

BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of Duke)
Energy Ohio, Inc. to Establish its Fuel and) Case No. 11-974-EL-FAC
Economy Purchased Power Component of)
its Market-Based Standard Service Offer for)
2011.)

In the Matter of the Application of Duke)
Energy Ohio, Inc. to Establish its System) Case No. 11-975-EL-RDR
Reliability Tracker of its Market-Based)
Standard Service Offer for 2011.)

OPINION AND ORDER

The Public Utilities Commission of Ohio, having considered the record in these matters and the stipulation and recommendation submitted by the signatory parties, and being otherwise fully advised, hereby issues its opinion and order.

APPEARANCES:

Amy B. Spiller, Rocco O. D'Ascenzo, Elizabeth H. Watts, and Jeanne W. Kingery, 139 East Fourth Street, Cincinnati, Ohio 45201, on behalf of Duke Energy Ohio, Inc.

Mike DeWine, Ohio Attorney General, Thomas W. McNamee and Stephen A. Reilly, Assistant Attorneys General, 180 East Broad Street, Columbus, Ohio 43215, on behalf of Staff of the Commission.

Bruce J. Weston, Ohio Consumers' Counsel, by Joseph P. Serio, Assistant Consumers' Counsel, 10 West Broad Street, Suite 1800, Columbus, Ohio 43215, on behalf of the residential utility consumers of Duke Energy Ohio, Inc.

OPINION:

I. Background

Duke Energy Ohio, Inc. (Duke) is a public utility as defined under Section 4905.02, Revised Code, and, as such, is subject to the jurisdiction of this Commission.

By opinion and order issued on October 24, 2007, in *In the Matter of the Application of The Cincinnati Gas & Electric Company to Modify Its Nonresidential Generation Rates to Provide for Market-Based Standard Service Offer Pricing and to Establish an Alternative Competitive-Bid*

Service Rate Option Subsequent to the Market Development Period, Case Nos. 03-93-EL-ATA, et al., the Commission ordered The Cincinnati Gas & Electric Company, now known as Duke, to establish both a fuel and economy purchased power component (FPP) and a system reliability tracker component (SRT) of its market-based standard service offer. The FPP consists of fuel and purchased power expenses, a reconciliation adjustment, a system loss adjustment, and emission allowances. The SRT permits Duke to apply annually to the Commission to purchase power to cover peak and reserve capacity requirements and to flow through those actual costs on a dollar-for-dollar basis.

The Commission approved the creation of Riders price-to-compare (PTC)-FPP and system resource adequacy (SRA)-SRT as a continuation of its FPP and SRT in *In the Matter of the Application of Duke Energy Ohio, Inc., for Approval of an Electric Security Plan*, Case Nos. 08-920-EL-SSO, et al (08-920). Both Rider PTC-FPP and Rider SRA-SRT are subject to audit by the Commission. The last such audit was accomplished in *In the Matter of the Application of Duke Energy Ohio, Inc. to Establish its Fuel and Economy Purchased Power Component of its Market-Based Standard Service Offer for 2010*, Case Nos. 10-974-EL-FAC, et al.

On November 18, 2009, the Commission issued RFP No. U09-FPP-1 in *In the Matter of the Application of Duke Energy Ohio, Inc. to Establish its Fuel and Economy Purchased Power Component of its Market-Based Standard Service Offer for 2009*, Case Nos. 09-974-EL-FAC, et al. (09-974), in order to obtain qualified independent auditing services for annual audits of Riders PTC-FPP and SRA-SRT for calendar years 2009, 2010, and 2011, Audits 1, 2, and 3, respectively. The RFP stated that the Commission assumed that the auditor selected to perform Audit 1 would also perform Audits 2 and 3. However, the Commission reserved the right to rescind the award of Audits 2 and 3. On January 7, 2010, in 09-974, the Commission selected Schumaker and Company (Schumaker) to perform the audit of Rider PTC-FPP and Rider SRA-SRT for the calendar year 2009.

By entry issued on January 19, 2011, in the above-captioned cases, the attorney examiner directed Schumaker to complete Audits 2 and 3, and to file its final audit report, Audit 3, for calendar year 2011, by May 10, 2012. On May 10, 2012, both a redacted and an unredacted version of Schumaker's management/performance (m/p) and financial audit of Duke's Riders PTC-FPP and SRA-SRT for the year 2011 (audit report), were filed.

