

THE PUBLIC UTILITIES COMMISSION OF OHIO

IN THE MATTER OF THE AUDIT OF DUKE
ENERGY OHIO, INC.'S RIDERS SUPPLIER
COST RECONCILIATION, RETAIL
CAPACITY, RETAIL ENERGY, LOAD
FACTOR ADJUSTMENT, ELECTRIC
SECURITY STABILIZATION CHARGE, AND
ECONOMIC COMPETITIVENESS FUND.

CASE NO. 17-28-EL-RDR

FINDING AND ORDER

Entered in the Journal on August 2, 2017

I. SUMMARY

{¶ 1} In this Finding and Order, the Commission finds Staff's recommendations regarding Duke Energy Ohio, Inc.'s Riders Supplier Cost Reconciliation, Retail Energy, Retail Capacity, Load Factor Adjustment, and Economic Competitiveness Fund should be adopted.

II. DISCUSSION

{¶ 2} Duke Energy Ohio, Inc. (Duke) is an electric distribution utility (EDU) and a public utility as defined by R.C. 4928.01(A)(6) and R.C. 4905.02, respectively. As such, it is subject to the jurisdiction of this Commission.

{¶ 3} R.C. 4928.141 mandates that an EDU shall provide a standard service offer (SSO) of all competitive retail electric services necessary to maintain essential electric service, including a firm supply of electric generation service, to all consumers within its certified territory. The SSO may be established as a market rate offer under R.C. 4928.142 or an electric security plan (ESP) under R.C. 4928.143.

{¶ 4} On May 29, 2014, Duke filed an application for approval of its third SSO, an ESP under R.C. 4928.143. On April 2, 2015, the Commission issued an Opinion and Order that approved Duke's application subject to certain modifications. *In re Duke Energy Ohio, Inc.*, Case No. 14-841-EL-SSO, et. al. (*Duke ESP 3*), Opinion and Order (Apr. 2, 2015).

{¶ 5} In *Duke ESP 3*, the Commission established the process for review of Duke's various pricing terms and filings made during the ESP's effective period and instructed that future informational filings arising from the provisions of the application approved in the *Duke ESP 3* should be made in *In re Duke Energy Ohio, Inc.*, Case No. 15-6001-EL-RDR. Informational filings are those filings related to riders where quarterly reports and true-ups are necessary and audits are conducted at the discretion of the Commission but for which no Commission action is generally required to adjust the tariff rates. *Duke ESP 3*, Entry (May 13, 2015) at 2. Riders that require informational filings during the term of the ESP include the Supplier Cost Reconciliation Rider (Rider SCR), the Retail Energy Rider (Rider RE), the Retail Capacity Rider (Rider RC), the Load Factor Adjustment Rider (Rider LFA), and the Economic Competitiveness Fund (Rider ECF) (collectively, the Riders). Pursuant to the Commission's instruction, Duke submitted various informational filings under Case No. 15-6001-EL-UNC.

{¶ 6} Although Commission action is not always required with regard to these informational filings, the Commission recognized and preserved its discretion to determine that some action – including an audit – may be necessary. In such cases, the Commission may require that filings be made in a separate docket. *Duke ESP 3*, Entry (May 13, 2015) at 2-3.

{¶ 7} On January 27, 2017, Duke initiated this proceeding by filing its application for an audit of the Riders.

{¶ 8} On April 28, 2017, Staff filed its review and recommendations regarding the Riders. Upon its review of the application (including, but not limited to portions related to the revenues, supplier payments, auction expenses, commercial activity taxes, and revenues and expenses associated with its percentage of income payment plan program, as well as other work papers supporting the Riders), and its verification that all applicable credits were correctly calculated and applied, Staff states it is satisfied that Duke's application is both consistent with and in compliance with Commission orders. As such, Staff recommends that the application be accepted as filed.

{¶ 9} Upon consideration of the application and Staff's review, the Commission finds that the recommendations set forth in Staff's April 28, 2017 filing should be adopted and Duke's application should be accepted as filed.

