

**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
FOR RENEWAL OF PROTECTIVE ORDER**

Pursuant to Rule 4901-1-24(F), O.A.C., Ohio Edison Company, The Cleveland Electric Illuminating Company and The Toledo Edison Company (the “Companies”) respectfully move the Commission to renew trade secret protection to the highly competitively sensitive pricing and supplier-identifying information provided to Staff, the auditors, the parties to the case (under protective agreements) and submitted in the record in this matter under seal. This proprietary information is associated with the Companies’ procurement of renewable energy credits (“RECs”) to meet their alternative energy purchase compliance obligations and includes: (a) the identities of specific REC suppliers who participated in a series of request for proposals (“RFPs”) held by the Companies; (b) the specific prices for the RECs bid by those specific suppliers in response to each RFP; and (c) detailed financial information regarding specific REC transactions between suppliers and the Companies (collectively, the “REC Procurement Data”).

Specifically, the Companies are seeking to renew the protective status of the REC Procurement Data set forth in the unredacted version of the audit report by Exeter Associates, Inc. (“Exeter”) filed on the docket in this proceeding on August 15, 2012 (“the Exeter Report”). On November 20, 2012, during a hearing at the Commission, the Attorney Examiner found that the

REC Procurement Data in the unredacted version of the Exeter Report was a trade secret under Ohio law entitled to protection from disclosure to the public. Pursuant to Rule 4901-1-24(F), this protection under that order is due to expire on May 20, 2014. As demonstrated in the attached memorandum in support, the REC Procurement Data continues to warrant trade secret protection. Further the information the Companies gave to Staff and the auditors was submitted to the Commission with the expectation that the information would be kept confidential in accordance with Section 4901.16 of the Ohio Revised Code. The Commission should thus keep the unredacted version of the Exeter Report under seal.

Respectfully submitted,

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TABLE OF CONTENTS

I.	INTRODUCTION	1
II.	STATEMENT OF FACTS AND PROCEDURAL HISTORY	2
III.	ARGUMENT	7
A.	The Applicable Standard.....	7
B.	The REC Procurement Data Contained In The Unredacted Version Of The Exeter Report Continues To Constitute A Trade Secret Pursuant To Section 1331.61(D) And The Six-Factor Test Set Forth In <i>The State ex rel.</i> <i>The Plain Dealer v. Ohio Dept. of Insurance</i>	9
1.	The REC Procurement Data at issue continues to constitute a trade secret pursuant to Section 1331.61(D).....	9
a.	The REC Procurement Data at issue continues to bear independent economic value	10
b.	The Companies have made reasonable efforts to ensure the secrecy of the REC Procurement Data at issue.....	14
2.	The REC Procurement Data at issue satisfies the six-factor test set forth in <i>The State ex rel. The Plain Dealer v. Ohio Dept. of</i> <i>Insurance</i>	15
IV.	CONCLUSION.....	18

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I. INTRODUCTION

On four separate previous occasions in this proceeding, the Commission has found that the REC Procurement Data for which the Companies now seek continued protection constituted a trade secret. Continued protection of this information is necessary to preserve the competitive integrity of Ohio's REC market and future REC procurements. The dissemination of this information, which would reveal proprietary bidding strategies, could lead potential REC suppliers to engage in collusive behavior and seek to game the system. In turn, REC prices could increase, thereby harming customers. Thus, pursuant to Rule 4901-1-24(F), the REC Procurement Data contained in the unredacted version of the Exeter Report warrants a continuation of trade secret protection. Further, to assist with the instant audit proceeding, the Companies provided the REC Procurement Data to Staff and its agents, i.e., the Exeter auditors, with the expectation of strict confidentiality as guaranteed by Section 4901.16 of the Ohio Revised Code. For all of those reasons, the Commission should renew the protective order related to the unredacted Exeter Report, which is due to expire on May 20, 2014.