On March 1, 2012, Duke filed its application requesting approval of Rider PTC-FPP prices and Rider SRA-SRT charges for the period ending December 31, 2011. Duke also filed the testimony of William Wathen and Gregory Cecil. Duke supplemented Mr. Wathen's testimony on September 7, 2012. Duke also filed the testimony of Salil Pradhan was also filed on September 7, 2012.

By entry issued on June 12, 2012, the attorney examiner granted the motion to intervene filed by the Ohio Consumers' Counsel (OCC) and set these matters for a hearing on August 1, 2012. Subsequently, by entry issued on July 24, 2012, Duke's motion to extend the procedural schedule and reschedule the hearing to September 18, 2012, was granted. The hearing, which convened on September 18, 2012, was continued to October 10, 2012.

The hearing was reconvened on October 10, 2012, at the offices of the Commission. At the hearing, Duke submitted a stipulation and recommendation (stipulation) which was filed in these dockets on October 9, 2012, as corrected on that same day. The stipulation was signed by Duke and Staff (Jt. Ex. 1). OCC neither opposed nor supported the stipulation (October 10, 2012, Tr. at 12). In addition, the following exhibits were entered into the record without objection: the quarterly rider PTC-FPP filings filed on March 1, 2011, June 1, 2011, and August 31, 2011 (Duke Exs. 1A-1C); Duke's March 1, 2012, application (Duke Ex. 2); the testimony of Duke's witnesses (Duke Exs. 3-7, 3A, and 5A); and the redacted and unredacted versions of the audit report filed on May 10, 2012 (Comm.-ordered Exs. 1 and 1A).

II. Motions for Protective Order

On September 7, 2012, Duke filed a motion for protective order regarding certain information contained in Salil Pradhan's testimony and attachments. Specifically, Duke argues that the information contained in these documents, concerning Duke's policy and negotiation strategies with respect to coal contracts, is confidential trade secret information, including Duke's weighted average cost of inventory for a specific generating station, coal contract information related to governmental imposition claims, accounting adjustments, and business strategy. Duke asserts that, if this information is disclosed, its competitors would have access to competitively sensitive, confidential information, which would put Duke at a competitive disadvantage in its coal contract negotiations. No one filed memoranda contra Duke's motions for protective order filed on September 7, 2012.

Section 4905.07, Revised Code, provides that all facts and information in the possession of the Commission shall be public, except as provided in Section 149.43, Revised Code, and as consistent with the purposes of Title 49 of the Revised Code. Consistent the Ohio Supreme Court's interpretation of Section 149.43, Revised Code,¹ Rule 4901-1-24, Ohio Administrative Code (O.A.C.), allows the Commission to issue an order to protect the confidentiality of information contained in a filed document, "to the extent that state or federal law prohibits release of the information, including where the information is deemed . . . to constitute a trade secret under Ohio law, and where non-disclosure of the information is not inconsistent with the purposes of Title 49 of the Revised Code." The

¹ *State ex rel. Besser v. Ohio State*, 89 Ohio St.3d 396, 399, 732 N.E.2d 373 (2000).

Commission has examined the information covered by the motion for protective order filed by Duke, as well as the assertions set forth in the supportive memorandum. Applying the requirements that the information have independent economic value and be the subject of reasonable efforts to maintain its secrecy pursuant to Section 1333.61(D), Revised Code, as well as the six-factor test set forth by the Ohio Supreme Court,² the Commission finds that the information contained in Duke witness Pradhan's testimony and attachment constitutes trade secret information. Release of this information is, therefore, prohibited under state law. Therefore, the Commission finds that Duke's motion for protective order filed on September 7, 2012, is reasonable and should be granted with regard to the confidential information contained in Mr. Pradhan's testimony and attachment filed under seal on September 7, 2012. Rule 4901-1-24(F), O.A.C., provides that, unless otherwise ordered, protective orders issued pursuant to Rule 4901-1-24(D), O.A.C., automatically expire after 18 months. Therefore, confidential treatment shall be afforded for a period ending 18 months from the date of this order or until May 28, 2014. Until that date, the docketing division should maintain, under seal, the information filed confidentially.

By entry issued on June 12, 2012, the attorney examiner granted Duke's motion for protective treatment regarding certain information contained in the audit report filed May 10, 2012, as well as the attachment to Mr. Wathen's initial testimony filed on March 1, 2012, for a period of 18 months, ending on December 12, 2013. In keeping with our ruling above, and in order to synchronize the expiration dates of the protective orders issued in these cases, the Commission finds that protective treatment regarding the information contained in the audit report filed May 10, 2012, as well as the attachment to Mr. Wathen's initial testimony filed on March 1, 2012, should be extended to May 28, 2014.

