

**STATE OF NEW YORK
PUBLIC SERVICE COMMISSION**

Application of Deepwater Wind South Fork, LLC for a Certificate of Environmental Compatibility and Public Need for the Construction of Approximately 3.5 Miles of Submarine Export Cable from the New York State Territorial Waters Boundary to the South Shore of the Town of East Hampton in Suffolk County and Approximately 4.1 Miles of Terrestrial Export Cable from the South Shore of the Town of East Hampton to an Interconnection Facility with an Interconnection Cable Connecting to the Existing East Hampton Substation in the Town of East Hampton, Suffolk County.

Case No. 18-T-0604

**MOTION OF SIMON V. KINSELLA TO
COMPEL PSEG LONG ISLAND, LLC TO RESPOND
TO INFORMATION REQUEST SI KINSELLA #32
PURSUANT TO 16 NYCRR §§ 3.6, 5.1, 5.3 AND 5.4**

I, Simon V. Kinsella, respectfully submit this motion pursuant to 16 NYCRR §§ 3.6, 5.1, 5.3 and 5.4 for an order compelling PSEG Long Island, LLC (“PSEGLI”) to respond to Interrogatory/Document Request Si Kinsella #32 (“IR SK #32”).

I am an intervenor in the above-caption proceeding. To the extent that I am neither a lawyer nor have I hired a lawyer (due to lack of intervenor funding), I respectfully request a degree of latitude regarding this motion.

I. Background

Deepwater Wind South Fork LLC (the “Applicant) seeks a Certificate of Environmental Compatibility and Public Need (“Certificate”) from New York State Public Service Commission (the “Commission”) for the construction and operation of the South Fork Wind Farm, South Fork Export Cable (“SFEC”) and Interconnection Facility.

The SFEC includes the submarine segment of the cable in New York State territorial waters (SFEC-NYS), the terrestrial underground segment of the cable (SFEC-Onshore), and the new interconnection facility (SFEC-Interconnection Facility), all of which are subject to review and approval under Article VII and will hereafter be referred to as “the Project” [emphasis added].¹

PSEG Long Island, LLC (“PSEGLI”) is an intervening party in the above-caption proceeding. “On January 1st, 2015, PSEG Long Island assumed responsibility for LIPA’s power supply planning” and through its wholly-owned subsidiary, Long Island Electric Utility Servco LLC, provides services “such as purchasing power and fuel procurement” on behalf of LIPA.²

On August 24, 2020, I submitted IR SK #32³ to PSEGLI seeking information that is “relevant and material” to this proceeding and “information likely to lead to such information” pursuant to 16 NYCRR § 5.1(a).

¹ Article VII application filed September 14, 2018, Application (at p. 1)

² See Exhibit A - Request for Proposals, South Fork Resources issued June 24, 2015 (at p. 7)

³ See Exhibit B – Information Request Si Kinsella #32

IR SK #32 requests information that relates to the administration of a Request for Proposals for South Fork Resources issued by PSEGLI on June 24, 2015 (“South Fork RFP”) and its subsequent award determination of a power purchase agreement (“PPA”) to the Applicant pursuant to that RFP.

On September 3, 2020, PSEGLI responded to IR SK #32 and notified Administrative Law Judge Belsito of PSEGLI’s objections to IR SK #32 pursuant to ALJ Belsito’s ruling of February 12, 2020 in this proceeding.⁴

In its response, PSEGLI answered questions (1) and (3) and objected to questions (2) and (4) though (10). PSEGLI’s objections were all identical and read –

PSEG Long Island objects to this request on the grounds that it seeks confidential information that is neither relevant to, nor reasonably calculated to lead to, the discovery of admissible evidence in this Article VII proceeding

On September 3, PSEGLI and I spoke on the telephone and attempted to resolve the issues related to PSEGLI’s objections to IR SK #32. The telephone call ended without resolution, although, PSEGLI committed to contemplate providing just “the names of the companies and the dates when they submitted the bids.”⁵ The following day (September 4), I received PSEGLI’s reply (via email) that reads –

Yesterday we had a telephone conversation where you asked me if I could provide the names of the companies and the dates when they submitted the bids. I promised you I would reply with a response by COB today (September 4, 2020). In response

⁴ See Exhibit C – IR SK #32 – Response by PSEGLI (at p. 1)

⁵ See Exhibit D – IR SK #32 Email Chain between PSEGLI & SK (Sep 3, 2020)

to that second question, on December 2, 2015, 21 proposals were received from 16 entities. In response to your first question, there are at least 3 of those 16 entities that have been publicly identified, such as:

- 1. Applied Energy Group (implementation of a load reduction program);*
- 2. Deepwater Wind South Fork, LLC (offshore wind farm); and*
- 3. LI Energy System, LLC (battery storage in Montauk and East Hampton).*

We are not providing you with a list of the other 13 entities that submitted bids on December 2, 2015. I understand that you may be asking for this information in a Motion to Compel; it is our position that this confidential information is neither relevant to, nor reasonably calculated to lead to, the discovery of admissible evidence in this Article VII proceeding [emphasis added].⁶

