FILE

BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Petition of TracFone Wireless, Inc. dba Safelink Wireless for Designation as an Eligible Telecommunications Carrier	))))	Case No. 97-632-TP-COI Case No. 10-614-TP-UNC

MEMORANDUM CONTRA OF THE APPALACHIAN PEACE AND JUSTICE NETWORK AND EDGEMONT NEIGHBORHOOD COALITION TO TRACFONE WIRELESS, INC.'S MOTION FOR PROTECTIVE ORDER

On August 10, 2010, TracFone Wireless, Inc. ("TracFone") filed a motion for protective order in response to a public records request for information that TracFone provided in quarterly reports to the Commission. TracFone incorrectly asserts that the Appalachian Peace and Justice Network ("APJN") and the Edgemont Neighborhood Coalition ("Edgemont") initiated this public records request. (Motion for Protective Order at 1). In fact, the Advocates for Basic Legal Equality, Inc. ("ABLE") and the Ohio Poverty Law Center ("OPLC"), separate from this proceeding, initiated the public records request under Ohio's public records law. Specifically, ABLE and OPLC submitted their public records request on August 2, 2010, electronically and by regular U.S. mail, to the Commission, c/o Kim Bojko, PUCO Chief of Staff, under the Ohio Public Records Act, R.C. 149.43.

ARGUMENT

I. TRACFONE CONFUSES THIS PROCEEDING AND THE PUBLIC RECORDS REQUEST OF ABLE AND OPLC.

TracFone's filing of this Motion for Protective Order—the third Motion for Protective Order it has filed in this proceeding—is perplexing and reflects their misunderstanding of the Ohio Public Records Act, R.C. 149.43. TracFone confuses the Public Records Act request submitted to the Commission on August 2—totally apart from this proceeding—with the protective order requirements governing PUCO proceedings. They are two very distinct actions. The Public Records Act request is not dependent on the outcome of any discovery, docketing or related protective order proceedings in this case. The intervenors in the instant case[1]—APJN and Edgemont—are not parties to the Public Records Act request. Conversely, the requestors under Ohio's public records law—ABLE and OPLC—are not parties to the instant case. While ABLE and OPLC represent APJN and Edgemont respectively, neither party in this proceeding was a signatory to the public records request.

Further, it is incumbent on the Commission to respond to the Public Records Act request; that request is not directed to TracFone or related to any discovery proceedings in TracFone's ETC Lifeline case. Any failure by the PUCO to disclose the requested public records may be challenged by the requesting entities filing a mandamus action in the Franklin County Court of Common Pleas, the Franklin County Court of Appeals, or the Supreme Court of Ohio. R.C. 149.43(C). The validity and enforceability of the public records request by ABLE and OPLC may not be determined in this proceeding and is not governed by the issuance of (or failure to issue) any protective orders in this proceeding. Although APJN and Edgemont are

[1] *In the Matter of the Petition of Tracfone Wireless, Inc. dba Safelink Wireless for Designation as an Eligible Telecommunication Carrier*, Case Nos. 97-622-TP-COI and 10-614-TP-UNC.

addressing TracFone's unpersuasive trade secrets argument in this Memorandum in Opposition, the Commission should recognize TracFone's conflation of these two independent processes and reject TracFone's attempt to mix this proceeding with the independent Public Records Act request of ABLE and OPLC.

In short, TracFone is mixing the PUCO's authority over its cases with its responsibilities as part of State government under Ohio's public records law. The filing of this Memorandum Contra by APJN and Edgemont in a PUCO case is not in any way a waiver of rights (nor could it be a waiver of such rights) to seek the recourse and remedies available under Ohio's public records law outside the ambit of the PUCO's jurisdiction over cases.

II. REGARDLESS OF THE INAPPRORIATENESS OF TRACFONE'S PUBLIC RECORDS ARGUMENT IN THIS PROCEEDING, THE QUARTERLY REPORTS SUBMITTED BY TRACFONE TO THE COMMISSION ARE CLEARLY PUBLIC RECORDS WITHIN THE MEANING OF THE OHIO PUBLIC RECORDS ACT, R.C. 149.43.

