

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

**In the Matter of the Review of the
Alternative Energy Rider Contained in the
Tariffs of Ohio Edison Company, The
Cleveland Electric Illuminating Company,
and the Toledo Edison Company**

Case No. 11-5201-EL-RDR

**MOTION OF OHIO EDISON COMPANY, THE CLEVELAND
ELECTRIC ILLUMINATING COMPANY, AND THE TOLEDO EDISON
COMPANY FOR A PROTECTIVE ORDER REGARDING THE OFFICE
OF THE OHIO CONSUMERS' COUNSEL'S REQUEST FOR PUBLIC RECORDS**

On December 21, 2012, The Office of the Ohio Consumers' Counsel ("OCC") made a public records request to the Commission for documents that reflect the Companies' comments on a confidential draft of the Final Report/Performance Audit of the Alternative Energy Resource Rider (Rider AER) of FirstEnergy Ohio Utility Companies for October 2009 through December 31, 2011 (the "Confidential Draft Documents").¹ In response to OCC's public records request, Ohio Edison Company, The Cleveland Electric Illuminating Company and The Toledo Edison Company ("the Companies") respectfully move for a protective order to prevent the Commission from providing the Confidential Draft Documents to OCC.²

The Commission should grant a protective order for at least two reasons. First, the Confidential Draft Documents contain information on renewable energy credit ("REC") supplier pricing and identities. This information has already been held to be confidential trade secret

¹ OCC's request is attached as Exhibit A.

² Although Rule 4901-1-24, O.A.C., requires that parties exhaust all reasonable efforts prior to seeking a protective order, in the present situation such efforts are futile because OCC filed the public records request with the Commission without notice to the Companies. The timing of the Companies' response to OCC's request, which was received during a holiday week, does not allow sufficient time to engage in meaningful discussions with OCC.

information and subject to a protective order that prevents disclosure to the public and limits disclosure to OCC subject to the terms of a mutually acceptable protective agreement.³ As a result, under Ohio law, the Confidential Draft Documents are not subject to disclosure under a public records request. Second, the Confidential Draft Documents are not subject to disclosure under Section 4901.16 of the Ohio Revised Code because these documents were provided to Staff as confidential materials pursuant to Staff's audit of the Companies' alternative energy rider, Rider AER.

For these reasons and as further set forth in the attached Memorandum in Support, the Commission should grant the Companies' Motion for a Protective Order and bar the dissemination of the Confidential Draft Documents in response to OCC's public records request.

Respectfully submitted,

/s/ David A. Kutik

James W. Burk, Counsel of Record (0043808)
Carrie M. Dunn (0076952)
FIRSTENERGY SERVICE COMPANY
76 South Main Street
Akron, Ohio 44308
Phone: (330) 384-5861
Facsimile: (330) 384-3875
E-mail: burkj@firstenergycorp.com
cdunn@firstenergycorp.com

David A. Kutik (0006418)
Lydia M. Floyd (0088476)
JONES DAY
North Point
901 Lakeside Avenue
Cleveland, Ohio 44114-1190

³ Case No. 11-5201-EL-RDR, Hearing Transcript, pp. 17-18 (Nov. 20, 2012) ("Hearing Tr.").

Telephone: (216) 586-3939
Facsimile: (216) 579-0212
E-mail: dakutik@jonesday.com
lfloyd@jonesday.com

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

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

**In the Matter of the Review of the
Alternative Energy Rider Contained in the
Tariffs of Ohio Edison Company, The
Cleveland Electric Illuminating Company,
and the Toledo Edison Company**

Case No. 11-5201-EL-RDR

**MEMORANDUM IN SUPPORT OF MOTION OF OHIO EDISON COMPANY, THE
CLEVELAND ELECTRIC ILLUMINATING COMPANY, AND THE TOLEDO EDISON
COMPANY FOR A PROTECTIVE ORDER REGARDING THE OFFICE OF THE
OHIO CONSUMERS' COUNSEL'S REQUEST FOR PUBLIC RECORDS**

I. INTRODUCTION

A protective order preventing dissemination of the Confidential Draft Documents in response to OCC's public records request is necessary for at least two reasons. First, the Confidential Draft Documents contain confidential supplier pricing and supplier-identifying information that the Attorney Examiner has already held to be trade secrets that should be protected from public disclosure. As a result, these documents are not public records that are subject to Ohio's public records statute. Second, the Confidential Draft Documents are confidential documents that the Companies provided to Staff in the course of Staff's audit of the Companies' Rider AER and under an agreement that such information would be kept confidential. Further, the Confidential Draft Documents, as comments on the Staff's draft audit report, if disclosed would in essence reveal the content of Staff's draft audit report. Section 4901.16 of the Ohio Revised Code thus prevents the disclosure of the Confidential Draft Documents.

