

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF SUFFOLK

SIMON V. KINSELLA, PAMELA I. MAHONEY AND MICHAEL P. MAHONEY,

Index No.

Plaintiffs,

-against-

COMPLAINT

LONG ISLAND POWER AUTHORITY and
SOUTH FORK WIND LLC fka DEEP-
WATER WIND SOUTH FORK LLC,

Defendants.

Plaintiffs Simon V. Kinsella, Pamela I. Mahoney, and Michael P. Mahoney for their complaint against Long Island Power Authority (“LIPA”) and South Fork Wind LLC fka Deepwater Wind South Fork LLC (“Deepwater Wind”), allege as follows:

Introduction

1. Long Island’s South Fork presents a unique challenge to Long Island’s power grid. Its peak demand takes places on summer weekend and weekday late afternoons and evenings when an increase in residential air conditioning use drives a corresponding increase in electricity use.

2. In 2015 the Long Island Power Authority asked for “proposals from experienced and qualified entities to acquire sufficient local resources to meet expected peak load requirements until at least 2022 in the South Fork of

Long Island, and 2030 for certain areas east of Buell,” as an alternative to adding new transmission lines.

3. The RFP requested proposals for local power production resources located on Long Island that would be dispatchable to meet peak load (or peak electrical demand) and operational by May 1, 2019.

4. LIPA, however, ignored its own criteria for power production resources and entered into a \$1.625 billion power purchase agreement with bidder Deepwater Wind for an offshore wind project.

5. Contrary to the RFP criteria, offshore wind-generated power is unreliable and non-dispatchable because it depends on an intermittent resource to generate electricity.

6. Offshore wind turbines cannot be switched “on” if the wind is not blowing.

7. Wind is least likely to be blowing during hot summer months—the precise time when LIPA required a power resource to meet peak loads from air conditioning use.

8. Internal LIPA documents show a correlation between peak summertime temperatures (when demand for electricity peaks in response to an increase in air conditioner use) and low wind conditions when offshore wind turbines cannot reliably supply power to meet peak demand.

9. The Deepwater Wind offshore wind project is not a local power generation resource, is not dispatchable, would not be operational until the end of 2022, and requires a new 60-mile offshore transmission line plus an onshore interconnection facility and substantial local transmission upgrades.

10. The contract award to a non-responsive bidder violated the state's procurement laws and should be declared void.

Facts

1. South Fork Peak Electricity Demand

11. On June 24, 2015, LIPA, through its agent, PSEG Long Island, issued a Notice to Proposers soliciting proposals from experienced and qualified entities to acquire sufficient local resources to meet expected peak load requirements until at least 2022 in the South Fork of Long Island, and 2030 for certain areas east of Buell in the Town of East Hampton.

12. LIPA described electrical load growth on the South Fork of Long Island as increasing faster than the rest of Long Island.

13. The South Fork has a unique load profile where summer, weekend, and holiday activity in the Hamptons and surrounding towns cause electricity demand to peak at a different time than the rest of Long Island.

14. According to LIPA, residential customers drive peak electricity demand on the South Fork, with 60 percent of that demand coming from air conditioning.

15. Many of those residential homes are seasonally occupied in the summer months concentrating a demand for power in those summer months when temperatures rise.

16. South Fork peak demand often occurs on Saturdays—compared to the entire LIPA system which never peaks on a Saturday due to weekday commercial load demand.

17. LIPA described the South Fork of Long Island as a peninsular, semi-isolated electricity load pocket with highly constrained connectivity to LIPA's remaining transmission and distribution system.

18. LIPA projected peak load on the South Fork to be 314 MW in 2019, growing to 341 MW in 2022 (a nine percent increase).

19. LIPA projected peak load for the subarea east of Buell to be 41 MW in 2019, growing to 54 MW in 2030 (a 32 percent increase).

2. LIPA's Request for Proposals

20. The RFP requested proposals for "local resources" "located on Long Island" to meet "peak load" or peak electrical demand as an alternative to adding new transmission lines.

21. Local resources could be load reduction or power production or a combination of the two.

22. Load reduction typically includes behind-the-meter resources, meaning products or services that help the customer reduce power usage, especially during times of peak demand.

