

**BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI**

In the Matter of the Application of Grain Belt Express)
Clean Line LLC for a Certificate of Convenience and)
Necessity Authorizing It to Construct, Own, Operate,)
Control, Manage, and Maintain a High Voltage, Direct) File No. EA-2014-0207
Current Transmission Line and an Associated)
converter Station Providing an Interconnection on the)
Maywood-Montgomery 245 kV Transmission Line.)

**RESPONSE OF INFINITY WIND POWER TO MOTION TO COMPEL OF EASTERN
MISSOURI LANDOWNERS ALLIANCE D/B/A/ SHOW ME CONCERNED
LANDOWNERS**

Infinity Wind Power (Infinity) hereby responds to the *Motion to Compel Discovery, Motion for Discovery Conference and Motion to Expedite Response* (Motion), filed in the above-captioned matter on November 4, 2014.

I. BACKGROUND

1. On October 14, 2014, Infinity witness Mr. Matt Langley filed cross-surrebuttal testimony in accordance with the Missouri Public Service Commission’s (Commission) *Order Setting Procedural Schedule and Other Procedural Requirements* (Procedural Order) issued in this matter on June 18, 2014.

2. On October 25, 2014,¹ Eastern Missouri Landowners Alliance d/b/a Show Me Concerned Landowners (“Show Me”) served on Mr. Langley a set of data requests consisting of fourteen (14) questions with various subparts.

3. On October 31, 2014, Infinity issued to Show Me an objection to question nine (9) in its entirety because, *inter alia*, the information sought in question nine (9) is the subject of

¹ Show Me submitted the data requests at 5:14 p.m. on Oct. 24, 2014. Pursuant to the Commission’s June 18, 2014 *Order Setting Procedural Schedule and Other Procedural Requirements*, data requests sent after 5:00 p.m. are considered served the next business day.

the Commission's *Order Denying Motion to Compel and Granting Motions for Protective Order*, issued on Sept. 24, 2014 (Protective Order).

4. On Monday, November 3, 2014, Show Me's counsel contacted the undersigned counsel to discuss the objection and Infinity counsel indicated it would likely be at least Tuesday before Infinity would be able to respond.

5. On Tuesday, November 4, 2015, Show Me filed its Motion, and on November 5, 2014, the Commission issued its *Order Directing Response to Motion and Setting Expedited Discovery Conference*. Infinity hereby offers its response.

II. RESPONSE

6. Infinity agrees with Show Me's representation of the facts surrounding the discussion between counsel regarding the objection to Show Me's question nine (9), but adds that Infinity's attention was focused on providing the responses to the remaining thirteen data requests that were due by close of business that day, in accordance with 3(C) of the Commission's Procedural Order.² Additionally, in addition to activities taking place in the instant proceeding, undersigned counsel had other matters to attend to and was unfortunately unable to respond to Show Me's counsel by close of business on Tuesday. However, at no time was a definitive time set or agreed upon as to a deadline for Infinity to provide a response to Show Me.

7. As it relates to Infinity's objection to Show Me's question nine (9), the Commission determined in its *Order Denying Motion to Compel and Granting Motions for Protective Order* (Protective Order) that release of certain information will be harmful to Infinity

² Order Setting Procedural Schedule and Other Procedural Requirements, p. 3.

and will “negatively impact [Infinity’s] ability to negotiate power contracts with customers[.]”³ The information now sought by Show Me in its data request question nine (9) is of the same character as that information previously protected by the Commission.

8. Specifically, the question asked by the Missouri Landowners Alliance (Alliance) relevant to the current discussion, and which the Commission determined Infinity did not have to answer when issuing the Protective Order, was “[i]n your response to the RFI, please describe in detail how you calculated the Annual Capacity Factor provided in Part A of the RFI form.”⁴ While Show Me is not seeking information specific to the RFI, the character of the information sought is the same, in that a wind generator’s capacity factor data is among its most sensitive and highly confidential information, the disclosure of which will irreparably harm a wind generator’s competitive interests. As such, Infinity views the data covered under the Commission’s Protective Order to be of the same character of that currently being requested by Show Me.

