

NEW YORK STATE BOARD ON ELECTRIC
GENERATION SITING AND THE ENVIRONMENT

CASE 14-F-0485 - Application of Lighthouse Wind LLC for a
Certificate of Environmental Compatibility and
Public Need Pursuant to Article 10 to Construct
a 201 MW Wind Energy Facility.

RULING ON MOTION FOR RECONSIDERATION

(Issued November 1, 2016)

DAVID R. VAN ORT, SEAN MULLANY, and RICHARD A. SHERMAN,
Examiners:

INTRODUCTION

In this ruling we deny motions by the Town of Yates ("Yates") and John Riggi and James Simon (hereinafter "Riggi and Simon") to reconsider a ruling issued in this case on August 25, 2016. We also deny a cross-motion brought by Lighthouse Wind, LLC ("Lighthouse") seeking authorization to exclude certain parties from the pre-application stipulation process.

BACKGROUND

Article 10 provides for a pre-application stipulations process, under which an applicant "may consult and seek agreement with any interested person ..." regarding "any aspect of the preliminary scoping statement and any study or program of studies made or to be made to support [an] application" under Article 10.¹ In any subsequent hearing on an application, a party that did not enter into a stipulation remains free to timely object to any aspect of the preliminary scoping statement

¹ PSL §163(5).

("PSS") and the methodology and scope of any stipulated studies or program of studies.²

The August 25 Ruling

In a ruling issued August 25, 2016 (the "August 25 Ruling"), we decided that any pre-application stipulation process undertaken by Lighthouse pursuant to Public Service Law ("PSL") §163(5) and 16 NYCRR §1000.5(j) would be confidential, by operation of 16 NYCRR §1000.3 and 16 NYCRR §3.9(d) ("Rule 3.9(d)").³ Rule 3.9(d) says that "[p]articipating parties, their representatives and other persons attending settlement negotiations shall hold confidential ... discussions, admissions, concessions, and offers to settle and shall not disclose them outside the negotiations except to their principals, who shall also be bound by the confidentiality requirement, without the consent of the parties participating in the negotiations."

The August 25 Ruling explained how confidentiality would promote candid settlement discussions, thereby increasing the chances of agreement on stipulations, consistent with Article 10's goal of establishing a more efficient review process. The August 25 Ruling also explained how settlements can reduce transactional costs, thereby allowing parties to focus their time and resources.⁴

The Motions for Reconsideration

Two motions were filed seeking reconsideration. On September 19, 2016, Riggi and Simon filed a motion ("Riggi-Simon

² PSL §163(5).

³ August 25 Ruling, p. 11.

⁴ August 25 Ruling, pp. 11-13.

Motion") as individual citizens.⁵ On September 26, 2016, Yates also filed a motion for reconsideration.⁶ The motions argue that a confidential stipulation process is inconsistent with Article 10 because the statute requires public participation and confidentiality prevents the public from participating. The instant motions claim that confidentiality will prevent the public from offering "informed comments" to their elected officials. Yates also asserts that Rule 3.9(d) infringes the free speech rights of elected officials and the public, as well as the right to a republican form of government.⁷

Both motions attempt to take issue with an observation made in the August 25 Ruling that confidentiality promotes candid settlement discussions.⁸ Riggi and Simon claim the August 25 Ruling never explained why a non-confidential process would discourage public participation. The Yates motion asserts there is no record evidence supporting a finding that an open stipulation process would discourage public participation.

Yates claims the August 25 Ruling is contrary to the Freedom of Information Law ("FOIL") because documents generated during the stipulations process would be subject to disclosure under FOIL. In addition, Yates charges it was improper to apply Rule 3.9(d) because Article 10 siting cases are not "adversarial."

Save Ontario Shores ("SOS") supports reconsideration, joining in the claims that confidentiality excludes the public in a manner inconsistent with the statutory goal of enhancing

⁵ Riggi and Simon filed their motion pro se as private citizens. They are also members of the Town Board of the Town of Yates.

⁶ Yates is an eligible municipal party and was awarded pre-application intervenor funding.

⁷ Yates Motion, p.4.

⁸ August 25 Ruling, pp. 12-13.

public participation. According to SOS, this is also inconsistent with the basic conception of a political community.⁹

The Lighthouse Opposition and Cross-Motion

Lighthouse opposed the Riggi-Simon motion in a filing made on September 27, 2016, and also cross-moved for a ruling allowing it to exclude certain parties from the stipulation process. On October 4, 2016, Lighthouse filed a response opposing the Yates motion as well.

