

ORIGINAL

IN THE SUPREME COURT OF OHIO

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

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INTRODUCTION

This appeal by Cross-Appellant the Environmental Law & Policy Center (“ELPC”) concerns whether trade secret protection is warranted under Ohio Revised Code (“R.C.”) 1333.61(D) for information regarding purchases of renewable energy credits (“RECs”) that the Ohio Edison Company, the Cleveland Electric Illuminating Company, and the Toledo Edison Company (collectively, “FirstEnergy”) made nearly five years ago. Under R.C. 1333.61(D) and this Court’s precedent, FirstEnergy bears the heavy burden of providing record evidence that this information should be kept from the public – including the FirstEnergy ratepayers who funded these purchases – because it has “independent economic value.” ELPC’s Second Merit Brief explained that the Public Utilities Commission of Ohio (“PUCO” or “Commission”) acted unreasonably and unlawfully in granting trade secret protection for this information when FirstEnergy failed to carry that evidentiary burden. FirstEnergy presented the PUCO with nothing beyond conclusory assertions that the REC procurement information from 2009 and 2010 at issue in this case would have any relevance or value in today’s REC market, a market that the record undisputedly shows has changed drastically from that of five years ago. Since there was in fact no evidence in the record on that key issue, the Third Merit Briefs of the PUCO and FirstEnergy unsurprisingly suffer from the same flaw; they offer only blanket assertions regarding the continuing economic value of the REC purchase information sought by ELPC, unsupported by any facts. Because FirstEnergy never provided the requisite factual and legal basis for the PUCO’s decision on this issue, the Court must reverse and remand with orders to make this information publicly available.

ARGUMENT

I. The Navigant Letter and Bradley Affidavit Do Not Speak To the Current Economic Value of the REC Procurement Information.

In response to ELPC's argument regarding the lack of record evidence regarding the current economic value of the REC procurement information, both the PUCO and FirstEnergy rely entirely on two documents: an October 26, 2012 letter filed in the PUCO docket by Daniel Bradley of Navigant Consulting (FirstEnergy Supp. 673); and an additional affidavit by Bradley filed in support of FirstEnergy's February 7, 2013 motion to the PUCO for a protective order (FirstEnergy Supp. 669). *See* PUCO Third Merit Br. at 6-7; FirstEnergy Third Merit Br. at 40-41. There is no dispute as to what these documents say: that "the public disclosure of the information that [FirstEnergy] received from or relating to bidders and bids during the RFPs [requests for proposals] . . . may result in harm to Ohio's ratepayers by discouraging prospective bidders from participating in future competitive procurements," because the disclosure of bidders' bidding data "could reveal their bidding strategies and valuations, and discourage them from participating in future procurements." FirstEnergy Supp. 670, Bradley Aff. at 2; *see also* FirstEnergy Supp. at 673-674, Navigant Letter at 1-2 (same). ELPC noted that FirstEnergy had presented these statements by Navigant to the PUCO in its initial merit brief in this case. ELPC Merit Br. at 17. However, no matter how many times FirstEnergy and the PUCO reiterate these assertions, the fact remains that Bradley failed to explain how the release of bidding data from years ago in a vastly different REC market could reveal bidding strategies that would be relevant to, and have value in, the current REC market in Ohio.

The PUCO suggests that the REC procurement information, like "the formula for Coca-Cola," has not lost its value even though "market conditions may have changed somewhat since the auctions were conducted." PUCO Third Merit Br. at 7. In fact, that comparison only

highlights the lack of record evidence supporting the PUCO's decision here. It would likely be simple to demonstrate the continuing economic value of the formula for Coca-Cola with evidence showing the formula is still in use and that copying it would allow competitors to steal Coca-Cola's customers by duplicating its product. By contrast, FirstEnergy offered no such testimony as to *why* the outdated REC procurement information remains relevant to the strategies of bidders in today's market. If anything, releasing the REC procurement information at issue here would be more like revealing Coca-Cola's strategies for pricing its product in the 1880s, when the company first introduced its product into a completely different market than exists in the modern era. Presumably, no court would grant trade secret protection to such outdated information based on assertions about its value in revealing Coca-Cola's pricing strategies from the 1880s, without some demonstration of the current relevance of those strategies in today's market. It is even more essential for FirstEnergy to satisfy that burden to show trade secret protection is necessary to protect information with current economic value, where it seeks to conceal information from its own ratepayers about purchases it made with their money.

