



155 East Broad Street  
21<sup>st</sup> Floor  
Columbus, Ohio, 43215

o: 614-222-1330  
f: 614-222-1337

September 26, 2014

Docketing Division  
Public Utilities Commission of Ohio  
180 East Broad Street, 11<sup>th</sup> Floor  
Columbus, OH 43215-3716

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

Dear Docketing,

On September 26, 2014, Duke Energy Ohio filed an Application for Rehearing in the above referenced case. The Application was inadvertently filed without a signature. It has since been signed and Duke Energy Ohio, Inc. respectfully request the Commission accept this updated Application.

Please find enclosed a copy of the signed version of the Application to replace the original filing.

Should you have any questions, please contact me.

Respectfully submitted,

A handwritten signature in blue ink, appearing to read 'Carys Cochern', written over the text 'Respectfully submitted,'.

Carys Cochern

**BEFORE**

**THE PUBLIC UTILITIES COMMISSION OF OHIO**

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

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

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**APPLICATION FOR REHEARING  
OF  
DUKE ENERGY OHIO, INC.**

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On May 29, 2014, Duke Energy Ohio, Inc., (Duke Energy Ohio or the Company) filed an application (Application) with the Public Utilities Commission of Ohio (Commission), seeking approval of a standard service offer in the form of an electric security plan (ESP), pursuant to R.C. 4928.143. As part of that Application, Duke Energy Ohio included certain information that is proprietary and a trade secret, and that is addressed by a motion for a protective order. Subsequent to the intervention of numerous parties, the Company began the negotiation of a confidentiality agreement (CA) that would allow interested intervenors to have access to confidential information for purposes of these proceedings, both as such information is contained in the Application and associated testimony and as provided by the Company in the course of discovery.

A few of the intervenors balked at the terms of the CA offered by the Company, with one, the Office of the Ohio Consumers' Counsel (OCC), even drafting its own proposal (OCC

Version). A lengthy motion practice followed. Ultimately, the attorney examiner issued an oral ruling on the content of the needed CA, allowing use of the Company's version of the CA, with a variety of modifications. Among the attorney examiner's decisions in that regard were two important determinations with regard to how the information should be treated after the conclusion of the case.

First, the examiner addressed return issues. The CA, as prepared by Duke Energy Ohio and consistent with prior agreements acceptable to the intervenors, had required the recipients to return all copies of the confidential material to the Company, together with notes and analyses relating to that material. The Company had agreed to allow OCC to retain one copy, pursuant to state law applicable to only OCC, leaving the OCC without a complaint in this regard. Nevertheless, intervenors that had not challenged the CA by way of motion were permitted to identify their objections to the document during oral argument. And, in doing so, these intervenors challenged the requirement to return or destroy the Company's confidential information that had been provided solely for purposes of the captioned proceedings. The examiner, agreeing with intervenors' oral arguments, required Duke Energy Ohio to allow parties to retain the confidential information permanently.

Second, although no intervenor had argued the point in the numerous motions relating to the CA, one party raised the question of how the retained information could be used. Again, the attorney examiner agreed with the intervenors' position and required Duke Energy Ohio to produce confidential information in this case to parties who could then use that information – under seal, at least – for any purpose they deem appropriate.

Duke Energy Ohio took issue with these aspects of the examiner's decision and, on August 18, 2014, filed an interlocutory appeal (Appeal). The Commission's entry (Entry)

responding to the Appeal, issued on August 27, 2014, modified the examiner's order by requiring use of the OCC Version – or a version “like . . . the agreements entered into in the previous ESP proceedings,”<sup>1</sup> rather than the Company's CA. This outcome, while not specifically addressing the content of the Appeal, apparently left in place the aspects of the decision for which the Appeal had been filed; to wit, the permanent retention of the confidential information and the use of that information by intervenors outside of the above-captioned proceedings.

Duke Energy Ohio now submits its Application for Rehearing of the Commission's Entry, pursuant to Revised Code (R.C.) 4903.10 and Ohio Administrative Code (O.A.C.) 4901-1-35. Duke Energy Ohio asserts that the Commission's Order is unlawful and/or unreasonable in the following respects:

1. The Commission's Entry fails to address whether confidential information may be used in cases other than the one in which the information was provided, the primary issue raised in the Appeal. (Assignment of Error 1)
2. The Commission's Entry conflicts with Ohio law and regulations, state court precedent, federal court precedent, Commission precedent, and recognized treatises on the subject. (Assignment of Error 2)
3. The Commission's Entry modifies aspects of the examiner's ruling that were not at issue in the Appeal. (Assignment of Error 3)

Based upon these errors, Duke Energy Ohio respectfully requests that the Commission modify its Entry to authorize Duke Energy Ohio to include, in all current and prospective confidentiality agreements with intervenors in this case, terms to prevent the use of the Company's confidential information for any purpose other than the proceedings in which such information was obtained. Furthermore, the Commission should make its ruling applicable to all

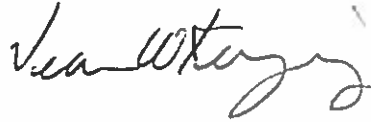
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<sup>1</sup> Entry, pg. 5. It is important to note, also, that the OCC Version is substantially different than the various agreements used with parties other than the OCC in prior ESP proceedings relating to the Company. Significantly, those prior agreements require the return or destruction of Duke Energy Ohio's confidential information.

such agreements executed in respect of the present proceedings, such that all confidential information already released to intervenors is subject to this reasonable restriction.

