

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).¹ 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.² 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.

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

² 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.³ 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

³ 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.⁴

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.⁵ 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

⁴ 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).

⁵ 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.⁶

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.⁷ 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.⁸

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.

⁶ See DPS Response to Petitions for Rehearing, pp. 7-8.

⁷ Certificate Order, p. 105.

⁸ 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