STATE OF NEW YORK
PUBLIC SERVICE COMMISSION

Application of Deepwater Wind 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.	Case No. 18-T-0604

SIMON V. KINSELLA
MOTION TO REOPEN THE RECORD

Preliminary Statement

I, Simon Kinsella, am an intervenor-party who seeks to reopen the record in this (above-captioned) proceeding so that I may "be afforded reasonable opportunity to present evidence and examine and cross-examine witnesses"[1] that has been denied me. I seek to add to the presently incomplete evidentiary record in this proceeding material, admissible factual evidence. Recent events subsequent to the conclusion of the evidentiary hearing has brought to light glaring and fundamental deficiencies in the record. Should the Commission make a determination on whether to grant the Applicant a Certificate of Environmental Compatibility and Public Need, now, before the record is complete, its decision will be prejudiced and subject to further litigation.

[1] 16 NYCRR § 4.5 (a)

Intervenor Funding

New York State Public Service Commission (the "Commission") has *not* required South Fork Wind LLC (formerly Deepwater Wind South Fork LLC, the "Applicant") to deposit funds on account for intervenors "to defray expenses incurred by … parties to the proceeding … for expert witness, consultant, administrative and legal fees"[2] in this proceeding. By denying funds to intervenors, the Commission for whatever reason has added to the burden of effective public participation. By so doing, the Commission has stifled public participation to the benefit of the Applicant and to the detriment of the public interest. To the extent that the Commission has denied me intervenor funds necessary to hire a lawyer, I respectfully request a degree of latitude regarding the submission of my Motion to Reopen the Record.

Discussion

2015 South Fork RFP and 2017 PPA

I seek to add to the evidentiary record in this proceeding cross-examination of witnesses' testimony and signatory parties to the Joint Proposal pertaining to "the basis of the need for the facility"[3] as expressed in the 2015 South Fork RFP and the 2017 Power Purchase Agreement between the Applicant and Long Island Lighting Company d/b/a LIPA ("2017 PPA").

[2] NY CLS Pub Ser § 122(5)(a)
[3] NY CLS Public Service Law, Article VII, § 126 (1) (a)

In four separate rulings it had been successfully argued by the Applicant and consistently decided that both the 2015 South Fork RFP and the 2017 PPA are beyond the scope of this Article VII proceeding. The ruling are as follows –

Ruling #1 Motion to Compel - September 14, 2020

On September 14, 2020, ALJ Belsito denied Motion to Compel the Town of East Hampton to respond to a request for information on possible financial relationships between parties. In his ruling, ALJ Belsito notes that the Applicant objected to the Motion on the grounds that, *inter alia*, "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."

Ruling #2 Motion to Compel - September 30, 2020

On September 30, 2020, ALJ Belsito denied Motion to Compel Production of Comparative Economic Review submitted by Mr. Bjurlof. In his ruling, ALJ Belsito states that "the 2015 RFP and the PPA are beyond the scope of this Article VII proceeding."

Ruling #3 Motion to Compel - October 27, 2020

On October 27, 2020, ALJ Belsito denied Motion to Compel PSEG Long Island to respond to a request for information pertaining to the South Fork RFP and its subsequent PPA award. In his ruling, ALF Belsito states: "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."

Ruling #4 Motion to Strike Testimony – November 24, 2020

On November 5, 2020, the Applicant submitted Motion to Strike Testimony from the evidentiary record that included *Exhibit A South Fork RFP* (exhibit number 310), and *Power Purchase Agreement between Long Island Power Authority and Deepwater Wind South Fork, LLC dated February 6, 2017* (exhibit number 318 on the evidentiary record).

On November 24, 2020, in his ruling on Motion to Strike Testimony, ALJ Belsito notes that the "Applicant argues that like the facilities in Cases 18-T-0499 and 19-T-0684, need for the Project is sufficiently established through selection in a competitive process, here the 2015 RFP [emphasis added]." In granting (in relevant part) the Applicant's Motion to Strike Testimony, ALJ Belsito 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." ALJ Belsito then proceeded to grant the Applicant's Motion to Strike Testimony that included striking from the record the very same exhibits that he subsequently allowed the Applicant to introduce *because* they *were relevant* to PSL §126 (a) to establish the basis of need, and in the process not only issued two rulings in direct opposition to one and other, but has denied party-intervenors opportunity to cross-examine witnesses on the subject of the 2015 South Fork RFP and its 2017 PPA.

