

ORIGINAL

IN THE SUPREME COURT OF OHIO

OHIO POWER COMPANY,	:	
	:	
Appellant/Cross-Appellee,	:	Case No. 2012-1484
	:	
v.	:	
	:	Appeal from the Public Utilities
THE PUBLIC UTILITIES	:	Commission of Ohio
COMMISSION OF OHIO,	:	
	:	Public Utilities Commission of Ohio
	:	Case Nos. 09-872-EL-FAC
	:	09-873-EL-FAC
Appellee.	:	

JOINT BRIEF OF APPELLANT/CROSS-APPELLEE OHIO POWER COMPANY
AND APPELLEE/CROSS-APPELLANT INDUSTRIAL ENERGY USERS-OHIO
IN RESPONSE TO THE COURT'S JUNE 20, 2013 SHOW-CAUSE ORDER

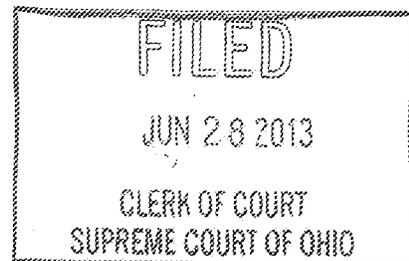
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INTRODUCTION

This Court has ordered the parties to show cause why a May 17, 2013 Entry by the Public Utilities Commission of Ohio (“Commission” or “PUCO”) in the underlying Fuel Adjustment Clause (“FAC”) dockets, in which the Commission agreed to temporarily maintain certain confidential information under seal, does not render moot the Motion for Protective Order that Appellee/Cross-Appellant Industrial Energy Users-Ohio (“IEU”) filed in this Court, which Motion Appellant/Cross-Appellee Ohio Power Company (“AEP Ohio”) supported. For the following reasons, IEU and AEP Ohio respectfully and jointly submit that the Commission’s May 17 Entry does not necessarily render IEU’s Motion for Protective Order moot, and respectfully ask this Court to grant IEU’s Motion in an entry or order that will confirm and clarify the scope and duration of restrictions on public access to the highly confidential, trade-secret materials found throughout IEU’s Second Merit Brief and Second Supplement. In the alternative, if the Court chooses to deem IEU’s Motion for Protective Order moot based on the Commission’s May 17 Entry, then because of the expiration date in that Entry, the Court should expressly confirm that it will continue to restrict public access to IEU’s Second Merit Brief and Second Supplement for as long as the Commission extends confidential treatment to the same information in any future entries issued pursuant to Ohio Adm.Code 4901-1-24(F).

LAW AND ARGUMENT

IEU and AEP Ohio respectfully submit that there are several reasons why the Commission’s May 17 Entry does not necessarily render IEU’s Motion for Protective Order moot. First, different rules apply to requests for confidential treatment that are made to the Commission (per the Ohio Administrative Code) versus requests for restrictions on public access that are made to this Court (per the Rules of Superintendence). Second, IEU’s Motion for

Protective Order pertains to information contained in IEU's Second Merit Brief and Second Supplement *filed with this Court*; thus, IEU's Motion properly seeks to restrict public access to compilations of confidential information that had not been filed with the Commission when it issued its May 17 Entry, and that would be publicly available on this Court's electronic docket in the normal course, absent an order restricting public access. Third, this Court has previously granted motions for protective orders relating to information that had been administratively sealed, making IEU's Motion for Protective Order consistent with that practice. Fourth, the Commission's May 17 Entry expires by its own terms in November 2014, and there is no guarantee that this Court will have ruled on the merits of this case by then, or that the need for restrictions on public access to certain portions of IEU's Second Merit Brief and Second Supplement will have lapsed by that time. As such, if this Court concludes that the Commission's May 17 Entry *does* render IEU's Motion moot, and agrees to continue to restrict public access to IEU's Second Merit Brief and Second Supplement on the basis of that Entry, then the Court should expressly confirm that it will restrict public access to these materials on its docket for as long as the Commission chooses to seal the same information in the underlying FAC dockets pursuant to Ohio Adm. Code § 4901-1-24(F) (which permits parties to move the Commission to extend existing protective orders).

