

**STATE OF NEW YORK  
PUBLIC SERVICE COMMISSION**

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**Application of Deepwater Wind South Fork, LLC for a Certificate of Environmental Compatibility and Public Need for the Construction of Approximately 3.5 Miles (3.1 Nautical Miles) (138 kilovolt [kV]) 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 (138 kV) 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.**

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**Case 18-T-0604**

**PETITION FOR REHEARING OF  
CITIZENS FOR THE PRESERVATION OF WAINSCOTT, INC.**

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**I. INTRODUCTION**

Pursuant to Sections 22 and 128(1) of the Public Service Law (“PSL”) and the regulations of the Public Service Commission (the “Commission”), 16 NYCRR section 3.7, Citizens for the Preservation of Wainscott, Inc. (“CPW”) respectfully seeks Rehearing of the Commission’s Order Adopting Joint Proposal issued on March 18, 2021 in this proceeding (the “Order”), which authorizes the construction and operation of the electric transmission facilities that are the subject of South Fork Wind, LLC’s (“SFW” or the “Applicant”) application for a Certificate of Environmental Compatibility and Public Need (“CECPN”) pursuant to Article VII of the PSL (the “Project”).

New York State’s rush to achieve its clean energy goals has led to the Commission failing to analyze properly and make the requisite findings and determinations required under PSL § 126(1).<sup>1</sup> The Order provides mere conclusory statements rather than analysis and documentation showing how and why the Commission reaches its conclusions. The Commission fails to show how it relies on the record to discredit CPW’s position. Instead, it appears the Commission made a wholesale adoption of the Applicant’s findings and conclusions, without citing any evidentiary support for these positions.<sup>2</sup> The lack of substantial evidence in the record to support the Order renders it arbitrary, capricious, and an abuse of discretion, and demonstrates errors of fact and law that require Rehearing. The Order is not made in accordance with procedures set forth in the PSL or established by rule or regulation of the Commission.

CPW is a proponent of the responsible development of off-shore wind energy. The purpose of CPW’s challenge of the Article VII application was to prompt a deeper, more thorough review of the impacts of the Applicant’s proposed landing site and on-shore cable route starting at Beach Lane. The Commission seems to suggest that CPW’s alternative routes are no more than a NIMBY exercise, and this is reflected in the Commission’s pro forma adoption of the Applicant’s position and its failure to engage in the merits on the issues presented by CPW.<sup>3</sup> But, calling out NIMBYism is neither an argument nor a legitimate substitute for a substantive response to

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<sup>1</sup> See L 2019, ch 106 (Climate Leadership and Community Protection Act).

<sup>2</sup> The Governor’s March 18, 2021 Press Release confirms that the Commission was under tremendous pressure to grant the CECPN as quickly as possible to further New York State’s Climate agenda. See 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, Press Release – Governor Cuomo Announces Plan to Build Transmission Power Line That Will Link The Proposed South Fork Onshore Wind Farm To East Hampton (issued March 19, 2021) (DMM 272, 3-19-21) (“Press Release”) (stating, “Offshore wind is a critical component of our ambitious green energy vision, and this plan holds the blueprint that will move us a step closer to making this vision a reality”).

<sup>3</sup> See Order, p. 103.

evidence in the record. Notwithstanding the pejorative way in which the decision characterizes CPW, studies have shown that NIMBYism can shed light on neighborhood concerns that developers and regulators might have missed or might misunderstand.<sup>4</sup> This is especially true when proponents of a project will not share in the sacrifice suffered by the so-called NIMBY.<sup>5</sup>

Given that CPW proposed enhancements that materially improves a Hither Hills route that the Applicant already conceded was viable, the failure of the Commission to include this alternate analyze this alternative to Beach Lane in its “Discussion” of alternatives is inexplicable.<sup>6</sup> At the outset, CPW realized using the existing Long Island Railroad (“LIRR”) right-of-way provided for fewer impacts to the Wainscott community and a more efficient route (both onshore and off-shore). The use of the rail lines –rather than roads--in CPW’s Hither Hills East and West routes addressed the flaws in the Applicant’s proposal for Hither Hills, which included going through the middle of East Hampton and Amagansett.

The Commission, in rendering its Order, ignores the fact that CPW’s Hither Hills routes shorten the distance the high-voltage cable must travel under the sea, reduce the use of roadways (by utilizing the LIRR where adjacent homes are already impacted by train noise), and reduce the number of residences burdened by the Project. There is nothing in the record to dispute these conclusions. CPW’s Hither Hills alternatives use existing commercial and industrial corridors and,

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<sup>4</sup> Reply Brief of Citizens for the Preservation of Wainscott, Inc., p. 4 (DMM 265 2-4-21); see also Fischel, William, Why Are There NIMBYs?, available at <https://www.dartmouth.edu/~wfischel/Papers/00-04.PDF>.

<sup>5</sup> See id.

<sup>6</sup> With respect to the Town and Trustees, however, one could readily conclude that two facts explain the inexplicable: (1) the relatively low number of voters in Wainscott mitigates political fallout; and (2) the developer’s low cost alternative was leveraged to obtain the highest price for land rights that the Town granted. With respect to the latter, if a CPW-proposed Hither Hills alternative were selected, there is nothing in the record to suggest that a \$29 million payment to the Town and the Trustees would be forthcoming because the Town has no right to grant an easement for access to the state park at Hither Hills. At the Hearing, the Applicant indicated it might be willing to enter into a similar Host Community Agreement if the Atlantic Avenue route was selected, but in that case Town roads and Trustee property would still be involved. (Transcript, pp. 387-388).

because they track closely with the LIRR right-of-way, they reduce the burden on residential neighborhoods. The Commission fails to explain the basis for its rejection of the Hither Hills alternative; to the extent the Order can be interpreted as doing so, the record does not support such a rejection (e.g., there is no evidence in the record to suggest that Hither Hills property rights are unavailable<sup>7</sup> or that impacts to wetlands<sup>8</sup> could not be properly mitigated). This failure constitutes error of law and fact.

The Commission does not provide any analysis showing why it adopted the Applicant's "findings" as its own. In a conclusory statement, the Commission says that "[n]othing in the record supports disrupting the Joint Proposal in favor of one of CPW's alternatives."<sup>9</sup> In fact, an overwhelming amount of evidence in the record *does* support choosing CPW's alternatives over the Beach Lane route.<sup>10</sup> Set forth below are several examples that illustrate the errors of fact and law the Commission makes in its Order adopting the Joint Proposal. These are discussed in more detail later in this Petition.

- Applicant's Route: The Beach Lane route allows the South Fork Export Cable ("SFEC"), carrying 138,000 volts of electricity, to snake its way through the narrow lanes and quiet residential neighborhoods of Wainscott and create risks of electrical fires, electric short circuits, violent energy releases in manholes, water contamination, and electromagnetic fields.
  - Remedy Provided by CPW's Routes: CPW's Hither Hills route avoid residential neighborhoods entirely and instead follows established commercial and industrial corridors. Thus, none of the impacts identified above will be inflicted upon quiet residential neighborhoods.
  - Error of Fact and/or Law: The Commission makes an error of law by failing to analyze CPW's Hither Hills route (and ignore it in its "Discussion" of alternatives).

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<sup>7</sup> In fact, the Commission noted the Applicant's admission that property rights were obtainable for its "viable" Hither Hills alternative (Route B). Order, p. 69.

<sup>8</sup> The Applicant alleges CPW's Hither Hills routes are non-viable because of impacts to wetlands. However, these impacts could easily be mitigated through an avoidance, minimization, and mitigation plan. South Fork Wind, LLC Reply Brief in Further Support of the Issuance of a Certificate of Environmental Compatibility and Public Need, p. 47 (DMM 261, 2-3-21).

<sup>9</sup> Order, p. 103.

<sup>10</sup> For example, the Joint Proposal supports construction of the Cove Hollow substation. CPW has provided evidence in the record that its routes can connect directly to East Hampton substation, without the need to construct an entirely new substation.

The Commission makes an error of fact by failing to support its adoption of the Beach Lane route with evidence in the record. The Commission makes an error of fact when it rejects the impacts imposed on the Wainscott community but finds compelling the impacts on those along the LIRR right-of-way who would, as the Applicant admits, be only temporarily impacted by the construction of the cable.

