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

In the Matter of the Application of

NOTICE OF AMENDED COMPLAINT AND PETITION

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

Petitioners-Plaintiffs,

-against-

Index No. 000613/2021

LONG ISLAND POWER AUTHORITY,
LONG ISLAND LIGHTING COMPANY,
PSEG LONG ISLAND LLC,
LONG ISLAND ELECTRIC UTILITY SERVCO LLC,
PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK,
NEW YORK STATE DEPARTMENT OF PUBLIC SERVICE, and
SOUTH FORK WIND LLC (FORMERLY DEEPWATER WIND SOUTH FORK LLC),

Respondents-Defendants,

for a Declaratory Judgment Pursuant to Article 30 and Judgment Pursuant to Article 78 of the Civil Practice Law and Rules

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PLEASE TAKE NOTICE, of annexed Verified Amended Complaint and Petition and the exhibits, appendices and documents incorporated by reference annexed thereto, the Affidavit of Simon V. Kinsella, sworn to on September 13, 2021, for an order pursuant to Sections 7803(1), 7803(3), 7806, and Article 30 of the New York Civil Practice Law and Rules ("CPLR"):

A. Adjudging and declaring that the Power Purchase Agreement between defendant Long Island Power Authority and defendant Deepwater Wind South Fork LLC (now known as South Fork Wind LLC) executed on or about February 6, 2017 exists in violation of State Finance Law § 163 and General Municipal Law § 103, and is illegal;

B. Annulling the aforementioned Power Purchase Agreement in its entirety;

C. Adjudging and declaring that the New York State Public Service Commission Order Adopting Joint Proposal issued on March 18, 2021 (under case 18-T-0604) was issued in violation of lawful procedure, affected by an error of law, arbitrary and capricious, and an abuse of discretion;

D. Annulling and vacating the aforementioned Order of March 18, 2021 in its entirety;

E. Adjudging and declaring that the granting by New York State Public Service Commission of a Certificate of Environmental Compatibility and Public Need to respondent Deepwater Wind (under case 18-T-0604) was in violation of lawful procedure, affected by an error of law, arbitrary and capricious, and an abuse of discretion;

F. Annulling the issuance of the aforementioned Certificate of Environmental Compatibility and Public Need in its entirety;

G. In the alternative, to prevent waste of resources, inconvenience to residents of the Town of East Hampton, property damage, and damage to stakeholders, ordering New York State Public Service Commission to forthwith issue a ruling either granting or denying plaintiffs'/petitioners' Petition for Rehearing and Stay, and temporarily staying this proceeding/action pursuant to CPLR § 2201 pending

issuance of that ruling;

H. To prevent waste of resources and inconvenience, Ordering New York State Public Service Commission to temporarily stay the hearing of respondent Deepwater Wind for a Petition for an Order Granting a Certificate of Public Convenience and Necessity and Establishing a Lightened Regulatory Regine (under case 21-E-0261) pending the outcome of this action/proceeding;

I. Granting plaintiffs/petitioners the costs and disbursements of this action/proceeding; and

J. Granting such other and further relief as the Court deems just and proper.

Dated: Wainscott, New York
September 13, 2021

Respectfully submitted,

Simon V. Kinsella
Plaintiff/Petitioner
PO Box 792
Wainscott, N.Y. 11975
Tel: (631) 903-9154
Si@Wainscott.Life

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

In the Matter of the Application of

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

Petitioners-Plaintiffs,

-against-

LONG ISLAND POWER AUTHORITY,
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PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK,
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VERIFIED AMENDED COMPLAINT AND PETITION

Index No. 000613/2021

Petitioner/plaintiff, Simon V. Kinsella, is appearing *pro se* in the (above-captioned) action/proceeding, complaining of the defendants' and petitioning the court respectfully shows to the court and alleges:

(a) This is a Complaint pursuant to Article 30 seeking a Declaratory Judgment and a petition pursuant to Article 78 challenging New York State Public Service Commission (hereinafter the "Commission" or "PSC") Order Denying Petitions for Rehearing issued August 12, 2021 (a copy of which is attached as Exhibit A hereto), and the Commission's grant of a Certificate of Environmental Capability and Public Need (DMM: item 271, Order Adopting Joint Proposal, p 1) to South Fork Wind LLC.

(b) This action is timely because it was brought within 30 days of issuing the Order Denying Rehearing of August 12, 2021, a copy of which is attached hereto as Exhibit A.

(c) The letter and affidavit of service required by Public Service Law, Section 128 are attached hereto as Exhibit B.

PRELIMINARY STATEMENT

Complaint challenging the award by LIPA of a power purchase agreement to South Fork Wind

1) PSEG Long Island LLC (hereinafter "PSEG Long Is." or "PSEG Long Island") and the Long Island Power Authority (hereinafter "LIPA") awarded Deepwater Wind South Fork LLC (hereinafter "Deepwater Wind") a twenty-year power purchase agreement for the supply of electrical energy at an average price of **22 cents** per kilowatt-hour over the life of the contract (see Exhibit 2).[1] The same offshore wind renewable energy can be bought from an adjacent wind farm, Sunrise Wind, for **just 8 cents** (see Exhibit 3)**.**[2] The offshore wind farms are only two miles apart.

2) The South Fork RFP was a manipulated, non-competitive solicitation where the company administering the procurement, PSEG Long Island, awarded a contract to its existing business partner, Deepwater Wind, at a rate that exceeded the market rate by fifty-three percent (53%) at the time.

3) On January 11, 2017, in his State of the State address, Governor Andrew M. Cuomo interfered with a procurement process and advance the interests of a private developer to the detriment of twenty other bids submitted for consideration in the South Fork RFP procurement process. Governor Cuomo called on the LIPA Board of Trustees to decide in the interests of Deepwater Wind (see Appendix S), knowing he appointed five of the nine trustees, in violation

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[1] Exhibit 2 - LIPA Est. Contract Value (at p. 1) - New York Office of the State Comptroller, Estimated Contract Value of Power Purchase Agreement between LIPA and Deepwater Wind South Fork LLC. Total Projected Energy Deliveries (MWh) over the 20-year contract term is 7,432,080 MWh (371,604 MWh per year for 20 years). Total Annual Contract Payments over the 20-year contract term is $1,624,738,893. Average contract price over the term is $218.61 per MWh ($1,624,738,893 divided by 7,432,080 MWh) or **21.9 cents per kWh**.

[2] Exhibit 3 - Ørsted- Sunrise Wind PPA (at p. 1) - Ørsted A/S Press Release: *Sunrise Wind signs power purchase agreement with New York*, released October 23, 2019. It reads: "The Sunrise Wind project has an average all-in development cost of USD80.64 per MWh (2018 prices)[.]"

of New York Constitution articles III and IV. Fourteen days later, during the LIPA Board of Trustees meeting (on January 25, 2021), the "Board of Trustees authorizes the Chief Executive Officer […] to execute a PPA […] to implement the Authority's purchase of energy […] from the Deepwater Wind South Fork, LLC, South Fork Wind Farm project" (see Exhibit 29 at p. 8).

4) On January 25, 2017, the Board of Trustees of LIPA agreed to pay more than double the estimated cost of building the South Fork Wind Farm. According to Deepwater Wind, the South Fork Wind Farm (including the transmission system) would cost $740 million.[3] The power purchase agreement between LIPA and Deepwater Wind commits ratepayers to a contract LIPA values at $1.624 billion.[4] Deepwater Wind's gross profit (excluding operations and maintenance) is, $885 million, representing 120% of the cost ($740 million).

5) Where LIPA and PSEG Long Island "had so fixed or manipulated the specifications as to shut out competitive bidding or permit unfair advantage or favoritism, the contract likewise would be illegal. (See *Randolph McNutt Co. v Eckert*, 257 NY 100, 104 [1931] citing *Brady v. Mayor*, 20 N. Y. 312; *Bigler v. Mayor*, 5 Abb. N. C. 51.)

6) The South Fork RFP was not a solicitation for offshore wind resources. The RFP is ninety-four pages long and does *not* mention "offshore wind" once. By contrast, the RFP mentions "energy storage" twenty times, "fuel" (for fossil-fuel generators) thirty-six times,

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[3] According to the Wall Street Journal, the New York Times, Newsday, and the Express News Group. Exhibit 30 - *Wind farm project approved by LIPA trustees* by Mark Harrington published in Newsday on January 25, 2017. Exhibit 31 - *New York State's First Offshore Wind Farm Gets Green Light Construction on the $740 million project on Long Island will start in 2020* by Joseph De Avila published in the Wall Street Journal on January 25, 2017. Exhibit 32 - *UPDATE: LIPA Approves $740 Million Wind Farm To Power The South Fork* published by the Express News Group. Exhibit 33 - *Nation's Largest Offshore Wind Farm Will Be Built Off Long Island* by Diane Cardwell published in the New York Times on January 25, 2017.

[4] Exhibit 2 – On January 30, LIPA's Chief Financial Officer, Joseph Branco, signed a Contract Encumbrance Request valuing the proposed project at one billion, six hundred and twenty four million, seven hundred and thirty eight thousand and eight hundred and ninety three dollars ($1,624,738,893).

"photovoltaic"/"solar" generation three times, and even "geothermal" once. Offshore wind is conspicuously missing (see Exhibit 21).

7) Six months after releasing the South Fork RFP (on June 24, 2015), PSEG Long Island issued the Renewable RFP on December 22, 2015. The Renewable RFP includes explicitly offshore wind, whereas the South Fork RFP does *not* (see Exhibit 22).

8) The Renewable RFP allows for "off-island projects" (such as offshore wind). The South Fork RFP calls *only* for "local resources" that are "located on Long Island[,]" thereby precluding offshore wind resources.[5]

9) The Renewable RFP allows for resources to "be connected by a new transmission line dedicated to the delivery of power to Zone K" (referring to Long Island). The South Fork RFP is designed to defer new transmission lines and seeks proposals as "an alternative" to new transmission lines [emphasis added].[6]

10) The Renewables RFP allows for a staggered installation that permits a commercial operation date ("COD") to be as late as May 1, 2024.[7] The South Fork RFP's latest COD is May 1, 2019. Deepwater Wind's (overly optimistic) proposed COD missed that target by two-and-a-

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[5] Exhibit 22 - Renewable RFP, Dec 2015 (at p. 7, ¶ 2.1.11) - Request for Proposals for New Renewable Capacity and Energy (available online at PSEG Long Island, click here). Also, see Exhibit 24 - Notice to Proposers South Fork RFP Cover Letter signed by Paul Napoli, Vice President of Power Markets, PSEG Long Island, addressed "To All Interested Proposers" dated June 24, 2015 (available online at PSEG Long Island, click here), and PSC DMM 007 p.1 Exhibit H).

[6] Exhibit 22 - Renewable RFP, Dec 2015 (at p. 7, ¶ 2.1.9 and 2.1.11) - Request for Proposals for New Renewable Capacity and Energy (available online at PSEG Long Island, click here). Also, Exhibit 21 - South Fork RFP, Jun 2015 (version date of November 10, 2015) (at p. 2, penultimate paragraph) (available online at PSEG Long Island, click here, and PSC DMM 189 p. 1 Exhibit 02).

[7] Exhibit 22 - Renewable RFP, Dec 2015 (at p. 11, footnote 3) that reads: "Staggered startup will be allowed to occur in blocks no smaller than 25% of Project size with a minimum of 1 month between block startup with total Project capacity installed within two years [emphasis added]. Power delivery from the first block [which] shall be no later than May 1, 2022 [emphasis added]" (available online at PSEG Long Island, click here).

half years, and, now, its revised COD will miss that target by four-and-a-half years.[8]

11) The submittal deadline for the Renewable RFP remained open for six months *after* the submittal deadline had closed for the South Fork RFP.[9] Still, LIPA and PSEG Long Island chose to award a contract for offshore wind power generation from within the South Fork RFP that was neither designed for offshore wind nor was a solicitation for offshore wind. By inserting Deepwater Wind's bid into an incongruous procurement, LIPA and PSEG Long Island guaranteed Deepwater Wind a clear field free of competition from other offshore wind farms.

12) Despite being written to accommodate such resources, *no* offshore wind contract was awarded under the Renewable RFP (see Exhibit 23).[10]

13) In November 2018, the New York State Energy Research and Development Authority (hereinafter "NYSERDA") issued an RFP for Offshore Wind Renewable Energy Certificates ("NYSERDA OSW RFP"). The RFP mentions "offshore wind" one hundred and thirty-two (132) times.[11] By comparison, the South Fork RFP does *not* mention "offshore wind" at all.

14) The NYSERDA OSW RFP was a competitive procurement where four offshore wind farm developers competed against each other. The procurement resulted in a contract award to, *inter alia*, Sunrise Wind, where the average price of electrical energy is 8 cents (per kilowatt-hour

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[8] Exhibit 21 - South Fork RFP, Jun 2015 (at p. 8). Although the commercial operation date is May 1, 2019, the RFP requests an "alternative pricing for the delay of project COD by one year" (see 2.2.1. Delayed COD). Available online at PSEG Long Island, click here, and PSC DMM 189 p. 1 Exhibit 02.

[9] The submittal deadline for the Renewable RFP is June 2016 (see Exhibit 22 at p. 11). The submittal deadline for the South Fork RFP is December 2, 2015 (see Exhibit 21, at p. 7).

[10] Exhibit 23 - Awards- Renewable RFP (last accessed July 11, 2021) - Pursuant to the Renewable RFP, LIPA and PSEG Long Island awarded a power purchase agreement only to LI Solar Generation LLC for Solar Photovoltaic (22.9 MW). Available online at PSEG Long Island, click here.

[11] Appendix A - NYSERDA OSW RFP (2018) - NYS Energy Research and Development Authority ("NYSERDA") Purchase of Offshore Wind Renewable Energy Certificates Request for Proposals ORECRFP18-1, Released November 8, 2018 (available online at NYSERDA, click here, and PSC DMM 205 p. 1 Exhibit 3-6.)

over the life of the contract). After the procurement awards had been announced, the identities of all four bidders were publicly disclosed.[12] By comparison, the South Fork RFP was a non-competitive procurement where *only one bidder*, Deepwater Wind, submitted a proposal for an offshore wind farm. The South Fork RFP resulted in a contract award to Deepwater Wind at an average price of 22 cents per kilowatt-hour (see Exhibit 2). Neither LIPA nor PSEG Long Island disclosed the identities of the other bidders until four years later.

15) According to the South Fork RFP's Evaluation Guide, "Mandatory Criteria" is used to measure a "Proposals' compliance to the RFP and […] to determine whether the Proposal can be accepted. If this information is not provided at the Proposal Submittal Deadline, the Proposal will be eliminated from consideration."[13] Still, LIPA and PSEG Long Is. overlooked three instances where Deepwater Wind violated mandatory criteria. LIPA and PSEG Long Island's deference towards Deepwater Wind stood in sharp contrast to its strict application of mandatory criteria to proposals from other bidders. LIPA and PSEG Long Island subsequently disqualified two other bidders for failing to comply with Mandatory Criteria, deeming their proposals as non-responsive (see Exhibit 8).[14]

Petition challenging the Commission's grant of an Article VII Certificate to South Fork Wind

16) Seventy-seven parties participated in the Deepwater Wind South Fork Article VII

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[12] Atlantic Shores Offshore Wind LLC, Empire Wind Project (Equinor US Holdings, Inc.), Liberty Wind (Vineyard Wind LLC), and Sunrise Wind (Bay State Wind LLC). See NYSERDA 2018 Solicitation, Four Major Developers Proposed, click here.

[13] Exhibit 7 - SF RFP Evaluation Guide (at p. 3) - PSEG Long Island's South Fork Resources RFP Evaluation Guide (December 1, 2015). Available online at PSC DMM 257 p. 4 Exhibit N.)

[14] Exhibit 8 - LIPA Memo Re- SF RFP (at p. 8). Landis + Gyr (a company offering Smart Grid technology) was deemed non-responsive and disqualified for failing to provide a firm price and to propose a full service contract. Solar City Corporation (a company offering rooftop solar installations), was deemed non-responsive and disqualified for failing to provide the required submittal fee check and alternative PPA. Available online at PSC DMM 257 p. 1 Exhibit A.

proceeding.[15.1] Of those, seven government agencies,[14.2] 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 in violation of Public Service Law §126 (1) (see Exhibit 20 - Petition for Rehearing & Stay).

17) Deepwater Wind submitting untruthful information to regulatory authorities, claiming (falsely) that there "were no hydraulically upgradient or adjacent properties along the study corridor that would represent a significant environmental risk to subsurface conditions[,]"[16] refusing to correct the error, and denying the existence of known contamination along its proposed construction corridor in the face of overwhelming evidence to the contrary;

18) Reports showing existing soil and groundwater contamination exceeding regulatory limits by one-hundred-times within one hundred and fifty feet (150 ft) of the Deepwater Wind's proposed construction corridor were submitted as evidence in the PSC Article VII proceeding (see Exhibit 6). The reports included two site characterization reports prepared for New York State Department of Environmental Conservation (hereinafter "DEC") and over four hundred laboratory reports from Suffolk County Department of Health Services (hereinafter "SCDHS").

[15.1] 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.

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

[16] Appendix B - Hazardous Materials Desktop Analysis (at pp. 122-191) - Article VII Application of Deepwater Wind South Fork LLC, Appendix F Part 2, Phase I Environmental Assessment prepared by VHB Engineering, Surveying, and Landscape Architecture P.C. – Hazardous Materials Desktop Analysis, dated March 30, 2018. Available online at PSC DMM 001 p. 33 Appendix F Part 2.

Still, *not one* lawyer or public official spoke up to protect the interests of residents living near the proposed construction site, despite the fact that the residents of Wainscott had already been drinking contaminated water for years (see Testimony Part 1-1 and 1-2: PFAS Contamiantion).

19) DPS admitted under cross-examination that they did *not* consider the cost impact of Deepwater Wind's project on ratepayers when making its recommendation to issue Deepwater Wind a Certificate of Environmental Compatibility and Public Need (hereinafter "Article VII Certificate") contrary to the agency's Procedural Guidelines (see Exhibit 19);

20) DPS contrived to exclude material and relevant evidence from the evidentiary record, willfully relied on obsolete information, erred in fact and law, acted arbitrarily and capriciously, violated statutorily mandated provisions, non-compliance with which rises to the level of abuse of authority, and has been dilatory to rule on a Petition for Rehearing and Stay (see Exhibit 20 - Petition for Rehearing and Stay) filed ninety (90) days ago (see Appendix R – Motion to Strike Testimony, Response by Kinsella); and

21) LIPA failed to comply with statutory provisions mandating that it seek the approval of the public authorities control board ("PACB") before proceeding to award a power purchase agreement to Deepwater Wind (see Exhibit 28).

PARTIES

22) Plaintiff/petitioner, Simon V. Kinsella, is a full-time resident of Wainscott in Town of East Hampton. Plaintiff/petitioner is a US citizen who reside near the location where defendant Deepwater Wind proposes to land high-voltage transmission cables(s), and install underground transmission infrastructure, and other related facilities. Plaintiff/petitioner is a taxpayer and ratepayer in the affected service area who, since 2016, has tried to perform a role typically

played by our elected officials, and state and town agencies. Plaintiff/petitioner has and contributed substantially in the development of as a complete a record as was permitted by the Administrative Law Judge in defendant Deepwater Wind's New York State Article VII proceeding by conducting discovery, submitting testimony, briefs, or other formal written comments, and participating in the evidentiary hearings, procedural conferences, conducting cross-examination, and other formal events conducted in the case. Also, plaintiff/petitioner has conducted research and reported on issues pertaining to local water quality (both surface and subsurface) and contamination thereof. Finally, plaintiff/petitioner is a volunteer without legal qualifications.

23) Plaintiffs/petitioners, Pamela I. Mahoney and Michael P. Mahoney, reside at 98 Beach Lane in Wainscott, New York, Suffolk County. The property is immediately adjacent to Deepwater Wind's proposed construction corridor, and the home is approximately one hundred and thirty feet (130 ft) from the location where Deepwater Wind proposes to install permanent underground high-voltage cables. Deepwater Wind has threatened to encroach into plaintiff's/petition's private property without legal authority.

