

**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

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**MOTION OF OHIO EDISON COMPANY, THE CLEVELAND ELECTRIC  
ILLUMINATING COMPANY, AND THE TOLEDO EDISON COMPANY FOR A  
PROTECTIVE ORDER**

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Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company (collectively, the “Companies”), pursuant to Rule 4901-1-24(A)(7), O.A.C., and Rule 4901-1-24(D), O.A.C., hereby move for a protective order to guard the confidentiality of proprietary business information contained in the confidential version of the Rehearing Testimony of Joseph P. Buckley (the “Buckley Testimony”) of the Staff of the Public Utilities Commission of Ohio (“Staff”), filed under seal on June 29, 2016. The information sought to be protected relates to a non-exhaustive list of adverse impacts of a downgrade to a non-investment grade rating (the “Proprietary Information”) that was only disclosed in a confidential response to a Data Request from Staff and belongs to the Companies’ corporate parent, FirstEnergy Corp. The Proprietary Information is highly competitively sensitive and is on all fours with the other competitively sensitive confidential business information that has been protected throughout this proceeding. The response to the Data Request was only provided to Staff, pursuant to Section 4901.16 of the Ohio Revised Code, and the parties to this proceeding that have executed a protective agreement with the Companies. Likewise, Staff filed the confidential version of the

Buckley Testimony under seal and it only has been served on those parties that have executed protective agreements with the Companies. Accordingly, as set forth in the attached Memorandum in Support, the Companies seek a protective order to prevent the public disclosure of the proprietary business information contained in the confidential version of the Buckley Testimony.

Date: July 1, 2016

Respectfully submitted,

/s/ Carrie M. Dunn

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TOLEDO EDISON COMPANY

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**I. INTRODUCTION**

Pursuant to Rules 4901-1-24(A)(7) and 4901-1-24(D), the Companies respectfully request that the Commission grant a protective order to guard the confidential and proprietary business information contained in the Buckley Testimony. In an Entry dated December 1, 2014, an Attorney Examiner in this proceeding granted protection to confidential and proprietary business information that had been filed with the Companies' application for approval of their electric security plan. Likewise, the Proprietary Information is confidential business information that warrants Commission protection. For the reasons that follow, the Commission should grant the Companies' motion for a protective order.

## II. ARGUMENT

### A. The Commission Regularly Protects Competitively Sensitive Material From Public Disclosure.

Pursuant to Rules 4901-1-24(A)(7) and 4901-1-24(D), the Commission may issue an order to protect trade secrets from public disclosure, including proprietary business information that is contained in witness direct testimony. *See* Rules 4901-1-24(A)(7); 4901-1-24(D), O.A.C.. Under Ohio law, the determination of trade secret status is made pursuant to Section 1333.61(D) of the Ohio Revised Code. In pertinent part, Section 1333.61(D) provides that a “trade secret” is:

Information . . . that satisfies both of the following:

- (1) It derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use.
- (2) It is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

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).

The Commission also relies on the six-factor test set forth in *The State ex rel. The Plain Dealer v. Ohio Dept. of Insurance*, 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.

The Commission routinely grants trade secret protection to proprietary business information that satisfies the requirements of Section 1333.61(D) and the Six-Factor Test. *See, e.g., In the Matter of the Application to Modify, in Accordance with R.C. 4929.08, the Exemption Granted to The East Ohio Gas Company d/b/a Dominion East Ohio*, Case No. 07-1224-GA-EXM, Case No. 12-1842-GA-EXM, 2015 Ohio PUC LEXIS 911 at \*7-20 (Nov. 2, 2015) (granting numerous motions for protective order to protect confidential and proprietary business information pursuant to Section 1333.61(D)); *In the Matter of the Application of The Cincinnati Gas & Electric Company to Modify its Nonresidential Generation Rates to Provide for Market-Based Standard Service Offer Pricing and to Establish an Alternative Competitive-Bid Service Rate Option Subsequent to the Market Development Period*, Case No. 03-93-EL-ATA, 2007 Ohio PUC LEXIS 703 at \*23-36 (Oct. 24, 2007) (granting numerous motions for protective order to protect confidential and proprietary business information pursuant to Section 1331.61 (D) and the Six-Factor Test); *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 \*2-11 (Nov. 18, 2011) (granting numerous motions for protective order to protect confidential and proprietary business information pursuant to Section 1331.61 (D) and the Six-Factor Test).

Moreover, Section 4901.16 of the Ohio Revised Code in pertinent part provides:

Except in his report to the public utilities commission or when called on to testify in any court or proceeding of the public utilities commission, no employee or agent referred to in section 4905.13 of the Revised Code shall divulge any information acquired by him in respect to the transaction, property, or business of any public utility, while acting or claiming to act as such employee or agent.

R.C. § 4901.16.

**B. The Proprietary Information Should Be Protected.**

On August 4, 2014, the Companies filed their Application in this proceeding. On the same day, and pursuant to Section 1333.61(D), the Companies moved for a protective order to protect proprietary information contained in their Application (the “August 4 Motion”). As demonstrated in the August 4 Motion, that proprietary information fell into two categories relevant here: (1) confidential business information belonging to FirstEnergy Solutions Corp. (“FES”); and (2) confidential business information belonging to ICF Resources Incorporated (“ICF”).<sup>1</sup> August 4 Motion at 6. In an Entry dated December 1, 2014 (the “December 1 Entry”), the Attorney Examiner granted protection to the FES and ICF confidential and proprietary business information. December 1 Entry at 11. The Attorney Examiner found that this information warranted protection under Ohio law. *Id.* So too here.

