

BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Commission's Review)	
and Adjustment of the Fuel and Purchased)	
Power and System Reliability Tracker)	Case No. 07-723-EL-UNC
Components of Duke Energy Ohio, Inc. and)	
Related Matters.)	
)	
In the Matter of the Application of Duke)	
Energy Ohio, Inc. to Adjust and Set its 2008)	Case No. 07-975-EL-UNC
System Reliability Tracker.)	

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), the Commission authorized Duke Energy Ohio, Inc. (Duke)¹ to establish a rate stabilization plan and, as a part of that plan, to recover various costs through identified riders, including a fuel and purchase power rider (FPP) and a system reliability tracker (SRT).² The FPP would allow Duke to collect incremental costs of fuel and purchased power. The SRT would permit Duke to apply annually to the Commission to make purchases to cover peak and reserve capacity requirements and to flow through those actual costs on a dollar-for-dollar basis.
- (2) The terms of the FPP and the SRT require that both riders be audited on an annual basis. The terms of the SRT also require that Duke file an annual application to establish the next year's SRT charge.
- (3) On June 20, 2007, Case No. 07-723-EL-UNC (07-723) was initiated in order to commence the review of Duke's most

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

2 These two riders were approved in an Order on Remand in the RSP Case, issued on October 24, 2007.

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recent charges for the FPP and SRT. On September 4, 2007, Duke filed an application in Case No. 07-975-EL-UNC (07-923) to establish the 2008 SRT.

- (4) On August 30, 2007, in 07-723, the Office of the Ohio Consumers' Counsel (OCC) filed a motion to compel Duke to respond to discovery. In its motion, OCC states that it is pursuing discovery but that an impasse has been reached in the negotiations of a protective agreement. According to OCC, in order to receive this information, it has proposed that it and Duke enter into a protective agreement that is substantially the same as the protective agreement Duke has signed with OCC in previous proceedings before the Commission. OCC also cites to a protective agreement approved in *In the matter of the Application of United Telephone Company of Ohio d/b/a Embarq for approval of an Alternative Form of Regulation of Basic Local Exchange Services Pursuant to Chapter 4901:1-4, Ohio Administrative Code*, Case No. 07-760-TP-BLS. Under this proposed agreement, OCC explains that it could not release Duke's claimed protected information without first following the processes for public disclosure required by the agreement, including prior notification to Duke. OCC notes this notification would allow Duke to seek a ruling from the Commission, or other body of competent jurisdiction, as to whether the information deserves protection. OCC explains that Duke has proposed an alternate protective agreement that would be inappropriate for it as a state agency to sign because it fails to provide OCC with adequate rights to challenge the confidentiality of the information that it might expect to receive through discovery. OCC requests that the Commission instruct Duke to accept OCC's desired protective agreement.
- (5) On September 17, 2007, Duke filed in 07-723 a memorandum contra OCC's motion to compel. Duke claims that the primary issue is how parties to a contested proceeding will work with each other to exchange information in discovery and later to present exhibits and create record evidence. Duke contends that OCC refuses to agree to protect any information submitted to it during discovery even where such information is protected by federal law or state law. Duke maintains that OCC seeks to be able to "thrust DE-Ohio's confidential and proprietary information into the public domain without regard to the sensitivity of the information." Duke argues that none of the information sought by OCC is a public record because it

remains in Duke's sole possession and has not been distributed to any public entity. Duke claims that parties to a litigated proceeding must be able to exchange information with confidence that each party will respect the confidential nature of protected material tendered during discovery and that OCC's position has made that impossible. Duke also notes that previously it negotiated an acceptable protective agreement with OCC where OCC's attorneys would review confidential documents and decide in advance which documents were inappropriately marked, but OCC withdrew from the agreement before it was ever implemented.

- (6) On September 27, 2007, OCC filed a reply to Duke's memorandum contra. In its reply, OCC argues that Duke should not be permitted to hold discovery responses hostage to force acceptance of Duke's approach to public records. Further, OCC notes that, as a state agency, it cannot substitute Duke's judgment for its own with respect to public records law; thus, OCC proposes a process by which disputes over whether information has been properly marked as confidential are resolved by someone other than Duke itself. OCC states that it is willing to enter into a protective agreement that conforms to its obligations under Ohio law. OCC contends that it should have the ability to challenge Duke's determination of confidential information, and have such a challenge heard by an independent arbiter. OCC also argues that the Commission has no authority under Ohio's public records law to order a state agency such as OCC to proceed in a way other than how OCC, in its independent judgment, believes it should proceed.
- (7) The issues in this proceeding are similar to the issues raised in the *Embarq* proceeding. In that case, the attorney examiner noted that OCC "should not be required to relinquish its right to challenge the confidentiality of information it might expect to receive through discovery, before, or as a precondition to, gaining access to such information." *Embarq*, Case No. 07-760-TP-BLS, Entry (August 10, 2007) at 2. Further, the examiner noted that the agreement proposed in that proceeding would protect the information whose confidentiality is at stake unless (a) an authority of competent jurisdiction determines that the information could be disclosed publically, or (b) the utility fails to seek a Commission or court ruling. Thus, the attorney examiner determined that the proposed protective agreement

was adequate for protecting the information whose confidentiality was at stake. *Embarq* at 5-6.

