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**BEFORE**  
**THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Application of )  
X5 OpCo LLC )  
to Provide Interexchange )  
Telecommunications Services in the State of Ohio )

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Case No. 15 - 172 JTC ACE

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**MOTION FOR PROTECTIVE ORDER**

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The applicant, X5 OpCo LLC ("X5 OpCo"), pursuant to Ohio Administrative Code ("OAC") Rule 4901-1-24(D), hereby moves the Public Utilities Commission of Ohio ("Commission") for a protective order to shield proprietary information from the public record and keep confidential the financial data and other proprietary information contained in Exhibit C to X5 OpCo's application for certification to provide interexchange services in the State of Ohio. The Memorandum in Support below presents the reasons to grant this motion.

Consistent with the requirements of OAC Rule 4901-1-24(D), X5 OpCo has filed under seal two (2) unredacted copies of the confidential exhibit that is the subject of this motion.

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**MEMORANDUM IN SUPPORT**

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OAC Rule 4901-1-24(D) provides that the Commission or certain designated employees may issue an 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. . . to constitute a trade secret under Ohio law, and where nondisclosure of the information is not inconsistent with the purposes of Title 49 of the Revised Code." Moreover, Ohio Revised Code ("R.C.") Section 4928.06(F) specifically permits

the Commission to grant confidentiality to competitive information. X5 OpCo asserts that the

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information being submitted in Exhibit C constitutes confidential and proprietary business information, as well as a trade secret. As such, state law prohibits the release of the information.

R.C. 4901.12 and 4905.07 were amended in 1996 to facilitate the protection of trade secrets in Commission proceedings. By referencing R.C. 149.43 (Ohio's Public Records Law), the Commission-specific statutes incorporate the definition of "public records," as well as an exception to that definition that includes "[r]ecords the release of which is prohibited by state or federal law." R.C. 149.43(A)(1)(v). In turn, state law prohibits the release of information meeting the definition of a trade secret. See R.C. 1333.61(D) and 1333.62. For this reason, records containing trade secrets are prohibited from public disclosure.

The definition of "trade secret" is set forth in R.C. 1333.61(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.

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. For, as the Ohio Supreme Court has explained:

by adopting the Uniform Trade Secrets Act, with the express purpose to make uniform the law with respect to their subject among states, the General Assembly has determined that public policy in Ohio, as in the majority of other jurisdictions, favors the protection of trade secrets, whether memorized or reduced to some tangible form.

*Al Minor & Associates, Inc. v. Martin*, (2008) 117 Ohio St.3d 58.

Courts of other jurisdictions not only have held that a public utilities commission has the authority to protect trade secrets, but that trade secret statutes create a duty to protect them. See *New York Tel. Co. v. Pub. Serv. Comm. N.Y.*, 56 N.Y. 2d 213 (1982).

Furthermore, the Commission itself has recognized the need to protect trade secrets from public disclosure as consistent with its other statutory obligations:

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). The Commission previously has carried out its obligation to protect the trade secret status of information from utilities and other regulated entities in numerous proceedings. See, e.g., *Cleveland Electric Illuminating Co.*, Case No. 07-171-EL-BTX (Entry dated August 14, 2008); *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). For the Commission to do otherwise would be to negate the protections the General Assembly has granted to all businesses, including public utilities, through the Uniform Trade Secrets Act.

Expounding upon the “trade secret” definition above, the Ohio Supreme Court has delineated factors to be considered in analyzing a trade secret claim:

- (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, 524-525. The Commission applies these factors in the context of applications for competitive services to conclude that certain financial exhibits constitute trade secrets.

Here, X5 OpCo requests that the information designated as confidential (Exhibit C of its certification application) be protected from public disclosure. If released to the public, the information for which protection is sought (income statements and balance sheets, collectively “Financial Statements”) would harm X5 OpCo by providing competitors with proprietary financial data not commonly known by or available to the public and involving a very competitive service. X5 OpCo has used its best efforts to keep and maintain such financial data confidential; and, to the best of its knowledge, current financial information has not been disclosed or released to the public. X5 OpCo also redacted the confidential financial data information from Exhibit C to the certification application and generally treats the information as a trade secret.

In the ordinary course of X5 OpCo’s business, this financial information is deemed confidential, is treated as proprietary and confidential by X5 OpCo employees, and is not disclosed to anyone other than as part of a legal proceeding and, even then, only pursuant to a protective agreement. The Financial Statements also derive economic value from not being generally known to, and not being readily ascertainable (through proper means), by other persons, who can obtain economic value from their disclosure and use. Specifically, the information contained therein is extremely sensitive information that could be used by competitors to determine revenue and other information damaging to X5 OpCo in the marketplace. Disclosure of such information would be extremely detrimental and could be used by X5 OpCo’s competitors to materially affect X5 OpCo’s ability to compete effectively in the State of Ohio.

For these reasons, the information in Exhibit C to the certification application falls directly within the definition of a "trade secret" and should be protected from public disclosure. The Financial Statements should be used by the Commission solely to consider X5 OpCo's application for operating authority. There is no legitimate purpose or public interest to be served in disclosing the financial statements to X5 OpCo's competitors or, indeed, to any person other than the appropriate staff members of the Commission.

For the foregoing reasons, X5 OpCo requests that the designated Financial Statements be protected from public disclosure.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "David A. Turano", is written over a horizontal line.

David A. Turano, Esq.

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