

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION, SECOND DEPARTMENT

SIMON V. KINSELLA,

Petitioner,

- against -

NEW YORK STATE PUBLIC SERVICE
COMMISSION and NEW YORK STATE
DEPARTMENT OF PUBLIC SERVICE,

Respondents.

VERIFIED ANSWER

Docket No. 2021-06572

Respondents New York State Public Service Commission (Commission) and New York State Department of Public Service (Department), by Robert Rosenthal, General Counsel, and John C. Graham, Assistant Counsel, of Counsel, answers the Verified Petition of Petitioner Simon V. Kinsella dated September 9, 2021 in the above-captioned original special proceeding pursuant to Public Service Law (PSL) Section 128:

1. Denies the allegations contained in paragraph 1.
2. Admits the allegations contained in paragraph 2.
3. Admits the allegations contained in paragraph 3.
4. Admits the allegations contained in paragraph 4.
5. Denies the allegations contained in paragraph 5, and affirmatively states that the Board of Trustees of the Long Island Power Authority (LIPA) approved a power purchase agreement with South Fork Wind LLC (SFW) on January 25, 2017.

6. Denies the allegations contained in paragraph 6, and affirmatively states that Deepwater Wind South Fork LLC changed its name to South Fork Wind LLC in September 2020.

7. Admits the allegations contained in paragraph 7.

8. Admits the allegations contained in paragraph 8.

9. Denies knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 9.

10. Denies knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 10.

11. Avers that paragraph 11 is a legal conclusion to which no response is required. To the extent that a response may be required, denies the allegations contained in paragraph 11 and respectfully refers the Court to PSL § 126(1) for a complete and accurate statement of its contents.

12. Denies the allegations contained in paragraph 12, except admits that SFW proposed installing cement duct banks connecting each splicing vault through which it proposed to run high voltage electric transmission cables.

13. Denies the allegations contained in paragraph 13.

14. Denies the allegations contained in paragraph 14, except admits that East Hampton Airport and Wainscott Sand and Gravel are located in the vicinity of the cable route, and further admits that East Hampton Airport is listed on the Registry of Inactive Hazardous Waste Disposal Sites (Registry) maintained by the New York State Department of Environmental Conservation (DEC) as a Class 2

“Superfund” site; and affirmatively states that Wainscott Sand and Gravel is not listed in the Registry and is classified by the DEC as a Class N site, Filing Nos. 133-14, 259-2, meaning that placement of the site on the Registry is not warranted, and respectfully refers the Court to <https://www.dec.ny.gov/chemical/8663.html> for a comprehensive explanation of DEC’s site classifications.¹

15. Denies the allegations contained in paragraph 15.

16. Admits the allegations contained in paragraph 16.

17. Denies the allegations contained in paragraph 17.

18. Admits the allegations contained in paragraph 18.

19. Denies the allegations contained in paragraph 19.

20. Admits the allegations contained in paragraph 20.

21. Denies the allegations contained in paragraph 21 and respectfully refers the Court to 6 NYCRR § 597.3 for a complete and accurate statement of its contents.

22. Denies the allegations contained in paragraph 22 and respectfully refers the Court to Petitioner’s Testimony Part 1-1, Filing Nos. 133-7, 133-22, for a complete and accurate statement of its contents.

23. Denies knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 23.

¹ Unless otherwise indicated, all references are to the record in the underlying administrative proceeding, and are designated by “Filing No.” Due to the size of the record, the Commission filed the administrative record with the Court (and parties) via a USB flash drive. To access the record, open the accompanying Excel spreadsheet and click on the blue attachment link associated with the Filing No. This will open the associated document directly.

24. Denies knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 24.

25. Denies the allegations contained in paragraph 25, except admits that the Hazardous Materials Desktop Analysis filed with the Commission contains the quoted statement.

26. Denies the allegations contained in paragraph 26, except admits that the response of SFW to Petitioner's interrogatories contains the quoted statement.