In the same manner that the 2015 South Fork RFP and its 2017 PPA were excluded from the evidentiary record, during cross-examination whenever subjects of the RFP or PPA were raised, the Applicant's objection was likewise sustained and neither the 2015 South Fork RFP

nor the 2017 PPA were permitted to be the subject of cross-examination.

For example, on December 7, 2020 during cross-examination when the issue of "the cost born by rate payers for electricity related to the project under consideration"[4] was raised, the Applicant 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."[5] Similarly, DPS staff joined the Applicant'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."[6] I was permitted to proceed with my line of questioning, but only on the basis that I was not "referencing the power purchase agreement or the South Fork RFP[.]" [7]

It was only *after* the evidentiary hearing had concluded that the Applicant request that the 2015 South Fork RFP and the 2017 PPA be included in the evidentiary record. In his Ruling Admitting Evidence (of December 23, 2020), ALJ Belsito, included in the evidentiary record both the 2015 South Fork RFP and the 2017 PPA.

The Applicant has been permitted to include into the record the 2015 South Fork RFP and the 2017 PPA, therefore, I respectfully request to be granted opportunity to cross-examine witnesses sponsoring these documents which previously had been denied me.

[4] DPS Staff Panel Cross-Examination by Simon Kinsella, on December 7, 2020 (at p. 593, lines 23-25).
[5] *Id.* (at p. 594, lines 5-9)
[6] *Id.* (at p. 594, lines 12-16)
[7] *Id.* (at p. 595, lines 2-4)

Amendment to 2017 PPA for increase in delivered energy

I seek to add to the evidentiary record in this proceeding the incremental increase in energy that the Applicant proposes to deliver to the LIPA-owned substation in East Hampton via the subject transmission facility as expressed in the recently executed Amendment to the 2017 Power Purchase Agreement and the price of said incremental energy that will be passed onto ratepayers *neither* of which has been included in the evidentiary record.

It has been four years since the Applicant and LIPA executed the 2017 Power Purchase Agreement (in February of 2017) and, still, we know *neither* the total amount of energy to be delivered by the subject transmission facility *nor* the total price to be passed onto ratepayers.

How is it possible to accurately measure health and safety requirements that will impact a residential neighborhood such as EMF levels without knowing the maximum expected amount of energy that will be delivered by the Applicant's proposed transmission facility?

DPS Staff Panel submitted testimony pursuant to this proceeding stating that the Commission is required to "take into account the total cost to society of such facilities"[8] and that "society could include rate payers."[9] In this case, the price of delivered energy from the Applicant's proposed transmission facility will affect the prices of utilities supplied to over one million ratepayers living on Long Island. The total price for delivered energy from the Applicant's proposed transmission facility is "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."[10] The total price for delivered energy is *not* part of the record.

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[8] Case: 18-T-0604 – Prepared Testimony of Department of Public Service Staff (DPS Staff) Panel, Oct 9, 2020 (at p. 15, lines 11-18) quoting Chapter 272 of the Laws of 1970, Section 1, Legislative Findings

[9] See **Exhibit A** - DPS Staff Panel, Cross-Examination by Kinsella, December 7, 2020 (at p. 589, lines 23-24)

[10] *Simon V. Kinsella v. Office of the New York State Comptroller*, Albany County Courts (index 904100-19), Jul 2019

In November of 2018, the LIPA Board of Trustees authorized its CEO, Thomas Falcone, to enter into an agreement[11] with the Applicant for additional capacity, but LIPA and the Applicant held-off signing any amendment for two years (until September 2020).[12] By delaying signing the amendment for two years, the Applicant avoided having to include the amendment in the evidentiary record in this proceeding.

To-date, the Applicant has disclosed *neither* the amount of additional capacity nor the price of that capacity as expressed in the amendment that was executed only three months ago. Now, the Applicant claims that it cannot disclose the amendment because it is still waiting on "approval by the OSC [Office of State Comptroller] and the AG [Attorney General]." [13] Not surprisingly, it has taken twice as long (so far) to approve the amendment than it took for the OSC and the AG to approve the original power purchase agreement.

The Commission is required by statute and by precedent to consider the effect on the price of utilities of the Applicant's proposed transmission facility and there is no legal basis for the Applicant to circumvent review of a public contract with a public authority for energy supplied and paid for by New York State ratepayers pursuant to a Public Service Commission Article VII review. Accordingly, I respectfully request that the evidentiary record be reopened to include, *inter alia,* the full price and expected maximum amount of energy to be delivered via the subject transmission facility in this proceeding.

