

FILE

10

BEFORE THE OHIO POWER SITING BOARD

RECEIVED-DOCKETING DIV
2009 MAY 15 PM 5:14
PUCO

In the Matter of the Application)
of Buckeye Wind LLC for a Certificate)
to Install Numerous Electricity) Case No. 08-666-EL-BGN
Generating Wind Turbines in)
Champaign County to be Collected at)
an Electric Substation in)
Union Township,)
Champaign County, Ohio)

REPLY MEMORANDUM OF APPLICANT IN RESPONSE TO
INTERVENORS' MEMORANDUM CONTRA MOTION
FOR PROTECTIVE ORDER

On April 24, 2009, Buckeye Wind LLC ("Buckeye Wind" or "the Applicant"), filed an application for a wind farm to be located in Champaign County Ohio as well as a motion for waiver of certain of the Board's rules, and a motion for protective order in Case No. 08-666-EL-BGN. On May 11, 2009, the Union Neighbors United, Robert McConnell, Diane McConnell, and Julia F. Johnson ("Intervenors") filed a memorandum contra to the Applicant's motion for protective order.

The Intervenors oppose the Applicant's motion solely with respect to pages 94-96 of Exhibit R which addresses the impact of the wind farm on landowners. The Intervenors claim "that information on the impact of the windfarm on landowners and on commercial and industrial development should have no more protection than any other information on community or environmental impacts . . ." As an initial point, the redacted portions of pages 94-96 of Exhibit R contain no information on the impact of the project on commercial and industrial development, as was inadvertently stated in Applicant's Memorandum in Support of Motion for Protective Order. This is clear from the content of the un-redacted portions of the pages and

This is to certify that the images appearing are an accurate and complete reproduction of a case file document delivered in the regular course of business.
Technician SM Date Processed MAY 18 2009

from the title of the subsection containing the redacted material (Section 9.4 Impacts on Landowners).

Contrary to the Intervenor's contention, information regarding the financial impacts to landowners should not be subject to public disclosure. As the Intervenor and the Board are aware, Buckeye Wind is not the only developer of wind energy operating in the state. As is the case in any industry, competitive advantage is key to a firm's success. One of the key factors in establishing a competitive edge is the composition of contract terms and, ultimately, landowner payments. Public disclosure of these private contract terms would erode the Applicant's competitive position. Indeed, confidential terms that relate to the competitive market are routinely exempt from disclosure in public utility proceedings. *See e.g. Ohio Consumers' Counsel v. Pub. Util. Comm.*, 121 Ohio St.3d 362, 2009-Ohio-604 (affirming Commission grant of motion to seal regarding terms of private agreements between utility-affiliated electric supplier and utility customers). As recently stated by the Supreme Court of Ohio "[e]xposing a competitor's business strategies and pricing points would likely have a negative impact on the provider's viability." *Id.* at ¶31.

More troubling, rather than propose a confidentiality agreement like they did as to the other redacted information, the Intervenor seeks to force the public disclosure of this confidential financial information to the detriment of the landowners who entered into turbine agreements with the Applicant. These landowners are entitled to privacy regarding the financial terms of the contracts they have entered into with the Applicant. Moreover, the parties seeking disclosure (the Intervenor) consist of a neighborhood association and individual local landowners. This raises the issue of why the Intervenor wants to make the financial information public and how they intend to use that information if it was released. The balancing of the public

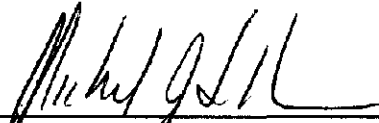
policy of providing public access to public records with the Board's duty to protect confidential information of both the Applicant and the landowners weighs heavily in favor of granting the Applicant's protective order. The Applicant's request for a protective order as to pages 94-96 of Exhibit R should be granted. The Applicant, however, is willing to enter into a confidentiality agreement with Intervenor to allow for an attorneys' eyes only review of the redacted financial information.

In regards to the remainder of the redacted information, the Applicant is also willing to enter into a confidentiality agreement (an example of which is attached hereto as Exhibit A) and would not include an attorneys' eyes only requirement. Once the confidentiality agreements are executed, the Applicant will provide unredacted pages of the information that is subject of the Applicant's motion as discussed by counsel. These confidentiality agreements and supply of the unredacted pages will provide reasonable terms to maintain the confidentiality of that information while providing reasonable access for the purposes of the proceedings and any point thereafter. Further, the Applicant has no objection to the Intervenor's request that an additional 21 days be provided to discuss an appropriate protective order with Applicant's counsel, so long as this does not result in any delay of the Board's completeness review or extension of the ongoing 60-day completeness review period.

