

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

**In the Matter of the Review of the
Alternative Energy Rider Contained in the
Tariffs of Ohio Edison Company, The
Cleveland Electric Illuminating Company,
and the Toledo Edison Company**

Case No. 11-5201-EL-RDR

**OHIO EDISON COMPANY, THE CLEVELAND ELECTRIC ILLUMINATING
COMPANY, AND THE TOLEDO EDISON COMPANY’S
MEMORANDUM CONTRA THE OFFICE OF THE OHIO CONSUMERS’ COUNSEL’S
MOTION FOR A PREHEARING CONFERENCE TO OBTAIN
THE FULL (NON-REDACTED) PUCO-ORDERED MANAGEMENT AUDIT REPORT
AND REQUEST FOR EXPEDITED RULING**

I. INTRODUCTION

In its pending motion, the Office of the Ohio Consumers’ Counsel (“OCC”) argues that a prehearing conference is needed to “obtain access” to an unredacted version of the Confidential Final Report/Performance Audit of the Alternative Energy Resource Rider (Rider AER) of FirstEnergy Ohio Utility Companies for October 2009 through December 31, 2011 (the “Exeter Report”). The motion, however, is nothing more than a backhanded attempt to bring a motion to compel that would otherwise be premature and procedurally flawed under the Commission’s rules. OCC provides no legal support for its position that the Commission should ignore its discovery rules. There is none. For this reason alone, the Commission should deny OCC’s motion.

In addition, the Commission should deny OCC’s motion because it violates two of the Commission’s rules. First, OCC’s request to compel the Companies to produce discovery violates Rule 4901-1-20(C) because the Companies’ responses to OCC’s second set of discovery, which contain its request for the unredacted copy of the Exeter Report, are not even due. Second, OCC’s request to compel the Companies to produce discovery violates Rule 4901-

23(C) because OCC has failed to exhaust all other reasonable efforts to resolve its discovery dispute with the Companies.¹

Indeed, OCC's motion fails to acknowledge that the Companies have offered to enter into a protective agreement with OCC and that the Companies' proposed protective agreement contains provisions that are similar to the protective agreement that OCC agreed to in the Companies' recent ESP case.² A protective agreement is necessary to prevent the disclosure of the competitively sensitive information contained within the Exeter Report. However, if OCC agrees to enter into the Companies' proposed protective agreement, then the Companies will provide certain additional information to OCC that is now redacted in the publicly filed version of the Exeter Report. Rather than responding to the Companies' offer and possibly resolving many of OCC's perceived issues (*i.e.*, engaging in the process contemplated by the Commission's rules), OCC rushed to file its motion.

Moreover, OCC provides no basis to support expediting (or just bypassing) the discovery process. Although OCC argues that upcoming deadlines in this case support expedition, OCC's own conduct contributed to any perceived delay in resolving OCC's request for an unredacted version of the Exeter Report. Certainly, OCC was aware that the Exeter Report as publicly filed in this case was redacted. OCC also had notice of the Commission's procedural schedule since August 22, 2012. As stated above, the Companies sent a protective agreement to OCC on September 11, 2012, to which OCC did not respond, except for a general reference to it as part of

¹ Further, OCC failed to contact the Companies regarding their request for expedited treatment as contemplated by O.A.C. 4901-1-12(C).

² *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. 12-1230-EL-SSO.

the instant motion that was filed on September 26, 2012. OCC's delay does not provide grounds for an expedited ruling. The Commission should deny OCC's request.

II. BACKGROUND

On August 15, 2012, the Commission Staff filed the unredacted Exeter Report under seal. On the same date, a public version of the report was also filed in which commercially sensitive and trade secret information related to suppliers was redacted. The redacted information is supplier-identifying information and pricing information that constitutes commercially sensitive and trade secret information.

On August 22, 2012, the Attorney Examiner set the procedural schedule for this matter. On August 24, 2012, OCC served its first set of discovery on the Companies. In OCC's first set of discovery, OCC did *not* request an unredacted copy of Exeter Report. On September 13, 2012, the Companies responded to an informal request by OCC for the Exeter Report. The Companies explained that the information redacted from the Exeter Report is confidential and proprietary information belonging to third parties. (Mem. Supp. at Attachment.) The next day, OCC served a formal request for an unredacted copy of the Exeter Report. Pursuant to Rule 4901-1-20(C) of the Ohio Administrative Code, the Companies' response to that discovery is due on October 4, 2012. Yet OCC filed this motion on September 26, 2012 requesting the Commission to compel the Companies to provide the requested discovery. OCC's motion was thus filed a week before the Companies' response to OCC's discovery request was even due.