In the Commission's November 18, 2009 Entry, the Commission informally ordered TracFone to provide quarterly reports to the Commission Staff including:

(a) number of applications for Lifeline service;

(b) number of Lifeline applications approved (noting whether the approval was based on program participation or income);

(c) current number of Lifeline customers;

(d) number of Lifeline applications denied and the reason for denial;

(e) number of handsets deactivated from Lifeline after 60 days of non-usage;

(f) number of handsets deactivated from Lifeline due to a customer's failure to recertify or verify eligibility;

(g) number of customers who subsequently re-enrolled in Lifeline after being deactivated;

(h) number and percentage of Lifeline customers who deplete the 68 Lifeline minutes by the first two weeks of a month and by the end of a month;

(i) number of customer-initiated contacts and the reason for the contact;

(j) number of Lifeline customers who purchase additional minutes;

(k) average number of additional minutes purchased; and

(l) percentage of customer minutes used for voice and text.

Under the Ohio Public Records Act, "public office" includes any State agency, public institution, political subdivision, or any other organized body, office, agency, institution, or entity established by the laws of the State for the exercise of any function of government. R.C. 149.011(A). "Records" includes any document, device, or item, regardless of physical form or characteristic, created or received by or coming under the jurisdiction of any public office of the State or its political subdivisions, which serves to document the organization, functions, policies, decisions, procedures, operations, or other activities of the office.

TracFone's quarterly reports are kept in a public office—the PUCO—and clearly relate to the functions of the PUCO in assessing, evaluating and monitoring TracFone's ETC status, Lifeline performance, and compliance with PUCO requirements. They clearly fall within the definition of "public records" under Ohio law.

III. TRACFONE OHIO RULE OF PRACTICE 4901-1-24(G) DOES NOT PROTECT THE REQUESTED INFORMATION FROM DISCLOSURE UNDER THE OHIO PUBLIC RECORDS ACT, R.C. 149.43.

TracFone relies on Ohio Rule of Practice 4901-1-24(G) to argue that its quarterly reports are confidential information protected from disclosure under the public records law. However, the pertinent language of Rule of Practice 4901-1-24(G) simply provides that "[t]he requirements of this rule do not apply to information submitted to the Commission Staff." Therefore, the procedural requirements in Rule of Practice 4901-1-24 do not necessarily apply to information submitted to the Commission Staff. If "[t]he requirements of this rule do not apply to information submitted to the Commission Staff," a fortiori the requirements of Rule of Practice 4901-1-24 do not apply to the public records requests made by ABLE and OPLC. In fact, PUCO Rule of Practice 4901-1-24—when viewed in its entirety—clearly relates to either discovery proceedings or the filing of documents with the Commission's docketing division.

Subsections (A), (B) and (C) relate solely to a motion for protection from **discovery**. Subsection (A) clearly states:

> **Upon motion of any party or person from whom discovery is sought** the Commission, the legal director, the deputy legal director, or an attorney examiner may issue any order which is necessary to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense.

Subsections (B) and (C) refer back to subsection (A), and merely explain the requirements of a motion for protection and the Commission's ability to deny the motion in whole or part. The public records request submitted by ABLE and OPLC is not discovery. Thus, Rule of Practice 4901-1-24 does not provide protection for TracFone's information.

Nor does subsection (D) of 4901-1-24 apply. Subsection (D) relates to seeking protection against the **filing of a document** with the Commission's docketing division **related to a case before the Commission**. It reads:

> Upon motion of any party or person with regard to the filing of a document with the Commission's docketing division relative to a case before the Commission, the Commission, the legal director, the deputy legal director, or an attorney examiner may issue any order which is necessary to protect the confidentiality of information contained in the document.

The documents requested by ABLE and OPLC do not pertain to the filing of a document with the Commission.

Therefore, this Rule of Practice is not applicable to public records requests.[2] TracFone is mistaken in its belief that the Commission has authority under that rule to prevent disclosure of information requested through a public records request. Rule of Practice 4901-1-24 does not provide such authority. TracFone is again inappropriately mixing the PUCO's regulatory authority with the PUCO's responsibility as a public office under Ohio's public records law.