Rule 4901-1-24(F), O.A.C., requires a party wishing to extend a protective order to file an appropriate motion at least 45 days in advance of the expiration date. Therefore, if Duke wishes to extend this confidential treatment, it should file an appropriate motion at least 45 days in advance of the expiration date. If no such motion to extend confidential treatment is filed, the docketing division may release this information without prior notice to Duke.

III. Summary of the Audit Report and Stipulation

The audit report submitted by Schumaker presents the results of Schumaker's m/p and financial audit for Riders PTC-FPP and SRA-SRT for the year 2011 (Comm.-ordered Ex. 1). In the audit report, Schumaker discusses Duke's Fuel Forecasting and Procurement in Chapter III, Power Plant Performance in Chapter IV, Fuel Handling and Inventory Management in Chapter V, Environmental Compliance in Chapter VI, and Midwest

² See *State ex rel. The Plain Dealer v. Ohio Dept. of Ins.*, 80 Ohio St.3d 513, 524-525, 687 N.E.2d 661 (1997).

Independent System Operator-Related Charges in Chapter VIII, and the auditor had no recommendations for these operations (Comm.-ordered Ex. 1 at 39, 67, 93, 98, 108). However, Schumaker set forth recommendations for the other areas of Duke's operations in the audit report.

As stated previously, a stipulation, signed by Duke and Staff, was submitted on the record, at the hearing held on October 10, 2012. The stipulation was intended by the signatory parties to resolve all outstanding issues in these proceedings. OCC neither opposed nor supported the stipulation (October 10, 2012, Tr. at 12). The stipulation includes provisions that address the recommendations set forth in the audit report.

The following is a summary of the recommendations from the audit report, followed by a summary of the stipulation addressing those recommendations. The Commission notes that these summaries are in no way intended to replace or supplement the text of either the audit report or the stipulation.

(a) Audit Report, Chapter VII, Alternative Energy Portfolio

Audit Report – As part of this year's integrated resource plan, Duke should revise the plan for meeting the alternative energy requirements into the future, based on the current electric security plan (ESP) program (Comm.-ordered Ex. 1 at 103).

Stipulation – Duke's ESP, approved in Case Nos. 11-3549-EL-SSO, et al. (11-3549),³ sets Duke on a path to develop long-term compliance strategy that introduces a collaborative process for expanding renewable resource options. Duke has satisfied the auditor's recommendation with the submission of a 10-year plan with its most recent compliance filing in Case No. 12-1214-EL-ACP. (Jt. Ex. 1 at 5.)

(b) Audit Report, Chapter IX, Financial Review, Rider RECON⁴

Audit Report – Duke should ensure that any Rider RECON adjustments are properly incorporated into subsequent filings (Comm.-ordered Ex. 1 at 131).

³ While the stipulation refers to Case No. 11-3459-EL-SSO, the Commission notes that the correct number for Duke's ESP is Case No. 11-3549-EL-SSO.

⁴ Rider RECON was approved by the Commission in 11-3549 for the purpose of conducting the final audit of and true-up of any costs associated with Riders PTC-FPP and SRA-SRT, as part of the transition from the ESP approved in 08-920 to the new ESP approved in 11-3549 (Duke Ex. 6 at 2).

Stipulation -

- (i) Duke shall adjust Rider RECON to recover governmental imposition claims of \$68,000, related to the 2011 deliveries of coal, and it shall be allocated among the customer classes on an energy basis (Jt. Ex. 1 at 6).
- (ii) The issues pertaining to Duke's proposal to recover two cost items via Rider RECON that relate to AEP-Ohio's operation of the Conesville Unit 4 (Conesville costs) are not resolved in this stipulation. Specifically, those issues relate to the recoverability and allocations, between ratepayers and shareholders, of costs billed to Duke by AEP-Ohio for liquidated damages paid by AEP-Ohio in respect of under-deliveries of coal and wash plant closure costs that occurred in 2011, that are more fully described in Duke witness Pradhan's testimony. (Jt. Ex. 1 at 6.)
- (iii) The issues related to the Conesville costs shall be bifurcated for future resolution through a process to be established by the Commission (Jt. Ex. 1 at 6).
- (iv) Rider RECON shall be extended and held open as the mechanism for the recovery of any Conesville costs approved by the Commission, as well as the costs of any independent auditor retained for this purpose. The final order addressing the Conesville costs will determine the period of time under which Duke will, if approved, recover the Conesville costs through Rider RECON. (Jt. Ex. 1 at 6-7.)
- (v) To the extent Duke over- or under-collects the dollars above to be collected in the aforementioned period, Duke will work with Staff to determine a reasonable and fair way to ensure any nonnegligible over- or under-recovery is trued up (Jt. Ex. 1 at 7).

