SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF SUFFOLK COUNTY

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

Plaintiffs,

- against -

LONG ISLAND POWER AUTHORITY and SOUTH FORK WIND LLC fka DEEPWATER WIND SOUTH FORK LLC,

Defendants.

Index No.: 621109/2021
RJI No.:

Hon.

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT SOUTH FORK WIND, LLC'S MOTION UNDER CPLR 3211(A) TO DISMISS THE COMPLAINT IN ITS ENTIRETY, WITH PREJUDICE

Dated: December 1, 2021

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

PRELIMINARY STATEMENT 1

STATEMENT OF FACTS 3

A. Request for Proposals and Power Purchase Agreement 3

Request for Proposals 3

2017 Power Purchase Agreement 4

2017 PPA Amendment 4

2020 PPA Amendment 4

B. The Project 4

C. Procedural History 5

ARGUMENT 5

POINT I

PLAINTIFFS DO NOT HAVE STANDING TO CHALLENGE LIPA'S ACTIONS REGARDING THE PPA 5

POINT II

PLAINTIFFS' CLAIMS ARE BARRED BY THE STATUTE OF LIMITATIONS 9

A. Plaintiffs' Claims are Subject to the Four-Month Statute of Limitations in CPLR 217 10

B. Plaintiff's First Cause of Action is Time Barred 10

C. Plaintiffs' Second Cause of Action is Time Barred 12

CONCLUSION 14

TABLE OF AUTHORITIES

Page

Cases

106 Mile Transport Assocs. v. Koch, 656 F. Supp. 1474 (SDNY 1987) 7

Blue v. Comm'r of Soc. Servs., 306 A.D.2d 527 (2d Dep't 2003) 13

Cook v. Long Island Power Authority, 2021 N.Y. Misc. LEXIS 3017 (Sup. Ct. Suffolk Cty. Feb. 17, 2021) 13

D'Avino v. Trachtenburg, 149 A.D.2d 399 (2d Dep't 1989) 12

Filut v. New York State Educ. Dep't, 91 A.D.2d 722 (3d Dep't 1982) 11

Glass v. Cty. of Suffolk, 130 A.D.3d 726–28 (2d Dep't 2015) 6

Initiative for Competitive Energy v. LIPA, 683 N.Y.S.2d 391 (Sup. Ct. Suffolk Cty. 1998) 8, 9

Lenihan v. City of New York, 58 N.Y.2d 695 (1980) 10

Martin v. Ronan, 44 N.Y.2d 374 (1978) 11

Matter of East End Prop. Co. # 1, LLC v. Kessel, 46 A.D.3d 817 (2d Dep't 2007) 6, 8

Matter of Edmead v. McGuire, 67 N.Y.2d 714 (1986) 11

Matter of Zupa v. Zoning Bd. of Appeals of Southold, 64 A.D.3d 723 (2d Dep't 2009) 13

New York State Ass'n of Nurse Anesthetists v. Novello, 2 N.Y.3d 207 (2004) 6

Salisbury v. Lapidez, 277 A.D.2d 319 (2d Dep't 2000) 12-13

Save the View Now v. Brooklyn Bridge Park Corp., 156 A.D. 3d 928 (2d Dep't 2017) 10

Soc'y of Plastics Indus. v. Cty. of Suffolk, 77 N.Y.2d 761 (1991) 6

Transactive Corp. v. New York State Dep't of Soc. Servs., 92 N.Y.2d 579 (1998) 6, 7

Windsor, 26 Misc. 3d 1233(A) 10

State Statutes

CPLR 217 ..... *passim*

CPLR 3001 10

CPLR 3211 1

General Municipal Law § 103 ..... *passim*

Public Authorities Law § 1020-f 3, 6, 8, 9

Public Service Law § 121 5

Public Service Law § 126 ..... 2, 5

Public Service Law § 128 5

State Finance Law § 163 ..... *passim*

Defendant South Fork Wind, LLC ("SFW") submits this memorandum of law in support of its motion under CPLR 3211(a) to dismiss the Complaint filed by Plaintiffs Simon Kinsella, Michael P. Mahoney, and Pamela I. Mahoney ("Plaintiffs") on November 9, 2021 ("Complaint") in its entirety, with prejudice.

