

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

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

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

**MEMORANDUM CONTRA OF IGS ENERGY INTERLOCUTORY APEAL OF
DUKE ENERGY OHIO**

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I. INTRODUCTION

These proceedings commenced nearly three months ago. But parties have yet to receive confidential discovery responses because Duke Energy Ohio (“Duke”) refuses to transmit information pursuant to a reasonable confidentiality agreement.¹ Following several discovery-related motions, the Attorney Examiner issued a ruling directing Duke to modify its protective agreement. Among other things, the ruling allowed parties to: (1) retain a copy of confidential information after litigation terminates; and (2) introduce that information under seal in a subsequent proceeding, subject to normal rules of evidence.² Duke filed an interlocutory appeal and refused to modify its confidentiality agreement to comport with the Attorney Examiner’s ruling.

As the Public Utilities Commission of Ohio (“Commission”) considers Duke’s appeal, it is important to keep one thing in mind—no aspect of the Attorney Examiner’s ruling allows any party to misappropriate or disclose to the public Duke’s confidential information.³ Rather, the ruling is focused on the retention and use of confidential information in future proceedings under seal. The Attorney Examiner’s ruling should be affirmed as it was reasonable and will promote administrative economy and development of the record. The ruling recognized that many of Duke’s cases are related and contain overlapping issues. And, to prevent

¹ Among other things, Duke included a \$1,000,000 punitive damages clause—regardless of harm—which, as a practical matter, no party could sign.

² See *Tr.* at 49-52 (Aug. 12, 2014).

³ Indeed, the ruling endorses Duke’s requirement that any individual that reviews confidential documents must execute a certificate and provide it to Duke.

duplicative discovery and for consistency of the record, it is appropriate to allow parties to keep a copy of confidential documents for future use.

The Commission's ruling is consistent with the Commission's rules, which state that the "[t]he purpose of rules 4901-1-16 to 4901-1-24 of the Administrative Code is to encourage the prompt and expeditious use of prehearing discovery in order to facilitate thorough and adequate preparation for participation in commission proceedings. These rules are also intended to minimize commission intervention in the discovery process."⁴ Consistent with this purpose, the Attorney Examiner's ruling would streamline the discovery process and reduce Commission intervention in discovery disputes.

Moreover, the Attorney Examiner's ruling is consistent with well-defined case law, which favors elimination of duplicative discovery. *Garcia v. Peeples*, 734 S.W.2d 343 (Supreme Court of Texas) (1987) ("Shared discovery is an effective means to insure full and fair disclosure. Parties subject to a number of suits concerning the same subject matter are forced to be consistent in their responses by the knowledge that their opponents can compare those responses.").⁵ The ruling strikes the appropriate balance of safeguarding Duke's protected information while facilitating full and complete discovery and the development of the record. Accordingly, as discussed more fully below, Interstate Gas Supply, Inc. ("IGS Energy" or "IGS") urges the Commission to affirm the Attorney Examiner's ruling.

⁴ Rule 4901-1-16(A), Ohio Administrative Code.

⁵ See also *Koval v. General Motors Corp.*, 62 Misc.2d 694, 699 (Ct. Comm. Pleas, Cuyahoga Co.) (1990) ("Even assuming General Motors had demonstrated that these documents were competitively valuable, which the court finds it has not, for the reasons that follow it would not be entitled to a protective order that would preclude such information sharing or require the return of these documents.").

II. ARGUMENT

Duke asserts that three reasons support reversal: (1) generally accepted practices contradict the ruling; (2) Duke would be unable to monitor and police other parties' use of its confidential information; and (3) Duke will be caught off-guard if parties could retain documents and use them later. Each of Duke's arguments lacks merit and Duke has not satisfied its heavy burden of demonstrating that the Attorney Examiner's ruling was an abuse of discretion.⁶ "The standard for 'abuse of discretion' is readily defined as more than error of law or judgment, but implies an attitude on the part of the trial court that is unreasonable, arbitrary or unconscionable."⁷ Because Duke has not satisfied this heavy burden, the Commission should reject Duke's interlocutory appeal.

A. Case law favors eliminating duplicative discovery

Duke claims that it is common practice to require a party to destroy confidential documents after a case terminates and to prevent use of such documents in future cases. Duke, however, ignores a substantial body of case law that favors the elimination of duplicative discovery in different proceedings that involve similar issues.⁸ As the Attorney Examiner noted in her order, "[t]here are

⁶ *Medical Mutual of Ohio v. Schlotterer*, 2009-Ohio-2496 ¶ 23 (Holding that "discovery orders are reviewed under an abuse-of-discretion standard" and "[w]hether a protective order is necessary remains a determination within the sound discretion of the trial court."). See also *Seattle Times v. Rhinehart*, 467 U.S. 20, 37 (1984) ("To be sure, Rule 26(c) confers broad discretion on the trial court to decide when a protective order is appropriate and what degree of protection is required The unique character of the discovery process requires that the trial court have substantial latitude to fashion protective orders.").

⁷ *Ruwe v. Springfield Twnshp Bd. Trustees*, 29 Ohio St. 3d 59, 61 (Supreme Court of Ohio 1987).

