STATE OF NEW YORK
DEPARTMENT OF PUBLIC SERVICE
OFFICE OF RENEWABLE ENERGY SITING
AND ELECTRIC TRANSMISSION

MATTER 25-01765 - Application of RWE SOLAR DEVELOPMENT, LLC, for a Major Renewable Energy Facility Siting Permit Pursuant to Article VIII of the New York State Public Service Law to Develop, Design, Construct, Operate, Maintain, and Decommission a 150-Megawatt (MW) Solar Energy Facility Known as the NY Cow Bell Solar Project Located in the TOWN OF FLORIDA, MONTGOMERY COUNTY.

INTERIM DECISION OF THE EXECUTIVE DIRECTOR ON INTERLOCUTORY APPEAL

(Issued November 12, 2026)

JASON ZEHR, Executive Director:

Presently before me are appeals from the July 20, 2026 Ruling on Motion of the Chief Administrative Law Judge for Article VIII Siting (Chief ALJ). In the Ruling, the Chief ALJ held that the May 22, 2026 protective order issued in this matter be held in abeyance and shall take effect upon the filing by prospective applicant RWE Solar Development, LLC (RWE) of the 60-day notice of intent to file an application required by 16 NYCRR 1100-1.3(d). For the reasons that follow, the Ruling on appeal is modified to provide that the protective order took effect upon issuance at the beginning of the pre-application phase of this proceeding and, as so modified, is affirmed.

Proceedings

The procedural background of proceedings before the Chief ALJ are detailed in the Ruling, and will not be repeated here. For purposes of this appeal, on May 22, 2026, at the request of Montgomery County (the County), the Chief ALJ issued

the protective order for this proceeding (Protective Order) during the pre-application phase but prior to RWE's issuance of a 60-day notice of intent to file an application pursuant to 16 NYCRR 1100-1.3(f).[1] The County filed its acknowledgment of the Protective Order on the same date.[2] By email dated June 1, 2026, counsel for RWE requested clarification on the effective date of the Protective Order. Deeming RWE's email clarification request a motion pursuant to 16 NYCRR 1100-8.5(c), the Chief ALJ authorized the filing of responses.[3] Both the County and Staff of the Department of Public Service, Office of Renewable Energy Siting and Electric Transmission (Staff), submitted responses to RWE's motion.[4]

In the July 20, 2026 Ruling on Motion, the Chief ALJ granted the motion to the extent of holding the May 22, 2026 Protective Order in abeyance and stating that it shall take effect upon the filing of the 16 NYCRR 1100-1.3(f) 60-day notice of intent to file an application by RWE. The Chief ALJ held:

> The purpose of protective orders issued under Public Service Law (PSL) Article VIII is to facilitate participation by parties and potential parties in the review of siting permit applications and hearings on those applications, and provide those participants with access to confidential information that would otherwise be unavailable under the Freedom of Information Law. As correctly noted by RWE and Staff, it has long been the practice to issue protective orders only after an applicant has made its intent to file an application known by filing

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[1] See DMM Item No. 8, Ruling Adopting Protective Order.

[2] See DMM Item No. 10, Montgomery County executed Attachment A.

[3] See DMM Item No. 12, Email Procedural Ruling.

[4] See DMM Item No. 13, Montgomery County Reply in Opposition; DMM Item No. 14, ORES Staff letter response.

> the 60-day notice contemplated in 16 NYCRR 1100-1.3(d). To allow the Protective Order issued in this matter to take effect prior to this established timeframe would undermine the pre-application process.
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> . . . . While applicants are encouraged to consult local municipalities at the earliest point possible, and must do so at least 60 days prior to filing an application pursuant to 16 NYCRR 1100-1.3(a), it has not been the practice to compel disclosure before a notice of intent to file an application is filed. Here, there has not been a sufficient showing that deviation from the established practice is warranted. Notwithstanding the foregoing, because municipalities are subject to the confidentiality requirements of FOIL, applicants are also encouraged to share confidential information with the municipalities during the required pre-application consultations to facilitate frank discussions and negotiations regarding local law compliance and potential host community benefits required by 16 NYCRR 1100-1.3(a).[5]

No parties appealed from the Ruling. Notwithstanding, in light of the public policy issues and concerns raised by RWE's motion and the responses of the County and Staff, I exercised my discretion pursuant to 16 NYCRR 1100-8.7(d)(4) to review the Ruling on an interlocutory basis, and authorized the filing of briefs on appeal and responses by the parties.

