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**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

**In the Matter of the Application
Of Exelon Energy Company
for Renewal Certification as a Retail
Natural Gas Supplier**

Case No. 02-1912-GA-CRS

**EXELON ENERGY COMPANY
MOTION FOR PROTECTIVE TREATMENT**

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**In the Matter of the Application
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**EXELON ENERGY COMPANY'S
MOTION FOR PROTECTIVE TREATMENT**

I. MOTION FOR PROTECTIVE TREATMENT

Pursuant to Ohio Administrative Code ("OAC") 4901-1-24(D), Exelon Energy Company ("Exelon Energy") respectfully moves the Public Utilities Commission of Ohio ("Commission") for an order protecting from disclosure the confidentiality of certain proprietary and trade secret documents filed concurrently with this motion in the above-captioned docket.

The document for which protective treatment is sought is C-5 Forecasted Financial Statements (Exhibit C-5) contained in Exelon Energy's Renewal Certification for Retail Natural Gas Supplier ("Renewal Certification"), filed simultaneously with this motion. The information in C-5 Forecasted Financial Statements (Exhibit C-5) is competitively sensitive and highly proprietary business and financial information comprising of trade secrets (collectively, "Proprietary Information" or "Confidential Information"). In accordance with OAC 4901-1-24(D), the Protected Information has been clearly marked as confidential, and is filed under seal, separate from the remainder of the materials that comprise Exelon Energy's Renewal

Certification.

The grounds for the instant motion are set forth below. Notably, the Commission has previously granted protective treatment to similar information in reference to Exelon Energy's previous request to renew its certification.'

II. MEMORANDUM IN SUPPORT

OAC 4901-1-24(D) provides for the issuance of an order to protect the confidentiality of information contained in documents filed at the Commission to the extent the information is: (i) prohibited from disclosure by state or federal law;² (ii) non-disclosure is not inconsistent with the purposes of Ohio Revised Code ("RC") Title 49, as required by OAC 4901-1-24(D); and, (iii) maintained as confidential by the entity seeking the protective treatment.³

Exelon Energy respectfully submits that Ohio law recognizes the need to provide protective treatment to the Proprietary Information. In particular, RC § 4929.23(A) specifically permits the Commission to grant confidentiality to competitive information.⁴ Further, RC § 4901.12 and 4905.07 facilitate the protection of trade secrets in the Commission's possession.⁵ RC § 4901.12

1. See *Exelon Energy's Renewal Certification for Retail Natural Gas Supplier* (August 24, 2006). See also *Entry* (granting protective treatment through March 14, 2008) (September 14, 2006).

2 See RC 149.43(A)(1)(v).

³ See *State ex rel. The Plain Dealer v. Ohio Dept. of Ins.* (1997), 80 Ohio St. 3d 513, 524-525, citing *Pyromatics, Inc. v. Petruziello* (1983), 7 Ohio App. 3d 131.

4. RC § 4929.23(A) provides: "A retail natural gas supplier or governmental aggregator subject to certification under section 4929.20 of the Revised Code shall provide the public utilities commission with such information, regarding a competitive retail natural gas service for which it is subject to certification, as the commission considers necessary to carry out sections 4929.20 to 4929.24 of the Revised Code. The commission shall take such measures as it considers necessary to protect the confidentiality of any such information."

5. RC § 4901.12 provides: "Except as otherwise provided in section 149.43 of the Revised Code and as consistent with the purposes of Title XLIX [49] of the Revised Code, all proceedings of the public utilities commission and all documents and records in its possession are public records." RC § 4905.07 provides: "Except as provided in section 149.43 of the Revised Code and as consistent with the purposes of Title XLIX [49] of the Revised Code, all facts and information in the possession of the public utilities commission shall be public, and all reports, records,

and 4905.07 have reference to RC § 149.43, and therefore, incorporate the provision that excepts from the public record such information and records whose release is prohibited by law.⁶ Therefore, it is clear that Ohio law prohibits the release of information meeting the definition of a trade secret, such as the Proprietary Information.