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⁶ *Ibid*

II. Exhibits

In support of this Motion to Compel, I submit the following exhibits –

- Exhibit A - 2015 South Fork RFP - June 24, 2015 (full)
- Exhibit B - IR SK #32
- Exhibit C - IR SK #32 - Response by PSEG LI (Sep 3, 2020)
- Exhibit D - IR SK #32 - Email Chain btw SK & PSEGLI (2020-09-03)
- Exhibit E - Kinsella vs NYS OSC - Decision (index 904100-19)
- Exhibit F - NYSERDA - OSW Phase 1 Report - Sunrise & Equinor (Oct 2019)
- Exhibit G - LIPA Press Release - Price 16.3¢
- Exhibit H - PPA - LIPA & Deepwater (OSC & LIPA)
- Exhibit I - NREL Comparing Offshore Wind Energy (June 2020)
- Exhibit J - IR SK #29 - PSEGLI Response - PPA Amendment No 1 (40 MW)
- Exhibit K - US DOE 2018 OSW Technologies Mk Report (updated Aug 2019)
- Exhibit L - Fig 32 - OSW Mkt Report Adj Strike Prices (Aug 2019)
- Exhibit M - LIPA Approval of PPA for Offshore Wind (DR-0014)
- Exhibit N - Ørsted AS - 2018 Annual Report (193 pages)
- Exhibit O - Ørsted AS - 2019 Annual Report (183 pages)
- Exhibit P - NJ Awards Grant for First Offshore Wind Project, WSJ (Oct 3, 2008)
- Exhibit Q - Maryland - US Wind & Skipjack (Mar 17, 2017)
- Exhibit R - NJ BPU OSW Evaluation Report (Oct 2008)
- Exhibit S - IR SK #19 - PSEGLI Conflicts of Interest
- Exhibit T - IR SK #19 - PSEGLI Response (Mar 13, 2020)

Arguments

III. Claim of Confidentiality

PSEGLI objected to IR SK #32 “on the grounds that it seeks confidential information” (IR SK #32, questions 2 and 4 through 10).⁷

PSEGLI neither claims the requested information pertains to trade secrets nor critical infrastructure and, therefore, its objection is limited *only* to it having to disclose information that it believes is confidential.

Pursuant to 16 NYCRR § 5.8(e): “Claims that information is exempt from discovery on the grounds it is a trade secret, confidential commercial information or critical infrastructure information shall be treated in accordance with § 6-1.4 of this Title.”

Pursuant to 16 NYCRR § 6-1.4(a)(1) and (2), PSEGLI is a “party requesting confidential status [and] shall submit the record containing such information to the presiding officer ... clearly identify the portions of the record considered to be confidential ... [and] shall also submit a comprehensive brief specifying in detail the reasons why such information should be accorded confidential status as provided for in § 6-1.3 (b)(2) of this Subpart.”

Pursuant to 16 NYCRR § 6-1.3 (b)(2), PSEGLI “shall clearly state the reason(s) why the information should be excepted from disclosure, as provided for in § 87(2) (d)

⁷ See Exhibit C – IR SK #32 – Response by PSEGLI

of the Public Officers Law. In all cases, the person must show the reasons why the information, if disclosed, would be likely to cause substantial injury to the competitive position of the subject commercial enterprise.”

PSEGLI’s claim of confidentiality is conclusory. PSEGLI neither provides reasoning nor evidence supporting its assertion that IR SK #32 seeks information that “if disclosed, would be likely to cause substantial injury to the competitive position of the subject commercial enterprise.”

PSEGLI is required pursuant to 16 NYCRR § 6-1.3 (b)(2) to comply with Public Officers Law § 87(2) (d). In its administration of the South Fork RFP “as agent of and acting on behalf of Long Island Lighting Company d/b/a LIPA” a public authority, PSEGLI was vetting a public contract (the PPA) that “would affect the pricing of utilities supplied to the general public” and, therefore, be “of significant interest to the general public.”⁸

The New York Legislature enacted Public Officers Law, Article 6 (§§ 84 – 90) in recognition that "a free society is maintained when government is responsive and responsible to the public, and when the public is aware of governmental actions. The more open a government is with its citizenry, the greater the understanding and participation of the public in government" (Public Officers Law § 84).

Public Officers Law § 87(2) (d) requires that each “agency shall, in accordance with its published rules, make available for public inspection and copying all records,

⁸ See Exhibit E – *Simon V. Kinsella vs. Office of the New York State Comptroller*, NYSCEF index 904100-19: Decision dated July 9, 2019 (at p. 2)

except that such agency may deny access to records or portions thereof that ... are trade secrets or are 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 [emphasis added].”

The agency which in this proceeding means the Department of Public Service (“DPS”) has the burden of establishing that this exemption applies (*Data Tree, LLC v Romaine*, 9 N.Y.3d 454, 463, 2007). Such exemptions must be interpreted and applied narrowly (*Id.* at 462) and the exemption from disclosure must be established with evidentiary support (*Baez v Brown*, 124 A.D.3d 881, 883, 2nd Dept 2015).

The Court of Appeals has confirmed that in order to meet the burden of proof in denying requested information, agencies [i.e. DPS] *must* provide "persuasive evidence" that disclosure would cause the harm envisioned rather than a "speculative conclusion that disclosure *might potentially* cause harm [emphasis added]" to warrant denying access to information (*Markowitz v. Serio*, 11 NY3d 43, 51, 2008).

PSEGLI has provided *no* evidence to support its assertion that the information requested in IR SK #32 is commercially sensitive and that should the information be disclosed, it “would cause substantial injury to the competitive position of the subject enterprise.”⁹ We do not even know whose interest PSEGLI seeks to protect. Does PSEGLI consider the requested information to be potentially injurious upon itself or is PSEGLI seeking to protect the Applicant? PSEGLI has left us guessing as to the name

⁹ NY CLS Pub O § 87(2) (d)

of the “subject enterprise” that it seeks to protect. PSEGLI has *not* bothered even to speculate as to what *might* injure the competitive position of the “subject enterprise” (whomever that may be). We *only* know it is not the public’s interest.

To the extent that PSEGLI may claim that disclosure of information may impair an entity’s ability to get the best price in future RFPs, PSEGLI cannot establish that it will have a more difficult time negotiating with developers in such RFPs.

