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 §4928.143, Revised Code, in the Form of an Electric Security Plan, Accounting Modifications and Tariffs for Generation Service.	:	Case No. 14-841-EL-SSO
In the Matter of the Application of Duke Energy Ohio for Authority to Amend its Certified Supplier Tariff, P.U.C.O. No. 20.	:	Case No. 14-842-EL-ATA

PROCEEDINGS

before Ms. Christine M. T. Pirik and Mr. Nick Walstra, Hearing Examiners, at the Public Utilities Commission of Ohio, 180 East Broad Street, Room 11-A, Columbus, Ohio, called at 1:30 p.m. on Tuesday, August 12, 2014.

- - -

ARMSTRONG & OKEY, INC.
222 East Town Street, 2nd Floor
Columbus, Ohio 43215
(614) 224-9481 - (800) 223-9481
FAX - (614) 224-5724

- - -

APPEARANCES:

Duke Energy Ohio, Inc.
By Ms. Amy B. Spiller
Ms. Jeanne W. Kingery
Ms. Elizabeth H. Watts
139 East Fourth Street
Cincinnati, Ohio 45202

On behalf of Applicant Duke Energy Ohio, Inc.

Bruce J. Weston, Consumers' Counsel
Office of the Ohio Consumers' Counsel
By Ms. Maureen R. Grady
Mr. Joseph P. Serio
Mr. Edmund "Tad" Berger
Assistant Consumers' Counsel
10 West Broad Street, Suite 1800
Columbus, Ohio 43215

On behalf of the Residential Customers of Duke Energy Ohio, Inc.

Vorys, Sater, Seymour and Pease, LLP
By Mr. M. Howard Petricoff
Mr. Michael J. Settineri
Mr. Stephen M. Howard
Ms. Gretchen L. Petrucci
52 East Gay Street
P.O. Box 1008
Columbus, Ohio 43216-1008

On behalf of Constellation NewEnergy, Inc., Exelon Generation Company, LLC, and Retail Energy Supply Association.

Mike DeWine, Ohio Attorney General
By Mr. M. Howard Petricoff
Special Assistant Attorney General
52 East Gay Street
P.O. Box 1008
Columbus, Ohio 43216-1008

On behalf of University of Cincinnati and University of Miami.

APPEARANCES (Continued):

Carpenter, Lipps & Leland, LLP
By Ms. Kimberly W. Bojko
Ms. Mallory Mohler
280 North High Street, Suite 1300
Columbus, Ohio 43215

On behalf of Ohio Manufacturers Association.

Carpenter, Lipps & Leland, LLP
By Ms. Rebecca L. Hussey
280 North High Street, Suite 1300
Columbus, Ohio 43215

On behalf of The Kroger Company.

Environmental Law & Policy Center
By Mr. Justin M. Vickers
35 East Wacker Drive, Suite 1600
Chicago, Illinois 60601-2110

On behalf of Environmental Law & Policy Center.

Mr. Douglas E. Hart
441 Vine Street, Suite 4192
Cincinnati, Ohio 45202

On behalf of The Greater Cincinnati Health Council.

Williams Allwein and Moser, LLC
By Mr. Christopher J. Allwein
Williams Allwein and Moser, LLC
1500 West Third Avenue, Suite 330
Columbus, Ohio 43212

On behalf of the Sierra Club.

Interstate Gas Supply, Inc.
By Mr. Joseph Oliker
Mr. Matthew White
6100 Emerald Parkway
Dublin, Ohio 43016

On behalf of Interstate Gas Supply, Inc.

APPEARANCES (Continued):

McNees, Wallace & Nurick, LLC
By Mr. Frank P. Darr
Mr. Matthew R. Pritchard
Fifth Third Center, Suite 1700
21 East State Street
Columbus, Ohio 43215-4288

On behalf of the Industrial Energy Users - Ohio.

Ohio Environmental Council
By Mr. Trent Dougherty
1207 Grandview Avenue, Suite 201
Columbus, Ohio 43215-3449

On behalf of Ohio Environmental Council.

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

On behalf of the City of Cincinnati.

Boehm, Kurtz & Lowry
By Mr. Kurt J. Boehm
36 East Seventh Street, Suite 1510
Cincinnati, Ohio 45202

On behalf of Ohio Energy Group.

Ms. Colleen L. Mooney
231 West Lima Street
Findlay, Ohio 45839-1793

On behalf of Ohio Partners for Affordable Energy.

FirstEnergy Service Company
By Mr. Scott J. Casto
76 South Main Street
Akron, Ohio 44308

On behalf of the FirstEnergy Solutions Corporation.

APPEARANCES (Continued):

Mike DeWine, Ohio Attorney General
By Mr. Steven Beeler
Mr. Thomas Lindgren
Mr. Ryan O'Rourke
Assistant Attorneys General
Public Utilities
180 East Broad Street, 6th floor
Columbus, Ohio 43215

On behalf of the Staff of the Public Utilities Commission.

Direct Energy
By Mr. Joseph M. Clark
21 East State Street, 19th floor
Columbus, Ohio 43215

On behalf of Direct Energy Services, LLC and Direct Energy Business, LLC.

- - -

Tuesday Afternoon Session,
August 12, 2014.

- - -

EXAMINER PIRIK: This is in the Matter of the Application of Duke Energy Ohio, Inc. for Authority to Establish a Standard Service Offer Pursuant to Section 4928.143 of the Revised Code in the Form of an Electric Security Plan, Accounting Modifications and Tariffs for Generation Service, and for Authority to Amend its Certified Supplier Tariff, PUCO No. 20., Case Nos. 14-841-EL-SSO and 14-842-EL-ATA.

My name is Christine Pirik, and with me is Nick Walstra, and we are the Attorney Examiners assigned to hear this case.

At this time I will take appearances on behalf of the parties. On behalf of the company.

MS. SPILLER: Good afternoon, your Honor. Amy Spiller, Elizabeth Watts, and Jeanne Kingery for Duke Energy Ohio.

EXAMINER PIRIK: We'll go right around the table.

MR. VICKERS: Good afternoon. Justin Vickers for the Environmental Law and Policy Center.

MS. GRADY: Thank you, your Honors. On

behalf of the Ohio Consumers' Counsel, Bruce J. Weston, Maureen R. Grady, Joseph P. Serio, and Tad Berger.

MR. HART: On behalf of the Greater Cincinnati Health Council, Douglas E. Hart.

MS. BOJKO: Thank you, your Honors. On behalf of the Ohio Manufacturers' Association, Kimberly W. Bojko and Mallory M. Mohler with Carpenter, Lipps & Leland, 280 North High Street, Suite 1300.

MR. HOWARD: Thank you, your Honors. On behalf of the Retail Energy Supply Association, Constellation NewEnergy, Inc., Exelon Generation Company, LLC, Miami University, and The University of Cincinnati, please show the appearance of the law firm of Vorys, Sater, Seymour, and Pease, 52 East Gay Street, Columbus, Ohio 43215, by M. Howard Petricoff, Michael J. Settineri, Gretchen L. Petrucci, and Stephen M. Howard. Thank you.

MR. ALLWEIN: Good afternoon, your Honors. On behalf of the Sierra Club, Christopher J. Allwein, Williams, Allwein and Moser, 1500 West Third Avenue, Suite 330, Columbus, Ohio 43212.

MR. OLIKER: Thank you, your Honor. One more try. Thank you, your Honor. On behalf of

Interstate Gas Supply, Inc., Joseph Oliker and Matt White, 6100 Emerald Parkway, Dublin, Ohio 43106.

MR. DARR: On behalf of IEU-Ohio, Frank Darr and Matt Pritchard.

MR. DOUGHERTY: Thank you, your Honor. On behalf of the Ohio Environmental Council, Trent Dougherty, 1207 Grandview Avenue, Suite 200, Columbus, Ohio 43212.

MR. O'BRIEN: Good afternoon, your Honors. On behalf of the City of Cincinnati, Bricker & Eckler, LLP, by Thomas J. O'Brien, 100 South Third Street, Columbus, Ohio 43215. Thank you.

MR. BOEHM: Good afternoon, your Honors. Kurt Boehm, appearing on behalf of the Ohio Energy Group.

MS. MOONEY: On behalf of Ohio Partners for Affordable Energy, I'm Colleen Mooney.

MR. CASTO: Thank you, your Honor. On behalf of FirstEnergy Solutions, Corp., Scott Casto.

MS. HUSSEY: Good afternoon, your Honors. Rebecca Hussey, on behalf of the Kroger Company.

MR. BEELER: On behalf of the Staff of the Public Utilities Commission of Ohio, Ohio Attorney General Mike DeWine, Steven Beeler, Ryan O'Rourke, and Thomas Lindgren, Assistant Attorneys

General, 180 East Broad Street, Columbus, Ohio.

