

BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of Duke)
Energy Ohio, Inc., to Establish its Fuel and) Case No. 07-974-EL-UNC
Economy Purchased Power Component of)
its Market-Based Standard Service Offer)
for the Period of July 1, 2007, through)
December 31, 2008.)

In the Matter of the Application of Duke)
Energy Ohio, Inc., to Establish its 2008) Case No. 07-975-EL-UNC
System Reliability Tracker of its Market-)
Based Standard Service Offer.)

ENTRY

The attorney examiner finds:

- (1) By order issued October 24, 2007, 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. (03-93), the Commission ordered The Cincinnati Gas & Electric Company, now known as Duke Energy Ohio, Inc. (Duke), to establish both a fuel and economy purchased power component (FPP) and a system reliability tracker component (SRT) of its market-based standard service offer. The FPP consists of fuel and purchased power expenses, a reconciliation adjustment, a system loss adjustment, and emission allowances. The SRT permits Duke to apply annually to the Commission to purchase power to cover peak and reserve capacity requirements and to flow through those actual costs on a dollar-for-dollar basis.
- (2) Both the FPP and the SRT are subject to audit by the Commission. By entry issued January 21, 2009, the Commission selected Liberty Consulting Group (Liberty) to perform the audit of the FPP and the SRT for the period of July 1, 2007 through December 31, 2008. The Commission directed Liberty to file its final audit report in these dockets by May 15, 2009.

- (3) On May 15, 2009, both a redacted and an unredacted version of Liberty's Management/Performance Audit and Financial Audit of Duke's FPP and SRT for the period of July 1, 2007 through December 31, 2008 (audit report), was filed in these cases.
- (4) On November 22, 2010, Duke filed a motion for a protective order, regarding the audit report. The unredacted audit report was most recently granted protective treatment on July 7, 2009. The audit report contains a description of Duke's fuel procurement strategy, emission allowance strategy, coal contract information, purchased 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, Duke contends the 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. 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. No one filed a memorandum contra Duke's motion for protective order.
- (5) 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* (2000), 89 Ohio St.3d 396, 399.

- (6) Similarly, Rule 4901-1-24, Ohio Administrative Code (O.A.C.), allows the 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."
- (7) 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.
- (8) The attorney examiner has reviewed the information included in Duke's motion for protective order, as well as the assertions set forth in the supportive memorandum. Applying the requirements that the information have independent economic value and be the subject of reasonable efforts to maintain its secrecy pursuant to Section 1333.61(D), Revised Code, as well as the six-factor test set forth by the Ohio Supreme Court,¹ the attorney examiner finds that the information contained in the audit report contains trade secret information. Its release is, therefore, prohibited under state law. The attorney examiner also finds that nondisclosure of this information is not inconsistent with the purposes of Title 49 of the Revised Code. Therefore, the attorney examiner finds that Duke's motion for protective order is reasonable with regard to the audit report, and should be granted.
- (9) Rule 4901-1-24(F), O.A.C., provides that, unless otherwise ordered, protective orders issued pursuant to Rule 4901-1-24(D), O.A.C., automatically expire after 18 months. Therefore, confidential treatment shall be afforded for a period ending 18 months from the date of this entry or until September 30, 2012. Until that date, the docketing division should maintain, under seal, the information filed confidentially.

¹ See *State ex-rel. the Plain Dealer v. Ohio Dept. of Ins.* (1997), 80 Ohio St.3d 513, 524-525.

- (10) 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 to extend confidential treatment is filed, the Commission may release this information without prior notice to Duke.


It is, therefore,

ORDERED, That the motion to extend the protective order filed by Duke be granted. It is, further,

ORDERED, That the Commission's docketing division maintain, under seal the audit report, which was filed under seal in this docket on May 15, 2009, for a period of 18 months, ending on September 30, 2012. It is, further,

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

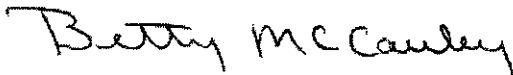
THE PUBLIC UTILITIES COMMISSION OF OHIO


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Betty McCauley
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Secretary