24) Defendant/respondent Long Island Power Authority (hereinafter "LIPA") –

a) Is a corporate municipal instrumentality and political subdivision of the State of New York that exercises essential governmental and public services to provide, *inter alia*, electric service to Nassau, Suffolk and part of Queens County pursuant to Public Authorities Law § 1020-c and the powers therein granted it by the New York State Legislature;

b) LIPA does business in the State of New York and has the right under New York Public Authorities Law to sue and be sued in its own name;

25) Defendant/respondent Long Island Lighting Company d/b/a LIPA (hereinafter "LILCO") is a corporation organized and existing under the laws of the State of New York and is a wholly owned subsidiary of Long Island Power Authority. LILCO does business in the State of New York.

26) Defendant/respondent PSEG Long Island LLC (hereinafter "PSEG Long Is.") is a wholly owned direct subsidiary of Public Service Enterprise Group, Inc.. PSEG Long Is. operates LIPA's electric transmission and distribution (hereinafter "T&D") system under an Operations Services Agreement (hereinafter "OSA"). PSEG Long Is. is the primary beneficiary of Servco. PSEG Long Is. does business in the State of New York.

27) Defendant/respondent Long Island Electric Utility Servco LLC (hereinafter "Servco") is a wholly owned subsidiary of PSEG Long Island. PSEG Long Island is the primary beneficiary of Servco. Pursuant to the OSA, Servco's operating costs are reimbursable entirely by LIPA. In addition to reimbursement of Servco's operating costs (as provided for in the OSA), PSEG Long Is. receives an annual contract management fee. For transactions in which Servco acts as an agent for LIPA, it records revenues and the related expenses on a net basis. Servco does business in the State of New York.

28) Defendant/respondent – South Fork Wind LLC (formerly Deepwater Wind South Fork LLC) (hereinafter "**Deepwater Wind**") holds interests offshore wind-generation projects related either directly or indirectly to through ownership interests to Deepwater Wind South Fork LLC and/or have been directly or indirectly involved with matters herein. On November 8, 2018, Ørsted A/S acquired all of the membership interests in Deepwater Wind South Fork LLC's parent company, Deepwater Wind LLC. Deepwater Wind is currently owned and controlled indirectly by joint and equal partners, Ørsted A/S and Eversourc. Deepwater Wind

South Fork LLC changed its name to South Fork Wind LLC on or about October 8, 2020. Deepwater Wind South Fork LLC does business in the State of New York.

29) Defendant/respondent Public Service Commission of the State of New York

30) Defendant/respondent New York State Department of Public Service

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VENUE

31) The venue in Suffolk County is proper because the claim/petition arises from actions that derive from where defendant Deepwater Wind proposes to bring its high-voltage electric submarine transmission cable(s) into the jurisdictional waters of the State of New York and ashore at the southern end of Beach Lane in the Hamlet of Wainscott, Suffolk County, New York. Plaintiff/petitioners reside in Suffolk County. Defendants South Fork Wind (formerly Deepwater Wind South Fork LLC), LIPA, PSEG Long Island, Long Island Electric Utility Servco LLC, do business in Suffolk County. The Public Service Commission of the State of New York pursuant to Public Service Law, Article VII and the New York State Department of Public Service conducted proceedings in the Town of East Hampton, Suffolk County. Defendant Town of East Hampton is located in Suffolk County and defendants Larry Cantwell, Peter Van Scoyoc, Sylvia Overby, and Kathee Burke-Gonzalez reside in the Town of East Hampton, Suffolk County.

FACTS

South Fork RFP Procurement & PPA

32) PSEG Long Is. and LIPA awarded Deepwater Wind a twenty-year contract to supply it

with electrical energy at an average price of **22 cents** over the life of the contract.[17] The same renewable energy can be bought from an adjacent wind farm, Sunrise Wind, for **just 8 cents.**[18] The offshore wind farms are only two miles apart.

33) On March 29, 2017, the New York Office of the State Comptroller (hereinafter "OSC") approved an executed power purchase agreement (hereinafter "PPA") between defendants Long Island Power Authority and Deepwater Wind. OSC approved LIPA's price of 22 cents (per kilowatt hour) for Deepwater Wind's electrical energy pursuant to that agreement.[19]

34) Forty-three (43) days later (on May 11, 2017), the Maryland Public Service Commission awarded a PPA to a similar offshore wind farm developer, Skipjack Offshore Energy LLC (hereinafter "Skipjack"), at an equivalent price of 14 cents (per kilowatt hour).[20] At the time, the price of electrical power from Deepwater Wind's was fifty-three percent (53%) more expensive than electrical power from Skipjack – for the same renewable energy.

35) The South Fork RFP was manipulated to ensure that defendant Deepwater Wind would be the *only* offshore wind farm developer to submit a bid.

36) On June 24, 2015, PSEG Long Is. issued the following notice (see Exhibit 24) –

> To All Interested Proposers:
> Through its Request for Proposals for South Fork Resources … PSEG Long Island …
> is soliciting proposals from experienced and qualified entities to acquire sufficient local

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17 Exhibit 2 - LIPA Est. Contract Value, *supra*

18 Exhibit 3 - Ørsted- Sunrise Wind PPA, *supra*

19 Exhibit 2 - LIPA Est. Contract Value, *supra*

20 Appendix C - Maryland PSC- Skipjack (at p. 85-86). Skipjack Offshore Energy, LLC was awarded a power purchase agreement at a "levelized price of $131.93/MWh (2012$)." The price of $131.93/MWh (or 13.193 cents /kWh) adjusted for inflation (from 2012 to 2016 dollars) at an annual rate of 2% is equal to a price of 14.3 cents /kWh (2016$). See Maryland Public Service Commission, Order No. 88192, Re- Skipjack Offshore Energy LLC, issued May 11, 2017 (available online at Maryland PSC 88192, and NYS PSC DMM 170 p. 1 Exhibit Q). Also, see Exhibit 5 - LIPA South Fork Wind Farm "Fact Sheet" dated October 28, 2019 (at p. 3, chart: A Developing Offshore Wind Industry).

> resources to meet expected peak load requirements until at least 2022 in the South Fork of Long Island, and 2030 for certain areas east of Buell [emphasis added]. Such resources will be located on Long Island and provided to LIPA [emphasis added].[21]

37) PSEG Long Island's Notice To Proposers requests proposals for "local resources" "located on Long Island" and, therefore, precludes proposals for resources that are *not* located on Long Island. By definition, an offshore wind farm is offshore and is neither a "local resource" nor can it be located on Long Island. In fact, Deepwater Wind's proposed South Fork Wind Farm is located in the northern Atlantic Ocean approximately sixty (60) miles from the beach landing site at the southern end of Beach Lane in Wainscott outside New York State jurisdiction.[22]

38) The Notice To Proposers requests proposals for local resources "to meet expected peak load requirements" or peak electrical demand on the South Fork. For the reasons described in greater detail below (see ¶ 59 (c) at pp. 22-23), an offshore wind farm is the least reliable source of power generation with which to meet "peak load" or peak electrical demand, which on the South Fork typically occurs during the summer. Internal LIPA documents (disclosed in January 2021) provides evidence supporting a correlation between peak summer-time temperatures (when demand for electricity peaks in response to air conditioner usage) and low wind conditions when an offshore wind farm cannot reliably provide power to meet peak demand.

39) The Notice to Proposers (see Exhibit 24) does *not* invite solicitations for proposals that cannot provide power to meet peak demand that are located off Long Island. Still, LIPA

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[21] Exhibit 24 - Notice to Proposers South Fork RFP Cover Letter signed by Paul Napoli, Vice President of Power Markets, PSEG Long Island, addressed "To All Interested Proposers" dated June 24, 2015 (available online at PSEG Long Island, click here, and PSC DMM 007 p.1 Exhibit H).

[22] The approximate location of the South Fork Wind Farm as measured from Montauk Point.

maintains that "all technologies capable of meeting the desired objectives were invited to bid."[23] Clearly, the technology of offshore wind resources were not invited to bid.

40) Up until the time when the Commission issued Order Adopting Joint Proposal on March 18, 2021, defendants Deepwater Wind, PSEG Long Is., LIPA, among others, (falsely) claimed that the South Fork RFP was a "technology-neutral competitive bidding process[.]"[24]

41) The Joint Proposal executed by supportive parties on September 17, 2020 (falsely) claims that the Project "addresses the need identified by LIPA in its 2015 technology-neutral competitive bidding process ("South Fork RFP") [emphasis added.]"[25] "Further, the Project was selected by PSEG Long Island in its RFP competitive bidding process to resolve transmission constraints in the South Fork of Long Island."[26] None of these statements are true.

42) On March 18, 2021, ALJ Belsito issued Order Adopting Joint Proposal largely repeating the (false) claims regarding the South Fork RFP's competitiveness: "Together the South Fork Wind Farm and the [transmission] Project, address the need identified by LIPA in its 2015 RFP competitive bidding process [emphasis added.]"[27] Notably, for the first time, the phrase "technology-neutral" was dropped from the description, understandably so. Nonetheless, for more than four years (from January 2017 through to March 2021), LIPA, PSEG Long Island, and

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[23] Exhibit 29 - LIPA Minutes Jan 25, '17 (at p. 3, penultimate paragraph) - LIPA Board of Trustees Minutes of the 266th Meeting of January 25, 2017 (available online at LIPA, click here)

[24] Appendix D - DWW Art. VII Application (at p. 5, Section D. Need for the Project) - Deepwater Wind South Fork LLC Art. VII Application (docket 18-T-0604), dated September 14, 2018 (available online at PSC DMM 001 p.2 Application). Also, Appendix E - Order Adopting Joint Proposal, executed Joint Proposal (at p. 9, ¶ 10) September 17, 2020 (available online at PSC DMM 271 Order Adopting JP).

[25] Appendix E - Order Adopting Joint Proposal, executed Joint Proposal (at p. 9, ¶ 10) September 17, 2020 (available online at PSC DMM 271 Order Adopting JP).

[26] Appendix E - executed Joint Proposal (at p. 69, ¶ 153), *supra*

[27] Appendix E - Order Adopting Joint Proposal, issued March 18, 2021, Section III (at p. 10-11), A. Need for the Project (available online at PSC DMM 271 Order Adopting JP).

Deepwater Wind repeated the (false) mantra, that Deepwater Wind's contract was awarded pursuant to a "technology-neutral competitive bidding process," willfully misleading the public.

43) LIPA states that the South Fork RFP's selection methodology "was reviewed in detail by the Department of Public Service[.]"[28] Although (over a year later), the Department of Public Service sought to qualify LIPA's statement by writing –

> Staff was not involved in the development or approval of the selection methodology. Staff attended several internal team meetings between LIPA and PSEG LI to observe the selection process by the selection team. Staff did not review and did not take part in LIPA and PSEG LI's South Fork RFP selection process. Staff did not observe or review any cost information.[29]

44) A letter from LIPA's Director of Customer Service Oversight and Stakeholder Relations, Mr. Deering, confirms that "LIPA issued a technology-neutral, competitive Request for Proposals [emphasis added,]" and, for clarification, defines technology-neutral as follows –

> By technology-neutral, we mean that clean energy technologies, including energy efficiency and demand response, as well as conventional generation, compete with conventional transmission reinforcements to find the least cost solution for all our customers on Long Island. This contrasts with other RFPs whose sole purpose is to secure specific types of energy resources.

45) Still, during the South Fork RFP procurement process, LIPA and PSEG Long Island do *not* remain "neutral" regarding technology. Instead, LIPA and PSEG Long Is. advance proposals based solely on their technology. "In some instances, proposals were advanced if they were the

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[28] Exhibit 25 - LIPA Ltr to Bjurlof (at page 2, third paragraph) - LIPA Letter (from Michael Deering) to Mr. Thomas Bjurlof, dated July 9, 2018.

[29] Exhibit 26 - DPS Response to HIFI #1 (at p. 1) - Deepwater Wind Art. VII (docket 18-T-0604), Information Request HIFI-1 to NYS Department of Public Service (from Mr. Bjurlof) Re- South Fork RFP, and response dated of October 21, 2019.

only proposal offering a particular technology[.]"[30]

46) In its Memorandum to the Office of the State Comptroller, LIPA confirms that four (4) proposals were advanced on the basis that the proposal was "the only proposal offering a particular technology" as follows –

> Two other proposals (i.e., Deepwater Wind [One] [DWW100] and Fuel Cell Energy [FCE100]) were designated as Semi-Finalists because their all-in levelized costs were a net benefit and they were the only proposals offering a particular technology. The Deepwater Wind proposal had a proposed Commercial Operation Date ("COD") of December 31, 2022 (now advanced to December 1, 2022 in the power purchase agreement negotiations), which, while not meeting the preferred commercial operating dates stated in Section 2.1 of the 2015 SF RFP, did fall within the allowable time limit in the RFP. Additionally, Deepwater Wind was the only proposal offering offshore wind technology [emphasis added]. The overall qualitative rating of the Fuel Cell Energy proposal was 'below expectations,' but it was designated because it was the only proposal with fuel cell technology [emphasis added]."
>
> Two proposals (i.e., NextEra Energy [NEX100] and Halmar International [HAL100]) were designated because they were the only proposals offering a particular technology [emphasis added]. NextEra Energy's proposal had a high all-in levelized cost but was the only proposal offering behind the meter thermal storage technology. The overall qualitative rating of the Halmar International proposal was "below expectations," but it was the only proposal with bio-fuels or combustion turbine technology."[31]

47) LIPA, PSEG Long Island, and Deepwater Wind conspired to conceal the fact that the South Fork RFP was *not* a technology-neutral and it was *not* competitive, and in doing so, willfully misled the public.

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[30] Exhibit 8 - LIPA Memo Re- SF RFP (at p. 12, first paragraph). Available at PSC DMM 257 p. 1 Exhibit A.

[31] Exhibit 8 - (at p. 13, first and second paragraphs), *Supra*

State Finance Law §163 and General Municipal Law § 103

48) LIPA purchase contracts such as the power purchase agreement it awarded to Deepwater Wind must comply with State Finance Law §163 *and* "in the manner provided by" General Municipal Law § 103.[32]

49) General Municipal Law, Section 103, is based "upon motives of public economy, and originated, perhaps, in some degree of distrust of the officers to whom the duty of making contracts for the public service was committed. If executed according to its intention, it will preclude favoritism and jobbing, and such was its obvious purpose. It does not require any argument to show that a contract made in violation of its requirements is null and void [emphasis added]" (see Brady v. Mayor of City of N.Y., 20 N. Y. 312, 316-317).

50) According to PSEG Long Island's South Fork Resources Evaluation Guide dated December 1, 2015 (hereinafter "Evaluation Guide"), "Best Value [is] [t]he basis for awarding Agreements to the Respondent(s) which best achieves the criteria specified by PSEG Long Island[.]" According to the South Fork RFP, "each Proposal shall stand alone in satisfying these requirements" as define in the RFP. Further, "[p]roposals that do not include the required information will be deemed non-responsive and will not be evaluated [and that] [n]on-responsive proposals include, but are not limited to, those that […] [a]re not in conformance with RFP

[32] LIPA is governed by its establishing act, the "Long Island power authority act" (hereinafter "LIPA Act") (see LIPA Act § 1020). Section 1020-cc (1) of the LIPA Act requires that "[a]ll contracts of the authority shall be subject to the provisions of the state finance law relating to contracts made by the state." Section 1020-f of the LIPA Act grants LIPA "the power: […] [t]o make and execute agreements, contracts […] in accordance with the provisions of section one hundred three of the general municipal law" (see NY CLS Pub A § 1020-f (h)). General Municipal Law § 103 provides that "purchase contracts … may be awarded on the basis of best value, as defined in section one hundred sixty-three of the state finance law, to a responsive and responsible bidder or offerer in the manner provided by this section[.]"

requirements and instructions […][or][c]ontain any material omission(s)."[33]

51) State Finance Law § 163 mandates that LIPA award contracts only to "responsive"[34] bidders that meet "the minimum specifications or requirements as prescribed in a solicitation[.]"[35] Furthermore, it mandates that: "Specifications shall be designed to enhance competition, ensuring the commodities or services of any offerer are not given preference[.]"[36]

52) Contrary to State Finance Law §163 and General Municipal Law § 103, LIPA and PSEG Long Island awarded a power purchase agreement to a bidder whose proposal did *not* meet the minimum specifications or requirements as prescribed in the South Fork RFP and Evaluation Guide, and the specifications contained therein were designed to eliminate rather than enhance competition.

53) Of the twenty-one proposals submitted pursuant to the South Fork RFP, two proposals were deemed to be non-responsive and disqualified for non-compliance with Mandatory Criteria.[37] Of the remaining nineteen proposals, *only* Deepwater Wind's proposal for a ninety-megawatt (90 MW) offshore wind farm and transmission system (60 miles long) failed to comply with Mandatory Criteria and the material specifications as defined in the South Fork RFP and Evaluation Guide. Regardless, Deepwater Wind's proposed offshore power generation and transmission project advanced in the procurement process despite its non-compliance.

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[33] Exhibit 21 - South Fork RFP, Jun 2015 (at p. 11) Section 3.1 General Requirements (available online at PSEG Long Island, click here, and PSC DMM 189 p. 1 Exhibit 02).

[34] See NY CLS St Fin § 163 (10) (c)

[35] *Id.* § 163 (1) (d))

[36] *Id.* § 163 (1) (e)

[37] Exhibit 8 - LIPA Memo Re- SF RFP (at p. 8). Landis + Gyr (a company offering Smart Grid technology) was deemed non-responsive and disqualified for failing to provide a firm price and to propose a full service contract, and Solar City Corporation (a company offering rooftop solar installations), was deemed non-responsive and disqualified for failing to provide the required submittal fee check and alternative PPA (available at PSC DMM 257 p. 1 Exhibit A).

54) One bidder, Halmar International, was initially deemed non-responsive for submitting "a change to their proposed fuel pricing mechanism (i.e. fuel cost pass through using a fuel price formula indexed to a well-known commodity market index). The SC [Selection Committee] could not accept this new information due to 2015 SF RFP Section 4.9, which states that Respondents may not alter their proposals after the proposal due date. Also, the Evaluation Guide definition of Mandatory Criteria states that if certain proposal information (e.g. proposal pricing) is not provided at the Proposal Submittal Deadline, the proposal would be eliminated from consideration." [38] PSEG Long Is. strictly enforced the provisions regarding Mandatory Criteria to Halmar (by mistake). Halmar had *not* actually changed its pricing mechanism. When Halmar brought the decision to PSEG Long Island's attention, its proposal was reclassified as responsive, and Halmar was permitted to continue in the procurement process. PSEG Long Island's treatment of Halmar International stands in stark contrast to its treatment of Deepwater Wind.

55) According to PSEG Long Island's RFP Evaluation Guide, "Mandatory Criteria" is a set of standards used for measuring "Proposals' compliance to the RFP and […] used to determine whether the Proposal can be accepted. If this information is not provided at the Proposal Submittal Deadline, the Proposal will be eliminated from consideration." [39] When measuring Deepwater Wind's proposal against the Mandatory Criteria, the project fails to comply with the reasons herein listed (below). Accordingly, Deepwater Wind's project should have been deemed non-responsive and disqualified for non-compliance

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[38] Exhibit 8 - (at p. 9, second paragraph), *Supra*

[39] Exhibit 7 - SF RFP Evaluation Guide (at p. 3) - PSEG Long Island's South Fork Resources RFP Evaluation Guide (December 1, 2015). Available online at PSC DMM 257 p. 4 Exhibit N.

56) According to the South Fork RFP, proposals will be evaluated individually during Phase I and II of the South Fork RFP procurement process. Portfolios (of proposals) will be evaluated after that.