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[11] See **Exhibit B** - LIPA Board of Trustees meeting memo dated November 14, 2018 with Subject: Authorization to execute Amendment No. 1 to the Power Purchase Agreement with Deepwater Wind South Fork, LLC

[12] On August 5, 2020, PSEG Long Island responded to discovery request PSEGLI Kinsella 029 (case 18-T-0604), confirming that LIPA had not executed an amendment for additional capacity (at p. 1).

On October 8, 2020, PSEG Long Island submitted a supplemental response, but this time confirming that "the PPA Amendment … was mutually executed recently" (at p. 2).

[13] PSEG Long Island response to discovery request PSEGLI Kinsella 029 (case 18-T-0604) (at p. 2).

Contamination levels in soil and groundwater along construction corridor

I seek to add to the incomplete evidentiary record in this proceeding material, admissible factual evidence that includes laboratory test results from approximately thirty-four (34) soil and groundwater samples that are part of an environmental survey that the Applicant commenced soon *after* the evidentiary hearing had concluded. By delaying such environmental survey and site evaluation, the Applicant has avoided including scientific evidence on "the nature of the probable environmental impact" and information as to whether or not "the facility represents the minimum adverse environmental impact" from being included in the evidentiary record.[14]

On January 4, 2020 (soon *after* the evidentiary hearing had concluded and the record closed), the Applicant issued a press release and email (see **Exhibit D**) with the title: "Environmental Surveys & Site Evaluation Background" that it anticipates beginning on or after January 6 and completing within three weeks. According to the email, the environmental survey and site evaluation will consists of "34 borings" for soil and groundwater sampling and groundwater monitoring well installations "along the onshore route in Town-owned roads."[15] Borehole locations marked with a yellow "X" in **Exhibit E** (at pp. 1-2) indicate the location of each borehole relative to known PFAS contamination along the proposed cable corridor. All borehole locations (see **Exhibit F**) and photographs of each location (as of Jan 10, 2021) can be viewed online through Google Maps by clicking on the following hyperlink – https://www.google.com/maps/d/edit?mid=1hoIYHBCvaf50oiakT0488cPEjUN2bio9&usp=sharing

[14] NY CLS Public Service Law, Article VII, § 126 (1) (b) and (c)
[15] See **Exhibit D** – SWF Environmental Surveys & Site Evaluation Background and email issues Jan 4, 2021.

The impact of PFAS contamination (PFOA of 160 ppt in groundwater well EH-1) that exceeds the NYS regulatory limit by sixteen-times (16x) that is within five hundred feet (500 feet) upgradient of the Applicant's proposed construction corridor will *not* be included in the evidentiary record. Likewise, soil contamination of 12,000 ppt and 10,000 ppt for PFOS (wells EH-19B1 and EH-1) upgradient from the Applicant's proposed construction corridor will *not* be included in the evidentiary record.

PFAS test results from soil and groundwater samples taken from the wells herein listed (see below) will *not* be part of the evidentiary record and withheld from the Commission when it makes its determination of "environmental compatibility" pursuant to PLS, Section 126 (1) –

Well	**Location**
04A-MW (3710)	Beach Lane #32
05A-SB (3724)	East side of Beach Lane North
05B-MW-SB (3726)	East side of Beach Lane North
06A-MW	Wainscott Main St 30 feet west Sayre's Path
06B-MW-SB (3731)	South side of Wainscott Stone Rd
07A-SB (3733)	South side of Wainscott Stone Rd
07B-SB (3736)	South side of Wainscott Stone Rd
08A-MW (3739)	Corner of Wainscott Stone Rd & Wainscott NW Rd
08B-MW-SB (3743)	East Side of Wainscott NW Rd
09A-SB (3821)	Wainscott NW Rd 295 feet south of Roxbury Ln
09B-SB (3819)	Wainscott NW Rd opp Roxbury Ln
10A-MW-SB (3750)	East Side of Wainscott NW Rd, 210 feet south Two Rod Hwy

