

**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	)	

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**INTERSTATE GAS SUPPLY, INC.'S MEMORANDUM  
CONTRA INTERLOCUTORY APPEALS OF DUKE ENERGY  
OHIO, INC. AND OHIO EDISON COMPANY, TOLEDO EDISON  
COMPANY, AND CLEVELAND ELECTRIC ILLUMINATING  
COMPANY**

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## **I. INTRODUCTION**

At discovery conference on June 2, 2015, the Attorney Examiner denied third party Duke Energy Ohio, Inc.'s ("Duke") Motion to Quash a subpoena to produce a prior forecast created by witness Judah Rose. The Attorney Examiner determined that Interstate Gas Supply, Inc. ("IGS") had demonstrated a need for the information because it was likely to lead to relevant evidence and it resided solely within Duke's possession.

The Attorney Examiner directed Duke to provide the information to IGS **under seal** despite facts and circumstances which exhibit that the information may have little or no value to Duke. Thus, the sole issue that the Attorney Examiner decided is that Duke must provide to IGS a confidential forecast which it previously relied upon in its sworn testimony.

Duke and Ohio Edison Company, Toledo Edison Company, and Cleveland Electric Illuminating Company (collectively "FirstEnergy") filed Interlocutory Appeals (hereinafter "appeals") requesting that the Public Utilities Commission of Ohio ("Commission") reverse the Attorney Examiner's ruling. Because the Attorney Examiner's ruling was well-reasoned, the appeals lack merit and should be denied.

## **II. BACKGROUND**

In its application to establish an electric security plan ("ESP"), 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 (capacity and energy) produced by witness Judah Rose. If Mr. Rose's forecast is wrong, customers could be on the hook for several billion dollars in above-market charges that will flow directly to FirstEnergy's unregulated affiliate, FES. Given the significance of Mr. Rose's testimony, the Commission should consider all relevant information, including whether Mr. Rose's previously submitted sworn testimony to *this Commission* regarding future prices was correct and based upon sound methodologies. Indeed, Mr. Rose provided a similar long-term forecast of capacity, energy, and natural gas prices in Duke's 2011 ESP case.<sup>1</sup> If Mr. Rose's forecast was not correct—either his methodologies or the conclusions he reached—the Commission should evaluate whether his current forecast suffers similar flaws.

IGS has been seeking a copy of Mr. Rose's 2011 forecast since December of 2014. IGS will not rehash every procedural roadblock that Duke and FirstEnergy have pulled out of their bag of tricks to prevent IGS from obtaining a copy of that study. But, suffice it to say that it is a long and frustrating history, which has entailed 12 pleadings

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<sup>1</sup> Direct Testimony of Judah Rose (Jun. 20, 2011).

amounting to over 140 pages (exclusive of exhibits, which total another 200 pages) on the sole issue of Mr. Rose's prior forecasts.<sup>2</sup>

This latest installment follows an Attorney Examiner ruling, which directs Duke to produce an unredacted copy of Mr. Rose's forecast under seal to IGS and FirstEnergy. The Attorney Examiner correctly concluded that Duke should be required to produce the information based upon IGS's demonstration of need for the information for purposes of FirstEnergy's ESP proceeding. Moreover, the Attorney Examiner specifically held that the information "may reflect upon Mr. Rose's credibility."<sup>3</sup>

Further, the Attorney Examiner correctly determined that disclosure places only a limited burden on Duke for several reasons. First, the information has already been docketed, implying that Duke need not perform an extensive or expensive search to locate and produce the requested information.<sup>4</sup> Second, the Attorney Examiner determined that the information is several years old and thus of questionable value from a competitive standpoint.<sup>5</sup> Third, the Commission determined that the competitive value of the information is further limited by the fact that Duke is no longer in the generation

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<sup>2</sup> IGS Energy's Motion to Compel or in the Alternative Motion to Strike and Request for Expedited Treatment (Dec. 10, 2014); 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); Notice of withdrawal by Duke Energy Ohio, Inc. (Dec. 18, 2014); IGS Energy's Response to Duke Energy Ohio, Inc.'s Notice of Withdrawal; Motion for a Third Party Subpoena Duces Tecum Directed to Duke Energy Ohio and Memorandum in Support (Apr. 1, 2015); Motion to Quash of Duke Energy Ohio, Inc.; Interstate Gas Supply, Inc.'s Memorandum Contra Duke Energy Ohio's Motion to Quash; Duke Energy Ohio's Reply to Memorandum Contra Motion to Quash Subpoena; Reply Memorandum in Support of Duke Energy Ohio, Inc.'s Motion to Quash Subpoena; Duke Energy Ohio's Application for Interlocutory Appeal and Motion for Stay; Ohio Edison Company's and The Cleveland Illuminating Company's and The Toledo Edison Company's Interlocutory Appeal of the Attorney Examiner's June 2, 2015 Oral Ruling.

