

ORIGINAL

IN THE SUPREME COURT OF OHIO

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

MOTION FOR LEAVE TO FILE MERIT BRIEF, APPENDIX, AND SUPPLEMENT  
 UNDER SEAL  
 BY  
 APPELLEE/CROSS-APPELLANT,  
 THE OFFICE OF THE OHIO CONSUMERS' COUNSEL

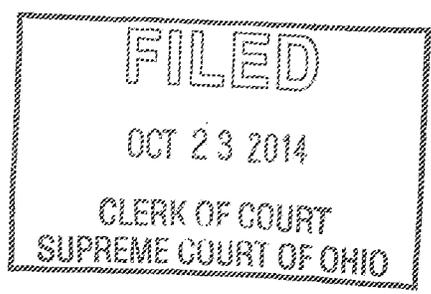
David A. Kutik (0006418)  
 Counsel of Record  
 Lydia M. Floyd (0088476)  
 Jones Day  
 901 Lakeside Ave.  
 Cleveland, Ohio 44114  
 (216) 586-3939  
 (216) 579-0212 (fax)  
[dakutik@jonesday.com](mailto:dakutik@jonesday.com)  
[lmfloyd@jonesday.com](mailto:lmfloyd@jonesday.com)

James W. Burk (0043808)  
 Carrie M. Dunn (0076952)  
 FirstEnergy Service Company  
 76 South Main Street  
 Akron, Ohio 44308  
 (330)384-5861  
 (330)384-38758 (fax)  
[burkj@firstenergycorp.com](mailto:burkj@firstenergycorp.com)  
[cdunn@firstenergycorp.com](mailto:cdunn@firstenergycorp.com)

*Counsel for Appellants/Cross-Appellees,  
 Ohio Edison Company, The Cleveland  
 Illuminating Company, and The Toledo Edison  
 Company*

Bruce J. Weston (0016973)  
 OHIO CONSUMERS' COUNSEL  
 Edmund Berger (0090307), Counsel of Record  
 Michael Schuler (0082390)  
 Assistant Consumers' Counsel  
**Office of the Ohio Consumers' Counsel**  
 10 West Broad Street, Suite 1800  
 Columbus, Ohio 43215-3485  
 (614) 466-1292– Telephone (Berger)  
 (614) 466-9547 – Telephone (Schuler)  
 (614) 466-9475 – Facsimile  
[edmund.berger@occ.ohio.gov](mailto:edmund.berger@occ.ohio.gov)  
[michael.schuler@occ.ohio.gov](mailto:michael.schuler@occ.ohio.gov)

*Counsel for Appellee/Cross-Appellant,  
 The Office of the Ohio Consumers' Counsel*



Michael DeWine (0009181)  
ATTORNEY GENERAL OF OHIO

William L. Wright (0018010)  
Public Utilities Section, Chief

Thomas G. Lindgren (0039210)  
Counsel of Record  
Ryan P. O'Rourke (0082651)  
Assistant Attorneys General  
Public Utilities Section  
180 East Broad Street, 6<sup>th</sup> Floor  
Columbus, Ohio 43215  
(614) 466-4397  
(614) 644-8767 (fax)  
[thomas.lindgren@puc.state.oh.us](mailto:thomas.lindgren@puc.state.oh.us)  
[ryan.orourke@puc.state.oh.us](mailto:ryan.orourke@puc.state.oh.us)

*Counsel for Appellee,  
The Public Utilities Commission of Ohio*

Mark R. Weaver (0065769)  
Isaac, Wiles, Burkholder & Tector  
Two Miranova, 7<sup>th</sup> Floor  
Columbus, Ohio 43215  
(614) 221-2121  
(614) 365-9516 (fax)  
[MWeaver@IsaacWiles.com](mailto:MWeaver@IsaacWiles.com)

*Outside Counsel for Appellee/Cross-Appellant,  
The Office of the Ohio Consumers' Counsel*

Madeline Fleisher  
Environmental Law & Policy Center  
1207 Grandview Avenue, Suite 201  
Columbus, Ohio 43212  
(614) 488-3301 – Telephone  
(312) 795-3730 – Facsimile  
[mfleisher@elpc.org](mailto:mfleisher@elpc.org)

