

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. 21-41-EL-BGN

ENTRY

Entered in the Journal on April 18, 2022

{¶ 1} Palomino Solar, LLC (Palomino or Applicant) is a person as defined in R.C. 4906.01.

{¶ 2} R.C. 4906.04 provides that no person shall construct a major utility facility in the state without first obtaining a certificate from the Ohio Power Siting Board (Board). In seeking a certificate, applicants must comply with the filing requirements outlined in R.C. 4906.06, as well as Ohio Adm.Code Chapters 4906-2 through 4906-4.

{¶ 3} Ohio Adm.Code 4906-3-03(B) requires an applicant, no more than 90 days prior to submitting a standard certificate application, to conduct at least one informational meeting that is open to the public and held in the area in which the project is to be located. Further, Ohio Adm.Code 4906-3-03(B)(2)(b) specifies that, at least 21 days before the informational meeting, the applicant shall send a letter that, among other things, provides notice of the meeting to designated property owners and affected tenants, including those who are contiguous to the planned site of the proposed facility.

{¶ 4} On March 9, 2020, the governor signed Executive Order 2020-01D (Executive Order), declaring a state of emergency in Ohio to protect the well-being of Ohioans from the dangerous effects of COVID-19. As described in the Executive Order, state agencies are required to implement procedures consistent with recommendations from the Ohio Department of Health (ODH) to prevent or alleviate the public health threat associated with COVID-19. Additionally, all citizens are urged to heed the advice of ODH regarding this public health emergency in order to protect their health and safety. ODH is making COVID-

19 information, including information on preventative measures, available via the internet at coronavirus.ohio.gov/.

{¶ 5} On January 14, 2021, Palomino filed a motion for waiver and request for an expedited ruling. Palomino stated that it will propose to construct a solar-powered electric generating facility in Highland County, Ohio (the Project). Palomino further stated that it sought a waiver of the requirement in Ohio Adm.Code 4906-3-03(B) to hold a preapplication public informational meeting in the area in which the Project is located, in light of the ongoing COVID-19 pandemic and orders issued by ODH. In lieu of holding an in-person public informational meeting in the area of the Project, Palomino proposed an alternative approach that included, among other things, an interactive virtual meeting to allow the public to learn about the Project and ask questions of Palomino's representatives.

{¶ 6} By Entry dated January 29, 2021, the administrative law judge (ALJ), upon consideration of the unique circumstances of this case and the state of emergency, granted Palomino's motion for waiver.

{¶ 7} On March 24, 2021, Palomino filed proof of notice of its virtual public informational meeting, which was held on March 9, 2021.

{¶ 8} On April 2, 2021, Palomino filed a motion requesting a waiver of the requirement in Ohio Adm.Code 4906-3-03(B)(2)(b) that a letter describing the certification process be sent to each property owner and affected tenant contiguous to the planned site of the proposed facility. Through its waiver, Palomino sought permission to remedy an inadvertent omission that occurred with respect to its February 5, 2021 notification letter by using an alternative approach that Palomino claims is designed to achieve substantial compliance with the rule's requirement.

{¶ 9} On April 21, 2021, the ALJ determined that Palomino failed to show good cause for its request and that the motion for partial waiver of the requirements in Ohio Adm.Code 4906-3-03(B)(2)(b) should be denied. Although Palomino indicated that the error

was unintentional, the ALJ found that the exclusion of 49 property owners or tenants was nonetheless significant and that Palomino's proposed remedial plan did not constitute substantial compliance with the rule's requirements. Accordingly, Palomino was directed to schedule and conduct a second public informational meeting and provide a notification letter to each property owner and affected tenant in accordance with Ohio Adm.Code 4906-3-03.

{¶ 10} Palomino filed a preapplication notification letter on February 19, 2021, and also filed a second preapplication notification letter on June 11, 2021. In the second letter, Palomino explained that construction of the proposed 200 megawatt solar-powered electric generation facility is estimated to begin in the second quarter of 2022, resulting in commercial operations by the end of 2023.

