

BEFORE


THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of United)	
Telephone Company of Ohio d/b/a Embarq)	
For Approval of an Alternative Form of)	
Regulation of Basic Local Exchange and)	Case No. 09-151-TP-BLS
Other Tier 1 Services Pursuant to)	
Chapter 4901:1-4, Ohio Administrative)	
Code.)	

EMBARQ'S MOTION FOR A PROTECTIVE ORDER

United Telephone Company of Ohio d/b/a Embarq ("Embarq") respectfully moves, pursuant to O.A.C. §4901-1-24(D) and §4901:1-4-09(E), for the issuance of a protective order with respect to certain confidential or proprietary CLEC-specific information included in its application filed in this case. The reasons underlying this motion are detailed in the attached Memorandum in Support. Consistent with the requirements of §4901-1-24(D), three unredacted copies of the confidential information which is the subject of this motion have been filed under seal.

Respectfully submitted,


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MEMORANDUM IN SUPPORT

Embarq respectfully requests that certain confidential and/or proprietary CLEC-specific information be considered as confidential or proprietary and be protected from public disclosure. The subject information includes the following: the identification of specific alternative providers along with the number of lines associated with E 9-1-1 service, directory listings, ported telephone numbers, and specific customer address information used to derive service availability on carrier websites.

The redacted information in Exhibit 3 dealing with specific information relative to the number of customers of alternative providers is generally protected from public disclosure in Commission proceedings. In addition Embarq's interconnection agreements with the alternative providers include language that requires Embarq to "safeguard Confidential Information from unauthorized use or disclosure using no less than the degree of care with which the Recipient safeguards its own Confidential Information."

O.A.C. §4901: 1-4-09(E) provides that confidential information filed by the ILEC will be eligible for proprietary treatment in accordance with O.A.C. §4901-1-24. O.A.C. §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 Title 49 of the Ohio Revised Code. As set forth herein, the information described below represents confidential business information and, therefore, should be protected from disclosure.

Non-disclosure of the identified confidential information will not impair the purposes of Title 49. The Commission and its Staff have full access to the information in order to review the competitive showings made in the application. 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.¹

Likewise, the Commission has facilitated the protection of trade secrets in its rules (O.A.C. § 4901-1-24(A)(7)).

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

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.

R. C. § 1333.61(D).

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

¹ *In re General Telephone Co.*, PUCO Case No. 81-383-TP-AIR (Entry, February 17, 1982).

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). Indeed, for the Commission to do otherwise would be to negate the protections the Ohio General Assembly 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.*, PUCO Case No. 89-965-TP-AEC (Finding and Order, September 21, 1989); *Ohio Bell Tel. Co.*, PUCO Case No. 89-718-TP-ATA (Finding and Order, May 31, 1989); *Columbia Gas of Ohio, Inc.*, PUCO Case No. 90-17-GA-GCR (Entry, August 17, 1990).

In 1996, the Ohio General Assembly amended R. C. §§ 4901.12 and 4905.07 in order to facilitate the protection of trade secrets in the Commission's possession. The General Assembly carved out an exception to the general rule in favor of the public disclosure of information in the Commission's possession. By referencing R. C. §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. §149.43(A)(1). In turn, state law prohibits the release of information meeting the definition of a trade secret. R. C. §§ 1333.61(D) and 1333.62. The amended statutes also reference the purposes of Title 49 of the Revised Code. The protection of trade secret information from public disclosure is consistent with the purposes of Title 49 because the Commission and its Staff have access to the information; in many cases, the parties to a case may have access under an appropriate protective agreement. The protection of trade secret information as requested herein will not impair the Commission's regulatory responsibilities.


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), 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.

For all of the information which is the subject of this motion, Embarq considers and has treated the information as a trade secret. In the ordinary course of business of Embarq, this information is stamped confidential, is treated as proprietary and confidential by Embarq employees, and is not disclosed to anyone except in a Commission proceeding or pursuant to a staff data request. During the course of discovery, information of this type has generally been provided only pursuant to a protective agreement.

For all of the foregoing reasons, Embarq requests that the Commission determine and declare that this information is properly the subject of a protective order.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Embarq Motion for Protective Order was served via first class mail, postage prepaid on the parties listed below on this 3rd day of March 2009.



Joseph R. Stewart

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3/3/2009 4:35:16 PM

in

Case No(s). 09-0151-TP-BLS

Summary: Motion for protective order and memorandum in support electronically filed by Sonya I Summers on behalf of United Telephone Company of Ohio d/b/a Embarq