<sup>3</sup> *Id.*

<sup>4</sup> Tr. at 68-70.

<sup>5</sup> *Id.*

business. Finally, despite the limited proprietary value of the information, the Attorney Examiner determined that the information would be transmitted, at this time, only to IGS and FirstEnergy under seal pursuant to a confidentiality agreement. Each of these parties was directed by the Attorney Examiner to enter into a confidentiality agreement authorized by the Attorney Examiner in this case—an agreement which was litigated in this proceeding at a time when Duke was a party—or the agreement that Duke utilized in its 2011 ESP case.<sup>6</sup> Because the latter agreement has been approved by the Commission, and the former was drafted by Duke itself, the Attorney Examiner implicitly concluded that these agreements will sufficiently protect the confidential information.

Both Duke and FirstEnergy filed Interlocutory Appeals, which largely reiterate positions set forth in Duke's Motion to Quash. Specifically, Duke claims that the ruling was "unreasonable, prejudicial, contrary to precedent, and failed to properly balance IGS's need for the proprietary information against the substantial burden imposed on Duke Energy Ohio."<sup>7</sup> FirstEnergy claims that the ruling utilized an incorrect legal standard, IGS had not demonstrated a substantial need for the information, confidential information belonging to one party cannot be used in another proceeding contrary to a confidential agreement, and, lastly, that it would be prejudicial to produce the information because Mr. Rose is contractually prohibited from discussing it with FirstEnergy. Finally, Duke requests that the Commission stay the ruling pending resolution of this appeal. Each of these arguments lack merit; thus, the appeals should be denied.

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<sup>6</sup> Tr. at 68-69.

<sup>7</sup> Duke appeal at 1.

### **III. ARGUMENT**

#### **A. After balancing the burden on Duke against IGS's need for the information, the Attorney Examiner correctly determined that the balance weighs in favor of production**

Duke claims that the Attorney Examiner did not properly weigh the burden on Duke of producing Mr. Rose's prior forecast. Similarly, FirstEnergy claims that the Attorney Examiner applied the wrong standard because he did not determine that IGS had demonstrated a substantial need for access to Mr. Rose's 2011 forecast. IGS will address these arguments slightly out of order.

##### **1. FirstEnergy lacks standing to challenge the standard applied by the Attorney Examiner**

FirstEnergy challenges the standard the Attorney Examiner applied in denying Duke's Motion to Quash. Under Rule 4901-1-15(E)(2), OAC, the Commission may "[d]ismiss the appeal, if the commission is of the opinion that the issues presented are moot, the party taking the appeal lacks the requisite standing to raise the issues presented or has failed to show prejudice as a result of the ruling in question." As discussed below, FirstEnergy has failed to demonstrate standing or that it was prejudiced by the standard the Attorney Examiner applied; thus, the Commission should dismiss this portion of FirstEnergy's appeal.

The Supreme Court of Ohio stated that "[i]t is an elementary concept of law that a party lacks standing to invoke the jurisdiction of the court unless he has, in an individual or representative capacity, some real interest in the subject matter of the action." *State Ex. Rel. Dallman v. Court of Common Pleas, Franklin County*, 35 Ohio St. 2d 176, 179 (1973) (quoting *Baker v. Carr*, 369 U.S. 186, 204 (1962)). Further, "'Standing' is defined at its most basic as '[a] party's right to make a legal claim or seek judicial enforcement

of a duty or right.” *Ohio Pyro v. Ohio Dept. of Commerce*, 115 Ohio St.3d 375, 381 (2007) (citing Black’s Law Dictionary at 1442, Eighth Edition). “To have standing, the general rule is that ‘a litigant must assert its own rights, not the claims of third parties.’” *Util. Service Partners, Inc. v. Pub. Util. Comm’n of Ohio*, 124 Ohio St.3d 284, 294 (2009) (quoting *City of N. Canton v. City of Canton*, 114 Ohio St.3d 253 at ¶14). “Third-party standing is ‘not looked favorably upon. . . .’” *Id.*

These appeals stem from the Attorney Examiner’s denial of Duke’s Motion to Quash. FirstEnergy lacked the legal right to file a motion to quash the subpoena to non-party Duke in the first instance;<sup>8</sup> thus, FirstEnergy lacks standing to challenge the Attorney Examiner’s denial of that motion. Moreover, the question of whether Duke must produce information to a party does not impact a substantial right or impose a burden on FirstEnergy.

Also, requiring Duke to produce information to IGS will not prejudice FirstEnergy. The Attorney Examiner specifically withheld ruling on the admissibility of the information that Duke was required to provide to IGS.<sup>9</sup> As the Attorney Examiner noted in his ruling, that issue will not even be ripe for consideration until IGS attempts to offer the evidence into the record.<sup>10</sup> Accordingly, the Commission should dismiss this portion of FirstEnergy’s appeal.<sup>11</sup>

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<sup>8</sup> See Civil Rule 45.

