

BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of Application of Duke  
Energy Ohio, Inc. for Approval of a  
Market Rate Offer to Conduct a  
Competitive Bidding Process for a  
Standard Service Offer Electric  
Generation Supply, Accounting  
Modifications, and Tariffs for  
Generation Service.

Case No. 10-2586-EL-SSO

ENTRY

The attorney examiner finds:

- (1) Duke Energy Ohio, Inc. (Duke) is a public utility as defined in Section 4905.02, Revised Code, and, as such, is subject to the jurisdiction of this Commission.
- (2) On November 15, 2010, Duke filed an application for a standard service offer (SSO) pursuant to Section 4928.141, Revised Code. This application is for a market rate offer in accordance with Section 4928.142, Revised Code.
- (3) By entry dated November 16, 2010, the attorney examiner established December 7, 2010, as the deadline by which parties were required to file motions to intervene in this proceeding. The following parties timely filed motions to intervene in this proceeding:

- Industrial Energy Users-Ohio
- The Ohio Energy Group
- Ohio Partners for Affordable Energy
- The Kroger Company
- Ohio Environmental Council
- FirstEnergy Solutions Corp.
- The Greater Cincinnati Health Council
- Constellation NewEnergy, Inc. and Constellation Energy Commodities Group, Inc.
- Ohio Consumers' Counsel
- Duke Energy Retail Sales, LLC

- Dominion Retail, Inc.
- Wal-Mart Stores East, LP and Sam's East, Inc.
- Ohio Manufacturers' Association
- Retail Energy Supply Association
- Columbus Southern Power and Ohio Power Company
- AEP Retail Energy Partners LLC
- City of Cincinnati
- Eagle Energy, LLC
- People Working Cooperatively, Inc.
- Ohio Advanced Energy

No one filed memoranda contra to these motions to intervene. The attorney examiner finds that these motions should be granted.

- (4) Motions for admission *pro hac vice* were filed on behalf of the following individuals:

- Robert A. Weishaar, Jr.
- David C. Rinebolt
- Cynthia A. Fonner Brady
- Rick D. Chamberlain

No one filed memoranda contra these motions. The attorney examiner finds that these motions should be granted.

- (5) On December 3, 2010, Duke filed a motion requesting that its proposed legal notice be considered sufficient. In its motion, Duke states that the legal notice proposed in its application contained a typographical error indicating that its new SSO would take effect January 12, 2012. This date was also included in the legal notice ordered in the November 16, 2010, attorney examiner entry. Upon further review, Duke realized that the January 12, 2012, date was in error because, as delineated in the application itself, Duke would like the new SSO to commence on January 1, 2012. Duke requests that the legal notice ordered in the November 16, 2010, entry be modified to contain the correct date of January 1, 2012, and that, with this modification, the publication be found to substantially comply with the November 16, 2010, entry. No memorandum contra this motion was filed. The attorney examiner finds that Duke's motion is reasonable and should be granted. Accordingly, Duke should publish its notice, as previously ordered, with the corrected effective date of January 1, 2012.

- (6) On December 3, 2010, Industrial Energy Users-Ohio (IEU) filed a motion to compel discovery. Specifically, IEU alleges that Duke has not been provided substantive responses to its first set of discovery which contains 24 interrogatories and 13 requests for production. IEU's first set of discovery requests relate to Duke's proposed transition from the Midwest Independent Transmission System Operator (MISO) to the PJM Interconnection (PJM) and can be broken down into the following five categories:
- (a) Category 1: interrogatories 1-8 and 14 and requests for production 1-4 and 8;
  - (b) Category 2: interrogatories 9-12 and requests for production 5 and 6;
  - (c) Category 3: interrogatory 13 and request for production 7;
  - (d) Category 4: interrogatories 15-20 and requests for production 9-11; and
  - (e) Category 5: interrogatories 21-24 and requests for production 12 and 13.
- (7) Duke filed its response to IEU's motion to compel on December 7, 2010. Generally, Duke objects to IEU's discovery requests on grounds of relevance, vagueness, and privilege.
- (8) In the discovery grouped together as Category 1, IEU requests documents and information relating to commitments or concessions made by MISO to Duke, or commitments or concessions requested by Duke relating to Duke's move to PJM, as well as any supporting documentation. In support of its discovery requests, IEU asserts that this information is directly relevant to Duke's ability, as part of its MRO, to comply with the statutory requirements of Sections 4928.142 and 4928.17, Revised Code, which require Duke to be a member of an regional transmission organization (RTO) with sufficient market monitor functions and require Duke to demonstrate that it has a sufficient corporate separation plan and policies in place.

In response, Duke asserts that this request is overly broad, unduly burdensome, and is unlikely to lead to the discovery of admissible

evidence. Moreover, Duke argues that this information is not relevant to the Commission's consideration of Duke's MRO application. Finally, Duke asserts that, even if commitments or concessions were made by MISO to encourage Duke to stay part of MISO, those are irrelevant because Duke has already made the decision to move to PJM.

