

BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of The )  
Cincinnati Gas & Electric Company to Modify )  
its Fuel and Economy Purchased Power ) Case No. 05-725-EL-UNC  
Component of its Market-Based Standard )  
Service Offer. )

In the Matter of the Application of Duke )  
Energy Ohio, Inc., to Adjust and Set its ) Case No. 06-1069-EL-UNC  
System Reliability Tracker. )

In the Matter of the Application of Duke )  
Energy Ohio, Inc., to Adjust and Set its ) Case No. 05-724-EL-UNC  
System Reliability Tracker Market Price. )

ENTRY

The attorney examiner finds:

- (1) *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 No. 03-93-EL-ATA, et al. (RSP case), this Commission authorized Duke Energy Ohio, Inc. (DE-Ohio), to recover various costs through identified riders.<sup>1</sup> The Commission permitted the recovery of costs of fuel, economy purchased power, system losses, and emission allowances through a rider designated as the fuel and economy purchased power component (FPP) of its market-based standard service offer (MBSSO). Recovery of costs of purchasing power to provide reliable provider-of-last-resort service, including an adequate reserve margin was approved by the Commission through the system reliability tracker component (SRT) of its MBSSO.*
- (2) In the RSP case, the Commission required that the FPP and the SRT be based on periodic filings and reviewed annually.

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<sup>1</sup> DE-Ohio was formerly known as the Cincinnati Gas & Electric Company. In this entry, it will be referred to as DE-Ohio, regardless of its name at the time being discussed. Case names, however, will not be modified.

### FPP Review – Background and Current Status

- (3) The Commission's first review of the FPP was undertaken in *In the Matter of the regulation of the Fuel and Economy Purchased Power Component of The Cincinnati Gas & Electric Company's Market-Based Standard Service Offer*, Case No. 05-806-EL-UNC, in which the Commission considered whether the FPP rates that had been charged during the first two quarters of 2005 were fair, just, and reasonable. Concluding that those FPP rates were fair, just, and reasonable, the Commission adopted a stipulation among all of the parties, addressing numerous technical issues related to the FPP.
- (4) DE-Ohio filed, in Case No. 05-725-EL-UNC, captioned above (FPP review case) on June 1, 2005; August 31, 2005; December 2, 2005; and March 24, 2006; quarterly statements, setting forth its FPP rates for the four quarters ended September 30, 2005; December 31, 2005; March 31, 2006; and June 30, 2006 (FPP review period).<sup>2</sup>
- (5) On September 1, 2006, DE-Ohio filed an application to establish its FPP for 2007, thereby initiating the Commission's review of the FPP charged for the FPP review period.<sup>3</sup> The examiner finds that a hearing should be scheduled in the RPP review case to consider whether the FPP rates charged during the FPP review period were fair, just, and reasonable and to determine any appropriate adjustment to reconcile the FPP rates actually charged with relevant costs incurred.

### SRT Review – Background and Current Status

- (6) The SRT has been considered by the Commission on two occasions. The first Commission review occurred in *In the Matter of the Application of The Cincinnati Gas & Electric Company to Modify its System Reliability Tracker Component of its Market-Based Standard Service Offer*, Case No. 04-1820-EL-ATA, when the Commission established the SRT rates to be charged during 2005. In *In the Matter of the Application of The Cincinnati Gas & Electric Company to Adjust and Set its System Reliability Tracker Market Price*, Case No. 05-724-EL-UNC (2005 SRT case), the Commission adopted a

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<sup>2</sup> The first of those filings was incorrectly made in Case No. 05-806-EL-UNC, as a part of its application for the first Commission review of the FPP.

<sup>3</sup> DE-Ohio's application was incorrectly filed in Case No. 06-1068-EL-UNC. That case will comprise the Commission's 2007 review of the FPP.

stipulation agreed to by all the parties in the proceeding. The Commission thereby ordered, *inter alia*, the following steps:

