

**BEFORE
THE PUBLIC UTILITY COMMISSION OF OHIO**

In the Matter of the Application of XOOM)
 Energy Ohio, LLC for a Certification Application)
 For Retail Generation Providers and Power)
 Marketers in Ohio)

Case No. B-1453-ELCRS

MOTION FOR PROTECTIVE ORDER

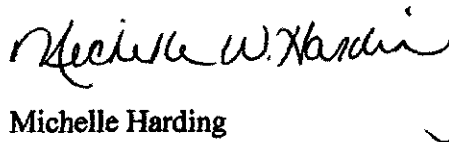
Pursuant to Rule 4901-1-24 (D) of the Ohio Administrative Code ("O.A.C."), XOOM Energy Ohio, LLC ("XOOM Energy Ohio) moves the Public Utility Commission of Ohio ("Commission") for a protective order granting confidential treatment to certain confidential and proprietary information being filed as part of XOOM Energy Ohio's Application for Competitive Retail Electric Generation Providers and Power Markers ("Application") as Exhibits A-12, and C-3, C-4 and C-5. Exhibit A-12 contains the XOOM Energy Ohio, LLC Operating Agreement, while Exhibits C-3, C-4 and C-5 contain financial information, including actual and forecasted financial statements. The attached Memorandum in Support of XOOM Energy Ohio, LLC's Motion for Protective Order sets forth reasons why the Commission should grant the protection requested in this motion. Consistent with the requirements of O.A.C. Rule 4901-1-24(D), concurrent with this motion XOOM Energy Ohio has filed under confidential seal three unredacted copies of Application Exhibits A-12, C-3, C-4 and C-5.

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Respectfully submitted,



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MEMORANDUM IN SUPPORT OF XOOM ENERGY OHIO, LLC'S MOTION FOR PROTECTIVE ORDER

I. OVERVIEW

XOOM Energy Ohio, LLC ("XOOM Energy Ohio"), through the foregoing Motion for Protective Order ("Motion for Protective Order"), requests that the Public Utility Commission of Ohio ("Commission") grant confidential treatment to and protect from public disclosure the confidential and proprietary information contained in Exhibits A-12, C-3, C-4 and C-5 ("Proprietary Information") of its Competitive Retail Electric Generation Providers and Power Markers Application ("Application"). Exhibit A-12 contains the XOOM Energy Ohio, LLC Operating Agreement, while Exhibits C-3, C-4 and C-5 contain financial information, including actual and forecasted financial statements of XOOM Energy Ohio's parent company and single-member manager, XOOM Energy, LLC.

As explained in greater detail below, Ohio law permits, and Commission regulations and policies encourage, the Commission to afford protected confidential treatment to "trade secret" information that is confidential and proprietary in nature. The Ohio definition of "trade secret" information includes business and financial information that (1) derives independent economic value from its confidential nature, and (2) is the subject of reasonable efforts to maintain its confidential nature. The Proprietary Information enclosed here constitutes proprietary business and financial information that is both economically valuable to XOOM Energy Ohio due to its confidential nature and the subject of reasonable efforts to maintain its confidential nature. Accordingly, the Protected Information constitutes trade secret information and should be granted protected confidential treatment by the Commission.

II. Discussion

A. The Commission's Policies Protect Trade Secrets from Public Disclosure

The Commission's rules permit it, through an appropriate representative to issue an order protecting from public disclosure certain proprietary information, referred to as "trade secret" that is filed with the Commission. The Ohio Administrative Code ("O.A.C.") provides:

Upon motion of any party or person with regard to the filing of a document with the [C]ommission's docketing division relative to a case before the [C]ommission, the [C]ommission, the legal director, the deputy legal director, or an attorney examiner may issue any 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 by the [C]ommission, the legal director, the deputy legal director, or the attorney examiner to constitute a trade secret under Ohio law, and where nondisclosure of the information is not inconsistent with the purpose of Title 49 of the Revised Code. O.A.C. Rule 4901-1-24(0) (emphasis added).

