

STATE OF VERMONT
PUBLIC SERVICE BOARD

Docket No. 7250

Amended Petition of Deerfield Wind, LLC, for a certificate)
of public good authorizing it to construct and operate a)
17-turbine, 34-35.7 MW wind generation facility, and)
associated transmission and interconnection facilities, on)
approximately 80 acres in the Green Mountain National)
Forest, located in Searsburg and Readsboro, Vermont, with)
7 turbines to be placed on the east side of Route 8 on the)
same ridgeline as the existing GMP Searsburg wind facility)
(Eastern Project Area), and 10 turbines along the ridgeline)
to the west of Route 8 in the northwesterly orientation)
(Western Project Area))

Order entered: 10/2/2015

PROCEDURAL ORDER RE: SECOND PROTECTIVE AGREEMENT

I. INTRODUCTION

Deerfield Wind, LLC ("Petitioner" or "Deerfield Wind") or other parties may have information that they allege is of a confidential and proprietary nature and that they have been, or may be, asked to provide to the Vermont Public Service Board ("Board"), the Vermont Department of Public Service ("Department"), and certain other parties (Petitioner and the Department sometimes will be referenced herein, where the context requires, as a "Party" and collectively as the "Parties"). To preserve the alleged confidentiality of that information while facilitating the disclosure of information in this proceeding, Deerfield Wind and the Department have entered into the Second Protective Agreement, dated August 27, 2015, attached hereto (the "Protective Agreement").¹ Schedule I of the Protective Agreement, as may be amended in accordance with the terms of the Second Protective Agreement, will describe information that the Petitioner alleges may result in financial or competitive harm to it or its parent company/affiliates

1. The Board previously issued an Order approving a Protective Agreement in this proceeding. Order of 2/6/08. Today's Order will apply to the exchange of information from this date forward.

or might threaten the security of local, regional, or national energy infrastructure if it is required to disclose such information to the public and which information the Petitioner believes to be proprietary, privileged, confidential, or in the nature of a trade secret (which information is referenced herein as "Allegedly Confidential Information") or which the Petitioner believes to be Critical Energy Infrastructure Information ("CEII") and is specifically described on Schedule I (for Allegedly Confidential Information) or Schedule Ia (for CEII) attached to the Protective Agreement.

Pursuant to the Second Protective Agreement and to preserve the confidentiality of Allegedly Confidential Information and CEII, the Parties request that the Board issue a Protective Order implementing the terms and procedures of the Second Protective Agreement.

II. DISCUSSION

Rule 26(c)(7) of the Vermont Rules of Civil Procedure, applicable to Board proceedings pursuant to Board Rule 2.214(A), authorizes the issuance of protective orders, for good cause shown, so as to protect "confidential research, development, or commercial information" from disclosure by the party or parties receiving it for purposes of discovery and presenting testimony in a given case. Over time in Board proceedings, a standard form of protective agreement has evolved that parties have used in seeking Board approval of a process for addressing the confidentiality concerns of parties without impeding the discovery process. In recent cases, some parties have sought changes to the standard form protective agreement.

In this proceeding, the Parties request that the Board approve a protective agreement that contains several provisions that do not relate specifically to the exchange of information. Instead, these provisions address subpoenas and access to public records (Paragraph 9) and a side agreement between the Parties (Paragraph 24) that refers to a separately executed Addendum that is not subject to Board approval. Paragraph 9 provides as follows:

9. Subpoenas and access to public records requests.

- a. Should the Department or any other Party receive any subpoena, or any request pursuant to Vermont law regarding access to public records, for any document or information received pursuant to this Agreement, the Department or such other Party promptly shall notify the counsel or other representative of the disclosing Party of the pendency of such subpoena or other request.

b. In response to a subpoena, the Department or other Party will produce the documents or information within the timeframe prescribed by the subpoena or applicable state law unless the disclosing Party obtains a Protective Order from a court or administrative body of competent jurisdiction barring the production of the documents or information.

c. Nothing in this Agreement shall limit or waive any rights that the disclosing Party may have under applicable law to seek protection against disclosure pursuant to a subpoena, a request for access to public records, or any other request for information.

