

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

ENTRY

The attorney examiner finds:

- (1) Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company (collectively, FirstEnergy or the Companies) are public utilities as defined in R.C. 4905.02 and, as such, are subject to the jurisdiction of this Commission.
- (2) On August 4, 2014, the Companies filed an application pursuant to R.C. 4928.141 to provide for a standard service offer (SSO) to provide generation service pricing for the period of June 1, 2016, through May 31, 2019. The application is for an electric security plan (ESP), in accordance with R.C. 4928.143. In conjunction with its application, FirstEnergy filed a motion for protective order regarding certain information referenced in the testimony of the Companies' witnesses and accompanying workpapers and exhibits.
- (3) By Entry issued August 13, 2014, the attorney examiner found that motions to intervene should be filed by October 1, 2014. Additionally, by Entry issued August 29, 2014, the attorney examiner established a procedural schedule. Thereafter, by Entry issued October 6, 2014, the attorney examiner modified the procedural schedule following a collective motion filed by multiple parties.

Motions to Intervene/Motions for Admission Pro Hac Vice

- (4) Motions for admission pro hac vice were filed on behalf of Garret Stone, Owen Kopon, and Michael Lavanga to appear

on behalf of Nucor, Madeline Fleisher to appear on behalf of the Environmental Law and Policy Center (ELPC), Jeffrey Mayes to appear on behalf of Monitoring Analytics, LLC (Market Monitor), Tony Mendoza, Michael Soules, and Shannon Fisk on behalf of Sierra Club, and Derrick Price Williamson to appear on behalf of Wal-Mart Stores East, LP, and Sam's East, Inc. (jointly, Wal-Mart). No party filed memoranda contra the motions for admission pro hac vice. The attorney examiner finds that the motions for admission pro hac vice are reasonable and should be granted.

- (5) Timely motions to intervene were filed by Ohio Energy Group (OEG); Industrial Energy Users-Ohio (IEU-Ohio); Ohio Power Co. (AEP Ohio); Ohio Partners for Affordable Energy (OPAE); Ohio Consumers' Counsel (OCC); Sierra Club; Direct Energy Services, LLC, Direct Energy Business, LLC, and Direct Energy Business Marketing, LLC (collectively, Direct Energy); Interstate Gas Supply, Inc. (IGS); The Kroger Company (Kroger); The Energy Professionals of Ohio (EPO); Ohio Hospital Association (OHA); Ohio Manufacturers' Association Energy Group (OMAE); Nucor Steel Marion (Nucor); The Cleveland Municipal School District (CMSD); Material Sciences Corporation (MSC); Association of Independent Colleges and Universities of Ohio (AICUO); Wal-Mart; the city of Cleveland; The Consumer Protection Association, The Cleveland Housing Network, and The Council for Economic Opportunities in Greater Cleveland (Citizens Coalition); Dynergy, Inc. (Dynergy); Ohio Environmental Council and Environmental Defense Fund (jointly, Environmental Groups); the Northwest Ohio Aggregation Coalition (NOAC); the city of Toledo, the Lucas County Board of Commissioners, the city of Northwood, the city of Sylvania, the city of Maumee, the village of Waterville, the village of Holland, the village of Ottawa Hills, and the Lake Township Board of Trustees (collectively, Individual Communities); International Brotherhood of Electrical Workers Local 245 (IBEW 234); Council of Smaller Enterprises (COSE); Mid-Atlantic Renewable Energy Coalition (MAREC); Northeast Ohio Public Energy Council (NOPEC); ELPC; NextEra Power Marketing, LLC (NextEra); city of Akron; Ohio Schools Council (OSC); Market Monitor; Ohio Advanced

Energy Economy (OAEE); PJM Providers Group and Electric Power Supply Association (jointly, Wholesale Suppliers); Retail Energy Supply Association (RESA); EnerNOC, Inc. (EnerNOC); Ohio School Boards Association, Buckeye Association of School Administrators, Ohio Schools Council, and Ohio Association of School Business Officials (collectively, Power4Schools); Exelon Generation Company, LLC, and Constellation NewEnergy, Inc. (jointly, Exelon); and Hardin Wind, LLC, Champaign Wind, LLC, and Buckeye Wind, LLC (collectively, Wind Farms).

