BEFORE
THE OHIO POWER SITING BOARD

In the Matter of the Application of Champaign Wind, LLC, for a Certificate to Install Electricity Generating Wind Turbines in Champaign County	)))))	Case No. 12-0160-EL-BGN

MEMORANDUM OF UNION NEIGHBORS UNITED, INC., ROBERT McCONNELL, DIANE McCONNELL, AND JULIA JOHNSON IN RESPONSE TO APPLICANT'S MOTION FOR PROTECTIVE ORDER

Champaign Wind LLC has filed a Motion for Protective Order pursuant to O.A.C. 4906-7-04(H)(4) requesting confidentiality for two categories of information in its application. Proposed intervenors Robert McConnell, Diane McConnell, Julia Johnson, and Union Neighbors United, Inc. (UNU) (collectively "Proposed Intervenors") hereby respond to this motion.[1]

The first category of information for which Applicant requests confidentiality consists of financial data on pages 53 to 56 of Applicant's application. The Prospective Intervenors do not object to confidentiality for this information, provided that it is produced to Proposed Intervenors for possible use in the case.

The second category for which Applicant requests confidentiality is a safety manual for the Gamesa G97 turbine model. Because there is no justification for withholding this manual from public review, the Prospective Intervenors object to an order of confidentiality for this manual.

O.A.C. 4906-7-07(H)(4) authorizes the issuance of a protective order only if two prerequisites are met: (1) the information is a trade secret under Ohio law, and (2) non-

[1] Since the Prospective Intervenors have filed a pending Petition for Leave to Intervene in this matter, they are "parties" entitled to file a memorandum responding to Applicant's motion. O.A.C. § 4906-7-12(E).

disclosure of the information is not inconsistent with the purpose of R.C. Title 49. The safety manual fails both of these tests.

I. Applicant Has Not Satisfied Its Burden To Produce Evidence Establishing That The Safety Manual In Its Entirety, Or Even Some Of Its Contents, Consists Of Trade Secrets.

According to R.C. 1333.61(D), information is a trade secret if (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; and (2) it is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

A claimant asserting trade secret status has the burden to identify the trade secrets sought to be protected, to enable an evaluation of that claim. *State ex rel. The Plain Dealer v. Ohio Dept. of Ins.*, 1997-Ohio-75, 80 Ohio St. 3d 513, 525, citing *Amoco Prod. Co. v. Laird*, 622 N.E.2d 912, 920 (Ind. 1993). Since Applicant has failed to describe the nature of the information in Gamesa's manual with enough specificity to determine whether it is a trade secret, Applicant cannot sustain its burden to prove that it is a trade secret. Moreover, because Applicant has not provided the Proposed Intervenors with a copy of Gamesa's safety manual, the Proposed Intervenors have not been able to review its contents. However, Exhibit R of the application contains the safety manuals of four other turbine manufacturers. These manuals are full of mundane information such as the proper technique for wearing a safety harness and common sense directives to shut off the turbine blades before working on the machine. They also contain some information such as admonitions about ice throw that, while important to the Board's consideration of Applicant's application, hardly constitutes a trade secret. Applicant has not identified any different types of information in Gamesa's manual that merit trade secret status.

Without doing so, Applicant cannot sustain its burden to prove that any of the manual's contents are trade secrets.

Even where a claimant has identified the material it wants to withhold, the Ohio Supreme Court has enunciated the following six part test to determine whether information actually is 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.

Plain Dealer, 80 Ohio St. 3d at 525. The claimant has the burden to demonstrate that the material is a trade secret. Id.

