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Thomas Falcone
Chief Executive Officer
Long Island Power Authority
333 Earle Ovington Blvd
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Via USPS registered mail
C/o: Lisa M. Zafonte, Esq.
Assistant General Counsel
Email: lzafonte@lipower.org

Re: Public Authorities Control Board
Approval of South Fork Wind PPA and Amendment

Dear Mr. Falcone:

Pursuant to the Long Island Power Authority Act ("LIPA Act"), Section 1020-f, Long Island Power Authority ("LIPA") "shall not undertake any project without the approval of the public authorities control board [PACB]" to the extent that the "project" is defined under Section 1020-b (12-a) to mean, *inter alia*, an action undertaken by LIPA that: "Commits 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."

To quote Andrea Stewart Cousins earlier this week: "crucial information should never be withheld from entities that are empowered to pursue oversight." [1]

As you are aware, LIPA entered into a power purchase agreement with then Deepwater Wind South Fork, LLC (now South Fork Wind, LLC) on February 6, 2017 ("South Fork PPA"). The South Fork PPA had received approval from New York Office of the State Comptroller ("NYOSC") on March 29, 2017. NYOSC valued the South Fork PPA at $1,624,738,893 (contract number: C000883). Also, LIPA and South Fork Wind entered into an (undisclosed) amendment to the South Fork PPA for expanded capacity in or around

[1] New York Post, Feb 15, 2021 (https://nypost.com/2021/02/12/democrats-in-rebellion-against-cuomos-nursing-home-coverup/)

September 2020. LIPA refuses to disclose publicly the extent to which the proposed South Fork Wind project has been expanded and the price to be passed on to ratepayers for such expanded capacity. By concealing the amendment to the South Fork PPA, LIPA avoids public scrutiny of its expanded capacity as expressed in the amendment and review pursuant to Public Service Law, Article VII that is currently before the New York State Public Service Commission (case 18-T-0604).

In July 2020, LIPA admitted that it "has never submitted a Power Agreement to the PACB for approval[.]" This is a clear violation of New York's Public Authorities Law,[2] which requires LIPA to receive approval for a power purchase agreement that is "greater than one million dollars and does not involve the day to day operations of the authority."[3] LIPA's failure to obtain PACB approval renders the South Fork PPA and any amendment thereto null.

In 1995, PACB was created as a mechanism to balance LIPA's extensive authority. "LIPA's broad powers were circumscribed by the Legislature through its amendment of section 1020-f of the Public Authorities Law. The PACB was thereby given review power over 'projects' undertaken by LIPA."[4] Evidently, the legislature believed "greater oversight regarding major decisions of the authority will be possible. By using the standards contained in the bill, the [PACB] will provide an independent evaluation of whether proposed actions of the Authority are financially feasible … will result in lower utility costs to customers in the service area, and will not materially adversely affect real property taxes and utility rates outside the LILCO service area."[5]

Had LIPA submitted and received approval from PACB for the South Fork PPA and any amendment(s) thereto, as it is statutorily compelled to do, my life since August of 2017

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[2] Public Authorities Law, Art. 1-A NYS Public Authorities Control Board §§ 50 - 51 and Art. 5 Public Utility Authorities, Title 1-A Long Island Power Authority § 1020

[3] *Id.* § 1020-b (12-a) (iii)

[4] *Suffolk County v Long Is. Power Auth.*, 177 Misc 2d 208, 213-214 [Sup Ct, Nassau County 1998]

[5] Mem of Assembly in Support, 1995 McKinney's Session Laws of NY, at 2199.

would have been far better by a long way than it has been due to LIPA's failure to comply with New York State Law. In essence, I would not have had to do the job that PACB would have had to do had LIPA not illegally circumvented PACB review. Due to LIPA's failure, South Fork Wind has been a constant threat like a Damoclean sword.

