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In The
SUPREME COURT OF OHIO

Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company,	:	Case No. 13-2026
Appellant,	:	On appeal from the Public Utilities Commission of Ohio, Case No. 11-5201-EL-RDR, *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.*
v.	:	
The Public Utilities Commission of Ohio,	:	
Appellee.	:	

THIRD MERIT BRIEF
SUBMITTED ON BEHALF OF APPELLEE,
THE PUBLIC UTILITIES COMMISSION OF OHIO

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THIRD MERIT BRIEF
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INTRODUCTION

The Public Utilities Commission of Ohio ("Commission") approved an adjustable rate mechanism to permit Ohio Edison Company, The Cleveland Electric Illuminating Company, and Toledo Edison Company ("FirstEnergy" or "the Companies") to seek recovery for prudently-incurred costs of acquiring renewable energy needed to comply with Ohio law. As part of a proceeding to review these costs, the Companies filed certain information they considered trade secrets and asked the Commission to protect that information from public disclosure. The Commission fulfilled its duty when it thoroughly reviewed this information and determined that it qualified for trade secret protection.

The Commission also had to establish the standard by which it would measure the prudency of the Companies' purchases of renewable energy credits or "RECs." In accordance with the Court's precedent, and as in any other utility case seeking recovery of costs from ratepayers, the Commission placed the burden on the Companies to justify their request. The Commission approved recovery of costs for which evidentiary support was presented and it denied recovery where such support was lacking. The Commission should be affirmed.

STATEMENT OF THE FACTS AND CASE

A complete statement of the facts and procedural history is contained in Appellee's Second Merit Brief and will not be repeated here. As pertinent to the issues raised in the cross-appeals, the Commission repeatedly found that certain information related to the Companies' procurement of renewable energy credits (RECs), such as the names of suppliers submitting bids, the prices offered in those bids, and other details about the transactions constituted trade secrets that must be protected from public dissemination. The initial orders were made by an Attorney Examiner after a thorough *in camera* review and these orders were later affirmed by the Commission. *See 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*, Case No.

11-5201-EL-RDR ("*In re FE Renewable Energy Credits*") (Opinion and Order at 8-9) (Aug. 7, 2013), FE App. at 10.[1]

The burden of proof issues raised by Cross-Appellant Office of the Ohio Consumers' Counsel (OCC) lack merit. Throughout the hearing below, the Companies always bore the burden of showing that their REC acquisitions were prudent. *Id.* at 21, FE App. at 29. The Commission correctly stated that it would presume that the Companies' management decisions were prudent, but this was a rebuttable presumption at best. *Id.* By so stating, the Commission correctly reviewed the Companies' actions based upon the facts and circumstances at that time rather than the Monday morning quarterback after the fact approach mistakenly advanced by the OCC.

ARGUMENT

Proposition of Law No. I:

> **The Commission properly maintained confidential treatment of records that constitute a trade secret under R.C. 1331.61 (D) and the Six-Factor Test set forth in *State ex. rel. The Plain Dealer v. Ohio Dept. of Ins.*, 80 Ohio St.3d 513, 524-525 (1997).**

OCC and ELPC challenge the Commission's decision to grant confidential treatment to certain information identified by FirstEnergy as trade secret information. Although Appellants address several Commission entries concerning confidentiality, the

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[1] References to the attached appendix are denoted "App. at __;" references to the appendix attached to appellant FirstEnergy's merit brief are denoted "FE App. at ___."

essence of their arguments is the same. As will be shown below, the Commission properly determined that this information was entitled to protection under Ohio law.

Ohio law not only permits but *requires* the protection of trade secrets. The release of trade secret information without the consent of the owner is unlawful. R.C. 1333.61, *et seq.*, App. at 1. Potential release may be enjoined. R.C. 1333.62, App. at 2. Improper release may subject persons to damages and attorney fees. R.C. 1333.63-1333.64, App. at 2.

Additionally, trade secret information is exempt from release in response to a public records request. The Public Records Act exempts from the definition of "public records" "records the release of which is prohibited by state or federal law." R.C. 149.43(A)(1)(v), App. at 4. Trade secret information, therefore, does not constitute a public record which must be released upon request. The Court has agreed, stating "[t]rade secrets are exempt from disclosure under the exemption of R.C. 149.43(A)(1)(v) for disclosures prohibited by state or federal law." *State ex rel. Carr v. Akron*, 112 Ohio St.3d 351, 358, 859 N.E.2d 948 (2006), *quoting State ex rel. Besser v. Ohio State Univ.*, 87 Ohio St.3d 535, 540, 721 N.E.2d 1044 (2000). *See also State ex rel. Lucas Cty. Bd. of Comm'rs v. Ohio EPA*, 88 Ohio St.3d 166, 172, 724 N.E.2d 411 (2000). When presented with a trade secret claim in the course of litigation, an administrative agency has "a legal obligation to determine the confidential status of particular documents and to provide appropriate relief, such as sealing the documents, if it finds that the documents qualify as trade secrets." *Cleveland Clinic Foundation v. Levin*, 120 Ohio St.3d 1210, 1213, 2008-Ohio-6197, 898 N.E. 2d 589, ¶15. This is what the Commission did.

A "trade secret" is defined as information that "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" and "is the subject of efforts that are reasonable under the circumstances to maintain its secrecy." R.C. 1333.61(D), App. at 1.

In describing the requirements of R.C. 1333.61(D), the Court has adopted the following factors to be applied when evaluating trade secret claims:

> (1) The extent to which the information is known outside the business;
>
> (2) The extent to which it is known to those inside the business, *i.e.*, by the employees;
>
> (3) The precautions taken by the holder of the trade secret to guard the secrecy of the information;
>
> (4) The savings effected and the value to the holder in having the information as against competitors;
>
> (5) The amount of effort or money expended in obtaining and developing the information; and,
>
> (6) The amount of time and expense it would take for others to acquire and duplicate the information.

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

The Commission has adopted rules to implement its obligation to protect trade secrets. O.A.C. 4901-1-24(D) provides:

> (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.

Ohio Admin. Code 4901-1-24(D), App. at 22.

The Commission examined the subject records and determined that the information had independent economic value and was the subject of reasonable efforts to maintain secrecy, thus meeting the requirements of R.C. 1333.61 (D). *In re FE Renewable Energy Credits*, (Opinion and Order at 11) (Aug. 7, 2013), FE App. at 19. The Commission further found that each element of the *Plain Dealer* test was satisfied. *Id.* Protection was properly denied, however, as to the identity of one of the bidders which was already in the public domain and had been widely disseminated. *Id.* at 12, FE App. at 20.

There is ample evidence in the record to support the Commission's findings. The records granted protection contain detailed information about the REC procurement process, including the specific identities of suppliers who submitted bids, specific bid prices, and other details regarding the transactions. Public disclosure of such competitively sensitive information could have a negative effect on bidding in the future. As the independent consultant advising the Companies on REC procurement explained in a letter filed with the Commission:

- Publicly disclosing the identity of winning or non-winning bidders, ranges of prices received in bids, and prices of selected bids has a chilling effect on participation because participants are likely to

believe disclosure of that information puts them at a competitive disadvantage in the marketplace compared to their competitors or in the context of business transactions with counterparties.

- Bidders in general do not want their bidding data disclosed, as that could reveal their bidding strategies and valuations, and discourage them from participating in future procurements. Since bidders have become extremely sophisticated, disclosing details of bids could also allow bidders to discern bidding strategies of other bidders which can lead to gaming of future bidding processes, resulting in less than competitive outcomes.

- Bidders prefer to participate in markets with clearly defined rules and procedures and may be reluctant to participate in markets where there is perceived to be arbitrary rule changes. Most bidders consider their bid prices to be highly sensitive and competitive information.