{¶ 11} On July 12, 2021, Palomino filed proof of notice of its in-person and virtual public informational meeting, which was held on June 28, 2021.

{¶ 12} On September 24, 2021, Palomino filed an application (Application) with the Board for a certificate of environmental compatibility and public need to construct the Project.

{¶ 13} On September 24, 2021, Palomino filed a motion for waivers of Ohio Adm.Code 4906-4-08(D)(2) and (D)(4) to allow for a reduced study area regarding the review of landmarks and visual impacts of the Project.

{¶ 14} Ohio Adm.Code 4906-4-08(D)(2) requires an applicant to provide an evaluation of the impact of the proposed facility on the preservation and continued meaningfulness of mapped landmarks within a ten-mile radius of the project area and describe plans to avoid or mitigate any adverse impact. Ohio Adm.Code 4906-4-08(D)(4) requires an applicant to evaluate the visual impact of the proposed facility within a ten-mile radius from the project area.

{¶ 15} In support of its motion for waiver of the above rules, Palomino states that it conducted a cultural resource review within a two-mile study area of the proposed Project, and it evaluated visual impacts from the proposed Project to a distance of five miles. Palomino states that a field architectural survey was conducted, and, as reflected in the Historical Architectural Reconnaissance Survey (Exhibit O), the area of potential effects is only a 0.5-mile radius around the Project area. Further, due to the Project's low profile and the screening afforded by vegetation and existing structures, the visibility of the planned components is anticipated to be limited to the immediate vicinity of the Project, which is well under the five-mile visual impact study area. Palomino reiterates that no impacts caused by the proposed Project are expected, both within and beyond the respective study area. Palomino also claims that the Board granted similar waiver requests in *In re Ross County Solar, LLC*, Case No. 20-1380-EL-BGN, Entry (Jan. 20, 2021); *In re Yellowbud Solar, LLC*, Case No. 20-972-EL-BGN, Entry (July 9, 2020); *In re Angelina Solar I, LLC*, Case No. 18-1579-EL-BGN, Entry (Jan. 17, 2019); and *In re Willowbrook Solar I, LLC*, Case No. 18-1024-EL-BGN, Entry (Oct. 4, 2018). Therefore, Palomino requests waiver of Ohio Adm.Code 4906-4-08(D)(2) and (D)(4) to allow for the more focused study area rather than a ten-mile study area.

{¶ 16} No party filed a document opposing Palomino's request for waivers.

{¶ 17} Ohio Adm.Code 4906-4-01(B) provides that the Board may waive any provisions in Ohio Adm.Code Chapter 4906-4 upon an application or a motion filed by a party, other than a requirement mandated by statute.

{¶ 18} Upon consideration of Palomino's request for waivers, the ALJ finds that good cause exists to grant Applicant's request for a waiver of Ohio Adm.Code 4906-4-08-(D)(2) and (D)(4). However, should Staff determine that information regarding areas covered by the requested waiver is necessary for its investigation of the Application, Palomino is expected to comply with any resulting requests for information from Staff.

