

**BEFORE  
THE OHIO POWER SITING BOARD**

In the Matter of the Application of Icebreaker	)	
Windpower Inc., for a Certificate to Construct a	)	Case No: 16-1871-EL-BGN
Wind-Powered Electric Generation Facility in	)	
Cuyahoga County, Ohio.	)	

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

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Pursuant to Rule 4906-2-21(D) of the Ohio Administrative Code (“OAC”), Icebreaker Windpower Inc. (the “Applicant”), respectfully moves the Ohio Power Siting Board (the “Board”) for a protective order to keep several portions of the Application in this case confidential and not part of the public record.

First, the Applicant requests that portions of pages 41-44 of the Application, which consist of financial data representing estimated capital and intangible costs, operation and maintenance costs, and the estimated monthly loss due to one month’s delay in construction, be kept confidential. The Applicant believes that public disclosure of this confidential and sensitive information will have a harmful effect on the company’s ability to compete and negotiate contracts with potential vendors for the project.

Second, the Applicant requests that Exhibit S, the safety manual for the Vestas V126-3.45 megawatt (“MW”) wind turbine, be kept confidential. The manufacturer provided the safety manual to the Applicant on a confidential basis and it contains information that is not publicly available. As such, the manual has been submitted under seal to maintain its confidentiality.

Third, the Applicant requests that Exhibit P, the Fred. Olsen Ocean HSE manual, be kept confidential. Fred. Olsen Ocean provided the safety manual to the Applicant on a confidential basis and it contains information that is not publicly available. As such, the manual has been submitted under seal to maintain its confidentiality.

Fourth, the Applicant requests that Exhibit I & Appendix A to Exhibit BB, which include the aquatic geotechnical and geophysical surveys, be kept confidential. The information contained in these documents is highly sensitive and, therefore, public disclosure will have an injurious effect on the Applicant. For these same reasons, the Applicant requests that portions of pages 80, 83-84, and 143 of the Application, which contain data drawn from the geotechnical and geophysical surveys, also be kept confidential.

Fifth, the Applicant requests that Exhibit U, which contains a detailed report describing the derivation of loads on Lake Erie wind turbine foundations due to ice, be kept confidential. As with the previous reports, the information contained in this report is considered confidential by the Applicant and is closely held. Disclosure of this information will place the Applicant at a competitive disadvantage.

Sixth, the Applicant requests that Exhibit C2, which contains technical specifications for the Vestas V126-3.45 MW wind turbine, be kept confidential. The manufacturer provided these specifications to the Applicant on a confidential basis and the information contained therein is closely held and not available to the public. Therefore, this information is being submitted under seal to maintain its confidentiality.

Finally, the Applicant requests that pages 84-85 of the Application, which contain wind speed data at the project location, be kept confidential. The information contained on these pages is considered confidential by the Applicant and is closely held. Disclosure of the information will place the Applicant at a competitive disadvantage.

An explanation of the reasons supporting this motion is detailed in the attached Memorandum in Support. Consistent with the practice of the Board, unredacted copies of the confidential pages of the Application, as well as the confidential exhibits, have been submitted to the Docketing Division under seal.

Accordingly, the Applicant respectfully moves for a protective order to keep the confidential information contained in the Application and certain exhibits under seal and not part of the public record.

Respectfully submitted,

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

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**I. INTRODUCTION**

In accordance with Chapter 4906 of the Ohio Revised Code (“ORC”) and OAC Chapter 4906-4, the Applicant filed an application for a certificate to construct a wind-powered electric generation facility on Lake Erie, in Cuyahoga County, Ohio (the “Application”) on February 1, 2017. Included in the materials supporting the Application is information that is considered trade secret and confidential. OAC Rule 4906-2-21 provides that the Applicant may file a motion for protective order to protect such information. Accordingly, the Applicant requests a protective order covering the following portions of the narrative of the Application and the designated exhibits:

