

8

FILE

RECEIVED-DOCKETING DIV

BEFORE
THE OHIO POWER SITING BOARD 2009 JUL 10 AM 11:30

In the Matter of the Application of **HARDIN**)
WIND ENERGY LLC for a Certificate to Site a) **PUCO**
Wind-Powered Electric Generation Facility in) Case No. 09-479-EL-BGN
Hardin County, Ohio)

HARDIN WIND ENERGY LLC'S MOTION FOR PROTECTIVE ORDER

Pursuant to Ohio Administrative Code ("OAC") Rule 4906-7-07(H)(4), Hardin Wind Energy LLC ("Hardin Wind"), respectfully moves the Ohio Power Siting Board ("OPSB") for a protective order to shield confidential, proprietary information from the public record and keep under seal the financial information required to be submitted with Hardin Wind's certification application under OAC 4906-17-06. The reasons underlying this motion are more fully set forth in the Memorandum in Support below. Consistent with practices of the OPSB, three (3) unredacted copies of the confidential financial information required to be included in Hardin Wind's certification application will be submitted and filed separately under seal.

MEMORANDUM IN SUPPORT

I. INTRODUCTION

OAC 4906-17-06(B) and (C) requires that a wind farm certification application include: 1) estimates of applicable capital and intangible costs; 2) operation and maintenance expenses for the project (i.e. the Hardin Wind Farm); and 3) a comparison of the total cost per kilowatt-hour for the project with the Applicant's other similar projects (presumably outside Ohio). Hardin Wind requests that the financial information required under OAC 4906-17-06(B) and (C) be designated as confidential and/or proprietary (along with any and all copies, including electronic copies), thereby protecting the material from public disclosure. Hardin Wind notes

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 JUL 10 2009

that general information regarding the average costs per installed megawatt-hour, and average operation and maintenance expenses can be obtained from the American Wind Energy Association (AWEA) and/or the U.S. Department of Energy and will be provided.

As discussed below, courts give particular consideration to preventing the disclosure of financial information when the disclosure would be to companies in direct competition with each other. This is especially important in light of the fact that development of wind resources in Ohio is in its infancy, and Hardin Wind is the first wind developer to file a certification application under new OAC Chapter 4906-17.

II. LAW AND ARGUMENT

A. The Public Utilities Commission of Ohio and OPSB encourage the protection of confidential and proprietary information under Ohio's trade secrets law.

One of the fundamental responsibilities of the OPSB and/or administrative law judge assigned to a power siting case is to “[p]revent public disclosure of trade secrets, proprietary business information, or confidential research, development, or commercial materials and information.” See OAC 4906-7-01(B)(8)(c). This rule clearly expresses the OPSB’s policy to prevent the disclosure of confidential trade secrets and/or other proprietary business materials.

In an analogous setting, the Public Utilities Commission of Ohio (the “Commission”) 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.). Both the OPSB and Commission previously have carried out their obligations to protect the trade secret status of information from utilities and other regulated entities in numerous proceedings. *See*,

e.g., *Cleveland Electric Illuminating Co.*, Case No. 07-171-EL-BTX (Entry dated August 14, 2008); *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). Indeed, for the OPSB 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.

B. OAC 4906-7-07(H)(4): Motions for Protective Order

OAC Rule 4906-7-07(H) governs the OPSB's handling of confidential and/or proprietary information. In the context of an application for the siting of a gas transmission line, the OPSB explained:

under Rule 4906-7-07(H), O.A.C., a party may request protection of information provided to Staff as part of its application, when the party believes that the information is a trade secret or other confidential business information. If a motion for a protective order is granted, then the information remains under seal and those documents may only be accessed by Staff during a proceeding and in a manner that protects the company's proprietary information. The Ohio Power Siting Board rules do not provide for party access to information maintained under a protective order. Therefore, when a party seeks any confidential information that has been provided to Staff, it is that party's responsibility to contact the party who filed the information under seal.

