

BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Commission's       )  
Review of the FirstEnergy Corp.       )  
Report Filed Pursuant to Rule       )       Case No. 10-997-EL-ESS  
4901:1-10-26, Ohio Administrative       )  
Code.       )

ENTRY

The attorney examiner finds:

- (1) On March 31, 2010, Ohio Edison Company, The Cleveland Electric Illuminating Company, The Toledo Edison Company, and American Transmission Systems, Inc. (ATSI) (collectively, the Companies) filed its annual system improvement plan report, as required by Rule 4901:1-10-26, Ohio Administrative Code (O.A.C.). In conjunction with the annual report, the Companies also filed a motion for protective order, requesting that certain proprietary and confidential financial information included in the annual report be protected from public disclosure.
- (2) In support of the motion for protective order, the Companies explain that the annual report includes, pursuant to Rules 4901:1-10-26(B)(3)(c) and (d), O.A.C., spreadsheets containing specific financial data and cost allocation information pertaining to the transmission and distribution infrastructure for each operating company and ATSI (10-26(B)(3)(c) and (d) spreadsheets). The 10-26(B)(3)(c) and (d) spreadsheets list 2009 budgeted and actual expenditures and 2010 budgeted expenditures for certain subaccounts relating to construction and maintenance expenses for transmission and distribution systems, as well as ratios comparing the actual and budgeted expenditures to the Companies' total investments in the transmission and distribution systems. The Companies assert that the 10-26(B)(3)(c) and (d) spreadsheets contain confidential, proprietary information not available to the public. The Companies contend that the public disclosure of this information would negatively impact their ability to minimize costs through negotiating favorable rates for distribution and transmission services and equipment with various third party suppliers, as the third party suppliers could determine the Companies' planned expenditures

and thus have no real incentive to negotiate or provide special rates. Therefore, the Companies request that the 10-26(B)(3)(c) and (d) spreadsheets be kept confidential.

- (3) On April 15, 2010, Staff filed a memorandum contra the Companies' motion for protective order. Staff contends that, since the 10-26(B)(3)(c) and (d) spreadsheets contain only general information, and are not broken down by project or type of equipment, it would be impossible for a prospective contractor or supplier to identify the Companies' expected costs for any particular project or equipment. As a result, Staff asserts that the Companies would not be harmed by the public release of this information, and, therefore, the 10-26(B)(3)(c) and (d) spreadsheets should not be kept confidential.

Staff also points out that Section 4928.11(B), Revised Code, the statute which establishes the requirement that electric utilities file an annual system improvement plan, states that the Commission shall make the reports available to the public. Accordingly, Staff argues that non-disclosure of the information would be inconsistent with the purposes of Title 49 of the Revised Code. Finally, Staff notes that the Companies are the lone electric utility to seek confidential treatment of the 10-26(B)(3)(c) and (d) spreadsheets, as all other Ohio electric utilities openly filed this information.

- (4) The Companies replied on April 26, 2010, arguing that the information contained in the 10-26(B)(3)(c) and (d) spreadsheets is not general in nature, as Staff asserts, but in reality provides valuable information to third-party suppliers with regard to each operating company's specific needs for services. The Companies point out that release of financial information relating to vegetation management, one of the categories included in the 10-26(B)(3)(c) and (d) spreadsheets, would allow third party suppliers to estimate how much each operating company budgeted and spent per mile completed. In addition, given that the size of each operating company's system is public information, suppliers could apply published industry percentage equipment failure rates to the reliability specific financial information to reasonably estimate the budget and expenditures on specific purposes such as pole replacements. For these reasons, the Companies argue that the information

contained in the 10-26(B)(3)(c) and (d) spreadsheets qualifies as a trade secret and should be protected.

The Companies also assert that non-disclosure of the 10-26(B)(3)(c) and (d) spreadsheets is not inconsistent with the purposes of Title 49 of the Revised Code, noting that protection is sought for only 8 pages out of an approximately 230-page report. The Companies state that they do not oppose release of general information, such as the total budget and actual expenditures amount, but believe that the information for each specific category contained in the 10-26(B)(3)(c) and (d) spreadsheets should not be released. The Companies publicly filed the total 2009 actual construction and maintenance expenditures, total investments and ratio of expenditures to investments for the transmission and distribution systems of each operating company and ATSI, but redacted all other information contained in the 10-26(B)(3)(c) and (d) spreadsheets. Finally, the Companies contend that Staff's argument that the information at issue should not be protected because the other electric utilities in the state did not seek protective treatment for their 10-26(B)(3)(c) and (d) spreadsheets lacks merit as it assumes that other utilities have the same vendor/contractor arrangements.

- (5) Section 4905.07, Revised Code, provides that all facts and information in the possession of the Commission shall be public, except as provided in Section 149.43, Revised Code, and as consistent with the purposes of Title 49 of the Revised Code. Section 149.43, Revised Code, specifies that the term "public records" excludes information which, under state or federal law, may not be released. The Ohio Supreme Court has clarified that the "state or federal law" exemption is intended to cover trade secrets. *State ex rel. Besser v. Ohio State* (2000), 89 Ohio St.3d 396, 399.
- (6) Similarly, Rule 4901-1-24, O.A.C., 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."

- (7) 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." Section 1333.61(D), Revised Code.
- (8) The attorney examiner has reviewed the information included in the Companies' 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 Section 1333.61(D), Revised Code, as well as the six-factor test set forth by the Ohio Supreme Court,<sup>1</sup> the attorney examiner finds that the information contained in the 10-26(B)(3)(c) and (d) spreadsheets does not constitute trade secret information. The attorney examiner finds that, since the listed expenditures are general in nature and are not identified with a specific project, piece of equipment, or distribution or transmission service sought by the Companies during the budget cycles listed, other persons cannot obtain economic value from the release of this information. Accordingly, state law does not prohibit the release of the 10-26(B)(3)(c) and (d) spreadsheets. Therefore, the attorney examiner finds that the Companies' motion for protective order, with regard to the 10-26(B)(3)(c) and (d) spreadsheets, should be denied.
- (9) On February 25, 2011, the docketing division of the Commission should release the unredacted 10-26(B)(3)(c) and (d) spreadsheets, which were filed under seal in this docket on March 31, 2010.

It is, therefore,

ORDERED, That the motion for protective order filed by the Companies be denied in accordance with Finding (8). It is, further,

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<sup>1</sup> See *State ex-rel. the Plain Dealer v. Ohio Dept. of Ins.* (1997), 80 Ohio St.3d 513, 524-525.

ORDERED, That on February 25, 2011, the Commission's docketing division release the unredacted 10-26(B)(3)(c) and (d) spreadsheets, which were filed under seal in this docket on March 31, 2010. It is, further,

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

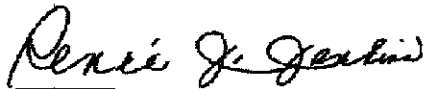
THE PUBLIC UTILITIES COMMISSION OF OHIO

  
By: Henry H. Phillips-Gary  
Attorney Examiner



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Renee J. Jenkins  
Secretary