

BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of)	
Constellation Energy Gas Choice, Inc.)	
for Certification as a Competitive Retail)	Case No. 02-1773-GA-CRS
Natural Gas Supplier.)	

ENTRY

The attorney examiner finds:

- (1) On June 5, 2012, MXEnergy, Inc. filed a Notification of Material Change in Business in accordance with Rule 4901:1-27-10, Ohio Administrative Code (O.A.C.), indicating that effective June 1, 2012, MXEnergy, Inc. would become Constellation Energy Gas Choice, Inc. (Constellation). Accordingly, the attorney examiner finds that, henceforth, the case caption of this case and all references to the applicant in this case shall refer to Constellation.
- (2) On July 13, 2012, Constellation filed a renewal application for certification as a competitive retail natural gas supplier. Also on July 13, 2012, Constellation filed a motion for a protective order, pursuant to Rule 4901-1-24(D), O.A.C., requesting that Exhibits C-4 and C-5 of its renewal certification application be kept under seal. Exhibit C-4 consists of Constellation's financial arrangements and Exhibit C-5 consists of Constellation's forecasted financial statements.
- (3) In support of its motion for a protective order, Constellation explains that each of the involved exhibits contain competitively sensitive and highly proprietary business financial information, which is not generally known or available to the general public. Therefore, Constellation requests that the information found in Exhibits C-4 and C-5 be treated as confidential.
- (4) 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*, 89 Ohio St.3d 396, 399, 732 N.E.2d 373 (2000).

- (5) 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.”
- (6) 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.
- (7) The attorney examiner has examined the information covered by the motion for protective order filed by Constellation, as well as the assertions set forth in the supporting 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 Exhibits C-4 and C-5 of Constellation’s renewal certification application constitutes trade secret information. Release of these documents is, therefore,

¹ See *State ex rel. The Plain Dealer v. Ohio Dept. of Ins.*, 80 Ohio St.3d 513, 524-525, 687 N.E.2d 661 (1997).

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 Constellation's motion for protective order is reasonable with regard to Exhibits C-4 and C-5 filed on July 13, 2012, as supplemented on August 3, 2012, and, therefore, the motion should be granted.

- (8) Rule 4901-1-24(D)(4), O.A.C., provides for protective orders relating to gas marketers' certification 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 gas marketers' certification applications with the expiration of their certification and that the expiration dates should allow adequate time for consideration of any motion for extension. Therefore, confidential treatment shall be afforded to Exhibits C-4 and C-5 for a period ending 24 months from the effective date of the certificate issued to Constellation, or until August 13, 2014. Until that date, the docketing division should maintain, under seal, Exhibits C-4 and C-5 which were filed under seal in this docket on July 13, 2012, as supplemented on August 3, 2012.
- (9) 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 Constellation 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 Constellation.
- (10) As a final matter, the attorney examiner notes that a previous confidential document filed by Constellation, which was designated as Exhibit C-5 of Constellation's 2010 renewal application, was granted protective treatment by the Commission and remains under seal. The filing date for this confidential document was July 12, 2010. By

attorney examiner entry issued on December 3, 2010, the unredacted Exhibit C-5 of Constellation's 2010 renewal application was to remain under seal until August 15, 2012. Constellation has not requested extension of the protective order granted by the entry. Therefore, the attorney examiner directs the Commission's docketing division to release Exhibit C-5 of Constellation's 2010 renewal application, filed in this docket on July 12, 2010, into the public record on November 5, 2012.

It is, therefore,

ORDERED, That the docketing division at the Commission change the case caption in this case to Constellation Energy Gas Choice, Inc., as the applicant. It is, further,

ORDERED, That the motion for protective order filed by Constellation be granted with regard to the information contained in Exhibits C-4 and C-5 of Constellation's renewal certification application. It is, further,

ORDERED, That the Commission's docketing division maintain, under seal, the un-redacted Exhibits C-4 and C-5, which were filed under seal in this docket on July 13, 2012, as supplemented on August 3, 2012, for a period of 24 months, ending on August 13, 2014. It is, further,

ORDERED, That the Commission's docketing division release into the public record, on November 5, 2012, Constellation's previous confidential document, designated as Exhibit C-5, that was filed under seal in this docket on July 12, 2010. It is, further,

ORDERED, That a copy of this entry be served upon each party of record.

THE PUBLIC UTILITIES COMMISSION OF OHIO

s/Bryce McKenney

By: Bryce McKenney
Attorney Examiner

SEF/sc

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in

Case No(s). 02-1773-GA-CRS

Summary: Attorney Examiner Entry ordering the Docketing Division of the Public Utilities Commission of Ohio to change the case caption to Constellation Energy Gas Choice, Inc. and granting Constellation's motion for protective order. - electronically filed by Sandra Coffey on behalf of Bryce McKenney, Attorney Examiner, Public Utilities Commission of Ohio