

**NEW YORK STATE BOARD ON ELECTRIC
GENERATION SITING AND THE ENVIRONMENT**

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In the Matter of:	:	
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Application of Canisteo Wind Energy LLC for a	:	Case 16-F-0205
Certificate of Environmental Compatibility and Public	:	
Need Pursuant to Article 10 for Construction of a Wind	:	
Energy Project in Steuben County.	:	
	:	
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CANISTEO WIND ENERGY LLC REQUEST
FOR INTERLOCUTORY REVIEW OF RULING COMPELLING
DISCLOSURE OF CONFIDENTIAL COMMERCIAL INFORMATION

Dated: September 20, 2019
Albany, New York

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I. INTRODUCTION

Canisteo Wind Energy LLC (CWE) requests review by the Siting Board of the *Ruling Directing Disclosure of Confidential Information* issued in this proceeding on September 6, 2019 (*Ruling*), compelling disclosure of Figure 13-1, a single page map containing confidential commercial information and trade secrets, to an individual appearing in this proceeding on her own behalf and as a representative of Citizens for Maintaining Our Rural Environment (CMORE), both of whom are opposed to granting CWE a Certificate of Environmental Compatibility and Public Need for the 290 MW Canisteo Wind Farm (Project). Figure 13-1 depicts all real property parcels comprising the entire facility site, color coded to indicate those parcels whose owners have signed agreements with CWE and those “in negotiation.” A revised and updated version of Figure 13-1 was included with the Application amendments submitted on May 24, 2019, pursuant to the Examiners’ *Ruling Adopting Procedural Schedule* issued on April 19, 2019, in both redacted and unredacted form. In light of the extraordinary circumstances described herein, the *Ruling* should be reversed. If not reversed, disclosure of the document at issue is likely to irreparably harm CWE’s commercial interests.

II. BACKGROUND

CWE proposes to build and operate the Project, a 290 MW wind energy generating facility, to be located in six Towns in Steuben County. On November 1, 2018, CWE filed its Application for a Certificate of Environmental Compatibility and Public Need with the Board on Electric Generation Siting and the Environment (Board). With the Application, CWE submitted a letter to the Examiners requesting that certain documents included with the Application be protected from disclosure pursuant to Part 6-1 of the Department of Public Service (DPS) regulations and Public Officers Law (POL) § 87 (November 1, 2018 Request). A copy of that request is attached as Appendix A. The request has not been acted upon and the documents have been maintained in a non-public portion of the DPS's files.

Among the Application documents for which CWE requested protection in the November 1, 2018 Request is Figure 13-1. In the November 1, 2018 Request, CWE stated the following:

Exhibit 13, Figure 13-1 identifies all the real property required for Project development separated into categories including leaseholds still under negotiation. Wind projects require the use of property within an area covering thousands of acres. Property rights must be secured for turbine sites, access roads, electrical collection lines, and related electrical facilities. Lacking the power of eminent domain, Invenergy must secure these rights through negotiations with landowners who are not compelled to sell or negotiate. In order for efforts to assemble the full array of required property rights to be successful, Invenergy must be able to negotiate with individual property owners independently of other on-going negotiations. Were a property owner able to learn that, *e.g.*, its property was the last outstanding link to complete a required interconnection line route, that owner would be in a position to demand a price for its property above its fair market value.

Figure 13-1 depicts the status of negotiations with owners of parcels Invenergy has identified as needed to develop the CWE Project. The map is kept confidential within Invenergy. While each owner knows the status of his or her negotiations, only Invenergy knows the status over the entire project area. The map is the product of several years of property acquisition efforts by Invenergy. Although it is

conceivable that a party could assemble the same information from a search of county property records and interviews with owners, such an effort would be expensive and time-consuming and would not capture the entirety of what is reflected due to Invenenergy's deliberate timing strategy of when it records its acquired property rights. Disclosure of Figure 13-1 would pose substantial harm to CWE's ability to conduct arm's length negotiations with owners of land not already under CWE's control.

By identifying those parcels which, though needed or desirable for Project development, are not now under CWE's control, Figure 13-1 would be useful to both competitors in the wind industry (who could use it to drive up CWE's real property costs) and to landowners with whom CWE is currently negotiating who could use it to sharpen their negotiating position. The information has been compiled by CWE for its own use and would be difficult and costly to replicate by others.

On April 19, 2019, the Examiners issued a *Protective Order* prescribing procedures for protecting confidential documents and gaining access to such documents. Included in the *Protective Order* are the following:

11. Any party that: (a) has requested the information or normally would be entitled to service of such under the Commission's Rules of Procedure and (b) is not a party that would benefit from access to the Protected Information by reason of being a competitor or having an adverse business interest to the Providing Party is entitled to access to Protected Information under this Protective Order. Parties receiving Protected Information under this Protective Order are "Receiving Parties."

and

16. A Providing Party may opt not to supply Protected Information to parties that have executed the Acknowledgement, State Agency Agreement, and/or Consultant Protective Agreement if the Providing Party has a good-faith belief that such parties are not qualified to be Receiving Parties, as described in Paragraph 10 (*sic*) of this Protective Order. To exercise this option, the Providing Party shall provide a written justification for its belief that such parties are among the persons for whom exceptions to disclosure of the Protected Information are or should be established. If such parties object to the withholding of the Protected Information by the Providing Party, and the parties have attempted to resolve the

objections on an informal basis but cannot reach agreement, the matter may be brought to the Presiding Examiners for resolution.