In addition, the Commission should consider that, on the same day as its public records request, OCC also requested the Confidential Draft Documents through a discovery request issued directly to the Companies. OCC's public records request is thus a backhanded attempt to

sidestep the Commission's discovery process.⁴ A protective order preventing disclosure of the Confidential Draft Documents through a public records request will allow the Commission's discovery process to run its course. This process will ensure that the Companies have an opportunity to respond to OCC's discovery request, allow any discovery that is provided to be governed by the protective agreement between OCC and the Companies or permit the Commission to resolve any issues regarding discovery of such materials through discovery motions.

Accordingly, the Commission should grant the Companies' Motion for a Protective Order and prevent the dissemination of the Confidential Draft Documents to OCC in response to OCC's public records request.

II. STATEMENT OF FACTS

On September 20, 2011, the Commission initiated the instant audit proceeding by opening a docket to review Rider AER. *See In the Matter of the Review of the Alternative Energy Rider Contained in the Tariffs of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company*, Case No. 11-5201-EL-RDR, Entry, p. 1 (Date: Jan. 18, 2012) ("Case No. 11-5201"). To assist with the audit, the Commission requested that Staff secure the services of outside auditors. *See* Case No. 11-5201, Entry, p. 1 (Feb. 23, 2011). Through a request for proposal ("RFP") process, Staff selected Exeter Associates, Inc. ("Exeter") to perform a management/performance audit. As part of that RFP, and consistent with Ohio Revised Code Section 4901.16⁵, the Commission ordered that "[t]he

⁴ It also contravenes Staff's instruction to OCC, which Staff's counsel made at the end of the telephone interview of Dr. Steven Estomin on December 18, 2012, that OCC make any discovery request for the information directly to the Companies so that the Companies will have an opportunity to respond to any request for the Confidential Draft Documents.

⁵ That statute provides in part:

auditor(s) shall not divulge any information regarding its audit activities to the media or any other entity, except in its report and testimony before the Commission, before, during, and/or after the audit.” Case No. 11-5201, Entry, pp. 2-3 (Jan. 18, 2012).

During the course of the audit, the Companies provided confidential information, which included the Confidential Draft Documents, to assist Exeter and Staff with the audit. The Companies provided this information with the express understanding that it would be kept confidential and not released to the public. (Stathis Affidavit attached to the Companies’ Reply Brief in Support of Their Motion for a Protective Order filed on October 25, 2012 as Exhibit A at ¶4 (“Stathis Affidavit”).) Indeed, the Companies met with Staff during the information-gathering process of the audit to address the Companies’ confidentiality concerns. (*Id.*) The Companies further understood in their meetings with Staff that the auditors’ final reports would be filed under seal and that such unredacted reports would be kept under seal until the Commission ruled otherwise. (*Id.*)

On August 15, 2012, Staff filed under seal the Confidential Final Report/Performance Audit of the Alternative Energy Resource Rider (Rider AER) of FirstEnergy Ohio Utility Companies for October 2009 through December 31, 2011 (the “Exeter Report”). On that same day, Staff filed a public version of the Exeter Report in which certain commercially sensitive and trade secret information involving pricing and the identities of suppliers was redacted.

(continued...)

Except in his report to the public utilities commission or when called on to testify in any court or proceeding of the public utilities commission, no employee or agent referred to in section 4905.13 of the Revised Code shall divulge any information acquired by him in respect to the transaction, property, or business of any public utility, while acting or claiming to act as such employee or agent.

R.C. § 4901.16.

On September 14, 2012, OCC served a discovery request on the Companies seeking production of an unredacted version of the Exeter Report. On October 3, 2012, and in response to that request, the Companies filed a motion for a protective order to prevent the public disclosure of supplier-identifying information and pricing information contained within the Exeter Report.

