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BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of)
Xclutel, LLC to Provide Competitive)
Local Exchange Telecommunications)
Services in the State of Ohio)

Case No. ~~18-1561-TP-ACE~~
18-1562-TP-ACE

MOTION FOR A PROTECTIVE ORDER

The applicant, Xclutel, LLC ("Xclutel"), pursuant to Ohio Administrative Code ("OAC") Rule 4901-1-24(D), hereby moves the Public Utilities Commission of Ohio ("Commission") for a protective order to shield proprietary information from the public record and keep confidential the financial data and other proprietary information contained in Confidential Exhibits 4, 5, 8, and 10 to Xclutel's application for certification to provide competitive local exchange services in the State of Ohio.

Consistent with the requirements of OAC Rule 4901-1-24(D), Xclutel has filed under seal three (3) unredacted copies of the confidential exhibits that are the subject of this motion.

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 the 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 nondisclosure of the information is not inconsistent with the purposes of Title 49 of the Revised Code." Moreover, Ohio Revised Code ("R.C.") Section 4928.06(F) specifically permits the Commission to grant confidentiality to competitive information. Xclutel asserts that the information being submitted in Confidential Exhibits 4, 5, 8, and 10, constitutes confidential and proprietary business information, as well as a trade secret; and as such, state law prohibits the release of the information.

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R.C. 4901.12 and 4905.07 were amended in 1996 to facilitate the protection of trade secrets in Commission proceedings. By referencing R.C. 149.43 (Ohio's Public Records Law), the Commission-specific statutes incorporate the definition of "public records," as well as an exception to that definition that includes "[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. See R.C. 1333.61(D) and 1333.62. For this reason, records containing trade secrets are prohibited from public disclosure.

The definition of "trade secret" is set forth in R.C. 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.

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. For, as the Ohio Supreme Court recently explained:

by adopting the Uniform Trade Secrets Act, with the express purpose to make uniform the law with respect to their subject among states, the General Assembly has determined that public policy in Ohio, as in the majority of other jurisdictions, favors the protection of trade secrets, whether memorized or reduced to some tangible form.

Al Minor & Associates, Inc. v. Martin, (2008) 117 Ohio St.3d 58.

Courts of other jurisdictions not only have held that a public utilities commission has the authority to protect trade secrets, but that trade secret statutes create a duty to protect them. See *New York Tel Co. v. Pub. Serv. Comm.*, N.Y, 56 N.Y. 2d 213 (1982).

Furthermore, the Commission itself has 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). The Commission previously has carried out its obligation to protect the trade secret status of information from utilities and other regulated entities in numerous proceedings. *See, e.g., Cleveland Electric Illuminating Co.*, Case No. 07-171-EL-BTX (Entry dated August 14, 2008); *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); *Columbia Gas of Ohio, Inc.*, Case No. 90-17-GA-GCR (Entry, August 17, 1990). For the Commission to do otherwise would be to negate the protections the General Assembly has granted to all businesses, including public utilities, through the Uniform Trade Secrets Act.

Expounding upon the "trade secret" definition above, the Ohio Supreme Court has delineated factors to be considered in analyzing a trade secret claim:

(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.

Stale ex. rel The Plain Dealer v. Ohio Dept. of Ins., (1997), 80 Ohio St.3d 513, 524-525. The Commission applies these factors in the context of applications for competitive services to conclude that certain financial exhibits constitute trade secrets.

Here, Xclutel requests that the information designated as confidential (Confidential Exhibits 4, 5, 8, and 10) of its certification application be protected from public disclosure. If released to the public, the information for which protection is sought (income statements and balance sheets, collectively "Confidential Information") would harm Xclutel by providing competitors with proprietary financial data not commonly known by or available to the public and involving a very competitive service. Xclutel has used its best efforts to keep and maintain such financial data confidential; and, to the best of its knowledge, current financial information has not been disclosed or released to the public. Xclutel also redacted the confidential information from Confidential Exhibits 4, 5, 8, and 10 to the certification application and generally treats the information as a trade secret.

In the ordinary course of Xclutel's business, this information is deemed confidential, is treated as proprietary and confidential by Xclutel employees, and is not disclosed to anyone other than as part of a legal proceeding and, even then, only pursuant to a protective agreement. The Confidential Information also derives economic value from not being generally known to, and not being readily ascertainable (through proper means), by other persons, who can obtain economic value from their disclosure and use. Specifically, the information contained therein is extremely sensitive information that could be used by competitors to determine revenue and other information damaging to Xclutel in the marketplace. Disclosure of such information would be extremely detrimental and could be used by Xclutel's competitors to materially affect Xclutel's ability to compete effectively in the State of Ohio.

For these reasons, the information in Confidential Exhibits 4, 5, 8, and 10 to the certification application falls directly within the definition of a "trade secret," and should be protected from public disclosure. The Confidential Information should be used by the

Commission solely to consider Xclutel's Application for operating authority. There is no legitimate purpose or public interest to be served in disclosing the Confidential Information to Xclutel's competitors or, indeed, to any person other than the appropriate staff members of the Commission. For the foregoing reasons, Xclutel requests that the designated Confidential Information be protected from public disclosure.

Respectfully Submitted,

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