- Applicant's Route: The landing of the cable from the ocean will involve drilling under the beach and sensitive dunes of Wainscott Beach at the foot of Beach Lane. A 600 to 800 foot stretch of Beach Lane near its southern end will be occupied by the sea-to-shore transition work zone for all or most of a seven-month construction window, and possibly over more than one construction season. A drilling rig will be situated within the Beach Lane roadway, surrounded by 12-foot-high noise walls. Additional equipment will also be staged in the work zone, including mud pumps, generators, a slurry plant, de-silter, backhoe, boom truck, and crane, along with areas for parking and storing other equipment, facilities, and materials necessary to support cable installation.
  - Remedy Provided by CPW's Routes: CPW's Hither Hills routes follow established commercial and industrial corridors with ample space to accommodate construction and associated equipment. CPW's Hither Hills routes have nearly no impacts on residents and would not require noise walls because of the lack of noise sensitive receptors.<sup>11</sup>
  - Error of Fact and/or Law: The Commission makes an error of law by failing to analyze how CPW's Hither Hills route reduces impacts to the community. The Commission makes an error of fact by failing to support its adoption of the Beach Lane route with evidence in the record, particularly when compared to the reasonable alternatives presented by CPW.
- Applicant's Route: The Beach Lane route runs adjacent to the Wainscott Sand & Gravel site and just south of the East Hampton Airport, which are both known areas of Per- and Polyfluoroalkyl substances ("PFAS") contamination. Construction in these areas could exacerbate the existing contamination.
  - Remedy Provided by CPW's Routes: Both CPW's Atlantic Avenue and Hither Hills routes avoid all known areas of PFAS contamination and not adjacent to a State Superfund Site.
  - Error of Fact and/or Law: The Commission makes an error of law by failing to consider how CPW's routes eliminate the potential for exacerbation of known PFAS contamination, and in fact whether there are current exceedances of PFAS contamination along the proposed Beach Lane route and the impact that could have on adjacent residents.
- Applicant's Route: The Beach Lane route places additional burdens on ocean resources.

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<sup>11</sup> CPW's Atlantic Avenue route also follows established commercial and industrial corridors and reduces the impacts to residences compared to the Applicant's Beach Lane route.

- Remedy Provided by CPW's Routes: The underwater portion of CPW's Hither Hills route is significantly shorter than the underwater portion of the Beach Lane route.<sup>12</sup>
- Error of Fact and/or Law: The Commission makes an error of law by failing to consider how CPW's routes reduce impacts to ocean resources and the fishing community.
- Applicant's Route: There are significant traffic and emergency vehicle access concerns associated with the Beach Lane route. The paved portion of Beach Lane is only 19-20 feet wide, which expert testimony concluded would result in safety violations.
  - Remedy Provided by CPW's Routes: CPW's routes maximize the use of established commercial and industrial corridors and existing rights of way. There are no contemplated violations of fire and safety codes that would require waivers.
  - Error of Fact and/or Law: The Commission makes an error of law by failing to analyze how CPW's Hither Hills route reduces impacts to the community. The Commission makes an error of fact by failing to support its adoption of the Beach Lane route with evidence in the record.
- Applicant's Route: The Applicant failed to request all necessary local law waivers in its Application. The Applicant will not be able to meet all local law requirements during construction.
  - Error of Fact and/or Law: The Commission erroneously concludes that the Project, as proposed in the Joint Proposal, complies with the substantive provisions of all applicable local laws, except those for which waivers were requested. This finding is error of law and fact. In fact, the testimony at the hearing and the evidence in the record is clear that the Joint Proposal does not provide the support for certain local law waivers granted by the Commission.

As demonstrated by the bulleted points above, and throughout this Petition, the Commission makes numerous errors of fact and law in its Order adopting the Joint Proposal which deserve Rehearing.

## II. STANDARD FOR REHEARING

A party may petition the Commission for a rehearing on the grounds the Commission committed error of law or fact, or when new circumstances warrant a different determination.<sup>13</sup>

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<sup>12</sup> Even CPW's Atlantic Avenue route has a shorter underwater cable length compared to the Beach Lane route. Pre-Filed Direct Testimony of John A. Conrad, at Ex. JAC-5 (DMM 182, 10-9-20).

<sup>13</sup> 16 NYCRR § 3.7(a); see also Case 95-T-0248, Application of New York State Electric & Gas Corporation for a Certificate of Environmental Compatibility and Public Need for the Construction of the Seneca Lake Storage Project Gas Transmission Facilities - Phase I, Opinion and Order Granting in Part and Otherwise Denying Petition for Rehearing (Issued May 16, 1996) (petition for rehearing granted "to the extent of reopening the Phase I record to accept submitted offers of proof and Phase II public statements"; stating "[a]lthough the Petition is inadequate as a



The Commission has broad discretion to grant rehearings as it deems necessary.<sup>14</sup> The Commission makes an error of fact when it misstates the evidence in the record or when it fails to support its conclusions with evidence in the record. Conversely, the Commission makes an error of law when it fails to address arguments or positions of the parties or when it fails to properly make conclusions pursuant to PSL § 126(1).<sup>15</sup> There are other instances where the Commission simply interprets the evidence incorrectly, which also require rehearing. Here, there is no evidentiary basis for the Commission's rejection of CPW's arguments against adoption of the Joint Proposal.<sup>16</sup> The Commission misinterprets CPW's position repeatedly throughout the Order, which constitutes error of fact. While the Order is over one hundred (100) pages long, only the last approximately nine pages are devoted to "discussion;" everything else is mere summary of the proceedings to date.<sup>17</sup> The "Discussion" section fails to even mention the Hither Hills alternatives even though a version of the Hither Hills alternatives was deemed viable by the Applicant and materially enhanced by CPW. Even in the brief discussion section, the Commission provides little to no actual discussion or analysis, instead, the Applicant's conclusions are adopted without any support in the record, constituting error of law.

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matter of law, the Public Service Law provides considerable discretion to determine whether and how rehearings may be granted"); Case 11-T-0534, Application of Rochester Gas and Electric Corporation for a Certificate of Environmental Compatibility and Public Need Pursuant to Article VII of the PSL for the Construction, Operation, and Maintenance of the Rochester Area Reliability Project, Order on Petitions for Rehearing (Issued August 15, 2013) (remanded to parties for review of agricultural impacts of alternative site stating "we cannot be assured that the appropriate balance was struck with respect to one of the objectives of the Article VII process – consideration of effects on agricultural lands in determining that the facility represents the minimum adverse environmental impact").

<sup>14</sup> See Case 95-T-0248, Opinion and Order Granting in Part and Otherwise Denying Petition for Rehearing (Issued May 16, 1996).

<sup>15</sup> Id.

<sup>16</sup> See Case 18-T-0604, Application of Deepwater Wind South Fork, LLC, Order Adopting Joint Proposal (issued March 18, 2021) (DMM 271, 2-18-21) ("Order").

<sup>17</sup> Id.

### **III. THE COMMISSION MADE NUMEROUS ERRORS OF LAW AND FACT**

#### **A. The Commission Fails to Properly Understand and Analyze CPW's Position**

The most basic failing of the Order is that it does not conduct any analysis of CPW's Hither Hills route.<sup>18</sup> The failure to consider CPW's Hither Hills route also shows that the Commission misconstrues CPW's position on a fundamental level. The Applicant's Hither Hills route was deeply flawed and non-viable from the onset due to extensive impacts to residential neighborhoods in Amagansett and East Hampton.<sup>19</sup> Based on the advice of experts, CPW developed a way to avoid all the impacts associated with the Applicant's Hither Hills route by designing an improved Hither Hills route that travels almost exclusively along the LIRR right-of-way.<sup>20</sup> CPW improved the claimed viable route by leveraging the rail line to avoid going through East Hampton and Amagansett and otherwise reducing the use of residential roads for the cable route. Moreover, CPW's Hither Hills route will not cause new impacts to a single residence.<sup>21</sup> Furthermore, CPW's Hither Hills route avoids all known areas of PFAS contamination, virtually eliminating the risk of exacerbation of existing contamination.<sup>22</sup> Moreover, CPW's Hither Hills route does not have the same space constraints as the Applicant's Beach Lane route. There is ample room along CPW's Hither Hills route to comply with all fire and building codes and to allow emergency vehicle access when necessary.<sup>23</sup> Despite all the advantages of CPW's Hither Hills route, the Commission inexplicably fails to even mention it in the "Discussion" section.<sup>24</sup> Ignoring CPW's Hither Hills route was error of fact, as the route clearly has fewer impacts than the Applicant's preferred Beach

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<sup>18</sup> The Commission is required to consider alternatives under PSL § 126(1)(c).

<sup>19</sup> Pre-Filed Direct Testimony of John A. Conrad, at 11-13 (DMM 182, 10-9-20).

<sup>20</sup> Id. at 13-17.

<sup>21</sup> Id. at Exs. JAC-7, JAC-9.

<sup>22</sup> See Id. at 11-13.

<sup>23</sup> Id. at 42-43.

<sup>24</sup> Order, p. 103-104.

Lane route. The failure to consider CPW's Hither Hills route is also an error of law because the PSL requires an analysis of reasonable alternatives.