The South Fork RFP is the only opaque RFP and one that is shrouded in secrecy. By comparison, other procurements for offshore wind are openly transparent. Examples of openly transparent procurements include Mayland Public Service Commission’s Evaluation and Comparison of US Wind and Skipjack,¹⁰ New Jersey Board of Public Utilities’ Evaluation Committee Award Recommendation,¹¹ and the procurement process administered by New York State Energy Research and Development Authority (“NYSERDA”) where Sunrise Wind and Empire Wind were awarded contracts.¹²

Notably, the transparent NYSERDA procurement resulted in a price for delivered power from Sunrise Wind and Empire Wind that is half the price of delivered power per the power purchase agreement (“PPA”) awarded Deepwater Wind South Fork LLC pursuant to the secretive and opaque South Fork RFP.

PSEGLI neither has provided evidence to support its claim for confidential status nor bothered even to speculate as to what possible “substantial injury to the competitive

¹⁰ See Exhibit Q - Mayland Public Service Commission: *Evaluation and Comparison of US Wind and Skipjack Proposed Offshore Wind Project Applications* dated March 17, 2017

¹¹ See Exhibit R - NJ Board of Public Utilities, Evaluation Committee Award Recommendation, 2008

¹² See Exhibit F - Launching New York’s Offshore Wind Industry: Phase 1 Report, October 2019.

position of the subject enterprise” *might possibly* result from disclosure of the information requested in IR SK #32. Furthermore, we are left guessing as to whether the “subject enterprise” is PSEGLI, the Applicant or some other enterprise.

Accordingly, I request that PSEGLI’s objection on the grounds that IR SK #32 “seeks confidential information” be denied.

IV. The price the public will have to pay is relevant.

PSEGLI objected to IR SK #32 on the grounds that it seeks information that is “neither relevant to, nor reasonably calculated to lead to, the discovery of admissible evidence in this Article VII proceeding.” (IR SK #32, questions 2 and 4 through to 10).¹³

To the extent that 16 NYCRR § 5.1(a) requires PSEGLI to “fully disclosed ... upon request, all information ... relevant and material” to this Article VII proceeding, “the scope of discovery is very broad, consistent with New York's policy of permitting 'open and far-reaching pretrial discovery.’”¹⁴

16 NYCRR § 5.8(d) provides that: “In resolving claims that information is ... exempt from discovery, the presiding officer shall be guided but not bound by the Civil Practice Law and Rules and case law pursuant to it[.]” The presiding officer may

¹³ See Exhibit C – IR SK #32 – Response by PSEGLI

¹⁴ Ruling on Motion to Compel in NYSDPS Case 13-T-0235 at p. 5 (Apr. 23, 2015), citing *Kavanagh v. Ogden Allied Maintenance Corp., et al.*, 92 N.Y.2d 952, 954 (1998).

look, therefore, to CPLR § 3101(a) for guidance which states: "There shall be full disclosure of all matter material and necessary in the prosecution or defense of an action [emphasis added]."

Nothing could be more "material and necessary" in this case than a close examination of whether or not the proposed transmission facility that is the subject of this Article VII proceeding is in the public interest.

The Commission "may not grant a certificate ... unless it shall find and determine: ... that the facility will serve the public interest, convenience, and necessity" (16 NYCRR § 126(1)(h)).

At issue is whether or not the public interest includes within its scope the price the public will pay for power delivered for sale in New York State by the Applicant. This issue already has been decided in the affirmative.

In the matter of *Simon V. Kinsella vs. Office of the New York State Comptroller*,¹⁵ Petitioner commenced the Article 78 proceeding seeking public disclosure of the price the public will have to pay for power delivered by the subject transmission facility by the Applicant for sale in New York State.

The decision handed down by the Hon. Richard Rivera, A.S.C.J. reads as follows –

In the instant matter the petitioner ... substantially prevailed. ... The Court finds that the record requested was of significant interest to the general public as the records sought consisted of the contract prices which would affect the pricing of

¹⁵ *Simon V. Kinsella vs. Office of the New York State Comptroller*, NYSCEF index 904100-19.

utilities supplied to the general public [emphasis added].¹⁶

The underlying reason given for why the Applicant's contract prices are of "significant interest to the general public" is because they "affect the pricing of utilities supplied to the general public." It logically follows, therefore, that issues affecting contract prices likewise are of significant interest to the general public as they, too, "affect the pricing of utilities supplied to the general public."

Issues that "affect the pricing of utilities supplied to the general public" include those for which information has been requested in IR SK #32 and is required to development and present my case before the Commission. Such issues are related to the bidding process that is centered on PSEGLI's administration of the South Fork RFP and the price the public will have to pay for the Applicant's delivered power pursuant to its subsequent PPA award.

Conspicuously absent from the Article VII application is the price the public will have to pay for delivered power and all other issues affecting the price. Such issues include the bidding process and methodology, the names of the other bidders, evaluation criteria, a comparative analysis of the bids, a market analysis, vendor questionnaires or any aspect whatsoever related to the procurement process.

The Article VII application is based on the absurd premise that the public on one side of a public contract with a public authority administered and negotiated by PSEGLI acting on behalf of LIPA cannot know the price that they will pay for delivered power by the

¹⁶ See Exhibit E – *Simon V. Kinsella vs. Office of the New York State Comptroller*, NYSCEF index 904100-19: Decision dated July 9, 2019 (at p. 2)

subject transmission facility pursuant to the PPA. The PPA is not a bid. It is not a proposal. It is not a draft. It is not subject to further or other negotiations. It is a final contract and has received all necessary approvals under state law. There is no plausibly reason why the South Fork RFP and its PPA should be denied public scrutiny in this Public Service Commission proceeding. It's only distinct from other public contracts because it relates to a controversial offshore renewable wind energy project. That feature, alone, does not provide grounds for PSEGLI to administer a closed shop opaque procurement process to avoid accountability and scrutiny by the public who will be purchasing (and subsidizing) delivered power from the Applicant's proposed transmission facility. IR SK #32 seeks answers to questions that affect the price of power from that transmission facility.