Evidentiary hearings were conducted from August 19-21, 2019, and initial briefs are due on September 27, 2019.

On September 3, 2019, Ms. Meagher signed the *Protective Order* and requested a copy of Figure 13-1 rev 1. CWE declined to provide Figure 13-1 to Ms. Meagher citing Paragraphs 11 and 16 of the *Protective Order*. By email exchanges on September 5, 2019, CWE sought, in good faith, to engage Ms. Meagher in dialogue to identify the information she sought and to agree on an alternative to disclosing Figure 13-1, which CWE concluded was beyond what is required to provide the information she had expressed an interest in. Ms. Meagher declined. Copies of the September 5 emails are attached as Appendix B).

On September 6, 2019, the Examiners issued a *Ruling* directing CWE to disclose Figure 13-1 and any updates to Figure 13-1. The September 6, 2019 *Ruling* provides no legal analysis. The Examiners declined to determine whether Figure 13-1 is entitled to protection and erroneously concluded that Ms. Meagher did not come within the meaning of having an “adverse business interest” to CWE. The *Ruling* should be reversed for the reasons discussed herein.

III. DISCUSSION

A. Figure 13-1 contains confidential commercial information and trade secrets and is entitled to POL § 87 protection.

As explained below, Figure 13-1 is both a “trade secret” because it satisfies each of the five criteria set forth in 16 NYCRR § 6-1.3 for determining trade secret status, but also “confidential business information.” Figure 13-1 is a single page map that incorporates and reveals a “compilation of information which is used in [CWE’s] business, and which gives [CWE] an opportunity to obtain an advantage over competitors who do not know or use it” (*id.* at § 6-1.3[1]).

Specifically, Figure 13-1 provides a one-page compilation of information regarding land acquisitions by CWE, including all parcels identified for the facility layout and the status of ongoing efforts to secure leasehold interests and other property rights from specific individuals. This information, in turn, reveals CWE's methods and procedures for sequencing the recording of executed agreements in the public records, as well as insights regarding the duration and complexity of ongoing negotiations with individual landowners. This information is not available to the general public, other developers who may wish to use the land, other renewable energy developers and others who may wish to disrupt the timing or success of CWE's projects, or those who may wish to solicit individuals who have revealed an interest in allowing development of their properties should CWE's Project not move forward. As a result, the information in Figure 13-1 satisfies the first criterion for determining trade secret status as specified in Section 6-1.3(b)(2)(i) because disclosure to a private citizen without adequate assurances that the receiving party would keep the information confidential would "cause unfair economic or competitive damage" to CWE.

With the information included in the reports, a competitor potentially could determine, among other things: (i) the percent of land rights already secured by CWE; (ii) which specific parcels are "unsecured" because the landowners have not yet agreed to binding terms; (iii) whether one or more unsecured parcels represent a critical acquisition, in light of the status of other surrounding parcels; (iv) the average duration of ongoing or completed negotiations; and (v) the strategy employed by CWE when choosing to record its agreements. If competitors or Project opponents were to obtain this information, they could target specific parcels that are critical to the Project in order to disrupt the negotiations, or, in turn, target individual landowners for making alternative offers. Competitors would acquire a unique ability to assess CWE's strengths and

weaknesses, which could also be used to target other projects sponsored by CWE's parent, Invenenergy, putting the company at a competitive disadvantage in other markets.

The information in Figure 13-1 is not "known by others" (Section 6-1.3[b][2][ii]) and CWE does not readily make it available to them. As explained in its November 1, 2018 Request, the map represents a compilation of years-long efforts. It is kept confidential within Invenenergy. Therefore, while each individual landowner may know the status of its own negotiation, information regarding other negotiations is not known. Nor would the individual landowner be in a position to perceive the relative importance of a parcel in light of other completed negotiations. CWE certainly would not alert competitors to the negotiation status of a critical parcel, nor identify any landowner with whom it may be experiencing more lengthy negotiations. Making such information available to competitors would provide them with an opportunity to pursue target landowners and/or in specific areas. Competitors should not be permitted to gain access to such competitively sensitive information by virtue of CWE's compliance with Article 10's reporting requirements.

The composite information contained in Figure 13-1 is highly valuable to CWE and Invenenergy and would be highly valuable to its competitors. As noted, the information included in 13-1 reveals Invenenergy's process and strategy for approaching landowners and beginning negotiations. Large-scale energy development projects require several years of advanced planning, which includes critical milestones that will influence important decisions. Sequencing land acquisitions, or the process for initiating land acquisition is a process gleaned from years of experience and study. Competitors would find insights into this process to be extremely valuable in that they could use it to determine, among other things: (i) which parcels were obtained first; (ii) how many parcels were secured before the project was revealed to the public; and (iii) the

intervals of time Invenergy requires to evaluate whether a project is economically viable. Competitors could use the information to modify their own procedures for siting new energy development projects, or other development. Accordingly, the second and third criteria for establishing a “trade secret” are met.