⁸ See *Garcia v. Peebles*, 734 S.W.2d 343 (Supreme Court of Texas) (1987); *Wilk v. Amer. Med. Assoc.*, 635 F.2d 1295, 1299 (1980) (7th Cir.) (citing *Olympic Refining Co. v. Carter*, 332 F.2d 260, 265-66 (9 Cir.), cert. denied, 379 U.S. 900, 85 S.Ct. 186, 13 L.Ed.2d 175 (1964) (holding "[w]e therefore agree with the result reached by every other appellate court which has considered the issue, and hold that where an appropriate modification of a protective order can place private litigants in a position they would otherwise reach only after repetition of another's discovery, such

always subsequent [Duke] cases that relate to previous cases, and there's always information that is needed for the client in subsequent cases referring to previous cases."⁹ The Attorney Examiner's reasoning is well supported and not an abuse of discretion.

To illustrate the Attorney Examiner's well-reasoned logic, Duke's ESP application contains requests for approval of generation, distribution, and transmission-related riders. If they are approved, each rider will give rise to a subsequent proceeding to which confidential material in this proceeding may relate. Moreover, Duke's application pertains to riders and provisions that were approved in Duke's prior ESP case—Duke proposes to continue some riders and terminate others. There may be confidential information from the prior ESP that is relevant to the termination or continuation of these riders. There is no reason why a party should be required to issue duplicative discovery to ask for information that Duke already provided in a prior proceeding. But that is exactly what Duke has proposed. The Commission should reject Duke's request, which would require parties to commit duplicative resources in multiple cases and frustrate the development of the record.

As the Supreme Court has stated, "modern discovery rules were designed to make a trial 'less a game of blindman's bluff and more a fair contest with the basic

modification can be denied only where it would tangibly prejudice substantial rights of the party opposing modification.")); *Comes v. Microsoft*, Case No. No. 07-2063 (Supreme Court of Iowa) (Nov. 22, 2009); *Raymond Handling Concepts Corp. v. Zuelzke*, 39 Cal.App.4th 584, 589 (Cal. Ct. Ap. 1st Dist.) (1995) ("This rule allows sharing of information in similar cases in order to ease the tasks of courts and litigants in the discovery process.").

⁹ Tr. at 49.

issues and facts disclosed to the fullest practicable extent.”¹⁰ But, “this goal is often hindered by the adversarial nature of discovery and the gamesmanship of parties locked in litigation.”¹¹ The case at bar is a perfect example. After three months and several motions to compel, parties still do not have access to *any* confidential discovery from Duke. Even after the Attorney Examiner directed Duke to modify its confidentiality agreement, it refused to do so. While retention of documents will not eliminate discovery games, it will at least mitigate their impact in the future.

B. Duke has sufficient recourse for breach

Duke claims that if parties maintain a copy of confidential information it will not be able to monitor parties’ use of confidential information or prevent misappropriation of its use. Duke’s claim lacks merit. Under the Commission-approved confidentiality agreement, the following protections are in place to prevent disclosure:

- Duke’s confidential information may be viewed only by individuals that have executed a non-disclosure certificate;
- Parties may maintain only one copy;
- Duke may obtain damages and an injunction for inappropriate disclosure

Thus, only select individuals specifically identified to Duke will have access to confidential documents. Access will be further limited after litigation terminates because parties may retain only one copy.

Moreover, courts have held that the mere possibility of disclosure is outweighed by the policy of promoting full and complete discovery. See *Komatsu*

¹⁰ *Rossmann v. Rossmann*, 47 Ohio App. 2d 103, 107 (Ct. Appeals, Cuyahoga Co.) (1975) (quoting *United States v. Procter & Gamble Co.*, 356 U.S. 677, 78 S.Ct. 983, 2 L.Ed.2d 1077 (1958)).

¹¹ *Comes v. Microsoft*, Case No. 07-2063 (Supreme Court of Iowa) (Nov. 20, 2009).

Forklift v. USA, 717 F.Supp. 843, 846 (Ct. Int. Trade) (1989). The fear of monetary sanctions and potential ethical sanctions provide sufficient encouragement for an attorney to not intentionally or inadvertently disclose confidential information. *Id.* See also Transcript at 49.

Duke also claims that information may be inadvertently disclosed, because, over time, counsel may change and records may be lost. Duke's argument downplays the sophistication of the parties that practice before the Commission. Moreover, Duke ignores the fact that confidential information becomes stale over time. If anything is likely to be lost over time, it is the confidential designation of the material; not the material itself.

C. Duke will not be unduly surprised

Duke claims that if parties are allowed to retain documents, it may be caught "flat footed" at hearing. Duke's claim lacks merit.

Initially, Duke ignores the fact that parties may introduce into evidence non-confidential documents from other cases. There is no reason to have different rules for confidential and non-confidential documents.

Moreover, As the Attorney Examiner noted, if confidential documents are utilized in a separate case, the Attorney Examiner will provide Duke with a sufficient opportunity to review the documents and only permit them into evidence if they satisfy all evidentiary requirements.

III. CONCLUSION

For the reasons stated herein, IGS urges the Commission to deny Duke's interlocutory appeal.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing *Memorandum Contra of IGS Energy Interlocutory Appeal of Duke Energy Ohio* was served this 25th day of August 2014 via electronic mail upon the following:

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