- (6) On October 15, 2014, FirstEnergy filed a memorandum contra the Market Monitor's motion to intervene. No other memoranda contra the motions to intervene were filed in this proceeding.
- (7) Ohio Adm.Code 4901-1-11(B) provides that, in determining whether to permit the intervention, the attorney examiner shall consider: "(1) The nature and extent of the prospective intervenor's interest[;] (2) The legal position advanced by the prospective intervenor and its probable relation to the merits of the case[;] (3) Whether the intervention by the prospective intervenor will unduly prolong or delay the proceedings[;] (4) Whether the prospective intervenor will significantly contribute to full development and equitable resolution of the factual issues[; and] (5) The extent to which the person's interest is represented by existing parties."
- (8) The attorney examiner finds that the unopposed motions to intervene meet the criteria set forth in Ohio Adm.Code 4901-1-11(B), are reasonable, and should be granted.
- (9) In its motion to intervene, the Market Monitor asserts that it meets the requirements to intervene in the proceeding on the basis that, first, it has a real and substantial interest in the competitiveness of PJM markets because it is required to monitor compliance with the PJM Market Rules, actual or potential design flaws in the PJM Market Rules, structural problems in the PJM Market that may inhibit a robust and competitive market, and the potential for a market participant to exercise market power or violate any PJM rule. Second, the Market Monitor claims that it takes the legal position that subsidies should not be permitted to interfere

with the competitiveness of PJM markets and PJM's competition-based market design, which relates to the merits of this case. Third, the Market Monitor asserts that it will not unduly prolong or delay the proceeding as it timely filed its motion to intervene and accepts the record established to date. Fourth, the Market Monitor states that it will significantly contribute to full development and equitable resolution of the factual issues, as no other party can adequately represent its interests, and it has exclusive resources and knowledge of PJM's markets, which could aid the Commission in resolving the outcome of the proceeding.

- (10) In its memorandum contra the motion to intervene filed by the Market Monitor, FirstEnergy argues that the Market Monitor has failed to satisfy the statutory requirements for intervention in this proceeding. More specifically, FirstEnergy first argues that the Market Monitor has failed to meet the Commission's standard for intervention in this proceeding because the nature and extent of its interests do not justify intervention. FirstEnergy asserts that the Market Monitor does not explain how the proceeding will affect its ability to monitor PJM's wholesale markets or that it has been or may be adversely affected by the proceeding, which FirstEnergy argues deals with ratemaking, job retention, economic benefits, fuel mixes and environmental attributes, and Ohio's energy future. Second, FirstEnergy argues that the Market Monitor's proffered legal position is incorrect and the competitiveness of the PJM markets is not within the Commission's power to address. Third, FirstEnergy asserts that the Market Monitor's access to confidential information could lead to prolonged disputes about the use of that information that could delay this proceeding. FirstEnergy also notes that the Market Monitor's counsel also represents the Sierra Club in this proceeding and the Companies have concerns that the Sierra Club may obtain confidential information to which it is not entitled due to these circumstances.
- (11) On October 16, 2014, AEP Ohio filed correspondence noting its opposition to the Market Monitor's motion to intervene for the same reasons set forth by FirstEnergy. Thereafter, on October 22, 2014, the PJM Power Providers Group and the

Electric Power Supply Association filed correspondence in support of the Market Monitor's motion to intervene.

