

In the Matter of Enron Energy Services)	
Inc., et al.)	
Complainants)	
)	
v.)	Case No. 01-393-EL-CSS
)	
FirstEnergy Corp., Ohio Edison Company,)	
The Cleveland Electric Illuminating Company)	
and The Toledo Edison Company)	
)	
Respondents)	

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COUNSEL FOR INDUSTRIAL ENERGY USERS-OHIO

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of Enron Energy Services
Inc., et al.

Complainants

v.

FirstEnergy Corp., Ohio Edison Company,
The Cleveland Electric Illuminating Company
and The Toledo Edison Company

Respondents

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Case No. 01-393-EL-CSS

**MOTION OF INDUSTRIAL ENERGY USERS-OHIO
FOR LEAVE TO FILE
MOTION FOR PROTECTIVE ORDER
AND MEMORANDUM IN SUPPORT**

Pursuant to Ohio Adm.Code 4901-1-02(E), Industrial Energy Users-Ohio ("IEU-Ohio") moves the Public Utilities Commission of Ohio ("Commission") for leave to make a filing in this case. A public records request regarding this proceeding was submitted to the Commission. IEU-Ohio has reviewed the material that was filed under seal years ago and represents that much of what was previously filed under seal is not deemed confidential by IEU-Ohio. However, some of the information should remain under seal. IEU-Ohio has identified for the Commission the specific portions of the record that IEU-Ohio believes should remain confidential and under seal and provided a privilege/confidentiality log for each redaction. IEU-Ohio submits this motion under the authority of Ohio Adm.Code 4901-1-24 for a finding from the Commission that the material designated by IEU-Ohio as confidential and non-public should remain under seal.

In accordance with Ohio Adm.Code 4901-1-02(E), IEU-Ohio represents that IEU-Ohio contacted the Commission's legal department to request that this proceeding be reopened for the limited purpose of IEU-Ohio submitting this motion. As more fully explained in the attached memorandum in support, IEU-Ohio requests that the Commission grant this motion and find that each of the three identified types of confidential information warrant protected status and should not be released.

Respectfully submitted,

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MEMORANDUM IN SUPPORT

I. Case History

On February 13, 2001, Enron Energy Services, Inc., Peco Energy Company d/b/a Exelon Energy, Strategic Energy, LLC, and AES Power Direct, LLC (collectively, "Complainants") filed a complaint against FirstEnergy Corporation, the Cleveland Electric Illuminating Company, the Toledo Edison Company, and the Ohio Edison Company, ("FirstEnergy" or "Respondents"). This complaint was filed shortly after the state of Ohio passed legislation to deregulate its electric utility industry. The complaint alleged that FirstEnergy had failed to properly implement its Commission-approved settlement of its electric transition plan. FirstEnergy denied various portions of the complaint and asserted several affirmative defenses.

The Complainants, attempting secure additional settlement benefits for themselves at the expense of Ohio businesses, also sought to involve IEU-Ohio in the proceeding through a deposition of an IEU-Ohio representative secured through a subpoena. Although the complaint was meritless and abandoned by the Complainants,

an IEU-Ohio representative was ultimately deposed in the proceeding. In an October 11, 2001 Entry, the Commission indicated that it was granting protective treatment to certain information that IEU-Ohio presented during the deposition of its representative.

Upon IEU-Ohio's recent review of the case record, now more than 20 years later, it is not clear what material related to IEU-Ohio the protected status granted by the Attorney Examiner applies to. For example, when the Complainants filed the deposition and exhibits, the entirety was filed under seal and the Complainants never refiled a partially redacted version based on the exact information that was confidential.

It is clear to IEU-Ohio that *most* of the approximately 2,500 pages of material filed under seal in this matter by the Complainant and Respondent do not contain any IEU-Ohio trade secrets (or in the case of utility tariffs that were filed under seal, are not likely to contain any confidential information). However, some of the information within the Commission's records constitute confidential, sensitive, trade secret, and proprietary information, as defined in R.C. 1333.61(D) and as recognized by Ohio Adm.Code 4901-1-24, and are therefore not subject to public disclosure. The confidential non-public material under seal includes individual customer account names and numbers, internal IEU-Ohio communications with counsel, and IEU-Ohio contracts with third party vendors and customer supply agreements. Release of this information would violate state or federal law and be inconsistent with the purposes of Title 49 of the Revised Code. Accordingly, IEU-Ohio reviewed the material filed under seal and narrowly redacted "only such information... as is essential to prevent disclosure of the allegedly confidential information."¹

¹ Ohio Adm.Code 4901-1-24(D)(1). In response to the public records request, IEU-Ohio bates stamped the entire confidential package of material provided to IEU-Ohio by the Commission for review, created a

II. Legal Standard

R.C. 4905.07 provides that all facts and information in the possession of the Commission shall be public, except as provided in R.C. 149.43, and as consistent with the purposes of Title 49 of the Revised Code. R.C. 149.43 specifies that the term “public records” excludes information that, under state or federal law, may not be released. The Ohio Supreme Court has clarified that the “state or federal law” exemption is intended to cover trade secrets.²

Pursuant to Ohio Adm.Code 4901-1-24(D), the Commission may issue any 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 that information, including trade secret information, as well as where non-disclosure of the information is not inconsistent with the purposes of Title 49 of the Revised Code.