- A. Financial Narrative: Pages 41-44 of the Application contain estimated capital and intangible costs, operation and maintenance costs, and the estimated monthly loss due to delay in construction.
- B. Exhibit S, Vestas Safety Manual: This document contains the safety information for the Vestas V126-3.45 MW wind turbine.
- C. Exhibit P, Fred. Olsen Ocean HSE Manual: This document contains the Health, Safety, and Environmental manual for Fred. Olsen Ocean.
- D. Exhibit I & Appendix A to Exhibit BB, Aquatic Geotechnical and Geophysical Surveys and Narrative: These exhibits contain the 2015 Factual Geotechnical Report, the 2015 Geotechnical Site Characterization Report, the 2016 Geotechnical Field Report, the 2016 Geotechnical Report, and the 2016 Marine Geophysical Survey. In addition, pages 80, 83-84, and 143 of the Application contain data drawn from the Geotechnical and Geophysical reports.
- E. Exhibit U, Ice Loads: This document contains a report on the derivation of loads on Lake Erie wind turbine foundations due to ice.
- F. Exhibit C2, Vestas Specifications: This document contains the technical specifications for the Vestas V126-3.45 MW wind turbine.

G. Wind Speed Narrative: Pages 84-85 of the Application contain wind speed data at the project location.

In light of the highly sensitive, trade secret information contained in the above-listed pages of the Application and the exhibits, the Applicant submits that the information must be kept confidential and not be made part of the public record. Therefore, the Applicant has submitted these pages of the Application and exhibits under seal to maintain their confidentiality.

## **II. PROJECT BACKGROUND**

The original developer of the Icebreaker Wind project was the Lake Erie Energy Development Corporation (LEEDCo). LEEDCo is a non-profit corporation that received funding from, among other entities, the U.S. Department of Energy (“DOE”) as part of its U.S. Offshore Wind: Advanced Technology Demonstration Projects program. DOE has provided over \$10 million in funding to advance the Icebreaker demonstration project, with a commitment to provide an additional \$40 million if certain milestones are met. In 2016, LEEDCo partnered with Fred. Olsen Renewables (“FOR”) of Norway. FOR has established FORUSA and Icebreaker Windpower Inc. to be the owner, developer, and operator of Icebreaker Wind. FORUSA may be interested in future offshore wind projects in the Great Lakes.

## **III. LEGAL AUTHORITY**

The OAC expressly permits the Board or the administrative law judge (“ALJ”) assigned to the case to protect the confidentiality of certain information filed with the Board’s Docketing Division. See OAC Rule 4906-2-21. In particular, OAC Rule 4906-2-21(D) provides that:

“[u]pon motion of any party or person filing a document with the board’s docketing division relative to a case before the board, the board or the [ALJ] assigned to the case may issue any order which is necessary to protect the confidentiality of information contained in the document, to the extent that state or federal law prohibits release of the information, including where it is determined that both of the following criteria are met: The information is deemed by the board or [ALJ] assigned to the case to constitute a trade secret under Ohio law, and where non-disclosure of the information is not inconsistent with the purpose of Title 49 of the Revised Code.”

Here, nondisclosure of the information requested to be kept confidential will in no way impair the purposes of ORC Title 49. The Board and its staff already have full access to the

information in order to fulfill the Board's statutory obligations. Thus, the question becomes whether the confidential information may be considered a "trade secret" under Ohio law.

The definition of a "trade secret" is set forth in Ohio's Uniform Trade Secrets Act, which states:

"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.

ORC Section 1333.61(D).