{¶ 19} Also on September 24, 2021, Applicant filed a motion for a protective order to keep the cost-related information on pages 30-32 of the Application narrative; pages 19-21 of Exhibit E, which is the Socioeconomic Report; Exhibit A, which is the manufacturer's equipment specification; and all disclosures in Exhibit N, which is the Cultural Resources Survey Report, confidential and not part of the public record. Applicant asserts that the information it seeks to protect consists of estimated capital and intangible costs of the Project, present capital costs, estimated operation and maintenance (O&M) costs for the first two years of operation, and present O&M cost. Applicant states that disclosure of the socioeconomic information would have a harmful effect on its ability to compete in the marketplace. Applicant states that the information it seeks to protect meets the definition of a trade secret under Ohio law. Palomino also argues that the information it seeks to protect in Exhibit A includes specific inverter equipment, solar panels, and array tracking systems under consideration for the Project. Applicant argues that disclosure of the information would give its competitors key information about the Project and would put Palomino at a competitive disadvantage, thus the information has economic value and competitive value. Applicant argues that even though its competitors could eventually learn of the equipment utilized at the site, the summary of proposed equipment is a competitive trade secret at this time. Palomino also states that it seeks confidential treatment of disclosures in the Cultural Resources Survey Report, Exhibit N. Applicant believes that keeping this information confidential will protect the archeological sites/finds, deter unauthorized field investigations, and protect the resources and locational information in the report. Applicant also identifies various federal and state laws that are intended to restrict public disclosure of archaeological site information. Contemporaneous with its motion, Palomino filed the information under seal.

{¶ 20} On October 13, 2021, Staff filed a memorandum contra the motion for protective order. Staff states that it does not object to the protection of the cost-related information but does object to keeping confidential the information in Exhibit A, which is the manufacturer's equipment specification, and all disclosures in Exhibit N, which is the

Cultural Resources Survey Report. As to Exhibit A, Staff asserts that the manufacturer's equipment specifications are all publicly available and should not receive confidential treatment. Staff emphasizes that records are presumed to be public absent an exemption under the Public Records Act. Staff explains that the equipment in Exhibit A includes a representative group of equipment the Applicant is considering using for the Project, so it would not give Applicant's competitors an advantage. On the other hand, Staff argues that the public has an interest in the equipment information, which could affect how much equipment the Project requires, product lifetime, degradation data, dimensions, safety class, fire rating, bifaciality, efficiency, snow load, wind load, and product certifications. Staff also asserts that the manufacturer specifications of the solar panels, inverters, plans of solar projects are routinely submitted as part of the public record in proceedings before the Board. As to Exhibit N, Staff notes that there is no confidential information to protect because the document does not include a disclosure of any archaeological sites. Staff explains that while sites have been identified, no specific site is identified in Exhibit N, so the Applicant should seek protection of the site information once the final survey report is filed.

{¶ 21} On October 20, 2021, Palomino filed a reply in support of its motion for protective order. Applicant stated that since filing the Application, it has determined that the information in Exhibit A, the manufacturer's equipment specifications, could be released into the public record and no longer seeks confidential treatment of the exhibit. Additionally, Applicant stated that it has determined that the information in Exhibit N, the Cultural Resources Survey Report, can be released into the public record. Concurrently, Palomino filed Exhibit A and Exhibit N in the public docket. Palomino also reasserts its motion for confidential treatment of the cost-related information on pages 30-32 of the Application narrative and pages 19-21 of Exhibit E, which is the Socioeconomic Report.

{¶ 22} On January 14, 2022, Palomino filed another motion for protective order. In its motion, Palomino seeks a protective order for its revised Exhibit N to its first supplement to the Application. Palomino also states that it seeks confidential treatment of the Phase I Archaeological Reconnaissance Report, revised Exhibit N. Applicant believes that keeping

this information confidential will protect the archeological sites/finds, deter unauthorized field investigations, and protect the resources and locational information in the report. Applicant also identifies various federal and state laws that are intended to restrict public disclosure of archaeological site information. Palomino also cites to other cases in which the Board has granted a motion for protective order for sensitive archaeological information. *See Dodson Creek Solar, LLC*, Case No. 20-1814-EL-BGN, Entry, ¶ 24 (Sept. 14, 2021); *Sycamore Creek Solar, LLC*, Case No. 20-1762-EL-BGN, Entry, ¶¶ 13-14 (July 15, 2021); *Juliet Energy Project LLC*, Case No. 20-1760-EL-BGN, Entry, ¶ 10 (Mar. 26, 2021). Contemporaneous with its motion, Applicant filed the information under seal.

