

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of Alternative Energy)	
Resources Report for Calendar Year 2018)	Case No. 19-0910-EL-ACP
from Constellation NewEnergy, Inc.)	

MOTION FOR PROTECTIVE ORDER

Pursuant to Ohio Administrative Code Rule 4901-1-24(D), Constellation NewEnergy, Inc. moves for a protective order to keep the confidential and proprietary forecast information contained in its Alternative Energy Resources Report for Calendar Year 2018 confidential and not part of the public record. The reasons underlying this motion are detailed in the attached Memorandum in Support. Consistent with the requirements of the above-cited rule, two (2) unredacted copies of the report are submitted under seal.

Respectfully submitted,

/s/ Gretchen L. Petrucci
Michael J. Settineri (0073369), Counsel of Record
Gretchen L. Petrucci (0046608)
Vorys, Sater, Seymour and Pease LLP
52 East Gay Street
P.O. Box 1008
Columbus, Ohio 43216-1008
(614) 464-5462
mjsettineri@vorys.com
glpetrucci@vorys.com

Counsel for Constellation NewEnergy, Inc.

**MEMORANDUM IN SUPPORT OF
MOTION FOR PROTECTIVE ORDER**

Constellation NewEnergy, Inc. (“Constellation”) requests that information in the Introductory Section and Section V.a of its Alternative Energy Resources Report for 2018 be protected from public disclosure. The information in those sections of the report lists the competitive trade secret information, including solar REC and non-solar REC requirements. Release of this information to the public would harm Constellation by providing its competitors with proprietary information that is designed by statute to now be a competitive service.

Ohio Administrative Code (“O.A.C.”) Rule 4901-1-24(D) provides that the Public Utilities Commission of Ohio (“Commission”) or certain designated employees may protect the confidentiality of information contained in documents filed with the Commission’s Docketing Division to the extent that state or federal law prohibits the release of the information and where non-disclosure of the information is not inconsistent with the purposes of Title 49 of the Revised Code (“R.C.”). State law recognizes the need to protect certain types of information, including that which is the subject of this motion. The non-disclosure of the information in the Introductory Section and Section V.a of Constellation’s report will not impair the purposes of Title 49. The Commission and its Staff have full access to the information in order to fulfill their statutory obligations. No purpose of Title 49 would be served by the public disclosure of the information.

The need to protect the designated information from public disclosure is clear, and there is compelling legal authority supporting the requested protective order. While the

Commission has often expressed its preference for open proceedings, the Commission also long ago recognized its statutory obligations with regard to trade secrets:

The Commission is of the opinion that the “public records” statute must also be read in pari materia with Section 1333.31, Revised Code (“trade secrets” statute). The latter statute must be interpreted as evincing the recognition, on the part of the General Assembly, of the value of trade secret information.

In re: General Telephone Co., Case No. 81-383-TP-AIR (Entry, February 17, 1982). Likewise, the Commission has facilitated the protection of trade secrets in its rules. *See*, O.A.C. Rule 4901-1-24(A)(7).

The definition of a “trade secret” is set forth in the Uniform Trade Secrets Act:

“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. § 1333.61(D). This definition clearly reflects the state policy favoring the protection of trade secrets, including the forecast information.

In *State ex rel The Plain Dealer the Ohio Dept. of Ins.* (1997), 80 Ohio St. 3d 513, the Ohio Supreme Court adopted a six-factor test to analyze whether information is a trade secret under the statute:

- (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.

Id. at 524-525 (quoting *Pyromatics, Inc. v. Petruziello*, 7 Ohio App. 3d 131, 134-135 (Cuyahoga County 1983)).

After applying these factors to the information sought to be protected, it is clear that a protective order should be granted. The Alternative Energy Resources Report for Calendar Year 2018 contains confidential and proprietary information. Such sensitive information is generally not disclosed. Its disclosure could give competitors an advantage that would hinder Constellation's ability to compete. In addition, public disclosure of this confidential information is not likely to assist the Commission in carrying out its duties. Moreover, the Commission has found forecast information to constitute a trade secret. *In the Matter of Direct Energy Services, LLC's Annual Alternative Energy Portfolio Status Report*, Case No. 12-1233-EL-ACP, Finding and Order at ¶14 (November 13, 2013).

Courts of other jurisdictions have held that not only does a public utilities commission have the authority to protect the trade secrets of the companies subject to its jurisdiction, the trade secrets statute creates a duty to protect them. *New York Tel. Co. v. Pub. Serv. Comm. N.Y.*, 56 N.Y. 2d 213 (1982). Indeed, for the Commission to do otherwise would be to negate the protections the Ohio General Assembly has granted to all businesses, including public utilities, and now the new entrants who will be providing power through the Uniform Trade Secrets Act. This Commission has previously carried out its obligations in this regard in numerous proceedings. *See, e.g., Elyria Tel. Co.*, Case No. 89-965-TP-AEC (Finding and Order,

September 21, 1989); *Ohio Bell Tel. Co.*, Case No. 89-718-TP-ATA (Finding and Order, May 31, 1989); *Columbia Gas of Ohio, Inc.*, Case No. 90-17-GA-GCR (Entry, August 17, 1990).

WHEREFORE, for the above reasons, Constellation requests that the Commission grant its motion for a protective order and to maintain under seal the information contained in the Introductory Section and Section V.a of its Alternative Energy Resources Report for Calendar Year 2018.

Respectfully submitted,

/s/ Gretchen L. Petrucci
Michael J. Settineri (0073369), Counsel of Record
Gretchen L. Petrucci (0046608)
Vorys, Sater, Seymour and Pease LLP
52 East Gay Street
P.O. Box 1008
Columbus, Ohio 43216-1008
(614) 464-5462
mjsettineri@vorys.com
glpetrucci@vorys.com

Counsel for Constellation NewEnergy, Inc.

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Summary: Motion Motion for Protective Order electronically filed by Mrs. Gretchen L. Petrucci on behalf of Constellation NewEnergy, Inc.