

BEFORE THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Investigative Audit of :
Northeast Ohio Natural Gas : Case No. 14-205-GA-COI
Corporation, Orwell Natural Gas :
Company, and Brainard Gas :
Corporation.

**MOTION FOR PROTECTIVE ORDER AND EXTENSION OF TIME TO SUBMIT
PROPOSED REDACTIONS OF NORTHEAST OHIO NATURAL GAS
CORPORATION, ORWELL NATURAL GAS COMPANY,
AND BRAINARD GAS CORPORATION**

Pursuant to Ohio Administrative Code ("O.A.C.") Section 4901-1-24(D) and the Commission's May 21, 2014 Entry in this case, Northeast Ohio Natural Gas Corporation ("Northeast"), Orwell Natural Gas Company ("Orwell"), and Brainard Gas Corporation ("Brainard")(collectively referred to as the "Companies") respectfully move for an order protecting from disclosure private, confidential, and trade secret information contained in the unredacted version the Investigation Report submitted by Rehmann Corporate Investigative Services, LLC ("Rehmann" or the "Auditor"). The Companies also request three (3) business days to submit proposed redactions to the Investigative Report, which will indicate the specific portions of the Investigative Report that should be protected from disclosure. The reasons underlying this motion are fully set forth in the attached Memorandum in Support.

Respectfully submitted,

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MEMORANDUM IN SUPPORT

I. Background

On November 13, 2013, the Commission issued an Opinion and Order *in In re Northeast Ohio Natural Gas Corp. and Orwell Natural Gas Company*, Case Nos. 12-209-GA-GCR et al (“2012 GCR Order”). In the 2012 GCR Order, the Commission stated that an investigative audit of the Companies should be performed. 2012 GCR Order at 3. On April 2, 2014, the Commission established this case (Case No. 14-205-GA-COI) for the purpose initiating an investigative audit into the Companies. The Commission directed Staff to issue a Request for Proposal to potential auditors and ultimately selected Rehmann Corporate Investigative Services, LLC (“Rehmann” or the “Auditor”) as the auditor to perform the investigative audit.

In its May 21, 2014 Entry, the Commission established a procedure for protecting confidential information contained in the Investigative Report if the Commission were to receive a public records request regarding the report:

Once disclosure is permitted by R.C. 4901.16, the following process applies to the release of any document or information marked as confidential. Three days' prior notice of intent to disclose shall be provided to the party claiming confidentiality. Three days after such notice, Staff or Rehmann may disclose or otherwise make use of such documents or information for any lawful purpose, unless the Commission receives a request for a protective order

pertaining to such documents or information within the three-day notice period. The three-day notice period will be computed according to Ohio Adm. Code 4901-1-07.

May 21, 2014 Entry, at pg. 3.

On May 26, 2015, a Hearing Examiner notified the Companies that the Commission received a public records request for an unredacted version of the Investigative Report, and that the Companies had until the close of business on May 29, 2015 to file a motion for protective order before the unredacted version was released to the public. The Companies hereby submit this motion for protective order to pursuant to the Commission's May 21, 2014 Entry.

II. Law & Argument

A. An exception to disclosure of public records under the Ohio Public Records Act is "trade secret" information.

One of the exemptions under the Ohio Public Records Act (the "Act") is information that "the release of which is prohibited by state or federal law." R.C. 149.43(A)(1)(v). "Trade secret" information has commonly been viewed as fitting within this exemption. The Commission's Rules allow for protective treatment of certain trade secrets filed at the Commission in order to prevent disclosure of such information.

O.A.C. 4901-1-24(D) states in part:

"(D) Upon motion of any party or person with regard to the filing of a document with the commission's docketing division relative to a case before the commission, the commission, the legal director, the deputy legal director, or an attorney examiner may issue any order which is necessary to protect the confidentiality of information contained in the document, to the extent that state or federal law prohibits release of the information, including where the information is deemed by the commission, the legal director, the deputy legal director, or the attorney examiner to constitute a trade secret under Ohio law, and where nondisclosure of the information is not

inconsistent with the purposes of Title 49 of the Revised Code. Any order issued under this paragraph shall minimize the amount of information protected from public disclosure.”

