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BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

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In the Matter of the Certification Application)
- Competitive Retail Natural Gas Brokers /) Case No. 15-1034-GA-AGG
Aggregators of Black Hawk Resources)
Limited)

MOTION FOR A PROTECTIVE ORDER

Black Hawk Resources Limited, by and through its undersigned counsel, and pursuant to Sections 4901-1-24(D) of the Commission's rules (O.A.C. § 4901-1-24(D)) moves for a protective order keeping confidential the designated confidential information included in its application filed in the above-referenced case. The reasons underlying this Motion are detailed in the attached Memorandum in Support. Consistent with the requirements of Section 4901-1-24(D)(2) of the Commission's rules, three (3) unredacted copies of the confidential information which is the subject of this Motion have been filed under seal.

Respectfully submitted,


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

Black Hawk Resources Limited, a privately held company, requests that certain information described below be considered as confidential and be protected from public disclosure. Division (D) of Section 4901-1-24 of the Commission's rules 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 Ohio Revised Code. As set forth herein, the information described below represents confidential commercial information and, therefore, should be protected from public disclosure.

The confidential commercial information consists of: (i) Black Hawk Resources Limited's financial statements from the past two (2) years; (ii) Black Hawk Resources Limited's forecasted financial statement; (iii) Black Hawk Resources Limited's credit rating; and (iv) Black Hawk Resources Limited's credit report.

Non-disclosure of the identified confidential commercial information will not impair the purpose of Title 49. The Commission and its staff have full access to the information via the unredacted copies of the confidential commercial information being filed under seal concurrently with this Motion. Moreover, no purpose of Title 49 would be served by public disclosure of the identified confidential commercial information.

The need to protect the designated information from public disclosure is clear, and there is compelling legal authority supporting the requested protective order. To that end, Ohio Rule

of Civil Procedure 26(C) mirrors the protections found in O.A.C. § 4901-1-24(D). Civ.R. 26(C) states that a trial court may limit discovery through the issuance of protective orders, including an order “that a trade secret or other confidential research, development, or **commercial information** not be disclosed” (emphasis added). Thus, like the Commission’s rules, the civil rules acknowledge that certain information should not be disclosed in discovery or should be disclosed only in a limited manner.

Further, 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 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 “trade secret” is set forth in Ohio Revised Code 1333.61(D) (emphasis added):

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.

This definition clearly reflects the state policy favoring the protection of trade secrets such as the confidential commercial information which is the subject of this Motion.

In 1996, the Ohio General Assembly amended R.C. §§ 4901.12 and 4905.07 in order to facilitate the protection of trade secrets in the Commission's possession. The General Assembly carved out an exception to the general rule in favor of the public disclosure of information in the Commission's possession. By referencing R.C. § 149.43, the Commission-specific statutes now incorporate the provision of that statute that excepts from the definition of "public record" records the release of which is prohibited by state or federal law. R.C. § 149.43(A)(1). In turn, state law prohibits the release of information meeting the definition of a trade secret. R.C. §§ 1333.61(D) and 1333.62.

The amended statutes also reference the purpose of Title 49 of the Revised Code. The protection of trade secret information from public disclosure is consistent with the purposes of Title 49 because the Commission and its staff have access to unredacted copies of the confidential commercial information being filed under seal concurrently with this Motion. Accordingly, the protection of confidential commercial trade secret information as requested herein will not impair the Commission's regulatory responsibilities and obligations.

Ohio courts have long-recognized the factors for analyzing whether certain information constitutes a trade secret:

- (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.

State ex rel. Besser v. Ohio State Univ., 89 Ohio St.3d 396, 399-400, 2000-Ohio-207, 732 N.E.2d 373, quoting *State ex rel. Plain Dealer v. Ohio Dept. of Ins.*, 80 Ohio St.3d 513, 524-525, 1997-Ohio-75, 687 N.E.2d 661, closely paraphrasing 4 Restatement of the Law, Torts, Section 757, comment b (1939).

For all of the commercial information which is the subject of this Motion, Black Hawk Resources Limited considers – and has treated – the commercial information as a trade secret. In the ordinary course of business of Black Hawk Resources Limited, this information is treated confidentially by Black Hawk Resources Limited’s employees, and is not publicly disclosed. Further, in the event of discovery, commercial information of this type would only be provided pursuant to a protective order.

For the foregoing reasons, Black Hawk Resources Limited requests that the designated commercial information be protected from public disclosure.

Respectfully submitted,



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