SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ALBANY

In the Matter of

SIMON V. KINSELLA,

Petitioner,

-against-

NEW YORK OFFICE OF THE STATE COMPTROLLER,

Respondent.

For a Judgment Under Article 78 of the Civil Practice Law and Rules

Index No. 904100-19

REPLY MEMORANDUM OF LAW IN SUPPORT OF VERIFIED PETITION AND OPPOSITION TO MOTION TO DISMISS AND MOTION TO STAY PROCEEDINGS

Petitioner Simon V. Kinsella, in support of his Verified Petition against Respondent Office of the New York State Comptroller and in reply to Respondent's Verified Answer and Memorandum of Law in support of same, as well as in opposition to Respondent's Motion to Dismiss and Motion to Stay, argues as follows:

ARGUMENT

I. The Competitive Interest of Deepwater/Ørsted Will Not Be Harmed if the PPA Contract Price is Disclosed

Ørsted, Deepwater's parent corporation, has been awarded power purchase agreements five times. Ver. Pet. Ex. 4. The contract prices are public knowledge for three of them. *Id*. Respondent does not address this inconvenient fact in its Memorandum and offers no evidence that the price in this PPA is unique and different in its origin from any other wind energy contract.

Respondent does not demonstrate the public prices in the other PPAs had any effect on Deepwater's competitive position in negotiations with LIPA (or any other party for that matter) for the PPA at issue here. Moreover, Respondent offers no evidence, nor can it, that disclosing the PPA pricing information will have any effect on its negotiations for an amended PPA. As such, Respondent has not met its burden to establish Deepwater/Ørsted will suffer any, let alone "substantial," competitive harm if the PPA contract price is disclosed.

Instead, Respondent's argument and the evidence it puts forth appears directed primarily at keeping LIPA's business dealings secret. LIPA, however, is an agency obligated under the Freedom of Information Law[1] to make its records public, and not a commercial enterprise within the meaning of FOIL § 87(2)(d). LIPA, as a public entity, cannot have a commercial interest to protect and keep information confidential at the expense of the public. FOIL does not provide an exemption from disclosure that an agency may assert on its own behalf for public contracts that it has entered.

Respondent also states that the PPA price "is the result of many dynamic factors influencing how a developer, such as Deepwater, may meet the needs of LIPA, as well as the give-and-take that occurs in competitive negotiations." Respondent's Memorandum at 19. This, however, is precisely why disclosure of the PPA price would *not* harm Deepwater/Ørsted or LIPA in future wind power generation negotiations.

First, any future negotiations necessarily will involve different geographic locations and climate patterns. Petitioner's Memorandum at 12. Second, any future negotiations may involve different technology. Miskiewicz Affirmation at 7 (Dkt. No. 15). Third, Respondent concedes that the PPA negotiations

[1] Public Officers Law, Article 6 ("FOIL").

involved "a package of services and allocation of risks" that varies from project to project. *Id*. at 10. For this precise reason, Petitioner made clear in his FOIL Request that "for the avoidance of doubt, I am not requesting any records pertaining to how the contract price is derived, records of formulae or costing information which may be considered to be legitimate 'trade secrets'." Ver. Pet. Ex. A.

Further, Respondent offers no evidence that negotiations for wind power contracts by LIPA going forward will in any way mirror the negotiations here. To the contrary, Respondent asserts that "[t]he rapidly shifting dynamics of this young industry are further illustrated by the fact that after the PPA was finalized, a development occurred in turbine technology that allowed Deepwater to offer increased capacity." Respondent's Memorandum at 19. Due to these changing dynamics, Respondent admits that "[a]s a result, and further illustrating the shifts in this developing market, the pricing in the amended contract will be *discounted*" (emphasis added). *Id.*

If these statements are true, then the industry is so dynamic and rapidly changing that the current PPA price cannot mean anything to negotiations for future contracts or negotiation of the amended PPA. And Respondent offers nothing to suggest why the current PPA price must remain secret while a new one is being negotiated through the changing winds of this "dynamic" and "young" industry. The only constant is the Respondent and LIPA keeping New Yorkers in the dark regarding the premium they will be paying for electricity generated from the Deepwater/Ørsted project. *See* Ver. Pet. at 2, 3.

