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 Edison Company for Authority to Provide for a Standard Service Offer Pursuant to R.C. 4928.143 in the Form of An Electric Security Plan	)))))))	**Case No. 14-1297-EL-SSO**

OHIO EDISON COMPANY, THE CLEVELAND ELECTRIC ILLUMINATING COMPANY, AND THE TOLEDO EDISON COMPANY'S MEMORANDUM CONTRA IGS ENERGY'S MOTION TO COMPEL

I. INTRODUCTION

In its Motion to Compel, IGS Energy ("IGS") seeks to have the Commission order Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company (collectively, the "Companies") to allow IGS's business and marketing employees, without limitation, to have access to competitively sensitive information belonging to FirstEnergy Solutions Corp. ("FES"). Indeed, IGS hardly disputes that it is a direct competitor of FES or that providing this information to IGS without appropriate safeguards in place for such information would competitively harm FES. Given these facts, under ample Commission authority, IGS is simply not entitled to the unfettered access it seeks to FES's competitively sensitive information. Notably, IGS cites to no authority that demonstrates otherwise; in fact, IGS cites to no authority whatsoever in its motion. The apparent motivation for IGS's motion is that it doesn't want to hire an outside expert. That provides scant basis for revealing FES's most competitively valuable information to a competitor. For that reason alone, IGS's motion should be denied.

Rather than pursue its meritless motion, IGS should enter into a suitable confidentiality and protective agreement that would: (a) protect FES's competitively sensitive information from IGS business and marketing employees (and other competitors); and (b) at the same time, permit IGS to participate meaningfully in this case by allowing counsel, those working with counsel, and outside experts full access to this information. The Companies have proposed just such an agreement, which several intervenors have already signed.

IGS argues that FES should somehow be required to intervene. IGS never says why. In any event, FES's intervention (or nonintervention) is of no moment; the Commission routinely protects competitively sensitive information belonging to third parties. Thus, as further demonstrated below, the Commission should deny IGS's motion to compel.

II. RELEVANT FACTS

On August 4, 2014, the Companies filed their Application for their fourth electric security plan, Powering Ohio's Progress ("ESP IV"). One component of ESP IV is the Economic Stability Program. Case No. 14-1297-EL-SSO, Application at 9 (Aug. 4, 2014). As explained in the Companies' Application, the Economic Stability Program "will act as a retail rate stability mechanism against increasing market prices and price volatility for all retail customers over the longer term." *Id.* As part of ESP IV, the Companies are seeking Commission approval of only the Retail Rate Stability Rider. The Economic Stability Program includes a detailed description of a proposed purchased power transaction between the Companies and FES whereby the Companies would purchase all of the generation output of certain assets owned by FES. Case No. 14-1297-EL-SSO, Direct Testimony of Jay A. Ruberto at 3 (Aug. 4, 2014). In turn, the Companies would "offer this output into the PJM markets, and

net 100% of the revenues against costs, with the differences being passed along to customers through [proposed] Rider RRS." *Id.*

In order to secure approval of the Retail Rate Stability Rider in the Economic Stability Program, as part of their Application and supporting testimony, the Companies included highly competitively sensitive pricing, cost and forecasting information related to FES's generating assets and internal business operations (the "Proprietary Data"). Cost and pricing data, forecasts and other operational information would be extremely valuable to CRES providers or participants in competitive wholesale procurements to compete against FES in these markets. Accordingly, the Proprietary Data was filed, and remains, under seal. This fact is undisputed.

The Companies further moved for a protective order to govern the Proprietary Data on the same day that the Companies filed their Application. *See* Case No. 14-1297-EL-SSO, Motion for Protective Order of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company (Aug. 4, 2014). As the Companies indicated in their motion, the Proprietary Data "was provided to the Companies pursuant to a nondisclosure agreement solely for purposes of the proposed transaction underlying the Companies' Economic Stability Program." *Id.* at 6. Notably, no party, including IGS, opposed this motion.

To continue to protect the Proprietary Data properly, yet allow other parties access to this information, the Companies, following past practice, have offered a proposed protective agreement ("Protective Agreement"). The Protective Agreement offers two-tiers of designations, protection and access. Access to information designated as "Confidential"[1] is provided to

[1] "Confidential" information is defined as "documents and information . . . that customarily are treated by the Companies or third parties as sensitive or proprietary, which are not available to the public, and which, if disclosed freely, would subject the Companies or third parties to risk of competitive disadvantage or other business injury, and may include materials meeting the definition of 'trade secret' under Ohio law." Protective Agreement at ¶3(A).

"Limited Authorized Representatives" of parties. Protective Agreement at ¶ 5 (attached as Ex. A.) "Limited Authorized Representatives" may include: (a) a party's in-house or outside legal counsel; (b) paralegals or other employees associated with relevant counsel; (c) an employee of a party who is involved in the proceedings; and (d) "an expert or employee of an expert retained . . . for the purpose" of advising or testifying in this proceeding." *Id.* at ¶ 5(A)-(D). Access to information designated as "Competitively Sensitive Confidential"[2] is limited to "Fully Authorized Representative[s]." *Id.* at ¶ 4. Pursuant to the terms of the Protective Agreement, a Fully Authorized Representative may be: (a) a party's in-house or outside legal counsel; (b) paralegals or other employees associated with relevant counsel; and (c) "an outside expert or employee of an outside expert retained . . . for the purpose" of advising or testifying in this proceeding. *Id.* at ¶ 4(A)-(C).

The Protective Agreement further requires that any such outside expert or associated employee not be "involved in (or providing advice regarding) decision making by or on behalf of any entity concerning any aspect of competitive retail electric service or of competitive wholesale electric procurements." *Id.* at ¶ 4(A). To permit otherwise would risk disclosure of the Proprietary Data to a competitor. Several intervenors to this proceeding have executed the Protective Agreement. The Companies, in turn, have provided those intervenors' Fully Authorized Representatives with the Proprietary Data.

