

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF SUFFOLK

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SIMON V. KINSELLA, et al.,

Plaintiffs,

Index No. 621109/2021

-against-

Motion No. 2

LONG ISLAND POWER AUTHORITY, et al.,

Hon. Carmen Victoria St. George

Defendants.

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

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Defendant South Fork Wind LLC (Dkt. No. Mot. No 2) raises in its memorandum to support its motion to dismiss (Dkt. No. 21; Mot. No 2) the same legal grounds raised by the Long Island Power Authority in its memorandum in support of its motion to dismiss (Dkt. No. 11; Mot. No 1). Accordingly, Plaintiffs incorporate by reference their Memorandum in Opposition to LIPA's Motion to Dismiss (Dkt. No. 22; Mot. No. 1).

### **Introduction**

Plaintiffs commenced this declaratory judgment action to have the Power Purchase Agreement between the Long Island Power Authority and South Fork Wind, LLC annulled. LIPA's procurement of the South Fork Wind PPA violated fundamental principles of competitive bidding under New York law.

This proceeding has nothing to do with construction and operation of an underground transmission cable. This lawsuit is not about anyone's backyard. It is about the rule of law and protecting Plaintiffs pocketbooks from an illegal contract that will cost Plaintiffs and their fellow ratepayers more than \$1 billion in excessive cost to LIPA for power generated from South Fork Wind's offshore wind project that will not be reliable enough to meet peak demand in their service area.

South Fork Wind was complicit in a procurement process that violated state laws. And it is party to a PPA that should be annulled because it was not approved by the Public Authorities Control Board as required by law.

This action is not time-barred and Plaintiffs have standing to prosecute it.

### **Counterstatement of Facts**

Deepwater Wind provides an incomplete description of what was sought in the RFP, claiming LIPA "established the South Fork Supply and Load Relief Project to defer new transmission needed on the South Fork of Long Island." Deepwater Wind's vague

description intentionally omits that the RFP sought local power production resources located on Long Island that would be dispatchable to meet peak load (or peak electrical demand), without adding new transmission lines, and operational by May 1, 2019.

Article VII proceedings under the Public Service Law before the Public Service Commission for a Certificate of Environmental Compatibility and Public Need are not part of the procedural history of this case. Nor are they relevant. The declaratory judgment action relates to LIPA's illegal procurement of the South Fork Wind PPA.

### **Argument**

#### **A. Plaintiffs' Have Standing to Challenge LIPA's Violations of State Law.**

South Fork Wind cites cases where courts found that parties challenging LIPA's actions did not allege or demonstrate sufficient potential injuries in fact or actual injuries in fact to establish standing. None of those cases, however, provide any evidence of what the challenging parties alleged or demonstrated.

In *Matter of East End Prop. Co. #1, LLC v. Kessel* (46 A.D.3d 817 (2d Dept. 2007)), the Second Department Appellate Division affirmed Supreme Court's standing determinations. The decision, however, contains no discussion of what injuries may or may not have been alleged.

In *Initiative for Competitive Energy v. Long Is. Power Auth.*, (178 Misc.2d 979 (1998)), a challenger to LIPA's actions failed to make any proffer that any of its members sustained an injury in fact. In *Cook v. Public Authorities Control Board and Long Island Power Authority* (Singer Aff., Ex. A) the decision offers no information regarding what the challenger proffered that failed to demonstrate an injury in fact within his zone of interest.

Here, Plaintiffs demonstrate in their complaint that they are within the zone of interests the state procurement laws and the PACB are in place to protect. They are taxpayer and ratepayers in the service area affected by the PPA. The PPA is priced at an amount that will increase the Plaintiffs utility bills. Moreover, the exorbitant cost of the PPA to LIPA will other consumers in the affected service area, including businesses that will pass those higher costs along to Plaintiffs as consumers. Further, the PPA has not solved the peak electrical demand problem the affected service area in the South Fork faces and Plaintiffs are aggrieved by facing a future of unreliable power.

**B. Plaintiffs Causes of Action Are Not Time-Barred.**

Plaintiffs challenge to the South Work Wind PPA award is not about the procurement process, but the result. Plaintiffs' challenge to the PPA award is not limited to the limitations period for Article 78 proceedings to address process irregularities. There's nothing here to be fixed by a writ from a court. There's only an illegal contract that's subject to a declaratory judgment action under the six-year limitations period.

**Conclusion**

Plaintiffs commenced this declaratory judgment action within the six-year statute of limitations period that is appropriate for their causes of action. They are parties who have

standing to challenge LIPA's illegal procurement of the PPA and to have the PPA annulled because it was not approved by the Public Authorities Control Board before LIPA entered it. South Fork Wind's motion to dismiss should be denied.

Dated: Albany, New York  
January 14, 2022

Respectfully submitted,

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**CERTIFICATION**

I, Cameron J. Macdonald, affirm under CPLR 2106 that:

This document is being filed by me. I certify under Court Rule 202.8-b that this document has 805 words as defined by the rule and complies with the word count.

Dated: Albany, New York  
January 14, 2022

/s/ Cameron J. Macdonald  
Cameron J. Macdonald