

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of Application of Duke Energy)
Ohio, Inc. to File for Tariff Approval) Case No. 14-2209-EL-ATA
)

**MOTION TO COMPEL PROTECTIVE AGREEMENT
AND MEMORANDUM IN SUPPORT OF IGS ENERGY AND REQUEST FOR
EXPEDITED TREATMENT**

Joseph Olikier (0086088)
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Attorney for IGS Energy

September 15, 2016

which was previously authorized by the Commission in Duke's last electric security plan case.

IGS requests that the Attorney Examiner provide an expedited ruling on this motion due to the fact that the deadline for testimony is approaching quickly and IGS has yet to review Duke's responses to the discovery at issue. At the time of this filing, IGS has not had an opportunity to obtain consent from all parties to an expedited ruling.

For the reasons discussed further in the attached memorandum in support, IGS requests that the Attorney Examiner grant this motion.

Respectfully submitted,

/s/ Joseph Olikier

Joseph Olikier (0086088)

Counsel of Record

Email: joliker@igsenergy.com

IGS Energy

6100 Emerald Parkway

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Attorney for IGS Energy

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of Application of Duke Energy)
Ohio, Inc. to File for Tariff Approval) Case No. 14-2209-EL-ATA
)

MEMORANDUM IN SUPPORT

I. INTRODUCTION

Precedent regarding the use of confidential information in future proceedings is well settled. As the Commission noted in the *ESP III Case*, “Duke is well aware of our determination that intervenors can retain a copy of the alleged confidential information and any attempted use of such information in a subsequent proceeding will be ruled upon within the context of that proceeding.” Despite the Commission’s precedent, continues to attempt to contractually restrict IGS’ use of confidential information to the proceeding in which it is produced. IGS therefore requests that the Commission compel Duke to adopt the suitable protective agreement contained in Attachment 1, which was previously compelled by the Commission following litigation between IGS and Duke.²

II. BACKGROUND

On March 26, 2014—nearly two and half years ago—the Public Utilities Commission of Ohio (“Commission”) issued a Finding and Order and policy statement in support of reforming utility practices to enable the competitive market to provide customers time-of-use (“TOU”) products and services that promote efficient energy

² *ESP III Case*, Entry (Aug. 27, 2014) (hereinafter “*ESP III Case*”); *ESP III*, Entry on Rehearing (Oct. 22, 2014); *ESP III Case*, Tr. at 49-52 (Aug. 12, 2014)

usage.³ To that end, the Commission directed all electric distribution utilities to file a tariff specifying terms and conditions for the transfer of interval data, as well as proposed formulas for calculating customers' individual network service peak load ("NSPL") and peak load contribution ("PLCs").⁴ This proceeding relates to Duke Energy Ohio's filing, which departed from the Commission's directive.

In its required tariff filing, Duke attempted to kick the can further down the road, stating, "[m]atters related to providing granular residential interval CEUD to CRES providers will require significant investment and will require additional stakeholder development"⁵ Finding that Duke had effectively proposed to move backward from the Commission's directive, the Commission determined that it may be unjust and unreasonable and set the matter for hearing. The Commission further determined that parties should address several issues:

- (a) What AMI CEUD is Duke currently collecting, and what are its system capabilities? This includes granularity of data, frequency of data collection, duration of data stored, and the ability to validate, estimate, and edit AMI data.
- (b) What type of CEUD should be available to CRES providers? This includes how frequently and via what method.
- (c) What are the estimated costs to provide AMI CEUD to CRES providers and what is the appropriate cost recovery mechanism?
- (d) What is a realistic timeframe for implementing a CEUD sharing system?

IGS subsequently submitted discovery on Duke with respect to the questions identified in

³ *In the Matter of the Commission's Investigation of Ohio's Retail Electric Service Market*, Case. No. 12-3151-EL-COI Finding and Order at 36 (Mar. 26, 2014) (hereinafter "*RMI Case*" or "*RMI Order*"); *RMI Case*, Entry on Rehearing at 19 (May 21, 2014).

⁴ *Id.*

⁵ Application at 2.

the Entry. IGS, however, agreed to hold its discovery in abeyance during settlement negotiations between the parties. During those discussions, parties freely exchanged information and did not find a need to enter into a protective agreement.

Following several settlement discussions, however, it became apparent that the parties would not amicably resolve this matter through a stipulation and recommendation. The Attorney Examiner then set this matter for hearing.

