

**SUPREME COURT OF THE STATE OF NEW YORK  
APPELLATE DIVISION : Second DEPARTMENT**

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Simon V. Kinsella, Petitioner

**- against -**

New York State Public Service Commission  
and New York State Department of Public  
Service, Respondents

**Appellate Division  
Case/Docket No. 2021-06572**

**Originating Court  
No.**

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**NOTIFICATION OF CASE NUMBER AND OTHER INFORMATION  
IN E-FILED ORIGINAL PROCEEDING  
(22 NYCRR 1245.3[c])**

PLEASE TAKE NOTICE that counsel for the petitioner, or a self-represented petitioner, in the matter captioned above:

- a special proceeding initiated in this court
- an action submitted to the court pursuant to CPLR 3222

has filed a notice of petition or other initiating documents by electronic filing method through the New York State Courts Electronic Filing System ("NYSCEF"). This notification is being served as required by 22 NYCRR 1245.3(c)

The case number for this matter is 2021-06572 .

**Parties represented by an attorney.** Within twenty (20) days of service of this notification, counsel to all other parties in this matter shall, as required by 22 NYCRR 1245.3(d):

- (a) (i) register or confirm registration as authorized e-filing users with NYSCEF; and
- (ii) enter electronically in NYSCEF such contact information and additional information as the court may require;

or

- (b) if an attorney exempt from e-filing, serve upon all parties and file with the court by hard copy service method, an attorney exemption certification.

**Parties not represented by an attorney.** Unrepresented litigants are exempt from e-filing, but may voluntarily participate in e-filing in this matter by:

- (a) registering as an authorized e-filing user in this matter with the NYSCEF site and entering case and contact information about the particular cause; and
- (b) recording his or her consent electronically in the manner provided at the NYSCEF

site; and

(c) serving and filing documents by electronic means as provided under these rules.

Note: An unrepresented litigant who has consented to participate voluntarily in e-filing in this matter may withdraw such consent at any time by filing and serving on all parties a notice of intent to cease e-filing (AD-EF-06).

**Important: Under 22 NYCRR 1245.5(c), upon the expiration of the 20 day registration and notice period, any party, other than persons exempt from e-filing, who fails to meet his or her obligation to register and enter information will be deemed served with any document electronically filed in this matter.**

For information on how to participate in e-filing, unrepresented litigants should contact the appropriate clerk in the court where the matter was filed or visit [www.nycourts.gov/efile-unrepresented](http://www.nycourts.gov/efile-unrepresented). Unrepresented litigants also are encouraged to visit [www.nycourthelp.gov](http://www.nycourthelp.gov).

For additional information about electronic filing and to create a NYSCEF account, visit the NYSCEF website at [www.nycourts.gov/efile](http://www.nycourts.gov/efile) or contact the NYSCEF Resource Center (phone: 646-386-3033; e-mail: [efile@nycourts.gov](mailto:efile@nycourts.gov)).

Dated: September 9, 2021

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To: Public Service Commission

Department of Public Service

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SUPREME COURT OF THE STATE OF NEW YORK  
APPELLATE DIVISION: SECOND DEPARTMENT

-----X  
SIMON V. KINSELLA,

Petitioner,

NOTICE PETITION

- against-

App. Div. Docket No.:

NEW YORK STATE PUBLIC SERVICE COMMISSION  
and NEW YORK STATE DEPARTMENT  
OF PUBLIC SERVICE,

Respondents.

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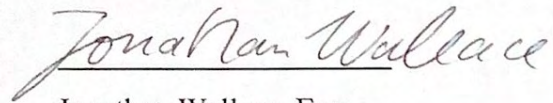
PLEASE TAKE NOTICE, that upon the annexed Verified Petition and the exhibits, appendices and documents incorporated by reference annexed thereto, Petitioner will move this court at the Appellate Division, Second Department Courthouse, 45 Monroe Place, Brooklyn, New York, on the 25th day of October, 2021 at 10 a.m. of that day, or as soon thereafter as counsel may be heard, for an order pursuant to Public Service Law Sections 128 and 129, and Sections 7803(1), 7803(3), 7806 of the New York Civil Practice Law and Rules (“CPLR”):

- A. Adjudging and declaring that New York State Public Service Commission (hereinafter “Commission” or “PSC”) Order Adopting Joint Proposal (in case 18-T-0604) dated on March 18, 2021 (hereinafter “Order”) was issued in violation of lawful procedure, affected by an error of law, arbitrary and capricious, and an abuse of discretion;
- B. Annuling and vacating the Order of March 18, 2021 in its entirety;
- C. Adjudging and declaring that the granting by the Commission of a Certificate of Environmental Compatibility and Public Need (hereinafter “Certificate”) to South Fork Wind LLC (in case 18-T-0604) was granted in violation of lawful procedure, affected by an error of law, arbitrary and capricious, and an abuse of discretion;
- D. Annuling the issuance of the Certificate in its entirety;
- E. In the alternative, adjudging and declaring that the Order Denying Petitions for Rehearing dated August 12, 2021 (in case 18-T-0604), was issued by the Commission in violation of lawful procedure, affected by an error of law, arbitrary and capricious, and an abuse of discretion;
- F. Annuling and vacating the Order Denying Petitions for Rehearing issued on August 12, 2021, in its entirety; and directing the Commission to grant Petitioner’s Motion for Rehearing;
- G. Granting Petitioner’s costs and disbursements of this proceeding; and

H. Granting such other and further relief as the court deems just and proper.

Dated: Amagansett, New York  
September 9, 2021

Respectfully submitted,

A handwritten signature in cursive script that reads "Jonathan Wallace". The signature is written in black ink and is positioned above the typed name and contact information.

