

In the Matter of the Review of The )  
Alternative Energy Rider Contained in )  
The Tariffs of Ohio Edison Company, The ) Case No. 11-5201-EL-RDR  
Cleveland Electric Illuminating Company )  
and The Toledo Edison Company. )

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## I. INTRODUCTION

The Office of the Ohio Consumers' Counsel ("OCC") recently discovered that FirstEnergy availed itself of an opportunity apparently unique to it to review and comment on the independent audit report investigating FirstEnergy's purchase of renewable energy credits ("RECs") prior to submission of the final audit report. Despite this opportunity, which was afforded to no other party, FirstEnergy now seeks to prevent the Commission from responding to the OCC's public records request directed to the Commission seeking "all records that reflect edits or comments on draft versions of the Audit Report." For the reasons more fully explained below, Ohio's public records law demands that the Commission deny FirstEnergy's Motion for Protective Order. And the

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PUCO should timely respond, as required by law, to OCC's public records request by providing a copy of all public records that reflect FirstEnergy's edits or comments on draft versions of the independent auditor's report.

## **II. STATEMENT OF FACTS**

On September 20, 2011, the Commission issued an entry on rehearing in *In the Matter of the Annual Alternative Energy Status Report of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company*, Case No. 11-2479-EL-ACP. In that entry, the Commission opened this action for the purpose of "reviewing the Companies' Rider AER, including the Companies procurement of renewable energy credits for purposes of compliance with Section 4928.64, Revised Code."<sup>2</sup> In accordance with that Entry, the Commission then ordered an audit to review FirstEnergy's "procurement of renewable energy credits for purposes of compliance with Section 4928.64, Revised Code,"<sup>3</sup> which were later discovered to be purchased, in some cases, at prices 15 times higher than the price of the applicable forty-five-dollar Alternative Compliance Payment.<sup>4</sup>

The Commission retained Exeter Associates, Inc. ("Exeter") to conduct the audit, by a contract that commenced on February 23, 2012. Exeter completed the audit and filed a Final Report under seal with the Commission on August 15, 2012. A redacted

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<sup>2</sup> *In the Matter of the Annual Alternative Energy Status Report of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company*, Case No. 11-2479-EL-ACP, Entry on Rehearing, p. 3 (Sept. 20, 2011).

<sup>3</sup> *In the Matter of the Annual Alternative Energy Status Report of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company*, Case No. 11-5201-EL-EDR, Entry, p. 1 (Jan. 18, 2012).

<sup>4</sup> Exeter Final Audit Report, p. 28 (Aug. 15, 2012).

copy of the Final Report, whereby information containing the pricing and identities of alternative energy credit bids, was also filed with the Commission and made available for public inspection. The OCC then sought production of an unredacted version of the Final Report.<sup>5</sup>

After numerous unsuccessful attempts to acquire an unredacted version of the Final Report informally, OCC resorted to seeking a copy of the unredacted Final Report through a discovery request.<sup>6</sup> In response, FirstEnergy filed a Motion for Protective Order (“First Motion for Protective Order”) on October 3, 2012, which the OCC opposed on October 18, 2012. The next day, FirstEnergy responded with an objection to the OCC’s discovery request arguing that the “request seeks the confidential and proprietary information of third parties.” As a result, the OCC was forced to file a Motion to Compel on October 23, 2012.

The Attorney Examiner conducted a hearing on November 20, 2012, in order to address the two aforementioned motions. The Attorney Examiner granted the two motions in part and denied them in part.<sup>7</sup> In doing so, the Attorney Examiner found that the redacted portions of the Final Report were trade secrets. He further found, however, that the OCC was entitled to an unredacted copy of the Final Report upon the parties reaching a mutually acceptable protective agreement.<sup>8</sup> In accordance with the Attorney Examiner’s ruling, on November 29, 2012, the OCC and FirstEnergy entered into a

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<sup>5</sup> See OCC’s Motion to Compel Discovery (Oct. 23, 2012).

<sup>6</sup> See *id.*

<sup>7</sup> November 20, 2012 Hearing Transcript (hereinafter referred to as “Transcript”), at p. 17.

<sup>8</sup> *Id.*, at p. 18.

protective agreement, whereby the OCC was provided with an unredacted version of the Final Report.

