

BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

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

**DUKE ENERGY OHIO'S REPLY
TO
MEMORANDUM CONTRA MOTION TO QUASH SUBPOENA**

I. Introduction

This case relates to an application filed by Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company (FE Utilities), seeking approval from the Public Utilities Commission of Ohio (Commission) for their next standard service offer for generation services. Duke Energy Ohio, Inc. (Duke Energy Ohio), is **not** a party to this proceeding.

Nevertheless, Interstate Gas Supply, Inc. (IGS), one of the intervenors in this proceeding, has subpoenaed confidential, proprietary information from Duke Energy Ohio – information that Duke Energy Ohio made available under the terms of a confidentiality agreement (ESP 2 CA) during a 2011 proceeding (Duke ESP 2) and for the limited purpose of that proceeding in which Duke Energy Ohio was the applicant.

Duke Energy Ohio moved to quash (Duke Motion) the IGS subpoena; IGS filed its memorandum contra (IGS Memo Contra). Duke Energy Ohio will not repeat all of the arguments previously made with regard to this issue, nor will it respond to all of the spurious

accusations made by IGS.¹ Rather, this reply will provide a usable framework for analysis of the controversy, while also addressing the most relevant errors in IGS's Memorandum.

Putting aside IGS's irrelevant bickering, Duke Energy Ohio focuses on the substantive arguments, offering a decision-making framework to assist in clarifying the issues:

- What procedural standards should be applied?
- What is Duke Energy Ohio's status in this case?
- What relevant rulings have already been made in this case?
- When balancing the needs of IGS and Duke Energy Ohio, what interests does each side have?

As this framework confirms, IGS is seeking the type of information that the Attorney Examiners have already determined to be irrelevant and beyond the scope of discovery in this proceeding. And it is doing so solely in order to bolster the misplaced claim that "customers could be on the hook for several billion dollars."² Such an outcome is not permitted under Ohio law or the Commission's regulations.

II. ARGUMENT

A. Applicable Standards

IGS wrongly posits that the Commission has already determined that the proprietary and confidential information it seeks from Duke Energy Ohio is discoverable.³ But no such determination has been made. Rather, the Attorney Examiners have reserved decision on

¹ For example, IGS accuses Duke Energy Ohio of "gamesmanship unparalleled in Commission practice" and having an "intention to frustrate the development of the record." Suffice it to say, and as is abundantly clear from the chain of events, Duke Energy Ohio simply strives to protect the confidentiality of its proprietary information.

² IGS Memo Contra, at pg. 3. Notably, the FE Companies have proposed to true up their proposed Rider RRS and, consequently, forecasts alone will not determine final rates. *See, e.g.*, FE Utilities' Application, at pg. 9 (August 4, 2014) and Direct Testimony of Joanne M. Savage, at pg. 3 (August 4, 2014).

³ IGS Memo Contra, at pg. 8.

whether the information sought from Duke Energy Ohio is, in the first instance, discoverable.⁴ As discussed herein, the decision should be answered in the negative.

To be discoverable, it is axiomatic that the requested information must be reasonably calculated to lead to the discovery of admissible evidence. A forecast that Judah Rose prepared under a different set of circumstances, for a different client is not reasonably calculated to lead to the discovery of evidence that is admissible in this proceeding. Indeed, IGS admits that it is seeking the confidential information only for the purpose of attacking the credibility of a witness; it is not seeking the information as substantive evidence. And Judah Rose's prior confidential work for Duke Energy Ohio undeniably does not have "any tendency to make the existence of any fact that is of consequence to the determination of [this FE proceeding] more probable or less probable than it would be without the evidence."⁵

Moreover, as discussed below, the Attorney Examiners have already rejected IGS's request for similar information from other non-party entities. IGS has offered no reason for the Attorney Examiners to depart from this prior decision.

Further, and as conceded by IGS, the Rules of Evidence must be considered for purposes of the ascertaining the legitimacy of its subpoena.⁶ As discussed above, these rules limit the introduction of evidence to that which is relevant. IGS seeks to satisfy this requirement by contending that "future electric prices are clearly relevant to this proceeding."⁷ As a general proposition, that may be an accurate statement. But what is critically absent is the source from which such information is derived. IGS has ample – and non-prejudicial – means by which to obtain future electric prices. It does not need to gather such information only from proprietary

⁴ Transcript, at pp. 111-12 (Dec. 18, 2014).

⁵ Evid.R. 401.

⁶ IGS Memo Contra, at pp. 9-10, wherein IGS acknowledges the significance of the Rules of Evidence.

⁷ IGS Memo Contra, at pg. 9.

documents prepared and exchanged for the limited purposes of a non-party's prior filings. IGS's contention, therefore, is a ruse.

