

BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of RD)
Energy, Inc. for Certification as a) Case No. 10-72-EL-AGG
Competitive Retail Electric Supplier.)

In the Matter of the Application of RD)
Energy, Inc. for Certification as a)
Competitive Retail Natural Gas) Case No. 10-73-GA-AGG
Aggregator/Broker.)

ENTRY

The attorney examiner finds:

- (1) On January 10, 2012, RD Energy, Inc. (RD Energy, company) filed renewal applications requesting certification to provide aggregation and power marketer services and aggregation and natural gas broker services (Case Nos. 10-72-EL-AGG (10-72) and 10-73-GA-AGG (10-73), respectively). On that same day, RD Energy filed motions for a protective order, pursuant to Rule 4901-1-24(D), Ohio Administrative Code (O.A.C.), requesting that exhibits C-3 and C-5 of its applications, which were filed under seal in 10-72 and 10-73 on January 10, 2012, and amended by a filing under seal in 10-72 on February 23, 2012, be kept confidential. These exhibits contain the company's financial information, including forecasted financial statements for 2011, 2012 and 2013. Further, as part of exhibit C-3 of its renewal applications, which was filed under seal on January 10, 2012, RD Energy also included the financial statements for 2009 that had been included with its original certificate applications in 2010.
- (2) In support of its motions for a protective order, RD Energy explains that exhibits C-3 and C-5 contain competitively sensitive and highly proprietary business financial information that is not generally known or available to the general public. Therefore, RD Energy requests that the information found in exhibits C-3 and C-5 be treated as confidential.
- (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 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.

- (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 of the Revised Code.”
- (5) 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), Revised Code.
- (6) The attorney examiner has examined the information covered by the motions for a protective order filed by RD Energy, as well as the assertions set forth in the supportive memoranda. Applying the requirements that the information have independent economic value and be the subject of reasonable efforts to maintain its 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, as further explained in finding (7) below, with the exception of the financial statements for 2009 that were included in exhibit C-3, the information contained in exhibits C-3 and C-5 of RD Energy’s renewal applications constitutes trade secret information. Release of these documents is, therefore,

¹ See *State ex rel. The Plain Dealer v. Ohio Dept. of Ins.*, (1997) 80 Ohio St.3d 513, 524-525.

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.

- (7) With respect to the 2009 financial statements that were included in exhibit C-3 of RD Energy's renewal applications, the attorney examiner finds that this portion of exhibit C-3 is not entitled to protective treatment. Specifically, the attorney examiner notes that RD Energy was granted protective orders in these cases, for exhibits C-3 and C-5, by entries issued March 26, 2010, and April 6, 2010. The confidential filings covered by those previous protective orders included the company's financial statements for 2009. Those protective orders have expired. Because no motion to extend those protective orders was filed by the company, the confidential information that was filed under seal on January 20, 2010, should be released to the public record. Therefore, since RD Energy's 2009 financial statements in exhibit C-3 of its original applications will be released to the public record, the 2009 financial statements in exhibit C-3 of its renewal applications do not contain any information that would be considered a trade secret.
- (8) Accordingly, the attorney examiner finds that, with the exception of the 2009 financial statements contained in exhibit C-3, there is good cause to grant RD Energy's motions for a protective order relative to exhibits C-3 and C-5 of the company's renewal applications. Relative to the 2009 financial statements contained in exhibit C-3, the motions for a protective order are denied.
- (9) Rule 4901-1-24(D)(4), O.A.C., provides for protective orders relating to electric and gas marketers' certification renewal applications to expire after 24 months. 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, exhibit C-3, except for the company's 2009 financial statements, and exhibit C-5 should receive protected status for a period ending 24 months from the effective date of the certificates issued to RD Energy, or until

February 20, 2014, in 10-72 and February 21, 2014, in 10-73. Until those dates, the docketing division should maintain, under seal, exhibit C-3, except for the company's 2009 financial statements, and exhibit C-5, which were filed under seal in 10-72 and 10-73 on January 10, 2012, and amended by a filing under seal in 10-72 on February 23, 2012.

- (10) On March 19, 2012, the docketing division is directed to release to the public record exhibits C-3 and C-5, filed under seal in these dockets on January 20, 2010, and the 2009 financial statements contained in exhibit C-3, which were filed under seal in these dockets on January 10, 2012.
- (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 RD 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 this information without prior notice to RD Energy.

It is, therefore,

ORDERED, That, with the exception of the 2009 financial statements contained in exhibit C-3, the motions for a protective order filed by RD Energy be granted with regard to the information contained in exhibits C-3 and C-5 of RD Energy's renewal applications. It is, further,

ORDERED, That the motions for a protective order are denied with respect to the 2009 financial statements contained in exhibit C-3 of RD Energy's renewal applications. It is, further,

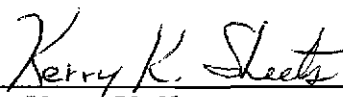
ORDERED, That, except for the company's 2009 financial statements contained in exhibit C-3, the Commission's docketing division maintain, under seal, the un-redacted exhibits C-3 and C-5, which were filed under seal in 10-72 and 10-73 on January 10, 2012, and amended by a filing under seal in 10-72 on February 23, 2012, for a period of 24 months, ending on February 20, 2014, in 10-72 and February 21, 2014, in 10-73. It is, further,

ORDERED, That the Commission's docketing division release to the public record, on March 19, 2012, exhibits C-3 and C-5, filed under seal in these dockets on January 20, 2010. It is, further,

ORDERED, That the Commission's docketing division release to the public record, on March 19, 2012, the 2009 financial statements contained in exhibit C-3, filed under seal in these dockets on January 10, 2012. It is, further,

ORDERED, That a copy of this entry be served upon each party of record.

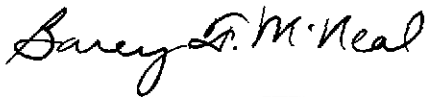
THE PUBLIC UTILITIES COMMISSION OF OHIO


By: Kerry K. Sheets
Attorney Examiner


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Barcy F. McNeal
Secretary