27. Admits the allegations contained in paragraph 27.

28. Denies the allegations contained in paragraph 28.

29. Denies knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 29.

30. Denies knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 30.

31. Denies knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 31.

32. Denies the allegations contained in paragraph 32 and respectfully refers the Court to Petitioner's Testimony, Exhibit L, Filing No. 133-14, and the December 3, 2020 evidentiary hearing transcript, Filing No. 225-1 at 188, for complete and accurate statements of their contents, and affirmatively states that the DEC Site Record for Wainscott Sand and Gravel (Filing No. 133-14) does not conclude that East Hampton Airport is the off-site source of contamination.

33. Denies the allegations contained in paragraph 33.

34. Denies the allegations contained in paragraph 34.

35. Denies the allegations contained in paragraph 35 and respectfully refers the Court to Petitioner's Testimony, Exhibit L, Filing No. 133-14, for a complete and accurate statement of its contents, and affirmatively states that it is possible that the construction of the line will not contact groundwater.

36. Admits the allegations contained in paragraph 36.

37. Denies the allegations contained in paragraph 37, and respectfully refers the Court to Filing No. 198-7 for a complete and accurate statement of its contents.

38. Denies the allegations contained in paragraph 38.

39. Denies the allegations contained in paragraph 39 and affirmatively states that the Commission, in Certificate Conditions 23, 44, 51, 52, 53, 101 and 151 and Certificate Appendices H and I, requires testing and monitoring of soil and groundwater during construction for potential per- and polyfluoroalkyl substances (PFAS) contamination.

40. Denies the allegations contained in paragraph 40.

41. Denies the allegations contained in paragraph 41.

42. Admits the allegations contained in paragraph 42.

43. Denies the allegations contained in paragraph 43, except admits that Petitioner filed with the Commission a Motion to Reopen the Record on January 13, 2021.

44. Denies the allegations contained in paragraph 44, except denies knowledge or information sufficient to form a belief as to the truth of the allegations concerning the origin of well locations listed in Petitioner's Motion to Reopen the Record.

45. Denies knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 45.

46. Denies the allegations contained in paragraph 46, except admits that SFW must excavate and dewater soil in a residential neighborhood in order to install splicing vaults.

47. Denies the allegations contained in paragraph 47 and respectfully refers the Court to *Matter of Entergy Nuclear Power Mktg. v. Pub. Serv. Commn.*, 122 A.D.3d 1024 (3d Dep't 2014) for a complete and accurate statement of its contents.

48. Denies the allegations contained in paragraph 48.

49. Denies the allegations contained in paragraph 49.

50. Avers that paragraph 50 is a legal conclusion to which no response is required. To the extent that a response may be required, denies the allegations contained in paragraph 50 and respectfully refers the Court to *Matter of Charles A. Field Delivery Serv.*, 66 N.Y.2d 516 (1985) for a complete and accurate statement of its contents.

51. Denies the allegations contained in paragraph 51.

52. Denies the allegations contained in paragraph 52 and respectfully refers the Court to the March 18, 2021 Order Adopting Joint Proposal (“Certificate Order”), Filing No. 271-1, and to PSL § 126(1)(b) for complete and accurate statements of their contents.

53. Avers that paragraph 53 is a legal conclusion to which no response is required. To the extent that a response may be required, denies the allegations contained in paragraph 53 and respectfully refers the Court to *Svquia v. Bd. of Educ. of the Harpursville Cent. Sch. Dist.*, 80 N.Y.2d 531 (1992) for a complete and accurate statement of its contents.

54. Denies the allegations contained in paragraph 54.

55. Denies the allegations contained in paragraph 55.

56. Denies the allegations contained in paragraph 56 and respectfully refers the Court to the Certificate Order for a complete and accurate statement of its contents.

57. Denies the allegations contained in paragraph 57 and affirmatively states that the Commission, in Certificate Conditions 23, 44, 51, 52, 53, 101 and 151 and Certificate Appendices H and I, requires testing and monitoring of soil and groundwater during construction for potential per- and polyfluoroalkyl substances (PFAS) contamination.

