STATE OF NEW YORK
PUBLIC SERVICE COMMISSION

CASE 22-T-0346 - Application of Empire Offshore Wind LLC for a Certificate of Environmental Compatibility and Public Need for the Construction of Approximately 12 Miles of Transmission Lines from the Boundary of New York State Territorial Waters to a Point of Interconnection in the Town of Hempstead, Nassau County.

RULING REGARDING SETTLEMENT PROCESS, SCHEDULE, AND DIRECTING FURTHER FILING

(Issued September 6, 2024)

ASHLEY MORENO and TARA A. KERSEY, Administrative Law Judges:

This ruling denies a requested change to the settlement process by Empire Offshore Wind LLC and EW Offshore Wind Transport Corporation (together, Applicant) and directs Applicant to file further information.

Procedural Process

On June 17, 2022, Empire Offshore Wind LLC[1] filed an application (Application) for a Certificate of Environmental Compatibility and Public Need pursuant to Article VII of the Public Service Law seeking to construct, operate, and maintain the New York portion of the transmission facilities required to interconnect its proposed Empire Wind 2 Offshore Wind Generating Facility to a Point of Interconnection with the New York State Transmission System at the Barrett 138-kilovolt (kV) Substation located in Oceanside in the Town of Hempstead, New York (Project). As is relevant here, on May 22, 2024, Applicant

[1] On February 14, 2023, Empire Offshore Wind LLC requested that the Commission accept a supplement to its Article VII Application in this proceeding to add EW Offshore Wind Transport Corporation as a co-applicant.

filed a letter advising that "it was temporarily suspending settlement discussions in order to conduct analyses of potential alternate routes for the cable routes and locations for the onshore substation" of the Project, stating that it anticipates several months to complete the process, and contending that, because it is not seeking to terminate settlement negotiations, it does not intend to restart the commencement of the 12-month review period required by Public Service Law (PSL) §123(3)(a). Applicant states that "[w]hile settlement discussions are paused, [it] intends to consult with representatives of potential host communities for the purpose of discussing the proprietary rights that may be required for various project routes and with affected New York State agencies for the limited purpose of obtaining environmental and technical baseline information on various potential project routes." Applicant takes the positions that proprietary issues are beyond the scope of Article VII, that discussions with state agencies are limited to information gathering, that the conversations would not involve negotiations concerning issues to be addressed during settlement, and it opines that those discussions should therefore not be subject to the notification requirements of 16 NYCRR 3.9(a) or the Commission's Settlement Guidelines.[2] It states that following the conclusion of its analyses and consultations, it will file a supplement to its application and resume settlement negotiations.

By email May 23, 2024, counsel for Department of Public Service trial staff (Staff) sent us and Judge Belsito, the settlement judge, an email, copying all parties, stating that the Applicant "does not make clear how the Applicant will conduct such discussions" it plans to undertake during the break

[2] Cases 90-M-0255 and 92-M-0138, Settlement Process and Rules, Opinion 92-2 (issued March 24, 1992), Appendix B.

in settlement discussions and requested clarification "whether the Applicant's intended course of action is permissible and consistent under the Commission's regulations and guidance."

The same day, we sent an email to all parties stating that we interpret the Applicant's filing as a motion proposing a change to the procedural process established in this proceeding and advised that any party may respond to the filing no later than May 31, 2024.

Timely responses were filed by Island Park Civic Association – Committee (IPCA Committee), Protect Our Coast – Long Island New York (POC-LINY), Costco Wholesale Corporation (Costco), and the Town of Hempstead (Hempstead).[3] Thereafter, Applicant filed a letter May 31, 2024, responding to the arguments raised.

