

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

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

**JOINT INTERLOCUTORY APPEAL
AND
JOINT MOTION FOR A STAY
OF THE RETAIL ENERGY SUPPLY ASSOCIATION
AND
THE OHIO GAS MARKETERS GROUP**

November 9, 2015

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Pursuant to Rule 4901-1-15(A)(1), Ohio Administrative Code, now come the intervenors Retail Energy Supply Association (“RESA”) and Ohio Gas Marketers Group (“OGMG”)¹, who take an immediate interlocutory appeal to the Public Utilities Commission of Ohio (“Commission”) of the procedural ruling issued in this case on November 2, 2015, by the Attorney Examiner. The November 2nd Entry denied in part the motions for protective orders requested by the Competitive Retail Natural Gas Service (“CRNGS”) suppliers addressing market-sensitive information the participating CRNGS providers supplied to the Staff for use by Staff in preparing a report on The East Ohio Gas Company d/b/a Dominion East Ohio (“DEO”) commercial default supply program. No memoranda contras were filed in response to the protective orders sought by the participating CRNGS providers. The November 2nd Entry, however, requires the participating CRNGS providers to submit revised data sheets which will reveal certain information that the CRNGS providers previously redacted because it is confidential. As parties who are adversely affected by the ruling on the motions for protective

¹ Intervenors Direct Energy, Just Energy, Constellation and IGS are members of RESA and OGMG.

orders and the ordered submissions, RESA and OGMG and their members file this immediate interlocutory appeal as of right, asking the Commission to revise the November 2nd Entry so that the following information will be given confidential treatment:

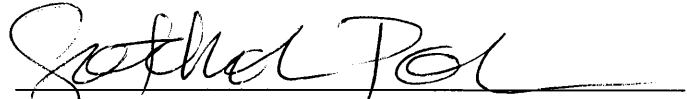
- Number and salaries of full-time and part-time employees
- Supplier descriptions of their products offered
- Value-added services, including promotions being offered

This information was compiled and submitted on an individual CRNGS provider basis by those CRNGS providers competing in the natural gas choice market in the service territory of DEO. This trade secret information has such great financial value and competitive value to the individual CRNGS provider that warrants maintaining its secrecy.

As explained more fully in the attached memorandum in support of the interlocutory appeal and the motion for a stay, the Attorney Examiner's November 2nd ruling unreasonably concluded that, for every CRNGS provider who submitted information to the Commission Staff, the numbers and salaries of the employees, product descriptions, and value-added services (including promotions) of these privately held companies shall not be given confidential treatment.²

² For the products descriptions and value-added services, the Attorney Examiner specifically ruled that, protective treatment would be granted "to the extent this information is not available online or otherwise publicly available." As a result, the CRNGS providers have the "burden of proving that the information is not publicly available by providing sufficient support justifying protection." Entry at 10.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "M. Howard Petricoff", is written over a horizontal line.

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**MEMORANDUM IN SUPPORT OF
THE JOINT INTERLOCUTORY APPEAL
AND
THE JOINT MOTION FOR A STAY
OF THE RETAIL ENERGY SUPPLY ASSOCIATION AND
THE OHIO GAS MARKETERS GROUP**

Rule 4901-1-15(A), Ohio Administrative Code, allows an adversely affected party to take an immediate interlocutory appeal to the Commission when a procedural ruling does any of the following:

- Grants a motion to compel discovery or denies a motion for protective order.
- Denies a motion to intervene, terminates a party's right to participate in a proceeding, or requires intervenors to consolidate their examination of witnesses or presentation of testimony.
- Refuses to quash a subpoena.
- Requires the production of documents or testimony over an objection based on privilege.

The November 2nd Attorney Examiner's Entry denies, in part, motions for protective order filed by RESA, OGMG and their members (collectively, "Suppliers"). As a result, RESA and OGMG have the right to seek an immediate interlocutory appeal and have timely filed this request with the Commission.