**1. The Proprietary Information satisfies both prongs of Section 1333.61(D).**

The Proprietary Information contained in the Buckley Testimony counts as confidential business information that warrants protection pursuant to Section 1333.61(D). Pursuant to the first prong of Section 1333.61(D), the Proprietary Information bears independent economic value and its disclosure would harm FirstEnergy Corp. Such information provides a window into FirstEnergy Corp.’s internal business operations and strategic market positioning and its public disclosure would place FirstEnergy Corp. at a competitive disadvantage. The confidential business information contained in the Memorandum Contra thus satisfies the first prong of Section 1333.61(D).

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<sup>1</sup> In their August 4 Motion the Companies also sought protection of the identity of individual transmission circuits associated with operating electric generation plants that was contained in the Direct Testimony of Gavin L. Cunningham (since adopted by Company witness Phillips). See August 4 Motion at 5. The Commission also granted protection to this information. See December 1 Entry at 11.

Further, the Companies have made reasonable efforts to protect the Proprietary Information. The Proprietary Information was provided to Staff in a confidential response to a Staff Data Request. Aside from Staff, the Proprietary Information only was provided to those parties to this proceeding that have executed a protective agreement with the Companies. Further, Staff filed the confidential version of the Buckley Testimony under seal and did not otherwise divulge the information. The Proprietary Information therefore satisfies the second prong of Section 1333.61(D). *See, e.g., In re The East Ohio Gas Company d/b/a Dominion East Ohio*, 2015 Ohio PUC LEXIS 911 at \*7-20; *In the Matter of the Application of The Cincinnati Gas & Electric Company*, 2007 Ohio PUC LEXIS 703 at \*23-36.

**2. The Proprietary Information satisfies the six-factor test set forth in *Plain Dealer*.**

The Proprietary Information also meets the *Plain Dealer* Six-Factor Test.

- (1) The extent to which the information is known outside the business: The Proprietary Information is not known outside of FirstEnergy Corp. It only has been disclosed to Staff and those parties who have executed a protective agreement with the Companies.
- (2) The extent to which it is known to those inside the business, i.e., by the employees: The Proprietary Information only is accessible on a need-to-know basis and otherwise is not distributed within First Energy Corp.
- (3) The precautions taken by the holder of the trade secret to guard the secrecy of the information: The Companies have taken reasonable steps to guard the secrecy of the Proprietary Information. The Proprietary Information was provided to Staff in a confidential discovery response and only shared with those parties to this proceeding who have executed a protective agreement with the Companies. Staff filed the confidential version of the Buckley Testimony under seal. The confidential version of the Buckley

Testimony only was distributed to those parties who have executed a protective agreement with the Companies.

- (4) The savings effected and the value to the holder in having the information as against competitors: The Proprietary Information would be of great value to FirstEnergy Corp.'s competitors. It would provide insight into FirstEnergy Corp.'s business strategies and allow competitors to anticipate FirstEnergy Corp.'s future business decisions.
- (5) The amount of effort or money expended in obtaining and developing the information: The Proprietary Information was generated as a result of the internal business operations of FirstEnergy Corp. Those internal business operations were developed over a number of years and at great expense.
- (6) The amount of time and expense it would take for others to acquire and duplicate the information: The Proprietary Information is unique to FirstEnergy Corp. and would prove very difficult and costly for FirstEnergy Corp.'s competitors to acquire or duplicate.

The Proprietary Information thus satisfies the *Plain Dealer* Six-Factor Test and warrants protection as confidential business information. *See, e.g., In the Matter of the Application of The Cincinnati Gas & Electric Company*, 2007 Ohio PUC LEXIS 703 at \*23-36; *In the Matter of the Application of Ohio Power Company*, Case No. 10-2376-EL-UNC, 2011 Ohio PUC LEXIS 1253 at \*2-11.

### **3. Section 4901.16 prohibits the public dissemination of the Proprietary Information.**

The Companies provided the Proprietary Information to Staff in a confidential response to a Staff Data Request pursuant to Section 4901.16. Section 4901.16 provides that, except in a Staff report or testimony, "no [member of Staff] shall divulge any information acquired by him in respect to the transaction, property, or business of any public utility, while acting or claiming



to act as such employee or agent.” R.C. § 4901.16. As confidential and proprietary business information acquired by Staff in the context of a proceeding before the Commission, the Proprietary Information falls under the ambit of Section 4901.16. Its disclosure therefore is prohibited and its protection is required.

### **III. CONCLUSION**

For the foregoing reasons, the Companies request that the Commission grant a protective order preventing public disclosure of the proprietary business information contained in the confidential version of the Rehearing Testimony of Joseph P. Buckley of the Staff of the Public Utilities Commission of Ohio.

Date: July 1, 2016

Respectfully submitted,

/s/ Carrie M. Dunn

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**CERTIFICATE OF SERVICE**

I certify that this Motion for Protective Order was filed electronically through the Docketing Information System of the Public Utilities Commission of Ohio on this 1st day of July, 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 parties via electronic mail.

/s/ Carrie M. Dunn  
One of the Attorneys for the Companies

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Summary: Motion of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company for a 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