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Via Electronic Mail

October 13, 2020

Hon. Erika Bergen
Hon. Anthony Belsito
Presiding Examiners
New York State Department of Public Service
New York State Board on Electric Generation Siting and the Environment
3 Empire State Plaza, 18th Floor
Albany, New York 12223-1350

RE: Case 17-F-0595 – Application of Watkins Glen Solar Energy Center, LLC for a Certificate of Environmental Compatibility and Public Need Pursuant to Article 10 of the Public Service Law for Construction of a Solar Electric Generating Facility Located in the Town of Dix, Schuyler County.

Dear Judges Bergen and Belsito:

Watkins Glen Solar Energy Center, LLC (“Watkins Glen Solar”) hereby requests that confidential status be granted to certain information being submitted as part of Watkins Glen Solar’s Article 10 Application in the above-captioned proceeding, and that such information be exempt from public disclosure pursuant to the New York Freedom of Information Law (“FOIL”) (Public Officers Law (“POL”) §§ 84–90) and Subpart 6-1 of the New York State Public Service Commission’s (“Commission”) regulations, as made applicable to the New York State Board on Electric Generation Siting and the Environment (the “Board”) by 16 NYCRR § 1000.3.

Specifically, Watkins Glen Solar seeks protection for the following documents, which are required for the Application but contain trade secrets, confidential commercial information, and/or critical energy infrastructure information:

- Appendix 5-1: System Reliability Impact Study;
- Appendix 8-1: Production Modeling Analyses and certain portions of Exhibit 8 that use figures from these analyses, specifically Tables 8-3 and 8-4 and surrounding text;

- Appendix 14-1: Estimated Costs of Facilities and certain facility cost information provided in Exhibit 27, specifically Table 27-5 and in text thereafter, and Attachment A to Appendix 29-1 (Detailed Cost Analysis);
- Appendix 20-1: Phase IA/B Archaeological/Cultural Resource Study;
- Appendix 22-2: Breeding Bird Survey;
- Appendix 22-3: Winter Raptor Survey and certain text of Exhibit 22 concerning threatened and endangered species;
- Portions of Appendix 22-8: Agency Correspondence containing data from the New York State Department of Environmental Conservation (“DEC”) concerning threatened and endangered species; and
- Appendix 23-2: Private Well Survey Data.

Section 6-1.4 of the Commission’s regulations provides that a “party requesting confidential status shall submit the record containing such information to the presiding officer in electronic form or by mail and shall clearly identify the portions of the record considered to be confidential.”¹ In addition, “the party submitting confidential information to the presiding officer shall also submit a comprehensive brief specifying in detail the reasons why such information should be accorded confidential status as provided for in section 6-1.3 (b)(2).”²

The Commission’s regulations define a “trade secret” as “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.”³ 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.” Pursuant to 16 NYCRR § 6-1.3(b)(2) and POL § 87(2):

a person submitting trade secret or confidential commercial information to the Department shall clearly state the reason(s) why the information should be excepted from disclosure, as provided for in §87(2)(d) of the Public Officers Law. In all cases, the person must show the reasons why the information, if disclosed, would be likely to cause substantial injury to the competitive position of the subject commercial enterprise. Factors to be considered include, but are not necessarily limited to:

- (i) the extent to which the disclosure would cause unfair economic or competitive damage;
- (ii) the extent to which the information is known by others and can involve similar activities;
- (iii) the worth or value of the information to the person and the person’s competitors;

¹ 16 NYCRR § 6-1.4(a)(1).

² 16 NYCRR § 6-1.4(a)(2).

³ 16 NYCRR § 6-1.3(a).

- (iv) the degree of difficulty and cost of developing the information;
- (v) the ease or difficulty associated with obtaining or duplicating the information by others without the person's consent; and
- (vi) other statute(s) or regulations specifically excepting the information from disclosure.

