

BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application to)
Modify, in Accordance with R.C.)
4929.08, the Exemption Granted to The) Case No. 12-1842-GA-EXM
East Ohio Gas Company d/b/a)
Dominion East Ohio in Case No. 07-)
1224-GA-EXM.)

ENTRY

The attorney examiner finds:

- (1) The East Ohio Gas Company d/b/a Dominion East Ohio (DEO) is a natural gas company as defined by R.C. 4905.03, and a public utility as defined by R.C. 4905.02 and, as such, is subject to the jurisdiction of the Commission, pursuant to R.C. 4905.04, 4905.05, and 4905.06.
- (2) On April 8, 2005, DEO filed an application requesting an exemption, pursuant to R.C. 4929.04, and seeking approval of phase one of its plan to exit the merchant function. *In re The East Ohio Gas Co. d/b/a Dominion East Ohio*, Case No. 05-474-GA-ATA (*DEO Phase 1 Case*). By Opinion and Order issued on May 26, 2006, the Commission approved DEO's application, as modified by the stipulation filed in the *DEO Phase 1 Case*, to undertake phase one of its proposal to test alternative, market-based pricing of commodity sales.
- (3) By Opinion and Order issued on June 18, 2008, the Commission authorized DEO to implement phase two of its plan to exit the merchant function, in which DEO implemented a standard choice offer, wherein suppliers bid for the right to supply gas in tranches to choice-eligible customers at a retail level. *In re The East Ohio Gas Co. d/b/a Dominion East Ohio*, Case No. 07-1224-GA-EXM (*DEO Phase 2 Case*).
- (4) On June 15, 2012, in the above-captioned case, a joint motion to modify the Opinion and Order issued in the DEO Phase 2 Case, pursuant to R.C. 4929.08, was filed by DEO and the Ohio Gas Marketers Group (OGMG). Motions to intervene

filed by Ohio Partners for Affordable Energy (OPAE), the Ohio Consumers' Counsel (OCC), and the Retail Energy Supply Association (RESA) were granted by the attorney examiner.

- (5) A stipulation and recommendation (Stipulation) signed by DEO, OCC, and OGMG was also filed on June 15, 2012.
- (6) On January 9, 2013, the Commission issued its Opinion and Order in this case granting the June 15, 2012 joint motion to modify the exemption Order in the *DEO Phase 2 Case*, and adopting the Stipulation entered into between DEO, OCC, and OGMG. In its Opinion and Order, the Commission directed DEO to provide Staff certain information recommended by Staff, OCC, OGMG, and RESA, so that all parties, and the Commission, could become better informed regarding the effect of DEO's exit on competition and customers.
- (7) OPAE and DEO filed applications for rehearing of the Commission's January 9, 2013 Order, on January 25, 2013, and February 5, 2013, respectively.
- (8) On March 6, 2013, the Commission issued an Entry on Rehearing denying the January 25, 2013 application for rehearing filed by OPAE and granting the February 5, 2013 application for rehearing filed by DEO. The Commission clarified the obligations of both DEO and suppliers providing competitive retail natural gas service (CRNGS) in DEO's service territory. Specifically, the Commission found that both DEO and suppliers would be required to provide the necessary information to Staff so that a comprehensive study of DEO's nonresidential exit could occur. Further, the Commission explained its expectation that DEO work with Staff and other stakeholders to determine what information needs to be provided on a continual basis and to provide any requested information to Staff. The Commission also expressed its expectation that it receive the same cooperation from suppliers regarding the collection of this information. However, the Commission again recognized that some of the information provided may be confidential and proprietary and, therefore, the Commission stated that the information would be given appropriate treatment.