My involvement in LIPA's ill-conceived, poorly planned, and illegal offshore wind project dates back to August 2017 when the Wainscott Citizens' Advisory Committee (of which I was a member at the time) asked me to investigate an offshore wind farm proposal by then Deepwater Wind South Fork. Since that time, the matter of South Fork Wind has caused irreparable harm and injury to my community and me. For example, out of the thirty-four lawyers (the vast majority of whom are employed at taxpayers' expense) participating in the New York State Public Service Commission Article VII proceeding (case 18-T-0604), not one lawyer raised the issue of why neither LIPA nor South Fork Wind would disclose the price of energy from South Fork Wind's facility. As you know, I had to commence an Article 78 proceeding[6] to force disclosure of the obscenely high cost of energy from South Fork Wind's 90-megawatt facility (see details on page 8). Also, neither LIPA nor South Fork has disclosed the amendment to the South Fork PPA, including by how much the capacity has been increased and the price of energy from that increase in capacity.

During the Article VII review, I have submitted well over ten thousand pages of testimony and exhibits mainly on issues pertaining to the protection of ratepayers from South Fork Wind's exorbitant prices; the absence of a basis of need for the facility; the wind farm's economic unviability; and, its inability to satisfy the purpose for which it was awarded a power purchase agreement – to reliably provide power to meet peak demand – a failed purpose that LIPA then later expanded upon. These issues would have presented themselves under review by PACB, and I would have been spared the injury of years of stress and having to work late into the night.

LIPA's failure to comply with its statutory obligations to submit to PACB for review and receive approval for the South Fork Wind power purchase agreement and any

[6] *Simon V. Kinsella vs NY Office of the State Comptroller*, Index 904100-19 [Sup Ct, Albany County 2019]

amendment(s) thereto has had a direct, persistent, and adverse effect on my family and me during this past four years.

In the recent matter of *Huntington Town Council Member Eugene Cook vs. Long Island Power Authority, National Grid Generation LLC, Town of Huntington*[7] before New York State Supreme Court Justice Emerson, Defendants' admitted to the following in their Memorandum of Law in Support of Motion to Dismiss (dated July 16, 2020) –

> Since May 1998, LIPA has sought PACB approval in connection with various "projects," as defined under Public Authorities Law § 1020-b (12-a), including financings, real property leases, asset acquisitions and more. See Krinick Aff. at ¶ 11. None have included a request for approval of a Power Agreement [emphasis added]. Indeed, since its inception, LIPA has entered into numerous Power Agreements with developers and power suppliers, all of which have been in excess of $1,000,000. See id. These agreements are part of LIPA's day-to-day obligation to secure safe and affordable electricity for its customers, and, thus, expressly excluded from the "projects" defined under Public Authorities Law § 1020-b (l2-a). Accordingly, LIPA has never submitted a Power Agreement to the PACB for approval, because such approval is not required [emphasis added].

LIPA claims that it never sought approval from PACB for a "Power Agreement" on the grounds that such agreements "are a part of LIPA's day-to-day" obligations and are, therefore, expressly excluded from any requirement to obtain approval from PACB. LIPA's position is contrary to both fact and law.

In fact, the PPA award to South Fork Wind pursuant to Request for Proposals for South Fork Resources ("South Fork RFP") was *neither* issued *nor* administered by LIPA. LIPA did not

[7] *Huntington Town Council Member Eugene Cook vs. Long Island Power Authority, National Grid Generation LLC, Town of Huntington*, Index 604663-20 [Sup Ct, Suffolk County, Com. Div. 2019]

manage the day-to-day operations of the procurement process and its subsequent PPA award. The South Fork RFP was issued by and administered by PSEG Long Island "as agent of and acting on behalf of LIPA[.]"[8]

On June 24, 2015, PSEG Long Island, LLC issued the South Fork RFP that reads –

> On January 1st, 2015, PSEG Long Island assumed responsibility for LIPA's power supply planning, and its affiliate provides certain services, such as purchasing power and fuel procurement, to LIPA related to these responsibilities. [The RFP continues,] PSEG Long Island and Servco (collectively referred to as "PSEG Long Island" or "PSEG LI"), as agent of and acting on behalf of LIPA per the A&R OSA, will administer this RFP on behalf of LIPA.[9]

The South Fork RFP expressly assigns responsibility for the day-to-day operations of LIPA's "power supply planning … such as purchasing power and fuel procurement" to PSEG Long Island and includes the administration of the South Fork RFP.