Timely briefs on appeal were filed by RWE and the County on October 16, 2026.[6] In addition, the Town of Florida filed a letter in support of the County's brief on appeal.[7]

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[5] DMM Item No. 15, Ruling on Motion, July 20, 2026, pp. 4-5 (citations omitted).

[6] See DMM Item No. 22, Montgomery County Brief on Appeal of July 20, 2026 Ruling on Motion of the Chief Administrative Law Judge (County appeal); DMM Item No. 26, Prospective Applicant's Brief on Appeal (RWE appeal).

[7] See DMM Item No. 20, Town of Florida letter to Secretary Phillips.

Staff filed a letter taking no position on the Ruling, but reserving its right to file a response to any briefs on appeal.[8]

In its brief, the County argues the Ruling is without a sound basis in reason, an abuse of discretion, arbitrary and capricious, and an error of law. The County asserts that the Protective Order is intended to enhance the PSL Article VIII process and RWE's argument that its early issuance undermines the process is flawed. As a municipality and participant, the County contends that it has a "clear right to review unredacted materials to determine if the project has the potential to impact local laws."[9] The County further argues that adjourning the effective date of the Protective Order based on RWE's claims that disclosure at this stage risks exposure of proprietary development work product and commercially sensitive information, and could potentially result in interference with ongoing real property negotiations by potential competitors ignores the fact that the County is a municipal corporation, not a competing developer. The County also notes that it is a municipality subject to General Municipal Law Article 18, Public Officers Law (POL) §74, and the Freedom of Information Law (POL Article 6 [FOIL]), all "laws that carry with them great responsibilities."[10] The County further notes that the Protective Order itself contains safeguards to prevent competitors getting access to protected information. The County claims that the Ruling is inconsistent with precedent under PSL Articles VIII and 10, regulatory requirements that mandate

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[8] See DMM Item NO. 21, Letter from Mr. Bittinger to Chief ALJ Costello.

[9] County appeal, p. 5.

[10] Id.

meetings with government officials no less than 60 days before the date on which an applicant files an application, and ORES's stated policy of encouraging consultations with local and State agencies at the earliest point possible in the project planning process.

The County further argues that the Ruling erred in holding that the County's request was a deviation from past practice when this is the first time any municipality has requested a pre-application Protective Order. Moreover, the County asserts that conducting its review of documents as they "come through over the course of a year rather than having to do a review all at once makes a significant difference for a small county such as Montgomery County that does not have huge staff to dedicate to extensive document review at the drop of a hat."[11] Finally, the County argues the Ruling is internally inconsistent in that it recognizes the need to share confidential information with local municipalities to facilitate frank discussions and negotiation during pre-application consultations, but does not require such disclosure until the 60-day notice is issued.

In its brief, RWE argues that although the Chief ALJ erred in issuing the Protective Order at the pre-application stage of the proceeding, the Ruling corrected that error by holding that the Order's effective date is when the applicant files the 60-day notice of intent to file an application. RWE asserts that no regulation or provision of the PSL requires an applicant to disseminate confidential information to anyone other than ORES during the pre-application phase. RWE points out that ORES consistently issues protective orders once an applicant files its 60-day notice.

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[11] Id., p. 12-13.

