

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

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

TRACFONE WIRELESS, INC.’S MOTION FOR PROTECTIVE ORDER

TracFone Wireless, Inc. (“TracFone”), by its attorneys and pursuant to Chapter 4901-1-24 of the Ohio Administrative Code, hereby files this Motion for Protective Order in response to a public records request for information that TracFone informally provided to Commission Staff. The Appalachian Peace and Justice Network (represented by the Ohio Poverty Law Center) and the Edgemont Neighborhood Coalition (represented by the Advocates for Basic Legal Equality, Inc.), both intervenors in this docket, initiated the records request for quarterly reports that TracFone submits to Commission Staff. TracFone seeks confidential treatment by the Commission, pursuant to a Protective Order, of certain confidential, competitively sensitive, and proprietary information contained in quarterly reports provided to Commission Staff in accordance with the Commission’s Orders in this docket.

BACKGROUND

The Commission conditionally designated TracFone as an Eligible Telecommunications Carrier (“ETC”) for an interim one year period in a May 21, 2009 Supplemental Finding and Order and a July 8, 2009 Entry on Rehearing issued in Case No. 97-632-TP-COI, the predecessor docket in this proceeding. In an Entry dated November 18, 2009, the Commission required TracFone to maintain certain Ohio-specific information on a monthly basis and to informally provide Commission Staff with quarterly reports. The reports must include the following

information: (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. Each of these reported items disclose confidential information and should not be made available to the public in response to a records request.

TracFone has provided the required quarterly reports to Commission Staff in accordance with the Commission's November 18, 2009 Entry. The November 18, 2009 Entry orders TracFone to "informally provide the quarterly reports to the Commission staff." See OAC 4901-1-24(G) ("the requirements of this rule [regarding motions for protective orders] do not apply to information submitted to the commission staff"). Therefore, the quarterly reports are treated as confidential by Commission Staff and are not disclosed to the public. However, now that there

has been a request for the reports, TracFone seeks a protective order to ensure that the quarterly reports are not disclosed to the public.¹

ARGUMENT

Rule 4901-1-24(D) of the Commission's Rules permits the Commission or an attorney examiner to issue an order to protect the confidentiality of information to the extent that state or federal law prohibits release of the information. Ohio law provides that trade secrets are protected from public disclosure. Ohio Revised Code, § 1333.61(D)) states:

(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)

The Ohio Supreme Court has identified factors to be considered in determining whether particular knowledge or process is a trade secret under the statute: (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

¹ The Office of Ohio Consumers' Counsel ("OCC") previously initiated a public records request to the Commission for the quarterly reports. TracFone and OCC negotiated a protective agreement with OCC that allowed OCC to receive copies of the quarterly reports. Counsel for TracFone offered to enter a protective agreement with the Appalachian Peace and Justice Network and the Edgemont Neighborhood Coalition, but was advised by counsel at the Ohio Poverty Law Center that the intervenors who initiated the records request were not interested in entering such a protective agreement.

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. See, State ex rel. The Plain Dealer v. Ohio Dept. of Ins., 80 Ohio St.3d 513, 525, 687 N.E. 2d 661, 672 (1997) (citing Pyromatics, Inc. v. Petruziello, 7 Ohio App.3d 131, 134-35, 454 N.E.2d 588, 592 (1983)).

The quarterly reports contain data that clearly falls within the categories of “business information or plans,” and “financial information” within the ambit of Rule 4901-1-24(D). This includes data about the number of Lifeline applicants, number of customers, the usage patterns of customers in terms of minutes used and purchased and type of usage (i.e., voice or text), and customers’ contacts with TracFone. The information in the quarterly reports is not generally known to others nor easily ascertainable. TracFone has undertaken reasonable efforts to protect the information in the quarterly reports from disclosure. In addition, application of the six factors for determining whether information constitutes a trade secret subject to confidential treatment requires the Commission to deny the records request. Moreover, Commission precedent supports TracFone’s position that the quarterly reports should not be disclosed to the public.