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SUPREME COURT OF THE STATE OF NEW YORK  
APPELLATE DIVISION: SECOND DEPARTMENT

-----X

SIMON V. KINSELLA,

Petitioner,

VERIFIED PETITION

- against-

App. Div. Docket No.:

NEW YORK STATE PUBLIC SERVICE COMMISSION  
and NEW YORK STATE DEPARTMENT  
OF PUBLIC SERVICE,

Respondents.

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Petitioner Simon V. Kinsella, by his attorneys, Ratschko Wallace PLLC, for his  
Verified Petition herein, alleges as follows:

1) 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 ([DMM: item 271, Order Adopting Joint Proposal, p 1](#)) to South Fork Wind LLC.

- 2) This action is brought in the Appellate Division as an original proceeding pursuant to Public Service Law, Sections 128 and 129.
- 3) 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.
- 4) The letter and affidavit of service required by Public Service Law, Section 128 are attached hereto as Exhibit B.

#### **CORPORATE STRUCTURE AND BACKGROUND**

- 5) 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.
- 6) 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”).
- 7) On September 14, 2018, then Deepwater Wind South Fork LLC, filed with New York State Public Service Commission (hereinafter the “Commission” or

“PSC”) an Article VII application for a Certificate of Environmental Compatibility and Public Need (hereinafter “Certificate”).

8) 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.

9) 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).

10) 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

11) 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.]”

12) 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 (26 $\frac{1}{3}$  feet long by 9 $\frac{1}{3}$  feet wide by 11 $\frac{1}{3}$  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.

13) 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.<sup>1</sup>

14) The proposed Cable Route A runs between two state-registered Superfund<sup>2</sup> sites – East Hampton Airport (hereinafter “Airport”) and Wainscott Sand and Gravel (hereinafter “Wainscott S&G”)<sup>3</sup> 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](#)).

15) 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.

16) The US Environmental Protection Agency (hereinafter “EPA”) defines a sole source aquifer to be an underground water source that supplies at least fifty percent (50%) 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. 120, Page 26611, June 21, 1978 - Sole Source Aquifer Determination for Aquifers Underlying Nassau and Suffolk Counties).

17) 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.<sup>4</sup>

18) On September 14, 2018, SFW filed with the New York State Public Service Commission (hereinafter the “Commission”) a Hazardous Materials Desktop Analysis dated March 30, 2018. 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

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<sup>4</sup> 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.”<sup>5</sup>

19) 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.

20) “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.

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

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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](#))

22) 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.<sup>6</sup>

23) 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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<sup>6</sup> 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](#)).

24) 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.

25) When SFW filed its Hazardous Materials Desktop Analysis with the Commission nearly a year later (on September 14, 2018), 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.

26) On January 20, 2020, detailed information on PFAS contamination was provided to the Commission, the Applicant, and parties to proceeding 18-T-0604 in Information Requests SK #3 through to #10 (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 #10 at [DMM: item 158, DWSF Resp. to IR Kinsella-1-10](#).

27) 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.

28) 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.

29) 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 500 feet of SFW’s proposed corridor, contains PFOA contamination at a concentration level (of 160 ppt) that is sixteen times the MCL (of 10 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).

30) 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 150 feet downgradient of SFW's proposed construction corridor, contains PFOS contamination at a concentration level (of 1,010 ppt) that is one hundred times the MCL (of 10 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).

31) 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).

32) 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 150 feet of SFW's proposed construction corridor], indicating a potential off-site source [at East Hampton Airport]." <sup>7</sup> When asked: "where is the most [...] likely off-site source of that

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<sup>7</sup> 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.”<sup>8</sup>

33) 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.

34) 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.

35) 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.

36) During cross-examination, when asked: “Where does South Fork Wind think that contamination came from”<sup>9</sup> referring to wells at Wainscott S&G,<sup>10</sup> 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]"<sup>11</sup> 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."<sup>12</sup>

37) 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)[.]"<sup>13</sup> 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.

38) If, as Mr. Holden claims, "PFOS is ubiquitous in the environment[.]"<sup>14</sup> 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 (750 ppt) is three-times the average level of PFOS contamination (261 ppt) detected at fourteen other wells.<sup>15</sup> 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.

39) The Commission has not required SFW to conduct any site-specific tests for probable PFAS contamination. There are no tests results whatsoever for PFAS contamination of soil or groundwater taken from the SFW's proposed construction corridor, not one.

40) 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.

41) 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

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<sup>15</sup> 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])*

42) 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.”<sup>16</sup>

43) 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

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<sup>16</sup> 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).

44) The well locations are listed in Petitioner Kinsella’s Motion to Reopen the Record (at pp. 9-10)<sup>17</sup> ([DMM: item 240, Motion, p 2](#)) are from photographs of survey markings painted on local roads and streets in Wainscott on or around January 10, 2021. The Commission had not considered any soil or groundwater test results when determining environmental compatibility under Public Service Law, Article VII.

45) 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.<sup>18</sup>

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

47) In the Matter of *Entergy Nuclear Power Marketing, LLC v NY State Public Service Commission*<sup>19</sup> (hereinafter “*Entergy Nuclear v PSC*”), the “record also

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<sup>17</sup> *Ibid.*

<sup>18</sup> 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>)

<sup>19</sup> 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.”

