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BRIEF IN SUPPORT

Telco Pros requests that the information it designated as confidential, Exhibits C-3, and C-5 to its Application for Certification to become an Aggregator and Power Broker, are held to be confidential by the PUCO. The information for which protection is sought covers financial statements (C-3), and financial forecasts (C-5). Such information if released to the public would harm TPI by providing its competitors proprietary information in what is designed by statute to now be a competitive service.

Rule 4901-1-24(D) of the Ohio Administrative Code 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. Specifically Section 4905.07 of the Ohio Revised Code provides that all facts and information in the possession of the Commission shall be public, except as provided in O.R. C. Section 149.43. O.R.C. Section 149.43, specifies that the term "public records" are:

[R]ecords kept by any public office, including, but not limited to, state, county, city, village, township, and school district units, and records pertaining to the delivery of educational services by an alternative school in this state kept by the nonprofit or for-profit entity operating the alternative school pursuant to section 3313.533 of the Revised Code.

O. R. C. Section 149.43(v) carves out an exception to the general rule that records that are to be kept public. O.R.C. Section 149.43(v) specifically excludes information which, under state or federal law, may not be released. The Supreme Court of Ohio has held that the "state or

federal law" exemption is intended to include trade secrets in State ex rel Besser v. Ohio State (2000), 89 Ohio St. 3d 396, 399.

An Order allowing TPI to keep the information disclosed in C-3, C-4, and C-5 private would not contradict the purposes of Title 49. The Public Utilities Commission of Ohio would still be able to use the information in order to fulfill all statutory and regulatory obligations. There is no hindrance in performance of the Public Utilities Commission of Ohio's duties by concealing the referenced information from public view. It is patently clear as to the reasons TPI is moving to protect the designated information from public disclosure. Further, there is compelling legal authority supporting the requested protective order. In addition, none of the guidelines or purposes of Title 49 would be served by the public disclosure of the information in question. Although the Public Utilities Commission of Ohio has open proceedings and keeps open records, the Commission has also recognized a statutory obligation concerning 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. O.R.C. § 1333.61(D).

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.

In State ex rel The Plain Dealer the Ohio Dept. of Ins. (1997), 80 Ohio St. 3d 513, the Ohio Supreme Court adopted a six factor test to analyze whether information 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 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. *Id.* at 524-525 (quoting Pyromatics, Inc. v. Petruziello, 7 Ohio App. 3d 131, 134-135 (Cuyahoga County 1983)).

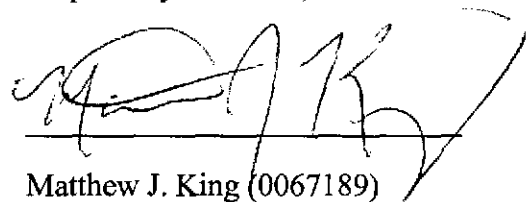
When we apply these six factors to the three financial exhibits TPI seeks to protect as they contain confidential information, it is clear that a protective order should be granted. TPI's exhibits C-3, C-4, and C-5 contain confidential financial statements, financial arrangements and financial forecasts. TPI continues to strive to keep such sensitive financial information from being disclosed. The disclosure of this sensitive information could give competitors an unfair advantage that would hinder TPI's ability to compete in an open market. In addition, public

disclosure of this financial information is not likely to assist the Commission in carrying out its duties under CRES rules.

Courts in other jurisdictions have held that not only does a Public Utilities Commission have the **authority** to protect the trade secrets of the companies subject to its jurisdiction; but also that the trade secrets statute creates a **duty** on behalf of the Public Utilities Commission to protect the trade secrets of companies under their purview. 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 that the Ohio General Assembly has granted to all businesses, including public utilities, and now the new entrants who will be providing power through the Uniform Trade Secrets Act. This Commission has previously carried out its obligations in this regard in numerous proceedings. See, 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).

WHEREFORE, for the above law and argument TPI requests the Commission grant its motion for a protective order and to maintain Exhibits C-3, C-4, and C-5 to its Application for Certification as a Competitive Retail Electric Service Aggregator and Power Broker under seal.

Respectfully Submitted,

A handwritten signature in black ink, appearing to read 'Matthew J. King', is written over a horizontal line.

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