

THE PUBLIC UTILITIES COMMISSION OF OHIO

IN THE MATTER OF THE OVEC
GENERATION PURCHASE RIDER AUDITS
REQUIRED BY R.C. 4928.148 FOR DUKE
ENERGY OHIO, INC., THE DAYTON
POWER AND LIGHT COMPANY D/B/A AES
OHIO, AND OHIO POWER COMPANY
D/B/A AEP OHIO.

CASE NO. 21-477-EL-RDR

ENTRY

Entered in the Journal on January 24, 2024

{¶ 1} In this Entry, the attorney examiner modifies the protective orders originally granted by Entry issued on July 7, 2023.

{¶ 2} Duke Energy Ohio, Inc. (Duke), The Dayton Power and Light Company d/b/a AES Ohio (AES), and Ohio Power Company d/b/a AEP Ohio (AEP) (collectively, the Companies) are electric distribution utilities (EDUs), as defined by R.C. 4928.01(A)(6), and public utilities, as defined in R.C. 4905.02, and, as such, are subject to the jurisdiction of this Commission.

{¶ 3} R.C. 4928.148, which became effective on October 22, 2019, required the Commission to (1) establish a replacement nonbypassable rate mechanism for the retail recovery of prudently incurred costs related to a legacy generation resource (LGR) for the period commencing January 1, 2020 and extending up to December 31, 2030, and (2) determine the prudence and reasonableness of the actions of EDUs with ownership interests in the LGR.

{¶ 4} By Entry issued on November 21, 2019, in Case No. 19-1808-EL-UNC, the Commission established the LGR Rider pursuant to R.C. 4928.148. *In re Establishing the Nonbypassable Recovery Mechanism for Net Legacy Generation Resource Costs Pursuant to R.C. 4928.148.*

{¶ 5} In accordance with R.C. 4928.148(A)(1), the Commission is required to determine the prudence and reasonableness of the actions of EDUs with LGR ownership interests during years 2021, 2024, 2027, and 2030.

{¶ 6} To assist the Commission with the audit of the Companies' actions in regard to their LGR ownership for the period from January 1, 2020, through December 31, 2020, by Entry issued in this proceeding on May 5, 2021, the Commission directed Staff to issue a request for proposal for audit services.

{¶ 7} On July 14, 2021, the Commission selected London Economics International (LEI) as the third-party auditor to assist with the prudency and reasonableness audit.

{¶ 8} On December 17, 2021, Staff filed in this docket the LEI audit of the LGR for each of the Companies. On December 17, 2021, Staff, Duke, AES Ohio, and AEP each filed separate motions for a protective order with respect to the confidential version of LEI's audit report, claiming that the report contained highly sensitive financial information and that protection of the information is consistent with the Commission's prior actions in cases involving this type of information. No memoranda contra the motions for protective order were filed.

{¶ 9} On April 7, 2023, by Entry, the attorney examiner established deadlines for a comment period in this proceeding. Initial comments were due on May 8, 2023, and reply comments were due by May 23, 2023. Initial comments were filed by AEP, Duke, AES, Sierra Club, Ohio Environmental Council (OEC), the Office of the Ohio Consumers' Counsel (OCC), Citizens Utility Board of Ohio (CUB), Union of Concerned Scientists (UCS), and The Ohio Manufacturers' Association Energy Group (OMAEG). Reply comments were filed by AEP, Duke, AES, OCC, OMAEG, Sierra Club, CUB, UCS, and OEC.

{¶ 10} On July 7, 2023, by Entry, the attorney examiner established a procedural schedule, setting, among other things, an evidentiary hearing to commence on October 17, 2023. Further, the attorney examiner granted the unopposed motions for protective order

filed by Staff and the Companies with respect to the confidential information contained in LEI's audit reports.

{¶ 11} No party filed an interlocutory appeal of the attorney examiner's July 7, 2023 Entry, including the granting of the motions for protective order.

{¶ 12} On September 1, 2023, Staff, AEP, Duke, AES, Sierra Club, OEC, OCC, CUB, UCS, the Kroger Company (Kroger), Ohio Energy Leadership Council, and OMAEG (Joint Movants) filed a joint motion for a continuance of the evidentiary hearing.

