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May 27, 2016

Kevin Casutto, Presiding Examiner
New York State Public Service Commission
Three Empire State Plaza
Albany, NY 12223-1350

Re: Case No. 14-F-0490: Application of Cassadaga Wind, LLC, for a Certificate of Environmental Compatibility and Public Need to Construct an Approximately 126 Megawatt Wind Electric Generating Facility in the Towns of Charlotte, Cherry Creek, Stockton, and Arkwright, New York

Dear Presiding Examiner Casutto:

We represent Cassadaga Wind LLC in the above referenced proceeding. Cassadaga Wind LLC has filed an Article 10 Application with the Secretary pursuant to NY Public Service Law Section 164. Pursuant to Section 87(2) of the New York Public Officers Law and the Commission's Rules and Regulations (16 NYCRR §6-1), Cassadaga Wind, LLC ("Applicant") hereby requests protection from public disclosure for certain information contained in its Application. Specifically, the Applicant seeks protection for certain information that is trade secret, confidential commercial information or critical energy infrastructure information but is required to be provided in the Article 10 Application pursuant to New York Public Service Law §164 and 16 NYCRR 1001 including: wind meteorological data and analyses, capital cost information, sections of the Systems Reliability Impact Study (SRIS), lease terms, electric modeling, technical vendor documents and records containing information about State endangered or threatened species. The Confidential Information is attached hereto.¹ For the reasons set forth below, the Confidential Information should be exempted from public disclosure as trade secret, confidential commercial information and/or critical energy infrastructure information.

¹ Pursuant to the Commission's regulations, at the same time as this request is filed, a redacted version of the Application is being served on the parties to the Article 10 proceeding and filed with the Secretary.

New York State Public Officers Law Section 87(2) requires State agencies to promulgate rules and regulations to protect information from public disclosure. Information exempt from disclosure includes: "(1) trade secrets or (2) are submitted to an agency by a commercial enterprise or derived from information obtained from a commercial enterprise and which if disclosed would cause substantial injury to the competitive position of the subject enterprise." N.Y. POL § 87(2)(d).

Other relevant categories of exempt information includes: information specifically exempted from disclosure by state statute; information that if disclosed, would jeopardize the capacity of an agency or an entity that has shared information with an agency to guarantee the security of its information technology assets, such assets encompassing both electronic information systems and infrastructures; and information that if disclosed could endanger the life or safety of any person. N.Y. POL § 87(2)(a), (2)(f), (2)(i).

The Department of Public Service has established rules and regulations pursuant to Public Officers Law § 87(2) under 16 NYCRR 6-1 for Applicant's requesting confidential status of records containing trade secrets, confidential commercial information or critical infrastructure information.

The Commission defines a "trade secret" as "any formula, pattern, device or compilation of information which is used in one's business, and which provides an opportunity to obtain an advantage over competitors who do not know or use it." Section 6-1.3(a).

NY Public Officers Law § 86 (5) defines "critical infrastructure" as systems, assets, places or things, whether physical or virtual, so vital to the state that the disruption, incapacitation or destruction of such systems, assets, places or things could jeopardize the health, safety, welfare or security of the state, its residents or its economy.²

Factors to be considered by the Commission in determining whether to grant trade secret or confidential commercial information status include but are not necessarily limited to:

- i) the extent to which the disclosure would cause unfair economic or competitive damage;
- ii) the extent to which the information is known by others and can involve similar activities;
- iii) the worth or value of the information to the person and the person's competitors;
- iv) the degree of difficulty and cost of developing the information;
- v) the ease or difficulty associated with obtaining or duplicating the information by others without the person's consent; and

² Confidential commercial information is not expressly defined in the regulations or Public Officers Law.

- vi) other statute(s) or regulations specifically excepting the information from disclosure.

Section 6-1.3(b)(2).

In addition, for confidential commercial information, the Applicant also needs to show why the information, if disclosed, would be likely to cause substantial injury to the competitive position of the subject commercial enterprise. Verizon New York, Inc. v. New York State Pub. Serv. Comm'n, 137 A.D.3d 66, 72-73, 23 N.Y.S.3d 446 (N.Y. App. Div. 2016).