Finally, regarding trade secret information, R.C. 1333.61(D) holds that a “trade secret” is “any information, including . . . any business information or plans, financial information, or listing of names . . . 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.” To this end, the entity claiming trade

privilege log identifying the specific redactions of confidential information and basis for the redactions, and provided the Commission with a package of material containing all the redactions of confidential information.

² *State ex. Rel. Besser v. Ohio State*, 89 Ohio St.3d 396, 399, 732 N.E.2d 373 (2000).

secret status must demonstrate that the material is included in the category of protected information and has taken active steps to maintain its secrecy.³

III. Argument

A. Customer Names & Account Numbers

The Commission has historically and routinely granted protective treatment for information identifying specific customers and their account numbers. In R.C. 149.43(A)(1)(aa), one of the specific exceptions to the definition of a “public record” is “usage information including names and addresses of specific residential and commercial customers of a municipally owned or operated public utility.” Commission rules also prohibit the release of customer account information.⁴ Public release of customer names and account numbers could negatively impact IEU-Ohio and allow a customer to be switched without the customer’s consent. Disclosure of this information would accordingly violate the intent of R.C. 149.43(A)(1)(aa) and would be inconsistent with the purposes of Title 49 of the Revised Code and the Commission’s rules.

In this case, the Commission’s records contain customer account numbers in multiple locations in the documents that were filed under seal. IEU-Ohio has identified the individual customer names and account numbers within the materials filed under seal and requests that this information remain confidential and under seal. Finally, because this information will remain a confidential trade secret, regardless of the passage of time, IEU-Ohio requests that the customer names and account numbers be granted permanent protected status.

³ See *Fred Siegel Co., L.P.A. v. Arter & Hadden* (1999), 85 Ohio St.3d 171, 181, 707 N.E.2d 853, 862.

⁴ See Rule 4901:1-10-12 and Rule 4901:1-29-09.

B. Attorney-Client Privileged Communications

Pursuant to R.C. 149.43(A)(4), attorney-client privileged communications are not public records and are not subject to disclosure. The term “public record” excludes “any record that contains information that is specifically compiled in reasonable anticipation of, or in defense of, a civil or criminal action or proceeding, including the independent thought processes and personal trial preparation of an attorney.” Both the Ohio Supreme Court and the Commission have recognized that communications between a client and its counsel are not subject to discovery and public disclosure.⁵ While the privilege may be waived by voluntary disclosure, a court order requiring production does not waive the attorney-client privilege nor does inadvertent production.⁶

As part of the deposition notice served on IEU-Ohio, Complainants requested communications between IEU-Ohio and an employee of its law firm who assisted in the provision of legal advice to IEU-Ohio.⁷ IEU-Ohio objected to the production and also sought to keep the information confidential and under seal.⁸ Because IEU-Ohio objected to the production, the communications were not voluntarily produced and it is still ripe to raise attorney-client privilege as a basis to maintain the information under seal. Again,

⁵ *State ex. Rel. Leslie v. Ohio Hous. Fin. Agency*, 105 Ohio St.3d 261, 824 N.E.2d 990, P18; *State ex. Rel. Leslie v. Ohio Hous. Fin. Agency*, 105 Ohio St.3d 261, 824 N.E.2d 990, P18; *Burnham v. Cleveland Clinic*, 151 Ohio St.3d 356 (2019); *See In re Complaint of LeeMar Steel Co. v. The Ohio Bell Telephone Co.*, Case No. 84-360-TP-CSS, Entry (Sept. 11, 1985); *In re Complaint of the City of Huron v. Ohio Edison Co.*, Case No. 03-1238-EL-CSS, et al., Entry (Aug. 2, 2005); *In re Ohio Edison Co., The Cleveland Electric Illuminating Co., and The Toledo Edison Co. for Approval of a New Rider*, Case No. 10-176-EL-ATA, Opinion and Order (Jan. 27, 2011).

⁶ *In re Complaint of the City of Huron v. Ohio Edison Co.*, Case No. 03-1238-EL-CSS, et al., Entry (Aug. 2, 2005) (finding that material remained privileged even though the Commission required its production for purposes of an in camera review).

⁷ Joint application of Complainants for Subpoena (May 9, 2001).