The information satisfies the fourth and fifth criterion for determining trade secret status in that CWE has expended significant effort to compile the information included in Figure 13-1 and competitors could not readily obtain or easily duplicate the information. As explained, this information is the result of years-long efforts to identify potential sites for developing a large-scale wind energy facility. The information in Figure 13-1 pertains to the status of private negotiations which is available only to the parties engaged in those negotiations, their representatives, or those persons that have been confided in. None of the information is available to the public or required to be disclosed in any other forum. A competitor would be required to contact each individual landowner involved and inquire directly regarding the status of each negotiations. Answers would be voluntary. Because Figure 13-1 is, of itself, a trade secret, it should be protected without further inquiry (*Matter of Verizon N.Y. Inc. v New York State Pub. Serv. Commn.*, 46 Misc 3d 858 [2014]).

Figure 13-1 also qualifies for POL §87 protection because it is confidential business information whose release to the public would cause substantial competitive injury. NY courts and tribunals do not require CWE to demonstrate actual competitive injury if the potential for competitive injury is real, as it is here (*Matter of Encore Coll. Bookstores v Auxiliary Serv. Corp. of State Univ. of N.Y. at Farmingdale*, 87 NY2d 410, 421 [1995]). Figure 13-1 is, at the very least, a list of names and locations that has been compiled by CWE, over time, and at great expense (*see, id.* [protecting booklist]). Further, courts of this state have long recognized the intrinsic competitive value of real estate transactions, and the tremendous competitive harm that would

befall an entity should its negotiations become compromised (*see e.g., Matter of City of Schenectady v O'Keeffe*, 50 AD3d 1384, 1387 [2008]). Nor can the Siting Board doubt that improper disclosure of the sensitive information contained in Figure 13-1 would influence, hamper, or disrupt ongoing negotiations between CWE and individual landowners. Preventing that type of disruption is exactly the purpose of POL §87 protection. Having established that the information is a trade secret and confidential business information, Figure 13-1 is exempt from disclosure, and must be protected as a matter of law in order to prevent competitive harm to CWE (*Curtis v Complete Foam Insulation Corp.*, 116 AD2d 907, 908, [1986]).

B. Ms. Meagher is a competitor of CWE whose interests are served by delaying and hindering the development of the Project.

The Freedom of Information Law (FOIL) does not define who is a “competitor,” for purposes of determining when the disclosure of confidential information may result in “competitive injury.” Instead, POL §87 makes clear that the focus of the inquiry should be on the injury that would be suffered because of the disclosure and whether the “competitive position” of the Providing Party would be diminished (*Encore*, 87 NY2d at 419). Black’s Law Dictionary, in turn, reads that “Competition” is defined variously as:

Rivalry. The play of contending forces ordinarily engendered by an honest desire for gain. The effort of two or more parties, acting independently, to secure the custom of a third party by the offer of the most favorable term.

(Black’s Law Dictionary [4th ed Rev.-a 1968]). No definitive exemplar of who may be deemed in “competition” with another is provided. And, to the extent one deems the necessary competition to be economic, such limits are ill defined.

CWE is a developer of large-scale renewable energy projects which requires for its business that it become a lessee of real property. Consequently, it is in the business of acquiring

land rights. Ms. Meagher, personally, is an opponent of the Project who is seeking the information contained in Figure 13-1 for the avowed purpose of identifying landowners who have yet to sign leases with CWE, in order to influence their decisions. CMORE, whom she represents, also is opposed to the land development proposed by CWE. Their goal is to influence such owners with respect to decisions regarding their land; to compete for their promises and fealty. This motive alone demonstrates that she is a rival, and in direct competition with CWE for the land rights under consideration. She and CMORE must be deemed “competitors.”

There is no basis for the Presiding Examiner’s conclusion that Ms. Meagher’s opposition to the Project does not come within the meaning of having an “adverse business interest.” Ms. Meagher and CMORE are acting collectively to “maintain the rural environment” of the host communities. Their “business” is to influence land development discussion. Should they gain access to Figure 13-1 and use it to influence the decisions of landowners with whom CWE is currently negotiating, their efforts could increase CWE’s lease costs, delay the successful conclusion of lease negotiations, or disrupt the currently planned layout of the facility in a manner that delays or prevents construction of the project entirely. All of these results would significantly damage CWE’s “competitive business interests.” In addition, disclosure to Ms. Meagher would create an uncontrolled avenue to discovery by other business entities who may be interested in either disrupting CWE’s energy business to gain a competitive advantage elsewhere, or who may desire an opportunity to develop a certain parcel of real estate that is currently unavailable because of CWE (*Matter of New York State Elec. & Gas Corp. v New York State Energy Planning Bd.*, 221 AD2d 121 [1996]).