In the Matter of the Application of American Transmission Systems, Incorporated and The Cleveland Electric Illuminating Company for a Certificate of Environmental Compatibility and Public Need for the Geauga County 138 kV Transmission Line Supply Project, Case No. 07-171-EL-BTX. (Entry dated August 14, 2008).

Perhaps most relevant to this motion is the OPSB's Opinion & Order, dated October 28, 2008, emphasizes that applicants seeking certification of a wind farm under OAC Chapter 4906-17 "should follow the procedures set forth at Rule 4906-7-07(H) to request protective treatment

of the financial information filed.” Therefore, in the very context in which Hardin Wind seeks protective treatment, the OPSB recognizes the need to protect the financial information that is the subject of this motion.

More specifically, OAC Rule 4906-7-07(H) explains that the OPSB (or administrative law judge assigned to the case) may issue an order necessary to protect the confidentiality of information contained in documents filed with the OPSB’s Docketing Division “to the extent that state or federal law prohibits the release of the information.” In order for the document to be deemed confidential, the rule requires the movant to demonstrate that: 1) the information is a trade secret under Ohio law (or otherwise confidential);¹ and 2) non-disclosure of the information is “not inconsistent with the purposes of Title 49 of the Revised Code.”

C. Hardin Wind’s financial information is a trade secret entitled to confidential treatment and to remain under seal during the pendency of this proceeding.

As the Ohio Supreme Court recently explained:

Among the substantial and conflicting policies at play *** are the protection of employers’ rights in their trade secrets *** versus the right of the individual to exploit his talents. However, by adopting the Uniform Trade Secrets Act, with the express purpose to make uniform the law with respect to their subject among states, the General Assembly has determined that public policy in Ohio, as in the majority of other jurisdictions, favors the protection of trade secrets, whether memorized or reduced to some tangible form.

Al Minor & Associates, Inc. v. Martin, (2008) 117 Ohio St.3d. 58.

The definition of a “trade secret” is set forth in Ohio Revised Code (“R.C.”) Section 1333.61(D), Ohio 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,

¹ In the Matter of the Applications of: *Vectren Retail, LLC, d/b/a Vectren Source*, Case No. 02-1668-GA-CRS, *Interstate Gas Supply, Inc.*, Case No. 02-1683-GA-CRS, *Shell Energy Services Co., L.L.C.*, Case No. 02-1680-GA-CRS, *First Energy Solutions Corp.*, Case No. 02-1864-GA-CRS and *Direct Energy Services, LLC*, Case No. 02-1829-GA-CRS (Entry dated August 11, 2004).

patter, 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.

As highlighted in the definition, the financial information that Hardin Wind is required to provide under OAC 4906-17-06 falls directly within the definition of "trade secret"—a definition that clearly reflects the state policy favoring the protection of trade secrets.

The Ohio Supreme Court has adopted the following 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. Plain Dealer v. Ohio Dep't of Ins. (1997), 80 Ohio St.3d 513, 524-25. Ohio courts often emphasize the first three factors in their determination. *See e.g., Water Management, Inc. v. Stayanchi* (Ohio 1984), 15 Ohio St.3d 83, 86 (recognizing the six-factors often cited in Ohio but focusing on "the extent to which information is known outside the business and the precautions taken to guard against the secrecy of the information."); *Hoffmann-La Roche Inc. v. Yoder* (S.D. Ohio 1997), 950 F. Supp. 1348, 1357-58 (surveying Ohio case law and finding that relative secrecy and reasonable efforts "now make-up the heart of the Ohio Act."). The designated financial information that is the subject of this motion meets each of the above-noted criteria.

Hardin Wind is a private company that is not subject to the federal and state reporting requirements of publicly-held companies. Hardin Wind considers, and has treated, the financial information sought under OAC 4906-17-06 as confidential and/or proprietary. In the ordinary course of its business, Hardin Wind identifies said financial information as confidential and/or proprietary, it is treated as such by its employees, and it is not disclosed to anyone outside of Hardin Wind, except pursuant to a confidentiality agreement, or in the context of regulatory proceedings where protection is granted.

