

# **EXHIBIT D**

**STATE OF NEW YORK  
PUBLIC SERVICE COMMISSION**

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<b>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.</b>	X
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**Case 18-T-0604**

**RESPONSE OF PSEG LONG ISLAND TO MOTION OF SIMON V. KINSELLA TO COMPEL PSEG LONG ISLAND, LLC TO RESPOND TO INFORMATION REQUEST SI KINSELLA #32 PURSUANT TO 16 NYCRR §§3.6, 5.1, 5.3 AND 5.4**

On September 30, 2020, Simon V. Kinsella (“Kinsella”) served a motion to compel PSEG Long Island LLC (“PSEG Long Island”)<sup>1</sup> to respond to certain document requests in connection with the 2015 South Fork Resources Request for Proposals (“RFP) selection process.<sup>2</sup> Subsequently, on October 5, 2020, Kinsella filed supplemental information in support of his

<sup>1</sup> PSEG Long Island manages overall operations of the transmission and distribution system, including promoting, administering, planning, developing and implementing energy efficiency, demand response, load management, and renewable energy programs in the service territory of the Long Island Power Authority (“LIPA”). PSEG Long Island undertakes these responsibilities pursuant to an Operations Services Agreement between PSEG Long Island and LIPA dated December 31, 2013, and is a party to this matter on behalf of LIPA.

<sup>2</sup> 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 Simon V. Kinsella to Compel PSEG Long Island, LLC to Respond to Information Request Si Kinsella #32 Pursuant to NYCRR §§ 3.6, 5.1, 5.3 and 5.4 (filed September 30, 2020)(“Motion”).

motion,<sup>3</sup> and on October 7, 2020, Kinsella filed a clarification letter explaining that he was already in possession of some of the information being requested in the Motion.<sup>4</sup> Specifically, Kinsella seeks to compel PSEG Long Island to provide a response to Interrogatory/Document Request Si Kinsella #32 (2), (4), (5), (6), (7), (8), (9), and (10) (hereinafter “IR 32”). In accordance with Sections 3.5 and 3.6 of the New York Public Service Commission’s (“Commission”) Rules and Regulations (“Rules”), PSEG Long Island, on behalf of LIPA, hereby files its response to the Motion.<sup>5</sup>

As described herein, the Motion should be denied in full on the grounds that IR 32 seeks information for the purpose of assessing the procurement process with respect to PSEG Long Island’s 2015 RFP that resulted in the selection of the South Fork Wind Farm Project. The information sought by Kinsella is neither relevant to, nor reasonably calculated to lead to, the discovery of admissible evidence in this proceeding.

### **BACKGROUND**

#### **South Fork Resources Request for Proposals**

On June 25, 2015, PSEG Long Island issued the South Fork Resources Request for Proposals (“RFP”) to acquire sufficient local resources to meet expected peak load requirements, and to defer to the greatest extent possible the construction of new transmission lines or other enhancements until at least 2022 in the South Fork of Long Island<sup>6</sup> as a whole, and until 2030 in the far eastern area of the South Fork (east of the Buell substation near the Village of East

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<sup>3</sup> Case 18-T-0604, *Supplemental Information in Support of Motion of Simon V. Kinsella to Compel PSEG Long Island, LLC to Respond to Information Request Si Kinsella #32* (filed October 5, 2020) (“Supplemental Information Filing”).

<sup>4</sup> Case 18-T-0604, *Clarification Letter* (filed October 7, 2020) (“Clarification Letter”).

<sup>5</sup> 16 NYCRR §§ 3.5(f) and 3.6(d)(1).

<sup>6</sup> For purposes of the South Fork RFP, the South Fork consists of the electrical load in the towns of East Hampton and Southampton connected to LIPA’s T&D System east of the Canal Substation, which is located in the Town of Southampton.

