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BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

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Ohio Schools Council, Ohio School Boards
Association, Ohio Association of School Business
Officials, and Buckeye Association of School
Administrators, dba Power4Schools,
Complainants,
v.
FirstEnergy Solutions Corp,
Respondent.

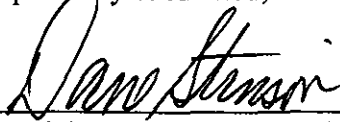
Case No. 14-~~1182~~-EL-CSS

***POWER4SCHOOLS'
MOTION FOR PROTECTIVE ORDER***

Ohio Schools Council ("OSC"), Ohio School Boards Association ("OSBA"), Ohio Association of School Business Officials ("OASBO"), and Buckeye Association of School Administrators ("BASA"), dba Power4Schools (collectively referred to herein as "Power 4Schools"), by its attorneys and pursuant to Rule 4901-1-24(D), Ohio Administrative Code, move the Public Utilities Commission of Ohio for a protective order to prohibit the disclosure and protect the confidentiality of the redacted portions of the complaint filed in this docket, and the following exhibits to the complaint: Exhibit A "Participating Members," Exhibit B "Master Agreement," Exhibit C "Representative Copy of FE EDU Supply Contract," Exhibit G "First Amended Master Agreement," and Exhibit H "Representative Copy of OP EDU Supply Contract." Complete copies of the complaint and the above exhibits have been filed under seal contemporaneously in this docket on this

date. The reasons supporting this motion are detailed in the attached Memorandum in Support.

Respectfully submitted,



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**MEMORANDUM IN SUPPORT OF
POWER4SCHOOLS' MOTION FOR PROTECTIVE ORDER**

Effective April 1, 2011, Power4Schools entered into a "Master Agreement to Provide Services to an Affinity Group" ("Master Agreement") with FirstEnergy Solutions ("FES"), pursuant to which Power4Schools established an affinity program for the purchase of electricity and endorsed FES to provide competitive retail electric service ("CRES") to OSC's, OSBA's, OASBO's and BASA's members in FirstEnergy Corp.'s electric distribution utilities' ("FE EDUs") service territories. The Master Agreement is attached to the complaint filed in this proceeding as Exhibit B.

FES also entered into individual supply contracts with OSC, OSBA, OASBO and BASA members who decided to join the affinity program ("Participating Members"). A list of the Participating Members is attached to the complaint as Exhibit A, and a representative copy of a Supply Contract and its Pricing Attachment for Power4Schools Participating Members in the FE EDUs' service territories ("FE EDU Supply Contracts") is attached to the complaint as Exhibit C.

Effective December 1, 2011, Power4Schools entered into the First Amendment to the Master Agreement ("First Amended Master Agreement"), which, *inter alia*, added the Ohio Power electric distribution utilities' ("OP EDU") service territories to the affinity program. The First Amended Master Agreement is attached to the complaint as Exhibit G. A representative copy of a Supply Contract and its Pricing Attachment for Power4Schools Participating Members in the OP EDUs' service territories ("OP EDU Supply Contracts") is attached to the complaint as Exhibit H.

Provisions contained in Exhibits B, C, G and H provide that the terms and conditions of these agreements are confidential. The redacted portions of the complaint filed in this docket refer to the confidential terms and conditions of these agreements.

The information for which protection is sought in Exhibits B and G describes the pricing structures and other terms and conditions under which FES provides service to Participating Members, as well as the terms and conditions of its business relationship with Power4Schools. This information would disclose Power4Schools' business strategies and the prices at which Participating Members have agreed to accept service. The information for which protection is sought in Exhibits C and H also describes the prices under which Participating Members have agreed to accept service and other terms and conditions under which FES provides service to Participating Members. The list of Participating Members in Exhibit A reveals the list of customers shopping under the affinity program and is proprietary. The information for which protection is sought clearly is competitively sensitive trade secret information. Public disclosure would place Power4Schools at an unfair competitive advantage. Should any of the confidential information become public, it would likely harm the Power4Schools in future negotiations for similar transactions.