After IGS reminded Duke of its outstanding discovery requests, Duke indicated that the requested documents could only be produced pursuant to a protective agreement.⁶ On September 6, 2016, Duke submitted to IGS a proposed protective agreement.⁷ After reviewing the proposed agreement, it became apparent that the agreement departed from Commission precedent inasmuch as it would restrict IGS' right to use confidential documents in future proceedings, as well require IGS to destroy or return documents following the resolution of this proceeding.⁸

On September 6, 2016, IGS notified Duke that the parties should use the last agreement entered into between the parties in Duke's ESP case as it has been approved by the Commission.⁹ IGS submitted that agreement for Duke's review on that same day. Later that day, Duke indicated that it could only use the agreement proposed by IGS to

⁶ See Attachment 4; Attachment 5 (containing the Affidavit of Joseph Olikier).

⁷ See Attachment 3.

⁸ Attachment 3 at 2-4 ("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" and "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.")

⁹ See Attachment 1; Attachment 5.

the extent that additional edits were included in the document.¹⁰ In an effort to resolve the issue, IGS indicated that it would review and consider any edits Duke proposed.¹¹

On September 8, 2016, Duke submitted to IGS proposed modifications to the agreement adopted by the Commission in the *ESP III Case*.¹² In its edits, however, Duke proposed that “[t]he Recipient shall not reveal or otherwise disclose Protected Materials other than as expressly authorized in this Agreement *and only for the purpose of the Proceeding*.”¹³

IGS promptly notified Duke on that same day that Duke’s proposal would violate Commission precedent resulting from litigation between IGS and Duke in the *ESP III Case*.¹⁴ Duke did not disagree. Instead, Duke claimed that: “Yes, we litigated all of these issues in the 841 case, but that case has not yet been concluded since rehearing was granted. And we still have an opportunity to appeal the issue. So we are not inclined to waive the argument here.”¹⁵ IGS responded to Duke that its position is not reasonable, given that Commission has not reversed its precedent at this time.¹⁶ IGS further indicated that it would file a motion to compel if Duke did not adopt a suitable confidentiality agreement by Monday, September 12, 2016.¹⁷ IGS’ efforts to resolve this matter are

¹⁰ Attachment 4.

¹¹ See Attachment 4; Attachment 5.

¹² Attachment 2; Attachment 4.

¹³ Attachment 1 at 1 (emphasis added).

¹⁴ *ESP III Case*, Entry (Aug. 27, 2014); *ESP III*, Entry on Rehearing (Oct. 22, 2014).

¹⁵ Attachment 4.

¹⁶ *Id.*

¹⁷ *Id.*

further set forth in the Affidavit of Joseph Oliker, which is included in this motion as Attachment 5. Because Duke has not agreed to remove its proposed unreasonable restriction, it is unfortunately necessary for the Commission to issue an order to resolve this discovery dispute.¹⁸

III. ARGUMENT

This Motion requests that the Commission confirm its precedent in the *ESP III* Case. In that proceeding, the Commission held that in order to facilitate the efficient resolution of proceedings it is appropriate to allow parties to retain confidential documents for future proceedings subject to rules pertaining to admissibility.¹⁹ The Commission reaffirmed this holding following both an interlocutory appeal and an application for rehearing submitted by Duke litigating this issue ad nauseum.²⁰

Duke does not contest the precedent in the *ESP III* Case. Rather, Duke claims that its application for rehearing in that case was granted for further consideration; therefore, it is unwilling to follow existing precedent because it *may* decide to ultimately appeal the Commission's decision and the Supreme Court may ultimately decide in favor of Duke. Duke's position lacks merit.

Initially, IGS appreciates Duke's desire to preserve its litigation position in the *ESP III* Case. But Duke's interest in not waiving the argument in this proceeding does not provide a basis for the Commission to disturb its precedent. Moreover, if the Commission's determination in *ESP III* Case was truly an important issue to Duke, it could

¹⁸ Attachment 5.

¹⁹ *ESP III* Case, Entry (Aug. 27, 2014); *ESP III*, Entry on Rehearing (Oct. 22, 2014).

²⁰ *Id.*

have taken an appeal from the denial of its interlocutory appeal and application for rehearing. It did not. Therefore, IGS requests that the Commission issue an order adopting the protective agreement contained in Attachment 1.

IV. CONCLUSION

Confidential documents are exchanged in nearly every Commission case. While confidential documents should be protected from disclosure to the public, it is necessary to allow such documents to be used in future cases to promote administrative economy and development of the record. To prevent duplicative discovery and for consistency of the record, it is appropriate to allow parties to keep a copy of confidential documents for future use. Therefore, IGS urges the Commission to expeditiously grant this motion.

