

BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of Ohio)
Power Company and Columbus Southern) Case No. 10-2376-EL-UNC
Power Company for Authority to Merge)
and Related Approvals.)

In the Matter of the Application of)
Columbus Southern Power Company and)
Ohio Power Company for Authority to) Case No. 11-346-EL-SSO
Establish a Standard Service Offer) Case No. 11-348-EL-SSO
Pursuant to Section 4928.143, Revised)
Code, in the Form of an Electric Security)
Plan.)

In the Matter of the Application of)
Columbus Southern Power Company and) Case No. 11-349-EL-AAM
Ohio Power Company for Approval of) Case No. 11-350-EL-AAM
Certain Accounting Authority.)

In the Matter of the Application of)
Columbus Southern Power Company to) Case No. 10-343-EL-ATA
Amend its Emergency Curtailment)
Service Riders.)

In the Matter of the Commission Review)
of the Capacity Charges of Ohio Power) Case No. 10-344-EL-ATA
Company and Columbus Southern Power)
Company.)

In the Matter of the Application of)
Columbus Southern Power Company for)
Approval of a Mechanism to Recover) Case No. 11-4920-EL-RDR
Deferred Fuel Costs Ordered Under)
Section 4928.144, Ohio Revised Code.)

In the Matter of the Application of Ohio)
Power Company for Approval of a)
Mechanism to Recover Deferred Fuel) Case No. 11-4921-EL-RDR
Costs Ordered Under Section 4928.144,)
Ohio Revised Code.)

ENTRY

The attorney examiner finds:

- (1) By entry issued October 7, 2011, the attorney examiner set forth a procedure to afford all persons interested the opportunity to review *in camera* the documents subject to a public records request and to comment on the motion for protective treatment docketed on September 30, 2011, in this matter. Interested persons were given until October 14, 2011, to complete the *in camera* review and any motions seeking to provide additional, more specific arguments regarding a certain document or documents were to be filed by October 19, 2011. Memoranda contra were due on October 24, 2011.
- (2) On October 19, 2011, a supplemental joint motion for protective order and memorandum in support was filed by counsel for Columbus Southern Power Company and Ohio Power Company, Ohio Energy Group, Constellation NewEnergy, Inc., Constellation Energy Commodities Group, Inc., Exelon Generation Company, LLC, Duke Energy Retail Sales, LLC, Ohio Hospital Association, AEP Retail Energy Partners LLC, Paulding Wind Farm LLC, EnerNoc, Inc., Environmental Law and Policy Center, Kroger Company, and Association of Independent Colleges and Universities of Ohio (collectively "joint movants"). Joint movants contend that during their *in camera* review of the documents subject to the public records request, they have identified 37 documents for which protective treatment is no longer sought and 183 documents for which they renew the motion for protective order.
- (3) No memoranda contra the October 19, 2011, supplemental joint motion for protective order were filed. However, on October 19, 2011, FirstEnergy Solutions Corporation, a non-signatory party to the stipulation in this proceeding, filed a memorandum in support of the issuance of a protective order.
- (4) By entry issued October 24, 2011, the attorney examiner directed the release of the 37 documents that the joint movants identified as no longer being subject to a motion for protective treatment subject to the public records request. The remaining 183 documents were subject to further *in camera* review by the attorney examiner.

Of the remaining 183 documents, joint movants claimed that 138 of the documents contain the parties' confidential settlement communications and/or references to AEP's highly sensitive financial and business information that should be redacted before any public disclosure. These 138 documents were denoted in paragraph 19 of the joint movants' October 19, 2011, supplemental joint motion for protective order. The remaining 45 documents, according to the joint movants and specified in paragraph 18 of the October 19, 2011, supplemental joint motion for protective order, represent confidential AEP-Ohio term sheets or other parties' redline markups of the AEP-Ohio term sheets that contain or reflect AEP-Ohio's highly sensitive financial and business information that can not be released in any form.

- (5) Joint movants argue that the state law prohibition set forth in Section 4901.16, Revised Code, clearly prohibits the disclosure of information acquired by the Commission staff regarding the transaction, property, or business of AEP-Ohio obtained by staff while acting as a party to this proceeding. As such, the documents subject to the public records request satisfy the state law exemption of Section 149.43(A)(1)(v), Revised Code, and are, therefore, not public records subject to disclosure. Joint movants also assert that the documents at issue also qualify as trade secrets pursuant to Section 1333.61(D), Revised Code, as the documents were marked confidential during the negotiations, the parties opened their dialogue by expressing a common understanding that the matters discussed are confidential, and the parties maintained the confidentiality of those discussions and documents exchanged in the effort to reach a negotiated result. Those documents include, according to joint movants, elements of AEP-Ohio's business that are highly competitively sensitive and confidential, including rate and business structures. Next, joint movants assert that the confidential settlement documents shared in negotiations are not public records under Section 149.011(G), Revised Code, as the documents do not document the organization, functions, policies, decisions, procedures, operations, or other activities of the Commission. Finally, joint movants maintain that existing case law does not concern preliminary settlement communications resembling those that the joint movants seek here to protect as confidential. In fact, joint movants claim that the settlement communications involved here constitute trial

preparation records exempt from disclosure under Section 149.43(A)(1)(g), Revised Code.

