

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

SIERRA CLUB’S MOTION TO MODIFY PROTECTIVE ORDER

Pursuant to O.A.C. 4901-1-12, Sierra Club respectfully moves to modify a protective order that was approved by the Commission in its March 31, 2016 Opinion and Order. Sierra Club seeks the modification of this protective order to enable the removal of redactions from certain portions of the Third Supplemental Testimony of Tyler Comings, filed in this proceeding on December 30, 2015.

The portions of testimony that Sierra Club seeks to publicly disclose discuss FirstEnergy Solutions Corp.’s (“FES”) projection of costs and revenues under Rider RRS and the proposed transaction. This projection, which contains no plant-specific data, is not a trade secret, and therefore should be removed from the scope of the Commission’s protective order. Specifically, Sierra Club seeks public disclosure of the redacted excerpts located at the following places within Mr. Comings’s 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)*¹
- 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

For the reasons set forth in the accompanying Memorandum, Sierra Club respectfully requests that the Commission modify its protective order so these redacted excerpts can be publicly disclosed.

April 22, 2016

Respectfully submitted,

s/ Michael C. Soules

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¹ Because the Companies' valuation is already publicly available, *see* SC Ex. 89, Sierra Club seeks the public disclosure of this entire figure.

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**MEMORANDUM IN SUPPORT OF
SIERRA CLUB’S MOTION TO MODIFY PROTECTIVE ORDER**

Pursuant to O.A.C. 4901-1-12, Sierra Club respectfully moves to modify a protective order that was approved by the Public Utilities Commission of Ohio in its March 31, 2016 Opinion and Order. Sierra Club seeks the modification of this protective order to enable the removal of redactions from certain portions of the Third Supplemental Testimony of Tyler Comings, filed in this proceeding on December 30, 2015. These portions of testimony discuss a FirstEnergy Solutions Corp. (“FES”) projection of costs and revenues under Rider RRS and the proposed transaction, including a calculation of the net impact that Rider RRS would have on customers over the eight-year term using FES’s forecast of market prices.¹ Public disclosure of such testimony, which contains only aggregate (rather than plant-specific) data that does not reveal any confidential or trade secret information, would increase transparency and understanding of Rider RRS and the proposed transaction by enabling the public to compare

¹ While neither a draft nor final version of the power purchase agreement (“PPA”) between FES and the Companies was ever produced in this proceeding, it is Sierra Club’s understanding, based on a FirstEnergy filing with FERC, that the PPA was executed the day after the Commission issued its Opinion and Order. Because there is no documentation of a final PPA in the record for this case, and to maintain consistency with the naming conventions used throughout this proceeding, this brief refers to this agreement as the “proposed transaction.”

FirstEnergy's projection of the financial impact of Rider RRS on customers with the projection based on forecasts by FES, the owner of the power plants at issue.

Specifically, Sierra Club seeks public disclosure of the redacted excerpts located at the following places within Mr. Comings's 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)*²
- 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

A. The FES Projection

Each of the redacted excerpts identified above discusses a projection of net costs and revenues under the proposed transaction and Rider RRS. This projection was developed internally by FES, the owner of the generation assets that are the subject of its proposed transaction with the Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company (collectively, "FirstEnergy" or the "Companies").

The FES projection is closely analogous to the Rider RRS projection presented by the Companies in this case. The Companies' projection was initially presented by FirstEnergy witness Jay Ruberto,³ and then later updated, based on an eight-year term and a 10.38% return on

² Because the Companies' valuation is already publicly available, Sierra Club seeks the public disclosure of all of Figure 1. The Companies' valuation is presented in the Mikkelsen Workpaper dated November 30, 2015, which was admitted as Sierra Club Exhibit 89. (The citation in footnote 4 of Mr. Comings's testimony references "Data Response OCC Set 17-RPD-10-Attachment 1." This discovery response is a Microsoft Excel version of Sierra Club Exhibit 89.)

³ See Co. Ex. 34, Errata Sheet of Jay Ruberto, Attachment JAR-1 revised.

equity (“ROE”), by FirstEnergy witness Eileen Mikkelsen.⁴ This aggregate projection was developed using price forecasts provided by FirstEnergy witness Judah Rose and plant-specific projections prepared by FirstEnergy witness Jason Lisowski.⁵ Although Mr. Rose’s price forecasts and Mr. Lisowski’s plant-specific data are confidential, the Companies’ aggregate projection is publicly available.