While Applicant's memorandum (at 5) pays lip service to the Ohio Supreme Court's six part test for identifying trade secrets, Applicant has not provided any evidence that the manual meets even one of these criteria. Applicant simply asserts, without a shred of evidence, that the manual satisfies the six factors. This blanket assertion fails to sustain Applicant's burden of proof. Nor does it comply with Applicant's obligation under O.A.C. 4906-7-07(H)(4)(c) to provide "a detailed discussion of the need for protection from disclosure." In contrast to Applicant's unsupported assertion, a claimant must "introduce sufficient evidence" to establish that information is a trade secret, such as demonstrating that it "retains potential, independent economic value from not being readily ascertainable by proper means by competitors." *State ex rel. Besser v. Ohio State Univ*., 2000-Ohio-207, 89 Ohio St. 3d 396, 401; R.C. 1333.61(D)(1). In fact, Applicant's utter lack of information about the six criteria make it impossible for the Ohio

Power Siting Board ("Board") or the Proposed Intervenors to evaluate the merits of Applicant's claim of trade secret status.

For the same reason, Applicant's invocation of the Board's rulemaking proceeding in Case No. 08-1024-EL-ORD does not obviate its burden to establish the trade secret status of a document. In fact, the Opinion and Order in that proceeding undercuts Applicant's position. There, several turbine manufacturers asked the Board to delete the rules' requirement for applicants to submit the manufacturers' safety manuals, asserting that they are trade secrets. Opinion and Order of Oct. 28, 2008, p. 31. The Board rejected this request, noting that applicants "may file a motion for protective treatment with the Board in accordance with O.A.C. 4906-7-07(H)(4)" on a case-by-case basis. Id. Nothing in the Board's opinion suggests that turbine safety manuals will automatically qualify for trade secret status without satisfying the prerequisites of that rule.

Nor does Applicant does explain why it considers Gamesa's safety manual to be a trade secret, even while disclosing the safety manuals of four other turbine manufacturers in its application. Applicant's disclosure of safety manuals for four other manufacturers, presumably without their objection, contradicts Applicant's contentions (at 5) that the disclosure of turbine safety manuals generally does not occur and that disclosure would give a competitive advantage to other turbine manufacturers.

While Applicant has noted (at 1) that Gamesa provided the safety manual to Applicant "on a confidential basis," this fact does not help Applicant to satisfy the six *Plain Dealer* criteria. As noted by the Ohio Supreme Court, the "mere existence of a confidentiality agreement" between the claimant and another party for a record does not establish trade secret status for such a record:

> [A]n agreement of confidentiality, standing alone, cannot support a trade secret claim for documents referred to in such an agreement. Without other demonstrable facts to support a trade secret claim, a party could easily use a confidentiality agreement as a shield against disclosure. A party thus cannot meet the statutory trade secret definition by stating that documents for which trade secret status is claimed are protected merely by reference to them in an agreement of confidentiality.

Plain Dealer, 80 Ohio St. 3d at 527. Thus, the existence of an agreement for confidentiality, if any, between Applicant and Gamesa does not establish that the safety manual is a trade secret. Applicant must provide evidence that the safety manual meets the six part Plain Dealer test for trade secrets, and it has failed to do so.

II. Applicant's Motion Fails To Identify The Portions Of The Safety Manual Alleged To Be Trade Secrets, And Thus Cannot Be Granted.

O.A.C. 4906-7-07(H)(4) prohibits the wholesale concealment of records from public disclosure, where only parts of those records contain trade secrets:

> Any order issued under this paragraph shall minimize the amount of information protected from public disclosure. The following requirements apply to a motion filed under this paragraph.
>
> (a) All documents submitted pursuant to paragraph (H) of this rule should be filed with only such information redacted as is essential to prevent disclosure of the allegedly confidential information. . . .

Accordingly, only the trade secrets in a document may be withheld from public view under the Board's rule. This principle is also consistent with the Ohio Supreme Court's practice of redacting only the trade secrets from publicly requested records under R.C. Chapter 149 and disclosing the remainder of these documents. *Plain Dealer*, 80 Ohio St. 3d at 517.

Surely, at least some of the information in Gamesa's entire safety manual does not qualify as trade secret. Yet Applicant has failed to identify and describe the

specific information alleged to qualify for secretive status. Consequently, Applicant's motion does not comply with O.A.C. 4906-7-07(H)(4) and must be denied.