By way of comparison, New York State Energy Research and Development Authority ("NYSERDA") issued in October 2019 a report titled: Launching New York's Offshore Wind Industry: Phase 1 Report ("NYOSW Phase 1 Report").¹⁷

In this report, NYSERDA provides details on its evaluation criteria, bidders, market and comparative analysis, an in-depth analysis on contract prices, copies of the Purchase and Sale Agreements where the contract prices are fully disclosed, and much more. Notably, there is *no* presumption of confidentiality with regard the procurement process and selection criteria once the bidding process has been finalized and the award(s) announced. Likewise, there is *no* presumption of confidentiality with regard the procurement processes reviewed by Mayland Public Service Commission¹⁸ or New Jersey Board of Public Utilities.¹⁹

¹⁷ See Exhibit F - Launching New York's Offshore Wind Industry: Phase 1 Report, October 2019.

¹⁸ See Exhibit Q - Mayland Public Service Commission: Evaluation and Comparison of US Wind and Skipjack

¹⁹ See Exhibit R - NJ Board of Public Utilities, Evaluation Committee Award Recommendation, 2008

NYSERDA awarded contracts to Sunrise Wind (Bay State Wind LLC) and Empire Wind (Equinor Wind US LLC) and even so, the public are still provided with the names of the other bidders: Atlantic Shores Offshore Wind (Atlantic Shores Offshore Wind LLC) and Liberty Wind (Vineyard Wind LLC). After the procurement process was complete, the awards were announced and information similar to that requested in IR SK #32 was released and publicly available.

The NYSERDA example of is one of a professionally administered RFP and stands is in stark contrast to the secretive and opaque manner in which the South Fork RFP is being managed by PSEGLI.

To the extent that the manner in which an RFP is administered affects the price, the NYSERDA RFP resulted in prices that are approximately half the price of the secretive and opaque South Fork RFP administered by PSEGLI.²⁰ What is PSEGLI hiding?

The US Department of Energy's National Renewable Energy Laboratory published a report in June 2020²¹ that compares utility-scale offshore wind farms (see table below). The price for delivered power from Deepwater Wind South Fork is 24% more expensive than power delivered pursuant to the next two most expensive contracts (US Wind and Skipjack).

Deepwater Wind South Fork and Sunrise Wind both transmit their power from adjacent offshore wind energy lease areas (they are only two miles apart), but Sunrise Wind

²⁰ NYSERDA contract prices are approximately 8.3 cents/kWh as opposed to the PSEGLI South Fork RFP contract price of 16.3 cents/kWh. See Exhibit F - Launching New York's Offshore Wind Industry: Phase 1 Report, October 2019 (at p. 38) and Exhibit G - LIPA Press Release - Price 16.3¢ (at p. 3). NB: The price of 14.1¢ widely publicized by LIPA includes prices for additional capacity to which neither LIPA nor the Applicant has committed and is *not* subject to contract.

²¹ See Exhibit I - NREL Comparing Offshore Wind Energy, Table A-2 U.S. Offshore Wind Offtake Agreements, June 2020 (at p. 49) - Technical Report NREL/TP-5000-76079 (www.nrel.gov/publications)

has to transmit its power twice the distance than Deepwater Wind South Fork,²² yet the price of delivered power from Sunrise Wind is half the rate of delivered power from Deepwater Wind South Fork LLC.

<u>Project</u>	<u>Size (MW)</u>	<u>Levelized Price</u>		
		<u>(\$/MWh)</u>	<u>(cents/kWh)</u>	
South Fork	90 ²³	\$163.00	16.3 ¢	Deepwater Wind South Fork and Sunrise Wind are in adjacent lease areas, but Sunrise Wind has to transmit its power twice the distance and, yet, its power is still half the price of power from Deepwater Wind South Fork LLC.
US Wind	248	\$131.94	13.2 ¢	
Skipjack	120	\$131.94	13.2 ¢	
Ocean Wind	1,100	\$116.82	11.7 ¢	
Revolution Wind	200	\$99.50	10.0 ¢	
Revolution Wind	104	\$98.43	9.8 ¢	
Revolution Wind	400	\$98.43	9.8 ¢	
Empire Wind	816	\$83.36	8.3 ¢	
Sunrise Wind	880	\$83.36	8.3 ¢	
Vineyard Wind	400	\$74.00	7.4 ¢	
Vineyard Wind	400	\$65.00	6.5 ¢	
Mayflower Wind	400	\$58.47	5.8 ¢	
Mayflower Wind	404	\$58.47	5.8 ¢	

The anomalous nature of the above-market rate, by definition, means that the “pricing of utilities supplied to the general public” were subject to influences outside market forces. Had the procurement been truly market-driven and competitive, the price, by definition, would have been at market rate (not above-market). If the decision to award a PPA was determined by a market-driven “technology-neutral competitive bidding process”

