

**BEFORE  
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Alternative Energy Portfolio Status Report for 2009 of Direct Energy Business, LLC.	)	Case No. 10-497-EL-ACP
	)	
In the Matter of the Alternative Energy Portfolio Status Report for 2010 of Direct Energy Business, LLC.	)	Case No. 11-2469-EL-ACP
	)	
In the Matter of the Alternative Energy Portfolio Status Report for 2011 of Direct Energy Business, LLC.	)	Case No. 12-1232-EL-ACP
	)	
In the Matter of the Alternative Energy Portfolio Status Report for 2012 of Direct Energy Business, LLC.	)	Case No. 13-890-EL-ACP
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**APPLICATION FOR REHEARING, MOTION FOR PROTECTIVE ORDER, AND  
MEMORANDUM IN SUPPORT OF DIRECT ENERGY BUSINESS, LLC**

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Pursuant to Section 4903.10, Revised Code, and Rule 4901:1-35 and 4901-1-24, Ohio Administrative Code, Direct Energy Business, LLC (“Direct Energy”) respectfully files an Application for Rehearing in this matter in conjunction with a Motion for Protective Order, as directed in the April 2, 2015 Finding and Order in this case. Specifically, Direct Energy alleges the April 2, 2015 Finding and Order is unlawful and unreasonable in the following respects:

1. The Finding and Order is unlawful inasmuch as it fails to protect Direct Energy’s confidential and proprietary projected data [Sections 5(a), 5(b), and 5(c)], which includes the ten (10) year forecast of solar and non-solar renewable energy credits (“RECs”) with projected sales data, supply portfolio projections, and the methodology used to evaluate compliance.

2. The Finding and Order is unreasonable inasmuch as it puts Direct Energy at a competitive disadvantage to the market.

WHEREFORE, Direct Energy respectfully requests that the Public Utilities Commission of Ohio (“Commission”) grant its Application for Rehearing in this matter and modify its Finding and Order in the manner suggested by Direct Energy. Direct Energy also requests the Commission grant its Motion for Protective Treatment of the projected data in the manner requested by Direct Energy in the memorandum in support.

Respectfully Submitted,

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## MEMORANDUM IN SUPPORT

On April 2, 2015, the Commission issued its Finding and Order in this docket accepting DEB's 2009, 2010, 2011, and 2012 alternative energy portfolio standard ("AEPS") compliance year filings, finding DEB complied with all its AEPS obligations for 2009 through 2012. Additionally, the Commission denied DEB's request for protective treatment of its current or historical sales data as well as its projected data filed in the respective AEPS compliance year filings. The Commission explained its precedent declined to protect current and historical data and reasoned that the projected data had already been protected for 18 months from filing. However, the Commission gave Direct Energy 30 days to renew its request for protective treatment of historical data but noted the Docketing Division would release the information if Direct Energy did not file a motion within the 30 days.<sup>1</sup>

Direct Energy acknowledges the Commission's precedent related to current and historical data and does not seek rehearing on that determination. Direct Energy respectfully requests rehearing only for the Commission's denial of the projected data. Direct Energy did not file projected data with its 2011 compliance year filing (Case No. 12-1232) so there is no projected data to protect from that filing. Thus, Direct Energy's Application for Rehearing only relates to its filings in Case Nos. 10-497, 11-2469, and 13-890.

The Commission should reverse its Finding and Order inasmuch as it is contrary to the letter and spirit of the Ohio Revised Code. Direct Energy requests at a minimum that protective treatment be granted for two (2) year period, pursuant to 4901-1-24(F), Ohio Administrative Code, for the 2009, 2010, and 2012 compliance year projected data. Alternatively, the Commission should also consider granting six (6) protective treatment for all projected data

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<sup>1</sup> Direct Energy believes the Commission meant "projected" instead of "historical" as it relates to the opportunity to renew a request for protective treatment.

[Sections 5(a), 5(b), and 5(c)] for all CRES providers, similar to the six (6) year protective treatment for financial data in suppliers' certification filings before the Commission.

- 1. The Finding and Order is unlawful inasmuch as it fails to protect DEB's projected data, including the ten year forecast of solar and non-solar renewable energy credits ("RECs") which also contains projected sales data, supply portfolio projections, and the methodology used to evaluate compliance.**

Rule 4901-1-24(D) of the Ohio Administrative Code provides that the Commission or certain designated employees may issue an order which is necessary to protect the confidentiality of information contained in documents filed with the Commission's Docketing Division to the extent that state or federal law prohibits the release of the information and where non-disclosure of the information is not inconsistent with the purposes of Title 49 of the Revised Code. State law recognizes the need to protect certain types of information which are the subject of this motion. The non-disclosure of the information will not impair the purposes of Title 49. The Commission and its Staff have full access to the information in order to fulfill its statutory obligations. No purpose of Title 49 would be served by the public disclosure of the information.