Petitioner requested the PPA's "actual pricing information to make 'apples to apples' comparisons to other offshore wind projects." Ver. Pet. at 3. Ørsted appears to believe in the virtues of such apples to apples comparisons. In comments to another state agency last year regarding a new round of bidding on

offshore wind projects, Deepwater suggested that every bidder submit a 400 MW bid so that bids could be compared on an "apples to apples" basis. Macdonald Affirmation, Ex. A at 2-4. The suggested 400 MW size is significant. Ørsted also agreed with the state that any offshore wind project smaller than 400 MW is *uneconomical*. Macdonald Affirmation, Ex. B at 2. Here, the project subject to the FOIL Request is 130 MW, up from an initial size of 90 MW. Ver. Pet. at 7. Petitioner requested that pricing information be disclosed for precisely these reasons so that the public may objectively evaluate the relative merits of the project with full transparency. Ver. Pet. at 2.

In a fair and free market each side to a commercial transaction is expected to maximize the value it receives in a mutual exchange. Here, however, the public does not know what value it is receiving, nor can it evaluate the fairness of the exchange. A good deal for Deepwater/Ørsted may not be a good deal for LIPA and New Yorkers. The public's right to know the price entered into by LIPA on its behalf far outweighs any alleged harm to Deepwater/Ørsted's competitive position. Respondent offers no legal precedent for keeping the price of a public contract confidential, and its arguments in this regard have no merit.

II. The Court Should Not Consider Either Respondent's Motion to Dismiss or Motion to Stay

The Court should not consider Respondent's procedurally improper motions to dismiss and to stay these proceedings, both of which are tucked into the memorandum of law submitted in support of its Verified Answer. *See* Respondent's Memorandum at 2 (stay request), 11-16 (motion to dismiss), and 20 (stay request.

CPLR 7804(f) states that "[t]he respondent may raise an objection in point of law by setting it forth in his answer *or* by a motion to dismiss the petition, made *upon notice* within the time allowed for answer" and "if the motion is

denied, the court shall permit the respondent to answer [emphasis added]. CPLR 7804(f). Of course, a motion for a stay of proceedings must also be accompanied by a notice of motion. CPLR 2214.

Here, Respondent includes within its Memorandum in support of its Verified Answer makeshift motions brought without proper and statutorily mandated notice to either the Court or Petitioner. Moreover, Respondent's Verified Answer does not contain the objection in point of law raised in the Memorandum. Respondent has not followed CPLR 7804(f) (with regards to its motion to dismiss) or CPLR 2214 (with regards to its motion to stay these proceedings), and, therefore, the Court should not consider either motion.

III. Respondent's Motion to Stay Should be Denied

This Court may "grant a stay of proceedings in a proper case, upon such terms as may be just." CPLR 2201. "The issuance of a stay pursuant to CPLR 2201 is discretionary in the trial court." *Research Corp v. Singer- General Precision Inc*, 36 A.D.2d 987, 988 (3d Dept. 1971); *Pierre Assoc v. Citizens Cas Co of NY*, 32 A.D.2d 495, 496 (1st Dept. 1969) (per curiam). In exercising its discretion under CPLR 2201, the Court must weigh "the prejudice to the moving party by denying a motion balanced against the prejudice to the non-movant by granting the motion." *Nezry v. Haven Ave Owner LLC*, 28 Misc.3d 1226(A) at *4 (Sup. Ct., N.Y. County 2010). A stay is warranted when "there exists some articulable reason, such as a showing of prejudice," *Estate of Salerno v. Estate of Salerno*, 154 A.D.2d 430, 430 (2d Dept. 1989).

Petitioner would be prejudiced by a discretionary grant of Respondent's motion to stay these proceedings. Respondent only presents one argument in support of its improvised motion for a stay: Petitioner (allegedly) will soon receive the pricing information sought pending the release of the pricing information

in the original and amended PPA. *See* Respondent's Memorandum at 2. However, 90 days (and likely more) is not "imminent." Respondent's Memorandum at 15. Moreover, Petitioner has no certainty an amended PPA will ever be completed.