Respectfully submitted,

/s/ Joseph Olikier
Joseph Olikier (0086088)
Email: joliker@igsenergy.com
Counsel of Record
IGS Energy
6100 Emerald Parkway
Dublin, Ohio 43016
Telephone: (614) 659-5000
Facsimile: (614) 659-5073

Attorney for IGS Energy

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing *Motion to Compel Protective Agreement and Memorandum in Support of IGS Energy and Request for Expedited Treatment* was served this 15th day of September 2016 via electronic mail upon the following:

John.jones@puc.state.oh.us Natalia.messenger@puc.state.oh.us cmooney@ohiopartners.org joliker@igsenergy.com mswhite@igsenergy.com trent@theoec.org	Amy.spiller@duke-energy.com Elizabeth.Watts@duke-energy.com mjsettineri@vorys.com glpetrucci@vorys.com wasieck@vorys.com whitt@whitt-sturtevant.com
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/s/ Joseph Oliker
Joseph Oliker

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Application of Duke)
 Energy Ohio for Authority to Establish a) Case No. 14-841-EL-SSO
 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.)

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.)

PROTECTIVE AGREEMENT

This Protective Agreement (“Agreement”) is entered into by and between **Duke Energy Ohio** (“Utility” or “Company”) and _____ (“Recipient”) (collectively, the “Parties”). This Agreement is designed to facilitate and expedite the exchange with Recipient of all information in the discovery process in this proceeding, as this “Proceeding” is defined herein. It reflects agreement between the Company and Recipient as to the manner in which “Protected Materials,” as defined herein, are to be treated. This Agreement is not intended to constitute any resolution of the merits concerning the confidentiality of any of the Protected Materials.

1. The purpose of this Agreement is to permit prompt access to and review of such Protected Materials in a controlled manner that will allow their use for the purposes of this Proceeding while protecting such data from disclosure to non-participants, without a prior ruling by an administrative agency of competent jurisdiction or court of competent jurisdiction regarding whether the information deserves protection.

2. “Proceeding” as used throughout this document means the above-captioned case(s), including any appeals, remands and other cases related thereto.

3. “Protected Materials” means documents and information furnished subject to the terms of this Agreement and so designated by the Company by conspicuously marking each document or written response as confidential. The term “Protected Materials” includes both Confidential Information and Highly Confidential Information. Counsel for Recipient, and any technical experts or secretaries assisting counsel for Recipient, will have sole access to Highly Confidential Information, provided such individuals are involved in the Proceeding and provided further that each such individual executes a non-disclosure certificate. Information labeled Highly Confidential Information may only be disclosed to those persons authorized by law or otherwise to receive and review information labeled Highly Confidential Information. Protected Materials do not include any information or documents contained in the public files of any state or federal administrative agency or court and do not include documents or information which at, or prior to, commencement of this Proceeding, is or was otherwise in the public domain, or which enters into the public domain.

4. Protected Materials provided in the context of this Proceeding will be provided to Recipient for use by Recipient in conjunction with this Proceeding. Nothing in this Agreement precludes the use of any portion of the Protected Materials that becomes part of the public record or enters into the public domain. Nothing in this Agreement precludes Recipient from filing Protected Materials under seal or otherwise using Protected Material in ways, such as *in camera* proceedings, that do not disclose Protected Materials.

5. As used in this Agreement, the term “Authorized Representative” includes Recipient’s counsel of record in this Proceeding and other attorneys, paralegals, economists, statisticians, accountants, consultants, or other persons employed or retained by Recipient and

engaged in this Proceeding.

6. Access to Protected Materials is permitted to Recipient's Authorized Representatives who are either a signatory to this Agreement or who have executed a Non-Disclosure Certificate in the form attached hereto as Exhibit A prior to any access. Recipient must treat all Protected Materials, copies thereof, information contained therein, and writings made therefrom as proprietary and confidential, and will safeguard such Protected Materials, copies thereof, information contained therein, and writings made therefrom so as to prevent voluntary disclosure to any persons other than Recipient's Authorized Representatives.

7. If any Recipient Authorized Representative ceases to be engaged in this Proceeding, access to any Protected Materials by such person will be terminated immediately and such person must promptly return Protected Materials in his or her possession to another Authorized Representative of Recipient and if there is no such Authorized Representative, such person must treat such Protected Materials in the manner set forth in Paragraph 14 hereof as if this Proceeding herein had been concluded. Any person who has signed the foregoing Non-Disclosure Certificate will continue to be bound by the provisions of this Agreement even if no longer so engaged.

8. In this proceeding, Recipient may disclose Protected Materials or writings regarding their contents to any individual or entity that is in possession of said Protected Materials or to any individual or entity that is bound by a Protective Agreement or Order with respect to the Protected Materials. Recipient may also disclose Protected Materials to employees or persons working for or representing the Public Utilities Commission of Ohio in connection with this Proceeding.