I. This Court Should Issue An Entry Or Order Granting IEU's Motion For Protective Order To Confirm And Clarify The Scope And Duration Of Restrictions On Public Access To IEU's Second Merit Brief And Second Supplement.

The Commission's May 17 Entry, attached here as Exhibit 1, granted AEP Ohio's request to extend confidential treatment to certain sensitive, trade-secret information that was submitted to the Commission under seal in the underlying FAC dockets, specifically:

- The confidential version of a May 14, 2010 Audit Report including confidential, proprietary, competitively sensitive and trade-secret information, including coal inventory information on an individual plant and total company basis, specific fuel/consumables contract terms and conditions (including pricing) and planned purchasing information, competitive financial and cost information for AEP's River Transportation Division affiliate, and competitive pricing information for Renewable Energy Certificates ("REC") and emission allowances;
- Testimony and briefs filed by the parties containing the above-described confidential information, as well as additional background data relating to a confidential fuel procurement agreement referenced in the Audit Report; and
- Evidentiary transcripts of the hearing that was conducted on August 23-24, 2010 before the Commission containing the above-described confidential information.

See AEP Ohio's March 21, 2013 Motion to Extend Protective Order filed in PUCO Case Nos. 09-872-EL-FAC & 09-873-EL-FAC (attached hereto as Exhibit 2).

When AEP Ohio originally sought a protective order from the Commission relating to the above-described information, as well as temporal extensions to that protective order, it did so pursuant to the Commission's rules pertaining to protective orders, which are found in the Ohio Administrative Code. See Ohio Adm.Code 4901-1-24 (attached hereto as Exhibit 3). Those rules give the Commission, the legal director, the deputy legal director, or an attorney examiner authority to issue any order necessary to protect the confidentiality of sensitive information in documents that are filed "*with the Commission's docketing division relative to a case before the Commission.*" Ohio Adm.Code 4901-1-24(D) (emphasis added). Those rules further provide that any order prohibiting public disclosure "shall automatically expire eighteen months after the

date of its issuance, and such information may then be included in the public record of the proceeding.” Ohio Adm.Code 4901-1-24(F). Paragraph (F) of the rule permits parties wishing to extend a protective order beyond eighteen months to file an appropriate motion at least forty-five days in advance of the expiration date of the existing order, including a “detailed discussion of the need for continued protection from disclosure.” *Id.* By their own terms, therefore, the Commission’s rules relating to protective orders result in temporary protective orders that pertain to information in documents that are filed “with the Commission’s docketing division relative to a case before the Commission” – not to documents filed on this Court’s docket with this Court’s Clerk (such as IEU’s Second Merit Brief and Second Supplement).

A different set of rules, outside of the Ohio Administrative Code, applies to public access to court records. Specifically, the Rules of Superintendence for the Courts of Ohio, Sup. R. 44-47, create a presumption of public access to court records that are filed with clerks of court, Sup. R. 45(A), and establish a procedure by which movants may seek to overcome that presumption and restrict public access, Sup. R. 45(E). Although the Rules of Superintendence are generally applicable only to all “courts of appeal, courts of common pleas, municipal courts, and county courts” in Ohio, the public access rules (Sup. R. 44 through 47) expressly apply to the Supreme Court as well. *See* Sup. R. 44. This Court’s Rules of Practice also briefly address public access to documents filed with the Supreme Court, noting in Rule 3.02(B) that such documents “are public records unless they have been sealed pursuant to a *court order* or are the subject of a motion to seal pending in the Supreme Court.” S.Ct.Prac.R. 3.02(B) (emphasis added).

IEU’s Motion for Protective Order filed in this Court, which AEP Ohio supported in its January 14, 2013 Memorandum, is consistent with the process anticipated by the Superintendence Rules, which is distinct from the process pursuant to which AEP Ohio