<sup>9</sup> Tr. at 68

<sup>10</sup> *Id.* at 72.

<sup>11</sup> If anything, FirstEnergy has standing to request clarification that Mr. Rose can discuss his prior forecast, subject to confidential protections, with IGS and FirstEnergy. But that issue may be addressed through a simple directive by the Commission that Mr. Rose may discuss the information.



**2. The Attorney Examiner applied the correct standard of review of a motion to quash; FirstEnergy requests that the Commission review the Attorney Examiner's ruling under an incorrect standard**

FirstEnergy's lack of standing aside, the Commission need not adhere to FirstEnergy's proposed rigid standard—which FirstEnergy claims is based upon the Civil Rules—because the Commission is not bound by either the Ohio Rules of Evidence or the Ohio Civil Rules.<sup>12</sup> Given the unique and specialized nature of Commission proceedings, this approach correctly ensures that Attorney Examiners have discretion to determine whether development of the record in a proceeding requires disclosure of information. To that end, the Attorney Examiner correctly determined that IGS's interest in receiving the disputed information outweighed the burden on Duke:

With respect to Duke's motion to quash we are going to deny the motion. IGS has demonstrated a need for the information, the information they thought is reasonably calculated to lead to admissible material. We are not ruling on any admission of the material at this time, solely for discovery. But IGS has demonstrated the information may reflect upon Witness Rose's credibility. We believe this imposes a limited burden on Duke which is a nonparty. The information has already been admitted into evidence before the Commission and already resides in the Commission records. The Commission has adequate procedures to protect the information, and the information is already four or five years old and relates to businesses with which Duke is no longer engaged. Duke is strictly a monopoly distribution service and no longer engages in the privilege of generation service in this state.<sup>13</sup>

Accordingly, the Attorney Examiner's ruling was well-reasoned. Thus, the Commission need not indulge FirstEnergy's appeal, which would rigidly bind the Commission to the detriment of the record and the public the Commission serves.

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<sup>12</sup> *Greater Cleveland Welfare Rights Org. v. Pub. Util. Comm'n Ohio*, 2 Ohio St. 2d 62 (1982).

<sup>13</sup> Tr. at 68.

In any event, even if the Commission were to accept FirstEnergy's proposal to adopt a rigid standard of review, the Civil Rules still do not require a demonstration of substantial need in this instance. The requirement to demonstrate a substantial need for information stems from Civil Rule 45(C)(5):

If a motion is made under division (C)(3)(c) or (C)(3)(d) of this rule, the court shall quash or modify the subpoena unless the party in whose 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.

That section indicates that a party must only demonstrate a substantial need if a motion to quash is filed under (C)(3)(c) or (d). Civil Rules 45(C)(3)(c) and (d), however, pertain to motions to quash subpoenas that request information from non-retained experts or unduly burdensome requests for information (emphasis added):

(3) 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:

(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;**

**(d) Subjects a person to undue burden.**

Neither division (c) nor (d) applies; thus, there is no requirement to demonstrate a substantial need.

First, division (c) prohibits disclosure of a fact or opinion known by a non-retained expert, but only “if the fact or opinion does not describe specific events or occurrences in dispute.” Notably, Duke appeal does not appear to claim that Mr. Rose is a non-retained expert. Clearly, Mr. Rose has been retained by a party to this proceeding; thus, the division of the rule does not apply. Moreover, the 2011 Forecast relates to specific events in dispute—future energy prices during a period of time at issue during this proceeding.<sup>14</sup>

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.<sup>15</sup> 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 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).

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.

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<sup>14</sup> Mr. Rose’s forecast in this proceeding and the Duke proceeding relate to overlapping time periods.

<sup>15</sup> *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.”).

Second, While Duke's Motion to Quash claimed production of the information would cause an undue burden, Duke's Motion was defective because Civil Rule 45(C)(4) does not permit a motion to quash to allege undue burden unless it is accompanied by an affidavit indicating the parties' efforts to resolve any claim of undue burden:

Before filing a motion pursuant to division (C)(3)(d) of this rule, a person resisting discovery under this rule shall attempt to resolve any claim of undue burden through discussions with the issuing attorney. A motion filed pursuant to division (C)(3)(d) of this rule shall be supported by an affidavit of the subpoenaed person or a certificate of that person's attorney of the efforts made to resolve any claim of undue burden.<sup>16</sup>

The rule mirrors Commission rules related motions to compel.<sup>17</sup> Duke filed no such affidavit, and Duke has made no attempt to try to resolve this dispute.<sup>18</sup> If the Commission rigidly applies the Civil Rules as proposed by FirstEnergy, it must apply all of the Civil Rules—it cannot pick and choose to apply some and ignore others.