{¶ 13} The attorney examiner granted the continuance request on September 11, 2023. The hearing commenced on October 31, 2023, and adjourned on November 6, 2023.

{¶ 14} During the hearing, the confidentiality status of certain information came under question. At the conclusion of the hearing, the parties agreed to confer with one another regarding some limited circumstances in which information previously considered confidential would be moved to the public domain. (Tr. Vol. V at 1370-1371.) Any other disputes were instructed to be raised in briefs.

{¶ 15} By Entry issued December 22, 2023, the attorney examiner noted that certain information in this proceeding, which had previously been held under a protective order granted by the Commission, appeared available in the public domain. Consequently, the attorney examiner instructed the parties to object to the release of specific information contained in the LEI audit reports by December 29, 2023. The briefing schedule was also amended to accommodate the procedure set forth in the Entry.

{¶ 16} Subsequently, by Entry issued December 27, 2023, the deadline for parties to object to the release of information contained in the LEI audit reports was extended to January 4, 2024, and the new deadlines for initial and reply briefs were similarly extended to January 29, 2024, and February 20, 2024, respectively.

{¶ 17} The Companies filed motions for continued protective treatment, with supportive memoranda and affidavits, on January 4, 2024.¹

{¶ 18} On January 8, 2024, OMAEG/Kroger² and OCC filed responses, as directed by the attorney examiner's Entry. CUB/UCS filed correspondence on January 9, 2024, requesting that the Companies review the testimony of witness Devi Glick to confirm whether certain excerpts may now be unredacted, given the updated LEI reports filed by the Companies.

{¶ 19} While asserting that various information contained within the LEI reports should remain confidential, all three Companies agreed to un-redact portions of the public, redacted versions of the LEI reports and their errata, as attached to their motions for protective order. The Companies note that the newly un-redacted information represents data that was publicly disclosed during hearing, has been determined to be publicly available, or is being voluntarily disclosed to allow additional transparency and public review. Further, the motions for protective order included affidavits of representatives of the Companies, as well as OVEC, noting that the redacted information contained in the new public versions of the reports should remain confidential as it contains competitively sensitive information. Finally, while the Companies indicated that they attempted to ensure consistency between the confidential treatment of the three reports, there may still be limited instances where the Companies' redactions are not completely aligned.

{¶ 20} In its response to the Companies' motions for protective order, OCC supported the disclosure of certain information released through updated LEI reports, emphasizing the importance of public transparency in this case. OMAEG/Kroger also agree

¹ AES initially filed its motion for protective order on January 4, 2024, but refiled a corrected copy in color on January 8, 2024. The attorney examiner will treat this filing as timely.

² OMAEG/Kroger jointly refiled their response with redactions at the direction of the attorney examiners. The attorney examiner will treat this filing as timely.

with the disclosure of additional information from the LEI reports; however, OMAEG/Kroger argue that the Companies should disclose additional information in their respective audit reports for the sake of consistency and transparency. Further, OMAEG/Kroger also suggest that all confidential testimony and exhibits presented at the evidentiary hearing containing information that has been deemed public and is publicly available also should be deemed non-confidential and be made publicly available. Finally, OMAEG/Kroger request that the emails contained in OMAEG Exhibit 9-C should be deemed non-confidential in their entirety.

{¶ 21} R.C. 4905.07 provides that all facts and information in the possession of the Commission shall be made public, except as provided in R.C. 149.43, and as consistent with the purposes of Title 49 of the Revised Code. R.C. 149.43 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” exception is intended to cover trade secrets. *State ex rel. Besser v. Ohio State*, 89 Ohio St.3d 396, 399, 732 N.E.2d 373 (2000).

{¶ 22} Similarly, Ohio Adm.Code 4901-1-24 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 nondisclosure of the information is not inconsistent with the purposes of Title 49 of the Revised Code.”

{¶ 23} 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.” R.C. 1333.61(D).