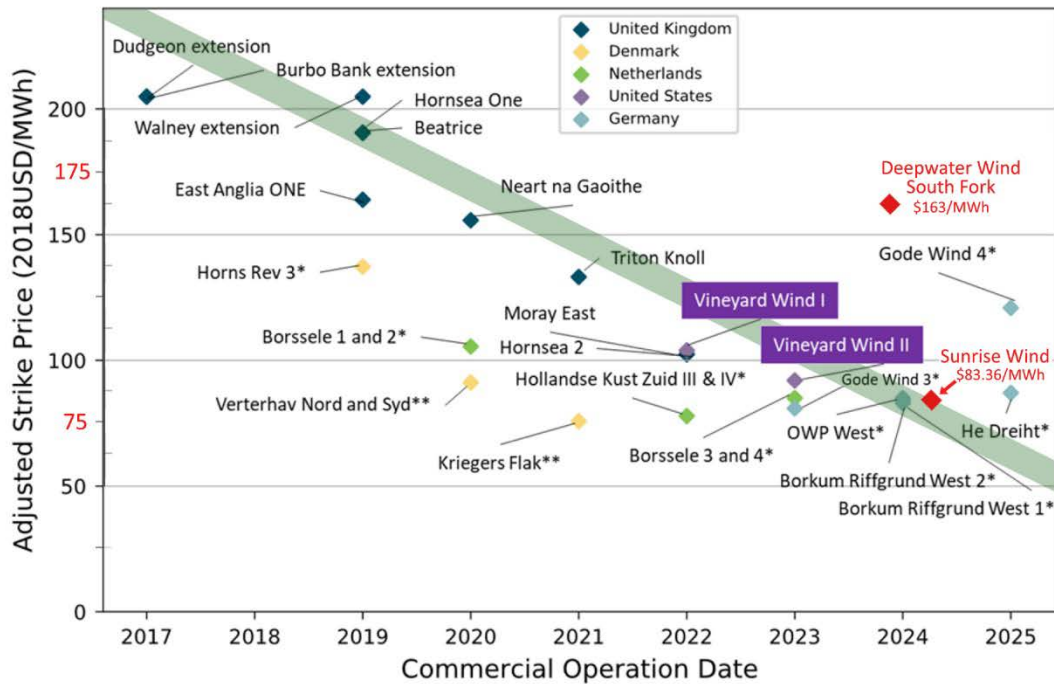
²² Sunrise Wind has to transmit its power ~110 miles from the source of generation to the interconnection in Holbrook whereas Deepwater Wind South Fork has to transmit its power half that distance, only ~55 miles to the interconnection in the Town of East Hampton.

²³ The NREL report states that Deepwater Wind South Fork as proposed has a capacity of 130 MW, whereas the only capacity that has been agreed in that specified in the only executed PPA for 90 MW.

as Deepwater Wind South Fork and PSEGLI both claim in their recently filed Joint Proposal, then market forces would have produced a competitive price, but it did not. PSEGLI’s South Fork RFP was as competitive as the above-market price it produced.

5.1 Fixed-Bottom Pricing Trends

Figure 32 shows (adjusted) strike prices from recent offshore wind auctions held in Germany, the United Kingdom, the Netherlands, Denmark, and the United States, for projects to be commissioned between 2017 and 2025.



Note: The red writing and trendline (shaded green) has been added subsequent to this publication and is not a part of the original Figure 32 published by US DOE (updated Aug 2019).
Figure 32. Adjusted strike prices from U.S. and European offshore wind auctions. Reprinted from Beiter et al. (2019)

The degree to which the Applicant’s price is anomalous is clearly evident when compared to eighteen similar (with fixed-bottom foundations) commercial-scale offshore wind contracts for delivered power (see Fig. 1 above).²⁴

²⁴ See Exhibit L – Fig. 32 - OSW Market Report Adjusted Strike Prices (updated August 2019) with notes. See Exhibit K - US DOE 2018 OSW Technologies Mk Report, updated Aug 2019 (Fig. 32 at p. 68) NB: Deepwater Wind South Fork and Sunrise Wind have been added subsequently and (for whatever reason) were not included in the original version published August 2019.

The South Fork RFP is not transparent and resulted in PPA with a price tag starkly outside market norms that serves to benefit Deepwater Wind South Fork LLC to the detriment of the public interest. IR SK #32 attempts to shed light on the procurement process administered by PSEGLI in an effort to gain an understanding of the issues so that the public can participate in and make informed decisions in a functioning democracy. Energy, today, more than ever before, is an important issue. The public should be able to know how their taxpayer and ratepayer dollars are being spent. The IR at issue seeks to answer the most fundamental questions that are being denied public scrutiny. Information that should be disclosed and is standard practice in all other procurements includes: the names of all the bidders, the number of bidders in each portfolio, the basis and methodology used for determining the successful bidder(s), any comparative analysis, memoranda, reports and/or findings, the evaluation criteria, letters or other correspondence seeking to clarify proposals, interviews transcript or site visit reports, etc. These are issues that have a direct bearing on the price the public has to pay for Deepwater Wind South Fork's delivered power. Insight into the South Fork RFP procurement process and its PPA is necessary, material and imperative in assessing whether Deepwater Wind South Fork is in the public interest, or not. "The words, *material and necessary*, are ... to be interpreted liberally to require disclosure, upon request, of any facts bearing on the controversy which will assist preparation for trial by sharpening the issues and reducing delay and prolixity [emphasis added]." *Allen v Crowell-Collier Publ. Co.*, 21 NY2d 403, 406 [1968] and 2004 N.Y. PUC LEXIS 465 (N.Y.P.S.C. November 17, 2004).

V. PSEG Long Island: existing conflict of interest

PSEGLI administered the South Fork RFP and did *not* disclose existing conflicts of interest that might have had a bearing on the procurement process it administered.

Did PSEG award a PPA to Deepwater Wind because it was the best proposal in a competitive field where there was more than one offshore wind farm developer bidding in an openly transparent and professionally managed procurement process?

– or –

Did PSEG award a PPA to Deepwater Wind because they were business partners and this is why there is an opaque and secretive procurement process?

The public interest demands the former whereas the evidence suggests the latter. Regardless, it is in the public interest that issues influencing the price that the public will have to pay pursuant to a public contract with a public authority are publicly disclosed.

PSEGLI issued the South Fork RFP in June 2015. It reads: “PSEG Long Island and Servco²⁵ (collectively referred to as “PSEG Long Island” or “PSEG LI”), as agent of and acting on behalf of LIPA per the A&R OSA,²⁶ will administer this RFP on behalf of LIPA.”²⁷

²⁵ Long Island Electric Utility Servco, LLC (“Servco”) is a wholly-owned operating subsidiary of PSEG LI.