Respectfully submitted,

DUKE ENERGY OHIO, INC.

A handwritten signature in black ink, appearing to read "Amy B. Spiller", written over a horizontal line.

Amy B. Spiller (Counsel of Record)  
Deputy General Counsel  
Rocco O. D'Ascenzo  
Associate General Counsel  
Jeanne W. Kingery  
Associate General Counsel  
Elizabeth H. Watts  
Associate General Counsel  
139 E. Fourth Street, 1303-Main  
P.O. Box 961  
Cincinnati, Ohio 45201-0960  
(513) 287-4359 (telephone)  
(513) 287-4385 (facsimile)  
Amy.Spiller@duke-energy.com (e-mail)

**BEFORE**

**THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Application of Duke	)	
Energy Ohio for Authority to Establish a	)	
Standard Service Offer Pursuant to Section	)	
4928.143, Revised Code, in the Form of	)	Case No. 14-841-EL-SSO
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In the Matter of the Application of Duke	)	
Energy Ohio for Authority to Amend its	)	Case No. 14-842-EL-ATA
Certified Supplier Tariff, P.U.C.O. No. 20.	)	

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**MEMORANDUM IN SUPPORT OF  
APPLICATION FOR REHEARING  
OF DUKE ENERGY OHIO, INC.**

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Duke Energy Ohio submits the following memorandum to the Commission in support of its Application for Rehearing. The Company alleges three errors for the Commission's consideration and urges the Commission to reverse the conclusions referenced herein in its entry on rehearing.

**I. Assignment of Error 1**

**The Commission's Entry fails to address whether confidential information may be used in cases other than the one in which the information was provided, the primary issue raised in the Appeal.**

The purpose of discovery is "to facilitate thorough and adequate preparation for participation in [C]ommission proceedings."<sup>2</sup> Discovery is not intended as a means to prepare for other proceedings. And it cannot be used to circumvent other protections that exist under the law. Thus, where other state-condoned interests – such as the appropriate confidentiality of trade

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<sup>2</sup> O.A.C. 4901-1-16(A).

secrets – must be weighed against the goals of discovery, the latitude generally afforded the scope of discovery must be reconsidered. Duke Energy Ohio’s offered CA balanced the goals of complete discovery and protection of business-sensitive data by allowing full access to the parties, but only while the case is ongoing and only for the purpose of participation in this case. Unfortunately, the examiner’s oral ruling upset that balance, allowing discovery, retention, and subsequent use of the Company’s confidential material as if it were no different than publicly available material.

The Company’s Appeal sought the Commission’s reconsideration of this outcome. The Appeal specifically raised two issues: the intervenors’ right to retain the confidential information after the case is complete and their right to use that information in subsequent, unrelated proceedings.

The Commission did not address the Company’s concerns in the Entry. The Commission simply adopted the OCC Version. The Entry recognized the existence of the retention issue with the statement that the Commission “agrees with the attorney examiner that . . . Duke’s proposed language regarding the retention of the alleged confidential information was too restrictive.”<sup>3</sup> But the Entry made no mention whatsoever of the Company’s concern regarding use of that information in unrelated proceedings.

Rather, the Commission, in the Entry, summarily – and with no reference to any support – stated that the Company’s interests were adequately protected:<sup>4</sup>

- The OCC Version ensures nondisclosure even after parties are no longer involved in the case.
- The OCC Version requires notice to the Company if the material is to be used other than as provided for.
- The OCC Version requires notice to the Company of any public records request.

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<sup>3</sup> Entry, pg. 5.

<sup>4</sup> Entry, pg. 5.

- The OCC Version allows the Company to pursue other remedies.
- The OCC Version has been proven to work.

The Commission is wrong:

- The OCC Version does not ensure nondisclosure after parties are no longer involved in the case. It specifically allows retention of the Company's proprietary information when the intervenors have no legitimate need therefor.
- The OCC Version does not prevent confidential information from being used for other purposes, as it allows permanent retention. Furthermore, the OCC Version does nothing to prevent parties from refusing to provide notice of the forthcoming use of the material in a hearing, as those parties can and will – and do – still claim the privilege allowed under the attorney work-product doctrine.
- The OCC Version, addressing public records requests, is of no relevance to other intervening parties.
- As the CA prepared by the Company also allows pursuit of other remedies, the OCC Version provides no additional benefit.

In reality, what has been proven is that an agreement that allows a party to retain possession of confidential material and to use it at will in later cases does not work. As will be discussed below, the Commission failed to consider or mention the Company's prior experience in which its confidential information was misused in a subsequent case, with no prior notice provided to the Company, and with the Company being allowed no opportunity to locate and present the applicable CA to the examiner.

