

STATE OF NEW YORK
PUBLIC SERVICE COMMISSION

Case 18-T-0604 - 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.

INITIAL BRIEF
OF
SIMON V. KINSELLA

Simon V. Kinsella
Party-Intervenor
PO Box 792
Wainscott, NY 11975
Tel: 1-631-903-9154
Fax: 1-631-537-0122
Email: Si@Wainscott.Life

DATED: January 20, 2021

Intervenor Funding

New York State Public Service Commission (the “Commission”) has not required South Fork Wind LLC (formerly Deepwater Wind South Fork LLC, the “Applicant”) to deposit funds on account for intervenors “to defray expenses incurred by ... parties to the proceeding ... for expert witness, consultant, administrative and legal fees” in this proceeding. By denying funds to intervenors, the Commission for whatever reason, has added to the burden of effective public participation. By so doing, the Commission has stifled public participation to the benefit of the Applicant and to the detriment of the public interest. To the extent that the Commission has denied me intervenor funds necessary to hire a lawyer, I respectfully request a degree of latitude regarding the submission of my Initial Brief.

[Left Blank]

I. INTRODUCTION

This proceeding has been characterized as one where parties have been engaged in a constant battle for basic information about the subject transmission facility. This information is necessary for parties to make an informed decision. Instead of discussing possible resolutions to problems and working towards a better and stronger facility, parties have been preoccupied with trying to obtain a straight answer and simple facts.

Astonishingly – after four years – we still know neither the price for delivered energy from the Applicant’s proposed facility that will be passed into ratepayers nor do we know the final generating capacity for delivered energy from the proposed transmission system.

The only publicly disclosed price to be contractually agreed upon between the Applicant and Long Island Power Authority (“LIPA”) is twice the price of Sunrise Wind.

The Applicant’s proposed facility, by its own admission, is uneconomic.

The Commission has not examined substantial evidence rebutting the presumption of validity regarding the South Fork RFP and power purchase agreement that was subsequently awarded to the Applicant.

The Applicant has *not* taken seriously extensive and ubiquitous PFAS contamination immediately adjacent to and within one hundred feet (100 ft) of the Applicant’s proposed construction corridor that exceeds New York State Maximum Contamination Levels by one-hundred-times (100x) that poses a risk to public health and the environment.

The Applicant has failed to test its proposed construction corridor for PFAS contamination in soil and groundwater or produce any analysis of existing PFAS contamination and how its plans to protect local residents.

For these and many more reasons, as detailed below, it is premature to continue without reopening the evidentiary record to review.

II. BACKGROUND

A. Procedural History

Throughout 2017 until September 2018, then Deepwater Wind South Fork LLC (the “Applicant”) engaged in a Public Involvement Plan.¹ Nevertheless, its Public Involvement Plan turned out to be what NYS Assemblyman Fred Thiele called “the classic ‘bait and switch’”.²

Since 2017, the Applicant has continually and willfully withheld material information from the public (and the Commission) in an on-going effort to gain support for its project based on misrepresentations.

On February 16, 2018, the Applicant submitted to the New York State Independent Systems Operator (“NYSISO”) an interconnection request for an additional forty (40) megawatts of capacity referred to as “South Fork Wind Farm II”. This increase in capacity from ninety to one hundred and thirty megawatts (90 -130 MW) represents a forty-four percent (44%) increase in total capacity. On July 24, 2018 – five months later – when pushed for an explanation, the Applicant refused to disclose the revised increase in capacity to Michael Wright of The East Hampton Press. Mr. Wright reported at the time: “Deepwater has declined multiple requests from The Press for comment on references to South Fork Wind Farm II in the New York State Independent Operator’s list of upcoming power generation projects.”

On April 6, 2018, the Applicant internally approved technical drawings³ specifying infrastructure to transmit electricity many times greater than could possibly be generated by a ninety megawatt (90 MW) wind farm. These drawings specify a transition vault, nineteen splicing vaults and duct banks all designed to accommodate two submarine cables, and with few modifications, to transmit up to six hundred megawatts (600 MW) of electricity to the existing Buell Lane Substation and to a new Wainscott Substation that LIPA planned to build. However, the very next day (on April 7) at a community forum organized by the East Hampton Group for Good Government, the Applicant failed to disclose the plans it had approved the day before,

¹ NYS PSC Article VII application by then Deepwater Wind South Fork LLC, Appendix R

² Article: Reversal on Wind Farm published in the East Hampton Star on January 31, 2019

³ *Id.* Exhibit 5, Fig. 5, 2-1 (648902-0000-47DD-0011), 2-2 (648902-0000-47DD-0010) and 2-5 (648902-0000-47DD-0013)

instead stating it would deliver electricity from only a 90-megawatt wind farm, contradicting its own plans.

The Applicant's misrepresentations to the public continued on May 17, 2018, at the joint East Hampton Town and Trustees' public hearing. Then, the Applicant remained silent about the plans it had approved on April 6. Such duplicitous behavior by the Applicant continued further as it participated in many meetings at least through September of 2018.

By its material omissions, the Applicant made a mockery of the Public Involvement Plan it submitted to the NYS Public Service Commission on September 14, 2018. In its NYS PSC Article VII application (see Appendix R), the Applicant wrote –

The purpose of this PIP is to demonstrate the Applicant's commitment to robust, inclusive, and transparent public involvement, and to detail the approach to public engagement that it will utilize to: identify key stakeholders in the area of the proposed project; advance public understanding of the project; encourage and collect public input; and disseminate information to the public and other stakeholders potentially affected by the project [emphasis added].

There are many other instances where information related to the South Fork Wind Project has been kept secret, for example, the extent of road closures and resulting traffic that will bring Montauk Highway at the intersection of Wainscott Northwest Rd to a stand-still. Nevertheless, the most conspicuous example of undisclosed information is the price.

It was only as a result of a legal action⁴ that the Applicant was forced to disclose the price of its delivered energy to local ratepayers three years *after* it had entered into a power purchase agreement with Long Island Light and Power d/b/a LIPA ("LIPA").

Today, the Applicant still hides from ratepayers the full price of its delivered energy and its proposed offshore windfarm's full capacity.

⁴ In the matter of *Simon V. Kinsella v. Office of the New York State Comptroller*, Albany County Courts, July 2019, index 904100-19 (exhibit no. 456) the Applicant sought trade secret status pursuant to NY Public Service Law Section 87(2)(d).

By its deceptions and misrepresentations, the Applicant has earned distrust within the community on eastern Long Island.

B. Joint Proposal

On September 17, 2020, Signatory Parties to the Joint Proposal recognized their belief that settlement is feasible. Notably, an overwhelming majority (71%) of party-intervenors in the proceeding rejected the Joint Proposal as follows (see Exhibit B – Joint Proposal Signatories). –

- Individuals - eighty-six percent (86%) rejected the Joint Proposal;
- Not-for-Profit Organizations - six-seven percent (67%) rejected the Joint Proposal;
- Commercial Entities - one hundred percent (100%) rejected the Joint Proposal;
- Municipalities, Public Trusts & Political Organizations - seven-five percent (75%) rejected the Joint Proposal (only the Trustees of the Freeholders and Commonalty of the Town of East Hampton signed the Joint Proposal)

Still, despite overwhelming opposition to the Joint Proposal, all five New York State agencies signed the Joint Proposal, and of those, only the Department of Public Service proffered testimony

C. Insufficient and Incomplete Evidentiary Record

Public Service Law § 126 (1) requires the Commission’s decision to be made “upon the record[.]” However, the record presented to the Commission in this proceeding remains insufficient and incomplete.

Parties have been deprived of the right to effective participation by the premature conclusion of the evidentiary hearing and denied the opportunity of cross-examination, and as a result, the record is incomplete and deficient. Without a full hearing and cross-examination, the record lacks the benefit of full participation by the parties who do not support the Project and lacks the resolution of contested, material, factual issues that can best be explored through cross-examination. The record continues to feature glaring gaps in information due to it being withheld

from disclosure by the Applicant and wholesale striking from the evidentiary record of material, admissible fact-based evidence by Commission. See pending Motion to Reopen the Record filed with the Commission on January 13, 2021, incorporated herein by reference (see Exhibit A – Motion to Reopen the Record).

I. STANDARD FOR THE COMMISSION’S DECISION

The Commission’s authority derives from the Public Service Law (PSL), through which numerous legislative powers are delegated to the Commission.

