

IN THE SUPREME COURT OF OHIO

In the Matter of the Review of The)	
Alternative Energy Rider Contained in The)	Case No. 13-2026
Tariffs of Ohio Edison Company, The)	
Cleveland Electric Illuminating Company and)	Appeal from the Public Utilities
The Toledo Edison Company.)	Commission of Ohio
)	
)	Public Utilities Commission of Ohio Case
)	No. 11-5201-EL-RDR

**MOTION FOR HEARING AND STAY OF THE BRIEFING SCHEDULE
BY
THE OFFICE OF THE OHIO CONSUMERS' COUNSEL**

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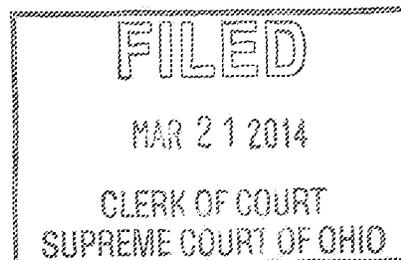
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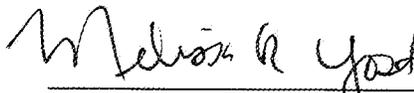
**MOTION FOR HEARING AND STAY OF THE BRIEFING SCHEDULE
BY
THE OFFICE OF THE OHIO CONSUMERS' COUNSEL**

The Office of the Ohio Consumers' Counsel ("OCC") respectfully moves¹ this Court to hold a hearing on the Motion to Seal filed by Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company (collectively referred to as "FirstEnergy" or "the Utility") to prevent the Ohio public from having access to significant information about this case (including FirstEnergy's consumers whose rates could be affected). OCC also moves this Court to stay the briefing schedule until the Court first decides whether it will deny the public access to information in this case, as has been requested by FirstEnergy. The reasons for granting this Motion are further set forth in the attached Memorandum in Support.

¹ S.Ct.Prac.R. 4.01 and Rule 45(E)(1) of the Rules of Superintendence for the Courts of Ohio.

Respectfully submitted,

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MEMORANDUM IN SUPPORT

I. INTRODUCTION

This Court should hold a hearing on the Motion to Seal, in accordance with Sup.R. 45(E), to determine whether there is clear and convincing evidence that the Court's own presumption of allowing public access to court documents is outweighed by FirstEnergy's desire to keep secret relevant information about the renewable energy that it purchased almost five years ago. Additionally, the Court should stay the briefing schedule until a decision is made on how the parties should treat the information that FirstEnergy seeks to continue to hide from public scrutiny.

On March 6, 2014, FirstEnergy filed a Motion to Seal certain portions of the Appendix and Supplement (filed with its Merit Brief) that contain facts underlying the basis of the PUCO's decision. Specifically, FirstEnergy claimed that renewable energy credit ("REC" or "renewable energy") supplier identities and the prices they bid for supplying the renewables in 2009, 2010 and 2011 ("Renewable Energy Pricing Information") is confidential trade secret information based upon the PUCO's ruling in the underlying action. (FirstEnergy Motion to Seal, pp. 3, 5).

OCC timely filed its Memorandum Contra on March 17, 2014, explaining that the information should be accessible to the public pursuant to Sup.R. 45, the dictate of public policy, and the case law of this Court. Without a ruling on this Motion, the parties are required to follow the PUCO ruling, which improperly declared that the dated Renewable Energy Pricing Information is "trade secret" and subject to confidential treatment albeit under a standard other than Sup.R. 45. This will require that the parties continue to file the historic Renewable Energy Pricing Information in a way that shields it from the

public's watchful eye. To prevent putting the cart before the horse, this Court should first hold a hearing and rule on the Motion to Seal before allowing briefing to continue.

II. LAW AND ARGUMENT

A. This Court Should Hold a Hearing on the Motion to Seal.

While OCC points out (in its Memorandum Contra) that FirstEnergy failed to carry its heavy burden to warrant hiding information from the public in this case, the Court should hold a hearing on the Motion to Seal to further review these important issues of transparency. In order to overcome this Court's required presumption that a court document should be open to public access, a motion must be made and "the court may schedule a hearing on the motion." Sup.R. 45(E)(1). It is in the public interest for this Court to allow this issue to be aired, through the hearing process set forth in Sup.R. 45(E)(1), before issuing a decision that would allow FirstEnergy to continue to hide this information from its customers and the public.