Appendix 5-1: System Reliability Impact Study

Appendix 5-1 consists of the System Reliability Impact Study ("SRIS") conducted by the New York Independent System Operator, Inc. ("NYISO") for the Watkins Glen Solar Energy Center (the "Project").

This information, if publicly disclosed, could pose a danger to electric system reliability and endanger "the health, safety, welfare or security of the state, its residents or its economy." POL § 86(5). The NYISO considers its power flow, stability, and short-circuit data as critical energy infrastructure information and restricts access to it to those parties who agree to not disclose it to others. Furthermore, the Commission has consistently held that the information in such studies should be protected from public disclosure as critical infrastructure information. Accordingly, Appendix 5-1 should be exempt from public disclosure.

Appendix 8-1: Production Modeling Analyses

Appendix 8-1 contains confidential analyses of the electric output of the Project, and the impact of that output on wholesale energy costs, air emissions, and must-run resources. In Exhibit 8, Tables 8-3 and 8-4 and some of the surrounding text use confidential information from Appendix 8-1. The production analyses are based on electric production input assumptions developed by Watkins Glen Solar using its individual experience and proprietary information, which is unknown by Watkins Glen Solar's competitors.

The production analyses qualify as trade secret and confidential commercial information under the Commission's regulations. If the information contained therein became publicly available, competitors could use it to calculate Watkins Glen Solar's expected production costs. Then such competitors could use the expected production costs to engage in predatory pricing, inappropriate exercise of market power, or collusion with others, thereby putting Watkins Glen Solar at a significant competitive disadvantage. Not only does Watkins Glen Solar compete against other generators in the competitive energy and capacity wholesale markets, but its corporate parent and affiliated companies compete in the renewable energy credit solicitations conducted by the New York State Energy Research and Development Authority. Similar information has been held to be exempt from disclosure under FOIL.⁴

⁴ See, e.g., *New York State Elec. & Gas Corp. v. New York State Energy Planning Bd.*, 221 A.D.2d 121 (3d Dep't 1996); Matter 13-01288, *In the Matter of Financial Reports for Lightly Regulated Utility Companies*, RAO Determination – Trade Secret 14-02 (June 30, 2014); Matter 13-01288, *supra*, Determination of Appeal of Trade Secret Determination (Trade Secret 14-02) (Aug. 13, 2014); Matter 13-01288, *supra*, Determination of Appeal of Trade Secret Determination (Oct. 27, 2015).

Furthermore, the results of the production analyses and their underlying data were developed by Watkins Glen Solar and are not known by outside parties. Finally, competitors cannot easily obtain the production analyses because they are based on Watkins Glen Solar's unique knowledge. Therefore, Appendix 8-1 and the aforementioned tables and text in Exhibit 8 qualify for exemption from disclosure under FOIL as trade secret and confidential commercial information.

Appendix 14-A: Estimated Costs of Facilities, Facility Cost Information in Exhibit 27, and Attachment A to Appendix 29-1 (Detailed Cost Analysis)

Appendix 14-1 consists of highly sensitive, proprietary information related to confidential financial data and capital cost estimates for the major components of the Project. This cost information is also used in Exhibit 27 to estimate economic activity and in Attachment A to Appendix 29-1 to estimate decommissioning costs. This information satisfies the definition of trade secret under the Commission's regulations.

The information contained in Appendix 14-1, Table 27-5 of Exhibit 27 and the cost estimates in the following paragraph, and Attachment A to Appendix 29-1 was developed by Watkins Glen Solar using its unique knowledge and experience. Thus, it would difficult for others to replicate the information. The information is not known outside of Watkins Glen Solar's business. This type of information is highly protected because it provides an opportunity to gain an advantage over competitors who do not know it.

Public dissemination of this information would cause substantial economic harm to Watkins Glen Solar and place it at a competitive disadvantage. It would prejudice Watkins Glen Solar's ability to secure the most cost-effective contracts for elements of the Project if bidders in competitive procurements knew the estimated capital costs. No party to a negotiation over price would willingly disclose precisely how much it is willing to spend.

