

**BEFORE  
THE PUBLIC UTILITIES COMMISSION OF OHIO**

**In the Matter of the Application to Modify, )  
in Accordance with Section 4929.08, )  
Revised Code, the Exemption Granted to ) Case No. 12-1842-GA-EXM  
The East Ohio Gas Company d/b/a )  
Dominion East Ohio in Case No. 07-1224- )  
GA-EXM.**

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**MOTION FOR PROTECTIVE ORDER  
OF THE OHIO GAS MARKETERS GROUP AND  
THE RETAIL ENERGY SUPPLY ASSOCIATION  
IN RESPONSE TO APRIL 1, 2015 ENTRY  
AND  
MOTION FOR AN ADDITIONAL FIVE BUSINESS DAYS TO REVIEW AND  
IDENTIFY ALL SUBMISSIONS TO STAFF WHICH FIT THE PROTECTIVE  
ORDER**

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The Ohio Gas Marketers Group and the Retail Energy Supply Association<sup>1</sup> (“Suppliers”) are trade associations who have been active parties in The East Ohio Gas Company d/b/a Dominion East Ohio exit-the-merchant-function proceedings, including the Phase II program, which is the subject matter of the above-styled docket. In accordance with the Attorney Examiner’s Entry of April 1, 2015, the Suppliers respectfully move that the Commission grant a protective order to prevent public distribution of the 2013 reports which Suppliers submitted as confidential to the Commission Staff, as well as the Dominion East Ohio (“DEO”) spreadsheets which show individual supplier or account sales volume and pricing information. As detailed in

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<sup>1</sup> The comments expressed in this filing represent the position of RESA as an organization but may not represent the views of any particular member of the Association. Founded in 1990, RESA is a broad and diverse group of more than twenty retail energy suppliers dedicated to promoting efficient, sustainable and customer-oriented competitive retail energy markets. RESA members operate throughout the United States delivering value-added electricity and natural gas service at retail to residential, commercial and industrial energy customers. More information on RESA can be found at [www.resausa.org](http://www.resausa.org).

the Memorandum in Support attached below, the supplier reports and the DEO spreadsheets contain proprietary information which under the Public Records Act<sup>2</sup> is afforded protection. Specifically, the reports submitted provide the following information by each participating supplier: 1) the number and salaries of its full- and part-time employees; 2) its individual sales and pricing data; 3) the dollar value of capital expenditures made in Ohio; 4) each supplier's Ohio Investments; 5) a description of the products each supplier is offering; 6) the individual product rate codes; and the 7) value-added services including promotions being offered.

Each of these seven items is protected from public dissemination by the Public Records Act trade secret provision. The Staff is collecting the confidential information on an individual company basis, and will aggregate it and make it public in the form of a Staff Report at some time in the future. The individual number of employees, sales and pricing data, dollar invested, descriptions of competitive products, capital expenditures, codes and value-added services is highly confidential and commercially sensitive information. If such individual supplier information were to be made public, it would put each participating supplier commercially at risk. The Commission asked for the Suppliers' cooperation in evaluating the DEO program and in its January 9, 2013 Opinion and Order and again in the March 6, 2013 Entry the Commission assured that confidential and proprietary information would be given the appropriate treatment.<sup>3</sup> Suppliers willingly participated and supplied some of their most sensitive commercial corporate information to assist the Commission Staff. The Suppliers trusted the Commission would protect their trade secrets. Unlike disclosures of utility information where the utility is often a monopoly and the Commission has been given general supervisory authority (see, Section 4905.04 -.06,

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<sup>2</sup> Section 149.43(A)(1), Revised Code.

<sup>3</sup> See the January 9, 2013 Opinion and Order at p. 17 and the March 6, 2013 Entry on Rehearing at Finding 24.

Revised Code), the Commission in the matter at bar is involved with policing a competitive market, in which it must protect commercially sensitive information or it will not receive non-jurisdictional proprietary information.