- (8) The attorney examiner finds that the issues in this proceeding are similar to, and should be resolved in the same manner as, the *Embarq* proceeding. Accordingly, the attorney examiner recommends that Duke and OCC enter into a protective agreement which is consistent with the agreement entered into between OCC and the utility in the *Embarq* proceeding. Since this protective agreement should adequately protect the confidentiality of Duke's information, the attorney examiner finds that the motion to compel should be granted. Further, the attorney examiner finds that it is unnecessary to address the question of whether the information sought to be discovered is a public record because neither party seeks to disclose that information to the public at this time. Finally, the attorney examiner notes that, with respect to any documents containing potentially confidential information, Duke should narrowly tailor its claims of confidentiality to only those specific portions of each individual document which Duke believes to be confidential.
- (9) On September 4, 2007, Duke filed in 07-723 and 07-975 a motion for a protective order of information contained in its application. In its motion, Duke states that certain information filed in its SRT application including Schedule A and B, which are attachments to the testimony of Charles Whitlock and Don Wathen, contain highly confidential trade secret information. Schedule A presents the estimate 2007-2008 sales and demand in kW/KWh and rates and revenue. Schedule B describes Duke's proposed resource plan, including the type and cost of various proposed supply-side power purchase options, its existing capacity position, forecasted demand for native load consumers, and supply requirement necessary for the provision of a 15 percent reserve margin in the competitive retail and wholesale electric markets. Duke contends that this information is trade secret information, that if publicly disclosed, would give Duke's competitors access to competitively sensitive confidential information which in turn, could allow the competitors to make offers to sell wholesale power at higher prices than the competitors might offer in the absence of such information, to the detriment of Duke and its customers. Duke states that it has filed this information in accordance with Rule 4901-1-24(D), Ohio Administrative Code

(O.A.C.). Duke also claims that the information is not known outside of Duke and is not disseminated within Duke, except to those employees with a legitimate business need to know.

- (10) On September 19, 2007, OCC filed in 07-723 and 07-975 a motion to hold in abeyance a ruling on Duke's motion for protection. OCC urges the Commission to hold in abeyance its ruling on the motion for protection until such time that Duke provides the information over which it seeks confidential treatment to parties willing to enter into a reasonable protective agreement and until such time that Duke provides proper notice to all parties regarding the motion for protection. OCC asserts that Duke has failed to provide it with the information that Duke has determined deserves confidential treatment. Further, it claims that Duke did not serve OCC with its motion in 07-723 and its motion does not contain a certificate of service stating that any other party to the case was served. OCC contends that Duke's actions prejudice OCC in its efforts to evaluate the merits of the motion for protection and deny OCC the details of the subject matter covered by Duke's motion for protection. Therefore, OCC claims that a ruling on the motion for protection should be held in abeyance until such time as Duke provides the entire information over which it seeks confidential treatment to OCC and until such time that Duke provides proper notice to all parties regarding the motion for protection. OCC also notes that these circumstances do not permit OCC to conclude whether Duke has fully complied with the requirement regarding minimizing the information redacted, pursuant to Rule 4901-1-24(D)(1), O.A.C.
- (11) On September 26, 2007, Duke filed a memorandum contra OCC's motion to hold ruling in abeyance. In its memorandum contra, Duke claims that OCC's improper notice allegation is unfounded. Duke indicates that it served all parties with a copy of the application, the motion for protection, and the accompanying testimony. Duke states that it sent the documents via overnight delivery and, according to attached copies of UPS delivery receipts, the parties received their packages on September 4, 2007. Duke notes that an undetected copying error resulted in the motion for protection not being attached to the application, but was included separately in the package and that Duke contacted counsel for Industrial Energy Users Group of Ohio and Ohio Energy

Group who confirmed that a copy of the motion for protection was included in the overnight delivery package. Duke argues that, since the Commission has not ruled on the confidential nature of the information contained in the September 4, 2007 filing, OCC has not been harmed. Further, Duke points out that it reserved its motion for a protective order, on all parties. Duke also argues that the Commission alone has the ability to determine whether, or not the information Duke wishes to file under seal is entitled to protection and there is no requirement that Duke provide this information to OCC prior to the Commission's determination. Duke requests the Commission grant its motion for a protective order.

- (12) On October 4, 2007, OCC filed a reply to Duke's memorandum contra. OCC states that, because Duke has not provided OCC with an unredacted version of its filings, OCC is not able to respond to Duke's motion for the Commission to deny public access to the information that Duke has submitted in support of its rate proposals. OCC maintains that Duke's motion for protection should be held in abeyance until such time that Duke provides the information over which it seeks confidential treatment to parties willing to enter into a reasonable protective agreement. OCC also states that Duke should correct the communications problems and comply with its obligations under the Commission's rules.
- (13) Upon review of OCC's motion, we agree with OCC that, prior to our ruling on Duke's motion for a protective order, it is reasonable that OCC be permitted to review the information in question in order to prepare a response to Duke's motion for a protective order. Therefore, within three days of the parties entering into a protective agreement, Duke shall provide all requested information to OCC and shall notify the attorney examiner by electronic mail that such information has been provided to OCC. Thereafter, OCC shall have a period of ten days within which to review this information and file a response to Duke's motion for a protective order for filed in 07-723 and 07-975. Duke shall then have a period of seven days to file a reply.

It is, therefore,

ORDERED, That OCC's motion to compel filed on August 30, 2007, be granted. It is, further,

ORDERED, That Duke and OCC enter into a protective agreement which is consistent with the agreement entered into between OCC and the utility in the *Embarq* proceeding as directed in Finding 8. It is, further,

ORDERED, That OCC's motion to hold in abeyance be granted. It is, further,

ORDERED, That OCC shall have ten days following receipt of the information to file a response to Duke's motion for protective order and Duke shall have seven days to file a reply to OCC's memorandum contra. It is, further,

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

THE PUBLIC UTILITIES COMMISSION OF OHIO



By: Scott Farkas
Attorney Examiners

grg/ct

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OCT 29 2007



Renee J. Jenkins
Secretary