

**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) Case No. 14-1297-EL-SSO
Edison Company for Authority to Provide)
a Standard Service Offer Pursuant to R.C.)
§ 4928.143 in the Form of an Electric)
Security Plan.)

**THE NORTHEAST OHIO PUBLIC ENERGY COUNCIL AND THE OFFICE OF THE
OHIO CONSUMERS' COUNSEL'S JOINT MOTION TO STRIKE
AND
JOINT MEMORANDUM CONTRA FIRSTENERGY'S MOTION TO AMEND THE
PROCEDURAL SCHEDULE
AND
JOINT MOTION FOR A PREHEARING CONFERENCE TO ADDRESS PENDING
PROCEDURAL MOTIONS**

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October 31, 2014

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In this case, FirstEnergy¹ seeks to shift the risks associated with its affiliate's uneconomic generating units onto its customers, whose charges for electric service will increase as a result. In order to fully participate in this important proceeding, parties must have access to vital information that FirstEnergy maintains must be protected. However, FirstEnergy has been unwilling to enter into a standard protective agreement that has been used previously in many cases and is withholding the necessary information. By this pleading, The Northeast Ohio Public Energy Council ("NOPEC") and the Office of the Ohio Consumers' Counsel ("OCC") (collectively, "Joint Movants") seek the ability to fully and fairly participate in this proceeding and, therefore: (1) move² to strike the affidavit of Trent Smith appended as Exhibit C to FirstEnergy's November 7, 2012, memorandum contra Joint Movant's motion to compel; (2)

¹ The Cleveland Electric Illuminating Company, Ohio Edison Company and the Toledo Edison Company are referred to in this pleading, collectively, as "FirstEnergy."

² See Ohio Admin. Code 4901-1-12.

oppose FirstEnergy's motion filed November 5, 2014, to amend the procedural schedule; and (3) move the Commission to order that a prehearing conference be held to resolve outstanding discovery and procedural matters, including Joint Movants' motion to compel filed October 31, 2014, and, if necessary, FirstEnergy's motion to amend the procedural schedule. By Attorney Examiner Entry issued October 6, 2014, the discovery cutoff is December 1, 2014, and intervenor testimony is due December 22, 2014. Due to the rapidly approaching due dates, Joint Movants request that the prehearing conference be held as soon as possible.

The reasons supporting Joint Movants' motions and opposition to FirstEnergy proposed extension of the procedural schedule are detailed in the attached memorandum in support.

Respectfully submitted,

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**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)	
Authority to Provide a Standard Service Offer)	Case No. 14-1297-EL-SSO
Pursuant to R.C. § 4928.143 in the Form of an)	
Electric Security Plan.)	

MEMORANDUM IN SUPPORT

I. INTRODUCTION

On October 31, 2014, the Northeast Ohio Public Energy Council (“NOPEC”) and the Office of the Ohio Consumers’ Counsel (“OCC”) (collectively, “Joint Movants”) filed a motion to compel The Cleveland Electric Illuminating Company, Ohio Edison Company and The Toledo Edison Company’s (collectively, “FirstEnergy”) to enter into a protective agreement with Joint Movants. That motion sought to compel FirstEnergy to use a protective agreement that is substantially similar to protective agreements that Joint Movants have entered with FirstEnergy in numerous past proceedings (the “Duke Protective Agreement”).³ Through its memorandum contra filed November 7, 2014, FirstEnergy continues to refuse to enter into the Duke Protective Agreement. The basis of FirstEnergy’s argument is that the alleged confidential information of its affiliate, FirstEnergy Services (“FES”), is entitled to greater protection than provided by past protective agreements FirstEnergy has signed on numerous occasions over the years. FirstEnergy attempts to support its position through the improper affidavit of FES’s vice president of sales and marketing. Joint Movants are harmed by each passing day that FirstEnergy refuses to provide the

³ See Motion to Compel, at Exhibits 1 and 5 (October 31, 2014).

information requested pursuant to the acceptable Duke Protective Agreement, considering that the discovery cutoff date is December 1, 2014 and intervenor testimony is due December 22, 2014.

