

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ALBANY

In the Matter of

SIMON V. KINSELLA,

Petitioner,

-against-

OFFICE OF THE NEW YORK STATE
COMPTROLLER,

Respondent.

For a Judgment Under Article 78 of the Civil
Practice Law and Rules

Index No.

VERIFIED PETITION

Petitioner Simon V. Kinsella, for his verified petition and complaint against the Office of the New York State Comptroller (“Comptroller”), alleges as follows:

Introduction

1. Petitioner wants to know the price under a Power Purchase Agreement (“PPA”) the Long Island Power Authority (“LIPA”) has agreed to pay for electricity to be generated by Deepwater Wind South Fork, LLC (“Deepwater”) at the proposed South Fork Wind Farm off Long Island.

2. Last fall, Petitioner made a Freedom of Information Law request for, among other things, “the contract price and any increase or decrease in contract price over the term of the PPA as expressed in the PPA between the Applicant and LIPA regarding a wind farm with a nameplate capacity of ninety (90) megawatts” (“FOIL Request”).

3. It took four months for the Comptroller to deny Petitioner's FOIL Request, in part, by claiming that the pricing in the PPA is exempt from disclosure as a "trade secret." The Comptroller then disclosed the PPA with the pricing information redacted.

4. Petitioner, however, submitted the FOIL Request because he and the public have a vested interest in knowing the price LIPA agreed to pay Deepwater for electricity. That price will be passed along to consumers if the South Fork Wind Farm comes online as scheduled sometime in 2022.

5. The pricing information is important because the New York State Public Service Commission ("PSC") recently issued Notice of Informational Forums and Public Statement Hearings inviting the public to make comments on Deepwater's proposed offshore wind farm project. The PSC public hearings are to take place on June 11, 2019 and will form part of the record of the Deepwater Article VII proceedings.

6. Petitioner wishes to comment on the proposed project after considering the project in its entirety which includes the price that he and others will have to pay. Respondent has denied Petitioner the opportunity to make an informed comment on Deepwater's proposed wind farm by refusing to disclose the executed contract price.

7. Indeed, the limited publicly available PPA pricing information suggests LIPA plans to pay a substantial premium for the electricity generated by the South Fork Wind Farm. The Comptroller has valued the PPA at a total amount that can be used to estimate the price, which ranges from 22¢ to 27¢ per kilowatt hour. Similar offshore wind projects for Massachusetts, Rhode Island, and Maryland, on the other hand, will cost ratepayers there 6.5¢, 7.4¢, and

13.2¢ per kilowatt hour, respectively. The offshore wind projects off Massachusetts and Rhode Island are owned by Ørsted U.S. Offshore Wind (“Ørsted”)—the same company that owns Deepwater.

8. As helpful as calculations derived from the PPA’s total value can be, Petitioner requested the actual pricing information to make “apples to apples” comparisons to other offshore wind projects and promote transparency regarding the Project and its ramifications for Long Islanders. Petitioner and the public have a right to know the premium they will pay for renewable electricity from the South Fork Wind Project when weighing its relative merits. For example, how does the price of electricity generated by the South Fork Wind Farm compare to the current rate of 9.2¢ per kilowatt hour residential customers on Long Island can expect to pay for power supply charges? How does Deepwater’s price compare to the most recent market prices of 6.5¢ and 7.4¢ per kilowatt hour?

9. Disclosing the price would allow the public to evaluate and test Ørsted’s statement on its website that “Our wind farm is the most affordable solution to meeting the South Fork’s unique energy needs.” Ørsted, <https://us.ored.com/newyork>, (last accessed June 3, 2019).

10. Petitioner appealed the denial of his FOIL Request, but the Comptroller denied the appeal. In doing so, the Comptroller asserted that disclosing the pricing information could “substantially harm” Deepwater’s competitive position. In other words, the Comptroller condones making pricing information negotiated by a public authority confidential so that future bidding on wind energy contracts will *not* result in state agencies obtaining lower and better bids.

11. The Comptroller further argued a position that is not supported by FOIL statute—that pricing information in an executed contract should be exempt from disclosure so that future bidding for LIPA contracts is not chilled.

