

BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of )  
Direct Energy Business, LLC for ) Case No. 00-1758-EL-CRS  
Certification as a Competitive Retail )  
Electric Supplier. )

ENTRY

The attorney examiner finds:

- (1) On October 2, 2008, Direct Energy Business, LLC (Direct Energy) filed, as part of its application for renewal of its certification to provide aggregation and power marketer services, a motion for a protective order under Rule 4901-1-24(D), Ohio Administrative Code (O.A.C.), to protect the confidentiality of three financial exhibits (Exhibits C-3, C-4, and C-5). Direct Energy submits that public disclosure of this information would be harmful to the company due to the fact that it would result in providing its competitors with proprietary information. Additionally, the company posits that public disclosure of this information is not likely to assist the Commission in carrying out its duties under the competitive retail electric supplier rules.
- (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 Supreme Court of Ohio has clarified that the "state or federal law" exemption is intended to include trade secrets. *State ex rel. Besser v. Ohio State* (2000), 89 Ohio St.3d 396, 399.
- (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: (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 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.* (1997), 80 Ohio St.3d 513, 524-525.
- (5) 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.
- (6) Thus, in order to determine whether to issue a protective order, it is necessary to review the materials in question, assess

whether the information constitutes a trade secret under Ohio law, decide whether non-disclosure of the materials will be consistent with the purposes of Title 49, Revised Code, and evaluate whether the confidential material can reasonably be redacted.

- (7) The attorney examiner has reviewed Exhibits C-3 (financial statements), C-4 (financial arrangements), and C-5 (financial forecasts) and the assertions set forth in the memorandum in support of Direct Energy'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 information sought to be protected in Exhibit C-3 is a trade secret. Its release is, therefore, prohibited under state law. The attorney examiner also finds that non-disclosure of the information is not inconsistent with the purposes of Title 49 of the Revised Code. Finally, the attorney examiner concludes that Exhibit C-3 cannot be reasonably redacted to remove the confidential information contained therein.
- (8) With respect to Exhibits C-4 and C-5, the Commission finds that these exhibits are not entitled to protective treatment. Specifically, the Commission finds that Exhibit C-4 is nothing more than a template agreement and does not contain any information that would be considered as a trade secret. Further, Exhibit C-5 is simply a statement indicating that forecasted financial statements are not available at this time.
- (9) The attorney examiner therefore finds that there is good cause to grant Direct Energy's motion for a protective order relative to Exhibit C-3. The exhibit should receive protected status for a 24-month period from the date of this entry, and should remain under seal in the docketing division for that time period. Direct Energy should note that Rule 4901-1-24(D)(4), O.A.C., provides that protective orders issued pursuant to the rule automatically expire after 24 months.

Relative to Exhibits C-4 and C-5, the motion for a protective order is denied.

(10) Accordingly, the docketing division should maintain under seal Exhibit C-3, as filed on October 2, 2008, for a period of 24 months from the date of this entry. Ten days from the date of this Entry, the docketing division is directed to release Exhibits C-4 and C-5 to the public record.

It is, therefore,

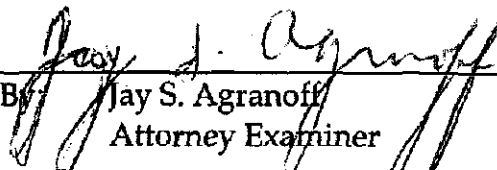
ORDERED, That Direct Energy's motion for a protective order is granted in part and denied in part in accordance with Findings (8) and (9). It is, further,

ORDERED, That Exhibit C-3 shall remain under seal in the Commission's docketing division for that 24 month period. It is, further,

ORDERED, That Exhibits C-4 and C-5 shall be released to the public record ten days from the date of this Entry. It is, further,

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

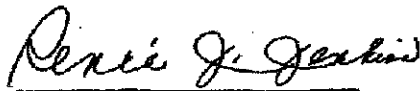
THE PUBLIC UTILITIES COMMISSION OF OHIO

  
By Jay S. Agranoff  
Attorney Examiner

*Jsg*;geb

Entered in the Journal

**OCT 20 2008**



Renee J. Jenkins  
Secretary