

BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Annual Alternative )  
Energy Portfolio Status Report of Direct ) Case No. 11-2481-EL-ACP  
Energy Services, LLC for 2010. )

ENTRY

The attorney examiner finds:

- (1) On April 15, 2011, Direct Energy Services, LLC (Direct Energy) filed its 2010 alternative energy portfolio status report pursuant to Section 4928.64, Revised Code, and Rule 4901:1-40-05(A), Ohio Administrative Code (O.A.C.), along with its ten-year compliance plan pursuant to Rule 4901:1-40-03(C), O.A.C. Direct Energy also filed, on April 15, 2011, a motion for protective treatment of certain portions of the status report and compliance plan pursuant to Rule 4901-1-24(D), O.A.C.
- (2) In support of its motion for protective order, Direct Energy asserts that the redacted portions of the status report and compliance plan contain data that, if made public, could harm Direct Energy's position in the competitive market for renewable energy credits (RECs). Specifically, Direct Energy has redacted, and seeks protection of, its actual retail sales for 2007, 2008, and 2009, as well as its 2010 renewable energy baseline and benchmark requirements. Direct Energy submits that this information is competitively sensitive and constitutes trade secret information. Direct Energy states that it does not disclose the redacted information publicly. Therefore, Direct Energy requests that the redacted information be treated as 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 that, 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).

- (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 redacted information covered by Direct Energy’s motion for protective order, as well as the assertions set forth in the memorandum in support. 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,<sup>1</sup> the attorney examiner finds that the redacted information contained in Direct Energy’s 2010 alternative energy portfolio status report and compliance plan does not constitute trade secret information. With respect to Direct Energy’s retail electric sales for 2007, 2008, and 2009, the attorney examiner finds that actual sales data is public information that is not maintained as confidential by Direct Energy and, therefore, is not a trade secret. Section 4928.06, Revised Code, requires each electric services company subject to certification under Section

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<sup>1</sup> 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).

4928.08, Revised Code, to file an annual report of sales and receipts for those services for which it is subject to certification. Annual reports received by the Commission are public records and are not accorded confidential treatment.<sup>2</sup> Additionally, Direct Energy's 2010 renewable energy baseline and benchmark requirements may be easily derived from Direct Energy's retail electric sales. The attorney examiner finds, therefore, that this information is also not a trade secret.

- (7) Although Direct Energy states that its motion for protective order includes confidential information pertaining to its ten-year forecast of RECs, supply portfolio projections, and methodology used to evaluate compliance, Direct Energy has not redacted or, in some cases, not provided, this information in its 2010 alternative energy portfolio status report and ten-year compliance plan. Therefore, the attorney examiner finds that Direct Energy has identified no information that requires protection from disclosure.
- (8) Accordingly, Direct Energy's motion for protective order should be denied. The Commission's docketing division should move Direct Energy's 2010 alternative energy portfolio status report and ten-year compliance plan, as filed under seal on April 15, 2011, to the public file, no sooner than 14 days after the date of this entry, or June 5, 2013.

It is, therefore,

ORDERED, That Direct Energy's motion for protective order, filed on April 15, 2011, be denied. It is, further,

ORDERED, That, no sooner than 14 days after the date of this entry, or June 5, 2013, the Commission's docketing division shall remove Direct Energy's 2010 alternative energy portfolio status report and ten-year compliance plan, as filed under seal on April 15, 2011, from the sealed record in this case and place it in the public file. It is, further,

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<sup>2</sup> *In the Matter of the Filing of Annual Reports for Calendar Year 2009 by Certified Competitive Retail Electric Service Providers, Natural Gas Suppliers, and Governmental Aggregators*, Case No. 10-03-GE-RPT (March 3, 2010).

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

THE PUBLIC UTILITIES COMMISSION OF OHIO

s/Sarah Parrot

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By: Sarah J. Parrot  
Attorney Examiner

JRJ/sc

**This foregoing document was electronically filed with the Public Utilities**

**Commission of Ohio Docketing Information System on**

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**in**

**Case No(s). 11-2481-EL-ACP**

Summary: Attorney Examiner Entry denies Direct Energy's motion filed on 04/15/2011 for a protective order. - electronically filed by Sandra Coffey on behalf of Sarah Parrot, Attorney Examiner, Public Utilities Commission of Ohio