

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

**MEMORANDUM CONTRA OHIO EDISON COMPANY, THE CLEVELAND
ELECTRIC ILLUMINATING COMPANY, AND THE TOLEDO EDISON COMPANY'S
MOTION TO RENEW AND ENFORCE PROTECTIVE ORDER**

I. INTRODUCTION AND PROCEDURAL HISTORY

The Attorney Examiner issued an Entry on December 1, 2014 granting the Companies' Motion for a Protective Order, filed simultaneously with the Companies' Application for the fourth electric security plan (ESP).¹ The Attorney Examiner granted the protective order for, among other things, information contained in the direct testimony and work papers of Companies witness Mr. Jason Lisowski for a period of 60 months, with the opportunity to extend the protective order in accordance with the requirements of Rule 4901-1-24(F), Ohio Administrative Code.²

On April 22, 2016, Sierra Club filed a motion to modify the protective order it originally filed in conjunction with witness Tyler Comings' Third Supplemental Testimony on December 30, 2015. The protective order was approved by the Commission in its March 31, 2016 Opinion and Order.³ Specifically, Sierra Club seeks to modify its protective order to remove specific redactions included in its witness' testimony, the Third Supplemental Testimony of Tyler Comings, filed in this proceeding on December 30, 2015.⁴ The redacted portions of witness Comings testimony that Sierra Club seeks to disclose relate to a discussion of projected net costs and revenues under the proposed transaction between the Companies and its affiliate, FirstEnergy Solutions (FES), pursuant to the power purchase agreement (PPA).

The same day, the Ohio Edison Company, the Cleveland Electric Illuminating Company, and the Toledo Edison Company (the Companies) responded by filing a motion to renew and

¹ Attorney Examiner Entry at 11-12 (December 1, 2014).

² Id.

³ Sierra Club's Motion to Modify Protective Order and Memorandum in Support (April 22, 2016) (Sierra Club Motion).

⁴ Id. at 1-2.

enforce the same protective order that was approved by the Commission on March 31, 2016.⁵ The Companies assert that redacted portions of Tyler Comings Third Supplemental Testimony, which Sierra Club now seeks to publicly disclose, are confidential and proprietary materials that contain trade secrets under Ohio law.⁶

The Attorney Examiner issued an Entry on April 22, 2016 establishing a response deadline to the motions for all parties. Pursuant to that Entry, OMAEG hereby files this memorandum contra FirstEnergy's motion to renew and enforce the protective order, and requests that the Commission modify Sierra Club's protective order to minimize the amount of information that is filed under seal.

II. APPLICABLE LAW

Section 4509.07, Ohio Revised Code, establishes a general rule that "all facts and information in the possession of the Commission shall be public."⁷ An exception to this general rule is contained in Rule 4901-1-24(D), Ohio Administrative Code, which permits an attorney examiner to issue any order necessary to protect confidential information contained in a filed document "to the extent that state or federal law prohibits release of the information, including where the information is deemed * * * to constitute a trade secret under Ohio law, and where non-disclosure of the information is not inconsistent with the purposes of Title 49 of the Revised Code." The rule, however, requires that "any order issued under this paragraph shall minimize the amount of information protected from public disclosure."⁸

⁵ Ohio Edison Company, the Cleveland Electric Illuminating Company, and the Toledo Edison Company's Motion and Memorandum in Support of Motion to Renew and Enforce Protective Order (April 22, 2016). (Companies Memo in Support).

⁶ Companies Motion at 1.

⁷ Section 4509.07, Ohio Revised Code.

⁸ Rule 4901-1-24(D), Ohio Administrative Code.

Trade secret is defined in Ohio law as information that satisfies both of the following:

- (1) It derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use
- (2) It is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.⁹

III. ARGUMENT

1. The aggregate projections contained in the redacted material should be treated similarly to other aggregate projections advanced by the Companies.

Witness Comings' projections were developed in a very similar manner to the Companies' Rider RRS projections.¹⁰ Specifically, the projections at issue were developed by taking Companies witness Lisowski's plant-specific projections using long-term forecasts of market energy, capacity, and carbon prices and aggregating them into one projection of net costs and revenues. Sierra Club witness Comings merely updated the Companies' original FES projection, which included an outdated 15-year term and return on equity (ROE), to reflect the new eight-year term and 10.38% ROE contained in the Third Supplemental Stipulation.¹¹ These are precisely the same actions that Companies witness Mikkelsen took when she updated the Companies' Rider RRS projection to reflect the new eight-year term and 10.38% ROE.¹² While the Companies sought protection of the underlying work papers, attachments, and portions of witness Judah Rose's testimony that were developed using the proprietary models and databases of ICF Resources Incorporated ("ICF"),¹³ the Companies did not seek protection of witness

⁹ Section 1333.61(D), Ohio Revised Code.

¹⁰ Sierra Club Motion at 2-4.

¹¹ Id. at 3-4.

¹² Companies Ex. 155 at 11 (Mikkelsen Fifth Supplemental); Sierra Club Ex. 89 (Mikkelsen Workpaper 11/30/15).

¹³ Motion for Protective Order of Ohio Edison Company, the Cleveland Electric Illuminating Company, and the Toledo Edison Company at 6. See also Attorney Examiner Entry at 11 (December 1, 2014).

