

BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of)
MXenergy Inc. for Certification as a) Case No. 02-1773-GA-CRS
Retail Natural Gas Supplier.)

ENTRY

The attorney examiner finds:

- (1) On July 12, 2010, MXenergy Inc. (MXenergy) filed an application for renewal of its certification as a retail natural gas supplier. Also on July 12, 2010, MXenergy filed a motion for protective order, requesting that exhibit C-5 of its renewal application be kept under seal. This exhibit contains MXenergy's forecasted financial statements for fiscal years 2011 and 2012. After being notified by the Commission's legal department that its motion for protective order was not filed by an attorney authorized to practice law in Ohio, as required by Rule 4901-1-08, Ohio Administrative Code (O.A.C.), MXenergy properly filed a second motion for protective order on October 22, 2010. No memorandum contra was filed regarding the motion for protective order.
- (2) In support of its motion for protective order, MXenergy explains that the Ohio retail natural gas market is extremely competitive, and disclosure of a retail supplier's financial forecasts would expose its financial status, customer acquisition costs, debt load and credit sources, doubtful accounts, and other financially sensitive data to its competitors. Finally, MXenergy asserts that nondisclosure of this information will not impair the purposes of Title 49 of the Revised Code, as the Commission will have full access to the information. Therefore, MXenergy requests that the information found in exhibit C-5 of its 2010 renewal application be kept confidential.
- (3) Section 4905.07, Revised Code, provides that all facts and information in the possession of the Commission shall be public, except as provided in Section 149.43, Revised Code, and as consistent with the purposes of Title 49 of the Revised Code. Section 149.43, Revised Code, specifies that the term "public records" excludes information which, under state or

federal law, may not be released. The Ohio Supreme Court has clarified that the "state or federal law" exemption is intended to cover trade secrets. *State ex rel. Besser v. Ohio State* (2000), 89 Ohio St.3d 396, 399.

- (4) Similarly, Rule 4901-1-24, O.A.C., allows an attorney examiner to issue an order to protect the confidentiality of information contained in a filed document, "to the extent that state or federal law prohibits release of the information, including where the information is deemed . . . to constitute a trade secret under Ohio law, and where non-disclosure of the information is not inconsistent with the purposes of Title 49 of the Revised Code."
- (5) Ohio law defines a trade secret as "information . . . 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." Section 1333.61(D), Revised Code.
- (6) The attorney examiner has reviewed the information included in MXenergy's motion for protective order, as well as the assertions set forth in the supportive memorandum. Applying the requirements that the information have independent economic value and be the subject of reasonable efforts to maintain its secrecy pursuant to Section 1333.61(D), Revised Code, as well as the six-factor test set forth by the Ohio Supreme Court,¹ the attorney examiner finds that the information contained in exhibit C-5 contains trade secret information. Its release is, therefore, prohibited under state law. The attorney examiner also finds that nondisclosure of this information is not inconsistent with the purposes of Title 49 of the Revised Code. Finally, the attorney examiner concludes that these documents could not be reasonably redacted to remove the confidential information contained therein. Therefore, the attorney examiner finds that MXenergy's motion for protective order is reasonable and should be granted.

¹ See *State ex-rel. the Plain Dealer v. Ohio Dept. of Ins.* (1997), 80 Ohio St.3d 513, 524-525.

- (7) Rule 4901-1-24(D)(4), O.A.C., provides for protective orders relating to gas marketer's renewal applications to expire after 24 months. The attorney examiner finds that the 24-month provision in Rule 4901-1-24(D)(4), O.A.C., is intended to synchronize the expiration of protective orders related to a gas marketer's certification application with the expiration of its certification and that the expiration dates should allow adequate time for consideration of any motion for extension. Therefore, confidential treatment shall be afforded to exhibit C-5 of MXenergy's 2010 renewal application for a period ending 24 months from the effective date of the certificate issued to MXenergy, or until August 15, 2012. Until that date, the docketing division should maintain, under seal, exhibit C-5 of MXenergy's 2010 renewal application, which was filed under seal in this docket on July 12, 2010.
- (8) Rule 4901-1-24(F), O.A.C., requires a party wishing to extend a protective order to file an appropriate motion at least 45 days in advance of the expiration date. If MXenergy wishes to extend this confidential treatment, it should file an appropriate motion at least 45 days in advance of the expiration date. If no such motion to extend confidential treatment is filed, the Commission may release this information without prior notice to MXenergy.
- (9) The attorney examiner notes that, by entries issued September 7, 2004, July 14, 2006, and August 27, 2008, confidential treatment was granted for exhibits B-3, C-3, C-4, and C-5 of MXenergy's 2004 and 2006 renewal applications and exhibit C-5 of MXenergy's 2008 renewal application, which were filed under seal in this docket on August 9, 2004, June 1, 2006, and July 15, 2008, respectively. The attorney examiner additionally notes that the protective orders covering these exhibits have expired. Since MXenergy has not moved to extend the confidential treatment afforded to these exhibits, the attorney examiner finds that, on December 17, 2010, the docketing division should release from protective treatment exhibits B-3, C-3, C-4, and C-5 of MXenergy's 2004 and 2006 renewal applications and exhibit C-5 of MXenergy's 2008 renewal application.

It is, therefore,

ORDERED, That the motion for protective order filed by MXenergy be granted in accordance with Finding (6). It is, further,

ORDERED, That the Commission's docketing division maintain, under seal, the unredacted exhibit C-5 of MXenergy's 2010 renewal application, which was filed under seal in this docket on July 12, 2010, for a period of 24 months, ending on August 15, 2012. It is, further,

ORDERED, That, on December 17, 2010, the docketing division should release from protective treatment exhibits B-3, C-3, C-4, and C-5 of MXenergy's 2004 and 2006 renewal applications and exhibit C-5 of MXenergy's 2008 renewal application, which were filed under seal in this docket on August 9, 2004, June 1, 2006, and July 15, 2008, respectively. It is, further,

ORDERED, That a copy of this entry be served upon all parties of record.

THE PUBLIC UTILITIES COMMISSION OF OHIO


By: Henry H. Phillips-Gary
Attorney Examiner

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Entered in the Journal

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Renee J. Jenkins
Secretary