BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Consideration of a Rule Regarding Nondisclosure of Confidential Information Contained in Long-Term Forecast Reports and Integrated Resource Plans of Electric Light Companies.	))))))	Case No. 89-1908-EL-ORD

ENTRY

The Commission, coming now to consider the above-entitled matter, makes the following findings:

1) On October 31, 1989, the Commission issued an entry in Case No. 88-816-EL-ORD revising and adopting rules for long-term forecast reports and integrated resource plans (IRP's) of electric light companies. Pursuant to this entry, amended Chapters 4901:5-1 through 4901:5-5, Ohio Administrative Code (O.A.C.), and new Chapter 4901:5-9, O.A.C., were filed for adoption on January 5, 1990, and became effective January 15, 1990.

2) Many of the electric light companies which filed comments in Case No. 88-816-EL-ORD expressed the concern that the proposed IRP rules did not adequately afford these companies the necessary protection from public disclosure of confidential information. In response to these concerns, the Commission initiated this proceeding to investigate the need for promulgating a rule concerning the nondisclosure of confidential information required to be filed in long-term forecast reports and integrated resource plans of electric light companies.

3) On January 17, 1990, the Commission issued an entry in this proceeding inviting comment on a series of questions concerning the need for a new rule to protect reporting companies against the disclosure of confidential information.

4) Following the issuance of the Commission's April 25, 1989 Entry, written comments were

submitted by the following electric light companies: Columbus Southern Power Company and Ohio Power Company (Columbus Southern and Ohio Power); Centerior Energy Corporation (Centerior) on behalf of Cleveland Electric Illuminating Company and Toledo Edison Company (CEI and Toledo Edison); The Cincinnati Gas & Electric Company (CG&E); The Dayton Power & Light Company (DP&L); Monongahela Power Company (Monongahela); and Ohio Edison Company (Ohio Edison). Comments were also filed by the following organizations representing various consumer interests: Armco Steel Company (Armco); the Office of the Consumers' Counsel (OCC); the city of Cleveland and the Montgomery County Prosecutor's Office (Cleveland and Montgomery County), and the Greater Cleveland Welfare Rights Organization, the Consumer League of Ohio, Western Reserve Alliance, and Cuyahoga County Concerned Citizens (collectively, Concerned Citizens).

5) The first question asks: Should the proposed rule on nondisclosure of confidential information permit nondisclosure on a case-by-case basis upon the showing by the reporting person that such information needs to be kept confidential, or should the reporting person be permitted, by rule, to keep certain information confidential under certain terms and conditions until such time as the Commission requires the disclosure of such information?

The electric light companies (Columbus Southern, Ohio Power, DP&L, Ohio Edison, CEI, Toledo Edison, Monongahela, and CG&E) responding to this question generally favored the promulgation of a rule pertaining to the filing of confidential information, rather than dealing with individual requests for protective orders on a case-by-case basis. The companies, however, differed in their responses on the issue of whether information that is considered to be confidential should be initially filed with the Commission, or should only be made available to the Commission staff for their review upon request.

Ohio Edison stated in its comments, that any confidential information should not be initially filed with the Commission, but should be made available to the Commission staff for review, upon request. All other parties to the IRP proceedings would have to show a valid reason for access to such information. (Comments of Ohio Edison, at 7; see also Comments of Monongahela Power, at 1).

Columbus Southern, CG&E, DP&L, and Ohio Power similarly stated that confidential information should not be included in the company's IRP filing, but should be made available to the Commission staff for their review upon request. The information would retain its protected status, unless such status is challenged, and the Commission determines the information does not merit protection. As to the question of what types of information should be presumed to be confidential under the proposed rule, Columbus Southern, DP&L, and Ohio Power doubt the feasibility and practicality of attempting to promulgate a rule that specifies exactly which information shall be presumed confidential; the companies state that this assumes first, that every reporting person possesses the same information, in the same format, and second, that the affected parties and the Commission could construct an all-inclusive list of information which would be responsive to the current filing requirements. Columbus Southern, DP&L, and Ohio Power state that neither of these assumptions is realistic (Comments of Columbus Southern and Ohio Power, at 3-4; Comments of DP&L at 2-3).

Consequently, Columbus Southern and Ohio Power advocate the adoption of a rule which would permit the reporting person to make the initial determination as to whether any given information is confidential (Comments of Columbus Southern and Ohio Power, at 3-4; see also Comments of CG&E, at 1).

Finally, Centerior proposes filing the long-term forecast report and resource plan in two parts--a confidential portion, which would be filed under seal with the Commission, and a

non-confidential portion, which would be filed with docketing and served by the company on the various public libraries, the Ohio Power Siting Board, and the OCC. Places where confidential information was omitted from the public filings would be conspicuously marked in these reports, and this confidential information would be made available to intervenors by the company, at their request, after signing a protective agreement.