EXAMINER PIRIK: Thank you. Is there anybody else who's not sitting at the table?

MR. CLARK: Your Honor, on behalf of Direct Energy Services, LLC, and Direct Energy Business, LLC, Joseph M. Clark.

EXAMINER PIRIK: It's our understanding that there are several motions that are pending. I will list the motions as I understand that are pending and then we will take them one at a time.

The first motion we have is a May 29th, 2014, motion that was filed with the application, regarding Mr. Arnold's testimony.

The second motion I have is one that was filed on July 8th, 2014, which is a Duke motion for protective order regarding a protective agreement.

The third one I have is a July 18th, 2014, motion filed by OCC, requesting abeyance of our ruling on Duke's motion for protective order.

And the fourth one I have is a July 18th, 2014, OCC motion to compel responses to discovery.

Are there any other filed motions that I haven't listed on this item that we need to discuss today?

Okay. So we'll start with the July 8th,

2014, Duke motion for protective order. I'm going to ask the parties, even though we have filings, I'm going to ask the parties to make their arguments and anything that they have to say on the record at this time.

So I'll look to you, Ms. Spiller.

MS. SPILLER: Thank you, your Honor. Actually, Ms. Kingery will be arguing the motion on the Company's behalf.

EXAMINER PIRIK: Ms. Kingery.

MS. KINGERY: Thank you, your Honor.

EXAMINER PIRIK: I don't think your microphone is on. There you go.

MS. KINGERY: How's that?

EXAMINER PIRIK: It's good.

MS. KINGERY: All right. Thank you, your Honor.

It's important, as we think about the confidentiality agreement today, to keep in mind that the information in question is proprietary information that belongs to Duke Energy Ohio. We are happy to share it in this proceeding under appropriate protections, but we are interested in protecting the company against the financial harm that it would incur by the unauthorized release of

this information.

There was a prior agreement -- is this still working? Yes.

There was a prior agreement that we have used in previous years, and we do not, at this point, feel that it's appropriate at this time. We don't feel that it protects the company appropriately under today's circumstances. This is a different world than it was some years ago when that agreement was evaluated by the Commission and approved for some specific purposes.

At this point, we have a market out there that's well developed and much competition and there are numerous ways in which that competitive market can impact the company and ways in which the confidential information can indeed also affect that market.

So we've drafted a new agreement that is intended to still be fair and still allow people the opportunity to get this information and use it in this proceeding, but we want to have it a little tighter than it's been in the past.

When we first put this agreement out into the hands of the intervenors in this proceeding, we heard a number of concerns, not from all parties but

certainly from some, and had lengthy discussions with OCC, among others.

As a result of those discussions, we made numerous changes to our agreement, changed things that were of little import to us and also changed things that were of great import. For example, the old agreement said nothing about what would happen on a breach of the agreement; what rights we would have. It was left to the law, but it didn't say anything in the agreement. So we had drafted the original -- this new version with provisions for both legal and equitable remedies.

The parties were particularly unhappy with the legal remedies that we had set forth and we took those out. So the current draft, as it appears, does not address legal remedies at all. For that reason, it's even more important to us that we keep provisions in the new version that talk about equitable remedies.

And, for that reason, we have in the agreement provisions that require the recipient of our information to acknowledge that, for the purposes of breach, the information is confidential and that its release would harm Duke, and that that harm would be material.

And those provisions are in there so that if it's a continuing breach, we have the ability to go to a court of law and seek an injunction. They do not have anything to do with whether this Commission and your Honors find the information actually to be confidential if the information is submitted to be a part of the record in this case. The agreement specifically says that the intervenor may challenge the confidentiality of the information in question, but that has nothing to do with a breach.

Now, the OCC has argued that our revised agreement shifts the burden of proof from the company to the recipient, but it does not. That acknowledgment by the recipient that it is confidential information is only in there so that we will have a way to get equitable relief in a prompt and expeditious way. Instead, the recipient has the affirmative right, under agreement, to argue in this hearing room about the confidential nature. So we would ask that the Bench rule that these provisions are acceptable.

Now, OCC has also argued that there are two other provisions that should be changed. One is easy and that is a statement that there is no waiver of sovereign immunity. The other one is a provision

in which the company would, in essence, indemnify OCC for any financial damage it might incur in problems with public records requests as a result of our confidentiality agreement. But we believe this is unreasonable.

Duke would follow the agreement, and the agreement has time deadlines in it under which we have to act. So if OCC gets a public records request, and we choose to do nothing and allow them to respond, they'll respond to the public records request. If, on the other hand, we think that it is confidential and we seek to stop them from releasing that information, then it would be pursuant to court order that they would not release it.

We don't believe it's appropriate that Duke Energy Ohio or its ratepayers should have to pay for any problem that may be caused by OCC and however it handles its public records matters.

So, your Honor, we would move for your acceptance of Duke Energy Ohio's revised version of the new confidentiality agreement.

EXAMINER PIRIK: I want to be sure we're looking at the same document and what your calling the revised version is what's attached to your July 8th motion; is that correct?

MS. KINGERY: Let me just check, your Honor. Yes, it is.

EXAMINER PIRIK: And --

MS. KINGERY: This is the -- this is the version of the document that we would sign with OCC. There are a few provisions in here that are specifically tailored to OCC as a governmental agency that would not be in the agreement for any other parties.

EXAMINER PIRIK: Are there any other parties that have been granted intervention that have not signed an agreement?

MS. KINGERY: There is only one party that has signed an agreement and that's OEG, and they signed an agreement that is essentially identical to what's in here, and they have actually been given confidential agreement -- or, documents as a result thereof.

EXAMINER PIRIK: And no other party has requested confidential information?

MS. KINGERY: Other parties have requested confidentiality agreements, some picked them up at the technical conference, some have requested them from us, but no one else has proceeded to actually discuss terms with us.

MS. SPILLER: And, your Honor, if I may interject, only because some of these requests come through my office and our paralegal in Cincinnati. We had initial confidentiality agreements distributed at the technical conference.

OEG then filed, in mid-June, a motion, asking the Commission to craft a confidentiality agreement. We negotiated an agreement with OEG. OEG has since signed, as Ms. Kingery indicates, withdrew their motion.

Subsequent to OEG's withdrawal of their motion, I believe we have had three or four of the several intervenors that have asked for a copy of that document. We have not heard back from those parties as to whether they would sign the same agreement that OEG has signed.

EXAMINER PIRIK: Because, I mean, next I'm going to turn to Ms. Grady and ask for her response to the motion that you've put on the record, but I want everyone to be aware of the fact that if you have anything to say with regard to the motion for protective order that you've received a copy of, or that you're working with the company on, or looking at, we need to talk about it today, because we need to resolve this issue so that discovery can

move forward and everyone can have the information in a ready fashion.

So I just want to be sure, I'm going to turn to Ms. Grady, but I'll also ask everyone else if you have anything in addition to respond; otherwise, our ruling today is going to be our ruling today and hopefully we can move forward.

So, Ms. Grady.

MS. GRADY: I'm going to try to be very brief because I know we've had these motions and they've all been filed, we filed responses.

A couple of points that I wanted to raise in response to Ms. Kingery's remarks. Ms. Kingery mentioned that the information that these protective agreements go to is proprietary information, and this is kind of the crux of the whole -- one of the issues that we have is it is alleged to be proprietary information. We have not seen the information and so we can't judge whether it's proprietary. But, for purposes of the protective agreement, we are willing to treat it as proprietary.

We, however, are not willing to sign a protective agreement, and I'm specifically talking about Section 2 and Section 7 of Duke's protective agreement, which is Exhibit 2A to Duke's motion. If

you look at Section 2, that requires OCC to acknowledge that the information provided in the agreement is confidential and that any disclosures will injure Duke. And that, we believe, is a concession that is inappropriate, inconsistent with the rules of the Commission, as well as inconsistent with the law.

In Section 7, if you turn to Section 7, that indicates that disclosure of the information without protection would likely damage Duke Energy Ohio and such damage would likely be material. It also goes on to state that Duke will suffer irreparable harm because of any breach of the agreement. That, your Honor, is an inappropriate concession and, again, shifts the burden of proof away from Duke to someone challenging the confidentiality of the agreement.

Ms. Kingery was correct in indicating that there are two other provisions, the indemnification provision and sovereign immunity provision which are not contained in Exhibit 2A but which are contained in OCC's proposed protective agreement. As a state agency, we need indemnification. This indemnification provision has not been a problem in the past with Duke.

So we come now, we presented our protective agreement in June, June 2nd of this year, shortly after the filing was made. We were then told that the protective agreement that we've used with Duke for 10 years or more, and we recently used in the Duke MGP case, that was signed less than a year ago, was not going to work. And the response of Duke was it doesn't work because some party, not OCC, in a unnamed proceeding, violated the terms of the protective agreement.

