

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Application of Ohio)	
Edison Company, The Cleveland Electric)	
Illuminating Company, and The Toledo)	Case No. 14-1297-EL-SSO
Edison Company for Authority to Provide for)	
a Standard Service Offer Pursuant to R.C.)	
4928.143 in the Form of An Electric Security)	
Plan)	

**OHIO EDISON COMPANY, THE CLEVELAND ELECTRIC ILLUMINATING
COMPANY, AND THE TOLEDO EDISON COMPANY'S MEMORANDUM
CONTRA IGS ENERGY'S MOTION TO COMPEL**

James W. Burk (0043808)
Counsel of Record
Carrie M. Dunn (0076952)
FIRSTENERGY SERVICE COMPANY
76 South Main Street
Akron, OH 44308
Telephone: (330) 384-5861
Fax: (330) 384-8375
Email: burkj@firstenergycorp.com
Email: dunn@firstenergycorp.com

David A. Kutik (0006418)
JONES DAY
901 Lakeside Avenue
Cleveland, OH 44114
Telephone: (216) 586-3939
Fax: (216) 579-0212
Email: dakutik@jonesday.com

James F. Lang (0059668)
N. Trevor Alexander (0080713)
CALFEE, HALTER & GRISWOLD LLP
The Calfee Building
1405 East Sixth Street
Cleveland, OH 44114
Telephone: (216) 622-8200
Fax: (216) 241-0816

Email: jlang@calfee.com
Email: talexander@calfee.com

ATTORNEYS FOR OHIO EDISON
COMPANY, THE CLEVELAND ELECTRIC
ILLUMINATING COMPANY, AND THE
TOLEDO EDISON COMPANY

TABLE OF CONTENTS

	Page
I. INTRODUCTION	1
II. RELEVANT FACTS.....	2
III. LAW AND ARGUMENT	7
A. Under Ohio Law, Discovery That Is Irrelevant And Not Needed Should Not Be Produced, Especially When Production Would Require Disclosure of Third-Party Confidential Information	7
B. The Third Party Confidential Information Sought By IGS Is Irrelevant and Unnecessary and Its Production Would Improperly Intrude on Third Party Confidential Information	9
C. There Is Also No Basis For Compelling The Production Of Mr. Rose's Unredacted Testimony From Case No. 11-3549-EL-SSO, Duke's Second ESP Proceeding	13
IV. CONCLUSION	15

I. INTRODUCTION

In its unprecedented Motion to Compel, IGS Energy (“IGS”) wants the Commission to order Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company (collectively, the “Companies”) to require Judah L. Rose, one of their outside experts, to produce hundreds (if not over 1000) forecasts containing irrelevant and confidential information belonging to third parties. Citing a single inapposite Commission decision for authority, IGS demands that the Companies be required to provide IGS with this irrelevant and confidential material so that IGS can “test” the “credibility” of certain forecasts contained in testimony and workpapers filed by the Companies.

IGS’s Motion to Compel has no basis in law or fact. For starters, the requests are extremely broad: they are not limited to markets or commodities in Ohio or PJM or to commodities that relate to any of the forecasts produced in this case. (Thus, these requests conceivably call for forecasts relating to prices for commodities like LNG, propane or crude oil.) Further, IGS seeks other forecasts that would allow IGS to pry into third parties’ confidential business affairs: many of the forecasts that IGS seeks were run using client-provided confidential assumptions or inputs or for specific confidential business reasons, unrelated to this proceeding. Thus, IGS’s requests would unnecessarily reveal third-party trade secrets. Given that IGS has already received some of ICF’s prior forecasts relating to markets and commodities relevant to the forecasts provided by Mr. Rose in his testimony (a fact IGS neglects to mention), under well-established Ohio law, IGS has failed to show that such irrelevant confidential information should be produced. IGS’s Motion to Compel should be denied.