- (9) On April 5, 2013, OGMG and RESA filed an application for rehearing of the Commission's March 6, 2013 Entry on Rehearing. The parties asserted that the Commission erred in not finding that all information sought by Staff must be afforded confidential treatment, noting that the disaggregated information from suppliers contained information that, given its proprietary nature, qualified as trade secrets. The parties requested the Commission determine that all information provided to Staff be afforded confidential treatment in perpetuity, similar to the treatment afforded the market monitoring information received by Staff pursuant to Ohio Adm.Code 4901:1-25-02(A)(5)(b).
- (10) By Entry on Rehearing issued May 1, 2013, the Commission denied the application for rehearing filed by OGMG and RESA. In that Entry, the Commission stated that, in the event Staff receives a request for the information, the attorney examiner would issue an entry establishing the appropriate process.
- (11) On February 18, 2015, OPAE contacted the Commission and requested all of the data collected by Staff in its study of the consequences of DEO's exit from the merchant function, pursuant to the Commission's directives in the March 6, 2013 and May 1, 2013 Entries on Rehearing. The data collected includes: spreadsheets from DEO that show the revenue performance over the past year; and responses and spreadsheets from the CRNGS suppliers relating to their customer base, their investment in the communities, and any new products or service offerings in the region. Further, the data also includes information submitted by DEO containing CRNGS suppliers' customer counts and product offerings.
- (12) Consistent with the Commission's May 1, 2013 Entry on Rehearing, the attorney examiner issued an Entry on April 1, 2015, setting forth the appropriate process to be followed by DEO and all CRNGS suppliers who wished to file a motion to protect the data enumerated in Finding (11) of this Entry from disclosure.

MOTIONS TO INTERVENE

- (13) On April 8, 2015, in response to the April 1, 2015 Entry, the following entities filed motions to intervene in this proceeding: Interstate Gas Supply, Inc. (IGS); Constellation Energy Gas Choice, Inc. and Integrys Energy Services – Natural Gas, LLC (Constellation); SouthStar Energy Services LLC, d/b/a Ohio Natural Gas (ONG); Commerce Energy of Ohio Inc., d/b/a Just Energy (Just Energy); and Direct Energy Services LLC, Direct Energy Business LLC, Direct Energy Business Marketing LLC, and Direct Energy Source LLC (Direct Energy) (collectively, Intervenors).
- (14) In their respective motions to intervene, the Intervenors state they are certificated CRNGS suppliers who, during the period 2013 to the present, provided such services in the DEO service area. The Intervenors state that they provided reports to Staff upon request and those reports, as well as other information, concerned CRNGS that they provided in DEO's service territory. In addition, DEO submitted spreadsheets which show the Intervenors' sales volume and pricing information. The Intervenors are seeking intervention for the purpose of protecting the confidential information they previously provided Staff, as well as the spreadsheets submitted by DEO, since they claim they provided this information conditioned on the fact the Commission assured them it would take appropriate action to keep the information confidential. IGS further asserts that it may be affected by the disclosure of this confidential information and, as such, it claims a direct, real, and substantial interest in this case that cannot be adequately represented by any other party to the proceeding. For these reasons, the Intervenors request that the Commission grant their respective motions for intervention. No memoranda contra the motions to intervene were subsequently filed.
- (15) The attorney examiner finds that the respective motions of IGS, Constellation, ONG, Just Energy, and Direct Energy are reasonable and should be granted. Further, although these motions to intervene were not filed within by the deadline of August 30, 2012, which was established by Entry dated July 27, 2012, we find that the motions, which are unopposed, should be granted, given that the sole interest of Intervenors

in this proceeding is to seek protective treatment for their customer-specific information.

MOTIONS FOR PROTECTIVE ORDER

- (16) Additionally, pursuant to the April 1 Entry, motions for protective treatment were filed on April 8, 2015, by the following entities: U.S. Gas & Electric, Inc., d/b/a Ohio Gas & Electric (OGE); IGS; ONG; Constellation; Just Energy; Direct Energy; DEO; OGMG; and RESA. No memoranda contra the motions for protective treatment were subsequently filed.
- (17) ONG, Direct Energy, Constellation, and Just Energy argue that there are seven types of confidential and business sensitive information which should be protected from disclosure: the number and salaries of full-time and part-time employees; individual sales and pricing data; the dollar value of capital expenditures made in Ohio; investments made in Ohio; a description of the products offered; the individual product rate codes; and the value added services, including promotions being offered. These movants also state that the information, when submitted to Staff, was clearly marked as "confidential," thereby demonstrating their intent to preserve its proprietary nature. The movants note that the confidential details for which protection is sought are not generally known in the market and are not readily ascertainable by other means. These movants contend that granting their motions for protective treatment would be consistent with Commission precedent and its policy to protect proprietary and confidential information. Although the movants consider this information to constitute trade secrets and argue for its protection, the movants request that, if the attorney examiner determines any part of this information should be released, it would be released in a way that will prevent outside parties from ascertaining the identity, product offerings, or other trade secrets of any given supplier.
- (18) OGMG and RESA support the arguments set forth in the motions for protective treatment filed by ONG, Direct Energy, Constellation, and Just Energy. In addition, OGMG and RESA point out that customer lists and pricing