Paragraph 24 states as follows:

24. The Parties have separately executed an Addendum, that is not subject to Board review and approval, is contractually binding as between the Parties to the extent not in conflict with the Board's order or the other provisions of this Protective Agreement, and its binding effect does not depend on Board approval.

In Docket 7970, the Board reviewed similar provisions in a Protective Agreement.² At that time, the Board declined to approve the provisions because it concluded that the Superior Court, not the Board, was the tribunal that would resolve any disputes related to the disclosure under Vermont's Access to Public Records Act of documents covered by the protective agreement at issue there.³ The Board found that the relevant sections were not germane to the purpose of Rule 26 protective orders, which is to facilitate discovery in a manner that avoids "annoyance, embarrassment, oppression, or undue burden or expense."⁴ Thus, while the Board approved the protective agreement in Docket 7970, it specifically did not approve the language in Paragraphs 9(c) and 9(d).⁵

For the same reasons, we decline to approve Paragraphs 9 and 24 of the Second Protective Agreement. The Board also observes that Paragraph 24 of the Second Protective

2. *Amended Petition of Vermont Gas Systems, Inc. for a certificate of public good, pursuant to 30 V.S.A. § 248, authorizing the construction of the "Addison Natural Gas Project" consisting of approximately 43 miles of new natural gas transmission pipeline in Chittenden and Addison Counties, approximately 5 miles of new distribution mainlines in Addison County, together with three new gate stations in Williston, New Haven and Middlebury, Vermont ("Vermont Gas Systems")*, Docket 7970, Order of 5/24/2013. In that docket, the provisions were not the same as the present Paragraphs 9 and 24. However, Paragraph 9 is very similar in content to Paragraphs 9(c) and 9(d) that the Board examined in Docket 7970.

3. *Vermont Gas Systems*, Docket 7970, Order of 5/24/13 at 3.

4. Vermont Rules of Civil Procedure 26(c).

5. The Board reached the same conclusion in *Investigation into Green Mountain Power Corporation's tariff filing*, Docket 8190, Order of 3/26/14.

Agreement refers to an addendum that was not attached to the filing. The language of that paragraph indicates that the parties are not seeking Board approval of the addendum. Approval is not sought for this provision, which provides a separate basis for our decision not to approve Paragraph 24 of the Second Protective Agreement.

With the exception of Paragraphs 9 and 24, the Board finds good cause to order the implementation of the Second Protective Agreement for the reasons discussed above. The Board has determined that the Second Protective Agreement is appropriate, useful, and reasonable, but with the following clarification. Today's Order shall govern only the protection of documents and information provided in disclosures and discovery. If a Party wishes to keep confidential any material that is proffered for inclusion in the evidentiary record, that Party must present a properly supported motion for protection of that material.

III. ORDER

Therefore, IT IS HEREBY ORDERED that Allegedly Confidential Information and CEII provided by Deerfield Wind, LLC pursuant to the Second Protective Agreement shall be treated in this proceeding as follows:

1. The Second Protective Agreement, filed with the Board on September 3, 2015, and attached hereto, is approved and adopted as part of this Order, with the exception of Paragraphs 9 and 24 of the Agreement, as explained above.

2. For each document or information response that a Party wishes to treat as Allegedly Confidential Information or CEII, the disclosing Party must submit a detailed, document-specific (or information-specific) averment of the basis for such treatment, which addresses the following, to the extent that the disclosing Party relies upon that factor as the basis for an assertion of confidentiality:

- a. Identification of the specific document or information for which confidential treatment is sought;
- b. Explanation of the degree to which the document or information contains a trade secret or other commercially sensitive information, is privileged, or is CEII;

c. For documents and information alleged to contain Allegedly Confidential Information or CEII,

- i. the extent to which the information is known beyond the disclosing Party and/or its parent or affiliates;
- ii. the extent the information is known by employees and independent contractors;
- iii. the measures taken to guard secrecy;
- iv. the value of the information to the Party, its parent, its affiliates, and competitors;
- v. the amount of effort or money used to develop the information;
- vi. the ease or difficulty of others in acquiring or duplicating the information; and
- vii. an explanation of how disclosure of the information could result in cognizable harm sufficient to warrant a protective order;

d. Justification of the period during which the Party asserts that material should not be available for public disclosure;

e. Explanation of whether partial disclosure or disclosure of redacted versions adequately can protect the Allegedly Confidential Information or CEII; and

f. Any other information that the Party seeking confidential treatment believes may be useful in assessing whether the document or information should remain confidential.

