STATE OF NEW YORK
PUBLIC SERVICE COMMISSION

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.

PETITION FOR REHEARING AND STAY
OF
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Intervenor Funding

New York State Public Service Commission (the "Commission") has not required South Fork Wind LLC (formerly Deepwater Wind South Fork LLC, the "Applicant") to deposit funds on account for intervenors "to defray expenses incurred by … parties to the proceeding … for expert witness, consultant, administrative and legal fees" in this proceeding. The Commission, for whatever reason, denied funding to intervenors, thereby adding to the burden of public participation, and effectively stifling such participation to the detriment of the public interest and the benefit of the Applicant. To the extent that the Commission has denied me the intervenor funds necessary to hire a lawyer and/or experts, I respectfully request a degree of latitude regarding my Petition for Rehearing and Stay.

Public Representation

Seventy-seven parties participated in the Deepwater Wind South Fork Article VII proceeding.[1.1] Of those, seven government agencies,[1.2] one municipality (the Town of East Hampton), the Village of East Hampton, and the East Hampton Town Trustees were represented by nineteen lawyers and four public officials. Still, despite all the lawyers and public officials paid at taxpayers' expense, not one spoke up for one million ratepayers living on Long Island who will end up paying for an offshore wind farm that is ill-conceived, not needed, and overpriced by one billion dollars.

Furthermore, when presented with reports prepared for the New York State Department of Environmental Conservation and evidence from Suffolk County Department of Health Services showing soil and groundwater contamination exceeding regulatory limits by one-hundred-times within one hundred and fifty feet of the Applicant's proposed construction corridor (in a residential neighborhood), not one lawyer or public official spoke up to protect the interests of residents living near the proposed construction site who had already been drinking contaminated water for years.

[1.1] The Department of Public Service Document Management System lists seventy-eight parties, but one party appears twice, so there are seventy-seven parties listed as of April 14, 2021.

[1.2] DOS, DOT, DEC, DPS, OPRHP, including LIPA (a public authority) and PSEG Long Island acting on behalf of LIPA

A. Introduction

Pursuant to Public Service Law ("PSL") §§ 22 and 128, and the regulations of the Public Service Commission (the "Commission"), and 16 NYCRR § 3.7, I request a rehearing on the grounds that the Order Adopting Joint Proposal issued by the Commission on March 18, 2021 (the "Order"):

I. Contravenes Article VII of the Public Service Law, the Department of Public Service Rules of Procedure, and the Commission's own Settlement Guidelines; [2]

II. Is *not* supported by substantial evidence or by information properly considered; [3]

III. Fails to take a hard look and to make reasoned elaboration, bases its determination on errors in law and is arbitrary and capricious;[4] and

IV. Contravenes US and state constitutional provisions requiring due process of law.[5]

The Order Adopting Joint Proposal is replete with errors of law and fact. These errors, in addition to new circumstances that warrant a different determination, are grounds for rehearing and are addressed herein separately identified and specifically explained with appropriate support.

B. Request for Stay

Although the Applicant's Construction and Operations Plan ("COP") is not expected to be approved by the Bureau of Ocean Energy Management ("BOEM") until January 18, 2022,[6] the Applicant may seek to commence preparation of the site for the construction of its

[2] Pursuant to Public Service Law § 128 (2) (a) and (d). The Commission's own Settlement Guidelines is in reference to Cases 90-M-0255, *et al.*, Procedures for Settlements and Stipulation Agreements, Opinion 92-2 issued March 24, 1992 ("Settlement Guidelines").

[3] Public Service Law § 128 (2) (b)

[4] Public Service Law § 128 (2) (e)

[5] U.S. Const. Amend. XIV; N.Y. Const. Art. I, § 6

[6] According to BOEM's website (see link below) last accessed on April 10, 2021 – (https://www.permits.performance.gov/permitting-projects/south-fork-wind-farm-and-south-fork-export-cable)

transmission facility within New York State jurisdiction without having had received final approval from BOEM.

Therefore, in light of the defects stated herein, I respectfully request that the Commission stay the Order Adopting Joint Proposal to prevent waste of resources, inconvenience to residents of the Town of East Hampton, property damage, and damage to stakeholders while a determination on the request for rehearing is pending.

C. **No rational basis or substantive discussion**

The Order Adopting Joint Proposal is three hundred and fifty-three (353) pages long (including the Joint Proposal). The Order itself is one hundred and eleven (111) pages long,[7] comprising a procedural background and summary of the Joint proposal (of 32 pages), stated positions of supportive parties, including disputed issues all written from the perspective of supportive parties (of 38 pages), stated positions of opposing parties (of 14 pages), a limited statement of legal authority that does *not* refer either to the Project or to any issues raised during the proceeding (2 pages) and finally, what purports to be a "Discussion" that is only eight (8) pages long (representing just 2% of the total Order Adopting Joint Proposal).

The "Discussion" is conclusory, contains numerous errors of fact, does *not* refer to *any* section of a legal statute whatsoever, erroneously refers to the Commission's Settlement Procedures and Guidelines, and contains *no* substantive discussion of fact or of the many legal issues raised during the proceeding.

The Commission merely summarizes the positions of supportive parties then, separately, summarizes the positions of opposing parties. The Commission neither compares the two opposing positions, weighs the relative factual or legal merits against each other, nor engages in a meaningful discussion. The "Discussion" section is void of arguments of fact and law.

[7] The Joint Proposal is two hundred and forty-two (242) pages, including appendices, testimony of witnesses supporting the Project (none opposing the Project), affidavits and exhibits.

By failing to substantively address and discuss the factual and legal merits of parties opposing the Article VII application, it is impossible to discern the reasoning for the Commission's decision. By excluding from the Order relevant, material, and factual information and arguments in fact and law and new circumstances that rebut the Commission's conclusory statements, the Commission denies parties the opportunity for judicial review and due process of law.

The Order places a far greater emphasis on the stated positions of supportive parties, and (to a lesser extent) the stated positions of opposing parties and a brief (two-page) statement of "legal authority." The clipped and conclusory "Discussion" section suggests that the Commission views the summary of the party's positions and separate "legal authority" (that does *not* refer to the party's positions as a substitute for legal and factual analysis). The Order's organization and structure avoid substantive factual and legal analysis. The petition for rehearing responds to the arguments within the "Discussion" section of the Order, but by avoiding any substantive factual and legal analysis within the "Discussion" section, the Commission limits the request for rehearing and redress.

To the extent that the Commission may be basing its decision on the arguments advanced within sections summarizing the stated positions of other parties, and a separate statement of "legal authority" (that does not reference the stating the positions of other parties), the petition for rehearing has no option but to rely on its previous submissions in this proceeding to address any such arguments. Accordingly, the petition for rehearing incorporates by reference the following documents and all exhibits and appendices to such documents containing relevant material fact-based legal discussion that is conspicuously missing from the Order Adopting Joint Proposal issued March 18, 2021.

Document Name	**Author**	**Date**	**Comment**
Testimony Part 2:			
Public Interest, Need & Price	Si Kinsella	Oct 09, '20	(of 52 pages)
Initial Brief	Si Kinsella	Jan 20, '21	(of 34 pages)
Reply Brief	Si Kinsella	Feb 03, '21	(of 12 pages)

Document Name	Author	Date	Comment
Motion to Strike Testimony	Applicant	Nov 05, '20	Kinsella Testimony Parts 1, 2 & 3
Motion to Strike - Resp Against	Simon Kinsella	Nov 16, '20	Opposing Applicant's Motion
Ruling to Strike Testimony **Granted**: (Testimony Part 2, only)	ALJ Belsito Nov 24, '20		Granted on the grounds "that like the facilities in Cases 18-T-0499 and 19-T- 0684, need for the Project is sufficiently established through selection in a competitive process, here the 2015 RFP [emphasis added]." In granting (in relevant part) the Applicant's Motion to Strike Testimony, ALJ Belsito states that the "critiques of the 2015 RFP process and the resulting PPA … are beyond the scope of this Article VII proceeding and Mr. Kinsella's testimony and exhibits related to these issues are irrelevant to the findings and determinations required by PSL §126."

Document Name	Author	Date	Comment
Motion to Compel EH Town	Kinsella	Aug 28, '20	Discovery Request No. 28b
Motion to Compel EH Town, Supp	Kinsella	Sep 02, '20	Supplemental Information
Ruling: **Denied**	ALJ Belsito	Sep 14, '20	Neither the 2015 RFP nor the PPA "are before the Commission in this case."
Motion to Compel - Applicant	Bjurlof	Sep 11, '20	Comparative Economic Review
Ruling: **Denied**	ALJ Belsito	Sep 30, '20	"[T]he 2015 RFP and the PPA are beyond the scope of this Article VII proceeding."