The South Fork PPA, likewise, expressly states that PSEG Long Island, *not* LIPA, is "to operate and manage [LIPA's] transmission and distribution system and other utility business functions, including [LIPA's] power supply planning … such as purchasing power and fuel procurement[.]" [10] The South Fork PPA reads as follows –

> WHEREAS, pursuant to the Amended and Restated Operation Services Agreement ("A&R OSA") dated December 31, 2013, … PSEG Long Island LLC through its operating subsidiary, Long Island Electric Utility Servco ("Servco"), assumed the responsibility as [LIPA's] service provider, <u>to</u> <u>operate and manage</u> [LIPA's] transmission and distribution system and other utility business functions, including [LIPA's] power supply planning, and Servco's

[8] Request for Proposals for South Fork Resources ("South Fork RFP") issued June 24, 2015 by PSEG Long Island, LLC (at p. 1).
[9] *Ibid*
[10] Power Purchase Agreement ("South Fork PPA") between Long Island Power Authority ("LIPA") then Deepwater Wind South Fork, LLC (now South Fork Wind, LLC) dated February 6, 2017 (at p. 1).

> affiliate provides certain services, such as purchasing power and fuel procurement, to [LIPA] related to these responsibilities[.][11]

In law, specifically in the matter of *AEP Resources Service Company v Long Island Power Authority, et al.,*[12] concerning an award of a contract regarding a similar project to that proposed by South Fork Wind, "an off-island electrical transmission system,"[13] Supreme Court Justice Winslow *rejected* LIPA's claim and ruled *against* LIPA making it clear that the award "is not something LIPA does day-to-day nor does it constitute part of such day-to-day operations of LIPA so as to be excluded from the statutory definition of 'project' and thus be exempt from PACB review. Were LIPA's interpretation of Public Authorities Law § 1020-b accurate, then few, if any, contracts would be reviewable by the PACB, clearly an unintended result."[14] Further, the court ordered LIPA to "submit all agreements arising out of the RFP to the PACB[.]"[15]

Justice Winslow's ruling (above) sits comfortably with an earlier ruling by Justice Winick in the matter of *Suffolk County v Long Is. Power Auth.*[16] In this case, LIPA applied to PACB for its approval of a project that required, *inter alia*, LILCO to enter into three separate agreements with LILCO affiliates or subsidiaries, one of which was a power supply agreement whereby a LILCO affiliate would sell electric power to LIPA. On July 16, 1997, PACB approved the project as a whole, including the power supply agreement that LIPA properly ratified subsequently, and the court agreed "that LIPA was required to apply to the PACB for approval [and that this] is not disputed."[17] At the time, LIPA did not dispute that it was statutorily compelled to seek approval from PACB for either the project as a whole or the power supply agreement in part.

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[11] *Ibid*
[12] *AEP Resources Serv. Co. v Long Island Power Auth., et al*, 179 Misc 2d 639 [Sup Ct, Nassau County 1999]
[13] *Id.* (at p. 1)
[14] Supreme Court Justice opinion, *AEP Resources Serv. Co. v Long Is. Power Auth., et al,* 179 Misc 2d 639 [Sup Ct, Nassau County 1999]
[15] *Id.* (at p. 4)
[16] *Suffolk County v Long Is. Power Auth.*, 177 Misc 2d 208 [Sup Ct, Nassau County 1998]
[17] *Ibid*

Accordingly, there is no basis in fact or in law that supports LIPA continuing with the South Fork Wind project; one that is based on an illegal granting of a power purchase agreement and amendment(s) thereto that had not received statutorily mandated approval from PACB. Pursuant to Section 1020-f of the LIPA Act, LIPA "shall not undertake any project without the approval of the public authorities control board [PACB]" and, therefore, LIPA's actions are *ultra vires* rendering the South Fork PPA illegal. It is well established that the "general rule of law is that no right of action can spring out of an illegal contract."[18] Since the South Fork PPA is an illegal contract, any amendment thereto would be null.

