

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Application of Duke)	
Energy Ohio for Authority to Establish a)	Case No. 14-841-EL-SSO
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.)	

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.)	

**MEMORANDUM CONTRA DUKE ENERGY OHIO INC.’S MOTION FOR
PROTECTIVE ORDER
BY
THE OFFICE OF THE OHIO CONSUMERS’ COUNSEL**

I. INTRODUCTION

This proceeding involves Duke Energy Ohio Inc.’s (“Duke” or “Utility”) request for the Public Utilities Commission of Ohio (“PUCO” or “Commission”) to approve its proposed Electric Security Plan (“ESP”). That ESP will affect the rates that its customers pay for electric service beginning June 1, 2015.

Duke has failed to provide responses to some of OCC’s discovery requests because it alleges that those responses contain information that is a trade secret. Additionally, OCC has been denied access to information redacted in Duke Witness Arnold’s testimony, including Schedules MWA-2, 3, 4, and 7. That redacted information

is the subject of Duke's May 29, 2014 Motion for Protection.¹ That Motion for Protection has not been ruled upon.

But instead of agreeing to enter into a reasonable protective agreement—which has been used in many PUCO cases by OCC/Duke—Duke seeks to have the PUCO force OCC to sign its preferred “confidentiality agreement”² in order to obtain access to the information.

OCC files this Memorandum Contra Duke's July 8, 2014 Motion for Protection. The PUCO should deny Duke's Motion because it would require OCC to execute an agreement that is unreasonable, unlawful, and contrary to the public interest in order to obtain responses to discovery that Duke alleges to be trade secret. Additionally, Duke has failed to show that any of the information is deserving of protection or that the terms and conditions of its proposed confidentiality agreement are just and reasonable.

Instead, as explained in OCC's Memorandum Contra OEG's Motion,³ the PUCO should require Duke to provide OCC the information sought under the terms of the time-honored OCC/Duke protective agreement (attached to this pleading and labeled Exhibit 1). The attached OCC/Duke protective agreement was negotiated by Duke and OCC years ago, after much effort and compromise. It is an agreement that has been accepted by numerous utilities over the years. And it is an agreement that the PUCO itself has found to be adequate (in a number of cases) to protect the rights and interests of both

¹ Duke's May 29, 2014 Motion for Protection, which is pending with no ruling to date, allowed Duke to redact Witness Arnold's Schedules MWA 2,3,4, and 7, and portions of his direct testimony.

² OCC has attached Duke's proposed confidentiality agreement as Exhibit 2a.

³ OCC's Memorandum Contra was filed on June 23, 2014.

OCC and the utility from whom discovery is being sought.⁴

It is an agreement that OCC can execute. It is an agreement that provides for information to be provided to OCC (subject to certain rights) without the PUCO determining whether that information is trade secret information. Duke's new and revised confidentiality agreement is not an agreement that affords adequate protections to a state agency—like OCC. And it should be noted that it is likely that OCC may not accept any information that is subject to Duke's proposed confidentiality agreement if Duke's Motion is granted.

II. ARGUMENT

The OCC/Duke protective agreement was intended to and did serve (for many years) as the ongoing template that avoided continual time-wasting re-negotiations between Duke and OCC. The protective agreement resulted in part from a PUCO order that was needed to resolve differences between Duke and OCC. Exhibit 1 is the protective agreement that OCC presented to Duke on June 2, 2014. The agreement is essentially what Duke and OCC have cooperatively signed for the better part of a decade, without needing to impose upon the PUCO for a result.

But, now after a month of negotiations, Duke continues to insist on reinventing the wheel, and by its Motion for Protection, seeks to force OCC to execute its proposed

⁴ See, e.g., *In re CG&E Post-MDP Service*, Case No. 03-93-EL-UNC et al., Entry at 4, ¶(9) (May 13, 2004); *In the Matter of the Commission's Review and Adjustment of the Fuel and Purchased Power and System Reliability Tracker Components of Duke Energy Ohio, Inc.*, Case No. 07-723-EL-UNC et al., Entry at 3, ¶7 (Oct. 29, 2007); *In re: Columbus Southern Power Company*, Case No. 05-376-EL-UNC, Entry at ¶7 (July 21, 2005); *In re: Embarq*, Case No. 07-760-TP-BLS, Entry at ¶7 (Aug. 10, 2007).

confidentiality agreement, albeit with some limited revisions that have been made during negotiations. Why?

Duke claims in its July 8, 2014 Motion for Protection that “given changed circumstances,” the OCC/Duke agreement “fails to provide adequate assurance that the Company’s confidential information will be properly protected or alternatively, that affords sufficient remedies should the agreement be breached.”⁵ But Duke does not explain what the changed circumstances are, nor does it explain how the OCC/Duke former protective agreement fails to properly protect it or afford it sufficient remedies.

Duke has thus failed to show good cause as to why its motion should be granted. Under Ohio Admin. Code 4901:1-12 (A), Duke must show good cause before the PUCO can grant a motion. Additionally, Duke has failed to show that any of the information is deserving of protection.

And while Duke claims that it has “tailored” its new confidentiality agreement to accommodate OCC, it also admits that its revisions do not address all of the concerns that OCC identified in its negotiations with it.⁶ Indeed, OCC discussed the following concerns it had with Duke’s proposed agreement during the two and a half hour negotiation session (initiated by OCC) on June 26, 2014 that are not addressed by Duke’s proposed agreement:

For example, Section 2 of Duke’s revised protective agreement remains unchanged from its earlier form. That provision requires OCC to acknowledge that the

⁵ Duke Motion for Protection at 2.

⁶ Duke Motion for Protection, Memorandum in Support at 1 (unnumbered).

information provided subject to the terms of the agreement *is* “confidential” and that any disclosure *will injure* Duke.⁷ As such it establishes concessions that the information is confidential and disclosure will cause injury to Duke.

