

FILE

RECEIVED-DOCKETING DIV

BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

2012 FEB 29 PM 3:27

In the Matter of the Application of NEP Energy)
Services, Ltd. for Certification as a Competitive)
Retail Electric Service Provider Broker/Aggregator)
In the State of Ohio.)

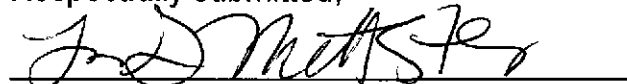
Case No. 12-818 ELA AG

MOTION FOR A PROTECTIVE ORDER

The applicant, NEP Energy Services, Ltd. ("NEP Energy Services"), pursuant to Rule 4901-1-24(D), Ohio Administrative Code ("OAC"), hereby moves the Public Utilities Commission of Ohio ("Commission") for a protective order to shield proprietary information from the public record and keep confidential the financial data and other proprietary information contained in Exhibits C-4 (financial arrangements), C-5 (forecasted financial statements) and C-7 (credit report) to NEP Energy Services' application for certification to operate as a competitive retail electric service provider broker/aggregator in the State of Ohio. The Memorandum in Support below presents the reasons to grant this motion.

Consistent with Rule 4901-1-24(D), OAC, NEP has filed under seal three unredacted copies of the confidential exhibits that are the subject of this motion.

Respectfully submitted,



Lisa G. McAlister
Bricker & Eckler LLP
100 South Third Street
Columbus, OH 43215
Telephone: (614) 227-4854
Facsimile: (614) 227-2390
E-Mail: lmcaster@bricker.com

ATTORNEYS FOR NEP ENERGY SERVICES, LTD.

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Application of NEP Energy)	
Services, Ltd. for Certification as a Competitive)	
Retail Electric Service Provider Broker/Aggregator)	Case No. 12- 818 -EL-AGG
In the State of Ohio.)	

MEMORANDUM IN SUPPORT

Rule 4901-1-24(D), OAC, provides that the Commission or certain designated Commission employees may issue an order "which is necessary to protect the confidentiality of information contained in the 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 nondisclosure of the information is not inconsistent with the purposes of Title 49 of the Revised Code." Moreover, Section 4928.06(F), Revised Code, specifically permits the Commission to grant confidentiality to competitive information. NEP Energy Services asserts that the information being submitted in Exhibits C-4, C-5 and C-7 constitutes confidential and proprietary business information, as well as a trade secret; and as such, state law prohibits the release of the information.

Sections 4901.12 and 4905.07, Revised Code, were amended in 1996 to facilitate the protection of trade secrets in Commission proceedings. By referencing Section 149.43, Revised Code, (Ohio's Public Records Law), the Commission-specific statutes incorporate the definition of "public records," as well as an exception to that definition that includes "[r]ecords the release of which is prohibited by state or federal law." Section 149.43(A)(1), Revised Code. In turn, state law prohibits the release of information meeting the definition of a trade secret. See, Sections 1333.61(D) and

1333.62, Revised Code. For this reason, records containing trade secrets are prohibited from public disclosure.

The definition of "trade secret" is set forth in Section 1333.61(D), Revised Code:

"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.

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. As the Ohio Supreme Court recently explained:

by adopting the Uniform Trade Secrets Act, with the express purpose to make uniform the law with respect to their subject among states, the General Assembly has determined that public policy in Ohio, as in the majority of other jurisdictions, favors the protection of trade secrets, whether memorized or reduced to some tangible form.

Al Minor & Associates, Inc. v. Martin, (2008) 117 Ohio St.3d 58.

Courts of other jurisdictions not only have held that a state public utilities commission has the authority to protect trade secrets, but that trade secret statutes create a duty to protect them. See, *New York Tel. Co. v. Pub. Serv. Comm. N.Y.*, 56 N.Y. 2d 213 (1982).

Furthermore, this Commission itself has recognized the need to protect trade secrets from public disclosure as consistent with its other statutory obligations:

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-AIR (Entry, February 17, 1982).

The Commission previously has carried out its obligation to protect the trade secret status of information from utilities and other regulated entities in numerous proceedings.

See, e.g., Cleveland Electric Illuminating Co., Case No. 07-171-EL-BTX (Entry dated August 14, 2008); *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).

Perhaps most importantly, the Commission regularly grants motions for protective orders to protect the confidential trade secret status of exhibits to competitive retail electric service provider broker/aggregator applications—see *e.g. Palmer Energy Corporation*, Case No. 10-1081-EL-AGG (Entry October 21, 2010) and *RD Energy, Inc.*, Case No. 10-72-EL-AGG (Entry March 26, 2010). *See also, Buckeye Energy Brokers, Inc.*, Case No. 02-1676-GA-AGG (Entry July 15, 2003, explaining that “income statement and balance sheet information can be considered a trade secret and afforded confidential treatment”). For the Commission to do otherwise would be to negate the protections the General Assembly has granted to all businesses, including public utilities, through the Uniform Trade Secrets Act.

Expounding upon the “trade secret” definition above, the Ohio Supreme Court has delineated factors to be considered in analyzing a trade secret claim:

(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, 524-525.

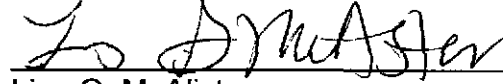
The Commission applies these factors in the context of competitive retail electric service provider broker/aggregator applications to conclude that certain financial exhibits constitute trade secrets. Here, NEP Energy Services requests that the information designated as confidential (Exhibits C-4, C-5 and C-7) in its certification application be protected from public disclosure. NEP Energy Services redacted the confidential information from Exhibits C-4, C-5 and C-7 to the certification application. In addition, the information for which NEP Energy Services seeks protection is entirely private and has never appeared in the public record.

NEP Energy Services is not a public company. NEP Energy Services asserts that the confidential information contained in Exhibits C-4, C-5 and C-7 is not generally known by the public, is held in confidence in the normal course of business and that any public dissemination of such information or any portion thereof would harm NEP Energy Services and give undue advantage to NEP Energy Services' aggregator/power broker competitors in Ohio. Additionally, the nondisclosure of the information will not impair the purpose of Title 49, as the Commission and its staff will have access to the requested information.

For the reasons stated above, the information in Exhibits C-4, C-5 and C-7 to the certification application falls directly within the definition of a "trade secret," and should

be protected from public disclosure. Thus, NEP Energy Services requests that the designated information in the exhibits to its certification application be protected from public disclosure.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Lisa G. McAlister", is written over a horizontal line.

Lisa G. McAlister
Bricker & Eckler LLP
100 South Third Street
Columbus, OH 43215
Telephone: (614) 227-4854
Facsimile: (614) 227-2390
E-Mail: lmcaster@bricker.com

ATTORNEYS FOR NEP ENERGY SERVICES, LTD.