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Via Hand-Delivery and Electronic Filing

New York State Office of Renewable Energy Siting
W. A. Harriman State Office Campus
Building 9, 4th Floor
1220 Washington Avenue
Albany, NY 12226

Re: Matter No. 23-00036: Application of North Seneca Solar Project, LLC, for a Permit Pursuant to Section 94-c of the New York State Executive Law to Construct a Major Renewable Energy Generation Facility in the Towns of Junius and Waterloo, Seneca County, New York

Dear Office of Renewable Energy Siting Staff:

This office represents the Applicant, North Seneca Solar Project, LLC (“North Seneca Solar” or “the Applicant”) with regard to the above proceeding. On March 4, 2024, North Seneca Solar filed an Application for a Permit to Construct a Major Renewable Energy Facility pursuant to Section 94-c of the New York State Executive Law and Title 19 of NYCRR, Part 900 (“Application”), seeking a permit from the Office of Renewable Energy Siting (“ORES”) to construct the North Seneca Solar Project (“the Facility”), an approximately 90-megawatt (“90 MW”) solar electric generating facility to be located in the Towns of Junius and Waterloo, Seneca County, New York. 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, the Applicant 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 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 information related to threatened or endangered species pursuant to Section 87(2)(a) of the FOIL and Section 3-0301(2)(r) of the Environmental Conservation Law.
- Protection of personal information including private drinking water well information pursuant to POL § 87(2)(b).

CONFIDENTIALITY ANALYSIS

The Applicant seeks confidential protection for certain information contained in the Application (i.e., the Exhibits) as well as various Figures and Appendices to the Application, and electronic shapefiles which provide the same information in a format requested by ORES, New York State Department of Public Service (“NYS DPS”) and/or New York State Department of Environmental Conservation (“NYS DEC”) 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, the Applicant is submitting this information under separate cover seeking confidential protection. Where a document contains both confidential and non-confidential information, the Applicant 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, POL § 89(5)(a)(3) requires agencies such as ORES to maintain CEII apart from all other agency records to ensure proper protection. *See*, Case 06-T-0710, *Consolidated Edison Company of New York, Inc.*, Ruling Granting Protection from Disclosure for Critical Infrastructure Information in Transmission Composite Diagrams (Feb. 1, 2007) (Finding that a preferred route for a proposed transmission facility could compromise the transmission system and impair electric supply, and protection of the information is appropriate). *See*, Case 08-T-0034, *Hudson Transmission Partners, LLC*, Ruling Granting Protection from Public Disclosure for Critical Infrastructure Information (Jan. 11, 2010) (finding that maps that show existing utility and municipal infrastructure and identity of proposed locations for a new transmission facility and its related equipment contain a level of detail which could be used in an effort to disrupt the City’s Infrastructure and should therefore be protected).

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.

The Applicant is seeking CEII confidentiality protection for:

- Appendix 21-A: System Reliability Impact Study

With respect to the SRIS, other state agencies including NYSDPS 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). In addition, documents such as the SRIS 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.

Accordingly, the SRIS and utility location information should be granted confidential protection. Due to the nature of the SRIS and the sensitivity of the information involved, the SRIS has 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, the Applicant is seeking confidential protection for the following documents, which summarize the results of the comprehensive review of archaeological resources on the Facility Site:

- Appendix 9-E: Phae IB Archaeological Survey Report
- Appendix 9-F: Archaeological Avoidance Plan

These documents include pictures and locations of protected cultural resources and areas. This information was assembled for the purpose 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

A document submitted with the Application should be deemed exempt from disclosure under FOIL if it contains record “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). Courts have consistently upheld withholding from disclosure confidential commercial information which qualifies as trade secret material or confidential commercial information. *See*, Case 00-E-1380, Order Clarifying Information and Data to be Provided and Measures Regarding Protection of Confidential Information (Aug. 23, 2000).

The Commission defines 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” (16 NYCRR § 6-1.3). The commission requires a person submitting trade secret or confidential commercial information to establish that if disclosed, the information would be likely to cause substantial injury to the competitive position of the subject commercial enterprise. The following factors should be considered:

- (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;
- (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. *Id.* § 6-1.3(b)(2)

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’Keefe*, 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).