58. Denies the allegations contained in paragraph 58.

59. Denies the allegations contained in paragraph 59.

60. Denies the allegations contained in paragraph 60.

61. Avers that paragraph 61 is a legal conclusion to which no response is required. To the extent that a response may be required, denies the allegations contained in paragraph 61 and respectfully refers the Court to PSL § 126(1) for a complete and accurate statement of its contents.

62. Admits the allegations contained in paragraph 62.

63. Admits the allegations contained in paragraph 63.

64. Admits the allegations contained in paragraph 64.

65. Denies knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 65, except admits that the Long Island Power Authority (LIPA) entered into a power purchase agreement with SFW.

66. Denies the allegation contained in paragraph 66 that “Sunrise Wind is a viable alternative” to SFW’s certificated project and affirmatively states that both Sunrise Wind and SFW’s project are necessary and appropriate, and denies knowledge or information sufficient to form a belief as to the truth of the remaining allegations contained therein.

67. Denies the allegations contained in paragraph 67, except admits that by ruling issued November 24, 2020 (Filing No. 220-1), the presiding Administrative Law Judge struck from the record Petitioner’s so-called “economic impact” testimony that was based upon LIPA’s 2015 request for proposal (RFP) process and the resulting power purchase agreement because Petitioner was improperly attempting to reevaluate SFW’s project from the perspective of the RFP.

68. Denies the allegations contained in paragraph 68 and respectfully refers the Court to the November 24, 2020 ruling of the presiding Administrative Law Judge, filing No. 220-1, for a complete and accurate statement of its contents.

69. Denies the allegations contained in paragraph 69 and respectfully refers the Court to the Certificate Order for a complete and accurate statement of its contents.

70. Denies the allegations contained in paragraph 70 and respectfully refers the Court to the Certificate Order and to PSL § 126(1)(c) for complete and accurate statements of their contents.

71. Avers that paragraph 71 is a legal conclusion to which no response is required. To the extent that a response may be required, denies the allegations contained in paragraph 71 and respectfully refers the Court to PSL § 126(1)(h) for a complete and accurate statement of its contents.

72. Avers that paragraph 72 is a legal conclusion to which no response is required. To the extent that a response may be required, denies the allegations contained in paragraph 72.

73. Denies the allegations contained in paragraph 73 and respectfully refers the Court to the Prepared Testimony of Department of Public Service Staff Panel, Filing No. 187-1, for a complete and accurate statement of its contents; and affirmatively states that the Department was a party in the proceeding before the Commission and that the Commission was not bound to accord any more weight to the Department's testimony than the testimony of any other party.

74. Denies the allegations contained in paragraph 73 and respectfully refers the Court to the Prepared Testimony of Department of Public Service Staff Panel, Filing No. 187-1, for a complete and accurate statement of its contents.

75. Denies the allegations contained in paragraph 75, except admits that the Department did not testify as to costs of the electricity generated by SFW to ratepayers, and affirmatively states that LIPA's power purchase agreement with SFW was outside the scope of the Commission proceeding.

76. Denies the allegations contained in paragraph 76.

77. Denies the allegations contained in paragraph 77.

78. Denies the allegations contained in paragraph 78 and respectfully refers the Court to Commission Cases 90-M-0255 *et al.*, Procedures for Settlements and Stipulation Agreements, Opinion 92-2 (issued March 24, 1992) ("Opinion 92-2") for a complete and accurate statement of its contents.

79. Denies the allegations contained in paragraph 79 and affirmatively states that the presiding Administrative Law Judge ruled that the RFP and the resulting power purchase agreement were outside the scope of the proceeding.

80. Denies the allegations contained in paragraph 80.

81. Denies the allegation in paragraph 81 that "the ALJ issued two rulings directly contradicting each other," and admits the remaining allegations contained therein.

82. Admits the allegations contained in paragraph 82.

83. Denies the allegations contained in paragraph 83, except admits that the quoted exchange between ALJ Belsito and Ms. Zafonte is correctly quoted from the transcript.