First, the information is not known outside of TracFone, other than to the Commission Staff and to OCC. TracFone provided the information to Commission Staff with the understanding that it would be treated as confidential. The Commission’s rules provide that informal submissions of information to Commission Staff are treated as confidential. See OAC 4901-1-24(G). Indeed, Commission Staff has treated the quarterly reports as confidential by alerting TracFone to public records requests for the reports and allowing TracFone an

opportunity to work with the entity that requested the reports to negotiate disclosure of the reports or to file a motion for protective order. Other than Commission Staff, the only entity to receive the quarterly reports is OCC. However, OCC's receipt of the quarterly reports is pursuant to a Protective Agreement between OCC and TracFone -- the very type of agreement to which the other intervenors in this proceeding -- the Appalachian Peace and Justice Network and the Edgemont Neighborhood Coalition -- refuse to execute. TracFone has not provided the information in the quarterly reports to any other third party nor is it subject to any legal obligation to disclose this information to any public entity. As such, the information contained in the quarterly reports is not readily available to persons external to TracFone.

Second, the information in the quarterly reports is only known by those few TracFone employees who collect and analyze relevant data and prepare the reports. Moreover, the quarterly reports are not readily available to TracFone employees outside of those employees who work on the reports.

Third, TracFone has taken precautions to guard the secrecy of the quarterly reports. As mentioned above, TracFone has not disclosed the reports to anyone other than Commission Staff and OCC pursuant to a Protective Agreement. TracFone also filed a motion for protective order on July 19, 2010, regarding portions of the reports cited in its Memorandum Contra Application for Rehearing, which remains pending. TracFone's filing of this Motion further demonstrates TracFone's efforts in maintaining the confidentiality of the quarterly reports.

Fourth, TracFone receives value from keeping the information contained in the quarterly reports from competitors. The information contained in TracFone's quarterly reports is highly confidential and competitively sensitive. The information, which discloses the number of applicants and customers, describes the airtime usage and purchase activities of TracFone's

Lifeline customers, and details the reasons customers contact TracFone, 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. Such access would give current and prospective competitors an unwarranted economic advantage in developing and marketing Lifeline services, as well as non-Lifeline services, to consumers in Ohio and elsewhere. Moreover, 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.

Fifth, TracFone expends significant resources in creating the quarterly reports. TracFone does not maintain the data required for the reports as part of its normal business routine. As such, TracFone employees responsible for the reports devote a significant amount of time analyzing and organizing the data to develop the reports. TracFone is not required to conduct the data maintenance and analysis required for the Ohio quarterly reports for any of the other 31 jurisdictions in which it has been designated as an ETC. While TracFone understands that it is required to comply with the Commission's Entry directing the filing of the quarterly reports, maintaining the data and conducting the analysis necessary for the reports is extremely burdensome.

Sixth, others are not able to obtain the information contained in the quarterly reports because no part of the information in the reports is publicly available. The only means for any third party, including any intervenor, to gain access to the reports is through a public records request or through negotiating a protective agreement with TracFone.

Based on the application of the six factor test, the quarterly reports constitute trade

secrets that may not be disclosed to the public. This conclusion is supported by Commission precedent. In In the Matter of the Joint Application of Frontier Communications Corporation, New Communications Holdings, Inc., and Verizon Communications Inc. for Consent and Approval of a Change in Control, Entry, Case No. 09-454-TP-ACO (Ohio Public Utilities Commission: November 24, 2009), an attorney examiner granted a motion for protective order regarding information similar to the information contained in the quarterly reports. In granting the motion the attorney examiner stated:

Upon review of the material, the attorney examiner finds, among other sensitive data, information that appears to reveal matters relating to the number of service orders, the number of customers, the number of port orders, broadband services, and projected capital investment. Because the information appears that it would be of value to competitors, the attorney examiner finds that the information should be protected as trade secret information.