Rather than considering the issues raised in the Company's Appeal, the Commission merely replaced the examiner's order with a new mandate that Duke Energy Ohio release its confidential information on terms presented by an intervenor.

Duke Energy Ohio respectfully requests that the Commission reconsider its Entry, ruling on the issues presented by the Company in the Appeal, such that intervenors (other than OCC<sup>5</sup>)

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<sup>5</sup> While OCC may retain confidential information for the mandated retention period, even it must ultimately return or destroy the material.



may not retain confidential information after the completion of the case in which that information was produced and such that no intervenor may use confidential information for any purpose other than the case in which it was produced.

## **II. Assignment of Error 2**

**The Commission's conflicts with Ohio law and regulations, state court precedent, federal court precedent, Commission precedent, and recognized treatises on the subject.**

Ohio law recognizes the importance of confidential information. Trade secrets, by definition, derive independent economic value, both actual and potential, from not being generally known or ascertainable.<sup>6</sup> This standard is the one regularly used by the Commission to determine whether information merits the issuance of a protective order.<sup>7</sup> As noted in the Company's Appeal, the economic value of confidential information must, appropriately, be balanced against the interests of parties to due process and full discovery of facts. But the Commission, in its Entry, failed to consider the balancing of these interests, as required by law and precedent, and as advised by recognized legal authorities.

The Company's Appeal described, in detail, Ohio laws that address trade secret issues.<sup>8</sup> As noted therein, R.C. 1333.65 mandates that Ohio courts preserve trade secrets appropriately, including in connection with discovery. And Commission procedural rules only permit discovery that is relevant to the proceeding in question.<sup>9</sup> This is critical: No Commission rule requires production of information in discovery, simply because that information might be relevant in another, subsequent proceeding. Consequently, no party can argue that it has a legitimate reason to keep confidential information after this case has concluded.

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<sup>6</sup> R.C. 1333.61(D).

<sup>7</sup> See O.A.C. 4901-1-24(D).

<sup>8</sup> See Appeal, pp. 14-16.

<sup>9</sup> O.A.C. 4901-1-16(B).

The Company's Appeal also described, in detail, decisions of state courts, including the Ohio Supreme Court, that support the restriction on subsequent use.<sup>10</sup> The Supreme Court has specifically ordered that confidential information be used only in connection with the case at hand. Duke Energy Ohio asks for no less.

The Company's Appeal also described, in detail, decisions of federal courts, to the same effect.<sup>11</sup> The United States District Court for the Northern District of Ohio even includes this limitation in its standard form stipulated protective order.

The Company's Appeal also described, in detail, Commission precedent that limited the use of confidential material obtained through discovery to the proceeding in which it was obtained.<sup>12</sup> Examples of Commission-ordered restrictions on the subsequent use of confidential information abound. Duke Energy Ohio seeks the same level of treatment in this regard as the Commission has granted to Cincinnati Bell Telephone Company, the Ohio Department of Industrial Relations – Division of Mines, River Gas Company, and numerous other utilities that have presented confidentiality concerns to the Commission and its examiners.<sup>13</sup>

And, finally, the Company's Appeal also described, in detail, the several major treatises on trade secrets and civil practice that recommend this same approach.<sup>14</sup> Confidential information that is produced in response to discovery should be used only in connection with the proceeding in which it is requested.

The Company will not repeat, here, the numerous cases, statutes, rules, and treatises that were argued in the Appeal. However, it should be pointed out that the examiner's oral ruling on the issue of subsequent use indicated a belief that "sufficient time was given in [the Company's

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<sup>10</sup> Appeal, pp. 8-9.

<sup>11</sup> Appeal, pp. 9-10.

<sup>12</sup> Appeal, pp. 11-14.

<sup>13</sup> See, e.g., cases cited in Appeal, pp. 11-14.

<sup>14</sup> Appeal, pp. 6-7.

capacity proceeding], even though the information had been received [by the intervenor] in a previous proceeding, to ensure that proper questions were allowed the company to be presented and that everyone was given their due process rights with regard to that information.” Similarly, the examiner opined that any future examiner would certainly give the Company “sufficient time” to address the offering of confidential information from a prior case.<sup>15</sup> Notwithstanding, reference to the transcript of that prior experience belies this opinion. In actual practice, with the prior confidentiality agreement not at hand, the examiner admitted the surprise confidential information, refusing to consider possible breach of that contract.<sup>16</sup>

The prior form of contract does not provide sufficient protection for the Company’s confidential information.

### **III. Assignment of Error 3**

**The Commission’s Entry modifies aspects of the examiner’s ruling that were not at issue in the Appeal.**

The Commission’s administrative rules provide clearly that the Commission may affirm, reverse, or modify an examiner’s ruling, “[u]pon consideration of an interlocutory appeal.”<sup>17</sup> The applicable rule does not allow the Commission to reconsider a multitude of original issues that were decided by the examiner in the same ruling and to modify that ruling without consideration of the appeal.

Here, Duke Energy Ohio’s Appeal specifically complained about only two aspects of the examiner’s decision: retention and subsequent use of the confidential information.<sup>18</sup> The Commission’s Entry correctly noted that the examiner determined that “one copy of the alleged

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<sup>15</sup> Tr. at 54.

