

9

**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

**MOTION OF OHIO EDISON COMPANY, THE CLEVELAND ELECTRIC
ILLUMINATING COMPANY, AND THE TOLEDO EDISON COMPANY TO
FILE DEPOSITION TESTIMONY UNDER SEAL AND FOR A PROTECTIVE ORDER**

Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company (collectively, the “Companies”), pursuant to Rule 4901-1-24(D), O.A.C., move for permission to file the confidential portion of the deposition testimony of Wilson Gonzalez, witness for the Office of Ohio Consumers’ Counsel (“OCC”), under seal and further move for a protective order to guard the confidentiality of supplier-identifying and pricing information contained therein because it constitutes a trade secret. Pursuant to Rules to Rule 4901-1-24(D)(1)-(2), the non-confidential portion of the deposition testimony, and three copies of the confidential portion (attached hereto as Exhibit A), have been filed contemporaneously herewith. Disclosure of the information contain in the confidential portion of Mr. Gonzalez’s deposition testimony could cause the Companies and their suppliers’ competitive harm. Accordingly, as set forth in the attached Memorandum in Support, the Companies seek permission to file the confidential portion of the deposition testimony of OCC witness Wilson Gonzalez under seal and further seek a protective order preventing public disclosure of the confidential portion of Mr. Gonzalez’s deposition testimony because it contains highly competitively sensitive supplier-identifying and pricing information.

This is to certify that the images appearing are an accurate and complete reproduction of a case file document delivered in the regular course of business
Technician *HC* Date Processed **FEB 15 2008**

DATED: February 15, 2013

Respectfully submitted,

David Kutik / per authority AEH

James W. Burk, Counsel of Record
Carrie M. Dunn
FIRSTENERGY SERVICE COMPANY
76 South Main Street
Akron, Ohio 44308
Phone: (330) 761-7735
Facsimile: (330) 761-7735
E-mail: burkj@firstenergycorp.com
cdunn@firstenergycorp.com

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

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

**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

**MEMORANDUM IN SUPPORT OF THE MOTION OF OHIO EDISON COMPANY,
THE CLEVELAND ELECTRIC ILLUMINATING COMPANY, AND THE TOLEDO
EDISON COMPANY TO FILE TESTIMONY UNDER SEAL AND FOR A
PROTECTIVE ORDER**

I. STATEMENT OF FACTS

Section 4928.64 of the Ohio Revised Code governs the acquisition of renewable energy credits (“RECs”) by electric utility companies to meet their mandatory alternative energy benchmark requirements. *See* R.C. § 4928.64. From 2009 through 2011, the Companies held a series of requests for proposals (“RFPs”) whereby the Companies relied upon a competitive bidding process to procure RECs from various suppliers in order to meet their alternative energy compliance obligations. On September 20, 2011, the Commission initiated the present proceeding to audit the Companies’ recovery of costs associated with the REC RFP process. Exeter Associates, Inc. (“Exeter”) was selected as an external auditor to assist the Commission Staff with the audit. [Case No. 11-5201-EL-RDR, Entry, p. 3 (Feb. 23, 2012).]

On August 15, 2012, the Commission filed 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”) under seal. On that same day, the Commission also filed a public version of the report in which commercially sensitive and trade secret information related to suppliers was redacted, specifically supplier-identifying information and pricing information (the “REC Procurement Data”).

On October 3, 2012, the Companies moved to have the REC Procurement Data kept under seal because it was highly competitively sensitive proprietary information of the Companies and its REC suppliers, thereby warranting trade secret protection. During a hearing on November 20, 2012, the Attorney Examiner granted the Companies' motion for a protective order to prevent the dissemination of the REC Procurement Data contained in the unredacted version of the Exeter Report. [See Case No. 11-5201-EL-RDR, Hearing Tr., 17:13-18:5 (Dec. 4, 2012).] 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. [*Id.*] The Attorney Examiner also 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 confidential portion of the deposition testimony of Mr. Gonzalez makes frequent reference to, and discusses at length, the same REC Procurement Data; namely, the pricing and supplier-identifying information that the Commission has already deemed worthy of trade secret protection.

For the reasons that follow and pursuant to Rule 4901-1-24(D), the Companies respectfully request permission to file the confidential portion of the deposition testimony of OCC witness Wilson Gonzalez under seal. The Companies further request a protective order regarding the same to safeguard the proprietary and highly confidential content contained therein, which the Commission has previously found constituted trade secrets.

