

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 explained 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. In support of its motion, AEP Ohio contended that the draft audit report and related communications are part of the Commission's confidential audit process under R.C. 4901.16 and 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. Alternatively, AEP Ohio claimed 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.

- (9) On December 16, 2015, OCC filed a memorandum contra AEP Ohio's motion. OCC argued 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 contended 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.
- (10) On December 23, 2015, AEP Ohio filed a reply to OCC's memorandum contra.
- (11) By Entry dated January 8, 2016, the attorney examiner granted AEP Ohio's motion to the extent set forth in the Entry. Specifically, the attorney examiner noted that R.C. 4901.16 should be construed narrowly as a potential exception to R.C. 149.43, and, therefore, R.C. 4901.16 does not preclude the release of draft audit reports and related communications indefinitely. The attorney examiner further noted that 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. *In re The Cincinnati Gas & Elec. Co.*, Case No. 00-681-GA-GPS (CG&E Case), Entry on Rehearing (July 28, 2004) at 5-6. The attorney examiner emphasized that the Commission's investigation remains ongoing in the present proceedings, with an evidentiary hearing to be scheduled by future entry. The attorney examiner determined that, 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. The attorney examiner concluded that, 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.

- (12) On January 13, 2016, OCC filed an interlocutory appeal of the attorney examiner's Entry dated January 8, 2016, requesting that the interlocutory appeal be certified to the Commission for consideration, pursuant to Ohio Adm.Code 4901-1-15(B). In its interlocutory appeal, OCC requests that the Commission reverse the attorney examiner's Entry granting AEP Ohio's motion for protective order.
- (13) AEP Ohio filed a memorandum contra OCC's interlocutory appeal on January 19, 2016.
- (14) Ohio Adm.Code 4901-1-15 sets forth the Commission's requirements for interlocutory appeals. The rule provides that no party may take an interlocutory appeal from a ruling by an attorney examiner unless that ruling is one of four specific rulings enumerated in paragraph (A) of the rule or unless the appeal is certified to the Commission pursuant to paragraph (B) of the rule. Ohio Adm.Code 4901-1-15(B) specifies that an attorney examiner shall not certify an interlocutory appeal unless the attorney examiner finds that the appeal presents a new or novel question of interpretation, law, or policy, or is taken from a ruling that represents a departure from past precedent and an immediate determination by the commission is needed to prevent the likelihood of undue prejudice or expense to one or more of the parties, if the Commission should ultimately reverse the ruling in question.
- (15) OCC contends that the interlocutory appeal should be certified to the Commission under Ohio Adm.Code 4901-1-15(B), because the granting of AEP Ohio's motion for protective order in the January 8, 2016 Entry departs from past precedent. Specifically, OCC notes that, in a prior case involving Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company (collectively, FirstEnergy), an attorney examiner required the disclosure of draft audit reports and related documents prior to the issuance of a final order by the Commission. *In re Ohio Edison Co., The Cleveland Elec. Illuminating Co., and The Toledo Edison Co.*, Case No. 11-5201-EL-RDR (*FirstEnergy Case*), Entry (Feb. 14, 2013). OCC points out that, in the *FirstEnergy Case*, a redacted version of the draft audit report and related comments were ordered to be provided to OCC, despite FirstEnergy's contention that R.C. 4901.16 prohibits the

release of confidential draft audit reports in response to a public records request. *FirstEnergy Case* at 3. OCC adds that the Commission's final order in the *FirstEnergy Case* was issued approximately six months after the draft audit reports and related documents were provided to OCC. OCC concludes that the January 8, 2016 Entry in the present proceedings is squarely in conflict with the attorney examiner's ruling in the *FirstEnergy Case*. Additionally, OCC argues that an immediate determination by the Commission is necessary to prevent undue prejudice to OCC and residential consumers, because the attorney examiner's ruling forecloses the use of the requested records in these proceedings.

- (16) In its memorandum contra, AEP Ohio asserts that OCC's interlocutory appeal should not be certified to the Commission under Ohio Adm.Code 4901-1-15(B). Initially, AEP Ohio contends that the January 8, 2016 Entry does not depart from past precedent, given that the Commission has previously determined, in balancing the public's general right of access under R.C. 149.43 against the Commission's duty under R.C. 4901.16 to protect information gathered through its investigations, that R.C. 4901.16 does constitute an exception to R.C. 149.43. *CG&E Case*, Entry on Rehearing (July 28, 2004) at 5-6. Further, AEP Ohio argues that OCC has failed to demonstrate that an immediate determination by the Commission is needed to prevent the likelihood of undue prejudice or expense to one or more of the parties, if the Commission should ultimately reverse the ruling in question. AEP Ohio notes that the January 8, 2016 Entry expressly preserves OCC's option to request the draft audit report and related communications upon the issuance of a final order in these proceedings. Noting that OCC has already conducted extensive discovery and is not precluded from challenging the audit findings through the hearing process or performing its own analysis of the issues addressed in the audit, AEP Ohio asserts that the temporary restriction on disclosure of the draft audit report does not prejudice OCC's involvement in these proceedings. Finally, AEP Ohio argues that, because OCC failed to mention the *FirstEnergy Case* in its memorandum opposing the Company's motion for protective order, OCC is procedurally barred from raising the *FirstEnergy Case* in its interlocutory appeal.

- (17) Upon consideration of OCC's interlocutory appeal and AEP Ohio's memorandum contra, the attorney examiner finds that the appeal presents a new or novel question of interpretation, law, or policy. The attorney examiner notes that the attorney examiner in the *FirstEnergy Case* did not reach the question of whether R.C. 4901.16 precluded release of the information at issue in that case. *FirstEnergy Case*, Entry (Feb. 14, 2013). Further, the January 8, 2016 Entry is different from the *CG&E Case*, where the Commission did not specify that the confidentiality afforded by R.C. 4901.16 does not end until the Commission's issuance of a final appealable order. Accordingly, the ruling in the January 8, 2016 Entry presents an issue of first impression before the Commission. Further, the attorney examiner finds that, because OCC has not been able to obtain the documents through the normal discovery process, a determination by the Commission regarding the January 8, 2016 Entry is needed to determine whether the documents will be available for use by OCC at the hearing in these proceedings. Therefore, the attorney examiner finds that OCC's interlocutory appeal should be certified to the Commission.

It is, therefore,

ORDERED, That OCC's request for certification to the Commission of its interlocutory appeal 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

s/Sarah Parrot

By: Sarah J. Parrot
Attorney Examiner

JRJ/sc

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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 OCC's request for certification to the Commission of its interlocutory appeal. - electronically filed by Sandra Coffey on behalf of Sarah Parrot, Attorney Examiner, Public Utilities Commission of Ohio