

BEFORE THE OHIO POWER SITING BOARD

In the Matter of the Application of)
Hardin Wind LLC for a Sixth)
Amendment to its Certificate) **Case No. 18-1473-EL-BGA**
Issued in Case No. 13-1177-EL-BGN)

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

Pursuant to Rule 4906-2-21 of the Ohio Administrative Code, Hardin Wind LLC (“Hardin Wind” or “the Applicant”) respectfully moves for a protective order to keep Appendices B, C, and D to the Application confidential and not part of the public record. Appendix B is entitled “Reduced Sound Power Levels AW125/3150, Appendix C is entitled “Sound Power Levels AW132/3465” and Appendix D is entitled “AW3000 Technical Description.” Appendices B, C, and D contain confidential turbine operational noise information and technical information for the two turbines being considered by the Applicant that are subject to this application. The material is being submitted under seal because the manufacturer has provided Appendices B, C, and D to the Applicant on a confidential basis. A protective order is necessary to maintain the confidentiality of the operational noise information during and after this proceeding. Moreover, 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 certain manuals from turbine manufacturers under seal pursuant to the Ohio Administrative Code.

WHEREFORE, Hardin Wind respectfully moves for a protective order to keep Appendices B, C, and D to the Application confidential and not part of the public record.

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 Appendices B, C, and D to the Application are submitted under seal.

Respectfully submitted,

/s/ Michael J. Settineri

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

Hardin Wind has submitted Appendices B, C, and D to the Application under seal and requests that it be protected from public disclosure. Appendices B, C, and D were provided to the Applicant by a turbine manufacturer on a confidential basis and contains sensitive information kept on a confidential basis by the manufacturer. Hardin Wind seeks a protective order to maintain that confidentiality.

Rule 4906-2-21(D) of the Ohio Administrative Code 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 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 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. 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 certain types of information which are the subject of this motion. Sections 1331.61 to 1333.69, Revised Code. 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.

Section 1333.61(D), Revised Code. This definition clearly reflects Ohio 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. 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, 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 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. 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 Hardin Wind 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 Board, 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 certain manuals from turbine manufacturers under seal pursuant the Ohio Administrative Code.

Turbine manufacturer model specific operational sound levels and related information are generally not disclosed to the public and constitute a trade secret. Disclosure of confidential excerpts from Appendices B, C, and D could give competitors of the wind turbine manufacturer an undue competitive advantage. On the other hand, public disclosure of Appendices B, C, and D is not likely to either assist the Board in carrying out its duties, especially since the Board staff will have the full text to look at, nor would it serve any other public policy. The need to protect the confidential information contained in Appendices B, C, and D is real and a protective order warranted.

WHEREFORE, for the above reasons, Hardin Wind requests that the Administrative Law Judge grant its motion for a protective order to maintain Appendices B, C, and D provided by the turbine manufacturer as confidential and not subject to public disclosure.

Respectfully submitted,

/s/ Michael J. Settineri

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Summary: Motion for Protective Order electronically filed by Mr. MacDonald W Taylor on behalf of Hardin Wind LLC