²⁶ Amended and Restated Operation Services Agreement (“A&R OSA”) dated December 31st, 2013.

²⁷ See Exhibit A – South Fork RFP dated June 24, 2015 issued and administered by PSEGLI (at p. 7)

In January 2017, LIPA CEO, Thomas Falcone, requested authorization from the LIPA Board of Trustees to “execute a Power Purchase Agreement (‘PPA’) with Deepwater Wind South Fork, LLC (‘Deepwater’), a wholly owned subsidiary of proposer, Deepwater Wind, LLC, and to ... implement arrangements for ... LIPA ... to purchase energy, installed capacity, renewable attributes and ancillary services from Deepwater’s proposed South Fork Wind Farm (the ‘Project’).”²⁸

In February 2017, LIPA executed a PPA between it and Deepwater Wind South Fork, LLC (the Applicant) to buy power delivered to the LIPA-owned East Hampton Substation located in Town of East Hampton within New York State jurisdiction.²⁹

Prior to 2018, Deepwater Wind South Fork, LLC (the Applicant) was a wholly-owned subsidiary of Deepwater Wind, LLC.

At the same time PSEGLI was administering the South Fork RFP,³⁰ it was also a business partner (indirectly through companies related by 100% ownership interests) with Deepwater Wind LLC, the proposer and holding company of the company to which it awarded the contract pursuant to that RFP, Deepwater Wind South Fork LLC.

PSEGLI and Deepwater Wind each indirectly owned a fifty percent (50%) interest in Garden State Offshore Energy LLC when PSEGLI awarded its business partner, Deepwater Wind, a power purchase agreement pursuant to the South Fork RFP it was administering.

²⁸ See Exhibit M – LIPA Trustees Board Approval of Deepwater PPA dated January 25, 2017 (at p. 1)

²⁹ Pursuant to the PPA, power is to be delivered from a ninety-megawatt (90 MW) offshore wind farm located on the Outer Continental Shelf (OCS) in US federal waters.

³⁰ PSEGLI administered the South Fork RFP from June 24, 2015 until February 6, 2017

PSEG LI is indirectly related by 100% ownership interests to a 50% ownership interest in the joint venture, Garden State Offshore Energy LLC, as follows –

- I. PSEG Long Island LLC is a wholly-owned subsidiary of Public Service Enterprise Group Incorporated (“PSEG Inc.”) a company based in New Jersey;
- II. PSEG Inc. wholly owns subsidiary PSEG Energy Holdings LLC;
- III. PSEG Energy Holdings LLC wholly owns subsidiary PSEG Global LLC;
- IV. PSEG Global LLC wholly owns subsidiary PSEG Renewable Generation LLC;
- V. PSEG Renewable Generation LLC owns 50% of the Membership Units of Garden State Offshore Energy LLC.

Deepwater Wind South Fork LLC, is indirectly related by 100% ownership interest a to 50% ownership interest in the joint venture, Garden State Offshore Energy LLC, as follows –

- I. Deepwater Wind South Fork LLC (the Applicant) is a wholly-owned subsidiary of Deepwater Wind LLC;
- II. Deepwater Wind LLC is wholly-owned by Deepwater Wind Holdings LLC;
- III. Deepwater Wind Holdings LLC was formed in mid-2008 with the acquisition of assets from Winergy Power Holdings LLC and First Wind Holdings Inc³¹ and has been referred to in regulatory filings as “Deepwater Wind Holdings, LLC (former Winergy Power Holdings, LLC).”³²

³¹ See Exhibit P - *N.J. Awards Grant for First Offshore Wind Project*, Wall Street Journal, Oct 3, 2008 (at p. 2)

³² See Exhibit Q - Mayland Public Service Commission: *Evaluation and Comparison of US Wind and Skipjack Proposed Offshore Wind Project Applications* dated March 17, 2017 (at p. 144)

IV. Winergy Power Holdings LLC owns 50% of the Membership Units of Garden State Offshore Energy LLC.³³

In November 2018, Deepwater Wind LLC was acquired by Ørsted A/S.³⁴

In February 2019, Eversource Energy acquired a 50% interest “in selected activities acquired through Deepwater Wind. These included the Revolution Wind (704MW) and South Fork (130MW) development projects[.]”³⁵

VI. PSEG Long Island: failure to disclose conflicts of interest

On March 3, 2020, PSEGLI was received (via email) information request Si Kinsella #19 (“IR SK #19”).

IR SK #19, question (10) reads – “Has PSEG or any of its subsidiaries and/or related entities invested in or maintained a beneficial and/or ownership interest in GSOE I, LLC or any of its subsidiaries and/or related entities at any time from January 1, 2015 through to March 3, 2020?”³⁶

PSEG Long Island responded (on March 13, 2020) as follows – “... yes. GSOE I, LLC is a direct, wholly-owned subsidiary of Garden State Offshore Energy LLC. PSEG Renewable Generation LLC, an indirect wholly-owned subsidiary of Public Service

³³ See Exhibit R - NJ Board of Public Utilities, Evaluation Committee Award Recommendation, 2008 (at p. 4)

³⁴ See Exhibit N - Ørsted A/S 2018 Annual Report reads: “On 8 November 2018, we acquired all of the membership interests in Deepwater Wind LLC, effectively gaining control of the company [for DKK 3,228]” section 8.5 Company overview (at pp. 162-166). “Awarded” US capacity in 2018 - South Fork (130MW), Skipjack (120MW) and Revolution Wind (704MW) (at p. 28).

³⁵ See Exhibit N - Ørsted A/S 2018 Annual Report 2019 (at pp. 6-7).

