

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 Commission 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) By Entry issued January 29, 2016, the attorney examiner certified OCC's interlocutory appeal to the Commission pursuant to Ohio Adm.Code 4901-1-15(B).
- (15) In its application for review, OCC asserts that the attorney examiner did not narrowly construe R.C. 4901.16, as required, and instead determined that the confidentiality of the draft audit report and related communications will continue until a final order is issued by the Commission. According to OCC, the Commission has consistently rejected sweeping claims that seek to preclude disclosure under R.C. 4901.16. *CG&E Case*, Entry on Rehearing (July 28, 2004); *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). Additionally, OCC argues that, in light of Ohio's canons of statutory construction in R.C. 1.52 pertaining to irreconcilable differences between two statutes, R.C. 149.43, which is the more recent statute, takes precedence over R.C. 4901.16 and, therefore, R.C. 4901.16 does not prohibit the release of information sought through a public records request under R.C. 149.43. OCC adds that legislative intent also indicates that R.C. 4901.16 is subservient to R.C. 149.43. Specifically, OCC notes that the General Assembly has not amended R.C. 4901.16 to account for R.C. 149.43, despite the fact that other provisions in R.C. Title 49 (R.C. 4901.12 and R.C. 4905.07) were so amended in 1996. OCC concludes that the attorney examiner's ruling is contrary to the manifest intent of the General Assembly and should, therefore, be reversed.
- (16) In its memorandum contra, AEP Ohio argues that the attorney examiner, consistent with R.C. 4905.07, achieved the appropriate balance between the requirements of R.C. 149.43 and R.C. 4901.16 by withholding public release of the audit report and related comments until the issuance of a final appealable order at the conclusion of these proceedings. Citing

R.C. 149.43(A)(1)(v), AEP Ohio emphasizes that the definition of "public record" excludes "records the release of which is prohibited by state or federal law," which, according to the Company, includes R.C. 4901.16. AEP Ohio also notes that the January 8, 2016 Entry merely defers disclosure of the requested records until the appropriate time, being the point at which a final appealable order sufficiently abates the need for ongoing confidentiality between the auditor and the Company. AEP Ohio adds that, contrary to OCC's claims regarding the secrecy of the investigatory process, the auditor's findings and recommendations are publicly available and will be the subject of a public hearing.

With regard to OCC's statutory construction argument, AEP Ohio responds that OCC waived the argument by failing to raise it in its memorandum contra the Company's motion for protective order. AEP Ohio asserts that, in any event, there is no irreconcilable conflict between R.C. 149.43 and 4901.16, given that R.C. 149.43(A)(1)(v) specifically provides that other state laws can and do prohibit the disclosure of certain information. AEP Ohio also contends that OCC waived its right to rely on the *FirstEnergy Case*, when OCC neglected to mention the case in its memorandum contra the Company's motion for protective order. AEP Ohio points out that, regardless, the January 8, 2016 Entry in the present proceedings properly relied upon the analysis of the Commission in the *CG&E Case*, which focused on balancing the interests of R.C. 4901.16 and R.C. 149.43. AEP Ohio also asserts that there is no conflict between the January 8, 2016 Entry and the attorney examiner's ruling in the *FirstEnergy Case*, which involved consideration of whether market pricing and supplier identities constituted trade secret information, and which are not at issue in the present proceedings. AEP Ohio concludes that the Commission should dismiss OCC's procedurally deficient interlocutory appeal or affirm the January 8, 2016 Entry on the merits.

- (17) 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.

- (18) The Commission has thoroughly reviewed OCC's interlocutory appeal and AEP Ohio's memorandum in opposition. Initially, the Commission finds no merit in OCC's legislative intent and statutory construction arguments. We do not find that R.C. 149.43 and R.C. 4901.16 are irreconcilable, contrary to OCC's claims. The Commission has previously harmonized the two statutes. *CG&E Case*, Entry on Rehearing (July 28, 2004) at 5-6. Turning to that substantive issue, Baker Tilly has, as AEP Ohio concedes, completed its investigation and filed the final audit report in the dockets of these proceedings. Moreover, the draft audit report was provided to AEP Ohio in order to ensure mathematical accuracy and protection of any trade secret or other confidential information. Under these specific circumstances, where the draft audit report has been provided to AEP Ohio for review and where the final audit report has been presented to the Commission and filed in the dockets, the Commission finds that the release of the draft audit report and related communications is not inconsistent with the purposes of Title 49 of the Revised Code, including R.C. 4901.16. Further, AEP Ohio offers no grounds for protection of the documents other than R.C. 4901.16. Accordingly, because AEP Ohio has failed to demonstrate that the designated information should be granted protective treatment under R.C. 4901.16, the Commission finds that the attorney examiner's January 8, 2016 Entry, which granted the Company's motion for protective order, should be reversed. However, the Commission notes that our decision in these proceedings is limited to the specific

facts of these proceedings and should not be construed as precedent in any other case. The draft audit report and related communications that are responsive to OCC's public records request should be released to OCC no sooner than 15 days from the date of this Entry, unless otherwise ordered by the Commission.

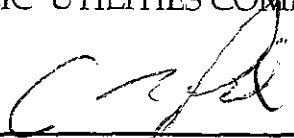
It is, therefore,

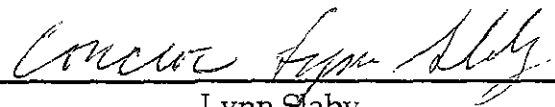
ORDERED, That the attorney examiner's January 8, 2016 Entry be reversed. It is, further,

ORDERED, That Baker Tilly's draft audit report and related communications be released to OCC no sooner than 15 days from the date of this Entry, unless otherwise ordered by the Commission, in accordance with finding (18). It is, further,

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

THE PUBLIC UTILITIES COMMISSION OF OHIO



Andre T. Porter, Chairman

Lynn Slaby

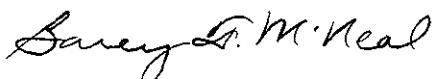
M. Beth Trombold

Asim Z. Haque

Thomas W. Johnson

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Entered in the Journal FEB 03 2016



Barcy F. McNeal

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Secretary

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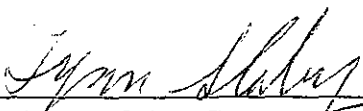
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CONCURRING OPINION OF COMMISSIONER LYNN SLABY

I concur; however, because we have no judicial precedent, I would hope that these issues can or will be further reviewed by the Supreme Court or clarified by the State Legislators in the future.

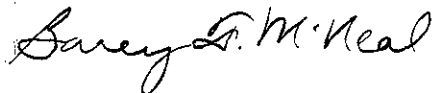


Lynn Slaby, Commissioner

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Barcy F. McNeal
Secretary