The FES projection was prepared through a nearly identical process: Using long-term forecasts of market energy, capacity, and carbon prices, Mr. Lisowski prepared plant-specific projections for Sammis, Davis-Besse, and the OVEC entitlement, which were then used to create an aggregate projection of net costs and revenues. The main difference between this projection and the Companies’ projection is that FES used its own internal forecasts of energy, capacity, and carbon prices, rather than the Judah Rose forecasts used for the Companies’ projection presented in this case.⁶

The original version of this FES projection included the 15-year term and the ROE assumptions that were presented in Mr. Ruberto’s testimony.⁷ Following the entry of the Third

⁴ See Co. Ex. 155, Fifth Supplemental Testimony of Eileen Mikkelsen, at 11 (testifying that the net nominal Rider RRS value over the eight-year term is \$561 million); SC Ex. 89 (workpaper relied on by Ms. Mikkelsen for the \$561 million figure).

⁵ Order at 80. Mr. Lisowski prepared separate projections for the Sammis plant, the Davis-Besse plant, and FES’s share of the OVEC plants. See Co. Ex. 22c (Lisowski Direct Testimony), 24c (Lisowski Errata).

⁶ Tr. VIII at 1599-1600 (cross-examination of FirstEnergy witness Jason Lisowski). Mr. Lisowski explained at the hearing that the FES projection, which was prepared in August 2014, did not use the Rose assumptions “because FES, running its own forecasts and projections, wants to use what it believed to be the most accurate for it.” *Id.*

⁷ The original version of the aggregate FES projection is on page 4 of Sierra Club Exhibit 36c, and was discussed in Mr. Comings’s direct testimony, SC Ex. 70c, on pages 6-7. In this motion, Sierra Club is not seeking to remove confidential treatment of this original FES projection, because that projection was updated in Mr. Comings’s Third Supplemental Testimony to reflect the eight-year term and different ROE included in the version of the proposed transaction approved by the Commission. Nevertheless, Sierra Club believes that the original aggregate FES projection is not a trade secret under Ohio law.

Supplemental Stipulation and the revised term sheet for the proposed transaction, Mr. Comings updated those results, using an eight-year term and the reduction of the proposed transaction's ROE to 10.38%, in his Third Supplemental Testimony.⁸ (In other words, Mr. Comings made the same updates to the FES projection that Ms. Mikkelsen made to the Companies' projection.) Mr. Comings presents the updated results of the FES projection in redacted excerpts of his testimony. It is these redacted excerpts that Sierra Club now seeks to publicly disclose.

When Sierra Club filed Mr. Comings's Third Supplemental Testimony, it also filed a motion for protective order, seeking confidential treatment for information discussed in Mr. Comings's testimony that had been provided by the Companies subject to a protective agreement. That motion, however, specifically reserved Sierra Club's "right to challenge whether the information is a confidential trade secret under Ohio law."⁹ When the Commission issued its Order on March 31, 2016, it granted the various pending motions for protective order, including Sierra Club's.¹⁰

B. The Redacted Excerpts Do Not Contain Trade Secret Information, and Therefore Should Be Publicly Disclosed.

Sierra Club seeks to modify the protective order so that the redacted excerpts identified above – which present the results of FES's projection of costs and revenues under the proposed transaction and Rider RRS, and which contain no trade secret information – can be publicly disclosed.

⁸ See SC Ex. 95 at 5-6; *see also* Order at 85. Although FirstEnergy criticized the FES projection in briefing, *see* FirstEnergy Post-Hearing Reply Br. at 110-12, Mr. Comings did not receive any questions about this projection during his January 20, 2016 cross-examination.

⁹ Memorandum in Support of Motion for Protective Order, at 3 (Dec. 30, 2015).

¹⁰ Order at 38.

As the Commission recognized in its Order, R.C. 4509.07 establishes a default rule that “all facts and information in the possession of the Commission shall be public.”¹¹ The statutory scheme, as well as O.A.C. 4901-1-24, carve out an exception for information that constitutes a trade secret. Under Ohio law, a “trade secret” is defined as information that satisfies two requirements:

- (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.¹²

Here, the protective order should be modified because the FES projection, discussed in the redacted excerpts of Mr. Comings’s Third Supplemental Testimony, is not a trade secret. The FES projection presents an aggregate result that contains no plant-specific data or market price forecast information. Because this aggregate projection has no independent economic value, it fails the test for a trade secret under Ohio law, and is therefore subject to public disclosure.

In a recently-filed motion for protective order, FirstEnergy recognized this distinction between plant-specific data (which may be competitively sensitive) and aggregate FES information (which is not):

Importantly, [FES] consistently has distinguished in this proceeding its plant-specific data in Mr. Lisowski’s attachments, which is highly confidential, from the aggregate data in Mr. Ruberto’s Attachment JAR-1. Mr. Ruberto’s attachment does not provide competitors with data from which plant-specific cost and revenue information can be calculated. In contrast, the plant

¹¹ *Id.* at 37-38 (citing R.C. 4905.07).

