

BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of)
 Vectren Retail, LLC, d/b/a Vectren Source) Case No. 02-1668-GA-CRS
 for Certification as a Retail Natural Gas)
 Supplier.)

ENTRY

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

(1) On May 4, 2006, Vectren Retail, LLC d/b/a Vectren Source (Vectren Source), filed an application for renewal of its certification as a competitive retail natural gas supplier (CRNGS), in accordance with Section 4929.20 *et seq.*, Revised Code. (The Commission issued Certificate No. 02-001 to Vectren Source on July 11, 2002, and renewed the same certificate on July 11, 2004.) Vectren Source's renewal application was accompanied by a motion for a protective order of the following application exhibits: financial statements (Exhibit C-3), financial arrangements (Exhibit C-4), and forecasted financial arrangements (Exhibit C-5). On July 7, 2006, Vectren Source amended its motion for a protective order. As part of this supplemental filing, Vectren Source submitted public (redacted) versions of Exhibits C-3, C-4 (with only the promissory notes remaining under seal), and C-5. Vectren Source argues that the financial statements, financial arrangements, and forecasted financial statements contained in Exhibits C-3, C-4, and C-5 are competitively sensitive, highly proprietary financial information, which require confidential treatment, and should be considered a trade secret under Section 1333.61(D), Revised Code. Vectren Source asserts that protecting the information in these exhibits would be consistent with the Commission's decisions (in attorney examiner entries issued on July 14, 2003, and August 11, 2004), as these exhibits contain the same types of financial information that the Commission protected in Vectren Source's two previous applications for certification as a CRNGS. Vectren Source specifically notes that it keeps its financial data confidential and that disclosure of the financial data would give its competitors an advantage. No memorandum contra was filed regarding Vectren Source's motion for protective order.

(2) Section 4905.07, Revised Code (in carrying out the purposes of Title 49, Revised Code) provides that all facts and information in the possession of the Commission shall be public, except as provided in Ohio's public records law under Section 149.43, Revised Code.

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Section 149.43, Revised Code, specifies that the term "public records" excludes information that may not be released under state or federal law. The Ohio Supreme Court has clarified that the "state or federal law" exemption is intended to cover trade secrets. *State ex rel. Besser v. Ohio State*, 89 Ohio St. 3d 396, 399 (2000).

- (3) In addition, Rule 4901-1-24, O.A.C., permits an attorney examiner to issue an order to protect the confidentiality of information contained in a filed document, "to the extent that state or federal law prohibits release of the information, including where the information is deemed . . . to constitute a trade secret under Ohio law, and where non-disclosure of the information is not inconsistent with the purposes of Title 49 of the Revised Code."
- (4) Ohio law, under Section 1333.61(D), Revised Code, defines a trade secret as "information . . . 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.
- (5) The Ohio Supreme Court has adopted the following six factors to be used in analyzing a claim that information is a trade secret under that section:
 - (1) [t]he 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 (1997) (citations omitted).

- (6) In addition, the Ohio Supreme Court has found that an *in camera* inspection is necessary to determine whether materials are entitled to protection from disclosure. *State ex rel. Allright Parking of Cleveland Inc. v. Cleveland*, 63 Ohio St. 3d 772 (1992).
- (7) Rule 4901-1-24(D)(1), O.A.C., also provides that, where 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 the wholesale removal of the document from public scrutiny.
- (8) Thus, in order to determine whether to issue a protective order, it is necessary to review the materials in question; to assess whether the information constitutes a trade secret under Ohio law; to decide whether non-disclosure of the materials will be consistent with the purposes of Title 49, Revised Code; and to evaluate whether the confidential material can reasonably be redacted.
- (9) The attorney examiner has reviewed the information for which Vectren Source seeks a protective order and the assertions set forth in the memorandum in support of Vectren Source's motion. Applying the requirements that the information have independent economic value and be the subject of reasonable efforts to maintain its secrecy, as well as the six-factor test set forth by the Ohio Supreme Court, the attorney examiner finds that the information set forth in Exhibits C-3 and C-5 is a trade secret. Specifically, Exhibits C-3 and C-5 contain sensitive financial information relating to this privately held applicant. (Exhibit C-2 of Vectren Source's May 4, 2006 renewal application submits that it is indirectly wholly owned by Vectren Corp.) As to Exhibit C-4, the attorney examiner notes that this exhibit consists of a basic financial agreement, with promissory notes as attachments. The attorney examiner further finds that the base agreement itself does not contain any proprietary information. Therefore, the information in the base financial agreement is not a trade secret and should not be afforded protection. However, the promissory notes attached to the base agreement are clearly proprietary in nature. The release of the proprietary information in these exhibits is thus prohibited under state law. The attorney examiner also finds that non-disclosure of the information is not inconsistent with the purposes of Title 49 of the Revised Code.

- (10) Following an *in camera* review, the attorney examiner concludes that Exhibits C-3 and C-5 cannot be reasonably redacted to remove the confidential information contained therein. However, the base financial agreement in Exhibit C-4 can be redacted to remove the entity names. As noted above in Finding (1), on July 7, 2006, Vectren Source filed Exhibit C-4 as a public document, with the entity names redacted, and only the promissory notes remaining under seal. This redaction was also required in the 2004 certification renewal process for Vectren Source in this case docket.
- (11) Accordingly, the attorney examiner finds that there is good cause to grant Vectren Source's motion for a protective order for Exhibits C-3 and C-5. However, only the promissory notes attached to Exhibit C-4 and the redacted entity names in that exhibit should receive protected status. Therefore, the unredacted version of Exhibits C-3, C-4, and C-5 (filed under seal on May 4, 2006) should receive protected status for an 18-month period from the date of this entry, and should remain under seal in the docketing division for that time period.
- (12) Vectren Source also requested a waiver of Rule 4901-1-24(F), O.A.C., which provides that any order prohibiting disclosure of certain documents will automatically expire 18 months from the date the order was issued. Vectren Source contends that the sensitive nature of the financial information will remain and the need to keep the information from public disclosure will not diminish. The attorney examiner notes this rule also 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." If Vectren Source wishes to extend that protection, it may file an appropriate motion at least 45 days in advance of the expiration date. Vectren Source's request for waiver of the initial 18-month limitation should be denied.

It is, therefore,

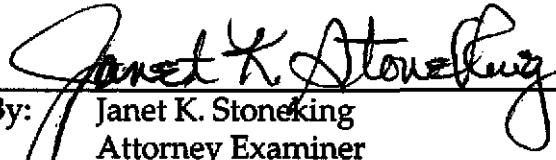
ORDERED, That Vectren Source's motion for a protective order is granted, in part, and denied, in part, as discussed above. Exhibits C-3 and C-5 are granted protected status and shall remain under seal for the 18-month period from the date of this entry. However, only the promissory notes attached to Exhibit C-4 and the entity names appearing in that exhibit are granted protection for that same period of time. It is, further,


ORDERED, That the docketing division maintain under seal the information set forth in unredacted Exhibits C-3, C-4, and C-5 of the application for a period of 18 months from the date of this entry. It is, further,

ORDERED, That the request of Vectren Source for a waiver of the 18-month time period contained in Rule 4901-1-24(F), O.A.C., is denied. It is, further,

ORDERED, That a copy of this entry be served upon Vectren Source, its counsel and all other parties of record.


THE PUBLIC UTILITIES COMMISSION OF OHIO


By: Janet K. Stoneking
Attorney Examiner

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Entered in the Journal

AUG 11 2008


Renee J. Jenkins
Secretary