II. RELEVANT FACTS

Company witness Judah Rose has proffered direct testimony in support of the Companies' electric security plan ("ESP") Application, specifically the Companies' request for approval of Rider RRS. Mr. Rose is a Managing Director at ICF International ("ICF").¹ *See* Direct Testimony of Judah L. Rose (Aug. 4, 2014). ICF is a global, diversified consulting firm with a well-known energy practice. *Id.* at 1. ICF experts who are members of this practice, such as Mr. Rose, provide advice to clients – including on such matters as forecasting and pricing projections based upon modeling tools that are proprietary to ICF. *Id.* Mr. Rose's testimony here addresses, among other things, forecasted projections for wholesale market electricity prices and the likelihood of price volatility over the term of the Economic Stability Program. *See generally, id.*

An unredacted version of Mr. Rose's testimony was filed under seal with the Companies' Application and the Companies moved to protect those portions of his testimony, attachments and workpapers that contained proprietary, confidential business information belonging to ICF. *See* Motion for Protective Order of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company at 6 (Aug. 4, 2014). As the Companies showed in their motion, that information included "forecasts of energy and capacity prices" created through the use of "ICF's proprietary models and databases" which were provided to the Companies by ICF "pursuant to a non-disclosure agreement." *Id.* Notably, no party – including IGS – opposed that motion. In an Entry, dated December 1, 2014, the Attorney Examiner found that this information constituted a trade secret pursuant to Ohio law and granted protection for a minimum of 60 months. Entry at 10-12 (Dec. 1, 2014). Parties who have executed a Protective

¹ IGS's pejorative description of Mr. Rose as a "professional witness" is typical of the misdirected and unprofessional rhetoric from IGS. Mot. To Compel at 1. In fact, Mr. Rose is a widely respected expert on energy markets, who has been relied upon by clients representing the full spectrum of interests: *i.e.*, he has worked for utilities, customers and regulators alike. Rose Direct, Attachment I.

Agreement, including counsel for IGS, have been provided with full access to the sealed portions of Mr. Rose's testimony and associated workpapers.

As part of its energy practice, ICF produces, on a subscription basis, proprietary quarterly and annual Strategic Energy Outlook reports (the "ICF Reports"). The ICF Reports contain forecasts and projections that provide utility planners, among others, with "detailed price, production, and consumption forecasts for the energy sector." ICForecast: Strategic Energy Outlook at <http://www.icfi.com/insights/products-and-tools/icforecast-strategic-power-outlook>. The ICF Reports are developed exclusively by ICF, using inputs selected solely by ICF from ICF's energy information database and proprietary modeling software. *Id.* In the course of creating the ICF Reports, ICF relies on its own assumptions and draws its own conclusions regarding the future nature of various power markets. *Id.*

ICF's energy experts, such as Mr. Rose, also produce forecasts for specific clients. These forecasts and projections (the "Client-Specific Forecasts") may be tailored for an individual client's specific inquiry or project. (*See* Affidavit of Judah L. Rose at ¶2 ("Rose Aff."), attached as Ex. A.)² The forecasts are generated using ICF's proprietary modeling software and databases and are often based upon, in whole or in part, on assumptions or inputs provided by the client. (*See id.*) The Client-Specific Forecasts typically involve a specific time period, a specific location, and specific generating assets. (*See id.*) ICF's clients regard the assumptions or inputs that they provide to ICF as confidential and proprietary because such assumptions or inputs reveal the clients' outlook, plans or strategies about the market. Further, divulging such forecasts could also risk disclosure of an ICF client's confidential business plans and strategies

² A fully executed version of Mr. Rose's affidavit will be filed on the docket in this matter as soon as it is executed and received by the undersigned counsel.

through revealing the purpose or scope of the forecast. (*See id.* at ¶3.) For example, a forecast relating to a certain part of a particular client's generation could necessarily reveal that client's potential intent to sell or otherwise value those assets. (*See id.*) In light of the client-specific confidential and proprietary information embodied in the Client-Specific Forecasts, they are provided pursuant to confidentiality agreements that contain provisions which prohibit the disclosure of the Client-Specific Forecasts without the mutual consent of ICF and its clients. (*See id.* at ¶4.)