<sup>16</sup> *In the Matter of the Application of Duke Energy Ohio, Inc., for the Establishment of a Charge Pursuant to Section 4909.18, Revised Code*, Case No. 12-2400-EL-UNC, *et al.*, Tr. XI, pp. 2802-2807.

<sup>17</sup> O.A.C. 4901-1-15(E)

<sup>18</sup> Appeal, pg. 2.

confidential information may be retained by the recipient” and that “rulings on the use of such information beyond these cases shall be dealt with in any subsequent cases.”<sup>19</sup> The Commission’s Entry addressed its opinion that the Company’s language regarding retention was “too restrictive.”

The Commission, instead of addressing the Company’s concerns regarding subsequent use of confidential information in other proceedings, ordered the Company to release its information under the terms of the OCC Version – or an agreement “like” that used in prior Duke Energy Ohio ESP cases. The direction taken by the Commission was not on the table.

Indeed, because this approach was not argued to the Commission, the Entry created additional problems. The OCC Version was not at all “like” the agreements used with other intervenors in the Company’s prior cases.<sup>20</sup> Thus, the Entry resulted in substantially increased confusion.

It is also noteworthy that the prior agreements used by Duke Energy Ohio with other intervenors did include provisions requiring return or destruction of the information, and allowing its use only for purposes of the case then at hand. Again, by ruling on what was not before it, the Commission had no basis on which to make its decision.

By taking such action, the Commission modified aspects of the examiner’s ruling that were not at issue and were not before it.

## **CONCLUSION**

Duke Energy Ohio respectfully requests that the Commission reconsider its Entry, ruling on the issues presented in the Appeal such that the Company’s confidential information must be returned to the Company and not used in other proceedings.

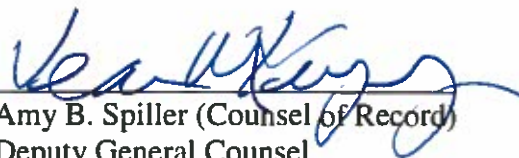
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<sup>19</sup> Entry, pg. 3.

<sup>20</sup> A copy of one of such agreements is attached for reference purposes.

Respectfully submitted,

DUKE ENERGY OHIO, INC.

A handwritten signature in blue ink, appearing to read "Amy B. Spiller", is written over a horizontal line.

Amy B. Spiller (Counsel of Record)  
Deputy General Counsel

Rocco O. D'Ascenzo  
Associate General Counsel

Jeanne W. Kingery  
Associate General Counsel

Elizabeth H. Watts  
Associate General Counsel

139 E. Fourth Street, 1303-Main  
P.O. Box 961

Cincinnati, Ohio 45201-0960

(513) 287-4359 (telephone)

(513) 287-4385 (facsimile)

Amy.Spiller@duke-energy.com (e-mail)

*Counsel for Duke Energy Ohio, Inc.*

## CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing was delivered by U.S. mail (postage prepaid), personal, or electronic mail, on this 26th day of September, 2014, to the following parties.

  
Jeanne W. Kingery

Steven Beeler  
Thomas Lindgren  
Ryan O'Rourke  
Assistant Attorneys General  
Public Utilities Section  
180 East Broad St., 6<sup>th</sup> Floor  
Columbus, Ohio 43215  
[Steven.beeler@puc.state.oh.us](mailto:Steven.beeler@puc.state.oh.us)  
[Thomas.lindgren@puc.state.oh.us](mailto:Thomas.lindgren@puc.state.oh.us)  
[Ryan.orourke@puc.state.oh.us](mailto:Ryan.orourke@puc.state.oh.us)

### **Counsel for Staff of the Commission**

Kevin R. Schmidt  
88 East Broad Street, Suite 1770  
Columbus, Ohio 43215  
[schmidt@sppgrp.com](mailto:schmidt@sppgrp.com)

### **Counsel for the Energy Professionals of Ohio**

David F. Boehm  
Michael L. Kurtz  
Jody M. Kyler Cohn  
Boehm, Kurtz & Lowry  
36 East Seventh Street, Suite 1510  
Cincinnati, Ohio 45202  
[dboehm@BKLawfirm.com](mailto:dboehm@BKLawfirm.com)  
[mkurtz@BKLawfirm.com](mailto:m Kurtz@BKLawfirm.com)  
[jkylercohn@BKLawfirm.com](mailto:jkylercohn@BKLawfirm.com)

### **Counsel for the Ohio Energy Group**

Mark A. Hayden  
Jacob A. McDermott  
Scott J. Casto  
FirstEnergy Service Company  
76 South Main Street  
Akron, Ohio 44308  
[haydenm@firstenergycorp.com](mailto:haydenm@firstenergycorp.com)  
[jmcdermott@firstenergycorp.com](mailto:jmcdermott@firstenergycorp.com)  
[scasto@firstenergycorp.com](mailto:scasto@firstenergycorp.com)

