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BEFORE THE TENNESSEE PUBLIC UTILITY COMMISSION
NASHVILLE, TENNESSEE

IN RE: **APPLICATION OF LIMESTONE WATER UTILITY OPERATING COMPANY, LLC, FOR AUTHORITY TO SELL OR TRANSFER TITLE TO THE ASSETS, PROPERTY, AND REAL ESTATE OF A PUBLIC UTILITY AND FOR A CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY**	**DOCKET NO. 21-00053**

IN RE: **APPLICATION OF LIMESTONE WATER UTILITY OPERATING COMPANY, LLC, FOR AUTHORITY TO SELL OR TRANSFER TITLE TO THE ASSETS, PROPERTY, AND REAL ESTATE OF A PUBLIC UTILITY AND FOR A CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY**	**DOCKET NO. 21-00055**

IN RE: **APPLICATION OF LIMESTONE WATER UTILITY OPERATING COMPANY, LLC, FOR AUTHORITY TO PURCHASE TITLE TO THE ASSETS, PROPERTY, AND REAL ESTATE OF A WATER SYSTEM AND FOR A CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY**	**DOCKET NO. 21-00059**

IN RE: **APPLICATION OF LIMESTONE WATER UTILITY OPERATING COMPANY, LLC, FOR AUTHORITY TO PURCHASE TITLE TO THE ASSETS, PROPERTY, AND REAL ESTATE OF A WASTEWATER SYSTEM AND FOR A CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY**	**DOCKET NO. 21-00060**

LIMESTONE'S BRIEF IN SUPPORT OF A CONFIDENTIAL DESIGNATION REGARDING CERTAIN PROPRIETARY INFORMATION

Comes now the Applicant, Limestone Water Utility Operating Company, LLC, and respectfully submits this brief in support of a Confidential Designation in the above styled Dockets. This brief is in response to Director David Foster's September 3, 2021 letter requesting certain items filed under seal be refiled and made publicly available. The Applicant respectfully disagrees with removing the confidential designation and in good faith believes it will expose commercially sensitive information to Applicant's detriment.

BACKGROUND AND PROCEDURAL HISTORY

The Applicant filed an Application in Docket 21-00053 on May 6, 2021, in Docket 21-00055 on May 17, 2021, in Docket 21-00059 on May 20, 2021 and in Docket 21-00060 on May 21, 2021. On May 27, 2021 the Hearing Officer issued a Protective Order in each of the respective Dockets at issue. The Protective Order states the purpose of the Order is to "facilitate the prompt resolution of disputes as to the confidentiality of information, to adequately protect information entitled to be kept confidential and to ensure that protection is afforded..." Each Protective Order further defines Proprietary or confidential information as follows:

> "Confidential Information", shall mean documents, testimony, material, or information in whatever form which the Producing Party, in good faith, and based on reasonable inquiry, deems to contain trade secrets, confidential research, development or other sensitive information protected by state or federal law, regulation or rule, and which has been specifically designated by the Producing Party.

In each Application the Applicant designated three exhibits as confidential, exhibits 7, 10, and 11. The Exhibits at issue in each Application are collimated. Exhibit 7 is the Asset Purchase Agreement in each acquisition. The Asset Purchase Agreement obviously differs as to the purchase price and the identity of the Seller in each respective purchase agreement. The financial information contained in exhibit 10, Central States Water Resources' ("CSWR") financial statements are identical in each Docket. Exhibit 11 is

Limestone's proforma financial statements for each acquired system and are similarly designed but differ depending on the size and condition of the system.

ARGUMENT AND SUPPORTING LAW

Tennessee Public Utility Commission Rule 1220-01-01-.01 3(g) defines proprietary information as follows:

> **Proprietary information means documents and information in whatever form which, pursuant to a protective order in a contested case, have been specifically designated by the producing party as proprietary information and which the producing party in good faith deems to contain or constitute trade secrets, confidential research or development or commercially sensitive information.**

Tenn. Code Ann. § 47-25-1702 protects proprietary information from unnecessary disclosure to the public. The statute specifically defines "trade secret" to include financial data that derives actual or potential economic value from not being generally known or readily ascertainable by others who can obtain economic value from its disclosure or use.