Further, the Commission has long-recognized the value of, and therefore the need to protect from public disclosure, trade secret and personal information. For example, the Commission has issued protective orders in numerous proceedings to maintain the confidentiality of competitively sensitive and proprietary information.⁷ In fact, the universal recognition of the value of permitting this type of information to remain confidential has even led courts of other jurisdictions to hold that public utilities have not only the authority, but the duty, to protect the trade secrets of the entities that they regulate.⁸ Thus, in accordance with state law, the Commission's rules and precedent prohibit the release of customer and proprietary business information, such as the Confidential Information.

The Proprietary Information contained in C-5 is comprised of competitively sensitive and highly proprietary business and financial information that falls within the statutory characterization of a trade secret as defined by RC § 1333.61(D). The definition of trade secret contained in RC § 1333.61 (D) is as follows:

"Trade secret" means information, including the whole or any portion or phase of any scientific or technical information, design, process, procedure, formula,

files, books, accounts, papers, and memorandums of every nature in its possession shall be open to inspection by interested parties or their attorneys."

6 RC § 149.43(A)(1)(v) provides in part that "'Public record' does not mean records the release of which is prohibited by state or federal law."

7 See, e.g., Elyria Tel. Co., Case No. 89-965-TP-A-EC (Finding and Order, Sept. 21, 1989); Ohio Bell Tel. Co., Case No. 89-718 TP-ATA (Finding and Order, May 31, 1989); Columbia Gas of Ohio, Inc., Case No. 90-17-GA-GCRR (Entry, Aug. 17, 1990).

⁸ See *New York Tel. Co. v. Pub. Serv. Comm. N.Y.*, 56 N.Y.2d 213 (1982).

pattern, compilation, program, device, method, technique, or improvement, or any business information or plans, *financial information*, or listing of names, addresses, or telephone numbers, 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.⁹

The Proprietary Information consists of financial statements, financial arrangements, and forecasted financial statements that are proprietary, and therefore, are confidential. Public disclosure of this information would jeopardize Exelon Energy's business position in negotiations with other parties and its ability to compete. Exelon Energy avers that this information is not generally known by the public and is held in confidence in the normal course of business. Accordingly, Exelon Energy respectfully requests that the Proprietary Information be deemed to contain trade secrets, and thus, be treated as confidential by the Commission and its Staff. Lastly, granting confidential treatment to the

⁹ Emphasis added. Further, in *Pyromatics Inc. v. Petruziello*, 7 Ohio App. 3d 131, 134-35 (Cuyahoga Co. 1983), the Court of Appeals, citing *Koch Eng. Co. v. Faulconer*, 210 U.S.P.Q. 854, 861 (Kan. 1980), delineated the factors to be considered in recognizing a trade secret:

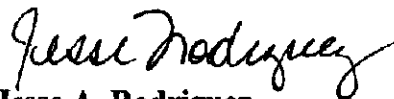
- (1) [T]he extent to which the information is known outside the business, (2) the extent to which it is known to those inside the business, i.e., by the employees, (3) the precautions taken by the holder of the trade secret to guard the secrecy of the information, (4) the savings effected and the value to the holder in having the information as against competitors, (5) the amount of effort or money expended in obtaining and developing the information, and (6) the amount of time and expense it would take for others to acquire and duplicate the information.

The above inquiry and the definition contained in Section RC § 1333.61 are satisfied in this request.

information will not impair the purposes of RC Title 49, because through the documents filed under seal the Commission and Staff have full access to the information.

The reasons set forth above demonstrate that the information contained in the Proprietary Documents has actual, substantial independent economic value from not being generally known, and not being ascertainable by proper means by persons that would derive economic value from disclosure. Public disclosure of the Proprietary Documents will cause substantial harm to Exelon Energy's business and competitive interests. Thus, Exelon Energy respectfully urges the Commission to grant an order to protect the confidentiality of the Proprietary Information, filed under seal.

Respectfully submitted,



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