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Via Electronic Filing

NYS Office of Renewable Energy Siting  
Empire State Plaza  
Swan Street Building – Core 1  
Room #110-119  
Albany, NY 12239

**Re: Matter 21-00962: Application of Tracy Solar Energy Center, LLC for a 94-c Permit for Major Renewable Energy Facility**

Dear Sir/Madam:

This office represents the Applicant, Tracy Solar Energy Center, LLC (“Applicant” or “TSEC”), with regard to the above proceeding. On September 10, 2021 the Applicant filed an Application under Executive Law Section 94-c. The Application contains certain information which the Applicant asserts should be protected from disclosure under the New York Freedom of Information Law (“FOIL”), Public Officers Law (“POL”) § 87(2)(a) and 89(5). Concurrent with that submission, TSEC hereby respectfully submits its brief in support of its request for confidential protection of certain documents and information contained within the Application, as specifically identified below.

## LEGAL STANDARD

Confidential protection is routinely granted to certain documents and data submitted to State agencies and boards, including the Office of Renewable Energy Siting (“ORES”), New York State Board on Electric Generation Siting and the Environment (“Siting Board”) and New York State Public Service Commission (“Commission” or PSC), through a suite of statutory and regulatory protections which guard such sensitive information and data from broad public release. As more fully discussed below, these protections are derived from various sources, including the statutory exemptions from disclosure under the New York Freedom of Information Law (FOIL), Public Officers Law (POL) § 87. Other statutes such as the New York Environmental Conservation Law (ECL) provide additional protection for certain information. *See e.g.*, ECL § 3-0301(2)(r) (protecting data on habitats of protected species).

In this case, submission of the identified confidential information is required as part of the Application for a permit under Section 94-c of the New York Executive Law. The confidential information must be submitted under separate cover and must be accompanied by this request from the Applicant for confidentiality protections, including exemption from public disclosure under FOIL.

With respect to the recently submitted Application for the Facility, the Applicant is requesting confidential protection as follows:

- Protection of critical energy infrastructure information (CEII) pursuant to POL § 86(5) (defining critical infrastructure) and POL § 89(5)(a)(1-a) (addressing requests for confidentiality for CEII).
- Protection of location of archaeological resources pursuant to New York State Parks, Recreation and Historic Preservation Law § 14.07.
- Protection of trade secret and/or confidential commercial information pursuant to POL § 87(2)(d).
- Protection of private drinking water well information pursuant to POL § 87(2)(b).

## **CONFIDENTIALITY ANALYSIS**

TSEC seeks confidential protection for certain information contained in the Application (i.e., the Exhibits) as well as various Appendices to the Application, and electronic shapefiles which provide the same information in a format requested by ORES, NYSDPS and/or NYSDEC staffs to aid in their review of certain Application data. The specific submissions and grounds for requesting confidential protection are discussed below.

As required by ORES, TSEC is submitting this information under separate cover seeking confidential protection. Where a document contains both confidential and non-confidential information, TSEC has included a redacted version of the document with the Application and submitted a non-redacted version to ORES in conjunction with the request for a confidentiality determination.

### **I. Critical Energy Infrastructure Information**

Protection of critical energy infrastructure information (CEII) happens largely automatically once a party submits the data, information or documents and flags them as containing CEII. POL § 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.” CEII is information which, by its very nature, must be kept confidential. The State has determined that the public interest is served best by maintaining CEII as strictly confidential, even if that means that the public is denied access to that information.

POL § 89(5)(a)(1-a) allows any person or entity making a submission that contains CEII to request protection of that information from disclosure and further protects the request itself as confidential where disclosure of the information contained in the request would defeat the purpose of the requested protection. That information can be considered exempt from disclosure under POL § 87(2)(f)’s protection of information which, if disclosed, “could endanger the life or safety of any

person” and/or § 87(2)(i)’s protection of information which, if disclosed, “would jeopardize the capacity of an agency or an entity” to ensure the security of its information technology assets, including electronic information system and infrastructure. In fact, the Commission and the New York State Department of Public Service (DPS) themselves are directed by POL § 89(5)(a)(3) to maintain CEII apart from all other agency records to ensure proper protection.

In many cases, the applicant is provided access to CEII only after signing a non-disclosure agreement or other contract with the New York Independent Systems Operator (NYISO), the Federal Energy Regulatory Commission (FERC), utilities or other entities; public disclosure of that CEII upon its submission by the applicant would likely violate the commitments the applicant made to obtain that information in the first instance.

With respect to the Application, TSEC is seeking confidentiality protection for Application Appendix 21-A, System Reliability Impact Study (SRIS) as CEII. These documents have been submitted under separate cover only to those DPS/ORES Staff members authorized to receive sensitive CEII information—specifically, Jonathan Forward at NYSDPS and Thomas Van Wert and Michael Cusack at ORES on September 8, 2021. These documents are not included in the Application, given the limitations on its release.

