

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of Complaint of Direct)	
Energy Business, LLC)	
)	
Complainant,)	
)	Case No. 14-1277-EL-CSS
v.)	
)	
Duke Energy Ohio, Inc.)	
)	
Respondent.)	

MOTION FOR PROTECTIVE ORDER

Pursuant to Rule 4901-1-24(D) of the Ohio Administrative Code (“O.A.C.”), Direct Energy Business (“DEB”) moves for a protective order to keep certain confidential and proprietary information contained in the Direct Testimony of Robert Kennelly confidential and not part of the public record. The reasons underlying this motion are detailed in the attached Memorandum in Support. Consistent with the requirements of the above cited Rule, two (2) unredacted copies of the confidential materials are submitted under seal.

Respectfully submitted,

/s/ Gerit F. Hull
Gerit F. Hull (0067333) (Counsel of Record)
Eckert Seamans Cherin & Mellott, LLC
1717 Pennsylvania Avenue N.W. - 12th Floor
Washington, DC 20006
(202) 659-6657
ghull@eckertseamans.com

April 14, 2015

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

DEB requests that the information it designated as confidential in the Direct Testimony of Robert Kennelly be granted protective treatment by the Commission. The information for which protection is sought covers financial and information of DEB as well as load information for SunCoke, a DEB customer (hereinafter “Financial and Load Data”). Such information, if released to the public, would harm DEB as well as its customer, SunCoke, by providing its respective competitors proprietary information in what is designed by statute to now be a competitive service.

Rule 4901-1-24(D) of the Ohio Administrative Code provides that the Commission or certain designated employees may issue an order which is necessary to protect the confidentiality of information contained in documents filed with the Commission’s Docketing Division to the extent that state or federal law prohibits the release of the information and where non-disclosure of the information is not inconsistent with the purposes of Title 49 of the Revised Code. State law recognizes the need to protect certain types of information which are the subject of this motion. The non-disclosure of the information will not impair the purposes of Title 49. The Commission and its Staff have full access to the information in order to fulfill its statutory obligations. No purpose of Title 49 would be served by the public disclosure of the information.

The need to protect the designated information from public disclosure is clear, and there is compelling legal authority supporting the requested protective order. While the Commission has often expressed its preference for open proceedings, the Commission also long ago recognized its statutory obligations with regard to trade secrets:

The Commission is of the opinion that the “public records” statute must also be read in pari materia with Section 1333.31, Revised

Code (“trade secrets” statute). The latter statute must be interpreted as evincing the recognition, on the part of the General Assembly, of the value of trade secret information.

In re: General Telephone Co., Case No. 81-383-TP-AIR (Entry, February 17, 1982.) Likewise, the Commission has facilitated the protection of trade secrets in its rules (O.A.C. § 4901-1-24(A)(7)).

The definition of a “trade secret” is set forth in the Uniform Trade Secrets Act:

“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.

R.C. § 1333.61(D). This definition clearly reflects the state policy favoring the protection of trade secrets such as the projections which are the subject of this Motion.

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 a protective order should be granted.

The Financial and Load Data contains confidential and proprietary information. Such sensitive information is generally not disclosed. 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. Its disclosure could give competitors an advantage that would hinder DEB and SunCoke's ability to compete by informing respective competitors of DEB and SunCoke financial and load data that could be used by such competitors to benchmark their own performance or edge out DEB or SunCoke in their respective marketplaces.

The Financial and Load Data is not publicly available and is the subject of reasonable efforts to maintain its secrecy. The information is not known outside DEB or SunCoke and only available to those employees who need this information to perform their job functions. DEB and SunCoke expend effort as well as money in obtaining and developing the information and it would take significant amounts of time and expense to acquire and duplicate the information about DEB as well as SunCoke.

Finally, the Commission routinely grants similar protective treatment of Financial and Load Data. DEB prepared a public version of the testimonies that redact from the publicly-filed versions only the Financial and Load Data that is confidential and trade secret information. Direct Energy endeavored in the public versions to leave as much information in the public record as it could without compromising or revealing the confidential and trade secret nature of

the Financial and Load Data. Granting DEB's Motion would be consistent with Commission precedent and continue the long-standing and solid public policy embraced by the Commission.

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 DEB and SunCoke. 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. See, e.g., Elyria Tel. Co., Case No. 89-965-TP-AEC (Finding and Order, September 21, 1989); Ohio Bell Tel. Co., Case No. 89-718-TP-ATA (Finding and Order, May 31, 1989); Columbia Gas of Ohio, Inc., Case No. 90-17-GA-GCR (Entry, August 17, 1990).

WHEREFORE, for the above reasons DEB requests the Commission grant its motion for a protective order of the Financial and Load Data of DEB and SunCoke and maintain the Financial and Load Data under seal.

Respectfully submitted,

/s/ Gerit F. Hull
Gerit F. Hull (0067333) (Counsel of Record)
Eckert Seamans Cherin & Mellott, LLC
1717 Pennsylvania Avenue N.W. - 12th Floor
Washington, DC 20006
(202) 659-6657
ghull@eckertseamans.com

April 14, 2015

CERTIFICATE OF SERVICE

The Public Utilities Commission of Ohio's e-filing system will electronically serve notice of the filing of this document on the parties referenced on the service list of the docket card who have electronically subscribed to the case. In addition, the undersigned hereby certifies that a copy of the foregoing document is also being served (via electronic mail) on the 14th day of April 2015 upon the persons listed below.

/s/ Gerit Hull
Gerit Hull

Amy B. Spiller, Deputy General Counsel
Jeanne W. Kingery, Associate General Counsel
Duke Energy Business Services, Inc.
139 Fourth Street, 1303-Main
Cincinnati, OH 45202

This foregoing document was electronically filed with the Public Utilities

Commission of Ohio Docketing Information System on

4/14/2015 5:36:29 PM

in

Case No(s). 14-1277-EL-CSS

Summary: Motion for Protective Order electronically filed by Mr. Gerit F. Hull on behalf of Direct Energy Business, LLC