Regardless, the clear purpose of requiring a movant to demonstrate an undue burden through an affidavit is to allow a court to evaluate the legitimacy of the movant's claim. In this case, the Attorney Examiner specifically rejected Duke's claim that production of the information would impose a burden on Duke.<sup>19</sup> Because Duke's Motion to Quash did not meet the requirements of Civil Rule 45(C)(4) and the burden on

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<sup>16</sup> Civil Rule 45(C)(4).

<sup>17</sup> See Rule 4901-1-23(C)(1)(3), which requires a motion to compel to include "[a]n affidavit of counsel, or of the party seeking to compel discovery if such party is not represented by counsel, setting forth the efforts which have been made to resolve any differences with the party or person from whom discovery is sought."

<sup>18</sup> Duke has indicated an unwillingness to produce the information under any terms, including under seal pursuant to a suitable confidentiality agreement. Although FirstEnergy has filed an affidavit attached to its interlocutory appeal, the affidavit is irrelevant to the burden that Duke may face in producing the information—it is the denial of Duke's Motion to Quash that is currently under review.

<sup>19</sup> Tr. at 68-71.

Duke is minimal, IGS was not required to demonstrate a substantial need for the information.

The cases cited by FirstEnergy to support its claim that IGS was required to demonstrate a substantial need under Civil Rule 45(c) are off base. In *Lambda Research*, the court reversed the trial court because it arbitrarily provided denied a motion to quash without any reasoning whatsoever. Moreover, the court specifically determined that the non-party had correctly asserted that production would impose an undue burden. The court did not excuse the party from the requirement to submit an affidavit to support its claim of undue burden.

In *Martin v. Budd*, 128 Ohio App. 3d 115 (9<sup>th</sup> Dist. 2009) a plaintiff requested production of proprietary tire design documents from Goodyear to demonstrate that an alternative design was commercially available. The court denied the request because it was not contested that an alternative design existed and the only issue in play was the cost of producing the alternative design. While that Court acknowledged the standard in Civil Rule 45(c), the Court did not excuse Goodyear of the affidavit requirement. And the holding appears to rely upon the fact that the information in the third party's possession was clearly not relevant and it would impose an undue burden on the third party. Thus, that case is not applicable.

*Splater v. Thermal Ease Hydronic Sys., Inc.*, 169 Ohio App. 3d 514 is of questionable precedential value because it does not apply Civil Rule 45(C)(5). In any event, the case held that "Splater failed to demonstrate a need for the formulae that overcame the potential harm that could result to Noveon as a result of disclosure." Here, the Attorney Examiner concluded that IGS does in fact have a need for the

information and the burden and potential harm to Duke is minimal. Thus, *Splater*, if anything, supports the Examiner's ruling.

Moreover, *Lampe v. Ford*, 9th Dist. Summit No.19388, 2000 Ohio App. LEXIS App. 90 (Jan. 19, 2000) does not support FirstEnergy's claim. The court never mentioned the words "substantial need" anywhere in its opinion. And the court specifically distanced itself from a rigid application of Civil Rule 45(C), noting that even if the criteria in Civil Rule 45(C) are met, the Court need not quash a subpoena in its entirety, "[w]e note, however, that Civ. R. 45(C)(3) does not require the trial court to quash a subpoena when these factors are present. Rather, the rule requires the court to quash or modify the subpoena, or to impose conditions upon the discovery so ordered if possible." Indeed, the Court affirmed the trial court's refusal to quash the subpoena on non-party Smithers because the trial court modified the subpoena to allow the non-party to appear in Ohio instead of California, "[a]lthough the original subpoena required Smithers' custodian of records to appear in person in California, the subpoena was later changed to require appearance at the offices of local counsel in Akron. As amended, this location does not pose an undue burden on Smithers." Thus, *Lampe* holds that a subpoena will not be quashed on the basis of undue burden to the extent that the court can modify it to limit the burden to an acceptable level. Here, that simply is not an issue because the Attorney Examiner concluded the burden on Duke is minimal.

While *Lampe* also quashed a portion of the subpoena, the court's reasoning is not applicable here. The court determined Smithers need not produce individual studies performed by Smithers at its own initiative. The court determined that this information should not be produced because it was produced by a non-party expert. As discussed

above, Mr. Rose has provided a forecast for a party to this proceeding; thus, the non-party witness exception to production is not available to FirstEnergy. Moreover, Mr. Rose's prior study describes facts or events in dispute (long-term electricity and natural gas prices); thus, the non-party witness exception does not apply even to the extent that the prior forecast is deemed produced by a non-party witness.

While each case discussed above is clearly inapplicable to this case, just as importantly, none of the cases cited by FirstEnergy involved a situation where a court denied production of a prior report/study produced by a witness to the case. That context is important to the Attorney Examiner's holding.

Accordingly, the Attorney's Examiner applied the correct standard in denying Duke's Motion to Quash. Thus, FirstEnergy's appeal should be denied.