### **Counsel for FirstEnergy Solutions Corp.**

Maureen R. Grady  
Joseph P. Serio  
Edmund "Tad" Berger  
Office of the Ohio Consumers' Counsel  
10 West Broad Street, Suite 1800  
Columbus, Ohio 43215-3485  
[Maureen.grady@occ.ohio.gov](mailto:Maureen.grady@occ.ohio.gov)  
[Joseph.serio@occ.ohio.gov](mailto:Joseph.serio@occ.ohio.gov)  
[Edmund.berger@occ.ohio.gov](mailto:Edmund.berger@occ.ohio.gov)

**Counsel for the Ohio Consumers'  
Counsel**

Kimberly W. Bojko  
Jonathan A. Allison  
Carpenter Lipps & Leland LLP  
280 Plaza, Suite 1300  
280 North High Street  
Columbus, Ohio 43215  
[Bojko@carpenterlipps.com](mailto:Bojko@carpenterlipps.com)  
[Allison@carpenterlipps.com](mailto:Allison@carpenterlipps.com)

**Counsel for the Ohio Manufacturers'  
Association**

Joseph M. Clark  
Direct Energy  
21 East State Street, 19<sup>th</sup> Floor  
Columbus, Ohio 43215  
[joseph.clark@directenergy.com](mailto:joseph.clark@directenergy.com)

**Counsel for Direct Energy Services,  
LLC and Direct Energy Business, LLC**

Dane Stinson  
Dylan F. Borchers  
Bricker & Eckler LLP  
100 S. Third Street  
Columbus, Ohio 43215  
[dstinson@bricker.com](mailto:dstinson@bricker.com)  
[dborchers@bricker.com](mailto:dborchers@bricker.com)

**Counsel for the Ohio Consumers'  
Counsel**

Joseph Olikier  
Matthew White  
6100 Emerald Parkway  
Dublin, Ohio 43016  
[joliker@igsenergy.com](mailto:joliker@igsenergy.com)  
[mwhite@igsenergy.com](mailto:mwhite@igsenergy.com)

**Counsel for Interstate Gas Supply, Inc.**

Gerit F. Hull  
Eckert Seamans Cherin & Mellot, LLC  
1717 Pennsylvania Avenue, N.W.  
12<sup>th</sup> Floor  
Washington, DC 20006  
[ghull@eckertseamans.com](mailto:ghull@eckertseamans.com)

**Counsel for Direct Energy Services,  
LLC and Direct Energy Business, LLC**

Samuel C. Randazzo  
Frank P. Darr  
Matthew R. Pritchard  
McNees Wallace & Nurick LLC  
21 East State Street, 17<sup>th</sup> Floor  
Columbus, Ohio 43215  
[sam@mwncmh.com](mailto:sam@mwncmh.com)  
[fdarr@mwncmh.com](mailto:fdarr@mwncmh.com)  
[mpritchard@mwncmh.com](mailto:mpritchard@mwncmh.com)

**Counsel for Industrial Energy Users-  
Ohio**

Trent Dougherty  
1207 Grandview Avenue, Suite 201  
Columbus, Ohio 43212-3449  
[tdougherty@theOEC.org](mailto:tdougherty@theOEC.org)

**Counsel for the Ohio Environmental  
Council**

Andrew J. Sonderman  
Margeaux Kimbrough  
Kegler Brown Hill & Ritter LPA  
Capitol Square, Suite 1800  
65 East State Street  
Columbus, Ohio 43215-4294  
[asonderman@keglerbrown.com](mailto:asonderman@keglerbrown.com)  
[mkimbrough@keglerbrown.com](mailto:mkimbrough@keglerbrown.com)

**Counsel for People Working  
Cooperatively, Inc.**

Colleen L. Mooney  
Ohio Partners for Affordable Energy  
231 West Lima Street  
Findlay, Ohio 45839-1793  
[cmooney@ohiopartners.org](mailto:cmooney@ohiopartners.org)

**Counsel for Ohio Partners for  
Affordable Energy**

Steven T. Nourse  
Matthew J. Satterwhite  
Yazen Alami  
American Electric Power Service  
Corporation  
1 Riverside Plaza 29<sup>th</sup> Floor  
Columbus, Ohio 43215  
[stnourse@aep.com](mailto:stnourse@aep.com)  
[mjsatterwhite@aep.com](mailto:mjsatterwhite@aep.com)  
[yalami@aep.com](mailto:yalami@aep.com)

**Counsel for Ohio Power Company**

Christopher J. Allwein  
Todd M. Williams  
Williams Allwein and Moser, LLC  
1500 West Third Avenue, Suite 330  
Columbus, Ohio 43212  
[callwein@wamenergylaw.com](mailto:callwein@wamenergylaw.com)  
[toddm@wamenergylaw.com](mailto:toddm@wamenergylaw.com)

**Counsel for the Sierra Club**



Rebecca L. Hussey  
Carpenter Lipps & Leland LLP  
280 Plaza, Suite 1300  
280 North High Street  
Columbus, Ohio 43215  
[Hussey@carpenterlipps.com](mailto:Hussey@carpenterlipps.com)

Douglas E. Hart  
441 Vine Street  
Suite 4192  
Cincinnati, Ohio 45202  
[dhart@douglaschart.com](mailto:dhart@douglaschart.com)

