ORIGINAL

IN THE SUPREME COURT OF OHIO

THE KROGER CO.,	:	
	:	**Case No. 2013-0521**
Appellant,	:	
	:	**Appeals from the Public Utilities**
	:	**Commission of Ohio**
v.	:	
	:	
THE PUBLIC UTILITIES	:	**Public Utilities Commission of Ohio**
COMMISSION OF OHIO,	:	**Case Nos. 11-346-EL-SSO,**
	:	**11-348-EL-SSO, 11-349-EL-AAM,**
Appellee.	:	**11-350-EL-AAM.**

OHIO POWER COMPANY'S MOTION FOR PROTECTIVE ORDER

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OHIO POWER COMPANY'S MOTION FOR PROTECTIVE ORDER

Pursuant to S.Ct.Prac.R. 3.02(B) & 4.01, and Sup. R. 44 through 47, Appellee/Cross-Appellant Ohio Power Company ("AEP Ohio") respectfully moves the Court to restrict public access to the information that is contained in Appellant Industrial Energy Users-Ohio ("IEU-Ohio")'s Confidential Supplement (Volume II), which is the subject of IEU-Ohio's December 10, 2013 Motion for Protective Order. As IEU-Ohio correctly notes in its Motion, AEP Ohio marked the information for which it seeks protective treatment confidential, AEP Ohio has considered it confidential, and it is the subject of a Protective Agreement executed by IEU-Ohio and AEP Ohio. (*See generally* IEU-Ohio Motion & Mem. in Supp.)

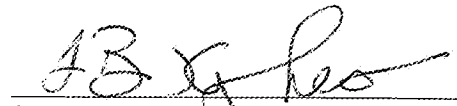
What IEU-Ohio fails to note in its Motion is the additional compelling fact that this Court has very recently agreed to restrict public access to precisely the same information in a separate appeal from the Public Utilities Commission of Ohio ("Commission") that is currently pending before the Court, *In the Matter of the Application of Ohio Power Company for Approval of an Amendment to its Corporate Separation Plan*, Ohio Supreme Court Case No. 2013-1014. Specifically, in a November 20, 2013 Entry in that appeal, this Court granted AEP Ohio's Motion for Protective Order, which pertained to the very same document that is at issue here in IEU-Ohio's Motion – a confidential exhibit (IEU-Ohio Exhibit 121) that was introduced by IEU-Ohio at the underlying Commission hearing.

IEU-Ohio also fails to note in its Motion that the Commission has previously agreed that the highly sensitive financial information in question should be accorded confidential treatment and has thus granted a protective order pursuant to the applicable requirements of the Ohio Administrative Code. And as this Court has recently determined, the Commission's protection of confidential information filed on its docket supports this Court's corresponding treatment of

the same information filed on its docket. *See In the Matter of the Fuel Adjustment Clauses for Columbus Southern Power Company and Ohio Power Company*, Case No. 2012-1484, Entry (Aug. 27, 2013) ("Because the [Commission] has again found that the information sought to be protected constitutes trade secrets and has renewed the protection of that information below, we grant [IEU-Ohio]'s motion, and order that the documents sought to be protected will remain under seal by the clerk of court until [the expiration of the Commission's sealing order].")

Restricting public access to the highly confidential information contained in IEU-Ohio's Confidential Supplement would thus be consistent with this Court's recent entries in both the *Corporate Separation* and *Fuel Adjustment Clause* dockets, as well as the Rules of Superintendence. A Memorandum in Support is attached.

Respectfully submitted,



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MEMORANDUM IN SUPPORT OF OHIO POWER COMPANY'S MOTION FOR PROTECTIVE ORDER

INTRODUCTION

Although Appellant Industrial Energy Users-Ohio ("IEU-Ohio")'s December 10, 2013 Motion for Protective Order does not say so, the highly sensitive financial information subject to that Motion and contained in IEU-Ohio's Confidential Supplement has already been afforded confidential treatment not only by IEU-Ohio and Appellee Ohio Power Company ("AEP Ohio") pursuant to a confidentiality agreement, but also by this Court in a separate appeal from the Public Utilities Commission of Ohio ("Commission") currently pending before the Court. *In the Matter of the Application of Ohio Power Company for Approval of an Amendment to its Corporate Separation Plan*, Supreme Court Case No. 2013-1014, Entry (Nov. 20, 2013). The same information has also been sealed by the Commission pursuant to a Protective Order issued under applicable provisions of the Ohio Administrative Code. AEP Ohio thus urges this Court, consistent with its very recent precedent and the Rules of Superintendence, to restrict public access to the highly confidential information contained in IEU-Ohio's Confidential Supplement for as long as the Commission does. *Accord, In the Matter of the Fuel Adjustment Clauses for Columbus Southern Power Company and Ohio Power Company*, Supreme Court Case No. 2012-1484, Entry (Aug. 27, 2013).