I. Background

In June 2012, DEO and OGMG jointly requested (a) a modification of the exemption previously granted to DEO and (b) approval of the accompanying stipulation. The modification would allow DEO to discontinue its Standard Choice Offer to non-residential customers and, instead, assign the non-residential customers to a CRNGS provider through a rotating assignment process. In January 2013, the Commission accepted the motion to modify the exemption. Additionally, the Commission decided to study the consequences of these changes ("exit-the-merchant-function study") and ordered DEO and CRNGS providers to provide information to the

Commission Staff.³ On rehearing, the Commission expressly acknowledged that some of the information to be provided could be confidential and proprietary and directed its Staff to treat the information as confidential.⁴ The Ohio Supreme Court affirmed the Commission's decision on September 8, 2015.⁵

In February 2015, the Ohio Partners for Affordable Energy ("OPAE") submitted a public records request asking for all data collected by the Staff for the exit-the-merchant-function study. In response, Suppliers filed, among other things, motions for protective orders with regard to the CRNGS provider-specific data submitted to the Staff. DEO also filed a motion for protective order with regard to the information it provided to the Staff in an aggregated format. On November 2, 2015, the Attorney Examiner granted in part and denied in part the motions for protective orders, and required submission of redacted reports and other data.

II. The Law

First and foremost, there is a direct statutory obligation for the Commission to treat CRNGS providers' competitive information confidentially. The Commission is required to take all measures considered necessary to protect the confidentiality of CRNGS providers' information. Specifically, Section 4929.23(A), Ohio Revised Code, states:

A retail natural gas supplier or governmental aggregator subject to certification under section 4929.20 of the Revised Code shall provide the public utilities commission with such information, regarding a competitive retail natural gas service for which it is subject to certification, as the commission considers necessary to carry out sections 4929.20 to 4929.24 of the Revised Code. The commission shall take such measures as it considers necessary to protect the confidentiality of any such information. (Emphasis added.)

³ Opinion and Order at 17.

⁴ Entry on Rehearing (March 6, 2013) at 12-13; Entry on Rehearing (May 1, 2013) at 4.

⁵ *In re Application to Modify, in accordance with R.C. 4929.08, the Exemption Granted to E. Ohio Gas Co.*, Slip Opinion No. 2015-Ohio-3627, September 8, 2015.

In addition, trade secrets are exempt from and are prohibited from disclosure under the Public Records Act. *See*, Sections 149.43(A)(1)(v), Revised Code. The Commission has regularly 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.) Moreover, 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 Section 1333.61(D), Revised Code, as follows:

“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 competitive CRNGS provider 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).

Moreover, the Ohio Supreme Court has ruled that trade secret information received by a public agency may be exempt from the definition of “public record” contained in Section 149.143(A)(1), Revised Code. *State ex. rel. Seballos v. School Emp. Retirement Sys.* (1994), 70 Ohio St. 3d 667.

Regarding the Suppliers’ request for a stay, the Commission has adopted a four-factor test to determine whether a stay should be granted in a Commission proceeding:⁶

- Whether there has been a strong showing that the party seeking the stay is likely to prevail on the merits;
- Whether the party seeking the stay has shown that it would suffer irreparable harm absent the stay;
- Whether the stay would cause substantial harm to other parties; and
- Where lies the public interest.

⁶ See, *In re Investigation into Modification of Intrastate Access Charges*, Case No. 00-127-TP-COI, Entry on Rehearing at 5 (February 20, 2003); *In re Columbus Southern Power Company and Ohio Power Company*, Case No. 08-917-EL-SSO, Entry at 3 (March 30, 2009).

III. Arguments Supporting Interlocutory Appeal

Since CRNGS providers are not public utilities and the pricing and marketing of their natural gas commodity is a competitive activity in Ohio, the Staff would not have access to the detailed information, save for the Commission's order in this proceeding. Suppliers provided their confidential information with the understanding that the Commission Staff would not make public their individual information. The information covered by the November 2nd Entry is in fact the individual CRNGS providers' information dis-aggregated, and the ruling would reveal each individual CRNGS provider's number of employees, salaries, products and services/offers to the public. Such information is proprietary and competitively sensitive.

