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 TO COMPEL

I. INTRODUCTION

In its Motion to Compel, the Office of the Ohio Consumers' Counsel ("OCC") accuses Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company (the "Companies") of deliberately delaying the discovery process in the present proceeding. This accusation is manifestly false. Indeed, OCC cannot point to a single instance in which the Companies have failed to comply with the Commission's rules. The apparent source of OCC's ire is its desire to have unfettered access to an unredacted copy of the audit report by the Exeter Associates, Inc. ("Exeter Report"). To that end, in its present motion, OCC does little more than rehash the same erroneous arguments proffered in its Memorandum Contra the Companies' Motion for a Protective Order ("Memorandum Contra").

As the Companies demonstrated in their reply in support of their motion for a protective order ("Companies' Reply"), transaction-specific renewable energy credit ("REC") bidder identity and pricing information contained in the Exeter Report are trade secrets worthy of Commission protection. REC suppliers provided this information in strict confidence to the Companies with the understanding that it was to stay that way unless the Commission ruled

otherwise. The disclosure of such competitively sensitive REC bidder and pricing data (which in analogous contexts the Commission routinely protects) could undermine the viability of future REC request for proposal ("RFP") processes.

The Companies, to no avail, have offered to enter into a protective agreement with OCC whereby OCC would have full access to a minimally redacted copy of the Exeter Report, redacting only the identities of the particular REC bidders. Contrary to OCC's claims, the REC bidder identities are not relevant to this proceeding and ample Commission precedent holds that such information is thereby not discoverable. Yet, as shown below, the release of the REC bidder identities could lead to a competitor gaining access to a REC supplier's proprietary bidding strategies and valuation methodologies, all to the detriment of future REC RFP processes. OCC also continues to labor under the false belief that *any* document filed with the Commission, even if under seal, automatically becomes a public document subject to disclosure upon filing. Abundant Ohio Supreme Court and Commission precedent hold otherwise. Accordingly, the Commission should deny OCC's motion to compel.

II. STATEMENT OF FACTS

Ohio Revised Code Sections 4928.64 and 4928.65 mandate that electric distribution utilities in Ohio, such as the Companies, "generate a portion" of their "electricity supply to retail customers" from alternative energy resources. *See* R.C. §§ 4928.64(B), 4928.65. To comply, electric utilities may purchase such resources, in the form of RECs, from suppliers through a REC procurement process involving the use of RFPs. As part of its Second Opinion and Order in Case No. 08-935-EL-SSO, the Commission approved the Companies' RFP process for the acquisition of RECs from 2009 to 2011. *See* Case No. 08-935-EL-SSO, Second Opinion and Order, p. 9 (Mar. 25, 2009). In that Order, the Commission further granted the Companies' request for the creation of an alternative energy rider, Rider AER, to recover the costs associated

with the REC RFP procurement process. *Id.* To comply with Section 4928.64, the Companies proceeded to issue RFPs, consider and accept bids, and enter into binding, confidential contracts with suppliers to acquire the requisite number of RECs.

On September 20, 2011, the Commission initiated this audit proceeding by creating a docket to review Rider AER. *See 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, Entry, p. 1 (Date: Jan. 18, 2012) ("Case No. 11-5201"). In its January 18, 2012 Entry, the Commission instructed the Commission Staff ("Staff") to select outside auditors to assist with the audit. Staff chose Exeter Associates, Inc. ("Exeter") to perform a management/performance audit and Goldenberg Schneider, LPA ("Goldenberg") to perform a financial audit. *See* Case No. 11-5201-EL-RDR, Entry, p. 2 (Feb. 23, 2012).

To aid the auditors, the Companies provided Exeter, Goldenberg, and Staff with competitively-sensitive third-party proprietary information, including: (a) the identities of specific REC suppliers who participated in the RFPs; (b) the specific prices for the RECs bid by specific suppliers in response to each RFP; and (c) detailed financial information regarding specific REC transactions between suppliers and the Companies (the "REC Procurement Data"). (Companies' Reply, Stathis Affidavit ("Stathis Aff."), ¶4.) The Companies provided the REC Procurement Data to the auditors with the understanding that the auditors would at all times keep this information strictly confidential. (*Id.*) The Companies further understood that the auditors would file any reports generated from the REC Procurement Data under seal and that any such reports would be kept under seal until the Commission ruled otherwise. (*Id.*)

