

FILE

BEFORE  
THE PUBLIC UTILITIES COMMISSION OF OHIO

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

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MEMORANDUM CONTRA COLUMBUS SOUTHERN POWER COMPANY'S  
AND OHIO POWER COMPANY'S MOTION FOR PROTECTIVE ORDER  
BY  
THE OFFICE OF THE OHIO CONSUMERS' COUNSEL

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**MEMORANDUM CONTRA**

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**I. INTRODUCTION**

On May 14, 2010, Columbus Southern Power Company and Ohio Power Company ("CSP," and "OP," respectively, and "AEP Ohio" or "Companies", collectively) filed a motion for protective order in these proceedings seeking protection for what it deemed to be trade secret information contained in the confidential version of the May 14, 2010 Audit Report. In its June 29, 2010 Entry, the Commission concluded that the information related to AEP Ohio's motion was confidential trade secret information, the release of which is prohibited by Ohio law. Pursuant to Ohio Admin. Code 4901-1-24(F), the PUCO granted a protective order for 18 months. On the basis of that protective order, and as discussed at the July 16, 2010 pre-hearing conference, the parties filed their respective testimony under seal.

Recently, on November 9, 2010, AEP Ohio filed its Motion for Protective Order ("Motion") that is the subject of this Memorandum Contra. AEP Ohio's Motion seeks a protective order regarding information AEP Ohio deems to be confidential trade secret information in two types of documents already filed under seal in these proceedings: (1) the confidential version of the parties' testimony and initial and reply briefs, and (2) the

evidentiary hearing transcripts that have been filed under seal in these dockets (Volume I, filed August 23, 2010, and Volume II, filed August 24, 2010).

According to AEP Ohio's Motion, the confidential, trade secret information includes "coal inventory information on an individual plant and total company basis, specific fuel/consumables contract terms and conditions (including pricing) and planned purchasing information, competitive financial and cost information for AEP's River Transportation division affiliate, and competitive pricing information for Renewable Energy Certificates and emission allowances."<sup>1</sup> In its Motion, AEP Ohio asks the Commission to grant "protective status" for the filings for 18 months.<sup>2</sup>

## II. ARGUMENT

**A. While protecting trade secret information, the Commission must, to the greatest extent possible, abide by the public policies of providing access to public records and transparency in government.**

Ohio's citizens, and in particular, AEP Ohio's customers, have a right to know the factual and legal bases of the Commission's determinations and orders in this case. This right to know is protected by R.C. 4905.07, which provides that all facts and information in the possession of the Commission shall be public, except as provided in R.C. 149.43. The public's right to know is also protected by R.C. 4901.12, which provides that "all proceedings of the public utilities commission and all documents and records in its possession are public records."

The public's right to access the records of the PUCO is necessary for AEP Ohio's customers to be able to scrutinize the Commission's decision that affects their electric

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<sup>1</sup> AEP Ohio's Motion for Protective Order at 2.

<sup>2</sup> See AEP Ohio's Motion for Protective Order at 1.

rates.<sup>3</sup> This right to access of records is also protected by R.C. 4903.09, which requires that in all contested cases heard by the PUCO, “a complete record of all the proceedings shall be made, including a transcript of all testimony and of all exhibits, and the commission shall file, with the records of such cases, findings of fact and written opinions setting forth the reasons prompting the decisions arrived at, based upon said findings of fact.”<sup>4</sup>

R.C. 149.43 provides that the term “public records” excludes information that, under state or federal law, may not be released. And the Ohio Supreme Court has clarified that the “state or federal law” exemption is intended to cover trade secrets.<sup>5</sup> Thus, under specified circumstances, the Commission must protect the confidentiality of information that it deems to be a trade secret.

But the Commission’s duty to protect trade secret information under R.C. 149.43 neither negates nor subjugates the public’s rights to public information and transparent government protected by R.C. 4901.12 and 4905.07. As the Ohio Supreme Court has held, “The determination that certain information constitutes a trade secret, \* \* \* is not the end of the commission’s analysis. The commission must also balance that determination with its duty under Ohio Adm. Code 4901-1-24(D)(1), which requires it to

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<sup>3</sup> See *State ex rel. WHIO-TV v. Lowe* (1977), 77 Ohio St.3d 350,355, 1997 Ohio 271, 673 N.E.2d 1360 (“The Public Records Act reflects the state’s policy that ‘open government serves the public interest and our democratic system.’ *State ex rel. Dann v. Taft*, 109 Ohio St.3d 364, 2007 Ohio 1825, 848 N.E.2d 472, P 20. The purpose of the act is to expose government activity to public scrutiny, which is absolutely essential to the proper working of a democracy.’”)

<sup>4</sup> R.C. 4903.09.

<sup>5</sup> See *State ex rel. Besser v. Ohio State* (2000), 89 Ohio St.3d 396, at 399.

redact confidential information when reasonable without rendering the remaining documents incomprehensible or of little meaning.”<sup>6</sup>

Ohio Adm. Code 4901-1-24(D) requires that “Any order issued under this paragraph shall minimize the amount of information protected from public disclosure.” Similarly, and specifically with regard to the redaction of documents pursuant to a motion for protective order, the Commission has determined that it “is obligated to keep as much information in the open record as possible.”<sup>7</sup> The Commission should do so here.

### III. CONCLUSION

The PUCO will need to write an order in this case that contains the finding of facts and written opinions required by R.C. 4903.09, that provides for its proceedings to be public records under R.C. 4901.12 and that meets the requirements of Ohio Adm. Code 4901-1-24(D) to “minimize the amount of information protected from public disclosure.” The PUCO will also need to address these imperatives for transparency and openness in government with the counterpoint of the need for protection of AEP Ohio’s information that is truly a trade secret under R.C. 149.43. Therefore, the PUCO should carve out from AEP Ohio’s Motion (and from the records of the case) any information, including bases for characterizations, that is not a trade secret and that is needed to comply with legal requirements for writing orders in satisfaction of the public’s right to know.

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<sup>6</sup> *Ohio Consumers’ Counsel v. Public Utilities Commission of Ohio et al.* (2009), 121 Ohio St.3d 362, at 370, 904 N.E2d 853 at 861.

<sup>7</sup> *In the Matter of the Complaints of S.G. Foods, Inc. et al. v. The Cleveland Electric Illuminating Company, et al.*, PUCO Case Nos: 04-28-EL-CSS, 05-803-EL-CSS, 05-1011-EL-CSS, and 05-1012-EL-CSS, at Para. 9, 2007 Ohio PUC LEXIS 742 at \*6.

Respectfully submitted,

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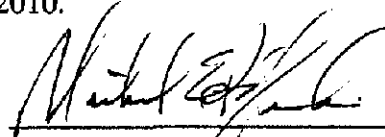
A handwritten signature in black ink, appearing to read "Michael E. Idzkowski", written over a horizontal line.

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## **CERTIFICATE OF SERVICE**

I hereby certify that a copy of the Office of the Ohio Consumers' Counsel's  
*Memorandum Contra* was served upon the persons listed below via first class U.S. Mail,  
postage prepaid, this 29<sup>th</sup> day of November 2010.



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