Hampton).<sup>7</sup> Consistent with the goals of the Commission's Reforming the Energy Vision (REV) initiative, all technologies capable of meeting the desired objectives were invited to bid. To encourage broad participation in the RFP, individual proposals were not required to meet the entire need by themselves and the RFP anticipated that a portfolio of proposals would be selected.<sup>8</sup>

A Selection Committee, consisting of staff from PSEG Long Island, supported by technical and legal advisors and consultants, was designated to conduct the evaluation. Prior to receiving proposals, the Selection Committee designed a multi-phase evaluation process that focused on selecting a portfolio of proposals that would provide the best value to LIPA's customers based on the quantitative and qualitative merits of each portfolio. During the evaluation process, LIPA staff provided input and oversight. The New York State Department of Public Service attended Selection Committee meetings as an observer.<sup>9</sup>

On December 2, 2015, 21 proposals were received from 16 entities. The 21 proposals included a wide range of technologies, including offshore wind, solar photovoltaic, lithium ion batteries, thermal storage, fuel cells, direct load control, aeroderivative combustion turbines, and reciprocating engines. The Selection Committee first reviewed the proposals individually for compliance with the submittal requirements of the RFP and then evaluated the responsive proposals based on criteria set forth in the RFP, including, among other things:

- Qualitative aspects of each proposal;
- Extent to which a proposal meets the objectives of the RFP;
- Prices for capacity and energy;

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<sup>7</sup> All of the information in the "Background" Section pertaining to the RFP or the PPA is publicly accessible on LIPA's website. For example, see the following two sites: (i) <https://www.lipower.org/wp-content/uploads/2019/02/2017-01-South-Fork-Board-Material.pdf> (last accessed on October 15, 2020); and (ii) <https://www.lipower.org/wp-content/uploads/2019/02/2018-11-South-Fork-Board-Material.pdf> (last accessed on October 15, 2020).

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

- Cost of fuel, where applicable;
- Costs of any required or avoided/deferred transmission system upgrades;
- Credits for helping to meet the LIPA's Board of Trustees ("LIPA Board") goal of 400 MW of renewables; and
- The cost impact on LIPA's purchases and sales of power.<sup>10</sup>

The qualitative evaluation considered the unique attributes of each proposal, including operational flexibility, environmental impacts, the interaction with LIPA's other power supply resources, community impact and acceptance, and the ability to meet the proposed project schedule.<sup>11</sup>

During the evaluation, PSEG Long Island, with input from LIPA's staff, identified and evaluated potential combinations of individual proposals that could provide the best possible solutions to the South Fork needs through at least 2022 (each such combination a "Portfolio"). Each Portfolio consisted of three to eight proposals selected from among the most cost-effective proposals based on the initial quantitative evaluation and with the least implementation and reliability risk based on the initial qualitative evaluation.<sup>12</sup> After further detailed quantitative and qualitative analyses were conducted, representatives of the Selection Committee met with South Fork community representatives to obtain further insight into community support for the types of projects that appeared to have the most promise of providing a cost-effective solution to the RFP requirements.<sup>13</sup>

Upon completion of the final qualitative and quantitative analyses in July 2016, the PSEG Long Island Selection Committee identified a Portfolio consisting of load reduction, battery storage, and offshore wind resources (*i.e.*, Deepwater Wind South Fork, LLC's ("DWSF") South Fork Wind Farm) that provided the best value to customers. This Portfolio had the lowest net

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<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

cost of the portfolios evaluated and met the objectives of the RFP. In other words, the aggregate cost imposed on LIPA by the Portfolio projects would be less on a net present value basis than timely construction of new transmission alone.<sup>14</sup>

#### Power Purchase Agreement (PPA)

PPA negotiations commenced during the summer of 2016. Negotiations for the DWSF PPA (“PPA”) were conducted by PSEG Long Island, with assistance and oversight by LIPA Staff. On January 25, 2017, the LIPA Board approved the PPA for the purchase of energy, installed capacity, renewable attributes and ancillary services from DWSF’s proposed 90 MW South Fork Wind Farm (the “Project”). The Project was one of a series of initiatives designed to meet increased load on the South Fork of Long Island and defer the need for local transmission upgrades, while also contributing to the Authority’s clean energy portfolio. Payment for the delivered energy, contract capacity, ancillary services, and renewable attributes is solely on a “pay-for-performance” basis for energy delivered to LIPA at its East Hampton substation.<sup>15</sup>

The PPA requires DWSF to obtain all required permits and approvals, and enter into necessary contracts to construct the Project. The wind project itself is located in federal waters. Environmental reviews have been conducted and are supervised by the Bureau of Ocean Energy Management pursuant to federal law. Construction of DWSF’s submarine and underground transmission facilities that will interconnect the project to the LIPA system requires a Certificate of Environmental Compatibility and Public Need (“Certificate”) from the Commission pursuant to Article VII of the Public Service Law (“PSL”).<sup>16</sup>

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<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

### Article VII Application

On September 14, 2018, DWSF filed an application for a Certificate under Article VII of the PSL to construct, operate, and maintain the South Fork Export Cable (“SFEC”), a 138kV electric cable that will connect the South Fork Wind Farm, located offshore in federal waters, to the existing mainland electric grid in the Town of East Hampton, on Long Island, Suffolk County, New York. The SFEC includes a submarine segment of the cable in New York State territorial waters, a terrestrial underground segment of the cable, and a new interconnection facility, all of which are subject to review and approval under Article VII.

