

**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 COMPEL RESPONSES TO DISCOVERY**

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Pursuant to the provisions of O.A.C. 4901-1-12(B)(1) and the attorney examiner's schedule for these proceedings, Duke Energy Ohio, Inc., (Duke Energy Ohio or Company) hereby files its memorandum contra a Motion to Compel Responses to Discovery (Motion to Compel Responses), filed with the Public Utilities Commission of Ohio (Commission) on July 18, 2014, by the Office of the Ohio Consumers' Counsel (OCC).

Duke Energy Ohio respectfully submits that the Commission should deny the Motion to Compel Responses.

**I. INTRODUCTION**

In yet another motion, OCC again addresses the question of terms for a confidentiality agreement between OCC and the Company, pursuant to which OCC may obtain access to the Company's proprietary information. OCC entitles this motion as one

to “compel responses to discovery.” But the body of the document reveals that OCC’s true intent is to compel Duke Energy Ohio<sup>1</sup> to enter into a confidentiality agreement that, based upon recent experience, fails to provide the Company with adequate protections in the event of a breach.

OCC fails to provide any factual or legal basis for its motion. It should be denied.

## **II. ARGUMENT**

OCC structures the Motion to Compel Responses as if it were actually embroiled in an unresolvable dispute with Duke Energy Ohio over whether Duke Energy Ohio must answer specific discovery requests. It even includes boilerplate language discussing the statutory right to ample discovery. But there is no dispute. The discovery responses that the Company has not provided to OCC are ones that seek confidential, proprietary information; they are not ones that the Company has refused to answer on the ground of irrelevance. OCC knows this. Indeed, as OCC admits, “the PUCO should find that [OCC’s draft] protective agreement . . . is appropriate and adopt it for purposes of allowing OCC access to information . . .” “The PUCO should . . . rule that [OCC’s draft] protective agreement . . . must be executed by Duke.”<sup>2</sup> There is no existing dispute, as defined in O.A.C. 4901-1-23(A), in need of Commission resolution.

It is noteworthy that O.A.C. 4901-1-23, pursuant to which OCC claims to have filed, does not address matters related to confidentiality. Rather, such issues are covered

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<sup>1</sup> The actual language in OCC’s motion requests that the Commission compel DP&L to enter into a protective agreement. In order not to waste the Commission’s time any further, Duke Energy Ohio will simply assume that OCC meant to say “Duke” and will not move to strike this motion. *Cf., In the Matter of the Application of Duke Energy Ohio, Inc., for an Increase in Gas Rates*, Case No. 12-1685-GA-AIR, *et al.*, Joint Motion to Strike by the Office of the Ohio Consumers’ Counsel, Kroger Company, Ohio Manufacturers’ Association, and Ohio Partners for Affordable Energy and Request for Expedited Ruling (moving to strike Duke Energy Ohio’s motion based on feigned confusion resulting from typographical error).

<sup>2</sup> Motion to Compel Responses, pp. 2, 11.

by O.A.C. 4901-1-24. That rule specifically states that a motion concerning how confidential material is to be disclosed is to be filed only by the party from whom discovery is sought. That party is the Company, not OCC. Its effort to cast its motion as one to compel discovery is an effort to circumvent the Commission's rules.

OCC also misstates the parties' resolution efforts. From OCC's filing, it appears that:

- The Company "is steadfast in its belief that its newly revised protective agreement should be the basis for agreement."
- The Company "has been willing to negotiate some of the terms."
- OCC has been "persistent."<sup>3</sup>

What is not clear from this document is that the Company has heavily revised its proposal, including the deletion of substantively important terms, and that OCC is "steadfast" in its unwillingness to compromise whatsoever.

With regard to the specific complaints that OCC again raises with regard to the Company's proposed confidentiality agreement, these items have, largely, been previously briefed by both parties. The Company will not waste the Commission's time with any further discussion. Rather, the Company incorporates herein its Reply to Memorandum Contra Motion for Protective Order, filed in these proceedings on July 17, 2014.

One elaboration by OCC does deserve a response. OCC complains about contractual language through which parties would agree, prior to any breach, that a violation of the contract's terms would have a specified impact. OCC asserts that such a

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<sup>3</sup> Motion to Compel Responses, pp. 1-2 (emphasis added).

provision is “unreasonable and inconsistent with the burden of proof in a breach of contract action.” OCC is wrong. This is not an uncommon provision in a contract, although it certainly does impact what issues must be proven in case of breach. And that is intentional. If a recipient of the Company’s proprietary information chooses to breach the confidentiality agreement, Duke Energy Ohio should not have to prove these issues. To avoid any negative impact of this provision, OCC need only abide by the terms of the confidentiality agreement it signs.

The additional provisions that OCC demands “for protection as a state agency” were never fully addressed between the parties, as OCC refused to sign the document before it even reviewed the modifications that Duke Energy Ohio agreed to. Despite this behavior, OCC now ironically urges specific protections that it needs as the potential recipient of another entity’s confidential information, yet cannot even discuss the adequate protections that that entity needs to provide such information.

That OCC’s version of a confidentiality agreement is based on one that has been used before is irrelevant and of no legal import. There is nothing to say that an agreement that was once satisfactory must continue to be so. But perhaps more troubling than OCC’s refusal to even consider a revised confidentiality agreement is its disregard for Commission rules. It is accepted – and undeniably understood – that a motion to compel is not summarily filed. Litigants are required first to endeavor to resolve a dispute amongst themselves, prior to burdening the Commission. Here, however, OCC did no such thing and its purported demonstration of “good faith” is misplaced.

OCC, through counsel, made no attempt to communicate with Duke Energy Ohio as to any of the responses the Company provided in respect of the discovery set forth in

Exhibit 3 to the Motion to Compel. Indeed, counsel's affidavit mentions no such efforts. Rather, counsel's attestations recount only those exchanges relating to a confidentiality agreement. Despite this blatant omission, counsel offers her sworn testimony under O.A.C. 4901-1-23, suggesting that somehow a conversation on one matter satisfies her obligation to exhaust all extrajudicial means of reaching an amicable resolution with regard to specific discovery requests and responses thereto. This disregard for the rules, demonstrated at a time when the Commission has before it the Company's Motion for Protective Order, cannot be cured by simply cloaking inapplicable statements in an affidavit.

### **III. CONCLUSION**

Duke Energy Ohio respectfully submits that the Commission should deny the Motion to Compel Responses.

Respectfully submitted,

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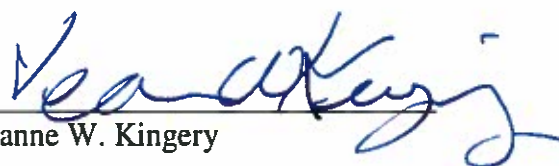
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**CERTIFICATE OF SERVICE**

I hereby certify that a true and accurate copy of the foregoing was delivered by U.S. mail (postage prepaid), personal, or electronic mail, on this 23<sup>rd</sup> day of July, 2014, to the parties listed below.

  
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