II. STATEMENT OF FACTS AND PROCEDURAL HISTORY

Under Ohio law, electric utilities may satisfy their alternative energy compliance obligations through the procurement of RECs from certified suppliers. *See* R.C. §§ 4928.64(B), 4928.65. On February 19, 2009, as part of their application in Case No. 08-935-EL-SSO, the Companies submitted a plan to procure the necessary RECs for the period January 1, 2009 through May 31, 2011. The plan called for RECs to be procured through an RFP process. *See* Case No. 08-935-EL-SSO, Second Opinion and Order, at 9 (Mar. 25, 2009). The Commission approved this plan and further approved the Companies' recovery of its REC procurement costs via an alternative energy cost-recovery rider, Rider AER. *Id.* The Companies, through an independent RFP manager, Navigant Consulting, Inc. ("Navigant"), then proceeded with the RFP process. With Navigant's assistance and advice, the Companies received, reviewed and accepted bids. The Companies then entered into binding, confidential contracts for the purchase of RECs with various suppliers to meet the Companies' alternative energy compliance obligations. Notably, the rules established for the RFPs called for information regarding the identities of the bidders and the price offered by the bidders to be confidential. *See* Affidavit of Dean W. Stathis ("Stathis Aff."), ¶4 (attached hereto as Exhibit A).

On September 20, 2011, the Commission initiated this audit proceeding 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-EL-RDR"). To assist with the audit, the Commission requested that the Staff secure the services of outside auditors. *See* Case No. 11-5201-EL-RDR, Entry, at 1 (Feb. 23, 2011). The Commission specifically stated that any outside auditor chosen by Staff was subject to the strictures of Section 4901.16 of the Ohio Revised Code. *Id.* at 2-3. Staff selected Exeter and

Goldenberg Schneider, LPA (“Goldenberg”) as outside auditors. *Id.* Exeter was selected to perform a management/performance audit and Goldenberg to perform a financial audit.

To assist with the audit, the Companies provided Exeter, Goldenberg and Staff with the highly competitively sensitive REC Procurement Data. *See* Stathis Aff. at ¶4 Prior to providing the REC Procurement Data to Staff and the auditors, the Companies met with Staff to address the Companies’ confidentiality concerns. *Id.* The Companies provided the REC Procurement Data with the understanding that Staff and the auditors would keep such information confidential and that it would not be made publicly available. *Id.* In their meeting with Staff, the Companies further understood that any audit reports incorporating the REC Procurement Data would be filed under seal and that such unredacted reports would be kept under seal until the Commission ruled otherwise. *Id.*

On August 15, 2012, the Staff filed a confidential version of the Exeter Report containing the REC Procurement Data with the Commission under seal. On the same day, a redacted version of the Exeter Report was made available to the public on the docket for this proceeding. *See* Case No. 11-5201-EL-RDR, Docket (Aug, 15, 2012). Only information identifying specific supplier bids and prices was redacted; the Exeter auditors’ recommendations and conclusions were made available in the public version.

The Companies subsequently filed a motion for a protective order to prevent the public disclosure of the REC Procurement Data contained in the Exeter Report. In this motion, the Companies sought to keep the unredacted version of the Exeter Report under seal, thereby protecting the REC Procurement Data. *See* Case No. 11-5201-EL-RDR, Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company’s Motion for a

Protective Order (Oct. 3, 2012). During a hearing on November 20, 2012, the Commission granted the Companies' motion. The Attorney Examiner specifically 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. at 17-18 (Dec. 4, 2012). The Attorney Examiner further recognized the need "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.* at 18-19. As part of his ruling, the Attorney Examiner also instructed various intervenors seeking to obtain unredacted versions of the Exeter report to enter into suitable protective agreements with the Companies. These intervenors subsequently entered into such agreements and the Companies provided them with unredacted copies of the Exeter Report.

On December 31, 2012, the Companies moved to protect from public dissemination a draft copy of the Exeter Report that contained confidential commentary by the Companies related to the REC Procurement Data. In an Entry dated February 14, 2013, the Attorney Examiner granted the Companies' request and again held:

The attorney examiner has reviewed the information included in FirstEnergy's motion for protective order, as well as the assertions set forth in the supportive memorandum. Applying the requirements that the information have independent economic value and be the subject of reasonable efforts to maintain its secrecy pursuant to Section 1333.61(D), Revised Code, as well as the six-factor test set forth by the Ohio Supreme Court, the attorney examiner finds that, consistent with the

ruling at the November 20, 2012, prehearing conference, confidential supplier pricing and supplier-identifying information that appears in the draft document contains trade secret information. Its release is, therefore, prohibited under state law. The attorney examiner also finds that nondisclosure of this information is not inconsistent with the purposes of Title 49 of the Revised Code.