³⁶ See Exhibit S – IR SK #19, March 3, 2020 (at p. 5)

Enterprise Group Incorporated, owns 50% of the Membership Units of Garden State Offshore Energy LLC.”³⁷

IR SK #19, question (8) reads – “Has PSEG or any of its subsidiaries and/or related entities invested in or maintained a beneficial and/or ownership interest in Ørsted A/S (a company registered in Denmark) or any of its subsidiaries and/or related entities at any time from January 1, 2015 through to March 3, 2020?”³⁸

PSEGLI responded (on March 13, 2020), stating that “neither PSEG nor any of its subsidiaries and/or related entities has ‘invested in or maintained a beneficial and/or ownership interest in Ørsted A/S (a company registered in Denmark) or any of its subsidiaries and/or related entities at any time from January 1, 2015 through to March 3, 2020.’”³⁹

In response to question (8), PSEGLI did *not* disclose the 50% ownership interest PSEG Renewable Generation LLC (a related company indirectly by 100% ownership interests) held in Garden State Offshore Energy LLC, a company in which Ørsted A/S held a 50% ownership interest indirectly through companies related by 100 ownership interests.

PSEGLI was aware of Garden State Offshore Energy LLC and its wholly-owned subsidiary GSOE I LLC because it had been directed to these two specific entities in IR SK #19, Questions (10) and (11). Furthermore, if PSEGLI was uncertain as to the name of its business partner, that information is readily available in the Annual Reports of Ørsted A/S

³⁷ See Exhibit T – IR SK #19 – PSEGLI Response, March 13, 2020 (at pp. 5-6)

³⁸ See Exhibit S – IR SK #19, March 3, 2020 (at p. 4)

³⁹ See Exhibit T – IR SK #19 – PSEGLI Response, March 13, 2020 (at p. 5)

that can be accessed by the public via Ørsted A/S's website.⁴⁰ The ownership interests of Ørsted A/S are listed in its 2018 Annual Report.⁴¹

Of further interest is a transaction that took place just one month prior (in December 2016) to PSEGLI awarding the PPA to the Applicant, Deepwater Wind South Fork LLC (in January 2017) pursuant to the South Fork RFP.

In December 2016, PSEGLI and Deepwater Wind, together, purchased Renewable Energy Lease OCS-A-0482. The renewable energy lease was purchased through a wholly-owned subsidiary of Garden State Offshore Energy LLC called GSOE I LLC.⁴² The renewable energy lease was purchased for a subsidiary of Deepwater Wind Holdings LLC, Skipjack Offshore Energy LLC.⁴³

PSEGLI, again, failed to disclose its relationship to an indirect beneficial/ownership interest in another Deepwater Wind subsidiary, Skipjack Offshore Energy LLC, the entity for which (in part) it was acquiring the lease.

I do *not* know whether PSEGLI's failures to disclose are in violation of the Amended and Restated Operation Services Agreement ("A&R OSA") between PSEG Long Island, LLC and Long Island Power Authority d/b/a/ LIPA dated December 31, 2013.

⁴⁰ <https://orsted.com/en/investors/ir-material/financial-reports-and-presentations#2>

⁴¹ See Exhibit N - Ørsted A/S 2018 Annual Report (at pp. 162-164)

⁴² See Exhibit U - OCS A-0482 Lease Assignment to GSOE I, LLC, Effective Dec 20, 2016 (at p. 1)

⁴³ See Exhibit Q - Maryland Public Service Commission, Evaluation and Comparison of US Wind and Skipjack Proposed Offshore Wind Project Applications dated March 17, 2017 (at pp. 9 and 12-13)

VII. Jurisdiction

The issue of the price of delivered power by the subject transmission facility currently before the Commission falls within the jurisdiction of New York State and, therefore, is within the jurisdiction of this Article VII proceeding.

The negotiated and executed contract prices have been agreed between the Applicant (as seller) and Long Island Power Authority d/b/a/ LIPA (as buyer) according to the terms and conditions within the executed Power Purchase Agreement (“PPA”) of February 2017.⁴⁴

The PPA is governed by the Laws of New York State.⁴⁵

According to the executed PPA, LIPA is to buy from the Applicant “Delivered Energy - means Energy that is generated by the Project and delivered by Seller to Buyer at the Delivery Point measured by Buyer's Metering Devices” and the “Delivery Point - means the point of interconnection” in the Town of East Hampton, New York State.⁴⁶

The contract prices are for power delivered by the Applicant’s transmission facility to New York State (Town of East Hampton) for sale to a New York State public authority (LIPA) according to a contract executed and governed by the Laws of New York State for use by consumers living in New York State (on eastern Long Island).

New York State Public Service Commission has jurisdictional authority within New York State and it is the *only* agency within New York State that has authority pursuant to Article VII to assess whether the Applicant’s proposal is in the public interest, or not.

⁴⁴ See Exhibit H - Power Purchase Agreement between Deepwater Wind South Fork LLC and Long Island Power Authority d/b/a/ LIPA, executed February 2017

⁴⁵ *Id.* Article 12.5 (at p. 55) and Section 5.02 (at p. 111)

⁴⁶ *Id.* Article 1: General Definitions (at p. 17)

VIII. South Fork RFP and PPA

In response to a Motion filed with on September 8, 2020,⁴⁷ Deepwater Wind South Fork LLC, the Applicant, claims that “there is no case before the Commission that concerns the RFP selection process or the PPA” and that “neither the 2015 RFP, the process used by LIPA that resulted in the ultimate selection of the SFWF, nor the terms and conditions of the Power Purchase Agreement that LIPA and DWSF entered into as a result of the 2015 RFP, are before the Commission in this case.”

