

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

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

**OHIO EDISON COMPANY, THE CLEVELAND ELECTRIC ILLUMINATING
COMPANY, AND THE TOLEDO EDISON COMPANY’S MEMORANDUM
CONTRA SIERRA CLUB’S MOTION TO MODIFY PROTECTIVE ORDER**

I. INTRODUCTION

In a motion lacking any authority, Sierra Club seeks permission from the Commission to disclose publicly various confidential and protected portions of the Third Supplemental Testimony of Tyler Comings (the “Comings Material”). The Comings Material 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, including various market projections internal to FirstEnergy Solutions Corp. (“FES”), (the “FES Proprietary Data”), provided to Sierra Club in response to a subpoena. FES is not a party to this proceeding. Apparently frustrated by the Commission’s finding in its Opinion and Order (“March 31 Order”) that Mr. Comings’ projection did not warrant significant consideration, Sierra Club now wants to disclose the confidential Comings Material to the public. Sierra Club seeks this relief some fifteen weeks after Sierra Club originally moved to protect the Comings Material and three weeks after the Commission found that it warranted protection as a trade secret under Ohio law. Conspicuously, the Motion to Modify Protective Order makes no showing of any harm or prejudice that Sierra Club has suffered, or will suffer, if the Comings

Material properly is kept confidential. Moreover, Sierra Club seeks to obfuscate the real issue before the Commission here – that the Comings Material is a trade secret and therefore its disclosure is legally prohibited under Ohio law. The best that Sierra Club can argue on this issue is that the Comings Material is allegedly similar to other information currently available to the public. What Sierra Club overlooks, among other things, is the fact that even the results of the analysis can provide valuable information of FES’s projections relative to ICF’s. Knowing the result of a calculation using FES’s projections and its direction (higher or lower) than the calculation using ICF’s projections is in itself competitively valuable. As demonstrated below, the Commission should deny Sierra Club’s Motion to Modify accordingly.

II. ARGUMENT

A. Sierra Club Waived Any Putative “Right To Challenge.”

As an initial matter, Sierra Club mistakenly believes that it has somehow reserved “a right to challenge” the confidential trade secret status of the Comings Material. Motion to Modify at 4. Sierra Club further believes that this alleged “right” may be exercised at Sierra Club’s pleasure, regardless of the procedural posture of this case. *See* email from Michael Soules to counsel for the Companies dated April 15, 2016, and email from David A. Kutik to Michael Soules dated April 19, 2016 (attached respectively as Exs. D and E to the Companies’ Motion to Renew and Enforce); Motion to Modify at 4.

Sierra Club filed its motion for protective order on December 30, 2015. Approximately twelve weeks passed until the Commission issued the March 31 Order, granting Sierra Club’s motion for protective order and finding that the Comings Material – which Sierra Club previously had moved to protect – met the requirements of Section 1333.61(D) and satisfied the six-factor *Plain Dealer* test. *See* March 31 Order at 37-38. The Commission made the finding of trade secret status regarding the Comings Material that Sierra Club sought. Sierra Club may

not now ask for a “do over.” If Sierra Club did not believe that the Comings Material was properly confidential, then it should have challenged that designation at the hearing.

B. Sierra Club Makes No Showing Of Harm Or Prejudice.

Even if Sierra Club still possessed some sort of “right to challenge,” which it does not, Sierra Club makes no showing of any harm that it has suffered, or will suffer, if the Comings Material remains properly under seal. Nothing has prevented Sierra Club from using the Comings Material in its post-hearing briefing. And, nothing will hinder Sierra Club from doing so in future filings. To justify revealing protected trade secrets surely requires Sierra Club to demonstrate why keeping the Comings Material under seal will prejudice Sierra Club’s ability to prosecute its case. Sierra Club utterly failed to do so.

Indeed, the Commission already has reviewed and analyzed the Comings Material and found it was not an outcome-determinative piece of evidence, but should nevertheless remain confidential. As the Commission observed, “if we had included th[e Comings’] projection in 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.” March 31 Order at 85 (emphasis added). Thus, Sierra Club gains nothing by the public disclosure of the Comings Material; Sierra Club is not harmed by keeping the Comings Material under seal. In marked contrast, as discussed extensively in the Companies’ Motion to Renew and Enforce Protective Order and discussed further below, FES risks being placed at a distinct competitive disadvantage if the Comings Material is inserted into the public domain. *See* Motion to Renew and Enforce at 12; 14-15.

