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BEFORE  
THE PUBLIC UTILITIES COMMISSION OF OHIO

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In the Matter of the Complaint of	)	
WPS Energy Services, Inc.	)	
	)	
and	)	
	)	
Green Mountain Energy Company,	)	
	)	
Complainants	)	
v.	)	Case No. 02-1944-EL-CSS
	)	
FirstEnergy Corp.	)	
Cleveland Electric Illuminating Company,	)	
Toledo Edison Company, and	)	
Ohio Edison Company	)	
	)	
Respondents	)	

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WPS ENERGY SERVICES, INC.'S  
MOTION FOR EXTENSION OF PROTECTIVE TREATMENT  
AND MEMORANDUM IN SUPPORT

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John W. Bentine, Esq. (0016388)  
Trial Counsel  
E-Mail: jbentine@cwsllaw.com  
Direct Dial: (614) 334-6121  
Bobby Singh, Esq. (0072743)  
E-Mail: bsingh@cwsllaw.com  
Direct Dial: (614) 334-6122  
Chester Willcox & Saxbe, LLP  
65 East State Street, Suite 1000  
Columbus, Ohio 43215  
(614) 221-4000 (main number)  
(614) 221-4012 (facsimile)

Attorneys for WPS Energy Services, Inc.

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**I. MOTION FOR EXTENSION OF PROTECTIVE TREATMENT**

Pursuant to Ohio Administrative Code ("OAC") 4901-1-24(F), WPS Energy Services, Inc. ("WPS-ESI") respectfully moves the Public Utilities Commission of Ohio ("Commission") to issue a protective order to extend confidential treatment and prohibit the disclosure of certain information (discussed below) for an additional eighteen (18) months.

The Honorable Presiding Attorney Examiner has previously granted protective treatment to this information by the Entries of May 2, 2003, and October 14, 2004. The current protective treatment is apparently scheduled to expire on April 14, 2006.

The subject information for which the extension of protective treatment is being

requested is contained in Exhibits A and D attached to the direct testimony of WPS-ESI witness Ann Farrell-Novak, consisting of personal information on a WPS-ESI customer, as well as competitively sensitive and highly proprietary business financial information comprising of trade secrets of WPS-ESI (collectively, "Confidential Information"). When filed, the Confidential Information was clearly marked as confidential and separately filed under seal.

## **II. MEMORANDUM IN SUPPORT**

As noted above, the Confidential Information for which this extension of protective treatment is being requested consists of personal information on a WPS-ESI customer, as well as competitively sensitive and proprietary financial information and trade secrets of WPS-ESI. The nature of the Confidential Information requires that it be protected from disclosure for at least an additional eighteen (18) months, the longest time period for protection provided by OAC 4901-1-24 after which a renewal must be requested.

OAC 4901-1-24 provides for the issuance of an order to protect the confidentiality of information contained in Commission filings to the extent the information is: (i) prohibited from disclosure by state or federal law, such as trade secrets and confidential information;<sup>1</sup> (ii) non-disclosure is not inconsistent with the purposes of Ohio Revised Code ("RC") Title 49; and, (iii) maintained as confidential by the entity seeking the protective treatment.<sup>2</sup> The Confidential Information unequivocally satisfies the above requirements.

First, state law recognizes the need to protect information that is confidential in nature, such as the Confidential Information. RC § 4929.23(A) specifically permits the Commission to

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<sup>1</sup> See RC 149.43(A)(1)(v).

<sup>2</sup> See *State ex rel. The Plain Dealer v. Ohio Dept. of Ins.* (1997), 80 Ohio St. 3d 513, 524-525, citing *Pyromatics, Inc. v. Petruziello* (1983), 7 Ohio App. 3d 131.

grant confidentiality to competitively sensitive information. Further, RC § 4901.12 and 4905.07 facilitate the protection of trade secrets in the Commission's possession,<sup>3</sup> because RC § 4901.12 and 4905.07, through their reference to RC § 149.43, incorporate the permission to exempt from the public record information whose release is prohibited by law.<sup>4</sup>

Further, the Commission has long-recognized the value of, and therefore the need to protect from public disclosure, trade secret and personal information. For example, the Commission has issued protective orders in numerous proceedings to maintain the confidentiality of competitively sensitive and proprietary information.<sup>5</sup> In fact, the universal recognition of the value of permitting this type of information to remain confidential has even lead courts of other jurisdictions to hold that public utilities have not only the authority, but the duty, to protect the trade secrets of the entities that they regulate.<sup>6</sup> Thus, in accordance with state law, the Commission's rules and precedent prohibit the release of customer and proprietary business information, such as the Confidential Information.