So we're having a very difficult time understanding why the OCC agreement, which this Commission has adopted, not just once but twice, and ordered Duke to sign, is not appropriate for use in this proceeding.

And I guess that's the end of my remarks, unless you have any questions, your Honor.

EXAMINER PIRIK: The document that you've attached to your memo contra that was filed on July 14th, that's the document that you're referring to?

MS. GRADY: Yes, your Honor. It is also the document that you will find on the July 18th motion, our motion as well.

EXAMINER PIRIK: And is that the

identical document that was, I guess, provided in the 16 -- the 13-168 --

MR. SERIO: 83 and 85, the electric and gas rate cases.

EXAMINER PIRIK: 83 and 85. Okay.

MS. GRADY: Your Honor, I've not done a redline version, but I believe it is, because we have a form and we've negotiated that form with Duke over the years, and it's been very painstakingly gone through. So, yes, I would believe that it is substantially the same if not exactly the same as it was.

EXAMINER PIRIK: So, I mean, I guess specifically my question about the indemnification and the sovereign immunity, are both of those provisions in the document that was approved in the last rate cases for Duke?

MS. GRADY: That is my understanding, your Honor.

EXAMINER PIRIK: That was what you signed.

MS. GRADY: Yes.

EXAMINER PIRIK: Okay.

Is there any other party that would like to say anything with regards to Duke's motion?

Ms. Bojko.

MS. BOJKO: Thank you, your Honor. First of all, I'd like to clear up that the OMA did in fact reach out to Duke numerous times to talk about the settlement agreement -- or, the protective agreement. We did state our concerns that they were the same as outlined in the motions that had been filed; so we didn't think it was necessary to go through every one again. So I think that statement was a misstatement. We did reach out to them.

And then, as Ms. Spiller said, we reached out again after the motion was withdrawn because we obviously still had the same concerns and we wanted them to know that our concerns were there and that they were made.

We also agree with OCC that -- and we did ask for the new agreement that was signed with OEG to be forwarded to us, and they did, we received that and we reviewed it.

We also agree that this assumes confidentiality. It assumes -- it's a blind assumption that anything disclosed is confidential and will injure Duke, and it also blindly assumes that Duke will suffer irreparable harm from that. That is problematic for us.

If you look at page 3 and page 7, as referenced by Ms. Grady, those have the acknowledgments of confidential and, without seeing it, we cannot agree that something is confidential.

Also, as far as the challenging of the confidentiality, I have concerns with Section 6.a. on page 6. That section is written very broadly. I think that it does state in fact that you cannot challenge the confidentiality of the documents. It says that you can't oppose it in subsequent proceedings. This basically grants permanent confidential treatment because you can never oppose a motion by Duke to seek confidential treatment in subsequent proceedings.

So, obviously, the Commission has ruled in the past that there's a 24-month limitation on these types of agreements that can then be extended. Well, this basically says it's permanent and we can never challenge the confidential treatment of that. So we do have concerns with that as well.

Although the million-dollar remedy was removed from the document on the new version, we still have significant concerns with page 7 which is Section 7 of the remedies. In essence, it is still a very significant penalty. It states that you're

agreeing that it is inadequate to just provide monetary damages and that Duke will suffer irreparable harm from this.

We could not agree to anything that opens or that has this kind of liability associated with it in the past. So while there might not be a million-dollar breach provision, these unlimited remedies do actually have the same effect, and we could not agree to something like that.

Also, we have concerns with the posting of bond language.

EXAMINER PIRIK: Okay. Slow down just a little bit. Hold on just a minute. I want to be sure I'm getting all this.

Okay. Specifically with regard to the last one, on page 7, Section 7, what sentence specifically are you concerned about?

MS. BOJKO: Well, there's numerous words throughout. "Would likely damage." That is stating that you agree that it would damage. "Such damage would likely be material."

EXAMINER PIRIK: Well, I guess my question is, in addition to what OCC has already pointed out, which are those very items --

MS. BOJKO: Okay.

EXAMINER PIRIK: -- you were mentioning something about it being a greater penalty.

MS. BOJKO: Well, because it's not limited. It's unlimited. And you have to seek remedies outside. That there's -- it could amount to -- if you're saying that the company suffers irreparable harm, the only way to fix that is a significant penalty. That's the concern that there is no limitation.

EXAMINER PIRIK: Okay. I thought there was additional language.

MS. BOJKO: Also, in that same paragraph, your Honor, it says "without the requirement that it post a bond." It's requiring parties that sign this document to agree to that. And that's a statutory requirement, at least as it pertains to a stay at the Supreme Court, and we could not agree to waive a statutory requirement such as a bond. I'm assuming it applies to that because it says any "court of competent jurisdiction."

EXAMINER PIRIK: Okay. I'm sorry. You can continue.

MS. BOJKO: And then lastly, your Honor, we have concerns of the agreement requiring any remedies or any objections to the agreement to be

dealt in Hamilton County court. It's interesting that throughout the document we talk about the Commission's jurisdiction and the Commission has a right to issue remedies, but, yet, then we talk about the Commission not having jurisdiction and that the jurisdiction rests solely within the Hamilton County court.

EXAMINER PIRIK: Again, what section is that?

MS. BOJKO: 9.8.

MR. HART: "e."

MS. BOJKO: I'm sorry. 9.e.

EXAMINER PIRIK: And, specifically, what's your reasoning behind that?

MS. BOJKO: 9.e. is saying that the agreement is construed and enforced with the laws of the state of Ohio and that those enforcements of the agreement should be brought in Hamilton County.

It does not allow anything to be brought in front of the Commission. Although, throughout the whole document it gives Commission -- I think there's discussion about the Commission remedies, it talks about different Commission provisions, but then when it talks -- and it talks about, paragraph 7, "as a remedy for the commission or continuance of

any...breach." So you're talking about breach in the context of the Commission having some jurisdiction, but then, at the end, you're excluding Commission jurisdiction and stating that everything has to be dealt with in Hamilton County.

EXAMINER PIRIK: Okay. Any other party?

Mr. Howard.

MR. HOWARD: Your Honors, RESA, Constellation and Exelon asked for this last week, and we just got ours -- our copy last night. So I haven't had a chance to review it. We would be concerned with assumptions of injury, indemnification provisions. And for RESA's sake, I'm not sure that, as a trade association, we're able -- we may or may not be able to sign this type of thing because I think this deals primarily with individual parties. Thank you.

EXAMINER PIRIK: Any other party?

Mr. Oliker.

MR. OLIKER: Thank you, your Honor. I would reiterate many of the points that Ms. Grady said, as well as Mr. Howard.

Additionally, I would note that provision 6.a. could be potentially problematic regarding motions to strike and retention of documents that

only OCC, I believe, is allowed to retain a copy under public records law.

The purpose of this agreement is to protect confidential information, and to the extent the information is being held confidential, it shouldn't be a problem if a party were to retain it, at least one copy. If you look back to the Duke MRO case, that's the way Duke's confidentiality agreement read.

And, by doing that, that allows a party to determine, at a later date, if Duke is not making statements that are necessarily consistent between applications, and we know this has been a problem with this company if you look at the capacity case and the Duke MRO case.

Whether or not the information can be used in each case is a different question, but at least it provides a basis for requesting information from past cases in discovery.

So I would note that parties should be allowed to retain at least one copy.

EXAMINER PIRIK: Anyone else?

MR. ALLWEIN: Just a couple things, your Honor. One, I would support the comments of the previous parties, in particular their comments

regarding the language in Section 7.

And then I just wanted to ask for a clarification from Duke, if I may, and that is that the former section, 4.a.2), originally required parties to let Duke know who they were talking to, and those parties -- those would be parties that had a confidentiality agreement, and it looks like that's been removed here. And I was just wondering is that the -- that removal would be applicable to all parties who are going to sign this, right?

MS. KINGERY: Yes, that's correct. What we agreed with OCC is that we would internally maintain a list of all parties who've signed a confidentiality agreement. When somebody new signs it, we will update the list, and we will circulate that list to all the parties who've signed so that you will always have an updated list. And as long as you're talking to only people on that list, you're fine.

That list would also include, if there was there -- if there was some differences between, substantive differences between one party's agreement and somebody else's agreement, that would also be identified on that list.

MR. ALLWEIN: Okay. So different parties

may get different agreements?

MS. KINGERY: That has not happened yet.

MR. ALLWEIN: Okay. All right. I'm sorry.

MS. KINGERY: We only have one. But if there were any --

MR. ALLWEIN: I see.

MS. KINGERY: -- then it would be listed on that list. And the goal here was to avoid having you have the burden to come to us and say is it okay if I talk with whoever.