### IR 32 Dispute

As set forth in the Motion, on August 24, 2020, Kinsella served IR 32, consisting of ten (10) subparts, on PSEG Long Island. On September 3, 2020, PSEG Long Island responded to IR 32 with objections. On September 30, 2020, Kinsella filed the instant Motion with the Secretary to the Commission. On October 5, 2020, Kinsella filed the Supplemental Information Filing with the Secretary to the Commission. On October 7, 2020, Kinsella, PSEG Long Island, LIPA, Administrative Law Judge (“ALJ”) Belsito, and the Applicant participated in a zoom conference call. After the conference call, Kinsella filed a Clarification Letter with the Secretary to the Commission.<sup>17</sup>

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<sup>17</sup> “Please find clarification in response to Mr. Greenblatt’s request during the zoom conference today”. Clarification Letter at 1.

**ARGUMENT****POINT I****THE INFORMATION SOUGHT BY KINSELLA'S INFORMATION REQUEST IS NOT RELEVANT TO THE ARTICLE VII PROCEEDING**

In IR 32, Kinsella requested documents submitted by all of the respondents to the 2015 South Fork RFP and/or documents that support the basis for the determination with respect to the award of the 2017 PPA. More specifically, IR 32 seeks, among other things, the names and addresses of all of the respondents to the 2015 South Fork RFP; documentation supporting the basis for the determination by PSEG Long Island and/or LIPA with respect to the award of the 2017 PPA to Deepwater Wind including but not limited to any comparative analysis and any memoranda, reports, and or findings; copies of any comparative evaluation criteria submitted pursuant to the 2015 South Fork RFP; copies of any correspondence seeking to clarify proposals for the purpose of assuring PSEG Long Island has a full understanding of any of the responses to the RFP; copies of any documentation as a result of any interviews and/or site visits submitted pursuant to the 2015 South Fork RFP; copies of any NYS Vendor Responsibility Questionnaire submitted pursuant to the 2015 South Fork RFP; and copies of any additional information to supplement the information provided in the NYS Vendor Responsibility Questionnaire used to assist the Selection Committee in making such a determination pursuant to the 2015 South Fork RFP.

In the Motion and Supplemental Information Filing, Kinsella argues that the information sought by these requests is relevant because "IR SK #32 attempts to shed light on the procurement process administered by PSEGLI in an effort to gain an understanding of the issues



so that the public can participate in and make informed decisions in a functioning democracy;”<sup>18</sup> “[i]nsight into the South Fork RFP Procurement process and its PPA is necessary, material and imperative in assessing whether Deepwater Wind South Fork is in the public interest, or not;”<sup>19</sup> and the “reason for seeking PSEGLI to respond to IR SK#32” is because Kinsella doesn’t “know the nature of [a company’s] bid.”<sup>20</sup>

As set forth by Section 5.8(a) of the Commission’s Rules, “[d]iscovery requests should be tailored to the particular proceeding and commensurate with the importance of the issues to which they relate.” Further, Section 5.1(a) of the Rules only requires parties to disclose to each other “all information ... relevant and material to a proceeding in which they are participating and any information likely to lead to such information.” The factors that the Commission must consider when making the decision to grant a proposed project a Certificate are clearly enumerated in PSL Section 126.

The facilities at issue in this case are the transmission line and associated equipment described in the Application – the SFEC-NYS, SFEC-Onshore, and SFEC-Interconnection Facility. The South Fork Wind Farm (“SFWF”) is not within the Commission’s jurisdiction and, as such, is not at issue in this proceeding. Likewise, neither the 2015 RFP, the process used that resulted in the ultimate selection of the SFWF, nor the terms and conditions of the Power Purchase Agreement that LIPA and DWSF entered into as a result of the 2015 RFP, are before the Commission in this case.

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<sup>18</sup> Motion, *supra*, at Section IV.

<sup>19</sup> *Id.*

<sup>20</sup> Case 18-T-0604, *Supplemental Information Filing* at 9.