12. The Comptroller cannot meet its burden to support these arguments and acted improperly in excepting from disclosure the PPA contract price. Accordingly, Petitioner brings this special proceeding to compel the Comptroller to disclose an unredacted version of the PPA in accordance with the FOIL request of November 26, 2018.

Additional Statement of Facts

13. In February 2017, LIPA awarded Deepwater with the PPA.

14. The PPA governs Deepwater's obligations to develop and operate the South Fork Wind Farm, the South Fork Export Cable, and the Interconnection Facility (collectively, the "Project"). The South Fork Wind Farm is more than four-times larger than the only other offshore wind farm in the United States.

15. The Project involves Deepwater generating and transmitting electricity from an offshore wind farm to LIPA's transmission and distribution system. The Project purports to address LIPA's need for new power generation sources to *cost-effectively* and reliably meet demand from the South Fork of Long Island.

16. LIPA and Deepwater anticipate the Project becoming operational by December 1, 2022.

17. At that point, Long Island residents will begin paying for the electricity generated from the Project. The price they pay for that electricity will be affected by the contract price as stipulated in the PPA negotiated by Deepwater and LIPA and approved by the LIPA Board of Trustees.

18. On November 28, 2018, Petitioner submitted a request under FOIL (“FOIL Request”) to the Comptroller for information relating to the PPA, namely the contract price agreed to by Deepwater and LIPA. (Exhibit A).

19. On March 20, 2019, the Comptroller partly denied Petitioner’s request by claiming that the contract price of the PPA is excepted from disclosure pursuant to FOIL § 87(2)(d), the “trade secrets” and “commercial information” exception. The Comptroller argued that the PPA contract price constitutes proprietary information or trade secrets that could injure the competitive positions of both Deepwater and LIPA. *See Exhibit B.*

20. According to the Comptroller, FOIL § 87(2)(d) exempts from disclosure the pricing information in the PPA as records submitted to an agency by a commercial enterprise which, if disclosed, would cause “substantial injury” to the competitive position of Deepwater. The Comptroller states that this “commercial information” is confidential because it would cause “substantial harm to the competitive position” of Deepwater. *See Exhibit B.*

21. In addition, the Comptroller claims that a purported competitive threat to LIPA because LIPA would be subject to “the impairment of getting the best offer from developers as LIPA heads into a period of repeated offshore wind procurement.” Exhibit B.

22. Petitioner appealed the Comptroller’s partial denial on March 27, 2019. (Exhibit C.)

23. In his appeal, Petitioner highlighted that of the six wind farm operators that have been awarded a purchase power agreement within the United States, Ørsted has a controlling interest in five, including Deepwater.

24. In three other instances where an Ørsted company has finalized a power purchase agreement, the contract price has been disclosed. See Exhibit C. Disclosing prices other contracts has not stopped Ørsted from winning new contracts on wind energy projects. And the Comptroller has not provided any evidence of bidding for wind energy contracts being chilled.

25. On April 9, 2019 the Comptroller denied Petitioner's appeal. (Exhibit D). The Comptroller cited New York case law in support of its argument that "commercial information...is 'confidential' if it would impair the government's ability to obtain necessary information in the future or cause 'substantial harm to the competitive position' of the person from whom the information was obtained." Exhibit D.

26. According to the Comptroller, disclosing the contract price in the PPA is especially important because LIPA is heading "into a period of repeated offshore wind procurement." Exhibit D. The Comptroller, however, cannot establish that LIPA will have a more difficult time negotiating with developers in the future or receiving bids. Indeed, the Comptroller admits that the New York State Energy Research and Development Authority ("NYSERDA") received multiple bids earlier this year responding to an RFP for additional offshore wind power projects.

27. Specifically, the Comptroller stated that NYSERDA "is presently involved in reviewing bids it received earlier this year in response to an RFP for additional off-shore wind, and will continue to issue other RFPS's in the future as it meets the goal of 9000 MW." Exhibit D.

