

UNITED STATES INTERNATIONAL TRADE COMMISSION
Washington, DC 20436

In the Matter of)
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)
CERTAIN VARIABLE SPEED) Investigation No. 337-TA-376
WIND TURBINES AND)
COMPONENTS THEREOF)

)

ORDER

This patent-based section 337 investigation was instituted by the Commission on May 30, 1995 (60 *Fed. Reg.* 28167) based on a complaint filed by Kenetech Windpower, Inc., of Livermore, CA. Complainant alleges violation of section 337 in the importation, sale for importation, and/or the sale within the United States after importation, of certain variable speed wind turbines and components thereof, by reason of infringement of claim 131 of U.S. Letters Patent 5,083,039 ("the '039 patent") and claim 51 of U.S. Letters Patent 5,225,712 ("the '712 patent"), both patents owned by complainant. Enercon GmbH of Aurich, Germany and The New World Power Corporation of Lime Rock, Connecticut were named as respondents.

The presiding administrative law judge (ALJ) held an evidentiary hearing on the merits beginning on January 31, 1996, and issued his final initial determination (ID) finding a violation of section 337 on May 30, 1996. The ALJ found that there had been a sale for importation of the accused products; that claim 131 of the '039 patent has been literally infringed; that claim 51 of the '712 patent was not infringed, either literally or under the doctrine of equivalents; and that complainant's activities with respect to the '039 and '712 patents satisfy the domestic industry requirements of section

337. Respondents filed a petition for review of the ED and the Commission investigative attorney (IA) filed an opposition to the petition for review. On July 17, 1996, the Commission issued a notice of its determination to review certain portions of the ED and requested written submissions on the issues under review and on remedy, the public interest, and bonding. 61 F.W. &g. 38473 (July 24, 1996). Submissions on the issues under review and on remedy, the public interest, and bonding were received from complainant, respondents, and the IA. Complainant, respondents, and the IA also filed reply submissions on those issues.

Having reviewed the record in this investigation, including the written submissions of the parties, the Commission has made its determination regarding violation of section 337 and on the issues of remedy, the public interest, and bonding. The Commission has determined that there is a violation of section 337 and that the appropriate form of relief is a limited exclusion order prohibiting the unlicensed entry for consumption of variable speed wind turbines and components thereof manufactured and/or imported by Enercon GmbH of Aurich, Germany and/or The New World Power Corporation of Lime Rock, Connecticut, and that infringe claim 131 of U.S. Letters Patent 5,083,039.

The Commission has also determined that the public interest factors enumerated in 19 U.S.C. § 1337(d) and (f) do not preclude the issuance of the limited exclusion order, and that the bond during the Presidential review period shall be in the amount of 100 percent of the entered value of the articles in question.

Accordingly, the Commission hereby **ORDERS THAT**

1. Variable speed wind turbines and components thereof covered by claim 131 of U.S. Letters Patent 5,083,039 (the " '039 patent") and manufactured and/or imported by or on behalf of Enercon GmbH of Aurich, Germany and/or The New World Power Corporation of Lime Rock, Connecticut, or any of their affiliated companies, parents, subsidiaries, licensees, contractors, or other related entities, or their successors or assigns, are excluded from entry for consumption into the United States for the

remaining term of the patent, *i.e.*, until February 1, 2010, except under license of the patent owner or as provided by law.

2. Variable speed wind turbines and components thereof covered by claim 131 of the '039 patent and manufactured and/or imported by or on behalf of Enercon GmbH of Aurich, Germany and/or The New World Power Corporation of Lime Rock, Connecticut, identified in paragraph 1 above, are entitled to entry into the United States under bond in the amount of one-hundred (100) percent of the entered value of such items pursuant to subsection (j) of section 337 of the Tariff Act of 1930, as amended (19 U.S.C. 1337(j)), from the day after this Order is received by the President, until such time as the President notifies the Commission that he approves or disapproves this action, but no later than 60 days after the date of receipt of this Order by the President.

3. In accordance with 19 U.S.C. § 1337(l), the provisions of this Order shall not apply to variable speed wind turbines and components thereof imported by and for the use of the United States, or imported for, and to be used for, the United States with the authorization or consent of the Government.

4. Complainant shall file a written statement with the Commission, made under oath, on September 30, 1996, and every three months thereafter until and including the date which is three (3) months after the date of expiration of the '039 patent, setting forth:

- a. the number of wind turbines covered by claim 131 of the '039 patent that have been produced by or on behalf of complainant in the United States during the three months preceding the date of the report;
- b. the type and number of components for variable speed wind turbines covered by claim 131 of the '039 patent that have been produced by or on behalf of complainant in the United States during the three months preceding the date of the report;
- c. the name and address of the facility(ies) at which the production referred to in subparagraphs (a) or (b) occurred and the nature or type of production activities performed at the facility (*e.g.*, manufacture, assembly, research and development and quality control);
- d. the nature and extent, if any, of complainant's activities with regard to repair, service, and/or maintenance of existing variable speed wind turbines covered by claim 131 of the '039 patent, including the number of employees involved and the name and address of the facility(ies) at which such activities occurred;
- e. a description of those components, if any, of variable speed wind turbines produced pursuant to claim 131 of the '039 patent that were imported into the United States by or on behalf of complainant during the three months preceding the date of the report;

- f. whether complainant has submitted bids or otherwise solicited sales of its variable speed wind turbines covered by claim 131 of the '039 patent, and, if so, from how many customers, during the three months preceding the date of the report; and
- g. and agreements between complainant and any other entity which contemplate or provide for the sale, in whole or in part, of complainant's wind turbine business.

5. In addition to the reports submitted to the Commission pursuant to paragraph 4 of this Order, complainant shall submit, under oath, a summary of any plan of reorganization filed in connection with its Chapter 11 bankruptcy proceeding (whether such plan is filed by complainant or by another party to the proceeding), together with a copy of the plan of reorganization and disclosure statement. Complainant shall submit such summary, plan, and disclosure statement within five (5) business days after the date of filing of the plan with the court. If complainant's case under Chapter 11 is either dismissed or converted to a case under Chapter 7 (liquidation), complainant shall notify the Commission of such conversion or dismissal within five (5) days of the conversion or dismissal. If complainant shall, at any time, decide to discontinue or abandon its wind turbine business, whether through sale or in any other manner, it shall notify the Commission within five (5) business days of such decision.

6. The Commission may modify this Order in accordance with the procedure described in section 210.76 of the Commission's Rules of Practice and Procedure (19 C.F.R. § 210.76).

7. The Secretary shall serve copies of this Order upon each party of record in this investigation and upon the Department of Health and Human Services, the Department of Justice, the Federal Trade Commission, and the U.S. Customs Service.

8. Notice of this Order shall be published in the Federal Register.

By order of the Commission.

Donna R. Koehnke
Secretary

Issued: August 30, 1996