

BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of Application of Duke)
Energy Ohio, Inc. for Authority to)
Establish a Standard Service Offer)
Pursuant to R.C. 4928.143 in the Form of) Case No. 14-841-EL-SSO
an Electric Security Plan, Accounting)
Modifications, and Tariffs for Generation)
Service.)

In the Matter of Application of Duke)
Energy Ohio, Inc. for Authority to)
Amend its Certified Supplier Tariff,) Case No. 14-842-EL-ATA
P.U.C.O. No. 20.)

ENTRY

The Commission finds:

- (1) Duke Energy Ohio, Inc. (Duke) is a public utility as defined in R.C. 4905.02 and, as such, is subject to the jurisdiction of this Commission.
- (2) On May 29, 2014, Duke filed an application for a standard service offer pursuant to R.C. 4928.141. This application is for an electric security plan (ESP) in accordance with R.C. 4928.143 that will begin on June 1, 2015.
- (3) By Entry issued August 5, 2014, the attorney examiner, *inter alia*, granted the motions to intervene in these matters filed by numerous entities, including the Ohio Consumers' Counsel (OCC) and IGS Energy (IGS). By that same Entry, the attorney examiner scheduled a prehearing conference in these matters for the purpose of considering various procedural motions regarding certain documents and information requested in discovery, including Duke's July 8, 2014 motion for protective order, OCC's July 18, 2014 motion to hold in abeyance Duke's motion for protective order, and OCC's July 18, 2014 motion to compel responses to discovery.
- (4) In its July 8, 2014 motion for protective order, Duke requests the Commission adopt Exhibit 3 to its motion, which is the confidentiality agreement attached to its motion (referred to

herein as Exhibit 3). Included in Exhibit 3 is language regarding the following: Section 2, the recipient of the confidential information (recipient) acknowledges the confidential nature of the information and that the unauthorized disclosure or use of the information will injure Duke; Section 6, if the recipient attempts to use the confidential information in any proceeding before the Commission or any other court, the recipient will not oppose Duke's motion to strike the use of the information and the recipient shall reimburse Duke for any costs it incurs in defending such confidentiality; and Section 7, the disclosure of the information would likely damage Duke, such damage would be material, Duke would suffer irreparable harm, and that Duke may, without the requirement to post bond, take any actions available for breach of the agreement.

- (5) On July 14, 2014, OCC filed a memorandum contra Duke's July 8, 2014 motion for protective order stating that Exhibit 3 deviates from past agreements, is inconsistent with the Commission's rules and with the general rule that all proceedings and documents at the Commission are public records. Moreover, OCC asserts that Duke has failed to substantiate its claim that circumstances changed that necessitate the new agreement. OCC maintains that Duke has failed to show good cause why its motion should be granted. Therefore, OCC advocates the Commission require Duke to enter into the protective agreement attached to its memorandum contra as Exhibit 1 (referred to herein as Exhibit 1), which is the same agreement Duke and OCC have used for over a decade in such proceedings, stating that this agreement protects the needs of Duke and OCC. Duke replied to OCC's memorandum contra on July 17, 2014.
- (6) On July 18, 2014, OCC filed a motion to hold in abeyance a ruling on Duke's motion for protection until Duke provides the information over which it seeks confidential treatment to parties willing to enter into a reasonable agreement. According to OCC, it is reasonable for OCC to review the information sought before it is required to prepare a response.
- (7) Duke filed a memorandum contra OCC's July 18, 2014 motion to hold the ruling in abeyance, stating that OCC's motion was

untimely, duplicative, and unnecessary. OCC replied to Duke's memorandum contra on July 28, 2014.

- (8) Also, on July 18, 2014, OCC filed a motion to compel responses to discovery, stating that it has exhausted all other reasonable means of resolving differences with Duke. OCC contends that, in light of the stalemate between Duke and OCC, without compelling Duke to enter into a protective agreement with OCC containing the same terms and structure of the agreements that they have executed in numerous proceedings, OCC will not have access to responses to discovery.
- (9) On July 23, 2014, Duke filed a memorandum contra OCC's motion to compel, asserting that OCC's true intent is to compel Duke to enter into a confidentiality agreement that fails to provide Duke with adequate protection in the event of a breach. OCC replied to Duke's memorandum contra on July 28, 2014.
- (10) The prehearing conference to address the motions and other procedural issues relating to discovery was held, as scheduled, on August 12, 2014, at the offices of the Commission.
- (11) At the prehearing conference, the attorney examiner determined that, with the following revisions to Exhibit 3, the parties should move forward and enter into protective agreements: Section 2 should be revised such that the recipient acknowledges that release of the alleged confidential information "may" injure Duke; Section 6 should be revised such that one copy of the alleged confidential information may be retained by the recipient and that rulings on the use of such information beyond these cases shall be dealt with in any subsequent cases; and Section 7 should be revised to reflect that disclosure of the information "may" damage Duke and the statement regarding Duke not being required to file a bond should be deleted. In addition, the attorney examiner noted that the information marked confidential by Duke is only alleged to be confidential and has not yet been ruled as confidential in these proceedings. The attorney examiner directed Duke to appropriately limit the scope of its alleged confidential information, in keeping with past precedent in previous proceedings. Accordingly, the attorney examiner:

granted, in part, and denied, in part, Duke's July 8, 2014 motion for protective order; denied OCC's July 18, 2014 motion to hold in abeyance Duke's motion for protective order; and found that OCC's July 18, 2014 motion to compel responses to discovery is moot, given the ruling on the protective order.