C. The *Protective Order* provides a mechanism for the Siting Board and DPS to fulfill their obligations under POL § 87.

The Siting Board is obligated to protect confidential commercial information through the procedures set forth in POL §89(5)(a). Specifically, POL §89(5)(a)(3) requires that information submitted with a request for trade secret and confidential treatment “shall be excepted from disclosure and be maintained apart by the agency from all other records until fifteen days after the entitlement to such exception has been finally determined” (*see also* 16 NYCRR § 6-1.4[a][3]). The rules of procedure place this obligation directly on the Presiding Examiner in the proceeding (16 NYCRR §6-1.4[c]). Protective orders are commonly used to effectuate the Siting Board’s obligations and the *Protective Order* appeared to protect trade secrets and confidential information under POL § 87(2)(d) in this proceeding. But that protection becomes illusory when disclosure of sensitive information is provided directly to persons and groups that are avowed opponents of the Project, who are not represented by counsel or employed as professional outside consultants with licensure requirements and other obligations established in law. There is no evidence in the record that Ms. Meagher is either a lawyer or a licensed professional acting in that capacity while representing CMORE or evidence that she otherwise has a legally enforceable incentive to maintain the secrecy of the confidential information once it is provided. Nor is there evidence in the record to document the business interest of other members of CMORE. Future disqualification from this proceeding and the potential for civil action in the case of breach would become irrelevant should the information be used to scuttle the Project and permanently harm the business interests of CWE. In short, Ms. Meagher has every incentive to violate the terms of the *Protective Order* and the Siting Board has no meaningful means of sanctioning her if she were to. CWE should not be forced to rely on the word of an individual who is an avowed Project opponent to safeguard its trade secrets.

The language employed in the *Protective Order* has come into common usage and numerous rulings have recognized that providing confidential information directly to project opponents is inappropriate (*Ruling Amending Protective Order*, NY PSC Case No. 18-T-0207 [Mar. 15, 2019] [DMM #54]); *Ruling Regarding Motion and Adopting Modified Protective Order*, NY PSC Case No. 18-C-0125 [Aug. 30, 2019] [DMM #23]; *Ruling on RESA's Motion to Compel Disclosure of ESCO Keys*, NY PSC Case No. 12-M-0476 [June 8, 2017] [DMM #1418]; *Ruling Clarifying June 8, 2017 Ruling on RESA's Motion to Compel Discovery of ESCO Keys*, NY PSC Case No. 12-M-0476 [June 30, 2017] [DMM #1439]). CWE has fully complied with the procedures for requesting confidential information, including efforts to work with Ms. Meagher and CMORE to narrow the scope of the request. These efforts were rebuffed and neither Ms. Meagher, nor CMORE has explained the need for the requested information. Accordingly, the Presiding Examiner's decision to allow Ms. Meagher access to this confidential information, which is presented without supporting legal analysis or support in the record, is contrary to the reasonable expectations of the parties and the sound reasoning employed in other proceedings.

D. Failure to protect Figure 13-1 would constitute a violation of POL § 87.

Under 16 NYCRR 4.7 of the Rules, interlocutory review of the *Ruling* is appropriate when a requesting party has established that extraordinary circumstances justify such review prior to the conclusion of proceedings before that officer. That requirement is clearly met in this case where the disclosure of confidential business information would be released during ongoing private contract negotiations, with the knowledge that such release could be used to interfere in those negotiations. Once disclosed, the harm would be instant and irreparable because the secrecy of the information could not be restored by later action. The mechanism to prevent such harm has been rendered a nullity.

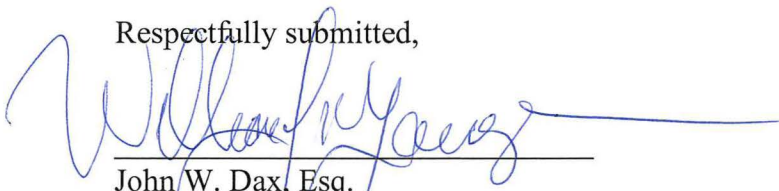
As a matter of law, the Siting Board has an affirmative responsibility to protect the confidential information submitted by CWE (*Matter of New York Tel. Co. v Public Serv. Commn.*, 56 NY2d 213, 220 [1982])[finding that PSC “had an affirmative responsibility to make provision, appropriate to the exercise of its regulatory authority, for the protection of the interest of the utility in any trade secrets”]). In its November 1, 2018 Request, CWE stated that all of the information it was submitting qualified for protection from disclosure under POL §87 as “a trade secret, confidential commercial information and/or critical infrastructure.” For Figure 13-1, it provided a description of the information, an explanation of the potential harm, confirmation of the expense incurred and value of the information it sought to protect. CWE has met its burden of proof (*see, Curtis v Complete Foam Insulation Corp.*, 116 AD2d 907, 908 [3d Dept 1986][“[w]hen party attempts to avoid discovery by asserting that information sought is privileged as a trade secret, minimum showing is necessary to substantiate the assertion”]; *see, also, Matter of Verizon N.Y., Inc. v New York State Pub. Serv. Commn.*, 137 AD3d 66, 72 [3d Dept 2016]). Yet Ms. Meagher and CMORE have failed to demonstrate their need for the information (*Curtis*, 116 AD2d at 908). Under these extraordinary circumstances, the interlocutory appeal must be granted, and the decision of the Presiding Examiner reversed (16 NYCRR § 6-1.4[d]).

