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BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

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
In the Matter of the Complaint of the Office of the Consumers' Counsel, Complainant,	)	
v.	)	Case No. 93-576-TP-CSS
The Ohio Bell Telephone Company, Respondent.	)	

APPLICATION FOR REHEARING
OF
OHIO PUBLIC COMMUNICATIONS ASSOCIATION

Pursuant to *Ohio Rev. Code § 4903.10*, the Ohio Public Communications Association ("OPCA") files this Application for Rehearing of the Attorney Examiner's *Entry* issued on March 30, 1994, in the above-captioned proceeding. The OPCA alleges that the Attorney Examiner's *Entry* was unreasonable and unlawful and respectfully requests that the Commission grant rehearing to reconsider the following issues:

1) The Attorney Examiner erred in finding that the information in Items (8) and (9) of Ohio Bell Telephone Company's Motion (OBT Motion) for Protective Order is entitled to protection as a trade secret because OBT failed to show, by the required

measure of proof, that the requested information contains confidential trade secrets that would give OPCA a competitive advantage over OBT; and,

2) By restricting access to such information to the OPCA and the OPCA's outside experts, the Commission will unfairly and unlawfully prejudice OPCA 's due process rights, including its right to present its case to the Commission.

I. THE INFORMATION IN ITEMS (8) AND (9) OF THE OBT MOTION SHOULD NOT BE PROTECTED AS TRADE SECRETS SINCE OHIO BELL HAS FAILED TO DEMONSTRATE THAT ITEMS (8) AND (9) CONSTITUTE TRADE SECRETS THAT WOULD GIVE OPCA A COMPETITIVE ADVANTAGE OVER OBT.

Item (8) of the OBT Motion contains Ameritech's Loop Cost Study and associated documents. Item (9) of the OBT Motion contains cost and revenue information associated with toll rate restructuring. In its *Entry*, the Attorney Examiner affirmed its earlier ruling which found the information contained in Items (8) and (9) of the OBT Motion to be proprietary and competitively sensitive ("highly competitively sensitive"). Based upon its characterization of the information as highly competitively sensitive, the Attorney Examiner ordered a two tier protective approach to Items (8) and (9). Under the two tier protective approach, only OPCA's attorneys and its outside expert witnesses would be able to review the data. The protective agreement would prohibit OPCA's attorney and its outside experts from discussing or revealing any of the information to members of OPCA, including those members who have been intimately involved in the preparation of OPCA's case to date.

The Commission's procedural rules, as well as the Ohio Revised Code, provide for the liberalized use of discovery. *Ohio Admin. Code § 4901-1-16* provides that the underlying purpose of the discovery rules is "to encourage prompt and expeditious use of prehearing discovery in order to facilitate thorough and adequate preparation for participation in

PUCO proceedings." Similarly, *Ohio Rev. Code § 4903.082* states that "[a]ll parties and intervenors shall be granted ample rights of discovery. The present rules of the public utilities commission should be reviewed regularly by the commission to aid full and reasonable discovery by all parties." Accordingly, the Commission had adopted a broad approach to discovery, requiring the disclosure of any matter, not privileged, that is reasonably calculated to lead to the discovery of admissible evidence. *See also Ohio R. Civ. P. (B)(1).*

The Commission's rules do indicate, however, that a party may, under certain limited circumstances, prevent discovery of particular information. Specifically, *O.A.C. 4901-1-24(A)(7)* authorizes the Commission to order that "[a] trade secret or other confidential research, development, commercial, or other information not be disclosed or be disclosed only in a designated way." In order for a party to obtain protection under *O.A.C. 4901-1-24(A)(7)*, however, the party must establish the specific basis for its allegation that the information constitutes a trade secret. In addition, the party bears the burden of establishing that the information should be protected from discovery. *O.A.C. 4901-1-24 (B)(1), 4901-1-27 (B)(7)(e)*; *OCC v. Dayton Power & Light*, Case No. 88-1744-TP-CSS, *Entry on Rehearing* at 2 (June 28, 1989).

In its Memorandum in Support of its Motion for Protective Order, Ameritech claims that the information in Items (8) and (9) qualifies as "trade secrets and/or confidential research" within the meaning of *O.A.C. 4901-1-24(A)(7)*. (Memorandum in Support at 8-9). Apart from scant conclusory statements, Ameritech did not offer any evidence to suggest that the information is sufficiently proprietary so as to protect it from disclosure.