On August 28, 2014, IGS, a CRES supplier and direct competitor of FES, requested a Protective Agreement from the Companies. The Companies' counsel provided the proposed Protective Agreement to IGS's counsel on the same day. Email from Martin Harvey to Joe

[2] "Competitively Sensitive Confidential" information includes "highly proprietary or competitively-sensitive information, that, if disclosed to suppliers, competitors or customers, may damage the producing party's competitive position or the competitive position of the third party which created the documents or information." *Id.* at ¶3(B).

Oliker (Aug. 28, 2014).[3] More than a month later, on October 9, 2014, IGS's counsel demanded that the Companies "remove" the "limitation" regarding "competitively sensitive information" to permit "IGS employees" to have access to the Proprietary Data. Email from Joe Oliker to Martin Harvey (Oct. 9, 2014; 9:18 AM). Later, on October 9, 2014, the Companies' counsel responded, indicating the Companies' willingness to consider any specific changes proffered by IGS and requested IGS to propose acceptable language for a Protective Agreement. Email from Martin Harvey to Joe Oliker (Oct. 9, 2014; 12:46 PM).

Still later on October 9, 2014, IGS's counsel responded requesting that the Companies modify the Protective Agreement so that IGS employees, including those employees involved in IGS business and marketing activities, could count as Fully Authorized Representatives. Email from Joe Oliker to Martin Harvey (Oct. 9, 2014; 1:02 PM). IGS counsel did not propose any specific protective agreement language. On October 13, 2014, IGS counsel again requested that IGS employees, without limitation, be permitted to be treated as "Fully Authorized Representatives" under the Companies' proposed agreement. Email from Joe Oliker to Martin Harvey (Oct. 13, 2014). IGS counsel also proposed additional changes to the Protective Agreement so that Fully Authorized Representatives from different parties could share competitively sensitive information. *Id.* Counsel threatened that, unless the Companies accepted all of IGS's proposed changes, IGS would file a motion to compel. *Id.*

On October 16, 2014, the Companies' counsel responded, stating that the Companies were willing to accept, in principle, IGS's proposed changes regarding the sharing of information between Fully Authorized Representatives of different parties. Email from Martin Harvey to Joe

[3] The email exchange between counsel for the Companies and counsel for IGS is attached as Ex. B.

Oliker (Oct. 16, 2014). The Companies again emphasized, however, that IGS's business and marketing employees could not have access to the Proprietary Data:

> We are not willing to agree to your proposal that would allow individuals who are involved in businesses competitive with FirstEnergy Solutions (specifically, either competitive retail electric suppliers or participants in competitive wholesale electric procurements) to see FES' competitive data. We know of no case in which the Commission has found that it is appropriate for such disclosures to take place. As we have advised you, we believe that the Commission regularly recognizes and protects competitively valuable information. We do not believe that our proposal inhibits IGS' ability to prepare for and participate in this case. You, as counsel, and any outside expert not involved in CRES or competitive wholesale procurements would be able to see all of the information that may be produced and introduced.

Id. Subsequently, IGS filed its motion to compel.

After this motion was filed, the Companies again reached out to IGS counsel. In a telephone call on November 5, the Companies offered to enter into a protective agreement relating to the production of documents designated as "Confidential," and expressly leaving the conditions of the production of documents designated as "Competitively Sensitive Confidential" subject to later agreement or Commission order. The Companies provided IGS counsel with a draft of such a protective agreement on November 6. Email from Martin Harvey to Joe Oliker (Nov. 6, 2014; attached as Ex. C). As of the filing of this Memorandum, IGS has not responded.

III. LAW AND ARGUMENT

IGS's motion to compel rests on two grounds, neither of which have merit. First, IGS claims that the Protective Agreement somehow hinders IGS's ability to participate meaningfully in this proceeding. Second, IGS argues that because FES is a third-party and has not intervened in this proceeding, the Companies cannot seek to protect the Proprietary Data. As demonstrated below, these arguments fly in the face of considerable Commission precedent. This well-settled

precedent uniformly holds that competitively sensitive information like the Proprietary Data, including that of third parties, warrants protection from disclosure to a competitor.

A. The Commission Routinely Recognizes The Need To Protect Competitively Sensitive Information, Including That Of Third Parties.

1. The Commission routinely protects competitively sensitive information to prevent an unfair competitive advantage.

The Commission routinely affords protection to competitively sensitive pricing, cost, and forecasting information like the Proprietary Data to prevent competitors from gaining an unfair advantage.[4] For example, in AEP Ohio's second ESP proceeding, the utility sought protection for the following types of information:

> [P]rojected proposed rider rates analyses; environmental compliance timeline and projected capacity rate projections; estimates of the impact of the termination or modification of certain provisions of the Pool Agreement; projected earnings and margins from off-system sales; the projected capacity factor of the Turning Point Solar facility; details of offerings for energy and capacity; reserve margins through 2029; planned retirements; and projected sales and load data.

In the Matter of the Application of Columbus Southern Power Company and Ohio Power Company for Authority to Establish a Standard Service Offer Pursuant to Section 4928.143, Revised Code, in the Form of an Electric Security Plan, Case No. 11-346-EL-SSO, 2011 Ohio PUC LEXIS 920 at *4-5 (Aug. 4, 2011) ("AEP ESP 2"). The utility claimed that the release of this information would cause competitive "harm" to the utility. *Id.* at *5. The Commission held

[4] As a general matter, the Commission has recognized the highly competitive nature of Ohio's electrical generation market. As the Commission has found: "[T]he business of providing electrical generation, especially by combustion turbine generators, is a highly competitive business. This is especially true in view of FERC Order 888 and the electric industry restructuring bill recently enacted into law in this state." *In the Matter of the Application of DPL Energy, Inc. for a Certificate of Environmental Compatibility and Public Need for an Electric Generating Plant in Fairfield County, Ohio*, Case No. 00-100-EL-BGN, 2000 Ohio PUC LEXIS 908 at *1-2 (Sept. 19, 2000).

that such information was "confidential, proprietary, competitively sensitive" and therefore warranted protection. *Id.*