- (12) On October 22, 2014, the Market Monitor filed a reply to FirstEnergy's memorandum contra. In its reply, the Market Monitor reasserts that it has standing to intervene in this matter. The Market Monitor asserts that it performs a public interest function that includes monitoring the PJM markets for any exercise of market power as well as recommending market changes to increase competition. The Market Monitor further asserts that its interest in the proceeding is the effect that FirstEnergy's proposed ESP may have on the PJM Capacity Market, and specifically notes its legal position that the ESP may result in anticompetitive conduct in the PJM Capacity Market. Further, the Market Monitor notes in its reply that it shares the same confidentiality concerns as the objecting parties, but claims that this concern is not a reasonable basis to preclude the Market Monitor's participation in this proceeding. The Market Monitor asserts that similar issues arose in a Maryland Commission proceeding, in response to which the Maryland Commission established rules to protect confidential documents and information. Finally, the Market Monitor argues that its counsel will not improperly disclose confidential information in response to FirstEnergy's argument that its counsel also represents the Sierra Club. The Market Monitor emphasizes that the Ohio Rules of Professional Conduct do not prohibit its representation of both parties, and notes that its present counsel was retained for the sole purpose of facilitating intervention and will not have a substantive role in the proceeding.
- (13) Additionally, on October 22, 2014, RESA filed a reply to FirstEnergy's memorandum contra the Market Monitor's motion to intervene. In its reply, RESA asserts that it supports the Market Monitor's intervention request on the basis that RESA shares the concern that the proposed Retail Rate Stability Rider is a subsidy that will distort Ohio's wholesale and retail power markets. Further, RESA asserts that the Market Monitor may assist the Commission in fully understanding the federal regulatory concepts the Market Monitor enforces, and that the Commission and Federal

courts have adequate means of protecting confidential information.

- (14) In considering the Market Monitor's motion to intervene, the attorney examiner initially notes that the Supreme Court of Ohio has held that statutes and rules governing intervention should be "generally liberally construed in favor of intervention." *Ohio Consumers' Counsel v. Pub. Util. Comm.*, 111 Ohio St.3d 384, 2006-Ohio-5853, 856 N.E.2d 940, ¶ 16, quoting *State ex rel. Polo v. Cuyahoga Cty. Bd. of Elections*, 74 Ohio St.3d 143, 144, 656 N.E.2d 1277 (1995). The attorney examiner finds that, considering the standard for intervention set forth in Ohio Adm.Code 4901-1-11(B), particularly in light of Supreme Court precedent finding that statutes and rules should be liberally construed in favor of intervention, the motion to intervene filed by the Market Monitor should be granted.
- (15) The attorney examiner finds that the Market Monitor has demonstrated the relevant nature and extent of its interest by explaining that it is required to monitor the PJM markets including any design flaws or structural problems that could inhibit a competitive market or the potential for a market participant to exercise market power. Further, the Market Monitor has set forth its legal position that FirstEnergy's proposed ESP in this case constitutes a subsidy with potential to interfere with competition in the PJM markets, which will directly impact Ohio's retail markets. Although FirstEnergy disagrees with the Market Monitor's legal position, the attorney examiner finds that the legal position is nevertheless relevant to this proceeding. The attorney examiner also finds that nothing indicates that the Market Monitor's participation will unduly prolong or delay the proceeding. The Market Monitor has demonstrated it can significantly contribute to full development and equitable resolution of the factual issues, and no other party can represent its interests. Finally, the attorney examiner notes that the Commission has substantial experience with managing and protecting confidential information; consequently, the attorney examiner does not find that the presence of confidential information is reason to deny the Market Monitor intervention.

Motion to Amend Procedural Schedule

- (16) In an October 6, 2014 Entry, the attorney examiner extended the due date for intervenor testimony to December 22, 2014, and the due date for Staff testimony to January 9, 2015, at multiple intervenors' request. Discovery requests remained due on December 1, 2014, and the prehearing conference and evidentiary hearings remained scheduled for January 9, 2015, and January 20, 2015, respectively.
- (17) On November 5, 2014, FirstEnergy filed a motion to further amend the procedural schedule so that the prehearing conference and evidentiary hearings will be scheduled for January 16, 2015, and January 28, 2015, respectively. In its memorandum in support, FirstEnergy argues that, in the absence of this modification, it will be unduly burdensome for the Companies to prepare for the prehearing and hearing, as the October 6, 2014 modification to the procedural schedule reduced the time between the filing of intervenor testimony and the hearing from six to four weeks, which fall around the holiday season. FirstEnergy contends that this reduces the time to depose witnesses of the over 50 intervenors to less than two weeks. Further, FirstEnergy represents that 25 parties have no objection to its proposed amendment to the procedural schedule.
- (18) On November 12, 2014, RESA filed a memorandum contra FirstEnergy's motion to amend the procedural schedule. In its memorandum, RESA asserts that it does not object to FirstEnergy's request to reschedule the prehearing conference and hearing; however, RESA requests that the discovery cutoff date and intervenor testimony deadline similarly be extended by one week, to December 8, 2014, and December 30, 2014, respectively. RESA explains that this extension is necessary as intervenors are facing difficulty assembling key personnel during the holiday season. Further, RESA points out that Commission precedent supports maintaining the symmetry of the procedural dates as proposed.
- (19) On November 13, 2014, the Wholesale Suppliers filed a joint memorandum contra FirstEnergy's motion to amend the procedural schedule. In their joint memorandum, the