Case No. 11-5201-EL-RDR, Entry at 5 (Feb. 14, 2013). The Attorney Examiner proceeded to extend such protection for 24 months, until February 13, 2015, at which time the Companies could move to extend protection for an additional 18 months. *Id* at 6.

The hearing in this matter was held from February 19, 2013 to February 25, 2013. Prior to the hearing, the Companies and various intervenors filed under seal and moved to protect the direct and deposition testimony of various witnesses that contained the REC Procurement Data. *See* Case No. 11-5201-EL-RDR, Docket. To prevent the dissemination of the REC Procurement Data, the Attorney Examiner bifurcated the hearing, and segregated the transcript, into confidential and public portions. The rebuttal testimony of the Companies was filed under seal as well as all post-hearing briefing. Importantly, minimally-redacted versions of the foregoing were made publicly available.

In its Opinion and Order dated August 7, 2013, the Commission granted all of the pending motions for protective orders and again found that the REC Procurement Data constituted a trade secret under Ohio law. The Commission specifically rejected arguments that the REC Procurement Data did not deserve continuing protection. Case No. 11-5201-EL-RDR, Opinion and Order at 8-9 (Aug. 7, 2013). The Commission held:

Applying the requirements that the information have independent economic value and be the subject of reasonable efforts to maintain its secrecy pursuant to Section 1333.61(D), Revised Code, as well as the six-factor test set forth by the Ohio Supreme Court in *Plain Dealer*...., the Commission finds that the REC procurement data contains trade secret information. Its release, therefore, is prohibited under state law. The Commission also finds that

nondisclosure of this information is not inconsistent with the purposes of Title 49 of the Revised Code.

Id. at 11-12. The only modification to the previous orders was that the Commission permitted the “generic disclosure” of one of the Companies’ REC suppliers as a successful bidder. *Id.* Again, however, the Order emphasized that any remaining REC Procurement Data “shall continue to be confidential and subject to the protective orders.” *Id.* The Commission further ordered that the protected material be kept under seal until January 19, 2015, at which time the Companies could move to extend protection for an additional 18 months. *Id.* at 14.

In its Second Entry on Rehearing (“Second Entry”), dated December 18, 2013, the Commission affirmed its findings from the Opinion and Order regarding the trade secret status of the REC Procurement Data. Case No. 11-5201-EL-RDR, Second Entry on Rehearing at 4 (Dec. 18, 2013). “As stated in the Order, the Commission found that the REC procurement data is trade secret information and its release is prohibited under state law.” *Id.* at 5. In its Second Entry, the Commission also emphasized the continued need to protect the REC Procurement Data because the public dissemination thereof could undermine the integrity of the REC market in Ohio. Specifically, the Commission found, “if this trade secret information was public, it could discourage REC suppliers’ confidence in the market and impede the function of the REC market.” *Id.*

On December 24, 2013, the Companies filed their notice of appeal with the Ohio Supreme Court and the Commission. On January 23, 2014, the confidential portions of the Commission record in this matter was transferred under seal to the Ohio Supreme Court. On March 6, 2014, the Companies filed portions of the appendix and supplement to their merit brief under seal in order to maintain the confidentiality of the REC Procurement Data. The protective

order regarding the unredacted version of the Exeter Report, issued on November 20, 2012, expires on May 20, 2014.

III. ARGUMENT

A. The Applicable Standard

Pursuant to Rule 4901-1-24(F), O.A.C., a party to a Commission proceeding may move the Commission to continue to protect confidential and proprietary information, such as trade secrets, beyond the initial default period of 18 months. *See* Rule 4901-1-24(F), O.A.C. The Commission routinely permits the continuation of protective treatment where, as here, the information at issue contains trade secrets. *See e.g., In the Matter of the Application of The Ohio Bell Telephone Company dba AT&T Ohio for Approval of an Alternative Form of Regulation of Basic Local Exchange Service and Other Tier 1 Services Pursuant to Chapter 4901:1-4, Ohio Administrative Code*, Case No. 07-259-TP-BLS, 2012 Ohio PUC LEXIS 240, *2-3 (Mar. 8, 2012) (granting second 18-month extension pursuant to Rule 4901-1-24(F) to afford continuing protection to proprietary information); *In the Matter of the Application of iNetworks Group, Inc. for a Certificate of Public Convenience and Necessity to Provide Competitive Telecommunications Services Within the State of Ohio*, Case No. 09-104-TP-ACE, 2010 Ohio PUC LEXIS 915, *1-3 (Sept. 10, 2010) (granting 18-month extension pursuant to Rule 4901-1-24(F) to afford continuing protection to “competitively sensitive financial information”); *In the Matter of the Commission's Investigation into Continuation of the Ohio Telecommunications Relay Service*, Case No. 08-439-TP-COI, 2010 Ohio PUC LEXIS 699, *1-2 (June 21, 2010) (granting 18-month extension to afford continuing trade secret protection pursuant to Rule 4901-1-24(F) to proprietary bidding information obtained via a “competitive bidding process”).

