

**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 (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 Miles (138 kV) 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 in Suffolk County

Case 18-T-0604

**RESPONSE TO SOUTH FORK WIND, LLC'S
MOTION TO STRIKE TESTIMONY OF SIMON V. KINSELLA**

On November 5, 2020, South Fork Wind, LLC (“SFW” or the “Applicant”) filed a Motion to Strike (i) the entirety of “Part 2” of the pre-filled testimony of Simon V. Kinsella (“Mr. Kinsella”) filed on October 9, 2020 regarding economic impacts; (ii) the entirety of the pre-filed direct testimony of Mr. Kinsella filed on September 9, 2020 and October 9, 2020 regarding poly-/perfluoroalkyl substances (“PFAS”) contamination; and (iii) the entirety of the rebuttal testimony of Mr. Kinsella filed on October 30, 2020 regarding both economic impact and PFAS contamination. This response is submitted on behalf of Citizens for the Preservation of Wainscott (“CPW”).

BACKGROUND

On September 14, 2018, SFW filed an Application for a Certificate of Environmental Compatibility and Public Need (“Certificate”) pursuant to Article VII of the Public Service Law (“PSL”) (the “Application”). In its Application, SFW proposed the construction, operation, and maintenance of a 138 kV electric cable (the “SFEC”) to connect the South Fork Wind Farm

(“SFWF”) located in federal waters to the existing electrical grid in the Town of East Hampton, Suffolk County, New York (collectively the “Project”).

Mr. Kinsella is a resident of the Hamlet of Wainscott, Town of East Hampton and lives approximately 700-feet from the proposed facility. On September 9, 2020, Mr. Kinsella filed direct testimony as an intervenor in this proceeding. Mr. Kinsella filed additional direct testimony on October 9, 2020 and rebuttal testimony on October 30, 2020. All testimony filed by Mr. Kinsella was proper and timely.

SFW filed the instant Motion to Strike on November 5, 2020. On November 10, 2020 Administrative Law Judge (“ALJ”) Anthony Belsito granted a three-day extension to the deadline to file responses to SFW’s Motion to Strike. In his email, Judge Belsito stated that all responses must be filed no later than close of business on November 16, 2020.

ARGUMENT

I. The Public Service Commission must consider economics as part of an Article VII proceeding.

The Applicant argues all of Mr. Kinsella’s direct and rebuttal testimony regarding “economic impacts” should be stricken from the record. However, the Applicant is incorrect in its statement that “economic impact is squarely outside the scope of this proceeding.”¹ Section 126(1)(c) of the PSL requires a finding that “the facility avoids or minimizes to the extent practicable any significant adverse environmental impact, considering the state of available technology and the nature and *economics* of the various alternatives...” [emphasis added]. This

¹ 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, Motion of South Fork Wind, LLC to Strike Testimony of Simon V. Kinsella (filed November 5, 2020) (“Motion to Strike”) at 1.

means that the Commission must consider not only the economics of the proposed facility, but also the economics of all proposed alternatives.

The Commission has historically considered economics in its decisions under Article VII. For example, in Case 13-T-0077, the Commission justified consideration of factors such as accessibility and constructability under the purview of “economics,” as permitted by PSL § 126(1)(c).² Similarly, in Case 10-T-0139, the Commission stated that, “information that enables one to conclude whether a particular alternative converter site is reasonable or worthy of further exploration is both relevant and material in an Article VII proceeding.”³ Based on this analysis, the Commission allowed consideration of the location of a facility and the proposed location’s impact on the environment and associated costs.

In the Argument section of its Motion to Strike, SFW limits its objections to “information relating to the 2015 RFP, PPA, and PPA Amendments” based on a claim of irrelevancy.⁴ However, despite this limited scope, it still requests the ALJ strike *all* of Mr. Kinsella’s testimony regarding “economic impacts.” To date, Mr. Kinsella has filed over 13,500 pages of testimony (including exhibits), much of it regarding the economic impacts of the proposed facility and of the proposed alternatives. The scope of Mr. Kinsella’s testimony regarding the economic impacts of the project is far broader than the Applicant’s interpretation in its Motion to Strike. The Applicant’s request to strike all of Mr. Kinsella’s testimony regarding “economic impacts” is vague and misleading,

² Case 13-T-0077, Application of Niagara Mohawk Power Corporation d/b/a National Grid to Amend the Certificate of Environmental Compatibility and Public Need Issued to New York State Electric & Gas Corporation and Niagara Mohawk Power Corporation Regarding Homer City to Stolle Road 345 kV Transmission Facility, Order Granting Amendment to Certificate of Environmental Compatibility and Public Need (issued August 22, 2014) at 17.

