**BEFORE**
**THE PUBLIC UTILITIES COMMISSION OF OHIO**

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| **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** |

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**OHIO EDISON COMPANY, THE CLEVELAND ELECTRIC ILLUMINATING COMPANY, AND THE TOLEDO EDISON COMPANY'S MOTION TO RENEW AND ENFORCE PROTECTIVE ORDER**

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Pursuant to Rule 4901-1-24(A)(7), O.A.C., Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company (the "Companies"), hereby move to renew and enforce a protective order to prevent the public disclosure of certain confidential information that appears in the confidential version of the Third Supplemental Testimony of Sierra Club witness Tyler Comings and was derived from confidential and proprietary business information that belongs to FirstEnergy Solutions Corp. ("FES"). Sierra Club has threatened to insert this currently protected confidential and proprietary material into the public domain.

The specific protected material that Sierra Club has threatened to disclose publicly, and for which the Companies seek continued protection, includes the redacted portions of the following pages from the confidential version of Mr. Comings' Third Supplemental Testimony:

- Page 1, line 24
- Page 2, lines 6-8
- Page 3, line 13
- Page 4, Competitively Sensitive Confidential Figure 1: Valuation of the Proposed Transaction by the Companies and FES (Cumulative NPV, $2015 mil)
- Page 5, lines 18, 22
- Page 5, footnote 6

- Page 6, lines 1-3, 6, 10-11, 22, 24
- Page 7, lines 10-15, 17

As demonstrated in the attached Memorandum in Support, the Commission should grant the Companies' Motion to Renew and Enforce Protective Order and prohibit Sierra Club from releasing and publicly disseminating this currently protected confidential and proprietary information.

Date: April 22, 2016

Respectfully submitted,

*/s/ David A. Kutik*

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

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# OHIO EDISON COMPANY, THE CLEVELAND ELECTRIC ILLUMINATING COMPANY, AND THE TOLEDO EDISON COMPANY MEMORANDUM IN SUPPORT OF MOTION TO RENEW AND ENFORCE PROTECTIVE ORDER

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## I. INTRODUCTION

Under the alleged auspices of a protective agreement between Sierra Club and the Companies, Sierra Club has threatened to disclose certain confidential and proprietary material contained in the Third Supplemental Testimony of Sierra Club witness Tyler Comings. The material at issue involves a certain projection regarding the alleged cost of Rider RRS over the term of Stipulated ESP IV. This projection was generated using inputted confidential and proprietary cost and revenue projections that FES provided to Sierra Club in response to a subpoena request. Disclosure of this material could economically harm FES by placing FES at a competitive disadvantage. The material at issue was filed under seal. Sierra Club subsequently moved to protect it. The Commission, in its recent Opinion and Order, granted the motion, finding the information merited trade secret protection. Indeed, the Commission observed that disclosing Mr. Comings' projection would lead, by derivation, to the disclosure of FES's confidential business information. Apparently frustrated with the Commission's decision, Sierra Club has now decided to resort to self-help and has threatened to insert this already protected information into the public domain.

Because the material at issue has already been granted protection by the Commission, Sierra Club's remedy, if any, is to seek appropriate relief before the Commission. Further, and in any event, the material contained in Mr. Comings' Third Supplemental Testimony warrants continued trade secret protection under Ohio law. As demonstrated below, the Commission should grant the Companies' Motion to Renew and Enforce Protective Order and prohibit Sierra Club from releasing and publicly disseminating this currently protected confidential and proprietary information.

## II. RELEVANT FACTS AND PROCEDURAL HISTORY

On August 4, 2014, the Companies filed their Application for their fourth electric security plan ("ESP"), which, as modified by certain stipulations ("Stipulated ESP IV"), was recently approved as modified by the Commission in its Opinion and Order (the "March 31 Order"). The Companies also filed supporting testimony that included certain highly competitively sensitive revenue and cost forecasting information that belonged to non-party FES. This proprietary information related to certain generating assets owned by FES, the W.H. Sammis Plant ("Sammis") and the Davis-Besse Nuclear Power Station ("Davis-Besse").[1] The Companies moved to protect this information simultaneous with the filing of their ESP application. In their Motion for Protective Order, the Companies specifically noted the competitively sensitive nature of the FES materials contained in the testimony of Company witness Lisowski and the attendant need for Commission protection:

> This information was provided to the Companies pursuant to a nondisclosure agreement solely for purposes of the proposed transaction underlying the Companies' Economic Stability Program. FES considers and has treated the information as a trade secret. In the ordinary course of business of FES, this information is treated as proprietary and confidential by FES employees. It is not disclosed to anyone without proper safeguards. Mr. Lisowski's attachments and workpapers include forecasted revenue, cost and revenue requirements data for specific generating plants. In part, the information reflects the output of proprietary modeling software. This information would be of great value to FES's competitors and would competitively disadvantage FES if publicly disclosed.

Motion for Protective Order of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company at 6 (Aug. 4, 2014).

[1] FES's OVEC Entitlement is not germane to the instant dispute.

On or about September 30, 2014, the Companies and Sierra Club entered into a negotiated protective agreement (the "Protective Agreement"). (A true and accurate copy of the Protective Agreement is attached as Exhibit A.) As stated in the Protective Agreement:

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

Protective Agreement, Par. 1 (emphasis added).

The Protective Agreement provides two-tiers of protection. The first tier is for materials deemed "Confidential." Such materials were treated by the Companies or other third parties as "sensitive or proprietary, which are not available to the public, and which, if disclosed freely, would subject the Companies or third parties to risk of competitive disadvantage or other business injury, and may include materials meeting the definition of 'trade secret' under Ohio law." *Id.* at Par. 3.A. The second tier is for materials deemed "Competitively Sensitive Confidential." Such materials "contain highly proprietary or competitively-sensitive information, that, if disclosed to suppliers, competitors or customers, may damage the producing party's competitive position or the competitive position of the third party which created the documents or information." *Id.* at Par. 3.B. Upon execution of the Protective Agreement, the Companies duly provided Sierra Club with, among other proprietary materials, the FES revenue and cost projections contained in Mr. Lisowski's unredacted testimony and workpapers. These materials were deemed Competitively Sensitive Confidential.

