

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Application of Ohio)	
Power Company and Columbus Southern	)	Case No. 10-2376-EL-UNC
Power Company for Authority to Merge)	
and Related Approvals)	

In the Matter of the Application of)	
Columbus Southern Power Company and)	
Ohio Power Company for Authority to	)	Case No. 11-346-EL-SSO
Establish a Standard Service Offer	)	Case No. 11-348-EL-SSO
Pursuant to §4928.143, Ohio Rev. Code,)	
in the Form of an Electric Security Plan.)	

In the Matter of the Application of)	
Columbus Southern Power Company and	)	Case No. 11-349-EL-AAM
Ohio Power Company for Approval of	)	Case No. 11-350-EL-AAM
Certain Accounting Authority)	

In the Matter of the Application of)	
Columbus Southern Power Company	)	Case No. 10-343-EL-ATA
to Amend its Emergency Curtailment)	
Service Riders)	

In the Matter of the Application of)	
Ohio Power Company	)	Case No. 10-344-EL-ATA
to Amend its Emergency Curtailment)	
Service Riders)	

In the Matter of the Commission Review of)	
the Capacity Charges of Ohio Power	)	Case No. 10-2929-EL-UNC
Company and Columbus Southern Power)	
Company.)	

In the Matter of the Application of)	
Columbus Southern Power Company	)	Case No. 11-4920-EL-RDR
for Approval of a Mechanism to Recover)	
Deferred Fuel Costs Ordered Under)	
Ohio Revised Code 4928.144)	

In the Matter of the Application of)	
Ohio Power Company for Approval)	
of a Mechanism to Recover	)	Case No. 11-4921-EL-RDR
Deferred Fuel Costs Ordered Under)	
Ohio Revised Code 4928.144)	

**JOINT MOTION FOR PROTECTIVE ORDERS
OF SIGNATORY PARTIES TO THE SEPTEMBER 7, 2011 STIPULATION
FILING AS JOINT MOVANTS**

Pursuant to Rule 4901-1-24(D) of the Ohio Administrative Code (O.A.C.), the undersigned signatory parties (Joint Movants) to the September 7, 2011 Stipulation (“Stipulation”) filed in these proceedings respectfully and request that the Public Utilities Commission of Ohio (“Commission”) issue protective orders maintaining the confidentiality of all draft stipulations, draft term sheets, and related communications in the possession of the Commission Staff that convey compromise settlement offers and proposals or counterproposals exchanged by the parties during the process culminating in the Stipulation. The confidential documents do not constitute public records, disclosure by Commission Staff is prohibited by the Ohio Revised Code and the documents constitute protected trade secrets that are privileged as trial preparation. The reasons supporting this motion are more fully explained in the attached memorandum in support.

Respectfully submitted jointly,

ss// All Joint Movants Listed Below

David F. Boehm
Michael L. Kurtz
Kurt J. Boehm
Boehm, Kurtz & Lowry
36 East Seventh Street, Suite 1510
Cincinnati, OH 45202

Counsel for Ohio Energy Group

Lisa G. McAlister
Matthew W. Warnock
Bricker & Eckler LLP
100 South Third Street
Columbus, OH 43215-4291

Counsel for The OMA Energy Group

M. Howard Petricoff
Vorys, Sater, Seymour and Pease LLP
52 East Gay Street
P.O. Box 1008
Columbus, OH 43216-1008

Counsel for Constellation NewEnergy, Inc., Constellation Energy Commodities Group, Inc., Retail Energy Supply Association and Exelon Generation Company, LLC

Thomas J. O'Brien
Bricker & Eckler LLP
100 South Third Street
Columbus, OH 43215-4291

Counsel for the Ohio Hospital Association

Jay E. Jadwin
American Electric Power Service Corporation
1 Riverside Plaza, 29th Floor
Columbus, OH 43215

Counsel for AEP Retail Energy Partners LLC

Terrence O'Donnell
Christopher M. Montgomery
Bricker & Eckler LLP
100 South Third Street
Columbus, OH 43215-4291

Counsel for Paulding Wind Farm II LLC

Gregory J. Poulos
EnerNOC, Inc.
101 Federal Street, Suite 1100
Boston, MA 02110

Counsel for EnerNOC, Inc.

Steven T. Nourse
Matthew J. Satterwhite
American Electric Power Corporation
1 Riverside Plaza, 29th Floor
Columbus, Ohio 43215-2373

Daniel R. Conway
Porter Wright Morris & Arthur
Huntington Center
41 S. High Street, 30th Floor
Columbus, Ohio 43215

Counsel for Columbus Southern Power Company and Ohio Power Company

Philip B. Sineneng
Carolyn Flahive
Terrance A. Mebane
Thompson Hine LLP
41 South High Street, Suite 1700
Columbus, OH 43215

Counsel for Duke Energy Retail Sales, LLC

Tara C. Santarelli
Environmental Law & Policy Center
1207 Grandview Avenue, Suite 201
Columbus, OH 43212

Counsel for the Environmental Law and Policy Center

John W. Bentine
Mark S. Yurick
Zachary Kravitz
Chester Willcox & Saxbe, LLP
65 East State Street, Suite 1000
Columbus Ohio 43215

Counsel for Kroger Company

Christopher L. Miller
Schottenstein Zox & Dunn Co., LPA
250 West Street
Columbus, OH 43215
Counsel for the Association of Independent Colleges and Universities of Ohio

