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DOCKETING DIVISION
Public Utilities Commission of Ohio

**BEFORE THE
PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Application of)
FirstEnergy Solutions Corp. For Approval)
of its Alternative Energy Annual Status) Case No. 10-467-EL-ACP
Report and for an Amendment of its 2009)
Solar Energy Resources Benchmark)
Pursuant to R.C. § 4928.64(C)(4)(a))

FIRSTENERGY SOLUTIONS CORP.'S MOTION FOR PROTECTIVE ORDER

FirstEnergy Solutions Corp. ("FES"), by its attorneys and pursuant to Section 4901-1-24(D) of the Commission's rules, moves for a protective order keeping confidential the designated confidential and/or proprietary information contained on the exhibits to FES's Application for Approval of its Alternative Energy Annual Status Report and Request for an Amendment of its 2009 Solar Energy Resources Benchmark filed contemporaneously with this Motion. The exhibits contain information regarding the resources used by FES to satisfy its statutory benchmark and, if made public, could be used by FES's competitors to gain an advantage in the competitive market for RECs and renewable resources. The reasons underlying this Motion are detailed in the attached Memorandum in Support. Consistent with the requirements of Section 4901-1-24(D) of the Commission's Rules, unredacted copies of the confidential information which is the subject of this Motion have been filed under seal.

Respectfully submitted,

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ATTORNEYS FOR FIRSTENERGY
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MEMORANDUM IN SUPPORT OF MOTION FOR PROTECTIVE ORDER

FirstEnergy Solutions Corp. ("FES") requests that the information designated on Attachment A hereto as confidential and/or proprietary (along with any and all copies, including electronic copies) be protected from public disclosure. The information is set forth in Exhibits 1-4 to FES's Application for Approval of its Alternative Energy Annual Status Report and Request for an Amendment of its 2009 Solar Energy Resources Benchmark ("Application"). The exhibits contain confidential information regarding the identity and sources of Non-Solar and Solar RECs retired by FES in order to comply with its statutory mandated alternative energy resources benchmark. Such information would harm FES in the competitive electric services market and the REC market if it was made available to FES's competitors in those markets.

Section 4901-1-24(D) of the Commission's rules provides that the Commission or certain designated employees may issue an order which is necessary to protect the confidentiality of information contained in documents filed with the Commission's Docketing Division to the extent that state or federal law prohibits the release of the information and where non-disclosure of the information is not inconsistent with the purposes of Title 49 of the Revised Code. As set forth herein, state law prohibits the release of the information which is the subject of this Motion. Moreover, the non-disclosure of the information will not impair the purposes of Title 49. The

Commission and its Staff have full access to the information in order to fulfill their statutory obligations. No purpose of Title 49 would be served by the public disclosure of the information. The need to protect the designated information from public disclosure is clear, and there is compelling legal authority supporting the requested protective order. While the Commission has often expressed its preference for open proceedings, the Commission also long ago recognized its statutory obligations with regard to trade secrets. See In re: General Telephone Co., Case No. 81-383-TP-AIR (Entry, February 17, 1982) (recognizing necessity of protecting trade secrets). Likewise, the Commission has facilitated the protection of trade secrets in its rules. O.A.C. § 4901-1-24(A)(7).

The definition of a "trade secret" is set forth in the Uniform Trade Secrets Act:

"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.

R. C. § 1333.61(D). This definition clearly reflects the state policy favoring the protection of trade secrets such as the information which is the subject of this Motion.

The Ohio Supreme Court has held that not only does the Commission have the authority to protect the trade secrets of a public utility, the trade secret statute creates a duty to protect them. Ohio Consumers' Counsel v. Pub. Util. Comm., 121 Ohio St.3d 362, 2009-Ohio-604 (2009). Indeed, for the Commission to do otherwise would be to negate the protections the Ohio

General Assembly has granted to all businesses, including public utilities, through the Uniform Trade Secrets Act. This Commission has previously carried out its obligations in this regard in numerous proceedings. See, e.g., Elyria Tel. Co., Case No. 89-965-TP-AEC (Finding and Order, September 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-GCR (Entry, August 17, 1990).

In 1996, the Ohio General Assembly amended R.C. §§ 4901.12 and 4905.07 in order to facilitate the protection of trade secrets in the Commission's possession. The General Assembly carved out an exception to the general rule in favor of the public disclosure of information in the Commission's possession. By referencing R.C. § 149.43, the Commission-specific statutes now incorporate the provision of that statute that excepts from the definition of "public record" records the release of which is prohibited by state or federal law. R.C. § 149.43(A)(1). In turn, state law prohibits the release of information meeting the definition of a trade secret. R.C. §§ 1333.61(D) and 1333.62. The amended statutes also reference the purposes of Title 49 of the Revised Code. The protection of trade secret information from public disclosure is consistent with the purposes of Title 49 because the Commission and its Staff have access to the information; in many cases, the parties to a case may have access under an appropriate protective agreement. The protection of trade secret information as requested herein will not impair the Commission's regulatory responsibilities.

In Pyromatics, Inc. v. Petruziello, 7 Ohio App. 3d 131, 134-135 (Cuyahoga App. 1983), the court of appeals, citing Koch Engineering Co. v. Faulconer, 210 U.S.P.Q. 854, 861 (Kansas 1980), delineated factors to be considered in recognizing a trade secret: (1) The 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 Ohio Supreme Court has adopted these factors as appropriate. State ex rel. Perrea v. Cincinnati Pub. Sch., 123 Ohio St.3d 410, 414, 2009-Ohio-4762 (2009).

FES has treated all of the information which is the subject of this Motion as proprietary, confidential business information. FES considers and has treated the information as a trade secret. In the ordinary course of business of FES, this information is treated as proprietary and confidential by FES employees, and is not disclosed to anyone. The information that is the subject of this Motion provides specific information about the RECs that FES has retired to meet its 2009 benchmark. Such information would allow a competitor to learn the sources and structure of FES's REC acquisition strategy, and would competitively disadvantage FES if publicly disclosed. Given the general lack of alternative energy resources in this state and adjacent states, and the particular scarcity of solar energy resources, FES must protect the details of its REC acquisition strategy.

The necessity of protecting this information is particularly important given FES's status as an electric services company operating in a competitive market. As the Ohio Supreme Court recently noted, the Commission "has a duty to encourage competitive providers of electric generation." Ohio Consumers' Counsel, 121 Ohio St.3d at 370 (affirming Commission's decision to redact information due, in part, to "the volatility and competitiveness of the electric industry"). The court explained that in the competitive and relatively new market in which electric services companies operate, "[e]xposing a competitor's business strategies and pricing

points would likely have a negative impact on that provider's viability." Id. Here, the information that FES is seeking to protect would provide its competitors with specific information regarding its alternative energy compliance strategy.

Attachment A to this Memorandum in Support lists the information which has been redacted from the associated filing and further describes why it should be granted protected status. For the foregoing reasons, FES requests that the designated information be protected from public disclosure.

Respectfully submitted,

/s/ Mark A. Hayden / N.T.A. (0080713)

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ATTACHMENT A

1. Identification of Confidential Information

Exhibit 1 to Application containing confidential information and identifying the Non Solar In-State RECs retired by FES to meet its 2009 benchmark.

Exhibit 2 to Application containing confidential information and identifying the Non Solar Adjacent State RECs retired by FES to meet its 2009 benchmark.

Exhibit 3 to Application containing confidential information and identifying the Solar In-State RECs retired by FES to meet its 2009 benchmark.

Exhibit 4 to Application containing confidential information and identifying the Solar Adjacent State RECs retired by FES to meet its 2009 benchmark.