Pursuant to PSL § 5 (1), the “jurisdiction, supervision, powers and duties” of the Commission extend to the “manufacture, conveying, transportation, sale or distribution of . . . electricity.” PSL § 5 (2) requires the Commission to “encourage all persons and corporations subject to its jurisdiction to formulate and carry out long-range programs, individually or cooperatively, for the performance of their public service responsibilities with economy, efficiency, and care for the public safety, the preservation of environmental values and the conservation of natural resources.”⁵ Here, the Commission’s statutory obligation extends to include South Fork Wind LLC (the “Applicant”), its officeholders, employees, and contractors operating within New York State.

[Left Blank]

⁵ Case 15-E-0302 – Order Adopting Modifications to the Clean Energy Standard October 15, 2020 (at p. 11)

II. ARTICLE VII REQUIRED FINDINGS (as Applicable to the Proposed Project)

A. The Need for the Project

“[T]he Applicant has the burden of proving all required statutory findings under Public Service Law § 122”⁶ including but not limited to “the need for the facility[.]”⁷

The Applicant has failed to sustain its burden to show a need for its facility.

*[T]he commission may not grant a certificate for the construction or operation of a major utility transmission facility, either as proposed or as modified by the commission, unless it shall find and determine: (a) the basis of the need for the facility [emphasis added.]*⁸

In its Article VII application, the Applicant defines the need for its facility by reference to the South Fork RFP⁹ and its subsequent award (to the Applicant) of a Power Purchase Agreement (“PPA”).¹⁰

The South Fork RFP and its subsequent PPA award are *sine qua non* to the Applicant’s Article VII application.

The Article VII application reads as follows –

The Project, in conjunction with the SFWF, addresses the need identified by LIPA for new sources of power generation that can cost-effectively and reliably supply the South Fork of Suffolk County, Long Island, as an alternative to constructing new transmission facilities [emphasis added]. The SFWF and 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

⁶ Case: 06-T-0650 – NY Regional Interconnect, Inc., Ruling on Scope, Hearing Procedures and Schedule (at p. 10)

⁷ Public Service Law § 122 (1) (d)

⁸ Public Service Law § 126 (1) (a)

⁹ South Fork Resources Request for Proposals issued June 24, 2015 (“RFP”) administered by PSEG Long Island LLC (“PSEGLI”) as agent of and acting on behalf of Long Island Lighting Company d/b/a LIPA (“LIPA”)

¹⁰ Power Purchase Agreement between then Deepwater Wind South Fork LLC (the “Applicant”) and Long Island Lighting Company d/b/a LIPA executed February 2017 (“PPA”)

Purchase Agreement (PPA) executed in 2017 resulting from LIPA's technology-neutral competitive bidding process [emphasis added].¹¹

The need, as express in the Applicant's Article VII application, is also reflected in the executed Joint Proposal that reads –

The Project, in conjunction with the SFWF [South Fork Wind Farm], 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.¹²

The Project, along with the SFWF, will serve the public interest by, inter alia, contributing to State energy policy goals in the State Energy Plan and Clean Energy Standard.¹³

According to both the Applicant's Article VII application and the executed Joint Proposal, the Applicant (wrongly) claims that its facility satisfies the –

- (I) Need identified by LIPA in the South Fork RFP; or
- (II) Need to address State energy policy goals in the State Energy Plan **and** Clean Energy Standard.

Nevertheless, as proposed, the Applicant's Project satisfies *neither* the need identified in the South Fork RFP *nor* does it comply with New York State energy policies.

¹¹ Article VII Application, Application (at p. 5, Section D)

¹² Case 18-T-0604 (Exhibit No. 180) – Joint Proposal executed September 17, 2020 (at p. 9, paragraph 10)

¹³ *Id.* (at p. 9, paragraph 11)

(I) Need as Identified in South Fork RFP

On January 25, 2017, the Applicant was awarded a power purchase agreement (“PPA”) pursuant to the South Fork RFP to supply energy from a ninety-megawatt (“90 MW”) offshore wind farm to Long Island Lighting Company d/b/a LIPA (“LIPA”).¹⁴

PPA – Presumption of Validity

Although the executed PPA is a final contract that had received approval from State of New York Office of the State Comptroller (“NY OSC”) and approval (as to form) from New York State Office of the Attorney General, substantial evidence exists sufficient to sustain the burden of proof required to rebut the presumption of validity attached to the PPA inasmuch as the PPA was awarded to the Applicant subject to a competitive bidding process. Substantial evidence rebutting the presumption of validity includes written testimony (of 52 pages) by me signed before a notary together with thirty (30) exhibits mostly from New York State and US federal agencies (of 640 pages), and sixteen (16) exhibits containing offshore wind speed data from the US National Oceanic and Atmospheric Administration (NOAA) (of 8,828 pages). I submitted testimony and exhibits to NYS DPS on October 9, 2020, under the title: Testimony Part 2 – Public Interest, Need & Price.¹⁵

The ultimate strength, credibility or persuasiveness of petitioner's arguments are not germane during this threshold inquiry. Similarly, the weight to be given to either party's evidence is not a relevant consideration at this juncture. Instead, in answering the question whether substantial evidence exists, a court should simply determine whether the documentary and testimonial evidence proffered by petitioner is based on "sound theory and objective data" [16] rather than on mere wishful thinking. Though the substantial evidence standard is low, it "does not rise from bare surmise, conjecture, speculation or rumor" [17].[18]

¹⁴ Case 18-T-0604 (Exhibit No. 318) - Power Purchase Agreement between the Applicant (then Deepwater Wind South Fork LLC and Long Island Lighting Company d/b/a LIPA executed February 2017 (“PPA”)

¹⁵ Case 18-T-0604 – Testimony Part 2 - Public Interest, Need & Price by of Simon Kinsella, October 9, 2020

¹⁶ *Matter of Commerce Holding Corp. v Board of Assessors*, 88 NY2d 724, 732

¹⁷ *300 Gramatan Ave. Assocs. v State Div. of Human Rights*, supra, at 180

¹⁸ *FMC Corp. v Unmack*, 92 NY2d 179, 188 [1998]

Notably, substantial evidence sufficient to overcome the presumption of validity was provided by NY OSC that approved the PPA on March 29, 2017. These ten (10) exhibits mostly comprise Vendor Responsibility Questionnaires submitted to NYS OSC by participating vendors pursuant to the South Fork RFP.

*On the other hand, once petitioner has met its initial burden and rebutted the presumption of validity ... a court must weigh the entire record, including evidence of claimed deficiencies[.]*¹⁹

On November 5, 2020, Applicant filed Motion to Strike Testimony that included Testimony Parts 1-1 & 1-2 on PFAS Contamination (Sep 9 & Oct 9, 2020), Testimony Part 2 - Public Interest, Need & Price (Oct 9, 2020), and Testimony Part 3 – Rebuttal (Oct 30, 2020). ALJ Belsito ruled that “the Applicant’s motion to strike is granted as to Mr. Kinsella’s Direct Testimony, “Part 2., Public Interest” and is otherwise denied.”²⁰

Neither the Applicant nor the presiding officer sought to invoke a presumption of validity at any time since filing Testimony Part 2 with the Commission (on October 9, 2020).

South Fork RFP – Basis of the Need

The Applicant’s Project does *not* satisfy either of the needs of the South Fork RFP. These are to provide LIPA with:

- (a) an alternative to adding new transmission lines; and
- (b) a local resource to supply energy to meet peak demand on the South Fork.

Without going into the procurement process and only looking to that which was submitted into evidence, the South Fork RFP²¹ describes its objectives as follows –

¹⁹ *Ibid*

²⁰ Case 18-T-0604 – Ruling on Motion to Strick Testimony of Kinsella, dated November 24, 2020 (at p. 7)

²¹ *Id.* – (Exhibit No. 310) - Request for Proposals, South Fork Resources issued June 24, 2015 by PSEG Long Island LLC through its operating subsidiary, Long Island Electric Utility Servco LLC as agent of and acting on behalf of Long Island Lighting Company d/b/a LIPA (“South Fork RFP”)

The peak load on the South Fork [and] ... of the subarea east of Buell is projected to ... grow... If this peak load growth were to occur without the addition of local resources (i.e. Load Reduction and/or Power Production) in the load pocket, new transmission lines would need to be built.