Wholesale Suppliers assert, similar to RESA, that they do not object to FirstEnergy's request to reschedule the prehearing conference and hearing; however, the Wholesale Suppliers assert that intervenors should also be given a one-week extension on discovery and the deadline for filing testimony in order to accommodate the holiday season. The Wholesale Suppliers request the same amendment as RESA: extension of the discovery cutoff date and intervenor testimony deadline to December 8, 2014, and December 30, 2014, respectively.

- (20) On November 14, 2014, NOPEC and the Ohio Consumers' Counsel (jointly, Joint Movants) filed a joint memorandum contra FirstEnergy's motion to amend the procedural schedule, and a joint motion for a prehearing conference. In their joint memorandum contra, Joint Movants oppose FirstEnergy's motion to extend the dates for the prehearing conference and hearing without a concomitant extension of the discovery cutoff date and deadline for intervenor testimony. As to this issue, Joint Movants argue that it is reasonable to extend the discovery cutoff date and intervenor testimony deadline and that FirstEnergy's intent in refusing to agree to such an extension is to prejudice Joint Movants' and other parties' preparation for hearing. Joint Movants assert that the Commission should extend the discovery cutoff date to December 8, 2014; the intervenor testimony and staff testimony deadlines to December 30, 2014, and January 15, 2015, respectively; and the prehearing conference and hearing commencement dates to January 20, 2015, and January 28, 2015, respectively. Additionally, Joint Movants request a prehearing conference to resolve outstanding procedural motions.
- (21) Thereafter, on November 19, 2014, FirstEnergy filed a reply to the memoranda contra of RESA and the Wholesale Suppliers. In its reply, FirstEnergy opposes RESA's and the Wholesale Suppliers' requests to modify the intervenor testimony deadline, on the basis that the proposed modification would reinstate the problem of which the Companies complain in their motion to amend the current procedural schedule. The Companies elaborate that an intervenor testimony deadline of December 30, 2014,

similarly leaves FirstEnergy little time prior to the commencement of hearing to review intervenor testimony and schedule and take depositions of witnesses sponsored by the numerous intervenors in this proceeding. Further, FirstEnergy argues that RESA's and the Wholesale Suppliers' requests ignore the need for the Commission to issue its decision in this proceeding by April 8 in order that the Companies may have sufficient time to prepare for the PJM base residual auction in May 2015.

- (22) On November 21, 2014, FirstEnergy filed a reply to the Joint Movants' memorandum contra. In its reply, FirstEnergy similarly argues that Joint Movants' request to modify the discovery cutoff date and intervenor testimony deadline would recreate the issue the Companies' seek to rectify in their motion to amend. Further, the Companies assert that, given the modest nature of their request to amend the procedural schedule, there is no need to schedule a prehearing conference.
- (23) The attorney examiner finds that FirstEnergy's request to amend the procedural schedule is reasonable and should be granted in order to afford FirstEnergy sufficient time in which to review intervenor testimony and depose witnesses, particularly given the number of intervenors in this proceeding. Additionally, the attorney examiner finds that, as requested by RESA, the Wholesale Suppliers, and the Joint Movants, it is reasonable to extend the discovery cutoff date by one week. The attorney examiner finds, however, that the requests by RESA, the Wholesale Suppliers, and Joint Movants to extend the deadlines for intervenor and Staff testimony would perpetuate the issue FirstEnergy seeks to rectify in its motion to amend. Further, the attorney examiner notes that one extension of the intervenor testimony deadline has already been granted; if that requested extension was insufficient, intervenors should have informed the attorney examiner at that time. Consequently, the attorney examiner finds that the prehearing conference and evidentiary hearings shall be rescheduled for January 16, 2015, and January 28, 2015, respectively, and the discovery cutoff date shall be extended until December 8, 2014. All other procedural dates shall

remain as previously scheduled. Additionally, the attorney examiner finds that Joint Movants' request for a prehearing conference should be denied, as this Entry resolves the outstanding procedural motions.