On November 20, 2012, the Attorney Examiner held that the pricing information and supplier-identifying information contained in the Exeter Report is trade secret information and granted in part the Companies' motion to prevent the information from public disclosure. (Hearing Tr., pp. 17-18.) The Attorney Examiner also ordered that the Companies would have to disclose confidential, trade-secret information to OCC only after OCC and the Companies entered into a mutually acceptable protective agreement. The Companies and OCC later entered into a mutually acceptable protective agreement. As a result, OCC has received an unredacted version of the Exeter Report.

On December 18, 2012, the Companies and several intervening parties participated in a telephone interview of Dr. Steven Estomin, one of the authors of the Exeter Report. At the end of the interview, OCC requested that Dr. Estomin provide the Confidential Draft Documents. In response, counsel for Staff advised OCC that it should make a formal discovery request to the Companies for this information, noting that a discovery request would allow the Companies the opportunity to object. Instead of following Staff's suggestion, on December 21, 2012, OCC filed a public records request for the Confidential Draft Documents. On that same day, OCC also served a discovery request on the Companies requesting the same information. (OCC Set 3 RPD-7, Attached as Exhibit B.)

As demonstrated below, the Commission should grant the Companies' Motion for a Protective Order to prevent the dissemination of the Confidential Draft Documents to OCC in response to OCC's public records request.

III. ARGUMENT

A. The Confidential Draft Documents Contain Trade Secret Information That Is Exempt From A Request For Disclosure Of Public Records.

Settled Ohio Supreme Court and Commission precedent hold that trade secrets are exempt from Ohio's public records disclosure statutes. *See, e.g., State ex rel. Carr v. City of Akron* (2006), 112 Ohio St. 3d 351, 358 ("Trade secrets are exempt from disclosure under the exemption of R.C. 149.43(A)(1)(v) for disclosures prohibited by state or federal law."); *State ex rel. Lucas County Bd. of Comm'rs v. Ohio EPA* (2000), 88 Ohio St. 3d 166, 172 ("The Ohio Uniform Trade Secrets Act, R.C. 1333.61 through 1333.69, is a state law exempting trade secrets from disclosure under R.C. 149.43."); *In the Matter of the Application of Commerce Energy, Inc. for Certification as a Competitive Retail Natural Gas Supplier*, Case No. 02-1828-GA-CRS, 2012 Ohio PUC LEXIS 67, *3 (Jan. 20, 2012) ("Section 149.43, Revised Code, specifies that the term 'public records' excludes information which, under state or federal law, may not be released. The Ohio Supreme Court has clarified that the 'state or federal law' exemption is intended to cover trade secrets.").

In the present matter, the Attorney Examiner recently held that information regarding REC supplier prices and identities contained within the unredacted version of the Exeter Report warranted trade secret protection. (Hearing Tr., pp. 17-18 .) "The Commission has generally ruled that bidder-specific information including prices, quantities, and the identity of bidders to be trade secret information." (*Id.*, p. 17.) The Attorney Examiner specifically found that the redacted version of the Exeter Report had independent economic value and that the Companies

had made reasonable efforts to keep the information at issue secret. (*Id.*) In light of its finding, the Attorney Examiner granted the Companies’ motion for a protective order (the “Protective Order”) to prevent the public disclosure of this highly confidential and competitively-sensitive information. (*Id.*)

The Confidential Draft Documents, which consist of unpublicized and confidential commentary from the Companies related to drafts of the Exeter Report, likewise warrant protection from public disclosure for the very same reason that the unredacted final version of the Exeter Report did. These documents contain the very same highly confidential and competitively-sensitive information, *i.e.*, “prices, quantities, and the identity of bidders,” that the Commission held to be trade secrets in its Protective Order. (Hearing Tr., p. 17.) Indeed, the Confidential Draft Documents contain the same trade secrets as the unredacted version of the Exeter Report. To permit the public disclosure of the Confidential Draft Documents would thus defeat the purpose of the Protective Order because the identical highly confidential and competitively-sensitive information is at stake. Further, because the Confidential Draft Documents contain trade secrets, they are not subject to dissemination pursuant to Ohio’s public records disclosure statute—as the case law cited above makes clear. OCC’s untoward request thus flies in the face of settled Ohio Supreme Court and Commission precedent and the Commission should rule accordingly.

