

BEFORE THE PUBLIC UTILITIES COMMISSION OF OHIO

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In the Matter of the :
Application of Duke Energy :
Ohio for Authority to :
Establish a Standard Service :Case No. 14-841-EL-SSO
Offer Pursuant to \$4928.143, :
Revised Code, in the Form of :
an Electric Security Plan, :
Accounting Modifications and :
Tariffs for Generation :
Service. :

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

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.

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1 APPEARANCES:

2 Duke Energy Ohio, Inc.
 3 By Ms. Amy B. Spiller
 4 Ms. Jeanne W. Kingery
 5 Ms. Elizabeth H. Watts
 6 139 East Fourth Street
 7 Cincinnati, Ohio 45202

8 On behalf of Applicant Duke Energy
 9 Ohio, Inc.

10 Bruce J. Weston, Consumers' Counsel
 11 Office of the Ohio Consumers' Counsel
 12 By Ms. Maureen R. Grady
 13 Mr. Joseph P. Serio
 14 Mr. Edmund "Tad" Berger
 15 Assistant Consumers' Counsel
 16 10 West Broad Street, Suite 1800
 17 Columbus, Ohio 43215

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

20 Vorys, Sater, Seymour and Pease, LLP
 21 By Mr. M. Howard Petricoff
 22 Mr. Michael J. Settineri
 23 Mr. Stephen M. Howard
 24 Ms. Gretchen L. Petrucci
 25 52 East Gay Street
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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
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On behalf of University of Cincinnati and
 University of Miami.

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APPEARANCES (Continued):

Carpenter, Lipps & Leland, LLP
By Ms. Kimberly W. Bojko
Ms. Mallory Mohler
280 North High Street, Suite 1300
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On behalf of Ohio Manufacturers
Association.

Carpenter, Lipps & Leland, LLP
By Ms. Rebecca L. Hussey
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On behalf of The Kroger Company.

Environmental Law & Policy Center
By Mr. Justin M. Vickers
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On behalf of Environmental Law & Policy
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Mr. Douglas E. Hart
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On behalf of The Greater Cincinnati
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Williams Allwein and Moser, LLC
By Mr. Christopher J. Allwein
Williams Allwein and Moser, LLC
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On behalf of the Sierra Club.

Interstate Gas Supply, Inc.
By Mr. Joseph Olikier
Mr. Matthew White
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On behalf of Interstate Gas Supply, Inc.

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APPEARANCES (Continued):

McNees, Wallace & Nurick, LLC
By Mr. Frank P. Darr
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On behalf of the Industrial Energy
Users - Ohio.

Ohio Environmental Council
By Mr. Trent Dougherty
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On behalf of Ohio Environmental Council.

Bricker & Eckler, LLP
By Mr. Thomas J. O'Brien
100 South Third Street
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On behalf of the City of Cincinnati.

Boehm, Kurtz & Lowry
By Mr. Kurt J. Boehm
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On behalf of Ohio Energy Group.

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On behalf of Ohio Partners for Affordable
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FirstEnergy Service Company
By Mr. Scott J. Casto
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On behalf of the FirstEnergy Solutions
Corporation.

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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
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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.

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Tuesday Afternoon Session,
August 12, 2014.

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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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1 General, 180 East Broad Street, Columbus, Ohio.

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

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

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

11 The first motion we have is a May 29th,
12 2014, motion that was filed with the application,
13 regarding Mr. Arnold's testimony.

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

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

20 And the fourth one I have is a July 18th,
21 2014, OCC motion to compel responses to discovery.

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

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

1 2014, Duke motion for protective order. I'm going to
2 ask the parties, even though we have filings, I'm
3 going to ask the parties to make their arguments and
4 anything that they have to say on the record at this
5 time.

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

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

10 EXAMINER PIRIK: Ms. Kingery.

11 MS. KINGERY: Thank you, your Honor.

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

14 MS. KINGERY: How's that?

15 EXAMINER PIRIK: It's good.

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

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

1 this information.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

3 EXAMINER PIRIK: And --

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

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

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

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

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

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

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

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

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

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

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

8 So, Ms. Grady.

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

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

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

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

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

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

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

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

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

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

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

25 EXAMINER PIRIK: And is that the

1 identical document that was, I guess, provided in the
2 16 -- the 13-168 --

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

5 EXAMINER PIRIK: 83 and 85. Okay.

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

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

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

20 EXAMINER PIRIK: That was what you
21 signed.

22 MS. GRADY: Yes.

23 EXAMINER PIRIK: Okay.

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

1 Ms. Bojko.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

25 MS. BOJKO: Okay.

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

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

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

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

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

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

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

8 EXAMINER PIRIK: Again, what section is
9 that?

10 MS. BOJKO: 9.8.

11 MR. HART: "e."

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

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

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

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

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

6 EXAMINER PIRIK: Okay. Any other party?
7 Mr. Howard.

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

18 EXAMINER PIRIK: Any other party?
19 Mr. Oliker.

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

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

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

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

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

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

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

22 EXAMINER PIRIK: Anyone else?

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

1 regarding the language in Section 7.

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

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

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

25 MR. ALLWEIN: Okay. So different parties

1 may get different agreements?

2 MS. KINGERY: That has not happened yet.

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

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

7 MR. ALLWEIN: I see.

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

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

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

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

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

25 The first one being the Section 2 issue

1 with regard to the confidentiality language. It's on
2 page 3, Section 2, the "will injure" language.

