

BEFORE THE PUBLIC UTILITIES COMMISSION OF OHIO

)
) Case No. 17-1827-EL-AEC
)
In the Matter of the Joint)
Application of Vadata, Inc. and Ohio)
Power Company for Approval of a)
Unique Economic Development)
Arrangement for Ohio Data Center)
Campuses)

MOTION TO EXTEND PROTECTIVE ORDER FILED BY VADATA, INC., NOW
KNOWN AS AMAZON DATA SERVICES, INC.

On January 9, 2018, the Public Utilities Commission of Ohio (the “PUCO”) granted the Motions for Protective Order filed by Vadata, Inc., which is now known as Amazon Data Services, Inc. (“ADS”), and the Office of the Ohio Consumers’ Counsel (“OCC”), which were filed on September 1, 2017, September 22, 2017, and November 7, 2017. The Motions for Protective Order sought to keep confidential certain information contained in the *Joint Application for a Unique Economic Development Arrangement* (the “Joint Application”), in the direct testimony filed by ADS witness Charles Daitch, and in the direct testimony of witness Michael Haugh filed by the OCC.

ADS, by and through its attorneys, and pursuant to Rule 4901-1-24(F) of the Ohio Administrative Code, respectfully moves the PUCO to extend the Protective Order and keep the information that is subject to that Protective Order confidential and under seal, and not available publicly, for an additional twenty-four (24) months for the reasons stated below and in the accompanying Memorandum in Support.

1. As this Commission previously found, the information about ADS's operation and financial data; actual and potential investment levels; electric use and pricing information and employment figures and plans related to the development of its Ohio campuses constitutes trade secret information under Ohio law;

2. ADS does not and has not shared this trade secret information with the general public and it has taken and continues to take steps to prevent the disclosure of this information;

3. ADS would be at a competitive disadvantage against its competitors and in the marketplace worldwide if this trade secret information becomes publicly available; and

4. Disclosure of the confidential information could result in misuse of this confidential, proprietary and trade secret information.

For these reasons, ADS respectfully moves the PUCO to grant its Motion to Extend Protective Order. A memorandum in support of this Motion is filed herewith.

Date: November 22, 2019

Respectfully submitted,

/s/ David F. Proaño

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MEMORANDUM IN SUPPORT OF THE MOTION TO EXTEND PROTECTIVE
ORDER BY VADATA, INC. NOW KNOWN AS AMAZON DATA SERVICES, INC.

Vadata, Inc., now known as Amazon Data Services, Inc. (“ADS”), respectfully seeks an extension of the protective order entered by the Public Utilities Commission of Ohio (the “PUCO”) in the above-captioned case on January 9, 2018 (the “Protective Order”) pursuant to Rule 4901-1-24(D) of the Ohio Administrative Code (“OAC”), which found that certain information filed in this matter contained confidential trade secret information that should not be publicly disclosed pursuant to Ohio law that protects such information.

Procedural Background

On September 1, 2017, ADS commenced the above-captioned case by filing a *Joint Application for a Unique Economic Development Arrangement* (“Joint Application”). ADS is an affiliate of Amazon Web Services, Inc. (“AWS”), which is a wholly owned subsidiary and operating segment of Amazon.com, Inc. (“Amazon”). ADS committed to invest hundreds of millions of dollars over a number of years in Ohio to acquire and develop three properties as campuses (“Ohio Campuses”) in Dublin, Hilliard, and New Albany capable of accommodating up to fifteen total

cloud computing data centers (such existing and potential additional data centers, “Ohio Data Centers”).

The Joint Application contained confidential, sensitive, and proprietary operational and financial data, actual and potential investment levels, electric use and pricing information, employment figures and plans, that constitute trade secret information subject to protection from public disclosure by Ohio law. Accordingly, concurrent with the filing of the Joint Application, on September 1, 2017, ADS filed a Motion for Protective Order to maintain under seal and confidential that trade secret information.

On September 22, 2017, the OCC filed comments regarding the Joint Application and also filed a Motion for Protective Order. In the motion, OCC stated that, as part of discovery in this proceeding, it received information from ADS subject to an executed protective agreement. OCC stated that ADS communicated that the information subject to the protective agreement is proprietary and confidential, constitutes trade secrets under Ohio law, and that non-disclosure is not inconsistent with the purposes of Title 49 of the Revised Code. While not conceding that the information ADS sought to protect constituted trade secrets, out of an abundance of caution, OCC requested the PUCO to protect information contained in limited portions of its public comments.

On November 7, 2017, ADS and OCC also filed motions for protective order with regard to the testimony provided by ADS witness Charles Daitch and OCC

witness Michael Haugh, portions of which contained trade secret information subject to protective under Ohio law.

No memoranda contra to the four motions for protective order filed by ADS and OCC were filed by any party.

On January 9, 2018, the PUCO entered an Order finding the information that was the subject of the motions for protective order filed by ADS and OCC constituted trade secrets subject to protection from public disclosure under Ohio law. Specifically, the PUCO found that “the information subject to the motions for protective order constitute trade secrets and, therefore, their release is prohibited under state law.” (January 9, 2018 Protective Order at ¶ 11.) The PUCO also held, consistent with Ohio Adm.Code 4901-1-24(D), that confidential treatment of that trade secret information should be afforded for a period ending twenty-four (24) months after entry of the order, and that until such date the Commission’s docketing division should maintain, under seal, all information filed confidentially by ADS and OCC.

