

# THE PUBLIC UTILITIES COMMISSION OF OHIO

IN THE MATTER OF THE REVIEW OF DUKE  
ENERGY OHIO, INC.'S ALTERNATIVE  
ENERGY RECOVERY RIDER.

CASE NO. 19-51-EL-RDR

## FINDING AND ORDER

Entered in the Journal on December 2, 2020

### I. SUMMARY

{¶ 1} The Commission adopts the recommendations found in the audit report of Duke Energy Ohio, Inc.'s Alternative Energy Recovery Rider.

### II. PROCEDURAL HISTORY

{¶ 2} Duke Energy Ohio, Inc. (Duke or the Company) is an electric distribution utility (EDU) as defined by 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.

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

{¶ 4} On December 19, 2018, the Commission approved a stipulation and recommendation filed by Duke and other parties that, among other things, included an ESP for the period June 1, 2018, through May 31, 2024. *In re Duke Energy Ohio, Inc.*, Case No. 17-1263- EL-SSO, et al., Opinion and Order (Dec. 19, 2018). In the Opinion and Order, the Commission continued Duke's Alternative Energy Recovery Rider (Rider AER-R). In accordance with the stipulation, through Rider AER-R, Duke may recover the costs it incurs in complying with the alternative energy portfolio standard requirements of R.C. 4928.64. Rider AER-R is filed quarterly and is subject to true-up and annual audits.

{¶ 5} On January 23, 2019, the Commission issued an Entry directing Staff to issue a request for proposal to acquire audit services to assist the Commission with the review of Duke's Rider AER-R. Bidders were directed to demonstrate their understanding of the project and the work required by showing a clear understanding of the tasks to be completed, the experience and qualifications of the personnel who will perform the work, and the anticipated breakdown of costs and timing. The audit would occur in two phases, with Audit 1 completing a review of Rider AER-R for the period of 2017 to 2018 and Audit 2 completing a review for 2019.

{¶ 6} On March 27, 2019, the Commission issued an Entry selecting Larkin & Association, PLLC (Larkin) to perform the consulting activities for Duke's Rider AER-R and directed Duke to enter into a contract with Larkin for the purpose of providing payment for its auditing services.

{¶ 7} Thereafter, on August 28, 2019, Larkin submitted its report for Audit 1. After a comment period, the Commission adopted the recommendations in the audit report in a Finding and Order issued December 4, 2019.

{¶ 8} By Entry issued January 23, 2020, the attorney examiner issued an initial procedural schedule regarding Audit 2.

{¶ 9} In compliance with the January 23, 2020 Entry, Larkin submitted its report for Audit 2 on July 10, 2020, under seal.

{¶ 10} Staff and Duke timely filed their respective comments on July 31, 2020, and Duke submitted reply comments on August 14, 2020.

### **III. DISCUSSION**

#### **A. *Summary of the Audit Report***

{¶ 11} As previously mentioned, on July 10, 2020, Larkin filed the management/performance and financial audit report (Audit Report) on Duke's Rider AER-

R for the period of January 1, 2019 through December 31, 2019. The report examined Duke's compliance with Rider AER-R, as it was originally implemented, as well as Commission-adopted recommendations and modifications from previous Rider AER-R audits. See, *In re Duke Energy Ohio, Inc.*, Case No. 12-802-EL-RDR (2012 Audit), *In re Duke Energy Ohio, Inc.*, Case No. 12-3111-EL-RDR (2013 Audit), and *In re Duke Energy Ohio, Inc.*, Case No. 15-1854-EL-RDR (2014/2015 Audit and 2016 Audit).

{¶ 12} Regarding Duke's compliance with previous audit recommendations, Larkin found that, overall, the Company is generally compliant. Larkin suggests that previous recommendations should be continued, as applicable.

{¶ 13} Upon a review of Duke's management practices, Larkin submitted five recommendations. First, Larkin states Duke should continue to monitor and document market compliance, renewable energy credit (REC) inventory, and renewable portfolio standard (RPS) compliance. Larkin also recommends that the Company update its principles, guidelines, and strategy document to reflect the passage of House Bill 6 (HB 6), which was signed into law on July 23, 2019, and the elimination of the solar-specific RPS compliance after 2019. After considering whether a "dollar cost averaging approach" could result in systemic cost savings in periods in which REC market based costs are increasing or fluctuating, Larkin recommends that Duke continue to monitor market conditions and risks and reassess at least once a year whether shifting to a "dollar cost averaging approach" could help provide protection from REC price volatility.

{¶ 14} As to Larkin's fourth recommendation, the auditor explains that Duke's yearend adjustments for RPS compliance for 2019 resulted in putting RECs that were accounted for as a cost of RPS compliance back into the REC inventory. Larkin states this was the result of over-estimating RPS compliance requirements, caused by over-forecasting retail load and the impact of customer switching. According to Larkin, Duke should conduct a mid-year evaluation, review the quantities of RECs recorded, the remaining

expected REC requirements for the year, and adjust its monthly estimated consumption/recording of RECs accordingly.