Similarly, in *In the Matter of the Application of Metromedia Energy, Inc., for Certification as a Competitive Retail Natural Gas Supplier*, Case No. 02-1926-GA-CRS, 2008 Ohio PUC LEXIS 806 at *4-6 (Oct. 29, 2008), a natural gas supplier sought protection for, among other things, proprietary pricing information. The Commission agreed with the utility that "if released, this information would provide a competitive advantage to other marketers, as [the supplier's] competitors and suppliers would be able to use it for pricing and product strategies." *Id.* at *5. Thus, the Commission is keenly aware of the need to prevent competitively sensitive information like the Proprietary Data from falling into the hands of competitors. *See also, In the Matter of the Application of Ohio Power Company to Adjust Its Economic Development Rider Rate*, Case No. 14-1329-EL-RDR, 2014 Ohio PUC LEXIS 225 at *4-6 (Sept. 17, 2014) (finding that pricing information contained in special arrangement contracts was proprietary in nature and warranted protection after movants claimed release of information would "compromise their business position and ability to compete"); *In the Matter of the Application of Ohio Gas Company for Approval of a Special Arrangement to Provide Firm Gas Transportation Service to Campbell Soup Supply Co. LLC*, Case No. 13-1884-GA-AEC, 2013 Ohio PUC LEXIS 233 at *1-3 (Oct. 23, 2013) (agreeing with joint applicants for a protective order that "public disclosure of...pricing information would impair both parties' business position and ability to compete"); *In the Matter of the Application of Paulding Wind Farm, LLC, for a Certificate to Construct a Wind-Powered Electric Generating Facility in Paulding County, Ohio*, Case No. 09-980-EL-BGN, 2010 Ohio PUC LEXIS 782 at *1-2 (July 22, 2010) (agreeing with applicant that disclosure of pricing information "could harm [applicant] by

providing its competitors with access to proprietary information, thereby placing [applicant] at an undue competitive disadvantage").

2. The Commission routinely protects third-party competitively sensitive information to prevent an unfair competitive advantage.

The Commission also routinely protects third-party competitively sensitive and proprietary information, such as the Proprietary Data, even when those third parties have not intervened in the relevant matter. For example, in *AEP ESP 2*, the utility sought to protect the confidential information of the utility, as well as two third parties, regarding a solar power participation agreement. Case No. 11-346-EL-SSO, 2011 Ohio PUC LEXIS 920 at *1-3. The information at issue included "commercial terms and conditions, pricing, payment structure and key terms of the agreement." *Id.* at *1. The utility claimed that "disclosure of the information [would] provide [the utility's and third parties'] competitors an unfair competitive advantage causing harm" to the utility and the third parties. *Id.* at *2. Notably, the third parties did not intervene in the proceeding. The Commission found that the third-party materials "constitute[d] confidential, proprietary, competitively sensitive" information and warranted protection. *Id.*

Likewise, in *In the Matter of the Review of Duke Energy Ohio, Inc.'s, Riders Supplier Cost Reconciliation, Retail Capacity, Retail Energy, Load Factor Adjustment, Electric Security Stabilization Charge, and Economic Competitiveness Fund*, Case No. 14-81-EL-RDR, 2014 Ohio PUC LEXIS 90 (April 16, 2014), the utility sought to protect "third-party vendor information regarding auction fees." *Id.* at *3. The information was contained in the utility's filed workpapers. *Id.* The utility maintained that if such information were released:

> [T]he vendor's competitors would have access to competitively sensitive, confidential information that, in turn, could allow the competitors to offer auction services at different prices than the competitors would offer in the absence of such information, thus, being able to significantly undermine the vendor's ability to compete.

Id. at *3. The Commission agreed and granted protection. *Id.* at *4. Again, there was no indication that the third-party vendor had intervened in the proceeding. *See also, In the Matter of the Application of Ohio Power Company to Establish Initial Storm Damage Recovery Rider Rates*, Case No. 12-3255-EL-RDR, 2014 Ohio PUC LEXIS 83 at *5-8 (April 2, 2014) (granting protection to "competitively sensitive" third-party contractor information related to storm damage restoration); *In the Matter of the Application of Verizon North, Inc. to Determine Permanent Rates for Unbundled Network Element Prices*, Case No. 00-1186-TP-UNC, 2000 Ohio PUC LEXIS 928 at *1-2 (Sept. 26, 2000) (granting protection of "cost studies" containing information that was proprietary to utility's third-party vendors and filed with utility's application after utility claimed that such information would be of "interest to competitors").

B. The Companies' Proposed Protective Agreement Does Not Hinder The Ability Of IGS To Participate Fully In This Proceeding.

In its motion, IGS claims that the Protective Agreement "will limit IGS's ability to participate in these proceedings." Mot. at 6. Specifically, IGS contends that the Protective Agreement will prevent certain IGS employees from accessing the Proprietary Data. *Id.* IGS further argues that the Companies' efforts to protect the Proprietary Data will require IGS to hire an outside expert, thereby driving up IGS's litigation costs and also lead to IGS having to file "costly motion(s) to compel" in the future. *Id.* at 6; 7. IGS cites to no authority, from the Commission or otherwise, in support of this argument.

This argument falls flat. The Protective Agreement does not limit IGS's ability to participate effectively in these proceedings. As noted, under the Protective Agreement, IGS's counsel and those employees associated with counsel could have full access to the Proprietary Data. IGS's counsel is an able advocate, who has participated as counsel in numerous cases before the Commission for years. He and his legal team can have full access to the Proprietary

Data. Further, as several intervenors in this proceeding have already done, IGS could readily secure – either on its own or in conjunction with similarly-situated parties – an outside expert not involved in CRES or competitive wholesale procurements, who could also have full access (as could that expert's employees).

