

**BEFORE THE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Commission's Review of)	
its Rules for Energy Efficiency Programs)	Case No. 13-651-EL-ORD
Contained in Chapter 4901:1-39 of the Ohio)	
Administrative Code.)	
)	
In the Matter of the Commission's Review of)	
its Rules for the Alternative Energy Portfolio)	Case No. 13-652-EL-ORD
Standard Contained in Chapter 4901:1-40 of)	
the Ohio Administrative Code.)	
)	
In the Matter of the Amendment of Ohio)	
Administrative Code Chapter 4901:1-40)	Case No. 12-2156-EL-ORD
regarding the Alternative Energy Portfolio)	
Standard, to Implement Am. Sub. S.B. 315.)	
)	

COMMENTS OF FIRSTENERGY SOLUTIONS CORP.

Pursuant to the Commission's January 29, 2014 Entry ("Entry"), FirstEnergy Solutions Corp. ("FES") hereby submits the following comments regarding the proposed changes to Chapter 4901:1-40 of the Ohio Administrative Code (OAC). FES, as a certified retail electric service ("CRES") provider, is required to file annual alternative energy portfolio status reports. As explained more fully below, the proposed requirement to make entire status reports publicly available is unreasonable, in conflict with existing Rules, and at odds with longstanding Ohio law.

New Rule 4901:1-40-05(A)(4) would require the public disclosure of actual

annual sales volumes¹ and would reveal the CRES provider's average sales price.² In other words a CRES provider would have to divulge all annual megawatt hour sales and revenues to the public and competitors. This change contradicts current Rule 4901:1-25-02(A)(4), which provides unequivocal protection to this information. The presence of two, conflicting rules is an obvious dilemma and the Commission should rectify this problem by not adopting the change in Rule 4901:1-40. It is worth noting that Rule 4901:1-25 is currently subject to review and Staff did not suggest reversal of the longstanding confidential protection suggested in this docket. More importantly, releasing this competitively sensitive information is prohibited by law.

Ohio law defines a "trade secret":

[I]nformation, 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.

¹ OAC 4901:1-40-05(A)(4)(a)

² OAC 4901:1-40-05(A)(4)(d)

R. C. § 1333.61(D).³ The law further prohibits the release of information meeting the definition of a trade secret. R.C. §§ 1333.61(D) and 1333.62. Moreover, the General Assembly carved out an exception to the general rule in favor of the public disclosure of information in the Commission's possession; "public records" do not include records the release of which are prohibited by state or federal law. R.C. § 149.43(A)(1).

While the Commission has often expressed its preference for open proceedings, the Commission has long recognized its statutory obligations with regard to the protection of trade secrets. *See In re: General Telephone Co.*, Case No. 81-383-TP-AIR, Entry (Feb.17, 1982) (recognizing necessity of protecting trade secrets). Indeed, the Ohio Supreme Court has held that, not only does the Commission have the authority to protect the trade secrets of a public utility, Ohio law imposes a duty on the Commission to protect them -- as such protection are granted through the Uniform Trade Secrets Act to all businesses. *See Ohio Consumers' Counsel v. Pub. Util. Comm.*, 121 Ohio St.3d 362, 2009-Ohio-604. This Commission has previously carried out its obligations in this regard in numerous proceedings. *See, e.g., Elyria Tel. Co.*, Case No. 89-965-TP-AEC, Finding and Order (Sept. 21, 1989); *Ohio Bell Tel. Co.*, Case No. 89-718-TP-ATA, Finding and Order, (May 31, 1989); *Columbia Gas of Ohio, Inc.*, Case No. 90-17-GA-GCR, Entry (Aug. 17, 1990).

³ Ohio courts have also identified factors to be considered in recognizing a trade secret: (1) The extent to which the information is known outside the business, (2) the extent to which it is known to those inside the business, *i.e.*, by the employees, (3) the precautions taken by the holder of the trade secret to guard the secrecy of the information, (4) the savings effected and the value to the holder in having the information as against competitors, (5) the amount of effort or money expended in obtaining and developing the information, and (6) the amount of time and expense it would take for others to acquire and duplicate the information. *Pyromatics, Inc. v. Petruziello*, 7 Ohio App. 3d 131, 134-135 (Cuyahoga App. 1983) citing *Koch Engineering Co. v. Faulconer*, 210 U.S.P.Q. 854, 861 (Kans. 1980); *State ex rel. Perrea v. Cincinnati Pub. Sch.*, 123 Ohio St.3d 410, 414, 2009-Ohio-4762 (adopting these factors as appropriate).

If the Commission adopts the suggested changes to this Rule, then CRES providers would be compelled to divulge proprietary trade secrets. Staff's justification for this new rule is that it will increase program transparency and improve administrative efficiency. Entry at 4-5. However, there is no indication that the current process is administratively burdensome. Nor is there an explanation as to how the apparent transparency overcomes insurmountable dangers of releasing competitively sensitive information. Moreover, there is nothing in the underlying statute, R.C. § 4928.64, that suggests the legislature intended to provide the Commission discretion to ignore Ohio's trade secrets law when administering alternative energy requirements. If the legislature had intended its alternative energy statute to require companies to divulge their trade secrets, or to provide such discretion to the Commission, then it would have expressly stated it in R.C. § 4928.64. Because the legislature did not, the Commission lacks the authority to make rules that would so clearly cut against Ohio trade secrets law and policy. To avoid rules that exceed Commission authority, Staff's suggested rule changes at proposed rule section 4901:1-40-05(A)(4) should be modified as suggested below:

(4) The alternative energy portfolio status reports filed by each electric utility and electric services company shall include at least the following content; ~~that shall be made publicly available;~~ for the applicable compliance year:

Making the change that FES suggests to Staff's proposed rule does nothing to change the discretion the Commission has as the finder of fact to make a determination whether certain information warrants trade secret protection under Ohio law. Companies filing for alternative energy portfolio standards compliance will still be required to make a showing that their information meets the criteria for information that must be protected. Preserving the current practice is far preferable to Staff's proposal, which incorrectly sets

in stone a determination that filings for alternative energy compliance do not include trade secret information. Instead, FES requests that the Commission make the small change suggested above and preserve the Commission's authority to make trade secrets determinations on a case by case basis, and thereby avoid exceeding the authority granted to it by R.C. § 4928.64.

For the reasons stated above, the Commission should ensure confidential information is afforded proper protection and make the changes suggested by FES.

Respectfully submitted,

/s/ Scott J. Casto

Mark A. Hayden (0081077)
Associate General Counsel
Scott J. Casto (0085756)
FIRSTENERGY SERVICE COMPANY
76 South Main Street
Akron, OH 44308
(330) 761-7735
haydenm@firstenergycorp.com
scasto@firstenergycorp.com

This foregoing document was electronically filed with the Public Utilities

Commission of Ohio Docketing Information System on

2/28/2014 4:33:26 PM

in

Case No(s). 12-2156-EL-ORD, 13-0651-EL-ORD, 13-0652-EL-ORD

Summary: Comments of FirstEnergy Solutions Corp. electronically filed by Mr. Scott J Casto on behalf of FirstEnergy Solutions Corp.