IV. CONCLUSION

For these reasons, CWE respectfully requests that the Siting Board grant this request for Interlocutory Review of the Ruling. CWE further requests that the Siting Board confirm that the information contained in Figure 13-1 constitutes a "trade secret" and/or confidential business information that may not be released to others who cannot establish a need for the information.

Dated: September 20, 2019
Albany, New York

Respectfully submitted,



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William F. McLaughlin*

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November 1, 2018

Via Email Maureen.Leary@dps.ny.gov

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Via Email Ashley.Moreno@dps.ny.gov

The Honorable Ashley Moreno
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Re: Siting Board Case 16-F-0205 – Canisteo Wind Energy LLC
Request for Protection of Confidential Information

Dear Judge Leary and Judge Moreno:

Today Canisteo Wind Energy LLC (CWE) is filing with Secretary Burgess its Application for a Certificate of Environmental Compatibility and Public Need authorizing construction and operation of the 290.7 MW Canisteo Wind Farm in Steuben County. By this letter CWE seeks protection from public disclosure of all or portions of the following documents unredacted copies of which are attached:

Exhibit 5, Appendix 5a – System Reliability Impact Study.

Exhibit 6, Appendix 6c – Turbine Design Certification.

Exhibit 6, Appendix 6d – Wind Resource Assessment.

Exhibit 8 – Electric System Production Modeling (and related computer files).

Exhibit 13, Figure 13-1 – Map Depicting Status of CWE's Real Property Rights.

Exhibit 14 – Facility Costs.

Exhibit 22, Appendix 22h3 – Net Benefit for Listed Bats.

Exhibit 23, Figure 23-4 – Public Water Supply sources.

Exhibit 22, Appendix 22h1 2014 Raptor Nest Survey, 2018 Raptor Nest Survey, and 2018 Bat Mist-Netting Survey reports.

Applicable Standards

The State's Freedom of Information Law (FOIL), Public Officer Law (POL) § 84-90, provides that records held by State agencies are presumed to be open for public inspection (POL § 84). "Record" is broadly defined. FOIL authorizes agencies to deny access to records or portions thereof that

are trade secrets or 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

(POL § 87.2[d]). This exception to disclosure has been interpreted to consist of two independent exceptions: "records or portions thereof that... are trade secrets" and "records or portions thereof that... are submitted to an agency by a commercial enterprise... which if disclosed would cause substantial injury to the competitive position" of that enterprise. The qualifier "which if disclosed would cause substantial injury" does not limit the exception for trade secrets: if a record contains a trade secret, that portion of the record is excepted from disclosure without any need to demonstrate that disclosure would cause substantial injury to the competitive position of the entity submitting the document. In *Matter of Verizon N.Y. Inc. v New York State Pub. Serv. Commn.*, 137 AD3d 66, 69-70 (2016), the Appellate Division stated:

Accordingly, we agree with Supreme Court that the plain language of Public Officers Law § 87(2)(d) confirms that the Legislature intended to create two separate FOIL exemptions in the same statutory provision, one that exempts all records proven to be bona fide trade secrets, and another that requires a showing of substantial competitive injury in order to exempt from FOIL discovery all other types of confidential commercial information imparted to an agency.

These standards are incorporated into the rules of the Public Service Commission and incorporated into Siting Board practice by virtue of 16 NYCRR § 1000.3. Trade secrets are broadly defined to include "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" (16 NYCRR 6-1.3[a]). This definition is nearly identical to the definition given "trade secret" in the Restatement of Torts, which the lower court relied on in *Matter of Verizon NY Inc. v New York State Pub. Serv. Commn.*, 46 Misc3d 858, 869 (2014). Factors to be considered by the agency in deciding whether disclosure "would be likely to cause substantial injury to the competitive position of the subject commercial enterprise" include the

extent to which disclosure would cause unfair economic or competitive damage, the extent to which the information is known to others, the value of the information to the enterprise or its competitors and the degree of difficulty and cost of developing the information (16 NYCRR 6-1.3[b][2]).

Records containing “critical infrastructure information” are exempt from disclosure pursuant to POL § 89.5(1-a). “Critical infrastructure” is also defined in POL § 86.5.

Each of the documents contains information that qualifies for protection as a trade secret, confidential commercial information and/or critical infrastructure information.

Exhibit 5, Appendix 5a is a System Reliability Impact Study prepared for the New York Independent System Operator (NYISO), CWE and New York State Electric & Gas Corporation pursuant to confidentiality requirements of the NYISO’s Open Access Transmission Tariff. It contains critical infrastructure information.