*As an alternative to adding new transmission lines, this Request For Proposals (“2015 SF RFP”) seeks to acquire sufficient local resources to meet expected peak load requirements until at least 2022 in the South Fork, and 2030 in the east of Buell subarea.*²²

(a) An alternative to adding new transmission lines?

On September 14, 2018, the Applicant filed an application for a Certificate²³ “to construct, operate, and maintain the South Fork Export Cable ... that will connect the South Fork Wind Farm ... to the existing mainland electric grid in East Hampton, New York”²⁴ (of approximately 66 miles in length).²⁵ However, the Applicant maintains that its Project is limited to that portion of the transmission cable that, if approved, would be located within New York State jurisdiction (of approximately 7.6 miles in length).²⁶ In any case, whether the proposed transmission cable is 66 or 7.6 miles long: it is nonetheless a transmission cable.

What the Applicant identifies as a transmission cable cannot also be “an alternative to adding new transmission lines[.]” It is a new transmission line. The Applicant cannot show that its Project satisfied the need as defined in the South Fork RFP to defer new transmission lines.

Furthermore, the local transmission system on eastern Long Island was designed and built over some sixty-to-eighty (60-80 years) ago and is aging and frail and requires extensive upgrades and new transmission lines. During discovery in this proceeding, PSEG Long Island wrote as follows –

²² *Id.* (at p. 2)

²³ Certificate of Environmental Compatibility and Public Need (“Certificate”)

²⁴ *Id.* (Exhibit No. 180) – Executed Joint Proposal dated September 17, 2020 (at pp. 1-2)

²⁵ South Fork Wind LLC (the Applicant) - Construction and Operations Plan (COP) submitted to the Bureau of Ocean Energy Management (“BOEM”) revised July 22, 2020 (at p. 3-37, Table 3.2.1)

²⁶ *Ibid*

*In order to address transmission constraints in the East End area, PSEG Long Island proposed various transmission projects, such as the Canal to Southampton 69kV new cable (already completed in summer 2019), Wildwood to Riverhead 69kV to 138kV circuit conversion (proposed for summer 2021), Riverhead to Canal 2nd 138kV cable (proposed for summer 2021), Bridgehampton to Buell 69kV new cable (proposed for summer 2023), and East of Buell 23kV to 33kV conversion (proposed for summer 2023), etc.*²⁷

Any additional energy from the proposed wind farm would exacerbate the need for further upgrades and new transmission lines. Instead of deferring the need for new local transmission lines, the South Fork Wind Project would increase the urgency to install new transmission lines.

(b) A local resource to supply energy to meet peak demand?

The Applicant proposes resolving peak demand issues on the South Fork by supplying energy from its offshore wind farm via its proposed transmission facility to meet that peak demand. There are two fundamental flaws with choosing an offshore wind farm as a local resource to supply energy to meet peak demand:

- (I) Delivering energy from an offshore wind farm sixty-six miles out in the Atlantic Ocean is not a “local” “Power Production” resource.²⁸ As defined within the South Fork RFP, a “local resource” is one that is “in the South Fork” “East of the Canal” substation.²⁹
- (II) According to the South Fork RFP, peak electrical demand on the South Fork is “primarily driven by residential air conditioning” on hot summer days during the summer.³⁰ Here, the issue is the relationship between hot days and wind speed.

“The South Fork has a unique load profile, with significant summer, weekend, and holiday activity in the Hamptons and surrounding towns, and corresponding peaks in energy usage ... the South Fork typically reaches its peak electric demand at a different

²⁷ Case 18-T-0604 – Discovery Request PSEGLI-CPW-1 (LIPA) (at p. 3)

²⁸ Case 18-T-0604 (Exhibit No. 310) - South Fork RFP issued June 24, 2015 (at p. 2, Section 1.2)

²⁹ *Ibid.*

³⁰ *Id.* (at p. 53)

time than the rest of Long Island, and is primarily driven by residential air conditioning load [emphasis added].”³¹

“Residential customer loads in the South Fork are much more weather sensitive than commercial. On a peak summer day, up to sixty (60%) percent of the average residential load is directly attributable to air conditioning [emphasis added].”³²

The problem with relying on a transmission facility that depends on wind-speed for energy generation is that when energy is needed most (for residential air conditioning systems), wind speed is more likely to be insufficient to generate the energy required to meet peak demand. A transmission facility that relies on the wind for energy generation is problematic during the summer when ocean winds off eastern Long Island are weaker than they are during the winter. Consequently, energy from a transmission facility that relies on the wind will generate less energy during the summer when demand for energy is highest, and sometimes no energy at all for days.

Note: Testimony Part 2 – Public Interest, Need & Price provides empirical evidence based on offshore wind data from NOAA that attests to the unreliable nature of offshore wind as a source of energy during the summer. For whatever reason, the Applicant and NYS DPS believe wind-speed is *not* relevant to the supply of energy from a transmission facility dependent upon the wind for energy generation. Relevant, admissible fact-based evidence that includes the cut-in/cut-off speeds of the wind turbines has been erased from the evidentiary record. For example, when wind speed is less than 6.7 mph, the Applicant’s transmission facility will *not* deliver *any* energy whatsoever. NYS DPS granted the Applicant’s Motion to Strike all testimony regarding wind speed and empirical evidence as to the Project’s reliability (or lack thereof) to provide energy during the summer. The evidentiary record remains insufficient and incomplete. Please see Motion to Reopen the Record (Exhibit A).

³¹ *Ibid*

³² *Id.* (at p. 54)

Pursuant to Public Service Law § 126 (1) (a) “[T]he commission may not grant a certificate ... unless it shall find and determine: (a) the basis of the need for the facility [emphasis added.]

The concept of “... public need” requires that the Commission “... take into account the total cost to society of such facilities” when making a decision on whether it should grant an Article VII certificate.³³

No single aspect of an application can be looked at in a vacuum; rather the Commission must consider the totality of all of the relevant factors in making its determination of environmental compatibility and public need.³⁴

Elaborating on the concept of “public need,” the Department of Public Service states that the “total cost to society” is “[a]ll encompassing”³⁵ that includes the cost when “a rate payer pays his or her regular electricity bill”³⁶

Therefore, public need requires that the Commission take into account the total cost of such facility, including ratepayers, of which there are over one million living on eastern Long Island. Still, by its own admission, when NYS DPS recommended that “the Commission can make findings in all areas without further recommendations or modifications to the proposed Settlement Documents”³⁷ including “the basis of the need for the facility,”³⁸ the DPS Staff did *not* consider ratepayers –

There’s no testimony in this, in our document, to the best of my recollection that addresses cost to rate payers.³⁹

³³ Case 18-T-0604 – Prepared Testimony of the Department of Public Service Staff (DPS Staff) Panel, October 9, 2020 (at p. 15, lines 11-18) quoting Chapter 272 of the Laws of 1970, Section 1, Legislative Findings

³⁴ *Id.* (at p. 15, line 18 through to 16, line 1)

³⁵ Case 18-T-0604 – DPS Staff Panel, Cross-Examination by Kinsella, December 7, 2020 (at p. 583, lines 18-21 and p. 584, line 12-14)

³⁶ *Id.* (at p. 590, line 23 through to 591, line 2)

³⁷ Case 18-T-0604 – Prepared Testimony of the Department of Public Service Staff (DPS Staff) Panel, October 9, 2020 (at p. 21, lines 3-6)

³⁸ *Id.* (at p. 13, line 15)

³⁹ Case 18-T-0604 – DPS Staff Panel, Cross-Examination by Kinsella, December 7, 2020 (at p. 595, lines 19-21)

B. Nature and Minimization of Significant Adverse Environmental Impacts

Pursuant to Public Service Law § 122 (1) (c), the Applicant has failed to file with the Commission as part of its application “a summary of any studies which have been made of the environmental impact of the project and a description of such studies[.]” Such studies include but are not limited to those related to probable PFAS contamination along the Applicant’s proposed construction corridor.

