

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Application)
of Ohio Power Company to Update) **Case No. 20-1061-EL-RDR**
The Energy Efficiency and Peak)
Demand Reduction Rider)

**MOTION OF OHIO POWER COMPANY TO PROTECT
CONFIDENTIAL INFORMATION IN ACCORDANCE WITH
OHIO ADMINISTRATIVE CODE SECTION 4901-1-24**

Ohio Power Company (“AEP Ohio” or the “Company”), pursuant to Rule 4901-1-24(D) of the Ohio Administrative Code, respectfully requests that the Public Utilities Commission of Ohio (“Commission”) issue a protective order keeping confidential limited information redacted from the public version of the Application Attachment 1 (Schedule 5). These portions of Schedule 5 filed under seal contain confidential and proprietary competitively-sensitive information related to PJM Energy Efficiency Credits and reflect customer-specific proprietary data. That data constitutes trade secrets under Ohio law and, therefore, merits protection from public disclosure. The reasons supporting this motion are provided in the attached Memorandum in Support. Three unredacted copies of the confidential attachments will be filed under seal with the Commission.

Respectfully submitted,

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MEMORANDUM IN SUPPORT

AEP Ohio requests that the Public Utilities Commission of Ohio (“Commission”) issue a protective order keeping confidential the limited information redacted from Schedule 5 of Attachment 1. Schedule 5 implements the Commission’s May 28, 2015 Second Entry on Rehearing in the ESP III (Paragraph 30, Case No. 13-2385-EL-SSO) which ordered as follows: “Ohio should bid the IRP-D related capacity resources into PJM's incremental capacity auctions held during the ESP term, to the extent that such capacity resources have not already been bid by the customer into any of PJM's auctions for the three delivery years of the ESP 3 term. The resulting revenues should be credited back to customers through the EE/PDR rider.”

The redacted portions of Schedule 5 filed under seal contain confidential and proprietary competitively-sensitive information related to PJM Energy Efficiency Credits and reflect customer-specific proprietary data. That data constitutes trade secrets under Ohio law and, therefore, merits protection from public disclosure. The information is the product of original research and development that has been kept confidential, and, as a result, retains substantial economic value by being kept confidential. It would be costly and time-consuming for third parties to replicate the information on their own. Allowing unfettered public access to the information would give third parties inappropriate access to competitively sensitive business information about the affected customer(s). Accordingly, release of the information to the public would significantly reduce, if not eliminate, the value that the information has by being kept confidential and, thus, would cause harm to the affected customer(s).

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. As set forth herein, state law prohibits the release of the Confidential Information.

The Commission long ago recognized its statutory obligations with regard to trade secrets. *See In re: General Telephony Co.*, Case No. 81-383-TP-AIR (Entry, February 17, 1982) (recognizing necessity of protecting trade secrets). Likewise, the Commission has facilitated the protection of trade secrets in its rules. *See* Rule 4901-1-24(A)(7), O.A.C. 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 Confidential Information at issue here.

The Ohio Supreme Court has held that not only does the Commission have the authority to protect the trade secrets of a public utility, the trade secrets statute creates a duty to protect them. *Ohio Consumers' Counsel v. Pub. Util. Comm.* (2009), 121 Ohio St.3d 362, 2009-Ohio-604. 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. *See, e.g., Elyria Tel. Co.*, Case No. 89-965-TP-AEC (Finding and Order,

September 21, 1989); *Ohio Bell Tel Co.*, Case No. 89-718-TP-ATA (Finding and Order, May 31, 1989); *Columbia Gas of Ohio, Inc.*, Case No. 90-17-GA-GCR (Entry, August 17, 1990).

In 1996, the Ohio General Assembly amended R.C. §§ 4901.12 and 4905.07 in order to facilitate the protection of trade secrets in the Commission's possession by carving out an exception to the general rule in favor of public disclosure. By referencing R.C. § 149.43, the Commission-specific statutes now incorporate the provision of that statute that excludes from the definition of "public record" records the release of which is prohibited by state or federal law. R.C. § 149.43(A)(1). In turn, state law prohibits the release of information meeting the definition of a trade secret. R.C. §§ 1333.61(D) and 1333.62. The amended statutes also reference the purposes of Title 49 of the Revised Code. The protection of trade secret information from public disclosure is consistent with the purposes of Title 49 because the Commission and its Staff have access to the information; in many cases, the parties to a case may have access under an appropriate protective agreement. The protection of trade secret information, as requested herein, will not impair the Commission's regulatory responsibilities.

In *Pvromatics, Inc. v. Pettiiziello*, 7 Ohio App. 3d 131, 134-135 (Cuyahoga App. 1983), the court of appeals, citing *Koch Engineering Co. v. Faulconer*, 210 U.S.P.Q. 854, 861 (Kansas 1980), delineated factors to be considered in recognizing a trade secret: (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. The Ohio Supreme Court has adopted these

factors as appropriate. *State ex rel. Perrea v. Cincinnati Pub. Sch.* (2009), 123 Ohio St.3d 410, 414, 2009-Ohio-4762 (2009).

Applying these factors to the Confidential Information here demonstrates that protection from disclosure is appropriate. AEP Ohio has taken steps to maintain the confidentiality of the Confidential Information. The Confidential Information is generally considered restricted access confidential due to the high level of value to competitors and is not known or easily obtainable outside of AEP Ohio's business. The Confidential Information is kept confidential in the offices of AEP Ohio. As discussed above, the Confidential Information consists of specific information about the RECs that AEP Ohio has secured to meet its 2015 alternative energy benchmark obligations. Public disclosure of such information would allow a competitor to learn the sources and structure of the Company's REC acquisition strategy, and would competitively disadvantage AEP Ohio. Given the general lack of alternative energy resources in this state and adjacent states, and the particular scarcity of solar energy resources, AEP Ohio must protect the details of its REC acquisitions.

Consistent with Rule 4901-1-24(D), the Commission should maintain the confidentiality of the Confidential Information given that the information clearly falls within the definition of a trade secret subject to protection under Ohio law. Moreover, any requests under the Open Records law for disclosure of this information should be rejected under R.C. §149.43(A), as a request for records whose release is prohibited under state law.

For the foregoing reasons, AEP Ohio respectfully requests that the Commission grant this motion for protective order and order that the Confidential Information be subject to confidential treatment and be kept under seal.

Respectfully submitted,

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Summary: Motion - Motion of Ohio Power Company to Protect Confidential Information in Accordance with Ohio Administrative Code 4901:1-24 electronically filed by Mr. Steven T Nourse on behalf of Ohio Power Company