Against this backdrop, FirstEnergy, by motion filed November 5, 2014, requested the Commission to extend the date for the prehearing conference in this matter from January 9, 2015 to January 16, 2015. Additionally, FirstEnergy seeks to move the hearing back -- from January 20, 2014, to January 28, 2014. FirstEnergy made its request to provide it more time to prepare for hearing. Tellingly, FirstEnergy has refused to recommend concomitant extensions to the rapidly approaching discovery cutoff date or the due date for intervenor testimony (despite Joint Movants' request) to Joint Movants' prejudice.

By this filing, Joint Movants:

- (1) move the Commission to strike the affidavit of Trent Smith, appended as Exhibit C to FirstEnergy's November 7, 2014 memorandum contra, as improper;
- (2) oppose FirstEnergy's motion to extend that date for the prehearing conference and hearing commencement date, without a concomitant extension to the discovery cutoff date and intervenor testimony due date; and
- (3) move the Commission to order a prehearing conference be held in this matter as soon as possible to resolve outstanding procedural matters, including Joint Movants' motion to compel filed October 31, 2014, and, if necessary, FirstEnergy's November 5, 2014, motion to amend the procedural schedule.

II. ARGUMENT

A. *The Affidavit of Trent Smith Must be Stricken as Improper to the Extent It Presents Opinion and Not Facts.*

FirstEnergy claims that the alleged confidential information pertaining to its affiliate, FES, is subject to a higher degree of protection because Joint Movants are customers and/or competitors of FES. As explained in Joint Movants' motion to compel, OCC is neither a customer nor

competitor of FES.⁴ NOPEC is not a competitor.⁵ Although NOPEC is a customer, its contract with FES through 2019 obviates the need for the draconian protective agreement FirstEnergy proposes. Moreover, Joint Movants further explained that it is immaterial whether they are considered a competitor or customer because the Duke Protective Agreement adequately protects FirstEnergy's interests.⁶

Yet, FirstEnergy persists in its attempts to enforce this distinction. Notably, FES has not bothered to take action to protect its own confidential information. It relies instead upon FirstEnergy to plead its position. In this regard, FirstEnergy presents the affidavit of FES' vice president of marketing and sales, Trent Smith. In that affidavit, Mr. Smith states that NOPEC is a customer of FES. Additionally, Mr. Smith improperly opines that producing FES's confidential information would provide NOPEC with a competitive advantage.⁷

As to factual matters, Mr. Smith's affidavit states the obvious, *e.g.*, that NOPEC is FES's customer and that FES considers the information Joint Movants need to participate effectively in this case to be confidential.⁸ Joint Movants do not dispute that NOPEC is FES' customer or that the information subject to its motion to compel could be confidential. What is in dispute is the restrictions that may be placed on Joint Movants' use of such information while affording Joint Movants the opportunity to meaningfully participate in the hearing.

⁴ Obviously, OCC is neither a customer nor competitor, but FirstEnergy nevertheless seeks to restrict the consultants OCC can retain in this proceeding under the theory that a consultant who advises FES's competitor potentially could pass on confidential information to them. FirstEnergy Memorandum Contra, at 5. FirstEnergy's theory lacks merit because any consultant could subsequently be retained by a FES competitor and pass on the confidential information. The provisions of the Duke Protective Agreement adequately protects against the misappropriation of confidential information under either circumstance.

⁵ In its Memorandum Contra, FirstEnergy inaccurately attempts to portray NOPEC's inactive CRES affiliate, NOPEC, Inc., as a "direct" competitor of FES. FirstEnergy Memorandum Contra, at 2.

⁶ Joint Movants' Motion to Compel, at 10 (October 31, 2014).

⁷ FirstEnergy Memorandum Contra, at Exhibit C (November 7, 2014).

⁸ *Id.*, at paragraphs 2 and 3.