Indeed, CPW hired experts, conducted extensive research, and presented the Commission with alternatives that are in many ways superior to the Applicant's favored Beach Lane route as shown below:

Hither Hills<sup>25</sup>:

- Significantly lower total length of the marine cable from 61.6 miles (Beach Lane) to 49.7 miles (Hither Hills East) or 50.8 miles (Hither Hills West)<sup>26</sup>
- No evidence of PFAS contamination risk
- Complies with Building and Fire Code and allows for maintenance of a 20-foot wide lane for emergency access and a turnaround area
- Reduces risks to pedestrians
- Minimizes the use of roads with fewer impacts to roads in Wainscott<sup>27</sup>
- No residential impacts<sup>28</sup>
- Maximizes use of established rights of way associated with the LIRR
- High-voltage cable is buried almost entirely within the LIRR right-of-way, avoiding construction-related traffic disruptions and community impacts
- Satisfies the requirement to interconnect into the East Hampton substation while eliminating the need to build an entirely new substation
- Strengthens the electrical grid and promotes future expansion by placing high voltage infrastructure east of East Hampton on the South Fork of Long Island
- No evidence that property rights, in connection with the construction along the rail lines, would be unattainable<sup>29</sup>

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<sup>25</sup> CPW's Atlantic Avenue route provides many of the same significant improvements over the Applicant's proposed Beach Lane route. For example, the Atlantic Avenue route: (1) minimizes impacts in residential neighborhoods by limiting the length of new transmission cable along local roads to 0.8 miles, as opposed to 2.0 miles for the Beach Lane route; (2) maximizes the use of established power rights of way by placing 4.2 miles of the 5.0 mile on-shore cable corridor within the LIRR right-of-way; and (3) uses the wider Atlantic Avenue right-of-way for the landing (132 feet) instead of the narrow Beach Lane landing right-of-way (49.5 feet); Pre-Filed Direct Testimony of John A. Conrad, at 42-43 (DMM 182, 10-9-20).

<sup>26</sup> Additionally, the total lengths of CPW's Hither Hills routes are each approximately 5.0 miles less than the Applicant's Beach Lane route. Pre-Filed Direct Testimony of John A. Conrad, at Ex. JAC-5 (DMM 182, 10-9-20).

<sup>27</sup> The Applicant's Beach Lane route will impact 2.0 miles of state and local roads, CPW's Hither Hills West route will impact 0.0 miles and CPW's Hither Hills East route will impact only 1.5 miles of state and local roads. CPW's Hither Hills routes also decrease the total number of road crossings from 14 to four or fewer. Pre-Filed Direct Testimony of John A. Conrad, at Ex. JAC-5 (DMM 182, 10-9-20).

<sup>28</sup> The Applicant's Beach Lane route will impact 87 residential properties whereas CPW's Hither Hills routes impact no properties that are not already impacted by the LIRR right-of-way. Pre-Filed Direct Testimony of John A. Conrad, at Ex. JAC-7 (DMM 182, 10-9-20).

<sup>29</sup> There is no evidence in the record suggesting Hither Hills State Park is not a viable landing site. See Case 02-T-0036, Application of Neptune Regional Transmission System LLC for a Certificate of Environmental Compatibility and Public Need for the Construction of Two 600-Megawatt (+/- 500 kV) High Voltage Direct Current

Despite all of the above, the Commission, in error, concluded that “[n]othing in the record supports disrupting the Joint Proposal in favor of one of CPW’s alternatives.”<sup>30</sup> The employment of the word “nothing” suggests the Commission failed to conduct any independent analysis of the Project. Indeed, there are numerous instances where the Commission simply got it wrong. For example, in its haste to evaluate the entire record, the Commission seeks to discredit the option to interconnect the cable at the Buell substation. In fact, CPW abandoned a proposed interconnection at Buell substation in favor of interconnection directly into the East Hampton substation.<sup>31</sup> This error committed by the Commission deserves Rehearing.

The impacts of the Project on Beach Lane, Wainscott Beach, and the Wainscott community<sup>32</sup> have been a source of debate throughout the Article VII process. Yet, despite the voluminous record on these issues, the Commission dismisses these issues in two throw-away sentences in an over 100-page Order.<sup>33</sup> The Commission finds that impacts to Wainscott Beach and Beach Lane will “largely be avoided” and “minimized to the extent practicable,” yet it fails to explain its reasoning for these findings, including even addressing the Hither Hills route.<sup>34</sup> While

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Submarine/Underground Electric Transmission Cables to Connect Load Centers in New York with Transmission and Generation Resources in New Jersey, Opinion and Order Adopting Joint Proposal and Granting Certificate of Environmental Compatibility and Public Need for a Transmission Facility from New Jersey to Long Island (January 23, 2004) (granting CECPN for cable landing at Jones Beach State Park).

<sup>30</sup> Even if the Commission prefers the Applicant’s route, the Commission cannot say that *nothing* in the record supports one of CPW’s route.

<sup>31</sup> Reply Brief of Citizens for the Preservation of Wainscott, Inc., pp. 24-25 (DMM 265 2-4-21).

<sup>32</sup> The Commission also summarily dismisses CPW’s concerns about Georgica Pond. To be clear, CPW is fully aware that there are two regular activities associated with Georgica Pond, the dredging and the opening. CPW understands that the Applicant has agreed to pay the Trustees back for any lost revenue associated with the dredging operation. The Trustees’ financial issue is not CPW’s concern. However, the Applicant has failed to fully address the nature of the probable environmental impacts to Georgica Pond and how those impacts will be minimized. In turn, the Commission, which accepted the Applicant’s assertions in full, failed to perform its duty under PSL 126(1)(b) and (c). The Applicant admitted that it did not perform any analysis concerning the impacts its proposed construction along Beach Lane will have on the sensitive resources of Georgica Pond. Instead, it relied on assurances of the Trustees, who also admitted they performed no scientific or technical analysis concerning impacts to the pond. Moreover, evidence indicates that dredging accumulated sand improves pond water circulation and improves water quality in the pond. These facts have been completely ignored by the Applicant and now by the Commission.

<sup>33</sup> Order, p. 101.

<sup>34</sup> Id.

suggesting that impacts roads will be “short term,” it ignores the Applicant has up to 2 ½ years to complete construction.

The record also contains extensive information on the potential for the Applicant to encounter PFAS during construction of the Project, yet the Commission fails to analyze CPW’s position. PFAS are a significant public health issue that has been gaining attention recently with environmental agencies and lawmakers alike. Despite the very real danger of exacerbating existing PFAS contamination due to the proposed location of the Project, the Commission dismisses CPW<sup>35</sup> and the other intervenors’<sup>36</sup> concerns in half a page of “discussion.”<sup>37</sup> The Commission states that it “agree[s] with the Applicant and DPS Staff and find[s] that the Project, as proposed and conditioned will not exacerbate existing PFAS.”<sup>38</sup> Yet, the only evidence in the record regarding the extent of PFAS contamination was not presented by the Applicant or even the New York State Department of Environmental Conservation (“DEC”). The Commission’s conclusory statement about PFAS contamination fails to even attempt to balance the desires of the Applicant to move forward against the potential public health issues posed by performing construction activities in an area of known PFAS contamination where residents still have drinking water wells.<sup>39</sup> Post-certification plans and sampling are not sufficient to address the risks. The Commission’s failure

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<sup>35</sup> Transcript, at 18-98; Initial Post-Hearing Brief of Citizens for the Preservation of Wainscott, Inc., pp. 18-19, 24 (DMM 249 1-20-21); Reply Brief of Citizens for the Preservation of Wainscott, Inc., pp. 9-12 (DMM 265 2-4-21); CPW’s Response to Motion to Reopen Record (DMM 253, 1-21-21).

<sup>36</sup> The intervenors have been very vocal throughout the Article VII process about the possibility of exacerbation of PFAS contamination due to construction along the Applicant’s Beach Lane Route. Transcript, at 105-191.

<sup>37</sup> Order, p. 102.

<sup>38</sup> Id.

