

BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of Duke)
Energy Ohio, Inc. to Adjust Rider DR-IM) Case No. 10-2326-GE-RDR
and Rider AU for 2010 SmartGrid Costs)
and Mid-Deployment Review.)

ENTRY

The attorney examiner finds:

- (1) 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*, provides a process for recovering costs associated with the deployment of an electric SmartGrid system through Rider Distribution Reliability - Infrastructure Modernization (Rider DR-IM). In addition, the stipulation provides that, in the second quarter of each year, Duke Energy Ohio, Inc. (Duke) shall file for approval of Rider DR-IM adjustments, subject to due process, including a hearing. Additionally, 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 an automated gas meter reading system, which would share the SmartGrid communications technology, and a method for recovering costs associated with the plans, which was designated Rider Advanced Utility (Rider AU).
- (2) On June 30, 2011, Duke filed an application to adjust Riders DR-IM and AU for SmartGrid deployment, pursuant to the processes approved in the *Gas Distribution Rate Case* and *ESP Case*. Along with its application, Duke filed the testimony of Mark D. Wyatt, which contains an attachment setting forth a cost/benefit model (model).
- (3) On June 30, 2011, Duke filed the report of the audit conducted by MetaVu, Inc. (MetaVu), containing a mid-deployment review of Duke's SmartGrid program (MetaVu report).

- (4) On June 30, 2011, Duke also filed motions for protective order, claiming parts of the model contained as an attachment to the testimony of Mark D. Wyatt, as well as certain information provided in the MetaVu report, constitute confidential trade secret information under Ohio law.
- (5) By entry on September 19, 2011, the attorney examiner ordered Duke to file an amended motion for protective order by September 28, 2011. Specifically, Duke was directed to explain why information contained in Tables 26 and 27 in the model, as well as Section 9 Appendix 3, and Section 13 Appendix 7 in the MetaVu report, have been redacted as confidential trade secret information.
- (6) On September 28, 2011, Duke filed an amended motion for protective order. Duke explains that Tables 26 and 27 contain recently updated spreadsheets depicting growth rates as applied to the price of electricity and gas, as well as the amount of energy consumed and the number of installed meters. Duke argues this information should be protected as proprietary information because it would enable competitors to use it in conjunction with public information to manipulate bids in the competitive marketplace. In addition, Duke provides that Section 13 Appendix 7 in the MetaVu report also contains projected growth rates and proprietary data that should be protected, as it derives independent economic value from not being ascertainable to the public and Duke makes efforts to maintain its secrecy.

Regarding Section 9 Appendix 3, Duke explains that the redacted data relates to security, privacy, and potential vulnerabilities to Duke's SmartGrid System. Duke explains that these findings coupled with minimal knowledge of the National Institute of Standards and Technology Interagency Report protocols could allow an individual with ill intent to discern where Duke conforms or does not conform based on the highly sensitive security and privacy data.

- (7) On November 4, 2011, Staff filed comments in this case (Staff comments), along with a motion for protective order regarding portions of Staff's comments that incorporate information contained in the model and MetaVu report. Staff explains that

that the public disclosure of this information may be highly prejudicial to Duke and harm its customers.

- (8) 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.
- (9) Similarly, 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."
- (10) 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.
- (11) The attorney examiner has reviewed the information included in Duke and Staff's motions 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

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

information contained in the model and the MetaVu report contains trade secret information. The attorney examiner notes that, while Staff did not support its assertion that the redacted information contained in Staff's comments satisfies the six-factor test and Section 1333.61(D), Revised Code, because Staff only summarized information taken from the MetaVu report, the attorney examiner will rely on the arguments contained in the amended motion for protective order filed by Duke. Accordingly, the attorney examiner concludes that Duke was able to demonstrate that the confidential information contained in MetaVu's report should be protected, as well as the information contained within Staff's comments. 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. Finally, the attorney examiner concludes that these documents could not be reasonably redacted to remove the confidential information contained therein. Therefore, the attorney examiner finds that Duke and Staff's motions for protective order are reasonable, with regard to the model, MetaVu report, and Staff comments, and should be granted.

- (12) 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 July 25, 2013. Until that date, the docketing division should maintain, under seal, the information in the model, MetaVu report, and Staff comments, which was filed under seal on June 30, 2011, and November 4, 2011.
- (13) 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. Should Duke wish to extend this confidential treatment, it should file an appropriate motion at least 45 days in advance of the expiration date. Duke should also indicate in its motion if it wishes confidential treatment of Staff's comments to continue. If no such motion to extend confidential treatment is filed, the Commission may release this information without prior notice to Duke.

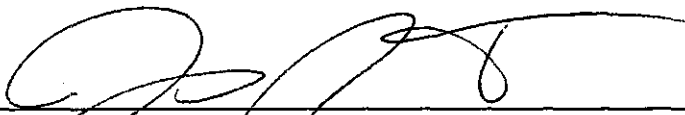
It is, therefore,

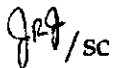
ORDERED, That the motions for protective order filed by Duke and Staff be granted. It is, further,

ORDERED, That the Commission's docketing division maintain, under seal, the unredacted information in the model, MetaVu report, and Staff comments, which was filed under seal on June 30, 2011, and November 4, 2011, for a period of 18 months, ending on July 25, 2013, as set forth in Finding (12). It is, further,

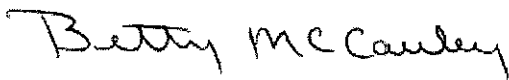
ORDERED, That a copy of this entry be served upon all parties of record.

THE PUBLIC UTILITIES COMMISSION OF OHIO


By: Jonathan J. Tauber
Attorney Examiner



Entered in the Journal
JAN 25 2012



Betty McCauley
Secretary