At the request of FirstEnergy, the PUCO Staff made Dr. Steven Estomin of Exeter Associates, one of the auditors, available for a telephone interview on December 18, 2012. It was during the course of that phone interview that OCC learned that Exeter provided a draft of the audit report to FirstEnergy prior to filing the Final Report with the Commission. OCC also learned that FirstEnergy provided edits to the Exeter audit report (hereinafter referred to as “Draft Report”), a copy of which was filed with the Commission. Three days later, OCC made a public records request to the Commission for “any and all records that reflect edits or comments on draft version of the Audit Report by employees, outside consultants and/or counsel of [FirstEnergy].” On December 31, 2012, FirstEnergy filed the Motion for Protective Order at issue (“Second Motion for Protective Order”), seeking to prevent the Commission from responding to the OCC’s public records request.

### **III. LAW AND ARGUMENT**

This Commission’s approach to resolving motions for protective orders recognizes that there is a “strong presumption in favor of disclosure.”<sup>9</sup> The presumption is created by the public record statutes applicable to the Commission,<sup>10</sup> and by case law that holds that confidential treatment should only be given in “extraordinary

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<sup>9</sup> *In the Matter of the Five-Year Review of Natural Gas Company Uncollectible Riders*, Case No. 08-1229-GA-COI, *Entry on Rehearing* at 4 (February 1, 2012).

<sup>10</sup> *See* R.C. 149.43, R.C. 4901.12 and 4905.07.

circumstances.”<sup>11</sup> Both the Supreme Court of Ohio and this Commission have emphasized the importance of the public records laws and have noted that “Ohio public records law is intended to be liberally construed to ‘ensure that governmental records be open and made available to the public \* \* \* subject to only a very few limited exceptions.’”<sup>12</sup>

By filing its Second Motion for Protective Order, FirstEnergy attempts to prevent the Commission from complying with its statutory duty conferred by Ohio’s public records laws. As discussed below, FirstEnergy’s Second Motion for Protective Order, however, should be denied because FirstEnergy failed to carry its burden of establishing that the Draft Report contains trade secret information. Even if FirstEnergy met that burden, the Commission must still produce the Draft Report, redacting only those portions determined to be trade secret, which is limited to the names of suppliers that are in the Report.

Moreover, despite FirstEnergy’s argument to the contrary, R.C. 4901.16 does not require blanket protection against disclosure of Commission-ordered documentation. Finally, the public interest in full disclosure of FirstEnergy’s edits made to the independent auditor’s Draft Report, which found gross overpayment for some RECs, far outweighs FirstEnergy’s interest in maintaining confidentiality in the amounts paid to suppliers for those RECs.

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<sup>11</sup> *In the Matter of the Application of the Cleveland Electric Illuminating Company for Approval of an Electric Service Agreement with American Steel Wire Corporation*, Case No. 95-77-EL-AEC, Entry at 2-3 (September 6, 1995).

<sup>12</sup> See, e.g., *In the Matter of the Application of NOPEC, Inc. for Authority to Operate as a Certified Retail Electric Supplier in the State of Ohio*, Case No. 07-891-EL-CRS, Entry at 1, citing *State ex rel. Williams v. Cleveland*, 64 Ohio St.3d 544, 549 (1992).

**A. The Commission should Deny the Motion for Protective Order Because None of the Information Contained in the Draft Report Qualifies as Trade Secret Information under Ohio Law.**

Under R.C. 4901.12, all proceedings of the public utilities commission and all documents and records in its possession are public records. Additionally, under R.C. 4905.07, “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.” Additionally, Ohio’s Public Records Law,<sup>13</sup> broadly defines public records to include records kept at any state office but excludes or exempts from the definition of public records those records “whose release is prohibited by state or federal law.”<sup>14</sup> Because Ohio has adopted the Uniform Trade Secrets Act, and has codified the definition of “trade secrets,”<sup>15</sup> the PUCO and other public agencies are prohibited from releasing those portions of public documents that qualify as a trade secret, per R.C. 149.43.

FirstEnergy argues that the Draft Report contains trade secret information relating to “prices, quantities, and the identity of bidders,” and should therefore be protected from disclosure.<sup>16</sup> FirstEnergy concedes that this is the same argument advanced in its First Motion for Protective Order and argued at the November 20, 2012 hearing before the Attorney Examiner.<sup>17</sup>

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<sup>13</sup> R.C. 149.43.

<sup>14</sup> R.C. 149.43(A)(1)(v).