The April 1<sup>st</sup> Entry informing the suppliers that their confidential submissions to the Commission Staff in the DEO proceeding were being requested was not served directly on all participating suppliers. Instead, only the parties to the proceeding received an Entry late on April 1<sup>st</sup> providing one week to review the submissions, evaluate them and request a protective order. Excluding the three-day holiday weekend, that left only three business days for the trade association to inform its members of the Entry, have its members obtain the actual copies of the reports submitted to Staff, and to prepare redactions. DEO also submitted confidential information about suppliers which DEO gathered as the consolidated billing agent for the competitive retail natural gas service providers. No arrangements or time was provided for those spreadsheets of monthly data to be reviewed by the suppliers for confidential information. Since in accordance with the January 9, 2013 Opinion and Order Suppliers worked with DEO and Staff to stream line the pricing data in electronic fashion from DEO who was acting as the billing agent for Suppliers members,<sup>4</sup> Suppliers believe that the DEO spreadsheets also contain confidential information about the individual competitive retail natural gas service providers sales and prices. While Suppliers do not object to allowing public dissemination of the total sales and price figures in the aggregate (which is what is scheduled to happen when the Staff issues a report), providing to the public information on an account-by-account basis or providing individual price and volume sales information would allow for predatory pricing. The Commission has received a public information request, so if it denies the protective order not just

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<sup>4</sup> Competitive Retail Natural Gas Suppliers who were not using DEO as a billing agent agreed to provide the same pricing and volume data DEO was sending to the Staff

the competitor OPAE but all competitors will have the pricing, products, services, investments, codes, and employee salaries of those suppliers who cooperated with the Commission Staff.

WHEREFORE, the Ohio Gas Marketing Group and the Retail Energy Supply Association request a protective order be issued to protect (a) all the reports provided by all suppliers (members and nonmembers alike) and (b) the reports that DEO provided that contain the following protected information: (1) the number and salaries of its full- and part-time employees; (2) its individual sales and pricing data; (3) the dollar value of capital expenditures made in Ohio; (4) the supplier's Ohio Investments; (5) a description of the products the supplier is offering; (6) the individual product rate codes; and (7) value-added services including promotions being offered.

In addition, the Ohio Gas Marketers Group and the Retail Energy Supply Association request a five-day extension from the time of an entry ruling on this motion for all competitive retail natural gas service providers to obtain the copies of the information which was submitted to the Staff by the individual supplier or DEO so that they can prepare redacted versions of supplier and DEO reports and prevent the seven protected types of information from public disclosure. Issuing such a protective order will prevent harm to those suppliers who voluntarily agreed to provide the Staff with confidential information and who permitted DEO as the billing agent to provide the Staff with confidential information concerning the suppliers without revealing confidential information. When the redacted sheets are made public, the Ohio Partners for Affordable Energy ("OPAE") can challenge the redactions, so the requested protective order will not deny OPAE a procedure to obtain non-protected information.

Respectfully Submitted,



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M. Howard Petricoff

Stephen M. Howard

Gretchen L. Petrucci

Vorys, Sater, Seymour and Pease LLP

52 E. Gay Street

P.O. Box 1008

Columbus, OH 43216-1008

614-464-5414

[mhpetricoff@vorys.com](mailto:mhpetricoff@vorys.com)

[smhoward@vorys.com](mailto:smhoward@vorys.com)

[glpetrucci@vorys.com](mailto:glpetrucci@vorys.com)

Attorneys for the Ohio Gas Marketers Group and the Retail  
Energy Supply Association

**MEMORANDUM IN SUPPORT  
OF THE MOTION FOR PROTECTIVE ORDER  
AND  
THE MOTION FOR AN ADDITIONAL FIVE BUSINESS DAYS TO REVIEW AND  
IDENTIFY ALL SUBMISSIONS TO STAFF WHICH FIT THE PROTECTIVE  
ORDER**

**I. INTRODUCTION**

On April 8, 2005, The East Ohio Gas Company d/b/a Dominion East Ohio (“DEO”) filed an application requesting an exemption, pursuant to Section 4929.04, Revised Code, and seeking approval of phase one of its plan to exit the merchant function. *In Re The East Ohio Gas Co d/b/a Dominion East Ohio*, Case No. 05-474-GA-ATA (DEO Phase I case). In its May 26, 2006 Opinion and Order, the Commission approved DEO’s application, as modified by the stipulation filed in the DEO phase one case to undertake phase one of its proposal to test alternative, market-based pricing of commodity sales.

