

**BEFORE THE  
PUBLIC UTILITIES COMMISSION OF OHIO**

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|--|---|--------------------------------|
| <b>In the Matter of the Annual Alternative</b> | ) |                                |
| <b>Energy Status &amp; Compliance Report</b>   | ) |                                |
| <b>Under Rule 4901:1-40-05, Ohio</b>           | ) | <b>Case No. 12-1212-EL-ACP</b> |
| <b>Administrative Code, for</b>                | ) |                                |
| <b>Ohio Power Company</b>                      | ) |                                |

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**MOTION OF OHIO POWER COMPANY TO PROTECT CONFIDENTIAL  
INFORMATION PURSUANT TO  
OHIO ADMINISTRATIVE CODE SECTION 4901-1-24**

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Ohio Power Company (“AEP Ohio” or the “Company”), pursuant to Rule 4901-1-24(D) of the Ohio Administrative Code, respectfully requests that the Public Utilities Commission of Ohio (“Commission”) issue a protective order keeping confidential certain information contained in the attachment accompanying the Company’s correction letter to its 2011 Annual Alternative Energy Status & Compliance Report. In its January 5, 2011 Entry in Case No. 10-467-EL-ACP, the Commission determined that similar information constituted trade secrets subject to protection under Ohio law. A memorandum in support detailing the sensitivity and confidentiality of the information is attached. Three unredacted copies of the confidential attachments will be filed under seal with the Commission.

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## **MEMORANDUM IN SUPPORT**

AEP Ohio requests that certain confidential information contained in the attachment enclosed with the Company's correction letter to its 2011 Annual Alternative Energy Compliance Status Report be exempted from public disclosure as confidential, proprietary, and competitively sensitive trade secret information. The attachment contains confidential information regarding the identity, sources and amount of Non-Ohio, Non-Solar renewable energy certificates ("RECs") (the "Confidential Information") secured by the Company in order to comply with its statutorily mandated alternative energy resources benchmark. Allowing unfettered public disclosure of the Confidential Information would permit inappropriate access to competitively sensitive business information about the Company and its contracting parties. Accordingly, release of the Confidential Information to the public would significantly reduce, if not eliminate, the value that the Confidential Information has by being kept confidential and, thus, would cause harm to AEP Ohio.

The Commission has already found information similar to the Company's Confidential Information to be confidential and subject to a protective order. *See In the Matter of the Application of FirstEnergy Solutions Corp. For Approval of its Alternative Energy Annual Status Report and for an Amendment of its 2009 Solar Energy Resources Benchmark Pursuant to R.C. § 4928.64(C)(4)(a)*, Case No. 10-467-EL-ACP (Entry January 5, 2011). In that case, the Attorney Examiner found that similar information constituted trade secrets and that there was good cause to issue a protective order.

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 Confidential Information.

The Commission long ago recognized its statutory obligations with regard to trade secrets. *See In re: General Telephony 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. *See* 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 Confidential Information at issue here.

The Ohio Supreme Court has held that not only does the Commission have the authority to protect the trade secrets of a public utility, but that the trade secrets statute creates a duty to protect them. *Ohio Consumers' Counsel v. Pub. Util. Comm.* (2009), 121 Ohio St.3d 362, 2009-Ohio-604. 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. sections 4901.12 and 4905.07 in order to facilitate the protection of trade secrets in the Commission's possession by carving out an exception to the general rule in favor of public disclosure. By referencing R.C. section 149.43, the Commission-specific statutes now incorporate the provision of the statute that excludes 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 *Pvromatics, Inc. v. Pettiiziello*, 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.* (2009), 123 Ohio St.3d 410, 414, 2009-Ohio-4762 (2009).

Applying these factors to the Confidential Information here demonstrates that protection from disclosure is appropriate. AEP Ohio has taken steps to maintain the confidentiality of the Confidential Information. The Confidential Information is generally considered restricted access confidential due to the high level of value to competitors and is not known or easily obtainable outside of AEP Ohio's business. The information is kept confidential in the offices of AEP Ohio. As discussed above, the Confidential Information consists of specific information about the RECs that AEP Ohio has secured to meet its 2011 benchmark. Public disclosure of such information would allow a competitor to learn the sources and structure of the Company's REC acquisition strategy, and would competitively disadvantage AEP Ohio. Given the general lack of alternative energy resources in this state and adjacent states, and the particular scarcity of solar energy resources, AEP Ohio must protect the details of its REC acquisitions.

Consistent with Rule 4901-1-24(D), the Commission should maintain the confidentiality of the Confidential Information given that the information clearly falls within the definition of a trade secret subject to protection under Ohio law. Only the information that is essential to prevent disclosure of the Confidential Information is redacted. Moreover, any requests under the Open Records law for disclosure of this information should be rejected under R.C. §149.43(A), as a request for records whose release is prohibited under state law.

For the foregoing reasons, AEP Ohio respectfully requests that the Commission grant this motion for protective order and order that the Confidential Information be subject to confidential treatment and be kept under seal.

Respectfully submitted,

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**This foregoing document was electronically filed with the Public Utilities**

**Commission of Ohio Docketing Information System on**

**6/14/2012 10:27:43 AM**

**in**

**Case No(s). 12-1212-EL-ACP**

Summary: Motion Motion for Protective Order electronically filed by Mr. Yazen Alami on behalf of Ohio Power Company