

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Application of Ohio)	
Edison Company, The Cleveland Electric)	
Illuminating Company and the Toledo)	Case No. 14-1297-EL-SSO
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.		

**OHIO POWER COMPANY’S MEMORANDUM CONTRA
THE OFFICE OF THE OHIO CONSUMERS’ COUNSEL AND
THE NORTHEAST OHIO PUBLIC ENERGY COUNCIL’S
REQUEST FOR INTERLOCUTORY APPEAL AND APPLICATION FOR REVIEW**

I. Introduction

AEP Ohio offers its opposition to the Joint Movants request for certification of an interlocutory in an attempt to offer a voice of reason in an environment of increasing discovery disputes and request for Commission-ordered confidentiality agreements between parties. The Office of the Ohio Consumers’ Counsel (“OCC”) and the Northeast Ohio Public Energy Council (“NOPEC”) (collectively “Joint Movants”), filed a request for certification of a denial of their request to mandate a specific protective agreement for use with the Applicant in this case and disagreed with the Applicant’s attempts to label and treat competitively sensitive material with a more rigorous level of confidentiality.

Seeking Commission adjudication of discovery issues should be a matter of last resort and not a convenient opportunity to erode away at existing workable agreements negotiated between parties to a specific case. Joint Movants should not seek to take disputes with one party

based on distinct facts and interactions with one company and then declare a Commission ordered standard for all confidentiality agreements before the Commission.

II. Argument: The Issues sought for certification to the Commission are not new or novel questions of law or policy and the ruling in this case did not violate precedent

Parties with confidential and sensitive information have the right to enter into agreements ensuring the protection of that information and recognizing their experiences with those parties. Those protections include the appropriate labeling of such information to assist in the appropriate treatment of such information tied to that particular proceeding under review. The different levels of confidentiality that appear to be an issue in this particular case have become more important in recent years recognizing the new competitive nature of environment of Ohio's electric industry. In short, these are not your grandfather's regulatory proceedings anymore, and the protection of the competitively sensitive information discussed should be a priority for the Commission as it seeks to foster a level playing field.

The Commission should deny the Joint Movants request for certification of the appeal to the Commission. The issues do not involve a new question of law or policy and does not depart from past precedent. The issue deals with weighing of factors between parties in this case. The filing improperly seeks to take this specific discovery dispute (and past issues with other parties in other cases) and extrapolate it to a Commission rule or form agreement. The Commission should decline this request and encourage parties to work cooperatively in their cases balancing the importance of keeping competitively sensitive information protected with the opportunity to review the information as needed for that particular proceeding. At the end of the day a healthy respect, including the importance of protecting competitively sensitive information, is the duty for all sides. Attempts to bootstrap clauses or language from other distinct cases — without the

full context of the other case including the other provisions within that separate agreement -- undermines the cooperative nature needed between parties to a case and should not be encouraged by entertaining the request in this proceeding.

A. Past Commission Proceedings Support the Utilization of Tiers of Confidential Information

If the Commission decides to use past discovery issues related to other cases as some guidance in this case it should bear in mind that some of the past examples discussed by the Joint Movants were not portrayed in their full light. For example, the Applicant in this case incorporates the AEP Ohio agreements from its recent ESP proceedings to show industry practice. Joint Movants dismiss the AEP Ohio examples as non-applicable because the Commission did not approve the clauses within the AEP Ohio agreement only found the information provided in the case was protected. It appears that the Joint Movants miss the point of the Applicant's incorporation of the AEP Ohio agreement. As indicated by the Applicant, the AEP Ohio agreement signed and used by parties in that ESP proceeding had different tiers of confidentiality. The parties signed and participated in the hearing operating with this level of distinction. Despite a very lengthy and difficult proceeding involving extensive discovery, there were no Commission elevated discovery disputes arguing over terms or clauses in those agreements. In fact the level of public disagreement about the merits between Intervenors and AEP Ohio reached an unprecedented level in the public domain, but the parties respected the protective agreement and the need for tiers of confidentiality and duties tied to the different levels.

