

**BEFORE
THE OHIO POWER SITING BOARD**

In the Matter of the Application of Firelands Wind,)
LLC for a Certificate of Environmental Compatibility)
and Public Need to Construct a Wind-Powered) Case No: 18-1607-EL-BGN
Electric Generation Facility in Huron and Erie)
Counties, Ohio.)

**MOTION FOR PROTECTIVE ORDER REGARDING FIRELANDS WIND, LLC'S
RESPONSES TO THE SIXTH DATA REQUEST
FROM THE STAFF OF THE OHIO POWER SITING BOARD
AND MEMORANDUM IN SUPPORT**

Pursuant to Rule 4906-2-21(D) of the Ohio Administrative Code (“O.A.C.”), Firelands Wind, LLC (“Applicant” or “Company”) respectfully moves the Ohio Power Siting Board (“Board”) for a protective order to keep certain portions of its response to the OPSB Staff’s Sixth Data Request (“Data Request”) confidential and not part of the public record.

First, Attachment 1 to the Data Request contains confidential financial information that was included in the JEDI model, which was used to evaluate the economic impact of the Project in Exhibit F of the Application that was filed on January 31, 2019. Portions of the Narrative to the Application, as well as Exhibit F – the report assessing the socioeconomic impact of the Project - were filed under seal to protect this information. Likewise, the information in Attachment 1 and proposed for redaction herein is from that analysis and is confidential financial information.

Second, information in questions 27-29 of the Data Request comes from the Nordex Safety Manuals that have been filed under seal in this proceeding as part of Exhibit N to the January 31, 2019 Application, as well as Attachments 4 and 5 of the Applicant’s Third Supplement to the Application filed on July 10, 2019. This information is sensitive and is not

publicly available. As such, a portion of the information set forth in these questions has been submitted under seal to preserve its confidentiality.

An explanation of the reasons supporting this motion is detailed in the attached Memorandum in Support. Consistent with the practice of the Board, an unredacted copy of the confidential information in Attachment 1 and questions 27-29 have been submitted to the Docketing Division under seal.

Accordingly, the Applicant respectfully moves for a protective order to keep confidential information contained in this Attachment 1 and questions 27-29, which were provided in response to the Data Request.

Respectfully submitted,

/s/ Christine M.T. Pirik

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

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 wind-powered electric generation facility (“Project” or “Facility”) in Huron and Erie Counties, Ohio (the “Application”) on January 31, 2019, which was supplemented on March 18, 2019, April 11, 2019, July 10, 2019, and September 12, 2019, as revised on October 4, 2019.

The Applicant filed, this same day, a response to OPSB Staff’s Sixth Data Request, which included, as Attachment 1, a breakdown of the financial information contained in the JEDI model used for the analysis of the economic review in Exhibit F to the Application. In addition, a portion of the information in questions 27-29 of the Data Request refers to information contained in the Nordex Safety Manuals that have been filed under seal in this proceeding as part of Exhibit N to the Application, as well as Attachments 4 and 5 of the Applicant’s Third Supplement to the Application.

The information in the JEDI document and the Nordex manuals 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, the Applicant requests a protective order covering portions of Attachment 1 of the response to the Data Request and portions of questions 27-29 of the Data Request. In light of the highly sensitive, trade secret information contained in the attachment and questions, the Applicant submits that the information must be

kept confidential and not be made part of the public record. Therefore, the Applicant has submitted portions of the attachment and questions under seal to maintain their confidentiality.

II. PROJECT BACKGROUND

The Applicant is proposing to construct a wind-powered electric generation Facility of up to 297.66 megawatts, located in Erie and Huron Counties, Ohio. The general purpose of the Facility is to produce wind-powered electricity that will maximize energy production from wind resources in the Project area in order to deliver clean, renewable electricity to the Ohio bulk power transmission system—serving the needs of electric utilities and their customers.

III. LEGAL AUTHORITY

The O.A.C. 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 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 R.C. 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.

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); *Hardin Solar Energy, LLC*, Case No. 17-773-EL-BGN, Entry (Feb. 20, 2018); *Vinton Solar Energy, LLC*, Case No. 17-774-EL-BGN, Opinion and Order (Sept. 20, 2018); *Paulding Wind Farm IV LLC*, Case No. 18-91-EL-BGN, Opinion and Order (Feb. 21, 2019).

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. In addition, all of the confidential and sensitive information contained in portions of questions 27-29 of the Data Request 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 O.A.C.

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).

A. Attachment 1 – Financial Information

The confidential financial information contained in the JEDI model 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 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, if this information were made available to the public, the time and money expended for purposes of developing the Application would be unfairly bestowed on competitors. Other developers seeking to compete with the Applicant and build similar projects would gain the benefit of the Applicant's methodologies without having to undertake the enormous effort and expense incurred by the Applicant to generate the information. This would give competitors an unfair advantage at the expense of the Applicant. As such, the final three factors of Ohio's trade secret test have been met in this case.

B. Data Request Questions 27-29

As stated previously, a portion of the information in questions 27-29 of the Data Request refers to information contained in the Nordex Safety Manuals that have been filed under seal in this proceeding as part of Exhibit N to the Application, as well as Attachments 4 and 5 of the

Applicant's Third Supplement to the Application. The Nordex turbine models represent brand new technology developed by the wind turbine manufacturer. To date, the manufacturer has not released any public information / data pertaining to this new technology. Therefore, the information contained in the Nordex Safety Manual is, therefore, unique, not having been produced by any other business in the industry. The very nature of the manual demonstrates the undue competitive disadvantage that would result from public disclosure of such highly coveted and confidential information, including the information referenced in questions 27-29 of the Data Request.

Further, the manufacturer provided this information to the Applicant on a confidential basis. This information is, therefore, being submitted under seal to maintain its confidentiality. The information in questions 27-29 of the Data Request is not publicly available and the Applicant has agreed with the manufacturer to protect it from public disclosure. The manufacturer has devoted great time and expense to develop the Manual and the information contained therein—public disclosure would give its competitors an undue competitive advantage.

Moreover, disclosure of this information is also not likely to assist the Board in carrying out its duties, considering the Board staff can view the unredacted version placed under seal. Disclosure would similarly not serve any other public policy.

The Board, in addressing the issue of confidential information in wind turbine manuals, has contemplated that applicants may need to submit manuals from wind turbine manufacturers under seal, consistent with the Board's rules. See *Power Siting Board Requirements for Elec. 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.

V. CONCLUSION

For the foregoing reasons, the Applicant requests that the Board or the ALJ grant its motion for a protective order to maintain the information contained the Manual requested in the OPSB Staff's Sixth Data Request as confidential and not subject to public disclosure.

Respectfully submitted,

/s/ Christine M.T. Pirik

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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 these cases. In addition, the undersigned certifies that a copy of the foregoing document is also being served upon the persons below this 10th day of February 2020.

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Summary: Motion for Protective Order regarding Fireland Wind, LLC's Responses to the Sixth Data Request from the Staff of the Ohio Power Siting Board and Memorandum in Support electronically filed by Christine M.T. Pirik on behalf of Firelands Wind, LLC