{¶ 23} On February 2, 2022, Staff filed a letter stating that it does not oppose Applicant's motion for a protective order.

{¶ 24} Pursuant to Ohio Adm.Code 4906-2-21(D), the Board "may issue any order that is necessary to protect the confidentiality of information contained in [a] document, to the extent that state or federal law prohibits release of the information, including where it is determined that both * * * the information is deemed * * * to constitute a trade secret under Ohio law * * * and non-disclosure of the information is not inconsistent with the purpose of Title 49 of the Revised Code." To be designated a trade secret under R.C. 1333.61, financial information must both: (1) derive independent economic value from not being generally known to, or readily ascertainable by, other persons who can obtain economic value from its disclosure or use and (2) be subject to reasonable efforts under the circumstances to maintain its secrecy. R.C. 1333.61(D). Moreover, the Supreme Court of Ohio has established a six-part test to apply when analyzing a trade secret claim. *State ex rel. The Plain Dealer v. Ohio Dept. of Ins.*, 80 Ohio St.3d 513, 524-525, 687 N.E.2d 661 (1997). In addition to information deemed to be a trade secret, Ohio Adm.Code 4906-2-21(A)(7) empowers the Board to issue a protective order providing that other confidential research, development, commercial, or other information not be disclosed, or be disclosed only in a designated manner.

{¶ 25} The ALJ has examined the information filed under seal, as well as the assertions set forth in Applicant's memorandum in support of its motion for protective order. Applying the requirements discussed above, the ALJ finds that Applicant's motion should be granted in part and dismissed in part. Consequently, pages 30-32 of the Application narrative, pages 19-21 of Exhibit E, which is the Socioeconomic Report, and revised Exhibit N to the first supplement to the Application that Palomino filed under seal should be kept confidential and not subject to public disclosure. As to Palomino's requests for confidential treatment of Exhibit A and Exhibit N to the Application, Palomino withdrew those requests on October 20, 2021, and concurrently filed those unredacted documents in the public docket. Thus, those requests are dismissed.

{¶ 26} Ohio Adm.Code 4906-2-21(F) specifies that, unless otherwise ordered, a protective order issued under Ohio Adm.Code 4906-2-21(D) expires 24 months after the date of its issuance. Should Palomino wish to extend that 24-month period, it shall file an appropriate motion at least 45 days in advance of the expiration date. If no such motion is filed, the docketing division may release the information without prior notice.

{¶ 27} By letter dated October 18, 2021, the Board notified Palomino that its Application has been found not to comply with Ohio Adm.Code Chapters 4906-01, et seq. and lacks sufficient detail for Staff to begin its investigation and make recommended findings.

{¶ 28} Palomino supplemented its Application on January 14, 2022, and January 18, 2022.

{¶ 29} By letter dated March 15, 2022, the Board notified Palomino that its Application was compliant and provided sufficient information to permit Staff to commence its review and investigation.

{¶ 30} On March 16, 2022, Palomino filed a certificate of service of its accepted and complete Application as required by Ohio Adm.Code 4906-3-07.

{¶ 31} On March 30, 2022, Palomino filed proof that it submitted its application fee to the Treasurer of the State of Ohio as required by Ohio Adm.Code 4906-3-07.

{¶ 32} Ohio Adm.Code 4906-3-08(A) states that, once the applicant has complied with Ohio Adm.Code 4906-3-07, the Board or the ALJ shall file an entry indicating the date on which the accepted, complete application is deemed filed. Additionally, once the effective date is established, the ALJ must promptly fix the dates for public hearings. Under R.C. 4906.07(A), the public hearing must be held not less than 60 nor more than 90 days after the effective date.

{¶ 33} Therefore, the effective date of the Application shall be April 18, 2022. Petitions to intervene in this proceeding will be accepted by the Board up to 30 days following the service of the notice required by Ohio Adm.Code 4906-3-09 or by May 27, 2022, whichever is later.