<sup>15</sup> See R.C. 1331.61(D)

<sup>16</sup> Second Motion for Protective Order, p. 9.

<sup>17</sup> *Id.*



Therefore, OCC renews and incorporates by reference the arguments set forth in Sections IV and VII of the Joint Memorandum Contra to FirstEnergy's First Motion for Protective Agreement, which was filed on October 18, 2012. For the reasons more fully explained in that Memorandum Contra, this Commission should find that the Draft Report does not contain trade secret information and deny FirstEnergy's Second Motion for Protective Order. Upon such a ruling, the Commission should produce an unredacted copy of the Draft Report in response to the OCC's December 21, 2012 public records request in accordance with Ohio law.

**B. The Commission should Deny the Motion for Protective Order Because FirstEnergy Failed to Meet the High Burden Associated with Specifically Identifying the Need for Protection from Disclosure.**

FirstEnergy failed to carry its burden of establishing that the Draft Report should not be released in response to OCC's public records request. Specifically, FirstEnergy fails to meet that burden with respect to the suggested edits contained in the Draft Report. The Commission has made it clear that a movant who seeks to protect information from the public must raise "specific arguments as to how public disclosure of the specific items could cause them harm, or how disclosure of the information would permit the companies' competitors to use the information to their advantage."<sup>18</sup>

This is consistent with Ohio Adm. Code 4901-1-24(D)(3) that requires movants for confidentiality to file a pleading "setting forth the specific basis of the motion,

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<sup>18</sup> *In the Matter of the Joint Application of the Ohio Bell Telephone Company and Ameritech Mobile Services, Inc. for Approval of the Transfer of Certain Assets*, Case No. 89-365-RC-ATR, *Opinion and Order* at 5-6 (October 18, 1990).

including a detailed discussion of the need for protection from disclosure \* \* \* .”<sup>19</sup> Ohio Adm. Code 4901-1-27(B)(7)(e) requires that “[t]he party requesting such protection shall have the burden of establishing that such protection is required.”

Under a set of circumstances similar to this case, this Commission denied Cincinnati Gas & Electric’s (“CG&E”) motion to protect a report prepared by the Battelle Memorial Institute (“Battelle”).<sup>20</sup> In that case, “as a result of a natural gas explosion,” the Commission ordered the staff to “examine CG&E’s compliance with the gas pipeline safety rules set forth in Chapter 4901:1-16, Ohio Administrative Code”.<sup>21</sup>

CG&E contracted with Battelle “to conduct research into riser leaks” after the Commission ordered that CG&E “develop a corrective action plan to address service head adapter-style riser leaks.”<sup>22</sup> The Commission noted that CG&E’s motion for protective order conclusorily argued that “the Battelle Final Report ‘contains information that could be used to lead to the development of such an invention, such that the report has potential economic value, and is not readily ascertainable by proper means by other persons who can obtain economic value from its disclosure or use.’”<sup>23</sup> As part of its reasoning for denying the motion for protective order, the Commission explained that

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<sup>19</sup> The Commission has recognized that this rule is intended to strike a reasonable balance between the legitimate interests of a company in keeping a trade secret confidential and the obligations of the Commission relative to the full disclosure requirements mandated by Ohio law and public policy. *See In the Matter of the Amendment of Chapters 4901-1 et al. of the Ohio Administrative Code*, Case No. 95-985-AU-ORD, Entry at 11 (March 21, 1998).

<sup>20</sup> *In the Matter of the Investigation of The Cincinnati Gas & Electric Company Relative to Its Compliance With the Natural Gas Pipeline Safety Standards and Related Matters*, Case No.00-681-GA-GPS, Entry on Rehearing, 2005 Ohio PUC LEXIS 104, at 7 (Mar. 2, 2005).

<sup>21</sup> *Id.* at p. 1.

<sup>22</sup> *Id.*

<sup>23</sup> *See Id.* at pp. 3, 5-7.

CG&E had not “described with any specificity the type of information contained in the report that may have independent economic value if kept confidential.”<sup>24</sup>

FirstEnergy did not specifically explain what part(s) of the Draft Report contain(s) trade secret information, despite a requirement to do so. Instead, FirstEnergy simply argues that the Draft Report “contain[s] the **same** trade secrets as the unredacted version of the [Final] Report.”<sup>25</sup> FirstEnergy’s argument is even more conclusory than the reasoning rejected by this Commission in the *CG&E*, 2005 Ohio PUC LEXIS 104 case. Such a bold assertion, thus, fails to carry the burden placed upon FirstEnergy to describe, with specificity, the type of information to be kept confidential. Because FirstEnergy failed to carry its burden, the Commission should deny the Second Motion for Protective Order and provide OCC with an unredacted copy of the Draft Report.