In re FE Renewable Energy Credits (Navigant Consulting, Inc. Letter at 2) (Oct. 26, 2012), App. at 18.

As noted in the letter, a bidder could use the information to unfairly manipulate or gain advantage for itself for future bids, thus influencing the outcome (to the detriment of customers). The information kept under seal clearly has independent economic value. While market conditions may have changed somewhat since the auctions were conducted, that, by itself, does not render the information of no present economic value, as the Appellants argue. Some information never loses its value-the formula for Coca-Cola has remained a closely guarded secret for over a century.

Additionally, the Companies demonstrated their efforts to maintain the secrecy of the data, both within and outside the Companies. As detailed by the Companies' Director of Regulated Commodity Sourcing, the information was segregated and only available on a narrow need-to-know basis. *In re FE Renewable Energy Credits* (Affidavit of Dean W.

Stathis) (Oct. 25, 2012), App. at 15. The Companies thus took the "active steps" necessary to maintain the secrecy of their information. *State ex rel. Perrea v. Cincinnati Public Schools*, 123 Ohio St.3d 410, 2009-Ohio-4762, 916 N.E.2d 1049, ¶25. As to certain information that had already been publicly disclosed, the Commission properly denied trade secret treatment. *In re FE Renewable Energy Credits* (Opinion and Order at 12) (Aug. 7, 2013) . That small amount of information does not infect or affect the status of other information that the Commission correctly found to constitute trade secret material. See *Perrea*, 2009-Ohio-4762 at ¶29 ("partial disclosure would not foreclose the possibility of a trade secret").

The Commission properly found that the REC procurement data contained trade secrets and should therefore be maintained under seal. So long as the Commission's factual findings are supported by sufficient record evidence, they should be upheld by the Court, *Consumers' Counsel v. Pub. Util. Comm.*, 117 Ohio St.3d 289, 2008-Ohio-860, 883 N.E.2d 1025, ¶ 10. Moreover, the Court "will not substitute its own opinion for that of the PUCO on questions of fact." *Payphone Assoc. v. Pub. Util. Comm.*, 109 Ohio St.3d 453, 457, 2006-Ohio-2988, 849 N.E.2d 4, ¶ 16. The Court should deny the Appellants' invitation to do so here and affirm the Commission on this issue.

Proposition of Law No. II:

> **In any Commission proceeding where the utility seeks to recover costs, it has the burden of justifying its request. *In re Application of Duke Energy Ohio*, Inc., 131 Ohio St.3d 487, 2012-Ohio-1509, ¶ 8. A presumption of prudence in favor of the utility does not shift this burden away, it merely places the burden of going forward with the evidence on the opposing parties. *Evans v. Natl. Life and Acc. Ins. Co.*, 22 Ohio St.3d 87, 90, 88 N.E.2d 1247 (1986).**

The Commission followed bedrock evidentiary principles in setting out, as part of a two-part framework, the burden of proof applicable to the proceeding below. First, following this Court's guidance and consistent with the terms that created Rider AER, the Commission placed the burden squarely on FirstEnergy to show that its REC-procurement costs were prudently incurred. Second, following its own precedent, the Commission granted a presumption of prudence to FirstEnergy's management decisions. Importantly, this presumption did not relieve FirstEnergy of the burden to show prudence. All it did was shift the burden of going forward with evidence to Staff and the Intervenors. At all times during the proceeding, the burden to show prudence of its actions remained with FirstEnergy.

OCC does not dispute that it had a full and fair opportunity to make its case to show that certain REC-procurements should be disallowed. Nor does it dispute that it had a full and fair opportunity to challenge FirstEnergy's evidence. Instead, as a way of indirectly attacking the Commission's factual findings, OCC claims the Commission erred in setting out the applicable burden of proof. OCC incorrectly asserts that the Commission placed the burden of proof on Staff and the Intervenors. OCC likewise fails to

cite any controlling authority showing how the Commission committed any error in this regard.

The burden of proof is a composite concept that "encompasses two different aspects of proof: the burden of going forward with evidence (or burden of production) and the burden of persuasion." *Chari v. Vore*, 91 Ohio St.3d 323, 326, 744 N.E.2d 763 (2001). The burden of production refers to the burden that rests on a party to "'go forward' with the evidence * * *." *Id.* (quoting *Commonwealth v. Walker*, 370 Mass. 548, 350 N.E.2d 678 (1976). The burden of persuasion refers to that "quantum of evidence" that a party must present to convince the factfinder that a fact has been established. *Id.* "The burden of persuasion never leaves the party on whom it is originally cast." *State ex rel. Hardin v. Clermont Cty. Bd of Elections*, 972 N.E.2d 115, 2012-Ohio-2569, ¶ 23 (12th Dist.) (quoting 29 Am. Jur. 2d, Evidence Section 171 (2012).

As early as the first year of law school, we learn that the burden of production (burden of going forward with the evidence), however, can shift. *Id.* One way of shifting the burden of production is through a presumption. Notably, a presumption does not shift the burden of persuasion onto the party against whom it is directed, it simply imposes on that party the burden to go forward with the evidence to rebut the presumption. *Evans v. Natl. Life and Acc. Ins. Co.*, 22 Ohio St.3d 87, 90, 88 N.E.2d 1247 (1986) (citing Evid.R. 301).

The Commission closely followed these generally-applicable evidentiary principles in the context of its prudence review. As for the burden of persuasion, the Commission placed the burden on FirstEnergy to show that the cost of its REC procurements (that

it sought to recover from its ratepayers) were prudently incurred. *In re FE Renewable Energy Credits* (Opinion and Order at 21) (Aug. 7, 2013), FE App. at 29 ("the Companies bear the burden of proof in this proceeding."). The Commission did this for two reasons. First, the Commission-approved stipulation from ESP 1 mandated that FirstEnergy could seek recovery of only its "prudently incurred" REC-procurement costs. *Id.* Second, this Court has explained that the utility bears the burden of persuasion in a prudence review: that is, the utility "ha[s] to prove a positive point: that its expenses [were] prudently incurred. The commission d[oes] not have to find the negative: that the expenses were imprudent." *In re Application of Duke Energy Ohio*, Inc., 131 Ohio St.3d 487, 2012-Ohio-1509, ¶ 8. The utility is not "given a blank check, but an opportunity to prove to the commission that it had reasonably and prudently incurred the costs it sought to recover. *Id.* at ¶ 9.

As for the burden of production, the Commission granted a presumption of prudence to FirstEnergy's management decisions, which shifted the burden of production to Staff and Intervenors. *In re FE Renewable Energy Credits* (Opinion and Order at 21) (Aug. 7, 2013), FE App. at 29. This presumption followed from the Commission's earlier decision in *In re Syracuse Home Util. Co.*, Case No. 86-12-GA-GCR, 1986 Ohio PUC Lexis 1, *21-*22 (Dec. 30, 1986) (cited with approval in *City of Cincinnati v. Pub. Util. Comm.*, 67 Ohio St.3d 523, 620 N.E.2d 826 (1993)). The presumption of prudence is rooted in the understanding that the Commission should not micromanage a utility's day-to-day business judgments. *W. Ohio Gas Co. v Pub. Util. Comm.*, 128 Ohio St. 301, 318, 191 N.E. 105 (1934) (rev'd on other grounds, 294 U.S. 63 (1935)). In granting the

presumption, the Commission noted that it was merely rebuttable and could be overcome by countervailing evidence. *In re FE Renewable Energy Credits* (Opinion and Order at 21) (Aug. 7, 2013), FE App. at 29. The Commission determined that the management/performance audit found in the Exeter Report was sufficient to overcome the presumption, thus shifting the burden of production back to FirstEnergy. *Id.* At no time, however, was FE relieved of its ultimate burden to show that its costs were reasonably and prudently incurred.

