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BEFORE
THE PUBLIC UTILITY COMMISSION OF OHIO

In the Matter of Application of XOOM)
Energy Ohio, LLC)
for 2017 Alternative Energy Report)

Case No. 18-0400-EL-ACP

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 Alternative Energy Report for 2017 ("AER"). Specifically, XOOM Energy Ohio is requesting confidential treatment for the ten year planning projections in Section V(a) as such projections are sensitive proprietary business information. The attached Memorandum in Support of XOOM Energy Ohio'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(0), concurrent with this motion XOOM Energy Ohio has filed under confidential seal three un-redacted copies of the AER.

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 Section 5 (a) of its AER.

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. *NY. Tel. Co. v. Pub. Serv. Comm. NY.*, 56 N.Y. 2d 213, 220 (1982), cited with approval in *States Power Co. v. ND. 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 Section 5 (a) of the AER 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.

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 is a privately-held company, and as such it is not required to, and chooses not to, make its Proprietary Information, which includes the projections in Section V(a) available to the public. XOOM Energy Ohio is a licensed CRES in Ohio, and its ability to thrive in the competitive energy market in Ohio depends, at least in part, on the viability and strength of its business plans, financial assets and internal management operating structure and procedures. The way 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's projected projections in Section V(a) is economically valuable because it reveals XOOM Energy Ohio's proprietary future business plans. The disclosure to the public of these proprietary operational plans 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.

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 has 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 has taken to guard the secrecy of the Proprietary Information, (4) the savings value to XOOM Energy Ohio in keeping the information confidential from competitors, (5) the amount of effort or money XOOM Energy Ohio has 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. (3) Also as explained above in Section II.B.3 of this memorandum, the Proprietary Information is not available in the public domain 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 business plans 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 has expended significant effort and money to develop the Proprietary Information through any source other than XOOM Energy Ohio, regardless of the resources it is 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 Section 5 (a) of the AER under confidential seal.

Respectfully Submitted,



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