

BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of Application of Duke )  
Energy Ohio, Inc. for Authority to )  
Establish a Standard Service Offer )  
Pursuant to R.C. 4928.143 in the Form of ) Case No. 14-841-EL-SSO  
an Electric Security Plan, Accounting )  
Modifications, and Tariffs for Generation )  
Service. )

In the Matter of Application of Duke )  
Energy Ohio, Inc. for Authority to )  
Amend its Certified Supplier Tariff, ) Case No. 14-842-EL-ATA  
P.U.C.O. No. 20. )

ENTRY ON REHEARING

The Commission finds:

- (1) Duke Energy Ohio, Inc. (Duke) is a public utility as defined in R.C. 4905.02 and, as such, is subject to the jurisdiction of this Commission.
- (2) On May 29, 2014, Duke filed an application for a standard service offer pursuant to R.C. 4928.141. This application is for an electric security plan (ESP) in accordance with R.C. 4928.143 that will begin on June 1, 2015.
- (3) By Entry issued August 5, 2014, the attorney examiner, inter alia, granted the motions to intervene in these matters filed by numerous entities, including the Ohio Consumers' Counsel (OCC) and IGS Energy (IGS). By that same Entry, the attorney examiner scheduled a prehearing conference for the purpose of considering various procedural motions regarding certain documents and information requested in discovery, including Duke's July 8, 2014 motion for protective order, OCC's July 18, 2014 motion to hold in abeyance Duke's motion for protective order, and OCC's July 18, 2014 motion to compel.
- (4) The prehearing conference was held, as scheduled, on August 12, 2014. At the prehearing conference, the attorney examiner determined that the parties should move forward and enter into protective agreements consistent with the confidentiality agreement attached to Duke's July 8, 2014 motion (referred to

herein as Exhibit 3) with certain revisions, including that the agreement should be revised such that one copy of the alleged confidential information may be retained by the recipient and that rulings on the use of such information beyond these cases shall be dealt with in any subsequent cases. Accordingly, the attorney examiner: granted, in part, and denied, in part, Duke's July 8, 2014 motion for protective order; denied OCC's July 18, 2014 motion to hold in abeyance Duke's motion for protective order; and found that OCC's July 18, 2014 motion to compel was moot, given the ruling on the protective order.

- (5) On August 18, 2014, in accordance with Ohio Adm.Code 4901-1-15, Duke filed an interlocutory appeal of the attorney examiner's ruling granting, in part, and denying, in part, its July 8, 2014 motion for protective order. Duke explained that, to ensure that its confidential information would be safeguarded properly, Exhibit 3 requires recipients to use any confidential information produced in these proceedings only for these proceedings; the recipients must then return or destroy the confidential information after these proceedings. However, the attorney examiner's August 12, 2014 ruling provided that recipients may retain the confidential information indefinitely, and may use the information in future proceedings, subject only to future evidentiary objections.
- (6) On August 25, 2014, OCC and IGS filed memoranda contra Duke's interlocutory appeal. IGS and OCC asserted the attorney examiner's ruling should be affirmed, stating the ruling was just, reasonable, and lawful. IGS noted that no part of the ruling allows any party to disclose Duke's confidential information; rather the ruling focused on the retention and use of the confidential information in future proceedings under seal. According to IGS, the ruling will promote administrative economy and development of the record, as it recognized that many of Duke's cases are related and contain overlapping issues. IGS and OCC agreed that the ruling is consistent with the Commission's rules and well-defined case law that favors elimination of duplicative discovery. The ruling strikes the appropriate balance of safeguarding Duke's protected information and providing Duke sufficient recourse for breach, while facilitating full and complete discovery and development of the record, according to IGS. OCC advised that the

Commission order parties to use the protective agreement attached to OCC's memorandum contra Duke's motion for protective order (referred to herein as Exhibit 1), which has been used for decades.

- (7) By Entry issued August 27, 2014, the Commission found that the attorney examiner's rulings at the August 12, 2014 prehearing should be modified, in part. Initially, upon review of Exhibit 3, the Commission found that Duke had gone too far in its efforts to address any potential issues that may arise, finding Duke's proposed language regarding the retention of the alleged confidential information was too restrictive. With these concerns in mind, the Commission compared Exhibit 3 and Exhibit 1 and found that Exhibit 1, which has been used by Duke for over a decade, is more reasonable, consistent with past cases and precedent, and contains the language needed to sufficiently protect Duke's interests, including provisions that: ensure recipients do not disclose confidential information and are bound by the confidential agreement, even if they are no longer engaged in the proceeding; and require recipients to provide notice to Duke if they desire to use the protected material other than in a manner provided for in the confidential agreement. Moreover, in the event of a breach of the agreement, Duke may pursue all remedies available by law. Therefore, the Commission concluded that, in order to enable the parties to move forward with discovery in these proceedings, Exhibit 1 should be adopted and Duke should enter into protective agreements, like Exhibit 1 and the agreements entered into in the previous ESP proceedings, with the intervenors that are seeking the alleged confidential information. Accordingly, the Commission modified the attorney examiner's ruling such that: Duke's July 8, 2014 motion for protective order was granted to the extent the information marked confidential by Duke should be treated confidentially by the recipients until such time as the Commission rules otherwise, and denied to the extent Duke requested the Commission adopt Exhibit 3; and OCC's July 18, 2014 motion to compel responses to discovery was granted.
- (8) R.C. 4903.10 allows any party who has entered an appearance in a Commission proceeding to apply for rehearing with respect to any matters decided. Any such applications for