<sup>39</sup> As a recent example of the seriousness in which the DEC regards PFAS contamination, on April 14, 2021, the DEC issued an update regarding its investigation of PFAS in the Jenkinville Assessment Area. Specifically, the DEC is testing nearby private wells and taking actions to reduce PFAS exposure. Community Update Jenkinville Assessment Area, <https://www.dec.ny.gov/data/der/factsheet/jenkinvilleupdate0421.pdf>.

to provide any meaningful discussion or analysis related to PFAS constituted an error of law and fact.<sup>40</sup>

Similarly, despite disagreement about the impacts of noise from construction of the Project, the Commission merely refers back to the proposed Certificate Conditions in the Joint Proposal without requiring specific noise mitigation measures.<sup>41</sup> The Commission assumes the Applicant's noise mitigation measures are sufficient.<sup>42</sup> The Commission's failure to cite evidence in the record in support of these assumptions constitutes error deserving of Rehearing.<sup>43</sup>

In sum, instead of reviewing the record and performing its own independent analysis, the Commission merely adopts the views of the Applicant as its own. To that end, the Commission is seemingly relying on its summaries of the parties' positions (pages 1-95 of the Order) as fulfilling its duty to "find and determine" each element of PSL § 126(1).<sup>44</sup> The summaries of the parties' positions do not include any analysis or comparison of the positions against one another.<sup>45</sup> Based on the foregoing, the Commission clearly accepted the Applicant's assertions without evidentiary support and thereby improperly dismissed the concerns of CPW. Moreover, some of the findings the Commission did make have no basis in the record or were simply wrong.<sup>46</sup> For these reasons, Rehearing should be granted.

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<sup>40</sup> See id.

<sup>41</sup> Id.

<sup>42</sup> See id.

<sup>43</sup> See Order, p. 101.

<sup>44</sup> Order pp. 1-95.

<sup>45</sup> Id.

<sup>46</sup> The Commission adopts the position of the Signatory Parties and finds that, "CPW's Atlantic Avenue Alternative will impact Atlantic Avenue Beach Town Park (Order, p. 49). However, CPW's proposed Atlantic Avenue route does not impact the Atlantic Avenue Beach Town Park which, in actuality, is the parking lot at the end of Atlantic Avenue. CPW has not proposed any construction activities in the parking lot. In addition, the Order incorrectly finds that the Project, as proposed, complies with all state and local laws, except those for which waivers were requested. Order, p. 105.

## **B. The Commission's Conclusions are Arbitrary and Capricious and Affected by Errors of Law**

An action is arbitrary and capricious when it is taken without sound basis in reason or regard to the facts.<sup>47</sup> When making a determination, an agency must invoke the documents in the record that it relied on during the decision-making process.<sup>48</sup> The documents relied on must provide substantial evidence for the agency's determination.<sup>49</sup> Here, the Order fails to list the documents the Commission relied on while making its decision.<sup>50</sup> The Order does not indicate that the Commission reviewed the record in full, nor does it state which pieces of evidence the Commission finds compelling enough to support its decision to grant the CECPN.<sup>51</sup> Instead, the Order adopts the Applicant's assurances that the Project's impacts are properly mitigated without including any cited evidence.<sup>52</sup> An independent analysis is especially important in this case, where the record is voluminous, detailed, and technical.<sup>53</sup> The Commission should have weighed the assurances of the Applicant against the arguments of CPW and the other intervenors. Instead, the Commission conducts no independent analysis and merely accepts the Applicant's proposal without modification.<sup>54</sup> In doing so, the Commission does not base its decision on evidence in the record, which results in a decision that is arbitrary and capricious and affected by errors of law.<sup>55</sup>

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<sup>47</sup> CPLR § 7803; see Markowitz v Town Bd. Of Town of Oyster Bay, 200 AD2d 673 (2d Dept 1994).

<sup>48</sup> See Ignaczak v Ryan, 79 AD3d 881 (2d Dept 2010).

<sup>49</sup> Markowitz, 200 AD2d at 674.

<sup>50</sup> See Order.

<sup>51</sup> Id.

<sup>52</sup> Id.

<sup>53</sup> In addition, the unfairness of this error has been compounded by the Commission's ignoring CPW's request, contained in its Motion for Interlocutory Review (dated December 31, 2020), to direct the Administrative Law Judge to prepare a Recommended Decision instead of a "Report," the latter of which clearly formed the basis for the Commission's Order. Motion of Citizens for the Preservation of Wainscott, Inc. for Interlocutory Review of December 18, 2020 Ruling on Process (DMM 236, 12-31-20).

<sup>54</sup> Id.

<sup>55</sup> See CPLR § 7803; see also Markowitz, 200 AD2d 673.

**C. The Commission’s Conclusion that the Application Meets the Requirements of PSL § 126(1) was in Error and Therefore the Commission Should Not Have Granted a Certificate of Environmental Compatibility and Public Need**

*i. Findings and Determinations Have Not Been Made by the Commission*

The Order fails to explain why the Commission chose to adopt the Joint Proposal and accept the Applicant’s submissions as fact. Similarly, the Order does not explain why the Commission chose to discredit and reject CPW’s submissions. The Order does not properly cite to the record to show which documents the Commission reviewed and relied upon in its decision-making process.<sup>56</sup> Because of that, the Order wholly fails to show actual grounds for the Commission’s decision, which is necessary for intelligent judicial review of the determination.<sup>57</sup> Without an explanation of the grounds for its determination, the Commission’s order will be deemed arbitrary and capricious if challenged at the Appellate Division.<sup>58</sup> Pursuant to the State Administrative Procedure Act (“SAPA”), “findings of fact, if set forth in statutory language, shall be accompanied by a concise and explicit statement of the underlying facts supporting the findings.” Thus, conclusions alone, as the Commission set forth here, are insufficient to support a determination under SAPA. Moreover, CPW is directly harmed by the Order because it must seek rehearing without the benefit of knowing *why* the Commission rejected its position.

Under the PSL, the Commission is required to make certain findings and determinations prior to granting a CECPN. Here, the Commission simply adopts the proposed findings in Appendix C of the Joint Proposal and states that the Applicant’s proposed findings are “well supported by the record.”<sup>59</sup> Despite the fact that an overwhelming amount of evidence in the record

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<sup>56</sup> The Commission does not list, or reference, a list of documents from the record it relied or, or even which documents from the record it reviewed.

<sup>57</sup> Gilbert v Stevens, 284 App. Div. 1016, 1016 (3d Dept 1954).

<sup>58</sup> See id.

<sup>59</sup> Order, p. 105. In the Order, the Commission made much of the fact that CPW lacked property rights, yet there is a dearth of evidence in the record that the Applicant has those same rights. Indeed, even for its obviously flawed Hither Hills “viable” alternative, the Applicant itself did not dismiss that alternative because of its lack of property rights.



supports choosing one of CPW's alternative routes, the Commission simply finds nothing to disrupt the Joint Proposal.<sup>60</sup> In doing so, the Commission chose Beach Lane without a meaningful analysis of the Hither Hills alternative. This flawed decisionmaking, however, was in error and not fully based on the record and the Commission's Order, therefore, deserves rehearing.

Another unsupportable choice made by the Commission is its conclusion that the Joint Proposal supports construction of the South Fork Export Cable ("SEFC") Interconnection Facility, otherwise known as the Cove Hollow substation.<sup>61</sup> But, CPW has provided evidence in the record that its routes can connect directly to East Hampton substation, without the need to construct an entirely new interconnection facility. The needless construction of the Cove Hollow substation will further impact the Dune Alpin community, a community already impacted by industrial sprawl.<sup>62</sup> Yet the Commission adopts the conclusory statements of the Applicant, without any evidentiary support, that the impacts to the Dune Alpin community have been either avoided or minimized.<sup>63</sup> The only way to avoid the impacts to the Dune Alpin community is to NOT site a new substation, and CPW is the only party who has provided evidence and a way for that to occur. It was error for the Commission to fail to acknowledge and to act on CPW's proposal in this regard.

CPW presented evidence in the record numerous times that its alternatives have far fewer impacts to residential neighborhoods as they closely follow the LIRR right-of-way.<sup>64</sup> The Joint Proposal rejected the Applicant's proffered viable alternative, the Hither Hills<sup>65</sup> landing site<sup>66</sup> in

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<sup>60</sup> Order, p. 103.

<sup>61</sup> Joint Proposal, p. 4. The Joint Proposal considers three potential locations for the SFEC Interconnection Facility, but never considers the option of using existing infrastructure and connected directly to the East Hampton substation as suggested by CPW.

<sup>62</sup> Reply Brief of Citizens for the Preservation of Wainscott, Inc., pp. 24-25 (DMM 265 2-4-21)

<sup>63</sup> Order. P. 75.

<sup>64</sup> Pre-Filed Direct Testimony of John A. Conrad, at 4-5, 11-17 (DMM 182, 10-9-20).

<sup>65</sup> CPW asserts at hearings that the Applicant's "viable alternative" is purposely flawed to force the Commission to accept its preferred Beach Lane Route. Pre-Filed Direct Testimony of John A. Conrad, at 4 (DMM 182, 10-9-20).

<sup>66</sup> Ex. 180, p. 66. The Joint Proposal rejected the Applicant's Hither Hills landing site "due to the fact that it is located alongside 0.13 acres of the 100-foot adjacent area for mapped NYSDEC freshwater wetlands, the proximity of a State

part because of impacts on a state-regulated wetland adjacent area, even though that impact could be easily mitigated.