Courts of other jurisdictions have held that a public utilities commission has the authority to protect trade secrets of companies subject to its jurisdiction. *New York Tel. Co. v. Pub. Serv. Comm.*, 56 N.Y. 2d 213 (1982). In fact, the existence of a state trade secret statute creates a duty of the public utilities commission to protect them. *Id.* Recognizing this duty, the Board has issued orders protecting trade secrets in numerous proceedings. See, e.g., *Buckeye Wind*, Case No. 08-666-EL-BGN, Entry (July 31, 2009); *Paulding Wind Farm LLC*, Case No. 09-980-EL-BGN, Entry (Feb. 23, 2010); *Carroll Co. Energy, LLC*, Case No. 13-1752-EL-BGN, Entry (Jan. 6, 2014); *North Coast Gas Transmission, LLC*, Case No. 14-1754-GA-BLN, Entry (Dec. 30, 2014).

In *State ex rel. The Plain Dealer v. Ohio Dept. of Ins.*, 80 Ohio St.3d 513, 687 N.E.2d 661 (1997), the Ohio Supreme Court adopted the six factor test set forth in *Pyromatics, Inc. v. Petruziello*, 7 Ohio App.3d 131, 134-135, 454 N.E.2d. 588, 592 (1983), which served to further define "trade secrets" under Ohio law. The six factors to be considered in recognizing a trade secret are:

(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.

Note that the Board is not necessarily limited to protecting information meeting the precise definition of “trade secret.” The Board may issue a protective order providing that a “trade secret *or other confidential research, development, commercial, or other information* not be disclosed or be disclosed only in a designated way.” OAC Rule 4906-2-21(A)(7) (*emphasis added*). As will be discussed in the next section, the information the Applicant seeks to protect should be considered trade secret. But, at a minimum, all of the confidential and sensitive information contained in the exhibits and described in this motion and memorandum in support would be considered “confidential research, development, commercial, or other” information warranting protection from the public record, pursuant to the OAC.

#### **IV. APPLICATION OF “TRADE SECRET” FACTORS**

The information the Applicant seeks to keep confidential and not part of the public record meets each of the six factors that determine the existence of a trade secret under Ohio law. As detailed in the preceding section, the information would rise to the level of a trade secret if it is not generally known outside (or inside) the Applicant’s business, if sufficient precautions were taken to guard the secrecy of the information, if the information has competitive value, if the Applicant spent significant time and resources developing the information, and if it would take significant time and resources to duplicate the information. *State ex rel. The Plain Dealer v. Ohio Dept. of Ins.*, 80 Ohio St.3d 513, 687 N.E.2d 661 (1997).

Here, the Icebreaker Wind project will be the first freshwater offshore wind farm constructed not only in the Great Lakes but in North America as well. Much of the information the Applicant seeks to protect is therefore unique and has not yet been produced by any other business in the industry. The very nature of the project demonstrates the undue competitive disadvantage that would result from public disclosure of confidential Icebreaker Wind project-

specific development information. In addition, the information is not available outside the company and cannot be found in the public domain. Not only is this information not publicly available, but it is closely held within the company and is only disclosed to those employees who “need to know.” Such heightened confidentiality and protection evidences the significant precautions taken by the company to guard the secrecy of the information. Thus, the first three factors of Ohio’s trade secret test have been met in this case.

Further, the Applicant spent considerable time and expense working with different consultants and contractors to produce various confidential reports and surveys for purposes of this groundbreaking freshwater wind farm project and the Application. These consultants and contractors consider the methodologies and the results of their research to be highly confidential and, as such, the contents of their research are not publicly available. In fact, it would take several millions of dollars, and hundreds of hours of staff time, to recreate the wealth of information generated by these consultants and contractors, which is contained in the portions of the Application and exhibits that have been submitted under seal.

If this information were made available to the public, the time and money expended for purposes of generating the information by the Applicant – all in an effort to be the forerunner in the freshwater offshore wind market – would be unfairly bestowed on competitors. Developers seeking to compete with the Applicant and build similar projects would gain the benefit of the Applicant’s research and methodologies without having to undertake the enormous effort and expense incurred by the Applicant to produce the information. This would give competitors an unfair advantage at the expense of the Applicant, who would be put at an unfair disadvantage. As such, the final three factors of Ohio’s trade secret test have also been met.