{¶ 15} Larkin's final recommendation from the audit of Duke's management practices concerns the Ohio GoGreen Program. Larkin suggests Duke should consider, at least once a year: recording the difference between program revenue and cost into a regulatory liability account; evaluating the allocation of the annual GoGreen REC purchases for the Ohio program; evaluating whether inventory accounting could improve the matching of costs with the GoGreen Program revenues; continuing to make GoGreen REC purchases separately from Ohio RPS compliance purchases; to continue to make GoGreen REC purchases separately from Ohio RPS compliance purchases and at different times; to continue to retire RECs used for RPS compliance through the PJM-GATS tracking system and to retire RECs used for the Ohio GoGreen Program through the MRETS tracking system, or the REC tracking system where the supplier has a registered REC account (Larkin clarifies that Duke should be obtaining, reviewing, and evaluating market information on RECs that could be used for RPS compliance, and if Duke is able to obtain MRETS RECs for RPS purposes, the Company should evaluate such offers; and continuing to purchase GoGreen RECs that are Green-e Certified.

{¶ 16} After conducting the financial audit, Larkin renews its management audit recommendation that Duke should consider recording the difference between GoGreen Program revenue and cost into a regulatory liability account. Additionally, Larkin recommends that Duke monitor and pursue receipt of the zero cost solar RECs to which the Company is entitled to assure that they are recognized and accounted for in the period in which such RECs are being created and comply with previous financial audit recommendations related to RPS compliance.

***B. Comments on the Audit Report***

{¶ 17} In comments, Duke states that Larkin's initial recommendation – shifting to a “dollar cost averaging approach” – is not optimal for meeting the Company's compliance

needs. However, Duke agrees to continue to monitor market conditions and risks and reassess this judgement once per year.

{¶ 18} With respect to Larkin's recommendations that Duke should conduct a mid-year evaluation, review the quantities of RECs recorded, the remaining expected REC requirements for the year, and adjust its monthly estimated consumption/recording of RECs accordingly, the Company states that it revisits the load forecast twice annually and makes any necessary adjustments, with a semi-annual review currently in progress. Additionally, as to the switch/non-switch load, Duke states that the Company considers only recent data in estimating the portion of load that is non-switched. On reply, Staff states that retaining this recommendation would permit the next auditor to confirm the related actions were implemented during 2020, as this particular audit covered the 2019 calendar year.

{¶ 19} In response to Larkin's recommendation that Duke monitor and pursue receipt of the zero cost solar RECs to which the Company is entitled to assure that they are recognized and accounted for in the period in which such RECs are being created, Duke notes that, while the Company does not disagree with the recommendation, the number of RECs received from such facilities is small in comparison to Duke's total RPS obligation. Accordingly, Duke believes that having these solar RECs in inventory would not have changed any solar REC purchasing decisions made by the Company in 2016-2018. On reply, Staff states that it does not contest Duke's observation.

{¶ 20} Lastly, Larkin recommended that Duke evaluate whether inventory accounting could improve the matching of costs with GoGreen Program revenues on an annual calendar year basis. Duke states that, while the Company agrees to evaluate this question, Duke's accounting has deemed GoGreen Program expenses to be immaterial and not require inventory accounting.

{¶ 21} As a general note, Staff recommends that the Commission approve the Audit Report as filed, as no changes are necessary.

**C. *Consideration of the Audit Report***

{¶ 22} Upon review, the Commission adopts the findings outlined in the Audit Report regarding the previous audits. In doing so, we find Duke should continue to apply the recommendations adopted in previous Commission orders from the 2012, 2013, 2014-2015, and 2016 Audits on an ongoing basis and should continue to document its rationale. As to Larkin's management and financial audit recommendations, upon consideration of the Audit Report and the comments, the Commission finds the recommendations set forth in the Audit Report should be adopted in their entirety.

**D. *Motion for Protective Order***

{¶ 23} As an additional matter, the Commission notes that Duke filed a motion for protective order on July 10, 2020 for leave to file under seal certain information contained in the Audit Report.

{¶ 24} 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.").

{¶ 25} 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).

{¶ 26} 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 within the Audit Report. Duke identifies this designated material as specific purchase prices, vendor names, and internal procedural documentation. 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 the confidential material, if disclosed, would enable competitors to ascertain the way the Company plans and manages its AER-R compliance efforts and the costs associated therewith. Duke also states that information is known only to itself and to those employees with a legitimate business need to know and act upon the information. Duke opines that the public interest will be served by granting its motion stating that the Commission will prevent undue harm to the Company and its customers as well as ensuring a sound competitive marketplace. No memoranda contra Duke's motion for protective order were filed.

{¶ 27} 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 the Audit Report 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 July 10, 2020 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).

#### IV. ORDER

{¶ 28} It is, therefore,

{¶ 29} ORDERED, That the recommendations in the Audit Report be adopted as discussed herein. It is, further,

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

{¶ 31} ORDERED, That, for a period of 24 months, the Commission's docketing division maintain, under seal, certain information in the Audit Report, which was filed under seal in this docket on July 10, 2020. It is, further,

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

COMMISSIONERS:

*Approving:*

M. Beth Trombold  
Lawrence K. Friedeman  
Daniel R. Conway  
Dennis P. Deters

LLA/hac



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**Case No(s). 19-0051-EL-RDR**

Summary: Finding & Order adopting the recommendations found in the audit report of Duke Energy Ohio, Inc.'s Alternative Energy Recovery Rider electronically filed by Heather A Chilcote on behalf of Public Utilities Commission of Ohio