By Opinion and Order issued on June 18, 2008, the Commission authorized DEO to implement phase two of its plan to exit the merchant function in which DEO implemented a Standard Choice Offer, wherein suppliers bid for the right to supply gas in tranches to Choice-eligible customers at a retail level. *In Re The East Ohio Gas Co. d/b/a Dominion East Ohio*, Case No. 07-1224-GA-EXM (DEO Phase Two Case).

On June 15, 2012, in Case No. 12-1842-GA-EXM, a Joint Motion to Modify the Opinion and Order issued in the DEO Phase II case was filed by DEO and the Ohio Gas Marketers Group (“OGMG”) pursuant to Section 4929.08, Revised Code. A Stipulation and Recommendation (“Stipulation”) signed by DEO, the Ohio Consumers’ Counsel (“OCC”), and OGMG were also filed on June 15, 2012. Motions to intervene by the Ohio Partners for Affordable Energy

("OPAE"), OCC, and the Retail Energy Supply Association ("RESA") were granted by the Attorney Examiner.

On January 9, 2013, the Commission issued its Opinion and Order in this matter granting DEO's and the OGMG's motion to modify the Commission's 07-1224-GA-EXM Exemption Order in the DEO Phase II Case ("2012 Exemption Order"). In doing so, the Commission adopted without modification the Stipulation and Recommendation signed by DEO, OGMG and OCC. The Commission also directed DEO and the competitive retail natural gas service providers ("Suppliers") to collect information that the Staff determined was necessary and to provide such information periodically to the Staff. The Commission noted that the Staff would take appropriate action to protect information that is marked as confidential.

OPAE and DEO each filed applications for rehearing of the Commission's January 9, 2013 Opinion and Order. In its March 6, 2013 Entry on Rehearing, the Commission denied OPAE's application for rehearing. However, it granted DEO's application for rehearing which sought clarification of DEO's obligations under the Order with respect to the scope and content of information to be provided for the surveys and analysis recommended by various parties.

In Finding 24 of its March 6, 2013 Entry on Rehearing, the Commission stated:

As an initial matter we begin by clarifying that Staff, not DEO, is expected to conduct the studies and surveys of the effects of the elimination of SCO service for non-residential customers. DEO will bear the burden of providing much of the information necessary for Staff to perform its evaluation. However, the Commission agrees with DEO that our Order could be read to require DEO to provide information to which it does not have access. Therefore, the Commission wishes to clarify that both DEO and Suppliers will bear the responsibility of providing the necessary information to Staff so that a full study of DEO's non-residential exit can occur. Moreover, we do not expect DEO to provide information, unsolicited, on a continued basis. Instead, the Commission expects DEO to work with Staff and other stakeholders to determine what information needs to be provided

on a continued basis and to provide any requested information to Staff. All information provided to Staff will also be provided to OCC. The Commission finds that the cost of providing information to Staff, conducting surveys, and any associated costs may be properly funded through DEO's customer education fund. Further, the Commission expects to receive the same cooperation from Suppliers, as it does from DEO, but recognizes that some of the information provided may be confidential and proprietary and would be given appropriate treatment. Accordingly, DEO's application should be granted. (emphasis added)

On April 5, 2013, the OGMG and RESA filed an Application for Rehearing of the Commission's March 6, 2013 Entry on Rehearing. The OGMG and RESA asserted that the Commission erred in not finding that all information sought by the Staff must be afforded confidential treatment, noting that the disaggregated information from suppliers contained information that, given its proprietary nature, qualified as trade secrets. The parties asked the Commission to determine that all information provided to the Staff be afforded confidential treatment in perpetuity, similar to the treatment afforded the market monitoring information received by the Staff pursuant to Rule 4901:1-25-02(A)(5)(b) of the Ohio Administrative Code.