Therefore, the Commission is empowered to protect a confidential document from public disclosure to the extent that state or federal law prohibits the public release of the document.

Ohio has adopted the Uniform Trade Secrets Act, which protects from public disclosure proprietary information that is considered a "trade secret." Section 1333.61(D) of the Ohio Revised Code provides the following definition for "trade secret" (emphasis added):

"Trade secret" means information, including the whole or any portion of phase of 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 of use.
- (2) It is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

By this definition, business and financial information constitutes "trade secret" information that should be protected from public disclosure when it both (1) derives independent economic value

due to its confidential nature and (2) is the subject of reasonable efforts to maintain its confidential nature.

In addition to simply permitting the confidential treatment of trade secret information, the Commission has recognized explicitly the value of granting trade secret information protected confidential treatment:

The Commission is of the opinion that the “public records” statute must also be read in pari material 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 dated Feb. 17, 1982).

Accordingly, the Commission is permitted to afford and has a preference favorable to affording protected confidential treatment to information that constitutes a “trade secret” under Ohio Law.

In addition to the statutory standard, the Ohio Supreme Court has adopted several 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.

State ex. Re: The Plain Dealer v. Ohio Dept. of Ins. (Plain Dealer), 687 N.E.2d 661, 672 (Ohio 1997) (adopting the standard previously adopted by the Ohio 8th District Court of Appeals in *Pyromatics, Inc. v. Petruziello*, 454 N.E.2d 588, 592 (Ohio Ct. App. 1983).

This Commission has previously protected from public disclosure proprietary information protected by the state’s trade secret laws. *See: e.g., Cleveland Elec. Illuminating Co.*, Case No. 07-171-EL-BTX (Entry dated Aug. 14, 2008). *Columbia Gas of Ohio, Inc.*, Case

No. 90-17-GA-GCR (Entry dated Aug. 17, 1990). *Elyria Tel. Co.*, Case No. 89-718-TP-ATA (Finding and Order dated May 31, 1989).

Importantly, the Commission routinely grants motions for protective order seeking confidential treatment of trade secret information for financial documents and other competitively sensitive materials being filed as exhibits to competitive retail generation providers and power marketers (“CRES”) applications. See: *e.g. Switch Energy, LLC*, Case Number 13-764-EL-CRS, (Entry dated April 30, 2013) (granting protected treatment to CRES application Exhibits C-3, C-4 and C-5) and *BFE Scheduling, LLC*, Case Number 13-0148-EL-CRS, (granting protected treatment to CRES application Exhibits C-3, C-4 and C-5) (Entry dated February 11, 2013). Consistent with Commission practice, the Commission should grant XOOM Energy Ohio’s Motion for Protective Order. Further, courts of jurisdictions outside of Ohio have held that the presence of trade secrets statute creates an “affirmative responsibility” for a public utility commission to exercise its regulatory authority to protect the trade secrets of companies subject to the public utility commission’s jurisdiction. *N.Y. Tel. Co. v. Pub. Serv. Comm. N.Y.*, 56 N.Y. 2d 213, 220 (1982), cited with approval in *States Power Co. v. N.D. Pub. Serv. Comm’n*, 502 N.W.2d 240, 248 (N.D. 1993).

B. The Proprietary Information Constitutes One or More Trade Secrets

1. The Proprietary Information Consists of Business and Financial Information

Under the standards set forth above and in Ohio Revised Code Section 1333.61(D), the Proprietary Information, including Exhibits A-12, C-3, C-4 and C-5, constitutes trade secret information that the Commission should protect from public disclosure because the Proprietary Information (1) is business or financial information; (2) 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 (3) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy; and (4) meets the six-factors for recognizing a trade secret that the Ohio Supreme Court articulated in the *Plain Dealer* case.