The Applicant seeks confidential treatment of the following:

- Figure 2-3: Design Constraints
- Exhibit 18: Socioeconomic Effects
- Figure 20-1: Communication Systems
- Appendix 21-A: Systems Reliability Impact Study

This information is entitled to protection as confidential commercial information which, if disclosed, would cause the Applicant substantial competitive and economic injury. *See*, Case 98-G-1589, Rochester Gas and Electric Corporation, Trade Secret Protection for Information

Pertaining to Agreement with Empire State Pipeline (Jan. 22, 2001) (Finding that information that pertains to specific rates and determinants for those rates that have been negotiated are entitled to protections because the information contained therein is highly sensitive from a commercial standpoint). *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. Information Related to Endangered, Threatened, or Protected Species

Section 87(2)(a) of the FOIL grants an exemption from disclosure for records that are specifically identified as protected from disclosure under other provisions of State or federal law. Section 3-0301(2)(r) of the Environmental Conservation Law specifically authorizes the NYSDEC to "deny access to inspection of records which identify locations of habitats of species" designated as endangered, threatened, or species of special concern under ECL § 11- 0535, plants protected under ECL § 9-1503, or "any other species or unique combination of species of flora or fauna where the destruction of such habitat or the removal of such species therefrom would impair their ability to survive." The State has determined that environmental protections are afforded when certain information pertaining to protected species is kept confidential, including information pertaining to where protected species live, roost, gather, or winter. Such information is treated as confidential to prevent injury or death by hunters or disturbance of critical habitat by visitors. The protection of such information outweighs the public's general interest in free access to government information. *See* Case 12-T-0248, *New York State Electric & Gas Corp.*, Ruling Granting Requests for Protection of Information Concerning Critical Electrical Infrastructure and Rate, Threatened, or Endangered Species (Oct. 17, 2013). The State has determined that information concerning confirmed populations of endangered species and displaying locations of rare species is considered sensitive information and is entitled to confidential status, specifically information received by DEC, because release to the public could potentially lead to the taking of species or disruption of habitat described. *See* Case 11-T-0534, *Rochester Gas and Electric Corporation*, Ruling on Request for Confidential Status for Rare Species Map (Feb. 24, 2012) The Applicant need only show that data or documents provided to a state agency contain information relating to the habitat of endangered, protected or threatened species. If such information is in fact contained therein, the agency shall afford the requested confidential treatment.

With respect to the Application, the Applicant seeks confidential protection of the following information:

- Exhibit 2: Overview and Public Involvement
- Appendix 11-A: Rare Plant Survey Report
- Appendix 11-B: Plant and Wildlife Species
- Exhibit 12: NYS Threatened or Endangered Species
- Appendix 12-A: Wildlife Site Characterization
- Appendix 12-B: Agency Correspondence

- Appendix 12-C: Breeding Bird Survey Report
- Appendix 12-D: Winter Raptor Survey Report
- Appendix 12-E: Phase 1 Bog Turtle Habitat Assessment Report
- Appendix 12-F: Determination of Occupied Habitat
- Appendix 12-G: Net Conservation Benefit Plan
- Exhibit 13: Water Resources and Aquatic Ecology

These Appendices contain information about endangered, protected, threatened, rare, or special concern species and their habitats, including the presence or absence of those species in a particular area, the use by those species of a certain habitat, and/or the location of critical habitat. This information is entitled to confidential treatment under ECL §3-0301(2)(r) without any further showing.

V. Personal Information

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 I 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.

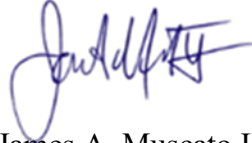
The Applicant asserts that the following information is eligible for protection under POL § 87(2)(b), and/or eligible for protection as drinking water source information which, if released, could threaten the health and safety of the public:

- Appendix 2-A: Local Agency and Community Engagement
- Appendix 13-B: Water Well Survey Responses and Agency Correspondence
- Figure 13-1: Groundwater Well Offsets
- Figure 13-2: Groundwater Aquifers and Recharge Areas
- Appendix 14-A: Wetland and Stream Delineation Report
- Appendix 15-A: Agricultural Survey Responses

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,

A handwritten signature in blue ink, appearing to read "James A. Muscato II".

James A. Muscato II
Young/Sommer LLC

Attorneys for North Seneca Solar Project, LLC

Enclosures

cc: ORES (without enclosures)