BEFORE

**THE PUBLIC UTILITIES COMMISSION OF OHIO**

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| In the Matter of Application of Duke Energy Ohio, Inc. to File for Tariff Approval | )  )  ) | Case No. 14-2209-EL-ATA |

**MOTION TO COMPEL PROTECTIVE AGREEMENT**

**AND MEMORANDUM IN SUPPORT OF IGS ENERGY AND REQUEST FOR EXPEDITED TREATMENT**

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**September 15, 2016**

BEFORE

**THE PUBLIC UTILITIES COMMISSION OF OHIO**

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| In the Matter of Application of Duke Energy Ohio, Inc. to File for Tariff Approval | )  )  ) | Case No. 14-2209-EL-ATA |

**MOTION TO COMPEL AND REQUEST FOR EXPEDITED TREATMENT**

Interstate Gas Supply, Inc. (“IGS” or “IGS Energy”) moves the Attorney Examiner to establish a protective agreement that can be used for purposes of obtaining confidential information from the Duke Energy Ohio, Inc. (Duke”) in above-captioned proceeding. Such an order is necessary because the protective agreement proposed by Duke contains a restriction—that IGS cannot retain and utilize confidential documents produced in this proceeding under seal in any future proceeding—the Public Utilities Commission of Ohio (“Commission”) previously rejected in Duke’s last ESP case.[[1]](#footnote-1)

IGS has attempted to resolve this matter with Duke. But Duke refuses to accommodate IGS’ requests, despite Commission precedent holding that Duke’s position is untenable. Therefore, IGS respectfully requests that the Attorney Examiner issue an order directing Duke to enter into a protective agreement to permit IGS to retain a copy of confidential documents produced in this proceeding for potential future use under seal, subject to normal rules regarding admissibility. Accordingly, IGS requests that the Commission adopt the protective agreement included in this motion as Attachment 1, which was previously authorized by the Commission in Duke’s last electric security plan case.

IGS requests that the Attorney Examiner provide an expedited ruling on this motion due to the fact that the deadline for testimony is approaching quickly and IGS has yet to review Duke’s responses to the discovery at issue. At the time of this filing, IGS has not had an opportunity to obtain consent from all parties to an expedited ruling.

For the reasons discussed further in the attached memorandum in support, IGS requests that the Attorney Examiner grant this motion.

Respectfully submitted,

*/s/ Joseph Oliker*

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**MEMORANDUM IN SUPPORT**

1. **INTRODUCTION**

Precedent regarding the use of confidential information in future proceedings is well settled. As the Commission noted in the *ESP III Case*, “Duke is well aware of our determination that intervenors can retain a copy of the alleged confidential information and any attempted use of such information in a subsequent proceeding will be ruled upon within the context of that proceeding.” Despite the Commission’s precedent, continues to attempt to contractually restrict IGS’ use of confidential information to the proceeding in which it is produced. IGS therefore requests that the Commission compel Duke to adopt the suitable protective agreement contained in Attachment 1, which was previously compelled by the Commission following litigation between IGS and Duke.[[2]](#footnote-2)

1. **BACKGROUND**

On March 26, 2014—nearly two and half years ago—the Public Utilities Commission of Ohio (“Commission”) issued a Finding and Order and policy statement in support of reforming utility practices to enable the competitive market to provide customers time-of-use (“TOU”) products and services that promote efficient energy usage.[[3]](#footnote-3) To that end, the Commission directed all electric distribution utilities to file a tariff specifying terms and conditions for the transfer of interval data, as well as proposed formulas for calculating customers’ individual network service peak load (“NSPL”) and peak load contribution (“PLCs”).[[4]](#footnote-4) This proceeding relates to Duke Energy Ohio’s filing, which departed from the Commission’s directive.

