

**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

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**MOTION OF OHIO EDISON COMPANY, THE CLEVELAND ELECTRIC  
ILLUMINATING COMPANY, AND THE TOLEDO EDISON COMPANY FOR A  
PROTECTIVE ORDER REGARDING TRADE SECRET INFORMATION  
CONTAINED IN THE DIRECT TESTIMONY TO BE OFFERED BY THE OFFICE OF  
THE OHIO CONSUMERS' COUNSEL**

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Ohio Edison Company, The Cleveland Electric Illuminating Company and The Toledo Edison Company (collectively, the “Companies”), pursuant to Rule 4901-1-24(D) of the Ohio Administrative Code, move for a protective order to prohibit the disclosure of confidential supplier pricing and supplier-identifying information that appears in a confidential version of the direct testimony of Wilson Gonzalez (the “Confidential Gonzalez Testimony”). On January 31, 2013, the Office of Ohio Consumers’ Counsel (“OCC”) filed the Confidential Gonzalez Testimony under seal as required by the Attorney Examiner’s November 20, 2012 order and pursuant to the protective agreement between the Companies and OCC. On that same date, OCC also filed a motion for a protective order to file the Confidential Gonzalez Testimony under seal and a public version of Mr. Gonzalez’s testimony in which the confidential supplier pricing and supplier-identifying information was redacted.

A protective order should be granted because the Confidential Gonzalez Testimony contains supplier pricing information and identities of suppliers that the Attorney Examiner has already held to be confidential trade secret information and subject to a protective order that

prevents disclosure to the public.<sup>1</sup> Disclosure of the trade secret information that is currently redacted would thus cause competitive harm to the Companies and their suppliers. It also would violate the Attorney Examiner's order prohibiting public disclosure of this information.

For these reasons and as further set forth in the attached Memorandum in Support, the Commission should grant both the Companies' and OCC's Motions for a Protective Order and prohibit the public disclosure of the supplier pricing and supplier-identifying information that appears in the Confidential Gonzalez Testimony.

DATED: February 7, 2013

Respectfully submitted,

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TOLEDO EDISON COMPANY

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<sup>1</sup> (Nov. 20, 2012, Hearing Tr., 17:13-18:5 (Dec. 4, 2012).

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**MEMORANDUM IN SUPPORT**

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**I. INTRODUCTION**

On November 20, 2012, the Attorney Examiner determined that confidential supplier pricing and supplier-identifying information (the “REC Procurement Data”) that is contained within the Confidential Final Report/Performance Audit of the Alternative Energy Resource Rider of FirstEnergy Ohio Utility Companies for October 2009 through December 31, 2011 (the “Exeter Report”) is trade-secret information that must be protected from public disclosure. In the Confidential Gonzalez Testimony, the same type of REC Procurement Data is recited. Mr. Gonzalez specifically relies on the protected REC Procurement Data to testify regarding a total dollar amount that he recommends for disallowance and amounts for penalty and interest payments. These amounts that were derived using the protected REC Procurement Data must remain protected as well because, if disclosed, REC pricing data could be derived using publicly available data. The number of RECs purchased by the Companies is publicly available information. The formula used by Mr. Gonzalez is also publicly available in his pre-filed direct testimony. The disallowance amount recommended by Mr. Gonzalez is the last piece needed to do the math to calculate the amount spent to acquire RECs. Thus, confidential supplier pricing

information can be derived from this testimony if the confidential portions are made public. A protective order is thus necessary to prohibit the disclosure of the Confidential Gonzalez Testimony. Indeed, OCC would be violating an existing order of the Attorney Examiner if it publicly disclosed the protected REC Procurement Data.

Notwithstanding that OCC has filed for a motion for a protective order seeking confidential treatment of the Confidential Gonzalez Testimony, OCC has informed the Companies that OCC “seeks to publicly release the total dollar amount of FirstEnergy’s renewable energy expenditures that OCC is asking the PUCO to disallow FirstEnergy from charging customers plus interest” despite those portions of Mr. Gonzalez’s confidential testimony being specifically based on the protected REC Procurement Data. Because the Attorney Examiner has already ruled that the REC Procurement Data is trade-secret protected information, any portion of Mr. Gonzalez’s testimony that would disclose the REC Procurement Data must be protected from disclosure. The Commission’s “evaluation” thus can end here. Accordingly, the Commission should grant both OCC’s and the Companies’ Motions for a Protective Order and prohibit the public disclosure of the Confidential Gonzalez Testimony.

