

IN THE SUPREME COURT OF OHIO

OHIO EDISON COMPANY, THE)	
CLEVELAND ELECTRIC)	
ILLUMINATING COMPANY & THE)	CASE NO. 2013-2026
TOLEDO EDISON COMPANY)	
)	Appeal from the Public Utilities
Appellants,)	Commission of Ohio
)	
v.)	Public Utilities Commission of Ohio
)	Case No. 11-5201-EL-RDR
THE PUBLIC UTILITIES COMMISSION)	
OF OHIO)	
)	
Appellee.)	

**RESPONSE OF OHIO EDISON COMPANY, THE CLEVELAND ELECTRIC
ILLUMINATING COMPANY, AND THE TOLEDO EDISON COMPANY TO MOTION
FOR HEARING AND STAY OF THE BRIEFING SCHEDULE
FILED BY THE OFFICE OF THE OHIO CONSUMERS' COUNSEL**

David A. Kutik (Reg. No. 0006418)
Lydia M. Floyd (Reg. No. 0088476)
JONES DAY
901 Lakeside Avenue
Cleveland, OH 44114
Telephone: (216) 586-3939
Facsimile: (216) 579-0212
E-mail: dakutik@jonesday.com
E-mail: lfloyd@jonesday.com

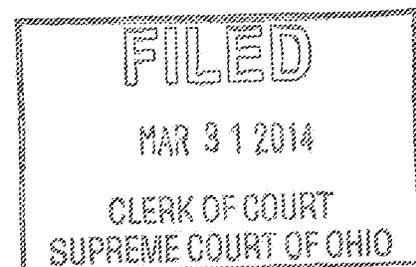
James W. Burk (Reg. No. 0043808)
Carrie M. Dunn (Reg. No. 0076952)
FIRSTENERGY SERVICE COMPANY
76 South Main Street
Akron, OH 44308
Telephone: (330) 384-5861
Facsimile: (330) 384-3875
E-mail: burkj@firstenergycorp.com
E-mail: cdunn@firstenergycorp.com

COUNSEL FOR APPELLANTS OHIO
EDISON COMPANY, THE CLEVELAND
ELECTRIC ILLUMINATING COMPANY,
AND THE TOLEDO EDISON COMPANY

Michael DeWine (Reg. No. 0009181)
Attorney General of Ohio

William L. Wright (Reg. No. 018010)
Section Chief, Public Utilities Section
Thomas G. Lindgren (0039210)
Ryan P. O'Rourke (0082651)
PUBLIC UTILITIES COMMISSION OF OHIO
180 East Broad Street, 6th Floor
Columbus, Ohio 43215-3793
Telephone: (614) 466-4397
Facsimile: (614) 644-8767
E-mail: william.wright@puc.state.oh.us
E-mail: thomas.lindgren@puc.state.oh.us
E-mail: ryan.orourke@puc.state.oh.us

COUNSEL FOR APPELLEE
PUBLIC UTILITIES COMMISSION OF OHIO



Melissa R. Yost (Reg. No. 0070914)
Deputy Consumers' Counsel
Edmund Berger (Reg. No. 0090307)
Assistant Consumers' Counsel
OFFICE OF THE OHIO CONSUMERS'
COUNSEL
10 West Broad Street, Suite 1800
Columbus, OH 43215
Telephone: (614) 466-1291
Facsimile: (614) 466-9475
E-mail: melissa.yost@occ.ohio.gov
E-mail: edmund.berger@occ.ohio.gov

Mark R. Weaver
ISAAC WILES
Two Miranova Place, Suite 700
Columbus, OH 43215
Telephone: (614) 221-2121
E-mail: mweaver@isaacwiles.com

COUNSEL FOR APPELLEE/CROSS-
APPELLANT OFFICE OF THE OHIO
CONSUMERS' COUNSEL

Nicholas McDaniel (Reg. No. 0089817)
Staff Attorney
ENVIRONMENTAL LAW & POLICY
CENTER
1207 Grandview Avenue, Suite 201
Columbus, OH 43212
Telephone: (614) 488-3301
Facsimile: (614) 487-7510
E-mail: NMcDaniel@elpc.org

COUNSEL FOR APPELLEE/CROSS-
APPELLANT ENVIRONMENTAL LAW &
POLICY CENTER

continued protection of this information is warranted. If, as is unlikely, OCC prevails on that part of its cross-appeal, the information that OCC seeks to have open to the public will be publicly available at the end of this case. OCC wholly fails to demonstrate that anyone (including the public) is harmed by delaying any possible disclosure until the end of this case. More to the point of the instant motion, OCC never even attempts to argue that the Court's normal adjudication process of briefs and oral arguments is somehow inadequate to consider OCC's cross-appeal or the merits of the confidential and proprietary nature of the information at issue. This Court should thus deny OCC's motion.