Exhibit 6, Appendix 6c contains a report certifying the conformity of turbine designs to their design standards prepared by a third-party certification firm for two manufacturers of wind turbines under consideration by CWE. This report includes information that are trade secrets of those manufacturers.

Exhibit 6, Appendix 6d is a Wind Resource Analysis prepared exclusively for CWE, which assesses the potential of the Project to produce electric energy. This analysis lies at the heart of CWE’s business decision-making regarding the ultimate value of the Project to its owner and, accordingly, guides its investment, bidding and procurement strategies in the highly competitive wind power development industry. The competitive pressure CWE faces is illustrated by the number of proposals submitted to New York State Energy Research and Development Authority and New York Power Authority in response to their requests for proposals from renewable energy developers. The analysis provides information known only to CWE and its affiliates, was developed at considerable expense to CWE and could only be duplicated at considerable expense to others. Access to this information by CWE’s competitors or vendors would inform them about CWE’s revenue and earnings expectations, giving them insights into CWE’s bidding and procurement strategies. Appendix 6d contains, among other items, the very kind of site-specific meteorological data found to be exempt from disclosure in two recent rulings (PSC Case No 15-F-0327 Galloo Island Wind LLC, *Ruling on Request for Confidential Treatment of Information* [Issued May 8, 2018]; PSC Case No. 16-F-0328 – Number Three Wind LLC, *Ruling on Request for Confidential Treatment of Information* [Issued September 17, 2018]).

Exhibit 8, is a report prepared to support the Article 10 Application. It includes detailed tables reporting CWE’s expected monthly capacity and energy sales volumes and the average prices CWE will receive for its electric energy and the impact on the value of energy throughout the New York Independent System Operator wholesale market. This information is known only

to CWE and its consultant and would be expensive and difficult for competitors to develop. Disclosure would afford competitors insights into how CWE expects to operate the Project and the revenues it expects to earn.

Exhibit 13, Figure 13-1 identifies all the real property required for Project development separated into categories including leaseholds still under negotiation. Wind projects require the use of property within an area covering thousands of acres. Property rights must be secured for turbine sites, access roads, electrical collection lines, and related electrical facilities. Lacking the power of eminent domain, Invenergy must secure these rights through negotiations with landowners who are not compelled to sell or negotiate. In order for efforts to assemble the full array of required property rights to be successful, Invenergy must be able to negotiate with individual property owners independently of other on-going negotiations. Were a property owner able to learn that, *e.g.*, its property was the last outstanding link to complete a required interconnection line route, that owner would be in a position to demand a price for its property above its fair market value.

Figure 13-1 depicts the status of negotiations with owners of parcels Invenergy has identified as needed to develop the CWE Project. The map is kept confidential within Invenergy. While each owner knows the status of his or her negotiations, only Invenergy knows the status over the entire project area. The map is the product of several years of property acquisition efforts by Invenergy. Although it is conceivable that a party could assemble the same information from a search of county property records and interviews with owners, such an effort would be expensive and time-consuming and would not capture the entirety of what is reflected due to Invenergy's deliberate timing strategy of when it records its acquired property rights. Disclosure of Figure 13-1 would pose substantial harm to CWE's ability to conduct arm's length negotiations with owners of land not already under CWE's control.

By identifying those parcels which, though needed or desirable for Project development, are not now under CWE's control, Figure 13-1 would be useful to both competitors in the wind industry (who could use it to drive up CWE's real property costs) and to landowners with whom CWE is currently negotiating who could use it to sharpen their negotiating position. The information has been compiled by CWE for its own use and would be difficult and costly to replicate by others.

Exhibit 14 provides projected capital costs for the development and construction of the CWE Project. The cost estimates are the product of the application of the owner's experience, expertise, and vendor relations, a combination which is uniquely Invenergy's. The resulting cost estimates are known only to CWE and its owner and would provide competitors with valuable insights into CWE's cost structure and therefore its earnings potential.

Exhibit 22, Appendix 22.h-3, CWE's Net Benefit Plan for Listed Bats, includes a plan to voluntarily curtail operations under certain conditions and times of day and year in order to avoid or minimize bat fatalities. The proposed curtailment plan is known only to CWE. Disclosure

The Honorable Maureen F. Leary
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would reveal to competitors CWE's tolerance for forgoing revenues from the energy and renewable electricity credit markets in which CWE will sell its production. This information would assist CWE's competitors in formulating business and bidding strategies to the detriment of CWE.

Exhibit 23, Figure 23-4 is a map disclosing the location of public water supply sources which is critical infrastructure. The information was provided to CWE by the New York State Department of Health (NYS DOH) pursuant to the requirements of a Confidentiality and Data Use Agreement between CWE and NYS DOH. The agreement bars CWE from using data disclosed to it in a manner that would lead to its further disclosure without a protective order.