**Counsel for The Kroger Company**

**Counsel for The Greater Cincinnati Health Council**

M. Howard Petricoff  
Michael J. Settineri  
Gretchen L. Petrucci  
Vorys, Sater, Seymour, and Pease, LLP  
52 East Gay Street  
P.O.Box 1008  
Columbus, Ohio 43216-1008  
[mhpetricoff@vorys.com](mailto:mhpetricoff@vorys.com)  
[mjsettineri@vorys.com](mailto:mjsettineri@vorys.com)  
[glpetrucci@vorys.com](mailto:glpetrucci@vorys.com)

Cynthia Fonner Brady  
Exelon Business Services Company  
4300 Winfield Road  
Warrenville, Illinois 60555  
[Cynthia.brady@constellation.com](mailto:Cynthia.brady@constellation.com)

**Counsel for Constellation NewEnergy, Inc. and Exelon Generation Company, LLC**

**For Constellation NewEnergy, Inc.**

David I. Fein  
Vice President, State Government  
Affairs - East  
Exelon Corporation  
10 South Dearborn Street, 47<sup>th</sup> Floor  
Chicago, Illinois 60603  
[David.fein@exeloncorp.com](mailto:David.fein@exeloncorp.com)

Lael Campbell  
Exelon  
101 Constitution Avenue, NW  
Washington, DC 2001  
[Lael.Campbell@constellation.com](mailto:Lael.Campbell@constellation.com)

**For Exelon Corporation**

**For Constellation NewEnergy, Inc.**

M. Howard Petricoff  
Special Assistant Attorney General  
Vorys, Sater, Seymour, and Pease, LLP  
52 East Gay Street  
P.O. Box 1008  
Columbus, Ohio 43216-1008  
[mhpetricoff@vorys.com](mailto:mhpetricoff@vorys.com)

**Counsel for Miami University and the  
University of Cincinnati**

Justin Vickers  
Environmental Law & Policy Center  
35 East Wacker Drive, Suite 1600  
Chicago, Illinois 60601  
[jvickers@elpc.org](mailto:jvickers@elpc.org)

**Counsel for the Environmental Law &  
Policy Center**

Samantha Williams  
Natural Resources Defense Council  
20 N. Wacker Drive, Suite 1600  
Chicago, Illinois 60606  
[swilliams@nrdc.org](mailto:swilliams@nrdc.org)

**Counsel for the Natural Resources  
Defense Council**

M. Howard Petricoff  
Michael J. Settineri  
Gretchen L. Petrucci  
Vorys, Sater, Seymour, and Pease, LLP  
52 East Gay Street  
P.O.Box 1008  
Columbus, Ohio 43216-1008  
[mhpetricoff@vorys.com](mailto:mhpetricoff@vorys.com)  
[mjsettineri@vorys.com](mailto:mjsettineri@vorys.com)  
[glpetrucci@vorys.com](mailto:glpetrucci@vorys.com)

**Counsel for the Retail Energy Supply  
Association**

Gregory J. Poulos  
EnerNOC, Inc.  
471 E. Broad Street, Suite 1520  
Columbus, Ohio 43215  
[gpoulos@enernoc.com](mailto:gpoulos@enernoc.com)

**Counsel for EnerNOC, Inc.**

Thomas J. O'Brien  
Bricker & Eckler LLP  
100 South Third Street  
Columbus, Ohio 43215-4291  
[tobrien@bricker.com](mailto:tobrien@bricker.com)

**Counsel for the City of Cincinnati**

Rick D. Chamberlain  
Behrens, Wheeler, & Chamberlain  
6 N.E. 63rd Street, Suite 400  
Oklahoma City, OK 73105  
[rchamberlain@okenergylaw.com](mailto:rchamberlain@okenergylaw.com)

Donald L. Mason  
Michael R. Traven  
Roetzel & Andress, LPA  
155 E. Broad Street, 12<sup>th</sup> Floor  
Columbus, Ohio 43215  
[dmason@ralaw.com](mailto:dmason@ralaw.com)  
[mtraven@ralaw.com](mailto:mtraven@ralaw.com)

**Counsel for Wal-Mart Stores East, LP  
and Sam's East, Inc.**

**Counsel for Wal-Mart Stores East, LP  
and Sam's East, Inc.**

Judi L. Sobecki  
The Dayton Power and Light Company  
1065 Woodman Drive  
Dayton, Ohio 45432  
[Judi.sobecki@aes.com](mailto:Judi.sobecki@aes.com)

**Counsel for The Dayton Power and  
Light Company**

## **CONFIDENTIALITY AGREEMENT**

**CONFIDENTIALITY AGREEMENT** (Agreement), dated as of December 15, 2010, between Duke Energy Ohio, Inc., an Ohio corporation (Duke Energy Ohio) with offices at 139 East Fourth Street, Cincinnati, Ohio 45201, and AEP Retail Energy Partners LLC (AEP).