1) 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](#)).

48) 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.

49) 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*.

50) “[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.”<sup>20</sup>

51) 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[.]”<sup>21</sup>

52) 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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<sup>20</sup> *Charles A Field Delivery Serv .. Inc.*, 66 N.Y.2d 516, 520 (1985).

<sup>21</sup> *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.

53) 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.”<sup>22</sup>

54) The evidentiary record in this proceeding remains insufficient and incomplete.<sup>23</sup>

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

<sup>23</sup> 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](#)).



56) 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].”<sup>24</sup> 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.

57) 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

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<sup>24</sup> 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.

58) 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 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; and
- d) *Alternative* reasoning by SFW for the presents of PFAS contamination that did not stand up to scrutiny, contradicted its own evidence, and lacked merit;
- e) Delaying until *after* the record had closed before SFW conducted its Environmental Surveys & Site Evaluation of the Cable Route A cable; 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.

59) 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).

60) 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).

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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)*

61) 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.]”

62) In January 2017, LIPA and PSEG Long Is., acting on behalf of LIPA, awarded SFW <sup>25</sup> 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](#)).<sup>26</sup>

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)).

64) 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.

65) On January 25, 2017, the Board of Trustees of LIPA entered into a power purchase agreement with SFW <sup>27</sup> valued at \$1.624 billion,<sup>28</sup> 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**.

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 \$740 million.<sup>29</sup>

SFW's gross profit represents 120% of the estimated cost (\$740 million) or \$885 million (excluding operations and maintenance).

66) On October 28, 2019, LIPA released a South Fork Wind Fact Sheet that reads:

“LIPA will also buy an estimated 90 MW of offshore wind from the recently announced 1,700 MW of New York State projects.” One of the two projects 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 @ 90 MW” and “Future Offshore Wind Projects: Estimated @ 800+MW[.]”<sup>30</sup> LIPA admits that it plans to buy “90 MW” of offshore wind energy from either Sunrise Wind (880 MW) or Empire Wind (816 MW). Therefore, Sunrise Wind is a viable alternative and technically feasible.

67) The LIPA South Fork Wind Fact Sheet was introduced into the record in Petitioner Kinsella's Testimony Part 2 (submitted October 9, 2020) as Exhibit G.

On November 24, 2020, the presiding Administrative Law Judge struck it from the

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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 ([LIPower.org](http://LIPower.org), [click here](#) or [oswSouthFork.info](http://oswSouthFork.info), [click here](#)).

record along with over ten thousand pages of sworn testimony at the SFW's request.<sup>31</sup>

68) 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.”<sup>32</sup>

The reasons cited by the ALJ are not supported by fact and conclusory, and its decision arbitrary and capricious.

69) 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 control interests of the 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.<sup>33</sup>

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 utilizing 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.

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<sup>33</sup> 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 (~50 miles) 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.<sup>34</sup>

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

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

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.

70) 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.<sup>36</sup> 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

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<sup>36</sup> 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.<sup>37</sup>

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

71) 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.]”<sup>38</sup>

72) 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

(A) Public Interest - total cost to society

73) 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

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<sup>37</sup> 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](#)).

<sup>38</sup> 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).”<sup>39</sup>

74) 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.”<sup>40</sup>

75) 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.”<sup>41</sup> 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

76) “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.”<sup>42</sup> 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).

77) 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.<sup>43</sup>

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

78) 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.]"<sup>44</sup> 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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<sup>43</sup> *Ibid.* See also *Richardson v. Comm'r of N.Y. City Dep't of Soc. Servs.*, 88 N.Y.2d 35 (1996)

<sup>44</sup> 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.<sup>45</sup>

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

79) 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,<sup>46</sup> and to cross-examine witnesses regarding those documents.

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

<sup>46</sup> At the time, South Fork Wind was known as Deepwater Wind South Fork LLC.

80) 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.

81) 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<sup>47</sup> (in part), which includes striking from the record the same exhibits the ALJ then

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<sup>47</sup> Ruling on Motion to Strike Testimony, issued Nov 24, 2020 ([DMM: item 220, Ruling on Motion](#)).

admitted into the record one month later.<sup>48</sup> In the process, the ALJ issued two rulings directly contradicting each other.

82) 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”<sup>49</sup> 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.”<sup>50</sup> 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.”<sup>51</sup> 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[.]”<sup>52</sup>

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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](#)).



83) 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]?”

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].”

84) 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[.]” 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[.]”

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

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

87) 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.

88) 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.

89) 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."<sup>53</sup> The proceeding regulations anticipate a hearing and, specifically, anticipate "cross-examination of a witness' prepared written testimony[.]"<sup>54</sup> While the regulations also allow for a presiding officer to "expedite the orderly conduct of the proceeding,"<sup>55</sup> 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

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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[.]"<sup>56</sup> Parties in this proceeding did *not* waive their rights to cross-examination.

90) The Commission's Procedural Guidelines for Settlement (the "Settlement Guidelines") require that "[p]arties not participating in the settlement must be given the opportunity to participate fully in our proceedings. This includes the opportunity to oppose the settlement by offering evidence in opposition to the proposed settlement and the opportunity to cross-examine proponents of the settlement. For the purpose of opposing the settlement, any party may also develop fully the issues and positions it wishes to advocate, by cross-examination and by introduction of affirmative testimony."<sup>57</sup> 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 Department of Public Service Rules of Procedure.