This is different from most protective agreements under which parties agree to protect alleged confidential information, and yet maintain their rights to challenge the characterization of the information as “confidential.” For instance, the OCC/Duke protective agreement treats the information as confidential, but does not resolve the merits concerning the confidentiality of any of the protected material.⁸

And although under Duke’s proposed agreement as revised, OCC still has the ability to challenge the characterization of materials as “confidential,” such a challenge would likely be very difficult. This is because the concessions created under the Duke newly proposed protective agreement is that the information *is confidential* and unauthorized disclosure *will injure Duke*. Thus any claim by OCC to the contrary (that the information is not confidential or disclosure does not injure Duke) would be unlikely to succeed given the concessions assumed in Duke’s protective agreement. OCC would have to overcome this concession of confidentiality, making it difficult to prevail. Such an agreement (to the confidential nature of the information) shifts the burden of proof from the utility to the party seeking disclosure. In this sense it is contrary to PUCO rules which squarely place the burden of proving confidentiality of materials on the utility that

⁷ Exhibit 2a at ¶2.

⁸ See Exhibit 1 at 1, ¶17 (OCC does not waive any right to dispute Duke’s determination regarding any material identified as confidential.)

is resisting disclosure.⁹

Similarly, Duke's proposed protective agreement, at Section 7, establishes concessions that make it unreasonable and inconsistent with the burden of proof in a breach of contract action. In that proposed section, the Parties would be required to agree that disclosure of information without protection "*would likely damage Duke Energy Ohio, [and] such damage would likely be material.*"¹⁰ The Parties to such provision would also be required to agree that Duke "*will suffer irreparable harm* because of any breach of the agreement." This wording, like Section 2, establishes inappropriate concessions. Those concessions are that disclosure (1) will likely damage Duke, (2) the damage will likely be material, and (3) Duke will suffer irreparable harm because of the breach. Thus any defense mounted by OCC with respect to a claim of breach of the agreement will be greatly diminished by these provisions. And any opposition to Duke recovering damages and equitable relief will be thwarted as well. Like Section 2, this section appears to impose strict liability upon OCC in regard to any claim that Duke would have for damages and equitable relief if there was any disclosure. Thus, the language appears to be contrary to the burden of proof borne by a litigant in a breach of contract action.¹¹

⁹ See Ohio Admin. Code 4901-1-24(A).

¹⁰ Exhibit 2a at Section 7.

¹¹ But see Exhibit 1, which contains no provisions pertaining to damages to Duke from breach of contract.

The language included in Section 7 is also inconsistent with the general rule that that under Ohio law (R.C. 4901.12) all proceedings of the PUCO and all documents and record in its possession are public records. Duke also failed to include in its revised confidentiality agreement other provisions that OCC insists upon, for appropriate protection as a state agency subject to Ohio's Public Records Law. These provisions include providing indemnification of OCC in regard to a public records request¹² and provisions specifying that OCC does not waive sovereign immunity.¹³ These provisions are appropriate protections for a state agency, and were provisions included in the previous Duke/OCC protective agreements.

In light of these concerns, it is not reasonable or lawful to force OCC to execute Duke's new and revised confidentiality agreement in order to obtain the full and complete discovery rights OCC is entitled to under R.C. 4903.82. Duke's new and revised agreement should not be adopted and its Motion for Protection should be denied.

Duke has not shown good cause to grant its Motion.¹⁴ Instead it has merely alleged that there are undisclosed changed circumstances that require a new agreement to assure that its confidential information will be protected. It claims that the prior OCC/Duke protective agreement "is no longer acceptable" but does not explain why.¹⁵ And it has failed to show that a new agreement is necessary to enable discovery to proceed under terms that are fair, reasonable, and unduly burdensome to it *and* OCC.

¹² Exhibit 1 at ¶14.

¹³ Exhibit 1 at ¶19.

¹⁴ See Ohio Admin. Code 4901-1-12(A) which provides that a motion shall be granted upon good cause shown.

¹⁵ Duke Motion for Protection, Memorandum Contra at 1.

In contrast, Exhibit 1, the OCC/Duke proposed protective agreement, is designed to address the legal requirements placed on the OCC as a public agency and designed to address a rational, fair basis for document protection. First, the OCC has proposed a protective agreement recognizing that public records requests could be directed to it regarding information provided by Duke in this case.¹⁶ The OCC is the only party to this case (besides the PUCO) that is a state agency and any protective agreement entered into must be consistent with the requirements of Ohio's Public Records Laws in regard to requests for public records. Second, the protective agreement also addresses the OCC's legal obligation to comply with records retention requirements mandated by Ohio law.¹⁷ Third, the prior OCC/Duke protective agreement recognizes OCC's need, as a public agency, to have transparency in the proceedings of government that affect Ohioans. Fourth, the protective agreement OCC proposes cannot be "mutual" as Duke proposes -- owing to the difference between the obligations of public entities such as the OCC and private entities such as Duke. Nonetheless, Duke is provided protection from disclosure of its alleged proprietary information under OCC's proposed protective agreement. OCC cannot release Duke's claimed protected information without first following the processes for public disclosure required by the agreement, including prior notification to Duke. This notification would allow Duke to seek a ruling from the PUCO, or other body of competent jurisdiction, as to whether the information deserves protection. OCC's agreement would protect the information whose alleged confidentiality is at stake

¹⁶ Exhibit 1 at ¶¶13, 14.

¹⁷ Exhibit 1 at ¶16.

unless (a) an authority of competent jurisdiction determines that the information could be disclosed publically or (B) the utility fails to seek a Commission or Court ruling.

The protective agreement offered by OCC had its beginnings in 2003 after extensive research and consultation with the Ohio Attorney General's Office. Versions of agreements that recognize the public nature of the OCC have been used in various cases before the Commission. Parties executing similar agreements with the OCC include FirstEnergy, AEP Ohio, SBC Ohio, Dayton Power & Light, and Columbia Gas. OCC appreciates the administrative efficiency and fairness of the various and similar protective agreements that OCC has achieved with others.