The need to protect the designated information from public disclosure is clear, and there is compelling legal authority supporting the requested protective order. While the Commission has often expressed its preference for open proceedings, the Commission also long ago recognized its statutory obligations with regard to trade secrets:

The Commission is of the opinion that the "public records" statute must also be read in pari materia with Section 1333.31, Revised Code ("trade secrets" statute). The latter statute must be interpreted as evincing the recognition, on the part of the General Assembly, of the value of trade secret information.

In re: General Telephone Co., Case No. 81-383-TP-AIR (Entry, February 17, 1982.) Likewise, the Commission has facilitated the protection of trade secrets in its rules (O.A.C. § 4901-1-24(A)(7)).

The definition of a “trade secret” is set forth in the Uniform Trade Secrets Act:

“Trade secret” means information, including the whole or any portion or phase of any scientific or technical information, design, process, procedure, formula, pattern, compilation, program, device, method, technique, or improvement, or any business information or plans, financial information or listing of names, addresses, or telephone numbers, 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). This definition clearly reflects the state policy favoring the protection of trade secrets such as the projections which are the subject of this Application for Rehearing.

In State ex rel The Plain Dealer the Ohio Dept. of Ins. (1997), 80 Ohio St. 3d 513, the Ohio Supreme Court adopted a six factor test to analyze whether information is a trade secret under the statute:

- (1) The extent to which the information is known outside the business,
- (2) the extent to which it is known to those inside the business, i.e., by the employees,
- (3) the precautions taken by the holder of the trade secret to guard the secrecy of the information,
- (4) the savings effected and the value to the holder in having the information as against competitors,
- (5) the amount of effort or money expended in obtaining and developing the information, and
- (6) the amount of time and expense it would take for others to acquire and duplicate the information.

Id. at 524-525 (quoting Pyromatics, Inc. v. Petruziello, 7 Ohio App. 3d 131, 134-135 (Cuyahoga County 1983)).

After applying these factors to the information sought to be protected, it is clear that a protective order should be granted for the projected information in the AEPS reports for calendar years 2009, 2010, and 2012 inasmuch as they are trade secrets. The projected data in subsection

5(a) is information that is a compilation of Direct Energy's projected sales and REC obligations for ten (10) years. Further, subsection 5(b) (entitled Supply Portfolio Projection) describes the process, patterns, and methods that Direct Energy intends to use to comply with the AEPS requirements. Subsection 5(c) (entitled Methodology Used to Evaluate Compliance) discusses the method that Direct Energy uses to estimate its projected data. Moreover, all three (3) subsections are business information or plans as well as financial information. Direct Energy satisfies the requirements of Section 1333.61(D), Revised Code.

The projected data also contain information of great actual independent economic value to Direct Energy's competitors (e.g. other persons who can obtain economic value from its disclosure or use). Direct Energy protects this information from public disclosure to prevent its competitors from knowing what it is doing in the marketplace. Knowing what your competitors are doing in the market would be an important advantage to any market participant. Release of projected data for any CRES provider would provide its competitors a direct view into the CRES provider's beliefs as it relates to its projected growth, or conversely, its expected contraction. In this case that CRES provider is Direct Energy. This information would provide Direct Energy's competitors with information about how fast Direct Energy intends to grow (or shrink) its business as well as its sourcing plans for RECs in the next ten (10) years. Direct Energy's competitors could easily use this information to benchmark their own compliance efforts or at least to understand their own projections, plans, and business health in relation to other players in the market. Finally, as to this point, Direct Energy retains positive value in the information not being known inasmuch as other competitors (and perhaps even non-competitors) could use the protected details in a biased manner that may not tell the entire story towards the end of harming Direct Energy or distracting Direct Energy from its core businesses.

Additionally, the projected data is not generally known in the market and is not readily ascertainable by proper means. Direct Energy does not publish or otherwise make the information public. The information is also not broadcast or widely known internally among Direct Energy employees and is largely held by a small subset of employees who work on Direct Energy commercial efforts. The information in the proprietary details is not generally known in the market and is not readily ascertainable using proper means. Direct Energy satisfies the requirements of Section 1333.61(D)(1), Revised Code.

As demonstrated in the preceding paragraph, the proprietary details are the subject of efforts that are reasonable under the circumstances to maintain its secrecy. The proprietary details contain a great deal of information precisely related process, patterns, and methods, business information, and plans of Direct Energy. It would be entirely reasonable for the Commission in these circumstances to protect this information in the same manner that Direct Energy protects the proprietary details in the projected data. Direct Energy satisfies the requirements of Section 1333.61(D)(2), Revised Code.

