

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Commission's)	
Investigation into XOOM Energy Ohio,)	
LLC's Compliance with the Ohio)	Case No. 22-267-GE-COI
Administrative Code and Potential Remedial)	
Actions for Non-Compliance)	

MOTION FOR PROTECTIVE ORDER

Pursuant to Ohio Administrative Code 4901-1-24(D), XOOM Energy Ohio, LLC ("XOOM Energy") moves for a protective order to keep confidential and not disclose in response to a public records request dated May 16, 2022, from the Office of the Ohio Consumers' Counsel, the confidential and proprietary information provided by XOOM Energy in relation to this proceeding. The Staff identified twelve documents in response to public records requests. The documents should not be provided because they contain confidential trade secrets and confidential settlement communications, except to the limited extent noted below relative to Document 1 (for which XOOM Energy proposes to provide the Attorney Examiner with a redacted copy for review *in camera* before disclosure).¹ The reasons underlying this motion are detailed in the attached Memorandum in Support and further supported by the attached affidavit of Jackie Whitman, Marketing Director of XOOM Energy.

Respectfully Submitted,

/s/ Gretchen L. Petrucci
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Counsel for XOOM Energy Ohio, LLC

¹ XOOM Energy will provide the Attorney Examiner with unredacted copies of the 12 documents as well for an in-camera review.

**MEMORANDUM IN SUPPORT OF
MOTION FOR PROTECTIVE ORDER**

XOOM Energy Ohio, LLC (“XOOM Energy”) requests that the Commission keep confidential the 12 documents provided by XOOM Energy on a confidential basis to the Staff (they were all marked confidential). Staff identified the 12 documents as responsive to a public records request dated May 16, 2022, from the Office of the Ohio Consumers’ Counsel (“OCC”). The documents are not public records. Rather, some documents contain confidential settlement communications and all documents contain market-sensitive information, market strategy and activities, and/or enrollment quantities at specific granular levels. The information constitutes confidential trade secrets and warrants protection – their release to the OCC would harm XOOM Energy by providing confidential and proprietary documents to a public agency that will not then hold the information confidential. OCC could proceed to disclose the information – information that is designed by statute to involve a competitive service – in any number of ways, and harm XOOM Energy.

Ohio Administrative Code (“Ohio Adm.Code”) 4901-1-24(D) provides that the Public Utilities Commission of Ohio (“Commission”) or certain designated employees may 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 (“R.C.”). Thus, state law recognizes the need to protect certain types of information held by the Commission, including that which is the subject of this motion. The Commission and its Staff still have full access to the information in order to fulfill their statutory obligations. No purpose of Title 49 would be served by the public disclosure of this confidential and proprietary 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 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. See Ohio Adm.Code 4901-1-24(A)(7) – a protective order may provide that “a trade secret or *** other information not be disclosed or be disclosed only in a designated way.” The definition of a “trade secret” is set forth in R.C. Section 1333.61(D) – 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.

This definition clearly reflects the state policy favoring the protection of trade secrets such as the information listed below that 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 Supreme Court of Ohio 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)).

Applying these trade secret factors to the 12 documents, and recognizing that certain customer information in the documents is not a public record,² and state law protects against public release of customer account information and statements made in settlement negotiations,³ it is clear that a protective order should be granted as detailed below. The attached affidavit of Jackie Whitman, Marketing Director of XOOM Energy, confirms that the documents contain confidential trade secrets and confidential settlement communications.

Document 1 XOOM Energy Response to Staff sent 7/6/2021 (Initial response to the Staff's Notice of Probable Noncompliance [NOPN]): This document contains XOOM Energy's offers for resolving certain aspects of the NOPN. As such, the settlement-related communications should be redacted and should not be publicly disclosed in response to OCC's public records request. XOOM Energy proposes to provide the Attorney Examiner with a proposed redacted copy for an *in camera* inspection before being publicly disclosed in response to OCC's public records request.

Document 2 XOOM Energy Response to Staff sent 7/12/2021 (Contains customer information): This document follows up with detailed information on a discrete subset of the customer enrollments, identifying the names, service locations, emails, and utility account numbers. This customer-specific information is generally protected by XOOM Energy and the Commission. It is not readily duplicated and would harm XOOM Energy if declared to be publicly available and disclosable, allowing third parties and competitors to gain access to sensitive XOOM Energy's customer information. Public disclosure would also harm the customers by providing third parties with access to their personal information. The document contains confidential trade secrets and should not be publicly disclosed in response to OCC's public records request.