PRELIMINARY STATEMENT

This action is another in a series of "not in my backyard" efforts by Plaintiffs to delay and thwart the construction and operation of an underground electric transmission cable (the "South Fork Export Cable" or "SFEC") that will deliver needed renewable energy from the South Fork Wind Farm ("SFWF"), an approximately 130 megawatt ("MW") offshore wind generation facility, to the electric grid at the Long Island Power Authority's ("LIPA") substation in East Hampton, New York (see Affidavit of Kenneth Bowes, dated November 24, 2021 ["Bowes Aff."] ¶ 14). The Complaint challenges the validity of a 2017 power purchase agreement between LIPA and SFW. For the reasons set forth herein, the Plaintiffs lack standing to challenge the 2017 power purchase agreement between LIPA and SFW and Plaintiffs' claims regarding the 2017 power purchase agreement are time-barred. Accordingly, the Complaint should be dismissed in its entirety, with prejudice.

On March 18, 2021, the New York State Public Service Commission ("Commission") issued an order granting a Certificate of Environmental Compatibility and Public Need ("CECPN") to SFW for the construction, operation, and ownership of the SFEC ("Article VII Order") (Bowes Aff. ¶ 29).[1] In issuing the Article VII Order, the Commission found that the SFEC as proposed, including the 195 conditions governing the construction and operation of the SFEC,

[1] Case 18-T-0604, *SFW, LLC*, Order Adopting Joint Proposal (issued March 18, 2021). The Article VII Order is attached to the Bowes Aff. as Exhibit B.

met all of the requirements for issuance of a CECPN as required under section 126 (1) of the Public Service Law ("PSL ") (Article VII Order at 105) (Bowes Aff. ¶ 29). Among other findings, the Commission held that the SFEC:

> will serve the public interest, convenience, and necessity by, among other things, contributing to State energy policy goals in the CLCPA, State Energy Plan, and Clean Energy Standard, diversifying the State's electric generation mix, lowering greenhouse gas emissions, and assist LIPA in serving its customers.

(Article VII Order at 105).

Construction of the SFEC will cause only temporary, off-season inconvenience to residents of the Town of East Hampton ("Town") (Bowes Aff. ¶ 25). Once built, the transmission line will be underground within Town roadways and in the Long Island Railroad ("LIRR") right-of-way ("ROW"), and will leave behind few visible traces of its existence –namely, a few manhole covers (*Id.* ¶¶ 16-17). The SFEC will interconnect to the existing transmission grid at Lippi's East Hampton Substation, and the necessary equipment to accommodate the interconnection will be built immediately adjacent to the East Hampton Substation and surrounded by an architectural wall that will limit visibility of the equipment to some lightning masts that are required under the applicable electric code (*Id.* ¶ 18).

As established herein, Plaintiffs lack standing to challenge LIPA's determination to execute a power purchase agreement for the power from the SFWF because they have not demonstrated that they have suffered any injury in fact distinct from that of the general public. Nor have Plaintiffs established that they have suffered any injury in fact distinct from that of the general public regarding LIPA's alleged failure to obtain the approval of the State Public Authorities Control Board ("PACB") before executing the power purchase agreement at issue.

Moreover, Plaintiffs' claims are barred by the applicable statutes of limitation. The power purchase agreement was executed on February 6, 2017, and approved by the Office of the Attorney

General ("OAG") on March 9, 2017, and the Office of the State Comptroller ("OSC") on March 29, 2017 (*Id.* ¶ 44). Plaintiffs commenced this action on or about November 9, 2021, well after the applicable four-month statute of limitations expired. As such, Plaintiffs' claims that LIPA's actions regarding the power purchase agreement violated State Finance Law § 163 and General Municipal Law § 103 are time-barred by the applicable four-month statute of limitations under CPLR 217.

