



Agenda Date: 12/20/23
Agenda Item: 8B

STATE OF NEW JERSEY
Board of Public Utilities
44 South Clinton Avenue, 1st Floor
Post Office Box 350
Trenton, New Jersey 08625-0350
www.nj.gov/bpu/

CLEAN ENERGY

IN THE MATTER OF THE OPENING OF OFFSHORE WIND RENEWABLE ENERGY CERTIFICATE (OREC) APPLICATION WINDOW FOR 1,200 TO 2,400 MEGAWATTS OF OFFSHORE WIND CAPACITY IN FURTHERANCE OF EXECUTIVE ORDER NO. 8 AND EXECUTIVE ORDER NO. 92)	ORDER APPROVING MOTION TO DISMISS
)	
)	DOCKET NO. QO20080555
)	
)	
IN THE MATTER OF THE BOARD OF PUBLIC UTILITIES OFFSHORE WIND SOLICITATION 2 FOR 1,200 MW TO 2,400 MW – ATLANTIC SHORES OFFSHORE WIND PROJECT 1, LLC)	DOCKET NO. QO21050824
)	
)	

Parties of Record:

Brian O. Lipman, Esq., Director, New Jersey Division of Rate Counsel
Adam L. Peterson, Esq., on behalf of Atlantic Shores Offshore Wind Project 1, LLC
Thomas Stavola Jr., Esq., on behalf of Save Long Beach Island, Inc.

BY THE BOARD:

By this Order, the New Jersey Board of Public Utilities (“Board” or “BPU”) considers the petition submitted on August 7, 2023, by Save Long Beach Island, Inc. (“Save LBI”) (“Petition” or “Save LBI Petition”) requesting a hearing so that it can seek a reduction in the Offshore Wind Renewable Energy Certificate (“OREC”) pricing applicable to Atlantic Shores Offshore Wind Project 1, LLC’s (“Atlantic Shores” or “ASOW”) 1,509.6 megawatt (“MW”) offshore wind project that was approved by the Board on June 30, 2021 (“Project”). The Board also considers ASOW’s motion to dismiss (“Motion”).

BACKGROUND

On August 19, 2010, the Offshore Wind Economic Development Act (“OWEDA”) was signed into law.¹ OWEDA establishes offshore wind as a Class I renewable energy resource and directs the BPU to establish an OREC program.² OWEDA requires an OREC-approved offshore wind project to present “positive economic and environmental net benefits to the State.”³

Governor Murphy signed Executive Order No. 8 (“EO 8”) on January 21, 2018, establishing an offshore wind (“OSW”) goal of 3,500 MW of OSW capacity by 2030.⁴ On November 19, 2019, Governor Murphy signed Executive Order No. 92 (“EO 92”), which increased the State’s OSW energy goal to 7,500 MW by 2035.⁵ On September 21, 2022, Governor Murphy signed Executive Order No. 307 (“EO 307”), which expanded the State’s OSW goal to 11,000 MW by 2040.⁶

Following the passage of OWEDA, the Board adopted rules building upon the application requirements set forth in OWEDA and setting forth an application process and evaluation framework for OSW projects, found at N.J.A.C. 14:8-6.1 et seq. (“Board rules” or “OWEDA Regulations”).

By Order dated June 30, 2021, the Board approved the 1,509.6 MW Project proposed by Atlantic Shores Offshore Wind Project 1, LLC. Atlantic Shores was selected in connection with the Board’s second offshore wind solicitation for a target of 1,200 – 2,400 MW of OSW (“Second OSW Solicitation”).⁷ The Board found that the Atlantic Shores project had a cost-benefit value of 1.246, reflecting net positive economic and environmental benefits to the state.⁸

PROCEDURAL HISTORY

On June 12, 2023, Save LBI filed the Petition with the BPU, requesting a hearing to seek reduction in the OREC pricing applicable to Atlantic Shores’ 1,509.6 MW offshore wind project that was approved by the OREC Order. After initial review of the Petition, Save LBI was informed of a procedural requirement in which corporations are required to be represented by an attorney, pursuant to N.J.A.C. 1:1-5.1.

¹ See N.J.S.A. 48:3-87 et seq.

² N.J.S.A. 48:3-51. “Class I renewable energy” means “electricity produced from solar technologies, photovoltaic technologies, *wind energy*, fuel cells powered by renewable fuels, geothermal technologies, wave or tidal action, small scale hydropower facilities with a capacity of three megawatts or less and put into service after July 23, 2012” (emphasis added). N.J.A.C. 14:8-1.2.

