

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 and) Case No. 10-343-EL-ATA
Ohio Power Company to Amend their) Case No. 10-344-EL-ATA
Emergency Curtailment Service Riders.)

In the Matter of the Commission Review)
of the Capacity Charges of Ohio Power) Case No. 10-2929-EL-UNC
Company and Columbus Southern Power)
Company.)

In the Matter of the Application of)
Columbus Southern Power Company and)
Ohio Power Company for Approval of) Case No. 11-4920-EL-RDR
Mechanisms to Recover Deferred Fuel) Case No. 11-4921-EL-RDR
Costs Ordered Under Section 4928.144,)
Revised Code.)

ENTRY

The Commission 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 (jointly AEP-Ohio); Ohio Energy Group; Constellation NewEnergy, Inc.; Constellation Energy Commodities Group, Inc.; Exelon Generation Company, LLC; Duke Energy Retail Sales, LLC; Ohio Hospital Association (OHA); AEP Retail Energy Partners LLC; Paulding Wind Farm LLC (Paulding Wind); 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) Following an *in camera* review and trade secret analysis pursuant to Section 1333.61(D), Revised Code, as well as the six-factor test set forth by the Ohio Supreme Court in *State ex re. The Plain Dealer v. Ohio Dept. of Ins.* (1997), 80 Ohio St.3d 513, 524-525, the attorney examiner ruled in an entry issued on November 18, 2011, that the 138 documents set forth in paragraph 19 of the October 19, 2011, supplemental joint motion for protective order would be released in redacted form on November 25, 2011, unless otherwise ordered. The November 18, 2011, entry afforded parties to the proceeding the opportunity to review the redacted documents before November 25, 2011.
- (6) On November 23, 2011, counsel representing AEP-Ohio, OHA, and Paulding Wind (collectively, "joint applicants") filed an interlocutory appeal of the attorney examiner's proposed release of the document identified as number 92 in redacted form.
- (7) Joint applicants' interlocutory appeal of the attorney examiner's ruling, in order to allow the Commission to determine whether to release document number 92 including the term sheet utilized during negotiations, was granted pursuant to Rule 4901-1-15(A), Ohio Administrative Code (O.A.C.), on November 25, 2011. All remaining documents identified in paragraph 19 of the October 19, 2011,

supplemental joint motion for protective order were released in redacted reform on November 25, 2011.

- (8) In support of the interlocutory appeal, joint applicants seek to incorporate by reference the September 7, 2011, joint motion for protective orders of the signatory parties¹ and the supplemental joint motion filed on October 19, 2011, as if fully rewritten. Joint applicants assert that the term sheet included in the document identified as number 92 contains highly sensitive financial, business, and trade secret information that may not be publicly disclosed. Indeed, according to joint applicants, Ohio law exempts from disclosure under the Public Records Act (i.e., Section 149.43, Revised Code) any business information that derives potential economic value from not being known by others and is the subject of reasonable efforts to maintain its secrecy. Joint applicants further contend that much of the information contained in the term sheet included in document 92 satisfies the multifactor test that Ohio courts apply to determine whether business information constitutes a trade secret. Joint applicants also note that numerous other states have found that trade secrets submitted to public agencies during confidential settlement negotiations, like the trade secrets contained in the term sheet at issue here, are exempt from disclosure under public records acts because release of such materials would impair agency functions and chill critical settlement negotiations.

Lastly, joint applicants argue that confidential settlement communications that parties share with Commission staff during negotiations are not "records" under Section 149.011(G), Revised Code, and, therefore, are not required to be disclosed. The parties settlement communications with staff are also exempt from disclosure under Section 149.43(A)(1)(v), Revised Code, and Section 4901.16, Revised Code, which prohibits staff from divulging any information regarding the transaction, property, or business of any public utility according to joint applicants.

¹ The joint motion for protective orders of the signatory parties was actually docketed on September 30, 2011.

