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June 2, 2022

**Via Electronic Filing Only**

Ms. Carmen Diaz, Acting Board Secretary  
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**Re: In the Matter of the Petition of Ocean Wind, LLC Pursuant to N.J.S.A. 48:3-87.1(f) for a Determination that Easements Across Green Acres Restricted Properties and Consents Needed for Certain Environmental Permits in, and with Respect to, the City of Ocean City are Reasonably Necessary for the Construction or Operation of the Ocean Wind 1 Qualified Offshore Wind Project  
BPU Docket No. QO22020041**

Dear Ms. Diaz:

The New Jersey Division of Rate Counsel (“Rate Counsel”) submits these written comments regarding the above-referenced petition filed by Ocean Wind, LLC (“Ocean Wind” or “Company”) with the New Jersey Board of Public Utilities (“Board”) on February 2, 2022, requesting a determination that its preferred route for its onshore export cable is reasonably necessary for the construction and operation of the 1,100 megawatt (“MW”) Ocean Wind I project (“Project”). Ocean Wind’s preferred onshore cable export route (“Preferred Route”), requires “access” across Green Acres designated parcels at 35th Street and Roosevelt Boulevard in Ocean City (“City”). Ocean Wind claims that the Preferred Route is the shortest route to the B.L. England (“BLE”) substation point of interconnection (“POI”). Accordingly, Ocean Wind

also requests that the Board find that the easements described in its petition over the Green Acres-restricted property owned by the City are reasonably necessary for the construction and operation of the Project. Last, Ocean Wind requests the Board issue an Order approving the acquisition of the necessary easements across the subject properties.

### **Comments**

As preliminary matter, Rate Counsel wants to be clear on the nature of the issues before the Board and what it believes is relevant to the Board's review in this matter. Under N.J.S.A. 48:3-87.1(f), the Board must determine whether the Preferred Route of the Project's onshore export cable is "reasonably necessary for the construction or operation of the qualified offshore wind project." The existence of global warming and its effects on future generations are not part of this proceeding. Whether or where to site the Project's wind turbines are not part of this proceeding. Whether continued reliance on fossil fuels is detrimental to the public's health is not part of this proceeding.

We agree that addressing the global challenge of climate change is important. However, the Governor, the Board, and the Legislature have all developed policies, and continue to develop policies addressing climate change and New Jersey's role in regional and national efforts. One of those policies concerns the development of offshore wind. Nonetheless, a referendum on that policy is not presently before the Board.

In this proceeding, rather, the primary issue is whether the Preferred Route, as proposed by Ocean Wind, is reasonably necessary. Therefore, asking questions regarding the Preferred Route should not be conflated or confused with a position that is against the Project in general. Likewise, voicing concerns regarding the process should not be mistaken for a position that is anti-offshore wind energy. To the contrary, advocating for a thorough and robust process is in

the public interest because it aids in the development of a complete record, which benefits the Board's decision-making and stakeholder interests alike. Indeed, the Board will need to make certain findings, and requires a full record to support its findings. Rate Counsel is statutorily mandated to represent the public interest<sup>1</sup> and our office believes that the ratepayers of this State (who will ultimately pay for the development of offshore wind, including this Project) deserve such a process and record before the Board makes its decision in this case.

### **Whether the Preferred Route is Reasonably Necessary**

After reviewing the petition, testimony and other exhibits, as well as the Company's responses to questions from the Board and our office, Rate Counsel has some concerns regarding Ocean Wind's determination of the Preferred Route, which, as previously mentioned, requires "access" across Green Acres designated parcels at 35th Street and Roosevelt Boulevard in the City. Ocean Wind contends that this Preferred Route is the shortest route to the Project's POI at the BLE substation. However, as Rate Counsel's witness Mr. Chang indicated in his testimony, Ocean Wind identified an alternative route that follows the path of an abandoned railroad right-of-way that, although longer in distance, may result in fewer disturbances.<sup>2</sup> Despite these potential benefits, Ocean Wind has stated that it qualitatively eliminated this alternative route without adequate explanation provided in the record currently before the Board.<sup>3</sup>

Similarly, several members of the public questioned why Ocean Wind could not simply go around Ocean City.<sup>4</sup> In addition, the City asserts that the Great Egg Harbor Route, which travels offshore and around the City, is a better alternative to the route through the island of the

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<sup>1</sup> N.J.S.A. 52:27EE-48.

