

**BEFORE THE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Commission Review of)	
the Capacity Charges of Ohio Power)	Case No. 10-2929-EL-UNC
Company and Columbus Southern Power)	
Company.)	

**FIRSTENERGY SOLUTIONS CORP.'S
MOTION FOR PROTECTIVE ORDER**

FirstEnergy Solutions Corp. (“FES”), pursuant to O.A.C. 4901-1-24(D) and 4901-1-27(B), moves for a protective order keeping confidential certain portions of the transcript of the cross-examination of FES witness Tony C. Banks. During the hearing in the above-captioned proceeding, on Thursday, April 26, 2012, Mr. Banks was cross-examined by counsel for Ohio Power Company (“AEP Ohio”). In recognition of the sensitive nature of certain of the questions, the cross-examination was performed in a closed session and designated as confidential (the “Confidential Portion”). The Confidential Portion included AEP Ohio’s examination of and reference to FES’ confidential, competitively sensitive, trade-secret information relating to FES’ business operations as a competitive retail electric service provider. The limited Confidential Portion referred to information produced by FES to AEP Ohio pursuant to a confidentiality agreement and included examination on specific terms in FES’ competitive contracts. Release of the information to the public, including FES’ competitors, would cause significant prejudice and competitive harm to FES. Thus, as forth in further detail in the attached Memorandum in Support, which is incorporated herein, FES seeks a protective order preventing public disclosure of that Confidential Portion of the transcript of Mr. Banks’ cross-examination that was previously identified as confidential.

Respectfully submitted,

s/ Mark A. Hayden

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**MEMORANDUM IN SUPPORT OF
FIRSTENERGY SOLUTIONS CORP.'S MOTION FOR PROTECTIVE ORDER**

I. Introduction & Background

FirstEnergy Solutions Corp. ("FES") is a registered competitive retail electric service ("CRES") provider, which competes to provide electric generation service to customers in Ohio, including customers in the service territory of Ohio Power Company ("AEP Ohio"). FES is just one of many CRES providers that have developed in, or entered, the state since the General Assembly declared that electric generation service would be a competitive service. CRES providers, including FES, provide benefits to customers because they must compete against each other to acquire customers by offering lower prices and/or different products that fit customers' needs.

In connection with this proceeding (and only under the order of the Attorney Examiners), FES produced to AEP Ohio significant information regarding FES' contracts in AEP Ohio's service territory, including copies of the contracts themselves, the contract terms, and certain pricing analyses. This type of information is central to FES' competitive strategy and represents trade-secret information that forms the basis for FES' ability to compete. Thus, FES produced the information to AEP Ohio under the terms of a Protective Agreement, which required AEP Ohio to keep designated materials confidential. After FES produced this information, AEP Ohio cross-examined FES witness Tony C. Banks regarding certain confidential, competitively

sensitive information. At the time of the cross-examination, on Thursday, April 26, 2012, counsel for AEP Ohio and counsel for FES requested that the transcript be designated confidential and the Attorney Examiners ordered the cross-examination to be performed in a closed session (the “Confidential Portion”). FES hereby requests, pursuant to O.A.C. 4901-1-24(D) and 4901-1-27(B), that the Confidential Portion of the transcript be maintained as confidential and withheld from public disclosure in order to prevent the prejudice that would result to FES if FES’ competitively sensitive information was released.

II. LAW & ARGUMENT

The Commission and Ohio law has long protected trade-secret information. Pursuant to R.C. § 1333.61(D), a “trade secret” is:

[A]ny 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. [And]

(2) It is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

Ohio law grants special protections to such trade secrets, including statutory causes of action for an injunction precluding the misappropriation of trade secrets.¹ The Commission has recognized the statutory obligation to protect trade secrets, even in the context of its preference for open proceedings and has previously carried out its obligations in this regard in numerous

¹ See R.C. § 1333.62.

proceedings.² Indeed, the Commission's rules provide for the protection of trade secret information that may arise in the course of a hearing.

The presiding hearing officer shall regulate the course of the hearing and the conduct of the participants. Unless otherwise provided by law, the presiding hearing officer may, without limitation: . . . Take such actions as are necessary to: . . .

