

BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of Duke Energy Retail)
Sales, LLC's Annual Alternative) Case No. 11-2517-EL-ACP
Energy Portfolio Status Report.)

In the Matter of Duke Energy Retail)
Sales, LLC's Ten-Year Alternative) Case No. 11-2518-EL-ACP
Energy Portfolio Compliance Plan.)

ENTRY

The attorney examiner finds:

- (1) On April 15, 2011, Duke Energy Retail Sales, LLC (DERS) filed its 2010 alternative energy portfolio status report pursuant to Section 4928.64, Revised Code, and Rule 4901:1-40-05(A), Ohio Administrative Code (O.A.C.), along with its ten-year compliance plan pursuant to Rule 4901:1-40-03(C), O.A.C. DERS also filed, on April 15, 2011, a motion for protective treatment of certain portions of the status report and compliance plan pursuant to Rule 4901-1-24(D), O.A.C.
- (2) In support of its motion for protective order, DERS asserts that the redacted portions of the status report and compliance plan contain data that, if made public, could be used by DERS' competitors to gain an advantage in the competitive market for renewable energy credits (RECs) and resources. Specifically, DERS states that it seeks protection of its total retail electric sales for 2009; its 2010 renewable energy baseline and benchmark requirements; the identity and sources of RECs that DERS seeks to retire to comply with its renewable energy benchmark requirements; and the methodology used to evaluate compliance options. DERS submits that this information is proprietary and constitutes a trade secret. According to DERS, disclosure of the redacted information to its competitors would harm DERS' ability to compete in the markets for electric services and RECs. DERS further states that it does not disclose the redacted information and makes reasonable efforts to maintain its secrecy. Additionally, DERS asserts that non-disclosure of the redacted information will not impair the purposes of Title 49 of the Revised Code and that release of the information would negate the protections granted

through the Uniform Trade Secrets Act. Therefore, DERS requests that the redacted information be treated as confidential.

- (3) 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 that, 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.
- (4) 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."
- (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.
- (6) The attorney examiner has reviewed the redacted information covered by DERS' motion for protective order, as well as the assertions set forth in the memorandum in support. 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 redacted

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

information does not constitute trade secret information. With respect to DERS' total retail electric sales for 2009 and its 2010 renewable energy baseline and benchmark requirements, the attorney examiner finds that actual sales data is public information that is not maintained as confidential by DERS and, therefore, is not a trade secret. Section 4928.06, Revised Code, requires each electric services company subject to certification under Section 4928.08, Revised Code, to file an annual report of sales and receipts for those services for which it is subject to certification. Annual reports received by the Commission are public records and are not accorded confidential treatment.² As an electric services company, DERS publicly filed its 2009 annual report, which includes retail electric sales data for 2009.

Additionally, DERS' 2010 renewable energy baseline and benchmark requirements may be easily derived from DERS' total retail electric sales for 2009. The attorney examiner finds, therefore, that this information is also not a trade secret.

Finally, the attorney examiner notes that DERS redacted its 2009 benchmarks, which were filed in the public record in the dockets related to DERS' 2009 alternative energy portfolio status report and ten-year compliance plan on April 15, 2010.³ DERS' 2009 benchmarks are thus public information that is not subject to protection from disclosure.

- (7) Although DERS states that its motion for protective order includes information pertaining to the identity and sources of RECs that DERS seeks to retire to comply with its renewable energy benchmark requirements, DERS has not provided this information in its 2010 alternative energy portfolio status report and ten-year compliance plan. DERS also states that it seeks protection of the methodology used to evaluate compliance options. Although DERS has provided a brief description of its methodology, it has not redacted any information in this section of its status report and compliance plan. Therefore,

² *In the Matter of the Filing of Annual Reports for Calendar Year 2009 by Certified Competitive Retail Electric Service Providers, Natural Gas Suppliers, and Governmental Aggregators*, Case No. 10-03-GE-RPT (March 3, 2010).

³ *In the Matter of Duke Energy Retail Sales, LLC's Annual Alternative Energy Portfolio Status Report*, Case No. 10-508-EL-ACP, et al.

with respect to the identity and sources of RECs that DERS seeks to retire to comply with its renewable energy benchmark requirements, as well as DERS' methodology used to evaluate compliance options, the attorney examiner finds that DERS has identified no information that requires protection from disclosure.

- (8) Accordingly, DERS' motion for protective order should be denied. The Commission's docketing division should move DERS' 2010 alternative energy portfolio status report and ten-year compliance plan, as filed under seal on April 15, 2011, to the public file, no sooner than 14 days after the date of this entry, or June 9, 2011.

It is, therefore,

ORDERED, That DERS' motion for protective order, filed on April 15, 2011, be denied. It is, further,

ORDERED, That, no sooner than 14 days after the date of this entry, or June 9, 2011, the Commission's docketing division shall remove DERS' 2010 alternative energy portfolio status report and ten-year compliance plan, as filed under seal on April 15, 2011, from the sealed record in these cases and place it in the public file. 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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JPB/sc

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Betty McCauley

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Secretary