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**BEFORE
THE OHIO POWER SITING BOARD**

FILE
In the Matter of the Application of)
Hog Creek Wind Farm, LLC for an)
Amendment to its Certificate of) **Case No. 11-5542-EL-BGA**
Environmental Compatibility and Public)
Need for the Wind-Powered Electric)
Generation Facility in Hardin County, Ohio)
(Hog Creek Wind Farm I))

In the Matter of the Application of)
Hog Creek Wind Farm, LLC for an)
Amendment to its Certificate of) **Case No. 11-5543-EL-BGA**
Environmental Compatibility and Public)
Need for the Wind-Powered Electric)
Generation Facility in Hardin County, Ohio)
(Hog Creek Wind Farm II))

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

Pursuant to Rule 4906-7-01(B)(8)(c) of the Ohio Administrative Code, Hog Creek Wind Farm, LLC ("Hog Creek") respectfully moves for a protective order to keep portions of the Applications in these cases confidential and not part of the public record. The information which is requested to be treated as confidential consists of financial data representing estimated capital and intangible cost, average estimated costs for the Applicant's similar facilities, present worth and annualized capital costs, operation and maintenance costs, present worth and annualized operation and maintenance costs, and the estimated monthly loss due to one month's delay in construction. Hog Creek believes that public disclosure of this confidential and sensitive information will have a deleterious effect on competition.

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In addition, the Applicant requests that the safety manuals for two manufacturers of a wind turbine being considered for these projects be kept confidential. The manufacturers have provided the safety manuals to the Applicant on a confidential basis. These safety manuals will be submitted under seal. The Commission, in adopting rules in its October 28, 2008 Opinion and Order in Case No. 08-1024-EL-ORD at pages 31-32, contemplated that applicants may have to submit safety manuals from turbine manufacturers under seal pursuant to Rule 4906-7-01(B)(8)(c) of the Ohio Administrative Code.

Explanation of the reasons supporting this motion is detailed in the attached Memorandum in Support. Consistent with the practice of the Board, three (3) unredacted copies of the confidential pages of the Application and the safety manuals are submitted under seal.

WHEREFORE, Hog Creek Wind Farm, LLC respectfully moves for a protective order to keep the financial information contained in the Application and the manufacturers' safety manuals confidential and not part of the public record.

Respectfully submitted,



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

Hog Creek has filed a redacted version of the Application and requests that pages containing certain financial information be protected from public disclosure.

These pages of the Application contain estimated capital and intangible costs as well as operation and maintenance expenses as well as other financial data and are sensitive and confidential. By having to reveal this sensitive and confidential information in a publicly filed document, the applicant would be providing its competitors with a competitive advantage.

The Applicant will also provide under seal the safety manuals of the two additional manufacturers of a wind turbine being considered for the projects as part of these Applications to amend the Certificates. These safety manuals were provided to the Applicant on a confidential basis and contain sensitive and proprietary information. The Applicant seeks a protective order to maintain the confidentiality.

Section 4905.07, Revised Code, provides that all facts and information in the possession of the Commission shall be public, except as provided in Section 149.43 Revised Code, and as consistent with the purposes of Title 49 of the Revised Code. Section 149.43, Revised Code, specifies that the term “public records” excludes information which, under state or federal law, may not be released. The Ohio Supreme Court has clarified that the “state or federal law” exemption is intended to cover trade secrets. State ex. Rel. Besser v. Ohio State (2000), 89 Ohio St. 3d 396, 399.

Rule 4906-7-01(B)(8)(c) of the Ohio Administrative Code provides that the administrative law judge may issue an order which is necessary to protect the confidentiality of information contained in documents filed with the Board’s Docketing Division to the extent that

state or federal law prohibits the release of the information and where non-disclosure of the information is not inconsistent with the purposes of Title 49 of the Revised Code. State law recognizes the need to protect certain types of information which are the subject of this motion. The non-disclosure of the information will not impair the purposes of Title 49. The Board and its Staff have full access to the information in order to fulfill its statutory obligations. No purpose of Title 49 would be served by the public disclosure of the information.

The need to protect the designated information from public disclosure 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.

Section 1333.61(D), Revised Code. This definition clearly reflects the state 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; the trade secrets statute creates a duty to protect them. New York Tel. Co. v. Pub. Serv. Comm. N.Y., 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, and now the new entrants who will be providing power through the Uniform Trade Secrets Act. This Board or its Administration Law Judge has previously carried out its obligations in this regard in numerous proceedings. See, e.g., Buckeye Wind, Case No. 08-666-EL-BCN (Entry July 31, 2009)); Paulding Wind Farm LLC, Case No. 09-980-EL-BCN (Entry, February 23, 2010).

In State ex rel. The Plain Dealer v. Ohio Dept. of Ins. (1997), 80 Ohio St. 3d 513, the Ohio Supreme Court has adopted the six factors test set forth in Pyromatics, Inc. v. Petruziello (1983), 7 Ohio App. 3d 131, 134-135, 7 OBR 165, 169, 454 N.E. 2d. 588, 592. Those 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 Hog Creek seeks to keep confidential, it is clear that the information has independent economic value, is the subject of reasonable efforts to maintain its secrecy, and meets the six factor test set forth above. In addition, the Commission, in its October 28, 2008 Opinion and Order in adopting rules in Case No. 08-1024-EL-ORD at pages 31-32 contemplated that applicants may have to submit safety manuals from turbine manufacturers under seal pursuant to Rule 4906-7-01(B)(8)(c) of the Ohio Administrative Code.

Such sensitive information is generally not disclosed and constitutes a trade secret. Its disclosure could give competitors of Hog Creek and the wind turbine manufacturers an undue advantage. On the other hand, public disclosure of this information is not likely to

either assist the Board in carrying out its duties under rules, especially if since the Board staff will have the full text or the agreement to look at, or serve any other public policy.

WHEREFORE, for the above reasons, Hog Creek requests that the Administrative Law Judge grant its motion for a protective order and to maintain the financial information and the safety manuals from the turbine manufacturers as confidential and not subject to public disclosure.

Respectfully submitted,



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EXHIBIT A

LIST OF EXHIBITS
FOR WHICH PROTECTION IS SOUGHT

<u>EXHIBITS</u>	<u>REASONS JUSTIFYING PROTECTION</u>
Financial Data contained in the Application	Disclosure of estimated capital and intangible costs, average estimated costs for the Applicant's similar facilities, present worth and annualized capital costs, operation and maintenance costs, estimated present worth and annualized operation and maintenance costs, and the estimated monthly loss due to one month's delay in construction would give an undue advantage to competitors and would hinder competition.
Safety Manuals from the manufacturers of the REpower MM100 and the Nordex N100 wind turbines being considered for these projects	Disclosure could give competitors of the manufacturer an undue advantage and could hinder competition.