

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Application of Direct)
Energy Services, LLC for Certification as a)
Retail Natural Gas Supplier.) Case No. 02-1829-GA-CRS

MOTION FOR PROTECTIVE ORDER

Pursuant to the provisions of Rule 4901-1-24(D) of the Ohio Administrative Code ("O.A.C."), Direct Energy Services, LLC ("DES, LLC") respectfully moves the Public Utilities Commission of Ohio ("Commission") to issue a protective order to protect the confidentiality of and prohibit the disclosure of certain documents filed simultaneously with this Motion in the above-captioned docket. The documents in Exhibits C-4 Financial Arrangements ("Exhibit C-4") and C-5 Forecasted Financial Statements ("Exhibit C-5"), contain competitively sensitive and highly proprietary business financial information comprising of trade secrets. These documents have been clearly marked as confidential and are hereby filed under seal, separate from the remainder of the materials that comprise DES, LLC's Renewal Certification Application filed with this Motion for Protective Order.

The reasons underlying this Motion are detailed in the attached Memorandum in Support. Consistent with the requirements of the above cited Rule, three (3) unredacted copies of the exhibits are submitted under seal.

Respectfully submitted,

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**MEMORANDUM IN SUPPORT OF
MOTION FOR PROTECTIVE ORDER**

DES, LLC filed its Renewal Certification Application for Competitive Retail Natural Gas Suppliers (“CRNGS”) on August 19, 2014. The Application contains information and materials in accordance with the Commission's Renewal Certification Filing Instructions for Competitive Retail Natural Gas Suppliers and Rule 4901-1-24, O.A.C. As part of the Application materials, the Commission requested information regarding DES, LLC’s financial arrangements (Exhibit C-4) and forecasted financial statements (Exhibit C-5).

DES, LLC submitted the requested information under seal because the information and documents contain competitively sensitive and highly proprietary business financial information, which require confidential treatment. Consequently, DES, LLC requests that the Commission maintain the confidential nature of these documents and the information contained therein, and protects the documents from public disclosure.

Rule 4901-1-24(D), O.A.C., provides for the issuance of an order that is necessary to protect the confidentiality of information contained in documents filed at the Commission to the extent that state and federal law prohibit the release of such information and where non-disclosure of the information is not inconsistent with the purposes of Title 49 of the Revised Code (“R.C.”). State law recognizes the need to protect information that is confidential in nature, as is the information contained in Exhibits C-4 and C-5. Section 4929.23(A), R.C., specifically permits the Commission to grant confidentiality to competitive information.¹

² Section 4929.23(A), R.C., provides: “A retail natural gas supplier or governmental aggregator subject to certification under section 4929.20 of the Revised Code shall provide the public utilities commission with such information, regarding a competitive retail natural gas service for which it is subject to certification, as the commission considers necessary to carry out sections 4929.20 to 4929.24 of the Revised Code. The commission shall take such measures as it considers necessary to protect the confidentiality of any such information.”

Sections 4901.12 and 4905.07, R.C., facilitate the protection of trade secrets in the Commission's possession.² Sections 4901.12 and 4905.07, R.C., reference Section 149.43, R.C., and therefore incorporate the provision that exempts from the public record information and records of which the release is prohibited by law.³ State law prohibits the release of information meeting the definition of a trade secret. Additionally, non-disclosure of the information will not impair the purposes of Title 49 as the Commission and its Staff will have full access to the requested information in order to complete their review process.

The documents and information contained in Exhibits C-4 and C-5 are comprised of competitively sensitive and highly proprietary business financial information falling within the statutory characterization of a trade secret as defined by Section 1333.61(D), R.C. The definition of trade secret contained in Section 1333.61(D), R.C., is as follows:

"Trade secret" means information, including the whole or any portion or phase of any scientific or technical information, design, process, procedure, formula, pattern, compilation, program, device, method, technique, or improvement, or any business information or plans, financial information, or listing of names, addresses, or telephone numbers, 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.

³ Section 4901.12, R.C., provides: "Except as otherwise provided in section 149.43 of the Revised Code and as consistent with the purposes of Title XLIX [49] of the Revised Code, all proceedings of the public utilities commission and all documents and records in its possession are public records."

Section 4905.07, R.C., provides: "Except as provided in section 149.43 of the Revised Code and as consistent with the purposes of Title XLIX [49] of the Revised Code, all facts and information in the possession of the public utilities commission shall be public, and all reports, records, files, books, accounts, papers, and memorandums of every nature in its possession shall be open to inspection by interested parties or their attorneys."

⁴ Section 149.43(A)(1)(v), R.C., provides in part: "'Public record' does not mean records the release of which is prohibited by state or federal law."

Section 1333.61(D), R.C. (emphasis added). In State ex rel The Plain Dealer the Ohio Dept. of Ins. (1997), 80 Ohio St. 3d 513, the Ohio Supreme Court adopted a six factor test to analyze whether information is a trade secret under the statute:

(1) The extent to which the information is known outside the business, (2) the extent to which it is known to those inside the business, i.e., by the employees, (3) the precautions taken by the holder of the trade secret to guard the secrecy of the information, (4) the savings effected and the value to the holder in having the information as against competitors, (5) the amount of effort or money expended in obtaining and developing the information, and (6) the amount of time and expense it would take for others to acquire and duplicate the information.

Id. at 524-525 (quoting Pyromatics, Inc. v. Petruziello, 7 Ohio App. 3d 131, 134-135 (Cuyahoga County 1983)).

After applying these factors to the information sought to be protected, it is clear that financial arrangements and forecasted financial statements contain proprietary data and are confidential as trade secrets. Public disclosure of this information would jeopardize DES, LLC's business position in negotiations with other parties and its ability to compete. This information has independent economic value to DES, LLC from not being known by its competitors.

DES, LLC also asserts that this information is not generally known by the public and is held in confidence in the normal course of business. Additionally, there is great value to DES, LLC in having this information to itself and not for consumption by its competitors. Direct Energy expends substantial resources and effort to obtain and develop the information in Exhibits C-4 and C-5 and it would take DES, LLC's competitors substantial amounts of time and expense for others to acquire an duplicate the information.

Therefore, DES, LLC reasonably requests that the identified financial information contained in Exhibits C-4 and C-5 in this certificate renewal Application be deemed to contain trade secrets, and thus, be treated as confidential by this Commission and its Staff.

Courts of other jurisdictions have held that not only does a public utilities commission have the authority to protect the trade secrets of the companies subject to its jurisdiction, the trade secrets statute creates a duty to protect DES. New York Tel. Co. v. Pub. Serv. Comm. N.Y., 56 N.Y. 2d 213 (1982). Indeed, for the Commission to do otherwise would be to negate the protections the Ohio General Assembly has granted to all businesses, including public utilities, and now the new entrants who will be providing power through the Uniform Trade Secrets Act. This Commission has previously carried out its obligations in this regard in numerous proceedings, *including previous requests in this docket*. See, In the Matter of the Application of Direct Energy Services, LLC for Certification as a Retail Natural Gas Supplier, Case No. 02-1829-GA-CRS, Entry at 2-3 (October 16, 2012). Granting DES's Motion would be consistent with this precedent and continue the solid public policy embraced by the Commission's precedent in the past protecting this proprietary and confidential information.

WHEREFORE, for the above reasons DES, LLC requests the Commission grant its motion for a protective order and protect Exhibits C-4 and C-5.

Respectfully submitted,

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Summary: Motion for Protective Order electronically filed by JOSEPH CLARK on behalf of Direct Energy Services, LLC