23. The RFP required load reduction products or services to be available every day of the week, covering a part of an eight-hour period between 1:00 p.m. and 9:00 p.m. during months that must include the warmer months, from May through to September.

24. The RFP mandated that power production resources comply with "Operating Modes" consistent with dispatchable resources that are capable of being turned on, or ramped-up, remotely in response to a "trigger signal."

25. The RFP required a commercial operating date no later than May 1, 2019, with an alternative date and pricing option for a one-year delay, no later than May 1, 2020.

26. The RFP required that each proposal “stand alone” in satisfying the RFP’s requirements.

3. Deepwater Wind’s Bids

27. According to LIPA, Deepwater Wind submitted three separate proposals in the South Fork RFP procurement process:

- DWW100 - a ninety-megawatt offshore wind farm (90 MW)
- DWW200 - a battery storage facility at Wainscott (4.9 MW)
- DWW300 - a battery storage facility at Montauk (5.1 MW)

(Neither of the two battery storage facilities were selected to continue past Phase II in the procurement process.)

28. At the time, Deepwater Wind proposed installing 15 six-megawatt wind turbines, with an aggregate nameplate capacity of 90 MW, approximately 30 miles off Montauk Point on eastern Long Island.

29. The project requires a new 60-mile-long transmission line to connect the offshore wind turbines and offshore substation to a new onshore interconnection facility (substation).

30. Deepwater Wind’s proposed new transmission line includes substantial onshore infrastructure to accommodate high-voltage cables, such as duct-banks and splicing vaults.

31. Deepwater Wind proposed a commercial operating date of December 31, 2022 (later negotiated to December 1, 2022).

4. Deepwater Wind's Wind Power Bid Deficiencies

32. The South Fork RFP was not designed for an offshore wind project developer to submit a bid.

33. Regardless, LIPA selected Deepwater Wind's proposal despite many deficiencies:

- It is not a "local resource" that is "located on Long Island";
- It is not an alternative to adding new transmission lines;
- It does not defer the need for new transmission lines, but instead requires substantial transmission upgrades;
- It cannot reliably supply power to satisfy peak demand for electricity in response to air conditioner usage on the South Fork in the hotter months from June to September;
- The project cannot be a source of power until at least 2023 with a proposed commercial operating date of December 31, 2022;
- It cannot supply a dispatchable resource capable of functioning in Operating Modes that require power to be turned on in response to a "trigger signal" (because turbines that depend on the wind cannot be turned on as demand requires); and
- It is not a resource designed to meet "performance calculations" that are "no less severe than [...] [a] maximum steady wind velocity [of] 130

mph” (offshore wind turbines cease generating power at a wind speed closer to 55 mph).

34. Contrary to state procurement law, LIPA awarded a power purchase agreement to a bidder whose proposal did *not* meet the minimum specifications or requirements as prescribed in the South Fork RFP and its Evaluation Guide.

35. Moreover, LIPA should have disqualified Deepwater Wind’s proposal at the outset.

36. According to the South Fork RFP’s Evaluation Guide, “Mandatory Criteria” is used to measure a “Proposals’ compliance to the RFP and [...] to determine whether the Proposal can be accepted. If this information is not provided at the Proposal Submittal Deadline, the Proposal will be eliminated from consideration.”

37. LIPA, however, overlooked four instances where Deepwater Wind did not meet mandatory criteria while disqualifying two of the 21 bids for not meeting mandatory criteria.

38. The Evaluation Guide listed as a mandatory criterion a May 1, 2019, commercial operating date required under the RFP.

39. Deepwater Wind proposed a December 31, 2022, commercial operating date—three and a half years later than the required date—that should have led to immediate disqualification in the first phase of the procurement process

40. The RFP required proposals to have a pricing mechanism for delay.

41. That mechanism, however, only allowed for a one-year delay—May 1, 2020, which makes Deepwater Wind’s proposed commercial operating date two and half years later than any delay that could still meet the RFP’s requirements.