The fact that the quarterly reports are in the physical possession of the Commission Staff, as opposed to another division or unit of the PUCO, is also irrelevant to a public records request under Ohio law. Under R.C. 4901.12 all documents in the PUCO's possession not excepted under R.C. 149.43 are public records. Furthermore, the quarterly reports would be public records subject to mandatory disclosure by the PUCO even if the reports were not in the PUCO's physical possession. For example, *State ex rel. Mazzaro v. Ferguson*, 550 N.E.2d 464 (1990), the Supreme Court of Ohio considered whether a public office must honor a request for records to

[2] Because Rule of Practice 4901-1-24 does not govern public records requests, even the issuance of a protective order on such grounds would not determine the Commission's decision concerning the disclosure of the requested public records under Ohio's public records law.

which a public office has access but does not actually possess. Holding that such records were subject to the Public Records Act, the Supreme Court noted that:

> we come to these conclusions because they are consistent with R.C. 149.43(C), which allows a mandamus action against either the governmental unit **or the person responsible for a public record.** In our view, the disjunctive used in R.C. 149.43(C) manifests an intent to afford access to public records, **even where a private entity is responsible for the records.**

5550 N.E.2d 464, 467 (1990) (emphasis added).

Similarly, the Supreme Court of Ohio in *State ex rel. Cincinnati Enquirer v. Krings*, 93 Ohio St.3d 654, 657, 758 N.E.2d 1135, 1139 (2001), clarified that a private entity is subject to the Public Records Act if three conditions are satisfied:

(1) the private entity prepared the records to carry out a public office's responsibilities;

(2) the public office is able to monitor the private entity's performance; and

(3) the public office has access to the records for this purpose.

Not only do TracFone's quarterly reports squarely fall within these three conditions, but the quarterly reports are already in the possession of a public office, i.e., the Commission's own staff.

IV. TRADE SECRETS EXCEPTION UNDER THE OHIO PUBLIC RECORDS ACT, R.C. 149.43.

TracFone argues in its Motion for Protective Order that the records requested by ABLE and OPLC are trade secrets and therefore fall under an exception to mandatory disclosure under Ohio's public records law. TracFone is again inappropriately mixing the PUCO's regulatory authority with the PUCO's responsibility as a state office under Ohio's public records law. However, regardless of the inappropriateness of TracFone's argument in this particular

proceeding, the public records requested by ABLE and OPLC in their separate public records request do not fall within the narrow trade secrets exception to mandatory disclosure under Ohio's public records law.

Analysis of exceptions to the Public Records Act must be guided by the inherent, fundamental policy of R.C. 149.43 to promote open government, not restrict it. *State ex rel. The Miami Student v. Miami Univ.*, 79 Ohio St.3d 168, 171, 680 N.E.2d 956, 959 (1997). Exceptions to disclosure will be strictly construed against the public office and the public office bears the burden to establish applicability of an exception. *State ex re. McGowan v. Cuyahoga Metro. Hous. Auth.*, 78 Ohio St.3d 518, 519 (1997). Trade secrets are exempt from disclosure under the "state or federal law" exception of R.C. 149.43. *The State Ex Rel. Besser et al,Appellants, v. Ohio State Univ.*,89 Ohio St.3d at 396, 399; 2000 Ohio 207; 732 N.E.2d 373, 377.

The Motion for Protective Order should be denied because TracFone falls woefully short of its evidentiary burden to prove that the information has independent competitive value derived from its secrecy and that it is not available to its competitors through proper means. The Commission should not issue a protective order for the above-mentioned data because none of the data for which TracFone seeks confidential treatment qualifies as trade secrets under Ohio law.

Ohio's adoption of the Uniform Trade Secrets Act ("UTSA") defines a trade secret as any information that:

> (1) 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, and

(2) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

R.C. 1333.61 (2010).

To determine whether information constitutes a trade secret under R.C. 1333.61, Ohio courts examine six factors:

(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.

State ex rel. Plain Dealer v. Ohio Dept. of Ins., 80 Ohio St.3d 513, 687 N.E.2d 661, 672 (1997). The first three factors address the secret or confidential nature of the information, while the last three factors go toward the competitive use or value of the information.

Furthermore, under the Title 49 public records statutes, any exceptions to public records must be consistent with the purposes of Title 49. R.C. 4901.12. Therefore, the Commission must consider whether the public interest in disclosing the requested information outweighs any interest TracFone has in keeping the information confidential.

