

THE PUBLIC UTILITIES COMMISSION OF OHIO

IN THE MATTER OF ENRON ENERGY
SERVICES, INC., ET AL.,

COMPLAINANTS,

CASE NO. 01-393-EL-CSS

v.

FIRSTENERGY CORP., OHIO EDISON
COMPANY, THE CLEVELAND ELECTRIC
ILLUMINATING COMPANY, AND THE
TOLEDO EDISON COMPANY,

RESPONDENTS.

ENTRY

Entered in the Journal on July 22, 2022

I. SUMMARY

{¶ 1} The attorney examiner denies the motion for protective order filed by the Industrial Energy Users-Ohio as it relates to the requested protective treatment of alleged trade secret information contained in two agreements filed under seal in this proceeding.

II. DISCUSSION

A. *Procedural History*

{¶ 2} Pursuant to R.C. 4905.26, the Commission has authority to consider written complaints filed against a public utility by any person or corporation regarding any rate, service, regulation, or practice relating to any service furnished by the public utility that is in any respect unjust, unreasonable, insufficient, or unjustly discriminatory.

{¶ 3} Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company (collectively, FirstEnergy or the Companies) are public utilities as defined in R.C. 4905.02 and electric distribution companies (EDUs) as defined in R.C. 4928.01, and, as such, are subject to the jurisdiction of this Commission. FirstEnergy Corp. is an Ohio corporation whose principal office is located in Akron, Ohio, and is a holding company and the parent company for the three named EDUs.

{¶ 4} 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 the Companies and FirstEnergy Corp., alleging that the Companies had failed to implement their transition plans pursuant to Commission orders and had violated several statutes and Commission rules pertaining to corporate separation requirements. *See In re the Application of FirstEnergy for Approval of Transition Plans and Authorization to Collect Transition Revenues*, Case No. 99-1212-EL-ETP, et al., Opinion and Order (July 19, 2000); R.C. 4928.02, 4928.17.

{¶ 5} On March 7, 2001, the Companies filed an answer denying various portions of the complaint and asserting several affirmative defenses.

{¶ 6} Pursuant to an Entry issued by the attorney examiner on October 11, 2001, briefs and exhibits were submitted by the parties for the Commission's consideration. No evidentiary hearing was conducted.

{¶ 7} On April 3, 2019, following nearly 18 years of inactivity on the docket and silence from the parties as to whether this case should proceed, the Commission dismissed the complaint for lack of prosecution.

{¶ 8} No applications for rehearing were filed and the case was closed on June 3, 2019.

{¶ 9} Following closure of the case, a public records request was received by the Commission, requesting unredacted copies of the following documents filed in the docket: reply brief of Complainants; confidential brief filed on behalf of Respondent, FirstEnergy Corp.; Confidential part 5 of 5; Confidential part 4 of 5; Confidential part 3 of 5; brief, etc. continued (Part 2 of 5); briefs, depositions, exhibits, and documents filed on behalf of

Complainants (Part 1 of 5); and confidential information filed on behalf of Complainants on August 31, 2001.¹

{¶ 10} Pursuant to the Commission's long-standing process, Industrial Energy Users-Ohio (IEU-Ohio), a non-party to the proceeding, but the entity whose information was filed under seal, was notified of the public records request and provided an opportunity to file a motion for protective order. *See, e.g., In re the Application of Ohio Power Co., and Columbus S. Power Co. for Authority to Merge and Related Approvals*, Case No. 10-2376-EL-UNC, et al., Entry (Jan. 20, 2012).

{¶ 11} IEU-Ohio contacted the Commission's legal department to have the case reopened in order to file a motion for protective order.

{¶ 12} On April 26, 2022, the case was reopened and IEU-Ohio filed a motion for protective order for various portions of the documents filed under seal and requested in the public records request.

{¶ 13} No memoranda contra were filed in response to the motion for protective order.

{¶ 14} By Entry issued June 8, 2022, the attorney examiner granted, in part, and denied, in part, the motion for protective order. Specifically, the attorney examiner granted the motion as it related to customer specific information and denied the motion for communications IEU-Ohio alleged were protected by attorney client privilege. Additionally, the attorney examiner scheduled a hearing to determine whether information filed under seal in this proceeding constitutes trade secret information, pursuant to R.C. 1333.61(D).

{¶ 15} No interlocutory appeal was filed in response to the June 8, 2022 Entry.

¹ The information requested in the public records request pertains to information filed under seal in this docket on August 31, 2001, as well as October 29, 2001.

