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BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

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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

REPLY OF OHIO EDISON COMPANY, THE CLEVELAND ELECTRIC ILLUMINATING COMPANY, AND THE TOLEDO EDISON COMPANY IN SUPPORT OF THEIR MOTION FOR A PROTECTIVE ORDER

I. INTRODUCTION

Ohio Edison Company, The Cleveland Electric Illuminating Company and The Toledo Edison Company (collectively, "the Companies") seek a protective order regarding the highly competitively sensitive pricing information contained within the confidential version of the direct testimony of Wilson Gonzalez on behalf of the Office of Ohio Consumers' Counsel ("OCC"). In its Memorandum Contra to the Companies' Motion, OCC wants to disclose publicly a proposed disallowance amount and related interest payments set forth by Mr. Gonzalez in his testimony. OCC contends that the Attorney Examiner should reverse his order granting protection to the confidential renewable energy credit ("REC") pricing information at issue because such information allegedly has already been inadvertently publicly disclosed by Staff through two unredacted passages in the audit report prepared by Exeter Associates, Inc. ("Exeter").

As demonstrated below, OCC is wrong on all counts. Releasing the proposed disallowance and interest amounts contained in Mr. Gonzalez's testimony would enable anyone, with little effort, to arrive at the confidential REC pricing data already deemed worthy of trade secret protection. In turn, such public disclosure would likely have a chilling effect on supplier

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participation in Ohio's emerging renewable market for fear of competitive harm. Likewise, OCC's claim that the highly competitively sensitive REC pricing information has already been inserted into the public domain is specious. The passages from the Exeter audit report relied upon by OCC to support this claim in no way undermine the trade secret status previously afforded by the Attorney Examiner to the REC pricing information.

II. STATEMENT OF FACTS

On August 15, 2012, the Commission filed 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") under seal. On that same day, the Commission also filed a public version of the report in which highly competitively sensitive and trade secret information related to suppliers was redacted; specifically, supplier-identifying information and pricing information (the "REC Procurement Data"). On October 3, 2012, the Companies moved to have the REC Procurement Data kept under seal because it was the highly competitively sensitive proprietary information of the Companies and its REC suppliers, thereby warranting trade secret protection. On October 18, 2012, OCC moved to have the unredacted version of the Exeter Report publicly disclosed.

During a hearing on November 20, 2012, the Attorney Examiner agreed with the Companies and denied OCC's motion to permit the public dissemination of the REC Procurement Data contained in the unredacted version of the Exeter Report. [*See* Case No. 11-5201-EL-RDR, Hearing Tr., 17:13-18:5 (Dec. 4, 2012) ("November 20 Protective Order").] Specifically, the Attorney Examiner found that the highly confidential and proprietary REC Procurement Data contained in the Exeter Report deserved Commission protection because it constituted a trade secret pursuant to settled Ohio law and Commission precedent. [*Id.*]

Subsequently, the Companies entered into protective agreements with various intervening parties, including OCC. These agreements severely restricted access to the REC Procurement Data. Further, the Companies have consistently moved throughout these proceedings to protect at all times the REC Procurement Data from public dissemination. Indeed, the Companies have filed protective orders related to the following documents containing the REC Procurement Data:

- Unredacted Exeter Report (October 3, 2012)
- OCC Public Records Request (December 31, 2012)
- Stathis and Bradley Direct Testimony (January 23, 2013)
- Mikkelsen Rebuttal Testimony (February 22, 2013)

[*See also* Affidavit of Dean Stathis attached as Exhibit A to the motion for protective order at issue (Feb. 7, 2013) (attesting to fact that the Companies have continuously protected the REC Procurement Data from public disclosure).] Importantly, and mindful of the need to ensure an open and transparent Commission process, the Companies have sought to protect the REC Procurement Data through the use of minimally-redacted documents, public versions of which have all been filed on the docket for this proceeding.

With respect to Mr. Gonzalez's testimony, OCC redacted information identifying:

1. the amount of OCC's recommended disallowance (Wilson Testimony p. 5, 34, 36, Ex. WG-3);
2. the amount of interest on that disallowance (*id*, p. 5, 35, 36, Ex. WG-3);
3. the identify of a bidder (*id.*, p. 5, 7, 18, 23, 26); and
4. prices and price ranges (*id.*, p. 7, 8, 14, 16, 19, 20, 31, 33, Ex. WG-3).