FirstEnergy also offers no adequate explanation of how the Navigant letter and Bradley Affidavit address the current economic value of the REC procurement information that ELPC seeks. FirstEnergy appears to summarize the Navigant Letter and Bradley Affidavit with its statement that "[t]he ability to tie prices to specific bidders provides an improper window into bidders' proprietary pricing methodologies. . . . To disclose these methodologies to competitors would thus place bidders at a competitive disadvantage." FirstEnergy Third Merit Br. at 42 (citing Supp. 674, Navigant Letter at 2). But there is a key premise implicit in FirstEnergy's conclusion: that "bidders' proprietary pricing methodologies" from 2009 and 2010 have not changed even though the Ohio REC market has changed significantly from its nascent,

constrained state of five years ago. *See* FirstEnergy Supp. 21, Bradley Test. at 34. There is nothing supporting that premise in the Navigant Letter or the Bradley Affidavit.

FirstEnergy even notes in its own brief that “[u]nder the Companies’ sealed-bid protocol, ‘bidders tend to provide competitive prices *reflective of market conditions.*’” FirstEnergy Third Merit Br. at 41 (quoting the Exeter Associates audit report commissioned by the PUCO, Supp. 109) (emphasis added). Given that those market conditions have now changed substantially, it is an open question as to whether the REC procurement information from 2009 and 2010 retains any economic value – and it was FirstEnergy’s burden to provide sufficient record evidence to answer that question. *State ex rel. Besser v. Ohio State Univ.*, 89 Ohio St.3d 396, 400, 732 N.E.2d 373 (2000). It did not.

FirstEnergy also places great emphasis on the idea that “[m]ost bidders consider their bid prices to be highly sensitive and competitive information” and expect that such information “will remain confidential.” FirstEnergy Third Merit Br. at 41, 42. This argument does not fill the gap in the record evidence regarding the economic value of the REC procurement information. Foremost, FirstEnergy’s claim regarding the expectations of bidders in its 2009 and 2010 RFPs is not consistent with the record. In this case, as noted in ELPC’s initial merit brief, the purchase and sale agreements for the REC procurements at issue in fact only provided for bidding information to remain confidential for a year, and no auction participant has intervened in this case to seek any additional protection beyond that time period. ELPC Merit Br. at 13-14. Even if FirstEnergy’s assertions were supported by evidence of actual attempts by bidders to maintain the secrecy of the REC procurement information, that alone is not sufficient to show the information has “independent economic value” as required by R.C. 1333.61(D). While *Plain Dealer* identified “the precautions taken by the holder of the trade secret to guard the secrecy of

the information” as one factor relevant to trade secret status, that very opinion also held with respect to particular documents at issue in the case that “[a]lthough the information in the documents at issue is not generally known outside the business, there is no discernible value attributable to Blue Cross in having this information as against competitors.” *State ex rel. Plain Dealer v. Ohio Department of Insurance*, 80 Ohio St.3d 513, 524, 526, 687 N.E.2d 661 (1997). In other words, merely because information has been maintained as secret does not mean the information warrants trade secret protection, absent actual record evidence of the economic value resulting from keeping that information out of the public sphere.

The facts have not changed since ELPC filed its initial merit brief; the record does not contain any evidence that the bidding information relating to the 2009 and 2010 REC procurements has “independent economic value” in today’s REC market and thus merits trade secret protection under R.C. 1333.61(D). It was FirstEnergy’s burden to provide such evidence, and it failed to do so. Because the PUCO did not require FirstEnergy to meet its evidentiary burden and relied solely on conclusory assertions about the economic value of the REC procurement information, its decision was unreasonable and unlawful.

II. Ohio Law and PUCO Precedent Does Require That a Determination of Trade Secret Protection Rest on a Showing That Information Has Current Economic Value.

FirstEnergy spends a significant amount of time in its Third Merit Brief attempting to show that, under Ohio precedent applying R.C. 1333.61(D), “age” of information is not “the sole determining factor” in deciding whether that information merits trade secret protection.

FirstEnergy Third Merit Br. at 44. ELPC has never asserted that it is. FirstEnergy has missed ELPC’s point in this case -- that R.C. 1333.61(D) requires that information have “independent economic value” before it can be withheld from the public as a trade secret, and age is one factor

that may deprive information of that economic value *as the conditions that made the information valuable when it was fresh change over time*. Here, ELPC and the Ohio Consumers' Counsel ("OCC") have consistently argued that the relevant circumstances have in fact changed with respect to the outdated REC procurement information, and it has remained FirstEnergy's burden to provide evidence to show that ELPC and OCC are wrong – that the REC procurement information is relevant to and valuable in the REC market despite the vast changes since 2009 and 2010. FirstEnergy has not done so.