Furthermore, Plaintiffs' claim that LIPA violated Public Authorities Law § 1020-f (aa) because it did not obtain approval of the PACB before executing the power purchase agreement was commenced more than four years after the power purchase agreement was executed and approved. Thus, this claim also is time barred by the applicable four-month statute of limitations under CPLR 217. Moreover, Plaintiffs failed to make the requisite demand that LIPA submit the power purchase agreement to the PACB for approval within four months of LIPA's execution of the power purchase agreement.

For the reasons set forth herein, Plaintiffs claims should be dismissed.

STATEMENT OF FACTS

A. Request for Proposals and Power Purchase Agreement

Request for Proposals

In 2015, Defendant LIPA, through its agent PSEG Long Island ("PSEG-LI") established the South Fork Supply and Load Relief Project to defer new transmission needed on the South Fork of Long Island until the year 2022 and to defer transmission needed east of its Buell substation until 2030 (*Id.* ¶ 38). On June 25, 2015, PSEG-LI issued a technology-neutral request for proposals ("RFP") seeking project(s) that could satisfy those needs (*Id.*). A description of the RFP process is provided in the accompanying affidavit of Kenneth B. Bowes (*Id.* ¶¶ 37-40).

2017 Power Purchase Agreement

On January 26, 2017, the LIPA Board approved a power purchase agreement between LIPA and SFW that required SFW to deliver 90 MW of energy, installed capacity, renewable attributes, and ancillary services from the SFWF to the LIPA East Hampton Substation ("2017 PPA") (*Id.* ¶ 41). On February 6, 2017, LIPA and SFW executed the 2017 PPA (*Id.*).

2017 PPA Amendment

During its review of the 2017 PPA, the OSC requested that SFW amend the 2017 PPA to modify the assignment provisions and add language to comply with the New York State Finance Law (*Id.* ¶ 42). On March 6, 2017, SFW and LIPA executed an amendment to the 2017 PPA that aligned the 2017 PPA with the OSC's requests ("2017 PPA Amendment") (*Id.*). The 2017 PPA and 2017 PPA Amendment were approved by the OAG on March 9, 2017 and the OSC on March 29, 2017 (*Id.* ¶ 43).

2020 PPA Amendment

Following the execution of the 2017 PPA and 2017 PPA Amendment, available wind turbine generator ("WTG") technology improved, allowing SFW to use larger WTGs to increase the overall size of the SFWF while retaining the original footprint (*Id.* ¶ 44). As a result of this technology change, on September 9, 2020 SFW and LIPA executed a second amendment to the 2017 PPA for SFW to deliver up to an additional 40 MW of incremental capacity, bringing the total capacity to approximately 130 MW which was approved, without modification, by the OAG on November 2, 2020 and the OSC on April 9, 2021 (*Id.*).

B. The Project

A description of the SFEC project is provided in the accompanying affidavit of Kenneth B. Bowes (*Id.* ¶¶ 15-20).

C. Procedural History

To construct a major utility transmission facility in New York State, a developer must receive, among other things, a CECPN from the Commission pursuant to Article VII of the PSL (PSL § 121(1)). In order to grant a CECPN, the Commission must find and determine, *inter alia*, (i) the basis of the need for the project; (ii) the nature of the probable environmental impact; and (iii) that the project minimizes, to the extent practicable, any significant adverse environmental impacts (*Id.* § 126(1)).

The Commission issued the Article VII Order granting the CECPN on March 18, 2021 (Bowes Aff. ¶ 29). The Commission concluded that the SFEC project would have only "minimal adverse environmental impact" and that the record "fully support[ed] a finding of public need" (*Id.*).[2]

On April 19, 2021, Plaintiff Mr. Kinsella and another party to the Article VII proceeding filed petitions for rehearing of the Article VII Order pursuant to PSL section 128 ("Petitions for Rehearing") (*Id.* ¶ 31). On August 12, 2021, the Commission issued an order denying the Petitions for Rehearing on the grounds that they failed to allege any errors of fact or law or new information warranting a departure from the Article VII Order (*Id.* ¶ 34).

