

BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Alternative Energy)
Resources Report for Calendar Year 2010) Case No. 11-2448-EL-ACP
from Constellation NewEnergy, Inc.)

ENTRY

The attorney examiner finds:

- (1) On April 14, 2011, Constellation NewEnergy, Inc. (Constellation), filed a redacted copy of 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 redacted report, Constellation filed a motion requesting protective treatment of the redacted portions of the report pursuant to Rule 4901-1-24(D), O.A.C.
- (2) In support of its motion for protective order, Constellation asserts that the redacted portions of the report contain confidential and proprietary information that, if released to the public, would harm Constellation by allowing its competitors to gain an advantage in the competitive market. Specifically, Constellation has redacted its retail electric sales for 2007, 2008, and 2009; the renewable energy credits (RECs) required and obtained for 2010; the amount of solar RECs for which it obtained a *force majeure* determination in 2009 and carried over to its 2010 benchmark; the ten-year forecast of solar RECs, non-solar RECs, and the total RECs; the supply portfolio projection; and the methodology used to evaluate compliance options. Constellation submits that disclosure of such sensitive information would harm Constellation by providing its competitors with proprietary information in what is designed by statute to be a competitive service. Further, Constellation contends that public disclosure of the confidential information is not likely to assist the Commission in carrying out its duties. Therefore, Constellation 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 Univ.*, 89 Ohio St.3d 396, 399, 732 N.E.2d 373 (2000).
- (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.
- (6) The attorney examiner has reviewed the redacted information and the assertions set forth in the memorandum in support of Constellation’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,¹ the attorney examiner finds that the information consisting of the amount of solar RECs for which it obtained a *force majeure* determination in 2009 and carried over to its 2010 benchmark; the ten-year forecast of solar

¹ See *State ex rel. the Plain Dealer v. Ohio Dept. of Ins.*, 80 Ohio St.3d 513, 524-525, 687 N.E.2d 661 (1997).

RECs, non-solar RECs, and the total RECs; the supply portfolio projection; and the methodology used to evaluate compliance 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 Constellation 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 Constellation's motion for a protective order as to the amount of solar RECs for which it obtained a *force majeure* determination in 2009 and carried over to its 2010 benchmark; the ten-year forecast of solar RECs, non-solar RECs, and the total RECs; the supply portfolio projection; and the methodology used to evaluate compliance. 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. Constellation 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) 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 days in advance of the expiration date. If Constellation 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 to extend confidential treatment is filed, the Commission may release this information without prior notice to Constellation.
- (9) The attorney examiner notes that Constellation has also sought to protect its sales for 2007, 2008, and 2009, the average annual sales of the active years, and the amount of RECs required and obtained for 2010. Constellation has provided no specific explanation as to why its retail sales in prior years contain sensitive information and none is apparent. Additionally, Constellation filed with the Commission annual

reports for 2008² and 2009³ containing its retail sales for those years. Further, Constellation's renewable energy baseline and benchmark requirements may be easily derived from its total retail electric sales for 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.

- (10) In conclusion, the information consisting of Constellation's sales for 2007, 2008, and 2009, contained on page 1 in section 2.a., the average annual sales of the active years, and the RECs required and obtained for 2010, contained on page 2 in the chart in section 3, has not been shown to contain trade secrets and the attorney examiner finds that Constellation's motion for protective order with respect to this information should be denied. The Commission's docketing division should move these portions of Constellation'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.

It is, therefore,

ORDERED, That Constellation's motion for a protective order be granted in part and denied in part as set forth in findings (7) and (10). It is, further,

ORDERED, That the Commission's docketing division maintain, under seal, the redacted portions of the report as set forth in finding (7), which were filed under seal in this docket on April 14, 2011, for a period of 18 months. 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 Constellation's report set forth in finding (10) from the sealed record in this case and place them in the public file. It is, further,

² *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 (May 4, 2009).

³ *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 (April 22, 2010).

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

THE PUBLIC UTILITIES COMMISSION OF OHIO

s/Mandy Willey

By: Mandy L. Willey
Attorney Examiner

SEF/sc

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in

Case No(s). 11-2448-EL-ACP

Summary: Attorney Examiner Entry granting in part and denying in part a motion for protective order filed by Constellation NewEnergy, Inc. - electronically filed by Sandra Coffey on behalf of Mandy Willey, Attorney Examiner, Public Utilities Commission of Ohio