

BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Fuel Adjustment)	Case No. 09-872-EL-FAC
Clauses for Columbus Southern Power)	
Company and Ohio Power Company.)	Case No. 09-873-EL-FAC

ENTRY

The attorney examiner finds:

- (1) By Order issued March 18, 2009 (ESP), the Commission approved the establishment of fuel adjustment clause (FAC) mechanisms, under which Columbus Southern Power Company (CSP) and Ohio Power Company (OP) can recover prudently incurred costs associated with fuel, including consumables related to environmental compliance, purchased power costs, emission allowances, and costs associated with carbon-based taxes and other carbon-related regulations. The Commission affirmed the establishment of the FAC in its July 23, 2009, Entry on Rehearing.
- (2) The Commission established in its ESP an annual audit to approve the appropriateness of the accounting of the FAC costs and the prudence of decisions made. Energy Ventures Analysis, Inc. (EVA) and its subcontractor, Larkin & Associates PLLC (Larkin) were selected by the Commission to perform the management/performance and financial audits for 2009, 2010, and 2011.
- (3) On May 14, 2010, consistent with the Commission's order in the ESP, AEP-Ohio filed its 2009 report of the management/performance and financial audits of its FAC (report) in Case Nos. 09-872-EL-FAC and 09-873-EL-FAC (09-872). Along with its report, AEP-Ohio filed a motion for protective order, claiming that certain information provided in the confidential version of the report constitutes confidential trade secret information under Ohio law.
- (4) Section 4905.07, Revised Code, provides that all facts and information in the possession of the Commission shall be public, except as provided in Section 149.43, Revised Code, and as consistent with the purposes of Title 49 of the Revised Code. Section 149.43, Revised Code, specifies that the term "public records" excludes information which, 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* (2000), 89 Ohio St.3d 396, 399.

- (5) Similarly, Rule 4901-1-24, Ohio Administrative Code (O.A.C.), allows the Commission to issue an order to protect the confidentiality of information contained in a filed document, "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, and where non-disclosure of the information is not inconsistent with the purposes of Title 49 of the Revised Code."
- (6) Ohio law defines a trade secret as "information . . . that satisfies both of the following: (1) It 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. (2) It is the subject of efforts that are reasonable under the circumstances to maintain its secrecy." Section 1333.61(D), Revised Code.
- (7) The attorney examiner has examined the information covered by the motion for protective order filed by AEP-Ohio, as well as the assertions set forth in the supportive memorandum. Applying the requirements that the information have independent economic value and be the subject of reasonable efforts to maintain its secrecy pursuant to Section 1333.61(D), Revised Code, as well as the six-factor test set forth by the Ohio Supreme Court,¹ the attorney examiner finds that the information redacted from the confidential version of the report constitutes trade secret information. Release of this information is, therefore, prohibited under state law. The attorney examiner also finds that nondisclosure of this information is not inconsistent with the purposes of Title 49 of the Revised Code. Therefore, the attorney examiner finds that AEP-Ohio's motion for protective order is reasonable with regard to the information redacted from the confidential version of the report.
- (8) Rule 4901-1-24(F), O.A.C., provides for protective orders relating to trade secrets to automatically expire 18 months after the date of issuance. Rule 4901-1-24(F), O.A.C., requires a party wishing to extend a protective order to file an appropriate motion at least 45

¹ See *State ex rel. The Plain Dealer v. Ohio Dept. of Ins.* (1997), 80 Ohio St.3d 513, 524-525.

days in advance of the expiration date. If AEP-Ohio wishes to extend this confidential treatment, it should file an appropriate motion at least 45 days in advance of the expiration date. If no such motion is filed, the Commission may release this information to the public upon expiration of the protective order, without prior notification to AEP-Ohio.

- (9) On May 17, 2010, AEP-Ohio filed a letter indicating that two references in the report were inadvertently not redacted, and requesting that two corresponding pages, which it filed the same day, be substituted for those pages in which the unredacted material appeared. The attorney examiner finds this request to be reasonable; therefore, it should be granted. Additionally, on May 19, 2010, EVA and Larkin filed a letter communicating that it inadvertently left Case No. 09-873-EL-FAC off of the cover pages of the report. With their letter, EVA and Larkin filed two corrected cover pages, which they asked to be substituted for the original cover sheets on the public report and the confidential report. The attorney examiner finds the requests of AEP-Ohio, and EVA and Larkin to be reasonable; therefore, they should be granted.
- (10) The Office of the Ohio Consumers' Counsel, Industrial Energy Users-Ohio, and Ormet Primary Aluminum Company were granted intervention in 09-872 on January 7, 2010.
- (11) Having reviewed the report, the attorney examiner finds that this matter should be set for hearing. Accordingly, the following procedural schedule shall be set:

August 16, 2010	Prehearing conference Pre-filed testimony deadline
August 23, 2010	Hearing commences

As stated above, the hearing will commence on August 23, 2010, and will proceed through August 24, 2010, if necessary. If additional time is needed to conclude the hearing after August 24, 2010, the hearing will continue on August 30, 2010. Both the prehearing conference and the hearing will take place at 10:00 a.m., at the offices of the Commission, 180 East Broad Street, 11th Floor, Hearing Room 11-A, Columbus, Ohio 43215-3793.

It is, therefore,

ORDERED, That the procedural schedule set forth in finding (11) be adopted. It is, further,

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

THE PUBLIC UTILITIES COMMISSION OF OHIO

Rebecca Hussey
By: Rebecca Hussey
Attorney Examiner

/dah *SEP*

Entered in the Journal

JUN 29 2010

Renee J. Jenkins

Renee J. Jenkins
Secretary