

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

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**MEMORANDUM CONTRA OF IGS ENERGY APPLICATION FOR REHEARING OF  
DUKE ENERGY OHIO**

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**I. BACKGROUND**

During these proceedings, Duke Energy Ohio (“Duke”) has refused to amicably agree to a reasonable protective agreement.<sup>1</sup> Following several discovery-related motions, the Attorney Examiner issued a ruling directing Duke to modify its protective agreement. 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. Duke filed an Interlocutory Appeal, challenging the Attorney Examiner’s ruling that parties may retain a copy and use that information in future cases under seal.

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

The Commission issued an Entry on Rehearing (“Entry”) denying Duke’s Interlocutory Appeal because it advocated for terms that are “too restrictive”. Instead, the Commission determined that Duke should utilize the protective agreement proposed by the Office of the Ohio Consumers’ Counsel (“OCC”) in its motion to compel. Further, the Entry provided that parties may retain one copy of confidential information.

Duke filed an application for rehearing submitting three arguments:

- the Entry failed to determine whether parties may introduce confidential information in future proceedings;
- The Entry conflicts with precedent;
- The Entry modifies aspects of the Attorney Examiner’s order not at issue.

Duke’s arguments raised on rehearing are without merit and should be rejected by the Commission.

## **II. ARGUMENT**

First, Duke’s claim that the Commission failed to determine whether parties may introduce confidential information at hearing is without merit. The Commission explicitly stated that Duke’s proposed protective agreement is too restrictive. That agreement provided that Duke may strike in a future proceeding any confidential information that is used in this proceeding. The Entry rejected that provision in the agreement and required Duke to utilize the OCC protective agreement that contains no such restriction. In so doing, the Commission determined that parties may retain confidential information (one copy after the existing and related proceedings terminate) and use that information in a future proceeding, subject to the rules of evidence.

Second, Duke's claim that the Commission's Entry violates precedent is also without merit. Duke has submitted no new arguments for the Commission to address. As Duke stated in its Application for Rehearing, "the company will not repeat, hear, the numerous cases, statutes, rules, and treatises that were argued in the appeal". While this issue has been thoroughly considered—and IGS does not wish to rehash them here—Duke continues to present a claim that represents poor public policy. Specifically, the notion that parties have no legitimate interest in maintaining a copy of confidential discovery after a proceeding terminates. This is simply not true.

Retaining a copy of confidential documents will reduce or eliminate duplicative discovery and reduce discovery disputes. But, by prohibiting parties from retaining confidential discovery responses, it will be more difficult to hold Duke accountable for representing accurate information in future related proceedings. Retention will allow a party to "fact check" Duke's statements in subsequent proceedings and allow for a more full and complete development of the record. And this is precisely the scenario that Duke does not wish to occur. Duke complains that in Case No. 12-2400-EL-UNC a party was permitted to obtain administrative notice of Duke's Confidential documents that were previously admitted into evidence in Case No. 10-2500-EL-MRO. Duke does not challenge the relevance of the admitted documents; rather, Duke would simply prefer to require other parties to again jump through all of the discovery hoops Duke erects before being able to obtain relevant and admissible information. The Commission should decline that request.

Finally, Duke is incorrect that the Commission modified an aspect of the Attorney Examiner's order that was not at issue by approving the OCC agreement. The Entry on

Rehearing flatly denied Duke's request to utilize its overly restrictive protective order and required Duke to implement an agreement "like" the agreement proposed by OCC. Because the OCC agreement did not contain the restrictions suggested by Duke in its Interlocutory Appeal and its Application for Rehearing, the OCC agreement provides a suitable solution for resolving contested issues.

It is important to keep one thing in mind—the currently approved confidentiality agreement does not allow any party to misappropriate or disclose to the public Duke's confidential information.<sup>2</sup> Parties must maintain Duke's confidential information under seal and share it with only a small population of individuals. The Entry on Rehearing should be affirmed as it was reasonable and will promote administrative economy and development of the record.

The Commission's ruling is also 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".<sup>3</sup> 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. Peebles*, 734 S.W.2d

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<sup>2</sup> Indeed, the ruling endorses Duke's requirement that any individual that reviews confidential documents must execute a certificate and provide it to Duke.

<sup>3</sup> Rule 4901-1-16(A), Ohio Administrative Code.

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.”). The ruling strikes the appropriate balance of safeguarding Duke’s protected information while facilitating full and complete discovery and the development of the record.

### III. CONCLUSION

For the reasons stated herein, IGS urges the Commission to deny Duke’s Application for Rehearing.

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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