

BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Annual Alternative)
Energy Portfolio Status Report of Border) Case No. 13-881-EL-ACP
Energy Electric Services, Inc.)

FINDING AND ORDER

The Commission finds:

- (1) Border Energy Electric Services, Inc. (Border or Company) is an electric services company as defined in R.C. 4928.01(A)(9) and, as such, is subject to the jurisdiction of this Commission.
- (2) R.C. 4928.64(B)(2) establishes benchmarks for electric services companies to acquire a portion of their electricity supply for retail customers in Ohio from renewable energy resources. Half of the renewable benchmark must be met with resources located within Ohio (in-state renewable benchmark), including a portion from solar energy resources (solar benchmark), half of which must be met with resources located within Ohio (in-state solar benchmark). The specific renewable compliance obligations for 2012 are 1.50 percent (which includes the solar requirement) and 0.06 percent for solar. R.C. 4928.65 provides that an electric utility or electric services company may use renewable energy credits (RECs) to satisfy all or part of a renewable energy resource benchmark, including a solar benchmark (SRECs). Ohio Adm.Code 4901:1-40-01(BB) defines a REC as the environmental attributes associated with one MWh of electricity generated by a renewable energy resource, except for electricity generated by facilities as described in Ohio Adm.Code 4901:1-40-04(E).
- (3) Ohio Adm.Code 4901:1-40-05(A) requires each electric services company to annually file by April 15 an annual alternative energy portfolio status report (AEPS report), unless otherwise ordered by the Commission. The AEPS report must analyze all activities the company undertook in the previous year in order to demonstrate how pertinent alternative energy portfolio benchmarks have been met. Staff then conducts an annual compliance review with regard to the benchmarks.

- (4) On April 12, 2013, Border filed its 2012 AEPS report, pursuant to R.C. 4928.64 and Ohio Adm.Code 4901:1-40-05(A), with a motion for protective order. In its AEPS report, Border proposes a baseline of 366,053 MWh using an average of its actual Ohio retail sales for 2011 and 2012, as the Company had no Ohio retail sales for the years 2009 or 2010. Using this baseline and the 2012 statutory benchmarks, Border calculated its 2012 compliance obligations to be 220 solar MWh, of which at least 110 MWh must originate from Ohio facilities, and 5,271 non-solar MWh, of which at least 2,636 MWh must originate from Ohio facilities. Using this baseline and the 2012 statutory benchmarks, Border reports that it has met its renewable, in-state renewable, solar, and in-state solar benchmarks.
- (5) With respect to its motion for protective order, Border asserts that Table 1 of its AEPS report contains data that, if made public, could harm its ability to compete in Ohio's retail electric generation marketplace. Specifically, Company seeks protection of its forecasted retail electric load, for the years 2013 through 2015. The Company states that it has taken measures to maintain the confidentiality of this data, and requests that the redacted information be treated as confidential.
- (6) R.C. 4905.07 provides that all facts and information in the possession of the Commission shall be public, except as provided in R.C. 149.43, and as consistent with the purposes of R.C. Title 49. R.C. 149.43 specifies that the term "public records" excludes information that, under state or federal law, may not be released. The Ohio Supreme Court has clarified that the "state or federal law" exemption is intended to cover trade secrets. *State ex rel. Besser v. Ohio State*, 89 Ohio St. 3d 396, 399, 732 N.E.2d 373 (2000). Ohio Adm.Code 4901-1-24 allows the Commission to issue an order to protect the confidentiality of information to the extent that state or federal law prohibits release of the information, including where the information is deemed * * * to constitute a trade secret under Ohio law. R.C. 1333.61(D) defines a trade secret as 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: (1) 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 (2) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy. *State ex rel. the Plain Dealer v. Ohio Dept. of Ins.*, 80 Ohio St.3d 513, 524-525, 687 N.E.2d 661 (1997). In that case, the Court also listed six factors for 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. *Plain Dealer*, 524-525, 687 N.E.2d 672, citing *Pyromatics, Inc. v. Petruziello* (1983), 7 Ohio App.3d 131, 134-135, 7 OBR 165, 169, 454 N.E.2d 588, 592. Further, an entity claiming trade secret status bears the burden to identify and demonstrate that the material is included in categories of protected information under the statute and additionally must take some active steps to maintain its secrecy. *See, Fred Siegel Co., L.P.A. v. Arter & Hadden* (1999), 85 Ohio St.3d 171, 181, 707 N.E.2d 853, 862.

