

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

**In the Matter of the Amendment of Ohio
Adm. Code 4901-1-24, Regarding
Motions for Protective Orders**

Case No. 18-322-AU-ORD

**COMMENTS OF OHIO EDISON COMPANY,
THE CLEVELAND ELECTRIC ILLUMINATING COMPANY, AND
THE TOLEDO EDISON COMPANY**

I. INTRODUCTION

Pursuant to the Commission’s Entry of February 28, 2018, (“Entry”) Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company (collectively, the “Companies”), respectfully file their comments in this proceeding addressing recommended amendments to rules contained in Chapter 4901-1-24 of the Ohio Administrative Code (“O.A.C.”). The Companies appreciate the opportunity to comment. The Companies respectfully request the Commission consider their comments in this proceeding, and appropriately modify the proposed rules as discussed below.

As an initial matter, the Commission cited as the impetus for this proceeding the Supreme Court of Ohio’s January 25, 2018, decision in *In re Rev. of Alternative Energy Rider contained in Tariffs of Ohio Edison Co.* There the Supreme Court held that discussion of evidence supporting the request for protective treatment is necessary to support a trade secret determination. The Commission has proposed amendments to effectuate the Court’s determination on a prospective basis. Entry at p.2. The Companies note that this determination by the Court did not set a new precedent; it simply applied long-standing case law and traditional agency review jurisprudence. The Companies further note that in the associated underlying

docket, Case No. 11-5201-EL-RDR, the Companies filed an affidavit with their Reply to the Office of Consumers' Counsel's Memorandum Contra, and that a similar affidavit has accompanied every subsequent request for an extension of the protection. Moreover, a hearing on the Companies' Motion for Protective Order was scheduled and held before the protective order was granted. While the Companies have followed this process, to the extent the Commission wishes to codify the process into a requirement, the Companies offer the following recommendations.

II. COMMENTS

Rules 4901-1-24(D)(3) and 4901-1-24(F)

The Commission proposes amendments to Rule 4901-1-24(D)(3) and 4901-1-24(F) to add: "Facts supporting the motion shall be set forth in an affidavit made on personal knowledge." The Companies recommend the Commission consider adopting the use of declarations found in the Federal Rules of Evidence codified as 28 U.S.C. 1746, which states:

Wherever, under any law of the United States or under any rule, regulation, order, or requirement made pursuant to law, any matter is required or permitted to be supported, evidenced, established, or proved by the sworn declaration, verification, certificate, statement, oath, or affidavit, in writing of the person making the same (other than a deposition, or an oath of office, or an oath required to be taken before a specified official other than a notary public), such matter may, with like force and effect, be supported, evidenced, established, or proved by the unsworn declaration, certificate, verification, or statement, in writing of such person which is subscribed by him, as true under penalty of perjury, and dated, in substantially the following form:

...

(2) If executed within the United States, its territories, possessions, or commonwealths: "I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct. Executed on (date).

(Signature)".

The main benefit of accepting unsworn declarations is to streamline the process by eliminating the need to be notarized for filing. Thus, affiants who work out-of-state or in remote regional or field offices would not experience the logistical obstacle of obtaining notarization to timely file proper evidence in support of a motion for protective order.

Another suggestion to streamline operation of the proposed rule amendment is to provide an exception to the evidentiary requirement to support protection of customer information that is proprietary or private. Such information is sometimes included in filings made by the Companies in which the corresponding customers have not intervened. The Commission already protects confidential customer information in several of its rules. For example, Rule 4901:1-10-12, O.A.C. provides for several consumer protections. Specifically, the Companies are required to provide to customers a summary of rights and obligations that include protections of customer privacy for information such as: (i) a prohibition from disclosing account numbers and social security numbers without customer consent;¹ and (ii) a prohibition from disclosing customer energy usage data that is more granular than the monthly historical consumption data, provided on the customer pre-enrollment list pursuant to paragraph (E) of Rule 4901:1-10-29, O.A.C.² Further, Rule 4901:1-10-12(F)(4), O.A.C. contains a specific provision on how customer consent can be obtained should a person seek to receive such customer information.