Document Name	Author	Date	Comment
Motion to Compel PSEG LI	Kinsella	Sep 14, '20	Information Request No. 32
Motion to Compel PSEG LI	Kinsella	Oct 05, '20	Supplemental Information
Ruling: **Denied**	ALJ Belsito	Oct 27, '20	"[T]he 2015 RFP and the resulting PPA are beyond the scope of this Article VII proceeding."
Motion to Reopen the Record	Kinsella	Jan 13, '21	Seeking to include examination of South Fork RFP & PPA, Amendment to PPA & Applicant's Environmental Survey Test Results
Motion to Reopen the Record	Kinsella	Jan 29, '21	Supplemental Information, LIPA Disclosures
Ruling: **Denied**	ALJ Belsito	Feb 10, '21	"[T]the 2015 RFP and the PPA are beyond the scope of this Article VII proceeding. Nothing in Mr. Kinsella's Motion or Supplemental Motion suggests or requires a different result. Mr. Kinsella acknowledges that the PPA is a final contract that has been approved by the Office of the New York State Comptroller and the New York State Attorney General. Mr. Kinsella makes no valid legal or practical argument that this Article VII proceeding is the appropriate venue to re-litigate the RFP process[.]"

The request to incorporate by reference the aforementioned documents is to seek the judicial remedy of demonstrable errors of fact and law and to introduce new circumstances that warrant a different determination. The request does *not* seek to repeat prior errors or omissions of the Commission. Even in instances where the same errors in fact or law are repeated during a single proceeding, as is the case here, or new circumstances are ignored, the existence of prior errors does *not* relieve the Commission of its statutory obligations pursuant to PSL § 126.

D. Order - Part VI. Legal Authority

Here there is some confusion surrounding the Order's legal authority. The Order appears to quote directly from Public Service Law § 126 (1), but the Commission appears to have lost the word "find" (somewhat ironically) so that it merely reads –

> *"Public Service Law §126 provides that the Commission may only grant a Certificate for the construction or operation of a major electric transmission facility if it determines the basis of the need for the facility [emphasis added.]"*

Although the Order is merely paraphrasing §126 (1), it perhaps inadvertently reflects the truth insofar as the Order *has* failed to *find* a basis of need for the facility, and without first finding a basis of need, the Commission cannot then determine what it is. As explained in greater detail (below), the Commission has *not* taken a hard look to *find* the basis of need but rather has looked the other way.

Citing *Entergy Nuclear Power Marketing, LLC v New York State Public Service Commission* ("*Entergy Nuclear v NYSPSC*"),[8] the Order goes on to state that –

> *Public Service Law §126 does not require the Commission to determine whether the project is economically feasible and nonmonetary aspects of a facility are enough to support findings that a project is needed and in the public interest.*[9]

The matter of *Entergy Nuclear v NYSPSC* addresses the issue of "whether the project is economically feasible" and does *not* purport to address the public interest standard of "whether the settlement strikes a fair balance among the interests of ratepayers and investors and the long-

[8] Entergy Nuclear Power Marketing, LLC v New York State Public Service Commission, 122 AD3d 1024, 1028
[9] *Id.* (at p. 1029)

term soundness of the utility."[10] The Commission is relieved neither of its obligations pursuant to its own Settlement Guidelines nor is it relieved of its statutory mandated obligation to ensure "that the facility will serve the public interest, convenience, and necessity" pursuant to Public Service Law § 126 (1) (h). Furthermore, the New York Court of Appeals noted that the "applicant is only authorized to recover the project costs through wholesale power transactions," where consumers would be insulated from paying "above-market prices," thereby protecting ratepayers and the public interest. *Entergy Nuclear v NYSPSC* is distinguished from the instant proceeding insofar as the above-market rate for energy from the Applicant's proposed transmission facility will be passed onto ratepayers who *will* be subsidizing a Project. The Applicant in the instant proceeding proposes charging ratepayers almost three times the market rate, and its Project is overpriced by over one billion dollars.

As to whether "nonmonetary aspects of a facility are enough to support findings that a project is needed[,]" in the matter of *Entergy Nuclear v NYSPSC*, the opinion notes that "there are three uncontested aspects of the project that validate the Commission's findings of need and public interest [emphasis added]." Again, *Entergy Nuclear v NYSPSC* is distinguished from the instant proceeding insofar as here, in the instant proceeding, *all aspects* that validate the Project's need and public interest *are contested*, and there is *no* substantial evidence to support "a basis of need for the facility" or "that the facility will serve the public interest[.]"[11]

Finally, in the matter of *Entergy Nuclear v NYSPSC*, the "record also demonstrates that the Commission seriously assessed the probable environmental impacts of the project and determined that the facility minimized any adverse environmental impact." Importantly, the Commission bases its determination on the fact that the "risk has been minimized by the placement of the cable route utilizing existing habitat information designed to avoid significant coastal fish and wildlife habitat areas … and the exclusion zones identified by the parties in the joint proposal." On the other hand, in the instant proceeding the Applicant's cable route has *not* been "designed to avoid" an area of known soil, and groundwater contamination along its onshore cable route and there are *no* "exclusion zones" identified by the parties in the joint proposal [emphasis added]." In fact, the Applicant's cable route is specifically designed to plow

[10] Settle Guideleines
[11] Public Service Law § 126 (1) (a) and (h)

through the middle of the most contaminated soil and groundwater on the South Fork. The Commission has acknowledged existing PFAS contamination of soil and groundwater along the Applicant's proposed construction corridor, but states that "the Project will avoid or minimize adverse impacts to the environment[.]" The Commission's position is neither supported by fact nor rationally based.

The matter of *Entergy Nuclear v NYSPSC* underscores the fact that the Commission in the instant proceeding, by comparison, failed to "find and determine … the nature of the probable environmental impact" and failed to require that the Applicant design its onshore cable route so that it "avoids" an area of known chemical contamination as it is statutorily compelled to do.

Furthermore, "[W]hen an agency determines to alter its prior stated course, it must set forth its reasons for doing so. Unless such an explanation is furnished, a reviewing court will be unable to determine whether the agency has changed its prior interpretation of the law for valid reasons or has simply overlooked or ignored its prior decision (Kramer, op. cit., at 68-70). Absent such an explanation, failure to conform to agency precedent will, therefore, require reversal on the law as arbitrary."[12] In the instant proceeding, the Commission failed to explain the reason why it reached a different result from that in the matter of *Entergy Nuclear v NYSPSC,* with respect to avoiding probable environmental impact or creating an exclusion zone where the facts and law are substantially similar, and by doing so, the Commission's actions are arbitrary and capricious and "require reversal on the law[.]"[13]

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[12] Charles A Field Deliverv Serv .. Inc., 66 N.Y.2d 516, 520 (1985).

[13] *Ibid.* See also Richardson v. Comm'r of N.Y. City Dep't of Soc. Servs, 88 N.Y.2d 35 (1996)

E. Order - Part VII. "Discussion"

i) The majority of participants did *not* sign the Joint Proposal

The "Discussion" section of the Order Adopting Joint Proposal opens with a list of supportive signatory parties to the Joint Proposal. Parties opposing the Order are not afforded the same recognition, curiously.

Given the driving force behind the development of offshore wind farms is spearheaded by the New York State Governor, Andrew M. Cuomo, it comes as no surprise that each government agency signed onto the Joint Proposal. Although, it is telling that *no government agency*, even the Department of Environmental Conversation ("NYSDEC"),[14] submitted testimony supporting the Applicant's proposed transmission facility, testimony that could be subject to cross-examination, except for the Department of Public Service ("NYSDPS"). NYSDPS Staff Panel testimony did *not* stand up well under cross-examination.

The municipality of the Town of East Hampton ("Town"), and the Trustees of the Freeholders and Commonalty of the Town of East Hampton ("Trustees") were paid approximately twenty-nine million dollars ($29 million) to sign onto the Joint Proposal. Tellingly, no one on either of the two elected boards lives in Wainscott near where the Applicant proposes to land its high-voltage export cables or along the proposed construction corridor where the Applicant plan to construct underground transmission infrastructure and install high-voltage cables with other subsequent developers. It is commonly accepted that very little if any of the $29 million will be spent for the benefit of Wainscott residents, who will bear the brunt of construction and future development. Notably, the Incorporated Village of East Hampton did *not* sign the Joint Proposal.

There were nine groups that actively participated in the proceeding, of which the majority did *not* sign the Joint Proposal (only four signed the Joint Proposal).[15]

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[14] The Department of Environmental Conversation ("NYSDEC") wrote a brief letter of support, but did not submit testimony subject to cross-examination.

