

**BEFORE  
THE OHIO POWER SITING BOARD**

In the Matter of the Application of Hardin Solar )  
Energy LLC for a Certificate of Environmental ) Case No: 17-773-EL-BGN  
Compatibility and Public Need to Construct a Solar- )  
Powered Electric Generation Facility in Hardin )  
County, Ohio.

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**INTERLOCUTORY APPEAL  
OF ADMINISTRATIVE LAW JUDGE'S ENTRY  
ISSUED FEBRUARY 20, 2018  
REQUEST FOR ONE-DAY EXTENSION OF TIME  
AND MEMORANDUM IN SUPPORT**

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Pursuant to Ohio Administrative Code ("O.A.C.") Rule 4906-2-29(A) Hardin Solar Energy LLC ("Applicant") respectfully files this interlocutory appeal of the Administrative Law Judge's (ALJ's) February 20, 2018 entry, which denied, in part, the Applicant's Motion for Protective Order. Specifically, the Applicant requests that the Ohio Power Siting Board ("Board") review the ALJ's ruling and determine that the manufacturer's technical specifications document that addresses the reliability and safety certifications for the General Electric ("GE") 4 MVA UL Inverter ("GE Inverter") contained in Exhibit C, which is one of several inverters being considered for this project that was filed under seal in this docket on July 5, 2017, is confidential and should not be part of the public record.

In addition, pursuant to O.A.C. Rule 4906-2-29(C), the Applicant requests a one-day extension of time to file this interlocutory appeal. An explanation of the reasons supporting this interlocutory appeal and request for extension of time is detailed in the attached Memorandum in Support.

Accordingly, the Applicant respectfully files this interlocutory appeal and request for a one-day extension of time, and requests that the Board issue a protective order to keep the confidential information contained Exhibit C, Item 5, of the Application regarding the GE Inverter under seal and not part of the public record.

Respectfully submitted,

/s/ Christine M.T. Pirik

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*(Counsel is willing to accept service via email.)*

***Attorneys for Hardin Solar Energy LLC***

**February 27, 2018**

## **MEMORANDUM IN SUPPORT**

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### **I. INTRODUCTION**

In accordance with Chapter 4906 of the Ohio Revised Code (“R.C.”) and O.A.C. Chapter 4906-4, the Applicant filed an application for a certificate to construct a solar-powered electric generation facility in Hardin County, Ohio (“Application”) on July 5, 2017. Included in the materials supporting the Application was information that is considered trade secret and confidential. O.A.C. Rule 4906-2-21 provides that the Applicant may file a motion for protective order to protect such information. Accordingly, on July 5, 2017, the Applicant filed a motion requesting a protective order covering the following: financial narrative at pages 30-32 of the Application; Exhibits A, B, and C containing the module, tracking, and inverter specifications; and Exhibit M the Certificate of Insurance Liability.

On February 15, 2018, the Board issued its Opinion, Order, and Certificate approving and adopting the stipulation and recommendation in this matter, and issuing a certificate to the Applicant for the construction, operation, and maintenance of the facility.

On February 20, 2018, the ALJ issued an entry granting, in part, and denying, in part, the Applicant’s July 5, 2017 Motion for Protective Order. Specifically, the ALJ granted the Applicant’s request for protection of the financial information contained in the narrative of the Application, but denied the request for protection of the information contained in Exhibits A, B, and C of the Application, as well as part of Exhibit M.

At this time, the Applicant is filing this interlocutory appeal requesting that the Board review the ALJ’s ruling and find that the manufacturer’s technical specifications sheet that

addresses the reliability and safety certifications for the GE Inverter, contained in Exhibit C, Item 5, should be held as confidential and should not be part of the public record. The Applicant understands that the remainder of the information and documentation in Exhibits A, B, and C will be released into the public record, and the Applicant will be filing a portion of Exhibit M in the open record. However, the information contained in Item 5 of Exhibit C, the GE Inverter information, is closely held by the company and the Applicant, is not available in the public domain, and should be granted protective status.