42. Mandatory criteria included the RFP requirement that any “[p]roposal must contain the location of any proposed facility requiring construction and/or permitting” by the submittal deadline (of December 2, 2015).

43. Upon information and belief, Deepwater Wind did not have locations for proposed facilities until one and a half years *after* the submittal deadline.

44. As a stand-alone solution, a proposal could not be conditioned on some other act or omission under LIPA’s mandatory criteria.

45. LIPA, however, joined Deepwater Wind’s offshore wind project to separate battery storage proposals to make it potentially workable.

46. In other words, LIPA itself salvaged Deepwater Wind’s proposal by adding two other conditional acts—agreements for installing two battery storage projects.

47. Deepwater Wind’s proposed offshore wind project and 60-mile-long transmission system did not comply with either the mandatory criteria or the material specifications according to the RFP and Evaluation Guide.

5. The LIPA/Deepwater Wind Power Purchase Agreement

48. On January 25, 2017, LIPA awarded Deepwater Wind a twenty-year power purchase agreement (“PPA”) that the New York Office of the State Comptroller (“OSC”) approved on March 29, 2017.

49. LIPA agreed to purchase electricity from Deepwater Wind at an average price of *22 cents* per kilowatt-hour over the twenty-year life of the contract.

50. In 2019 the New York State Energy Research and Development Agency finalized a contract for an adjacent offshore wind project, Sunrise Wind, only two miles away from Deepwater Wind's project, and Sunrise Wind's cost of electricity is *just 8 cents* per kilowatt-hour.

51. OSC valued Deepwater Wind's PPA at \$1.625 billion, yet the cost for the same amount of renewable energy from Sunrise Wind will be only \$595 million.

52. LIPA agreed to the most expensive renewable energy option available at the time.

53. In 2016 the U.S. Energy Information Administration, in a simple average of regional values estimated the cost of energy from offshore wind plants coming online in 2022 to be almost two and a half that of onshore wind and almost twice as much as solar photovoltaic.

54. The cost comparison between offshore wind and solar photovoltaic holds up locally on Long Island's South Fork.

55. Around the same time that LIPA was evaluating the South Fork RFP responses, it was also developing the Long Island Community Microgrid Project (the "LI Solar Microgrid").

56. The LI Solar Microgrid was planned for the Town of East Hampton and included 15 megawatts (MW) of new solar photovoltaic generation.

57. The US National Renewable Energy Laboratory (“NREL”) estimated the cost of constructing and installing the 15 MW solar facility to be \$38.5 million.

58. NREL estimated that it would cost \$4.4 million in total operational expenses over twenty years to run the 15 MW solar facility.

59. NREL also provided an estimate of the amount of energy the facility would generate per month.

60. Based on NREL’s independent analysis, the cost of power from LI Solar Microgrid’s 15 MW solar facility would be half the price of power from South Fork Wind.

61. NREL’s analysis factors in periods of no generation at night and low generation on cloudy days.

62. The LI Solar Microgrid proposal would supply power most efficiently as needed on hot sunny summer days when air conditioning usage peaks demand—the problem the South Fork RFP sought to solve.

63. During the summer peak demand period, the cost of energy from LI Solar Microgrid’s 15 MW solar facility would have been one-third the price of power from South Fork Wind.

64. Rather than find a way to make a sensible renewable energy project work, LIPA went forward with a project located 30 miles offshore, using technology that is least likely to provide power to meet peak demand as specified in the RFP.

65. The contrived RFP process and the exorbitant price LIPA agreed to pay may have resulted from political pressure for New York to be the first in

the country to build and install a large offshore wind project of fifteen turbines.

66. In his 2017 State of the State, former Governor Andrew Cuomo publicly called on LIPA to approve the Deepwater Wind project.

67. Cuomo got his wish just two weeks later when the LIPA Board approved the Deepwater Wind PPA.

6. Public Authorities Control Board Approval

68. LIPA did not follow statutory provisions mandating that it seek the approval of the New York Public Authorities Control Board (“PACB”) before entering the PPA with Deepwater Wind.

69. Under New York law, LIPA cannot undertake any project without approval from the PACB.

70. “Project” is defined as a LIPA undertaking that commits LIPA to a contract with total consideration greater than \$1 million and does not involve LIPA’s day to day operations.

