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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 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	REPLY OF THE COUNTY OF CAPE MAY TO PETITIONERS REPLY IN RESPONSE TO THE COUNTY OF CAPE MAY'S MOTION TO DECLINE JURISDICTION AND DISMISS THE PETITION WITHOUT PREJUDICE
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Background

The County of Cape May (“the County”) submits this Reply Brief in response to the Reply Brief of Ocean Wind, LLC (“Ocean Wind 1,” “OW1,” “Petitioner”) to the County’s Motion to Decline Jurisdiction and Dismiss without Prejudice submitted to the New Jersey Board of Public Utilities (“the Board,” “BPU”). The County does not wish to belabor its arguments, all of which it restates and incorporates here by reference, or engage in a paper consumption battle, however, the County is obliged to briefly point out the conclusory and inaccurate arguments of OW1 as well as a number of important admissions by OW1.

The County takes issue with OW1’s false allegation that the County’s within motion is “little more than attempt to delay.” OW1 Reply at 1. The fact of the matter is that the elected officials of the County of Cape May have an obligation to defend the voting franchise of over

75,000 registered-voter residents of Cape May County, all of tis residents and business owners. OW1's Petition specifically requests that the BPU stand in the shoes of the elected officials of Cape May County and give consent and property interests held by the people of Cape May County to OW1, even if those duly elected officials do not consent. The County also objects to the clear attempts by OW1, despite their denials, to shift the burden of determining the pre-action obligations of of OW1, from OW1 to the County of Cape May. Among other things, as argued in the County's within motion, the County seeks to have BPU set workable definitions for certain undefined words and phrases and set reasonable pre-action thresholds that will require strict specificity on the part of any Qualified Offshore Wind Project ("QWOP") when it comes to demands the QOWP may make on municipalities and counties and for triggering the jurisdiction of BPU.

The processes associated with a Petition filed with BPU under the Offshore Wind Economic Development Act ("OWEDA") N.J.S.A. 48:3-87 *et seq.*, related to the desire of a QWOP to have BPU supplant the authority of duly elected local and county officials are completely novel, without true precedent and of first impression before BPU. The County argues respectfully and in good faith, with no nefarious intent such as delay, for BPU to tread thoughtfully and carefully in establishing these new parameters and processes. While OW1 might have a timeline and want these proceedings to be *pro forma* and move with lightening quickness, deliberation is called for, especially on the question of when BPU will take jurisdiction of a Petition of this nature and place the Board over and above duly elected public officials.

The County will quickly address OW1's arguments in turn.

The Standard of Review Argument

OW1 argues that the County has ignored the applicable standard of review related to its Motion to Decline Jurisdiction and Dismiss without Prejudice. The County does not ignore the standards in the least, since there is, as of yet, no specific standard in place with regard to the Board taking jurisdiction of a Petition filed under N.J.S.A. 48:3-87.1(f). (Also “87.1(f)”) There is no BPU or New Jersey Court holding that defines terms like “request,” “consult,” “consent” in the context 87.1(f), or what the prerequisites for triggering BPU jurisdiction should be. The County submits that OW1's focus on typical questions of Petition sufficiency review and the typical opening of a Petition matter before BPU is misplaced. Typical analysis cannot possibly be overlaid upon this novel process. As BPU is well aware, the decisions made now will guide these processes for decades to come and, perhaps not in this case, but at some point, will likely be subject to review by the Courts. This is the well-worn path that new statutes of this nature take. The County simply urges that BPU give some deference to the County as required by the State Constitution to interpret OWEDA to place pre-action burdens on QOWPs and not allow for the shifting of those burdens to the Counties and municipalities.

OW1 submits that the County's arguments that the requests and demands of OW1 made upon the County leading up the filing of the Petition were vague, ambiguous and conditional do not amount to allegations that the Petition is in some way deficient. This is a *non sequitur* unless the Board approves of the submission of vague, ambiguous and conditional demands upon municipalities and counties as satisfactory to trigger the jurisdiction of the Board in this setting. For if the Board follows the County's suggestion for a much more specific and reasonable process, the current OW1 Petition is, without doubt, deficient.

OW1 in its Reply cites again to the Pre-Filed Testimony of Madeline Urbish for the proposition that all of OW1's requests were specific and delineated for the County what was "required." OW1 Reply at 2. Yet, the Board need only look to the OW1 letter of September 28, 2021, to find the relentlessly repeated parenthetical "(if required)" and the OW1 letter of April 12, 2022, to find that the request for an easement was couched by the word "may" and conditioned on the establishment of as-yet unestablished facts. This is not concrete. This is not specific. In fact, as detailed below, OW1 now admits that its requests were, in fact, vague ambiguous and conditional. The extraordinary jurisdiction that OW1 wants BPU to exercise here should stand on much firmer ground.