Sole-source Aquifer

US Environmental Protection Agency (“USEPA”) designated the aquifer system on Eastern Long Island a Sole-Source Aquifer on June 21, 1978.⁴⁰ The aquifer-system provides one hundred percent (100%) of the drinking water consumed on the South Fork, and there is no alternative drinking water source that could physically, legally, and economically supply all those who depend upon the aquifer for their drinking water and all other freshwater needs.⁴¹

The Applicant proposes to construct its high-voltage transmission infrastructure above and through the Upper Glacial Aquifer and through two Critical Environmental Areas that are designed to protect the safety of the aquifer:

- (1) Special Groundwater Protection Area (South Fork); and
- (2) Water Recharge Overlay District.⁴²

Insufficient and Incomplete Record of PFAS Contamination

Public Service Law § 126 (1) requires that the Commission “shall render a decision upon the record” and mandates that it “may not grant a certificate ... unless it shall find and determine: ... the nature of the probable environmental impact[.]”⁴³ Still, the evidentiary record presented to the Commission in this proceeding remains insufficient and incomplete.

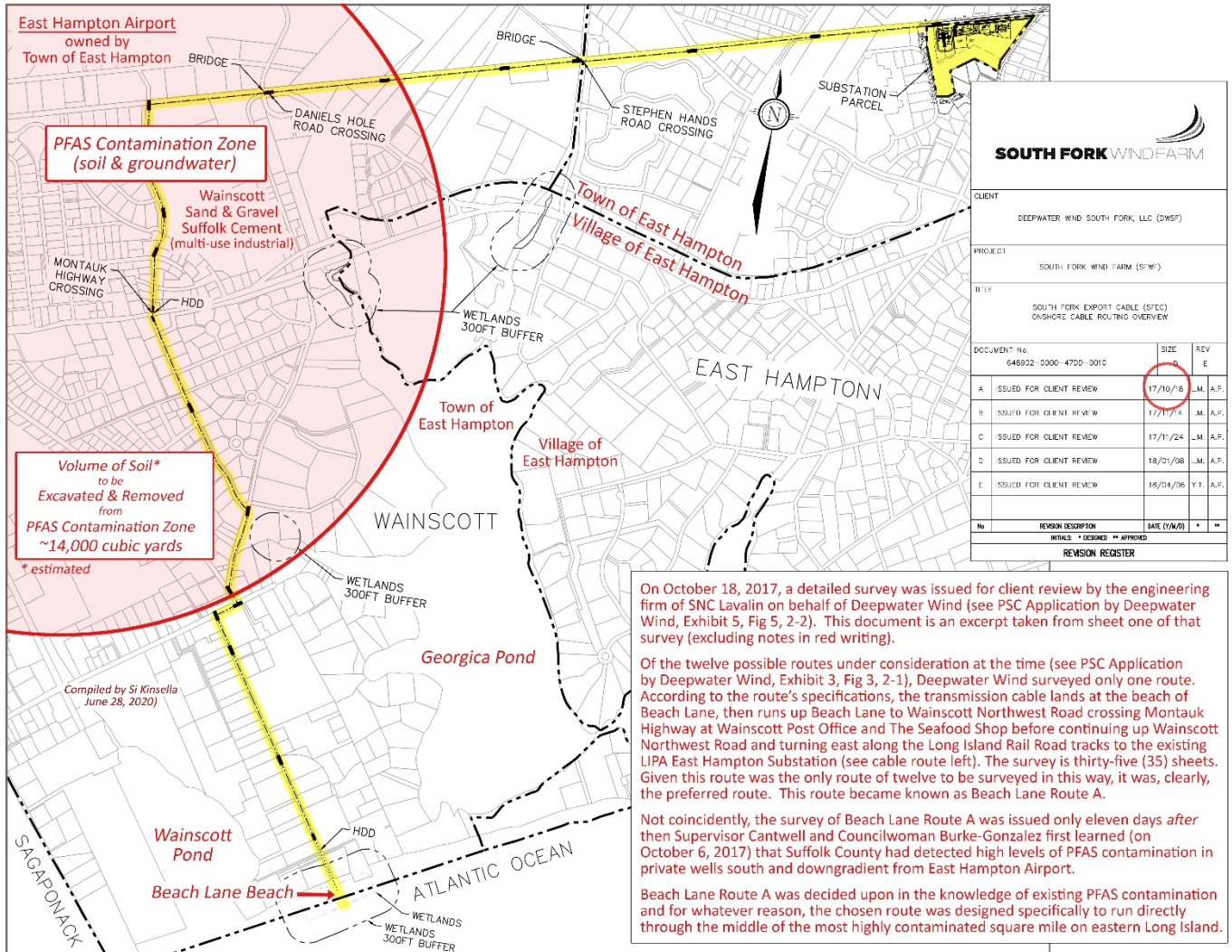
⁴⁰ US Environmental Protection Agency: "Nassau- 12 Suffolk Aquifer System, Federal Register Notice, Volume 43, No. 120, 13 Page 26611, June 21, 1978 - Sole Source Aquifer Determination for Aquifers Underlying Nassau and Suffolk Counties

⁴¹ Case 18-T-0604 –Testimony of Simon V. Kinsella, Part 1-1 on PFAS Contamination (at p. 4)

⁴² Evidentiary record Exhibit No. 379 – Groundwater Protection CEA & Water Recharge CEA (at pp. 1-3).

⁴³ Public Service Law § 126 (1) (b)

For example, the evidentiary record does *not* include an on-site scientific analysis of poly-/perfluoroalkyl substance ("PFAS") contamination that is known to exist on all sides of the Applicant's proposed construction corridor for approximately two (2) miles. The Applicant proposes to install underground its high-voltage transmission infrastructure along its Beach Lane Route A Cable Corridor. The map (below) is based on the Applicant's Exhibit 5, Fig 5, 2-2.⁴⁴



The onshore Beach Lane Route A Cable Corridor is approximately 4.1 miles long. It begins at the Atlantic Ocean off the southern end of Beach Lane in Wainscott and continues north along Beach Lane to Wainscott Main Street thence to the Wainscott Post office via Sayre's Path,

⁴⁴ Case 18-T-0604 – Evidentiary record Exhibit No. 396 – PFAS Contamination Zone

Wainscott Stone Road and Wainscott Northwest Road. The Applicant proposes to bury its large vaults (approximately twenty that are each the size of a forty-foot shipping container) and cable duct banks underneath Montauk Highway and northward along Wainscott Northwest Road adjacent and to the west of a former sand-mining operation (Wainscott Sand and Gravel) until it reaches the LIRR at which point it turns east and continues until it reaches the Applicant's Interconnection.

The PFAS contamination of the drinking-water supply in Wainscott was widely known a year *before* the Applicant filed its Article VII application with New York State Public Service Commission (on Sep 14, 2018). On October 11, 2017, Suffolk County Department of Health Services first alerted residents to the PFAS contamination when it issued a Water Quality Advisory for Private-Well Owners in Area of Wainscott.⁴⁵ The news made the front-pages in all the local newspapers. The Applicant pretended that the contamination did not exist.

On January 2, 2020, the Applicant was provided with detailed information, references, and source documentation (herein listed below) attesting to extensive PFAS contamination in the vicinity of its proposed cable corridor.⁴⁶ The Applicant, again, chose to ignore the overwhelming evidence of PFAS contamination from New York State agencies and objected “on the grounds that the information is inaccurate and not based in fact [emphasis added].”⁴⁷

May 31, 2016 – Environmental Protection Agency (EPA) Fact Sheet: PFOA and PFOS Drinking Water Health Advisory (70 ppt)

Oct 11, 2017 – Suffolk County Department of Health Services
Water Quality Advisory for Private-Well Owners in Area of Wainscott

May 24, 2018 – Map of Suffolk County Department of Health Services Private Well Survey Area in Wainscott – PFASs

Jun 15, 2018 – Email from Suffolk County Department of Health Services Deputy Commissioner Capobianco to East Hampton Town Supervisor Van Scoyoc
Subject: “Wainscott PFC [aka PFAS] Weekly Update - 6/15/18”

Jun 15, 2018 – PFAS laboratory test results from 297 private drinking-water wells (per email from Suffolk County Department of Health Services Deputy Commissioner Capobianco on PFAS contamination)

⁴⁵ Case 18-T-0604 – Testimony of Simon V. Kinsella, Part 1-1 on PFAS Contamination (at p. 26, lines 10-15)

⁴⁶ *Id.* Evidentiary record Exhibit No. 240 – Information Requests Kinsella #01 to #10 – PFAS Contamination

⁴⁷ *Id.* (at Information Request Kinsella #03, p. 2, third paragraph)