- (12) Ohio Adm.Code 4901-1-15 provides that any party who is adversely affected may take an immediate interlocutory appeal to the Commission from any ruling issued during a prehearing conference that grants a motion to compel discovery or denies a motion for a protective order.
- (13) On August 18, 2014, Duke filed an interlocutory appeal of the attorney examiner's oral ruling granting, in part, and denying, in part, its July 8, 2014 motion for protective order. Duke explains that, to ensure that its confidential information would be safeguarded properly, Exhibit 3 requires recipients to use any confidential information produced in these proceedings only for these proceedings; the recipients must then return or destroy the confidential information after these proceedings. However, the attorney examiner's ruling on August 12, 2014, provided that recipients may retain the confidential information indefinitely, and may use the information in future proceedings, subject only to future evidentiary objections.
- (14) On August 25, 2014, OCC and IGS filed memoranda contra Duke's interlocutory appeal. IGS and OCC assert the attorney examiner's ruling should be affirmed, stating that the ruling was just, reasonable, and lawful. IGS notes that no part of the ruling allows any party to disclose Duke's confidential information; rather the ruling focused on the retention and use of the confidential information in future proceedings under seal. According to IGS, the ruling will promote administrative economy and development of the record, as it recognized that many of Duke's cases are related and contain overlapping issues. IGS and OCC agree that the ruling is consistent with the Commission's rules and well-defined case law that favors elimination of duplicative discovery. The ruling strikes the appropriate balance of safeguarding Duke's protected information and providing Duke sufficient recourse for breach, while facilitating full and complete discovery and development of the record, according to IGS. OCC advises that the

Commission order parties to use Exhibit 1 that has been used for decades.

- (15) Upon consideration of Duke's August 18, 2014 interlocutory appeal and the attorney examiner's rulings at the August 12, 2014 prehearing regarding Duke's July 8, 2014 motion for protective order and OCC's July 18, 2014 motion to compel responses to discovery, the Commission finds that the rulings should be modified, in part. Initially, we note that, like the attorney examiner, the Commission is open to considering new language in protective agreements; but, upon review of Exhibit 3, the Commission finds that Duke has gone too far in its efforts to address any potential issues that may arise. The Commission agrees with the attorney examiner that Duke's language was too definitive and the term "may" was more appropriate than the term "will," and Duke's proposed language regarding the retention of the alleged confidential information was too restrictive. With these concerns in mind, we reviewed and compared Exhibit 3 and Exhibit 1, and we find that Exhibit 1, which has been used by Duke for over a decade, is more reasonable, consistent with our past cases and precedent, and contains the language needed to sufficiently protect Duke's interests, including provisions that: ensure recipients do not disclose confidential information and are bound by the confidential agreement, even if they are no longer engaged in the proceeding; require recipients to provide notice to Duke if they desire to use the protected material other than in a manner provided for in the confidential agreement; and, if OCC receives a public records request for protected materials, OCC is required to provide Duke notice to enable Duke to file a pleading before a court of competent jurisdiction. Moreover, in the event of a breach of the agreement, Duke may pursue all remedies available by law. In addition, as pointed out by both OCC and IGS, Exhibit 1 has been proven to work for discovery purposes in previous cases before the Commission involving Duke. Therefore, the Commission finds that, in order to enable the parties to move forward with discovery in these proceedings, Exhibit 1 should be adopted. Accordingly, Duke should enter into protective agreements, like Exhibit 1 and the agreements entered into in the previous ESP proceedings, with the intervenors that are seeking the alleged confidential information. To that end, we conclude that the attorney

examiner's ruling should be modified such that: Duke's July 8, 2014 motion for protective order should be granted to the extent the information marked confidential by Duke should be treated confidentially by the recipients until such time as the Commission rules otherwise, and denied to the extent Duke requested the Commission adopt Exhibit 3 consistent with our determination in this Entry; and OCC's July 18, 2014 motion to compel responses to discovery should be granted. Finally, the Commission directs Duke to provide the alleged confidential information to OCC and any other intervenor that has requested the information by the end of the day on August 29, 2014, irrespective of whether the necessary protective agreements have been executed. In the interim, until the protective agreements are finalized consistent with this Entry, the recipients shall treat all information marked as confidential by Duke in accordance with the terms of Exhibit 1.

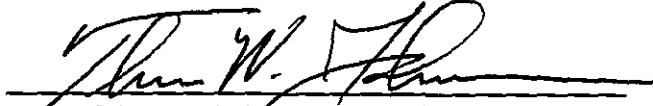
It is, therefore,

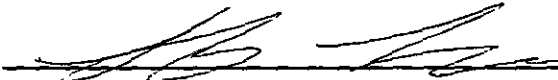
ORDERED, That the attorney examiner's rulings at the August 12, 2014 prehearing conference are modified, to the extent set forth in finding (15). It is further,

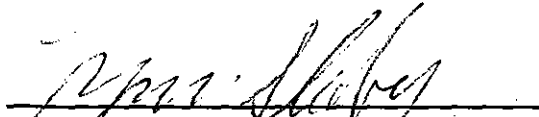
ORDERED, That, in accordance with finding (15), Duke provide the alleged confidential information by the end of the day on August 29, 2014. It is, further,

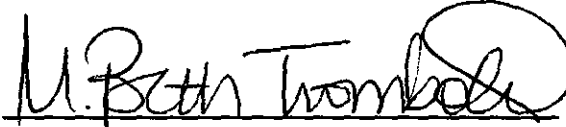
ORDERED, That a copy of this Entry be served upon all parties of record.

THE PUBLIC UTILITIES COMMISSION OF OHIO


Thomas W. Johnson, Chairman


Steven D. Lesser



Lynn Slaby


M. Beth Trombold


Asim Z. Haque

CMTF/NJW/vrm

Entered in the Journal
AUG 27 2014



Barcy F. McNeal
Secretary