BACKGROUND

On December 10, 2013, IEU-Ohio filed its Third Merit Brief and Supplement (Volumes I & II) in this appeal from the Commission. On the same date, IEU-Ohio filed a Motion for Protective Order, asking this Court to restrict public access to IEU-Ohio's Confidential

Supplement (Volume II). In its supporting memorandum, IEU-Ohio notes that the information that is the subject of its Motion for Protective Order "has been marked confidential and has been considered confidential by [AEP Ohio]." (IEU-Ohio Mem. in Supp. at 3.) IEU-Ohio also notes that its Motion is being filed "pursuant to a Protective Agreement executed by IEU-Ohio and [AEP Ohio]." (*Id.*) These assertions are accurate and support the Court's issuance of the Protective Order that IEU-Ohio seeks. However, because IEU-Ohio does not specifically describe the information that is the subject of its Motion for Protective Order, and because IEU-Ohio also fails to describe either this Court's or the Commission's prior confidential treatment of the information in question, AEP Ohio will do so briefly here.

IEU-Ohio's Confidential Supplement, for which it appropriately seeks restrictions on public access, contains a single exhibit that IEU-Ohio first introduced into evidence in the underlying Commission proceeding (hereinafter the "*ESP II*" hearing). Specifically, on May 25, 2012, at the *ESP II* hearing before the Commission's Attorney Examiner, counsel for IEU-Ohio cross-examined an AEP Ohio witness concerning IEU-Ohio Exhibit 121, which is the same document contained in IEU-Ohio's Confidential Supplement filed with this Court. Based on the confidential nature of the Exhibit, the Attorney Examiner moved the *ESP II* hearing into confidential session for this exchange, and after re-direct and re-cross examination, the Attorney Examiner admitted IEU-Ohio Exhibit 121 into evidence.[1]

After the *ESP II* hearing concluded, IEU-Ohio filed an Initial Post-Hearing Brief, in which it discussed and referred to IEU-Ohio Exhibit 121 in the text and accompanying footnotes. (*See ESP II*, IEU-Ohio Initial Br., Public Version, at 55; *see also id.* n.203 (June 29, 2012).) Due to the highly confidential nature of IEU-Ohio Exhibit 121, which had been discussed only in

[1] *ESP II* Tr. Vol. VII – Confidential Excerpt – at 2173-2197 (May 25, 2012). The record from the *ESP II* case was filed with this Court on May 1, 2013.

closed session at the *ESP II* hearing, IEU-Ohio properly filed a Motion for Protective Order with the Commission on the same date that it filed its Initial Post-Hearing Brief, asking the Commission to enter a protective order pursuant to Ohio Adm. Code 4901-1-24(D). (*See ESP II*, IEU-Ohio Mot. for Protective Order and Mem. in Supp. (June 29, 2012).) Shortly thereafter, AEP Ohio also filed a Motion for Protective Order with the Commission, demonstrating that IEU-Ohio Exhibit 121 was "not readily available in the public domain, has been designated as restricted confidential within the Company, and retains substantial economic value to AEP Ohio by being kept confidential." (*See ESP II*, AEP Ohio Mot. for Protective Order and Mem. in Supp. at 5 (July 5, 2012).) In support of its Motion, AEP Ohio applied this Court's six-factor test for trade secrets pursuant to R.C. 1333.61. (*Id.* at 4-5, citing *State ex rel. The Plain Dealer v. Ohio Dept. of Ins.*, 80 Ohio St.3d 513, 524-525 (1997).)

In its August 8, 2012 Opinion and Order in the underlying *ESP II* case, the Commission granted the motions for protective order filed by IEU-Ohio and AEP Ohio with respect to IEU-Ohio Exhibit 121, finding that "confidential treatment shall be afforded for a period ending 18 months from the date of this order, until February 8, 2014." *ESP II*, Opinion and Order at 9-10 (Aug. 8, 2012). As such, the information contained in IEU-Ohio's Confidential Second Supplement currently remains sealed at the Commission and will remain sealed at least until February 8, 2014, pursuant to the Commission's Protective Order. Moreover, the Ohio Administrative Code gives parties appearing before the Commission the opportunity to seek extensions of such Protective Orders if they can demonstrate the need for continued restrictions on public access, Ohio Adm. Code 4901-1-24(F), and AEP Ohio intends to do so with respect to the highly sensitive information contained in IEU-Ohio Exhibit 121.

After the Commission granted the motions for protective order in the *ESP II* case, IEU-Ohio referred to the highly confidential IEU-Ohio Exhibit 121 in a separate Commission docket, *In the Matter of the Application of Ohio Power Company for Approval of an Amendment to its Corporate Separation Plan*, App. for Rehearing and Mem. in Supp. of [IEU-Ohio] at 10-11 (Nov. 16, 2012).) When IEU-Ohio appealed to this Court from the Commission's Order in the *Corporate Separation* proceeding, it chose to include IEU-Ohio Exhibit 121 in its Confidential Supplement, filed in this Court on September 3, 2013. Both IEU-Ohio (on September 3, 2013) and AEP Ohio (on September 18, 2013) filed Motions for Protective Order, asking this Court to restrict public access to IEU-Ohio Exhibit 121, and on November 20, 2013 this Court granted AEP Ohio's motion.

