BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the 2011 Alternative Energy Portfolio Status Report of Constellation NewEnergy, Inc.	)))	Case No. 12-1218-EL-ACP

FINDING AND ORDER

The attorney examiner finds:

(1) Constellation NewEnergy, Inc. (Constellation or the Company) is an electric services company as defined in R.C. 4928.01(A)(9) and, as such, is subject to the jurisdiction of the Commission.

(2) R.C. 4928.64(B) establishes renewable energy resource benchmarks applicable to the electricity supplied to Ohio retail customers by electric services companies. For 2011, these benchmarks include a mandate that 1.0 percent of a supplier's Ohio retail electric sales must come from renewable energy resources (renewable benchmark), half of which must be met with resources located within Ohio (in-state renewable benchmark). Included within the renewable benchmark is a mandate that 0.03 percent of a supplier's Ohio retail electric sales must come from solar energy resources (solar benchmark), half of which must be met with resources located within Ohio (in-state solar benchmark).

(3) Ohio Adm.Code 4901:1-40-05(A) requires each electric services company to file, by April 15 of each year, an annual alternative energy portfolio status (AEPS) report. The report must analyze all activities the company undertook in the previous year in order to demonstrate how pertinent alternative energy portfolio benchmarks and planning requirements have been met. Additionally, Staff must conduct an annual compliance review with regard to the benchmarks. Ohio Adm.Code 4901:1-40-02(A) provides that electric services companies that do not directly serve Ohio retail electric customers are not required to comply with the terms of the alternative energy portfolio benchmarks.

(4) On April 2, 2011, Constellation filed its 2011 AEPS report pursuant to R.C. 4928.64 and Ohio Adm.Code 4901:1-40-05(A). Contemporaneously, Constellation filed a motion for protective

treatment, pursuant to Ohio Adm.Code 4901-1-24, of information in the AEPs report concerning (1) sales for 2008, 2009, 2010, (2) the average annual sales of the active years, i.e. the baseline, (3) the renewable energy credits required and obtained for 2011, (4) the ten-year forecast of solar RECs, non-solar RECs, and the total RECs, (5) the supply portfolio projections, and (6) the methodology used to evaluate compliance. Constellation contends that "such information, if released to the public, would harm * * * Constellation by providing its competitors proprietary information in what is designated by statute to now be a competitive service." Constellation adds that public disclosure of such information is not likely to assist the Commission in carrying out its duties.

(5) 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 R.C. Title 49. R.C. 149.43 specifies that the term "public records" excludes information that, 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*, 89 Ohio St. 3d 396, 399, 732 N.E.2d 373 (2000). Ohio Adm.Code 4901-1-24 allows the Commission to issue an order to protect the confidentiality of information 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. R.C. 1333.61(D) defines a trade secret as information, including the whole or any portion or phase of any scientific or technical information, design, process, procedure, formula, pattern, compilation, program, device, method, technique, or improvement, or any business information or plans, financial information, or listing of names, addresses, or telephone numbers, that: (1) 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; and (2) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy. *State ex rel. the Plain Dealer v. Ohio Dept. of Ins.*, 80 Ohio St.3d 513, 524-525, 687 N.E.2d 661 (1997). In that case, the Court also listed six factors for analyzing a trade secret claim: (1) the extent to which the

information is known outside the business; (2) the extent to which it is known to those inside the business, i.e., by the employees; (3) the precautions taken by the holder of the trade secret to guard the secrecy of the information; (4) the savings effected and the 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 the information. *Plain Dealer*, 524-525, 687 N.E.2d 672, citing *Pyromatics, Inc. v. Petruziello*, 7 Ohio App.3d 131, 134-135, 454 N.E.2d 588, 592 (8th Dist. 1983). Further, an entity claiming trade secret status bears the burden to identify and demonstrate that the material is included in categories of protected information under the statute and additionally must take some active steps to maintain its secrecy *See, Fred Siegel Co., L.P.A. v. Arter & Hadden*, 85 Ohio St.3d 171, 181, 707 N.E.2d 853, 862 (1999).

(6) Applying the statutory requirements and the Court's six-factor test discussed in *Plain Dealer* and *Besser*, the Commission has held that motions for protective orders with respect to AEPS reports should be granted for future projected data, but denied for any current or historical data that has been publicly disclosed, such as a company's historical intrastate sales or renewable energy credit (REC) requirements that are a mathematical function of publicly-reported sales. *See, e.g., Public Power, LLC*, Case No. 13-884-EL-ACP, Finding and Order (December 18, 2011) at 3-5, *Commerce Energy of Ohio, Inc., dba Just Energy*, Case No. 13-928-EL-ACP, Finding and Order (December 18, 2011) at 2-4, and *Direct Energy Services, LLC*, Case No. 12-1233-EL-ACP, Finding and Order (December 11, 2013) at 5-6.