On May 1, 2013, the Commission issued an Entry on Rehearing denying the application for rehearing filed by the OGMG and RESA, but noted that in the event the Staff received a request for the information, the Attorney Examiner would issue an Entry establishing the appropriate process.

Subsequently, in compliance with the above-underscored language of the March 6<sup>th</sup> Entry, OGMG\RESA met with Staff to determine what information the Staff would need for its report. The outcome of those meetings was a reporting form on an excel spreadsheet that could be submitted by the individual competitive retail natural gas service provider to the Staff. The use of a uniform reporting sheet assisted Staff by presenting information from individual providers in a like fashion so it could easily be aggregated. The use of uniform reporting sheets



enhanced industry wide tabulation of information. In keeping with the Commission's January 9, 2013 Opinion and Order, which assured that the Staff would take appropriate measures to protect the confidentiality of the suppliers information,<sup>5</sup> all members of RESA and the OGMG marked their excel reporting sheets "confidential" and the Commission Staff protected those reporting sheets accordingly.

As required by the Rehearing Entry of March 6<sup>th</sup> 2013, OGMG\RESA met with DEO as well as Staff as to the information about Suppliers which DEO would supply on a regular basis to Staff.<sup>6</sup> DEO reported on an account basis using codes that were also used by competitive retail natural gas suppliers in their excel spreadsheets to the Staff. It is OGMG\RESA's understanding that the DEO reports were also to be afforded confidential treatment. Given the granular nature of the information provided electronically by DEO to Staff, that information also should be treated as a trade secret and kept confidential. On February 18, 2015, OPAE contacted the Commission and requested all of the data collected by the Staff in its study of the consequences of DEO's exit from the merchant function, pursuant to the Commission's directives in the March 6, 2013 and May 1, 2013 Entries on Rehearing. The data collected includes spreadsheets from DEO that show the individual suppliers' revenue month billing; residential, non-residential and total customer counts, Mcf volumes, commodity amounts, and the average rate billed and submitted rate information. The data collected from the individual suppliers included the supplier name, quarter ending date, rate code, product description, value-added services, the number of full-time and part time employees, the value of capital expenditures expressed in dollars and any other Ohio investment.

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<sup>5</sup> See the January 19, 2013 Opinion and Order at p. 17.

<sup>6</sup> See the underscored language of Finding 24 of the March 6, 2013 Entry.

On April 1, 2015, the Attorney Examiner issued an Entry in this matter setting forth a process to be followed by DEO and all the Competitive Retail Natural Gas Service Suppliers who wish to file a motion to protect certain information from disclosure. First, DEO or the Competitive Retail Natural Gas Service Suppliers who wishes to review the information they submitted per the Commission's directives in 2013 would be provided the opportunity to review the submitted materials by contacting the Attorney Examiner who would then provide an opportunity for DEO or such supplier to review its respective information.

## **II. CONFIDENTIAL INFORMATION**

The information that is the subject of this motion relates to the spreadsheets (whether written or in electronic format) from DEO that show the individual suppliers' revenue month billing; residential, non-residential and total customer counts, Mcf volumes, commodity amounts, and the average rate billed and submitted rate information. The subject information also includes the data collected from the individual suppliers including the supplier name, quarter ending date, rate code, product description, value-added services, the number of full-time and part-time employees, the value of capital expenditures expressed in dollars and any other Ohio investment. All of the information provided by the members of the OGMG and RESA to the Staff pursuant to the March 6 and May 1, 2013 Entries on Rehearing constitute trade secret information and should not be provided to OPAE as part of a public information request under any circumstances.

The Staff had requested dis-aggregated information from Suppliers that contains information very specific to each individual Supplier. This type of information is even more proprietary than the market-monitoring information that Suppliers currently submit to the Staff confidentially. The information requested from individual Suppliers, which includes such items

as individual corporate dollar investments, value-added services, and charitable contributions. Clearly, information of such a confidential and proprietary nature under Ohio's Public Records Act constitutes a trade secret. The supplier community represented by OGMG/RESA has supplied such confidential trade secret information to the Staff, but now seeks the proper protective treatment of this very sensitive information. To that end, just as the Commission has by rule determined that certain market-monitoring information must be treated confidentially, the Commission should determine that the information supplied by DEO and OGMG/RESA to the Staff must be treated confidentially.

