IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

LINCOLN ELECTRIC CO., *et al.*	)	**CASE NO. CV 14 833403**
	)	
Plaintiffs,	)	**JUDGE JOHN P. O'DONNELL**
	)	
vs.	)	
	)	
FIRSTENERGY SOLUTIONS CORP.	)	**JOURNAL ENTRY DENYING**
	)	**THE DEFENDANT'S MOTION TO**
	)	**SEAL THE COMPLAINT BUT**
Defendant.	)	**SEALING THE EXHIBIT**

The 11 plaintiffs are businesses who buy their electricity from defendant FirstEnergy Solutions Corp. Each plaintiff entered into a form contract with FirstEnergy known as a customer supply agreement. The complaint, filed on September 26, 2014, seeks a declaratory judgment that expenses charged to FirstEnergy by its regional transmission organization because of extreme weather conditions in January 2014 cannot be passed through to the plaintiffs under the terms of the customer supply agreement. For their second cause of action, the plaintiffs allege that FirstEnergy breached their contracts by attempting to pass through the extra costs.

A specimen copy of the customer supply agreement is attached as an exhibit to the complaint. Paragraphs 18, 31 and 32 of agreement are quoted in the complaint. Paragraph 18 provides for the procedure in the event the customer disputes a charge. It is mentioned in the complaint only to demonstrate that the plaintiffs followed the contractual procedure for disputing a charge by objecting to the RTO surcharges as they were assessed. Paragraphs 31 and 32 are at the heart of the lawsuit. The gist of those provisions is that FirstEnergy is permitted to pass

through to the plaintiffs certain charges imposed on it by, among other entities, a regional transmission organization.

On January 12, 2015, FirstEnergy filed a motion to place the complaint and exhibit under seal. That motion is fully briefed and this entry follows.

FirstEnergy argues that the complaint and customer supply agreement should be placed under seal and unavailable to the public because they "contain confidential business information"[1] and the contract has a confidentiality provision. The plaintiffs counter that the contract permits disclosure in the event of a lawsuit and the reasons proffered by FirstEnergy do not justify sealing the complaint and its exhibit from public inspection.

Paragraph 33 of the customer supply agreement is captioned "confidentiality" and reads as follows:

> Except as provided for herein, neither party shall disclose the terms or conditions of this Agreement to any third party (other than the Party's employees, affiliates, lenders, counsel, accountants or advisors who have a need to know such information and have agreed to keep such terms confidential) except in order to comply with any applicable law, regulation, or any exchange, control area or Independent system operator rule or in connection with any court or regulatory proceeding. However, each Party shall, to the extent practicable, use reasonable efforts to prevent or limit the disclosure.

Trial courts are vested with discretion to allow civil pleadings, or portions of them, to be filed under seal where they contain information that is confidential. But court proceedings are presumed open and the power to seal records should be exercised only where other considerations outweigh that presumption. One of those considerations is the parties' agreement to keep information confidential. Here, the parties did agree not to disclose the contract's terms, yet they also agreed that disclosure is permissible "in connection with any court . . . proceeding." This lawsuit is such a proceeding.

[1] Defendant's motion to seal, page 1.

Another consideration when deciding whether presumptively public pleadings should be sealed is whether information labeled as confidential is, in fact, confidential and "competitively sensitive."[2] Here the portions of the contract necessary to set forth the basis of the lawsuit are paragraphs 18, 31 and 32. While conceding the lack of a thorough evidentiary record upon which I can base a fully informed decision on the question, the bare terms of these paragraphs give me little reason to believe they are competitively sensitive since one might safely assume that most suppliers try to pass through unanticipated costs to their customers and most suppliers' contracts provide a means for disputed charges to be negotiated while still collecting undisputed charges.

As for whether the contract is truly confidential, I note that the same issue raised by the complaint in this case is being litigated before the Public Utilities Commission of Ohio in *Ohio Schools Counsel, et al. v. FirstEnergy Solutions Corp*., PUCO Case No. 14-1182-EL-CSS. The complaint there – which included a representative copy of a supply agreement as Exhibit H – was filed under seal because, among other reasons, Exhibit H described prices paid for electricity by the complainant association's members.[3] I find no such price terms in the representative agreement attached as an exhibit to this complaint.[4] Moreover, a reading of the redacted complaint in *Ohio Schools Counsel* makes it clear that FirstEnergy's contract contains a pass-through provision that it used to justify charging customers for the RTO's increased charges to FirstEnergy in early 2014. In other words, while the exact terms of the contract are not part of the publicly available docket in *Ohio Schools Counsel*, a competitor can reasonably infer from

[2] Defendant's reply brief in support of the motion to seal, p. 6.
[3] See the complainant's July 3, 2014, motion for a protective order, pp. 3-4.
[4] The "Pricing Attachment" referred to in paragraph 1 of the customer supply agreement is not an exhibit to the *Ohio Schools Counsel* complaint.

the public docket there the basic outline of paragraphs 31 and 32 in the customer supply agreement.

In short, the parties to the customer supply agreement agreed that its terms could be disclosed in connection with a court proceeding, the terms disclosed here are not obviously competitively sensitive, and the essence of the pertinent provisions is already known to competitors and others through the public docket in *Ohio Schools Counsel*. For those reasons, the defendant has not overcome the presumption of openness and its motion to seal the complaint is denied.

Nevertheless, the excerpts of the contract in the body of the complaint are enough to satisfy the plaintiffs' obligations under Rules 8(A) and 10(D)(1) of the Ohio Rules of Civil Procedure to make a short and plain statement of the claim and provide the written instrument upon which the claim is founded. It is therefore not necessary to include as an exhibit the entire customer supply agreement. If there is a need later in the case to make the entire agreement part of the docket or the evidentiary record then a request to do so will be considered at that point. For now, it is sufficient to say that it is superfluous to attach the entire contract since its pertinent provisions have been reproduced in the complaint. For these reasons, the defendant's motion to seal the customer supply agreement attached as an exhibit to the complaint is granted.

IT IS SO ORDERED:

_____ June 8, 2015

Judge John P. O'Donnell Date

SERVICE

A copy of this journal entry was sent by email on June 8, 2015, to the following:

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Judge John P. O'Donnell