III. ARGUMENT

A. OCC's Motion For A Prehearing Conference Is An Improper Attempt To Accelerate The Discovery Process.

OCC seeks to accelerate the discovery process improperly by requesting that the Commission hold a prehearing conference to compel the Companies to provide an unredacted

copy of the Exeter Report. But OCC offers no legal support for its argument that the orderly discovery process set forth by Ohio law should not apply to its request for this information.³ For this reason alone, the Commission should deny OCC's motion.

OCC's request for an order to compel the Companies to produce this information should also be denied because it violates the Commission's discovery rules. Specifically, OCC's request violates Rule 4901-1-20(C) of the Ohio Administrative Code. This rule provides that a party has 20 days to respond to a request for production of documents. (O.A.C. 4901-1-20(C)). OCC's request is to compel production of an unredacted version of the Exeter Report is premature at best. The Companies responses to OCC's discovery requests are not due until October 4, 2012. The Companies reserve the right to and will make all other applicable objections to the discovery requests propounded by OCC at the time they respond to those requests.

Second, Rule 4901-1-23(C) of the Ohio Administrative Code provides that if a party fails to respond to a discovery request, then the requesting party must exhaust all reasonable means of resolving the dispute before filing a motion to compel. OCC has not met this requirement. In fact, OCC fails even to acknowledge that Companies have attempted to work with OCC. The Companies have explained to OCC that if OCC enters into the Companies' proposed protective agreement, then the Companies will provide OCC with access to additional, confidential information. As set forth in Section III (B), the Companies submitted a draft of that protective

³ Although the OCC cites the November 25, 2003 Entry in *In the Matter of the Applications of Ohio Edison Company, the Cleveland Electric Illuminating Company and The Toledo Edison Company for Authority to Continue and Modify Certain Regulatory Accounting Practices and Procedures, for Tariff Approvals and to Establish Rates and Other Charges Including Regulatory Transition Charges Following the Market Development Period*, Case No. 03-2144-EL-ATA (Mem. Supp. at 5) as support for its request for a prehearing conference, this Entry did not hold that the parties need not follow the discovery process set forth under the Ohio Administrative Code.

agreement to OCC on September 11, 2012. But OCC has failed to respond to the Companies' offer.

The Commission has previously denied a similar attempt by OCC to side step the discovery process through a request for a prehearing conference. *In the Matter of the 2010 Electric Long-Term Forecast Report of Duke Energy Ohio, Inc.*, Case No. 10-503-EL-FOR, at ¶ 13 (Entry, Oct. 21, 2010). In that case, OCC and other intervening parties filed a motion for a prehearing discovery conference. The attorney examiner found that the 20-day time period for discovery responses set forth under Rule 4901-1-20 had not yet expired. *Id.* The attorney examiner also noted that even after the 20-day time period had expired, Rule 4901-1-23 requires the intervening parties to exhaust all reasonable means to resolve their discovery differences before filing a motion to compel. *Id.* As a result, the attorney examiner denied the intervening parties' request for a prehearing conference.

Here, the Commission should similarly deny OCC's request to side step the discovery process.

B. A Prehearing Conference Is Unnecessary To Address The Confidentiality Of The Supplier Information That Is Contained In The Publicly Filed Version Of The Exeter Report.

OCC also argues that a prehearing conference is necessary to resolve "issues of confidentiality" that the Companies will raise regarding the Exeter Report. (Mem. Supp. at 4.) OCC's request, however, is nothing more than a plea to the Commission to require the parties to negotiate the terms of a protective agreement in front of the attorney examiner. More importantly, OCC fails to show that the parties will be unable to negotiate on their own.

In its motion, OCC does not acknowledge that on September 11, 2012, the Companies offered to enter into a protective agreement that would contain most of the same provisions that OCC agreed to in the ESP 3 case. The only difference between what OCC has previously agreed

to and the protective agreement proposed by the Companies is that the latter contains additional provisions to protect competitively sensitive confidential information. These provisions are necessary in this case because this case involves confidential proprietary information belonging to suppliers, not parties to this action, and for which the Companies are required by contract to protect such information from disclosure. Indeed, the proposed protective agreement provisions regarding competitively sensitive information are similar to provisions that parties agreed to in the AEP ESP case.⁴

