

BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Alternative Energy)
Resources Report for Calendar Year 2010) Case No. 11-2440-EL-ACP
from MidAmerican Energy Company.)

ENTRY

The attorney examiner finds:

- (1) On April 14, 2011, MidAmerican Energy Company (MidAmerican) filed its alternative energy resources report pursuant to Section 4928.64, Revised Code, and Rule 4901:1-40-05(A), Ohio Administrative Code (O.A.C.). In conjunction with its report, MidAmerican filed a motion requesting protective treatment of certain portions of the report pursuant to Rule 4901-1-24(D), O.A.C.
- (2) In support of its motion for protective order, MidAmerican asserts that the redacted portions of the report contain confidential and proprietary information that, if released to the public, would harm MidAmerican by allowing its competitors to gain an advantage in the competitive market. Specifically, MidAmerican has redacted its retail electric sales for 2007, 2008, and 2009; the average annual sales of the active years; the projected amount of retail electric generation sales anticipated for calendar year 2010; the renewable energy credits (RECs) required and obtained for 2010; the ten-year forecast of solar RECs, non-solar RECs, and the total RECs; the supply portfolio projections; and the methodology used to evaluate compliance options. MidAmerican submits that disclosure of such sensitive information would harm MidAmerican by providing its competitors proprietary information in what is designed by statute to be a competitive service. Further, MidAmerican asserts that public disclosure of this confidential information is not likely to assist the Commission in carrying out its duties. Therefore, MidAmerican requests that the redacted information be treated as confidential.
- (3) 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 that, 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 include trade secrets. *State ex rel. Besser v. Ohio State* (2000), 89 Ohio St.3d 396, 399.

- (4) Similarly, Rule 4901-1-24, O.A.C., allows an attorney examiner 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."
- (5) 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. The Supreme Court has adopted the following six factors to be used in analyzing a claim that information is a trade secret under that section:
 - (a) The extent to which the information is known outside the business.
 - (b) The extent to which it is known to those inside the business, i.e., by the employees.
 - (c) The precautions taken by the holder of the trade secret to guard the secrecy of the information.
 - (d) The savings affected and the value to the holder in having the information as against competitors.
 - (e) The amount of effort or money expended in obtaining and developing the information.
 - (f) The amount of time and expense it would take for others to acquire and duplicate the information.

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

- (6) The attorney examiner has reviewed the redacted information and the assertions set forth in the memorandum in support of MidAmerican's motion for protective order. 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, the attorney examiner finds that the information consisting of the projected amount of retail electric generation sales anticipated for calendar year 2010; the RECs required and obtained for 2010; and the ten-year forecast of solar RECs, non-solar RECs, and the total RECs, is trade secret information. Its release is, therefore, prohibited under state law. The attorney examiner also finds that non-disclosure of the information is not inconsistent with the purposes of Title 49 of the Revised Code. The attorney examiner also notes that MidAmerican has redacted the report in order to allow for a public filing.
- (7) The attorney examiner, therefore, finds that there is good cause to grant MidAmerican's motion for a protective order as to the projected amount of retail electric generation sales anticipated for calendar year 2010; the RECs required and obtained for 2010; and the ten-year forecast of solar RECs, non-solar RECs, and the total RECs. The unredacted report should receive protected status for an 18-month period from the date of this entry, and should remain under seal in the Docketing Division for that time period. MidAmerican should note that Rule 4901-1-24(F), O.A.C., provides that protective orders issued pursuant to the rule automatically expire after 18 months. Accordingly, the Docketing Division should maintain under seal the unredacted portions of the report set forth in finding (6) as filed on April 14, 2011, for a period of 18 months from the date of this entry.
- (8) The attorney examiner notes that MidAmerican has also sought to protect its sales for 2007, 2008, and 2009, as well as the average annual sales of the active years. MidAmerican has provided no specific explanation as to why its retail sales in prior years contain sensitive information and none is apparent. Additionally, MidAmerican filed with the Commission annual

reports for 2008¹ and 2009² containing its retail sales and intrastate gross earnings for those years. Further, MidAmerican has made available on its website annual reports filed pursuant to Section 13 and 15(a) of the Securities and Exchange Act of 1934. The "selected financial data" portion of these reports contains information from which a reader could easily discern MidAmerican's Ohio retail sales in 2007, 2008, and 2009. Consequently, the attorney examiner finds that this information does not hold independent economic value and is not 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 Supreme Court of Ohio.

Additionally, although MidAmerican states in its motion for protective order that it seeks protection of the supply portfolio projection and methodology used to evaluate compliance, it has not redacted any information in these two sections of its report, which consist of brief descriptions. Consequently, with respect to MidAmerican's supply portfolio projection and methodology used to evaluate compliance, the attorney examiner finds that MidAmerican has identified no information that requires protection from disclosure.

- (9) In conclusion, the information consisting of MidAmerican's sales for 2007, 2008, and 2009, contained on page 1 in section 2.a., the average annual sales of the active years, contained on page 1 in section 2.b., the supply portfolio projection, contained on page 2 in section 5.b., and the methodology used to evaluate compliance, contained on page 3 in section 5.c., has not been shown to contain trade secrets and the attorney examiner finds that MidAmerican's motion for protective order with respect to this information should be denied. The Commission's Docketing Division should move these portions of MidAmerican's report, as filed under seal on April 14, 2011, to the public file, no sooner than 14 days after the date of this entry.

¹ *In the Matter of the Filing of Annual Reports for Calendar Year 2008 by Regulated Public Utilities Railroads and Service Providers*, Case No. 09-0001-AU-UNC (April 14, 2009).

² *In the Matter of the Filing of Annual Reports for Calendar Year 2009 by Certified Competitive Retail Electric Service Providers, Natural Gas Suppliers, and Governmental Aggregators*, Case No. 10-0003-GE-RPT (March 30, 2010).

It is, therefore,

ORDERED, That MidAmerican's motion for a protective order be granted in part and denied in part as set forth in findings (7) and (9). It is, further,

ORDERED, That the redacted portions of the report as set forth in finding (7) remain under seal in the Commission's Docketing Division for an 18-month period. It is, further,

ORDERED, That, no sooner than 14 days after the date of this entry, the Commission's docketing division shall remove the portions of MidAmerican's report set forth in finding (9) from the sealed record in this case and place them in the public file. It is, further,

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

THE PUBLIC UTILITIES COMMISSION OF OHIO

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Entered in the Journal

MAY 26 2011

Betty McCauley

Betty McCauley
Secretary