

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

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

**OHIO PARTNERS FOR AFFORDABLE ENERGY'S
MEMORANDUM CONTRA TO THE JOINT INTERLOCUTORY APPEAL AND
JOINT MOTION FOR STAY OF THE RETAIL ENERGY SUPPLY
ASSOCIATION AND THE OHIO GAS MARKETERS GROUP**

I. Introduction

Ohio Partners for Affordable Energy ("OPAE") hereby respectfully submits to the Public Utilities Commission of Ohio ("Commission") this memorandum contra the Joint Interlocutory Appeal and Joint Motion for Stay of the Retail Energy Supply Association and the Ohio Gas Marketers Group ("Joint Movants") filed on November 10, 2015. The Joint Movants are appealing the Attorney Examiner's Entry of November 2, 2015 determining the disclosure of information collected by the Staff of the Commission and Dominion East Ohio ("DEO") in response to questions posed by the Commission in this docket pursuant to the Opinion and Order issued on January 9, 2013 and the Entry on Rehearing issued on March 6, 2015.

II. Background

In the January 9, 2013 Opinion and Order, the Commission granted DEO the authority to exit the merchant function for nonresidential customers. The Commission retained jurisdiction, citing its authority to reverse the elimination of standard choice offer ("SCO") service for nonresidential customers in the event the exit is found to result in unjust or unreasonable rates. Opinion and Order at 17.

The Commission noted that granting the motion provided “an excellent opportunity to study the consequences of the exit.” Id. To that end, the Commission cited the testimonial assertions of several witnesses for parties that were proponents that the exit would have positive economic impacts and be advantageous to customers. The Commission ordered that “a maximum amount of information should be provided regarding the impact of DEO’s exit.” Id. The Entry of November 2, 2015 defines the information provided to Staff directly by Competitive Retail Natural Gas Suppliers (“CRNGS”):

- 1) The supplier name;
- 2) The quarter ending date;
- 3) The number and salaries of its full-time and part-time employees;
- 3) Individual sales and pricing data;
- 4) The dollar value of capital expenditures made in Ohio;
- 5) Investments made in Ohio;
- 6) A description of the products offered;
- 7) Individual product rate codes; and,
- 8) The value added services, including promotions being offered.

DEO directly supplied spreadsheets documenting information to Staff as follows:

- 1) CRNGS revenue month billings;
- 2) Residential, nonresidential and total customer counts;
- 3) Commodity volumes, amounts and average rate billed; and,
- 4) Rate information in DEO’s Energy Choice program.

The Opinion and Order directed DEO to provide the information to Staff, OCC, and *any other interested party* “so that all parties can become better informed regarding the effect of DEO’s exit on competition and customers.” Id. [Emphasis added.] “DEO and suppliers shall collect the information that Staff determines is necessary and provide such information to Staff. Staff shall take

appropriate actions to protect information that is marked as confidential.” Id. The Entry on Rehearing clarified how the information was to be collected. Entry on Rehearing at 12 (March 6, 2015).

OPAE is a party within the meaning of the Opinion and Order and the Entry on Rehearing because it was granted intervention by the Commission in this case. This also makes OPAE a stakeholder, a not surprising conclusion given that OPAE ultimately appealed the case to the Supreme Court. As such, under the plain language of the Opinion and Order, OPAE is to have access to the information provided by CRNGS and DEO to Staff in order to be “...informed regarding the effect of DEO’s exit on competition and customers.” Opinion and Order at 12.

OPAE contacted Staff in February of this year and requested to view the information the Commission ordered be made available to parties/stakeholders because of OPAE’s continuing concern that an exit from the merchant function might produce rates that were not just and reasonable, and to evaluate the impacts of the exit as specifically required by the Commission’s Opinion and Order. OPAE viewed this as a benign request, consistent with the Commission Opinion and Order. Staff, however, chose to treat OPAE’s request as a party as a public records request despite OPAE’s clear indication that it was willing to sign confidentiality agreements with all CRNGS and DEO regarding the information provided to Staff.¹

¹ OPAE also suggested the parties get together and develop a standard confidentiality agreement. These entreaties were ignored by the CRNGS parties and DEO.

OPAE did not object to the Commission's May 1, 2013 Entry on Rehearing regarding treatment of the requested information. OPAE did not object to the motions to intervene filed by the CRNGS in response to the April 1, 2015 Entry, nor to the process dictated by the Entry. OPAE did not object to the motions for protective treatment. Why? Because OPAE never indicated an interest in publicly releasing the data, nor did it intend to make a public records request when it initially requested the information. Despite IGS's assertion that OPAE could not be trusted to abide by a confidentiality agreement – a slur that impugns the integrity of OPAE's counsel who have never violated a confidentiality agreement and deserve an apology – OPAE stands willing to sign reasonable confidentiality agreements with all parties that have provided information in order to accomplish what the Commission originally ordered: “to study the consequences of the exit.” Opinion and Order at 17.

OPAE has reluctantly entered this fray, however, because RESA and OGMG are requesting confidential treatment of information that does not constitute a trade secret and should be made available to parties without a confidentiality agreement.