CG&E, Duke Energy Ohio's predecessor, was compelled by the PUCO to execute a protective agreement proposed by the OCC not once but twice—first in a post-market development service case, and second in a 2007 system reliability tracker case. See *In re CG&E Post-MDP Service*, Case No. 03-93-EL-UNC et al., Entry at 4, ¶(9) (May 13, 2004); *In the Matter of the Commission's Review and Adjustment of the Fuel and Purchased Power and System Reliability Tracker Components of Duke Energy Ohio, Inc.*, Case No. 07-723-EL-UNC et al., Entry at 3, ¶7 (Oct. 29, 2007). In the 2004 case, Attorney Examiner Kingery found OCC's proposed protective agreement to be a "reasonable and appropriate method for protecting the CG&E information." In the 2007 case, Attorney Examiner Farkas found that OCC's protective agreement "should adequately protect the confidentiality of Duke's information."

AEP Ohio was also compelled by the PUCO to execute a substantially similar protective agreement proposed by OCC. *In re: Columbus Southern Power Company*, Case No. 05-376-EL-UNC, Entry at ¶7 (July 21, 2005); see also *In re: Embarq*, Case No.

07-760-TP-BLS, Entry at ¶7 (Aug. 10, 2007). AEP Ohio was required to accept protective agreement provisions related to OCC's responsibilities re: public records matters. Moreover, OCC and Duke have executed protective agreements on many occasions. The agreements contain the same protections offered by the OCC in the attached protective agreement.¹⁸

OCC is willing to execute its attached and time-honored protective agreement that recognizes the legal responsibilities of the OCC as a public agency (that Duke has recognized for years in agreements) without the PUCO first determining whether each document is trade secret under Ohio law. The OCC will treat the utility's documents with the appropriate care under the protective agreement that Duke should have executed, but instead rejected this time. There is nothing in the present case that is more compelling or distinctive that warrants treatment different than that which has satisfied numerous other Ohio utilities.

The OCC/Duke agreement protects the needs of the utility and the needs of OCC. It will allow for OCC to have reasonable access to information alleged to be trade secret and will protect Duke. Duke should be required to provide OCC with information (alleged to be trade secret) in accordance with its terms.

¹⁸ See, e.g., *In the Matter of the Application of Duke Energy Ohio, Inc., for an Increase in its Natural Gas Distribution Rates*, Case No. 12-1645-GA-AIR et al.; *In the Matter of the Application of Duke Energy Ohio, Inc., for the Establishment of a Charge Pursuant to Section 4909.18, Revised Code*, Case No. 12-2400-EL-UNC, et al.

Duke's proposal would improperly create a potentially legally binding concession that information is to be kept from the public, contrary to Ohio law. It also improperly imposes strict liability for disclosure (inadvertent or otherwise), rather than requiring proof of such harm. The PUCO should deny Duke's Motion for Protection, and instead rule that the OCC/Duke protective agreement that has been repeatedly utilized, and approved by the PUCO in previous cases, must be executed by Duke.

Respectfully submitted,

BRUCE J. WESTON
OHIO CONSUMERS' COUNSEL

/s/ Maureen R. Grady

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing *Memorandum Contra* has been served electronically upon those persons listed below this 14th day of July 2014.

/s/ Maureen R. Grady

Maureen R. Grady
Assistant Consumers' Counsel

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**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Application of Duke)	
Energy Ohio for Authority to Establish a)	Case No. 14-841-EL-SSO
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Energy Ohio for Authority to Amend its)	Case No. 14-842-EL-ATA
Certified Supplier Tariff, P.U.C.O.)	
No. 20.)	

PROTECTIVE AGREEMENT

This Protective Agreement ("Agreement") is entered into by and between **Duke Energy Ohio** ("Utility]" or "Company") and the Office of the Ohio Consumers' Counsel ("OCC") (collectively, "the Parties"). This Agreement is designed to facilitate and expedite the exchange with OCC of all information in the discovery process in this proceeding, as this "Proceeding" is defined herein. It reflects agreement between the Company and OCC as to the manner in which "Protected Materials," as defined herein, are to be treated. This Agreement is not intended to constitute any resolution of the merits concerning the confidentiality of any of the Protected Materials.

1. The purpose of this Agreement is to permit prompt access to and review of such Protected Materials in a controlled manner that will allow their use for the purposes of this Proceeding while protecting such data from disclosure to non-participants, without a prior ruling by an administrative agency of competent jurisdiction or court of competent jurisdiction regarding whether the information deserves protection.

2. “Proceeding” as used throughout this document means the above-captioned case(s), including any appeals, remands and other cases related thereto.

3. “Protected Materials” means documents and information furnished subject to the terms of this Agreement and so designated by the Company by conspicuously marking each document or written response as confidential. Protected Materials do not include any information or documents contained in the public files of any state or federal administrative agency or court and do not include documents or information which at, or prior to, commencement of this Proceeding, is or was otherwise in the public domain, or which enters into the public domain.

4. Protected Materials provided in the context of this Proceeding will be provided to OCC for use by OCC in conjunction with this Proceeding. Nothing in this Agreement precludes the use of any portion of the Protected Materials that becomes part of the public record or enters into the public domain. Nothing in this Agreement precludes OCC from filing Protected Materials under seal or otherwise using Protected Material in ways, such as *in camera* proceedings, that do not disclose Protected Materials.

5. As used in this Agreement, the term “Authorized Representative” includes OCC’s counsel of record in this Proceeding and other attorneys, paralegals, economists, statisticians, accountants, consultants, or other persons employed or retained by OCC and engaged in this Proceeding.

6. Access to Protected Materials is permitted to OCC’s Authorized Representatives who are either a signatory to this Agreement or who have executed a Non-Disclosure Certificate in the form attached hereto as Exhibit A prior to any access. OCC must treat all Protected Materials, copies thereof, information contained therein, and writings made therefrom as proprietary and confidential, and will safeguard such Protected Materials, copies thereof,

information contained therein, and writings made therefrom so as to prevent voluntary disclosure to any persons other than OCC's Authorized Representatives.