9. Recipient may file Protected Materials under seal in this Proceeding whether or not Recipient seeks a ruling that the Protected Materials should be in the public domain. If

Recipient desires to include, utilize, refer, or copy any Protected Materials in such a manner, other than in a manner provided for herein, that might require disclosure of such material, then Recipient must first give notice (as provided in Paragraph 13) to the Company, specifically identifying each of the Protected Materials that could be disclosed in the public domain. The Company will have five (5) business days after service of Recipient's notice to file, with an administrative agency of competent jurisdiction or court of competent jurisdiction, a motion and affidavits with respect to each of the identified Protected Materials demonstrating the reasons for maintaining the confidentiality of the Protected Materials. The affidavits for the motion must set forth facts delineating that the documents or information designated as Protected Materials have been maintained in a confidential manner and the precise nature and justification for the injury that would result from the disclosure of such information. If the Company does not file such a motion within five (5) business days of Recipient's service of the notice, then the Protected Materials will be deemed non-confidential and not subject to this Agreement.

10. The Parties agree to seek *in camera* proceedings by the administrative agency of competent jurisdiction or court of competent jurisdiction for arguments or for the examination of a witness that would disclose Protected Materials. Such *in camera* proceedings will be open only to the Parties, their counsel, other Recipient Authorized Representatives, and others authorized by the administrative agency or court to be present; however, characterizations of the Protected Materials that do not disclose the Protected Materials may be used in public.

11. Any portion of the Protected Materials that the administrative agency of competent jurisdiction or court of competent jurisdiction has deemed to be protected and that is filed in this Proceeding will be filed in sealed confidential envelopes or other appropriate containers sealed from the public record.

12. It is expressly understood that upon a filing made in accordance with Paragraph 9

of this Agreement, the burden will be upon the Company to show that any materials labeled as Protected Materials pursuant to this Agreement are confidential and deserving of protection from disclosure.

13. All notices referenced in Paragraph 9 must be served by the Parties on each other by one of the following methods: (1) sending the notice to such counsel of record herein via e-mail; (2) hand-delivering the notice to such counsel in person at any location; or (3) sending the notice by an overnight delivery service to such counsel.

14. Once the above-captioned matter (including all appeals and remands) is concluded, Recipient must return or dispose of all copies of the Protected Materials unless the Protected Materials have been released to the public domain or filed with a state or federal administrative agency or court under seal except (1) if, at the conclusion of the above-captioned matter, a related proceeding is ongoing, Recipient may retain Protected Material until the conclusion of the related proceeding (including all appeals and remands of the related proceeding), at which time Recipient must return or dispose of all copies of the Protected Materials unless the Protected Materials have been released to the public domain or filed with a state or federal administrative agency or court under seal; and (2) upon the completion of the above captioned matter and any related proceeding or proceedings, Recipient may keep one copy of each document designated as Protected Material that was filed under seal and one copy of all testimony, cross-examination, transcripts, briefs and work product pertaining to such filed information and will maintain that copy as provided in this Agreement unless the Protected Materials have been released to the public domain or filed with a state or federal administrative agency or court under seal.

15. By entering into this Protective Agreement, Recipient does not waive any right

that

it may have to dispute the Company's determination regarding any material identified as confidential by the Company and to pursue those remedies that may be available to Recipient before an administrative agency or court of competent jurisdiction. Nothing in this Agreement precludes Recipient from filing a motion to compel.

16. By entering into this Protective Agreement, the Company does not waive any right it may have to object to the discovery of confidential material on grounds other than confidentiality and to pursue those remedies that may be available to the Company before the administrative agency of competent jurisdiction or court of competent jurisdiction.

17. This Agreement represents the entire understanding of the Parties with respect to Protected Materials and supersedes all other understandings, written or oral, with respect to the Protected Materials. No amendment, modification, or waiver of any provision of this Agreement is valid, unless in writing signed by both Parties.

18. This Agreement will be governed by and construed in accordance with the laws of the State of Ohio.

Duke Energy Ohio, Inc.
By:

Counsel

Counsel

Date

Date

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Application of Duke)
Energy Ohio for Authority to Establish a) Case No. 14-841-EL-SSO
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.)

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.)

NON-DISCLOSURE CERTIFICATE

I certify my understanding that Protected Materials may be provided to me pursuant to the terms and restrictions of the Protective Agreement, last executed _____, 2014, and certify that I have been given a copy of and have read the Protective Agreement, and that I agree to be bound by it. I understand that the contents of Protected Materials, and any writings, memoranda, or any other form of information regarding or derived from protected materials will not be voluntarily disclosed to anyone other than in accordance with the Protective Agreement and will be used only for the purposes of this Proceeding as defined in paragraph two of the Protective Agreement.

Name: _____

Company: _____

Address: _____

Telephone: _____

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Application of Duke)
Energy Ohio, Inc., for Tariff Approval)
Regarding Customer Energy Usage Data.)

Case No. 14-2209-EL-ATA

PROTECTIVE AGREEMENT

This Protective Agreement (“Agreement”) is entered into by and between **Duke Energy Ohio** (“Utility” or “Company”) and _____ (“Recipient”) (collectively, the “Parties”). This Agreement is designed to facilitate and expedite the exchange with Recipient of all information in the discovery process in this proceeding, as this “Proceeding” is defined herein. It reflects agreement between the Company and Recipient as to the manner in which “Protected Materials,” as defined herein, are to be treated. This Agreement is not intended to constitute any resolution of the merits concerning the confidentiality of any of the Protected Materials.