III. Argument

The Joint Movants are appealing the attorney examiner's ruling that they provide the following information: 1) the number and salaries of full-time and part-time employees; 2) supplier descriptions of their product offered; and, 3) value-added services, including promotions being offered. Of the three, only the first was

to be made publicly available pursuant to the Entry of November 2, 2015. The Joint Movants did not oppose releasing the names of the CRNGS or the quarter ending date.

The Joint Movants begin by arguing that R.C. 4929.23(A) requires the Commission to protect the confidentiality of information. However, the code section applies to applications for certification, not information requested as a component of the Commission's oversight of an alternative regulation plan. Nonetheless, the Commission regularly protects trade secrets and doing so in this docket is not a break with precedent. Likewise, the Commission has ruled that the public records statute be read in light of the trade secrets statute. As such, if information requested by the Staff is a trade secret, it is not subject to a public records request. Joint Movants at 6. The Joint Movants next cite the trade secret statute, R.C. 1333.61(D), and draw the conclusion that there is a state policy favoring the protection of trade secrets, and quotes the six-part test issued by the Supreme Court in *State ex rel The Plain Dealer v. the Ohio Dept. of Ins.* (1977), 80 Ohio St. 3d 513. OPAE agrees that there is a state policy, but disagrees that the information Joint Movants seek to protect qualifies under the test.

A number of the parties make the argument that because the information provided to Staff was market 'confidential' it must be treated as such. Naming something confidential does not make it so. There is the six part test, which the Joint Movants cite, that provides guidance for the Commission or a court to make such a determination.

A. Number and Salaries of Employees.

This information is being collected because CRNGS witnesses indicated that if the exit was granted there would be an increase in the number of employees and the increased salaries would have a positive economic impact in Ohio. However, it would take only a few phone calls among gas industry professionals to roughly ascertain how many employees each marketer has and gather a rough estimate of the salaries. The natural gas marketing industry is a tight knit group in Ohio, much like the regulatory bar. Unlike our bar, however, salespeople and administrators often move from one company to another. Moreover, companies regularly announce increases in employment and layoffs. This type of information is commonly in the business press and often in the mainstream press. Absent a showing that CRNGS are somehow unique when compared to other companies and actively seek to protect such material, there is no reason to withhold this information.

The Joint Movants have the burden to prove the information they are requesting be protected meet the six part test. Regarding the employee-related information, there is no showing that the information is not known outside the business. The number of employees, and probably the salaries, are bound to be known by some, if not all, employees of the business. There is no evidence that the Joint Movants take any precautions to conceal this information; in fact, the Joint Movants are not even the employers in this case. There is no evidence that the other three prongs of the test are satisfied either.

B. Product Descriptions and Value-Added Services, including Promotions being Offered.

It is exceedingly odd that the Joint Movants want to protect product descriptions, services and promotions. Products and services are what is sold to customers. If the products, services and promotions are secret, then how would customers know what they are? In addition, customers shop. They gather offers from multiple marketers. As such, they know what offers are available, at least to them. Since every commercial customer in the DEO territory is a customer of a marketer, someone must be aware of every commercial offer, and most customers are shoppers as well. Moreover, at least some of these offers are publicly available on the Apples-to-Apples website.

Clearly product descriptions are known outside the business and are known within the business. Anyone involved in natural gas sales knows roughly what other CRNGS are doing. That is how competition works. No action, other than this litigation, has been demonstrated to be taken to protect the product descriptions because customers are readily made aware of them. This is not 'information' in the context of the six-part test; it is the product the CRNGS are selling. A market is only effectively competitive if it is transparent.

IV. Conclusion

The Joint Movants seek to characterize this information as being gathered as a part of the Commission's market-monitoring function. That is not the case. This information is being gathered to assess the impact of the exit from the merchant function. CRNGS that supported the exit volunteered on the stand that

there would be a positive impact on employment and Ohio's economy. They contended that there would be an increase in the products and services made available. The types of promotions would increase (beyond free toasters). These assertions were made in public in a hearing before this Commission. The witnesses did not say that this information was confidential or a trade secret. They were willing to trumpet in public that this would happen. It's time to prove it, not just to the Commission's Staff, but to the customers, especially those that no longer have access to the SCO.

Apparently, the Joint Movants are uninterested in ensuring customers can benefit from an effectively competitive market. They are adamant that there be no transparency in the market. They do not want us to know the economic impact of middlemen that have been inserted into Ohio's retail natural gas market. They do not want us to know what products, services, or promotions CRNGS are offering. The Commission should not pull down the veil of secrecy on information that has been alluded to in public, is commonly known in the industry, and will contribute to the transparency of the market, helping to ensure effective competition.

Respectfully submitted,

/s/ David C. Rinebolt

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Memorandum Contra was served electronically upon the persons identified below in this case on this 13th day of November 2015.

/s/ David C. Rinebolt
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Summary: Memorandum Ohio Partners for Affordable Energy's Memorandum Contra to the Joint Interlocutory Appeal and Joint Motion for Stay of the Retail Energy Supply Association and the Ohio Gas Marketers Group electronically filed by Mr. David C Rinebolt on behalf of Ohio Partners for Affordable Energy