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

ENTRY

The Commission finds:

(1) Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company (collectively, FirstEnergy) are electric distribution utilities as defined in R.C. 4928.01(A)(6) and public utilities as defined in R.C. 4905.02 and, as such, are subject to the jurisdiction of this Commission.

(2) R.C. 4928.141 provides that an electric distribution utility shall provide customers within its certified territory a standard service offer (SSO) of all competitive retail electric services necessary to maintain essential electric services to customers, including firm supply of electric generation services. The SSO may be either a market rate offer in accordance with R.C. 4928.142 or an electric security plan (ESP) in accordance with R.C. 4928.143.

(3) On August 4, 2014, FirstEnergy filed an application pursuant to R.C. 4928.141 to provide for an ESP to provide generation pricing for the period of June 1, 2016, through May 31, 2019. As part of the application, FirstEnergy filed direct testimony prepared by Judah Rose, an independent consultant, which includes projections of electricity market prices in support of the application.

(4) Duke Energy Ohio was granted intervention in this proceeding by Entry issued December 2, 2014. Thereafter, on December 18, 2014, Duke made an oral motion to withdraw from the proceeding at a prehearing discovery conference (Tr. Dec. 18, 2014 at 112).

(5) On April 1, 2015, Interstate Gas Supply, Inc. (IGS), filed a motion for a subpoena duces tecum on Duke Energy Ohio, Inc., (Duke) pursuant to Ohio Adm.Code 4901-1-25. The subpoena sought Duke's production of documents including all forecasts of the future price of electricity, natural gas, and coal for the PJM Interconnection region created by Judah Rose since or under his direction since 2010, as well as work papers, within the possession or control of Duke, and an unredacted copy of Mr. Rose's testimony in *In re Duke Energy Ohio*, Case Nos. 11-3549-EL-SSO, et al. (*Duke ESP Case*), and all work papers (collectively, 2011 Rose Testimony). IGS asserted that these topics are relevant to the Commission's decision in this case, as FirstEnergy has put the projected economic value of certain plants at issue in this proceeding. IGS further explained that FirstEnergy has relied upon projections of future market prices of electricity, natural gas, and coal prices created by Mr. Rose to support its application, including the liability of certain plants. IGS further asserted that IGS attempted to obtain the 2011 Rose Testimony while Duke was a party in this proceeding, prior to Duke's withdrawal. IGS noted that FirstEnergy has claimed that it does not have possession or control of the 2011 Rose Testimony. Consequently, IGS asserted that it has no other option but to obtain the documents from Duke, which is now a nonparty. The attorney examiner signed the subpoena the same day.

(6) On April 10, 2015, Duke filed a motion to quash the subpoena. In its memorandum in support, Duke asserted that the 2011 Rose Testimony is irrelevant to this proceeding and is not reasonably calculated to lead to the discovery of admissible evidence. Further, Duke asserted that applicable rules require the subpoena to be quashed because it seeks information that is protected pursuant to statute, it seeks information relating to work done by an expert in a different proceeding, and it seeks competitively sensitive confidential information. Duke added that precedent from numerous jurisdictions agrees that confidential information released in one case should not be available for use in another. Finally, Duke contended that IGS should not be able to use the subpoena process to avoid the confidentiality agreement in a prior proceeding.

(7) On June 2, 2015, a prehearing conference was held to resolve pending discovery matters. At the conference, the attorney

examiners denied Duke's motion to quash the subpoena for the 2011 Rose Testimony. The attorney examiners reasoned that IGS had demonstrated a need for the information and that the information was reasonably calculated to lead to admissible evidence, as it may reflect upon the credibility of Mr. Rose. Moreover, the examiners found a limited burden on Duke because: the information had already been admitted into evidence before the Commission in another proceeding and resides in the Commission's records; the Commission has adequate procedures in place to protect the information; and, the information was already several years old and related to a business with which Duke was no longer engaged (Tr. June 2, 2015 at 68).

(8) Ohio Adm.Code 4901-1-15(A)(3) provides that any party who is adversely affected may take an immediate interlocutory appeal to the Commission from any oral ruling that refuses to quash a subpoena. Any party[1] wishing to take an interlocutory appeal must file the appeal within five days after the ruling is issued.

(9) On June 8, 2015, FirstEnergy and Duke filed interlocutory appeals of the attorney examiners' decision denying Duke's motion to quash the subpoena for the 2011 Rose Testimony.

