

NEW YORK STATE BOARD ON ELECTRIC
GENERATION SITING AND THE ENVIRONMENT

CASE 15-F-0327 - Application of Galloo Island Wind LLC for a Certificate of Environmental Compatibility and Public Need Pursuant to Article 10 to Construct a Wind Energy Facility.

RULING ON REQUEST FOR CONFIDENTIAL TREATMENT OF INFORMATION

(Issued November 10, 2017)

ASHLEY MORENO, Presiding Examiner:

Pursuant to the Freedom of Information Law (FOIL), Public Officers Law (POL) § 87(2), and the regulations of the Department of Public Service implementing FOIL, 16 NYCRR Subpart 6-1, Galloo Island Wind, LLC (Galloo) requests exemption from disclosure of certain information contained in Appendix DD to its application to construct a wind facility pursuant to Article 10 of the Public Service Law. For the reasons stated below, Galloo's request for exemption of disclosure is granted in part and otherwise denied.

BACKGROUND AND REQUEST FOR INFORMATION

On September 25, 2017, Galloo submitted an application to construct a wind facility pursuant to Article 10 of the Public Service Law. Exhibit 22 to the application, entitled Terrestrial Ecology and Wetlands, discusses, among other things, potential impacts from the construction and operation of the facility to four threatened species (the northern long-eared bat, bald eagle, northern harrier and upland sandpiper) and one endangered species (the short-eared owl), and the measures Galloo proposes to take to avoid, minimize, and mitigate any adverse impacts to such species. Exhibit 22 states that Galloo has voluntarily elected to pursue an "incidental take permit" for such species pursuant to Environmental Conservation Law

§ 11-0535 and 6 NYCRR Part 182. In one place, Exhibit 22 states that an Incidental Take Permit Application is included as Appendix DD. In another place, Exhibit 22 states that the Galloo Island Conservation Plan is included as Appendix DD.

Maintaining that Appendix DD contains critical infrastructure information, confidential commercial information, trade secrets and/or proprietary information entitled to confidential treatment pursuant to 16 NYCRR 6-1.4, Galloo did not attach any documents as Appendix DD for public availability. Instead, pursuant to section 6-1.4, Galloo filed an unredacted version of Appendix DD with the Examiners, requesting that it be protected from public disclosure pursuant to Public Officers Law (POL) § 87(2) and 16 NYCRR Subpart 6-1.

By letter dated September 28, 2017, Clifford P. Schneider requested access to the Appendix DD filed with the Examiners, stating in relevant part:

It is important for the public to know what the Applicant will be requesting. Are they asking to kill bald eagles and other listed species? If so, then what is the basis for their request? What studies have they completed that would justify their request? Moreover, why is the entire Take Permit Application redacted?

On October 5, 2017, Galloo filed a new redacted version of Appendix DD for public disclosure. The document is entitled "Exhibit 22/Article 11, Endangered and Threatened Species Permit Application, Supplemental Materials for the Joint Application Form - 9/14/2017." Except for certain redacted information that is clearly identified in the public version of Appendix DD, the document is identical to the Appendix DD filed as confidential with the Examiners.

Apparently in response to Galloo's updated filing, as relevant here, Mr. Schneider stated by email on October 6, 2017, that he could "understand why nesting locations of listed species should be redacted to minimize public disturbance," but

that he could not "understand why any other information would be redacted" and his "guess is that nothing need be redacted in Appendix DD."

CLAIM OF CONFIDENTIALITY

Galloo states that it seeks "protection of information related to proposed measures to minimize impacts to endangered or threatened species and the financial impacts associated with those measures." While not specified in its request for protection from public disclosure, the information Galloo seeks to protect includes location of threatened species (p. 4), proposed operational curtailment conditions (including factors such as wind speed, applicable time and temperature) and impacts on energy production (pp. 17, 31, 33-35) and monetary amounts to be dedicated to mitigation efforts (pp. 35, 37-38). Galloo essentially raises two arguments in support of its position.

First, Galloo states that the Siting Board should exempt from disclosure records that include the location of threatened and endangered species based on an available exemption in the Environmental Conservation Law (ECL) Section 3-0301(2)(r). Galloo apparently maintains that identification of the habitat would impair the species' ability to survive.

Second, Galloo argues that the information be exempted from disclosure as trade secrets and/or confidential commercial information. It argues that the calculation of the potential taking of endangered or threatened species, based on the specific proposed minimization in the form of operational curtailment, is highly sensitive, project-specific information that would be extremely valuable to competitors. It maintains the information was costly to obtain, contains project-specific assumptions not known outside of Galloo's business, and would enable competitors to understand impacts on energy production and lost revenue, which could enable them to obtain an advantage

in the commercial marketplace. For example, it states, a competitor could use the information to place itself at a competitive advantage when bidding for power purchase agreements. According to Galloo, disclosure of the information "would provide an opportunity for competitors to gain an advantage over the Applicant if publicly available, provide insight on Applicant's business model, and unfairly disclose Applicant's economic impacts for the Facility under certain curtailment scenarios."