¹ Rule 4901:1-10-12(F)(1) and (2), O.A.C. The Companies recognize that this rule permits the disclosure with a commission or court order.

² Rule 4901:1-10-12(F)(3), O.A.C. This rule clearly contemplates even providing monthly historical consumption data only to pre-enrollment lists so that a customer may shop with a CRES provider. Again, the Companies recognize that this rule permits the disclosure with a commission or court order.

The Companies redact such information from publicly filed documents not because the Companies themselves derive an economic benefit from maintaining its confidentiality, but rather to comply with the Commission's rules. Sections 4901-1-24(D) and 4901-1-24(F) are not limited in applicability to trade secret information or to the Companies' own internal data. It would be unduly burdensome to require an affidavit or declaration based on personal knowledge to protect information that is already deemed protected under the Rules. Instead, the burden of proof should remain on any person seeking to obtain such information.

A third suggestion to streamline the proposed new rules is to obviate the need for an affidavit/declaration if the memorandum in support of the motion for protective treatment includes references to pre-filed direct testimony or a hearing transcript of testimony of a witness with personal knowledge that supports the request. Such testimony would already be evidence of record and thus provide the factual basis for citation and discussion in an order protecting the subject information. A further requirement to include an affidavit or declaration with the motion would be unnecessarily duplicative.

The Companies therefore offer the following edits to the proposed amendments in 4901-1-24(D)(3) to reflect these suggestions:

- (3) The motion for protection of allegedly confidential information shall be accompanied by a memorandum in support setting forth the specific basis of the motion, including a detailed discussion of the need for protection from disclosure, and citations of any authorities relied upon. Except for proprietary customer information protected under Ohio Adm. Code 4901-1-10 et seq, facts supporting the motion shall be set forth in an affidavit, unsworn declaration, or reference to testimony made on personal knowledge. The motion, memorandum in support, and affidavit shall be made part of the public record of the proceeding.

And in 4901-1-24(F):

- (F) Unless otherwise ordered, any order prohibiting public disclosure pursuant to paragraph (D) of this rule shall automatically expire twenty-four months after the date of its issuance, and such information may then be included in the public record of the proceeding. A party wishing to extend a protective order beyond twenty-four

months shall file an appropriate motion at least forty-five days in advance of the expiration date of the existing order. The motion shall include a detailed discussion of the need for continued protection from disclosure. Except for proprietary customer information protected under Ohio Adm. Code 4901-1-10 et seq, facts supporting the motion shall be set forth in an affidavit, unsworn declaration, or reference to testimony made on personal knowledge. The motion and affidavit or unsworn declaration shall be made part of the public record of the proceeding. Nothing precludes the commission from reexamining the need for protection issue de novo during the twenty-four month period if there is an application for rehearing on confidentiality or a public records request for the redacted information.

4901-1-24(E)

The Companies have no comments on the amendments proposed to this section at this time, and reserve their right to submit Reply Comments if scheduled by the Commission in this proceeding.

III. CONCLUSION

The Companies acknowledge the Commission's efforts to modify the proposed rules to address concerns previously identified. The Companies, however, urge the Commission to adopt the recommendations of the Companies set forth above to fully address the issues and improve the practicability of the amendments.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing Comments of Ohio Edison Company, The Cleveland Electric Illuminating Company and The Toledo Edison Company were filed with the Commission's Docketing Division on this 16th day of March 2018 and is available to all interested parties.

*/s/ Robert M. Endris*_____

*One of the Attorneys for Ohio Edison
Company, The Cleveland Electric
Illuminating Company and The Toledo
Edison Company*

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3/16/2018 3:19:49 PM

in

Case No(s). 18-0322-AU-ORD

Summary: Comments Comments of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company electronically filed by Mr. Robert M. Endris on behalf of Endris, Robert Mr.