- July 29, 2019 – Environmental Law Post (Philips Lytle): New York Proposes MCLs for PFOS and PFOA (10 ppt) by Robert Reagan
- Mar 26, 2018 – Report to East Hampton Town Supervisor Van Scoyoc on PFC Contamination by Si Kinsella (pages 1-13, only)
- Mar 26, 2018 – Heat Maps of PFAS Contamination within Wainscott
- Nov 30, 2018 – NYS DEC Site Characterization Report on PFAS Contamination at East Hampton Airport (adjacent to Applicant’s proposed Beach Lane Route A cable corridor to the north) showing PFAS contamination exceeding US EPA Health Advisory Level (HAL) by four-times and exceeding (4x) NYS Maximum Contamination Level (MCL) by twenty-nine-times (29x)
- DEC Remediation Sites –Airport 152250/152156 and Wainscott Sand & Gravel
- NYS DEC declared “State Superfund” Hazardous Waste Disposal Sites

On September 9, 2020, Testimony Part 1 – PFAS Contamination – was filed with the Public Service Commission. The submission consists of testimony on PFAS contamination (of 37 pages) together with thirty-one (31) exhibits. For the first time since the Applicant filed its Article VII Application two years earlier (on September 14, 2018), PFAS soil and groundwater contamination concentration levels were entered into the evidentiary record. The PFAS contamination concentrations in soil and groundwater are from two reports prepared for the New York State Department of Environmental Conservation, Site Characterization Report –

- NYSDEC SC: East Hampton Airport (NYSDEC Site Codes 152250/152156)
- NYSDEC SC: Wainscott Sand and Gravel (NYSDEC Site Code 152254)

PFAS contamination concentration levels quoted herein have been taken directly from the two aforementioned site characterization reports.

East Hampton Airport (NYSDEC site codes 152250/152156) is the only known source of PFAS contamination upgradient from the Applicant’s proposed construction corridor. PFAS contamination concentration levels detected in soil and groundwater from Wells: EH-19A, EH-19A2, and EH-19B are all located within 1,000 feet upgradient from the Applicant’s proposed construction corridor, and Well: EH-1 is located within 500 feet upgradient from the Applicant’s proposed construction corridor.

Wainscott Sand and Gravel (NYSDEC site code: 152254) is downgradient and on the opposite side of the Applicant’s proposed construction corridor. Wells downgradient from the proposed construction corridor – Wells: MW5, MW3, and MW4 (groundwater), and Wells: S1, S11, and S16 (soil) – are all within one hundred and fifty feet downgradient from the Applicant’s proposed construction site.

The same profile of PFAS contamination at East Hampton Airport can be seen in wells on the other side of the construction corridor at Wainscott Sand and Gravel (see details below).

Ten (10) of the twelve (12) readings from monitoring wells within one thousand feet (1,000 feet) upgradient from the proposed construction corridor exceed statutory limits designed to protect human health. The results for groundwater contamination are as follows –

Well: EH-19A	– PFOS	=	5.0 ppt	(< NYS MCL of 10 ppt)
	– PFOA	=	140 ppt	(14-times NYS MCL of 10 ppt)
	– PFOA/PFOS	=	145 ppt	(2.1-times USEPA HAL of 70 ppt)
Well: EH-19A2	– PFOS	=	140 ppt	(14-times NYS MCL of 10 ppt)
	– PFOA	=	34 ppt	(3.4-times NYS MCL of 10 ppt)
	– PFOA/PFOS	=	174 ppt	(2.5-times USEPA HAL of 70 ppt)
Well: EH-19B	– PFOS	=	77 ppt	(7.7-times NYS MCL of 10 ppt)
	– PFOA	=	89 ppt	(8.9-times NYS MCL of 10 ppt)
	– PFOA/PFOS	=	166 ppt	(2.4-times USEPA HAL of 70 ppt)
Well: EH-1	– PFOS	=	1.8 ppt	(< NYS MCL of 10 ppt)
	– PFOA	=	160 ppt	(16-times NYS MCL of 10 ppt)
	– PFOA/PFOS	=	162 ppt	(2.3-times USEPA HAL of 70 ppt)

PFOS, PFOA, and PFHxS contamination detected in shallow surface soil upgradient from the proposed construction corridor at East Hampton Airport Site are as follows –

Well: EH-19A	– PFOS	=	3,900 ppt	(DEC Leaching analysis)
	– PFOA	=	180 ppt	(no EPA or NYS standard)
	– PFHxS	=	170 ppt	(no EPA or NYS standard)
	– PFOA/PFOS	=	4,080 ppt	(no EPA or NYS standard)

Well: EH-19B1	– PFOS	=	12,000 ppt	(no EPA or NYS standard)
	– PFOA	=	3,800 ppt	(no EPA or NYS standard)
	– PFHxS	=	3,800 ppt	(no EPA or NYS standard)
	– PFOA/PFOS	=	15,800 ppt	(no EPA or NYS standard)
Well: EH-1	– PFOS	=	10,000 ppt	(no EPA or NYS standard)
	– PFOA	=	180 ppt	(no EPA or NYS standard)
	– PFHxS	=	170 ppt	(no EPA or NYS standard)
	– PFOA/PFOS	=	10,180 ppt	(no EPA or NYS standard)

PFOA, PFOS, and PFHxS contamination concentration levels in groundwater samples taken from the three monitoring wells within one hundred and fifty feet (150 feet) downgradient of the Applicant’s proposed construction corridor all show high-to-extremely high levels of PFOA, PFOS, and PFHxS contamination (see below).

These readings are from wells on the opposite side of the construction corridor from the source of contamination. According to NYSDEC Superfund Designation Site Environmental Assessment of the Wainscott Sand and Gravel (site code 152254): “Overall, the highest total PFAS detections were in monitoring wells MW3, MW5, MW6 located on the Western (side-gradient) and Northern (upgradient) boundaries of the site, indicating a potential off-site source.”⁴⁸ During cross-examination, when asked: “where is the most ... likely off-site source of that contamination” the Applicant’s Onshore Water Resources Panel responded: “It’s the airport facility.”⁴⁹

The readings for wells on the western-side of the Wainscott Sand and Gravel site (Wells: MW5, MW3, and MW4) are as follows –

Well: MW5	– PFOS	=	877 ppt	(88-times NYS MCL of 10 ppt)
	– PFOA	=	69 ppt	(7-times NYS MCL of 10 ppt)
	– PFHxS	=	566 ppt	(PFAS compound unregulated)
	– PFOA/PFOS	=	946 ppt	(13-times USEPA HAL of 70 ppt)

⁴⁸ Case 18-T-0604 (Exhibit No. 397) - Wainscott Sand & Gravel, Superfund Designation (at p. 2, last sentence)

⁴⁹ *Id.* Cross-examination of On-shore Water Resources Panel (Kenneth Bowes, Jeffery Holden, and Matthew O’Neill), December 3, 2020 (at p. 188, lines 6-8 and O’Neill referring to groundwater at line 10)

Well: MW3	– PFOS	=	1,010 ppt	(101-times NYS MCL of 10 ppt)
	– PFOA	=	28 ppt	(3-times NYS MCL of 10 ppt)
	– PFHxS	=	306 ppt	(PFAS compound unregulated)
	– PFOA/PFOS	=	1,038 ppt	(14-times USEPA HAL of 70 ppt)
Well: MW4	– PFOS	=	232 ppt	(23-times the NYS MCL of 10 ppt)
	– PFOA	=	5.57 ppt	(less than the NYS MCL of 10 ppt)
	– PFHxS	=	43.4 ppt	(PFAS compound unregulated)
	– PFOA/PFOS	=	238 ppt	(3-times USEPA HAL of 70 ppt) ⁵⁰

PFAS contamination with the same chemical profile as its source (at East Hampton Airport) can be seen in wells located on the Wainscott Sand and Gravel site, and for the contamination to get from East Hampton Airport to Wainscott Sand and Gravel, it would have had to leach through and impact the Applicant’s proposed construction corridor.

During the Town of East Hampton Town Board Work Session on September 8, 2020, John Wagner (acting counsel for the Town) informed the Town Board and members of the public that there are some circumstances where the vaults can go as deep as “sixteen to twenty feet (16-20’)” below the ground surface.⁵¹ In these circumstances, splicing vaults installed along Wainscott Northwest Road (adjacent to a former sand-mining operation known as Wainscott Sand and Gravel) will encroach into groundwater that contains PFAS contamination. Any encroachment into the sole-source aquifer will impact and affect the drinking-water supply.