MEMORANDUM IN SUPPORT

Table of Contents

I.	INTRODUCTION.....	5
II.	LAW AND ARGUMENT.....	6
A.	R.C. 4901.16 Prohibits by Law Disclosure of Confidential Settlement Documents By Commission Staff.....	6
1.	State Law Prohibition.....	7
2.	Commission Staff Disclosure Concerns Trade Secrets.....	9
B.	Confidential Draft Settlement Documents Shared in Negotiations in Commission Proceedings are not Public Records Under R.C. 149.011(G)...	10
C.	Existing Caselaw Does Not Concern Preliminary Settlement Communications Resembling Those That The Joint Movants Seek Here To Protect as Confidential.....	13
1.	<i>Dupuis</i> involved the organization and policies of a public agency.....	13
2.	The Settlement Communications Constitute Trial Preparations Exempt from Disclosure Under R.C. 149.43(A)(1)(g).....	14
III.	CONCLUSION.....	18

MEMORANDUM IN SUPPORT

I. INTRODUCTION

The undersigned parties to the September 7, 2011 Stipulation (hereinafter, the “Joint Movants”) were advised by counsel for the Commission on or about September 27, 2011 that the Commission and its Staff had received a public records request for records regarding a range of topics, including the settlement discussions that culminated in the recent Stipulation. Counsel for the Commission further advised the Companies that, absent a specific request not to disclose them, the Commission may be required to produce matters “typically considered ‘confidential and privileged’ as settlement discussions *** (term sheets, stipulation drafts, analyses supporting discussions, etc.).”¹ The Joint Movants respectfully request that any draft stipulations, draft term sheets, and related settlement communications in the possession of the Commission Staff that convey compromise settlement offers and proposals or counterproposals exchanged by the parties during the prehearing process culminating in the Stipulation (hereinafter referred to as “Settlement Communications”) be protected from public disclosure through a protective order issued by the Commission.

Rule 4901-1-24(D) of the Ohio Administrative Code provides that the Commission or certain designated employees may issue an order to protect the confidentiality of information to the extent that state or federal law prohibits the release of the information and where non-disclosure of the information is not inconsistent with the

¹ It is the understanding of the Joint Movants that the only documents at risk for disclosure are documents from the confidential settlement discussions and not documents involved in discovery in accordance with *Cleveland Clinic Found. v. Levin*, 120 Ohio St. 3d 1210; 2008 Ohio 6197. Please provide notice if that assumption is incorrect as documents released in discovery are subject to confidentiality agreements amongst the parties and prohibition against disclosure by Staff under R.C. 4901.16.

purposes of Title 49 of the Revised Code. For the following reasons, disclosure of the Joint Movants' confidential Settlement Communications could:

- be inconsistent with the fact that the parties explicitly opened negotiations stating an expectation of engaging in confidential settlement discussions,
- nullify and have a disastrous chilling effect on the willingness and ability of parties to engage in meaningful settlement negotiations in Commission proceedings,
- subject Commission Staff to disqualification from employment under R.C. 4901.16; and/or
- be entirely at odds with the language and purposes of the Public Records Act, as well as the many state and federal privilege doctrines and statutes that underscore the properly confidential nature of settlement communications.

The failure of the Commission to protect these confidential prehearing settlement documents could eliminate its Staff and other public agencies, such as the Ohio Consumers' Counsel, from participating in future settlement discussions on the complex issues that come before the Commission.

II. LAW AND ARGUMENT

A. R.C. 4901.16 Prohibits by Law Disclosure of Confidential Settlement Documents By Commission Staff.

The confidential settlement documents exchanged with Commission Staff during confidential settlement discussions in the AEP Ohio ESP case are not public records because their release is prohibited by state law. R.C. 4901.16 prohibits Commission Staff from releasing information related to a Commission action punishable by disqualification of employment. Under the R.C. 149.43(v) exemption to the Public Records Act, any documents that are prohibited from release by state law are not considered public records.

1. State Law Prohibition

The state law prohibition clearly prohibits the disclosure of information related to a Commission proceeding. Specifically, R.C. 4901.16 states:

Except in his report to the public utilities commission or when called on to testify in any court or proceeding of the public utilities commission, no employee or agent referred to in section 4905.13 of the Revised Code shall divulge any information acquired by him in respect to the transaction, property, or business of any public utility, while acting or claiming to act as such employee or agent. Whoever violates this section shall be disqualified from acting as agent, or acting in any other capacity under the appointment or employment of the commission.

This specific statute prohibits the disclosure of the information acquired by the Commission Staff in respect to the transaction, property, or business of the AEP Ohio Companies while acting as a party to the Commission proceeding. A settlement concerning the very structure of the Joint Movants' operations going forward and the resulting standard service offer concerns the transaction, property, and business of the utilities. As such the release of the Settlement Communications is prohibited by state statute, with such prohibition further reinforced and evidenced by the provision for immediate disqualification of employment as a consequence.

The Ohio Administrative Code also contemplates the protection of utility information from disclosure by Commission Staff in its involvement in Commission proceedings prior to public hearings and Commission decisions. The very rule pursuant to which this motion for a protective order is being sought carves out information provided to the Commission staff from the need for a protective order. Under Ohio Administrative Code 4901-1-24(G), requests for protective orders are not required for confidential information that is submitted to Commission Staff, because (unlike

information filed with the docketing division), such information does not become part of the “public record” in a proceeding.

