BEFORE THE
PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of FirstEnergy Solutions Corp.'s Ten-Year Alternative Energy Compliance Plan	)))	Case No. 13-0912-EL-ACP
In the Matter of the Application of FirstEnergy Solutions Corp. For Approval of its Alternative Energy Annual Status Report	)))))	Case No. 13-0914-EL-ACP

FIRSTENERGY SOLUTIONS CORP.'S MOTION FOR PROTECTIVE ORDER

Pursuant to O.A.C. 4901-1-24(D), FirstEnergy Solutions Corp. ("FES") moves for a protective order keeping confidential the designated proprietary information contained in: (a) FES' Ten-Year Alternative Energy Compliance Plan (the "Ten-Year Plan") and (b) FES' related Alternative Energy Annual Status Report (the "Annual Report"). Redacted versions of the Plan and the Annual Report have been filed contemporaneously with this Motion in their respective dockets, as identified above.[1] The designated information reflects trade secrets and proprietary information regarding FES' past and future sales (which is used to calculate its baselines), its strategies for achieving compliance with its alternative benchmarks, and its projections for satisfying its future alternative energy benchmarks based on the alternative energy resources it already owns or has under contract. As further described in the attached Memorandum in Support, which is incorporated herein, such information could be used by FES' competitors to gain an advantage in the competitive market, including the market for RECs and renewable resources, if such information were made public. Accordingly, FES requests that the

[1] Pursuant to O.A.C. 4901-1-24(D), unredacted copies of the confidential information that is the subject of this Motion also have been filed under seal.

Commission grant this Motion and protect from disclosure the confidential and propriety information designated in FES' Ten-Year Plan and FES' Annual Report.

Respectfully submitted,

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MEMORANDUM IN SUPPORT OF MOTION FOR PROTECTIVE ORDER

FirstEnergy Solutions Corp. ("FES") requests that the Commission protect from public disclosure the information designated on Attachment A hereto as confidential and/or proprietary (along with any and all copies, including electronic copies). The designated information is included in FES' Ten-Year Alternative Energy Compliance Plan (the "Ten-Year Plan") and FES' Alternative Energy Annual Status Report (the "Annual Report"). The information reflects confidential information regarding FES' recent and current sales data, FES' projections of its future baseline for compliance with its alternative energy requirements, and FES' projections for satisfying its alternative energy benchmarks based on the resources it already owns, has under contract, or will need to procure in the future from the competitive REC market or through self-development. Disclosure of such information to FES' competitors will harm FES in the competitive electric services market and the REC market. As set forth herein, Ohio law and the Commission's rules provide for the protection of such trade secrets and proprietary information.

A. Ohio Law Protects Trade Secrets.

Ohio law defines a "trade secret":

> [I]nformation, 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).[2] The law further prohibits the release of information meeting the definition of a trade secret. R.C. §§ 1333.61(D) and 1333.62. Moreover, the General Assembly carved out an exception to the general rule in favor of the public disclosure of information in the Commission's possession; "public records" do not include records the release of which is prohibited by state or federal law. R.C. § 149.43(A)(1).

While the Commission has often expressed its preference for open proceedings, the Commission has long recognized its statutory obligations with regard to the protection of trade secrets. *See In re: General Telephone Co.*, Case No. 81-383-TP-AIR, Entry (Feb.17, 1982) (recognizing necessity of protecting trade secrets). Indeed, the Ohio Supreme Court has held

[2] Ohio courts have also identified 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. *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 (Kans. 1980); *State ex rel. Perrea v. Cincinnati Pub. Sch.*, 123 Ohio St.3d 410, 414, 2009-Ohio-4762 (adopting these factors as appropriate).

that, not only does the Commission have the authority to protect trade secrets, Ohio law imposes a duty on the Commission to protect them – as such protections are granted through the Uniform Trade Secrets Act to all businesses. *See Ohio Consumers' Counsel v. Pub. Util. Comm.*, 121 Ohio St.3d 362, 2009-Ohio-604. 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 (Sept. 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 (Aug. 17, 1990).

Specifically, O.A.C. 4901-1-24(A) provides the Commission may issue:

> [A]ny order which is necessary to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense. Such a protective order may provide that: . . .
> (7) A trade secret or other confidential research, development, commercial, or other information not be disclosed or be disclosed only in a designated way.

Pursuant to O.A.C. 4901-1-24(D), the Commission also may issue an order to protect the confidentiality of information contained in documents filed with the Commission 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. Here, the information FES seeks to protect constitutes proprietary, trade-secrets information that warrants the Commission's protection and non-disclosure is not inconsistent with the purposes of Title 49.

B. The Designated Information Warrants The Commission's Protection.

FES has treated all of the information that is the subject of this Motion as proprietary, confidential business information and as trade secrets. In the ordinary course of FES' business, this information is protected by FES employees, and is not disclosed to third parties. For example, the information that is the subject of this Motion provides specific data regarding FES'

recent, current, and projected sales, including FES' future baseline for compliance with its alternative energy requirements. Pursuant to the formula in O.A.C. 4901:1-40(B)(2), FES' baseline is based on actual sales data and projections of the amount of kilowatt-hours of electricity FES will sell to retail electric consumers in Ohio for each of the ten years included in the Plan. The information sought to be protected by this Motion also contains estimates of FES' ability to comply with its alternative energy benchmarks based on alternative energy resources it either owns or already has under contracts that have not been publicly announced. Additionally, FES seeks to protect the details of its business strategy and acquisition structure for satisfying the statutory benchmarks.

Disclosure of these types of information would harm FES by providing its competitors with information concerning FES' sales data and projections, as well as FES' business strategies and plans. Accordingly, the information constitutes trade secrets protected by Ohio law. Moreover, the non-disclosure of the information will not impair the purposes of Title 49. The Commission and its Staff have full access to the information in order to fulfill their statutory obligations. No purpose of Title 49 would be served by the public disclosure of the information.

The necessity of protecting this information is particularly important given FES' status as an electric services company operating in a competitive market. As the Ohio Supreme Court recently noted, the Commission "has a duty to encourage competitive providers of electric generation." *Ohio Consumers' Counsel*, 121 Ohio St.3d 362, 370, 2009-Ohio-604 (affirming Commission's decision to redact information due, in part, to "the volatility and competitiveness of the electric industry"). The court explained that in the competitive and relatively new market in which electric services companies operate, "[e]xposing a competitor's business strategies and pricing points would likely have a negative impact on that provider's viability." *Id.* Here, the

information that FES seeks to protect would provide its competitors with specific information regarding FES' actual sales, its future sales projections and its alternative energy compliance strategy. The confidentiality of competitive data and strategies is critical to the proper functioning of the competitive retail electric services market.

C. Conclusion

For the foregoing reasons, FES requests that the information identified on Attachment A and designated in FES' Ten-Year Plan and Annual Report be protected from public disclosure.

Respectfully submitted,

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ATTACHMENT A

Confidential Information Contained in FES' Ten-Year Annual Compliance Plan

Case No. 13-0912-EL-ACP

1. Exhibit 1 to FES' Ten-Year Plan – Exhibit 1 provides projections regarding FES' future baseline and its ability to satisfy its non-solar and solar compliance obligations based on assets it currently owns or has under purchase agreements.

Confidential Information Contained in FES' Alternative Energy Annual Status Report

Case No. 13-0914-EL-ACP

1. Table 1 in FES' Annual Report – Table 1 provides data on FES' recent and current sales in the Ohio competitive market and FES' requirements for compliance with its alternative energy (non-solar and solar) benchmarks.

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