

**BEFORE  
THE PUBLIC UTILITIES COMMISSION OF OHIO**

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

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**MEMORANDUM CONTRA  
DUKE ENERGY OHIO, INC.'S  
APPLICATION FOR REHEARING  
BY  
THE OFFICE OF THE OHIO CONSUMERS' COUNSEL**

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**I. INTRODUCTION.**

Access to information alleged by Duke Energy Ohio, Inc. (“Duke” or “the Utility”) as being confidential trade secret information has been at issue between Duke and the Ohio Consumers’ Counsel (“OCC”) and other Intervenors to this case since the Utility filed its Application on May 29, 2014. As has been detailed in previous pleadings, OCC has engaged in long and time consuming discussions with the Utility in an attempt to negotiate a protective agreement that would protect the confidentiality of Duke’s information, while at the same time allow OCC access to information that is central to disposition of important issues in the case. Despite these efforts and the existence of a proposed Protective Agreement that Duke signed with the OCC in its recent electric and

natural gas distribution rate cases.<sup>1</sup> Duke balked at using that same Protective Agreement. This impasse lasted until the Attorney Examiner issued an oral ruling on August 12, 2014, that ordered Duke to use the previously agreed upon Protective Agreement with certain modifications. Duke filed an Interlocutory Appeal of that decision, which the PUCO upheld in its August 27, 2014 Entry.<sup>2</sup> One aspect of both rulings was that parties to the Protective Agreement could retain Duke's protected materials beyond the present case.<sup>3</sup> The PUCO noted that its decision was intended to allow interested parties to "move forward with discovery."<sup>4</sup>

On September 26, 2014, Duke filed an Application for Rehearing claiming that the PUCO's Entry was unlawful and unreasonable as it did not protect Duke's confidential information from being used by the Intervenors in matters outside of these proceedings.<sup>5</sup> Duke seeks a ruling that would prohibit the use of confidential information in proceedings outside of the case for which the information was produced.

As a state agency, OCC is uniquely positioned in this dispute. OCC is bound by state records retention requirements and as such is specifically bound by the terms of the Protective Agreement entered into with Duke in this case.

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<sup>1</sup> *In the Matter of the Application of Duke Energy Ohio, Inc. for an Increase in Gas Rates*, Case No. 12-1685-GA-AIR, and *In the Matter of the Application of Duke Energy Ohio, Inc., for an Increase in its Electric Distribution Rates*, Case No. 12-1682-EL-AIR.

<sup>2</sup> *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, Entry (August 27, 2014) ("*Duke Energy Ohio ESP III*").

<sup>3</sup> *Duke Energy Ohio ESP III*, Interlocutory Appeal at 1-2 (August 18, 2014).

<sup>4</sup> *Duke Energy Ohio ESP III*, Entry at 5 (August 27, 2014).

<sup>5</sup> *Duke Energy Ohio ESP III*, Application for Rehearing at 3 (September 26, 2014).

## II. ARGUMENT.

### A. Any Confidential Documents Retained By The OCC Are Adequately Protected By The Terms Of Then Protective Agreement.

In its first assignment of error, Duke alleged that “[t]he Commission Entry fails to address whether confidential information may be used in cases other than the one in which the information was provided.”<sup>6</sup> The protective agreement executed in this proceeding specifically allows OCC to keep “one copy of each document designated as Protected Material \* \* \* and one copy of all testimony, cross-examination, transcripts, briefs and work product pertaining to such information.”<sup>7</sup> Duke’s argument presumes that any protected materials that OCC retains per its records retention requirements will be used at some time in the future in a different proceeding. However, OCC has not used any Duke protected materials in such a manner in the past. Furthermore, Duke makes no allegation that OCC has ever attempted to use any information in such a manner. Thus, Duke’s argument addresses a situation that has not arisen and is not ripe for review by the PUCO.

Although the Protective Agreement does not specify the purpose for the retention of protected materials, the Protective Agreement continues to provide for the protection of protected materials after termination of the current proceedings. Under paragraph 4 of the Protective Agreement, OCC is authorized to use the protected material in a manner that does not disclose the material. Furthermore, paragraph 16 of the Protective Agreement entitles OCC to retain one copy of documents containing confidential

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<sup>6</sup> *Duke Energy Ohio ESP III*, Memorandum in Support of Application for Rehearing at 1 (September 26, 2014).

<sup>7</sup> Protective Agreement at 5-6.

information after complying with the records retention schedule. Thus at all times, protected materials are adequately protected from unauthorized disclosure.

Any question of protected materials being used in any future proceedings is an issue better addressed at that point in time when the matter is ripe for review. Such circumstances are not ripe now, and as a creature of statute<sup>8</sup> the PUCO is precluded from addressing matters not ripe for review at this time.<sup>9</sup> For the purpose of this case, the Protective Agreement between OCC and Duke affords the protected materials with adequate protection from disclosure. What may or may not occur in the future is a matter that should be determined at such time the circumstances are presented to the PUCO.

As the PUCO stated in its Entry, OCC's Protective Agreement ensures that confidential information is not disclosed and that such information is protected under the protective agreement, even after the proceedings have ended.<sup>10</sup> There is no risk of confidential information being treated as publicly available information at any point in its retention by OCC. Therefore, the PUCO should deny Duke's Application for Rehearing leaving OCC's Protective Agreement in place. The PUCO should find instead that its Entry, requiring the adoption of OCC's protective agreement, is lawful and reasonable.