CPW's Hither Hills East and West alternatives remedied the concerns with the Applicant's Hither Hills routes, yet they were dismissed without consideration by the Commission.<sup>67</sup> The Commission neither explained its decision-making process nor cited evidence in the record in support of the Joint Proposal.<sup>68</sup>

In the Introduction of the Order, the Commission states:

The Joint Proposal addresses all of the statutory and regulatory issues pertaining to the Applicant's request for a Certificate to construct, maintain and operate this facility, adequately discusses all probable environmental impacts, and addresses the steps needed to ensure that the facility represents the minimal adverse environmental impact considering the state of available technology and the nature and economics of the various alternatives and other pertinent considerations.<sup>69</sup>

While such sweeping conclusory statements might be appropriate in an introduction section, the Commission does not use the rest of the order (all 105 pages) to explain why or how it reached this conclusion.<sup>70</sup> Instead, the Commission repeats the Applicant's arguments and conclusions and without conducting any independent analysis. Further, while the Joint Proposal may address all of the statutory and regulatory issues pertaining to the Applicant's request, this does not obviate the Commission's duty to independently find and determine each criterion under PSL § 126(1), as

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Park campground and other non-residential structures, the presence of hard-bottom habitats off-shore, construction feasibility concerns, impacts to traffic, businesses and the community, and impacts to historic properties." But, the Order did not evaluate the evidence to support this conclusion. Indeed, as noted elsewhere, impacts to a wetland adjacent area can be easily mitigated and CPW's Hither Hills route avoids impacts to traffic, businesses and the community by leveraging the rail lines. With respect to the other reasons, the Applicant may have been dismissive of its "viable" Hither Hills route, but there is nothing in the Order suggesting any analysis of the remaining reasons the Applicant dismissed the route and limited information in the record to support the same. See Order, p. 27. For example, there is a reference in the Order to the historic East Hampton rail station (Order, p. 73) but no evidence in the record that it would be adversely impacted.

<sup>67</sup> Pre-Filed Direct Testimony of John A. Conrad, at 4-5, 11-17 (DMM 182, 10-9-20).

<sup>68</sup> See Order.

<sup>69</sup> Order, p. 2.

<sup>70</sup> See Order.

shown below. The Commission cannot bypass its duties by summarily adopting the findings of the Applicant and other Signatory Parties as this constitutes a major breach of its responsibilities under the PSL.

*ii. The Order Misconstrues the Parties' Positions and Makes Numerous Errors of Fact*

The text of the summary sections of the Order confirms that the Commission does not properly analyze the alternatives proposed by CPW. The Commission summarizes CPW's position by stating that CPW prefers the Atlantic Avenue route "because it eliminates or significantly mitigates the adverse impacts to Beach Lane associated with the Applicant's route."<sup>71</sup> While this is a true statement, it is a misleading oversimplification of CPW's contentions. First, CPW has repeatedly stated that its mission is to reduce the impacts of the project along the *entire route*, not just the Beach Lane section.<sup>72</sup> Second, the Atlantic Avenue and Hither Hills routes have numerous benefits, which the Commission (and the Applicant) has chosen to ignore.

In its summary of CPW's position, the Commission states that "CPW dismisses arguments that further analysis of the Atlantic Avenue alternative is necessary."<sup>73</sup> CPW never stated that further analysis of the Atlantic Avenue route is not necessary and it was error for the Commission to so conclude. In fact, CPW acknowledged additional investigation and planning is necessary, but that this burden should fall on the Applicant, not CPW.<sup>74</sup> The Atlantic Avenue route was not submitted for certification as part of the Article VII process. Had the Commission chosen not to

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<sup>71</sup> Order, p. 91.

<sup>72</sup> See Comments of Citizens for the Preservation of Wainscott, Inc. (DMM 14, 2-20-19); see also Motion of Citizens for the Preservation of Wainscott, Inc. for Interlocutory Review of December 18, 2020 Ruling on Process, pp. 2-3 (DMM 236, 12-31-20); see also Initial Post-Hearing Brief of Citizens for the Preservation of Wainscott, Inc., p. 6 (DMM 249 1-20-21).

<sup>73</sup> Id.

<sup>74</sup> Initial Post-Hearing Brief of Citizens for the Preservation of Wainscott, Inc., pp. 21-22 (DMM 249 1-20-21).

grant a CECPN, it could have instead directed the Applicant to conduct additional analysis of the Atlantic Avenue route (or one of the Hither Hills routes) and reapply for Article VII certification.<sup>75</sup>

As explained in detail above, the Order fails to provide any analysis of CPW's Hither Hills routes<sup>76</sup>. While the routes are mentioned, briefly, in the summary section of the Order, they are never mentioned, much less analyzed, in the "Alternatives" subsection of the "Discussion" section.<sup>77</sup> Choosing not to consider and analyze CPW's Hither Hills routes was error of both fact and law.

One of the most glaring errors in the Order is the Commission's summary of CPW's position on the interconnection point for the 138 kV cable. Specifically, the Order neglects to mention that CPW decided to modify its proposal for the termination point of its alternatives from the Buell substation to the East Hampton substation.<sup>78</sup> This change, and the reasoning behind it, was discussed in CPW's Post-Hearing Reply Brief.<sup>79</sup> By switching the proposed interconnection point to the East Hampton substation, any arguments attacking CPW's alternatives regarding space and accommodation issues at Buell substation became moot.<sup>80</sup> Termination directly into the East

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<sup>75</sup> See Case 11-T-0534, Application of Rochester Gas and Electric Corporation for a Certificate of Environmental Compatibility and Public Need Pursuant to Article VII of the PSL for the Construction, Operation, and Maintenance of the Rochester Area Reliability Project, Order on Petitions for Rehearing (Issued August 15, 2013) (remanded to parties for review of agricultural impacts of alternative site stating "we cannot be assured that the appropriate balance was struck with respect to one of the objectives of the Article VII process – consideration of effects on agricultural lands in determining that the facility represents the minimum adverse environmental impact")

<sup>76</sup> The Commission seemingly accepted the Applicant's dismissal of its proposed "viable" Hither Hills route, including for the reason that there would be an impact, however minimal, that the route would have on 0.13 acres of wetland adjacent area. This is not problematic because most Article VII Joint Proposals indisputably include EM&CP specifications requiring a Wetland Mitigation Plan. Even if that had been required for a Hither Hills route, such mitigation, if required for such a minimal impact, could have been easily accommodated.

<sup>77</sup> Order, pp. 103-104.

<sup>78</sup> The Order states, "CPW proposes that the line terminate at the Buell Lane substation" (Order, p. 85).

<sup>79</sup> CPW specifically requested that the Commission "focus on CPW's proposal to utilize just the East Hampton substation and ignore those portions of the Applicant's and PSEG's tunnel-visioned arguments about Buell Substation, the NYISO, and any upgrade projects PSEG may be in the process of implementing at Buell" (Reply Brief of Citizens for the Preservation of Wainscott, Inc., p. 25 (DMM 265 2-4-21)).

<sup>80</sup> In particular, PSEG spent almost ten pages of its initial brief discussing why it believes the SFEC cannot interconnect at Buell substation (Initial Brief of PSEG Long Island LLC on Behalf of and as Agent for the Long Island Lighting Company d/b/a LIPA (DMM 244 1-20-21)).

Hampton substation also resolves any conflict with satisfaction of the requirements of the Power Purchase Agreement (“PPA”) with LIPA.<sup>81</sup> However, the Commission commits error by failing to acknowledge this change in its summary of CPW’s position.<sup>82</sup>

*iii. The Commission Creates a Double Standard for Review of the Applicant and CPW’s Route*

The Order sets an unattainable “viability” bar for CPW’s routes yet does not apply the same standard to the Applicant’s Beach Lane route. For example, in the Order, the Commission deems CPW’s Atlantic Avenue route non-viable “due to the inability to obtain necessary property rights.”<sup>83</sup> To be sure, the Applicant may not have all necessary property rights, including an agreement with LIRR, for the alternate Hither Hills route.<sup>84</sup> However, the Applicant has acknowledged that it has not yet obtained all necessary property rights for its preferred Beach Lane route, including for the Cove Hollow substation.<sup>85</sup> The Commission has committed error by creating a double standard where CPW’s routes are considered non-viable due to lack of property rights, yet the Applicant’s routes are viable even without evidence in the record that the Applicant has established property rights.<sup>86</sup> Even more egregious in terms of error is that established property rights are not required for certification of a route under Article VII. The Commission has previously stated that “acquisition of property rights does not fall within our Jurisdiction under Article VII,” but here the Order uses property rights as a determining factor.<sup>87</sup> The fact that CPW

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<sup>81</sup> See Initial Post-Hearing Brief of Citizens for the Preservation of Wainscott, Inc., pp. 21-22 (DMM 249 1-20-21).