Motion for Protective Order/Motions to Compel

- (24) In conjunction with its application, FirstEnergy filed a motion for protective order regarding certain information referenced in the testimony of the Companies' witnesses and accompanying workpapers and exhibits on the basis that the information is confidential, proprietary, trade secret, and/or competitive business information of the Companies, the Companies' affiliate, or the Companies' witnesses and consultants. More specifically, FirstEnergy's motion covers three categories of information: (1) identification of individual transmission circuits associated with plants, which are critical infrastructure under the National Infrastructure Protection Plan, contained in redacted portions of Attachment GLC-1 to testimony of Gavin Cunningham; (2) proprietary, confidential business information of FirstEnergy Solutions Corp. (FES), which is trade secret information provided to the Companies pursuant to a nondisclosure agreement solely for purposes related to the proposed Economic Stability Program, contained in sealed attachments JJJL-1, JJJL-2, and JJJL-3 to the testimony of Jason Lisowski and portions of workpapers of Jason Lisowski; and (3) proprietary, confidential business information of ICF Resources Incorporated, which was provided to the Companies pursuant to a nondisclosure agreement solely for purposes related to the proposed Economic Stability Program, contained in portions of testimony, attachments, and workpapers of Judah Rose, and portions of workpapers of Steven Strah. No party filed memoranda contra FirstEnergy's motion for protective order.
- (25) R.C. 4905.07 provides that all facts and information in the possession of the Commission shall be public, except as provided in R.C. 149.43 and as consistent with the purposes of Title 49 of the Revised Code. R.C. 149.43 specifies that the term "public records" excludes information which, under state or federal law, may not be released. The Supreme

Court of Ohio has clarified that the “state or federal law” exemption is intended to cover trade secrets. *State ex rel. Besser v. Ohio State Univ.*, 89 Ohio St.3d 396, 399, 732 N.E.2d 373 (2000).

- (26) Similarly, Ohio Adm.Code 4901-1-24 allows an attorney examiner to issue an order to protect the confidentiality of information contained in a filed document “to the extent that state or federal law prohibits release of the information, including where the information is deemed * * * to constitute a trade secret under Ohio law, and where non-disclosure of the information is not inconsistent with the purposes of Title 49 of the Revised Code.”
- (27) Ohio law defines a trade secret as “information * * * 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. 1333.61(D).
- (28) 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 R.C. 1333.61(D), as well as the six-factor test set forth by the Supreme Court of Ohio, the attorney examiner finds that the information contained in the sealed portions of the application is trade secret information. *See State ex rel. Plain Dealer v. Ohio Dept. of Ins.*, 80 Ohio St.3d 513, 524-525, 687 N.E.2d 661 (1997). 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. Therefore, the attorney examiner finds that FirstEnergy’s motion for protective order is reasonable with regard to the portions filed under seal and should be granted.

- (29) Ohio Adm.Code 4901-1-24(F) provides that, unless otherwise ordered, protective orders issued pursuant to Ohio Adm.Code 4901-1-24(D) automatically expire after 24 months. The attorney examiner finds that confidential treatment shall be afforded to the information filed under seal in categories (2) and (3) for a period ending 60 months from the date of this Entry. Until that date, the docketing division should maintain, under seal, the information filed confidentially. Given that the information filed under seal in category (1) contains sensitive infrastructure information, consistent with previous rulings on such critical energy infrastructure information, the attorney examiner finds that it would be appropriate to grant protective treatment indefinitely, until the Commission orders otherwise. Therefore, the docketing division should maintain, under seal, the information in category (1).
- (30) Rule 4901-1-24(F) requires a party wishing to extend a protective order to file an appropriate motion at least 45 days in advance of the expiration date. If FirstEnergy wishes to extend the confidential treatment, it should file an appropriate motion at least 45 days in advance of the expiration date. If no such motion to extend confidential information is filed, the Commission may release this information without prior notice to FirstEnergy.
- (31) On October 23, 2014, IGS filed a motion to compel FirstEnergy to establish a protective agreement to be used for purposes of obtaining confidential and/or competitively sensitive information from FirstEnergy. IGS asserts that the protective agreement proposed by FirstEnergy contains restrictions that would limit IGS' ability to participate meaningfully in this proceeding.

