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.

REPLY BRIEF
OF
SIMON V. KINSELLA

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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 Reply Brief.

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A. Procedural History

On September 14, 2018, then Deepwater Wind South Fork LLC (the "Applicant") filed its Application for a Certificate pursuant to PSL § 122 seeking to construct underground high voltage transmission infrastructure through a residential neighborhood and construct a new substation that is dangerously close to family homes. At this time, it was public knowledge that hazardous waste as defined in New York State Law,[1] specifically, perfluorooctanoic acid ("PFOA") and perfluorooctane sulfonate ("PFOS") was suspected of having contaminated soil and groundwater upgradient and within five feet of the Applicant's proposed construction corridor.[2] The Applicant denied the existence of poly-/perfluoroalkyl substances ("PFAS") contamination

On November 30, 2018, the New York State Department of Environmental Conservation ("NYSDEC") released Site Characterization Report of East Hampton Airport, citing extensive PFAS contamination exceeding US Environmental Protection Agency ("USEPA") Health Advisory Levels within five hundred feet of the Applicant's proposed construction corridor.[3]

On November 15, 2019, the Applicant was presented with documents and source references that show extensive of PFAS contamination on all sides for approximately two miles of its proposed construction corridor. In response, the Applicant objected "on the grounds that the information is inaccurate and not based in fact."[4]

On October 30, 2020, for the first time, the Applicant *was forced to acknowledge* existing of poly-/perfluoroalkyl substances ("PFAS") contamination. It took the Applicant two years

[1] DEC added PFOA-acid to New York State's list of hazardous substances (6 NYCRR Section 597.3) on January 27, 2016, and added PFOA-salt, PFOS-acid, and PFOS-salt to the list on April 25, 2016, making them hazardous wastes as defined by ECL Article 27, Title 13.

[2] On October 11, 2018, Suffolk County Department of Health Services issued a Water Quality Advisory for Private-Well Owners in Area of Wainscott that reads: "Since the East Hampton Airport indicated that it had used or stored products that may have contained PFOS and PFOA, the state requested that the Suffolk County Department of Health Services (SCDHS) sample drinking water supplies near the airport." East Hampton Airport is upgradient and adjacent to the Applicant's proposed construction corridor of which approximately two miles is impacted by poly-/perfluoroalkyl substances ("PFAS") contamination.

[3] Case 18-T-0604: DMM 199-200 - SFW Exhibit___(OWRP-2) - East Hampton Airport Site Characterization.

[4] Case 18-T-0604: DMM 158 – Exhibit 42 - DWSF responses to Information Request Kinsella-1-10, 21, 35 (at p. 1 first paragraph) citing Information Request Kinsella-1 of November 15, 2019: "Deepwater Wind South Fork, LLC ("DWSF") objects to the information asserted as part of the "Background" section of Information Request Set Kinsella-1 (specifically, pages 1-3) on the grounds that the information is inaccurate and not based in fact."

before it would recognize extensive contamination of soil and groundwater upgradient and within five hundred feet of its proposed construction corridor.[5]

Disturbingly, NYSDEC turned a blind eye to the Applicant's willful ignorance of PFAS contamination in the full knowledge of such PFAS contamination as detailed in the Site Characterization Report of East Hampton Airport (of November 30, 2018).

On November 5, 2020, the Applicant filed Motion to Strike Testimony. The Applicant sought to exclude from the records my testimony as a whole and has not addressed individual questions and answers. My testimony was submitted in the questions-and-answers form as required by 16 NYCRR § 4.5(3)(i) and as requested by the presiding officer, Administrative Law Judge Belsito.

On November 10, 2020, Administrative Law Judge Belsito, Mr. Leonard Singer representing the Applicant, and myself held a brief conference call to discuss a request for an extension. During the call, I requested an extra five (5) business days. The presiding officer, ALJ Belsito, denied the request on the grounds that "such a submission would amount to submission of additional testimony which is inappropriate at this stage of the proceeding." ALJ Belsito granted me a three-day extension (over the weekend) until Monday, November 16, to file my Response to Applicant's Motion to Strike Testimony.

On November 24, 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.[6] My entire Testimony Part 2 – Public Interest, Need & Price was erased from the record, including 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).