³ N.J.S.A. 48:3-87.1(b)(1)(b).

⁴ Exec. Order N. 8 (2018).

⁵ Exec. Order N. 92 (2019). This Executive Order, signed by Governor Murphy on November 19, 2019, changed the State’s OSW goal to 7,500 MW by 2035. All other provisions of EO8 remained in full force and effect.

⁶ Exec. Order N. 307 (2022).

⁷ In re the Board of Public Utilities Offshore Wind Solicitation 2 for 1,200 to 2,400 MW – Atlantic Shores Offshore Wind 1, LLC, BPU Docket No. QO21050824, Order dated June 30, 2021 (“OREC Order”).

⁸ Id. at 16. A positive cost-benefit result exists where the benefit/cost ration is greater than or equal 1.0.

On August 7, 2023, Save LBI re-filed the Petition following retention of counsel. By the Petition, Save LBI requested a formal hearing to address the price schedule approved by the Board in the OREC Order. With its Petition, Save LBI attached a report with an economic analysis. The report asserts that the OREC Order conducted a flawed cost-benefit analysis under OWEDA.⁹ Specifically, Save LBI claimed that the Board's cost-benefit analysis (1) did not consider costs to tourism and fishing communities, (2) projected the social cost of carbon incorrectly and were inappropriate in representing statewide impacts.¹⁰ The report found, adjusting for these issues, that the Atlantic Shores project did not have a positive benefit/cost ratio.¹¹ Save LBI further contended that the OREC pricing should reduce the internal rate of return ("IRR") achieved by Atlantic Shores' shareholders and reflect potentially applicable tax credits.¹² Ultimately, the Save LBI Petition requested a hearing to correct the allegedly incorrect cost-benefit analysis and adjust the OREC award price.¹³

On August 29, 2023, Atlantic Shores filed the Motion to dismiss the Petition, with prejudice, pursuant to N.J.A.C. 14:1-5.4(b). In the Motion, Atlantic Shores sought dismissal of the Petition, with prejudice, on the basis that Save LBI is not entitled to a hearing and the Board lacks authority to grant the substantive relief sought.

Atlantic Shores first argued for dismissal because the hearing requested in the Petition is inapplicable to the Board's OREC application processes.¹⁴ Atlantic Shores asserted that the legal framework for the application process leading to the award of ORECs in the Second OSW Solicitation, and the requirements for the same, were established in OWEDA, and the OWEDA regulations. Atlantic Shores contended that these authorities do not provide for administrative hearings in connection with OREC applications. Therefore, the sole venue for any non-party to challenge a Board order culminating in an OREC application process (such as the OREC Order) is to appeal to the Appellate Division of the Superior Court of New Jersey.¹⁵ Atlantic Shores contended that, since Save LBI is seeking review of the OREC Order, the only proper avenue to do so would have been to file an appeal with the Appellate Division within 45 days from the notice of the OREC Order, pursuant to N.J. Court Rule 2:4-1(b) – which lapsed in the instant matter on August 14, 2021.¹⁶

⁹ In re the Board of Public Utilities Offshore Wind Solicitation 2 for 1,200 to 2,400 MW – Atlantic Shores Offshore Wind 1, LLC, BPU Docket No. QO21050824, Save LBI Petition dated August 7, 2023 ("Save LBI Petition"), at p. 3.

¹⁰ Id.

¹¹ Id. at 4.

¹² Id. at 5

¹³ Id.

¹⁴ In re the Board of Public Utilities Offshore Wind Solicitation 2 for 1,200 to 2,400 MW – Atlantic Shores Offshore Wind 1, LLC, BPU Docket No. QO21050824, ASOW Motion to dismiss dated August 29, 2023, at p. 7

¹⁵ Id.

¹⁶ Id. at 8.