(10) Thereafter, on June 15, 2015, IGS filed an unopposed motion for extension of the deadline to file its memorandum contra the interlocutory appeals. By Entry issued June 15, 2015, the attorney examiner extended the deadline until June 17, 2015. IGS filed its memorandum contra the interlocutory appeals on June 17, 2015.

(11) In its interlocutory appeal, FirstEnergy asserts that the assumptions provided in the 2011 Rose Testimony are proprietary and that Mr. Rose is prohibited contractually from sharing that information; consequently, FirstEnergy asserts that it is unfair to allow IGS to use the 2011 Rose Testimony without FirstEnergy having the ability to provide the context of the testimony. Second, FirstEnergy asserts that the attorney examiners' ruling failed to use the correct legal standard, which requires IGS to demonstrate a substantial need for the 2011

1 The Commission notes that Ohio Adm.Code 4901-1-15 only permits a "party" to a proceeding to file an interlocutory appeal. Duke is not a party to this proceeding. However, the Commission will waive this requirement to the extent necessary to rule on Duke's interlocutory appeal.

Rose Testimony. FirstEnergy contends that IGS has no substantial need for the information because Rose has already produced extensive data, including numerous forecasts. Thirdly, FirstEnergy claims that the attorney examiners' ruling will result in parties participating in future Commission proceedings being less willing to produce confidential information voluntarily, for fear that any confidential document on file at the Commission can be obtained regardless of preexisting agreements in a wholly different proceeding.

(12) In its interlocutory appeal, Duke asserts that the attorney examiners' ruling was unreasonable and prejudicial, contrary to precedent, and failed to manage properly IGS' need for the confidential testimony against the substantial burden imposed on Duke. In support of its application, Duke first argues that the ruling is contrary to Commission precedent because it contradicts the attorney examiners' prior oral ruling in this proceeding on December 18, 2014, whereby the attorney examiners granted a motion to quash a subpoena as to confidential information sought from non-parties, and directed IGS to propound discovery on Duke, which was then a party.

Next, Duke argues that the attorney examiners' ruling failed to weigh properly the burden imposed on Duke. Instead, Duke argues that the attorney examiners appear to have concluded that there was no meaningful burden on Duke because: first, the 2011 Rose Testimony was already filed, under seal, with the Commission's Docketing Division; second, the 2011 Rose Testimony was created several years ago; third, Duke was no longer in the generation business; and, finally, the Commission has sufficient protection for confidential information. Duke argues that the attorney examiners' conclusions are incorrect for several reasons. The existence of information in Docketing's files has no discernable favorable impact on a nonparty that previously shared the information only under very strict parameters. The 2011 Rose Testimony, although several years old, provides forecasts extending into 2021. Duke claims that, although it is no longer in the generation business, it has the right to seek approval of new generation facilities. Duke also contends that the Commission's protection of confidential information is not sufficient as the Companies' information is now at risk in this proceeding. Duke adds that IGS has failed to make a substantial showing of need as

FirstEnergy has already provided IGS with copies of multiple prior forecasts.

Finally, Duke argues that the attorney examiners' ruling was unreasonable and prejudicial to the interests of Duke. Duke explains that the attorney examiners ruled previously that the burden on non-parties to respond to subpoenas for confidential information outweighed IGS' need. Duke continues that the attorney examiners did not investigate whether the information had ever been provided to the Commission, the age of the forecasts, or the current or future business interests of the non-parties. Duke adds that the attorney examiners did not consider the sufficiency of the Commission's confidentiality protections.

(13) On June 17, 2015, IGS filed its memorandum contra the interlocutory appeals. First, IGS argues that, after balancing the burden on Duke against IGS' need for the 2011 Rose Testimony, the attorney examiners correctly determined that the balance weighs in favor of production. More specifically, IGS argues that FirstEnergy has failed to demonstrate it has standing to challenge the standard applied by the attorney examiners. IGS adds that requiring Duke to produce the 2011 Rose Testimony will not prejudice FirstEnergy because the attorney examiners have not ruled on its admissibility. IGS argues that the attorney examiners applied the correct standard of review for a motion to quash and notes that the Commission is not bound to the Ohio Rules of Evidence, and the attorney examiners correctly determined that IGS' interest in receiving the 2011 Rose Testimony outweighed the burden on Duke. Further, IGS points out that the requirement to demonstrate a substantial need stems from Civ.R. 45(C)(5), which pertains only to motions to quash subpoenas that request information from non-retained experts or unduly burdensome requests—neither of which apply here. IGS continues that, even if this rule did apply, IGS has, in fact, demonstrated a substantial need for the 2011 Rose Testimony as it is the exclusive property of Duke and IGS cannot reproduce it because it is based upon Mr. Rose's individual analysis. IGS adds that the burden on Duke is minimal as the Docketing Division already has the 2011 Rose Testimony; the attorney examiners required the 2011 Rose Testimony to be submitted under seal; the 2011 Rose Testimony is nearly five years old; and Duke is no longer in the