57) Deepwater Wind's proposed offshore wind farm and transmission project fails the following Mandatory Criteria –

a) Commercial Operation Dates – The RFP and Evaluation Guide mandate that "[p]roposals should offer a COD of May 1, 2017, May 1, 2018, or May 1, 2019."[40] Still, Petitioner "proposed [a] Commercial Operation Date ("COD") of December 31, 2022 (now advanced to December 1, 2022, in the power purchase agreement negotiations)[.]"[41] According to the South Fork RFP and Evaluation Guide, Deepwater Wind's proposed COD in December 2022 is two and a half years *after* the latest mandated commercial operation date (May 1st of 2019). Deepwater Wind's project should have been deemed non-responsive for this infraction alone, and disqualified for non-compliance.

b) Pricing for a one-year delay – The RFP and Evaluation Guide mandates that "[p]roposals must provide the pricing for pricing options for a one-year delay in COD [Commercial Operation Date], as discussed in RFP Section 2.2.1"[42] Section 2.2.1 of the South Fork RFP reads: "All proposals must offer alternative pricing for the delay of project COD by one year."[43] A one-year delay in preferred commercial operation dates advance such

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[40] Exhibit 7 - SF RFP Evaluation Guide (at p. 13) - Section 2.1- Additional Requirements. The Evaluation Guide mandates that: "Each proposal must include pricing options for a one-year delay from the offered COD, at LIPA's option." The mandate for pricing options where the commercial operation date is delayed by one year is addressed under 3.2.3 Pricing. Available online at PSC DMM 257 p. 4 Exhibit N.

[41] Exhibit 8 - LIPA Memo Re- SF RFP (at p. 13, first paragraph) Available at PSC DMM 257 p. 1 Exhibit A.

[42] Exhibit 7 - Evaluation Guide (at p. 11), *Supra*

[43] Exhibit 21 - South Fork RFP, Jun 2015 (at p. 8, last paragraph) - Section 2.2.1 Delayed COD (available online at PSEG Long Island, click here, and PSC DMM 189 p. 4 Exhibit B).

dates to May 1st of 2018, May 1st of 2019, and May 1st of 2020. Therefore, Deepwater Wind was mandated to provide prices for these delayed dates; otherwise, the Deepwater Wind's "[p]roposal will be eliminated from consideration."[44] Still, Deepwater Wind's proposed a commercial operation date of December 1, 2022, advanced from December 31, 2022 (see paragraph above), and provided prices accordingly.[45] Therefore, according to the South Fork RFP and Evaluation Guide, Deepwater Wind's commercial operation date of December 1, 2022, for which it provided price options, is two and a half years *after* the latest mandated one-year delayed commercial operation date (of May 1, 2020), and Deepwater Wind's project should have been deemed non-responsive and disqualified for non-compliance, again.

c) Location of any proposed facility – The RFP and Evaluation Guide mandates that a "[p]roposal must contain the location of any proposed facility requiring construction and/or permitting" by the submittal deadline (of December 2, 2015).[46] In May 2017 – one and a half years *after* the submittal deadline – then Supervisor for the Town of East Hampton, Larry Cantwell, and then Town Councilman Peter Van Scoyoc, met with then-Vice President of Development for Deepwater Wind, Clinton Plummer. During that meeting, Cantwell and Van Scoyoc recommended to Plummer that Deepwater Wind add "three potential south shore landfalls" as potential beach-landing sites for Deepwater Wind's transmission cable. Therefore, the beach landing site location (at the southern

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[44] Exhibit 7 - Evaluation Guide (at p. 3), *Supra*

[45] Appendix F - Deepwater PPA, Feb 2017 (at p. 12) - Project COD Target Date. Power Purchase Agreement ("PPA") between Long Island Power Authority ("LIPA") and then Deepwater Wind South Fork LLC, executed on or about February 6, 2017 (available online at NY OSC, click here, and PSC DMM 189 p. 3 Exhibit H).

[46] Exhibit 7 - Evaluation Guide (at p. 12), *Supra*

end of Beach Lane in Wainscott), could not possibly have been considered as part of Deepwater Wind's Project before May of 2017.[47] If "the location" of the beach landing site and cable route was considered for the first time in only May 2017 – one and a half years *after* the mandated submittal deadline of December 2, 2015 – it could *not* have been possible for Deepwater Wind to have provided the location of the transition and splicing vaults, duct banks and related transmission facilities that all require "construction and/or permitting" by the submittal deadline. Accordingly, Deepwater Wind's project should have been deemed non-responsive and disqualified for non-compliance, for the third time.

Material or substantial variance between the RFP's specifications and Deepwater Wind's bid

58) "Where the variance between the bid and the specification is material or substantial, however, the defect may not be waived and the municipality must reject the bid so that all bidders may be treated alike and so that the possibility of fraud, corruption or favoritism is avoided" (see *Le Cesse Bros. Contr., Inc. v Town Bd. of Williamson*, 62 AD2d 28, 32 [4th Dept 1978], citing *Matter of Gottfried Baking Co. v Allen*, 45 Misc 2d 708, 710; *Matter of Glen Truck Sales & Serv. v Sirignano*, 31 Misc 2d 1027, 1030 [Hopkins, J.]).

59) According to a Memorandum from LIPA to the New York Office of the State Comptroller regarding the South Fork RFP, "the basic objective of the RFP was 'to acquire sufficient local resources to meet expected peak load requirements until at least 2022 in the South Fork, and

[47] Exhibit 13 –South Shore Landfalls - Deepwater Wind added "three potential south shore landfalls" as possible cable routes, including Beach Lane for the first time, on the recommendation of then Town Supervisor Larry Cantwell and then Councilman Peter Van Scoyoc during a meeting in the first week of May 2017 (see Deepwater Wind Email (Plumber) to East Hampton Town Supervisor Cantwell of May 12, 2017 (DWSF 001903 at pp. 226-228). Available online at PSC DMM 157 p. 1 Part 10).

2030 in the east of Buell area.'"[48] The South Fork RFP reads: "As an alternative to adding new transmission lines, this Request For Proposals […] seeks to acquire sufficient local resources to meet expected peak load requirements until at least 2022 in the South Fork, and 2030 in the east of Buell subarea."[49] Nevertheless, Deepwater Wind's proposal is the antithesis of what LIPA refers to as the "basic objects of the RFP[.]" It is *not* a local power generation resource, it is the least likely technology to provide electrical power to meet peak demand, will *not* be operational until many years *after* the commercial operation date, and, finally, its proposal *is* a new transmission line (rather than being an alternative to new transmission line).

60) In addition to Deepwater Wind's non-compliance with Mandatory Criteria as defined in the South Fork RFP and Evaluation Guide (see ¶¶ 51-58 at pp. 17-21) that should have resulted in Deepwater Wind's disqualification from the procurement, Deepwater Wind proposal varies substantially with the specifications of the RFP and Evaluation Guide as follows. Deepwater Wind proposes to –

a) Build an offshore wind power generation resource in the northern Atlantic Ocean on the outer continental shelf approximately sixty (60) miles from its proposed beach landing site in Wainscott, NY. Deepwater's proposal is contrary to the South Fork RFP solicitation which calls for resources "located on Long Island[.]"[50]

b) Build and install beneath the seabed and underground (onshore) a complex transmission system approximately sixty (60) miles long and an interconnection facility. Deepwater

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[48] Exhibit 8 - LIPA Memo (at p. 1), *Supra*

[49] Exhibit 21 - South Fork RFP (at p. 2) - Section 1.2. Description of Solicitation and Objectives, *Supra*

[50] Exhibit 24 - Notice to Proposers South Fork RFP Cover Letter signed by Paul Napoli, Vice President of Power Markets, PSEG Long Island, addressed "To All Interested Proposers" dated June 24, 2015 (available online at PSEG Long Island, click here, and PSC DMM 007 p.1 Exhibit H).

Wind's proposed new transmission system is contrary to the South Fork RFP that seeks "the addition of local resources (i.e. […] Power Production) in the load pocket [without which] new transmission lines would need to be built. As an alternative to adding new transmission lines, this Request For Proposals ("2015 SF RFP") seeks to acquire sufficient local resources […] in the South Fork, and […] in the east of Buell subarea."[51] Deepwater Wind's new 60-mile-long transmission line is *not* an "alternative to adding new transmission lines" – it *is* a new transmission line.

c) Use offshore wind turbines to generate electrical power "to meet expected peak load requirements[.]"[52] In addressing Deepwater Wind's capacity to provide power to meet expected peak load, an internal LIPA report concluded that "wind alone has a very small effective capacity due to the distinct statistical possibility that it may have very low available power output at the time of a peak-period contingency."[53] Another internal LIPA report based on data provided by Deepwater Wind concluded that "Deepwater Wind's offshore wind project […] would have a May through September Peak Period unavailability (or EFOR) of 29.9% without the assistance of LI Energy Storage [33 MW] battery [.]" The report continues: "Without the [33 MW] battery, shortfalls occur on 77 of the 152 Peak Period days, or about 50% of the days" and that there "are periods of up to 4 consecutive days where Wind+ [33 MW] Battery shortfalls are occurring in August and September."[54] Pursuant to the South Fork RFP, LIPA did *not* choose a 33 MW

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[51] Exhibit 21 - South Fork RFP (at p. 2), *Supra*

[52] *Ibid.*

[53] Exhibit 9 - WESC EFOR of OSW (at p. 2, last sentence) - WESC Report: Calculation of Effective Forced outage Rate of Offshore Wind (DWW100) and Offshore Wind and Battery (DWW100+LIE400) meta-dated August 2, 2016 (available online at PSC DMM 257 p.2 Exhibit F).

[54] Exhibit 10 - Deepwater OSW Analysis (at pp. 2-3) - South Fork RFP Deepwater Offshore Wind Proposal, EFOR

battery facility but instead chose two battery facilities of only 5 MW each, which combined are just one-third the size of the battery facility used in the analysis. Whereas the South Fork RFP sought proposals for power generation specifically to meet peak demand, LIPA internal reports show that the offshore wind farm proposed by Deepwater Wind cannot be relied upon to generate power during periods of peak demand, when it is needed most.

d) "[M]eet projected load growth and thereby defer the need for new transmission"[55] and claims a need exists for its offshore wind-generated electricity as "an alternative to adding new transmission lines[.]"[56] Still, the position of Petitioner is contradicted by LIPA and PSEG Long Island in separate submissions to regulatory authorities. PSEG Long Island, in response to a Request for Proposed Transmission Needs "identified transmission needs driven by the interconnection of OSW [offshore wind]" including "a need to enhance the ability to move power from eastern Long Island to western Long Island … based on proposed projects currently in the NYISO interconnection queue" (i.e. Deepwater Wind).[57] Furthermore, LIPA, in a letter to Commission Chairman, John Rhodes, writes: "The Long Island Power Authority ("LIPA") hereby refers to the New York Public Service Commission ("PSC" or "Commission") its determination that a transmission need exists within the Long Island Transmission District, driven by the Commission's Offshore Wind ("OSW") Standard set forth in the July 12, 2018 Order in

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Analysis, meta-dated January 20, 2017 (available online at PSC DMM 257 p.2 Exhibit G).

55 Exhibit 21 - South Fork RFP (at p. 4, ¶ 2) - Section 1.2. Description of Solicitation and Objectives, *Supra*

56 Exhibit 21 - South Fork RFP (at p. 2, penultimate paragraph), *Supra*

57 Exhibit 11 - PSEG LI- Transmission Needs (at pp. 3-4) - PSEG Long Island (Robert G. Grassi) Response to Request for Proposed Transmission Needs from the New York Independent System Operator ("NYISO"), dated October 2, 2020 (available online at PSC 21-E-0261 DMM 007 p.1 Exhibit K).

PSC Case 18-E-0071 (the "2018 OSW Order")." LIPA requests the Commission to "determine that the 2018 OSW Order constitutes a Public Policy Requirement ("PPR") driving the need for transmission facilities [...] [and that] foregoing transmission needs are driven by the interconnection of OSW to LIPA's system, regardless of the specific locations at which the OSW projects may be connected."[58] To put it another way, both LIPA and PSEG Long Island admit in recent regulatory filings that the integration of offshore wind-generated electrical power is *not* an alternative to new transmission lines or enhancements but instead is a driver for further new transmission lines and enhancements. LIPA's and PSEG Long Island's submissions contradict the (false) claim that Deepwater Wind's proposed 90 MW OSW farm is an alternative to adding new transmission lines that will defer the need for such transmission enhancements.

e) Provide electrical power "until at least 2022 in the South Fork, and 2030 in the east of Buell subarea."[59] Deepwater Wind, evidently indifferent to the requirements of the South Fork RFP, initially proposed a commercial operating date of December 31, 2022. A memorandum from LIPA to the New York Office of the State Comptroller ("OSC"), reads: "The Deepwater Wind proposal had a proposed Commercial Operation Date ("COD") of December 31, 2022 (now advanced to December 1, 2022, in the power purchase agreement negotiations), which, while not meeting the preferred commercial operating dates stated in Section 2.1 of the 2015 SF RFP, did fall within the allowable

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[58] Exhibit 12 - LIPA- Transmission Needs (at pp. 1-2) - LIPA Letter to NYS PSC Chairman, John Rhodes, Re- Proposed Public Policy Transmission Needs ("PPPTN") Consideration for 2018 (case 18-E-0623), dated July 30, 2020 (available online at PSC 21-E-0261 DMM 007 p.4 Exhibit L).

[59] Exhibit 21 - South Fork RFP (at p. 2, penultimate paragraph), *Supra*

time limit in the RFP."[60] However, the Commercial Operation Date proposed by Deepwater Wind does *not* fall within the allowable time limit. Pursuant to Section 2.1 of the South Fork RFP, the allowable Commercial Operating Dates are "May 1st of 2017, May 1st of 2018 or May 1st of 2019."[61] Even if such dates were delayed by one year (pursuant to Section 2.2.1), Petitioner would still have missed the latest one-year delayed commercial operation date (of May 1st of 2020) by two and a half years.

f) The South Fork RFP mandates that Power Production resources comply with Operating Modes consistent with dispatchable resources that are capable of being turned on, or ramped-up, remotely in response to a "trigger signal" from PSEG Long Island. By its nature, offshore wind-generated power is characterized as a non-dispatchable resource that depends on the wind for power generation. An offshore wind farm, therefore, can be switched-on only to the extent that the wind can be switched-on.[62]

g) The South Fork RFP mandates specific environmental conditions be used for "performance calculations" that includes a "[m]aximum steady wind velocity [of] 130 mph[.]" Instead, Deepwater Wind proposes to use wind turbine generators that stop generating power (to avoid damage) when wind speed exceeds less than half (56 mph) that specified for "performance calculations" in the South Fork RFP.[63]

61) Deepwater Wind's proposal for a 90 MW offshore wind farm and 60-mile-long transmission system failed to comply with both Mandatory Criteria and the material

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[60] Exhibit 8 - LIPA Memo (at p. 13, ¶ 1), *Supra*

[61] Exhibit 21 - South Fork RFP (at p. 8, penultimate paragraph), Section 2.1. Commercial Operating Date, *Supra*

[62] *Id.* (at pp. 67-69) - Section B6. Operating Modes, *Supra*

[63] *Id.* (at p. 62) - Section B4.5 Environmental Conditions, *Supra*

specifications as defined in the South Fork RFP and Evaluation Guide. Therefore, LIPA's grant of a power purchase agreement to Deepwater Wind was illegal.

62) "The [South Fork RFP] evaluation concluded that the selected portfolio [including Deepwater Wind's offshore wind farm project] best meets the objectives of the RFP and provides the Best Value[4] to LIPA customers." [64] These statements are *not* true.

63) Deepwater Wind's proposal neither complied with the South Fork RFP's and Evaluation Guide's basic objectives, Mandatory Criteria, nor with a multitude of material and substantial specifications.

64) "A person or corporation who conspires to prevent competitive bidding or competitive offering on a contract for public work or purchase advertised for bidding or offering shall be guilty of a misdemeanor as provided in section one hundred three-e of this article" (see General Municipal Law § 103 (7)).

65) LIPA, PSEG Long Island, Deepwater Wind, the Town of East Hampton, PSC, and DPS conspired to conceal the price of electrical energy from Deepwater Wind, and successfully managed to avoid public scrutiny and review pursuant to Public Service Law, Article VII.

66) On January 25, 2017, the Long Island Power Authority Board of Trustees authorized its Chief Executive Officer to execute a PPA with Deepwater Wind South Fork LLC.[65]

67) On July 9, 2019, Petitioner-resident living in the LIPA service area filed an Article 78

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[64] Exhibit 8 - LIPA Memo (at p. 2, ¶ 2), *Supra*. Footnote "4" refers to "Capitalized terms in this procurement memo have the meaning as set forth in the Evaluation Guide (***Attachment 7***) or the 2015 SF RFP (***Attachment 1***). The Evaluation Guide (dated December 1, 2015) defines: "Best Value – The basis for awarding Agreements to the Respondent(s) which best achieves the criteria specified by PSEG Long Island including, without limitation, quality, cost and efficiency."

[65] Appendix H - LIPA Minutes Jan 25, 2017 (at p. 8) LIPA Board of Trustees Minutes of the 266th Meeting of January 25, 2017, resolution 1333 records that "the Board of Trustees (the "Board") authorizes the Chief Executive Officer or his designee(s) to execute a PPA" with Deepwater Wind South Fork LLC (available online at LIPA, click here).

petition seeking public disclosure of the contract prices as expressed in the PPA between LIPA and Deepwater Wind South Fork LLC (executed on or about February 6, 2017) under Freedom of Information Law.[66]

68) On October 28, 2019 (three years *after* authorizing a PPA between Deepwater Wind South Fork LLC and LIPA), LIPA, preempting an adverse ruling in the Article 78 proceeding, issued a press release titled: South Fork Wind Farm Fact Sheet ("LIPA Fact Sheet")(see Exhibit 4 and Exhibit 5).[67] Disturbingly, the so-called "Fact Sheet" had little to do with facts, and more to do with deliberately misleading the public.

69) The "LIPA Fact Sheet" contains numerous material factual falsehoods and was designed to deceive the public. LIPA's misleading public disclosure was carefully calibrated to conceal the relatively high price of power from Deepwater Wind South Fork LLC compared to another similar offshore wind farm negotiated around the same time as Deepwater Wind South Fork, Skipjack Offshore Energy, LLC ("Skipjack") (see Exhibit 4 and Exhibit 5).

70) The "LIPA Fact Sheet" is designed to deceive the public into believing that the South Fork Wind Farm (see Exhibit 4 and Exhibit 5)–

a) Will cost ratepayers 16.3 cents (contradicting the Office of the State Comptroller's valuation of 21.9 cents per kilowatt-hour);

b) Would supply power pursuant to a power purchase agreement awarded in 2015

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[66] Appendix G - *Simon V. Kinsella v. Office of the New York State Comptroller* (at p. 2, ¶ 3) Albany County Courts, July 9, 2019 (index 904100-19). The decision reads (in relevant part): "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 which would affect the pricing of utilities supplied to the general public." Available online at PSC 18-T-0604 DMM 189 p.1 Exhibit 01).

[67] Exhibit 5 - LIPA SFWF "Fact Sheet" (October 28, 2019) - LIPA South Fork Wind Farm "Fact Sheet" (available online at LIPA, click here, and PSC DMM 189 p. 6 Exhibit G).

(whereas the power supply contract was *not* executed until two year *later*, on or about February 6, 2017); and

c) Nameplate capacity of ninety megawatts (90 MW) would be expanded by forty megawatts (40 MW) per an agreement in November 2018 (whereas the agreement between LIPA and Deepwater Wind *not* signed until two-and-a-half years later, on April 9, 2021).

71) The LIPA "Fact Sheet" reads: "In November 2018, LIPA agreed to purchase an additional 40-megawatts of clean energy from the project [emphasis added.]" Whereas LIPA "agreed" (i.e. signed an agreement) on or about April 9, 2021, nearly two and a half years *later*.[68] On November 14, 2018, the LIPA Board of Trustees only authorized the expanded capacity.[69] By holding off signing Amendment No. 1 to the Power Purchase Agreement (executed on or about February 6, 2017) for expanded capacity until April 2021, LIPA, PSEG Long Is. and Deepwater Wind avoided public disclosure pursuant to Freedom of Information Law (see Appendices J and K). To-date, neither the amendment for expanded capacity nor the price of energy from that expanded capacity has been disclosed.