Document 3 XOOM Energy Response to Staff sent 8/6/2021 (Provides results of XOOM Energy audit): This document identifies XOOM Energy's marketing activities during the audit period in 2021, provides customer counts and categories, details one aspect of XOOM Energy's quality assurance program and activity under that aspect during the audit period. This information is not publicly available and not readily duplicated. Public disclosure

² R.C. Section 149.43(A)(1)(aa).

³ See Ohio Adm.Code 4901:1-10-24(E), 4901:1-13-12(D), 4901:1-29-09 and 4901:1-21-10 (utilities and suppliers shall not disclose a customer's account number except under circumstances not applicable here); Ohio Adm.Code 4901-1-26(E) ("Evidence of conduct or statements made in compromise negotiations is likewise not admissible"); and *Ohio Consumers' Counsel v. PUC* (2006), 111 Ohio St. 3d 300, 2006-Ohio-5789, quoting *Goodyear Tire & Rubber Co. v. Chiles Power Supply, Inc.* (C.A.6 2003), 332 F.3d 976 (privilege protects against the disclosure of settlement communications).

would also harm XOOM Energy by providing third parties with access to details of its marketing activities in Ohio, marketing strategy for Ohio, and internal processes for compliance. The first page also contains a proposal for settlement related to one issue. Altogether, the document contains confidential trade secrets and confidential settlement communications. It should not be publicly disclosed in response to OCC's public records request.

Document 4 XOOM Energy Response to Staff sent 8/12/2021 (Correspondence with a revision to one of the offers from XOOM Energy made on 7/6/2021 related to a subset of certain customers): This document relates to the information that is proposed to be redacted in Document 1. The document contains confidential settlement communications and should not be publicly disclosed in response to OCC's public records request.

Document 5 XOOM Energy Response to Staff sent 9/9/2021 (Answers Staff questions regarding audit information and contains settlement communications): This correspondence chain provides detailed responses to the Staff's specific questions about XOOM Energy's audit report and about XOOM Energy's corrective actions. It also explains one of the settlement offers from XOOM Energy made on 7/6/2021. Additionally, there are detailed numbers of customer enrollments by different categories and related to XOOM Energy's quality assurance efforts as well. This information is not publicly available and not readily duplicated. Public disclosure would also harm XOOM Energy by providing third parties with access to details of its marketing activities, marketing strategy for Ohio, and internal processes for compliance. The document contains confidential trade secrets and confidential settlement communications. It should not be publicly disclosed in response to OCC's public records request.

Document 6 XOOM Energy Response to Staff sent 9/21/2021 (Answers Staff questions regarding audit information and contains settlement communications): This correspondence provides detailed responses to the Staff's questions about one part of XOOM Energy's audit report and about XOOM Energy's efforts related to one of the proposed corrective actions. It also follows up regarding one of the settlement offers from XOOM Energy made on 7/6/2021 in Document 1. This information is confidential and public disclosure would harm XOOM Energy by providing third parties with access to information of its marketing activities/strategy for Ohio. The document contains confidential trade secrets and contains confidential settlement communications. This document should not be publicly disclosed in response to OCC's public records request.

Document 7 XOOM Energy Presentation to Staff on 10/29/2021 (Provides a summary of the 2021 issue, the internal investigation activities, the remediation and enhancements made, the 2021 audit conducted, enrollment process and documents, and proposed settlement terms): This document contains a compilation of confidential and sensitive information. Public disclosure will provide OCC and potentially other third parties with extensive details of XOOM Energy's business operations in Ohio (and outside of Ohio), numbers of customer enrollments by different categories, and marketing strategy/activities in Ohio (and outside of Ohio). In addition, the document was marked as being provided "for settlement purposes." The document contains confidential trade secrets and contains confidential settlement communications. The document should not be publicly disclosed in response to OCC's public records request.