### **3. IGS has demonstrated a substantial need for the information**

While IGS disagrees that it must demonstrate a substantial need, one exists in this instance. 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.

FirstEnergy claims that IGS does not have a substantial need for the information because FirstEnergy produced some of ICF International's quarterly reports. FirstEnergy places far too much emphasis on this argument. First, those reports were not produced specifically by Mr. Rose. They were produced by ICF International. Second, it is not appear that those reports contain the same type of information and

level of detail that Mr. Rose provided to FirstEnergy and Duke. For example, the ICF Quarterly Reports do not contain a single forecast of capacity prices. Thus, the ICF Quarterly Reports shed no light on Mr. Rose's forecasts of capacity prices. Therefore, IGS has a substantial need for information and the Commission should require Duke to produce Mr. Rose's 2011 forecast pursuant to subpoena.

#### **4. The burden on Duke is minimal**

Unlike FirstEnergy, Duke does not challenge the standard the Attorney Examiner applied—it accepts it to be legitimate. Rather, Duke challenges the Attorney Examiner's determination that the ruling will not impose a burden on Duke. Duke, however, concedes that the Attorney Examiner considered several factors in determining the burden on Duke:

- Docketing already has the information;
- The Attorney Examiner required the information to be submitted under seal;
- The information is nearly 5 years old;
- Duke is no longer in the generation business, so the potential harm to Duke is minimal to non-existent.<sup>20</sup>

Yet Duke claims that the Attorney Examiner “either did not weigh the relevant interest, or did so inappropriately.”<sup>21</sup> Duke's argument lacks merit.

Regarding the first two points, Duke asserts similar arguments. Duke claims that producing the information would impose a large burden on it because it previously transmitted the information under seal pursuant to a confidentiality agreement, which does not allow use of the information in future cases. Duke argues that this burden is

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<sup>20</sup> Duke Appeal at

<sup>21</sup> Duke Appeal at 7.



not minimized by the fact that it has already filed the information in the Commission's docket. Duke's arguments are each based on an unacceptable definition of burden. As case law demonstrates, an undue burden is an increased responsibility or obligation that is difficult to bear. See *generally Lampe* (modifying the subpoena appearance location from California to Ohio to eliminate an undue burden). Here, producing the information at issue does not require endless searches and the transfer of voluminous documents—it could be accomplished through an e-mail exchange. Thus, the burden on Duke is very limited.

Duke's argument about use of information in different cases lacks merit. The confidentiality agreement from its ESP II case was never approved by the Commission (and IGS did not sign the agreement, so IGS is not bound). And, in Duke's most recent ESP, the Commission explicitly rejected Duke's proposed restrictive agreement, holding that a party may use proprietary information in a different case **under seal** and pursuant to normal rules of evidence related to admissibility. Duke's appeal merely rehashes old ground that the Commission has already addressed.

Duke incorrectly claims that the ruling places its proprietary information at risk. The ruling specifically held that any information produced would only be disclosed pursuant a confidentiality agreement, and the Attorney Examiner held that Duke may enter an agreement based upon its second ESP case or the agreement that the Attorney Examiner approved in the present proceeding. Duke drafted the former agreement, and it participated in the litigation that led to the latter. Thus, the terms of either agreement should be acceptable to Duke and impose minimal burden.

As an extension of its second argument, Duke argues that while the information is old it still has value because it involved a long-term forecast. And Duke claims that the information should be protected because it may later seek to provide competitive generation service. Duke misses the point. As the Commission has constantly held, proprietary information loses its value over time. While the Attorney Examiner noted that the information has little if any proprietary value, the Attorney Examiner required it to remain under seal, and, for the time being, the Attorney Examiner required the information to be provided to only IGS and FirstEnergy.

Accordingly, the Attorney Examiner did in fact balance the above-mentioned factors in determining whether Duke must produce Mr. Rose's prior forecast. The Examiner determined the burden was limited in relative to IGS's need for the information.

**B. The ruling will not have an impact on the willingness to produce truthful and complete information in the discovery process**

FirstEnergy argue that the ruling will have a chilling effect on parties' willingness to produce complete discovery. FirstEnergy Appeal at 6, 15. It is not completely clear, but it appears that FirstEnergy represents that if the ruling stands, it would violate ethical duty to provide complete and truthful discovery responses. Because that type of behavior would potentially expose its counsel to sanctions and potential disbarment, IGS will not address this argument in great detail. Nor should the Commission.

Moreover, FirstEnergy's challenge appears to insinuate that the ruling will not protect any information from disclosure to the public. That is simply not the case. While the ruling questioned the proprietary nature of the information, it required the

information to be held under seal.<sup>22</sup> Thus, FirstEnergy cannot legitimately claim that the ruling will have a chilling effect on parties' willingness to produce discovery.