{¶ 16} The hearing occurred, as scheduled, on July 1, 2022, and was transcribed by a court reporter. IEU-Ohio presented the testimony of Mr. Kevin Murray in support of its motion for protective order and claim that certain information filed under seal in this case warranted continued protection (IEU-Ohio Ex. 1).

B. IEU-Ohio's Motion for Protective Order

{¶ 17} While IEU-Ohio continues to acknowledge that much of what was filed under seal in this docket is not deemed confidential, IEU-Ohio maintains that contracts with third party vendors and customer supply agreements should continue to be protected from public disclosure. Specifically, IEU-Ohio claims that 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 (MPA). IEU-Ohio argues that 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 and the other contract relates to IEU-Ohio's supply agreements with individual IEU-Ohio members. 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 (Tr. at 11-12, 22-25). Moreover, according to IEU-Ohio, 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. As to the second set of materials, IEU-Ohio argues its business and its ability to support its members' interests in the competitive marketplace would be harmed by disclosure of these contracts. In fact, IEU-Ohio states that the Commission has previously treated these same types of contracts as confidential. *In re Complaint of City of Toledo v. FirstEnergy Solutions Corp.*, Case No. 14-1944-EL-CSS, Entry (Jan. 6, 2016). Furthermore, IEU-Ohio also argues that the contracts fall under the state or federal law exception to the definition of a public record in R.C. 149.43, as well as the comparable

exemption of disclosure of private-sector commercial or financial information under the Freedom of Information Act. 5 U.S.C.S. § 552(b)(4); *Food Mktg. Inst. v. Argus Leader Media*, 139 S. Ct. 2356 (2019). IEU-Ohio asserts that it provided the material to Complainants under a confidentiality agreement and IEU-Ohio has at all times treated the material as confidential. Accordingly, IEU-Ohio contends these contracts constitute confidential non-public material that should not be released and, further, believes that it would be reasonable for the Commission to grant permanent protective status to this category of material (Tr. at 8-10).

C. Conclusion

{¶ 18} 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. *State ex. rel. Besser v. Ohio State*, 89 Ohio St.3d 396, 399, 732 N.E.2d 373 (2000). 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; and (2) it is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.” The burden to identify and demonstrate that the material is a trade secret is on the person claiming it to be a trade secret. *Fred Siegel Co.*,

L.P.A. v. Arter & Hadden, 85 Ohio St.3d 171, 181, 1999-Ohio-260, 707 N.E.2d 853. When analyzing a trade secret claim, Ohio courts have considered: (1) extent to which the information is known outside the business; (2) extent to which it is known to those inside the business, i.e., by employees; (3) precautions taken by holder of the trade secret to guard the secrecy of the information; (4) savings effected and value to holder in having the information as against competitors; (5) amount of effort or money expended in obtaining and developing the information; and (6) amount of time and expense it would take for others to acquire and duplicate the information. *Sheil v. Horton*, 117 N.E.3d 194, 2018-Ohio-5240 (8th Dist.). Moreover, in the event trade secret information is identified, the Commission must evaluate whether the trade secret information may be reasonably redacted in order to maintain as much information in the public domain as possible, consistent with R.C. 4905.07 and 149.43.

{¶ 19} The June 8, 2022 Entry went through extensive detail regarding the discovery process leading up the filing of documents under seal in this case and that are now subject to the public records request. The attorney examiner will not duplicate that summary here. Additionally, the attorney examiner will not speak as to the motions for protective order that remained pending prior to the initial closure of this case; the analysis contained herein is targeted to the motion for protective order filed on April 26, 2022, as it relates to the two agreements IEU-Ohio seeks to protect today.² Further, it is important to note that the attorney examiner's review is limited to those documents filed under seal in this proceeding in 2001, and thus, currently in the possession of the Commission. During the hearing, the attorney examiner determined that the entirety of both agreements, albeit redacted versions, were filed on August 31, 2001, although counsel correctly noted that portions of those agreements and references thereto were also filed throughout the confidential filings in this

² As noted in the June 8, 2022 Entry, while Complainants and FirstEnergy Corp. filed these motions, Complainants indicated that, in the event Mr. Murray did not file a motion requesting protective treatment and justifying the need for such protective treatment, Complainants would withdraw the motion for protective order. FirstEnergy Corp. requested that protective treatment be afforded to its brief submitted on November 19, 2001, pursuant to the motion for protective order filed by Complainants on October 29, 2001. Entry (June 8, 2022) at ¶ 30.

case. The MSA is a document consisting of 16 pages and the MPA is a document consisting of six pages.³

