



disclosed. Kroger could then file a motion seeking protective agreement within seven days after receipt of OCC's notice.

On February 24, OCC sent Kroger a notice requesting that all contracts provided to it by Kroger including an agreement for the purchase of retail electric generation services between Kroger and Constellation NewEnergy, Inc. ("Constellation") be considered in the public domain. On March 2, 2007, Kroger filed a response to OCC's notice and also moved for a protective order protecting all contracts provided by Kroger pursuant to the Protective Agreement as well as the transcript of OCC's February 20, 2007 deposition of Kroger representative Denis George.

All of the Constellation contracts are confidential documents between *Constellation and its customers. These contracts are never made public as they contain proprietary pricing and other information regarding the contractual relationship between Constellation and the customer. Constellation did not attend the deposition of Mr. George, and only became aware that one of its contracts may be disclosed to the public four days ago when as an intervenor to the proceeding Constellation received the Kroger's motion.*

Constellation submits this Memorandum in support of the Motion for a Protective Order of Kroger.

## **II. Argument**

### **1. The Commission should protect the Agreement between Kroger and Constellation as a trade secret.**

Constellation supports and confirms the arguments advanced by Kroger that the agreement between Constellation and Kroger contain highly sensitive

information concerning pricing and other terms the public disclosure of which would place Kroger and Constellation at a competitive disadvantage. This Agreement remains in effect today and contains certain prices and terms which are of a proprietary nature. Constellation supports Kroger's requests that the Commission find that the Agreement, if it is to be admitted into evidence, must be admitted under seal and subject to protection.

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. State law recognizes the need to protect certain types of information which are the subject of this motion. The non-disclosure of the 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.

Section 1333.61(D), Revised Code. This definition clearly reflects the state policy favoring the protection of trade secrets such as the information which is the subject of this memorandum.

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. 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).

In Pyromatics, Inc. v. Petruziello, 7 Ohio App. 3d 131, 134-135 (Cuyahoga County 1983), the Court of Appeals, citing Koch Engineering Co. v. Faulconer, 210 U.S.P.Q. 854, 861 (Kansas 1980), has delineated factors to be considered in recognizing a trade secret:

(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.

Applying these factors to the Agreement between Kroger and Constellation, it is clear that a protective order should be granted. Such sensitive information is generally not disclosed. Its disclosure could give competitors of either Kroger or Constellation an advantage. On the other hand, public disclosure of this information is not likely to either assist the Commission in carrying out its duties under the rules, especially if since the Commission Staff will have the full text of the Agreement to look at, or serve any other public policy.

**2. No one will be prejudiced by affording confidential treatment to the Agreement.**

Constellation agrees with Kroger that if the agreement in question remains confidential and protected there will be no prejudice or disadvantage to OCC, the

Commission, or any other party. Kroger provided the Constellation Agreement to OCC on the condition that OCC sign the Protective Agreement. OCC is now and will be able during the course of the proceeding to review and put the protected contracts to use in this proceeding as evidence pursuant to the terms of that Protective Agreement. Similarly, should the OCC elect to use the protected contracts, any other party upon signing a confidentiality agreement and showing the need to review the protected contracts, would also be able to use the contracts for this proceeding.

In that regard, because of interest Constellation has in the Kroger \ Constellation agreement, if any other party wishes to view the Kroger/Constellation contract, that party should sign a protective agreement with both Kroger and Constellation. This would permit Constellation to enforce an unauthorized disclosure.

### **III. Conclusion**

Constellation NewEnergy, Inc. respectfully requests that the Commission grant Kroger's Motion for a Protective Order, afford protective treatment to the contract between Kroger and Constellation, and require any other party who wishes to view such a contract to sign protective agreements with both Kroger and Constellation.

Respectfully submitted,

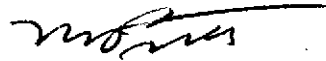


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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Memorandum in Response to the Motion for a Protective Order of Kroger Co. was served either by email or regular U.S. mail, postage prepaid, this 9<sup>th</sup> day of March, 2007



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