OW1 appears to argue that the mere filing of a Petition requires the Board to take jurisdiction and ignore any challenge such as the County offers here. OW1 essentially argues that there are no pre-action requirements, such as specific and unconditional requests, necessary to be established before the Board can exercise this unique and far-reaching power to set aside the authority of elected officials and exercise that authority even contrary to the interests of those elected officials and the New Jersey residents they represent. This is an indefensible standard.

OW1 continuously blames the County of Cape May for the lack of specificity in OW1's requests and demands. Yet, OW1 essentially admits that its requests and demands were insufficient, stating, "[The County] only now states what the County wants in terms of unequivocal, unconditioned and specific demands from Ocean Wind..." In the context of the installation of an industrial energy generation facility that will become a permanent part of the oceanfront horizon in Cape May County and be there long after many of us involved in this process are long gone, what County or municipal government would not want "unequivocal, unconditioned and specific demands." Here again, OW1 attempts to shift the burden to the

County. Shocked almost as credibly as Captain Renault upon learning of gambling in Rick's Café, OW1 submits to BPU that it could not possible have known that the County would require specific, unambiguous and unconditional requests and demands before granting extraordinary consents to activities that will likely have negative impacts on the County and its residents for at least the next generation.

The burden to define the specific and actually required needs of this QOWP should be born entirely by OW1 and not foisted on the County of Cape May.

Ignoring the State Constitution's Requirement to Liberally Construe OWEDA in Favor of the County; the Insufficiency of the September 28, 2021, OW1 Letter

In arguing that Article IV, Section VII, paragraph 11 of the New Jersey State Constitution does not apply in this matter, OW1 offers this perplexing passage::

First, OWEDA is not a “law concerning municipal corporations formed for local government, or concerning counties,” so Article IV, Section VII, paragraph 11 of the N.J. Constitution is not applicable to OWEDA or this proceeding. Second, the entire legislative purpose of OWEDA (and specifically, N.J.S.A. 48:3-87.1(f), the section under which this matter was filed) was to give the Board wide-ranging jurisdiction to allow for the approval and development of offshore wind projects. N.J.S.A. 48:3-87.1(f) specifically gives the Board the authority to preempt municipal or county authority in certain, limited circumstances.

(Emphasis added.)

Both of these statements cannot be simultaneously true. Respectfully, the first is simply wrong. Clearly 87.1(f) **IS** “a law concerning municipal corporations formed for local government, or concerning counties.” The Constitutional provision is mandatory here. The long string of eminently distinguishable cases cited by OW1 do not illuminate the issues. This is a

matter of absolute first impression and not simply one of a NIMBY municipality or County attempting to throw up road-blocks against necessary energy generation or a water delivery project or other item falling under the auspices of BPU.

Whether it is the argument that BPU should not follow the Constitution or the “(if required)” letter of September 28, 2021, the crux of this issue is the same. BPU must determine what are the prerequisites that a QOWP must meet before the Board will take jurisdiction of a Petition of this nature under OWEDA. One of those prerequisites must be that the QWOP must provide specific, unequivocal and unconditioned demands to a County or municipality before the Board will consider effective consultation to have taken place. Otherwise, a QOWP can simply make vague and ambiguous requests, even going so far as to expressly state that the QOWP doesn’t know if an item is required, as OW1 has done here, and then run to BPU when the County or municipality involved does not take on the burden of determining what the QOWP actually requires for the project. That is an absurdity. Interestingly, at page 17-18 of its Reply, OW1 states, “On page 2 of the September 28 Letter, Ocean Wind informed the County of its need to pursue a diversion of a portion of Green Acres-encumbered property...” OW1 then includes a reproduction of a portion of the September 28th letter that includes one of the many the “(if required)” parentheticals. OW1 then explains that it has since determined that it won’t need Green Acres diversion. This fact makes it crystal clear that this application is not yet ripe for disposition inasmuch as OW1 has not yet determined what, precisely, it needs for the project, and what, precisely, it needs from the County or BPU. OW1 attempts to overcome these fatal deficiencies by blaming the County.

