

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Amendment of)	
Ohio Adm.Code 4901-1-24 Regarding)	Case No. 18-322-AU-ORD
Motions for Protective Orders)	

COMMENTS OF INDUSTRIAL ENERGY USERS-OHIO

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On February 28, 2018, the Public Utilities Commission of Ohio (“Commission”) solicited comments regarding proposed revisions to Rule 4901-1-24, Ohio Administrative Code (“O.A.C.”), governing motions for protective orders.¹ The proposed rule change is in response to a decision from the Supreme Court of Ohio reversing and remanding the Commission’s issuance of a protective order in the audit proceeding of FirstEnergy’s Alternative Energy Rider (“AER”).² Notably, the Commission’s proposed rule changes would require an affidavit supporting a motion for protective order and would provide the Commission with the discretion to hold a hearing on the motion.³

As discussed below, the proposed revisions to the rule will not cure the deficiencies that lead to the Court’s decision unless the Commission modifies its proposed rule to require hearings where a party contests a claim of confidentiality. The Commission should further revise the proposed rule to accommodate the different circumstances under which a party may seek to challenge claims of confidentiality.

¹ Entry at 1 (Feb 28, 2018).

² *Id.* at 2.

³ *Id.*, Attachment A at 3.

I. ARGUMENT

The Commission has proposed a rule change in response to issues identified by the Court's decision in the FirstEnergy AER case. In the appeal of FirstEnergy's AER, the Court reversed the Commission's issuance of a protective order for two reasons. First, the Court found that the Commission had failed to cite any evidence when it granted the contested protective order.⁴ Second, the Court held that even if the Commission had cited evidence it had failed to explain itself.⁵

The Commission's proposed rule would require an affidavit to be filed with a motion for protective order and further provides that the Commission may provide for an evidentiary hearing on a motion for protective order. These revisions will only address the issues identified by the Court if the requirement to hold a hearing on a contested request for a protective order is mandatory. An affidavit in support of a motion for a protective order standing alone should not be sufficient to resolve contested factual issues involving requests for information in Commission proceedings to be deemed protected trade secrets.

Further, the Commission should revise the proposed rule to accommodate challenges to requests that material be designated as protected. Often the basis for challenging the requested protected designation may occur outside the 15-day timeframe for the filing of memorandum contra. A typical example would be an application with a portion of the supporting testimony filed under seal where other parties may not have intervened sufficiently early in the case to contest the motion (they may not become

⁴ *In re Review of the Alternative Energy Rider Contained in the Tariffs of Ohio Edison Company, Cleveland Electric Illuminating Company, and Toledo Edison Company*, 2018-Ohio-229 at ¶ 35-36.

⁵ *Id.*

parties within 15 days, and they may not have access to the confidential information under a protective agreement within 15 days). Additionally, the current and proposed rules do not necessarily address circumstances where a party intends to rely on confidential material produced in discovery in the proceeding where that party also seeks to challenge the confidential designation of that information. To address these concerns, and to accommodate the need to resolve factual disputes through a hearing process, the Commission's rule should be revised to allow parties to move the Commission to hold a prehearing conference where parties can contest claims that certain information should remain under seal.

II. **CONCLUSION**

For the reasons discussed herein, Industrial Energy Users-Ohio ("IEU-Ohio") urges the Commission to modify its proposed rule to require hearings where a party contests a claim of confidentiality.

Respectfully submitted,

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CERTIFICATE OF SERVICE

In accordance with Rule 4901-1-05, Ohio Administrative Code, the PUCO's e-filing system will electronically serve notice of the filing of this document upon the following parties. In addition, I hereby certify that a service copy of the foregoing *Comments of Industrial Energy Users-Ohio* was sent by, or on behalf of, the undersigned counsel for IEU-Ohio to the following parties of record this 16th day of March 2018, *via* electronic transmission.

/s/ Matthew R. Pritchard

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ON BEHALF OF THE STAFF OF THE PUBLIC UTILITIES COMMISSION OF OHIO

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Summary: Comments of Industrial Energy Users-Ohio electronically filed by Mr. Matthew R. Pritchard on behalf of Industrial Energy Users-Ohio