**C. The Commission should Deny the Motion for Protective Order Because the Requested Records must be Produced in a Redacted Form.**

Even if this Commission were to find that FirstEnergy articulated its arguments with sufficient specificity and that the Draft Report contains trade secret information, withholding the Draft Report in its entirety (as FirstEnergy requests) is not the appropriate remedy. This takes far too narrow a view of the Public Records Act, a provision that is to be construed “liberally in favor of broad access,” whereby any doubt is to be settled “in favor of disclosure of public records.”<sup>26</sup> Instead, any trade secret information should be redacted from the Draft Report in the same way it was redacted

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<sup>24</sup> *Id.* at p. 6.

<sup>25</sup> Second Motion for Protective Order, p. 9 (emphasis in original).

<sup>26</sup> *State ex rel. Rucker v. Guernsey Cty. Sheriff's Office*, 126 Ohio St.3d 224, 2010-Ohio-3288, 932 N.E.2d 327, ¶ 6.

from the Final Report – limited only to the prices, quantities and identity of bidders. In fact, this Commission and Ohio courts have recognized that redaction is the appropriate way to prevent disclosure of trade secret information, not blanket withholding of the entire document.

In the *CG&E*, 2005 Ohio PUC LEXIS 104 case, the Commission took issue with the fact that “CG&E was not selective in what it [sought] to have protected,” but instead sought to “have the entire Battelle Final Report protected.”<sup>27</sup> Ohio courts have been even more direct, holding that even if a public record contains some material that is exempt from disclosure, the governmental body is obligated to disclose the non-exempted material, after redacting the exempted material.<sup>28</sup> In fact, the Supreme Court of Ohio upheld this Commission’s decision to conduct an in camera inspection of Duke Energy’s agreements with competitive retail suppliers and allow information to be “redacted as trade secrets,” instead of prohibiting release of documents in their entirety.<sup>29</sup>

Based upon this precedent, even if this Commission were to find that the Draft Report contains the same trade secret material as is allegedly contained in the Final Report, protecting the entire report from production is not appropriate. To comply with public records law, the Commission should redact the same information that was redacted from the publicly available Final Report (limited only to the prices, quantities and

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<sup>27</sup> *In the Matter of the Investigation of The Cincinnati Gas & Electric Company Relative to Its Compliance With the Natural Gas Pipeline Safety Standards and Related Matters*, Case No.00-681-GA-GPS, *Entry on Rehearing*, 2005 Ohio PUC LEXIS 104, at 7 (Mar. 2, 2005).

<sup>28</sup> *See State ex rel. Toledo Blade Co. v. Telb*, 50 Ohio Misc. 2d 1, 552 N.E.2d 243, 1990 Ohio Misc. LEXIS 1 (1990).

<sup>29</sup> *Ohio Consumers’ Counsel v. PUC*, 121 Ohio St. 3d 362, 2009-Ohio-604; 904 N.E.2d 853, ¶ 26.

identities of suppliers) and produce the remaining portions pursuant to the OCC's public records request.

**D. FirstEnergy's Motion for Protective Order should be Denied Because 4901.16 Does Not Prevent Public Disclosure of the Draft Report Pursuant to a Public Records Request.**

FirstEnergy alternatively argues that 4901.16 prohibits the Commission from disclosing any documents requested pursuant to the Public Records Act, irrespective of whether they contain trade secrets.<sup>30</sup> In making this argument, FirstEnergy essentially argues that R.C. 4901.16 trumps the Ohio Public Records Act contained in R.C. 149.43. This position, however, is not supported by this Commission's interpretation of R.C. 4901.16, or by the canons of statutory construction and legislative intent.

Wisely, the Commission has consistently declined to accept sweeping claims that would preclude disclosure under R.C. 4901.16.<sup>31</sup> Furthermore, the Commission has recognized that "[t]here is a distinction between staff-acquired information and Commission-ordered documentation filed with the Docketing Division," whereby "Section 4901.16, Revised Code, does not relate to the latter."<sup>32</sup> Based upon this reasoning, the Commission held that R.C. 4901.16 is inapplicable to a request for protective order where Cincinnati Gas & Electric sought a protective order to prevent

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<sup>30</sup> Second Motion for Protective Order, pp. 9-11.