**C. The ruling is not contrary to Commission precedent**

Duke claims that the ruling is contrary to the Attorney Examiner's prior oral ruling in this case, which denied IGS's Motion to compel Mr. Rose to produce every forecast of electricity and natural gas prices that he created since 2009. Duke is incorrect—and it must know it is incorrect—because the Attorney Examiner clarified to Duke that he had made no ruling with respect to discovery on Duke as a non-party and that Duke may be required to produce Mr. Rose's forecast as a non-party if IGS can demonstrate it has no other means to obtain the information:

MS. SPILLER: Just very briefly and for clarification, the ruling was two part in respect of information that Judah Rose may have produced for other companies. You denied the motion to compel with regard to nonparties, granted the motion to compel with respect to Duke Energy Ohio. So I would ask for the Bench's clarification if Duke Energy Ohio were not a party to this proceeding, would it be subject to that aspect of your motion that denied?

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EXAMINER PRICE: As to your theoretical question, if you were no longer a party to this proceeding, I have no idea. At that point it's going to be up to Mr. Olier to demonstrate he has no other way of getting it, and we will go from there. I don't know. I can't give you a theoretical ruling.<sup>23</sup>

Thus, the ruling is not contrary to prior precedent in the proceeding.

Moreover, Duke is not similarly situated to the non-parties discussed in the Examiner's prior ruling. Said parties, their locations, and the information Mr. Rose provided to them was not known. Moreover, none of those parties had relied upon Mr. Rose's forecasts in an Ohio Commission proceeding. These differences easily

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<sup>22</sup> Tr. at 68.

<sup>23</sup> Tr. at 111 (Dec. 18, 2014).

distinguish the Attorney Examiner's prior ruling from the narrowly tailored ruling that is at issue in this appeal.

Further, there is precedent in this case which does in fact require a non-party to produce confidential information. FirstEnergy Solutions has done so at length pursuant to third party subpoena.

FirstEnergy claims that the Attorney Examiner's ruling is contrary to prior Commission precedent, which allegedly prohibits a party from using discovery produced in one case in a future case. FirstEnergy is incorrect. The Commission as recently as Duke's last ESP held that discovery produced in one case may be used in future cases under seal and subject to normal evidentiary objections regarding admissibility.<sup>24</sup> Although FirstEnergy fails to acknowledge this precedent, it cannot feign ignorance given that it has been discussed at length in this case.<sup>25</sup>

#### **D. The ruling is not contrary to the State or Federal Civil rules**

FirstEnergy claims that the appeal is contrary to Ohio Civil Rule 26(B)(5)(b) and Federal Rule 26(b). As discussed above in Section A(1), FirstEnergy lacks standing and has failed to show prejudice to raise this issue. Regardless, FirstEnergy's claim lacks merit.

Initially, the preamble to Civil Rule 26(B)(5)(b) indicates "[u]nless otherwise ordered by the court in accordance with these rules, the scope of discovery is as

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<sup>24</sup> *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. 14-841-EL-SSO, *et al.*, Entry at 3-6 (Aug. 27, 2014) (hereinafter "Duke ESP II"); *Duke ESP III*, Entry on Rehearing at 4-7 (Oct. 22, 2014).

<sup>25</sup> IGS's Memorandum Contra Motion to Quash at 10-11; IGS Energy's Response to Notice of Withdrawal at 4 (Dec. 30, 2014).

follows. . . .” Thus, the rule recognizes that a court has broad discretion in interpreting the Civil Rules. Moreover, Rule 26(B)(1) states “[p]arties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action.” And “[i]t is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.” Thus, the scope of discovery under Civil Rule 26(B) is broad. While FirstEnergy claims that rule 26(B)(5)(b) limits discovery of an expert’s opinions that have previously been given to a party or those to be given at trial, FirstEnergy has failed to provide any case that has limited disclosure of prior expert reports.

Moreover, there is a substantial body of federal case law that requires experts to disclose their prior reports—and some of these cases explicitly reject the precedent cited by FirstEnergy. In *Simuro v. Shedd*, Dist. Court, D. Vermont 2014, Case No. 2:13-cv-30, the court held that “[t]he reports here are relevant to the adequacy of interviews in child sexual abuse cases, a central element of the Plaintiffs’ claims. They are also relevant to Dr. Kinsler’s credibility and whether there is inconsistency in his analysis of these interviews.” In *Douponce v. Drake*, 183 FRD 565 – 1998 (Colorado); See also *Safeco Ins. Co. of Am. v. Vecsey*, 259 F.R.D. 23, 33 (D. Conn. 2009) (holding that reports written by or relied on by expert witness in other cases are relevant as to the expert’s credibility and are subject to discovery); *ParkerVision, Inc. v. Qualcomm, Inc.*, 2013 WL 3771226, at \*2 (M.D. Fla. Jul. 17, 2013) (holding that prior expert reports are relevant and discoverable in part because the reports can be used for impeachment and the information in the reports was related to expected testimony).

