

BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of :
Diamond Energy East, LLC for : Case No. 21-0629-EL-CRS
Certification as a Competitive :
Retail Electric Service Provider :

MOTION FOR A PROTECTIVE ORDER

Pursuant to Rule 4901-1-24(D) of the Ohio Administrative Code (“OAC”), Diamond Energy East, LLC (“Diamond Energy”) hereby moves for a protective order to keep confidential and not part of the public record Exhibits B-1, B-2, B-3, C-8, and portions of Exhibits A-12, D-1 and D-2 to its application (“Application”)¹ seeking certification to provide competitive retail electric service. Diamond Energy’s Application is simultaneously being filed with the Public Utilities Commission of Ohio. As more fully explained in the accompanying memorandum, the aforementioned exhibits contain information regarding Diamond Energy’s corporate structure, financial information, legal matters, business arrangements, business plans, commercially sensitive information and personal identification information of key personnel.

WHEREFORE, Diamond Energy respectfully requests that its motion for a protective order be granted and that the Commission issue an order providing that it is not required to make Exhibits B-1, B-2, B-3, C-8 and portions of Exhibits A-12, D-1 and D-2 part of the public record. Diamond Energy requests that the Commission maintain the confidential information until such time as Diamond Energy publically announces the information, consents to its disclosure upon

¹ A Motion for Protective Order is not required to keep forecasted financial statements, financial arrangements, credit ratings and credit reports under seal. Ohio Admin. Code 4901:1-24-08. Please note that Diamond Energy’s Exhibits C-2 (Financial Statements), C-3 (Forecasted Financials), C-4 (Credit Rating) and C-5 (Credit Report) have been filed under seal.

any request made to disclose such information, or as otherwise ordered by law.

Respectfully submitted,

/s/ Scott R. Dismukes

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Dated: June 10, 2021

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Certification as a Competitive :
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MEMORANDUM IN SUPPORT OF MOTION FOR A PROTECTIVE ORDER

As indicated in the foregoing motion, Diamond Energy East, LLC (“Diamond Energy”) seeks a protective order to keep confidential Exhibits B-1, B-2, B-3, C-8 and portions of Exhibits A-12, D-1 and D-2 filed with the Public Utilities Commission of Ohio (the “Commission”) as part of its competitive retail electric supplier application.² Rule 4901-1-24(D) of the Ohio Administrative Code (the “Code”) provides that the Commission or certain designated employees may issue an order that is necessary to protect the confidentiality of information contained in documents filed with the Commission, 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 Revised Code. Rule 4901-1-24(D) specifically notes that trade secrets under Ohio law are a type of confidential information intended to be protected by the Rule. Similarly, Section 4905.07 of the Revised Code, which provides that facts and information in the possession of the Commission shall be made public, includes an exception for “[r]ecords the release of which is prohibited by state or federal law.” R.C. 4905.07; R.C. 149.43(v). The Ohio Supreme Court has confirmed that trade secrets fall within this

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exception. *State ex rel. Besser v. Ohio State*, 89 Ohio St. 3d 396, 399 (2000) (“Trade secrets are exempt from disclosure under the ‘state or federal law’ exemption of R.C. 149.43.”). 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 (Ohio 1997).

The information for which protection is sought covers Diamond Energy’s corporate structure, financial information, legal matters, business arrangements, business plans, commercially sensitive information and personal identification information of key personnel.

The release of the information to the public would harm Diamond Energy by providing its

competitors commercially sensitive and proprietary information. The competitively sensitive, confidential information derives independent economic value, actual or potential, from not being generally known to Diamond Energy's competitors and from not being reasonably ascertainable by Diamond Energy's competitors, who could obtain economic value from its disclosure or use. Disclosure of the sensitive information in the aforementioned Exhibits would provide Diamond Energy's competitors with valuable insight into Diamond Energy's business activities. The release of the information would also be inappropriate as it would disclose personal identification information of key personnel.

Diamond Energy submits that Exhibits B-1, B-2, B-3, C-8 and portions of Exhibits A-12, D-1 and D-2 contain competitively sensitive, highly confidential and personal identification information that is not generally known or available to the public. Diamond Energy has undertaken efforts to keep this information confidential. Diamond Energy has taken appropriate precautions to guard the secrecy of the information including stamping it as confidential in the ordinary course of business and filing it under seal in other jurisdictions where it seeks to serve as a competitive retail electric supplier. Additionally, Diamond Energy submits that the information contained in the exhibits is not considered "public information" that must be available to the public pursuant to state law. Ohio Rev. Code Ann. § 149.43 (defining "public record" as "records kept by any public office, including, but not limited to, state, county, city, village, township, and school district units, and records pertaining to the delivery of educational services by an alternative school in this state kept by the nonprofit or for-profit entity operating the alternative school [...]").

It is clear that the information in Exhibits B-1, B-2, B-3, C-8 and portions of Exhibits A-12, D-1 and D-2 should be protected from public disclosure. Further, the non-disclosure of the

information is not inconsistent with the purposes of Title 49 of the Revised Code. The Commission has full access to the information and can rely on it in order to fulfill its obligations under Title 49.

WHEREFORE, Diamond Energy East, LLC respectfully requests that its motion for a protective order be granted and that the Commission issue an order providing that it is not required to make public its exhibits labeled as confidential until such time as the Commission orders otherwise. Diamond Energy requests that the Commission maintain the Confidential Information until such time as Diamond Energy publically announces the information, consents to its disclosure upon any request made to disclose such information, or as otherwise ordered by law.

Respectfully submitted,

/s/ Scott R. Dismukes

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Dated: June 10, 2021

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Summary: Motion for a Protective Order electronically filed by Ms. Sarah Stoner on behalf of Diamond Energy East, LLC