

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Application of Metro)	
FiberNet, LLC for a Certificate of Public)	Case No. 19-1504-TP-ACE
Convenience and Necessity.)	

**METRO FIBERNET'S
MOTION FOR PROTECTIVE ORDER**

Pursuant to Ohio Administrative Code ("O.A.C.") Rule 4901-1-24(D), Metro Fibernet, LLC ("MFN") respectfully moves the Public Utilities Commission of Ohio ("Commission") to issue a protective order to protect the confidentiality and prohibit disclosure of certain highly confidential and proprietary information in connection with MFN's application for authority to operate as a competitive local exchange company Ohio. The documents in Exhibit D.2 ("Actual and Pro Forma Financial Statements") and D.3 ("Source of Funds"), contemporaneously filed this date, contain competitively sensitive and highly proprietary business financial information composed of trade secrets. Pursuant to the requirements of O.A.C. 4091-1-24(D), MFN has filed under seal unredacted copies of the confidential information sought to be protected by this Motion.

The grounds for this Motion are set forth in the attached Memorandum in Support.

Respectfully Submitted,



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**MEMORANDUM IN SUPPORT OF METRO FIBERNET’S
MOTION FOR PROTECTIVE ORDER**

Contemporaneously with this Motion for Protective Order, Metro Fibernet, LLC. (“MFN”) filed its Application for a Certificate of Public Convenience and Necessity to operate as a competitive local exchange carrier (“CLEC”) in Ohio (“Application”). The Application contains certain information and materials required in accordance with the Commission’s certification filing instructions for CLECs and Ohio Adm. Code Section 4901:1-6-08(E). As part of the Application, the Commission requests information regarding MFN’s actual and pro forma financial statements (Exhibit D.2) and source of funds (Exhibit D.3) (collectively, “Confidential Information”). MFN has submitted the Confidential Information as exhibits to the Application under seal because they contain competitively sensitive and highly proprietary business financial information that requires confidential treatment. Therefore, MFN requests that the Commission issue an order to protect the confidentiality and prohibit the disclosure of the Confidential Information.

MFN is a wholly owned subsidiary of its parent, Metronet Holdings, LLC (“Metronet”), and has submitted Metronet’s financial information to support MFN’s Application. Metronet is not a publicly traded company and its financial information is not publicly available. Therefore, MFN requests that the financial statements contained in Exhibit D.2 and the source of funds contained in Exhibit D.3 be protected from public disclosure. The information for which

protection is sought describes MFN's financial information and results of operation, financial arrangements, and projected financial information. Such information clearly is competitively sensitive trade secret information. Public disclosure would impair MFN's ability to respond to competitive opportunities in the marketplace and would provide competitors with an unfair competitive advantage.

O.A.C. 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 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 Ohio Revised Code Title 49. State law and specifically Section Ohio Revised Code Section ("R.C.") 4929.23(A) permits the Commission to protect the confidentiality of competitive information submitted as a part of the certification process as a CLEC. Moreover, R.C. 4901.12 and 4905.07 facilitate the protection of trade secrets in the Commission's possession. These statutes incorporate by reference the provisions of R.C. 149.43, which excepts from the public record information and records for which disclosure is prohibited by law. State law prohibits the release of information meeting the definition of a trade secret. R.C. 1333.61(D) and 1333.62. R.C. 4901.12 and 4905.07 also reference the purposes of Revised Code Title 49. The protection of trade secret information from public disclosure is consistent with the purposes of Title 49 and non-disclosure of the information will not impair the purposes of Title 49, because the Commission and its Staff have full access to the information in order to fulfill its statutory obligations. 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 part 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 documents and information contained in Exhibits D.2 and D.3 contain competitively sensitive and highly proprietary business financial information falling within the statutory characterization of a trade secret as defined by R.C. Section 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 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).

The Commission regularly grants motions for protective orders to protect the confidential trade secret status of exhibits to competitive retail broker/aggregator applications—see e.g. *Palmer Energy Corporation*, Case No. 10-1081-EL-AGG (Entry October 21, 2010) and *RD Energy, Inc.*, Case No. 10-72-EL-AGG (Entry March 26, 2010). *See also*, *Buckeye Energy Brokers, Inc.*, Case No. 02-1676-GA-AGG (Entry July 15, 2003, explaining that “income statement and balance sheet information can be considered a trade secret and afforded confidential treatment”). 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 CLEC applications to conclude that certain financial exhibits constitute trade secrets. Here, MFN requests that the information designated as confidential (Exhibits D.2 and D.3) in its Application be protected from public disclosure.

MFN considers and has treated the documents and information contained in the exhibits for which protection is sought as trade secret. In the ordinary course of business, the information

is deemed confidential, is treated as proprietary and confidential by MFN employees, and is not disclosed to anyone unless required pursuant to a legal proceeding.

Considering the competitive environment in which MFN operates, the information requested in the exhibits for which protection is sought is highly proprietary, confidential and commercially sensitive. Therefore, it is imperative that MFN be required to provide such information only under seal, thus precluding potential competitors from gaining access to this commercially sensitive information. Additionally, non-disclosure of the information will not impair the purposes of Title 49, because the Commission and its Staff have full access to the information in order to fulfill its statutory obligations. The Commission can thus ensure that MFN (1) complies with Commission's rules and (2) will receive no regulatory advantage over its potential competitors,

For the foregoing reasons, MFN requests that the designated information be protected from public disclosure.

Respectfully Submitted,



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Summary: Motion of Metro Fibernet, LLC for Protective Order and Memorandum in Support electronically filed by Teresa Orahoad on behalf of Dane Stinson