

BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of The )  
Cincinnati Gas & Electric Company to Modify )  
Its Nonresidential Generation Rates to )  
Provide for Market-Based Standard Service ) Case No. 03-93-EL-ATA  
Offer Pricing and to Establish an Alternative )  
Competitive-Bid Service Rate Option Sub- )  
sequent to the Market Development Period. )

In the Matter of the Application of The )  
Cincinnati Gas & Electric Company for )  
Authority to Modify Current Accounting ) Case No. 03-2079-EL-AAM  
Procedures for Certain Costs Associated with )  
the Midwest Independent Transmission )  
System Operator. )

In the Matter of the Application of The )  
Cincinnati Gas & Electric Company for )  
Authority to Modify Current Accounting )  
Procedures for Capital Investment in its ) Case No. 03-2081-EL-AAM  
Electric Transmission and Distribution System ) Case No. 03-2080-EL-ATA  
And to Establish a Capital Investment )  
Reliability Rider to be Effective after the )  
Market Development Period. )

ENTRY

The attorney examiner finds:

- (1) The applicant, The Cincinnati Gas & Electric Company (CG&E), filed applications in these matters to modify its non-residential generation rates to provide for market-based standard service offer pricing and to establish an alternative competitive-bid process subsequent to the end of the market development period, to permit it to defer costs and investments, and to establish a rider to recover certain capital investments.
- (2) On May 6, 2004, CG&E filed a motion entitled Motion of The Cincinnati Gas & Electric Company for Protective Order (Motion for Protective Order).
- (3) In response to the Motion for Protective Order, the Ohio Consumers' Counsel (OCC) filed a Motion to Compel Discovery, Request for Expedited Ruling and Memorandum Contra Motion for Protective Order of The Ohio Consumers' Counsel (OCC's Motion to Compel), on May 11, 2004.

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- (4) The information (CG&E information) sought to be discovered by OCC, as described in CG&E's Motion for Protective Order and OCC's Motion to Compel, relates to the provider of last resort charges proposed in CG&E's revised electric reliability and rate stabilization plan (ERRSP). This information is relevant to the subject matter of this proceeding. CG&E does not claim that the information is privileged. It is discoverable under the terms of Rule 4901-1-16, Ohio Administrative Rules (O.A.C.).
- (5) OCC does not argue that the CG&E information is not a trade secret. Rather, the dispute between CG&E and OCC centers on the terms under which CG&E is willing to provide the information to OCC. CG&E states, in its Motion for Protective Order, that it would be willing to enter into an agreement which covered the following issues:
  - (a) CG&E information produced in response to OCC's discovery requests would be used by OCC only for purposes of these proceedings.
  - (b) OCC would not disclose the CG&E information to any third parties except for OCC consultants who agree to be bound by these restrictions.
  - (c) OCC would keep the CG&E information confidential and, if it wishes to use the information at a hearing, it would be filed with the Commission under seal and OCC would request that the public hearing in this proceeding go into an *in camera* session, with a sealed record.
- (6) CG&E claims, in its Motion for Protective Order, that OCC refuses to enter into an agreement that includes the provisions just described. However, a review of the proposed Protective Agreement attached to OCC's motion to compel (protective agreement) shows that OCC protective agreement does cover those items.

Item (a) is covered in Section 4 of the protective agreement, which states that "'protected materials' provided in the context of this proceeding shall be provided to OCC for use by OCC solely in conjunction with this proceeding."

Item (b) is covered in Section 6 of the protective agreement, which states that "[a]ccess to protected materials is permitted to OCC's Authorized Representatives who are either a signatory to this Agreement or who have executed a Non-Disclosure Certificate in the form attached as Exhibit A prior to any access."

Item (c) is covered in Sections 6 and 9 of the protective agreement. Section 6 states that "OCC shall treat all protected materials, copies thereof, information contained therein, and notes made therefrom as proprietary and confidential, and shall safeguard such protected materials, copies thereof, information contained therein, and notes made therefrom so as to prevent voluntary disclosure to any persons other than OCC's Authorized Representatives." Section 9 provides that "[a]ny portions of the protected materials that the Commission has deemed to be protected that ultimately are admitted into evidence shall be filed in sealed, confidential envelopes or other appropriate containers endorsed to the effect that they are sealed from the public record" and that "OCC shall file such protected materials under seal for consideration by the Commission." In addition, Section 9 states that "[e]xamination of a witness concerning the protected materials that the Commission has deemed to be protected shall be conducted *in camera*" and that "[t]ranscripts of the closed hearing shall be stored in sealed envelopes or other appropriate containers endorsed to the effect that they are sealed pursuant to the Commission's order."