It is important to recognize that the Commission has established a system to utilize its Staff in Commission proceedings *as a party* to help develop complex issues prior to the public hearings that ultimately determine the Commission’s position on the cases and controversies that come before it. Under the Commission’s rules, the Commission’s Staff is in many respects an independent party to the Commission’s proceedings, separate and apart from the ultimate decision-maker, the Commission itself. This fact was even recognized by the Supreme Court of Ohio upholding “the PUCO’s determination that its staff [is] *another party* that participate[s] in [proceedings] ‘*like the other parties*[.]’” *Vectren Energy Delivery of Ohio v. Pub. Util. Comm.*, 113 Ohio St.3d 180, 190, 2007-Ohio-1386, ¶ 47 (2007). Like each of the Joint Movants in this case, the Staff is subject to the Commission’s rules regulating the filing, format, signing, service, and amendment of pleadings and other papers (Rules 4901-1-02 through -06, O.A.C.); the filing of motions, memoranda contra, and reply memoranda (Rule 4901-1-12, O.A.C.); the filing of requests for continuance and extension (Rule 4901-1-13, O.A.C.); the filing of interlocutory appeals (Rule 4901-1-15, O.A.C.); participation in prehearing conferences (Rule 4901-1-26, O.A.C.); requesting oral arguments (Rule 4901-1-32, O.A.C.); the filing of exceptions to an attorney examiner’s report (Rule 4901-1-33, O.A.C.); and the filing of motions to reopen proceedings (Rule 4901-1-34, O.A.C.), among others. *See* Rule 4901-1-10(C), O.A.C. And like each of the Joint Movants, the Commission’s Staff may enter into stipulations with other *parties* (Rule 4901-1-30, O.A.C.). The designation of the

Commission Staff as a party is an important distinction that reinforces the statutory prohibition against the divulging of information prior to a public hearing.

As indicated in the Ohio Revised Code and further supported by the Ohio Administrative Code, the documents received by Commission Staff as another party to the case are precluded from disclosure outside of a report to the Commission or the grounds of a proper line of testimony at hearing. The prohibition against disclosure, supported by the rule declaring items provided to Commission Staff not requiring a protective order to maintain confidentiality, satisfies the criteria in R.C. 149.43(A)(1)(v) that the confidential negotiation documents are not public records subject to disclosure.

2. Commission Staff Disclosure Concerns Trade Secrets

The obvious purpose of R.C. 4901.16 is to prevent the Commission Staff from disclosing confidential information that, if released, can cause a substantial financial impact upon the utility and the industry. Compromise offers made during negotiations of a pending case squarely fall within the scope of the statute. A daily release of settlement offers or negotiated positions could have a severe impact on stock prices and the financial standing of all utilities and companies involved in a negotiation, equating to a trade secret for the utility.

The actions of the participants are consistent with the treatment of trade secrets. The Settlement Communications are consistent with the definition of trade secrets in R.C. 1333.61(D). Specifically, the business information 1) derives potential independent economic value from not being generally known by other persons who can obtain economic value from its disclosure or use, and 2) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy. During the pendency of

negotiations the parties mark the communications confidential, open their dialogue by expressing a common understanding that the matters discussed are confidential, and maintain the confidentiality of those discussions and documents exchanged in the effort to reach a negotiated result. Those documents include elements of the company's business that are highly competitively sensitive and confidential, including rate and business structures. An after-the-fact release of those Settlement Communications made during the negotiations carries similar concerns with disclosure. Positions that a company may be willing to take in the middle of a negotiation can be misread and abused by investors and the public who are not privy to the context of the offers or documents used in negotiations. That can have a devastating effect on the private companies involved. A protective order is appropriate to protect from this unintended economic consequence of releasing trade-secret documents that involve the core elements of the negotiators' business.

B. Confidential Draft Settlement Documents Shared in Negotiations in Commission Proceedings are not Public Records Under R.C. 149.011(G).

The Settlement Communications that the Joint Movants seek to protect here are not required to be released under the Public Records Act because they do not meet the definition of a "record" in the Act. A "record" that is subject to disclosure under the Act must "document the organization, functions, policies, decisions, procedures, operations, or other activities of the office." R.C. 149.011(G). The possession of a document by a public agency does not necessarily equate to the categorization of a "record." The Supreme Court of Ohio, in *State ex rel. Cincinnati Enquirer v. Dupuis*, 98 Ohio St.3d 126, 2002-Ohio-7041 (a case involving settlement proposals and discussed in further detail below), found that "even if a record is not in final form, it may still constitute a

'record' for purposes of R.C. 149.43 if it documents the organization, policies, functions, decisions, procedures, operations, or other activities of a public office." *Dupuis citing State ex rel. Calvary v. Upper Arlington (2000), 89 Ohio St.3d 229, 232, 2000 Ohio 142, 729 N.E.2d 1182*, and cases cited therein. The Court used the term "may" indicating that an analysis is required comparing the documents in question to the list of potential categories provided to determine if they are "records" for purposes of R.C. 149.43. As the Supreme Court of Ohio has recognized, not every document in the possession of a State agency does these things, and it would be "absurd" to conclude otherwise. *State ex rel. Beacon Journal Publishing Co. v. Whitmore*, 83 Ohio St.3d 61, 1998-Ohio-180, (letters sent to judge regarding upcoming sentencing decision, even though kept in her files, were not "records" because they were not used by the judge in rendering her sentencing decision).

Applied to this case, the Settlement Communications do not document the organization, functions, policies, decisions, procedures, operations, or other activities of the Commission. A proposed term sheet or draft stipulation – intended to move the parties toward the resolution of a dispute pending *before the office*, does not document any function, policy, decision, procedure, operation, or other activity *of the office* (the Commission). The documents retained by the Commission Staff in its role as a party to the case are nothing more than confidential settlement documents that contain information about the workings and structure of third parties, in this case the Joint Movants. Typically, the cases cited to support the establishment of a public agency's documents qualifying as "records" subject to R.C. 149.43, involve matters like a collective bargaining contract, a civil suit against a public entity, an individual public

employee contract dispute, or some other litigation involving the makeup or actions of the public agency. The facts of this case are distinguishable because the public agency's involvement is limited to a segment of its Staff's as a party to litigation concerning a third party's business plans that produces a final public document the Commission has the opportunity to consider in a public hearing.