- (6) 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 held that records of communications between attorneys and their state government clients pertaining to attorney’s legal advice are excepted from disclosure under Section 149.43, Revised Code, as release of such records is prohibited by state law. *State ex rel. Thomas v. Ohio State Univ.* (1994), 71 Ohio St.3d 245. In addition, the 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.
- (7) Similarly, Rule 4901-1-24, Ohio Administrative Code (O.A.C.), allows the 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.”
- (8) 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.
- (9) The Ohio Supreme Court has found that an *in camera* inspection is necessary to determine whether materials are entitled to protection from disclosure. *State ex re. Allright Parking of Cleveland Inc. v. Cleveland* (1992), 63 Ohio St.3d 772. The attorney examiner has conducted an *in camera* review and determined that the following documents contain privileged

attorney/client communications between and among Staff and its counsel: 8, 18, 75, 79, 80, 81, 82, 83, 97, 99, 100, 102, 109, 119, 122, 123, 137, 138, 140, 142, and 144. Accordingly, the attorney examiner finds that these documents are not subject to disclosure under Section 149.43, Revised Code. Notwithstanding that the identified documents are exempted from disclosure as privileged attorney/client communications pursuant to Section 149.43, Revised Code, the attorney examiner notes that the staff, in the interest of public disclosure and openness, has agreed that the identified documents can be released subject to any redaction for trade secrets as discussed further below.

- (10) Rule 4901-1-24(D)(1), O.A.C., also provides that, where confidential material can be reasonably redacted from a document without rendering the remaining document incomprehensible or of little meaning, redaction should be ordered rather than wholesale removal of the document from public scrutiny. Thus, in order to determine whether to issue a protective order, it is necessary to review the materials in question; to assess whether the information constitutes a trade secret under Ohio law; to decide whether nondisclosure of the materials will be consistent with the purposes of Title 49, Revised Code; and to evaluate whether the confidential material can be reasonably redacted. Further, the Ohio Supreme Court recently upheld the Commission's determination that trade secret information included information such as: (1) customer names, (2) account numbers, (3) customer Social Security numbers or employer identification numbers, (4) contract termination dates or other termination provisions, (5) financial consideration in each contract, (6) price of generation specified in each contract, (7) volume of generation covered by each contract, and (8) terms under which options may be exercisable. *Ohio Consumers' Counsel v. Pub. Util. Comm.*, 121 Ohio St.3d 362, 2009-Ohio-604.
- (11) Based upon the *in camera* review of the materials in question, the attorney examiner will now consider each of the two tests to assess whether trade secrets are present. Should the attorney examiner find trade secrets to be present, the attorney examiner will then consider whether, based on the review of the documents, nondisclosure will be consistent with the purposes

expressed in Title 49. Finally, the attorney examiner will evaluate the possibility of redaction, if necessary.

- (12) 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 documents identified in paragraph 19 of the October 19, 2011, supplemental joint motion for protective order do include information that constitutes trade secret information. The attorney examiner notes that retail electric generation service is a competitive service in this state. Section 4928.03, Revised Code. Therefore, consistent with the Court's decision in *Ohio Consumers Counsel, supra*, the attorney examiner finds that the following information should be considered as trade secrets: (1) customer names, (2) customer load information, (3) rates and prices charged to individual customers, (3) proposed rates and components of proposed rates, (4) time periods during which proposed rates would be charged, (5) volume of customer load or generation subject to proposed rates, and (6) specific terms and conditions under which proposed rates may be obtained.
- (13) 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. In making this determination, the attorney examiner notes that the joint movants have argued that the documents were marked confidential during the negotiations, the parties opened their dialogue by expressing a common understanding that the matters discussed were confidential, and the parties maintained the confidentiality of those discussions and documents exchanged in the effort to reach a negotiated result. Those documents include, according to joint movants, elements of AEP-Ohio's business that are highly competitively sensitive and confidential, including rate and business structures. The joint movants arguments in this regard are unopposed.
- (14) Having determined that certain documents contain trade secret information, the attorney examiner now must evaluate whether

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

the documents containing trade secrets can be reasonably redacted to remove the confidential information contained therein without rendering the remaining document incomprehensible or of little meaning. The attorney examiner does find that it is possible to redact the identified documents and release a redacted version of the documents. This determination is in accord with the joint movants' assertion that the identified documents could be released in a redacted form. Therefore, the identified documents will be released in redacted form on November 25, 2011, unless otherwise ordered. Parties to the proceeding may review *in camera* at the offices of the Commission the redacted documents before November 25, 2011.

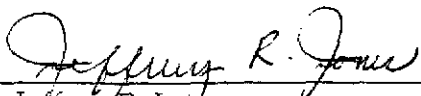
- (15) The attorney examiner will rule on the release of the remaining documents in a future entry.

It is, therefore,

ORDERED, That, unless otherwise ordered by the Commission, the documents identified in finding 12 be released in redacted form on November 25, 2011. It is, further,

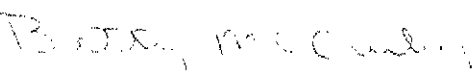
ORDERED, That a copy of this entry be served upon all parties of record in these matters.

THE PUBLIC UTILITIES COMMISSION OF OHIO


By: Jeffrey R. Jones
Attorney Examiner

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Betty McCauley
Secretary