

FILE

BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

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In the Matter of the Commission Order)
Workshop Regarding Smart Metering) Case No. 07-646-EL-UNC
Deployment)

In the Matter of the Commission's)
Response to Provisions of the Federal)
Energy Policy Act of 2005 Regarding Net) Case No. 05-1500-EL-COI
Metering, Smart Metering and Demand)
Response, Cogeneration and Power)
Production Purchase and Sale)
Requirements, and Interconnection)

In the Matter of the Application of Ohio)
Edison Company, The Cleveland Electric)
Illuminating Company, and The Toledo) Case No. 07-551-EL-AIR
Edison Company for Authority to Increase) Case No. 07-552-EL-ATA
Rates for Distribution Service, Modify) Case No. 07-553-EL-AAM
Certain Accounting Practices and for) Case No. 07-554-EL-UNC
Tariff Approvals)

In the Matter of the Application of Ohio)
Edison Company, The Cleveland Electric) Case No. 08-935-EL-SSO
Illuminating Company, and The Toledo)
Edison Company for Authority to)
Establish a Standard Service Offer)
Pursuant to R.C. 4928.143 in the Form of)
an Electric Security Plan.)

REPLY TO MEMORANDUM CONTRA FIRSTENERGY'S
MOTION FOR PROTECTION

OHIO EDISON COMPANY,
THE CLEVELAND ELECTRIC
ILLUMINATING COMPANY, AND
THE TOLEDO EDISON COMPANY

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**REPLY TO MEMORANDUM CONTRA FIRSTENERGY'S
MOTION FOR PROTECTION**

I. INTRODUCTION

On July 13, 2009, The Office of the Ohio Consumers' Counsel ("OCC") filed a memorandum contra styled as "Memorandum Contra FirstEnergy's Motion for Protection" ("Memo Contra"). In its Memo Contra, the OCC provides a brief introduction and statement of fact attempting to summarily explain a number of

tangential dockets, and the Commission's May 21, 2009 Entry ("May 21st Entry"), which in part, directed Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company (collectively, the "Companies") to file with the Commission a draft Department of Energy ("DOE") stimulus funding application consistent with paragraph 26 of the Commission's Second Opinion and Order in Case No. 08-935-EL-SSO ("DOE Draft Stimulus Application"). OCC correctly states that the Companies only filed its DOE Draft Stimulus Application in the case docket applicable to such filing and specifically cited in the applicable paragraph of the Commission's May 21st Entry.¹ In the May 21st Entry, the Commission exercised its administrative discretion in choosing to address a number of separate and distinct dockets in a single entry. The Commission neither consolidated each of the dockets nor directed the parties that going forward that all pleadings and/or notices pertaining to one of the dockets should be indiscriminately filed in each of the dockets referenced in the May 21st Entry.

OCC's Memo Contra does not so much contest the Companies' contention that its DOE Draft Stimulus Application is confidential information, but rather attacks the form and sufficiency of the Companies' Motion for Protective Order. Specifically, OCC's Memo Contra requests that the Commission: (i) deny the Companies' Motion for Protective Order, (ii) require any additional requests for confidential treatment of information be filed in accordance with Commission rules and Ohio law, and (ii) order the Companies to file "their submissions regarding its smart grid development" in each of Case No. 07-646-EL-UNC; Case No. 05-1500-EL-COI; Case No. 07-551-EL-AIR; Case No. 07-552-EL-ATA; Case No. 07-553-EL-AAM; Case No. 07-554-EL-UNC; and Case No. 08-935-EL-SSO.

II. ARGUMENT

A. Ohio Administrative Code ("O.A.C.") § 4901-1-24(D) sets forth requirements for a motion for protective order, and the Companies satisfied the applicable requirements²

¹ On July 2, 2009, OCC notified the Companies that it did not receive service of the Companies' DOE Draft Stimulus Application filed with the Commission on July 1, 2009. OCC indicated that although it had access to the non-confidential part of the filing it did not have access to the confidential portion. The Companies provided OCC the confidential portion of the filing on July 2, 2009. In addition, the Companies circulated a copy of the filing on July 6, 2009.

² The fourth requirement set forth below is not applicable and will not be addressed herein.

On July 1, 2009, the Companies citing O.A.C. § 4901-1-24(D) filed a Motion for Protective Order to protect the confidentiality of the information contained in its DOE Draft Stimulus Application. On July 13, 2009, OCC filed its Memo Contra alleging the Companies' motion was deficient. The Companies' Motion for Protective Order was not deficient. O.A.C. § 4901-1-24(D) provides that a motion for protective order must satisfy the following requirements:

(1) All documents submitted pursuant to paragraph (D) of this rule should be filed with only such information redacted as is essential to prevent disclosure of the allegedly confidential information. Such redacted documents should be filed with the otherwise required number of copies for inclusion in the public case file.

(2) Three unredacted copies of the allegedly confidential information shall be filed under seal, along with a motion for protection of the information, with the secretary of the commission, the chief of the docketing division, or the chief's designee. Each page of the allegedly confidential material filed under seal must be marked as "confidential," "proprietary," or "trade secret."