The Court of Appeals has held:

> [C]onfidential business information is akin to trade secrets, which consist of any formula, process, pattern, device or ***compilation of information that is used in one's business and which gives him an opportunity to obtain an advantage over competitors who do not use it.*** Information cannot constitute a trade secret and, thus, is not confidential if the subject matter is of public knowledge or general knowledge in the industry or if the matter consists of ideas which are well known or easily ascertainable." (emphasis added) *Venture Express v. Zilly*, 973 S.W.2d 602, 606 (Tenn. Ct. App. 1998) citing *Heyer-Jordan & Assocs. v. Jordan*, 801 S.W.2d 814, 821 (Tenn. App. 1990) quoting *Hickory Specialties v. B & L Labs., Inc.*,592 S.W.2d 583, 586-87 (Tenn. App. 1979).

Tenn. Code Ann. § 65-3-109 states:

> The Authority, the Commission, "shall not give publicity to any contracts, leases, or engagements obtained by it in its official capacity, if the interests of any company would thereby be injuriously affected…

I. PURCHASE/SALE AGREEMENT

Limestone and its parent company, Central States Water Resources, are in the business of acquiring water and wastewater systems in Tennessee and various other states such as Texas, Kentucky, Louisiana, Missouri, Arkansas, Arizona, and Alabama. Each acquisition is individually unique and requires extensive

due diligence and arm's length negotiations. Limestone believes disclosure of the purchase/sale agreement in each acquisition would seriously impair negotiations with future acquisition targets by disclosing purchase prices and creating an artificial expectation of the target and adversely affecting "arm's length" negotiations. For this reason, Limestone designated each purchase agreement as confidential. Limestone has a specific business model and careful consideration is afforded to each step in the acquisition process. The business model and terms of each purchase agreement are not matters of public knowledge or generally known in the industry. Limestone uses the terms and conditions of the negotiated agreements to compile and prepare competitive offers to potential sellers. In order to preserve the integrity of future negotiations with acquisition targets Limestone believes, in good faith, that it is necessary the confidential designation remain intact, at least as to the purchase price, for each Purchase/Sale Agreement in the Dockets at issue.

II. FINANCIAL STATEMENTS OF CENTRAL STATES WATER RESOURCES

Central States Water Resources is not a regulated entity. Limestone has stated the company relies solely on its parent company's financial resources for equity investments necessary to make acquisitions and provide working capital, and has responded to data request regarding the financial capability of CSWR.[1] Limestone and CSWR have provided the requested information with a confidential designation to both the Commission Staff and the Customer Advocate Unit. CSWR is not a public company and its financial statements are not available to the general public and should not be subject to public disclosure in pending proceedings involving its regulated affiliate Limestone. If CSWR's financial statements are made public, CSWR believes it will be damaged by potentially providing other companies seeking to acquire small water and wastewater systems a competitive advantage within the bidding process. Similar to the purchase/sale agreement, CSWR financials would undoubtably bestow an unfair advantage to the Seller in negotiations, providing leverage to inflate the purchase price, possibility resulting in an unnecessary increase in rates for consumers.

III. PROFORMA FINANCIAL STATEMENTS

[1] *See Application filed in Docket 21-00053 IV (B) pg. 8. See Application filed in Docket 21-00055 IV (B) pg. 8. See Application filed in Docket 21-00059 IV (B) pg. 8. See Application filed in Docket 21-00060 IV (B) pg. 8.*

In addition, Limestone's proforma financial statements include financial information that should not be disclosed to the general public. Limestone frequently pursues bids from various vendors across the state of Tennessee and in other states. The bids from vendors and the eventual contracts are competitively bid or privately-negotiated. Providing vendors access to proprietary financial information regarding estimated operating costs would enable vendors to set an artificial price point for their respective products or services. Vendors' access to this information would adversely affect CSWR's negotiating leverage, possibly resulting in increased operating costs and ultimately higher rates to the consumers.