<sup>2</sup> Direct Testimony of Maximilian Chang at 13:4-14:15.

<sup>3</sup> It is important to understand that at this time, Rate Counsel is not taking a position opposing the Preferred Route. Rather, it is Rate Counsel's position that the record is not sufficiently developed for Rate Counsel to take a position supporting or opposing the Preferred Route. As explained below, Rate Counsel believes a more fulsome record is needed before Rate Counsel can offer a position and the Board can ultimately make a determination.

<sup>4</sup> Morning Public Hearing T26:2-6, T30:17-31:3; Evening Public Hearing T34:9-16, T43:4-10,; April 27, 2022. See also Letter Response of City ("Response") at 2 (April 27, 2022).

City, because it appears to be of comparable length and would likely provide less impact of the City's shoreline or inlet boat traffic.<sup>5</sup> The City also disputes Ocean Wind's claim that the bridges along the Great Egg Harbor Route, specifically the Ocean City-Longport bridge and the Route 52 bridge, are historic bridges.<sup>6</sup> The City has stated that both bridges are relatively new bridges (built in 2002 and 2012, respectively) and both have high clearances.<sup>7</sup> In order to fully evaluate reasonable input from the impacted City and its residents, the Board should at least request that Ocean Wind to provide cost estimates, detailed environmental, detailed engineering, or other impacts and any other relevant information so that the Board can adequately develop the record and determine if Ocean Wind's Preferred Route is indeed reasonably necessary in comparison to other potential routes.

Notwithstanding this dispute of facts presented by the City regarding the bridges in question, Ocean Wind also declined to provide the projected costs associated with the Preferred Route, or any of the alternatives evaluated by the Company. Although the Company maintains that it bears the risk of the Preferred Route's cost, Rate Counsel believes the Board should have the opportunity to review ongoing project costs to ensure that the Board-approved offshore renewable energy certificate ("OREC") price, which was established to incentivize the development of offshore wind, was not set at an unreasonably high or low rate.<sup>8</sup>

Accordingly, Rate Counsel recommends that the Board require Ocean Wind to provide cost estimates and more analysis of the Preferred Route and the alternatives evaluated by the Company. This is not an exceptional request. In fact, it is well-established that "[a]lternative sites or methods and their comparative advantages and disadvantages to all interests involved,

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<sup>5</sup> Response at 2.

<sup>6</sup> Ibid.

<sup>7</sup> Ibid.

<sup>8</sup> While the Board has no authority to change the agreements already established for this Project, this will provide valuable insight for ongoing and future solicitations.

including cost, must be considered in determining such reasonable necessity.”<sup>9</sup> In this case, the information regarding the cost of the Preferred Route, and the cost the alternative routes, would add to the record of the Board’s decision on whether the Preferred Route is indeed reasonably necessary. Without this information, it is unclear how the Board can adequately evaluate the different routes.

Rate Counsel has additionally expressed concerns about how the decisions in this proceeding will impact the transmission upgrade cost sharing mechanism approved by the Board. Rate Counsel provided testimony explaining that there is a nexus between the Board’s decisions about the easements for the export cable routes and the transmission upgrade requirements.<sup>10</sup> This is relevant to the Board’s determination of the Preferred Route. As the courts have explained, “[t]he Board's obligation is to weigh all interests and factors in the light of the entire factual picture . . . .”<sup>11</sup> The courts have expressly noted that the entire factual picture includes “availability of other locations” and “the possibility of other methods of attaining the needed improvement or addition to facilities not involving the site at all.”<sup>12</sup> Based on this precedent, our office urges the Board to require Ocean Wind to demonstrate that its Preferred Route is also the least-cost plan when including the transmission cost upgrades to minimize the cost impact to ratepayers.

### **Limited Review of the Preferred Route Proposal**

Rate Counsel also has concerns regarding the procedural process afforded to the responding parties in this matter. The Board has taken a unique and unprecedented procedural approach to

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<sup>9</sup> In re Pub. Serv. Elec. & Gas Co., 35 N.J. 358, 377 (1961)(emphasis added). See also In re S. Jersey Gas Co., 447 N.J. Super. 459, 481 (App. Div. 2016) and In re Pub. Serv. Elec. & Gas Co., 2013 N.J. Super. Unpub. LEXIS 304, 32 (2013)(finding that the Board fulfilled its obligation to consider cost in determining reasonable necessity).

