

BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of the)
Fuel Adjustment Clauses for Columbus) Case No. 11-5906-EL-FAC
Southern Power Company and Ohio)
Power Company and Related Matters.)

In the Matter of the Fuel Adjustment)
Clauses for Columbus Southern Power) Case No. 12-3133-EL-FAC
Company and Ohio Power Company.)

In the Matter of the Fuel Adjustment) Case No. 13-572-EL-FAC
Clauses for Ohio Power Company.)

In the Matter of the Fuel Adjustment) Case No. 13-1286-EL-FAC
Clauses for Ohio Power Company.)

In the Matter of the Fuel Adjustment) Case No. 13-1892-EL-FAC
Clauses for Ohio Power Company.)

ENTRY

The attorney examiner finds:

- (1) Ohio Power Company d/b/a AEP Ohio (AEP Ohio or the Company) is a public utility as defined in R.C. 4905.02 and an electric utility as defined in R.C. 4928.01(A)(11), and, as such, is subject to the jurisdiction of this Commission.
- (2) In Case No. 11-346-EL-SSO, et al., the Commission modified and approved, pursuant to R.C. 4928.143, AEP Ohio's application for an electric security plan, including a fuel adjustment clause (FAC) mechanism under which the Company is intended to recover prudently incurred fuel and fuel-related costs. *In re Columbus Southern Power Co. and Ohio Power Co.*, Case No. 11-346-EL-SSO, et al., Opinion and Order (Aug. 8, 2012) at 18. In addition, a new alternative energy rider was established to enable AEP Ohio to recover alternative energy costs, which were previously recovered through the FAC. Annual audits are to be performed of AEP Ohio's fuel costs, fuel management practices, and alternative energy costs.

- (3) On December 4, 2013, in the above-captioned proceedings, the Commission selected Energy Ventures Analysis, Inc. (EVA) to perform the annual audit of AEP Ohio's fuel and alternative energy costs for the 2012, 2013, and 2014 audit periods.
- (4) On May 9, 2014, in Case No. 13-1892-EL-FAC, EVA filed its report regarding the management/performance and financial audits of AEP Ohio's FAC for 2012 and 2013.
- (5) By Entry issued in the above-captioned proceedings on May 21, 2014, the Commission selected Baker Tilly Virchow Krause, LLP (Baker Tilly) to investigate AEP Ohio's alleged double recovery of certain capacity-related costs, and to recommend to the Commission a course of action based on the auditor's findings.
- (6) On October 6, 2014, Baker Tilly filed its audit report addressing AEP Ohio's recovery of certain capacity-related costs.
- (7) By Entry dated January 9, 2015, a procedural schedule was established for these proceedings. Subsequently, the procedural schedule, with the exception of the intervention deadline of January 16, 2015, was suspended.
- (8) On December 9, 2015, AEP Ohio filed, pursuant to Ohio Adm.Code 4901-1-24, a motion for protective order or, alternatively, a request that certain information not be considered public documents for release. AEP Ohio explains that the motion was filed in response to a public records request received by the Commission from the Ohio Consumers' Counsel (OCC), seeking draft audit reports sent to the Company and communications from the Company related to draft audit reports. Noting that a public version of Baker Tilly's final audit report is available to OCC in the Commission's dockets, AEP Ohio argues that OCC nevertheless seeks to use the public records statute to circumvent the Commission's established discovery rules and process, in order to obtain documents that have no relevance to the final audit report. AEP Ohio contends that the draft audit report and comments are part of the confidential audit process pursuant to R.C. 4901.16. AEP Ohio further contends that R.C. 4901.16 provides that

information related to an investigation of the Commission may only be released in a report or through testimony. AEP Ohio maintains that neither situation is satisfied under the circumstances of OCC's public records request. AEP Ohio asserts that the Commission should afford protected status to documents that are part of the investigatory process, as not protecting the documents could result in parties seeking drafts of Staff testimony or even drafts of Commission orders.