IGS next contends that, under the Rules of Evidence, it may obtain confidential information in order to attack the credibility of Judah Rose. In fact, IGS posits that prior, confidential information belonging to a non-party is necessary to determine whether Mr. Rose overstated capacity prices for particular delivery year.⁸ But IGS misunderstands expert testimony and the critical focus of same. That is, while IGS alleges its request is related only to "credibility," it is really one concerning the reliability of Judah Rose's expert analysis in this proceeding. And, in this regard, it is immaterial whether Judah Rose's conclusions are, or were, correct. Rather, as expressed in Evid.R. 702, the question is whether the principles and methods employed by Mr. Rose to reach his conclusions are reliable. It is not whether his conclusions are correct.⁹ Thus, in this proceeding, the relevant question is whether Judah Rose's analysis, evaluation, and forecasting techniques were reliable. Resolving this question does not give rise to the need for Duke Energy Ohio to produce its proprietary and confidential information, generated in respect of an unrelated proceeding. IGS had ample opportunity, whether in paper discovery or through deposition, to explore the manner in which Judah Rose performed his expert analysis here. That it may have failed to do so is not a shortcoming to be cured by Duke Energy Ohio.¹⁰

B. Duke Energy Ohio's Status

As the Commission is aware, Duke Energy Ohio previously intervened in this proceeding. However, before it was subjected to any discovery requests, Duke Energy Ohio

⁸ IGS Memo Contra, at pg. 9.

⁹ See, e.g., *Miller v. Bike Athletic Company*, 80 Ohio St.3d 607, 610, 1998-Ohio-178.

¹⁰ IGS wrongly contends that it requested information from Judah Rose "months ago." See IGS Memo Contra, at pg. 4. But IGS fails to admit that such a request was misdirected to the applicants in this proceeding, entities that would not have access to the proprietary and confidential information of Duke Energy Ohio.

withdrew from the proceeding, at the pretrial hearing on December 18, 2014.¹¹ On the same day, Duke Energy Ohio also filed a written confirmation of that withdrawal, to ensure that the docket card directly reflected the withdrawal that had occurred during the transcribed pretrial hearing. IGS asserts that it propounded discovery on Duke Energy Ohio prior to Duke Energy Ohio's withdrawal,¹² but that statement is false. The hearing was adjourned at 4:27 p.m.¹³ and IGS's e-mailed discovery questions were received thereafter.¹⁴ The discovery, therefore, was improperly tendered to a non-party.

Although there is no dispute that Duke Energy Ohio is not party to this proceeding, IGS emphatically dismisses this fact as immaterial. And, in doing so, it argues that existing Commission precedent confirms that confidential documents produced pursuant to a protective agreement that prohibits subsequent use of such documents can, in fact, be used in unrelated proceedings.¹⁵ No such precedent exists and the circumstances referenced by IGS are clearly inapposite. Insofar as it concerns subpoenas issued under Case No. 14-841-EL-SSO, *et al.*, it is imperative to note that there were no motions opposing the subpoenas. The identified witnesses voluntarily appeared. With regard to this proceeding and requests directed to FirstEnergy Solutions (FES), it is important to note that FES is the owner of the generating assets forming the basis of a present proposal. It is thus not similarly situated to non-party Duke Energy Ohio. And with regard to arguments related to the proper scope of confidentiality agreements, as

¹¹ Transcript, pg. 112 (Dec. 18, 2014).

¹² IGS Memo Contra, at pg. 5, fn. 8.

¹³ *Id.*, pg. 114.

¹⁴ At a subsequent prehearing, the Attorney Examiners ruled that Duke Energy Ohio's withdrawal was effective when made.

¹⁵ IGS Memo Contra, at pg. 10.

asserted in Duke Energy Ohio's pending ESP proceeding, such rulings have not been finally decided. Rather, they are issues for which rehearing has been requested.¹⁶

C. Prior Rulings

To the extent that rulings on issues have already been made in this proceeding, they should not be reconsidered in the context of Duke Energy Ohio's motion to quash the subpoena from IGS, and should be applied here in the same fashion that they were applied elsewhere. As the Chairman of the Commission has emphasized, a consistent regulatory approach" is critical; and "There is going to be a level playing field at the commission."¹⁷

In December, the Attorney Examiners ruled that Duke Energy Ohio, as a party at that time, could be subjected to discovery on this topic. At that same prehearing, they also considered the possibility of allowing subpoenas for comparable information to be issued to various entities that were **not** parties. Balancing the interests of those entities against IGS's need for the information, the Examiners concluded that the subpoenas should **not** be allowed.

[B]alancing the interests of IGS to obtain the information versus the interests of I don't know how many nonparties to this proceeding, . . . the Attorney Examiners find that the balance weighs in favor of the nonparties . . .¹⁸

Regardless of statements to the contrary by IGS, the Examiners have not made any other rulings concerning the discoverability or admissibility or relevance of this information. "I haven't ruled anything with respect to Duke."¹⁹

¹⁶ *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. 14-841-EL-SSO, *et al.*, Duke Energy Ohio Application for Rehearing (May 4, 2015).