The instant motion seeks to keep this information confidential. OCC's suggestion in its memorandum contra that it be allowed to disclose the amount of its proposed disallowance overlooks a dispositive fact. Given that the number of RECs purchased is part of the public

record, disclosing a proposed disallowance amount would allow the average price paid for certain RECs to be known. The average price information can be determined merely by dividing the proposed disallowance amount by the number of RECs purchased. The interest amount, being derivative of the proposed disallowance amount, would similarly reveal average prices of certain RECs.

III. LAW AND ARGUMENT

A. The Commission Routinely Protects Trade Secrets Contained in Intervenor Testimony from Public Disclosure.

The Commission routinely protects trade secrets contained in intervenor testimony, particularly if these trade secrets were provided to an intervenor via a protective agreement. *See, e.g., In the Matter of the Commission Review of the Capacity Charges of Ohio Power Company and Columbus Southern Power Company*, Case No. 10-2929-EL-UNC, 2012 Ohio PUC LEXIS 359, *2-3 (April 13, 2012) (granting motion for protective order and ordering that intervenor testimony be filed under seal where testimony contained a party's trade secrets obtained through a confidentiality and protective agreement); *In the Matter of the Joint Application of Frontier Communications Corporation, New Communications Holdings, Inc., and Verizon Communications Inc. for Consent and Approval of a Change in Control*, Case No. 09-454-TP-ACO, 2011 Ohio PUC LEXIS 1129, *2-4 (Oct. 17, 2011) (same).

Further, in a wide range of contexts, the Commission has regularly found that confidential pricing information is proprietary in nature and warrants trade secret protection. *See, e.g., In the Matter of the Commission's Investigation into Continuation of the Ohio Telecommunications Relay Service*, Case No. 08-439-TP-COI, 2012 Ohio PUC LEXIS 842, *6-7 (Dec. 12, 2012) (holding that out-of-state prices for telecommunications relay services ("TRS") constituted trade secrets for the purposes of a competitive bidding process involving RFPs to

award such a service in Ohio); *In the Matter of the Application of Columbus Southern Power Company and Ohio Power Company to Adjust Their Economic Development Cost Recovery Rider Pursuant to Rule 4901:1-38-08(A)(5), Ohio Administrative Code, Case No. 11-4570-EL-RDR*, 2011 Ohio PUC LEXIS 1107, *3-5 (Oct. 12, 2011) (holding that actual prices paid for electricity usage constituted trade secrets); *In the Matter of the Application of Ohio Edison Company, The Cleveland Electric Illuminating Company and The Toledo Edison Company for Approval of a Competitive Bid Process to Bid Out Their Retail Electric Load*, Case No. 04-1371-EL-ATA, 2005 Ohio PUC LEXIS 177, *8-9 (April 6, 2005) (holding that pricing information contained in competitive bids in a retail electric load auction warranted trade secret protection).

In the instant matter, the Attorney Examiner followed settled Commission precedent and found that the REC Procurement Data deserves trade secret protection, in large part due to the confidential and proprietary pricing information that comprises a significant portion thereof. In the November 20 Protective Order, the Attorney Examiner specifically held:

> The Examiner finds that the redacted portions of the auditor reports have independent economic value and the information was subject to reasonable efforts to maintain its secrecy. Further, the Examiner finds the redacted portions of the auditor's reports meet the six-factor test specified by the Supreme Court. Therefore, the Examiner finds that the redacted portions of the auditor's reports are trade secrets and a protective order should be granted pursuant to Rule 4901-1-24 of the Ohio Administrative Code.

[Case No. 11-5201-EL-RDR, Hearing Tr., 17:13-18:5 (Dec. 4, 2012).] Moreover, the Attorney Examiner also ordered, "I'd like to emphasize that all parties will maintain the confidentiality of the confidential information contained in the unredacted audit reports [and] . . . none of that information may be publicly disclosed, and any information containing documents [that contain this information] filed with this Commission will be filed under seal." [*Id.*, 18:19-19:1.] Hence, the REC Procurement Data containing confidential pricing information provided to the OCC via

a protective agreement and contained within Mr. Gonzalez's direct testimony warrants trade secret protection and should remain under seal.