C. The Only Issue Is Whether The Comings Material Contains Trade Secrets – Which It Does.

Sierra Club's claim that there is a "compelling public interest" in publicly disclosing the Comings Material obfuscates the real issue here, *i.e.*, whether the Comings Material contains trade secrets, the public release of which would place FES at a competitive disadvantage in the retail and wholesale markets, thereby economically harming FES. As the March 31 Order correctly found, and as the Companies again demonstrated in their Motion to Renew and Enforce Protective Order, the Comings Material counts as a trade secret under Ohio law pursuant to Section 1333.61(D) and the *Plain Dealer* six-factor test. (The Companies incorporate by reference here their Motion to Renew and Enforce Protective Order; *see also In the Matter of the Commission's Review and Adjustment of the Fuel and Purchased Power and System Reliability Tracker Components of Duke Energy Ohio, Inc. and Related Matters*, Case No. 07-723-EL-UNC, 2008 Ohio PUC LEXIS 504 at *1-8 (Aug. 4, 2008) (finding that information related to the type and cost of various proposed supply-side power purchase options, the utility's existing capacity position, forecasted demand for native load customers, supply requirements necessary for 15 percent reserve margin in competitive wholesale and retail markets, fuel procurement strategy, emission allowance strategy, coal contract information, and general business information contained in witness testimony and an audit report met the requirements of Section 1333.61(D) and the *Plain Dealer* test).)

Given the trade secret status of the Comings Material, any "compelling interest" here thus involves the protection of trade secrets. As the Attorney Examiner held in granting 60 months of trade secret protection to the FES confidential cost and revenue data filed under seal in conjunction with the Companies' Application:

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.

Entry at 11 (December 1, 2014). In issuing that ruling, the Attorney Examiner stressed the pressing “need to protect highly competitively sensitive information owned by an affiliate.”

December 1 Entry at 16. 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).

As the Companies demonstrated in their Motion to Renew and Enforce Protective Order, permitting Sierra Club to disclose the Comings Material likely could enable a competitor of FES to “back into” the FES Proprietary Data. April 21 Lisowski Aff. at ¶6 (Motion to Renew and Enforce at Exhibit F). The Commission came to a similar conclusion in the March 31 Order, finding: “As [Mr. Comings’] 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 rider RRS *without confidential information being easily derived from the calculation.*” March 31 Order at 85 (emphasis added). In other words, inserting Mr. Comings’ projection into the public domain likely would enable a competitor of FES to drill down into the FES Proprietary Data.

An example demonstrates how. Take the following publicly available information: (1) the cumulative or end numbers from Company witness Mikkelsen’s workpaper dated November 30, 2015 (Sierra Club Exhibit 89); (2) publicly available market projections regarding future energy markets available on ICF International’s website; and (3) publicly available cost data for nuclear and coal generation units. Affidavit of Jason Lisowski at ¶3 (April 26, 2016) (attached hereto as Exhibit A). By inputting (1), (2) and (3) into an off-the-shelf dispatch model, one would be able to estimate how Sammis and Davis-Besse were dispatched to arrive at the end numbers in Sierra Club Exhibit 89 (the November 30, 2015 workpaper of Company witness

Mikklesen). This can be done by inserting the publicly available inputs “solving” for the publicly available end result. The program would iteratively search for the solution that “fits,” *i.e.*, comes up with the same end result. The “run” that “solved” or “fit” the publicly available data would be the estimated case how the model dispatched the units to arrive at Ms.

Mikkelsen’s resulting Rider RRS credit figure. *See id.* at ¶4. Using this model and that dispatch scheme discovered in the first calculation, and taking the cumulative or end numbers from the Comings Material, one could undertake a second calculation to determine the values of certain internal FES projections relative to public ICF projections. One could input the publicly available cost data and, using the dispatch scheme that “fit” in the first calculation, solve for the resulting number shown in the Comings Material. That solution would produce a range of “fitting” market projections. *See id.* at ¶6. Indeed, simply knowing the cumulative result of using FES’s projections, rather than ICF’s projections, could give competitors similar insight into the relative projections of FES versus ICF. *See id.* at ¶7. Such a reasonable range would provide a window into FES’s internal business operations and its wholesale and retail market strategies. *See id.* This result would give any competitor a distinct leg up when competing with FES for generation business.