Kinsella argues in the Motion that PSEG Long Island should be compelled to respond to IR 32 so he can develop and present his “case” before the Commission.<sup>21</sup> However, there is no case before the Commission that concerns the RFP selection process or the PPA. The process by which the Project was selected to move forward to the Article VII process is simply outside of the scope of the Commission’s jurisdiction in this case. Moreover, Kinsella’s misunderstanding of this case is evident in his very first sentence of the Motion, in Section I, where he incorrectly states as fact that the Applicant is seeking a Certificate for the construction and operation of the South Fork Wind Farm.<sup>22</sup> As explained in numerous places, including the Application and the Joint Proposal, the SFWF and the portion of the SFEC located in the Outer Continental Shelf (“SFEC-OCS”) are situated within federal waters and are thus outside the scope of the instant proceeding. In the Supplemental Filing Information, Kinsella seems to understand this point a little clearer as he states “in fact, the subject of this Article VII proceeding is a new transmission line.”<sup>23</sup>

Thus, information requests, such as the ones contained in IR 32, that seek information relating to the RFP process do not pass the requirements of Rule 5.8(a) to be “tailored to the particular proceeding,” and are not “relevant and material to [the] proceeding” as required by Rule 5.1(a). And, Kinsella is already well aware of this based on prior conversations and rulings in this case. For example, a few weeks ago, on August 28, 2020, Kinsella moved for a ruling compelling the Town of East Hampton to respond to a request for information. In ALJ Belsito’s

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<sup>21</sup> “Issues that ‘affect the pricing of utilities supplied to the general public’ include those for which information has been requested in IR SK #32 and is required to development and present my case before the Commission.” Motion at 12.

<sup>22</sup> “Deepwater Wind South Fork LLC (the “Applicant”) seeks a Certificate of Environmental Compatibility and Public Need (“Certificate”) from New York State Public Service Commission (the “Commission”) for the construction and operation of the South Fork Wind Farm, South Fork Export Cable (“SFEC”) and Interconnection Facility.” Motion at 2 (emphasis added).

<sup>23</sup> Case 18-T-0604, *Supplemental Filing Information* at 16.

*Ruling on Motion to Compel Production*, issued 16 days prior to this instant Motion, it was determined that “2015 RFP issues are beyond the scope of this proceeding.”<sup>24</sup> Similarly, in another ALJ Belsito ruling that was issued just prior to this instant motion being filed, it was determined that “[b]oth the 2015 RFP and the PPA are beyond the scope of this Article VII proceeding.”<sup>25</sup> On the zoom conference call that took place on October 7, 2020, Kinsella admitted that he did not review the *Ruling on Motion to Compel Production of Comparative Economic Review*, and the determination that this issue has already been decided, before he “hit send” on his Motion. Based on precedent alone, this is yet another example of a motion to compel that should have been withdrawn “so as to not waste ALJ Belsito’s and the Department of Public Service’s valuable time.”<sup>26</sup>

Why Kinsella wants this broad information is unclear (the information he provided in the Supplemental Information Filing discusses topics such as other substations not related to this Article VII proceeding and US Olympic sprinters); however, what is clear is that almost all of the information being sought has neither been previously submitted by any party, nor is it being relied upon by any party except Kinsella. If the information already provided to Kinsella is not enough for his review of the preferred and alternative routes in this Article VII matter, then Kinsella is essentially asking for information to undo the results of the 2015 RFP, or undo the fully executed PPA. This fishing exercise is improper and cannot lead to admissible evidence in this Article VII matter. This Article VII proceeding is not the proper forum to challenge the results of the RFP; that ship has sailed. LIPA’s procurement of new energy sources starts with

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<sup>24</sup> Case 18-T-0604, *Ruling on Motion to Compel* (Issued September 14, 2020) at 9.

<sup>25</sup> Case 18-T-0604, *Ruling on Motion to Compel Production of Comparative Economic Review* (Issued September 30, 2020).