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 1333.61, 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. Rule 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.

Section 1333.61(D), Revised Code. This definition clearly reflects the state policy favoring the protection of trade secrets such as the information which has been requested by OP&E.

In *State ex rel The Plain Dealer v. 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)). The determination of whether information constitutes a trade secret is a highly fact-specific inquiry. *DeBoer Structures Inc. v. Shafer Tent & Awning Co.*, 233 F. Supp. 2d 934, 948 (S.D. Ohio 2002).

In *State ex. rel. Seballos v. School Emp. Retirement Sys.* (1994), 70 Ohio St. 3d 667, a case not dissimilar to the situation before this Commission, the Ohio Supreme Court confirmed that trade secrets, which are prohibited from public disclosure, may be exempt from the definition of “public record” contained in Section 149.43(A)(1), Revised Code. In December, 1992, the School Employees Retirement System (“SERS”) issued a Request for Proposal for the School Employees Retirement System (“RFP”), which solicited proposals from qualified organizations that offered provider networks and could meet specified administrative, financial

and other requirements. The RFP had been prepared by Robert W. Kalman, a healthcare consultant hired by SERS to assist in developing and implementing a strategy for managing SERS' post-retirement medical benefit plan costs more effectively.

Three insurance companies (Aetna, Community Mutual and Blue Cross) submitted written proposals to SERS in response to the RFP. SERS, through Kalman, requested additional documentation and information concerning the business and financial structure and proposals of the three companies. The requested information was very detailed, highly confidential and considered by Kalman to constitute trade secrets. Kalman had expressly promised Blue Cross and implicitly assured Aetna and Community Mutual that all the information they were providing would remain confidential. After evaluating the submitted proposals and additional information, Kalman prepared a comprehensive report documenting key findings in the selection process and recommended a managed healthcare vendor. The SERS subsequently selected Aetna to administer SERS's health benefit plan. A few days later, Ms. Seballos, an employee of a law firm that represented Blue Cross in certain litigation, requested SERS to provide copies of all documents relating to SERS' selection of an organization to offer a managed care network pursuant to its Managed Medical Care Request for Proposal. The SERS had advised Ms. Seballos that it had received her written request for records and that the request was being reviewed by legal counsel. Ms. Seballos subsequently filed a complaint in the Franklin County Court of Appeals requesting a writ of mandamus to compel SERS to furnish access to and the right to inspect and copy the records she requested. The Court of Appeals subsequently granted a writ of mandamus directing SERS to provide access to the requested documents.

The Ohio Supreme Court reversed, finding that trade secrets, which are prohibited from public disclosure, may be exempt from the definition of "public record" contained in

Section 149.43(A)(1), Revised Code. The Ohio Supreme Court found that Court of Appeals erred in misinterpreting the case of *State ex. rel. Alright Parking of Cleveland, Inc. v. Cleveland* (1992), 63 Ohio St. 3d 772, 591 N.E. 2d 708. The Court in the *Seballos* case stated “Neither R.C. 3309.69 nor any other statutory provision makes these records, which might otherwise constitute trade secrets pursuant to R.C. 1333.51, subject to public disclosure.” The Court went on to state that, when a governmental body asserts that public records are excepted from disclosure and this assertion is challenged, the court in which the action is brought must conduct an *in camera* inspection of the documents. We ask the Commission or its Attorney Examiner to make an *in camera* inspection of the subject documents and to find that all documents that are the subject of this motion constitute confidential trade secret information which must be exempted from the definition of public records.

In *Thermodyn Corp. v. 3M Co.* (N.D. Ohio 12-17-2008), 593 F. Supp. 2d 972, the United States District Court for the Northern District of Ohio, Western Division, found that under Ohio law, customer lists and pricing information can constitute trade secrets. The information submitted by the individual OGMG and RESA members to the Staff includes customer counts, volumes and rate information.

