

**BEFORE**

**THE PUBLIC UTILITIES COMMISSION OF OHIO**

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

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**DUKE ENERGY OHIO, INC.'S  
MEMORANDUM CONTRA MOTION OF INTERSTATE GAS SUPPLY, INC.  
TO COMPEL PROTECTIVE AGREEMENT**

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Comes now Duke Energy Ohio, Inc., (Duke Energy Ohio or Company) and, for its memorandum in opposition to the Motion to Compel and Request for Expedited Treatment (Motion) filed by Interstate Gas Supply, Inc., (IGS Energy) states as follows.

IGS Energy seeks responses to certain discovery requests it has propounded in this proceeding. Much of the discovery requested consists of highly proprietary and confidential information that must be subject to a protective agreement. The Company provided such an agreement to IGS Energy and IGS Energy declined to agree to the proposed terms. IGS Energy argues that a specific provision contained in the proposed agreement is objectionable and that the debate regarding the provision has already been litigated in a prior case. However, IGS Energy fails to recognize that these issues were raised by the Company in an application for rehearing<sup>1</sup> and the Commission has granted rehearing in that case.<sup>2</sup> Thus, the Commission's decision is not yet final. IGS Energy's reliance on this decision that is not yet final is misplaced.

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<sup>1</sup> *In the Matter of the Application of Duke Energy Ohio for Authority to Establish a Standard Service Offer Pursuant to Section 4928.143, Revised Code, in the Form of an Electric Security Plan, Accounting Modifications and Tariffs for Generation Service*, Case No.14-841-EL-SSO, *et al.*, Application for Rehearing, at p.29 (May 4, 2015).

<sup>2</sup> *Id.*, Entry Granting Rehearing, (May 28, 2015).

Moreover, IGS Energy fails to recognize that each case before the Commission is unique and involves different subject matter and different questions. It is precisely these differences that make it imperative that any discovery produced, which consists of confidential and proprietary information, only be used for the purposes intended. Otherwise, a company may be unfairly compromised by having to unknowingly produce information in one case that is in fact intended to be used in a different case.

This concern is particularly relevant in the context of this proceeding. Duke Energy Ohio has received discovery from a competitive supplier that potentially impacts sales of energy in a competitive market, *i.e.*, PJM Interconnection, LLC. While circumstances may warrant production of such material in this proceeding under appropriate assurances of protection, it would be inappropriate to allow the use of such materials in different cases. IGS Energy's discovery seeks confidential information that could impact its rival competitors. The potential for abuse and for IGS Energy to profit from the intellectual labor of others is precisely why confidential information must be protected.

The proposed confidentiality agreement provision at issue in the motion imposes a requirement that the receiving party may reveal or discover information "only for the purpose of the proceeding." Otherwise, a receiving party must return or destroy the material at the conclusion of the proceeding.

IGS Energy is asking the Commission to order the Company to adopt a protective agreement used in a different context. But there is no requirement that a uniform protective agreement be used in every case. Indeed, it is likely that IGS Energy has signed a wide variety of different agreements for different companies and in different settings throughout its involvement in the regulatory arena. Its request also ignores the provisions of OAC 4901-1-24,

which allow the Commission to impose restrictions on the discovery process for a particular proceeding. This rule acknowledges that discovery matters are case specific – a conclusion that undermines IGS Energy’s attempt to standardize the process.

Nor has IGS Energy explained how it is harmed by adhering to the proffered agreement. Indeed, as appropriate in each case, IGS Energy could propound additional discovery and the Company would then have the opportunity to respond as warranted by the facts and the litigation of each proceeding.

Moreover, IGS Energy argues that the Company’s response is contrary to precedent that IGS Energy believes was established by the Commission in an earlier case. But as stated above, matters related to discovery are unique to each proceeding and to the parties that may participate in each proceeding. While terms of a particular agreement may be appropriate within a particular context, the same terms may be inappropriate in a later case. Such is true in these proceedings where the information to be produced is highly proprietary and concerns the Company’s internal business operations and interactions with competitive suppliers as well as with PJM. Permitting IGS Energy to retain the produced information and potentially to retain it indefinitely for any use as it wishes subjects the Company and potentially other competitors to a significant disadvantage.

There is abundant case law and precedent to establish the Company’s right to protect its own proprietary and confidential information. All of the most prominent treatises on the laws governing the production of confidential business information in discovery support the inclusion of provisions limiting the use of confidential information to the litigation in which that information is produced and requiring the return or destruction of that information at the conclusion of the limitation. *Milgrim on Trade Secrets*, a treatise commonly cited by courts at

all levels of the state and federal court systems, counsels that a typical protective order has “several basic strands. Access to the information is closed and is strictly limited, often in tiered levels\*\*\*, and is to be used solely for the purposes of the litigation.”<sup>3</sup> Thus, *Milgrim’s* recommends that the typical stipulated protective order contain language restricting use of the protected material to the instant proceeding.<sup>4</sup>

This advice is echoed by two of the standard treatises on civil litigation in Ohio, *Baldwin’s Ohio Practice* and Matthew Bender’s *Ohio Forms of Pleading and Practice*. Both treatises, like *Milgrim’s*, offer form Stipulated Protective orders. And both treatises, like *Milgrim’s*, suggest that those protective orders allow the use of confidential information produced in discovery “only for the purposes of this litigation,” and require that any confidential materials “be returned” or “be destroyed.”<sup>5</sup>

The protection the Company is seeking in this proceeding is not unusual or novel and relatively easy for parties to accommodate. IGS Energy does not explain why compliance with the terms is burdensome and merely rests upon the incorrect assertion that the matter has already been determined. But this case presents different circumstances in a more competitive environment and the matters to be resolved are sensitive in a highly competitive environment. As the Commission has undertaken in recent years to foster and support a more competitive retail electric energy service market, such matters take on new significance and sensitivity.

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<sup>3</sup> (Emphasis added.) 3-14 MILGRIM ON TRADE SECRETS §14.02

<sup>4</sup> Id. §14.02[4][g][i].

<sup>5</sup> 3 BALDWIN’S OHIO PRACTICE: CIVIL PRACTICE FORMS §10.13, ¶¶ 3,4 and 6 (2013). See also, William W. Milligan, OHIO FORMS OF PLEADING AND PRACTICE, Form 26.10C, ¶¶ e and (h) (LexisNexis Matthew Bender 2014)(requiring that the recipient of the confidential information use it “solely for the purposes of this litigation” and return or destroy all documents containing confidential information “[w]ithin five days after the entry of a final judgment in this litigation.”)

For the reasons stated herein, Duke Energy Ohio respectfully requests that the Commission deny IGS Energy's motion.

Respectfully submitted,

Duke Energy Ohio, Inc.

Handwritten signature of Elizabeth H. Watts in blue ink, with a horizontal line underneath and the initials "v331c" to the right.

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CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing was delivered by U.S. mail (postage prepaid), personal delivery, or electronic mail, on this 23rd day of September, 2016, to the following parties.

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

**Commission of Ohio Docketing Information System on**

**9/23/2016 4:47:05 PM**

**in**

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

Summary: Memorandum Duke Energy Ohio, Inc.'s Memorandum Contra Motion of Interstate Gas Supply, Inc. to Compel Protective Agreement electronically filed by Dianne Kuhnell on behalf of Duke Energy Ohio, Inc. and Spiller, Amy B. and Watts, Elizabeth H.