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[5] Case 18-T-0604: DMM 199-200 SFW Exhibit___(OWRP-2) - East Hampton Airport Site Characterization Report
[6] Case 18-T-0604: Ruling on Motion to Strick Testimony of Kinsella, dated November 24, 2020 (at p. 7)

During the Article VII proceeding, the South Fork request for proposals ("RFP") issued in 2015 and its subsequent award of a power purchase agreement ("PPA") to the Applicant in 2017 have been consistently ruled to be "beyond the scope of this Article VII proceeding." [7]

On December 23, 2020 (after the evidentiary hearing had concluded), the South Fork RFP and its subsequent PPA were admitted into the evidentiary record.[8]

On January 13, 2021, I filed Motion to Reopen the Record: "so that I may 'be afforded reasonable opportunity to present evidence and examine and cross-examine witnesses'[9] that has been denied me … [and] to add to the presently incomplete evidentiary record in this proceeding material, admissible factual evidence." [10]

On January 21, 2021, intervenor-party Citizens for the Preservation of Wainscott, Inc. filed Response to Motion to Reopen Record in support of Motion to Reopen the Record. The Applicant filed Response to Kinsella Motion to Reopen the Record, and LIPA filed LIPA's Response to Kinsella Motion to Reopen Record, both opposing the motion.

On January 29, 2021, I filed Supplemental Information to Motion to Reopen the Record. My latter submission contained information that came to light *after* I had submitted to NYSDPS my Motion to Reopen the Record.

The Motion to Reopen the Record and Supplemental Information to Motion to Reopen the Record filed by me both remain pending.

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[7] Case 18-T-0604: Ruling by ALJ Belsito denying Motion by Kinsella to Compel PSEG Long Island to respond to a request for information request pertaining to the South Fork RFP and its subsequent PPA award to the Applicant (October 27, 2020).

[8] Case 18-T-0604: Ruling Admitting Evidence by ALJ Belsito (December 23, 2020).

[9] 16 NYCRR § 4.5 (a)

[10] Motion by Simon V. Kinsella to Reopen the Record, January 13, 2021 (at p. 1)

As detailed in my Motion to Reopen the Record and subsequent Supplemental Information, the evidentiary record in the proceeding does *not* include the following –

1. Evidence, examination, and cross-examination of the South Fork RFP and its subsequent PPA regarding issues specifically related to "the basis of the need for the facility" and whether "the facility will serve the public interest"; [11]

2. The total amount of energy that the Applicant plans to deliver via its proposed transmission facility, including an (undisclosed) Amendment to the PPA and the total price to be passed onto ratepayers, both of which go to "the basis of the need for the facility" and whether "the facility will serve the public interest[;]" [12] and

3. Soil and groundwater contamination test results from thirty-four (34) samples that are part of an environmental survey the Applicant commenced *soon after* the evidentiary hearing had concluded, thereby avoiding having to include evidence on "the nature of the probable environmental impact" and whether or not "the facility represents the minimum adverse environmental impact" in the record.[13]

4. Information recently disclosed by LIPA on "the weighted probability that the resource is not available at the time it is needed." [14] In reference to the reliability of the Applicant to deliver energy, one report provided by LIPA states that "wind alone has a very small effective capacity due to the distinct statistical possibility that it may have very low available power output at the time of a peak-period contingency." [15] Another report provided by LIPA concluded that the earlier analysis "is not believed to be excessively conservative" because "it assumed no correlation between high load and persistent low-wind conditions. Initial analysis of temperature/wind correlation in the Block Island data provided by DWW

[11] NY Public Service Law § 126 (1) (a) and (h)
[12] *Ibid.*
[13] *Id.* (b) and (c)

[14] Exhibit 1 - WESC Report: Calculation of Effective Forced outage Rate of Offshore Wind (DWW100) and Offshore Wind and Battery (at p. 1, third paragraph)

[15] *Id.* (at p. 2, last paragraph)

indicates that such a correlation may exist."[16] Yet another report from LIPA concludes "that Deepwater Wind's offshore wind project at P90 probability level would have a May through September Peak Period unavailability … of 29.9%" and that "[w]ithout the [33 MW] battery, shortfalls occur on 77 of the 152 Peak Period days, or about 50% of the days" and "[t]here are periods of up to 4 consecutive days where Wind+Battery [33 MW] shortfalls are occurring in August and September." [17]

The evidence provided by LIPA reinforces the evidence contained within my Testimony Part 2 – Public Interest, Need & Price that was struck from the record.[18]

5. Information recently disclosed by LIPA that shows that the Applicant's proposed facility will *not* defer the need for transmission upgrades; and

6. Information recently disclosed by LIPA that shows that the Applicant's proposed facility is one billion dollars more expensive than an existing viable alternative, to buy the same renewable energy from Sunrise Wind or combine South Fork Wind with Sunrise Wind (see Motion to Reopen the Record).