A. Number and Salaries of Employees

The specific number of a specific CRNGS provider's employees in Ohio and the salaries of those employees, is information that is held private by these private companies. It demonstrates the size and scale of the CRNGS provider's operations in Ohio, which should be a trade secret. Depending on how the individual CRNGS provider submitted its information to the Staff, it may also show individual employees' compensation. Absent this Entry, the number of full- and part-time employees and their compensation is not generally known now, nor readily ascertainable by others who would obtain economic value from it. It has independent economic value from not being generally known. This information should not be made public. Note, that when the Staff Report is made available, the total, overall number of part-time and full-time employees working for CRNGS providers in the DEO service area and the total, overall compensation will be made available. Since the aggregate information is going to be made public, the invasion of privacy and potential business harm created by making public the individual CRNGS provider-specific numbers cannot be justified.

B. Product Descriptions

The specific Suppliers' product descriptions are of enormous value to the individual members and the compilation of the product descriptions will disclose the individual CRNGS provider's entire line of products in Ohio. This information shows which state-specific products are most successful and which are not, and whether products were widespread or offered on a limited basis. Unlike the aggregated information, which will list the type, number and use of various products made available and which is helpful to judge the contribution of CRNGS providers under the new plan, disclosing on a company basis the products reveals the business model of each individual CRNGS provider. That type of disclosure harms market participants and makes Ohio a less attractive place to try new products. CRNGS providers expend considerable effort and money to develop their products and services which are intended to result in market advantage – it is the lifeblood of their businesses. A compilation of the product descriptions unequivocally demonstrates the CRNGS provider's market strategy, which is plainly a trade secret in this competitive market and which undoubtedly would have economic value to competitors in the market.

Additionally, this product information has independent economic value from not being generally known and readily ascertainable in a compiled format. The amount of time and expense it would take for others to acquire and duplicate the full product line information of a specific Supplier member is probably unquantifiable inasmuch as it is virtually impossible to replicate due to these secrets being so closely guarded by the individual Supplier. As such, it was error for the Attorney Examiner to conclude that the information would only be granted protective treatment “to the extent this information is not available online or otherwise publicly

available.”⁷ In addition, the fact that some products may be listed on the Commission’s Apples to Apples chart or may be the subject of mass mailings is not tantamount to a prior disclosure of an otherwise confidential spreadsheet which lists all products some that have been publicly revealed and some that have not been made public. The comprehensive nature of the spreadsheets provides a description from which the Supplier’s business plan for the year is revealed. By analogy, the fact that one discloses a few addresses would not amount to making public a map which shows those addresses as well as others. Redacting the non-public offers on the spreadsheets but leaving the public ones conveys the relationships between the public and non-public offers. The spreadsheet itself (because it is a compendium of all offers) still reveals business and marketing plans when the private offers are redacted and thus even the redacted spreadsheets broadcasts trade secrets.

C. Value-Added Services, including Promotions being Offered

Like the product descriptions, the value-added services including promotional offers (“services/offers”) are of enormous value to the individual CRNGS providers. The compilation of those services/offers will also disclose the specific CRNGS provider’s marketing strategy in Ohio. This information shows which value-added services are most successful and which are not, and whether they were widespread or offered on a limited basis. It will disclose the full array of promotions as well. This compiled information further discloses the provider’s decisions about how, when, where, and why to support and promote various products in particular markets. As a result, a compilation of the value-added services, including promotional offers, unequivocally demonstrates the CRNGS provider’s market strategy, which is plainly a trade secret in this competitive market.

⁷ Entry at 10.

Additionally, this services/offers information has independent economic value from not being generally known and readily ascertainable in a compiled format. The amount of time and expense it would take for others to acquire and duplicate this services/offers information of a specific Supplier is probably unquantifiable because it too is virtually impossible to replicate due to these secrets being so closely guarded by the individual Suppliers. As such, it was error for the Attorney Examiner to conclude that the information would only be granted protective treatment "to the extent this information is not available online or otherwise publicly available."