Mr. Smith's affidavit deviates from mere factual representation when he opines that producing the FES information would provide NOPEC a competitive advantage.⁹ Mr. Smith's opinion appears to be based upon FirstEnergy's mischaracterization of case law. Throughout its memorandum contra, FirstEnergy cites numerous cases for the proposition that the Commission customarily protects proprietary information by issuing a protective order.¹⁰ FirstEnergy confuses the purpose of a motion for protective order in the cited cases, with the purpose of the protective agreement sought in this proceeding. In the cited cases, protective orders were sought to prevent the public disclosure of confidential information to persons who had not executed a protective agreement. The cases do not address protective agreements and their design to provide litigants access to such protected information, subject to reasonable safeguards, to permit the litigants' meaningful participation in a hearing.¹¹ Thus, the Commission's protection of information as proprietary (*e.g.*, ordering that it not be publicly disclosed) does not resolve what reasonable restrictions may be placed on a litigant's use of the information through a protective agreement.

An affidavit is "[a] voluntary **declaration of facts** written down and sworn to by the declarant before an officer authorized to administer oaths."¹² But Mr. Smith's affidavit goes beyond mere factual declarations and provides opinion at paragraph 4:

Given FES' ongoing relationship with NOPEC, NOPEC would have a competitive advantage in [FES-NOPEC] present and future dealings if NOPEC were to be provided competitively sensitive information, such as [FES'] cost and other operational information.

⁹ *Id.*, at paragraph 4.

¹⁰ See, FirstEnergy Memorandum Contra, at 13-16 (November 5, 2014).

¹¹ The Commission cases FirstEnergy cites do not address the two-tiered protective agreement it proposes. Interestingly, the cases FirstEnergy cites (in footnote 9 to its Memorandum Contra) for the proposition that "Attorneys Eyes Only" protective agreements are used in practice, actually stand for the proposition that the courts favor less restrictive means of protecting confidential information, regardless of whether a party is a customer or competitor, including ordering persons not to disclose information, limiting the use of the information to the case at hand, and providing penalties for disclosure. The Duke Protective Agreement provides these sufficient safeguards.

¹² Black's Law Dictionary (9th Edition, 2009) (emphasis supplied).

Mr. Smith's statement assumes that the confidential information at issue would be provided to NOPEC without the same reasonable restrictions contained in FirstEnergy's past protective agreements, and opines that the information would provide NOPEC a competitive advantage. Mr. Smith's assumptions and opinions based thereon are not declarations of fact and thus must be stricken.

B. Any Extension of the Procedural Schedule Must Include an Extension of the Discovery Cut Off Date and the Intervenor Testimony Due Date

By entry issued October 6, 2014, the attorney examiner established the following procedural schedule:

- **December 1, 2014:** Discovery Cutoff Date
- **December 22, 2014:** Intervenor Testimony Due Date
- **January 9, 2015:** Staff Testimony Due Date
- **January 9, 2015:** Prehearing Conference Date
- **January 20, 2015:** Hearing Commencement Date

By motion filed November 5, 2014, FirstEnergy seeks to extend the Prehearing Conference Date to January 16, 2015, and the Hearing Commencement Date to January 28, 2015, a seven and eight day extension, respectively. In discussions with FirstEnergy, Joint Movants' requested that FirstEnergy also extend the other due dates by approximately one week. Despite this request, and its continuing failure to comply with Joint Movants' discovery requests,¹³ FirstEnergy has not proposed extending the Discovery Cutoff Date or the Intervenor Testimony Due Date.

FirstEnergy seeks an extension of the Hearing Commencement Date, arguing that it will have insufficient time to depose witnesses prior to the January 20 hearing date. Indeed, FirstEnergy states that, "[r]ealistically, given the holidays, it will prove very difficult for the

¹³ Joint Motion to Compel, at 4 (October 31, 2014); See also Motion to Compel, Exhibit 2, Attachment A; and Motion to Compel, Exhibit 4.