It serves no purpose to understand the organization or function of the public agency through the release of information about third party entities in the possession of the Commission Staff appearing as a party to the case. As noted by the Supreme Court of Ohio, "disclosure [of non records] would not help to monitor the conduct of state government." *State ex rel. Dispatch v. Johnson*, 106 Ohio St.3d 160, 2005-Ohio-4384, at ¶27 (citing *State ex rel. McCleary v. Roberts*, 88 Ohio St.3d 365, 369, 2000-Ohio-345 (names, addresses, and other personal information kept by city recreation and parks department regarding children who used city's recreational facilities are not public records)). The mere fact that the Commission Staff has documents that detail settlement negotiations about the substance of the Joint Movants' standard service offer does not make the documents a "record" for purposes of R.C. 149.43.

The "function" of the Commission is not to negotiate settlement terms and circulate (confidential) proposals, but rather to (publicly) rule on the Stipulation that may (or may not) ultimately be proposed by the negotiating parties. Settlement terms offered in a term sheet or draft stipulation do not reflect the "policy" of the Commission *until the Stipulation is approved* – what comes before that time reflects only the (confidential) desires, concessions, and concerns of the negotiating parties.

In the absence of any documents that describe the organization, functions, policies, decisions, procedures, operations, or other activities of the Commission, the documents cannot be considered “records” required under R.C. 149.43 to be released. Hence, it is appropriate for the Commission to issue a protective order in this case to ensure the confidential protections of compromise offers in the context of negotiations.

C. Existing Caselaw Does Not Concern Preliminary Settlement Communications Resembling Those That The Joint Movants Seek Here To Protect as Confidential.

The Ohio Supreme Court’s decision in *State ex rel. Cincinnati Enquirer v. Dupuis*, 98 Ohio St.3d 126, 2002-Ohio-7041, is commonly used to assert a requirement for disclosure of public records involving settlement proposals. But the *Dupuis* case does not control here. The *Dupuis* case concerned an investigation by the Department of Justice into alleged “patterns and practices” of the City of Cincinnati’s police division. In March 2002, a reporter for the *Enquirer* learned that the City had received a proposed settlement agreement from the DOJ to resolve the issues raised in the litigation concerning the actions of the City. The reporter went to the public office that was a party to the proposed agreement – *the City itself* – but his public-records request was rebuffed. As discussed above this case involved the very “organization, functions, policies, decisions, procedures, operations” of the City.

1. *Dupuis* involved the organization and policies of a public agency.

Here, in contrast, the “public office” itself – the Commission – is not a party to the Stipulation. Instead of documenting the functions *of the public office*, which the proposed agreement at issue in *Dupuis* did with respect to the City, the Settlement Communications at issue here merely reflect the preliminary views and proposals of various parties

appearing *before the public office* that then properly filed the resulting agreement for public viewing and formal consideration *by that office*. The Supreme Court in *Dupuis* expressly noted that “the city and its Solicitor considered the proposal” embodied in the DOJ’s proposed settlement requested by the *Enquirer*, meaning that “it documents [the City and its Solicitor’s] policies and decisions” as it must in order to be a “record” subject to the disclosure requirements of the Act. *Dupuis*, 2002-Ohio-7041, at ¶ 10. Here, in contrast, the Commission did not consider the preliminary Settlement Communications that the Joint Movants seek here to protect from public disclosure – it will consider only the signed and publicly filed Stipulation. Put another way, the final settlement agreement (the signed Stipulation) was filed with the Commission and is indeed a public record under the public records laws, but the negotiations leading up to that point reflect the parties trial preparations, which are by law exempt from disclosure. Indeed, the fact that not all parties to these proceedings signed the Stipulation guarantees more litigation still to come – underscoring the “trial preparation” nature of the Settlement Communications.

2. The Settlement Communications Constitute Trial Preparations Exempt from Disclosure Under R.C. 149.43(A)(1)(g).

The *Dupuis* decision determined that the proposal sought in that proceeding did not constitute trial preparation, but the facts of this case are different than what faces the Commission in this case. Unlike the present case, the *Dupuis* decision considered settlement agreements in the context of complete settlement and not partial settlements still subject to litigation. Specifically, the Court in the *Dupuis* decision stated:

[**P18] "A settlement agreement is not a record compiled in anticipation of or in defense of a lawsuit. It simply does not prepare one for trial. A settlement agreement is a contract negotiated *with the opposing party to prevent or conclude litigation.*"

[**P19] Similarly, a settlement proposal received by a public office is not a record compiled in anticipation of or in defense against a lawsuit. It is simply an offer *intended to prevent or conclude litigation*.

Partial settlements before the Commission are not the same bilateral litigation considered by the Court in the *Dupuis* decision. Nothing about the settlement signed in the ESP case prevented or concluded litigation as indicated in the decision. The decision merely defined the scope of the litigation but still left the overall issues involved unresolved and subject to a litigated end. The negotiations leading up to the final settlement were trial preparation documents distinguishable from the Court's consideration in *Dupuis*.

The final settlement agreement was filed with the Commission and is a public record as intended under the public records laws, but the negotiations leading up to that point were trial preparation by parties to the case. A subset of parties to the negotiations filed a public document opposing further continuance of the settlement discussions declaring settlement negotiations no longer fruitful. Therefore, the work that went into preparing the settlement agreement should be privileged as work product of the parties with the common interest to settle. The nature of the proceedings now is that the signatory parties are defending that public Settlement against the non-signatory parties. The final product is public and subject to full inspection by the Commission in its quasi-judicial responsibility, but the negotiations leading to that document in anticipation of litigation are not public records.

The Ohio Attorney General Sunshine Law Manual cites two more cases supporting the position that the trial preparation exception will not apply to settlement

agreements where a governmental entity is a party to a settlement agreement.² The cases cited are *State ex rel. Kinsley v. Berea Bd. Of Educ.* (8th Dist. 1990), 64 Ohio App.3d 659, and *State ex rel. Sun Newspapers v. City of Westerville Bd. Of Educ.* (8th Dist. 1991), 76 Ohio App.3d 170. Both cases are not applicable to the facts facing the Commission in the present situation.

