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

INTERLOCUTORY APPEAL
AND
APPLICATION FOR REVIEW
BY
THE OFFICE OF THE OHIO CONSUMERS' COUNSEL
AND
THE NORTHEAST OHIO PUBLIC ENERGY COUNCIL

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In this case Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company ("FirstEnergy") seek to charge customers for electric service it will provide under an electric security plan ("ESP") for 2015 to 2018. The Office of the Ohio Consumers' Counsel ("OCC") and the Northeast Public Energy Council ("NOPEC) (collectively, "Joint Movants") seek to establish a protective agreement that will enable them to obtain full and complete responses to discovery.

To facilitate this objective, Joint Movants respectfully file this interlocutory appeal.[1] This appeal seeks review of the Attorney Examiner's entry issued in this proceeding on December 1, 2014 (the "Entry"), attached hereto as Attachment A. That Entry denied Joint Movants' motion to compel, filed October 31, 2014. That motion to compel asked the Public Utilities Commission of Ohio ("PUCO" or "Commission") to

[1] This interlocutory appeal is filed pursuant to OAC 4901-1-15.

order FirstEnergy[2] to enter into a protective agreement that OCC has used for years in PUCO proceedings.

Joint Movants request that this appeal be certified for review to the PUCO because the rulings memorialized therein present a new question of law and policy, as well as a departure from past precedent. Certification, and ultimate reversal, of the Entry will retain the current balance established by long-standing precedent. That precedent allows intervenors such as Joint Movants the ability to conduct necessary discovery in order to meaningfully participate in a case, and at the same time protects FirstEnergy's confidential information.

Absent reversal, Joint Movants will be irreparably prejudiced because they will be required to participate in this proceeding under FirstEnergy's proposed protective agreement. That agreement severely restricts Joint Movants' ability to communicate with their clients in this case. Moreover it limits the Joint Movants' choice of consultants. The grounds supporting this Interlocutory Appeal and Application for Review are more fully stated in the following Memorandum in Support.

[2] The Cleveland Electric Illuminating Company, The Toledo Edison Company and Ohio Edison Company are referred to as "FirstEnergy."

Respectfully submitted,

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MEMORANDUM IN SUPPORT

I. INTRODUCTION

In the current proceeding FirstEnergy seeks approval of its fourth electric security plan ("ESP IV"). FirstEnergy makes a startling proposal that would require all customers (shopping and non-shopping) to pay for and guarantee a profit on the federally-regulated power plants owned by FirstEnergy's competitive affiliate, FirstEnergy Solutions ("FES").

Specifically, FirstEnergy proposes to enter into a purchase power agreement ("PPA") under which it would purchase the power from three aged power plants, owned in whole or part by FES. The PPA is for approximately 3,500 MW of generation—generation from Davis-Besse Nuclear Power Station, W.H. Sammis Plant, and FES's entitlement to a portion of the output of the Ohio Valley Electric Corporation ("OVEC"). The cost of FES's power to FirstEnergy would be loosely based upon traditional, regulatory cost-of-service principles that would guarantee FES a return of, and on, its investment in the plants. FirstEnergy would sell the power at market prices into the PJM Interconnection LLC ("PJM"), with the promise that if the cost of power from these

generation units is below market, all of FirstEnergy's customers would receive a credit for the difference through the proposed Retail Rate Stability Rider ("Rider RRS"). On the other hand, if the cost is above market, all of First Energy's customers would pay the difference through the RRS as a surcharge, regardless of who actually supplies their generation.[3]

Joint Movants each represent customers who will be required to guarantee FES profits on the power generated at three generating facilities at issue if FirstEnergy's ESP IV application is approved. NOPEC, the largest governmental retail energy aggregator in the State of Ohio, provides governmental electric aggregation service to nearly 500,000 retail residential and small commercial electric customers located in FirstEnergy's service territory. OCC represents approximately 1.9 million FirstEnergy residential retail electric customers. Accordingly, Joint Movants have an overriding interest in determining the reasonableness of the costs customers will be required to pay to support FES's uneconomic generating facilities. These are —costs that would have been publicly available under the traditional, regulatory cost-of-service principles FirstEnergy seeks to emulate in this ESP IV.

Ohio Revised Code Section ("R.C.") 4903.082 provides that "all parties and intervenors shall be granted ample rights of discovery." As parties to this proceeding, Joint Movants are entitled to timely and complete discovery of the terms of the PPA, the costs customers will pay under the RRS, and other costs and proposals contained in the ESP IV application. To the extent the information sought is confidential, Joint Movants still are entitled to discover it under the terms of a reasonable protective agreement.

[3] See, generally Pre-filed Direct Testimony of FirstEnergy Witness Steven H. Strah (Aug. 4, 2014).

Over a course of months, Joint Movants each made numerous attempts to obtain an acceptable protective agreement to enable them to obtain full and complete responses to discovery of the ESP application and, particularly, Rider RRS. Despite these efforts, FirstEnergy withheld certain discovery because it was unwilling to agree to the terms of a reasonable protective agreement that the PUCO recently reviewed and ordered Duke Energy Ohio to sign. .[4] Instead, FirstEnergy unreasonably demanded that Joint Movants' execute its proposed protective agreement, which will prevent Joint Movants from meaningfully participating in this proceeding.

Under these circumstances, Joint Movants, on October 31, 2014, filed a Motion to Compel on the grounds that: 1) FirstEnergy's proposed protective agreement precluded Joint Movants' meaningful participation in FirstEnergy's ESP; and 2) Joint Movants' proposed protective agreement was reasonable, was adopted by the PUCO in the past (including the recent *Duke ESP Proceeding*), and was used with multiple utilities (including FirstEnergy) in multiple cases.[5] In their motion, Joint Movants requested the PUCO to grant their Motion to Compel and require FirstEnergy to execute the protective agreement Joint Movants' proposed (referred to as the "Duke ESP Agreement")—the form of an agreement that the PUCO has repeatedly endorsed.[6]

[4] See *In Re Duke Energy Ohio*, Case No. 14-841-EL-SSO (Entry, Aug. 27, 2014) ("*Duke ESP Proceeding").*

[5] *Joint Motion to Compel of the Northeast Ohio Public Energy Council and The Office of the Ohio Consumers' Counsel* at 11-13 (Oct. 31, 2014) ("*Joint Motion to Compel*").

[6] Id.

On November 7, 2014, FirstEnergy filed a Memorandum Contra Joint Movants' Motion to Compel.[7] On December 1, 2014, the Attorney Examiner issued an Entry denying the motion.[8]

The Attorney Examiner's rulings present a new question of law and policy, as well as a departure from past precedent. Certification, and ultimate reversal, of the Entry will retain the current balance established by long-standing precedent. That precedent allows intervenors such as Joint Movants the ability to conduct necessary discovery in order to meaningfully participate in a case, and at the same time protects FirstEnergy's confidential information.

Absent reversal, Joint Movants will be irreparably prejudiced because they will be required to participate in this proceeding under FirstEnergy's proposed protective agreement. That agreement severely restricts Joint Movants' ability to communicate with their clients and unreasonably restrains their choice of expert consultants.. For these reasons, the PUCO should grant Joint Movants' Interlocutory Appeal and reverse the Attorney Examiner's ruling.

II. FACTS

FirstEnergy proposes a two-tiered protective agreement for "Confidential" and "Competitively Sensitive Confidential" information, the latter of which it defines as "highly proprietary or competitively-sensitive information that, if disclosed to suppliers, competitors, or customers, may damage the producing party's competitive position . . .

[7] See *Ohio Edison Company, The Cleveland Electric Illuminating Company, and the Toledo Edison Company's Memorandum Contra*, Case No. 14-1297-EL-SSO (Nov 7, 2014) ("*First Energy Memorandum Contra"*).

[8] Entry at ¶ 36. (Dec. 1, 2014).