<sup>10</sup> Direct Testimony of Maximilian Chang at 16:2-19:6.

<sup>11</sup> Pub. Serv. Elec. & Gas Co., 35 N.J. at 377.

<sup>12</sup> In re Hackensack Water Co., 41 N.J. Super. 408, 426 (App. Div. 1956).

this case, which has resulted in limited opportunities for stakeholders to provide input to the Board as Ocean Wind embarks on its venture to install 1,100 MW of offshore wind. In prior matters filed with the Board under N.J.S.A. 40:55D-19 (“Municipal Land Use Law”), which uses the same “reasonably necessary” language, the Board allowed for discovery, testimony, and public and evidentiary hearings.<sup>13</sup> However, this is not occurring here, and Rate Counsel finds it unsettling that the process employed by the Board in this case does not afford the same level of participation and development of an evidentiary record as the Board has provided in prior infrastructure siting cases filed under the Municipal Land Use Law.

It is important to understand the legal context of this case. Clearly, it is different than proceedings under the Municipal Land Use Law. The decision before the Board, however, is not a simple eminent domain proceeding either. Under the “Eminent Domain Act of 1971,”<sup>14</sup> referenced in N.J.S.A. 48:3-87.1(f), a court is required to determine if a party seeking condemnation has the authority to condemn the property and then the matter proceeds to a hearing on the issue of valuation. The Board’s statute has an additional requirement that the Board find the easements required by the Preferred Route are reasonably necessary. Clearly a route to a POI is necessary, so the Board’s inquiry must be something more. In order for the Board to grant Ocean Wind’s petition, it must make an explicit finding that the Preferred Route is reasonably necessary. The Board requires a factual record on which to base this decision. As explained above, the criteria for determining the reasonable necessity of the Preferred Route is well-settled. While not an identical fit, the Municipal Land Use Law is clearly a closer fit to the

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<sup>13</sup> See e.g., In re the Petition of New Jersey Natural Gas Company for a Determination Concerning the Southern Reliability Link Pursuant to N.J.S.A. 40:55D-19 and N.J.S.A. 48:925.4, BPU Docket No. GO1504040; In re the Petition of South Jersey Gas Company for a Determination Pursuant to the Provisions of N.J.S.A. 40:55D-19, BPU Docket No. G013111049; In re the Petition of Public Service Electric and Gas Company for a Determination Pursuant to the Provisions of N.J.S.A. 40:55D-19 (Susquehanna – Roseland Transmission Line), BPU Docket No. EM09010035.

<sup>14</sup> Codified under N.J.S.A. 20:3-1 et seq.

statute being applied here. Without additional opportunities to develop the record in this case, it is unclear on what basis the Board will make these determinations. "Administrative due process is generally satisfied if the parties had adequate notice, a chance to know opposing evidence, and the opportunity to present evidence and argument in response . . . ." <sup>15</sup>

Additionally, the first petition filed by Ocean Wind initially stated that the Preferred Route requires the diversion of two parcels of land that amount to 0.838 acres. However, in response to questions posed by Rate Counsel, the Company calculated the required easements on the properties at 0.658 acres. After Rate Counsel filed its testimony, Ocean Wind submitted an amended petition to the Board indicating that only 0.579 acres are necessary at the beach landing with an additional 0.068 acres further along the Preferred Route, which amounts to 0.647 acres total. Despite this discrepancy and the filing of an amended petition by the Company, Rate Counsel has not been afforded any additional opportunity to propound discovery to verify this new calculation. Rate Counsel respectfully requests that the procedural schedule in this matter be modified in order to do so.

**The Board Should Provide Proper Review of the Entire Controversy in One Proceeding**

Rate Counsel is concerned that the piecemeal method of examining the onshore export cable route could also result in a Board decision that affects - or even predetermines - future proceedings pertaining to Ocean Wind. For example, the Petition describes the Preferred Route's use of overhead lines where it interconnects with the substation which, according to Ocean Wind, is "not at issue" in this case. <sup>16</sup> Although approval of the overhead construction has not been requested yet, the statute requires the Board to make a determination that aboveground

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<sup>15</sup> Moore v. Dep't of Corr., 335 N.J. Super. 103, 108 (App. Div. 2000)(emphasis added)(internal quotation marks omitted)(quoting In re Dep't of Ins.'s Order Nos. A-89-119 & A-90-125, 129 N.J. 365, 382 (1992)).

