

FILE

BEFORE
THE OHIO POWER SITING BOARD

In the Matter of the Application of)
Palomino Solar, LLC for a Certificate of)
Environmental Compatibility and Public)
Need)

Case No. 21-0041-EL-BGN

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MOTION FOR A PROTECTIVE ORDER OF PALOMINO SOLAR, LLC AND
MEMORANDUM IN SUPPORT

Pursuant to Rule 4906-2-21 of the Ohio Administrative Code ("OAC"), Palomino Solar, LLC ("Palomino Solar") moves the Ohio Power Siting Board (the "Board") for a protective order to keep the following portions of its Application confidential and not part of the public record: the cost-related information on pages 30-32 of the Application narrative and pages 19-21 of Exhibit E to the Application (the Socioeconomic Report); Exhibit A to the Application (manufacturer's equipment specifications); and all disclosures set forth in Exhibit N to the Application (the Cultural Resources Survey Report).

The information that is requested to be treated as confidential consists of: total estimated capital and intangible costs of the project, present worth of the capital costs, the estimated annual staffing and operation and maintenance ("O&M") cost of the project for the first two years of commercial operation, and present worth of the O&M cost. Palomino Solar also seeks protection of Exhibit A (manufacturer's equipment specifications), which details the specific inverter equipment, solar panels, and array tracking systems under consideration for the proposed project. Last, Palomino Solar seeks confidential treatment of all disclosures set forth in Exhibit N, which is the Cultural Resources Survey Report.

Palomino Solar believes that public disclosure of this confidential and sensitive information will have an adverse effect on it and others. Palomino Solar therefore moves for a protective order to keep the cost-related information on pages 30-32 of the Application narrative

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and pages 19-21 of Exhibit E to the Application (the Socioeconomic Report), Exhibit A to the Application (manufacturer's equipment specifications), and all disclosures set forth in Exhibit N (the Cultural Resources Survey Report) as confidential and not part of the public record. Explanation of the reasons supporting this motion is detailed in the attached Memorandum in Support. Pursuant to OAC 4906-2-21(D), three unredacted confidential copies of the cost-related information on pages 30 -32 of the Application narrative and pages 19-21 of Exhibit E to the Application (the Socioeconomic Report), Exhibit A to the Application (manufacturer's equipment specifications), and Exhibit N (the Cultural Resources Survey Report) are being submitted separately under seal in this proceeding.

Respectfully submitted,

/s/ Kodi Jean Verhalen

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MEMORANDUM IN SUPPORT OF MOTION FOR PROTECTIVE ORDER

Palomino Solar has submitted the cost-related information on pages 30-32 of the Application narrative and pages 19-21 of Exhibit E to the Application (the Socioeconomic Report), Exhibit A to the Application (manufacturer's equipment specifications), and Exhibit N (the Cultural Resources Survey Report) under seal and requests that this information be protected from public disclosure. The three pages of the Application narrative and the three pages of Exhibit E to the Application (the Socioeconomic Report) contain highly sensitive cost-related information, namely total estimated capital and intangible costs of the project, present worth of the capital costs, the estimated annual staffing and O&M cost of the project for the first two years of commercial operation, and present worth of the O&M cost. Disclosure of this financial information would provide Palomino Solar's competitors (and others in the industry) with details of its business operations, to the advantage of its competitors.

Exhibit A to the Application (manufacturer's equipment specifications) contains details the specific inverter equipment, solar panels, and array tracking systems under consideration for the proposed project. Disclosure of this information would give Palomino Solar's competitors the equipment details and key information from which to readily discern Palomino Solar's estimated costs of the proposed project as well as its selection of equipment it believes will result in a successful project. Also, as affirmed by Palomino Solar's Managing Director in the affidavit attached to this motion, disclosure of the equipment information in Exhibit A (manufacturer's equipment specifications) would put Palomino Solar at a competitive disadvantage vis-à-vis its competitors who may not be as far along in the development process or are responding to requests for power off-take proposals that require pricing (because that pricing can hinge on the manufacturer and equipment models selected for a project). Thus, Exhibit A (manufacturer's

equipment specifications) has specific economic value and competitive value from not being disclosed or generally known to Palomino Solar's competitors at this time.