### **WITNESSETH:**

**WHEREAS**, Duke Energy Ohio and AEP (each individually referred to as Party, or collectively as Parties) have entered into an agreement for AEP to receive confidential information in Case No. 10-2586-EL-SSO (hereinafter collectively referred to as the Pending Case); and

**WHEREAS**, the Parties desire to ensure the confidentiality of such confidential information provided or to be provided by Duke Energy Ohio (the Providing Party) to AEP (the Receiving Party) in connection with the Pending Case;

**NOW, THEREFORE**, in consideration of the premises and the mutual covenants herein contained, the Parties hereto, intending to be legally bound, agree as follows:

### **1. CONFIDENTIAL AND PROPRIETARY NATURE OF THE CONFIDENTIAL INFORMATION**

The Receiving Party acknowledges the confidential and proprietary nature of the Confidential Information (as defined below) and that any unauthorized disclosure or unauthorized use thereof by the Receiving Party will injure the Providing Party's business and/or the business of customer(s) of the Providing Party. The Receiving Party agrees to hold and keep the Confidential Information as provided in this Agreement and otherwise agrees to each and every restriction and obligation set forth in this Agreement.

### **2. CONFIDENTIAL INFORMATION**

As used in this Agreement, the term Confidential Information means and includes any and all information that meets both of the following requirements:

- a. The information concerning the business and affairs of the Providing Party, however documented, that has been or may hereafter be provided or shown to the Receiving Party by the Providing Party or by the directors, officers, employees, agents, consultants, advisors, or other representatives including legal counsel, accountants and financial advisors (each, a Representative) of the Providing Party (collectively, the Providing Party Representatives) or is otherwise obtained from review of Providing Party documents or property or discussions with Providing Party Representatives by the Receiving Party or its attorneys or persons involved in the Pending Case, such as experts and anticipated witnesses, (each a Receiving Party's Representative or collectively

the Receiving Party's Representatives) irrespective of the form of the communication, and also includes all notes, analyses, compilations, studies, summaries, and other material prepared by the Receiving Party or the Receiving Party's Representatives containing or based, in whole or in part, on any information included in the foregoing; and

- b. The information contains trade secrets concerning the business and affairs of the Providing Party and or its customers, plant and product specifications, data, know-how, formulae, compositions, processes, designs, sketches, photographs, graphs, drawings, samples, inventions and ideas, past, current, and planned research and development, customer lists, current and anticipated customer requirements, price lists, market studies, business plans, computer software and programs (including object code and source code), computer software and database technologies, systems, structures and architectures (and related processes, formulae, composition, improvements, devices, know-how, inventions, discoveries, concepts, ideas, designs, methods and information), contracts, and any other information, however documented, that is a trade secret within the meaning of applicable law.

Confidential Information shall not include any oral information exchanged between the Parties that is not promptly reduced to writing and confirmed by the applicable Parties.

Further, Confidential Information shall not include any information of the Providing Party that:

- a. was or becomes generally available to the public other than as a result of a disclosure by the Receiving Party or the Receiving Party's Representatives;
- b. was available, or becomes available, to the Receiving Party on a non-confidential basis prior to its disclosure to the Receiving Party by the Providing Party or a Providing Party Representative, but only if (i) to the best of the Receiving Party's knowledge after due inquiry, the source of such information is not bound by a confidentiality agreement with the Providing Party or is not otherwise prohibited from transmitting such information to the Receiving Party or the Receiving Party's Representatives by a contractual, legal, fiduciary or other obligation, and (ii) the Receiving Party provides the Providing Party with prompt written notice of such prior possession; or
- c. was independently acquired or developed by the Receiving Party without violating any of its obligations under this Agreement.

### **3. RESTRICTED USE OF CONFIDENTIAL INFORMATION**

The Receiving Party agrees that (a) it will keep confidential any and all Confidential Information and, except as provided in the following paragraph or as otherwise expressly permitted by the terms of this Agreement, will neither, without the specific prior written consent of the Providing Party, disclose any Confidential

Information to any person (including the fact that the Confidential Information has been made available to the Receiving Party or that the Receiving Party has inspected any portion of the Confidential Information); and (b) it will not use any of the Confidential Information for any reason or purpose other than to perform its obligations, if any, in the Pending Case.

The Receiving Party may disclose Confidential Information to those Representatives of the Receiving Party who (i) in the judgment of the Receiving Party, require access to such material for the purpose of assisting the Receiving Party in performing work directly associated with the Pending Case and (ii) are informed by the Receiving Party of the confidential nature of the Confidential Information and the obligations of this Agreement and agree to be bound by all the provisions hereof applicable to the receipt and use of Confidential Information by the Receiving Party. The Receiving Party agrees to be fully responsible for enforcing as to the Receiving Party's Representatives the obligations of this Agreement applicable to the Receiving Party and to take such action, legal or otherwise, to the extent necessary (including all actions that the Receiving Party would take to protect its own confidential information and trade secrets) to cause its Representatives to comply with such obligations.