(c) Audit Report, Chapter IX, Financial Review, Billing

Audit Report - Duke shall continue to monitor billing situations where distribution kilowatt hour (kWh) data and generation kWh data do not match, so as to find out what is causing the billing issue and resolve it (Comm.-ordered Ex. 1 at 131).

Stipulation - Duke will continue to monitor billing situations where the kWh data does not match. Duke will monitor the billing data on a statistical sample basis (Jt. Ex. 1 at 5).

CONCLUSION:

Rule 4901-1-30, O.A.C., authorizes parties to Commission proceedings to enter into stipulations. Although not binding on the Commission, the terms of such an agreement are accorded substantial weight. *Akron v. Pub. Util. Comm.*, 55 Ohio St.2d 155, 157, 378 N.E.2d 480 (1978). This concept is particularly valid where the stipulation is unopposed by any party and resolves almost all issues presented in the proceeding in which it is offered.

The standard of review for considering the reasonableness of a stipulation has been discussed in a number of prior Commission proceedings. *Cincinnati Gas & Electric Co.*, Case No. 91-410-EL-AIR (April 14, 1994); *Western Reserve Telephone Co.*, Case No. 93-230-TP-ALT (March 30, 1994); *Ohio Edison Co.*, Case No. 91-698-EL-FOR et al. (December 30, 1993); *Cleveland Electric Illum. Co.*, Case No. 88-170-EL-AIR (January 30, 1989); *Restatement of Accounts and Records (Zimmer Plant)*, Case No. 84-1187-EL-UNC (November 26, 1985). The ultimate issue for our consideration is whether the agreement, which embodies considerable time and effort by the signatory parties, is reasonable and should be adopted. In considering the reasonableness of a stipulation, the Commission has used the following criteria:

- (1) Is the settlement a product of serious bargaining among capable, knowledgeable parties?
- (2) Does the settlement, as a package, benefit ratepayers and the public interest?
- (3) Does the settlement package violate any important regulatory principle or practice?

The Ohio Supreme Court has endorsed the Commission's analysis using these criteria to resolve issues in a manner economical to ratepayers and public utilities. *Indus. Energy Consumers of Ohio Power Co. v. Pub. Util. Comm.*, 68 Ohio St.3d 559, 561, 629 N.E.2d

423 (1994), citing *Consumers' Counsel v. Pub. Util. Comm.*, 64 Ohio St.3d 123, 126, 592 N.E.2d 1370 (1992). Additionally, the Court stated that the Commission may place substantial weight on the terms of a stipulation, even though the stipulation does not bind the Commission. *Consumers' Counsel* at 126.

Duke witness Wathen testifies that the stipulation is a product of serious bargaining among capable, knowledgeable parties and is the product of an open process. Mr. Wathen further explains that the knowledge and capability of the stipulating parties and their attorneys are readily apparent, and that the stipulating parties regularly participate in rate proceedings before the Commission. Moreover, Mr. Wathen represents that all parties to these proceedings had an opportunity to participate and express their opinions during the negotiation process. (Duke Ex. 7 at 3-4.) Upon review of the terms of the stipulation, based on our three-prong standard of review, we find that the first criterion, that the process involved serious bargaining by knowledgeable, capable parties, is met.

Mr. Wathen points out the stipulation benefits ratepayers and is in the public interest because it addresses the recommendations contained in the audit report and provides for a process to close out Rider RECON. Moreover, the witness states that the stipulation represents a timely and efficient resolution of the issues raised in these proceedings. (Duke Ex. 7 at 4-5). Upon review of the stipulation, the Commission finds that, as a package, it satisfies the second criterion.