<sup>31</sup> *See In the Matter of the Investigation of the Cincinnati Gas & Electric Company Relative to its Compliance with the Natural Gas Pipeline Safety Standards and Related Matters*, Case No. 00-681-GA-GPS, Entry on Rehearing at 10-12 (Jul. 28, 2004).

<sup>32</sup> *In the Matter of the Investigation of The Cincinnati Gas & Electric Company Relative to Its Compliance with the Natural Gas Pipeline Safety Standards and Related Matters*, Case No.00-681-GA-GPS, Entry, 2005 Ohio PUC LEXIS 104, at 5 (Mar. 2, 2005).

public disclosure of a report by Battelle Memorial Institute that allegedly contained trade secrets.<sup>33</sup>

Like the *CG&E* case, the Commission ordered the Exeter audit of FirstEnergy.<sup>34</sup> In accordance with the Commission's order, the Final Report and the Draft Report were filed with the Docketing Division. Because both reports were filed with the Docketing Division, R.C. 4901.16 does not apply and should not provide a basis upon which FirstEnergy may seek a protective order to prevent the public disclosure of the Draft Report.

Alternatively, even if R.C. 4901.16 applied, Ohio's canons of statutory construction warrant denial of FirstEnergy's Second Motion for Protective Order. Under Ohio law, "[i]f statutes enacted at the same or different sessions of the legislature are irreconcilable, the statute latest in date of enactment prevails."<sup>35</sup> This Commission previously recognized the irreconcilable differences that exist between R.C. 4901.16 and R.C. 149.43 when it noted that it "raise[s] a perplexing question." Explaining the conflict, the Commission further explained, "[o]n the one hand, all public records held by our agency must be made available for inspection per Section 149.43, Revised Code," and

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<sup>33</sup> *Id.*

<sup>34</sup> See *In the Matter of the Annual Alternative Energy Status Report of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company*, Case No. 11-2479-EL-ACP, Entry on Rehearing (Sept. 20, 2011); *In the Matter of the Annual Alternative Energy Status Report of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company*, Case No. 11-5201-EL-EDR, Entry, p. 1 (Jan. 18, 2012).

<sup>35</sup> R.C. 1.52.

“[o]n the other hand, Section 4901.16, Revised Code, requires Commission employees to not divulge information acquired with respect to a public utility’s business.”<sup>36</sup>

While FirstEnergy looks to R.C. 4901.16 for protection against the Public Records Act, the latter became effective February 12, 2004, which post-dates the R.C. 4901.16’s October 1, 1953 effective date. Pursuant to Ohio’s canons of statutory construction, because there is an irreconcilable difference between the statutes, the Public Records Act, the statute latest in date of enactment, controls this issue.<sup>37</sup> Therefore, R.C. 4901.16 does not protect the Commission from releasing information in response to a public records request made pursuant to R.C. 149.43.

In addition to the statutory canons of construction, legislative intent also indicates that R.C. 4901.16 is subservient to the Public Records Laws. Creating an exception to the Title 49 public records statutes for materials subject to R.C. 4901.16 is something the Legislature could have done in 1996, when it amended the Title 49 public records statutes. In 1996, the provisions of R.C. 4909.16 were already in place, having been enacted in some form as early as 1911.<sup>38</sup> Instead, the Legislature amended the R.C. Title 49 public record statutes to recognize limited exceptions to public records — those that are consistent with the purposes of Title 49 and at the same time recognized under Ohio Public Records law, R.C. 149.43:

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<sup>36</sup> *In the Matter of the Investigation of The Cincinnati Gas & Electric Company Relative to Its Compliance With the Natural Gas Pipeline Safety Standards and Related Matters*, Case No.00-681-GA-GPS, *Entry on Rehearing*, 2004 Ohio PUC LEXIS 271, at 5 (Jul. 28, 2004).

<sup>37</sup> See R.C. 1.52.

<sup>38</sup> See H.B. 325, G.C. 614-11 (1911) (slightly amended and recodified in 1953).

Sec. 4901.12 ~~ALL~~ EXCEPT AS PROVIDED IN SECTION 149.43 OF THE REVISED CODE AND AS CONSISTENT WITH THE PURPOSES OF TITLE XLIX OF THE REVISED CODE, ALL proceedings of the public utilities commission and all documents and records in its possession are public records.