In addition, the Protective Agreement provides the Companies with a means to prevent a party in receipt of Confidential or Competitively Sensitive Confidential materials from publicly

disclosing such information by filing a motion for protective order with the Commission. At Paragraph 11, the Protective Agreement states:

> If Receiving Party desires to include, utilize, refer to, or copy any Protected Materials in such a manner, other than in a manner provided for herein, that might require disclosure of such material, then Receiving Party must first give notice…to the Companies, specifically identifying each of the Protected Materials that could be disclosed in the public domain. The Companies will have five (5) business days after service of Receiving Party's notice to file, with an administrative agency of competent jurisdiction or court of competent jurisdiction, a motion and affidavits with respect to each of the identified Protected Materials demonstrating the reasons for maintaining the confidentiality of the Protected Materials.

On December 1, 2014, the Attorney Examiner issued an Entry granting the Companies' Motion for Protective Order and approving, with a slight modification (of no relevance here), the Protective Agreement. In granting the Companies' motion, the Entry specifically addressed the "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." Entry at 10 (Dec. 1, 2014) ("December 1 Entry"). The Attorney Examiner held that the FES information constituted a trade secret under Ohio law pursuant to Section 1333.61(D) of the Ohio Revised Code and the six-factor test from *State ex rel. Plain Dealer v. Ohio Dept. of Ins.*, 80 Ohio St.3d 513, 524-525 (1997). The Attorney Examiner granted 60 months of protection to the confidential and proprietary FES business information contained in the direct testimony and workpapers of Mr. Lisowski, with the opportunity for continued protection beyond 60 months. December 1 Entry at 12. In approving the two-tiered structure of the Protective Agreement, which had been challenged by various intervenors, the Attorney Examiner stressed the "need to protect highly competitively sensitive information owned by an affiliate." December 1 Entry at 16.

Prior to the issuance of the December 1 Entry, on November 25, 2014, Sierra Club moved for a subpoena against FES, seeking, among other things, additional cost and revenue projections and forecasts. *See* Sierra Club's Motion for a Subpoena Duces Tecum Directed to FirstEnergy Solutions Corp. at 2-3 (Nov. 25, 2014). As a reasonable compromise regarding the subpoena, FES provided additional proprietary cost and revenue projections regarding Sammis and Davis-Besse to Sierra Club (the "FES Proprietary Data"). On or about December 8, 2014, in an email exchange between counsel for Sierra Club and counsel for FES, Sierra Club agreed that it would treat the FES Proprietary Data as Competitively Sensitive Confidential according to the terms of the Protective Agreement. (A true and accurate copy of that email is attached as Exhibit B.) On or about December 9, 2014, counsel for FES emailed the FES Proprietary Data, in the form of spread sheets labeled Competitively Sensitive Confidential, to counsel for Sierra Club. (True and accurate copies of those emails are attached as Exhibit C.)

On December 30, 2015, Sierra Club filed under seal the confidential version of the Third Supplemental Testimony of Tyler Comings, which was entered into evidence at hearing as Sierra Club Exhibit 96C. Mr. Comings used the FES Proprietary Data as inputs in his Third Supplemental Testimony to arrive at a certain projection regarding the alleged cost of Rider RRS over the term of Stipulated ESP IV. *See* Sierra Club Ex. 96C at 2,4,6. On the same day, Sierra Club filed a motion for protective order regarding the confidential information contained in the confidential version of Mr. Comings' Third Supplemental Testimony. *See* Motion for Protective Order by Sierra Club (December 30, 2015).

On March 31, 2016, the Commission issued its Opinion and Order in this proceeding. In the March 31 Order, the Commission granted all pending motions for protective order, including that of Sierra Club. *See* March 31 Order at 37-38. The Commission found that the confidential

and proprietary information at issue in the parties' supplemental testimony and post-hearing briefing, including presumably the FES Proprietary Data and information derived therefrom, warranted trade secret protection pursuant to Section 1333.61(D) and *Plain Dealer*. *See id.* at 38. Regarding the projection derived from the FES Proprietary Data contained in Mr. Comings' Third Supplemental Testimony, the Commission found:

> Sierra Club witness Comings also produced a projection of net charges or credits under Rider RRS (Sierra Club Ex. 96C at 2, 6). *This projection is based upon confidential information obtained from FES in discovery*, subject to the reduction in the length of Rider RRS from 15 years to 8 years and the reduction in the ROE from 11.15 percent to 10.38 percent (Sierra Club Ex. 95 at 3; Sierra Club Ex. 96C at 3). *As this projection is based upon confidential information, it is impossible for us to include this projection in our estimate of the net credit or charges to customers under RRS without confidential information being easily derived from the calculation.*

March 31 Order at 85 (emphasis added).[2]

At the close of business on Friday, April 15, 2016, Sierra Club provided email notification to counsel for the Companies that Sierra Club intended to release unilaterally various portions of the confidential and currently protected version of Mr. Comings' Third Supplemental Testimony into the public domain. (A true and accurate copy of that email is attached as Exhibit D.) Specifically, Sierra Club stated that it intended to disclose publicly the following portions of the currently protected confidential version of Mr. Comings' Third Supplemental Testimony (the "Comings Material"):

- Page 1, line 24
- Page 2, lines 6-8
- Page 3, line 13

[2] The Commission further observed: "However, we will note that, if we had included this projection in the average with the other two projections to develop our estimate, it would not change our decision in this case as there would continue to be a projected net credit to customers over the eight years of Rider RRS (Sierra Club Ex. 96C, Co. Ex. 155 at 11, OCC/NOPEC Ex. 9 at 12)." March 31 Order at 85.

