
**OHIO HOSPITAL ASSOCIATION'S MEMORANDUM
REGARDING THE MODIFICATION OF THE PROTECTIVE ORDER**

In response to the Attorney Examiner's Entry of August 8, 2007, the Ohio Hospital Association ("OHA") herewith submits its memorandum urging the Commission to maintain intact the protective orders issued in the above-captioned proceedings. The OHA also supports in full the memorandum submitted by Duke Energy Retail Sales, LLC, responding to the Attorney Examiners' August 8, 2007, Entry.

On March 2, 2007, the OHA filed a motion for a protective order to keep confidential certain agreements between OHA members and an affiliate of Duke Energy Ohio ("DE-Ohio"). The OHA's motion was supported by the affidavit of Richard L. Sites, the OHA's General Counsel. On March 19, 2007, the attorney examiners in a bench ruling granted a number of motions for protective orders thereby protecting the confidentiality of the subject documents. The documents and information at issue were filed with the Commission by the Office of the Ohio Consumers' Counsel ("OCC") under seal, specifically in the deposition, testimony and related exhibits of OCC witness Beth Hixon. The OHA urges the Commission to abide by its legal obligation to continue to keep these protected materials under seal.

Ohio Administrative Code ("O.A.C.") Rule 4901-1-24(D) provides that the Commission or certain designated Staff 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 Ohio Revised Code ("R.C.") Chapter 4928. Ohio Administrative Code Rule 4901-1-27(B)(7)(e) grants the attorney examiner the authority to prevent public disclosures of trade secrets and proprietary business information. Moreover, R.C. Section 4928.06(F) specifically permits the Commission to grant confidentiality

to competitive information. Therefore, state law recognizes the need to protect certain types of information relating to competitive retail electric services, which are the subject of the March 2, 2007 motion. The documents at issue are with DE-Ohio's unregulated CRES provider, Duke Energy Retail Sales, LLC ("DERS").

Ohio Revised Code Sections 4901.12 and 4905.07 were amended in order to facilitate the protection of trade secrets in the Commission's possession. Am. Sub. H. B. 476, effective September 17, 1996. By referencing R.C. Section 149.43, the Commission-specific statutes now incorporate the provision of that statute that excepts from the definition of "public record" those records where the release of such is prohibited by state or federal law. R.C. Section 149.43(A)(1)(v). In turn, state law prohibits the release of information that meets the definition of a trade secret. R.C. Sections 1333.61(D) and 1333.62. The amended statutes also reference the purposes of R.C. Title 49. The Ohio Supreme Court has clarified that the "state or federal law" exemption is intended to cover trade secrets. *State ex rel. Besser v. Ohio State*, 89 Ohio St. 3d 396, 399 (2000). Ohio Revised Code Section 4928.06(F) specifically states that "the Commission shall take such measures as it considers necessary to protect the confidentiality of any such information [necessary to effect competition]." The protection of trade secret information from public disclosure is consistent with the purposes of R.C. Chapter 4928 because the Commission and its Staff have access to the information, but at the same time the information is protected from other competitors entering the electric retail market. Thus the protection of trade secret information as requested by the OHA will not impair the Commission's regulatory responsibilities.

Even before the enactment of R.C. Chapter 4928, the need to protect the designated information from public disclosure was 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. 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.

R.C. Section 1333.61(D). This definition clearly reflects the state policy favoring the protection of trade secrets such as the information that 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 a public utility, 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, 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); *In the Matter of the Application of Volunteer Energy Services, Inc. for Certification as a Retail Natural Gas Supplier*, Case No. 02-1786-GA-CRS (January 8, 2007).

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.

First, the designated information meets each of the above-noted criteria. The OHA and its affected members consider and have treated the information as confidential and/or proprietary. In the ordinary course of their business, that information is kept as confidential and/or proprietary by the OHA and its affected members, is treated as such by their employees, and is not disclosed to anyone outside of the OHA and its Affected Members except pursuant to confidentiality agreements, or in the context of regulatory proceedings where protection is granted. Accordingly, that information constitutes trade secret information under Ohio law warranting protection from public disclosure.

Second, the information derives independent economic value from not being known to persons (e.g., competitors) who can use it to their own financial advantage. Courts commonly treat financial records, such as revenue statements or earnings, as trade secrets, especially when parties are in direct competition with each other. See, *Valco Cincinnati, Inc. v. N & D Machinery Service, Inc.*, 24 Ohio St. 3d 41 (1986) (court defines trade secret as including business plans and financial information); *Brittain v. The Stroh Brewery Co.*, 136 F.R.D. 408 (M.D.N.C. 1991) (net profits are trade secrets); *Coca-Cola-Bottling Co. v. Coca-Cola Co.*, 107 F.R.D. 288 (D.Del. 1985) (court finds that disclosure of trade secret is even more damaging where there is intense competition); *Fischer v. Sciotto*, No. 95 APEO4-490, 1995 Ohio App. LEXIS 4783 (Franklin County October 24, 1995) (court held that sales projections and profit and loss statements are proprietary especially where parties were in direct competition). This Commission has concurred with these results, finding that purely private financial books can be a trade secret. See, e.g., *In re Filing of Annual Reports by Regulated Public Utilities*, No. 89-360-AU-ORD, 1989 PUC LEXIS 541 (June 15, 1989) (Commission found that company income statements and balance sheets are trade secrets as to its competitors).

The non-disclosure sought here by the OHA and its Affected Members is consistent with the purposes of R.C. Chapter 4928 as declared by the Ohio General Assembly as it specifically relates to competitive services. In R.C. Section 4928.02, the Ohio legislature specifically provided that:

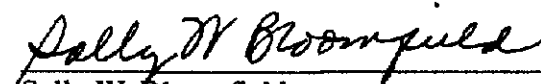
It is the policy of [Ohio] to:

...
(C) Ensure diversity of electric supplies and suppliers, by giving consumers effective choices over the selection of those supplies and suppliers ...; [and]

(F) Recognize the continuing emergence of competitive electricity markets through the development and implementation of flexible regulatory treatment[.]

R.C. Section 4928.02. Through this enactment, the Ohio legislature has thus declared its policy favoring diversity and competition in Ohio's electric industry. The Commission's protection of the confidential and proprietary information contained in this request is not inconsistent with, but rather is necessary to encourage and effectuate, those purposes as well.

WHEREFORE, the Ohio Hospital Association requests that the Commission should not modify the March 19, 2007 ruling by the attorney examiners, and requests that the Commission maintain the confidentiality of OHA's agreement with DE-Ohio.



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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing Motion to Protective Order was served upon the parties of record listed below this ^{4th} 16 day of August 2007 via electronic mail.


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