

**BEFORE THE
PUBLIC UTILITIES COMMISSION OF OHIO**

City of Toledo)	
)	
Complainant,)	
)	
v.)	CASE NO. 14-1944-EL-CSS
)	
FirstEnergy Solutions Corp.)	
)	
Respondent.)	

UNOPPOSED MOTION FOR PROTECTIVE ORDER

FirstEnergy Solutions Corp. (“FES”), by its attorneys and pursuant to Section 4901-1-24(D) of the Commission’s rules, moves for a protective order keeping confidential the Customer Supply Agreement and Pricing Attachment (collectively, the “Contract”) which are attached to the Complaint as Exhibit 1.¹ The Contract specifically provides that the parties agree to keep the Contract confidential.² The Contract’s terms and conditions are the confidential business information of FES, and FES would be harmed in the marketplace if this information were publicly disclosed. Therefore, the Contract should not be publicly filed in this proceeding, and should instead be filed under seal. The Commission has previously recognized this and granted the Contract confidential treatment in other similar proceedings.³

The City of Toledo (“Complainant”) did not file the Contract under seal when filing the Complaint. However, Complainants counsel has been contacted, and has agreed that the Contract should be removed from the public docket and filed under seal. Accordingly, FES

¹ See pp. 6-18 of the PDF version of the Complaint available on the Commission’s website.

² Customer Supply Agreement, ¶ 33.

³ See Case No. 14-1182-EL-CSS, Entry dated September 4, 2014, p. 5.

requests that Complaint Exhibit 1 be removed from the publicly available docket and be filed under seal.

Respectfully Submitted,

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**MEMORANDUM IN SUPPORT OF UNOPPOSED MOTION FOR PROTECTIVE
ORDER**

I. Introduction

FES, by its attorneys and pursuant to Section 4901-1-24(D) of the Commission’s rules, moves for a protective order keeping confidential the Customer Supply Agreement and Pricing Attachment (collectively, the “Contract”) which are attached to the Complaint as Exhibit 1.⁴ The Contract specifically provides that the parties agree to keep the Contract confidential.⁵ The Contract’s terms and conditions are confidential business information of FES and would harm FES in the marketplace if publicly disclosed. Therefore, the Contract should not be publicly filed in this proceeding, and should instead be filed under seal. Counsel for Complainant has been contacted and does not oppose this motion.

II. Legal Standard

Section 4901-1-24(D) of the Commission’s rules 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

⁴ See pp. 6-18 of the PDF version of the Complaint available on the Commission’s website.

⁵ Customer Supply Agreement, ¶ 33.

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. As set forth herein, state law prohibits the release of the information which is the subject of this Motion. 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 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. See In re: General Telephone Co., Case No. 81-383-TP-AIR (Entry, February 17, 1982) (recognizing necessity of protecting trade secrets). Likewise, the Commission has facilitated the protection of trade secrets in its rules. O.A.C. § 4901-1-24(A)(7).

The definition of a "trade secret" is set forth in the Uniform Trade Secrets Act:

"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.

R. C. § 1333.61(D). This definition clearly reflects the state policy favoring the protection of trade secrets such as the information which is the subject of this Motion.

The Ohio Supreme Court has held that not only does the Commission have the authority to protect the trade secrets of a public utility, the trade secret statute creates a duty to protect them. Ohio Consumers' Counsel v. Pub. Util. Comm., 121 Ohio St.3d 362, 2009-Ohio-604 (2009). Indeed, for the Commission to do otherwise would be to negate the protections the Ohio General Assembly has granted to all businesses, including public utilities, 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-GA-GCR (Entry, August 17, 1990).

In 1996, the Ohio General Assembly amended R.C. §§ 4901.12 and 4905.07 in order to facilitate the protection of trade secrets in the Commission's possession. The General Assembly carved out an exception to the general rule in favor of the public disclosure of information in the Commission's possession. By referencing R.C. § 149.43, the Commission-specific statutes now incorporate the provision of that statute that excepts from the definition of "public record" records the release of which is prohibited by state or federal law. R.C. § 149.43(A)(1). In turn, state law prohibits the release of information meeting the definition of a trade secret. R.C. §§ 1333.61(D) and 1333.62. The amended statutes 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 because the Commission and its Staff have access to the information; in many cases, the parties to a case may have access under an appropriate protective agreement. The protection of trade secret information as requested herein will not impair the Commission's regulatory responsibilities.

In Pyromatics, Inc. v. Petruziello, 7 Ohio App. 3d 131, 134-135 (Cuyahoga App. 1983), the court of appeals, citing Koch Engineering Co. v. Faulconer, 210 U.S.P.Q. 854, 861 (Kansas 1980), 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. The Ohio Supreme Court has adopted these factors as appropriate. State ex rel. Perrea v. Cincinnati Pub. Sch., 123 Ohio St.3d 410, 414, 2009-Ohio-4762 (2009).

III. Argument

FES has treated all of the information which is the subject of this Motion as proprietary, confidential business information. FES considers and has treated the information as a trade secret. In the ordinary course of business of FES, this information is treated as proprietary and confidential by FES employees, and is not disclosed to anyone. The information that is the subject of this Motion provides the specific contract terms between FES and Complainant. This Contract is currently in effect between the parties, and the public disclosure of these terms could be used by FES's competitors to market to FES customers.

The necessity of protecting this information is particularly important given FES's 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 at 370 (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 is seeking to protect would provide its competitors with specific information regarding FES’s contract with Complainant and the terms of its contracts generally. Public disclosure of this information would accordingly have a negative impact on FES’s viability. The Commission has previously recognized this, and has granted the Contract confidential treatment in the past.⁶

IV. Conclusion

By its express terms, the Contract is confidential. It also meets the requirements for confidentiality under Ohio law, and has been previously treated as confidential by the Commission. Therefore, Exhibit 1 to the Complaint should be redacted from the Complaint and filed under seal. Complainant does not oppose this Motion.

Respectfully Submitted,

/s/ Mark A. Hayden

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CERTIFICATE OF SERVICE

I certify that this *Motion for Protective Order* was filed electronically through the Docketing Information System of the Public Utilities Commission of Ohio on this 6th day of November, 2014. The PUCO's e-filing system will electronically serve notice of the filing of this document on all parties.

James F. Lang
One of Attorneys for Applicants

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Summary: Motion (Unopposed) for Protective Order electronically filed by Mr. James F Lang on behalf of FirstEnergy Solutions Corp.