Lighthouse says the Riggi-Simon motion has no basis in law or fact and instead rests on inaccurate claims and on the opinions of the movants. Lighthouse says it is "patently untrue" that the August 25 Ruling deprives the public of any ability to comment on disputed issues.¹⁰ Lighthouse asserts that confidentiality is consistent with the provisions of Article 10 allowing for the stipulation process and maintains that confidentiality advances settlement. Lighthouse argues that, although Article 10 recognizes a significant role for public involvement, the statute also entitles applicants to a fair and expeditious review and requires consideration of a broad range of interests. Therefore, Lighthouse argues, Article 10 does not allow recalcitrant parties and anti-wind groups to frustrate or interfere with the stipulation process.

Lighthouse cross-moves for a ruling allowing it to exclude certain parties from the stipulation process, claiming it has tried to negotiate with the parties in question, but they have not participated in good faith.¹¹ These parties, Lighthouse charges, "have filed frivolous and duplicative motions, and

⁹ SOS Response, pp. 1-2.

¹⁰ Lighthouse Response and Cross-Motion, p. 4.

¹¹ Lighthouse's motion did not specifically identify the parties it seeks to exclude.

refused to offer any substantive input into the stipulations negotiations."¹² They have also made their obstructionist intentions known, Lighthouse claims, and have used the stipulation process to delay, frustrate or subvert the Article 10 process.¹³ Under such circumstances, Lighthouse claims, it has no legal obligation to continue negotiating with the parties in question, and can instead exclude them from the process.¹⁴

Two days after filing its response in opposition and cross-motion, Lighthouse submitted documents to the ALJs for in camera review¹⁵ which, Lighthouse claims, provide evidence of "a lack of substantive or otherwise productive participation by certain parties."¹⁶

The Town of Somerset ("Somerset") and Riggi and Simon opposed the Lighthouse cross-motion. They vigorously deny having interfered with the stipulation process and claim a strong interest in being able to continue participating. Riggi and Simon claim "a right to be heard" and allege Lighthouse wants to exclude them rather than negotiate with them. Riggi and Simon ask for a ruling compelling Lighthouse to negotiate with them publicly. Somerset claims it has provided timely and

¹² Lighthouse Response and Cross-Motion, p. 2.

¹³ Lighthouse Response and Cross-Motion, p. 12.

¹⁴ Lighthouse Response and Cross-Motion, p. 11. Lighthouse also asks that Messrs. Riggi and Simon be ordered to stop making duplicative and legally baseless motions. Lighthouse Response and Cross-Motion, pp. 3-4.

¹⁵ In an email ruling sent on October 4, 2016, ALJ Mullany ruled that the period for responding to Lighthouse's cross-motion would be deemed to have commenced as of September 29, 2016, the date Lighthouse submitted the documents in support of its cross-motion.

¹⁶ Lighthouse Response and Cross-Motion, p. 1 & n. 1. The cross motion did not specifically reference any portion of the documents submitted for in camera review.

substantive comments, but that Lighthouse has entirely ignored them.

Somerset goes further, asserting that Lighthouse wants to exclude Somerset so it can then confidentially negotiate stipulations with state agencies. Somerset claims such stipulations would bind those agencies and the agency commissioners sitting on the Siting Board. In this way, Somerset asserts, Lighthouse seeks to deprive Somerset of any meaningful opportunity to convince State agency stakeholders that the project should not be approved. It asks that we compel Lighthouse to continue negotiating with Somerset.

DISCUSSION

A motion for reconsideration is essentially a motion for re-argument addressed to a tribunal's discretion. The Riggi-Simon and Yates motions do not identify any valid basis for granting reconsideration. Both motions essentially repeat claims previously raised by the Town of Somerset and rejected in the August 25 Ruling.¹⁷

The August 25 Ruling does not prohibit public participation in the stipulation process. It requires (1) that Article 10 pre-application stipulation consultations be on notice to all parties, and (2) that any "discussions, admissions, concessions, and offers to settle" made during stipulation consultations be maintained as confidential, as required by 16 NYCRR §3.9(d).¹⁸

Concerns about public participation are addressed by the requirement for notice to all parties.¹⁹ In this case, the

¹⁷ August 25 Ruling, pp. 9, 11-12.

¹⁸ August 25 Ruling, pp. 2 & 11.

¹⁹ August 25 Ruling, p. 2.

notice of the pre-application conference satisfied this mandate.²⁰ In addition, Article 10 provides other opportunities for public involvement during the pre-application stage of any proposal, including the preparation and filing of a Public Involvement Program ("PIP") plan.²¹ Before any stipulation can be finalized, the public must be given notice and a reasonable opportunity to comment.²² Finally, any party choosing not to enter into a stipulation may then be heard on the merits through the Article 10 process itself.²³

No one has identified any member of the public that has actually been prevented from participating in the stipulation process. Riggi and Simon filed their motion as private citizens and do not allege they have been prevented from participating in the stipulation process. No elected officials have come forward claiming they have been prevented from participating in the stipulation process. The claim that confidentiality will prevent elected officials from including their constituents in the stipulation process was raised and rejected previously.²⁴ The movants have not alleged any facts showing that, because of Rule 3.9(d), elected officials have

²⁰ Case 14-F-0485, Notice of Pre-Application Conference to Consider Pre-Application Intervenor Funding Requests and to Initiate the Stipulations Process, (issued December 30, 2015).