{¶ 10} As an additional matter, the Commission notes that Duke filed a motion for a protective order on January 27, 2017. The motion is unopposed.

{¶ 11} Under R.C. 4905.07, "all facts and information in the possession of the [Commission] shall be public * * * [and] open to inspection by interested parties or their attorneys," except as provided in R.C. 149.43. R.C. 4905.07. In turn, R.C. 149.43 specifies that a record prohibited from release under state or federal law is not a "public record." R.C. 149.43(A)(1)(v). This exemption includes trade secrets. *State ex rel. Besser v. Ohio State Univ.*, 89 Ohio St.3d 396, 399, 732 N.E.2d 737 (2000) ("Trade secrets are exempt from disclosure under the 'state or federal law' exemption of R.C. 149.43.").

{¶ 12} Ohio law defines a "trade secret" as information that both "derives independent economic value * * * from not being generally known to, and not being readily ascertainable by * * * other persons who can obtain economic value from its disclosure or use" and "is the subject of efforts that are reasonable under the circumstances to maintain its secrecy." R.C. 1333.61(D). In analyzing whether a trade secret claim meets the statutory definition codified in R.C. 1333.61(D), one must consider: (1) the extent to which the information is known outside the business; (2) the extent to which it is known within the business; (3) the precautions taken by its holder to guard the secrecy of the information; (4) the savings effected and value to the holder in having the information as against competitors; (5) the amount of effort or money expended in obtaining and developing the information; and (6) the amount of time and expense it would take for others to acquire and duplicate it. *State ex rel. The Plain Dealer v. Ohio Dept. of Ins.*, 80 Ohio St.3d 513, 524-525, 687 N.E.2d 661 (1997).

{¶ 13} Duke's motion for a protective order is filed pursuant to Ohio Adm.Code 4901-1-24(D), which permits a party to request, and the Commission to issue, any order necessary to protect the confidentiality of any information contained within a document "to the extent

that state or federal law prohibits the release of the information, including where the information is deemed * * * to constitute a trade secret under Ohio law * * *." *Ohio Adm.Code 4901-1-24(D)*. By its motion, Duke seeks to protect from public view certain information supporting its Rider SCR contained within Attachment A to its application. Duke identifies this designated material as auction fees charged by a third-party vendor. Duke states that it considers the information to be a confidential, proprietary trade secret. Duke submits that releasing the information to public view would result in a competitive disadvantage to both Duke and the third-party vendor, which would result in higher fees for Duke and, thus, its customers. Duke posits that upholding the confidentiality of the data would retain its independent economic value by shielding its competitively sensitive nature from the market. Duke also states that information is known only to itself and its vendor. Furthermore, the information is subject to a confidentiality agreement by which only employees with a legitimate business need to know and act are privy to it.

{¶ 14} Upon review of the information designated as confidential, Duke's arguments in support of retaining that confidentiality, and legal standards discussed above, the Commission concludes that the material portions of Attachment A constitute a trade secret. As such, release of the information is prohibited. The Commission further finds that the nondisclosure of information is not inconsistent with the purposes of R.C. Title 49. Accordingly, the Commission finds that Duke's January 27, 2017 motion for a protective order should be granted. Any party wishing to extend this confidential treatment should file an appropriate motion at least 45 days in advance of the expiration date. *Ohio Adm.Code 4901-1-24(F)*.

III. ORDER

{¶ 15} It is, therefore,

{¶ 16} ORDERED, That, in accordance with paragraph 10, Staff's recommendations be adopted and Duke's application be accepted as filed. It is, further,

{¶ 17} ORDERED, That the motion for protective order filed by Duke be granted. It is, further,

{¶ 18} ORDERED, That, for a period of 24 months, the Commission's docketing division maintain, under seal, certain information in Attachment A, which was filed under seal in this docket on January 27, 2017. It is, further,

{¶ 19} ORDERED, That a copy of this Finding and Order be served upon all parties of record.

THE PUBLIC UTILITIES COMMISSION OF OHIO

Asim Z. Haque, Chairman

M. Beth Trombold

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PAS/sc

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Secretary