Respondent admits the pricing information will be released at some point in the future but provides no support for delaying disclosure or these proceedings. Respondent offers no evidence connecting pricing information to disclosure to the parties' bargaining positions. Assuming that Ørsted is correct and the project is uneconomical, public knowledge of the pricing information could only help LIPA drive a better bargain for affected New Yorkers. And that is exactly how disclosure under FOIL is supposed to work. A stay of the proceedings can only prejudice Petitioner and the public. As such, Respondent's motion to stay, if considered, should be denied.

IV. Respondent's Motion to Dismiss Should Be Denied

A. Deepwater/Ørsted Is Not a Necessary Party under FOIL

Respondent incorrectly asserts that Deepwater/Ørsted should have been joined to this Article 78 proceeding because it has an interest that "may be inequitably affected by a judgment in the action." Respondent's Memorandum at 11 (citing CPLR 1001(a)). Deepwater/Ørsted does not have such an interest. It freely entered into a public contract, the PPA, with a public agency, LIPA, that it knew would be a public document. Deepwater/Ørsted expressly acknowledged in section 16.2 of the PPA that it would be subject to disclosure under FOIL. Lynch Affirmation, Ex. 1 at 70 (Dkt. No. 17).

In acknowledging FOIL's application to the PPA, Deepwater/Ørsted also acknowledged that agencies have discretion to apply FOIL exemptions. FOIL § 87(2) ("such agency may deny access . . ."). "[T]he language of the exemption provision contains permissive rather than mandatory language, and it is

within the agency's discretion to disclose such records . . . if it so chooses." *Capital Newspapers Division of Hearst Corp. v. Burns*, 67 N.Y.2d 562, 567 (1986); *see also*, *Buffalo Teachers Federation Inc. v. Buffalo Board of Ed.*, 156 A.D.2d 1027, 1028 (4th Dept 1989).

Section 16.2 of the PPA recognizes that FOIL requires an agency receiving a request for information marked confidential to provide notice to the submitting party. Here, the PPA provided that LIPA would give Deepwater/Ørsted notice of third-party requests for confidential information. The PPA further contemplated providing Deepwater/Ørsted a thirty-day period to seek a protective order or any other appropriate remedy if LIPA determined to disclose the confidential information. Accordingly, the PPA acknowledges that FOIL places the decision to disclose records solely in an agency's hands, leaving a submitting party to find a remedy on its own. The PPA acknowledges the FOIL notice requirements that also apply to the Respondent.

FOIL § 89(5) provides the procedure for identifying and joining parties to a proceeding where a disclosure exemption under FOIL § 89(2)(d) is implicated. Under FOIL § 89(5)(a), a party submitting information to a state agency may request that the agency except the information from disclosure under FOIL § 89(2)(d). FOIL § 89(5)(b) permits an agency on its own initiative to determine whether a submitting party's request for an exception from disclosure should be granted or continued. In so doing, the agency must give the submitting party notice of its action and allow the party ten business days to respond. Here, LIPA agreed with Deepwater/Ørsted in the PPA to keep certain marked information in the PPA confidential, subject to the terms of FOIL.

FOIL § 89(5)(b) works the same way upon the request of a person for the subject record. When Petitioner requested the PPA with unredacted pricing information, Respondent had a statutory obligation to inform

Deepwater/Ørsted of the request and to provide it ten business days to provide a written statement of the necessity for keeping the pricing information confidential. FOIL § 89(5)(b)(2). Respondent then had seven business days from receipt of the written statement or expiration of the ten business days to respond to make a determination. FOIL § 89(5)(c).

FOIL § 89(5)(f) further provides that an agency that denies access to a record under FOIL § 87(2)(d) has the burden of proving the record falls within the provision of that exception to disclosure. Having the burden of proof that an exception to disclosure applies, FOIL contemplates that an agency is the only necessary party to an Article 78 proceeding contesting a disclosure exemption for information submitted to an agency by a commercial enterprise that may cause competitive injury.