(7) With respect to the instant case, Constellation's motion should be granted for any future projections shown in Part V of the AEPs report concerning a ten year forecast of solar and non-solar RECs, supply portfolio projection, and methodology used to evaluate compliance, but denied with respect to Part II, which concerns sales for 2008, 2009, 2010, as well as the average annual sales of the active years, i.e. the baseline, and denied for Part III, which indicates the renewable energy credits required and obtained for 2011. As noted in the above-referenced

orders, historic intrastate sales must be publicly disclosed in an electric services company's annual report to the Commission for fiscal assessment purposes, and the corresponding REC requirements can be calculated from this published data. Accordingly, such data should not be afforded confidential treatment. Further, the Docketing Division is directed to release Parts II and III of the confidential version of the report now under seal no sooner than 14 days after the issuance of this Entry.

(8) 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. Constellation should note that any motion to extend such period of confidential treatment should be filed at least 45 days in advance of the expiration date, pursuant to Ohio Adm.Code 4901-1-24(F), or this information may be released without further notice.

(9) On October 29, 2013, Staff filed its review and recommendations of the Company's AEPS report. Staff finds that Constellation was required to comply with the renewable benchmarks for its retail electric sales in Ohio in 2011. In addition, Staff finds that Constellation's proposed 2011 baseline, comprised of an average of its annual retail electric sales for 2008-2010, is reasonable, and that Constellation accurately calculated its compliance obligations, given its proposed baseline. Further, Staff reviewed the Company's reserve subaccount data with the PJM EIS Generation Attribute Tracking System (GATS) and concluded that Constellation has satisfied its compliance obligations for 2011. Staff also confirmed that the RECs and SRECs originated from generating facilities certified by the Commission and were associated with electricity generated during the applicable timeframe. Therefore, Staff recommends that Constellation be found to be in compliance with its 2011 renewable energy compliance obligations. Finally, Staff recommends that, for future compliance years in which the Company utilizes GATS to demonstrate its Ohio compliance efforts, Constellation initiate the transfer of the appropriate RECs and SRECs to its GATS reserve subaccount between March 1 and April 15 so as

to precede the filing of its annual AEPS report with the Commission.

(10) In regards to the excess RECs and SREC, Staff recommends that Constellation coordinate with Staff and GATS representatives to adjust the quantity of RECs and SRECs transferred to the reserve subaccount for future compliance purposes so that the quantity transferred matches the Company's compliance obligation as determined by the Commission. If such adjustments cannot be completed prior to March 1 of the reporting year, Staff recommends that the excess RECs and SREC be eligible to be applied administratively to a future compliance obligation, consistent with Ohio Adm.Code 4901:1-40-04(D)(3). Staff further recommends that, for future compliance years in which the Company utilizes GATS to demonstrate its Ohio compliance efforts, Constellation initiate the transfer of the appropriate RECs and SRECs to its GATS reserve subaccount between March 1 and April 15 so as to precede the filing of its annual AEPS report with the Commission.

(11) The Commission finds that Constellation is in compliance with its 2011 renewable, in-state renewable, solar, and in-state solar benchmarks and that the Company's AEPS report for 2011 should be accepted. The Commission also directs that, for future compliance years, Constellation initiate the transfer of the appropriate RECs and SRECs to its GATS reserve subaccount between March 1 and April 15, consistent with Staff's recommendations. Further, as Constellation was in excess of its 2011 compliance obligations, the Company is directed to coordinate with Staff and GATS representatives to adjust the quantity of RECs and SRECs transferred to the reserve subaccount for future compliance purposes consistent with Staff's recommendations noted above.

It is, therefore,

ORDERED, That the Company's AEPS report for 2011 be accepted as filed. It is, further,

ORDERED, That Constellation take all actions regarding Staff's recommendations as adopted above. It is, further,

ORDERED, That Constellation's motion for protective order be granted for a period of 24 months from the issuance of this order, for projections shown in Part V of its AEPs report concerning a ten year forecast, supply portfolio projection, and methodology used to evaluate compliance. It is, further,

ORDERED, That Constellation's motion for protective order be denied with respect to Parts II and II of its AEPS report, which concern sales for 2008, 2009, 2010; the average annual sales of the active years, i.e. the baseline; and also renewable energy credits required and obtained for 2011, respectively. It is, further,

ORDERED, That, no sooner than 31 days after the issuance of this order, the Docketing Division shall release Parts II and III of the Company's AEPS report filed under seal on April 12, 2013. It is, further,

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

THE PUBLIC UTILITIES COMMISSION OF OHIO

Thomas W. Johnson, Chairman

Steven D. Lesser

Lynn Slaby

M. Beth Trombold

Asim Z. Haque

JML/sc

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Barcy F. McNeal
Secretary