*Counsel for Appellee/Cross-Appellant,  
Environmental Law & Policy Center*

**IN THE SUPREME COURT OF OHIO**

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

---

**MOTION FOR LEAVE TO FILE MERIT BRIEF, APPENDIX, AND SUPPLEMENT  
UNDER SEAL**

**BY  
APPELLEE/CROSS-APPELLANT,  
THE OFFICE OF THE OHIO CONSUMERS' COUNSEL**

---

Pursuant to Rule 3.02(B) of the Rules of the Practice of the Supreme Court of Ohio, the Office of the Ohio Consumers' Counsel ("OCC") respectfully requests this Court for leave to file certain portions of its Brief, Appendix, and Supplement under seal. Specifically, OCC requests that the following documents contained in the Appendix and Supplement be submitted under seal:

Appendix:

- *In the Matter of the Review of the Alternative Energy Rider Contained in the Tariffs of Ohio Edison Company, The Cleveland Electric Illuminating Company, and the Toledo Edison Company, Office of the Ohio Consumers' Counsel – Confidential Application for Rehearing (Sept. 6, 2013)*

Supplement:

- *In the Matter of the Review of the Alternative Energy Rider Contained in the Tariffs of Ohio Edison Company, The Cleveland Electric Illuminating Company, and the Toledo Edison Company, Pub. Util. Comm. No. 11-5201-EL-RDR, Confidential Exeter Associates, Inc. Management/Performance Audit (Aug. 15, 2012)*

- *In the Matter of the Review of the Alternative Energy Rider Contained in the Tariffs of Ohio Edison Company, The Cleveland Electric Illuminating Company, and the Toledo Edison Company*, Pub. Util. Comm. No. 11-5201-EL-RDR, Office of the Ohio Consumers' Counsel – Confidential Direct Testimony of Wilson Gonzalez (January 31, 2013)
- *In the Matter of the Review of the Alternative Energy Rider Contained in the Tariffs of Ohio Edison Company, The Cleveland Electric Illuminating Company, and the Toledo Edison Company*, Pub. Util. Comm. No. 11-5201-EL-RDR, Office of the Ohio Consumers' Counsel – Confidential Revised Exhibit WG-3 of the Direct Testimony of Wilson Gonzalez (February 15, 2013)
- *In the Matter of the Review of the Alternative Energy Rider Contained in the Tariffs of Ohio Edison Company, The Cleveland Electric Illuminating Company, and the Toledo Edison Company*, Pub. Util. Comm. No. 11-5201-EL-RDR, Confidential Hearing Transcript Volume I, Page 142 (February 19, 2013)
- *In the Matter of the Review of the Alternative Energy Rider Contained in the Tariffs of Ohio Edison Company, The Cleveland Electric Illuminating Company, and the Toledo Edison Company*, Pub. Util. Comm. No. 11-5201-EL-RDR, Confidential Hearing Transcript Volume II, Pages 391, 493, OCC Ex. 9, OCC Ex. 15 (February 20, 2013)
- *In the Matter of the Review of the Alternative Energy Rider Contained in the Tariffs of Ohio Edison Company, The Cleveland Electric Illuminating Company, and the Toledo Edison Company*, Pub. Util. Comm. No. 11-5201-EL-RDR, Confidential Hearing Transcript Volume III, Pages 648-665 (February 21, 2013)

OCC maintains that this information does not constitute trade secret that should be excepted from public disclosure required by law. *See* R.C. 149.43, R.C. 1333.61, R.C. 4901.12, and R.C. 4905.07. Nevertheless, this Court ruled that this information is already being maintained under seal pending a final decision by this Court on whether the PUCO properly protected the documents as trade secret. Without waiving any arguments or issues for appeal, OCC respectfully requests that this Court grant leave to file the relevant portions of its Brief, Appendix, and Supplement under seal.

Respectfully submitted,

Bruce J. Weston (0016973)  
OHIO CONSUMERS' COUNSEL



---

Edmund Berger (0090307), Counsel of Record  
Michael Schuler (0082390)  
Assistant Consumers' Counsel  
**Office of the Ohio Consumers' Counsel**  
10 West Broad Street, Suite 1800  
Columbus, Ohio 43215-3485  
(614) 466-1292– Telephone (Berger)  
(614) 466-9547 – Telephone (Schuler)  
(614) 466-9475 – Facsimile  
[edmund.berger@occ.ohio.gov](mailto:edmund.berger@occ.ohio.gov)  
[michael.schuler@occ.ohio.gov](mailto:michael.schuler@occ.ohio.gov)