Further, Section 4901.16 of the Ohio Revised Code imposes a duty of confidentiality on

Staff and its agents regarding information obtained from a public utility during the course of a Commission audit proceeding. *See* R.C. 4901.16; *Vectren Energy Delivery of Ohio, Inc. v. Pub. Util Comm.* (2007), 113 Ohio St. 3d 180, 191-192 (emphasis added). The Commission has held that Section 4901.16 prohibits Staff or its agents from divulging such information. *See, e.g., 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, 2004 Ohio PUC LEXIS 271, *11 (July 28, 2004) (holding that Section 4901.16 may preclude the disclosure of confidential information that does not rise to the level of a trade secret); *In the Matter of the Commission's Investigation Into the Adequacy and Availability of Electric Power for the Summer Months of 2001 from Ohio's Investor-Owned Electric Utility Companies*, Case No. 01-985-EL-COI, 2001 Ohio PUC LEXIS 179, *5-6 (May 3, 2001) (holding that Section 4901.16 requires Staff to maintain the confidentiality of proprietary information acquired from a utility during the course of a Commission-sponsored investigation).

In addition, adhering to Section 4901.16 promotes an important policy goal; namely, it encourages utilities, like the Companies, to share confidential information freely with the Commission and Staff. As the Commission has observed on a prior occasion, refusing to follow Section 4901.16 “would have the impact of discouraging utilities from sharing information with the staff for fear that it will be considered to be a public record that must be disclosed upon request (contrary to the likely purpose of Section 4901.16, Revised Code).” *In the Matter of the Investigation of The Cincinnati Gas & Electric Company*, 2004 Ohio PUC LEXIS 271 at *9-10. For purposes of the audit, the Companies submitted the REC Procurement Data to Staff and the auditors, in order for them to prepare the Exeter Report, with the expectation that it would remain confidential. Renewal of the protective order for the Exeter Report would advance the

policy interests of protecting trade secret information and promoting the free flow of information between public utilities and staff as contemplated by Section 4901.16.

As demonstrated below, the REC Procurement Data contained in the unredacted version of the Exeter Report continues to readily satisfy the requirements of Section 1331.61(D) and the six-factor test set forth in *The State ex rel. The Plain Dealer v. Ohio Dept. of Insurance*, 80 Ohio St. 3d 513, 524-25 (1997). Thus, pursuant to Rule 4901-1-24(F), the Commission should grant the Companies' motion and continue to protect the REC Procurement Data at issue for an additional 18 months.

B. The REC Procurement Data Contained In The Unredacted Version Of The Exeter Report Continues To Constitute A Trade Secret Pursuant To Section 1331.61(D) And The Six-Factor Test Set Forth In *The State ex rel. The Plain Dealer v. Ohio Dept. of Insurance*.

1. The REC Procurement Data at issue continues to constitute a trade secret pursuant to Section 1331.61(D).

Section 1333.61(D) of the Ohio Revised Code provides a two-pronged test for the determination of trade secret status:

(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.

R.C. 1331.61(D). The REC Procurement Data at issue continues to satisfy both prongs. The REC Procurement Data therefore warrants the Commission's ongoing protection and falls

outside of the purview of the public records disclosure requirements of Section 149.43. *See State ex rel. Lucas County Bd. of Comm'rs v. Ohio EPA*, 88 Ohio St. 3d 166, 172 (2000) (“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.”).

a. The REC Procurement Data at issue continues to bear independent economic value.