IGS attached FirstEnergy's proposed protective agreement to its motion. The protective agreement divides protected materials into two categories: (1) confidential materials, and (2) "competitively sensitive confidential" materials, which contain proprietary or competitively sensitive information. Additionally, the protective agreement provides that only "fully authorized representatives" may view materials categorized as competitively sensitive confidential, and that fully authorized representatives include only (1) outside

legal counsel or in-house legal counsel actively involved in this proceeding, (2) paralegals and other employees associated with the counsel described above, and (3) outside experts or employees retained for purposes of this proceeding who are not involved in decision-making or advising by or on behalf of any entity concerning any aspect of competitive retail electric service (CRES) or of competitive wholesale electric procurements.

IGS asserts that, because FirstEnergy's proposed protective agreement allows only fully authorized representatives to access information categorized as competitively sensitive information, internal IGS employees would be prohibited from viewing that information in order to testify in this proceeding, with the exception of IGS' counsel or a retained outside expert. IGS asserts that this is unreasonable as it would cause IGS to duplicate its efforts and bear substantial unnecessary cost, as it already has a qualified internal expert. IGS also points out that, but for FirstEnergy's choice to request a power purchase agreement as part of its application, FES' confidential information would not be at issue. Finally, IGS asserts that FirstEnergy has demonstrated no risk that IGS employees will misappropriate FES' confidential information, because IGS does not own large-scale generating assets and FES has declared it is leaving the retail business.

- (32) On October 31, 2014, NOPEC and OCC (jointly, Joint Movants) filed a motion to compel discovery from FirstEnergy as well as a memorandum in support. In their motion, Joint Movants represent that FirstEnergy has withheld certain discovery because it has been unwilling to agree to the terms of a reasonable protective agreement. Consequently, Joint Movants request an order compelling FirstEnergy to enter into Joint Movants' proposed protective agreement, which they attached to their motion to compel.

More specifically, Joint Movants contend that FirstEnergy's proposed protective agreement would preclude their meaningful participation in this proceeding, as it would (1) require Joint Movants' counsel to withhold relevant information from their clients and prevent their clients from making informed decisions; and (2) unreasonably restrict

Joint Movants' right to contract with consultants of their choosing as it restricts disclosure of competitively sensitive confidential information to consultants who do not advise on "any aspect" of competitive wholesale or CRES procurements.

Further, Joint Movants assert that their attached proposed protective agreement is reasonable, has been used previously in cases before the Commission, and was used recently in *In re Duke*, 14-841-EL-SSO (*Duke ESP Case*). Joint Movants conclude that the Commission should order FirstEnergy to produce discovery using their proposed protective agreement, as the Commission found in the *Duke ESP* proceeding that the agreement was "reasonable, consistent with our past cases and precedent, and contains the language needed to sufficiently protect [the utility's] interests."

- (33) On November 7, 2014, FirstEnergy filed a memorandum contra IGS' motion to compel, arguing that IGS' motion should be denied. In its memorandum contra, FirstEnergy initially argues that the Commission routinely protects competitively sensitive information, including that of third parties, in order to prevent an unfair competitive advantage. Further, FirstEnergy contends that the Companies' proposed protective agreement will not hinder IGS' ability to participate fully in this proceeding, contrary to IGS' assertions. FirstEnergy asserts that, under the Companies' proposed agreement, IGS' counsel and employees associated with counsel would have full access to the proprietary information, or IGS could retain an outside expert who is not involved in CRES or competitive wholesale procurements. FirstEnergy argues that it is irrelevant that IGS would have to incur expense to retain an outside expert, as that is part of the cost of litigation. Additionally, FirstEnergy asserts that it is irrelevant that IGS does not own large-scale generating assets, as the proprietary data in question is still highly competitively sensitive information.
- (34) Additionally, on November 7, 2014, FirstEnergy filed a memorandum contra Joint Movants' motion to compel, arguing that Joint Movants' proposed protective agreement would fail to safeguard FES' competitively sensitive