<sup>82</sup> See Order.

<sup>83</sup> Order, p. 103.

<sup>84</sup> Transcript, at 496.

<sup>85</sup> Transcript, at 864, 874. See also Exhibit 236, DWSF Response to Information Response CPW-20.

<sup>86</sup> The Town’s issuance of an easement is the subject of litigation which has not yet been completed. See Citizens for the Preservation of Wainscott v. Town Board of the Town of East Hampton and South Fork Wind, Index No. 601847/2021, Suffolk County, filed February 2, 2021.

<sup>87</sup> See Case No. 07-T-1492, Petition of New York Regional Interconnect Inc. for a Declaratory Ruling that Section 11(7) of the Transportation Corporations Law either Does not Apply to NYRI or NYRI’s Project or that the Statute is Unconstitutional (Order Dismissing Petition, February 13, 2008) (“Article VII authorizes the Commission to determine whether a proposed facility is necessary and is in the public interest, and which route or location best suits the need and the public interest, consistent with environmental considerations, **but does not authorize the**

does not have property rights for its Atlantic Avenue and Hither Hills routes is not, and cannot be, a bar to full consideration during the Article VII process.

The Order also impermissibly relies on the proposed certification conditions in the Joint Proposal, the forthcoming Environmental Management and Construction Plan (“EM&CP”), and other assurances from the Applicant that impacts will be minimized to the extent practicable as required by the PSL.<sup>88</sup> At the same time, the Order does not give any new specifications or requirements for mitigation measures.<sup>89</sup> Given the unprecedented nature of this Project and the extent of adverse consequences, the mere promise of inclusion in the EM&CP is insufficient for the Commission to determine that adverse impacts are minimized. There is no way of knowing, at this certification stage, if the measures in the EM&CP will materialize or if they will be sufficient to mitigate impacts. Similar to the Applicant’s approach in doing everything possible to move rapidly towards certification, the Commission forfeits its duties under PSL § 126(1) by relying too heavily on the EM&CP to require mitigation of impacts. By relegating issues to the EM&CP, it allows the Commission to sidestep essential considerations under the PSL.<sup>90</sup>

*iv. The Order Fails to Make Findings and Determinations Under PSL § 126(1)*

Under PSL § 126, the Commission must “find and determine” seven criteria prior to granting a CECPN. Under typical constructs of statutory interpretation, this means the

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**Commission to adjudicate property rights.** Processes for property rights adjudication are addressed in statutes other than the PSL in other fora.”) (emphasis added).

<sup>88</sup> See Order, pp. 100-105.

<sup>89</sup> See *id.*

<sup>90</sup> While development of an EM&CP is typical and reliance by the Commission on an EM&CP is not in and of itself a basis for error, here the magnitude in which the Applicant has been allowed to kick the can to identify potential environmental impacts demonstrates the absence of substantial evidence in the record to support a finding under PSL § 126(1)(b).

Commission must complete two steps and both “find” and “determine” each of the criteria.<sup>91</sup> Here, the “Discussion” section of the Order contains the following subsections, “Basis of Need for the Facility,” “Nature of Environmental Impacts,” Conformance with Long-Range Plans for Expanding the Electric Power Grid,” “Compliance with State and Local Laws,” and “Public Interest, Convenience and Necessity.” Based on these titles, the Commission seemingly intended to discuss the environmental impacts of the Project<sup>92</sup> and its impact on active farming<sup>93</sup> together under the “Nature of Environmental Impacts” heading. Moreover, the Commission does not consistently “find” and “determine” each criterion. For example, the “Nature of Environmental Impacts” subsection makes several unsubstantiated findings but makes no determination.<sup>94</sup> The ways in which the Order fails to analyze each PSL § 126(1) criterion separately and thoroughly are discussed in more detail below.

*v. The Order References the Settlement Guidelines and Seems to Determine that Balancing Interests Allows it to Ignore the Criteria of PSL § 126(1)*

The Joint Proposal is a settlement between the Signatory Parties but it does not necessarily conform to the required findings under PSL § 126. In the Order, the Commission chose to adopt the Joint Proposal without modification, but it cannot bypass its legal obligations under PSL § 126 because some of the parties chose to “settle.” The Commission focuses on the settlement guidelines but ignores the requirement that its determinations must still meet all the criteria under PSL § 126(1), while the Joint Proposal does not have the same requirement. The Joint Proposal balances

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<sup>91</sup> See *In re Wojnar*, 5 AD3d 889, 900-901 (3d Dept 2004) (finding, “where ... an issue of statutory interpretation only is involved, the court may ‘ascertain the proper interpretation from the statutory language and legislative intent’” which means determining the “plain meaning” of the statute).

<sup>92</sup> PSL § 126(1)(c).

<sup>93</sup> PSL § 126(1)(d).

<sup>94</sup> Order, pp. 100-104.

the interests of the Signatory Parties (some of whom are single parties), but the Commission cannot adopt it in full and fail to supplement as necessary to satisfy PSL § 126(1).

*vi. The Order Fails to Meaningfully Analyze Alternatives*

The most egregious error of law or fact is the violation of PSL § 126(1) by the Commission which is found in the subsection discussing alternatives to the Applicant's preferred route.<sup>95</sup> Pursuant to PSL § 126(1)(c), the Commission must consider the "nature and economics of the various alternatives" in its determination that the Project represents the minimum adverse impact. The Order states that "the Beach Lane route and the Cove Hollow interconnection site are the preferred options," but it does not provide a full analysis of the alternatives.<sup>96</sup> The alternatives subsection of the Order surprisingly only discusses one alternative, the Atlantic Avenue route, and ignores both the Applicant and CPW's Hither Hills routes entirely.<sup>97</sup> Moreover, the Commission failed in its duty to hold the Applicant to its obligation to provide the Commission with true, viable alternatives for consideration.<sup>98</sup> The Hither Hills route as proposed by the Applicant was impractical because, unlike the modified Hither Hills routes proposed by CPW that leverages the rail lines, it was designed to run through the middle of town in East Hampton and Amagansett.

The most significant error in the Commission's analysis, is that it fails to distinguish between the impacts associated with installation of a high-voltage cable along a road right-of-way and the impacts of the same installation along the Long Island Railroad ("LIRR") right-of-way. The LIRR path is already the site of train traffic and frequent maintenance work, and installation of the cable will have minimal impact (as the Applicant often argues, albeit incorrectly as applied to the Beach Lane route). The LIRR right-of-way is easily characterized as an existing industrial

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<sup>95</sup> Order, pp. 103-104.

<sup>96</sup> *Id.* at 103.

<sup>97</sup> *Id.* at 103-104.

<sup>98</sup> PSL § 122(1)(e).



corridor. In contrast, installation of a high-voltage cable on a quiet, residential street such as Beach Lane will have significant detrimental impacts to residents. The failure to distinguish between the impact from roads and rail lines leads the Commission to ignore the advantage of leveraging rail lines to avoid an impact on residential areas.

The mistake of conflating the impacts from roads and rail lines leads the Commission to overstate the impact CPW's Atlantic Avenue route has on "additional amounts of residential areas."<sup>99</sup> Most of this "additional amount[]" is confined to residences located along the LIRR right-of-way. These residences are already impacted by train traffic, which is significantly more impactful than a buried high-voltage transmission cable, as well as existing electricity infrastructure.<sup>100</sup> As such, the installation of the SFEC would hardly constitute an additional impact. In comparison, the Beach Lane route creates two miles of new transmission corridor along narrow lanes and roads that pass through undisturbed residential neighborhoods.<sup>101</sup> Construction along an existing rail line, with electric transmission lines already sited, that crosses residential properties simply cannot be compared to the installation of a brand new high-voltage cable along the lanes and roads in the Wainscott neighborhoods.

Lastly, as mentioned above, the Order neglects to consider CPW's revised proposal to interconnect its Atlantic Avenue and Hither Hills routes directly into the East Hampton substation. The Commission finds that "interconnecting at the Buell Substation is ... not a viable option" due to "lack of space and underground ROW" and "reliability and safety concerns."<sup>102</sup> Given some of the concerns raised by the Applicant and LIPA regarding interconnection at Buell substation<sup>103</sup>,

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<sup>99</sup> Order, p. 73.

<sup>100</sup> A similar analysis can be applied to the East Hampton Middle School as it already abuts the LIRR right-of-way.

<sup>101</sup> Pre-Filed Direct Testimony of John A. Conrad, at 10 (DMM 182, 10-9-20).

<sup>102</sup> Order, p. 104.

