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

OHIO EDISON COMPANY, THE CLEVELAND ELECTRIC ILLUMINATING COMPANY, AND THE TOLEDO EDISON COMPANY'S MEMORANDUM CONTRA THE NORTHEAST OHIO PUBLIC ENERGY COUNCIL AND THE OFFICE OF THE OHIO CONSUMERS' COUNSEL'S REQUEST FOR CERTIFICATION OF AN INTERLOCUTORY APPEAL

David A. Kutik (0006418)
JONES DAY
901 Lakeside Avenue
Cleveland, OH 44114
Telephone: (216) 586-3939
Fax: (216)579-0212
Email: dakutik@jonesday.com

James W. Burk (0043808)
Counsel of Record
Carrie M. Dunn (0076952)
FIRSTENERGY SERVICE COMPANY
76 South Main Street
Akron, OH 44308
Telephone: (330) 384-5861
Fax: (330) 384-8375
Email: burkj@firstenergycorp.com
Email: dunn@firstenergycorp.com

James F. Lang (0059668)
N. Trevor Alexander (0080713)
CALFEE, HALTER & GRISWOLD LLP
The Calfee Building
1405 East Sixth Street
Cleveland, OH 44114
Telephone: (216) 622-8200
Fax: (216) 241-0816
Email: jlang@calfee.com
Email: talexander@calfee.com

ATTORNEYS FOR OHIO EDISON COMPANY, THE CLEVELAND ELECTRIC ILLUMINATING COMPANY, AND THE TOLEDO EDISON COMPANY

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I. INTRODUCTION

In their Interlocutory Appeal and Application for Review (the "Request for Certification"), the Northeast Ohio Public Energy Council ("NOPEC") and the Office of the Ohio Consumers' Counsel ("OCC") (collectively, "Joint Movants") request that their interlocutory appeal of the Entry in this proceeding dated December 1, 2014 (the "Entry") be certified to the Commission for review. Joint Movants' Request for Certification is nothing more than a rehash of the same flawed arguments contained in their Joint Motion to Compel, filed October, 31, 2014. In that motion, Joint Movants sought to have the Attorney Examiner order Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company (collectively, the "Companies") to enter into a protective agreement that was demonstrably unsuitable to protect the third-party competitively sensitive information at issue in this case. This third-party information belongs to FirstEnergy Solutions Corp. ("FES"), the Companies' affiliate, and was filed under seal when the Companies filed their electric security plan ("ESP") application in this proceeding. Joint Movants sought to have the Attorney

Examiner reject the Protective Agreement, offered by the Companies (and signed by numerous other intervenors), that featured two tiers of designations of proprietary information: (1) "Confidential"; and (2) "Competitively Sensitive Confidential."

In the Entry, the Attorney Examiner correctly denied Joint Movants' motion to compel, granted trade secret protection to the competitively sensitive information at issue, and held that the Companies' two-tiered Protective Agreement was best suited to protect that information. As demonstrated below, Joint Movants' Request for Certification falls well wide of the mark. Joint Movants fail to show that the Entry in any way departs from past Commission precedent or that the Entry somehow presents new or novel question of interpretation, law, or policy.

Likewise, Joint Movants similarly fail to show that, absent an immediate Commission determination, some sort of undue prejudice will befall them. Instead, Joint Movants resort to misrepresentations and half-truths regarding a range of topics – from NOPEC's claim that it won't obtain any competitive advantage (even though NOPEC is a customer of FES and NOPEC's closely related affiliate is a direct competitor of FES) to Joint Movants' supposed inability to conduct discovery due to the Protective Agreement (even though several other intervenors have executed the Protective Agreement and are conducting discovery without issue). The Request for Certification should be denied accordingly.

II. RELEVANT FACTS AND PROCEDURAL POSTURE

In the Entry, the Attorney Examiner denied various motions to compel filed by Joint Movants and IGS Energy ("IGS") which sought to order the Companies to enter into a single-tier protective agreement that would have failed to protect the competitively sensitive information at issue. Instead, the Attorney Examiner, agreeing with the Companies, found that, with one modification, the Companies' two-tiered Protective Agreement was reasonable and "appropriate

in this situation." Entry at 17. Among other things, the Request for Certification noticeably, and tellingly, fails to provide much more than a cursory overview of the pertinent facts. A fuller discussion of these facts and a brief review of the Entry are warranted to see why the Companies' Protective Agreement is clearly "appropriate" here.

A. The Economic Stability Program

On August 4, 2014, the Companies filed their Application seeking approval of the Companies' fourth electric security plan, Powering Ohio's Progress ("ESP IV"). A key component of ESP IV is the Economic Stability Program. Application at 9 (Aug. 4, 2014). As explained in the Companies' Application, the Economic Stability Program "will act as a retail rate stability mechanism against increasing market prices and price volatility for all retail customers over the longer term." *Id.* As part of ESP IV, the Companies are seeking Commission approval of only the Retail Rate Stability Rider. The Economic Stability Program includes a detailed description of a proposed purchased power transaction between the Companies and FES whereby the Companies would purchase all of the generation output of certain assets owned by FES. Direct Testimony of Jay A. Ruberto at 3 (Aug. 4, 2014). In turn, the Companies would "offer this output into the PJM markets, and net 100% of the revenues against costs, with the differences being passed along to customers through [proposed] Rider RRS."[1] *Id.*

[1] Joint Movants repeatedly mischaracterize the Economic Stability Program as designed to "guarantee" profits for FES. *See, e.g.*, Request for Cert. at 1, 2. As explained in the Companies' Application, however, the Economic Stability Program "will act as a retail rate stability mechanism against increasing market prices and price volatility for all retail customers over the longer term." Application at 9. The Economic Stability Program will provide three types of benefits both to the Companies' customers and the State of Ohio as a whole. Specifically, the Economic Stability Program will: (1) convey over $2 billion in potential credits over the term of the program; (2) enhance stability and reliability through ensuring "diversity of generation fuel supply and plant type"; and (3) provide over $1 billion dollars annually in benefits to Ohio's economy. Direct Testimony of Steven E. Strah at 2 (Aug. 4, 2014).

B. The Proprietary Data

As part of their Application and supporting testimony related to the Economic Stability Program, the Companies included highly confidential and competitively sensitive pricing, cost and forecasting information related to FES's generating assets and internal business operations (the "Proprietary Data"). Cost and pricing data, forecasts and other operational information would be extremely valuable to CRES providers, marketers, brokers and aggregators as well as participants in competitive wholesale procurements to compete against FES in these markets. It would also be valuable to customers who may purchase FES's services through contracts negotiated directly with FES.

Accordingly, the Proprietary Data was filed, and remains, under seal. The Companies further moved for a protective order to govern the Proprietary Data on the same day that the Companies filed their Application. *See* Motion for Protective Order of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company (Aug. 4, 2014). As the Companies indicated in their motion, the Proprietary Data "was provided to the Companies pursuant to a nondisclosure agreement solely for purposes of the proposed transaction underlying the Companies' Economic Stability Program." *Id.* at 6. Notably – no party, including NOPEC or OCC – opposed this motion. In fact, neither NOPEC nor OCC dispute that FES's cost, pricing and operational information is competitively valuable. And, indeed, as discussed below, in the Entry, the Attorney Examiner found likewise and held that the Proprietary Data constituted a trade secret under Ohio law and ordered that it be protected for a minimum of 60 months. *See* Entry at 10-11.