On August 15, 2012, the Exeter Report was filed, under seal, with the Commission. A public version of the Exeter Report, redacting the competitively sensitive REC Procurement Data, was filed the next day. Soon after the filing under seal of the unredacted version of the Exeter Report, OCC informally asked the Companies enter into a form protective agreement in order to get the unredacted Exeter Report. The Companies were unable to agree with OCC's proffered protective agreement because it failed to provide sufficient protection to the REC Procurement Data. Instead, the Companies proposed a protective agreement that would preclude the public disclosure of the unredacted version of the Exeter Report, yet still provide OCC with access to all the relevant information contained therein. As the Companies proposed, the minimally redacted version that would be provided would only keep the identities of the Companies' REC suppliers redacted, thereby allowing OCC full access to the rest of the REC Procurement Data, including all pricing information.[1] To date, OCC has refused to enter into such an agreement with the Companies.

On August 24, 2012, the Companies received their first set of discovery requests from OCC. Nothing in this discovery requested an unredacted copy of the Exeter Report. On September 12, 2012, pursuant to Rule 4901-1-20(C), O.A.C., the Companies responded to these requests in timely fashion.[2] On September 14, 2012, the Companies received a second set of

[1] The Companies' proposed protective agreement also contained provisions relating to special treatment of third party (*i.e.*, supplier) confidential information. Similar provisions have been routinely part of such orders in cases before the Commission. Because the confidential information at issue does not belong to the Companies, previous protective agreements that may have been entered into between the Companies and OCC (which only covered the Companies' proprietary information), were not appropriate here. Further, contrary to OCC's suggestion, the Companies have always stood ready to produce the Exeter Report, redacting only supplier names, subject to an acceptable protective agreement. OCC seems to point to the Companies' counsel's September 13 letter (attached as Exhibit H to OCC's motion) as a departure from the Companies' prior position. Any such inference is not accurate. That letter was a response to OCC's demand that the Companies provide an unredacted copy of the Exeter Report. The letter said flatly that the Companies would not agree to this request. The letter did not – and was not meant to – reflect the Companies' position as to what they were willing to provide.

[2] On October 16, 2012, pursuant to Rule 4901-1-16, O.A.C., the Companies supplemented these responses.

discovery requests from OCC. In this set, OCC asked for an unredacted copy of the Exeter Report. Pursuant to the Commission Rules and again in timely fashion, the Companies responded to these requests on October 4, 2012. On October 8, 2012, and again in accordance with the Commission Rules, the Companies supplemented their responses to OCC's second set of discovery requests.

Seeking to force the issue, on September 26, 2012, before any response to their request for the unredacted Exeter Report was due, OCC filed its Motion for a Prehearing Conference. Therein, OCC sought to circumvent the normal discovery process by requesting the Commission to hold a hearing on the release to OCC of an unredacted version of the Exeter Report. In its Entry dated October 11, 2012, the Commission rejected OCC's motion, finding that "OCC filed its motion prior to the due date for the requested discovery [and] failed to exhaust all other means of resolving the alleged discovery dispute as provided by Rule 4901-1-23, O.A.C." (Entry, p. 3.) On October 3, 2012, the Companies filed their Motion for a Protective Order to prevent the public disclosure of the REC Procurement Data. On October 18, 2012, OCC filed its Memorandum Contra seeking the public disclosure of the unredacted version of the Exeter Report and, on October 25, 2012, the Companies filed their Reply. On October 23, 2012, the OCC filed its Motion to Compel. The aforementioned motions for a protective order and to compel, and related briefing, are currently pending before the Commission.

III. ARGUMENT

A. Contrary to OCC's assertion, the Companies Have Not in Any Way Sought to Delay the Discovery Process.

In its motion, OCC alleges (but tellingly fails to substantiate) that the Companies have sought to delay the discovery process by refusing to turn over an unredacted version of the Exeter Report to OCC (even though there is no protective order or suitable protective agreement

in place). (*See* Mot. to Compel, p. 1.) These allegations are false. If anyone has sought to subvert and undermine the discovery process in this proceeding, it is OCC.

To begin, the scheduling order for this proceeding does not alter the default response times for discovery under the Commission Rules. Pursuant to Rules 4901-1-19(A) and 4901-1-20(C), parties to a Commission proceeding have 20 days to respond to interrogatories and requests for production of documents. Here, the Companies have received and responded to two sets of document requests from OCC. The Companies received the first set on August 24, 2012 and responded on September 12, 2012, and the Companies received the second set on September 14, 2012 and responded on October 4, 2012. The Companies' discovery response times fell well within the 20-day response period allotted them by right under the Rules. Further, and in accordance with the requirements of Rule 4901-1-16, the Companies properly supplemented their responses as updated information became available.