In addition, the Commission was presented with a similar issue in Docket 11-00182. In that specific Docket, Telmate, LLC filed an Application for a Certificate of Authority to Provide Operator Services and/or Resell Telecommunications Services in Tennessee. Pay-Tel Communications, Inc., a competitor of Telmate, filed a Motion to Remove Confidential Designation of certain documents filed in the Docket relating to contracts and certain financial information. The Commission noted that proprietary information is defined as follows:

> Documents and information in whatever form which, pursuant to a protective order in a contested case, have been specifically designated by the producing party as proprietary information and which the producing party in good faith deems to contain or constitute trade secrets, confidential research or development or commercially sensitive information.

The Commission found that Telemate's confidential designation of the documents at issue was made in good faith and for an appropriate purpose and the designation should remain in place. A true and correct copy of the Commission Order is attached as Exhibit A. The Commission has set a precedent of protecting a producing party's documents, deemed by that party, to contain commercially sensitive information. [2]

CONCLUSION

Limestone has designated the exhibits at issue as confidential in good faith and for a legitimate competitive business purpose. For the forgoing reasons, Limestone respectfully requests the Applicant's designation remain effective.

Dated: September 23rd, 2021

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[2] *2012 Tenn. PUC LEXIS 243, *12 (Tenn. P.S.C. October 24, 2012)*

Respectfully submitted,

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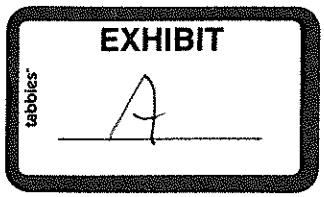
CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been served via either U.S. Mail, postage prepaid, or electronically to the following this 23th day of September, 2021.

Vance Broemel Karen H. Stachowski Terra Allen Rachel Bowen Consumer Protection and Advocate Division Office of the Attorney General P.O. Box 20207 Nashville, TN 37202	

Charles B. Welch, Jr., Esq.



2012 Tenn. PUC LEXIS 243

Tennessee Regulatory Utility Commission

October 24, 2012

DOCKET NO. 11-00181; DOCKET NO. 11-00182

TN Regulatory Utility Commission *Decisions*

Reporter
2012 Tenn. PUC LEXIS 243 *

IN RE: APPLICATION OF TELMATE, LLC FOR A CERTIFICATE OF AUTHORITY TO PROVIDE OPERATOR SERVICES AND/OR RESELL TELECOMMUNICATIONS SERVICES IN TENNESSEE; IN RE: PETITION OF TELMATE, LLC FOR AUTHORITY TO PROVIDE COCOT SERVICES IN TENNESSEE

Core Terms

confidential, protective order, legacy, disclosure, competitor, confidential information, proprietary information, vendor's contract, bid, company representative, initial order, trade secret, personnel, vendor, has

Opinion By: **[*1]** CASHMAN-GRAMS

Opinion

ORDER DENYING MOTION TO REMOVE CONFIDENTIAL DESIGNATION

This matter is before the Hearing Officer of the Tennessee Regulatory Authority (the "Authority") upon the *Motion to Remove Confidential Designation ("Motion")* filed by Pay-Tel Communications, Inc. ("Pay-Tel") on October 9, 2012. On October 11, 2012, Telmate, LLC ("Telmate") filed its *Response of Telmate, LLC to Pay-Tel Communications, Inc. 's Motion to Remove Confidential Designation ("Response")* in the docket file. [1]

[*2]

PAY-TEL'S *MOTION*

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[1] Because Pay-Tel's *Motion* requested a ruling by Friday, October 12, 2012, prior to the panel's consideration of the docket during its regularly scheduled Authority Conference on Monday, October 15, 2012, and in response to the parties' request for an informal telephone conference, the Hearing Officer sent an email to the parties on October 10, 2012. In the email, the Hearing Officer encouraged the parties to resolve Pay-Tel's request amicably, if possible. In the event that the parties were unable to resolve the matter, then, at Telmate's option: 1) a response to the motion was to be filed by noon on Friday, after which an abbreviated ruling would be rendered by email, and an Order containing findings and conclusions would be issued on a later date, or 2) in the event that Telmate needed more time to respond, then the docket would be removed from Monday's Authority Conference Agenda and a response to the motion due by October 16, 2012.

