

BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of U.S.)
Gas & Electric, Inc. for Certification to) Case No. 08-601-GA-CRS
Provide Competitive Retail Natural Gas)
Service in the State of Ohio.)

ENTRY

The attorney examiner finds:

- (1) On September 19, 2012, U.S. Gas & Electric, Inc. (USG&E) filed an application for renewal of Certificate No. 08-139(G)(2), which authorizes it to provide competitive retail natural gas services. The application was approved and, as a result, a renewal certificate, namely Certificate No. 08-139(G)(3), with an effective date of October 19, 2012, was issued to USG&E on October 18, 2012.
- (2) On September 14, 2012, as amended on September 19, 2012, and October 4, 2012, pursuant to Rule 4901-1-24, Ohio Administrative Code (O.A.C.), USG&E filed a motion for protective order requesting that certain financial information it considers confidential and that it filed, under seal, be kept under seal. More specifically, USG&E is seeking:
 - (a) Pursuant to Rule 4901-1-24(F), O.A.C., a protective order extending, for another 24-month period, the existing protective order covering exhibits C-3 (financial statements), C-4 (financial arrangements), and C-5 (forecasted financial statements) of USG&E's original certification application filed on May 16, 2008. All three of these exhibits were originally filed, in unredacted form, under seal, with USG&E's original certification application on May 16, 2008.
 - (b) Pursuant to Rule 4901-1-24(F), O.A.C., a protective order extending, for another 24-month period, the existing protective order covering exhibits C-3, C-4, C-5, and C-6 (credit rating) of USG&E's renewal

certification application filed on August 30, 2010. All four of these exhibits were filed, in unredacted form, under seal, on August 30, 2010, in this case.

- (c) Pursuant to Rule 4901-1-24(D), O.A.C., a protective order for a 24-month period, covering exhibits C-3, C-4, C-5, and C-6, filed, in unredacted form, under seal, on September 19, 2012, and October 4, 2012.
- (3) In support of its September 14, 2012, motion, as amended on September 19, 2012, and October 4, 2012, USG&E submits that each of the involved exhibits (whether submitted with USG&E's original certification application, its 2010 certification renewal application, or its 2012 certification renewal application) contain competitively sensitive and highly proprietary business information, which is not generally known or available to the general public. Therefore, USG&E requests that the information found in these exhibits be treated as confidential.
- (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*, 89 Ohio St.3d 396, 399, 732 N.E.2d 373 (2000).
- (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 USG&E’s September 14, 2012, motion, as amended on September 19, 2012, and October 4, 2012, 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 of USG&E’s May 16, 2008, certification application, exhibits C-3, C-4, and C-5 of USG&E’s August 30, 2010, certification renewal application, and in exhibits C-3, C-4, and C-5 of USG&E’s September 19, 2012, certificate renewal application constitutes trade secret information. Release of these documents 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 USG&E’s September 14, 2012, motion, as amended on September 19, 2012, and October 4, 2012, is reasonable with regard to each of the involved exhibits and, therefore, the motion should be granted.
- (8) The attorney examiner finds that the financial information contained in USG&E’s exhibit C-6, both as filed, under seal, on August 30, 2010, and also as filed, under seal, on September 19, 2012, does not constitute trade secret

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).

information. In each instance, the information set forth in exhibit C-6 is contained in a Dunn and Bradstreet credit report and, as such, is available to any subscriber of that service. Therefore, it is public information. Since the information is already available to the public, it cannot qualify as trade secret information and, thus, does not need to remain under seal. Accordingly, the attorney examiner finds that USG&E's motion for protective order should be denied with regard to the information filed in USG&E's exhibit C-6, both as filed, under seal, on August 30, 2010, and also as filed, under seal, on September 19, 2012. Consequently, the attorney examiner finds that the Commission's docketing division should, on January 25, 2013, publicly release the information filed, under seal, in exhibit C-6 of USG&E's August 30, 2010, certification renewal application, and filed, under seal, in exhibit C-6 of USG&E's September 19, 2012, certificate renewal application.

- (9) Further, the attorney examiner finds that, on September 19, 2012, USG&E filed, under seal, certain exhibits that it never addressed or made the subject of any motion for protective order, namely exhibits C-7, C-8, C-9, D-1, D-2, and D-3 of USG&E's September 19, 2012, certificate renewal application. USG&E has never formally sought protective treatment for these exhibits; therefore, no justification for affording them such treatment exists of record. Consequently, the attorney examiner finds that, although the exhibits were filed under seal on September 19, 2012, the Commission's docketing division should release them on January 25, 2013.
- (10) Rule 4901-1-24(D)(4), O.A.C., provides for protective orders relating to 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, confidential treatment shall be afforded to exhibits C-3, C-4, and C-5, of USG&E's original May 16, 2008, certification application, exhibits C-3, C-4, and C-5 of USG&E's August 30, 2010, certification

renewal application, and exhibits C-3, C-4, and C-5 of USG&E's September 19, 2012, certificate renewal application, for a period ending 24 months from the effective date of Certificate No. 08-139(G)(3), or until October 19, 2014. Until that date, the docketing division should maintain, under seal, the applicable exhibits C-3, C-4, and C-5 of USG&E's applications, which were filed on May 16, 2008, August 30, 2010, September 19, 2012, and October 4, 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 USG&E wishes to extend the confidential treatment granted by protective order issued by today's entry, 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 USG&E.

It is, therefore,

ORDERED, That USG&E's September 14, 2012, motion for protective order, as amended on September 19, 2012, and October 4, 2012, be granted, in part, in accordance with finding (7), and denied, in part, in accordance with finding (8). It is, further,

ORDERED, That, in accordance with finding (7), the Commission's docketing division maintain, under seal, the applicable unredacted exhibits C-3, C-4, and C-5 filed on May 16, 2008, August 30, 2010, September 19, 2012, and October 4, 2012, for a period of 24 months, ending on October 19, 2014. It is, further,

ORDERED, That, in accordance with finding (8), the Commission's docketing division shall, on January 25, 2013, publicly release the information contained in USG&E's exhibit C-6, which was filed, under seal, on August 30, 2010, and also as filed, under seal, on September 19, 2012. It is, further,

ORDERED, That, in accordance with finding (9), the Commission's docketing division shall, on January 25, 2013, publicly release USG&E's exhibits C-7, C-8, C-9, D-1, D-2, and D-3, which were filed, under seal, on September 19, 2012. It is, further,

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

THE PUBLIC UTILITIES COMMISSION OF OHIO

s/Daniel Fullin

By: Daniel E. Fullin
Attorney Examiner

JRJ/sc

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1/15/2013 3:31:33 PM

in

Case No(s). 08-0601-GA-CRS

Summary: Attorney Examiner Entry ruling on a motion for protective order. - electronically filed by Sandra Coffey on behalf of Daniel Fullin, Attorney Examiner, Public Utilities Commission of Ohio