

BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

| | | |
|---|---|-----------------------|
| In the Matter of the Application of |) | |
| The Ohio Bell Telephone Company d/b/a AT&T Ohio |) | |
| For Approval of an Alternative Form of |) | |
| Regulation of Basic Local Exchange |) | Case No. 09-74-TP-BLS |
| And other Tier 1 Services Pursuant to |) | |
| Chapter 4901:1-4, Ohio Administrative |) | |
| Code. |) | |

MOTION FOR EXTENSION OF PROTECTIVE ORDER

AT&T Ohio¹, by its attorneys, and pursuant to O.A.C. §§ 4901-1-24(D) and 4901:1-4-09(E), moves for a further extension of the protective order granted in the captioned case. In its Entry adopted on February 17, 2009, the Commission granted AT&T Ohio's motion for a protective order concerning CLEC and wireless carrier proprietary information that was filed as part of AT&T Ohio's application. A previous extension was granted in an Entry adopted on June 15, 2010. The protective order will expire on February 12, 2012. Under O.A.C. § 4901-1-24(F), AT&T Ohio seeks an 18-month extension of the protective order. The reasons underlying this motion are detailed in the attached Memorandum in Support.

This motion is being filed more than 45 days prior to the expiration of the protective order.

¹ The Ohio Bell Telephone Company uses the name AT&T Ohio.

Respectfully submitted,

AT&T Ohio

/s/ Jon F. Kelly

Jon F. Kelly (Counsel of Record)

Mary Ryan Fenlon

AT&T Services, Inc.

150 E. Gay St., Rm. 4-A

Columbus, Ohio 43215

(614) 223-7928

Its Attorneys

MEMORANDUM IN SUPPORT OF MOTION FOR
EXTENSION OF PROTECTIVE ORDER

AT&T Ohio seeks an 18-month extension of the protective order previously granted in this case. In an Entry adopted in another case, the Commission denied the Company's request for an unlimited extension and instead granted an 18-month extension. *See*, AT&T Ohio, Case No. 09-259-TP-BLS, Entry, May 1, 2009. There, the Attorney Examiner found that the information sought to be protected was proprietary but did not warrant permanent protection.

The CLEC and wireless carrier proprietary information filed and used in this case is competitively sensitive information that deserves of further protection under Ohio law as a trade secret. It has not lost its commercial relevance since the time it was first granted protection. As explained in its application, AT&T Ohio notified the CLECs and wireless carriers of the Company's possible use of that information and the manner in which it would be used. As AT&T Ohio noted:

In Case Nos. 06-1013-TP-BLS and 07-259-TP-BLS, AT&T Ohio sent CLECs and wireless service providers separate "Accessible Letters" regarding the use and treatment of data that might be considered to be proprietary, giving them an opportunity for comment and feedback. AT&T Ohio is relying on the letters from Case No. 07-259-TP-BLS for this proceeding. The Accessible Letters are included in this filing as Attachments 1 and 2.

Memorandum in Support of Application, January 30, 2009, p. 4.

Typically, AT&T Ohio's interconnection agreements with CLECs and wireless carriers contain the following provision:

Notwithstanding any other provision of this Agreement, the Confidential Information provisions of this Agreement shall apply to all information regarding the usage and other characteristics of the other Party's Customers acquired by either Party in performing under this Agreement, and to all information furnished by either Party to the other in furtherance of the purpose of this Agreement, even if furnished before the date of this Agreement and each Party's obligation to safeguard Confidential Information disclosed prior to expiration or termination of this Agreement will survive such expiration or termination.

The obligations under that provision are not time-limited. AT&T Ohio thus seeks continued protection of the information filed under seal in this case.

The information that is the subject of this motion should be considered as confidential and/or proprietary and should be further protected from public disclosure. O.A.C. § 4901:1-4-09(E) provides that confidential information filed by the ILEC will be eligible for proprietary treatment in according with O.A.C. § 4901-1-24. Division (D) of that section 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 Title 49 of the Revised Code. As set forth herein, the information described below represents confidential business information and, therefore, should be protected from disclosure. While it is no longer the most current information on the presence of CLEC and wireless providers and CLEC market share in the AT&T Ohio exchanges, the information is not considered by those entities to be transitory.

The confidential information consists of CLEC line counts and the count of other

CLEC and wireless carrier presence indicators. Exchange-specific information of this nature is generally protected from public disclosure in Commission proceedings.

Non-disclosure of the identified confidential information will not impair the purposes of Title 49. The Commission and its Staff have full access to the information in order to review the competitive showings made in the application. No purpose of Title 49 would be served by the public disclosure of the information.

The need to protect the designated information from public disclosure is clear, and there is compelling legal authority supporting the requested protective order. While the Commission has often expressed its preference for open proceedings, the Commission also long ago 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 facilitated the protection of trade secrets in its rules (O.A.C. § 4901-1-24(A)(7)).

The definition of a "trade secret" is set forth in the Uniform Trade Secrets Act:

"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.

R. C. § 1333.61(D). This definition clearly reflects the state policy favoring the protection of trade secrets such as the 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). Indeed, for the Commission to do otherwise would be to negate the protections the Ohio General Assembly 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); Columbia Gas of Ohio, Inc., Case No. 90-17-GA-GCR (Entry, August 17, 1990).

In 1996, the Ohio General Assembly amended R. C. §§ 4901.12 and 4905.07 in order to facilitate the protection of trade secrets in the Commission's possession. The General Assembly carved out an exception to the general rule in favor of the public disclosure of information in the Commission's possession. By referencing R. C. § 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. § 149.43(A)(1). In turn, state law prohibits the release of information meeting the definition of a

trade secret. R. C. §§ 1333.61(D) and 1333.62. The amended statutes also reference the purposes of Title 49 of the Revised Code. The protection of trade secret information from public disclosure is consistent with the purposes of Title 49 because the Commission and its Staff have access to the information; in many cases, the parties to a case may have access under an appropriate protective agreement. Such a protective agreement is in place in this case. The protection of trade secret information as requested herein will not impair the Commission's regulatory responsibilities.

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.

For all of the information which is the subject of this motion, AT&T considers and has treated the information as a trade secret. In the ordinary course of business of AT&T Ohio, this information is stamped confidential, is treated as proprietary and confidential by AT&T Ohio employees, and is not disclosed to anyone except in a Commission proceeding and/or pursuant to staff data request. During the course of discovery, information of this type information has generally been provided only pursuant to a protective agreement.

For the foregoing reasons, AT&T Ohio requests that the protective order issued in this case be extended for 18 months.

Respectfully submitted,

AT&T Ohio

/s/ Jon F. Kelly
Jon F. Kelly (Counsel of Record)
Mary Ryan Fenlon
AT&T Services, Inc.
150 E. Gay St., Rm. 4-A
Columbus, Ohio 43215

(614) 223-7928

Its Attorneys

09-74.motion protective order extension

Certificate of Service

I hereby certify that a copy of the foregoing has been served by e-mail this
30th day of December, 2011 on:

Terry Etter
Office of the Ohio Consumers' Counsel
10 W. Broad St., Suite 1800
Columbus, OH 43215

etter@occ.state.oh.us

/s/ Jon F. Kelly
Jon F. Kelly

This foregoing document was electronically filed with the Public Utilities

Commission of Ohio Docketing Information System on

12/30/2011 1:48:28 PM

in

Case No(s). 09-0074-TP-BLS

Summary: Motion for extension of protective order and memorandum in support electronically filed by Jon F Kelly on behalf of AT&T Ohio