RWE further argues that issuance of the Protective Order at this stage of the proceeding exposes confidential trade secret and confidential commercial information that is protected from disclosure under FOIL. RWE also argues that release of confidential materials such as wildlife site characterization and breeding bird survey scopes identifies locations where studies are proposed to be conducted and from which the potential location of future project components could be extrapolated by a commercial competitor or project opponent. RWE asserts that requiring release of such preliminary, draft, and confidential business information would be highly prejudicial to RWE raising significant risks, "including interference with ongoing and active real property negotiations and the possibility that competing developers or other third parties could obtain sensitive project location information merely executing the Protective Order."[12] RWE expresses the concern that developers must conduct extensive environmental, engineering, and siting analyses "long before determining whether a project is viable or whether an application will ultimately be file," and that the significant investment of time and financial resources could be jeopardized by competitors or project opponents seeking to block a project by acquiring real property interests in any parcels that have not yet been finalized.[13] RWE also notes that the release of wildlife site characterization and breeding bird survey scopes contradicts the protection of data on habitats of species protected by ECL 3-0301(2)(r).

Thereafter, timely responses were filed by the County

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[12] RWE appeal, p. 6.

[13] Id., pp. 6-7.

and Staff on October 30, 2026.[14] In its response, the County reiterates is argument that it is not a competitor, but a municipal subdivision of the State whose interest in the subject information is to review the potential projects for impacts on local laws. The County further argues that RWE has not carried its burden of establishing that the requested materials are trade secrets or confidential commercial information and, therefore, cannot use this as a basis to deny the County access to the unredacted information under the Protective Order. The County accuses both RWE and ORES Staff of over-redacting materials rendering them "useless for review without any real justification" from RWE.[15] The County further argues that PSL Article 10 precedent establishes that "maps and locations of land owners, even those locations still in negotiation, must be disclosed under a Protective Order."[16]

With respect to information about threatened and endangered species information, the County notes that it is compelled by statute and case law to fully consider a project's impacts on such species within its borders and, accordingly, the confidentiality of such information under the Environmental Conservation Law also cannot provide the basis for denying the County access to that information under the Protective Order. Finally, the County argues that RWE's reliance on FOIL and its case law precedent is misplaced and fails to establish that the

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[14] See DMM Item No. 31, Montgomery County Responsive Brief on Appeal of July 20, 2026 Ruling on Motion of the Chief Administrative Law Judge (County response); DMM Item No. 28, ORES Staff Response to Briefs on Appeal (Staff response).

[15] County response, p. 5.

[16] Id., p. 6.

County is not entitled to unredacted documents under the Protective Order.

In its response, ORES Staff recommends that "based on the arguments raised on appeal by RWE and Montgomery County, absent a showing by RWE that Montgomery County will not abide by its responsibilities to keep the Protected Information confidential, the July 20, 2026, Ruling on Motion should be reversed – resulting in the denial of RWE's Motion and giving the Protective Order immediate effect."[17] Noting the purpose of the Protective Order, Staff acknowledges that the "`established ORES practice' of 'issu[ing] protective orders only after an applicant has made its intent to file an application known by filing the 60-day notice' has historically appeared to strike the right balance between (1) providing maximum transparency into the ORES permitting process while (2) safeguarding sensitive information submitted by applicants, prospective applicants, and other interested parties to the extent required by law."[18] However, based on the arguments of RWE and the County, Staff argues that "it appears that Montgomery County has made a 'sufficient showing' and provided 'valid reasons' that deviation from this prior established practice (i.e., issuing Protective Orders only once a 60-Day notice has been filed) is now warranted. Shifting the issuance of Protective Orders to the pre-application stage can still properly effectuate their stated purpose and strike the right balance between transparency and safeguarding sensitive information."[19]

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[17] Staff response, p. 1.

[18] Id., p. 2.

[19] Id.

