

**BEFORE THE
PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Application of Ohio)	
Edison Company, The Cleveland Electric)	
Illuminating Company, and The Toledo)	Case Nos. 12-2190-EL-POR
Edison Company for Approval of Their)	12-2191-EL-POR
Energy Efficiency and Peak Demand)	12-2192-EL-POR
Reduction Portfolio Plans for 2013)	
through 2015)	

**MOTION REQUESTING A DETERMINATION THAT COLLABORATIVE
MATERIALS ARE NOT CONFIDENTIAL AND REQUEST FOR AN EXPEDITED
RULING BY THE ENVIRONMENTAL LAW AND POLICY CENTER AND THE OHIO
ENVIRONMENTAL COUNCIL**

As part of the energy efficiency collaborative process required by the Public Utilities Commission of Ohio (“Commission” or “PUCO”), Ohio Edison Company, the Cleveland Electric Illuminating Company, and the Toledo Edison Company (collectively “FirstEnergy” or “Companies”) have shared with stakeholders certain necessary information about energy efficiency programs and activities. This information includes energy efficiency savings and progress, updates on budgets and program spending, and general updates on FirstEnergy’s energy efficiency activities or program changes. Without justification, FirstEnergy has claimed that all information shared with stakeholders as part of the Collaborative is confidential and not to be shared with the public. The ability of organizations to share this information with their members and the public is crucial for developing good programs, increasing public involvement and engagement, and ensuring prudence in utility actions.

Despite the best efforts of the Environmental Law & Policy Center (“ELPC”), the Ohio Environmental Council (“OEC”), and other parties, we have been unable to resolve the confidentiality issue in the Collaborative. Therefore, ELPC and OEC request a determination by

the Commission that the Collaborative materials are not subject to trade secret or any other category of protection and can be shared with the public. For the foregoing reasons and as demonstrated in the Memorandum in Support, the Commission should grant this Motion.

Respectfully submitted,

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**MEMORANDUM IN SUPPORT OF MOTION REQUESTING A DETERMINATION
THAT COLLABORATIVE MATERIALS ARE NOT CONFIDENTIAL AND REQUEST
FOR AN EXPEDITED RULING**

I. INTRODUCTION

ELPC and OEC participate in FirstEnergy's energy efficiency Collaborative, which the Commission required FirstEnergy to establish for the purpose of discussing energy efficiency programs and issues with stakeholders. At Collaborative meetings, which are held at least quarterly, FirstEnergy and other parties discuss energy efficiency savings and progress, updates on budgets and program spending, and general updates on FirstEnergy's energy efficiency activities or program changes.¹ The information-sharing and robust discussion is essential for public participation in the development and improvement of programs, developing new ideas, and resolving disagreements.

Without justification or legal support, FirstEnergy has marked all presentations and the most innocuous of information shared as part of the Collaborative as confidential. This lack of transparency makes it impossible for organizations to engage their members and educate and involve the general public, including FirstEnergy customers who pay for FirstEnergy's energy

¹ An example of Collaborative materials, in the form of a presentation by FirstEnergy, is attached to this motion as Attachment A. It has been filed under seal until the Commission determines that it can be public.

efficiency activities through the energy efficiency rider. ELPC and OEC should be able to use information regarding the programs to educate their members, the public, and policymakers about Ohio's progress on energy efficiency and any new developments in energy efficiency program development or implementation. ELPC, OEC, and other parties have discussed this confidentiality issue with FirstEnergy and have been unable to reach a resolution. Therefore, ELPC and OEC request a ruling by the Commission on the confidentiality of Collaborative materials.²

II. ARGUMENT

FirstEnergy bears the burden of demonstrating that the Collaborative materials should be confidential and kept from public disclosure. *See State ex rel. Besser v. Ohio State Univ.*, 89 Ohio St.3d 396, 400, 732 N.E.2d 373 (2000). In determining whether certain information should be public, the presumption of public access to documents is liberally construed. *See State ex rel. The Miami Student v. Miami Univ.*, 79 Ohio St.3d 168, 170, 680 N.E.2d 956 (1997). Because FirstEnergy has not met its burden to prove that Collaborative materials should be confidential, the Commission should determine that Collaborative members are free to publicly disclose the information.

A. Commission Orders require FirstEnergy to share information through the Collaborative.

FirstEnergy cannot claim that the information shared through the Collaborative is voluntary and can therefore be conditioned on its being kept confidential. FirstEnergy is

² *See In the Matter of the Application of The Cleveland Electric Illuminating Company, Ohio Edison Company, and The Toledo Edison Company for Approval of Their Energy Efficiency and Peak Demand Reduction Program Portfolio Plans for 2010 through 2012 and Associated Cost Recovery Mechanism*, Case No. 09-1947-EL-POR, Opinion and Order at 20 (March 23, 2011) (“Where there are genuine disputes of policy, facts or the law [in the Collaborative], the Commission is prepared to hear and resolve such issues.”)

required under Commission Orders to operate a Collaborative with interested stakeholders and share information as part of that process.

The FirstEnergy Collaborative was first formed as part of a PUCO-approved stipulation in Case No. 08-935-EL-SSO.³ Later, in its Order approving FirstEnergy's first energy efficiency portfolio plan, the Commission described the Collaborative as follows:

The Commission has encouraged the formation of utility-stakeholder collaboratives because we believe that collaborative investigations may provide valuable insights into new and emerging issues. The collaborative provides an opportunity for technical staff and experts from different stakeholders to establish common vocabulary, identify key issues needing further exploration, **gather lessons learned and new ideas from programs in Ohio** and other states, discuss the implications of independent research, **exchange data** and seek to resolve factual questions.⁴

The Commission confirmed the importance of the Collaboratives and information-sharing in its Order approving FirstEnergy's second energy efficiency plan, requiring quarterly meetings and Collaborative materials to be shared at least a week in advance of those meetings.⁵

A robust Collaborative, like that envisioned (and required) by the Commission, is not possible without transparency and the sharing of information such as energy savings and updates on budgets, program spending, and program activity. With this clear directive from the Commission regarding Collaboratives, FirstEnergy cannot argue that its sharing of information with the Collaborative is voluntary.

³ See Stipulation and Recommendation (Feb. 19, 2009) at 24 (creating Collaborative and providing opportunity for stakeholders to make recommendations, establish priorities, and provide input).

⁴ See Case No. 09-1947-EL-POR, Opinion and Order at 20 (March 23, 2011).

⁵ See *In the Matter of the Application of The Cleveland Electric Illuminating Company, Ohio Edison Company, and The Toledo Edison Company for Approval of Their Energy Efficiency and Peak Demand Reduction Program Portfolio Plans for 2013 through 2015*, Case No. 12-2190-EL-POR, Opinion and Order at 43 (March 20, 2013).

B. FirstEnergy cannot demonstrate that any of the information in the Collaborative materials is confidential.

Staff plays an important role in the Collaborative and, as a Collaborative participant, receives Collaborative materials. Ohio Revised Code (“R.C.”) § 4905.07 makes clear that all “facts and information in the possession of the public utilities commission shall be public” unless some category applies that qualifies the information for confidential treatment. The presumption of public access to documents is liberally construed. *See Miami Univ.*, 79 Ohio St.3d at 170. Information must be made public unless it falls into a set of narrow exemptions for information that is traditionally outside of the public domain, such as trade secrets, medical records, and records subject to the attorney-client privilege. *See R.C. 149.43(A)(1); Besser*, 89 Ohio St.3d at 399. All doubts as to the potential confidentiality of a given document must be resolved in favor of disclosure. *See State ex rel. Bardwell v. Cuyahoga Cty. Bd. of Comm’rs*, 127 Ohio St.3d 202, 2010-Ohio-5073, 937 N.E.2d 1274, ¶ 10; *State ex rel. Plain Dealer v. Ohio Dep’t of Ins.*, 80 Ohio St.3d 513, 518, 687 N.E.2d 661 (1997).

FirstEnergy has not demonstrated that any category of protection should apply to the Collaborative materials. In fact, it is difficult to fathom any argument as to why information such as program savings and budget updates should be subject to protection from public disclosure, particularly when customers pay for the programs. Information about energy savings and energy efficiency program updates are not trade secrets. To qualify for trade secret protection, a party must show that the information at issue (1) “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” and (2) “is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.” R.C. § 1333.61(D). FirstEnergy has offered no argument as to how the information

contained in the Collaborative materials could possibly have independent economic value due to its secrecy.

No other reasons exist for protecting the Collaborative materials from public disclosure. They do not trigger privacy concerns and they are not privileged. As explained above, FirstEnergy is required to share information and updates as part of the Collaborative process. In fact, FirstEnergy files annual status reports containing some of the same information at issue in the Collaborative materials (program savings, spending, etc.) and has never argued that this information should somehow be confidential and protected from public disclosure.

Ohio's other three electric distribution utilities operate similar collaboratives, created either through stipulations or Commission orders.⁶ Throughout the collaborative process, those utilities share energy efficiency savings and progress, updates on budgets and program spending, and other relevant information. Tellingly, Ohio's other three utilities have never claimed that these materials are somehow confidential and not to be shared with the public. In fact, ELPC is active in collaboratives in Ohio, Illinois, Michigan, and Iowa, and ELPC is unaware of any other utilities that have argued their collaborative materials should be kept confidential.

Because FirstEnergy cannot demonstrate that information such as energy savings and program updates should be confidential, the Commission should determine that stakeholders are free to share Collaborative materials with the public.

III. CONCLUSION AND REQUEST FOR AN EXPEDITED RULING

The Commission should grant ELPC's and OEC's Motion and require FirstEnergy to end the practice of labeling as confidential every piece of information shared in the Collaborative.

⁶ See, e.g., *In the Matter of the Application of Columbus Southern Power Company and Ohio Power Company for Approval of its Program Portfolio Plan*, Case No. 09-1089-EL-POR, Opinion and Order Approving Stipulation at 9 (May 13, 2010) (“[AEP] will offer transparent reporting of program costs, including EE/PDR impacts and progress toward goals, incentives and administrative costs, to the Collaborative on a quarterly basis.”).

This overreaching and lack of transparency is one of many hindrances to a fully-functioning and robust Collaborative. Organizations' member engagement and the public's involvement are crucial to successful energy efficiency programs and utility accountability.

In addition to granting this motion, ELPC and OEC respectfully request that the Commission consider it on an expedited basis and issue a ruling within 21 days. Ohio Administrative Code § 4901-1-12(C) allows for a party to include in its motion "a specific request for an expedited ruling." Due to recent legislation, FirstEnergy's energy efficiency programs may undergo significant changes in the near future. At this critical juncture in Ohio's energy future, the public and FirstEnergy's customers – who are, again, footing the bill for FirstEnergy's activities – should be able to learn about the efficiency programs, energy savings, and any other information shared in the Collaborative.

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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Motion, submitted on behalf of the Environmental Law & Policy Center and Ohio Environmental Council, was served by electronic mail upon the following Parties of Record this 16th day of July, 2014.

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Attachment A

Redacted

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Summary: Motion Motion to Request Determination that Collaborative Materials are not Confidential and Request an Expedited Ruling by ELPC and OEC electronically filed by Mr. Robert Kelter on behalf of Environmental Law & Policy Center and Ohio Environmental Council