IPCA Committee opposes the motion, asserting that it would be prejudiced if Applicant were authorized to modify the procedural processes as requested. First, it argues that it may be deprived necessary time to consider and participate in settlement and hearings with respect to any new route or substation location that is proposed. It claims that a new

[3] While they did not file responses to the motion, between May 27 and May 31, 2024, individual intervenors Kristen Donovan, Debbie Slott, Christina Tisi-Kramer, Boris Livshiz, Noel Donohue, Mike Dean, Lucy Smorto, Patricia Beaumont, Caren Riskin, Hal Riskin, and Kathleen Sullivan served us and all parties with emails indicating they shared the questions and concerns raised in correspondence from counsels for Staff and Protect Our Cost – Long Island New York (POC-LINY). They each opposed Applicant's proposal to conduct analyses and consultations outside the settlement process, and some stated their opinion that to do so may cause conflicts among stakeholders with different interests and may affect the outcome of the process. Those individuals state that discussions related to the Project route should remain transparent and inclusive and that to do otherwise would undermine confidence in the process.

route or substation location may impact new residents, would require time to review and scrutinize any proposal, and alleges that the IPCA Committee would have less time to prepare for either settlement negotiations or litigation than if the Applicant maintained the existing route and process. It further contends that Applicant's proposed schedule would not provide sufficient time to conduct additional public outreach and public statement hearings. Second, IPCA Committee argues that Applicant's proposal that would limit discussions to "proprietary rights" with potential municipal host communities is unrealistic and prejudicial to the parties and public who would be excluded from such discussions and negotiations. IPCA Committee states that although the main purpose of such discussions may be proprietary rights, there would likely be discussion of issues that would ordinarily be addressed in the context of settlement. IPCA Committee states that, if the Applicant wishes to broaden the scope of discussions beyond the parameters of the existing application in a material way, it should withdraw its application and file a new application.

POC-LI opposes Applicant's proposal contending that it violates the Commission's Settlement Rules "because the proposal contemplates communications related to settlement issues and that are not inclusive of, or on notice to, all parties." It states that the Applicant identified alternate routes as within the scope of settlement discussions, that any discussion regarding potential alternate routes therefore must be on notice to all parties and permit reasonable time for preparation, and that Applicant is prohibited from meeting with any non-utility party unless all parties consent otherwise. POC-LI states that Applicant "proposes to benefit from the confidentiality and tolling provisions afforded by 'suspended' settlement status, while flagrantly violating the clear prohibition on *ex parte*

communications provided by Rule 3.9(a) and mandatory Commission Settlement Guidelines." It asserts settlement should continue in compliance with the applicable rules. In the alternative, POC-LI proposes that settlement discussions be terminated, and a litigation schedule be established. Noting that Applicant has terminated its contract with New York State Energy Research and Development Authority and withdrawn from the New York Independent System Operator (NYISO) queue and opining that it "is demonstrably unable to obtain all necessary property rights for its preferred cable route," POC-LI requests adjudication of whether Applicant can obtain necessary property rights and whether the Project is in the public interest. It attached a report to its response, "Economic Analysis of a Potential Empire Two Wind Project Re-Bid Award," as an offer of proof that the Project is not in the public interest.

Village of Island Park opposes Applicant's proposal. It states that Applicant's route is no longer viable "following the Governor's refusal to alienate land required for the Applicant's original route," that pursuant to Public Service Law (PSL) §122 Applicant has an obligation to identify any reasonable alternate location or locations for the facility, and has failed to provide evidence that there are any additional reasonable alternate routes, a description of them, or their comparative merits and detriments. While the Village agrees that discussion of proprietary rights is beyond the scope of Article VII, it argues that the process must be completed prior to the filing of a viable application. The Village contends that Applicant cannot be permitted to continue a process it has not fully perfected and that allowing Applicants to supplement its application with a new route would prejudice the rights of the municipalities and the amount of time provided for the municipalities' consideration of any alternative routes

proposed. The Village opines that Applicant should be directed to withdraw its application and refile with the Commission once it can identify any and all reasonable alternate locations and why the primary proposed location is best suited for the facility as required by the PSL.

Costco posits that the Applicant's proposal violates 16 NYCRR 3.9(a) insomuch as it contemplates communications related to settlement issues with and between a select group of potential stakeholders to the exclusion of parties. Costco states that the communications are contrary to the Settlement Guidelines, undermines participation in the process, and "runs afoul of the spirit of the public process." Costco states that the Applicant has only hypothetical onshore routes because its primary route is not feasible, that Applicant should be directed to withdraw its application, and the requested change of procedure should fail.