Apparently, having not complied with the statute or providing notice to Deepwater/Ørsted of Petitioner's FOIL Request, Respondent now unfairly seeks to shift its burden to Petitioner. Petitioner, however, had no obligation to notify Deepwater/Ørsted of his FOIL Request, nor does FOIL contemplate that Deepwater/Ørsted is a necessary party to this special proceeding.

The provisions of FOIL § 89(5) control requests for records excepted from disclosure under FOIL § 87(2)(d). Respondent cites cases relating to invasions of personal privacy and personnel records that require affirmative consent to be released under Civil Rights Law § 50a that do not provide the same notice and due process mechanisms provided to third parties that exist under FOIL § 89(5).

Deepwater/Ørsted is not a necessary party under FOIL, but it may seek intervenor status to participate (which it tellingly has not done). *See*, *e.g.*, *Washington Post Co. v. New York State Ins. Dep't*, 61 N.Y.2d 557, 563–64, (1984); *Glens Falls Newspapers, Inc. v. Ctys. of Warren & Washington Dev.*

Agency, 257 A.D.2d 948, 949 (1999); *Aurelius Capital Mgmt., LP v. Dinallo*, 70 A.D.3d 467, 467 (1st Dept. 2010).

B. Deepwater/ Ørsted Has Not Been Prejudiced by its Voluntary Nonparticipation in These Proceedings

Even if FOIL § 89(5) did not control here, dismissal would not be appropriate. When non-joinder of necessary parties is found, dismissal is not warranted where the interests of the named party and the non-joined party are so intertwined that there is virtually no prejudice to the non-joined party. *See* CPLR 1001(b); *Sawicki v. County of Suffolk,* 4 A.D.3d 465, 466 (2nd Dept. 2004). Even assuming that Deepwater/Ørsted is a necessary party, Respondent has demonstrated that Deepwater/Ørsted will not suffer any prejudice if the proceedings continue without it.

Respondent freely admits that it has adopted and is asserting LIPA's position–deeply intertwined with Deepwater/Ørsted's–that both parties to the PPA will suffer harm if the PPA pricing information is disclosed. Indeed, LIPA appears to feel more strongly about disclosure than Deepwater/Ørsted. LIPA has voluntarily participated in this proceeding through an affirmation by its Deputy General Counsel while Deepwater/Ørsted, contractually privileged to receive notice of this proceeding, has sat on the sidelines. That follows from Deepwater/Ørsted's previous willingness to enter into wind energy contracts where pricing has been made public.

C. Litigation Should Continue in the Absence of Deepwater/Ørsted

Even if it is found that Petitioner should have joined Deepwater/Ørsted and that its interests are not sufficiently intertwined, Deepwater/Ørsted is not a necessary party in these proceedings under the five factors set forth in CPLR 1001(b) and, therefore, these proceedings should continue without it.

1. Whether the plaintiff has another effective remedy in case the action is dismissed on account of the nonjoinder.

Petitioner does not have an effective remedy if this matter is dismissed. Contrary to Respondent's contention that the disclosure of the pricing information is "imminent", it will likely take at least 90 days, and probably more, for the pricing information to be disclosed. Moreover, Petitioner has no certainty an amended PPA will ever be completed. Further, the pricing information should have been made available under FOIL months ago. It's not appropriate for public records that should already be disclosed to be used as bargaining chips and held hostage until politically convenient for an agency.

2. The prejudice which may accrue from the nonjoinder to the defendant or to the person not joined.

Deepwater/Ørsted has not, and will not, be prejudiced by its voluntary nonparticipation. If Deepwater/Ørsted wants the PPA pricing information to be kept confidential, then its interest is being vigorously represented by Respondent. More likely, since previously it has entered into wind energy agreements where the pricing information is public, Deepwater/Ørsted does not believe that it will be prejudiced if the PPA pricing information is disclosed. As such, this factor weighs heavily of continuing these proceedings without Deepwater/Ørsted.

