

BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of)
Dominion Retail, Inc., for Certification as a) Case No. 02-1757-GA-CRS
Retail Natural Gas Supplier.)

ENTRY

The attorney examiner finds:

- (1) On July 15, 2002, Dominion Retail, Inc., (Dominion) filed its initial application for certification as a retail natural gas supplier and a motion for protective treatment of exhibits C-3(a) and C-5 of the application.
- (2) On July 2, 2004, Dominion filed its first application for renewal of its certification and a motion for protective treatment of exhibits C-3a, C-3b, and C-5 of that application.
- (3) On July 11, 2006, Dominion filed its second application for renewal of its certification and a motion for protective treatment of exhibits C-3a, C-3b, and C-5 of that application. That motion was granted on January 8, 2007, for a period of 24 months. Thus, the protective order covering the information filed in 2006 is scheduled to expire on January 8, 2009.
- (4) On June 24, 2008, Dominion filed its third application for renewal of its certification and a motion for a protective order of exhibits C-3 and C-5 of that application.
- (5) Section 4905.07, Revised Code, provides that all facts and information in the possession of the Commission shall be public, except as provided in Section 149.43, Revised Code, and as consistent with the purposes of Title 49 of the Revised Code. Section 149.43, Revised Code, specifies that the term "public records" excludes information which, under state or federal law, may not be released. 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).
- (6) Similarly, Rule 4901-1-24, Ohio Administrative Code (O.A.C.), allows an attorney examiner to issue an order to protect the confidentiality of information contained in a filed document, "to the

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extent that state or federal law prohibits release of the information, including where the information is deemed . . . to constitute a trade secret under Ohio law, and where non-disclosure of the information is not inconsistent with the purposes of Title 49 of the Revised Code."

- (7) Ohio law defines a trade secret as "information . . . 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. The Ohio Supreme Court has adopted the following six factors to be used in analyzing a claim that information is a trade secret under that section:

- (a) The extent to which the information is known outside the business.
- (b) The extent to which it is known to those inside the business, i.e., by the employees.
- (c) The precautions taken by the holder of the trade secret to guard the secrecy of the information.
- (d) The savings effected and the value to the holder in having the information as against competitors.
- (e) The amount of effort or money expended in obtaining and developing the information.
- (f) 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., 80 Ohio St.3d 513, 524-525 (1997).

- (8) The Ohio Supreme Court has found that an *in camera* inspection is necessary to determine whether materials are entitled to protection from disclosure. *State ex rel. Allright Parking of Cleveland Inc. v. Cleveland*, 63 Ohio St. 3d 772 (1992).

- (9) Rule 4901-1-24(D)(1), O.A.C., also provides that, where confidential material can be reasonably redacted from a document without rendering the remaining document incomprehensible or of little meaning, redaction should be ordered rather than wholesale removal of the document from public scrutiny.
- (10) The attorney examiner finds that the same procedures applicable to the initial issuance of a protective order should be used for considering the extension of a protective order. Therefore, in order to determine whether to grant or to extend a protective order, it is necessary to review the materials in question; to assess whether the information constitutes a trade secret under Ohio law; to decide whether non-disclosure of the materials will be consistent with the purposes of Title 49, Revised Code; and to evaluate whether the confidential material can reasonably be redacted.
- (11) The exhibits covered by Dominion's 2008 motion consist of financial statements and forecasted financial statements. Dominion submits that this information is highly sensitive, confidential and proprietary. The attorney examiner has reviewed the information in Exhibits C-3 and C-5 of the 2008 application, as well as the assertions set forth in Dominion's motion. Applying the requirements that the information have independent economic value and be the subject of reasonable efforts to maintain its secrecy, as well as the six-factor test set forth by the Ohio Supreme Court, the attorney examiner finds that the exhibits filed with the 2008 application contain trade secret information. Their release is therefore prohibited under state law. The attorney examiner also finds that non-disclosure of this information is not inconsistent with the purposes of Title 49 of the Revised Code. Finally, the attorney examiner concludes that these exhibits cannot be reasonably redacted to remove the confidential information contained therein.
- (12) Rule 4901-1-24(F), O.A.C., provides that, unless otherwise ordered, protective orders under Rule 4901-1-24(D), O.A.C., automatically expire after 18 months. Rule 4901-1-24(D)(4), O.A.C., provides for protective orders relating to gas marketers' certification renewal applications to expire after 24 months.
- (13) The examiner finds that Dominion's 2008 motion should be granted for a period of 24 months from the date of this entry. Therefore, until that date, the docketing division of the Commis-

sion should maintain exhibits C-3 and C-5 of Dominion's 2008 certification renewal application under seal.

- (14) Rule 4901-1-24(F), O.A.C. requires a party wishing to extend a protective order to file an appropriate motion at least forty-five days in advance of the expiration date. If Dominion wishes to extend this confidential treatment, it should file an appropriate motion at least 45 days in advance of the expiration date.
- (15) The examiner also notes that, while Dominion moved for a protective order with regard to its 2002 and 2004 applications, the Commission did not act on those motions. The Commission did, however, hold the information confidentially. Thus, *de facto* confidential treatment has been maintained. The examiner is aware that the Commission did not inform Dominion of an expiration date for its confidential treatment. She has performed an *in camera* review of the 2002 and 2004 information and has found that it was analogous to the 2008 information that is the subject of protection by this entry. Therefore, the examiner will, as of this date, issue a protective order with regard to the 2002 and 2004 schedules that were filed under seal. This protective order will remain in effect for three months from the date of this entry. During that time, if Dominion believes that the 2002 and 2004 schedules remain proprietary and competitively sensitive, it should file a motion for renewal of the protective order. The memorandum in support of such a motion should address, among other things, the reasons why such information remains proprietary and the efforts made by Dominion to maintain it as confidential.

It is, therefore,

ORDERED, That the motion by Dominion for protective treatment of Schedules C-3 and C-5, filed on June 24, 2008, be granted for a period of 24 months from the date of this entry. It is, further,

ORDERED, That the Commission's docketing division shall maintain, under seal, exhibits C-3 and C-5 of Dominion's 2008 certification renewal applications, as filed on June 24, 2008, for a period of 24 months from the date of this entry. It is, further,

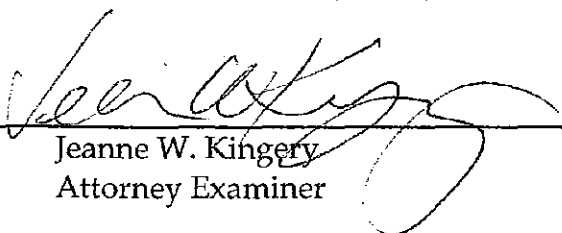
ORDERED, That the motions by Dominion for protective treatment of Schedules C-3a and C-5 of its 2002 certification application and Schedules C-3a, C-3b, and C-5 of its 2004

certification renewal application be granted for a period three months from the date of this entry. It is, further,

ORDERED, That the Commission's docketing division shall maintain, under seal, exhibits C-3a and C-5 of Dominion's 2002 certification application and Schedules C-3a, C-3b, and C-5 of Dominion's 2004 certification renewal application, filed on July 15, 2002, and July 2, 2004, respectively, for a period of 3 months from the date of this entry

ORDERED, That a copy of this entry be served upon all parties of record.


THE PUBLIC UTILITIES COMMISSION OF OHIO


By: Jeanne W. Kingery
Attorney Examiner

JWK:geb

Entered in the Journal

JUL 18 2008


Renee J. Jenkins
Secretary