³ Case 10-T-0139, Application of Champlain Hudson Power Express, Inc. for a Certificate of Environmental Compatibility and Public Need Pursuant to Article VII of the PSL for the Construction, Operation, and Maintenance of a High Voltage Direct Current Circuit from the Canadian Border to New York City, Ruling on Motion to Compel (issued June 3, 2011) at 5.

⁴ Case 18-T-0604, *supra*, Motion of South Fork Wind, LLC to Strike Testimony of Simon V. Kinsella (filed November 5, 2020) at 3-6.

especially when the argument of the Motion only discusses testimony related to specific, narrow topics. Through its Motion to Strike, SFW is attempting to remove valid opposition from the record, which cannot be allowed. A decision to strike all of Mr. Kinsella's testimony referencing the economic impacts of the facility would jeopardize the Commission's ability to consider the impacts of the proposed facility as required by Article VII.

II. The public documents and testimony filed by Mr. Kinsella should remain in the record.

The Applicant is correct in its statement that Mr. Kinsella is not an expert witness related to scientific issues, however, this fact alone does not preclude him from filing relevant testimony that should be part of the record and considered by the Commission. The Applicant protests that Mr. Kinsella has not provided information regarding his work history or education in conjunction with his testimony. However, Mr. Kinsella does not, and has never, made himself out to be an expert witness on the matters in his testimony. Instead, Mr. Kinsella provides factual testimony which references publicly available, relevant documents. The Applicant did not dispute the truthfulness of any of the testimony or exhibits in its Motion to Strike and does not allege that Mr. Kinsella is attempting to enter false information into the record.

SFW states that Mr. Kinsella's testimony regarding PFAS "will not assist the Commission in deciding any of the findings it must make under Section 126 of the Public Service Law" because Mr. Kinsella "is not an expert regarding these issues."⁵ SFW similarly claims that Mr. Kinsella's testimony has no probative value because he is not an expert.⁶ However, SFW acknowledges that the exhibits to Mr. Kinsella's testimony are public documents often obtained from state and federal agencies through Freedom of Information Requests.⁷ While Mr. Kinsella may not be an "expert"

⁵ *Id.* at 9-10.

⁶ *Id.* at 9.

⁷ *Id.*

on PFAS, he has submitted relevant information to the Commission for its own review and interpretation. Mr. Kinsella has merely brought the issue of PFAS contamination along the proposed SFEC route, a fact SFW has largely ignored, to the attention of the Commission. As SFW points out, the formal rules of evidence do not apply to Commission proceedings.⁸ Thus there is no formal requirement that Mr. Kinsella be an “expert” to submit testimony regarding PFAS and his testimony should be allowed to remain as part of the record.

III. Consideration of economic and environmental impacts aid the Commission in determining whether the Article VII application is in the public interest.

In determining whether a project is “in the public interest” pursuant to PSL § 126(1)(h), the Commission considers aspects of the project such as affordability, reliability, environmental, employment, and economic growth benefits, among others. In Case 18-T-0202, the Commission found the project was in the public interest because the applicant “made extensive efforts to avoid and minimize the Facility’s impacts on the public and environmental resources.”⁹ The Commission has also found that proposed projects represent the “minimum adverse environmental impact, considering the state of available technology and the nature and economics of the various alternatives...” When reviewing economic impacts, the Commission considers whether energy will be provided at a reasonable and low cost.¹⁰

⁸ *Id.* at 10.

⁹ Case 18-T-0202, Application of Eight Point Wind, LLC for a Certificate of Environmental Compatibility and Public Need Pursuant to Article VII to Construct and Operate a 16.5 Mile 114 kV Transmission Line, Order Granting Certificate of Environmental Compatibility and Public Need (issued October 18, 2019) at 26-27; Case 18-T-0207, Application of New York Power Authority for a Certificate of Environmental Compatibility and Public Need Pursuant to Article VII for the Rebuild of the Existing Moses-Adirondack 1&2 230 kV Transmission Lines Extending approximately 86 Miles from the Robert Moses Switchyard in the Town of Massena, St. Lawrence County to the Adirondack Substation in the Town of Croghan, Lewis County, New York, Order Granting Certificate of Environmental Compatibility and Public Need (issued November 14, 2019) at 39.