Exhibit 22, Appendix 22h1 – Finally, the Department of Environmental Conservation (DEC) has requested that information revealing the locations and numbers of Threatened and Endangered Species not be publicly disclosed. Reports in Appendix 22h1 entitled *2014 Raptor Nest Survey*, *2018 Raptor Nest Survey*, and *2018 Bat Mist-Netting Survey* contain such information gathered from wildlife surveys focused on bats and raptors. The specific information at issue in the publicly available versions of those reports has been redacted. CWE is honoring DEC's request by asking that you extend confidentiality to that information as well.

Based on the consideration of the factors discussed herein, CWE requests that you maintain the attached documents in a separate, non-public file. Each has been marked appropriately.

Respectfully submitted,

THE DAX LAW FIRM, P.C.

John W. Dax

JWD:imd

Enclosures

cc (without enclosures):

Hon. Kathleen H. Burgess, Secretary to the Commission

Hon. Lisa A. Wilkinson, Administrative Law Judge, NYS DEC

Party List

From: John Dax <jdax@daxlawfirm.com>
Sent: Thursday, September 5, 2019 9:02 AM
To: 'Mona Meagher' <monalmeagher@gmail.com>
Cc: 'Jeff Veazie' <jveazie@invenergyllc.com>; 'Miller, Eric' <emiller@invenergyllc.com>; 'Woodcock, Gordon' <GWoodcock@invenergyllc.com>
Subject: Your request for Fig 13-1

Mona, Can we explore using DPS staff as an intermediary to get you what you need without sharing Fig 13-1?

John W. Dax
The Dax Law Firm, P.C.
54 State St. Suite 805
Albany, NY 12207
518 432 1002

From: John Dax <jdax@daxlawfirm.com>

Sent: Thursday, September 5, 2019 9:27 AM

To: 'Mona Meagher' <monalmeagher@gmail.com>

Cc: 'Jeff Veazie' <jveazie@invenergyllc.com>; 'Miller, Eric' <emiller@invenergyllc.com>; 'Woodcock, Gordon' <GWoodcock@invenergyllc.com>

Subject: RE: Your request for Fig 13-1

Mona, Is the highlighted text below the crux of your inquiry? If not please explain what your focus is.

John W. Dax
The Dax Law Firm, P.C.
54 State St. Suite 805
Albany, NY 12207
518 432 1002

From: Mona Meagher <monalmeagher@gmail.com>

Sent: Thursday, September 5, 2019 9:21 AM

To: John Dax <jdax@daxlawfirm.com>

Subject: Re: Your request for Fig 13-1

Mr. Dax,

I am not quite sure how that would work. Do you propose they share with CMORE/me the 200 plus names of participants? Leave out those in negotiation? Being that this document was discussed fairly extensively during the evidentiary hearing in response to CMORE's cross of Mr Woodcock and in particular one of CMORE's members, I would like to be able to review the document that was submitted in May 2019 and compare to your proposed update map to assure that CMORE members in particular are being accurately represented.

Which as far as I can tell would require seeing the documents in their entirety.

Thank you,

Mona Meagher

CMORE

On Thu, Sep 5, 2019 at 9:02 AM John Dax <jdax@daxlawfirm.com> wrote:

Mona, Can we explore using DPS staff as an intermediary to get you what you need without sharing Fig 13-1?

John W. Dax
The Dax Law Firm, P.C.
54 State St. Suite 805
Albany, NY 12207
518 432 1002

From: Mona Meagher <monalmeagher@gmail.com>

Sent: Thursday, September 5, 2019 9:52 AM

To: John Dax <jdax@daxlawfirm.com>

Cc: Leary, Maureen (DPS) <Maureen.Leary@dps.ny.gov>; Sherman, Richard A (DEC) <richard.sherman@dec.ny.gov>; Woodcock, Gordon <GWoodcock@invenergyllc.com>; Miller, Eric <emiller@invenergyllc.com>; cc: Zoghlin, Jacob <Jacob@zoglaw.com>; Zoghlin, Mindy <mindy@zoglaw.com>; Benjamin Wisniewski, Esq. <benjamin@zoglaw.com>; Williamson, Ted <tedw@kfoc.net>; Wells, Tara (AGRICULTURE) <Tara.Wells@agriculture.ny.gov>; Vigars, Jessica (DPS) <Jessica.Vigars@dps.ny.gov>; Jeff Veazie <jveazie@invenergyllc.com>; Tayrien, Mark <mtayrien@labellapc.com>; Staffier, John <jstaffier@sdsatty.com>; Spencer, Kathy <kspencer@labellapc.com>; John Sharkey <jmshark138@gmail.com>; Senlet, Ekin <esenlet@barclaydamon.com>; Saviola, Michael (AGRICULTURE) <Michael.Saviola@agriculture.ny.gov>; Phillips, Michael J (HEALTH) <Michael.Phillips@health.ny.gov>; Paulsen, Kara E (DEC) <Kara.Paulsen@dec.ny.gov>; O'Toole, Bridget <bridget@zoglaw.com>; Ng, Jennifer <JNg@invenergyllc.com>; Aaron Mullen <aaron@m-alaw.com>; Moran, Sean <nyslofenergy@gmail.com>; Dufresne, Zack <Article10@aceny.org>; Lorraine Dewey <ldewey@daxlawfirm.com>; Cerbin, Andrea (DPS) <Andrea.Cerbin@dps.ny.gov>; Cady-Poulin, Kristen K (DEC) <kristen.cady-poulin@dec.ny.gov>; Tim Brown <tjebrown@frontiernet.net>; Bonilla, Mary Anne (DEC) <MaryAnne.Bonilla@dec.ny.gov>; Behnke, Heather (DPS) <Heather.Behnke@dps.ny.gov>; Abbott, Judith A (HEALTH) <judith.abbott@health.ny.gov>