Thus, the real issue at stake is whether the trade secrets of FES warrant Commission protection. As the Commission already has determined, such confidential and proprietary business information undoubtedly does. Sierra Club’s Motion to Modify should be denied accordingly.

III. CONCLUSION

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

Date: April 26, 2016

Respectfully submitted,

/s/ David A. Kutik

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ATTORNEYS FOR OHIO EDISON
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TOLEDO EDISON COMPANY

CERTIFICATE OF SERVICE

I hereby certify that the foregoing Memorandum Contra Sierra Club's Motion to Modify Protective Order was filed electronically through the Docketing Information System of the Public Utilities Commission of Ohio on this 26th 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

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. As I stated in my affidavit dated April 21, 2016 (the "April 21 Affidavit"), I am knowledgeable regarding the additional confidential and proprietary cost and revenue information (the "FES Proprietary Data") related to the W.H. Sammis Plant ("Sammis") and the Davis-Besse Nuclear Power Station ("Davis-Besse") (collectively, "the Plants") that was provided to Sierra Club by FirstEnergy Solutions Corp. ("FES") in December 2014 in response to a subpoena request from Sierra Club. April 21 Affidavit at ¶4. I am also 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. April 21 Affidavit at ¶5.

2. I am also knowledgeable regarding Sierra Club Exhibit 89 (the November 30, 2015 workpaper of Company witness Eileen M. Mikkelsen) and the numbers contained therein.

3. As in the April 21 Affidavit, 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. April 21 Affidavit at ¶6. Specifically, access to such information could enable a sophisticated competitor of FES 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. April 21 Affidavit at ¶6.

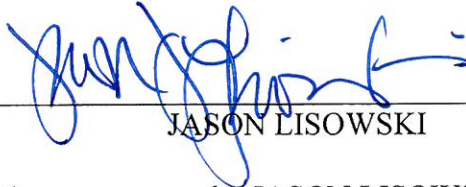
4. This “backing into” process could work as follows. The following types of information is publicly available: (1) the cumulative or end numbers from Company witness Mikkelsen's workpaper dated November 30, 2015 (Sierra Club Exhibit 89); (2) publicly available market projections regarding future energy markets available on ICF International's website; and (3) publicly available cost data for nuclear and coal generation units. If one input this data into an off-the-shelf dispatch model, a competitor could estimate how Sammis and Davis-Besse were dispatched to arrive at the end numbers in Sierra Club Exhibit 89.

5. Such an estimate could be calculated by inserting the publicly available inputs “solving” for the publicly available end result. The program would iteratively search for the solution that “fits”, i.e., comes up with the same end result. The “run” that “solved” or “fit” the publicly available data would be the estimated case of how the model dispatched the units to arrive at the Rider RRS credit figure in Sierra Club Exhibit 89.

6. Using this model and that dispatch scheme discovered in the first calculation, and taking the cumulative or end numbers from the Mr. Comings' projection, a competitor could undertake a second calculation to determine the values of certain FES projections relative to public ICF projections. One could input the publicly available cost data and, using the dispatch

scheme that “fit” in the first calculation, solve for the resulting number shown in Mr. Comings’ projection. That solution would produce a range of “fitting” market projections.

7. Simply knowing the cumulative result of using FES’s projections, rather than ICF’s projections, could give competitors similar insight into the relative projections of FES versus ICF. Such a reasonable range would provide a window into FES’s internal business operations and its wholesale and retail market strategies, thereby providing FES’s competitors with a competitive advantage against FES.



JASON LISOWSKI

Sworn to and subscribed in my presence by JASON LISOWSKI on this 26th day of April, 2016.



Notary Public



Debra S. Flowers
Notary Public, State of Ohio
My Commission Expires 12-03-2019

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in

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

Summary: Memorandum Contra Sierra Club's Motion to Modify 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