[15] The following parties did *not* sign the Joint Proposal: Long Island Commercial Fishing Association; Montauk Boatman's and Captain's Association; Multi-Aquaculture Systems Inc; Wainscott Pond Project Inc (although represented by Simon Kinsella who is also an individual party, Mr. Kinsella speaks separately for each); and

There were thirty-four (34) active participants in the proceeding who signed up as party-intervenors representing themselves, all of whom participated at the meeting, and submitted letters. Of the thirty-four (34) party-intervenors as individuals, thirty-one (31) or ninety-one percent (91%) did *not* sign the Joint Proposal. Only three (3) party-intervenors as individuals signed the Joint Proposal.[16] Furthermore, the notion put forward by the Applicant that "the overwhelming majority of the registered parties played no role in the proceeding insofar as they did not participate in settlement negotiations or the evidentiary hearing" [17] is not supported by fact, and the Applicant provides no evidence or list of names to support its claim. The burden of proof rests with the Applicant, and it has failed to sustain that burden.[18]

ii) Full and fair opportunity to participate

The Commission's finding that "the public and all interested parties have had a full and fair opportunity to participate" is conclusory and *not* based on fact. The proceeding from the outset has been prejudicial to the detriment of public participants as party-intervenors representing themselves and to the benefit of the Applicant. The Public Service Commission reinforced the prejudice by *not* requiring the Applicant to deposit funds on account for intervenors "to defray expenses incurred by … parties to the proceeding … for expert witness, consultant, administrative and legal fees" in this proceeding. The Commission, for whatever reason, denied funding to intervenors, thereby adding to the burden of public participation and effectively stifling such participation to the detriment of the public interest and the benefit of the Applicant. Members of the public were placed at a distinct disadvantage, and well-trained industry lawyers took full advantage of their superior knowledge in a very complex field of law; sadly, the Department of Public Service was not much better.

Wavecrest Resort. The following four parties signed the Joint Proposal: Montauk Chamber of Commerce; Montauk United; Concerned Citizens of Montauk; and Group for the East End.

[16] The following thirty-one (31) party-intervenors representing themselves as individuals did *not* sign the Joint Proposal: Z Cohen, C Cirlin, N Faber, S Lambert, A Berger, M Berger, D Gruber, T Bjurlof, E Choron, G Cobb, A Edlich, J Evans, D Fink, L Grenci, l James, L Jerome, S Kinsella, C Logan, M Mahoney, P Mahoney, D Posnett, S Roxbury, L Siedlick, N Stern, J Twiname, V Visconti, J Weigley, S Farnham, A Cobb, R Mancini, and C Macdonald. The following three (3) party-intervenors representing themselves as individuals did sign the Joint Proposal: C Rogers, D Foster, and M Hansen.

[17] Case 18-T-0604 – South Fork Wind LLC (the Applicant), Reply Brief, dated February 3, 2021, (at p. 2)

[18] Case: 06-T-0650 – NY Regional Interconnect, Inc., Ruling on Scope, Hearing Procedures and Schedule (at p. 10)

At times one could cut the air with a knife. On one side, you had professionally trained industry lawyers and government agency lawyers who appeared to be working for the industry despite being paid at taxpayers' expense. Lawyers representing the industry were being paid, ultimately, at ratepayers' expense. The only people who were *not* paid and *not* represented and *not* granted assistance during a proceeding run by the Department of Public Service were members of the public, member of the public trying, earnestly, to protect their homes and their neighborhood from unwanted development. Sadly, they received to no assistance whatsoever. Frankly, the entire proceeding has been a shameful sham.

During the proceeding, lawyers representing the Applicant were condescending, dismissive, arrogant, and worst of all, bullying. At one point, I had to stand up for one particular party-intervenor who was trying to ask a genuine question, in reply to which the Applicant's lawyer was incredibly rude and dismissive to the point of insulting. The incident was inappropriate, to say the least, and the settlement judge did little to stem the practice of bullying.

For this reason, I felt the need to "request a degree of latitude" when submitting each of my three Motions to Compel Productions (all denied), my Initial Brief and Reply Brief (both completely ignored), and my Motion to Reopen the Record (denied). I was *not* granted *any* latitude whatsoever. For example, the Applicant filed a frivolous Motion to Strike my entire testimony of over thirteen thousand pages that the Commission granted to the extent that over ten thousand pages, mostly from US and state agencies that rebutted the many false claims made by the Applicant, were erased from the record. Absurdly, the Commission ruled that the subject of wind for a facility that relies on wind to generate energy is irrelevant. At times, participating in this proceeding has felt like being in a room with a pack of wolves that included lawyers purporting to represent the public interest but were acting on behalf of the Applicant.

Party-Intervenors participating during the proceeding fell into one of two camps. In one camp there were representatives of the power industry and their lawyers. This camp included the Applicant, LIPA, PSEG Long Island, DPS, DEC, Town of East Hampton, Trustees and Win with Wind. Members of the public were in another camp, unpaid, unassisted, unrepresented and

untrained. It is a gross mischaracterization to describe this proceeding as "a full and fair opportunity to participate[.]" This statement is conclusory and *not* supported in fact.

For example, after the evidentiary hearing had concluded, there is a conversation between LIPA's Assistant General Counsel, Lisa Zafonte, and ALJ Belsito about the inclusion of the PPA and South Fork RFP on the exhibit list. The conversation is as follows –

> LIPA [Ms. Zafonte]: "The PPA and the RFP are on the exhibit list and I want to know, … since you ruled on four prior occasions that they're beyond the scope of the Article VII proceeding, um ... Is there a reason why they're coming in?
>
> DPS [ALJ Belsito]: "Ah, they were offered and I didn't hear a specific objection. If you're objecting again[?] … but I think the PPA and the RFP, less so the RFP, um … go to the need of the project. My rulings previously were avoiding … (someone needs to go on mute) … were trying to avoid litigating the prophecies and the details of those documents. I don't think that having the documents as part of the record goes too far beyond relevance and I don't think … um … it will confuse the record. So, I'm willing to hear an objection at this point, but that's where I was coming from [emphasis added].
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> LIPA [Ms. Zafonte]: "I don't mind them [the PPA and South Fork RFP] being submitted into evidence so long as *they* don't try to litigate what was already decided by you [emphasis added]."
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> DPS [ALJ Belsito]: "That's fair, um … and, you know, to the point that people put things in their briefs that aren't relevant to the argument and the issues that the Commission has to consider, then … you know, I don't think any of *us* have to spend a lot of time responding to those [emphasis added]. Um … but *we* can talk about how to *we're* going to handle briefs to [emphasis added]."

The ingrained attitude and prejudice of "they" (the public who oppose the Project) and "us" (industry laywers and the Department of Public Service working on the same side) is on display, clearly.

Also, during the conversation, the ALJ admit into the record the PPA and the South Fork RFP at the last minute, literally, before the evidentiary record closes despite ruling "on four prior occasions that they're beyond the scope of the Article VII proceeding[,]" and despite the ALJ's own admission that they're "beyond relevance[.]" If the PPA and RFP are "beyond the scope" and "beyond relevance," then there would have been no reason to entered them into record. So, evidently, they *are* relevant as they "go to the need of the project[.]"

Still, LIPA and the Applicant cannot afford to have anyone questioning the PPA or the RFP because the Project could be exposed as a fraud that will end up costing ratepayers on Long Island one-billion-dollar (the RFP was fixed). So, LIPA and the ALJ come to an agreement to admit the PPA and RFP (because they "go to the need of the project" and support the Applicant), and to make sure "*they* don't try to litigate[,]" the ALJ agrees to ignore the any brief to do with the PPA or RFP: "That's fair … to the point that people put things in their briefs that aren't relevant [anything to do with the PPA or South Fork RFP] … then … you know, I don't think any of *us* have to spend a lot of time responding to those [emphasis added]. Um … but *we* can talk about how to *we're* going to handle briefs to [emphasis added]."

What the Commission describes as "a full and fair opportunity to participate" is what most reasonable people would describe as a fix. There is *no* underlying rational basis in law that allows one party (the Applicant) to refer and rely on documents (the PPA and the South Fork RFP) and deny other parties the right to refer, examine, question, and cross-examine witnesses related to those same documents. The case needs to be reheard in front of an independent judge with financial assistance granted to intervenor-parties.

iii) Limited discovery and restricted opportunity to make arguments

The Commission's Procedural Guidelines demand that the "Administrative Law Judge must take requisite action to ensure that all parties have a fair and reasonable opportunity to develop issues and advocate positions[.]"[19] Still, party-intervenors were deprived of "reasonable opportunity to present evidence and examine and cross-examine witnesses,"[20] contrary to the Department of Public Service's Rules of Procedure.

The instant proceeding has made a mockery of the Commission's Settlement Guidelines which state: "It is necessary to have available for our review as complete a record as feasible, setting forth the positions of each major party."[21] If the record were complete and had the Commission conducted a substantive review according to its statutory obligations, the Commission could *not* make a finding based on that current record in favor of the Applicant.