Surface soil within one hundred and fifty feet (150 feet) downgradient of the proposed construction corridor shows high levels of PFOS contamination (below). Again, these readings are from wells on the opposite side of the construction corridor from the source of contamination. The readings are as follows –

Well: S1	– PFOS	=	600 ppt	(no EPA or NYS standard)
Well: S11	– PFOS	=	790 ppt	(no EPA or NYS standard)
Well: S16	– PFOS	=	860 ppt	(no EPA or NYS standard) ⁵²

⁵⁰ *Id.* (at p. 20, line 18 through to 21, line 10)

⁵¹ Case 18-T-0604 –Testimony of Simon V. Kinsella, Part 1-1 on PFAS Contamination (at p. 25, lines 9-11) from Town of East Hampton, Town Board Work Session on September 8, 2020 (at 1 hr, 1 min, 40 secs into meeting, see <https://www.youtube.com/watch?v=BRFEKNZJE5k>)

⁵² *Id.* (at p. 21, line 15, 17 and at p. 22, line through to 22, line 2)

During cross-examination, when asked: “where does the applicant think that contamination came from”⁵³ referring to wells S1, S11, and S16,⁵⁴ the Applicant’s Onshore Water Resources Panel responded (Mr. Holden): “it’s probably airborne deposition at concentrations you’re liable to find anywhere just because PFOS is ubiquitous in the environment.”⁵⁵ Mr. Holden elaborated: “that’s atmospheric deposition that’s no different than background conditions in most areas in New York state [*sic*] or frankly across most places in America today.”⁵⁶ Still, the explanation proffered by Mr. Holden contradicts the Applicant’s exhibit introduced on the subject of the Environmental Fate and Transport for Per- and Polyfluoroalkyl Substances that reads: “While many PFAS exhibit relatively low volatility, airborne transport of some PFAS is a relevant migration pathway through industrial releases (for example, stack emissions)”⁵⁷ and there are no applicable industrial centers or stack emissions on the peninsular of eastern Long Island and the Applicant did *not* identify any such potential source of airborne PFAS contamination.

Furthermore, the average levels of PFOS contamination detected in wells S1, S11, and S16 (750 ppt) is three-times (3x) the average PFOS contamination detected (261 ppt) at the other well locations on the East Hampton Airport site (at fourteen other well locations).⁵⁸ If “PFOS is [as] ubiquitous in the environment”⁵⁹ as Mr. Holden claims it is, then it would have been detected at similar levels across the other fourteen wells at East Hampton Airport, and even more so on a site known to have existing levels of PFOS contamination.

Finally, at *no* time has the Applicant tested soil or groundwater for PFAS contamination or conducted any site-specific soil or groundwater testing whatsoever along its proposed construction corridor. Evidence introduced by the Applicant states: “Downward leaching of PFAS in unsaturated soils during precipitation or irrigation events is site-specific and occurs as a

⁵³ *Id.* Cross-examination of On-shore Water Resources Panel (Kenneth Bowes, Jeffery Holden, and Matthew O’Neill), December 3, 2020 (at p. 188, lines 6-8 and Holden referring to “surface data [line 17]”)

⁵⁴ *Id.* (at p. 186, lines 12-14, 18-20 and 23-25)

⁵⁵ *Id.* (at p. 188, at lines 19-21)

⁵⁶ *Id.* (at p. 190, lines 22-25, Holden referring to “[s]urface soil contamination [line 19]”)

⁵⁷ Case 18-T-0604 (Exhibit No. 263) - ITRC Environmental Fate and Transport for Per- and Polyfluoroalkyl Substances (at p. 7, opening sentence)

⁵⁸ Well locations where there were no known incidence of a release of PFAS contamination.

⁵⁹ *Id.* (at p. 188, at lines 19-21)

function of media and PFAS structural properties [emphasis added].”⁶⁰ Also, “PFAS distribution in soils is complex, reflecting several site-specific factors such as total organic carbon (TOC), particle surface charges, and phase interfaces (see Section 3). Properties of individual PFAS, such as C-F chain length and ionic functional group, are also important factors.” During cross-examination, when asked whether the Applicant had “assessed the impact on the carbon content or the organic content in the soil” with regard to its project, the Applicant responded that: “There's been no sampling of the carbon content of the soil.”⁶¹

C. Impacts to Active Farming Operations

Public Service Law § 126 (1) requires the Commission’s decision to be made “upon the record[.]” which it cannot do where the evidentiary record is grossly insufficient and incomplete. Please see the pending Motion to Reopen the Record incorporated herein by reference (see Exhibit A).

D. Availability and Impacts of Alternatives

Public Service Law § 126 (1) requires the Commission’s decision to be made “upon the record[.]” which it cannot do where the evidentiary record is grossly insufficient and incomplete. Please see the pending Motion to Reopen the Record incorporated herein by reference (see Exhibit A).

E. Undergrounding

Public Service Law § 126 (1) requires the Commission’s decision to be made “upon the record[.]” which it cannot do where the evidentiary record is grossly insufficient and incomplete. Please see the pending Motion to Reopen the Record incorporated herein by reference (see Exhibit A).

⁶⁰ *Id.* (at p. 7, Transport Summary [blue box], third bullet-point)

⁶¹ Case 18-T-0604 – Cross-examination of On-shore Water Resources Panel (Kenneth Bowes, Jeffery Holden, and Matthew O'Neill), December 3, 2020 (at p. 155, lines 21-22)

F. Conformance with Long-Range Plans for Expanding the Electric Grid

In its testimony, the Department of Public Service (DPS) Staff Panel states that the Applicant’s facility “would provide benefits consistent with the State’s policies regarding renewable energy generation, including offshore wind energy generation”⁶² without providing evidence that its facility complies with New York State energy policies.

The Applicant relies solely on the fact that its facility is designed to deliver renewable energy but ignores all other aspects of NYS energy policy. For example, the Clean Energy Standard of 2016 emphasizes renewable energy, but it also requires that New York State’s energy sector remain “safe, cost-effective, reliable, resilient and protective of the natural environment.”⁶³

The Applicant has failed to sustain its burden to show that its facility is cost-effective, reliable, resilient, or will protect the natural environment as well as, or better than, any other alternatives.

DPS Staff Panel “recommend that the Commission find that the Facility provides consistency with energy policies and long-range objectives contained in the most recent State energy plan[.]”⁶⁴ The Commission is obligated by Law and cannot make such a finding.

On August 1, 2016, the Commission issued an Order Adopting a Clean Energy Standard (CES) that reads as follows –

[A]s the chief State agency with the experience and obligation of protecting consumer interests in an industry so affected with the broad public interest, the Commission is statutorily compelled to act in a manner that ensures that it is effective in ensuring that both during the transformation of the industry and in achieving the transformed industry that the energy sector in New York remains

⁶² Case 18-T-0604 – Prepared Testimony of the Department of Public Service Staff (DPS Staff) Panel, October 9, 2020 (at p. 29, line 20 through to 30, line 2).

⁶³ Case 15-E-0302 – Proceeding to Implement a Large-Scale Renewable Program and a Clean Energy Standard, Order Adopting a Clean Energy Standard (issued August 1, 2016).

⁶⁴ *Id.* (at p. 29, lines 16-19) NB: DPS Staff Panel replied in the affirmative, “yes” (at p. 29, line 20).

*safe, cost-effective, reliable, resilient and protective of the natural environment [emphasis added].*⁶⁵

The Applicant’s Project is *not* cost-effective (see Section H. Public Interest (i) Ratepayers), is *not* reliable (see Section I (b) (II) – Peak Electric Demand), and is less resilient by having to rely on a frail distribution system (than residential solar that does *not* have to rely on a frail distribution system). Finally, the Applicant has shown a complete disregard to the onshore natural environment by ignoring extensive PFAS contaminating and failing to protect the sole-source aquifer that is our *only* drinking-water supply.