Any delay is the result of OCC's own conduct. The Companies, to no avail, offered to enter into a suitable protective agreement whereby OCC would have access to almost the entire unredacted version of the Exeter Report, save for the REC bidder identities.[3] OCC has rejected this reasonable arrangement, going so far as to seek the public disclosure of the unredacted version of the Exeter Report (Memorandum Contra, p. 6) —notwithstanding the fact that the Exeter Report contains highly competitively-sensitive third-party proprietary information worthy of trade secret protection.

Indeed, OCC, as evidenced by the filing of its premature motion for a prehearing conference, is the party seeking to subvert and manipulate the discovery process. The

[3] The form protective agreement referenced by OCC in its Motion to Compel (Memo. in Support, p. 3) fails to provide the level of protection necessary for the REC Procurement Data.

Commission, in its October 11, 2012 Entry, rejected this ploy on the part of OCC, holding at length:

> The attorney examiner notes that the Commission's discovery rules are intended to minimize Commission intervention in the discovery process. Rule 4901-1-16(A). In this case, OCC filed its motion prior to the due date for the requested discovery, failed to exhaust all other means of resolving the alleged discovery dispute as provided by Rule 4901-1-23, O.A.C., and failed to file a motion to compel discovery. Consequently, the attorney examiner finds that the motion for a prehearing conference is premature and should be denied.

Case No. 11-5201-EL-RDR, Entry, p. 3 (Oct. 11, 2012). If any party is playing fast and loose with the discovery rules it is OCC. OCC's charges of delay on the part of the Companies are thus baseless.

That the Companies did not agree to OCC's unilateral demand for an unredacted copy of the Exeter Report and responded to discovery in the time provided for under the rules is not evidence of delay. That OCC would argue otherwise demonstrates the utter unreasonableness of OCC's position.

B. The Redacted REC Bidder Identities in the Exeter Report Are Irrelevant to the Instant Proceeding.

In its motion, OCC is seeking to compel the production of irrelevant information, a litigation tactic prohibited by both the Rules and abundant Commission precedent. Pursuant to Rule 4901-1-16(B), "[a]ny party to a commission proceeding may obtain discovery of any matter, not privileged, which is *relevant to the subject matter of the proceeding*." (emphasis added.) By negative implication, irrelevant information is not discoverable under the Rules. Parties are thus only required to produce relevant information.

Ample Commission precedent cements this analysis. *See, e.g., Williams v. East Ohio Gas Co.*, Case No. 99-951-GA-CSS, 200 Ohio PUC LEXIS 437, *7 (April 6, 2000) (affirming,

on interlocutory appeal, denial of complainant's motion to compel because discovery request for Social Security Administration records from utility was "irrelevant"); *Myers v. Ameritech Ohio*, Case No. 98-1143-TP-CSS, 1999 Ohio PUC LEXIS 742, *59-60 (affirming attorney examiner's denial of motion to compel because "the requested discovery was irrelevant and not reasonably calculated to lead to the discovery of admissible evidence in accordance with Rule 4901-1-16(B)") (Dec. 16, 1999); *In re Application of Cincinnati Bell Telephone Company*, Case No. 96-899-TP-ALT, p. 2 (Dec. 5, 1997) (denying motion to compel because "information requested….is not relevant or reasonably calculated to lead to the discovery of admissible evidence").

Here, the REC bidder identities that comprise a tiny fraction of the REC Procurement Data, and an even smaller fraction of the Exeter Report, are irrelevant to this proceeding. What is relevant is the prices paid for RECs—this is the subject matter of this audit—and not which entity supplied them. In its Motion to Compel, OCC describes this case as follows: "This case relates to a Commission review of [the Companies'] *purchase of, and customers payment for* renewable energy credits." [Mot. to Compel, p. 1 (emphasis added).]. Indeed, it is the Companies' "purchase" of "non-solar RECs" that is the subject matter of both the Exeter Report and the present audit proceeding. [Mem. in Support, p. 7.] Thus, by OCC's own admission, what is relevant is REC pricing information.