- Page 4, Competitively Sensitive Confidential Figure 1: Valuation of the Proposed Transaction by the Companies and FES (Cumulative NPV, $2015 mil).
- Page 5, lines 18, 22
- Page 5, footnote 6
- Page 6, lines 1-3, 6, 10-11, 22, 24
- Page 7, lines 10-15, 17

The Comings Material all involves and is related to a projection regarding the alleged costs of Rider RRS over the term of Stipulated ESP IV that Mr. Comings generated using the FES Proprietary Data as inputs.

On April 19, 2016, counsel for the Companies responded to the Sierra Club's notification in an email. (A true and accurate copy of that email is attached as Exhibit E.) In that email, counsel for the Companies stated that Sierra Club's threat to disclose publicly the Comings Material was in violation of the March 31 Order. *See id.* The Companies sought further assurance that Sierra Club would desist from going forward with its threat to disclose the Comings Material. No assurance was forthcoming. Accordingly, the Companies have filed the instant motion to renew and enforce a protective order with the Commission to prevent the public disclosure and dissemination of the Comings Material.[3]

## III. LAW AND ARGUMENT

### A. Applicable Ohio Law And Commission Precedent

#### 1. Legal requirements for trade secret status under Ohio law.

Pursuant to Rule 4901-1-24(A)(7), the Commission routinely applies two tests for the determination of trade secret status under Ohio law. First, the Commission relies on Section 1333.61(D) of the Ohio Revised Code. Section 1333.61(D) provides:

[3] Assuming that the terms of the Protective Agreement control, the Companies' motion is timely and should prevent Sierra Club from following through on its threat until there has been a ruling on this motion. Pursuant to Paragraph 11 of the Protective Agreement, the Companies are allotted five business days to file a motion for protective order with "an administrative agency of competent jurisdiction."

> (D) "Trade secret" means information, including the whole or any portion or phase of any scientific or technical information, design, process, procedure, formula, pattern, compilation, program, device, method, technique, or improvement, or any business information or plans, financial information, or listing of names, addresses, or telephone numbers, that satisfies both of the following:
>
> (1) It derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use.
>
> (2) It is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

R.C. 1331.61(D). Further, "The Ohio Uniform Trade Secrets Act, R.C. 1333.61 through 1333.69, is a state law exempting trade secrets from disclosure under R.C. 149.43." *State ex rel. Lucas County Bd. of Comm'rs v. Ohio EPA*, 88 Ohio St.3d 166, 172 (2000).

Second, the Commission relies on the six-factor test set forth in *State ex rel. Plain Dealer v. Ohio Dept. of Ins.*, 80 Ohio St.3d 513, 524-25 (1997). Those six factors are:

> (1) The extent to which the information is known outside the business; (2) the extent to which it is known to those inside the business, i.e., by the employees; (3) the precautions taken by the holder of the trade secret to guard the secrecy of the information; (4) the savings effected and the value to the holder in having the information as against competitors; (5) the amount of effort or money expended in obtaining and developing the information; and (6) the amount of time and expense it would take for others to acquire and duplicate the information.

**2. The Commission regularly affords trade secret status to pricing, cost, and revenue forecasting information.**

The Commission regularly finds that pricing, cost, and revenue projections warrant trade secret protection. *See, e.g., In the Matter of the Application of Columbus Southern Power Company and Ohio Power Company for Authority to Establish a Standard Service Offer Pursuant to Section 4928.143, Revised Code, in the Form of an Electric Security Plan*, Case No. 11-346-EL-SSO, 2011 Ohio PUC LEXIS 920 at *4-5 (Aug. 4, 2011) (granting trade secret

protection to capacity rate projections, details of offerings for energy and capacity, projected sales and load data, and reserve margins through 2029); *In the Matter of the Fuel Adjustment Clause of Columbus Southern Power Company and Ohio Power Company and Related Matters for 2010*, Case No. 10-268-EL-FAC, 2014 Ohio PUC LEXIS 104 at *20-21 (May 14, 2014) (granting trade secret protection to "competitive cost and financial information" related to coal inventories and contracts); *In the Matter of the Application of Duke Energy Ohio, Inc. to Adjust Rider DR-IM and Rider AU for 2010 SmartGrid Costs and Mid-Deployment Review*, Case No. 10-2326-GE-RDR, 2012 Ohio PUC LEXIS 89 at *2-7 (Jan. 25, 2012) (granting protection to growth projections and other forecasting information pursuant to Section 1333.61(D)); *In the Matter of the Application of Ohio Power Company and Columbus Southern Power Company for Authority to Merge and Related Approvals*, Case No. 10-2376-EL-UNC, 2011 Ohio PUC LEXIS 1253 at *9 (Nov. 18, 2011) (granting trade secret protection to, among other things, the volume of customer load related to generation rates as well as other price and cost information pursuant to Section 1333.61(D) and the *Plain Dealer* test); *In the Matter of the Application of Ohio Power Company to Adjust Its Economic Development Rider Rate*, Case No. 14-1329-EL-RDR, 2014 Ohio PUC LEXIS 225 at *4-6 (Sept. 17, 2014) (granting motion for protective order where pricing information contained in special arrangement contracts was proprietary in nature and would "compromise [movants'] business position and ability to compete"); *In the Matter of the Application of Ohio Gas Company for Approval of a Special Arrangement to Provide Firm Gas Transportation Service to Campbell Soup Supply Co. LLC*, Case No. 13-1884-GA-AEC, 2013 Ohio PUC LEXIS 233 at *1-3 (Oct. 23, 2013) (granting motion for a protective order where "public disclosure of…pricing information would impair both parties' business position and ability to compete" pursuant to Section 1333.61(D) and the *Plain Dealer* test).