Atlantic Shores relatedly argued that Save LBI's petition must be barred because it was filed stale, being filed two (2) years after ASOW's OREC Order.¹⁷ Atlantic Shores contended that the general purpose of limitation statutes, such as N.J. Court Rule 2:4-1(b), is to stimulate prompt action, penalize negligence, and to protect the litigation of stale claims.¹⁸ Atlantic Shores asserted that it would be fundamentally unfair to allow Save LBI to raise claims to challenge the OREC Order approximately two years after its effective date.¹⁹

Atlantic Shores further argued that, even if a hearing was a viable procedural option in this instance, the Board has no authority to amend the OREC Order as requested by Save LBI without Atlantic Shores' consent.²⁰ Atlantic Shores notes OWEDA establishes that "an Order issued by the board pursuant to this subsection shall not be modified by subsequent board orders, unless the modifications are jointly agreed to by the parties."²¹ Atlantic Shores asserted that the above referenced provision in OWEDA provides certainty to selected applications that the approved OREC price cannot be unilaterally changed by future Board action and serves as a critical underpinning to New Jersey's offshore wind industry.²² Atlantic Shores contended that the OREC pricing schedule approved by the Board in connection with an OSW project provides visibility to the selected developer, its shareholders, and its financing partners that if the significant capital required to undertake an OSW project is invested, the project will in fact benefit from a defined stream of payments for ORECs on a pay for performance basis.²³ Atlantic Shores further argued that the ability to finance OSW projects in New Jersey relies on the enforceability of the Board order awarding ORECs.²⁴ Atlantic Shores contended that the absence of such provision would have devastating impacts on New Jersey's offshore wind industry.²⁵ Atlantic Shores concluded by arguing that because it has not and will not provide consent to amend the OREC pricing as reflected by the Petition, the Petition should be dismissed.²⁶

¹⁷ Id.

¹⁸ Id. at 8-9.

¹⁹ Id. at 9.

²⁰ Id.

²¹ Id., citing N.J.S.A. 48:3-87.1(3)(c).

²² Id. at 10.

²³ Id.

²⁴ Id.

²⁵ Id.

²⁶ Id.

Save LBI filed a brief in opposition to the Motion on September 7, 2023. In its brief, Save LBI first argued that its request is properly within the jurisdiction of the Board because Atlantic Shores is ostensibly a producer of electricity for the State, and the BPU maintains jurisdiction over the production of electricity.²⁷ According to Save LBI, the Board's general grant of jurisdiction trumps the lack of express hearing provisions in OWEDA and the OWEDA regulations – in other words, according to Save LBI, the Board has the jurisdiction and ability to establish proceedings under OWEDA.²⁸

Save LBI further asserted that its Petition ultimately claims the Board violated OWEDA's cost-benefit requirement by conducting an improper cost-benefit analysis and unfairly balancing the risks between ratepayers and Atlantic Shores.²⁹ Save LBI, therefore argued that while the statute provides that an OREC order cannot be modified unless jointly agreed to by the parties, the OREC Order is in direct violation of the statute and the Petition should thus be heard.³⁰

On September 13, 2023, Atlantic Shores filed a reply brief to Save LBI's opposition brief which reiterated and strengthened the arguments raised in their moving papers.

DISCUSSION AND FINDINGS

Save LBI's petition requests a formal hearing to evaluate ASOW's OREC pricing schedule. Save LBI contends that the OREC Order incorrectly evaluated the costs and benefits of the Atlantic Shores project. Save LBI also argues that the OREC award price should be adjusted to more fairly balance the risks between ratepayers and ASOW.

Whether or not these requests have merit, the Petition was not timely filed. The OREC Order was issued on June 30, 2021. A proper Petition was not filed until more than two (2) years later, on August 7, 2023. The Board cannot now hear the Petition because it would unfairly prejudice Atlantic Shores and the stakeholders that have relied on the development of the Atlantic Shores project.³¹

Further, it is clear that the Petition requests a reduction in the price schedule approved in the OREC Order, as opposed to a hearing regarding the Atlantic Shores' general production of electricity to assure the reliability of electricity supply to customers in the state, pursuant to N.J.S.A. 48:2-13(d). The Petition states in clear terms that Save LBI seeks a reduction in the previously approved price schedule. N.J.S.A. 48:3-87.1(c) states clearly and unambiguously that "[a]n order issued by the board pursuant to this subsection shall not be modified by subsequent board orders, unless the modifications are jointly agreed to by the parties." Accordingly, the Board **HEREBY FINDS** that the Petition constitutes a request for a hearing to modify the OREC Order, which is expressly prohibited by N.J.S.A. 48:3-87.1(c) without the consent of all parties.

²⁷ In re the Board of Public Utilities Offshore Wind Solicitation 2 for 1,200 to 2,400 MW – Atlantic Shores Offshore Wind 1, LLC, BPU Docket No. QO21050824, Save LBI Opposition Brief dated September 7, 2023 ("Save LBI Opposition Brief"), at p. 1.