D. Tip of the Iceberg

The Commission has gathered this competitive information requested by OPAE specifically to carry out the Commission's market-monitoring function. The information was not submitted so that the information would be then transmitted and given to the public. The Commission's responsibility as a market monitor includes the responsibility to keep the market participants' secrets confidential. To act in a contrary manner would seriously undermine the efficacy of the Commission in performing this function. The General Assembly gave the Commission a policing role as to certain consumer protections in an otherwise competitive market for natural gas commodity, and authorized the Commission as part of its certificate process to ask for and retain as confidential competitively sensitive information. See the above quoted provision of Section 4929.23 (A), Revised Code. The information on the spreadsheet that the Staff asked Suppliers to provide contains the same type of information required in the certificate process, including employees, salaries and business plans all of which can be submitted under seal. The fact that the General Assembly treats workforce, salaries and business plans as confidential for the Commission's policing of the certification process indicates a belief by the General Assembly that workforce, salaries and business plans are confidential in nature.

As demonstrated above, disclosure of this information will provide OP&E and any other member of public who asks with multitudes of trade secret information about individual CRNGS providers participating in the natural gas choice market in Ohio. OP&E will also be able to disclose the information. The ruling on this interlocutory appeal will have a much greater impact on the competitive marketplace in Ohio than just the DEO program. Disclosure of the confidential information covered in the Entry will have a chilling effect on CRNGS providers submitting information to the Staff for fear that competitors could make similar public records requests to discover what the competitor pays its employees, learn the fully array of products and services/offers, and glean enormous amounts of details about the marketing strategy of the competitor. A denial of this interlocutory appeal will result in irreparable harm to the competitive market in Ohio.

IV. Arguments Supporting the Request for a Stay

The Attorney Examiner granted in part and denied in part motions for protective orders, and required submission of redacted reports and other data “within 14 days from the date of this Entry, or November 16, 2015.” Thus, it is possible that the date for making the documents public may occur prior to the Commission’s ruling on the interlocutory appeal. Suppliers believe that a stay of the requirement to submit the redacted reports and other data should be issued until ten business days after the Commission’s ruling. That would allow sufficient time to prepare the requested amended spreadsheets should the Commission affirm the Entry. Without a stay, Suppliers may effectively lose their ability to have this interlocutory appeal, which by rule they have a right to have the Commission consider.

Furthermore, there is no substantial harm to other parties by this requested stay. The information has not been available to OP&E or the public and further time will not cause

substantial harm. Finally, the requested stay is consistent with the public interest. As explained earlier, the Commission required submission of the information so that it could study the effects of its decision. The Commission has recognized, from the very beginning of this information-gathering process that this information would include highly confidential, competitive market information that the market participants protect. Additionally, the public interest does not justify revealing competitive market participant information to OP&E, whose fervent opposition to DEO's choice program was flat-out rejected by the Ohio Supreme Court. As a result, it is reasonable and with good cause that RESA and OGMG request a stay.

V. Conclusion

For all of the foregoing reasons, the Commission should reverse the Attorney Examiner's November 2 ruling in this proceeding and rule that the CRNGS provider information that has been submitted to the Staff shall be treated confidentially and need not be unredacted:

- Number and salaries of full-time and part-time employees
- Description of the products offered
- Value-added services, including promotions being offered

Respectfully submitted,



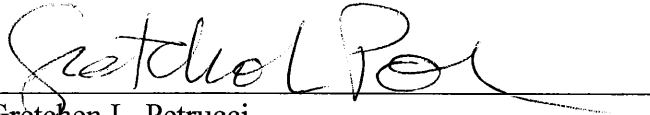
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CERTIFICATE OF SERVICE

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Summary: Motion -- Joint Interlocutory Appeal and Motion for a Stay electronically filed by Mrs. Gretchen L. Petrucci on behalf of Retail Energy Supply Association and Ohio Gas Marketers Group