While OCC chides the Commission for granting a presumption of prudence to FirstEnergy's actions, the Commission did exactly what this Court has asked it do: it applied Commission precedent. The Court has repeatedly observed that the Commission should respect its own precedents to ensure predictability in the law. *Consumers' Counsel v. Pub. Util. Comm.*, 125 Ohio St.3d 57, 2010-Ohio-134, ¶ 15; *Consumers' Counsel v. Pub. Util. Comm.*, 10 Ohio St.3d 49, 50, 461 N.E.2d 303 (1984) ; *Cleveland Electric Illum. Co. v. Pub. Util. Comm.*, 42 Ohio St.2d 403, 431, 330 N.E.2d 1 (1975) .

Mindful of this line of authority, the Commission relied upon its earlier *Syracuse* decision as the basis for granting a presumption of prudence to FirstEnergy. In *Syracuse*, the Commission articulated the view that "[t]here should exist a presumption that decisions of utilities are prudent." 1986 Ohio PUC Lexis 1, *21. It explained that while the utility bore the burden of persuasion, the presumption of prudence was a procedural device that simply shifted the burden of production to Staff to come forward with countervailing evidence to rebut that presumption. *Id.* at *22. To provide stability to the law

the Commission applied the principles from *Syracuse* to this proceeding, just as the Court has asked.

While OCC claims that Commission decisions have no precedential value, this is misleading. Of course Commission decisions do not bind this Court, which sits in judgment of the Commission's decisions; no one is arguing to the contrary. But earlier administrative decisions like *Syracuse* should be construed as highly persuasive by the same tribunal that issued them, especially in later administrative proceedings raising similar issues, which is exactly what happened here. Stated differently, the Commission is not free to simply ignore its precedent. Equally true, the Commission must fully explain any decision that deviates from its earlier rulings.

Citing to various out-of-state cases, OCC thinks the presumption of prudence should not apply to affiliate transactions. But no controlling authority from this Court nor any Commission precedent has carved out an exception to the presumption of prudence recognized in *Syracuse*, nor is there any logical reason to do so. OCC also cites to the policy adopted by the National Association of Regulatory Utility Commissioners (NARUC) declaring that affiliate transactions should not be given a presumption of prudence. But the Commission is not bound by NARUC's policies, and the Commission expressly refused to be bound by that policy in this proceeding, *In re FE Renewable Energy Credits* (Second Entry on Rehearing at 7) (Dec. 18, 2013), FE App. at 52, thereby preserving its administrative autonomy to adapt to the ever-changing conditions presented by Ohio's utility industries.

Most important, OCC presents no harm from the affiliate relationships to justify any outcome beyond the cost disallowance that the Commission imposed below. As the Commission noted, the "Exeter Report contains no evidence of undue preference by the Companies in favor of [its affiliate] or any other bidder or improper contacts or communication between FirstEnergy and [its affiliate] or any other party." *In re FE Renewable Energy Credits* (Opinion and Order at 29) (Aug. 7, 2013), FE App. at 37. The Commission also credited the Exeter Report's analysis which "found nothing to suggest that [FirstEnergy] operated in a manner other than to select the lowest cost bids received from a competitive solicitation." *Id.* Without "concrete evidence of improper communications, anticompetitive behavior, or undue preference for [the affiliate] in awarding bids," *Id.*, OCC cannot show harm. The Court will not reverse the Commission's order unless a party can shown harm from the order. *In re Complaint of Buckeye Energy Brokers*, 139 Ohio St.3d 284, 2014-Ohio-1532, ¶ 23 (collecting cases). The Court should apply that precedent here and reject OCC's unfounded affiliate arguments.

Lastly, OCC contends that even if it is assumed that the Commission accurately identified the applicable burden-of-proof standards, the Commission misapplied those standards to the underlying facts. The sole basis for this argument rests on an isolated statement the Commission made which OCC has taken completely out of context. When placed in context, the Commission' statement makes eminent sense and thus belies OCC's acontextual reading.

In criticizing the Commission's order, OCC states that "[t]he PUCO looked instead to the intervening parties (and PUCO Staff) and held that they did not produce

evidence 'sufficient to overcome the presumption that [FirstEnergy's] decisions were prudent to support a disallowance of the costs of the REC purchases.' " The internally quoted Commission statement, according to OCC, creates an inconsistency with the Commission's prior remark stating that the Exeter Report was sufficient to overcome the presumption of prudency. There is no inconsistency.

When it comes to interpretation, the Court has stated that context matters. *In re Application of Ohio Power Co.*, Slip Opinion No. 2014-Ohio-4271, ¶ 26. This maxim applies as much to reading a statute as it does to reading a tribunal's opinion. "[C]ourts have recognized the folly of lifting a general phrase or sentence out of an opinion and applying it to an entirely different context." *Amer. Meat Inst. v. U.S. Dept. of Agric.*, 760 F.3d 18, 39 (D.C. Cir. 2014) (Brown, J., dissenting). This principle has deep roots. *See Arkansas Game and Fish Comm. v. U.S.*, 133 S. Ct. 511, 520 (2012) (noting "Chief Justice Marshall's sage observation" from *Cohens v. Virginia*, 6 Wheat. 264, 399 (1821) "that 'general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used.' ").

The Commission's statement that the presumption of prudence had not been rebutted was made solely in the context of FirstEnergy's RFP 1 from August 2009, a contextual clue that OCC's brief conveniently fails to mention, thereby leaving the Court with a misleading picture of what the Commission actually meant. The Commission did not act inconsistently. Simply because the Commission found that the presumption of prudence was rebutted in one RFP case does not automatically mean that the Commission

found that the presumption had been rebutted for all the other RFPs. Context dispels the mirage of inconsistency conjured by the OCC.

Moreover, OCC is wrong to argue that the effect of this isolated statement shifted the burden of persuasion to Staff and Intervenors. To support its argument, OCC claims that nowhere in the Commission' order is there an express declaration by the Commission that FirstEnergy's REC procurements were "prudent and reasonable." Even assuming this is true, it is beside the point. The Court does not insist on the recitation of magic words to convey a particular point – it focuses on substance. *See, e.g., Bay Mechanical & Elec. Corp. v. Testa*, 133 Ohio St.3d 423, 2012-Ohio-4312, ¶ 22-23 (absence of magic words not dispositive); *State v. Lomax*, 114 Ohio St.3d 350, 2007-Ohio-4277, ¶ 48 (same); *Young v. Ohio Dept. of Human Serv.*, 76 Ohio St.3d 547, 551, 668 N.E.2d 908 (1996) (same).

The substance of the Commission's order shows that, regardless of whether Staff and Intervenors rebutted the presumption of prudence, FirstEnergy met its burden of persuasion with respect to the REC-procurement costs that were not disallowed. It would have been more than a little odd if the Commission ordered a disallowance for costs that were in-fact prudently incurred. It necessarily follows that, where the Commission orders a partial cost disallowance, the utility did sustain its burden of showing that the remaining costs were prudently incurred. And the record bears this out.