Documents found to be trade secrets are exempt from disclosure without further inquiry. Verizon New York Inc. v. New York State Pub. Serv. Comm'n, 991 N.Y.S.2d 841 (Sup. Ct. 2014), aff'd, 137 A.D.3d 66, 23 N.Y.S.3d 446 (3d Dept 2016) (“it is wholly unnecessary and overly burdensome to require the entity to then make a separate showing that FOIL disclosure of the trade secret would cause substantial injury to its competitive position.”)

Wind Meteorological Data and Analyses

Wind Meteorological Data falls under the category of trade secret as defined by the Commission. The process for assessing the wind resource at a particular site can be complex and is developed over many years. There are investment costs associated with permitting, construction, and operation of Meteorological Towers. In addition, the data is compiled and analyzed by the Company utilizing proprietary methods to assess the economic viability of the project and to determine the best locations for facility components.

This data is not known outside of the Applicant’s business and is maintained as confidential by the Applicant’s business partners (i.e. consultants and turbine manufacturers). The Applicant has taken steps to ensure its secrecy, as the value of this information to the Applicant is very high and would be of even higher value to its competitors, for example other projects in Chautauqua County. It would be costly for the Applicant’s competitors to replicate this data making it highly valuable.

Developing large-scale wind farms requires significant upfront capital to assess the wind resource of a given site. In this case, the public release of the Applicant’s meteorological data could result in substantial injury to the competitive position of the Company because the data sought is not public information and the disclosure of such data could result in competitors gaining free access to essential and costly aspects of the company’s development of the Facility and/or using the information without having had to incur the cost of its development. A level playing field is important when it comes to the complexity of regulatory compliance and treatment of confidential materials.

The Courts have affirmed this exemption in cases, involving disclosure of information which is costly to gather and develop, and which would confer economic benefit to a competitor if disclosed. *New York State Elec. & Gas Corp. v. New York State Energy Planning Board*, 221 AD2d 121 (3d Dept. 1996)(permitting exemption from disclosure for operational data of cogeneration facility based on substantial injury to the competitive position of the subject enterprise because “the data sought is not public information and that the disclosure of such data

could result in competitors, like petitioner, inferring essential aspects of [company's] production costs fundamental to projecting future costs, its conclusion that disclosure could cause competitive damage is sound). *City of Schenectady v. O'Keeffe*, 50 AD3d 1384 (3d Dept. 2008) (data had commercial value not only to the commercial enterprise – a utility – but also to the enterprise's competitors, where compiling that data was “a costly and complex endeavor that entails an exhaustive review” by the utility), *citing Matter of Encore Coll. Bookstores v. Auxiliary Serv. Corp. of State Univ. of N.Y. at Farmingdale*, 87 N.Y.2d 410, 421 (1995). “Where FOI[L] disclosure is the sole means by which competitors can obtain the requested information, the inquiry ends [t]here.” *Passino v. Jefferson-Lewis*, 277 AD2d 1028 (4th Dept. 2000), *citing Encore Coll. Bookstores* 87 N.Y.2d at 421.

Public dissemination of this data would subject the Applicant to substantial economic and competitive harm and should be protected from public disclosure.

Capital Cost Information (Cost Work Papers)

The Capital Cost information sought to be protected consists of highly sensitive proprietary information related to confidential financial data and capital cost estimates incorporated in the Applicant's proposed Facility and the technologies and methods used to estimate costs.

Capital Cost information is a compilation of financial information which helps the Applicant determine the total cost of the Facility. Capital Cost information is not known outside of the Applicant's business which provides an opportunity to obtain an advantage over competitors who do not know or use it. Capital Cost information is highly protected as the public dissemination of this information could cause substantial economic harm to the Applicant, and would place the Applicant at a competitive disadvantage.