MR. ALLWEIN: All right. Thank you. That's all I have, your Honors. Thank you.

MS. KINGERY: Then, your Honors, I would like to respond at some point to various comments.

EXAMINER PIRIK: I want to be sure that we're all on the same page and we're talking about the same number of issues and the exact issues before we move on and have any responses of any kind.

So I find, based upon the conversation and the discussion and the motions and replies that we've just had, that there are seven issues before us right now that we need to help resolve with regard to the protective order.

The first one being the Section 2 issue

with regard to the confidentiality language. It's on page 3, Section 2, the "will injure" language. That's No. 1.

No. 2 is found in Section 7, page 7. The first issue in that paragraph has to do with the language: "would likely damage"; "would likely be material"; and "will suffer irreparable harm." That's what I'm considering the second issue.

The third issue is the concern that OCC has with regard to indemnification. And, Mr. Howard, you mentioned indemnification --

MR. HOWARD: Yes.

EXAMINER PIRIK: -- as well.

The fourth issue has to do with the sovereign immunity issue raised by OCC.

The fifth issue has to do with the issue brought up on page 6, Section 6.a., Ms. Bojko brought up with regard to the opposition of the motion, and the concern that I believe Mr. Oliker brought up that parties should be able to retain at least one copy of documents for other proceedings.

The sixth issue is what Ms. Bojko brought up on page 7. The last part with regard to the bond issue and the limitation of the penalty.

And the seventh issue has to do, on page

9, Section 9.e., with regard to the Hamilton County court and whether or not that excludes Commission jurisdiction.

Are we all on the same page? Did I miss anything? And my intent is, then, to go down the list and actually make decisions based upon those items and have the protective agreement revised according to whatever our rulings are.

Ms. Bojko.

MS. BOJKO: Your Honor, I would just -- you talked about Section 2, page 3, the "will injure" But I think embedded in that, as well as Section 7, there's the idea that there's a presumption of confidentiality. I'm not sure you said that.

EXAMINER PIRIK: I believe that I encompassed that actually in the Section 7, the beginning, the first part of that Section 7 issue.

MS. BOJKO: Thank you.

EXAMINER PIRIK: And to the extent that that would affect that paragraph in general, our ruling would apply equally.

Okay. Ms. Kingery.

MS. KINGERY: Thank you, your Honor.

First of all, with regard to the major issue of the presumption of confidentiality and

acknowledgment that the information is confidential and would injure Duke and that injury would be material.

As I said, when I made the motion, this is so that we will be able to go into a court of competent jurisdiction to consider a potential breach of contract and get equitable relief, that is, an injunction.

So the language is not in there to say that the parties have to agree blind, without having seen it, that the information is actually confidential for purposes of this hearing and the Commission. They still have the absolute right to argue about whether or not the information should be treated confidentially. Our goal was not to take that away.

Section 7 was the second one. And this is one that's talking about damages and the fact that the damage to Duke would be difficult to quantify. Certainly, your Honors can understand that it would be difficult to quantify, as can we, and that is language that, again, is necessary for obtaining an injunction from a court. So if a party were, once again, involved in a continuing breach, we would want to be able to enjoin that, that behavior.

So that's what the language is there for. It's not there as part of some unlimited level of damages that might be assessed. There was no effort in here to either limit or not limit monetary damages. Indeed, the old agreement that OCC wants to use had nothing in it about damages; therefore, all damages are unlimited. There's no cap under that agreement as to damages and the level that might be calculated.

No. 3 was indemnification. I understand that it's in the old agreement. That doesn't make it right. We certainly have a right to attempt to change agreements that we've signed, going forward, as they relate to other cases, and this is one that we think is reasonable to change. There's no reason why Duke Energy Ohio should be indemnifying OCC's compliance with the public records laws.

As to the sovereign immunity, we're happy to add that provision. That's not a problem.

Your fifth item, this related to Section 6.a. and the question of whether parties, other than the OCC, should get to retain a copy. And this is very interesting. It goes to the crux of confidentiality agreements and how they are generally structured, including the old one that we have

previously used.

Confidential information is released by the utility to the parties in a case for purposes of that case only. If the information is returned to the utility or if it's destroyed, then we can be confident that it's not going to be inappropriately used.

Now, we understand that OCC is under statutory requirements to maintain records for certain lengths of time. We understand that. That's not a problem. Other parties are not.

And the suggestion that other parties would want to keep a copy of our confidential information so they could look at it in the context of another case and make decisions about how to represent their clients and oppose us in that subsequent case on the basis of old confidential information is astonishing, absolutely astonishing, because they all have signed documents that say we will use this information only in this proceeding.

Just because they don't plan to admit it into or attempt to admit it into the record in a subsequent case, doesn't mean that they're not using it. So it must be returned or destroyed. It's critical. That was No. 5.

No. 6 was the bond. And the suggestion was made that this would be contrary to state law because there's a bond requirement of the Supreme Court. But we're not talking about the Supreme Court. We're not talking about appeals here.

We're talking about original actions where there's been a breach of a contract and we're trying to get an injunction. And Duke Energy Ohio should not be out the money for the bond just because it's trying to prevent continued breach of its contract.

The Hamilton County court issue has also been blown out of proportion here. The Commission has what jurisdiction it has. Our contract cannot, under any circumstances, change the Commission's jurisdiction nor are we attempting to.

But the Commission generally does not have jurisdiction over breach of contract cases. There are aspects of this confidential information dispute that the Commission certainly has jurisdiction over. There are others that it may not. Where we would end up in a court of competent jurisdiction outside of the Commission, that is where we wish to have it take place, in Hamilton County.

One other point that I would add as to

using information from one case in determining strategy in another case, I am fairly sure that if you would compare our agreement with the agreements that are signed with other utilities in the state of Ohio, I doubt there are other utilities that would allow confidential information to be used in that way, in subsequent proceedings. That's all, your Honor. Thank you.

EXAMINER PIRIK: Thank you. I believe we received the replies that we needed on one through four, but I think we still, I think I will allow the other parties to respond with regard to No. 5, No. 6, and No. 7. Beginning with Section 6.a., the second part of Section 7, and Section 9.e. So does anyone have any response to what Ms. Kingery said?

MS. BOJKO: Yes, your Honor.

I would say I appreciate Counsel's explanation in representations that the agreement wasn't intended to do certain things, but the words are in the agreement and they actually require that.

It says a bond by a competent -- court of competent jurisdiction. That would be a Supreme Court -- the Supreme Court. So although it wasn't the intent, that's what the words say. The words say you can't oppose a motion in another proceeding or a

venue and implies the permanency of such confidential treatment. I think that that's problematic.

The words say it provides exclusive jurisdiction in the last paragraph in e., and it requires the parties to consent to that court. So even though there may be some issues that are under the Commission's jurisdiction, that's not what you're agreeing to under this context.

So while I appreciate the explanations, I think that we just need to work to make sure the agreement says exactly what the intent is with regard to acknowledging confidentiality, and what you can or cannot oppose, and who has jurisdiction in which context. Thank you, your Honor.

EXAMINER PIRIK: Anything else from anyone?

MR. OLIKER: Just a short follow-up, your Honor. If I understand Duke's position, it's if it makes statements in discovery or testimony, sworn statements, and they're are under seal, then it gets a clean slate in a new case. I don't think that's the case. That's not the purpose of a confidentiality agreement. It's to protect those statements from disclosure.

And to allow one party to hold onto those

statements and potentially ask for them to be reproduced later, I don't think that that is unreasonable. So long as they give the appropriate safeguards to these statements, it shouldn't be damaging Duke's business interests, and, if anything, it will keep the record more clear for the Commission in these proceedings.

EXAMINER PIRIK: Anything else?

MR. CASTO: Yes, your Honor. I didn't get a chance to have any initial comments. I haven't seen the agreement between Duke and OEG. I had some communication problems with Ms. Kingery. So I think that our issues can be resolved if I can just see that and probably agree to it. I don't know if I'm going to have a chance because your Honor said you're going to rule from the Bench, but, for what it's worth, I think our issues are resolved with the agreement that was signed between OEG and Duke.

EXAMINER PIRIK: Okay. Anything further?

Let me start by saying it's difficult to, and I think OCC brings this up in one of their filings, it's difficult to understand a protective agreement and how it's going to be applied unless you're actually looking at the information. I think this Bench especially, I've been very consistent

through all of the cases that I've presided over, and intend on being very consistent with this case as far as what the Bench believes is confidential, and that's extremely limited items and documents.

And so, it concerns me that while I understand the need, perhaps, to tighten up some of the issues that the company's concerned about in a protective agreement, and I appreciate that, and I look at the protective agreement and I see where the company is coming from because of the market changes and things that have progressed since the last time these agreements have been entered into.

