

THE PUBLIC UTILITIES COMMISSION OF OHIO

IN THE MATTER OF THE APPLICATION OF DUKE ENERGY OHIO, INC., FOR AN INCREASE IN ELECTRIC DISTRIBUTION RATES.

CASE NO. 17-32-EL-AIR

IN THE MATTER OF THE APPLICATION OF DUKE ENERGY OHIO, INC., FOR TARIFF APPROVAL.

CASE NO. 17-33-EL-ATA

IN THE MATTER OF THE APPLICATION OF DUKE ENERGY OHIO, INC., FOR APPROVAL TO CHANGE ACCOUNTING METHODS.

CASE NO. 17-34-EL-AAM

IN THE MATTER OF THE APPLICATION OF DUKE ENERGY OHIO, INC., FOR APPROVAL TO MODIFY RIDER PSR.

CASE NO. 17-872-EL-RDR

IN THE MATTER OF THE APPLICATION OF DUKE ENERGY OHIO, INC., FOR APPROVAL TO AMEND RIDER PSR.

CASE NO. 17-873-EL-ATA

IN THE MATTER OF THE APPLICATION OF DUKE ENERGY OHIO, INC., FOR APPROVAL TO CHANGE ACCOUNTING METHODS.

CASE NO. 17-874-EL-AAM

IN THE MATTER OF THE APPLICATION OF DUKE ENERGY OHIO, INC., FOR AUTHORITY TO ESTABLISH A STANDARD SERVICE OFFER PURSUANT TO R.C. 4928.143 IN THE FORM OF AN ELECTRIC SECURITY PLAN, ACCOUNTING MODIFICATIONS, AND TARIFFS FOR GENERATION SERVICE.

CASE NO. 17-1263-EL-SSO

IN THE MATTER OF THE APPLICATION OF DUKE ENERGY OHIO, INC. FOR AUTHORITY TO AMEND ITS CERTIFIED SUPPLIER TARIFF, P.U.C.O. No. 20.

CASE NO. 17-1264-EL-ATA

IN THE MATTER OF THE APPLICATION OF DUKE ENERGY OHIO, INC., FOR AUTHORITY TO DEFER VEGETATION MANAGEMENT COSTS.

CASE NO. 17-1265-EL-AAM

**IN THE MATTER OF THE APPLICATION OF
DUKE ENERGY OHIO, INC., TO ESTABLISH
MINIMUM RELIABILITY PERFORMANCE
STANDARDS PURSUANT TO OHIO
ADM.CODE CHAPTER 4901:1-10.**

CASE No. 16-1602-EL-ESS

ENTRY

Entered in the Journal on September 6, 2018

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

{¶ 2} On April 13, 2018, Duke and certain parties filed a stipulation and recommendation (Stipulation) that purports to resolve issues in four pending cases. The cases included in the Stipulation are:

- *In the Matter of the Application of Duke Energy Ohio, Inc., for an Increase in Electric Distribution Rates, Case 17-32-EL-AIR, et al. (Rate Case);*
- *In the Matter of the Application of Duke Energy Ohio, Inc., for Approval to Modify Rider PSR, Case No. 17-872-EL-RDR, et al. (PSR Case);*
- *In the Matter of the Application of Duke Energy Ohio, Inc., for Authority to Establish a Standard Service Offer, Case No. 17-1263-EL-SSO, et al. (ESP Case); and*
- *In the Matter of the Application of Duke Energy Ohio, Inc., to Establish Minimum Reliability Performance Standards, Case No. 16-1602-EL-ESS (Standards Case).*

The parties that signed the Stipulation are: Duke, Staff, the City of Cincinnati, Ohio Partners for Affordable Energy, Ohio Energy Group, Ohio Hospital Association, and People Working Cooperatively, Inc. Non-opposing signatories are the Kroger Company, Industrial Energy

Users-Ohio, Ohio Manufacturers' Association Energy Group, and Wal-Mart Stores East LP and Sam's East, Inc.

{¶ 3} On May 9, 2018, the attorney examiner granted Duke's motion to consolidate the cases and set forth a procedural schedule. Thereafter, the evidentiary hearing began on July 9, 2018, and concluded on July 24, 2018, with rebuttal testimony being heard on August 6, 2018. In the hearing, it was established that the deadline to file briefs is September 11, 2018, and reply briefs are due by October 2, 2018.