Town of Hempstead maintains that Applicant lacks standing to engage in settlement conferences, reiterating the position it took in its interlocutory appeal of our April 3, 2024 Ruling.[4] It takes a different view than other parties and contends that "continued engagement under the procedural rules governing the Article VII application would undermine confidence and the need for open and full disclosure on matters of public importance." It contends that further discussion should be conducted outside the Article VII process and without the confidentiality restrictions to encourage public engagement and debate.

In response, Applicant states that, in consideration of "strong community opposition" to its proposed route, it wishes to explore "a variety of alternate routes" that would

[4] See Town of Hempstead Interlocutory Appeal (filed April 17, 2024).

require additional environmental and land use analysis prior to development. Applicant argues that it should be free to engage in consultations similar to those that it engaged in prior to the filing of an application because it would expedite the processing of formulating a new proposed route for the Project and that inclusion of all parties would hinder that process by increasing the time required for the development of any such proposal. Applicant argues that no party will be deprived the right to participate in settlement negotiations because any revised route would be filed with the Commission and served on all parties.

Applicant further argues that the Commission's Settlement Rules do not apply to the consultations that it envisions. It notes that the Commission's Settlement Rules are applicable when there is potential to settle issues, regardless of whether there is a pending proceeding, or outside the context of a formal proceeding or in anticipation of a formal filing. It states that the conversations it intends to engage in are limited to information gathering, that the Commission's rules are not intended to "interfere with the ability of developers to obtain the baseline environmental and technical information required to prepare their Article VII applications or to revise such applications once filed," that bringing "such consultations within the scope of the Commission's settlement rules would serve no legitimate purpose and would instead serve only to impose further burdens and delays on the development of the transmission facilities required to achieve New York's clean energy agenda" and contends that to do contrary would violate the requirement of the First Amendment to the United States Constitution that "Congress shall make no law … abridging … the right of the people … to petition the Government for a redress of grievances."

Ruling

Article VII establishes a time frame to bring a proposed project before the Commission for final decision.[5] As is the case here, where the parties are engaged in settlement negotiations, that time is tolled.[6] In the instant case, Applicant seeks to "pause" settlement discussions so as to continue to toll the time to bring this case before the Commission, while it undertakes further study to determine whether any additional reasonable alternate routes and substation locations exist. Applicant's request would maintain its Article VII application pending before the Commission and hold the proceedings in abeyance for an undefined amount of time. As an initial matter, as suggested by our treatment of Applicant's letter as a motion, we do not find that Applicant has the unilateral authority to hold the proceeding in abeyance as its original letter would suggest. Rather, we are charged with overseeing the procedural processes, including overseeing the development of a schedule to timely bring the matter before the Commission and any requests to delay the proceedings must be directed to the judges. We do not find that it is reasonable nor equitable to the parties and potentially affected communities and landowners to hold this proceeding in abeyance indefinitely and the request is denied.

The question raised by DPS Staff and the main issue in contention in the parties' responses is whether Applicant's proposal to consult with and engage in discussions with state agencies and potential host communities regarding potential alternate cable routes and substation locations, without providing notice and a reasonable opportunity to participate in those consultations and discussions, would violate the

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[5] PSL §123(a).

[6] Id.

Commission's Settlement Rules. We find that it does. In consideration that settlement has not concluded, what the Applicant proposes is to caucus with certain state agency and municipal parties, and potentially new municipal parties, without the consent of the other parties. In its Opinion, Order and Resolution Adopting Settlement Procedures and Guidelines, the Commission stated that "caucuses between utility and non-utility parties without notice to all are too susceptible to appearances of impropriety to be tolerated. The settlement process must be an open one, offering all parties the opportunity to participate meaningfully in settlement discussions; private meetings between non-utility and utility parties give the opposite impression and will not be authorized."[7] The Settlement Guidelines state that "if a utility is involved in a caucus with any non-utility party, all parties must be notified of the meeting and allowed to attend, unless all parties consent otherwise."[8] Here, there is vociferous opposition by many of the parties to private discussions between Applicant and other entities. In the absence of consent of all parties, such caucus between Applicant and any existing or potential party is not permissible and violates the intent of the Settlement Rules and the Guidelines.