A. TracFone Has Failed To Meet Its Evidentiary Burden.

The entity claiming trade secret status bears the burden of proving that the knowledge or process is a trade secret within the meaning of R.C. 1333.61. *State ex rel. Besser v. Ohio State Univ.*, 89 Ohio St.3d 396, 400, 732 N.E.2d 373, 378 (2000); *Fred Seigel Co. v. Arter & Hadden*, 85 Ohio St.3d 171, 707 N.E.2d 853, 862 (1999). A party can meet its evidentiary burden by presentation of factual evidence; conclusory statements—even in the form of affidavits—are insufficient. *See Besser*, 89 Ohio St.3d at 400–04. Moreover, any exceptions under the Public Records Act including the trade secrets exception—must be narrowly construed, and "any doubt should be resolved in favor of disclosure of public records." *State ex rel. Strothers v. Wertheim*, 684 N.E.2d 1239, 1241 (1977).

For example, in *Besser*, supra, the Supreme Court of Ohio rejected OSU's claim that Park Medical Center's preliminary business plan was a trade secret because OSU failed to present **factual evidence** to substantiate its conclusory statements and the processes described in the business plan lacked sufficient uniqueness. 89 Ohio St.3d at 401. The Supreme Court also ruled that most of the other documents sought from OSU—including a draft asset purchase agreement, an outline of its emergency department staffing contract and its profit/loss analysis, summaries describing the goals for its medical center, and electronic mail specifying the average nursing salary and other numerical data—did not deserve trade secrets protection because OSU had not met its evidentiary burden to establish that the withheld information was novel, secret, and of competitive value. *Id.* at 400–404. These records provided more detailed information about OSU's medical center business plan and strategies to its potential competitors than the TracFone information sought by ABLE and OPLC would provide to its potential competitors.

TracFone offers its own vague assertions (without any supporting affidavits) that disclosure of the information "would provide existing and potential competitors with an unfair advantage by giving them access to proprietary TracFone customer data that is not generally known" and would give those same competitors "an unwarranted economic advantage in developing and marketing Lifeline services, as well as non-Lifeline services, to consumers in Ohio and elsewhere." (TracFone Motion for Protective Order at 6). TracFone offers no facts in support, nor does it suggest how revealing this information would damage its business.

Bold and factually unsupported assertions are not sufficient to meet TracFone's burden. At the very minimum, some factual evidence is needed to evaluate TracFone's claims. TracFone's Motion for Protective Order must be denied because it has failed to meet its evidentiary burden of proving that the information at issue has competitive value derived from its secrecy.

B. None Of The Information For Which TracFone Seeks Protection Qualifies As Trade Secrets Under Ohio Law Because It Lacks Significant Independent Economic Value.

The customer usage data at issue are not trade secrets within the meaning or R.C. 1333.61 because they lack independent economic value derived from their secrecy.

An examination, in particular, of the fourth and fifth factors used by Ohio courts to determine trade secret status demonstrates that the information lacks competitive value.

1. <u>The Savings Effected and the Value to the Holder Having the Information as Against Competitors</u>

The fourth factor spelled in *Plain Dealer* addresses the competitive value of the information. The "value to the holder" can also be described as the competitive

advantage derived from the information's secrecy. See *I Have Secrets?: Applying the Uniform Trade Secrets Act to Confidential Information That Does Not Rise to the Level of Trade Secret Status*, 12 Marq. Intell. Prop. L. Rev. 359 at 364 (2008). TracFone asserts that the data in the quarterly reports has:

> independent economic value to TracFone because TracFone relies on its customers' usage and purchasing data to assess the effectiveness of its service plans and to determine and revise, as necessary, its marketing and sales strategies.

(Motion for Protective Order at 6). This conclusory statement demonstrates TracFone's misunderstanding of Ohio trade secrets law in light of *Besser's* admonition against offering unsupported statements instead of facts to meet one's evidentiary burden. Though the information may have some value to TracFone, TracFone has failed to explain how there is value in keeping the data secret. It has presented no facts and has offered no explanation regarding the value that its unidentified potential competitors might gain by releasing the information. The data does not include information on how, when and whom TracFone solicits as part of its marketing strategy. The information sought to be protected are merely numbers, which may provide some insight as to **how much** success TracFone has achieved, but **not how** that success was achieved or **what** marketing strategy TracFone utilized to reach those numbers.