#### 1. Personal Customer Information

The customer information contained in the Confidential Information consists of personal contact and financial information, such as the customer name and identification, customer

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<sup>3</sup> RC § 4901.12 provides: "Except as otherwise provided in section 149.43 of the Revised Code and as consistent with the purposes of Title XLIX [49] of the Revised Code, all proceedings of the public utilities commission and all documents and records in its possession are public records." RC § 4905.07 provides: "Except as provided in section 149.43 of the Revised Code and as consistent with the purposes of Title XLIX [49] of the Revised Code, all facts and information in the possession of the public utilities commission shall be public, and all reports, records, files, books, accounts, papers, and memorandums of every nature in its possession shall be open to inspection by interested parties or their attorneys."

<sup>4</sup> RC § 149.43(A)(1)(v) provides in part that "'Public record' does not mean records the release of which is prohibited by state or federal law."

<sup>5</sup> See, e.g., *Elyria Tel. Co.*, Case No. 89-965-TP-A-EC (Finding and Order, Sept. 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, Aug. 17, 1990).

<sup>6</sup> See *New York Tel. Co. v. Pub. Serv. Comm.* N.Y., 56 N.Y.2d 213 (1982).

address and telephone numbers, personal financial information necessary to qualify to receive service, and the account number. This information is not generally known by the public, and is held in confidence in the normal course of business. If this information is disclosed, WPS-ESI is unable to predict the extent of the harm that may be caused to the customer and its related personal finances. Thus, this information has actual, substantial independent economic value from not being generally known, and not being ascertainable by proper means by persons that would derive economic value from disclosure. Indeed, the Commission's rules prohibit disclosure of such information without the customer's written affirmative consent,<sup>7</sup> which consent WPS-ESI does not have.

The personal customer information contained in the Confidential Information is protected from disclosure under the Commission's rules and state law, and, for the customer's protection, this information should not be made public even since protection was first granted. Therefore, WPS-ESI respectfully submits that the Commission should grant protective treatment to this information for an additional eighteen (18) months.

## 2. Competitively Sensitive and Proprietary Business and Financial Information

The Confidential Information consisting of WPS-ESI's competitively sensitive and proprietary business and financial information constitutes trade secrets as defined by RC § 1333.61(D), and therefore, merits continued protective treatment for an additional eighteen (18) months. The definition of trade secret contained in RC § 1333.61 (D) is as follows:

"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:

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<sup>7</sup> See OAC 4901:1-21-10(B).

(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.<sup>8</sup>

The Confidential Information comprised of WPS-ESI's competitively sensitive and proprietary business information consists of financial statements, financial arrangements, and monthly billed revenues and write-offs associated with its competitive retail electric service activities. Even since protected treatment was first accorded, this information remains competitively sensitive and proprietary, because competitors would be able to use the information to back-calculate WPS-ESI's margin and losses on generation sales, as well as its market share. Disclosing this information will compromise WPS-ESI's ability to compete in the marketplace and WPS-ESI would be exposed to being under-bid for new sales.

This information has actual, substantial independent economic value from not being generally known, and not being ascertainable by proper means by persons that would derive economic value from disclosure. WPS-ESI avers that this information is not generally known by the public and is held in confidence in the normal course of business. Accordingly, WPS-ESI respectfully requests that the Confidential Information consisting of competitively sensitive and proprietary business financial information be deemed to be trade secrets and be protected from

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<sup>8</sup> Emphasis added. In *Pyromatics Inc. v. Petruziello*, 7 Ohio App. 3d 131, 134-35 (Cuyahoga Co. 1983), the Court of Appeals, citing *Koch Eng. Co. v. Faulconer*, 210 U.S.P.Q. 854, 861 (Kan. 1980), delineated the factors to be considered in recognizing a trade secret:

[T]he 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

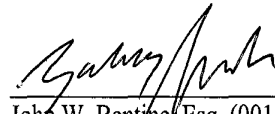
The above inquiry and the definition contained in Section RC § 1333.61 are satisfied in this request.

public disclosure for an additional eighteen (18) months in accordance with OAC 4901-1-24.

The non-disclosure of the Confidential Information will not impair the purposes of Title 49 because the Commission and its Staff have full access to the information. The Honorable Presiding Attorney Examiner has previously granted protective treatment to this information, and the passage of time since protective treatment was originally granted has not eroded the original basis for protection. For the reasons presented above, the nature of the Confidential Information merits protective treatment for an additional eighteen (18) months.