The *Kinsley* decision considered the public nature of the final settlement agreement. In fact, the Court alluded to the fact that the *result* is what was in question and not the bargaining to get to that point. The Eighth District Court stated,

A settlement agreement is a contract negotiated with the opposing party to prevent or conclude litigation. Consequently, although the parties and their attorneys subjectively evaluated the litigation confronting them in order to reach a settlement, the settlement agreement itself contains only the result of the negotiation process and *not the bargaining discourse which took place between the parties in achieving the settlement.*

Emphasis added. *Kinsley v. Berea Bd. at 663.* The case is distinguishable from the present situation because it dealt with the resulting settlement agreement but it is useful in that it recognizes different status of the “bargaining discourse” to get to that point.

The decision in *State ex rel. Sun Newspapers v. City of Westerville Bd. Of Educ* suffers from the same distinguishing factor faced in *Kinsley*, in that it deals with a final settlement and not the negotiations leading to that point. The *Sun Newspapers* decision involved a school district that agreed to keep the final terms of an agreement confidential. Clearly, the final terms of the settlement in this case are filed in the Commission’s public docket without any provision indicating that some portion of the document is confidential

² Ohio Attorney General Mike DeWine’s, Ohio Sunshine Laws 2011: An Open Government Resource Manual at page 36, located at: <http://www.ohioattorneygeneral.gov/Sunshine.aspx/?from=nav>

and not open to public review. The holding in the *Sun Newspapers* decision thus does not apply to the facts of the present situation. Instead it supports the notion that the final document resulting from settlement is the document that should be open to public review, a fact that can already be found in the present situation.

The settlement negotiations before the Commission are more akin to other prehearing/pretrial actions like discovery, which are already protected as trial preparation. As the Supreme Court of Ohio held in its 2008 decision in *Cleveland Clinic Found. v. Levin* 120 Ohio St. 3d 1210, 1212; 2008 Ohio 6197, ¶10 “***documents that a public office obtains as a litigant through discovery will ordinarily qualify as "trial preparation records" pursuant to R.C. 149.43(A)(1)(g) throughout the discovery phase of the litigation.” The participation in the negotiations concerning the AEP Ohio companies’ standard service offer are the same type of prehearing trial preparation. The documentation under review is information that the Commission Staff obtained as a litigant to the proceeding, and not as a named party to a justice department investigation. The *Cleveland Clinic* finding was issued in 2008 and the *Dupuis* holding is a 2002 holding. Clearly the Court is still openly considering the application of R.C. 149.43 and *Dupuis* is not a sweeping prohibition against the use of the trial preparation exemption for prehearing/pretrial matters.

There are other reasons that *Dupuis* does not control here. In *Dupuis*, the Supreme Court noted that the parties “agreed to voluntarily disclose the DOJ’s settlement proposal” to opposing parties in another lawsuit. The Court noted that the voluntary disclosure of a requested record constituted a waiver of the City’s right to claim an exemption to disclosure under the Public Records Act. *Dupuis*, 2002-Ohio-7041 at ¶ 22.

Here, in contrast, there has been no voluntary disclosure of the Joint Movants' preliminary Settlement Communications leading up to the Stipulation. The Joint Movants have not waived their assertion that the Settlement Communications are statutorily exempt from disclosure as trial preparation records. Moreover, in *Dupuis* the DOJ's proposed settlement had not only been disclosed to other parties in another forum, it had also been provided by the City to the Enquirer itself after the settlement was fully executed. In other words, the *Enquirer* already had the very document that it was requesting in its writ action. As Justice Lundberg Stratton noted in her dissenting opinion in *Dupuis*, this disclosure rendered the mandamus action moot. 2002-Ohio-7041 at ¶¶ 36-41 (Lundberg Stratton, J., dissenting). It is doubtful that in any future mandamus action regarding the Settlement Communications at issue here – the public disclosure of which would impair future settlement negotiations before the Commission – the Supreme Court would ascribe a great deal of precedential value to a moot case in which the public office had waived any exemptions under the Public Records Act and already produced the information requested.

III. CONCLUSION

For the foregoing reasons, the Joint Movants request that the Commission grant their motion for protective orders to maintain the confidentiality of any draft stipulations, draft term sheets, and related settlement communications in the possession of the Commission Staff that convey compromise settlement offers and proposals or counterproposals exchanged by the parties during the process culminating in the Stipulation. The public policy in favor of the confidentiality of settlement communications is well known and entrenched in many federal and state statutes, as well

as evidentiary privileges. A hasty decision by the Commission to release the Settlement Communications at issue here would turn this tradition of confidentiality on its head and have dire practical consequences in pending and future matters before the Commission and elsewhere.

Given the press of time, the Joint Movants have not had the opportunity to specifically identify each and every Settlement Communication that they believe the Staff may possess which should be subject to the protective orders sought herein. Some of the Joint Movants have identified documents as reflected in the index in Appendix A, identifying the documents Commission Staff may have in its possession. However, the Joint Movants respectfully ask that the Commission Staff provide an index of Settlement Communications in their possession, which the Commission has identified as potentially a public record, and allow the Joint Movants an adequate opportunity to identify any confidential Settlement Communications that should not be disclosed.

Ultimately, the Joint Movants seek a protective order to protect the very basis of confidential settlement discussions in proceedings before the Commission. The expectation of confidential settlement discussions is implicit in the legal system. The Ohio Revised Code and Ohio Administrative Code ensure that these Settlement Communications are protected when shared with Commission Staff. A Commission declaration of a protective order would simply verify the existing rule of law. An adverse ruling in this proceeding could impair settlement discussions for years to come before the Commission.

