

BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of )  
Direct Energy Business, LLC for a )  
Certificate to Provide Competitive ) Case No. 00-1758-EL-CRS  
Retail Electric Service in the State of )  
Ohio. )

ENTRY

The attorney examiner finds:

- (1) On September 27, 2010, Direct Energy Business, LLC (Direct Energy or applicant) filed an application for the renewal of its certificate as a competitive retail electric service (CRES) provider in the state of Ohio.
- (2) On September 29, 2010, as amended on November 9 and 12, 2010, Direct Energy filed a motion for a protective order, pursuant to Rule 4901-1-24(D), Ohio Administrative Code (O.A.C.), seeking to keep Exhibits C-4 (financial arrangements), C-5 (financial forecasts), and C-7 (financial reports) of its application confidential and not part of the public record due to the claim that such information, if released to the public, would harm Direct Energy by providing its competitors with proprietary information in what is designed by statute to now be a competitive service. Specifically, Direct Energy asserts that the financial information contained in these exhibits is not generally disclosed and that its disclosure could give competitors an advantage that would hinder Direct Energy's ability to compete. Additionally, Direct Energy submits that public disclosure of its financial information is not likely to assist the Commission in carrying out its duties under the CRES Rules.
- (3) 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, 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.

- (4) 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, Revised Code."
- (5) 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 of Ohio 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 affected 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.

- (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) 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.
- (8) The attorney examiner has reviewed Exhibits C-4, C-5, and C-7 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 Supreme Court of Ohio, the attorney examiner finds that the identified information contained in Exhibits C-4, C-5, and C-7 sought to be protected is a trade secret. Their 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, Revised Code. Further, the attorney examiner concludes that the exhibits cannot be reasonably redacted to remove the confidential information contained therein.
- (9) The attorney examiner, therefore, finds that there is good cause to grant Direct Energy's motion for a protective order relative to Exhibits C-4, C-5, and C-7. The identified exhibits 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.
- (10) Accordingly, the docketing division should maintain under seal Exhibits C-4, C-5, and C-7 for a period of 24 months from the date of this entry.
- (11) Rule 4901-1-24(F), O.A.C., requires a party wishing to extend a protective order to file an appropriate motion at least 45 days in advance of the expiration date. If Direct Energy 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 to extend confidential treatment is filed, the Commission may release the information without prior notice to Direct Energy.

It is, therefore,

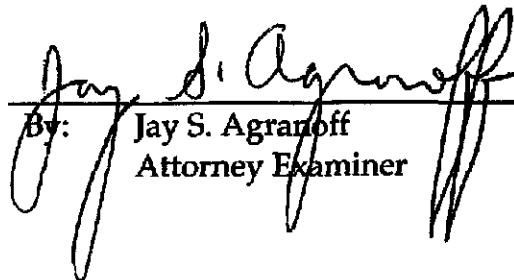
ORDERED, That Direct Energy's motion for a protective order be granted in accordance with Findings (8) and (9). It is, further,

ORDERED, That Exhibits C-4, C-5, and C-7 remain under seal in the Commission's docketing division for a 24-month period consistent with Finding (10). It is, further,

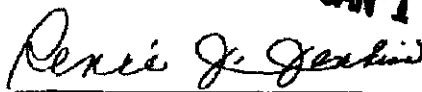
ORDERED, That a copy of this entry be served upon all parties of record.

THE PUBLIC UTILITIES COMMISSION OF OHIO

grg  
/dah

  
By: Jay S. Agranoff  
Attorney Examiner

Entered in the Journal

  
JAN 11 2011

Renee J. Jenkins  
Secretary