Furthermore, because the wind industry is relatively new to Ohio, financial information is invaluable to the short term and long term success of Hardin Wind (and its parent company). The disclosure of capital and intangible costs, as well as operation and maintenance expenses, for the Hardin Wind Farm and other similar facilities owned by Hardin Wind (and/or its parents company) not only would give the public insight into the company's financial dealings and investment strategies, but provide competitors with a detailed understanding of the confidential financial outlays for Hardin Wind. It has taken Hardin Wind (and/or its parent company Invenenergy LLC) decades to learn the wind industry, develop cost-effective and profitable development strategies, and implement these processes in Ohio. To require Hardin Wind to turn over its confidential financial information to the public (and its competitors) would not only threaten the company's financial and business integrity, but discourage private wind developers from entering the Ohio market. Accordingly, that information constitutes trade secret information under Ohio law warranting protection from public disclosure.

Second, the information derives independent economic value from not being known to persons (e.g., competitors) who can use it to their own financial advantage. Courts commonly treat financial records, such as revenue statements or earnings, as trade secrets, especially when

parties are in direct competition with each other. *See State ex rel. Besser v. Ohio State Univ.* (2000), 87 Ohio St. 3d 535, 541 (holding that a pro forma, including charts and tables outlining financial calculations and projections are trade secrets exempt from disclosure under the Ohio Public Records Act); *FCC v. Kohn* (S.D.N.Y. 1957), 154 F.Supp. 899 (FCC protected a company's "financial positions and their profits and losses" from disclosure as trade secrets); *Brittain v. The Stroh Brewery Co.*, 136 F.R.D. 408 (M.D.N.C. 1991) (trade secrets include market strategy and financial information); *Coca-Cola-Bottling Co. v. Coca-Cola Co.*, 107 F.R.D. 288 (D.Del. 1985) (court finds that disclosure of trade secret is even more damaging where there is intense competition). The Commission has concurred with these results, finding that purely private financial books can be a trade secret. *See, e.g., In re Filing of Annual Reports by Regulated Public Utilities*, No. 89-360-AU-ORD, 1989 PUC LEXIS 541 (June 15, 1989) (where company income statements and balance sheets were found to be trade secrets); *In the Matter of the Application of Peoples Energy Services Corporation for Certification as a Competitive Retail Natural Gas Service Provider*, Case No. 05-1133-GA-CRS (Entry dated April 11, 2007) (concluding that financial forecasts and other financial data constitute protected trade secrets). Thus, the information sought to be protected complies with the first criterion of R.C. 1333.61(D).

The second criterion of the definition of trade secret requires a company to take reasonable measures to keep the trade secret information protected from disclosure. In the case of Hardin Wind, this information is never released for public viewing. Only certain directors, officers and upper management of it or of its affiliates who have a need to know are able to have access to the information. The information is kept on a secure data server for retrieval only by

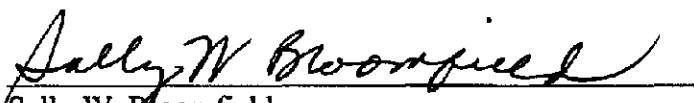
the individuals listed above. Thus the information meets the second criterion of R.C. 1333.61(D).

D. Non-disclosure of Hardin Wind's financial information falls directly in line with R.C. Title 49.

The protection of trade secret information from public disclosure is consistent with the purposes of R.C. Title 49 because both the OPSB and its Staff have access to the information, but at the same time the information is protected from other competitors entering the wind market in Ohio. Thus, the protection of confidential financial information as requested by Hardin Wind will not impair the OPSB's regulatory responsibilities.

WHEREFORE, Hardin Wind Energy LLC requests that the designated financial information be protected from public disclosure, and remain under seal for the pendency of this certification proceeding.

Respectfully submitted on behalf of
HARDIN WIND ENERGY LLC



Sally W. Bloomfield
Matthew W. Warnock
BRICKER & ECKLER LLP
100 South Third Street
Columbus, OH 43215-4291
Telephone: (614) 227-2368; 227-2388
Facsimile: (614) 227-2390
E-Mail: sbloomfield@bricker.com
mwarnock@bricker.com