Instead, FirstEnergy relies on inapposite PUCO decisions and misconstruction of Ohio court precedents to support the argument that it does not have to show the current economic value of the REC procurement information. For example, FirstEnergy cites PUCO decisions granting trade secret protection to REC data from 2011 – a year after the REC purchases under consideration here, when the REC market may have indeed been similar to the market that exists today. FirstEnergy itself has correctly explained that a trade secret determination depends on "fact specific consideration," FirstEnergy Third Merit Br. at 45, and in this case the facts show that the REC market has changed since 2009 and 2010 such that the PUCO acted unreasonably in assuming that bidding information from that time period has economic value today without any record evidence to that effect.

FirstEnergy also unsuccessfully attempts to distinguish the cases cited in ELPC's initial brief, each of which illustrates the PUCO's and this Court's duty to specifically consider the current-day value of the REC procurement information in determining whether it merits trade secret protection. According to FirstEnergy, these cases solely relate to situations where the information concerns a "single, ephemeral event" or has already become public. FirstEnergy Third Merit Br. at 47. However, that artificially narrow view fails to recognize the overarching

principle embodied by these cases: information cannot be awarded trade secret protection without, as this Court explained in *State ex rel. Besser v. Ohio State University*, a showing that the information “retains potential, independent economic value” in the present. 89 Ohio St.3d at 401, 732 N.E.2d 373 (emphasis added).

For example, FirstEnergy asserts that in *Jacono v. Invacare Corp.*, 8th Dist. Cuyahoga No. 86605, 2006-Ohio-1596, “most of the information at issue had been made public or was known to competitors via ‘reverse engineering.’” FirstEnergy Third Merit Br. at 46. In fact, that decision also held that the plaintiff’s knowledge of her former employer Invacare’s “pricing structure and manufacturing costs” was outdated and therefore lacked economic value given that Invacare’s pricing and costs “*changed significantly* after [she] left the company, due to outsourcing and new guidelines for reimbursement.” *Jacono* at ¶ 27 (emphasis added). FirstEnergy similarly omits pertinent facts from its description of the holding in *Brentlinger Enterprises v. Curran*, 141 Ohio App.3d 640, 752 N.E.2d 994 (10th Dist. 2001), asserting that *Brentlinger* related only to information that “was readily available to the public.” FirstEnergy Merit Br. at 46-47. While *Brentlinger* did uphold a trial court decision that such public information could not qualify as trade secrets, it also affirmed the trial court’s *separate* conclusion that even information that *would* count as “proprietary information or trade secrets” when fresh would “rapidly become stale with the passage of time.” *Brentlinger* at 648. These and the other cases cited in ELPC’s Merit Brief thus directly support the argument that the PUCO erred in its decision below when it failed to similarly consider the effects of changing circumstances over time on the value of the REC procurement information, and assumed that information continued to retain economic value despite evidence of material changes in the REC market since 2009 and 2010.

Finally, FirstEnergy attempts to direct the Court's attention away from its own relevant statements and the resulting PUCO conclusions in PUCO Case Nos. 04-1371-EL-ATA and 08-935-EL-SSO, rather than offering any explanation of why those cases do not provide helpful context to illustrate the PUCO's error here. FirstEnergy's principle argument, that information regarding those cases is outside the evidentiary record here, is inconsistent with the proceedings below. *See* FirstEnergy Third Merit Br. at 47. Several parties – including FirstEnergy – cited both of these cases, along with comments filed in their respective dockets, numerous times in support of their arguments before the PUCO. *E.g.*, Supp. 347, FirstEnergy Mot. for Protective Order at 3 (Oct. 3, 2012) (citing PUCO Case No. 04-1371-EL-ATA); Supp. 349-351, FirstEnergy Reply Br. in Support of Mot. for Protective Order at 9-11 (Oct. 25, 2012) (discussing PUCO Case No. 08-935-EL-SSO and comments filed in that docket by FirstEnergy and others); Supp. 353-355, FirstEnergy Memorandum Contra Applications for Rehearing at 58-60 & nn.285, 292 (Sept. 16, 2013) (citing both PUCO Case Nos. 04-1371-EL-ATA and 08-935-EL-SSO in support of its trade secret arguments); Supp. 357-359, OCC Application for Rehearing at 50 n.203, 54 n.223, 55 n.225 (Sept. 6, 2013) (citing PUCO Case No. 04-1371-EL-ATA). ELPC therefore cited these decisions – and the comments in the public docket by FirstEnergy and others that the PUCO was relying on in reaching its conclusions – not as a supplement to facts in the record, but merely to provide context for PUCO precedents that FirstEnergy and others have offered as providing instructive parallels to the circumstances of this case.¹ It is disingenuous for FirstEnergy to now disavow the relevance of these cases and its own statements in the relevant dockets after itself citing them below.