The Department of Public Service and the Public Service Commission has held that Capital Cost information is protected from disclosure as trade secrets. *See* 08-T-0034 Application of Hudson Transmission Partners, LLC for a Certificate of Environmental Compatibility and Public Need for a 345 Kilovolt Submarine/Underground Electric Transmission Link Between Manhattan and New Jersey, Ruling Granting Protection for Project's Estimate Capital Costs; *See also* Re: Request for Exemption from Disclosure of Trade Secrets & Proprietary, Confidential Commercial & Critical Infrastructure Info., 09-E-0310, 2009 WL 2569703 (Aug. 13, 2009); Case 05-E-1222, Proceeding on Motion of the Commission as to the Rates, Charges, Rules and Regulations of New York State Electric & Gas Corporation for Electric Service, Ruling Granting Trade Secret Protection to NYSEG's Mobile Radio System Cost Estimates (Oct. 13, 2005), pp. 1-2.

Since Capital Cost information is a trade secret it is exempt from disclosure. *Verizon New York Inc. v. New York State Pub. Serv. Comm'n*, 991 N.Y.S.2d 841 (Sup. Ct. 2014), aff'd, 137 A.D.3d 66, 23 N.Y.S.3d 446 (3d Dept 2016).

Public dissemination of capital cost information would subject the Applicant to substantial economic and competitive harm and should be protected from public disclosure.

Lease Agreement Terms in the Decommissioning Plan (Appendix EEE)

The decommissioning payment terms of the lease agreement are trade secrets, in that lease terms and agreements are devices used in the Applicant's business, and provide an opportunity to obtain an advantage over competitors who do not know or use it.

If a competitor were to learn the Applicant's lease terms they could use this information to place the Applicant at a competitive disadvantage with landholders, not only in the current project area, but in future project locations. Lease terms are not known outside of the Applicant's business and the value of this information to the Applicant's competitors would be high. If a competitor were to learn of lease terms they could potentially undercut the Applicant and prevent a project from moving forward.

The Second Department has held that customer information including lease terms are "trade secrets" under the same definition as Section 6-1.3(a). E. Bus. Sys., Inc. v. Specialty Bus. Sols., LLC, 292 A.D.2d 336, (2d Dept. 2002)(the information entitled to trade secret status included, client and potential client names, addresses, contact names, the machines possessed, by the clients, or contacts and their lease terms.)

Public dissemination of lease terms would subject the Applicant to substantial economic and competitive harm and should be protected from public disclosure.

Systems Reliability Impact Study (SRIS) (Appendix E)

The Applicant requests protection and confidential status for the following sections of the SRIS: Section 3: Criteria, Methodology and Assumptions; Section 4: Power Flow Analysis; Section 5: Stability Analysis; Section 6: Extreme Contingency Analysis; Section 7: Transfer Limit Analysis; Section 8: Short Circuit Analysis; Section 9: NCPP A-10 Test; Section 10: N-1-1 Contingency Analysis; Section 11: Power Factor Evaluation; Section 12: Cost Estimates; Section 13: Conclusions; and corresponding Appendices A through M.

These sections of the SRIS contain critical infrastructure information which if disclosed could pose a danger to electric system reliability and endanger the life or safety of the public within the meaning of the Public Officers Law.

Specifically, included in the SRIS is information related to transformer settings, potential weaknesses in the system, overhead transmission standards, and other information which qualifies as critical infrastructure information. Furthermore, NYISO considers its power flow, stability and short-circuit data as critical energy infrastructure information, and restricts access to this information to parties who agree not to disclose the data to other parties.

The Department of Public Service and the Public Service Commission have consistently held that the vast majority of the information contained in the SRIS should be protected from disclosure as critical infrastructure information. *See* Case 06-T-0650 Application of New York Regional Interconnect, Inc., Ruling Granting Protection for Critical Energy Infrastructure Information (disclosure of SRIS "has the potential to lead to disruption of New York's power system, which could endanger the life and safety of the public"); Case 08-T-0746 Application of

the Village of Arcade and Noble Allegany Windpark, LLC, Ruling Granting Request for Confidential Status (finding that portions of the SRIS should be exempted from disclosure); Case 08-T-0034 Application of Hudson Transmission Partners, LLC, Ruling Granting Protection for Critical Energy Infrastructure Information; Case 07-T-0140 Application of Noble Wethersfield Windpark, LLC, Ruling Granting Protection from Disclosure for Critical Infrastructure Information.