### B. The Commission Should Prohibit The Public Release Of The Comings Material.

#### 1. The Commission has already ordered that the Comings Material is protected.

As an initial matter, further motion practice and rulings on the Comings Material should be unnecessary. The Commission already determined that the Comings Material is a trade secret. In the March 31 Order, the Commission found:

> 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 in *State ex rel. Plain Dealer v. Ohio Dept of Ins.*, 80 Ohio St.3d 513, 524-525, 687 N.E.2d 661 (1997), we find that the documents filed under seal in this docket contain trade secret information. Their release, therefore, is prohibited under state law. We also find that nondisclosure of this information is not inconsistent with the purposes of Title 49 of the Revised Code…. Accordingly, we find that all pending motions for protective order are reasonable and should be granted.

March 31 Order at 38.

The Protective Agreement between the Companies and Sierra Club does not provide a basis to dispute the confidentiality of the Comings Material now. That agreement was designed to facilitate the discovery of Competitively Sensitive Confidential information, such as the FES Proprietary Data, prior to rulings on trade secret status. As Paragraph 1 of the Protective Agreement states: "The purpose of this Agreement is to permit prompt access to and review of such Protected Materials…*without a prior ruling* by an administrative agency of competent jurisdiction or court of competent jurisdiction regarding whether the information deserves protection." Here, however, such a ruling already has occurred. The Commission - "an administrative agency of competent jurisdiction" - has found that the Comings Material contains trade secrets pursuant to Ohio law. Sierra Club's attempt to seek redress in the Protective

Agreement here misreads the Protective Agreement and ignores the procedural posture of this case.

Rather than challenge the trade secret findings that the Commission made in its March 31 Order, Sierra Club has decided to resort to self-help. Its threat to insert trade secret material subject to Commission protection into the public domain circumvents all proper Commission process and procedure. The Commission thus should grant the Companies' Motion to Renew and Enforce Protective Order on this basis alone.

**2. The Comings Material warrants trade secret protection under Section 1333.61(D) and the six-factor test set forth in *Plain Dealer*.**

In any event, the Comings Material specifically warrants trade secret protection under Section 1333.61(D) and the *Plain Dealer* six-factor test.

**a. The Comings Material warrants trade secret protection under Section 1333.61(D).**

A showing of trade secret status under Section 1333.61(D) requires that the material under consideration: (1) bears independent economic value; and (2) reasonable efforts have been made to maintain its secrecy. *See* R.C. 1333.61(D). The Comings Material readily satisfies both of these requirements.

Independent Economic Value: In its findings related to Mr. Comings' Third Supplemental Testimony, the Commission held: "Th[e Comings'] projection is based upon confidential information obtained from FES in discovery….As this projection is based upon confidential information, it is impossible for us to include this projection in our estimate of the net credit or charges to customers under RRS *without confidential information being easily derived from the calculation*." March 31 Order at 85 (emphasis added). Indeed, such a derivation is primarily a matter of simple division. Because there are only two plants, Sammis and Davis-Besse, and because the nameplate capacity of the Plants is publicly available,

approximately 3,000 MW, the number of megawatts could be divided into the numerical projection in Mr. Comings' testimony to derive the approximate plant-specific profitability of the Plants. *See* Affidavit of Jason Lisowski at ¶6 (April 21, 2016) ("Lisowski Aff.") (attached hereto as Exhibit F). In turn, this information could be used to "back into" underlying assumptions regarding energy, capacity, gas, coal prices, and costs as related to the Plants, which potentially could be extrapolated to the remainder of FES's competitive generation fleet. *See id.* Such information would allow access to FES's own view and perceptions on the profitability of not only the Plants but FES's generation fleet as a whole. *See id.*

Access to such information by FES's competitors would give them a competitive advantage against FES in the marketplace. Such insight into the anticipated revenue and cost structure of FES's generation fleet – and particularly, FES's projections about the natural gas, coal and energy markets – could enable competitors and potential counterparties to approximate, with a fair degree of accuracy, FES's business strategies. *See* Lisowski Aff. at ¶7. For example, a competitor of FES could rely on such confidential business information to understand and approximate FES's retail and wholesale market strategies, thereby placing FES at a competitive disadvantage and economically harming FES. *See id.* Similarly, counterparties in potential fuel contracts would receive an enormous advantage in dealing with FES if they knew what FES thought future fuel prices might be. *See id.* Hence, by any measure, the Comings Material bears independent economic value and meets the first prong of Section 1333.61(D).

Reasonable Efforts to Maintain Secrecy: As noted, the Comings Material has been kept confidential and has not been disclosed publicly. Sierra Club filed the confidential version of Mr. Comings' Third Supplemental Testimony under seal and moved for a protective order

accordingly. In the March 31 Order, the Commission granted all pending motions for protective order including the relevant motion by Sierra Club. *See* March 31 Order at 37-38.

Indeed, FES takes great care to safeguard such confidential and proprietary business information. *See* Lisowski Aff. at ¶8. FES's confidential business information, such as FES's projections about costs and markets, is only accessible outside of FES to entities or persons that have entered into appropriate confidentiality agreements. *See id.* This requirement applies to FES's external auditors as well. *See id.* FES is very careful in its publicly filed financial documents to characterize the data contained therein in such a way so as not to reveal confidential plant-specific information or projections about costs and markets. *See id.* Similarly, confidential business information - like the FES data provided as part of discovery to Sierra Club, including cost and market projections that are part of Mr. Comings' testimony that Sierra Club now seeks to disclose - is sequestered internally within FES and only accessible on a need-to-know basis. *See* Lisowski Aff. at ¶9. It only is disclosed internally to those individuals who participate in strategic decision-making at FES. *See id.* Thus, the second prong of Section 1333.61(D) is met as well.