{¶ 24} Initially, as noted at the end of the evidentiary hearing, the parties had agreed that they would evaluate certain confidential exhibits to determine whether portions of those exhibits could be released into the public record, notably OMAEG Exhibit 9-C, CUB/UCS Exhibit 2-C, and portions of the audit reports (Tr. Vol. V at 1370-1371). Through email correspondence, the parties were able to come to some agreement as to OMAEG Ex. 9-C and CUB/UCS Exhibit 2-C. The attorney examiner notes that OMAEG filed a late-filed exhibit on January 22, 2024, OMAEG Exhibit 17, which represents the public version of OMAEG 9-C, which will be deemed admitted to the record at this time. Further, in response to CUB/UCS's correspondence filed on January 9, 2024, the Companies notified the parties and the attorney examiner that they agreed to releasing a majority of the noted references from witness Glick's testimony.³ However, the Companies disputed the release of certain information contained on pages 37 (lines 10-12), 49 (beginning on line 21), and 50 (lines 8-14), arguing that material has not been released publicly through the less-redacted audit reports. As such, the Companies request that the referenced material remain confidential. The attorney examiner agrees with the Companies that the information contained within the three noted exceptions has not been publicly disclosed in the updated LEI reports filed by the Companies.

{¶ 25} The attorney examiner has reviewed the information that is the subject of the motions for protective order, as well as the assertions set for in the supportive and responsive memoranda. Initially, the attorney examiner agrees with OMAEG/Kroger in that there should be consistency applied to the manner in which confidential treatment is afforded to certain information contained in all three of the LEI reports. Furthermore, through email correspondence with the parties, the Companies noted their attempts to achieve consistency with the redactions and agreed to the release of the majority of

³ This includes the following references contained in witness Glick's confidential testimony: page 10 (line 6), page 11 (lines 5 and 10), page 27 (lines 16-23), pages 29-30 (all redactions including table 6), page 31, page 33 (lines 5-6), and page 34 (lines 14 and 9-13).

information cited by OMAEG/Kroger.⁴ However, one dispute remains. OMAEG/Kroger contends that a name related to an OVEC coal procurement strategy should be released, arguing that the information has been publicly released elsewhere in the updated audit reports.⁵ The Companies deny that the information, used in this context, has been revealed as the redacted excerpt relates to a forward-looking strategy for OVEC's Clifty Creek coal procurement. OMAEG/Kroger disputes this, arguing that is not requesting to reveal strategy-related information, but rather, information noting from where the coal may be procured. The attorney examiner agrees with the Companies that the redacted information pertains to future coal procurement strategies and has not otherwise been disclosed in the updated, less-redacted LEI reports. Simply because the Companies agreed to disclose other strategy-related information on those cited pages, does not mean that they have waived confidentiality for all coal procurement strategies discussed therein. Further, there is no indication that this information is otherwise publicly available. Thus, the attorney examiner finds that the information has not been publicly disclosed by the parties.

{¶ 26} The attorney examiner notes that, again, the December 17, 2021 motions for protective order were unopposed when they were granted and no subsequent interlocutory appeal was filed. Entry (July 7, 2023) at ¶¶14, 18. The existing protective order was granted, in part, based on the fact that the moving parties averred that the information was not available in the public domain. As previously noted in this proceeding, the Commission and, by extension, its attorney examiners retain the right to reconsider the confidential status of information presented in proceedings before the Commission when it becomes apparent that the information no longer satisfies the criteria for protective treatment, including occasions in which it is later determined that information is available in the public domain. Entry (Dec. 22, 2023) at ¶14. Applying the requirements that the information have

⁴ This includes Staff Ex. 2 at 26 and AEP's audit report supplement (Staff Ex. 8-C) at 2.

