

19-0818-TP-ACE

March 26, 2019

VIA FedEx Delivery

Docketing Division
Public Utilities Commission of Ohio
180 East Broad Street
Columbus, Ohio 43215-3793

Re: PeakNet, LLC

On behalf of PeakNet, LLC f/k/a Peak Tower, LLC ("PeakNet"),¹ enclosed for filing please find one original and seven copies of PeakNet's Application to Provide Competitive Facilities-Based and Resold Local Services through the State of Ohio. PeakNet is also separately submitting three copies of its Motion for Protective Order seeking confidential treatment of its financial information and anticipated network deployment.

Sincerely,



Jason Denaburg

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¹ Peak Tower, LLC previously filed an Application to Provide Competitive Facilities-Based and Resold Local Services through the State of Ohio (18-1300-TP-ACE). Based on guidance from Commission staff, PeakNet is withdrawing its former application under its former name, and refiling this Application with additional documentation providing examples of PeakNet's anticipated network deployment under seal.

**BEFORE THE
PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the
Application of:
PeakNet, LLC

Case No: 19-0818-TP-ACE

To Provide Competitive Facilities-Based
and Resold Local Services
throughout the State of Ohio

MOTION FOR A PROTECTIVE ORDER

Pursuant to Ohio Administrative Code Section 4901-1-24(D), PeakNet, LLC ("PeakNet") respectfully moves for a protective order to prevent public disclosure of confidential and proprietary information, including financial data and network diagrams, included as exhibits in PeakNet's Application to provide Facilities-Based and Resold Local Services throughout the State of Ohio. The reasons underlying this motion are detailed in the attached Memorandum in Support. Pursuant to O.A.C. § 4901-1-24(D)(2), three (3) unredacted copies of the confidential exhibits are being submitted under seal as Exhibits A and B.

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MEMORANDUM IN SUPPORT OF MOTION FOR PROTECTIVE ORDER

BACKGROUND

PeakNet has contemporaneously filed the above-referenced Application with the Commission. Pursuant to the terms of the Application, PeakNet is required to provide information regarding sensitive financial and business information (including a statement of PeakNet's financial condition, audited financial statements and confidential network diagrams). PeakNet submits that this information is confidential and proprietary in nature and requests that it be protected from public disclosure.

THE NEED FOR A PROTECTIVE ORDER

The information for which protection is sought is attached herewith as Exhibits A and B. Due to the sensitive nature of this information, its release to the public would harm PeakNet by providing PeakNet's competitors with confidential information in what is designed by statute to be a competitive service. Therefore, the information in Exhibits A and B should be used solely and exclusively by the Commission in exercising its governmental functions in considering PeakNet's Application.

Pursuant to O.A.C. § 4901-1-24(D), the Commission or certain designated employees may issue an order which is necessary to protect the confidentiality of information contained in the 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.

Although R.C. § 4905.07 provides that all facts and information in the possession of the Commission shall be public except as provided in R.C. § 149.43, the statute (R.C. § 149.43) specifies that the term "public records" excludes information which, under state or federal law, may not be released. The Supreme Court of Ohio and O.A.C. § 4901-1-24(D) make clear that the

“state or federal law” exception includes trade secrets. *See State ex rel. Besser v. Ohio State Univ.* (2008), 89 Ohio St.3d 396, 399.

The non-disclosure of the subject information will not impair the purposes of Title 49 of the Ohio Revised Code. The Commission and its Staff have full access to the information in order to fulfill the required statutory obligations. No purpose of Title 49 is served by the public disclosure of the information. Public disclosure of the information will only prove detrimental to PeakNet.

There is further compelling legal authority supporting PeakNet’s requested protective order. While the Commission has often expressed its preference for open proceedings, the Commission has also 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.

In re General Telephone Co., Case No. 81-383-TP-AIR (Entry, February 17, 1982). Likewise, the Commission has further recognized the protection of trade secrets in its rules. See O.A.C. § 4901-1-24(A)(7).

The Uniform Trade Secrets Act prohibits the misappropriation of trade secrets without express or implied consent. R.C. 1333.61 et seq. Under the Act, a “trade secret” is defined as:

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 the following (emphasis added):

- (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)(emphasis added). This definition clearly reflects the state policy favoring the protection of trade secrets such as the names and financial information that are the subject of this motion.

The Supreme Court of Ohio has adopted a six-factor analysis for determining whether information is a “trade secret” under R.C. 1333.61(D):

(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. The Plain Dealer v. Ohio Dept. of Ins. (1997), 80 Ohio St.3d 513, 524-25 (quoting *Pyromatics, Inc. v. Petruziello*, 7 Ohio App.3d 131, 134-35, 454 N.E.2d 588 (8th Dist. 1983)).

Applying these factors to the information contained in Exhibits A and B that PeakNet has designated as confidential, it is clear that a protective order should be granted. Exhibit A contains PeakNet’s confidential financial statements. Disclosure of this financial information could give competitors an advantage that would impair PeakNet’s ability to compete in the market. PeakNet, a limited liability company, is a privately held company and is not required to file financial information with the United States Securities and Exchange Commission. Consequently, PeakNet does not otherwise disclose its financial information to the public. Similarly, the network diagrams contained in Exhibit B detail network deployment opportunities that PeakNet is currently exploring, and if disclosed to competitors, could allow such carriers to unfairly compete against PeakNet.

Accordingly, PeakNet respectfully requests that the Commission grant its Motion for Protective Order allowing the information contained in the documents provided in Exhibits A and B to be treated as confidential, thereby protecting said information from public disclosure.

CONCLUSION

For the foregoing reasons, PeakNet, LLC respectfully requests that its Motion for Protective Order be granted.

Respectfully submitted,

/s/
Richard Saffir