*Counsel for Appellee/Cross-Appellant,  
The Office of the Ohio Consumers' Counsel*

Mark R. Weaver (0065769)  
Isaac, Wiles, Burkholder & Teetor  
Two Miranova, 7<sup>th</sup> Floor  
Columbus, Ohio 43215  
(614) 221-2121  
(614) 365-9516 (fax)  
[MWeaver@IsaacWiles.com](mailto:MWeaver@IsaacWiles.com)

*Outside Counsel for Appellee/Cross-Appellant,  
The Office of the Ohio Consumers' Counsel*

**IN THE SUPREME COURT OF OHIO**

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

---

**MEMORANDUM IN SUPPORT OF MOTION FOR LEAVE**

---

**I. INTRODUCTION AND STATEMENT OF FACTS**

This is the appeal of an audit proceeding before the Public Utilities Commission of Ohio (“PUCO” or “the Commission”). The audited entities in the case below are Appellants /Cross-Appellees, Ohio Edison Company, The Cleveland Electric Illumination Company, and The Toledo Edison Company (collectively “FirstEnergy,” “FE,” or “the Utility”).

In the case below, FirstEnergy filed a number of Motions for Protective Order seeking to designate certain information and documents as protected information under R.C. 149.43 and R.C. 1333.61. The attorney examiners in the case determined that specific renewable energy bidding information – identities of those that bid renewable energy credits and the specific prices bid for those renewables – were trade secret information subject to protection. *In the Matter of the Review of the Alternative Energy Rider Contained in the Tariffs of Ohio Edison Company, The Cleveland Electric Illuminating Company, and the Toledo Edison Company*, Pub. Util. Comm. No. 11-5201-EL-RDR, Hearing Transcript at 18 (November 20, 2012); see also, *In the Matter of the Review of the Alternative Energy Rider Contained in the Tariffs of Ohio Edison Company, The Cleveland Electric Illuminating Company, and the Toledo Edison Company*, Pub.

Util. Comm. No. 11-5201-EL-RDR, Entry at 5-6 (February 14, 2013). Accordingly, the parties entered into a Protective Agreement to handle such protected information in accordance with the attorney examiners' ruling.

The PUCO later “affirm[ed] the rulings of the attorney examiners granting protective orders in all but one respect . . . to permit the general disclosure of FES as a successful bidder in competitive solicitations.” *In the Matter of the Review of the Alternative Energy Rider Contained in the Tariffs of Ohio Edison Company, The Cleveland Electric Illuminating Company, and the Toledo Edison Company*, Pub. Util. Comm. No. 11-5201-EL-RDR, Opinion and Order at 11 (Aug. 7, 2013). That ruling is a portion of OCC’s cross-appeal<sup>1</sup> to this Court and the subject of an earlier Motion to Seal filed by FirstEnergy and a Motion for Hearing and Stay filed by OCC before this Court.<sup>2</sup> However, this Court denied FirstEnergy’s motion to seal as moot, explaining that “[t]he documents are currently being maintained under seal pursuant to Sup.R. 44(C)(1) and Sup.Ct.Prac.R. 3.02(B).” *In the Matter of the Review of the Alternative Energy Rider Contained in the Tariffs of Ohio Edison Company, The Cleveland Electric Illuminating Company, and the Toledo Edison Company*, Entry (Sept. 3, 2014).

## II. LAW AND ARGUMENT

The Supreme Court’s rules are instructive regarding the treatment of documents filed with the Court:

---

<sup>1</sup> OCC Notice of Cross-Appeal at 3-4, ¶¶ C and D (1-5).

<sup>2</sup> FirstEnergy’s Motion to Seal was filed on March 6, 2014. OCC filed a Memo opposing that Motion on March 17, 2014. OCC then filed a Motion for Hearing and Stay of the Briefing Schedule on March 21, 2014, requesting the Supreme Court’s ruling whether this information should continue to be sealed for purposes of Briefs, Appendices and Supplements before the Supreme Court. Although the Supreme Court initially stayed the briefing schedule, on September 3, 2014, the Supreme Court denied OCC’s Motion for Hearing and determined to address this matter upon briefs and oral argument.

Documents filed with the Supreme Court shall be treated as 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.

Sup.Ct.Prac.R. 3.02(B). The OCC realizes the difficulties presented where a case involves a dispute regarding the confidential treatment of documents before the Court (itself a public office).