II. STATEMENT OF THE RELEVANT FACTS

In the proceeding below, the Commission repeatedly found that certain information related to the Companies' procurement of renewable energy credits ("RECs") – namely, the names of suppliers submitting bids to sell RECs to the Companies, the REC prices offered by these suppliers, and detailed financial information involving specific REC transactions (the "REC Procurement Data") – constituted a trade secret under Ohio law deserving protection from public dissemination. *See* Case No. 2013-2026, Motion to Seal of Appellants, Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company ("Companies' Mot. to Seal") at 4-5 (Mar. 6, 2014)¹. The Commission made these determinations subsequent to an *in camera* review and pursuant to Section 1331.61 of the Ohio Revised Code and the six-factor test set forth in *The State ex rel. The Plain Dealer v. Ohio Dept.*

¹ The Commission found that the REC Procurement Data counted as a trade secret in the following orders: Case No. 11-5201-EL-RDR, Hearing Tr. at 17-18 (Dec. 4, 2012); Case No. 11-5201-EL-RDR, Entry at 5 (Feb. 14, 2013); Case No. 11-5201-EL-RDR, Opinion and Order at 8-9 (Aug. 7, 2013); Case No. 11-5201-EL-RDR, Second Entry on Rehearing at 4 (Dec. 18, 2013).

of Insurance, 80 Ohio St.3d 513, 524-25, 687 N.E.2d 661 (1997). *See* Companies' Mot. to Seal at 4-5.

As demonstrated in the various motions before and orders of the Commission, for customers to realize the full benefit of competitive processes undertaken by utilities to purchase generation or RECs, the process must indeed be competitive; potential suppliers must have an incentive to put forward their lowest and most competitive price. Maintaining the confidentiality of certain data is a necessary part of keeping such processes competitive. Accordingly, the rules for the processes at issue here (the Request for Proposals ("RFPs") to sell RECs) called for the identity of bidders and bid prices (the REC Procurement Data) to be confidential. The record below showed without dispute that the public dissemination of the REC Procurement Data would reveal, among other things, REC suppliers' proprietary bidding strategies. *See* Case No. 11-5201-EL-RDR, Navigant Consulting, Inc., Comments Letter at 2 (Oct. 29, 2012). With such information, other suppliers could game the system, counter the bid strategies revealed with less aggressive prices or even engage in collusive behavior. Such conduct would obviously undermine the competitive integrity of Ohio's REC market, not to mention the competitiveness of future REC RFPs. *Id.* In addition, such a state of affairs would likely have a "chilling effect" on the willingness of other REC suppliers to enter this market or participate in RFPs, thereby driving up REC prices bid in utility RFPs. *Id.* Indeed, as the Commission itself observed in its Second Entry on Rehearing, reaffirming the trade secret status of the REC Procurement Data, "if this trade secret information was public, it could discourage REC suppliers' confidence in the market and impede the function of the REC market." Case No. 11-5201-EL-RDR, Second Entry on Rehearing at 5 (Dec. 18, 2013).

The Commission thus held that release of the REC Procurement Data was prohibited under state law. *See* Case No. 11-5201-EL-RDR, Entry at 5 (Feb. 14, 2013); Case No. 11-5201-EL-RDR, Opinion and Order at 11-12 (Aug. 7, 2013). Further, in line with these rulings, the Commission separated the hearing in the proceeding below into public and confidential portions. The record in the hearing below was correspondingly segregated, with the confidential portion kept under seal in the Commission's files.

On December 24, 2013, the Companies filed their notice of appeal in the instant matter. On January 23, 2014, the Commission transferred the record from the proceeding below to the office of this Court's Clerk, the confidential portions of which were transferred under seal. On March 6, 2014, the Companies filed their merit brief. On that date, pursuant to Rule 3.02(B) of the Rules of Practice,² the Companies also filed a motion to seal certain portions of the appendix and supplement to their merit brief. These portions of the Companies' appendix and supplement contained the REC Procurement Data and were comprised of material already under seal with the office of this Court's Clerk. *See* Companies' Mot. to Seal, *passim*. On March 17, 2014, OCC filed its response to the Companies' motion to seal and, on March 21, 2014, OCC filed its motion for a hearing and suspension of the briefing schedule.