The Commission has routinely found that the supplier-identifying and pricing data generated in competitive bidding processes (“CBPs”), including those involving the procurement of RECs, constitutes a trade secret. For example, in *In the Matter of DPL Energy Resources, Inc.’s Annual Alternative Energy Portfolio Status Report*, Case No. 12-1205-EL-ACP, 2013 Ohio PUC LEXIS 265 (Nov. 13, 2013), an electric services company sought trade secret protection for the identity of its REC suppliers on the basis that such information was proprietary in nature. Specifically, the utility sought confidential treatment for information contained in its annual Alternative Energy Procurement Standards (“AEPS”) status report, namely “specifications of the facility name, certificate serial numbers, and Ohio certificate number of the counterparties from which the RECs were acquired.” *Id.* at *3. The electric services company asserted that “the identity of the source of supply of the RECs is proprietary, trade secret information, and that its public disclosure would subject [the electric services company] to a competitive disadvantage.” *Id.* The Commission agreed. The Commission found, among other things, that the REC data under review had independent economic value and, therefore, was deserving of trade secret protection pursuant to Section 1333.61. *Id.* at *6-8. *See also, In the Matter of the Alternative Energy Portfolio Status Report of Dominion Retail, Inc.*, Case No. 12-1223-EL-ACP, 2013 Ohio PUC LEXIS 251 (Nov. 13, 2013) (agreeing with electric services

company's claim that "competitively sensitive information," which consisted in "specific details of the RECs retired....including identity and sources" bore independent economic value).

Likewise, in 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, Entry (May 23, 2011) ("Companies' ESP"), two evaluative post-auction market monitor reports from a competitively bid auction for SSO load were filed under seal. *See id.* at 1-2. While certain information was released to the public after 21 days to allow the winning bidders to procure additional capacity to serve the SSO load, other information was deemed highly sensitive and confidential, and ordered to remain under seal "indefinitely." *Id.* at 2. The sealed information included the identities of unsuccessful bidders, price information (including starting price methodologies and round prices/quantities for individual bidders), and "indicative pre-auction offers." *Id.*

As detailed in a letter by the auction manager from CRA International, Inc. d/b/a Charles River Associates ("CRA"), the CBP data in the Companies' ESP 1 bore independent economic value. Case No. 08-935-EL-SSO, CRA International, Inc. Comments Letter, p. 1 (June 6, 2011). CRA urged that "the identity [sic] of Qualified Bidders" should not be disclosed because such bidders "believe disclosure . . . may put them at a competitive disadvantage." *Id.* Further, CRA stated, "detailed bidding data" can reveal "bidding strategies and valuations" and the disclosure thereof can "discourage bidders from participating in future auctions" and enable other bidders to try to "game" the system. *Id.* at 2. These pressing policy considerations led CRA to conclude that the release of the sealed report "may be harmful to future competitive bidding processes." *Id.* The Commission presumably agreed with this assessment because it did not subsequently

unseal the documents at issue. *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, 2013 Ohio PUC LEXIS 257, *3-4 (Nov. 13, 2013) (agreeing with Staff that disclosure of [confidential bidder-identity and pricing] information would be highly prejudicial to the bidding parties and the viability of any future auction in Ohio” and ordering that such information be protected “indefinitely” due to its “highly competitive sensitive nature”).

So too, here. The REC Procurement Data contained in the unredacted version of the Exeter Report continues to bear independent economic value. Such information is on all-fours with the protected REC data from *DPL Energy* and *Dominion Retail*, and directly analogous to the bidding data from the CBP auction cases noted above. Releasing such data, which as a matter of business practice the Companies never voluntarily do, could undermine the Companies’ ability to attract suppliers to future REC RFPs. *See* Stathis Aff. at ¶5. Suppliers expect the Companies to keep such information strictly confidential. *Id.* The fear over the loss of such confidentiality might drive suppliers that would otherwise participate in the Companies’ RFPs to instead decide to participate in other utilities’ RFPs (in Ohio or elsewhere) where confidentiality was guaranteed. *Id.* Such an adverse impact on supplier participation would undermine the competitive outcome of any RFP, thereby increasing the prices that the Companies and their customers would have to pay for RECs. *Id.*

Allowing for the dissemination of the REC Procurement Data at issue also has broader negative implications. Release of the REC Procurement Data contained in the unredacted version of the Exeter Report could reveal proprietary bidding strategies. It could also enable bidders to game the system and engage in collusive behavior, thereby driving up prices and

harming ratepayers. The foregoing could, in turn, have a chilling effect on potential entry of suppliers into Ohio's REC markets, thereby undermining the competitive integrity thereof.