Exhibit N (the Cultural Resources Survey Report) contains details of archeological sites and finds in and around the project area. Palomino Solar filed this exhibit under seal to protect the archeological sites/finds, deter unauthorized field investigations, and protect the resources and locational information in the report. The Board should grant confidential treatment of Exhibit N (the Cultural Resources Survey Report) to protect the archeological sites/finds and information in the study area for these fundamental policy reasons. Notably, several federal laws seek to protect and limit harm to archeological resources on federal land and American Indian sacred sites for these same reasons. *See* 16 U.S.C. § 470hh; 54 U.S.C. § 307103; 36 C.F.R. § 296.18; 43 C.F.R. § 7. Likewise, other state laws and guidelines restrict public disclosure of archeological site information for similar reasons. *See, e.g.,* New Hampshire RSA 227-C:11; *Cultural Resources Confidentiality Guidelines*, Alaska Department of Transportation and Public Facilities, https://dot.alaska.gov/stwddes/desenviron/assets/pdf/resources/cultural_resources_confidentiality_guidelines.pdf (Feb. 15, 2015).

In sum, revealing the cost-related information and the equipment information in a publicly filed document would provide Palomino Solar's competitors and others with a competitive advantage. Also, disclosing the archeological sites/finds information will disclose sensitive information and unnecessarily risk harm in those areas. Therefore, Palomino Solar seeks a protective order under OAC 4906-2-21 to keep the above-identified information confidential. OAC 4906-2-21(D) provides, in pertinent part, that:

Upon 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 administrative law judge 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 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.

The non-disclosure of the above information in the Application will not impair the purposes of Title 49. The Board and its Staff have full access to the information in order to fulfill the statutory obligations. Furthermore, no purpose of Title 49 would be served by the public disclosure of the information sought to be protected.

State law recognizes the need to protect the types of information that are the subject of this motion. Ohio Revised Code ("ORC") 1331.61 to 1333.69. The need to protect the designated information from public disclosure in this case is clear, and there is compelling legal authority supporting the requested protective order. 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.

ORC 1331.61(D) (emphasis added). This definition clearly reflects Ohio's policy favoring the protection of trade secrets such as the information which is the subject of this motion.

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, a trade secrets statute creates a duty to protect them. *New York Tel. Co. v. Public Service Com.*, 56 N.Y.2d 213

(1982). Indeed, for the Board to do otherwise would be to negate the protections the Ohio General Assembly has granted to all businesses, including public utilities, through the Uniform Trade Secrets Act.

In *State ex rel. Plain Dealer v. Ohio Dep't of Ins.*, 80 Ohio St. 3d 513 (1997), the Ohio Supreme Court adopted the six-factor test set forth in *Pyromatics, Inc. v. Petruziello*, 7 Ohio App. 3d 131, 134-35 (1983). The 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.

Applying these factors to the information that Palomino Solar seeks to keep confidential, it is clear that the information for which it seeks protective treatment has independent economic value, is the subject of reasonable efforts to maintain its secrecy, and meets the six-factor test set forth above. First, its estimated cost information is generally not disclosed, and it constitutes a trade secret. The attached affidavit, executed by Palomino Solar's Managing Director, affirms that Palomino Solar does not publicly disclose cost information about its projects, and its disclosure would harm Palomino Solar. In addition, this Board or its Administrative Law Judge has previously concluded that estimated project costs are trade secret information. *See, e.g., Ross County Solar, LLC*, Case No. 20-1380-EL-BGN, Entry, ¶ 17 (Jan. 20, 2021); *Big Plain Solar, LLC*, Case No. 19-1823-EL-BGN, Entry, ¶ 12 (July 7, 2020); *Hillcrest Solar I, LLC*, Case No. 17-1152-EL-BGN, Opinion, Order, and Certificate, ¶ 19 (Feb. 15, 2018); *North Coast Gas Transmission LLC*, Case No. 14-1754-GA-BLN, Entry, ¶ 3 (Dec. 30, 2014). A similar conclusion should be reached in this matter.