APPLICABLE LAW AND DISCUSSION

The Freedom of Information Law (FOIL) was "enacted in furtherance of the public's vested and inherent 'right to know.'"¹ All records of a public agency are presumptively open to public inspection and copying unless otherwise specifically exempted from disclosure, and exemptions are to be narrowly construed.² A party seeking to invoke an exemption bears the burden of proof as to its applicability, and must demonstrate a particularized and specific justification for denying access.³

Records Protected by State or Federal Statute

Galloo maintains that certain information in Appendix DD is exempted from disclosure by New York Environmental Conservation Law (ECL) Section 3-0301(2)(r). That section provides that, notwithstanding FOIL, the Department of Environmental Conservation is authorized to:

deny access to inspection of records which identify locations of habitats of species designated endangered pursuant to section 11-0535 of this chapter, protected pursuant to section 9-1503 of this chapter or any other species or unique combination of species of flora or fauna where the destruction of such habitat or the removal of such species therefrom would impair

¹ Matter of Capital Newspapers v. Burns, 67 N.Y.2d 562, 565-566 (1986).

² Id.

³ Id.

their ability to survive provided, however, that the commissioner may, in his discretion permit access to such inspection to persons engaged in legitimate scientific and academic research.

Specifically, Galloo seeks protection for a map identifying the habitat location for the Upland Sandpiper, a species identified as threatened in New York State. The destruction of the habitat or removal of Upland Sandpiper from the habitat may impair its ability to survive. Therefore, the map is exempted from disclosure pursuant to ECL section 3-0301(2)(r).

Trade Secrets

Galloo apparently seeks to protect as trade secrets certain information contained in Appendix DD. There is a two-prong approach to determine the existence of a bona fide trade secret. First, the party asserting the claim must establish that the information in question is a formula, pattern, device, or compilation of information which is used in one's business, and which gives one an opportunity to obtain an advantage over competitors who do not know or use it.⁴ Second, if the information fits this general definition, an additional factual determination must be made regarding whether the alleged trade secret is truly secret by considering:

- (1) The extent to which the information is known outside of the business;
- (2) The extent to which it is known by employees and others involved in the business;
- (3) The extent of measures taken by the business to guard the secrecy of the information;
- (4) The value of the information to the business and its competitors;

⁴ Matter of Verizon New York, Inc. v. New York State Public Service Commission, 137 A.D.3d 66 (3d Dep't 2016) at 72.

- (5) The amount of effort or money expended by the business in developing the information; and
- (6) The ease or difficulty with which the information could be properly acquired or duplicated by others.⁵

The information that Galloo seeks to protect as trade secrets states (1) the times, temperatures and wind speeds at which Galloo proposes to curtail the operation of its turbines (known as feathering) to reduce impacts to endangered or threatened species at the project site, (2) the specific expenditures proposed to be made for certain other mitigation efforts, and (3) impacts on energy production if feathering is required at higher wind speeds. Although Galloo discusses certain factors to be considered in determining whether to apply the trade secret exemption, it does not establish that the information it seeks to protect constitutes a formula, pattern or device. Nor does it establish that it seeks to protect the compilation of information that gives it an opportunity to obtain an advantage over competitors who do not know or use it. Galloo simply has not shown how the information gives it any advantage over any competitors who do not know or use that specific information.

Confidential Commercial Information

In evaluating a request for exemption from disclosure based on the exception POL §87(2)(d), first, it must be determined whether the information submitted to the agency is by a commercial enterprise or derived from information obtained from a commercial enterprise and then, whether disclosure of the information would cause substantial injury to the competitive position of the subject enterprise. The party resisting disclosure must establish “[a]ctual competition” and demonstrate

⁵ Id. at 72-73.

"the likelihood of substantial competitive injury."⁶ Moreover, to "meet its burden, the party seeking exemption must present specific, persuasive evidence that disclosure will cause it to suffer a competitive injury; it cannot merely rest on a speculative conclusion that disclosure might potentially cause harm."⁷

While Galloo is a commercial enterprise, it fails to carry its burden of providing specific, persuasive evidence that release of the information is likely to cause it substantial competitive injury. Rather, it merely states the general nature of the information and offers conclusory statements to the effect that its disclosure would "provide an opportunity for competitors to gain an advantage over the Applicant ..., provide insight on Applicant's business model, and unfairly disclose Applicant's economic impacts for the Facility under certain curtailment scenarios." Although it claims that a competitor could use the information to its advantage in bidding for power purchase agreements, it fails to explain how. Therefore, its request is denied.

CONCLUSION

Galloo's request for exemption of disclosure is granted with respect to page 4 of Appendix DD, the map that includes protected habitat locations. Its request is denied with respect to the remaining information.

Consequently, Galloo should prepare and file a new redacted version of Appendix DD conforming to this ruling that will be publicly available, including to Mr. Schneider. If Galloo chooses to appeal this ruling, its information will be

⁶ Matter of Encore College Bookstores, Inc. v. Auxiliary Serv. Corp. of State Univ. of N.Y., 87 N.Y.2d 410, 421 (1995).

⁷ Matter of Markowitz v. Serio, 11 N.Y.3d 43, 51 (2008).

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maintained as confidential until its appeal is finally exhausted.

(SIGNED)

ASHLEY MORENO