{¶ 20} The attorney examiner will first address IEU-Ohio's claims that the entirety of the two agreements should be granted protective treatment. In support of this claim, IEU-Ohio cites to one case in which an uncontested motion for protective order was granted for a supply agreement. *In re the Complaint of the City of Toledo v. FirstEnergy Solutions Corp.*, Case No. 14-1944-EL-CSS, Entry (Jan. 6, 2016). In that case, the Commission granted the unopposed motion for protective order just over a year from when the case was first initiated (Tr. at 20). Despite this one occasion where the entire agreement was granted protective treatment, the attorney examiner finds more persuasive the litany of both Ohio and Commission precedent that has limited the proprietary nature of contracts to specific terms, such as pricing and billing information. *See, e.g., Ohio Consumers' Counsel v. Pub. Util. Comm.*, 121 Ohio St.3d 362, 2009-Ohio-604, 904 N.E.2d 853 (where the Court agreed that the Commission could treat certain information contained in side agreements between an electric utility and several large customers, such as customer names, account numbers, price of generation referenced in each contract, and volume of generation covered by each contract, as trade secrets); *In re the Application of Brainard Gas Corp.*, Case No. 14-948-GA-AEC, Finding and Order (Aug. 19, 2015) (where the Commission found that the pricing information contained in the transportation agreements constituted trade secret information); *In re the Application of Cincinnati Gas & Elec. Co. to Modify its Nonresidential Generation Rates to Provide for Market-Based Std. Service Offer Pricing and to Establish an Alternative Competitive-Bid Service Rate Option Subsequent to the Market Development Period (CG&E Market Development Case)*, Case No. 03-93-EL-ATA, et al., Order on Remand (Oct. 24, 2007) at 10-18, Entry (Nov. 10, 2008)⁴; *In re the Joint Application of Northeast Ohio Natural Gas*

³ The attorney examiner will only address the alleged trade secret information as delineated in IEU-Ohio's privilege log submitted to the Commission in response to the public records request.

⁴ As part of the information directed to be released by the Commission in that case were copies of supply agreements, including a 2004 supply agreement entered into between Cinergy Corp. (Cinergy), through its agent Cinergy Retail Sales, LLC, and IEU-Ohio for the benefit of Marathon Ashland, Inc., and General

Corp., Ullico Infrastructure Master Fund, L.P., and Ullico Infrastructure Hearths, Case No. 21-93-GA-UNC (where the attorney examiner denied the motion for protective order as to the entire sales transaction agreement, but granted the motion as to the negotiated price and quantity terms); *In re the Application of Ohio Gas Co.*, Case No. 12-757-GA-AEC, Finding and Order (Mar. 21, 2012) (where the Commission found trade secrets exist as to the unit price); *In re the Joint Application of North Coast Gas Transm. LLC and Suburban Natural Gas Co.*, 06-1100-PL-AEC, Entry (Feb. 7, 2007) at 2 (where the Commission noted “we understand that negotiated price and quantity terms can be sensitive information in a competitive environment.”); *In re North Coast Gas Transm., LLC*, Case No. 05-1214-PL-AEC, Entry (Nov. 9, 2005) at 2; *In re Vectren Retail LLC, d/b/a Vectren Source*, Case No. 02-1668-GA-CRS, Entry (June 8, 2005); *In re Northeast Ohio Natural Gas Corp.*, Case No. 03-1229-GA-UNC, Finding and Order (June 5, 2003) (where purchase price and certain schedules were granted confidential treatment); *In re The East Ohio Gas Co.*, Case No. 11-4324-GA-ATR, Entry (Sep. 14, 2011). During the hearing, IEU-Ohio’s witness noted that IEU-Ohio is certified as a CRES supplier and has expressed to its members a willingness to provide generation service to them, similar to what they did when securing market support generation as part of FirstEnergy’s electric transition plan. Mr. Murray further explained that IEU-Ohio does not possess “the internal capabilities to offer the full range of requirements to act as a [CRES] provider,” indicating that IEU-Ohio would need to contract with a third-party vendor in order to serve generation supply today (Tr. at 11-12). Additionally, upon further questioning by the attorney examiner, both IEU-Ohio’s witness and counsel averred that merely redacting the pricing and billing information, similar to these aforementioned cases, would not provide adequate protection and the entire agreement, including general contract terms, should be considered trade secret (Tr. at 24-25). However, IEU-Ohio has not provided any case precedent demonstrating that these general terms of contract have been, or should be, treated as trade secrets for purposes of R.C. 1333.61. Thus, consistent with

Motors, Inc. *CG&E Market Development Case*, Released Documents (Nov. 10, 2008) at 101-107 (pages 103-109 of 200).