72) "South Fork Offshore Wind Farm will produce a total of 130-megawatts of energy[.]" The South Fork Wind Farm, in fact, will produce on average less than half its nameplate capacity (of

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[68] Appendix I - PPA Amendment No. 2 (40 MW) - On September 20, 2020, LIPA and South Fork Wind executed PPA Amendment No. 2 for expanded power generating capacity of forty megawatts (40 MW). Six months later (on April 9, 2021), the New York Office of the State Comptroller approved the amendment to the original power purchase agreement between LIPA and Deepwater Wind South Fork LLC (executed on or about February 6, 2017) for additional nameplate capacity (40 MW) up from 90 MW to a total capacity of 130 MW (see Appendix H - South Fork RFP, Projects with Purchase Power Agreements (available online at PSEG Long Island, click here, last updated: June 30th, 2021). The total contract value over twenty-years went from $1,624,738,893 (90 MW) to $2,013,198,056 (130).

[69] In November 2018, LIPA only authorized its CEO to execute an amendment to increase delivered capacity, but LIPA did not enter into any agreement with Deepwater Wind South Fork LLC (see Appendix H - LIPA Minutes Jan 25, 2017, *Supra*

130 MW). For example, Deepwater Wind's Block Island Wind Farm has a nameplate capacity of 30 MW, but from 2017 to 2020 generated on average only 13.1 MW, or 43.7% of its total nameplate capacity.[70] Allowing for newer and larger offshore wind turbines, the South Fork Wind Farm may generate on average up to 47% of its nameplate capacity, or 61.1 MW on average per year.

73) "The deficiency projected in the 2015 South Fork RFP is shown in the chart [referring to a chart titled: South Fork Electric Needs 2017 through 2030 appears to the right of the text]. Current projections are consistent with those at the time of the RFP." The deficiency projections displayed in the chart are inflated. A year *after* the South Fork RFP was issued (in June 2015), the projected deficiency was revised downwards, but the revisions are *not* reflected in the chart.[71] For example, average deficiency for the three years from 2017 to 2019 was revised down by 51% (from 18 to 9 MW). Although the LIPA Fact Sheet was published on October 28, 2019, the June 2015 revisions were excluded, thereby inflating the deficiency by 51% (from 2017 to 2019), and deceiving the public.

74) The LIPA chart titled: "A Developing Offshore Wind Industry, South Fork Wind Farm was the Least Cost Solution to Meet Increasing Electric Demand on the South Fork and New York's Renewable Energy Goals" is designed to deceive the public.

75) The contract price for the "South Fork Wind Farm (90MW) 16.3¢ (NY)" is understated. At the time the contract was executed (on or about February 6, 2017), LIPA and the New York

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[70] Over the past four years (from January 1, 2017 to December 31, 2020), Ørsted's Block Island Wind Farm has operated at an average capacity of 43.7% of its operating nameplate capacity (of 30 megawatts). See Exhibit 14 - BIWF Output & Capacity (source data: www.EIA.gov. For Block Island Wind Farm data, click here).

[71] The subsequent revision shows a substantial reduction in the deficiency projections. For example, the projected deficiency in 2017 was revised from 8 MW to 0 MW, and in 2018, it was revised from 18 MW to less than half, only 8 MW). See Exhibit 8 - LIPA Memo (at p. 17, Fig 3), *Supra*

Office of the State Comptroller valued Deepwater Wind South Fork contract (90 MW) at 21.9 cents (/kWh) *not* 16.3 cents. (see Exhibit 2 at p. 1).

76) The chart indicates that the contract for the "South Fork Wind Farm (90MW) 16.3¢ (NY)" was entered into sometime in January 2015. However, the agreement was actually executed in February, 2017 – two years *later*.

77) The combined effect of understating the price of energy (by 26%) and back-dating the execution date by two years (from 2017 to 2015), conceals what otherwise would have been glaringly obvious – the relatively high price of the South Fork Wind Farm - 21.9 cents - compared to the lower price of another offshore wind farm Skipjack Offshore Energy LLC ("Skipjack").[72] Although Skipjack was similar in size and a similar distance offshore, the price of power from Skipjack is only 14.3 cents.[73]

78) LIPA concealed the fact that it entered into a contract with Deepwater Wind and overpaid for electrical energy by 53% at above-market rates. The burden of paying such a high price for Deepwater Wind's electrical power will fall hardest on low-income families who can afford it the least.

79) Department of Public Service avers in sworn testimony that it did *not* consider the cost of

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[72] Skipjack Offshore Energy LLC ("Skipjack") was a wholly-owned subsidiary of Deepwater Wind Holdings, LLC that in 2016-2017 (see Exhibit 17 at p. ES-9, "Skipjack") indirectly held a 50% ownership interest in GSOE I, LLC. PSEG Long Island, LLC is a wholly-owned subsidiary of Public Service Enterprise Group Incorporated (a corporation registered in New Jersey) that indirectly holds a 50% ownership interest in GSOE I, LLC (see Exhibit 18 at p. 6, ¶ 1). GSOE I, LLC owns BEOM Lease Number OCS-A-0482 that was assigned to Skipjack Offshore Energy, LLC with an effective date of December 20, 2016, 36 days before Governor Andrew Cuomo announces LIPA's award of a PPA to Deepwater Wind (see Exhibit 15 - GSOE I OCS-A-0482).

[73] The South Fork Wind Farm and Skipjack were being negotiated at the same time, both wind farms are of a similar size (90/130 MW vs 120 MW, respectively), and both wind farm are a similar distance offshore (35 vs 20-24 miles, US standard miles 35 (South Fork Wind Farm) vs 20-24 (Skipjack), or in nautical miles 30 vs 17-21 (see Exhibit 17 at p. 98, ¶ last)

Deepwater Wind.[74] There are over one million ratepayers who are still paying down the accumulated debt from Shoreham without anything to show for it in the same way the ratepayers will have nothing to show for the *extra* $1 billion they will have to pay for the South Fork Wind Farm.

80) Department of Public Service avers in sworn testimony that the "PPA resulted from a competitive bidding process initiated by LIPA in 2015[.]"[75] This is *not* true.

81) PSEG Long Island administered the South Fork RFP (ostensibly on behalf of LIPA) and awarded a power purchase agreement to its (undisclosed) business partner, Deepwater Wind, subject to an opaque non-competitive procurement process. At the time, PSEG Long Is. and Deepwater Wind were equal joint venture partners in Garden State Offshore Energy LLC indirectly through wholly-owned subsidiaries of their respective parent companies that indirectly held the offshore lease rights for a wind farm project owned by another subsidiary of Deepwater Wind, Skipjack Offshore Energy LLC ("Skipjack").

82) Garden State Offshore Energy LLC – At the time PSEG Long Island was negotiating a power purchase agreement with Deepwater Wind South Fork LLC, they were equal joint venture partners in an offshore wind Renewable Energy Lease (no. OCS-A 0482).

83) PSEG Long Island maintained a fifty percent interest indirectly through wholly-owned subsidiaries of its parent company in Garden State Offshore Energy LLC.

84) Deepwater Wind South Fork LLC also maintained a fifty percent interest indirectly through wholly-owned subsidiaries of its parent company to Garden State Offshore Energy LLC.

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[74] Exhibit 19 - DPS Staff Cross-Examination (at p. 595, lines 9-21) – In the Matter of South Fork Export Cable (NYSPSC, case 18-T-0604), DPS Staff Panel Cross-Examination on December 7, 2020 (pp. 566-724).

[75] Appendix N - DPS Staff Testimony (at p. 595, lines 5-7) – In the Matter of South Fork Export Cable (NYSPSC, case 18-T-0604), Prepared Testimony of Department of Public Service Staff, dated October 9, 2020.

85) Garden State Offshore Energy LLC was an equal joint venture partnership between PSEG Long Is and Deepwater Wind South Fork indirectly through wholly-owned subsidiaries of their respective parent companies, Deepwater Wind Holdings LLC and Public Service Enterprise Group Incorporated ("PSEG Inc").

86) GSOE I LLC – was a wholly-owned subsidiary of Garden State Offshore Energy LLC, and at the time, held a one-hundred percent (100%) interest in Federal OCS Renewable Energy Lease Number: OCS-A 0482. GSOE I LLC had been assigned the lease a month before the award of a power purchase agreement to Deepwater Wind South Fork LLC was announced by Governor of New York, Andrew M. Cuomo (on January 25, 2017).[76]

General Municipal Law, § 51

87) "Moreover, once a contract is proved to have been awarded without the required competitive bidding, a waste of public funds is presumed and a taxpayer is entitled to have the contract set aside without showing that the municipality suffered any actual injury. (See *Gerzof v Sweeney*, 16 NY2d 206, 208-209 [1965]. Also, see *American La France & Foamite Corp. v. City of New York*, 156 Misc. 2, 4, affd. 246 App. Div. 699; *Rodin v. Director of Purch.*, 38 Misc 2d 362, 364; *Grace v. Forbes*, 64 Misc. 130, 139; and, *Tinston v. City of New York*, 17 A D 2d 311, 312-313, affd. 13 N Y 2d 850.)

88) "It is sufficient in such a situation that the public 'has been deprived of the protection which the law was intended to afford." (See *Matter of Emigrant Ind. Sav. Bank*, 75 N. Y. 388, 396.)

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[76] The Bureau of Ocean Energy Management ("BOEM") received a request to assign lease number OCS-A 0482 to GSOE I LLC on December 6, 2016. The lease assignment effective date is December 20, 2016 (see Exhibit 15 - GSOE I OCS-A-0482).

89) There is a presumption that waste and injury occurred by reason of the action complained of in a taxpayer's suit where it is alleged that a certain contract was let without competitive bidding in a situation where § 103 requires such bidding (see *Rodin v Director of Purchasing*, 38 Misc. 2d 362, 238 N.Y.S.2d 2, 1963 N.Y. Misc. (N.Y. Sup. Ct. 1963)).

90) A taxpayer is entitled to the relief provided for by the above statute where the specifications of a public contract are so slanted as to limit the bidding thereon to a single manufacturer where there is no reason in the public interest for so doing (see *Gerzof v Sweeney*, 16 N.Y.2d 206, 264 N.Y.S.2d 376, 211 N.E.2d 826, 1965 N.Y. (N.Y. 1965)).

Public Service Commission, Article VII Proceeding 18-T-0604

91) This is an Article 78 petition challenging New York State Public Service Commission (hereinafter the "Commission" or "PSC") Order Denying Petitions for Rehearing issued August 12, 2021 (a copy of which is attached as Exhibit A hereto), and the Commission's grant of a Certificate of Environmental Capability and Public Need (hereinafter "Certificate") (DMM: item 271, Order Adopting Joint Proposal, p 1) to South Fork Wind LLC.

92) This action is brought in the Appellate Division as an original proceeding pursuant to Public Service Law, Sections 128 and 129.

93) This action is timely because it was brought within 30 days of issuing the Order Denying Rehearing of August 12, 2021, a copy of which is attached hereto as Exhibit A.

94) The letter and affidavit of service required by Public Service Law, Section 128 are attached hereto as Exhibit B.

CORPORATE STRUCTURE AND BACKGROUND

95) On January 25, 2017, PSEG Long Island LLC (hereinafter "PSEG Long Is.") and Long Island Power Authority (hereinafter "LIPA") awarded Deepwater Wind South Fork LLC a twenty-year power purchase agreement ("PPA") for the supply of electrical energy.

96) Deepwater Wind South Fork LLC has since changed its name (in October of 2020), and is now known as South Fork Wind LLC (hereinafter "SFW").

97) On September 14, 2018, then Deepwater Wind South Fork LLC, filed with the Commission an Article VII application for a Certificate.

98) The Certificate is for the construction of a submarine/terrestrial export cable connecting the South Fork Wind Farm (hereinafter "SFWF") to the existing LIPA East Hampton Substation via the beach at the southern end of at Beach Lane in Wainscott (hereinafter "Cable Route A"), and includes an interconnection facility that SFW proposes to build next to LIPA's East Hampton Substation in the Town of East Hampton (hereinafter the "Town") in Suffolk County.

99) On November 8, 2018, Ørsted A/S (hereinafter "Ørsted"), acquired the parent company of then Deepwater Wind South Fork LLC, Deepwater Wind LLC, thereby gaining ownership and control of its subsidiary, now known as South Fork Wind LLC (SFW).

100) In February 2019, Ørsted and Eversource Energy (hereinafter "Eversource") entered into an equal joint venture, North East Offshore LLC, that owns SFW.

DISCUSSION

I. The Commission's procedural noncompliance violates Public Service Law § 126 (1) (b) – the nature of the probable environmental impact

101) Public Service Law ("hereinafter "PSL") § 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: […] (b) the nature of the probable environmental impact [emphasis added.]"

102) SFW plans to install up to nineteen (19) splicing vaults under local laneways, roads, and streets from the beach at Beach Lane through a residential neighborhood in the Hamlet of Wainscott to the existing LIPA East Hampton Substation. Each splicing vault (26⅓ feet long by 9⅓ feet wide by 11⅓ feet deep) is similar in size to a forty-foot shipping container. Between each vault, SFW proposes installing cement duct banks connecting each splicing vault through which it plans to run high voltage transmission cables.

103) The onshore splicing vaults, a transmission vault, duct banks, and related infrastructure are designed to accommodate two high voltage transmission circuits

for two submarine cables that could feasibly transmit up to six hundred megawatts (600 MW) of electrical energy.[1]

104) The proposed Cable Route A runs between two state-registered Superfund [2] sites – East Hampton Airport (hereinafter "Airport") and Wainscott Sand and Gravel (hereinafter "Wainscott S&G")[3] and is the most contaminated square mile on the South Fork of Long Island. See PFAS Contamination Zone Map marked as Exhibit K to Kinsella Testimony Part 1-1 on PFAS contamination (DMM: item 133, Exhibit K, p. 3).

105) SFW's splicing vaults will encroach into PFAS-contaminated soil and groundwater and impact the sole-source aquifer, the only source of freshwater (including drinking water) for the Town of East Hampton.

106) The US Environmental Protection Agency (hereinafter "EPA") defines a sole source aquifer to be an underground water source that supplies at least fifty percent (5%) of the drinking water consumed in the area overlying the aquifer. These

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1 SFW proposes boring a hole beneath the beach at Beach Lane large enough for an HDPE conduit with an internal diameter of approximately 24 inches. Given that a 138 kV HVAC (three-core) submarine cable has a diameter of less than 8 inches, the conduit could accommodate an additional submarine cable with a diameter of up to approximately 10 inches rated at 240 – 275 kV. With such a cable configuration, SFW's proposed onshore infrastructure is capable of transmitting electrical energy of up to six hundred megawatts (600 MW).

2 The Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) (1980) "informally called Superfund....allows EPA to clean up contaminated sites [and] forces the parties responsible for the contamination to either perform cleanups or reimburse the government for EPA-led cleanup work". "What is Superfund?" EPA.gov https://www.epa.gov/superfund/what-superfund

3 NYS Department of Environmental Conservation site codes for East Hampton Airport are 152250 and 152156, and for Wainscott Sand and Gravel is 152254.

areas have no alternative drinking water source that could physically, legally, and economically supply all those who depend upon the aquifer for their drinking water. EPA designated the aquifer system underlying the South Fork on Eastern Long Island a Sole-Source Aquifer on June 21, 1978 (See US Environmental Protection Agency: "Nassau-Suffolk Aquifer System, Federal Register Notice, Volume 43, No. 12, Page 26611, June 21, 1978 - Sole Source Aquifer Determination for Aquifers Underlying Nassau and Suffolk Counties).

107) SFW proposes to construct its high-voltage transmission infrastructure through and above the Upper Glacial Aquifer and two Critical Environmental Areas designed to protect the safety of the aquifer: (1) the Special Groundwater Protection Area (South Fork); and (2) the Water Recharge Overlay District.[4]

108) On September 14, 2018, SFW filed with the New York State Public Service Commission (hereinafter the "Commission") a Hazardous Materials Desktop Analysis dated March 3, 218. The analysis reads as follows –

> "Based upon an evaluation of historical resources […] as well as a review of regulatory agency database listings […] it was determined that there were no hydraulically upgradient or adjacent

4 See Kinsella Testimony Part 1-1, Exhibit A – Groundwater Protection CEA & Water Recharge CEA (at pp. 1-3) (DMM: item 133, Exhibit A, p 1).

properties along the study corridor that would represent a significant environmental risk to subsurface conditions."[5]

109) The information provided by SFW contradicts overwhelming evidence of existing per- /polyfluoroalkyl substances (hereinafter "PFAS") contamination of soil and groundwater immediately adjacent and on all sides of its proposed Cable Route A corridor for approximately one mile. That one-mile stretch runs between the two state-registered Superfund sites (the Airport and Wainscott S&G), although PFAS contamination is likely to be found elsewhere along the proposed construction corridor.

110) "PFAS" is a broad classification of chemical contaminants comprising fluorinated organic chemicals that are part of a large group. The PFAS classification includes PFOA (perfluorooctanoic acid), PFOS (perfluorooctane sulfonic acid), PFHxS (perfluorohexane sulfonic acid), and PFNA (Perfluorononanoic acid), among others.

111) New York State Environmental Conservation Law, Article 27, Title 13, defines PFOA and PFOS as hazardous substances (6 NYCRR Section 597.3).

5 Hazardous Materials Desktop Analysis (at pp. 122-191) - Article VII Application of Deepwater Wind South Fork LLC, Appendix F Part 2, Phase I Environmental Assessment prepared by VHB Engineering, Surveying, and Landscape Architecture P.C. – Hazardous Materials Desktop Analysis, dated March 30, 2018. (DMM 001 p. 33 Appendix F Part 2)(oswSouthFork.info, click here)

112) The EPA warns that exposure to PFOS and PFOA contamination may cause "developmental effects to fetuses during pregnancy or to breastfed infants (e.g., low birth weight, accelerated puberty, skeletal variations), cancer (e.g., testicular, kidney), liver effects (e.g., tissue damage), immune effects (e.g., antibody production and immunity), thyroid effects and other effects (e.g., cholesterol changes). The US Agency for Toxic Substances and Disease Registry (hereinafter "ATSDR") cite human epidemiology studies that suggest links between PFHxS exposure and liver damage and decreased antibody responses to vaccines (this could be of concern for a potential coronavirus vaccine). According to reports, PFHxS has a half-life in humans of 8.5 years. The ATSDR cites epidemiology studies that suggest links between PFNA exposure and increases in serum lipid levels, particularly total cholesterol, and LDL cholesterol. PFHxS and PFNA concentration levels in some Wainscott drinking-water wells are higher than levels of PFOS and PFOA.[6]

113) On October 11, 2017, Suffolk County Department of Health Services issued a Water Quality Advisory for Private-Well Owners in Area of Wainscott, notifying residents of PFAS contamination in some local private drinking-water wells. The PFAS contamination made front-page headlines in local newspapers.

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6 See Kinsella Testimony Part 1-1 (September 9, 2020), Exhibit H - PFAS Information - EPA, ATSDR, NYSDEC & ToxFAQ and Exhibit C - Report #3 - PFAS Contamination, Wainscott 2020 (at pp. 8-9) (DMM: item 133, Exhibit H, p 5).

114) In November 2017, suspected PFAS contamination at Airport also made front-page headlines in local newspapers. The Airport is adjacent and upgradient to SFW's proposed construction corridor.

115) When SFW filed its Hazardous Materials Desktop Analysis with the Commission nearly a year later (on September 14, 218), SFW (falsely) claimed "that there were no hydraulically upgradient or adjacent properties along the study corridor that would represent a significant environmental risk to subsurface conditions." SFW's submission is untrue. When this was brought to the attention of the Commission, it remained silent on the issue.

116) On January 20, 2020, detailed information on PFAS contamination was provided to the Commission, the Applicant, and parties to proceeding 18-T-64 in Information Requests SK #3 through to #1 (see Kinsella Testimony Part 1-1 on PFAS contamination, Exhibit N available at DMM: item 133, Exhibit N, p. 5). In response, SFW "continues to object to this characterization of the Beach Lane Route on the grounds that the information is inaccurate and not based in fact [emphasis added]." See SFW's response to IR SK #3 to #1 at DMM: item 158, DWSF Resp. to IR Kinsella-1-10.