C. The Companies' Protective Agreement

To continue to protect the Proprietary Data, yet allow other parties access to this information, the Companies, following past practice, offered a proposed Protective Agreement,

which, the Attorney Examiner subsequently approved, with one minor modification, in the Entry. The Protective Agreement offers two-tiers of designations, protection and access. Access to information designated as "Confidential"[2] is provided to "Limited Authorized Representatives" of parties. Protective Agreement at ¶ 5 (version modified pursuant to the Entry attached as Ex. A). "Limited Authorized Representatives" may include: (a) a party's in-house or outside legal counsel; (b) paralegals or other employees associated with relevant counsel; (c) an employee of a party who is involved in the proceedings; and (d) "an expert or employee of an expert retained....for the purpose" of advising or testifying in this proceeding." *Id.* at ¶ 5(A)-(D).

Access to information designated as "Competitively Sensitive Confidential"[3] is limited to "Fully Authorized Representative[s]." *Id.* at ¶ 4. Pursuant to the original terms of the Protective Agreement, a Fully Authorized Representative could be: (a) a party's in-house or outside legal counsel; (b) paralegals or other employees associated with relevant counsel; and (c) "An 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." *Id.* at ¶ 4(A)-(B); Original Protective Agreement at ¶4(C) (original version attached as Ex. A to the Companies'

[2] "Confidential" information is defined as "documents and information....that customarily are treated by the Companies or third parties as sensitive or proprietary, which are not available to the public, and which, if disclosed freely, would subject the Companies or third parties to risk of competitive disadvantage or other business injury, and may include materials meeting the definition of 'trade secret' under Ohio law." Protective Agreement at ¶3(A).

[3] "Competitively Sensitive Confidential" information includes "highly proprietary or competitively-sensitive information, that, if disclosed to suppliers, competitors or customers, may damage the producing party's competitive position or the competitive position of the third party which created the documents or information." *Id.* at ¶3(B).

Memorandum Contra Joint Movants' Motion to Compel (Nov. 7, 2014) ("Companies Memo Contra Joint Mot. To Compel").

In the Entry, as discussed below, the Attorney Examiner held that the Protective Agreement was reasonable in all aspects, save for a slight modification to Paragraph 4(C). The Entry required that the latter half of Paragraph 4(C) be modified to read as follows: "An outside expert or employee of an outside expert....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." Entry at 17 (modification emphasized). Prior to the Entry, several intervenors, including counsel for IGS, executed a version of the Protective Agreement containing the unmodified provision and have had full access to the Proprietary Data, many for a period of several months.[4]

D. NOPEC Is A Customer Of FES And Is Closely Affiliated With A Competitor Of FES.

Much as they did in their Joint Motion to Compel, Joint Movants ignore, downplay or belittle the competitive disadvantage that would befall FES should NOPEC receive the unrestricted access to the Proprietary Data that Joint Movants' protective agreement provides. Indeed, contrary to NOPEC's claims, disclosure of FES's commercially valuable pricing and cost information would be competitively harmful to FES. For starters, NOPEC is a customer of FES. Knowing FES's costs, for example, would aid NOPEC in its future negotiations with FES over power or other contracts. As in Joint Movants' Motion to Compel, NOPEC again

[4] Counsel for NOPEC and OCC have entered into "Confidential-only" versions of the Protective Agreement and have full access to all materials designated "Confidential" under the terms of the Protective Agreement. "Competitively sensitive confidential" information has not been provided, subject to a ruling on the motion to compel.

incompletely states that one current power contract will expire in 2019. *See* Request for Cert. at 15. Tellingly, NOPEC continues to omit that FES and NOPEC have had continuing regular discussions and interactions, including: (a) other contracts that amend or supplement the parties' master agreement; and (b) other agreements relating to additional products and services. (*See* Affidavit of Trent Smith at ¶3 ("Smith Aff."), attached as Ex. C to the Companies' Memo Contra Joint Mot. To Compel.)

Once again, NOPEC also misleadingly claims that it is not a competitor of FES, even though NOPEC is forced to admit that its affiliate, NOPEC, Inc., with whom NOPEC is closely linked, is a "CRES provider." Request for Cert. at 15. Specifically, NOPEC, Inc. is an Ohio non-profit corporation. The Articles of Incorporation for NOPEC, Inc. list its purpose as, among other things, "procuring electricity ... and related products and services for sale to electric ... customers in those political subdivisions that are members of the Northeast Ohio Public Energy Council...." Art. at 5 (attached as Ex. D to Companies' Memo Contra Joint Mot. To Compel). NOPEC, Inc. received a Certificate of Continued Existence on May 14, 2012, after a filing was made and signed by its President, Charles Keiper. Mr. Keiper is also Executive Director of NOPEC.[5]

On April 30, 2014, NOPEC, Inc., filed to renew its certificate as a retail generation provider, power broker and power marketer. *See* "Renewal Application for Retail Generation Providers and Power Marketers," Original CRS Case No. 07-891-EL-CRS, NOPEC, Inc. (April 30, 2014). Charles Keiper, again NOPEC's Executive Director, signed the renewal application and is listed as NOPEC, Inc.'s President. *Id.* at 5. On June 3, 2014, the Commission issued Renewal Certificate 07-139E(4) to NOPEC, Inc. The certificate states that NOPEC, Inc. may

[5] *See* http://www.nopecinfo.org/about-nopec/leadership/board/.

provide "retail generation, power marketer, and power broker services with the State of Ohio effective May 31, 2014." Case No. 07-891-EL-CRS, Renewal Certificate 07-139E(4) at 1 (June 3, 2014). NOPEC, Inc., as a certified CRES provider, is a direct competitor with FES.

E. Joint Movants' Motion To Compel And Their Failure To Attempt To Resolve Their Discovery Dispute With The Companies In Good Faith

Joint Movants attempt to portray the Companies as inflexible and failing to attempt to resolve the dispute that culminated in the Entry. Request for Cert. at 3. The exact opposite is true – it is Joint Movants who did not act in good faith. Neither of these parties ever attempted to propose any alternative to their initial position. OCC simply claimed, without any explanation, that the Companies' proposals were "too broad." NOPEC claimed – falsely – that it would not be advantaged by seeing FES's competitive information.

As shown in the Companies' Memorandum Contra Joint Movants' Motion to Compel, on August 15, 2014, counsel to OCC requested a copy of the Protective Agreement. (*See* Companies' Memo Contra Joint Mot. to Compel at 7.) Counsel for OCC then requested several substantive modifications to the Protective Agreement. (*See id.* at 9.) OCC also complained that Paragraph 4(C) – the provision addressing who could see "Competitively Sensitive Confidential" material – was too broad but did not suggest any modifications to that paragraph. (*See id.*)

The Companies' acceded to OCC's specific substantive changes and, on September 11, 2014, forwarded via email a Protective Agreement to counsel for OCC, which had been modified accordingly. (*See id.*) Approximately five weeks later, on October 17, 2014, counsel for OCC responded and again complained that Paragraph (4)(C) was still "over-broad." But again he provided no suggestions as how to further modify the paragraph to address OCC's alleged concerns. (*See id.*) The Companies again requested that OCC suggest language that would allay OCC's concerns. OCC did not respond to this request.

Similarly, on October 14, 2014, counsel for NOPEC sent an email to the Companies with a proposed protective agreement that does not provide for a Competitively Sensitive Confidential designation. (*See id.* at 10.) In that email, counsel for NOPEC further claimed that the Protective Agreement was too "severe" and would preclude counsel from "sharing" competitively sensitive information with NOPEC's Executive Director. (*Id.*) On October 20, 2014, counsel for the Companies responded that, given NOPEC's status as a customer and competitor of FES, the Companies could not enter into the single-tiered protective agreement proposed by NOPEC. The Companies noted, however, that counsel for NOPEC, and any outside experts who qualified under Paragraph 4(C), could have full access to the Proprietary Data and NOPEC could meaningfully participate in the instant matter. (*See id.* at 10-11.)

