

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of Commerce Energy, Inc.) 16-2006-GE-UNC
d/b/a Just Energy.)

**MOTION FOR PROTECTIVE ORDER OF
COMMERCE ENERGY, INC. D/B/A JUST ENERGY**

In accordance with Ohio Admin. Code 4901-1-24(D), Commerce Energy, Inc. d/b/a Just Energy (Just Energy) requests an order granting the following relief:

- That a protective order issue to prevent public disclosure of the documents identified in the November 14, 2016 email from the Commission’s Legal Department to Just Energy’s counsel. *See* Exhibit A.
- That a prehearing conference be scheduled for the purpose of conducting an *in camera* inspection of the documents identified in Exhibit A; and
- That following such *in camera* inspection, the Commission address by subsequent order the documents, or portions thereof, that are exempt from public disclosure, or are subject to disclosure only in accordance with terms that require OCC to maintain the confidentiality of such documents.

The process outlined above is essentially the same process recently ordered in a different case also involving a request for the disclosure of confidential information. *See* Case No. 15-1739-EL-RDR (Entry, November 15, 2016). An affidavit of counsel describing efforts taken to avoid filing this motion is attached. A memorandum in support follows.

MEMORANDUM IN SUPPORT

I. INTRODUCTION

OCC served the Commission with a public records request for documents exchanged between Just Energy and Commission Staff during the course of Staff's investigation of certain marketing practices. Given that the investigation has been closed and a Stipulation between Just Energy and Staff approved, the point of requesting these documents is not entirely clear. What is clear, however, is that the documents OCC has asked the Commission to produce contain confidential, proprietary, and trade secret information. To the extent the Commission is inclined to comply with OCC's request, it must do so in a manner that respects the confidentiality of the documents requested.

OCC submitted a public records request dated November 8, 2016. The Commission notified Just Energy of this request on November 14. The notice provided to Just Energy included copies of documents identified as responsive to the request, but as potentially containing confidential or proprietary information. The notice set a deadline of today, November 17, to file a motion for protective order with respect to these documents. The documents are attached to the email identified in Exhibit A.

The documents identified in Exhibit A consist of emails and attachments exchanged between Just Energy and Staff. All but two of the documents bear a "confidential" stamp, or words of similar import. These documents bear this designation because Just Energy did not intend to waive the confidentiality of these documents by providing them to Staff. Two sets of emails and attachments reflect Staff's comments to information provided by Just Energy. These documents also contain confidential information, but were not marked as such by Staff.

All of the documents identified in Exhibit A, whether stamped “confidential” or not, generally fall into two categories. One category pertains to information furnished to and reviewed by Staff in Staff’s development of a compliance plan. The other category pertains to information furnished by Just Energy to Staff in accordance with the approved Stipulation. Both categories reflect Just Energy’s business methods, practices, and sales strategies. Just Energy would suffer competitive harm if this confidential information became public.

In addition to the documents brought to Just Energy’s attention and identified in Exhibit A, Just Energy understands that the Commission also maintains audio recordings of calls between Just Energy (or its agents’) call center representatives and prospective customers. These recordings include not only names and addresses, but account numbers and other personal identifiers as well.

In issuing a protective order, the Commission is required to “minimize the amount of information protected from public disclosure.” O.A.C. 4901-1-24(D). Thus, the Commission has historically disfavored granting protective treatment to documents in their entirety. Compliance with the Commission’s rule usually requires a party to redact confidential information, while leaving non-confidential information available for public view.

Many of the documents identified in Exhibit A include both confidential and non-confidential information. Given the nature of the documents, their volume, and the short amount of time to comply with the deadline for seeking a protective order, it would be neither practical nor productive to submit line-by-line redactions for each document. Doing so would likely only serve to invite dispute over each redaction. It would be far more efficient to first review the documents *in camera* so that all parties can be heard on what should or should not be afforded

confidential treatment. This process was recently ordered in Case No.15-1739-EL-RDR, and should be ordered here as well.

II. ARGUMENT

A. **The documents identified in the November 14, 2016 notice to Just Energy contain information exempt from disclosure under the Ohio Public Records Act.**

R.C. 149.43 requires a “public office” to produce a “public record” in response to a properly submitted request. “Records the release of which is prohibited by state or federal law,” “personal information,” and “specific confidential investigatory techniques or procedures or specific investigatory work product” are not “public records” and therefore not subject to disclosure under the Public Records Act. R.C. 149.43(A)(1)(v); (dd); (2)(c).