Here, in the instant proceeding, the Commission's cavalier and casual association with the law has resulted in purported findings that are so flawed that, legally, they cannot be deemed "findings" at all.

The Commission "may *not* grant" the Applicant a Certificate "unless it shall *find* and determine: (a) the basis of the need for the facility; (b) the nature of the probable environmental impact; (c) that the facility avoids or minimizes to the extent practicable any significant adverse environmental impact; (e) in the case of an electric transmission line, (1) what part, if any, of the line shall be located underground; (2) that such facility conforms to a long-range plan for expansion of the electric power grid of the electric systems serving this state and interconnected utility systems, which will serve the interests of electric system economy and reliability; (h) that the facility will serve the public interest, convenience, and necessity [emphasis added.]"[22]

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[19] Cases 90-M-0255 and 92-M-0138, Procedures for Settlements and Stipulation Agreements, Opinion 92-2 (issued March 24, 1992) ("Settlement Guidelines"), Part E. (3) (at p. 7)

[20] Title 16 Department of Public Service, Rules of Procedure § 4.5 (a)

[21] Cases 90-M-0255 and 92-M-0138, Settlement and Stipulation Agreement Proceeding, Opinion, Order and Resolution Adopting Settlement Procedures and Guidelines (issued March 24, 1992) (Opinion 92-2) (at p. 23, penultimate paragraph)

[22] Public Service Law § 126 (1)

The Commission has erred in granting the Applicant a conditional Certificate by closing its eyes to material relevant fact-based information instead of complying with its statutory obligations to both "*find* and determine" the requirements mandated by New York State Law pursuant to PSL § 126 (1) without which the Commission "may *not* grant" the Applicant a Certificate. The Commission's actions lack a reasonable basis in fact, and the law is arbitrary and capricious.

Under the "Discussion" section of the Order, the Commission asserts that the "Parties conducted extensive discovery, during and prior to submitting pre-filed testimony and related exhibits … [and] were afforded an extensive opportunity to make their arguments regarding the proposed Project and the Joint Proposal in briefs and reply briefs which were submitted and fully considered." These assertions are unsubstantiated, conclusory, and *not* based in fact.

For example, from November 15, 2019, through to November 19, 2020, I submitted forty-three Interrogatory/Document Requests, the vast majority of which were never substantively answered.

The Order reads: "CPW's and Mr. Kinsella's arguments regarding an incomplete record are bellied by the extensive process the parties have been afforded and in which they fully participated.[251] Further, the volume of relevant information contained in the record is beyond dispute."[23] [Note 251: See Ruling Admitting Evidence (issued December 23, 2020).] For the avoidance of doubt, I herein dispute the volume of relevant information.

During the proceeding, party-intervenors filed at least eight Motions to Compel Production seeking information from the Applicant and proponents of the Applicant's Project, namely LIPA, PSEG Long Island, and the Town of East Hampton. No Motions to Compel Production were granted to *any* degree whatsoever. The Administrative Law Judge narrowed the scope of the proceeding to such extent that any information that could possibly pose a risk to the Project as proposed was denied entry into the record.[24]

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[23] Order Adopting Joint Proposal (at p. 98)

[24] Motion to Compel Production filed by Citizens for the Preservation of Wainscott, Inc. (CPW), **denied**, February 12, 2020. Motion to Compel Production filed by CPW seeking information of PSEG LI, **denied**, on the grounds that it was overly broad, May 1, 2020. Motion to Compel Production filed by CPW seeking information of PSEG LI and LIPA, **denied** on the grounds that it was not relevant or material, Sepember 14, 2020. Motion to

During the instant proceeding, the Administrative Law Judge granted *only* one motion.[25] Unsurprisingly, the ALJ granted the Applicant a Motion to Strike Testimony, further reducing the completeness of the record by erasing information the Applicant found unfavorable. The ALJ granted the Applicant's Motion to Strike Testimony of over eleven thousand pages.[26]

By denying factual, relevant, and material information from entering the record and by granting a motion to permanently erase factual, relevant, and material information from the record, the ALJ actively shielded the Applicant from having to reveal even the most basic information about the proposed Project. As at the time of writing this Petition for Rehearing, neither party-intervenors, ratepayers, nor the public knows the final price that they will have to pay for energy from the Applicant's proposed transmission facility, or indeed the final total capacity of the Project. The Public Service Commission has gone to great lengths and has done the public a great disservice by contriving to keep secret basic information about a public contract.

Example: Information Request Kinsella No. 32

For example, Information Request Kinsella No. 32 ("IR Kinsella No. 32") included ten questions related to the 2015 South Fork RFP procurement process,[27] such as how many responses were received by PSEG Long Is.; what are the respondents names and addresses; what

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Compel Production filed by Si Kinsella seeking information of Town of East Hampton, **denied** on the grounds that neither the 2015 RFP nor the PPA are before the Commission in this case, September 14, 2020. Motion to Compel Production filed by Mr. Bjurlof seeking Comparative Economic Review, **denied**, on the grounds that the 2015 RFP and the PPA are beyond the scope of this Article VII proceeding, September 30, 2020. Motion to Compel Production filed by Mr. Gruber seeking information of Deepwater Wind South Fork LLC, **denied**, on the grounds that it was unduly broad, September 30, 2020. Motion to Compel Production filed by Si Kinsella seeking information of PSEG LI, **denied**, on the grounds that the 2015 RFP and the resulting PPA are beyond the scope of this Article VII proceeding, October 27, 2020. Motion to Reopen Record filed by Kinsella seeking to add to a complete recording in the proceeding, **denied**, on the grounds that "both the 2015 RFP and the PPA are beyond the scope of this Article VII proceeding. Nothing in Mr. Kinsella's motion or supplemental motion suggests or requires a different result." February 10, 2021.

[25] Motion to **Strike Testimony**, **granted**, filed by Deepwater Wind South Fork seeking to erase factual, material and relevant testimony from the record that the Applicant found unfavorable, granted, November 24, 2020.

[26] Case 18-T-0604, Testimony Part 2 and Exhibits – Public Interest, Need & Price (DMM File/Item No 189) at – http://documents.dps.ny.gov/public/MatterManagement/MatterFilingItem.aspx?FilingSeq=253845&MatterSeq=57656

[27] On June 24, 2015, PSEG Long Island LLC ("PSEG Long Is.") through its operating subsidiary, Long Island Electric Utility Servco LLC as agent of and acting on behalf of Long Island Lighting Company d/b/a LIPA ("LIPA") release a Request for Proposals, South Fork Resources ("South Fork RFP"). The Aplicant was awarded a Power Purchase Agreement ("PPA") between it and LIPA in January 2017 pursuant to the South Fork RFP.

was the basis for the determination to the award the PPA to the Applicant (e.g. comparative analysis, memoranda, reports, and/or findings); comparative evaluation criteria; interviews and/or site visits; copies of NYS Vendor Responsibility Questionnaire. The questions seek standard information similar to that which is typically released to the public subsequent to other awards for offshore wind farms within the US.[28]

In response, PSEG Long Is. answered only two of the ten questions and objected to providing information in response to the outstanding eight questions using the exact same terminology as follows –

> PSEG Long Island objects to this request on the grounds that it seeks confidential information that is neither relevant to, nor reasonably calculated to lead to, the discovery of admissible evidence in this Article VII proceeding.

On September 30, 2020, a Motion to Compel PSEG Long Island to Respond to Information Request Kinsella No. 32 filed with the Commission sought information that had been provided to the public pursuant to other US procurements of offshore wind projects. The Motion to Compel PSEG Long Island specifically related to the South Fork RFP and its subsequent award of a power purchase agreement ("PPA")[29] to the Applicant.[30] Five days later, Supplemental Information (provided by the NY Office of the State Comptroller) in support of said Motion was filed with the Commission.[31] The Motion to Compel and Supplemental Information combined is forty-seven pages long and contains forty-one exhibits and over one thousand, eight-hundred pages. By contrast, the Administrative Law Judge's discussion of the issues was one paragraph in length, dismissive, conclusory and within its few sentences contains substantive factual inaccuracies.

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[28] Case 18-T-0604 (evidence exhibit no. 455) Launching New York's Offshore Wind Industry: Phase 1 Report issued October 2019 by NYSERDA

[29] Power Purchase Agreement between LIPA and Deepwater Wind South Fork LLC (the Applicant) executed February 6, 2017.