(emphasis added).

Under R.C. 1333.61(D), “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.”

Expounding upon the definition of “trade secret,” the Supreme Court of Ohio has delineated factors to be considered when analyzing a trade secret claim:

(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 of others to acquire and duplicate information.

State ex. rel. The Plain Dealer v. Ohio Dept. of Ins., 80 Ohio St. 3d 513, 687 N.E.2d 661 (1998).

In accordance with the criteria set forth above, state law prohibits the release of the trade secret information.

B. A number of the documents contain “trade secrets” that should not be released to the public.

There are various sources of “trade secret” information contained in the Investigative Report. A number of the exhibits contain customer account numbers that the Companies have with gas marketers. These account numbers can be used to access the Companies’ account information and access information regarding the Companies’ gas purchasing history with particular suppliers. If these account numbers are disclosed, a third-party could potentially use this information to gain unauthorized access to the Companies’ sensitive business information.

One of the exhibits of the Report is a document that outlines the Companies’ natural gas procurement procedures and strategies. This document was created based upon years of gas purchasing experience, and details the Companies’ on-going methodology for procuring gas. If this information is disclosed, the Companies would be at a competitive disadvantage because the Companies’ natural procurement strategies would be in the public domain.

Some of the exhibits also contain copies of internal policies and procedures, which the Companies have expended time and resources to develop. These documents are not shared with the public. If these internal procedures were to be released to the public and adopted by another party, this would be unfair to the Companies because of time and effort the Companies spent on developing these internal procedures. In addition, some of these exhibits contain customer usage information for commercial customers. The Commission regularly protects against public disclosure of this type of customer usage information.

The Commission should issue a protective order to prevent the disclosure of this trade secret information. This trade secret information is scattered throughout the

exhibits to the Investigative Report in various places. Therefore, the Companies request more time to redact this specific information, which will assist the Commission in determining whether to provide the documents confidential treatment.

C. Some of the exhibits contain “personal information” that should be protected from public disclosure under R.C. 149.45(C)(1).

In addition to protecting against the disclosure of the Companies’ trade secrets, the Commission should not disclose any of the “personal information” of the Companies. Some of the documents contain checking account numbers for the Companies. This is “personal information” protected from disclosure under R.C. 149.45(C)(1). R.C. 149.45(A)(1)(d) specifically defines “personal information” as an “individual’s checking account number” or “credit card number.” There are documents in the Investigative Report that contain checking account numbers or credit card numbers. And, as discussed above, some of these documents contain the Companies’ account numbers with gas suppliers. These account numbers with gas suppliers can be just as sensitive as social security numbers or checking account numbers, and could be used by an individual to access the private business information of the Companies. The Commission should allow the Companies an opportunity to redact all of this personal information from the exhibits to the Investigative Report.

D. The Commission should not disclose the names of witnesses that were interviewed by the Auditor to protect those individuals from harassment, intimidation, or retaliation.

The Investigative Report contains information that was derived through employee interviews. Some of the allegations made by these employees, if shown to be true, could be considered damaging for individuals that were engaged in the alleged

misconduct. Some of these employees that were interviewed by the Auditor are still employed with the Companies, while others are not. Before the Investigative Report was published, the Companies requested that the names of the interviewees be redacted to protect these individuals that decided to cooperate with Auditor. The Auditor agreed to redact these individuals' names, and noted in its report that "**publication of names and information may subject interviewees to possible adverse action or unwanted scrutiny.**" Investigative Report at 31.

The Commission should grant the Companies' motion for protective order with respect to those portions of the Investigative Report that contain the names of interviewees to protect these individuals from "possible adverse action or unwanted scrutiny."