generation business, making the potential harm minimal or non-existent.

In its second argument, IGS contends that the attorney examiners' ruling will not have an impact on parties' willingness to produce truthful and complete information in the discovery process. IGS argues that FirstEnergy's argument suggests that the attorney examiners' ruling will cause parties to violate their ethical duty to provide complete and truthful discovery responses, exposing their counsel to sanctions. IGS adds that the attorney examiners' ruling clearly required that the information would be held under seal to protect it from public disclosure.

In its third argument, IGS maintains that the ruling is not contrary to the attorney examiners' prior oral ruling in this case, as the attorney examiners clarified to Duke that no ruling was being made with respect to discovery on Duke as a non-party. IGS adds that Duke is not similarly situated to non-parties discussed in the attorney examiners' prior ruling as none of these parties relied upon Mr. Rose's forecasts in an Ohio Commission proceeding. Further, IGS notes that the Commission has held recently that discovery produced in one case may be used in future cases under seal and subject to normal evidentiary objections, citing *In re Duke Energy Ohio*, Case Nos. 14-841-EL-SSO, et al., Entry (Aug. 27, 2014) at 3-6; Entry on Rehearing (Oct. 22, 2014) at 4-7.

In its fourth argument, IGS claims that the attorney examiners' ruling is not contrary to the State or Federal Civil rules. More specifically, IGS argues that FirstEnergy has claimed that Civ.R. 26(B)(5)(b) limits discovery of an expert's opinions that have been given previously to a party or those to be given at trial, but has failed to cite any case that has limited disclosure of prior expert reports. IGS also cites several cases it claims have required experts to disclose their prior reports.

In its fifth and final argument, IGS asserts that FirstEnergy failed to present properly its claim that the ruling is unworkable, and that the Commission has authority to require Mr. Rose to discuss his prior forecast with any party. Initially, IGS asserts that FirstEnergy failed to attach the confidentiality agreement between Mr. Rose and Duke to its pleading

pursuant to Civ.R. 10(D). IGS goes on to argue that, even though Mr. Rose's affidavit has indicated he cannot discuss the proprietary information in the 2011 Rose Testimony, he has failed to state whether his confidentiality agreement allows for disclosure pursuant to a court order—which IGS indicates is a provision contained in Mr. Rose's confidentiality agreement with FirstEnergy.

IGS adds that the Commission should not stay the attorney examiners' ruling pending resolution of this appeal on the basis that Duke has not demonstrated a substantial likelihood of success on the merits.

(14) The Commission finds that interlocutory appeal should be denied and affirms the decision of the attorney examiners to deny the motion to quash. Initially, the Commission notes that the standard for quashing a subpoena is set forth in Ohio Adm.Code 4901-1-25(c), which provides, in pertinent part, that an attorney examiner may "quash a subpoena if it is unreasonable or oppressive." Additionally, FirstEnergy has argued that the attorney examiners failed to follow the Ohio Rules of Civil Procedure in determining whether the subpoena should be quashed. In making our determination, the Commission notes that we are required to abide by Ohio Adm.Code 4901-1-25(c) and, while the Commission, as an administrative agency, is not bound by the Ohio Rules of Civil Procedure, we look to them as persuasive authority. Based upon the circumstances in this case, the Commission does not find that the subpoena at issue is unreasonable or oppressive.