TracFone further asserts that "the information contained in TracFone's quarterly reports is highly confidential and competitively sensitive," and that the information, "if disclosed to the public, would provide existing and potential competitors with an unfair advantage by giving them access to proprietary TracFone customer data that is not generally known." (Motion for Protective Order at 5-6). These statements largely parrot back the statutory phrases. Moreover, the PUCO has itself held, in analyzing whether others (i.e., competitors) can obtain economic

value from the disclosure, that economic value is not derived simply from the fact that the information is not generally known by other persons.[3] That is exactly what TracFone pleads when it alleges that the quarterly reports are a trade secret because they pertain to confidential information that competitors could use.

Additionally, TracFone asserts that "such access would provide existing and potential competitors an unwarranted economic advantage in developing and marketing Lifeline services, as well as non-Lifeline services, to consumers in Ohio and elsewhere." (Motion for Protective Order at 6). In the landmark case of *Besser*, supra, the Supreme Court of Ohio dismissed similar trade secret arguments. In that case, OSU asserted that if it entered into any future negotiations similar to its Park Medical Center transaction, other parties could use the secrets in its preliminary business plan "to determine OSU's valuation process, negotiating style, and internal process for making and receiving offers, and that competitors can use this information even now to attack, undermine, and circumvent OSU's business strategies." *Besser*, 89 Ohio St.3d at 401. The Supreme Court emphasized that conclusory statements and assumptions unsupported by credible evidence cannot establish a trade secret exemption and rejected those conclusory statements and assumptions because "any factual evidence to support those conclusory Statements and argument" was "[n]otably lacking." *Id.* at 402.

Likewise, TracFone has not offered any factual evidence to support its conclusory statements and argument. In *Besser*, OSU's assertions were at least based on interviews with hospital staff incorporated into affidavits. By contrast, TracFone has not even offered such

[3] *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 at 10 (November 25, 2003). The Commission found that data compiled by SBC Ohio that listed locations where broadband service had been deployed was not a trade secret. *Id.*

meager evidentiary support. In short, there is no credible evidence that the information contained in TracFone's quarterly reports would significantly benefit TracFone's competitors.

The Supreme Court in *Besser* also drew a distinction between general characteristics of a business or its customers and customer-specific information. Specifically, the Court ruled that one page of OSU's preliminary business plan satisfied the definition of a trade secret because that page listed the names of the top patient volume physicians and their individual characteristics, and "[t]he disclosure of this page would permit OSU's competitors to determine which physician affiliated with Park Medical Center produced the most revenue." Because that information could be used to target those physicians, "[t]his list is similar to a business's customer list, which constitutes an intangible asset that is presumptively a trade secret...." *Besser* at 402. In contrast to the physician list in *Besser*, ABLE and OPLC are not seeking any customer lists or other customer-specific information from TracFone or the PUCO.

TracFone also cites three Commission decisions that purportedly ruled that "customer count and volume information" was competitively sensitive and should be afforded protection from public disclosure. (Motion for Protective Order at 7). Notably, all of those cases involved **uncontested** motions for protective orders. None of those cases involved public records requests under the Ohio Public Records Act, R.C. 149.43. TracFone again confuses motions for protective orders in the context of discovery proceedings with independent public records requests under the Ohio public records law.

TracFone has also conveniently ignored contrary Commission precedent that has adopted a more conservative approach to defining trade secrets exemptions. For instance, the Commission has declined to interpret as a trade secret the telephone company calling data that reveals business information such as **traffic volume and revenue** from interLATA calls between

telephone exchanges.[4] Even detailed financial information such as balance sheets, plant, accumulated depreciation, and amortization—data far more commercially sensitive than the numbers of TracFone Lifeline customers or applications—had been found to fail to meet the definition of a trade secret.[5] More generally, the Commission has emphasized that the trade secrets provisions create a very limited and narrow exception to Ohio's public records law.[6]