The Comings Material thus warrants trade secret protection under Section 1333.61(D) and the Commission should prohibit its public disclosure accordingly. *See, e.g., In the Matter of the Application of Duke Energy Ohio*, 2012 Ohio PUC LEXIS 89 at *2-7; *In the Matter of the Application of Ohio Power Company*, 2011 Ohio PUC LEXIS 1253 at *9; *In the Matter of the Application of Ohio Gas Company*, 2013 Ohio PUC LEXIS 233 at *1-3.

**b. The Comings Material warrants trade secret protection under the six-factor test set forth in *Plain Dealer*.**

The Comings Material also warrants trade secret protection because it satisfies the six factors set forth in *Plain Dealer*.

Regarding the first factor, the extent to which the information is known outside the business, no untoward disclosure of the Comings Material or, by derivation the FES Proprietary Data, has occurred. As noted, the Comings Material has been filed and kept under seal and granted protection by the Commission in the March 31 Order. *See* March 31 Order at 37-38. Further, FES only discloses its confidential business information, such as cost and revenue projections, with outside entities or persons that have executed confidentiality agreements with FES. *See* Lisowski Aff. at ¶8.

Regarding the second factor, the extent to which the information is known to those inside the business, *i.e.*, by the employees, FES internally sequesters confidential business information like the FES cost and revenue projections provided as part of discovery to Sierra Club. *See* Lisowski Aff. at ¶9. Further, such information is only accessible to FES employees on a need-to-know basis for those employees who participate in strategic decision-making at FES. *See id.*

Regarding the third factor, the precautions taken by the holder of the trade secret to guard the secrecy of the information, FES treats its proprietary and confidential business information with great care. It is only available to outside entities or persons who have entered into a confidentiality agreement with FES. *See id.* at ¶8. Internally, it is sequestered and only provided to employees on a need-to-know basis. *See id.* at ¶9.

Regarding the fourth factor, the savings effected and the value to the holder in having the information as against competitors, FES would be placed at a competitive disadvantage if the Comings Material and, by derivation the FES Proprietary Data, were inserted into the public domain. *See id.* at ¶7. As noted, such disclosure would provide insight into the anticipated revenue and cost structure of FES's generation fleet that could enable competitors and counterparties alike to approximate and glean access to FES's business strategies. *See id.*

Further, publicly disclosing the Comings Material and, by derivation, the FES Proprietary Data potentially would provide a competitor with access to FES's assumptions regarding energy, capacity, gas, coal prices, and costs as related to the Plants. *See id.* These assumptions in turn could be extrapolated to the remainder of FES's generation fleet and provide a window into FES's perceptions regarding the profitability thereof. *See id.* Hence, such information is very valuable to FES as against its competitors. Public disclosure of FES's projections of its costs and market prices would also put FES at a competitive disadvantage with competitors in wholesale and retail markets and with counterparties in fuel contracts. *See id.*

Regarding factor five, the amount of effort or money expended in obtaining and developing the information, and factor six, the amount of time and expense it would take for others to acquire and duplicate the information, FES's cost and revenue projections reflect significant investment in proprietary computer modeling software and human resources. *See id.* at ¶10. Given the proprietary nature of such modeling, it would be very difficult - and would involve a great deal of time and expense - for a competitor or counterparty of FES to produce comparable revenue and cost projections of the type provided to Sierra Club in discovery, if it were possible at all. *See id.*

Hence, the Comings Material satisfies the six-factor test set forth in *Plain Dealer*, thereby warranting trade secret protection. *See, e.g., In the Matter of the Application of Ohio Power Company*, 2011 Ohio PUC LEXIS 1253 at *9; *In the Matter of the Application of Ohio Gas Company*, 2013 Ohio PUC LEXIS 233 at *1-3.

## IV. CONCLUSION

For the foregoing reasons, the Companies respectfully request that the Commission grant the Companies' Motion to Renew and Enforce Protective Order.

Date: April 22, 2016

Respectfully submitted,

*/s/ David A. Kutik*

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

## CERTIFICATE OF SERVICE

I hereby certify that the foregoing Motion to Renew and Enforce Protective Order was filed electronically through the Docketing Information System of the Public Utilities Commission of Ohio on this 22nd day of April, 2016. The PUCO's e-filing system will electronically serve notice of the filing of this document on counsel for all parties. Further, a courtesy copy has been served upon the parties via electronic mail.

*/s/ David A. Kutik*
David A. Kutik

# EXHIBIT A

**BEFORE**
**THE PUBLIC UTILITIES COMMISSION OF OHIO**

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| In the Matter of the Application of Ohio Edison Company, The Cleveland Electric Illuminating Company and The Toledo Edison Company for Authority to Provide for a Standard Service Offer Pursuant to R.C. § 4928.143 in the Form of an Electric Security Plan | ) ) ) ) ) ) ) | Case No. 14-1297-EL-SSO |

## PROTECTIVE AGREEMENT

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

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

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

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

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

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

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

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

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

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

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

C. An outside expert or employee of an outside expert retained by Receiving Party for the purpose of advising, preparing for or testifying in this Proceeding and who is not involved in (or providing advice regarding) decision-making by or on behalf of any supplier, marketer, broker, aggregator or governmental aggregator (as defined in ORC Section 4928.01(A)(13)) concerning any aspect of competitive retail electric service in Ohio, Illinois, Maryland, Michigan, New Jersey or Pennsylvania or of any supplier, marketer, or broker concerning any aspect of competitive wholesale electric procurements in the PJM or MISO markets. .

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

17. By entering into this Protective Agreement, Receiving Party does not waive any right that it may have to dispute the Companies' determination regarding any material identified as confidential by the Companies and to pursue those remedies that may be available to

Receiving Party before an administrative agency or court of competent jurisdiction. Nothing in this Agreement precludes Receiving Party from filing a motion to compel.