The same logic requires that the proposed disallowance and interest payments, based as they are on a readily divisible aggregate of the pricing components of the REC Procurement Data, should receive similar protective treatment and also remain under seal. To do otherwise would frustrate the purpose of the November 20 Protective Order. OCC mistakenly argues that the confidential information at issue here – namely, the proposed disallowance and interest amounts contained in the confidential version of Mr. Gonzalez's direct testimony – "fall[s] outside of the scope of the Attorney Examiner's ruling." [OCC Mem. Contra, p. 6.]

Nothing could be further from the truth. As noted above, the number of RECs procured by the Companies during the audit period is publicly known. In turn, if the proposed disallowance and interest payments are publicly disclosed then arriving at the confidential pricing information currently under protection becomes a simple division problem well within the grasp of any reader. Indeed, one could readily arrive at the specific highly competitively sensitive pricing information contained in the confidential versions of the direct testimony of the Companies' witnesses Dean Stathis and Daniel Bradley. Pursuant to Rule 4901-1-24, O.A.C., the November 20 Protective Order, and the ample Commission precedent cited above, the information under consideration here deserves protection. OCC's contention otherwise is meritless—as is especially evidenced by the fact, discussed immediately below, that the very cases relied upon by OCC actually support the Companies' position.

B. The Commission Decisions Cited By OCC Support the Companies' Position.

OCC claims that "confidential treatment should only be given in 'extraordinary circumstances'." [Memo Contra, p. 4.] What OCC neglects to discuss is that the present instance counts as an 'extraordinary circumstance' pursuant to the OCC-cited

Commission decision, *In the Matter of the Application of The Cleveland Electric Illuminating Company for Approval of an Electric Service Agreement With American Steel & Wire Corporation*, Case No. 95-77-EL-AEC, 1995 Ohio PUC LEXIS 663, *2-3 (Sept. 6, 1995). Therein, the Commission held that the terms of an electric service agreement entered into by a utility and an Ohio steel producer warranted confidential treatment, thereby counting as an "extraordinary circumstance[]." *Id.* at *3. On policy grounds, the Commission reasoned that "immediate disclosure of the agreement could put the state of Ohio at a disadvantage relative to similar steel economic development efforts presently under way." *Id.*

A similar "extraordinary circumstance" obtains here. Disclosure of the REC Procurement Data and the proposed disallowance and interest contained in the confidential version of Mr. Gonzalez's testimony would likely undermine REC suppliers' confidence in the still-developing Ohio renewables market. This circumstance, in turn, could put Ohio at a competitive disadvantage vis-a-vis other states as a jurisdiction within which national and regional REC suppliers would otherwise want to set up shop. In a letter filed on the instant docket on October 26, 2012, Navigant Consulting, Inc. ("Navigant") warned that the public disclosure of REC pricing information would likely have a "chilling effect" on REC supplier participation in Ohio's emerging renewables market. [Case No. 11-5201-EL-RDR, Letter from Navigant Consulting, Inc., p. 2 (Oct. 26, 2012).] Indeed, "[p]ublicly disclosing....ranges of prices received in bids and prices of selected bids has a chilling effect on participation because participants are likely to believe disclosure of that information puts them at a competitive disadvantage in the marketplace." [*Id.*]

OCC cites to a pair of cases that ostensibly stand for the proposition that aggregate numbers compiled from confidential data are "not subject to confidential treatment." [Memo

Contra, p. 4.] The cited decisions, however, support the opposite conclusion when, as found here, the aggregates involved could readily be broken down into their highly competitively sensitive constituents. In *In the Matter of the Petition of Deborah Davis and Numerous Other Subscribers of the Mogadore Exchange of Ameritech Ohio, v. Ameritech Ohio and Verizon North Incorporated*, Case No. 02-1752-TP-PEX, 2002 Ohio PUC LEXIS 889, (Sept. 30, 2002), a telecommunications provider sought to have an aggregate figure regarding data related to "access line counts" placed under trade secret protection. *Id.* at *1. The aggregate number at issue had been compiled from generic data in such a way that it could not be broken down into specific access line counts (which were confidential information). *Id.* Further, the telecommunications provider had historically not sought protection for such information. *Id.* at *3.

In denying the telecommunications provider's motion for a protective order, the Commission found that "the redacted information is an aggregate figure that in no way *reveals or would be useful in revealing specific*" access line counts (i.e., confidential information). *Id.* at *6 (emphasis added). In particular, allowing the disclosure of the aggregate number of access lines would not: "(a) *permit the discernment* of the number of access lines within the....exchange served by one or more [providers]; or (b) *compromise the confidentiality of any information* related to orders for services." *Id.* at *7 (emphasis added).[1] Under the reasoning in *Petition of Deborah Davis,* if the disclosure of an aggregate number can be "useful in revealing confidential information" or "permits the discernment" or in any way "compromises the confidentiality" of any of its constituent components then that aggregate figure warrants Commission protection.