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

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<sup>56</sup> *Id.* (b) (2)

<sup>57</sup> 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 [...]”<sup>58</sup> 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.<sup>59</sup> The Commission erred in fact and law and acted arbitrarily and capriciously.

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

92) 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)).

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

94) 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 .<sup>[60]</sup>

95) 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.<sup>61</sup> LIPA provided substantial evidence, objectively, 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.

96) 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.

97) 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 not 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.

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

*Entergy Nuclear Power Marketing, LLC v New York State Public Service*

*Commission*<sup>62</sup>

98) 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. The Commission has *not* taken a hard look to *find* the basis of need but has looked the other way.

99) The Commission, citing *Entergy Nuclear Power Marketing, LLC v New York State Public Service Commission* (“*Entergy Nuclear v NYSPSC*”),<sup>63</sup> states that –

Public Service Law §126 does not require the Commission to determine whether the project is economically feasible and

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

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



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

100) 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.”<sup>65</sup> 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. The fixed rates as expressed in the PPA

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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](#)).

between LIPA and SFW will be passed onto ratepayers who *will be subsidizing* the SFW project. SFW proposes charging ratepayers over one billion dollars at almost three times the current market rate for its electrical energy.

101) 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[.]”<sup>66</sup>

#### PSL § 122 and § 126

102) 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.]”<sup>67</sup> Furthermore, “the Applicant has the burden of proving all required statutory findings under Public

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<sup>66</sup> Public Service Law § 126 (1) (a) and (h)

<sup>67</sup> *Id.* § 126 (1) (a)

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

103) 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].”<sup>70</sup>

104) The Commission’s Order drops that the phrase “technology-neutral” because the documents disclosed by LIPA shown that the South Fork RFP was not technology-neutral.

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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](#))

105) 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.

106) 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.]”

107) 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 a procurement process is proven to be fatally flawed.

108) 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.

109) The Commission’s alleged basis of need for the SFW project is conclusory.

110) 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.

111) 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.”<sup>71</sup>

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

112) On January 22, 2021, LIPA Deputy General Counsel James Miskiewicz released documents proving that the South Fork RFP was non-competitive.<sup>72</sup> The internal LIPA records show that when LIPA awarded a PPA to SFW, 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.

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

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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.

114) 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](#)).

115) 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.”

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

117) 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.

118) 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.<sup>73</sup>

119) “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.”<sup>74</sup>

120) 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.”<sup>75</sup>

121) 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.

122) The NY Office of the State Comptroller valued the power purchase agreement between the SFW and LIPA at \$1.625 billion.<sup>76</sup> The cost for the same amount of renewable energy from Sunrise Wind is only \$0.595 billion.<sup>77</sup>

123)	<u>Total Cost for the same Renewable Energy</u>	
	South Fork Wind	\$1,624,738,893
	<u>Sunrise Wind</u>	<u>\$594,566,400</u>
	<b>Waste</b>	<b>\$1,030,172,493</b>

124) 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 [...]”

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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 kilowatt-hour (c/kWh). ([oswSouthFork.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].<sup>78</sup> 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.<sup>79</sup>

125) Within the LIPA disclosures, is an analysis by WESC: Calculation of Effective Forced Outage Rate of Offshore Wind ([SFWF]).<sup>80</sup> 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.”<sup>81</sup>

126) Another report by WESC, referring 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

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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.

127) 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.]”<sup>82</sup>

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].”<sup>83</sup>

128) 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].<sup>84</sup> 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.<sup>85</sup>

129) On September 14, 2018, SFW filed an Article VII application for a Certificate of Environmental Compatibility and Public Need “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”<sup>86</sup> of approximately sixty-six miles in length.<sup>87</sup> 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.

130) 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.<sup>88</sup>

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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](#))

131). 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[.]”<sup>89</sup> But by the time the Applicant commences operations by the end of 2023,<sup>90</sup> the transmission constraints will have been resolved, thereby permitting renewable energy to come from farther western Long Island at half the price (from Sunrise Wind).

132) 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].”<sup>91</sup> The Commission's Order is conclusory, *not* based in fact, lacks any rational basis, is arbitrary and capricious.

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## VIII. The Order

lacks rational basis and substantive discussion

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<sup>89</sup> *Ibid*

<sup>90</sup> Newsday article titled: [South Fork Wind Farm delayed until 2023 \(click here\)](#), October 28, 2020

<sup>91</sup> See [Order Adopting Joint Proposal](#), dated March 18, 2021 (at p. 99) ([DMM: item 271, Order Adopting Joint Proposal, p 1](#))

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

134) 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.

135) 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.

136) 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.

137) 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.

138). 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.

139) SFW’s proposed project does not comply with the long range planning requirements of the 2016 Clean Energy Standard <sup>92</sup> and NYSERDA’s Offshore Wind Policy Options Paper, that “forms part of New York’s Offshore Wind Master Plan (Master Plan), published concurrently” <sup>93</sup> (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, Orsted and Eversource, submitted comments to NYSERDA stating 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.” (see [DMM: item 205, Exhibit 3-6, p. 1](#)).

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<sup>92</sup> 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).

<sup>93</sup> 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](#)).