In addition, in accordance with O.A.C. Rule 4906-2-29(C) any party wishing to take an interlocutory appeal from any ruling may file an application for review with the Board within five days after the ruling is issued, unless an extension of time is granted under extraordinary circumstances. The interlocutory appeal of the ALJ's entry was to be filed on February 26, 2018; however, the Applicant is hereby requesting that the Board grant a one-day extension of time to file this interlocutory appeal on February 27, 2018. In support of this request for extension, the Applicant states that, in light of the ALJ's all-encompassing ruling, the Applicant had to engage in extensive due diligence by thoroughly reviewing the information and communicating with the affected entities in order to submit an interlocutory appeal that focused only on the information we still seek to protect as confidential, notwithstanding the ALJ's previous decision. As a result of this extensive review, it was determined that the only document remaining where a protective order is still necessary is the GE Inverter manufacturer's specification document in Exhibit C, Item 5. Given the length of time that was needed to complete this extensive review, the Applicant requests that the Board find that these

circumstances warrant a one-day extension of time and that this interlocutory appeal be accepted as timely.

## **II. LEGAL AUTHORITY**

Under O.A.C. Rule 4906-2-29(A), there are certain circumstances adversely affecting a party that allow the party to submit an immediate interlocutory appeal directly to the Board from any ruling issued under O.A.C. Rule 4906-2-28 without the need for the appeal to be certified to the Board by the ALJ. One of the circumstances that warrant a direct appeal to the Board is when the ALJ denies a motion for protective order. Therefore, in light of the ALJ's February 20, 2018 ruling denying confidential protection for the GE Inverter manufacturer specifications in Exhibit C of the Application, the Applicant hereby files this interlocutory appeal with the Board.

The O.A.C. expressly permits the Board or the ALJ to protect the confidentiality of certain information filed with the Board's Docketing Division. See O.A.C. Rule 4906-2-21. In particular, O.A.C. 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 RC Title 49. The Board and its staff already have full access to the information contained in the GE Inverter manufacturer's specifications. In fact, the Board has already reviewed the information and approved the stipulation and Application in this matter;

thus, fulfilling their 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.

R.C. 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.” O.A.C. 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.

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

The information contained in the GE Inverter manufacturer’s specification document, which should be kept 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 company’s business, if sufficient precautions were taken to guard the

secrecy of the information, if the information has competitive value, if the company 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).

The information contained in the GE Inverter manufacturer's specification documents is not available outside the company or the Applicant, 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 by the Applicant, and is only disclosed to those employees who "need to know." Such heightened confidentiality and protection evidences the significant precautions taken by the company and the Applicant to guard the secrecy of the information. The company provided this information to the Applicant under the direction of strict confidentiality. Moreover, the document contains insider information that reveals the source within the company that authored the modifications; such information is held closely by the company and not revealed in the public domain.

As noted by the ALJ some of the information contained in the other documents found in Exhibit C could be found on the internet; however, such is definitely not the case for the GE Inverter manufacturer's specification documents. The document contained in Exhibit C, Item 5 is a closely held document and is subject to a confidentiality agreement with the Applicant. Thus, the first three factors of Ohio's trade secret test have been met in this case.

Further, if this information contained in the GE Inverter manufacturer's specification documents were made available to the public through this docket, the time and money expended for purposes of developing the information therein would be unfairly bestowed on competitors.



Developers seeking to compete would gain the benefit of the methodologies by the Applicant without having to undertake the enormous effort and expense incurred to produce the information. This would give competitors an unfair advantage. As such, the final three factors of Ohio's trade secret test have also been met.

The GE Inverter manufacturer's specification document was provided to the Applicant on a confidential basis. This document contains the manufacturer's technical specifications that address the reliability and safety certifications for the equipment; therefore, they were submitted under seal to maintain their confidentiality. 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. The Applicant has agreed with the manufacturer to protect the information from public disclosure.

The Applicant would also note that disclosure of this information is not likely to assist the Board in carrying out its duties, especially since the Board's staff can view the unredacted version that was submitted under seal and the Board has already approved the stipulation and issued a certificate in this matter. Disclosure would similarly not serve any other public policy. It should be noted that the Board, in addressing the issue of confidential manufacturers' manuals, has contemplated that applicants may have to submit such information 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.

#### **IV. CONCLUSION**

For the above reasons, the Applicant requests that the Board grant a one-day extension of time to file this interlocutory appeal and that the Board reverse the ALJ's February 20, 2018 entry insofar as the entry denied the Applicant's motion for a protective order to maintain the information contained in Exhibit C, Item 5, the GE Inverter manufacturer's specification documents.