7. If any OCC Authorized Representative ceases to be engaged in this Proceeding, access to any Protected Materials by such person will be terminated immediately and such person must promptly return Protected Materials in his or her possession to another Authorized Representative of OCC and if there is no such Authorized Representative, such person must treat such Protected Materials in the manner set forth in Paragraph 16 hereof as if this Proceeding herein had been concluded. Any person who has signed the foregoing Non-Disclosure Certificate will continue to be bound by the provisions of this Agreement even if no longer so engaged.

8. In this proceeding, OCC may disclose Protected Materials or writings regarding their contents to any individual or entity that is in possession of said Protected Materials or to any individual or entity that is bound by a Protective Agreement or Order with respect to the Protected Materials. OCC may also disclose Protected Materials to employees or persons working for or representing the Public Utilities Commission of Ohio in connection with this Proceeding.

9. OCC may file Protected Materials under seal in this Proceeding whether or not OCC seeks a ruling that the Protected Materials should be in the public domain. If OCC desires to include, utilize, refer, or copy any Protected Materials in such a manner, other than in a manner provided for herein, that might require disclosure of such material, then OCC must first give notice (as provided in Paragraph 15) to the Company, specifically identifying each of the Protected Materials that could be disclosed in the public domain. The Company will have five (5) business days after service of OCC's notice to file, with an administrative agency of competent jurisdiction or court of competent jurisdiction, a motion and affidavits with respect to

each of the identified Protected Materials demonstrating the reasons for maintaining the confidentiality of the Protected Materials. The affidavits for the motion must set forth facts delineating that the documents or information designated as Protected Materials have been maintained in a confidential manner and the precise nature and justification for the injury that would result from the disclosure of such information. If the Company does not file such a motion within five (5) business days of OCC's service of the notice, then the Protected Materials will be deemed non-confidential and not subject to this Agreement.

10. The Parties agree to seek *in camera* proceedings by the administrative agency of competent jurisdiction or court of competent jurisdiction for arguments or for the examination of a witness that would disclose Protected Materials. Such *in camera* proceedings will be open only to the Parties, their counsel, other OCC Authorized Representatives, and others authorized by the administrative agency or court to be present; however, characterizations of the Protected Materials that do not disclose the Protected Materials may be used in public.

11. Any portion of the Protected Materials that the administrative agency of competent jurisdiction or court of competent jurisdiction has deemed to be protected and that is filed in this Proceeding will be filed in sealed confidential envelopes or other appropriate containers sealed from the public record.

12. It is expressly understood that upon a filing made in accordance with Paragraph 9 or Paragraph 13 of this Agreement, the burden will be upon the Company to show that any materials labeled as Protected Materials pursuant to this Agreement are confidential and deserving of protection from disclosure.

13. OCC will give the Company notice (as provided in Paragraph 15) if OCC receives a public records request for Protected Materials. The Company will have five (5) business days after service of OCC's notice to file a pleading before a court of competent jurisdiction to

prevent disclosure of the Protected Materials in question. If the Company files such a pleading, OCC will continue to protect the Protected Materials as required by this Agreement pending an order of the court. If the Company does not file at a court of competent jurisdiction within five (5) business days of service of OCC's notice, then such Protected Materials can be deemed by OCC to be non-confidential, not a trade secret and not subject to this Agreement. Alternatively, the Company may provide notice to OCC that the Protected Materials may be disclosed in response to a public records request.

14. If, under Ohio's public records law, a court awards a relator or person or party attorney's fees or statutory damages or court costs in connection with OCC's non-disclosure or delayed disclosure of Protected Materials, then the Company will pay such awarded fees, statutory damages, and/or court costs to the relator or person or party so that the State of Ohio, OCC and OCC's employees and officials are held harmless.

15. All notices referenced in Paragraphs 9 and 13 must be served by the Parties on each other by one of the following methods: (1) sending the notice to such counsel of record herein via e-mail; (2) hand-delivering the notice to such counsel in person at any location; or (3) sending the notice by an overnight delivery service to such counsel.

16. Once OCC has complied with its records retention schedule(s) pertaining to the retention of the Protected Materials and OCC determines that it has no further legal obligation to retain the Protected Materials and this Proceeding (including all appeals and remands) is concluded, OCC must return or dispose of all copies of the Protected Materials unless the Protected Materials have been released to the public domain or filed with a state or federal administrative agency or court under seal. OCC may keep one copy of each document designated as Protected Material that was filed under seal and one copy of all testimony, cross-

examination, transcripts, briefs and work product pertaining to such information and will maintain that copy as provided in this Agreement.

17. By entering into this Protective Agreement, OCC does not waive any right that it may have to dispute the Company's determination regarding any material identified as confidential by the Company and to pursue those remedies that may be available to OCC before an administrative agency or court of competent jurisdiction. Nothing in this Agreement precludes OCC from filing a motion to compel.

18. By entering into this Protective Agreement, the Company does not waive any right it may have to object to the discovery of confidential material on grounds other than confidentiality and to pursue those remedies that may be available to the Company before the administrative agency of competent jurisdiction or court of competent jurisdiction.

19. This Agreement represents the entire understanding of the Parties with respect to Protected Materials and supersedes all other understandings, written or oral, with respect to the Protected Materials. No amendment, modification, or waiver of any provision of this Agreement is valid, unless in writing signed by both Parties. Nothing in this Agreement should be construed as a waiver of sovereign immunity by OCC.

20. This Agreement will be governed by and construed in accordance with the laws of the State of Ohio.

Duke Energy Ohio

BY:

Counsel

Date

Office of the Ohio Consumers' Counsel
BY:

Counsel

Date

Exhibit A

**BEFORE
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In the Matter of the Application of Duke)
Energy Ohio for Authority to Establish a) Case No. 14-841-EL-SSO
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Certified Supplier Tariff, P.U.C.O.)
No. 20.)

NON-DISCLOSURE CERTIFICATE

I certify my understanding that Protected Materials may be provided to me pursuant to the terms and restrictions of the Protective Agreement, last executed _____ 200_, and certify that I have been given a copy of and have read the Protective Agreement, and that I agree to be bound by it. I understand that the contents of Protected Materials, and any writings, memoranda, or any other form of information regarding or derived from protected materials will not be voluntarily disclosed to anyone other than in accordance with the Protective Agreement and will be used only for the purposes of this Proceeding as defined in paragraph two of the Protective Agreement.