Further, Direct Energy satisfies every prong of the test set forth in State ex rel The Plain Dealer the Ohio Dept. of Ins. As described above, the projected data is not known outside of the business (except to the extent it is provided on a confidential basis to a governmental entity in contexts such as this case) and is readily available to only a subset of employees inside the business. Direct Energy's protection of this information, consciously keeping it out of the public domain while limiting access internally, demonstrates the precautions taken by Direct Energy to guard the secrecy of the information. Direct Energy also employs various enterprise software and other mechanisms to protect the integrity of Direct Energy's computer systems from cyber theft, which would include the projected data. Moreover, as demonstrated above, the proprietary

details have significant value to Direct Energy in its efforts to comply with the AEPS and would be of value to its competitors to know what Direct Energy is doing in the RECs marketplace. Direct Energy expends money every year in employee salaries, benefits, overhead and all other necessary costs to employ people to create, maintain, and execute purchasing and trading of RECs to meet its Ohio (and other states') AEPS mandates. Direct Energy believes it would take a significant effort to acquire and duplicate the proprietary details. Release of this information would essentially do the work for a competitor to acquire and duplicate all of the work Direct Energy undertook to put the projected data together.

Courts of other jurisdictions have held that not only does a public utilities commission have the authority to protect the trade secrets of the companies subject to its jurisdiction, the trade secrets statute creates a duty to protect DEB. New York Tel. Co. v. Pub. Serv. Comm. N.Y., 56 N.Y. 2d 213 (1982). Indeed, for the Commission to do otherwise would be to negate the protections the Ohio General Assembly has granted to all businesses, including public utilities, through the Uniform Trade Secrets Act. This Commission has previously carried out its obligations in this regard in numerous proceedings.

The projected data are trade secrets and should be protected from public disclosure. Direct Energy requests at a minimum that protective treatment be granted for two (2) year period, pursuant to 4901-1-24(F), Ohio Administrative Code, for the 2009, 2010, and 2012 compliance year projected data. Direct Energy has demonstrated at a minimum that it meets the statutory and case law criteria for protection of the information for another 24 months.



**2. The Finding and Order is unreasonable inasmuch as it puts Direct Energy at a competitive disadvantage to the market.**

The Commission should also grant Direct Energy’s Application for Rehearing for the policy and practical reasons as outlined below. Primarily, as demonstrated below, release of Direct Energy’s projected financial data without a similar release of other CRES providers’ similar data would unfairly harm Direct Energy. Direct Energy understands the Commission may want to put projected data into the public domain quicker than it has in the past, and that it is difficult for the Docketing Division to keep up with when protective treatment lapses on confidential materials, but Direct Energy does not want to be the guinea pig inasmuch as it will hurt Direct Energy as compared to its fellow competitors.

First, release of the 2012 data (in the 2013-0890) filing would be unfair. The chart below demonstrates that the Commission this year already granted 24 month protective treatment of projected data filed in 2013 to two (2) CRES providers. Additionally, there are still some 2013 filings that the Commission has not yet ruled on protection of the projected data (where protection of at least one section of projected data was sought by the CRES provider). The chart below captures the Commission’s decisions and demonstrates the Commission’s Finding and Order treats Direct Energy differently than other CRES providers’ 2013 filings.<sup>2</sup>

Case No.	Date of PUCO Order	Decision related to projected data (protective treatment requested)
13-919	None	None
13-905	None	None
13-882	None	None
13-741	None	None
13-732	None	None
13-1100	Jan 14, 2015	Granted for two years from date of Finding and Order
13-1017	Jan 7, 2015	Granted for two years from date of Finding and Order
13-930	Aug 6, 2014	Granted for two years from date of Finding and Order

<sup>2</sup> Any missing cases not cited are an accidental oversight. Direct Energy searched for EL-ACP cases filed from January 1 of 2014 through May 1, 2014 (since the filings are due on April 15). Direct Energy believes all of the CRES providers were treated similarly (except where noted).

13-927	Aug 6, 2014	Granted for two years from date of Finding and Order
13-926	Aug 6, 2014	Granted for two years from date of Finding and Order
13-912	July 30, 2014	Granted for two years from date of Finding and Order
13-906	July 30, 2014	Granted for two years from date of Finding and Order
13-891	July 30, 2014	Granted for two years from date of Finding and Order
13-889	July 30, 2014	Granted for two years from date of Finding and Order
13-884	Dec 18, 2013	Granted for 18 months from date of the Finding and Order
13-881	Dec 18, 2013	Granted for 18 months from date of the Finding and Order
13-794	July 30, 2014	Granted for two years from date of Finding and Order
13-751	Dec 18, 2013	Granted for 18 months from date of the Finding and Order
13-735	July 30, 2014	Granted for two years from date of Finding and Order
13-658	July 30, 2014	Granted for two years from date of Finding and Order
13-657	July 9, 2014	Granted for 18 months from date of the Finding and Order
13-540	July 30, 2014	Granted for two years from date of Finding and Order

The same fairness concerns exist for the 2010 compliance year filings made in 2011 (Case No. 2011-2469 in the case of Direct Energy). CRES providers that sought protective treatment of their projected data had that information protected for a period of 18 months.<sup>3</sup> While that 18 month period passed a while ago, and Direct Energy acknowledges its projected data has been protected up to this time, none of the other CRES providers' projected data from the 2011 filings has been released even though none of those CRES providers filed for extension of protective treatment. While docketing may not release Direct Energy's confidential information immediately, the Commission's Finding and Order puts release of that information at jeopardy. It would be unfair to put Direct Energy in that position without similar release of other CRES providers' projected data.