Accordingly, the Applicant respectfully requests that the Board and its Administrative Law Judge reject Intervenor's arguments against the Applicant's sought protective order for pages 94-96 of Exhibit R and provide additional time to the Applicant and

the Intervenor to try to resolve this issue of confidentiality as to the information subject to Applicant's motion.

Respectfully submitted,



M. Howard Petricoff (0008287)
Michael J. Settineri (0073369)
VORYS, SATER, SEYMOUR AND PEASE LLP
52 East Gay Street
P.O. Box 1008
Columbus, Ohio 43216-1008
(614) 464-5414
(614) 719-4904 (fax)
mhpetricoff@vorys.com
mjsettineri@vorys.com

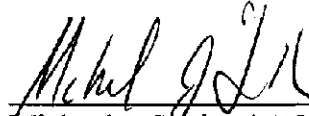
Attorneys for Buckeye Wind LLC

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing document was served upon the following persons via e-mail and via first class U.S. mail, postage prepaid, this 15th day of May, 2009.

Jack A. VanKley
Trial Counsel
VanKley & Walker, LLC
132 Northwoods Boulevard
Suite C-1
Columbus, OH 43235
jvankley@vankleywalker.com

Christopher A. Walker
VanKley & Walker, LLC
137 North Main Street
Suite 316
Dayton, OH 45402
cwalker@vankleywalker.com



Michael J. Settineri (0073369)

CONFIDENTIALITY AGREEMENT



CONFIDENTIALITY AGREEMENT (Agreement), dated as of May ____, 2009, between Buckeye Wind LLC ("Buckeye") and Union Neighbors United, Robert McConnell, Diane McConnell, and Julia F. Johnson (collectively "Intervenors").

WITNESSETH:

WHEREAS, Buckeye and Intervenors (each individually referred to as Party, or collectively as Parties) have entered into an agreement for Intervenors to receive confidential information in Case No. 08-666-EL-BGN (hereinafter referred to as the Pending Case); and

WHEREAS, the Parties desire to ensure the confidentiality of such confidential information provided or to be provided by Buckeye (the Providing Party) to the Intervenors (the Receiving Party) in connection with the Pending Case;

NOW, THEREFORE, in consideration of the premises and the mutual covenants herein contained, the Parties hereto, intending to be legally bound, agree as follows:

1. CONFIDENTIAL AND PROPRIETARY NATURE OF THE CONFIDENTIAL INFORMATION

The Receiving Party acknowledges the confidential and proprietary nature of the Confidential Information (as defined below) and that any unauthorized disclosure or unauthorized use thereof by the Receiving Party will injure the Providing Party's business and/or the business of customer(s) of the Providing Party. The Receiving Party agrees to hold and keep the Confidential Information as provided in this Agreement and otherwise agrees to each and every restriction and obligation set forth in this Agreement.

2. CONFIDENTIAL INFORMATION

As used in this Agreement, the term Confidential Information means and includes any and all information that meets both of the following requirements:

- a. The information concerning the business and affairs of the Providing Party, however documented, that has been or may hereafter be provided or shown to the Receiving Party by the Providing Party or by the directors, officers, employees, agents, consultants, advisors, or other representatives including legal counsel, accountants and financial advisors (each, a Representative) of the Providing Party (collectively, the Providing Party Representatives) or is otherwise obtained from review of Providing Party documents or property or discussions with Providing Party Representatives by the Receiving Party or its attorneys or persons involved in the Pending Case, such as experts and anticipated witnesses, (each a Receiving Party's Representative or collectively the Receiving Party's Representatives) irrespective of the form of the

communication, and also includes all notes, analyses, compilations, studies, summaries, and other material prepared by the Receiving Party or the Receiving Party's Representatives containing or based, in whole or in part, on any information included in the foregoing; and

- b. Pursuant to Section 1333.61(D), Revised Code, the information contains trade secrets concerning the business and affairs of the Providing Party and or its customers, plant and product specifications, data, know-how, formulae, compositions, processes, designs, sketches, photographs, graphs, drawings, samples, inventions and ideas, past, current, and planned research and development, customer lists, current and anticipated customer requirements, price lists, market studies, business plans, computer software and programs (including object code and source code), computer software and database technologies, systems, structures and architectures (and related processes, formulae, composition, improvements, devices, know-how, inventions, discoveries, concepts, ideas, designs, methods and information), contracts, and any other information, however documented, that is a trade secret within the meaning of Section 1333.61(D), Revised Code.

Confidential Information shall not include any oral information exchanged between the Parties that is not promptly reduced to writing and confirmed by the applicable Parties.