Addressing the arguments raised in the briefs on appeal, Staff concludes that the County has distinguished itself from competitors and has offered "credible policy arguments for why issuing the Protective Order at the pre-application stage would, in fact, aid municipalities' participation in the ORES process."[20] Staff argues that (1) the Protective Order contains safeguards to prevent competitors or those with an adverse business interest from getting access to information under the Order, (2) the County is a municipal corporation that is subject to FOIL and other laws that require governmental entities to maintain confidentiality, and (3) the County's policy arguments demonstrate that issuing the Protective Order at the pre-application stage would aid municipal participation in the ORES process by providing them with access to documents earlier in the process, extending the time for municipal review, and allowing municipalities to be better informed in advance of the required pre-application consultations with applicants.

Staff also notes that the Town of Florida's letter in support of the County provides further support for the argument that municipalities would benefit from access to confidential information during the pre-application stage. Staff concludes that "[i]ssuing the Protective Order at the pre-application stage provides an opportunity for municipalities to fully and timely review application materials, while safeguarding any materials potentially subject to redaction. In addition, the importation of the Protective Order to the pre-application phase in the process creates an opportunity for any challenge to redaction of those materials, either pursuant to FOIL claims or under the Protective Order, to go through a consistent and

[20] Id., p. 3.

orderly review process. It similarly provides applicants a similar opportunity to seek protection against release of any such materials through that same process."[21] Accordingly, Staff urges that absent a showing by RWE that the County will not abide by its responsibilities to keep confidential information confidential, the Ruling should be reversed, and immediately effectuate the Protective Order's provisions.

Also on October 30, 2026, RWE filed a letter withdrawing its claim of confidentiality based on trade secrets and commercial business information confidentiality and, accordingly, asserted that the County's appeal position is moot.[22] RWE notes, however, that certain document redactions required by the Environmental Conservation Law remained.[23] The County subsequently filed a letter in response, asserting that RWE was withdrawing its objections for some, but not all, of the documents that are the subject of the appeal and that a determination whether the Protective Order should be held in abeyance is still necessary given that documents will continue to be filed in the matter.[24]

Discussion

Standard of Review

On an administrative appeal from a ruling of an Administrative Law Judge, the Executive Director reviews the

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[21] Id., p. 5.

[22] See DMM Item No. 29, Letter from James A. Muscato II to Chief ALJ Costello.

[23] See id.

[24] See DMM Item No. 32, Letter from Meghan Manion to ORES.

ruling for error of law or fact, or abuses of discretion.[25] In addition, administrative appeals provide the Executive Director with the opportunity to provide guidance on legal and policy issues to optimize the permitting process.[26]

Analysis

As an initial matter, I reject RWE's assertion that because it has withdrawn its trade secrets and confidential commercial information claims, the County's appeal is rendered moot. The issue regarding when the Protective Order should go into effect remains ripe whether the information that is claimed to be confidential is trade secrets or confidential commercial information, confidential threatened and endangered species information, or any other confidential information protected by the Protective Order.

On the merits, I agree with Staff that public policy considerations warrant a re-examination and modification of ORES practice. ORES has long recognized the important role municipalities in particular have in the renewable energy facility siting permit review process.[27] ORES encourages applicants to involve municipalities as early in the application development process as possible not only with regard to fostering discussions concerning an application's compliance

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[25] See 16 NYCRR 1100-8.7(d)(8).

[26] See Matter 24-03041, Matter of Hecate Energy Columbia County 1, LLC, Interim Decision of the Executive Director, Aug. 13, 2026, at 11; Matter 21-00026, Matter of Heritage Wind, LLC, Interim Decision of the Executive Director, Sept. 27, 2021, at 10.

