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BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

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In the Matter of the Joint Application of)
Ohio Edison Company, The Cleveland) Case No. 05-704-EL-ATA
Electric Illuminating Company and the)
Toledo Edison Company for Approval of a)
Generation Charge Adjustment Rider.)

In the Matter of the Joint Application of) Case No. 05-1125-EL-ATA
Ohio Edison Company, The Cleveland) Case No. 05-1126-EL-AAM
Electric Illuminating Company, and the) Case No. 05-1127-EL-UNC
Toledo Edison Company for Authority to)
Modify Certain Accounting Practices and)
for Tariff Approvals)

**MOTION OF CONSTELLATION ENERGY COMMODITIES GROUP, INC.,
CONSTELLATION NEWENERGY, INC., WPS ENERGY SERVICES, INC. AND
DIRECT ENERGY SERVICES LLC FOR A PROTECTIVE ORDER**

Constellation Energy Commodities Group, Inc., Constellation NewEnergy,
Inc., WPS Energy Services, Inc., and Direct Energy Services LLC ("the Intervenor"), by
its attorneys and pursuant to Section 4901-1-24(D) of the Ohio Administrative Code, move
for an order protecting the confidentiality of the information designated as confidential
and/or proprietary. The information for which protection is sought is contained in the
Initial Brief of the Intervenor. A Memorandum in Support is attached that sets forth in
greater detail the reasons underlying this motion. As required by rule, three unredacted
copies of the Initial Brief (Confidential Version) have been filed under seal. Also, the
required number of copies of the public version of the Initial Brief have been filed with
Docketing.

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Respectfully submitted,



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MEMORANDUM IN SUPPORT

The Intervenors respectfully request that the information contained in the Intervenors' Initial Brief which references Constellation Exhibits 1 and 2 be protected from public disclosure (including any and all copies of such information, including electronic copies). This information relates to projected fuel cost increases and projected fuel deferrals of FirstEnergy Corp. ("FirstEnergy") that FirstEnergy considers confidential. The Intervenors have signed a protective agreement with FirstEnergy prohibiting its disclosure. Public disclosure of this redacted information would cause the Intervenors to violate its protective agreement with FirstEnergy.

Section 4901-1-24(D) of the Ohio Administrative Code grants the Commission or certain designated employees the authority to 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 and 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 Ohio Revised Code. *See* Ohio Admin. Code § 4901-1-24(D). As discussed below, not only does state law enjoin the release of the confidential information related to the projected fuel cost increases and projected fuel deferrals of FirstEnergy because of its trade secret status, but the operation and purposes of Title 49 will not be impaired by the non-disclosure of that information. The Commission and Staff will have full access to the unredacted information despite its confidential nature and therefore will be able to fulfill their statutory obligations. No purpose of Title 49 would be served by publicly disclosing that information.

This Commission has long-recognized the value of, and therefore the need to protect from public disclosure, trade secret information. For example, this Commission has issued protective orders in numerous proceedings to maintain the confidentiality of competitively sensitive and proprietary information. *See, e.g., Elyria Tel. Co.*, Case No. 89-965-TP-AEC (Finding and Order, Sept. 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, Aug. 17, 1990). Even Commission rules have long-acknowledged the need to maintain the confidentiality of trade secret information. *See* Ohio Admin. Code § 4901-1-24(A)(7). In fact, the universal recognition of the value of permitting this type of information to remain confidential has even lead courts of other jurisdictions to hold that public utilities have not only the authority, but the duty, to protect the trade secrets of the public utilities that they regulate. *New York Tel. Co. v. Pub. Serv. Comm. N.Y.*, 56 N.Y.2d 213 (1982).

Ohio law defines the term "trade secret" in the Uniform Trade Secrets Act and states the following:

"Trade secret" mean 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.

Ohio Rev. Code § 1333.61(D). This definition reflects Ohio's policy favoring the protection of trade secrets like the confidential information related to the projected fuel cost increases and projected fuel deferrals of FirstEnergy which is the subject of this motion.

In Pyromatics, Inc. v. Petruziello, 7 Ohio App. 3d 131, 134-35 (Cuyahoga Co. 1983), the Court of Appeals, citing Koch Eng. Co. v. Faulconer, 210 U.S.P.Q. 854, 861 (Kan. 1980), delineated the factors to be considered in recognizing a trade secret:

(1) [T]he 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.

Both that inquiry and the definition contained in Section 1333.61(D) of the Ohio Revised Code referred to above are satisfied here.

As per its agreement with FirstEnergy, the Intervenor_s have treated the information contained on Constellation Exhibits 1 and 2 and referenced in their Initial Brief as a trade secret. That information, according to FirstEnergy, derives independent economic value from not being known to persons (e.g., competitors) who can use it to their own financial advantage. Moreover, in the ordinary course of its business that information is identified as confidential and/or proprietary by FirstEnergy, and is not disclosed to anyone outside of FirstEnergy except by the terms of the protective agreement. Accordingly, that information constitutes trade secret information under Ohio law warranting protection from public disclosure.

Moreover, the limited non-disclosure sought by the Intervenors here is consistent with the purposes of Title 49 of the Ohio Revised Code as declared by the Ohio General Assembly. Recently, the Ohio legislature enacted H.B. 563, which states, in relevant part, that:

It is the policy of [Ohio] to:

...

- (3) Encourage innovation in the telecommunications industry;
- (4) Promote diversity and options in the supply of public telecommunications services and equipment throughout the state; [and]
- (5) Recognize the continuing emergence of a competitive telecommunications environment through flexible regulatory treatment of public telecommunications services where appropriate.

Ohio Rev. Code § 4927.02. Through this enactment, the Ohio legislature has thus declared its policy favoring innovation, diversity and competition in Ohio's telecommunications industry. The Commission's protection of the projected fuel cost increases and projected fuel deferrals of FirstEnergy contained in the Initial Brief of the Intervenors as confidential and proprietary information is not inconsistent with, but rather is necessary to encourage and effectuate, those purposes as well.

The attachment to this Memorandum lists the information that has been redacted from the associated filing and further describes why it should be granted protected status. For the foregoing reasons, the Intervenors respectfully request that the designated information be protected from public disclosure and that this motion be granted.

Respectfully Submitted,



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ATTACHMENT

Information Redacted

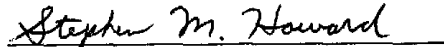
Reasons

Projected Fuel Cost Increases and
Projected Fuel Deferrals of FirstEnergy

This information comes from FirstEnergy for which
FirstEnergy has required the Intervenors to keep
confidential as part of a protective agreement.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and accurate copy of the foregoing Motion for a Protective Order was served this 16th day of December 2005, by regular U.S. mail, postage prepaid or Email if known, upon the persons on the attached service list.


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