3. If a Party wishes to prefile any testimony or exhibits that include or otherwise disclose Allegedly Confidential Information or CEII, that the Party must give five business days' advance notice to counsel for the Party or other person that designated the information as Allegedly Confidential or CEII. Any Party may move the Board for an order that the testimony or exhibits be filed under seal or under other conditions to prevent unnecessary disclosure.

a. If such motion is filed within the five business days' advance notice period, the proponent of the testimony and exhibits shall place them in a sealed record by filing such documents in sealed envelopes or other appropriate sealed containers on which shall be endorsed the caption and docket number of the proceeding, the

nature of the contents (exhibit, report, etc.), and a statement that it shall not be opened or released from custody of the Clerk of the Board except by order of the Board or Hearing Officer.

Notwithstanding such a statement, the members of the Board, and any employee or consultant specifically authorized by the Board to assist the Board in this proceeding and any Hearing Officer appointed to this Docket, may have access to such sealed Allegedly Confidential Information or CEII but shall not disclose the contents of any such sealed information to any person who has not agreed to be bound by the Protective Agreement. The Board will then determine whether the proffered evidence should continue to be treated as confidential information and, if so, what protection, if any, may be afforded to such information.

b. If no such motion is filed by the end of the five business days' advance notice period, the testimony and exhibits may be filed as documents available for public access.

4. At any hearing or conference in this proceeding, no witness may be questioned with respect to any Allegedly Confidential Information or CEII unless examining counsel has provided advance notice to counsel for any Party or other person that designated the information as allegedly confidential. To the extent possible, such notice shall be given prior to the commencement of the hearing or conference. Any Party may move the Board for an order that the testimony be received in camera or under other conditions to prevent unnecessary disclosure. If such motion is made, the Board will then determine whether the testimony should be received in camera or subject to other protection.

5. Upon receipt of an executed Protective Agreement signature form, that is, either Schedule IIa or IIb to the Second Protective Agreement, counsel for the disclosing Party shall forward one copy of the form to the Clerk of the Board.

6. All documents filed with the Board that are subject to the Second Protective Agreement as Allegedly Confidential Information or CEII and any documents that discuss or reveal documents that constitute Allegedly Confidential Information or CEII shall be placed in a

sealed record by filing such information in sealed envelopes or other appropriate sealed containers on which shall be endorsed the caption and docket number of the proceeding, the nature of the contents (discovery response, report, etc.), and a statement that it shall not be opened or released from custody of the Clerk of the Board except by order of the Board. Notwithstanding such a statement, the members of the Board, and any employee or consultant specifically authorized by the Board to assist the Board in this proceeding and any Hearing Officer appointed to this Docket, may have access to such sealed Allegedly Confidential Information or CEII but shall not disclose the contents of any such sealed information to any person who has not agreed to be bound by the Protective Agreement.

7. The Board will retain jurisdiction to make such amendments, modifications, and additions to this Order as it may from time to time deem appropriate, including any such amendments, modifications, or additions resulting from a motion made pursuant to the Second Protective Agreement. Any Party or other person may apply to the Board for an amendment, modification, or addition to this Order.

8. The Board cautions the parties that there must be a good-faith basis for all claims of confidentiality. Claims without such a basis may result in sanctions against the Party making the unfounded claim. A Party's public disclosure of information that it has designated as Allegedly Confidential or CEII may indicate that the Party lacked a good-faith basis for that designation.

Dated at Montpelier, Vermont, this 2nd day of October, 2015.

<u>s/James Volz</u>	)	
	)	PUBLIC SERVICE
	)	
<u>s/Margaret Cheney</u>	)	BOARD
	)	
	)	OF VERMONT
<u>s/Sarah Hofmann</u>	)	

OFFICE OF THE CLERK

FILED: October 2, 2015

ATTEST: s/Susan M. Hudson
Clerk of the Board

NOTICE TO READERS: This decision is subject to revision of technical errors. Readers are requested to notify the Clerk of the Board (by e-mail, telephone, or in writing) of any apparent errors, in order that any necessary corrections may be made. (E-mail address: psb.clerk@vermont.gov)