Furthermore, the Commission “may not grant a certificate ... unless it shall find and determine ... that such facility conforms to a long-range plan for expansion of the electric power grid of the electric systems serving this state [emphasis added.]”⁶⁶

In 2016, Governor Cuomo signaled a dramatic change in New York State energy policy and long-range plans for expansion away from fossil fuel energy generation towards renewable energy generation. “Governor Cuomo announced in his 2016 State of the State address the development by NYSERDA of a New York Offshore Wind Master Plan (Master Plan), the purpose of which is to provide a comprehensive State roadmap for advancing the development of offshore wind in a cost-effective and responsible manner [emphasis added].⁶⁷ The “roadmap for advancing development” was for offshore wind, but with a caveat; it had to be cost-effective and responsible. Governor Cuomo policy desires were then backed by the legislature in its enacting the Clean Energy Standard of 2016, compelling the Commission by Law to ensure “that the energy sector in New York remains safe, cost-effective, reliable, resilient and protective of the natural environment[.]”⁶⁸

⁶⁵ Case 15-E-0302 – Proceeding to Implement a Large-Scale Renewable Program and a Clean Energy Standard, Order Adopting a Clean Energy Standard (issued August 1, 2016).

⁶⁶ NY CLS Public Service Law § 126 (1) (e) (2)

⁶⁷ NYSERDA – Offshore Wind Policy Options Paper, NYS Offshore Wind Master Plan (January 29, 2018). Evidentiary record Exhibit No. 419 (at p. 13, second paragraph)

⁶⁸ Case 15-E-0302 – Proceeding to Implement a Large-Scale Renewable Program and a Clean Energy Standard, Order Adopting a Clean Energy Standard (issued August 1, 2016).

In 2017 Governor Cuomo, again, in his State of the State Address (on January 11, 2017) announces that an Offshore Wind Master Plan being developed by the New York State Energy Research and Development Authority (“NYSERDA”) will be “released by the end of 2017 and will outline specific steps the State will take to promote offshore wind development on a large-scale and cost-effective basis [emphasis added].”⁶⁹

But during the same address, Governor Cuomo then proceeded to contradict himself by preempting the “cost-effective” plan he had just announced by a year and without an outline on any specific steps to promote cost-effective offshore wind, announces –

The first major step in the State’s offshore wind development plan is a 90 megawatt, 15-turbine project off the East End of Long Island. The Governor calls on the Long Island Power Authority to approve this critical project[.]

By making such a public announcement (during a State of the State Address), Governor Cuomo applies considerable pressure to the Long Island Power Authority (“LIPA”) Board of Trustees heavily in favor of the Applicant. Given that the New York State Governor appoints five of nine members to the LIPA Board of Trustees,⁷⁰ it comes as no surprise that the Board of Trustees voted to approve granting of a Power Purchase Agreement to the Applicant only fourteen days later (on January 25, 2017).

When asked about the Deepwater Wind Power Purchase Agreement some months later, the Chief Executive Officer for LIPA notably said of the procurement process –

*“We frankly did not do a thorough evaluation of [the] complex renewable costs,” LIPA chief executive Tom Falcone said, because it’s a “highly uncertain and rapidly changing industry.”*⁷¹

⁶⁹ New York State Governor Andrew M. Cuomo, 2017 State of the State Address, January 11, 2017 (at pp. 54-55) (<https://www.governor.ny.gov/sites/governor.ny.gov/files/atoms/files/2017StateoftheStateBook.pdf>)

⁷⁰ N.Y. CLS Public Authorities Law, Art. V, § 1020-d

⁷¹ Case 18-T-0604 - Exhibit No. 420 - LIPA Evaluation, Article published in Newsday by Harrington (10/30/2020)

In 2018, after considering comments in response to the NYSERDA Offshore Wind Policy Options Paper,⁷² the Commission issued Order Establishing Offshore Wind Standard and Framework for Phase 1 Procurement.⁷³ The Offshore Wind Policy Options Paper “forms part of New York’s Offshore Wind Master Plan (Master Plan), published concurrently[.]”⁷⁴ The Policy Options Paper reads as follows –

Small initial projects are not likely to deliver cost savings. Due to diseconomies of scale, the costs per unit of energy for projects of 100 MW and 200 MW in size are significantly higher than those for 400 MW projects. As a result, the total Phase I program costs for such smaller projects would be comparable to those of a 400 MW project despite their smaller size and energy output.”⁷⁵

The Applicant claims that its facility is designed to deliver energy from an offshore wind farm of 132 megawatts, and according to NYSERDA, “costs per unit of energy ... [will be] significantly higher than those for 400 MW projects.”⁷⁶ In other words, South Fork Wind is uneconomic.

In July 2018, NYSERDA released a Request for Information OSW-2018 (“OSW RFI”). In response to the OSW RFI, Ørsted and Eversource, the owners of South Fork Wind LLC (the Applicant), submitted the following comments –

The 2018 RFP should establish a minimum capacity bid of 400 MW. As one of the key findings of the NYSERDA OSW Policy Options Paper (“Options Paper”), NYSERDA concluded that “Small initial projects are not likely to deliver cost savings. Due to diseconomies of scale, the costs per unit of energy for projects of 100 MW and 200 MW in size are significantly higher than those for 400 MW projects. As a result, the total Phase I program costs for such

⁷² NYSERDA – Offshore Wind Policy Options Paper, NYS Offshore Wind Master Plan (January 29, 2018). Evidentiary record Exhibit No. 419.

⁷³ Case 18-E-0071, In the Matter of Offshore Wind Energy, Order Establishing Offshore Wind Standard and Framework for Phase 1 Procurement (issued July 12, 2018).

⁷⁴ *Id.* (at p. 4, Executive Summary, first paragraph, last sentence).

⁷⁵ NYSERDA – Offshore Wind Policy Options Paper, NYS Offshore Wind Master Plan (January 29, 2018). Evidentiary record Exhibit No. 419 (at p. 62, paragraph 2)

⁷⁶ *Ibid*

smaller projects would be comparable to those of a “400 MW project despite their smaller size and energy output.”⁷⁷

When asked whether the NYSERDA Offshore Wind Policy Paper had been considered when drafting DPS Staff Panel testimony, DPS Staff Panel replied that they “didn’t believe that it is applicable” because its facility is “outside of the study area” referring to a map on page 70 of the options paper.⁷⁸ The map DPS Staff Panel referred to was of a study area used to “derive resource costs that are representative of potential offshore wind projects in New York and consistent with current and likely future Wind Energy Areas to be leased by BOEM[.]”⁷⁹ One such current Wind Energy Area leased by BOEM is that leased to the Applicant, lease reference OCS-A-0517 (formerly part of OCS-A-0486). The map is *not* designed to restrict the applicability of the NYSERDA Offshore Wind Policy Options Paper as DPS Staff Panel (wrongly) believes, but one that merely defines a study area used for a representative cost analysis that is broadly applicable outside the study area as the paper itself states (on page 70).

DPS Staff Panel must consider NYSERDA’s Offshore Wind Masterplan and Offshore Wind Policy Options Paper pursuant to PSC Order Establishing Offshore Wind Standard and Framework for Phase 1 Procurement,⁸⁰ but for whatever reason, DPS has *not*.

[Left Blank]

⁷⁷ Comments of Bay State Wind (a joint venture special purpose entity owned by Ørsted and Eversource the same owners of South Fork Wind, another special purpose entity) in Response to Request for Information OSW-2018 (at p. 2, fourth paragraph), Evidentiary record Exhibit No. 418

⁷⁸ Case 18-T-0604 – DPS Staff Panel, Cross-Examination by Kinsella, December 7, 2020 (at p. 620, lines 6-8, lines 10-11 and lines 15-21)

⁷⁹ NYSERDA – Offshore Wind Policy Options Paper, NYS Offshore Wind Master Plan (January 29, 2018) Evidentiary record Exhibit No. 419 (at p. 70, first paragraph)

⁸⁰ Case 18-E-0071, In the Matter of Offshore Wind Energy, Order Establishing Offshore Wind Standard and Framework for Phase 1 Procurement (issued July 12, 2018).