Mr. Rose has also provided testimony in other proceedings before the Commission, including Case No. 11-3549-EL-SSO, Duke Energy Ohio's second ESP proceeding. *See* Case No. 11-3549-EL-SSO ("*Duke ESP 2*"), Direct Testimony of Judah L. Rose (June 20, 2011). When it filed its ESP application, Duke also moved to protect those portions of Mr. Rose's testimony that contained proprietary and confidential information. In its subsequent Opinion and Order, the Commission granted such protection for an initial period of 18 months. *See* Case No. 11-3549-EL-SSO, Opinion and Order at 49 (Nov. 22, 2011). On April 4, 2013, and again on August 12, 2014, Duke moved the Commission to continue the confidential treatment and protection of this material. *See* Case No. 11-3549-EL-SSO, Motion of Duke Energy Ohio, Inc. to Extend Protective Order (Aug. 12, 2014). As the Commission has not yet ruled on that motion, the protective order remains in place. OAC 4901-1-24(D)-(F).

On November 6, 2014, IGS served written discovery on the Companies requesting:

- The identity and production of "all forecasts of electric prices produced by Judah Rose since 2009." IGS Set 1-INT-1 and IGS Set RPD-1 (attached as Ex. 1 to Mot. to Compel).
- The identity and production of "all forecasts of commodity prices produced by Judah Rose since 2009." IGS Set 1-INT-2 and IGS Set RPD-2 (attached as Ex. 1 to Mot. to Compel).

- An “unredacted copy of the testimony that Judah Rose submitted in [*Duke ESP 2*] as well as all workpapers and forecasts to support that testimony.” IGS Set 1-RPD-6 (attached as Ex. 1 to Mot. to Compel).

Notably, these requests are plainly overbroad. In fact, in over thirty years at ICF, Mr. Rose has never seen requests as broad. (*See* Rose Aff. at ¶6.) They are unlimited as to region or commodity forecasted. Thus, the requests call for the production of hundreds (and potentially over 1000) of Client-Specific Forecasts. (*See id.*) The requests call for the production of forecasts unrelated to Ohio or PJM. (*See id.*) The requests call for forecasts relating to all manner of commodities, including such commodities as LNG, propane or crude oil, which have nothing to do with any of Mr. Rose forecasts in this case. (*See id.*) Indeed, these requests are so broad that Mr. Rose estimates that it would take over fifty persons at ICF to review ICF’s files to respond. (*See id.*)

Nevertheless, in response to the first two sets of requests, regarding all forecasts of electric and commodity prices produced by Mr. Rose since 2009, the Companies directed IGS to several of the Companies’ responses to discovery requests by Sierra Club, in particular SC Set 1-RPD 23 and SC Set 1-RPD-27. *See* Companies’ Responses to IGS Set 1-INT-1, IGS Set RPD-1, IGS Set 1-INT-2, and IGS Set RPD-2 (attached as Ex. 1 to Mot. to Compel). In response to SC Set 1-RPD 23, in which Sierra Club requested documents that Mr. Rose relied upon to forecast future natural gas and power prices, the Companies produced ICF Reports dating back through 2013 (seven quarterly reports in total). In their response to SC Set 1-RPD-27, in which Sierra Club requested “any other wholesale power price forecasts created by Mr. Rose or ICF since January 1, 2013,” the Companies objected that such forecasts were irrelevant and that Mr. Rose was contractually prohibited from producing them. *See* Companies’ Response to SC Set 1-RPD-27 (c) (attached as Ex. 1 to Mot. to Compel). With regard to IGS Set 1-RPD-6, the

Companies stated that the testimony filed by Mr. Rose in *Duke ESP 2* was not in the Companies' possession, custody or control, was governed by a Commission protective order from a separate proceeding, and was irrelevant to this proceeding. *See* Companies' Response to IGS Set 1-RPD-6.