FirstEnergy charged its customers an unprecedented sum (an amount that the PUCO prevented Ohio citizens from seeing) for its imprudent purchase of renewable energy from 2009 -2011. In the case below, OCC was prevented (by PUCO orders) from stating either the amounts paid by FirstEnergy for renewable energy or identifying the supplier to whom the amount was paid. Additionally, OCC was prohibited from informing the public as to the amount of money that OCC urged the PUCO to credit customers. Ultimately, the PUCO disallowed only a portion of those costs in the amount of \$43,362,796.50 (an amount which the PUCO found **could** be revealed even though a disallowance of \$298.50 per renewable energy credit could be readily calculated from the

PUCO's Order - \$43,362,796.50/145,269 RECs). (Opinion and Order, p. 25). Given the amount of money at stake and because FirstEnergy's affiliate—FirstEnergy Solutions—“was a successful bidder in the competitive solicitations,”² the public interest weighs heavily in favor of, at the least, conducting a hearing to determine if Ohio citizens, including FirstEnergy's customers, should know the cost of the renewable energy for which they paid and from whom it was purchased. Therefore, a hearing should be held on this very important issue that is the subject of OCC's appeal.

B. This Court Should Stay the Briefing Schedule Pending a Decision on FirstEnergy's Motion to Seal.

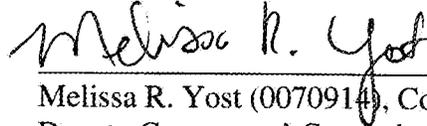
This Court's decision on the Motion to Seal will greatly affect the procedural posture of this case; therefore, this Court should rule on the Motion to Seal and settle this issue before briefing continues. This Court has previously stayed appellate briefing schedules where there is a pending motion. *Pankey v. Ohio Adult Parole Auth.*, 85 Ohio St.3d 1451, 708 N.E.2d 724 (1999) (staying the briefing schedule while a motion to dismiss was pending). This Court has also stayed the briefing schedule in cases where there is an unresolved public records issue. *Cleveland Clinic Found. v. Levin*, 118 Ohio St.3d 1438, 2008-Ohio-2694, 888 N.E.2d 415. In that case, this Court *sua sponte* stayed merit briefing while it directed parties to address public records issues that were raised in memoranda – whether documents were exempt from disclosure under R.C. 149.43. *Cleveland Clinic Found. v. Levin*, 118 Ohio St.3d 1438, 2008-Ohio-2694, 888 N.E.2d 415.

² *In re Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company*, 2013 Ohio PUC LEXIS 159, at *28.

In this case, a very pressing public access issue was raised in FirstEnergy's pending Motion to Seal. This Court's ruling on that Motion will determine whether the public may have access to the Renewable Energy Pricing Information – the substantive information upon which the merits of this case are based – throughout the pendency of this appeal. Absent a stay of the briefing schedule, the parties will be forced to file their briefs and potentially conduct oral argument in a way that undermines the transparency that is required by Sup.R. 45. This not only would put the cart before the horse (requiring parties to file information under seal before this Court has so ruled) but it is not in the interests of judicial economy. Consequently, it is appropriate for the Court to rule on FirstEnergy's Motion **before** requiring the filing of Appellee and Cross-Appellant Briefs in this matter that are expected to rely on portions of the record sought by FirstEnergy to be kept under seal. For these reasons, this Court should stay the briefing schedule until a ruling on the Motion to Seal has been issued.

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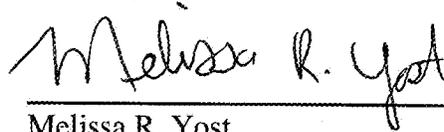
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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing *Motion for Hearing and Stay of the Briefing Schedule* was served on the persons listed below, via electronic service, this 21st day of March 2014.



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