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

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

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

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

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

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

Ohio Edison Company, The Cleveland Electric Illuminating Company and The Toledo Edison Company

BY:

Counsel

Sept. 30, 2014

Date

Sierra Club

BY:

Counsel

Sept 29, 2014

Date

# EXHIBIT B

**From:** Tony Mendoza [mailto:tony.mendoza@sierraclub.org]
**Sent:** Monday, December 08, 2014 7:24 PM
**To:** Hayden, Mark A. <haydenm@firstenergycorp.com>
**Cc:** Shannon Fisk <sfisk@earthjustice.org>; Michael Soules <msoules@earthjustice.org>
**Subject:** Re: Sierra Club's response to FES's December 4, 2014 letter re Sierra Club subpoena

We do so agree. Thank you.

On Mon, Dec 8, 2014 at 4:19 PM, Hayden, Mark A. <haydenm@firstenergycorp.com> wrote:

Tony - yes, I think you agreed to treat it pursuant to the protective order at page 2 of your 12.5.14 letter.

On Dec 8, 2014, at 6:13 PM, "Tony Mendoza" <tony.mendoza@sierraclub.org> wrote:

Mark - Can you confirm that this information is covered by the existing NDA that we have signed for this proceeding? If not, we should discuss that issue promptly. Tony

On Mon, Dec 8, 2014 at 3:00 PM, Hayden, Mark A. <haydenm@firstenergycorp.com> wrote:

Tony - - see attached information provided pursuant to our agreement on your subpoena. The remainder will be provided tomorrow. We are confirming Jason Lisowski's availability for deposition on this material for Dec 18 or Dec 19.

Mark A. Hayden
Associate General Counsel
FirstEnergy Corp.
76 South Main Street
Akron, OH 44308
Phone (330) 761-7735
Cell (330) 620-9483

haydenm@firstenergycorp.com

**From:** Tony Mendoza [mailto:tony.mendoza@sierraclub.org]
**Sent:** Friday, December 05, 2014 2:56 PM
**To:** Hayden, Mark A.
**Cc:** Shannon Fisk; Michael Soules
**Subject:** Sierra Club's response to FES's December 4, 2014 letter re Sierra Club subpoena

Mark - The attached letter responds to your letter that we received yesterday. Please propose a time for a call if you think that would be helpful to resolving any issues. Tony

--

Tony G Mendoza

Staff Attorney

Sierra Club Environmental Law Program

85 Second St., 2nd Floor

San Francisco, CA 94105
(415) 977-5589
(415) 977-5793 fax
tony.mendoza@sierraclub.org

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# EXHIBIT C

**From:** Hayden, Mark A.
**Sent:** Monday, December 08, 2014 6:01 PM
**To:** Tony Mendoza <tony.mendoza@sierraclub.org>
**Cc:** Shannon Fisk <sfisk@earthjustice.org>; Michael Soules <msoules@earthjustice.org>
**Subject:** RE: Sierra Club's response to FES's December 4, 2014 letter re Sierra Club subpoena

Tony - - see attached information provided pursuant to our agreement on your subpoena. The remainder will be provided tomorrow. We are confirming Jason Lisowski's availability for deposition on this material for Dec 18 or Dec 19.

Mark A. Hayden
Associate General Counsel
FirstEnergy Corp.
76 South Main Street
Akron, OH 44308
Phone (330) 761-7735
Cell (330) 620-9483
haydenm@firstenergycorp.com

**From:** Tony Mendoza [mailto:tony.mendoza@sierraclub.org]
**Sent:** Friday, December 05, 2014 2:56 PM
**To:** Hayden, Mark A.
**Cc:** Shannon Fisk; Michael Soules
**Subject:** Sierra Club's response to FES's December 4, 2014 letter re Sierra Club subpoena

Mark - The attached letter responds to your letter that we received yesterday. Please propose a time for a call if you think that would be helpful to resolving any issues. Tony

--
Tony G Mendoza
Staff Attorney
Sierra Club Environmental Law Program
85 Second St., 2nd Floor
San Francisco, CA 94105
(415) 977-5589
(415) 977-5793 fax
tony.mendoza@sierraclub.org



FES response to Sierra Club subpoena.xlsx

From: Hayden, Mark A.
Sent: Tuesday, December 09, 2014 4:56 PM
To: Tony Mendoza <tony.mendoza@sierraclub.org>; Shannon Fisk <sfisk@earthjustice.org>; Michael Soules <msoules@earthjustice.org>
Subject: Sierra Club subpoena request info

Tony - - this is the remainder of the information related to Topics 1 and 2 of your subpoena.

Mark A. Hayden
Associate General Counsel
FirstEnergy Corp.
76 South Main Street
Akron, OH 44308
Phone (330) 761-7735
Cell (330) 620-9483
haydenm@firstenergycorp.com



FES Subpoena Response - Attachment 4 (Outputs) - COMPETITIVELY SENSITIVE CONFIDENTIAL.xlsx

FES Subpoena Response - Attachment 3 (OVEC) - COMPETITIVELY SENSITIVE CONFIDENTIAL.xlsx

FES Subpoena Response - Attachment 2 (Davis Besse) - COMPETITIVELY SENSITIVE CONFIDENTIAL.xlsx

FES Subpoena Response - Attachment 1 (Sammis) - COMPETITIVELY SENSITIVE CONFIDENTIAL.xlsx

# EXHIBIT D

| | |
|---|---|
| From: | Michael Soules <msoules@earthjustice.org> |
| To: | "burkj@firstenergycorp.com" <burkj@firstenergycorp.com>, "'cdunn@firstenergycorp.com'" <cdunn@firstenergycorp.com>, "jlang@calfee.com" <jlang@calfee.com>, "talexander@calfee.com" <talexander@calfee.com>, "'dakutik@jonesday.com'" <dakutik@jonesday.com> |
| Cc: | Shannon Fisk <sfisk@earthjustice.org>, 'Tony Mendoza' <tony.mendoza@sierraclub.org>, "Richard Sahli (rsahli@columbus.rr.com)" <rsahli@columbus.rr.com> |
| Date: | 04/15/2016 04:43 PM |
| Subject: | FirstEnergy ESP, Case No. 14-1297-EL-SSO -- disclosure of information pursuant to Protective Agreement |

Counsel:

Pursuant to Paragraphs 11 and 15 of the September 30, 2014 Protective Agreement between Sierra Club and the Companies in Case No. 14-1297-EL-SSO, we are writing to provide notice that we intend to disclose into the public domain certain information that was produced as "Protected Materials" under this Agreement.

