

FILE

BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

IN THE MATTER OF THE
APPLICATION OF CLEARVIEW
ELECTRIC, INC. FOR CERTIFICATION
AS A COMPETITIVE RETAIL
ELECTRIC GENERATION PROVIDER

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CASE NO. ~~11-175~~-EL-CRS

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MOTION FOR PROTECTIVE ORDER

Pursuant to O.A.C. § 4901-1-24(D), Clearview Electric, Inc. moves for a protective order to prevent public disclosure of confidential and proprietary financial information, as well as trade secrets included in Exhibits B-3, C-3, C-4, C-5, and D-3 of Clearview Electric, Inc.'s Certification Application for Retail Generation Provider. The reasons underlying this motion are detailed in the attached Memorandum in Support. Pursuant to O.A.C. § 4901-1-24(D)(2), three (3) unredacted copies of Exhibits B-3, C-3, C-4, C-5 and D-3 are being submitted under seal.

Respectfully submitted,



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MEMORANDUM IN SUPPORT OF MOTION FOR PROTECTIVE ORDER

BACKGROUND

Clearview Electric, Inc. ("Clearview") has submitted a Certification Application for Retail Generation Providers ("Application"). As part of the Application, Clearview is required to provide information regarding its managerial capability and experience via Exhibits B-3 and D-3, as well as audited financial statements and other sensitive financial information via Exhibits C-3, C-4, and C-5. Clearview requests that the information contained in these Exhibits be protected from public disclosure.

THE NEED FOR A PROTECTIVE ORDER

The information for which protection is sought covers the identities of key technical personnel (B-3 and D-3), financial statements (C-3), financial arrangements (C-4), and financial forecasts (C-5). Due to the sensitive nature of this information, its release to the public would harm Clearview by providing Clearview's competitors with confidential information in what is designed by statute to be a competitive service. Therefore, the Exhibits should be used solely by the Public Utilities Commission of Ohio ("Commission") in exercising its governmental functions in considering Clearview's Application.

Pursuant to O.A.C. § 4901-1-24(D), the Commission or certain designated employees may issue an order which is necessary to protect the confidentiality of information contained in the 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 Ohio Revised Code.

Although R.C. § 4905.07 provides that all facts and information in the possession of the Commission shall be public except as provided in R.C. § 149.43, R.C. § 149.43 specifies that the

term "public records" excludes information which, under state or federal law, may not be released. The Supreme Court of Ohio and O.A.C. § 4901-1-24(D) make clear that the "state or federal law" exception includes trade secrets. *See State ex rel. Besser v. Ohio State Univ.* (2008), 89 Ohio St.3d 396, 399.

The non-disclosure of the subject information will not impair the purposes of Title 49 of the Ohio Revised Code. 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. Contrarily, public disclosure of the information would only prove detrimental to Clearview.

There is further compelling legal authority supporting Clearview's requested protective order. While the Commission has often expressed its preference for open proceedings, the Commission has also 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 material 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-AIR (Entry, February 17, 1982). Likewise, the Commission has further recognized the protection of trade secrets in its rules. *See* O.A.C. § 4901-1-24(A)(7).

The Uniform Trade Secrets Act prohibits the misappropriation of trade secrets without express or implied consent. R.C. 1333.61 *et seq.* Under the Act, a "trade secret" is defined as:

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 the following (emphasis added):

- (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)(emphasis added). This definition clearly reflects the state policy favoring the protection of trade secrets such as the names and financial information that are the subject of this motion.

The Supreme Court of Ohio has adopted a six-factor analysis for determining whether information is a "trade secret" under R.C. 1333.61(D):

- (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.

State ex rel. The Plain Dealer v. Ohio Dept. of Ins. (1997), 80 Ohio St.3d 513, 524-25 (quoting *Pyromatics, Inc. v. Petruziello*, 7 Ohio App.3d 131, 134-35, 454 N.E.2d 588 (8th Dist. 1983)).

Applying these factors to the information contained in the Exhibits that Clearview has designated as confidential, it is clear that a protective order should be granted. Exhibits B-3 and D-3 each contain the identities and former employers of current employees and managers of Customized Energy Solutions, LLC and Enhanced Energy Services of America, LLC, each of which Clearview contracts with for the provision of wholesale management services and experience. These Exhibits also contain the names and former employers of employees and managers of EC Inforsystems, an entity that Clearview contracts with to satisfy its electric system operations experience. These individuals are not employees of Clearview. Rather, they

are independent contractors that help compose Clearview's "team" that it uses to comprehensively deliver its services. Clearview derives its value, in part, by utilizing the services of these individuals, which are a component of Clearview's overall business plan. Business plans are protected under the Uniform Trade Secret Act, as are names of individuals that Clearview derives independent economic value from.

Further, the names and former employers of these individuals are not germane to the Commission's inquiry in this matter, nor will this information assist the Commission in deciding Clearview's Application. The names and former employers of these individuals are not publicly disclosed by Clearview, and the release of this information would otherwise allow competitors to gain competitively sensitive information and a competitive advantage over Clearview.

Exhibits C-3, C-4, and C-5 contain Clearview's confidential financial statements, financial arrangements, and financial forecasts respectively. Disclosure of this financial information could give competitors an advantage that would hinder Clearview's ability to compete in the market. Clearview, a Texas Corporation authorized to do business in Ohio, is a privately held company and is not required to file financial information with the United States Securities and Exchange Commission. Consequently, Clearview does not otherwise disclose its financial information to the public.

Further, public disclosure of Clearview's financial information is not likely to assist the Commission in carrying out its duties in considering Clearview's Application. Such information is often kept under seal in similarly filed applications, and Clearview respectfully requests that its information be kept under seal due to its competitively sensitive nature. This information is confidential, proprietary and can be considered a trade secret as well per the law cited above.

Accordingly, Clearview respectfully requests that the Commission grant its Motion for Protective Order allowing Exhibits B-3, C-3, C-4, C-5 and D-3 of the Applications to be treated as confidential, thereby protecting the information contained in those documents from public disclosure.

CONCLUSION

For the foregoing reasons, Clearview Electric, Inc. respectfully requests that its Motion for Protective Order be granted.

Respectfully submitted,



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