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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

MOTION TO DECLINE JURISDICTION
AND DISMISS THE PETITION
WITHOUT PREJUDICE AS UNRIPE FOR
DISPOSITION AND NONJUSTICIABLE
UNDER N.J.S.A. 48:3-87.1(f) and N.J.S.A.
20:3-1 *Et Seq.*

MOTION

For the reasons set forth herein below and as supported by the included Certification of Kevin L. Lare, County Administrator, Respondent County of Cape May (“the County”) respectfully moves The Board of Public Utilities (“the Board” or “BPU”) to decline jurisdiction and for the dismissal of the within Petition, without prejudice, as untimely and unripe for disposition and nonjusticiable. The County specifically and unconditionally reserves every and all right, defense, argument, claim, counterclaim, or any matter or issue, choate or inchoate, legal and/or equitable. Respectfully, by the filing of this motion the County does not indicate its consent and/or acquiescence to the legitimacy of the process defined in N.J.S.A. 48:3-87.1 *et seq.*, and specifically reserves its right to challenge same.

BACKGROUND

Petitioner Ocean Wind, LLC, submitted the within Petition to the Board on May 20, 2022, in connection with the Ocean Wind 1 Qualified Offshore Wind Project (also referred to as “OW1”). OW1 is the first of two anticipated projects that seek to place offshore wind-generation facilities, including hundreds of towers and turbines visible from shore, off the beaches of Cape May County, New Jersey. The projects are spearheaded by the Denmark-based multi-national corporation, Orsted. The Petition seeks to force the provision of as yet incompletely defined consents from the elected officials of Cape May County and seeks to take certain real property interests from the County without the County’s approval and contrary to New Jersey statutes and

jurisprudence related to condemnation proceedings. As of the date of submission of this motion, the Board has not yet indicated that it is retaining jurisdiction. However, the County is compelled to file this early motion in order to ensure the County's entitlement to appropriate due process in connection with these efforts by OW1 to have the Board of Public Utilities stand in the shoes of the elected officials of Cape May County and make decision on behalf of the people of Cape May County. The early filing is also necessary inasmuch as time is an essential element of the motion as well as a critical component of the County's rights and ability to engage in a full exposition of the facts and law before the Board in the County's own defense.

The County urges the Board to decline jurisdiction and moves to dismiss the Petition without prejudice. This motion is based on the language and requirements of N.J.S.A. 48:3-87.1(f), the Offshore Wind Economic Development Act ("OWEDA" "87.1(f)") and N.J.S.A. 20:3-1 *et seq.*, the Eminent Domain Act ("EDA"). OWEDA contains requirements for "requests" and includes a 90 day pre-action waiting period. The EDA contains a number of nonwaivable, strictly enforced pre-action requirements.

The motion turns, in large part, on the contents of two letters from OW1 to the County. The first, dated September 28, 2021, includes certain vague, ambiguous and conditional items, which are analyzed below in detail, which OW1 claims were the "requests" referenced in N.J.S.A. 48:3-87.1(f). The second letter, dated April 12, 2022, includes a speculative demand from OW1 for certain real property interests from the County and makes an offer of \$10,000.00 in compensation for those interests. No appraisal of the property in question was ever conducted by OW1.

LAW AND ARGUMENT

The parties hereto agree that "This Petition raises issues of first impression under the OWEDA," N.J.S.A. 48:3-87.1 *et seq.* (See, paragraph 10 of the Petition). Accordingly, there has been no judicial exposition, approval, disapproval or reformation of the Act or any of its components. BPU is charting new territory with every decision in this setting. The Constitution of the State of New Jersey of 1947, Article IV, Section VII, paragraph 11, requires that "any law concerning municipal corporations formed for local government, or concerning counties, shall be liberally construed in their favor." Thus, BPU is compelled by the Constitution of the State of New Jersey to liberally construe the Act in favor of the County. The County argues that where the Board is faced with competing but similarly weighted arguments by the Petitioner and the County, the Constitution compels the Board to resolve the issue in favor of the County.