."[9] Under FirstEnergy's proposed protective agreement, only a "Fully Authorizing Representative" can access information FirstEnergy deems to be "Competitively Sensitive Confidential."[10] A "Fully Authorized Representative" is 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 A, above]; 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 competitive retail electric service or of competitive wholesale electric procurements.[11]

By way of contrast, the Duke ESP Agreement proposed by Joint Movants permits the parties, their counsel and all consultants (all "Authorized Representatives") access to all alleged confidential information upon execution of a non-disclosure agreement.[12] It also provides safeguards for keeping the information confidential[13] and provides for the return of alleged confidential information if an Authorized Representative ceases to be engaged in this proceeding, and at the conclusion of this proceeding,[14] It also provides protections when filing or using the alleged confidential information in this proceeding,

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[9] See *FirstEnergy Memorandum Contra*, at 4 (Nov. 7, 2014).

[10] Id. at 3.

[11] Id.

[12] *Joint Motion to Compel*, Ex. 1, at paragraphs 4-6.

[13] Id. at paragraph 6.

[14] Id. at paragraphs 7 and 16.

and provides protection for the utility when disclosure is sought through a public records request.[15]

Under the Joint Movants' proposed agreement (the Duke ESP Agreement) , in the unlikely event that it the agreement is breached, FirstEnergy has all rights available to it at law or equity for breach of contract.[16] The form of the Duke ESP Agreement is not new to Ohio's utilities, including FirstEnergy, which have agreed to operate under forms substantially similar to the Duke ESP Agreement for years.[17] Further, as discussed in detail in Section III, below, PUCO precedent provides that the Duke ESP Agreement is "reasonable, consistent with [the Commission's] past cases and precedent, and contains the language needed to sufficiently protect [the utility's] interests . . . ."[18]

III. STANDARD OF REVIEW

A. The Interlocutory Appeal must be certified to the Commission in order to reverse the December 1, 2014, Entry. It can be because it creates new policy, departs from past precedent, and severely prejudices Joint Movants' meaningful participation in this proceeding.

The PUCO's procedural rules establish the standard for an interlocutory appeal, providing in part:

> . . . no party may take an interlocutory appeal from any ruling issued under rule 4901-1-14 of the Administrative Code or any oral ruling issued during a public hearing . . . unless the appeal is certified to the commission by the legal director, deputy legal director, attorney examiner, or presiding hearing officer.

[15] Id. at paragraphs 7 and 16. OCC and NOPEC (as a regional council of governments) are subject to Ohio's public records laws).

[16] See *Duke ESP Proceeding*, Entry at ¶15 (Aug. 27, 2014).

[17] *Joint Motion to Compel*, at 11-13.

[18] *Duke ESP Proceeding*, Entry at ¶15 (Aug. 27, 2014).

> The legal director, deputy legal director, attorney examiner, or presiding hearing officer shall not certify such an appeal unless he or she finds that the appeal presents a new or novel question of interpretation, law, or policy, **or** is taken from a ruling which represents a departure from past precedent and an immediate determination by the commission is needed to prevent the likelihood of undue prejudice or expense to one or more of the parties, should the commission ultimately reverse the ruling in question.[19] [Emphasis added.]

Upon consideration of an appeal, the PUCO may affirm, reverse, or modify the ruling or dismiss the appeal.[20] Joint Movants' Interlocutory Appeal qualifies for certification under the PUCO's rules, and for the reasons stated below, the Attorney Examiner's ruling should be reversed.

IV. ARGUMENT

A. The Attorney Examiner's ruling represents a departure from past precedent.

1. By denying Joint Movants'' Motion to Compel, the Attorney Examiner has departed from the PUCO's precedent sanctioning the protective agreements that Joint Movants propose.

The protective agreement that Joint Movants propose in this proceeding has been used in substantially the same form for well over a decade. Duke Energy, FirstEnergy, AEP Ohio, SBC Ohio, Dayton Power & Light, and Columbia Gas have all signed substantively similar agreements.

Notably, AEP Ohio has been compelled to execute a substantially similar protective agreement proposed by OCC,[21] as well as Duke Energy's predecessor,

[19] Ohio Adm. Code 4901-1-15(B).

[20] Ohio Adm. Code 4901-1-15(E).

[21] See *In re Columbus Southern Power Company*, Case No. 05-376-EL-UNC, Entry at ¶7 (July 21, 2005).

Cincinnati Gas & Electric Company ("CG&E"), and Duke Energy itself.[22] Thereafter, FirstEnergy has executed protective agreements on many occasions containing substantially similar protections offered by the Joint Movants in this case.[23] In fact, in FirstEnergy's second ESP case, FES entered into the protective agreement that Joint Movants propose using in this case.[24]Likewise, NOPEC and FirstEnergy executed such a substantially similar agreement in FirstEnergy's previous ESP III proceeding.[25]

As stated above, Duke or its predecessor has been compelled to enter into the form of protective agreement Joint Movants propose on three occasions. On the first occasion, the attorney examiner found such agreement to be a "reasonable and appropriate method for protecting CG&E information."[26] On the second occasion, the attorney examiner found that OCC's protective agreement "should adequately protect the confidentiality of Duke's information."[27] The third, and very recent occasion, involved the PUCO's reversal of an attorney examiner's decision upon review of OCC's interlocutory appeal, and is discussed below.[28] Nothing in this proceeding distinguishes it from this past precedent.

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[22] See *In re CG&E Post MDP Service Case*, Case No. 03-93-EL-UNC, et al., Entry at 4 (May 13, 2004) ("*CG&E Post MDP*"); *In the Matter of the Commission's Review and Adjustment of the Fuel and Purchased Power and System Reliability Tracker Components of Duke Energy Ohio, Inc.*, Case No. 07-723-EL-UNC et al., (Oct. 29, 2007) ("*Duke Tracker*"); *Duke ESP Proceeding*, Entry (Aug. 27, 2014).

[23] See, e.g., *In re In the Matter of the Determination of the Existence of Significant Excessive Earnings for 2013 Under the Electric Security Plans*, Case No. 14-828-EL-UNC (July 21, 2014); *In re FirstEnergy Energy Efficiency and Peak Demand Reduction Portfolio Plans for 2013 through 2015*, Case Nos. 12-2190-EL-POR, et al. (Sept. 13, 2012); *In re FirstEnergy ESP III*, Case No. 12-1230-EL-SSO (May 1, 2012).

[24] See *In re Ohio Edison Company, The Cleveland Electric Illuminating Company and The Toledo Edison Company*, Case No. 10-388-EL-SSO (March 26, 2010).

[25] *Joint Motion to Compel*, Ex. 5.

[26] *In re CG&E Post MDP*, Case No. 03-93-EL-UNC, et al., Entry at ¶4 (May 13, 2004).

[27] *In re Duke Tracker*, Case No. 07-723-EL-UNC, Entry at 3 (Oct. 29, 2007).

[28] See *Duke ESP Proceeding*, Entry (Aug. 27, 2014).

2. By denying Joint Movants' Motion to Compel, the Attorney Examiner departed from the PUCO's most recent precedent in which the PUCO compelled Duke Energy to use the exact protective agreement proposed by Joint Movants.

The PUCO has not only repeatedly endorsed the protective agreement Joint Movants propose, but in the most recent case involving the protective agreement, the *Duke ESP Proceeding*, the PUCO *compelled* its use by the utility. The Attorney Examiner's December 1, 2014, Entry ignores this recent PUCO precedent.

In the *Duke ESP Proceeding*, Duke moved for a protective order that proposed a protective agreement between it and OCC.[29] OCC objected to Duke's proposed protective agreement, stating, inter alia, that it deviated from past agreements.[30] Rather, OCC proposed the same protective agreement that Joint Movants propose in this proceeding and, as stated above, one that the PUCO had compelled the use of in prior cases,[31] and which has been repeatedly used in PUCO proceedings since.

The Attorney Examiner approved Duke's proposed protective agreement, with some modifications.[32] However, upon review, the PUCO modified the Attorney

[29] *Duke ESP Proceeding*, Entry at ¶4 (Aug. 27, 2014).