On October 24, 2014, counsel for NOPEC responded by simply reiterating its previous stance, denying that NOPEC was a competitor of FES, and that NOPEC's customer status should not pose any issue. (*See id.* at 11.) NOPEC never provided or suggested any language that would address NOPEC's alleged concerns. On October 31, 2014, OCC and NOPEC jointly moved the Attorney Examiner to order the Companies to enter into the inadequate, single-tier protective agreement that comprises the subject matter of Joint Movants' Request for Certification. On November 7, 2014, the Companies filed their memorandum contra.

F. The December 1, 2014 Entry

As noted, on December 1, 2014, the Attorney Examiner issued the Entry, which granted trade secret protection to the Proprietary Data and denied Joint Movants' Motion to Compel.[6] Pursuant to Rule 4901-1-24, O.A.C., the Entry held that the third-party Proprietary Data

[6] In the Entry, the Attorney Examiner also denied a motion to compel by IGS that was based on similar grounds to the Joint Movants' motion. *See generally*, IGS Motion to Compel (Oct. 23, 2014).

belonging to FES constituted a trade secret pursuant to Section 1333.61(D) of the Ohio Revised Code and the six-factor test set forth in *State ex rel. Plain Deal v. Ohio Dept. of Ins.*, 80 Ohio St. 3d 513, 524-525 (1997). *See* Entry at 10-11. The Entry afforded 60 months of protected status to the Proprietary Data at which time the Companies could move for continued protection. *Id.* at 12.

In its denial of the pending motions to compel, the Attorney Examiner approved the Protective Agreement in its entirety (save for the minor modification noted above). The Entry held, in pertinent part:

> 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...the attorney examiner [thus] finds that the tiered approach to protect competitively sensitive information is appropriate in this situation.

Entry at 17. On December 8, 2014, Joint Movants filed their Request for Certification.

III. STANDARD OF REVIEW

Pursuant to Rule 4901-1-15(A), O.A.C. an "immediate interlocutory appeal" of an Attorney Examiner's ruling is only permissible in four circumstances. Rule 4901-1-15(A), O.A.C. Specifically, when that ruling "(1) [g]rants a motion to compel discovery or denies a motion for a protective order; (2) [d]enies a motion to intervene, terminates a party's right to

participate in a proceeding, or requires intervenors to consolidate their examination of witnesses or presentation of testimony; (3) [r]efuses to quash a subpoena; [or] (4) [r]equires the production of documents or testimony over an objection based on privilege." *Id.*

All other applications for interlocutory appeals, such as the one presented here (i.e., for a denial of a motion to compel) must first be certified by the "legal director, deputy legal director, attorney examiner, or presiding hearing officer." Rule 4901-1-15(B), O.A.C. In order to succeed on a request for certification of an interlocutory appeal, a movant must satisfy both requirements of Rule 4901-1-15(B):

> The legal director, deputy legal director, attorney examiner, or presiding hearing officer shall not certify such an appeal unless he or she finds that:
>
> [1] the appeal presents a new or novel question of interpretation, law, or policy, or is taken from a ruling which represents a departure from past precedent; and
>
> [2] an immediate determination by the commission is needed to prevent the likelihood of undue prejudice or expense to one or more of the parties, should the commission ultimately reverse the ruling in question.

Rule 4901-1-15(B), O.A.C.

Requests for certification that fail to meet both of these requirements are routinely denied. *See, e.g., In the Matter of the Self Complaint of Suburban Natural Gas Company Concerning its Existing Tariff Provisions*, Case No. 11-5846-GA-SLF, 2012 Ohio PUC LEXIS 677 at *1-3 (July 6, 2012) (denying request for certification because movant failed to show that Entry at issue presented any new or novel question of interpretation, law, or policy, or a departure from past precedent, and that immediate determination by the Commission was not necessary to avoid undue prejudice); *In the Matter of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company for Authority to Provide for a Standard Service Offer Pursuant to Section 4928.143, Revised Code, in the Form of an Electric*

Security Plan, Case No. 12-1230-EL-SSO, 2012 Ohio PUC LEXIS 619 at *8-10 (June 21, 2012) (same); *In the Matter of the Application of Columbia Gas of Ohio, Inc., for Approval of an Alternative Form of Regulation*, Case No. 11-5515-GA-ALT, 2012 Ohio PUC LEXIS 484 at *13-14 (May 18, 2012) (same); *In the Matter of the Commission's Investigation into Intrastate Carrier Access Reform Pursuant to Sub. S.B. 162*, Case No. 10-2387-TP-COI, 2011 Ohio PUC LEXIS 494 at *2-3 (April 20, 2011) (same).

IV. LAW AND ARGUMENT

Joint Movants fail to satisfy either of the requirements set forth in Rule 4901-1-15(B). Joint Movants fail to show that the ruling at issue presents a new or novel question of interpretation, law, or policy, or that it departs from past precedent. Further, Joint Movants simply fail to address why an immediate determination by the Commission is necessary for them to avoid any undue prejudice. Their Request for Certification should be denied accordingly.

A. The Entry Presents No New Or Novel Question Of Interpretation, Law, or Policy, Or A Departure From Past Precedent.

1. The Entry does not present a departure from past precedent.

The Commission has long protected competitively sensitive information belonging to third parties, like the Proprietary Data, in order to prevent those parties from being placed at a competitive disadvantage. As such, the Entry is on firm ground; it does not constitute a departure from past precedent. For example, in Case No. 11-346-EL-SSO, AEP Ohio's second ESP case, the utility sought to protect the confidential information of the utility, as well as two third parties, regarding a solar power participation agreement. *See* Case No. 11-346-EL-SSO, 2011 Ohio PUC LEXIS 920 at *1-3 ("*AEP ESP 2*"). The information at issue included "commercial terms and conditions, pricing, payment structure and key terms of the agreement." *Id.* at *1. The utility claimed that that "disclosure of the information [would] provide [the

utility's and third parties'] competitors an unfair competitive advantage causing harm" to the utility and the third parties. *Id.* at *2. The Commission found that the third-party materials "constitute[d] confidential, proprietary, competitively sensitive" information and warranted protection. *Id.*

Likewise, in *In the Matter of the Review of Duke Energy Ohio, Inc.'s, Riders Supplier Cost Reconciliation, Retail Capacity, Retail Energy, Load Factor Adjustment, Electric Security Stabilization Charge, and Economic Competitiveness Fund*, Case No. 14-81-EL-RDR, 2014 Ohio PUC LEXIS 90 (April 16, 2014), the utility sought to protect "third-party vendor information regarding auction fees." *Id.* at *3. The information was contained in the utility's filed workpapers. *Id.* The utility maintained that if such information were released:

> [T]he vendor's competitors would have access to competitively sensitive, confidential information that, in turn, could allow the competitors to offer auction services at different prices than the competitors would offer in the absence of such information, thus, being able to significantly undermine the vendor's ability to compete.

Id. at *3. The Commission agreed and granted protection. *Id.* at *4. *See also, In the Matter of the Application of Ohio Power Company to Establish Initial Storm Damage Recovery Rider Rates*, Case No. 12-3255-EL-RDR, 2014 Ohio PUC LEXIS 83 at *5-8 (April 2, 2014) (granting protection to "competitively sensitive" third-party contractor information related to storm damage restoration); *In the Matter of the Application of Verizon North, Inc. to Determine Permanent Rates for Unbundled Network Element Prices*, Case No. 00-1186-TP-UNC, 2000 Ohio PUC LEXIS 928 at *1-2 (Sept. 26, 2000) (granting protection of "cost studies" containing information that was proprietary to utility's third-party vendors and filed with utility's application after utility claimed that such information would be of "interest to competitors").