3. Whether and by whom prejudice might have been avoided or may in the future be avoided.

FOIL places the burden on an agency to inform a party that submitted information it requested to be kept confidential is subject to a FOIL request. Here, Respondent had a duty to Deepwater/Ørsted that it apparently failed to honor. Any prejudice to Deepwater/Ørsted lies with Respondent, and future prejudice may be avoided by Respondent complying with FOIL's requirements. Further, under the terms of the PPA, Deepwater/ Ørsted has notice of these proceedings and, unlike LIPA, has chosen not to participate. It cannot now

benefit from its voluntary nonparticipation via a dismissal of these proceedings. Therefore, this factor weighs heavily in favor of continuing these proceedings without Deepwater/Ørsted.

4. *The feasibility of a protective provision by order of the court or in the judgment.*

A protective provision could serve no purpose here. If Petitioner prevails, the PPA contract price will be disclosed.

5. *Whether an effective judgment may be rendered in the absence of the person who is not joined.*

Respondent admits that an effective judgment may be rendered in the absence of Deepwater/ Ørsted. Respondent's Memorandum at 16.

D. Even if Deepwater/Ørsted is Found to be a Necessary Party, This Court Can Order Petitioner to Summon Deepwater/Ørsted

Respondent argues that Deepwater/Ørsted, as an alleged necessary party, is not subject to the jurisdiction of this court because the statute of limitations has run and that, because of this, cannot be joined to this action. Respondent's Memorandum at 14. However, non-joined parties have been found to be subject to a Supreme Court's jurisdiction even if the statute of limitations has run. *Romeo v. New York State Dep't of Educ.,* 41 A.D.3d 1102, 1105 (3d Dept. 2007)[2] (citing, *cf. Matter of Red Hook/Gowanus Chamber of Commerce v. New York City Bd. of Stds. & Appeals,* 5 N.Y.3d 452, 459 (2005) (raising this issue but

[2] The Court in *Romeo* sheds light on the exact issues of joinder present here: "Several prior cases and commentaries assumed that the practical inability to join a necessary party due to the lapse of the statute of limitations was equivalent to the party being beyond the court's jurisdiction, and therefore required an inquiry under CPLR 1001(b) as to whether the nonjoinder may be excused and the proceeding permitted to continue without the absentee." *Romeo*, 41 A.D.3d at 1104 (citations omitted). "But a notable commentator on the CPLR recently acknowledged that these cases and commentaries were '[t]echnically ... a gloss on the statute' (Alexander, Supp Practice Commentaries, McKinney's Cons. Laws of N.Y., Book 7B, CPLR C1001:2, 2007 Pocket Part, at 25). While there may be practical difficulties with strictly construing the word jurisdiction in the joinder statute (*see* Alexander, Supp. Practice Commentaries, McKinney's Cons. Laws of N.Y., Book 7B, CPLR C1001:2, 2007 Pocket Part, at 25), we cannot condone a loose interpretation of 'jurisdiction' in any provision of the CPLR." *Id.*

not answering it). "A statute of limitations does not deprive a court of jurisdiction nor even a litigant of a substantive right, but is merely a defense which may, if properly asserted, deprive a plaintiff of any remedy from a defendant." *Id.* (citations omitted).

Based on these findings, the Appellate Division, Third Department in *Romeo* found that the absent party was subject to the Supreme Court's jurisdiction "despite the lapse of the statute of limitations." *Romeo*, 41 A.D.3d at 1105. Because of this, the Third Department found that the Supreme Court "was required to order petitioners to summon the absent party" and then the party would be able to "respond and raise any defenses it may have." *Id.*

Here, even if Deepwater/ Ørsted is found to be a necessary party to these proceedings, this Court can join Deepwater/Ørsted. Deepwater/Ørsted can then respond and raise whatever defenses it may choose.

CONCLUSION

Petitioner respectfully requests an order granting the relief sought in his Verified Petition. Petitioner also respectfully requests that, if Respondent's motion to dismiss and motion to stay are considered, that they be denied.

Dated: Albany, New York
August 29, 2019

Respectfully submitted,

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