BEFORE THE
PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company For Approval of Their Energy Efficiency and Peak Demand Reduction Program Portfolio Plans for 2013 through 2015	)))))))	Case Nos. 12-2190-EL-POR 12-2191-EL-POR 12-2192-EL-POR

MEMORANDUM CONTRA MOTION OF THE ENVIRONMENTAL LAW AND POLICY CENTER AND THE OHIO ENVIRONMENTAL COUNCIL FOR A DETERMINATION THAT COLLABORATIVE MATERIALS ARE NOT CONFIDENTIAL

I. Introduction

On July 16, 2014, the Environmental Law & Policy Center ("ELPC") and the Ohio Environmental Council ("OEC") filed a joint motion in which they asked the Commission to find that interested third party stakeholders attending non-public meetings ("Collaborative") sponsored by Ohio Edison Company, The Cleveland Electric Illuminating Company and The Toledo Edison Company (collectively, "Companies") be authorized to make public, *at the third party's discretion*, certain business information that the Companies choose not to make public.[1] They also ask that the Commission rule on the motion within 21 days pursuant to Ohio Administrative Code § 4901-1-12(C).[2] As more fully discussed below, ELPC's and OEC's requested remedy is contrary to Commission policy, contrary to both statutory and case law, and contrary to the principles underlying the Collaborative process. Similarly, the rationale purporting to support their request for an expedited ruling is contrary to the facts. Accordingly, the Joint Motion of ELPC and OEC should be summarily rejected.

[1] ELPC/OEC Motion, p. 4.
[2] ELPC/OEC Motion, p. 8. Pursuant to Administrative Code § 4901-1-12(C), the Companies hereby submit their response within seven days of the filing. Absent a specific request by the Commission or certain members of the Commission staff, no reply memorandum is permitted.

II. Argument

A. The remedy sought by ELPC and OEC is contrary to Commission policy, statutory and case law, and Collaborative principles.

ELPC and OEC are asking this Commission to provide a blanket advisory opinion that would allow all participants in the Collaborative process to disclose to the public, at their sole discretion, any or all of the Companies' business information.[3] The Commission has consistently refused to provide advisory opinions, instead deciding cases based upon an evidentiary record.[4] Without such a record, the Companies would be denied their due process rights. In this instance, there is no evidentiary record on which the Commission could base a remedy such as that being requested by ELPC and OEC. There is no description of the nature of the information that ELPC and OEC are so keen to freely disclose to the public. Instead, there is only the unsubstantiated (and unsworn) statements of ELPC and OEC claiming that they need to be able to publicly broadcast information that the Companies have chosen not to be made public.[5] Also lacking is any legal authority to support such a request.

As a creature of statute, the Commission has only the jurisdiction conferred upon it by the General Assembly. *Canton Storage and Transfer Co. v. Pub. Util. Comm.*, (1995) 72 Ohio St. 3d 1, 5. Nowhere in the Ohio Revised Code is there statutory authority for the Commission to dictate the information that must be disclosed to third parties through a voluntary stakeholder process. And certainly, there is nothing that would authorize the Commission to grant those

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[3] ELPC and OEC couch their Motion in terms of *confidential* information (ELPC/OEC Motion, p. 4) and trade secrets (Id. at 6). While certain information, such as non-public PJM bidding information is considered confidential and not shared with members of the Collaborative while open markets exist, most of the information is not considered to be *trade secrets* or *confidential* by the Companies. Rather, the Companies view this information as *business* information that they often choose not to disclose to the general public. Therefore, the Companies insist that the information provided to Collaborative members during the meetings not be *publicly disseminated.*

[4] *In re: WorldCom v. Dayton*, Case No. 03-324-AU-PNC, Entry on Rehearing (Aug. 19, 2003).