Mikkelsen's use of witness Rose's attachments and projections in the aggregate to create the Companies' Rider RRS projections.¹⁴ Similarly, Sierra Club witness Comings used underlying data from witness Lisowski to calculate and update the projection of the costs associated with Rider RRS included in his testimony. Therefore, the aggregate projections contained in witness Comings testimony should be provided the same treatment as witness Mikkelsen's aggregate projections and be publicly disclosed.

It is unjust, unreasonable, and unduly prejudicial to allow the Companies to selectively choose which information can be disseminated to the public and which information must be kept confidential when the aggregated information was developed using the same process. While the Companies rely heavily on case law and an analysis of the *Plain Dealer* six-factor test to argue that the Comings material warrants trade secret protection,¹⁵ none of the cases cited by the Companies includes a discussion of *aggregate* data that was compiled from or based upon otherwise confidential or trade secret information. Further, the Companies fail to acknowledge their own treatment of similar information contained in testimony filed by its own witness. If the Companies believe that witness Mikkelsen's aggregate projections are not confidential, then it logically follows that witness Comings' similar projections are also not confidential and should not be protected pursuant to the motion for a protective order.

2. The information contained in the redacted portions of witness Comings Third Supplemental Testimony that the Companies seek to protect do not contain trade secret information and therefore should not be protected from public disclosure.

The redacted portions of the projections contained in witness Comings Third Supplemental Testimony are not trade secrets and should not be protected under a protective

¹⁴ Sierra Club Ex. 89 (Mikkelsen Workpaper 11/30/15); Tr. Vol. XXXVI at 7512-7513.

¹⁵ Companies Motion at 8-11.

order. Witness Comings' projections include only aggregate data and contain no plant-specific information that could include competitively sensitive data proprietary to FES. Although the Companies assert that confidential information could be derived through a calculation,¹⁶ this argument rings hollow as the Companies have publically disclosed similar aggregate projections involving the same plant information (see Mikkelsen work paper 11/30/15 developed using Attachment JAR-1). Additionally, the projections contain no underlying market price forecasts and have no independent economic value. Therefore, these specific redactions should not be protected and should be publicly disclosed in accordance with the general rule that "all facts and information in the possession of the Commission shall be public."¹⁷

3. Public disclosure of the specified information contained in the redacted excerpts is critical to ensuring the public clearly understands the impact of the Commission's order.

As previously discussed, there is no lawful or otherwise persuasive reason to protect the aggregate data regarding FES' proprietary information contained in witness Comings testimony. However, as stated by Sierra Club, "there is a compelling interest in public disclosure of this projection."¹⁸

It is undeniable that the Companies' Application for a fourth ESP and this accompanying proceeding have generated much public interest, especially as it relates to the Retail Rate Stability (Rider RRS) at the core of the ESP.¹⁹ In reviewing the evidence, the Commission stated that it chose the "most reliable of these projections and forecasts to make a

¹⁶ Id. at 11-12.

¹⁷ Section 4509.07, Revised Code.

¹⁸ Sierra Club Motion at 6.

¹⁹ See *Concurring Opinion of Commissioner Asim Z. Haque* at 6, Opinion and Order (March 31, 2016) (noting "the tremendous amount of public sentiment expressed over the past two years associated with these cases").

determination of whether the Stipulations, as a package, benefit ratepayers.”²⁰ Further, although referencing witness Comings projections of net charges or credits under Rider RRS in its Order, the Commission stated that because the projections were based on confidential information, it could not include them in its own estimate of net credits or charges without revealing confidential information.²¹ Thus, the public is prohibited from being provided all of the information that was critical to the Commission’s decision in such a monumental case that will have significant impacts on the price of electric service. Given the Commission’s reliance on projections as articulated in its Order, it is in the public interest to have all of the comparable projections in the public domain.

Moreover, as stated in Rule 4901-1-24(D), Ohio Administrative Code, protective orders that are issued to protect confidential information contained in a filed document “shall minimize the amount of information protected from public disclosure.”²² Accordingly, the Commission’s own rules indicate a preference for public disclosure of information in order to fully inform and assist in understanding the Commission’s decision in this case, and only the minimal amount of information should be shielded from the public domain. Sierra Club appropriately requested to modify its protective order to limit the amount of information that will be protected from public disclosure.

²⁰ Order at 80.

²¹ Id. at 85

²² Section 4901-1-24(D), Ohio Administrative Code.

IV. CONCLUSION

In accordance with the arguments set forth above, OMAEG opposes FirstEnergy's request to renew protective status for aggregate information that fails to constitute trade secrets. OMAEG supports modification of Sierra Club's protective order that was approved by the Commission in its March 31, 2016 Opinion and Order in order to permit the removal of redactions from specific portions of the Third Supplement Testimony of Tyler Comings.

Wherefore, OMAEG respectfully requests that the Commission deny the Companies' motion to renew and enforce the protective order approved by the Commission as it is overly broad and includes information that does not constitute trade secrets as required by Ohio law. Accordingly, the Commission should release the limited aggregate information proposed by Sierra Club in order to afford customers who have an important interest in this proceeding to review and analyze the data that is being relied upon in this proceeding and by the Commission.

Respectfully submitted,

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Counsel for OMAEG

CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing was served upon the following parties via electronic mail on April 26, 2016.

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Summary: Memorandum Contra Ohio Edison Company, The Cleveland Electric Illuminating Company, And The Toledo Edison Company's Motion To Renew And Enforce Protective Order electronically filed by Mrs. Kimberly W. Bojko on behalf of OMA Energy Group