

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.

RULING ON MOTION

(Issued November 24, 2020)

ANTHONY BELSITO, Examiner:

On November 5, 2020, Deepwater Wind South Fork, LLC (the Applicant) moved to strike the pre-filed direct testimony of Witness Simon Kinsella regarding (i) "economic impact";¹ (ii) Kinsella's pre-filed direct testimony regarding poly-/perfluoroalkyl substances (PFAS) contamination;² and (iii) Kinsella's rebuttal testimony.³ As explained below, the motion is granted to the extent of striking Mr. Kinsella's direct "public interest testimony" and is otherwise denied.

Applicant's Motion

The Applicant notes that Mr. Kinsella's public

¹ Kinsella Direct Testimony, Part 2 Public Interest (October 9, 2020)(public interest testimony).

² Kinsella Direct Testimony, PFAS (September 9, 2020) and (October 9, 2020).

³ See Kinsella Rebuttal Testimony (October 30, 2020).

interest testimony addresses the 2015 RFP and the PPA process. The Applicant rejects Mr. Kinsella's claim that because the Application and the Joint Proposal rely on the PPA to demonstrate the need for the Project that the PPA must be considered in the Commission's review of the Project. The Applicant argues that "there is a clear distinction between the role that the PPA plays with respect to the Project and the relevance of its commercial terms to this proceeding."⁴ The Applicant argues Mr. Kinsella's testimony amounts to an inappropriate attempt to undo the RFP process and the terms of the PPA.

The Applicant argues that like the facilities in Cases 18-T-0499 and 19-T-0684,⁵ need for the Project is sufficiently established through selection in a competitive process, here the 2015 RFP. The Applicant further argues that as in those cases, this Article VII matter is not the proper venue for challenging the outcome of the competitive selection process.

The Applicant argues that Mr. Kinsella's PFAS related testimony should be stricken because Mr. Kinsella is not an expert and, therefore, not qualified to provide opinion testimony on the subject. The Applicant claims that "PFAS contamination is a highly technical and scientific topic that is not within the knowledge of an average person and is only appropriately opined upon by an expert."⁶ The Applicant also argues that Mr. Kinsella is not an appropriate fact witness because he "has no personal knowledge of the information in his testimony."⁷

⁴ Deepwater Wind Southfork's Motion (November 5, 2020).

⁵ See Case 18-T-0499, Application of NextEra Energy Transmission New York, Inc Pursuant to Article VII and Case 19-T-0684, Application of New York Transco LLC Pursuant to Article VII.

⁶ Id., p. 9.

⁷ Id.

The Applicant argues that if Mr. Kinsella's testimony is not stricken, the Applicant would be deprived from an opportunity to cross-examine Mr. Kinsella. The Applicant explains that because Mr. Kinsella is not an expert witness and has no personal knowledge of the documents used to develop his testimony, he will only be able to provide speculative opinions in response to cross-examination.

Parties' Responses

Mr. Kinsella, Zachary Cohen, David Gruber, Pamela and Michael Mahoney, Cynthia Cirlin, Thomas Bjurlof, Citizens for the Preservation of Wainscott (CPW), and the Long Island Commercial Fishing Association (LLCFA) all filed responses opposing the Applicant's motion. Mr. Kinsella argues his testimony contributes important information to the record including: the price of energy generated by the Project; that the Project was selected as the result of the "non-competitive opaque" 2015 RFP; that selection of the proposed project is counter to the New York State Energy Research and Development Authority (NYSERDA's) recommendations; and that PFAS contamination exists in the area of the proposed Project.⁸

Mr. Kinsella argues that the Commission must consider the price of energy agreed to in the PPA to determine that the project will serve the public interest. Mr. Kinsella also argues that the Commission must also consider the price of energy from the Project in considering the "economics of various alternatives."⁹ Mr. Kinsella argues that alternatives include technologies other than offshore wind and that examples of alternatives are included in his testimony. Mr. Kinsella further argues that because "the contract prices of energy

⁸ Kinsella Response (November 16, 2020).

⁹ Id., p. 10 (citing PSL § 126[1][c]).

supplied to the general public are of interest to the general public," the Commission's "public interest" consideration must include the price for energy specified in the PPA.

Mr. Kinsella argues that he is not attempting to undo the 2015 RFP or the PPA but simply wants the contract price included in the record, so that the Commission can consider it as part of its public interest analysis. Mr. Kinsella argues that his testimony and exhibit prove that the 2015 RFP was not competitive "and only by looking to the true nature of the RFP process and including into the record the contract prices" can the Commission determine if the Project is in the public interest.