<sup>103</sup> The East Hampton substation is only approximately 460 feet from the Buell substation. Ex. 450.

CPW modified its proposal and determined both its routes could interconnect directly into the East Hampton substation.<sup>104</sup> It was error for the Commission to ignore CPW’s modification and instead consider CPW’s routes under the assumption they can only interconnect into the Buell substation.<sup>105</sup>

*vii. The Order Fails to Provide Reasoning for How the Project Represents the Minimum Adverse Environmental Impact*

PSL §§ 126(1)(b) and (c)<sup>106</sup> specify that the Commission must “find and determine” the “nature of the probable environmental impact” and that the “facility represents the minimum adverse environmental impact.” The Order includes a subsection in the “Discussion” section titled “Nature of Environmental Impacts.” Instead of discussing the potential impacts of the project on the environment, as might be expected in this “Discussion” section, the Order lists the categories of proposed Certificate Conditions in the Joint Proposal and concludes that these “will ensure that construction and operation of the project will avoid or minimize adverse impacts to the environment and to active farming operations to the extent practicable.”<sup>107</sup> Notably, the Order does not discuss or analyze the substantive provisions of the proposed Certificate Conditions.<sup>108</sup> There is no analysis of the potential environmental impacts of the project or whether the proposed Certificate Conditions are sufficient to mitigate the impacts.<sup>109</sup> The lack of pertinent information in this section of the Order does not allow the Commission to “find and determine” the “nature of the probable environmental impact” and constitutes error.

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<sup>104</sup> Post-Hearing Reply Brief of Citizens for the Preservation of Wainscott, Inc. (DMM 265, 2-4-21).

<sup>105</sup> See Order, p. 104.

<sup>106</sup> PSL § 126(1)(c). The Commission must determine “that the facility represents the minimum adverse environmental impact, considering the state of available technology and the nature and economics of the various alternatives, and other pertinent considerations including but not limited to, the effect on agricultural lands, wetlands, parklands and river corridors traversed.”

<sup>107</sup> Order, p. 101.

<sup>108</sup> Id.

<sup>109</sup> Id.

The Order addresses impacts to Wainscott Beach and Beach Lane in a one-paragraph subsection.<sup>110</sup> The Order states that impacts will be minimized through “comprehensive soil and groundwater testing and handling procedures, extensive measures to minimize and avoid construction and operation noise impacts, and extensive Town and community notice, construction monitoring requirements, and limited, seasonal construction windows.”<sup>111</sup> While in theory some of these measures could reduce impacts to Wainscott Beach and Beach Lane, the Commission fails to explain how the mitigation will be accomplished.<sup>112</sup> The Order does not specify how the “groundwater testing and handling procedures” will mitigate impacts, in part because the Applicant has not yet informed the Commission regarding its proposed procedures.<sup>113</sup> The Commission again relies on the assurances of the Applicant regarding the impacts of the project.<sup>114</sup>

The next subsection in the Order addresses noise impacts from the Project.<sup>115</sup> Despite voluminous evidence in the record on this issue, and concerns voiced by CPW and other local residents, the Commission only devotes two sentences to noise impacts.<sup>116</sup> The Commission states that “proper siting, construction techniques and noise mitigation measures including mufflers and walls”<sup>117</sup> will help minimize noise related impacts from the Project. The Commission does not reveal which construction techniques will reduce noise impacts and how those techniques will be utilized.<sup>118</sup> The Commission also notes that the Joint Proposal requires “robust sound monitoring

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<sup>110</sup> Presumably this section potentially addresses PSL § 126(1)(b) or (c), but it is not clear.

<sup>111</sup> Order, p. 101.

<sup>112</sup> Id.

<sup>113</sup> Id. While it is understood that Certificate Conditions and appendices to a Joint Proposal often require a certain number of plans as part of an Environmental Management and Construction Plan, the sheer volume of plans required under this Certificate is staggering and virtually doubles the number of such plans seen in a typical Article VII Joint Proposal.

<sup>114</sup> See id.

<sup>115</sup> Again, this section potentially addresses PSL 126(1)(b) or (c), but the Order is not clear.

<sup>116</sup> Order, p. 101.

<sup>117</sup> Id.

<sup>118</sup> Id.

during construction and operation.”<sup>119</sup> As stated earlier, the inclusion of certain provisions in the Joint Proposal does not dispose of the Commission’s duty to “find and determine” each element of PSL § 126(1).

One of the most polarizing and potentially catastrophic issues for local citizens debated during the Article VII process has been the presence of PFAS along the proposed cable route. There is extensive evidence in the record documenting the detrimental impacts to environmental and human health from exposure to PFAS. Additionally, the record contains extensive evidence showing how the Applicant’s preferred Beach Lane route runs directly through potential PFAS contamination.<sup>120</sup> The Applicant, to date, has largely ignored the PFAS issue and has repeatedly assured the Commission that there is no danger of PFAS exacerbation.<sup>121</sup> This is especially difficult to believe because the Applicant has not yet conducted a full groundwater and soil sampling analysis to determine the full extent of the PFAS contamination along the Beach Lane route.<sup>122</sup> Despite the lack of evidence supporting the Applicant’s position that the Project will not exacerbate existing PFAS contamination, the Commission agrees with the Applicant on the issue.<sup>123</sup> The Commission, in a four sentence “discussion,” provides no explanation for why it chose to ignore the evidence in the record supporting a thorough investigation of PFAS contamination prior to certification of the Project.<sup>124</sup> The Commission repeats that there will be

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<sup>119</sup> Id.

<sup>120</sup> The Beach Lane route entails trenching on Wainscott Northwest Road, adjacent to the Wainscott Sand & Gravel Site and just south of the East Hampton Airport. Both of these sites are known to be contaminated with PFAS (Hearing Transcript, at 17-18), and the Airport is a State Superfund Site.

<sup>121</sup> The Application did not even address the issue of potential PFAS contamination (see Ex. 18), though it was well known at the time the Application was filed. The East Hampton Airport, which is near the preferred cable route is a State Superfund Site (Site 152250) and has been listed as such well before the current Application was filed. Indeed, the issue was not acknowledged by the Applicant until brought up by intervenor, Simon Kinsella.

<sup>122</sup> Note that the Applicant conducted soil and groundwater sampling immediately after conclusion of the Evidentiary Hearing. The Applicant has not disclosed the results of the sampling. Intervenor Simon Kinsella filed a motion to reopen the record to include results of the sampling, which CPW joined, but as with almost every motion made by CPW or Mr. Kinsella, this motion was denied.

<sup>123</sup> Order, p. 102.

<sup>124</sup> Id.

“measures to ensure that the [contaminated] material is handled and disposed of properly,”<sup>125</sup> however, there is no information about how these measures will be developed and if they will sufficiently control all contamination.<sup>126</sup> Also, and more importantly, particularly when it comes to PFAS contamination of drinking water wells and impacting the environment, how can a conclusion be made that impacts will be minimized, even with a Plan, if the record were devoid of a complete evidentiary picture of what those impacts constitute? Initially, the only information in the record presented about this potential risk was included at the insistence of an intervenor over the objection of the Applicant.<sup>127</sup>

viii. *The Order Fails to Determine Compliance with State and Local Laws*

In its discussion of applicable state and local laws the Commission yet again commits error by failing to properly support its findings with evidence in the record.<sup>128</sup> PSL Section 126(1)(g) provides that one of the Findings the Commission must make is as follows:

[T]hat the location of the facility conforms to applicable state and local laws and regulations issued thereunder, all of which shall be binding upon the commission, except that the commission may refuse to apply and local ordinance, law, resolution or other action or any regulation issued thereunder or any local standard or requirement which would otherwise be applicable if it finds as applied to the proposed facility such is unreasonable restrictive in view of the existing technology, or of factors of cost or economics, of the news of consumers whether located inside or outside the municipality.

The Commission indicates it agrees with the Applicant that the Project will comply with local laws as identified by the Applicant.<sup>129</sup> The Commission further grants all local law waivers

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<sup>125</sup> Id.

<sup>126</sup> See id.

<sup>127</sup> Ruling on Motion (DMM 220, 11-24-20) (denying the Applicant’s motion to strike intervenor Simon Kinsella’s testimony regarding PFAS).

<sup>128</sup> Order, p. 105.