Executive Branch and Legislative Branch are Separate

Although the Offshore Wind Policy Options Paper acknowledges that “LIPA and Deepwater Wind reached an agreement on a 20-year power purchase agreement for the 90 MW South Fork project” and that the “project represents the first 90 MW toward New York’s 2.4 GW goal[,]” these are quotes drawn from a press release by Governor Andrew Cuomo (as acknowledged in the footnote).⁸¹ The press release states that the South Fork Wind Farm will provide “Affordable Energy” (not true) and is “Part of Governor Cuomo’s Clean Energy Standard to Secure 50 Percent of the State’s Electricity Supply from Renewable Sources by 2030” [it does *not* comply with many of CES’s provisions] and that the LIPA Board of Trustees approved the contract after “detailed cost modeling [not true, see quote by Falcone at p. 27].”⁸² A press release from a politician does *not* constitute Law.

A press release does *not* relieve the Commission of its statutory obligations pursuant to the 2016 Clean Energy Standard. Here, “the Commission is statutorily compelled to act in a manner that ensures ... that the energy sector in New York remains safe, cost-effective, reliable, resilient and protective of the natural environment [*emphasis added*].”⁸³ Likewise, the Commission is *not* relieved of its obligation pursuant to the NYSERDA Offshore Wind Policy Options Paper, the object of which is to “balance the scale, pace and design of procurements needed to rapidly drive down offshore wind cost in the long run, while seeking to minimize the cost to ratepayers[.]”⁸⁴

[Left Blank]

⁸¹ NYSERDA – Offshore Wind Policy Options Paper, NYS Offshore Wind Master Plan (January 29, 2018) “Governor Cuomo Announces Approval of Largest Offshore Wind Project in the Nation.” NYSERDA, Jan 25, 2017 (<https://www.nyserdera.ny.gov/About/Newsroom/2017-Announcements/2017-01-25-Governor-Cuomo-Announces-Approval-of-Largest-Offshore-Wind-Project>) Evidentiary record Exhibit No. 419 (at p. 15, footnote)

⁸² *Ibid*

⁸³ Case 15-E-0302 – Proceeding to Implement a Large-Scale Renewable Program and a Clean Energy Standard, Order Adopting a Clean Energy Standard (issued August 1, 2016).

⁸⁴ NYSERDA – Offshore Wind Policy Options Paper, NYS Offshore Wind Master Plan (January 29, 2018) Evidentiary record Exhibit No. 419 (at p. 18, Section 1.8 Objective)

G. State Laws - Obligations of the Public Service Commission

PSL §4 (1) expressly provides the Commission with “all powers necessary or proper to enable [the Commission] to carry out the purposes of [the PSL]” including, without limitation, a guarantee to the public of safe and adequate service at just and reasonable rates, environmental stewardship, and the conservation of resources.⁸⁵

Further, PSL § 65 (1) provides the Commission with authority to ensure that “every electric corporation and every municipality shall furnish and provide such service, instrumentalities and facilities as shall be safe and adequate and, in all respects, just and reasonable.”⁸⁶

H. Public Interest, Convenience and Necessity

i) Ratepayers – Price per PPA

When considered the price of energy from the Applicant’s proposed transmission facility, the State of New York Supreme Court ruled that the price of energy from the Applicant’s proposed facility is “of significant interest to the general public as the records sought consisted of the contract prices which would affect the pricing of utilities supplied to the general public.”⁸⁷

The total price for delivered energy is not part of the record. Subsequent to the conclusion of the evidentiary hearing, the Power Purchase Agreement between the Applicant and Long Island Lighting Company d/b/a LIPA executed February 2017 (“2017 PPA”) and Request for Proposals, South Fork Resources issued by PSEG Long Island LLC through its operating subsidiary, Long Island Electric Utility Servco LLC as agent of and acting on behalf of Long

⁸⁵ PSL §5(2); see also, *Consolidated Edison Co. v Public Service Commission*, 47 NY2d 94 (1979) (overturned on other grounds) (describing the broad delegation of authority to the Commission and the Legislature’s unqualified recognition of the importance of environmental stewardship and resource conservation in amending the PSL to include §5).

⁸⁶ *Ibid*

⁸⁷ In the matter of *Simon V. Kinsella v. Office of the New York State Comptroller*, Albany County Courts, July 2019, index 904100-19 (exhibit no. 456) the Applicant sought trade secret status pursuant to NY Public Service Law Section 87(2)(d).

Island Lighting Company d/b/a LIPA (“2015 SF RFP”) were moved into the evidentiary record (on December 23, 2020)⁸⁸ (see Exhibit A – Motion to Reopen Record).

When LIPA and the Applicant executed the 2017 PPA, the Applicant (wrongly) claimed that the table of contract prices was subject to secret trade status. Neither LIPA nor the Applicant disclosed the table of contract prices that would be passed onto ratepayers. Only after three (3) years and a lawsuit did the Applicant publicly disclose its prices (for 90 MW only).

On November 12, 2019, the prices for delivered energy from the Applicant’s proposed transmission facility were disclosed to ratepayers (for 90 MW only).⁸⁹

The price is between 16.3 and 17.0 cents per kilowatt-hour (¢ /kWh).

The Applicant’s project exceeds the market price by a large margin compared to other projects that derive their energy from offshore wind. For example, the price of delivered energy from nearby offshore wind energy leases⁹⁰ in dollars per megawatt-hour (\$/MWh), and cents per kilowatt-hour (¢ /kWh) are as follows –

South Fork Wind	New York State	\$163.00 /MWh	16.3 ¢ /kWh	(90 MW only)
Revolution Wind	Rhode Island	\$98.40 /MWh	9.8 ¢ /kWh	40% less than SFW ⁹¹
Revolution Wind	Connecticut	\$98.40 /MWh	9.8 ¢ /kWh	40% less than SFW ⁹²
Vineyard Wind	Massachusetts	\$84.23 /MWh	8.4 ¢ /kWh	48% less than SFW ⁹³
Sunrise Wind	New York State	\$83.36 /MWh	8.3 ¢ /kWh	49% less than SFW ⁹⁴

⁸⁸ South Fork RFP (exhibit no. 310) and Power Purchase Agreement between Long Island Power Authority and Deepwater Wind South Fork LLC, dated Feb 6, 2017 and Amendment, dated Mar 2, 2017 (exhibit no. 318)

⁸⁹ On November 12, 2019, the contract prices as expressed in Appendix 4, Table 4.1 of the 2017 PPA were publicly disclosed (see exhibit no. 318, at pp. 90-91).

⁹⁰ Nearby leases within the BOEM Rhode Island/Massachusetts Wind Energy Lease Area

⁹¹ Launching New York’s Offshore Wind Industry: Phase 1 Final Report #19-41, October 2019 Revised (at p. 5)

⁹² *Id.* (at p. 6)

⁹³ *Id.* (at p. 5)

⁹⁴ *Id.* (at p. 22)

III. CONCLUSION

The Proceeding on Motion of the Commission Regarding the Effects of COVID-19 on Utility Service ⁹⁵ has brought into focused the need for a review of the Applicant's proposed facility with specific reference to the unconscionably high rate for its electricity.

The Applicant has failed to acknowledge its excessive rates and likewise failed to address the potentially devastating impact of its facility, including the long-term impacts on customers' inability to pay bills. A constant supply of electricity could be a matter of life or death.

It is extraordinary that with a national death-toll surpassing 400,000 people and an economy struggling with high unemployment, that the Applicant has failed to take this into account and has completely ignored this most severe crisis.

It is difficult to understand how DPS Staff can ignore the price of the Applicant's delivered energy that is double that of Sunrise Wind. The irrationality of spending approximately \$2 billion on a facility that is not needed is mind-boggling.

Approval of the Article VII application would be inconsistent with the Commission's efforts to ease burdens on ratepayers, mainly due to the COVID-19 Pandemic and associated economic conditions.

Should the Commission permit the Applicant to exclude relevant, admissible factual evidence, it will deny the Commission opportunity to take a hard look at issues of need, probable environmental impact and public interest that are necessary for it to make a determination pursuant to N.Y. Public Service Law § 126 (1) and by so doing would circumvent the purpose of Article VII, circumvent judicial process, and circumvent US constitutional provisions requiring "due process of law."⁹⁶

⁹⁵ Case 20-M-0266, Proceeding on Motion of the Commission Regarding the Effects of COVID-19 on Utility Service

⁹⁶ U.S. Const. Amend. XIV; N.Y. Const. Art. I, § 6.

For the aforementioned reasons, I respectfully request that New York State Public Service Commission deny the Applicant a Certificate of Environmental Compatibility and Public Need.

Respectfully submitted,



Simon V. Kinsella

Dated: January 20, 2021

Wainscott, New York