The DPS and PSC have consistently held that the vast majority of the information contained in the SRIS should be protected from disclosure as CEII—holdings to which the Applicant presumes ORES will also adhere. *See* Case 06-T-0650, *Application of New York Regional Interconnect, Inc.*, Ruling Granting Protection for Critical Energy Infrastructure Information, p. 3 (July 31, 2008) (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, p. 2 (July 30, 2008) (finding that all of the SRIS except the Executive Summary and Sections 1 and 2 of the SRIS should be exempted from disclosure); *see also* Case 08-T-0034, *Application of Hudson Transmission Partners, LLC*, Ruling Granting Protection for Critical Energy Infrastructure Information (Apr. 25, 2008); Case 07-T-0140, *Application of Noble Wethersfield Windpark, LLC*, Ruling Granting Protection from Disclosure for Critical Infrastructure Information (Mar. 15, 2007). Documents such as the SRIS and Generation Dispatch Forecasting Analysis required for all proposed Article 10 projects are routinely considered confidential CEII because they include information related to transformer settings, potential weaknesses in the system, overhead transmission standards, and other similar information that qualifies as critical infrastructure information. Furthermore, NYISO considers its power flow, stability and short-circuit data—which are included in the SRIS—as critical energy infrastructure information and restricts access to this information to parties who agree not to disclose the data to other parties.

Accordingly, the SRIS and Class Year Study should be granted confidential protection. Due to the nature of these documents and the sensitivity of the information involved, they have not been uploaded to DMM, consistent with standing requirements for handling of this sensitive data.

## **II. Location of Archaeological Resources**

POL § 87(2)(a) grants a FOIL exemption to any information that is specifically identified as protected from disclosure under other provisions of State or federal law. Both the federal and State historic preservation acts contain provisions authorizing agencies to withhold from disclosure

information on the location of archaeological sites to protect against possible damage. Of particular note, New York State Historic Preservation Law § 14.07 authorizes the withholding of information on archaeological sites from the public where sites “may be damaged by unauthorized investigators if their locations be generally publicized.” See 9 NYCRR § 427.8; *see also* 54 USC § 307103(a) (authorizing federal agencies to withhold from public disclosure information on the location of historic property if it is determined that disclosure may risk harm to the property). Consistent with these provisions, the Commission has recognized the need to protect the location of archaeological sites from disclosure. *See, e.g.,* Case 12-T-0248, *Application of New York State Electric & Gas Corp.*, Order on Waiver Requests (Sept. 14, 2012).

With respect to the Application, TSEC is seeking confidential protection for Application Appendix 9-E and 9-F, Phase 1A and Phase 1B Archaeological Survey Reports, which summarize the results of the comprehensive review of archaeological resources on the Facility Site. These documents include pictures and locations of protected cultural resources and areas. This information was assembled for purposes of assessing the impact of the Facility on these resources and enabling the Applicant to locate the Facility away from these resources where possible. Making this information available to the public would facilitate identification/location of these resources, increasing the potential risk of damage by third parties. Consistent with the laws identified above, ORES should protect this information from disclosure. The State has determined that the goals advanced by keeping this information confidential—protecting the locations where archaeological resources may be found to prevent harm to those resources by “unauthorized investigators”—outweighs the public’s general interest in free access to government information.

### **III. Trade Secrets and Confidential Commercial Information**

One document submitted with the Application should be deemed exempt from disclosure under FOIL as containing records “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 exemption protects the interests of a commercial enterprise in avoiding a significant competitive injury as a result of disclosure of information provided to an agency, thereby fostering the State's economic development efforts to attract business to New York. *See Matter of Encore Coll. Bookstores, Inc. v. Auxiliary Serv. Corp. of State Univ. N.Y. at Farmingdale*, 87 N.Y.2d 410, 420 (1995).

Certain documents and commercial information may not rise to the level of bona fide trade secrets but may nevertheless be entitled to protection as confidential commercial information where the owner of the documents or information demonstrates that disclosure of that information could cause substantial injury to the owner’s competitive position. *Verizon New York Inc. v. New York State Pub. Serv. Comm’n*, 137 A.D.3d 66 (3d Dept. 2016)(outlining a “two-part inquiry” to determine whether information satisfies the trade secret exemption and, if not, whether it nevertheless satisfies the “substantial competitive injury standard”). Consistent with POL § 87(2)(d) as interpreted by the courts, information is “confidential commercial information” where it is (1) confidential or non-public information of a commercial nature which (2) would, if disclosed, cause substantial competitive injury.

The Court of Appeals has affirmed the need for this exemption in finding that

[b]ecause competition in business turns on the relative costs and opportunities faced by members of the same industry, there is a potential windfall for competitors to whom valuable information is released under [Freedom of Information Act (FOIA)]. If those competitors are charged only minimal FOIA retrieval costs for the information, rather than the considerable costs of private reproduction, they may be getting quite a bargain. Such bargains could easily have competitive consequences not contemplated as part of FOIA's principal aim of promoting openness in government.”