[30] *Id*. at ¶5.

[31] *See In re CG&E Post-MDP Service*, Case No. 03-93-EL-UNC et al., Entry at 4, ¶(9) (May 13, 2004); *In the Matter of the Commission's Review and Adjustment of the Fuel and Purchased Power and System Reliability Tracker Components of Duke Energy Ohio, Inc.*, Case No. 07-723-EL-UNC et al., Entry at ¶7 (Oct. 29, 2007).

[32] *Duke ESP Proceeding*, Entry at ¶11 (Aug. 27, 2014).

Examiner's ruling and rejected Duke's proposed protective agreement in its entirety,[33] instructing the parties to adopt OCC's proposed agreement. The PUCO noted that the agreement was "more reasonable, *consistent with our past cases and precedent*, and contains the language needed to sufficiently protect Duke's interests . . . ."[34] (Emphasis added). The PUCO noted that this agreement's provisions:

> . . . ensure that recipients do not disclose confidential information and are bound by confidential agreement, even if they are no longer engaged in the proceeding; require recipients to provide notice to Duke if they desire to use the protected material other than in a manner provided for in confidential agreement; and, if OCC receives a public records request for protected materials, OCC is required to provide Duke notice to enable Duke to file a pleading before a court of competent jurisdiction. Moreover, in the event of a breach of the agreement, Duke may pursue all remedies available by law.[35]

The protective agreement proposed by Joint Movants in the present case is, substantively, exactly the same as the protective agreement the PUCO ordered the parties to adopt in the Duke ESP case. Nonetheless, the Attorney Examiner denied Joint Movants' Motion to Compel, explaining that "the issues presented in the motion to compel differ substantially from the issues in the Duke ESP Case."[36] Specifically, the Attorney Examiner stated that the present case could be distinguished from the Duke ESP Case because in that case, "Duke sought to preclude the use of confidential information in subsequent proceedings," whereas no such proposal exists in the present case.[37]

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[33] *Id*. at ¶15.

[34] Id.

[35] Id.

[36] Entry, Case No. 14-1297-EL-SSO at ¶36 (Dec. 1, 2014).

[37] Id.

The Attorney Examiner reads the PUCO's decision compelling the use of the protective agreement in the Duke ESP Case too narrowly. Instead, at issue in the Duke ESP Proceeding—and the present case—was the balancing of two competing interests: the requirement that the PUCO ensure that parties are allowed "full and reasonable discovery"[38] and the protection of proprietary and competitive interests. In the Duke ESP Case, if the PUCO had only been concerned with precluding the use of Duke's confidential information in subsequent proceedings, then the PUCO merely would have revised that portion of the protective agreement proposed by Duke and kept the remainder of the agreement. Instead, the PUCO determined that the agreement proposed by Duke, *in its entirety*, went "too far in its efforts to address any potential issues that might arise."[39] The Duke Order expressly stated that "the Commission appropriately viewed the *totality* of the confidentiality agreements contained in Duke's Exhibit 3 and OCC's Exhibit 1 and determined that Exhibit 1 was a protective agreement that had proven effective in previous cases before the Commission."[40]

Here, FirstEnergy's proposed protective agreement goes too far. It requires Joint Movants' counsel to withhold relevant information from their clients and prevents their clients from making informed decisions in the ESP hearing. It also unreasonably restricts Joint Movants' right to contract with consultants of their choosing.

The Duke ESP Proceeding provides precedent that protective agreements that fail to strike the proper balance should be rejected, especially when a better option is available. The PUCO has repeatedly determined that the Duke ESP Agreement can be

[38] R.C. 4903.082.

[39] *Id*.

[40] *Duke ESP Proceeding*, Entry of Rehearing, at ¶5 (Oct. 22, 2014).

relied on to strike the right balance between ensuring full and reasonable discovery and protecting proprietary and competitive interests. The Attorney Examiner's ruling to reject this tried and true protective agreement in favor of the untested, controversial, and restrictive agreement proposed by FirstEnergy is a departure from PUCO practice and precedent. The December 1, 2014, ruling departed from the Commission's prior decision in the *Duke ESP Case* and departed from past precedent. Consequently, this Interlocutory Appeal should be certified to the Commission for review, consistent with Ohio Admin. Code 4901-1-15(B).[41]

B. The appeal presents a new or novel question or interpretation, law, or policy.

1. A novel question of law and policy arises because the December 1, 2014 Entry restricts a client's ability to communicate with its attorney.

Paragraphs 4(A) and (B) of FirstEnergy's protective agreement limit disclosure of the FES cost and pricing information to Joint Movants' counsel and counsel's employees. This information relates to the single most important issue in this proceeding. The December 1, 2014, Entry provides that "[a]lthough the protective agreement limits the individuals employed by intervenors who can access the most restricted information, such information can be reviewed by intervenors' counsel and by experts who are not directly involved in competing against FES."[42]

Pricing information is essential to this proceeding. Customers are being asked to pay costs attributable to the PPA; however, the Joint Movants' retained consultants and decision-makers are not permitted to review that information even under the safeguards

[41] Ohio Adm. Code 4901-1-15(B).

[42] Entry, Case No. 14-1297-EL-SSO at ¶36 (Dec. 1, 2014).

of the traditional protective agreement. Such information goes to the heart of the dispute in this proceeding. This limited access is a new policy that severely handicaps parties' ability to challenge any charges associated with the PPA. This restriction also presents a conflict with Ohio's Rules of Professional Conduct that require counsel to "abide by a client's decisions concerning the object of representation … and to consult with the client as to the means by which they are to be pursued"[43]

The ruling represents a new or novel question of law and policy regarding parties' ability to meaningfully participate in a case where customers are being asked to guarantee payment for FES's unregulated generating plants. Under Ohio Admin Code 4901-1-15(B) it should be certified to the PUCO for review.

2. FirstEnergy proposes a new and novel, highly restrictive approach to protect the information of a non-participating third-party.

FirstEnergy asserts that PUCO precedent supports the restrictive protection of third-party information by its proposed agreement.[44] However, even a brief examination of the case law relied by FirstEnergy quickly undermines FirstEnergy's claim. For example, FirstEnergy cites Ohio Power's second ESP case,[45] where the utility sought to protect its own confidential information, as well as two unrelated third parties, regarding a solar power participation agreement.[46] As noted by FirstEnergy, the PUCO found that

[43] See, Ohio Rules of Professional Conduct, Rule 1.2(a).

[44] *FirstEnergy Memorandum Contra*, at 15 (Nov. 7, 2014).

[45] *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 at ¶2 (Aug. 4, 2011) ("*AEP ESP II*").

[46] Id., *citing AEP ESP II.*

the third-party materials "constitute[d] confidential, proprietary, competitively sensitive" information and warranted protection.[47]

However, the protection that AEP sought, and which the Commission approved, was the protection of this information from ***public disclosure***.[48] AEP-Ohio did not seek to impose a protective agreement that withheld third-party information from participating parties in the case. In fact, in AEP's motion for a protective order—which FirstEnergy touts as the standard to follow in the present case—AEP states, "[u]pon request, AEP Ohio will provide such information to parties which have executed a protective order with the Company . . . ."[49] Joint Movants here seek that same opportunity—the opportunity to have information provided under a reasonable protective agreement. Here, FirstEnergy does not merely seek to protect certain information of a third party from ***public disclosure***. If this were the issue at hand, there would be no dispute, as Joint Movants readily acknowledge the important policy of protecting certain third-party information from ***public disclosure***. Indeed, Joint Movants have repeatedly offered to enter into a PUCO endorsed protective agreement that has been recognized as protecting confidential information from public disclosure. Instead, FirstEnergy's proposed agreement presents a new and novel question for the PUCO concerning the extent to which third-party information may be withheld from parties even within the context of confidential non-disclosure agreements.

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[47] Id.