**WHEREFORE**, WPS-ESI respectfully requests that the Commission grant this Motion for Extension of Protective Treatment.

Respectfully submitted,



John W. Bentine, Esq. (0016388)

Trial Counsel

E-Mail: [jbentine@cwslaw.com](mailto:jbentine@cwslaw.com)

Direct Dial: (614) 334-6121

Bobby Singh, Esq. (0072743)

E-Mail: [bsingh@cwslaw.com](mailto:bsingh@cwslaw.com)

Direct Dial: (614) 334-6122

Chester Willcox & Saxbe, LLP

65 East State Street, Suite 1000

Columbus, Ohio 43215


(614) 221-4000 (main number)

(614) 221-4012 (facsimile)

**Attorneys for WPS Energy Services, Inc.**

### CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing pleading was served upon the following parties of record or as a courtesy, via U.S. Mail postage prepaid, express mail, hand delivery, or electronic transmission, on January 23, 2006.

  
\_\_\_\_\_  
Bobby Singh, Esq.

### SERVICE LIST

Alfred P. Agler  
The Public Utilities Commission of Ohio  
180 East Broad Street  
Columbus, Ohio 43215

James W. Burk  
FirstEnergy Corp  
76 South Main Street  
Akron, Ohio 44308

Steve Lesser  
The Public Utilities Commission of Ohio  
180 East Broad Street  
Columbus, Ohio 43215

Joanne Borrell, Director  
FirstEnergy Services Corp.  
395 Ghent Road  
Akron, Ohio 44333

Howard M. Petricoff  
Vorys, Sater, Seymour & Pease  
52 East Gay Street  
P.O. Box 1008  
Columbus, Ohio 43216-1008

Jeffrey L. Small  
Ohio Consumers' Counsel  
18<sup>th</sup> Floor  
10 West Broad Street  
Columbus, Ohio 43215-3485

Helen L. Liebman  
Jones, Day, Reavis & Pogue  
Suite 1900  
41 South High Street  
Columbus, Ohio 43215

Evelyn R. Robinson  
Green Mountain Energy Company  
Suite 240  
5450 Frantz Road  
Dublin, Ohio 43016

William Zigli  
City of Cleveland  
Room 106  
601 Lakeside Avenue E  
Cleveland, Ohio 44114-1077

Jean A. Demarr  
Regulatory Attorney  
East Ohio Gas Company  
P.O. Box 5759  
Cleveland, Ohio 44101



Bruce Weston  
169 West Hubbard Avenue  
Columbus, Ohio 43215

Sheilah H. McAdams  
City of Maumee  
204 West Wayne Street  
Maumee, Ohio 43537

Paul Goldberg  
Suite 400  
4853 Monroe Street  
Toledo, Ohio 43623-4353

James E. Moan  
Lydy & Moan  
4930 Holland-Sylvania Road  
Sylvania, Ohio 43560-2149

Samuel C. Randazzo  
McNees, Wallace & Nurick  
Fifth Third Center  
Suite 910  
21 East State Street  
Columbus, Ohio 43215

Glenn S. Krassen  
Bricker & Eckler  
Suite 1500  
1375 East Ninth Street  
Cleveland, Ohio 44115-1718

David C. Rinebolt  
Ohio Partners for Affordable Energy  
Fourth Floor, Suite 5  
337 South Main Street  
P.O. Box 1793  
Findlay, Ohio 45839-1793

Michael Smalz  
Ohio State Legal Service Assoc.  
555 Buttles Avenue  
Columbus, Ohio 43215-1137

Brian Ballenger  
Ballenger & Moore Co., LPA  
Suite C  
3401 Woodville Road  
Northwood, Ohio 43619

Peter D. Gwyn  
110 West Second Street  
Perrysburg, Ohio 43551

Leslie A. Kovacic  
Department of Public Utilities  
Suite 100  
420 Madison Avenue  
Toledo, Ohio 43604

Lance M. Keiffer  
Assistant Prosecuting Attorney  
Suite 250  
Lucas County Courthouse  
Toledo, Ohio 43624-1680

Sally W. Bloomfield  
Bricker & Eckler  
100 South Third Street  
Columbus, Ohio 43215

Paul A. Skaff  
Leatherman, Witzler, Dombey & Hart  
353 Elm Street  
Perrysburg, Ohio 43551