Further, as an affiliate of NextEra Energy Resources, LLC ("NEER"), Watkins Glen Solar will be able to procure preferred pricing from vendors for many Project components because of the large number of solar components purchased by NEER and its affiliates. Under their agreements with such vendors, NEER and its affiliates are not allowed to publicly disclose those preferred prices. Competitors would be able to leverage that information against vendors and NEER and its affiliates in competitive solicitations. Therefore, public disclosure of Appendix 14-A, Table 27-5 and the cost estimates in the following paragraph, and Attachment A to Appendix 29-1 would result in a "substantial injury to the competitive position" of Watkins Glen Solar.

Moreover, the Commission has previously held that capital cost information is protected from disclosure as trade secret.⁵ Therefore, the cost estimates discussed herein are trade secrets under the Commission's regulations and should be exempt from public disclosure.

⁵ Case 08-T-0034, *Hudson Transmission Partners, LLC*, Ruling Granting Protection for Project's Estimated Capital Costs (Mar. 6, 2008); Case 05-E-1222, *N.Y. Elec. & Gas Corp.*, Ruling Granting Trade Secret Protection to NYSEG's Mobile Radio System Cost Estimates (Oct. 13, 2005).

Appendix 20-1: Phase IA/B Archaeological/Cultural Resource Study

Appendix 20-1 contains information on the character and locations of archaeological and cultural resources. It was developed using agency records that include site location information only available to agency representatives and professional archaeologists and their researchers. To protect this location information from potential vandalism and unauthorized investigations, archaeological reports are filed with federal and State review agencies as privileged and confidential documents and protected from public disclosure under federal and State law.⁶

POL § 87(2)(a) prohibits the public disclosure of records that “are specifically exempted from disclosure by state or federal statute.” Therefore, the information contained in Appendix 20-1 is exempt from public disclosure under FOIL.

Appendices 22-2 and 22-3: Breeding Bird and Winter Raptor Surveys, Certain Text in Exhibit 22, and Appendix 22-8: Agency Correspondence

Exhibit 22(d)(3), Appendices 22-2 and 22-3, and Appendix 22-8 contain data concerning species that are listed by the State of New York as endangered, threatened, or special concern. This information is exempt from public disclosure pursuant to POL § 87(2)(a) and Environmental Conservation Law (“ECL”) § 3-0301(2)(r).

POL § 87(2)(a) exempts from public disclosure records that “are specifically exempted from disclosure by state” statute. ECL § 3-0301(2)(r) exempts from public disclosure information pertaining the habitats of State-listed species. Therefore, the data on listed species in Exhibit 22 and its appendices is exempt from public disclosure.

Appendix 23-2: Water Well Survey and Responses

Appendix 23-2 contains the results of a private well survey that was distributed to landowners within 2,000 feet of the Project Area. The survey responses contain landowners’ contact information and detailed information about their wells that is not necessarily available from public sources. This information is exempt from public disclosure pursuant to POL § 87(2)(b).

POL § 87(2)(b) exempts from public disclosure records that “if disclosed would constitute an unwarranted invasion of personal privacy” Allowing the survey responses to be public would intrude on the personal privacy of the landowners that responded. In addition, declining to protect this information may discourage others from responding to similar surveys, which would deprive the Siting Board of some information relevant to the statutory findings required by Article 10.

⁶ See National Historic Preservation Act § 307103; New York State Historic Preservation Act § 14.09; 9 NYCRR § 427.8.

For the foregoing reasons, the items described above qualify for exemption from disclosure under FOIL as trade secret, confidential commercial information, and/or critical infrastructure information.

Respectfully submitted,

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Center, LLC

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Attachments

cc: DMM Party List (w/o attachments)
Statutory Service List (w/o attachments)