[30] Motion of Simon Kinsella to Compel PSEG Long Island to Respond to Information Request No. 32 dated September 30, 2020, seeking details related to the administration of the South Fork RFP and its subsequent award of a power purchase agreement (PPA) to the Applicant pursuant to that RFP. See documents at – http://documents.dps.ny.gov/public/MatterManagement/MatterFilingItem.aspx?FilingSeq=253461&MatterSeq=57656

[31] Supplemental Information (provided by NY Office of the State Comptroller) in Support of Motion of Simon Kinsella to Compel PSEG Long Island to Respond to Information Request No. 32, dated October 5, 2020 – http://documents.dps.ny.gov/public/MatterManagement/MatterFilingItem.aspx?FilingSeq=253662&MatterSeq=57656

The "discussion" reads as follows –

> Both the 2015 RFP and the resulting PPA are beyond the scope of this Article VII proceeding. [No reasoning provided.] As noted in Mr. Kinsella's motion, "the 2015 RFP is a final contract and has received all necessary approvals under state law [emphasis added]."[5] Therefore, the information Mr. Kinsella is requesting regarding non-winning submissions to the 2015 RFP are not relevant to the findings and determinations required by PSL §126, nor are they likely to lead to such information. The motion is denied. [Note 5 refers to "Kinsella's Motion, p. 6."]

The alleged quote from "Kinsella's Motion, p. 6" has been misquoted, has a substantially different meaning in the Motion to Compel Production filed with the Commission (and is on page 13, not page 6). In fact, the actual passage reads as follows –

> The Article VII application is based on the absurd premise that the public on one side of a public contract with a public authority administered and negotiated by PSEGLI acting on behalf of LIPA cannot know the price that they will pay for delivered power by the subject transmission facility pursuant to the PPA. The PPA is not a bid. It is not a proposal. It is not a draft. It is not subject to further or other negotiations. It is a final contract and has received all necessary approvals under state law. There is no plausible reason why the South Fork RFP and its PPA should be denied public scrutiny in this Public Service Commission proceeding.

The paragraph specifically addresses "the price that they [the public] will pay for delivered power by the subject transmission facility pursuant to the PPA" and why the price of the *winning* submission (i.e., the PPA) is being concealed from the public. The Administrative Law Judge confuses *non*-winning submissions pursuant to the "2015 RFP" procurement process with the *winning* "PPA" and then makes an unfounded leap to: "Therefore, the information Mr. Kinsella is requesting regarding *non*-winning submissions to the 2015 RFP are not relevant to the findings and determinations required by PSL §126, nor are they likely to lead to such information. The motion is denied." The ALJ's ruling is *not* based on fact; there is *no* rational basis for the determination; the determination is arbitrary and capricious.[32]

Information Request No. 32 was issued with the view to ascertain whether the South Fork RFP was a "competitive bidding process" or a smoke-screen to hide the awarding of a contract at inflated prices to a business partner of the company administering the procurement. As it turns

[32] Matter of *Poster v. Strough*, 299 AD.2d 127, 140-43 (2d Dep't 2002)

out, the South Fork RFP was a smokescreen. The company administering the procurement, PSEG Long Island, awarded a lucrative PPA to the Applicant, an existing joint-venture business partner at an inflated price that, at the time, was 50% above market.[33]

For example, where sworn testimony and exhibits (largely from US federal and state agencies) threatened to expose the narrative supporting the Applicant's alleged basis of need for the Project, over eleven thousand pages of testimony and exhibits were stricken from the record at the Applicant's request. See Testimony Part 2 and Exhibits – Public Interest, Need & Price (DMM File/Item No 189) that are incorporated by reference.[34]

iv) Basis of Need for the facility

The Applicant and signatory parties to the Joint Proposal have failed to sustain their "burden of proving that a proposed settlement is in the public interest [that] rests on the parties proposing the settlement."[35] Relevant, material fact-based evidence refuting the basis of need for the facility and evidence establishing that the facility is *not* in the public interest has either been denied entry into the evidentiary record or stricken from the record during the proceeding. Party-intervenors have been denied "the opportunity to oppose the settlement by offering evidence in opposition to the proposed settlement and the opportunity to cross-examine proponents of the settlement."[36] The Commission's actions are arbitrary and capricious.

The Commission "may *not* grant" the Applicant a Certificate of Environmental Compatibility and Public Need "unless it shall *find* and determine: (a) the basis of the need for the facility [emphasis added.]"[37] Further, "the Applicant has the burden of proving all required

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[33] Around the same time that Deepwater Wind South Fork LLC (90 MW) was awarded a contract pursuant to a procurement process administered by PSEG Long Island, the Maryland Public Service Commission was negotiating a similar contract to another Deepwater Wind subsidiary, Skipjack Offshore Energy LLC (120 MW). Skipjack was awarded a contract whereby it could sell its renewable energy at a priced of 14.3 cents/kWh (2016$) not long after Deepwater Wind South Fork was awarded a contract priced at 22 cents/kWh (2016$) or 53% more than Skipjack.

[34] Case 18-T-0604, Testimony Part 2 and Exhibits – Public Interest, Need & Price (DMM File/Item No 189)

[35] *Id.* Settlement Guidelines, Part E. (at p. 6, first paragraph)

[36] *Id.* Settlements Guidelines, Part E. (2) (at p. 6, last paragraph)

[37] Public Service Law § 126 (1) (a)

statutory findings under Public Service Law ("PSL") § 122" [38] including but not limited to "the need for the facility[.]" [39] The Applicant failed to sustain its burden of proof in support of the basis of need for its facility, and the Commission has failed to state pertinent and material facts showing the grounds for its Order Adopting Joint Proposal.

The basis of need is defined in the Applicant's Article VII application as follows (in relevant part only) –

> The Project, in conjunction with the SFWF [South Fork Wind Farm], addresses the need identified by the LIPA for new sources of power generation that can cost-effectively and reliably supply the South Fork of Suffolk County, Long Island, as an alternative to constructing new transmission facilities [emphasis added]." [40]

The basis of need is also defined in the Joint Proposal. It is the same as it is in the Applicant's Article VII application (above)[41] but for one exception: the Joint Proposal includes an additional qualifying clause such that, now, it reads: "The Project … addresses the need identified by the LIPA in its 2015 technology-neutral competitive bidding process (South Fork RFP) [internal quotes removed, emphasis added]." [42]

Furthermore, the need as it is defined in the Joint Proposal (paragraph 10) begins: "As described in Exhibit 3 of the Application," [43] but it is *not* as described in Exhibit 3. Exhibit 3 does *not* qualify or restrict the definition solely to the "2015 technology-neutral competitive bidding process (South Fork RFP)."

The factual error in the Joint Proposal (at p. 9), is substantively restated by the Administrative Law Judge in the Order (at p. 11), included word-for-word in Appendix C of the

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[38] Case: 06-T-0650 – NY Regional Interconnect, Inc., Ruling on Scope, Hearing Procedures and Schedule (at p. 10)

[39] Public Service Law § 122 (1) (d)

[40] Case 18-T-0604, Article VII application dated September 14, 2018, Part D. Need for the Project (at p. 5)

[41] The need as defined in Applicant's Article VII application is stated under Part D. of the Application (at p. 5) and in Exhibit 3: Alternatives (at p. 3-4). The need as defined in both documents are identical to each other and neither seek to qualify the "need identified by LIPA" by adding "in its 2015 technology-neutral competitive bidding process (South Fork RFP)[.]"

[42] Case 18-T-0604, Order Adopting Joint Proposal dated March 18, 2021, Joint Proposal dated September 17, 2020 Part III. Environmental Compatibility and Public Need, paragraph 10 (at p. 9)

[43] *Ibid.*

Joint Proposal (Proposed Findings), all of which has been adopted by the Commission in its Order Adopting Joint Proposal.

The insidious change in how the need for the Project is defined reveals the Applicant's efforts to ring-fenced the definition of need from this proceeding and place it out of reach of party-intervenors. The Applicant relies on the South Fork RFP to justify its alleged basis of need, but party-intervenors have been denied the opportunity to question, challenge, examine or cross-examine witnesses of parties with respect to the basis of need contained within the South Fork RFP.

On November 23, 2020, LIPA Chief Executive Officer Thomas Falcone defined the basis of need as one "for the purpose of enabling LIPA to meet projected peak load requirements, while avoiding to [sic] the greatest extent possible the construction of new transmission lines or other enhancements until 2030 in the far eastern area of the South Fork (east of the Buell substation near the Village of East Hampton)." [44]

Although mandated by statute, the Commission has contrived a basis of need that is *not* based in fact. The alleged need in the Commission's Order is so divorced from the fact that it is unreconcilable with the evidence presented during the proceeding.