(3) The motion for protection of allegedly confidential information shall be accompanied by a memorandum in support setting forth the specific basis of the motion, including a detailed discussion of the need for protection from disclosure, and citations of any authorities relied upon. The motion and memorandum in support shall be made part of the public record of the proceeding.

The Companies' Motion for Protective Order substantially met these requirements.

(4) If a motion for a protective order is filed in a case involving a request for approval of a contract between a telecommunications carrier and a customer, and the contract has an automatic approval process, unless the commission suspends the automatic approval process or otherwise rules on the motion for a protective order, the motion for a protective order will be automatically approved for an eighteen-month period beginning on the date that the contract is automatically approved. Nothing prohibits the commission from rescinding the protective order during the eighteen-month period. If a motion for a protective order for information included in a gas marketer's renewal certification application case filed pursuant to section 2928.09 of the Revised Code, or a competitive retail electric service provider's renewal certification application case filed pursuant to section 4928.09 of the Revised Code, is granted, the motion will be automatically approved for a twenty-four month period beginning with the date of the renewed certificate. Nothing prohibits the commission from rescinding the protective order during the twenty-four month period. Automatic approval of confidentiality under this provision shall not preclude the commission from examining the confidentiality issue de novo if there is an application for rehearing on confidentiality or a public records request for the redacted information.

1. All documents submitted should be filed with only such information redacted as is essential to prevent disclosure of the allegedly confidential information. Such redacted documents should be filed with the otherwise required number of copies for inclusion in the public case file.

It is no secret that the ratio of applicants and stimulus funds requested far exceeds the number of awards and stimulus funds that will be disbursed. It is an understatement to label it a competitive process. The Companies expect that its final application submitted to the DOE for consideration for limited stimulus funds will be joined by over a thousand other applications competing for the same resources. Such applications may come from a wide range of stakeholders ranging from other investor owned utilities, to public power/rural cooperatives, energy efficiency consortiums, community action organizations, or other research and development institutions. Given the fierce competition expected for this unprecedented federal grant, the Companies thoughtfully and purposely filed its proposed DOE Draft Stimulus Application under seal. The document in its entirety will be reviewed and evaluated based on its form, layout, substance, scope, etc. The Companies took great care to attach its entire DOE Draft Stimulus Application under seal to avoid prematurely releasing the nature, form, style and content to competing parties.³ The Companies believe that its entire competitive DOE Draft Stimulus Application is confidential, and thus did not violate O.A.C. § 4901-1-24(D)(1) by filing the entire document under seal.

2. Three unredacted copies of the allegedly confidential information shall be filed under seal, along with a motion for protection of the information, with the secretary of the commission, the chief of the docketing division, or the chief's designee. Each page of the allegedly confidential material filed under seal must be marked as "confidential," "proprietary," or "trade secret."

On July 1, 2009, pursuant to O.A.C. § 4901-1-24(D)(2), the Companies filed three "unredacted" copies of its DOE Draft Stimulus Application under seal, as Exhibit 1 to its Application, along with a motion for protection of the information, with the secretary of

³ The Companies also filed blank forms under seal to demonstrate to the Commission that such forms would be included in the Companies' filing, but were not complete at the time of filing. The Companies filed such pages under seal so not to disclose to competing parties the fact that such required pages were not yet complete. OCC violated the Companies' intent to keep such information confidential by disclosing such facts in its Memo Contra.

the commission. Given that Exhibit 1 in its entirety is a confidential document, no redacted version was filed. The docketing division denoted the document as confidential document target and reported on the docket that confidential treatment had been requested for the 107 page document.⁴

3. The motion for protection of allegedly confidential information shall be accompanied by a memorandum in support setting forth the specific basis of the motion, including a detailed discussion of the need for protection from disclosure, and citations of any authorities relied upon. The motion and memorandum in support shall be made part of the public record of the proceeding.

The Companies' Motion for Protective Order was accompanied by a memorandum in support which set forth the specific basis of the motion including a detailed discussion of the need for protection from disclosure. Specifically, the Companies' stated:

The Companies' Stimulus Application contains competitively-sensitive information, the public disclosure of which could adversely affect the Companies' opportunity to be awarded stimulus funds given the highly competitive process involved. Moreover, the Companies' Stimulus Application contains confidential information pertaining to the Companies' distribution infrastructure and system.

The Companies' filed its Motion for Protective Order and Memorandum in Support of Motion for Protective Order in the public record.