You know, I have concerns about what the company is marking confidential and what they're going to be proposing as confidential in the record. And I think that's evidenced by the attachments to Mr. Arnold's testimony. The documents that I looked at are far from what we had discussed in previous cases, including the MGP and the capacity case, as far as what is confidential.

And I was disappointed, I guess I should say, to see the documents, in whole, trying to be put in the record as a confidential document when in fact we had many conversations about what's confidential. So I was really disappointed when I looked at the

document.

Of course, given the fact that it is marked confidential, and I understand the parties haven't gotten to see it yet, you know, obviously we're not going to rule on that today, but I bring up that motion is still pending and we'll rule on that at the hearing itself. And once I finish resolving the issues that we have before us right now, these seven issues we have, then we'll talk more about what the process can be for alleviating the Bench's concern with regard to those documents.

That being said, I do understand that the documents you're providing parties are part of discovery, may or may not be put into the record, may or may not be something that the Bench will ultimately see; however, you know, I would expect that the company would use the same diligence in redacting out of those documents, so that it's very limited, so everyone really understands what's confidential.

And I'm not so certain that it would be so difficult signing a confidentiality agreement, holding people to a higher standard, if in fact that very limited scope was put on the documents that you were turning over in discovery just like you were

turning over to the Bench.

So, you know, that being said, to expect parties to sign, you know, kind of a document that holds them in breach of items that may or may not be confidential, is a concern. I just don't see how that would work.

In other words, they could be held in breach for releasing something that was determined by the Bench not to be confidential just because it was marked confidential by the company and handed over during discovery.

So that is a concern and I don't see how that really works in the whole scheme of really what, at least this Bench, has been trying to resolve as far as documents that are brought forth in Duke cases.

And I understand that there are other examiners that deal with AEP and FirstEnergy, and you all have probably experienced different rulings from other Benches, but this Bench, at least, has been really consistent.

So, that being said, let's go through each of the items and we'll make our rulings on those items.

I'll take the first item which is Section

2 and the second item which is Section 7 that were brought up in Duke's motion for protective order first, and this is just dealing with the first part of Section 7, not the second part that was brought up by Ms. Bojko.

With regard to the language, it seems to the Bench that both of these items are strictly worded. While, again, as I mentioned, the alternative to editing this protective agreement that Duke is looking trying to progress towards and, you know, the alternative is either revising this agreement to meet the Bench's concerns, or to go back to the other agreements that were approved and signed in the MGP order and the previous situations where protective orders, such as the one OCC put forward in their memo contra.

So I look at the first issue in Section 2, I think that the Bench finds that the information is -- the language is quite certain, and that understanding the explanation by the company as to how this works with just considering the breach, it's still unclear. There are things that are not clear in the document that need to be revised. But I don't think that the language should be so certain. I think that a mere change of the word "will" to "may,"

I think may resolve some of the issues.

So that certainly it is arguable, and the company may argue, for confidential purposes, that it may injure Duke, but to say and ask someone to sign in a protective agreement that it will definitely injure Duke when in fact some of the information may not be confidential, I don't believe is appropriate. So I think some of the less strict language.

As well as in Section 7, which is our second issue, where it says "would likely," I think changing the "would" to a "may"; "may likely be material." I think it allows for the argument, but it doesn't mandate that in fact that is a definite.

It is a burden upon the company to make those arguments and other parties should be allowed to respond. So I think stepping back from the definitive to an arguable position is a better position in a protective agreement. So that would be with regard to the first part of Section 2 and Section 7.

Does anyone have any questions about those issues?

MR. CLARK: Your Honor, my concern is in the agreement if it's just a "may likely be," I'm not certain that we -- that we really totally take out --

or, get to where I think you're heading to go. So just a "may be" would be consistent with your earlier ruling. So instead of saying "may likely be," just "may be."

EXAMINER PIRIK: I agree. I agree. I think the word "likely" is not appropriate. What I was trying to express, which is why I asked were there any questions, I'm glad you brought that up, is it's the "may be." I mean "likely" makes it sound like it's even more definitive than just the "may be." So it needs to be an arguable statement as opposed to a definitive statement or one that is closer to definitive than arguable.

Are there any other questions on No. 1 and No. 2?

MS. BOJKO: Your Honor, did your ruling go to the word "acknowledges" in Section 2, where just because it's marked confidential that we don't have to acknowledge that it is in fact confidential? The second paragraph of Section 2, page 3.

EXAMINER PIRIK: Well, I guess my understanding is that if we change the word to "Recipient may," that it "may injure Duke." I mean I think you can acknowledge that if it is confidential or it's highly confidential, it may injure them.

MS. BOJKO: But it says "acknowledges the Confidential or Highly Confidential nature" of the documents. That's the concern that you're agreeing that it is -- the nature of it is confidential, before we even get to the harming piece.

EXAMINER PIRIK: I think that's a good point.

I think that it needs to be, you know, I don't want to tell you specifically how to reword the paragraphs, and I think that is something that you should be able to work with the parties on, but it needs to be an arguable statement. It can't be a definitive statement. And I think that goes along with the ruling from the Bench.

So I appreciate you bringing that up. I think that is something that I'm asking the companies to work on to make it more of an arguable statement. That would be in keeping with that ruling.

Is there any other specific questions on the language that we're looking at, at least in No. 1 and No. 2?

Turning to No. 3. Mr. Howard, could you clarify for me. I mean you said you, too, were concerned about indemnification. I wasn't certain what specifically you meant by that.

MR. HOWARD: I think Ms. Kingery has cleared that up for me. Thank you.

EXAMINER PIRIK: Okay. I do understand that the indemnification language had been in previous agreements from what you had said, Ms. Grady. However, I don't think that it's necessary in these agreements. I don't think that it needs to be in these agreements. And so, I will not require the company to include indemnification in there.

I think it is important that the sovereign immunity, which is our fourth issue, be included in there, that OCC has every right to make the arguments. I think the company has already agreed to do that. So I think that's an important step.

MS. GRADY: Your Honor, if I might.

EXAMINER PIRIK: Yes.

MS. GRADY: And just to be clear, when we were talking indemnification, I believe the company indicated that we were asking for indemnification for our own fault, and that is clearly what we're not asking for.

If you look at Exhibit 1 to our protective agreement, it is that they would indemnify

it if a person or party, who sought the public records, sued OCC because OCC delayed disclosing that under the protective agreement or did not disclose it under the protective agreement due to Duke's action and not OCC's action.

So, with that understanding, that is the reason. It is not that we want them to indemnify us against our own actions, it's that we don't respond to a public records request, and with all the information, based upon Duke's representation and Duke's actions and, therefore, then, we are sued. So that is the real reason for the indemnification.

And it is in our Exhibit 1, paragraph 14, and it was -- we did confirm that it was in the Duke MGP case, that very specific language.

EXAMINER PIRIK: And I appreciate that and I do understand where you're coming from and I did get that out of the document that you filed that that was where your issues were, but I think as -- having worked with public records for quite a number of years, I don't -- I think there's a process and there's a process that agencies go through in responding to public records request, and there are statutory provisions as to what is and what is not acceptable.

And we have our processes, which I believe are set forth in the agreements, as what would be followed if you were requested the information. But I don't think that it is appropriate to put that kind of indemnification into the protective agreement, at least what's before us right now.

That takes care of issues one through four. We turn to No. 5. We're looking at paragraph 6.a.

This is one of those issues that, again, is made very difficult because I do know, I do remember and I do recall what happened last year with regard to the gas rate case and exactly the difficulty that was had with the information in trying to recall and trying to rebuild that information.

But it's also made more difficult by the fact that I think confidentiality and what's provided in discovery, again as I said, has turned into a broad spectrum as opposed to the more narrow spectrum that the Commission at least considers confidential and that ultimately may or may not be considered confidential by other courts of competent jurisdiction.

So, I mean, this is a difficult -- this is a difficult call. But I don't think that parties should be required to -- I think there should be a limit on parties not being able to divulge confidential information.

And if it's important to limit those individuals because it's highly confidential and, perhaps, only the attorneys should see the information and, therefore, they're also subject to the attorney requirements as far as ethics go on highly confidential information, then I can see that that would be appropriate.

But I don't see, if parties receive information via discovery in a case, there are always subsequent cases, there are always subsequent cases that relate to previous cases, and there's always information that is needed for the client in subsequent cases referring to previous cases.

I think this language needs to -- needs to allow parties to retain some information, at least one copy, and I think there should be the ability, you know, I do not think that the parties should be required to sign away their ability to make arguments in subsequent cases. I mean, those decisions will be made by the Bench in a given proceeding.