Respectfully submitted,

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### **CERTIFICATE OF SERVICE**

The Ohio Power Siting Board's e-filing system will electronically serve notice of the filing of this document on the parties referenced in the service list of the docket card who have electronically subscribed to this case. In addition, the undersigned certifies that a copy of the foregoing document is also being served upon the person below via electronic mail this 27th day of February, 2018.

/s/ Christine M.T. Pirik

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COLUMBUS 39579-24 85128v3

## THE OHIO POWER SITING BOARD

IN THE MATTER OF THE APPLICATION OF  
HARDIN SOLAR ENERGY, LLC FOR A  
CERTIFICATE OF ENVIRONMENTAL  
COMPATIBILITY AND PUBLIC NEED TO  
CONSTRUCT A SOLAR-POWERED ELECTRIC  
GENERATION FACILITY IN HARDIN  
COUNTY, OHIO.

CASE NO. 17-773-EL-BGN

### ENTRY

Entered in the Journal on February 20, 2018

{¶ 1} On July 5, 2017, Hardin Solar Energy, LLC (Hardin or Applicant) filed an application to construct a solar-powered electric generation facility in Hardin County, Ohio. With its application, Hardin filed a motion for protective order to maintain as confidential portions of its application which it filed under seal. The information that Hardin seeks to protect falls into three areas. The first is the financial data appearing on pages 30-32 of the application. Hardin seeks to protect estimated capital and intangible costs, operation and maintenance costs, and estimated total and present worth of construction and operation payroll from public disclosure. The second area of information Hardin seeks to protect is manufacturers' equipment specification documents, identified as Exhibits A (module specifications), B (tracking specifications), and C (inverter specifications). Hardin claims that the documents were provided to Hardin on a confidential basis and provides manufacturers' technical specifications that address the reliability and safety certifications for the equipment. The third area of information is found in Exhibit M, the Certificate of Liability Insurance. Exhibit M contains financial information regarding Hardin's insurance for the development, construction, operation, and decommissioning of the facility.

{¶ 2} Hardin claims that the information that it seeks to keep confidential and not part of the public record meets the Ohio Supreme Court's six-factor test<sup>1</sup> to qualify as trade secret information. In support of its motion, Hardin states that the information contained in the exhibits is not available outside the company and cannot be found in the public

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<sup>1</sup> *State ex rel. The Plain Dealer v. Ohio Dept. of Ins.*, 80 Ohio St.3d 513, 524-525, 687 N.E.2d 661 (1997).

domain. Moreover, the information is closely held within the company and is only disclosed to those employees who “need to know.” If the information were made available to the public, competitors would benefit from the time and money expended by Hardin. Others wishing to compete with Hardin would build similar projects with the benefit of Hardin’s methodologies without undertaking the effort and expense incurred by Hardin. This would convey an unfair advantage to competitors. For these reasons, Hardin believes it has satisfied the criteria in Ohio Adm.Code 4906-2-21(D), the Uniform Trade Secrets Act, and the six-factor test adopted by the Ohio Supreme Court in *The Plain Dealer* at 524-525.

{¶ 3} Hardin urges the Board to find that the information it seeks to protect is “trade secret” material and, in accordance with Ohio law, must be protected from public disclosure. Hardin points out that the Board or the administrative law judge (ALJ) has authority under Ohio Adm.Code 4906-2-21(D) to issue an order to protect the confidentiality of trade secrets to the extent that state or federal law prohibits release of the information, and where nondisclosure of the information is not inconsistent with the purposes of Title 49 of the Revised Code.

{¶ 4} Ohio law defines a trade secret as “information 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.” R.C. 1333.61(D).

{¶ 5} The ALJ has examined the information filed under seal, as well as the assertions set forth in the Applicant’s memorandum in support of a protective order. Applying the requirements that the information have independent economic value and be the subject of reasonable efforts to maintain its secrecy pursuant to R.C. 1333.61(D), as well as the six-factor test set forth by the Ohio Supreme Court in *The Plain Dealer* at 524-525, the ALJ finds that the motion should be granted, in part, and denied, part. Specifically, the ALJ

finds that the financial data on pages 30-32 of the application should be afforded protective treatment consistent with Ohio Adm. Code 4906-2-21(D).

