

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Application of RCLEC, Inc. to)
Provide Resold and Facilities Based Local)
Exchange and Competitive Telecommunications) Case No. 14-1165-TP-ACE
Services.)

MOTION FOR A PROTECTIVE ORDER

Pursuant to Ohio Administrative Code (“OAC”) Rule 4901-1-24(D) RCLEC, Inc. (“RCLEC”) moves the Public Utilities Commission of Ohio (“Commission”) for a protective order to shield proprietary information from the public record and keep confidential its financial statements (Exhibits D-2 and D-3) in its application for authority to provide resold and facilities based local exchange and competitive telecommunications service. RCLEC seeks protection of its Exhibits D-2 and D-3 so that the information would not be generally available to the public or to the competitors and/or potential competitors of RCLEC. The Memorandum in Support below presents the reasons to grant this motion.

Consistent with the requirements of OAC Rule 4901-1-24(D), RCLEC filed under seal the unredacted copies of the confidential Exhibits D-2 and D-3 that are the subject of this motion.

MEMORANDUM IN SUPPORT

RCLEC’s application for certification contains confidential and important business information included on Exhibits D-2 and D-3, which are not available to the public, and have been filed under seal pursuant to O.A.C. Rule 4901-1-24(D). In doing so, RCLEC moves the

Commission to enter a protective order directing that the designated information in Exhibits D-2 and D-3 (along with any and all copies, including electronic copies) not be disclosed to the general public or to other parties, including competitors and potential competitors of RCLEC, without the express, written consent of RCLEC.

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. RCLEC asserts that the information required by the Telecommunications Application Form 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 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. 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, "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. Thus, the protection of trade secret information as requested by RCLEC 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); *Western Reserve Communications, LLC*, Case No. 12-2313-TP-ACE (Attorney Examiner Entry, September 12, 2012).

The non-disclosure sought by RCLEC here is consistent with the purposes of R.C. Chapter 49 as declared by the Ohio General Assembly as it specifically relates to competitive services. In R.C. Section 4927.02(A), the Ohio legislature specifically provided that:

It is the policy of [Ohio] to:

...

- (3) Rely primarily on market forces, where they exist, to maintain reasonable service levels for telecommunications services at reasonable rates;
- (4) Encourage innovation in the telecommunications industry and the deployment of advanced telecommunications services; [and]
- (5) Create a regulatory climate that provides incentives to create and maintain high technology jobs for Ohioans;
- (6) Promote diversity and options in the supply of telecommunications services and equipment throughout the state;
- (7) Recognize the continuing emergence of a competitive telecommunications environment through flexible regulatory treatment of telecommunications services where appropriate;

(8) Consider the regulatory treatment of competing and functionally equivalent services and, to the extent practicable, provide for equivalent regulation of all telephone companies and services;

(9) Not unduly favor or advantage any provider and not unduly disadvantage providers of competing and functionally equivalent services; and

R.C. Section 4927.02. Through this enactment, the Ohio legislature has thus declared its policy favoring diversity and competition in Ohio's telecommunications industry. The Commission's protection of the confidential and proprietary information contained in this request is not inconsistent with, but rather is necessary to encourage and effectuate those purposes as well.

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.

RCLEC meets these considerations.

RCLEC redacted the information from Exhibits D-2 and D-3 as required in the Telecommunications Application Form and has treated the information as a trade secret. In the ordinary course of business of RCLEC, this information is deemed confidential, is treated as proprietary and confidential by RCLEC employees, and is not disclosed to anyone except in a legal proceeding and is only pursuant to protective agreement.

RCLEC is a privately held company seeking authority to provide resold and facilities based local exchange and competitive telecommunications service. Therefore the information requested in the Telecommunications Application Form concerns information that RCLEC considers highly proprietary and confidential. Given the competitive environment in which RCLEC operates, it is imperative that RCLEC be allowed to disclose the information only under seal, precluding its competitors from gaining access to this sensitive information. Moreover, maintaining the confidentiality of this information will not prejudice RCLEC's competitors.

Thus for the foregoing reasons, RCLEC requests that the Exhibits D-2 and D-3 be kept confidential.

Respectfully submitted on behalf of
RCLEC, INC.



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Summary: Motion of RCLEC, Inc. for a Protective Order and Memorandum in Support electronically filed by Teresa Orahod on behalf of Thomas O'Brien