10B-SB (3750)	East Side of Wainscott NW Rd, 180 feet south of Two Rod Hwy
11A-SB (3815)	East Side of Wainscott NW Rd at corner of Merriwood Dr
11B-SB (3754)	East Side of Wainscott NW Rd 100 feet south of Wainscott PO
12A-SB (3813)	Corner of Wainscott NW Rd & Montauk Hwy South
12B-SB (3811)	Corner of Wainscott NW Rd & Montauk Hwy North
14A-SB (3809)	Center Wainscott NW Rd outside Seafood Shop
14B-SB (3806)	Center East-side of Wainscott NW Rd north of Cow Hill Lane
15A-MW-SB (3764)	Center Wainscott NW Rd outside Breadzilla
15B-SB (3762)	Center Wainscott NW Rd outside Breadzilla
16A-SB (3803)	Wainscott NW Road app 230 feet south Sandown Ct
16B-SB (3773)	Wainscott NW Rd north 250 feet Sandown CT
17A-SB (3777)	Wainscott NW Rd appox 220 feet south Broadwood Ct
17B-SB (3800)	Wainscott NW Road at LIRR South
18B-MW (3785)	Wainscott NW Rd 130 feet south LIRR
19A-SB (3792)	LIRR 80 feet east Wainscott NW Rd
19B-SB (3795)	LIRR 150 feet SE of 39 Industrial Rd

The Applicant knew of the existence of soil and groundwater contamination since November 2019, but chose to wait over a year until just days *after* December 23, 2020 when ALJ Belsito issued his Ruling Admitting Evidence before commencing its Environmental Surveys & Site Evaluation. By delaying its Environmental Surveys & Site Evaluation, the Applicant avoided including in the evidentiary record PFAS contamination test results of soil and groundwater samples taken from its proposed construction corridor. There is no reason for

the Applicant to have had waited over a year before conducting its Environmental Surveys & Site Evaluation other than to avoid the Commission taking a hard look at issues involving PFAS contamination when making its determination as to whether to grant the Applicant a Certificate of Environmental Compatibility and Public Need, or *not*.

Furthermore, erroneous information submitted by the Applicant remains uncorrected in the evidentiary record. In its Article VII application, the Applicant denies that there are any "hydraulically upgradient or adjacent properties along the study corridor that would represent a significant environmental risk to subsurface conditions" and prefaces this determination as follows -

> *The aforementioned historic resources and EDR database report were reviewed to determine the history and usage of the study corridor. Adjacent and surrounding site uses were also examined within 500 feet as part as part of the analysis to determine if any potential hazardous materials may have affected subsurface conditions within the corridor. As previously indicated, site hydrogeology was also analyzed and special consideration was given to adjacent and surrounding sites located both topographically and hydraulically upgradient of the corridor, as these locations have a greater potential to affect hazardous materials conditions within the corridor.*[16]

[16] See Article VII application, Appendix F Part 2, Phase I Environmental Assessment prepared by VHB Engineering, Surveying, and Landscape Architecture P.C. - Hazardous Materials Desktop Analysis, 19 dated March 30, 2018 (at pp. 122-191).

The Hazardous Materials Desktop Analysis is dated March 30 2018, five months *after* Suffolk County issued a Water Quality Advisory for Private-Well Owners in Area of Wainscott (on October 11, 2017) warning residents that "PFOS and PFOA [had been] detected above the USEPA lifetime health advisory level of 0.07 ppb [i.e. 70 ppt]" in the drinking-water supply near East Hampton Airport.

As explained in Part 1 of my Testimony on PFAS Contamination (September 9, 2020) –

The Hazardous Materials Desktop Analysis fails to take into account at least two uses of historic contamination –

(1) The USEPA National Biennial RCRA Hazardous Waste Report, for the two years of 1991 and 1993, list Shaw Aero Devices, Inc that operated a facility at or near 39/41 Industrial Road that is within 200 feet upgradient from the Applicant's construction corridor.

Shaw Aero Devices manufactured lift and turn technology fuel caps for commercial, military, construction and mining vehicles, including vehicle fast-fueling systems to minimized burst fuel tanks and/or over-filling the tanks causing wasteful ground-fuel spillage. According to the EPA National Biennial RCRA, Hazardous Waste Reports (1991 and 1993), Shaw Aero Devices generated over 42 tons of hazardous waste. Given the nature of operations at this site from the mid- l 950s up until the 1980s, it is probable that the facility represents a significant environmental risk to subsurface conditions that is within 200 feet upgradient from the study corridor. See Exhibit – Shaw Aero.

