

**STATE OF NEW YORK  
PUBLIC SERVICE COMMISSION**

---

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

---

Case No. 18-T-0604

**RESPONSE OF DAVID GRUBER TO  
MOTION OF SOUTH FORK WIND LLC  
TO STRIKE ENTIRE TESTIMONY OF SIMON KINSELLA**

I am an intervening party in the above-caption proceeding.

On November 5, 2020, South Fork Wind LLC (formerly Deepwater Wind South Fork LLC) (the "Applicant") served a motion to strike the testimony of Simon Kinsella in its entirety. On November 11, 2020, Administrative Law Judge Belsito invited (via email) other parties who "wish to respond to the Applicant's motion ... [to] do so by close of business on November 16, 2020." Within is my response to the Applicant's Motion to Strike Testimony.

I object to the Applicant's Motion to Strike Testimony as contrary to both the Public Service Law pursuant to which this proceeding is conducted and to the public interest that law is intended to protect.

## I. APPLICANT'S FIRST OBJECTION TO KINSELLA'S TESTIMONY

Applicant's objection to testimony and evidence introduced by testimony regarding the economics of the subject project on the grounds that the 2015 RFP, the PPA, and PPA amendment are themselves beyond the scope of this proceeding. In so claiming, the Applicant misstates the law and the facts. In particular, the Applicant argues that, "The RFP process was approved by the LIPA Board in January 2017 and the PPA was approved by the New York State Comptroller's Office and the New York State Attorney General prior to becoming effective. Therefore, the time for challenging those determinations has long passed."

Whatever determinations the State Comptroller and the Attorney General may have made regarding the RFP and the power purchase agreement, they are not a substitute for this proceeding and do not defease the jurisdiction of the Public Service Commission pursuant to Article VII of the Public Service Law. The Commission is required by the statute in order to grant the certificate of environmental compatibility and public need sought by the Applicant specifically to find, "(c) that the facility represents the minimum adverse environmental impact considering the state of available technology and the nature and *economics* [emphasis added] of the various alternatives . . . ." NY CLS PSL § 126(1)(c). It is impossible for the Commission to fulfill its statutory responsibility without considering the economics of the project, particularly given that the public will bear all of its costs for 20 years.

That the Commission must consider the economics does not call into question the propriety of the RFP process or of the entering into of the PPA. It may be assumed given the approvals of the Comptroller and Attorney General that the process was itself regular. It is not, however, the job of the Comptroller or the Attorney general to consider substantively whether

the project is in the public interest given its economic and environmental impacts. That is precisely the responsibility of the Commission itself under NY CLS PSL, Art. VII. Under the guise of seeking to strike testimony, the Applicant is actually seeking to exclude from this proceeding the very essence of what the statute requires the Commission to consider and to find as a condition to issuing the certificate. All of Mr. Kinsella's testimony on the economics of the project is directly relevant to the finding that the Commission must make under PSL § 126(1)(c) and (h), "that the facility will serve the public interest." It should therefore be admitted, but in any event cannot possibly be excluded on the grounds raised by the Applicant. That would render this entire proceeding a farce by excluding evidence addressed to a necessary finding.

The Applicant's citations to other proceedings involving the ISO and purchase agreements that do not themselves fall under Art. VII are completely irrelevant, indeed disingenuous. It is not the power purchase agreement *per se* that is at issue here. It is the project in its entirety, including its economics under the explicit language of the statute, that the Commission must find meets the public need. Moreover, even if LIPA, itself a public authority, were the titular rather than the *de facto* owner of the subject project, LIPA itself would not be exempt from review of the project economics. NY CLS PBA § 1020-s provides,

1. The rates, services and practices relating to the electricity generated by facilities owned or operated by the authority [LIPA] shall not be subject to the provisions of the public service law or to regulation by, or the jurisdiction of, the public service commission, except to the extent (a) article seven of the public service law applies to the siting and operation of a major utility transmission facility as defined therein.