117) On September 9, 2020, two years after SFW had filed its Article VII application (on September 14, 2018), Petitioner Kinsella filed Testimony Part 1-1

on PFAS Contamination (DMM: item 133, Testimony Pt 1, p. 1), including prior PFAS information and supplementing it with two DEC reports –

a) Site Characterization Report for East Hampton Airport, and

b) Site Characterization Report for Wainscott Sand and Gravel.

118) The PFAS contamination cited in DEC Site Characterization Report for The Airport is immediately adjacent and upgradient to SFW's proposed construction corridor, whereas the same contamination cited in DEC Site Characterization Report for Wainscott Sand and Gravel, is immediately adjacent and downgradient from SFW's proposed corridor.

119) Airport monitoring wells within 1,000 feet upgradient from SFW's proposed construction corridor contained PFAS contamination exceeding the New York State Drinking Water Maximum Contamination (or "MCL") Level by many times over, and the EPA Drinking Water Health Advisory Level by more than double. For example, Airport Well EH-1 located within 5 feet of SFW's proposed corridor, contains PFOA contamination at a concentration level (of 16 ppt) that is sixteen times the MCL (of 1 ppt). The same well contains combined PFOA/PFOS contamination at a concentration level (of 162 ppt) that is more than double the EPA HAL (of 70 ppt).

120) Wainscott S&G monitoring wells within 150 feet downgradient on the opposite side of SFW's proposed construction corridor from the source of

contamination (the Airport) also exceeds the NYS Drinking Water MCL by one hundred times, and the EPA Drinking Water HAL by well over ten times. For example, Wainscott S&G Well MW3 located within 15 feet downgradient of SFW's proposed construction corridor, contains PFOS contamination at a concentration level (of 1,1 ppt) that is one hundred times the MCL (of 1 ppt). The same well contains combined PFOA/PFOS contamination at a concentration level (of 1,038 ppt) that is fourteen times the EPA HAL (of 70 ppt).

121) Ten (10) of twelve (12) samples from monitoring wells within 1,000 feet upgradient from SFW's corridor exceed statutory limits designed to protect human health (where statutory limits exist).

122) The DEC's Superfund Designation Site, Environmental Assessment for Wainscott S&G, reads: "Overall, the highest total PFAS detections were in monitoring wells MW3, MW5, MW6 located on the Western (side-gradient) and Northern (upgradient) boundaries of the site [within 15 feet of SFW's proposed construction corridor], indicating a potential off-site source [at East Hampton Airport]."[7] When asked: "where is the most […] likely off-site source of that

7 See Wainscott Sand & Gravel, Superfund Designation (at p. 2, last sentence), marked as Exhibit L to Kinsella Testimony Part 1-1 on PFAS contamination, available at DMM: item 133, Exhibit L, p. 4).

contamination" during cross-examination, SFW's Onshore Water Resources Panel responded: "It's the airport facility."[8]

123) The same PFAS contamination profile seen in groundwater and soil samples upgradient at the Airport, the source of contamination, can also be seen downgradient on the opposite side of SFW's proposed construction corridor.

124) Evidence shows PFAS contamination leaching through soil and flowing across the East Hampton Town Police Department's car park (in runoff from washing firetrucks at the adjacent fire training facility) and finding its way to Wainscott S&G downgradient on the opposite side of SFW's chosen Cable Route A corridor.

125) It is implausible for the PFAS contamination to get from the Airport to Wainscott S&G without coming in contact with and impacting the proposed Cable Route A construction corridor.

126) During cross-examination, when asked: "Where does South Fork Wind think that contamination came from" [9] referring to wells at Wainscott S&G,[10] SFW's Onshore Water Resources Panel responded: "it's probably airborne deposition at

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8 *Id.* Cross-examination of On-shore Water Resources Panel (Kenneth Bowes, Jeffery Holden, and Matthew O'Neill), December 3, 2020 (at p. 188, lines 6-8 and O'Neill referring to groundwater at line 10) (available at DMM: item 225, Evidentiary Hearing Transcript, Dec 3, 2020)

9 Case 18-T-0604, Cross-examination of On-shore Water Resources Panel (Kenneth Bowes, Jeffery Holden, and Matthew O'Neill), December 3, 2020 (at p. 188, lines 6-8 and Holden referring to "surface data [line 17]") (available at DMM: item 225, Evidentiary Hearing Transcript, Dec 3, 2020)

10 *Id.* (at p. 186, lines 12-14, 18-20 and 23-25) (DMM: item 225, Hearing Transcript, Dec 3, 2020)

concentrations you're liable to find anywhere just because PFOS is ubiquitous in the environment [emphasis added]"[11] SFW elaborated: "that's atmospheric deposition that's no different than background conditions in most areas in New York state [*sic*] or frankly across most places in America today."[12]

127) Mr. Holden's explanation contradicts his own evidence on the subject of Environmental Fate and Transport for Per- and Polyfluoroalkyl Substances that reads: "While many PFAS exhibit relatively low volatility [i.e., unlikely to vaporize at normal atmospheric pressures and temperatures], airborne transport of some PFAS is a relevant migration pathway through industrial releases (for example, stack emissions)[.]"[13] There are no industrial centers near the Airport or anywhere on either the South or North Forks of eastern Long Island. SFW failed to identify any such source of airborne PFAS contamination.

128) If, as Mr. Holden claims, "PFOS is ubiquitous in the environment[,]"[14] then other well locations at the Airport (where there are no known releases of PFOS contamination) would have similar levels of PFOS contamination. However, the

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11 *Id.* (at p. 188, at lines 19-21) (DMM: item 225, Evidentiary Hearing Transcript, Dec 3, 2020)

12 *Id.* (at p. 190, lines 22-25, Holden referring to "[s]urface soil contamination [line 19]") (available at DMM: item 225, Evidentiary Hearing Transcript, Dec 3, 2020)

13 ITRC Environmental Fate and Transport for PFAS (at p. 7, opening sentence) (marked as 18-T-0604 Evidentiary Record Exhibit 263, available at DMM: item 198, SFW Exhibit - OWRP-3 - ITRC Environmental Fate and Transport, p. 2)

14 Cross-examination of On-shore Water Resources Panel (Kenneth Bowes, Jeffery Holden, and Matthew O'Neill), December 3, 2020 (at p. 188, at lines 19-21) (available at DMM: item 225, Evidentiary Hearing Transcript, Dec 3, 2020)

average level of PFOS contamination in wells S1, S11, and S16 (75 ppt) is three-times the average level of PFOS contamination (261 ppt) detected at fourteen other wells.[15] SFW's expert proffered that the PFOS contamination dropped from the sky as "atmospheric deposition" rather than leached through soil and flowed across the police car park is contrary to evidence and lacks merit.

129) The Commission did not require SFW to conduct any site-specific tests for PFAS contaminants to be conducted prior to issuing SFW a Certificate. There are no tests results in the record, whatsoever, for PFAS contamination of soil or groundwater taken from the SFW's proposed construction corridor, not one.

130) The Commission has not taken a hard look at the probable environmental impact of PFAS contamination of the Applicant's proposed Cable Route A corridor and the evidentiary record in Public Service Commission proceeding 18-T-0604 is woefully incomplete.

131) The extensive evidence of PFAS contamination surrounding the proposed construction site raises serious doubts concerning the health and safety aspects of installing underground and partially within the sole-source aquifer high voltage transmission infrastructure.

> "[…] we find nothing in this language [of PSL § 126 (1)] which remotely suggests that the Commission has the authority to order

15 Wells where there is no known release of PFAS contamination.

> a research program after final certification. In our view, if the Commission had doubts concerning the health and safety aspects of the transmission line, then it should not have granted final certification until those doubts were resolved.
> (*Atwell v Power Auth. of NY*, 67 AD2d 365 [3d Dept 1979])

132) On January 4, 2021, SFW announced in a press release that it would conduct an "Environmental Surveys & Site Evaluation" of its proposed construction corridor. SFW anticipated beginning the work on or after January 6 and completing it within three weeks. According to the email, the survey and evaluation will consist of "34 borings" for soil and groundwater sampling and groundwater monitoring well installations "along the onshore route in Town-owned roads." [16]

133) On January 13, 2021, Petitioner Kinsella filed a Motion to Reopen the Record (DMM: item 240, Motion, p 2) seeking to include the results from the Environmental Surveys & Site Evaluation in the evidentiary record. Inclusion of the test results would have contributed scientific evidence that goes directly to "the nature of the probable environmental impact" and whether or not the Applicant's "facility represents the minimum adverse environmental impact" that the

16 See Motion to Reopen the Record of Kinsella, Exhibit D – SWF Environmental Surveys & Site Evaluation Background and email, issued January 4, 2021 (DMM: item 240, Motion, p 2)

Commission is statutorily mandated to "find and determine" under Public Service Law, § 126 (1) (b) and (c).

134) The well locations are listed in Petitioner Kinsella's Motion to Reopen the Record (at pp. 9-1) [17] (DMM: item 24, Motion, p 2) are from photographs of survey markings painted on local roads and streets in Wainscott on or around January 1, 221. The Commission had not considered any soil or groundwater test results when determining environmental compatibility under Public Service Law, Article VII.

135) During a Town of East Hampton Town Board Work Session (on September 8, 2020), acting counsel for the Town, John Wagner, informed the Town Board and members of the public that there would be circumstances where splicing vaults can go as deep as "sixteen to twenty feet" (16-20 feet) below the ground surface.[18]

136) SFW has to excavate and dewater soil in a residential neighborhood containing high PFAS contamination levels to install the splicing vaults.

137) In the Matter of *Entergy Nuclear Power Marketing, LLC v NY State Public Service Commission*[19] (hereinafter "*Entergy Nuclear v PSC")*, the "record also

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17 *Ibid.*

18 Case 18-T-0604 –Testimony of Simon V. Kinsella, Part 1-1 on PFAS Contamination (at p. 25, lines 9-11) (DMM: item from Town of East Hampton, Town Board Work Session on September 8, 2020 (at 1 hr, 1 min, 40 secs into meeting, see https://www.youtube.com/watch?v=BRFEKNZJE5k)

19 Matter of *Entergy Nuclear Power Mktg., LLC v NY State Pub. Serv. Commn.*, 122 AD3d 1024 [3d Dept 2014]

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." 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]." Instead, SFW has designed its cable route to plow through the middle of the most contaminated soil and groundwater on the South Fork (see DMM: item 205, Exhibit 3-2 – PFAS Heat Map, p. 3).

138) The Commission has acknowledged existing PFAS contamination of soil and groundwater adjacent to the Applicant's proposed construction corridor, but states that "the Project will avoid or minimize adverse impacts to the environment[.]" The facts do not support the Commission's position. The Commission's ruling is not rationally based.

139) The matter of *Entergy Nuclear v NYSPSC* underscores the fact that the Commission in the instant proceeding failed to "find and determine […] the nature

of the probable environmental impact" and declined to require SFW to design its onshore cable route so that it "avoids" an area of known chemical contamination as in the matter of *Entergy Nuclear v NYSPSC.*

140) "[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 68-7). Absent such an explanation, failure to conform to agency precedent will, therefore, require reversal on the law as arbitrary." [20]

141) In the instant proceeding, the Commission failed to explain why it reached a different result from that in *Entergy Nuclear v NYSPSC* concerning avoiding probable environmental impact or creating an exclusion zone. The facts and law are substantially similar in both proceedings. By failing to cite its reasons for arriving at a different result, the Commission acted arbitrarily and capriciously, and therefore, "require reversal on the law[.]" [21]

142) Nowhere in the Order does it state that the Commission satisfied the requirements of § 126 (1) (b). The Commission does *not* have statutory authority to grant a certificate of environmental compatibility and public need "unless it

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20 *Charles A Field Deliverv Serv .. Inc.*, 66 N.Y.2d 516, 520 (1985).

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

shall find and determine […] the nature of the probable environmental impact[.]" The Commission has *not* established the concentration levels, nature, or extent of known PFAS contamination along the proposed construction corridor. It has failed to comply with its mandated statutory obligations, and the Commission exceeded its authority by granting a Certificate to the Applicant.

143) 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."[22]

144) The evidentiary record in this proceeding remains insufficient and incomplete.[23]

145) Countless roads lead down to the southern beaches of the South Fork where SFW could have chosen to land its cable, but there is only one road and one cable route that contains the most contaminated soil and groundwater on the South Fork, and SFW chose that route. The facts do not support the illusion that the Commission or SFW has minimized or avoided adverse environmental impacts concerning PFAS contamination.

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

23 See Motion to Open the Record of Kinsella, filed January 13, 2021 (DMM: item 240, Motion to Reopen Record, p. 2 or oswSouthFork.info, click here).

146) The Order (Part 3: PFAS at p. 102) reads: "We agree "with the Applicant and DPS Staff and find that the Project, as proposed and conditioned will not exacerbate existing PFAS." According to the Order (at p. 62), the Applicant "argues that any potential exposure related to construction of the Project will be de minimis as to the public will not have direct contact with the soil piles. The Applicant concludes that given the low PFAS concentrations in the soils, the very short duration of stockpile existence, and the infinitesimally small amount of dust exposure, the associated is risk very low [emphasis added]."[24] Here, SFW relies on a "given" presumption of "low PFAS concentrations in the soils[.]" that is unfounded and unsubstantiated, and is, therefore, at best a guess because SFW had never tested any soil or groundwater from its proposed construction corridor before making this claim. The Commission, in turn, relies on SFW's conclusory and unfounded presumption.

147) The Commission's and SFW's reliance on the false presumption of "low PFAS concentrations in the soils" and their subsequent conclusion that residents would be exposed only to an "infinitesimally small amount of dust" fails to explain why the Commission did not require SFW to test its proposed Cable Route A

24 See Order Adopting Joint Proposal, issued March 18, 2021 (at p. 62, last paragraph) (available at DMM: item 271, Order Adopting Joint Proposal, p 1) citing SFW's Brief (at pp. 70-71) citing Certificate Conditions 52 and 53.

corridor in view of the overwhelming evidence of PFAS contamination *before* granting it a Certificate as it is statutorily compelled to do.

148) Had the Commission required SFW to test the proposed Cable Route A corridor for PFAS contamination, such evidence would have settled many irregularities in the Article VII proceeding, including –

a) SFW's submission of false information in its Article VII application in its Hazardous Materials Desktop Analysis that it failed to subsequently correct;
b) SFW's denial of known PFAS contamination for two years (from September 2018 until September, 2020);
c) SFW's false responses to IR SK #1 and IR SK #03 through to #10;
d) A*lternative* reasoning by SFW for the presents of PFAS contamination that does not withstand scrutiny, contradicts its own evidence, and lacks merit;
e) SFW's delay until *after* the evidentiary record had closed before conducting its Environmental Surveys & Site Evaluation of Cable Route A; and
f) The Commission's denial of Petitioner Kinsella's Motion to Reopen the Record that sought to include in the record PFAS test results from the Environmental Surveys & Site Evaluation, effectively denying parties of the right to examine and cross-examination of such Surveys and Evaluation.

149) The Commission's Order is not a finding and it does not address its statutory mandate to *find* and determine "the nature of the probable environmental impact" of existing PFAS contamination in violation of its statutory mandate pursuant to PSL § 126 (1) (b).

150) Without knowing the degree and extent to which SFW's Cable Route A corridor is contaminated with PFAS, the Commission cannot make a finding and it cannot determine "that the facility represents the minimum adverse environmental impact" in violation of its statutory mandate pursuant to PSL § 126 (1) (c).

II. The Commission's procedural noncompliance also violates PSL § 126 (1) (c) – minimum adverse environmental impact considering economics

Sunrise Wind (8 cents) vs. South Fork Wind (22 cents)

151) PSL § 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: […] (c) that the facility represents the minimum adverse environmental impact considering the state of available technology and the nature and economics of the various alternatives, and other pertinent considerations [emphasis added.]"

152) In January 2017, LIPA and PSEG Long Is., acting on behalf of LIPA, awarded SFW [25] a PPA for the supply of energy at an average price of **22 cents** per kWh over the life of the contract (see Exhibit 2).[26]

63) LIPA plans to purchase the same offshore wind renewable energy from another wind farm, Sunrise Wind, for **8 cents** per kWh, nearly one-third the price of SFW (see Exhibit 3 – Ørsted's Sunrise Wind PPA (at p. 1)).

154) The two offshore wind farms – SFWF and Sunrise Wind Farm – are only two miles apart and are owned and controlled indirectly by the same joint and equal partners, Ørsted and Eversource.

155) On January 25, 2017, the Board of Trustees of LIPA entered into a power purchase agreement with SFW [27] valued at $1.624 billion,[28] more than double the estimated cost of building the SFWF. According to reports at the time, the SFWF

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25 At the time, South Fork Wind LLC was known as Deepwater Wind South Fork LLC.

26 Exhibit 2 - LIPA Est. Contract Value (at p. 1) - New York Office of the State Comptroller, Estimated Contract Value of Power Purchase Agreement between LIPA and Deepwater Wind South Fork LLC. Total Projected Energy Deliveries (MWh) over the 20-year contract term is 7,432,080 MWh (371,604 MWh per year for 20 years). Total Annual Contract Payments over the 20-year contract term is $1,624,738,893. Average contract price over the term is $218.61 per MWh ($1,624,738,893 divided by 7,432,080 MWh) or **21.9 cents per kWh**. NB: ALJ denied the FOIL response into the record (DMM).

27 At the time, South Fork Wind LLC was known as Deepwater Wind South Fork LLC.

28 Exhibit 2 – On January 30, LIPA's Chief Financial Officer, Joseph Branco, signed a Contract Encumbrance Request valuing the proposed project at one billion, six hundred and twenty four million, seven hundred and thirty eight thousand and eight hundred and ninety three dollars ($1,624,738,893).

(including offshore and onshore transmission systems) would cost $74 million.[29] SFW's gross profit represents 12% of the estimated cost ($74 million) or $885 million (excluding operations and maintenance).

156) 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 1,7 MW of New York State projects." One of the two projects to which LIPA refers is Sunrise Wind. Moreover, the Fact Sheet states that "LIPA will responsibly buy offshore wind," under which it reads: "Share of Recent NYSERDA Awards: Estimated @ 9 MW" and "Future Offshore Wind Projects: Estimated @ 8+MW[.]" [3] LIPA admits that it plans to buy "9 MW" of offshore wind energy from either Sunrise Wind (88 MW) or Empire Wind (816 MW). It follows, therefore, that LIPA considers Sunrise Wind to be a viable alternative and technically feasible.

157) The LIPA South Fork Wind Fact Sheet was introduced into the record in Petitioner Kinsella's Testimony Part 2 (submitted October 9, 22) as Exhibit G.

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29 According to the Wall Street Journal, the New York Times, Newsday, and the Express News Group. Exhibit 30 - *Wind farm project approved by LIPA trustees* by Mark Harrington published in Newsday on January 25, 2017. Exhibit 31 - *New York State's First Offshore Wind Farm Gets Green Light Construction on the $740 million project on Long Island will start in 2020* by Joseph De Avila published in the Wall Street Journal on January 25, 2017. Exhibit 32 - *UPDATE: LIPA Approves $740 Million Wind Farm To Power The South Fork* published by the Express News Group. Exhibit 33 - *Nation's Largest Offshore Wind Farm Will Be Built Off Long Island* by Diane Cardwell published in the New York Times on January 25, 2017.

30 South Fork Wind Farm Fact Sheet published by LIPA on October 28, 2019 (DMM: item 257, Motion, p.5) (LIPower.org, click here or oswSouthFork.info, click here).

On November 24, 2020, the presiding ALJ struck it from the record along with over ten thousand pages of sworn testimony at the SFW's request.[31]

158) In the Order, the administrative law judge ruled against the proposition that SFW "coordinated and combined [its Project] with the Sunrise Wind Project," concluding that the Sunrise Wind alternative "is not supported by the record."[32] The reasons cited by the ALJ are not supported by fact, conclusory, and its decision arbitrary and capricious.

