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report) to ESPI's original application filed on December 22, 2011 which were the subject of a Motion For Protective Order filed on that same date that has not been ruled upon and which pursuant to Section 4901-1-24(E) have not been publicly disclosed.

These documents were clearly marked as confidential and were filed under seal, separate from the rest of ESPI's Certification Application. The reasons supporting this Motion are set forth in the attached Memorandum in Support.

Respectfully submitted,

ENERGY SERVICES PROVIDERS, INC.

By: 

Thomas H. Stewart (0059246)

BLANK ROME LLP

201 East Fifth Street, Suite 1700

Cincinnati, Ohio 45202

Telephone: (513) 362-8704

Facsimile: (513) 362-9793

Email: stewart@blankrome.com

MEMORANDUM IN SUPPORT

(1) Protective Order For Renewal Application Exhibits

Contemporaneously with this Motion for Protective Order, ESPI is filing its Renewal Application For Retail Generation Providers and Power Marketers. The Application contains all of the required information and materials in accordance with the Commission's Filing Instructions for Retail Generation Providers and Power Marketers. As part of the Renewal Application, the Commission requested information regarding ESPI'S corporate structure (Exhibit A-11), financial statements (Exhibit C-3), financial arrangements (Exhibit C-4), forecasted financial statements (Exhibit C-5), and credit rating (C-6). ESPI has submitted the requested information and exhibits under seal because the documents contain competitively sensitive and highly proprietary business and financial information, which require confidential treatment. ESPI's competitors would gain an unfair competitive advantage if the Exhibits were disclosed. ESPI therefore requests that the Commission maintain the confidentiality of these documents and information contained therein by entering a Protective Order.

Exhibit A-11 contains ESPI's corporate structure and ownership. This is information that ESPI does not release to the public and is not available to, but shielded from, the general public including ESPI's competitors. The release of this information would provide ESPI's competitors unfair valuable insight into ESPI and its inner workings. Exhibit A-11 contains confidential and proprietary information related to ESPI's business model and plans for its electricity marketing efforts. This confidential business information and plans contain strategic information of potentially great economic value to other providers in the Ohio marketplace who could use this information to disadvantage ESPI in the retail electricity marketplace. Revealing this information would give potential competitors important information about ESPI's current and

future business plans as well. Such information could be unfairly leveraged by ESPI's competitors in their planning and marketing to the detriment of ESPI. Exhibit A-11 meets the statutory test for protecting business information or plans that are confidential trade secrets and therefore should be protected from disclosure pursuant to Ohio law.

Exhibits C-3, C-4, C-5, and C-6 contain the financial statements, financial arrangements, forecasted financial statements, and credit information that is proprietary data and maintained in confidence. Public disclosure of this information would jeopardize ESPI's business position in negotiations with other parties and its ability to fairly compete. This information is not generally known by the public and is held in confidence in the normal course of business. The release of this information would provide ESPI's competitors unfair valuable insight into ESPI and its inner workings. Exhibits C-3, C-4 and C-5 contain the kind of proprietary, confidential financial information that the Commission routinely protects via protective orders. Exhibit C-6 contains credit information about ESPI which is not for use by the general public. ESPI uses its best efforts to keep this and similar trade secrets confidential and shielded from release to others. If not protected, these trade secrets could be used by competitors to determine ESPI's revenue, cash flow, credit agreements, contractual arrangements, and other similar information to obtain an unfair competitive advantage. Disclosure of such information now or in the next 24 months would unfairly damage ESPI in the marketplace and adversely affect ESPI's ability to compete effectively. The public has no cognizable interest in the disclosure of all or any of the trade secrets or confidential business information.

ESPI is not a publicly traded company and its financial and business records, including the information contained in Exhibits A-11, C-3, C-4, C-5, and C-6, are not publicly available nor known to the general public. Rather, ESPI maintains the information in these Exhibits in

strict confidence in the usual course of its business. The Exhibits contain competitively sensitive and highly proprietary business and financial information that, if disclosed, would put ESPI at an unfair competitive disadvantage. These Exhibits contain trade secrets of ESPI within the meaning of R.C. § 1333.61(D). The Ohio Supreme Court has held that the “state or federal law” exception to the public records statute, R.C. § 149.43, includes trade secrets. *State ex rel. Besser v. Ohio State University*, 89 Ohio St.3d 396, 399 (2000). Both R.C. § 4905.07 and § 4905.12 specifically incorporate the exceptions found in R.C. § 149.43.¹ Likewise, O.A.C. § 4901-1-24(D) permits the Commission to enter a protective order “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.” Thus, disclosure of trade secrets like the information contained in Exhibits A-11, C-3, C-4, C-5 & C-6 to ESPI’s Application is specifically prohibited under state law.

R.C. § 149.43 provides that the term “public records” excludes information which, under state or federal law, may not be released. This “state or federal law” exemption from disclosure covers trade secrets. *State ex rel. Besser v. Ohio State University* (2000), 89 Ohio St.3d 396, 399. OAC Rule 4901-1-24 permits the Commission to protect confidential information in a filing “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.”