MS. SPILLER: Your Honor, if I may just, I guess some clarity because I'm trying to understand practically how that may play out. And I think, as the Bench is fully aware, discovery, particularly in Commission proceedings, is voluminous and broad, and we have endeavored, particularly in this case, to be mindful of what truly we believe to be confidential.

All told, we probably have 250 discovery requests that we've answered, another 130 in the pipeline from the OCC alone. Of those, 11 of the responses have been marked confidential. So we've been pretty thoughtful, I believe.

So that I understand the Bench's ruling, if I produce confidential information in this case, information that may never see the light of day in respect of the hearing or what may ultimately be offered into evidence, a party may, three, four years down the road, pull out that confidential information from this ESP proceeding and use it in, hypothetically, an electric distribution rate case.

I'm just trying to understand sort of the import of the ruling and what the parties are being allowed in respect of information in this case that they may want to seek discovery of, knowing that, oftentimes, we may object to relevance, but then

answer over that objection in producing discovery in a good-faith effort to comply with the spirit of the rules.

EXAMINER PIRIK: So, I'm not sure that I am making it clear, but I hear what you're saying, but, obviously, all arguments, including the fact that that information was provided in this proceeding not for the purpose of that subsequent proceeding, and any motion to strike that you would like in that subsequent proceeding, of course, you know, I'm not aware of what that would be, but those issues would be resolved in that subsequent proceeding.

Whether or not in that proceeding that information would be allowed to be presented, whether or not you would argue to strike that information, if it's relevant or, in discovery situations, likely to lead to relevant information, if it's relevant information for the proceeding at hand, as long as all the parties are aware and the company is aware that that information is being presented, then I don't -- and the company has sufficient time to review the information, I don't see what the problem is with it.

And I understand what you're saying is that there's only 11 documents so far that you've

marked as confidential. But, again, it could be, I don't know -- it's alleged confidential, I don't know whether it's confidential or not, and we may never see it here in this case.

But to say that the information was provided, and to determine, here and now, that it's not a relevant document for a subsequent proceeding, I just -- I don't think that's appropriate for this Bench to make that decision. I think those arguments need to be made at a later time.

MS. SPILLER: And would you envision, then, your Honor, intervenors disclosing, beforehand, previously-produced confidential information that they intend to use in a subsequent proceeding?

EXAMINER PIRIK: I think there are obviously different avenues that parties can go through to determine what information is and what information is not being used, by way of requests for documents, by way of interrogatories and so forth that you do during the course of discovery.

MS. SPILLER: And the response, I will tell you, your Honor, we've asked the question, it's attorney work product. Documents to be used at trial, evidence to be introduced at the hearing has yet to be determined. Typically, and I think it's

customary in litigation, the response that you get is that that's attorney work product.

And I ask the question, because as the Bench recalls, I mean we were caught flat-footed without a prior agreement to which to refer when previously-produced confidential information was offered last year.

So I just want to be sure that there is an opportunity for equity. So that if parties intend to pull out three-year-old confidential information, we have the opportunity to be prepared to respond to that.

And so, you know, I feel like we're somewhat between a rock and a hard place if people aren't going to tell us. And they may not know right away, but if they're not going to tell us what documents they're going to use to cross-examine a witness, I don't know how I bring in every single case record in which we may have shared confidential information so that we're doing the best we can to protect our client's interests.

EXAMINER PIRIK: And, again, I guess, you know, I don't recall necessarily all the specifics of the information that we looked at in the last proceeding, but I know that not all of it was deemed

confidential that was presented even in that context.

So I would say that sufficient time was given in that proceeding, even though the information had been received in a previous proceeding, to ensure that proper questions were allowed the company to be presented and that everyone was given their due process rights with regard to that information. And I would anticipate that that would be the same in any subsequent proceeding to this one. Any rights that you have, any due process rights that any party has, will likewise be found in subsequent proceedings.

MS. SPILLER: I would assume, your Honor, I guess a final question if I may, in connection with your comments with regard to paragraph 6, is to the extent future use may be contemplated, it's controlled. I have no way to police what 25 parties and their experts and consultants may do with my information, and that is a concern.

And so, to the extent that parties can keep an active file and continually root through our confidential information, I don't know what they're doing, how they may be using it. And so, that really is one of the drivers, based upon some recent past experience, for why we had asked for the information to be destroyed or returned.

EXAMINER PIRIK: I do understand that. And, again, I understand that it's alleged confidential information, that's why I think it behooves the company to be very strict in what they consider confidential so that you're aware specifically of what's out there and all parties are aware of what they can and cannot disclose. I think that's really important. I think it's really important.

MS. BOJKO: Your Honor --

EXAMINER PIRIK: Yes.

MS. BOJKO: May I?

EXAMINER PIRIK: Ms. Bojko.

MS. BOJKO: There's an underlying assumption from the company that once something is confidential, it's always confidential. And I think the concern that I have with removing this language of never being able to oppose that is just that. You have to be able to oppose that it is subsequently confidential. It could become public if it's been out there for two or three years. It's not always confidential. And we saw that with marketing data, for instance, in previous cases.

So, you know, the company is worried about a concern of ongoing confidentiality. I would

just add that the concern from the other side is that it may no longer be confidential and we should have the right to challenge it.

EXAMINER PIRIK: Those determinations -- well, we'll make the determination in this case as to what comes before us as alleged relevant information and, subsequently, that will be made in those subsequent cases.

But, at this time, the Bench finds that this paragraph, 6.a., should be revised in accordance with the ruling, and you should work with the parties as far as the language goes.

With regard to the second part, it's issue No. 7 that I listed. The posting of a bond.

I just don't see why that language needs to be within here. I mean, I understand, I'm not really looking at either the Supreme Court argument about a bond or not a bond, but just in general, I think the bond issue is something that the courts will determine, and what the parties argue with regard to that, the parties should be allowed to make whatever arguments they view is appropriate, and the court should be allowed to make that determination.

And, finally, with regard to issue No. 7, which is in paragraph 9.e. I do understand where the

company is coming from with that, but I don't think it's clear in this language. So I think the language needs to be clarified to recognize the jurisdiction of the Commission and, you know, make sure that it's the appropriate -- whatever the appropriate forum is, whatever the appropriate venue is. And as long as it's clarified within that context, I think it should be fine.

Are there any questions with regard to the rulings on No. 5, 6, or 7?

MS. KINGERY: Your Honor, on No. 7. So what you're saying is that that language should just identify that the governing law and venue, it would either be here at the Commission, or, if jurisdiction is found in a court, then in Hamilton County.

EXAMINER PIRIK: The Bench would be fine with that.

MS. KINGERY: Thank you.

EXAMINER PIRIK: Are there any questions with regard to the rulings on one through seven?

It's our hope that, at least by the end of this week, that the parties, who are trying to resolve the confidentiality agreements, will be able to come to some resolution of those issues.

I think the company understands where

we're going with this, and I think that they will use their best efforts to look at the agreement and revise it, and hopefully the parties will be able to resolve this, and the information can be provided as soon as possible.

Are there any other issues to come before us?

MR. DARR: Your Honor, one question.

EXAMINER PIRIK: Mr. Darr.

MR. DARR: Thank you, your Honor. If there remain to be sticking points, how would you like us to proceed? Since we haven't definitively drafted the language at this point.

EXAMINER PIRIK: Actually, I think the Bench has been pretty clear. I'm really pushing the parties to resolve the issues. I'm really pushing the parties because the only other option would be to delay the proceeding. I don't know what else to say. And that would be problematic from the Bench's perspective because we understand our timeline as far as getting a decision out of the Commission, and I think everyone understands the situation with regard to the proposed auction schedule. So I guess I am anticipating that the company is going to work with parties to resolve the issue.

If there isn't a resolution, then I would ask that the Attorney General notify the Bench that there is a remaining issue, and we may in fact have to reconvene at some point to resolve it.

MR. DARR: Thank you, your Honor.

EXAMINER PIRIK: I think that's the quickest way to do it.

MS. GRADY: Your Honor, I just wanted to make sure, are you -- you had talked about the different motions. Are we done with that motion and you will then hear arguments on the remaining motions?

EXAMINER PIRIK: With regard to the remaining motions, I thank you for bringing that up, Ms. Grady, because, honestly, when I look at the remaining motions, we have ruled on Duke's motion for protective order filed on 7/8/14, and granted in part and denied the motion in part, as we previously discussed.

With regard to holding the motion in abeyance, in light of the fact that we resolved those issues, we're obviously not holding the motion in abeyance and would move forward. So that request is denied.

With regard to the motion to compel

responses to discovery, in light of the fact that, hereto, we've also ruled on the motion for protective order, we find that the July 18th, 2014, motion to compel is moot.

In the event that there are additional sticking points with the protective order, like I said, we will reconvene at the request of the parties and we will resolve those issues at that time.