Further, Confidential Information shall not include any information of the Providing Party that:

- a. was or becomes generally available to the public other than as a result of a disclosure by the Receiving Party or the Receiving Party's Representatives;
- b. was available, or becomes available, to the Receiving Party on a non-confidential basis prior to its disclosure to the Receiving Party by the Providing Party or a Providing Party Representative, but only if (i) to the best of the Receiving Party's knowledge after due inquiry, the source of such information is not bound by a confidentiality agreement with the Providing Party or is not otherwise prohibited from transmitting such information to the Receiving Party or the Receiving Party's Representatives by a contractual, legal, fiduciary or other obligation, and (ii) the Receiving Party provides the Providing Party with prompt written notice of such prior possession; or
- c. was independently acquired or developed by the Receiving Party without violating any of its obligations under this Agreement.

3. DESIGNATION OF CONFIDENTIAL INFORMATION

At the time the Providing Party produces information to the Receiving Party, the Providing Party may designate any information as Confidential Information, as defined herein in paragraph 2, by stamping the word "Confidential" on the face of each document and each page so designated at the time it is produced.

The inadvertent or unintentional disclosure of Confidential Information shall not, under any circumstance, be deemed a waiver, in whole or in part, of the Providing Party's claims of confidentiality. If Confidential Information is inadvertently produced without the appropriate designation of confidentiality, the Receiving Party shall, upon notice of the confidential status of the document or information, treat the document or information as if it had been appropriately designated confidential at the moment it was produced.

The Receiving Party shall be entitled to challenge the Providing Party's designation of Confidential Information. The Receiving Party may challenge the Providing Party's designation of confidentiality by engaging in a conference of counsel. If counsel are unable to resolve the differences between them, either party may apply for a ruling from any appropriate court or agency. The Parties agree to seek in camera proceedings by the administrative agency or court of competent jurisdiction for the portion of arguments that would disclose Protected Materials. The Providing Party shall have the burden of establishing that the material is Confidential Information, as defined in paragraph 2 herein. Until such time as the court or agency determines that any Confidential Information is not entitled to protection, it shall be treated as confidential according to the terms of this Agreement.

4. RESTRICTED USE OF CONFIDENTIAL INFORMATION

The Receiving Party agrees that (a) it will keep confidential any and all Confidential Information and, except as provided in the following paragraph or as otherwise expressly permitted by the terms of this Agreement, will neither, without the specific prior written consent of the Providing Party, disclose any Confidential Information to any person (including the fact that the Confidential Information has been made available to the Receiving Party or that the Receiving Party has inspected any portion of the Confidential Information); and (b) it will not use any of the Confidential Information for any reason or purpose other than to perform its obligations, if any, in the Pending Case. If it becomes necessary to use Confidential Information in the Pending Case, then any such filing shall be made under seal or pursuant to such other procedures as the Presiding Officer shall determine. The Parties agree to seek in camera examination of a witness for the portion of the examination that would disclose Confidential Information.

The Receiving Party may disclose Confidential Information to those Representatives of the Receiving Party who (i) in the judgment of the Receiving Party, require access to such material for the purpose of assisting the Receiving Party in performing work directly associated with the Pending Case and (ii) are informed by the Receiving Party of the confidential nature of the Confidential Information and the obligations of this Agreement and agree to be bound by all the provisions hereof applicable to the receipt and use of Confidential Information by the Receiving Party. The Receiving Party agrees to be fully responsible for enforcing as to the Receiving Party's Representatives the obligations of this Agreement applicable to the Receiving Party and to take such action, legal or otherwise, to the extent necessary (including all actions that the Receiving Party would take to protect its own confidential information and trade secrets) to cause its Representatives to comply with such obligations.

5. DISCLOSURE REQUIRED BY LAW

If the Receiving Party or any of the Receiving Party's Representatives is requested or becomes legally compelled (by oral questions, interrogatories, requests for information or documents, subpoena, civil or criminal investigative demand, or similar process) or is required by a regulatory body to make any disclosure that is prohibited or otherwise constrained by this Agreement, the Receiving Party or such Representative, as the case may be, will provide the Providing Party with prompt notice of such request so that it may seek an appropriate protective order or other appropriate remedy. Subject to the foregoing, the Receiving Party or such Representative may furnish that portion (and only that portion) of the Confidential Information that, in the written opinion of its counsel, reasonably acceptable to the Providing Party, the Receiving Party is legally compelled or is otherwise required to disclose. In addition, the Receiving Party or such Representative shall use reasonable efforts to obtain reliable assurances that confidential treatment will be accorded any Confidential Information so disclosed.