In its required tariff filing, Duke attempted to kick the can further down the road, stating, “[m]atters related to providing granular residential interval CEUD to CRES providers will require significant investment and will require additional stakeholder development . . . .”[[5]](#footnote-5) Finding that Duke had effectively proposed to move backward from the Commission’s directive, the Commission determined that it may be unjust and unreasonable and set the matter for hearing. The Commission further determined that parties should address several issues:

1. What AMI CEUD is Duke currently collecting, and what are its system capabilities? This includes granularity of data, frequency of data collection, duration of data stored, and the ability to validate, estimate, and edit AMI data.
2. What type of CEUD should be available to CRES providers? This includes how frequently and via what method.
3. What are the estimated costs to provide AMI CEUD to CRES providers and what is the appropriate cost recovery mechanism?
4. What is a realistic timeframe for implementing a CEUD sharing system?

IGS subsequently submitted discovery on Duke with respect to the questions identified in the Entry. IGS, however, agreed to hold its discovery in abeyance during settlement negotiations between the parties. During those discussions, parties freely exchanged information and did not find a need to enter into a protective agreement.

Following several settlement discussions, however, it became apparent that the parties would not amicably resolve this matter through a stipulation and recommendation. The Attorney Examiner then set this matter for hearing.

After IGS reminded Duke of its outstanding discovery requests, Duke indicated that the requested documents could only be produced pursuant to a protective agreement.[[6]](#footnote-6) On September 6, 2016, Duke submitted to IGS a proposed protective agreement.[[7]](#footnote-7) After reviewing the proposed agreement, it became apparent that the agreement departed from Commission precedent inasmuch as it would restrict IGS’ right to use confidential documents in future proceedings, as well require IGS to destroy or return documents following the resolution of this proceeding.[[8]](#footnote-8)

On September 6, 2016, IGS notified Duke that the parties should use the last agreement entered into between the parties in Duke’s ESP case as it has been approved by the Commission.[[9]](#footnote-9) IGS submitted that agreement for Duke’s review on that same day. Later that day, Duke indicated that it could only use the agreement proposed by IGS to the extent that additional edits were included in the document.[[10]](#footnote-10) In an effort to resolve the issue, IGS indicated that it would review and consider any edits Duke proposed.[[11]](#footnote-11)

On September 8, 2016, Duke submitted to IGS proposed modifications to the agreement adopted by the Commission in the *ESP III Case*. [[12]](#footnote-12) In its edits, however, Duke proposed that “[t]he Recipient shall not reveal or otherwise disclose Protected Materials other than as expressly authorized in this Agreement *and only for the purpose of the Proceeding.*”[[13]](#footnote-13)

IGS promptly notified Duke on that same day that Duke’s proposal would violate Commission precedent resulting from litigation between IGS and Duke in the *ESP III Case*.[[14]](#footnote-14) Duke did not disagree. Instead, Duke claimed that: “Yes, we litigated all of these issues in the 841 case, but that case has not yet been concluded since rehearing was granted. And we still have an opportunity to appeal the issue. So we are not inclined to waive the argument here.”[[15]](#footnote-15) IGS responded to Duke that its position is not reasonable, given that Commission has not reversed its precedent at this time.[[16]](#footnote-16) IGS further indicated that it would file a motion to compel if Duke did not adopt a suitable confidentiality agreement by Monday, September 12, 2016.[[17]](#footnote-17) IGS’ efforts to resolve this matter are further set forth in the Affidavit of Joseph Oliker, which is included in this motion as Attachment 5. Because Duke has not agreed to remove its proposed unreasonable restriction, it is unfortunately necessary for the Commission to issue an order to resolve this discovery dispute.[[18]](#footnote-18)

1. **ARGUMENT**

This Motion requests that the Commission confirm its precedent in the *ESP III Case*. In that proceeding, the Commission held that in order to facilitate the efficient resolution of proceedings it is appropriate to allow parties to retain confidential documents for future proceedings subject to rules pertaining to admissibility.[[19]](#footnote-19) The Commission reaffirmed this holding following both an interlocutory appeal and an application for rehearing submitted by Duke litigating this issue ad nauseum.[[20]](#footnote-20)

Duke does not contest the precedent in the *ESP III Case*. Rather, Duke claims that its application for rehearing in that casewas granted for further consideration; therefore, it is unwilling to follow existing precedent because it *may* decide to ultimately appeal the Commission’s decision and the Supreme Court may ultimately decide in favor of Duke. Duke’s position lacks merit.