MS. GRADY: Your Honor, there are, then, two additional issues that we would like to raise with the Bench.

The procedural -- as the procedural order is set, we will be in hearing beginning on October 7th of this year. Earlier this morning, I sent an e-mail around to the parties in the proceeding, indicating to the parties that I was -- I would request a continuance based on a vacation that is scheduled, that has been scheduled since spring of this year, that will flow into the week of the 7th. I was asking that a continuance be allowed till the 14th, which is the Tuesday following the holiday on the Monday -- on the following week.

The response, generally, has been no opposition. In fact, there are a number of parties who have gotten back to me with no opposition to my

request, that would be Wal-Mart, OEG, PWC, Direct Energy, RESA, Constellation, Exelon, Miami University, University of Cincinnati. And also, in support of the continuance that would be EnerNOC, who Mr. Poulos is not attending, but Greater Cincinnati Health Council and OPAE as well.

I did then hear from the company and they did -- there is some issue with the company, but I wanted to raise that issue and make the Bench aware of the fact that I do have personal vacation plans. I am the lead counsel in this case. And we don't have any scheduled witnesses at this point. So, rather than try to work around that, I would respectfully request that the hearing be continued another week.

EXAMINER PIRIK: Any of the other parties, before I turn to the company?

MR. OLIKER: IGS did not notify OCC of its position, but we would also support the continuance.

MS. MOONEY: OPAE supports OCC.

MR. HART: Your Honor, on behalf of the Greater Cincinnati Health Council, I have a conflict on that Friday the 10th, myself, so the continuance would be appropriate for me as well.

MR. ALLWEIN: The Sierra Club would support the continuance.

MR. DOUGHERTY: OEC as well.

MS. BOJKO: OMA has no objection, your Honor.

EXAMINER PIRIK: Ms. Spiller.

MS. SPILLER: Thank you, your Honor. And I appreciate Ms. Grady reaching out to the parties prior to today's prehearing conference. As lead counsel for the company, what she's asking is that the company prosecute their case beginning the week of October 13th, commencing on that Tuesday. That creates a problem for me particularly with regard to our witnesses and the direct examination, cross-examination that would be contemplated for them.

We, too, had some conflicts in connection with the hearing starting on the 7th, but managed through those. But starting the trial on October 14th is not -- is not one that my client can acquiesce to, in light of the conflicts that I personally have for that week. I appreciate absolutely the work and the burden that any continuance is putting on the Commission, particularly in connection with our proffer of

January 2015 auction.

So we would simply recognize potentially two options for consideration of the Bench. One would be to start the hearing on October 22nd, keeping in place all of the other deadlines that the Bench has previously established in terms of paper discovery, witness testimony, staff testimony. We would also propose perhaps a deadline for the completion of discovery depositions of October 10.

And then, with agreement of the parties, and assuming the Bench may be so inclined, to truncate the briefing process so that to the extent there is any expedited work that is to be done, it's borne by the attorneys in this case and not the Bench.

The other only alternative that I can reasonably identify and, again, at the discretion of the Bench, would be to move the hearing back up to some date in September. Thank you, your Honor.

EXAMINER PIRIK: Any responses?

MS. GRADY: Your Honor, the proposal to move the hearing, unfortunately, up into the prior week will be right in the middle of my plans. I am out of the country for a two-week period of time. So that will not help, but I do appreciate the offer.

And I will indicate that I do not -- we are not proposing any change in the filing of the testimony, nor are we proposing any change in the discovery deadlines. We would certainly be willing to maintain and work within the deadlines. The only issue here is continuing the hearing and pushing the hearing back by four days, your Honor.

EXAMINER PIRIK: Are there any responses to Ms. Spiller's proposal?

MS. BOJKO: Moving it up, we would be opposed to moving it back to September, your Honor.

EXAMINER PIRIK: Everyone seems to be agreeing with that.

First of all, I think -- and I understand vacation plans and I understand vacations are made, but it shouldn't be a surprise to anyone that the hearing in this case was going to be September, October, and November, because we knew what the auction schedule was three years ago. So we knew that the plan was coming to an end and that we had to do something about it.

So, as frustrating as that is for parties to try to put plans, and I understand you make your plans, the only person that -- or, people that are really affected or harmed by a delay in the hearing

at all is the Bench. So it's really the Bench saying we don't need much time to take care of this document and we understand, you know, we -- we give up our holidays so that you all can go on your vacations.

So it is with a frustration that I'm saying we can move the hearing to October 22nd, because if we do one for one party, we can't not do that same thing for other parties.

So, you know, I understand, but then you also have to realize that the briefing schedule is going to be shortened. We're just not going to be able to allow a long period of time. It could be very quick briefing schedules. So anything that you would want to put in your brief, I would hope you would prepare yourself to be able to do that.

Now, realizing that there also could be a potential for parties to have discussions between now and then and, as in some cases, there's stipulations and whatnot. It also doesn't allow us much room to move the hearing out if in fact that's happening. So I would expect the parties, if there is some thought that you're going to have discussions, to start that sooner rather than later, so that we don't have to move the hearing out again. Because be it a full case or stipulated case, it still takes time -- or

even a partially stipulated case, it still takes time for us to write everything.

So, that being said, we will grant the motion for continuance and we will convene the hearing on October 22nd.

We would ask that the party, the company, I understand, has not yet published notice.

MS. SPILLER: Correct, Your Honor.

EXAMINER PIRIK: So you will have to adjust the notice to be sure that it appropriately reflects the new hearing date. It will be October 22nd at 10:00 a.m. I don't think that there are any other documents that need to be revised, but I know the legal notice needs to be revised.

As far as the other requests that the company had asked that the depositions be brought to an end, I believe October 10th was the date you had mentioned?

MS. SPILLER: Yes, your Honor.

EXAMINER PIRIK: And you're saying the request for depositions or the actual depositions themselves?

MS. SPILLER: The actual depositions so that they're done.

EXAMINER PIRIK: Okay.

MS. SPILLER: With transcripts, thus, being able to be created and testimony reviewed by witnesses prior to the October 22 hearing date.

EXAMINER PIRIK: Okay. I mean in light of the fact that we were supposed to begin the hearing on the 7th, I think that that's a reasonable request. I think that the remainder of the schedule, as far as filing of testimony, it gives the parties additional time to be able to prepare their cases and perhaps begin some type of briefing process.

I should say also that, as with most briefs in the Duke cases, we're not asking you to give the procedural history of the case. So you don't have to put that in your briefs, unless, of course, it has something to do with what you're trying to argue in your brief itself. So you can keep that in mind if you decide that you are going to start early.

And I think I've already said that we will have a shorter than normal briefing schedule so that we can meet the deadlines that we've set.

MS. GRADY: Thank you, your Honor. And one, just, clarification on the depositions. We put out a deposition notice, and we generally do this in cases, that would cover direct, supplemental, and

rebuttal testimony, and we would ask that if there is rebuttal testimony, that it not have to -- that the deposition not have to take place before October 10th, because in the nature of rebuttal testimony it won't be coming until later. So we wanted to make it very clear that we would not be precluded from pursuing that type of deposition.

EXAMINER PIRIK: That's a good clarification. I appreciate that. Although, you know, I believe rebuttal should be very limited. So hopefully there wouldn't be a need for any type of deposition for rebuttal, but that's a good clarification. Thank you.

MS. GRADY: And yes, your Honor, we had one final matter.

We do have depositions going forward this week, Friday, Mr. Wathen and Mr. Whitlock. We have another deposition scheduled and noticed for the following week of the OVEC, Mr. Brodt.

We would ask that given all the issues that we've had with trying to resolve matters of confidentiality with Duke, we would ask that one of your Honors be available to resolve any disputes that may arise during the taking of the depositions because we really have not been able -- we don't have

a protected agreement. We've had issues, many issues on discovery related to what is alleged to be protective. We haven't yet seen what they are alleging.

And so, we anticipate that there will be issues, carryover issues from this at our deposition, and we would respectfully request that the Bench be available to settle disputes, any disputes that may arise during those upcoming depositions.

EXAMINER PIRIK: Could you give us the dates and times of those again?

MS. GRADY: Yes, your Honor. I believe Friday's deposition begins at --

MS. SPILLER: Mr. Whitlock, your Honor, is at 10:00 a.m. Mr. Wathen is at 1:00 p.m.

MS. GRADY: And then the deposition of -- the OVEC deposition is on Tuesday. I believe it's beginning at 10:00. I believe your Honors may have received notice of that electronically and, if not, we can certainly forward that information to you. And the depositions of Mr. Whitlock and Mr. Wathen will take place here in Columbus at the offices of Duke. The deposition of Mr. Brodt, on behalf of OVEC, will take place at OCC.