The Order's first attempt to *find* a basis need confuses a need with a purpose. It reads: "a need exists for the Project to transmit electricity from the proposed offshore South Fork Wind Farm generation facility to the point of interconnection at the East Hampton substation[.]" [45] Since the Applicant filed an Article VII application (in September 2018), it comes as no surprise that it is "a major utility transmission facility" as defined in statute and that its sole *raison d'être* is to transmit energy.[46] Therefore, it is true, by definition, to say that an electrical transmission facility is "to transmit electricity"; otherwise, it would not be an electrical transmission facility, but this does *not* necessarily mean that there is a need for one. Circular reasoning that serves to

[44] Motion by Simon Kinsella to Reopen the Record, Exhibit L - Letter from LIPA Chief Executive Office Thomas Falcone to Simon Kinsella dated November 23, 2020 (at p. 1, second paragraph).

[45] Case 18-T-0604, Order Adopting Joint Proposal dated March 18, 2021 (at p. 99)

[46] Public Service Law § 120 (2)

re-enforce its own definition does *not* justify a need. A purpose and a need are different concepts.

The Order then attempts to establish the basis of need by reference to "requirements under the PPA and to meet the needs of LIPA's ratepayers." We are left hanging. What are the needs of LIPA's ratepayers under the PPA? Similarly, the Order then defines the basis of the need as that "identified by LIPA in its 2015 RFP for new sources of power generation that could *cost-effectively* and *reliably* supply the South Fork of Suffolk County, Long Island." Neither the determination by reference to "requirements under the PPA" nor "the need identified by LIPA in its 2015 RFP" constitute an actual finding, but merely conclusory statements without providing the element of any "rational basis" that is required for substantive review.[47] The "Discussion" section fails to address or even identify the needs.

Ratepayers – "total cost to society."

The Department of Public Service (DPS) Staff aver in sworn testimony that the Commission is required to "take into account the total cost to society" of the Applicant's facility.[48] According to DPS Staff, the cost to society includes the cost when "a rate payer pays his or her regular electricity bill."[49] In the same sworn testimony, DPS Staff confirms that it did *not* consider the cost burden to over one million ratepayers – "There's no testimony … that addresses cost to rate payers."[50] The cost to ratepayers for energy from the Applicant's proposed transmission facility is nearly three times the current market rate for the same offshore wind renewable energy. At the time the power purchase agreement was executed, the cost to ratepayers was fifty percent above the market. Recently released internal documents provided by LIPA prove that the cost to ratepayers is 22 cents per kilowatt-hour.[51] The cost to ratepayers for

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[47] Cases 90-M-0255 and 92-M-0138, Procedures for Settlements and Stipulation Agreements, Opinion 92-2 (issued March 24, 1992) ("Settlement Guidelines") (at p. 30, second paragraph, element 4.)

[48] Case 18-T-0604 - Prepared Testimony of Department of Public Service Staff Panel: (at p. 15, lines 11-18) See alo Chapter 16 272 of the Laws of 1970, Section 1, Legislative 17 Findings

[49] *Id*. (at p. 590, line 23 through to 591, line 2)

[50] Case 18-T-0604 – Cross-Examination of DPS Staff Panel by Kinsella, December 7, 2020 (at p. 595, lines 19-21)

[51] See Motion by Simon Kinsella to Reopen the Record, Supplemental Information, Exhibit K - Contract Encumbrance Request (Jan 30, 2017) AC340 – Est. Contract Value (click here for AC340 Contract Request). Projected energy delivered over contract term (20 years) is 7,432,080 MWh (371,604 MWh per year by 20 years). NY Office of the State Comptroller's valuation (C000883) of $1,624,738,893 (click here for C000883)

delivered energy from Applicant's proposed facility is 14 cents more expensive per kilowatt-hour than Sunrise Wind (8 cents)[52] for the same renewable energy that is generated offshore only two miles away. Disclosure requests and subsequent motions to compel production from party-intervenors were all denied. Party-intervenors were denied the opportunity to cross-examining witnesses with regards to both the South Fork RFP and its subsequent award of a power purchase agreement to the Applicant in violation of Public Service Law and the Commission's Procedural Guidelines. New circumstances in the form of discovery of internal documents from LIPA subsequent to the evidentiary hearing's conclusion were denied entry into the record.[53] LIPA's internal documents contain material, relevant and factual information for which there was no rational basis for excluding them from the evidentiary record. LIPA's internal documents constitute new circumstances that warrant a different determination.

The Commission may not rely on stale data when more recent information is available. The New York Court of Appeals is clear that, where the Commission makes a decision based upon outdated evidence and refuses to reopen a hearing to consider more recent evidence, such action is arbitrary within the meaning of CPLR Section 7803(3) and requires remand to the Commission for consideration of the updated evidence.[54] "The law is well-settled that the Commission may not rely on a reckoning when actual experience is available and establishes that the predictions have been substantially incorrect."[55] The Applicant's obsolete information

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Average price over contract term (20 years) is 21.9 cents/kWh or $218.61/MWh ($1,624,738,893/7,432,080).

[52] See Testimony Part 2 – Public Interest, Need & Price - DMM File/Item No 180 (click here), Exhibit G. South Fork Wind Farm Fact Sheet, LIPA released Oct 28, 2019 (at p. 3, see chart) (available at LIPA click here) See Response by Kinsella to Applicant's Motion to Strike Kinsella Testimony. Applicant sought to erase factual, material and relevant testimony from the record. Motion granted insofar as Testimony Part 2, Nov 24, 2020 DMM File/Item No 217 (click here), for Response by Kinsella Motion to Strike

[53] See Full and fair opportunity to participate (at page 13)
Case 18-T-0604: Motion by Kinsella to Reopen the Record, Jan 13, 2021 – DMM File/Item No 240 (clcik here)
Id. Supplemental Information to Motion to Reopen Record, Jan 29, 2021 – DMM File/Item No 257 (click here)

[54] New York Tel. Co. v. Public Serv. Comm'n, 29 N.Y.2d 164 (1971); see Rochester Gas & Elec. Corp. v. Public Serv. Comm'n, 64 A.D.2d 345, 349 (3d Dep't 1978) ("The disallowance of wages in the present record and in particular the refusal to conduct a hearing on the reasonableness of the actual increase exceeding 6% was without any rational basis in the record and is arbitrary and capricious."); Chenango & Unadilla Tel. Corp. v. Public Serv. Comm'n, 45 A.D.2d 409, 413-14 (3d Dep't 1974) (annulling a Commission determination that was based on information that had become stale and concluding that the Commission is bound to consider relevant data which is "as current as feasible").

[55] New York Tel. Co. v. Public Serv. Comm'n, supra, at 169 (citing West Ohio Gas Co. v. Public Utilities Comm'n [No. 2], 294 U.S. 79, 82 (1935)); see Lindheimer v. Illinois Bell Tel. Co., 292 U.S. 151, 164 (1934); see also Rochester Gas & Elec. Corp. v. Pub. Serv. Comm'n, 64 A.D.2d 345, 349-50 (3d Dep't 1978); Potomac Elec.

leaves the Commission without a valid basis upon which to make the required Article VII findings and determinations that warrant a rehearing.

Ratepayers - "a proper balance[?]"

The Commission "may *not* grant" the Applicant a Certificate of Environmental Compatibility and Public Need "unless it shall *find* and determine: (h) that the facility will serve the public interest, convenience, and necessity [emphasis added.]"[56]

The Commission's Procedural Guidelines state that one of the four elements of the public interest standard "to be considered in the ensuing substantive review" is "whether the settlement strikes a fair balance among the interests of ratepayers and investors and the long-term soundness of the utility [emphasis added.]"[57] A "fair balance" naturally requires that the Commission weigh the respective interests and determine an equilibrium between ratepayers, investors (the Applicant), and the long-term viability of the utility (LIPA), but by DPS Staff's own admission, it did *not* weigh the interests of ratepayers. The Commission's Settlement Guidelines require that ratepayers' interests "be considered," but DPS Staff did *not* take them into consideration. It would have been impossible for DPS Staff to know, therefore, whether it had struck a fair balance. The Commission's actions are arbitrary and capricious insofar as "a particular action should have been taken or is justified" given that the Commission's own Settlement Guidelines required that the interests of ratepayers be considered, but the Commission erred by *not* adhering to its Settle Guidelines.[58]

Ratepayers - "significant interest to the general public."

"The Court finds that the record requested [the PPA including contract prices] was of significant interest to the general public as the records sought consisted of the contract prices

Power Co. v. Public Serv. Comm'n, 380 A.2d 126, 134 (D.C. 1977) ("[T]he rate maker may not rely on out-of-date information when more recent actual experience…is available.").

[56] Public Service Law § 126 (1) (h)

[57] Cases 90-M-0255, *et al.*, Procedures for Settlements and Stipulation Agreements, Opinion 92-2 (issued March 24, 1992) ("Settlement Guidelines").