Ohio law prevents anyone (whether a “public office” or otherwise) from releasing a “trade secret” of another. R.C. 1333.61(B). Ohio law defines a “trade secret” as:

[I]nformation, 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.¹

¹ R. C. § 1333.61(D). Ohio courts have also identified factors to be considered in recognizing 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. *Pyromatics, Inc. v. Petruziello*, 7 Ohio App. 3d 131, 134-135 (Cuyahoga App. 1983) citing *Koch Engineering*

Thus, a “public office” with possession of documents and information constituting a “trade secret” does *not* have authority to release the information in response to a Public Records Act request. The Commission has long recognized its statutory obligations with regard to the protection of trade secrets. See *In re: General Telephone Co.*, Case No. 81-383-TP-AIR, Entry (Feb.17, 1982) (recognizing necessity of protecting trade secrets). See also *Ohio Consumers’ Counsel v. Pub. Util. Comm.*, 121 Ohio St.3d 362, 2009-Ohio-604 (Commission has mandatory duty to protect trade secrets).

All of the documents identified in Exhibit A contain trade secrets. Indeed, the investigation arises from the “process, procedure ... method, technique ...or business information or plans” of Just Energy in the competitive energy market. That Just Energy has agreed to alter some of its business practices does not diminish the fact that the requested documents disclose not only former business practices, but prospective practices as well. And not *all* of the former business practices have been criticized by Staff. Just Energy would undoubtedly suffer competitive harm if a roadmap of how it conducts business were publicly disclosed. The documents identified in Exhibit A could also be deemed to provide a roadmap of Staff’s “specific confidential investigatory techniques or procedures or specific investigatory work product,” and be exempt from disclosure on this basis as well. R.C. 149.45(A)(2)(c).

B. Call center recordings should not be disclosed.

As part of its investigation, Staff reviewed a sample of recorded conversations involving Just Energy agents and prospective customers. These recordings should not be disclosed. During the sales and enrollment process, prospective customers must necessarily disclose “personal

Co. v. Faulconer, 210 U.S.P.Q. 854, 861 (Kans. 1980); *State ex rel. Perrea v. Cincinnati Pub. Sch.*, 123 Ohio St.3d 410, 414, 2009-Ohio-4762 (adopting these factors as appropriate).

information,” as defined in R.C. 149.45. Such “personal information” includes social security numbers, state or federal tax identification numbers, driver license or state ID numbers, and banking and account numbers. Thus, in addition to harm that would occur to Just Energy if a protective order were not issued, innocent third parties would be harmed as well.

C. A prehearing conference should be scheduled to review the documents and recordings.

Motions, replies, and interlocutory appeals are not the only ways to resolve issues involving confidentiality. In Case No. 15-1739-EL-RDR (Entry, November 15, 2016), OCC served a public records request to the Commission for an audit report OCC could not get from FirstEnergy in discovery. *Id.* ¶¶ 4-5. Rather than decide whether the audit report contained information confidential to FirstEnergy, the Attorney Examiner scheduled a prehearing conference. “At this conference, the parties are expected to be prepared to argue the issues presented in the pending motions.” *Id.* at ¶ 5.

The same process would be beneficial here. And contrary to inflicting prejudice, the process should prove beneficial to OCC. To the extent OCC is requesting documents to explore whether to seek rehearing, the fast-approaching statutory deadline dictates it access the documents sooner rather than later. Continued briefing of the issues would likely drag beyond the rehearing deadline. A prehearing conference would allow the issues to be addressed quickly and efficiently, thereby resolving any disputes rather than prolong them.

III. CONCLUSION

For the foregoing reasons, Just Energy respectfully requests issuance of the protective order requested in this motion, and the prompt scheduling of a prehearing conference.

Dated: November 17, 2016

Respectfully submitted,

/s/ Mark A. Whitt

Mark A. Whitt (0067996)

Andrew J. Campbell (0081485)

Rebekah J. Glover (0088798)

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(Counsel willing to accept service by email)

ATTORNEYS FOR COMMERCE

ENERGY, INC. D/B/A/ JUST ENERGY

CERTIFICATE OF SERVICE

I hereby certify that a copy of this Motion for Protective Order was served by electronic mail this 17th day of November, 2016 to the following:

Ajay Kumar
Office of the Ohio Consumers' Counsel
10 West Broad Street, Suite 1800
Columbus, Ohio 43215-3485
ajay.kumar@occ.ohio.gov

John Jones
Assistant Attorney General
Public Utilities Section
30 East Broad Street, 16th Floor
Columbus, Ohio 43215
john.jones@ohioattorneygeneral.gov

/s/ Rebekah J. Glover

One of the Attorneys for Commerce Energy,
Inc. d/b/a Just Energy

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In the Matter of Commerce Energy, Inc.) 16-2006-GE-UNC
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**AFFIDAVIT OF COUNSEL IN SUPPORT OF
MOTION FOR PROTECTIVE ORDER OF
COMMERCE ENERGY, INC. D/B/A JUST ENERGY**