[48] See *Motion of Columbus Southern Power Company and Ohio Power Company to protect Confidential Information Under Ohio Administrative Code Section 4901-1-24*, Case No 11-346-EL-SSO (July 1, 2011).

[49] Id. at 7. Similarly, the remainder of the case law relied on by FirstEnergy merely supports the proposition that certain third-party information should be protected from public disclosure, a proposition that Joint Movants do not dispute. However, like the *AEP ESP II* case relied on by FirstEnergy, these cases do nothing to support the restrictive protective agreement that it proposes.

3. FirstEnergy's proposal establishes a new policy of classifying non-profit political subdivisions as competitors, and withholding information from political subdivisions as such.

FirstEnergy's reasons for rejecting Joint Movants' proposed protective agreement and insisting that NOPEC execute FirstEnergy's unreasonable protective agreement are dubious, at best. They present a new and novel policy of treating non-profit political sub-divisions as competitors. The adverse consequences of such a policy are significant. The issues should be certified to the PUCO for review.

FirstEnergy argues that NOPEC is a "customer" and "competitor" of FES. Because much of the information categorized by FirstEnergy as "Competitively Sensitive Confidential" is FES' cost and pricing information, FirstEnergy argues that individuals within NOPEC with access to that information would give NOPEC an unfair advantage when competing with FES.

NOPEC is a regional council of governments under R.C. Chapter 167 and, as such, is a non-profit Ohio political subdivision. It is certified by the Commission as a governmental aggregator. FirstEnergy ignores that FES is the exclusive electric supplier for the NOPEC aggregation program through 2019—well past the term of the currently proposed ESP.[50] Quite simply, NOPEC is not competing with FES. However, FirstEnergy attempts to dispute NOPEC's noncompetitive status by highlighting what it apparently believes to be a smoking gun: the existence of NOPEC, Inc., a CRES provider.[51]

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[50] FES' website highlights NOPEC as a customer, through 2019:

https://www.fes.com/content/fes/home/community/ohio/nopec.html.

Thus, whether NOPEC is a customer of FES is not relevant to this proceeding and, even if NOPEC's customer status were an issue, the Duke ESP Agreement adequately protects FirstEnergy's interests.

[51] *FirstEnergy Memorandum Contra*, at 18 (Nov. 7, 2014).

According to FirstEnergy, NOPEC and NOPEC, Inc. are "intimately related" because they reside in the same city and have at least one shared executive. Therefore, FirstEnergy argues that NOPEC must also be treated as a competitor.[52] No matter that NOPEC and NOPEC, Inc. are two separate and distinct entities. No matter that NOPEC, Inc. has never conducted business in the state of Ohio or in competition with FES. No matter that FES has exited from the Ohio retail electric market, except to continue serving existing aggregation contracts and large industrial customers. And no matter that NOPEC has proposed to enter into an agreement that would prevent the misuse of information by any of its management that is also affiliated with NOPEC, Inc. As discussed repeatedly in this appeal, the protective agreement that Joint Movants propose protects the confidential information from misuse. At the same time it allows FirstEnergy to pursue remedies if there is a breach of the agreement.. Surely, the executives at FirstEnergy and FES can appreciate the integrity of the protections provided by such an agreement. Indeed, that they are required by Ohio law and PUCO rule to maintain confidences from each other in their organizations.[53]

Classifying a non-profit Ohio political subdivision as a competitor to FirstEnergy presents a new and detrimental policy. In effect, an Ohio political subdivision, Ohio elected officials, and the constituents they represent, would be severely handicapped in the ability to participate in PUCO proceedings if it were denied information.. For instance, under FirstEnergy's proposal, NOPEC's Board would be denied important information related to the proceedings. FirstEnergy acknowledges this fact, but dismisses

[52] *Id*.

[53] R.C. 4928.17.

this concern by suggesting that NOPEC's counsel will have access to the information and may act on behalf of the organization.[54]

However, this assertion on part of FirstEnergy ignores the reality of how a non-profit political subdivision like NOPEC is organized. NOPEC is a board-driven entity, and the board makes all major decisions in proceedings such as the one at hand. These decisions include questions of intervention, settlements, and appeals. NOPEC's Board of Directors is largely composed of the elected county and city officials who represent many of the 500,000 residential and small commercial FirstEnergy customers who are part of NOPEC. The NOPEC Board of Directors, on behalf of its member communities, requires access to information to the greatest extent possible in order to make informed decisions for the public good. As it has in past cases, NOPEC is willing to enter into a reasonable protective agreement. Thus, the proposal by FirstEnergy to limit information available to non-profit Ohio political subdivisions by casting such entities as competitors presents a new policy and warrants consideration, and reversal, by the PUCO. This matter should be certified to the PUCO.

C. An immediate determination by the PUCO is needed to prevent the likelihood of undue prejudice to Joint Movants.

The consequences of the December 1, 2014 Entry are severe. FirstEnergy's proposed protective agreement limits disclosure of the FES cost and pricing information at the heart of this proceeding. FirstEnergy's proposed protective agreement requires Joint Movants' counsel to withhold relevant information from their clients and prevents their clients from making informed decisions for participation in the ESP hearing.

[54] *FirstEnergy Memorandum Contra*, at 19 (Nov. 7, 2014).

Moreover, FirstEnergy's protective agreement restricts Joint Movants from selecting consultants of their choosing.

The practical effect is that Joint Movants' ability to meaningfully participate in this case is handicapped. Already, FirstEnergy has denied certain discovery to Joint Movants.[55] This has hampered Joint Movants' ability to fully participate in the case and prepare for the fast-approaching hearing. Additionally, the parties may incur additional expenses in hiring outside consultants and will be disadvantaged by not being able to openly confer with their clients.

Notably, the end of discovery, December 8, 2014, has now passed. Thus, Joint Movants will be unable to obtain written discovery, even after signing the agreement, and already have been prejudiced by the Attorney Examiner's ruling. In addition, intervenor testimony is due December 22, 2014. To prevent further prejudice, Joint Movants require an immediate ruling in order to have adequate time to perform necessary analysis on the confidential information to be provided in their pre-filed direct testimony.

V. CONCLUSION

The rulings memorialized in the December 1, 2014 Entry present a new question of law and a departure from past precedent. The PUCO's reversal of the Entry will retain the balance provided by the PUCO's precedent and will permit Joint Movants to conduct necessary discovery while protecting FirstEnergy's confidential information. Importantly, the PUCO's reversal of the December 1, 2014 Entry, will permit Joint Movants to meaningfully participate in this proceeding. Accordingly, Joint Movants request that

[55] *Joint Motion to Compel*, Ex. 2 and Ex. 4.

this Interlocutory Appeal be certified to the Commission for review, and that the Commission reverse the Attorney Examiner's ruling of December 1, 2014.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Interlocutory Appeal was served via electronic service upon the parties this 8th day of December 2014.

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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

ENTRY

The attorney examiner finds:

(1) Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company (collectively, FirstEnergy or the Companies) are public utilities as defined in R.C. 4905.02 and, as such, are subject to the jurisdiction of this Commission.

(2) On August 4, 2014, the Companies filed an application pursuant to R.C. 4928.141 to provide for a standard service offer (SSO) to provide generation service pricing for the period of June 1, 2016, through May 31, 2019. The application is for an electric security plan (ESP), in accordance with R.C. 4928.143. In conjunction with its application, FirstEnergy filed a motion for protective order regarding certain information referenced in the testimony of the Companies' witnesses and accompanying workpapers and exhibits.

(3) By Entry issued August 13, 2014, the attorney examiner found that motions to intervene should be filed by October 1, 2014. Additionally, by Entry issued August 29, 2014, the attorney examiner established a procedural schedule. Thereafter, by Entry issued October 6, 2014, the attorney examiner modified the procedural schedule following a collective motion filed by multiple parties.