previously obtained temporary protective orders from the Commission under Ohio Adm.Code 4901-1-24 in the underlying FAC dockets. Together, IEU's Motion for Protective Order and AEP Ohio's Memorandum in Support demonstrate by clear and convincing evidence, consistent with Sup. R. 45(E)(2), several compelling reasons why IEU's Second Merit Brief and Second Supplement contain information that should be restricted from public access. For example, IEU's Motion for Protective Order notes that the information is subject to a Protective Agreement executed by IEU-Ohio and Ohio Power Company. *See* IEU Motion at 3. AEP Ohio's Memorandum notes that the Commission's Attorney Examiner applied this Court's multifactor test to conclude that the information in question constitutes trade secrets pursuant to R.C. 1333.61(D), and that nondisclosure of the information is not inconsistent with the purposes of Title 49 of the Ohio Revised Code. *See* AEP Ohio Mem. in Supp. at 3 (citing *State ex rel. The Plain Dealer v. Ohio Dept. of Ins.*, 80 Ohio St.3d 513, 524-525, 687 N.E.2d 661 (1997); *In the Matter of the Fuel Adjustment Clauses for Columbus Southern Power Company and Ohio Power Company*, Case Nos. 09-872-EL-FAC, *et al.*, Entry at ¶ 7 (June 29, 2010)).

It has been this Court's prior practice to grant motions for protective order with respect to confidential information that had previously been sealed by an administrative agency. For example, this Court has granted an appellant's motion for protective order in an appeal from the Ohio Power Siting Board ("OPSB"), even though information subject to the motion for protective order had previously been sealed by the OPSB's administrative law judge. *See In re Application of Am. Transm. Sys. Inc.*, Ohio Supreme Court Case No. 2009-0481, Entry (June 30, 2009) (granting appellant's motion to seal Volume III of its Supplement); *see also In re Application of Am. Transm. Sys. Inc.*, OPSB Docket No. 07-0171-EL-BTX, Entries (March 3,

2008 & October 6, 2009) (entering and extending the OPSB's protective order relating to the information).

This Court has also recently disagreed with a tribunal's sealing order, which underscores why the Court may prefer to rule on the merits of IEU's Motion for Protective Order instead of simply deeming it moot based on the Commission's prior determination. *See State ex rel. Vindicator Printing Co. v. Wolff*, 132 Ohio St.3d 481, 2012-Ohio-3328, ¶¶ 23-37 (applying Rules of Superintendence and concluding that no clear and convincing evidence supported restrictions on public access to information sealed by trial judge). As such, IEU's Motion for Protective Order (which no party has opposed) is consistent with this Court's practice and decisional law, in which the Court has considered the merits of requests relating to public access on their merits, without merely deferring to the sealing decisions previously made by other tribunals or agencies. IEU's Motion is also not inconsistent with (or rendered unnecessary by) this Court's Rules of Practice, given that S.Ct.Prac.R. 3.02(B) restricts public access to documents that were sealed pursuant to a "court order" but does not expressly restrict public access to documents that were sealed pursuant to an *agency's* order.

Notably, there remains some uncertainty regarding the relationship between the Superintendence Rules on public access to court documents and other sources of law that provide public access to certain public records. Just days ago, for example, this Court instructed the parties in an original action to brief the issue of whether the Superintendence Rules provide the "sole means by which a party may obtain access to court records," or whether an aggrieved party may pursue an action under either R.C. 149.43 or Sup.R. 47(B). *See State ex rel. Village of Richfield v. Laria*, Ohio Supreme Court Case No. 2013-0530, Entry (June 19, 2013). Given the uncertainty regarding the scope and effect of the Superintendence Rules on public access to court

records, IEU and AEP Ohio submit that it would be most prudent for the Court to proceed to issue a decision on the merits of IEU's Motion for Protective Order, rather than merely relying on the determination made previously by the Commission under the Ohio Administrative Code.

Thus, IEU and AEP Ohio jointly and respectfully ask the Court to proceed to rule on (and to grant) IEU's Motion for Protective Order, which has not been opposed by any party to date, to confirm and clarify the restrictions on public access that are appropriate for the competitively sensitive confidential business information and trade secrets contained in IEU's Second Merit Brief and Second Supplement. As AEP Ohio demonstrated in its January 14, 2013 Memorandum in Support, AEP Ohio's trade secrets and confidential business information, including confidential coal inventory information on an individual plant and total company basis, specific coal contract terms and conditions (including pricing), and other sensitive, competitive financial and cost information of AEP Ohio, are found throughout IEU's Second Merit Brief and Second Supplement. *See, generally*, AEP Ohio's January 14, 2013 Mem. in Support.