{¶ 4} On August 9, 2018, a joint motion for reconsideration was filed by the Environmental Law & Policy Center, the Natural Resources Defense Council, the Sierra Club, the Ohio Environmental Council, and the Environmental Defense Fund (collectively, the Conservation Groups). The Conservation Groups note that on July 10, 2018, Duke witness Judah Rose provided testimony in support of the Stipulation. Specifically, the Conservation Groups state that Mr. Rose's testimony supported Duke's request to modify the Price Stability Rider (Rider PSR), which seeks to pass through to customers the costs or credits of Duke's nine percent ownership share in the Ohio Valley Electric Corporation (OVEC). As part of his testimony, Mr. Rose forecasted the projected costs of Duke's OVEC share. In a June 6, 2018 motion for protective order, Duke requested to maintain Mr. Rose's formulas and calculations as confidential. At the start of the hearing, Duke stated that it was no longer seeking protection for Mr. Rose's projection of the Duke's total share of OVEC costs, for the seven year term of the rider, which was \$77 million. In the hearing on July 10, 2018, Sierra Club asked that Mr. Rose's annual OVEC projections not be considered confidential. At that time, according the Conservation Groups, the attorney examiners denied Sierra Club's request. The Conservation Groups now seek reconsideration of that ruling.

{¶ 5} In their motion, the Conservation Groups maintain that Duke failed to meet the burden to show that the projections should be kept out of the public record. According to the Conservation Groups, Mr. Rose testified that, if the annual projections were known,

a person would not be able to use that information to calculate OVEC's projected spending or a specific parameter of his formulas. The Conservation Groups argue that Duke failed to provide sufficient evidence to support the confidentiality of the numbers and, thus, the Conservation Groups assert that the numbers cannot be considered trade secrets because no competitive harm would take place nor would any proprietary information be released.

{¶ 6} Duke filed a memorandum contra the Conservation Groups' request on August 18, 2018. Duke first submits that the Conservation Groups' motion is improper and should be dismissed. According to Duke, pursuant to Ohio Adm.Code 4901-1-15, parties seeking to appeal an oral ruling from a hearing must first seek certification to file an interlocutory appeal with the Commission. Such filing must occur within five days of the ruling. Duke therefore argues that the Conservation Groups' motion is both late and incorrectly filed. Duke additionally submits that the motion should be dismissed for substantive reasons. Duke asserts that, in deciding whether information should be confidential or public, it is a balance between the public's need for the information and a company's need to keep that information confidential. Thus, Duke argues the information should remain confidential, as Mr. Rose testified that release of the information would expose an overall competitive position. Finally, Duke maintains that keeping the numbers confidential is consistent with Commission precedent.

{¶ 7} R.C. 4905.07 provides that all facts and information in the possession of the Commission shall be public, except as provided in R.C. 149.43 and as consistent with the purposes of Title 49 of the Revised Code. R.C. 149.43 specifies that the term "public records" excludes information which, under state or federal law, may not be released. The Supreme Court of Ohio has clarified that the "state or federal law" exemption is intended to cover trade secrets. *State ex rel. Besser v. Ohio State Univ.*, 89 Ohio St.3d 396, 399, 732 N.E.2d 373 (2000). Similarly, Ohio Adm.Code 4901-1-24 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.” 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; and (2) It is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.” R.C. 1333.61(D).

{¶ 8} Upon review, the attorney examiner reaffirms the initial ruling regarding the confidentiality of Mr. Rose’s OVEC forecast. Specifically, Mr. Rose’s projection that Duke’s obligation to OVEC, in accordance with Rider PSR and the Stipulation, would likely result in a \$77 million total cost to customers over the term of the Rider PSR should be part of the public record. Additionally, Mr. Rose’s projection that each year the Rider PSR would likely result in a cost to customers, should also be part of the public record. However, the annual projection for each individual year of the rider should remain confidential. Mr. Rose testified that, if the information was revealed, it would depict “what’s going on at the plant” and expose an overall competitive position (Confidential Tr. II at 280). The projected annual numbers relate to power plants that participate in the competitive wholesale market and maintain independent economic value. Thus, they qualify as trade secrets and should remain confidential. Notably, this is consistent with prior Commission rulings regarding other OVEC forecasts. *See In re Duke Energy Ohio, Inc.*, Case No. 14-841-EL-SSO, et al., Opinion and Order at 10-11 (April 2, 2015). Accordingly, the motion for reconsideration filed by the Conservation Groups should be denied.

{¶ 9} It is, therefore,

{¶ 10} ORDERED, That the motion for reconsideration filed by the Conservation Groups be denied. It is, further,

{¶ 11} ORDERED, That a copy of this Entry be served upon all parties of record.

THE PUBLIC UTILITIES COMMISSION OF OHIO

s/Nicholas J. Walstra

By: Nicholas J. Walstra
Attorney Examiner

MJA/hac

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Case No(s). 17-0032-EL-AIR, 17-0033-EL-ATA, 17-0034-EL-AAM, 17-0872-EL-RDR, 17-0873-EL-ATA, 1

Summary: Attorney Examiner Entry Denying motion for reconsideration. electronically filed by Heather A Chilcote on behalf of Nicholas Walstra, Attorney Examiner, Public Utilities Commission