Document 8 XOOM Energy Response to Staff sent 11/12/2021 (Answers Staff questions regarding a subset of the audit information): This document follows up with detailed information on a discrete subset of the customer enrollments during the audit period, identifying customer counts and numbers on different subset levels. Public disclosure of this document, like the audit report itself (Document #3), would harm XOOM Energy by providing third parties with access to details of its marketing strategy/activities in Ohio and extrapolate same for other jurisdictions. The document contains confidential trade secrets and should not be publicly disclosed in response to OCC's public records request.

Document 9 XOOM Energy Response to Staff sent 12/15/2022 (Answers Staff questions regarding audit information and addresses a proposal for settlement): This document follows up with detailed information on discrete subsets of the customer enrollments during the audit period, identifies additional enrollment-confirming activities performed related to enrollments, and discusses XOOM Energy's settlement position. Public disclosure of this document, like the audit report itself (Document #3), would harm XOOM Energy by providing third parties with access to details of its marketing strategy/activities in Ohio and allow them to extrapolate same for other jurisdictions. Public disclosure would also disclose confidential settlement discussions. The document contains confidential trade secrets and contains confidential settlement communications. The document should not be publicly disclosed in response to OCC's public records request.

Document 10 XOOM Energy Response to Staff sent 2/18/2022 (Answers Staff questions regarding audit information, includes discussion of one issue for settlement, and includes a proposed settlement agreement): This document follows up with detailed information on discrete subsets of the customer enrollments during the audit period, including identification of the customers' names and addresses. Public disclosure of this document, like the audit report itself and follow-up answers about the audit (Documents #3, #5-#9), would harm XOOM Energy by providing third parties with access to details of its marketing strategy/activities in Ohio and allow them to extrapolate same for other jurisdictions. Public disclosure would also disclose customer-specific information, confidential settlement discussions, and a settlement proposal. This customer and settlement information is generally protected by XOOM Energy and the Commission. The document contains confidential trade secrets and contains confidential settlement communications. It should not be publicly disclosed in response to OCC's public records request.

Document 11 XOOM Energy Compliance Plan sent 5/10/2022 (Provides XOOM Energy's proposed compliance plan and was provided as a confidential settlement communication): This document compiles information provided in other documents, presenting a proposed compliance plan as part of a proposed resolution of the issues. It contains detailed information regarding XOOM Energy's internal quality assurance procedures and requirements. In addition, this document contains a proposal for settlement and was provided as a confidential settlement communication, which was reflected in correspondence accompanying the document. Public disclosure of this document would harm XOOM Energy by providing third parties with access to details of its internal processes and requirements for providing services in Ohio and allow them to extrapolate same for other jurisdictions. This information is generally protected by XOOM Energy and is not readily duplicated. In addition, proposed settlement communication and terms are generally protected by XOOM Energy and the Commission. As such, this document

constitutes a confidential trade secret and confidential settlement communication. It should not be disclosed in response to OCC's public records request.

Document 12 XOOM Energy Response to Staff sent 5/11/2022 (Describes and explains XOOM Energy's audit information, provides customer contracts and was provided as a confidential settlement communication): This document follows up with detailed information on a discrete subset of the customer enrollments during the audit period, describing their enrollments and providing executed customer contracts containing terms/conditions and customer-specific information including names, service locations and utility account numbers. The document contains customer counts at a subset level, the manner by which XOOM Energy enrolls certain customers, and identifies customers and their personal information. The details at these levels describe XOOM Energy's marketing strategy, identify specific customers, and identifies the customers' personal information. This information is generally protected by XOOM Energy and the Commission. It is not readily duplicated and would harm XOOM Energy if disclosed publicly, allowing competitors to gain access to XOOM Energy's market information. It was provided as a confidential settlement communication, which was reflected in the correspondence accompanying the document. As such, this document constitutes a confidential trade secret and confidential settlement communication. It should not be disclosed in response to OCC's public records request.

In addition to the details above, XOOM Energy's confidential and sensitive information is generally not publicly disclosed, nor publicly disclosed at market-specific levels. As detailed in the attached affidavit of XOOM Energy's Marketing Director, a decision finding that the information is public will allow numerous competitors access to significant details about XOOM Energy's business and competitive activities in Ohio – including XOOM Energy's marketing strategy and activities, providing competitors with an advantage that would hinder XOOM Energy's ability to compete. It could also allow competitors to extrapolate the information and understand the details of XOOM Energy's competitive activities in other jurisdictions. As such, the compilation of this information has unique and highly competitive value as well. Its disclosure publicly would harm XOOM Energy.