In its *Motion,* pursuant to § 7 of the Protective Order, Pay-Tel requests removal of the confidential designation of two contracts filed by Telmate in response discovery requests propounded by Pay-Tel. In support of its request, Pay-Tel asserts that, with the exception of one provision, the entirety of the contracts executed between Telmate and its vendors, collect call operator/billing services provider, Legacy Long Distance International, Inc. ("Legacy"), and underlying wholesale carrier, AireSpring, Inc. ("AireSpring"), contain "little or no information that can be considered "confidential. " [2] Without explanation or analysis, Pay-Tel contends that the figure included in § 4.A of the Legacy contract can be redacted and the rest of the document made public, and that the AireSpring contract contains "no pricing or other information which meets the TRA's definition of 'confidential' material." [3] In conclusion, Pay-Tel asserts that the Hearing Officer should require Telmate to re-file the contracts without the confidential designation, allowing only § 4.A of Telmate's contract with Legacy to be redacted.

[*3] TELMATE'S *RESPONSE*

On October 11, 2012, Telmate filed its *Response* in the docket file. In its *Response,* Telmate asserts that its contracts with Legacy and AireSpring meet the definition of proprietary information set forth in the TRA Rules, the Protective Order entered in this docket, and Tennessee law. As such, the contracts are confidential and should remain protected from public disclosure. Telmate further notes that Pay-Tel has cited no facts or legal authority to support its claim that the contracts "contain little or no confidential information, " or are not entitled to protection.

Telmate states that in granting limited intervention to Pay-Tel, the Hearing Officer acknowledged the competitive relationship of the parties and, for that reason, restricted access to proprietary or confidential information to the TRA Staff and Pay-Tel's legal counsel alone, and expressly prohibited access to Pay-Tel company representatives and personnel. [4] The Protective Order, proposed jointly by the parties, was issued by the Hearing Officer on October **[*4]** 5, 2012. [5] Telmate asserts that, in good faith, and relying on the Protective Order, it designated the contracts confidential to protect its business interests, and, consistent with its obligations under the contracts, it does not and has never made the contracts available to the public or other third parties. Telmate asserts that it would suffer significant harm if its vendor contracts were made available to competitors.

Telmate further asserts that, under *Tenn. Code Ann. § 65-3-109*, the Authority routinely protects competitively sensitive information, like that contained in its vendor contracts, from injurious disclosure to competitors and others engaged in marketing or providing similar services. In addition, under *Tenn. Code Ann. § 47-25-1702(4),* protected **[*5]** proprietary information includes information that derives actual or potential economic value from not being generally known or readily ascertainable by other persons who can obtain economic value from its disclosure or use, and is the subject of reasonable efforts to maintain its secrecy.

Because it acquires business and provides services through publicly-bid contracts with federal, state, and local corrections departments, Telmate contends that its vendor relationships, which necessarily include the terms, pricing, and structure of those relationships, are a key element underlying the bids offered by Telmate. Telmate asserts that the identities of its vendors and the terms of its business relationships are valuable information that is not generally known to its competitors. Disclosure of this commercially sensitive information will put Telmate at a competitive disadvantage, destroy the level playing field of the public bidding process, and be contrary to the state's policy of encouraging competition and advancing technology in the telecommunications market in Tennessee.

FINDINGS & CONCLUSIONS

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[2] Pay-Tel contends that only § 4.A of Telmate's contract with Legacy is "arguably confidential. " *Motion,* p. 1 (October 9, 2012).

[3] *Motion,* p. 1 (October 9, 2012).

[4] *Initial Order of the Hearing Officer Granting Limited Intervention to Pay-Tel Communications, Inc.*, pp. 20-21 (August 9, 2012).