{¶ 34} The local public hearing in this matter shall be held on June 29, 2022, at 5:00 p.m., at the Wharton Building of the Highland County Fairgrounds, 604 John Street #1030, Hillsboro, Ohio 45133. For those individuals interested in testifying at the local public hearing, a sign-in sheet will be available at the venue and witnesses will be taken in the order in which they sign up to testify; testimony should be limited to five minutes in duration. If individuals wish to supplement their testimony with an exhibit for the Board's consideration, a copy of the document should be provided to the ALJ before the end of the local public hearing. Further, all individuals should adhere to any pandemic measures put in place by the Highland County Fairgrounds. In this regard, Applicant should contact local health and safety authorities regarding the local public hearing to ensure the health and safety of all in attendance at this event.

{¶ 35} The evidentiary hearing will commence on July 13, 2022, at 10:00 a.m., at the offices of the Public Utilities Commission of Ohio (Commission), Hearing Room 11-C, 11th Floor, 180 East Broad Street, Columbus, Ohio 43215-3793. To participate in the hearing, parties and observers should register at the lobby desk and proceed to the 11th floor. Any

accommodations necessary to ensure the availability of social distancing and plexiglass dividers should be made in advance of the hearing. As pandemic restrictions continue to evolve, additional instructions regarding further safety requirements or accommodations for the hearing room will either be posted on the Commission/Board website or communicated to the parties.

{¶ 36} Palomino should issue public notice of the Application and scheduled hearings in accordance with Ohio Adm.Code 4906-3-09. Pursuant to the same rule, in addition to other required information, the notice should include the following statement: “Attendees at the local public hearing and the evidentiary hearing should follow the most recent CDC and/or local health authority guidelines. Please contact the legal department at 614-466-6843 to ask any questions or request accommodations related to health protocols.” In addition, the notice shall include a statement that the public hearings in this case shall consist of two parts and will be conducted in-person:

- (a) A local public hearing, pursuant to R.C. 4906.08(C), where the Board shall accept written or oral testimony from any person on June 29, 2022, at 5:00 p.m., at Wharton Building, Highland County Fairgrounds, 604 John Street #1030, Hillsboro, Ohio 45133.
- (b) An evidentiary hearing commencing on July 13, 2022, at 10:00 a.m., Hearing Room 11-C, at the offices of the Public Utilities Commission of Ohio, 180 East Broad Street, Columbus, Ohio 43215. The purpose of the evidentiary hearing is for Applicant, Staff, and any intervenors to provide evidence regarding the Application.

{¶ 37} Further, under R.C. 4906.06(C) and Ohio Adm.Code 4906-3-09, the initial notice shall include the following language:

Petitions to intervene in the evidentiary hearing will be accepted by the Board up to 30 days following service of the notice required by R.C.

4906.06(C) and Ohio Adm.Code 4906-3-09, or May 27, 2022, whichever is later. However, the Board strongly encourages interested persons who wish to intervene in the evidentiary hearing to file their petitions as soon as possible. Petitions should be addressed to Docketing Division, the Ohio Power Siting Board, 180 East Broad Street, Columbus, Ohio 43215-3793 with a reference to Case No. 21-41-EL-BGN.

{¶ 38} Applicant shall issue public notice of the hearings and Application in this matter. The notice should be published in newspapers of general circulation in those municipal corporations and counties in which the chief executive officer received service of a copy of the Application pursuant to Ohio Adm.Code 4906-3-07. The notice should be published with letters not less than ten-point type, bear the heading “Notice of Proposed Major Utility Facility” in bold type not less than one-fourth inch high or 30-point type, and include the following information: the name and a brief description of the Project; a map showing the location and general layout of the proposed facility; a statement, including the assigned docket number, that an application for a certificate to construct, operate, and maintain said facility is pending before the Board; the date and time of the evidentiary and local public hearings; and a statement that the public will be given an opportunity to comment on the proposed facility.