Recall that the Commission only ordered a disallowance for the 2011 vintage RECs that were purchased in August 2010. *In re FE Renewable Energy Credits* (Opinion

and Order at 25) (Aug. 7, 2013), FE App. at 33. All of the earlier REC purchases, however, which the Commission permitted FirstEnergy to recover, occurred during a markedly different environment as FirstEnergy was able to show. The record evidence for these earlier purchases showed, and the Commission found factually, that the market was nascent, transparent information on market prices was generally not available, and that market participants were grappling with liquidity issues. *Id.* at 21-25, FE App. at 29-33. This evidence adduced by FirstEnergy shows that it met its burden of persuasion to show that its REC procurements were prudently incurred for REC purchases in those years. Regardless of whether the Commission used the magic words "prudent and reasonable," the substance of the Commission's order shows that FirstEnergy sustained its burden of persuasion for those earlier REC procurements.

CONCLUSION

The Commission's order is lawful, is supported by the evidence, and should be affirmed.

Respectfully submitted,

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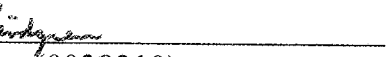

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PROOF OF SERVICE

I hereby certify that a true copy of the foregoing Third Merit Brief, submitted on behalf of appellee, the Public Utilities Commission of Ohio, was served by regular U.S. mail, postage prepaid, or hand-delivered, upon the following parties of record, this 3rd of December, 2014.

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1333.61 Uniform trade secrets act definitions.

As used in sections 1333.61 to 1333.69 of the Revised Code, unless the context requires otherwise:

(A) "Improper means" includes theft, bribery, misrepresentation, breach or inducement of a breach of a duty to maintain secrecy, or espionage through electronic or other means.

(B) "Misappropriation" means any of the following:

(1) Acquisition of a trade secret of another by a person who knows or has reason to know that the trade secret was acquired by improper means;

(2) Disclosure or use of a trade secret of another without the express or implied consent of the other person by a person who did any of the following:

(a) Used improper means to acquire knowledge of the trade secret;

(b) At the time of disclosure or use, knew or had reason to know that the knowledge of the trade secret that the person acquired was derived from or through a person who had utilized improper means to acquire it, was acquired under circumstances giving rise to a duty to maintain its secrecy or limit its use, or was derived from or through a person who owed a duty to the person seeking relief to maintain its secrecy or limit its use;

(c) Before a material change of their position, knew or had reason to know that it was a trade secret and that knowledge of it had been acquired by accident or mistake.

(C) "Person" has the same meaning as in division (C) of section 1.59 of the Revised Code and includes governmental entities.

(D) "Trade secret" means information, including the whole or any portion or phase of any scientific or technical information, design, process, procedure, formula, pattern, compilation, program, device, method, technique, or improvement, or any business information or plans, financial information, or listing of names, addresses, or telephone numbers, 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.

Effective Date: 07-20-1994; 2008 HB562 (Vetoed) 06-24-2008

1333.62 Injunction against misappropriation.

(A) Actual or threatened misappropriation may be enjoined. Upon application to the court, an injunction shall be terminated when the trade secret has ceased to exist, unless the court finds that termination of the injunction is likely to provide a person who committed an actual or threatened misappropriation with a resulting commercial advantage, in which case the injunction shall be continued for an additional reasonable time in order to eliminate commercial advantage that otherwise would be derived from the misappropriation.

(B) In exceptional circumstances, an injunction may condition future use upon payment of a reasonable royalty for no longer than the time for which use could have been prohibited. Exceptional circumstances include a material and prejudicial change of position prior to acquiring knowledge or reason to know of misappropriation that renders a prohibitive injunction inequitable.

(C) In appropriate circumstances, affirmative acts to protect a trade secret may be compelled by court order.

Effective Date: 07-20-1994

1333.63 Damages recoverable.

(A) Except to the extent that a material and prejudicial change of position prior to acquiring knowledge or reason to know of misappropriation renders a monetary recovery inequitable, a complainant in a civil action is entitled to recover damages for misappropriation. Damages may include both the actual loss caused by misappropriation and the unjust enrichment caused by misappropriation that is not taken into account in computing actual loss. In lieu of damages measured by any other methods, the damages caused by misappropriation may be measured by imposition of liability for a reasonable royalty that is equitable under the circumstances considering the loss to the complainant, the benefit to the misappropriator, or both, for a misappropriator's unauthorized disclosure or use of a trade secret.

(B) If willful and malicious misappropriation exists, the court may award punitive or exemplary damages in an amount not exceeding three times any award made under division (A) of this section.

1333.64 Attorney's fees.

The court may award reasonable attorney's fees to the prevailing party, if any of the following applies:

(A) A claim of misappropriation is made in bad faith.

(B) A motion to terminate an injunction is made or resisted in bad faith.

(C) Willful and malicious misappropriation exists.

Effective Date: 07-20-1994

149.43 *[Effective 3/20/2015]* Availability of public records for inspection and copying.

(A) As used in this section:

(1) "Public record" means records kept by any public office, including, but not limited to, state, county, city, village, township, and school district units, and records pertaining to the delivery of educational services by an alternative school in this state kept by the nonprofit or for-profit entity operating the alternative school pursuant to section 3313.533 of the Revised Code. "Public record" does not mean any of the following:

(a) Medical records;

(b) Records pertaining to probation and parole proceedings or to proceedings related to the imposition of community control sanctions and post-release control sanctions;

(c) Records pertaining to actions under section 2151.85 and division (C) of section 2919.121 of the Revised Code and to appeals of actions arising under those sections;

(d) Records pertaining to adoption proceedings, including the contents of an adoption file maintained by the department of health under sections 3705.12 to 3705.124 of the Revised Code;

(e) Information in a record contained in the putative father registry established by section 3107.062 of the Revised Code, regardless of whether the information is held by the department of job and family services or, pursuant to section 3111.69 of the Revised Code, the office of child support in the department or a child support enforcement agency;

(f) Records specified in division (A) of section 3107.52 of the Revised Code;

(g) Trial preparation records;

(h) Confidential law enforcement investigatory records;

(i) Records containing information that is confidential under section 2710.03 or 4112.05 of the Revised Code;

(j) DNA records stored in the DNA database pursuant to section 109.573 of the Revised Code;

(k) Inmate records released by the department of rehabilitation and correction to the department of youth services or a court of record pursuant to division (E) of section 5120.21 of the Revised Code;

(l) Records maintained by the department of youth services pertaining to children in its custody released by the department of youth services to the department of rehabilitation and correction pursuant to section 5139.05 of the Revised Code;

(m) Intellectual property records;

(n) Donor profile records;

(o) Records maintained by the department of job and family services pursuant to section 3121.894 of the Revised Code;

(p) Peace officer, parole officer, probation officer, bailiff, prosecuting attorney, assistant prosecuting attorney, correctional employee, community-based correctional facility employee, youth services employee, firefighter, EMT, or investigator of the bureau of criminal identification and investigation residential and familial information;

(q) In the case of a county hospital operated pursuant to Chapter 339. of the Revised Code or a municipal hospital operated pursuant to Chapter 749. of the Revised Code, information that constitutes a trade secret, as defined in section 1333.61 of the Revised Code;

(r) Information pertaining to the recreational activities of a person under the age of eighteen;

(s) Records provided to, statements made by review board members during meetings of, and all work products of a child fatality review board acting under sections 307.621 to 307.629 of the Revised Code, and child fatality review data submitted by the child fatality review board to the department of health or a national child death review database, other than the report prepared pursuant to division (A) of section 307.626 of the Revised Code;

(t) Records provided to and statements made by the executive director of a public children services agency or a prosecuting attorney acting pursuant to section 5153.171 of the Revised Code other than the information released under that section;

(u) Test materials, examinations, or evaluation tools used in an examination for licensure as a nursing home administrator that the board of executives of long-term services and supports administers under section 4751.04 of the Revised Code or contracts under that section with a private or government entity to administer;

(v) Records the release of which is prohibited by state or federal law;

(w) Proprietary information of or relating to any person that is submitted to or compiled by the Ohio venture capital authority created under section 150.01 of the Revised Code;

(x) Financial statements and data any person submits for any purpose to the Ohio housing finance agency or the controlling board in connection with applying for, receiving, or accounting for financial assistance from the agency, and information that identifies any individual who benefits directly or indirectly from financial assistance from the agency;

(y) Records listed in section 5101.29 of the Revised Code;

(z) Discharges recorded with a county recorder under section 317.24 of the Revised Code, as specified in division (B)(2) of that section;

(aa) Usage information including names and addresses of specific residential and commercial customers of a municipally owned or operated public utility;

(bb) Records described in division (C) of section 187.04 of the Revised Code that are not designated to be made available to the public as provided in that division.