[5] ELPC/OEC Motion, p. 4.

third parties the power to decide whether the public should be made aware of business information that the Companies choose not to (and are not required to) make public. In support of their Motion, ELPC and OEC quote the Commission's Opinion and Order in Case No. 09-1947-EL-POR,[6] noting that the Commission encouraged the formation of utility-stakeholder collaboratives because it believed that the collaborative process "may provide valuable insights into new and emerging issues."[7] And, while the Commission noted that the process provides "an opportunity for technical staff and experts from different stakeholders to establish common vocabulary, identify key issues needing further exploration, gather lessons learned and new ideas from programs in Ohio and other states, discuss the implications of independent research, exchange data and seek to resolve factual questions,"[8] the Commission never indicated that the Collaborative process was to be used as an informal discovery vehicle through which parties could gather information to be used against the Companies (as ELPC did during legislative hearings)[9], or give participants in the Collaborative *carte blanche* authority to make public the Companies' non-public business information simply by virtue of their attendance at a Collaborative meeting.

ELPC and OEC cite a handful of cases in support of their motion. However, none of these cases are relevant because all of these cases deal with public records requests submitted to

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[6] *In the Matter of the Application of the Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company for Approval Of Their Energy Efficiency and Peak Demand Reduction Program Portfolio Plans for 2010 through 2012 and Associated Cost Recovery Mechanism*, Case No. 09-1947-EL-POR et al, Opinion and Order, p. 20 (Mar. 23, 2011).

[7] ELPC/OEC Motion, p. 5.

[8] *See* fn. 6.

[9] *See e.g.*, Testimony of Robert Kelter, Senior Attorney, Environmental Law & Policy Center, before the Ohio House Public Utilities Committee, p. 3 (Nov. 20, 2013) ("It is important for the committee to know that [FirstEnergy] shared its preliminary [energy efficiency] results from 2013 with the consumer and environmental groups that participate in the collaborative process, and those results show that as of July 31, 2013, the Company had already beaten its savings targets by 23% with five months to go. This raises even more questions about the Company's motives at this time.") Note that this information was disclosed prior to the Companies making their energy efficiency results public in their annual status report.

government entities.[10] The Companies are wholly owned subsidiaries of a publicly traded company. They are not government entities and, accordingly, reliance upon opinions and statutes involving public records requests are irrelevant for purposes of deciding what, if any, of the Companies' business information should be made public.

The public policy pleas of ELPC and OEC ring equally hollow. ELPC and OEC claim that "[a] robust Collaborative ... is not possible without transparency and the sharing of information such as energy savings and updates on budgets, program spending and program activity."[11] What ELPC and OEC fail to grasp is that the Companies are not opposed to providing this type of program information to collaborative members for the purpose of spurring discussion within the Collaborative. However, they are opposed to providing this non-public business information to participants that desire to trumpet it throughout the land or use it against the Companies, especially when the information is often preliminary and/or provided in a manner that could be taken out of context if the reader was not privy to the discussions taking place in the Collaborative meetings. If, indeed, ELPC and OEC are interested in robust discussions, then their requested remedy, if granted, will have the opposite effect. If the Companies must be concerned that any one of the participants in the Collaborative process can freely disclose any of the business information provided during the Collaborative meetings, even though the Companies do not make such information public and are only providing it in an effort to promote discussion during Collaborative meetings (which are not open to the public), then the Companies would be forced to rethink the level of details provided through the Collaborative

[10] *See e.g., State ex rel. Besser v. Ohio State Univ.*, 89 Ohio St. 3d 396 (2000) (a public records request is made to a state land grant college); *State ex rel. The Miami Student v. Miami Univ.*, 79 Ohio St. 3d 168 (1997) (a public records request is made to a state funded university); *State ex rel. Bardwell v. Cuyahoga Cty Bd. of Comm'rs*, 127 Ohio St. 3d 202 (a public records request made to the Cuyahoga County Prosecutor); *State ex rel. Plain Dealer v. Ohio Dep't of Ins.*, 80 Ohio St. 3d 513 (1997) (a public records request was made on the Ohio Department of Insurance).