The comments filed by the various consumer interests generally opposed the adoption of a specific rule for the nondisclosure of confidential information, and stated that nondisclosure of confidential information should only be provided for on a case-by-case basis (Comments of OCC, at 4-6; Comments of Cleveland and Montgomery County, at 3-5; Comments of Armco, at 2-3; and Comments of Concerned Citizens, at 1-3).

6) The second question asks: Should the burden of proof be placed upon the party wishing to have information disclosed or upon the party wishing to keep the information confidential?

The electric light companies responding to this question generally recognized that "[s]ince the regulatory process is premised on openness, and public participation, the general rule is that the person urging an exception to openness has the burden of demonstrating the need for confidential treatment of information" (Comments of Columbus Southern and Ohio Power, at 4). However, a majority of the companies stated that certain types of information should be presumed confidential. Columbus Southern and Ohio Power advocated a rule creating a rebuttable presumption of confidentiality with respect to certain types of information, or with respect to information filed in response to certain of the IRP rules (Id.). Other companies advocated a rule creating a rebuttable presumption of confidentiality upon the company's initial assertion that the information was confidential and needed protective treatment (Comments of CG&E, at 1; Comments of DP&L, at 6). Such a rebuttable presumption of confidentiality would

place on the party desiring access to the information the initial burden of going forward with sufficient evidence in support of disclosure. However, once the party desiring access to the information had met its initial burden of going forward, the ultimate burden of persuasion would be on the company to demonstrate the need for confidentiality (Comments of Columbus Southern and Ohio Power, at 4; Comments of Centerior, at 12; Comments of CG&E, at 1-2; Comments of DP&L, at 6). Ohio Edison and Monongahela stated that the ultimate burden of proof should be on the party requesting access to the information (Comments of Ohio Edison, at 7; Comments of Monongahela, at 1).

The consumer groups uniformly stated that the burden of proof must be on the company to show the need for nondisclosure (Comments of OCC, at 6-8; Comments of Cleveland and Montgomery County, at 5; Comments of Armco, at 3; and Comments of Concerned Citizens, at 3). Cleveland and Montgomery County advocate a presumption that all information is nonconfidential in nature, unless the company demonstrates otherwise (Comments of Cleveland and Montgomery County, at 5).

7) The third question asks: What should a party have to show to keep information confidential?

The electric light companies believe that certain types of information should be presumed to be confidential. Under such a rule, the companies would not have any burden of going forward to initially demonstrate the need for protective treatment (See paragraph 6, above). With respect to the ultimate burden of proof on this issue, the majority of the companies stated that the question of what the company would have to show to keep any given information confidential must be determined on a case-by-case basis (Comments of Centerior, at 13; Comments of CG&E, at 2; Comments of Columbus Southern and Ohio Power, at 4-5; Comments of DP&L, at 7-8).

Parties representing consumer interests generally agreed that the company should have to

show "a clearly defined and very serious injury" in order to keep information confidential [Comments of OCC, at 8 (quoting U.S. v. IBM, 67 F.R.D. 40, 45 (S.D.N.Y. 1975); see also Comments of Concerned Citizens, at 3-4 ("substantial and unjustifiable harm"); and Comments of Cleveland and Montgomery County, at 6 ("would harm the company in a specific, verifiable manner")]. Some other factors mentioned by these respondents include the following: the extent to which the information is known outside the company; the extent to which information is known to those inside the company; measures taken by the company to guard the secrecy of the information; the value of the information to the company and to its competitors; and whether the information is "proprietary" (i.e., has the company in some way generated this information?) (Id.). Finally, Armco advocates that the company be required to show that confidentiality "will promote competitive bidding and the lowest rates consistent with adequate service" (Comments of Armco, at 3).

8) The fourth question asks: What information, if any, to be provided under the IRP rules should receive confidential treatment? To whom should such information not be disclosed, and why?

Although the responses of the electric light companies tended to be somewhat general, some of the companies did list specific areas of the IRP rules which require responsive information that is likely to be confidential or commercially valuable to the company. Thus, Columbus Southern and Ohio Power listed the following areas of the IRP rules as likely to require the filing of commercially valuable information: the "total resource cost test" and the "ratepayer impact measure test" specified in Sections 4901:5-5-01(A)(21) & (22), O.A.C.; the estimate of expenditures by year, over a four-year period, for implementing each demand-side management program in the IRP, required under Section 4901:5-9-02(B)(4), O.A.C.; and the discussion of costs and short and long-term benefits of each demand-side management program in the IRP Status Report,

required under Section 4901:5-9-03(B)(2) & (3), O.A.C. (Comments of Columbus Southern and Ohio Power, at 5-6).

