

**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. )

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**DUKE ENERGY OHIO'S  
MEMORANDUM CONTRA MOTION  
TO ESTABLISH PROTECTIVE AGREEMENT**

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Comes now Duke Energy Ohio, Inc., (Duke Energy Ohio or Company) and, for its memorandum in opposition to the Motion to Establish Protective Agreement (Motion) filed by Ohio Energy Group (OEG), states as follows.

In bringing its motion, OEG does not deny that a protective agreement is appropriate in connection with the confidential documents and other confidential information to be produced by the Company in the context of these proceedings. Nor does OEG contest most of the provisions of the protective agreement tendered to it by Duke Energy Ohio for purposes of this case. Rather, OEG takes exception to five sections, claiming them to be too stringent or unreasonable. In doing so, OEG fails to inform the Public Utilities Commission of Ohio (Commission) that the Company agreed, prior to the submission of the Motion, to revise one of the allegedly controversial provisions. Further, OEG does not articulate for the Commission any attempts that

it made, prior to the filing of the Motion, to respond to Duke Energy Ohio's explanations for the remaining four provisions. Notably, there were no such attempts by OEG to informally discuss the Company's justification for the four provisions prior to filing the instant Motion. The Commission is now burdened with what should be an issue between Duke Energy Ohio and OEG. And the Commission must now address OEG's misplaced objections to provisions that should not be a threat or that otherwise fail to impose an undue burden. Significantly, if OEG adheres to the proper use of the Company's confidential information with which it may be entrusted, it will not be exposed to the damages about which it now complains.

Duke Energy Ohio discusses the specific provisions identified in OEG's Motion below.

#### Section 2

Duke Energy Ohio agreed, following the initial contact by OEG, to revise Section 2 of the protective agreement. The revision offered by Duke Energy Ohio is as follows:

By entering into this Agreement, the Recipient acknowledges the Confidential or Highly Confidential nature of the Confidential Information or Highly Confidential Information and that any unauthorized disclosure or unauthorized use thereof by the Recipient will injure Duke Energy Ohio's business and/or the business of the customer(s) and/or affiliate(s) of Duke Energy Ohio; **provided, however, that the Recipient shall retain the right to dispute, at the Public Utilities Commission of Ohio, the confidentiality of the Confidential Information or Highly Confidential Information.**

This section is therefore not in dispute.

#### Section 4(a)(2)

In this section of the protective agreement, Duke Energy Ohio is not seeking to restrict the exchange of information in the context of these proceedings in which confidential information may be disclosed. Indeed, this section imposes no greater burden than those to which OEG has agreed in connection prior Duke Energy Ohio proceedings as well as those involving

Ohio's other utilities. Rather, as discussed herein, this provision is intended only to enable the Company to confirm that the intended recipients of its confidential information can, in fact, receive such information.

As an initial matter, Duke Energy Ohio observes that OEG does not contest the requirement to secure and return to the Company executed non-disclosure certificates from those individuals associated with it who may receive confidential information. Indeed, OEG has agreed to such an undertaking in prior Company proceedings and in connection with proceedings initiated by the FirstEnergy distribution utilities. (See OEG Motion, Exhibit B, Paragraph 3 at page 2 and OEG Motion, Exhibit D, Paragraphs 4-6 at page 2.) Thus, OEG has already conceded that the Company may learn, during the pendency of these proceedings, of the identity of those persons associated with OEG with whom it will share confidential information and that such a disclosure does not impede or in any way prejudice its litigation position.

The requirement in Section 4(a)(2) imposes no greater burden on OEG. Through this provision, OEG is merely asked to identify for the Company those other parties to these proceedings with whom it wants to share Duke Energy Ohio's confidential information and to obtain from the Company permission for such a disclosure. Through Section 4(a)(2), Duke Energy Ohio is not seeking an identification of the specific confidential information to be provided or the reasons for the exchange; nor is the Company asking OEG to delineate the substance of any conversations that may occur in respect of the confidential information. It is merely asking for the right to confirm that those persons with whom OEG desires to share confidential information can rightly receive it, provided they have executed the unchallenged non-disclosure certificate and have otherwise agreed to be bound by the terms of the protective agreement. As such, this provision does not restrict or compromise OEG's ability to develop its

litigation position subsequent to the initiation of these proceedings and it seeks no more information than that which is commonly exchanged between litigants.