{¶ 39} Ohio Adm.Code 4906-2-09 provides that the ALJ shall regulate the course of the hearing. In so doing, the ALJ may require expert or factual testimony to be offered at Board proceedings to be reduced to writing and filed with the Board. Accordingly, the ALJ establishes the following procedural schedule and process:

- (a) Pursuant to Ohio Adm.Code 4906-3-06(C), Staff shall file its report of investigation on or before June 14, 2022.

(b) On or before July 8, 2022, each party shall file a list of issue(s) citing specific concerns about which they may be interested in pursuing cross-examination of witnesses at the evidentiary hearing.

(c) All expert and factual testimony to be offered by Applicant shall be filed by July 5, 2022. All expert and factual testimony to be offered by the intervenors and Staff shall be filed by July 8, 2022.

(d) Any stipulation entered into by the parties shall be filed by noon on July 12, 2022, along with the associated testimony supporting the stipulation.

{¶ 40} It is, therefore,

{¶ 41} ORDERED, That Palomino's September 24, 2021 motion for waivers be granted as stated in Paragraph 18. It is, further,

{¶ 42} ORDERED, That Palomino's September 24, 2021 motion for protective order be granted in part and dismissed in part, as stated in Paragraphs 25 and 26. It is, further,

{¶ 43} ORDERED, That Palomino's January 14, 2022 motion for protective order be granted as stated in Paragraphs 25 and 26. It is, further,

{¶ 44} ORDERED, That, for a period of 24 months, the Board's docketing division maintain, under seal, certain information in pages 30-32 of the Application narrative, pages 19-21 of Exhibit E, which is the Socioeconomic Report, and revised Exhibit N to the first supplement of the Application, which were filed under seal in this docket on September 24, 2021 and January 14, 2022. It is, further,

{¶ 45} ORDERED, That the effective date of the application be April 18, 2022, and the hearings in this matter be scheduled in accordance with Paragraphs 34 and 35. It is, further,

{¶ 46} ORDERED, That the notice of the Application and hearings be published by Palomino in accordance with Paragraphs 36, 37, and 38. It is, further,

{¶ 47} ORDERED, That the parties observe the filing deadlines set forth in Paragraph 39. It is, further,

{¶ 48} ORDERED, That a copy of this Entry be served upon all interested persons and parties of record.

THE OHIO POWER SITING BOARD

/s/ Jacky Werman St. John

By: Jacky Werman St. John
Administrative Law Judge

**This foregoing document was electronically filed with the Public Utilities
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4/18/2022 3:23:51 PM

in

Case No(s). 21-0041-EL-BGN

Summary: Administrative Law Judge Entry granting Palomino's September 24, 2021 motion for waivers as stated in Paragraph 18; granting Palomino's September 24, 2021 motion for protective order in part and dismissing it in part, as stated in Paragraphs 25 and 26; granting Palomino's January 14, 2022 motion for protective order as stated in Paragraphs 25 and 26; ordering that, for a period of 24 months, the Board's docketing division maintain, under seal, certain information in pages 30-32 of the Application narrative, pages 19-21 of Exhibit E, which is the Socioeconomic Report, and revised Exhibit N to the first supplement of the Application, which were filed under seal in this docket on September 24, 2021 and January 14, 2022; ordering that the effective date of the application be April 18, 2022, and the local public hearing in this matter be scheduled for June 29, 2022 at 5:00 p.m. and the evidentiary hearing in this matter be scheduled for July 13, 2022 at 10:00 a.m. in accordance with Paragraphs 34 and 35; ordering that the notice of the Application and hearings be published by Palomino in accordance with Paragraphs 36, 37, and 38; and ordering that the parties observe the filing deadlines set forth in Paragraph 39. electronically filed by Kelli C. King on behalf of Jacky Werman St. John, Administrative Law Judge, Ohio Power Siting Board