1. The purpose of this Agreement is to permit prompt access to and review of such Protected Materials in a controlled manner that will allow their use for the purposes of this Proceeding while protecting such data from disclosure to non-participants, without a prior ruling by an administrative agency of competent jurisdiction or court of competent jurisdiction regarding whether the information deserves protection. The Recipient shall not reveal or otherwise disclose Protected Materials other than as expressly authorized in this Agreement and only for the purpose of the Proceeding.

2. “Proceeding” as used throughout this document means the above-captioned case(s), including any appeals, remands and other cases related thereto. The term “Proceeding” does not include any cases that may be substantively or procedurally related but are not captioned above, other than appeals and remands; provided, however, that the Parties may agree in writing, pursuant to Section 9(c) below, to modify this definition such that other legal proceedings may be included in the definition of the term, “Proceeding” and, provided further, that the specific reference to the ability of the Parties to agree in writing to modify such definition does not alter the Parties’ ability to modify other provisions of this Agreement or the requirement that such other modification requires written agreement.

3. “Protected Materials” means documents and information furnished subject to the terms of this Agreement and so designated by the Company by conspicuously marking each document or written response as confidential. The term “Protected Materials” includes both Confidential Information and Highly Confidential Information. Counsel for Recipient, and any technical experts or secretaries assisting counsel for Recipient, will have sole access to Highly Confidential Information, provided such individuals are involved in the Proceeding and provided further that each such individual executes a non-disclosure certificate. Information labeled Highly Confidential Information may only be disclosed to those persons authorized by law or otherwise to receive and review information labeled Highly Confidential Information. Protected Materials do not include any information or documents contained in the public files of any state or federal administrative agency or court and do not include documents or information which at, or prior to, commencement of this Proceeding, is or was otherwise in the public domain, or which enters into the public domain.

4. Protected Materials provided in the context of this Proceeding will be provided to Recipient for use by Recipient in conjunction with this Proceeding. Nothing in this Agreement

precludes the use of any portion of the Protected Materials that becomes part of the public record or enters into the public domain. Nothing in this Agreement precludes Recipient from filing Protected Materials under seal or otherwise using Protected Material in ways, such as *in camera* proceedings, that do not disclose Protected Materials.

5. As used in this Agreement, the term “Authorized Representative” includes Recipient’s counsel of record in this Proceeding and other attorneys, paralegals, economists, statisticians, accountants, consultants, or other persons employed or retained by Recipient and engaged in this Proceeding.

6. Access to Protected Materials is permitted to Recipient’s Authorized Representatives who are either a signatory to this Agreement or who have executed a Non-Disclosure Certificate in the form attached hereto as Exhibit A prior to any access. Recipient must treat all Protected Materials, copies thereof, information contained therein, and writings made therefrom as proprietary and confidential, and will safeguard such Protected Materials, copies thereof, information contained therein, and writings made therefrom so as to prevent voluntary disclosure to any persons other than Recipient’s Authorized Representatives.

7. If any Recipient Authorized Representative ceases to be engaged in this Proceeding, access to any Protected Materials by such person will be terminated immediately and such person must promptly return Protected Materials in his or her possession to another Authorized Representative of Recipient and if there is no such Authorized Representative, such person must treat such Protected Materials in the manner set forth in Paragraph 14 hereof as if this Proceeding herein had been concluded. Any person who has signed the foregoing Non-Disclosure Certificate will continue to be bound by the provisions of this Agreement even if no longer so engaged.

8. In this proceeding, Recipient may disclose Protected Materials or writings

regarding their contents to any individual or entity that is in possession of said Protected Materials or to any individual or entity that is bound by a Protective Agreement or Order with respect to the Protected Materials. Recipient may also disclose Protected Materials to employees or persons working for or representing the Public Utilities Commission of Ohio in connection with this Proceeding.

9. Recipient may file Protected Materials under seal in this Proceeding whether or not Recipient seeks a ruling that the Protected Materials should be in the public domain. If Recipient desires to include, utilize, refer, or copy any Protected Materials in such a manner, other than in a manner provided for herein, that might require disclosure of such material, then Recipient must first give notice (as provided in Paragraph 13) to the Company, specifically identifying each of the Protected Materials that could be disclosed in the public domain. The Company will have five (5) business days after service of Recipient's notice to file, with an administrative agency of competent jurisdiction or court of competent jurisdiction, a motion and affidavits with respect to each of the identified Protected Materials demonstrating the reasons for maintaining the confidentiality of the Protected Materials. The affidavits for the motion must set forth facts delineating that the documents or information designated as Protected Materials have been maintained in a confidential manner and the precise nature and justification for the injury that would result from the disclosure of such information. If the Company does not file such a motion within five (5) business days of Recipient's service of the notice, then the Protected Materials will be deemed non-confidential and not subject to this Agreement.

