

In the Matter of the Review of The)
Alternative Energy Rider Contained in)
The Tariffs of Ohio Edison Company, The) Case No. 11-5201-EL-RDR
Cleveland Electric Illuminating Company)
and The Toledo Edison Company.)

To the extent the PUCO intends to grant an extension of FirstEnergy's protective order, it should be limited in nature to recognize the possibility that the Supreme Court of Ohio may rule on this issue during the additional 18-months requested by the Utility.

II. STATEMENT OF FACTS

On September 20, 2011, the PUCO ordered an audit to review FirstEnergy's "procurement of renewable energy credits."¹ Two separate audits were conducted: (1) a financial audit, and (2) a management/performance audit. Exeter Associates, Inc. ("Exeter") conducted the management audit, and a Final Report was filed under seal with the PUCO on August 15, 2012.² A public copy of the Final Report, redacting supplier identities and most supplier pricing information ("REC bidding information") was also filed with the PUCO. Nevertheless, certain pricing information and a supplier's identity were disclosed in the publicly filed document. FirstEnergy allowed this information to remain publicly available for 49 days before the Utility eventually filed a Motion for Protective Order claiming that all supplier identities and pricing information was a trade secret.³

Over OCC's objections, the Attorney Examiner granted, in part, FirstEnergy's Motion for Protective Order. In doing so, the Attorney Examiner found that the redacted portions of the Final Report contained trade secret information.⁴ In its August 7, 2013 Opinion and Order, the PUCO adopted but slightly modified the earlier protective order. In doing so, the PUCO substantively altered the Attorney Examiner's ruling thereby

¹ Opinion and Order at 2 (Aug. 7, 2013).

² Id. at 3.

³ Id. at 9.

⁴ November 20, 2012 Transcript, at pp. 17-22.

permitting “generic disclosure of FES as a successful bidder in the competitive solicitations.”⁵

FirstEnergy appealed the merits of the case to the Supreme Court of Ohio, and both OCC and the Environmental Law and Policy Center (“ELPC”) filed cross-appeals with the Court. In their cross-appeals, OCC and ELPC have appealed the PUCO’s decision to grant trade secret protection over the REC bidding information. The appeal and corresponding cross-appeals are currently pending before the Supreme Court of Ohio.

III. LAW AND ARGUMENT

- A. The PUCO should deny FirstEnergy’s motion for renewal of its protective order because the REC bidding information is not trade secret under the standards set forth in R.C. 1333.61(D) and is information that should be made available to customers.**

In response to FirstEnergy’s arguments that the renewables bidding information is trade secret information entitled to confidential treatment,⁶ OCC reiterates that the information is not economically valuable. Nor did the Utility take sufficient efforts to safeguard the information as required by R.C. 1333.61(D). Therefore, OCC hereby adopts and incorporates by reference the arguments it has made in the following documents:

- Office of the Ohio Consumers’ Counsel’s Memorandum Contra FirstEnergy’s Motion for Protective Order (October 18, 2012);

⁵ Opinion and Order at 12.

⁶ FirstEnergy Motion for Renewal of Protective Order, at pp. 10-18 (Dec. 23, 2014).

- Memorandum Contra FirstEnergy's Motion for Protective Order by The Office of the Ohio Consumers' Counsel (January 15, 2013);
- Memorandum Contra FirstEnergy's Motion for Protective Order by The Office of the Ohio Consumers' Counsel (February 7, 2013);
- Memorandum Contra FirstEnergy's Motion for Protective Order by The Office of the Ohio Consumers' Counsel (February 25, 2013);
- Initial Brief by The Office of the Ohio Consumers' Counsel, at pp. 58-83, 86-87 (April 15, 2013);
- Application for Rehearing by The Office of the Ohio Consumers' Counsel, at pp. 44-54, 56-57 (August 6, 2013).

The additional cases to which FirstEnergy cites where competitive retail electric services ("CRES") suppliers sought trade secret protection over bidding information,⁷ are distinguishable from this case. This is because no such protection has been sought by any of the CRES suppliers that submitted bids for the RECs at issue in this case. Nor did FirstEnergy file its motion for protection contemporaneously with the disclosure of the information like DPL and Dominion.⁸ Instead, FirstEnergy chose to wait 49 days after the Exeter Audit Report was filed with the PUCO before filing its motion for protection. And unlike the information at issue in the *DPL* and *Dominion* cases, as mentioned in the numerous pleadings listed above, the REC bidding information at issue in this case is no longer current or relevant in today's REC market. That bidding information is now

⁷ See, *Id.*, at pp. 11-12, citing *In the matter of DPL Energy Resources, Inc.'s Annual Alternative Energy Portfolio Status Report*, Case No. 12-1205-EL-ACP, 2013 Ohio PUC LEXIS 265 Finding and Order (November 13, 2013); *In the Matter of the Alternative Energy Portfolio Status Report of Dominion Retail, Inc.*, Case No. 12-1223-EL-ACP, 2013 Ohio PUC LEXIS 251, Finding and Order (November 13, 2013).