[5] Protective Order (October 5, 2012)

Upon review and consideration of the parties' positions set forth in their pleadings **[*6]** and summarized above, the Hearing Officer makes the following findings and conclusions:

In its petition for intervention, Pay-Tel asserted its direct competitor status as the primary basis upon which it should be granted intervention. [6] While finding that Pay-Tel's status as a competitor did not convey a right to intervene in these proceedings, in the exercise of her discretion, the Hearing Officer granted Pay-Tel a limited intervention on the certification issue it had raised. Acknowledging the competitive relationship of the parties, the Hearing Officer expressly prohibited Pay-Tel company representatives and personnel from access to or review of any proprietary information filed by Telmate under a protective order, and permitted Pay-Tel's legal counsel to review but not share proprietary information with Pay-Tel company representatives and personnel. [7] On October 5, 2012, the Hearing Officer entered the Protective Order, filed jointly by the parties, without modification. [8]

[*7]

Thereafter, on October 8, 2012, in responding to certain discovery requests propounded upon it by Pay-Tel, Telmate designated its vendor contracts with Legacy and AireSpring confidential, in accordance with the Protective Order. Under both the Protective Order and TRA Rules, proprietary information is defined as:

> [D]ocuments and information in whatever form which, pursuant to a protective order in a contested case, have been specifically designated by the producing party as proprietary information and which the producing party in good faith deems to contain or constitute trade secrets, confidential research or development or commercially sensitive information. [9]

Further, as it concerns confidential information, *Tenn. Code Ann. § 65-3-109* expressly provides that the Authority, "shall not give publicity to any contracts, leases, or engagements obtained by it in its official capacity, if the interests of any company would thereby be injuriously affected, unless in the judgment of the [Authority], the public interest **[*8]** requires it." [10] Under this statute, the Authority protects competitively sensitive information from injurious disclosure to competitors and others. *Tenn. Code Ann. § 47-25-1702(4)* provides further guidance as to when information may be protected:

> "Trade secret" means information, without regard to form . . . that: A) 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; and B) Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy. [11]

The Tennessee Court of Appeals has held that "confidential business information is akin to trade secrets, " which consist of "any formula, process, pattern, device or compilation of information that is used in one's business and which gives him an opportunity to obtain an advantage over competitors who do not use it. Information cannot constitute a trade secret and, thus, is not confidential if the subject matter is "of public knowledge or general

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[6] *Petition to Intervene* (April 19, 2012).

[7] *Initial Order of the Hearing Officer Granting Limited Intervention to Pay-Tel Communications, Inc.*, pp. 20-21 (August 9, 2012).

[8] Protective Order (October 5, 2012).

[9] *Id.* at § 1; *see also* ***Tenn. Rules & Regs. 1220-1-1-.01(3)***.

[10] The TRA retains the duties and powers delegated in Chapter 3 of Title 65, including *Tenn. Code Ann. § 65-3-109*, following abolition of the Public Service Commission. *See* 1995 Tenn. Pub. Acts Ch. 305 § 11.

[11] *Tenn. Code Ann. § 47-25-1702(4)*.

knowledge in the industry" or if the matter consists **[*9]** of "ideas which are well known or easily ascertainable. " [12] Thus, confidential information is closely analogous to a trade secret and warrants similar protection. [13]

[*10]

In these proceedings, despite Pay-Tel's previous decision to forgo discovery, asserting that certification type is strictly a question of law, Telmate responded, without objection, to the factual discovery requests propounded upon it by Pay-Tel. Although earlier responses to TRA Staff data requests concerning Telmate's business practices and associations were initially designated confidential, which Telmate later voluntarily disclosed, such information did not include the explicit terms and conditions of Telmate's business arrangements. Telmate asserts that, in good faith, and in accordance with the Protective Order, it has produced these private vendor contracts, which contain valuable proprietary information, and designated them confidential in order to protect its business interests from competitors.