Respectfully submitted jointly,

ss// All Joint Movants Listed Below

David F. Boehm
Michael L. Kurtz
Kurt J. Boehm
Boehm, Kurtz & Lowry
36 East Seventh Street, Suite 1510
Cincinnati, OH 45202

Counsel for Ohio Energy Group

M. Howard Petricoff
Vorys, Sater, Seymour and Pease LLP
52 East Gay Street
P.O. Box 1008
Columbus, OH 43216-1008

*Counsel for Constellation NewEnergy,
Inc., Constellation Energy Commodities
Group, Inc., Retail Energy Supply
Association and Exelon Generation
Company, LLC*

Thomas J. O'Brien
Bricker & Eckler LLP
100 South Third Street
Columbus, OH 43215-4291

Counsel for the Ohio Hospital Association

Lisa G. McAlister
Matthew W. Warnock
Bricker & Eckler LLP
100 South Third Street
Columbus, OH 43215-4291

Counsel for The OMA Energy Group

Steven T. Nourse
Matthew J. Satterwhite
American Electric Power Corporation
1 Riverside Plaza, 29th Floor
Columbus, Ohio 43215-2373

Daniel R. Conway
Porter Wright Morris & Arthur
Huntington Center
41 S. High Street, 30th Floor
Columbus, Ohio 43215

*Counsel for Columbus Southern Power
Company and Ohio Power Company*

Philip B. Sineneng
Carolyn Flahive
Terrance A. Mebane
Thompson Hine LLP
41 South High Street, Suite 1700
Columbus, OH 43215

Counsel for Duke Energy Retail Sales, LLC

Jay E. Jadwin
American Electric Power Service
Corporation
1 Riverside Plaza, 29th Floor
Columbus, OH 43215

*Counsel for AEP Retail Energy Partners
LLC*

Terrence O'Donnell
Christopher M. Montgomery
Bricker & Eckler LLP
100 South Third Street
Columbus, OH 43215-4291

Counsel for Paulding Wind Farm II LLC

Gregory J. Poulos
EnerNOC, Inc.
101 Federal Street, Suite 1100
Boston, MA 02110

Counsel for EnerNOC, Inc.

Tara C. Santarelli
Environmental Law & Policy Center
1207 Grandview Avenue, Suite 201
Columbus, OH 43212

*Counsel for the Environmental Law and
Policy Center*

John W. Bentine
Mark S. Yurick
Zachary Kravitz
Chester Willcox & Saxbe, LLP
65 East State Street, Suite 1000
Columbus Ohio 43215

Counsel for Kroger Company
Christopher L. Miller
Schottenstein Zox & Dunn Co., LPA
250 West Street
Columbus, OH 43215

*Counsel for the Association of Independent
Colleges and Universities of Ohio*

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing *Joint Motion for Protective Orders of Signatory Parties to the September 7, 2011 Stipulation Filing as Joint Movants* has been served upon the below-named counsel and Attorney Examiners via electronic mail this 30th day of September, 2011.

//ss// Matthew J. Satterwhite

Matthew J. Satterwhite

Samuel C. Randazzo
Joseph E. Oliker
Frank P. Darr
McNees Wallace & Nurick LLC
21 East State Street, 17th Floor
Columbus, OH 43215
sam@mwncmh.com
joliker@mwncmh.com
fdarr@mwncmh.com

Dorothy K. Corbett
Associate General Counsel
139 East Fourth Street
1303-Main
Cincinnati, OH 45202
Dorothy.Corbett@duke-energy.com

Philip B. Sineneng
Carolyn Flahive
Terrance A. Mebane
Thompson Hine LLP
41 South High Street
Suite 1700
Columbus, OH 43215
Philip.Sineneng@ThompsonHine.com
Carolyn.flahive@thompsonhine.com
Terrance.mebane@thompsonhine.com

David F. Boehm
Michael L. Kurtz
Kurt J. Boehm
Boehm, Kurtz & Lowry
36 East Seventh Street, Suite 1510
Cincinnati, OH 45202
dboehm@BKLawfirm.com
mkurtz@BKLawfirm.com
kboehm@BKLawfirm.com

Richard L. Sites
General Counsel & Senior Director
of Health Policy
Ohio Hospital Association
155 East Broad Street, 15th Floor
Columbus, OH 43215-3620
ricks@ohanet.org

Thomas J. O'Brien
Bricker & Eckler LLP
100 South Third Street
Columbus, OH 43215-4291
tobrien@bricker.com

David C. Rinebolt
Colleen L. Mooney
Ohio Partners for Affordable Energy
231 West Lima Street
Findlay, OH 45839-1793
drinebolt@aol.com
cmooney2@columbus.rr.com

Steve W. Chriss
Manager, State Rate Proceedings
Wal-Mart Stores, Inc.
2001 SE 10th Atreet
Bentonville, AR 72716-0550
Stephen.chriss@wal-mart.com

Terrence O'Donnell
Christopher Montgomery
Bricker & Eckler LLP
100 South Third Street
Columbus, OH 43215-4291
todonnell@bricker.com
cmontgomery@bricker.com

Lisa G. McAlister
Matthew W. Warnock
Bricker & Eckler LLP
100 South Third Street
Columbus, OH 43215-4291
lmcaster@bricker.com
mwarnock@bricker.com

John W. Bentine
Mark S. Yurick
Zachary Kravitz
Chester Willcox & Saxbe, LLP
65 East State Street, Suite 1000
Columbus Ohio 43215
jbentine@cwsllaw.com
myurick@cwsllaw.com
zkravitz@cwsllaw.com
Mark A. Hayden
Kathy J. Kolich
FirstEnergy Service Company
76 South Main Street
Akron, OH 44308
haydenm@firstenergycorp.com
kjkolich@firstenergycorp.com