## **V. ADDITIONAL SUPPORTING INFORMATION**

As previously stated, the information the Applicant seeks to protect should be considered trade secret. However, it should also be noted that, at a minimum, all of the confidential and sensitive information contained in the narrative and the exhibits, and described in this motion and memorandum in support, would be considered “confidential research, development, commercial, or other information” warranting protection from the public record consistent with OAC Rule 4906-2-21(A)(7).



A. Financial Narrative

Pages 41-44 of the Application consist of financial data representing estimated capital and intangible costs, operation and maintenance costs, and the estimated monthly loss due to one month's delay in construction. This information has independent economic value, is the subject of reasonable efforts to maintain its secrecy, is not generally known outside the Applicant's business, and is not otherwise available in the public domain. Disclosure of this information to competitors would result in a significant competitive disadvantage for the Applicant as cost data is frequently factored into the overall development plan of a wind project.

In addition, public disclosure of this information would have an adverse effect on the application process moving forward, given the Applicant's current and ongoing negotiations with contractors and vendors involved in the project. This Board has previously recognized such adverse effects and has protected the confidentiality of this type of information. See *North Coast Gas Transmission, LLC*, Case No. 14-1754-GA-BLN, Entry (Dec. 30, 2014). Hence, the Applicant requests that this information be kept confidential and not part of the public record.

B. Exhibit S, Vestas Safety Manual

The manufacturer of the Vestas V126-3.45 MW wind turbine provided its safety manual to the Applicant on a confidential basis. This manual is, therefore, being submitted under seal to maintain its confidentiality. The safety manual is not publicly available and the Applicant has agreed with the manufacturer to protect the manual from public disclosure. The manufacturer has devoted great time and expense to develop the manual—public disclosure would give competitors of the wind turbine manufacturer an undue competitive advantage. Such disclosure is also not likely to assist the Board in carrying out its duties, especially since the Board staff can view unredacted versions placed under seal. Disclosure would similarly not serve any other public policy. It should be noted that the Board, in addressing the issue of confidential wind turbine safety manuals, has contemplated that applicants may have to submit safety manuals from wind turbine manufacturers under seal consistent with the Board's rules. See *Power Siting Board Requirements for Electric Generating Wind Facilities*, Case No. 08-1024-EL-ORD, Order (Oct. 28, 2008) at 31-32. Thus, the Applicant requests that this information be kept confidential and not part of the public record.

C. Exhibit P, Fred. Olsen Ocean HSE Manual

Fred. Olsen Ocean developed this unique manual and provided it to the Applicant on a confidential basis. This document is, therefore, being submitted under seal to maintain its confidentiality. The manual is not publicly available and the Applicant has agreed with Fred. Olsen Ocean to protect it from public disclosure. Fred. Olsen Ocean devoted great time and expense to develop the manual—public disclosure would give competitors of Fred. Olsen Ocean an undue competitive advantage. Note that disclosure is unlikely to assist the Board in carrying out its duties, especially since the Board and its staff can view unredacted versions placed under seal. Disclosure would similarly not serve any other public policy.

D. Exhibit I & Appendix A to Exhibit BB, Geotechnical and Geophysical Surveys and Narrative

As previously explained, Exhibit I contains several documents, including: 1) the 2015 Factual Geotechnical Report; 2) the 2015 Geotechnical Site Characterization Report; 3) the 2016 Geotechnical Field Report; 4) the 2016 Geotechnical Report; and 5) the 2016 Marine Geophysical Survey. Appendix A to Exhibit BB contains the Section 106 Geophysical Survey, which the Applicant provided to DOE under seal. The Applicant has provided the Section 106 Geophysical Survey, along with the Appendices and Enclosures included in Exhibit BB, to DOE to initiate the Section 106 consultation process with the State Historic Preservation Office.

