

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of FirstEnergy Solutions Corp.’s Ten Year Alternative Energy Compliance Plan.	:	Case No. 14-0596-EL-ACP
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In the Matter of the Application of FirstEnergy Solutions Corp. for Approval of its Alternative Energy Annual Status Report	:	Case No. 14-0597-EL-ACP
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**MEMORANDUM CONTRA
TO THE MOTION FOR A PROTECTIVE ORDER
FILED BY FIRSTENERGY SOLUTIONS CORP.
SUBMITTED ON BEHALF OF THE STAFF OF
THE PUBLIC UTILITIES COMMISSION OF OHIO**

INTRODUCTION

FirstEnergy Solutions Corp. (FES or Company) is not entitled to the confidential treatment it seeks in Table 1 of the Company’s annual compliance status report filed in Case No. 14-0597-EL-ACP. Table 1 in the report – filed under seal – does not contain any proprietary information requiring confidential treatment. The information in Table 1 may easily be derived from FES’ publicly available competitive retail electric supplier (CRES) annual reports, filed at the Commission, and the applicable statute, R.C. 4928.64(B)(2). The material does not merit a protective order. The Public Utilities Commission of Ohio (Commission) should deny FES’ request for a protective order with respect to Table 1 of the report filed in Case No. 14-0597-EL-ACP. Staff is not

expressing a position on the requested treatment of the data redacted from the Company's ten-year alternative energy compliance plan filed in Case No. 14-0596-EL-ACP.

STATEMENT OF FACTS

On April 14, 2014, FES filed its ten-year alternative energy compliance plan (14-0596-EL-ACP) and its annual compliance status report (14-0597-EL-ACP), along with a motion for a protective order covering components of both filings. In the compliance report filed in Case No. 14-0597-EL-ACP, FES redacted its annual Ohio retail electric sales for the period 2010-2012, the statutory percentage requirements, and the RECs required for 2013 as part of its filing pursuant to O.A.C. 4901:1-40-05. In addition, the Company redacted the projected data provided in response to the filing requirements under O.A.C. 4901:1-40-03(C) in Case No. 14-0596-EL-ACP. FES' Motion for Protective Order refers to the redacted portions as involving trade-secret information for which confidential treatment is warranted. This is misguided as it relates to Table 1 of the report in Case No. 14-0597-EL-ACP.

LAW AND ARGUMENT

- A. The under-seal information in Table 1 may be easily derived from FES' publicly available CRES annual reports and R.C. 4928.64(B)(2), and, therefore, does not merit confidential treatment.**

FES is not entitled to the confidential treatment it seeks in this proceeding. The information in Table 1 of the Company's annual compliance status report filed in Case No. 14-0597-EL-ACP – filed under seal – does not contain any proprietary information requiring confidential treatment. Rather, Table 1 merely contains information that may

easily be derived from FES' publicly available CRES annual reports and R.C.

4928.64(B)(2). The Commission has previously held that this type of information is public in a similar case, Case No. 12-1233-EL-ACP, *In the Matter of Direct Energy Services, LLC Annual Alternative Energy Portfolio Status Report*, and stated:

With respect to the information regarding the RECs required and obtained by DES, as reported at item (3) on the second page of the amended alternative energy portfolio status report and as shown on the attachment at the end of the report, the Commission finds that the number of RECs and solar RECs required to meet DES' 2011 renewable energy benchmark requirements may be easily derived from DES' publicly available actual retail electric sales. The information is, therefore, not a trade secret. Accordingly, the Commission's docketing division should move the second page of DES' 2011 amended alternative energy portfolio status report and the attachment at the end of the report, as filed under seal on April 12, 2013, to the public file, no sooner than 14 days after the date of this finding and order, or November 27, 2013.

R.C. 4905.07 provides that all facts and information in the possession of the Commission shall be public, except as provided in R.C. 149.43 and as consistent with the purposes of Title 49 of the Revised Code. R.C. 149.43 specifies that the term "public records" excludes information that, 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.¹ Similarly, O.A.C. 4901-1-24 allows the Commission 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

¹ *State ex rel Besser v. Ohio State*, 89 Ohio St. 3d 396, 399, 732 N.E.2d 373 (2000).

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.”

R.C. 1333.61(D) 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.” The information in Table 1 of the Company’s annual compliance status report filed in Case No. 14-0597-EL-ACP may easily be derived from FES’ publicly available CRES annual reports, filed at the Commission, and R.C. 4928.64(B)(2). As a result, the information lacks independent economic value and FES cannot perform reasonable efforts to maintain its secrecy.

Ohio law requires the information to be public unless confidentiality is established. Here, FES has failed to establish cause for confidential treatment. The under-seal material in Table 1 of the Company’s annual compliance status report, filed in Case No. 14-0597-EL-ACP, does not merit a protective order. It is the Company’s burden to justify confidential treatment. Here, the Company fails to meet this burden. The Commission should deny FES’ motion for a protective order as it relates to Table 1 of the Company’s annual compliance status report filed in Case No. 14-0597-EL-ACP.

CONCLUSION

FES is not entitled to confidential treatment in Table 1 of the Company's annual compliance status report filed in Case No. 14-0597-EL-ACP. The information in Table 1 lacks the sensitivity required by Ohio law to be treated as confidential. Ohio law requires the information to be public unless confidentiality is established. The information in Table 1 is easy discernable and should be open to public scrutiny. The Commission should deny FES' request for confidential treatment as it relates to Table 1 of the Company's annual compliance status report filed in Case No. 14-0597-EL-ACP.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the Memorandum Contra to the Motion for a Protective Order Filed by FirstEnergy Solutions Corp. Submitted on Behalf of the Staff of the Public Utilities Commission of Ohio was served by regular U.S. mail, postage prepaid, hand-delivered, or via electronic mail, upon the following parties of record, this 23rd day of April, 2014.

/s/ Steven L. Beeler

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Summary: Memorandum Memorandum Contra to the Motion for Protective Order filed by FirstEnergy Solutions Corp. electronically filed by Mrs. Tonneta Y Scott on behalf of PUCO