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**BEFORE THE
PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Application of)
South Point Biomass Generation, LLC)
For Certification as an Eligible Ohio) Case No. 09-1043-EL-REN
Renewable Energy Resource)
Generating Facility)

MOTION FOR PROTECTIVE ORDER

Pursuant to Rule 4901-1-24(D) of the Ohio Administrative Code ("O.A.C."), South Point Biomass Generation, LLC ("South Point") moves for a protective order to prevent public disclosure of a response to a Staff data request. The basis for this Motion for Protective Order is contained in the accompanying memorandum in support. Three unredacted copies of the response to the Staff data request have been submitted under seal.

A Memorandum in Support of this Motion is attached.

WHEREFORE, South Point Biomass Generation, LLC respectfully moves that the Commission grant its request for a protective order and allow the response to the Staff data request to be submitted under seal.

Respectfully submitted,



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MEMORANDUM IN SUPPORT

On November 6, 2009, South Point Biomass Generation, LLC ("Applicant" or "South Point") filed an Application for Certification as an Eligible Ohio Renewable Energy Resource Generating Facility accompanied by an affidavit from its president. In late January, the Staff filed interrogatories on the Applicant covering a wide range of topics including a request for the type of biomass which constitutes a fuel source for South Point and availability of such sources. On February 15, 2010 South Point filed responses to the Staff's first set of interrogatories including a lengthy description of the types of acceptable fuel and a description of its fuel supply acquisition plan. On February 24, 2010 the Staff filed a second set of interrogatories posing a single question:

Question 1: Please indicate the commitment and measures that will be undertaken by South Point Biomass Generation to ensure long-term procurement of an environmentally sustainable fuel supply.

To answer the above question South Point has prepared a more detailed description of its long term procurement strategy. Since South Point, if the project is approved, will be using this strategy to procure fuel supply as well as enhance its supply, a public disclosure at this time of its procurement plan could harm South Point's ability to implement the plan in a timely and economic manner. South Point understands and appreciates the Staff's need for such information in order to evaluate the long term efficiency of the facility. Thus to balance the Staff's need to know and to protect South Point's proprietary strategies and supply sources, South Point respectfully requests that this information be considered confidential and allowed to be submitted under seal.

Rule 4901-1-24(D) of the Ohio Administrative Code provides that the Commission or certain designated employees may issue an order which is necessary to protect the confidentiality

of information contained in documents filed with the Commission's Docketing Division to the extent that state or federal law prohibits the release of the information and where non-disclosure of the information is not inconsistent with the purposes of Title 49 of the Revised Code. State law recognizes the need to protect certain types of information which are the subject of this motion. The non-disclosure of the response to the Staff data request will not impair the purposes of Title 49. The Commission and its Staff have full access to the information in order to fulfill its statutory obligations. No purpose of Title 49 would be served by the public disclosure of this information.

The need to protect the designated information from public disclosure is clear, and there is compelling legal authority supporting the requested protective order. While the Commission has often expressed its preference for open proceedings, the Commission also 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.) Likewise, the Commission has facilitated the protection of trade secrets in its rules (O.A.C. § 4901-1-24(A)(7)).

The definition of a "trade secret" is set forth in the 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, 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. § 1333.61(D). This definition clearly reflects the state policy favoring the protection of trade secrets such as the information which is the subject of this motion.

In State ex rel. The Plain Dealer v. Ohio Dept. of Ins. (1997) 80 Ohio St. 3d 513, 524-525, the Ohio Supreme Court adopted the Eighth District Court of Appeals' six factor test in Pyromatics, Inc. v. Petruziello, 7 Ohio App. 3d 131, 134-135 (Cuyahoga County 1983) in determining whether a trade secret claim meets the statutory definition as codified in R.C. 1333.61(D). In Pyromatics, Inc., the Court of Appeals, citing Koch Engineering Co. v. Faulconer, 210 U.S.P.Q. 854, 861 (Kansas 1980), delineated six factors to be considered in recognizing a trade secret:

- (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.

Applying these factors to the response to the Staff data request, it is clear that a protective order should be granted.

Courts of other jurisdictions have held that not only does a public utilities commission have the authority to protect the trade secrets of the companies subject to its jurisdiction, the trade secrets statute creates a duty to protect them. New York Tel. Co. v. Pub. Serv. Comm. N.Y., 56 N.Y. 2d 213 (1982). Indeed, for the Commission to do otherwise would be to negate the protections the Ohio General Assembly has granted to all businesses, including public utilities, and now the new entrants who will be providing power through the Uniform Trade Secrets Act. This Commission has previously carried out its obligations in this regard in

numerous proceedings. See, e.g., 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).

South Point asserts that the response to the Staff data request is confidential, proprietary and trade secrets and is not generally known or available to the general public. The response to the Staff data request would contain information regarding the source of the fuel for South Point's project. Public disclosure of this information would give South Point's competitors an undue competitive advantage and would jeopardize South Point's ability to compete in the market.

WHEREFORE, for the above reasons South Point Biomass Generation, LLC respectfully requests that the Commission grant its Motion for Protective Order and maintain the response to the Staff data request under seal.

Respectfully submitted,



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**Case No. 09-1043-EL-REN
South Point Biomass Generation Plant
Staff Interrogatories – Second Set**


Staff Interrogatories – Second Set

Question 1: Please indicate the commitment and measures that will be undertaken by South Point Biomass Generation to ensure long-term procurement of an environmentally sustainable fuel supply.

Answer 1: Public disclosure of South Point's long term procurement strategy would compromise South Point's ability to procure on a long term basis the fuel it needs at market prices by revealing to its competitors and suppliers how it will purchase fuel. A responsive answer is being submitted under seal.

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing pleading was served upon the following persons by e-mail and U.S. postal mail this 12th day of March, 2010.



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