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Sec. 4905.07. ~~ALL~~ EXCEPT AS PROVIDED IN SECTION 149.43 OF THE REVISED CODE AND AS CONSISTENT WITH THE PURPOSES OF TITLE XLIX 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>39</sup>

Had the Legislature intended for R.C. 4901.16 to serve as an exception to the Title 49 public record statutes, it could have done so when it rewrote the Title 49 public records statutes in 1996. However, by deeming it appropriate to amend the Title 49 public records laws to recognize the 1953 Ohio Public Records Law while not addressing the existing R.C. 4901.16, the General Assembly evinced clear legislative intent otherwise. Reading R.C. 4901.16 as broadly as FirstEnergy suggests would be contrary to the manifest intent of the General Assembly to provide for only limited exclusions to the Title 49 public record statutes—those recognized under Ohio’s Public Records Law that are consistent with the purposes of Title 49. For these reasons, this Commission should deny FirstEnergy’s Second Motion for Protective Order.

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<sup>39</sup> See Am Sub. H.B. No. 476 (1996).



**E. Public Policy Supports Denial of FirstEnergy's Motion for Protective Order.**

The public interest in disclosure of the Draft Report far outweighs FirstEnergy's interest in preventing its disclosure. In order to overcome the presumption in favor of disclosure, as previously discussed in Section III(A) of this Memorandum, the movant's interest in maintaining confidentiality of the information must outweigh the public interest in full disclosure.<sup>40</sup> In this case, the public interest in disclosure is great.

OCC's public records request arose from an audit report, which suggests that FirstEnergy grossly overpaid for some In-State All Renewable RECs. These REC costs are ultimately collected from the FirstEnergy's customers by way of their utility bills, thus, creating a strong interest in this action. The public interest in the identity of the suppliers, which were filed under seal, is compounded in an audit case where those particular informational components are directly at issue. The public interest in the sealed documents filed with the Commission grew exponentially when it was discovered that FirstEnergy was the only entity afforded the opportunity to review and comment on Exeter's audit report prior to submitting the Final Report.

Therefore, the public has a keen interest in FirstEnergy's edits contained in the Draft Report, an interest that is not outweighed by FirstEnergy's desire to hide what is likely to be evidence that is unfavorable to the Company's position. For these reasons alone, this Commission should deny FirstEnergy's Second Motion for Protective Order

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<sup>40</sup> *In the Matter of the Joint Application of the Ohio Bell Telephone Company and Ameritech Mobile Services, Inc. for Approval of the Transfer of Certain Assets*, Case No. 89-365-RC-ATR, *Opinion and Order* at 5-6 (October 18, 1990).

and respond to the OCC's public records request by providing an unredacted copy of the Draft Report.

#### **IV. CONCLUSION**

If this Commission were to accept FirstEnergy's claims of trade secret, without a substantive demonstration that the information is indeed a trade secret,<sup>41</sup> it would effectively negate the public records laws in the state of Ohio. Information that should be public would be held in secret even though not a trade secret. That is why Ohio statutes, as well as Ohio Supreme Court and Commission precedent, require specificity from those that seek to keep information from the public record. FirstEnergy has failed to meet the burden of proof as required by Ohio law and the Commission's rules.

Nor can FirstEnergy hide behind a misinterpretation of R.C. 4901.16, which significantly pre-dates Ohio's Public Records Act. For these reasons, this Commission should deny FirstEnergy's Motion for a Protective Order and produce an unredacted copy of the Draft Report in accordance with OCC's public records request. Alternatively, this Commission should produce the Draft Report, only redacting those parts that contain the prices, quantities and identities of REC suppliers, which were redacted in the Final Report.

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<sup>41</sup> *Cf. State ex rel The Plain Dealer et al. v. Ohio Dept. of Insurance*, 80 Ohio St. 3d 513, 525 (1998)(holding that a claimant asserting trade secret status has the burden to identify and demonstrate that the material is included in categories of protected information under the state (citation omitted)).

Respectfully submitted,

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I hereby certify that a copy of the *Memorandum Contra* was served on the persons listed below, via electronic service, this 15th day of January 2013:

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Summary: Memorandum Memorandum Contra FirstEnergy's Motion for Protective Order by the Office of the Ohio Consumers' Counsel electronically filed by Patti Mallarnee on behalf of Yost, Melissa Ms.