II. In The Alternative, If The Court Chooses To Deem IEU's Motion For Protective Order Moot Based On The Commission's May 17 Entry, Then The Court Should Expressly Confirm That It Will Restrict Public Access To IEU's Second Merit Brief And Second Supplement For As Long As The Commission Extends Confidentiality To The Information Pursuant To Ohio Adm. Code § 4901-1-24(F).

Because the Superintendence Rules exclude from the definition of "court record" and "case document" any "document or information in a document exempt from disclosure under state, federal, or the common law," Sup. R. 44(B) & (C)(2)(a), and because the Commission has already determined that the information subject to IEU's Motion for Protective Order should be sealed pursuant to Ohio Adm. Code § 4901-1-24 and R.C. 1333.61, this Court may decide that its Clerk is not required by the Rules of Superintendence to make IEU's Second Merit Brief and Second Supplement available for public access at this time. After all, Sup. R. 45(A) makes the

presumption of public access apply only to “court records,” and Sup. R. 45(B) by its terms requires the Clerk to make only “a court record” available to the public by direct access. If the Court decides that IEU’s Motion for Protective Order is moot on this or any other basis, however, then due to the November 2014 expiration date in the Commission’s existing protective order, the Court should expressly confirm that its restrictions on public access to IEU’s Second Merit Brief and Second Supplement will remain in place for as long as the Commission agrees to extend confidentiality to the same information pursuant to Ohio Adm. Code § 4901-1-24(F). In that way, the confidential treatment afforded by this Court and the Commission with respect to information filed on both dockets would remain consistent.

CONCLUSION

For the foregoing reasons, IEU and AEP Ohio jointly and respectfully ask this Court to grant IEU’s Motion for Protective Order to confirm and clarify the scope and duration of any restrictions on public access to the confidential business information and trade secrets contained in IEU’s Second Merit Brief and Second Supplement. In the alternative, if the Court chooses to deem IEU’s Motion for Protective Order moot based on the Commission’s May 17 Entry, then the Court should expressly confirm that its restrictions on public access to IEU’s Second Merit Brief and Second Supplement will remain in place for as long as the Commission agrees to extend confidentiality to the information pursuant to Ohio Adm. Code § 4901-1-24(F).

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned counsel certifies that the foregoing Joint Brief of IEU and AEP Ohio in Response to the Supreme Court's June 20, 2013 Show-Cause Order was served by First-Class U.S. Mail upon the following counsel of record this 28th day of June 2013.


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BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Fuel Adjustment)
Clauses for Columbus Southern Power) Case No. 09-872-EL-FAC
Company and Ohio Power Company.) Case No. 09-873-EL-FAC

ENTRY

The attorney examiner finds:

- (1) By opinion and order issued on March 18, 2009, in Case No. 08-917-EL-SSO, *et al.*, the Commission approved the establishment of fuel adjustment clause (FAC) mechanisms under which Columbus Southern Power Company and Ohio Power Company (jointly, AEP Ohio)¹ recovered prudently incurred costs associated with fuel, including consumables related to environmental compliance, purchased power costs, emission allowances, and costs associated with carbon-based taxes and other carbon-related regulations. The Commission also established an annual audit of the FAC mechanisms. Energy Ventures Analysis, Inc. and its subcontractor, Larkin & Associates PLLC, were selected by the Commission to perform the management/performance and financial audits of AEP Ohio for 2009, 2010, and 2011.
- (2) On October 5, 2011, and March 21, 2013, AEP Ohio filed motions for protective order, seeking to extend protection granted by entry on June 29, 2010, for certain information contained in the confidential version of the May 14, 2010, FAC audit report, as well as to protect testimony, briefs, and transcripts that contain the confidential information from the May 14, 2010, FAC audit report, which were filed under seal on August 16, 2010, August 23, 2010, September 8, 2010, September 23, 2010, and October 15, 2010. AEP Ohio claims that the confidential information from the May 14, 2010, FAC audit report constitutes trade secret information under Ohio law. No memoranda contra the motions for protective order were filed.

¹ By entry issued on March 7, 2012, the Commission approved and confirmed the merger of Columbus Southern Power Company into Ohio Power Company. *In the Matter of the Application of Ohio Power Company and Columbus Southern Power Company for Authority to Merge and Related Approvals*, Case No. 10-2376-EL-UNC.