The Commission notes that, as argued by IGS, FirstEnergy's SSO application puts at issue the projected economic value of certain generation plants. This projected economic value of the generation plants is strongly correlated to projections of future market prices. FirstEnergy selected Mr. Rose, an independent consultant, as a witness to testify regarding these projections of future market prices and pre-filed his direct testimony on August 4, 2014, when it filed its application in this proceeding. Therefore, as Mr. Rose is subject to cross-examination in this proceeding, parties are entitled to discover information related to the credibility of Mr. Rose, including the ability of Mr. Rose to reliably forecast future market prices. The 2011 Rose Testimony, which consists of market projections previously

submitted to the Commission by Mr. Rose in the *Duke ESP Case*, may lead to the discovery of admissible evidence in this case, such as evidence reflecting whether the methodology used by Mr. Rose to project market prices is reliable or whether Mr. Rose consistently applies the same methodology. Further, the 2011 Rose Testimony may lead to admissible evidence regarding the sensitivity of the future market price projections to the assumptions provided to Mr. Rose by the utility sponsoring his testimony. All of these issues may reflect upon the credibility of Mr. Rose's testimony in this proceeding.

Further, the Commission rejects FirstEnergy's claim that the attorney examiners applied the incorrect standard in denying the motion to quash. Ohio Adm. Code 4901-1-25(C) provides that a subpoena should be quashed if it is "unreasonable or oppressive." We agree with FirstEnergy that the Commission should consider whether IGS has demonstrated a "substantial need" for this information (Civ.R. 45(C)(5)) as well as whether the subpoena subjects Duke to an "undue burden" (Civ.R. 45(C)(3)(d)). However, we find that the attorney examiners correctly ruled that IGS has demonstrated a substantial need for the 2011 Rose Testimony (Tr. June 2, 2015 at 68). The 2011 Rose Testimony is unique in that it was presented in similar circumstances as this case; the information was submitted by an Ohio electric distribution utility in support of a proposed ESP. FirstEnergy has not demonstrated that any other projections prepared by Mr. Rose or by ICF International and provided by FirstEnergy to IGS in discovery are as comparable to Mr. Rose's testimony filed in this case as the 2011 Rose Testimony. Further, as the 2011 Rose Testimony is currently under seal, IGS cannot obtain its own expert to replicate the 2011 Rose Testimony to test the consistency of Mr. Rose's testimony in this case. Accordingly, the Commission finds that IGS has demonstrated a substantial need for the 2011 Rose Testimony.

Further, we affirm the attorney examiners' ruling that the subpoena does not subject Duke, a nonparty to this proceeding, to an undue burden. The Commission notes that the "burden" cited by the attorney examiners in the June 2, 2015 ruling is not the burden on Duke of copying or physically providing the information to IGS. The burden reflects the impact on Duke, a nonparty, of providing confidential information to IGS for use

in this proceeding. However, the Commission finds that the burden on Duke in this case is minimal. This is not a case where a nonparty's confidential and proprietary information has been subpoenaed for use in some proceeding in a faraway court. As the examiners pointed out in the June 2, 2015 ruling, the information sought by IGS has already been filed with the Commission and admitted into the record of the *Duke ESP Case*. Duke has shared that information with an unknown number of other parties in that case. The Commission relied upon this information in approving the ESP eventually proposed by Duke. The information continues to reside, under seal, in the Commission's docket. The Commission's procedures for protecting confidential information were sufficient when it suited Duke in the *Duke ESP Case* and the procedures remain sufficient today. In fact, IGS has been directed by the attorney examiners to submit to a protective agreement consistent with the agreement used by Duke and the intervenors in the *Duke ESP Case* (Tr. June 2, 2015 at 68-69). We also note that the Commission has determined previously that a protective agreement may not contain a clause prohibiting a recipient of the confidential information from using the information in a subsequent proceeding, but that intervenors may retain a copy of such information and the Commission will rule upon any future attempted use within the context of that subsequent proceeding. *In re Duke Energy Ohio*, Case Nos. 14-841-EL-SSO, et al., Entry (Aug. 27, 2014) at 5-6; Entry on Rehearing (Oct. 22, 2014) at 5.

Further, the Commission agrees with the attorney examiners that the age of the confidential information and the fact that Duke is no longer engaged in the business of providing generation are relevant factors in considering the burden on Duke. The Commission has consistently held that confidential information loses its value over time. The projections in the 2011 Rose Testimony were prepared sometime in 2010 or 2011, and the age of the projections is certainly relevant in determining the burden on Duke. Likewise, the Commission notes that Duke has fully divested its generation assets in Ohio. The record is not clear that the aging generation market projections in the 2011 Rose Testimony have any economic value to a monopoly distribution and transmission electric utility such as Duke, which also reduces any potential burden upon Duke.

