



STATE OF NEW JERSEY
Board of Public Utilities
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www.nj.gov/bpu/

CLEAN ENERGY

IN THE MATTER OF CONSIDERATION OF THE)
STATE WATER WIND PROJECT AND OFFSHORE)
WIND RENEWABLE ENERGY CERTIFICATE)
ORDER)
DOCKET NO. QO18080843)

BY PRESIDENT FIORDALISO:

BACKGROUND AND PROCEDURAL HISTORY

On September 17, 2018, the New Jersey Board of Public Utilities ("Board") retained the Petition filed by Nautilus Offshore Wind, LLC ("Nautilus") which requested, among other things, approval of an offshore wind facility. President Joseph L. Fiordaliso was designated as the Presiding Commissioner, authorized to rule on all motions and modify any schedules that may be set as necessary to secure a just and expeditious determination of the issues.

On September 26, 2018, the New Jersey Laborers-Employers Cooperation and Education Trust ("NJLECET"), the International Union of Operating Engineers Local 825 ("IUOE"), and jointly the National Wildlife Federation and New Jersey Audubon Society ("NWF/NJA"), (together, "Intervenors"), filed timely motions to intervene in the proceeding.

Nautilus filed an Opposition to the Motion to Intervene by NWF/NJA on October 1, 2018, stating, among other things, that NWF/NJA would not be substantially, specifically and directly affected by the outcome of the proceeding and that they were not likely to add constructively to the case without causing undue delay or confusion. Should the Board grant intervenor status, Nautilus urged the Board to bar any further discovery and NWF/NJA's involvement in settlement discussions regarding the OREC pricing plan and other matters unrelated to wildlife protection. Nautilus further lobbied that if NWF/NJA were granted intervenor status, that Nautilus should be permitted to protect its confidential information and trade secrets by redacting materials not relevant to NWF/NJA.

On October 3, 2018, President Fiordaliso issued an Order granting all three motions to intervene. Following that determination, the Intervenors sought to enter into the form non-disclosure agreement ("NDA") previously executed by Rate Counsel. This NDA represented the standard form of NDA developed by the Board and used in cases of all types.

Nautilus was unwilling to enter into the NDA with the Intervenors, and instead sought to negotiate a separate agreement. Such negotiation failed. As a result, on October 5, 2018, Nautilus sent a letter to the Presiding Commissioner, seeking a stay of the procedural schedule in order to file a motion for a protective order. In response to this letter, the Presiding Commissioner suspended the schedule and issued a Motion Practice schedule

Nautilus filed this Motion for a Protective Order on October 9, 2018, requesting that access by the Intervenors to certain confidential, propriety information and trade secrets ("Confidential Information") in its petition be limited. Nautilus argued that release of the Confidential Information to the Intervenors, even under an NDA, would: violate other NDAs it has with third-party and place Nautilus at a competitive disadvantage if the information were disclosed. It also noted that the information is not relevant to the Intervenors' stated interests, and therefore, a protective order that permits Nautilus to redact and/or withhold the Confidential Information would not limit or impair the Intervenors' involvement in the proceeding.

Rate Counsel replied on October 16, 2018, stating that it remained unpersuaded by Nautilus' concerns. Rate Counsel emphasized Nautilus's failure to provide any concrete reasons why the standard NDA would not be effective in this case. Rate Counsel takes issue with Petitioner's claim that the Intervenors do not need to know the confidential information, stating that "it is inappropriate for any party to determine which intervenors can or cannot receive confidential information." To limit some intervenors' access to confidential information sets a dangerous precedent, and will ultimately create substantial additional work, strain limited agency resources and increase the possibility of inadvertent disclosures. Rate Counsel affirms that the parties are free to agree on the information provided to the Intervenors, or Intervenors could agree to receive the public versions. The brief concludes that the standard NDA should suffice.

NWF/NJA also filed a reply on October 16, 2018, providing two arguments. First, NWF/NJA reasons that the Board has already implicitly denied this request when it was silent on the issue of confidentiality raised by Nautilus' Opposition to Intervenor status. Had the Board determined it was appropriate to limit access, it would have done so in the October 3, 2018 Order, granting intervenor status. Second, NWF/NJA argues that Nautilus has not demonstrated "good cause" as required by law and that the reasons listed in the motion are purely speculative. NWF/NJA concludes by stressing that it needs the Confidential Information so that it may fully represent its stated interests in the proceeding.

On October 18, 2018, Petitioner submitted a response, reiterating its strong interest in protecting its confidential information and trade secrets, and further asserting its fear of an inadvertent release of confidential information, even under an NDA. Nautilus remains committed to the argument that NWF/NJA simply do not need the contested information to properly represent their stated interests. Nautilus, therefore, requests that the Board rule in favor of allowing the information to remain confidential. Nautilus also maintains that the Board's previous silence on the matter, in the Order granting intervenor status, is not an implicit denial of Petitioner's request. Nautilus concludes by volunteering to carry the administrative burden of providing any level of permissible redaction, and requests that any confidential versions of documents produced by Rate Counsel, be provided to Nautilus for redaction prior to distribution to the Intervenors.

DISCUSSIONS AND FINDINGS

Upon motion by a party for a protective order, and for good cause shown, the Board may issue "any order that justice requires to protect a party or person from annoyance, embarrassment,

oppression, or undue burden or expense, including, but not limited to, one or more of the following: . . . (g) That a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way" R. 4:10-3. Implicit in Rule 4:10-3 is the notion that the movant bears the burden of persuading the court that good cause exists for issuing the protective order. Kerr v. Able Sanitary & Env'tl. Servs., Inc., 295 N.J. Super. 147, 155 (App. Div. 1996). The limiting factors underlying Rule 4:10-3 must be weighed against the presumptively broad scope of discovery authorized in Rule 4:10-2 and other discovery provisions in our Rules of Court. Serrano v. Underground Utils. Corp., 407 N.J. Super. 253, 267 (App. Div. 2009).

