

FILE

BEFORE THE PUBLIC
UTILITIES COMMISSION OF OHIO

2007 NOV 26 PM 4:59

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) Case No. 07-975-EL-UNC
2008 System Reliability Tracker.)

DUKE ENERGY OHIO, INC.'S REPLY TO OCC'S COMMENTS AS TO
CONFIDENTIAL PROTECTION

Now comes Duke Energy Ohio, Inc., ("DE-Ohio"), pursuant to the Commission's Entry dated October 29, 2007, and hereby submits its Reply to the Comments on Confidential Protection ("Comments") of the Office of the Ohio Consumers' Counsel ("OCC") in the above styled proceedings.¹ In its Comments, OCC opposes DE-Ohio's request for confidential treatment of certain trade secret information filed in the above styled proceedings.²

First, OCC does not agree that certain information contained in Attachment WDW-2 to DE-Ohio's Witness William Don Wathen's pre-filed Direct Testimony, namely, information related to DE-Ohio's calculation of its System Reliability Tracker ("Rider SRT") for 2006, a component of its Market-Based Standard Service Offer ("MBSSO"), should continue to be confidential.³ OCC bases its claim purely on the passage of time, arguing that simply because the information is related to the calculation of the Rider SRT for 2006, that information is stale, and has lost its need for confidential protection. OCC's justification for making this information

¹ Entry at 6, (October 29, 2007).

² OCC's Comments at 3-4, (November 19, 2007).

³ *Id.*

This is to certify that the images appearing are an
accurate and complete reproduction of a case file
document delivered in the regular course of business.
Technician SM Date Processed 11/26/07

public shows a misunderstanding of the nature of the trade secret information and the need for its protection from public disclosure.

The definition of Trade Secret contained in R.C. 1333.61(D) is as follows:

“Trade secret” means information, including the whole or any portion or phase of any scientific or technical information, design, process, procedure, formula, pattern, compilation, program, device, method, technique, or improvement, or any business information or plans, financial information, or listing of names, addresses, or telephone numbers, 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.⁴

In analyzing a trade secret claim, the Ohio Supreme Court has adopted the following factors as relevant to determining whether a document constitutes a trade secret:

- (1) The 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.⁵

The information contained in WDW-2 contains more than just the estimated and actual SRT levels for 2006. The information contained in WDW-2 gives the underlying support and calculations DE-Ohio used to determine its Rider SRT requirements, thereby giving insight to DE-Ohio's proprietary forecasting methodology used to calculate the fifteen percent (15%) reserve margin on an annual basis for capacity necessary to meet customer load. DE-Ohio uses the same methodology to determine the 2007 and 2008 Rider SRT requirements as it used to

⁴ Ohio Rev. Code Ann. § 1333.61(D) (Baldwin 2007).

⁵ *State ex rel. Besser v. Ohio State Univ.*, 89 Ohio St. 3d 396, 732 N.E.2d 373 (2000).

assess its needs for 2006. This methodology is equally deserving of confidential protection today as it was in 2006. Simply put, contrary to OCC's assumption in its Comments, this information contained in WDW-2 did not lose its value over time. This methodology is not known outside of DE-Ohio, and is only known by those in DE-Ohio who have a legitimate need to know. If released, it would be possible for DE-Ohio's sophisticated competitors and vendors to evaluate and determine DE-Ohio's capacity positions, resource needs and forecasting calculations for serving load. This information would give competitors and vendors insight into DE-Ohio's view of the capacity market and DE-Ohio's own capacity positions, and would give them an unfair advantage and the potential to affect prices to the detriment of both consumers and DE-Ohio as it negotiates to satisfy capacity reserve requirements. Accordingly, the Commission should not disallow protection of WDW-2, simply because it contains the underlying support for DE-Ohio's 2006 Rider SRT levels.