Name: _____

Company: _____

Address: _____

Telephone: _____

BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

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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.)

**CONFIDENTIALITY AGREEMENT
BETWEEN
DUKE ENERGY OHIO, INC.
AND**

THE OFFICE OF THE OHIO CONSUMERS' COUNSEL

This Confidentiality Agreement (Agreement) is made and entered into by and between Duke Energy Ohio, Inc., (Duke Energy Ohio) and the Office of the Ohio Consumers' Counsel (Recipient) (each individually a Party and, collectively, the Parties), effective as of _____.

Recitals

- A. Duke Energy Ohio is an Ohio public utility, as defined in Revised Code (R.C.) 4905.02 and an electric utility, as defined in R.C. 4928.01(A)(11). As such, Duke Energy Ohio is subject to the jurisdiction of the Public Utilities Commission of Ohio (Commission).
- B. Recipient is the representative of residential customers of Duke Energy Ohio and has filed (or expects to file) a motion seeking leave to intervene in the Proceeding, as defined herein, which motion has not been denied.

- C. Certain written, verbal, and electronic information anticipated to be disclosed by Duke Energy Ohio to Recipient contains proprietary, confidential, and competitive information of Duke Energy Ohio and, potentially, third parties.

Now, therefore, in consideration of the premises and the mutual covenants hereinafter set forth, the Parties, intending to be legally bound, agree as follows:

Agreement

1. Definitions

For purposes of this Agreement, the term “Confidential” means that counsel for Duke Energy Ohio deems, in good faith, the information to which the term refers to be subject to protection either under Rule 26(c) of the Federal or Ohio Rules of Civil Procedure or under Rule 4901-1-24(D) of the Ohio Administrative Code because it constitutes a trade secret or other confidential business information of Duke Energy Ohio or Duke Energy Ohio’s customers or Duke Energy Ohio’s affiliates, including but not limited to plant and product specifications, data, know-how, formulae, compositions, processes, designs, sketches, photographs, graphs, drawings, samples, inventions and ideas, research and development, customer lists, current and anticipate customer requirements, price lists, market studies, business plans, computer software and programs (including object code and source code), databases (including technologies, systems, structures, and architectures), contracts, or any other information, however documented, that is a trade secret within the meaning of applicable law and including other commercial information and/or confidential information that is subject to a further confidentiality provision with a third party. However, the term “Confidential” does not refer to any information or document that is either (i) contained in the public files of any state or federal administrative agency or court or (ii) at or prior to the commencement of the Proceeding is or was otherwise in the public domain, or enters into the public domain as a result of publication by Duke Energy Ohio.

For purposes of this Agreement, the term “Highly Confidential” means that counsel for Duke Energy Ohio deems, in good faith, the information to which the term refers to be “Confidential” and also to be information that, if disclosed, might damage the Company’s current or prospective business or any current or prospective financial position and is, therefore, disclosed only for review by attorneys representing the Recipient.

For purposes of this Agreement, the term “Confidential Information” or “Highly Confidential Information” means information that is designated as “Confidential” or “Highly Confidential – Attorneys’ Eyes Only” by Duke Energy Ohio in writing or, if recorded as part of a deposition or transcribed testimony, orally. “Confidential Information” and “Highly Confidential Information” shall refer to such designated information whether revealed during deposition, in a document, by production of tangible evidence, in a hearing or oral testimony of

any sort, or otherwise. "Confidential Information" and "Highly Confidential Information" shall also include all copies or reproductions, in any medium, or any so designated information. In addition, "Confidential Information" and "Highly Confidential Information" shall include all notes, analyses, compilations, studies, summaries, and other material prepared by the Recipient or the Recipient's Representatives (as defined below) containing or based, in whole or in part, on any Confidential Information or "Highly Confidential Information" provided from or on behalf of Duke Energy Ohio. Where reasonably possible, "Confidential Information" or "Highly Confidential Information" shall bear a legend to that effect, record or affixed on it in such a way as to be obvious to a reasonable examiner.

For purposes of this Agreement, the term "Proceeding" means the Commission proceeding or proceedings captioned above, including any appeal to the Ohio Supreme Court that stems directly from the Commission's decision therein and any remand by the Ohio Supreme Court to the Commission. The term "Proceeding" does NOT include any cases that may be substantively or procedurally related but are not captioned above, other than appeals and remands; provided, however, that the Parties may agree in writing, pursuant to Section 9(c), below, to modify this definition such that other legal proceeding(s) may be included with the definition of the term "Proceeding" and, provided further, that the specific reference to the ability of the Parties to agree in writing to modify such definition does not alter the Parties' ability to modify other provisions of this Agreement or the requirement that such other modification requires written agreement.

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Comment [JWK1]: Duke Energy Ohio has added a specific statement indicating that we can agree to modify what proceedings are covered by this agreement. We have also clarified that no other change in modification rights or requirements are intended to be impacted by the fact that we are specifically identifying this possible modification.

2. Identification of Confidential Information and Highly Confidential Information

Duke Energy Ohio will conspicuously mark all written and electronic data containing Confidential Information or Highly Confidential Information as "Confidential" or "Highly Confidential – Attorneys' Eyes Only." In the event that Duke Energy Ohio notifies the Recipient after providing Confidential Information or Highly Confidential Information that such information was not appropriately so marked, the Recipient shall add such marking to the Confidential Information or Highly Confidential Information and shall treat it as such under the terms of this Agreement.

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.

Comment [JWK2]: Duke Energy Ohio is not changing this paragraph. As discussed, it is important to us that the Recipient of our information acknowledge its confidential nature. This provision still enables the Recipient to dispute that character. But if there is no challenge, then you will treat the information as confidential.