Centerior listed the following areas of IRP rules as likely to require the disclosure of confidential information: the "inventory of all potential cogeneration of size equal to or greater than one megawatt in the utility's service territory," required by Section 4901:5-5-02(C)(5), O.A.C.; the description of the company's anticipated operating, maintenance, and fuel expense for each unit for each year of the forecast period, required by Section 4901:5-5-03(B)(1), O.A.C.; the description of the pooling, mutual assistance, and all agreements for purchasing from and selling power and energy to other utilities or non-utilities, including costs and amounts, required under Section 4901:5-5-03(B)(2), O.A.C.; the discussion of the company's options for power interchange with neighboring systems, and the regulatory climate, required under Section 4901:5-5-03(C)(1); the comparison of the company's revenue requirement and rate impacts of the company's IRP and alternative plans, required under Section 4901:5-5-03(D)(3); information concerning potential rate and customer bill impacts of the company's IRP, the impacts of the IRP on the company's financial status, the equity among customer classes, and the impacts of the IRP over time, which is required under Section 4901:5-5-03(D)(5); and information relating to the company's planned facilities and demand-side management programs which is required to be filed under Sections 4901:5-9-02(B)(2) through (6), O.A.C. (Comments of Centerior, at 15-17).

Comments of parties representing consumer interests generally stated that the Commission should not pre-specify any type of information under the IRP rules as confidential, rather the parties requesting confidential treatment of information should be required to demonstrate the need for such treatment on a case-by-case basis (Comments of OCC, at 9-10; Comments of Concerned Citizens, at 4; Comments of

Cleveland and Montgomery County, at 6; and Comments of Armco, at 3).

9) The fifth question asks: Are there reasons for keeping IRP related information confidential other than competitive interests?

The comments filed by the electric light companies listed a variety of additional reasons why some of the information required under the IRP rules should be kept confidential. Several of the companies stated that the disclosure of the company's plans to acquire (or dispose of) property or facilities would limit the company's ability to negotiate and to bargain effectively (Comments of Centerior, at 17; Comments of Monongahela, at 2; Comments of Ohio Edison, at 8). Ohio Edison also noted that since utilities compete in financial markets for scarce financial resources, the premature disclosure of confidential information might place them at a disadvantage in obtaining necessary financing at desirable rates and terms -- thus affecting the companies' cost of capital (Comments of Ohio Edison, at 8). Centerior expressed concern that the company's management might be held accountable to shareholders if the company fails to achieve its anticipated future earnings which are filed pursuant to the IRP rules (Comments of Centerior, at 17). Both Ohio Edison and Centerior stated that customer-specific information should be protected from disclosure (Comments of Ohio Edison, at 8; Comments of Centerior, at 14).

The parties representing consumer interests generally stated that there were no other reasons to justify confidentiality (Comments of Armco, at 3; Comments of Concerned Citizens, at 4; Comments of OCC, at 10-11). However, OCC recognizes that "there may be limited circumstances which would warrant confidentiality to avoid the risk of economic detriment to a utility company," but that this determination must be made on a case-by-case basis (Comments of OCC, at 10-11).

10) The sixth question asks: What information, if any, should be kept confidential from each of

the following interests who become a party to a forecast proceeding: 1) competing gas companies; 2) competing electric companies; 3) qualifying facilities and qualifying facilities developers; 4) independent power producers; 5) Office of the Consumers' Counsel and other customer intervenors; and 6) Commission and staff?

Columbus Southern, Ohio Power, and Centerior stated that the Commission should limit intervention in long-term forecast proceedings to those entities with an interest as a consumer of services from the electric utility, and that the Commission should not allow competitors, promoters, developers, and others with similar interests to be parties to these proceedings (Comments of Columbus Southern and Ohio Power, at 6-7; Comments of Centerior, 18). To the extent that a competitor, promoter, developer, or one with a similar interest is also a customer of the company, and thus entitled to intervene in the proceeding, "special precautions would need to be implemented to protect against the inappropriate use of the confidential information" (Comments of Columbus Southern and Ohio Power, at 6-7). Finally, Columbus Southern and Ohio Power state that OCC should only have access to confidential information in proceedings involving a hearing, and should not automatically have access to such information, as would be the case with state agencies with specific regulatory responsibilities for protecting the environment or for planning land use, which will receive such information whether or not a hearing is held (Comments of Columbus Southern and Ohio Power, at 8).

With respect to the issue of which documents should be provided to intervenors, Centerior responded that intervenors should request only those confidential documents relevant to that party's intervention in the proceeding, and that the requesting party should agree to a protective agreement covering such confidential documents (Comments of Centerior, at 18-19). DP&L stated that access to confidential documents should not extend beyond a party's attorney of record and the party's

THE PUBLIC UTILITIES COMMISSION OF OHIO

Jolynn Barry Butler, Chair

J. Michael Biddison

Ashley C. Brown

Richard M. Fanelly

Lenworth Smith, Jr.

KPW/vrp

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