The Commission also disagrees with Duke's claim that the June 2, 2015 ruling is inconsistent with the attorney examiners' previous ruling, made on December 18, 2014, regarding other confidential projections prepared by Mr. Rose on behalf of various unnamed nonparties. First, the attorney examiners explicitly excluded the 2011 Rose Testimony from the scope of the December 18, 2014 ruling (Tr. Dec. 18, 2014 at 54). Second, Duke should be distinguished from the various unnamed nonparties at issue in the December 18, 2014 ruling. The December 18, 2014 ruling was made in response to a broad request in a motion to compel by IGS for any market projections prepared by Mr. Rose or his firm (Tr. Dec. 18, 2014 at 38-40, 47-50, 53-54). There is no information in the record as to the identity of these unnamed nonparties, whether they are located in this state, or whether they have any connection with Ohio at all. Duke is different. Duke is a public utility regulated by this Commission and regularly practices before this Commission, as opposed to an unnamed nonparty from an unknown location required to incur expenses protecting its interests before an unfamiliar regulatory body. Further, on December 18, 2014, Duke was, in fact, a party to this proceeding, and Duke acknowledges that it subsequently withdrew from this proceeding solely to frustrate IGS' discovery request (Tr. June 2, 2015 at 28).

Additionally, regarding FirstEnergy's argument that it will be unable to elicit testimony from Mr. Rose in order to put the 2011 Rose Testimony in context due to Mr. Rose's contract regarding confidentiality, the Commission finds that this issue is not ripe. As the attorney examiners noted in their ruling, no decision has been made with respect to admissibility of the 2011 Rose Testimony at the hearing (Tr. June 2, 2015 at 72). The Commission and the attorney examiners will consider this issue if and when it arises during the hearing. However, the Commission notes that, in considering the prejudice that may result to either FirstEnergy or IGS, FirstEnergy is the party that put the projected economic value of the plants at issue and FirstEnergy selected Mr. Rose as a witness to testify regarding market price projections which underlie the economic value of the plants.

Finally, although we are mindful of FirstEnergy's claim that this decision may have a potential chilling effect on the use of

confidential information on future proceedings, the Commission must balance this potential with the rights of parties to cross-examine witnesses in adversarial proceedings. Commission proceedings depend heavily on expert testimony prepared for a specific Commission proceeding by both utilities and intervenors. We have been, and continue to be, skeptical of the use of claims of confidentiality to preclude cross-examination of witnesses on prior statements and testimony made before this Commission.

Based on the foregoing, the Commission finds that the subpoena at issue is neither unreasonable nor oppressive and may lead to the discovery of relevant, admissible information in this proceeding. Accordingly, the interlocutory appeals filed by FirstEnergy and Duke are denied, and the attorney examiners' denial of the motion to quash is affirmed.

(15) In light of our decision to affirm the decision of the attorney examiners to deny the motion to quash, the Commission finds that Duke's motion for a stay should be denied. In light of the fact that Commission orders are effective when issued by the Commission, Duke is directed to comply with the subpoena immediately.

It is, therefore,

ORDERED, That the interlocutory appeals filed by FirstEnergy and Duke be denied and the attorney examiners' denial of the motion to quash is affirmed. It is, further,

ORDERED, That Duke must comply with the subpoena immediately. It is, further,

ORDERED, That a copy of this Entry be served upon all parties of record.

THE PUBLIC UTILITIES COMMISSION OF OHIO

Andre T. Porter, Chairman

Lynn Slaby

M. Beth Trombold

Asim Z. Haque

Thomas W. Johnson

MWC/GAP/vrm/sc

Entered in the Journal
JUL 22 2015

Barcy F. McNeal
Secretary

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CONCURRING OPINION OF COMMISSIONER LYNN SLABY

I concur with the above order. I write separately, only to point out that it is only because of the uniqueness of the facts and circumstances of this case that I do concur. Our rules provide that the Commission may quash a subpoena if it is unreasonable or oppressive. In making that determination, I believe the Commission must use the utmost caution when deciding each case carefully on its own facts and circumstances.

Lynn Slaby, Commissioner

LS/sc

Entered in the Journal

JUL 22 2015

Barcy F. McNeal

Barcy F. McNeal
Secretary