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BEFORE THE  
PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of Ohio )  
Edison Company, The Cleveland Electric )  
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 )

Case No. 08-935-EL-SSO

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In the Matter of the Application of Ohio )  
Edison Company, The Cleveland Electric )  
Illuminating Company and The Toledo )  
Edison Company for Approval of Rider )  
FUEL and Related Accounting Authority )

Case Nos. 09-21-EL-ATA  
09-22-EL-AEM  
09-23-EL-AAM

COMMENTS OF EXELON GENERATION COMPANY, LLC  
REGARDING AEP'S RELEASE OF DATA

I. INTRODUCTION

Exelon Generation Company, LLC ("Exelon Generation") hereby submits its comments opposing the proposed disclosure of the standard service offer ("SSO") auction report ("the Report") prepared by Boston Pacific Company, Inc. ("Boston Pacific") at the request of the Public Utilities Commission of Ohio (the "Commission") in the above-captioned proceedings. Boston Pacific monitored Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company's (collectively, "FirstEnergy") competitive wholesale procurement auction, which occurred on May 13-14, 2009. Subsequent to that auction, Boston Pacific filed a confidential report, under seal, detailing the conduct of the SSO auction. This Report contains highly competitively sensitive information regarding bid pricing methodologies and bidding strategies of the various auction participants.

Exelon Generation owns generation and is an active supplier of wholesale generation and a leading power marketer throughout the country. Exelon Generation actively participates in wholesale auctions and, has an interest in the integrity of wholesale auctions conducted in Ohio. As such, Exelon Generation requests that the Commission confirm its previous decision that the Report remain under seal indefinitely. Failure to protect the confidentiality of the Report would impair the growth of the competitive wholesale and retail electric markets in Ohio and would negatively impact the ability and willingness of bidders to participate in future Ohio SSO type utility auctions.

## **II. BACKGROUND**

On May 13-14, 2009, FirstEnergy conducted an SSO auction pursuant to its Electric Security Plan, which was established by a Stipulation signed by various stakeholders and approved by this Commission on March 25, 2009. The SSO auction was conducted pursuant to the Competitive Bid Process Communications Protocols ("CBP rules") as incorporated in the ESP Stipulation. The Commission retained Boston Pacific to assess and report to the Commission on the conduct of the SSO auction. Boston Pacific's duties included assisting the Commission in evaluating the SSO proposal and monitoring the actual CBP rules in the 2009 SSO auction.<sup>1</sup>

Subsequent to the auction, Boston Pacific filed a confidential report under seal with the Commission containing its evaluation of the SSO auction. The Report contains highly sensitive information regarding the conduct of the SSO auction, including portions of the bidders' applications, the names of unsuccessful bidders, pre-auction offers, and bid pricing information

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<sup>1</sup> Entry, February 19, 2009, p. 2.

including starting price methodologies and the prices and quantities bid in each round for each individual bidder.<sup>2</sup>

On May 14, 2009, Commission Staff filed a motion for a protective order preventing disclosure of the Report, noting that the Report contains information that is “highly competitively sensitive” and “[p]ublic disclosure of this information would be highly prejudicial to the bidding parties and to the viability of any future Auction in Ohio.”<sup>3</sup> The Commission granted the Staff’s motion for a protective order.<sup>4</sup> The Commission, in its Order, recognized that the Report contains sensitive information including the names of unsuccessful bidders and round-by-round bid information. The Commission deemed this information confidential and ordered the information to “remain under seal.”<sup>5</sup>

On May 17, 2011, the Columbus Southern Power and Ohio Power Company (collectively “AEP Ohio”) filed a request with the Commission seeking disclosure of the highly sensitive information contained in the Report. AEP Ohio asserted that the Report was subject to the 18 month time limit on protective orders under Ohio Administrative Code O.A.C.4901-1-24(F). In response, the Attorney Examiner issued an Entry on May 23, 2011, stating that contrary to AEP Ohio’s request, it was the intent of the Commission that the Report “remain under seal *indefinitely*.”<sup>6</sup> However, the Attorney Examiner also sought comments from interested parties as to whether this Report should remain confidential.

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<sup>2</sup> Entry, May 23, 2011, p. 2.

<sup>3</sup> Motion for a Protective Order, p. 1.

<sup>4</sup> Finding and Order, May 14, 2009.

<sup>5</sup> Finding and Order, p. 2.

<sup>6</sup> May 23, 2011, Entry, p. 2, (emphasis added).

### III. LEGAL ARGUMENT

Exelon Generation requests that the Commission confirm its previous order that the Report must remain under seal indefinitely in order to protect the interests of bidders in the First Energy SSO auction and to protect bidders in future auctions. To allow this information to be released will set a harmful precedent that will seriously undermine the viability of future SSO auctions to the detriment of the competitive retail and wholesale electric market. Denial of AEP Ohio's request for disclosure is necessary in order to support effective SSO auctions and ensure the growth of the competitive wholesale and retail electric markets, while complying with the Commission's order and Ohio law.