Electric System Modeling (Exhibit 8), Electric Modeling Files and Generation Dispatch Analysis (Appendix L)

Exhibit 8, the Electric Modeling Files and the Generation Dispatch Analysis contain proprietary data and critical energy infrastructure information. This data includes spot pricing analysis, output capability analysis, and resource analysis. All of the data, modeling and analysis is entitled to trade secret protection and is clearly information and data "which is used in one's business, and which provides an opportunity to obtain an advantage over competitors who do not know or use it."

Furthermore, disclosure of this data and analysis would cause the Applicant to suffer a competition disadvantage. This analysis is otherwise unavailable to the Applicant's competitors and could not be duplicated or independently developed. Moreover, this data and analysis was costly to develop and if competitors were allowed access to this information the Applicant would be at a clear disadvantage.

Public dissemination of this data would subject the Applicant to substantial economic and competitive harm and should be protected from public disclosure.

The modeling and analysis also identify critical energy infrastructure information. The information provided includes potential constraints and weaknesses in the energy infrastructure and discloses technical and locational details of electrical systems, which if disturbed could result in a threat to the public's health, safety welfare or security.

Technical Foundation Drawings (Appendix Q), Type Certification (Appendix F), and Turbine Safety Technical Manuals (Appendix R)

The Applicant has compiled documents from various vendors, including information supplied to them as *trade secrets* in response to a Request for Information issued to vendors and contractors. Technical drawings, type certifications and technical manuals are all proprietary information obtained from potential vendors to assist the Applicant in determining the types of turbines which may be suitable for this Facility and which have been included with this Application for limited informational purposes.

Technical documents such as drawings, certifications and manuals are all costly to produce and obtain. The vendors only disclose this information to potential purchasers, such as the Applicant, with the understanding that the potential purchaser will not share or disclose this technical information publically or to their competitors.

These documents are developed by the manufacturers at their expense, are kept confidential and are not publically available, and could cause substantial competitive harm if made publically available.

The Public Service Commission has found that technical documents which are costly to produce and which were clearly intended to be kept confidential are entitled to "trade secret" protection. See Re: Appeal of Determination Concerning Request for Records Submitted by Mr. Norlander on June 17, 2014 (Filed in Case 14-M-0183), 14-M-0183, 2014 WL 4102107, at 22 (Aug. 15, 2014).

Public dissemination of these documents would subject the Applicant and the Applicant's vendors to substantial economic and competitive harm and should be protected from public disclosure.

Endangered or Threatened Species Information (Appendix LL)


The Eagle Point Memo prepared for the Applicant contains specific local information for New York listed threatened species.

This data is statutorily exempt from FOIL pursuant to Public Officer's Law § 87(2)(a); NY ECL § 3-0301(2)(r). These provisions permit agencies such as DEC, notwithstanding the FOIL provisions, to deny access to records containing information about endangered, protected or threatened species or ecological communities, as the terms are defined in NY ECL § 11-0535(1). DEC may also deny access to information pertaining to other rare species as defined in NY ECL § 9-1503. These are statutory exemptions to FOIL which are permitted under NY Public Officers Law § 87(2)(a), which allows an agency to withhold records which are "specifically exempted from disclosure by state or federal statute."

CONCLUSION

For the foregoing reasons, the above identified, Confidential Information should be exempted from public disclosure as trade secret, confidential commercial information and/or critical energy infrastructure information. Should you have any questions regarding this filing, please contact me.

Respectfully submitted,



James A. Muscato II
Young/Sommer LLC
Attorneys for Cassadaga Wind LLC

cc: Secretary to the Commission (w/out enclosures)
Parties to the Article 10 proceeding (w/out enclosures)