[58] Pell v Bd. of Educ., 34 NY2d 222, 230 [1974]

which would affect the pricing of utilities supplied to the general public." [59] The high price of energy from the Applicant's transmission facility was not considered "as an element of the public interest standard"[60] in the Commission's determination to approve the Applicant's Article VII application in contravention of the Commission's Settlement Guidelines. By failing to explain why the Commission considered the contract prices contained within the PPA to be excluded from the public interest standard, contrary to Judge Rivera's ruling in the matter of *Simon V. Kinsella v. Office of the New York State Comptroller*, the Commission's actions are arbitrary and capricious.[61]

Applicant cannot "cost-effectively" [62] supply power

Buying energy from the Applicant is *not* cost-effective. It will cost $1 billion more to buy energy from the Applicant than it would to buy the same renewable energy from Sunrise Wind. The NY Office of the State Comptroller valued the power purchase agreement between the Applicant and LIPA at $1.625 billion.[63] The cost for the same amount of renewable energy from Sunrise Wind is only $0.595 billion.[64] The Order states that "the Project addresses the need identified by LIPA in its 2015 RFP for new sources of power generation that could cost-effectively and reliably supply the South Fork of Suffolk County, Long Island [emphasis added]."[65] This statement is conclusory, *not* based in fact, lacks a rational basis, is arbitrary and capricious.

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[59] In the matter of *Simon V. Kinsella v. Office of the New York State Comptroller*, Albany County Courts, July 2019, index 904100-19 (exhibit no. 456) the Applicant sought trade secret status pursuant to NY Public Service Law Section 87(2)(d).

[60] Settlements Guidelines (at p. 30)

[61] Richardson v. Comm'r of N.Y. City Dep't of Soc. Servs, 88 N.Y.2d 35 (1996)

[62] Settlements Guidelines (at p. 99)

[63] New York Office of the State Comptroller valued the power purchase agreement ("PPA") between LIPA and Deepwater Wind South Fork LLC (the "Applicant") at $1,624,738,893. The valuation estimates projected energy deliveries to be 7,432,080 megawatt-hours over the twenty-year contract term. The average price of energy over the contract term is $218.61 per megawatt-hour ($/MWh) or 21.9 cents per kilowatter-hour (c/kWh).

[64] Case 18-T-0604: Motion by Simon Kinsella to Reopen the Record, January 13, 2021 (at pp. 15-16) – (http://documents.dps.ny.gov/public/MatterManagement/MatterFilingItem.aspx?FilingSeq=258773&MatterSeq=57656)

[65] Case 18-T-0604, Order Adopting Joint Proposal dated March 18, 2021 (at p. 99)

Sunrise Wind is a viable alternative

The Administrative Law Judge ruled against the proposition that the Applicant "coordinated and combined [its Project] with the Sunrise Wind Project," concluding that the Sunrise Wind alternative "is not supported by the record."[66] The reasons cited by the ALJ are all conclusory and superficial.

One reason the ALJ gives for his decision is that "the two generation facilities projects have different ownership [emphasis added.]" Although this may be *technically* accurate, it is grossly misleading: both projects are controlled by the same same ownership interest. It would have been more candid of the Commission to say that the Applicant, South Fork Wind LLC (formerly Deepwater Wind South Fork LLC) and Sunrise Wind LLC are both owned and controlled indirectly by the same joint and equal partners, Ørsted A/S and Eversource.[67]

The design engineering distinction is conclusory and meaningless without any rational basis or reasoned discussion. The Commission provides neither rational basis nor reasoned discussion. If the engineering distinction (we don't know and are left guessing) is in reference to Sunrise Wind's proposed use of direct current (DC) for its main export cable as opposed to the Applicant that plans to use alternating current (AC), even then, the interconnection cable array connecting the turbine generators would all be using alternating current (AC). No reason is given as to why South Fork Wind and Sunrise wind could not be interconnected via the inter-cable array and then share the same direct current (DC) export cable.

The reference to "different interconnection points [emphasis added]"[68] is conclusory and meaningless without any rational basis or reasoned discussion. The Commission provides neither rational basis nor reasoned discussion. If the Commission is concerned about the distance (we are left guessing), electromagnetic energy travels at near-to the speed of light

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[66] Case 18-T-0604: Order Adopting Joint Proposal, Part VII Discussion (at p. 99, last paragraph)

[67] South Fork Wind LLC (formerly Deepwater Wind South Fork LLC) is owned by North East Offshore LLC, a joint and equal partnership between Ørsted A/S and Eversource. Sunrise Wind LLC is owned by Bay State Wind LLC, also a joint and equal partnership between Ørsted A/S and Eversource.

[68] Case 18-T-0604: Order Adopting Joint Proposal, Part VII Discussion (at p. 100, first paragraph)

(depending upon the conductor), so whether an offshore wind farm is connected to the grid at Holbrook or Hither Hills is irrelevant.

Finally, the ALJ's reference to "different customers"[69] merely parrots the Applicant, is conclusory, and meaningless without any rational basis or reasoned discussion and *not* supported by fact. The Commission provides neither rational basis, reasoned discussion, nor facts. On October 28, 2019, LIPA released a South Fork Wind Fact Sheet that reads: "LIPA will also buy an estimated 90 MW of offshore wind from the recently announced 1,700 MW of New York State projects." One of the two projects from which LIPA will buy "offshore wind" is Sunrise Wind. The Fact Sheet, again, states that "LIPA will responsibly buy offshore wind," under which it reads: "Share of Recent NYSERDA Awards: Estimated @ 90 MW" and "Future Offshore Wind Projects: Estimated @ 800+MW[.]"[70] If LIPA can buy "90 MW" of energy from Sunrise Wind, then Sunrise Wind *is* a viable alternative, and it *is* technically feasible. The ALJ's decision is *not* based on fact, is arbitrary and capricious. LIPA's South Fork Wind Fact Sheet was introduced into the record as Exhibit G to my Testimony Part 2 (on October 9, 2020). On November 24, 2020, the ALJ struck it from the record along with over ten thousand pages of sworn testimony at the Applicant's request.[71]

The facility cannot meet peak demand and is an unreliable supply of power

The basis of need for the Applicant's transmission facility defined by LIPA, specifically, is to meet peak demand. Sworn testimony (of over ten thousand pages) refuting the claim that the subject facility could reliably provide energy to meet peak demand was stricken from the record at the Applicant's request. Further, LIPA's own documents, which came to light only after the evidentiary hearing had closed, refute beyond doubt any claim that the proposed transmission facility can reliably meet peak demand. The Administrative Law Judge ruled

[69] Case 18-T-0604: Order Adopting Joint Proposal, Part VII Discussion (at p. 100, first paragraph)

[70] South Fork Wind Farm Fact Sheet published by LIPA on October 28, 2019 (available at link below) – https://www.lipower.org/wp-content/uploads/2019/10/LIPA-First-Offshore-Wind-Farm-Doc-V19_102819-FINAL.pdf

[71] See Testimony Part 2 – Public Interest, Need & Price (DMM File/Item No 189, Exhibit G) at – http://documents.dps.ny.gov/public/MatterManagement/MatterFilingItem.aspx?FilingSeq=253845&MatterSeq=57656 See Motion to Strike Testimony filed by the Applicant seeking to erase factual, material and relevant testimony from the record. The motion was granted insofar as Testimony Part 2 on November 24, 2020.

against including LIPA's documents as new circumstances proving that the proposed Project is a flawed choice of technology to use as a supply of energy to meet peak demand and to be a reliable source of power. LIPA's disclosed documents that refute the baseless and unfounded claims of the Applicant constitute new circumstances that warrant a different determination and rehearing. The Commission may not rely on stale data when more recent information is available (see footnotes notes 54 and 55).

Deferral of New Transmission Lines:

The basis of the need for the Applicant's facility defined by LIPA includes its ability to defer new transmission line enhancements. Internal LIPA documents show that by the time the Applicant's facility will be operational, the new transmission line enhancements would have been completed. Therefore, the Applicant's proposed facility will *not* defer the planned new transmission line enhancements. The internal LIPA documents were provided subsequent to the evidentiary hearing. A motion to reopen the record to include the documents in the proceeding was denied. LIPA's internal documents constitute new circumstances that warrant a different determination and rehearing. The Commission may not rely on stale data when more recent information is available (see footnotes notes 54 and 55). See Motion to Reopen the Record.[72]

South Fork RFP - Presumption of validity

The Order Adopting Joint Proposal reads as follows –

> [T]he 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.