information can constitute trade secrets under Ohio law. *Thermodyn Corp. v. 3M Co.*, 593 F. Supp.2d 972 (N.D. Ohio Dec. 17, 2008). OGMG and RESA also request the Commission use caution if the Commission chooses to redact these proprietary documents instead of prohibiting the release of the whole document.

- (19) IGS contends the spreadsheets provided by DEO and the data collected directly from IGS should be afforded confidential treatment, including: revenue month billing; residential, nonresidential, and total customer counts; commodity volumes, amounts, and the average rate billed; and submitted rate information. Additionally, IGS claims the data collected directly from IGS including the supplier name, quarter ending date, rate code, product description, value-added services, the number of full-time and part-time employees, the value of capital expenditures expressed in dollars, and any other Ohio investment should also be afforded confidential treatment. IGS claims all of this information is competitively sensitive and proprietary and has been clearly marked as such every time IGS provided information to Staff. Given that this data contains proprietary details regarding its programs and business plans, IGS believes it would be reasonable for the Commission to protect this information. Further, IGS claims that, if the Commission were to release this information, its actions may cause suppliers to become less willing to provide this type of information in future proceedings. IGS expresses doubt that entering into a confidentiality agreement with OPAE will adequately protect this information, as it was requested in a public records request and not in the context of a Commission proceeding. IGS claims this would unnecessarily create a possibility for any individual to make a similar request. IGS also adopts those arguments presented by OGMG and RESA.
- (20) OGE claims that the data submitted to Staff with regard to this proceeding contains information and records that OGE considers confidential and proprietary secrets. Further, OGE asserts disclosure of this information could potentially be harmful to OGE's competitive position as an energy provider, as well as the other entities involved in this

proceeding. Given the competitive nature of the services it provides, OGE asserts this information is a legitimate trade secret and requests it to be protected. Additionally, OGE requests that its responses to any subsequent request for additional information or clarification that Staff might make with regard to these same requests also be permitted to be filed under seal. OGE also asserts that protection of this information will not prejudice any other party or individual. In fact, by protecting the information, OGE argues that the Commission will effectively be preserving the competitive nature of this industry.

- (21) In its motion for protective order, DEO states that it is seeking protection for email attachments provided to Staff spanning over a period from June 10, 2013, to March 10, 2015, which included information regarding competitor pricing, customer counts, and volumes in DEO's Energy Choice program. In support of its request, DEO argues that the state policy provided in R.C. 4929.02 requires the Commission to support and protect the development of competitive retail markets and that there is a serious risk that disclosure of this confidential information will jeopardize those markets. In addition, DEO claims that the spreadsheets referenced in the April 1 Entry provide highly detailed information regarding the pricing and rate information of all CRNGS rate offers in DEO's Energy Choice program. DEO contends this type of pricing information has repeatedly been provided protective treatment and the fact that this information is a comprehensive representation of DEO's Energy Choice program only increases the need for such protection. Moreover, DEO states that, even though secondary precautions were taken by assigning numbers to CRNGS suppliers, rather than naming them in the spreadsheets, those suppliers' identities could nonetheless be determined by correlating publicly available information with the rates, customer counts, and volumes associated with various offers. Further, DEO asserts it has taken reasonable efforts to protect this information, emphasizing that its tariffs provide that all rate information will be kept confidential and noting it requested that any information provided to Staff be kept confidential at various intervals in this

proceeding. Given the extremely confidential nature of this information, DEO also requests an opportunity to review any redacted data before it is released.