¹² R.C. 1333.61(D).

specific information contained in Attachments JIL-1, JIL-2 and JIL-3 is highly competitively sensitive in nature and proprietary to FES. Access to this information by a competitor – such as the companies represented by P3/EPSC – would provide a window into FES’s forward-looking business plans related to the specific generation assets involved and would give those competitors a competitive advantage.¹³

The same principle applies here. The FES projection discussed in Mr. Comings’ Third Supplemental Testimony only includes aggregate data, with no plant-specific information. This projection is therefore directly analogous to the aggregate projections provided in Attachment JAR-1 and the Mikkelsen workpaper – both of which are publicly available. Moreover, this aggregate FES projection does not contain any of the underlying market price forecasts.¹⁴ In sum, the FES projection, which contains no plant-specific data, does not qualify as a trade secret, and thus should be removed from the scope of the Commission’s protective order.

C. Public Disclosure of the FES Projection Will Assist the Public’s Review and Understanding of the Commission’s Opinion and Order.

As explained above, there is no legitimate basis for continued confidential treatment of the FES projection discussed in Mr. Comings’s testimony. By contrast, there is a compelling interest in public disclosure of this projection.

The Economic Stability Program, including Rider RRS, is the “centerpiece” of FirstEnergy’s ESP.¹⁵ And the Commission’s approval of Rider RRS relied, in part, on its

¹³ Companies’ Motion for Protective Order, at 2 (filed Jan. 11, 2016).

¹⁴ Again, this is a perfect parallel to Attachment JAR-1 and the Mikkelsen workpaper. Those aggregate projections are in the public record, but the underlying market price forecasts provided by FirstEnergy witness Rose remain confidential.

¹⁵ Order at 80.

“estimate of the net credit or charge based upon the evidence in the record of this case.”¹⁶ After averaging the Companies’ projection with a projection from OCC witness James Wilson, the Commission arrived at an “estimate of a projected \$255.5 million . . . net credit to customers over the eight years of Rider RRS.”¹⁷ The Commission further stated: “Accordingly we will rely upon that estimate for purposes of this proceeding. [I]n approving Rider RRS today, we base our decision on these projections.”¹⁸

After discussing these publicly-available projections, and its own estimate of the projected impacts of Rider RRS on customers, the Commission noted:

Sierra Club witness Comings also produced a projection of net charges or credits under Rider RRS. . . . 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. 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.¹⁹

As the above-quoted passages demonstrate, the cost and revenue projections submitted in this case were crucial to the Commission’s consideration of Rider RRS. Consequently, the people of Ohio – who have demonstrated a strong interest in this case²⁰ – would benefit from the

¹⁶ *Id.* (“Considering the nature of the proposed Rider RRS as a potential hedge or insurance on electricity rates, in making its determination the Commission must choose from the most reliable of these projections and forecasts to make a determination of whether the Stipulations, as a package, benefit ratepayers.”).

¹⁷ *Id.* at 85.

¹⁸ *Id.*

¹⁹ *Id.* (citations omitted).

²⁰ In its Order, the Commission noted that “[a] large number of public comments were filed in the docket of this case.” *Id.* at 12. *See also* Concurring Opinion of Commissioner Asim Z. Haque, at 6 (noting “the tremendous amount of public sentiment expressed over the past two years associated with these cases”).

public release of a projection by FES, the owner of the plants at the heart of Rider RRS. Doing so would allow the public to see FES's own expectations of the proposed transaction, and it would help the public assess the impact of "includ[ing] this projection in the average with the other two projections."²¹

Because disclosure of the FES projection would facilitate the public's review and understanding of the Commission's decision, and because this projection is not a trade secret, this information should be publicly released.²²

²¹ Order at 85.

²² If the Commission grants this Motion, and modifies the protective agreement to permit the release of these redacted excerpts, Sierra Club is prepared to file an updated version of Mr. Comings's public Third Supplemental Testimony, with the newly-released excerpts no longer redacted.

* * *

For the foregoing reasons, Sierra Club respectfully requests that the Commission grant this motion and that the redactions be removed from the portions of Mr. Comings's testimony identified above.

April 22, 2016

Respectfully submitted,

s/ Michael C. Soules

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CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing Sierra Club's Motion to Modify Protective Order, along with a Memorandum in Support, has been served upon the following parties via electronic mail on April 22, 2016:

s/ Michael Soules

Michael Soules

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Summary: Motion to Modify Protective Order electronically filed by Mr. Tony G. Mendoza on behalf of Sierra Club