- (3) Section 4905.07, Revised Code, provides that all facts and information in the possession of the Commission shall be public, except as provided in Section 149.43, Revised Code, and as consistent with the purposes of Title 49 of the Revised Code. Section 149.43, Revised Code, specifies that the term "public records" excludes information, which, 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).
- (4) Similarly, Rule 4901-1-24(D), Ohio Administrative Code (O.A.C.), allows an attorney examiner to issue an order to protect the confidentiality of information contained in a filed document, "to the extent that state or federal law prohibits release of the information, including where the information is deemed . . . to constitute a trade secret under Ohio law, and where non-disclosure of the information is not inconsistent with the purposes of Title 49 of the Revised Code."
- (5) Ohio law defines a trade secret as "information . . . 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." Section 1333.61(D), Revised Code.
- (6) The attorney examiner has reviewed the information covered by the motions for protective order filed by AEP Ohio, as well as the assertions set forth in the memoranda in support. Applying the requirements that the information have independent economic value and be the subject of reasonable efforts to maintain its secrecy pursuant to Section 1333.61(D), Revised Code, as well as the six-factor test set forth by the Ohio Supreme Court,² the attorney examiner finds that the information redacted from the confidential version of the May 14, 2010, FAC audit report constitutes trade secret information. Release of this information is, therefore, prohibited under state law. The attorney examiner also finds that nondisclosure of

² See *State ex rel. The Plain Dealer v. Ohio Dept. of Ins.*, 80 Ohio St. 3d 513, 524-525, 687 N.E.2d 661 (1997).

this information is not inconsistent with the purposes of Title 49 of the Revised Code. Therefore, the attorney examiner finds that AEP Ohio's motions for protective order are reasonable with regard to the information redacted from the confidential version of the May 14, 2010, FAC audit report, and should be granted.

- (7) Rule 4901-1-24(F), O.A.C., provides that, unless otherwise ordered, protective orders issued pursuant to Rule 4901-1-24(D), O.A.C., automatically expire after 18 months. Therefore, confidential treatment shall be afforded for a period ending 18 months from the date of this entry, or until November 17, 2014. Until that date, the docketing division should maintain, under seal, the information filed confidentially.
- (8) Rule 4901-1-24(F), O.A.C., requires a party wishing to extend a protective order to file an appropriate motion at least 45 days in advance of the expiration date. If AEP Ohio wishes to extend this confidential treatment, it should file an appropriate motion at least 45 days in advance of the expiration date. If no such motion is filed, the Commission may release the information without prior notice to AEP Ohio.

It is, therefore,

ORDERED, That the motions for protective order filed by AEP Ohio be granted. It is, further,

ORDERED, That the Commission's docketing division maintain, under seal, the confidential information filed under seal on May 14, 2010, August 16, 2010, August 23, 2010, September 8, 2010, September 23, 2010, and October 15, 2010, for a period of 18 months, ending on November 17, 2014. It is, further,

ORDERED, That a copy of this entry be served upon all parties of record.

THE PUBLIC UTILITIES COMMISSION OF OHIO

s/Sarah Parrot

By: Sarah J. Parrot

Attorney Examiner

GAP/sc

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in

Case No(s). 09-0872-EL-FAC, 09-0873-EL-FAC

**Summary: Attorney Examiner Entry grants AEP Ohio's motion for protective order. -
electronically filed by Sandra Coffey on behalf of Sarah Parrot, Attorney Examiner, Public
Utilities Commission of Ohio**

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Fuel Adjustment)	
Clauses for Columbus Southern Power)	Case No. 09-872-EL-FAC
Company and Ohio Power Company)	Case No. 09-873-EL-FAC

**OHIO POWER COMPANY'S
MOTION TO EXTEND PROTECTIVE ORDER**

Ohio Power Company¹ ("AEP Ohio" or the "Company"), pursuant to Rule 4901-1-24(F), Ohio Admin. Code, hereby moves the Commission to renew and extend its June 29, 2010, Entry ordering confidentiality treatment for, and prohibition against the disclosure of, certain information filed under seal in these dockets. The reasons supporting this motion are detailed in the accompanying memorandum in support.

