

BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

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) Case No. 14-841-EL-SSO
an Electric Security Plan, Accounting)
Modifications and Tariffs for Generation)
Service.)

In the Matter of the Application of Duke)
Energy Ohio for Authority to Amend its) Case No. 14-842-EL-ATA
Certified Supplier Tariff, P.U.C.O. No. 20.)

**DUKE ENERGY OHIO, INC.'S REPLY
TO MEMORANDUM CONTRA MOTION FOR PROTECTIVE ORDER**

Duke Energy Ohio, Inc., (Duke Energy Ohio or Company), pursuant to O.A.C. 4901-1-24(A), hereby submits to the Public Utilities Commission of Ohio (Commission) its reply to a memorandum (Memorandum) contra the Company's motion for a protective order filed by the Office of the Ohio Consumers' Counsel (OCC).

The matter in dispute relates to Duke Energy Ohio's right to protect its confidential, trade secret, and proprietary information (collectively, confidential information), as permitted by O.A.C. 4901-1-24(A). That rule allows a party from whom discovery is sought to seek an order from the Commission or the assigned attorney examiner, establishing parameters pursuant to which confidential information may be exchanged. Despite this express language in the rule, the OCC impermissibly seeks an order from the Commission imposing upon the Company an outdated and unsatisfactory confidentiality agreement on the sole basis that it is familiar to the

OCC. The OCC's response, however, is procedurally and substantively defective and should therefore be denied.

Negotiation

Before responding to OCC's specific arguments, a few background points must be addressed so as to put the OCC's reply in the proper context. The document that OCC seeks to force upon the Company – which it oddly references using the moniker “the OCC/Duke agreement” – is one that OCC took it upon itself to draft. But based on the experience that Duke Energy Ohio has had in Commission proceedings, it is the owner of confidential information that generally prepares an agreement to propose terms under which it is willing to disclose that information. Indeed, the regulation pursuant to which Duke Energy Ohio's motion for a protective order was filed contemplates that the party from whom discovery is sought is the party with the right to seek appropriate parameters for discovery. OCC ignores this regulation and instead improperly uses its Memorandum as a vehicle for seeking a confidentiality agreement that it alone prefers.

Even assuming the OCC can initiate imposition of a confidentiality agreement, such an outcome cannot be achieved absent a demonstration of good faith and an exhaustion of all extrajudicial remedies. Here, however, OCC has demonstrated neither. Significantly, it cannot demonstrate that it has exhausted all efforts of compromise, as it has simply failed to negotiate.

OCC did discuss its concerns with the Company, in a two and one-half hour conversation, as OCC indicated.¹ And Duke Energy Ohio did agree to make revisions after that discussion, although not – as described by OCC – “limited” revisions.² Rather, the Company agreed to modify its proposed agreement in many areas, including the deletion of a major remedy

¹ OCC Memorandum Contra, pg. 4.

² *Id.*, pg. 4.

provision that would have provided the Company with an important tool for ensuring the protection of its information. The truth is found in this OCC statement: The Company “admits that its revisions do not address all of the concerns that accommodate OCC.”³ OCC complains that Duke Energy Ohio is unwilling to release its confidential, proprietary information under the terms of an old confidentiality agreement. OCC is unwilling to consider any changes. Indeed, after Duke Energy Ohio spent two and one-half hours on the phone with OCC and then several hours making the requested changes, OCC was unwilling to even look at the modified document before rejecting it outright. Regardless of how much OCC points the finger of blame at the Company, it is OCC that is failing to negotiate in good faith.

Good Cause for Protective Order

OCC also claims, in its Memorandum, that Duke Energy Ohio failed to make the necessary showing of good cause for the issuance of a protective order. In making this assertion, OCC proposes two areas in which such a showing was needed.

First, it suggests that the Company did not explain either the changed circumstances that prompted the new agreement or the ways in which the prior agreement was no longer satisfactory. But, in moving for a protective order, the Company did explain that (as quoted by OCC) the prior version “fails to provide adequate assurance that the company’s confidential information will be properly protected or . . . affords sufficient remedies should the agreement be breached.”⁴ This was certainly an explanation of the ways in which the prior form of agreement failed to offer satisfactory protection of the Company’s property. And nothing in the law or the Commission’s rules requires an applicant to explain what caused it to reach a given business decision.

³ *Id.*, pg. 4 (emphasis added).

⁴ *Id.*, pg. 4 (citing memo in support of motion, at 2).

Second, OCC attempts to sidestep the real issues at hand by asserting that the Company “failed to show that any of the information is deserving of protection.” Whether any particular information is confidential and proprietary under Ohio law is not before the Commission at this time. Such a matter would fall under the terms of O.A.C. 4901-1-24(D), wherein a party can seek an order requiring information to be held confidentially by the Commission’s docketing division. Rather, the motion under consideration was made under O.A.C. 4901-1-24(A)(7), seeking an order specifying the way in which information is to be disclosed. Duke Energy Ohio had no obligation to prove that any particular information is or is not confidential. The issue is simply outside the scope of the decision to be made.

OCC’s claims that the Company has failed, at this juncture, to demonstrate the existence of confidential information is further undermined by its own efforts. OCC cannot legitimately complain that documents are not worthy of protection when it persists in seeking adopting of no other confidentiality agreement but its own. If the Company’s efforts were procedurally improper, as OCC implies, it would not need to impose upon the Commission for adoption of any agreement.