*Encore College Bookstores, Inc.*, 87 N.Y.2d at 420 (quoting *Worthington Compressors v. Costle*, 662 F.2d 45, 51 (D.C. Cir. 1981)). Accordingly, the central inquiry with respect to confidential commercial information is the potential value of the requested information to competitors. *Id.* (“[b]ecause the submitting business can suffer competitive harm only if the desired material has commercial value to its competitors, courts must consider how valuable the information will be to the competing business, as well as the resultant damage to the submitting enterprise”). The entity seeking protection is not required to prove actual competitive harm; only that there exists “actual competition and the likelihood of substantial competitive injury.” *Id.* at 421 (quoting *Gulf & Western Industries v. United States*, 615 F.2d 527, 530 (D.C. Cir. 1980)). Courts will also examine the potential economic windfall that might result to competitors should the requested information be disclosed. *See, e.g., New York State Elec. & Gas Corp. v. New York State Energy Planning Bd.*, 221 A.D.2d 121, 125 (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 . . . the disclosure of such data could result in competitors, like petitioner, inferring essential aspects of [company’s] production costs fundamental to projecting future costs”); *City of Schenectady v. O’Keeffe*, 50 A.D.3d 1384, 1386 (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).

Portions of Application Exhibit 4, Real Property, are eligible for confidential commercial information protection, because they contain information about contracts and land agreements, some of which are still being actively negotiated with between the Applicant and property owners. For that reason, public release of this information at this time could interfere with, and potentially jeopardize these ongoing contract negotiations, to the competitive detriment of the Applicant. To a certain extent, release of this information could also result in competitive harm to the Applicant, should a competitor gain knowledge of those pending negotiations and seek to prevent the contracts from being signed or otherwise interfere with negotiations. It would be impossible for Applicant’s competitors to obtain this information from other sources. In fact, public disclosure of the redacted information is the *only* manner in which the Applicant’s competitors could obtain this information, which would put Applicant at a clear and significant disadvantage.

Given the significant competition for contracts and awards, loss of any competitive advantage matters. This information is entitled to protection as confidential commercial information which, if disclosed, would cause the Applicant substantial competitive and economic injury. *See, e.g., Case 08-T-0034, Hudson Transmission Partners, LLC, Ruling Granting Protection for Project’s Estimated Capital Costs* (Mar. 6, 2008) (granting applicant’s capital cost

estimate protection from disclosure as confidential commercial information); *see also* Case 14-T-0360, *Dunkirk Gas Corp.*, FOIL Determination Regarding Exhibit 9 (Oct. 14, 2014) (concluding release of cost estimates would undermine competitive bidding process giving rise to substantial likelihood that Applicant would suffer actual and substantial injury as a result of its release and justifying exempting information from disclosure as confidential commercial information).

#### **IV. Personal Information and Drinking Water Data**

Pursuant to POL § 87(2)(b), an agency may deny access to records or portions thereof where the information "if disclosed would constitute an unwarranted invasion of privacy under the provisions of subdivision two of section eighty-nine of this article." POL § 89(2), in turn, authorizes agencies to adopt guidelines regarding deleting identifying details or withholding records to prevent privacy invasions and to authorize agencies to delete identifying details when it makes records available. The statute includes a non-exclusive list of actions that are considered unwarranted invasions of privacy.

Furthermore, as stated by the New York State Department of Health in confidentiality agreements required to obtain drinking water intake information, "secure public water supply systems are a prerequisite for ensuring safe drinking water and protecting public health, and as such all records and other information pertaining to the critical infrastructure of public water supply systems are exempt from disclosure" under FOIL. As noted in Section II of this brief, POL § 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." Critical infrastructure is not limited to electrical systems; by definition, this must include water infrastructure which, if identified publicly, could jeopardize the health, safety, welfare or security of the State and its residents.

The Applicant asserts that the following information is eligible for protection under POL § 87(2)(b), and/or eligible for protection as drinking water source information which, if released, could threaten the health and safety of the public:

- Appendix 13-D, Private Well Survey Results, redacted to exclude details relating to private drinking water wells.
- Exhibit 4, Real Property, redacted to remove information related to the status of ongoing contract negotiations which are, to an extent, private information regarding the landowner(s) involved.

With respect to the Water Well Data and Private Well Data, to satisfy its obligations under the Section 94-c regulations, the Applicant sent water well surveys to residences/businesses in close proximity to the proposed Facility in order to obtain information about the configuration of their groundwater wells, which enabled the Applicant to assess groundwater conditions at the Facility Site and avoid potential impacts. The completed surveys contain contact information about the property owner as well as detailed information about their well that is not necessarily available from public sources. Consistent with POL § 87(2)(b), these surveys should be protected from disclosure to preserve the confidentiality of names and addresses of the well owners. Moreover, declining to provide such privacy protections to the private water survey results may discourage others from participating in such surveys, depriving applicants and the State of information

relevant to assessing the potential impact of proposed facilities on groundwater and drinking water resources.

## CONCLUSION

For all of the reasons listed above, the items identified by the Applicant should be exempted from public disclosure. Should you have any questions or require anything further in this regard, please feel free to contact us. Thank you.

Respectfully,

*Laura Bomyea Darling*

Laura Bomyea Darling

James A. Muscato II

Attorneys for the Applicant

Enclosures

cc: ORES (without enclosures)