The September 28, 2021, Letter and the Property Owners Certification

OW1 submits at paragraph 39 of the Petition, that its letter of September 28, 2021, was in satisfaction of the requirements of N.J.S.A. 48:3-87.1(f), "providing the requisite 90-day statutory notice and requesting the specific approvals, consents and easements from Cape May County that are reasonably necessary for the construction and operation of the Project." The Board is respectfully urged to give attention to the word "specific" in that averment. The word is misplaced, at best. The letter is included herewith as Exhibit CMC-A. A dissection of the

various parts of the September 28, 2021, letter clearly indicates that it was anything but a “specific” request to the County.

On page one of the letter as the contents allegedly move into “specific” requests, OW1 states, “NJDEP DLRP permits requiring Cape May County consent **are anticipated to include:**” (Emphasis added). This language begs the question: How is the County reasonably supposed to assess what is specifically requested when OW1 says these things are “anticipated to include.” This is not specificity. This is vague, ambiguous generalization. To characterize this as a request would be far too indulgent. Also, it is beyond any rational dispute that the County of Cape May has no obligation to determine for OW1 what consent it will actually need as opposed to those it merely anticipates it will need. The language used here is critically important. As stipulated, we deal with matters of first impression, where even a single word could have an impact on the processes and procedures related to the OWEDA for decades to come. The County urges the Board to set clear parameters at this juncture on the specificity required or items to be consider "requests" and to trigger the 90-day countdown within 87.1(f). Surely, the above cannot meet a reasonable standard of specificity. The conclusion that this language is unreasonably nonspecific is reinforced by the remainder of the letter.

The contents of the September 28, 2021, letter become even more vague, ambiguous and conditional as the letter goes on. The letter states:

- Permissions /easement for NJDEP Bureau of Tidelands Management Tidelands Grant or License for portion of the onshore cable route across mapped tidelands where Cape May County is the upland owner (**if required**).
- Road Opening permits and Highway Occupancy permits (**if required**)
- Road opening permits from the Cape May County Department of Public Works for the portion (**if required**)
- Signatures / approval on NJDEP Short Term de Minimis General Permit (B7) for groundwater discharge resulting from construction dewatering activities (**if required**)
- Signatures on NJDEP Temporary Dewatering permits for water withdrawal from construction dewatering activities (**if required**)
- Cape May County’s consent to an application to the NJDEP for a diversion of Green Acres property within Ocean City (**if required**)

(Emphasis added).

Again, it is impossible to conclude what specifically OW1 is seeking. Essentially every item is couched and conditional by virtue of the fact that it has the words “if required” appended to it. Respectfully, this cannot be the standard that BPU wishes to set when it comes to the specificity required to trigger litigation or the starting of the clock on the 90 day period of 87.1(f). Were the Board to conclude that such vague, ambiguous and conditional statements are sufficient to trigger litigation and/or start that clock, then counties and municipalities across the coastal regions of our state would be compelled to determine what precisely is required for construction of a particular Qualified Offshore Wind Project (“QOWP”) in order to assess whether or not the governing body might agree to consent to permit applications or grant property rights. The County urges BPU to follow a much stricter standard and to construe this

portion of the statute liberally in favor of the County as required by the State Constitution. The proposed standard is a simple one: A QOWP must state with specificity sufficient to allow the County/Municipality the ability to make a fully informed decision those consents and property interests the QOWP is requesting. As detailed below, there is broad support in the law for such a standard. Qualifying each request with the words "if required" or "it is anticipated" attempts to shift the burden of determining what is required from the QOWP to the governmental Respondent. This is unreasonable and contrary to the requirements of the law and the State Constitution.