In its Comments, OCC takes particular issue with the confidential treatment of information contained on WDW-2, Page 4 of 30 ("Summary Schedule"), that shows "allocation percentages that [DE-Ohio] has used to translate the cost of its market positions to rates for customer classes."⁶ OCC believes that this information does not reveal information on DE-Ohio's market position, and should be made public. Upon further consideration, DE-Ohio agrees with OCC on this point and does not oppose OCC's request to make the particular column which shows the allocation percentages, ("Column A") public in this proceeding. In addition, DE-Ohio does not object to columns B, C, and H of the Summary Schedule becoming public. However, for the reasons articulated above, DE-Ohio continues to believe that the remainder of the information contained on the Summary Schedule continues to be confidential trade secret information. In addition, although not specifically mentioned in OCC's Comments, for the

⁶ OCC Comments at 4.

reasons discussed above, the Company believes the redacted information contained in the other attachments and pre-filed testimony submitted in the above styled proceedings, including but not limited to, the rest of the redacted portions of Attachments WDW-2 and Attachment CRW-1, contains confidential trade secret information, and should continue to be protected and under seal. Specifically, this information includes, but is not limited to, DE-Ohio's estimates of kWh sales and purchased capacity costs, all of which if made public would give sophisticated competitors and vendors insight into DE-Ohio's forecasting methodology.

Lastly, in its Comments, OCC takes issue with DE-Ohio's request for confidential treatment of its Schedule B included in the pre-filed direct Testimony of Charles Whitlock which, among other things, includes information regarding DE-Ohio's 2007 Rider SRT.⁷ Contrary to OCC's claims, Schedule B continues to be confidential. In its Comments, OCC calls attention to the fact that, in a pleading filed nearly a year ago and in another proceeding, DE-Ohio inadvertently released an approximation of its estimated 2007 Rider SRT requirement. The filing did not state the exact estimate for the 2007 Rider SRT, just a rounded approximation. While DE-Ohio agrees that in the filing, the Company disclosed this rounded approximation of its aggregate 2007 Rider SRT level, none of the other confidential trade secret information contained in Schedule B and related to the 2007 Rider SRT calculation was mentioned. The information inadvertently released by DE-Ohio was only the rounded aggregate estimate for 2007, and contained none of the Company's underlying forecast information, or capacity needs.

Schedule B contains more than just an approximation of the total projected costs of Rider SRT for the calendar year. It includes, among other things, a detail by month of the required purchases, DE-Ohio's monthly capacity positions, supply and estimated peak demand. Simply because DE-Ohio accidentally disclosed a rounded approximation for 2007, it does not mean that

⁷ *Id.*

the entirety of Schedule B has lost its protection. Similarly, simply because the Company inadvertently released a rounded approximation of its 2007 Rider SRT does not result in the levels for 2008 losing their status as trade secret information.

Therefore, the Commission should disregard OCC's Comments and continue to protect DE-Ohio's trade secret information, as requested in its Motion for Protection and as revised in this Reply to OCC's Comments.

Respectfully submitted,



Paul Colbert (0058582)

Associate General Counsel

Rocco D'Ascenzo (0077651)
Counsel

Duke Energy Ohio, Inc

139 East Fourth Street, Rm 25 AT II

Cincinnati, OH 45201-0960

Phone: (513) 419-1852

Fax: (513) 419-

Email: paul.colbert@duke-energy.com

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served via overnight delivery this 26th

day of November 2007 to the following:



Paul A. Colbert
Rocco O. D'Ascenzo

David F. Boehm
Michael L. Kurtz
Boehm, Kurtz & Lowry
36 East Seventh Street, Suite 1510
Cincinnati, OH 45202

Samuel C. Randazzo
Lisa G. McAhster
Daniel J. Neilsen
Joseph M. Clark
McNees Wallace & Nurick LLC
21 East State Street, 17th Floor
Columbus, OH 43215-4228

Duane Luckey
Attorney General's Office
Public Utilities Commission of Ohio
180 East Broad Street, 9th Floor
Columbus, OH 43215

Jeffrey Small
Ohio Consumers' Counsel
10 West Broad Street Suite 1800
Columbus, OH 43215-3485

Ohio Partners For Affordable Energy
Colleen L. Mooney
1431 Mulford Rd
Columbus, OH 43212