BEFORE
THE OHIO POWER SITING BOARD

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

BRATENAHL RESIDENTS' RESPONSE TO APPLICANT'S MOTION FOR A PROTECTIVE ORDER REGARDING STAFF'S FIFTH SET OF INTERROGATORIES

I. INTRODUCTION

On June 11, 2018, Applicant Icebreaker Windpower, Inc. ("Icebreaker") submitted its responses to Board Staff's Fifth Set of Interrogatories. Pursuant to O.A.C. 4906-2-21, Icebreaker asserted that information being submitted in response to four of those interrogatories constituted "trade secrets" and therefore submitted that information under seal. Icebreaker also moved the Board for a protective order asking that the such information "be maintained as 'confidential-attornys' eyes only.'" Motion for Protective Order at 3-4.[1] Bratenahl residents W. Susan Dempsey, Robert M. Maloney, Gregory Binford, and Leon Blazey, Jr. (together, the "Bratenahl Residents") hereby submit this response to Icebreaker's motion.

II. ARGUMENT

"In determining whether to grant a protective order, a trial court must balance the competing interests to be served by allowing discovery to proceed against the harm which may result." *Arnold v. American Nat'l Red Cross*, 93 Ohio App.3d 564, 576 (8th Dist. 1994) (citation omitted). "'In Ohio, the burden of showing that testimony or documents are confidential or privileged rests upon the party seeking to exclude it." A claim of privilege 'must rest upon some

[1]Icebreaker also noted that it intends to amend its February 1, 2017 Motion for Protective Order to specifically request the same "confidential-attorneys' eyes only" designation for portions of its Application.

specific constitutional or statutory provision.'" *Hope Academy Broadway Campus v. White Hat Management, LLC*, No. 12AP-116, 2013-Ohio-911 at ¶23 (10th Dist.) (citations omitted), *appeal not accepted,* 136 Ohio St.3d 1452, 2013-Ohio-3210.

Pursuant to O.A.C. 4906-2-21(D), the Board "may issue any order which is *necessary* to protect the confidentiality of information contained in [a document filed with the Board], *to the extent that state or federal law prohibits release of the information* . . . ." O.A.C. 4906-2-21(D) (emphasis added). The Board's rule requires that two preconditions be met prior to the issuance of a protective order shielding claimed "trade secrets" from public disclosure:

> The information is deemed by the board or administrative law judge 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.

Id. See also Civ.R.26(C)(7). And significantly, the rule expressly provides that "[a]ny order issued under this paragraph *shall minimize the amount of information protected from public disclosure*." O.A.C. 4906-2-21(D) (emphasis added). See also *In re Application of Icebreaker Windpower, Inc.*, No. 16-1871-EL-BGN, slip op at 9, ¶23 (May 23, 2018) ("[A]ny order issued under Ohio Adm.Code 4906-2-21 should minimize the amount of information protected from public disclosure.").

Icebreaker asserts that information that is the subject of its present Motion for Protective Order constitutes "trade secrets." Under Ohio law:

> "[t]rade 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). "[A] party seeking trade secret protection bears the burden to identify and demonstrate that the material falls within the categories of information protected under the statute." *Hope Academy Broadway Campus*, 2013-Ohio-911 at ¶24 (citation omitted).

> The Supreme Court of Ohio has adopted factors that must be considered in determining a trade secret claim, including the precautions taken to guard the secrecy of the information, the amount of effort or money expended in obtaining and developing the information, and the amount of time and expense it would take for others to duplicate the information. Although the factors outlined in the *Plain Dealer* decision do not directly apply here, they demonstrate that *a party seeking to avoid discovery based on a claim of confidential or proprietary information bears a heavy burden.*

Hope Academy Broadway Campus, 2013-Ohio-911 at ¶24 (citing *State ex rel. Plain Dealer v. Ohio Dep't of Ins.*, 80 Ohio St.3d 513, 525-26 (1997)) (emphasis added).

Courts—and the Board—have "broad authority to fashion a protective order that protects the secrecy of a trade secret." *Alpha Benefits Agency, Inc. v. King Ins. Agency, Inc.*, 134 Ohio App.3d 673, 683 (8th Dist. 1999). However, "[a]lthough confidential, trade secret information is not absolutely privileged. The disclosure of such information in discovery is contemplated both by Civ.R. 26(C) and by R.C. 1333.65, provided its secrecy is preserved." *Armstrong v. Marusic*, No. 2001-L-232, 2004-Ohio-2594 at ¶23 (11th Dist.) (citing *Svoboda v. Clear Channel Communications, Inc.*, No. L-02-1149, 2003-Ohio-6201 at ¶4 (6th Dist.)). The Board must "balance [a party's] need for the information with the potential harm to [opposing parties] resulting from disclosure of their trade secrets." *Alpha Benefits Agency, Inc.*, 134 Ohio App.3d at 682.

