

BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of)
Spark Energy Gas, LP, for Certification as) Case No. 08-638-GA-CRS
a Retail Natural Gas Supplier.)

ENTRY

The attorney examiner finds:

- (1) On May 27, 2008, Spark Energy Gas, LP, (Spark) filed an application for certification as a retail natural gas supplier and a motion for protective treatment of exhibits C-1, C-3, C-4, C-5, C-6, and C-7 of that application. The motion was amended on June 3, 2008.
- (2) 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).
- (3) Similarly, Rule 4901-1-24, O.A.C., allows an attorney examiner to issue an order to protect the confidentiality of information contained in a filed document, "to the 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."
- (4) Ohio law defines a trade secret as "information . . . that satisfies both of the following: (a) 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. (b) It is the subject of efforts that are reasonable under the circumstances to maintain its secrecy." Section 1333.61(D),

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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).

- (5) 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).
- (6) 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.
- (7) The attorney examiner finds that, 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.

- (8) The exhibits covered by Spark's motion consist of annual reports (Exhibit C-1), financial statements (Exhibit C-3), financial arrangements (Exhibit C-4), forecasted financial statements (Exhibit C-5), credit rating information (Exhibit C-6), and credit report (Exhibit C-7). Spark submits that the financial arrangements and audited financial information contains highly proprietary and confidential commercial and financial information, the disclosure of which would violate certain covenants in the credit arrangements and would be detrimental to Spark. Noting that the industry is highly competitive, Spark contends that all of the information covered by its motion should be held confidentially for at least five years, because of the competitive harm disclosure would cause.
- (9) The attorney examiner has reviewed the information in exhibits C-1, C-3, C-4, C-5, C-6, and C-7 of Spark's application, as well as the assertions set forth in its 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 Spark's 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.
- (10) 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.
- (11) The examiner also finds that the 24-month provision in Rule 4901-1-24(D)(4), O.A.C., is intended to synchronize the expiration of protective orders related to gas marketers' certification applications with the expiration of their certification and that the expiration date should allow adequate time for consideration of any motion for extension. Therefore, the motion will be granted in part and confidential treatment

shall be afforded for a period ending on August 31, 2010. Until that date, the docketing division of the Commission should maintain exhibits C-1, C-3, C-4, C-5, C-6, and C-7 of Spark's certification application under seal.

- (12) 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 Spark wishes to extend this confidential treatment, it should file an appropriate motion at least 45 days in advance of the expiration date. If no such motion is filed, then the Commission may, after expiration of the protective order, release this information to the public without prior notice to Spark.

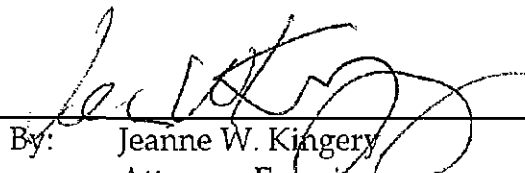
It is, therefore,


ORDERED, That the motion by Spark for protective treatment be granted in part and denied in part, as more fully set forth in this entry. It is, further,

ORDERED, That the Commission's docketing division shall maintain, under seal, exhibits C-1, C-3, C-4, C-5, C-6, and C-7 of Spark's certification application, as filed on May 27, 2008, until August 31, 2010. It is, further,

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

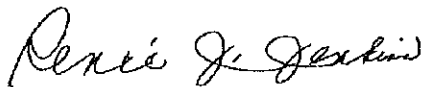
THE PUBLIC UTILITIES COMMISSION OF OHIO


By: Jeanne W. Kingery
Attorney Examiner

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Entered in the Journal

AUG 5 2008



Renee J. Jenkins
Secretary