[1] OCC's other cited decision along these lines is, essentially, the verbatim antecedent of *Petition of Deborah Davis*. *See In the Matter of the Petition of Dean Thompson and Numerous Other Subscribers of the Laura Exchange of Verizon North Inc. v. Verizon North Inc. and United Telephone Company of Ohio dba Sprint*, Case No. 02-880-TP-PEX, 2002 Ohio PUC LEXIS 679, *5-6 (July 31, 2002).

Here, because the aggregate number represented by the proposed disallowance and interest can be readily broken down into the highly competitively sensitive pricing information already deemed worthy of Commission protection, the aggregate numbers contained in Mr. Gonzalez's confidential testimony should remain under seal. Following *Petition of Deborah Davis*, the aggregate numbers would certainly prove "useful in revealing" the pricing components of the REC Procurement Data, given the publicly known quantity of RECs involved. To fail to keep the proposed disallowance and interest payments confidential would enable almost anyone to "discern", and thus "compromise", the confidential REC pricing information at issue and defeat the very reason as to why the Companies sought, and the Commission granted, a protective order in the first place.

C. The Attorney Examiner Should Reject OCC's Request to Reverse the November 20 Protective Order.

Lastly, OCC argues that the Attorney Examiner should reverse the November 20 Protective Order with regards to the highly competitively sensitive pricing information "because it is already publicly available." [Memo Contra, p. 5.] In support of this bald claim, OCC points to two passages in the public version of the Exeter Report whereby the Companies "in some cases" paid prices for RECs at several times the statutory compliance payment and that these prices "exceeded reported prices" paid in other jurisdictions for non-solar RECs. [*Id.*, quoting Exeter Report at iv; 28.]

This argument is preposterous. This generic claim, along with the claim related to "exceeded reported prices," cannot be used to discern with any degree of precision any of the specific REC pricing information currently under protection. OCC's contention that the REC pricing information under scrutiny has thus already been publicly disclosed is baseless.

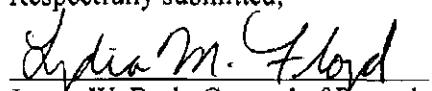
Further, even if the quoted passages from the Exeter Report counted as instances of public disclosure (which they do not), at the very most these passages would amount to nothing more than *partial* disclosure of the confidential REC pricing information. Well-settled Ohio Supreme Court precedent holds that partial disclosure is not sufficient to undermine continuing trade secret status. *See e.g., State Ex. Rel. Perrea v. Cincinnati Pub. Schools* (2009), 123 Ohio St. 3d 410, 415 (holding that "partial disclosure" does not "foreclose" trade secret status); *State Ex. Rel. Lucas County Bd. of Comm'rs* (2000), 88 Ohio St. 3d 166, 174 (same).

IV. CONCLUSION

For the foregoing reasons, the Commission should not publicly release the highly competitively sensitive information contained in the confidential version of the direct testimony of OCC witness Wilson Gonzalez filed under seal and should grant the Companies' motion for a protective order regarding the same.

DATED: March 4, 2013

Respectfully submitted,



James W. Burk, Counsel of Record
Carrie M. Dunn
FIRSTENERGY SERVICE COMPANY
76 South Main Street
Akron, Ohio 44308
Phone: (330) 761-7735
Facsimile: (330) 761-7735
E-mail: burkj@firstenergycorp.com

David A. Kutik
Lydia M. Floyd
JONES DAY
901 Lakeside Avenue
Cleveland, Ohio 44114-1190
Telephone: (216) 586-3939
Facsimile: (216) 579-0212
E-mail: dakutik@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 4th day of March, 2013:

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

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

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

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@BKLlawfirm.com
mkurtz@BKLlawfirm.com
jkyler@BKLlawfirm.com

Attorneys for The Ohio Energy Group

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

Michael K. Lavanga
Brickfield, Burchette, Ritts & 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: cathy@theoec.org
trent@theoec.org

Attorneys for the OEC

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

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

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.

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

Attorney for ELPC

Lydia M. Floyd

An Attorney For Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company