- (22) R.C. 4905.07 provides that all facts and information in the possession of the Commission shall be public, except as provided in R.C. 149.43 and as consistent with the purposes of Title 49 of the Revised Code. R.C. 149.43 specifies that the term "public records" excludes information which, under state or federal law, may not be released. The Supreme Court of Ohio has clarified that the "state or federal law" exemption is intended to cover trade secrets. *State ex rel. Besser v. Ohio State*, 89 Ohio St.3d 396, 399, 732 N.E.2d 373 (2000).
- (23) Similarly, Ohio Adm.Code 4901-1-24(D) allows an attorney examiner to issue an order to protect the confidentiality of information contained in a filed document, "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." Further, Ohio Adm.Code 4901-1-24(D)(1) provides that all documents submitted pursuant to Ohio Adm.Code 4901-1-24(D) should be filed with only such information redacted as is essential to prevent disclosure of the allegedly confidential information.
- (24) Ohio law defines a trade secret as "information * * * 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). The Supreme Court of Ohio has established a six-factor test to be used in analyzing a claim that information is a trade secret under that section. *State ex rel. The Plain Dealer v. Ohio Dept. of Ins.*, 80 Ohio St.3d 513, 524-25, 687 N.E.2d 661 (1997).
- (25) The Supreme Court of Ohio has found that an in camera inspection is necessary to determine whether materials are

entitled to protection from disclosure. *State ex rel. Allright Parking of Cleveland, Inc. v. Cleveland*, 63 Ohio St.3d 772, 591 N.E.2d 708 (1992).

- (26) Therefore, in order to determine whether to grant or to extend a protective order, it is necessary to review the materials in question; to assess whether the information constitutes a trade secret under Ohio law; to decide whether nondisclosure of the materials will be consistent with the purposes of R.C. Title 49; and to evaluate whether the confidential material can reasonably be redacted.
- (27) The attorney examiner will evaluate the following information to determine whether protective treatment is warranted:
 - (a) Information that was submitted to Staff directly from the CRNGS suppliers, which includes:
 - (i) The supplier name;
 - (ii) The quarter ending date;
 - (iii) The number and salaries of its full-time and part-time employees;
 - (iv) Individual sales and pricing data;
 - (v) The dollar value of capital expenditures made in Ohio;
 - (vi) Investments made in Ohio;
 - (vii) A description of the products offered;
 - (viii) The individual product rate codes; and
 - (ix) The value added services, including promotions being offered.
 - (b) Email attachments DEO provided to Staff spanning over a period from June 10, 2013, to March 10, 2015, which contain spreadsheets documenting CRNGS suppliers' revenue month billing; residential,

nonresidential and total customer counts; commodity volumes, amounts, and the average rate billed; and submitted rate information in DEO's Energy Choice program. DEO provided a sample spreadsheet in which it proposed how these spreadsheets would be redacted if its motion for protective order was granted. (Exhibit A).

- (28) The attorney examiner has examined the information covered by the motions for a protective order filed by OGE, IGS, ONG, Constellation, Just Energy, Direct Energy, DEO, OGMG, and RESA, as well as the assertions set forth in the supportive memoranda. Further, the attorney examiner has applied the requirements that the information must have independent economic value and be the subject of reasonable efforts to maintain its secrecy pursuant to R.C. 1333.61(D), as well as the six-factor test set forth by the Supreme Court of Ohio. The attorney examiner finds that the information contained in Finding (27), Items (a)(iv) through (a)(vi), Item (a)(viii), and Item (b) constitute trade secret information, as defined under R.C. 1333.61(D) and, as such, should be granted protective treatment. The release of this information is, therefore, prohibited under state law. The attorney examiner also finds that nondisclosure of this information is not inconsistent with the purposes of R.C. Title 49. Therefore, the motions for protective order filed by OGE, IGS, ONG, Constellation, Just Energy, Direct Energy, DEO, OGMG, and RESA are reasonable and should be granted to the extent set forth in this Entry.
- (29) Additionally, the attorney examiner finds the information contained in Finding (27), Items (a)(vii) and (ix), will only be granted protective treatment to the extent this information is not available online or otherwise publicly available. The parties will have the burden of proving that the information is not publicly available by providing sufficient support justifying protection. Such justification shall be provided to the attorney examiner in addition to the documents required in Finding (34). The attorney examiner further notes that any information found to be publicly available will not be granted protective treatment and, thus, will be released.