(2) "Confidential law enforcement investigatory record" means any record that pertains to a law enforcement matter of a criminal, quasi-criminal, civil, or administrative nature, but only to the extent that the release of the record would create a high probability of disclosure of any of the following:

(a) The identity of a suspect who has not been charged with the offense to which the record pertains, or of an information source or witness to whom confidentiality has been reasonably promised;

(b) Information provided by an information source or witness to whom confidentiality has been reasonably promised, which information would reasonably tend to disclose the source's or witness's identity;

(c) Specific confidential investigatory techniques or procedures or specific investigatory work product;

(d) Information that would endanger the life or physical safety of law enforcement personnel, a crime victim, a witness, or a confidential information source.

(3) "Medical record" means any document or combination of documents, except births, deaths, and the fact of admission to or discharge from a hospital, that pertains to the medical history, diagnosis, prognosis, or medical condition of a patient and that is generated and maintained in the process of medical treatment.

(4) "Trial preparation record" means any record that contains information that is specifically compiled in reasonable anticipation of, or in defense of, a civil or criminal action or proceeding, including the independent thought processes and personal trial preparation of an attorney.

(5) "Intellectual property record" means a record, other than a financial or administrative record, that is produced or collected by or for faculty or staff of a state institution of higher learning in the conduct of or as a result of study or research on an educational, commercial, scientific, artistic, technical, or scholarly issue, regardless of whether the study or research was sponsored by the institution alone or in conjunction with a governmental body or private concern, and that has not been publicly released, published, or patented.

(6) "Donor profile record" means all records about donors or potential donors to a public institution of higher education except the names and reported addresses of the actual donors and the date, amount, and conditions of the actual donation.

(7) "Peace officer, parole officer, probation officer, bailiff, prosecuting attorney, assistant prosecuting attorney, correctional employee, community-based correctional facility employee, youth services employee, firefighter, EMT, or investigator of the bureau of criminal identification and investigation residential and familial information" means any information that discloses any of the following about a peace officer, parole officer, probation officer, bailiff, prosecuting attorney, assistant prosecuting attorney, correctional employee, community-based correctional facility employee, youth services employee, firefighter, EMT, or investigator of the bureau of criminal identification and investigation:

(a) The address of the actual personal residence of a peace officer, parole officer, probation officer, bailiff, assistant prosecuting attorney, correctional employee, community-based correctional facility employee, youth services employee, firefighter, EMT, or an investigator of the bureau of criminal identification and investigation, except for the state or political subdivision in which the peace officer, parole officer, probation officer, bailiff, assistant prosecuting attorney, correctional employee, community-based correctional facility employee, youth services employee, firefighter, EMT, or investigator of the bureau of criminal identification and investigation resides;

(b) Information compiled from referral to or participation in an employee assistance program;

(c) The social security number, the residential telephone number, any bank account, debit card, charge card, or credit card number, or the emergency telephone number of, or any medical information pertaining to, a peace officer, parole officer, probation officer, bailiff, prosecuting attorney, assistant prosecuting attorney, correctional employee, community-based correctional facility employee, youth services employee, firefighter, EMT, or investigator of the bureau of criminal identification and investigation;

(d) The name of any beneficiary of employment benefits, including, but not limited to, life insurance benefits, provided to a peace officer, parole officer, probation officer, bailiff, prosecuting attorney, assistant prosecuting attorney, correctional employee, community-based correctional facility employee, youth services employee, firefighter, EMT, or investigator of the bureau of criminal identification and investigation by the peace officer's, parole officer's, probation officer's, bailiff's, prosecuting attorney's, assistant prosecuting attorney's, correctional employee's, community-based correctional facility employee's, youth services employee's, firefighter's, EMT's, or investigator of the bureau of criminal identification and investigation's employer;

(e) The identity and amount of any charitable or employment benefit deduction made by the peace officer's, parole officer's, probation officer's, bailiff's, prosecuting attorney's, assistant prosecuting attorney's, correctional employee's, community-based correctional facility employee's, youth services employee's, firefighter's, EMT's, or investigator of the bureau of criminal identification and investigation's employer from the peace officer's, parole officer's, probation officer's, bailiff's, prosecuting attorney's, assistant prosecuting attorney's, correctional employee's, community-based correctional facility employee's, youth services employee's, firefighter's, EMT's, or investigator of

the bureau of criminal identification and investigation's compensation unless the amount of the deduction is required by state or federal law;

(f) The name, the residential address, the name of the employer, the address of the employer, the social security number, the residential telephone number, any bank account, debit card, charge card, or credit card number, or the emergency telephone number of the spouse, a former spouse, or any child of a peace officer, parole officer, probation officer, bailiff, prosecuting attorney, assistant prosecuting attorney, correctional employee, community-based correctional facility employee, youth services employee, firefighter, EMT, or investigator of the bureau of criminal identification and investigation;

(g) A photograph of a peace officer who holds a position or has an assignment that may include undercover or plain clothes positions or assignments as determined by the peace officer's appointing authority.

As used in divisions (A)(7) and (B)(9) of this section, "peace officer" has the same meaning as in section 109.71 of the Revised Code and also includes the superintendent and troopers of the state highway patrol; it does not include the sheriff of a county or a supervisory employee who, in the absence of the sheriff, is authorized to stand in for, exercise the authority of, and perform the duties of the sheriff.

As used in divisions (A)(7) and (B) (9) of this section, "correctional employee" means any employee of the department of rehabilitation and correction who in the course of performing the employee's job duties has or has had contact with inmates and persons under supervision.

As used in divisions (A)(7) and (B) (9) of this section, "youth services employee" means any employee of the department of youth services who in the course of performing the employee's job duties has or has had contact with children committed to the custody of the department of youth services.

As used in divisions (A)(7) and (B)(9) of this section, "firefighter" means any regular, paid or volunteer, member of a lawfully constituted fire department of a municipal corporation, township, fire district, or village.

As used in divisions (A)(7) and (B)(9) of this section, "EMT" means EMTs-basic, EMTs-I, and paramedics that provide emergency medical services for a public emergency medical service organization. "Emergency medical service organization," "EMT-basic," "EMT-I," and "paramedic" have the same meanings as in section 4765.01 of the Revised Code.

As used in divisions (A)(7) and (B)(9) of this section, "investigator of the bureau of criminal identification and investigation" has the meaning defined in section 2903.11 of the Revised Code.

(8) "Information pertaining to the recreational activities of a person under the age of eighteen" means information that is kept in the ordinary course of business by a public office, that pertains to the recreational activities of a person under the age of eighteen years, and that discloses any of the following:

(a) The address or telephone number of a person under the age of eighteen or the address or telephone number of that person's parent, guardian, custodian, or emergency contact person;

(b) The social security number, birth date, or photographic image of a person under the age of eighteen;

(c) Any medical record, history, or information pertaining to a person under the age of eighteen;

(d) Any additional information sought or required about a person under the age of eighteen for the purpose of allowing that person to participate in any recreational activity conducted or sponsored by a public office or to use or obtain admission privileges to any recreational facility owned or operated by a public office.