Ameritech's *ipse dixit* declaration does not, in the absence of any supporting evidence, justify a conclusion that the information amounts to a trade secret.

R.C. 4901.12, 4901.13, and *4905.07* create a strong presumption that any information relevant to a proceeding before the Commission should be freely disclosed. In order to overcome this presumption, a party claiming protective status must demonstrate that disclosure will cause significant harm to the party, or will result in an unfair competitive advantage in favor of its competitors. *See, e.g., In the matter of Ohio Bell Telephone and Ameritech Mobile Services, Inc.*, Case No. 89-365-RC-ATR, *Opinion and Order* at 3 (Oct. 18, 1990). In prior proceedings, the Commission has applied a balancing test to determine whether disclosure of particular information would be appropriate. *Id.* Under the balancing test, the Commission weighs the interests of the utility in keeping certain information confidential against the public's interest in complete disclosure.

In applying the balancing test, the Commission generally issues protective orders only where the release of information would place a utility at an extreme disadvantage vis-a-vis its competition. For example, in *Ohio Bell Telephone Co.*, Case No. 79-1184-TP-AIR, Entry, at 4 (July 29, 1980), the Commission granted a protective order where it found that the information sought by the utility's competitors would indicate the direction and magnitude of the utility's future technology, marketing strategy, future products, services and plans.

Release of the information in Items (8) and (9) to OPCA will not place OBT at an extreme competitive disadvantage. Item (8) contains a number of documents including (A) single loop cost - all areas; (B) File OBTREVEU Printout; (C) Staff WP OBT S&E Costs; (D) File OBT RTCT Printout; (E) 1993 Loop Cost Study; (F) 1993 Service and Establishment Nonrecurring Cost Study; and (G) Central Office Line Termination Cost

Study. This information singularly, or taken together, will not provide OPCA with any information that would enable OPCA to derive a competitive advantage over OBT.

Items (8) (A) and (E) relate to the provision of the local loop. OPCA and its members do not presently provide local loops nor do they have intentions of providing local loops in the forseeable future. Item 8 (B) is merely an OBT revenue printout, apparently for exchange access revenue. Again OPCA does not compete with OBT for exchange access. Moreover, the Commission has generally refused to protect the release of financial information as a trade secret. See e.g., Cincinnati Bell Long Distance, Inc., Case No. 89-988-TP-AAC Entry at 6 (Nov. 2, 1989)(denying a protective order for pro forma information that allegedly revealed average revenue per minute of use, cost of providing service and future marketing strategies); Cable & Wireless Communications, Inc., Case No. 90-411-TP-AAC Entry at 3 (Apr. 2, 1990)(denying a protective order for information that revealed projected company growth, expenses, net company revenues, non-operating income and net revenues). Item (8)(C) and (E) relate to service and establishment costs. OPCA does not compete with Ohio Bell here either. Item 8 (D) relates to a summary work sheet prepared by the Staff containing rate totals and cost totals for various services. OPCA again, does not compete with Ohio Bell for any of the services listed. Item 8 (G) relates to central office lines. Again, OPCA does not compete with Ohio Bell for central office lines at the present time, and does not intend to do so in the near future.

Item (9) consists of "cost and revenue information, and primary and secondary carrier expense information associated with the toll rate restructuring." As explained supra, revenue information, as a general principle does not amount to a trade secret. OPCA assumes that the cost information and the primary and secondary expense information associated with toll

rate restructuring relates to costs and expenses paid by Ohio Bell to primary and secondary toll carriers, which costs are either reflected in the carriers' tariffs, or are on file as contracts between Ohio Bell and the carriers. In either event, the costs and expenses are already in the public domain and any claim here that the information is highly competitively sensitive should be dismissed.

The cases decided under Ohio's trade secret law, *R.C. 1333.51*, provide support for ordering OBT to produce Items (8) and (9) to OPCA, without unnecessary restriction. Pursuant to *R.C. 1333.51*, a party seeking to recover damages with respect to trade secret violations bears the burden of proving his case by a preponderance of the evidence. *Mead Corp. v. Lane*, 54 Ohio App. 3d 59, 64, 560 N.E.2d 1319 (1988). Moreover, Ohio courts require a party to introduce clear and convincing evidence that a trade secret exists before it will grant an injunction where such relief is requested. *Id.* at 63. By granting Ameritech a protective order in the instant proceeding, the Attorney Examiner issued a *de facto* injunction against the Intervenors, including the OPCA, that prevents them from reviewing the requested information. The Attorney Examiner's Entry afforded Ameritech this protection even though Ameritech failed to put forth any evidence that the information in Items (8) and (9) amounts to trade secrets. Thus, the Attorney Examiner's Entry is in error.

