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February 10, 2021

Via FedEx Priority Overnight

Public Utilities Commission of Ohio
Docketing Division
180 East Broad Street
Columbus, Ohio 43215

Re: Case No. 21-0106-TP-ACE: Application of Dark Fiber and Infrastructure, LLC to Provide Competitive Telecommunications Services Throughout the State of Ohio

To Whom It May Concern:

On behalf of Dark Fiber and Infrastructure, LLC ("DF&I"), enclosed for filing are an original and seven copies of DF&I's Motion for Protective Order and Memorandum in Support Thereof requesting confidential treatment of DF&I's Confidential Financial Statements, referred to in DF&I's Application as Exhibit E. Also enclosed in a sealed and Confidential envelope are two copies of the Confidential Financial Statements.

Thank you for your attention to this matter. If you have any questions concerning this Application, please do not hesitate to contact me by email at mpest@eckertseamans.com or by phone at 412.566.1930.

Sincerely,



Michael P. Pest
(Ohio Bar No. 99289)

Enclosures

cc: James C. Falvey

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**Before the
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of)
)
Application of Dark Fiber and)
Infrastructure, LLC To Provide)
Competitive Telecommunications)
Services Throughout the State of Ohio)

**MOTION FOR PROTECTIVE ORDER
AND MEMORANDUM IN SUPPORT THEREOF**

Pursuant to Rule 4901-1-24(D) of the Ohio Administrative Code, Dark Fiber and Infrastructure, LLC ("DF&I") respectfully moves for a protective order to keep its actual and pro forma financial statements ("Financial Statements") confidential and not part of the public record of this proceeding. The financial statements are being filed as part of DF&I's Application to Provide Competitive Telecommunications Services Throughout the State of Ohio. The reasons underlying this Motion are outlined in the attached Memorandum in Support. Consistent with Ohio rules, two (2) unredacted copies of the financial statements are enclosed under seal.

Dated: February 10, 2021

Respectfully submitted,



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PJCC

**Before the
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of)	
)	
Application of Dark Fiber and)	
Infrastructure, LLC To Provide)	Case No. 21-0106-TP-ACE
Competitive Telecommunications)	
Services Throughout the State of Ohio)	

MEMORANDUM IN SUPPORT OF MOTION FOR PROTECTIVE ORDER

As part of the Application of Dark Fiber and Infrastructure, LLC (“DF&I”) to Provide Competitive Telecommunications Services Throughout the State of Ohio (“Application”), DF&I is filing its confidential actual and pro forma financial statements (“Financial Statements”) under seal. The Financial Statements contain proprietary, sensitive, commercial, and financial information that is not publicly available and which, if released, could be used by competitors of DF&I to cause competitive harm.

Under Rule 4901-1-24(D) of the Ohio Administrative Code, the Public Utilities Commission of Ohio (“Commission”) has the authority to 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 commission, 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 purposes of Title 49 of the Revised Code.

The non-disclosure of DF&I’s Financial Statements is consistent with Rule 4901-1-24(D). All necessary Commission and Staff members will have access to the information and will thus be able to fulfill their statutory obligations. The Financial Statements should solely be

used by the Commission in exercising its governmental functions in considering DF&I's Application. There is no legitimate purpose or public interest to be served in disclosing the Financial Statements to DF&I's current or future competitors or to any person other than the appropriate Commission Staff. Protection of the Financial Statements does not affect the public interest and does not restrict interested parties from participating in the administrative process. Furthermore, the harm that would result to DF&I from disclosure of the Financial Statements far outweighs the public interest in accessing this information.

The Commission has previously recognized the need for trade secret information to be kept out of the public record. The Ohio Revised Code defines "trade secret" as:

[I]nformation, 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.¹

The Ohio Supreme Court has adopted the following six-prong test explicating how to decide whether information is a trade secret under Section 1333.61(D):

(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.²

¹ 13 Ohio Rev. Code § 1333.61(D) (2021).

² *State ex rel. The Plain Dealer et al. v. Ohio Dep't of Ins.*, 80 Ohio St. 3d 513, 524, 687 N.E.2d 661, 672 (Ohio 1997).

DF&I's Financial Statements meet the statutory requirements as interpreted by the *Plain Dealer* case. DF&I is privately-held corporation. As such, DF&I is not required to file its Financial Statements publicly with the United States Securities and Exchange Commission. DF&I has not otherwise disclosed these Financial Statements to the public, and only limited DF&I personnel have access to the Financial Statements. DF&I seeks confidential treatment for its Financial Statements each and every time it is required to produce them in a regulatory proceeding such as this one. Because DF&I is operating in highly competitive markets for certain telecommunications and related services, public disclosure of its financial condition would adversely disadvantage DF&I. Moreover, release of this information to the public could cause undue economic damage and substantially harm DF&I's ability to compete in the marketplace in Ohio and nationwide. The Financial Statements, filed under seal, meet the standard detailed above and a protective order should therefore be granted.

WHEREFORE, DF&I respectfully requests that the Commission grant a protective order for its confidential Financial Statements and not make those statements available to the public.

Dated: February 10, 2021

Respectfully submitted,



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