Commission precedent, it is more appropriate to limit the analysis to those terms that the Commission has historically treated as trade secret.

{¶ 21} Even assuming pricing and other negotiated terms were to be considered trade secret information,⁵ the most obvious obstacle to IEU-Ohio's request for protective treatment remains that these agreements are now over 20 years old. As noted by the attorney examiner during the July 1, 2022 hearing, the state of the competitive market for electric generation service in Ohio is in a very different place than it was when these agreements were first executed, including the fact that the market development period contemplated in the stipulation approved by the Commission in FirstEnergy's electric transition plan proceeding has long passed. (Tr. at 10-12). *See In re the Application of FirstEnergy Corp. on behalf of Ohio Edison Co., The Cleveland Elec. Illum. Co., and The Toledo Edison Co. for Approval of their Transition Plans and for Authorization to Collect Transition Revenues*, Case No. 99-1212-EL-ETP, et al., Opinion and Order, (July 19, 2000). These evolving circumstances cannot be ignored, and the passage of time is certainly a relevant factor to consider whether trade secret status should apply (Tr. at 21). Counsel for IEU-Ohio even acknowledged during the hearing that there exists Commission precedent holding that information previously afforded protective treatment could no longer be considered trade secret due to the age of the information (Tr. at 20-21). *See, e.g., CG&E Market Development Case*, Entry (Jan. 31, 2011) (where the Commission denied a motion for protective order filed by Duke Energy Ohio, Inc. with respect to information previously held confidential that was no longer deemed a trade secret and ordered release due to the age of the information)⁶,

⁵ Various master service agreements have been publicly filed in Commission proceedings without redaction of such terms. *See, e.g., In re the Complaint of Financial Network Solutions v. Universal Access, Inc.*, Case No. 99-1727-CT-CSS; *Covista Communications, Inc. v. Victory Telecom Inc and Xtension Services, Inc.*, Case No. 12-2574-TP-CSS.

⁶ In that Entry, the attorney examiner specifically noted that "[w]hile such information is accurately described by Duke, this information deals with contractual agreements in 2004, 2005, and 2006 and how four agreements, dating back to 2002, affected one of Duke's 2005 audits. Duke claims that, by revealing this information, competitors would have insight into Duke's current fuel buying patterns and its FPP positions and the identity of entities that Duke deals with for fuel. Nevertheless, Duke has failed to demonstrate how knowledge of this information to competitors, which dates back five to eight years,

Entry (Feb. 23, 2011), Entry (June 11, 2012); *In re the Application of Stand Energy Corp.*, Case No. 02-2549-GA-CRS, Entry (Oct. 2, 2009) (where the attorney examiner denied the motion for protective order as the applicant had not justified the continued protection of outdated documents); *In re the Application of Interstate Gas Supply, Inc.*, Case No. 02-1683-GA-CRS, Entry (Sept. 6, 2012) (where the attorney examiner denied protective treatment for exhibits to the renewal certification application as the “age of these documents has so diminished their value that they no longer constitute trade secrets); *In re the Applications of Energy Alliances Inc.*, Case No. 09-1048-EL-AGG, 09-1854-GA-AGG, Entry (June 30, 2014) (where the attorney examiner found that information filed under seal no longer constituted trade secret information, given its age, despite the fact that no Commission action was taken to either grant or deny the motions for protective order). In fact, counsel for IEU-Ohio failed to produce even one case where the Commission had previously granted a motion for protective order for an agreement that is over 20 years old (Tr. at 21-22).

{¶ 22} The information subject to the public records request in this proceeding shares a similar fate. Despite claiming that disclosure of the agreements in question may inhibit IEU-Ohio’s ability to contract with a third-party vendor in the event it decides to once again serve generation supply to its customers, the attorney examiner is not persuaded by Mr. Murray’s testimony or counsel’s arguments regarding the continued economic value of these dated agreements. The Commission has a statutory responsibility to keep its records and proceedings open to the public pursuant to R.C. 4901.12 and 4905.07. It is only under very limited circumstances that material in the Commission’s possession will be afforded protective treatment. It is not the Commission’s policy to protect dated historical information. *In re the Application of Delta Energy LLC*, Case No. 08-1037-GA-CRS, Entry (Oct. 16, 2012). The attorney examiner finds that IEU-Ohio has not demonstrated that the circumstances involved here warrant confidentiality, and, therefore, the motion for protective order as to MSA and MPA, and associated references, should not be granted. *See*

would jeopardize Duke’s current fuel purchasing patterns or practices.” *CG&E Market Development Case*, Entry (Jan. 31, 2011) at 7.