Subject: Re: CMORE /Protected Information request

Your Honors,

As I am unfamiliar with the specific points of this type of negotiation and Mr. Dax is attempting to pin me down on fine details of the request, I would prefer to defer to your Honors and trust your judgement in the ruling on this matter.

Respectfully,

Mona Meagher

CMORE

On Thu, Sep 5, 2019 at 9:38 AM John Dax <jdax@daxlawfirm.com> wrote:

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Your honors, Please be aware that CWE is exploring alternative means for providing the information Ms. Meagher has requested. I ask that you give us until COB tomorrow to conclude those discussions.

John W. Dax
The Dax Law Firm, P.C.
54 State St. Suite 805
Albany, NY 12207
518 432 1002

From: Leary, Maureen (DPS) <Maureen.Leary@dps.ny.gov>
Sent: Thursday, September 5, 2019 9:35 AM
To: Mona Meagher <monalmeagher@gmail.com>
Cc: Sherman, Richard A (DEC) <richard.sherman@dec.ny.gov>; John Dax <jdax@daxlawfirm.com>; Woodcock, Gordon <GWoodcock@invenenergyllc.com>; Miller, Eric <emiller@invenenergyllc.com>; cc: Zoghlin, Jacob <Jacob@zoglaw.com>; mindy@zoglaw.com; Benjamin Wisniewski, Esq. <benjamin@zoglaw.com>; Williamson, Ted <tedw@kfoc.net>; Wells, Tara (AGRICULTURE) <Tara.Wells@agriculture.ny.gov>; Vigars, Jessica (DPS) <Jessica.Vigars@dps.ny.gov>; Jeff Veazie <jveazie@invenenergyllc.com>; Tayrien, Mark <mtayrien@labellapc.com>; Staffier, John <jstaffier@sdsatty.com>; Spencer, Kathy <kspencer@labellapc.com>; jmshark138@gmail.com; Senlet, Ekin <esenlet@barclaydamon.com>; Saviola, Michael (AGRICULTURE) <Michael.Saviola@agriculture.ny.gov>; Phillips, Michael J (HEALTH) <Michael.Phillips@health.ny.gov>; Paulsen, Kara E (DEC) <Kara.Paulsen@dec.ny.gov>; bridget@zoglaw.com; Ng, Jennifer <JNg@invenenergyllc.com>; Aaron Mullen <aaron@m-alaw.com>; Moran, Sean <nyslofenergy@gmail.com>; Dufresne, Zack <Article10@aceny.org>; Lorraine Dewey <ldewey@daxlawfirm.com>; Cerbin, Andrea (DPS) <Andrea.Cerbin@dps.ny.gov>; Cady-Poulin, Kristen K (DEC) <kristen.cady-poulin@dec.ny.gov>; Tim Brown <tjeibrown@frontiernet.net>; Bonilla, Mary Anne (DEC) <MaryAnne.Bonilla@dec.ny.gov>; Behnke, Heather (DPS) <Heather.Behnke@dps.ny.gov>; Abbott, Judith A (HEALTH) <judith.abbott@health.ny.gov>
Subject: Re: CMORE /Protected Information request

Ms. Meagher:

Please file your September 4, 2019 response to Mr. Dax's September 3, 2019 letter in DMM, if you have not already done so. We will be issuing a formal ruling addressing the dispute shortly. There is no need for further action on your part. Any other party who would like to be heard on this matter may file by today. No replies will be permitted. Thank you.

Maureen F. Leary
Administrative Law Judge
New York State Department of Public Service
3 Empire State Plaza
Albany, New York 12223
(518) 486-9353

On Sep 5, 2019, at 8:51 AM, Mona Meagher <monalmeagher@gmail.com> wrote:

ATTENTION: This email came from an external source. Do not open attachments or click on links from unknown senders or unexpected emails.

Your Honors,

I am requesting clarification on the filing of documents pertaining to Protective Order information requests.

The provision of the Protective Order paragraph 16 states attempts at resolving objections should be done informally.

CMORE sent its initial request only to the parties. Mr. Dax responded with a denial of that request and filed it with DMM. CMORE's response to Mr. Dax was sent only to the parties. Is this response letter from CMORE to be filed on DMM?

Also, if CMORE seeks resolution from your Honors in this matter, should that be filed on DMM or kept between the parties?

Thank you for your assistance in this matter.

Respectfully,
Mona Meagher
CMORE Board Member