

FILE

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

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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
PUCO

MOTION FOR A PROTECTIVE ORDER

Strategic Energy L.L.C. ("Strategic Energy"), 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 keep confidential the financial data designated confidential and/or proprietary information contained in Sections C-3 (most recent financial statements), C-4 (financial arrangements) and C-5 (forecasted financial statements) of Strategic Energy's certificate renewal application for authority to continue operating as a certified retail electric supplier ("CRES") pursuant to OAC Rule 4901-1-24-09. The Memorandum in Support below presents the reasons to grant this motion. Consistent with the requirements of Section 4901-1-24(D) of the Commission's rules, Strategic Energy has filed under seal unredacted copies of the confidential information that are the subject of this motion.

MEMORANDUM IN SUPORT

On September 26, 2000, Strategic Energy filed an application for authority to operate as a CRES provider. Strategic Energy's application was filed with request for a protective order of

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Strategic Energy's financial statements and disclosure of financial arrangements. On October 24, 2000, the Commission granted Strategic Energy's motion for protective order. This request is identical in all substantive respects with the motions for protective order that the Commission granted for Strategic Energy's original application on October 24, 2000 and for Strategic Energy's renewal application on October 10, 2002.

Strategic Energy requests that the financial data required in Sections C-3, C-4 and C-5 be designated as confidential and/or proprietary in 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. Strategic Energy asserts that financial information required by Sections C-3, C-4 and C-5 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 that the 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 Strategic Energy 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-GRC (Entry, August 17, 1990).

More recently, with respect to CRES applications, the Commission has granted motions for protective orders for financial forecasts – *AmerenEnergy Marketing Company*, Case No. 02-2420-EL-CRS (Entry September 20, 2002), *Mid-American Energy Company*, Case No. 00-1786-EL-CRS, (Entry September 11, 2002 and October 24, 2000) (also granted protection for credit reports); *Green Mountain Energy Company*, 01-88-EL-CRS, (Entry January 29, 2001); *New Power Company*, Case No. 00-2003-EL-CRS, (entry January 8, 2001); *Unicom Energy Inc.*, Case No. 00-1784-CRS, (Entry October 24, 2000) and both the first application of Strategic Energy, Case No. 1758-EL-CRS, (Entry October 24, 2000) and the 2002 Renewal Application of Strategic Energy, Case No. 1758-EL-CRS (Entry October 10, 2002). It has also granted a protective order with respect to financial arrangements in the first Strategic Energy application as

well as its 2002 renewal application. The Commission has also granted confidential treatment for recent financial statements in the first Strategic Energy application, the 2002 renewal application and in Unicom Energy Inc., *supra*, though it did deny protective treatment to Green Mountain, *supra*.

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.

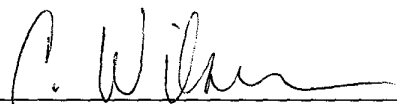
Strategic Energy meets these considerations. Attached is an affidavit of Corey Wilson, Strategic Energy's Market Manager for Ohio and Illinois, which gives details about trade secret protections that Strategic Energy has implemented. This affidavit demonstrates that Strategic Energy has complied with the statutory and case law requirements that merit trade secret protection.

Strategic Energy redacted the financial information required in Sections C-3, C-4 and C-5 from its certification renewal application and has treated the information as a trade secret. In the ordinary course of business of Strategic Energy, this information is deemed confidential, is treated as proprietary and confidential by Strategic Energy employees and is not disclosed to anyone except in a legal proceeding and is only pursuant to protective agreement.

Strategic Energy seeks to renew its certification to continue its operations as a CRES provider in the state of Ohio. Therefore, the financial information requested in Sections C-3, C-4 and C-5 concerns data from Strategic Energy's most recent financial statements, which Strategic Energy considers highly proprietary and confidential. Given the competitive environment in which Strategic Energy operates, it is imperative that Strategic Energy be allowed to disclose its financial resources only under seal, precluding its competitors from gaining access to this sensitive information. Moreover, maintaining the confidentiality of Strategic Energy's financial statements will in no way prejudice Strategic Energy's competitors. The Commission will have the financial information necessary to make an informed decision about renewing Strategic Energy's certification as a CRES provider. The Commission will, therefore, be able to ensure that Strategic Energy complies with the Commission's rules, and Strategic Energy will receive no regulatory advantage over its potential competitors.

Thus for the foregoing reasons, Strategic Energy requests that the designated information in its certification renewal application be protected from public disclosure.

Respectfully submitted by
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