The Order is conclusory, lacking in any discussion or discernable reasoning is arbitrary and capricious. The law is clear on when evidence requires that a presumption of validity be questioned:

> The ultimate strength, credibility or persuasiveness of petitioner's arguments are not germane during this threshold inquiry. Similarly, the weight to be given to either party's evidence is not a relevant consideration at this juncture. Instead, in answering the question whether substantial evidence exists, a court should simply determine

[72] Motion by Kinsella to Reopen the Record, Jan 13, 2021 (incl. exhibits) DMM File/Item No 240 (click here)
Motion by Kinsella to Reopen, Supplemental, Jan 29, 2021 (incl. exhibits) DMM File/Item No 257 (click here)
Ruling Denying Motions to Reopen Record by ALJ Belsito, Feb 10, 2021, DMM File/Item No 270 (click here)

> whether the documentary and testimonial evidence proffered by petitioner is based on "sound theory and objective data" [73] rather than on mere wishful thinking. Though the substantial evidence standard is low, it "does not rise from bare surmise, conjecture, speculation or rumor" [74].[75]

The Commission ignored substantial evidence that more than sufficiently sustains the burden of proof required to rebut the presumption of validity attached to the South Fork RFP with specific regard to the basis of need for the facility.[76] LIPA provided substantial evidence, objectively, that goes directly to the heart of whether there exists a basis of need for the Applicant's facility pursuant to Public Service Law, Article VII, § 126 (1) (a). The Commission's Order was affected by an error of law, is arbitrary and capricious.

Furthermore, the Commission's Order lacks any rational basis. It reads –

> 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.

The Applicant relies on the South Fork RFP for its basis of need "identified by LIPA" and contrary to the Commission's Order, there is no statutory requirement for either the Office of the New York State Comptroller or the New York State Attorney General to approve the South Fork RFP procurement process. Furthermore, neither the Office of the New York State Comptroller nor the New York State Attorney General did approve the South Fork RFP. The only document to receive approval from the Office of the New York State Comptroller was the PPA (*not* the RFP), and approval from the New York State Attorney General (solely as to form) was the PPA (again, *not* the RFP). The Commission erred in fact and law, acted arbitrarily and capriciously.

Although the Order states that "the costs of the Project are the responsibility of the Applicant," this distinction does *not* negate the fact that ratepayers will ultimately have to pay the bill for the Applicant's delivered energy.

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[73] Matter of Commerce Holding Corp. v Board of Assessors, 88 NY2d 724, 732

[74] 300 Gramatan Ave. Assocs. v State Div. of Human Rights, supra, at 180

[75] FMC Corp. v Unmack, 92 NY2d 179, 188 [1998]

[76] NY CLS Public Service Law, Article VII, § 126 (1) (a)

South Fork RFP – Parties Denied Examination and Cross-examination

During the proceeding, parties were denied the opportunity to examine and cross-examine the South Fork RFP and its subsequent PPA award. The ALJ repeatedly ruled that the South Fork RFP and PPA were out of scope of the proceeding, "not relevant to the findings and determinations required by PSL §126, nor are they likely to lead to such information."[77]

After the evidentiary hearing had concluded, after denying parties opportunity to examination and cross-examination of witnesses with regards to the South Fork RFP and PPA, the ALJ then admitted both the South Fork RFP and the PPA into evidence so that the Applicant could rely on it to establish its basis of need. Therefore, parties were denied rights of examination and cross-examination of a pivotal document upon which the Applicant relies that goes directly to the heart of PSL Section 126 (1) and the Article VII proceeding.

Under PSL Section 126 (1), in an Article VII proceeding, "[t]he commission shall render a decision upon the record either granting or denying the application." PSL Section 125 further specifies that a "record shall be made of the hearing and of all testimony taken and the cross-examinations thereon."

Here, as in any Article VII proceeding, the Commission must make its determination upon the record. The record presented to the Commission in this proceeding, however, remains insufficient and incomplete because parties were denied the opportunity to examine and cross-examine. The record lacks the benefit of full participation by the parties who may or may not support the Project, but was unable to reach a conclusion because the evidentiary record lacks the resolution of contested, material, factual issues that can best be explored through cross-examination. The record also continues to feature serious gaps in information.

The Commission's Regulations require parties to have a reasonable opportunity to present evidence and examine and cross-examine witnesses.

"At hearings, parties to the proceeding will be afforded reasonable opportunity to present evidence and examine and cross-examine witnesses."[78] These regulations governing this proceeding anticipate a hearing and also specifically anticipate the cross-examination of

[77] Ruling on Motion by Kinsella to Compel PSEG Long Island Re: Information Request Kinsella No. 32 (at p. 4)

[78] 16 NYCRR § 4.5 (a)

witnesses who prepared written testimony.[79] While these regulations also allow for a presiding officer to "expedite the orderly conduct of the proceeding,"[80] such orderly conduct would still require upholding the parties' rights and creating a complete record. Indeed, the regulations state that the only circumstance in which a witness's prepared written testimony would not be subject to cross-examination is where "cross-examination . . . is waived by all other parties . . . ."[81] Parties in this proceeding did *not* waive their rights to cross-examination.

The Commission's Procedural Guidelines for Settlement (the "Settlement Guidelines") require that "[p]arties not participating in the settlement must be given the opportunity to participate fully in our proceedings. This includes the opportunity to oppose the settlement by offering evidence in opposition to the proposed settlement and the opportunity to cross-examine proponents of the settlement. For the purpose of opposing the settlement, any party may also develop fully the issues and positions it wishes to advocate, by cross-examination and by introduction of affirmative testimony."[82]

Finally, the requirements for cross-examination is described by Governor Rockefeller when approving the legislation that created PSL Article VII, requiring that "[a]fter a full hearing with all parties having the right of cross-examination, the Commission may only approve a new transmission facility if it finds and determines [and complies with the PSL Section 126 (1)]."[83] There is no doubt that the Legislature intended to have hearings and cross-examination and that the South Fork RFP should have been subject to scrutiny, especially given the importance and pivotal role it plays in establishing the basis of need for the Applicant's proposed transmission facility.[84] The Commission erred in fact and law, acted arbitrarily and capriciously.

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[79] 16 NYCRR § 4.5 (b)(2)

[80] 16 NYCRR § 4.4 (a)

[81] 16 NYCRR § 4.5(b)(2)

[82] Case 90-M-0255 et al., Proceeding on Motion of the Commission Concerning its Procedures for Settlement and Stipulation Agreements, filed in C 11175, Opinion No. 92-2, Opinion, Order and Resolution Adopting Settlement Procedures and Guidelines issued March 24, 1992. The Settlement Guidelines appear in Appendix B to Opinion No. 92-2 at 6-7

[83] Memorandum filed with Senate Bill No. 9455 and Assembly Bill No. 6821, signed by New York State Governor Nelson A. Rockefeller (April 29, 1970).

[84] The only exception in which an Article VII witness's testimony would not be subject to cross-examination is where, as provided for in the regulations, the right to cross-examination is waived by all parties.

PFAS Contamination

Public Service Law § 126 (1) requires that the Commission "shall render a decision upon the record" and mandates that it "may not grant a certificate … unless it shall *find* and determine: … the nature of the probable environmental impact [emphasis added.]"[85]

Nowhere in the Order does it state that the Commission has satisfied the requirements of § 126 (1) (b). The Commission does *not* have statutory authority to grant a certificate of environmental compatibility and public need ("Certificate") "unless it shall find and determine … the nature of the probable environmental impact[.]" The Commission has *not* established the level and extent of known PFAS contamination along the Applicant's proposed construction corridor and has failed to comply with its statutory obligations as it is compelled to do. Therefore, the Commission has exceeded its authority by granting a Certificate to the Applicant and has violated its statutory mandate. Where there is procedural noncompliance by an administrative board that violates a mandatory statutory provision and rises to the level of an abuse of authority, "the noncompliance alone is sufficient to warrant granting a new hearing."[86]

Still, the evidentiary record in this proceeding remains insufficient and incomplete (please see Motion to Open the Record).

The Order Adopting Joint Proposal states that "that construction and operation of the Project will avoid or minimize adverse impacts to the environment[,]" but does *not* provide any details on how or if the Commission has attempted in any way to "avoid" the contamination. Countless roads lead down to the southern beaches of the South Fork where the Applicant could have chosen to land its cable, but there is only one road and cable route that contains the most contaminated soil and groundwater on the South Fork, and the Applicant chose that route. Any illusion that the Applicant or the Commission will "avoid" adverse environmental impacts is *not* based on fact.

[85] Public Service Law § 126 (1) (b)

[86] Svquia v. Bd. of Educ. of the Harpursville Cent. Sch. Dist., 80 N.Y.2d 531 (1992)

The Order, Part 3: PFAS (at p. 102) states that the Commission agrees "with the Applicant and DPS Staff and find that the Project, as proposed and conditioned will not exacerbate existing PFAS." The Commission's findings do *not* address its statutory mandate to find and determine existing PFAS contamination along the Applicant's construction corridor, which the Commission has failed to do in violation of the law.

CONCLUSION

For the aforementioned reasons, I respectfully request that this Petition for Rehearing and Stay be granted in full.

Respectfully submitted,

Simon V. Kinsella
Dated: April 16, 2021
Wainscott, New York