Moreover, far from being "untested" and "controversial," two-tiered protective agreements are nothing new. Request for Cert. at 12. Indeed, in the *AEP ESP 2* proceeding, the standard protective agreement employed *three* tiers of protection, "Confidential," "Competitively Sensitive Confidential," and "Restricted Access Confidential," and two separate non-disclosure certificates. *See* Case No. 11-346-EL-SSO, Protective Agreement at 1 (attached as Ex. G to the Companies Memo Contra the Joint Mot. to Compel). Notably, OCC participated fully in that proceeding and executed such an agreement. OCC did not complain about that multi-tiered agreement then and, likewise, should not complain about the instant two-tiered Protective Agreement now. Given OCC's full participation in that proceeding, for it now to claim that a very similar protective agreement "goes too far" and "requires Joint Movants' counsel to withhold relevant information from their clients" rings hollow. Request for Cert. at 11.

In a similar vein, Joint Movants seek to rely on several cases that are clearly inapposite to the instant proceeding. For instance, Joint Movants rely heavily on a recent decision in Case No. 14-841-EL-SSO, Duke's current ESP proceeding. In that decision, the utility sought to use a protective agreement that: (a) required a recipient of confidential information to "acknowledge" that disclosure of such information would injure the utility; (b) prohibited the recipient of confidential information from using that information against the utility in a future proceeding; and (c) required the recipient of confidential information to acknowledge that "the disclosure of the information would cause the utility "irreparable harm." Case No. 14-841-EL-SSO, Entry at 2 (Aug. 27, 2014). The Attorney Examiner ordered these provisions modified or deleted and the utility filed an interlocutory appeal. *Id.* The Commission denied the utility's interlocutory appeal and ordered the utility to employ a protective agreement similar to that proposed by Joint Movants. *Id.* at 5-6.

In relying on the ruling in the Duke ESP case and the fact that Duke's proposed protective agreement also had two tiers, Joint Movants leave out two important pieces of information. First, the two-tiered nature of the utility's original protective agreement *was not at issue*. Further, none of the controversial provisions in Duke's ESP case (i.e., the ones rejected by the rulings there) are contained in the Protective Agreement. Thus, the Commission's decision in the Duke ESP case has no application here.

Second, in Duke's ESP case, the Commission found that the protective agreement it ordered the utility to adopt "sufficiently protect[ed the utility's] interests" relative to the concerns raised by the utility. *Id.* at 5. Here, a single-tiered protective agreement, as the Attorney Examiner correctly found, is not up to the task of "sufficiently" protecting the Proprietary Data which belongs to FES. Such an agreement is by no means the "better option" in the instant proceeding. Request for Cert. at 11. Rather, the two-tiered approach embodied in the Companies' Protective Agreement "to protect [the] competitively sensitive information is appropriate in this situation." Entry at 17. Succinctly, Duke's ESP proceeding does not involve highly competitively sensitive third-party information related to costs, forecasts and pricing of a commodity or product in a competitive market, i.e., the Proprietary Data. Hence, the "totality" of circumstances regarding the proposed confidentiality agreements in that proceeding has no bearing here. Request for Cert. at 11.

Joint Movants cling to three other cases that also have no applicability here. First, Joint Movants cite to *In re Columbus S. Power Co.*, Case No. 05-376-EL-UNC, to support the claim that "AEP Ohio has been compelled to execute a substantially similar agreement proposed by OCC." Request for Cert. at 7. What Joint Movants neglect to mention, however, is that *In re Columbus S. Power Co.* involved a dispute between OCC and the utility regarding OCC's desire

for the addition of a public records request provision. *See* Case No. 05-376-EL-UNC, Entry at 2 (July 21, 2005). That case clearly has no bearing here; the Companies have already acceded to such a request on the part of OCC.

Joint Movants' second case, *In re the Application of Cincinnati Gas & Electric Company*, addressed confidential information which belonged to the utility regarding its provider of last resort charge. *See* Case No. 03-93-EL-ATA, Entry at 2 (May 13, 2004). Their third case, *In re Duke Energy Ohio, Inc.'s System Reliability Tracker*, involved confidential information belonging to a utility that was related to an audit of its system reliability tracker. *See* Case No. 07-723-EL-UNC, Entry at 1 (Oct. 29, 2007). Unlike here, in the above cases no competitively sensitive third-party information related to costs and pricing of a product for a competitive market was involved. These decisions are thus inapposite.

Joint Movants also argue that the Companies, in two of their prior ESP proceedings, Case Nos. 10-388-EL-SSO and 12-1230-EL-SSO, entered into versions of the protective agreement favored by Joint Movants. Request for Cert. at 8. While true, this fact proves nothing and is of no moment here. Those proceedings involved different issues and different facts. Specifically, neither of those proceedings involved the type of highly competitively sensitive third-party information at issue here.[7] Neither involved competitive information related to the cost or pricing of generation service.

Given the above, Joint Movants' claim that the Entry presents a departure from past precedent falls flat. Their Request for Certification should be denied accordingly.

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[7] In footnote 23 of the Request for Certification, the Joint Movants also cite two other proceedings in which the Companies have allegedly entered into the Joint Movants' preferred single-tier protective agreement, Case Nos. 14-828-EL-UNC and 12-2190-EL-POR, involving the Companies' SEET test and Energy Efficiency and Demand Portfolio Plans respectively. Again, however, none of these matters involves the type of competitively sensitive confidential third-party information related to the costs and pricing of competitive generation that is at issue here.

2. Joint Movants' appeal does not present a new or novel question of interpretation, law or policy.

a. The Entry does not restrict a client's ability to communicate with its attorney.

Joint Movants errantly claim that simply because the Protective Agreement restricts access to the Proprietary Data "to intervenors' counsel and...experts who are not directly involved in competing against FES" the Protective Agreement therefore is ostensibly in conflict with the Ohio Rules of Professional Conduct. Request for Cert. at 12-13 quoting Entry at 17. Nothing could be further from the truth. This claim has no basis in fact or law.

To begin, the Entry, and the Protective Agreement, in no way impede either of Joint Movants from representing their clients. Indeed, protective agreements restricting access to highly competitively sensitive information to "attorneys' eyes only" are by no means new or novel. Such designations, which preclude competitor/customer clients from seeing another party's competitively sensitive information, have been standard fare in litigation for years, whether before the Commission or Ohio courts. *See, e.g., In the Matter of the Complaint of Westside Cellular dba Cellnet of Ohio Inc. v. GTE Mobilnet, Inc.*, Case No. 93-1758-RC-CSS, 1999 Ohio PUC LEXIS 279 at *20-21 (July 7, 1999) (acknowledging the use of "attorneys only" designation); *In the Matter of the Complaint of The River Gas Company v. Eddy Biehl*, Case No. 87-232-GA-CSS, 1989 Ohio PUC LEXIS 452 at *5-6 (accepting, at the parties' suggestion, the use of an "attorney's eyes only" designation to resolve a discovery dispute); *Northeast Prof'l Home Care, Inc. v. Advantage Home Health Servs.*, 188 Ohio App. 3d 704 (5th Dist. 2010) (discussing at length an "attorney's eyes only" designation permitted by a trial court's protective order to protect proprietary or other business information and not indicating that such a designation was improper when used appropriately by the parties); *Ramun v. Ramun*, 2009-Ohio-6405, ¶40 (7th Dist., Dec. 4, 2009) (discussing the value of such designations in protecting

trade secrets from opposing parties and noting that such designations are permitted both by Ohio statute and other courts that have considered them).

Tellingly, the many other intervenors that have already signed the Protective Agreement apparently don't share Joint Movants' alleged ethical concerns. Indeed, none of them have claimed that the Protective Agreement "severely handicaps parties' ability to challenge" the Economic Stability Program. Request for Cert. at 13. Nor could they. The Request for Certification should thus be denied on this issue.

b. The Companies' Protective Agreement is neither new, novel, nor a "highly restrictive approach to protect the information of a non-participating third-party."