OW1 includes the sentence at the beginning of the September 28, 2022, letter, "Pursuant to N.J.S.A. 48:3-87.1 et seq., Ocean Wind, LLC ("Ocean Wind") is writing to formally provide the County of Cape May ("County" or "Cape May County") with notice of specific requests pertaining to the Ocean Wind 1 Project ("Ocean Wind 1" or "Project")." OW1 will certainly argue that this statutory reference serves to allow the letter to trigger subsequent litigation over the so-called requests and/or starting the 90-day clock. However, simply inserting a statutory reference does not equate to automatic compliance with the requirements of the statute. Simply including the statutory reference does not create the "request" required by the statute. "'Request' is defined in Black's Law Dictionary * * * as 'an asking * * *, the expression of a desire to some person for something to be granted or done.' 'To request' is defined in Webster's Third New International Dictionary as 'to ask to do something.'" State v. Community Distributors, Inc., 123 N.J. Super. 589, 595, (County Court 1973), aff'd, 64 N.J. 479, 317 A.2d 697 (1974). The contents of the September 28, 2021, OW1 letter does not conform to the accepted definition of the word "request." Instead, OW1 provided a series of undefined items that may or may not be required for the QOWP. These items are, at best, conditional. "Conditional" is defined in West's Encyclopedia of American Law, 2005, as "Subject to change; dependent upon or granted based on the occurrence of a future, uncertain event." Certainly, the Legislature could not have intended that requests under 87.1 (f) be allowed to be so vague and ambiguous and conditioned on the QOWP determining at some later date whether or not the items are even required. Even more clearly, the Legislature could not possibly have intended to shift the burden of determining what is actually required from the QOWP to a County governing body through the allowance of equivocal language by the QOWP. Perhaps most concerning is the fact that OW1 attempts to now foist onto BPU the obligation to determine, through the Petition process, what OW1 actually wants or needs in terms of property and consent from the County of Cape May. Under OW1's approach, the parties will be compelled to litigate before the BPU each and every supposed "request" since one cannot glean from the September 28, 2021, letter whether the items are required or not. There is no reasonable argument to be made that this is what the Legislature intended in adopting N.J.S.A. 48:3-87.1. The burden of specificity here should be on OW1 in the first instance and not on the County or BPU.

Outside of the conditional items set forth in the OW1 letter of September 28, 2021, there are references to the alleged need of the QOWP for the following:

- Cape Atlantic Conservation District Erosion and Sediment Control Approval for the cable installation.
- Cape May County Planning/Site Plan Approval from Cape May County Planning Department for construction.
- Cape Atlantic Conservation District Erosion and Sediment Control Approval for the substation construction.

It is beyond dispute that these items can only be granted by autonomous or semi-autonomous agencies and not by the County of Cape May. Again, as a matter of first impression, it would appear only reasonable that BPU would conclude that OW1 could only come to the Board after the exhaustion of the normal application process to these entities. N.J.S.A. 48:3-87.1 expressly recognizes the obligation of the QOWP to conform to the normal processes of these agencies. The statute states at paragraph (f), “after consultation with a municipality, county, or other political subdivision of the State, or any agency, authority, or other entity thereof,” the QOWP may file a Petition with BPU seeking to compel certain consents and/or property rights. The County of Cape May is not legally competent to make decisions on behalf of the Cape Atlantic Conservation District or the County Planning Board. Only those agencies can do so. These items also cannot be appropriately characterized as “requests” under 87.1(f) and their inclusion in the September 28, 2021, letter lends support to the County's argument that the contents of the letter in no way satisfy the pre-action requirements of 87.1(f).

The Property Owner Certification Form

OW1 brought its focus upon obtaining a signature from the County on a NJDEP Land Use Management Program, Division of Land Use Regulation, Property Owner Certification form. Ocean Wind representatives indicated verbally and in writing that they simply needed the form signed so that they could advance their project planning and permit applications, and that the County did not need to consent to the project. The contents of the form did not comport with what Ocean Wind 1 was representing. The form contains a certification that the County Administrator or the Director of the Board of Commissioners would have to make on behalf of the County. The certification states:

I certify under penalty of law that I have personally examined and am familiar with the information submitted in this document and all attachments and that, based on my inquiry of those individuals immediately responsible for obtaining and preparing the information, I believe that the information is true, accurate, and complete. I am aware that there are significant penalties for knowingly submitting false information, including the possibility of fine and imprisonment. I hereby grant permission for the conduct of the proposed activities and consent to allow access to the site by representatives or agents of the Department for the purpose of conducting a site inspection(s) of the property in question.

The County was never supplied with “the information submitted in this document and all attachments” as mentioned in the certification. It is literally impossible for a County official to sign such a certification without having the opportunity to review those items and perhaps have expert assistance in doing so. The certification requires a County official to certify, under penalty of law, that all information submitted to NJDEP by Ocean Wind 1 “is true, accurate, and complete.” Again, none of the information was supplied to the County for the type of substantive review that would be required for a County official to make such a certification. In order to do

so, the County would need to review everything that was submitted by Ocean Wind 1 to NJDEP as part of its multi-part permit application. This information has not been supplied. As pointed out by the County Administrator in his certification, it was not and is not the obligation of the County to undertake the effort needed to determine what OW1 is actually requesting or fill in the information gaps created by OW1's failure to conform to its obligations in connection with its request for the County's execution of the Property Owner Certification. Those obligations belong solely to OW1 and they have not been fulfilled. It cannot possibly be the standard that where a QOWP fails to fulfill a pre-action obligation of these types, the burden shift to the County or Municipal agency to point out such deficiencies to the QOWP.