The Protective Agreement simply limits business and marketing employees of IGS, a direct competitor of FES, from accessing the Proprietary Data. IGS specifically claims that one of its business and marketing employees, Tim Hamilton, should be allowed to provide testimony in this proceeding regarding the Companies' proposed Rider RRS just as he has in the pending ESP proceedings of Ohio Power Company (Case No. 13-2385-EL-SSO) and Duke Energy Ohio (Case No. 14-841-EL-SSO). Mot. at 6. As an initial matter, IGS overlooks that Mr. Hamilton is free to testify based on his review of the public and "confidential"-designated material in this case. Moreover, the information at issue in the Ohio Power and Duke Energy matters is different from the Proprietary Data. Ohio Power and Duke Energy's interests in OVEC are a result of their entitlement to the output of OVEC only and therefore the information being produced is generally billing and cost information related to that entitlement. Here, because FES directly owns the specific plants at issue, the relevant competitively sensitive information being provided to parties as part of the case is unit specific, plant level intensive data that is much more granular and sensitive in nature. As such, those proceedings are inapposite. Thus, the supposed inability of IGS to participate in these proceedings due to the Protective Agreement is illusory.

Moreover, in its motion, IGS cites to absolutely no authority – from the Commission or otherwise – that requires a party to a Commission proceeding to disclose competitively sensitive information, like the Proprietary Data, to a competitor simply because the competitor does not want to hire an outside expert. Indeed, Commission precedent points in decidedly the opposite

direction. As noted, well-settled Commission precedent uniformly recognizes the need to prevent competitively sensitive information from being disclosed to a competitor during the course of a Commission proceeding. Specifically, the Commission routinely protects competitively sensitive pricing, cost and forecasting information, such as the Proprietary Data. *See*, *AEP ESP 2* at *4-5; *Metromedia* at *5; *Ohio Power Company (Economic Development Rider)* at *4-6; *Ohio Gas* at *1-3; *Paulding Wind* at *1-2. In the absence of the Protective Agreement, allowing IGS business and marketing employees full access to the Proprietary Data "would provide a competitive advantage" to IGS and cause competitive "harm" to FES. *Metromedia* at *5; *AEP ESP 2* at *5. The Protective Agreement helps ensure that no such "competitive advantage" will unfairly accrue to IGS and that no competitive "harm" will befall FES during the course of the proceeding.

Simply put, in some cases, hiring experts – like retaining counsel – is part of the cost of litigation that each party must bear. In this case, for example, the Companies do not seek to recover the costs of their counsel or experts. IGS, and all other parties, must bear similar costs, as part of their voluntary participation in this case.

C. The Companies Should Protect The Proprietary Data Even Though FES Has Not Intervened In This Proceeding.

Again ignoring well-settled Commission precedent, IGS claims that because FES has not intervened in these proceedings, it is somehow improper for the Companies to seek to protect the Proprietary Data through the Protective Agreement.[5] Mot. at 6-7. IGS cites no authority for this proposition. Nor could it. For starters, the argument is a non sequitur. There is nothing about FES's status in this case that bears on the question of whether the Proprietary Data should be

[5] IGS's claim that the Companies and FES are "conspiring" to prevent IGS from having access to the Proprietary Data is preposterous and not worthy of further response. Mot. at 7.

protected. Moreover, Commission precedent comes down squarely on the Companies' side here. As logic dictates, simply because the Proprietary Data belongs to a third party (relative to this proceeding) does not mean that business and marketing employees of IGS should have unfettered access to it.

The Proprietary Data is consistent with the third-party vendor and contractor information that was at issue in *AEP ESP 2*, *Duke*, *Ohio Power Company (Storm Damage)*, and *Verizon*. Just as in those cases, providing the Proprietary Data to IGS's business and marketing employees would "significantly undermine" FES's business position in the CRES market; it would provide IGS with an "unfair competitive advantage." *Duke* at *3; *AEP ESP 2* at *2. Merely because the Proprietary Data belongs to a third party does not make it any less competitively sensitive or commercially valuable. In turn, all that the Protective Agreement does is ensure that the Proprietary Data does not fall into the hands of the business and marketing employees of a competitor.

Instead of properly addressing the Companies' concerns, IGS blithely seeks to assure the Commission that the Proprietary Data is of no value to IGS because "IGS does not own large-scale generating assets." Mot. at 7. But the fact that IGS does not own any "large scale" generating assets does not mean that the Proprietary Data is of "little value." *Id.* Again, the Proprietary Data is highly competitively sensitive information. It provides a window into FES's internal business operations regarding pricing, cost estimation, and forecasting. For example, knowing FES's costs and cost structure would enable IGS to undercut FES in the CRES market. Presumably IGS would not want business and marketing employees from FES acquiring such knowledge of similar information at IGS. Hence, as provided for in the Protective Agreement,

business and marketing employees from IGS – or any other direct competitor of FES – should not be permitted access to the Proprietary Data.

IV. CONCLUSION

For the foregoing reasons, the Commission should deny IGS Energy's Motion to Compel.

Date: November 7, 2014

Respectfully submitted,

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ATTORNEYS FOR OHIO EDISON COMPANY, THE CLEVELAND ELECTRIC ILLUMINATING COMPANY, AND THE TOLEDO EDISON COMPANY

CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing has been filed with the Public Utilities Commission of Ohio and has been served upon the following parties via electronic mail on November 7, 2014.

/s/ David A. Kutik
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EXHIBIT A

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 Edison Company for Authority to Provide for a Standard Service Offer Pursuant to R.C. § 4928.143 in the Form of an Electric Security Plan	)))))))	Case No. 14-1297-EL-SSO

PROTECTIVE AGREEMENT

This Protective Agreement ("Agreement") is entered into by and between Ohio Edison Company, The Cleveland Electric Illuminating Company and The Toledo Edison Company ("the Companies") and IGS Energy ("Receiving Party") (collectively, "the Parties"). This Agreement is designed to facilitate and expedite the exchange with Receiving Party of information in the discovery process in this proceeding, as this "Proceeding" is defined herein. It reflects agreement between the Companies and Receiving Party as to the manner in which "Protected Materials," as defined herein, are to be treated. This Agreement is not intended to constitute any resolution of the merits concerning the confidentiality of any of the Protected Materials or any resolution of the Companies' obligation to produce (including the manner of production) any requested information or material.

1. The purpose of this Agreement is to permit prompt access to and review of such Protected Materials in a controlled manner that will allow their use for the purposes of this Proceeding while protecting such data from disclosure to non-participants, without a prior ruling by an administrative agency of competent jurisdiction or court of competent jurisdiction regarding whether the information deserves protection.