Motions to Intervene/Motions for Admission Pro Hac Vice

(4) Motions for admission pro hac vice were filed on behalf of Garret Stone, Owen Kopon, and Michael Lavanga to appear

on behalf of Nucor, Madeline Fleisher to appear on behalf of the Environmental Law and Policy Center (ELPC), Jeffrey Mayes to appear on behalf of Monitoring Analytics, LLC (Market Monitor), Tony Mendoza, Michael Soules, and Shannon Fisk on behalf of Sierra Club, and Derrick Price Williamson to appear on behalf of Wal-Mart Stores East, LP, and Sam's East, Inc. (jointly, Wal-Mart). No party filed memoranda contra the motions for admission pro hac vice. The attorney examiner finds that the motions for admission pro hac vice are reasonable and should be granted.

(5) Timely motions to intervene were filed by Ohio Energy Group (OEG); Industrial Energy Users-Ohio (IEU-Ohio); Ohio Power Co. (AEP Ohio); Ohio Partners for Affordable Energy (OPAE); Ohio Consumers' Counsel (OCC); Sierra Club; Direct Energy Services, LLC, Direct Energy Business, LLC, and Direct Energy Business Marketing, LLC (collectively, Direct Energy); Interstate Gas Supply, Inc. (IGS); The Kroger Company (Kroger); The Energy Professionals of Ohio (EPO); Ohio Hospital Association (OHA); Ohio Manufacturers' Association Energy Group (OMAEG); Nucor Steel Marion (Nucor); The Cleveland Municipal School District (CMSD); Material Sciences Corporation (MSC); Association of Independent Colleges and Universities of Ohio (AICUO); Wal-Mart; the city of Cleveland; The Consumer Protection Association, The Cleveland Housing Network, and The Council for Economic Opportunities in Greater Cleveland (Citizens Coalition); Dynergy, Inc. (Dynergy); Ohio Environmental Council and Environmental Defense Fund (jointly, Environmental Groups); the Northwest Ohio Aggregation Coalition (NOAC); the city of Toledo, the Lucas County Board of Commissioners, the city of Northwood, the city of Sylvania, the city of Maumee, the village of Waterville, the village of Holland, the village of Ottawa Hills, and the Lake Township Board of Trustees (collectively, Individual Communities); International Brotherhood of Electrical Workers Local 245 (IBEW 234); Council of Smaller Enterprises (COSE); Mid-Atlantic Renewable Energy Coalition (MAREC); Northeast Ohio Public Energy Council (NOPEC); ELPC; NextEra Power Marketing, LLC (NextEra); city of Akron; Ohio Schools Council (OSC); Market Monitor; Ohio Advanced

Energy Economy (OAEE); PJM Providers Group and Electric Power Supply Association (jointly, Wholesale Suppliers); Retail Energy Supply Association (RESA); EnerNOC, Inc. (EnerNOC); Ohio School Boards Association, Buckeye Association of School Administrators, Ohio Schools Council, and Ohio Association of School Business Officials (collectively, Power4Schools); Exelon Generation Company, LLC, and Constellation NewEnergy, Inc. (jointly, Exelon); and Hardin Wind, LLC, Champaign Wind, LLC, and Buckeye Wind, LLC (collectively, Wind Farms).

(6) On October 15, 2014, FirstEnergy filed a memorandum contra the Market Monitor's motion to intervene. No other memoranda contra the motions to intervene were filed in this proceeding.

(7) Ohio Adm.Code 4901-1-11(B) provides that, in determining whether to permit the intervention, the attorney examiner shall consider: "(1) The nature and extent of the prospective intervenor's interest[;] (2) The legal position advanced by the prospective intervenor and its probable relation to the merits of the case[;] (3) Whether the intervention by the prospective intervenor will unduly prolong or delay the proceedings[;] (4) Whether the prospective intervenor will significantly contribute to full development and equitable resolution of the factual issues[; and] (5) The extent to which the person's interest is represented by existing parties."

(8) The attorney examiner finds that the unopposed motions to intervene meet the criteria set forth in Ohio Adm.Code 4901-1-11(B), are reasonable, and should be granted.

(9) In its motion to intervene, the Market Monitor asserts that it meets the requirements to intervene in the proceeding on the basis that, first, it has a real and substantial interest in the competitiveness of PJM markets because it is required to monitor compliance with the PJM Market Rules, actual or potential design flaws in the PJM Market Rules, structural problems in the PJM Market that may inhibit a robust and competitive market, and the potential for a market participant to exercise market power or violate any PJM rule. Second, the Market Monitor claims that it takes the legal position that subsidies should not be permitted to interfere

with the competitiveness of PJM markets and PJM's competition-based market design, which relates to the merits of this case. Third, the Market Monitor asserts that it will not unduly prolong or delay the proceeding as it timely filed its motion to intervene and accepts the record established to date. Fourth, the Market Monitor states that it will significantly contribute to full development and equitable resolution of the factual issues, as no other party can adequately represent its interests, and it has exclusive resources and knowledge of PJM's markets, which could aid the Commission in resolving the outcome of the proceeding.

(10) In its memorandum contra the motion to intervene filed by the Market Monitor, FirstEnergy argues that the Market Monitor has failed to satisfy the statutory requirements for intervention in this proceeding. More specifically, FirstEnergy first argues that the Market Monitor has failed to meet the Commission's standard for intervention in this proceeding because the nature and extent of its interests do not justify intervention. FirstEnergy asserts that the Market Monitor does not explain how the proceeding will affect its ability to monitor PJM's wholesale markets or that it has been or may be adversely affected by the proceeding, which FirstEnergy argues deals with ratemaking, job retention, economic benefits, fuel mixes and environmental attributes, and Ohio's energy future. Second, FirstEnergy argues that the Market Monitor's proffered legal position is incorrect and the competitiveness of the PJM markets is not within the Commission's power to address. Third, FirstEnergy asserts that the Market Monitor's access to confidential information could lead to prolonged disputes about the use of that information that could delay this proceeding. FirstEnergy also notes that the Market Monitor's counsel also represents the Sierra Club in this proceeding and the Companies have concerns that the Sierra Club may obtain confidential information to which it is not entitled due to these circumstances.

(11) On October 16, 2014, AEP Ohio filed correspondence noting its opposition to the Market Monitor's motion to intervene for the same reasons set forth by FirstEnergy. Thereafter, on October 22, 2014, the PJM Power Providers Group and the

Electric Power Supply Association filed correspondence in support of the Market Monitor's motion to intervene.

(12) On October 22, 2014, the Market Monitor filed a reply to FirstEnergy's memorandum contra. In its reply, the Market Monitor reasserts that it has standing to intervene in this matter. The Market Monitor asserts that it performs a public interest function that includes monitoring the PJM markets for any exercise of market power as well as recommending market changes to increase competition. The Market Monitor further asserts that its interest in the proceeding is the effect that FirstEnergy's proposed ESP may have on the PJM Capacity Market, and specifically notes its legal position that the ESP may result in anticompetitive conduct in the PJM Capacity Market. Further, the Market Monitor notes in its reply that it shares the same confidentiality concerns as the objecting parties, but claims that this concern is not a reasonable basis to preclude the Market Monitor's participation in this proceeding. The Market Monitor asserts that similar issues arose in a Maryland Commission proceeding, in response to which the Maryland Commission established rules to protect confidential documents and information. Finally, the Market Monitor argues that its counsel will not improperly disclose confidential information in response to FirstEnergy's argument that its counsel also represents the Sierra Club. The Market Monitor emphasizes that the Ohio Rules of Professional Conduct do not prohibit its representation of both parties, and notes that its present counsel was retained for the sole purpose of facilitating intervention and will not have a substantive role in the proceeding.

(13) Additionally, on October 22, 2014, RESA filed a reply to FirstEnergy's memorandum contra the Market Monitor's motion to intervene. In its reply, RESA asserts that it supports the Market Monitor's intervention request on the basis that RESA shares the concern that the proposed Retail Rate Stability Rider is a subsidy that will distort Ohio's wholesale and retail power markets. Further, RESA asserts that the Market Monitor may assist the Commission in fully understanding the federal regulatory concepts the Market Monitor enforces, and that the Commission and Federal

courts have adequate means of protecting confidential information.

