

VIA ELECTRONIC MAIL TO: Si@Wainscott.Life

January 22, 2021

Mr. Simon V. Kinsella
PO Box 792,
Wainscott, NY 11975

Dear Mr. Kinsella,

On behalf of LIPA's Records Access Office, and in response to your FOIL of August 24, 2020 regarding Deepwater Wind (DWW) and your January 11, 2021 letter to LIPA CEO Thomas Falcone proffered as an appeal from a "constructive denial" of said FOIL, LIPA provides the following:

The current FOIL constitutes the third time you have sought procurement records relative to LIPA's selection, and the New York Office of State Comptroller's (OSC) approval, of a power purchase agreement (PPA) with DWW to meet growing load demand in the so-called South Fork of Long Island while respecting community opposition to major expansion of transmission infrastructure, or the building of fossil-fuel generators that would violate State law requiring a shift to entirely renewable electric generation by the year 2040. LIPA and the OSC have previously provided to you records pursuant to your earlier FOILs while at the same time withholding others pursuant to well-defined trade secret privileges under FOIL.¹ Our disclosures and decisions to withhold have been upheld to date by administrative appeal and in one judicial ruling in response to a complaint you filed in State Supreme Court in Albany County.

On August 24, 2020, you filed the instant FOIL for many of same or similar procurement records. This third FOIL coincided with your filing of seemingly identical discovery demands upon PSEG Long Island as an intervenor-party in Application of Deepwater Wind South Fork, LLC for a Certificate of Environmental Compatibility and Public Need for the Construction, (hereafter Application of DWW), Case No. 18-T-0604, before the Department of Public Service (DPS).

Over many weeks, PSEG Long Island and LIPA have sought to respond to your demands in the so-called Article VII matter notwithstanding that procurement of DWW's generation services is legally irrelevant in that matter. To avoid duplication of effort and waste of LIPA customer resources, certain records were provided to you in the Article

¹ Public Officers Law §87(2)(d).

VII matter, while others were withheld. In four separate decisions, the ALJ in Application of DWW denied your motions to compel further disclosures.²

Notwithstanding voluntary, good-faith accommodations provided you by PSEG Long Island, litigation of certain items and demands for rulings by the ALJ, necessitated extensive effort by LIPA's Records Access Office to evaluate the body of disclosed records and continuously re-assess the record in that proceeding to ensure that while the broader objectives of FOIL would be fulfilled, the privileges afforded under FOIL were also lawfully defended.

With your Article VII discovery demands now apparently resolved by repeated judicial rejection of your claims, LIPA's Records Access Office is finally able to evaluate what has been provided to you in Application of DWW, what, if anything, remains outstanding in your duplicative FOIL request, and as to the latter whether given the broader availability of records under FOIL, there remain any responsive records left that may not be privileged.

Further, LIPA has sought to meet its legal obligation under FOIL by re-assessing whether previous privilege claims remained well-founded given numerous voluntary accommodations provided to you in Application of DWW. The passage of time, enormous changes in the offshore wind generation market, as well as regulatory and statutory changes since 2017 required LIPA to re-evaluate and judicially affirmed claims of trade secret privileges under FOIL. Insofar as enclosed records previously withheld are now produced, this constitutes LIPA's continued effort to comply with FOIL while at the same time confirming that renewable generation and services through a contract with DWW was procured in a fair and competitive manner, consistent with State Finance Law, approved by OSC pursuant to a "best value" standard³ for the citizens of New York State and 1.1 million customers of LIPA.

² The following generally sets forth the ALJ's reasoning for the denials under Article VII:

The Commission's rules provide that parties shall fully disclose to each other, upon request, all information (including data, records, objects, and documents) relevant and material to a proceeding in which they are participating and any information likely to lead to such information. Mr. Kinsella's interrogatory seeks information specific to the administration of the 2015 RFP, arguing that this information affects the price agreed to in the PPA between Deepwater and PSEG/LIPA. Both the 2015 RFP and the resulting PPA are beyond the scope of this Article VII proceeding. As noted in Mr. Kinsella's motion, "the 2015 RFP is a final contract and has received all necessary approvals under state law." Therefore, the information Mr. Kinsella is requesting regarding non-winning submissions to the 2015 RFP are not relevant to the findings and determinations required by PSL §126, nor are they likely to lead to such information. The motion is denied.

Id., Ruling on Motion to Compel Production at 4 (October 27, 2020) (internal footnotes omitted).

³ See State Finance Law §163.

Records not provided herein have either been previously disclosed or are publicly available to you elsewhere.

With respect to a copy of DWW's original proposal in response to the South Fork RFP, as you are aware, a 40MW amendment to the original 90MW PPA, remains an active, subject to FOIL's privileges applicable to imminent procurements.⁴ LIPA is in the process of requesting DWW to review a proposed, redacted copy of said proposal to be produced pursuant to this FOIL to ensure it is consistent with existing agreements by the parties regarding continued, legally-grounded, concerns of commercial-sensitivity to a private vendor's competitive interests in the marketplace.

Since you have already filed an appeal of this FOIL based on a theory of "constructive denial," LIPA will forego repeating a notice of your appeal rights. Meanwhile, your administrative appeal will be held in abeyance for 20 business days from the date of this response. Excluding DWW's proposal document referenced above, LIPA requests that you either acknowledge that the enclosed records, in light of additional material provided to you in connection in Application of DWW, satisfy your FOIL requests, or that you wish to proceed with an administrative review this matter by LIPA's Chief Executive Officer. If LIPA receives no further correspondence from you within the timeframe set forth above, it will regard this matter as closed.

Sincerely,



James Miskiewicz

⁴ Public Officers Law §87(2)(c).