in Support of Duke Energy Ohio, Inc.'s Motion to Quash Subpoena electronically filed by Ms. Carrie M Dunn on behalf of The Toledo Edison Company and The Cleveland Electric Illuminating Company and Ohio Edison Company