Consistent with the purposes of Title 49 of Ohio Revised Code, R.C. § 4928.06(F) provides that an electric services company “shall provide the commission with such information, regarding a competitive retail electric service for this it is subject to certification, as the

¹ R.C. § 4905.07 and § 4905.12 provide that records in the possession of the Commission are public records but both begin with the caveat: “Except as provided in section 149.43 of the Revised Code and consistent with the purposes of Title [49] of the Revised Code . . .”

commission considers necessary to carry out this chapter . . . The Commission shall take measures as it deems necessary to **protect the confidentiality of any such information.**” (Emphasis added). The General Assembly clearly recognized the need to protect an applicant’s confidential information. The Ohio Administrative Code expressly provides that a protective order “may provide that . . . (7) A trade secret or other confidential research, development, commercial, or other information not be disclosed . . .” O.A.C. § 4901-1-24(A). Likewise, in hearings, the commission or an Attorney Examiner may “[p]revent public disclosure of trade secrets, proprietary business information, or confidential research, development or commercial materials or information.” O.A.C. § 4901-1-27(B)(7)e).

Ordering the information therein be maintained under seal is not inconsistent with Title 49 of the Ohio Revised Code. There is no legitimate purpose or public interest to be served by disclosing the strategic, confidential business and financial information to the general public including ESPI’s competitors or to any person other than the Attorney Examiner or appropriate Commission staff in exercising its review of the application. Finally, there is no reasonable manner to redact the information in Exhibits A-11, C-3, C-4, C-5, or C-6 under O.A.C. § 4901-1-24(D) without making the remaining document incomprehensible, so that the Exhibits should be sealed in their entirety by a protective order.

(2) Protective Order For Original Application Exhibits

ESPI filed its original Application for Certification on December 22, 2011. That same date, ESPI separately filed under seal Exhibits A-13 (corporate structure), B-4 (environmental disclosure), C-3 (financial statements), C-4 (financial arrangements), C-5 (forecasted financial statements), and C-6/C-7 (credit rating/credit report) and moved for a protective order under O.A.C. § 4901-1-24(D) that these exhibits containing confidential information remain under seal.

Pursuant to O.A.C. § 4901-1-24(E), the foregoing exhibits have not been included in the public record of this case pending a ruling upon the Motion For Protective Order. The docket of this case shows that this original Motion For Protective Order has not been ruled upon, which ESPI discovered in preparing its Renewal Application filed herewith. Therefore, there is not technically an existing protective order to extend under the provisions of O.A.C. § 4901-1-24(F) but ESPI submits that the information has been protected from disclosure and a protective order maintaining that protection for 24 months should be entered for the reasons set forth in the December 22, 2011 Motion For Protective Order, in section (1) above regarding the exhibits to the Renewal Application, and below.

Exhibit A-13 to the original application contained ESPI's corporate structure and Exhibit B-4 contained environmental disclosures. Exhibit C-3 contained financial statements from the previous two years. Exhibit C-4 contained ESPI's financial arrangements to conduct competitive retail natural gas service. Exhibit C-5 contained ESPI's 2-year forecast for balance sheet and income and cash flow statements. Exhibit C-6/C-7 contained Exhibit C-6 (and Exhibit C-7 which incorporates Exhibit C-6) contains credit information about ESPI and includes at the end of the document a statement that it is "[p]rovided under contract for the exclusive use of subscriber ENERGY SERVICES PROVIDERS, INC." which demonstrates that the information is not for use by the general public. The passage of another two years since these projections has not diminished the trade secret status of this business and financial information. Such information clearly falls within the statutory definition of "trade secret" as ". . . business information or plans [and] financial information . . . that . . . derives independent economic value . . . from not being generally known to . . . other persons who can obtain economic value from its disclosure or use [and] is the subject of efforts that are reasonable under the circumstances to

maintain its secrecy.” R.C. § 1333.61(D). This statutory definition clearly evidences this state’s policy of protecting trade secrets like the information in Exhibits A-13, B-4, C-3, C-4, C-5, and C-6/C-7 to ESPI’s original application. Further, this is the state law that prohibits release of records, which is a specified exception to the definition of “public record” in R.C. ¶ 149.43. Indeed, the General Assembly in 1996 enacted R.C. § 4901.07 and § 4901.12 which govern the Commission’s duties regarding public records and which specifically incorporate the exceptions to disclosure in R.C. § 149.43.

Just as in 2012 when its original application was filed, ESPI continues today to use its best efforts to keep this, and similar, trade secrets confidential and shielded from release to others. The trade secrets and confidential information contained in Exhibits A-13, B-4, C-3, C-4, C-5, and C-6/C-7 remain extremely sensitive information today. If not protected, those trade secrets could be used by competitors to determine ESPI’s internal corporate structure, environmental disclosures, previous and projected (therefore, likely current) balance sheets, revenue, cash flow, credit agreements, contractual arrangements, and other similar information to obtain an unfair competitive advantage. Thus, the information has independent economic value. Disclosure of such information now or in the next 24 months would unfairly damage ESPI in the marketplace and adversely affect ESPI’s ability to compete effectively. The public has no more interest today in the disclosure of all or any of the trade secrets than two years ago.

Conclusion


For all of the foregoing reasons, ESPI respectfully requests that the Commission enter a Protective Order

(1) sealing for 24 months Exhibits A-11, C-3, C-4, C-5, and C-6 to ESPI's Renewal Application For Retail Generation Providers and Power Marketers filed contemporaneously herewith; and

(2) sealing for 24 months Exhibits A-13, B-4, C-3, C-4, C-5, and C-6/C-7 to ESPI's Certification Application For Retail General Providers and Power Marketers filed on December 22, 2011.

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