B. R.C. § 4901.16 Prohibits Disclosure of the Confidential Draft Documents.

Even if the Confidential Draft Documents did not contain trade secrets, which they do, Section 4901.16 of the Ohio Revised Code would preclude their disclosure. Section 4901.16 prohibits Staff from disclosing any information obtained from a public utility during the course of an audit or investigation of a utility except in a report or during testimony in a Commission

proceeding. In its January 18, 2012 Order, the Commission specifically ruled that any outside auditor chosen by Staff was subject to Section 4901.16. Indeed, the Commission has observed:

The auditor is subject to the Commission's statutory duty under Section 4901.16, Revised Code, which states:

Except in his report to the public utilities commission or when called on to testify in any court or proceeding of the public utilities commission, no employee or agent referred to in section 4905.13 of the Revised Code shall divulge any information acquired by him in respect to the transaction, property, or business of any public utility, while acting or claiming to act as such employee or agent.

(Case No. 11-5201-EL-RDR, Entry, pp. 2-3 (Jan. 18, 2012).)

In turn, the Ohio Supreme Court has construed Section 4901.16 as follows:

[Section] 4901.16 provides that no PUCO employee or agent is permitted to disclose information acquired in the course of his or her duties except as provided therein. Specifically, the statute prevents employees or agents of the PUCO who examine the accounts, records, or memoranda kept by public utilities pursuant to R.C. 4905.13 from divulging information regarding “the transaction, property, or business” of the public utility other than in reports to the PUCO or testimony in court or commission proceedings....[Section] 4901.16 *imposes a duty of confidentiality on PUCO employees and agents.*

Vectren Energy Delivery of Ohio, Inc. v. Pub, Util Comm. (2007), 113 Ohio St. 3d 180, 191-192 (emphasis added); *see also, In the Matter of the Investigation of The Cincinnati Gas & Electric Company Relative to Its Compliance With the Natural Gas Pipeline Safety Standards and Related Matters*, Case No. 00-681-GA-GPS, 2004 Ohio PUC LEXIS 271, *11 (July 28, 2004) (holding that Section 4901.16 may preclude the disclosure of confidential information that does not rise to the level of a trade secret); *In the Matter of the Commission's Investigation Into the Adequacy and Availability of Electric Power for the Summer Months of 2001 from Ohio's Investor-Owned Electric Utility Companies*, Case No. 01-985-EL-COI, 2001 Ohio PUC LEXIS 179, *5-6 (May 3, 2001) (holding that Section 4901.16 requires Staff to maintain the

confidentiality of proprietary information acquired from a utility during the course of a Commission-sponsored investigation).

In addition, adhering to Section 4901.16 promotes an important policy goal; namely, it encourages utilities, like the Companies, to freely share confidential information with the Commission and Staff. As the Commission has observed on a prior occasion, refusing to follow Section 4901.16 “would have the impact of discouraging utilities from sharing information with the staff for fear that it will be considered to be a public record that must be disclosed upon request (contrary to the likely purpose of Section 4901.16, Revised Code).” *In the Matter of the Investigation of The Cincinnati Gas & Electric Company*, 2004 Ohio PUC LEXIS 271 at *9-10.

Here, the Confidential Draft Documents were provided to Staff and the auditor as part of the audit process for Rider AER. These documents were never publicly filed or disclosed in any way beyond the Companies’ provision of them to Staff and the auditor. As discussed above, the Confidential Draft Documents contain highly confidential and competitively-sensitive information. These documents were provided with the understanding that Staff would not publicly disclose or otherwise disseminate the information contained therein. As recognized by the Ohio Supreme Court, Section 4901.16 imposes a duty on Staff and the auditor to keep such information confidential. *Vectren Energy*, 113 Ohio St. 3d 180 at 192. The Confidential Draft Documents thus fall within the protective ambit of Section 4901.16 and their public disclosure is prohibited.

IV. CONCLUSION

For the foregoing reasons, the Commission should grant the Companies' Motion for a Protective Order and bar the dissemination of the Confidential Draft Documents in response to OCC's public records request.