As illustrated in a letter by Navigant Consulting, Inc. ("Navigant"), the Companies' independent RFP manager for the RFPs at issue in this case:

Publicly disclosing the identity of winning or non-winning bidders, ranges of prices received in bids, and prices of selected bids has a chilling effect on participation because participants are likely to believe disclosure of that information puts them at a competitive disadvantage in the marketplace compared to their competitors or in the context of business transactions with counterparties.

Case No. 11-5201-EL-RDR, Navigant Consulting, Inc., Comments Letter, p. 2 (Oct. 29, 2012).

In its Second Entry, the Commission also pinpointed this issue. "If this trade secret information [i.e., the REC Procurement Data] was public, it could discourage REC suppliers' confidence in the market and impede the function of the REC market." *Id.*, Second Entry on Rehearing at 4 (Dec. 18, 2013).

Importantly, the age of the REC Procurement Data at issue is of no moment. *See Stathis Aff.* at ¶5 ("Releasing such information, regardless of its age, would harm the ability of the Companies to attract suppliers to participate in RFPs."). Commission precedent further confirms that this is so. In *Dominion Retail*, the REC procurement data found to bear independent economic value involved RECs retired in 2010 and was therefore, at a minimum, 36 months old when placed under protection. *See Case No. 12-1223-EL-ACP*, Motion for Protective Order of *Dominion Retail, Inc.*, at 2 (April 13, 2012) ("If disclosed to competitors, the identity and sources of the RECs retired by *Dominion Retail* in 2010 to meet its [AEPS compliance obligations] would damage *Dominion Retail*'s position in the Ohio retail electric market.") (emphasis added). Likewise the CBP data placed under trade secret protection in the Companies' ESP 1 remains so, approximately 60 months after being filed under seal. Thus, as amply

demonstrated above, the REC Procurement Data contained in the unredacted version of the Exeter Report continues to bear independent economic value and satisfies the first prong of Section 1331.61.

b. The Companies have made reasonable efforts to ensure the secrecy of the REC Procurement Data at issue.

The Companies have consistently exercised reasonable efforts to preserve the secrecy of the REC Procurement Data contained in the unredacted version of the Exeter Report, thereby satisfying the second prong of Section 1331.61(D). The REC Procurement Data at issue has not been revealed to any third parties outside of this audit proceeding and the subsequent appeal thereof. *See* Stathis Aff. at ¶3. It has also only been revealed to those parties to this proceeding that have executed a confidentiality and protective agreement with the Companies. Further, it was provided to Staff and the outside auditors with the understanding that it would be kept confidential and remain under seal. *See id.* at ¶4.

Moreover, the REC Procurement Data at issue was acquired through contracting with various suppliers and these contracts contained strict confidentiality provisions. *See* Case No. 11-5201-EL-RDR, Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company's Motion for a Protective Order, Ex. 1, Section 14.7 and Ex. 2, Article 13 (Oct. 3, 2012). Internally, the REC Procurement Data was segregated and only provided to the Companies' employees on a need-to-know basis. *See* Stathis Aff. at ¶3. As detailed above, the Companies also have consistently moved to protect the REC Procurement Data contained in not only in the unredacted version of the Exeter Report but also any filings in this matter, including direct and rebuttal witness testimony, deposition testimony, and all post-hearing briefing. To further safeguard the REC Procurement Data, the hearing in this matter was bifurcated into confidential and public portions with access to the transcripts for the confidential

portions restricted accordingly. *See* Case No. 11-5201-EL-RDR, Entry, p. 2 (Mar. 19, 2013).

Further, in their recent filing at the Ohio Supreme Court, the Companies filed portions of their appendix and supplement to their merit brief under seal because these material contained the same REC Procurement Data that is at issue here.

