

155 FERC ¶ 61,095
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Norman C. Bay, Chairman;
Cheryl A. LaFleur, Tony Clark,
and Colette D. Honorable.

Essential Power, LLC
Essential Power Massachusetts, LLC
Essential Power Newington, LLC
Essential Power OPP, LLC
Essential Power Rock Springs, LLC
Lakewood Cogeneration, L.P.
Nautilus Generation, LLC

Docket No. EC16-82-000

ORDER REQUIRING PRODUCTION OF MATERIAL PURSUANT TO A
PROTECTIVE AGREEMENT

(Issued April 25, 2016)

1. On February 29, 2016, Essential Power, LLC (Essential Power), Essential Power Massachusetts, LLC (EPMA), Essential Power Newington, LLC (Newington), Essential Power OPP, LLC (OPP), Essential Power Rock Springs, LLC, (Rock Springs) and Lakewood Cogeneration, L.P. (Lakewood) (collectively, Essential Power Companies) and Nautilus Generation, LLC (Nautilus, and together with Essential Power Companies, Applicants), filed an application (Application) for authorization under section 203(a)(1) of the Federal Power Act (FPA)¹ and the Commission's regulations² for the disposition of jurisdictional facilities that will result from the transfer of 100 percent of the direct membership interests in Essential Power Investments, LLC (EPI) from IFM Global Infrastructure Fund (IFM Global) to Nautilus (Proposed Transaction).

¹ 16 U.S.C. § 824b (2012).

² 18 C.F.R. pt. 33 (2015).

2. On March 21, 2016, Public Citizen, Inc. (Public Citizen) filed a motion to intervene and request to obtain a copy of the Proposed Transaction's confidential purchase and sale agreement. Public Citizen provided a signed copy of the Protective Agreement that was attached to the Application for confidential and privileged treatment of Exhibit I, the Purchase and Sale Agreement, under 18 C.F.R. § 388.112 (2015). On March 28, 2016, Applicants filed an objection to Public Citizen's request.

3. As discussed below, we will require Applicants to provide Public Citizen with a copy of the Purchase and Sale Agreement pursuant to the Protective Agreement.

I. Background

4. Essential Power is a limited liability company that operates as a wholesale power marketer in the United States with Commission authorization to make wholesale sales of energy, capacity, and ancillary services at market-based rates.³ Essential Power does not directly own any generation facilities and does not control any unaffiliated generation capacity. It is a wholly owned direct subsidiary of Essential Power Holdings, LLC, which is a wholly owned direct subsidiary of EPI.

5. The other Essential Power Companies are each limited liability companies (except Lakewood)⁴ and wholly owned direct subsidiaries of Essential Power. Each owns generation facilities in the United States and each is an exempt wholesale generator under the Public Utility Holding Company Act of 2005.⁵ Additionally, each of these other Essential Power Companies has received Commission authorization to make wholesale sales of energy, capacity, and ancillary services at market-based rates.⁶

6. IFM Global is a fund managed by IFM Investors Pty Ltd (IFM), and is a unit trust designed for investment in core infrastructure assets in global developed markets, principally in Europe and North America. IFM is a global investment manager with approximately \$47 billion in funds under management as of December 31, 2015 across listed equities, private equity, infrastructure, and debt.⁷

³ Application at 3.

⁴ Lakewood is a limited partnership.

⁵ 42 U.S.C. § 16,451 *et seq.* (2012).

⁶ Application at 4-9.

⁷ *Id.* at 9-10.

7. As a result of the Proposed Transaction, Nautilus will indirectly own 100 percent of Essential Power, EPMA, Newington, OPP and Rock Springs, and 80 percent of Lakewood. IFM Global will not hold any ownership interest in Essential Power Companies following the consummation of the Proposed Transaction.

8. Applicants designated Exhibit I, the Purchase and Sale Agreement, as non-public privileged and/or CEII material, and included a Protective Agreement with the Application.

9. Notice of the Application was published in the *Federal Register*, 81 Fed. Reg. 11,786 (2016), with interventions and protests due on or before March 21, 2016. Public Citizen filed a timely motion to intervene and request for release of confidential information. Public Citizen executed the Protective Agreement and attached it to its motion to intervene and request for release of confidential information.

10. On March 28, 2016, Applicants filed an objection with the Commission of Public Citizen's request for release of confidential information.

II. Discussion

11. Section 388.112 of the Commission's regulations permits any person filing a document with the Commission to request privileged treatment for some or all of the information contained in the document that the filer claims is exempt from the mandatory public disclosure requirements of the Freedom of Information Act (FOIA). To obtain privileged treatment, the filer must (1) include a justification for requesting privileged treatment, (2) designate the document as privileged, and (3) submit a public version of the document with the information that is claimed to be privileged material redacted, to a practicable extent.⁸

12. However, when such material is filed in a proceeding to which a right to intervene exists (as is the case here), the filer is required to include a proposed form of protective agreement with the filing⁹ and provide the public version of the document and its proposed form of protective agreement to each entity that is required to be served with the filing. An intervenor to the proceeding may make a written request to the filer for a copy of the complete, non-public version of the document. The request must include an executed copy of the complete, non-public version of the protective agreement and a statement of the person's right to party status or a copy of their motion to intervene. The Commission specifically exempts four categories of documents from the protective

⁸ 18 C.F.R. § 388.112 (b)(1) (2015).