28. The Comptroller further fails to establish that the prior disclosure of PPA prices has hindered state agencies from negotiating power purchase

agreements with other energy providers. Nor can the Comptroller establish that disclosure will cause substantial injury to the competitive positions of Deepwater/Ørsted.

29. The FOIL Request seeks pricing information in a completed public contract. Ørsted as the winning bidder cannot have any reasonable expectation that pricing terms in the finally negotiated PPA would be kept confidential, and the PPA itself is not competitively sensitive.

30. Purchase power agreements vary wildly from project to project. For the three purchase power agreements entered into by Ørsted where the contract price is known, the contract price ranges from 7.4 c/kWh to 24.4 c/kWh. Because the contract prices vary widely from project to project, disclosing pricing information here cannot substantially harm the competitive position of Deepwater/Ørsted.

31. In November 2018, the LIPA Board of Trustees voted to allow Deepwater to expand the Project's output by 40 megawatts (from 90 to 130) at a cost of \$388 million. According to a Newsday article at the time, LIPA asserts that the cost of power generated from the Project will see a "substantial" reduction from the "originally negotiated price." (Exhibit E).

32. The public does not know the "originally negotiated price" of the PPA. Therefore, Long Islanders have no idea whether LIPA, on their behalf, have entered into a beneficial deal for them and, as stated above, the PPA is already being renegotiated under the guise of increased savings (and wind energy output) in relation to the PPA contract price that is unknown to the public.

Parties

33. Petitioner Simon V. Kinsella is an individual and taxpayer who resides in Suffolk County, New York.

34. Respondent Comptroller is an “agency” within the meaning of Public Officers Law § 86(3).

Jurisdiction and Venue

35. This Court has jurisdiction under CPLR 7804(b) and 506(b) because all actions at issue in this case took place within Albany County, which is where the Comptroller’s principle office is located.

Cause of Action: Article 78

Review of Wrongful Denial of FOIL Request

36. Petitioner repeats and re-alleges paragraphs 1 through __ as if fully set forth in this paragraph.

37. Article 78 is the appropriate method of review of agency FOIL request determinations.

38. Petitioner has a right under FOIL to the records requested.

39. Petitioner has sought and has been denied production of records reflecting the conduct of official business.

40. The Comptroller’s failure to produce documents under the circumstances of the request is not justified under FOIL.

41. Petitioner has exhausted his administrative remedies and has no other remedy at law.

42. A prior application to this Court for the relief requested was voluntarily dismissed without prejudice.

Relief Requested

43. Petitioner respectfully requests that this Court issue an order:
- a. Declaring that (i) the Comptroller acted unlawfully in failing to produce records in response to the FOIL Request; and (ii) the Comptroller must release the requested records;
 - b. Directing the Comptroller to produce to Petitioner within five days of the date of the order the records requested in Petitioner's FOIL Request;
 - c. Awarding attorneys' fees and costs incurred in this litigation as allowed under FOIL; and
 - d. Granting such other and further relief as this Court may deem just and proper.

Dated: Albany, New York
July 3, 2019

Respectfully submitted,



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Counsel for Petitioner

VERIFICATION

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

Cameron J. Macdonald, being duly sworn, deposes and says:

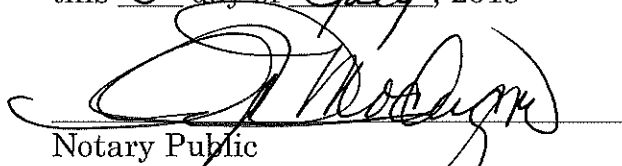
I am the attorney for Simon V. Kinsella, Petitioner in the above-captioned action. I have reviewed the foregoing Petition and know its contents to be true to my knowledge, except as to the matters therein stated to be alleged on information and belief, and that as to those matters I believe them to be true based on my review of pertinent documents and conversations with persons with personal knowledge.

This verification is made by me rather than Petitioner because the Petitioner resides outside Albany County where I maintain my office.



Cameron J. Macdonald

Sworn to and subscribed before me
this 3 day of July, 2019


Notary Public

AMY J. DiMODUGNO
Notary Public, State of New York
Reg. # 01DI6131968
Qualified in Saratoga County
Commission expires August 22, 2021