[27] See, e.g., Matter 21-02480, Matter of Horseshoe Solar Energy LLC, Decision of the Executive Director, Dec. 9, 2022, pp. 17-18.

with applicable local laws and regulations, but also regarding the potential host community benefits a project will bring to the community.[28] Municipalities are encouraged to get involved early in the planning process as well, and aid Staff's review by making their views known regarding local law compliance at a time when Staff can meaningfully factor their views into its review of applications.[29] Providing access to confidential information relevant to a municipalities' review of an application for compliance with its local laws earlier in the pre-application stage fosters transparency in the siting permit review process, provides municipalities with more flexibility in devoting resources to that review, allows them to be better informed regarding local law compliance and other matters during pre-application consultations with applicants, and enhances their opportunities to provide Staff with their views regarding projects earlier in the process, all consistent with the express purpose of Article VIII for "ensuring the protection of the environment and consideration of all pertinent social, economic and environmental factors in the decision to permit."[30] Thus, I agree that providing municipalities with early access to confidential information during the pre-application phase would aid municipalities in their participation in the ORES process.

RWE's concerns regarding the potential release of confidential information to competitors and project opponents do not outweigh the benefits of providing municipalities in particular with early access to protected information relevant to their review. As governmental entities, municipalities are

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[28] See id.; see also 16 NYCRR 1100-1.3(a).

[29] See Horseshoe Solar, Decision, p. 17-18.

[30] See PSL §136.

under statutory obligations, including pursuant to FOIL and General Municipal Law Article 18, to maintain the confidentiality of documents submitted to them. And as governmental entities, municipalities are entitled to the presumption of regularity, that is, that they will comply with all relevant legal obligations regarding the confidentiality of documents in their possession.[31]

With respect to competitors and persons with adverse business interests to applicants, the Protective Order contains safeguards that allow an applicant to decline to provide confidential information to such persons based upon a good-faith belief that they are competitors or have adverse business interests.[32] As to other third parties, to gain access to information under the Protective Order, third parties must register as a party to the proceeding and, thus, are deemed to be bound by the standards of conduct required of attorneys appearing before the courts of the State of New York, which includes the obligation to abide by the rulings and orders of the ALJ.[33] They must also execute an acknowledgement agreeing to be bound by the terms of the Protective Order, and have their consultants do the same.[34] Violations of the Protective Order exposes those persons to administrative sanctions, including exclusion from the proceeding and any later proceeding, and

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[31] See People v Dominique, 90 NY2d 880, 881 (1997) (the law presumes that no official or person acting under an oath of office will do anything contrary to their official duty, or omit anything which their official duty requires to be done).

[32] See Protective Order ¶¶ 13, 18, pp. 5-6, 8.

[33] See id. ¶ 3, p. 2; 16 NYCRR 1100-8.7(c)(1).

[34] See id. ¶¶ 14, 15, 19, pp. 6-8; id. Attachment A and B.

potential legal liability and penalties for breaches of the Protective Order.[35] Thus, the Protective Order contains significant safeguards to prevent the improper release of confidential information to competitors and project opponents.

Finally, in addition to aiding municipalities in the ORES permit application review process, issuance of the Protective Order at the beginning of the pre-application phase of a project provides applicants and ORES Staff with an orderly process for the submission of confidential information during that phase and provides applicants and Staff with procedures to resolve any disputes regarding a document's confidentiality.[36]

Conclusion

In sum, I agree with Staff that issuing Protective Orders early in the pre-application stage of a siting permit proceeding properly effectuates the Orders' stated purpose of facilitating participation by parties and potential parties in the review of siting permit applications and hearings on those applications, and provides those participants with access to confidential information that would otherwise be unavailable under FOIL, while striking the right balance between transparency and safeguarding sensitive information. Accordingly, for the reasons stated above, the Ruling on Motion is modified to provide that the protective order took effect upon issuance at the beginning of the pre-application phase of this proceeding and, as so modified, is affirmed. I anticipate

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[35] See id. ¶ 42, p. 15.

[36] See id. ¶¶ 31-36, pp. 12-13.

this policy being implemented by the office going forward.



(SIGNED) JASON ZEHR
Executive Director
Office of Renewable Energy Siting
and Electric Transmission
New York State Department of
Public Service

Dated: November 12, 2026
Albany, New York

cc: Party List – MATTER 25-01765