

In the Matter of the Application of Foster Energy Services, LLC d/b/a My Choice Energy, LLC for Authority to Provide Aggregator/ Power Broker Services in the State of Ohio.)
)
) Case No. 13-1511-EL-AGG

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

| | | |
|---|---|-------------------------|
| In the Matter of the Application of Foster Energy |) | |
| Services, LLC d/b/a My Choice Energy, LLC for |) | |
| Authority to Provide Aggregator/ Power Broker |) | Case No. 13-1511-EL-AGG |
| Services in the State of Ohio. | | |

MEMORANDUM IN SUPPORT

OAC Rule 4901-1-24(D), 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. FES My Choice asserts that the information being submitted in Exhibits C-3and C-5 constitutes confidential and proprietary business information, as well as a trade secret; and as such, state law prohibits the release of the information.

Ohio Revised Code Sections (“R.C.”) 4901.12 and 4905.07, were amended in 1996 to facilitate the protection of trade secrets in Commission proceedings. By referencing R.C. 149.43, (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.” R.C. 149.43(A)(1). In turn, state law prohibits the release of information meeting the definition of a trade secret. *See* R.C. 1333.61(D)

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

The definition of “trade secret” is set forth in R.C. 1333.61(D):

“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 has previously 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).

Moreover, the Commission regularly grants motions for protective orders to protect the confidential trade secret status of exhibits to competitive retail 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 CRES broker/aggregator applications to conclude that certain financial exhibits constitute trade secrets. Here, FES My Choice requests that the information designated as confidential (Exhibits C-3 and C-5) in its application be protected from public disclosure. FES My Choice redacted the confidential information from Exhibits C-3 and C-5 to the certification application. In addition, the information for which FES My Choice seeks protection is entirely private and has never appeared in the public record.

FES My Choice is a publicly held corporation, and does not publicly release its financial information. FES My Choice asserts that the confidential information contained in Exhibits C-3 and C-5 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 FES My Choice and give undue advantage to FES My Choice's 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 herein, the information in Exhibits C-3 and C-5 to the certification application falls directly within the definition of a "trade secret," and should be protected from public disclosure.

Accordingly, FES My Choice respectfully requests that the Commission grant this Motion for Protective Order and protect the designated information in Exhibits C-3 and C-5 to its application from public disclosure.

Respectfully submitted on behalf of
Foster Energy Services, LLC d/b/a My Choice Energy, LLC



Thomas J. O'Brien
Bricker & Eckler LLP
100 South Third Street
Columbus, OH 43215
Telephone: (614) 227-2335
Facsimile: (614) 227-2390
E-Mail: tobrien@bricker.com

This foregoing document was electronically filed with the Public Utilities

Commission of Ohio Docketing Information System on

6/27/2013 3:21:09 PM

in

Case No(s). 13-1511-EL-AGG

Summary: Motion of Foster Energy Services, LLC d/b/a My Choice Energy, LLC for a Protective Order and Memorandum in Support electronically filed by Teresa Orahod on behalf of Thomas O'Brien