On November 28, 2014, counsel for IGS sent a letter to counsel for the Companies regarding their responses. *See* Letter from IGS to The Companies, dated Nov. 28, 2014 ("IGS Letter") (attached as Ex. 2 to Confidential Version of IGS Motion). In that letter, counsel for IGS contended that any and all forecasts created by Mr. Rose since 2009 were "directly relevant" to this proceeding. *Id.* at 1. Counsel for IGS further claimed that any concerns over contractual prohibitions were simply misplaced. *Id.*

On December 5, 2014, counsel for the Companies responded to the IGS Letter. *See* Letter from the Companies to IGS, dated December 5, 2014 ("Companies' Letter") (attached as Ex. 3 to Mot. to Compel). Counsel for the Companies informed counsel for IGS that "the Companies have disclosed both the inputs used by Mr. Rose in his testimony and the [ICF Reports] on power prices, natural gas prices, coal prices emission allowance prices, and renewable energy prices." *Id.* at 1. Counsel for the Companies further stated that the Client-Specific Forecasts, due to their highly individualized nature, were irrelevant to this proceeding. Counsel for the Companies also informed counsel for IGS that the Client-Specific Forecasts could not be produced due to non-disclosure provisions contained in the confidentiality agreements between ICF and its clients. *See id.*

Counsel for the Companies also noted that the testimony of Mr. Rose filed in *Duke ESP 2* could not be produced to IGS by the Companies. *See id.* at 2. Specifically, Counsel for the Companies stated: "It would be inappropriate for IGS to circumvent Commission protective

orders by using discovery in unrelated cases to access confidential documents.” *Id.* And further: “If IGS would like to access this testimony, it should raise this issue in that case and obtain an appropriate order from the Attorney Examiner in that proceeding.” *Id.*

On December 10, 2014, IGS filed its Motion to Compel.

III. LAW AND ARGUMENT

A. Under Ohio Law, Discovery That Is Irrelevant And Not Needed Should Not Be Produced, Especially When Production Would Require Disclosure of Third-Party Confidential Information.

The Commission routinely denies motions to compel when the movant seeks the production of irrelevant material. *See, e.g., In the matter of the Application of Middletown Coke Co.*, Case No. 08-281-EL-BGN, 2008 Ohio PUC LEXIS 821 at *3-4 (Nov. 4, 2008) (denying a motion to compel and holding that irrelevant material was not subject to discovery); *In the Matter of the Continuation of the Rate Freeze and Extension of the Market Development Period for The Dayton Power and Light Company*, Case Nos. 02-2779-EL-ATA, 2003 Ohio PUC LEXIS 392 at *34-35 (Sept. 2, 2003) (acknowledging the general rule that discovery is limited to materials “relevant to the subject matter of the proceeding” and denying a motion to compel because “the information sought would not be relevant to the determination of [the present] matter”); *In the Matter of Bauman v. The Western Reserve Telephone Co.*, Case No. 90-1095-TP-PEX, 991 Ohio PUC LEXIS 325 at *7-9 (denying a motion to compel discovery because requested information was irrelevant to the proceeding).

Ohio courts concur. *See, e.g., Malcolm v. Duckett*, 2013-Ohio-2806, ¶¶26-27, 996 N.E.2d 988 (Ohio Ct. App., Lucas County 2013) (affirming the denial of a motion to compel upon finding that the information sought by the motion was not “relevant to the subject matter involved in the pending action” and not reasonably calculated to lead to the discovery of admissible evidence); *Wallace v. Ganley Auto Group*, 2011-Ohio-2909, ¶44 (Ohio Ct. App.,

Cuyahoga County June 16, 2011) (affirming a lower court’s denial of a motion to compel because the appellant’s excessive discovery requests “sought documents and information that were not relevant to the issue before the court”); *Martin v. GMAC*, 160 Ohio App. 3d 19, 32, 2005-Ohio-1349, ¶¶65-66 (Ohio Ct. App., Mahoning County 2005) (affirming the denial of a motion to compel because the information sought was “burdensome and irrelevant” and would not affect the decision in the case).

Specifically addressing motions to compel, Ohio courts employ a balancing test. “In exercising its discretion in a discovery matter, the court balances the relevancy of the discovery request, the requesting party’s need for the discovery, and the hardship upon the party from whom the discovery was requested.” *Stegawski v. Cleveland Anesthesia Group, Inc.*, 37 Ohio App. 3d 78, 85-87 (Ohio Ct. App., Cuyahoga County 1987). *See also, Reynolds v. Personal Serv. Ins. Co.*, 1993 Ohio App. LEXIS 3096, 8-9 (Ohio Ct. App., Franklin County June 15, 1993) (same); *Sawyer v. Devore*, 1994 Ohio App. LEXIS 4954, 17-18 (Ohio Ct. App., Cuyahoga County Nov. 3, 1994) (same); *Bansal v. Mount Carmel Health Sys.*, 2011-Ohio-3827, ¶14 (Ohio Ct. App., Franklin County Aug. 4, 2011) (same).