2. "Proceeding" as used throughout this document means the above-captioned case(s), including any appeals, remands and other cases related thereto.

3.A. "Protected Materials" means documents and information designated under this Agreement as "CONFIDENTIAL" that customarily are treated by the Companies or third parties as sensitive or proprietary, which are not available to the public, and which, if disclosed freely, would subject the Companies or third parties to risk of competitive disadvantage or other business injury, and may include materials meeting the definition of "trade secret" under Ohio law.

B. "Protected Materials" also includes documents and information designated under this Agreement as "COMPETITIVELY SENSITIVE CONFIDENTIAL" that contain highly proprietary or competitively-sensitive information, that, if disclosed to suppliers, competitors or customers, may damage the producing party's competitive position or the competitive position of the third party which created the documents or information. COMPETITIVELY SENSITIVE CONFIDENTIAL DOCUMENTS can include documents or information prepared by the Companies or provided to the Companies by a third-party pursuant to a nondisclosure agreement.

C. "Protected Materials" do not include any information or documents contained in the public files of any state or federal administrative agency or court and do not include documents or information which at, or prior to, commencement of this Proceeding, is or was otherwise in the public domain, or which enters into the public domain except that any disclosure of Protected Materials contrary to the terms of this Agreement or protective order or a similar protective agreement made between the Companies and other persons or entities shall not be deemed to have caused such Protected Materials to have entered the public domain.

D. "Protected Materials" that are in writing shall be conspicuously marked with the appropriate designation, or counsel for the Companies may orally state on the deposition record that a response to a question posed at a deposition is considered Protected Materials.

E. "Protected Materials" includes documents or information that are stored or recorded in the form of electronic or magnetic media (including information, files, databases, or programs stored on any digital or analog machine-readable device, computers, discs, networks or tapes) ("Computerized Material"). The Companies at their discretion may produce Computerized Material in such form. To the extent that Receiving Party reduces Computerized Material to hard copy, Receiving Party shall conspicuously mark such hard copy as confidential.

4. "Fully Authorized Representative" must execute a Non-Disclosure Certificate in the form of Exhibit B (applicable to COMPETITIVELY SENSITIVE CONFIDENTIAL Protected Materials) and shall be limited to the following persons:

A. Receiving Party's outside legal counsel and in-house legal counsel who are actively engaged in the conduct of this Proceeding;

B. Paralegals and other employees who are associated for purposes of this case with the attorneys described in Paragraph 4(A); and

C. An outside expert or employee of an outside expert retained by Receiving Party for the purpose of advising, preparing for or testifying in this Proceeding and who is not involved in (or providing advice regarding) decision-making by or on behalf of any entity concerning any aspect of competitive retail electric service or of competitive wholesale electric procurements.

5. "Limited Authorized Representative" must execute the Non-Disclosure Certificate in the form of Exhibit A (applicable to CONFIDENTIAL Protected Materials) and shall be limited to the following persons:

A. Legal counsel who have made an appearance in this proceeding or are actively engaged in this Proceeding for Receiving Party;

B. Paralegals and other employees who are associated for purposes of this case with an attorney described in Paragraph 5(A);

C. An employee of Receiving Party who is involved in the Proceedings on behalf of Receiving Party;

D. An expert or employee of an expert retained by Receiving Party for the purpose of advising, preparing for or testifying in this Proceeding.

6. Copies of all executed Non-Disclosure Certificates signed by Fully Authorized Representatives and Limited Authorized Representatives in this proceeding shall be provided to counsel for the Companies as soon as possible after the Certificates are executed.

7. Access to Protected Materials designated as "CONFIDENTIAL" is permitted to Fully Authorized Representatives and Limited Authorized Representatives who have executed the appropriate Non-Disclosure Certificate. Notwithstanding other provisions of this Agreement to the contrary, Protected Materials designated as "COMPETITIVELY SENSITIVE CONFIDENTIAL" or with words of similar import will be **strictly** limited to Fully Authorized Representatives. Counsel for Receiving Party will ensure that individuals who are not Fully Authorized Representatives are not permitted to access COMPETITIVELY SENSITIVE CONFIDENTIAL materials. Receiving Party, its Counsel, Fully Authorized Representatives and Limited Authorized Representatives must treat all Protected Materials (no matter how designated), copies thereof, information contained therein, and writings made therefrom (including, without limitation, Protected Materials comprised of portions of transcripts) as proprietary and confidential, and will safeguard such Protected Materials, copies thereof, information contained therein, and writings made therefrom so as to prevent voluntary,

inadvertent, or accidental disclosure to any persons other than Receiving Party's counsel and those persons authorized to have access to the Protected Materials as set forth in this Agreement.

8. Nothing in this Agreement precludes the use of any portion of the Protected Materials that becomes part of the public record or enters into the public domain except that any disclosure of Protected Materials contrary to the terms of this Agreement or protective order or a similar protective agreement made between the Companies and other persons or entities shall not be deemed to have caused such Protected Materials to have entered the public domain. Nothing in this Agreement precludes Receiving Party from using any part of the Protected Materials in this Proceeding in a manner not inconsistent with this Agreement, such as by filing Protected Materials under seal.

9. If any Receiving Party counsel, Fully Authorized Representative or Limited Authorized Representative ceases to be engaged in this Proceeding, access to any Protected Materials by such person will be terminated immediately and such person must promptly return Protected Materials in his or her possession to a counsel of Receiving Party who is a Fully Authorized Representative, and if there is no such counsel of Receiving Party who is a Fully Authorized Representative, such person must treat such Protected Materials in the manner set forth in Paragraph 16 hereof as if this Proceeding herein had been concluded. Any person who has signed either form of the foregoing Non-Disclosure Certificates will continue to be bound by the provisions of this Agreement even if no longer so engaged.