⁹ 18 C.F.R. § 388.112 (b)(2)(i).

agreement procedure: (1) landowners lists, (2) privileged information filed under section 380.12(f) or section 380.16(f), which pertains to cultural resources, (3) privileged information filed under section 380.12(m), which pertains to reliability and safety information that must be filed by liquefied natural gas facilities, and (4) privileged information filed under section 380.12(o), which pertains to engineering and design material information that must be filed by liquefied natural gas facilities.

13. Public Citizen states that it needs access to the Purchase and Sale Agreement to meaningfully evaluate whether the Proposed Transaction is consistent with the public interest.

14. Applicants object to Public Citizen's request, arguing that all of the information necessary to demonstrate that the Proposed Transaction is in the public interest is publically available in the non-confidential version of the Application. Applicants argue that the Purchase and Sale Agreement contains commercial and financial information that reflects sensitive economic arrangements between private parties and that this information is not publicly available because of the serious risk of competitive harm associated with the release of such information. Applicants further assert that they provided a copy of the Purchase and Sale Agreement with the Application with the understanding that the Commission would protect the confidentiality of the Purchase and Sale Agreement as required by section 388.107(d) of the Commission's regulations.¹⁰ However, Applicants state that if the Commission deems disclosure appropriate, they are willing to provide Public Citizen's authorized representative with a redacted version of the Purchase and Sale Agreement. Applicants also assert that any comments filed by Public Citizen after receipt of the Purchase and Sale Agreement under the Protective Agreement would be impermissibly filed out-of-time.

15. Section 388.107 of the Commission's regulations does not apply to non-disclosure agreement procedures with an intervening party under section 388.112 because section 388.107 only relates to material that may be protected from the public at-large.¹¹ It is common practice for parties to a proceeding to use a protective agreement to gain access to confidential and proprietary information submitted on a non-public basis while at the same time ensuring such information is neither publicly disclosed nor used by parties for purposes unrelated to their participation in the proceeding.¹² The Commission

¹⁰ 18 C.F.R. § 388.107(d) (2015) (identifying "[t]rade secrets and commercial or financial information obtained from a person and privileged or confidential" as Commission records exempt from public disclosure).

¹¹ *Arlington Storage Co., LLC*, 145 FERC ¶ 61,025, at P 8 (2013).

¹² *See, e.g., id.; West Deptford Energy, LLC*, 134 FERC ¶ 61,189, at P 29 (2011); *Southern Co. Energy Marketing, Inc.*, 111 FERC ¶ 61,011 (2005).

finds use of such agreements appropriately balances the interests of filers in protecting their sensitive information against inappropriate disclosure and the right of intervenors to access information necessary to their full and meaningful participation in a contested proceeding.

16. Applicants have failed to demonstrate why the Purchase and Sale Agreement cannot be protected by means of the Protective Agreement governing Public Citizen's use and disclosure of the information Applicants believe to be commercially sensitive.¹³ Public Citizen has complied with section 388.112 of the Commission's regulations and filed a motion to intervene and signed the Protective Agreement, and thus should be granted access to the complete, non-public version. Accordingly, the Commission hereby orders Applicants to provide Public Citizen with a complete, un-redacted, copy of the Purchase and Sale Agreement, within 15 days of the date of this order.

17. We disagree with Applicants that any comments filed by Public Citizen after its receipt of the Purchase and Sale Agreement should be considered comments impermissibly submitted out-of-time. As Applicants note, Public Citizen filed its motion to intervene before the comment period for the Application ended. Thus, consistent with Commission precedent, we will permit Public Citizen to file additional comments based on the Purchase and Sale Agreement, within 21 days of its receipt of the Purchase and Sale Agreement.¹⁴

The Commission orders:

(A) Within 15 days after the issuance of this order, Applicants shall provide the Purchase and Sale Agreement to Public Citizen pursuant to the terms of the executed Protective Agreement, as required by section 388.112(b)(2) of the Commission's regulations.

¹³ "The burden is on the party seeking to safeguard information to show that the protective order does not adequately protect its interests." *Empire State Pipeline*, 115 FERC ¶ 61,113, at P 7 (2006) (citing *Mojave Pipeline Co.*, 38 FERC ¶ 61,249, at 61,842 (1987)).

¹⁴ *Arlington Storage Co., LLC*, 145 FERC ¶ 61,025; *Dominion Cove Point LNG, LP*, 147 FERC ¶ 61,202 (2014).

(B) Public Citizen may file additional comments based upon the Purchase and Sale Agreement within 21 days after receipt of the Purchase and Sale Agreement.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.