10. The Parties agree to seek *in camera* proceedings by the administrative agency of competent jurisdiction or court of competent jurisdiction for arguments or for the examination of a witness that would disclose Protected Materials. Such *in camera* proceedings will be open only to the Parties, their counsel, other Recipient Authorized Representatives, and others authorized by

the administrative agency or court to be present; however, characterizations of the Protected Materials that do not disclose the Protected Materials may be used in public.

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12. It is expressly understood that upon a filing made in accordance with Paragraph 9 of this Agreement, the burden will be upon the Company to show that any materials labeled as Protected Materials pursuant to this Agreement are confidential and deserving of protection from disclosure.

13. All notices referenced in Paragraph 9 must be served by the Parties on each other by one of the following methods: (1) sending the notice to such counsel of record herein via e-mail; (2) hand-delivering the notice to such counsel in person at any location; or (3) sending the notice by an overnight delivery service to such counsel.

14. Once the above-captioned matter (including all appeals and remands) is concluded, Recipient must return or dispose of all copies of the Protected Materials unless the Protected Materials have been released to the public domain or filed with a state or federal administrative agency or court under seal except (1) if, at the conclusion of the above-captioned matter, a related proceeding is ongoing, Recipient may retain Protected Material until the conclusion of the related proceeding (including all appeals and remands of the related proceeding), at which time Recipient must return or dispose of all copies of the Protected Materials unless the Protected Materials have been released to the public domain or filed with a state or federal administrative agency or court under seal; and (2) upon the completion of the above captioned matter and any related proceeding

or

proceedings, Recipient may keep one copy of each document designated as Protected Material that was filed under seal and one copy of all testimony, cross-examination, transcripts, briefs and work product pertaining to such filed information and will maintain that copy as provided in this Agreement unless the Protected Materials have been released to the public domain or filed with a state or federal administrative agency or court under seal.

15. By entering into this Protective Agreement, Recipient does not waive any right that it may have to dispute the Company's determination regarding any material identified as confidential by the Company and to pursue those remedies that may be available to Recipient before an administrative agency or court of competent jurisdiction. Nothing in this Agreement precludes Recipient from filing a motion to compel.

16. By entering into this Protective Agreement, the Company does not waive any right it may have to object to the discovery of confidential material on grounds other than confidentiality and to pursue those remedies that may be available to the Company before the administrative agency of competent jurisdiction or court of competent jurisdiction.

17. This Agreement represents the entire understanding of the Parties with respect to Protected Materials and supersedes all other understandings, written or oral, with respect to the Protected Materials. No amendment, modification, or waiver of any provision of this Agreement is valid, unless in writing signed by both Parties.

18. This Agreement will be governed by and construed in accordance with the laws of the State of Ohio.

Duke Energy Ohio, Inc.
By:

By:

Counsel

Counsel

Date

Date

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Application of Duke)
Energy Ohio for Authority to Establish a) Case No. 14-841-EL-SSO
Standard Service Offer Pursuant to)
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I certify my understanding that Protected Materials may be provided to me pursuant to the terms and restrictions of the Protective Agreement, last executed _____, 2014, and certify that I have been given a copy of and have read the Protective Agreement, and that I agree to be bound by it. I understand that the contents of Protected Materials, and any writings, memoranda, or any other form of information regarding or derived from protected materials will not be voluntarily disclosed to anyone other than in accordance with the Protective Agreement and will be used only for the purposes of this Proceeding as defined in paragraph two of the Protective Agreement.

Name: _____

Company: _____

Address: _____

Telephone: _____

CONFIDENTIALITY AGREEMENT

CONFIDENTIALITY AGREEMENT (Agreement), dated as of September ____, 2016, between Duke Energy Ohio, Inc., an Ohio corporation (Duke Energy Ohio) with offices at 139 East Fourth Street, Cincinnati, Ohio 45201, and Interstate Gas Supply, Inc. (IGS).

WITNESSETH:

WHEREAS, Duke Energy Ohio and IGS (each individually referred to as Party, or collectively as Parties) have entered into an agreement for IGS to receive confidential information in Case No. 14-2209-EL-ATA (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 IGS (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; (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; and (iii) have executed a Non-Disclosure Certificate in the Form attached hereto as Exhibit A prior to any access to Confidential Information. 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. The Receiving Party may also disclose Confidential Information to any party to the Pending Case that is similarly bound by the terms of a Confidentiality Agreement with the Providing Party applicable to the Pending Case and that is in possession of said Confidential Material.