Specifically, we intend to publicly disclose the redacted excerpts from Tyler Coming's Third Supplemental Testimony (filed on Dec. 30, 2015) located at the following places within his testimony:

- Page 1, line 24
- Page 2, lines 6-8
- Page 3, line 13
- Page 4, Competitively Sensitive Confidential Figure 1: *Valuation of the Proposed Transaction by the Companies and FES (Cumulative NPV, $2015 mil).*
    - Note: to be clear, we intend to publicly disclose this entire Figure.
- Page 5, lines 18, 22
- Page 5, footnote 6
- Page 6, lines 1-3, 6, 10-11, 22, 24
- Page 7, lines 10-15, 17

Sierra Club intends to publicly disclose the above-referenced redacted excerpts because they do not contain any trade secrets. Each of these excerpts refers to aggregate FES data concerning a projection of costs and revenues under the proposed transaction and Rider RRS. This aggregate data is akin to the non-confidential data presented by the Companies in Sierra Club Ex. 89 and Mr. Ruberto's Attachment JAR-1 revised. Moreover, the disclosure of this aggregate data would not divulge any plant-specific information or market price forecasts.

Please do not hesitate to contact us if you have any questions or concerns.

Sincerely,
Michael Soules

Michael Soules
Earthjustice
1625 Massachusetts Ave. NW
Suite 702
Washington, DC 20036
(202) 797-5237
msoules@earthjustice.org

# EXHIBIT E

| | |
|---|---|
| From: | David A. Kutik/JonesDay |
| To: | Michael Soules <msoules@earthjustice.org> |
| Cc: | "burkj@firstenergycorp.com" <burkj@firstenergycorp.com>, "'cdunn@firstenergycorp.com'" <cdunn@firstenergycorp.com>, "jlang@calfee.com" <jlang@calfee.com>, "Richard Sahli (rsahli@columbus.rr.com)" <rsahli@columbus.rr.com>, Shannon Fisk <sfisk@earthjustice.org>, "talexander@calfee.com" <talexander@calfee.com>, 'Tony Mendoza' <tony.mendoza@sierraclub.org> |
| Date: | 04/19/2016 01:24 PM |
| Subject: | Re: FirstEnergy ESP, Case No. 14-1297-EL-SSO -- disclosure of information pursuant to Protective Agreement |

Michael --

Be advised that the Companies oppose your unilateral attempt to disclose FES's proprietary and confidential information. It appears that you misunderstand the procedural posture of the case. The protective agreement that you seem to rely on permitted a receiving party to provide notice of an intent to disclose information deemed confidential by the producing party in discovery. This mechanism was included in the protective agreement to allow discovery to proceed without the need for the parties to litigate the question of the propriety of the confidential designation. The confidentiality of the disputed information would then be determined before or at the hearing.

In the case of the information that you have designated from the testimony of Mr. Comings, that information has already been subject to a motion for a protective order -- filed by Sierra Club -- that was granted by the Commission. Thus, Sierra Club is under an order to maintain the confidential protection of that information. For this reason, if Sierra Club now believes that the information is not confidential, then Sierra Club must apply to the Commission for relief from the order protecting this information and not resort to "self help" by unilateral public disclosure and violate the Commission's order.

If you nevertheless believe that you have the unilateral right to disclose the information that you have designated, please advise me immediately, so that we can raise the issue with the Attorney Examiners.

David A. Kutik (bio)
Partner
JONES DAY® - One Firm Worldwide℠
North Point
901 Lakeside Avenue
Cleveland, Ohio 44114
Office +1.216.586.7186
Facsimile +1.216.579.0212
dakutik@jonesday.com

| | |
|---|---|
| From: | Michael Soules <msoules@earthjustice.org> |
| To: | "burkj@firstenergycorp.com" <burkj@firstenergycorp.com>, "'cdunn@firstenergycorp.com'" <cdunn@firstenergycorp.com>, "jlang@calfee.com" <jlang@calfee.com>, "talexander@calfee.com" <talexander@calfee.com>, "'dakutik@jonesday.com'" <dakutik@jonesday.com> |
| Cc: | Shannon Fisk <sfisk@earthjustice.org>, 'Tony Mendoza' <tony.mendoza@sierraclub.org>, "Richard Sahli (rsahli@columbus.rr.com)" <rsahli@columbus.rr.com> |
| Date: | 04/15/2016 04:43 PM |
| Subject: | FirstEnergy ESP, Case No. 14-1297-EL-SSO -- disclosure of information pursuant to Protective Agreement |

Counsel:

Pursuant to Paragraphs 11 and 15 of the September 30, 2014 Protective Agreement between Sierra Club and the Companies in Case No. 14-1297-EL-SSO, we are writing to provide notice that we intend to disclose into the public domain certain information that was produced as "Protected Materials" under this Agreement.