## A CAUSE OF ACTION

### Public Service Law Sections 128 and 129

140) Respondent Public Service Commission's approval of the Certificate hereunder, and Respondent Department of Public Service's failure to order a rehearing, are not (a) in conformity with the constitution and the laws of the state and the United States; (b) supported by substantial evidence in the record or by information properly considered in the opinion; (c) within the Commission's statutory jurisdiction or authority; (d) made in accordance with procedures set forth in Section 128 or established by rule or regulation of the Commission; and are (e) arbitrary, capricious or an abuse of discretion.

WHEREFORE, Petitioner demands judgment as follows:

- I. 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;
- II. Annuling and vacating the aforementioned Order of March 18, 2021, in its entirety;



III. Adjudging and declaring that the granting by New York State Public Service Commission of a Certificate of Environmental Compatibility and Public Need to SFW (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;

IV. Annuling the issuance of the aforementioned Certificate of Environmental Compatibility and Public Need in its entirety;

V. In the alternative, Adjudging and declaring that the New York State Public Service Commission Order Denying a Rehearing of this matter, issued August 12, 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; annulling and vacating the aforementioned Order of August 12, 2021, in its entirety; and directing the Public Service Commission to grant Petitioner's Motion for Rehearing;

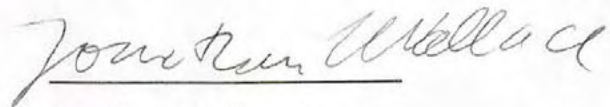
VI. Granting Petitioner the costs and disbursements of this action/proceeding; and

VII. Granting such other and further relief as the court deems just and proper.

Dated: Amagansett, New York

September 9, 2021

Respectfully submitted,

A handwritten signature in cursive script that reads "Jonathan Wallace". The signature is written in dark ink and is positioned above a horizontal line.

Jonathan Wallace, Esq.

Ratschko Wallace PLLC

11 Broadway Suite 715

New York, NY 10004

Tel: (917)359-6234

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SUPREME COURT OF THE STATE OF NEW YORK  
APPELLATE DIVISION SECOND DEPARTMENT

-----X  
SIMON V. KINSELLA,

Petitioner,

Index:

against

VERIFICATION

NEW YORK STATE PUBLIC  
SERVICE COMMISSION and NEW  
YORK STATE DEPARTMENT OF  
PUBLIC SERVICE

Respondent.

-----X

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

Simon V. Kinsella, being duly sworn, deposes and says:

I am the Petitioner in this proceeding. I have read the foregoing Verified Petition and know the contents thereof; and the same is true to my own knowledge, except as to those matters therein stated to be alleged on information and belief, and to those matters I believe them to be true.

*Simon V. Kinsella*  
Simon V. Kinsella



Sworn to before me this 8<sup>th</sup> day of  
September 2021.  
*Laura Phung*

STATE OF NEW YORK  
PUBLIC SERVICE COMMISSION

At a session of the Public Service  
Commission held in the City of  
Albany on August 12, 2021

COMMISSIONERS PRESENT:

John B. Howard, Chair  
Diane X. Burman  
James S. Alesi  
Tracey A. Edwards  
David J. Valesky  
John B. Maggiore  
Rory M. Christian

CASE 18-T-0604 - Application of Deepwater South Fork, LLC for a Certificate of Environmental Compatibility and Public Need for the Construction of Approximately 3.5 Miles of Submarine Export Cable from the New York State Territorial Waters Boundary to the South Shore of the Town of East Hampton in Suffolk County and Approximately 4.1 Miles of Terrestrial Export Cable from the South Shore of the Town of East Hampton to an Interconnection Facility with an Interconnection Cable Connecting to the Existing East Hampton Substation in the Town of East Hampton, Suffolk County.

ORDER DENYING PETITIONS FOR REHEARING

(Issued and Effective August 12, 2021)

BY THE COMMISSION:

INTRODUCTION

On March 18, 2021, the Public Service Commission (Commission) issued an Order Adopting Joint Proposal

(Certificate Order) in which it granted Deepwater Wind South Fork, LLC (South Fork or the Certificate Holder) a Certificate of Environmental Compatibility and Public Need (Certificate) pursuant to Article VII of the Public Service Law (PSL) for the South Fork Export Cable (SFEC) project (Project).<sup>1</sup> On April 16, 2021, pursuant to PSL §§22 and 128(1), Citizens for the Preservation of Wainscott, Inc. (CPW) and individual Simon V. Kinsella (together, Petitioners) filed Petitions for Rehearing.<sup>2</sup> Responses to the Petitions for Rehearing were filed by South Fork Wind LLC, PSEG Long Island LLC, the Department of Public Service (DPS), the Department of Environmental Conservation, the Trustees of the Freeholders and Commonalty of the Town of East Hampton, and Win With Wind, all signatories of the Joint Proposal adopted in the Certificate Order. This Order denies the Petitions for Rehearing based on their failure to identify any errors of law or fact, or any new circumstances that might warrant a different determination as required by the Commission's regulations, 16 NYCRR §3.7(b).

#### DISCUSSION

Under New York Public Service Law (PSL) §22 and 16 NYCRR §3.7(a), any interested person may apply for rehearing of a Commission order within 30 days after service of such order.

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<sup>1</sup> Case 18-T-0604, Deepwater Wind South Fork, LLC - Article VII Transmission Siting, Order Adopting Joint Proposal (issued March 18, 2021).