3. Protection of Confidential Information

The Recipient agrees that (i) it will hold all Confidential Information and Highly Confidential Information as required by this Agreement and will not, without the specific prior written consent of Duke Energy Ohio, disclose any Confidential Information or Highly Confidential Information (including the fact that the Confidential Information or Highly Confidential Information has been made available to the Recipient or that the Recipient has inspected any portion of the Confidential Information or Highly Confidential Information) to any person other than as allowed hereunder, (ii) it will not use any of the Confidential Information or Highly Confidential Information for any reason or purpose other than the Proceeding, and (iii) in the event the Recipient has a need to publicly file any document containing Confidential Information or Highly Confidential Information, with the Confidential Information or Highly Confidential Information redacted, the Recipient shall ensure that the redacted information cannot, technologically, be obtained by third parties.

All Confidential Information and Highly Confidential Information shall be held by the Recipient in separate and identifiable files, with access to such files restricted to persons to whom disclosure is permitted hereunder.

The Recipient is fully responsible for enforcing, with regard to its Representatives (including legal counsel), the obligations of this Agreement and for taking such action, legal or otherwise (including all actions that the Recipient would take to protect its own confidential information and trade secrets), as may be necessary to cause its Representatives (including legal counsel) to comply with such obligations.

4. Permitted Disclosure

a. Disclosure of Confidential Information is permitted only as follows:

- 1) The Recipient may disclose Confidential Information to those representatives of the Recipient (including directors, officers, employees, agents, consultants, advisors, legal counsel, paralegals, economists, statisticians, accountants, and financial advisors (Representatives)) who (a) in the judgment of the Recipient, require access to such material for the purpose of assisting the Recipient in performing work directly associated with the Proceeding; (b) are informed by the Recipient and/or Duke Energy Ohio of the Confidential nature of the Confidential Information and the obligations of this Agreement and agree to be bound by all the provisions hereof; and (c) have executed a Nondisclosure Certificate in the form attached hereto and have returned a copy of such executed Nondisclosure Certificate to Duke Energy Ohio prior to obtaining access to Confidential Information.

- 2) The Recipient may also disclose Confidential Information to any party to the Proceeding that is bound by the terms of a similar Confidentiality Agreement with Duke Energy Ohio; provided that such other party is included on a list of parties so bound, which list will be maintained and updated as necessary by the Company. Furthermore, the Recipient shall abide by any restrictions that are set forth on such list and shall, also, ensure that all individual party representatives to whom disclosure is made have signed the Nondisclosure Certificate required by this Confidentiality Agreement and have returned such certificate to Duke Energy Ohio.
- 3) In connection with the Proceeding, the Recipient may also disclose Confidential Information to (a) employees of the Commission or (b) counsel for the Commission or for Commission employees.
- 4) In the event the Commission requires disclosure of Confidential Information, the Recipient shall follow the procedures set forth in paragraph 6, below.
- b. Highly Confidential Information is disclosed by Duke Energy Ohio under this Agreement, for attorneys' eyes only. Disclosure of Highly Confidential Information is permitted only as follows:
- 1) The Recipient may not disclose Highly Confidential Information to any Representative other than legal counsel of record in the Proceeding, and may only do so provided such counsel (a) is informed by the Recipient and/or Duke Energy Ohio of the Highly Confidential nature of the Highly Confidential Information and the obligations of this Agreement and agrees to be bound by all the provisions hereof, including the obligation not to disclose the Highly Confidential Information other than as permitted herein, and (b) has executed a Nondisclosure Certificate in the form attached hereto and has returned a copy of such executed Nondisclosure Certificate to Duke Energy Ohio prior to obtaining access to Highly Confidential Information.
- 2) The Recipient may also disclose Highly Confidential Information to legal counsel of record in the Proceeding, which legal counsel represents any party to the Proceeding that is bound by the terms of a similar Confidentiality Agreement with Duke Energy Ohio; provided that such other party is included on a list of parties so bound, which list will be maintained and updated as necessary by the Company. Furthermore, the Recipient shall abide by any restrictions that are set forth on such list and shall, also, ensure that all attorneys to whom disclosure is made have

Comment [JWK3]: As discussed, the changes in this paragraph will replace the requirement for the Recipient to get permission to discuss with other parties. Instead, we will maintain a list of parties with whom conversation is allowed. The onus is still on the Recipient to ensure the people in the discussion have all signed nondisclosure certificates.

Deleted: similar Confidentiality Agreement is applicable only to the Proceeding and, provided further, that, prior to such disclosure by the Recipient, the Recipient has received from Duke Energy Ohio written permission for the disclosure of Confidential Information to such other party to the Proceeding.

Comment [JWK4]: This new paragraph allows disclosure to the Commission, staff, and their counsel.

Comment [JWK5]: To avoid confusion or duplication, Duke Energy Ohio has revised this paragraph to refer to the process in paragraph 6.

Deleted: s

Deleted: As described more fully

Deleted: , the Recipient may disclose Confidential Information as ordered by the Commission or its personnel; provided, however, that the Recipient shall provide notice to Duke Energy Ohio that such an order has been received, at least three business days prior to disclosure, and, provided further, that the Recipient shall not disclose Confidential Information pursuant to such an order if Duke Energy Ohio has informed the Recipient that it has initiated an effort (through a formal filing or otherwise) to appeal that order or otherwise to petition the Commission or its personnel to change the order

Comment [JWK6]: As discussed, the changes in this paragraph will replace the requirement for the Recipient to get permission to discuss with other parties. Instead, we will maintain a list of parties with whom conversation is allowed. The onus is still on the Recipient to ensure the people in the discussion have all signed nondisclosure certificates.

signed the Nondisclosure Certificate required by this Confidentiality Agreement and have returned such certificate to Duke Energy Ohio.

- 3) In connection with the Proceeding, the Recipient may also disclose Confidential Information to (a) employees of the Commission or (b) counsel for the Commission or for Commission employees.
- 4) In the event the Commission requires disclosure of Highly Confidential Information, the Recipient shall follow the procedures set forth in paragraph 6, below.

