

BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of)
Commerce Energy, Inc. for Certification) Case No. 02-1828-GA-CRS
as a Competitive Retail Natural Gas)
Supplier.)

ENTRY

The attorney examiner finds:

- (1) On August 12, 2010, the applicant, Commerce Energy, Inc. d/b/a Just Energy (Commerce Energy) filed an application in this case for renewal of its certification as a competitive retail natural gas service (CRNGS) provider. On September 10, 2010, the Commission suspended the automatic renewal process so the Commission's staff (Staff) could further review the certification renewal application. On September 20, 2010, a staff report was filed, and on September 30, 2010, the office of the Ohio Consumers' Counsel (OCC) was granted intervention. On November 4, 2010, Commerce Energy, Staff, and OCC filed a joint stipulation that resolved all the issues presented in the staff report. On November 22, 2010, the Commission issued an Opinion and Order approving the stipulation with limited revisions. As part of the stipulation, Commerce Energy agreed to file with the Commission a quarterly report on its progress in managing its sales force.
- (2) On April 15, 2011, the applicant filed a motion for protective order, pursuant to Rule 4901-1-24(D), Ohio Administrative Code (O.A.C.), requesting that certain limited information contained within the quarterly report, namely, a monthly breakdown of the number of third-party verification (TPV) calls that were processed, as well as the number of such calls that were not processed, be kept under seal. Because the applicant considers this information confidential, it redacted it from the version of the quarterly report that was publicly filed on April 15, 2011. However, three copies of the quarterly report, in unredacted form, i.e., containing the information for which protective treatment is sought, were filed, under seal, by the applicant on April 18, 2011.
- (3) In support of its motion for protective order, the applicant explains that public disclosure of the information for which protective

treatment is sought would lead to the discovery of sales information which is confidential, competitively sensitive, highly proprietary, and a trade secret. The applicant asserts that the number of TPV calls processed and the number of TPV calls not processed in any given month is confidential and is not generally known or available to the general public. Public disclosure of this information would provide an undue competitive disadvantage to Commerce Energy, claims the applicant.

- (4) 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* (2000), 89 Ohio St.3d 396, 399.
- (5) 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."
- (6) 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.
- (7) The attorney examiner has examined the information covered by the motion for protective order filed in this case by Commerce Energy on April 15, 2011, as well as the assertions set forth in the memorandum in support of that motion. Applying the requirements that the information must have independent economic value and be the subject of reasonable efforts to maintain

secrecy pursuant to Section 1333.61(D), Revised Code, as well as the six-factor test set forth by the Ohio Supreme Court,¹ the attorney examiner finds that the information which is the subject of the motion for protective order constitutes trade secret information. Release of the information in question is, therefore, prohibited under state law. The attorney examiner also finds that nondisclosure of this information is not inconsistent with the purposes of Title 49 of the Revised Code. Therefore, the attorney examiner finds that Commerce Energy's motion for protective order is reasonable and should be granted with regard to the limited information contained within the quarterly report, relating to the number of TPV calls that were processed, as well as the number of such calls that were not processed, that was redacted from the version publicly filed on April 15, 2011, but was contained in the unredacted version of the quarterly report that was filed, under seal, on April 18, 2011.

- (8) Rule 4901-1-24(D)(4), O.A.C., provides that if a motion for protective order is granted with regard to information included in a case such as this, involving an application for renewal of a gas marketer's certification, then the motion will be automatically approved for a 24-month period beginning with the date of the renewed certificate. The attorney examiner 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 dates should allow adequate time for consideration of any motion for extension. Therefore, confidential treatment should be afforded to information contained within the quarterly report, relating to the number of TPV calls that were processed, as well as the number of such calls that were not processed, that was redacted from the version publicly filed on April 15, 2011, but was contained in the unredacted version of the quarterly report that was filed, under seal, on April 18, 2011, for a period ending 24 months from the effective date of the certificate issued to Commerce Energy, or until November 22, 2012. Until that date, the Commission's docketing division should maintain this information under seal.
- (9) 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

¹ See *State ex rel. The Plain Dealer v. Ohio Dept. of Ins.* (1997), 80 Ohio St. 3d 513, 534-525.

advance of the expiration date. If Commerce Energy wishes to extend the confidential treatment granted here, 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 this information without prior notice to Commerce Energy.

It is, therefore,

ORDERED, That the motion for protective order filed in this case by Commerce Energy on April 15, 2011, be granted with regard to the information contained within the quarterly report, relating to the number of TPV calls that were processed, as well as the number of such calls that were not processed, that was redacted from the version publicly filed, but was contained in the unredacted version of the quarterly report that was filed, under seal, on April 18, 2011. It is, further,

ORDERED, That the Commission's docketing division maintain, under seal, for a period ending 24 months, concluding on November 22, 2012, the information contained within the quarterly report, relating to the number of TPV calls that were processed, as well as the number of such calls that were not processed, that was redacted from the version publicly filed, but was contained in the unredacted version of the quarterly report that was filed, under seal, on April 18, 2011. It is, further,

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

THE PUBLIC UTILITIES COMMISSION OF OHIO



By: Daniel E. Fullin
Attorney Examiner

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Entered in the Journal

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Betty McCauley
Secretary