⁸ *In the Matter of DPL Energy Resources, Inc.'s Annual Alternative Energy Portfolio Status Report*, Case No. 12-1205-EL-ACP, 2013 Ohio PUC LEXIS 265, Finding and Order at 2; *In the Matter of the Alternative Energy Portfolio Status Report of Dominion Retail, Inc.*, Case No. 12-1223-EL-ACP, 2013 Ohio PUC LEXIS 251, Finding and Order at 2.

nearly four to five years old. For these reasons, FirstEnergy failed to meet its high burden of establishing that the REC bidding information is entitled to confidential treatment.

B. R.C. 4901.16 would not prohibit public disclosure of docketed information that is no longer trade secret.

FirstEnergy argues that even if the information is no longer trade secret, it should not be publicly divulged under R.C. 4901.16.⁹ FirstEnergy misinterprets R.C. 4901.16, which only applies to information relating to the business of a *public utility*. It does not prevent disclosure of information of other parties.¹⁰ The bidding information at issue in this case is not that of FirstEnergy – it belongs to the entities that submitted bids. Not only does the information of those parties fall outside the purview of R.C. 4901.16, but, as previously mentioned, those parties have never sought protection of the REC bidding information.

The cases to which FirstEnergy cites to support this argument are inapposite. FirstEnergy cites to *In the Matter of the Investigation of The Cincinnati Gas & Electric Company Relative to Its Compliance With the Natural Gas Pipeline Safety Standards and Related Matters*, Case No. 00-681-GA-GPS, 2004 Ohio PUC LEXIS 271. But the PUCO acknowledging that the case involved “a unique set of circumstances.”¹¹ And the PUCO made a limited ruling because the PUCO was “not willing to accept Cincinnati Gas & Electric’s sweeping claim that Section 4901.16, Revised Code, precludes disclosure of all

⁹ FirstEnergy Motion for Renewal of Protective Order at 9-10.

¹⁰ See, *In the Matter of the Application for Establishment of a Reasonable Arrangement between Eramet Marietta, Inc. and Columbus Southern Power Company*, Case No. 09-516-EL-AEC, at 8 (Mar. 3, 2011).

¹¹ *In the Matter of the Investigation of The Cincinnati Gas & Electric Company Relative to Its Compliance With the Natural Gas Pipeline Safety Standards and Related Matters*, Case No. 00-681-GA-GPS, 2004 Ohio PUC LEXIS 271, Entry on Rehearing at 5 (July 28, 2004).

utility business information that is informally acquired by the Commission and staff.”¹² Furthermore, in a subsequent entry that the PUCO issued in that same case the Commission found that “[t]here is a distinction between staff-acquired information and Commission-ordered documentation filed with the Docketing Division . . . Section 4901.16, Revised Code, does not relate to the latter.”¹³ Unlike the information that Cincinnati Gas & Electric voluntarily shared with the PUCO, the Exeter Audit Report was filed with the docketing division per the direction of the PUCO.¹⁴ Therefore, to the extent that the information does not constitute trade secret,¹⁵ it should not be entitled to protection under R.C. 4901.16. Furthermore, like the information at issue in this matter, the PUCO has found that an argument based upon 4901.16 is moot when the information had already been public released.¹⁶

FirstEnergy also cites to *In the Matter of the Commission's Investigation Into the Adequacy and Availability of Electric Power for the Summer Months of 2001 from Ohio's Investor-Owned Electric Utility Companies*, Case No. 01-985-EL-COI, 2001 Ohio PUC LEXIS 179 for the proposition that “Section 4901.16 requires Staff to maintain the confidentiality of proprietary information acquired from a utility during the course of a Commission-sponsored investigation.”¹⁷ Like the information at issue in the *Cincinnati*

¹² Id.