6. RETURN OF CONFIDENTIAL INFORMATION

If the Receiving Party determines that it does not wish to proceed with the Pending Case, then the Receiving Party, upon request of the Providing Party, (a) (i) will promptly deliver to the Providing Party all documents or other materials furnished by the Providing Party or any Providing Party Representative to the Receiving Party or the Receiving Party's Representatives constituting Confidential Information, together with all copies and summaries thereof in the possession or under the control of the Receiving Party or the Receiving Party's Representatives, and (ii) will destroy materials generated by the Receiving Party or the Receiving Party's Representatives that include or refer to any part of the Confidential Information, without retaining a copy of any such material; or (b) as an alternative to the procedure described in the preceding clause (a) if the Providing Party gives its prior written consent the Receiving Party will promptly destroy all documents or other matters constituting Confidential Information in the possession or under the control of the Receiving Party or the Receiving Party's Representatives and shall promptly, upon request, certify the same in writing to the Providing Party (including in such certification a list of the destroyed materials).

7. REMEDIES

The Receiving Party understands and agrees that money damages would not be a sufficient remedy for any breach of this Agreement by it or by the Receiving Party's Representatives and that the Providing Party will suffer irreparable harm because of any such breach of this Agreement. The Receiving Party further understands and agrees that the Providing Party will be entitled, without the requirement of posting a bond or other security, to specific performance and injunctive relief as remedies for such breach. Such remedies shall not be deemed to be the exclusive remedies for a breach of this Agreement by the Receiving Party but shall be in addition to all other remedies available at law or equity.

8. MISCELLANEOUS

(a) Modification. The agreements set forth in this Agreement may be modified or waived only by a separate writing signed by the Providing Party and the Receiving Party expressly modifying or waiving such agreements.

(b) Waiver. The rights and remedies of the Parties to this Agreement are cumulative and not alternative. Neither the failure nor any delay by any Party in exercising any right, power, or privilege under this Agreement will operate as a waiver of such right, power, or privilege, and no single or partial exercise of any such right, power, or privilege will preclude any other or further exercise of such right, power, or privilege or the exercise of any other right, power, or privilege. To the maximum extent permitted by applicable law, (i) no claim or right arising out of this Agreement can be discharged by one Party, in whole or in part, by a waiver or renunciation of the claim or right unless in writing signed by the other Party; (ii) no waiver that may be given by a Party will be applicable except in the specific instance for which it is given; and (iii) no notice to or demand on one Party will be deemed to be a waiver of any obligation of such Party or of the right of the Party giving such notice or demand to take further action without notice or demand as provided in this Agreement.

(c) Person. The term person means any individual, corporation (including any non-profit corporation), general or limited partnership, limited liability company, joint venture, estate, trust, association, organization or other entity.

(d) Severability. The invalidity or unenforceability of any provision of this Agreement shall not affect the validity or enforceability of any other provisions of this Agreement, which shall remain in full force and effect. If any of the covenants or provisions of this Agreement are determined to be unenforceable by reason of its extent, duration, scope or otherwise, then the Parties contemplate that the court making such determination shall reduce such extent, duration, scope or other provision and enforce them in their reduced form for all purposes contemplated by this Agreement.

(e) Costs. The Receiving Party agrees that if it is held by any court of competent jurisdiction to be in violation, breach, or nonperformance of any of the terms of this Agreement, then it will pay all costs of such action or suit, including reasonable attorneys' fees.

(f) Assignment. Neither Party may assign any of its rights hereunder without the prior written consent of the other Party, which consent shall not be unreasonably withheld.

(g) Governing Law. This Agreement shall be governed by the laws of the State of Ohio without regard to conflicts of laws principles thereof.

(h) Counterparts. This Agreement may be executed in one or more counterparts, each of which will be deemed to be an original copy of this Agreement, and all of which, when taken together, shall be deemed to constitute one and the same agreement.

IN WITNESS WHEREOF, each of the Parties hereto has caused this Agreement to be executed on its behalf by an appropriate officer thereunto duly authorized, all as of the date set forth at the beginning of this Agreement.

Buckeye Wind LLC

M. Howard Petricoff
Attorney for Buckeye Wind LLC

Michael J. Settineri
Attorney for Buckeye Wind LLC

Union Neighbors United, Robert McConnell,
Diane McConnell, and Julia F. Johnson

Christopher A. Walker
Attorneys for Union Neighbors United, Robert McConnell,
Diane McConnell, and Julia F. Johnson

Jack A. VanKley
Attorneys for Union Neighbors United, Robert McConnell,
Diane McConnell, and Julia F. Johnson