III. LAW AND ARGUMENT

The extraordinary procedure requested by OCC is wholly unwarranted and has no basis in law or fact. There are no rules that contemplate, much less require, such a hearing. OCC has not shown that it or anyone else is harmed. Nor has OCC shown that the Court's procedure of

² Rule 3.02(B) provides: "Documents filed with the Supreme Court 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).

briefing and oral argument is inadequate to address OCC's concerns. Therefore, this Court should deny OCC's motion.

A. The Rules Applicable To This Court Do Not Provide For The Type Of Extraordinary Procedure Requested By OCC.

OCC requests the extraordinary step of a hearing and a stay of the briefing schedule. *See* Case No. 2013-2026, Motion for Hearing and Stay of Briefing Schedule by the Office of the Ohio Consumers' Counsel ("OCC Mot.") at 1, 4. The Rules of Practice of the Supreme Court of Ohio make no provision for such extraordinary procedures. Generally, the Rules of Practice only provide for hearings in a very narrow set of jurisdictional categories such as applications to reopen a death penalty proceeding, original actions, petition challenges, and apportionment cases. *See* S.Ct.Prac.R. 11.06, 12.10, 14.01, and 14.03. The instant matter, however, is an appeal from a Commission proceeding and does not fall into one of these categories. Therefore, the Rules of Practice simply do not provide for the type of extraordinary relief which OCC has requested.

Notably, OCC does not cite any Rule of Practice, but relies exclusively on Rule 45(E) of the Rules of Superintendence to justify the extraordinary request for a hearing. *See* OCC Mot., *passim*. This reliance is misplaced. Rule 45(E) applies to "case documents." Supp. R. 45(E). As employed by these Rules, the term "case document" is technical in nature and defined by Rule 44. Rule 44 provides, in pertinent part:

As used in Sup. R. 44 through 47:

(C)(1) "Case document" means a document and information in a document submitted to a court or filed with a clerk of court in a judicial action or proceeding, including exhibits, pleadings, motions, orders, and judgments, and any documentation prepared by the court or clerk in the judicial action or proceeding, such as journals, dockets, and indices, subject to the exclusions in division (C)(2) of this rule.

(2) The term "case document" *does not include* the following:

(a) A document or information in a document exempt from disclosure under state, federal, or the common law...

Sup. R. 44 (emphasis added). Tellingly, OCC omits this crucial information from its motion.

The portions of the Companies' appendix and supplement filed under seal contain the REC Procurement Data, which the Commission repeatedly found in the proceeding below to constitute a trade secret. *See* Case No. 11-5201-EL-RDR, Hearing Tr. at 17-18 (Dec. 4, 2012); Case No. 11-5201-EL-RDR, Entry at 5 (Feb. 14, 2013); Case No. 11-5201-EL-RDR, Opinion and Order at 8-9 (Aug. 7, 2013); Case No. 11-5201-EL-RDR, Second Entry on Rehearing at 4 (Dec. 18, 2013). Under Ohio law, trade secrets are exempt from public records disclosure requirements. *See State ex rel. Lucas County Bd. of Comm'rs v. Ohio EPA*, 88 Ohio St. 3d 166, 172, 2000-Ohio-282, 724 N.E.2d 411 (2000) ("The Ohio Uniform Trade Secrets Act, R.C. 1333.61 through 1333.69, is a state law exempting trade secrets from disclosure under R.C. 149.43."). Thus, Rule 45 of the Rules of Superintendence does not apply here. OCC's motion lacks any legal basis. For this reason alone, OCC's motion should be denied.

B. OCC Fails To Show That It Will Suffer Any Prejudice Or That The Extraordinary Procedure It Seeks Is Necessary.

Further, OCC has completely failed to show that it will suffer any harm if this Court grants the Companies' motion to seal. OCC has had full access to the confidential REC Procurement Data during the proceedings below (indeed, OCC's own hearing exhibits contain much of this information). Thus, sealing the portions of the Companies' appendix and supplement to their merit brief that contain the REC Procurement Data will in no way hinder or impede OCC from fully briefing any issue on appeal in this case.

