

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,) Case No. 11-5201-EL-RDR
The Cleveland Electric Illuminating)
Company, and The Toledo Edison)
Company.)

ENTRY

The attorney examiner finds:

- (1) On September 20, 2011, the Commission issued an entry on rehearing in *In the Matter of the Annual Alternative Energy Status Report of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company*, Case No. 11-2479-EL-ACP. In that entry on rehearing, the Commission stated that it had opened the above-captioned case for the purpose of reviewing the Rider AER of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company (collectively, FirstEnergy or the Companies). Additionally, the Commission stated that its review would include the Companies' procurement of renewable energy credits for purposes of compliance with Section 4928.64, Revised Code.
- (2) By entry issued on February 23, 2012, the Commission selected Exeter Associates, Inc. (Exeter), to conduct the management/performance portion of the audit and Goldenberg Schneider, LPA (Goldenberg), to conduct the financial portion of the audit in accordance with the terms set forth in the RFP.
- (3) On August 15, 2012, Exeter and Goldenberg filed final audit reports on the management/performance portion and financial portion of Rider AER, respectively.
- (4) On September 26, 2012, Ohio Consumers' Counsel (OCC) filed a motion for a prehearing conference in order to obtain a non-redacted copy of the management/performance portion of the audit report,

which the attorney examiner denied by entry issued on October 11, 2012, finding that OCC's motion was premature.

- (5) On October 3, 2012, FirstEnergy filed a motion for protective order to protect from public disclosure confidential supplier pricing and supplier-identifying information that appears in the unredacted version of the final report of the management/performance audit of Rider AER.
- (6) Thereafter, on October 23, 2012, OCC filed a motion to compel FirstEnergy to provide a completely unredacted copy of the final report of the management/performance portion of the audit.
- (7) On October 29, 2012, Daniel Bradley, Director of Navigant Consulting, filed correspondence with the Commission recommending against the release of the unredacted final report of the management/performance portion of the audit.
- (8) FirstEnergy filed a memorandum contra OCC's motion to compel on November 7, 2012.
- (9) On November 20, 2012, a prehearing was held in this proceeding pursuant to the procedural schedule. At the prehearing conference, the presiding attorney examiner addressed FirstEnergy's pending motion for protective order and OCC's pending motion to compel, granting them, in part, and denying them, in part. More specifically, the presiding attorney examiner found that the redacted portions of the auditor report have independent economic value, are subject to reasonable efforts to maintain its secrecy, and meet the six-factor test specified by the Supreme Court of Ohio. Nevertheless, the presiding attorney examiner found that FirstEnergy should disclose unredacted copies of the audit report to OCC, contingent upon a mutually acceptable protective agreement between FirstEnergy and OCC.
- (10) Thereafter, on December 31, 2012, FirstEnergy filed a second motion for protective order, requesting a protective order regarding a public records request made by OCC on

December 21, 2012. According to FirstEnergy, OCC's public records request at issue requested documents reflecting the Companies' comments on a confidential draft of the final report of the management/performance audit of Rider AER for October 2009 through December 31, 2011 (draft documents). FirstEnergy argues that the Commission should grant a protective order as to the confidential draft documents because they contain information on renewable energy credit supplier pricing and identities, which was already held to be confidential trade secret information subject to a protective order preventing public disclosure and limiting disclosure to OCC subject to a protective agreement at the November 20, 2012, prehearing. FirstEnergy asserts that, as a result, the confidential draft documents are not subject to disclosure under a public records request. Secondly, FirstEnergy contends that the confidential draft documents are not subject to disclosure under a public records request pursuant to Section 4901.16, Revised Code, because they were provided to Staff as confidential materials pursuant to Staff's audit of Rider AER. FirstEnergy argues that OCC's public records request is an inappropriate attempt to sidestep the Commission's discovery process.

- (11) On January 15, 2013, OCC filed a memorandum contra FirstEnergy's motion for protective order. In its memorandum contra, OCC argues that the Commission should deny FirstEnergy's motion for protective order because none of the information contained in the draft documents qualifies as trade secret information under Ohio law; because FirstEnergy failed to meet the burden associated with specifically identifying the need for protection from disclosure; because the draft documents must be produced in a redacted form; because Section 4901.16, Revised Code, does not prevent public disclosure of the draft documents pursuant to a public records request; and, because public policy supports denial of FirstEnergy's motion for protective order. In its memorandum contra, OCC also states that a draft copy of the audit report was filed with the Commission.
- (12) On January 22, 2013, FirstEnergy filed a reply to OCC's memorandum contra the Companies' motion for protective

order. In its reply, FirstEnergy initially points out that OCC incorrectly contends in its memorandum contra that the confidential draft documents were filed with the Commission. FirstEnergy notes that the draft documents were not filed with the Commission, but were provided to Staff as part of the audit process as contemplated by the RFP with the understanding that the documents would be kept confidential. Consequently, FirstEnergy reemphasizes its argument that the confidential draft documents fall within the ambit of Section 4901.16, Revised Code, and are not subject to disclosure under a public records request. Further, FirstEnergy argues that, even if the documents were not protected by Section 4901.16, Revised Code, the plain language of Section 149.43(v), Revised Code, excludes from the definition of public records those that are prohibited from disclosure by state or federal law.