EXAMINER PIRIK: And what specifically

are you asking? Are you asking that we're available by phone?

MS. GRADY: Yes, your Honor. Of course it's certainly your option, if you would prefer to attend in person, but I think, yes, we would like, you know, we would like to think that we can get through the deposition and there will be no discovery disputes and there will be no instructing of witnesses not to answer on grounds that are inappropriate, but we're not certain that that will occur given the somewhat tempestuous issues that we faced with Duke with regard to confidentiality.

So, yes, we would ask that there be some way that a ruling could be made so that we could go forward and continue our depositions and continue through the discovery.

EXAMINER PIRIK: Okay. We will make ourselves available, and if we're not available we will be sure that there's a supervisor in the legal department that will be able to help you with any concern that you have.

What we will do is I would prefer not to give our direct contact information as far as cell phone, you know, widespread. I know some individuals in the room may have our information already. So

what I will do is Examiner Walstra and I will send an e-mail to yourself and counsel for Duke with the appropriate line of communication and who you should get in touch with and how to get in touch with them to let you know before Friday.

MS. GRADY: We do appreciate that, your Honor.

EXAMINER PIRIK: Ms. Bojko.

MS. BOJKO: Your Honor, this raises an interesting concern, and I'm not sure what you thought about timing of correcting the confidentiality agreement if depositions are going forward on Friday.

We haven't been able to see any information of the confidential sorts, and so it puts us in a difficult position to be able to depose a witness on such matters when we haven't seen such matters. So did you have in mind a timing for the company to turn around and do an agreement and for us to obtain the confidential information?

EXAMINER PIRIK: I think, at least from our perspective, we were, you know, as I mentioned, by end of the week we would like to see something resolved. We want to see it resolved. We want you to have the information.

My understanding that there's depositions beginning on Friday, there could be questions, you know, the possibility of having to bring them back to finish anything that may come up with regard to confidential information that hopefully you'll have sufficient time, but, if not, you know, I think that there's the possibility that perhaps things can be resolved quickly by the end of the day and information can be provided, you know, Thursday morning. That's the wish list from the Bench.

MS. SPILLER: And, your Honor, I appreciate that. I think we need to go back and confer with clients, and these are Ms. Grady's notices of deposition and she may do with that what she pleases. I would prefer, for the sake of our witnesses, especially Mr. Whitlock who is not a witness in this case, that there be some consideration to whether it makes sense going forward with those witnesses Friday, and the same with the OVEC witness.

I don't think there's any surprise here in this room that the subject nature of Mr. Brodt's deposition will be confidential information, and I don't know where the OCC stands in respect of a confidentiality agreement with OVEC and their

counsel. I suspect they were probably waiting to see what happened today to help guide their decision in that regard.

I've not explored holding firm the depositions for Friday with Ms. Grady, but, you know, I think, you know, perhaps some consideration to what's efficient and what makes sense for the parties involved.

MS. GRADY: Your Honor, if we, perhaps, have some time to try to -- I think we can resolve this. I do appreciate OMA's comments. And it will be very difficult to review information and go forward with the Friday depositions. So we may want to engage in some rescheduling of either of those. You know, OVEC may be another issue, so.

EXAMINER PIRIK: And just keep us posted on exactly what you resolve. And we will send you a list of contacts in the order in which, and you can do that for basically any situation that you may have in not just these depositions but other depositions. If they're scheduled for a later time, just let us know.

MS. GRADY: Thank you, your Honor.

MS. BOJKO: Your Honor, to Ms. Grady's point about OVEC. We got an e-mail saying the whole

deposition or majority of it would be confidential, and people questioned that via e-mail. But we still haven't seen a confidentiality agreement or anything.

I don't know if you're working with one, but that's a concern --

MS. GRADY: Yes.

MS. BOJKO: -- of ours.

MS. GRADY: They were in fact -- I have been in contact with OVEC's counsel, and they were in fact waiting for the ruling. They didn't want to enter into several different agreements. They wanted to be able to offer a Commission-sanctioned protective agreement. So I think that to the extent that one is available, if Duke makes theirs available, and we will certainly be signing our agreement with Duke -- with OVEC, that has been what we've been negotiating with OVEC.

EXAMINER PIRIK: Okay.

MS. BOJKO: I guess my -- we haven't seen it. We don't know if it's going to be Duke's same agreement or if it's going to be a new or separate agreement. And, obviously, that would be a concern if there's confidential issues that we need to resolve with regard to OVEC before the deposition next week as well.

EXAMINER PIRIK: Have you requested the confidentiality agreement from OVEC?

MS. BOJKO: Well, he said he was going to send it to all of the parties after he talked to and worked out one with OCC. So we're kind of in a waiting game right now.

EXAMINER PIRIK: Okay.

MS. BOJKO: Isn't that what he said?

EXAMINER PIRIK: Well, I would recommend that, as you mentioned, Ms. Grady, see where we can get with the protective agreement, see whether it's a good idea to postpone, perhaps, Mr. Wathen and Mr. Whitlock until a later date so that you would have the ability to actually have sufficient cross at the deposition. I think that would be appropriate. But keep us informed of what you decide.

MS. SPILLER: And, your Honor, if I may, with regard to OVEC. I mean you probably have until Tuesday to work out a confidentiality agreement. I mean it's a deposition. I don't anticipate, from the subpoena, that there was going to be a production of documents prior to that deposition. So as long as parties are under a confidentiality agreement, they can participate in those portions of the deposition that would be confidential.

And, again, I believe from the subpoena and the notice of deposition that there were some pretty discreet issues, and I suspect those to be confidential. But do I think there's a little bit more time with respect to OVEC. They're not butting up against Friday depositions and documents that may have been requested of them in the course of discovery is my only point.

EXAMINER PIRIK: I would just say, in a general sense, I do understand that you're going to have depositions and that those depositions could be used some. I think the company is very aware, as well as the parties, because we painstakingly, in the MGP case, went through a difficult process as far as how we were looking at confidential information, and I think we came up with -- we resulted in a record that is pretty well open to the public, information that they need to receive, and that is how the Bench looks at it.

So I would ask, in those situations, realizing that there's a potential that some information from depositions could be used, I would ask, in order to shortcut some of that process, that the company look at those documents and keep in mind how the Bench typically rules when it comes to

confidential information. So that when we get to the hearing itself, we can kind of shorten some of the debates as to what is and what isn't.

I think the company's done an excellent job presenting, in the past cases, to the Bench, what they understand the Bench would consider confidential and not confidential. So hopefully, in preparation for our October 22nd hearing, we can just cut short a lot of the debate and just have before us something that we can very willingly say yes, we agree this is appropriately redacted. So I guess I'm -- it's just a request that we try to get it out there first.

Speaking of that, I would say, I had mentioned Mr. Arnold's testimony and the concerns that the Bench has as far as the attachments. I think there's quite a bit of information in there that can be unredacted, and I would ask the company to look at those attachments.

I understand there's the one J.D. Power document, but, likewise, I also think that those arguments, if in fact they are arguments that are being made on behalf of J.D. Power, then counsel for J.D. Power needs to make those arguments, because, otherwise, it's going to be very difficult for us to really understand the confidential nature, if at all,

of that document.

So, you know, I'm not setting a specific deadline, but I would ask that the company work toward appropriately redacting those attachments so that everything that can be in the open record is in the open record, and that includes symbols and numbers and letters and dollar signs. And I know that that's a real problem, but I would really not -- I don't want to have the problem when we come to hearing to have to have the Bench have to start dealing with that. It would be a much smoother process if it's all resolved before we actually all sit down in the room together.

MS. SPILLER: And, your Honor, we certainly will be prepared, as necessary, to have counsel for J.D. Power here to talk about the license agreements that applies to those surveys.

I will say, in preparations for today's hearing, we did go back and revisit Attachment 7 to Mr. Arnold's testimony and, consistent with past experience, have revised that for which we'll seek the confidential treatment. So we will be tendering to docketing today a Revised MWA-7 attachment with copies to the Bench and to the parties.

EXAMINER PIRIK: We appreciate that.

Thank you very much.

Is there anything else to come before us? If not, we will adjourn for the day. Thank you all.

(Thereupon, the hearing was concluded at 3:08 p.m.)

- - -

CERTIFICATE

I do hereby certify that the foregoing is a true and correct transcript of the proceedings taken by me in this matter on Tuesday, August 12, 2014, and carefully compared with my original stenographic notes.

_____

Carolyn M. Burke, Registered Professional Reporter, and Notary Public in and for the State of Ohio.

My commission expires July 17, 2018.

- - -

Summary: Transcript in the matter of Duke Energy Ohio hearing held on 08/12/14 electronically filed by Mr. Ken Spencer on behalf of Armstrong & Okey, Inc. and Burke, Carolyn M. Mrs.