71. The total consideration of the PPA is \$1.625 billion that LIPA must pass on to ratepayers.

72. At the time, the project involved constructing 15 offshore wind turbines, a 60-mile-long undersea cable, a new onshore interconnection facility (substation), and substantial onshore infrastructure, including duct-banks and splicing vaults designed for high-voltage cables to connect the wind turbines to LIPA’s transmission and distribution system.

73. LIPA is committed to reimbursing Deepwater Wind for capital costs for the interconnection infrastructure.

74. Upon information and belief, the reimbursable capital costs for the interconnection infrastructure will be greater than \$1 million.

75. The \$1.625 billion PPA is not a contract for a day-to-day operations matter like a coffee service agreement, office equipment lease, or janitorial services contract.

76. The South Fork wind project is the precise type of project the Legislature intended the PACB to evaluate and decide whether the action (1) is financially feasible; (2) does not materially adversely affect overall real property taxes; (3) will result in lower utility costs to customers in the service area; and (4) will not materially adversely affect real property taxes and utility rates outside the service area.

77. The South Fork wind project is not financially feasible and will increase utility costs to customers in LIPA's service area.

PARTIES

78. Plaintiff, Simon V. Kinsella, resides in Suffolk County and is a taxpayer and ratepayer in the affected service area.

79. Plaintiffs, Pamela I. Mahoney, and Michael P. Mahoney, reside in Suffolk County and are taxpayers and ratepayers in the affected service area.

80. Defendant Long Island Power Authority is a New York corporate municipal instrumentality created under the LIPA Act that, among other things, supplies electric service to Nassau, Suffolk and part of Queens County has

the right under the Public Authorities Law to sue and be sued in its own name.

81. Defendant South Fork Wind LLC (formerly Deepwater Wind South Fork LLC) is a Delaware limited liability company that does business in the State of New York.

VENUE

82. The venue in Suffolk County is proper because it is the county where the Plaintiffs reside and LIPA has facilities involved in this action.

FIRST CAUSE OF ACTION (For Declaratory Judgment Pursuant to CPLR § 3001 for violations of General Municipal Law § 103 and State Finance Law § 163)

83. Plaintiffs repeat and reallege the allegations contained in paragraphs 1 through to 82 as if set forth fully here.

84. Defendant LIPA awarded a contract for the supply of electrical energy to an offeror, Deepwater Wind, whose bid did not comply with bidding requirements and was not responsive, in violation of State Finance Law § 163 and General Municipal Law § 103.

85. Defendant LIPA manipulated bidding specifications in the South Fork RFP procurement process to preclude true competitive bidding in violation of State Finance Law § 163 and General Municipal Law § 103.

SECOND CAUSE OF ACTION (For Declaratory Judgment Pursuant to CPLR § 3001 for violation of the LIPA Act § 1020-f (aa) and § 1020-b 12-a (iii))

86. Plaintiffs repeat and reallege the allegations contained in paragraphs 1 through to 82 as if set forth fully here.

87. Defendant LIPA violated Public Authorities Law § 1020-f (aa) and did not have authority to execute the power purchase agreement without obtaining the approval of the Public Authorities Control Board for a contract or agreement with a total consideration of greater than one million dollars that does not involve the day-to-day operations of LIPA.

REQUEST FOR RELIEF

Plaintiffs respectfully request that the Court enter judgment against defendants as follows:

- A. Declaring that the Power Purchase Agreement between LIPA and Deepwater Wind executed on or about February 6, 2017, exists in violation of State Finance Law § 163 and General Municipal Law § 103, and is void;
- B. Declaring that LIPA violated Public Authorities Law § 1020-f (aa) by not receiving Public Authorities Control Board approval of the project and that LIPA did not have authority to enter the PPA;
- C. Annuling the Power Purchase Agreement in its entirety;
- D. Granting Plaintiffs the costs and disbursements of this action; and

E. Granting such other and further relief as the Court believes just and proper.

Dated: Albany, New York
November 9, 2021

Respectfully submitted,

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