

BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of)
Delta Energy, LLC, for Certification as) Case No. 08-1037-GA-CRS
a Retail Natural Gas Marketer.)

ENTRY

The attorney examiner finds:

- (1) On September 6 and 7, 2012, Delta Energy, LLC, (Delta), filed applications for renewal of its certification as a retail natural gas marketer. In addition, on September 6 and 18, 2012, Delta filed motions for a protective order, requesting that exhibits C-3, C-4, and C-5 of its renewal application be kept under seal. These exhibits contain Delta's financial statements, including forecasted financial statements for 2013 and 2014.
- (2) Pursuant to Rule 4901-1-24(F), Ohio Administrative Code (O.A.C.), Delta also filed a motion to extend the protective orders for its previously submitted financial statements (former C- 3 exhibits), filed under seal on August 2, 2010, and August 28, 2008, as part of the company's 2010 renewal application and its 2008 original application for certification. Exhibit C-3 of the 2010 renewal application consists of 2008 and 2009 financial statements, and exhibit C-3 of the 2008 application consists of 2005, 2006, and 2007 financial statements. Delta asserts that the information protected in those former C-3 exhibits continues to be competitively sensitive and proprietary business financial information. Delta seeks to continue the protective orders issued on September 24 and 30, 2010, for an additional 24-month period.
- (3) No memorandum contra was filed regarding Delta's motions for protective order or its motion to extend the protective orders for its previously submitted financial statements.
- (4) In support of its motions for protective order, Delta explains that exhibits C-3, C-4, and C-5 of its 2012 renewal

application contain trade secrets comprised of Delta's sensitive business and financial information. Delta contends that it derives independent economic value from the information contained in the exhibit not being generally known to its competitors. Delta also details the steps it takes to protect the secrecy of this information. Finally, Delta asserts that nondisclosure of this information will not impair the purposes of Title 49 of the Revised Code, as the Commission will have full access to the information. Therefore, Delta requests that the information found in exhibits C-3, C-4, and C-5 of its 2012 renewal application be kept confidential.

- (5) 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, 732 N.E. 2d 373 (2000).
- (6) 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."
- (7) 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.

- (8) The attorney examiner has reviewed the information included in Delta's motions for protective order, 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 the information contained in exhibits C-3, C-4, and C-5 contain trade secret information. Their release 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. Finally, the attorney examiner concludes that these documents could not be reasonably redacted to remove the confidential information contained therein. Therefore, the attorney examiner finds that Delta's motions for protective order are reasonable and should be granted.
- (9) With regard to Delta's motion to extend protective orders for its previously submitted financial statements, the attorney examiner notes that the competitive value of exhibit C-3 of Delta's 2010 renewal application, given its age, is diminished. However, the attorney examiner finds, at the present time, that exhibit C-3 of Delta's 2010 renewal application still constitutes trade secret information. Therefore, the attorney examiner finds that Delta's motion to extend the protective order with respect to exhibit C-3 of its 2010 renewal application is reasonable and should be granted.
- (10) Rule 4901-1-24(D)(4), O.A.C., provides for protective orders relating to gas marketer's 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 a gas marketer's certification application with the expiration of its certification and that the expiration dates should allow adequate time for consideration of any

¹ See *State ex-rel. The Plain Dealer v. Ohio Dept. of Ins.*, 80 Ohio St.3d 513, 524-525, 687 N.E.2d 661 (1997).

motion for extension. Therefore, confidential treatment shall be afforded to exhibits C-3, C-4, and C-5 of Delta's 2012 renewal application and exhibit C-3 of the company's 2010 renewal application for a period ending 24 months from the effective date of the certificate issued to Delta, or until October 10, 2014. Until that date, the docketing division should maintain, under seal, exhibits C-3, C-4, and C-5 of Delta's 2012 renewal application and exhibit C-3 of the company's 2010 renewal application, which were filed under seal in this docket on September 6 and 18, 2012, and August 2, 2010.

- (11) On September 6 and 18, 2012, Delta also moved for a waiver of Rule 4901-1-24(F), O.A.C., which provides for automatic expiration of any order prohibiting disclosure of certain documents. Delta contends that the financial information contained in exhibits C-3, C-4, and C-5 of its 2012 renewal application will continue to be sensitive and the need to keep the information from public disclosure will not diminish. Delta also contends that a waiver would conserve the Commission's resources, because there would be no need to issue an extension of the protective order. The attorney examiner finds that Delta's requests for a waiver are without merit. The Commission's rules limit the duration of protective orders, and require a party seeking to extend a protective order to justify the necessity of additional protection. Therefore, Delta's motions for a waiver are denied.
- (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 45 days in advance of the expiration date. If Delta 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 Delta.
- (13) Finally, upon review, the attorney examiner finds that Delta's financial information filed in exhibit C-3 of its 2008 application for certification no longer constitutes trade secret information. While agreeing that the financial information in that former C-3 exhibit once was

appropriate for protection as a trade secret, the examiner notes that it contains information no more current than 2007. It is not the Commission's policy to protect such dated historical information. Therefore, Delta's motion to extend the protective order with respect to exhibit C-3 of its 2008 application is denied. The Commission's docketing division is directed to place exhibit C-3 of Delta's 2008 application, which was filed under seal on August 28, 2008, in the public record on November 2, 2012.

It is, therefore,

ORDERED, That the motions for protective order filed by Delta be granted in accordance with Findings (8) and (9). It is, further,

ORDERED, That Delta's motion for a waiver of Rule 4901-1-24(F), O.A.C., be denied. It is, further,

ORDERED, That Delta's motion to extend the protective order with respect to the C-3 exhibits of its 2010 and 2008 applications is granted, in part, and denied, in part, in accordance with Findings (9) and (13). It is, further,

ORDERED, That the Commission's docketing division maintain, under seal, the unredacted exhibits C-3, C-4, and C-5 of Delta's 2012 renewal application, which were filed under seal in this docket on September 6 and 18, 2012, for a period of 24 months, ending on October 10, 2014. It is, further,

ORDERED, That the Commission's docketing division continue to maintain, under seal, the unredacted exhibit C-3 of Delta's 2010 renewal application, which was filed under seal in this docket on August 2, 2010, for a period of 24 months, ending on October 10, 2014. It is, further,

ORDERED, That, on November 2, 2012, the docketing division release into the public record exhibit C-3 of Delta's 2008 application, which was filed under seal in this docket on August 28, 2008. It is, further,

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

THE PUBLIC UTILITIES COMMISSION OF OHIO

s/Kerry Sheets

By: Kerry K. Sheets
Attorney Examiner

JRJ/sc

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in

Case No(s). 08-1037-GA-CRS

Summary: Attorney Examiner Entry granting a protective order. - electronically filed by Sandra Coffey on behalf of Kerry Sheets, Attorney Examiner, Public Utilities Commission of Ohio