- (7) CG&E also indicated that the protective agreement proposed by OCC would allow disclosure after five days' notice of a public records request, unless the Commission orders otherwise within the five days. Section 11 of the protective agreement provides that, in the event of a public records request for the CG&E information, OCC will notify CG&E immediately and will allow CG&E to demonstrate the trade secret status of the information requested. If the parties disagree, CG&E would be given time to seek appropriate legal action to prevent disclosure of the materials. The five-day provision to which CG&E is apparently referring relates to OCC's use of the material other than as provided in the agreement. The agreement would require notice, negotiation between the parties, notification of the Commission, and consideration by the Commission. Once the Commission makes a determination of the appropriate treatment of the information in question, then the material would either be admitted into evidence under seal or not, depending on the Commission's decision.
- (8) Rule 4901-1-24(D), O.A.C., provides that an attorney examiner may issue a protective order where the information in question is deemed to be sensitive and where non-disclosure of the information is not inconsistent with the purposes of Title 49, Revised Code. CG&E has asserted that the information in question is retained as a trade secret by CG&E, and that its disclosure would have a negative competitive impact. Non-disclosure of this information is not inconsistent with the

purposes of Title 49, Revised Code. Thus, the attorney examiner finds that protection is warranted. The motion for protective order will therefore be granted to the extent that the documents filed under seal with that motion shall be maintained under seal and confidential treatment shall be afforded, for a 24-month period.

- (9) OCC's proposed protective agreement is a reasonable and appropriate method for protecting the CG&E information. Therefore, OCC's motion to compel will be granted. CG&E will respond to OCC's discovery requests, under the terms set forth in the protective agreement.
- (10) On April 5, 2004, WPS Energy Services, Inc. (WPS), filed a motion to intervene in Case No. 03-93-EL-ATA (03-93). Although WPS had previously requested and been granted leave to intervene in other cases with which 03-93 is consolidated, and WPS had been participating in 03-93 through the filing of various pleadings, WPS had never formally moved for intervention in 03-93. WPS has set forth valid reasons for intervention. The attorney examiner finds that intervention in this circumstance is appropriate.
- (11) On April 21, 2004, the city of Cincinnati (Cincinnati) moved to intervene in these proceedings. While Cincinnati sets forth valid reasons for intervention, its filing was made substantially after the deadline for intervention in these cases. Cincinnati submits that it was not aware of the possible effect of CG&E's proposals on its agreements with CG&E. It states, further, that the process of arranging for intervention consumed a period of time. No party has filed any objection to the admission of Cincinnati as an intervenor. Since no hearing has yet been held in these cases, Cincinnati will be allowed to intervene at this point, although it will only be allowed to participate from the point of intervention forward, accepting the record as of this date.

It is, therefore,

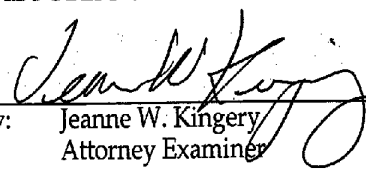
ORDERED, That CG&E's motion for protective order be granted to the extent that the documents filed by CG&E under seal with that motion shall be maintained under seal and confidential treatment shall be afforded, for a 24-month period. It is, further,

ORDERED, That OCC's motion to compel discovery be granted to the extent that CG&E shall be compelled to respond to OCC discovery requests and OCC shall be required to maintain the discovered information as a trade secret, pursuant to the terms of its proposed protective agreement. It is, further,

ORDERED, That the motions by WPS and Cincinnati for intervention in these proceedings, as set forth in findings (10) and (11), be granted. It is, further,

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

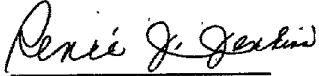
THE PUBLIC UTILITIES COMMISSION OF OHIO

By:   
Jeanne W. Kingery  
Attorney Examiner

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Entered in the Journal

MAY 13 2004



Renee J. Jenkins  
Secretary