The ambiguity and vagueness and conditional nature of OW1’s requests continues throughout their submissions to BPU. At page 11 of OW1's reply, OW1 seeks to clear up the

“County’s misunderstanding” about how the NJDEP owner’s consent process works. OW1 says that the County merely had to sign a simple consent letter and reserve all of its rights. Yet in the next breath, OW1 quotes the September 28, 2021, letter which includes an indication that the Property Owner Certification Form would be required. The County respectfully refers the Board to its arguments in its initial motion papers related to the Property Owners Certification Form. The certification, as argued, includes the requirement that the official making the certification state that he or she has reviewed all documents related to the application and the contents are true, accurate and complete. None of those documents were ever supplied by OW1 to the County, which OW1 now admits at page 12 of its Reply. Yet, again, OW1 seeks to blame Cape May County for its failure to deliver those documents to the County for review, stating, “...the County did not request information about Ocean Wind’s permit applications...” Why should this burden also shift to the County? NJDEP requires it of OW1. The County should not have to press the highly sophisticated and eminently well-represented Ocean Wind One on this or any other requirement but rather should have been able to expect that OW1 would make certain to do everything required for its project to advance and not simply assume that the County would proceed as bade.

It is helpful to analogize this situation to the more familiar setting of a land use application. Imagine if the applicant were to submit an application that listed a multitude of various requests for relief to a Zoning/Planning Board but included after each the parenthetical (if required) and insisted that the Board investigate the necessity of each item and then determine what was actually required for the project. In that instance, the Board would refuse to take jurisdiction, the application would be summarily dismissed without prejudice and the applicant told that that it is not the Board’s job to determine what the applicant requires. This is almost

precisely what has happened here. OW1 has submitted myriad requests and demands to the County of Cape May, but left open the answer as to whether or not these things are even required. When the County protests, OW1 tells BPU that it is the County's burden to figure out what OW1 needs. OW1 goes further and attempts to convince BPU that the County has the additional burden of telling OW1 that it should submit specific, unambiguous and unconditioned requests and if the County does not, OW1 is relieved of the obligation.. Again, this is absurd.

The Equivocal April 12, 2022, letter and Denying the Application of the Eminent Domain Act

The first paragraph of OW1's April 12, 2022, letter to the County states in relevant part, "... the Project **may include** the proposed construction of an underground onshore export cable under Cape May County's (County) road right of way..." (Emphasis added). The letter does not conclude that OW1 **will** need to an easement over County property. Everything that follows the words "may include" is speculative. As has been consistent in terms of the approach of OW1, the letter goes on to shift the burden of establishing whether or not real property that "may" be required for the project is a right-of-way or something else from OW1 to the County of Cape May. One can envision the process for making such a determination in a County that was established in 1692 and involving the Township of Upper, where the County lands in question are located, which was established in 1798. A deep dive into County historical records, deeds and other conveyances in the County Clerk's office and other title-related documents as well as historical records of County of Cape May actions would need to be reviewed to conclusively answer such questions. This is common in situations where the boundaries of long-existing roadways must be determined. However, that does not make the analysis a simple one. Via its

letter of April 12, 2022, OW1 implicitly insisted that the County of Cape May undertake this lengthy and challenging review in order to answer the questions about the boundaries of this particular real property/right-of-way. Again, the County argues that BPU should not approve of such pre-action burden shifting in this setting. It may be tedious and difficult work for OW1 to create the historical record to establish whether they need an easement or not, but it should be their work. OW1 should not be allowed to push that obligation onto Cape May County or any other municipality or County. Essentially, OW1 say, “We’ve done a little bit of due diligence on the question and can’t make a determination if this is a right-of-way or not, so you do the work necessary to answer the question. And if you don’t, we are going to haul you before the BPU.”

Respectfully, BPU should set the standard that these burdens rest solely upon the QOWP and they can not shift them to a County or municipality. Cape May County’s extensive cooperation with OW1 is documented in its motion and supporting documents. OW1’s suggestion that “The only reason certain aspects of the April 12 Offer (sic) were conditional was directly tied to the County’s refusal to provide Ocean Wind with information that Ocean Wind has been requesting for months with respect to the property” is disingenuous at best. (OW1 Reply at 4). The phrase here, “refusal to provide Ocean Wind with information,” if written accurately would state, “refusal to undertake the laborious task of establishing conclusively the boundaries of the right-of-way through historical sources.” OW1 has six highly competent attorneys on the service list alone, and has engaged others. OW1 has access to multiple land use and real property experts. OW1 has access to thousands of records through the use of the Open Public Records Act and by searching deeds and other records of title. The time, expense and burden of establishing answers to real property questions in this context should be solely on the shoulders of the QOWP. OW1 cleverly creates the strawman of telling the BPU that they must

bring this Petition because the County won't tell them the answer to this and other questions.

Left out is the extraordinary research and legal inquiry burden that OW1 attempts to shift to the County.

Even if a County in this setting refused to cooperate or speak with a QOWP in any way, shape or form, BPU should still conclude that the QOWP cannot trigger the jurisdiction of BPU unless and until the QOWP has exhausted every available avenue to determine whether or not it needs an easement. Otherwise, the QOWP is simply utilizing the BPU process to force BPU or a County or municipality to answer a question the QOWP did not carry the burden of answering itself.