ARGUMENT

POINT I

PLAINTIFFS DO NOT HAVE STANDING TO CHALLENGE LIPA'S ACTIONS REGARDING THE PPA

Plaintiffs' first causes of action alleging that the 2017 PPA should be annulled based on claimed violations of State Finance Law § 163 and General Municipal Law § 103, and their second

[2] A full description of the process that resulted in the issuance of the Article VII order is provided the accompanying affidavit of Kenneth B. Bowes (Bowes Aff. ¶¶ 19-31, 34).

cause of action alleging that LIPA violated Public Authorities Law § 1020-f (aa) should be dismissed because Plaintiffs' lack standing to challenge LIPA's actions regarding the PPA.

Standing is "a threshold requirement" for a party challenging a governmental action (*New York State Ass'n of Nurse Anesthetists v. Novello*, 2 N.Y.3d 207, 211 (2004); *Soc'y of Plastics Indus. v. Cty. of* Suffolk, 77 N.Y.2d 761, 772, 773 (1991)). To establish standing generally, a party must meet the requirements of a two-prong test. First, a party must show that it will suffer a real, non-speculative "injury in fact," meaning that the party "will actually be harmed by the challenged. . . action" (*Novello*, 2 N.Y.3d at 211). Second, it "must demonstrate that the injury claimed falls within the zone of interests to be protected by the statute challenged" (*Transactive Corp. v. New York State Dep't of Soc. Servs.*, 92 N.Y.2d 579, 587 (1998) (citing *Soc'y of Plastics Indus.*,77 N.Y.2d at 772, 773)). A plaintiff must also "show that it would suffer direct harm. . . that is in some way different from that of the public at large" (*Soc'y of Plastics*, 77 N.Y.2d at 774; *see also Glass v. Cty. of Suffolk*, 130 A.D.3d 726, 727–28 (2d Dep't 2015)). In *Matter of East End Prop. Co. # 1, LLC v. Kessel*, 46 A.D.3d 817, 819 (2d Dep't 2007), *appeal denied*, 10 N.Y.3d 926 (2008), the Appellate Division, Second Department explained that when challenging LIPA's authority to enter into contracts, a plaintiff must "demonstrate sufficient potential injury in fact to sustain their burden of establishing standing," and that "[i]n the absence of some injury in fact, the 'zone of interest' test [does] not confer standing . . . merely because [a plaintiff is a] customer[] of the utility."

Plaintiffs do not have standing to assert their claims under State Finance Law §163 or General Municipal Law § 103 (*See* Complaint ¶¶ 84-85). Standing under State Finance Law § 163 requires a plaintiff to show "that they have suffered an injury in fact, distinct from that of the general public" (*Transactive Corp.*, 92 N.Y.2d at 579 (citing *Soc'y of Plastics Indus.*, 77 N.Y.2d

at 771-74)). In *Transactive Corp.*, 92 N.Y.2d at 587, several petitioners brought an Article 78 proceeding challenging the Department of Social Services' award of a contract to Citicorp Services to create and implement an electronic benefit transfer system for distribution of certain government benefits. Petitioners challenged the award on the basis of an alleged defective bidding process. Included among the petitioners was Transactive Corporation, a subcontractor of Fleet Financial Group ("Fleet"). Fleet bid on the project in competition with Citicorp. The court held that Transactive lacked standing to sue. Transactive was not within the zone of interests protected by State Finance Law § 163 because it was not a bidder or offeror (*Id.* at 587-588 (citations omitted)). The court similarly found that Check Cashers, Inc., a trade association, had not alleged an injury in fact because it had no direct stake in the outcome of the bidding process.

The same standing requirement applies to claims under § 103 of the General Municipal Law (*See Tilcon N.Y., Inc. v. Town of New Windsor*, 172 A.D.3d 942 (2d Dep't 2019); *Troeller v. N.Y.C Dep't of Educ.* (1st Dep't 2013)); *see also 106 Mile Transport Assocs. v. Koch*, 656 F. Supp. 1474, 1484 (SDNY 1987) (plaintiffs did not have standing to sue for alleged violation of Gen. Mun. L. §103 where plaintiffs did not bid on contract and therefore, alleged violation of competitive bidding laws did not injure them)).