Deleted: similar Confidentiality Agreement is applicable only to the Proceeding and, provided further, that, prior to such disclosure by the Recipient, the Recipient has received from Duke Energy Ohio written permission for the disclosure of Highly Confidential Information to such legal counsel for such other party to the proceeding.

Comment [JWK7]: This new paragraph allows disclosure to the Commission, staff, and their counsel.

Comment [JWK8]: To avoid confusion or duplication, Duke Energy Ohio has revised this paragraph to refer to the process in paragraph 6.

Deleted: As described more fully

Deleted: the Recipient may disclose Highly Confidential Information as ordered by the Commission or its personnel; provided, however, that the Recipient shall provide at least three business days' prior notice to Duke Energy Ohio that such an order has been received and, provided further, that the Recipient shall not disclose Highly Confidential Information pursuant to such an order if Duke Energy Ohio has informed the Recipient that it has initiated an effort (through a formal filing or otherwise) to appeal that order or otherwise to petition the Commission or its personnel to change the order

5. Ownership

All Confidential Information and Highly Confidential Information shall remain the property of Duke Energy Ohio. No license or other rights under any patents, trademarks, copyrights, or other proprietary rights is granted or implied by this Agreement or the disclosure of the Confidential Information or Highly Confidential Information.

6. Limited Use of Confidential Information

The Recipient shall not reveal Confidential Information or Highly Confidential Information or otherwise disclose such information other than as expressly authorized in this Agreement and only for the purpose of the Proceeding.

- a. If the Recipient or any one or more of the Recipient's Representatives attempts to use the Confidential Information or Highly Confidential Information in any legal proceeding (whether before the Commission or any other court or agency) other than this Proceeding, neither Recipient nor any of its Representatives shall oppose a motion by Duke Energy Ohio to strike such use or any other such motion deemed appropriate by counsel for Duke Energy Ohio and the Recipient shall be responsible for reimbursing Duke Energy Ohio for any and all costs that incurs in defending the Confidentiality of such Confidential Information or Highly Confidential Information. Similarly, if the Recipient is a party to a subsequent legal proceeding in any administrative agency or court (which subsequent proceeding is not included in the definition of the Proceeding) and another entity or person (that was also a party to the Proceeding and had executed a confidentiality agreement with Duke Energy Ohio with regard to the Proceeding) attempts to use Confidential Information or Highly Confidential Information in that subsequent proceeding, the Recipient agrees not to oppose any motion by Duke Energy Ohio to strike or otherwise prevent such unauthorized use of the Confidential Information or Highly Confidential Information.

Comment [JWK9]: The change in this section is intended to clarify that this provision only applies to use of the information in another case.

Deleted: for any purpose

- b. If the Recipient is legally compelled (by oral questions, interrogatories, requests for information or documents, subpoenas, civil or criminal investigative demands, regulatory requirements, or other similar processes) to make any disclosure that is prohibited or otherwise constrained by this Agreement, the Recipient will provide Duke Energy Ohio notice, within three business days' of the receipt thereof, so that Duke Energy Ohio may determine whether to seek an appropriate protective order or other appropriate remedy. Subject to the foregoing, the Recipient may furnish that portion (and only that portion) of the Confidential Information or Highly Confidential Information that, in the written opinion of its public records officer, the Recipient is legally compelled to disclose. A copy of such written opinion shall be provided to Duke Energy Ohio.

Comment [JWK10]: The changes in this section are intended:

- to allow the OCC's public records officer to opine as to the need to disclose, and
- to delete the need for OCC to encourage confidential treatment by those who may receive the information.

Deleted: counsel (reasonably acceptable to Duke Energy Ohio)

Deleted: In addition, the Recipient shall use reasonable efforts to obtain reliable assurances that confidential treatment will be accorded any Confidential Information or Highly Confidential Information so disclosed.

7. Remedies

The Parties stipulate and agree that disclosure of such information without the protection of this Agreement would likely damage Duke Energy Ohio, such damage would likely be material, but the measure of such damage is difficult to quantify. The Parties stipulate and agree that monetary damages would therefore not be an adequate remedy for a breach of this Agreement by the Recipient or any of its Representatives and that Duke Energy Ohio will suffer irreparable harm because of any such breach. In addition to any legal remedies and any sanctions that may be imposed by the Commission or a court of competent jurisdiction for a violation of this Agreement, the Parties agree that Duke Energy Ohio may, without the requirement that it post a bond or other security, take any actions available at law or at equity for a breach of this Agreement. Thus, Duke Energy Ohio may, in addition to any other remedies that might otherwise be available to it, seek specific performance and injunctive or other equitable relief in the courts of Ohio or any other court of competent jurisdiction as a remedy for the commission or continuance of any such breach or anticipated breach.

Comment [JWK11]: For purposes of reaching a compromise here, Duke Energy Ohio is willing to delete the liquidated damages provision, based on OCC's concern about the lack of clarity in actual practice, potentially leading to accidental disclosure. However, we are not willing to delete the specific agreements that would assist us in obtaining equitable relief in the event of a breach.

Deleted: and

Deleted: herefore, i

Deleted: agree to the following remedies:¶

¶ In the event that either (1) during the pendency of the Proceeding, the Recipient discloses any Highly Confidential Information other than as authorized under this Agreement or (2) after the pendency of the Proceeding, the Recipient discloses any Confidential Information or Highly Confidential Information, the Parties agree that damages shall be calculated at the greater of actual damages to Duke Energy Ohio or \$500,000. In addition, the Recipient so breaching this Agreement shall be responsible for reimbursing Duke Energy Ohio for all costs of pursuing its legal and/or equitable remedies hereunder, including, but not limited to, attorneys' fees, court costs, and expert witnesses. ¶

¶ Furthermore, the Parties

Deleted: Therefore, i

Deleted: shall thus be entitled

Deleted: to

Comment [JWK12]: The changes in the section are intended to address OCC's record retention requirements.