¹ If this Court does believe that such documents cannot be considered either as part of the record or as context for relevant PUCO decisions dealing with analogous circumstances, then the Court is still free to take judicial notice of documents that were filed in PUCO dockets and thus are part

More importantly, FirstEnergy does not offer any substantive rebuttal to ELPC's point that these cases demonstrate the unreasonableness of the PUCO's decision here. As discussed in our initial merit brief, Case No. 04-1371-EL-ATA shows that the PUCO has in similar circumstances held that outdated procurement information no longer merited trade secret protection where it pertained to a unique market situation that had changed over time. ELPC Merit Br. at 11-12. Case No. 08-935-EL-SSO meanwhile provides an example of the type of record evidence that a party must provide to show that market information continues to have economic value over time and therefore constitutes trade secrets. *Id.* at 17-20. FirstEnergy does assert that the circumstances in Case No. 04-1371-EL-ATA are irrelevant because that proceeding involved a "one-off" auction rather than "successive" RFPs as there are for RECs, FirstEnergy Third Merit Br. at 47 n.14, but that explanation suffers from the same failing as all of FirstEnergy's arguments – it does not provide any reason why the REC procurements of today should be considered successors to those of 2009 and 2010 given the substantial changes in the REC market over the last five years. Nor has FirstEnergy offered any counterargument to ELPC's point that the PUCO's reliance on FirstEnergy's conclusory assertions about the present-day value of the REC procurement information stands entirely contrary to the PUCO's established policy against granting indefinite protective orders given the likelihood that information may lose its value with "the passage of time and changing circumstances." *In the Matter of the Application of Volunteer Energy Services, Inc. for Renewal of its Certificate as a Competitive Retail Electric Service Provider in the State of Ohio*, Pub. Util. Comm. No. 03-1742-EL-AGG, 2007 Ohio PUC LEXIS 739 at 2-3 (Nov. 2, 2007) (cited in ELPC Merit Br. at 12-13). Despite recognizing that issue in other cases, the PUCO unreasonably and unlawfully

of the public record. *See State ex rel. Everhart v. McIntosh*, 115 Ohio St. 3d 195 2007-Ohio-4798, 874 N.E.2d 516, ¶ 10 (taking judicial notice of public records in court docket).

failed to consider whether FirstEnergy had adequately carried its burden to show the current value of the REC procurement information in this case.

CONCLUSION

FirstEnergy has failed to refute ELPC's straightforward arguments. Under R.C. 1333.61(D)(1), a party seeking trade secret protection for information must show that it has "economic value" in order for it to be withheld from public disclosure. The decisions of this Court and other Ohio courts establish that such a finding of "economic value" must include a consideration of whether information "retains" economic value despite the changing of relevant circumstances over time. *Besser*, 89 Ohio St.3d at 401, 732 N.E.2d 373. Furthermore, conclusory assertions are not sufficient to establish the current economic value of information. *Id.* at 400-401. The PUCO has likewise recognized that it must evaluate the present-day value of information based on record evidence to determine whether it warrants trade secret protection. *Infra* at 9-10. Contrary to those precedents, the PUCO relied on conclusory assertions by FirstEnergy about the value of the REC procurement information, which were unsupported by any discussion of why that information would be valuable in the current REC market despite substantial changes in that market since 2009 and 2010. That decision was both unreasonable and unlawful.

For the foregoing reasons, ELPC respectfully requests that this Court find that the PUCO's Order was unlawful and unreasonable as pertains to the secrecy of relevant REC pricing, sellers, and the recommended penalty amount, and remand with orders to make the documents public immediately.

Respectfully submitted,

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I hereby certify that a true copy of the foregoing *Merit Brief*, submitted on behalf of the Environmental Law & Policy Center, was served by electronic mail to all Parties of Record, on December 24, 2014.

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