

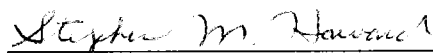
**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Application of)	
Capital Energy LLC for a)	Case No. 11-5899-EL-CRS
Certificate to Provide Competitive)	
Retail Electric Service in Ohio)	

MOTION FOR PROTECTIVE ORDER

Now comes Capital Energy LLC ("Capital"), seeking renewal of its certification to provide competitive retail electric service and pursuant to Rule 4901-1-24(D) of the Ohio Administrative Code ("O.A.C.") moves for a protective order to keep three financial exhibits (Exhibits C-3, C-4 and C-5) to its application for certification confidential and not part of the public record. The reasons underlying this motion are detailed in the attached Memorandum in Support. Consistent with the requirements of the above cited Rule, three (3) unredacted copies of the exhibits are submitted under seal.

Respectfully submitted,



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**MEMORANDUM IN SUPPORT OF
MOTION FOR PROTECTIVE ORDER**

Capital requests that the information it designated as confidential – Exhibits C-3, C-4 and C-5 – to its Renewal Application for Certification to provide competitive retail electric services be protected from public disclosure. The information for which protection is sought covers financial statements (C-3), financial arrangements (C-4) and financial forecasts (C-5). Such information if released to the public would harm Capital by providing its competitors proprietary information in what is designed by statute to now be a competitive service.

Rule 4901-1-24(D) of the Ohio Administrative Code provides that the Commission or certain designated employees may issue an order which is necessary to protect the confidentiality of information contained in 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 Revised Code. Although 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, Section 149.43, Revised Code specifies that the term "public records" excludes information which, under state or federal law, may not be released. The Supreme Court of Ohio has clarified that the "state or federal law" exemption is intended to include trade secrets. State ex rel Besser v. Ohio State (2000) 89 Ohio St. 3d 396, 399.

The non-disclosure of the subject information will not impair the purposes of Title 49. 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.

The need to protect the designated information from public disclosure is clear, and there is compelling legal authority supporting the requested protective order. While the Commission has often expressed its preference for open proceedings, the Commission also long ago 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 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.) Likewise, the Commission has facilitated the protection of trade secrets in its rules (O.A.C. § 4901-1-24(A)(7)).

The definition of a “trade secret” is set forth in the Uniform Trade Secrets Act:

“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.

R.C. § 1333.61(D). 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.

In State ex rel The Plain Dealer the Ohio Dept. of Ins. (1997), 80 Ohio St. 3d 513, the Ohio Supreme Court adopted a six factor test to analyze whether information is a trade secret under the statute:

(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.

Id. at 524-525 (quoting Pyromatics, Inc. v. Petruziello, 7 Ohio App. 3d 131, 134-135 (Cuyahoga County 1983)).

Applying these factors to the three financial exhibits Capital seeks to protect as they contain confidential information, it is clear that a protective order should be granted.

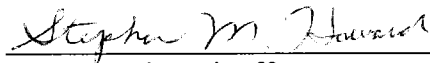
Exhibits C-3, C-4 and C-5 contain confidential financial statements, financial arrangements, financial forecasts and credit reports. Such sensitive financial information is generally not disclosed. Its disclosure could give competitors an advantage that would hinder Capital's ability to compete. In addition, public disclosure of this financial information is not likely to assist the Commission in carrying out its duties under CRES rules.

Courts of other jurisdictions have held that not only does a public utilities commission have the authority to protect the trade secrets of the companies subject to its jurisdiction, the trade secrets statute creates a duty to protect them. New York Tel. Co. v. Pub. Serv. Comm. N.Y., 56 N.Y. 2d 213 (1982). Indeed, for the Commission to do otherwise would be to negate the protections the Ohio General Assembly has granted to all businesses, including public utilities, and now the new entrants who will be providing power through the Uniform

Trade Secrets Act. This Commission has previously carried out its obligations in this regard in numerous proceedings. See, e.g., 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).

WHEREFORE, for the above reasons Capital requests the Commission grant its motion for a protective order and to maintain Exhibits C-3, C-4 and C-5 to its Renewal Application for Certification as a Competitive Retail Electric Service Provider under seal.

Respectfully submitted,



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LIST OF EXHIBITS
FOR WHICH PROTECTION IS SOUGHT

EXHIBITS

C-3 (Financial Statements)

C-4 (Financial Arrangements)

C-5 (Financial Forecasts)

REASONS JUSTIFYING PROTECTION

These exhibits contain financial information. Disclosure would give an undue advantage to competitors and would hinder Capital's ability to compete.

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12/4/2013 1:46:26 PM

in

Case No(s). 11-5899-EL-CRS

Summary: Motion Motion for Protective Order electronically filed by Mr. Stephen M Howard on behalf of Capital Energy LLC