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 or upon the conclusion of the Pending Case as evident by either the Providing Party withdrawing its case or the issuance of a final order, 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). The Receiving Party

further agrees, regardless of the alternative selected above, to produce to the Providing Party, upon its request, copies of all Non-Disclosure Certificates executed pursuant to this Confidentiality Agreement Representatives of the Receiving Party.

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, Inc.

Elizabeth H. Watts
Associate General Counsel

Interstate Gas Supply, Inc.

Joseph E. Oliker
Counsel for Interstate Gas Supply, Inc.

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Application of)
Duke Energy Ohio, Inc., to File for) Case No. 14-2209-EL-ATA
Tariff Approval.)

NON-DISCLOSURE CERTIFICATE

I certify my understanding that Protected Materials may be provided to me, but only pursuant to the terms and restrictions of the Protective Agreement, last executed _____ 2016, and certify that I have been given a copy of and have read the Protective Agreement, and that I agree to be bound by it. I understand that the contents of Protected Materials, and any writings, memoranda, or any other form of information regarding or derived from protected materials shall not be voluntarily disclosed to anyone other than in accordance with the Protective Agreement and shall be used only for the purposes of this Proceeding as defined in paragraph two of the Protective Agreement.

Name: _____

Company: _____

Address: _____

Telephone: _____

Date: _____

From: [Joe Oliker](#)
To: [Watts, Elizabeth H](#)
Cc: [Kuhnell, Dianne B](#)
Subject: RE: CASE NO.14-2209-EL-ATA PROTECTIVE AGREEMENT EDITED.docx
Date: Thursday, September 8, 2016 4:29:00 PM

The earlier version suffers from the same flaws. It requires IGS to destroy or return documents and limits use to this case. It also contains additional provisions not contained in the agreement approved in the ESP case.

From: Watts, Elizabeth H [mailto:Elizabeth.Watts@duke-energy.com]
Sent: Thursday, September 8, 2016 4:23 PM
To: Joe Oliker
Cc: Kuhnell, Dianne B
Subject: Re: CASE NO.14-2209-EL-ATA PROTECTIVE AGREEMENT EDITED.docx

Joe:

What is your objection to the alternative agreement?

Elizabeth

On Sep 8, 2016, at 3:38 PM, Joe Oliker <joliker@igsenergy.com> wrote:

Elizabeth,

While Duke has the right to appeal, Commission orders are effective unless otherwise reversed by the court. Therefore, we do not think it is appropriate to include the proposed provision in the confidentiality agreement.

If it was such a concern, Duke should have taken an appeal to the court from the denials of the interlocutory appeal and application for rehearing that were issued in 2014. Duke is effectively asking IGS to wait to enforce existing precedent until there is a ultimately a resolution from the Supreme Court of Ohio (assuming Duke appeals) at some future point. We cannot accept that delay.

If Duke does not agree to execute the agreement that we proposed by Monday, September 12 IGS will file a motion to compel adoption of the agreement. I really don't want to waste the resources going down this road again, but will do so if necessary.

Joseph Oliker

Senior Regulatory Counsel

Direct (614) 659 5069

Mobile (518) 225 9114

Email joliker@igsenergy.com

IGS Energy :: 6100 Emerald Parkway :: Dublin, OH 43016

<http://www.IGSenergy.com>

From: Watts, Elizabeth H [<mailto:Elizabeth.Watts@duke-energy.com>]
Sent: Thursday, September 8, 2016 12:46 PM
To: Joe Olikier
Cc: Kuhnell, Dianne B
Subject: RE: CASE NO.14-2209-EL-ATA PROTECTIVE AGREEMENT EDITED.docx

Joe:

Yes, we litigated all of these issues in the 841 case, but that case has not yet been concluded since rehearing was granted. And we still have an opportunity to appeal the issue. So we are not inclined to waive the argument here.
The reference to 9c is an error that we can correct.

EW

From: Joe Olikier [<mailto:joliker@igsenergy.com>]
Sent: Thursday, September 08, 2016 12:40 PM
To: Watts, Elizabeth H
Cc: Kuhnell, Dianne B
Subject: RE: CASE NO.14-2209-EL-ATA PROTECTIVE AGREEMENT EDITED.docx

***** Exercise caution. This is an EXTERNAL email. DO NOT open attachments or click links from unknown senders or unexpected email. *****

Elizabeth,

I am having difficulty understanding the proposed edit. We litigated the issue with respect to use of documents in future proceedings in the ESP case (under seal of course). There was even an interlocutory appeal, which was rejected by the Commissioners. Is there something else that Duke is concerned about here that I am missing.

Also, the proposed edit mentions section 9(c). I don't see that section.