I respectfully request that my Motion to Reopen the Record and Supplemental Information to Motion to Reopen the Record (filed on January 13 and 29, 2021) be incorporated by reference into my Reply Brief as they go directly to NYSDPS Staff's claim in its Initial Brief that the "Joint Proposal was arrived at fairly and in full compliance with all of the Commission's rules and guidelines on settlement." [19]

[16] Exhibit 2 - WESC SF RFP Portfolio Load Cycle Analysis (at pp. 3-4)
[17] Exhibit 3 - South Fork RFP Deepwater Offshore Wind Proposal
[18] Case 18-T-0604: Ruling on Motion to Strick Testimony of Kinsella, dated November 24, 2020 (at p. 7)
[19] Department of Public Service Staff's Initial Brief (at p. 15)

NYSDPS Staff write –

> In deciding whether to authorize the construction and operation of the Project here, the Commission must determine (among other things, as noted above) whether to make the "minimum adverse environmental impact" and "public interest, convenience and necessity" findings. These findings necessitate the weighing and balancing of adverse environmental impact and public interest with other considerations, including the state of available technology, the nature and economics of the various alternatives, the public necessity for the facility and other pertinent considerations addressed in the Joint Proposal and evidence proffered for the record. Based on the Record before the Commission here, each of these findings and determinations can and should be made [emphasis added].[20]

"If the record as a whole … does not support the required statutory findings, a certificate may not be issued, and it may be concluded that the Applicant has not met its burden of proof [emphasis added]." [21] Nevertheless, the Commission is statutorily compelled pursuant to Public Service Law, Section 126 (1) to make a determination on whether or not to grant the Applicant a Certificate of Environmental Compatibility and Public Need, but in the instant proceeding, it cannot "render a decision upon the record" [22] where that record is grossly insufficient and incomplete.

Protection of ratepayers

NYSDP Staff Initial Brief states that the "Joint Proposal was arrived at fairly and in full compliance with all of the Commission's rules and guidelines on settlement"[23] citing the Procedural Guidelines for Settlement that "set forth the following criteria for deciding whether a

[20] Department of Public Service Staff's Initial Brief (at p. 18)

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

[22] NY Public Service Law § 126 (1)

[23] Cases 90-M-0255 and 92-M-0138, Settlement and Stipulation Agreement Proceeding, Opinion, Order and Resolution Adopting Settlement Procedures and Guidelines (issued March 24, 1992) (Opinion 92-2).

settlement is in the public interest [that includes] … [a] desirable settlement should strive for a balance among (1) protection of the ratepayers [emphasis added.]" [24]

NYSDPS Staff Panel made the same (false) claim in DPS Staff Panel Testimony.[25] In response, I submitted the following testimony that NYSDPS has wholly ignored –

> Specifically, DPS Staff Panel quoted NYS PSC Opinion: that "a desirable settlement should strive for a balance among (1) protection of the ratepayers, (2) fairness to investors, and (3) the long term viability of the utility[.]" DPS Staff Panel could not have assessed whether or not ratepayers were protected without knowing the price ratepayers would have to pay for the Applicant's delivered energy. The Applicant has not disclosed (within this proceeding) the price for its delivered energy pursuant to the executed PPA (for 90 megawatts) and has not disclosed (within this proceeding, publicly or otherwise) other than to PSEG Long Island, Long Island Power Authority ("LIPA"), Office of State Comptroller ("OSC") and Office of the Attorney General ("OAG") the price of a PPA Amendment that "was mutually executed recently" according to PSEG Long Island's supplemental response to Information Request SK #29 dated October 8, 2020 (see Exhibit 3-1). DPS Staff Panel would neither have known the Applicant's price table for delivered energy pursuant to the PPA (90 megawatts) nor for delivered energy pursuant to a PPA Amendment for additional capacity (including the actual amount of additional capacity). The Application is for delivered energy from the Applicant's proposed offshore wind power-generation facility that, according to the Article VII application, could be as much as 180 megawatts. Until a PPA Amendment is disclosed, the total amount of energy to be delivered by the Applicant's proposed transmission facility is unknown and so is the final price for the delivered energy which are both dependent upon the PPA and any PPA Amendment. Without knowing the final capacity and price, DPS Staff Panel could not possibly have known whether or not ratepayers are protected and, therefore, could not possibly have known whether or not the Joint Proposal was "a balance among (1) protection of the ratepayers, (2) fairness to investors, and (3) the long term viability of the utility[.]" [26]