#### A. Disclosing the Information in the Report is Contrary to the Commission's Order and Ohio Law

The Commission granted a protective order for the information in the Report pursuant to O.A.C. 4901-1-24, at the request of Commission Staff. O.A.C. 4901-1-24 acts to protect the confidentiality of information disclosed to the Commission, particularly where the information is a trade secret and where disclosure of the information would be inconsistent with Title 49 of the Revised Code. Unless otherwise ordered, O.A.C. 4901-1-24(F) provides that the protective order shall prevent disclosure of the confidential information for 18 months from the date the protective order is granted. In its May 14, 2009 Finding and Order, the Commission specifically stated that the information contained in the Report will "remain under seal," demonstrating the Commission's intent that the Report is not subject to the 18 month limitation.<sup>7</sup> The Commission also evidenced this intent by approving FirstEnergy's Stipulation, which incorporated the CBP rules protecting the same confidential information contained in the Report. The highly

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<sup>7</sup> May 14 Order, p. 3.

competitively sensitive nature of the information contained in the Report also reflects the necessity for indefinite protection from disclosure. The Report contains information that, if released, would be greatly prejudicial to auction participants and would discourage bidder participation in future auctions.

Disclosure of the Report is contrary to Ohio's "Uniform Trade Secrets Act."<sup>8</sup> Ohio's Uniform Trade Secrets Act prohibits the disclosure of information that is considered a trade secret. A "trade secret" is defined under the Uniform Trade Secrets Act as information that has an independent economic value derived from the fact that the information is not generally known and efforts have been made to maintain its secrecy.<sup>9</sup> In *Pyromatics, Inc. v. Petruziello*, 7 Ohio App. 3d 131, 134-135 (Cuyahoga County 1983), the Court of Appeals, citing *Koch Engineering Co. v. Faulconer*, 210 U.S.P.Q. 854, 861 (Kansas 1980), has 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.

It is without question that the information contained in the Report constitutes trade secrets that necessitate protection under Ohio law. The Report details bid information including the identity of bidding parties, as well as starting price methodologies and the individual bidder's round prices and the related quantities. The bidders derive economic value from ensuring that

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<sup>8</sup> R.C. § 1333.61 to 1333.69.

<sup>9</sup> R.C. § 1333.61.

this information and the bidding strategies evidenced therein are not disclosed to competitors. The Commission has acknowledged that the Report contains "sensitive information" and has made efforts to keep that information confidential.<sup>10</sup> Further, those parties that participated in the SSO auction also consider the information to be confidential and protected by relying on the assurances in the CBP rules.

The public generally has the right to request a release of records in the Commission's control under the Ohio Public Records Act, at R.C. § 149.43(A)(1). However, the Ohio Public Records Act specifically prohibits the release of any record contrary to state or federal law.<sup>11</sup> Because the Report contains trade secrets, such a disclosure of the information would be a violation of this Ohio state law protecting trade secrets. Further, the Commission has stated that the public records statute must be read "*in pari material*" with the Uniform Trade Secrets Act, so that the Uniform Trade Secrets Act is "interpreted as evincing the recognition, on the part of the General Assembly, of the value of trade secret information."<sup>12</sup> As a result, disclosure of the Report would be improper under state law.

B. Disclosure of the Report Would Set Harmful Precedent and Discourage the Participation of Bidders in Future SSO Auctions.

The CBP rules in the SSO auction are an essential aspect of the competitive electric market. Thus, in order to ensure effective competition in the competitive wholesale and retail electric market, the Commission must ensure that the CBP rules adequately protect the interests of potential bidders. The reliability of CBP rules that govern SSO auctions is essential to

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<sup>10</sup> May 14 Order, p. 3.

<sup>11</sup> R.C. §149.43(A)(1).

<sup>12</sup> *In re: General Telephone Co.*, Case No. 81-383-TP-AIR (Entry, February 17, 1982.)

encouraging prospective bidders to participate in SSO auctions and to protect those bidders that participate against unwanted disclosures of competitively sensitive information.

The 2009 SSO auction was governed by the CBP rules incorporated into FirstEnergy's ESP. These rules provide elevated protection for round-by-round bid information specifically noting that "confidentiality is necessary to ensure that bidders do not obtain information that would provide them with insights into other bidders' bidding strategies and valuations and that may harm the competitiveness of future Solicitations."<sup>13</sup> The information contained in the Report is the same information that the CBP rules intend to protect. This information provides insight into bidders' strategies and methodologies, information that would be harmful to bidders if released.

Competitive electric suppliers that bid in the 2009 SSO auction relied on the CBP rules and its assurance that the information contained in the Report would not be released. Failure to enforce the CBP rules in the 2009 SSO auction sets a harmful precedent for future SSO auctions. Exelon Generation, as a potential future bidder in an SSO auction, expects to be able to rely on the assurances of the CBP rules. Potential bidders, such as Exelon Generation, are less likely to participate in a future auction if the Commission takes the position that it will not protect the competitively sensitive information gained from the auction. Further, the failure to protect this information would discourage bidders in a future SSO auction from fully disclosing information and will likely encourage more conservative and limited bidding strategies. Ensuring the ability of suppliers to bid freely and openly is essential to a successful SSO auction. Allowing disclosure of highly competitively sensitive information will limit the effectiveness of SSO

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<sup>13</sup> CBP Rules, p. 3.

auctions thus inhibiting the growth of the competitive wholesale and retail electric market in Ohio.

#### **IV. CONCLUSION**

Wherefore, in consideration of the foregoing, Exelon Generation requests that AEP Ohio's request for disclosure of the Report be denied and that the confidentiality of the Report be maintained indefinitely.

Respectfully submitted,



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## CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and accurate copy of the foregoing documents was served this 7<sup>th</sup> day of June, 2011 by regular U.S. mail, postage prepaid, or by electronic mail, upon the persons listed below.



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