- (9) The Commission is very concerned with the real possibility that disclosure of draft negotiation proposals under a public records request, such as the term sheet included as part of document 92, will impair the ability of public agencies such as the Commission Staff, Ohio Consumers' Counsel, and municipal customers to negotiate effectively with other parties and will chill participation in negotiations by such public agencies. As pointed out by joint applicants, Illinois and New York courts have shielded documents used in negotiations involving utilities and shared with that state's public agency from disclosure under a public records act request. Finally, the Commission notes that, in the judicial system, the courts generally enforce confidentiality agreements among parties and protect such communications, including documents shared in the course of negotiations, from public disclosure. Accordingly, the Commission believes that there is a strong public policy rationale for exempting documents shared during negotiations from the public records law. The Ohio Supreme Court has in fact announced a similar concern in *State ex rel. Cincinnati Enquirer, Div. of Gannett Satellite Info. Network, Inc. v. Dupuis*, 98 Ohio St.3d 126, 2002-Ohio-7041. In *Dupuis*, the Court held, in considering whether a trial-preparation exemption applied under the public records law to settlement proposals considered during pre-stipulation negotiations, that:

[T]here is no specific exemption for documents provided to a public office to negotiate the settlement of a potential lawsuit or for settlement proposals before a final settlement agreement is reached. If the General Assembly had so intended, it would have specifically provided such an exemption. Although there may be good policy reasons to exempt settlement proposals, these policy considerations cannot override R.C. 143.43 because the General Assembly is the ultimate arbiter of public policy.

The Commission believes that there are significant differences between this case and *Dupuis*, which further weigh against release of the draft negotiation proposals. For example, in this case, the proposed stipulation and recommendation was

docketed in this proceeding and was subject to extensive litigation before the Commission regarding whether the proposals should be adopted. In addition, the settlement proposal discussed by the Court in *Dupuis* resulted from an investigation into the conduct of the City's employees; in this case, the settlement proposals are the result of the Commission's exercise of our quasi-judicial function. However, despite our misgivings regarding the chilling effect disclosure of draft negotiation proposals will have on the ability of the public agencies to conduct negotiations that resolve matters between parties in Commission cases in the future, we believe we are bound by the precedent established by the Ohio Supreme Court in *Dupuis*. Therefore, under the authority of *Dupuis*, we believe that we are obligated to disclose the documents shared during the negotiations leading to the adoption of the stipulation and recommendation in this matter unless otherwise exempted by Section 149.43, Revised Code.

Joint applicants have also argued that any proposals shared with staff during negotiations in this matter are exempt from disclosure pursuant to Section 4901.16, Revised Code. Joint applicants overstate the breadth of this section as this statute does not preclude the disclosure of information by Staff pursuant to an order of the Commission.

Joint applicants have also argued that proposals shared with Staff during negotiations are not "records" under Section 149.011(G), Revised Code. As defined in Section 149.011(G), Revised Code, "records" include any document, device, or item, regardless of physical form or characteristic, including an electronic record..., created or received by or coming under the jurisdiction of any public office of the state..., which serves to document the organization, functions, policies, decisions, procedures, operations, or other activities of the office. In *Dupuis*, supra, the Court determined that documents considered by a public entity in considering whether to settle a matter constituted a "public record" subject to disclosure under Section 149.43, Revised Code. Even though the draft documents at issue were submitted to Staff for purposes of considering whether to enter into a stipulation and not held by

the Commission, as noted above, we believe that the precedent established in *Dupuis* is controlling and is likely to be applied by the Court in this instance. Accordingly, the joint applicants' interlocutory appeal concerning disclosure of the term sheet appended to document 92 is denied.

- (10) Further, we will reverse the attorney examiner's decision with respect to the redaction of document 92. The Commission does not believe that joint applicants have established sufficient grounds for the redaction of the information contained in the document. The joint applicants have not demonstrated that the proposed rates, terms and conditions redacted by the attorney examiner, which were shared by joint applicants with numerous parties to this proceeding, have independent economic value 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 or that joint applicants made reasonable efforts to maintain its secrecy. Moreover, the Commission notes that the joint applicants signed a stipulation and recommendation and submitted it to the Commission on September 7, 2011. This stipulation and recommendation was subject to extensive hearings and testimony before the Commission, and the Commission issued its decision with respect to the stipulation on December 14, 2011. Therefore, we direct that document 92 should be released, in its entirety, seven days after the issuance of this entry unless otherwise ordered.

It is, therefore,

ORDERED, That the joint applicants' interlocutory appeal be denied. It is, further,

ORDERED, That document 92 be released in accordance with finding (10) unless otherwise ordered. 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


Todd A. Snitchler, Chairman


Paul A. Centolella


Steven D. Lesser

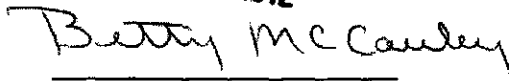

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Betty McCauley

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Secretary