And with regard to OCC’s efforts, they are not justified. OCC has not made a sufficient showing as to why its old confidentiality agreement must be used here. It cites “administrative efficiency” and “similar” agreements between it and other utilities. But the purported efficient operation of OCC’s internal processes is not the determinative factor here. Rather, it is whether the agreement offered by the Company affords sufficient protection of its confidential material, while enabling OCC to engage in discovery and prepare a defense to the issues at hand. As discussed below, the agreement sought by Duke Energy Ohio does this.

Substantive Issue: Acknowledgement of Confidentiality

OCC complains that Section 2 of the agreement provides that the recipient of the Company's proprietary information must acknowledge the confidential (or highly confidential) nature of that information, as well as the fact that its public disclosure will injure the Company.⁵ As the Company informed OCC, this would be an important provision in the event of breach. OCC still has, under this language, an absolute right to assert that any particular information is not actually confidential or proprietary. However, if a signatory does not make that claim, then it should be held to its agreement to hold the matter in confidence.

OCC protests because this provision would make it "difficult to prevail."⁶ True. OCC is concerned because the new agreement would make it more difficult for OCC to "prevail" in the event it is seeking to release the Company's proprietary information?

OCC also suggests that this approach is contrary to the Commission's rules, wherein the burden of proving the confidentiality of information is on the party asserting confidentiality.⁷ OCC is confused here. Duke Energy Ohio makes no effort to alter the Commission's rules. If OCC were to dispute the nature of the information, the burden would indeed be on the Company to demonstrate to the Commission why the information should be protected. But the provision in question addresses how the contracting parties will treat the information; this issue is not governed by the Commission's rules.

Substantive Issue: Acknowledgement of Material Harm

In a similar vein, OCC objects to a provision in the agreement in which it would have to agree that improper disclosure of the Company's proprietary information would likely damage

⁵ *Id.*, pg. 5.

⁶ *Id.*, pg. 5.

⁷ *Id.*, pg. 5-6.

the Company in a material way and that it would suffer irreparable harm.⁸ As is evident from a reading of the redlined agreement, as attached to the Company's motion for a protective order, prior to modification the agreement included both liquidated damages and an agreement for equitable relief. For purposes of negotiation, the Company agreed to delete the liquidated damages clause that would have provided a legal remedy. Without that provision, clauses allowing for equitable relief are even more important. It may be OCC wants the Company to have no remedy whatsoever in the event of breach, but that is not acceptable to the Company. Indeed, the lack of explicit remedies is part of the problem with the prior version that OCC is so anxious to continue using.

OCC seems to believe that an agreement, governing the relationship and understanding between the contracting parties, must be consistent with a law requiring the Commission to maintain its records as public, unless otherwise ordered.⁹ The agreement, rather, simply requires certain actions to be taken by OCC with regard to confidential information. It has nothing to do with the public records requirement applicable to the Commission, as set forth in R.C. 4901:12.

Continued Negotiation

Although OCC also now points to two additional concerns about the agreement,¹⁰ as well as the two major issues identified above, it did not choose to continue negotiating after Duke Energy Ohio conceded numerous issues. OCC rejected the modified document out of hand, falling back on its desire to have an agreement similar to what it has with other utilities. It makes

⁸ *Id.*, pg. 6, citing section 7.

⁹ *Id.*, pg. 7.

¹⁰ *Id.*, pg. 7 (indemnification of OCC for damages, attorney's fees, or court costs related to public records requests and lack of waiver of sovereign immunity).

this desire clear in its Memorandum, asserting that the agreement “has been accepted by numerous utilities over the years.”¹¹

OCC contrasts Duke Energy Ohio with AEP-Ohio, saying that AEP-Ohio “was required to accept protective agreement provisions related to OCC’s responsibilities re: public records matters.”¹² The contrast is interesting, but it goes the other way. The Company voluntarily made numerous changes to the document, at OCC’s request, to address public records matters. OCC has, in the Memorandum, identified some additional changes that it would need. But it utterly failed to discuss that need with the Company. It simply rejected the agreement.

Duke Energy Ohio has no objection to negotiating an agreement that provides for OCC to have reasonable access to confidential and proprietary information. However, that agreement must also serve to protect the Company and its information from public disclosure and from use outside the proceedings for which it was released.

Conclusion

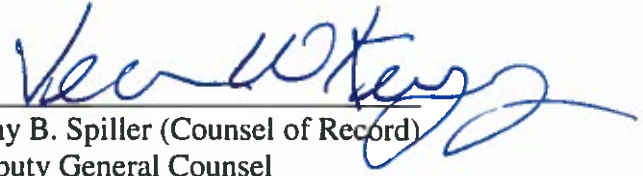
Duke Energy Ohio respectfully requests that the Commission grant its motion for a protective order.

¹¹ *Id.*, pg. 2. *See also Id.*, pg. 9.

¹² *Id.*, pg. 10.

Respectfully submitted,

DUKE ENERGY OHIO, INC.

A handwritten signature in blue ink, appearing to read "Amy B. Spiller", written over a horizontal line.

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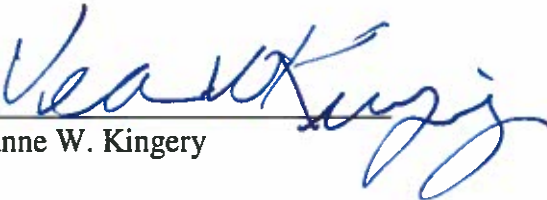
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CERTIFICATE OF SERVICE

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 17th day of July 2014, to the parties listed below.



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