159) According to the Order (at p. 100), the SFWF cannot coordinate and combined its project with Sunrise Wind because "the two generation facilities projects have different ownership different design engineering, different interconnection points and serve different customers."

a) Ownership - Although it is *technically* accurate to say that South Fork Wind LLC and Sunrise Wind LLC are separate corporate entities, the ALJ's Order misleads the reader into believing that the ownership and controlling interests of the two wind farms are different, when in fact they are owned and controlled by the same entities. It would have been more candid of the Commission to say

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31 See Kinsella Testimony Part 2 – Public Interest, Need & Price (DMM item 189, Exhibit G, p. 6 or oswSouthFork.info, click here). Also, see Motion to Strike Testimony, Response of Kinsella (DMM: item 217, Response of Kinsella, p 1 or oswSouthFork.info, click here). The Applicant sought to erase factual, material and relevant testimony from the record, and, in part, succeeded. The motion was granted insofar as Testimony Part 2 on November 24, 2020 (DMM: item 220, Ruling on Motion, p 1).

32 See Order Adopting Joint Proposal, Part VII Discussion (at p. 99, last paragraph) (available online at DMM: item 271, Order Adopting Joint Proposal, p 1) .

that South Fork Wind and Sunrise Wind are both owned and controlled indirectly by the same joint equal partners, Ørsted A/S and Eversource.[33]

b) Design engineering - The design engineering distinction between the two wind farms highlighted by the Commission is at best a distraction. The Commission provides neither a rational basis nor reasoned discussion of why the two wind farms' difference in design precludes them from coordinating and combining their projects. If the engineering distinction (we don't know and are left guessing) is about Sunrise Wind's proposed use of direct current (DC) for its submarine export cable(s) as opposed to SFW's planned use of alternating current (AC), even then the design distinction is irrelevant because the two wind farms can still use their interconnection cable arrays that connect the turbine generators that utilize the same alternating current (AC) system to connect the wind farms. Neither the Commission nor SFW proffers any reason why SFW and Sunrise Wind could not interconnect using their respective interconnection cable arrays that both use alternating current and then share the same direct current (DC) export cable to connect their (combined) offshore substation to the onshore Holbrook Substations.

33 South Fork Wind LLC is owned by North East Offshore LLC, a joint equal partnership between Ørsted A/S and Eversource. Sunrise Wind LLC is owned by Bay State Wind LLC, also a joint equal partnership between Ørsted A/S and Eversource.

c) Interconnection points - The Commission's reference to "different interconnection points" is meaningless without any rational explanation or reasoned discussion of which the Commission provides neither. If the Commission is concerned about the (fifty-mile-long) distance (again, we are left guessing), electromagnetic energy travels at near-to the speed of light (depending upon the conductor), so whether an offshore wind farm is connected to the grid at Holbrook or Hither Hills is irrelevant. On the other hand, if the Commission is concerned about whether electrical energy can travel eastward to the South Fork from the Holbrook Substation, LIPA has already answered this question in its South Fork Wind Fact Sheet. Evidently, LIPA believes that electrical energy can travel to the South Fork because "LIPA will also buy an estimated 90 MW of offshore wind from the recently announced 1,700 MW of New York State projects" that includes Sunrise Wind.[34]

d) Customers - The ALJ's reference to "different customers" [35] merely parrots the Applicant and is meaningless without any rational basis or reasoned discussion of which the Commission provides neither. SFW and Sunrise

34 South Fork Wind Farm Fact Sheet published by LIPA on October 28, 2019 (LIPower.org, click here or oswSouthFork.info, click here).

35 See Order Adopting Joint Proposal, Part VII Discussion (at p. 100, first paragraph) (available at DMM: item 271, Order Adopting Joint Proposal, p 1)

Wind are both selling the same offshore wind-generated electrical energy. The Commission does not reason why it is relevant if SFW and Sunrise Wind sell to the same customers or to different customers.

160) PSL § 126 (1) (c), mandates that the Commission select the wind farm that can provide electrical energy with "the minimum adverse environmental impact considering […] the nature and economics of the various alternatives[.]" SFW proposes transmitting a small amount of electrical energy (130 MW) via high voltage transmission cables that it plans to install underground through a sole-source aquifer and the most contaminated soil and groundwater on the South Fork of Long Island and sell at vastly inflated prices.[36] Sunrise Wind is a viable alternative that has none of the issues regarding soil or groundwater contamination, does not pose a threat to a sole-source aquifer, and can transmit nearly seven times (7x) the energy at less than half the price of SFW. In its Order, the Commission rejected the argument "that the [SFW] Project is not needed because it could be coordinated and combined with the Sunrise Wind Project[.]" The basis for its rejection was that it "is not supported by the record[.]" However, as explained above (¶ 71 - 77), Sunrise Wind *is* a viable alternative, more economical, and impacts the environment to a lesser extent

36 The first ninety megawatts (90 MW) of delivered electrical energy is priced at 22 cents per kilowatt-hour. South Fork Wind has not released the price for the remaining forty megawatts (40 MW).

than SFW. The Commission's determination is not supported by fact and is arbitrary and capricious.[37]

III. The Commission's procedural noncompliance also violates New York State PSL § 126 (1) (h) – the public interest of ratepayers

161) The Commission "may not grant" SFW a Certificate "unless it shall find and determine: (h) that the facility will serve the public interest [emphasis added.]" [38]

162) Assessing the public interest requires that the Commission consider –

(A) the total cost to society;

(B) the pricing of utilities supplied to the general public; and

(C) a fair balance including ratepayers

72) Public Interest - total cost to society

163) Respondent Department of Public Service (hereinafter "DPS") Staff aver in sworn testimony that under Public Service Law, Article VII, the "concept of 'environmental compatibility and public need' requires that the Commission 'protect environmental values, and take into account the total cost to society of

37 See Order Adopting Joint Proposal, issued March 18, 2021 (at p. 99, last paragraph) (available at DMM: item 271, Order Adopting Joint Proposal, p 1).

38 Public Service Law § 126 (1) (h)

such facilities' when deciding on whether it should grant an Article VII certificate (Chapter 16 272 of the Laws of 1970, Section 1, Legislative 17 Findings)."[39]

164) According to the DPS Staff Panel during cross-examination, the total cost to society includes the cost when "a rate payer pays his or her regular electricity bill."[40]

165) Furthermore, in the same sworn testimony, DPS Staff admits that it did not consider the cost burden to ratepayers of SFW's facility ($1.625 billion). "There's no testimony […] that addresses cost to rate payers."[41] The Department of Public Service admits that it failed to consider over one million ratepayers in LIPA's service area, violating PSL Article VII.

(B) Public Interest - the pricing of utilities supplied to the general public

166) "The Court finds that the record requested [containing contract prices] was of significant interest to the general public as the records sought consisted of the contract prices which would affect the pricing of utilities supplied to the general public."[42] The Commission failed to explain why it excluded from consideration

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39 Case 18-T-0604 - Prepared Testimony of Department of Public Service Staff Panel: (at p. 15, lines 11-18) (DMM: item 187, DPS Staff Panel Testimony).

40 *Id*. (at p. 590, line 23 through to 591, line 2) (DMM: item 187, DPS Staff Panel Testimony).

41 See Cross-Examination of DPS Staff Panel by Kinsella, December 7, 2020 (at p. 595, lines 19-21) (see DMM: item 227, Evidentiary Hearing Transcript, December 7, 2020).

42 In the matter of *Simon V. Kinsella v. Office of the New York State Comptroller*, Albany County Court, July 2019, index 904100-19 (exhibit no. 456) the Applicant sought trade secret status pursuant to NY Public Service Law Section 87(2)(d) (DMM: item 189, Exhibit 01 - Kinsella vs NYS OSC - Decision (index 904100-19), p. 1).

SFW's contract prices that would have "affect the pricing of utilities supplied to the general public," and, therefore, would have been "of significant interest to the general public" when making a determination of "public need" under PSL § 126 (1) (h).

167) The facts in *Simon V. Kinsella v. Office of the New York State Comptroller* are the same (it is the same PPA at issue), and the law is the same. By failing to cite any rationale for arriving at a different result, the Commission acted arbitrarily and capriciously, and therefore, the Order requires reversal on the law. [43]

(C) Public Interest - a fair balance that includes ratepayers

168) The Commission's Procedural Guidelines define four "factors to be considered in […] ensuing substantive review" of which one 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.]" [44] A "fair balance" naturally requires that the Commission weigh the respective interests and determine an equilibrium between ratepayers, investors (SFW), and the long-term viability of the utility (LIPA). However, by DPS Staff's admission, it did *not* weigh the interests of ratepayers. The Commission's Settlement Guidelines

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

44 Cases 90-M-0255, *et al.*, Procedures for Settlements and Stipulation Agreements, Opinion 92-2 (issued March 24, 1992) ("Settlement Guidelines") (90-M-0255 DMM: item 1, Opinion, Order and Resolution Adopting Settlement Procedures and Guidelines).

require that ratepayers' interests "be considered," but DPS Staff ignored and excluded ratepayers from consideration. Therefore, it would have been impossible for DPS Staff to know whether it had struck a fair balance between "ratepayers and investors and the long-term soundness of the utility" without taking ratepayers into account. 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 Settlement Guidelines required it to consider the interests of ratepayers, but it did not. The Commission erred in its failure to act according to its Settlement Guidelines.[45]

IV. By denying rights of examination and cross-examination, the Commission violates 16 NYCRR, DPS Rules of Procedure

169) The Commission denied parties in Article VII proceeding 18-T-0604 the opportunity to examine the 2015 South Fork Request for Proposals (hereinafter "South Fork RFP") procurement process and the subsequent award of a PPA to SFW,[46] and to cross-examine witnesses regarding those documents.

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

46 At the time, South Fork Wind was known as Deepwater Wind South Fork LLC.

170) The Commission and SFW rely on the South Fork RFP and subsequent PPA to justify granting SFW a Certificate but placed the documents beyond parties' reach and prevented administrative review and due process law.

171) The presiding ALJ repeatedly ruled the South Fork RFP and PPA out of bounds and beyond the reach of parties participating in the proceeding. The ALJ's ruling are as follows –

a) On September 14, 2020, the presiding ALJ ruled that "neither the 2015 RFP, […] nor the terms and conditions of the Power Purchase Agreement (PPA) that LIPA and the Applicant have entered into as a result of the 2015 RFP, are before the Commission in this case."

b) On September 30, 2020, the ALJ ruled that "the 2015 RFP and the PPA are beyond the scope of this Article VII proceeding."

c) The ALJ's ruling on October 27, 2020, reads: "PSEG further notes that neither […] the 2015 RFP, nor the PPA are before the Commission in this case" and concurs with PSEG Long Island insofar as "the 2015 RFP and the resulting PPA are beyond the scope of this Article VII proceeding."

d) On November 5, 2020, SFW filed Motion to Strike Testimony of Petitioner Kinsella from the evidentiary record, including "Exhibit A South Fork RFP" (PSC DMM exhibit number 310) and the "Power Purchase Agreement between Long Island Power Authority and Deepwater Wind South Fork, LLC dated February 6, 2017" (PSC DMM exhibit number 318).

In the ALJ's ruling on Motion to Strike Testimony (on November 24, 2020), the ALJ notes that the "Applicant argues that […] need for the Project is sufficiently established through selection in a competitive process, here the 2015 RFP." In granting (in part) SFW's Motion to Strike Testimony, the ALJ 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." The ALJ then grants SFW's Motion to Strike Testimony[47] (in part), which includes striking from the record the same exhibits the ALJ then

47 Ruling on Motion to Strike Testimony, issued Nov 24, 2020 (DMM: item 220, Ruling on Motion).

admitted into the record one month later.[48] In the process, the ALJ issued two rulings directly contradicting each other.

172) Whenever the South Fork RFP or PPA came up during cross-examination, SFW *and* DPS would raise an objection that the ALJ always sustained. For example, during cross-examination on December 7, 2020, when the issue of "the cost born by rate payers [*sic*] for electricity related to the project under consideration" [49] was raised, SFW objected, stating that if "this is going to the prices under the power purchase agreement, I believe you have already ruled on a number of occasions that it's not -- not relevant to this case."[50] Similarly, DPS staff joined the SFW's objection, stating that "included in the most recent motions to strike Mr. Kinsella's testimony, it was made very clear by Your Honor that issues related to the cost of the PPA and any comparative analysis were also stricken."[51] Petitioner Kinsella was permitted to proceed with his line of questioning, but only on the basis that he was not "referencing the power purchase agreement or the South Fork RFP[.]"[52]

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48 Ruling Admitting Evidence, issued Dec 23, 2020 (DMM: item 234, Ruling Admitting Evidence).

49 DPS Staff Panel Cross-Examination by Simon Kinsella, on December 7, 2020 (at p. 593, lines 23-25) (see DMM: item 227, Evidentiary Hearing Transcript, Dec 7, 2020).

50 *Id.* (at p. 594, lines 5-9) (see DMM: item 227, Evidentiary Hearing Transcript, Dec 7, 2020).

51 *Id.* (at p. 594, lines 12-16) (see DMM: item 227, Evidentiary Hearing Transcript, Dec 7, 2020).

52 *Id.* (at p. 595, lines 2-4) (see DMM: item 227, Evidentiary Hearing Transcript, Dec 7, 2020).

173) After the evidentiary hearing had concluded and parties no longer had rights of examination or cross-examination, the presiding ALJ then admitted the South Fork RFP and PPA into the evidentiary record. The following exchange between the presiding officer, ALJ Belsito, and LIPA's Assistant General Counsel, Lisa Zafonte, about including the South Fork RFP and PPA in the evidentiary record is revealing –

> 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 [emphasis added]?
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> 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 [emphasis added]. 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].

> 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]."
>
> 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]."

174) During the exchange, the ALJ admits into the record the South Fork RFP and PPA at the last minute 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 admission that they're "beyond relevance[.]" If the RFP and PPA *are* "beyond the scope" and "beyond relevance," then there would be no reason to entered them into the record. So, evidently, they *are* relevant as they "go to the need of the project[.]"

175) Under PSL § 126 (1), "[t]he commission shall render a decision upon the record either granting or denying the application."

176) PSL § 125 further specifies that a "record shall be made of the hearing and of all testimony taken and the cross-examinations thereon."

177) Here, as in any Article VII proceeding, the Commission must make its determination upon the record. However, the record in the instant proceeding remains insufficient and incomplete absent resolution of contested, material, factual issues that are best explored through examination and cross-examination.

178) The evidentiary record lacks the benefit of full participation by parties who may or may not support SFW's proposal but were unable to arrive at a conclusion due to limitations the Commission placed on parties' ability to question aspects of SFW's project cloaked behind the South Fork RFP and PPA. The evidentiary record features substantial gaps in relevant and material information.

179) Department of Public Service regulations requires 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."[53] DPS regulations anticipate a hearing and, specifically, anticipate "cross-examination of a witness' prepared written testimony[.][54] While the regulations also allow for a presiding officer to "expedite the orderly conduct of the proceeding,"[55] 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

53 16 NYCRR § 4.5 (a)

54 *Id.* (b) (2)

55 16 NYCRR § 4.4 (a)

witness's prepared written testimony would not be subject to cross-examination is where "cross-examination […] is waived by all other parties[.]"[56] Parties in this proceeding did *not* waive their rights to cross-examination.

180) The Commission's Procedural Guidelines for Settlement ("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."[57] By denying parties' rights to examine the South Fork RFP procurement and its subsequent PPA award to SFW and to cross-examine witnesses regarding such evidence, the presiding ALJ acted contrary to Title 16 DPS Rules of Procedure and DPS Settlement Guidelines.

181) Finally, the requirements for cross-examination were described by Governor Rockefeller when approving the legislation that created Article VII, requiring that

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56 *Id.* (b) (2)

57 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 (90-M-0255 DMM: item 1, Opinion, Order and Resolution Adopting Settlement Procedures and Guidelines).

"[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 […]"[58] There is no doubt that the Legislature intended to have hearings and cross-examination. The South Fork RFP should have been subject to scrutiny, especially given its importance in allegedly establishing a basis of need for SFW's proposal.[59] The Commission erred in fact and law and acted arbitrarily and capriciously.

V. The Commission failed to question the presumption of validity attached to South Fork RFP, ignoring sound theory and objective data

182) The Order 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.

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

59 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 (see 16 NYCRR § 4.5 (b) (2)).

183) The Order is conclusory, lacks any discussion, or discernable reasoning, and is arbitrary and capricious.

184) 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 whether the documentary and testimonial evidence proffered by Petitioner is based on sound theory and objective data rather than on mere wishful thinking. Though the substantial evidence standard is low, it "does not rise from bare surmise, conjecture, speculation or rumor .[60]

185) 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.[61] LIPA provided substantial evidence, objectively (see paragraphs 112 to 132), that goes directly to the heart of whether there exists a basis of need for SFW's facility under Public Service Law,

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60 *FMC Corp. v Unmack*, 92 NY2d 179, 188 [1998] (quotes and citations omitted).

61 NY CLS Public Service Law, Article VII, § 126 (1) (a)

Article VII, § 126 (1) (a). The Commission's Order was affected by an error of law, is arbitrary and capricious.

186) 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.

187) The Commission's Order misleads the reader into believing that both the PPA and RFP were approved by the Comptroller or the State Attorney General, but there is no statutory requirement for the Comptroller or the State Attorney General to approve a specific RFP. The RFP was <u>not</u> signed by either Comptroller or the State Attorney General whereas the PPA was signed by both. The Commission erred in fact and law, and acted arbitrarily and capriciously.

VI. The Commission's procedural noncompliance also violates NY PSL § 126 (1) (a) – <u>basis</u> <u>of</u> <u>need</u> for the South Fork Wind project

Entergy Nuclear Power Marketing, LLC v New York State Public Service Commission [62]

188) Under "Legal Authority," the Order appears to quote directly from PSL § 126 (1), but the Commission lost the word "find" in the statute, so that it merely reads –

> "[…] the Commission may only grant a Certificate […] if it determines the basis of the need for the facility [emphasis added.]"

Although the Order merely paraphrases §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 determine what it is (see paragraphs 112 to 132). The Commission has *not* taken a hard look to *find* the basis of need but has looked the other way.

189) The Commission, citing *Entergy Nuclear Power Marketing, LLC v New York State Public Service Commission* ("*Entergy Nuclear v NYSPSC*"),[63] states that – Public Service Law §126 does not require the Commission to determine whether the project is economically feasible and

62 *Entergy Nuclear Power Marketing, LLC v New York State Public Service Commission*, 122 AD3d 1024, 1028 (3rd Dept. 2014).

63 *Entergy Nuclear Power Marketing, LLC v New York State Public Service Commission*, 122 AD3d 1024, 1028 (3rd Dept. 2014).

> nonmonetary aspects of a facility are enough to support findings that a project is needed and in the public interest.[64]

190) However, 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-term soundness of the utility."[65] Regardless, the Commission is relieved neither of its obligations under its Settlement Guidelines nor is it relieved of its statutorily mandated duty to ensure "that the facility will serve the public interest, convenience, and necessity" according to PSL § 126 (1) (h). Furthermore, the court in the matter of *Entergy Nuclear v NYSPSC* 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. In this regard, *Entergy Nuclear v NYSPSC* is distinguished from the instant proceeding insofar as SFW is not subject to market forces in a wholesale energy market but instead is selling its energy at above-market rates that were negotiated in a non-competitive opaque procurement process, and the fixed rates as

64 *Id.* (at p. 1029)

65 See Settlement Guidelines, supra. (90-M-0255 DMM: item 1, Opinion, Order and Resolution Adopting Settlement Procedures and Guidelines).

expressed in the PPA between LIPA and SFW will be passed onto ratepayers who *will be subsidizing* the SFW project. SFW proposes overcharging ratepayers more than one billion dollars extra at a rate that is almost three times the current market rate for the same offshore wind renewable energy.

191) Concerning whether "nonmonetary aspects of a facility are enough to support findings that a project is needed[,]" the opinion in the matter of *Entergy Nuclear v NYSPSC* 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 of the Project 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[" (see paragraphs 112 to 132).[66]

PSL § 122 and § 126

192) 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.]"[67] Furthermore, "the Applicant has the burden of proving all required statutory findings under Public

66 Public Service Law § 126 (1) (a) and (h)

67 *Id.* § 126 (1) (a)

Service Law ("PSL") § 122"[68] including but not limited to "the need for the facility[.]"[69] SFW failed to sustain its burden of proof in support of its facility's basis for need (see paragraphs 112 to 132). Instead, SFW merely refers to documents that, with assistance from DPS and the Commission, have been placed beyond the reach of parties participating in administrative proceeding 18-T-0604.