<sup>2</sup> Mr. Kinsella's petition also included a request for a stay pending rehearing. The request is rendered moot by issuance of this Order; however, it should be noted that Rule 3.7(d) specifies that a petition for rehearing does not stay or excuse compliance with a Commission Order. Such a stay will not be granted absent a showing of a likelihood of success on the merits, irreparable harm in the absence of a stay or injunction, and a balance of the equities in favor of the party seeking a stay, none of which were demonstrated here.

For the Commission to consider a petition seeking rehearing, the petition must, under 16 NYCRR §3.7(b), establish that the Commission committed an error of law or fact or that new circumstances warrant a different determination by separately identifying and explaining each alleged error or new circumstance.

Both petitions argue that the Certificate Order was based on errors of fact or law; i.e., neither raises any new circumstances. However, rather than identify any such error of fact or law, the Petitions for Rehearing simply reiterate Petitioners' arguments made in the context of the case and in opposition to the Joint Proposal, all of which were appropriately addressed by the Commission in the underlying Certificate Order. Mere disagreement with the Certificate Order does not create an error of fact or law.

To be clear, the Certificate Order acknowledges each of the points raised by Petitioners, including their primary argument that the Commission should have rejected the project route identified in the Joint Proposal in lieu of the alternative route proposed in the case by the Petitioners. The Commission made clear that it was not persuaded that the alternative route was preferable to the route included in the Joint Proposal and provided a record basis for that determination.<sup>3</sup> While the petitions enumerate what Petitioners consider to be the benefits of their proposed alternative route, they fail to acknowledge any of the contrary evidence in the record raised by the supporting parties as to the negative impacts attached to that route. Moreover, because of the lack of any evidence in the record that the Petitioners provided adequate notice to the persons that would be affected by the

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<sup>3</sup> Certificate Order, p. 103.

alternative route, as DPS explains, the Commission would have likely made an error of law had it required the Joint Proposal to be modified to require the Project to utilize Petitioners' proposed alternative route, instead of the route agreed to in the Joint Proposal.<sup>4</sup>

The Commission also rejects Petitioners' argument that the Certificate Order ignored the existence of poly-/perfluoroalkyl substances (PFAS) existing along the Project route supported as part of the Joint Proposal. It is notable that, in making this argument, Petitioners mischaracterize the aspect of the Certificate Order that examined issues related to PFAS. It is not that the Commission ignored the existence of PFAS contamination, and indeed the Certificate Order notes that the Administrative Law Judge assigned to the case specifically allowed the Petitioners' evidence regarding PFAS into the record.<sup>5</sup> Instead, the Commission determined that such evidence was not sufficiently convincing to demonstrate that the protections provided in the Joint Proposal were inadequate and would not minimize or avoid environmental impacts to the maximum extent practicable. That Petitioners disagree with the Commission's determination does not make its determination an error of law or fact.

Indeed, Petitioners seem to argue that the existence of PFAS, and its hazardous characteristics, are enough to establish that the Project's environmental impacts were not

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<sup>4</sup> See DPS Response to Petitions for Rehearing, pp. 4-5, citing PSL §§126 and 122. See also South Fork's Response to Petitions for Rehearing, pp. 14-16 (discussing the absence of record evidence as to the existence of property rights for the Petitioners' proposed alternative).

<sup>5</sup> Certificate Order, p. 9. See also CPW Petition for Rehearing, p. 6 (acknowledging that "[t]here is extensive evidence in the record documenting the detrimental impacts to environmental and human health from exposure to PFAS.")

minimized to the maximum extent practicable. However, Petitioners do not acknowledge, and therefore do not address any shortcomings, of the Joint Proposal's measures for handling PFAS contamination during project construction and operation.<sup>6</sup>

Similarly, the petitions make unsupported claims that the Commission made an error of law or fact in finding that the Project will comply with State and local laws. The Certificate Order first identifies the record evidence supporting the Commission's findings regarding this issue on pages 78 and 79 of the order. Later in the order, the Commission again analyzed the record evidence regarding compliance with State and local laws to further support its finding in this regard. The Commission also evaluated the record evidence to support its determination to waive certain local requirements on the grounds that they would be unreasonably restrictive and, in so ruling, expressly rejected CPW's argument that portions of the Town of East Hampton's Building Code related to fire protections are applicable.<sup>7</sup> To the extent that Petitioners' claim the Commission made an error of law in making this determination, we agree with South Fork Wind that the Building Code is applicable only to new buildings or structures, and existing structures only where specifically referenced by the Building Code, and that the Project does not fall into any of the categories that would render it subject to the code.<sup>8</sup>

We have reviewed all of the Petitioners' claims and find them to be without merit. Those claims do not raise any errors of law or fact, nor do they present new circumstances warranting a different result, and so rehearing is denied.

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<sup>6</sup> See DPS Response to Petitions for Rehearing, pp. 7-8.

<sup>7</sup> Certificate Order, p. 105.

<sup>8</sup> South Fork Response to Petitions for Rehearing, p. 25.



The Commission orders:

1. The Petitions for Rehearing filed by the Citizens for the Preservation of Wainscott, Inc. (CPW) and individual Simon V. Kinsella are denied.