Curiously, OEG claims that the provisions in Section 4(a)(2) will compromise the work that it may do in anticipation of litigation. But this claim is misplaced as OEG will not come to possess the Company's confidential information, as may be disclosed in connection with these proceedings, prior to such time as the proceedings were initiated by the Company. OEG's arguments, undeniably manufactured for purposes of its Motion, should be discounted.

Given prior experiences in which the Company has been involved – experiences where parties improperly disclosed confidential information obtained in one proceeding in a subsequent and clearly unrelated matter – this revision is intended only to enable the Company to confirm that its confidential information is being shared only with those who may legitimately receive it. Obtaining the Company's permission here is no more burdensome than securing a non-disclosure certificate and returning that to the Company. And as OEG has committed to the latter, it cannot fairly claim undue burden with the former.

#### Section 4(b)(2)

This section similarly imposes upon OEG the obligation to secure the Company's consent before sharing information with counsel for other parties to these proceedings. As such, the Company incorporates here the arguments asserted above.

There is, however, one critical distinction in Section 4(b)(2), as compared to Section 4(a)(2), and that distinction concerns the classification of the information at issue. Specifically, Section 4(b)(2) extends to information that has been classified as highly confidential such that it may be shared only between attorneys representing parties in these proceedings. Given the heightened concerns and greater risks associated with the impermissible disclosure of highly

confidential information, it is reasonable for the Company to merely seek to ensure that recipients are, in fact, authorized to receive such information. As noted above, the burden here is no greater than that previously and willingly undertaken by OEG. Indeed, even under the FirstEnergy agreement that OEG cites in its Motion, OEG has willingly agreed to provisions dictating the manner in which highly confidential information may be exchanged between counsel of record in a proceeding and the obligations that it must fulfill relative to same. The undertaking in Section 4(b)(2) is really no more onerous and, as written, will not compromise counsel's ability to prepare its case or defend the proposals offered by the Company in these proceedings.

#### Section 6(a)

OEG objects to this section, in part, on the basis that most protective agreements make provision for damages in the event of a breach by the party receiving confidential information and that these additional provisions are therefore unnecessary. But this Motion is not about most protective agreements and, importantly, is a filing through which OEG objects to the Company's remedies for breach. But OEG cannot reasonably claim that Section 6(a) is unnecessary because the Company has remedies and then contest those other very remedies. OEG's purported rationale for opposing Section 6(a) is unpersuasive and illogical.

The provisions of Section 6(a) should not be controversial. In the event OEG impermissibly seeks to use confidential information provided to it in connection with these proceedings for any reason not authorized by the protective agreement, it will have violated the terms of the agreement. And a violation of an agreement should not be without consequence. This is a basic principle of contract law: a breach results in damages to the non-breaching party, for which the breaching party must respond. Should OEG breach the agreement, a consequence

is that OEG will concede its impermissible use of the confidential information and will not hinder the Company's ability to restrict such impermissible use. And as OEG's improper conduct would have been the cause the Company's responsive actions and participation in motion practice, it is fair for OEG to assume the associated costs.

The provisions of Section 6(a) should not incite such strong opposition from OEG. By complying with the agreement, OEG can ensure that it is not exposed to a claim for breach and associated damages. In this regard, the damages for which the Company would seek recovery under Section 6(a) are those directly and proximately caused by OEG's failure to adhere to the section. They are not, as OEG contends, a limitless concession for signing the protective agreement.