While financial information is often confidential, even Pay-Tel concedes the confidentiality of a numerical percentage in Telmate's contract with Legacy, it is not the only information that may be protected. The contracts at issue contain the detailed billing and service arrangements negotiated between Telmate and its vendors, Legacy and AireSpring. The contracts have been expressly **[*11]** designated "confidential information" by their own terms, and further require Telmate to use reasonable efforts to protect the contractual information and to secure consent of the other party (Legacy and/or AireSpring) prior to any public disclosure. [14] Telmate asserts that, consistent with its contractual duties, it does not and has never made the contracts available to the public or third parties. The information contained in the contracts is not public or general knowledge, and is not easily ascertainable.

Telmate's business is derived through the submission of blind competitive bids on publicly-bid inmate contracts. Telmate uses the information within its negotiated agreements, in part, to compile and prepare its competitive bid. As such, it is easy to see how its disclosure would, or very likely could, provide a competitive advantage to others and correspondingly result in competitive disadvantage and harm to Telmate. Telmate's contracts with its vendors, which **[*12]** comprise a key component of the bids that Telmate is able to offer, further reflect and may provide insight into its overall business planning and strategy.

Upon review and consideration of the foregoing, the Hearing Officer, consistent with the reasoning set forth in the *Response*, finds that Telmate's confidential designation was made in good faith, for an appropriate purpose, and that the contracts at issue constitute proprietary or confidential information as set forth in the Protective Order and TRA Rules. Further, in accord with *Tenn. Code Ann. § 65-3-109*, as the disclosure of its privately-negotiated vendor contracts, which form the backbone of its business strategy and comprise essential and underlying components of its competitive bids, would harm the competitive interests of Telmate, and the public interest does not otherwise require it, the contracts should remain protected. Therefore, Telmate's contracts with Legacy and AireSpring are competitively sensitive confidential information that are entitled to protection and should remain sealed from public disclosure.

In addition, on October 12, 2012, following the Hearing Officer's **[*13]** email informing the parties that Pay-Tel's *Motion* was denied, Pay-Tel filed a *Petition for Appeal of Initial Order* seeking panel review of the Hearing Officer's ruling and forthcoming Order provided herein. It should be noted that this Order resolves a preliminary motion for which interlocutory review may be sought upon application to the Hearing Officer for approval, and is not an initial

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[12] *Venture Exp., Inc. v. Zilly, 973 S.W.2d 602, 606 (Tenn. Ct. App. 1998)*, *citing* *Heyer--Jordan & Assocs. v. Jordan, 801 S.W.2d 814, 821 (Tenn.App.1990)* (quoting ***Hickory Specialties v. B & L Labs., Inc., 592 S.W.2d 583, 586-87 (Tenn.App.1979))*** (internal citations omitted).

[13] *Wright Medical Technology, Inc. v. Grisoni, 135 S.W.3d 561, 588 (Tenn. Ct. App. 2001)*, *perm. to app. denied, rec. for publication* (2002).

[14] *Response*, pp. 4 and 7 (October 11, 2012).

order on the merits of the case. [15] Nevertheless, the finer points of procedural practice aside, the Hearing Officer finds that, during the regularly scheduled Authority Conference held on October 15, 2012, insofar as the parties each extensively presented their positions, including discussing Telmate's business association with Legacy and AireSpring, and the merits of these dockets were subsequently decided by the panel, Pay-Tel's purpose for filing the *Petition for Appeal of Initial Order* so as to discuss the terms of Telmate's business arrangements in a public hearing is moot. But, whether the documents should be made public, and so accessible to Pay-Tel company representatives and personnel, remains an issue capable of review by the Authority panel, for which the Hearing Officer **[*14]** grants permission for interlocutory review.

IT IS THEREFORE ORDERED THAT:

1. The *Motion to Remove Confidential Designation* filed by Pay-Tel Communications, Inc. is denied.

2. Permission for interlocutory review of this Order on the question of whether Telmate's vendor contracts, found herein to be information protected under the Protective Order, TRA Rules, and Tennessee law, should be made public, and so accessible to Pay-Tel company representatives and personnel, is granted.

Kelly Cashman-Grams

Hearing Officer

TN Regulatory Utility Commission Decisions

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[15] See ***Tenn. Rules & Regs. 1220-1-2-.06(6)***.