For example, in *Sawyer*, the court affirmed the denial of two motions to compel by the trial court. *Sawyer* at *21. The appellant had sought to compel the production of a large quantity of information related to, among other things, various “memoranda” dispersed throughout thousands of employee files. *Id.* at *18. In affirming the denial of the motions to compel, the court held that the lack of relevancy of the information requested and the hardship of compiling it outweighed any need that movant might have had for the information. *Id.* The *Sawyer* court also repeatedly chastised the appellant for conducting a “fishing expedition.” *Id.* at *16-18. *See also Bansal* at ¶¶6; 14 (employing balancing test when affirming denial of motion to compel

because discovery requests “constitute[d] a ‘fishing expedition’ and [were] not reasonably calculated to lead to the discovery of relevant evidence”). Applying such balancing here, discovery of the Client-Specific Forecasts adds little or nothing to this case, while unnecessarily prolonging the hearing and disclosing third-party confidential business information.

B. The Third Party Confidential Information Sought By IGS Is Irrelevant and Unnecessary and Its Production Would Improperly Intrude on Third Party Confidential Information.

The requests here are remarkably broad. In fact, Mr. Rose has never seen a request as broad in his over three decades at ICF. (*See* Rose Aff. at ¶6.) The requests are unlimited as to geographic region. Thus, they would call for forecasts wholly unrelated to Ohio or PJM. (*See id.*) The requests are also unlimited regarding the types of commodities for which prices were forecasted. Thus, the requests call for forecasts relating to commodities like LNG, propane or crude oil, which have no relevance to anything that Mr. Rose did in this case. (*See id.*) Mr. Rose estimates that the requests call for forecasts numbering in the hundreds (if not over 1000). (*See id.*) He further estimates that it would take over fifty people at ICF to respond to this request. (*See id.*)

Yet, IGS already has information to pursue its comparison of ICF forecast done elsewhere with the forecasts done in this case. IGS has seven subscriber-only confidential ICF Reports published in 2013 and 2014. These are detailed reports that contain solely ICF’s assumptions, inputs and modeling.

The Client-Specific forecasts do not add to this case. Indeed, the opposite is true. The Client-Specific forecasts were done for a variety of purposes. They contained a varied mix of client-directed assumptions or inputs. Thus, assuming that IGS concentrated solely on Client-Specific Forecasts for Ohio and PJM relating to commodities relevant to Mr. Rose’s forecasts in this case, introduction of such forecasts would bog the hearing down into a series of mini-trials

with respect to each Client-Specific Forecast. For example, in order for the Commission to determine the relevance of each Client-Specific Forecast, the parties would need to identify, among other things, each set of assumptions or inputs and explain the origin of each one. Mr. Rose would have to be asked whether he agreed with the assumptions or inputs and, if not, how the forecast might change.

But in laying out the Client-Specific Forecasts and the assumptions or inputs underlying each, the record would reveal much highly sensitive confidential information from third parties. The assumptions or inputs provided by clients would show those clients' attitudes, plans, philosophies or strategies about various aspects of the markets studied. (*See* Rose Aff. at ¶¶2-3.)

What's more, in reviewing each Client-Specific Forecast, the specific reason for the forecast may either be obvious or need to be explained. These reasons could go to the very heart of third parties' confidential business plans or strategies. Given the breadth of ICF's energy practice and the uniform confidentiality accorded by ICF to its clients' proprietary information, allowing IGS (or anyone else) to see such information would have serious adverse consequences to ICF's energy practice and to its many and varied clients.