Interestingly, TracFone asserts that "the quarterly reports are not readily available to TracFone employees outside of those employees who work on the reports" (Motion for Protective Order at 5), and that "TracFone does not maintain the data required for the reports as part of its normal business routine" (*Id.* at 6). At the same time, TracFone claims (as earlier noted) that "the information has independent economic value to TracFone because TracFone relies on its customers' usage and purchasing data to assess the effectiveness of its service plans and to determine and to revise, as necessary, its marketing and sales strategies." (Motion for Protective Order at 6). If the information is only available to employees who "work on" the data—and not to company decisionmakers—how does TracFone use that data to assess the effectiveness of its service plans and to determine and revise its marketing and sales strategies? Furthermore, if TracFone compiles this data only because it is required to do so by the PUCO, and not as part of its normal business routine, is TracFone claiming that it fortuitously discovered how valuable this information is for purposes of its business planning only after the Commission

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[4] *In the Matter of the Petition of Alvahn L. Mondell, et al. v. The Ohio Bell Telephone Company Relative to a Request for Two-Way, Non-Optional Extended Area Service Between the Salem Exchange and the Alliance and Sebring Exchanges of the Ohio Bell Telephone Company*, Case No. 89-221-TP-PEX, Entry (May 16, 1989).

[5] *In the Matter of the Filing of Annual Report by Regulated Public Utilities*, Case No. 89-360-AU-ORD, Entry at 7–11 (August 1, 1989).

[6] See *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 at 7 (November 25, 2003) (citations omitted).

required it to develop and submit this data to the Commission? At best, TracFone's claims seem disingenuous and contradictory.

The paucity of Ohio court decisions directly on point suggests that the Commission should look to similar cases from other jurisdictions that have adopted the Uniform Trade Secrets Act (UTSA). Indeed, the Ohio General Assembly has directed that Ohio's adoption of the UTSA "shall be applied and construed to effectuate [its] general purpose to make uniform the law with respect to [its] subject among the state's enacting [the] UTSA." R.C. 1333.68 (2010). Significantly, appellate courts in Ohio's neighboring state of Indiana—which has also adopted the UTSA—have already addressed similar issues. *See Indiana Bell Telephone Co., Inc. v. Indiana Utility Reg. Comm'n.*, 810 N.E.2d 1179 (Ind. Ct. App. 2004); *Cellco Partnership et al. v. Indiana Utility Reg. Comm'n.*, 810 N.E.2d 1137 (Ind. Ct. App. 2004).

For example, in *Indiana Bell Telephone Co., Inc.*, supra, the telephone company argued that disclosure of the number of its access lines, provisioning of advance service, and the number of customers at each rate center—data that the company provided to the Commission in a legislatively mandated Local Competition Survey—would help current or potential competitors "evaluate market potential, make pricing decisions and/or market entry decisions." *Indiana Bell Telephone Co., Inc.*, 810 N.E.2d at 1185. However, the Indiana Court of Appeals found that such usage and location information had limited independent economic value and that the company failed to show that the disclosure of this information would "inflict substantial competitive harm on the company." *Id.* at 1186.

In another decision issued by the same court on the same day, the Indiana Court of Appeals rejected a wireless telephone carrier's claim that disclosure of its revenue report constituted confidential trade secrets. The wireless carrier claimed that keeping its revenue

information private had independent economic value because releasing it would "allow competitors to assess the relative efficiency of each wireless carrier's marketing and strategic business initiatives in Indiana." *Cellco Partnership et al.*, 810 N.E.2d at 1142–1143. The appeals court, however, found that the information had only "limited economic value" and did not merit trade secret protection. The information TracFone seeks to hide is similar in nature or purpose to the data that Indiana Bell and Cellco tried to hide from disclosure under the trade secrets doctrine.

In summary, TracFone has declined to offer anything more than conclusory statements and argument in support of its Motion for Protective Order. TracFone has not provided factual evidence to support its argument that information contained in TracFone's quarterly reports would give potential competitors an undue competitive advantage in developing Lifeline services. Further, since Lifeline is a benefit program with a discreet and identifiable base of potential customers, it is also unlikely that the information derives value by virtue of TracFone's knowledge of a potential customer base. The total potential customer base for this rate payer-funded benefit program is defined by state and federal law. In addition, both Commission precedent and relevant case law bolster the conclusion that the general customer usage data contained in TracFone's quarterly reports lacks sufficient independent economic value to warrant trade secret status under Ohio's public records law.