8. Return and/or Destruction of Confidential Information or Highly Confidential Information

If any individual Representative of the Recipient ceases to be employed by the Recipient or otherwise engaged in the Proceeding, access to any Confidential Information will be terminated immediately and such individual shall (a) promptly return all Confidential Information and Highly Confidential Information in his or her possession to another Representative of the Recipient who has signed the Nondisclosure Certificate or, (2) if there is no such other Representative of the Recipient, treat the Confidential Information and Highly Confidential Information as described below, as if the Proceeding had been concluded. Any person who has signed the Nondisclosure Certificate will continue to be bound by the provisions of this Agreement even if no longer employed by the Recipient or engaged in the Proceeding.

Confidential Information or Highly Confidential Information provided under the terms of this Agreement must be returned to Duke Energy Ohio or destroyed, as described in this section, under the following circumstances:

- a. ~~The~~ Commission issues a final order in the Proceeding, assuming it is not appealed to the Ohio Supreme Court.
- b. If appealed to the Ohio Supreme Court, such Court issues its opinion, assuming it is not remanded to the Commission.
- c. If remanded to the Commission, the Commission issues a final order in the Proceeding.

Comment [JWK13]: The first two subsections are being deleted because the retention schedule would still require the retention of the information.

Deleted: <#>The Recipient's intervention in the Proceeding is denied by the Commission or its personnel.¶

↑<#>The Recipient determines that it does not wish to continue its participation in the Proceeding and files a notice of such withdrawal.¶

In any of the above-listed circumstances, the Recipient shall, within 15 days after it has complied with its records retention schedule(s) pertaining to the Confidential Information or Highly Confidential Information, either return to Duke Energy Ohio or destroy (as instructed by Duke Energy Ohio) the Confidential Information and Highly Confidential Information furnished by Duke Energy Ohio, together with all copies and summaries thereof in the possession or under the control of the Recipient or its Representatives, and shall destroy all materials generated by the Recipient or the Recipient's Representatives that include or refer to any part of the Confidential Information or Highly Confidential Information. Furthermore, the terms of this Agreement shall remain in full force and effect after the final conclusion of the Proceeding.

Deleted: within 15 days from its receipt of notification from Duke Energy Ohio

Deleted: . as instructed by Duke Energy Ohio in such notification. In that event, the Recipient shall promptly deliver to Duke Energy Ohio any Confidential Information and Highly Confidential Information

Deleted: One copy of the Confidential Information or Highly Confidential Information may be retained by the Recipient for record purposes only, but only if the Recipient is a governmental entity and such retention is mandated by law. If such a record is retained by the Recipient, it shall under no circumstances be used for any purpose other than the Proceeding.

The Recipient shall, within 15 days of the conclusion of its required record retention period, provide written, notarized and sworn certification of its compliance with this section. The Parties acknowledge that failure to abide by the requirements of this section may result in Duke Energy Ohio not being willing to enter into similar confidentiality agreements in future cases.

Deleted: . regardless of whether the Recipient retained a record copy of the Confidential Information or Highly Confidential Information or not

Deleted: from its receipt of notification from Duke Energy Ohio to return to Duke Energy Ohio or destroy the Confidential Information and Highly Confidential Information, the Recipient shall also

9. Miscellaneous

a. Notices

Notices required or permitted by this Agreement shall be served by certified mail, return receipt requested, or reputable overnight courier service to the following addresses:

To Duke Energy Ohio: Amy B. Spiller, Deputy General Counsel
139 East Fourth Street, 1303-Main
Cincinnati, OH 45202

To _____: _____

b. Authority

The undersigned individuals represent that they are authorized to sign this Agreement on behalf the respective Parties.

c. Entire Agreement, Severability, and Waiver

This Agreement constitutes the entire Agreement among the Parties with respect to the subject matter hereof, supersedes any prior understandings or representations among all of the Parties to this Agreement relating to the confidential treatment of the Confidential Information and Highly Confidential Information, and shall not be modified except by a written agreement signed by all Parties.

All provisions of this Agreement are severable and the unenforceability of any of the Provisions of this Agreement shall not affect the validity or enforceability of the remaining provisions of this Agreement.

The failure of any Party to insist upon strict performance of any of the terms and conditions shall not be deemed to be a waiver of those or any other terms and conditions of this Agreement.

d. Assignability

This Agreement may not be assigned by any Party without the prior written consent of the other Party.

e. Governing Law and Venue

This Agreement shall be construed and enforced in accordance with the laws of the state of Ohio. Any action to enforce the terms of this Agreement shall be brought in a court located within Hamilton County, Ohio, and both Parties hereby consent to the jurisdiction of such court.

f. Counterparts and Facsimile or Electronic Signatures

This Agreement may be executed in counterparts and, in the absence of an original signature, faxed signatures (or signatures transmitted by other electronic media) will be considered the equivalent of an original signature.

IN WITNESS WHEREOF, each of the Parties hereto has caused this Agreement to be executed on its behalf by an appropriate officer or other person thereunto duly authorized, as of the date set forth at the beginning of this Agreement.

DUKE ENERGY OHIO, INC.

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.)	

NONDISCLOSURE CERTIFICATE

I certify my understanding that Confidential Information or Highly Confidential Information may be provided to me, but only pursuant to the terms and restrictions of the Confidentiality Agreement executed on _____, and certify that I have been given a copy of and have read such Confidentiality Agreement, and that I agree to be bound by it (including the definitions therein of any terms in this certificate). I understand that the contents of Confidential Information or Highly Confidential Information, and any writings, memoranda, or any other form of information regarding or derived from Confidential Information or Highly Confidential Information, shall not be voluntarily disclosed to anyone other than in accordance with such Confidentiality Agreement. Furthermore, I understand that the Confidential Information and Highly Confidential Information shall only be used for purposes of the above-captioned Proceeding.

Name: _____

Company: _____

Address: _____

Telephone: _____

Date: _____

This foregoing document was electronically filed with the Public Utilities

Commission of Ohio Docketing Information System on

7/14/2014 5:10:23 PM

in

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

Summary: Memorandum Memorandum Contra Duke Energy Ohio Inc.'s Motion for Protective Order by the Office of the Ohio Consumers Counsel electronically filed by Ms. Deb J. Bingham on behalf of Grady, Maureen R. Ms.