information. FirstEnergy asserts that its proposed protective agreement follows past practice, including tiers of designations, protection, and access, and will not impede Joint Movants' discovery rights.

FirstEnergy elaborates that its protective agreement will not restrict NOPEC's ability to participate in this proceeding. Initially, FirstEnergy asserts that NOPEC is both a customer of FES and is closely affiliated with a competitor of FES, NOPEC, Inc., as they share a president and executive director. Consequently, FirstEnergy asserts that NOPEC lacks non-competitive status. FirstEnergy further claims that NOPEC's counsel would have full access to the proprietary data, as would any outside expert retained by NOPEC so long as that expert does not provide advice to other CRES providers or participate in wholesale power procurements. To its memorandum contra, FirstEnergy attached the affidavit of Trent Smith, Vice President of Sales and Marketing for FES, asserting that FES has never revealed competitively sensitive pricing structure, strategies, or objectives to NOPEC and that NOPEC would have a competitive advantage if it were privy to such information.

Next, FirstEnergy addresses OCC's arguments and similarly argues that its proposed protective agreement will not restrict OCC's ability to participate in the proceeding. Initially, FirstEnergy notes that, to the extent OCC is not a competitor of FES, OCC's execution of the proposed protective agreement should not preclude OCC's governing board from accessing the proprietary data, assuming the board executes non-disclosure certificates. FirstEnergy also argues that it agreed to three substantive additions to its proposed protective agreement at OCC's request. Additionally, FirstEnergy notes that OCC has executed previously a tiered protective agreement in *In re AEP Ohio*, Case No. 11-346-EL-SSO.

FirstEnergy also addresses Joint Movants' assertion that the protective agreement will unreasonably restrict the ability to secure an outside expert by arguing that Joint Movants have not alleged they have actually been prevented from using an expert of their choice and have not suggested modifications to this provision in the proposed protective agreement.

Finally, FirstEnergy contends that the Joint Movants' attached protective agreement proposal, recently used in the *Duke ESP Case*, is inappropriate in this proceeding, as the *Duke ESP Case* did not involve highly competitively sensitive information belonging to a third party, such as the FES' proprietary data at issue in this case.

- (35) On November 14, 2014, NOPEC and OCC filed a joint motion to strike the affidavit of Trent Smith on the basis that it presents opinion and not facts. Thereafter, on November 21, 2014, FirstEnergy filed a motion to strike the joint motion to strike, arguing that there is no prohibition against an affidavit containing an opinion, and that the joint motion to strike is really an improper reply in substance. The attorney examiner does not rely on this affidavit in ruling upon the motion to compel; accordingly, the motions to strike are moot and should be denied.
- (36) The attorney examiner finds that the motions to compel should be denied. In addressing these motions, the examiner must balance the Companies' need to protect highly competitive sensitive information owned by an affiliate with the intervenors' right to participate effectively in this proceeding. The attorney examiner finds that FirstEnergy should not be compelled to use the protective agreement proffered by Joint Movants, as this proceeding involves highly competitive sensitive information belonging to FirstEnergy's competitive affiliate. Further, the attorney examiner notes that the issues presented in the motions to compel differ substantially from the issues in the *Duke ESP Case*, where Duke sought to preclude the use of confidential information in subsequent proceedings. The attorney examiner finds that the protective agreement proffered by the Companies does not unduly burden the intervenors' right to participate in the proceeding. Although the protective agreement limits the individuals employed by intervenors who can access the most restricted information, such information can be reviewed by intervenors' counsel and by experts who are not directly involved in competing against FES. Consequently, the attorney examiner finds that FirstEnergy shall be permitted to use its proposed protective agreement, with one modification. While the attorney

examiner finds that the tiered approach to protect competitively sensitive information is appropriate in this situation, the attorney examiner finds that FirstEnergy's restriction on outside experts or employees contained in the definition for "fully authorized representative" is overly restrictive.