OCC has also failed to show how the public is harmed by placing these confidential materials under seal. Whether the REC Procurement Data is confidential and proprietary and thus warrants trade secret protection is an issue raised by OCC's cross-appeal. Consequently,

this issue can be decided by this Court through the ordinary course of briefing and oral argument as provided in the Court's Rules of Practice. *See* OCC Mot. at 4. OCC utterly fails to explain how the Court's normal procedures are inadequate. OCC never contends that it would be restricted in any way from presenting its arguments in this case. Indeed, it couldn't make such showing, given that it had access to such information in the proceeding below and was fully able to present its arguments to the Commission.

Under the facts presented here, OCC has failed to show that any departure from the ordinary course is warranted in any way. In the unlikely event that this Court holds, after briefing and oral argument, that the REC Procurement Data should be publicly disclosed, this Court can order that its file in this matter be unsealed. OCC nowhere states how such disclosure after this case is decided is inadequate or against the public interest.

Similarly, there is also no need to suspend the briefing schedule in this matter. Indeed, the cases to which OCC cites for support are inapposite. In *Pankey v. Ohio Adult Parole Auth.*, 85 Ohio St.3d 1451, 708 N.E.2d 724 (1999), a decision without published opinion, this Court suspended the briefing schedule while a motion to dismiss was pending. There is no motion to dismiss pending here. Likewise, in *Cleveland Clinic Found. v. Levin*, 118 Ohio St.3d 1438, 2008-Ohio-2694, 888 N.E.2d 415, this Court *sua sponte* suspended the briefing schedule in order to have the parties prepare memoranda regarding a pair of novel public records discovery issues involving a "public office as litigant." *Id.* No such novel issues exist here. Thus, neither of these cases supports suspending the briefing schedule in the instant matter.

There is no need for a special procedure to consider the Companies' motion to seal or, ultimately, whether the REC Procurement Data is confidential and proprietary and deserving of trade secret protection from public disclosure. OCC's motion should be denied.

IV. CONCLUSION

For the foregoing reasons, this Court should deny OCC's motion for hearing and to stay the briefing schedule.

Dated: March 31, 2014

Respectfully submitted,

David A. Kutik / per authority AEH
David A. Kutik (Counsel of Record)
Lydia M. Floyd
JONES DAY
901 Lakeside Avenue
Cleveland, Ohio 44114-1190
Phone: (216) 586-3939
Facsimile: (216) 579-0212
E-mail: dakutik@jonesday.com
E-mail: lmfloyd@jonesday.com

James W. Burk
Carrie M. Dunn
FIRSTENERGY SERVICE COMPANY
76 South Main Street
Akron, Ohio 44308
Phone: (330) 384-5861
Facsimile: (330) 384-3875
E-mail: burkj@firstenergycorp.com
E-mail: cdunn@firstenergycorp.com

ATTORNEYS FOR APPELLANTS, OHIO
EDISON COMPANY, THE CLEVELAND
ELECTRIC ILLUMINATING COMPANY AND
THE TOLEDO EDISON COMPANY

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served by electronic mail on the thirty-first day of March, 2014, upon the following:

William Wright
Chief, Public Utilities Section
Thomas G. Lindgren
Ryan P. O'Rourke
Assistant Attorneys General
Public Utilities Commission of Ohio
180 East Broad Street, 6th Floor
Columbus, OH 43215
E-mail: william.wright@puc.state.oh.us
E-mail: thomas.lindgren@puc.state.oh.us
E-mail: ryan.orourke@puc.state.oh.us

Nicholas McDaniel
Staff Attorney
Environmental Law & Policy Center
1207 Grandview Avenue, Suite 201
Columbus, OH 43215
E-mail: NMcDaniel@elpc.org

Melissa R. Yost
Deputy Consumers' Counsel
Edmund Berger
Assistant Consumers' Counsel
Office of the Ohio Consumers' Counsel
10 West Broad Street, Suite 1800
Columbus, OH 43215

Mark R. Weaver
Isaac Wiles
Two Miranova Place, Suite 700
Columbus, OH 43215
E-mail: melissa.yost@occ.ohio.gov
E-mail: edmund.berger@occ.ohio.gov
E-mail: mweaver@isaacwiles.com

David A. Kutis / per authority ACH
AN ATTORNEY FOR APPELLANTS OHIO
EDISON COMPANY, THE CLEVELAND
ELECTRIC ILLUMINATING COMPANY
AND THE TOLEDO EDISON COMPANY