84. Denies the allegations contained in paragraph 84.

85. Admits the allegations contained in paragraph 85.

86. Admits the allegations contained in paragraph 86.

87. Denies the allegations contained in paragraph 87, except admits that PSL Article VII, at § 126(1), requires the Commission to “render a decision upon the record.”

88. Denies the allegations contained in paragraph 88.

89. Denies the allegations contained in paragraph 89 and respectfully refers the Court to 16 NYCRR §§ 4.4 and 4.5, and affirmatively states that those regulations are promulgated by the Commission, not the Department.

90. Denies the allegations contained in paragraph 90 and respectfully refers the Court to Opinion 92-2 for a complete and accurate statement of its contents.

91. Denies the allegations contained in paragraph 91 and respectfully refers the Court to the Memorandum filed with Senate Bill No. 9455 and Assembly Bill No. 6821, signed by Governor Nelson A. Rockefeller (April 29, 1970), for a complete and accurate statement of its contents.

92. Admits the allegations contained in paragraph 92 but affirmatively states that the entirety of the Certificate Order passage from which the quotation contained in paragraph 92 was taken states as follows:

Mr. Kinsella's arguments regarding the validity of the PPA and whether the Project satisfies the stated need of the 2015 RFP do not undermine our determination that the Project is needed. The validity of the 2015 RFP and the resulting PPA is not under consideration in this proceeding. In any event, we note previous review and approval by the Office of the New York State Comptroller and the New York State Attorney General. Further, the costs of the project are the responsibility of the Applicant.

93. Denies the allegations contained in paragraph 93.

94. Avers that paragraph 94 is a legal conclusion to which no response is required. To the extent that a response may be required, denies the allegations contained in paragraph 94 and respectfully refers the Court to *FMC Corp. v. Unmack*, 92 N.Y.2d 179 (1998) for a complete and accurate statement of its contents.

95. Denies the allegations contained in paragraph 95, except admits that LIPA provided substantial evidence supporting the need for SFW's project.

96. Denies the allegations contained in paragraph 96, except admits that the quotation from the Certificate Order is accurate.

97. Denies the allegations contained in paragraph 97, except admits that neither the Office of the New York State Comptroller nor the Office of the New York State Attorney General were required to review the RFP, that neither of those offices signed the RFP, and that those offices did review and sign the PPA.

98. Denies the allegations contained in paragraph 98 and respectfully refers the Court to PSL § 126(1) for a complete and accurate statement of its contents.

99. Denies the allegations contained in paragraph 99 and respectfully refers the Court to PSL § 126 and *Entergy Nuclear Power Mktg. v. Pub. Serv. Commn.*, 122 A.D.3d 1024 (3d Dep't 2014) for complete and accurate statements of their contents.

100. Avers that paragraph 100 is a legal conclusion to which no response is required. To the extent that a response may be required, denies the allegations contained in paragraph 100 and respectfully refers the Court to *Entergy Nuclear Power Mktg. v. Pub. Serv. Commn.*, 122 A.D.3d 1024 (3d Dep't 2014) for a complete and accurate statement of its contents.

101. Avers that paragraph 101 is a legal conclusion to which no response is required. To the extent that a response may be required, denies the allegations contained in paragraph 101 and respectfully refers the Court to *Entergy Nuclear Power Mktg. v. Pub. Serv. Commn.*, 122 A.D.3d 1024 (3d Dep't 2014) for a complete and accurate statement of its contents.

102. Avers that paragraph 102 is a legal conclusion to which no response is required. To the extent that a response may be required, denies the allegations contained in paragraph 102 and respectfully refers the Court to PSL §§ 122 and 126(1) for complete and accurate statements of their contents.

103. Denies the allegations contained in paragraph 103 and respectfully refers the Court to Exhibit 3 to SFW's Article VII application, Filing No. 1-9, for a complete and accurate statement of its contents.