II. ARGUMENT

Pursuant to Rule 4901-1-24(D), the Commission routinely permits parties to file the deposition testimony of witnesses under seal and grants protective orders regarding such

testimony when it contains trade secrets. *See, e.g., In the Matter of the Application of Ohio Power Company and Columbus Southern Power Company for Authority to Merge and Related Approvals*, Case No. 10-2376-EL-UNC, 2011 Ohio PUC LEXIS 1027, *7-8 (Sept. 16, 2011) (granting protective orders to deposition testimony and exhibits filed under seal because they contained trade secrets); *In the Matter of the Application of Duke Energy Ohio, Inc., for an Increase in Electric Distribution Rates*, Case No. 08-709-EL-AIR, 2009 Ohio PUC LEXIS 989, *3-4 (Nov. 13, 2009) (same); *In the Matter of the Application of The Cincinnati Gas & Electric Company to Modify its Nonresidential Generation Rates to Provide for Market-Based Standard Service Offer Pricing and to Establish an Alternative Competitive-Bid Service Rate Option Subsequent to the Market Development Period*, Case No. 03-93-EL-ATA, 2007 Ohio PUC LEXIS 703, *19-30 (Oct. 24, 2007 (same)).

In its hearing on the matter, the Attorney Examiner agreed with the Companies that the REC Procurement Data contained in the Exeter Report should be afforded trade secret protection. 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.

[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.]

Here, the identical highly competitively sensitive and confidential information is at stake, the disclosure of which would again likely cause both the Companies and their REC suppliers competitive harm. The confidential portion of the deposition testimony of OCC witness Gonzalez contains and discusses at length the same REC Procurement Data contained in the Exeter Report, namely detailed pricing and supplier-identifying information. Given that the Attorney Examiner previously found that this very same information is proprietary in nature, warrants trade secret protection, and should be protected from public disclosure, the Commission should make the same finding here. [*Id.*] Pursuant to Rule 4901-1-24(D), the Commission should thus permit the Companies to file the confidential portion of the deposition testimony of OCC witness Gonzalez under seal and issue a protective order to prevent the public disclosure of the highly competitively sensitive information contained therein. Further, the non-confidential portion of the testimony at issue has been filed with the Commission contemporaneously with this Motion, and the confidential portion of Mr. Gonzalez's deposition testimony has been served on all parties to this proceeding who have executed a protective agreement with the Companies.

III. CONCLUSION

For the foregoing reasons, the Companies respectfully request that the Commission permit the Companies to file the confidential portion of the deposition testimony of OCC witness Wilson Gonzalez under seal and grant a protective order to prevent the public disclosure of the highly competitively sensitive and confidential pricing and supplier-identifying information contained therein.

DATED: February 15, 2013

Respectfully submitted,

David Kutik /per authority A&H

James W. Burk, Counsel of Record
Carrie M. Dunn
FIRSTENERGY SERVICE COMPANY
76 South Main Street
Akron, Ohio 44308
Phone: (330) 761-7735
Facsimile: (330) 761-7735
E-mail: burkj@firstenergycorp.com

David A. Kutik
JONES DAY
North Point
901 Lakeside Avenue
Cleveland, Ohio 44114-1190
Telephone: (216) 586-3939
Facsimile: (216) 579-0212
E-mail: dakutik@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 the foregoing was delivered to the following persons by e-mail this 15th day of February, 2013:

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

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

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

Attorney for the Sierra Club

Bruce J. Weston
Melissa Yost
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: yost@occ.state.oh.us

Attorneys for Office of the Ohio Consumers' Counsel

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@BKLawfirm.com
mkurtz@BKLawfirm.com
jkyler@BKLawfirm.com

Attorneys for The Ohio Energy Group

Michael K. Lavanga
Brickfield, Burchette, Ritts & 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 Nucor Steel Marion, Inc.

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: cathy@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

Nicholas McDaniel
ENVIRONMENTAL LAW &
POLICY CENTER
1207 Grandview Ave., Suite 201
Columbus, OH 43212
NMCDaniel@elpc.org

Attorney for ELPC

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.

David Kutik / per authority A&H
*An Attorney For Ohio Edison Company, The
Cleveland Electric Illuminating Company, and
The Toledo Edison Company*