Plaintiffs have failed to meet their burden to establish standing under State Finance Law § 163 or General Municipal Law § 103. There are no allegations in the Complaint that address, let alone show, that Plaintiffs have suffered an injury in fact distinct from that of the general public with respect to the allegations in the complaint regarding the 2017 PPA. Indeed, the Plaintiffs were neither bidders in the RFP process nor had any other direct stake in the outcome of that process. Further, Plaintiffs have failed to identify any direct injury they allegedly would suffer as

a result of Defendant's alleged violations of the competitive bidding rules. Accordingly, Plaintiffs' claims under State Finance Law § 163 and General Municipal Law § 103 should be dismissed.

For the same reasons, Plaintiffs also do not have standing to assert the claim under the Public Authorities Law § 1020-f (aa) set forth in their second cause of action. In *Matter of East End Prop. Co. # 1, LLC*, 46 A.D.3d at 819 the appellants challenged, among other claims, LIPA's authority to enter into a power purchase agreement.[3] The Appellate Division, Second Department stated in that case that when challenging LIPA's authority to enter into contracts, a plaintiff must "demonstrate sufficient potential injury in fact to sustain their burden of establishing standing," and that "[i]n the absence of some injury in fact, the 'zone of interest' test [does] not confer standing…merely because [a plaintiff is a] customer[] of the utility" (*Id.*) In that case, the appellate court held "the individual appellants failed to demonstrate sufficient potential injury in fact to sustain their burden of establishing standing to challenge the power of [LIPA] to enter into a contract…" (*Id.*).

Similarly, in *Initiative for Competitive Energy v. LIPA*, 683 N.Y.S.2d 391 (Sup. Ct. Suffolk Cty. 1998) the plaintiffs challenged certain actions by LIPA claiming that they had standing as ratepayers of LIPA that would be harmed by LIPA's actions. The Court found that the plaintiffs lacked standing because they did not allege that they sustained an injury in fact or that any alleged injury differs from that allegedly suffered by the community at large.

Justice Emerson's recent decision in *Cook v. Public Authorities Control Board and Long Island Power Authority* issued November 3, 2021 (see Affirmation of Leonard H. Singer, dated December 1, 2021, Exhibit A) held that the same standing requirements apply to a claim that LIPA

[3] LIPA clearly had the authority to enter into the 2017 PPA. Public Authorities Law § 1020-f(r) provides LIPA with the power "[t]o enter into agreements to purchase power from…any private entity…."

did not submit certain agreements to the PACB. In that case, the court granted a motion by LIPA and the PACB to dismiss the petition finding that:

> the petitioner has failed to demonstrate an injury-in-fact that falls within his zone of interest (*Skelos v. Paterson* 65 AD3d 339, *revd on other grounds* 13 NY3d 141) and that is different in kind from the public at large (Matter of AEP Resources Serv. Co. v. Long Is. Power Auth., 179 Misc2d 639, 648 citing *Soc'y of Plastics Indus.*, 77 N.Y.2d at 761). He, therefore, lacks standing to challenge LIPA's authority to enter into a contract without approval from the PACB.

(*Id*. at 2).

In the instant case, Plaintiffs fail to allege that they suffered any injury from LIPA's actions in executing the 2017 PPA, let alone that they suffered injury that is particularized and distinct from that of the general public. The allegation in the Complaint that Plaintiffs are "taxpayers and ratepayers in the affected service area" (Complaint ¶¶ 78-79) fails to show that Plaintiffs have standing to assert the causes of action stated in the Complaint. Having failed to show both an injury in fact and that any alleged injury differs from that suffered by the community at large, this Court should find that Plaintiffs lack standing to assert their claims that the PPA should be annulled, and, as such, both causes of action in the Complaint should be dismissed.

POINT II

PLAINTIFFS' CLAIMS ARE BARRED BY THE STATUTE OF LIMITATIONS

Plaintiffs' first cause of action alleging that the process that resulted in the 2017 PPA violated General Municipal Law § 103 and State Finance Law § 163 was commenced well after the expiration of the applicable four-month statute of limitations and, as such, should be dismissed. Similarly, Plaintiffs' second cause of action alleging that LIPA violated Public Authorities Law § 1020-f (aa) because it executed the 2017 PPA without obtaining the approval of the PACB should be dismissed because this action was commenced more than four months after the 2017 PPA was

executed and because Plaintiffs failed to make a demand that LIPA submit the 2017 PPA to the PACB within the applicable four-month statute of limitations.