With regard to the third criterion, Mr. Wathen asserts that the stipulation is consistent with prior Commission orders involving Duke's Riders PTC-FPP and SRA-SRT. Furthermore, the witness states that the stipulation results in a reasonable rate for customers and allows Duke to recover its eligible costs in a manner consistent with Duke's ESP that was approved by the Commission. In addition, Mr. Wathen notes that the stipulation allows an opportunity for a separate audit of specific fuel costs that are related to the Conesville Unit 4. (Duke Ex. 7 at 4-5.) Accordingly, the Commission finds that there is no evidence that the stipulation violates any important regulatory principle or practice and, therefore, the stipulation meets the third criterion.

Therefore, the Commission finds that the stipulation entered into by the parties is reasonable and should be adopted.

As a final matter, the Commission finds that the issues pertaining to the Conesville costs should be addressed in *In the Matter of the Fuel Adjustment Clauses for Columbus Southern Power Company and Ohio Power Company and Related Matters*, Case No. 11-281-EL-FAC (11-281). Accordingly, a procedure to address these issues will be established in 11-281, and such procedure will provide Duke and any other entity that is not yet a party to 11-281 an opportunity to intervene for the purpose of addressing the Conesville costs.

FINDINGS OF FACT AND CONCLUSIONS OF LAW:

- (1) Duke is a public utility under Section 4905.02, Revised Code, and is subject to the jurisdiction of this Commission.
- (2) These cases relate to the Commission's review of Duke's Riders PTC-FPP and SRA-SRT for the calendar year 2011.
- (3) On May 10, 2012, both a redacted and an unredacted version of Schumaker's m/p and financial audits of Duke's Riders PTC-FPP and SRA-SRT for the year 2011, were filed in these cases.
- (4) By entry issued on June 12, 2012, OCC was granted intervention in these cases.
- (5) Duke's motion for protective order filed on September 7, 2012, should be granted.
- (6) A hearing in these matters was held on September 18, 2012, and October 10, 2012.
- (7) At the hearing, a stipulation was submitted, intending to resolve all issues in these cases. The stipulation was signed by Duke and Staff. OCC neither opposed nor supported the stipulation.
- (8) The stipulation meets the criteria used by the Commission to evaluate stipulations, is reasonable, and should be adopted.

ORDER:

It is, therefore,

ORDERED, That the motion for protective order filed by Duke on September 7, 2012, be granted. It is, further,

ORDERED, That the Commission's docketing division maintain, under seal, the unredacted attachment filed under seal in this docket on March 1, 2012, the unredacted audit filed on May 10, 2012, and the unredacted testimony and attachment filed on September 7, 2012, for a period of 18 months, ending on May 28, 2014. It is, further,

ORDERED, That the stipulation of the parties be adopted and approved. It is, further,

ORDERED, That Duke take all necessary steps to carry out the terms of the stipulation and this order. It is, further,

ORDERED, That Duke file in final form complete copies of tariffs consistent with this order. Duke shall file one copy in these case dockets and one copy shall be filed in Duke's TRF docket. It is, further,


ORDERED, The effective date of the new rates shall be a date not earlier than the date upon which four complete, printed copies of the final tariff page are filed with the Commission. It is, further,

ORDERED, That the issues pertaining to the Conesville costs be addressed in 11-281. It is, further,

ORDERED, That nothing in this opinion and order shall be binding upon the Commission in any future proceeding or investigation involving the justness or reasonableness of any rate, charge, rule, or regulation. It is, further,

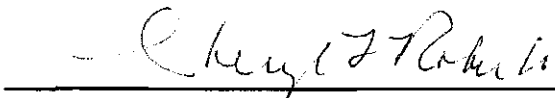
ORDERED, That a copy of this opinion and order be served upon each party of record in 11-281, and the parties in these cases.

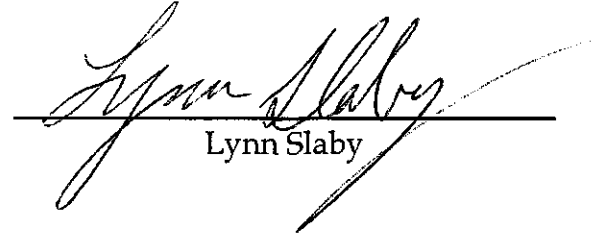
THE PUBLIC UTILITIES COMMISSION OF OHIO



Todd A. Snitchler, Chairman

Steven D. Lesser

Andre T. Porter

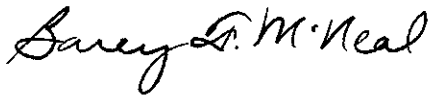
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Secretary