But, this Court has recognized that this information will remain under seal until it “decide[s] whether the commission properly protected the documents as trade secrets after briefing and oral argument.” *In the Matter of the Review of the Alternative Energy Rider Contained in the Tariffs of Ohio Edison Company, The Cleveland Electric Illuminating Company, and the Toledo Edison Company*, Entry (Sept. 3, 2014). Furthermore, the OCC entered into a protective agreement with FirstEnergy as part of the discovery process in order to speed up the discovery process. That agreement provides that the OCC will make filings in this case (including any appeal to the Supreme Court) under seal if OCC intends to use information over which FirstEnergy claims is confidential.

OCC’s Merit Brief, Appendix, and Supplement contain documents or excerpts from documents that are part of the sealed portion of the record. Consequently, OCC is filing this Motion for Leave, contemporaneously with the filing of those documents, requesting that such information quoted or duplicated in OCC’s Merit Briefs, Appendix, and/or Supplement, be filed under seal pending the Supreme Court’s review of this issue. Without waiving the issues set forth in its cross-appeal, or waiving any arguments set forth in its Merit Brief, OCC respectfully requests that this Court grant leave to file the relevant portions of its Brief, Appendix and Supplement under seal.

### III. CONCLUSION

For the foregoing reasons, and pursuant to the Court's rules of practice, the OCC requests that its Motion for Leave be granted.

Respectfully submitted,

Bruce J. Weston (0016973)  
OHIO CONSUMERS' COUNSEL



---

Edmund Berger (0090307), Counsel of Record  
Michael Schuler (0082390)  
Assistant Consumers' Counsel  
**Office of the Ohio Consumers' Counsel**  
10 West Broad Street, Suite 1800  
Columbus, Ohio 43215-3485  
(614) 466-1292– Telephone (Berger)  
(614) 466-9547 – Telephone (Schuler)  
(614) 466-9475 – Facsimile  
[edmund.berger@occ.ohio.gov](mailto:edmund.berger@occ.ohio.gov)  
[michael.schuler@occ.ohio.gov](mailto:michael.schuler@occ.ohio.gov)

*Counsel for Appellee/Cross-Appellant,  
The Office of the Ohio Consumers' Counsel*

Mark R. Weaver (0065769)  
Isaac, Wiles, Burkholder & Teetor  
Two Miranova, 7<sup>th</sup> Floor  
Columbus, Ohio 43215  
(614) 221-2121- Telephone  
(614) 365-9516 - Fax  
[MWeaver@IsaacWiles.com](mailto:MWeaver@IsaacWiles.com)

*Outside Counsel for Appellee/Cross-Appellant,  
The Office of the Ohio Consumers' Counsel*

## CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing *Motion for Leave* by the Office of the Ohio Consumers' Counsel was served upon the below-listed counsel by electronic service this 23<sup>rd</sup> day of October, 2014.



---

Michael Schuler  
Assistant Consumers' Counsel

## SERVICE LIST

David A. Kutik  
Lydia M. Floyd  
Jones Day  
901 Lakeside Avenue  
Cleveland, Ohio 44114-1190  
[dakutik@jonesday.com](mailto:dakutik@jonesday.com)  
[lmfloyd@jonesday.com](mailto:lmfloyd@jonesday.com)

Madeline Fleisher  
Environmental Law & Policy Center  
1207 Grandview Avenue, Suite 201  
Columbus, Ohio 43212  
[mfleisher@elpc.org](mailto:mfleisher@elpc.org)

James W. Burk  
Carrie M. Dunn  
FirstEnergy Service Company  
76 South Main Street  
Akron, Ohio 44308  
[burkj@firstenergycorp.com](mailto:burkj@firstenergycorp.com)  
[cdunn@firstenergycorp.com](mailto:cdunn@firstenergycorp.com)

William L. Wright  
Section, Chief  
Thomas G. Lindgren  
Counsel of Record  
Ryan P. O'Rourke  
Assistant Attorneys General  
Public Utilities Section  
180 East Broad Street, 6<sup>th</sup> Floor  
Columbus, Ohio 43215  
[thomas.lindgren@puc.state.oh.us](mailto:thomas.lindgren@puc.state.oh.us)  
[ryan.orourke@puc.state.oh.us](mailto:ryan.orourke@puc.state.oh.us)