Second, the equipment information under consideration and reflected in Exhibit A (manufacturer's equipment specifications) is also trade secret information. As reflected in the affidavit of Palomino Solar's Managing Director attached to this motion, disclosure of the equipment details allows competitors to readily discern Palomino Solar's estimated costs of the proposed project. The disclosure of the equipment details will also provide Palomino Solar's competitors a roadmap for the equipment selections that Palomino Solar believes will lead to an economically successful project. While Palomino Solar's competitors may eventually learn of the actual equipment utilized at the site, and while general information on equipment may be publicly available on the internet, the summary of the equipment that may be used (types of panels, type of array tracking system, and type of inverter) is a competitive trade secret that warrants protection at this time. The Board should not allow competitors the opportunity to gain access to trade secret through a secondary means.

Third, the Board should protect the archeological sites/finds information in Exhibit N (the Cultural Resources Survey Report). Protective treatment will allow the Board and Staff to examine the information without risk of harm to the archeological sites/finds. The Board should maintain Exhibit N (the Cultural Resources Survey Report) under seal as the disclosure of this information could give competitors of Palomino Solar an undue advantage or risk harm to archeological sites/finds. At the same time, public disclosure of this information is not likely to either assist the Board in carrying out its duties under the rules or serve any other public policy.

For the above reasons, Palomino Solar requests that the Board grant its motion for protective order to maintain the cost-related information on pages 30-32 of the Application narrative and pages 19-21 of Exhibit E to the Application (the Socioeconomic Report), Exhibit A to the Application (manufacturer's equipment specifications), and Exhibit N (the Cultural

Resources Survey Report) under seal and requests that this information be protected from public disclosure.

Respectfully submitted,

/s/ Kodi Jean Verhalen

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*Counsel willing to accept service via electronic mail

CERTIFICATE OF SERVICE

I certify that the foregoing was filed electronically through the Docketing Information System of the Public Utilities Commission of Ohio on September 24, 2021. The Public Utilities Commission of Ohio's e-filing system will electronically serve notice of the filing of this document on counsel for all parties.

s/ Kodi Jean Verhalen

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AFFIDAVIT


STATE OF DELAWARE)
COUNTY OF SUSSEX) SS:

I, David Little, Managing Director of Palomino Solar, LLC and an officer of Palomino Solar, LLC, being duly sworn and cautioned, state that I am over 18 years of age and competent to testify to the matters stated in this affidavit and further state the following based upon my personal knowledge:

1. I am the Managing Director of Palomino Solar, LLC ("Palomino Solar"), and I have been authorized to make this affidavit on behalf of Palomino Solar.
2. I have personal knowledge of the cost information contained in Palomino Solar's Application in this proceeding, specifically pages 30-32 of the Application narrative and pages 19-21 of Exhibit E to the Application (the Socioeconomic Report).
3. The total estimated capital and intangible costs of the project, present worth of the capital costs, the estimated annual staffing and operation and maintenance ("O&M") cost of the project for the first two years of commercial operation, and present worth of the O&M cost is information that is restricted to only those employees with a need to have such knowledge, is information for which Palomino Solar and its parent, Innergex Renewable Energy, Inc., take multiple steps to maintain its secrecy, and is information that is not disclosed to competitors.
4. The above-referenced cost information has specific economic value from not being generally known, and particularly from not being known by competitors.
5. Public disclosure of the inverter equipment, solar panels, and array tracking systems under consideration as contained in Application Exhibit A (manufacturer's equipment specifications) will allow competitors the ability to derive Palomino Solar's estimated

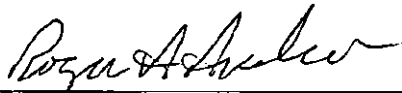
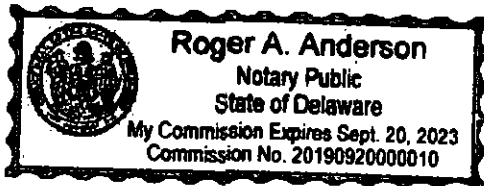
costs for the proposed project. In addition, disclosure of that information will inform competitors of Palomino Solar's collective equipment selections that can assist competitors in accelerating their project development as well as competing against Palomino Solar in responses to requests for proposals on power purchase agreements and the pricing of power off-take.

6. The above is true, to the best of my knowledge and information and belief.



David Little
Managing Director
Palomino Solar, LLC

Sworn to before me and signed in my presence this 23 day of September, 2021.



Notary Public

Printed Name: ROGER A ANDERSON

Commission Expires: 20 SEPT 2023