B. The Companies properly filed its DOE Draft Stimulus Application under seal

OCC equates the Companies' rough draft federal stimulus application to a regulatory proceeding before the Commission whereby the Commission must evaluate the merits of a companies' filing to determine based on the evidence of record whether to grant its petition. In such cases, to the extent appropriate, information must be available to the public to provide such public with a meaningful opportunity to respond. The matter at issue here is distinctly different and unique. In this particular case, the Companies committed to develop a proposal to pursue federal stimulus funds that may be available

⁴ Although, the Companies placed the entire Exhibit 1 document in an envelope marked confidential, the Companies inadvertently did not mark each of the 107 pages as confidential. Notwithstanding, the docketing division, upon request by the Companies, filed the entire Exhibit 1 under seal, as confidential.

for smart grid investment.⁵ Subsequently, the Commission directed the Companies to (i) file a draft of its stimulus application; and (ii) meet with Commission staff to discuss the draft stimulus application and incorporate any staff modifications to the Companies' final application to be filed at the DOE. The Companies' DOE Draft Stimulus Application filed on July 1, 2009 constituted a rough draft work product which was neither ready for public dissemination or for Commission consideration of its merits. The sole purpose of the Companies' July 1st filing, as explicitly stated in the Commission's May 21st Entry, was to provide Commission staff an opportunity to review and modify the Companies' draft application before it was finalized and submitted to the DOE. The May 21st Entry did not provide any other party the right to preview the Companies' rough draft DOE application. The Companies have not been afforded the opportunity to preview any other companies' draft DOE application. It would not be fair to require the Companies to make public its proposed filing to the DOE before such time that the final application is filed with DOE and all other such applications are made public by the DOE.⁶ Moreover, the confidential nature of the Companies' proposed DOE application constitutes a "trade secret" as such term is defined in Revised Code § 1333.61(D)

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

⁵ Companies' Stipulation and Recommendation at p. 21, ¶ 3.

⁶ To the extent one application is made public before it is filed with DOE, all such applications should be made public, so all parties are afforded the opportunity to compare and contrast their respective application and supplement their respective application based on information gained from another party's proposed application.

The Companies' DOE Draft Stimulus Application contains specific scientific and technical information, as well as specific design, process, procedure, program, device, method, technique, and system improvements (the "Confidential Information").⁷ As stated in the Companies' Request for Staff Review of Draft Stimulus Application, which was filed publicly, "the purposes of the Companies' smart grid project are the following: assess changes necessary to both the operation and design of the Companies' system to accommodate smart grid technologies; document process steps to achieve transferability to wider range of the Companies' Ohio distribution systems; provide data to DOE to strengthen the metrics associated with the transition to a smart grid system and smart-grid technologies, and understand customer behavior and motivations in energy consumption and their response to price signals."⁸ The Confidential Information in the Companies' DOE Draft Stimulus Application derives independent economic value, from not being generally known to, and not being readily ascertainable by proper means by, other parties who can obtain economic value from its disclosure or use, in that other parties have been challenged to file similar applications with the DOE and only a limited number of parties will be awarded stimulus funding based on the contents of their respective application. The DOE Draft Stimulus Application contains Confidential Information the disclosure of which would compromise and diminish the Companies' prospect of being awarded stimulus funding. The Companies have worked diligently to ensure that the DOE Draft Stimulus Application remain confidential, providing copies only to employees working directly on the DOE Draft Stimulus Application, and ensuring that the DOE Draft Stimulus Application is not disseminated externally.⁹

The non-disclosure of the information is not inconsistent with the purposes of Title 49 of the Revised Code or any other provision of Ohio law. Therefore, given the highly confidential nature of the information, the Companies urge the Commission to deny OCC's Memo Contra.

⁷ OCC's statement that the Companies would like to conduct regulatory dealings in private (including when the subject is federal stimulus funding paid by the American public) is counterproductive, unsubstantiated and flat out false.

⁸ Companies' Request for Staff Review of Draft Stimulus Application at p.3.

⁹ The Companies did provide OCC a copy of the DOE Draft Stimulus Application, subject to an executed confidentiality agreement among the Companies and the OCC.

C. The Companies' properly filed its Draft Stimulus Application in Case No. 09-835-EL-SSO.

OCC requests that the Commission issue an order directing the Companies to file "their submissions regarding its smart grid development" in each of Case No. 07-646-EL-UNC; Case No. 05-1500-EL-COI; Case No. 07-551-EL-AIR; Case No. 07-552-EL-ATA; Case No. 07-553-EL-AAM; Case No. 07-554-EL-UNC; and Case No. 08-935-EL-SSO. Such a filing in seven (7) dockets would only serve to confuse parties as to which case the matter originated, create great redundancy in the dockets, and inefficiency and waste in the number of copies served to the Commission's docketing department. The Companies' respectfully request that all matters pertaining to its filing for stimulus funds remain in Case No. 09-835-EL-SSO, or alternatively a separate docket be opened for the matter.

III. CONCLUSION

The Companies' Motion for Protective Order was properly filed in accordance with O.A.C. § 4901-1-24(D) and should be granted. Moreover, the filing of the Companies' DOE Draft Stimulus Application arises from paragraph 26 of the Commission's Second Opinion and Order in Case No. 08-935-EL-SSO, and thus the Companies' July 1st filing was properly limited to Case No. 08-935-EL-SSO. The OCC's Memo Contra should be denied.

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Reply to Memorandum Contra FirstEnergy's Motion for Protection was served by electronic transmission and by U.S. Mail, prepaid, to the persons listed below on this 20th day of July 2009.

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