- (a) The Commission established the SRT rates to be charged during 2006.
  - (b) The Commission ordered that management of the 2006 SRT be subject to a prudence review.
  - (c) The Commission ordered its staff to audit the SRT charges on an annual basis. A hearing regarding staff's annual audit will be held upon the request of any party.
  - (d) The Commission required DE-Ohio to obtain prior Commission approval if it intends to use certain identified assets as part of the SRT. In such event, the Commission would hold a hearing if any party is concerned about that proposed use.
- (7) On August 9, 2006, the Commission issued an entry, initiating a prudence review of the management of the SRT during the period of January 1, 2006, through June 30, 2006, pursuant to the requirements of the stipulation adopted in 2005 SRT case.
- (8) On September 1, 2006, in Case No. 06-1069-EL-UNC, captioned above (2006 SRT case), DE-Ohio filed an application to establish its system reliability tracker component (SRT) of its MBSSO for 2007, to gain the Commission's approval of its resource plan for 2007, and obtain permission to file quarterly updates to the SRT during 2007. This application initiated the Commission's annual audit of the SRT charges, covering the period of January 1, 2005, through June 30, 2006.
- (9) On September 15, 2006, the Office of the Ohio Consumers' Counsel (OCC) filed a motion to intervene in the 2006 SRT case. Among its arguments, OCC stated that it "is concerned about Duke Ohio's proposed use of DENA Assets to set the SRT in the instant proceeding, and a hearing should be held."
- (10) As the stipulation in the 2005 SRT case provided for a hearing in the event any party requests a hearing on the staff's annual audit or in the event any party is concerned about DE-Ohio's proposed use of those identified assets in the SRT, the examiner finds that a hearing should be held on the issues of the staff's audit of the SRT

for January 1, 2005, through June 30, 2006; DE-Ohio's proposed use of DENA assets; and the prudence review of management of the SRT during the period of January 1, 2006, through June 30, 2006.

Procedural Matters

- (11) The examiner finds that a single hearing should be held to consider both the FPP issues and the SRT issues.
- (12) Testimony was filed by DE-Ohio on September 1, 2006. If DE-Ohio desires to file any additional testimony, such testimony will be due no later than November 16, 2006. Testimony to be filed by any intervenor or by staff will be due no later than November 22, 2006.
- (13) A hearing will be scheduled for Thursday, November 30, 2006, at 10:00 a.m., in Hearing Room 11-C, 11<sup>th</sup> floor, at the Commission offices at 180 East Broad Street, Columbus, Ohio 43215.
- (14) Motions to intervene were filed by Ohio Energy Group (OEG), OCC, Industrial Energy Users–Ohio (IEU), and Ohio Partners for Affordable Energy (OPAE), on September 11, September 15, and October 3, 2006.
- (15) As the examiner finds that the intervenors have set forth valid reasons for intervention, all of the motions to intervene will be granted, with regard to the consolidated proceedings. A motion for admission *pro hac vice* was filed to admit David C. Rinebolt to practice before the Commission. This motion will also be granted.

Protective Order

- (16) On September 1 and October 12, 2006, DE-Ohio filed motions for protective orders with regard to certain information contained in the applications in the FPP review case and the 2006 SRT case, as well as related testimony and attachments and contained in the report of the auditor in the FPP review case. Although the latter of these motions was only filed in the FPP review case, the redacted version of the auditor's report shows redactions of information in the portion of the report dealing with the prudence review of the management of the SRT during the first six months of 2006. Therefore, the examiner will also treat this second motion as having been filed in the 2005 SRT case.

- (17) 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. Section 149.43, Revised Code, specifies that the term "public records" excludes information which, under state or federal law, may not be released. The Ohio Supreme Court has clarified that the "state or federal law" exemption is intended to cover trade secrets. *State ex rel. Besser v. Ohio State*, 89 Ohio St.3d 396, 399 (2000).
- (18) Similarly, Rule 4901-1-24, O.A.C., allows an attorney examiner 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."
- (19) Ohio law defines a trade secret as "information . . . that satisfies both of the following: (1) It derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use. (2) It is the subject of efforts that are reasonable under the circumstances to maintain its secrecy." Section 1333.61(D), Revised Code. The Ohio Supreme Court has adopted the following six factors to be used in analyzing a claim that information is a trade secret under that section:
- (1) [t]he extent to which the information is known outside the business;
  - (2) the extent to which it is known to those inside the business, i.e., by the employees;
  - (3) the precautions taken by the holder of the trade secret to guard the secrecy of the information;
  - (4) the savings effected and the value to the holder in having the information as against competitors;

(5) the amount of effort or money expended in obtaining and developing the information; and

(6) the amount of time and expense it would take for others to acquire and duplicate the information.