¹³ *In the Matter of the Investigation of The Cincinnati Gas & Electric Company Relative to Its Compliance With the Natural Gas Pipeline Safety Standards and Related Matters*, Case No. 00-681-GA-GPS, 2005 Ohio PUC LEXIS 104, Entry at 5 (Mar. 2, 2005).

¹⁴ Case No. 11-5201-EL-RDR, Entry, RFP at p. 5 (Jan. 18, 2012).

¹⁵ OCC maintains that the information contained in the Final Exeter Audit Report does not constitute trade secret. *See supra*, Section III (A).

¹⁶ *In the Matter of the Application for Establishment of a Reasonable Arrangement Between Eramet Marietta, Inc. and Columbus Southern Power Company*, Case No. 09-516-EL-AEC, 2011 Ohio PUC LEXIS 288, Entry at 8 (Mar. 3, 2011).

¹⁷ FirstEnergy Motion for Renewal of Protective Order at 9.

Gas & Electric case, however, the information at issue in the 2001 commission ordered investigation was not filed in the public docket. Rather, the parties were required to submit their responses to the PUCO staff only.¹⁸ Moreover, with regard to this proceeding, there is no longer a Commission-sponsored investigation. In fact, the Commission-sponsored investigation was completed the day that the final Exeter Audit Report was filed with the PUCO on August 15, 2012. More importantly, the information that FirstEnergy seeks to protect is not proprietary.¹⁹

C. Alternatively, if the PUCO grants FirstEnergy's motion for renewal of its protective order, it should limit its ruling to recognize that the Supreme Court of Ohio may rule on this issue during the additional 18-month period.

As previously mentioned, multiple parties have appealed this Commission's ruling on the confidentiality of the renewables bidding information. OCC's Notice of Cross-Appeal stated in pertinent part as follows:

- C. The PUCO acted unlawfully and unreasonably when it prevented the public disclosure of information relating to FirstEnergy's imprudent purchases of in-state all renewable energy credits.
- D. By improperly applying R.C. 1331.61(D) and violating R.C. 4901.13, R.C. 4905.07 and Ohio Adm. Code 4901-1-24(D)(1), the PUCO unlawfully granted FirstEnergy's motions for protective orders, preventing disclosure of public information relating to the identity of bidders from which FirstEnergy purchased in-state all renewal energy credits and the prices paid for those renewable energy credits.

A similar notice of appeal was filed by the ELPC.

¹⁸ *In the Matter of the Commission's Investigation Into the Adequacy and Availability of Electric Power for the Summer Months of 2001 from Ohio's Investor-Owned Electric Utility Companies*, Case No. 01-985-EL-COI, 2001 Ohio PUC LEXIS 179, Entry at 3 (May 3, 2001).

¹⁹ *See supra*, Section III(A).

As FirstEnergy points out, the Supreme Court of Ohio “will decide whether the Commission properly protected the documents as trade secrets after briefing and oral argument.”²⁰ But FirstEnergy requests extended protection for 18 months without any reference to the possibility of the Court overruling the PUCO’s Opinion and Order in this matter. If the PUCO is inclined to grant FirstEnergy’s motion, it should do so with the caveat that the protective order expires with any Supreme Court ruling to the contrary.

The PUCO could also refrain from ruling on FirstEnergy’s Motion for Renewal of Protective Order. By filing the Motion, FirstEnergy has sufficiently preserved the right to continued protection while the issue is on appeal. Ohio Adm. Rule 4901-1-24 mandates that information filed under seal will be shielded from public disclosure while a motion to protect the confidentiality of information is pending.²¹ FirstEnergy will suffer no irreparable harm if this Commission refuses to rule on the Motion until the Supreme Court rules in this matter.

IV. CONCLUSION

The PUCO should deny FirstEnergy’s Motion for Renewal of Protective Order because the information for which the Utility seeks confidential treatment does not meet the strict standards set forth in R.C. 1333.61(D). Alternatively, the PUCO should ensure that any protective order it issues expires with any contrary Supreme Court ruling.

²⁰ S. Ct. Case No. 2013-2026, Entry at 1 (Sept. 3, 2014); FirstEnergy Motion for Renewal of Protective Order at 7.

²¹ Ohio Adm. Code 4901-1-24 (E).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing *Memorandum Contra* was served on the persons listed below via electronic mail this 7th day of January, 2015.

/s/ Michael J. Schuler

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Summary: Memorandum Memorandum Contra FirstEnergy's Motion for Renewal of Protective Order by the Office of the Ohio Consumers' Counsel electronically filed by Patti Mallarnee on behalf of Schuler, Michael Mr.