A. Plaintiffs' Claims are Subject to the Four-Month Statute of Limitations in CPLR 217

Although Plaintiffs' assert that their claims are for a declaratory judgement under CPLR 3001, the four-month statute of limitations governing Article 78 proceedings set forth in CPLR 217 is applicable to both of their claims. It is well settled that "where a declaratory judgment action involves claims that could have been made in another proceeding for which a specific limitation period is provided, the action is subject to the shorter limitations period" (*Save the View Now v. Brooklyn Bridge Park Corp.*, 156 A.D. 3d 928, 931 (2d Dep't 2017)). Moreover, "[w]here an action could have been brought pursuant to CPLR article 78, the four-month statute of limitations applicable to such proceedings applies" (*Id.* at 928; CPLR 217(1)). If a proceeding pursuant to CPLR Article 78 would have been appropriate to settle a dispute with a governmental entity, the four-month period of limitations governing Article 78 proceedings is applicable (*See* CPLR 217(1); *Lenihan v. City of New York, 58 N.Y.2d 695 (1980); Windsor,* 26 Misc. 3d 1233(A)). Therefore, the applicable statute of limitations in this instance is set by CPLR 217(1), which requires that a proceeding against a body or officer must be commenced within four months after the determination to be reviewed becomes final.

B. Plaintiff's First Cause of Action is Time Barred

Courts apply a four-month statute of limitations in proceedings brought against governmental entities and officials under the State Finance Law § 163 and General Municipal Law § 103 (*See, e.g., Fishman v. Mills*, 294 A.D.2d 764 (3d Dep't 2002) (applying four-month statute of limitations to State Finance Law § 163 claim); *Fawcett v. City of Buffalo*, 275 A.D.2d 954 (4th Dep't 2000) (applying four-month statute of limitations to Gen. Mun. L. § 103 claim to set aside

municipal contract as violative of competitive bidding requirements); *Tufaro Transit Co. v. Board of Educ.*, 79 A.D.2d 376 (2d Dep't 1981) (applying four-month statute of limitations to Gen. Mun. L. § 103 claim); *Windsor*, 26 Misc. 3d 1233(A) (applying four-month statute of limitations in hybrid Article 78 and declaratory judgment action alleging lease was obtained without competitive bidding in violation of State Finance Law § 163)).

The limitations period of CPLR 217 begins to run when there has been a final and binding determination by which the plaintiff is aggrieved (*Matter of Edmead v. McGuire*, 67 N.Y.2d 714, 716 (1986); *Martin v. Ronan*, 44 N.Y.2d 374, 382 (1978)). A decision is considered to be "final and binding when it has an impact upon a petitioner" (*Filut v. New York State Educ. Dep't*, 91 A.D.2d 722, 723 (3d Dep't 1982)).

The 2017 PPA was executed by SFW and LIPA on February 6, 2017 (Bowes Aff. ¶ 42). It was then that LIPA's decision to enter into the 2017 PPA with SFW pursuant to the RFP process became final. The instant proceeding was commenced on November 9, 2021, which is well after the four-month statute of limitations to commence an action under CPLR 217 expired. Even if it were determined that LIPA's actions with respect to the 2017 PPA were not concluded until the final State approval of the PPA was received, the OSC approved the 2017 PPA on March 29, 2017 and, thus, even by that standard, Plaintiffs' claims are still clearly time barred (*Id.* ¶ 44). As such, Plaintiffs' first cause of action is untimely and should be dismissed.

Plaintiffs' first cause of action regarding the 2017 PPA is based on assertions that the RFP process that resulted in the execution of the 2017 PPA was improper. Because the claim in the Complaint alleges impropriety of the RFP process, the LIPA action by which Plaintiffs claim they were aggrieved occurred when the RFP process concluded – *i.e.* the execution of the 2017 PPA.

Because this action was commenced well after four months from February 6, 2017, it is time barred and should be dismissed.