10. Receiving Party, its counsel, Fully Authorized Representatives and Limited Authorized Representatives are prohibited from disclosing Protected Materials to another party or that party's authorized representatives, provided however, (i) Receiving Party's counsel may disclose Protected Materials to employees or persons working for or representing the Public

Utilities Commission of Ohio in connection with this Proceeding, (ii) for Protected Materials identified as CONFIDENTIAL, Receiving Party's counsel may disclose Protected Materials or writings regarding their contents to any individual or entity that is in possession of said Protected Materials or to any individual or entity that is bound by a Protective Agreement or Order with respect to the Protected Materials and has signed a Non-Disclosure Certificate applicable to materials designated as CONFIDENTIAL, and (iii) for Protected Materials identified as COMPETITIVELY SENSITIVE CONFIDENTIAL, Receiving Party's counsel may disclose such materials to another party's counsel as long as Receiving Party's Counsel has executed the **appropriate** Non-Disclosure Certificate and the Receiving Party's counsel (a) represents a party that has signed a protective agreement with the Companies and (b) has signed a Non-Disclosure Certificate applicable to materials designated as COMPETITIVELY SENSITIVE CONFIDENTIAL. Protected Materials, designated as "CONFIDENTIAL" or "COMPETITIVELY SENSITIVE CONFIDENTIAL" and provided to Receiving Party by another party or its counsel shall be treated by Receiving Party, its counsel, Fully Authorized Representatives and Limited Authorized Representatives as being provided by the Companies and all terms of this Protective Agreement shall apply to the treatment of such materials.

11. Receiving Party may file Protected Materials under seal in this Proceeding whether or not Receiving Party seeks a ruling that the Protected Materials should be in the public domain. If Receiving Party desires to include, utilize, refer to, or copy any Protected Materials in such a manner, other than in a manner provided for herein, that might require disclosure of such material, then Receiving Party must first give notice (as provided in Paragraph 15) to the Companies, specifically identifying each of the Protected Materials that could be disclosed in the public domain. The Companies will have five (5) business days after service of Receiving

Party's notice to file, with an administrative agency of competent jurisdiction or court of competent jurisdiction, a motion and affidavits with respect to each of the identified Protected Materials demonstrating the reasons for maintaining the confidentiality of the Protected Materials. The affidavits for the motion must set forth facts delineating that the documents or information designated as Protected Materials have been maintained in a confidential manner and the precise nature and justification for the injury that would result from the disclosure of such information. If the Companies do not file such a motion within five (5) business days of Receiving Party's service of the notice, then the Protected Materials will be deemed non-confidential and not subject to this Agreement.

12. The Parties agree to seek *in camera* proceedings by the administrative agency of competent jurisdiction or court of competent jurisdiction for arguments or for the examination of a witness that would disclose Protected Materials. Such *in camera* proceedings will be open only to the Parties, their counsel who are either a signatory to this Agreement or who have executed a Non-Disclosure Certification prior to any access, any other person who would otherwise be permitted to have access to the Protected Materials under the terms of Paragraph 7, and others authorized by the administrative agency or court to be present; however, characterizations of the Protected Materials that do not disclose the Protected Materials may be used in public.

13. Any portions of the Protected Materials that the administrative agency of competent jurisdiction or court of competent jurisdiction has deemed to be protected and that is filed in this Proceeding will be filed in sealed confidential envelopes or other appropriate containers sealed from the public record.

14. It is expressly understood that upon a filing made in accordance with Paragraph 11 of this Agreement, the burden will be upon the Companies to show that any materials labeled as Protected Materials pursuant to this Agreement are confidential and deserving of protection from disclosure.

15. All notices referenced in Paragraph 11 must be served by the Parties on each other by one of the following methods: (1) sending the notice to such counsel of record herein via e-mail; (2) hand-delivering the notice to such counsel in person at any location; or (3) sending the notice by an overnight delivery service to such counsel.

16. Once Receiving Party has complied with its records retention schedule(s) pertaining to the retention of the Protected Materials and Receiving Party determines that it has no further legal obligation to retain the Protected Materials and this Proceeding (including all appeals and remands) is concluded, Receiving Party must return or dispose of all copies of the Protected Materials unless the Protected Materials have been released to the public domain or filed with a state or federal administrative agency or court under seal. Receiving Party may keep one copy of each document designated as Protected Material that was filed under seal and one copy of all testimony, cross-examination, transcripts, briefs and work product pertaining to such information and will maintain that copy as provided in this Agreement.

17. By entering into this Protective Agreement, Receiving Party does not waive any right that it may have to dispute the Companies' determination regarding any material identified as confidential by the Companies and to pursue those remedies that may be available to Receiving Party before an administrative agency or court of competent jurisdiction. Nothing in this Agreement precludes Receiving Party from filing a motion to compel.

18. By entering into this Protective Agreement, the Companies do not waive any right it may have to object to the discovery of confidential material on grounds other than confidentiality and to pursue those remedies that may be available to the Companies before the administrative agency of competent jurisdiction or court of competent jurisdiction.

19. Inadvertent production of any document or information during discovery without a designation of "CONFIDENTIAL" or "COMPETITIVELY SENSITIVE CONFIDENTIAL" will not be deemed to waive the Companies' claim to its confidential nature or estop the Companies from designating the document or information at a later date. Disclosure of the document or information by Receiving Party prior to such later designation shall not be deemed a violation of this Agreement and Receiving Party bears no responsibility or liability for any such disclosure. Receiving Party does not waive its right to challenge the Companies' delayed claim or designation of the inadvertent production of any document or information as "CONFIDENTIAL" or "COMPETITIVELY SENSITIVE CONFIDENTIAL."

20. This Protective Agreement shall become effective upon the date first above written, and shall remain in effect until terminated in writing by either party or three (3) years from the date first set forth above, whichever occurs earlier. Notwithstanding any such termination, the rights and obligations with respect to the disclosure of Protected Materials as defined hereinabove shall survive the termination of this Protective Agreement for a period of three (3) years following the later of the Commission's final Order or Entry on Rehearing in this proceeding.

21. To the extent of any conflicts between this Agreement and any previously signed confidentiality or nondisclosure agreement related to the disclosure of information associated with the Companies' fourth electric security plan, this Agreement prevails.