[24] Department of Public Service Staff's Initial Brief (at p. 15)
[25] Prepared Testimony of Department of Public Service Staff Panel filed October 9, 2020 (at p. 25, lines 13-21 and at p. 26, lines 1-8)
[26] Testimony by Simon Kinsella in Rebuttal filed on October 30, 2020 (at pp. 6-8)

Furthermore, during cross-examination, DPS Staff Panel admitted that it had *not* considered ratepayers as follow –

> *There's no testimony in this, in our document, to the best of my recollection that addresses cost to rate payers.*[27]

PFAS Contamination

NYSDP Staff Initial Brief admits that "Mr. Kinsella's testimonies and exhibits establish the presence of PFAS contaminated soils and groundwater proximal to portions of the proposed SFEC-onshore route, particularly the portion of the upland construction corridor along the LIRR ROW and downgradient of the source of the PFAS contamination at the East Hampton airport[.]"[28] However, NYSDPS Staff fails to take such contamination into account when considering alternatives to the Applicant's proposed transmission facility and whether or not the applicant's "facility represents the minimum adverse environmental impact[.]" [29]

Further, in its Initial Brief, NYSDPS Staff asserts that: "Mr. Kinsella fails to demonstrate why the potential presence of contaminated groundwater and/or soils should preclude construction and operation of the Facility" ignoring that "the Applicant has the burden of proving all required statutory findings under PSL §122"[30] and has had opportunity to prove "the nature of the probable environmental impact"[31] and that its "facility represents the minimum adverse environmental impact"[32] with regards to soil and water contamination, but has failed to sustain its burden of proof. The burden rests with the Applicant, not me. As detailed in my Motion to Reopen the Record, the Applicant has failed to assure the Commission that its facility will neither exacerbate known PFAS contamination nor pose a risk to public health and the environment.

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

[28] Department of Public Service Staff's Initial Brief (at p. 34)

[29] NY Public Service Law § 126 (1) (c)

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

[31] NY Public Service Law § 126 (1) (a)

[32] *Id.* § 126 (1) (b)

CONCLUSION

Pursuant to Public Service Law § 126 (1): "The commission shall render a decision upon the record [and] ... may not grant a certificate … unless it shall find and determine … the basis of the need for the facility … 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 [emphasis added.]" [33]

Should the Commission chose to exclude from the evidentiary record information provided by LIPA in its recent response to my FOIL request, the Commission cannot "render a decision upon the record[.]" [34]

LIPA's new information shows that Sunrise Wind is a viable alternative to South Fork Wind and that it is achievable to deliver energy from farther western Long Island.

The Sunrise Wind alternative would avoid unnecessary environmental impacts such as disturbing and exacerbating existing PFAS contamination above a sole-source aquifer and within a residential neighborhood along the Applicant's proposed construction corridor

Sunrise Wind would avoid laying sixty miles of submarine cable parallel to the South Fork's southern shoreline and avoid horizontal directional drilling (HDD) beneath the beach off Beach Lane that could destabilize the shoreline. Sunrise Wind would avoid laying a new 138-kilovolt high-voltage cable within feet of where families play and walk to and from the beach and avoid installing yet more electrical infrastructure and equipment in what is already an extremely dangerous substation within 100 feet of homes within a residential neighborhood the

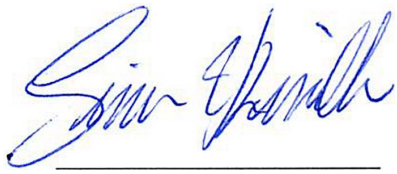
[33] Public Service Law § 126 (1) (c)
[34] *Id.* § 126 (1)

accumulative effects of which have not been considered within this proceeding.

Should relevant, admissible factual evidence be excluded from the record, the Commission will be denied the opportunity of taking a hard look at issues of need, probable environmental impact, and public interest that are necessary for it to make a determination under 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." [35]

For the aforementioned reasons, I respectfully request that this supplemental information be included by reference and considered concurrently with my earlier Motion to Reopen the Record submitted to the Department of Public Service on January 13, 2021; and that my Motion to Reopen the Record be granted in full.

Respectfully submitted,



Simon V. Kinsella
Dated: February 3, 2021
Wainscott, New York

[35] U.S. Const. Amend. XIV; N.Y. Const. Art. I, § 6.