2. This proceeding is continued.

By the Commission,

(SIGNED)

MICHELLE L. PHILLIPS  
Secretary



RATSKOWALLACE<sub>PLLC</sub>

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New York, New York 10004  
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[jwallace@ratschko.com](mailto:jwallace@ratschko.com)

September 8, 2021

VIA USPS AND EMAIL  
NEW YORK STATE  
PUBLIC SERVICE COMMISSION  
NEW YORK STATE DEPARTMENT OF  
PUBLIC SERVICE  
3 Empire State Plaza  
Albany, NY 12223

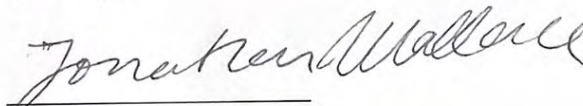
Re: Kinsella v. PSC et al CASE 18-T-0604

To the Public Service Commission and the Department of Public Service of the State of New York:

Please take notice that Simon Kinsella, pursuant to Public Service Law Section 128, hereby demands you file with the Appellate Division, 2<sup>nd</sup> Department, a copy of the written transcript of the record of the proceeding denying the petition for rehearing in the above cited matter and a copy of your order and opinion.

As soon as we receive a docket number from the Appellate Division upon filing of Simon Kinsella's petition under Public Service Law Section 128, we will notify you of that number.

Sincerely,

  
Jonathan Wallace, Esq.

SUPREME COURT OF THE STATE OF NEW YORK  
APPELLATE DIVISION: SECOND DEPARTMENT

-----X  
SIMON V. KINSELLA,

Petitioner,

AFFIDAVIT OF SERVICE

- against -

App. Div. Docket No.:

NEW YORK STATE PUBLIC  
SERVICE COMMISSION and NEW  
YORK STATE DEPARTMENT OF  
PUBLIC SERVICE

Respondents.

-----X

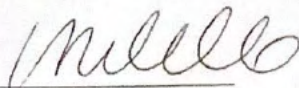
IMKE RATSCHKO, an attorney admitted to practice in the courts of the  
State of New York, affirms the following to be true under penalty of perjury:

I am counsel to the Petitioner herein. On September 8, 2021, I mailed the  
within demand pursuant to Public Service Law Section 128 by personally  
enclosing the same in a First Class mail post-paid sealed envelope properly  
addressed to:

Public Service Commission  
Empire State Plaza  
Agency Building 3  
Albany NY 12223

Department of Public Service  
Empire State Plaza  
Agency Building 3  
Albany NY 12223

New York, New York,  
September 9, 2021



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Imke Ratschko  
Ratschko Wallace PLLC  
11 Broadway Suite 715  
New York, NY 10004

# Supreme Court of the State of New York

## Appellate Division: Second Judicial Department

Informational Statement (Pursuant to 22 NYCRR 1250.3 [a]) - Civil

**Case Title:** Set forth the title of the case as it appears on the summons, notice of petition or order to show cause by which the matter was or is to be commenced, or as amended.

Simon V. Kinsella , Petitioner

- against -

NEW YORK STATE PUBLIC SERVICE COMMISSION  
and NEW YORK STATE DEPARTMENT  
OF PUBLIC SERVICE , Respondents.

For Court of Original Instance

Date Notice of Appeal Filed

For Appellate Division

**Case Type**

- |  |  |
|--|--|
| <input type="checkbox"/> Civil Action                      | <input checked="" type="checkbox"/> CPLR article 78 Proceeding |
| <input type="checkbox"/> CPLR article 75 Arbitration       | <input type="checkbox"/> Special Proceeding Other              |
| <input type="checkbox"/> Action Commenced under CPLR 214-g | <input type="checkbox"/> Habeas Corpus Proceeding              |

**Filing Type**

- |   |   |
|---|---|
| <input type="checkbox"/> Appeal                       | <input type="checkbox"/> Transferred Proceeding |
| <input type="checkbox"/> Original Proceedings         | <input type="checkbox"/> CPLR Article 78        |
| <input checked="" type="checkbox"/> CPLR Article 78   | <input type="checkbox"/> Executive Law § 298    |
| <input type="checkbox"/> Eminent Domain               | <input type="checkbox"/> CPLR 5704 Review       |
| <input type="checkbox"/> Labor Law 220 or 220-b       |   |
| <input type="checkbox"/> Public Officers Law § 36     |   |
| <input type="checkbox"/> Real Property Tax Law § 1278 |   |

**Nature of Suit:** Check up to three of the following categories which best reflect the nature of the case.

- |  |   |  |   |
|--|---|--|---|
| <input type="checkbox"/> Administrative Review                     | <input type="checkbox"/> Business Relationships | <input type="checkbox"/> Commercial    | <input type="checkbox"/> Contracts                    |
| <input type="checkbox"/> Declaratory Judgment                      | <input type="checkbox"/> Domestic Relations     | <input type="checkbox"/> Election Law  | <input type="checkbox"/> Estate Matters               |
| <input type="checkbox"/> Family Court                              | <input type="checkbox"/> Mortgage Foreclosure   | <input type="checkbox"/> Miscellaneous | <input type="checkbox"/> Prisoner Discipline & Parole |
| <input type="checkbox"/> Real Property<br>(other than foreclosure) | <input checked="" type="checkbox"/> Statutory   | <input type="checkbox"/> Taxation      | <input type="checkbox"/> Torts                        |

