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BEFORE  
THE PUBLIC UTILITIES COMMISSION OF OHIO


IN THE MATTER OF THE  
APPLICATION OF MCENERGY, INC.  
FOR CERTIFICATION AS A  
COMPETITIVE RETAIL ELECTRIC  
GENERATION BROKER

CASE NO. 12-0825-EL-AGG

**MOTION FOR PROTECTIVE ORDER**

Pursuant to O.A.C. § 4901-1-24(D), MCEnergy, Inc. moves for a protective order to prevent public disclosure of confidential and proprietary financial information included in Exhibits C-3 and C-5 of MCEnergy, Inc.'s Renewal Application for certification as a Competitive Retail Electric Service ("CRES") Provider (as a Power Broker). The reasons underlying this motion are detailed in the attached Memorandum in Support. Pursuant to O.A.C. § 4901-1-24(D)(2), three (3) unredacted copies of Exhibits C-3 and C-5 are being submitted under seal.

Respectfully submitted,

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

### **BACKGROUND**

On April 2, 2012, the Public Utilities Commission of Ohio ("Commission") issued Certificate No. 12-492E(1) (the "Certificate") to MCEnergy, Inc. ("MCEnergy") pursuant to MCEnergy's Certification Application for Retail Generation Providers to serve as a Power Broker ("Application"). The Certificate became effective April 1, 2012 and is set to expire on April 1, 2014.

MCEnergy has recently filed a Renewal Application for certification to continue as a CRES Provider in the State of Ohio ("Renewal Application"). Pursuant to the Renewal Application, MCEnergy is required to provide information regarding sensitive financial information, including audited financial statements and financial forecasts via Exhibits C-3 and C-5. MCEnergy requests that the information contained in these Exhibits be protected from public disclosure.

### **THE NEED FOR A PROTECTIVE ORDER**

The information for which protection is sought covers financial statements (C-3) and financial forecasts (C-5) of MCEnergy. Due to the sensitive nature of this information, its release to the public would harm MCEnergy by providing MCEnergy's competitors with confidential information in what is designed by statute to be a competitive service. Therefore, the Exhibits should be used solely and exclusively by the Commission in exercising its governmental functions in considering MCEnergy's Renewal Application.

Pursuant to O.A.C. § 4901-1-24(D), the Commission or certain designated employees may issue an order which is necessary to protect the confidentiality of information contained in the 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 Ohio Revised Code.

Although R.C. § 4905.07 provides that all facts and information in the possession of the Commission shall be public except as provided in R.C. § 149.43, the statute (R.C. § 149.43) specifies that the term "public records" excludes information which, under state or federal law, may not be released. The Supreme Court of Ohio and O.A.C. § 4901-1-24(D) make clear that the "state or federal law" exception includes trade secrets. *See State ex rel. Besser v. Ohio State Univ.* (2008), 89 Ohio St.3d 396, 399.

The non-disclosure of the subject information will not impair the purposes of Title 49 of the Ohio Revised Code. The Commission and its Staff have full access to the information in order to fulfill the required statutory obligations. No purpose of Title 49 is served by the public disclosure of the information. Public disclosure of the information will only prove detrimental to MCEnergy.

There is further compelling legal authority supporting MCEnergy's requested protective order. While the Commission has often expressed its preference for open proceedings, the Commission has also 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 material 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 further recognized the protection of trade secrets in its rules. *See* O.A.C. § 4901-1-24(A)(7).

The Uniform Trade Secrets Act prohibits the misappropriation of trade secrets without express or implied consent. R.C. 1333.61 *et seq.* Under the Act, a "trade secret" is defined as:

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 the following (emphasis added):

- (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)(emphasis added). This definition clearly reflects the state policy favoring the protection of trade secrets such as the names and financial information that are the subject of this motion.

The Supreme Court of Ohio has adopted a six-factor analysis for determining whether information is a "trade secret" under R.C. 1333.61(D):

- (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, 524-25 (quoting *Pyromatics, Inc. v. Petruziello*, 7 Ohio App.3d 131, 134-35, 454 N.E.2d 588 (8<sup>th</sup> Dist. 1983)).

Applying these factors to the information contained in the Exhibits that MCEnergy has designated as confidential, it is clear that a protective order should be granted. Exhibits C-3 and C-5 contain MCEnergy's confidential financial statements, financial arrangements, and financial forecasts respectively. Disclosure of this financial information could give competitors an advantage that would impair MCEnergy's ability to compete in the market. MCEnergy, a New

York Corporation authorized to do business in Ohio as a foreign corporation, is a privately held company and is not required to file financial information with the United States Securities and Exchange Commission. Consequently, MCEnergy does not otherwise disclose its financial information to the public.

Further, public disclosure of MCEnergy's financial information is not likely to assist the Commission in carrying out its duties in considering MCEnergy's Renewal Application. Such information is often kept under seal in similarly filed applications, and MCEnergy respectfully requests that its information be kept under seal due to its competitively sensitive nature. This information is confidential, proprietary and can be considered a trade secret per the law cited above.

Finally, it should be noted that the Commission granted a similar motion protecting substantially similar categories of MCEnergy's sensitive financial information on April 11, 2012 in connection with MCEnergy's original Application.

Accordingly, MCEnergy respectfully requests that the Commission grant its Motion for Protective Order allowing Exhibits C-3 and C-5 of the Renewal Application to be treated as confidential, thereby protecting the information contained in those documents from public disclosure.

### **CONCLUSION**

For the foregoing reasons, MCEnergy, Inc. respectfully requests that its Motion for Protective Order be granted.

*[Signatures appear on following page.]*

Respectfully submitted,



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