Moreover, *Dering v. Service Experts, Alliance LLC*, 2007 WL 4299968 at \*2 (N.D.Ga.), 69 Fed.R.Serv.3d 939 specifically rejected *Trunk v. Midwest Rubber* and *Surles*. The court stated that it:

[H]as not found, nor have the parties cited, any Eleventh Circuit authority concurring with *Surles*. **The Court is not convinced that a blanket prohibition of discovery of the opinions of an expert is appropriate.** . . . The Court concludes that the traditional balancing of the probative value to Plaintiffs against the burden placed upon the responding party is the appropriate way to resolve the issue.

*Id.* (emphasis added). See also *Phillips v. Raymond*, 213 F.R.D. 521 (N.D. Illinois) (Jan. 22, 2003) (“To that end, Philipps is entitled to obtain chapter and verse of Caulfield’s prior expressions of opinion . . .”).

*Midwest Rubber* was also rejected by *Western Resources, Inc. v. Union Pacific Railroad Co.*, No. 00-2043-CM (Dist. Ct. of KA) (July, 2002). “Rule 26(a)(2)(B) provides for the mandatory disclosure of certain expert witness information, even without a request from the opposing party. However, there is no indication on the face of the rule to suggest that a party is absolutely prohibited from seeking any additional information about an opponent’s expert witnesses.” *Id.* at \*4. The Court further held, citing the advisory committee notes that “Nor are parties precluded from using traditional discovery methods to obtain further information regarding these matters, as for example asking an expert during a deposition about testimony given in other litigation beyond the four-year period specified in Rule 26(a)(2)(B).” *Id.* Thus, a significant body of federal case law holds that an expert’s prior reports must be disclosed to the extent that they may lead to relevant evidence.

Indeed, the cases cited by FirstEnergy have largely been explicitly rejected by other courts. *Jackson v. Dollar Gen. Store*, 2014 U.S. Dist. Lexis 17159 (D. Utah Feb. 10, 2014) actually undermines FirstEnergy's position. In that case, the Court rejected a request for production of expert reports in unrelated litigation because plaintiff's request was overly broad—it by no means indicated that such reports were per se off limits. Rather, in that case plaintiff requested indiscriminate production of over 20 years of reports. The Court indicated that it may have required production of the reports expert reports if Plaintiff had narrowed its request to litigation containing similarities to the present case: "Plaintiff's motion casts an overly broad net because it seeks every expert report Nelson has prepared for the past twenty years. Plaintiff made no effort to narrow the time frame or subject matter covered by his motion. For example, Plaintiff neglected to restrict his subpoena to only those expert reports for cases that share similarities with Plaintiff's case." *Id.* at \*7 (emphasis added). Here, IGS has requested a report that contains substantial similarities to the report that Mr. Rose provided to FirstEnergy in this case.

Similarly, in *Schwab v. A.A.A. Fire & Cas. Ins Co.*, 2015 U.S. Dist. 52118 (D. Col. Apr. 21, 2015), the Court denied a request for a blanket production of prior expert reports. The Court held that the plaintiff had failed to demonstrate that they are relevant to the present litigation. The Court held:

Absent some showing of potential relevance, the subpoena should also be quashed because speculation as to potential bias alone is not a sufficient ground to burden Mr. Craver and third-parties with the task of sifting through materials in the unrelated expert reports to determine whether such reports contain confidential materials properly subject to redaction. Having said nothing of the contents of any particular prior reports beyond the general subject matter, Plaintiffs have failed to provide the court with a reasonable basis to conclude that the relevance of the unrelated expert

reports, or any bias such reports could reflect, outweighs the burden to Mr. Carver. Charles E. Wright et al., 8 FED. PRAC. & PROC. CIV. § 2015 (3d ed.) (collecting authorities) (noting that as to the discoverability of evidence of bias generally, "the task for the court is to assess the likelihood that the discovery actually will produce admissible evidence; unless there is reasonable basis to predict that it will, discovery may be refused on that ground.").

Here, there is no question that Mr. Rose's forecasts of capacity, energy, and natural gas, and the methodologies to derive those prices are relevant to this case. Thus, the case is not applicable.

Moreover, in *Lind v. United States*, 2014 U.S. Dist. Lexis 88749 (D. Ariz. June 27, 2014), the court denied production of an expert's prior expert reports because the plaintiff merely speculated that they may be relevant. This is a common theme that resonates in several cases cited by FirstEnergy. Here, there is more than a mere matter of speculation. Witness Rose testified that the Commission should approve a similar ESP for Duke under the theory that energy and capacity prices will remain low in the near term, yet rise in the long-term. The near-term of Mr. Rose's Duke forecast appears to be over. Yet, Mr. Rose has again claimed that the Commission should approve a utility's proposed ESP under the theory that market prices will be low in the near term, but high in the long-term. The degree of Mr. Rose's inconsistency will only be revealed by a comparison of his two forecasts.