3 That's No. 1.

4 No. 2 is found in Section 7, page 7. The
5 first issue in that paragraph has to do with the
6 language: "would likely damage"; "would likely be
7 material"; and "will suffer irreparable harm."

8 That's what I'm considering the second issue.

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

12 MR. HOWARD: Yes.

13 EXAMINER PIRIK: -- as well.

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

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

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

25 And the seventh issue has to do, on page

1 9, Section 9.e., with regard to the Hamilton County
2 court and whether or not that excludes Commission
3 jurisdiction.

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

9 Ms. Bojko.

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

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

18 MS. BOJKO: Thank you.

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

22 Okay. Ms. Kingery.

23 MS. KINGERY: Thank you, your Honor.

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

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

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

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

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

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

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

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

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

1 previously used.

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

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

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

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

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

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

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

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

25 One other point that I would add as to

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

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

16 MS. BOJKO: Yes, your Honor.

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

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

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

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

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

15 EXAMINER PIRIK: Anything else from
16 anyone?

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

25 And to allow one party to hold onto those

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

8 EXAMINER PIRIK: Anything else?

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

19 EXAMINER PIRIK: Okay. Anything further?

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

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

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

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

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

1 document.

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

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

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

1 turning over to the Bench.

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

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

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

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

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

25 I'll take the first item which is Section

1 2 and the second item which is Section 7 that were
2 brought up in Duke's motion for protective order
3 first, and this is just dealing with the first part
4 of Section 7, not the second part that was brought up
5 by Ms. Bojko.

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

17 So I look at the first issue in Section
18 2, I think that the Bench finds that the information
19 is -- the language is quite certain, and that
20 understanding the explanation by the company as to
21 how this works with just considering the breach, it's
22 still unclear. There are things that are not clear
23 in the document that need to be revised. But I don't
24 think that the language should be so certain. I
25 think that a mere change of the word "will" to "may,"

1 I think may resolve some of the issues.

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

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

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

21 Does anyone have any questions about
22 those issues?

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

17 MS. GRADY: Your Honor, if I might.

18 EXAMINER PIRIK: Yes.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1 confidential that was presented even in that context.

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

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

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

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

10 MS. BOJKO: Your Honor --

11 EXAMINER PIRIK: Yes.

12 MS. BOJKO: May I?

13 EXAMINER PIRIK: Ms. Bojko.

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

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

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

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

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

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

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

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

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

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

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

16 EXAMINER PIRIK: The Bench would be fine
17 with that.

18 MS. KINGERY: Thank you.

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

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

25 I think the company understands where

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

6 Are there any other issues to come before
7 us?

8 MR. DARR: Your Honor, one question.

9 EXAMINER PIRIK: Mr. Darr.

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

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

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

5 MR. DARR: Thank you, your Honor.

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

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

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

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

25 With regard to the motion to compel

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

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

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

12 The procedural -- as the procedural order
13 is set, we will be in hearing beginning on
14 October 7th of this year. Earlier this morning, I
15 sent an e-mail around to the parties in the
16 proceeding, indicating to the parties that I was -- I
17 would request a continuance based on a vacation that
18 is scheduled, that has been scheduled since spring of
19 this year, that will flow into the week of the 7th.
20 I was asking that a continuance be allowed till the
21 14th, which is the Tuesday following the holiday on
22 the Monday -- on the following week.

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

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

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

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

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

21 MS. MOONEY: OP&E supports OCC.

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

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

3 MR. DOUGHERTY: OEC as well.

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

6 EXAMINER PIRIK: Ms. Spiller.

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

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

1 January 2015 auction.

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

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

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

20 EXAMINER PIRIK: Any responses?

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

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

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

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

12 EXAMINER PIRIK: Everyone seems to be
13 agreeing with that.

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

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

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

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

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

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

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

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

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

8 MS. SPILLER: Correct, Your Honor.

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

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

19 MS. SPILLER: Yes, your Honor.

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

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

25 EXAMINER PIRIK: Okay.

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

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

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

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

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

1 rebuttal testimony, and we would ask that if there is
2 rebuttal testimony, that it not have to -- that the
3 deposition not have to take place before October
4 10th, because in the nature of rebuttal testimony it
5 won't be coming until later. So we wanted to make it
6 very clear that we would not be precluded from
7 pursuing that type of deposition.

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

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

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

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

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

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

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

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

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

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

25 EXAMINER PIRIK: And what specifically

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

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

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

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

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

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

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

8 EXAMINER PIRIK: Ms. Bojko.

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

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

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

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

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

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

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

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

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

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

23 MS. GRADY: Thank you, your Honor.

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

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

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

6 MS. GRADY: Yes.

7 MS. BOJKO: -- of ours.

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

18 EXAMINER PIRIK: Okay.

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

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

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

7 EXAMINER PIRIK: Okay.

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

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

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

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

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

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

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

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

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

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

1 of that document.

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

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

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

25 EXAMINER PIRIK: We appreciate that.

1 Thank you very much.

2 Is there anything else to come before us?

3 If not, we will adjourn for the day. Thank you all.

4 (Thereupon, the hearing was concluded at
5 3:08 p.m.)

6 - - -

7 CERTIFICATE

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

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

16 My commission expires July 17, 2018.

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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.