Respectfully Submitted,

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¹ By entry issued on March 7, 2012, the Commission approved and confirmed the merger of Columbus Southern Power Company with and into Ohio Power Company effective December 31, 2011. *In the Matter of the Application of Ohio Power Company and Columbus Southern Power Company for Authority to Merge and Related Approvals*, Case No. 10-2376-EL-UNC. Accordingly, references herein to Ohio Power Company or AEP Ohio, the surviving entity after the merger, included the predecessor interests of Columbus Southern Power Company.

MEMORANDUM IN SUPPORT

The information filed under seal in these dockets on May 14, 2010, August 16, 2010, August 23, 2010, September 23, 2010, October 15, 2010 and September 8, 2010, consists of the following:

- The confidential version of the May 14, 2010, Audit Report, including confidential, proprietary, competitively sensitive and trade secret information, including coal inventory information on an individual plant and total company basis, specific fuel/consumables contract terms and conditions (including pricing) and planned purchasing information, competitive financial and cost information for AEP's River Transportation Division affiliate, and competitive pricing information for Renewable Energy Certificates ("REC") and emission allowances (collectively "Confidential Information");
- Testimony and briefs filed by the parties containing Confidential Information, including testimony on those topics identified above and additional background data relating to a confidential fuel procurement agreement referenced in the Audit Report; and
- Evidentiary transcripts of the hearing conducted on August 23-24, 2010, containing Confidential Information.

The Confidential Information was initially subject to a protective order for 18 months from the issuance of the Commission's Entry on June 29, 2010, or until December 29, 2011. On October 5, 2011, the Company filed a motion to renew and extend the protective order for an additional 18-month period from December 29, 2011, or until June 29, 2013. The Company

hereby renews its request for continued protection of the foregoing Confidential Information to prevent its public disclosure.

The Confidential Information, previously found to be confidential, proprietary, and competitively sensitive by the Attorney Examiner in this case, and accordingly filed under seal and prohibited from public disclosure, should remain confidential for an additional 18-month period from the expiration of the current order on June 29, 2013. Many of the Company's fuel/consumable contracts run for terms longer than 18 months, and regardless, many of the terms (including price) and conditions of the Company's contracts remain competitively sensitive even after termination or expiration of a particular contract. Likewise, procurement plans, REC pricing and financial information relating to AEP's River Transportation Division remains highly confidential; release of such information would create a significant disadvantage for AEP in future negotiations.

For the foregoing reasons, the Company respectfully requests a renewal of the current protective order for an additional 18-month period, and that any requests under the Open Records law for disclosure of the documents filed under seal in this proceeding be rejected under § 149.43(A)(a)(v), Revised Code, as a request for records whose release is prohibited under state law.

Respectfully submitted,

/s/ Yazen Alami

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served via electronic mail upon the below-listed counsel of record on this 21st day of March, 2013.

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Case No(s). 09-0872-EL-FAC, 09-0873-EL-FAC

Summary: Motion to extend Protective Order electronically filed by Mr. Yazen Alami on behalf of Ohio Power Company

4901-1-24 Motions, for protective orders.

(A) Upon motion of any party or person from whom discovery is sought, the commission, the legal director, the deputy legal director, or an attorney examiner may issue any order which is necessary to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense. Such a protective order may provide that:

- (1) Discovery not be had.
- (2) Discovery may be had only on specified terms and conditions.
- (3) Discovery may be had only by a method of discovery other than that selected by the party seeking discovery.
- (4) Certain matters not be inquired into.
- (5) The scope of discovery be limited to certain matters.
- (6) Discovery be conducted with no one present except persons designated by the commission, the legal director, the deputy legal director, or the attorney examiner.
- (7) A trade secret or other confidential research, development, commercial, or other information not be disclosed or be disclosed only in a designated way.
- (8) Information acquired through discovery be used only for purposes of the pending proceeding, or that such information be disclosed only to designated persons or classes of persons.