104. Denies the allegations contained in paragraph 104.

105. Denies the allegations contained in paragraph 105.

106. Admits the allegations contained in paragraph 106.

107. Denies the allegations contained in paragraph 107.

108. Denies the allegations contained in paragraph 108.

109. Denies the allegations contained in paragraph 109.

110. Denies the allegations contained in paragraph 110 and respectfully refers the Court to PSL § 126(1) for a complete and accurate statement of its contents.

111. Avers that paragraph 111 is a legal conclusion to which no response is required. To the extent that a response may be required, denies the allegations contained in paragraph 111 and respectfully refers the Court to *Svquia v. Bd. of Educ. of the Harpursville Cent. Sch. Dist.*, 80 N.Y.2d 531 (1992), for a complete and accurate statement of its contents.

112. Denies the allegations contained in paragraph 112, except denies knowledge or information sufficient to form a belief as to the truth of the allegation that LIPA released documents, and affirmatively states that the RFP bears no relevance to this matter.

113. Denies the allegations contained in paragraph 113, except admits that LIPA released documents in response to Petitioner's Freedom of Information Law request on January 22, 2021.

114. Denies the allegations contained in paragraph 114, except admits that Petitioner filed a motion to reopen the record.

115. Denies the allegations contained in paragraph 115.

116. Denies the allegations contained in paragraph 116.

117. Denies the allegations contained in paragraph 117.

118. Avers that paragraph 118 is a legal conclusion to which no response is required. To the extent that a response may be required, denies the allegations contained in paragraph 118 and respectfully refers the Court to CPLR § 7803(3) and to the full text of the cases cited in footnote 73 of the Verified Petition for complete and accurate statements of their contents.

119. Avers that paragraph 119 is a legal conclusion to which no response is required. To the extent that a response may be required, denies the allegations contained in paragraph 119 and respectfully refers the Court to the full text of the cases cited in footnote 74 of the Verified Petition for complete and accurate statements of their contents.

120. Denies the allegations contained in paragraph 120.

121. Denies the allegations contained in paragraph 121.

122. Denies knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 122, and affirmatively states that the value of the PPA bears no relevance to this matter.

123. Denies knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 123, and affirmatively states that the value of the PPA bears no relevance to this matter.

124. Denies the allegations contained in paragraph 124 and respectfully refers the Court to the Certificate Order for a complete and accurate statement of its contents.

125. Denies the allegations contained in paragraph 125 and respectfully refers the Court to Filing No. 257-10 for a complete and accurate statement of its contents.

126. Denies the allegations contained in paragraph 126 and respectfully refers the Court to Filing No. 257-10 for a complete and accurate statement of its contents.

127. Denies the allegations contained in paragraph 127 and respectfully refers the Court to Filing No. 257-9 for a complete and accurate statement of its contents.

128. Denies the allegations contained in paragraph 128 and respectfully refers the Court to the Certificate Order for a complete and accurate statement of its contents.

129. Denies the allegations contained in paragraph 129, except admits that on September 14, 2018, SFW filed an Article VII application with the Commission for a Certificate of Environmental Compatibility and Public Need to construct, operate and maintain the South Fork Export Cable, and respectfully refers the Court to the executed Joint Proposal, Filing No. 271-1, for a complete and accurate statement of its terms.

130. Denies the allegations contained in paragraph 130 and respectfully refers the Court to Filing No. 170-6 for a complete and accurate statement of its contents.

131. Denies the allegations contained in paragraph 131 and respectfully refers the Court to Filing No. 170-6 for a complete and accurate statement of its contents.

132. Denies the allegations contained in paragraph 132 and respectfully refers the Court to the Certificate Order for a complete and accurate statement of its contents.

133. Denies the allegations contained in paragraph 133 and respectfully refers the Court to the Certificate Order for a complete and accurate statement of its contents, except admits that the page counts stated therein are accurate.

134. Denies the allegations contained in paragraph 134.

135. Denies the allegations contained in paragraph 135 and respectfully refers the Court to the Certificate Order for a complete and accurate statement of its contents.