II. THE COMMISSION SHOULD NOT LIMIT ACCESS TO ITEMS (8) AND (9) OF THE MOTION TO NON-AFFILIATED EXPERTS, BUT SHOULD PERMIT ACCESS TO SUCH INFORMATION TO ANY ATTORNEY OR EXPERT ASSISTING IN THE LITIGATION.

In its Entry, the Attorney Examiner directed that the information in Items (8) and (9) of the OBT Motion be provided to the Intervenors pursuant to a two-tier protective agreement. Under this agreement, the information would be given only to the Intervenors' attorneys and their non-employee experts. The Attorney Examiner's ruling is unjust and unreasonable, and will impose a severe hardship upon and will prejudice OPCA.

Since the beginning of this proceeding, OPCA has utilized "in-house" experts to analyze the issues and prepare its case for trial. By relying on its own employees, the OPCA has been able to limit its litigation expenses. In addition, the OPCA's in-house experts provide a valuable resource to it because they possess in-the field expertise that perhaps, can not be matched elsewhere. Now, nearly a year after this case was initiated, Ameritech effectively seeks to prohibit OPCA from utilizing its in-house experts.

OPCA will bear a great expense if its in-house experts are prohibited from reviewing and testifying on the information in Items (8) and (9) of the Motion. In the first place, OPCA has undertaken great effort, and expended considerable sums, so that its in-house experts would be familiar with the issues involved in this proceeding. If these experts are unable to review the requested information, the time and effort that OPCA has already expended will go for naught. Moreover, OPCA will be forced to incur the additional cost

of retaining outside experts and bringing them up to speed in time to provide testimony at trial.

The OPCA will be further prejudiced by the Commission's two-tier restriction because experts it may retain from the "outside" may not be as familiar with COCOT operations in Ohio as OPCA's in-house experts. OPCA's members, for the most part, either employ or are affiliated with experts who possess considerable technical knowledge over the matters involved herein. The Commission, by restricting OPCA's access to the information in Items (8) and (9) of the Motion, will seriously inhibit the ability of OPCA to effectively litigate this case. The Attorney Examiner, by her Entry, thwarts OPCA's ability to access valuable in-house resources, which will have the effect of hindering OPCA's case presentation.

Under the approved two tier approach, OPCA and its members are essentially being told what experts it can call to testify (it can't put in-house experts on to testify to areas that involve information subject to the two tier protective agreement) and are being prohibited from seeing (much less having input into) testimony filed on their own behalf! When the practical effect of these restrictions are looked at, it begins to be clear that the conditions imposed by the two tier protective agreement are unreasonable and infringe upon the OPCA's due process right to argue their claims before the Commission. Accordingly, the Commission should permit any OPCA experts, including OPCA's in-house experts, to have access to the information which the Attorney Examiner has deemed proprietary and competitive.

Moreover, OPCA is concerned with the Attorney Examiner's ruling being read too expansively, and being used to squelch legitimate discovery efforts in other cases. For

instance, in the directory assistance complaint case, Case No. 92-1953-TP-CSS, OBT is refusing to provide discovery on a number of items to OPCA, except under terms of a two tier protective agreement. Blanket application of the label "highly competitively sensitive" and the concomitant two tier treatment, is inappropriate and should not be condoned by the Commission here and elsewhere.

CONCLUSION

For the foregoing reasons, the OPCA respectfully requests that the Commission grant its application for rehearing with respect to the propositions set forth above. By granting the OPCA relief from the oppressive terms of the protective order, the Commission will enable OPCA to present its case in a fair and efficient manner.

Respectfully submitted,

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ON BEHALF OF THE OHIO PUBLIC COMMUNICATIONS ASSOCIATION

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the OPCA's Application For Rehearing has been served upon all parties on the attached service list this 29th day of April, 1994, by regular U.S. Mail.

Janine L. Migden
One of the attorneys for the OPCA

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