[T]o overcome the presumption in favor of discoverability, a party must show "good cause" for withholding relevant discovery by demonstrating, for example, that the information sought is a trade secret or is otherwise confidential or proprietary. See R. 4:10-3; Hammock by Hammock v. Hoffmann-LaRoche, Inc., 142 N.J. 356, 369, 662 A.2d 546 (1995). Not every proprietary claim will meet this standard. The party attempting to show that "secrecy outweighs the presumption" of discoverability must be "specific[] as to each document"; "[b]road allegations of harm, unsubstantiated by specific examples or articulated reasoning, are insufficient." Id. 142 N.J. at 381-82, 662 A.2d 546.

[Capital Health Sys. v. Horizon Healthcare Servs., 230 N.J. 73, 80 (2017)].

The Board has discretion under this rule to take necessary steps to protect a party's confidential information, while still permitting the right to access. See generally, Martin v. Educ. Testing Serv., Inc., 179 N.J. Super. 317, 329 (Ch. Div. 1981)

In its Motion, Nautilus requests that the Board issue an Order protecting confidential, proprietary information and trade secrets. "Confidential information and proprietary information are not entitled to the same level of protection from disclosure as trade secret information." Littlejohn v. Bic Corp., 851 F.2d 673, 685 (3d Cir.1988). Some of Nautilus' Confidential Information may qualify as trade secrets, and therefore fall within Rule 4:10-3's purview, and some of the Confidential Information is, admittedly, proprietary.

Nevertheless, the Board must determine whether secrecy substantially outweighs the presumption of access. Capital Health Sys., 230 N.J. at 80. Ultimately, the Board must weigh the risk of potential harm against equity, fairness and the needs of the parties, with a significant leaning towards favoring access.

Here, Nautilus contends that disclosure of confidential information to particular parties creates a risk that the information will reach its competitors because the intervenors will form future relationships with competitors. Nautilus further contends that an NDA between the parties and the Intervenor is insufficient to protect the Confidential Information because of the risk of the Confidential Information inadvertently getting into the hands of the Petitioner's competitors.

I remain unpersuaded that these risks rise to the level substantially outweighing the presumption of disclosure to an entity who will execute an NDA and that has been granted full party status. Nautilus merely provides "[b]road allegations of harm, unsubstantiated by specific examples or articulated reasoning." Ibid. The Intervenor, particularly NWF/NJA, routinely

participate in Board proceedings, under NDAs, without issue. Nautilus fails to articulate an instance where information protected under an NDA was inadvertently disclosed by these Intervenor, nor do they identify a specific articulable risk of such disclosure in the future.

Intervenor assert that they need access to the Confidential Information so that they may properly represent their interests in this proceeding. They wish to fully participate in settlement conferences and hearings, arguing it is the only way to understand the entire context of Nautilus' petition.

A petitioner cannot be permitted to determine which information is needed for Intervenor to represent their interests. The Intervenor are validly concerned that if they are precluded from any portion of settlement conferences in which the Confidential Information is discussed, Nautilus could effectively control which portions of the settlement Intervenor could participate. It would be inequitable to permit a party to pick and choose which information is pertinent to another party's representation.

Despite Nautilus's offer to carry the administrative burden of its request, this would not resolve this issue. Nautilus proposed that any confidential versions of discovery or testimony first be provided to Nautilus so that it could redact it, prior to distribution to Intervenor. This would essentially give Nautilus control, and possibly discretion, over what information is disseminated to Intervenor. Such a process may require Rate Counsel to pre-produce documents to Nautilus, ahead of scheduled due dates. Rate Counsel also presumably needs to ensure the proper information was redacted, taking up additional time and resources.

Based upon the above, and the arguments put forward, I **HEREBY DENY** the motion for a protective order with respect to all four intervenor. Without having any concrete, historical evidence of the inadvertent disclosure of NDA-protected information or particular articulable cause to believe that such disclosure will occur in the future, these speculative risks remain modest and do not outweigh the Intervenor's need to access the information, which is otherwise protected through the Board's standard NDA. Nautilus' stated issue fails to transcend the normal concern of all parties in actions before the Board; nearly every petition includes information that the petitioner does not wish to be made public. The Intervenor have not been accused of breaching a NDA in the past, and there is no reason to assume that they will do so. If they were to break the NDA, they would be subject to the appropriate repercussions. As such, and in light of the standard approach normally used by the Board, the standard NDA is appropriate.

Therefore, I **HEREBY ORDER** the Nautilus, NJLECET, IUOE and NWF/NJA execute the Board's standard NDA prior to receiving confidential information.

I **FURTHER DIRECT** Board Staff to post this Order on the Board's website and serve a copy of the Order to the service list electronically.

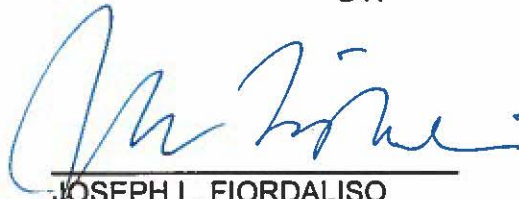
This ruling is provisional and subject to ratification or other alteration by the Board as it deems appropriate during the proceeding in this matter.

This order shall take effect immediately.

DATED:

10/24/18

BOARD OF PUBLIC UTILITIES
BY:



JOSEPH L. FIORDALISO
PRESIDENT

In the Matter of the Petition of Nautilus Offshore Wind, LLC for the Approval of the State Waters
Wind Project and Authorizing Offshore Wind Renewable Energy Certificates

BPU Docket No. QO18080843

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