Additionally, the Property Owner Certification Form requires that a County Official certify that the Official is "aware that there are significant penalties for knowingly submitting false information, including the possibility of fine and imprisonment." One is left to wonder how OW1 could find it reasonable, when faced with the prospects of punishment for false swearing, that a County Official would certify that he or she "personally examined and am familiar with the information submitted in this document and all attachments" when the opportunity to effectuate the required review was never afforded to the County. It has been long established that submitting a false certification subjects the person making the certification to serious consequences, including the possibility of criminal charges. State v. Parmigani, 65 N.J. 154, 156-57 (1974). It is eminently unreasonable to expect a County Official to so certify and equally unreasonable to demand to litigate the matter before the BPU when the pre-action requirements have clearly not been met.

The County respectfully urges the Board to conclude that neither the OW1 letter of September 28, 2021, nor the OW1 demand for execution of the Property Owner Certification qualify as the "requests" required under the 87.1(f). Furthermore, the County urges BPU to find that OW1 has not complied with the requirements to supply all information and documents related to its permit applications for review by the County. Consequently, the within Petition is not justiciable until such time as specific and unconditional requests are submitted to the County and the County has had a real opportunity to review all the information and documents, perhaps with the assistance of an expert, in order to make an informed assessment of the propriety of executing the Property Owner Certification form. No competent requests that would satisfy the requirements of N.J.S.A. 48:3-87.1(g), liberally construed in favor of the County as the Constitution requires, having been made via the September 28, 2021, letter, or otherwise. The Petition is untimely, unripe and nonjusticiable. Respectfully, BPU should decline jurisdiction and dismiss the petition without prejudice.

The April 12, 2022, Letter, "Requests" and The Eminent Domain Act

On April 12, 2022, OW1 submitted a letter to Cape May County ostensibly seeking certain real property interests. (Exhibit CMC-B) This letter was also equivocal, stating, "* * * the Project may include the proposed construction of an underground onshore export cable under Cape May County's (County) road right of way (Roosevelt Boulevard), identified on the Official Tax Map of Ocean City as Block 3350.01, Lot 17.01 (Property)". (Emphasis added). One is left to wonder, based on the clear language of OW1's April 12, 2022, letter, whether the project will include construction on County lands or not. Again, BPU is respectfully urged by the County

adopt a strict standard of specificity in this regard rather than allow loose and speculative language to open the Petition process.

As with the September 28, 2021, letter the April 12, 2022, letter also sought to shift the burden of establishing certain QOWP obligations to the County. OW1 required the County to “Kindly confirm, within fourteen (14) days of this letter, whether the County agrees that the portion of the Property crossed by the Project is dedicated road right-of-way.” After receiving detailed and complex questions related to County real property and decisions made by the County of Cape May, including insistence that the County and/or its officials explain the reasoning for certain decisions and/or prove or disprove certain property status, the County pointed out to OW1 that it was not the obligation of the County to perform OW1’s due diligence and that OW1 would need to utilize the New Jersey Open Public Records Act (“OPRA”), N.J.S.A. 47:1A-1 *et seq.*, in order to obtain documents responsive to its demands. This is confirmed by OW1. “The County has requested that Ocean Wind submit requests through the New Jersey Open Public Records Act, but has also indicated that it may be preparing responses to Ocean Wind’s requests. As of the date of this filing, outside of the OPRA process, Ocean Wind has not received responses from the County to its questions.” *Direct Testimony of Madeline Urbish*, P12:12-16.¹ One is left to wonder why OW1 would believe it would receive responses “outside of the OPRA process” when the County expressly stated that OW1 would need to utilize the OPRA process. The necessity of an OPRA requests for obtaining informational documents from local and County government is ubiquitous throughout New Jersey. To date, it appears that a representative of OW1 submitted to the County multiple OPRA requests with regard to the issues underlying the within Petition and the County has responded appropriately. Respectfully, the County is at a loss to understand why OW1’s various requests are ambiguous and conditional. Nevertheless, they remain so. