

# THE PUBLIC UTILITIES COMMISSION OF OHIO

IN THE MATTER OF THE APPLICATION OF  
NESTLÉ PURINA PETCARE COMPANY FOR  
APPROVAL OF A REASONABLE  
ARRANGEMENT WITH DUKE ENERGY  
OHIO, INC.

CASE NO. 22-932-EL-AEC

## FINDING AND ORDER

Entered in the Journal on December 14, 2022

### I. SUMMARY

{¶ 1} The Commission finds that the application for a reasonable arrangement between Nestlé Purina PetCare Company and Duke Energy Ohio, Inc. is reasonable and should be approved.

### II. PROCEDURAL HISTORY

{¶ 2} R.C. 4905.31 authorizes the Commission to approve reasonable electric services arrangements between an electric utility and a mercantile customer or group of mercantile customers. R.C. 4928.01(A)(19) defines "mercantile customer" to mean a commercial or industrial customer that consumes more than 700,000 kilowatt hours of electricity per year for nonresidential use, or the customer is part of a national account involving multiple facilities in one or more states. Ohio Adm.Code 4901:1-38-03 provides rules for the filing of applications, pursuant to R.C. 4905.31, for approval of economic development arrangements that further the policy of the state of Ohio embodied in R.C. 4928.02.

{¶ 3} Duke Energy Ohio, Inc. (Duke) is an electric light company, as defined by R.C. 4905.03(A)(3), and a public utility, as defined under R.C. 4905.02 and, as such, is subject to the jurisdiction of this Commission.

{¶ 4} On October 7, 2022, Nestlé Purina Petcare Company (Nestlé Purina) filed an application for approval of a reasonable arrangement between Nestlé Purina and Duke

pursuant to Ohio Adm.Code Chapter 4901:1-38-03 and R.C. 4905.31 (Arrangement),<sup>1</sup> with a motion for protective order regarding redacted information in the application that Nestlé Purina asserts constitutes confidential, proprietary, and trade secret information. According to the application, Nestlé Purina is a mercantile customer, as defined in R.C. 4928.01(A)(19), and will produce dry dog and cat food brands in a brand new facility located in Williamsburg Township, Ohio, within the certified service area of Duke. The Nestlé Purina facility in Williamsburg Township will be Nestlé Purina's first new factory built from the ground up since 1975. The application indicates that construction of the facility is expected to result in a temporary increase of \$231 million in labor income for Clermont County and \$298 million in labor income for the State of Ohio. Further, the application notes that Nestlé Purina will use the savings generated from the Arrangement to increase training for employees for the new facility and provide additional internships and opportunities for enhancing the development of skill sets from the community. (Application at 1-3, 7, 9, 17.)

{¶ 5} Under the proposed Arrangement, Nestlé Purina, within a term commencing with the approval of the Application and ending on the final billing cycle that includes October 31, 2027, will pay Duke's charges for transmission services, distribution services, ancillary services, and non-bypassable riders (collectively, Wire Services) subject to a \$0.004 per kilowatt-hour (kWh) credit. This credit will be subject to an annual accumulation cap of \$750,000. Also, during the term, Nestlé Purina, at its discretion, will be allowed to receive energy and capacity from a competitive electric service provider. (Application at 4-5, 14)

{¶ 6} Furthermore, under the proposed Arrangement, Nestlé Purina commits to employ no less than 300 people at the facility by year-end 2024, as well as maintain at least 300 employees as an annual average for the remainder of the period covered by the

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<sup>1</sup> During the time in which Nestlé Purina PetCare Company (Nestlé Purina) and Duke Energy Ohio, Inc. (Duke) filed for this arrangement, the Commission approved the proposed amendments to Ohio Adm.Code Chapter 4901:1-38 in Case No. 22-867-EL-ORD on November 16, 2022, which eliminated Ohio Adm.Code 4901:1-38-03. However, the rules adopted by the Commission are not yet effective and, therefore, Nestlé Purina and Duke's Arrangement shall be considered under the existing Ohio Adm.Code 4901:1-38-03 framework.

Arrangement. Under the Arrangement, Nestlé Purina asserts it will be able to continue to invest in the facility, with room for physical expansion and available production capacity. Additionally, the application notes that Nestlé Purina will cumulatively invest at least \$550,000,000 in the facility by year-end 2024 and increase expenditures on worker training by at least the credit amount that Nestlé Purina receives on its wire charges over the period of the Arrangement and one year thereafter. It is noted that over the life of the facility, Nestlé Purina will spend significant funds to support the facility's operating expenditures and capital projects. (Application at 5, 7, 9.) However, if Nestlé Purina does not meet or maintain employment or capital investment commitments during the term, then the credit per kWh provided for under the Arrangement is reduced according to the average of the shortfall ratio until the next billing cycle when the commitment is satisfied. The Arrangement further clarifies that all shortfall adjustments apply to future periods, and Nestlé Purina, under no circumstance, will be subject to claw back of discounts or other benefits received under the Arrangement. (Application at 14-16).

{¶ 7} Pursuant to Ohio Adm.Code 4901:1-38-03, motions to intervene and comments were due to be filed 20 days after the filing the application.

{¶ 8} On October 17, 2022, Duke filed a timely motion to intervene.

{¶ 9} On October 27, 2022, the Ohio Consumers Counsel (OCC) timely filed a motion to intervene.

{¶ 10} No memoranda contra the motions to intervene were filed.

{¶ 11} On November 17, 2022, Staff filed a report of its review of the proposed Arrangement. Staff's opinion is that the application is consistent with the Commission's rules governing approval of economic development arrangements and, therefore, recommended that the Commission approve the application.

### III. PROCEDURAL ISSUES

{¶ 12} On October 7, 2022, Nestlé Purina filed motions for protective order, seeking to protect certain confidential information contained in the five transportation agreements filed for the Commission's approval in this case. Specifically, Nestlé Purina asserts that the certain portions of the application, as well as Appendix D of the application, contain sensitive and confidential company billing, load, and financial information and should be granted protected status. Nestlé Purina states that the identified information constitutes confidential, sensitive, and proprietary trade secret information, as defined in R.C. 1333.61(D) and as recognized by Ohio Adm.Code 4901-1-24. Nestlé Purina asserts protection of the alleged confidential information would be consistent with previous cases, as well. See, e.g., *In re the Joint Application of Vadata, Inc. and Ohio Power Co. for Approval of a Unique Economic Development Arrangement*, Case No. 17-1827-EL-AEC, Entries (Jan. 9, 2018, Jan. 7, 2020, and Feb. 7, 2022). No memoranda contra the motion for protective order were filed.

{¶ 13} 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 that, 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*, 89 Ohio St.3d 396, 399, 732 N.E.2d 373 (2000).

{¶ 14} Similarly, Ohio Adm.Code 4901-1-24 allows the Commission 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 nondisclosure of the information is not inconsistent with the purposes of Title 49 of the Revised Code.”

{¶ 15} 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.” R.C. 1333.61(D).

{¶ 16} The Commission has reviewed the information that is the subject of Nestlé Purina’s motion for protective order, as well as the assertions set forth in the supportive memorandum. Applying the requirements that the information have independent economic value and be the subject of reasonable efforts to maintain its secrecy pursuant to R.C. 1333.61(D), as well as the six-factor test set forth by the Supreme Court of Ohio,<sup>2</sup> the Commission finds that the billing, load, and financial information contained in the application, and Appendix D of the application, constitutes trade secret information. Its release is, therefore, prohibited under state law. The Commission also finds that nondisclosure of this information is not inconsistent with the purposes of Title 49 of the Revised Code. Therefore, the Commission finds that Nestlé Purina’s motion for protective order is reasonable and should be granted.

{¶ 17} Ohio Adm.Code 4901-1-24(F) provides that, unless otherwise ordered, protective orders issued pursuant to Ohio Adm.Code 4901-1-24(D) automatically expire after 24 months. Therefore, confidential treatment shall be afforded for a period ending 24 months from the date of this Finding and Order. Until that date, the Commission's docketing division should maintain, under seal, the information filed confidentially by Nestlé Purina on October 7, 2022.

{¶ 18} Ohio Adm.Code 4901-1-24(F) 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 Nestlé Purina 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

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<sup>2</sup> *State ex rel. the Plain Dealer v. Ohio Dept. of Ins.*, 80 Ohio St.3d 513, 524-525, 687 N.E.2d 661 (1997).

confidential treatment is filed, the Commission may release this information without prior notice.

{¶ 19} Ohio Adm.Code 4901:1-38-05(F) allows affected parties to file motions to intervene as well as comments or objections to an application within 20 days of the filing of the application. R.C. 4903.221 and Ohio Adm.Code 4901-1-11 permit intervention in Commission proceedings by parties with real and substantial interests that are not otherwise adequately represented, but may be adversely affected by the proceeding. In entertaining motions to intervene, R.C. 4903.221(B) directs the Commission to consider: (1) The nature and extent of the prospective intervenor's interest; (2) The legal position advanced by the prospective intervenor and its probable relation to the merits of the case; (3) Whether the intervention by the prospective intervenor will unduly prolong or delay the proceedings; (4) Whether the prospective intervenor will significantly contribute to full development and equitable resolution of the factual issues.

{¶ 20} As noted above, Duke and OCC filed timely motions to intervene in this proceeding. In its motion to intervene, Duke stated that, as a party to the contract, it possessed a clear and direct interest in the proceeding, will not prolong or delay the proceeding, and is in a unique position to contribute to the full development and equitable resolution of any factual issues that might arise. In its motion to intervene, OCC notes that it represents Duke's residential utility customers and that this case may adversely affect the interests of such customers. However, OCC notes that it is not objecting to the application, "given the law \* \* \* as written and that OCC's consumer protection expectations are met in the [a]pplication." OCC further submits that its participation will not unduly prolong or delay the proceeding and that its advocacy will significantly contribute to the full development and equitable resolution of the issues.

{¶ 21} No memorandum contra Duke or OCC's motions to intervene were filed. Upon review, the Commission finds that the motions to intervene are reasonable, pursuant to R.C. 4903.221 and Ohio Adm.Code 4901-1-11, and should be granted.

#### IV. CONSIDERATION OF THE PROPOSED ARRANGEMENT

{¶ 22} R.C. 4905.31 provides that a public utility may enter into a reasonable arrangement with one of its customers and that a public utility may request recovery of costs incurred in conjunction with any economic development and job retention program of the utility. Ohio Adm.Code 4901:1-38-03 authorizes an electric utility, with one or more of its mercantile customers, to file an application for approval to enter into a reasonable arrangement, and prescribes certain verifiable information to be included within the application. This rule further provides that an applicant prove that the proposed arrangement is reasonable and that information is submitted detailing the rationale for the arrangement. Additionally, the arrangement must not violate R.C. 4905.33 or R.C. 4905.35, which prohibit the utility from providing service at discriminatory rates, or for free.

{¶ 23} Nestlé Purina is a mercantile customer served by Duke in its certified service territory (Application at 17). The Nestlé Purina facility will be Nestlé Purina's first new factory built from the ground up since 1975 and will produce dry dog and cat food brands. Nestlé Purina has committed to employing and maintaining no less than 300 people during the Arrangement's term, of which the full-time equivalent positions will receive base wage rates exceeding 150% of the current federal minimum wage. (Application at 1-3.) In addition, the application indicated that the facility's construction would generate a temporary increase of \$231 million in labor income for Clermont County and \$298 million in labor income for the State of Ohio. Under the Arrangement, Nestlé Purina will be able to continue to invest in the Nestlé Purina facility, with room for physical expansion and available production capacity. Also, according to Nestlé Purina, further worker training for the facility is an identified challenge. (Application at 7, 9.)

{¶ 24} The Applicants entered into the proposed Arrangement to address the above challenges and situations involved with the new Nestlé Purina facility. To help reduce its energy costs while also increasing the size of the skilled-worker pool, the Arrangement's proposed terms, as noted above, require Duke to adjust/credit Nestlé Purina's monthly billed Wire Services charges to the Nestlé Purina facility in Williamsburg Township at a rate

of \$0.004 per kWh of monthly usage, while setting a \$750,000 million annual cap on that credit. (Application at 5, 13).

{¶ 25} In addition, Nestlé Purina commits to requiring capital investment to acquire land and develop the Nestlé Purina Facility of at least \$550 million by year-end 2024 and make an increased investment in worker training of the full amount of the discount received off Wire Services, subject to a credit reduction if commitments are not met or maintained. Lastly, in the Arrangement, the economic impact of the project is expected to be significant and create jobs which will have average hourly base wage rates for the full-time equivalent jobs exceeding 150% of the current federal minimum wage. (Application at 14-15.)

{¶ 26} The Commission finds that the Applicant provided the information required by Ohio Adm.Code 4901:1-38-03(a)(2) and that, in light of the Staff's recommendation for approval, the comments supporting the Arrangement filed by area leaders, no comments being filed opposing the Arrangement, and the convincing detailed rationale for the Arrangement, the Applicant has met its burden of proof for obtaining a reasonable arrangement under Ohio Adm.Code Chapter 4901:1-38. Therefore, the Arrangement should be approved.

## V. FINDINGS OF FACT AND CONCLUSIONS OF LAW

{¶ 27} Duke is an electric light company, as defined by R.C. 4905.03(A)(3), and a public utility, as defined under R.C. 4905.02 and, as such, is subject to the jurisdiction of this Commission.

{¶ 28} Nestlé Purina is currently Duke's customer and qualifies as a mercantile customer, as defined by R.C. 4928.01(A)(19).

{¶ 29} On October 7, 2022, Nestlé Purina filed an application pursuant to Ohio Adm.Code Chapter 4901:1-38, for approval of a reasonable arrangement, pursuant to R.C. 4905.31. Additionally, Nestlé Purina filed a motion for protective order for portions of the application and Appendix D of the application.



{¶ 30} No comments were filed opposing the approval of the application and no memoranda contra the motion for protective order were filed.

{¶ 31} Duke and OCC filed motions to intervene on October 17, 2022, and October 27, 2022, respectively. No memoranda contra the motions to intervene were filed. The motions to intervene will be granted.

{¶ 32} On November 17, 2022, Staff filed its report recommending that the Commission approve the Arrangement.

{¶ 33} The information identified in the motion for protective order filed by Nestlé Purina on October 7, 2022, constitutes trade secret information pursuant to R.C. 1333.61, and the nondisclosure of this information is not inconsistent with the purposes of Title 49 of the Revised Code. As such, the motion for protective order will be granted for a period of 24 months from the issuance of this Finding and Order.

{¶ 34} The proposed Arrangement has met the burden of proof for obtaining a reasonable arrangement under Ohio Adm.Code Chapter 4901:1-38. Furthermore, the proposed Arrangement does not violate R.C. 4905.33 or 4905.35. Therefore, we find that the proposed Arrangement is reasonable and should be approved.

## VI. ORDER

{¶ 35} It is, therefore,

{¶ 36} ORDERED, That the motions to intervene by Duke and OCC be granted. It is, further,

{¶ 37} ORDERED, That the application of Nestlé Purina for a reasonable arrangement with Duke be approved. It is, further,

{¶ 38} ORDERED, That the motion for protective order filed by Nestlé Purina on October 7, 2022, be granted. It is, further,

{¶ 39} ORDERED, That Applicant file an executed contract implementing the Arrangement and take all necessary steps to carry out the terms of this Finding and Order. It is, further,

{¶ 40} ORDERED, That nothing in this Finding and Order shall be binding upon the Commission in any future proceeding or investigation involving the justness or reasonableness of any rate, charge, rule, or regulation. It is, further,

{¶ 41} ORDERED, That a copy of this Finding and Order be served upon each party of record.

**COMMISSIONERS:**

*Approving:*

Jenifer French, Chair  
M. Beth Trombold  
Lawrence K. Friedeman  
Daniel R. Conway  
Dennis P. Deters

DMH/IMM/dmh

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Summary: Finding & Order finding that the application for a reasonable arrangement between Nestlé Purina PetCare Company and Duke Energy Ohio, Inc. is reasonable and should be approved electronically filed by Ms. Mary E. Fischer on behalf of Public Utilities Commission of Ohio