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 1331.61(D) test. *State ex rel. Perrea v. Cincinnati Pub. Sch.*, 123 Ohio St.3d 410, 414 (2009). As the Attorney Examiner and the Commission correctly found on four previous occasions, the REC Procurement Data at issue thus continues to satisfy the statutory requirements for trade secret status under Section 1331.61(D). Finally, those parties who seek to have this information publicly disclosed, have not demonstrated a compelling reason to do so especially in light of the serious risk to the Ohio REC market that such public dissemination would cause.

Pursuant to Rule 4901-1-24(F), the Commission should thus extend its trade secret protection of the REC Procurement Data contained in the unredacted version of the Exeter Report for an additional 18 months.

2. The REC Procurement Data at issue satisfies the six-factor test set forth in *The State ex rel. The Plain Dealer v. Ohio Dept. of Insurance*.

As the Commission has previously found, the REC Procurement Data continues to satisfy the six-factor test articulated by the Ohio Supreme Court in *The State ex rel. The Plain Dealer v. Ohio Dept. of Insurance*. These six factors are:

- (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.

80 Ohio St.3d 513, 524-25 (1997).

The Commission has routinely found that data generated as part of CBPs, including those to procure RECs, satisfies the *Plain Deal* six-factor test. *See, e.g., DPL Energy*, Case No. 12-1205-EL-ACP, 2013 Ohio PUC LEXIS at *8 (holding that the REC procurement data at issue met the *Plain Dealer* six-factor test); *Dominion Retail*, Case No. 12-1223-EL-ACP, 2013 Ohio PUC LEXIS 251 at *7-8 (same); *In the Matter of the Application of Duke Energy Ohio, Inc. to Adjust Rider DR-IM and Rider AU for 2010 SmartGrid Costs and Mid-Deployment Review*, Case No. 10-2326-GE-RDR, 2012 Ohio PUC LEXIS 89, *3-6 (Jan. 25, 2012) (holding that confidential pricing and growth projections data met the *Plain Dealer* six-factor test and agreeing with utility that release of such data “would enable competitors to use it in conjunction with public information to manipulate bids in the competitive marketplace”).

In line with these cases, the REC Procurement Data at issue here readily satisfies the *Plain Dealer* six-factor test. With regard to the first factor, as noted, the Companies have consistently protected the REC Procurement Data. *See* Stathis Aff. at ¶3. The vast majority of the REC Procurement Data is thus not known outside of the confines of the Companies, Navigant or the protected limited disclosure permitted in this case.¹

Further, and in line with the second factor, employees of the Companies were only granted access to the REC Procurement Data on a “need-to-know” basis. It thus was not widely disseminated within the Companies. *Id.*

¹ The small fraction thereof inadvertently disclosed in the improperly redacted public version of the Exeter Report occurred without the Companies’ knowledge or permission

As also noted, concerning the third factor, the Companies have taken a host of precautions to safeguard the REC Procurement Data. The Companies acquired the REC Procurement Data via contracts containing strict confidentiality provisions; the Companies have at all times ensured the secrecy of the REC Procurement Data; and all of the Companies' filings, including witness testimony and all post-hearing briefing containing the REC Procurement Data have been done under seal. *See* Docket, Case No. 11-5201-EL-RDR. In the appeal of this matter, the Companies have filed the portions of the appendix and supplement to their Ohio Supreme Court merit brief that contain the REC Procurement Data under seal.

With regard to the fourth factor, the REC Procurement Data bears independent economic value. Its dissemination would likely cause competitive harm to the Companies by undermining the integrity of future REC procurement efforts due to decreased supplier participation in the Companies' RFPs. *See* Stathis Aff. at ¶5. *See also*, Case No. 11-5201-EL-RDR, Navigant Consulting, Inc. Comments Letter, p. 2 (Oct. 26, 2012).

Concerning the fifth factor, as detailed in the Exeter Report, the Companies incurred significant expenses in retaining Navigant and conducting an open, transparent and fulsome series of REC RFPs, the means by which the Companies acquired the REC Procurement Data. *See* Case No. 11-5201-EL-RDR, Final Report (Redacted) Management/Performance Audit of the Alternative Energy Resource Rider (Rider AER) of the FirstEnergy Ohio Utility Companies for October 2009 through December 31, 2011, at 3-6 (Aug. 15, 2012).

Lastly, regarding the sixth factor, it is difficult to envision how another entity could acquire the REC Procurement Data, aside from its public dissemination, regardless of the time and expense expended. Hence, the strenuous efforts on the part of the Companies to ensure the protection of the REC Procurement Data since its generation during the RFP process.