Initially, IGS appreciates Duke’s desire to preserve its litigation position in the *ESP III Case*. But Duke’s interest in not waiving the argument in this proceeding does not provide a basis for the Commission to disturb its precedent. Moreover, if the Commission’s determination in *ESP III Case* was truly an important issue to Duke, it could have taken an appeal from the denial of its interlocutory appeal and application for rehearing. It did not. Therefore, IGS requests that the Commission issue an order adopting the protective agreement contained in Attachment 1.

1. **CONCLUSION**

Confidential documents are exchanged in nearly every Commission case. While confidential documents should be protected from disclosure to the public, it is necessary to allow such documents to be used in future cases to promote administrative economy and development of the record. To prevent duplicative discovery and for consistency of the record, it is appropriate to allow parties to keep a copy of confidential documents for future use. Therefore, IGS urges the Commission to expeditiously grant this motion.

Respectfully submitted,

*/s/ Joseph Oliker\_\_\_\_\_\_\_\_\_*

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***Attorney for IGS Energy***

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that a copy of the foregoing *Motion to Compel Protective Agreement and Memorandum in Support of IGS Energy and Request for Expedited Treatment* was served this 15th day of September 2016 via electronic mail upon the following:

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*/s/ Joseph Oliker*

Joseph Oliker

1. *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*, Entry (Aug. 27, 2014) (hereinafter “*ESP III Case*”); *ESP III*, Entry on Rehearing (Oct. 22, 2014). [↑](#footnote-ref-1)
2. *ESP III* Case, Entry (Aug. 27, 2014) (hereinafter “ESP III Case”); ESP III, Entry on Rehearing (Oct. 22, 2014); *ESP III Case*, Tr. at 49-52 (Aug. 12, 2014) [↑](#footnote-ref-2)
3. *In the Matter of the Commission’s Investigation of Ohio’s Retail Electric Service Market*,Case. No. 12-3151-EL-COI Finding and Order at 36 (Mar. 26, 2014) (hereinafter “*RMI Case*” or “RMI Order”); *RMI Case*, Entry on Rehearing at 19 (May 21, 2014). [↑](#footnote-ref-3)
4. *Id.*  [↑](#footnote-ref-4)
5. Application at 2. [↑](#footnote-ref-5)
6. See Attachment 4; Attachment 5 (containing the Affidavit of Joseph Oliker). [↑](#footnote-ref-6)
7. See Attachment 3. [↑](#footnote-ref-7)
8. Attachment 3 at 2-4 (“it will not use any of the Confidential Information for any reason or purpose other than to perform its obligations, if any, in the Pending Case” and “will destroy materials generated by the Receiving Party or the Receiving Party's Representatives that include or refer to any part of the Confidential Information, without retaining a copy of any such material.”) [↑](#footnote-ref-8)
9. See Attachment 1; Attachment 5. [↑](#footnote-ref-9)
10. Attachment 4. [↑](#footnote-ref-10)
11. See Attachment 4; Attachment 5. [↑](#footnote-ref-11)
12. Attachment 2; Attachment 4. [↑](#footnote-ref-12)
13. Attachment 1 at 1 (emphasis added). [↑](#footnote-ref-13)
14. *ESP III Case*, Entry (Aug. 27, 2014); *ESP III*, Entry on Rehearing (Oct. 22, 2014). [↑](#footnote-ref-14)
15. Attachment 4. [↑](#footnote-ref-15)
16. *Id.*  [↑](#footnote-ref-16)
17. *Id.*  [↑](#footnote-ref-17)
18. Attachment 5. [↑](#footnote-ref-18)
19. *ESP III Case*, Entry (Aug. 27, 2014); *ESP III*, Entry on Rehearing (Oct. 22, 2014). [↑](#footnote-ref-19)
20. *Id.* [↑](#footnote-ref-20)