IGS doesn't even come close to justifying why it needs to impose such an extraordinary burden on ICF or to intrude into third party confidential business affairs. The single Commission authority cited by IGS is inapposite. IGS cites to *In the Matter of the Commission's Investigation into the Implementation of Section 276 of the Telecommunications Act*, Case No. 96-1310-TP-COI, 2001 Ohio PUC LEXIS 244 at *40 (June 1, 2001), for the broad proposition that "past testimony is relevant" and therefore, parties can be "compelled to produce discovery related to prior testimony and opinions." Mot. to Compel at 6. The discovery ordered produced in that decision simply had to do with the titles of publications and the dates of prior testimony

for an expert witness. *Section 276* at *40. Such commonplace discovery is not at issue here, where a voluminous quantity of irrelevant and confidential material owned by unrelated third parties dating back several years is being sought. Thus, *Section 276* does nothing to support the alleged relevancy of the Client-Specific Forecasts.³ In fact, in addition to the ICF reports, Mr. Rose has already disclosed 19 publications, 113 prior speaking engagements, and 122 past testimonies. Rose Direct, Attachment I. This more than complies with the *Section 276* standard for background information.

Another authority cited by IGS, a decision from the Board of Tax Appeals (“BTA”), is also inapposite. In *Cincinnati Gas & Electric Co. v. Clermont County Board of Revision*, BTA Case No. 98-K-75, 2000 Ohio Tax LEXIS 493 (April 4, 2000), the BTA granted a motion to compel the production of an “integrated resource plan” that allegedly contained the trade secrets and proprietary information of a third-party consultant. *Id.* at *3. The party seeking discovery argued that the unredacted version of the plan was required so that its appraiser could perform an accurate value analysis. *Id.* at *4. The BTA found that production of the confidential material was “necessary in order to formulate an opinion of value.” *Id.* at *6.

Unlike here, access to the confidential plan in the BTA proceeding was necessary to formulate the value of the property at issue. Thus, the integrated resource plan was clearly relevant, as opposed to the Client-Specific Forecasts in this proceeding. Moreover, the need for

³ IGS decries the Companies’ requests for deposition transcripts of any witness that IGS may seek to testify on its behalf. *See* Mot. to Compel at 9. Such requests are standard fare in litigation, however, and very different from the Client-Specific Forecasts. A witness’s prior deposition testimony is not uniquely tailored to individualized circumstances and background assumptions. Moreover, if that prior deposition testimony is confidential then IGS can raise that issue as the Companies have in this case. Also, IGS’s blithe, unsupported assumption that the Protective Agreement entered into between the Companies and IGS should somehow “ameliorate” “any concerns” on the part of ICF and ICF’s clients that, e.g., their confidential business plans and information will be adequately protected by IGS is cold comfort to those third parties who more than likely never bargained that another company in the energy market would have access to information revealing confidential business plans. Mot. to Compel at 11-12.

the report in the BTA proceeding was high because, in its absence, it might have proven very difficult to provide a valuation of the property under consideration. As noted, given the production of the ICF Reports to IGS, there is no corresponding high level of need here, or any need at all, given the amount of ICF information already in the hands of IGS. Thus, the BTA decision, for what it's worth, has no application to the present proceeding.

IGS is also wrong when it baldly asserts that the information contained in the Client-Specific Forecasts is stale. "By their very nature, past price projections become stale over time and provide no independent value after the future unfolds." Mot. to Compel at 8. Allegedly, because some of the requested Client-Specific Forecasts are up to five-years old, any proprietary protection has waned accordingly. To no surprise, IGS cites absolutely no authority in support of this claim.

The error of IGS's view can be seen by going no further than the December 1, 2014 Entry in this case. In that Entry, the Attorney Examiner granted trade secret status for a period of 60 months to the very type of forecasting data that IGS claims should go stale fairly quickly. *See* Entry at 10-12. Specifically, the Attorney Examiner granted trade secret status to the forecasting information belonging to ICF that formed a portion of Mr. Rose's testimony and workpapers. *Id.* at 11. The Entry notes that when the 60-month period expires, the Companies may move to extend protection accordingly. *Id.* at 12. The fact that the Attorney Examiner granted protection to this information for five years belies any unsupported claim by IGS that "a large majority" of the requested Client-Specific Forecasts are "stale." Mot. to Compel at 8. *See also, In the Matter of the Application of the Ohio Edison Company, the Cleveland Electric Illuminating Company, and The Toledo Edison Company for Authority to Establish a Standard Service Offer Pursuant to Section 4928.143, Revised Code, in the Form of an Electric Security*

Plan, Case No. 08-935-EL-SSO, Entry (May 23, 2011) (noting that certain price information (including starting price methodologies and round prices/quantities for individual bidders) related to competitive bidding auction had been place under seal “indefinitely”). IGS’s unsupported staleness claim carries no weight.