The legislature has specifically addressed the relationship of the authority of LIPA and Art. VII and has determined that Art. VII applies. There is no exception made for LIPA with respect to any of the provisions of §126 and the findings that the Commission must make to grant a certificate as is sought by the Applicant. *A fortiori*, the Applicant, not itself a public authority, is not in any manner exempted from the requirements of §126 by having entered into a power purchase agreement with LIPA. LIPA is not exempt from Art. VIII and cannot magically confer exemption upon the Applicant by contract. That LIPA has the authority to enter into power agreements, as cited by the Applicant, is simply irrelevant. The Applicant is not before the commission seeking approval of the PPA. This proceeding is where and when the public interest in both the environmental and economics of the project are weighed and the public interest protected by law. The fact of LIPA's RFP, the PPA and amendment, and the approvals of the Comptroller and Attorney General are in no manner to the contrary. Were the decision of LIPA, as a public authority, considered sufficient to protect the public interest in the matter of the siting of a major electric transmission facility, the legislature would not have specifically carved out Art. VII from its general exclusion of PSC jurisdiction over LIPA. If a member of the public had objected to the Comptroller or Attorney General that the economics of this project are contrary to the public interest in light of the alternatives, the Applicant undoubtedly would have objected that such matters are beyond the competence of those officers and are specifically the province of the Commission, and quite properly so.

The Applicant's citations to Your Honor's October 27, 2020 ruling are likewise inapposite. That ruling did not decide that the economics of the project are irrelevant. If it did, that ruling would be contrary to the statute and would have to be reversed. The evidence sought

as to which Your Honor ruled was with respect to non-winning submissions to the RFP and thus "not relevant to the findings and determinations required by PSL §126." To conclude thereby that the economics of the *winning* submission, for which siting approval is sought herein, are likewise "not relevant" would be absurd.

## II. APPLICANT'S SECOND OBJECTION TO KINSELLA'S TESTIMONY

The Applicant's objection to Mr. Kinsella's testimony on PFAS chemical contamination is that, "Mr. Kinsella is not an expert witness and therefore is unqualified to provide testimony regarding PFAS issues." The short response to the Applicant's lengthy argument that Mr. Kinsella is not an expert is, "So what?"

Much of Mr. Kinsella's testimony introduces into the record facts and records regarding PFAS contamination in the area where the Applicant proposes to dig. Those facts should properly be in the record of this proceeding as the Commission is required by law to consider environmental impacts that most certainly include the interaction of the project with groundwater and soil contamination known, due to investigation by the NYS Dept. of Environmental Conservation, to exist in the very area where the Applicant proposes to dig. County water mains were recently installed throughout Wainscott, at great public expense, for that very reason.

As to whether Mr. Kinsella is an expert on PFAS contamination, the Applicant misconceives the nature of this proceeding. It is not a trial, let alone a jury trial, in which an inexperienced lay jury and even a non-expert judge may be misled by testimony offered by non-experts. This is a proceeding before an expert body with specific jurisdiction over the

environmental and economic issues presented by the siting of a major electric transmission facility. Your Honor has the ability expertly to weigh Mr. Kinsella's testimony and to give it the weight, and only the weight, that Mr. Kinsella's evidence and the matters to which his testimony about the evidence draws attention deserves. Moreover, the Commission has the intellectual and professional resources of the entire government of the State of New York, including the DEC that discovered the contamination, to render assistance in evaluating PFAS risks raised by Mr. Kinsella's testimony and evidence should Your Honor find it necessary in order properly to evaluate it.

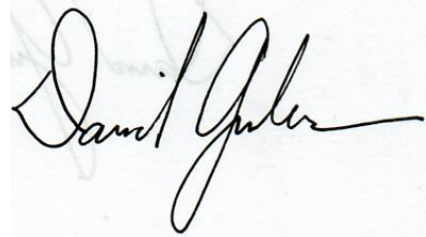
Mr. Kinsella is a member of the public, invited by law to intervene as a party to these proceedings. The Applicant, having paid hundreds of millions of dollars to acquire the South Fork Wind project before a shovel is even in the ground or its application granted, and having billions of dollars of capital at its disposal that it can to deploy in the effort to realize the value of its investment by obtaining a certificate from the Commission, seeks only to impose an intolerable burden on public participation. The Applicant would oblige members of the public to pay for lawyers (because Mr. Kinsella admittedly is not) and chemical engineers (because Mr. Kinsella is not) and to underwrite their own studies of the physical conditions in the project area rather than rely upon publicly available information. The information presented by Mr. Kinsella belongs in the record. Your Honor can then give it the weight that he thinks it deserves.

### **CONCLUSION**

All of the evidence and testimony offered by Mr. Kinsella is directly relevant to the findings that that the Commission must make under PSL §126. It therefore must be allowed into

the record of these proceedings.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "David Gruber", written over a light blue grid background.

David Gruber  
7 Hardscrabble Close  
East Hampton, NY 11937  
email: [dgruber@grubergray.com](mailto:dgruber@grubergray.com)  
(631) 786-5922

Dated: November 16, 2020  
East Hampton, New York