Accordingly, the REC Procurement Data also continues to satisfy the six-factor test recognized in *The State ex rel. The Plain Dealer*. Pursuant to Rule 4901-1-24(F), the Commission should thus extend the protection of the REC Procurement Data contained in the unredacted version of the Exeter Report for an additional 18 months.

IV. CONCLUSION

For the foregoing reasons, the Companies respectfully request that the Commission continue to protect the REC Procurement Data contained in the unredacted version of the Exeter Report for an additional 18 months from May 20, 2014.

April 4, 2014

Respectfully submitted,

/s/ David A. Kutik

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served by electronic mail on the 4th day of April, 2014, upon all of the parties to this proceeding.

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/s/ David A. Kutik

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AND THE TOLEDO EDISON COMPANY

EXHIBIT A

**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**

AFFIDAVIT OF DEAN W. STATHIS

2. Because employees of RCS represent the marketing arm of the regulated utilities, they are considered regulated marketing function employees by the Federal Regulatory Commission (“FERC”). This classification requires two organizational separations from the rest of FirstEnergy Corp. (“FE”) and its affiliates. First, from an affiliate restrictions standpoint, RCS must be independent of, and separate from, FirstEnergy Corp.’s unregulated power supply subsidiary, FirstEnergy Solutions (“FES”). This is primarily accomplished through separate physical work locations, separate corporate identification credentials, separate IT Systems and

mandatory affiliate restrictions training administered by the FE Corporate Compliance Department. Secondly, RCS must be separated from the regulated transmission function of FE to ensure that RCS employees (regulated marketing function) do not receive non-public transmission information. This separation is similarly accomplished by separate physical work locations, separate corporate identification credentials, separate IT Systems and FERC mandatory standards of conduct training administered by the FE Corporate Compliance Department.

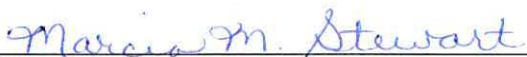
3. With respect to the information received from or relating to bidders and bid in the RFPs at issue, RCS maintained separate physical and electronic files that can only be accessed by RCS personnel or others within FirstEnergy Service Company on a need to know basis, i.e., only to persons having a legitimate business reason to access such data. Prior to the audits conducted in this case, this information was not shared with anyone outside of FirstEnergy Service Company and Navigant Consulting, Inc.

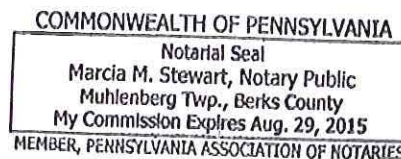
4. My department and others within FirstEnergy Service Company provided certain information to the Staff of the Public Utilities Commission of Ohio and the two auditors in this case with the understanding that, consistent with our internal policy and with our contractual obligations to the RFP bidders and alternative energy suppliers, transaction-specific information – such as the names of bidders making specific price bids – would remain confidential. Among other things, the Staff and auditors were provided: (a) the specific identities of the 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 the suppliers and the Companies.

5. I have directed or overseen more than 100 large-scale purchased power auctions and REC procurement RFPs during my tenure at FirstEnergy. As a matter of business practice, the Companies do not voluntarily publicly release data, such as individual supplier pricing or bids or supplier-identifying information. Releasing such information, regardless of its age, would harm the ability of the Companies to attract suppliers to participate in RFPs. Because of the fear that information supplied to the Companies in confidence would someday become public, suppliers that would otherwise participate in the Companies' RFPs would be inclined instead to choose to participate in other utilities' RFPs (in Ohio or elsewhere) if the suppliers came to believe that information provided in confidence to the Companies would be released. This adverse impact on supplier participation would undermine the competitive outcome of any RFP, thereby potentially driving up the prices that the Companies and their customers would have to pay for RECs.


DEAN W. STATHIS

Sworn to and subscribed in my presence by Dean W. Stathis on this 4th day of April,
2014.


Notary Public



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Case No(s). 11-5201-EL-RDR

Summary: Motion for Renewal of Protective Order electronically filed by MR. DAVID A KUTIK on behalf of Ohio Edison Company and The Cleveland Electric Illuminating Company and The Toledo Edison Company