IGS already has in its possession sufficient information to pursue its theory of “testing” Mr. Rose’s forecasts. There is no reason to impose such an unprecedented burdensome request on ICF and have ICF produce forecasts that have no relation to Ohio, PJM or commodities not at issue in any of Mr. Rose’s forecasts in this case. There is also no reason to intrude on the confidences of others. Discovery of this information will unnecessarily prolong the hearing. Consequently, the Motion to Compel should be denied.

C. There Is Also No Basis For Compelling The Production Of Mr. Rose’s Unredacted Testimony From Case No. 11-3549-EL-SSO, Duke’s Second ESP Proceeding

In its Motion to Compel, IGS also seeks to have the Commission order the Companies to produce to IGS Mr. Rose’s unredacted testimony and workpapers from *Duke ESP 2*. IGS provides no argument – and again, cites to no authority – as to why the Commission ought to grant this portion of the Motion to Compel. There is no basis in law or fact for IGS’s improper request.

The Companies cannot disclose this information for a variety of reasons. First, as noted, Mr. Rose’s testimony and workpapers from *Duke ESP 2* have already been deemed confidential and are subject to protected status pursuant to a Commission order from a separate Commission proceeding, Case No. 11-3549-EL-SSO. Ordering the Companies to produce this information would undermine a valid protective order which Duke has recently sought to extend. *See* Case No. 11-3549-EL-SSO, Motion of Duke Energy Ohio, Inc. to Extend Protective Order (Aug. 12, 2014). Duke has consistently treated this material as confidential, requiring parties who wish to

gain access to it to execute a confidentiality agreement with Duke. Quite simply, this is not the Companies' confidential information to give. It belongs to Duke. To the extent that IGS wishes to gain access to this material, IGS should seek the permission of the Attorney Examiner in *Duke ESP 2*, directly contact Duke, or both.⁴

Further, Mr. Rose, as in the case of the Client-Specific Forecasts, is contractually prohibited from disclosing this information to a third party like IGS. (*See* Rose Aff. at ¶4.) Again, however, IGS has made no showing as to why this information is relevant to the instant proceeding. IGS has also failed to substantiate its need for this information. In the absence of such a showing, IGS's request for Mr. Rose's testimony is little more than a procedurally improper "fishing expedition" and should be denied as such. *See Sawyer* at *16-18; *Bansal* at ¶¶6; 14.

Lastly, given IGS's utter inability to justify its Motion to Compel or substantiate its discovery requests, there is absolutely no basis for a motion to strike.

⁴ Indeed, IGS intervened in *Duke ESP 2* and presumably entered into a confidentiality agreement with Duke to gain access to the confidential portions of Mr. Rose's testimony that have been improperly requested by IGS in this proceeding.

IV. CONCLUSION

For the foregoing reasons, the Commission should deny IGS Energy's Motion to Compel.

Date: December 15, 2014

Respectfully submitted,

/s/ David A. Kutik

James W. Burk (0043808)
Counsel of Record
Carrie M. Dunn (0076952)
FIRSTENERGY SERVICE COMPANY
76 South Main Street
Akron, OH 44308
Telephone: (330) 384-5861
Fax: (330) 384-8375
Email: burkj@firstenergycorp.com
Email: dunn@firstenergycorp.com

David A. Kutik (0006418)
JONES DAY
901 Lakeside Avenue
Cleveland, OH 44114
Telephone: (216) 586-3939
Fax: (216) 579-0212
Email: dakutik@jonesday.com

James F. Lang (0059668)
N. Trevor Alexander (0080713)
CALFEE, HALTER & GRISWOLD LLP
The Calfee Building
1405 East Sixth Street
Cleveland, OH 44114
Telephone: (216) 622-8200
Fax: (216) 241-0816
Email: jlang@calfee.com
Email: talexander@calfee.com