The third section of the definition for fully authorized representative in the copy of FirstEnergy's proposed protective agreement provided by IGS provides covers "[a]n outside expert or employee of an outside expert retained by Receiving Party for the purpose of advising, preparing for or testifying in this Proceeding and who is not involved in (or providing advice regarding) decision-making by or on behalf of any entity concerning any aspect of competitive retail electric service or of competitive wholesale electric procurements." The attorney examiner finds that this provision shall be modified to cover "[a]n outside expert or employee of an outside expert retained by Receiving Party for the purpose of advising, preparing for or testifying in this Proceeding and who is not involved in (or providing advice regarding) decision-making by or on behalf of any load-serving entity within the PJM Interconnection LLC or Midcontinent Independent System Operator, Inc. (MISO), footprint concerning any aspect of competitive retail electric service or of competitive wholesale electric procurements." The attorney examiner finds that this modification will expand the pool of outside experts available to intervenors who may qualify as fully authorized representatives and view competitively sensitive information, while affording FES appropriate protection of its competitively sensitive information.

It is, therefore,

ORDERED, That the motions for admission pro hac vice filed by Garret Stone, Owen Kopon, Michael Lavanga, Madeline Fleisher, Jeffrey Mayes, Tony Mendoza, Michael Soules, Shannon Fisk, and Derrick Price Williamson are granted. It is, further,

ORDERED, That the motions to intervene filed by OEG, IEU-Ohio, AEP Ohio, OPAGE, OCC, Sierra Club, Direct Energy, IGS, Kroger, EPO, OHA, OMAEG, Nucor, CMSD, MSC, AICUO, Wal-Mart, Cleveland, Citizens Coalition, Dynergy, Environmental Groups, NOAC, Individual Communities, IBEW 234, COSE, MAREC, NOPEC, ELPC, NextEra, Akron, OSC, Market Monitor, OAEE, Wholesale Suppliers, RESA, EnerNOC, Power4Schools, Exelon, and Wind Farms are granted as set forth herein. It is, further,

ORDERED, That the procedural schedule set forth in Finding (23) be observed by the parties. It is, further,

ORDERED, That the motion for protective order filed by FirstEnergy is granted as set forth in Finding (28). It is, further,

ORDERED, That, as set forth in Findings (28) and (29) the Commission's docketing division maintain, under seal, the information in categories (2) and (3), including Attachments JJL-1, JJL-2, and JJL-3 to the testimony of Jason Lisowski, portions of testimony and attachments of Judah Rose, and portions of workpapers of Jason Lisowski, Judah Rose, and Steven Strah, which were filed under seal in this docket on August 4, 2014, for a period of 60 months. It is, further,

ORDERED, That, as set forth in Findings (28) and (29), the Commission's docketing division maintain, under seal, the information in Category (1), including portions of attachment GLC-1 to the testimony of Gavin Cunningham, which was filed under seal in this docket on August 4, 2014, until otherwise ordered by the Commission. It is further,

ORDERED, That the motions to strike filed by NOPEC, OCC, and First Energy are denied. It is, further,

ORDERED, That the motions to compel filed by IGS, OCC, and NOPEC are denied as set forth in Finding (36). It is further,

ORDERED, That FirstEnergy shall modify its protective agreement as set forth in Finding (36). It is, further,

ORDERED, That a copy of this Entry be served upon all parties of record.

THE PUBLIC UTILITIES COMMISSION OF OHIO

s/Mandy W. Chiles

By: Mandy Willey Chiles
Attorney Examiner

SEF/sc

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Case No(s). 14-1297-EL-SSO

Summary: Attorney Examiner Entry ruling on motions to intervene, motions for admission pro hac vice, motion to amend the procedural schedule, motion for a protective order, and motions to compel. - electronically filed by Sandra Coffey on behalf of Mandy Willey Chiles, Attorney Examiner, Public Utilities Commission of Ohio