The Companies have offered to provide this competitively-sensitive proprietary information to OCC via a minimally redacted version of the Exeter Report, so long as OCC enters into a suitable protective agreement. OCC has balked at doing so, instead making much of the fact that it provided a form protective agreement to the Companies on the day after the filing under seal of the Exeter Report. [Mot. to Compel, p. 3.] Even a cursory overview of this form

protective agreement proposed by OCC, however, demonstrates that it is woefully inadequate for the task of protecting the type of third-party proprietary information at stake here. [*See* Mot. to Compel, Ex. G (Companies' edits and comments).] To the extent it lacks access to a less redacted version of the Exeter Report, OCC has only itself to blame.

Nor can OCC credibly argue that REC bidder identities are relevant to ensure that a competitive RFP process obtained and that the Companies did not favor any one REC supplier over the other. Exeter investigated this issue thoroughly and concluded that no such concerns arose out of the Companies' RFP process. In this vein, Exeter concluded:

> The solicitations issued by the Companies….were competitive and the rules for determining winning bids appear to have been applied uniformly. We found nothing to suggest that the FirstEnergy Ohio utilities operated in a manner other than to select the lowest bids received from a competitive solicitation to satisfy the In-State All Renewables requirement established by the legislation.

Exeter Report, p. 29. The Exeter Report evidences no issues regarding preferential pricing for select REC suppliers or collusion amongst suppliers. Simply put, the REC bidder identities do not comprise part of the relevant subject matter of this proceeding and, as a result, are not discoverable by OCC.

C. Even if the REC Bidder Identities Were Relevant to This Proceeding, Which They Are Not, They Would Be Exempted from Disclosure in the Absence of a Suitable Protective Agreement Because the Transaction-Specific REC Bidder Identities Are Trade Secrets.

As demonstrated in the Companies' Reply, the REC Procurement Data, including transaction-specific REC bidder identities, is a trade secret under Ohio law. Section 1333.61 of the Ohio Revised Code provides a two-prong test to determine whether information warrants trade secret protection:

> (D) "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*. (emphasis added.)

As demonstrated below, the REC Procurement Data satisfies both prongs of the Section 1333.61 test. The Commission's role here is to "attempt to balance the interests of ensuring the confidentiality of proprietary information, encouraging participation in future auctions and maintaining public accountability of the auction process." *In the Matter of the Application of Ohio Edison Company, Cleveland Electric Illuminating Company, and The Toledo Edison Company for Approval of a Competitive Bid Process to Bid Out Their Retail Electric Load*, Case No. 04-1371-EL-ATA, Finding and Order, p. 6 (April 6, 2005). A Commission protective order accompanied by a protective agreement that allows parties to access the entire unredacted version of the Exeter Report, save for the REC bidder identities, strikes just the right balance.

1. The REC Procurement Data, including the transaction-specific REC bidder identities, bears independent economic value.

The Commission's treatment of the SSO competitive bidding process ("CBP") cases provides a direct analogy to the REC RFP procurement process at issue here. Both involve highly competitively-sensitive proprietary bidding information, including the identities of competitive bidders, specific prices bid and paid, and the specific transactions that tie the aforementioned together. In the SSO CBP cases, the Commission has routinely held that such

competitive bidding information bears independent economic value and therefore deserves continuing protection in order to preserve the competitive integrity of the CBP auction process.

In *In the Matter of the Application of the Ohio Edison Company, the Cleveland Electric Illuminating Company, and The Toledo Edison 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. 08-935-EL-SSO, Finding and Order, p. 3 (May 14, 2009) ("Companies' First ESP Case"), the Commission held that "the following information will be protected from public release: the names of unsuccessful bidders; price information, including starting price methodologies and round prices/quantities for individual bidders; all information in [the first two parts] of the bidder applications; and indicative pre-auction offers." *See also, In the Matter of the Procurement of Standard Service Offer Generation for Customers of Duke Energy Ohio, Inc.*, Case No. 11-6000-EL-UNC, 2012 Ohio PUC LEXIS 500, Finding and Order, *3-4 (May 23, 2012) (protecting the same information); *In the Matter of the Application of Ohio Edison Company, Cleveland Electric Illuminating Company, and The Toledo Edison Company for Approval of a Competitive Bid Process to Bid Out Their Retail Electric Load,* Case No. 04-1371-EL-ATA, 2005 Ohio PUC LEXIS 177, Finding and Order, *6 (April 6, 2005) (protecting the same information). In this line of cases, the Commission was particularly concerned that the public dissemination of such competitively-sensitive information would seriously undermine "the viability of future auctions in Ohio." *Duke Energy*, Case No. 11-6000-EL-UNC, *4.