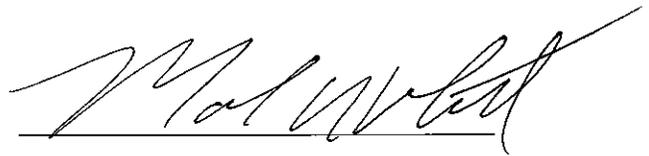
STATE OF OHIO)
) ss:
FRANKLIN COUNTY)

Mark A. Whitt, being first duly sworn, states as follows:

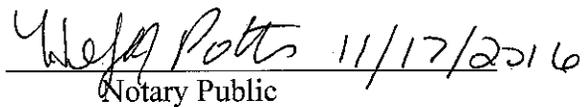
1. My name is Mark A. Whitt. I am over the age of 18 and have personal knowledge of the facts stated in this affidavit.
2. I am counsel in this proceeding for Commerce Energy, Inc. d/b/a Just Energy. I am submitting this affidavit in according with O.A.C. 4901-1-24(B)(3).
3. On November 14, 2016, I received an email from Donald K. Leming, Associate General Counsel in the Commission's Legal Department. A true and correct copy of this email is attached as Exhibit A. Mr. Leming's email advised me of Office of Consumer Counsels' (OCC) public records request.
4. On Tuesday, November 15, I called Larry Sauer at OCC to discuss issues of confidentiality raised by OCC's request. Mr. Sauer was not available so I left a message. Mr. Sauer sent an email at 5:30 that afternoon, apologizing for missing my call.
5. Mr. Sauer called me on Wednesday morning, November 16. I generally explained that Just Energy had some concerns about the disclosure of confidential information, but that we thought we could resolve them by entering into a protective order with OCC. Mr. Sauer said he thought that idea was worth exploring. He sent me a copy of a protective agreement executed between Just Energy and OCC in a previous case.
6. In the early afternoon of Wednesday, November 16, I sent Mr. Sauer an email outlining my proposed resolution of the confidentiality issues we had discussed. A true and correct copy of that email is attached as Exhibit B. I did not receive a response to this email.

7. On Thursday morning, November 17, I sent Mr. Sauer a mark-up of the proposed protective agreement. A true and correct copy of my transmittal email is attached as Exhibit C. I did not receive a response to this email.
8. I called Mr. Sauer around 1:00 p.m. on Thursday, November 17 to find out whether OCC was agreeable to the approach I suggested in my email the day before. My call was not answered so I left a message. I did not receive a return call.
9. Just Energy remains willing to execute an agreed protective order with OCC. Since that has not happened, this motion is the only means available to preserve the confidentiality of information contained in the documents OCC has requested.

Sworn to and subscribed in my presence this 17th day of November, 2016.



Holly A. Potter
Notary Public, State of Ohio
My Commission Expires 03-24-20



Notary Public

Subject: Just Energy

Date: Wednesday, November 16, 2016 at 1:10:36 PM Eastern Standard Time

From: Mark Whitt

To: Larry Sauer

CC: Becky Glover

Larry –

I've talked to my client, and here is how we would propose to proceed:

1. Just Energy and OCC file a joint motion for protective order by COB tomorrow.
2. The protective order would generally follow the same terms as the precedent you sent.
3. The motion would indicate that the PUCO should not copy and disclose any taped conversations, because the tapes include personal identifiers. However, OCC may go to the PUCO, listen to the tapes, and take notes.
4. OCC will treat all other information disclosed per the request as confidential. Any notes OCC takes of recorded conversations would also be confidential.
5. OCC will not publicly disclose any of the information without first giving notice to Just Energy. If the parties cannot agree on whether the information should remain confidential, Just Energy will seek a protective order from the PUCO.

If these general terms are acceptable, let me know and I will draft the motion and edit the protective agreement as necessary. Thanks.

Mark A. Whitt

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Subject: Just Energy protective agreement
Date: Thursday, November 17, 2016 at 10:01:15 AM Eastern Standard Time
From: Mark Whitt
To: Larry Sauer
Attachments: 16-2006 Just Energy-OCC Protective Agreement v1.doc

Larry – As a follow up to yesterday’s email, I’ve attached a draft protective order. It is based on the version you sent me. Let me know if you have any comments or questions. (I realize the paragraph formatting is messed up but we can fix that when we’ve addressed substantive issues, if any)

Mark A. Whitt

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in

Case No(s). 16-2006-GE-UNC

Summary: Motion for Protective Order and Memorandum in Support electronically filed by Ms. Rebekah J. Glover on behalf of Commerce Energy, Inc. d/b/a Just Energy