

BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of The)
Cleveland Electric Illuminating Company,)
Ohio Edison Company, and The Toledo) Case No. 12-2190-EL-POR
Edison Company for Approval of Their) Case No. 12-2191-EL-POR
Energy Efficiency and Peak Demand) Case No. 12-2192-EL-POR
Reduction Program Plans for 2013 through)
2015.)

ENTRY

The attorney examiner finds:

- (1) On March 25, 2009, the Commission adopted a stipulation in the first electric security plan case for the Cleveland Electric Illuminating Company, Ohio Edison Company, and the Toledo Edison Company (collectively, the Companies or FirstEnergy). *See In re Ohio Edison Co., Cleveland Elec. Illum. Co, and Toledo Edison Co.*, Case Nos. 08-935-EL-SSO, et al. (*ESP I Case*), Second Opinion and Order (Mar. 25, 2009). The stipulation, inter alia, established an energy efficiency collaborative (the Collaborative) through which FirstEnergy and signatory parties to the stipulation agreed to work to develop energy efficiency and demand-side management programs. *See ESP I Case*, Second Opinion and Order (Mar. 25, 2009) at 13-14, 18; Stipulation and Recommendation (Feb. 19, 2009) at 23-30.
- (2) On July 31, 2012, in the above-captioned case, the Companies filed an application for approval of the Companies' energy efficiency and peak demand reduction program portfolio plans for 2013 through 2015 pursuant to the Revised Code, Ohio Adm.Code 4901:1-39-04, 4901:1-39-05, 4901:1-39-06, and 4901:1-39-07, and the Commission's February 29, 2012 Entry in Case No. 12-814-EL-UNC. On March 20, 2013, the Commission issued an Opinion and Order approving the portfolio plans with modifications.
- (3) Thereafter, the Environmental Law and Policy Center and the Ohio Environmental Council (jointly, the Environmental Groups) filed a motion requesting a determination that materials provided as part of the Collaborative process are not

confidential (motion for a determination), as well as a request for an expedited ruling. Subsequently, the Environmental Groups filed a renewed motion for a determination.

- (4) In its motion for a determination, the Environmental Groups assert that, as part of the Collaborative process, the Companies have shared with stakeholders information about the Companies' energy efficiency programs and activities. The Environmental Groups contend that the Companies, without justification, have claimed that this information shared with the Collaborative is confidential and may not be shared with the public. The Environmental Groups assert that it is crucial that members of the Collaborative be able to share this information with the public in order to develop good programs, increase public engagement, and ensure prudence. Consequently, the Environmental Groups request that the Commission determine that materials shared within the Collaborative are not subject to protection and may be shared with the public. To its motion for a determination, the Environmental Groups attached a redacted example of Collaborative materials, Attachment A, and simultaneously filed those materials under seal accompanied by a motion for protective order.
- (5) On July 22, 2014, FirstEnergy filed a memorandum contra the Environmental Groups' motion for a determination. In its memorandum contra, FirstEnergy asserts that the Environmental Groups' requested remedy is contrary to Commission policy, statutory and case law, and the principles underlying the Collaborative process, and should be rejected.
- (6) Initially, the Companies note that they do not consider most of the information shared with members of the Collaborative to be trade secrets or confidential, but to be business information that the Companies often choose not to disclose to the general public. The Companies note that this information is often preliminary and based upon estimates and projections. The Companies next argue that the Environmental Groups are requesting a blanket advisory opinion with no evidentiary record on which the Commission could base such a remedy, which is against the Commission's precedent, citing *In re WorldCom v. Dayton*, Case No. 03-324-AU-PWC, Entry on Rehearing (Aug. 19, 2003). Further, the

Companies contend that, if the Environmental Groups' motion is granted, it will quell robust discussion within the Collaborative, as any participant in the Collaborative process will be able to freely disclose any information provided during the Collaborative meetings, requiring the Companies to rethink the level of details provided through the Collaborative process.

- (7) Thereafter, on September 24, 2014, FirstEnergy filed an application to amend its energy efficiency and peak demand reduction program portfolio plans for 2015 through 2016, pursuant to Sections 6(A) and 6(B) of 2014 Sub.S.B. 310 (S.B. 310). Comments and reply comments on the application were filed by multiple intervenors, including the Environmental Groups. The Commission approved the Companies' application, with modifications, on November 20, 2014. Thereafter, several parties filed applications for rehearing, including the Environmental Groups. On January 14, 2015, the Commission granted the applications for rehearing for the purpose of further consideration of the matters therein.
- (8) The attorney examiner finds that the Environmental Groups' motion for a determination should be denied. Initially, the attorney examiner finds that a categorical determination of the confidentiality of documents that have not been brought before the Commission for its examination regarding confidentiality is not possible under Ohio law. Determinations must be made on a document-by-document basis. *See State ex rel. Plain Dealer v. Ohio Dept. of Ins.*, 80 Ohio St.3d 513, 524, 687 N.E.2d 661 (1997). Additionally, the attorney examiner notes that, during the pendency of the amendment proceeding, the Environmental Groups were free to challenge any claims for confidentiality made by the Companies in order to receive a Commission determination on any confidentiality issues. Moreover, the attorney examiner stresses that, with respect to any document the Companies claimed to be confidential, nothing would have precluded any party from using such a document for any relevant purpose during the proceeding, in accordance with established Commission procedures for handling confidential materials. Consequently, the attorney examiner finds that the Environmental Groups' motion for a determination should be denied.

- (9) Next, the attorney examiner turns to the Environmental Groups' motion for protective order regarding the example of Collaborative materials filed under seal, Attachment A. In the motion for protective order, the Environmental Groups argue that FirstEnergy has claimed that all information shared in the Collaborative, including Attachment A, is confidential. The Environmental Groups note their disagreement with this claim, but assert that they have filed it under seal pending a Commission ruling.
- (10) 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 R.C. Title 49. R.C. 149.43 specifies that the term "public records" excludes information which, under state or federal law, may not be released. The Ohio Supreme Court 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).
- (11) 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."
- (12) 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).
- (13) The attorney examiner has reviewed the information included in the Environmental Groups' motion for protective order. 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 Ohio Supreme Court, the attorney examiner finds that the information before the Commission contained in Attachment A does not contain trade secret information. *See Plain Dealer*, 80 Ohio St.3d at 524-525, 687 N.E.2d 661.

- (14) In conclusion, the information consisting of Attachment A has not been shown to contain trade secrets and the attorney examiner finds that the Environmental Groups' motion for protective order should be denied. The Commission's Docketing Division should move this attachment, as filed under seal on July 16, 2014, to the public file, no sooner than 10 days after the date of this Entry, unless otherwise ordered by the Commission.

It is, therefore,

ORDERED, That the Environmental Groups' motion requesting a determination that Collaborative materials are not confidential is denied. It is, further,

ORDERED, That the Environmental Groups' motion for protective order be denied. It is, further,

ORDERED, That the Commission's Docketing Division move Attachment A to the public file as directed in Finding (14). It is, further,

ORDERED, That copies of this Entry be served upon the parties and counsel of record.

THE PUBLIC UTILITIES COMMISSION OF OHIO

s/Mandy W. Chiles

By: Mandy Willey Chiles
Attorney Examiner

JRJ/sc

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in

Case No(s). 12-2190-EL-POR, 12-2191-EL-POR, 12-2192-EL-POR

Summary: Attorney Examiner Entry denying the Environmental Groups' motion for a determination and motion for a protective order. - electronically filed by Sandra Coffey on behalf of Mandy Willey Chiles, Attorney Examiner, Public Utilities Commission of Ohio