The Applicant’s position that the South Fork RFP and its subsequent PPA are not “before the Commission in this case” conflicts with the Applicant’s Article VII application and the Executed Joint Proposal that it and PSEGLI recently filed with the Department of Public Service (on September 17, 2020). The Article VII application and Joint Proposal clearly place the South Fork RFP and its subsequent PPA at the center of its case before the Commission. Without the South Fork RFP and its PPA, the Applicant’s case would *not* survive.

At the heart of the Applicant’s case is its reliance of the South Fork RFP and its PPA as justification for the “basis of the need for the facility” without which the Commission cannot issue the Applicant with a Certificate pursuant to NY CLS Pub Ser § 126(1)(a).

In its Article VII applicant, the Applicant states that the “Project will also help LIPA achieve its renewable energy goals and will enable DWSF to fulfill its contractual commitments to LIPA pursuant to a Power Purchase Agreement (PPA) executed in 2017”

⁴⁷ Motion of Simon V. Kinsella to Compel Town of East Hampton to Respond to Interrogatory/Document Request Si Kinsella #28(b), filed on August 28, 2020 (“Motion to Compel IR SK #28”).

resulting from LIPA’s technology-neutral competitive bidding process [emphasis added]”
(i.e. the South Fork RFP).⁴⁸

The Joint Proposal that is signed by, *inter alia*, the Applicant and PSEGLI reads –

9. *The Commission must consider the totality of all relevant factors in making its determination of ... public need. The relevant factors include, without limitation, and in no order of priority, the basis of the need, cost ... and the public interest, convenience, and necessity.*
10. *The Project ... addresses the need identified by LIPA in its 2015 technology-neutral competitive bidding process (“South Fork RFP”) for new sources of power generation that could cost-effectively and reliably supply the South Fork of Suffolk County, Long Island. Further, the SFEC will help LIPA achieve its renewable energy goals [emphasis added]. ...*
11. *In 2015, PSEG Long Island ... developed the South Fork RFP to:*
 - a. *Acquire additional local power production and/or load reduction resources in the South Fork to meet projected load growth and thereby defer the need for new transmission infrastructure;*
 - b. *Support load demand to avoid overload of existing transmission assets during transmission outages that limit transmission capacity to the South Fork load area; and*
 - c. *Support system voltage to avoid voltage collapse during a transmission*

⁴⁸ Article VII application filed on September 14, 2018, Application, Section D Need for the Project (at p. 5)

outage [emphasis added].

12. The SFWF, along with other proposals, was selected as a portfolio because it most cost-effectively meets these needs as established by PSEG Long Island. On February 6, 2017, LIPA and DWSF executed a power purchase agreement (“PPA”) for the SFWF that requires energy from the SFWF to be delivered to the LIPA 9EU-East Hampton Substation. The SFEC is required to interconnect the SFWF to the East Hampton Substation pursuant to the PPA [emphasis added].⁴⁹

If it is true that “there is no case before the Commission that concerns the RFP selection process or the PPA”⁵⁰ then the Commission has to disregard “the need identified by LIPA in its 2015 technology-neutral competitive bidding process (“South Fork RFP”)” per the Joint Proposal and the Applicant’s “contractual commitments to LIPA pursuant to a Power Purchase Agreement (PPA) executed in 2017 resulting from LIPA’s technology-neutral competitive bidding process” per its Article VII application.

The South Fork RFP and the executed PPA is either relevant to the Article VII proceeding as the Applicant and PSEGLI have clearly stated (above), or not. Deepwater Wind South Fork cannot claim they are relevant for the purposes of defining the Project’s need and then claim they irrelevant when parties question the South Fork RFP or its PPA.

The Applicant’s claim that “there is no case before the Commission that concerns the RFP

⁴⁹ Executed Joint Proposal filed with on September 17, 2020 (at pp. 11-12)

⁵⁰ On September 8, 2020, in response to Motion of Simon V. Kinsella to Compel Town of East Hampton to Respond to Interrogatory/Document Request Si Kinsella #28(b), filed on August 28, 2020 (“Motion to Compel IR SK #28”).

selection process or the PPA”⁵¹ conflicts with the *sine qua non* need as defined in the Applicant’s Article VII application currently before the Commission.

The Applicant provides us with an answer in paragraph (9) of the Joint Proposal it executed with PSEGLI (on September 17, 2020). It reads –

“The Commission must consider the totality of all relevant factors in making its determination of ... public need. The relevant factors include, without limitation ... the basis of the need, cost ... and the public interest [emphasis added]”.

This motion to compel is submitted pursuant to 16 NYCRR § 5.1(a), that requires parties to “fully disclose to each other, upon request, all information (including data, records, objects, and documents) relevant and material to a proceeding in which they are participating and any information likely to lead to such information [emphasis added]. Furthermore, “the rules themselves contemplate and permit discovery that may not lead to material or relevant information, only requiring that such discovery is “likely” to lead to relevant and material information.” *Ruling on Motion to Compel Discovery*, Case No. 19-T-0549, Princetown to Rotterdam Project, June 1, 2020 (at p. 7). PSEGLI’s response to IR SK #32 may not lead to material information, but given the fact presented herein, IR SK #32 is *likely* to lead to material information that is necessary in preparing my case in this Article VII proceeding.

⁵¹ On September 8, 2020, in response to Motion of Simon V. Kinsella to Compel Town of East Hampton to Respond to Interrogatory/Document Request Si Kinsella #28(b), filed on August 28, 2020 (“Motion to Compel IR SK #28”).

For the aforementioned reasons, I respectfully request that PSEG Long Island, LLC be compelled to respond in full to IR Si Kinsella #32;

CONCLUSION

WHEREFORE, based on the foregoing reasons, I respectfully requests that an Order be issued directing –

- (1) PSEG Long Island, LLC to respond fully and completely to Interrogatory/Document Request Si Kinsella #32.

Respectfully submitted,



Dated: September 30, 2020

Wainscott, New York