[11] ELPC/OEC Motion, p. 5.

process. A similar result will occur if it is concluded, as ELPC and OEC suggest at page 6 of their Motion, that all information provided in the Collaborative meetings are subject to public records requests at the Commission by virtue of Staff's attendance at these meetings. Such a conclusion would be contrary to statute.[12]

ELPC and OEC also claim that they "should be able to use information regarding the programs to educate their members, the public and policymakers about Ohio's progress on energy efficiency and any new developments in energy efficiency program development or implementation."[13] Again, what ELPC and OEC apparently fail to grasp or refuse to acknowledge is that much of the program information provided in the Collaborative meetings is *preliminary and based upon estimates and projections.* If ELPC and OEC feel that it is their calling to educate the masses, then such education should be based upon final, verified information that is already being provided through progress and other reports that are publicly available not only to ELPC and OEC, but to anyone else desiring to view them.[14]

In light of the foregoing, ELPC and OEC have failed to provide a single legitimate reason to justify third parties being allowed to decide how much of the Companies' non-public business information should be made public. Accordingly, their request should be denied.

B. The request for an expedited ruling should be rejected.

ELPC and OEC asked the Commission to issue a ruling within 21 days of the filing of their Motion because of recent changes in energy efficiency requirements as set forth in Am. Sub. S. B. 310 ("S.B. 310").[15] While the Companies are not opposed to the Commission issuing its ruling within 21 days if it so desires, the urgency that ELPC and OEC claim is non-existent.

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[12] *See* R.C. 4901.16.
[13] ELPC/OEC Motion, p. 4.
[14] *See e.g., In re Energy Efficiency and Peak Demand Reduction Program Portfolio Status Report,* Case No. 14-859-EL-EEC (May 15, 2014); *In re Energy Efficiency and Peak Demand Reduction Program Portfolio Status Report,* Case No. 13-1185-EL-EEC (May 15, 2013).
[15] ELPC/OEC Motion, p. 8.

S.B. 310 will go into effect ninety days after its passage on September 12, 2014. The Companies then have an additional thirty days in which to submit a filing to modify their current energy efficiency portfolio plans should they choose to do so.[16] Inasmuch as the governor signed S.B. 310 into law on June 13, 2014, the Companies have until mid-October, 2014 to decide whether they wish to proceed with modifications to their current energy efficiency plans. Therefore, even if the Commission were to issue a ruling within 21 days of the filing of this memorandum contra, it would be more than two months before the Companies had to make a final decision on whether to file to amend their currently approved portfolio plans. Therefore, the facts do not support the request for an expedited ruling.

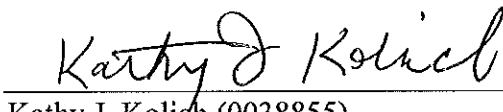
III. Conclusion

In sum, the Companies make public the business information that they either are required by law to provide, or choose to provide. It is not the role of the third party members of the Collaborative to make this decision for them, and it certainly is not the role of the Commission to empower these third parties to do so. The Commission has a long standing policy that it will not

[16] S.B. 310, Section 6(B)(1).

issue advisory opinions and nothing in the Motion of ELPC and OEC justifies a deviation from this policy. For all of the reasons discussed above, the Motion of ELPC and OEC should be denied.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that this *Memorandum Contra, Motion of ELPC and OEC for a Determination That Collaborative Materials are Not Confidential* submitted by Ohio Edison Company, The Cleveland Electric Illuminating Company and The Toledo Edison Company, was filed electronically through the Docketing Information System of the Public Utilities Commission of Ohio on this 22nd day of July, 2014.

Kathy J. Kolich

One of the Attorneys for Ohio Edison Company, The Cleveland Electric Illuminating Company and The Toledo Edison Company

Summary: Memorandum Contra ELPC/OEC Motion for a Determination that Collaborative Materials are not Confidential electronically filed by Ms. Kathy J Kolich on behalf of Ohio Edison Company and The Cleveland Electric Illuminating Company and The Toledo Edison Company