The second part of this Section, that concerning improper use of confidential information by another party, is addressed only in passing in OEG's Motion. As OEG does not articulate any reason why it should be permitted to support another party's improper use of the Company's confidential information, the Company cannot reasonably be expected to reply in detail here. However, to the extent OEG would have the Commission believe that it is exposed to damages for another party's breach of Section 6(a), Duke Energy Ohio states that such an inference is incorrect. As expressly provided for in Section 6(a), OEG will not be obligated to reimburse the Company for its costs in opposing another party's improper use of confidential information. And as OEG has already admitted that appropriate restrictions should be placed upon the exchange and use of confidential information, it cannot now claim that affirmatively advocating in favor of a breach is reasonable.

Section 7(a)

OEG opposes the notion of liquidated damages in the event it misuses the confidential information that the Company is providing for the limited purposes of these proceedings. As an initial matter, Duke Energy Ohio is concerned with OEG's objections, as OEG can avoid any risk of exposure to liquidated damages by properly using the Company's trade secrets and other confidential information in the manner set forth in the protective agreement. Further, it is significant that OEG does not object to the restrictions imposed upon the use of confidential information, with the minor exception of Sections 4(a)(2) and 4(b)(2). But as discussed above, those sections do not restrict OEG's use of confidential information with other persons who may receive it. As OEG has acquiesced to restrictions upon the use of confidential information, it is clear that OEG's desire here to strike an appropriate damages provisions is intended only to protect it from its own misconduct. But Duke Energy Ohio should not shoulder the burden of OEG's inability to responsibly receive and use confidential information.

Duke Energy Ohio contemplates that it will be called upon to disclose trade secret information and other highly confidential information that, if shared with other entities, would provide them a competitive advantage over the Company. Disclosure of such information will undeniably cause harm to the Company. At this time, the amount of actual damages is uncertain and Section 7(a) thus serves as a measure of the losses that would be sustained. A liquidated damages provision such as Section 7(a) is accepted in Ohio jurisprudence, a fact that OEG does not dispute. Rather, OEG simply claims that the provision is new and that other remedies are available. As past experience dictates, however, compliance with a protective agreement cannot be assumed and, therefore, it is reasonable for the Company to seek protections for the damages that will ensue from a breach.

### OEG's Requested Relief

OEG asks the Commission to order Duke Energy Ohio to adopt a protective agreement used by another utility in Ohio. But there is no requirement for a uniform, statewide protective agreement and OEG has admittedly signed a wide variety of different agreements for different companies and in different settings throughout its involvement in the regulatory arena. Its request also ignores the provisions of OAC 4901-1-24, which allow the Commission to impose restrictions on the discovery process for a particular proceeding. This rule acknowledges that discovery matters are case specific – a conclusion that undermines OEG's quest for standardization. But to the extent the Commission is inclined to modify the terms of Duke Energy Ohio's proffered protective agreement, the Company respectfully requests that it consider the relative ease with which OEG can avoid the consequences of breach. By merely respecting the restrictive use of the Company's confidential information, OEG will not be exposed to damages. That mere fact that OEG protests these provisions raises doubt as to its intention to comply. And to expose Duke Energy Ohio to the real threat of the damage that would be occasioned by noncompliance is not reasonable or appropriate, particularly as OEG controls its own use (or misuse) of the Company's confidential information.

### Conclusion

For the reasons stated herein, Duke Energy Ohio respectfully requests that the Commission deny OEG's motion and instead impress upon it the reasonable restrictions for its use and handling of confidential information, as set forth in the Company's protective agreement, attached as Exhibit A to OEG's Motion.



Respectfully submitted,


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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 18<sup>th</sup> day of June 2014, to the following parties.

  
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**This foregoing document was electronically filed with the Public Utilities**

**Commission of Ohio Docketing Information System on**

**6/18/2014 4:51:25 PM**

**in**

**Case No(s). 14-0841-EL-SSO, 14-0842-EL-ATA**

Summary: Memorandum Memorandum Contra Motion to Establish Protective Agreement electronically filed by Jeanne W Kingery on behalf of Duke Energy Ohio