- (30) While the protected information may retain its value for a number of years, the attorney examiner notes that an indefinite protective order would be excessive in this case, as such an order could cause the Commission to protect information that has lost its value, thereby, exceeding the level of necessary protection. With the passage of time and changing circumstances, it is likely that the information these movants seek to protect will become stale and lose its worth to competitors. For these reasons, it is against the Commission's general policy to grant an indefinite protective order. See *In re SBC Ohio*, Case No. 02-3069-TP-ALT, Entry (June 30, 2004). Ohio Adm.Code 4901-1-24(F) provides that, unless otherwise ordered, protective orders issued pursuant to Ohio Adm.Code 4901-1-24(D) automatically expire after 24 months. Therefore, confidential treatment shall be afforded for a period ending 24 months from the date of this Entry or until November 2, 2017.
- (31) Ohio Adm.Code 4901-1-24(F) requires a party wishing to extend a protective order to file an appropriate motion at least 45 days in advance of the expiration date. If the movants wish to extend this confidential treatment, each respective movant should file an appropriate motion at least 45 days in advance of the expiration date. If no such motion to extend confidential treatment is filed, the Commission may release this information without prior notice to the movants.
- (32) Further, the attorney examiner finds that the information contained in Finding (27) Items (a)(i) through (a)(iii) do not constitute trade secret information and should, therefore, not be afforded protective treatment. As such, this information will be provided to OPAC in accordance with the procedure set forth in Findings (34) and (35).

MOTION FOR ADDITIONAL FIVE-DAY REVIEW PERIOD

- (33) OGMG and RESA also claim that suppliers were not provided enough time to evaluate the suppliers' reports or the spreadsheets DEO presented to Staff. OGMG and RESA request an additional five days from the date of this Entry to provide redacted versions of the supplier and DEO reports

and prevent the protected types of information from public disclosure. ONG, Just Energy, Constellation, and Direct Energy also expressed concern over the amount of time provided to suppliers to redact confidential and proprietary information from the requested documents and data provided to Staff and, thus, are requesting an additional five days to submit their redacted versions, as well.

- (34) The attorney examiner finds that the request of various parties and interested persons for additional time to submit redacted reports and spreadsheets is reasonable and should be granted. However, due to the confidential and proprietary nature of this information, the parties and interested persons to this proceeding may submit to the attorney examiner, within 14 days from the date of this Entry, or November 16, 2015, reports and spreadsheets which redact the trade secret information as described in Findings (28) and (29), and do not redact the remaining information, consistent with Finding (32). Any necessary justification for protective treatment as required by this Entry shall also be provided at this time.
- (35) Thereafter, the following procedure shall be followed:
 - (a) Upon receiving the redacted reports and spreadsheets, the attorney examiner will confirm that the redactions comply with this Entry. Once the attorney examiner has confirmed the redactions comply with this Entry, the attorney examiner will contact each movant with respect to its submitted documents and notify them of such compliance.
 - (b) Those wishing to observe what information will be provided to OPAA before it is distributed may contact the attorney examiner within three days of being provided notice of compliance with this Entry. The attorney examiner will then set a time for the information to be reviewed.

- (c) After providing DEO and CRNGS suppliers the opportunity to review the data to be distributed, the attorney examiner will then send the newly redacted reports and spreadsheets to OP&E in response to its public records request.

It is, therefore,

ORDERED, That the motions to intervene filed by IGS, Constellation, ONG, Just Energy, and Direct Energy be granted, pursuant to Finding (15). It is, further,

ORDERED, That the motions for protective treatment filed by OGE, IGS, ONG, Constellation, Just Energy, Direct Energy, DEO, O&MG, and RESA be granted to the extent set forth in this Entry. It is, further,

ORDERED, That, pursuant to Finding (34), parties will submit, within 14 business days from the date of this Entry, redacted reports and other data provided during this proceeding. It is, further,

ORDERED, That the procedure identified in Findings (34) and (35) shall be followed by the parties and interested persons of this proceeding. It is, further,

ORDERED, That a copy of this Entry be served upon all parties and interested persons of record.

THE PUBLIC UTILITIES COMMISSION OF OHIO

s/Megan Addison

By: Megan J. Addison
Attorney Examiner

CMTP/sc

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Case No(s). 12-1842-GA-EXM

Summary: Attorney Examiner Entry setting a procedural schedule, granting motions to intervene, and granting motions for protective treatment. - electronically filed by Sandra Coffey on behalf of Megan Addison, Attorney Examiner, Public Utilities Commission of Ohio