(14) In considering the Market Monitor's motion to intervene, the attorney examiner initially notes that the Supreme Court of Ohio has held that statutes and rules governing intervention should be "generally liberally construed in favor of intervention." *Ohio Consumers' Counsel v. Pub. Util. Comm.*, 111 Ohio St.3d 384, 2006-Ohio-5853, 856 N.E.2d 940, ¶ 16, quoting *State ex rel. Polo v. Cuyahoga Cty. Bd. of Elections*, 74 Ohio St.3d 143, 144, 656 N.E.2d 1277 (1995). The attorney examiner finds that, considering the standard for intervention set forth in Ohio Adm.Code 4901-1-11(B), particularly in light of Supreme Court precedent finding that statutes and rules should be liberally construed in favor of intervention, the motion to intervene filed by the Market Monitor should be granted.

(15) The attorney examiner finds that the Market Monitor has demonstrated the relevant nature and extent of its interest by explaining that it is required to monitor the PJM markets including any design flaws or structural problems that could inhibit a competitive market or the potential for a market participant to exercise market power. Further, the Market Monitor has set forth its legal position that FirstEnergy's proposed ESP in this case constitutes a subsidy with potential to interfere with competition in the PJM markets, which will directly impact Ohio's retail markets. Although FirstEnergy disagrees with the Market Monitor's legal position, the attorney examiner finds that the legal position is nevertheless relevant to this proceeding. The attorney examiner also finds that nothing indicates that the Market Monitor's participation will unduly prolong or delay the proceeding. The Market Monitor has demonstrated it can significantly contribute to full development and equitable resolution of the factual issues, and no other party can represent its interests. Finally, the attorney examiner notes that the Commission has substantial experience with managing and protecting confidential information; consequently, the attorney examiner does not find that the presence of confidential information is reason to deny the Market Monitor intervention.

Motion to Amend Procedural Schedule

(16) In an October 6, 2014 Entry, the attorney examiner extended the due date for intervenor testimony to December 22, 2014, and the due date for Staff testimony to January 9, 2015, at multiple intervenors' request. Discovery requests remained due on December 1, 2014, and the prehearing conference and evidentiary hearings remained scheduled for January 9, 2015, and January 20, 2015, respectively.

(17) On November 5, 2014, FirstEnergy filed a motion to further amend the procedural schedule so that the prehearing conference and evidentiary hearings will be scheduled for January 16, 2015, and January 28, 2015, respectively. In its memorandum in support, FirstEnergy argues that, in the absence of this modification, it will be unduly burdensome for the Companies to prepare for the prehearing and hearing, as the October 6, 2014 modification to the procedural schedule reduced the time between the filing of intervenor testimony and the hearing from six to four weeks, which fall around the holiday season. FirstEnergy contends that this reduces the time to depose witnesses of the over 50 intervenors to less than two weeks. Further, FirstEnergy represents that 25 parties have no objection to its proposed amendment to the procedural schedule.

(18) On November 12, 2014, RESA filed a memorandum contra FirstEnergy's motion to amend the procedural schedule. In its memorandum, RESA asserts that it does not object to FirstEnergy's request to reschedule the prehearing conference and hearing; however, RESA requests that the discovery cutoff date and intervenor testimony deadline similarly be extended by one week, to December 8, 2014, and December 30, 2014, respectively. RESA explains that this extension is necessary as intervenors are facing difficulty assembling key personnel during the holiday season. Further, RESA points out that Commission precedent supports maintaining the symmetry of the procedural dates as proposed.

(19) On November 13, 2014, the Wholesale Suppliers filed a joint memorandum contra FirstEnergy's motion to amend the procedural schedule. In their joint memorandum, the

Wholesale Suppliers assert, similar to RESA, that they do not object to FirstEnergy's request to reschedule the prehearing conference and hearing; however, the Wholesale Suppliers assert that intervenors should also be given a one-week extension on discovery and the deadline for filing testimony in order to accommodate the holiday season. The Wholesale Suppliers request the same amendment as RESA: extension of the discovery cutoff date and intervenor testimony deadline to December 8, 2014, and December 30, 2014, respectively.

(20) On November 14, 2014, NOPEC and the Ohio Consumers' Counsel (jointly, Joint Movants) filed a joint memorandum contra FirstEnergy's motion to amend the procedural schedule, and a joint motion for a prehearing conference. In their joint memorandum contra, Joint Movants oppose FirstEnergy's motion to extend the dates for the prehearing conference and hearing without a concomitant extension of the discovery cutoff date and deadline for intervenor testimony. As to this issue, Joint Movants argue that it is reasonable to extend the discovery cutoff date and intervenor testimony deadline and that FirstEnergy's intent in refusing to agree to such an extension is to prejudice Joint Movants' and other parties' preparation for hearing. Joint Movants assert that the Commission should extend the discovery cutoff date to December 8, 2014; the intervenor testimony and staff testimony deadlines to December 30, 2014, and January 15, 2015, respectively; and the prehearing conference and hearing commencement dates to January 20, 2015, and January 28, 2015, respectively. Additionally, Joint Movants request a prehearing conference to resolve outstanding procedural motions.

(21) Thereafter, on November 19, 2014, FirstEnergy filed a reply to the memoranda contra of RESA and the Wholesale Suppliers. In its reply, FirstEnergy opposes RESA's and the Wholesale Suppliers' requests to modify the intervenor testimony deadline, on the basis that the proposed modification would reinstate the problem of which the Companies complain in their motion to amend the current procedural schedule. The Companies elaborate that an intervenor testimony deadline of December 30, 2014,

similarly leaves FirstEnergy little time prior to the commencement of hearing to review intervenor testimony and schedule and take depositions of witnesses sponsored by the numerous intervenors in this proceeding. Further, FirstEnergy argues that RESA's and the Wholesale Suppliers' requests ignore the need for the Commission to issue its decision in this proceeding by April 8 in order that the Companies may have sufficient time to prepare for the PJM base residual auction in May 2015.

(22) On November 21, 2014, FirstEnergy filed a reply to the Joint Movants' memorandum contra. In its reply, FirstEnergy similarly argues that Joint Movants' request to modify the discovery cutoff date and intervenor testimony deadline would recreate the issue the Companies' seek to rectify in their motion to amend. Further, the Companies assert that, given the modest nature of their request to amend the procedural schedule, there is no need to schedule a prehearing conference.

(23) The attorney examiner finds that FirstEnergy's request to amend the procedural schedule is reasonable and should be granted in order to afford FirstEnergy sufficient time in which to review intervenor testimony and depose witnesses, particularly given the number of intervenors in this proceeding. Additionally, the attorney examiner finds that, as requested by RESA, the Wholesale Suppliers, and the Joint Movants, it is reasonable to extend the discovery cutoff date by one week. The attorney examiner finds, however, that the requests by RESA, the Wholesale Suppliers, and Joint Movants to extend the deadlines for intervenor and Staff testimony would perpetuate the issue FirstEnergy seeks to rectify in its motion to amend. Further, the attorney examiner notes that one extension of the intervenor testimony deadline has already been granted; if that requested extension was insufficient, intervenors should have informed the attorney examiner at that time. Consequently, the attorney examiner finds that the prehearing conference and evidentiary hearings shall be rescheduled for January 16, 2015, and January 28, 2015, respectively, and the discovery cutoff date shall be extended until December 8, 2014. All other procedural dates shall

remain as previously scheduled. Additionally, the attorney examiner finds that Joint Movants' request for a prehearing conference should be denied, as this Entry resolves the outstanding procedural motions.