⁸ *See, e.g.*, IEU-Ohio Motion to Quash (May 15, 2001).

the Complainants ultimately elected to abandon the meritless complaint and the case never proceeded to a final decision from the Commission or a final appealable order for IEU-Ohio to further seek protection of the information.

IEU-Ohio's internal privileged communications with its counsel are contained in the deposition exhibits and are also discussed in portions of the briefs. IEU-Ohio has identified the specific portions of the confidential material where these communications exist, or are discussed, and which should remain under seal. The confidentiality and non-public nature of this material will not lapse with time. Accordingly, IEU-Ohio requests that the Commission grant permanent confidential status to this material.

C. IEU-Ohio's Confidential Agreements With Third-Party Vendors and Supply Agreements with IEU-Ohio Members

The documents held by the Commission contain two contracts that are proprietary, highly sensitive, trade secret, and which are irrelevant to this case. The first agreement is a Master Service Agreement (MSA) and the second is an IEU-Ohio Member Participation Agreement. At the outset, IEU-Ohio again notes that these materials were required to be produced confidentially in discovery, and only exist in the Commission's records because Complainants filed the discovery in a docket where admissibility and relevance were never ruled upon by the Commission.

In any event, the documents are confidential trade secrets. One contract relates to IEU-Ohio's contract with third party vendors to assist IEU-Ohio with the technical capabilities necessary to function as a competitive retail electric service ("CRES") provider. The other contract relates to IEU-Ohio's supply agreements with individual IEU-Ohio members. The initial set of material contains business sensitive information that reveals the terms and conditions upon which IEU-Ohio would be agreeable to contract

with a third-party vendor to assist IEU-Ohio to function as a CRES provider. IEU-Ohio maintains its CRES status, and accordingly, publication of IEU-Ohio's prior contracts with third-party vendors could negatively affect IEU-Ohio's ability to competitively contract with vendors in the future. Moreover, the parties to the contract have taken reasonable steps to keep the agreement confidential as the contract itself requires the parties to keep it confidential and IEU-Ohio fought to preserve its confidential status in this proceeding. The second set of materials relate to individual customer CRES supply agreements with IEU-Ohio. IEU-Ohio's business and its ability to support its members' interests in the competitive marketplace would be harmed by disclosure of these contracts.

The Commission has previously treated these same types of contracts as confidential. For example, in Case No. 14-1944-EL-CSS, the Commission granted protected status, holding that an entire supply agreement, which similarly contained provisions that it be maintained as confidential, constituted a confidential trade secret.⁹

The contracts also fall under state or federal law exception to the definition of a public record in R.C. 149.43. The federal scheme for public records requests under the freedom of information act ("FOIA") is similar to Ohio's structure and exempts from disclosure private-sector commercial or financial information in the government's possession.¹⁰ The United States Supreme Court has affirmed Congress's intent and held that "at least where commercial or financial information is both customarily and actually treated as private by its owner and provided to the government under an assurance of

⁹ *In re Complaint of City of Toledo v. FirstEnergy Solutions Corp.*, Case No. 14-1944-EL-CSS, Entry at P9. (Jan. 6, 2016).

¹⁰ 5 U.S.C.S. § 552(b)(4); *Food Mktg. Inst. v. Argus Leader Media*, 139 S. Ct. 2356 (2019).

privacy, the information is ‘confidential’ within the meaning of Exemption 4.”¹¹ Here, IEU-Ohio provided the material to Complainants under a confidentiality agreement and IEU-Ohio has at all times treated the material as confidential.¹²

Accordingly, these contracts constitute confidential non-public material that should not be released. IEU-Ohio has identified for the Commission the specific portions of the confidential material and briefs related to these contracts that should remain under seal. Like the first two categories of information, IEU-Ohio believes it would be reasonable for the Commission to grant permanent protective status to this category of material.

IV. Conclusion

For the reasons set forth in this Memorandum in Support, IEU-Ohio requests that its Motion for Protective Order be granted and confidentiality be maintained in perpetuity.

Respectfully submitted,

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¹¹ *Food Mktg. Inst. v. Argus Leader Media*, 139 S. Ct. 2356 (2019).

¹² See Entry at 2 (Sep. 26, 2001) (requiring IEU-Ohio to provide information to “Complainants upon Complainants entering into a confidentiality agreement with IEU-OH . . .”).

CERTIFICATE OF SERVICE

In accordance with Ohio Adm.Code 4901-1-05, 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 *Motion of Industrial Energy Users – Ohio for Leave to File Motion for Protective Order and Memorandum in Support* was sent by, or on behalf of, the undersigned counsel for Industrial Energy Users-Ohio, April 26, 2022.

/s/ Matthew R. Pritchard

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Case No(s). 01-0393-EL-CSS

Summary: Motion of Industrial Energy Users-Ohio for Leave to File Motion for
Protective Order and Memorandum in Support electronically filed by Mr. Matthew
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