III. Applicant's Attempt To Conceal Gamesa's Safety Manual Violates The Purpose Of R.C. Title 49 To Subject The Board's Proceedings And Utility Applications To Public Review.

To obtain a protective order under O.A.C. 4906-7-07(H)(4), a claimant must also show that non-disclosure of the information is not inconsistent with the purpose of R.C. Title 49. Applicant claims (at 5) to comply with this mandate, because "public disclosure of the manual is not likely to either assist the Board in carrying out its duties, especially since the Board Staff will have the full text to look at, nor would it serve any other public policy."

To the contrary, R.C. 4901.12 declares:

> Except as provided in section 149.43 of the Revised Code and as consistent with the purposes of Title XLIX of the Revised Code, all proceedings of the public utilities commission and all documents and records in its possession are public records.

The Board, of course, is part of the Public Utilities Commission under R.C. 4906.02(A), and thus is bound by this statute. The protective order requested by Applicant would violate both the purpose of R.C. 4901.12 and the public policy of R.C. 149.43 that is incorporated by reference into R.C. 4901.12.

The Ohio Supreme Court has advised that "the inherent, fundamental policy of R.C. 149.43 is to promote open government, not restrict it." *Besser*, 89 Ohio St. 3d at 398. Consistent with this policy, "[t]he Ohio Public Records Act is intended to be liberally construed 'to ensure that governmental records be open and made available to the public . . . subject to only a few very limited and narrow exceptions." *Plain Dealer*, 80 Ohio St. 3d at 518.

While Applicant has not revealed any contents of Gamesa's safety manual, the contents of the manuals for other turbine manufacturers show that safety manuals typically contain

information germane to the public's health and safety. For example, the safety manual for GE Energy's turbines in Exhibit R of the application, under the heading of "Special Dangers -- Icing," admits that "[i]ce build-up on wind turbine generator systems [WTG] and, in particular, the shedding of ice from rotor blades can lead to problems if wind turbine generator systems are planned in the vicinity of roads, car parks or buildings at locations with an increased risk of freezing conditions, unless suitable safety measures are taken." Application, Exh. R, GE Energy manual, at p. 49. The manual goes on to advise that ice detectors can be installed to detect ice on the turbine blades, at which time the blades can be turned off or rotate "at a very low speed." Id. However, the manual acknowledges that the detectors do not detect ice until some time after it has started to collect on the blades, creating "a residual risk for the reliable detection of ice build-up on the rotor blades." Id. at pp. 49-50. The manual then provides a formula that can be used to determine the safe distance between the public and a turbine without an ice detector. Id. at p. 50. Other manuals provided in Exhibit R of the application also discuss the hazards of ice throw from turbines. See the Nordex Safety Manual at p. 27 and the Vestas Americas Health, Safety and Environmental Manual (the last document in Exh. R) at pp. 49, 61-62.

Accordingly, the Proposed Intervenors and the public need to have access to any information in Gamesa's manual that might be pertinent to their health and safety. Merely providing this important information to the Board and its Staff does not fulfill the public's entitlement to this information under R.C. 4901.12 and R.C. 149.43. Moreover, the Proposed Intervenors have a right to this information in the event that they are granted leave to participate as intervenors in this proceeding. Therefore, the Proposed Intervenors request that the Board deny Applicant's motion to withhold this information.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that, on May 30, 2012, a copy of the foregoing memorandum was served by electronic mail on Howard Petricoff, Vorys, Sater, Seymour and Pease LLP, 52 East Gay Street, Columbus, Ohio 43215, mhpetricoff@vorys.com.

Jack A. Van Kley

Summary: Memorandum in Response to Applicant's Motion for Protective Order electronically filed by Mr. Jack A Van Kley on behalf of Union Neighbors United and Johnson, Julia Ms. and McConnell, Robert Mr. and McConnell, Diane Ms.