1. *The names of private citizens that were interviewed during the investigation are not considered "public records."*

The Supreme Court of Ohio has held that names of private individuals that happen to be in the possession of a public agency do not automatically constitute a "public record." *State ex rel. McCleary v. Roberts*, 88 Ohio St. 3d 365, 370, 725 N.E.2d 1144 (2000). In *McCleary*, the Court determined that the names of private citizens did not constitute "public records" because the names of these citizens did not "document the organization, functions, policies, decisions, procedures, operations, or other activities of the office." *Id.* The Court indicated that the individuals were not employees of the agency and their names were not contained in a personnel file. *Id.* The Court found that disclosure of the individuals' names, standing alone, did nothing to document any aspect of the public agency's operations. *Id.* at 368. See also *State ex rel. Beacon Journal Publ'g Co. v. Bond*, 2002-Ohio-7117, ¶ 11, 98 Ohio St. 3d 146, 149, 781 N.E.2d

180, 186 (The Court held the names of private citizens were not “records” under the Act because the names did not document the public agency’s performance of its statutory duty.).

The names of the individuals interviewed by the Auditor do not document any of the activities of the Commission. The names of these individuals do not document any of the activities of the Companies. The only information that is arguably relevant regarding these individuals is the information they shared with the Auditor regarding the alleged conduct of the Companies’ prior management, which is already publicly available. Disclosure of these individuals’ names would not further the purpose of the Act, and will not help enlighten anyone regarding the Commission’s or the Companies’ performance of their duties. The Commission should not disclose the list of individuals’ names because this information does not constitute a “public record.”

2. *The names of the interviewees should not be disclosed because this information is exempt under R.C. 149.43(A)(1)(v).*

Even if the Commission decides that the interviewees’ names constitute a “public record”, the information is exempt under R.C. 149.43(A)(1)(v) because disclosing this information will violate these individuals privacy rights. In *McCleary*, the court held that certain private information could be protected even if the information constituted a “public record.” The Court determined that the public agency was under no obligation to release the names of children due to the “unacceptable risk” that the children could be victimized if their names were released to the public. See also *State ex rel. Keller v. Cox*, 85 Ohio St. 3d 279, 282, 707 N.E.2d 931 (1996) (The Court determined that personal information of police officers, such as their names and addresses, should not be released because the information might be “use[d] the information to achieve

nefarious ends.”). The Supreme Court of Ohio has also taken steps to protect individuals’ privacy by recognizing a privacy exemption for social security numbers. *State ex rel. Beacon Journal Publ’g Co. v. Akron*, 70 Ohio St. 3d 605, 612, 640 N.E.2d 164 (1994)(“We find today that the high potential for fraud and victimization caused by the unchecked release of city employee SSNs outweighs the minimal information about governmental processes gained through the release of the SSNs.”).

The unredacted version of the Investigative Report contains the names of employees that provided information to the Auditor. To protect the employees that provided information to the Auditor, the Companies specifically requested that these individuals’ names be removed from the public version of the Investigative Report. There is no value in the disclosure of these individuals’ names. There is, however, a substantial amount of risk associated with disclosure of this information. These individuals may be harassed or intimidated for providing information to the Auditor. If this would occur, these individuals may be less likely to cooperate in this proceeding in the future. In addition, such harassment may deter individuals from cooperating in future Commission investigations. Considering the negative consequences of disclosure, it is critical that the Commission issue a protective order protecting disclosure of the interviewees’ names.

E. The Companies request that the Commission provide the Companies three (3) business days to submit proposed redactions to the Investigative Report.

The Companies request that the Commission provide the Companies three (3) business days to submit proposed redactions to the Investigative Report. There are a substantial number of exhibits to Investigative Report that are marked “confidential.”

The Companies are not seeking protective treatment for the majority of these documents. However, the Companies need to make minor redactions to a number of these documents. Although the Companies need more time to complete these redactions, the vast majority of information in the exhibits will be public. The Companies intend to be conservative while redacting this information so that only those portions of the Investigative Report which are truly confidential will be redacted. This will not substantially delay the release of the Investigative Report, and the Companies are confident that the majority of the information requested will be released in a reasonable period of time.

III. Conclusion

Based on the foregoing, the Companies request the Commission (1) provide the Companies three days to submit a redacted version of the Investigative Report and (2) issue an order protecting the information designated by the Companies from public disclosure after reviewing the proposed redactions.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of foregoing was served this 29th day of May, 2015 by electronic mail upon the following:

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Summary: Motion Motion for protective order electronically filed by Mr. Devin D. Parram on behalf of Northeast Ohio and Brainard Gas and Orwell Natural Gas