Specifically, we intend to publicly disclose the redacted excerpts from Tyler Coming's Third Supplemental Testimony (filed on Dec. 30, 2015) located at the following places within his testimony:

- Page 1, line 24
- Page 2, lines 6-8
- Page 3, line 13
- Page 4, Competitively Sensitive Confidential Figure 1: *Valuation of the Proposed Transaction by the Companies and FES (Cumulative NPV, $2015 mil).*
    - Note: to be clear, we intend to publicly disclose this entire Figure.
- Page 5, lines 18, 22
- Page 5, footnote 6
- Page 6, lines 1-3, 6, 10-11, 22, 24
- Page 7, lines 10-15, 17

Sierra Club intends to publicly disclose the above-referenced redacted excerpts because they do not contain any trade secrets. Each of these excerpts refers to aggregate FES data concerning a projection of costs and revenues under the proposed transaction and Rider RRS. This aggregate data is akin to the non-confidential data presented by the Companies in Sierra Club Ex. 89 and Mr. Ruberto's Attachment JAR-1 revised. Moreover, the disclosure of this aggregate data would not divulge any plant-specific information or market price forecasts.

Please do not hesitate to contact us if you have any questions or concerns.

Sincerely,
Michael Soules

Michael Soules
Earthjustice
1625 Massachusetts Ave. NW
Suite 702
Washington, DC 20036
(202) 797-5237
msoules@earthjustice.org

==========

# EXHIBIT F

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 |

## AFFIDAVIT OF JASON LISOWSKI

STATE OF OHIO )
) ss:
COUNTY OF SUMMIT )

Jason Lisowski, being first duly sworn, states:

1. I am employed by FirstEnergy Service Company as the Assistant Controller – FES/FEG of FirstEnergy Solutions Corp ("FES"). I am responsible for all accounting and financial reporting related matters associated with FES, its generation plants and generation business budgeting. I also actively participate with the FES and generation business executive and leadership teams on financial, accounting and forecasting planning matters. In the course of these responsibilities, I routinely review, analyze and generate confidential and proprietary business information that belongs to FES.

2. In this proceeding, I have testified on behalf of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company (collectively, the "Companies") to provide, among other things, information related to the revenue and cost projections of the W.H. Sammis Plant ("Sammis") and the Davis-Besse Nuclear Power Station ("Davis-Besse") (collectively, "the Plants"). I have filed testimony and workpapers in this proceeding in support of the Companies' application for approval of their fourth electric security

plan, as modified by various stipulations ("Stipulated ESP IV"), which was recently approved with modifications by the Public Utilities Commission of Ohio.

3. My direct testimony and workpapers in this proceeding contain certain cost and revenue projections regarding the Plants; these projections contain information that is confidential and proprietary to FES.

4. I also am knowledgeable regarding the additional confidential and proprietary cost and revenue information (the "FES Proprietary Data") related to the Plants that was provided to Sierra Club by FES in December 2014 in response to a subpoena request from Sierra Club.

5. I also am aware of Sierra Club witness Tyler Comings' use of the FES Proprietary Data as inputs in his Third Supplemental Testimony to arrive at a certain projection regarding the alleged cost of Rider RRS over the term of Stipulated ESP IV.

6. Allowing the disclosure of the confidential and proprietary material contained in Mr. Comings' testimony – and particularly, the projections of the purported "cost" of Rider RRS -- could lead to the public disclosure of the FES Proprietary Data. Because there are only two plants, Sammis and Davis-Besse, and because the nameplate capacity of the Plants is publicly available, approximately 3,000 MW, the number of megawatts could be divided into the numerical projection in Mr. Comings' testimony to derive the approximate plant-specific profitability of the Plants. In turn, this information could be used to "back into" underlying assumptions regarding energy, capacity, gas, coal prices, and costs as related to the Plants, which, potentially could be extrapolated to the remainder of FES's competitive generation fleet. Such information would allow access to FES's own view and perceptions on the profitability of not only the Plants but FES's generation fleet as a whole.

7. Such insight into the anticipated revenue and cost structure of FES's generation fleet – and particularly, FES's projections about the natural gas, coal, energy, and capacity markets -- could enable competitors and potential counterparties to approximate, with a fair degree of accuracy, FES's business strategies. For example, a competitor of FES could rely on such confidential business information to understand and approximate FES's retail and wholesale market strategies, thereby placing FES at a competitive disadvantage and economically harming FES. Similarly, counterparties in potential fuel contracts would receive an enormous advantage in dealing with FES if they knew what FES thought future fuel prices might be.

8. FES takes a number of steps to safeguard this type of confidential business information. FES's confidential business information, such as FES's projections about costs and markets, is only accessible outside of FES to entities or persons that have entered into appropriate confidentiality agreements. This requirement applies to FES's external auditors as well. FES is very careful in its publicly filed financial documents to characterize the data contained therein in such a way so as not to reveal confidential plant-specific information or projections about cost and markets.

9. Similarly, confidential business information like the FES data provided as part of discovery to Sierra Club, including cost and market projections that are part of Mr. Comings' testimony that Sierra Club now seeks to disclose, is sequestered internally within FES and only accessible on a need-to-know basis. It only is disclosed internally to those individuals who participate in strategic decision-making at FES.

10. The generation of FES's confidential and proprietary cost and revenue projections, like the FES Proprietary Data, reflects a significant investment by FES in proprietary computer

modeling software and human resources. It would prove very difficult, if it were possible at all, and involve great time and expense, for a competitor of FES to attempt to produce comparable cost and revenue projections.

JASON LISOWSKI

Sworn to and subscribed in my presence by JASON LISOWSKI on this 21 day of April, 2016.

Notary Public

SCOTT J. CASTO
NOTARY PUBLIC, STATE OF OHIO
PORTAGE COUNTY
My Commission Has No Expiration, ORC 147.03

Summary: Motion to Renew and Enforce Protective Order electronically filed by MR. DAVID A KUTIK on behalf of Ohio Edison Company and The Cleveland Electric Illuminating Company and The Toledo Edison Company