Motion for Protective Order/Motions to Compel

(24) In conjunction with its application, FirstEnergy filed a motion for protective order regarding certain information referenced in the testimony of the Companies' witnesses and accompanying workpapers and exhibits on the basis that the information is confidential, proprietary, trade secret, and/or competitive business information of the Companies, the Companies' affiliate, or the Companies' witnesses and consultants. More specifically, FirstEnergy's motion covers three categories of information: (1) identification of individual transmission circuits associated with plants, which are critical infrastructure under the National Infrastructure Protection Plan, contained in redacted portions of Attachment GLC-1 to testimony of Gavin Cunningham; (2) proprietary, confidential business information of FirstEnergy Solutions Corp. (FES), which is trade secret information provided to the Companies pursuant to a nondisclosure agreement solely for purposes related to the proposed Economic Stability Program, contained in sealed attachments JJL-1, JJL-2, and JJL-3 to the testimony of Jason Lisowski and portions of workpapers of Jason Lisowski; and (3) proprietary, confidential business information of ICF Resources Incorporated, which was provided to the Companies pursuant to a nondisclosure agreement solely for purposes related to the proposed Economic Stability Program, contained in portions of testimony, attachments, and workpapers of Judah Rose, and portions of workpapers of Steven Strah. No party filed memoranda contra FirstEnergy's motion for protective order.

(25) R.C. 4905.07 provides that all facts and information in the possession of the Commission shall be public, except as provided in R.C. 149.43 and as consistent with the purposes of Title 49 of the Revised Code. R.C. 149.43 specifies that the term "public records" excludes information which, under state or federal law, may not be released. The Supreme

Court of Ohio has clarified that the "state or federal law" exemption is intended to cover trade secrets. *State ex rel. Besser v. Ohio State Univ.*, 89 Ohio St.3d 396, 399, 732 N.E.2d 373 (2000).

(26) Similarly, Ohio Adm.Code 4901-1-24 allows an attorney examiner to issue an order to protect the confidentiality of information contained in a filed document "to the extent that state or federal law prohibits release of the information, including where the information is deemed * * * to constitute a trade secret under Ohio law, and where non-disclosure of the information is not inconsistent with the purposes of Title 49 of the Revised Code."

(27) Ohio law defines a trade secret as "information * * * that satisfies both of the following: (1) It derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use. (2) It is the subject of efforts that are reasonable under the circumstances to maintain its secrecy." R.C. 1333.61(D).

(28) The attorney examiner has reviewed the information included in FirstEnergy's motion for protective order, as well as the assertions set forth in the supportive memorandum. Applying the requirements that the information have independent economic value and be the subject of reasonable efforts to maintain its secrecy pursuant to R.C. 1333.61(D), as well as the six-factor test set forth by the Supreme Court of Ohio, the attorney examiner finds that the information contained in the sealed portions of the application is trade secret information. *See State ex rel. Plain Dealer v. Ohio Dept. of Ins.*, 80 Ohio St.3d 513, 524-525, 687 N.E.2d 661 (1997). Its release is, therefore, prohibited under state law. The attorney examiner also finds that nondisclosure of this information is not inconsistent with the purposes of Title 49 of the Revised Code. Therefore, the attorney examiner finds that FirstEnergy's motion for protective order is reasonable with regard to the portions filed under seal and should be granted.

(29) Ohio Adm.Code 4901-1-24(F) provides that, unless otherwise ordered, protective orders issued pursuant to Ohio Adm.Code 4901-1-24(D) automatically expire after 24 months. The attorney examiner finds that confidential treatment shall be afforded to the information filed under seal in categories (2) and (3) for a period ending 60 months from the date of this Entry. Until that date, the docketing division should maintain, under seal, the information filed confidentially. Given that the information filed under seal in category (1) contains sensitive infrastructure information, consistent with previous rulings on such critical energy infrastructure information, the attorney examiner finds that it would be appropriate to grant protective treatment indefinitely, until the Commission orders otherwise. Therefore, the docketing division should maintain, under seal, the information in category (1).

(30) Rule 4901-1-24(F) requires a party wishing to extend a protective order to file an appropriate motion at least 45 days in advance of the expiration date. If FirstEnergy wishes to extend the confidential treatment, it should file an appropriate motion at least 45 days in advance of the expiration date. If no such motion to extend confidential information is filed, the Commission may release this information without prior notice to FirstEnergy.

(31) On October 23, 2014, IGS filed a motion to compel FirstEnergy to establish a protective agreement to be used for purposes of obtaining confidential and/or competitively sensitive information from FirstEnergy. IGS asserts that the protective agreement proposed by FirstEnergy contains restrictions that would limit IGS' ability to participate meaningfully in this proceeding.

IGS attached FirstEnergy's proposed protective agreement to its motion. The protective agreement divides protected materials into two categories: (1) confidential materials, and (2) "competitively sensitive confidential" materials, which contain proprietary or competitively sensitive information. Additionally, the protective agreement provides that only "fully authorized representatives" may view materials categorized as competitively sensitive confidential, and that fully authorized representatives include only (1) outside

legal counsel or in-house legal counsel actively involved in this proceeding, (2) paralegals and other employees associated with the counsel described above, and (3) outside experts or employees retained for purposes of this proceeding who are not involved in decision-making or advising by or on behalf of any entity concerning any aspect of competitive retail electric service (CRES) or of competitive wholesale electric procurements.

IGS asserts that, because FirstEnergy's proposed protective agreement allows only fully authorized representatives to access information categorized as competitively sensitive information, internal IGS employees would be prohibited from viewing that information in order to testify in this proceeding, with the exception of IGS' counsel or a retained outside expert. IGS asserts that this is unreasonable as it would cause IGS to duplicate its efforts and bear substantial unnecessary cost, as it already has a qualified internal expert. IGS also points out that, but for FirstEnergy's choice to request a power purchase agreement as part of its application, FES' confidential information would not be at issue. Finally, IGS asserts that FirstEnergy has demonstrated no risk that IGS employees will misappropriate FES' confidential information, because IGS does not own large-scale generating assets and FES has declared it is leaving the retail business.

(32) On October 31, 2014, NOPEC and OCC (jointly, Joint Movants) filed a motion to compel discovery from FirstEnergy as well as a memorandum in support. In their motion, Joint Movants represent that FirstEnergy has withheld certain discovery because it has been unwilling to agree to the terms of a reasonable protective agreement. Consequently, Joint Movants request an order compelling FirstEnergy to enter into Joint Movants' proposed protective agreement, which they attached to their motion to compel.

More specifically, Joint Movants contend that FirstEnergy's proposed protective agreement would preclude their meaningful participation in this proceeding, as it would (1) require Joint Movants' counsel to withhold relevant information from their clients and prevent their clients from making informed decisions; and (2) unreasonably restrict

Joint Movants' right to contract with consultants of their choosing as it restricts disclosure of competitively sensitive confidential information to consultants who do not advise on "any aspect" of competitive wholesale or CRES procurements.

Further, Joint Movants assert that their attached proposed protective agreement is reasonable, has been used previously in cases before the Commission, and was used recently in *In re Duke*, 14-841-EL-SSO (*Duke ESP Case*). Joint Movants conclude that the Commission should order FirstEnergy to produce discovery using their proposed protective agreement, as the Commission found in the Duke ESP proceeding that the agreement was "reasonable, consistent with our past cases and precedent, and contains the language needed to sufficiently protect [the utility's] interests."

(33) On November 7, 2014, FirstEnergy filed a memorandum contra IGS' motion to compel, arguing that IGS' motion should be denied. In its memorandum contra, FirstEnergy initially argues that the Commission routinely protects competitively sensitive information, including that of third parties, in order to prevent an unfair competitive advantage. Further, FirstEnergy contends that the Companies' proposed protective agreement will not hinder IGS' ability to participate fully in this proceeding, contrary to IGS' assertions. FirstEnergy asserts that, under the Companies' proposed agreement, IGS' counsel and employees associated with counsel would have full access to the proprietary information, or IGS could retain an outside expert who is not involved in CRES or competitive wholesale procurements. FirstEnergy argues that it is irrelevant that IGS would have to incur expense to retain an outside expert, as that is part of the cost of litigation. Additionally, FirstEnergy asserts that it is irrelevant that IGS does not own large-scale generating assets, as the proprietary data in question is still highly competitively sensitive information.