(e) Prevent public disclosure of trade secrets, proprietary business information, or confidential research, development, or commercial materials and information. **The presiding hearing officer may, upon motion of any party, direct that a portion of the hearing be conducted in camera and that the corresponding portion of the record be sealed to prevent public disclosure of trade secrets, proprietary business information, or confidential research, development, or commercial materials and information.**³

Ohio law also reflects a recognition that information associated with Ohio's competitive market warrants a different level of protection than the information-sharing associated with regulated public utilities.⁴ Indeed, the Ohio Supreme Court has held that, not only does the Commission have the authority to protect trade secrets, the trade secret statute creates a duty to protect them:

[T]he commission has the statutory authority to protect competitive agreements from disclosure, and as we have noted, the commission also has a duty to encourage competitive providers of electric generation. All of the parties agree that [as of 2009] the market is weak, and anything could affect the future growth of competitive providers. **Exposing a**

² See *In re: General Telephone Co.*, Case No. 81-383-TP-AIR (Entry, February 17, 1982) (recognizing necessity of protecting trade secrets); 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).

³ O.A.C. 4901-1-27(B)(7) (emphasis added); see also O.A.C. 4901-1-24(D).

⁴ See R.C. § 4928.06(F) ("The commission shall take such measures as it considers necessary to protect the confidentiality of any such information" that the commission is provided with regard to competitive retail electric service.).

competitor's business strategies and pricing points would likely have a negative impact on that provider's viability.⁵

Here's the Confidential Portion of Mr. Banks' cross-examination involved FES' trade-secret information that is critical to its ability to compete in Ohio's non-regulated competitive market for retail electric generation service. AEP Ohio examined Mr. Banks regarding the terms of specific FES contracts and the number and types of customers whose contracts may include such terms. Contracts reflect the negotiations of FES and its customers regarding numerous elements beyond pricing, such as the service to be provided, payment terms, duration, and termination provisions. FES has treated the terms of its contracts, including those that are the subject of Confidential Portion, as proprietary and confidential⁶ because the public disclosure of such information would reveal details of FES' business strategies and competitively disadvantage FES. FES' competitors would gain critical information that would enable them to compete against FES. Indeed, as a CRES provider, such information is critical to FES' business and FES takes numerous steps to protect the confidentiality of its proprietary, trade-secret information, including the Protective Agreement entered into by AEP Ohio and FES.

Further, a protective order regarding the Confidential Portion will protect FES without prejudicing any other party. AEP Ohio is the only party in this proceeding for whom the information could in any way be relevant (and FES submits that it is not relevant for AEP Ohio

⁵ *Ohio Consumers' Counsel v. Pub. Util. Comm.*, 121 Ohio St.3d 362, 370 2009-Ohio-604, ¶ 31 (2009) (emphasis added) *citing* R.C. § 4928.06(F).

⁶ The factors to be considered in recognizing a trade secret include: (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. *See State ex rel. Perrea v. Cincinnati Pub. Sch.*, 123 Ohio St.3d 410, 414, 2009-Ohio-4762 (2009); *Pyromatics, Inc. v. Petruziello*, 7 Ohio App. 3d 131, 134-135 (Cuyahoga App. 1983) *citing Koch Engineering Co. v. Faulconer*, 210 U.S.P.Q. 854, 861 (Kansas 1980).

either). Moreover, there is no public right for the public to access or review FES' proprietary information because FES is not a regulated utility. Counsel for the parties and the Attorney Examiners also ensured that only the confidential information be included in the portion of the transcript designated as confidential. All other testimony, including AEP Ohio's extensive non-confidential cross-examination of Mr. Banks, remains available in the transcript. Indeed, the Confidential Portion was focused on AEP Ohio's questions regarding FES' competitive practices and proprietary contract terms spanning only several questions. Accordingly, a protective order is warranted and appropriate.

III. CONCLUSION

For the foregoing reasons, FES requests that the portion of the hearing transcript in this proceeding taken on Thursday, April 26, 2012, involving the cross-examination of FES witness Tony C. Banks that was designated as confidential be placed under a protective order to prevent that limited portion of the transcript from being disclosed publicly.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing *FirstEnergy Solutions Corp.'s Motion for Protective Order* and the *Memorandum in Support* thereof was served this 10th day of May, 2012, via e-mail upon the parties below.

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This foregoing document was electronically filed with the Public Utilities

Commission of Ohio Docketing Information System on

5/10/2012 10:40:10 AM

in

Case No(s). 10-2929-EL-UNC

Summary: Motion for Protective Order electronically filed by Ms. Laura C. McBride on behalf of FirstEnergy Solutions Corp.