TracFone's quarterly reports contain similar types of information, including number of customers, number of applications for service, and type of service provided (quarterly report, items (a), (b), (c), (d), (g) and (l)). An attorney examiner of this Commission also has held that customer count and volume information, in the case of a natural gas provider, was competitively sensitive and should be afforded protection from public disclosure. See In the Matter of the Application of Metromedia Energy, Inc. for Renewal of Certification As a Retail Natural Gas Supplier, Entry, Case No. 02-1926-GA-CRS (Ohio Public Utilities Commission: October 5, 2006); see also In the Matter of the Applications of: Energy Cooperative of Ohio, and Metromedia Energy, Inc. for Certification as a Retail Natural Gas Supplier in the State of Ohio, Entry, Case Nos. 02-1891-GA-CRS, 02-1926-GA-CRS (Ohio Public Utilities Commission: September 16, 2004 (customer count and volume data protected)). TracFone's quarterly reports, which include data regarding its customer's airtime usage similarly should be protected (quarterly report, items (e), (f), (h), (j), (k), and (l)). Finally, the number of customer contacts

and reason for the contacts (quarterly report, item (i)) discloses issues that Ohio customers have with TracFone's Lifeline service. This information is highly confidential and competitively sensitive because it is used by TracFone to determine whether customers are satisfied with its Lifeline service and whether any modifications should be made to the Lifeline service.

Finally, there is no public interest served by disclosure of the quarterly reports. Customers have access to the terms of TracFone's Lifeline plan and can decide if TracFone's Lifeline service meets their needs. Furthermore, competitors do not have a right to access internal business data regarding TracFone's service. Competitors can look at publicly available information, such as the amount of Lifeline support received by TracFone, to learn whether consumers are choosing TracFone's Lifeline service over another ETC's Lifeline service. Competitors are also free to develop their own Lifeline service products to meet the needs of low-income consumers. There is no public interest served by requiring TracFone to disclose internal competitively-sensitive data regarding its customer counts, customers' airtime usage, and customers' communications with TracFone.

CONCLUSION

Based on the foregoing, the TracFone's quarterly reports submitted to Commission Staff are confidential and should not be disclosed to the public for any reason, including in response to a public records request. TracFone respectfully requests the Commission to grant its Motion for Protective Order and to issue an order protecting the confidential quarterly reports in their entirety from public disclosure.

Respectfully submitted,

TRACFONE WIRELESS, INC.

/s Mitchell F. Brecher

Mitchell F. Brecher

Debra McGuire Mercer

GREENBERG TRAURIG, LLP

2101 L Street, NW

Suite 1000

Washington, DC 20037

(202) 331-3100

Its Attorneys

August 10, 2010

CERTIFICATE OF SERVICE

I, Raymond Lee, a Legal Secretary with the law firm of Greenberg Traurig, LLP, hereby certify that a copy of the foregoing TracFone Wireless, Inc.'s Motion for Protective Order was served electronically to the persons listed below, on this 10th day of August 2010.

/s Raymond Lee
Raymond Lee

SERVICE LIST

DUANE W. LUCKEY Assistant Attorney General Chief, Public Utilities Section 180 East Broad Street, 9 th Floor Columbus, Ohio 43215-3793 Duane.luckey@puc.state.oh.us	ELLIS JACOBS Advocates for Basic Legal Equality, Inc. 333 W. First Street, Suite 500B Dayton, OH 45402 ejacobs@ablelaw.org
DAVID C. BERGMANN TERRY L. ETTER Counsel of Record Office of the Ohio Consumer's Counsel 10 West Broad Street, Suite 1800 Columbus, Ohio 43215-3485 bergmann@occ.state.oh.us etter@occ.state.oh.us	MICHAEL W. SMALZ Counsel of Record Ohio Poverty Law Center 555 Buttles Avenue Columbus, OH 43215 msmalz@ohiopovertylaw.org
NOEL M. MORGAN Communities United for Action Legal Aid Society of Southwest Ohio, L.L.C. 215 E. Ninth Street, Suite 500 Cincinnati, OH 45202 nmorgan@lascinti.org	JOSEPH V. MASKOVYAK Ohio Poverty Law 555 Buttles Avenue Columbus, OH 43215 jmaskovyak@ohiopovertylaw.org
MICHAEL A. WALTERS Pro Seniors, Inc. 7162 Reading Road, Suite 1150 Cincinnati, OH 45237 mwalters@proseniors.org	

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Summary: Motion TracFone Wireless, Inc.'s Motion for Protective Order electronically filed by Mrs. Debra M Mercer on behalf of TRACFONE WIRELESS, INC.