

BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Applications of:)	
)	
MxEnergy, Inc.,)	Case No. 02-1773-GA-CRS
ACN Energy, Inc., and)	Case No. 02-1828-GA-CRS
Direct Energy Services, LLC)	Case No. 02-1829-GA-CRS
)	
for Certification as Retail Natural)	
Gas Suppliers in the State of Ohio.)	

ENTRY

The attorney examiner, pursuant to the authority granted by Rules 4901-1-14 and 4901-1-24, Ohio Administrative Code (O.A.C.), finds:

- (1) On August 9, 2004, MxEnergy, Inc. (MxEnergy), a previously certified competitive retail natural gas supplier pursuant to Section 4929.20 *et seq.*, Revised Code, filed its renewal application to retain its certified status. As part of that filing, MxEnergy requested a protective order under Rule 4901-1-24(D), O.A.C., for its summary of experience ("Exhibit B-3"); financial statements ("Exhibit C-3"); financial arrangements ("Exhibit C-4"); and forecasted financial statements ("Exhibit C-5").
- (2) Similarly, on August 10, 2004 and August 16, 2004, respectively, Direct Energy Services, LLC (Direct Energy) and ACN Energy, Inc. (ACN Energy), previously certified competitive retail natural gas suppliers pursuant to Section 4929.20 *et seq.*, Revised Code, filed their renewal applications to retain their certified status. As part of its filing, Direct Energy requested a protective order under Rule 4901-1-24(D), O.A.C., for its Supplemental Exhibit C-6. ACN Energy sought similar protection for its Exhibits C-3, C-4 and C-5. Also, on August 9, 10 and 16, 2004, MxEnergy, Direct Energy and ACN Energy respectively filed under seal with the Docketing Division of the Commission the exhibits for which they each sought a protective order, and filed their motions for protective order. No memoranda contra were filed regarding any of the motions for protective order.
- (3) The Commission has emphasized, in *In the Matter of the Application of The Ohio Bell Telephone Company for Approval of an Alternative Form of Regulation*, Case No. 93-487-TP-ALT, Entry issued November 23, 2003, that:

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[a]ll proceedings at the Commission and all documents and records in its possession are public records, except as provided in Ohio's public records law (Section 149.43, Revised Code) and as consistent with the purposes of Title 49 of the Revised Code. Ohio public records law is intended to be liberally construed to "ensure that governmental records be open and made available to the public...subject to only a few very limited exceptions." *State ex rel. Williams v. Cleveland* (1992), 64 Ohio St. 3d 544, 549, [other citations omitted].

- (4) In determining whether to issue a protective order in these instances, it is necessary to assess whether the materials for which such an order is sought:
 - (a) are prohibited to be released by state or federal law under Section 149.43(A)(1)(v), Revised Code;
 - (b) are maintained as confidential by the company seeking the order (see, *State ex rel. The Plain Dealer v. Ohio Dept. of Ins.* (1997), 80 Ohio St. 3d 513, 524-525, citing *Pyromatics, Inc. v. Petruziello* (1983), 7 Ohio App. 3d 131); and
 - (c) the non-disclosure of which will not be inconsistent with the purposes of Title 49, Revised Code, as required by Rule 4901-1-24(D), O.A.C.
- (5) Section 4929.23(A), Revised Code, requires that, "the Commission take such measures as it considers necessary to protect the confidentiality of any such [competitive retail natural gas service] information." However, the mere filing of materials required by the Commission pursuant to this statute does not satisfy the requirements for non-disclosure of what is otherwise a public document. An *in camera* inspection is necessary to determine whether the materials are entitled to protection from disclosure. *State ex rel. Allright Parking of Cleveland Inc. v. Cleveland* (1992), 63 Ohio St. 3d 772. During that inspection, the question is whether the materials have actual or potential independent economic value from not being

generally known. See, *State ex rel. Besser v. Ohio State Univ.* (2000), 89 Ohio St. 3d 396.