In this instance, OW1 concedes that it doesn't even know if it needs an easement. OW1 states, "In the event that a definitive determination that the Property is public ROW(sic), Ocean Wind will withdraw its relevant requests from the instant proceeding." (OW1 reply at 20). Why should there be a proceeding if OW1 has not answered the question? Is OW1 expecting BPU to order the County of Cape May to do this work for OW1? It seems so. Certainly, that is not the purpose of OWEDA and 87.1(f).

OW1 argues that the New Jersey Eminent Domain Act does not apply to these proceedings. This, in spite of OW1's admission that OWEDA includes the EDA by reference. OWEDA references the payment of compensation pursuant to the EDA, but then references the entire "'Eminent Domain Act of 1971.' P.L.171, c.361 (C.20-1.1 *et seq.*)". The Legislature could have easily incorporated by reference only those sections of the EDA that relate to establishing just compensation, but it did not. It referenced the entire Eminent Domain Act. OW1 points to language in 87.1(f) that states that BPU may effectuate a taking of County or municipal property "notwithstanding the provisions of any other State law, rule, or regulation to the contrary" for the

proposition that the EDA does not apply. However, the EDA is not a “State law, rule, or regulation to the contrary” of OWEDA. In fact, it would appear that the body of law that has developed around the Eminent Domain Act would be very helpful to BPU. Additionally, what due process is the County entitled to in the instant proceeding if not the due process attendant to the taking of property by eminent domain? Taking OW1’s arguments to their ends would lead BPU to the conclusion that the provisions of New Jersey Constitution itself should be ignored since OW1 would characterize them as “State law, rule, or regulation to the contrary” of OWEDA.

After presenting an appraisal to Ocean City in connection with its desires there, OW1 referenced that appraisal in its April 12, 2022, letter to the County. This is both an indication that OW1 understands that an appraisal is necessary and an admission that OW1 conducted no appraisal of the Cape May County property in question. OW1 now says that an appraisal is not required and the pre-action, strictly enforced requirement of an appraisal of the EDA does not apply to these proceedings. OWEDA doesn’t say that and the EDA cannot be characterized as a “State law, rule, or regulation to the contrary” of OWEDA. The County respectfully refers BPU to the County’s arguments in its moving papers on this topic. OW1’s failure to obtain an appraisal in accordance with the accepted EDA process is fatal to its application for a taking by BPU under OWEDA. If a contrary conclusion is reached, then BPU will likely be eternally faced with QOWP Petitions for takings where no appraisal has been supplied to the County or municipality involved and the added litigation that will follow. Instead, BPU should set the standard now that QOWPs, as a prerequisite to gaining the jurisdiction of BPU over an 87.1(f) Petition, must follow the appraisal requirement of the Eminent Domain Act.

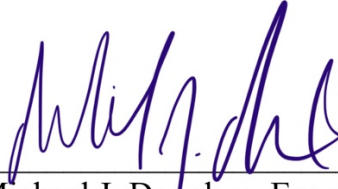
Conclusion

Despite the detailed arguments of the attorneys, this attorney included, this is a simple case. BPU can simply indicated that, in connection with “county approvals, consents, or affirmative filings with other public entities required to construct or operate a qualified offshore wind project,” the QOWP must submit specific, unequivocal and unconditioned requests or demands to the County that are subsequently denied by the County by action or inaction, before the QOPW can file a Petition for BPU to preempt the authority of the duly elected officials of the County. Additionally, BPU can indicated that a QOPW that wants BPU to effectuate a taking of County property must first provided an appraisal of said property to the County for the property in question and allow the County the 90 day time period to consider the appraisal before filing a Petition with the BPU under 87.1(f). Here, Ocean Wind One having done neither, the Board should decline jurisdiction and dismiss the Petition without prejudice. OW1 can then satisfy these requirements and if the County is not responsive, OW1 can file its Petition with the pre-action requirements satisfied. This approach would not only construe OWEDA in favor of the County of Cape May as the Constitution requires, it would also afford the County the due process it deserves, and it would establish workable and clear procedures for future Petitions under 87.1(f).

The County of Cape May object to and opposes any arguments submitted by OW1 not specifically addressed in this Reply. The County, for the reasons stated in its submissions, respectfully moves the Board of Public Utilities to decline jurisdiction of this Petition and dismiss the Petition without prejudice.

Respectfully submitted,

For the County of Cape May
BLANEY, DONOHUE & WEINBERG, P.C.

A handwritten signature in blue ink, appearing to read "Michael J. Donohue", is written over a horizontal line.

Michael J. Donohue, Esquire

Dated: June 27, 2022