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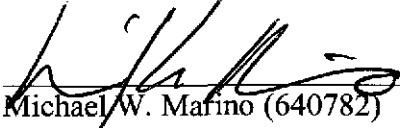
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In the Matter of the Application of)
Noble Americas Gas & Power, Corp.)
d/b/a Emerald Energy Retail for) Case No. 11-6013-GA-CRS
Certification as a Competitive Retail)
Natural Gas Supplier)

MOTION FOR PROTECTIVE ORDER

Noble Americas Gas & Power Corp. ("NAGP") by its attorneys and pursuant to Section 4901-1-24(D) of the Commission's rules (O.A.C. §4901-1-24(D)) moves for a Protective Order keeping confidential: Exhibit C-5 to its application for Certification as a Competitive Retail Natural Gas Supplier. The reasons underlying this Motion are set forth in the attached Memorandum in Support.

Respectfully submitted,


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MEMORANDUM IN SUPPORT OF MOTION FOR PROTECTIVE ORDER

NAGP requests that the information designated as confidential—Exhibit C-5 of its application for Certification to provide competitive retail natural gas services—be protected from public disclosure. The information for which protection is sought covers NAGP's confidential financial forecasts. Such information if released to the public would harm NAGP by providing its competitors proprietary information in what is designed by statute to now be a competitive service.

Rule 4901-1-24(D) of the Ohio Administrative Code provides that the Commission or certain designated employees may issue an order which is necessary to protect the confidentiality of information contained in documents filed with the Commission's Docketing Division to the extent that state or federal law prohibits the release of the information and where non-disclosure of the information is not inconsistent with the purposes of Title 49 of the Revised Code. State law recognizes the need to protect certain types of information which are the subject of this motion. The non-disclosure of the information will not impair the purposes of Title 49. The Commission and its Staff have full access to the information in order to fulfill its statutory obligations. No purpose of Title 49 would be served by the public disclosure of the information.

The need to protect the designated information from public disclosure is clear, and there is compelling legal authority supporting the requested protective order. While the Commission has often expressed its preference for open proceedings, the Commission also long ago recognized its statutory obligations with regard to trade secrets:

The Commission is of the opinion that the "public records" statute must also be read in pari materia with Section 1333.31, Revised Code ("trade secrets" statute). The latter statute must be interpreted as evincing the recognition, on the part of the General Assembly, of the value of trade secret information.

In re: General Telephone Co., Case No. 81-383-TP-AIT (Entry, February 17, 1982). Likewise, the Commission has facilitated the protection of trade secrets in its rules (O.A.C. §4901-1-24(A)(7)).

The definition of a "trade secret" is set forth in the Uniform Trade Secrets Act:

"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.

R.C. §1333.61(D). This definition clearly reflects the state policy favoring the protection of trade secrets such as the financial information which is the subject of this motion.

Courts of other jurisdictions have held that not only does a public utilities commission have the authority to protect the trade secrets of the companies subject to its jurisdiction; the trade secrets statute creates a duty to protect them. New York Tel. Co. v. Pub. Serv. Comm. N.Y., 56 N.Y. 2d 213 (1982). Indeed, for the Commission to do otherwise would be to negate the protections of the Ohio General Assembly has granted to all business, including public utilities, and now the new entrants who will be providing power through the Uniform Trade Secrets Act. This Commission has previously carried out its obligations in this regard in numerous proceedings. See, e.g., Elyria Tel. Co., Case No. 89-965-TP-AEC (Finding and Order, September 21, 1989); Ohio Bell Tel. Co., Case No. 89-718-TP-ATA (Finding and Order, May 31, 1989); Columbia Gas of Ohio, Inc., Case No. 90-17-GA-GCR (Entry, August 17, 1990).

In 1996, the Ohio General Assembly amended R.C. §§4901.12 and 4905.07 in order to facilitate the protection of trade secrets in the Commission's possession. The General Assembly carved out an exception to the general rule in favor of the public disclosure of information in the

Commission's possession. By referencing R.C. §149.43, the Commission-specific statutes now incorporate the provision of that statute that excepts from the definition of "public record" records the release of which is prohibited by state or federal law. R.C. §149.43(A)(1). In turn, state law prohibits the release of information meeting the definition of a trade secret. R.C. §§1333.61(D) and 1333.62. The amended statutes also reference the purposes of Title 49 of the Revised Code. The protection of trade secret information from public disclosure is consistent with the purposes of Title 49 because the Commission and its Staff have access to the information; in many cases, the parties to a case may have access under an appropriate protective agreement. The protection of trade secret information as requested herein will not impair the Commission's regulatory responsibilities.

In Pyromatics, Inc. v. Petruziello, 7 Ohio App. 3d 131, 134-135 (Cuyahoga County 1983), the Court of Appeals, citing Koch Engineering Co. v. Faulconer, 210 U.S.P.Q. 854, 861 (Kansas 1980), has delineated factors to be considered in recognizing a trade secret:

- (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.

Applying these factors to the financial forecasts NAGP seeks to protect as they contain confidential information, it is clear that a protective order should be granted.

The confidential information contained in NAGP's Exhibits C-5 financial forecasts is the type of sensitive information which is generally not disclosed. Its disclosure could give competitors an advantage that would hinder NAGP's ability to compete. On the other hand, public disclosure of this financial information is not likely to assist the Commission in carrying out its duties under Competitive Retail Natural Gas Supply rules.

THEREFORE, for the above reasons NAGP requests the Commission to grant its motion for a protective order and to maintain Exhibit C-5 to its Application for Certification as a Competitive Retail Natural Gas Supplier confidential and under seal.

LIST OF EXHIBITS
FOR WHICH PROTECTION IS SOUGHT

EXHIBITS

C-5 (Financial Forecasts)

REASONS JUSTIFYING PROTECTION

This exhibit contains financial information. Disclosure would give an undue advantage to competitors and would hinder CNEG's ability to compete.