(9) "Community control sanction" has the same meaning as in section 2929.01 of the Revised Code.

(10) "Post-release control sanction" has the same meaning as in section 2967.01 of the Revised Code.

(11) "Redaction" means obscuring or deleting any information that is exempt from the duty to permit public inspection or copying from an item that otherwise meets the definition of a "record" in section 149.011 of the Revised Code.

(12) "Designee" and "elected official" have the same meanings as in section 109.43 of the Revised Code.

(B)

(1) Upon request and subject to division (B)(8) of this section, all public records responsive to the request shall be promptly prepared and made available for inspection to any person at all reasonable times during regular business hours. Subject to division (B)(8) of this section, upon request, a public office or person responsible for public records shall make copies of the requested public record available at cost and within a reasonable period of time. If a public record contains information that is exempt from the duty to permit public inspection or to copy the public record, the public office or the person responsible for the public record shall make available all of the information within the public record that is not exempt. When making that public record available for public inspection or copying that public record, the public office or the person responsible for the public record shall notify the requester of any redaction or make the redaction plainly visible. A redaction shall be deemed a denial of a request to inspect or copy the redacted information, except if federal or state law authorizes or requires a public office to make the redaction.

(2) To facilitate broader access to public records, a public office or the person responsible for public records shall organize and maintain public records in a manner that they can be made available for inspection or copying in accordance with division (B) of this section. A public office also shall have available a copy of its current records retention schedule at a location readily available to the public. If a requester makes an ambiguous or overly broad request or has difficulty

in making a request for copies or inspection of public records under this section such that the public office or the person responsible for the requested public record cannot reasonably identify what public records are being requested, the public office or the person responsible for the requested public record may deny the request but shall provide the requester with an opportunity to revise the request by informing the requester of the manner in which records are maintained by the public office and accessed in the ordinary course of the public office's or person's duties.

(3) If a request is ultimately denied, in part or in whole, the public office or the person responsible for the requested public record shall provide the requester with an explanation, including legal authority, setting forth why the request was denied. If the initial request was provided in writing, the explanation also shall be provided to the requester in writing. The explanation shall not preclude the public office or the person responsible for the requested public record from relying upon additional reasons or legal authority in defending an action commenced under division (C) of this section.

(4) Unless specifically required or authorized by state or federal law or in accordance with division (B) of this section, no public office or person responsible for public records may limit or condition the availability of public records by requiring disclosure of the requester's identity or the intended use of the requested public record. Any requirement that the requester disclose the requestor's identity or the intended use of the requested public record constitutes a denial of the request.

(5) A public office or person responsible for public records may ask a requester to make the request in writing, may ask for the requester's identity, and may inquire about the intended use of the information requested, but may do so only after disclosing to the requester that a written request is not mandatory and that the requester may decline to reveal the requester's identity or the intended use and when a written request or disclosure of the identity or intended use would benefit the requester by enhancing the ability of the public office or person responsible for public records to identify, locate, or deliver the public records sought by the requester.

(6) If any person chooses to obtain a copy of a public record in accordance with division (B) of this section, the public office or person responsible for the public record may require that person to pay in advance the cost involved in providing the copy of the public record in accordance with the choice made by the person seeking the copy under this division. The public office or the person responsible for the public record shall permit that person to choose to have the public record duplicated upon paper, upon the same medium upon which the public office or person responsible for the public record keeps it, or upon any other medium upon which the public office or person responsible for the public record determines that it reasonably can be duplicated as an integral part of the normal operations of the public office or person responsible for the public record. When the person seeking the copy makes a choice under this division, the public office or person responsible for the public record shall provide a copy of it in accordance with the choice made by the person seeking the copy. Nothing in this section requires a public office or person responsible for the public record to allow the person seeking a copy of the public record to make the copies of the public record.

(7) Upon a request made in accordance with division (B) of this section and subject to division (B)(6) of this section, a public office or person responsible for public records shall transmit a copy

of a public record to any person by United States mail or by any other means of delivery or transmission within a reasonable period of time after receiving the request for the copy. The public office or person responsible for the public record may require the person making the request to pay in advance the cost of postage if the copy is transmitted by United States mail or the cost of delivery if the copy is transmitted other than by United States mail, and to pay in advance the costs incurred for other supplies used in the mailing, delivery, or transmission.

Any public office may adopt a policy and procedures that it will follow in transmitting, within a reasonable period of time after receiving a request, copies of public records by United States mail or by any other means of delivery or transmission pursuant to this division. A public office that adopts a policy and procedures under this division shall comply with them in performing its duties under this division.

In any policy and procedures adopted under this division, a public office may limit the number of records requested by a person that the office will transmit by United States mail to ten per month, unless the person certifies to the office in writing that the person does not intend to use or forward the requested records, or the information contained in them, for commercial purposes. For purposes of this division, "commercial" shall be narrowly construed and does not include reporting or gathering news, reporting or gathering information to assist citizen oversight or understanding of the operation or activities of government, or nonprofit educational research.

(8) A public office or person responsible for public records is not required to permit a person who is incarcerated pursuant to a criminal conviction or a juvenile adjudication to inspect or to obtain a copy of any public record concerning a criminal investigation or prosecution or concerning what would be a criminal investigation or prosecution if the subject of the investigation or prosecution were an adult, unless the request to inspect or to obtain a copy of the record is for the purpose of acquiring information that is subject to release as a public record under this section and the judge who imposed the sentence or made the adjudication with respect to the person, or the judge's successor in office, finds that the information sought in the public record is necessary to support what appears to be a justiciable claim of the person.

(9)

(a) Upon written request made and signed by a journalist on or after December 16, 1999, a public office, or person responsible for public records, having custody of the records of the agency employing a specified peace officer, parole officer, probation officer, bailiff, prosecuting attorney, assistant prosecuting attorney, correctional employee, community-based correctional facility employee, youth services employee, firefighter, EMT, or investigator of the bureau of criminal identification and investigation shall disclose to the journalist the address of the actual personal residence of the peace officer, parole officer, probation officer, bailiff, prosecuting attorney, assistant prosecuting attorney, correctional employee, community-based correctional facility employee, youth services employee, firefighter, EMT, or investigator of the bureau of criminal identification and investigation and, if the peace officer's, parole officer's, probation officer's, bailiff's, prosecuting attorney's, assistant prosecuting attorney's, correctional employee's, community-based correctional facility employee's, youth services employee's, firefighter's, EMT's, or investigator of the bureau of criminal identification and investigation's spouse, former spouse,

or child is employed by a public office, the name and address of the employer of the peace officer's, parole officer's, probation officer's, bailiff's, prosecuting attorney's, assistant prosecuting attorney's, correctional employee's, community-based correctional facility employee's, youth services employee's, firefighter's, EMT's, or investigator of the bureau of criminal identification and investigation's spouse, former spouse, or child. The request shall include the journalist's name and title and the name and address of the journalist's employer and shall state that disclosure of the information sought would be in the public interest.

(b) Division (B)(9)(a) of this section also applies to journalist requests for customer information maintained by a municipally owned or operated public utility, other than social security numbers and any private financial information such as credit reports, payment methods, credit card numbers, and bank account information.

(c) As used in division (B)(9) of this section, "journalist" means a person engaged in, connected with, or employed by any news medium, including a newspaper, magazine, press association, news agency, or wire service, a radio or television station, or a similar medium, for the purpose of gathering, processing, transmitting, compiling, editing, or disseminating information for the general public.