Upon review of the arguments regarding this category of discovery, the attorney examiner is mindful of the discovery standard contained in Rule 4901-1-16, Ohio Administrative Code, which provides that "any party to a commission proceeding may obtain discovery of any matter, not privileged, which is relevant to the subject matter of the proceeding. It is not a ground for objection that the information sought would be inadmissible at the hearing, if the information sought appears reasonably calculated to lead to the discovery of admissible evidence." The attorney examiner believes that IEU's discovery requests in Category 1 are reasonably calculated to lead to the discovery of information which may be admissible in the Commission's consideration of Duke's MRO application. Accordingly, with respect to interrogatories 1-8 and 14 and requests for production 1-4 and 8, IEU's motion to compel is granted.

- (9) With respect to the discovery requests contained in Category 2, IEU requests any studies or analysis Duke has conducted or commissioned regarding any revenues Duke may receive by either remaining a member of MISO or by migrating to PJM. IEU asserts that the discovery requests at issue in its motion to compel go directly to the quantity and quality of competition in the wholesale market.

In its response, Duke asserts that these requests are overly broad and unduly burdensome because the information sought is not relevant. Duke also asserts that responses to these requests would be privileged, although Duke does not elaborate on its claim of privilege.

In considering this set of discovery requests, the attorney examiner finds that these requests may lead to the discovery of admissible evidence in this case, inasmuch as incentives provided by MISO or PJM may address Duke's ability to maintain corporate separation and the RTO's ability to maintain the market monitor function.

Moreover, because Duke did not elaborate on its claim of privilege, the attorney examiner is unable to consider Duke's assertion of privilege. Accordingly, IEU's motion to compel with regard to interrogatories 9-12 and requests for production 5 and 6 is reasonable and should be granted.

- (10) In Category 3, IEU requests any documents that establish internal protocols or guidelines for communications with the management or directors of any RTO. In support its discovery requests, IEU states that its requests investigate whether Duke's interactions with RTO officials may have any consequences on the wholesale market.

In response, Duke asserts that this request is overly broad and unduly burdensome, given that it seeks information that is not relevant to this proceeding, nor does it seek evidence that is likely to lead to the discovery of admissible evidence.

In considering this request, the attorney examiner finds that the discovery request set forth in Category 3 is reasonably calculated to lead to the discovery of admissible evidence, as this evidence may clarify how Duke interacts with its RTO and how it interacts with the market monitor. Accordingly, with respect to interrogatory 13 and request for production 7, IEU's motion to compel is reasonable and should be granted.

- (11) In Category 4, IEU requests information on any studies or analysis Duke has performed or commissioned regarding the impact of its transition from PJM to MISO on: MISO, MISO's members, and PJM's members.

In response, Duke argues that this request is overly broad and unduly burdensome. Duke also argues that the impact on MISO, its members, or PJM's members, of Duke's potential transition to PJM is not relevant to the instant case.

In considering the requests for production and interrogatories contained in Category 4, the attorney examiner agrees with Duke, that these requests are not reasonably calculated to lead to the discovery of evidence that is admissible in the current proceeding. Therefore, IEU's motion to compel is denied with respect to interrogatories 15-20 and requests for production 9-11.

- (12) In Category 5, IEU requests any studies or analysis conducted or commissioned by Duke or its affiliates regarding any revenues Duke's affiliated companies will receive if Duke remains a member of MISO or transitions to PJM.

Duke responds to these requests by arguing that they are overly broad and unduly burdensome, given that they seek information that is neither relevant nor likely to lead to the discovery of admissible evidence. Duke also argues that these requests are beyond the scope of discovery allowed by Ohio law and may contain privileged information.

In considering these requests, the attorney examiner finds that these requests may lead to the discovery of admissible evidence. However, the attorney examiner believes that this request should be limited to require Duke to produce only information and documents within the possession of Duke Energy Ohio, not its affiliates. Accordingly, with this limitation in place, IEU's motion to compel is reasonable and should be granted, with respect to interrogatories 21-24 and requests for production 12 and 13.

- (13) As a final matter, the attorney examiner reminds the parties that admissibility of any evidence will be determined at the hearing in this matter. Moreover, the attorney examiner directs the parties to work collaboratively to enter into any necessary protective agreements that will facilitate the necessary exchange of information.
- (14) As a final matter, the attorney examiner finds that Duke should respond to IEU's discovery request on or before December 16, 2010.

It is, therefore,

ORDERED, That the motions to intervene filed by various parties be granted in accordance with finding (3). It is, further,

ORDERED, That the motions for admission *pro hac vice* filed on behalf of various individuals be granted in accordance with finding (4). It is, further,

ORDERED, That Duke's motion regarding the sufficiency of its legal notice be granted in accordance with finding (5). It is, further,

ORDERED, That Duke respond to IEU's discovery request on or before December 16, 2010. It is, further,

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

THE PUBLIC UTILITIES COMMISSION OF OHIO

Katie L. Stenman  
By: Katie L. Stenman  
Attorney Examiner

/dah<sup>PD</sup>

Entered in the Journal

DEC 13 2010

Renee J. Jenkins

Renee J. Jenkins  
Secretary