22. This Agreement represents the entire understanding of the Parties with respect to Protected Materials and supersedes all other understandings, written or oral, with respect to the Protected Materials. No amendment, modification, or waiver of any provision of this Agreement is valid, unless in writing signed by both Parties.

23. This Agreement will be governed by and construed in accordance with the laws of the State of Ohio.

Ohio Edison Company, The Cleveland Electric Illuminating Company and The Toledo Edison Company	IGS Energy
BY:	BY:
_____	_____
Counsel	Counsel
_____	_____
Date	Date

Exhibit A

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 Edison Company for Authority to Provide for a Standard Service Offer Pursuant to R.C. § 4928.143 in the Form of an Electric Security Plan.	)))))))	Case No. 14-1297-EL-SSO

NON-DISCLOSURE CERTIFICATE FOR
CONFIDENTIAL PROTECTED MATERIALS

I certify my understanding that Protected Materials may be provided to me pursuant to the terms and restrictions of the Protective Agreement, last executed _____ 2014, and certify that I have been given a copy of and have read the Protective Agreement, and that I agree to be bound by it. I understand that the contents of Protected Materials, and any writings, memoranda, or any other form of information regarding or derived from protected materials will not be disclosed to anyone other than in accordance with the Protective Agreement and will be used only for the purposes of this Proceeding as defined in Paragraph 2 of the Protective Agreement.

Name: _____

Company: _____
Address: _____
Telephone: _____

Date: _____

Exhibit B

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 Edison Company for Authority to Provide for a Standard Service Offer Pursuant to R.C. § 4928.143 in the Form of an Electric Security Plan.	)))))	Case No. 14-1297-EL-SSO

NON-DISCLOSURE CERTIFICATE FOR
COMPETITIVELY SENSITIVE CONFIDENTIAL PROTECTED MATERIALS

I certify my understanding that access to COMPETITIVELY SENSITIVE CONFIDENTIAL Protected Materials may be provided to me pursuant to the terms and restrictions of the Protective Agreement, last executed _____ 2014, and certify that I have been given a copy of and have read the Protective Agreement, and that I agree to be bound by it. I understand that the contents of Protected Materials, and any writings, memoranda, or any other form of information regarding or derived from protected materials will not be disclosed to anyone other than in accordance with the Protective Agreement and will be used only for the purposes of this Proceeding as defined in Paragraph 2 of the Protective Agreement.

Name: _____

Company: _____
Address: _____
Telephone: _____

Date: _____

EXHIBIT B

Subject:
RE: Case No. 14-1297-EL-SSO: IGS Energy Protective Agreement
From:
Joe Oliker
10/20/2014 06:26 PM
To:
Martin T Harvey
Cc:
"David A. Kutik"
Hide Details
From: Joe Oliker <joliker@igsenergy.com>
To: Martin T Harvey <mtharvey@JonesDay.com>,
Cc: "David A. Kutik" <dakutik@JonesDay.com>
History: This message has been forwarded.

Marty,

Your response is unfortunate. We had hoped to resolve this issue without Commission intervention, but IGS cannot agree to execute the agreement in its proposed form, which would limit our ability to participate in this case.

Joseph Oliker
Regulatory Counsel

Direct (614) 659 5069
Mobile (518) 225 9114
Email joliker@igsenergy.com
IGS Energy :: 6100 Emerald Parkway :: Dublin, OH 43016
www.IGSenergy.com

From: Martin T Harvey [mailto:mtharvey@JonesDay.com]
Sent: Thursday, October 16, 2014 5:06 PM
To: Joe Oliker
Cc: David A. Kutik
Subject: Fw: Case No. 14-1297-EL-SSO: IGS Energy Protective Agreement

Joe --

We have reviewed your draft. We are willing to accept the intent of your changes to paragraph 10 to allow individuals who are Fully Authorized Representatives of one party to share Competitively Sensitive Confidential information with Fully Authorized Representatives of another party . We are similarly willing to allow Limited Authorized Representatives of one party to share Confidential information with Limited Authorized Representatives of another party. We believe that the language that we have proposed in the attached draft accomplishes this objective. It largely tracks your proposal but keeps some language that you deleted.

We are not willing to agree to your proposal that would allow individuals who are involved in businesses competitive with FirstEnergy Solutions (specifically, either competitive retail electric suppliers or participants in competitive wholesale electric procurements) to see FES' competitive data. We know of no case in which the Commission has found that it is appropriate for such disclosures to take place. As we have advised you, we believe that the Commission regularly recognizes and protects competitively valuable information. We do not

believe that our proposal inhibits IGS' ability to prepare for and participate in this case. You, as counsel, and any outside expert not involved in CRES or competitive wholesale procurements would be able to see all of the information that may be produced and introduced.

Thank you,

Martin Harvey
Jones Day
Phone: (216) 586-7026
Email: mtharvey@jonesday.com

From : Joe Oliker <joliker@igsenergy.com>
To : Martin T Harvey <mtharvey@JonesDay.com>
Cc : "David A. Kutik" <dakutik@JonesDay.com>, "burkj@firstenergycorp.com" <burkj@firstenergycorp.com>, "Matt S. White" <mswhite@igsenergy.com>
Sent on : 10/13 04:45:24 PM EDT
Subject : RE: Case No. 14-1297-EL-SSO: IGS Energy Protective Agreement

Marty,

On October 9, 2014, IGS indicated that it has concerns with FirstEnergy's proposed confidentiality agreement and requested that FirstEnergy modify the agreement to allow an internal employee to qualify as a Fully Authorized Representative. We have not heard a response from FirstEnergy.

In addition, the proposed agreement is overly restrictive inasmuch as it prohibits non-counsel from discussing confidential information with another party that has executed a confidentiality agreement. There is no legitimate reason to so limit conversations between parties. The purpose of a confidentiality agreement is to prevent disclosure of information—not to restrict discussions between appropriately authorized parties. As a practical matter, the proposed provision would cause problems in the context of settlement discussions, depositions, and any hearings in this case.