- (13) The attorney examiner has conducted an *in camera* review of the document subject to the public records request to determine whether the document contains trade secrets or confidential information and whether any such information can be redacted from the document.
- (14) Section 4905.07, Revised Code, provides that all facts and information in the possession of the Commission shall be public, except as provided in Section 149.43, Revised Code, and as consistent with the purposes of Title 49 of the Revised Code. 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. *State ex rel. Besser v. Ohio State*, 89 Ohio St.3d 396, 399, 732 N.E.2d 373 (2000).
- (15) Similarly, Rule 4901-1-24, Ohio Administrative Code (O.A.C.), allows an attorney examiner to issue an order to protect the confidentiality of information contained in a filed document, “to the extent that state or federal law prohibits release of the information, including where the information is deemed . . . to constitute a trade secret under Ohio law, and where non-disclosure of the information is

not inconsistent with the purposes of Title 49 of the Revised Code.”

- (16) Ohio law defines a trade secret as “information . . . 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.” Section 1333.61(D), Revised Code.
- (17) The attorney examiner has reviewed the information included in FirstEnergy’s motion for protective order, as well as the assertions set forth in the supportive memorandum. Applying the requirements that the information have independent economic value and be the subject of reasonable efforts to maintain its secrecy pursuant to Section 1333.61(D), Revised Code, as well as the six-factor test set forth by the Ohio Supreme Court,¹ the attorney examiner finds that, consistent with the ruling at the November 20, 2012, prehearing conference, confidential supplier pricing and supplier-identifying information that appears in the draft document contains trade secret information. Its release is, therefore, prohibited under state law. The attorney examiner also finds that nondisclosure of this information is not inconsistent with the purposes of Title 49 of the Revised Code. Therefore, the attorney examiner finds that FirstEnergy’s motion for protective order is reasonable with regard to the confidential supplier pricing and supplier-identifying information that appears in the draft document and should be granted to the extent discussed herein.
- (18) Having determined that the supplier pricing and supplier-identifying information contains trade secret information, the attorney examiner now must evaluate whether the document can be reasonably redacted to remove the confidential information contained therein without rendering the remaining document incomprehensible or of little meaning. The attorney examiner does find that it is

¹ See *State ex rel. the Plain Dealer v. Ohio Dept. of Ins.*, 80 Ohio St.3d 513, 524-525, 687 N.E.2d 661 (1997).

possible to redact the document and release a redacted version of the document. Therefore, the document will be released in redacted form in seven days unless otherwise ordered. Finally, the parties to the proceeding may review *in camera* at the offices of the Commission the redacted document prior to its scheduled release.

- (19) Rule 4901-1-24(F), O.A.C., provides that, unless otherwise ordered, protective orders issued pursuant to Rule 4901-1-24(D), O.A.C., automatically expire after 18 months. However, in this case, the attorney examiner finds that confidential treatment shall be afforded for a period ending 24 months from the date of this entry or until February 13, 2015.
- (20) Rule 4901-1-24(F), O.A.C., requires a party wishing to extend a protective order to file an appropriate motion at least 45 days in advance of the expiration date. If FirstEnergy wishes to extend this confidential treatment, it should file an appropriate motion at least 45 days in advance of the expiration date. If no such motion to extend confidential treatment is filed, the Commission may release this information without prior notice to FirstEnergy.

It is, therefore,

ORDERED, That the motion for protective order filed by FirstEnergy is granted as set forth in Finding (17). It is, further,

ORDERED, That, unless otherwise ordered by the Commission, the redacted document be released in seven days in accordance with Finding (18). It is, further,

ORDERED, That a copy of this entry be served upon all parties of record.

THE PUBLIC UTILITIES COMMISSION OF OHIO

s/Mandy Willey Chiles

By: Mandy Willey Chiles
Attorney Examiner

GAP/sc

This foregoing document was electronically filed with the Public Utilities

Commission of Ohio Docketing Information System on

2/14/2013 9:58:57 AM

in

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

Summary: Attorney Examiner Entry granting motion for protective order and ordering release of redacted version of document in seven days. - electronically filed by Sandra Coffey on behalf of Mandy Willey Chiles, Attorney Examiner, Public Utilities Commission of Ohio