A protective agreement is needed because the information that is redacted in the publicly filed version of the Exeter Report is information related to suppliers' pricing of renewable energy credits and information that identifies the suppliers who participated in the Companies' competitive bid processes. The Commission has found this type of competitively sensitive information to qualify as a trade secret and has protected it from disclosure. *Columbus Southern Power Co.*, Case No. 11-4570-EL-RDR, *3-4 (Finding and Order, October 12, 2011) (granting a protective order over supplier pricing information); *Ohio Edison Co.*, Case No. 04-1371-EL-ATA, *6 (Finding and Order, April 6, 2005) (finding that bidder information was a trade secret and granting a protective order over this information); *Monongahela Power Co.*, Case No. 04-1047, *18 (Finding and Order, April 6, 2005) (same); *Ohio Tel. Relay Serv.*, Case No. 01-2945-TP-COI, *5 (Entry, May 2, 2002) (granting a protective order over information contained within a bid proposal).

The Companies also are required to protect this information from disclosure under the terms of the Companies' contracts with suppliers who participated in the Companies'

⁴ *In the Matter of the Application of Columbus Southern Power Company and Ohio Power Company for Authority to Establish a Standard Service Offer Pursuant to Section 4928.143, Revised Code, in the Form of an Electric Security Plan*, Case No. 11-346-EL-SSO.

competitive bid processes. These agreements prohibit disclosure of a supplier's confidential information without the supplier's consent.⁵ (*See e.g.*, Form of Renewable Energy Credit Purchase and Sale Agreement FirstEnergy Service Company, as Agent for The Cleveland Electric Illuminating Company, Ohio Edison Company and The Toledo Edison Company, at Article 13 (Publicity and Disclosure) and Article 14.7 (Confidential Information), attached as Exhibit 1 and Form of Purchase and Sale Agreement for Firm Renewable Energy Credits First Energy Service Company, as Agent for The Cleveland Electric Illuminating Company, Ohio Edison Company and The Toledo Edison Company at Article 13.1 (Confidentiality), attached as Exhibit 2.) The Companies have not received this consent and thus do not have the authority at this time to release their suppliers' confidential information to OCC or any other party.

Once OCC signs a mutually agreeable protective agreement, however, the Companies will provide OCC with a version of the Exeter Report that contains less redactions. This version will provide additional pricing information to OCC. The Companies are willing to provide this information to OCC after entering into a mutually agreeable protective order because OCC is not a participant in a competitive REC market. The only information that will remain redacted will be supplier-identifying information, which is not relevant to the issues to be litigated in this proceeding

Accordingly, a prehearing conference is unnecessary to address the confidentiality of the information contained in the Exeter Report. The Commission should deny OCC's motion.

⁵ These agreements, however, provide exceptions for disclosure of the supplier's confidential information to the Public Utilities Commission and as required by court order. (Exhibit 1 at Article 14.7 and Exhibit 2 at Article 13.2.)

C. OCC’S Request For Expedited Discovery Is Unsupported.

OCC essentially requests expedited discovery. (Mem. Supp. at 5.) But OCC provides no grounds to support its request. OCC’s argument that a prehearing conference is “an important step in providing the parties adequate time to analyze the information sought for inclusion in testimony that must be filed by November 13, 2012” does not provide support for an expedited ruling. The procedural schedule for this matter, including the deadline for intervening testimony, was set on August 22, 2012. As of that date, OCC had the ability to request unredacted copies of the Exeter Report. Further, the Companies provided OCC a protective agreement on September 11, 2012, to which OCC has not responded. It is OCC’s own inaction that has contributed to any perceived timing issues. OCC offers no other reason as to why the Commission should expedite the discovery process. The Commission should deny OCC’s request. Further, the expedited schedule that OCC suggests to resolve the issues regarding the confidential information in the Exeter Report – *i.e.*, a prehearing conference this week – provides an inadequate amount of time to suppliers that participated in the Companies’ RFP (the parties with an interest in keeping their proprietary information confidential) to take action to protect their interests and information.

IV. CONCLUSION

For the foregoing reasons, the Companies request that the Commission deny OCC's motion for a prehearing conference and expedited ruling.

DATED: October 3, 2012

Respectfully submitted,

/s/ David A. Kutik_____

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CERTIFICATE OF SERVICE

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Summary: Memorandum Contra The Office Of The Ohio Consumer's Counsel's Motion For A Prehearing Conference To Obtain The Full (Non-Redacted) PUCO-Ordered Management Audit Report And Request For Expedited Ruling electronically filed by MR. DAVID A KUTIK on behalf of Ohio Edison Company and The Cleveland Electric Illuminating Company and The Toledo Edison Company