Case No.	Date of PUCO Order or Entry	Timeframe projected data protected	Request Renewal of Protective Treatment?	Projected data released by docketing
11-2492	May 23, 2012	Granted for 18 months from date of Order	No	No
11-2462	Aug 9, 2012	Granted for 18 months	No	No

<sup>3</sup> Any missing cases not cited are an accidental oversight. Direct Energy searched for EL-ACP cases filed from January 1 of 2011 through May 1, 2011 (since the filings are due on April 15). Direct Energy believes all of the CRES providers were treated similarly (except where noted).

		from date of Entry		
11-2457	Aug 29, 2012	Granted for 18 months from date of Order	No	No
11-2453	May 22, 2013	Granted for 18 months from date of Entry	No	No
11-2449	Aug 6, 2012	Granted for 18 months from date of Entry <sup>4</sup>	No	No
11-2448	Aug 30, 2012	Granted for 18 months from date of Entry	No	No
11-2440	May 26, 2011	Granted for 18 months from date of Entry	No	No
11-2363	Nov 2, 2012	Granted for 18 months from date of Entry	No	No
11-1345	Aug 7, 2012	Granted for 18 months from date of Entry	No	No

Finally, the same fairness concerns exist as it relates to Direct Energy's 2009 compliance year filing (Case No. 2010-497).<sup>5</sup> Although Direct Energy concedes it did not file a request to renew protective treatment, none of the other CRES providers have done so either. Thus it would be unfair to release Direct Energy's information without similarly releasing the other CRES providers' projected data too.

Case No.	Date of PUCO Order or Entry	Timeframe projected data protected	Request Renewal of Protective Treatment?	Projected data released by docketing
10-507	Jan 5, 2011	Granted for 18 months from date of Order	No	No
10-497	Jan 5, 2011	Granted for 18 months from date of Entry	No	No
10-495	Aug 10, 2010	Granted for 18 months from date of Order	No	No
10-468	Jan 5, 2011	Granted for 18 months from date of Entry	No	No
10-462	Aug 4, 2010	Granted for 18 months from date of Entry	No	No

<sup>4</sup> The Attorney Examiner denied protective treatment of 5(b) and 5(c) information.

<sup>5</sup> Any missing cases not cited are an accidental oversight. Direct Energy searched for EL-ACP cases filed from January 1 of 2010 through May 1, 2010 (since the filings are due on April 15). Direct Energy believes all of the CRES providers were treated similarly (except where noted).

For these fairness reasons, Direct Energy requests the Commission grant it protective treatment for another 24 month period.

**3. The Commission should consider establishing a six (6) year automatic protective treatment of projected data for AEPS filings.**

Direct Energy also suggests the Commission consider granting a blanket six (6) year protection for all projected data filed with AEPS reports. A six (6) year protection period (from the date of filing) properly balances the need to protect confidential, trade secret data of CRES providers like Direct Energy while timely affording the public information related to market participants' filings. Further, protecting projected data six (6) years from its filing would be consistent with the Commission's recently adopted rule that automatically protects from disclosure confidential financial information filed with license certification and recertification applications for a period of six (6) years. *See* Rules 4901:1-27-08 and 4901:1-24-08, Ohio Administrative Code. While Direct Energy acknowledges the Commission would be implementing such a suggestion before a rulemaking to formalize this practice, the Commission has been consistent in its protection of projected data and this would provide the fairness, certainty, and consistency the market needs as it relates to protection of that trade secret information. Should the Commission choose to go this route it could issue an Entry similar to the one it issued on October 16, 2014 in all of the EL-CRS and GA-CRS dockets.

## CONCLUSION

Direct Energy respectfully requests the Commission grant this Application for Rehearing and Motion for Protective Order and protect its trade secret projected data for another 24 months. Alternatively, the Commission should consider establishing a six (6) protective treatment period for all projected data in Section 5(a), 5(b), and 5(c) of the AEPS reports for all CRES providers.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I certify that a copy of the foregoing document was served *via* electronic mail on the following persons on this 1st day of May, 2015.

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Summary: Application for Rehearing and Motion for Protective Order electronically filed by JOSEPH CLARK on behalf of Direct Energy Business, LLC