FirstEnergy incorrectly relies upon *Cartier v. Four Star Jewelry*, 2003 U.S. Dist. LEXIS 16887 (S.D.N.Y. Sep. 24, 2003) and *Surles v. Air France*, 2001 U.S. Dist. LEXIS 10048 (S.D.N.Y. Jul. 19, 2001). In both of those cases, the court denied production of expert reports because plaintiff failed to demonstrate that the connection between them and the present case was more than mere speculation. Moreover, the *Cartier* court



specifically acknowledged that circumstances may exist that requires disclosure of prior expert reports when the subject matter is substantially similar. *Cartier* at \*2 at citing *Hussey v. State Farm Lloyds Insurance Company*, 216 F.R.D. 591, 2003 WL 21919357 (E.D. Tex. Aug. 11, 2003) (“The previous expert reports conducted by Perdue could potentially allow the fact-finder to logically infer that Perdue’s reports were not objectively prepared, that State Farm was aware of Perdue’s lack of objectivity, and that State Farm’s reliance on the reports was merely pretextual. . . .”).

Accordingly, federal case law does not support FirstEnergy’s claim; thus, the appeal should be denied.

**E. FirstEnergy failed to properly present its claim that the ruling is unworkable; The Commission has authority to require Mr. Rose to discuss his prior forecast with any party**

FirstEnergy claims that the ruling is unworkable because Mr. Rose is contractually prohibited from discussing or disclosing any proprietary information contained in the forecast in Duke’s possession. FirstEnergy’s claim is defective.

Under Civil Rule 10(D), “[w]hen any claim or defense is founded on an account or other written instrument, a copy of the account or written instrument must be attached to the pleading.” FirstEnergy’s claim is defective because it failed to attach the confidentiality agreement between Judah Rose and Duke. While FirstEnergy provided an affidavit, precedent indicates that is not enough. *In Hudson & Keyse, LLC v. Carson* (10th App. Dist., May 29, 2008), No. 07AP-936, a complaint attached an affidavit from plaintiff setting forth the amount due, it did not reference the account number and did not attach account statements. The Court found that the affidavit attached to plaintiff’s complaint failed to reference the account number of the account at issue, or attach any documents related to the account such as monthly statements or the credit card

agreement. As such, the Court held that plaintiff failed to place defendant on notice of the account upon which plaintiff's claims were based pursuant to Civil Rule 10(D)(1).

There are strong public policy reasons for requiring a party to attach a written instrument that provides the basis for its claim. Specifically, it allows the court to review all relevant issues, rather than a one-sided story presented by the claimant. Indeed, while Mr. Rose swears under oath in his affidavit that he cannot discuss the proprietary information, he fails to mention whether his agreement with Duke allows for disclosure pursuant to a court order. Such provisions are standard. In fact, the agreement between Mr. Rose and FirstEnergy contains this very provision.<sup>26</sup> Accordingly, the Commission may moot FirstEnergy's claim of prejudice by holding that witness Rose must discuss in this case—under seal, of course—the confidential information contained in the forecast that he provided to Duke. To remove any ambiguity that may exist regarding Mr. Rose's obligations, IGS recommends that the Commission order Mr. Rose to discuss his prior forecast with parties in this proceeding.

#### **F. The Commission should not stay the ruling**

Duke has moved to stay the Attorney Examiner's ruling pending resolution of its appeal. Duke has not justified its request because it has not demonstrated a substantial likelihood of success on the merits. Moreover, Duke has not demonstrated imminent harm will occur to it from production. Duke cannot do so because its arguments lack merit and the information at issue will be produced under seal and protected.

If any party will be harmed by a stay, it is IGS. Trial is fast approaching. IGS will need time to review the information and to prepare for the examination of Mr. Rose.

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<sup>26</sup> IGS Energy Motion to Compel at 8-9 and Attachment 3 (Dec. 10, 2014).

Thus, a stay would prejudice IGS's ability to prepare for trial. IGS has waited for this information for long enough.

#### **IV. CONCLUSION**

For the reasons stated herein, the Commission should deny the appeals submitted by FirstEnergy. But the Commission should also clarify that Mr. Rose is ordered to testify with respect to the proprietary information contained in his prior forecast.

Respectfully submitted,

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## **CERTIFICATE OF SERVICE**

I certify that Interstate Gas Supply, Inc.'s Memorandum Contra Interlocutory Appeals of Duke Energy Ohio, Inc. and Toledo Edison Company, and Ohio Edison Company, and Cleveland Electric Illuminating Company was filed electronically through the Docketing Information System of the Public Utilities Commission of Ohio on this 17th day of June, 2015 and electronically served to the following parties:

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Summary: Memorandum Contra Interlocutory Appeals of Duke Energy Ohio, Inc. and FirstEnergy electronically filed by Mr. Joseph E. Olikier on behalf of IGS Energy