The Companies' First ESP case proves particularly instructive. There, 24 months after two post-auction market monitor reports containing confidential CBP bidding information had been filed under seal, a competing utility moved the Commission to lift the seal on one of the reports. *See* Case No. 08-935-EL-SSO, Entry, pp. 1-2 (May 23, 2011). The Commission invited

comments from interested parties, and all of whom responded uniformly opposed the public disclosure of the post-auction report.[4] Most tellingly, an auction manager from Charles River Associates ("CRA"), unconnected with the report at issue, filed a letter that was strongly opposed to the release of the CBP auction data. *See* Case No. 08-935-EL-SSO, CRA International, Inc. Comments Letter, p. 1 (June 6, 2011). CRA stated that, in order to preserve the competitive integrity of future auction processes, "careful consideration must be given to what information is disclosed, to whom it is disclosed, and when it is disclosed." *Id.* CRA strongly cautioned against the disclosure of "the identities of Qualified Bidders" because such bidders "believe disclosure puts them at a competitive disadvantage." *Id.* Further, disclosing "detailed bidding data" can reveal "bidding strategies and valuations" which, in turn, can "discourage bidders from participating in future auctions" and enable other bidders to try to "game" the system. *Id.*, p. 2. The Commission, though it did not issue an order, never lifted the seal on the CBP auction bidding data and it remains under seal some 40 months (and counting) after it was originally placed on the Companies' First ESP Case docket.

The same situation obtains here. Public disclosure of the REC Procurement Data would likely have a chilling effect on future REC RFP processes by possibly betraying supplier bidding

[4] *See* Comments of Ohio Edison Company. The Cleveland Electric Illuminating Company and The Toledo Edison Company, p. 1 (June 7, 2011) ("Release of the Report will jeopardize the competitiveness and integrity of future SSO auctions because it will discourage participation by bidders."); Comments of Exelon Generation Company, LLC Regarding AEP's Release of Data, p. 1 (June 7, 2011) ("This report contains highly competitively sensitive information regarding bid pricing methodologies and bidding strategies of the various auction participants."); Comments of Constellation Energy Commodities Group, Inc. and Constellation NewEnergy, Inc., p. 1 (June 7, 2011), ("Constellation strongly objects to release of the….Report [because it] contains highly confidential and proprietary bids submitted during the …auction."); and FirstEnergy Solutions Corp.'s Comments Regarding the Disclosure of the Report of the Commission's Consultant, p. 1 (June 7, 2011) ("As a participant and winning bidder in the auction, FES has a real and substantial interest in maintaining the confidentiality of the Report. Disclosure of the Report, and the information therein, would have a drastic, negative effect on the developing competitive electric generation market in Ohio and would jeopardize bidder participation in future auctions."); Electric Power supply Association ("EPSA"), Motion For Limited Intervention and Comments of EPSA, p. 1 (Date: June 7, 2011) ("EPSA agrees with the attorney examiner's finding that the ….report should remain under seal indefinitely."). All of the aforementioned are from Case No. 08-935-EL-SSO.

strategies and valuation methodologies—especially if a competitor could tie specific bid prices to a specific REC supplier. A REC supplier could also use such information to try to game the REC RFP system, at cost to the competitive integrity thereof.

A letter from Navigant Consulting, Inc., the independent evaluator of the RFPs at issue, filed in this docket, drives these crucial points home. *See* Case No. 11-5201-EL-RDR, Navigant Consulting, Inc. Comments Letter (Oct. 29, 2012). Navigant strongly cautions:

> [W]e believe that releasing the Exeter Report in un-redacted form may result in harm to Ohio's ratepayers by discouraging prospective bidders from participating in future competitive procurements conducted by any utility in Ohio thereby creating less competition and in turn higher prices for renewable energy.

Id., p. 1. Navigant further noted that "there is no compelling benefit in disclosing the identities of either winning or non-winning bidders." *Id.*, p. 2. Releasing the REC Procurement Data in the absence of a protective order and suitable protective agreement will thus frustrate the purposes of Section 4928.64. The REC Procurement Data, including the REC bidder identities, bears independent economic value, thereby satisfying the first prong of the Section 1331.61(D) test.