The citation to an old AEP Ohio case in 2004 does not support the Joint Movants position that the Commission should deny a differentiation in types of confidential information. (JM

Interlocutory Appeal @ 7.) First, even though Joint Movants use this case to assert that AEP Ohio was compelled to provide information in the past it is not analogous to this case. In that case AEP Ohio pointed out its position that OCC had been seeking to stall the proceeding and use the review of confidential information as an opportunity for delay. As the Commission summarized the arguments it pointed out AEP's argument that OCC had time to review the documentation in AEP's offices and that OCC had not attempted to complete such a review in a timely manner. Second, the competitive nature of the Ohio electric industry was in its infancy at that time. AEP Ohio rates were still under close oversight by the Commission and the low rates translated into little to no shopping so competitive issues were not as prevalent. Fast forward to today where the entire regulatory scheme has changed and the Commission has transitioned the state into a more competitive model.

Confidentiality issues today carry a much more significant importance in cases involving three to four times the number of Intervenors in some cases with many of these intervenors representing market competitors. Finally, a review of the Commission's decision back in 2004 actually created a tiered system of confidentiality. The Commission called for different treatment of the critical infrastructure information as compared to the other data in the case. In a post-9-11 world, security and safety were at the forefront and there was a conscious effort to recognize the need to protect that information. The Commission has protected critical infrastructure data to date and must also recognize the heightened nature of competitive information in this new environment. Commission oversight dictates protection of the market data. The Commission should continue its past practice of recognizing tiers of confidential information whether that is for safety or protection of the competitive market.

B. The use of Joint Defense Agreements Elevates the Need for Clearly Identified Confidential Information and Rules for Treatment

The prevalence of Intervenor participants in cases under a joint defense agreement also raises the need for tiers of confidentiality. Regulatory proceedings have been known to produce strange bedfellows. A consistent labeling of confidential information and a heightened level of understanding of the differences in the levels of information assists public agencies and not-for-profit Intervenor participants properly treat and discuss information with joint defense partners that may be full competitive suppliers. Parties should not be encouraged to intervene in cases for the collateral benefit of obtaining competitively sensitive information in case discussions with other parties. The clear marking of the different levels of information and the limitation on access shows the importance of the data and serves as a reminder to counsel serving those intervenors to manage that information properly and ensure its agents are not improperly disclosing it in violation of the agreement. In some cases, the harm done by the release of competitively sensitive data into the public domain could be irreparable.

C. An Ample Right to Discovery does not mean Unfettered Access

It should also be pointed out that an ample right to discovery is not the same as unfettered access to any and all information. Discovery is a balancing act tied to providing parties access to the necessary information in the case at hand to properly participate in the issues in the case and protecting the competitive interests of the party providing the information. Protective agreements that recognize the increased confidential nature of information tied to the competitive industry provide that balance. The information is provided to Intervenor participants, but under guidelines that ensure the information is tied to the case and decreases the risk that the information will be used for a competitive advantage. Unfettered access to all information

would not properly protect the information and not give a producing party any assurance that the heightened nature of the information is being respected and limited to the relevance of the purpose of the Commission's review in a docketed case. The Commission should deny the request for certification of the interlocutory appeal because the Joint Movants have ample access to discovery without unfettered access.

III. Conclusion

AEP Ohio appreciates the opportunity to provide its point of view and respectfully requests denial of Joint Movants request for certification of the issue presented for an interlocutory appeal.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I certify that the foregoing *Ohio Power Company's Memorandum Contra The Office of the Ohio Consumers' Counsel and The Northeast Ohio Public Energy Council's Request for Interlocutory Appeal and Application for Review* was served on this 15th day of December, 2014 via email on the following parties:

/s/ Matthew J. Satterwhite
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Summary: Memorandum Contra electronically filed by Mr. Matthew J Satterwhite on behalf of Ohio Power Company