Each of these reports contained in Exhibit I will be submitted under seal to maintain their confidentiality. The Applicant spent significant time and resources developing each report because they are necessary for purposes of this wind farm. As previously mentioned, the Icebreaker Wind project will be the first freshwater offshore wind farm constructed in North America and in the Great Lakes region of Ohio—these reports have been generated for the first time by the Applicant and would therefore be incredibly valuable in the hands of a competitor. Considering these facts, public disclosure would have an injurious effect on competition and would allow undeserving industry competitors to reap the benefits of the Applicant's time and resources.

In addition, the reports in Exhibit I contain proprietary information describing the methods for acquiring samples and collecting the data. Divulging this information in a publicly filed document would provide competitors of the Applicant an undue advantage. Note too that

DOE has a process in place for keeping these documents confidential for up to five years under federal law. Considering the fact that these reports will be held as confidential by the DOE, we request that this Board take similar action to preserve the confidentiality of this sensitive information.

Finally, note that Appendix A of the Section 106 Geophysical Survey was provided to the DOE under seal. Likewise, in this Application before the Board, the Applicant is submitting Appendix A under seal and requesting that it be kept confidential. Appendix A is the same 2016 Marine Geophysical Survey (including the Appendices and Enclosures) that was submitted under seal as part of Exhibit I. As with all of these documents, disclosure is not likely to assist the Board in carrying out its duties, especially since the Board and its staff can view unredacted versions placed under seal. Disclosure would similarly not serve any other public policy.

E. Exhibit U, Ice Loads

Exhibit U contains a detailed report describing the derivation of loads on Lake Erie wind turbine foundations due to ice. Similar to the geotechnical and geophysical reports, the Applicant spent significant time and resources developing this report because it is necessary for purposes of an offshore wind farm. As previously mentioned, the Icebreaker Wind project will be the first freshwater wind farm constructed in North America and in the Great Lakes region of Ohio—the report on ice loads is unique in that it had not yet been developed and would therefore be invaluable in the hands of a competitor. As such, public disclosure would harm the Applicant and allow industry competitors to benefit from the Applicant's expenditure of time and resources. Moreover, it should be noted that disclosure is not likely to assist the Board in carrying out its duties and would not serve any other public policy.

F. Exhibit C2, Vestas Specifications

Exhibit C2 contains technical specifications for the Vestas V126-3.45 MW wind turbine. The Vestas V126-3.45 MW wind turbine manufacturer provided these specifications to the Applicant on a confidential basis. This information has independent economic value, is the subject of reasonable efforts to maintain its secrecy, is not generally known outside the business of the Applicant or manufacturer, and is not otherwise available in the public domain. Disclosure to competitors would result in a significant competitive disadvantage for the wind turbine manufacturer, and as a result the Applicant, and is not likely to assist the Board in

carrying out its duties or the public interest, especially since the Board and its staff can view unredacted versions placed under seal.

G. Wind Speed Narrative

Pages 84-85 of the Application contain data regarding wind speeds at the project location. As with the report describing the derivation of loads on Lake Erie wind turbine foundations due to ice, the Applicant spent significant time and resources developing this information because it is necessary for purposes of a wind farm. In addition, the Icebreaker Wind project will be the first freshwater wind farm constructed in North America and in the Great Lakes region of Ohio—the information on wind speeds is unique in that it has not yet been developed for purposes of this area and would therefore be invaluable in the hands of a competitor. As such, public disclosure would harm the Applicant and allow industry competitors to benefit from the Applicant's expenditure of time and resources. Moreover, it should be noted that disclosure is not likely to assist the Board in carrying out its duties and would not serve any other public policy.

**VI. Conclusion**

For the above reasons, the Applicant requests that the Board or the ALJ grant its motion for a protective order to maintain the information described above as confidential and not subject to public disclosure.

Respectfully submitted,

/s/ Christine M.T. Pirik

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