The competitive nature of REC pricing information should be beyond dispute. Indeed, recently in *In the Matter of the Commission's Alternative Energy Portfolio Standard Report to the General Assembly for the 2011 Compliance Year*, Case No. 12-2668-EL-ACP, the majority of the utilities and other companies required to file average (not transaction-specific) pricing information sought to protect such information from public disclosure.[5] The Commission should assure that the transaction-specific REC pricing information at issue here is similarly protected.

[5] *See* Docket, Case No. 12-2688-EL-ACP.

2. The Companies have made reasonable efforts to ensure the secrecy of the REC Procurement Data, including the REC bidder identities.

As shown in the Companies' Reply Brief, the Companies have exercised reasonable efforts to maintain the secrecy of the REC Procurement Data, including the REC bidder identities. Outside of Exeter, Goldenberg, and Staff, the Companies have not disclosed the REC Procurement Data to any other third parties. (Companies' Reply Brief, Stathis Aff., ¶3.) Moreover, the Companies provided this information to the auditors and Staff with the understanding that it would be kept confidential and under seal until the Commission ruled otherwise. (*Id.*) Internally, the Companies segregated the REC Procurement Data, only permitting access by their employees on a need-to-know basis. (*Id.*) Because the Companies have taken "active steps to maintain [the] secrecy" of the REC Procurement Data, they have satisfied the second prong of the Section 1333.61(D) test. *State ex rel. Perrea v. Cincinnati Pub. Sch.* (2009), 123 Ohio St. 3d 410, 414 (further holding that "partial disclosure" need not defeat trade secret status). Therefore, the REC Procurement Data, including the REC bidder identities, counts as a trade secret under Ohio law.

To protect this information, and to ensure the public accountability of the REC RFP process, the Companies have proposed the release of a minimally redacted version of the Exeter Report to OCC once OCC enters into a protective agreement. This reasonable arrangement would provide OCC with access to the entire unredacted version of the Exeter Report, save for the REC bidder identities. OCC, however, has willfully ignored the trade secret status of the REC Procurement Data and decided to file its Motion to Compel instead.

D. Ohio Supreme Court and Commission Case Law Makes Clear That Trade Secrets Are an Exception to the Public Document Disclosure Requirements of R.C. § 149.

Lastly, in its Motion to Compel, as in its Memorandum Contra, OCC mounts the odd (and spurious) argument that the filing of the Exeter Report with the Commission somehow automatically rendered the Exeter Report a public document pursuant to Section 149. In doing so, OCC ignores why an unredacted version of the Exeter Report was filed under seal and why a publicly available redacted version of the Exeter Report was filed on the Case No. 11-5201-EL-RDR docket the next day. Because the Exeter Report contains competitively-sensitive proprietary information it is accorded different status under Ohio law.

Specifically, trade secrets are an important and well-recognized exception to the disclosure requirements of the public document disclosure statutes. *See, e.g., State ex rel. Carr v. City of Akron*, 112 Ohio St. 3d 351, 358 (Ohio 2006) ("Trade secrets are exempt from disclosure under the exemption of R.C. 149.43(A)(1)(v) for disclosures prohibited by state or federal law."); *State ex rel. Lucas County Bd. of Comm'rs v. Ohio EPA* (2000), 88 Ohio St. 3d 166, 172 ("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."); *In the Matter of the Application of Commerce Energy, Inc. for Certification as a Competitive Retail Natural Gas Supplier*, Case No. 02-1828-GA-CRS, 2012 Ohio PUC LEXIS 67, *3 (Jan. 20, 2012) ("Section 149.43, Revised Code, specifies that the term 'public records' excludes information which, under state or federal law, may not be released. The Ohio Supreme Court has clarified that the 'state or federal law' exemption is intended to cover trade secrets."). The unredacted Exeter Report, given the trade secrets that it contains, is thus <u>not</u> subject to public disclosure via Section 149, regardless of the fact that it is filed in a docket of the Commission.

IV. CONCLUSION

For the foregoing reasons, the Commission should deny OCC's Motion to Compel.