<sup>16</sup> Petition at ¶ 25.

infrastructure is necessary before installing that equipment.<sup>17</sup> Likewise, on May 20, 2022, the Company filed another petition seeking Board-approval of another parcel of land. In that case, the parcel is owned by the County of Cape May (“Cape May Proceeding”).<sup>18</sup> Under this fragmented approach, if the Board decides to approve the Preferred Route in this matter, the Board may be limited in any subsequent decision about whether there should be an aboveground portion on the same Preferred Route. Presumably, this determination will be made in a future proceeding; however, by not addressing the issue here, the Board may make the issue moot in subsequent matters concerning the Preferred Route and deprive itself of a holistic review of the Ocean Wind I Project.

The Supreme Court has held that the application of judicial doctrines “such as res judicata, collateral estoppel, the single-controversy doctrine and the like” to adjudicative administrative agency decisions, as with judicial decisions, are based on certain policy considerations such as “finality and repose; prevention of needless litigation; avoidance of duplication; reduction of unnecessary burdens of time and expenses; elimination of conflicts, confusion and uncertainty; and basic fairness . . . .”<sup>19</sup>

That said, it is unclear in this case why the entirety of the controversies surrounding the Preferred Route is not being addressed in a single proceeding by the Board. Likewise, it is unclear that, if the Board finds the Preferred Route reasonably necessary in this proceeding, what occurs if a contrary decision is reached based on evidence in the Cape May Proceeding. Further,

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<sup>17</sup> N.J.S.A. 48:3-87.1(f)(1).

<sup>18</sup> In re the Petition of Ocean Wind, LLC Pursuant to N.J.S.A. 48:3-87.1(f) for a Determination that Certain Easements and Consents Needed for Certain Environmental Permits in, and with Respect to, the County of Cape May are Reasonably Necessary for the Construction or Operation of the Ocean Wind 1 Qualified Offshore Wind Project, BPU Docket No. QO22050347.

<sup>19</sup> See Hackensack v. Winner, 82 N.J. 1, 32-33 (1980). See also Bressman v. Gash, 131 N.J. 517, 527 (1993) (“As a general rule, an adjudicative decision of an administrative agency should be accorded the same finality that is accorded the judgment of a court.”).



the County's objection to the Preferred Route, if any, could be become moot by the Board's decision on the reasonable necessity of the Preferred Route in this case.

**Conclusion**

Rate Counsel emphasizes that the limited development of the evidentiary record and limited opportunity for stakeholder involvement materially affects the record on which the Board is being asked to make its decision. The significance of this decision is magnified by the fact that this is the first matter brought under N.J.S.A. 48:3-87.1(f), which may affect future proceedings before the Board. Rate Counsel recommends that the procedural schedule be modified to:

(1) Permit additional investigation into the Preferred Route and its potential alternatives, including cost;

(2) Provide an additional opportunity to propound discovery to verify Ocean Wind's new calculation of the Green-Acres restricted acreage; and

(3) Consolidate this matter with the Cape May Proceeding in order to include the entirety of the issues under which the Board has jurisdiction so the Board may conduct an adequate analysis of Ocean Wind's Preferred Route and the costs associated with it.

Rate Counsel thanks the Board for this opportunity to provide these written comments and looks forward to working with all parties throughout this proceeding.

Very truly yours,

Brian O. Lipman, Esq.  
Director, Division of Rate Counsel

By: */s/ David Wand*  
T. David Wand, Esq.  
Deputy Rate Counsel

In the Matter of the Petition of Ocean Wind, LLC Pursuant to N.J.S.A. 48:3-87.1(f) for a Determination that Easements Across Green Acres-Restricted Properties and Consents Needed for Certain Environmental Permits in, and with Respect to, the City of Ocean City are Reasonably Necessary for the Construction or Operation of the Ocean Wind 1 Qualified Offshore Wind Project  
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