(34) Additionally, on November 7, 2014, FirstEnergy filed a memorandum contra Joint Movants' motion to compel, arguing that Joint Movants' proposed protective agreement would fail to safeguard FES' competitively sensitive

information. FirstEnergy asserts that its proposed protective agreement follows past practice, including tiers of designations, protection, and access, and will not impede Joint Movants' discovery rights.

FirstEnergy elaborates that its protective agreement will not restrict NOPEC's ability to participate in this proceeding. Initially, FirstEnergy asserts that NOPEC is both a customer of FES and is closely affiliated with a competitor of FES, NOPEC, Inc., as they share a president and executive director. Consequently, FirstEnergy asserts that NOPEC lacks non-competitive status. FirstEnergy further claims that NOPEC's counsel would have full access to the proprietary data, as would any outside expert retained by NOPEC so long as that expert does not provide advice to other CRES providers or participate in wholesale power procurements. To its memorandum contra, FirstEnergy attached the affidavit of Trent Smith, Vice President of Sales and Marketing for FES, asserting that FES has never revealed competitively sensitive pricing structure, strategies, or objectives to NOPEC and that NOPEC would have a competitive advantage if it were privy to such information.

Next, FirstEnergy addresses OCC's arguments and similarly argues that its proposed protective agreement will not restrict OCC's ability to participate in the proceeding. Initially, FirstEnergy notes that, to the extent OCC is not a competitor of FES, OCC's execution of the proposed protective agreement should not preclude OCC's governing board from accessing the proprietary data, assuming the board executes non-disclosure certificates. FirstEnergy also argues that it agreed to three substantive additions to its proposed protective agreement at OCC's request. Additionally, FirstEnergy notes that OCC has executed previously a tiered protective agreement in *In re AEP Ohio*, Case No. 11-346-EL-SSO.

FirstEnergy also addresses Joint Movants' assertion that the protective agreement will unreasonably restrict the ability to secure an outside expert by arguing that Joint Movants have not alleged they have actually been prevented from using an expert of their choice and have not suggested modifications to this provision in the proposed protective agreement.

Finally, FirstEnergy contends that the Joint Movants' attached protective agreement proposal, recently used in the *Duke ESP Case*, is inappropriate in this proceeding, as the *Duke ESP Case* did not involve highly competitively sensitive information belonging to a third party, such as the FES' proprietary data at issue in this case.

(35) On November 14, 2014, NOPEC and OCC filed a joint motion to strike the affidavit of Trent Smith on the basis that it presents opinion and not facts. Thereafter, on November 21, 2014, FirstEnergy filed a motion to strike the joint motion to strike, arguing that there is no prohibition against an affidavit containing an opinion, and that the joint motion to strike is really an improper reply in substance. The attorney examiner does not rely on this affidavit in ruling upon the motion to compel; accordingly, the motions to strike are moot and should be denied.

(36) The attorney examiner finds that the motions to compel should be denied. In addressing these motions, the examiner must balance the Companies' need to protect highly competitive sensitive information owned by an affiliate with the intervenors' right to participate effectively in this proceeding. The attorney examiner finds that FirstEnergy should not be compelled to use the protective agreement proffered by Joint Movants, as this proceeding involves highly competitive sensitive information belonging to FirstEnergy's competitive affiliate. Further, the attorney examiner notes that the issues presented in the motions to compel differ substantially from the issues in the *Duke ESP Case*, where Duke sought to preclude the use of confidential information in subsequent proceedings. The attorney examiner finds that the protective agreement proffered by the Companies does not unduly burden the intervenors' right to participate in the proceeding. Although the protective agreement limits the individuals employed by intervenors who can access the most restricted information, such information can be reviewed by intervenors' counsel and by experts who are not directly involved in competing against FES. Consequently, the attorney examiner finds that FirstEnergy shall be permitted to use its proposed protective agreement, with one modification. While the attorney

examiner finds that the tiered approach to protect competitively sensitive information is appropriate in this situation, the attorney examiner finds that FirstEnergy's restriction on outside experts or employees contained in the definition for "fully authorized representative" is overly restrictive.

The third section of the definition for fully authorized representative in the copy of FirstEnergy's proposed protective agreement provided by IGS provides covers "[a]n 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." The attorney examiner finds that this provision shall be modified to cover "[a]n 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 load-serving entity within the PJM Interconnection LLC or Midcontinent Independent System Operator, Inc. (MISO), footprint concerning any aspect of competitive retail electric service or of competitive wholesale electric procurements." The attorney examiner finds that this modification will expand the pool of outside experts available to intervenors who may qualify as fully authorized representatives and view competitively sensitive information, while affording FES appropriate protection of its competitively sensitive information.

It is, therefore,

ORDERED, That the motions for admission pro hac vice filed by Garret Stone, Owen Kopon, Michael Lavanga, Madeline Fleisher, Jeffrey Mayes, Tony Mendoza, Michael Soules, Shannon Fisk, and Derrick Price Williamson are granted. It is, further,

ORDERED, That the motions to intervene filed by OEG, IEU-Ohio, AEP Ohio, OPAE, OCC, Sierra Club, Direct Energy, IGS, Kroger, EPO, OHA, OMAEG, Nucor, CMSD, MSC, AICUO, Wal-Mart, Cleveland, Citizens Coalition, Dynergy, Environmental Groups, NOAC, Individual Communities, IBEW 234, COSE, MAREC, NOPEC, ELPC, NextEra, Akron, OSC, Market Monitor, OAEE, Wholesale Suppliers, RESA, EnerNOC, Power4Schools, Exelon, and Wind Farms are granted as set forth herein. It is, further,

ORDERED, That the procedural schedule set forth in Finding (23) be observed by the parties. It is, further,

ORDERED, That the motion for protective order filed by FirstEnergy is granted as set forth in Finding (28). It is, further,

ORDERED, That, as set forth in Findings (28) and (29) the Commission's docketing division maintain, under seal, the information in categories (2) and (3), including Attachments JJL-1, JJL-2, and JJL-3 to the testimony of Jason Lisowski, portions of testimony and attachments of Judah Rose, and portions of workpapers of Jason Lisowski, Judah Rose, and Steven Strah, which were filed under seal in this docket on August 4, 2014, for a period of 60 months. It is, further,

ORDERED, That, as set forth in Findings (28) and (29), the Commission's docketing division maintain, under seal, the information in Category (1), including portions of attachment GLC-1 to the testimony of Gavin Cunningham, which was filed under seal in this docket on August 4, 2014, until otherwise ordered by the Commission. It is further,

ORDERED, That the motions to strike filed by NOPEC, OCC, and First Energy are denied. It is, further,

ORDERED, That the motions to compel filed by IGS, OCC, and NOPEC are denied as set forth in Finding (36). It is further,

ORDERED, That FirstEnergy shall modify its protective agreement as set forth in Finding (36). It is, further,

ORDERED, That a copy of this Entry be served upon all parties of record.

THE PUBLIC UTILITIES COMMISSION OF OHIO

s/Mandy W. Chiles
By: Mandy Willey Chiles
Attorney Examiner

SEF/sc

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Case No(s). 14-1297-EL-SSO

Summary: Attorney Examiner Entry ruling on motions to intervene, motions for admission pro hac vice, motion to amend the procedural schedule, motion for a protective order, and motions to compel. - electronically filed by Sandra Coffey on behalf of Mandy Willey Chiles, Attorney Examiner, Public Utilities Commission of Ohio

Summary: Request INTERLOCUTORY APPEAL
AND
APPLICATION FOR REVIEW
BY
THE OFFICE OF THE OHIO CONSUMERS' COUNSEL
AND
THE NORTHEAST OHIO PUBLIC ENERGY COUNCIL electronically filed by Ms. Deb J. Bingham on behalf of Sauer, Larry S.