rehearing are required to be filed within 30 days of the entry of the decision upon the Commission's journal.

- (9) On September 26, 2014, Duke filed an application for rehearing of the Commission's August 27, 2014 Entry, citing three grounds for rehearing. OCC and IGS filed memoranda contra Duke's application for rehearing on October 6, 2014.
- (10) In its first assignment of error, Duke states that the Entry is unlawful and/or unreasonable because it fails to address whether confidential information may be used in cases other than the one in which the information was provided. Duke argues that the purpose of discovery is to prepare for participation in a Commission proceeding, not as a means to prepare for other proceedings. According to Duke, its proposed Exhibit 3 balanced the goal of complete discovery and protection of business-sensitive data by allowing full access to the parties, but only while the case is ongoing and only for the purpose of participation in these cases. Duke mentions its prior experience in which confidential information was used in a subsequent case with no notice to Duke. Therefore, Duke requests the Commission modify the Entry to authorize Duke to include, in all current and prospective confidentiality agreements with intervenors in these cases, terms to prevent the use of Duke's confidential information for any purpose other than these proceedings.
- (11) In response to Duke's first assignment of error, IGS and OCC agree that the Commission's August 27, 2014 Entry is lawful and reasonable. IGS notes that the Commission, in its Entry, explicitly stated that Exhibit 3, which provided that Duke may strike in a future proceeding any confidential information that is used in these proceedings, was too restrictive; thus, requiring that OCC's Exhibit 1, which contains no such restriction, be utilized. In so doing, the Commission determined that the parties may retain confidential information and use that information in a future proceeding, subject to the rules of evidence. Furthermore, OCC points out that Exhibit 1 ensures that confidential information is not disclosed and that such information is protected under the protective agreement, even after the proceedings have ended. According to OCC, any question of protected materials being used in any future

proceeding is an issue that is better addressed at the point in time when the matter is ripe for review.

- (12) Upon consideration of Duke's first assignment of error, the Commission finds that it is without merit. In our deliberation of Duke's request for interlocutory appeal, the Commission determined that the examiner's rulings should be modified. Contrary to Duke's inference in its application for rehearing, the Commission's review on interlocutory appeal was not limited to considering only the two primary issues named by Duke in its appeal, i.e., whether the intervenors can retain a copy of the alleged confidential information and whether they can use such information in a subsequent proceeding. Rather, the Commission appropriately viewed the totality of the confidentiality agreements contained in Duke's Exhibit 3 and OCC's Exhibit 1 and determined that Exhibit 1 was a protective agreement that had proven effective in previous cases before the Commission. As acknowledged by Duke, a perusal of Exhibit 1 reveals that parties are not required to return documents to Duke and no mention is made of the possible use of the information in subsequent proceedings at the Commission. Moreover, the Commission's conclusion explicitly noted that Exhibit 1 contains the language needed to sufficiently protect Duke's interests, including provisions that: ensure recipients do not disclose confidential information and are bound by the confidential agreement, even if they are no longer engaged in the proceeding; and require recipients to provide notice to Duke if they desire to use the protected information in a subsequent proceeding. Therefore, contrary to its assertions on rehearing, 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. As for Duke's example of a previous situation where confidential information was used with no notice to Duke, our clarification of the process in these cases should forestall such an event. Therefore, the Commission concludes that Duke's first assignment of error should be denied.
- (13) The second assignment of error set forth by Duke asserts that the Entry conflicts with Ohio law and regulations; state court,

federal court, and Commission precedent; and recognized treatises on the subject. Duke reiterates its position that the economic value of confidential information must be balanced against the interests of parties to due process and full discovery, stating that the Commission, in its Entry, failed to consider the balancing of these interests, as required by law, precedent, and recognized treatises. Duke again notes that no Commission rule requires production of information in discovery, simply because it might be relevant in another, subsequent proceeding; therefore, no party can argue it has a legitimate reason to keep information after these proceedings.