(2) Griffiths Carpet & Upholstery Cleaners ("Griffiths Carpet") operated from the same facility at or near 39/41 Industrial Road that is within 200 feet upgradient

> *from Applicant's construction corridor. Griffiths Carpet used a Teflon-treatment process which is a known source of PF AS contamination. See Exhibit Griffiths Carpet.*[17]

Suffolk County issued its Water Quality Advisory to the public on October 11, 2017. The advisory was widely reported in the media and the Applicant would have known of the hazardous waste contamination (PFAS) that existed in soil and groundwater where it proposed to install underground its high voltage transmission infrastructure. The Applicant was notified of extensive PFAS contamination adjacent and on all sides of its proposed construction corridor at least as early as November 15, 2019, but at the time, objected to the information provided "on the grounds that the information is inaccurate and not based in fact." [18]

"[T]he Applicant has the burden of proving all required statutory findings under PSL §122"[19] and has had opportunity to prove "the nature of the probable environmental impact [and] that the facility represents the minimum adverse environmental impact" [20] with regards to soil and water contamination, but has failed to sustain its burden of proof.

Without an accurate, scientific environmental assessment and site evaluation of the onshore construction corridor on the record in this proceeding, the Commission is prevented from taking a hard look at soil and groundwater contamination and "nothing in the language of the statute suggests that the commission, … has the authority to order an applicant to participate

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[17] Case: 18-T-0604 - Testimony, Part 1, PFAS Contamination, October 9, 2020 (at pp. 28, line 11 to 29, line 15)

[18] See **Exhibit C** - Information Request – Si Kinsella #01 (Nov 15, 2019) and Applicant's Response (Nov 25, 2019) and Information Requests – Si Kinsella #03 through to #10 (Jan 2, 2020).

[19] Case: 06-T-0650 - NY Regional Interconnect, Inc., Ruling on Scope, Hearing Procedures and Schedule (at p. 10)

[20] NY CLS Public Service Law, Article VII, § 126 (1) (b) and (c)

in a research program after final certification as a condition of such certification; if the commission has doubts concerning the health and safety aspects of a transmission line, it should not grant final certification until those doubts are resolved (Atwell v Power Auth. of NY, 67 AD2d 365 [3d Dept 1979]). The Commission can resolve those doubts only by reopening the evidentiary record that was closed only a few weeks ago.

Accordingly, I respectfully request that the evidentiary record be reopened to include, *inter alia,* PFAS contamination test results of soil and groundwater samples taken from the Applicant's proposed construction corridor.

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Conclusion

Exclusion of the aforementioned evidence from the record by the Applicant is contrary to the legislative "purpose of this act to provide a forum for the expeditious resolution of all matters concerning the location of electric … transmission facilities [emphasis added]."[21]

I have been denied opportunity to "develop fully the issues and positions [I wish] to advocate, by cross-examination and by introduction of affirmative testimony" in opposition.

By *not* allowing into the evidentiary record relevant admissible factual evidence, the Commission has deprive me of a "reasonable opportunity to present evidence and examine and cross-examine witnesses"[22] and deprive me of "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."[23]

Furthermore, the Commission will be denying itself of the opportunity and necessity "to have available for [its] review as complete a record as feasible, setting forth the positions of each major party, including the staff of the Department of Public Service."[24]

"If the record as a whole … does not support the required statutory findings, a certificate may not be issued, and it may be concluded that the Applicant has not met its burden of proof [emphasis added]." [25]

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[21] Laws 1970, ch 272, § 1 (eff April 29, 1970)

[22] 16 NYCRR § 4.5(a)

[23] See Procedural Guidelines for Settlements, 1992 (cases 90-M-0255 and 92-M-0138), Appendix B, Section E. Responsibility of the Parties to Develop the Record. (at p.6, paragraph 2)

[24] *Id.* (at p. 5-6, paragraph 1)

[25] Case: 06-T-0650 - NY Regional Interconnect, Inc., Ruling on Scope, Hearing Procedures and Schedule (at p. 10)

Should the Commission permit the Applicant to exclude relevant admissible factual evidence, it will deny the Commission opportunity to take a hard look at issues of need, probable environmental impact and public interest that are necessary for it to make a determination pursuant to N.Y. Public Service Law § 126 (1) and by so doing would circumvent the purpose of Article VII, circumvent judicial process, and circumvent US constitutional provisions requiring "due process of law."[26]

For the aforementioned reasons, I respectfully request that New York State Public Service Commission to grant my Motion to Reopen the Record in this proceeding.

Respectfully submitted,

Simon V. Kinsella
Dated: January 13, 2021
Wainscott, New York

[26] U.S. Const. Amend. XIV; N.Y. Const. Art. I, § 6.