⁵ The disputed redactions can be found on Staff Ex. 2, page 49, Staff Ex. 4, page 52, and Staff Ex. 6, page 54.

independent economic value and be the subject of reasonable efforts to maintain its secrecy pursuant to R.C. 1333.61(D), as well as the six-factor test set forth by the Ohio Supreme Court⁶; the attorney examiner finds that the remaining redacted information contained in LEI's audit reports, including, but not limited to, capacity offer strategies, detailed financial information, and coal procurement strategies, constitutes trade secret information. The attorney examiner emphasizes the affidavits submitted by the Companies, on behalf of themselves and OVEC, attesting to the fact that the redacted information is not otherwise publicly available. This is bolstered by the fact that no party has indicated that they are able to produce the confidential information from publicly available resources. As trade secret information, its release 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. Therefore, the attorney examiner finds that the motions for continued protective treatment with respect to the confidential information contained in the updated LEI audit reports and errata are reasonable and should be granted, in part.⁷ Finally, the attorney examiner finds it unnecessary to require new versions of the LEI reports and errata to be filed, as the contents of the additional information released by this Entry have already been publicly disclosed through the updated LEI reports and errata or the responsive memoranda.

{¶ 27} Ohio Adm.Code 4901-1-24(F) provides that, unless otherwise ordered, protective orders issued pursuant to Ohio Adm.Code 4901-1-24(D) automatically expire after 24 months. Therefore, confidential treatment shall be afforded for a period of 24 months from the date of this Entry. Until that date, the Commission's Docketing Division

⁶ 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).

⁷ The motions for protective order will be denied to the extent the information has been otherwise released in the responsive pleadings or upon agreement between the parties.

should maintain, under seal, the information filed confidentially on January 4, 2024, through January 11, 2024, consistent with this Entry.

{¶ 28} Ohio Adm.Code 4901-1-24(F) 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 any party 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.

{¶ 29} Additionally, the attorney examiner instructs CUB/UCS to file a late-filed exhibit removing the redactions from CUB/UCS Exhibit 1, the public version of witness Glick's testimony, as described in footnote 3 of this Entry.

{¶ 30} As a final matter, given the findings above and consistent with prior guidance provided to the parties, the attorney examiner agrees with OMAEG/Kroger's suggestion and directs the parties to review the remaining exhibits and transcript excerpts filed confidentially in this proceeding and determine whether they, or portions thereof, may now be released into the public record, consistent with the modified protective order described in this Entry, or are otherwise publicly available. By January 31, 2024, the parties shall jointly notify the attorney examiner if there are any such exhibits, as well as the specific content therein that they propose to release. Additionally, the parties will advise the attorney examiner if they wish to file late-filed exhibits memorializing the release with updated redactions or, alternatively, will be including notations in their briefs acknowledging that the parties have agreed to the release of the cited information. The attorney examiner will provide further guidance to the parties at that time, if necessary. As the attorney examiner recognizes that this endeavor may take time that would otherwise be dedicated to drafting post-hearing briefs, the initial and reply brief deadlines will also be extended to February 12, 2024, and March 5, 2024, respectively.

{¶ 31} It is, therefore,

{¶ 32} ORDERED, That the motions for protective order be granted, in part, and modifies the protective orders originally granted by Entry issued on July 7, 2023. It is, further,

{¶ 33} ORDERED, That CUB/UCS file a late-filed exhibit removing certain redactions from CUB/UCS Exhibit 1, as described in this Entry. It is, further,

{¶ 34} ORDERED, That the parties engage in the review process described in Paragraph 30. It is, further,

{¶ 35} ORDERED, That the deadlines for initial and reply briefs be extended to February 12, 2024, and March 5, 2024, respectively. It is, further,

{¶ 36} ORDERED, That a copy of this Entry be served upon all parties of record.

THE PUBLIC UTILITIES COMMISSION OF OHIO

/s/Megan J. Addison

By: Megan J. Addison
Attorney Examiner

NJW/dmh

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Case No(s). 21-0477-EL-RDR

Summary: Attorney Examiner Entry that the motions for protective order be granted, in part, and modifies the protective orders originally granted by Entry issued on July 7, 2023. That CUB/UCS file a late-filed exhibit removing certain redactions from CUB/UCS Exhibit 1, as described in this Entry and the deadlines for initial and reply briefs be extended to February 12, 2024, and March 5, 2024, respectively electronically filed by Ms. Donielle M. Hunter on behalf of Megan J. Addison, Attorney Examiner, Public Utilities Commission of Ohio.