193) In its Article VII application, SFW defines its basis of need as follows –

> The Project, in conjunction with the SFWF, addresses the need identified by the LIPA for new sources of power generation that can cost-effectively and reliably supply the South Fork […], as an alternative to constructing new transmission facilities. The SFWF and the Project will also help LIPA achieve its renewable energy goals and will enable DWSF [SFW] to fulfill its contractual commitments to LIPA pursuant to a […] PPA […] resulting from LIPA's technology-neutral competitive bidding process [emphasis added]." [70]

194) The Commission's Order drops that the phrase "technology-neutral" because the documents disclosed by LIPA show that the South Fork RFP was not a technology-neutral procurement process.

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68 Case: 06-T-0650 – *NY Regional Interconnect, Inc.*, Ruling on Scope, Hearing Procedures and Schedule (at p. 10) (06-T-0650 DMM: item 436, New York Regional Interconnect, Inc., Ruling on Scope, Hearing Procedures and Schedule)

69 Public Service Law § 122 (1) (d)

70 See South Fork Wind's Article VII application, filed September 14, 2018, Exhibit 3, Section 3.3 (at p. 3.4) (DMM: 001, Exhibit 3, p. 4 of 34)

195) At this point, the Commission leaves us guessing: what is the need identified by LIPA in the South Fork RFP? The Commission and DPS prohibit parties from questioning the basis of need for the SFWF and its transmission facility.

196) PSL § 126 (1) (a) mandates that the "Commission shall render a decision upon the record […] [and] may not grant a certificate […] unless it shall find and determine: (a) the basis of the need for the facility [emphasis added.]"

197) The Commission has not taken a hard look and has neither found nor determined "the basis of need" for the SFW project. Instead, the Commission looks the other way, and it relies on a presumption of validity attached to the South Fork RFP procurement even when such procurement process is proven to be fatally flawed.

198) The Commission has not satisfied the requirements of § 126 (1) by failing to "find and determine […] the basis of the need" for the SFW project. The Order merely parrots SFW's (false) claim that it will provide a "new sources of power generation that can cost-effectively and reliably supply the South Fork […] as an alternative to constructing new transmission facilities." Just because the Commission and SFW allege a valid basis of need does not make it so.

199) The Commission's alleged basis of need for the SFW project is conclusory.

200) The Commission does *not* have statutory authority to grant a certificate of environmental compatibility and public need "unless it shall find and determine

[…]the basis of the need"[.]" The Commission has failed to comply with its mandated statutory obligations, and the Commission exceeded its authority by granting a Certificate to SFW.

201) 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."[71]

VII. The Commission relied on stale data when more recent information is available

202) On January 22, 2021, LIPA Deputy General Counsel James Miskiewicz released documents proving that the South Fork RFP was non-competitive.[72] The internal LIPA records show that when LIPA awarded a PPA to SFW (see paragraphs 121 to 124), LIPA estimated the price of electrical energy from SFW to be 22 cents per kilowatt-hour. The cost burden to ratepayers for SFW's power is 14 cents more expensive Sunrise Wind (at 8 cents) for the same renewable energy generated only two miles away.

203) LIPA withheld releasing the documents until January 22, 2021 – a month *after* the evidentiary record had closed. By delaying disclosure, LIPA prevented

71 See *Svquia v. Bd. of Educ. of the Harpursville Cent. Sch. Dist.*, 80 N.Y.2d 531 (1992).

72 In response to Freedom of Information Law Request filed by Petitioner Kinsella on August 24, 2020.

relevant information from being admitted into evidence, rendering the Commission blind when making its determination pursuant to PSL § 126 (1). The delay is not merely coincidental, but LIPA's calculated attempt to keep fact-based information unfavorable to SFW's case out of the evidentiary record.

204) On January 29, 2021, Petitioner Kinsella filed a Motion to Reopen the Record – Supplemental Information. The motion sought to include into the record "new fact-based, relevant and material evidence […] that goes directly to the basis of the need for the Applicant's facility." See Kinsella Motion to Reopen the Record – Supplemental Information (at pp. 5-6) (DMM: item 257, Motion, at p. 3).

205) The internal documents disclosed by LIPA refute the unfounded claim by SFW, and blindly endorsed by the Commission, that the project "addresses the need identified by the LIPA for […] power generation that can cost-effectively and reliably supply the South Fork […] as an alternative to constructing new transmission facilities."

206) The LIPA disclosures represent new circumstances that came to light only *after* the evidentiary hearing had concluded.

207) The LIPA documents contain material, relevant and factual information for which there was no rational basis for the ALJ to exclude them from the record. Had the documents been admitted into evidence, they would have warranted a different determination by the Commission.

208) 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.[73]

209) "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."[74]

210) The Commission relied on obsolete information and, given new evidence from LIPA, cannot find and determine a valid basis of need for SFW's facility pursuant to PSL § 126 (1) (a). Therefore, any rational basis for the Commission's

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73 See *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").

74 See *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. 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.").

determination no longer exists, and the Commission's decision to grant SFW a Certificate is arbitrary and capricious.

South Fork Wind cannot supply power "cost-effectively." [75]

211) Buying energy from SFW is *not* cost-effective. It will cost $1 billion more to buy SFW's energy than buy the same renewable energy from Sunrise Wind.

212) The NY Office of the State Comptroller valued the power purchase agreement between the SFW and LIPA at $1.625 billion.[76] The cost for the same amount of renewable energy from Sunrise Wind is only $0.595 billion.[77]

213) Total Cost for the same Renewable Energy

South Fork Wind (90 MW)	$1,624,738,893	7,432,080 MWh
Sunrise Wind (equivalent)	$594,566,400	7,432,080 MWh
Waste	**$1,030,172,493**	

214) 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 […] .

75 See Settlement Guidelines (at p. 99) (90-M-0255 DMM: item 1, Opinion, Order and Resolution Adopting Settlement Procedures and Guidelines).

76 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). (oswSoutFork.info, click here).

77 See Motion to Open the Record of Kinsella, filed January 13, 2021 (at pp. 15-16) (DMM: item 240, Motion to Reopen Record, p. 2 or oswSouthFork.info, click here).

supply the South Fork" with power [emphasis added].[78] The Commission's Order is conclusory, *not* based in fact, lacks any rational basis, is arbitrary and capricious.

South Fork Wind cannot supply power "reliably" to meet peak demand. [79]

215) The South Fork RFP "seeks to acquire sufficient local resources to meet expected peak load requirements [...]" [88] Within the LIPA disclosures, is an analysis by WESC: Calculation of Effective Forced Outage Rate of Offshore Wind ([SFWF]).[80] The report reads –

> [W]ind alone has a very small effective capacity due to the distinct statistical possibility that it may have very low available power output at the time of a peak-period contingency." [81]

216) Another report by WESC, refering to the analysis (above) reads –

> The […] analysis assumed no correlation between high load and persistent low-wind conditions. Initial analysis of temperature/wind correlation in the Block Island data provided by DWW [SFW] indicates that such a correlation may exist. Therefore, basing the portfolio analysis on an

78 See Order Adopting Joint Proposal dated March 18, 2021 (at p. 99) (available at DMM: item 271, Order Adopting Joint Proposal, p 1)

79 See Settlements Guidelines (at p. 99) (90-M-0255 DMM: item 1, Opinion, Order and Resolution Adopting Settlement Procedures and Guidelines).

80 See WESC: Calculation of Effective Forced Outage Rate (EFOR) of Offshore Wind (DWW100 [the SFWF]) and Offshore Wind Plus Battery (DWW100+LIE400) (DMM: item 257, F -RPT, WESC -Deepwater EFOR Calc, p. 2 or oswSouthFork.info, click here).

81 *Id.* (at p. 2, last paragraph) (DMM: item 257, F -RPT, WESC -Deepwater EFOR Calc, p. 2 or oswSouthFork.info, click here).

uncorrelated […] basis is not believed to be excessively conservative.

217) Another report, South Fork RFP Deepwater Offshore Wind Proposal, that is based on data provided by Deepwater Wind, concluded "that Deepwater Wind's offshore wind project […] would have a May through September Peak Period unavailability […] of 29.9% [emphasis added.]" [82] The report continues: "Without the [33 MW] battery, shortfalls occur on 77 of the 152 Peak Period days, or about 50% of the days." Further, there "are periods of up to 4 consecutive days where Wind+Battery [33 MW] shortfalls are occurring in August and September [emphasis added]."[83]

218) The Order states that "the Project addresses the need […] for new sources of power generation that could reliably […] supply the South Fork" with power [emphasis added]. [84] Still, when the South Fork needs power most, during periods of peak demand, LIPA internal reports confirm that the SFWF cannot be relied upon to supply that power. The Commission's Order is conclusory, *not* based in fact, lacks any rational basis, and is arbitrary and capricious.

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82 See South Fork RFP Deepwater Offshore Wind Proposal, EFOR Analysis (at p. 2) (DMM: item 257, G -RPT, Redacted, p. 2 or oswSouthFork.info, click here).

83 *Id.* (at p. 3) (DMM: item 257, G -RPT, Redacted, p. 2 or oswSouthFork.info, click here).

84 Order Adopting Joint Proposal dated March 18, 2021 (at p. 99) (DMM: item 271, Order Adopting Joint Proposal, p 1)

South Fork Wind is *not* an alternative to new transmission facilities."[85]

219) On September 14, 2018, SFW filed an Article VII application for a Certificate "to construct, operate, and maintain the South Fork Export Cable … that will connect the South Fork Wind Farm … to the existing mainland electric grid in East Hampton, New York" [86] of approximately sixty-six miles in length.[87] SFW's South Fork Export Cable is a new transmission line. A sixty-six-mile-long transmission line cannot *also* be "an alternative to adding new transmission lines" – it *is* a new transmission line. SFW's (false) claim that its project is an alternative to new transmission lines lacks merit.

220) Furthermore, the immediate need for additional energy generation on the South Fork was to overcome "highly constrained transmission capabilities" that prohibited energy from being delivered from mid-Long Island. [88]

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85 Settlement Guidelines (at p. 99) (90-M-0255 DMM: item 1, Opinion, Order and Resolution Adopting Settlement Procedures and Guidelines).

86 Executed Joint Proposal, signed by supportive parties on September 17, 2020 (at pp. 1-2) (DMM: item 144, Joint Proposal, p. 1)

87 South Fork Wind LLC, Construction and Operations Plan (COP) submitted to the Bureau of Ocean Energy Management ("BOEM") revised July 22, 2020 (at p. 3-37, Table 3.2-3. South Fork Export Cable Parameters) (available online at BOEM.gov South Fork Construction and Operations Plan, Updated May 7, 2021).

88 South Fork RFP, issued June 24, 2015, Description of Solicitation and Objectives (at p. 2) (DMM: item 170, Exhibit A - South Fork RFP, p. 4)

221). To overcome these transmission constraints, LIPA entered into a PPA whereby the SFW would deliver energy to the LIPA-owned substation in the Town of East Hampton "[a]s an alternative to adding new transmission lines … to acquire sufficient local resources to meet expected peak[.]"[89] But by the time the SFW commences operations by the end of 2023,[90] the transmission constraints will have been resolved, thereby permitting renewable energy to come from farther western Long Island at less than half the price (from Sunrise Wind).

222) The Order states that "the Project addresses the need identified by LIPA in its 2015 RFP for new sources of power generation […] as an alternative to constructing new transmission facilities [emphasis added]."[91] The Commission's Order is conclusory, *not* based in fact, lacks any rational basis, is arbitrary and capricious.

VIII. The Order
lacks rational basis and substantive discussion

89 South Fork RFP, issued June 24, 2015, Description of Solicitation and Objectives (at p. 2) (DMM: item 170, Exhibit A - South Fork RFP, p. 4)

90 Newsday article titled: South Fork Wind Farm delayed until 2023 (click here), October 28, 2020

91 See Order Adopting Joint Proposal, dated March 18, 2021 (at p. 99) (DMM: item 271, Order Adopting Joint Proposal, p 1)

223) The Order is three hundred and fifty-three (350) pages long (including the Joint Proposal executed on September 17, 2020 by supportive parties). The Commission's Order is one hundred and eleven (111) pages comprising of: a procedural background and summary of (32 pages); stated positions of supportive parties, including disputed issues written from the supportive parties' perspective (38 pages); stated positions of opposing parties (14 pages); a Legal Authority that does not refer either to the Project or to any issues raised during the proceeding (only 2 pages); and, finally, what purports to be a Discussion of only eight (8) pages.

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

225) The Commission's Order merely summarizes the positions of supportive parties then separately summarizes the positions of opposing parties. The Commission neither compares the two opposing positions in an attempt to reconcile those positions, weighs the relative factual or legal merits against each other, nor engages in any meaningful discussion. The "Discussion" section is void of arguments of fact and law.

226) By failing to substantively address and discuss the factual and legal merits of parties opposing the Commission's Order, 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 of the opportunity for judicial review and due process of law.

227) The Order places a greater emphasis on the positions of supportive parties, than the positions of opposing parties. Provides a brief (two-page) "legal authority." The conclusory "discussion" section suggests the Commission views the summary of parties' positions and separate "legal authority" as a substitute for legal and factual analysis. The Order's organization and structure avoid substantive factual and legal analysis. The Petition for Rehearing and Stay filed by Petitioner Kinsella responds to the arguments within the "discussion" section of the Order. However, by avoiding any substantive factual and legal analysis within the "discussion" section, the Commission limits the request for rehearing and redress.

228). The Commission may be basing its decision on the arguments advanced within sections summarizing the stating the positions of parties and its separate statement of "legal authority." To such extent, this Article 78 petition has no option but to rely on previous submissions in the Article VII proceeding to address any such arguments and, therefore, incorporates by reference Petitioner Kinsella's

Petition for Rehearing and Stay – Corrected (filed April 19, 2021) and documentation, exhibits and appendices listed therein (listed at pp. 5-6) (DMM: item 278, Petition for Rehearing & Stay – Kinsella – Corrected, p. 1). The documents, exhibits, and appendices therein contain relevant material fact-based legal discussion conspicuously missing from the Order.

229) Finally, SFW's proposed project does not comply with the long range planning requirements of the 2016 Clean Energy Standard [92] and NYSERDA's Offshore Wind Policy Options Paper, that "forms part of New York's Offshore Wind Master Plan, published concurrently" [93] (see Petitioner Kinsella's Initial Brief (at pp. 25-29) (DMM: item 256, Initial Brief of Si Kinsella, (Jan 20, 2021, Corrected), p. 1). The equal joint owners of SFW, Ørsted and Eversoure, admitted in comments submitted to NYSERDA (under the name of Bay State Wind, LC) that the South Fork Wind Farm project (of 130 MW) is uneconomic and not financially feasible. SFW's owners stated that "[s]mall initial projects are not likely to deliver cost savings. Due to diseconomies of scale, the costs per unit of energy for projects of 100 MW and 200 MW in size are significantly higher than those for 400 MW projects [citing NYSERDA Options Paper at 62]" (see DMM: item 205, Exhibit 3-6, p. 1).

[92] Case 15-E-0302 – Proceeding to Implement a Large-Scale Renewable Program and a Clean Energy Standard, Order Adopting a Clean Energy Standard (issued August 1, 2016).

[93] NYSERDA – Offshore Wind Policy Options Paper, NYS Offshore Wind Master Plan (January 29, 2018) (evidentiary record Exhibit No. 419) (see DMM: item 205, Exhibit 3-7, p. 1).

FIRST CAUSE OF ACTION – ART. 30

(For Declaratory Judgment Pursuant to CPLR § 3001 for violations of General Municipal Law § 103 and State Finance Law § 163)
(As against defendants LIPA, LILCO, and PSEG Long Is., Servco and officials thereof)

230. Plaintiffs repeat and reallege each and every allegation contained in paragraphs 1 through to 229 as if set forth fully herein.

231. Defendants LIPA, LILCO, PSEG Long Is., Servco, and officials thereof either individually or in collusion arranged to awarded a contract for the supply of electrical energy to a non-responsive offerer, Deepwater Wind, in violation of State Finance Law § 163 (1) (d), (e), and (j), § 163 (2) and § 163 (10) (c) that grants authority limited to "responsive" offerers as follows: "a state agency may elect to award a contract to one or more responsive […] offerers [emphasis added.]"

232. Defendants LIPA, LILCO, PSEG Long Is., and Servco either individually or in collusion arranged for a bid submitted by Deepwater Wind for the supply of electrical energy from an offshore wind farm for consideration in the South Fork RFP procurement process not to be deemed non-responsive in violation of State Finance Law § 163 (1), (2), (7), (8), (9) and (10), and General Municipal Law § 103 where "[c]ompetitive bidding provisions of general municipal law are violated when municipality manipulates bidding specification so as to preclude true competitive bidding."[77]

SECOND CAUSE OF ACTION – ART. 30

(For Declaratory Judgment Pursuant to CPLR § 3001 for violation of General Municipal Law § 103 (7))
(As against defendants LIPA, LILCO, and PSEG Long Is., Servco, and officials thereof)

[77] See Atlantic Tug & Equipment Co. v Tonawanda, 45 A.D.2d 916, 357 N.Y.S.2d 303, 1974 N.Y. App. Div. (N.Y. App. Div. 4th Dep't 1974).

233. Plaintiffs repeat and reallege each and every allegation contained in paragraphs 1 through to 229 as if set forth fully herein.

234. Defendants LIPA, LILCO, PSEG Long Is., Servco, and officials thereof conspired to "prevent competitive bidding or competitive offering on a contract for public work or purchase advertised for bidding or offering [and therefore] shall be guilty of a misdemeanor as provided in section one hundred three-e of this article" (see General Municipal Law § 103 (7)).

THIRD CAUSE OF ACTION – ART. 30

(For Declaratory Judgment Pursuant to CPLR § 3001
for violation of the LIPA Act § 1020-f)
(As against defendants LIPA, LILCO, Servco, and officials thereof)

235. Plaintiffs repeat and reallege each and every allegation contained in paragraphs 1 through to 229 as if set forth fully herein.

236. Defendants LIPA, LILCO, Servco, and officials thereof, either individually or in collusion, acted in violation of Public Authorities Law § 1020-f (h) by awarding to Deepwater Wind a contract contrary to "the provisions of section one hundred three of the general municipal law[.]"

FOURTH CAUSE OF ACTION – ART. 30

(For Declaratory Judgment Pursuant to CPLR § 3001
for violation of the LIPA Act § 1020-cc)
(As against defendants LIPA, LILCO, Servco, and officials thereof)

237. Plaintiffs repeat and reallege each and every allegation contained in paragraphs 1 through to 229 as if set forth fully herein.

238. Defendants LIPA, LILCO, Servco, and officials thereof, either individually or in collusion, acted in violation of Public Authorities Law § 1020-cc by awarding to Deepwater

Wind a contract contrary "to the provisions of the state finance law relating to contracts made by the state."

FIFTH CAUSE OF ACTION – ART. 30

(For Declaratory Judgment Pursuant to CPLR § 3001
for violation of the LIPA Act § 1020-a)
(As against defendants LIPA, LILCO, Servco, and officials thereof)

239. Plaintiffs repeat and reallege each and every allegation contained in paragraphs 1 through to 229 as if set forth fully herein.

240. Defendants LIPA, LILCO, Servco, and officials thereof, either individually or in collusion, acted in violation of Public Authorities Law § 1020-f by exceeding the authority granted therein to "the powers necessary or convenient to carry out the purposes and provisions of this title [emphasis added]" as defined in the declaration of legislative findings § 1020-a and summarized as follows: "the recurring and unavoidable theme reflected in the legislative history is that the intended *sine qua non* objective of the Act was to give LIPA the authority to save ratepayers money by controlling and reducing utility costs" (see *Citizens For An Orderly Energy Policy v Cuomo* 78 NY2d 398, 414) by awarding a contract, *ultra vires,* to Deepwater Wind contrary to the *sine qua non* objective of the LIPA Act.