As the Entry correctly observed, the Protective Agreement strikes the correct "balance [between] the Companies' need to protect highly competitively sensitive information owned by an affiliate with the intervenors' right to participate effectively in this proceeding." Entry at 16. It is in line with Commission precedent as well as prior utility practice involving the use of tiered-protective agreements in other Commission proceedings. Thus, the Joint Movants claims here fall well wide of the mark.

Joint Movants vainly seek to undermine the precedent relied on by the Companies in their Memorandum Contra Joint Movants Motion to Compel, particularly *AEP ESP 2*. Joint Movants claim that the *AEP ESP 2* case stands for the proposition that "the protection that AEP sought...was the protection of [competitively sensitive] from *public disclosure*," full stop. Request for Cert. at 14 (original emphasis). Joint Movants only get it half right. *AEP ESP 2* stands for the proposition that competitively sensitive information belonging to a third party and related to a competitive market needs to be protected not only from *public disclosure* but also from *any disclosure that would place that third party at a competitive disadvantage*. Indeed, AEP in fact claimed that that "disclosure of the [solar participation agreement] information

[would] provide [AEP's and the third parties'] competitors an unfair competitive advantage causing harm" to the AEP and the third parties involved. *AEP ESP 2* at *1.[8]

Moreover, the three-tiered protective agreement in *AEP ESP 2* drives this point home. That agreement specifically provided that "The Authorized Representatives identified in (i) and (ii), including both outside counsel and in-house counsel will ensure that persons involved with the CRES-related business activities are permitted to access COMPETITIVELY-SENSITIVE CONFIDENTIAL materials." (Ex. G to Companies' Memorandum Contra Joint Movants' Motion to Compel at ¶3.) Clearly, the focus here is to prevent the untoward disclosure of competitively sensitive confidential materials to a competitor. Indeed, what other purpose could a "competitively sensitive confidential" designation possibly serve? Joint Movants' single-tiered protective agreement simply is not up to the task of protecting highly competitively sensitive third-party information like the Proprietary Data.

The Commission has been protecting this type of information from being placed in the hands of a competitor. There is nothing new or novel about that. The Request for Certification should thus be denied on this issue.

c. The Protective Agreement does <u>not</u> "establish a new policy of classifying non-profit political subdivisions as competitors and withholding information from political subdivisions as such."

Joint Movants also claim that the approval of the use of the Protective Agreement in the Entry somehow constitutes a "new policy" whereby "non-profit political subdivisions" are

[8]The Joint Movants also claim that the other Commission precedent cited by the Companies only supports their half-right proposition. This is clearly incorrect. *See In the Matter of the Review of Duke Energy Ohio, Inc.'s Riders Supplier Cost Reconciliation* at *3-4; *In the Matter of the Application of Ohio Power Company* at *5-8; *In the Matter of the Application of Verizon North* at *1-2. Further, the Joint Movants seem to believe that the fact that the *AEP ESP 2* tiered agreement allowed parties who had executed the appropriate non-disclosure certificates to share information indicates that the utility was only concerned with "public disclosure." Request for Cert. at 14. The Protective Agreement, however, also has a similar provision. *See* Modified Protective Agreement at ¶10.

classified as "competitors" and information is withheld from them. Request for Cert. at 15. As such, "Ohio elected officials, and the constituents they represent, would be severely handicapped in the ability to participate in PUCO proceedings if [such a political subdivision] were denied information." *Id.* at 16. In light of NOPEC's customer/competitor status, these wayward claims are meritless and, further, the Protective Agreement in no way impacts NOPEC's ability to participate meaningfully in this proceeding.

NOPEC's status as a customer of FES, and NOPEC Inc.'s status as a direct competitor of FES, cannot be subject to dispute. This is so regardless of NOPEC's non-profit status. Providing unfettered access to NOPEC, a customer of FES would undermine FES's ability to negotiate with NOPEC on a level playing field. NOPEC makes it appear that the only extant agreement and contact between NOPEC and FES involves a contract that allegedly expires in 2019. *See* Request for Cert. at 15. Not so. In fact, FES has a number of ongoing relationships and agreements with NOPEC. (Smith Aff. at ¶2; attached as Ex. C to the Companies' Memo Contra Joint Movants' Mot. To Compel.) Those parties meet regularly to discuss ongoing and new business matters. (*Id.*) Since signing their Master Agreement (for service to NOPEC member customers), the parties have amended it and have discussed and entered into agreements to provide supplemental services. (*Id.* at ¶3.) Thus, by gaining access to FES' costs and pricing information, among other commercially sensitive information, NOPEC would get an improper competitive advantage in its future dealings with FES. (*Id.* at ¶4.)

NOPEC's relationship with its affiliate, NOPEC, Inc., should also give pause. NOPEC, Inc. is a "retail generation provider." NOPEC, Inc. has described one of its primary purposes as "procuring electricity ... and related products and services for sale to electric ... customers." Art. of Incorporation at 5 (attached as Ex. C to the Companies' Memo Contra. Joint Mot. To Compel).

NOPEC and NOPEC, Inc. are apparently intimately related. The Executive Director of NOPEC and the President of NOPEC, Inc. are one and the same person, Charles Keiper. Thus, NOPEC's claims that NOPEC's customer status, and NOPEC, Inc.'s direct competitor status, with FES should not provide due cause for concern ring decidedly hollow. Pursuant to the Commission precedent cited above, allowing NOPEC, Inc. business and marketing employees full access to the Proprietary Data would cause competitive "harm" to FES and "significantly undermine" FES's "ability to compete." *AEP ESP 2* at *5; *In the Matter of the Review of Duke Energy Ohio, Inc.'s Riders Supplier Cost Reconciliation* at *3. NOPEC's attempts to invoke its non-profit status in this regard prove unavailing and are nothing more than a smokescreen to hide from the Commission the true nature of NOPEC's competitively sensitive relationship with FES.

Likewise, NOPEC's claim that the Protective Agreement undermines its ability to participate meaningfully in this proceeding cannot be taken seriously. NOPEC's counsel – who have participated in numerous proceedings before the Commission – can have full access to the Proprietary Data. The same is true for any outside expert secured by NOPEC, as long as that expert does not provide advice CRES provider matters or participate in wholesale power procurements in the PJM or MISO footprint. Indeed, several intervenors have already gone down this path, and the Companies are working cooperatively with them during the discovery process. Moreover, pursuant to the Protective Agreement, "characterizations of the Protected Materials [i.e., the Proprietary Data] that do not disclose the Protected Materials may be used in public." Modified Protective Agreement at ¶12.

Thus, there is simply no basis for Joint Movants' claim that the Protective Agreement somehow requires the "withholding" of "information" from political subdivisions. Indeed, counsel for the Northwest Ohio Aggregation Coalition ("NOAC"), presumably another non-

profit "political subdivision" organized under Section 167 of the Ohio Revised Code, has entered into the Protective Agreement with the Companies. Counsel for NOAC has full access to the Proprietary Data. Notably, NOAC apparently thus does not share NOPEC's alleged concerns here. And further, Joint Movants' cite absolutely no precedent, Commission or otherwise, on this issue, because there is none. Joint Movants' Request for Certification on this issue should be denied accordingly.

B. An Immediate Determination By The Commission Is Not Needed To Prevent The Likelihood Of Undue Prejudice.

Even a cursory review of the Request for Certification makes manifest that Joint Movants have failed to substantiate any undue prejudice caused by the Entry as required under Rule 4901-1-15(B). Instead, Joint Movants make a series of conclusory remarks alleging, in the complete absence of any substantive foundation, that the Protective Agreement has impeded their ability to: (a) conduct written discovery; (b) participate meaningfully in this proceeding; and (c) confer openly with their clients. *See* Request for Cert. at 17-18.