- (6) Upon review, the attorney examiner finds that each company has made an effort to preserve the confidential nature of the materials related to its motion and each of the exhibits for which protection is sought contains sensitive information which would be of competitive value if publicly disclosed. Consistent with Rule 4901-1-24(D)(1), O.A.C., where such confidential material can be reasonably redacted from a document without rendering the remaining document incomprehensible or of little meaning, redaction should be ordered rather than wholesale removal of the document from public scrutiny. Based upon review of the documents, the examiner concludes:
- (a) All of Exhibit B-3 should not be kept under seal, as MxEnergy proposes. MxEnergy should redact the numbers related to customers and volumes delivered from Exhibit B-3, and the redacted document should be filed in the public record. However, removal of consolidated financial information from its Exhibit C-3 would leave only auditor's notes that have little meaning in the absence of the underlying numerical values. Similarly, Exhibits C-4 and C-5 cannot be reasonably redacted to protect the confidential materials contained therein. Accordingly, Exhibits B-3, C-3, C-4 and C-5, currently under seal, should remain under seal for the 18-month period after the date of this entry.
 - (b) Direct Energy's Supplemental Exhibit C-6, although characterized as a "credit rating," is actually a financial arrangement that can be easily redacted by removing the names and addresses of entities, the names of persons executing the agreement, specific financing dollar amounts, and interest rates. Accordingly, Direct Energy should redact the names and addresses of entities, the names of persons executing the agreement, specific financing dollar amounts, and interest rates from Supplemental Exhibit C-6, and the redacted document should be filed in the

public record. Unredacted Supplemental Exhibit C-6, currently under seal, should remain under seal for the 18-month period after the date of this entry.

- (c) ACN Energy's Exhibits C-3 and C-5 cannot be reasonably redacted to protect the confidential materials contained therein. However, Exhibit C-4, a lengthy financing agreement, can be reasonably redacted by removing the names and addresses of entities, the names of persons executing the agreement, specific financing dollar amounts, and interest rates. Accordingly, ACN Energy should redact the names and addresses of entities, the names of persons executing the agreement, specific financing dollar amounts, and interest rates from Exhibit C-4, and the redacted document should be filed in the public record. It is also noted that the agreement as submitted to the Commission is not an executed copy. Further, Exhibits C-3, C-4 and C-5, currently under seal, should remain under seal for the 18-month period after the date of this entry.

Therefore, there is good cause to grant in part and deny in part the motions for protective orders as described above.

- (7) The motions by MxEnergy and Direct Energy each request a waiver from Rule 4901-1-24(F), O.A.C., the provision that protective orders under Rule 4901-1-24(D), O.A.C., automatically expire after 18 months. However, that same rule provides that, "[a] party wishing to extend a protective order beyond eighteen months shall file an appropriate motion at least forty-five days in advance of the expiration date." The examiner is unwilling to accept that the information being protected today will continue in its entirety to require such protection 18 months from now. The requests for waiver of the initial 18-month limitation should be denied.

It is, therefore,

ORDERED, That the motion of MxEnergy for a protective order is granted in part and denied in part. Within seven days of the date of this entry, MxEnergy shall file Exhibit B-3 as a public document, redacted as required by this entry. Exhibits C-3, C-4 and C-5,

and the unredacted version of Exhibit B-3 will remain under seal for the 18-month period from the date of this entry. It is, further,


ORDERED, That the motion of Direct Energy for a protective order is granted in part and denied in part. Within seven days of the date of this entry, Direct Energy shall file Supplemental Exhibit C-6 as a public document, redacted as required by this entry. The unredacted version of Supplemental Exhibit C-6 will remain under seal for the 18-month period from the date of this entry. It is, further,

ORDERED, That the motion of ACN Energy for a protective order is granted in part and denied in part. Within seven days of the date of this entry, ACN Energy shall file Exhibit C-4 as a public document, redacted as required by this entry. Exhibits C-3, C-5 and the unredacted version of Exhibit C-4 will remain under seal for the 18-month period from the date of this entry. It is, further,

ORDERED, That the requests of MxEnergy and Direct Energy for a waiver of the 18-month time period contained in Rule 4901-1-24(F), O.A.C., are denied. It is, further,

ORDERED, That a copy of this entry be served upon MxEnergy, Direct Energy, ACN Energy, their counsel and all other interested parties of record.

THE PUBLIC UTILITIES COMMISSION OF OHIO

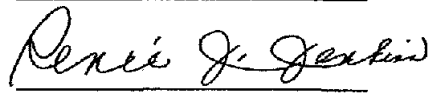


By: John L. Shailer
Attorney Examiner

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Renee J. Jenkins
Secretary