136. Denies the allegations contained in paragraph 136.

137. Denies the allegations contained in paragraph 137 and respectfully refers the Court to the Certificate Order for a complete and accurate statement of its contents.

138. Denies the allegations contained in paragraph 138.

139. Denies the allegations contained in paragraph 139 and respectfully refers the Court to Filing No. 205-7 for a complete and accurate statement of its contents.

140. Denies the allegations contained in paragraph 140.

AS AND FOR A FIRST OBJECTION IN POINT OF LAW

141. Petitioner has failed to join a necessary party as a respondent.

AS AND FOR A SECOND OBJECTION IN POINT OF LAW

142. This proceeding should be dismissed as against the Department. The Commission, not the Department, possesses the powers and duties set forth in the PSL. PSL § 4(1). The Commission, not the Department, is empowered to render a final decision on PSL Article VII applications. PSL § 126(1). The Department Staff was a party to the proceedings before the Commission. The Commission is not bound by the evidence and arguments presented by the Department. Consequently, the Department took no action that can be challenged in the instant judicial proceeding.

**AS AND FOR A STATEMENT OF THE GROUNDS FOR THE ACTION
TAKEN BY RESPONDENT NEW YORK STATE PUBLIC SERVICE
COMMISSION**

143. The Record in Case 18-T-0604 filed with this Court shows that the Commission's Order Adopting Joint Proposal and Order Denying Petitions for Rehearing were in no way arbitrary, capricious, an abuse of discretion, or affected by an error of law, but on the contrary are just, reasonable, supported by substantial record evidence and in all respects in conformity with the law.

144. Attached to this Verified Answer and marked "Schedule of Record" is the schedule of orders, notices, rulings, briefs, comments, petitions, correspondence, stenographic minutes, applications, exhibits, and other documents that constitute the Record of the proceedings before the Commission upon which its determinations are based. All of these documents are hereby made a part of this Verified Answer with the same force and effect as if fully set forth and alleged herein and as if duly certified copies of these documents were physically attached hereto.

WHEREFORE, the Commission requests that this Court dismiss and/or deny the Verified Petition in its entirety, and grant such other and further relief as it deems just and proper.

Respectfully submitted,

ROBERT ROSENTHAL

General Counsel

JOHN J. SIPOS

Deputy General Counsel

A handwritten signature in black ink, appearing to read "John C. Graham". The signature is written in a cursive style with a horizontal line crossing through the middle of the letters.

JOHN C. GRAHAM

Assistant Counsel

Of Counsel

Public Service Commission

of the State of New York

Three Empire State Plaza

Albany, New York 12223-1350

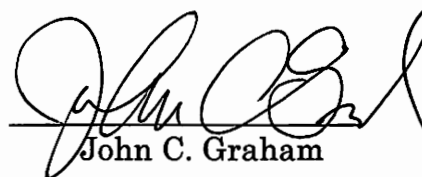
(518) 474-7687

Dated: November 8, 2021
Albany, New York

VERIFICATION

STATE OF NEW YORK)
) ss.:
COUNTY OF ALBANY)

John C. Graham, an attorney admitted to practice in the Courts of the State of New York and not a party to this proceeding, pursuant to CPLR 2106 and under penalty of perjury, states that he is an Assistant Counsel to Respondent Public Service Commission of the State of New York, that he has read the foregoing Verified Answer and knows the contents thereof; that the same is true of his own knowledge except as to the matters therein stated to be alleged upon information and belief, and as to those matters he believes "them" or "it" to be true and that the reason this Verification is made by this Affiant and not the Respondent is that the Respondent is a state commission and Affiant is an Assistant Counsel who is acquainted with the facts that are the subject of the Complaint in this proceeding. The copy of the Record supplied to the Court has been compared with the original record in the matter of Case 18-T-0604, and I hereby certify the same to be a true and correct copy therefrom.


John C. Graham

Sworn to before me this
5th day of November 2021


Notary Public

ALICIA M. SULLIVAN
Notary Public, State of New York
No. 028U6103304
Qualified in Montgomery County
Commission Expires December 22, 20 **23**