{¶ 6} Ohio Adm.Code 4906-2-21(F) provides that, “[u]nless otherwise ordered, any order prohibiting public disclosure pursuant to this rule shall automatically expire twenty-four months after the date of its issuance, and such information may then be included in the public record of the proceeding.” The information protected by this order shall remain under seal for a period ending 24 months from the date of this Entry.

{¶ 7} Ohio Adm.Code 4906-2-21(F), requires a party wishing to extend a protective order to file an appropriate motion at least 45 days in advance of the expiration date. If no such motion to extend confidential treatment is filed, the Docketing Division may release the information without prior notice to the Applicant.

{¶ 8} With respect to Exhibits A (module specifications), B (tracking specifications), and C (inverter specifications), the ALJ finds that Hardin has not shown that the information contained within the exhibits derives independent economic value from not being generally known to or readily ascertainable by other persons who can obtain economic value from its disclosure or use or demonstrated that the information in the exhibits is the subject of efforts that are reasonable under the circumstances to maintain its secrecy. Further, much of the information regarding technical specifications contained in Exhibits A, B, and C is publicly available on the website of the equipment manufacturers or is otherwise available on the internet. For similar reasons, the ALJ determines that the entirety of Exhibit M (Certificate of Liability Insurance) does not warrant protective status. Therefore, Hardin is instructed to file in the public docket Exhibit M with only the policy numbers and certificate number redacted or, in the alternative, Hardin may file a narrative explaining the types of insurance included in the comprehensive package of liability insurance and stating at a minimum the coverage limits of such insurance.



{¶ 9} In making the determination that Exhibits A, B, C, and the entirety of M do not qualify as a trade secret under R.C. 1333.61(D) and are not entitled to protection, the ALJ notes that, apart from indicating that the information is not generally known to others, Hardin proffered no information or evidence to support its trade secret claim under the factors set forth for consideration in *The Plain Dealer*, 80 Ohio St.3d 513, 524-525, 687 N.E.2d 661. Nor is satisfaction of these factors self-evident upon review of the information. The ALJ finds that Hardin has not sustained its burden to demonstrate that Exhibits A, B, C, and M, to the extent discussed herein, constitute trade secret information. Accordingly, the Commission's docketing division should move Exhibits A, B, and C to the public record ten days from the issuance of this Entry. Further, Hardin must file a public version of Exhibit M or file the alternative description of liability insurance described above in the public docket, within ten days from issuance of this Entry.

{¶ 10} It is, therefore,

{¶ 11} ORDERED, That the motion for protective order filed by Hardin be granted, in part, and denied, in part. It is, further,

{¶ 12} ORDERED, That the Commission's docketing division maintain, under seal, the financial information contained on pages 30-32 of the application. It is, further,

{¶ 13} ORDERED, That the Commission's docketing division move Exhibits A, B, and C to the public docket ten days after the issuance of this Entry. It is, further,

{¶ 14} ORDERED, That the Commission's docketing division maintain, under seal, Exhibit M but that Hardin otherwise comply with Paragraph 8 within ten days after issuance of this Entry. It is, further,

{¶ 15} ORDERED, That the Commission's Docketing Division maintain as confidential all information and documents afforded protective treatment by this Entry. It is, further,

{¶ 16} ORDERED, That this protective order shall be effective for a period of 24 months, until February 20, 2020. It is, further,

{¶ 17} ORDERED, That a copy of this Entry be served upon all parties and interested persons of record.

THE OHIO POWER SITING BOARD

/s/ L. Douglas Jennings

By: L. Douglas Jennings  
Administrative Law Judge

jrj/vrm



**This foregoing document was electronically filed with the Public Utilities**

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**in**

**Case No(s). 17-0773-EL-BGN**

Summary: Administrative Law Judge Entry granting in part and denying in part motion for protective order; electronically filed by Vesta R Miller on behalf of L. Douglas Jennings, Administrative Law Judge, Ohio Power Siting Board

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**2/27/2018 5:14:38 PM**

**in**

**Case No(s). 17-0773-EL-BGN**

Summary: Notice of Interlocutory Appeal of the ALJ's February 20, 2018 Entry electronically filed by Christine M.T. Pirik on behalf of HARDIN SOLAR ENERGY LLC