9. In paragraph five (5) of its Motion, Show Me states that “[i]t is curious that Infinity claims that the Data Request ‘seeks information not relevant to the Commission’s determination in this matter and is not reasonably calculated to lead to the discovery of admissible evidence.’ The Data Request seeks only supporting documentation to a specific statement made in the testimony of Infinity’s witness.” What Show Me fails to note is that the testimony of Mr. Langley, which is the subject of this discussion, is merely responsive to the testimony of Show Me’s witness, Mr. Proctor, regarding capacity factors of current and future wind projects. Arguing whether capacity factors are directly and legally relevant to the Commission’s decision in issuing a Certificate of Convenience and Necessity (CCN) is not the purpose of Mr. Langley’s testimony. Rather the purpose of the portion of Mr. Langley’s

³ Order Denying Motion to Compel and Granting Motions for Protective Order, p. 6, issued Sept. 24, 2014.

⁴ Motion for Protective Order of Infinity Wind, Attachment A, filed Sept. 11, 2014.

testimony that is in question is to illustrate to the Commission the technological changes occurring within the wind generation industry. In fact, Mr. Langley stated in his testimony that in his opinion the discussion relating to capacity factors as it relates to the Commission's determination of whether or not to issue a CCN to Grain Belt Express is of limited value due to the continual evolution of wind technology.⁵ It seems somewhat disingenuous of Show Me to complain of Infinity's continued position as to the legal relevancy of capacity data as being inappropriate when Infinity's testimony was merely responsive to the testimony of Show Me's witness.

10. The Commission can give the testimony in question the weight the Commission feels it deserves, but the Commission should not disregard its previous finding that disclosure of the information subject to the Protective Order, which is of the same character as the information now sought by Show Me, is harmful to Infinity and that that the Commission's classification of this information as highly confidential does not adequately protect Infinity from disclosure to Infinity's competitors.⁶

11. As to whether Infinity has information that is not confidential and yet responsive to Show Me's request, the answer is no. After consultation with Infinity, counsel reports that the data Infinity has in its possession is in confidential form, and any non-confidential information that Infinity could potentially provide would have to be created, as it does not currently exist. Creating the information in non-confidential form would be time and resource intensive, which is counter to Missouri Supreme Court Rule 56.01(c) that states, in part, that protective orders, such as the one issued by the Commission regarding the confidential information in question, protect against "undue burden or expense" in addition to protecting against disclosure of "trade secret or

⁵ Cross-Surrebuttal Testimony of Matt Langley, p. 3, lines 13-17.

⁶ Order Denying Motion to Compel and Granting Motions for Protective Order, pp. 4-5.

other confidential research, development, or commercial information.” As a general matter, a party is not obligated to create in response to discovery, documents not already in existence. As was true at the time of the Commission’s issuance of the Protective Order, the probative value of what Show Me seeks, if any, does not outweigh the harm of disclosure. Furthermore, Show Me is not without recourse in the event it disputes whether a 10% increase in capacity is a reasonable figure. Show Me can utilize generalized wind industry data to make such point.

12. Show Me, as the party seeking discovery, bears the burden of showing that the probative value of the information it seeks outweighs the harm that disclosure will have on Infinity.⁷ Show Me fails to make such a showing, and as such the Commission should deny the Motion to Compel.

WHEREFORE, Infinity Wind Power respectfully requests the Commission deny Show Me’s Motion to Compel and prohibit the discovery sought by Show Me in data request nine (9), because the information sought is trade secret, commercially sensitive, proprietary and highly confidential information, the release of which will irreparably harm the competitive interests of Infinity.

Respectfully submitted,

/s/ Terri Pemberton

Terri Pemberton (#60492)

(785) 232-2123

Glenda Cafer (KS #13342)

(785) 271-9991

CAFER PEMBERTON LLC

3321 SW 6th Avenue

Topeka, Kansas

Facsimile (785) 233-3040

terri@caferlaw.com

glenda@caferlaw.com

⁷ *Litton Industries, Inc. v. Chesapeake & Ohio Railway Company*, 129 F.R.D. 528,530 (E.D. Wis. 1990). See also, *Stortz by Stortz v. Seier*, 835 S.W. 2d 540, 541 (Mo. App. 1992).

ATTORNEYS FOR INFINITY WIND POWER

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document was served upon the parties to this proceeding by email this 6th day of November 2014.

/s/ Terri Pemberton

Terri Pemberton

Attorney for Infinity Wind Power