<sup>26</sup> Case 18-T-0604, *Motion of Simon V. Kinsella to Withdraw Motion to Compel Long Island Lighting Company d/b/a LIPA to Respond to Interrogatory/Document Request Si Kinsella #37 and Town of East Hampton to Respond to Interrogatory/Document Request Si Kinsella #24* (filed September 16, 2020).

open-source, technology neutral procurements. Energy needs were defined in the 2015 RFP, and all proposals were evaluated fully and fairly against pre-established criteria that considered factors such as cost, project feasibility, the experience of the developer, and community considerations. Kinsella is essentially asking to go back in time and challenge the results of the recommended projects from the RFP, which were already reviewed and approved by the LIPA Board, who are appointed by State elected officials. Further, the PPA was pre-audited and approved by the New York State Comptroller's Office and the Office of the Attorney General prior to becoming effective. The pre-audit by the State Comptroller's Office included reviewing the fairness of the procurement process and competing proposals that were not selected. Again, similar to the RFP example above, Kinsella is essentially asking for information from competing proposals in order to go back and challenge the PPA. Kinsella failed to provide any other reasonable explanation how this information relates to this proceeding.

## **POINT II**

### **THE INFORMATION SOUGHT BY KINSELLA'S INFORMATION REQUEST IS CONFIDENTIAL**

Pursuant to Public Officers Law § 87(2)(d), LIPA may “deny access to records or portions thereof that . . . are trade secrets or are submitted to an agency by a commercial enterprise . . . and which if disclosed would cause substantial injury to the competitive position of the subject enterprise.” The “trade secret” principle under the federal Freedom of Information Act (the template for New York's FOIL statute) was discussed in *Kewanee Oil Co. v. Bicron Corp.*, 416 U.S. 470 (1974). There the Supreme Court noted that: “[a] trade secret may consist of any formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it. It may be a formula for a chemical compound, a process of manufacturing, treating or preserving

materials, a pattern for a machine or other device, or a list of customers.” *Id.* at 474-475 (citations omitted). The New York State Public Service Commission has adopted a virtually identical definition and rules governing the submission of such material to that agency and protection of the privilege. *See* 16 NYCRR 6-1.3 *et seq.* In *Kewanee*, the Court added that “[t]he subject of a trade secret must be secret, and must not be of public knowledge or of a general knowledge in the trade or business.” *Id.* at 475.

That a private entity, such as the respondents to the RFP, over the course of its dealings with a state authority may provide records to an authority, or in this case reach a negotiated price for services, does not negate the availability of exceptions to disclosure provided under FOIL. *Markowitz v. Serio*, 11 N.Y.3d 43, 49 (2008). Records submitted by a private entity at the behest of a state authority are subject to public disclosure unless the private entity asserts that a FOIL exemption applies and meets its burden of establishing the basis for nondisclosure. *Id.* *See also*, *Matter of Xerox Corp. v. Town of Webster*, 65 N.Y.2d 131, 132, 490 N.Y.S.2d 488, 480 N.E.2d 74 [1985]; *Matter of New York Tel. Co. v. Public Serv. Commn.*, 56 N.Y.2d 213, 219–220, 451 N.Y.S.2d 679, 436 N.E.2d 1281 [1982]). Accordingly, the New York State Court of Appeals has held that FOIL exemptions are regarded as having been grafted onto “certain limitations on the disclosure of otherwise accessible records.” *Id.* at 50 (citing *Matter of Xerox Corp.*, 65 N.Y.2d at 132).

Here, the information Kinsella seeks is set forth in documents which the bidders explicitly asked be treated and marked as confidential, as defined by New York’s FOIL law. The Office of the State Comptroller previously informed Kinsella that portions of the materials he requested “contain proprietary information or trade secrets which could injure differing vendors’

competitive position in the marketplace if made public and are, accordingly, withheld.”<sup>27</sup> As private entities operating in a growing and competitive market to generate renewable energy, disclosure of the information requested in IR 32 would work a competitive disadvantage to the bidders in any future contracts it may pursue to provide renewable energy with utilities in the region. For that reason, the bidders have a reasonable interest in maintaining the subject of Kinsella’s request “a trade secret” that is not a matter “of public knowledge or of a general knowledge in the trade or business.” *Kewanee*, supra.

### CONCLUSION

As demonstrated herein, Kinsella’s IR 32 seeks information that is neither material nor relevant to this Article VII proceeding. The IR 32 at issue in the Motion violates the Commission's well-established Rules governing discovery. As such, PSEG Long Island respectfully requests that Your Honor decline Kinsella’s request to compel PSEG Long Island to provide the information sought by IR 32 as it is outside the scope of the Commission’s Article VII jurisdiction and is irrelevant and immaterial to the necessary findings to be made in this proceeding.

Respectfully submitted,



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<sup>27</sup> Case 18-T-0604, *Supplemental Information Filing*, Exhibit II at page 1.