The importance of PACB oversight is clearly evident in the instant matter of the South Fork PPA and any amendment(s) thereto. Pursuant to Section 1020-f (aa), which begins with the words: "Notwithstanding any other provision of law to the contrary" – LIPA "shall not undertake any project without the approval of" PACB.

Had LIPA fulfilled its statutory obligations and submitted to PACB the proposed South Fork PPA and any amendment(s) thereto, PACB would have had the opportunity to review, *inter alia*, the project's financial feasibility and whether or not the "project is anticipated to result generally in lower utility rates in the service area[.]"[19] LIPA's failure to comply with New York State Law denied PACB of that opportunity.

The LIPA Act, Section 1020-f (r) may grant LIPA the power "[t]o enter into agreements to purchase power from … any private entity, or any other available source at such price or prices as may be negotiated" but such power is subject to PACB approval and it is also limited to the extent that such power is "necessary or convenient to carry out the purposes and provisions of this title" including subsection (r). LIPA does *not* have authority to enter into a power purchase agreement that is contrary to the "purposes and provisions" of the LIPA Act, and PACB review

[18] *Carmine v Murphy*, 285 NY 413, 414 [1941]
[19] Long Island Power Authority Act § 1020-f (aa)

may impose conditions, as it often has done in the past, to address issues related to the South Fork PPA and any amendment(s) thereto.

The purposes and provisions of the LIPA Act are articulated within Section 1020-a of the act which reads (in part) as follows –

> "[S]uch an authority will provide safe and adequate service at rates which will be lower than the rates which would otherwise result and will facilitate the shifting of investment into more beneficial energy demand/energy supply management alternatives, realizing savings for the ratepayers and taxpayers in the service area … Moreover, in such circumstances the replacement of such investor owned utilities by such an authority will result in an improved system and reduction of future costs and a safer, more efficient, reliable and economical supply of electric energy."

Furthermore, in the Matter of *Citizens For An Orderly Energy Policy v Cuomo* "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".[20]

PACB review would have likely arrived at the unavoidable conclusion that the legislative findings and declarations appear to be written with the view of expressly prohibiting an "investor owned" facility from charging obscenely high rates such as those proposed by South Fork Wind; but we will never know unless LIPA, now, submits the amendment to the South Fork PPA to PACB for review, and, perhaps, we can all avoid South Fork Wind taking LIPA and ratepayers for a ride in the opposite direction to that intended by New York State legislators.

On March 29, 2017, the New York Office of the State Comptroller ("NYOSC") valued the South Fork PPA at $1,624,738,893 based on total projected energy deliveries throughout the duration of the contract term (20 years) of 7,432,080 MWh. The price that will be passed onto

[20] *Citizens For An Orderly Energy Policy v Cuomo* (78 NY2d 398, 414)

ratepayers for the South Fork PPA, therefore, is $218.61/MWh. On October 23, 2019, Ørsted A/S announced a power purchase agreement for Sunrise Wind with a price of only $80.64/MWh. If the same amount of energy (i.e. 7,432,080 MWh) was purchased from Sunrise Wind instead of South Fork Wind, it would cost only $599,322,931, which is $1,025,415,958 less expensive.

Astonishingly, the NYOSC approved a contract pursuant to a non-competitive opaque procurement process where the company administering the procurement, PSEG Long Island, awarded the PPA to its (undisclosed) New-Jersey-based business partner, Deepwater Wind where the contract award is more than two-and-a-half-times more expensive ($1.025 billion) than the same amount of renewable energy from an offshore lease area (Sunrise Wind lease area OSC-A 0487) only three miles away from the South Fork Wind lease (OSC-A 0517). This situation is offensive to all ratepayers, taxpayers and law-abiding residents, and the risk of such a situation is precisely what PACB review is designed to mitigate.

Accordingly, this letter constitutes a demand that LIPA comply with all statutory provisions pursuant to the Long Island Power Authority Act that compels LIPA to submit to the Public Authorities Control Board the amendment to the power purchase agreement between it and South Fork Wind, LLC for approval, immediately.

I hope that you and your family are well during this difficult time.

Sincerely yours,

Si Kinsella

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