AEP Ohio argues further that the documents sought by OCC are not public records, because R.C. 149.43 excludes information that may not be released under state law. Concluding that the disclosure of the documents is barred by R.C. 4901.16 and R.C. 149.43, AEP Ohio asserts that the Commission should grant the Company's motion and afford the documents protected status, because they are part of a confidential investigatory process of the Commission. Alternatively, AEP Ohio claims that, because the documents pertain to confidential discussions between the Company and the auditor, they are not public records subject to disclosure pursuant to a public records request. In further support of its motion, AEP Ohio asserts that OCC's public records request is an attempt to undermine the pending rehearing issues regarding a separate audit report filed in these proceedings, as well as Ohio Adm.Code 4901-1-10(C), which excludes Staff as a party for purposes of discovery. For these additional reasons, AEP Ohio urges the Commission to reject OCC's efforts to circumvent the confidentiality of the Commission's investigations afforded under R.C. 4901.16.

- (9) On December 16, 2015, OCC filed a memorandum contra AEP Ohio's motion. OCC argues that R.C. 149.43 requires the disclosure of the draft audit reports and communications that OCC seeks through its public records request, because the statute allows for limited exceptions to the general requirement that records kept by a public office must be disclosed, none of which apply here, according to OCC. OCC emphasizes that AEP Ohio's position is based solely on its claim that R.C. 4901.16 precludes disclosure of the records. OCC contends that R.C. 4901.16 is inapplicable under circumstances where the draft audit reports in

question were produced by an independent contractor appointed by the Commission, and where the investigation and audit have concluded. OCC asserts that the Commission has previously determined that the statute's restrictions apply only to Staff and only while investigations are ongoing. *In re The Cincinnati Gas & Elec. Co.*, Case No. 00-681-GA-GPS (CG&E Case), Entry (Dec. 17, 2003) at 4. Additionally, with respect to AEP Ohio's request for a protective order, OCC responds that Ohio Adm.Code 4901-1-24, which pertains to such motions, does not apply in this situation, because the records sought by OCC have not been requested pursuant to the Commission's discovery process or filed with the Commission's docketing division, and, in any event, the rule does not supersede R.C. 149.43. OCC concludes that the Commission should reject AEP Ohio's attempts to conflate the rules governing the Commission's process and procedures with the public records statute and that the Commission should promptly release the requested records.

- (10) On December 23, 2015, AEP Ohio filed a reply to OCC's memorandum contra. In its reply, AEP Ohio contends that the Commission has previously determined that R.C. 4901.16 constitutes an exception to the disclosure requirements of R.C. 149.43, specifically in a situation involving an ongoing investigation where Staff had obtained reports from a third-party contractor. *CG&E Case*, Entry on Rehearing (July 28, 2004) at 5-6. AEP Ohio also notes that the Commission's May 21, 2014 Entry, which appointed the auditor in these proceedings, states that the auditor is subject to the Commission's statutory duty under R.C. 4901.16. AEP Ohio argues, therefore, that its motion appropriately seeks a ruling that complies with the Commission's prior directives. Finally, AEP Ohio asserts that the Company properly invoked Ohio Adm.Code 4901-1-24 to ensure protection of confidential information in response to OCC's public records request.
- (11) 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. Further, R.C. 149.43 specifies that the term "public records" excludes information that,

under state or federal law, may not be released. Finally, R.C. 4901.16 states:

Except in his report to the public utilities commission or when called on to testify in any court or proceeding of the public utilities commission, no employee or agent referred to in Section 4905.13 of the Revised Code shall divulge any information acquired by him in respect to the transaction, property, or business of any public utility, while acting or claiming to act as such employee or agent. Whoever violates this section shall be disqualified from acting as agent, or acting in any other capacity under the appointment or employment of the commission.

- (12) The attorney examiner has thoroughly reviewed and considered AEP Ohio's motion for protective order and its alternate request that the documents sought by OCC not be considered public records subject to release, as well as OCC's memorandum contra the Company's motion.