<sup>129</sup> Presumably, the Commission is referring to Exhibit 7 of the Applicant (Ex. 43 of the Evidentiary Record).

requested by the Applicant.<sup>130</sup> However, there is absolutely no basis in the record for all of these local law waivers. A full discussion (sometimes any discussion) of why the waivers are necessary or even what the Applicant requests the Commission waive is lacking in the Order and the record.<sup>131</sup> Moreover, during the Hearing, the Applicant admitted it did not include all necessary waivers or the rationale for such waivers in Exhibit 7 to its Application.<sup>132</sup> Given the Applicant's admission and the failure of the Applicant provide its rationale as to why certain local laws should be waived, it was an error of fact and law for the Commission to determine compliance.<sup>133</sup>

The applicability of the New York State Fire and Building Code has been debated by the parties throughout this proceeding. As noted in CPW's Post-Hearing Brief and elsewhere in the record,<sup>134</sup> the Applicant plans to deviate from the requirements of the Building and Fire Code despite its failure to request waivers of the Codes in Exhibit 7 to its Application.<sup>135</sup> Specifically, the Project will not be able to comply with Sections 3301.2 and 3306.1 of the Building Code.<sup>136</sup> The Applicant argues that the Building Code is inapplicable to the Project because the Project does not fall under the definition of a "building"<sup>137</sup> pursuant to Building Code 202.<sup>138</sup> The Applicant further asserts that the Code is inapplicable because "the SFEC does not fall into any of the enumerated categories" found in Chapter 3 of the Building Code.<sup>139</sup> CPW renews its assertion that the Building Code is applicable and that the Project falls under "Utility and Miscellaneous Group

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<sup>130</sup> Order, p. 106.

<sup>131</sup> See Order.

<sup>132</sup> Transcript, at. 494-495. The Applicant admitted it did not request a waiver of the local law setting a 10-foot maximum height for walls, as applicable to the proposed noise walls along Beach Lane.

<sup>133</sup> See Order.

<sup>134</sup> Pre-Filed Direct Testimony of Gary Beck, at 4-7 (DMM 183, 10-9-20).

<sup>135</sup> Ex. 43.

<sup>136</sup> See Pre-Filed Direct Testimony of Gary Beck, at 4-7 (DMM 183, 10-9-20).

<sup>137</sup> The Building Code defines a building as "[a]ny structure utilized or intended for supporting or shelter any occupancy."

<sup>138</sup> South Fork Wind, LLC Initial Brief Supporting the Issuance of a Certificate of Environmental Compatibility and Public Need, p. 60 (DMM 245 1-20-21).

<sup>139</sup> A South Fork Wind, LLC Initial Brief Supporting the Issuance of a Certificate of Environmental Compatibility and Public Need, p. 60 (DMM 245 1-20-21).

U” of Section 312 (Chapter 3). Group U includes a list of enumerated structures, including communication equipment structures, but also allows for inclusion of structures not on the list.<sup>140</sup> Unsurprisingly, the Applicant does not include references to interpretations of the Building Code supporting its position.<sup>141</sup> And, the Commission did not perform any independent analysis of these statutory interpretation issues.

The Commission agrees with the Applicant and concludes that the “portions of the Fire Code referred to in CPW’s arguments are not applicable to the Project.”<sup>142</sup> The Commission’s conclusion, however, fails to address the provision of the Fire code relating to emergency vehicle access which is applicable to the Project. The Commission does not explain what relevant law or portions of the record it relied upon when making this decision.<sup>143</sup> The applicability of the provisions of the Fire Code relating to emergency access has not been disputed and testimony by CPW’s expert that the Project would violate emergency fire code provisions are uncontested. While the Applicant asserts that it will comply with the provisions of the Fire code<sup>144</sup>, presumably including with regard to emergency vehicle access, there is nothing in the record to demonstrate how it will do so. Indeed, given that “some temporary closure of non-NYSDOT [like Beach Lane] roads may be required,”<sup>145</sup> completely blocking Beach Lane and other local roads would present a clear safety issue and block emergency vehicles from accessing homes along the proposed cable

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<sup>140</sup> Section 312 states, “Group U shall include, but not be limited to the follow ...”

<sup>141</sup> In similar circumstances under the Labor Law, courts have found that telephone poles and the attached hardware, cable, and support systems do constitute structures (see Lewis-Moors v Contel of New York, Inc., 78 NY2d 942, 943 (1991)). Other cases, interpreting the definition of structure under 9 NYCRR 606.3, found that both a swimming pool and a temporary greenhouse constituted structures (Tarquini v Town of Aurora, 77 NY2d 354, 360 (1991); People v Camardella, 192 Misc. 2d 513, 516 (City Ct. 2002)).

<sup>142</sup> The Commission makes no distinction between the provisions of the Building Code and the Fire Code. Order, p. 105. In fact, the Order does not even cite to the relevant provisions of the Building and Fire Code. Strict compliance with the Building and Fire Code is vital to ensure the safety of residents of Beach Lane and Wainscott.

<sup>143</sup> Id.

<sup>144</sup> Order, p. 60 (citing Applicant’s Brief, pp. 60-63).

<sup>145</sup> Order, p. 17.

route. This safety issue, which arises because of the extreme narrowness of Beach Lane, is simply unaddressed by the Commission's Order, and it was error to either ignore the issue or somehow minimize.<sup>146</sup> The Commission wholly neglects its duty to support its determination that the Project conforms to applicable state and local laws and regulations with evidence in the record and therefore a Rehearing is necessary.<sup>147</sup>

#### **D. The Order Improperly Relies on Stale Data and Refuses to Acknowledge Updated Information**

On January 13, 2021, Intervenor Simon Kinsella ("Mr. Kinsella") filed a motion to reopen the record to allow for consideration of groundwater and soil sampling conducted by the Applicant following the conclusion of the hearing.<sup>148</sup> CPW filed a response in support of Mr. Kinsella's motion to reopen the record.<sup>149</sup> On February 10, 2021, Administrative Law Judge Anthony Belsito (the "ALJ") denied Mr. Kinsella's motion to reopen the record agreeing with the Applicant that "the record regarding the potential impact of the Project on PFAS and other possible contaminants is extensive[] [and] complete". In its Order, the Commission upholds the ALJ's denial of Mr. Kinsella's motion stating the "record is complete and [] sufficient to make the findings required to grant the Certificate." The Commission notes that the "volume of relevant information contained in the record is beyond dispute,"<sup>150</sup> however, despite the voluminous record, the ALJ and Commission chose to exclude highly relevant data from the groundwater and soil sampling which could have resulted in a more informed analysis and the ability to reach the findings required under Section 126 of the PSL. Indeed, there is substantial evidence already in the record that PFAS

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<sup>146</sup> The Commission ignores the possibility that construction could last for 30 months (Certificate Condition 9) and also totally ignores the fact that the required Decommissioning (Certificate Condition 193), which is discussed in the Order (pp. 58-59) will also have an impact.

<sup>147</sup> PSL § 126(1)(g).

<sup>148</sup> Motion to Reopen Record (DMM 240, 1-13-21).

<sup>149</sup> CPW Response to Motion to Reopen Record (DMM 253, 1-21-21).

<sup>150</sup> Order, p. 98.



contamination, which the NYSDEC in every other corner of the State has expressed significant concern about, may have a significant adverse health impact (and not just a temporary impact) to nearby residents.<sup>151</sup> Unfortunately, ignoring this real risk, both the ALJ and Commission rejected Mr. Kinsella and CPW's arguments that the results from the sampling scheduled to occur immediately following the conclusion of the Hearing should not be introduced into the record.<sup>152</sup> Given the potential public health impacts from PFAS contamination and the obligation of the Commission to determine the nature of the probable environmental impacts, it was error to deny Mr. Kinsella's efforts to reopen the record.<sup>153</sup> The Applicant's purposeful lack of transparency for the sake of expediency was successful. Due to the Commission's refusal to consider the groundwater and soil sampling data for the Beach Lane route, the Order is based on stale and incomplete data. A Rehearing is necessary so that the Commission can fully consider and analyze all relevant data, including the results of the groundwater and soil sampling that took place following conclusion of the Hearing.

#### **IV. CONCLUSION**

The Order contains numerous errors of law and fact which require Rehearing, and upon Rehearing, reversal of the decision to approve the Joint Proposal and grant a CECPN. For all the

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<sup>151</sup> Exs. 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 338, 339, 380, 381, 388, 392, 395, 396, 400, 401, 404, 406, 407; Transcript 18-191.

<sup>152</sup> See Motion to Reopen Record (DMM 240, 1-13-21); see also CPW Response to Motion to Reopen Record (DMM 253, 1-21-21).

<sup>153</sup> See Matter of Town of Northumberland v Sterman, 246 AD2d 729 (3d Dept 1998) ("Inasmuch as there was every indication that the proposed testing would have produced relevant, probative evidence bearing on an adjudicable issue ... [the] determination [to deny request for additional testing] cannot be said to have had a sound basis in reason").

foregoing reasons, CPW respectfully requests that the Commission grant a Rehearing of this matter, and upon such Rehearing, deny the Application for a CECPN.

Respectfully submitted,



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