SIXTH CAUSE OF ACTION – ART. 30

(For Declaratory Judgment Pursuant to CPLR § 3001
for violation of the LIPA Act § 1020-f (aa) and § 1020-b 12-a (iii))
(As against defendants LIPA, LILCO, Servco, and officials thereof)

241. Plaintiffs repeat and reallege each and every allegation contained in paragraphs 1 through to 229 as if set forth fully herein.

242. Defendants LIPA, LILCO, Servco, and officials thereof, either individually or in collusion, acted in violation of Public Authorities Law § 1020-f (aa) by not gaining "the approval

of the public authorities control board [PACB]" that "[c]ommits the authority to a contract or agreement with a total consideration of greater than one million dollars and does not involve the day to day operations of the authority" (see § 1020-b 12-a (iii)).

SEVENTH CAUSE OF ACTION – ART. 30

(For Judgment Pursuant to CPLR §§ 3001
for violation of the Public Authorities Law § 2878)
(As against defendants LIPA, LILCO, Servco,
PSEG Long Is., Deepwater Wind, and officials thereof)

243. Plaintiffs repeat and reallege each and every allegation contained in paragraphs 1 through to 229 as if set forth fully herein.

244. NY Public Authorities Law ("Pub. A.") § 2778 (1) mandates that "[e]very bid or proposal hereafter made to a public authority or to any official of any public authority created by the state or any political subdivision, where competitive bidding is required by statute, rule, regulation or local law, […] shall contain the following statement [according to subsection (a)(1), (2), and (3)] subscribed by the bidder and affirmed by such bidder as true under the penalties of perjury: Non-collusive bidding certification." Further, Pub. A. § 2778 (2) mandates that "[a] bid shall not be considered for award nor shall any award be made where (a)(1)(2) and (3) above have not been complied with [emphasis added.]"

245. Prior to LIPA awarding Deepwater Wind a power purchase agreement (executed on or about February 6, 2017), Deepwater Wind did not comply with the provisions of Pub. A. § 2778 (1), and, therefore, the award of a power purchase agreement to Deepwater Wind by LIPA executed on or about February 6, 2017 is illegal.

246. Deepwater Wind's failure to complete and affirmed as true under the penalties of perjury non-collusive bidding certification pursuant to the provisions of Pub. A. § 2778 as it pertains to

the South Fork Wind Farm Project and its involvement in an scheme to impede competition and defraud Nassau and Suffolk County ratepayers of one billion dollars ($1 billion) as alleged herein, implicates other projects of related entities servicing New York State such as Sunrise Wind and projects servicing other states (Ocean Wind, Revolution Wind, etc.) with similar prerequisites as they relate to a vendor's prior record of responsibility. See *Konski Eng'rs, P.C. v. Levitt*, 415 N.Y.S.2d 509 (3d Dep't 1979) where the New York State, Appellate Division, Third Department held that the Comptroller had the power to find a vendor non-responsible, and that the Comptroller's refusal to approve a contract was justified in view of his knowledge that the vendor was under investigation for possible involvement with political corruption in the award of public contracts. Factors affecting a vendor's "responsibility" include, *inter alia*, "prior determinations of integrity-related non-responsibility" (see Exhibit 27 – New York Office of the State Comptroller Guide).[78]

EIGHTH CAUSE OF ACTION – ART. 30

(For Judgment Pursuant to CPLR §§ 3001
for violation of the New York Constitution, Articles III, IV, and VI)
(As against defendant Governor of New York State, Andrew M. Cuomo)

247. Plaintiffs repeat and reallege each and every allegation contained in paragraphs 1 through to 229 as if set forth fully herein.

248. The Governor of New York State, Andrew M. Cuomo, violated New York Constitution, Articles III, IV, VI and acted in derogation of separation of powers doctrine by selecting and advancing the interests of one bid of a private developer to the detriment of twenty other proposals and interfering with the independence of a procurement process ostensibly being

[78] See XI.16Vendor Responsibility (state.ny.us).

conducted by an independent public authority, LIPA.

249. On January 11, 2017, in his State of the State address, Governor Cuomo singled out a bid for an offshore wind farm (of 90 megawatts) proposed by a private developer, Deepwater Wind. "The Governor calls on the Long Island Power Authority to approve this critical project, which would be approximately 30 miles southeast of Montauk and not visible from Long Island's beaches. This innovative project is the least expensive proposal" that includes "a 90 megawatt, 15-turbine project off the East End of Long Island" (see Appendix S).[79]

250. Governor Andrew M. Cuomo called on the LIPA Board of Trustees to decide in the interests of Deepwater Wind, knowing that he appointed five of the nine trustees.

251. Fourteen days later, during the LIPA Board of Trustees meeting (on January 25, 2021), the LIPA "Board of Trustees authorizes the Chief Executive Officer […] to execute a PPA and other related agreements and arrangements, consistent with the terms of the accompanying memorandum, […] to implement the Authority's purchase of energy […] from the Deepwater Wind South Fork, LLC, South Fork Wind Farm project" (see Exhibit 29 at p. 8, last paragraph).

NINTH CAUSE OF ACTION – ART. 78

(For Judgment Pursuant to CPLR §§ 7801-7806
for violation of the PSL § 122)
(As against defendant Deepwater Wind, and officials thereof)

252. Plaintiffs repeat and reallege each and every allegation contained in paragraphs 1 through to 229 as if set forth fully herein.

[79] See Appendix S – 2017 State of the State address by Governor Andrew M. Cuomo on January 11, 2017 (at pp. 55-56)

253. Public Service Law ("PSL") § 122 confers on Deepwater Wind "the burden of proving all required statutory findings" (see NY Regional Interconnect, Inc., Ruling on Scope, Hearing Procedures and Schedule (case 06-T-0650, at p. 10) including but not limited to "the need for the facility" (see PSL § 122 (1) (d)).

254. Deepwater Wind has failed to sustain its burden of proof in support of the basis of need for its facility pursuant to PSL § 122.

TENTH CAUSE OF ACTION – ART. 78

(For Judgment Pursuant to CPLR §§ 7801-7806
for violation of the PSL § 126 (1) (b) - Probable Environmental Impact)
(As against the respondents PSC, DPS, and officials thereof)

255. Petitioners repeat and reallege each and every allegation contained in paragraphs 1 through to 229 as if set forth fully herein.

256. Article 78 of New York's Civil Practice Law and Rules supersede the common-law writs of mandamus and provides a device for challenging the actions of NYS PSC and DPS and officials thereof.

257. Respondents PSC and DPS, and officials thereof, violated PSL § 126 (1) (b) requiring 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.]"

258. The Order neither finds nor determines the nature of per- and polyfluoroalkyl substances (hereinafter "PFAS") contamination that is known to exist within one hundred and fifty feet (150 ft) adjacent and downgradient from respondent Deepwater Wind's proposed construction corridor at detectible levels exceeding New York State regulatory standards by one-hundred-

times (100-x) where the source of the contamination is upgradient on the opposite side of the construction corridor on property owned by the Town of East Hampton (see Exhibit 6).

259. By failing to find and determine the nature of probable PFAS contamination (see Exhibit 6), the Commission has not complied with statutorily mandated provisions of the PSL and exceeded its authority by granting Deepwater Wind a Certificate of Environmental Compatibility and Public Need (hereinafter "Certificate"). Such statutory violation by the Commission rises to the level of an abuse of authority.

ELEVENTH CAUSE OF ACTION – ART. 78

(For Judgment Pursuant to CPLR §§ 7801-7806
for violation of the PSL § 126 (1) (c) – Minimum Environmental Impact)
(As against respondents PSC, DPS, and officials thereof)

260. Petitioners repeat and reallege each and every allegation contained in paragraphs 1 through to 229 as if set forth fully herein.

261. Article 78 of New York's Civil Practice Law and Rules supersede the common-law writs of mandamus and provides a device for challenging NYS PSC and DPS actions and officials thereof.

262. Respondents PSC and DPS, and officials thereof, violated Public Service Law § 126 (1) (c) requiring 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: […] that the facility represents the minimum adverse environmental impact[.]"

263. The Order cites the matter of *Entergy Nuclear v NYSPSC* (*Entergy Nuclear Power Marketing, LLC v New York State Public Service Commission*, 122 AD3d 1024, 1028). In that proceeding, the Commission bases its determination on the fact that the "risk has been

minimized by the placement of the cable route utilizing […] information designed to avoid significant […] areas […] and the exclusion zones identified by the parties in the joint proposal." In the instant Article VII proceeding, the 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. In fact, there are countless beaches and established rights-of-way leading from the southern shoreline of the South Fork towards Deepwater Wind's point of interconnection at the LIPA-owned East Hampton Substation. Of those, Deepwater Wind selected the only one that leads through the middle of arguably the most contaminated soil and groundwater on the South Fork.

264. Respondents PSC and DPS, and officials thereof, (falsely) claim that "the Project will avoid or minimize adverse impacts to the environment" is neither supported by fact nor rationally based and is arbitrary and capricious.

265. Respondents PSC and DPS have not provided a reason why the Commission changed its prior interpretation (in *Entergy Nuclear v NYSPSC*) of the law. "[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" (see *Charles A. Field Delivery Serv.*, 66 NY2d 516 [1985]).

TWELFTH CAUSE OF ACTION – ART. 78

(For Judgment Pursuant to CPLR §§ 7801-7806
for violation of the 16 NYCRR § 4.5 (a))
(As against respondents PSC, DPS, and officials thereof)

266. Petitioners repeat and reallege each and every allegation contained in paragraphs 1 through to 229 as if set forth fully herein.

267. Article 78 of New York's Civil Practice Law and Rules supersede the common-law writs of mandamus and provides a device for challenging the actions of NYS PSC and DPS and officials thereof.

268. Respondents PSC, DPS, and officials thereof violated 16 NYCRR § 4.5 (a) by not granting party-intervenors "reasonable opportunity to present evidence and examine and cross-examine witnesses" regarding the South Fork RFP and the power purchase agreement.

269. Respondents PSC, DPS, and officials thereof violated the Commission's Procedures for Settlements (Opinion 92-2 issued March 24, 1992, under cases 90-M-0255 and 92-M-0138) requiring that an "[a]dministrative Law Judge must take requisite action to ensure that all parties have a fair and reasonable opportunity to develop issues and advocate positions" regarding the South Fork RFP and the power purchase agreement awarded to Deepwater Wind.

270. The PSC Article VII proceeding was conducted in violation of the Commission's Settlement Guidelines (at p. 23), 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[.]" Suppose the Commission had conducted a substantive review of a complete record according to its statutory obligations. If that were the case, the Commission could not have made a finding in favor of Deepwater Wind based on that current record.

THIRTEENTH CAUSE OF ACTION – ART. 78

(For Judgment Pursuant to CPLR §§ 7801-7806
for violation of the PSL § 126 (1) (a) - Basis of Need)
(As against respondents PSC, DPS, and officials thereof)

271. Petitioners repeat and reallege each and every allegation contained in paragraphs 1 through to 229 as if set forth fully herein.

272. Article 78 of New York's Civil Practice Law and Rules supersede the common-law writs of mandamus and provides a device for challenging the actions of NYS PSC and DPS and officials thereof.

273. Respondents PSC and DPS, and officials thereof, violated Public Service Law § 126 (1) (a) requiring 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 basis of the need for the facility[.]"

274. Respondents PSC, DPS, and officials failed to "find" the basis of need for Deepwater Wind's proposed facility. Instead, said respondents relied on "the need identified by LIPA in its 2015 RFP competitive bidding process" (Order, at p. 11) that does not exist. Respondent Deepwater Wind's proposal did not meet the needs as defined in the South Fork RFP, such as providing power to meet peak demand, being an alternative to new transmission lines, being a local resource located on the South Fork, *et cetera*.

275. "The Joint Proposal states that […] the Project will serve the public interest by contributing to the goals of the State Energy Plan and Clean Energy Standard" (Order, at p. 11). However, an offshore wind project of fewer than four hundred megawatts (400 MW) in size is expressly excluded from the State Energy Plan and Clean Energy Standard on the basis that it would be uneconomic. Respondent Deepwater Wind proposes to build an offshore wind farm of one hundred and thirty megawatts (130 MW).

276. In Order (at p. 99), the Commission states that "a need exists for the Project […] to meet

the needs of LIPA's ratepayers." Still, DPS avers in sworn testimony that it did *not* consider the cost to ratepayers of Deepwater Wind's facility when making its recommendation to the Commission to issue a Certificate pursuant to Article VII (Exhibit 00, List of Documents, Cross-examination by Kinsella of DPS Staff Panel of October 9, 2020 (at p. 595, lines 9-21)(see Exhibit 19).

277. Respondents PSC and DPS, and officials thereof, failed to sustain the burden of proving "the basis of need for the facility" pursuant to PSL § 126 (1) (a) and issued a Certificate, *ultra vires*, to Deepwater Wind.

FOURTEENTH CAUSE OF ACTION – ART. 78

(For Judgment Pursuant to CPLR §§ 7801-7806
for violation of the PSL § 126 (1) (h) – Public Interest)
(As against respondents PSC, DPS, and officials thereof)

278. Petitioners repeat and reallege each and every allegation contained in paragraphs 1 through to 229 as if set forth fully herein.

279. Article 78 of New York's Civil Practice Law and Rules supersede the common-law writs of mandamus and provides a device for challenging the actions of PSC and DPS and officials thereof.

280. Respondents PSC and DPS, and officials thereof, violated Public Service Law § 126 (1) (h) requiring 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: […] that the facility will serve the public interest[.]"

281. According to the Commission's Procedural Guidelines, in assessing the public interest, the Commission is required to weight four elements that are "to be considered in the ensuing

substantive review[.]" The Commission shall consider "whether the settlement strikes a fair balance among the interests of ratepayers and investors and the long-term soundness of the utility [emphasis added]" (Settlements Guidelines). Still, DPS did not consider the interests of ratepayers (see ¶ 147 above).

282. Respondents PSC and DPS could not have weighted a fair balance without considering ratepayers, and the Commission acted arbitrarily and capricious by not taking "a particular action [that it] should have been taken or is justified[.]"

283. PSC and DPS ignored a Supreme Court (County of Albany) ruling by Judge Rivera concerning Deepwater Wind where the court found "that the record requested [the Deepwater Wind PPA with LIPA] was of significant interest to the general public as the records sought consisted of the contract prices which would affect the pricing of utilities supplied to the general public" (see *Simon V. Kinsella v. Office of the New York State Comptroller*, Albany County Court, dated January 14, 2020, index 904100-19). The Commission acted arbitrarily and capriciously by ignoring a superior court ruling.

FIFTEENTH CAUSE OF ACTION – ART. 78

(For Judgment Pursuant to CPLR §§ 7801-7806 - Stale Data)
(As against respondents PSC, DPS, and officials thereof)

284. Petitioners repeat and reallege each and every allegation contained in paragraphs 1 through to 229 as if set forth fully herein.

285. Article 78 of New York's Civil Practice Law and Rules supersedes the common-law writs of mandamus and provides a device for challenging the actions of PSC and DPS and officials thereof.

286. Respondents PSC and DPS, and officials thereof, relied on stale data when more recent

information was presented to it in a Motion to Reopen the Record (filed January 13, 2021, by petitioner Kinsella, denied by ALJ Belsito on February 10, 2021).

287. 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). It requires remand to the Commission for consideration of the updated evidence. "[W]e find that the order […] based on only out-of-date evidence and the refusal to reopen the hearing were arbitrary" (see *NY Tel. Co. v Pub. Serv. Com.*, 29 NY2d 164, 169 [1971]).

SIXTEENTH CAUSE OF ACTION – ART. 78

(For Judgment Pursuant to CPLR §§ 7801-7806 – Presumption of Validity)
(As against respondents PSC, DPS, and officials thereof)

288. Petitioners repeat and reallege each and every allegation contained in paragraphs 1 through to 229 as if set forth fully herein.

289. Article 78 of New York's Civil Practice Law and Rules supersedes the common-law writs of mandamus and provides a device for challenging the actions of PSC and DPS and officials thereof.

290. 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. LIPA provided substantial evidence, objectively, that goes directly to the heart of whether there exists a basis of need for the Deepwater Wind's facility pursuant to PSL § 126 (1) (a). The Commission's Order was affected by an error of law, is arbitrary and capricious. (See Matter of Commerce Holding Corp. v Board of Assessors, 88 NY2d 724, 732.)

REQUEST FOR RELIEF

Plaintiffs/petitioners respectfully requests that the Court enter judgment against defendants/respondents pursuant to NY State Finance Law § 163, NY General Municipal Law § 103, NY CPLR §§ 7803(1), 7803(3) and 7806 as follows:

K. Adjudging and declaring that the Power Purchase Agreement between defendant Long Island Power Authority and defendant Deepwater Wind South Fork LLC (now known as South Fork Wind LLC) executed on or about February 6, 2017 exists in violation of State Finance Law § 163 and General Municipal Law § 103, and is illegal;

L. Annulling the Power Purchase Agreement in its entirety;

M. Adjudging and declaring that the Commission's Order under case 18-T-0604 was issued in violation of lawful procedure, affected by an error of law, arbitrary and capricious, and an abuse of discretion;

N. Annulling and vacating the Order of March 18, 2021 under case 18-T-0604 in its entirety;

O. Adjudging and declaring that the Commission's granting of a Certificate to respondent Deepwater Wind under case 18-T-0604 was in violation of lawful procedure, affected by an error of law, arbitrary and capricious, and an abuse of discretion;

P. Annulling the issuance of the Certificate of Environmental Compatibility and Public Need under case 18-T-0604 in its entirety;

Q. In the alternative, to prevent waste of resources, inconvenience to residents of the Town of East Hampton, property damage, and damage to stakeholders, ordering the Commission to forthwith issue a ruling either granting or denying plaintiffs'/petitioners' Petition for Rehearing and Stay, and temporarily staying this proceeding/action pursuant to CPLR § 2206 pending

issuance of that ruling;

R. To prevent waste of resources and inconvenience, Ordering the Commission to temporarily stay the hearing of respondent Deepwater Wind for a Petition for an Order Granting a Certificate of Public Convenience and Necessity and Establishing a Lightened Regulatory Regine under case 21-E-0261 pending the outcome of this action/proceeding;

S. Granting plaintiffs/petitioners the costs and disbursements of this action/proceeding; and

T. Granting such other and further relief as the Court deems just and proper.

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

---------- X

In the Matter of the Application of

VERIFICATION

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

Petitioners-Plaintiffs,

-against-

Index No. 000613/2021

LONG ISLAND POWER AUTHORITY,
LONG ISLAND LIGHTING COMPANY,
PSEG LONG ISLAND LLC,
LONG ISLAND ELECTRIC UTILITY SERVCO LLC,
PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK,
NEW YORK STATE DEPARTMENT OF PUBLIC SERVICE, and
SOUTH FORK WIND LLC (FORMERLY DEEPWATER WIND SOUTH FORK LLC),

Respondents-Defendants,

for a Declaratory Judgment Pursuant to Article 30 and Judgment Pursuant to Article 78 of the Civil Practice Law and Rules

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STATE OF NEW YORK)
ss.:
COUNTY OF SUFFOLK COUNTY)

SIMON V. KINSELLA, being duly sworn, deposes and says:

I am one of the petitioners/plaintiffs. I have reviewed the annexed Verified Complaint and Petition and know its contents. The Verified Complaint and Petition is true to my knowledge, except as to matters stated to be alleged upon information and belief, and as to those matters, I believe them to be true.

Simon V. Kinsella

On the **13th** day of **September** in the year **2021**, before me, the undersigned, personally appeared **Simon V. Kinsella**, personally known to me or proved to me on the basis of satisfactory evidence to be the individual whose name is subscribed to the within instrument and acknowledged to me that he executed the same in his capacity, and that by his signature on the instrument, the individuals, or the person upon behalf of which the individuals acted, executed the instrument.

Notary Public

DAVID FINK
Notary Public, State of New York
No. 4526132
Qualified in New York County
Commission Expires Feburary 28, 2023