ATTORNEYS FOR OHIO EDISON
COMPANY, THE CLEVELAND ELECTRIC
ILLUMINATING COMPANY, AND THE
TOLEDO EDISON COMPANY

CERTIFICATE OF SERVICE

I certify that the foregoing was filed electronically through the Docketing Information System of the Public Utilities Commission of Ohio on this 15th day of December, 2014. The PUCO's e-filing system will electronically serve notice of the filing of this document on the following parties:

Association of Independent Colleges and Universities of Ohio, Buckeye Association Of School Administrators, Buckeye Wind LLC, Citizens Coalition, City Of Akron, City Of Cleveland, Constellation NewEnergy Inc., Council Of Smaller Enterprises, Direct Energy Services LLC, Duke Energy Ohio Inc., Dynegy Inc., Energy Professionals of Ohio, EnerNOC Inc., Environmental Law & Policy Center, Exelon Generation Company, LLC, Hardin Wind LLC, IBEW Local 245, IGS Energy, Industrial Energy Users Of Ohio, Kroger Co., Mid-Atlantic Renewable Energy Coalition, Monitoring Analytics LLC, MSC, Nextera Energy Resources, Northeast Ohio Public Energy Council, Northwest Ohio Aggregation Coalition, Nucor Steel Marion, Inc., Ohio Advanced Energy Economy, Ohio Association Of School Business, Ohio Consumers Counsel, Ohio Energy Group, Inc., Ohio Environmental Counsel, Ohio Hospital Association, Ohio Manufacturers' Association, Ohio Power Company, Ohio Partners For Affordable Energy, Ohio School Boards Association, Ohio Schools Council, PJM Power Providers Group, Power4Schools, Retail Energy Supply Association, Sierra Club, The Cleveland Municipal School District, The Electric Power Supply Association, Wal-Mart Stores East, LP, and Sam's East, Inc.

/s/ David A. Kutik

An Attorney for the Companies

In the Matter of the Application of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company for Authority to Provide for a Standard Service Offer Pursuant to R.C. 4928.143 in the Form of An Electric Security Plan

AFFIDAVIT OF JUDAH L. ROSE

Judah L. Rose, being first duly sworn, states as follows:

Pursuant to the confidentiality provisions of a non-disclosure agreement between the Companies

and ICF, portions of my testimony and workpapers are proprietary in nature and have been filed under seal.

3. Much of my work, as well as the work of other ICF experts in ICF's energy practice, involves producing forecasts for specific clients ("Client-Specific Forecasts").

4. Client-Specific Forecasts are commonly tailored to a client's specific need or project. These forecasts involve specific time periods, locations, and generating assets. Client-Specific Forecasts are generated through the use of ICF's proprietary modeling software and databases, and are frequently based, in whole or in part, on assumptions and inputs provided by the client.

5. To protect both ICF and ICF's clients, the Client-Specific Forecasts are provided pursuant to non-disclosure agreements that prohibit the disclosure of the Client-Specific Forecasts without the mutual consent of ICF and its clients.

6. Clients of ICF are greatly concerned about the confidentiality of their Client-Specific Forecasts. The divulging of a Client-Specific Forecast could lead to the disclosure of an ICF client's confidential business plans and strategies. For example, a forecast that related to a particular part of a client's generation could necessarily reveal that client's potential intent to sell or otherwise value those assets. As such, ICF takes great care to guard its clients' confidences and to abide by the terms of its non-disclosure agreements with its clients.

JUDAH L. ROSE

Sworn to and subscribed in my presence by JUDAH L. ROSE on this ____ day of ____,
2014.

Notary Public

This foregoing document was electronically filed with the Public Utilities

Commission of Ohio Docketing Information System on

12/16/2014 10:23:57 AM

in

Case No(s). 14-1297-EL-SSO

Summary: Memorandum Contra IGS Motion to Compel by Ohio Edison Company, The Cleveland Electric Illuminating Company and The Toledo Edison Company electronically filed by MR. DAVID A KUTIK on behalf of Ohio Edison Company and The Cleveland Electric Illuminating Company and The Toledo Edison Company