

ORIGINAL

IN THE SUPREME COURT 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. 2013-2026
)	Appeal from the Public Utilities Commission of Ohio
)	Public Utilities Commission of Ohio
)	Case No. 11-5201-EL-RDR
)	
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MOTION TO SEAL OF APPELLANTS OHIO EDISON COMPANY, THE CLEVELAND ELECTRIC ILLUMINATING COMPANY AND THE TOLEDO EDISON COMPANY

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MOTION TO SEAL OF APPELLANTS OHIO EDISON COMPANY, THE CLEVELAND ELECTRIC ILLUMINATING COMPANY AND THE TOLEDO EDISON COMPANY

Pursuant to Rule 3.02(B) of the Rules of Practice of the Supreme Court of Ohio and this Court’s precedent, Ohio Edison Company, The Cleveland Electric Illuminating Company and The Toledo Edison Company (collectively, “the Companies”) respectfully request this Court to seal certain portions of the Supplement to the Third Merit Brief (“Supplement”) that have been filed with the Companies’ Third Merit Brief. Specifically, the Companies request that the following documents contained in the Supplement be allowed to be submitted under seal:

- *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, PUCO No. 11-5201-EL-RDR, HEARING TRANSCRIPT VOLUME I (Feb. 19, 2013) (Confidential), page 19 SUPP. 0792*
- *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, PUCO No. 11-5201-EL-RDR, HEARING TRANSCRIPT VOLUME III (Feb. 21, 2013) (Confidential), pages 650, 651, 653, 654 SUPP. 0795-798*

As demonstrated in the attached Memorandum in Support, in the proceeding below the Public Utilities Commission of Ohio (the “Commission”) bifurcated that proceeding into confidential and public portions with corresponding confidential and public transcripts. The confidential information in the Supplement is also contained in the confidential portions of the record transferred under seal to the office of this Court’s clerk on January 23, 2014. The Companies recognize that on September 3, 2014, and on November 12, 2014, this Court issued Entries denying previous motions to file materials under seal in this proceeding as moot because Rule 3.02(B) exempted those materials from public disclosure. Notwithstanding these Entries, out of an abundance of caution, the Companies respectfully request that this Court grant this motion to seal the relevant portions of the Supplement to the Companies’ Third Merit Brief.

Dated: December 4, 2014

Respectfully submitted,

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MEMORANDUM IN SUPPORT OF MOTION TO SEAL

I. OVERVIEW AND PROCEDURAL HISTORY

As discussed in the Companies' Third Merit Brief, the proceeding below involved competitively sensitive third-party proprietary information related to the Companies' efforts to procure renewable energy credits ("RECs"). This information included: (a) the identities of specific REC suppliers who participated in the RFPs; and (b) the specific prices for the RECs bid by specific suppliers in response to each RFP (the "REC Procurement Data"). *See* Case No. 11-5201-EL-RDR, Opinion and Order at 9 (Aug. 7, 2013). As a result, during the hearing in the proceeding below, the Commission bifurcated the proceedings into public and confidential portions, with public and confidential transcripts, in order to protect the REC Procurement Data. *See* Case No. 11-5201-EL-RDR, Entry at 1 (Mar. 19, 2013).

Subsequent to the hearing, confidential portions of these transcripts, along with any associated exhibits, were placed and kept under seal at the offices of the Commission. *See id.* The portions of the Supplement referenced above contain transcript pages from the confidential portion of the proceeding below and have remained at all times under seal at the Commission.

On January 23, 2014, the Commission transferred the record from the proceeding below, which included those portions of the Supplement, to the office of this Court's clerk. Consistent with the above, those portions of the record sealed in the proceeding below remain so in the instant matter.

On March 6, 2014, the Companies filed their First Merit Brief. On that same date, the Companies filed their motion to seal confidential portions of the Appendix and the Supplement to their First Merit Brief because those materials contained the REC Procurement Data and confidential portions of the transcript from the proceeding below. In an Entry dated September 3, 2014, this Court denied the Companies' motion as moot. *See* Case No. 2013-2026, Entry at 1 (Sept. 3, 2014). In that Entry, this Court stated: "The documents are currently being maintained under seal pursuant to Sup.R. 44(C)(1) and Sup.Ct.Prac.R. 3.02(B), and the court will properly decide whether the commission properly protected the documents as trade secrets after briefing and oral argument." *Id.*

On October 23, 2014, the Office of the Ohio Consumers' Counsel ("OCC") filed its Second Merit Brief. On that same day, the OCC filed a motion to file the unredacted versions of its Second Merit Brief, Appendix and Second Supplement under seal because those materials contained the REC Procurement Data. In an Entry issued on November 12, 2014, this Court denied that motion as moot for essentially the same reasons stated in its earlier Entry, dated September 3, 2014. *See* Case No. 2013-2026, Entry at 1 (Nov. 12, 2014). In its later Entry, this Court likewise stated: "Pursuant to S.Ct.Prac.R. 3.02(B), the 'confidential' version of the merit brief, appendix and supplement filed on October 23, 2014, is exempt from public disclosure and shall be maintained under seal pending resolution of this appeal." *Id.*

II. ARGUMENT

Pursuant Rule 3.02(B) of the Supreme Court Rules of Practice, a document filed with this Court shall be public unless sealed by this Court or subject to a pending motion to seal. *See* S.Ct.R.Prac.R. 3.02(B). This Court routinely grants motions to file under seal portions of appendices and supplements to merit briefs that reference portions of a sealed record. For example, in *Ohio Consumers' Counsel v. Pub. Util. Comm.*, 121 Ohio St. 3d 362, 904 N.E.2d 853 (2009), this Court granted a motion to seal briefs and supplements referencing "material that the Commission determined to be trade secrets in the decision under appeal." *Id.* at 370. *See also Cincinnati Bell Tel. Co. v. Pub. Util. Comm.*, 91 Ohio St. 3d 1410, 740 N.E.2d 1110 (2001) (granting motion to seal portion of supplement); *In re Application of Am. Transmission Sys., Inc.*, 122 Ohio St. 3d 1451, 908 N.E.2d 943 (2009) (granting motion to seal portion of supplement in an appeal from the Ohio Power Siting Board).

Likewise, the portions of the Supplement that the Companies seek to file under seal are transcript pages from the confidential portion of the proceeding below. At all times this material has been kept under seal at the Commission and, on January 23, 2014, was transferred under seal to this Court as part of the record from the proceeding below. The Companies only seek to file the confidential portions of the Supplement under seal and have not redacted those sections of their Third Merit Brief that cite to the confidential portions of the Supplement.

The Companies recognize that the previous motions to seal filed by both them and OCC regarding the REC Procurement Data have been denied as moot by this Court. These motions were so denied because "Pursuant to S.Ct.Prac.R. 3.02(B), [the confidential materials at issue are] exempt from public disclosure and shall be maintained under seal pending resolution of this appeal." Case No. 2013-2026, Entry at 1 (Nov. 12, 2014); Case No. 2013-2026, Entry at 1 (Sept.

3, 2014). Nevertheless, out of an abundance of caution, the Companies seek to file the confidential portions of the Supplement under seal and respectfully request that these materials remain under seal until this Court expressly rules on the trade secret issues in this matter.

IV. CONCLUSION

For the foregoing reasons, this Court should grant the Motion to Seal of the Companies until the trade secret status issues in this matter have been expressly decided by this Court.

Dated: December 4, 2014

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Motion to Seal of Appellants, Ohio Edison Company, The Cleveland Electric Illuminating Company and The Toledo Edison Company, was served by delivery service on the fourth day of December, 2014, upon the following:

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