DATED: November 7, 2012

Respectfully submitted,

/s/ David A. Kutik
James W. Burk, Counsel of Record (0043808)
Carrie M. Dunn (0076952)
FIRSTENERGY SERVICE COMPANY
76 South Main Street
Akron, Ohio 44308
Phone: (330) 384-5861
Facsimile: (330) 384-3875
E-mail: burkj@firstenergycorp.com
cdunn@firstenergycorp.com

David A. Kutik (0006418)
Lydia M. Floyd (0088476)
JONES DAY
North Point
901 Lakeside Avenue
Cleveland, Ohio 44114-1190
Telephone: (216) 586-3939
Facsimile: (216) 579-0212
E-mail: dakutik@jonesday.com
lfloyd@jonesday.com

ATTORNEYS FOR OHIO EDISON COMPANY, THE CLEVELAND ELECTRIC ILLUMINATING COMPANY, AND THE TOLEDO EDISON COMPANY

CERTIFICATE OF SERVICE

I hereby certify that a copy of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company's Memorandum Contra the Office of Ohio Consumers' Counsel's Motion to Compel was delivered to the following persons by e-mail this 7th day of November, 2012:

Terrence O'Donnell
J. Thomas Siwo
BRICKER & ECKLER LLP
100 South Third Street
Columbus, OH 43215-4291
Telephone: (614) 227-2345
Facsimile: (614) 227-2390
E-mail: todonnell@bricker.com
tsiwo@bricker.com

Attorneys for Mid-Atlantic Renewable Energy Coalition

Bruce J. Weston
Joseph P. Serio
Office of the Ohio Consumers' Counsel
10 West Broad Street, Suite 1800
Columbus, OH 43215-3485
Telephone: (Serio) (614) 466-9565
Facsimile: (614) 466-9475
E-mail: serio@occ.state.oh.us

Attorneys for Office of the Ohio Consumers' Counsel

William Wright
Chief, Public Utilities Section
Public Utilities Commission of Ohio
180 East Broad Street, 6th Floor
Columbus, OH 43215
E-mail: William.wright@puc.state.oh.us

Attorneys for the Staff of the Public Utilities Commission of Ohio

David F. Boehm
Michael L Kurtz
Jody M. Kyler
Boehm Kurtz & Lowry
36 East Seventh Street, Suite 1510
Cincinnati, OH 45202
Telephone: (513) 421-2255
Facsimile: (513) 421-2764
E-mail: dboehm@BKLlawfirm.com
mkurtz@BKLlawfirm.com
jkylwer@BKLlawfirm.com

Attorneys for The Ohio Energy Group

Christopher J. Allwein
Williams, Allwein & Moser, LLC
1373 Grandview Ave., Suite 212
Columbus, OH 43212
Telephone: (614) 429-3092
Facsimile: (614) 670-8896
E-mail: callwein@wamenergylaw.com

Michael K. Lavanga
Brickfield, Burchette, Rittsw & Stone PC
1025 Thomas Jefferson Street NW
8th Floor West Tower
Washington, DC 20007
Telephone: (202) 342-0800
Facsimile: (202) 342-0807
E-mail: mkl@bbrslaw.com

Attorney for the Sierra Club

Cathryn Loucas
Trent A. Dougherty
Ohio Environment Council
1207 Grandview Avenue, Suite 201
Columbus, OH 43212-3449
Telephone: (614) 487-7506
Facsimile: (614) 487-7510
E-mail: cath@theoec.org
trent@theoec.org

Attorneys for the OEC

Matthew W. Warnock
BRICKER & ECKLER LLP
100 South Third Street
Columbus, OH 43215-4291
Telephone: (614) 227-2300
Facsimile: (614) 227-2390
E-mail: lmcalister@bricker.com
mwarnock@bricker.com

Attorneys for The OMA Energy Group

Attorney for Nucor Steel Marion, Inc.

Theodore S. Robinson
Citizen Power
2121 Murray Avenue
Pittsburgh, PA 15217
Telephone: (412) 421-7029
Facsimile: (412) 421-6162
E-mail: robinson@citizenpower.com

Attorney for Citizen Power

M. Howard Petricoff
Michael J. Settineri
Lija Caleps-Clark
VORYS, SATER, SEYMOUR AND PEASE LLP
52 East Gay Street
Columbus, OH 43215
Telephone: (614) 464-5414
mhpetricoff@vorys.com
mjsettineri@vorys.com
lkalepsclark@vorys.com

Attorneys for Interstate Gas Supply, Inc.

/s/ David A. Kutik
An Attorney For Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company

Summary: Memorandum Contra the Office of the Ohio Consumers' Counsel's Motion to Compel electronically filed by MR. DAVID A KUTIK on behalf of Ohio Edison Company and The Cleveland Electric Illuminating Company and The Toledo Edison Company