- (7) Applying the statutory requirements and the Court's six-factor test discussed in *Plain Dealer* and *Besser*, the Commission has held that motions for protective orders with respect to AEPS reports should be granted for projected data, but denied for any current or historical data that has been publicly disclosed, such as a company's historical intrastate sales or REC requirements that are a mathematical function of publicly-reported sales. *See, e.g., Direct Energy Services, LLC*, Case No. 12-1233-EL-ACP, Finding and Order (December 11, 2013) at 5-6. With respect to Border's request to prohibit disclosure of Table 1 of its AEPS report, the Commission finds that as such information relates to projections that the Company asserts have not been publicly disclosed, Border's motion for protective order should be granted. Ohio Adm.Code 4901-1-24(F) provides that, unless otherwise ordered, protective orders issued pursuant to Ohio Adm.Code 4901-1-24(D) automatically expire after 18 months. Therefore, confidential treatment shall

be afforded to the Table 1 of its AEPS report for a period ending 18 months from the date of this order. Any motion to extend such period of confidential treatment must be filed at least 45 days in advance of the expiration date, pursuant to Ohio Adm.Code 4901-1-24(F), or this information may be released without prior notice.

- (8) On October 16, 2013, Staff filed its review and recommendations of the Company's AEPS report. Staff finds that Border was required to comply with the renewable benchmarks for 2012, as it had retail electric sales in Ohio. However, Staff reports that the Company's proposed baseline is not consistent with Ohio Adm.Code 4901:1-40-03(B)(2)(a). Since Border did not have any Ohio retail electric sales in 2009 or 2010, but became active during 2011, Staff calculates that its compliance baseline for the 2012 should be its actual 2011 sales of 70,859 MWHs. Staff also reviewed the Company's PJM EIS Generation Attribute Tracking System (GATS) reserve subaccount data and concludes that, for 2012, Border exceeded its renewable, in-state renewable, solar, and in-state solar benchmarks. Staff also confirmed that the RECs and SRECs originated from generating facilities certified by the Commission and were associated with electricity generated during the applicable timeframe. Therefore, Staff recommends that Border be found to be in compliance with its 2012 renewable energy compliance obligations.
- (9) In regards to the excess RECs and SRECs, Staff recommends that Border coordinate with Staff and GATS representatives to adjust the quantity of RECs and SRECs transferred to the reserve subaccount for 2012 compliance purposes so that the quantity transferred matches the Company's compliance obligation as determined by the Commission. If such adjustments cannot be completed prior to March 1, 2014, Staff recommends that the excess RECs and SREC be eligible to be applied administratively to a future compliance obligation, consistent with Ohio Adm.Code 4901:1-40-04(D)(3). Staff further recommends that, for future compliance years in which Border utilizes GATS to demonstrate its Ohio compliance efforts, Border initiate the transfer of the appropriate RECs and SRECs to its GATS reserve subaccount between March 1 and April 15 so as to precede the filing of its annual AEPS report with the Commission.

- (10) Upon review of Border's AEPS report, as well as Staff's findings and recommendations, the Commission finds that Border is in compliance with its 2012 renewable, in-state renewable, solar, and in-state solar benchmarks; and that the Company's AEPS report for 2012 should be accepted using a baseline of 70,859 MWh for 2012. The Commission also directs that, for future compliance years, Border initiate the transfer of the appropriate RECs and SRECs to its GATS reserve subaccount between March 1 and April 15, consistent with Staff's recommendations. Further, as Border was in excess of its 2012 compliance obligations, the Company is directed to coordinate with Staff and GATS representatives to adjust the quantity of RECs and SRECs transferred to the reserve subaccount for 2012 compliance purposes consistent with Staff's recommendations noted above.

It is, therefore,

ORDERED, That Border's AEPS report for 2012 be accepted using the corrected baseline of 70,859 MWh. It is, further,


ORDERED, That Border take all actions regarding Staff's recommendations as adopted above. It is, further,

ORDERED, That Border's motion for protective order be granted, pursuant to Ohio Adm.Code 4901-1-24, until June 11, 2015. It is, further,

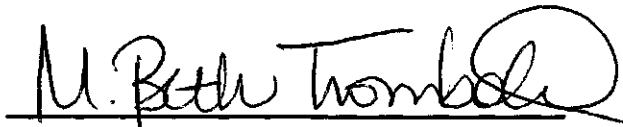
ORDERED, That a copy of this Finding and Order be served upon all parties of record.

THE PUBLIC UTILITIES COMMISSION OF OHIO


Todd A. Snitchler, Chairman


Steven D. Lesser


Lynn Slaby

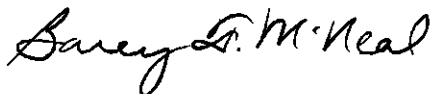

M. Beth Trombold


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Entered in the Journal

DEC 18 2013



Barcy F. McNeal
Secretary