

BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of Duke )  
Energy Ohio, Inc. to Establish its Fuel )  
and Economy Purchased Power ) Case No. 10-974-EL-FAC  
Component of its Market-Based Standard )  
Service Offer for 2010. )

In the Matter of the Application of Duke )  
Energy Ohio, Inc. to Establish its System ) Case No. 10-975-EL-RDR  
Reliability Tracker of its Market-Based )  
Standard Service Offer for 2010. )

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 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 (SSO). 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 for peak and reserve capacity requirements on a dollar-for-dollar basis. Both riders FPP and SRT are subject to audit by the Commission.
- (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., the Commission approved a stipulation submitted by the parties, as well as an annual audit process which would require Duke to file quarterly reports and to make a filing in the first quarter of each year regarding the audits for riders price-to-compare (PTC)-FPP and system resource adequacy (SRA)-SRT, formerly known as riders FPP and SRT.

- (3) These cases were opened on January 4, 2010, for the purpose of receiving filings pertaining to Duke's PTC-FPP and SRA-SRT riders for 2010.
- (4) On December 20, 2010, the Ohio Consumers' Counsel (OCC), filed a motion to intervene in these cases. No one filed memoranda contra. The attorney examiner finds that the motion to intervene is reasonable and should be granted.
- (5) On March 1, 2011, Duke filed its application for approval of the PTC-FPP and the SRA-SRT components of its market-based SSO for 2010.
- (6) On March 1, 2011, Duke filed a motion for a protective order regarding two attachments to its application filed on March 1, 2011, as amended on May 24, 2011. Specifically, Duke requests that the Commission declare the following documents confidential: Attachment SP-1 to the testimony of Salil Padhan and Attachment WDW-2 to the testimony of William Don Wathen Jr. (collectively, attachments).
- (7) In support of its March 1, 2011, motion for a protective order, Duke explains that the attachments contain confidential information, including data supporting the Rider SRA-SRT quarterly filing which includes estimates of power and capacity costs and allocations and reconciliations by retail rate group. In addition, Duke explains that SP-1 summarizes the Rider SRA-SRT transactions for each of the four quarters in 2010, including Duke's capacity and generation portfolio position and resource plan, depicting the type and cost of various supply-side power purchase options. Duke explains that this data includes confidential and proprietary trade secret information regarding its existing capacity position, forecasted demand for native load consumers, and supply requirements necessary for the provision of an appropriate reserve margin in the competitive retail and wholesale electric markets. If publically disclosed, Duke believes the information contained in the attachments would give its competitors an advantage in the market and would allow competitors to offer to sell capacity and wholesale power at higher prices than the competitors might offer in the absence of such information.
- (8) On November 18, 2009, the Commission issued RFP No. U09-FPP-1 in order to obtain qualified independent auditing services for

annual audits of Rider PTC-FPP and SRA-SRT for calendar years 2009, 2010, and 2011. On January 7, 2010, the Commission selected Schumaker & Company (Schumaker) to perform the audits. By entry issued January 19, 2011, the attorney examiner directed Schumaker file its audit report for 2010 with the Commission by May 12, 2011.

- (9) On May 12, 2011, both a redacted and an unredacted version of Schumaker's Management/Performance Audit and Financial Audit of Duke's PTC-FPP and SRA-SRT for the period of January 1, 2010 to December 31, 2010, (audit) was filed in these dockets.
- (10) On May 12, 2011, Duke filed a motion for a protective order regarding certain information contained in the audit. Specifically, Duke argues that the audit contains confidential trade secret information, including Duke's fuel procurement strategy, emission allowance strategy, coal contract information, purchased power information, generation information, and general business strategy. Duke asserts that access to this information may lead its competitors to increase coal prices.
- (11) No one filed memoranda contra Duke's motions for protective order filed on March 1, 2011, and May 12, 2011.
- (12) 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.
- (13) 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."

- (14) 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.
- (15) The attorney examiner has examined the information covered by the motions for protective order filed by Duke, 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,<sup>1</sup> the attorney examiner finds that the information contained in the attachments and the audit constitutes trade secret information. Release of these documents 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. Finally, the attorney examiner concludes that the attachments and the audit have been reasonably redacted to remove the confidential information contained therein, and have been docketed as such. Therefore, the attorney examiner finds that Duke's motions for protective order are reasonable and should be granted with regard to the confidential information contained in the attachments filed confidentially on March 1, 2011, as amended May 24, 2011, and the audit report filed confidentially on May 12, 2011.
- (16) 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 December 1, 2012. Until that date, the docketing division should maintain, under seal, the information filed confidentially.
- (17) 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. Therefore, if Duke wishes to extend this confidential treatment, it should file an appropriate motion at

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

least 45 days in advance of the expiration date. If no such motion to extend confidential treatment is filed, the docketing division may release this information without prior notice to the Duke.

- (18) In accordance with the process adopted by the Commission in 03-93, the attorney examiner finds that a hearing should be scheduled in these cases to commence on August 3, 2011, at 10:00 a.m., at the offices of the Commission, 180 East Broad Street, hearing room 11-C, Columbus, Ohio 43215.

It is, therefore,

ORDERED, That OCC's motion to intervene be granted. It is, further,

ORDERED, That the motions for protective order filed by Duke on March 1, 2011, and May 12, 2011, be granted in accordance with Finding (15). It is, further,

ORDERED, That the Commission's docketing division maintain, under seal, the unredacted attachments filed under seal in this docket on March 1, 2011, as amended May 24, 2011, and the unredacted audit filed May 12, 2011, for a period of 18 months, ending on December 1, 2012. It is, further,

ORDERED, That a hearing in these cases should be held as set forth in finding (18). 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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Attorney Examiner

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Betty McCauley

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Secretary