¹⁷ <http://www.dispatch.com/content/stories/business/2015/04/15/porter-sworn-in-as-puco-chairman.html> (accessed May 3, 2015).

¹⁸ Transcript, pg. 53 (Dec. 18, 2014).

¹⁹ *Id.*, pg. 111.

D. Interests to Balance

The information that IGS seeks does not belong to any party in this proceeding. It belongs to Duke Energy Ohio, and Duke Energy Ohio is not in this case to defend itself. And yet, in any helpful cross-examination of Mr. Rose on this information, Duke Energy Ohio would **have** to play a role. For example, as the IGS Memorandum makes patently obvious, the question of continued confidentiality of the forecast would be at issue, even though a protective order was granted elsewhere. Should that confidentiality be re-argued in this case, under new facts? IGS notes that Duke Energy Ohio's generating assets have been sold to Dynegy. Could the agreement with Dynegy have addressed the continued confidentiality of such information? Should we have a hearing on that agreement? Should Dynegy be here to defend itself, as the generating assets are now its property?

IGS appears to agree that the assumptions provided to Mr. Rose by his client might be relevant to the use of those forecasts at the FirstEnergy hearing. Would Duke Energy Ohio have to provide witnesses to discuss what input they had into the development of that forecast? Would that input, and the reasons therefor, be privileged under attorney-client privilege or attorney work product? Would Duke Energy Ohio need to assist in determining whether those forecasts appeared to have been reasonable at the time? And does IGS intend to compensate Duke Energy Ohio for its time and expenses in participating in this case, solely for the benefit of IGS's arguments?

IGS further states that the confidential and proprietary information is of no value whatsoever to Duke Energy Ohio as it previously transferred its legacy generating assets.²⁰ But even IGS admits that Duke Energy Ohio continues to retain an investment in the Ohio Valley Electric Corporation, which owns generating assets that participate in the wholesale market.

²⁰ IGS Memo Contra, at pg. 19.

Competitive strategies, as would be indicated from assumptions concerning the wholesale market are indeed very valuable to Duke Energy Ohio. Further, IGS ignores the inescapable conclusion that assumptions and strategies concerning on competitive field provide insight into other proprietary strategies. IGS's lack of appreciation confirms that its motion for a subpoena, if granted, will result in additional disputes over matters that have no place in this proceeding.

On the other side of the balance, IGS argues that it has no way to obtain the information, other than under the subpoena. FirstEnergy disagrees. At the prehearing in December, counsel for FirstEnergy explained that FirstEnergy had already provided or agreed to provide IGS with sufficient ammunition to attack the credibility of Mr. Rose's forecasted information.²¹ As discussed above and in the Duke Motion, IGS is not entitled to the information. It is neither relevant nor determinative of whether Judah Rose's work in this proceeding is reliable. Rather, it amounts to an impermissible fishing expedition that will only result in substantial prejudice to a non-party and needlessly delay.

III. CONCLUSION

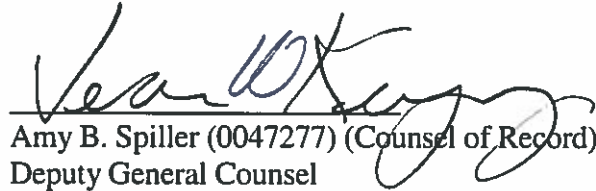
Duke Energy Ohio is not a party to this proceeding. Balancing IGS's need for the subpoenaed information against Duke Energy Ohio's interests in protecting its proprietary documents and the harm that it would suffer in defending its interests in this proceeding, the Attorney Examiners must conclude that Duke Energy Ohio should be treated no differently than other non-parties who possess comparable information.

The motion to quash IGS's subpoena to Duke Energy Ohio should be granted.

²¹ *Id.*, pp. 48, 52.

Respectfully submitted,

DUKE ENERGY OHIO, INC.

A handwritten signature in dark ink, appearing to read "Jeanne W. Kingery", is written over a horizontal line.

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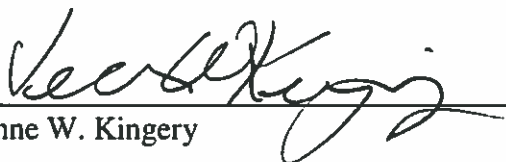
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CERTIFICATE OF SERVICE

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 4th day of May, 2015, to the parties listed below.



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Summary: Reply Duke Energy Ohio's Reply to Memorandum Contra Motion to Quash Subpoena electronically filed by Dianne Kuhnell on behalf of Duke Energy Ohio, Inc. and Kingery, Jeanne W. and Spiller, Amy B.