²¹ 16 NYCRR §1000.4(d). Lighthouse's revised PIP plan was filed on January 15, 2015. Section 6 of that document describes Lighthouse's proposed activities to identify stakeholders, gather input from them, and to encourage public participation. Lighthouse has filed with the department periodic event tracking logs that document its outreach efforts.

²² PSL §163(5); 16 NYCRR §1000.5(j)(3).

²³ 16 NYCRR §1000.5(k).

²⁴ August 25 Ruling, pp. 8 & 13.

been unable to solicit "informed" public comments.²⁵ Public officials must comply with laws governing confidentiality, even when they limit the information that can be shared with constituents.²⁶

Also unavailing is the argument that Rule 3.9(d) requires elected officials to spend time and effort negotiating stipulations without the benefit of informed public comments, only to later learn of strong public objections to formally proposed stipulations. This is a risk inherent in any form of representative government. Public officers must seek to inform themselves of public concerns within the bounds of the law, and then must exercise their own judgment.

Yates's argument that the August 25 Ruling is inconsistent with the Freedom of Information Law (FOIL), because records created during the stipulation process are subject to disclosure under FOIL,²⁷ is also unavailing. Whether any such records are subject to disclosure under FOIL is a separate question that is not presented.²⁸ No such determination can be made in the abstract.

We reject Yates's argument that confidentiality is inappropriate because Rule 3.9(d) only applies in adversarial

²⁵ If by "informed public comments" the movants mean comments informed by confidential information, then this argument is merely an expression of disagreement with the August 25 Ruling, and does not provide grounds for reconsideration.

²⁶ This argument was also raised and rejected in the August 25 Ruling.

²⁷ Yates Motion, p. 5.

²⁸ Yates wrongly claims the August 25 Ruling "implicitly acknowledged" that documents created during the stipulation process would be subject to disclosure under FOIL. Yates Motion, p. 5. The August 25 Ruling said only that a request for records under FOIL must be made upon the agency maintaining the records.

cases and the Article 10 process is not "adversarial."²⁹ We are not aware of any decisions on point, but that is unsurprising since this case is one of the first under Article 10. The claim that Article 10 cases are not adversarial is implausible because cases involving the siting of major electric facilities are typically highly contested and extensively litigated. The motion practice during the pre-application phase of this proceeding illustrates that this case is no exception. Moreover, the formal litigation process established under Article 10, with formal discovery, motion practice, evidentiary hearings, and a recommended decision subject to brief by the parties before the final decision of the Siting Board, which is thereafter appealable to state court, is fully consistent with an adversarial process.

We reject the claim of Riggi and Simon that the August 25 Ruling erroneously failed to explain why non-confidential negotiations would discourage public participation. On the contrary, the August 25 Ruling discussed how confidentiality promotes candid settlement discussions among the parties and why, absent confidentiality, the stipulation process would be less viable.³⁰ We also reject the related and unsupported claim of Yates that there must be record evidence that confidentiality promotes settlement. It has been judicially recognized that confidentiality not only serves settlement, it may be necessary for settlement:

In a matter that [is] of significant concern to the public, it is doubtful that a public settlement conference would ever permit the type of give and take that would lead to an agreed resolution of the dispute. Settlement positions are often extreme and should they be

²⁹ Yates Motion at 6.

³⁰ August 25 Ruling, pp. 12-13.

made public a litigant would reasonably fear being judged in the court of public opinion based upon what are nothing more than bargaining positions. These concerns would hardly encourage negotiations.

United States v. Town of Moreau, 979 F. Supp. 129, 135-136 (N.D.N.Y 1997), affirmed sub nom, United States v. Glens Falls Newspapers, 160 F.3d 853 (2d Cir. 1998).³¹ This is the reasoning behind the PSC's Rule 3.9(d) and the August 25 Ruling³² and it was not error to make this observation without holding an evidentiary hearing.

We have considered the other arguments presented in the Riggi-Simon Motion and the Yates Motion and find them unavailing. Accordingly, we deny the movants' requests that we compel Lighthouse to conduct non-confidential stipulation consultations.