¹⁰ Case 13-T-0235, Joint Application of New York State Electric & Gas Corporation and Niagara Mohawk Power Corporation d/b/a National Grid for a Certificate of Environmental Compatibility and Public Need for the Construction of Approximately 14.5 Miles of 115kV Electric Transmission Facilities from state Street Substation in Cayuga County to the Elbridge Substation in Onondaga County, NY, Order Granting Certificate of Environmental Compatibility and Public Need (issued February 25, 2016) at 63; See Case 13-T-0585, Application of Cricket Valley Energy Center, LLC for a Certificate of Environmental Compatibility and Public Need Pursuant to Article VII of the

Mr. Kinsella's testimony speaks directly to the issue of public interest; specifically, to affordability, economic growth benefits, and environmental impacts. It discusses negative impacts from the Project, which indicate construction as outlined in the Application and the Joint Proposal would not be in the public interest. The Applicant seeks to strike Mr. Kinsella's testimony, not because it is irrelevant or because he is unqualified, but because his testimony clearly shows the Project, as designed, is not in the public interest. Mr. Kinsella's testimony describes how the PFAS contamination already present in the East Hampton area will be disturbed by construction of the Project, creating an environmental and public health hazard. Mr. Kinsella's testimony further explains that unlike in previous cases before the Commission, the Project is not providing energy at a reasonable or low cost.¹¹ Mr. Kinsella's testimony should be allowed to remain in the record because it provides pertinent information to aid the Commission in its determination of public interest.

IV. *CPW requests permission to submit sur-rebuttal testimony.*

In the event SFW's Motion to Strike is granted, CPW respectfully requests permission to submit sur-rebuttal testimony on the issue of PFAS contamination. CPW's expert witness, John A. Conrad, who has provided both direct and rebuttal testimony in this proceeding is also qualified to testify as an expert witness on PFAS.¹² Mr. Conrad did not submit testimony on the issue of PFAS to date, because Mr. Kinsella's testimony on the subject was thorough and competent. PFAS contamination associated with the proposed facility is a legitimate hazard to both human and environmental health. Evidence regarding PFAS should be in the record for consideration by the

Public Service Law For Approval of a New 345 kV Line From the Pleasant Valley Substation to the Cricket Valley Energy Center, LLC, and the Reconductoring of an Existing 345 kV Line, in the Town of Dover, Dutchess County, Order Granting Certificate of Environmental Compatibility and Public Need (issued April 20, 2016) at 26.

¹¹ See Case 13-T-0235, *supra*, Order Granting Certificate of Environmental Compatibility and Public Need.

¹² Mr. Conrad's resume is provided as Exhibit __ (JAC-1) to his pre-filed testimony.

Commission as it clearly falls within the ambit of the Findings the Commission must make under Section 126 of the PSL. Additionally, to the extent the Applicant wishes to conduct cross-examination regarding the PFAS issues in Mr. Kinsella's testimony, Mr. Conrad is more than capable of addressing these issues.¹³

CONCLUSION

For the foregoing reasons, CPW respectfully requests that Your Honor deny SFW's Motion to Strike the testimony of Simon V. Kinsella filed on November 5, 2020 in this proceeding. In the alternative, CPW respectfully requests the opportunity to submit sur-rebuttal testimony of expert witness John A. Conrad.

Respectfully submitted,



Kevin M. Bernstein, Esq.
Bond, Schoeneck & King, PLLC
*Attorneys for Citizens for the Preservation
of Wainscott*
One Lincoln Center
Syracuse, New York 13202-1355
Phone: (315) 218-8000
Fax: (315) 218-8429
Email: bernsk@bsk.com

Dated: November 16, 2020
Syracuse, New York

¹³ While the Department of Environmental Conservation has not proffered testimony, its technical staff, who have brought state-wide attention to PFAS contamination, would presumably be able to address PFAS contamination, transport of PFAS contamination and remediation of such contamination. See <https://www.dec.ny.gov/chemical/108831.html>.