With regard to their supposed inability to conduct written discovery, any blame for any supposed inability on the part of Joint Movants to conduct discovery lies squarely at their feet. To the extent Joint Movants have been unable to conduct discovery against the Companies (although no specific examples are ever provided), their own dilatory tactics are at fault.

For example, counsel for OCC has been in possession of the Protective Agreement since late August, a period of several months. The Companies made several overtures to OCC to reach a reasonable accommodation, going so far as acceding to several of OCC's substantive changes and additions. OCC then chose not to respond to the Companies for several weeks – even though the ball was in its court. It is unclear what more the Companies could have done. Indeed, on December 4, 2014, several days prior to the written discovery cutoff date, counsel for the

Companies sent an email to counsel for OCC attaching the Protective Agreement, modified pursuant to the Entry. *See* Email from Martin Harvey to Larry Sauer, dated Dec. 4, 2014; attached as Ex. B. It wasn't until over a week later – on December 12 – that OCC finally signed the Protective Agreement. Likewise, NOPEC has not once made any suggestions regarding modifications to the Protective Agreement – even though the Companies repeatedly requested it do so.

Moreover, Joint Movants misleadingly imply that they have been "unable to obtain" *any* "written discovery" from the Companies. Not so. In fact, both OCC and NOPEC have entered into "Confidential-only" protective agreements with the Companies and have had full access to all written discovery responses designated "Confidential" as well as all public responses. Hence, any alleged prejudice here is by no means "undue"; if anything, it is self-inflicted. Further, nothing prevented OCC or NOPEC from signing the Protective Agreement, subject to the filing of their motion to compel. Indeed, counsel for another party did exactly that.

Second, any alleged claim that either the Entry or the Protective Agreement has somehow impeded Joint Movants' ability to participate meaningfully in this proceeding is completely unfounded. As noted, both NOPEC's counsel and any outside expert that does not provide advice on CRES matters or participate in wholesale power procurements in the PJM or MISO footprint may have access to the Proprietary Data. As evidenced by the numerous intervenors, including NOAC, that have executed the Protective Agreement and are participating fully in this proceeding and the discovery process, this provision is surely not the game-breaker NOPEC attempts to make it out to be.

OCC's position here is even more curious. Given its non-competitor and non-customer status, OCC could not credibly claim that the Protective Agreement precludes its meaningful

participation in this proceeding. For example, there is nothing in the Protective Agreement that would preclude OCC's Governing Board from accessing the Proprietary Data, assuming the proper non-disclosure certificates could be and were executed by those board members. As noted, tiered protective agreements are nothing new to OCC. OCC apparently executed just such an agreement in *AEP ESP 2* and participated fully in that proceeding. Moreover, given the great lengths that the Companies went to accommodate OCC, what more could the Companies have done?

Lastly, as noted, the Protective Agreement in no way impedes Joint Movants from conferring openly with their clients. Again, protective agreements restricting access to highly competitively sensitive information to "attorneys' eyes only" are by no means new or novel – counsel for NOPEC and OCC are highly experienced and surely have encountered such restrictions on unfettered access before. Moreover, the Protective Agreement's supposed impediment to "open" attorney-client communication would certainly come as a surprise to the many intervenors that have entered into that agreement with the Companies. Notably, none of them have voiced any similar concerns. Pursuant to the Protective Agreement, "characterizations of the Protected Materials [i.e., the Proprietary Data] that do not disclose the Protected Materials may be used in public." Modified Protective Agreement at ¶12. Thus, there is no showing here that an immediate Commission determination is necessary to prevent undue prejudice. The Request for Certification should be denied accordingly.

V. CONCLUSION

For the foregoing reasons, Joint Movants' Request for Certification should be denied.

Date: December 15, 2014

Respectfully submitted,

/s/ David A. Kutik
James W. Burk (0043808)
Counsel of Record
Carrie M. Dunn (0076952)
FIRSTENERGY SERVICE COMPANY
76 South Main Street
Akron, OH 44308
Telephone: (330) 384-5861
Fax: (330) 384-8375
Email: burkj@firstenergycorp.com
Email: dunn@firstenergycorp.com

David A. Kutik (0006418)
JONES DAY
901 Lakeside Avenue
Cleveland, OH 44114
Telephone: (216) 586-3939
Fax: (216)579-0212
Email: dakutik@jonesday.com

James F. Lang (0059668)
N. Trevor Alexander (0080713)
CALFEE, HALTER & GRISWOLD LLP
The Calfee Building
1405 East Sixth Street
Cleveland, OH 44114
Telephone: (216) 622-8200
Fax: (216) 241-0816
Email: jlang@calfee.com
Email: talexander@calfee.com

ATTORNEYS FOR OHIO EDISON COMPANY, THE CLEVELAND ELECTRIC ILLUMINATING COMPANY, AND THE TOLEDO EDISON COMPANY

CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing has been filed with the Public Utilities Commission of Ohio and has been served upon the following parties via electronic mail on December 15, 2014.

/s/ David A. Kutik
David A. Kutik

cmooney@ohiopartners.org
drinebolt@ohiopartners.org
TDoughtery@theOEC.org
joseph.clark@directenergy.com
ghull@eckertseamans.com
sam@mwncmh.com
fdarr@mwncmh.com
mpritchard@mwncmh.com
mkurtz@BKLlawfirm.com
kboehm@BLKlawfirm.com
jkylercohn@BKLlawfirm.com
larry.sauer@occ.state.oh.us
Kevin.moore@occ.state.oh.us
joliker@igsenergy.com
mswhite@igsenergy.com
myurick@taftlaw.com
Schmidt@sppgrp.com
ricks@ohanet.org
tobrien@bricker.com
stnourse@aep.com
mjsatterwhite@aep.com
yalami@aep.com
callwein@wamenergylaw.com
jfinnigan@edf.org
wttpmlc@aol.com
mkl@bbrslaw.com
gas@bbrslaw.com
ojk@bbrslaw.com
lhawrot@spilmanlaw.com
dwilliamson@spilmanlaw.com
meissnerjoseph@yahoo.com
trhayslaw@gmail.com
lesliekovacik@toledo.oh.gov
Cynthia.brady@exeloncorp.com
David.fein@exeloncorp.com
Christopher.miller@icemiller.com
Gregory.dunn@icemiller.com
Jeremy.grayem@icemiller.com
athompson@taftlaw.com
Marilyn@wflawfirm.com
Blanghenry@city.cleveland.oh.us
hmadorsky@city.cleveland.oh.us
kryan@city.cleveland.oh.us
selisar@mwncmh.com
ccunningham@akronohio.gov
bojko@carpenterlipps.com
Allison@carpenterlipps.com
hussey@carpenterlipps.com
gkrassen@bricker.com
dborchers@bricker.com
asonderman@keglerbrown.com
mfleisher@elpc.org
jscheaf@mcdonaldhopkins.com
mitch.dutton@fpl.com
matt@matthewcoxlaw.com
todonnell@dickinsonwright.conm
amy.spiller@duke-energy.com
Jeanne.kingery@duke-energy.com
Jeffrey.mayes@monitoringanalytics.com
toddm@wamenergylaw.com
sechler@carpenterlipps.com
gpoulos@enernoc.com
mhpetricoff@vorys.com
Thomas.mcnamee@puc.state.oh.us
Ryan.orourke@puc.state.oh.us
sfisk@earthjustice.org
msoules@earthjustice.org
tony.mendoza@sierraclub.org
Lael.campbell@exeloncorp.com
dstinson@bricker.com

EXHIBIT A

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

PROTECTIVE AGREEMENT

This Protective Agreement ("Agreement") is entered into by and between Ohio Edison Company, The Cleveland Electric Illuminating Company and The Toledo Edison Company ("the Companies") and _____ ("Receiving Party") (collectively, "the Parties"). This Agreement is designed to facilitate and expedite the exchange with Receiving Party of information in the discovery process in this proceeding, as this "Proceeding" is defined herein. It reflects agreement between the Companies and Receiving Party as to the manner in which "Protected Materials," as defined herein, are to be treated. This Agreement is not intended to constitute any resolution of the merits concerning the confidentiality of any of the Protected Materials or any resolution of the Companies' obligation to produce (including the manner of production) any requested information or material.