Rule 4901-1-24(D), Ohio Administrative Code, provides that the Commission or certain designated employees may issue an order which is necessary to protect the confidentiality of information contained in documents filed with the Commission's Docketing Division 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. State law, and specifically Section 4929.23(A), Ohio Revised Code, permits the Commission to protect the confidentiality of competitive information submitted as a part of the certification

process for competitive retail electric service providers. Moreover, Sections 4901.12 and 4905.07, Ohio Revised Code, facilitate the protection of trade secrets in the Commission's possession. These statutes incorporate by reference the provisions of Section 149.43, Ohio Revised Code, which excepts from the public record information and records for which disclosure is prohibited by law. State law prohibits the release of information meeting the definition of a trade secret. Sections 1333.61(D) and 1333.62, Ohio Revised Code. Sections 4901.12 and 4905.07, Ohio Revised Code, also reference the purposes of Title 49 of the Revised Code. The protection of trade secret information from public disclosure is consistent with the purposes of Title 49 and non-disclosure of the information will not impair the purposes of Title 49, because the Commission and its Staff have full access to the information in order to fulfill its statutory obligations. No purpose of Title 49 would be served by the public disclosure of the information.

The need to protect the designated information from public disclosure is clear, and there is compelling legal authority supporting the requested protective order. While the Commission has often expressed its preference for open proceedings, the Commission also long ago recognized its statutory obligations with regard to trade secrets:

The Commission is of the opinion that the "public records" statute must also be read *in pari materia* with Section 1333.31, Revised Code ("trade secrets" statute). The latter statute must be interpreted as evincing the recognition, on the part of the General Assembly, of the value of trade secret information.

In re: General Telephone Co., Case No. 81-383-TP-AIR (Entry, February 17, 1982).

The documents and information contained in Exhibits A, B, C, G and H, and reference to the information in the redacted portion of the complaint, contain competitively sensitive and highly proprietary business and financial information falling within the statutory characterization of a trade secret as defined by Section 1333.61(D), Ohio Revised Code:

"Trade secret" means information, 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.

This definition clearly reflects the state policy favoring the protection of trade secrets such as the information which is the subject of this motion.

Courts of other jurisdictions have held that not only does a public utilities commission have the authority to protect trade secret information submitted to it, the trade secret statute creates a duty to protect them. *New York Tel. Co. v. Pub. Serv. Comm. N. Y.*, 56 N.Y. 2d 213 (1982). Indeed, for the Commission to do otherwise would be to negate the protections the Ohio General Assembly has granted to all businesses, including competitive retail electric service providers, through the Uniform Trade Secrets Act. 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, September 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-GAGCR (Entry, August 17, 1990).

In *Pyromatics, Inc. v. Petruziello*, 7 Ohio App. 3d 131, 134-135 (Cuyahoga County 1983), the Court of Appeals, citing *Koch Engineering Co. v. Faulconer*, 210 U.S.P.Q. 854, 861 (Kansas 1980), has delineated 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.

See, also, *State ex rel. The Plain Dealer v. Ohio Dept. of Ins.* (1997), 80 Ohio St. 3d 513, 524- 525.

Power4Schools considers and treats the documents and information contained in the Exhibits and redacted portion of the complaint as trade secret, per the terms of the agreements for which protection is being sought. In the ordinary course of business, the information is deemed confidential, is treated as proprietary and confidential by Power4Schools employees and is not disclosed to anyone unless required pursuant to law.

Considering the competitive environment in which Power4Schools operates its affinity program, the information requested in Exhibits A, B, C, G and H is highly proprietary, confidential and commercially sensitive. Therefore, it is imperative that Power4Schools be required to provide such information only under seal, thus precluding competing CRES providers from gaining access to this commercially sensitive information. Additionally, non-disclosure of the information will not impair the purposes of Title 49, because the Commission and its Staff have full access to the information in order to fulfill its statutory obligations.

For the foregoing reasons, Power4Schools requests that the designated information

be protected from public disclosure.

Respectfully submitted,



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