Now, IEU-Ohio includes IEU-Ohio Exhibit 121 in its Confidential Supplement in this *ESP II* appeal, and refers to the document in its Third Merit Brief filed on December 10, 2013. (IEU-Ohio Third Merit Br. at 45, n. 174.) For the reasons set forth below, AEP Ohio respectfully moves this Court to restrict public access to IEU-Ohio Exhibit 121, as both this Court and the Commission have already done with respect to the very same document.

RESTRICTING PUBLIC ACCESS TO THE HIGHLY CONFIDENTIAL INFORMATION AT ISSUE IN IEU-OHIO'S MOTION FOR PROTECTIVE ORDER WOULD BE CONSISTENT WITH THIS COURT'S RECENT PRECEDENT AND THE RULES OF SUPERINTENDENCE.

This Court recently confronted another request for confidential treatment relating to an appeal from the Commission, *In the Matter of the Fuel Adjustment Clauses for Columbus Southern Power Company and Ohio Power Company* ("*FAC*" case), Supreme Court Case No. 2012-1484. In the *FAC* case, as here, both IEU-Ohio and AEP Ohio agreed that certain highly confidential information filed under seal in the Commission's docket should remain confidential in this Court's docket. (*See FAC* case, Joint Br. of Appellant/Cross-Appellee Ohio Power

Company and Appellee/Cross-Appellant [IEU-Ohio] In Response to the Ohio Supreme Court's June 20, 2013 Show-Cause Order (June 28, 2013).) In the *FAC* case, as here, the Commission had previously sealed the information in question pursuant to the applicable provisions in the Ohio Administrative Code. *See FAC* case, PUCO Case No. 12-1126-EL-UNC, Entry (May 17, 2013). And in the *FAC* case, this Court correctly concluded that "[b]ecause the [Commission] has again found that the information sought to be protected constitutes trade secrets and has renewed the protection of that information below, we grant IEU's motion, and order that the documents sought to be protected will remain under seal by the clerk of court until [the expiration of the Commission's sealing order]." *See FAC* case, Supreme Court Case No. 2012-1484, Entry (Aug. 27, 2013).

This Court followed the same approach even more recently in the *Corporate Separation* appeal, agreeing to restrict public access to the very same document (IEU-Ohio Exhibit 121) that is again at issue in IEU-Ohio's instant Motion for Protective Order. *In the Matter of the Application of Ohio Power Company for Approval of an Amendment to its Corporate Separation Plan*, Supreme Court Case No. 2013-1014, Entry (Nov. 20, 2013).

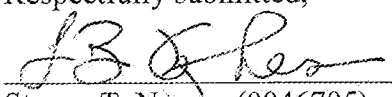
Restricting public access to the highly confidential IEU-Ohio Exhibit 121 would not only be consistent with this Court's recent precedent from both the *FAC* and *Corporate Separation* cases, but would also be consistent with the public access rules in the Rules of Superintendence for the Courts of Ohio, Sup. R. 44-47, which apply to this Court. The multiple Motions for Protective Order filed in the *ESP II* proceeding concerning IEU-Ohio Exhibit 121 demonstrate by clear and convincing evidence, consistent with Sup. R. 45(E)(2), several compelling reasons why the Exhibit should be restricted from public access. For example, IEU-Ohio's Motion for Protective Order in this Court notes that the information is treated as confidential by AEP Ohio

and is subject to a Protective Agreement executed by IEU-Ohio and AEP Ohio. AEP Ohio's Motion for Protective Order filed in the underlying *ESP II* proceeding notes that the information in question constitutes trade secrets pursuant to R.C. 1333.61(D) and satisfies this Court's six-factor test from *The Plain Dealer of Ohio Dept. of Ins.*, 80 Ohio St.3d 513, 524-525, 687 N.E.2d 661 (1997). Accordingly, as it did recently in the *Corporate Separation* appeal, and consistent with its decision in the *FAC* appeal, this Court should restrict public access to IEU-Ohio Exhibit 121 as it appears in IEU-Ohio's Confidential Supplement for as long as the Commission agrees to seal the same information.

CONCLUSION

For the foregoing reasons, AEP Ohio respectfully asks the Court to order that the information in IEU-Ohio's Confidential Supplement will remain under seal by the Clerk until the expiration of the Commission's sealing order or any extensions thereof.

Respectfully submitted,



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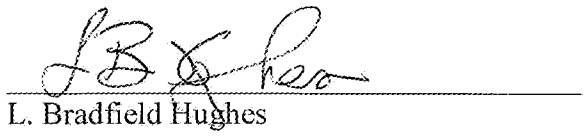
CERTIFICATE OF SERVICE

I certify that the foregoing *Motion for Protective Order* was served by First-Class U.S. Mail upon counsel for parties to this proceeding, identified below, this 12th day of December, 2013.



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