

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)
Component of its Market-Based) Case No. 07-974-EL-UNC
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.)

In the Matter of the Application of Duke)
Energy Ohio, Inc. to Establish its Fuel)
and Economy Purchased Power) Case No. 09-974-EL-FAC
Component of its Market-Based)
Standard Service Offer for 2009.)

In the Matter of the Application of Duke)
Energy Ohio, Inc. to Establish its System) Case No. 09-975-EL-RDR
Reliability Tracker of its Market-Based)
Standard Service Offer for 2009.)

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 (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 to cover peak

and reserve capacity requirements and to flow through those actual costs on a dollar-for-dollar basis.

- (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) In the above-captioned cases, Duke has been granted protective orders for the following documents and has requested continuation of the protective orders as follows:
 - (a) The multi-year boiler recovery plan, attachment 1 (plan attachment 1), filed January 28, 2010, in the four above-captioned cases, was granted protective treatment by entry issued May 19, 2010, for a period of 18 months.

On October 3, 2011, Duke filed a motion for continuation of protective treatment. In support of its motion for continuation of the protective order, Duke explains that plan attachment 1 contains Duke's plan for its generation assets and details the projects by generating unit through 2019, setting forth the priority of each project, outage duration, and estimated cost per project. According to Duke, this information is a confidential trade secret and, if publically disclosed, would give Duke's competitors access to competitively sensitive, confidential information, which could allow competitors to make offers to sell parts or services at higher prices than they might in the absence of such information. Duke also avers that plan attachment 1 contains sensitive outage information, including times and duration of outages necessary to effectuate the plan, which Duke believes would be of substantial value to a competitor or vendor to determine what Duke's energy or capacity needs will be, and could be used to manipulate prices and offers for replacement power or capacity.

- (b) Attachment SP-1 to the testimony of Salil Padhan, Attachment TJT-1 to the testimony of Timothy J. Thiemann, and Attachment WDW-2 to the testimony of William Don Wathen Jr. (collectively, testimony attachments), filed March 2, 2010, in Case Nos. 09-974-EL-FAC (09-974) and 09-975-EL-RDR (09-975), was granted protective treatment by entry issued June 14, 2010, for a period of 18 months.

On October 27, 2011, Duke filed a motion to extend protective treatment for the testimony attachments. In support of its motion for continuation of the protective order, Duke explains that the testimony attachments contain confidential information, including data describing Duke's capacity positions, coal inventory levels, and accounting adjustments at its Zimmer Generating Station. If publicly disclosed, Duke argues that this information could give Duke's competitors access to competitively sensitive, confidential information, which could allow competitors to make offers to sell coal, capacity, and wholesale power at higher prices than might be offered in the absence of such information; thus, giving Duke a competitive disadvantage.

- (c) Schumaker's Management/Performance Audit and Financial Audit of Duke's PTC-FPP and SRA-SRT for the period of January 1, 2009 to December 31, 2009, (unredacted audit report), filed May 14, 2010, in 09-974 and 09-975, was granted protective treatment by entry issued June 14, 2010, for a period of 18 months.

On October 27, 2011, Duke filed a motion to extend protective treatment of the unredacted audit report. In support of its motion for continuation of the protective order, 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.

- (4) 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.
- (5) 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.”
- (6) 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.
- (7) The attorney examiner has examined the information set forth in Duke’s motions for protective order filed on October 3, 2011, and October 27, 2011, as well as the assertions set forth in the supportive memoranda. 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 plan attachment 1, the testimony attachments, and the unredacted audit report contain 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 plan attachment 1 and the testimony attachments could not be reasonably redacted to remove the confidential information contained therein.

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

However, the audit report has been appropriately redacted with a redacted copy of the audit filed in the public record. Therefore, the attorney examiner finds that Duke's motions for protective order are reasonable with regard to the plan attachment 1, the testimony attachments, and the unredacted audit report, and should be granted.

- (8) 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 26, 2013. Until that date, the docketing division should maintain, under seal, the following documents:
- (a) plan attachment 1, filed January 28, 2010, in the four above-captioned cases;
 - (b) testimony attachments, filed March 2, 2010, in 09-974 and 09-975; and
 - (c) unredacted audit report, filed May 14, 2010, in 09-974 and 09-975.
- (9) 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 motions to extend the protective orders filed by Duke on October 3, 2011, and October 27, 2011, be granted. It is, further,

ORDERED, That the Commission's docketing division maintain, under seal plan attachment 1, which was filed under seal in these dockets on January 28, 2010; the testimony attachments, which were filed under seal in 09-974 and 09-975 on March 2, 2010; and the unredacted audit report which was filed under seal in 09-974 and 09-975 on May 14, 2010, for a period of 18 months, ending on July 26, 2013. It is, further,

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

THE PUBLIC UTILITIES COMMISSION OF OHIO

Katie L. Stenman

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JAN 30 2012

Betty McCauley

Betty McCauley
Secretary