2. The Amount of Effort or Money Expended in Obtaining and Developing the Information

The fifth factor enumerated in *Plain Dealer* addresses the intellectual property aspect of trade secrets. TracFone has presented no factual details regarding the amount of time and money it spent "developing" the data. Instead, TracFone claims, without any

supporting factual evidence, that "maintaining the data and conducting the analysis necessary for the report is extremely burdensome" (Motion for Protective Order at 6), that it "expends significant resources" (*Id.*), and that "TracFone employees responsible for the reports devote a significant amount of time analyzing and organizing the data to develop the report" (*Id.*).

Once again, TracFone is trying to satisfy a stringent legal test with general and conclusory statements without submitting any **specific factual evidence** substantiating its claims. The Supreme Court of Ohio's decision in *Besser*, supra, again highlights the deficiencies in TracFone's argument. Notably, in *Besser*, the Court soundly rejected OSU's argument that its research on two New York City hospitals specializing in certain surgeries constitute a trade secret because "OSU did not introduce "specific factual evidence concerning...the amount of money expended by OSU to obtain and develop the information." *Besser*, 89 Ohio St.3d at 404. As in *Besser*, TracFone has not introduced "specific factual evidence" concerning the amount of effort or money it has expended to obtain and develop the information.

V. TRACFONE SHOULD NOT BE ABLE TO USE OHIO'S TRADE SECRETS LAW TO MAINTAIN A MONOPOLY OR TO THWART COMPETITION IN A MARKET CREATED BY PUBLIC MONIES.

It is remarkable that TracFone would argue that usage data should be withheld from public scrutiny on the grounds that its competitors would gain an unfair advantage. As the solitary business authorized to provide wireless service to Lifeline subscribers in the state, TracFone thus far holds a government-sanctioned monopoly over the publicly funded market.

Because Lifeline is a publicly funded service, the public interest in this case weighs heavily in favor of disclosure.[7]

In the absence of any contrary explanation by TracFone, it is reasonable to assume that the information's competitive value is derived from the possibility that disclosure of the information might attract competition to a lucrative market. If this assumption is accurate, the information does not deserve trade secret protection because granting such protection would contravene the underlying purpose of Ohio's trade secrets law. In short, the UTSA and R.C. 1333.61 may not be used for the purpose of stifling competition or to hide the fact that a market exists for potential competition.

When the U.S. Supreme Court affirmed the state's right to develop its own trade secrets law, it lauded the purpose and effect of Ohio's law that enhances "constructive competition" while "encouraging invention." *Kewanee Oil Co. v. Bicron Corp.*, 416 U.S. 470, 483–84 (1974). If TracFone now seeks to use our state's trade secrets protection law to discourage competition and maintain its monopoly over a publicly funded market, it should not be allowed to do so.

The General Assembly directed that Ohio's adoption of the UTSA "shall be applied and construed to effectuate [its] general purpose to make uniform the law with respect to [its] subject among the states enacting [the UTSA.]" R.C. 1333.68 (2010). Although the Ohio Supreme Court has yet to address the issue directly, courts in other jurisdictions that have adopted the UTSA have opposed attempts to use the Act to stifle competition. *See Indiana Bell Telephone Co., Inc. v. Indiana Utility Reg. Comm'n.*, (Ind. Ct. App. 2004), 810 N.E.2d 1179, 1185; *Cellco Partnership et al. v. Indiana Utility Reg. Comm'n.*, (Ind. Ct. App., 2004), 810 N.E.2d 1137, 1141–42.

[7] The public funds, of course, are monies received from the Universal Service Fund that is generated by

Because the market in question here in Ohio exists only by virtue of public funds, the public interest weighs in favor of increased competition. TracFone currently holds a monopoly over the publicly funded market of wireless Lifeline services in the state of Ohio. TracFone should not be able to use Ohio trade secrets law to aid it in stifling competition simply by filing a motion that fails to offer any evidence or explanation of how its usage data constitute trade secrets under Ohio law.

VI. THERE ARE STRONG POLICY REASONS TO SUPPORT DISCLOSING THE REQUESTED INFORMATION THAT OUTWEIGH ANY INTERESTS TRACFONE (OR THE PUCO) HAS IN KEEPING THE INFORMATION SECRET.

This Commission has emphasized the importance of the public records laws and has noted that "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 very few limited exceptions.'"[8] Furthermore, this Commission has established a policy that confidential treatment is to be given only under extraordinary circumstances.[9] The presumption under the law favors disclosure.