Mr. Kinsella argues that this proceeding can be distinguished from Case 18-T-0499 because here, the selection process was not competitive. Mr. Kinsella further argues that the Public Policy Transmission Planning Process provided parties an opportunity to challenge the cost-effectiveness of proposed projects, whereas here, the 2015 RFP did not provide an opportunity for parties to challenge the results.¹⁰ Mr. Kinsella also argues that his testimony represents an honest critique of the Project and the Applicant is only moving to strike to keep the evidence "out of the public domain and away from public scrutiny."¹¹

Regarding his testimony on the topic of PFAS contamination, Mr. Kinsella denies admitting that he is not an expert, as argued by the Applicant. Rather, Mr. Kinsella argues he only acknowledges that he is not "a member of the professions, ... a lawyer (admitted to the bar), a chartered accountant, a medical doctor or an engineer."¹² Mr. Kinsella

¹⁰ Id., p. 15.

¹¹ Id., p. 17.

¹² Id., p. 21.

states that since 2016, after concluding his "conventional career" in the professional services industry and finance, he has "spent most [his] time conducting research into water quality issues related to sources of cyanobacteria and cyanotoxic contamination, PFAS contamination and research into the local hydrologic system in Wainscott."¹³

Mr. Kinsella argues that the issue of whether he qualifies as an expert witness is "moot" because he is an appropriate lay witness.¹⁴ Mr. Kinsella notes the New York State Department of Civil Service's Manual for Administrative Law Judges and Hearing Officers states that the rule regarding lay witness opinion must be liberally construed. Mr. Kinsella further argues that pursuant to the Federal Rules of Evidence a lay person may provide opinion testimony so long as it is rationally based on the witness's perception and helpful to understanding a witness's testimony or a relevant fact.¹⁵

Finally, Mr. Kinsella argues that the public documents he provided as exhibits should stand on their own as "prima facie evidence as against all the world of such facts therein stated as the official was required or authorized by law to state."¹⁶

All the other parties responding to the Applicant's motion oppose it. Mr. Gruber states that given that the 2015 RFP process and the PPA have received approvals of the New York State Comptroller and the New York State Attorney General, the selection process itself was presumably regular. However, Mr.

¹³ Id., p. 23.

¹⁴ Id., p. 24 (citing NYS Department of State, Manual for Administrative Law Judges And Hearing Officers, 2011 p. 250 and Federal Rules of Evidence Rule 701, Opinion Testimony by Lay Witnesses Rule 701).

¹⁵ Id.

¹⁶ Id., p. 25 (quoting Richards v. Robin, 178 A.D. 535, 165 N.Y.S. 780 (1st Dep't 1917)).

Gruber argues that Mr. Kinsella's testimony on the "economics" is directly relevant to the Commission's determinations in this proceeding. Mr. Gruber further argues that Mr. Kinsella's status as an expert should not determine the admissibility of the testimony but rather the weight provided it.

If the Applicant's motion is granted, CPW requests an opportunity to provide surrebuttal testimony by its Witness John A. Conrad indicating that he is qualified to testify as an expert witness on PFAS. The remainder of those opposing the Applicant's motion argue that Mr. Kinsella has provided evidence that is substantive, detailed, factual and credible and that may otherwise not be part of the record.

Discussion

Mr. Kinsella's "economic impact" testimony consists of his critiques of the 2015 RFP process and the resulting PPA and an effort to reevaluate the proposed Project from the perspective of 2015 RFP, including his own comparative evaluation of other proposals to the RFP.¹⁷ Those issues are beyond the scope of this Article VII proceeding and Mr. Kinsella's testimony and exhibits related to these issues are irrelevant to the findings and determinations required by PSL §126.¹⁸ Therefore, it is stricken from the record.

In comparison, issues relating to soil contamination and ground water concerns are generally relevant to the Commission's consideration of the Project's likely environmental impact and whether it avoids or minimizes to the extent

¹⁷ See Kinsella Testimony, Part 2 "Economic Impact."

¹⁸ See Case 18-T-0604, supra, Ruling on Motion to Compel Production (issued October 27, 2020); Ruling on Motion to Compel Comparative Economic Review (issued September 30, 2020); Ruling on Motion to Compel Production (issued September 14, 2020).

practicable any significant adverse environmental impacts.¹⁹ Further, Mr. Kinsell has clarified that his testimony is not offered as that of an expert.²⁰ Despite the Applicant's claim to the contrary, its concerns regarding Mr. Kinsella's testimony can be addressed by exploring its weight and persuasiveness through cross-examination, particularly now that Mr. Kinsella has provided details regarding his research, experience and knowledge on these topics.²¹

In conclusion, the Applicant's motion to strike is granted as to Mr. Kinsella's Direct Testimony, "Part 2., Public Interest"²² and is otherwise denied. CPW's request to submit surrebuttal is denied, as Mr. Kinsella's testimony regarding PFAS is not stricken and in any event, CPW did not provide an adequate explanation as to why that testimony was not or could not be timely filed.

(SIGNED)

ANTHONY M. BELSITO

¹⁹ PSL §126(1).

²⁰ See Kinsella Response, p. 24.

²¹ Id., Appendix B.

²² Submitted October 9, 2020.