

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Alternative Energy)	
Portfolio Status Report for Calendar Year)	Case No. 23-295-EL-ACP
2022 from Direct Energy Services, LLC)	

MOTION FOR PROTECTIVE ORDER

Pursuant to Ohio Administrative Code 4901-1-24(D), Direct Energy Services, LLC (“Direct Energy Services”) moves for a protective order to keep the confidential and proprietary subaccount data contained in the chart attached to its Alternative Energy Portfolio Status Report for Calendar Year 2022 confidential, and not part of the public record. The reasons underlying this motion are detailed in the attached Memorandum in Support. This same day, Direct Energy Services is submitting the confidential version of its Alternative Energy Portfolio Status Report for Calendar Year 2022 under seal in accordance with the procedures put into place on October 25, 2021, in *In the Matter of the Proper Procedures and Process for the Commission’s Operations and Proceedings during the Declared State of Emergency and Related Matters*, Case Nos. 20-591-AU-UNC et al., Entry (October 20, 2021).

Respectfully submitted,

/s/ Gretchen L. Petrucci
Gretchen L. Petrucci (0046608)
Vorys, Sater, Seymour and Pease LLP
52 East Gay Street
P.O. Box 1008
Columbus, Ohio 43216-1008
(614) 464-5407
glpetrucci@vorys.com
(Willing to accept service via email)

Counsel for Direct Energy Services, LLC

**MEMORANDUM IN SUPPORT
OF
MOTION FOR PROTECTIVE ORDER**

Direct Energy Services, LLC (“Direct Energy Services”) requests that the confidential and proprietary subaccount data contained in the chart included with its Alternative Energy Portfolio Status Report for 2022 be protected from public disclosure. The chart identifies market-sensitive information, market strategy and activities, and quantities at specific granular levels. Release of this information to the public would harm Direct Energy Services by providing its competitors with proprietary market information that is designed by statute to now be a competitive service.

Ohio Administrative Code (“Ohio Adm.Code”) 4901-1-24(D) provides that the Public Utilities Commission of Ohio (“Commission”) or certain designated employees may protect the confidentiality of information contained in documents filed with the Commission’s Docketing Division 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 (“R.C.”). State law recognizes the need to protect certain types of information, including that which is the subject of this motion. The non-disclosure of the information in the chart attached to Direct Energy Services’ report will not impair the purposes of Title 49. The Commission and its Staff have full access to the information in order to fulfill their statutory obligations. No purpose of Title 49 would be served by the public disclosure of the information.

The need to protect the designated information from public disclosure is clear, and there is compelling legal authority supporting the requested protective order. While the Commission has often expressed its preference for open proceedings, the Commission also long ago recognized its statutory obligations with regard to trade secrets:

The Commission is of the opinion that the “public records” statute must also be read in pari materia with Section 1333.31, Revised

Code (“trade secrets” statute). The latter statute must be interpreted as evincing the recognition, on the part of the General Assembly, of the value of trade secret information.

In re General Telephone Co., Case No. 81-383-TP-AIR, Entry (February 17, 1982). Likewise, the Commission has facilitated the protection of trade secrets in its rules. *See* Ohio Adm.Code 4901-1-24(A)(7).

The definition of a “trade secret” is set forth in R.C. Section 1333.61(D):

“Trade secret” means information, 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.

This definition clearly reflects the state policy favoring the protection of trade secrets such as the chart that is the subject of this motion.

In *State ex rel The Plain Dealer the Ohio Dept. of Ins.* (1997), 80 Ohio St. 3d 513, the Supreme Court of Ohio adopted a six-factor test to analyze whether information is a trade secret under the statute:

- (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.

Id. at 524-525 (quoting *Pyromatics, Inc. v. Petruziello*, 7 Ohio App. 3d 131, 134-135 (Cuyahoga County 1983)).

After applying these factors to the information sought to be protected, it is clear that a protective order should be granted. The Alternative Energy Portfolio Status Report for Calendar Year 2022 contains confidential and proprietary information. Such sensitive information is generally not disclosed at market-specific levels. Its disclosure could give competitors an understanding of Direct Energy Services' marketing strategy and activities, providing competitors with an advantage that would hinder Direct Energy Services' ability to compete. The compilation of this information has unique competitive value as well. In addition, public disclosure of this confidential information is not likely to assist the Commission in carrying out its duties. Moreover, the Commission has previously granted a protective order to prevent disclosure of marketing plans and strategies that constitutes trade secrets. *In the Matter of Stream Ohio Gas and Electric, LLC d/b/a Stream Energy for Certification as a Competitive Retail Natural Gas Supplier*, Case No. 07-1283-GA-CRS, Entry at ¶ 9 (May 2, 2014).

Courts in other jurisdictions have held that not only does a public utilities commission have the authority to protect the trade secrets of the companies subject to its jurisdiction, the trade secrets statute creates a duty to protect them. *New York Tel. Co. v. Pub. Serv. Comm. N.Y.*, 56 N.Y. 2d 213 (1982). Indeed, if the Commission were to not protect trade secrets, it would negate the protections the Ohio General Assembly has granted to all businesses, including competitive suppliers. This Commission has previously carried out its obligations in this regard in numerous proceedings. *See, e.g., Elyria Tel. Co.*, Case No. 89-965-TP-AEC, Finding and Order (September

21, 1989); *Ohio Bell Tel. Co.*, Case No. 89-718-TP-ATA, Finding and Order (May 31, 1989); and *Columbia Gas of Ohio, Inc.*, Case No. 90-17-GA-GCR, Entry (August 17, 1990).

WHEREFORE, for the above reasons, Direct Energy Services requests that the Commission grant its motion for a protective order and to maintain under seal the unredacted chart attached to its Alternative Energy Portfolio Status Report for Calendar Year 2022.

Respectfully submitted,

/s/ Gretchen L. Petrucci
Gretchen L. Petrucci (0046608)
Vorys, Sater, Seymour and Pease LLP
52 East Gay Street
P.O. Box 1008
Columbus, Ohio 43216-1008
(614) 464-5407
glpetrucci@vorys.com
(Willing to accept service via email)

Counsel for Direct Energy Services, LLC

**This foregoing document was electronically filed with the Public Utilities
Commission of Ohio Docketing Information System on**

4/11/2023 4:40:31 PM

in

Case No(s). 23-0295-EL-ACP

Summary: Motion for Protective Order electronically filed by Mrs. Gretchen L.
Petrucchi on behalf of Direct Energy Services, LLC.