"General allegations" that the release of claimed trade secret information "would result in harm [are] insufficient to establish good cause for a protective order. *Hope Academy Broadway Campus*, 2013-Ohio-911 at ¶32 (citation omitted). "When weighed against the interest of the public in maintaining open forums, these general assertions of harm [are] insufficient to justify a protective order." *Id.* (citation omitted).

In this case, Icebreaker has failed to establish that the material it seeks to shield from public disclosure constitutes a trade secret. It has merely made general allegations that the financial information for which it seeks a protective order is "unique and has not yet been produced by any other business in the industry," Motion for Protective Order at 6, and that it would face an "undue competitive disadvantage that would result from public disclosure of confidential Icebreaker Wind Project-specific development data." *Id* at 6-7. Such generalities are insufficient to outweigh the interests of the public in the disclosure of information regarding a project that the Board has called "precedent-setting." *In re Application of Icebreaker Windpower, Inc.*, No. 16-1871-EL-BGN, slip op at 1, ¶4 (Oct. 23, 2017). All of the people of the Ohio, and not just the counsel for the parties in this proceeding, should have access to basic financial information for a project that may ultimately alter the environment and seascape of one of the state's primary natural resources—Lake Erie—and significantly affect the future cost of their electricity. Quite simply, Icebreaker has failed to satisfy its heavy burden of showing that the information it seeks to keep confidential is entitled to trade secret protection.

Even if some of the information Icebreaker seeks to keep confidential can be considered confidential trade secrets, the Board must fashion a protective order that does not prevent or hinder parties to this proceeding from establishing their cases. When addressing a request to maintain the confidentiality of claimed trade secrets, the Board must "fashion[ ] an appropriate

protective order that would allow [a party] to make its case . . . while still protecting [the opposing party's] trade secrets." *Alpha Benefits Agency, Inc.*, 134 Ohio App.3d at 682. In this regard, the Board may "limit the persons who have access to the [disclosed] information . . . ." *Alpha Benefits Agency, Inc.*, 134 Ohio App.3d at 683. See also *Speece v. Speece*, No. 2016-G-0100, 2017-Ohio-7950 at¶27 (11th Dist.) (noting that limiting access to opposing party, her attorney, *and her expert witness* adequately protected claimed trade secrets); *Blackburn v. Coon Restoration and Sealants, Inc.*, No. 2006-CA-0037, 2007-Ohio-558 at ¶8 (5th Dist.) (affirming issuance of protective order that allowed release of trade secret information to counsel *and expert witness*); *Armstrong*, 2004-Ohio-2594 at ¶23 (affirming trial court's rejection of request for a protective order limiting information disclosed to "attorney' eyes only" because it was "impractical").

In its Motion, Icebreaker has asked the Board to designate the claimed trade secret information as "confidential-attorneys' eyes only." Motion for Protective Order at 3-4. It proceeds to explain that "[w]ith this designation, the financial information will only be provided to the attorneys for the intervenors, *as well as any expert witnesses* sponsored by the intervenors that will be testifying with regard to such financial matters." Motion for Protective Order at 8 (emphasis added). If the Board determines that some form of a protective order is appropriate, it must ensure—consistent with Icebreaker's representation—that such order provides access to the information by the parties' expert witnesses.

Such access will allow the parties to fully present evidence regarding all of the factors the Board must consider in ruling on a certificate application, see R.C. 4906.10(A), and particularly whether "the facility will serve the interests of electric system economy and reliability," R.C. 4906.10(A)(4), and whether "the facility will serve the public interest, convenience, and

necessity." R.C. 4906.10(A)(6). Only with such access can the Board ensure that "the evidentiary hearing will result in a much more robust record that the Board may consider in its ultimate determination regarding the application." *In re Application of Icebreaker Windpower, Inc.*, No. 16-1871-EL-BGN, slip op at 7, ¶19 (May 23, 2018).

III. CONCLUSION

For the foregoing reasons, the Bratenahl Residents respectfully urge the Board to deny Icebreaker's Motion for Protective Order, or in the alternative, to fashion a protective order that ensures that the Bratenahl Residents will be able to fully present their case by permitting access to any protected information by the Local Residents' expert witnesses.

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 also is being served upon the persons below via electronic mail on June 25, 2018.

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Summary: Response BRATENAHL RESIDENTS' RESPONSE TO APPLICANT'S MOTION FOR A PROTECTIVE ORDER REGARDING STAFF'S FIFTH SET OF INTERROGATORIES electronically filed by John F Stock on behalf of Dempsey, W. Susan and Maloney, Robert M. and Binford, Gregory and Blazey, Jr., Leon