ADS respectfully seeks an extension of the protections ordered in the January 9, 2018 Protective Order, as the confidential information that is the subject of that Protective Order continues to constitute highly sensitive trade secret information protected from public disclosure by Ohio law. As described below, the confidential information contained in the Joint Application and related testimony, if released to the public, would harm ADS by providing its domestic and international competitors with proprietary information concerning its operations, investment

projections, electric use and pricing information, and employment figures and plans at the Ohio Campuses.

Argument

I. Standard of Law

The confidential information should remain confidential and protected from public disclosure because, as the PUCO previously held, the information satisfies the requirements of Ohio Adm.Code 4901-1-24 and constitutes trade secrets under Ohio law and continues to remain trade secret information.

Ohio Adm.Code 4901-1-24(D) provides that the PUCO 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.”

Section 1333.61(D) of the Revised Code defines “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.

R.C. 1333.61(D). The Ohio Supreme Court has also identified six factors to consider when determining if information constitutes trade secrets:

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. The Plain Dealer v. Ohio Dept. of Ins., 80 Ohio St.3d 513, 524-525 (1997).

With respect to the extension of the Protective Order, Ohio Adm.Code 4901-1-24 provides that, “A party wishing to extend a protective order beyond twenty-four months shall file an appropriate motion at least forty-five days in advance of the expiration date of the existing order. The motion shall include a detailed discussion of the need for continued protection from disclosure.” This Motion to Extend Protective meets these requirements for an extension of the Protective Order.

II. Analysis

The PUCO reviewed Section 1333.61(D) and the *Plain Dealer* factors in its January 9, 2018 Order and found:

Applying the requirements that the information have independent economic value and be the subject of reasonable efforts to maintain its secrecy pursuant to Section 1333.61(D), as well as the six-factor test set forth by the Ohio Supreme Court, the attorney examiner finds the information subject to the motions for protective order constitute trade

secrets and, therefore, their release is prohibited under state law. . . . It is, therefore, ORDERED, That the motions for protective order filed by Vadata be granted.

The information redacted in the Joint Application, including the report attached as Appendix B, and related direct testimony of ADS witness Charles Daitch and OCC witness Michael Haugh, contain information regarding ADS's operational and financial data, actual and potential investment levels, electric use and pricing information, and employment figures and plans. This information constitutes "business information" and "financial information" under Section 1333.61(D), and derives independent economic value from not being generally known to the public. Ohio courts routinely find that similar information constitutes trade secrets. *See, e.g., Ohio Consumers' Counsel v. Pub. Util. Comm'n*, 112 Ohio St.3d 362, 2009-Ohio-604, 904 N.E.2d 853, ¶ 28 (information about electricity use and pricing); *Plain Dealer v. Ohio Dep't. of Ins.*, 80 Ohio St.3d 513, 1997-Ohio-75, 687 N.E.2d 661, ¶ 24 (investment information); *Boehm v. Black Diamond Casino Events, LLC*, 116 N.E.3d 704, 2018-Ohio-2379, at ¶¶ 5-6 (1st Dist.) (operational and financial data).

ADS continues to take all reasonable precautions to guard the information's secrecy. Such steps include, without limitation, entering into confidentiality agreements with persons receiving this trade secret information, keeping such trade secret information inaccessible to the public, and protecting any trade secret information from public disclosure. Similarly, the value to ADS of keeping this information confidential, and the potential competitive advantage that ADS's

competitors could obtain through this information, has not changed. As the Commission already found, this information is not known outside of ADS's business, and public disclosure of the confidential information could give competitors an advantage that would hinder ADS's ability to compete worldwide. The cloud-computing business is extremely competitive, and ADS's business interests would be harmed if any trade secret information is made public that could give its competitors an advantage or otherwise help ADS's competitors determine how ADS operates its data centers from a financial, energy, or logistical perspective. Consequently, an extension of the protective order is warranted because the information subject to that order continues to constitute trade secret information under Section 1333.61.

Finally, the protection of trade secret information from public disclosure is consistent with the purposes of R.C. Title 49 because the PUCO has access to the information, but at the same time the information is protected from other competitors. *Ohio Consumers' Counsel*, 2009-Ohio-604, at ¶ 26 (recognizing the need to balance the Commission's duty to provide access to public records with its need to preserve confidential information for market participants). Thus, the continued protection of ADS's trade secret information will not impair the PUCO's regulatory responsibilities. The Ohio Supreme Court has previously upheld the Commission's decision to protect trade secrets under similar circumstances. *Id.*

For each of these reasons, ADS's confidential information remains a trade secret, and should be protected as such.

Conclusion

Pursuant to Rule 4901-1-24(F), ADS respectfully requests the PUCO issue an order extending its January 9, 2018 Protective Order for a period of an additional twenty-four months.

Respectfully submitted,

/s/ David F. Proaño

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CERTIFICATE OF SERVICE

The PUCO's e-filing system will electronically serve notice of the filing of this document on the following parties on November 22, 2019, all of whom have agreed to accept service by e-mail:

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Summary: Motion to Extend Protective Order and Memorandum in Support electronically filed by Mr. David F. Proano on behalf of Amazon Data Services, Inc.