Companies to schedule and take depositions any time before January 5, 2015, and likely later.”¹⁴ However, in the next breath, FirstEnergy rejects Joint Movants’ proposal to extend the Discovery Cutoff Date to December 8 and the Intervenor Testimony Due Date to December 30, because it will limit the time available to conduct depositions.¹⁵ Considering FirstEnergy’s admission that it will not conduct depositions until after January 5, 2015, extending the Discovery Cutoff Date to December 8, 2014 and the Intervenor Testimony Due Date to December 30, 2014, will have absolutely no effect on FirstEnergy’s ability to conduct depositions after January 5, 2015. It is apparent that FirstEnergy’s intent in refusing to agree to an extension of the Discovery Cutoff Date and the Intervenor Testimony Due Date is to prejudice Joint Movants’ (and perhaps other parties’) preparation for hearing, particularly considering its refusal to comply with their discovery requests.¹⁶

FirstEnergy’s motion confirms the reasonableness of Joint Movants’ position – Joint Movants do not object to FirstEnergy’s motion to extend the Prehearing Conference and Hearing Commencement Dates provided the other due dates also are extended by approximately one week.

FirstEnergy also reasons that the Staff Testimony Due Date and the Prehearing Conference Date should not be the same day because there will be insufficient time to review Staff’s testimony prior to the conference. Apparently, considering the significant length of time between the Prehearing Conference Date and the Hearing Commencement Date, FirstEnergy may intend to use that time for purposes of settlement. That amount of time is excessive. If the parties wish to enter into settlement negotiations, those negotiations can occur during the course of the hearing, as is

¹⁴ FirstEnergy Motion, at 3 (November 5, 2014).

¹⁵ Motion at 4 (November 5, 2014).

¹⁶ Joint Motion to Compel, at 4 (October 31, 2014); See also Motion to Compel, Exhibit 2, Attachment A; and Motion to Compel, Exhibit 4.

common practice. Nevertheless, to accommodate FirstEnergy’s concerns, Joint Movants would not object to extending the Prehearing Conference Date to January 20, 2015. Such extension would avoid having Staff testimony and the prehearing conference of the same date, and would permit FirstEnergy more than ample time to conduct settlement negotiations if it chooses to do so. Accordingly, Joint Movants request the Commission to adopt their proposed revised procedural schedule (below) as fair and reasonable to all parties:

	Current	FirstEnergy	Joint Movants
Discovery Cutoff	12/1/14	12/1/14	12/8/15
Intervenor Testimony Due	12/22/14	12/22/14	12/30/05
Staff Testimony Due	1/9/15	1/9/15	1/16/15
Prehearing Conference	1/9/145	1/16/15	1/20/15
Hearing Commencement	1/20/15	1/28/15	1/28/15

C. A Prehearing Conference to Resolve Outstanding Procedural Motions is Reasonable

In Duke Energy Ohio’s electric security plan (“ESP”) case (PUCO No. 14-841-EL-SSO), the Attorney Examiner conducted a prehearing conference to resolve outstanding procedural motions. With each passing day that their motion to compel is not resolved, Joint Movants are prejudiced further in their inability to prepare adequately for hearing. For this reason, Joint Movants propose that the Attorney Examiner, as in the Duke ESP proceeding, schedule an immediate prehearing conference to resolve these procedural issues.

V. CONCLUSION

For the reasons set forth above, Joint Movants respectfully request that the Commission to:

1. strike the affidavit of Trent Smith, appended as Exhibit C to FirstEnergy's November 7, 2014 memorandum contra, as improper;
2. adopt Joint Movants' proposed procedural schedule; and
3. order a prehearing conference be held in this matter as soon as possible to resolve Joint Movants' outstanding motion to compel filed October 31, 2014, and, if necessary, FirstEnergy's November 5, 2014, motion to amend the procedural schedule.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of this Joint Motion was served on the persons stated below
via electronic transmission, this 14th day of November 2014.

/s/ Dane Stinson

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Summary: Motion to Strike, for Prehearing Conference, and Opposition to Procedural Schedule electronically filed by Dane Stinson on behalf of Northeast Ohio Public Energy Council and Office of the Ohio Consumers' Counsel