

BEFORE THE PUBLIC UTILITIES COMMISSION OF OHIO

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In the Matter of the Commission's Promulgation of Rules for Minimum Competitive Retail Electric Service Standards Pursuant to Chapter 4928, Revised Code) Case No. 99-1611-EL-ORD

In the Matter of the Application of STRATEGIC ENERGY L.L.C. for Authority to Operate as a Certified Retail Electric Supplier in the State of Ohio.) Case No. 00-1758-EL-CRS

MOTION FOR A PROTECTIVE ORDER

Strategic Energy L.L.C. ("SEL"), applicant in the above styled matter, pursuant to Rule 4901-1-24(D) of Ohio Administrative Code ("OAC"), moves the Public Utilities Commission of Ohio ("Commission") for a protective order to shield proprietary information from the public record and keeping confidential the proprietary information contained within its Power Supply Coordination Agreement ("Agreement"). The Agreement which has been designated confidential and/or proprietary information is submitted as an exemplar in connection with its request for a waiver. Consistent with the requirements of Section 4901-1-24(D) of the Commission's rules, SEL has filed under seal unredacted copies of the Agreement which is the subject of this motion.

MEMORANDUM IN SUPPORT

SEL is a privately held company and its proprietary information is not publicly available. Therefore, SEL requests that the Agreement be designated as confidential and/or proprietary in

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the accompanying filing (along with any and all copies, including electronic copies) be protected from public disclosure.

OAC Rule 4901-1-24(D) provides that the Commission or certain designated employees may issue an order which is necessary to 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 Ohio Revised Code ("R.C.") Chapter 4928. Moreover, R.C. Section 4928.06 (F) specifically permits the Commission to grant confidentiality to competitive information. SEL asserts that the Agreement provided constitutes trade secrets and as such state law prohibits the release of the information.

R. C. Sections 4901.12 and 4905.07 were amended in order to facilitate the protection of trade secrets in the Commission's possession. Am. Sub. H. B. 476, effective September 17, 1996. By referencing R. C. Section 149.43, the Commission-specific statutes now incorporate the provision of that statute that excepts from the definition of "public record" records the release of which is prohibited by state or federal law. R. C. Section 149.43(A)(1). In turn, state law prohibits the release of information meeting the definition of a trade secret. R. C. Sections 1333.61(D) and 1333.62. The amended statutes also reference the purposes of R.C. Title 49. R.C. Section 4928.06 (F) specifically states that "the Commission shall take such measures as it considers necessary to protect the confidentiality of any such information [necessary to effect competition]." The protection of trade secret information from public disclosure is consistent with the purposes of R.C. Chapter 4928 because the Commission and its Staff have access to the information, but at the same time the information is protected from other competitors entering the electric retail market. Thus the protection of trade secret information as requested by SEL will not impair the Commission's regulatory responsibilities.

Even before the enactment of R.C. Chapter 4928, the Commission recognized the need to protect trade secrets from public disclosure as consistent with its other statutory obligations:

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 (OAC Rule 4901-1-24(A)(7)).

The definition of a "trade secret" is set forth in the Uniform Trade Secrets Act, 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.

Emphasis added. This definition clearly reflects the state policy favoring the protection of trade secrets such as the financial information which is the subject of this motion.

Courts of other jurisdictions have held that not only does a public utilities commission have the authority to protect the trade secrets of a public utility, the trade secret statute creates a duty to protect them. *New York Tel. Co. v. Pub. Serv. Comm. N.Y.*, 56 N.Y. 2d 213 (1982). For

the Commission to do otherwise would be to negate the protections the Ohio legislature has granted to all businesses, including public utilities, through the Uniform Trade Secrets Act. 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); *Columbia Gas of Ohio, Inc.*, Case No. 90-17-GA-GCR (Entry, August 17, 1990).

In *Pyromatics, Inc. v. Petruziello*, 7 Ohio App. 3d 131, 134-135 (Cuyahoga County 1983), the Court of Appeals, citing *Koch Engineering Co. v. Faulconer*, 210 U.S.P.Q. 854, 861 (Kansas 1980), has delineated 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.

SEL meets these considerations. SEL is providing its Agreement under seal and has treated the Agreement as a trade secret. In the ordinary course of business of SEL, this information is deemed confidential, is treated as proprietary and confidential by SEL employees and is not disclosed to anyone except in a legal proceeding and is only pursuant to protective agreement.

SEL is a privately held company seeking authority to operate as a CRES in the state of Ohio. Therefore the Agreement is considered by SEL to be highly proprietary and confidential. Given the new competitive environment in which SEL will be operating, it is imperative that SEL be allowed to disclose this agreement only under seal, precluding its potential competitors

from gaining access to this sensitive information. Thus for the foregoing reasons, SEL requests that the designated information be protected from public disclosure.

Respectfully submitted on behalf of
STRATEGIC ENERGY L.L.C.



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