Exhibit A-12, XOOM Energy Ohio's the Operating Agreement, consists of "business information" since it sets forth the standards by which XOOM Energy Ohio has committed to conduct its business, including its financial and operations management procedures. Likewise, Exhibits C-3, C-4 and C-5 all contain "financial information." Specifically, Exhibits C-3 and C-5, which consist of the actual (Exhibit C-3) and projected (Exhibit C-5) financial statements of XOOM Energy Ohio and its parent company and single-member manager XOOM Energy, LLC constitute "financial information" as they set forth details regarding XOOM Energy Ohio's and XOOM Energy, LLC's monetary assets and liabilities. Exhibit C-3 sets forth the actual balance sheets, profit and loss statements, cash flow statements and related notes to financial statements for the life of XOOM Energy Ohio's and XOOM Energy, LLC's business. Exhibit C-5 sets forth projected balance sheets, profit and loss statements, and cash flow statements based on financial estimates for the coming two years. Moreover, Exhibit C-4 contains the Transactions Requirements Annex ("TRA") to the International Swaps and Derivatives Association, Inc. ("ISDA") agreement entered into between XOOM Energy Ohio and a Wholesale Supplier has made to XOOM Energy, LLC on behalf of XOOM Energy Ohio. Although the main ISDA between XOOM Energy Ohio and the Wholesale Supplier contains the terms of the supply agreement between XOOM Energy Ohio and the Wholesale Supplier, the TRA contains the terms of the credit facility. Specifically, the TRA sets forth the credit line and funding commitments the Wholesale Supplier has made to XOOM Energy, LLC and through XOOM

Energy, LLC to XOOM Energy Ohio – these terms constitute “business information” and “financial information” since it sets forth the contractual arrangements between XOOM Energy, LLC and an important commercial counterparty, Wholesale Supplier, and sets forth the financial aspects of a credit facility between the Wholesale Supplier and XOOM Energy, LLC.

2. The Proprietary Information Derives Independent Economic Value from its Confidential Nature

The Proprietary Information 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. XOOM Energy Ohio and its parent company and single-member manager XOOM Energy, LLC are both privately-held companies, and as such they are not required to, and choose not to, make their Proprietary Information, which includes financial information and the XOOM Energy Ohio Operating Agreement, available to the public. XOOM Energy Ohio is applying to be a CRES in Ohio, and XOOM Energy Ohio’s ability to thrive in the competitive energy market in Ohio will depend, at least in part, on the viability and strength of its financial assets and internal management operating structure and procedures. Each CRES conducts its management operations and financials business can play a large role in the success or failure of the business.

The confidential nature of the XOOM Energy Ohio Operating Agreement is economically valuable because the Operating Agreement reveals XOOM Energy Ohio’s proprietary operational and management procedures. The disclosure to the public of these proprietary operational and management procedures would reveal competitively sensitive information about the conduct of XOOM Energy Ohio’s business that, if released, could be used

by XOOM Energy Ohio's competitors to gain an advantage over XOOM Energy Ohio in the energy marketplace.

The confidential nature of the Proprietary Information of the TRA is economically valuable because XOOM Energy Ohio would suffer two particular types of economic harm if the confidentiality of the Proprietary Information were breached. First, if XOOM Energy Ohio publicly released the Proprietary Information, the Wholesale Supplier might pursue monetary damages from XOOM Energy Ohio's parent company and single member manager, XOOM Energy, LLC to account for the breach of confidentiality. Second, disclosing to the public the proprietary information contained in Exhibit C-4 it would reveal competitively sensitive information about the conduct of XOOM Energy Ohio's and the Wholesale Supplier's businesses that, if released, could be used by XOOM Energy Ohio's competitors to gain an advantage over XOOM Energy Ohio in the energy marketplace. This would clearly discourage companies from entering into private agreements whether the terms can be disclosed to the public so freely; conversely, the protection of this information will help safeguard the competitiveness of the retail energy market.