The Lighthouse Cross-Motion

We also deny Lighthouse's cross-motion. Lighthouse is correct that the pre-application stipulation process under Article 10 is voluntary. PSL §163(5) says an applicant "may consult and seek agreement with any interested party"³³ Therefore, Lighthouse is not legally obliged to pursue stipulations with any party and may decline to do so if it chooses. However, if Lighthouse elects to commence the stipulation process, then it must provide notice to all

³¹ Case 04-E-0572, Consolidated Edison Company of New York, Inc., Ruling Concerning Sanctions, (issued January 3, 2005) (Confidentiality "affords the participating parties an opportunity to exchange ideas frankly, without fear that others participating might later use such ideas to the disadvantage of others....").

³² August 25 Ruling, pp. 12-13.

³³ PSL §163(5) (emphasis added).

parties.³⁴ Such notice will promote a fair and inclusive process, allow the orderly and timely administration of the proceeding, and reasonably balance the interests of the public and the applicant.

To ensure continued fairness, once an applicant invokes the stipulation process, it cannot thereafter exclude a party without authorization from the presiding examiner(s) based on good cause shown. Such relief must be requested by a motion on notice to all parties. The inquiry will necessarily be fact-sensitive, but generally the exclusion of a party will not be permitted unless there is an evidentiary showing that the party has tried to frustrate, delay or interfere with the stipulation process. The movant will bear the burden of proof, and it will not be enough to show only that the party to be excluded has not contributed to the settlement process. That is because no party has any obligation to settle. Accordingly, all parties may attend the stipulations consultation process, but all parties must comply with Rule 3.9(d), and no party may interfere with the stipulation consultation process.

Based upon our review of the documents Lighthouse submitted in support of its cross-motion, we find that Lighthouse has not shown that the parties in question have attempted to interfere with the stipulation process. At most, those parties appear unwilling to move from the positions they hold. This does not provide a basis for Lighthouse to exclude these parties. Therefore, Lighthouse's cross-motion is denied without prejudice.

³⁴ August 25 Ruling, p. 2. Any person wishing to request party status can visit the Department of Public Service Website at www.dps.ny.gov and search for Case 14-F-0485, or contact the presiding examiners.

Because we deny the cross-motion on this ground, we do not need to address other arguments that were made in opposition to that cross-motion. We will address certain claims, however, for the purpose of providing guidance. First, we reject Somerset's unsupported claim that Siting Board members affiliated with a state agency would be bound by a stipulation signed by the staff of that agency.³⁵ Article 10 recognizes a distinction between agency staff and an agency's chief executive inasmuch as PSL §163(5) only permits an applicant to enter into a stipulation with agency staff.³⁶ A stipulation executed by staff would not bind any member of the Siting Board (including that particular agency's commissioner).³⁷ To the contrary, as a matter of due process, the members of the Siting Board must exercise independent judgment.³⁸

We also reject the claim that, if parties are excluded from the stipulation process, they would be "silenced" or deprived of an opportunity to persuade agency staff and the Siting Board on the merits of the matter. Such arguments misconstrue the stipulation process. That process is for seeking agreement on the scope and focus of pre-application

³⁵ Somerset Response Opposing Lighthouse Cross-Motion, p.3.

³⁶ PSL §163(5) (applicant "may consult and seek agreement with ... staff of [DPS], [DEC] and [DOH]...."); 16 NYCRR §1000.5(j) ("applicant may ... seek agreement ... with ... staff of DPS, DEC, or DOH").

³⁷ See United Water N.Y., Inc. v. PSC, 252 A.D.2d 810 (3d Dep't 1998) (Contract principles not dispositive for judicial review of PSC order interpreting settlement); ADT Co. v. Public Service Com. 53760, 128 A.D.2d 1, 4-5 (3d Dep't 1987) (PSC may conduct independent analysis and reach a conclusion not suggested by the parties).

³⁸ 1616 Second Ave. Restaurant v. New York State Liquor Auth., 75 N.Y.2d 158, 161 (1990) (An impartial decision maker is a core guarantee of due process in adjudicatory proceedings before administrative agencies).

impact studies or on other questions related to the preliminary scoping statement. Non-stipulating parties may litigate their case to the full extent permitted under Article 10.³⁹ The stipulation process is not "an opportunity to be heard" on the merits if the party has no genuine interest in settling any questions. All parties are cautioned that attempts to use the stipulation process exclusively for continued advocacy may constitute grounds for exclusion.

CONCLUSION

The motions filed by the Town of Yates and by Messrs. Riggi and Simon are denied with prejudice. The cross-motion filed by Lighthouse is denied without prejudice.

(SIGNED)

DAVID R. VAN ORT

(SIGNED)

SEAN MULLANY

(SIGNED)

RICHARD A. SHERMAN

³⁹ PSL §163(5).