1. The purpose of this Agreement is to permit prompt access to and review of such Protected Materials in a controlled manner that will allow their use for the purposes of this Proceeding while protecting such data from disclosure to non-participants, without a prior ruling by an administrative agency of competent jurisdiction or court of competent jurisdiction regarding whether the information deserves protection.

2. "Proceeding" as used throughout this document means the above-captioned case(s), including any appeals, remands and other cases related thereto.

3.A. "Protected Materials" means documents and information designated under this Agreement as "CONFIDENTIAL" that customarily are treated by the Companies or third parties as sensitive or proprietary, which are not available to the public, and which, if disclosed freely, would subject the Companies or third parties to risk of competitive disadvantage or other business injury, and may include materials meeting the definition of "trade secret" under Ohio law.

B. "Protected Materials" also includes documents and information designated under this Agreement as "COMPETITIVELY SENSITIVE CONFIDENTIAL" that contain highly proprietary or competitively-sensitive information, that, if disclosed to suppliers, competitors or customers, may damage the producing party's competitive position or the competitive position of the third party which created the documents or information. COMPETITIVELY SENSITIVE CONFIDENTIAL DOCUMENTS can include documents or information prepared by the Companies or provided to the Companies by a third-party pursuant to a nondisclosure agreement.

C. "Protected Materials" do not include any information or documents contained in the public files of any state or federal administrative agency or court and do not include documents or information which at, or prior to, commencement of this Proceeding, is or was otherwise in the public domain, or which enters into the public domain except that any disclosure of Protected Materials contrary to the terms of this Agreement or protective order or a similar protective agreement made between the Companies and other persons or entities shall not be deemed to have caused such Protected Materials to have entered the public domain.

D. "Protected Materials" that are in writing shall be conspicuously marked with the appropriate designation, or counsel for the Companies may orally state on the deposition record that a response to a question posed at a deposition is considered Protected Materials.

E. "Protected Materials" includes documents or information that are stored or recorded in the form of electronic or magnetic media (including information, files, databases, or programs stored on any digital or analog machine-readable device, computers, discs, networks or tapes) ("Computerized Material"). The Companies at their discretion may produce Computerized Material in such form. To the extent that Receiving Party reduces Computerized Material to hard copy, Receiving Party shall conspicuously mark such hard copy as confidential.

4. "Fully Authorized Representative" must execute a Non-Disclosure Certificate in the form of Exhibit B (applicable to COMPETITIVELY SENSITIVE CONFIDENTIAL Protected Materials) and shall be limited to the following persons:

A. Receiving Party's outside legal counsel and in-house legal counsel who are actively engaged in the conduct of this Proceeding;

B. Paralegals and other employees who are associated for purposes of this case with the attorneys described in Paragraph 4(A); and

C. An 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.

5. "Limited Authorized Representative" must execute the Non-Disclosure Certificate in the form of Exhibit A (applicable to CONFIDENTIAL Protected Materials) and shall be limited to the following persons:

A. Legal counsel who have made an appearance in this proceeding or are actively engaged in this Proceeding for Receiving Party;

B. Paralegals and other employees who are associated for purposes of this case with an attorney described in Paragraph 5(A);

C. An employee of Receiving Party who is involved in the Proceedings on behalf of Receiving Party;

D. An expert or employee of an expert retained by Receiving Party for the purpose of advising, preparing for or testifying in this Proceeding.

6. Copies of all executed Non-Disclosure Certificates signed by Fully Authorized Representatives and Limited Authorized Representatives in this proceeding shall be provided to counsel for the Companies as soon as possible after the Certificates are executed.

7. Access to Protected Materials designated as "CONFIDENTIAL" is permitted to Fully Authorized Representatives and Limited Authorized Representatives who have executed the appropriate Non-Disclosure Certificate. Notwithstanding other provisions of this Agreement to the contrary, Protected Materials designated as "COMPETITIVELY SENSITIVE CONFIDENTIAL" or with words of similar import will be **strictly** limited to Fully Authorized Representatives. Counsel for Receiving Party will ensure that individuals who are not Fully Authorized Representatives are not permitted to access COMPETITIVELY SENSITIVE CONFIDENTIAL materials. Receiving Party, its Counsel, Fully Authorized Representatives and Limited Authorized Representatives must treat all Protected Materials (no matter how designated), copies thereof, information contained therein, and writings made therefrom (including, without limitation, Protected Materials comprised of portions of transcripts) as proprietary and confidential, and will safeguard such Protected Materials, copies thereof, information contained therein, and writings made therefrom so as to prevent voluntary, inadvertent, or accidental disclosure to any persons other than Receiving Party's counsel and those persons authorized to have access to the Protected Materials as set forth in this Agreement.

8. Nothing in this Agreement precludes the use of any portion of the Protected Materials that becomes part of the public record or enters into the public domain except that any disclosure of Protected Materials contrary to the terms of this Agreement or protective order or a similar protective agreement made between the Companies and other persons or entities shall not be deemed to have caused such Protected Materials to have entered the public domain. Nothing in this Agreement precludes Receiving Party from using any part of the Protected Materials in this Proceeding in a manner not inconsistent with this Agreement, such as by filing Protected Materials under seal.

9. If any Receiving Party counsel, Fully Authorized Representative or Limited Authorized Representative ceases to be engaged in this Proceeding, access to any Protected Materials by such person will be terminated immediately and such person must promptly return Protected Materials in his or her possession to a counsel of Receiving Party who is a Fully Authorized Representative, and if there is no such counsel of Receiving Party who is a Fully Authorized Representative, such person must treat such Protected Materials in the manner set forth in Paragraph 16 hereof as if this Proceeding herein had been concluded. Any person who has signed either form of the foregoing Non-Disclosure Certificates will continue to be bound by the provisions of this Agreement even if no longer so engaged.

10. Receiving Party, its counsel, Fully Authorized Representatives and Limited Authorized Representatives are prohibited from disclosing Protected Materials to another party or that party's authorized representatives, provided however, (i) Receiving Party's counsel may disclose Protected Materials to employees or persons working for or representing the Public Utilities Commission of Ohio in connection with this Proceeding, (ii) for Protected Materials identified as CONFIDENTIAL, Receiving Party's counsel may disclose Protected Materials or writings regarding their contents to any individual or entity that is in possession of said Protected

Materials or to any individual or entity that is bound by a Protective Agreement or Order with respect to the Protected Materials and has signed a Non-Disclosure Certificate applicable to materials designated as CONFIDENTIAL, and (iii) for Protected Materials identified as COMPETITIVELY SENSITIVE CONFIDENTIAL, Receiving Party's counsel may disclose such materials to another party's counsel as long as Receiving Party's Counsel has executed the **appropriate** Non-Disclosure Certificate and the Receiving Party's counsel (a) represents a party that has signed a protective agreement with the Companies and (b) has signed a Non-Disclosure Certificate applicable to materials designated as COMPETITIVELY SENSITIVE CONFIDENTIAL. Protected Materials, designated as "CONFIDENTIAL" or "COMPETITIVELY SENSITIVE CONFIDENTIAL" and provided to Receiving Party by another party or its counsel shall be treated by Receiving Party, its counsel, Fully Authorized Representatives and Limited Authorized Representatives as being provided by the Companies and all terms of this Protective Agreement shall apply to the treatment of such materials.