James F. Lang
Laura C. McBride
N. Trevor Alexandor
Calfee, Halter & Griswold LLP
1400 KeyBank Center
800 Superior Ave.
Cleveland, OH 44114
jlang@calfee.com
lmcbride@calfee.com
talexander@calfee.com

Michael R. Smalz
Joseph V. Maskovyak
Ohio Poverty Law Center
555 Buttlers Avenue
Columbus, OH 43215
msmalz@ohiopoveritylaw.org
jmaskovyak@ohiopoveritylaw.org

Jay E. Jadwin
American Electric Power Service
Corporation
1 Riverside Plaza, 29th Floor
Columbus, OH 43215
jejadwin@aep.com

M. Howard Petricoff
Stephen M. Howard
Vorys, Sater, Seymour and Pease LLP
52 East Gay Street
P.O. Box 1008
Columbus, OH 43216-1008
mhpetricoff@vorys.com
smhoward@vorys.com

William L. Massey
Covington & Burling, LLP
1201 Pennsylvania Ave. NW
Washington, DC 20004
wmassey@cov.com

Pamela A. Fox
Law Director, the City of Hilliard, Ohio
pfox@hilliardohio.gov

Christopher L. Miller
Gregory H. Dunn
Asim Z. Haque
Schottenstein Zox & Dunn Co., LPA
250 West Street
Columbus, OH 43215
cmiller@szd.com
gdunn@szd.com
ahaque@szd.com

Kenneth P. Kreider
David A. Meyer
Keating Muething & Klekamp PLL
One East Fourth Street
Suite 1400
Cincinnati, OH 45202
kpkreider@kmklaw.com
dameyer@kmklaw.com

Michael J. Settineri
Benita Kahn
Lija Kaleps-clark
Vorys, Sater, Seymour and Pease LLP
52 East Gay Street
P.O. Box 1008
Columbus, OH 43216-1008
mjsettineri@vorys.com
lkalepsclark@vorys.com

Henry W. Eckhart
2100 Chambers Road, Suite 106
Columbus, OH 43212
henryeckhart@aol.com

Jesse A. Rodriguez
Exelon Generation Company, LLC
300 Exelon Way
Kennett Square, PA 19348
jesse.rodriguez@exeloncorp.com

Sandy I-ru Grace
Exelon Business Services Company
101 Constitution Avenue NW
Suite 400 East
Washington, DC 20001
sandy.grace@exeloncorp.com

Barth E. Royer
Bell & Royer Co., LPA
33 South Grant Avenue
Columbus, OH 43215-3927
BarthRoyer@aol.com

Tara C. Santarelli
Environmental Law & Policy Center
1207 Grandview Avenue, Suite 201
Columbus, OH 43212
tsantarelli@elpc.org

Holly Rachel Smith
Holly Rachel Smith, PLLC
3803 Rectortown Road
Marshall, VA 20115
holly@raysmithlaw.com

Shannon Fisk
2 North Riverside Plaza, Ste. 2250
Chicago, IL 60606
sfisk@nrdc.org

Jay L. Kooper
Katherine Guerry
Krystyn Noeth
Hess Corporation
One Hess Plaza
Woodbridge, NJ 07095
jkooper@hell.com
kguerry@hess.com

David A. Kutik
Jones Day
North Point
901 Lakeside Avenue
Cleveland, OH 44114
E-mail: dakutik@jonesday.com

Allison E. Haedt
Jones Day
P.O. Box 165017
Columbus, OH 43216-5017
E-mail: aehaedt@jonesday.com

Trent A. Dougherty
Nolan Moser
William i. Reisinger
Ohio Environmental Council
1207 Grandview Avenue, Suite 201
Columbus, OH 43212
camille@theoec.org
nolan@theoec.org
trent@theoec.org
will@theoec.org

Emma F. Hand
Douglas G. Bonner
Keith Nusbaum
Clinton A. Vince
Daniel D. Barnowski
SNR Denton US LLP
1301 K Street, Suite 600, East Tower
Washington, DC 20005-3364
emma.hand@snrdenton.com
doug.bonner@snrdenton.com
keith.nusbaum@snrdenton.com
cvince@sonnenschein.com
dbarnowski@sonnenschein.com

Gregory J. Poulos
EnerNOC, Inc.
101 Federal Street, Suite 1100
Boston, MA 02110
E-mail: gpoulos@enernoc.com

Grant Gaber
Jones Day
P.O. Box 165017
Columbus, OH 43215
gwgabrer@jonesday.com

Gary A. Jeffries
Dominion Resources Services, Inc.
501 Martindale Street, Suite 400
Pittsburgh, PA 15212-5817
Gary.A.Jeffries@dom.com

David I. Fein
Cynthia Fonner Brady
Constellation Energy Resources
550 W. Washington St.
Chicago, IL 60661
Cynthia.brady@constellation.com
David.fein@constellation.com

Robert Korandovich
KOREnergy
P.O. Box 148
Sunbury, OH 43074
korenergy@insight.rr.com

William Wright
Werner Margard
Thomas Lindgren
Stephen A. Reilley
Assistant Attorneys General
Public Utilities Section
180 E. Broad St., 6th Fl.
Columbus, OH 43215
William.wright@puc.state.oh.us
Stephen.reilly@puc.state.oh.us
Werner.margard@puc.state.oh.us
Thomas.lindgren@puc.state.oh.us

J. Kennedy & Associates
570 Colonial Park Dr., Ste. 305
Roswell, GA 30075

John Mascio
325 North 4th St., Lower Level
Steubenville, OH 43952

Paul F. Wight
John N. Estes, III
Skadden, Arps, Slate, Maegher & Flom
1440 New York Ave., NW
Washington, DC 20005
John.estes@skadden.com
Paul.wight@skadden.com