While SFW contends that the statute of limitations on LIPA's actions began to run when the 2017 PPA was executed, even if the four-month period did not commence until the 2017 PPA was approved by the OSC and OAG, the first cause of action is still well outside the applicable four-month statute of limitations. The 2017 PPA defines its "Effective Date" as occurring upon such approval by the OSC and OAG (Bowes Aff. ¶ 44). Those actions were completed as of March 29, 2017 (*Id.*). Thus, assuming, *arguendo*, that the statute of limitations began to run on the "Effective Date" of the 2017 PPA, rather than the date of its execution, the first cause of action remains well outside the four-month statute of limitations and would still be time barred.

C. Plaintiffs' Second Cause of Action is Time Barred

Plaintiffs' second cause of action alleges that LIPA "did not have authority to execute the power purchase agreement without obtaining the approval of the [PACB]…" (Complaint¶ 87.) The governmental action that Plaintiffs' are challenging – the execution of the 2017 PPA – occurred on February 6, 2017 when LIPA executed the 2017 PPA. Accordingly, this proceeding was commenced well after the four-month statute of limitations expired and should be dismissed.

Furthermore, the second cause of action concerns the performance of an act by a governmental entity—submission of the PPA to the PACB for approval—and thus constitutes a claim in the nature of mandamus. *D'Avino v. Trachtenburg*, 149 A.D.2d 399, 400 (2d Dep't 1989), *appeal denied*, 74 N.Y.2d 612 (1989). However, "[t]he extraordinary remedy of mandamus will lie only to compel the performance of a ministerial act, and only when there exists a clear legal right to the relief sought . . . [and] will not be awarded to compel an act with respect to which an administrative agency may exercise judgment or discretion" (*Salisbury v. Lapidez*, 277 A.D.2d

319, 319 (2d Dep't 2000) (internal citation and quotation marks omitted)). Moreover, "[b]efore commencing a proceeding in the nature of mandamus, it is necessary to make a demand and await refusal" (*Blue v. Comm'r of Soc. Servs.*, 306 A.D.2d 527, 528 (2d Dep't 2003) (internal citation and quotation marks omitted)). "A proceeding in the nature of mandamus to compel must be commenced within four months after the refusal by the body or officer, upon the demand of the aggrieved party, to perform a duty enjoined upon the body or officer by law" (*Matter of Zupa v. Zoning Bd. of Appeals of Southold*, 64 A.D.3d 723, 725 (2d Dep't 2009)).

In a recent case similar to this action, *Cook v. Long Island Power Authority*, 2021 N.Y. Misc. LEXIS 3017 (Sup. Ct. Suffolk Cty. Feb. 17, 2021), the plaintiff commenced a declaratory judgement action alleging among other things, that LIPA failed to submit a 2012 power purchase agreement to the PACB for approval. However, plaintiff did not allege or demonstrate that they made any demand on LIPA, let alone a timely demand to submit the agreement to the PACB before commencing the action. As such, the court held that plaintiff's claim was barred by the four-month statute of limitations and the doctrine of laches and dismissed plaintiff's action (*Id.* at *7-9). The same result is compelled here.

The Complaint fails to allege or establish that Plaintiffs made a demand that LIPA submit the 2017 PPA to the PACB for approval. Moreover, even if the Complaint is considered such a demand, the demand would have been made well after four months from both the execution of the PPA by LIPA and the approval of the PPA by OSC and the AG. Thus, Plaintiffs' second cause of action is time barred.

CONCLUSION

For the reasons set forth herein, this Court should grant SFW's motion and dismiss the Complaint in its entirety, with prejudice, along with such other and further relief as this Court may deem just and proper.

Dated: December 1, 2021
Albany, New York

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WORD COUNT CERTIFICATION

The undersigned counsel for Respondent-Defendant South Fork Wind, LLC, hereby certifies that pursuant to Rule 17 of subdivision (g) of section 202.70 of the Uniform Rules for the Supreme Court and County Court, the total number of words in this Memorandum of Law is 4,252 inclusive of point headings and footnotes and exclusive of the caption, table of contents, table of authorities and signature block.

Dated: Albany, New York
December 1, 2021

Leonard H. Singer