After applying Ohio law to the information sought to be protected, it is clear that a protective order should be granted. The information that has been provided to Staff is not known outside of the OGMG/RESA members’ individual businesses and is not widely known within these businesses. Further, OGMG/RESA members closely guard the secrecy of this information, as demonstrated by the fact that this information is not known by the public. Specific OGMG/RESA member data is of enormous value to the individual members inasmuch as the data shows the state-specific investment as well as which products and services are the most

successful or not, which guides individual member companies decisions about how, when, where, and why to invest in particular markets. Additionally, individual members expended considerable effort and money to develop the products and services to which this data relates. Finally, the amount of time and expense it would take for others to acquire and duplicate the information of a specific OGMG/RESA member is probably unquantifiable inasmuch as it is virtually impossible to replicate due to these secrets being so closely guarded by the individual OGMG/RESA member companies.

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. 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).

OGMG and RESA respectfully request that the Commission find that all of the above-listed information provided to the Staff constitutes a trade secret and that the Commission issue an Entry granting a protective order protecting the submission of all such information which was marked confidential from being considered as a public record in both the suppliers' reports and in the DEO spreadsheets. Given the small amount of time that was allotted for suppliers to present redactions (only three business days for the trade association to inform its members of the Entry, have its members obtain the actual copies of the reports submitted to Staff, and to

prepare redactions), OGMG and RESA also request that they be granted five days from a ruling on this request for their members to review, redact and submit redacted reports to the Staff and Attorney Examiner, as well as ensure that redactions to DEO's spreadsheets are appropriately accomplished.

WHEREFORE, OGMG and RESA respectfully request that the Commission grant a protective order finding that all the subject information provided by DEO and the Suppliers in response to the Staff's request be considered trade secret information and be given confidential treatment and not be provided to OPAE as part of its public information request. Specifically, the protective order should protect in (a) all the reports provided by all suppliers (members and nonmembers alike) and (b) the reports that DEO provided the following protected information: (1) the number and salaries of its full- and part-time employees; (2) its individual sales and pricing data; (3) the dollar value of capital expenditures made in Ohio; (4) the supplier's Ohio Investments; (5) a description of the products the supplier is offering; (6) the individual product rate codes; and (7) value-added services including promotions being offered. In addition, the OGMG and RESA request a five-day extension from the time of an entry ruling on this motion for all competitive retail natural gas service providers to obtain the copies of the information which was submitted to the Staff by the individual supplier or DEO so that they can prepare redacted versions of supplier and DEO reports and prevent the seven protected types of information from public disclosure.



Respectfully Submitted,



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M. Howard Petricoff  
Stephen M. Howard  
Gretchen L. Petrucci  
Vorys, Sater, Seymour and Pease LLP  
52 E. Gay Street  
P.O. Box 1008  
Columbus, OH 43216-1008  
614-464-5414  
[mhpetricoff@vorys.com](mailto:mhpetricoff@vorys.com)  
[smhoward@vorys.com](mailto:smhoward@vorys.com)  
[glpetrucci@vorys.com](mailto:glpetrucci@vorys.com)

Attorney for the Ohio Gas Marketers Group and the Retail  
Energy Supply Association

## CERTIFICATE OF SERVICE

I certify that a copy of the foregoing document was served by electronic mail on the following persons this 8<sup>th</sup> day of April, 2015:

  
\_\_\_\_\_  
Gretchen L. Petrucci

serio@occ.state.oh.us  
sauer@occ.state.oh.us  
BarthRoyer@aol.com  
cmooney2@columbus.rr.com  
sam@mwncmh.com  
joliker@mwncmh.com  
fdarr@mwncmh.com  
cgoodman@energymarketers.com  
tobrien@bricker.com  
whitt@whitt-sturtevant.com  
joseph.clark@directenergy.com  
Campbell@whitt-sturtevant.com  
drinebolt@aol.com  
thomas.lindgren@puc.state.oh.us

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**Case No(s). 12-1842-GA-EXM**

Summary: Motion for Protective Order and Motion for an Additional Five Business Days to Review and Identify All Submissions to Staff which Fit the Protective Order electronically filed by Mrs. Gretchen L. Petrucci on behalf of Ohio Gas Marketers Group and Retail Energy Supply Association