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

- (20) The Ohio Supreme Court has found that an *in camera* inspection is necessary to determine whether materials are entitled to protection from disclosure. *State ex rel. Allright Parking of Cleveland Inc. v. Cleveland*, 63 Ohio St. 3d 772 (1992).
- (21) Rule 4901-1-24(D)(1), O.A.C., also provides that, where confidential material can be reasonably redacted from a document without rendering the remaining document incomprehensible or of little meaning, redaction should be ordered rather than wholesale removal of the document from public scrutiny.
- (22) Thus, in order to determine whether to issue a protective order, it is necessary to review the materials in question; to assess whether the information constitutes a trade secret under Ohio law; to decide whether non-disclosure of the materials will be consistent with the purposes of Title 49, Revised Code; and to evaluate whether the confidential material can reasonably be redacted.
- (23) The attorney examiner has reviewed the information for which DE-Ohio seeks a protective order and the assertions set forth in the memorandum in support of DE-Ohio's motion. Applying the requirements that the information have independent economic value and be the subject of reasonable efforts to maintain its secrecy, as well as the six-factor test set forth by the Ohio Supreme Court, the attorney examiner finds that information redacted from auditor's report is a trade secret. The release of this information is therefore prohibited under state law. The attorney examiner also finds that non-disclosure of the information is not inconsistent with the purposes of Title 49 of the Revised Code.

- (24) Following an *in camera* review, the attorney examiner concludes that the documents covered by DE-Ohio's motions can, and have been, reasonably redacted to remove the confidential information contained therein.
- (25) The attorney examiner finds that there is good cause to grant DE-Ohio's motions for protective orders. The unredacted applications in the FPP review case and the 2006 SRT case, as well as related testimony and attachments, and the report of the auditor in the FPP review case and the 2005 SRT review case should receive protected status for an 18-month period from the date of this entry, and should remain under seal in the docketing division for that time period. DE-Ohio should note that Rule 4901-1-24(F), O.A.C., provides that protective orders under Rule 4901-1-24(D), O.A.C., automatically expire after 18 months. However, that same rule provides that, "[a] party wishing to extend a protective order beyond eighteen months shall file an appropriate motion at least forty-five days in advance of the expiration date." If DE-Ohio wishes to extend that protection, it may file an appropriate motion at least forty-five days in advance of the expiration date of this order.
- (26) Accordingly, the docketing division should maintain under seal the unredacted applications in the FPP review case and the 2006 SRT case, as well as related testimony and attachments, as filed on September 1, 2006, and the report of the auditor in the FPP review case and the 2005 SRT review case, as filed on October 12, 2006, for a period of 18 months from the date of this entry.

It is, therefore,

ORDERED, That a hearing be scheduled as set forth finding (13). It is, further,

ORDERED, That testimony be filed as set forth in finding (12). It is, further,

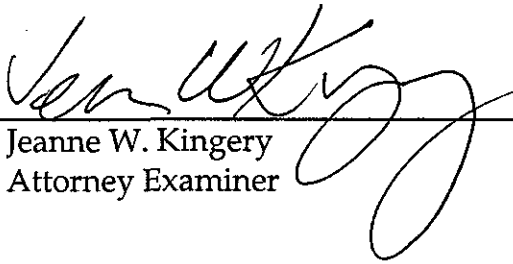
ORDERED, That motions by OCC, IEU, OPAE, and OEG for intervention in the consolidated proceedings, as set forth in finding (15). It is, further,

ORDERED, That the motion for admission *pro hac vice* be granted, as discussed in finding (15). It is, further,


ORDERED, That DE-Ohio's motion for a protective order be granted with regard to the unredacted applications in the FPP review case and the 2006 SRT case, as well as related testimony and attachments, as filed on September 1, 2006, and the report of the auditor in the FPP review case and the 2005 SRT review case, as filed on October 12, 2006, for a period of eighteen months from the date of this entry. This information shall remain under seal in the Commission's docketing division for that eighteen-month period. It is, further,

ORDERED, That a copy of this entry be served upon Energy Ventures Analysis, Inc., and all parties of record in this proceeding.

## THE PUBLIC UTILITIES COMMISSION OF OHIO

By:   
Jeanne W. Kingery  
Attorney Examiner

/ct *ren*  
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Renee J. Jenkins  
Secretary