(C)

(1) If a person allegedly is aggrieved by the failure of a public office or the person responsible for public records to promptly prepare a public record and to make it available to the person for inspection in accordance with division (B) of this section or by any other failure of a public office or the person responsible for public records to comply with an obligation in accordance with division (B) of this section, the person allegedly aggrieved may commence a mandamus action to obtain a judgment that orders the public office or the person responsible for the public record to comply with division (B) of this section, that awards court costs and reasonable attorney's fees to the person that instituted the mandamus action, and, if applicable, that includes an order fixing statutory damages under division (C)(1) of this section. The mandamus action may be commenced in the court of common pleas of the county in which division (B) of this section allegedly was not complied with, in the supreme court pursuant to its original jurisdiction under Section 2 of Article IV, Ohio Constitution, or in the court of appeals for the appellate district in which division (B) of this section allegedly was not complied with pursuant to its original jurisdiction under Section 3 of Article IV, Ohio Constitution.

If a requestor transmits a written request by hand delivery or certified mail to inspect or receive copies of any public record in a manner that fairly describes the public record or class of public records to the public office or person responsible for the requested public records, except as otherwise provided in this section, the requestor shall be entitled to recover the amount of statutory damages set forth in this division if a court determines that the public office or the person responsible for public records failed to comply with an obligation in accordance with division (B) of this section.

The amount of statutory damages shall be fixed at one hundred dollars for each business day during which the public office or person responsible for the requested public records failed to comply

with an obligation in accordance with division (B) of this section, beginning with the day on which the requester files a mandamus action to recover statutory damages, up to a maximum of one thousand dollars. The award of statutory damages shall not be construed as a penalty, but as compensation for injury arising from lost use of the requested information. The existence of this injury shall be conclusively presumed. The award of statutory damages shall be in addition to all other remedies authorized by this section.

The court may reduce an award of statutory damages or not award statutory damages if the court determines both of the following:

(a) That, based on the ordinary application of statutory law and case law as it existed at the time of the conduct or threatened conduct of the public office or person responsible for the requested public records that allegedly constitutes a failure to comply with an obligation in accordance with division (B) of this section and that was the basis of the mandamus action, a well-informed public office or person responsible for the requested public records reasonably would believe that the conduct or threatened conduct of the public office or person responsible for the requested public records did not constitute a failure to comply with an obligation in accordance with division (B) of this section;

(b) That a well-informed public office or person responsible for the requested public records reasonably would believe that the conduct or threatened conduct of the public office or person responsible for the requested public records would serve the public policy that underlies the authority that is asserted as permitting that conduct or threatened conduct.

(2)

(a) If the court issues a writ of mandamus that orders the public office or the person responsible for the public record to comply with division (B) of this section and determines that the circumstances described in division (C)(1) of this section exist, the court shall determine and award to the relator all court costs.

(b) If the court renders a judgment that orders the public office or the person responsible for the public record to comply with division (B) of this section, the court may award reasonable attorney's fees subject to reduction as described in division (C)(2)(c) of this section. The court shall award reasonable attorney's fees, subject to reduction as described in division (C)(2)(c) of this section when either of the following applies:

(i) The public office or the person responsible for the public records failed to respond affirmatively or negatively to the public records request in accordance with the time allowed under division (B) of this section.

(ii) The public office or the person responsible for the public records promised to permit the relator to inspect or receive copies of the public records requested within a specified period of time but failed to fulfill that promise within that specified period of time.

(c) Court costs and reasonable attorney's fees awarded under this section shall be construed as remedial and not punitive. Reasonable attorney's fees shall include reasonable fees incurred to produce proof of the reasonableness and amount of the fees and to otherwise litigate entitlement to the fees. The court may reduce an award of attorney's fees to the relator or not award attorney's fees to the relator if the court determines both of the following:

(i) That, based on the ordinary application of statutory law and case law as it existed at the time of the conduct or threatened conduct of the public office or person responsible for the requested public records that allegedly constitutes a failure to comply with an obligation in accordance with division (B) of this section and that was the basis of the mandamus action, a well-informed public office or person responsible for the requested public records reasonably would believe that the conduct or threatened conduct of the public office or person responsible for the requested public records did not constitute a failure to comply with an obligation in accordance with division (B) of this section;

(ii) That a well-informed public office or person responsible for the requested public records reasonably would believe that the conduct or threatened conduct of the public office or person responsible for the requested public records as described in division (C)(2)(c)(i) of this section would serve the public policy that underlies the authority that is asserted as permitting that conduct or threatened conduct.

(D) Chapter 1347. of the Revised Code does not limit the provisions of this section.

(E)

(1) To ensure that all employees of public offices are appropriately educated about a public office's obligations under division (B) of this section, all elected officials or their appropriate designees shall attend training approved by the attorney general as provided in section 109.43 of the Revised Code. In addition, all public offices shall adopt a public records policy in compliance with this section for responding to public records requests. In adopting a public records policy under this division, a public office may obtain guidance from the model public records policy developed and provided to the public office by the attorney general under section 109.43 of the Revised Code. Except as otherwise provided in this section, the policy may not limit the number of public records that the public office will make available to a single person, may not limit the number of public records that it will make available during a fixed period of time, and may not establish a fixed period of time before it will respond to a request for inspection or copying of public records, unless that period is less than eight hours.

(2) The public office shall distribute the public records policy adopted by the public office under division (E)(1) of this section to the employee of the public office who is the records custodian or records manager or otherwise has custody of the records of that office. The public office shall require that employee to acknowledge receipt of the copy of the public records policy. The public office shall create a poster that describes its public records policy and shall post the poster in a conspicuous place in the public office and in all locations where the public office has branch offices. The public office may post its public records policy on the internet web site of the public office if the public office maintains an internet web site. A public office that has established a

manual or handbook of its general policies and procedures for all employees of the public office shall include the public records policy of the public office in the manual or handbook.

(F)

(1) The bureau of motor vehicles may adopt rules pursuant to Chapter 119. of the Revised Code to reasonably limit the number of bulk commercial special extraction requests made by a person for the same records or for updated records during a calendar year. The rules may include provisions for charges to be made for bulk commercial special extraction requests for the actual cost of the bureau, plus special extraction costs, plus ten per cent. The bureau may charge for expenses for redacting information, the release of which is prohibited by law.

(2) As used in division (F)(1) of this section:

(a) "Actual cost" means the cost of depleted supplies, records storage media costs, actual mailing and alternative delivery costs, or other transmitting costs, and any direct equipment operating and maintenance costs, including actual costs paid to private contractors for copying services.

(b) "Bulk commercial special extraction request" means a request for copies of a record for information in a format other than the format already available, or information that cannot be extracted without examination of all items in a records series, class of records, or database by a person who intends to use or forward the copies for surveys, marketing, solicitation, or resale for commercial purposes. "Bulk commercial special extraction request" does not include a request by a person who gives assurance to the bureau that the person making the request does not intend to use or forward the requested copies for surveys, marketing, solicitation, or resale for commercial purposes.

(c) "Commercial" means profit-seeking production, buying, or selling of any good, service, or other product.

(d) "Special extraction costs" means the cost of the time spent by the lowest paid employee competent to perform the task, the actual amount paid to outside private contractors employed by the bureau, or the actual cost incurred to create computer programs to make the special extraction. "Special extraction costs" include any charges paid to a public agency for computer or records services.

(3) For purposes of divisions (F)(1) and (2) of this section, "surveys, marketing, solicitation, or resale for commercial purposes" shall be narrowly construed and does not include reporting or gathering news, reporting or gathering information to assist citizen oversight or understanding of the operation or activities of government, or nonprofit educational research.

BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

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	Case No. 11-5201-EL-RDR

AFFIDAVIT OF DEAN W. STATHIS

STATE OF PENNSYLVANIA)
) ss:
COUNTY OF BERKS)

Dean W. Stathis, being first duly sworn, states as follows:

1. I am Director, Regulated Commodity Sourcing ("RCS") for FirstEnergy Service Company. My department is responsible for procuring power and renewable products for all of the FirstEnergy utilities. My department was specifically responsible for the Request for Proposal (RFP") procurement processes held on behalf of Ohio Edison Company, The Cleveland Electric Illuminating Company and The Toledo Edison Company (the "Companies") to meet their alternative energy requirements under Ohio law.

2. Because employees of RCS represent the marketing arm of the regulated utilities, they are considered regulated marketing function employees by the Federal Regulatory Commission ("FERC"). This classification requires two organizational separations from the rest of FirstEnergy Corp. ("FE") and its affiliates. First, from an affiliate restrictions standpoint, RCS must be independent of, and separate from, FirstEnergy Corp.'s unregulated power supply subsidiary, FirstEnergy Solutions ("FES"). This is primarily accomplished through separate physical work locations, separate corporate identification credentials, separate IT Systems and

mandatory affiliate restrictions training administered by the FE Corporate Compliance Department. Secondly, RCS must be separated from the regulated transmission function of FE to ensure that RCS does not receive non-public transmission information. This separation is similarly accomplished by separate physical work locations, separate corporate identification credentials, separate IT Systems and FERC mandatory standards of conduct training administered by the FE Corporate Compliance Department.

3. With respect to the information received from or relating to bidders and bid in the RFPs at issue, RCS maintained separate physical and electronic files that can only be accessed by RCS personnel or others within FirstEnergy Service Company on a need to know basis, i.e., only to persons having a legitimate business reason to access such data. Prior to the audits conducted in this case, this information was not shared with anyone outside of FirstEnergy Service Company and Navigant Consulting, Inc.

4. My department and others within FirstEnergy Service Company provided certain information to the Staff of the Public Utilities Commission of Ohio and the two auditors in this case with the understanding that, consistent with our internal policy and with our contractual obligations to the RFP bidders and alternative energy suppliers, transaction-specific information – such as the names of bidders making specific price bids – would remain confidential. Among other things, the Staff and auditors were provided: (a) the specific identities of the specific REC suppliers who participated in the RFPs; (b) the specific prices for the RECs bid by specific suppliers in response to each RFP; and (c) detailed financial information regarding specific REC transactions between the suppliers and the Companies.

Dean W. Stathis

DEAN W. STATHIS

Sworn to and subscribed in my presence by Dean W. Stathis on this 25th day of October, 2012.

Marcia M. Stewart
Notary Public

COMMONWEALTH OF PENNSYLVANIA
Notarial Seal
Marcia M. Stewart, Notary Public
Muhlenberg Twp., Berks County
My Commission Expires Aug. 29, 2015
MEMBER, PENNSYLVANIA ASSOCIATION OF NOTARIES

FILE

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October 26, 2012

RECEIVED-DOCKETING DIV
2012 OCT 26 PM 2:39
PUCO

Public Utilities Commission of Ohio
Docketing Division
180 East Broad Street
Columbus, Ohio 43215-3793

Re: Case No. 11-5201-EL-RDR

It is our understanding that the Public Utilities Commission of Ohio ("PUCO" or the "Commission") is considering disclosing an un-redacted version of a report prepared by Exeter Associates, Inc. ("Exeter") for this docket entitled *"Final Report Management/Performance Audit of the Alternative Energy Resource Rider of the FirstEnergy Ohio Utility companies For October 2009 Through December 31, 2011"* dated June 15, 2012. The purpose of this letter is to help inform the Commission of potential ramifications of releasing this report in un-redacted form so that it may weigh these ramifications along with the other factors raised by the parties in making a decision. In summary, for the reasons discussed below we believe that releasing the Exeter report in un-redacted form may result in harm to Ohio's ratepayers by discouraging prospective bidders from participating in future competitive procurements conducted by any utility in Ohio thereby creating less competition and in turn higher prices for renewable energy. We believe that this harm outweighs the benefit of releasing an un-redacted report to improve transparency.

By way of background, Navigant Consulting, Inc. ("Navigant") is a world-wide consulting company, listed on the NYSE, having a diverse practice including about 300 consultants working on projects in the energy industry. As such, Navigant has extensive experience working for clients which include public and government owned utilities, regulatory commissions, generation (both renewable and non-renewable) and transmission developers, financial institutions, investors, and other interested parties on scores of electric utility competitive procurements throughout the U.S. Having worked on such procurements from these myriad perspectives, we believe we bring a unique perspective to issues such as the one addressed herein. Relevant to this docket, Navigant has served as the Independent Evaluator ("IE") on the six regulated renewable procurements ("RFPs") performed for the

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Transmission Cover Sheet for Letter of Commentary to the PUCO

Date: October 26, 2012

Case Number: 11-5201-EL-RDR

Case Title: Final Report Management/Performance Audit of the Alternative Energy Resource Rider of the FirstEnergy Ohio Utility companies For October 2009 Through December 31, 2011

Document Description: The following document is letter of commentary regarding the potential release of confidential bidding information disclosed to Exeter Associates for their Management Audit of the Alternative Energy Resource Rider of the FirstEnergy Ohio Utility companies For October 2009 Through December 31, 2011.

Length: 2 pages

Document Originator:

Daniel Bradley | Director | Energy | Navigant
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516-876-6235 Office | dbradley@navigant.com

Facsimile Operator:

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- **Encouraging Market Participation**—Navigant has found the most successful markets are those that have successfully convinced a large number of bidders to participate in their markets. Publicly disclosing the identity of winning or non-winning bidders, ranges of prices received in bids, and prices of selected bids has a chilling effect on participation because participants are likely to believe disclosure of that information puts them at a competitive disadvantage in the marketplace compared to their competitors or in the context of business transactions with counterparties. In addition, there is no obvious compelling benefit in disclosing identities of either winning or non-winning bidders. Further, based on our experience, similar information is generally only disclosed in competitive procurements in other U.S. jurisdictions when a compelling reason has been shown. We are not aware of any such compelling reason for disclosure here.

- **Encouraging Market Competition**—Navigant believes it is incumbent upon the Commission to evaluate whether the information released would be contrary to the objective of encouraging and sustaining competitive bidding processes in Ohio. Bidders in general do not want their bidding data disclosed, as that could reveal their bidding strategies and valuations, and discourage them from participating in future procurements. Since bidders have become extremely sophisticated, disclosing details of bids could also allow bidders to discern bidding strategies of other bidders which can lead to gaming of future bidding processes, resulting in less than competitive outcomes.

- **Procedural Changes**—Bidders prefer to participate in markets with clearly defined rules and procedures and may be reluctant to participate in markets where there is perceived to be arbitrary rule changes. Most bidders consider their bid prices to be highly sensitive and competitive information. Their participation in markets can be decided upon the disclosure requirements in a particular market or jurisdiction.

We understand that one of the Commission's goals is to promote a strong and vibrant competitive renewables market. We also appreciate and understand that there will always be pressure on the Commission to promote the most transparent process possible. However, those objectives are at odds on this issue.

For the reasons discussed above, I recommend against the release of the Exeter report in an unredacted form.

Sincerely,

Daniel Bradley
Director
Navigant Consulting

CC: Council of Record

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 that 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 that 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 that 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) Two 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.

(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 twenty-four 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 twenty-four 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. Nothing precludes the commission from reexamining the need for protection issue de novo during the twenty-four month period if there is an application for rehearing on confidentiality or a public records request for the redacted information.

(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 fax or e-filing will be given confidential treatment by the commission.