Moreover, XOOM Energy Ohio and XOOM Energy, LLC's actual and forecasted financial statements are economically valuable because these financial statements reveal the cash inflow and expenditures underlying the operation of the business. The disclosure to the public of this information about the finances and operation of XOOM Energy Ohio's and XOOM Energy, LLC's business would reveal competitively sensitive information about the conduct of XOOM Energy Ohio's and XOOM Energy, LLC's business that, if released could be used by XOOM Energy Ohio's competitors to gain an advantage over XOOM Energy Ohio in the energy marketplace. Accordingly, the Proprietary Information derives independent economic value

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.

3. The Proprietary Information Is the Subject of Reasonable Efforts to Maintain its Confidential Nature

The Proprietary Information is the subject of efforts that are reasonable under the circumstances to maintain its secrecy. XOOM Energy Ohio, its single-member manager XOOM Energy, LLC, and its affiliates have taken reasonable efforts to ensure that the Proprietary Information remains confidential and is not disclosed to the public. The Proprietary Information is not available in the public domain, and is only occasionally provided under confidential seal to appropriate third parties that request the information, such as state or federal regulatory bodies that afford such information confidential treatment.

4. The Proprietary Information Meets *Plain Dealer's* 6-Factor Standard for Recognizing a Trade Secret

The Ohio Supreme Court's six-factor standard established in the *Plain Dealer* case counsels in favor of granting XOOM Energy Ohio's Motion for Protective Order. *Plain Dealer* requires the Commission to consider the following six factors in determining whether XOOM Energy Ohio's trade secret claim meets the statutory standard of Ohio Revised Code Section 1333/61 (D): (1) The extent to which the Proprietary Information is known external to the business, (2) the extent to which the Proprietary Information is known to persons within the business, (3) the precautions XOOM Energy Ohio and its affiliates have taken to guard the secrecy of the Proprietary Information, (4) the savings value to XOOM Energy Ohio and its affiliates in keeping the information confidential from competitors, (5) the amount of effort or money XOOM Energy Ohio and its affiliates have expended in obtaining and developing the

Proprietary Information, and (6) the amount of time and expense third parties would need to expend to acquire and duplicate the information.

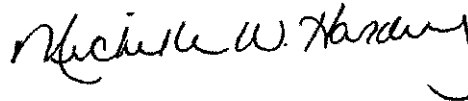
The Proprietary Information meets the Ohio Supreme Court's standard for trade secrets. (1) As explained above in Section II.B.3 of this memorandum, the Proprietary Information is not available in the public domain, and has only been provided to third parties in certain limited, appropriate circumstances in which the Proprietary Information has been provided under confidential seal. (2) The Proprietary Information is only made available internally to appropriate employees, contractors, officers and member of the board of managers of XOOM Energy Ohio and XOOM Energy, LLC. (3) Also as explained above in Section II.B.3 of this memorandum, the Proprietary Information is not available in the public domain, and has only been provided to third parties in certain limited, appropriate circumstances in which the Proprietary Information has been provided under Confidential Seal. (4) As explained in Section II.B.2, XOOM Energy Ohio derives significant economic value by organizing its business and its information in a proprietary way, and the value of this organization and information is only valuable to the extent that XOOM Energy Ohio's competitors do not have access to the Proprietary Information. (5) XOOM Energy Ohio and XOOM Energy, LLC have expended significant effort and money to develop the Proprietary Information through any source other than XOOM Energy Ohio or XOOM Energy, LLC, regardless of the resources they are willing to expend to obtain it.

III. CONCLUSION

XOOM Energy Ohio submits that the Proprietary Information constitutes a trade secret that is protected from public disclosure, that granting this Motion for Protective Order is not inconsistent with the purposes of Title 49 of the Revised Code, and that the Commission should grant XOOM Energy Ohio's Motion for Protective Order. For the reasons stated above, XOOM

Energy Ohio requests that Commission grant its Motion for Protective Order and maintain Exhibits A-12, C-3, C-4 and C-5 of its Application under confidential seal.

Respectfully submitted,



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Dated: June 19, 2013