DATED: December 31, 2012

Respectfully submitted,

/s/ David A. Kutik
James W. Burk, Counsel of Record (0043808)
Carrie M. Dunn (0076952)
FIRSTENERGY SERVICE COMPANY
76 South Main Street
Akron, Ohio 44308
Phone: (330) 384-5861
Facsimile: (330) 384-3875
E-mail: burkj@firstenergycorp.com
cdunn@firstenergycorp.com

David A. Kutik (0006418)
Lydia M. Floyd (0088476)
JONES DAY
North Point
901 Lakeside Avenue
Cleveland, Ohio 44114-1190
Telephone: (216) 586-3939
Facsimile: (216) 579-0212
E-mail: dakutik@jonesday.com
lfloyd@jonesday.com

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

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was delivered to the following persons by e-mail this 31st day of December, 2012:

Terrence O'Donnell
J. Thomas Siwo
BRICKER & ECKLER LLP
100 South Third Street
Columbus, OH 43215-4291
Telephone: (614) 227-2345
Facsimile: (614) 227-2390
E-mail: todonnell@bricker.com
tsiwo@bricker.com

Attorneys for Mid-Atlantic Renewable Energy Coalition

William Wright
Chief, Public Utilities Section
Public Utilities Commission of Ohio
180 East Broad Street, 6th Floor
Columbus, OH 43215
E-mail: William.wright@puc.state.oh.us

Attorneys for the Staff of the Public Utilities Commission of Ohio

Christopher J. Allwein
Williams, Allwein & Moser, LLC
1373 Grandview Ave., Suite 212
Columbus, OH 43212
Telephone: (614) 429-3092
Facsimile: (614) 670-8896
E-mail: callwein@wamenergylaw.com

Attorney for the Sierra Club

Bruce J. Weston
Melissa Yost
Office of the Ohio Consumers' Counsel
10 West Broad Street, Suite 1800
Columbus, OH 43215-3485
Telephone: (Serio) (614) 466-9565
Facsimile: (614) 466-9475
E-mail: yost@occ.state.oh.us

Attorneys for Office of the Ohio Consumers' Counsel

David F. Boehm
Michael L Kurtz
Jody M. Kyler
Boehm Kurtz & Lowry
36 East Seventh Street, Suite 1510
Cincinnati, OH 45202
Telephone: (513) 421-2255
Facsimile: (513) 421-2764
E-mail: dboehm@BKLawfirm.com
mkurtz@BKLawfirm.com
jkylwer@BKLawfirm.com

Attorneys for The Ohio Energy Group

Michael K. Lavanga
Brickfield, Burchette, Rittsw & Stone PC
1025 Thomas Jefferson Street NW
8th Floor West Tower
Washington, DC 20007
Telephone: (202) 342-0800
Facsimile: (202) 342-0807
E-mail: mkl@bbrslaw.com

Attorney for Nucor Steel Marion, Inc.

Cathryn Loucas
Trent A. Dougherty
Ohio Environment Council
1207 Grandview Avenue, Suite 201
Columbus, OH 43212-3449
Telephone: (614) 487-7506
Facsimile: (614) 487-7510
E-mail: cath@theoec.org
trent@theoec.org

Attorneys for the OEC

Matthew W. Warnock
BRICKER & ECKLER LLP
100 South Third Street
Columbus, OH 43215-4291
Telephone: (614) 227-2300
Facsimile: (614) 227-2390
E-mail: lmcalister@bricker.com
mwarnock@bricker.com

Attorneys for The OMA Energy Group

Nicholas McDaniel
ENVIRONMENTAL LAW &
POLICY CENTER
1207 Grandview Ave., Suite 201
Columbus, OH 43212
NMCDaniel@elpc.org

Attorney for ELPC

Theodore S. Robinson
Citizen Power
2121 Murray Avenue
Pittsburgh, PA 15217
Telephone: (412) 421-7029
Facsimile: (412) 421-6162
E-mail: robinson@citizenpower.com

Attorney for Citizen Power

M. Howard Petricoff
Michael J. Settineri
Lija Caleps-Clark
VORYS, SATER, SEYMOUR AND PEASE
LLP
52 East Gay Street
Columbus, OH 43215
Telephone: (614) 464-5414
mhpetricoff@vorys.com
mjsettineri@vorys.com
lkalepsclark@vorys.com

Attorneys for Interstate Gas Supply, Inc.

/s/ David A. Kutik
*An Attorney For Ohio Edison Company, The
Cleveland Electric Illuminating Company, and
The Toledo Edison Company*

This foregoing document was electronically filed with the Public Utilities

Commission of Ohio Docketing Information System on

12/31/2012 2:24:19 PM

in

Case No(s). 11-5201-EL-RDR

Summary: Motion for a Protective Order Regarding the Office of the Ohio Consumers' Counsel's Request for Public Records and Memorandum in Support electronically filed by MR. DAVID A KUTIK on behalf of Ohio Edison Company and The Cleveland Electric Illuminating Company and The Toledo Edison Company