(B) No motion for a protective order shall be filed under paragraph (A) of this rule until the person or party seeking the order has exhausted all other reasonable means of resolving any differences with the party seeking discovery. A motion for a protective order filed pursuant to paragraph (A) of this rule shall be accompanied by:

- (1) A memorandum in support, setting forth the specific basis of the motion and citations of any authorities relied upon.
- (2) Copies of any specific discovery requests which are the subject of the request for a protective order.
- (3) An affidavit of counsel, or of the person seeking a protective order if such person is not represented by counsel, setting forth the efforts which have been made to resolve any differences with the party seeking discovery.

(C) If a motion for a protective order filed pursuant to paragraph (A) of this rule is denied in whole or in part, the commission, the legal director, the deputy legal director, or the attorney examiner may require that the party or person seeking the order provide or permit discovery, on such terms and conditions as are just.

(D) Upon motion of any party or person with regard to the filing of a document with the commission's docketing division relative to a case before the commission, the commission, the legal director, the deputy legal director, or an attorney examiner may issue any order which is necessary to protect the confidentiality of information contained in the document, to the extent that state or federal law prohibits release of the information, including where the information is deemed by the commission, the

legal director, the deputy legal director, or the attorney examiner to constitute a trade secret under Ohio law, and where nondisclosure of the information is not inconsistent with the purposes of Title 49 of the Revised Code. Any order issued under this paragraph shall minimize the amount of information protected from public disclosure. The following requirements apply to a motion filed under this paragraph:

- (1) All documents submitted pursuant to paragraph (D) of this rule should be filed with only such information redacted as is essential to prevent disclosure of the allegedly confidential information. Such redacted documents should be filed with the otherwise required number of copies for inclusion in the public case file.
 - (2) Three unredacted copies of the allegedly confidential information shall be filed under seal, along with a motion for protection of the information, with the secretary of the commission, the chief of the docketing division, or the chief's designee. Each page of the allegedly confidential material filed under seal must be marked as "confidential," "proprietary," or "trade secret."
 - (3) The motion for protection of allegedly confidential information shall be accompanied by a memorandum in support setting forth the specific basis of the motion, including a detailed discussion of the need for protection from disclosure, and citations of any authorities relied upon. The motion and memorandum in support shall be made part of the public record of the proceeding.
 - (4) If a motion for a protective order is filed in a case involving a request for approval of a contract between a telecommunications carrier and a customer, and the contract has an automatic approval process, unless the commission suspends the automatic approval process or otherwise rules on the motion for a protective order, the motion for a protective order will be automatically approved for an eighteen-month period beginning on the date that the contract is automatically approved. Nothing prohibits the commission from rescinding the protective order during the eighteen-month period. If a motion for a protective order for information included in a gas marketer's renewal certification application case filed pursuant to section 2928.09 of the Revised Code, or a competitive retail electric service provider's renewal certification application case filed pursuant to section 4928.09 of the Revised Code, is granted, the motion will be automatically approved for a twenty-four month period beginning with the date of the renewed certificate. Nothing prohibits the commission from rescinding the protective order during the twenty-four month period. Automatic approval of confidentiality under this provision shall not preclude the commission from examining the confidentiality issue de novo if there is an application for rehearing on confidentiality or a public records request for the redacted information.
- (E) Pending a ruling on a motion filed in accordance with paragraph (D) of this rule, the information filed under seal will not be included in the public record of the proceeding or disclosed to the public until otherwise ordered. The commission and its employees will undertake reasonable efforts to maintain the confidentiality of the information pending a ruling on the motion. A document or portion of a document filed with the docketing division that is marked "confidential," "proprietary," or "trade secret," or with any other such marking, will not be afforded confidential treatment and protected from disclosure unless it is filed in accordance with paragraph (D) of this rule.
- (F) Unless otherwise ordered, any order prohibiting public disclosure pursuant to paragraph (D) of this rule shall automatically expire eighteen months after the date of its issuance, and such information may then be included in the public record of the proceeding. A party wishing to extend a protective order beyond eighteen months shall file an appropriate motion at least forty-five days in advance of

the expiration date of the existing order. The motion shall include a detailed discussion of the need for continued protection from disclosure.

(G) The requirements of this rule do not apply to information submitted to the commission staff. However, information submitted directly to the legal director, the deputy legal director, or the attorney examiner that is not filed in accordance with the requirements of paragraph (D) of this rule may be filed with the docketing division as part of the public record. No document received via facsimile transmission will be given confidential treatment by the commission.

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