Allen Freifeld
Samuel A. Wolfe
Viridity Energy, Inc.
100 West Elm St., Ste. 410
Coshohocken, PA 19428
afreifeld@viridityenergy.com
swolfe@viridityenergy.com

Constance Whyte Reinhard
Assistant General Counsel
Exelon Business Services Company
10 S. Dearborn Street
Chicago, IL 60603
Constance.reinhard@exeloncorp.com

Bruce Weston
Consumers' Counsel
Terry L. Etter
Maureen R. Grady
Jeffrey Small
Deb J. Bingham
Patti Mallarnee
Office of the Ohio Consumers' Counsel
10 West Broad St., Ste. 1800
Columbus, OH 43215
grady@occ.state.oh.us
etter@occ.state.oh.us
small@occ.state.oh.us
bingham@occ.state.oh.us
mallarnee@occ.state.oh.us

gthomas@gtpowergroup.com
laurac@chappelleconsulting.net
malina@wexlerwalker.com
ned.ford@fuse.net
callwein@williamsandmoser.com

Appendix A – List of Known Settlement Offers Transmitted to Staff in Connection With

<u>Email Date</u>	<u>Sender</u>	<u>Recipients</u>	<u>Attached Document File Name</u>
3-Aug	Steven Nourse	Jodi Bair and others	AEP Ohio August 3 Term Sheet CONFIDENTIAL
17-Aug	Steven Nourse	Haedt (Jones Day) and others	AEP Ohio Term Sheet - August 17 #419599
17-Aug	Steven Nourse	Jodi Bair and others	AEP Ohio Comprehensive Settlement Reg Matters
18-Aug	Steven Nourse	Haedt (Jones Day) and others	Rate Summary for August 17 Settlement Proposal
22-Aug	Steven Nourse	Haedt (Jones Day) and others	Exhibit DMR-7 Typical Bills
23-Aug	Steven Nourse	Haedt (Jones Day) and others	Typical Bilsl with Component Summary
24-Aug	John Jones	Steve Nourse	AEP Ohio Term Sheet 8-24-11 Final edited
26-Aug	Steven Nourse	Jodi Bair and others	AEP Ohio August 26 Term Sheet
31-Aug	Steven Nourse	Werner Margard and others	AEP Ohio August 26 Term Sheet redline from August 17 version
31-Aug	Steven Nourse	John Jones	2011-08-25 Summary of Increases
1-Sep	Emma Hand	Steven Nourse and others	22011-08-25 Typical Bills with Component Summary
1-Sep	John Jones	Kreider (KMKlaw) and others	AEP Ohio August 31 Term Sheet CONFIDENTIAL
1-Sep	Steven Nourse	John Jones (cc - others)	AEP Ohio August 31 Term Sheet - Clean #419997
2-Sep	Steven Nourse	Haque (SZD) and others	WDCLB1-25391395-v1-Ormet's redline of 1b
5-Sep	Steven Nourse	Haque (SZD) and others	AEP Ohio September 1 Term Sheet [1]
6-Sep	Steven Nourse	Sandy Grace and others	AEP Ohio September 1 Term Sheet [1]
9-Sep	Steven Nourse	Sandy Grace and others	AEP OHIO SEPT_1 TERM SHEET_#420022
9-Sep	Steven Nourse	Sandy Grace and others	AEP Ohio September 2 Term Sheet_#420123
6-Sep	Steven Nourse	Sandy Grace and others	"2011-09-02 Settlement MTR
9-Sep	Steven Nourse	Sandy Grace and others	"2011-09-02 Settlement Rate Summary
6-Sep	Steven Nourse	Sandy Grace and others	AEP Ohio Term Sheet - September 6 P_M_Redline_#420191
9-Sep	Steven Nourse	Sandy Grace and others	AEP Ohio Term Sheet - September 6 P_M_#420186
6-Sep	Steven Nourse	Haedt (Jones Day) and others	Appendix A
7-Sep	Steven Nourse	Haedt (Jones Day) and others	APPENDIX B_#420192
7-Sep	Steven Nourse	Haedt (Jones Day) and others	Appendix C-RPM Set Aside -906011 redline
7-Sep	Steven Nourse	Haedt (Jones Day) and others	Appendix C-RPM Set Aside 9-6-11 clean
7-Sep	Steven Nourse	Haedt (Jones Day) and others	2011-09-06 Settlement Rate Summary
7-Sep	Steven Nourse	Haedt (Jones Day) and others	AEP Ohio Stipulation September 6
7-Sep	Steven Nourse	Haedt (Jones Day) and others	AEP Ohio Stipulation - Final Redline - #420193

*Any other version of the Stipulation or Term Sheet that may have been hand delivered.

This foregoing document was electronically filed with the Public Utilities

Commission of Ohio Docketing Information System on

9/30/2011 10:52:21 AM

in

Case No(s). 10-2376-EL-UNC, 11-0346-EL-SSO, 11-0348-EL-SSO, 11-0349-EL-AAM, 11-0350-EL-AAM

Summary: Motion Joint Motion for Protective Orders of Signatory Parties to the Sept. 7, 2011 Stipulation Filing as Joint Movants electronically filed by Mr. Matthew J Satterwhite on behalf of Ohio Energy Group and OMA Energy Group and Constellation NewEnergy, Inc. and Constellation Energy Commodities Group, Inc. and Retail Energy Supply Association and Exelon Generation Company, LLC and Columbus Southern Power Company and Ohio Power Company and Ohio Hospital Association and Duke Energy Retail Sales, LLC. and AEP Retail Energy Partners, LLC. and Environmental Law & Policy Center and Pauling Wind Farm II, LLC and Kroger Company and EnerNOC, Inc. and Association of Independent Colleges and Universities of Ohio