#### **4. DISCLOSURE REQUIRED BY LAW**

If the Receiving Party or any of the Receiving Party's Representatives is requested or becomes legally compelled (by oral questions, interrogatories, requests for information or documents, subpoena, civil or criminal investigative demand, or similar process) or is required by a regulatory body to make any disclosure that is prohibited or otherwise constrained by this Agreement, the Receiving Party or such Representative, as the case may be, will provide the Providing Party with prompt notice of such request so that it may seek an appropriate protective order or other appropriate remedy. Subject to the foregoing, the Receiving Party or such Representative may furnish that portion (and only that portion) of the Confidential Information that, in the written opinion of its counsel, reasonably acceptable to the Providing Party, the Receiving Party is legally compelled or is otherwise required to disclose. In addition, the Receiving Party or such Representative shall use reasonable efforts to obtain reliable assurances that confidential treatment will be accorded any Confidential Information so disclosed.

#### **5. RETURN OF CONFIDENTIAL INFORMATION**

If the Receiving Party determines that it does not wish to proceed with the Pending Case, then the Receiving Party, upon request of the Providing Party, (a) (i) will promptly deliver to the Providing Party all documents or other materials furnished by the Providing Party or any Providing Party Representative to the Receiving Party or the Receiving Party's Representatives constituting Confidential Information, together with all copies and summaries thereof in the possession or under the control of the Receiving Party or the Receiving Party's Representatives, and (ii) will destroy materials generated by the Receiving Party or the Receiving Party's Representatives that include or refer to any part of the Confidential Information, without retaining a copy of any such material; or (b) as an alternative to the procedure described in the preceding clause (a) if the

Providing Party gives its prior written consent, the Receiving Party will promptly destroy all documents or other matters constituting Confidential Information in the possession or under the control of the Receiving Party or the Receiving Party's Representatives and shall promptly certify the same in writing to the Providing Party (including in such certification a list of the destroyed materials).

## **6. REMEDIES**

The Receiving Party understands and agrees that money damages would not be a sufficient remedy for any breach of this Agreement by it or by the Receiving Party's Representatives and that the Providing Party will suffer irreparable harm because of any such breach of this Agreement. The Receiving Party further understands and agrees that the Providing Party will be entitled, without the requirement of posting a bond or other security, to specific performance and injunctive relief as remedies for such breach. Such remedies shall not be deemed to be the exclusive remedies for a breach of this Agreement by the Receiving Party but shall be in addition to all other remedies available at law or equity.

## **7. MISCELLANEOUS**

(a) Modification. The agreements set forth in this Agreement may be modified or waived only by a separate writing signed by the Providing Party and the Receiving Party expressly modifying or waiving such agreements.

(b) Waiver. The rights and remedies of the Parties to this Agreement are cumulative and not alternative. Neither the failure nor any delay by any Party in exercising any right, power, or privilege under this Agreement will operate as a waiver of such right, power, or privilege, and no single or partial exercise of any such right, power, or privilege will preclude any other or further exercise of such right, power, or privilege or the exercise of any other right, power, or privilege. To the maximum extent permitted by applicable law, (i) no claim or right arising out of this Agreement can be discharged by one Party, in whole or in part, by a waiver or renunciation of the claim or right unless in writing signed by the other Party; (ii) no waiver that may be given by a Party will be applicable except in the specific instance for which it is given; and (iii) no notice to or demand on one Party will be deemed to be a waiver of any obligation of such Party or of the right of the Party giving such notice or demand to take further action without notice or demand as provided in this Agreement.

(c) Person. The term person means any individual, corporation (including any non-profit corporation), general or limited partnership, limited liability company, joint venture, estate, trust, association, organization or other entity.

(d) Severability. The invalidity or unenforceability of any provision of this Agreement shall not affect the validity or enforceability of any other provisions of this Agreement, which shall remain in full force and effect. If any of the covenants or provisions of this Agreement are determined to be unenforceable by reason of its extent, duration, scope or otherwise, then the Parties contemplate that the court making such

determination shall reduce such extent, duration, scope or other provision and enforce them in their reduced form for all purposes contemplated by this Agreement.

(e) Costs. The Receiving Party agrees that if it is held by any court of competent jurisdiction to be in violation, breach, or nonperformance of any of the terms of this Agreement, then it will pay all costs of such action or suit, including reasonable attorneys' fees.

(f) Assignment. Neither Party may assign any of its rights hereunder without the prior written consent of the other Party, which consent shall not be unreasonably withheld.

(g) Governing Law. This Agreement shall be governed by the laws of the State of Ohio without regard to conflicts of laws principles thereof.

(h) Counterparts. This Agreement may be executed in one or more counterparts, each of which will be deemed to be an original copy of this Agreement, and all of which, when taken together, shall be deemed to constitute one and the same agreement.

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

Duke Energy Ohio

\_\_\_\_\_  
Rocco D'Ascenzo  
Senior Counsel

AEP Retail Energy Partners LLC

  
\_\_\_\_\_  
Anne M. Vogel  
Counsel for AEP Retail Energy Partners LLC



**This foregoing document was electronically filed with the Public Utilities**

**Commission of Ohio Docketing Information System on**

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Summary: Application for Rehearing of Duke Energy Ohio, Inc. electronically filed by Carys Cochern on behalf of Kingery, Jeanne W Ms.