The attached document contains proposed modifications to the confidentiality agreement. Additionally, IGS would agree to execute a confidentiality agreement similar to the agreement authorized by the Commission in Case 14-841-EL-SSO, et al., on August 27, 2014.

Please let us know if you will consent to these modifications by Thursday, October 16, 2014 at 5:00 p.m. or we will file a motion to compel adoption of a confidentiality agreement consistent with the modifications discussed above.

We hope that we can resolve this matter without Commission involvement.

Joseph Oliker

Regulatory Counsel

Direct (614) 659 5069

Mobile (518) 225 9114

Email joliker@igsenergy.com

IGS Energy :: 6100 Emerald Parkway :: Dublin, OH 43016

www.IGSenergy.com

From: Joe Oliker
Sent: Thursday, October 09, 2014 1:02 PM
To: 'Martin T Harvey'
Cc: David A. Kutik
Subject: RE: Case No. 14-1297-EL-SSO: IGS Energy Protective Agreement

Marty,

The main issue is the classification of Fully Authorized Representative vs. Limited Authorized Representative. To the extent that you are willing to modify the definition of Fully Authorized Representative to include IGS employees that may be presented as a witness or that are involved in litigating the proceeding, we could agree to those terms. We have no problem with executing NDA

certificates for all individuals and also agreeing to not use competitively sensitive information for competitive purposes. Of course, as you probably know, IGS does not own power plants, so the risk of this competitive information being misappropriated is not on par with other participants in the proceeding.

Regarding the Duke case, IGS employees have access to competitively sensitive information. And an IGS employee submitted testimony under seal based upon Duke's competitively sensitive information.

Please advise whether FirstEnergy is willing to agree to this proposed modification. We appreciate you working with us to resolve this issue.

From: Martin T Harvey [mailto:mtharvey@JonesDay.com]
Sent: Thursday, October 09, 2014 12:46 PM
To: Joe Oliker
Cc: David A. Kutik
Subject: RE: Case No. 14-1297-EL-SSO: IGS Energy Protective Agreement

Joe,

We believe that the notion that protective agreements should keep confidential competitively valuable information confidential and away from competitors has been upheld by the Commission repeatedly, including in the Duke case. If there are particular problems that you have with our proposed agreement, we are willing to review any modifications that you may have and react to those as appropriate. I have attached a Word version of the Protective Agreement that I sent you on August 28, 2014 which you can use for a redline.

Thanks,

Marty

Martin Harvey
Jones Day
Phone: (216) 586-7026
Email: mtharvey@jonesday.com

From: Joe Oliker <joliker@igsenergy.com>

To: Martin T Harvey <mtharvey@JonesDay.com>,

Cc: "David A. Kutik" <dakutik@JonesDay.com>

Date: 10/09/2014 09:18 AM

Subject: RE: Case No. 14-1297-EL-SSO: IGS Energy Protective Agreement

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Marty,

I have a concern about the proposed confidentiality agreement. From a high level, the proposed agreement appears to limit disclosure of competitively sensitive information to outside legal experts (and excludes IGS employees besides legal counsel/paralegals). This is overly restrictive and not acceptable as it would effectively preclude IGS employees from testifying to several matters that will likely be at issue in this proceeding.

As you probably know, the Commission recently struck several provisions from the confidentiality agreement that Duke Energy Ohio proposed in its electric security plan. The Commission approved an agreement in that proceeding that does not contain the limitation proposed by FirstEnergy.

Please advise whether you will modify the agreement to remove this limitation. I hope that we can resolve this issue without involving the Commission.

Joseph Oliker
Regulatory Counsel

Direct (614) 659 5069
Mobile (518) 225 9114
Email joliker@igsenergy.com
IGS Energy :: 6100 Emerald Parkway :: Dublin, OH 43016
www.IGSenergy.com

From: Martin T Harvey [mailto:mtharvey@JonesDay.com]
Sent: Thursday, August 28, 2014 9:00 AM

To: Joe Oliker
Cc: David A. Kutik
Subject: Case No. 14-1297-EL-SSO: IGS Energy Protective Agreement

Joe,

On behalf of Jim Burk, attached please a draft protective agreement for your review. If this agreement is acceptable, please sign it and return it to me. Please note that, as with past agreements, others working on this case on behalf of IGS Energy will have to sign the applicable certifications and return those to me as well. Please call me at the number below with any questions.

Thank you,

Marty

Martin Harvey
Jones Day
Phone: (216) 586-7026
Email: mtharvey@jonesday.com

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[attachment "CLI_2244265_1_14-1297 IGS Protective Agreement.docx" deleted by Martin T Harvey/JonesDay]

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Confidentiality Notice: The information contained in this email may be confidential and/or legally privileged. It has been sent for the sole use of the intended recipient(s). If you are not the intended recipient or authorized to receive information for the recipient, you are hereby notified that any review, use, disclosure, distribution, copying, printing, or action taken in reliance on the contents of this e-mail is strictly prohibited. If you have received this communication in error, please contact the sender by reply email and destroy all copies of the original message. To contact our email administrator directly, send to admin@igsenergy.com

EXHIBIT C

Subject: Case No. 14-1297 IGS Protective Agreement--Confidential Only

From: Martin T Harvey 11/06/2014 04:00 PM
Extension: 6-7026

To: Joe Oliker

Cc: cdunn, David A. Kutik

Joe,

Pursuant to your recent phone conversation with Carrie Dunn, attached please find a redline and clean copy of a protective agreement which only treats access to confidential materials. Please note that this document is based on the version of the Protective Agreement that was sent to you on October 16, 2014 which incorporated various additions suggested by the prior concerns raised by IGS.

Thank you,

Marty

CLI_202269540_1_IGS Protective Agreement--Confidential Only.DOCX

- Change-Pro Redline - CLI-2244265-v1 and CLI-202269540-v1.docx

Martin Harvey
Jones Day
Phone: (216) 586-7026
Email: mtharvey@jonesday.com

Summary: Memorandum Contra IGS Energy's Motion to Compel electronically filed by MR. DAVID A KUTIK on behalf of Ohio Edison Company and The Cleveland Electric Illuminating Company and The Toledo Edison Company