

## 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 Com-       | ) | Case No. 07-723-EL-UNC |
| ponents of Duke Energy Ohio, Inc. and Re-       | ) |                        |
| lated Matters.                                  | ) |                        |
|   | ) |                        |
| In the Matter of the Application of Duke En-    | ) |                        |
| ergy Ohio, Inc. to Adjust and Set its 2008 Sys- | ) | Case No. 07-975-EL-UNC |
| tem Reliability Tracker.                        | ) |                        |

ENTRY

The attorney examiner finds:

- (1) On September 4, 2007, Duke Energy Ohio, Inc., (Duke) filed a motion for a protective order. In its motion, Duke states that certain information filed in its system reliability tracker (SRT) application including Schedules 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 estimated 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 requirements 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.

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- (2) On September 19, 2007, the office of the Ohio Consumers' Counsel (OCC) filed in 07-723 and 07-975 a motion to hold ruling on Duke's motion in abeyance and a memorandum contra that motion for a protective order. On September 26, 2007, Duke filed a memorandum contra OCC's motion and a reply to OCC's memorandum contra. Although various issues raised by these pleadings were addressed immediately, no ruling has been issued on the underlying motion for a protective order.
- (3) On October 31, 2007, Duke filed another motion for a protective order, regarding the Management/Performance Audit and Financial Audit filed in Case No. 07-723-EL-UNC (report). According to Duke, this report includes trade secret information; specifically, a description of Duke's fuel procurement strategy, emission allowance strategy, coal contract information, purchase power information, generation information and general business strategy. The confidential information in the report, Duke asserts, if publicly disclosed, would give its competitors access to competitively sensitive, confidential information which could allow the competitors to make offers to sell coal, etc., at higher prices than the competitors might offer in the absence of that information and to the detriment of Duke and its customers. Further, it contends, disclosure of this information would enable competitors in the wholesale power market to ascertain the manner in which Duke plans, manages, and operates its generating facilities, the fuel purchasing strategy, the purchased power strategy, the emission allowance strategy, and the costs associated therewith, and would enable them to ascertain Duke's positions with respect to electric generation capabilities. Further, Duke claims, this information would provide power marketing competitors with knowledge that would allow them to manipulate the market place so as to cause consumers to pay more for electricity than they otherwise would. Finally, Duke reasons that Duke would be placed at a competitive disadvantage in negotiations for fuel contracts, allowing competitors to adjust their prices, either to win contracts or to set prices artificially higher to take advantage of an overall short market, forcing consumers to pay higher prices for power. Duke confirms that this information is not known outside of Duke and is not disseminated within Duke except to those employees with a legitimate business need to know and act upon the information.

- (4) 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).
- (5) 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."
- (6) 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:
  - (a) The extent to which the information is known outside the business.
  - (b) The extent to which it is known to those inside the business, i.e., by the employees.
  - (c) The precautions taken by the holder of the trade secret to guard the secrecy of the information.
  - (d) The savings effected and the value to the holder in having the information as against competitors.

- (e) The amount of effort or money expended in obtaining and developing the information.
- (f) 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).

- (7) 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).
- (8) 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.
- (9) The attorney examiner finds that, in order to determine whether to grant 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.
- (10) The attorney examiner has reviewed the information covered by Duke's motions, as well as the assertions set forth in the supportive memoranda. 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 the information covered by the motions contain trade secret information. Their release is therefore prohibited under state law. The attorney examiner also finds that non-disclosure of this information is not inconsistent with the purposes of Title 49 of the Revised Code. Finally, the attorney examiner concludes that these exhibits have been reasonably redacted to remove the confidential information contained therein.

- (11) Rule 4901-1-24(F), O.A.C., provides that, unless otherwise ordered, protective orders under Rule 4901-1-24(D), O.A.C., automatically expire after 18 months. The examiner finds that Duke's motion should be granted. Therefore, confidential treatment shall be afforded for a period ending 18 months from the date of this entry. Until that date, the docketing division of the Commission should maintain, under seal, the information filed confidentially on September 4, 2007, (and re-filed on September 21, 2007) and on October 31, 2007.
- (12) Rule 4901-1-24(F), O.A.C., requires a party wishing to extend a protective order to file an appropriate motion at least forty-five days in advance of the expiration date. *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 Commission may release this information without prior notice to Duke.*

It is, therefore,

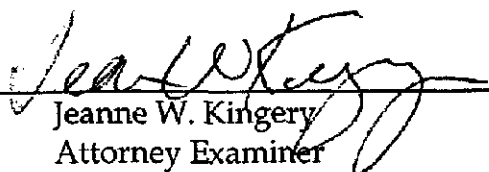
ORDERED, That the motions by Duke for protective treatment of the information filed by Duke in these dockets on September 4, 2007, (and re-filed on September 21, 2007) and on October 31, 2007, be granted for a period of 18 months, ending on February 4, 2010. It is, further,

ORDERED, That the Commission's docketing division shall maintain, under seal, the information filed by Duke in these dockets on September 4, 2007, (and re-filed on September 21, 2007) and on October 31, 2007, for a period of 18 months, ending on February 4, 2010. It is, further,

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


THE PUBLIC UTILITIES COMMISSION OF OHIO

JWK  
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By:   
Jeanne W. Kingery  
Attorney Examiner

Entered in the Journal

**AUG 4 2008**

  
Renee J. Jenkins  
Secretary