From: Watts, Elizabeth H [<mailto:Elizabeth.Watts@duke-energy.com>]
Sent: Thursday, September 8, 2016 12:05 PM
To: Joe Olikier
Cc: Kuhnell, Dianne B
Subject: CASE NO.14-2209-EL-ATA PROTECTIVE AGREEMENT EDITED.docx

Joe:

Attached is the Protective Agreement that you had proposed, with some edits. If you wish to use this version, we will require that you retain the edits. Otherwise, the version I sent earlier is the alternative.

Elizabeth

Confidentiality Notice: The information contained in this email may be confidential and/or legally privileged. It has been sent for the sole use of the intended recipient(s). If you are not the intended recipient or authorized to receive information for the recipient, you are hereby notified that any review, use, disclosure, distribution, copying, printing, or action taken in reliance on the contents of this e-mail is strictly prohibited. If you have received this communication in error, please contact the sender by reply email and destroy all copies of the original message.

Confidentiality Notice: The information contained in this email may be confidential and/or legally privileged. It has been sent for the sole use of the intended recipient(s). If you are not the intended recipient or authorized to receive information for the recipient, you are hereby notified that any review, use, disclosure, distribution, copying, printing, or action taken in reliance on the contents of this e-mail is strictly prohibited. If you have received this communication in error, please contact the sender by reply email and destroy all copies of the original message.

AFFIDAVIT OF JOSEPH OLIKER

State of Ohio : S.S.

County of Franklin :

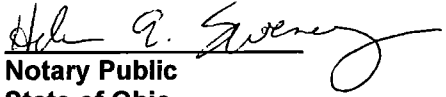
I, Joseph Oliker, counsel for Interstate Gas Supply, Inc. ("IGS" or "IGS Energy") in Case No. 14-2209-EL-ATA, being first duly sworn, depose and say:

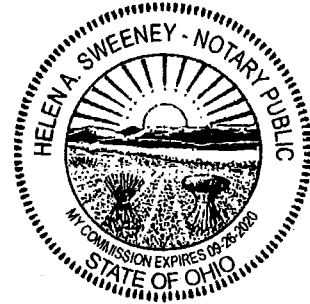
1. On behalf of IGS, I served discovery upon Duke Energy Ohio, Inc. ("Duke") in the above-captioned proceeding that required Duke to produce confidential information.
2. On September 6, 2016, Duke Energy Ohio notified me that portions of the requested discovery could be produced only pursuant to a protective agreement. On that same day, Duke submitted to IGS a proposed protective agreement. After reviewing the proposed agreement, it was apparent that it departed from Commission precedent and would unjustly and unreasonably restrict IGS' ability to utilize confidential information produced in this proceeding.
3. On September 6, 2016, I notified Duke's counsel that the parties should utilize the protective agreement authorized by the Commission in Duke's Electric Security Plan ("ESP") case (Case Nos. 14-841-EL-SSO, *et. al.*) and sent a copy of that agreement for Duke's review and execution. On that same day, Duke indicated that it could not use that agreement unless changes were included.
4. On September 6, 2016, I notified Duke that IGS would consider any proposed changes to the agreement authorized by the Commission in the ESP Case.
5. On September 8, 2016, Duke proposed changes to the protective agreement authorized by the Commission in the ESP Case. Like the initial agreement submitted by Duke, however, the modifications proposed to prohibit IGS from retaining and utilizing confidential information produced in this proceeding in any future proceeding.
6. On September 8, 2016, I notified Duke's counsel that proposed protective agreement departed from Commission precedent and would unjustly and unreasonably restrict IGS' ability to utilize confidential information produced in this proceeding. I notified Duke that if it did not agree to remove the objectionable restriction from the agreement, IGS would move to compel the adoption of a suitable agreement.
7. On September 8, 2016, Duke responded that if IGS would not accept its proposed changes to the agreement authorized by the Commission, it would then prefer to use the initial agreement it proposed on September 6, 2016.
8. On September 8, 2016, I notified Duke that the initial agreement, while containing additional objectionable provisions, also suffered from the same flaws contained in the modified agreement submitted by Duke. Specifically, the agreement would prohibit the utilization of confidential documents produced in this proceeding in future proceedings, as well as require IGS to destroy or return confidential documents produced in this proceeding.

9. Considering Duke's response, I believe that Duke does not intend to enter into a reasonable protective agreement with IGS or to transmit confidential discovery responses to IGS without an order from the Commission compelling Duke to enter into a protective agreement.


Joseph Olikar

Sworn before me and subscribed in my presence this 15th day of September, 2016


Notary Public
State of Ohio



This foregoing document was electronically filed with the Public Utilities

Commission of Ohio Docketing Information System on

9/15/2016 4:20:41 PM

in

Case No(s). 14-2209-EL-ATA

Summary: Motion to Compel Protective Agreement and Memorandum in Support and Request for Expedited Treatment electronically filed by Mr. Joseph E. Oliker on behalf of IGS Energy