- (14) IGS and OCC agree that Duke's second assignment of error should be denied. IGS argues the attorney examiner's ruling is consistent with well-defined case law, noting that Duke has submitted no new arguments for the Commission to address; rather, Duke states that it will not repeat the numerous cases, statutes, rules, and treatises that were argued on appeal. OCC reiterates that many of the cases cited by Duke to support its argument that the ruling is inconsistent with precedent are derived from civil litigation and are not binding on the Commission. Moreover, OCC points out that, unlike the issue before the Commission in these cases, the cited cases involved judges enforcing the language of a protective agreement between the parties. IGS notes that Duke continues to present a claim that represents poor public policy, namely that parties have no legitimate interest in maintaining a copy of the confidential information after a proceeding terminates. IGS asserts that retaining a copy of confidential documents will reduce duplicative discovery and discovery disputes. According to IGS, if parties are prohibited from retaining confidential discovery responses, it will be more difficult to hold Duke accountable for representing accurate information in future proceedings.
- (15) Duke raises no new issue and cites no new precedent in its second assignment of error that was not thoroughly considered by the Commission in arriving at our determination. As noted in our August 27, 2014 Entry, we believe that Exhibit 1, which has been used for many years by Duke, provides sufficient protection and ensures that recipients do not improperly disclose confidential information. Moreover, in balancing the

interests of Duke to protect this information with the need for parties in Commission cases to have access to relevant information, we believe that the protection afforded such information through Exhibit 1 is both appropriate and in keeping with past precedent. Therefore, the Commission finds that Duke's second assignment of error should be denied.

- (16) In its third assignment of error, Duke notes that the Entry modifies aspects of the examiner's ruling that were not at issue in the interlocutory appeal. According to Duke, the Commission's rule on interlocutory appeals, Ohio Adm.Code 4901-1-15(E), does not allow the Commission to reconsider a multitude of original issues that were decided by the examiner in the same ruling and to modify that ruling without consideration of the appeal.
- (17) In response to the third assignment of error, IGS and OCC agree that, by finding Exhibit 3 to be too restrictive and adopting Exhibit 1, which did not contain the restrictions suggested by Duke in its interlocutory appeal, the Commission decided the issues presented by Duke and provided a suitable solution for resolving the contested issues. IGS emphasizes that the confidentiality agreement approved by the Commission does not allow any party to misappropriate or disclose Duke's confidential information. OCC advocates that it is within the Commission's authority and discretion to choose the protective agreement proposed by OCC, which allows retention and subsequent use of the material.
- (18) Duke argues, incorrectly, that the Commission did not consider the issues Duke raised on interlocutory appeal. As we indicated previously, the two primary issues raised by Duke could not be viewed in a vacuum without the Commission's consideration of Duke's Exhibit 3 and OCC's Exhibit 1, and how those two documents portrayed the issues on appeal. In this instance, we are discussing the contents of an agreement; it is impossible and improper for the Commission to review a piece of such an agreement without consideration for those pieces in the totality of the overall agreement. Duke erroneously believes the Commission is limited in its review of the attorney examiner's ruling to only those specific items that Duke wants reviewed. On the contrary, it is the Commission's

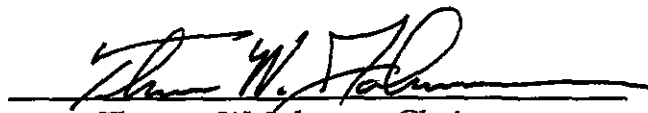
responsibility to look at the ruling in total, rather than only a piece of the ruling that suits Duke. Upon our review, while we appreciate the attorney examiner's efforts to allow Duke to craft a new agreement, from our perspective, Duke went too far and was unwilling to revise the document in a reasonable fashion to exclude the language as required by the attorney examiner. Since Exhibit 1 contained appropriate language, the Commission found that Exhibit 1 should be utilized. Accordingly, the Commission finds that Duke's third assignment of error should be denied.

It is, therefore,

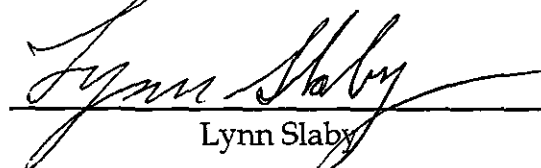
ORDERED, That the application for rehearing filed by Duke is denied. It is, further,

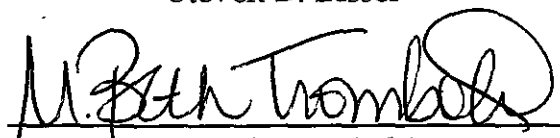
ORDERED, That a copy of this Entry be served upon all parties of record.

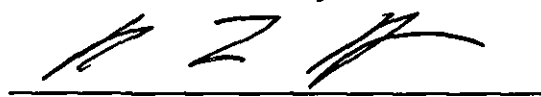
THE PUBLIC UTILITIES COMMISSION OF OHIO

  
Thomas W. Johnson, Chairman

  
Steven D. Lesser

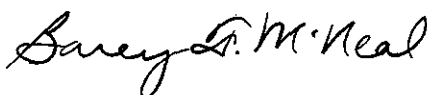
  
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**OCT 22 2014**



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Secretary