In this case, the public's interest in disclosure is great because Ohio customers are paying substantial public (general ratepayer) funds to TracFone to implement a low-income assistance program—the Lifeline rate discount—for low-income consumers for the purpose of maintaining access to essential basic local exchange phone service. Ohioans are expecting that the quid pro

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rate payers.

[8] See, for example, *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 at 4, (November 25, 2003) (relying on *State ex rel. Williams v. Cleveland*, 64 Ohio St.3d 544 (1992)).

[9] See *In the Matter of the Application of the Cleveland Electric Illumination Company for Approval of an Electric Service Agreement with American Steel & Wire Corp.*, Case No. 95-77-EL-AEC, Supplemental Entry on Rehearing at 3 (September 6, 1995).

quo for TracFone receiving Lifeline funds will be cost effective Lifeline service to its low-income customers.

Moreover, the fundamental policy of the Ohio Public Records Act is to promote open government, not restrict it. *Besser* at 398. The Ohio public has a right to know how TracFone or other wireless carriers spend ratepayer money (from the general ratepayer-funded Universal Service Fund) to subsidize essential telephone service for low-income Lifeline customers under the federally mandated Lifeline program. The TracFone Lifeline usage data intertwines issues of poverty, the efficient and effective expenditure of public (general ratepayer) funds, and universal access to essential public health, social service, employment, and other community services and programs. It is difficult to imagine any other Commission data that more clearly relates to issues of significant public interest. TracFone's business model here can only exist with the approval of the PUCO, and it relies on a revenue stream appropriated from the public through ratepayer dollars placed in to the Universal Service Fund. Transparency should be the watchword. To hold otherwise is bad public policy.

In addition, landline carriers, such as Verizon (aka Frontier Communications) and Embarq (aka Century Link), have routinely disclosed the numbers of their Lifeline customers, monthly increases or declines in the number of their Lifeline customers following marketing efforts, the numbers of Lifeline customers dropped due to failure to verify or recertify income, etc. to their Lifeline Advisory Board members without any confidentiality requirements or restrictions. Disparate treatment of wireless and landline carriers with respect to identical or similar data is unwarranted. Such disparity contravenes public policy favoring the uniform and consistent application of laws to similarly situated entities.

VII. IF CERTAIN INFORMATION IN TRACFONE'S QUARTERLY REPORTS IS PROTECTED BY THE TRADE SECRETS EXEMPTION AND OTHER INFORMATION IS NOT PROTECTED, THE PUCO MUST REDACT THE PROTECTED INFORMATION AND DISCLOSE THE REMAINING INFORMATION TO THE REQUESTORS.

The Commission must evaluate the merits (or lack thereof) of TracFone's trade secret exemption claim with respect to each of the ten items of information contained in its quarterly reports. As in *Besser*, supra, if certain records or portions of those records constitute a trade secret and other records or portions of those records do not merit trade secret protection, the different elements of information or data sought in the requestor's Public Records Act request must be separately analyzed and the information that does not qualify as a trade secret must still be disclosed even if other information in the same record is prohibited from disclosure. *Besser*, 89 Ohio St.3d at 404. Therefore, if certain information in TracFone's quarterly reports is prohibited from disclosure by the trade secrets exemption and other information is not protected from disclosure, the PUCO must redact the protected information and release the remaining information to the requestors, ABLE and OPLC.

VIII. CONCLUSION

TracFone has failed to meet its factual burden in proving that the information deserves trade secret protection because TracFone has failed to explain how the information would have significant independent value to TracFone or how public dissemination of this information would significantly harm TracFone. TracFone has also failed to provide specific factual evidence to support its conclusory statements concerning its burden of "developing" the requested numerical data. Finally, the strong public interest in disclosure of the requested information and in encouraging, not discouraging, competition, in light of TracFone's current monopoly status,

favors public disclosure and militates against classifying such information as a trade secret protected from disclosure under Ohio's public records laws. Additionally, because of the circumstances here that could perpetuate TracFone's de facto monopoly status, the Commission should find that, as a matter of sound public policy, the Motion should be denied.

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CERTIFICATE OF SERVICE

I hereby certify that a copy of this Memorandum Contra was served by regular U.S. Mail, postage prepaid and electronically, upon the parties of record identified below on this 25th day of August, 2010.

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