**B. The Commission's Entry Does Not Conflict With The Law, Precedent Or Treatise.**

In its Interlocutory Appeal, Duke cites civil cases, both state and federal, along with treatises to support its position that the PUCO's Entry allowing for the retention of

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<sup>8</sup> *In the Matter of the Complaint of Suburban Natural Gas Co. v. Kalida Natural Gas Co.*, Case No. 92-1876-GA-CSS, 1993 Ohio PUC LEXIS 736, at 10 (August 26, 1993).

<sup>9</sup> *Id.*

<sup>10</sup> *Duke Energy Ohio ESP III*, Entry at 5 (August 27, 2014).

confidential information by OCC is inconsistent with precedent.<sup>11</sup> As OCC previously stated in its Memorandum Contra Duke's Interlocutory Appeal, many of the cases cited are derived from civil litigation and are not binding authority for the PUCO.<sup>12</sup>

Moreover, the civil cases cited by Duke involve a judge ruling that confidential information cannot be used in subsequent proceedings. But in those cases, the judge was simply enforcing the language of the contract between the parties -- the protective agreement in those cases.<sup>13</sup> Thus in those cases, the precedent is that the protective agreement between the parties should be followed. It was not a matter of policy or precedent that information, in and of itself, could not be used in future proceedings. Instead, because the protective agreements that the parties agreed to in those cases, explicitly prohibited the subsequent use of confidential information, the court was merely enforcing the terms of those protective agreements.

Here, the language of the Protective Agreement between the parties allows for OCC's retention of confidential information.<sup>14</sup> In fact, the PUCO precedent cited by Duke in its Interlocutory Appeal has allowed OCC to retain one copy of the protected materials provided by the Utility.<sup>15</sup> Finally, retention of any protected materials by OCC does not automatically result in the disclosure of the information in a subsequent case. Duke's argument does not apply and the PUCO should deny Duke's rehearing.

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<sup>11</sup> *Duke Energy Ohio ESP III*, Interlocutory Appeal at 6-11 (August 25, 2014).

<sup>12</sup> *Duke Energy Ohio ESP III*, Case No. 14-841-EL-SSO, Memorandum Contra Duke's Interlocutory Appeal at 9-11 (August 25, 2014).

<sup>13</sup> *Duke Energy Ohio ESP III*, Interlocutory Appeal at 9-10 (August 18, 2014).

<sup>14</sup> Protective Agreement at 5-6.

<sup>15</sup> *Duke Energy Ohio ESP III*, Interlocutory Appeal at 11 (August 18, 2014).

**C. The PUCO's Entry Properly Resolves The Issues Raised In Duke's Interlocutory Appeal.**

In its third assignment of error, Duke asserted that “[t]he Commission’s Entry modifies aspects of the examiner’s ruling that were not at issue in the Interlocutory Appeal.”<sup>16</sup> In particular, the Entry required Duke to adopt OCC’s version of the protective agreement, which Duke alleges was not an issue raised in the appeal.<sup>17</sup> But the Protective Agreement between OCC and Duke is what controls the treatment of protected materials at issue in these proceedings. By requiring Duke to adopt OCC’s Protective Agreement, the PUCO decided the issues presented by Duke in its Interlocutory Appeal.

Moreover, the Attorney Examiner’s oral ruling on August 12, 2014 allowed Duke to implement the Utility’s draft protective agreement provided that it conformed with the Attorney Examiner’s ruling requiring less restrictive terms for retention and subsequent use of the protected materials.<sup>18</sup> Duke failed to negotiate a protective agreement consistent with the Attorney Examiner’s ruling, but instead raised these issues in its appeal. In deciding the issues, the PUCO was presented a choice between protective agreements -- Duke’s and OCC’s -- to govern access to protected materials. The PUCO held that Duke’s proposed protective agreement was more restrictive in nature and deemed inconsistent with the Attorney Examiner’s rulings.<sup>19</sup> While OCC’s proposed protective agreement had been used for many years prior and in many cases between OCC and Duke. Therefore, it was within the PUCO’s authority and discretion<sup>20</sup> to

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<sup>16</sup> *Duke Energy Ohio ESP III*, Application for Rehearing at 3 (September 26, 2014).

<sup>17</sup> *Duke Energy Ohio ESP III*, Memorandum in Support of Application for Rehearing at 7 (September 26, 2014).

<sup>18</sup> *Duke Energy Ohio ESP III*, Transcript at 49 (August 20, 2014).

<sup>19</sup> *Duke Energy Ohio ESP III*, Entry at 5 (August 27, 2014).

<sup>20</sup> *Id.*

choose the Protective Agreement proposed by the OCC which allows retention and subsequent use of the material. Duke's claim is misplaced and the PUCO should deny the Rehearing.

### **III. CONCLUSION.**

The Protective Agreement that the PUCO ordered interested parties to use in this proceeding appropriately protects the confidentiality of protected materials in the future. The protected materials cannot be disclosed during any future period of retention. Duke's concerns that such materials may be used in a future period are unfounded and not ripe for PUCO determination in this proceeding. Therefore, the PUCO's Entry should be upheld and Duke's Application for Rehearing should be denied.

Respectfully submitted,

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## **CERTIFICATE OF SERVICE**

I hereby certify that a copy of this *Memorandum Contra* was served on the persons stated below *via* electronic transmission, this 6<sup>th</sup> day of October, 2014.

*/s/ Joseph P. Serio*

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Summary: Memorandum Memorandum Contra Duke Energy Ohio, Inc.'s Application for Rehearing by the Office of the Ohio Consumers' Counsel electronically filed by Ms. Deb J. Bingham on behalf of Serio, Joseph P. Mr.