²⁸ Id. at 2-3.

²⁹ Id. at 4.

³⁰ Id. at 5, citing N.J.A.C. 14:8-6.5(a)(11).

³¹ See Lavin v. Board of Education, 90 N.J. 145, 151 (1982) (explaining that doctrines, such as laches, are applied to ensure stale claims do not prejudice a defending party); Fox v. Millman, 210 N.J. 401, 415 (2012) (explaining that a statute of limitations promotes stability by preventing litigation of state claims).

The relevant portions of N.J.S.A. 48:3-87.1(c) provide in clear and unambiguous terms that an order issued by the Board pursuant to this subsection shall not be modified by subsequent Board orders unless the modifications are jointly agreed to by the parties. Save LBI does not dispute that N.J.S.A. 48:3-87.1(c) requires the consent of Atlantic Shores to modify the OREC Order. The statutory language of OWEDA provides OSW developers and their financing parties with certainty that the legal framework surrounding the OREC Order will remain in place unless otherwise agreed to by the developers. Because the relief sought in the Petition – reduction of the pricing schedule established in the OREC Order – cannot be achieved without a modification to the OREC Order, Atlantic Shores’ consent is expressly required by OWEDA for said modifications. Accordingly, modification of the OREC Order or a subsequent order modifying the price schedule as established in the OREC Order are expressly prohibited by OWEDA without the consent of Atlantic Shores. Atlantic Shores indicated in its moving papers that it does not consent to modification of the OREC Order.

Save LBI’s brief acknowledges that the gravamen of the Petition is that the OREC Order allegedly violates the terms of N.J.S.A. 48:3-87.1(b)(1)(b).³² If Save LBI wanted to timely challenge the OREC Order – including any findings and legal conclusions – it should have submitted for review in the New Jersey Superior Court, Appellate Division, pursuant to N.J.S.A. 48:2-43 (“Any order made by the board may be reviewed by appeal to the appellate division of the Superior Court. Notice of appeal shall be within the time provided by rules of court.”). Court rules state that an appeal shall be taken within 45 days from the date of service of the decision or notice of the action taken.³³ The Appellate Division is the exclusive forum to seek review of final agency action or inaction.³⁴ These provisions further show that the Save LBI Petition and requested relief are untimely.

For the aforementioned reasons, Atlantic Shores’ Motion is **HEREBY GRANTED**. Accordingly, the Board **HEREBY DISMISSES** Save LBI’s Petition pursuant to N.J.A.C. 14:1-5.4(b).

³² Save LBI Opposition Brief, at p. 4.

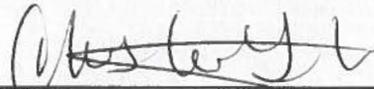
³³ R. 2:4-1(b).

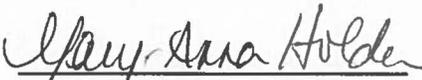
³⁴ See, R. 2:2-3(a)(2); Hosp. Ctr. at Orange v. Guhl, 331 N.J. Super. 332, 329 (App. Div. 2000).

The effective date of this Order is December 27, 2023.

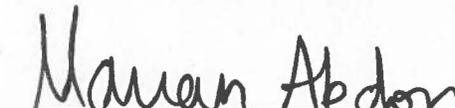
DATED: December 20, 2023

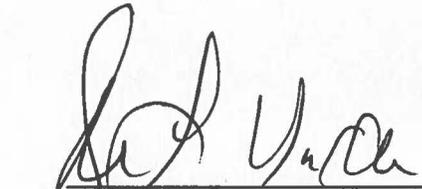
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SECRETARY

I HEREBY CERTIFY that the within
document is a true copy of the original
in the files of the Board of Public Utilities.

IN THE MATTER OF THE OPENING OF OFFSHORE WIND RENEWABLE ENERGY CERTIFICATE (OREC)
APPLICATION WINDOW FOR 1,200 TO 2,400 MEGAWATTS OF OFFSHORE WIND CAPACITY IN FURTHERANCE
OF EXECUTIVE ORDER NO. 8 AND EXECUTIVE ORDER NO. 92

DOCKET NO. QO20080555

IN THE MATTER OF THE BOARD OF PUBLIC UTILITIES OFFSHORE WIND SOLICITATION 2 FOR 1,200 MW TO
2,400 MW – ATLANTIC SHORES OFFSHORE WIND 1, LLC

DOCKET NO. QO21050824
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