

BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of Duke)
Energy Ohio to Adjust and Set its Gas and) Case No. 09-543-GE-UNC
Electric Recovery Rate for SmartGrid)
Deployment Under Riders AU and DR-IM.)
)
In the Matter of the Application of Duke) Case No. 09-544-GE-ATA
Energy Ohio for Tariff Approval.)
)
In the Matter of the Application of Duke)
Energy Ohio to Change its Accounting) Case No. 09-545-GE-AAM
Methods.)

ENTRY

The attorney examiner finds:

- (1) By opinion and order issued May 28, 2008, in *In the Matter of the Application of Duke Energy Ohio, Inc., for an Increase in Rates*, Case No. 07-589-GA-AIR et al. (*Gas Distribution Rate Case*), the Commission approved a stipulation that, *inter alia*, provided a process for filing deployment plans for the installation of a gas SmartGrid system, and a method for recovering costs associated with the plans, which was designated the advanced utility rider (Rider AU).
- (2) By opinion and order issued December 17, 2008, in *In the Matter of the Application of Duke Energy Ohio, Inc., for Approval of an Electric Security Plan*, Case No. 08-920-EL-SSO et al. (*ESP Case*), the Commission approved a stipulation that, *inter alia*, provided a process for recovering costs associated with the deployment of an electric SmartGrid system, designated the distribution rider-infrastructure modernization rider (Rider DR-IM).
- (3) On June 30, 2009, Duke filed an application to adjust the gas and electric recovery rates for SmartGrid deployment, pursuant to the processes approved in the *Gas Distribution Rate Case* and the *ESP Case*. In support of the application, Duke filed direct testimony of three individuals. In conjunction with this testimony, Duke filed a motion for protective order for attachments to the direct testimony of Donald H. Denton, III.

- (4) Rule 4901-1-24, Ohio Administrative Code (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."
- (5) 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. (1997), 80 Ohio St. 3d 513, 524-25.

- (6) 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* (1992), 63 Ohio St.3d 772.

- (7) 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.
- (8) Therefore, in order to determine whether to grant or to extend 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.
- (9) Duke contends that the information contained in attachment DHD-1 of the direct testimony of Mr. Denton is proprietary, confidential, trade secret information which is not known outside the realm of Duke and its vendors. Duke also posits that the information contained in attachment DHD-1 is not disseminated within Duke except to those employees with a legitimate business need to know and act upon the information. No memorandum in opposition to Duke's motion for protective order was filed.
- (10) Having reviewed the information contained within attachment DHD-1, the attorney examiner agrees that the information should be kept under seal. Therefore, the examiner finds that Duke's motion for protective order is reasonable and should be granted.
- (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. In conjunction with this rule, the examiner finds that Duke's motion should be granted for a period of 18 months from the date of this entry. Therefore, until that date, the docketing division of the Commission should maintain attachment DHD-1 of the direct testimony of Donald H. Denton, III, supporting Duke's application, under seal.
- (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 45 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 is filed, the Commission may release this information to the public upon expiration of the protective order, without prior notification to Duke.

- (13) Turning to the application, in order to accomplish the review of Duke's proposed adjustments to Riders AU and DR-IM envisioned in the stipulations approved by the Commission in the *Gas Distribution Rate Case* and the *ESP Case*, the attorney examiner finds that the following procedural schedule should be established:

- (a) September 16, 2009 –
Deadline for the filing of motions to intervene.
- (b) September 17, 2009 –
Technical conference, at 10:00 a.m., at the offices of the Commission, 180 East Broad Street, 11th floor, hearing room 11-E, Columbus, Ohio 43215.
- (c) October 8, 2009 –
Deadline for the filing of comments on the application by Staff and intervenors.
- (d) October 15, 2009 –
Deadline for all parties to file reply comments.
- (e) October 29, 2009 –
In the event all of the issues raised in the comments are not resolved, or if the Commission deems the application may be unjust or unreasonable, a hearing will be held, and Staff and intervenor testimony will be due on this date.
- (f) November 5, 2009 –
Deadline for Duke to file supplemental testimony.
- (g) November 16, 2009 –
In the event a hearing is deemed necessary, the hearing will commence at 10:00 a.m., at the offices of the Commission, 180 East Broad

Street, 11th floor, hearing room 11-F,
Columbus, Ohio 43215.

It is, therefore,

ORDERED, That, in accordance with finding (10), Duke's motion for protective treatment regarding the information contained in attachment DHD-1 be granted for a period of 18 months, ending on February 19, 2011. It is, further,

ORDERED, That the Commission's docketing division shall maintain, under seal, the unredacted attachment DHD-1 by Duke, for a period of 18 months, ending on February 19, 2011. It is, further,

ORDERED, That the procedural schedule set forth in finding (13) be adopted. It is, further,

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

THE PUBLIC UTILITIES COMMISSION OF OHIO

Rebecca Hussey

By: Rebecca Hussey
Attorney Examiner

GRJ
geb

Entered in the Journal

AUG 19 2009

Renee J. Jenkins

Renee J. Jenkins
Secretary