The rationales that Applicant advances that these consultations are permissible as merely information gathering or concerning property rights and therefore outside of the scope of the Article VII proceeding are unavailing. As POC-LI and other parties point out, the scope of settlement discussions, as identified by Applicant, include alternate transmission and substation locations. To the extent Applicant wishes to engage

[7] Cases 90-M-0255 and 92-M-0138, supra, Opinion 92-2, p. 15.

[8] Id., Appendix B, p. 4.

in soliciting information from state agencies regarding areas within their respective purviews, there is no reason such information cannot likewise be shared with the parties in the context of settlement. Applicant opines that discussions with potential municipalities regarding proprietary rights are outside the scope of the Commission's jurisdiction and the Article VII process. Discussions to determine whether a municipality may be inclined to grant proprietary rights are entwined with the pending Article VII review process. By the Applicants own admission such consultations would be for the purpose of identifying a new alternate route to supplement its Application. Reasonable alternate routes are the subject of settlement negotiations and so long as the Application is pending, any such conversations must be appropriately noticed to interested parties with the opportunity to participate in those conversations pursuant to 16 NYCRR 3.9(a). We are also unpersuaded by Applicant's statement that to conduct such consultations and conversations in the context of settlement would be delayed due to the numerous parties participating in this case. Judge Belsito is appointed as settlement judge and can assist the parties to ensure the process advances smoothly.

Both the Applicant and POC-LI acknowledge that the Settlement Rules apply even in the absence of a formal proceeding.[9] The Applicant argues that, because Article VII applicants are not required to notice such discussion before filing an application, it is suggestive that such consultation and information-gathering conversations it proposes are exempt from the Settlement Rules. However, the circumstances are completely dissimilar. As stated by the Commission, "[t]he regulations assign to the utility the responsibility to

[9] 16 NYCRR 3.9(c).

determine the interested parties when no case is pending." Where a potential Article VII applicant is meeting to engage in consultations with entities for the purpose of gathering information or in discussion of the potential for engaging certain land rights, that potential applicant has not yet developed a preferential route and therefore cannot define those entities that may be interested. Here, there is a formal proceeding with a defined set of interested parties and defined Project and the Settlement Rules are applicable.

With regard to other arguments raised by the parties, we have considered the arguments and find them to be either without merit or unnecessary to address in light of our determination herein.

As we noted above, we do not find it reasonable nor equitable to hold this proceeding in abeyance indefinitely. The parties have been engaged in settlement discussions since February, 2023 and have been in settlement discussion regarding all issues, including the onshore portion of the Project, since September, 2023. Those discussions have not resulted in any agreements for the Commission's considerations. In consideration of the significant time the parties spent engaged in settlement without any reported progress, we no longer find settlement negotiations to be in the public interest. Consequently, the settlement negotiations are now concluded, and we instead adopt the below litigation schedule to timely bring this matter before the Commission for decision.

Milestone	Date
Identification of Issues for Adjudication	October 16, 2024
Staff and Intervenor Testimony	November 26, 2024
Rebuttal Testimony	December 13, 2024
Commencement of Evidentiary Hearing	January 6, 2025

Parties intending to file testimony must file statements describing the issues they propose to develop and identify the required finding in PSL §126 to which the topic relates.

Project Interconnection

In a letter filed by the Applicant on May 1, 2024, Applicant stated that it planned to submit a new interconnection request to the NYISO on or about August 1, 2024. Applicant is directed to file a letter with the Secretary no later than close of business September 13, 2024, providing the date of any such submission to the NYISO and identifying any points of interconnection for which it seeks NYISO authorization. To the extent such request has not yet been submitted, Applicant is directed to identify the date by which such request will be made, along with the identification of any interconnection points for the Project and, when such submission is finally made with the NYISO, Applicant is required to file a letter with the Secretary providing the date the request was made and identifying any points of interconnection for which it seeks NYISO authorization.

(SIGNED) ASHLEY MORENO

(SIGNED) TARA A. KERSEY