**Appeal**

Paper Appealed From (Check one only):	If an appeal has been taken from more than one order or judgment by the filing of this notice of appeal, please indicate the below information for each such order or judgment appealed from on a separate sheet of paper.
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- |  |   |   |   |
|--|---|---|---|
| <input type="checkbox"/> Amended Decree    | <input type="checkbox"/> Determination          | <input type="checkbox"/> Order              | <input type="checkbox"/> Resettled Order  |
| <input type="checkbox"/> Amended Judgement | <input type="checkbox"/> Finding                | <input type="checkbox"/> Order & Judgment   | <input type="checkbox"/> Ruling           |
| <input type="checkbox"/> Amended Order     | <input type="checkbox"/> Interlocutory Decree   | <input type="checkbox"/> Partial Decree     | <input type="checkbox"/> Other (specify): |
| <input type="checkbox"/> Decision          | <input type="checkbox"/> Interlocutory Judgment | <input type="checkbox"/> Resettled Decree   |   |
| <input type="checkbox"/> Decree            | <input type="checkbox"/> Judgment               | <input type="checkbox"/> Resettled Judgment |   |

Court: <b>Choose Court</b>	County: <b>Choose County</b>
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Dated:	Entered:
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Judge (name in full):	Index No.:
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Stage: <input type="checkbox"/> Interlocutory <input type="checkbox"/> Final <input type="checkbox"/> Post-Final	Trial: <input type="checkbox"/> Yes <input type="checkbox"/> No If Yes: <input type="checkbox"/> Jury <input type="checkbox"/> Non-Jury
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**Prior Unperfected Appeal and Related Case Information**

Are any appeals arising in the same action or proceeding currently pending in the court?  Yes  No  
 If Yes, please set forth the Appellate Division Case Number assigned to each such appeal.

Where appropriate, indicate whether there is any related action or proceeding now in any court of this or any other jurisdiction, and if so, the status of the case:

Kinsella v. PSC et al, pro se action in Supreme Suffolk index 000613/2021

**Original Proceeding**

Commenced by: <input type="checkbox"/> Order to Show Cause <input checked="" type="checkbox"/> Notice of Petition <input type="checkbox"/> Writ of Habeas Corpus	Date Filed:
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Statute authorizing commencement of proceeding in the Appellate Division: <b>Public Service Law 128</b>	
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**Proceeding Transferred Pursuant to CPLR 7804(g)**

Court: <b>Choose Court</b>	County: <b>Choose County</b>
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Judge (name in full):	Order of Transfer Date:
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**CPLR 5704 Review of Ex Parte Order:**

Court: <b>Choose Court</b>	County: <b>Choose County</b>
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Judge (name in full):	Dated:
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**Description of Appeal, Proceeding or Application and Statement of Issues**

Description: If an appeal, briefly describe the paper appealed from. If the appeal is from an order, specify the relief requested and whether the motion was granted or denied. If an original proceeding commenced in this court or transferred pursuant to CPLR 7804(g), briefly describe the object of proceeding. If an application under CPLR 5704, briefly describe the nature of the ex parte order to be reviewed.

Challenge denial of rehearing pursuant to Public Service Law Section 128

Issues: Specify the issues proposed to be raised on the appeal, proceeding, or application for CPLR 5704 review, the grounds for reversal, or modification to be advanced and the specific relief sought on appeal.

Whether PSC acted arbitrarily and capriciously, ultra vires, not supported by substantial evidence or other grounds under Public Service Law 128 in granting certificate of public need in underlying administrative action relating to South Fork Wind project. Case number 18-T-0604

**Party Information**

Instructions: Fill in the name of each party to the action or proceeding, one name per line. If this form is to be filed for an appeal, indicate the status of the party in the court of original instance and his, her, or its status in this court, if any. If this form is to be filed for a proceeding commenced in this court, fill in only the party's name and his, her, or its status in this court.

No.	Party Name	Original Status	Appellate Division Status
1	Simon V. Kinsella		Petitioner
2	New York State Public Service Commission		Respondent
3	New York State Department of Public Service		Respondent
4			
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6			
7			
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## Attorney Information

Instructions: Fill in the names of the attorneys or firms for the respective parties. If this form is to be filed with the notice of petition or order to show cause by which a special proceeding is to be commenced in the Appellate Division, only the name of the attorney for the petitioner need be provided. In the event that a litigant represents herself or himself, the box marked "Pro Se" must be checked and the appropriate information for that litigant must be supplied in the spaces provided.

Attorney/Firm Name: Ratschko Wallace PLLC

Address: 11 Broadway Suite 715

City: NY

State: NY

Zip: 10004

Telephone No: 917-359-6234

E-mail Address:

Attorney Type:  Retained  Assigned  Government  Pro Se  Pro Hac Vice

Party or Parties Represented (set forth party number(s) from table above):  
 \_\_\_\_\_

Attorney/Firm Name:

Address:

City:

State:

Zip:

Telephone No:

E-mail Address:

Attorney Type:  Retained  Assigned  Government  Pro Se  Pro Hac Vice

Party or Parties Represented (set forth party number(s) from table above):  
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Attorney/Firm Name:

Address:

City:

State:

Zip:

Telephone No:

E-mail Address:

Attorney Type:  Retained  Assigned  Government  Pro Se  Pro Hac Vice

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Attorney/Firm Name:

Address:

City:

State:

Zip:

Telephone No:

E-mail Address:

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Attorney/Firm Name:

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Zip:

Telephone No:

E-mail Address:

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Attorney/Firm Name:

Address:

City:

State:

Zip:

Telephone No:

E-mail Address:

Attorney Type:  Retained  Assigned  Government  Pro Se  Pro Hac Vice

Party or Parties Represented (set forth party number(s) from table above):  
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