11. Receiving Party may file Protected Materials under seal in this Proceeding whether or not Receiving Party seeks a ruling that the Protected Materials should be in the public domain. If Receiving Party desires to include, utilize, refer to, or copy any Protected Materials in such a manner, other than in a manner provided for herein, that might require disclosure of such material, then Receiving Party must first give notice (as provided in Paragraph 15) to the Companies, specifically identifying each of the Protected Materials that could be disclosed in the public domain. The Companies will have five (5) business days after service of Receiving Party's notice to file, with an administrative agency of competent jurisdiction or court of competent jurisdiction, a motion and affidavits with respect to each of the identified Protected Materials demonstrating the reasons for maintaining the confidentiality of the Protected Materials. The affidavits for the motion must set forth facts delineating that the documents or

information designated as Protected Materials have been maintained in a confidential manner and the precise nature and justification for the injury that would result from the disclosure of such information. If the Companies do not file such a motion within five (5) business days of Receiving Party's service of the notice, then the Protected Materials will be deemed non-confidential and not subject to this Agreement.

12. The Parties agree to seek *in camera* proceedings by the administrative agency of competent jurisdiction or court of competent jurisdiction for arguments or for the examination of a witness that would disclose Protected Materials. Such *in camera* proceedings will be open only to the Parties, their counsel who are either a signatory to this Agreement or who have executed a Non-Disclosure Certification prior to any access, any other person who would otherwise be permitted to have access to the Protected Materials under the terms of Paragraph 7, and others authorized by the administrative agency or court to be present; however, characterizations of the Protected Materials that do not disclose the Protected Materials may be used in public.

13. Any portions of the Protected Materials that the administrative agency of competent jurisdiction or court of competent jurisdiction has deemed to be protected and that is filed in this Proceeding will be filed in sealed confidential envelopes or other appropriate containers sealed from the public record.

14. It is expressly understood that upon a filing made in accordance with Paragraph 11 of this Agreement, the burden will be upon the Companies to show that any materials labeled as Protected Materials pursuant to this Agreement are confidential and deserving of protection from disclosure.

15. All notices referenced in Paragraph 11 must be served by the Parties on each other by one of the following methods: (1) sending the notice to such counsel of record herein via e-

mail; (2) hand-delivering the notice to such counsel in person at any location; or (3) sending the notice by an overnight delivery service to such counsel.

16. Once Receiving Party has complied with its records retention schedule(s) pertaining to the retention of the Protected Materials and Receiving Party determines that it has no further legal obligation to retain the Protected Materials and this Proceeding (including all appeals and remands) is concluded, Receiving Party must return or dispose of all copies of the Protected Materials unless the Protected Materials have been released to the public domain or filed with a state or federal administrative agency or court under seal. Receiving Party may keep one copy of each document designated as Protected Material that was filed under seal and one copy of all testimony, cross-examination, transcripts, briefs and work product pertaining to such information and will maintain that copy as provided in this Agreement.

17. By entering into this Protective Agreement, Receiving Party does not waive any right that it may have to dispute the Companies' determination regarding any material identified as confidential by the Companies and to pursue those remedies that may be available to Receiving Party before an administrative agency or court of competent jurisdiction. Nothing in this Agreement precludes Receiving Party from filing a motion to compel.

18. By entering into this Protective Agreement, the Companies do not waive any right it may have to object to the discovery of confidential material on grounds other than confidentiality and to pursue those remedies that may be available to the Companies before the administrative agency of competent jurisdiction or court of competent jurisdiction.

19. Inadvertent production of any document or information during discovery without a designation of "CONFIDENTIAL" or "COMPETITIVELY SENSITIVE CONFIDENTIAL" will not be deemed to waive the Companies' claim to its confidential nature or estop the Companies from designating the document or information at a later date. Disclosure of the

document or information by Receiving Party prior to such later designation shall not be deemed a violation of this Agreement and Receiving Party bears no responsibility or liability for any such disclosure. Receiving Party does not waive its right to challenge the Companies' delayed claim or designation of the inadvertent production of any document or information as "CONFIDENTIAL" or "COMPETITIVELY SENSITIVE CONFIDENTIAL."

20. This Protective Agreement shall become effective upon the date first above written, and shall remain in effect until terminated in writing by either party or three (3) years from the date first set forth above, whichever occurs earlier. Notwithstanding any such termination, the rights and obligations with respect to the disclosure of Protected Materials as defined hereinabove shall survive the termination of this Protective Agreement for a period of three (3) years following the later of the Commission's final Order or Entry on Rehearing in this proceeding.

21. To the extent of any conflicts between this Agreement and any previously signed confidentiality or nondisclosure agreement related to the disclosure of information associated with the Companies' fourth electric security plan, this Agreement prevails.

22. This Agreement represents the entire understanding of the Parties with respect to Protected Materials and supersedes all other understandings, written or oral, with respect to the Protected Materials. No amendment, modification, or waiver of any provision of this Agreement is valid, unless in writing signed by both Parties.

23. This Agreement will be governed by and construed in accordance with the laws of the State of Ohio.

Ohio Edison Company, The Cleveland Electric Illuminating Company and The Toledo Edison Company

BY:

_____
Counsel

_____
Date

_____

BY:

_____
Counsel

_____
Date

Exhibit A

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

NON-DISCLOSURE CERTIFICATE FOR
CONFIDENTIAL PROTECTED MATERIALS

I certify my understanding that Protected Materials may be provided to me pursuant to the terms and restrictions of the Protective Agreement, last executed _____ 2014, and certify that I have been given a copy of and have read the Protective Agreement, and that I agree to be bound by it. I understand that the contents of Protected Materials, and any writings, memoranda, or any other form of information regarding or derived from protected materials will not be disclosed to anyone other than in accordance with the Protective Agreement and will be used only for the purposes of this Proceeding as defined in Paragraph 2 of the Protective Agreement.

Name: _____

Company: _____
Address: _____
Telephone: _____

Date: _____

Exhibit B

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

NON-DISCLOSURE CERTIFICATE FOR
COMPETITIVELY SENSITIVE CONFIDENTIAL PROTECTED MATERIALS

I certify my understanding that access to COMPETITIVELY SENSITIVE CONFIDENTIAL Protected Materials may be provided to me pursuant to the terms and restrictions of the Protective Agreement, last executed _____ 2014, and certify that I have been given a copy of and have read the Protective Agreement, and that I agree to be bound by it. I understand that the contents of Protected Materials, and any writings, memoranda, or any other form of information regarding or derived from protected materials will not be disclosed to anyone other than in accordance with the Protective Agreement and will be used only for the purposes of this Proceeding as defined in Paragraph 2 of the Protective Agreement.

Name: _____

Company: _____
Address: _____
Telephone: _____

Date: _____

EXHIBIT B

Subject: 14-1297-- Revised Protective Agreement for OCC

From: Martin T Harvey 12/04/2014 11:01 AM
To: Sauer, Larry
Cc: cdunn, David A. Kutik

Larry,

On behalf of Carrie Dunn, attached please find a revised protective agreement for OCC. I have also attached a redline that compares the revised version with the Confidential-only version that OCC has already executed.

Thanks,

Marty

Martin Harvey
Jones Day
Phone: (216) 586-7026
Email: mtharvey@jonesday.com

- 14-1297 Revised Protective Agreement for OCC.pdf

- Change-Pro Redline - CLI-202330320-v1 and CLI-202332157-v1.docx

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

Summary: Memorandum Contra NOPEC and OCC Request for Certification of an Interlocutory Appeal electronically filed by MR. DAVID A KUTIK on behalf of Ohio Edison Company and The Cleveland Electric Illuminating Company and The Toledo Edison Company