## **II. STATEMENT OF FACTS**

At all times during this action, the Companies, the other parties that have signed protective agreements, the Commission and the Attorney Examiner have protected the REC Procurement Data from public disclosure:

- As part of the initial phase of this proceeding, the Companies provided the REC Procurement Data to Staff and outside auditors, Exeter Associates, Inc. (“Exeter”) and Goldenberg Schneider, LPA (“Goldenberg”), with the express understanding that this information would be confidential. (Affidavit of Dean Stathis at ¶¶ 3-4, attached as Exhibit A.)

- On August 15, 2012 and consistent with the Companies' understanding with Staff and the auditors, the Commission filed the Exeter Report under seal. On that same day, the Commission also filed a public version of the report in which the REC Procurement Data was redacted.
- On October 3, 2012, in response to OCC's requests for disclosure of the REC Procurement Data, the Companies moved to have the Exeter Report kept under seal because the REC Procurement Data was highly competitively sensitive proprietary information of the Companies and their REC suppliers, thereby warranting trade secret protection.
- During a hearing on November 20, 2012, the Attorney Examiner agreed with the Companies and granted the Companies' motion for a protective order. Specifically, the Attorney Examiner found that the highly confidential and proprietary REC Procurement Data contained in the Exeter Report deserved Commission protection because it constituted a trade secret pursuant to settled Ohio law and Commission precedent. (Case No. 11-5201-EL-RDR, Hearing Tr., 17:13-18:5 (Dec. 4, 2012).) The Attorney Examiner held that the REC Procurement Data should not be publicly disclosed and that any documents that contain this information should be filed under seal. (*Id.* at 18:19-19:3.) The Attorney Examiner also ordered that the Companies negotiate a protective agreement with OCC to allow OCC access to this confidential information. (*Id.* at 18:6-12.) The Attorney Examiner also emphasized in the order that "all parties will maintain the confidentiality of the confidential information contained in the unredacted audit reports [and] . . . none of that information may be publicly disclosed" and that all documents containing the confidential information should be filed under seal. (*Id.* at 18:19-19:1.)
- Since November 20, 2012, the Companies have entered into protective agreements with various intervening parties: including OCC. These agreements strictly limit the disclosure of the REC Procurement Data even amongst those involved in this action. Indeed, the protective agreement between the Companies and OCC, consistent with the Attorney Examiner's Order, required OCC to file the Confidential Gonzalez Testimony under seal. (Protective Agreement between the Companies and OCC, attached as Exhibit B.)
- On December 31, 2012, the Companies moved for a protective order to prevent the disclosure of the REC Procurement Data that would be contained within documents responsive to a public records request made by OCC.
- On January 23, 2013, the Companies moved for a protective order and filed under seal the testimony of Dean Stathis and Daniel Bradley because this testimony referenced the REC Procurement Data. No party has opposed this Motion to date.
- As set forth in the Affidavit of Dean Stathis, attached as Exhibit A to this Motion, the Companies have continuously protected the REC Procurement Data from public disclosure. (Exhibit A.)

Thus, the REC Procurement Data, which the Attorney Examiner held to be confidential trade secret information, has been subject to repeated efforts to protect its confidentiality and has been consistently determined to be confidential.

This motion is the latest effort by the Companies to continue to maintain the confidentiality of the REC Procurement Data. Although OCC has moved for a protective order and filed the Confidential Gonzalez Testimony under seal, on February 1, 2013, OCC requested that the Companies allow OCC to disclose to the public certain portions of Mr. Gonzalez's testimony that are specifically based on the REC Procurement Data. As a result, the Companies are now requesting that the Commission grant a protective order and prohibit the public disclosure of the Confidential Gonzalez Testimony consistent with the Attorney Examiner's previous ruling on November 20, 2012 in this matter regarding the same competitively sensitive information.

The Companies have identified the specific portions of the Confidential Gonzalez Testimony that require protection in Exhibit C, attached hereto. OCC redacted these portions from its publicly filed version of Mr. Gonzalez's testimony. The confidential trade secret information includes all references to REC Procurement Data and Mr. Gonzalez's recommended amounts of disallowance, penalty payments and interest payments that are based on this information. Even Mr. Gonzalez's recommended amounts of disallowance, penalty payments and interests payments must be protected from public disclosure because the amount of RECs purchased by the Companies is publicly available information and thus could be used to determine confidential supplier pricing information as described above.

### III. ARGUMENT

The Commission should grant a protective order to prohibit the public disclosure of the Confidential Gonzalez Testimony because the REC Procurement Data contained within the testimony is confidential trade secret information and subject to an existing protective order.

Pursuant to Rule 4901-1-24(D), the Commission grants protective orders regarding testimony that contains trade secrets. *See, e.g., In the Matter of the Joint Application of Frontier Communications Corporation, New Communications Holdings, Inc., and Verizon Communications Inc. for Consent and Approval of a Change in Control*, Case No. 09-454-TP-ACO, 2011 Ohio PUC LEXIS 1129, \*3-4 (Oct. 17, 2011) (granting motion for a protective order to protect confidential information contained within testimony filed by intervening parties).

The Attorney Examiner has already determined that the REC Procurement Data is confidential trade secret information that should be protected from public disclosure.<sup>2</sup> (Case No. 11-5201-EL-RDR, Hearing Tr., 17:13-18:5 (Dec. 4, 2012).) Specifically, the Attorney Examiner held:

The Examiner finds that the redacted portions of the auditor reports have independent economic value and the information was subject to reasonable efforts to maintain its secrecy. Further, the Examiner finds the redacted portions of the auditor's reports meet the six-factor test specified by the Supreme Court. Therefore, the Examiner finds that the redacted portions of the auditor's reports are trade secrets and a protective order should be granted pursuant to Rule 4901-1-24 of the Ohio Administrative Code.

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<sup>2</sup> Pursuant to R.C. § 1333.61(D), a “trade secret” is:

[A]ny 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. [And]
- (2) It is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

(Case No. 11-5201-EL-RDR, Hearing Tr., 17:13-18:5 (Dec. 4, 2012).) The Attorney Examiner also held: “I'd like to emphasize that all parties will maintain the confidentiality of the confidential information contained in the unredacted audit reports [and] . . . none of that information may be publicly disclosed, and any information containing documents [that contain this information] filed with this Commission will be filed under seal.” (*Id.* 18:19-19:1.)

The same trade secret information is at stake here. Public disclosure of the REC Procurement Data thus would violate the Attorney Examiner’s November 20, 2012 order. The Commission should thus grant a protective order to prohibit the disclosure of the REC Procurement Data that is contained within the Confidential Gonzalez Testimony.

To be sure, the Companies would suffer harm if the REC Procurement Data is publicly disclosed. The Attorney Examiner found that the REC Procurement Data has independent economic value. (*See* Case No. 11-5201-EL-RDR, Hearing Tr., 17:13-18:5 (Dec. 4, 2012).). Public disclosure of this information thus would cause economic harm to both the Companies and their REC suppliers. In addition, the public release of the REC Procurement Data would harm the Companies’ ability to conduct future auctions because the public release would disclose information to the detriment of participants in their competitive bid processes. (*See* Affidavit of D. Bradley, attached as Exhibit D.) Disclosure of this information also may compromise the ability of both the suppliers and the Companies to obtain competitive pricing in the renewable energy credit market. (*Id.*)

Given that the Attorney Examiner previously ruled that the REC Procurement Data is proprietary in nature and warrants trade secret protection, the Commission should make the same finding here and grant a protective order prohibiting the disclosure of the Confidential Gonzalez Testimony.



#### IV. CONCLUSION

For the foregoing reasons, the Companies request that the Commission grant both OCC's and the Companies' Motions for Protective Orders and prohibit the public disclosure of the confidential supplier pricing and supplier-identifying information that is contained within the confidential version of the direct testimony of Wilson Gonzalez.

DATED: February 7, 2013

Respectfully submitted,

/s/ David A. Kutik

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## CERTIFICATE OF SERVICE

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