Denying the request for public disclosure of this confidential information in response to a public records request will not impact the Commission's ability to carry out its duties. Notably, another Attorney Examiner has recognized that a protective order is warranted to prevent disclosure of supplier's marketing plans and strategies as they constitute trade secrets. *See In the Matter of Stream Ohio Gas*

and Electric, LLC d/b/a Stream Energy for Certification as a Competitive Retail Natural Gas Supplier, Case No. 07-1283-GA-CRS, Entry at ¶ 9 (May 2, 2014).

Courts of 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, the trade secrets 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 suppliers like XOOM Energy. 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); and *Columbia Gas of Ohio, Inc.*, Case No. 90-17-GA-GCR, Entry (August 17, 1990).

WHEREFORE, XOOM Energy requests that the Commission grant this motion for a protective order. The 12 documents contain confidential trade secret information, settlement discussions, and proposed settlement documents. For all of the above reasons, the Commission should maintain under seal the 12 documents identified by Staff as responsive to OCC's public records request, except to the limited extent noted above relative to Document 1 (for which XOOM Energy proposes to provide the Attorney Examiner with a redacted copy for review *in camera* before disclosure).

Respectfully Submitted,

/s/ Gretchen L. Petrucci

Michael J. Settineri (0073369), Counsel of Record

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Counsel for XOOM Energy Ohio, LLC

CERTIFICATE OF SERVICE

The Public Utilities Commission of Ohio's e-filing system will electronically serve notice of the filing of this document on the parties referenced in the service list of the docket card who have electronically subscribed to these cases. In addition, the undersigned certifies that a courtesy copy of the foregoing document is also being served upon the persons below via electronic mail this 21st day of June, 2022.

Staff of the Public Utilities Commission of Ohio Jodi.bair@ohioAGO.gov
werner.margard@ohioAGO.gov

Office of the Ohio Consumers' Counsel angela.obrien@occ.ohio.gov
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/s/ Gretchen L. Petrucci

Gretchen L. Petrucci

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Commission's)	
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Affidavit

County of Franklin

State of Ohio

I, Jackie Whitman, after being first duly sworn according to law, deposes and states as follows:

1. I am the Marketing Director for XOOM Energy Ohio, LLC ("XOOM Energy").
2. I am personally familiar with the 12 documents referenced in XOOM Energy's Motion for Protective Order.
3. The documents were marked and provided to the Staff of the Public Utilities Commission of Ohio on a confidential basis, and XOOM Energy does not disclose the information contained in those documents publicly.
4. The documents contain extensive and granular details of XOOM Energy's business, including its marketing strategy in Ohio, marketing activities in Ohio, customer numbers/groups, services, and policies and procedures related to its competitive services and activities.
5. Public disclosure of this detailed information would harm XOOM Energy's business in Ohio and in other jurisdictions because third parties, including competitors, would have access to a wealth of information useful for understanding XOOM Energy's competitive business activities, and be able to use that information to harm and compete against XOOM Energy.
6. Several of the documents contain customer-specific information, including customer names, addresses, email addresses and utility account numbers. Public disclosure of this detailed information would likely harm those individuals.
7. The documents contain positions, proposals and settlement documents exchanged during the attempts to reach a compromise on the issues between XOOM Energy and the Staff of the Public Utilities Commission of Ohio. Public disclosure of this detailed information would harm XOOM Energy.

Further affiant sayeth naught.

Jackie Whitman



06/20/2022 01:33
PM EDT

Jackie Whitman

Subscribed and sworn to before me this 20th day of June 2022.



CHRISTOPHER M. BLINN
Notary Public, State of Ohio
My Commission Expires:
October 30, 2025

Online Notary Public. This notarial act involved the
use of online audio/video communication technology.

Christopher M. Blinn



06/20/2022 01:34
PM EDT

Notary Public: Christopher M. Blinn

Commission Expires: October 30, 2025

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6/21/2022 3:12:41 PM

in

Case No(s). 22-0267-GE-COI

Summary: Motion for Protective Order electronically filed by Mrs. Gretchen L.
Petrucchi on behalf of XOOM Energy Ohio, LLC