With respect to the procedural question of whether the filing of a motion for protective order under Ohio Adm.Code 4901-1-24 was proper, the attorney examiner notes that, in order to reconcile the statutory duty found in R.C. 4901.16 with the Commission's obligations under R.C. 149.43, including the duty to protect trade secret information, as defined in R.C. 1333.61, the Commission has engaged in a practice of notifying utility companies of its intent to disclose potential proprietary information and allowing the companies to file a motion for protective order to ensure a fair and equitable process consistent with both statutes. As AEP Ohio discusses in its motion, the Commission expressly recognized this practice when addressing requests for information provided by utilities. *In re Amendment of Ohio Adm.Code Chapters 4901-1, 4901-3, and 4901-9*, Case No. 95-985-AU-ORD, Entry (Mar. 21, 1996) at 10. Additionally, although OCC has argued that motions for protective order are limited to responding to discovery requests, Ohio Adm.Code 4901-1-24(G) provides that the requirements of the rule do not apply to information submitted to Staff, in

order to facilitate a more transparent process between Staff and utility companies and encourage the sharing of utility-related information. *Id.* Therefore, the attorney examiner finds that AEP Ohio's utilization of Ohio Adm.Code 4901-1-24 was an appropriate means to seek protection of the requested information.

- (13) The attorney examiner notes that, as a potential exception to R.C. 149.43, R.C. 4901.16 should be construed narrowly. Therefore, the attorney examiner finds that R.C. 4901.16 does not preclude the release of draft audit reports and related communications indefinitely. The Commission has determined that R.C. 4901.16 prohibits the release of draft audit reports and related communications concerning an ongoing investigatory process of the Commission. *CG&E Case, Entry on Rehearing (July 28, 2004)* at 5-6. As the Commission expressly noted in its May 21, 2014 Entry, the auditor is an agent of the Commission, subject to the Commission's statutory duty under R.C. 4901.16. Even in the event the Commission had omitted such an instruction, this statutory duty clearly applies to both employees and agents of the Commission. *Vectren Energy Delivery of Ohio, Inc. v. Pub. Util. Comm.*, 113 Ohio St.3d 180, 863 N.E.2d 599 (2007). The release of the documents requested by OCC is, therefore, prohibited under state law during the pendency of the Commission's investigation. The attorney examiner also finds that the release of this information would be inconsistent with the purposes of Title 49 of the Revised Code, as well as discourage the sharing of information during pending Commission investigations. *CG&E Case, Entry on Rehearing (July 28, 2004)* at 4-5.
- (14) Accordingly, the attorney examiner finds that AEP Ohio's motion requesting that the designated information not be subject to release should be granted. However, as AEP Ohio acknowledges, the release of a draft audit report upon the conclusion of a contested case is an effective means for the Commission to balance transparency with due regard for the hearing process. The attorney examiner finds that, in the present proceedings, the Commission's investigation remains ongoing, with an evidentiary hearing to be scheduled by future entry. At the hearing, the final audit report will be introduced into evidence and parties to the

proceedings will have the opportunity to present their evidence and arguments regarding the audit findings for the Commission's consideration. Further, it is possible that the auditor will be called as a rebuttal witness following the presentation of the parties' witnesses. Therefore, the attorney examiner concludes that issuance of a final appealable order represents the effective end of the Commission's investigation. Thus, upon the Commission's issuance of a final appealable order at the conclusion of the proceedings, the Commission's investigatory process, including the confidentiality afforded by R.C. 4901.16, will be at an end. At that time, the Commission will reconsider OCC's request for draft audit reports and related communications and determine whether they should be further exempted from public disclosure or provided to OCC.

It is, therefore,

ORDERED, That AEP Ohio's motion be granted to the extent set forth in this Entry. It is, further,

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

THE PUBLIC UTILITIES COMMISSION OF OHIO

s/Sarah Parrot

By: Sarah J. Parrot
Attorney Examiner

JRJ/sc

This foregoing document was electronically filed with the Public Utilities

Commission of Ohio Docketing Information System on

1/8/2016 5:27:50 PM

in

Case No(s). 11-5906-EL-FAC, 12-3133-EL-FAC, 13-0572-EL-FAC, 13-1286-EL-FAC, 13-1892-EL-FAC

Summary: Attorney Examiner Entry granting AEP Ohio's motion to the extent set forth in this Entry. - electronically filed by Sandra Coffey on behalf of Sarah Parrot, Attorney Examiner, Public Utilities Commission of Ohio