In re the Application of The Dayton Power and Light Co. for Approval of an Elec. Service Arrangement with General Motors Corp., Case No. 95-1137-EL-AEC, et al., Finding and Order (July 31, 1997) (where the Commission determined that the applicant had not demonstrated various rate and service information contained in the agreement warranted confidentiality, despite The Dayton Power and Light Company's claims that disclosure of such information would damage its ability to compete with other electric service providers). Although denying the motion for protective order, the attorney examiner notes that some documents responsive to the public records request may still be in redacted form as that is how they were accepted and filed under seal during the 2001 proceeding; pursuant to R.C. 149.43, the Commission can only provide the documents actually in its possession. Entry (Sept. 26, 2001) at 2.

{¶ 23} Finally, upon review of the motion for protective order, associated privilege log, and Mr. Murray's testimony, it appears IEU-Ohio is now seeking protection of information that falls outside of that requested in its motion for protective order. One such example is the confidentiality agreement entered into as directed in the September 26, 2001 Entry. As IEU-Ohio fails to raise the confidentiality agreement in its motion for protective order, it clearly has failed to provide any basis for granting protective treatment over such an agreement, especially as such an agreement does not contain any information specific to the two exhibits from Mr. Murray's deposition. In fact, such protective agreements are routinely filed before the Commission during the course of discovery disputes. *See, e.g., In re Ohio Edison Co., The Cleveland Elec. Illum. Co., The Toledo Edison Co.*, Case No. 17-974-EL-UNC, Motion for Protective Order (Mar. 10, 2022). Further, it is also important to note that the mere existence of a confidentiality agreement between IEU-Ohio and the parties to this case cannot prevent disclosure of records that are not determined to be trade secrets and are otherwise subject to disclosure under R.C. 149.43. *State ex rel. The Plain Dealer v. Ohio Dept. of Ins.*, 80 Ohio St.3d 513, 1997-Ohio- 75, 687 N.E.2d 661.

{¶ 24} Similarly, IEU-Ohio witness Murray presented testimony supporting continued confidential treatment of various email communications between IEU-Ohio

representatives and its members related to market support generation (IEU-Ohio Ex. 1 at 6). The attorney examiner notes that the June 8, 2022 Entry was not intended to be used as a second opportunity to shield various records from public disclosure after IEU-Ohio's claims for attorney client privilege were rejected. Entry (June 8, 2022) at ¶ 36 (where the attorney examiner noted "to the extent the documents claimed by IEU-Ohio to contain attorney-client privileged information are also argued to contain trade secret information, the Commission will refrain from disclosing such information either in the public docket or in response to the public records request until the hearing is held and a decision has been rendered by the presiding attorney examiner, and to the extent an appeal of the attorney examiner's decision sought, the appellate process has completed.") The June 8, 2022 Entry was merely noting that IEU-Ohio had claimed certain documents contained attorney client privilege as well as confidential, proprietary information, specifically the confidential briefs submitted in this proceeding. However, given the above rulings, this issue is moot and the communications may be disclosed into the public domain at this time.

{¶ 25} Therefore, the attorney examiner finds that the information filed under seal in this case,⁷ excluding the customer names and account numbers already granted protective treatment in the June 8, 2022 Entry, should be released into the public record and directs the Commission's docketing division to release this information on August 1, 2022, unless otherwise ordered.

III. ORDER

{¶ 26} It is, therefore,

{¶ 27} ORDERED, That the outstanding portion of the motion for protective order filed by IEU-Ohio on April 26, 2022 be denied, consistent with this Entry. It is, further,

⁷ The information to be released includes the communications that IEU-Ohio had previously claimed were protected by attorney-client privilege, which were denied protective treatment in the June 8, 2022 Entry, as well as the agreements and associated references discussed in this Entry.

{¶ 28} ORDERED, that the Commission's docketing division release the exhibits filed under seal in this case, excluding protected customer names and account numbers, into the public record on August 1, 2022, unless otherwise ordered. It is, further,

{¶ 29} ORDERED, That a copy of this Entry be served upon the parties of record.

THE PUBLIC UTILITIES COMMISSION OF OHIO

/s/ Megan J. Addison

By: Megan J. Addison
Attorney Examiner

NJW/mef

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

Summary: Attorney Examiner Entry denying the motion for protective order, as detailed herein electronically filed by Ms. Mary E. Fischer on behalf of Megan J. Addison, Attorney Examiner, Public Utilities Commission of Ohio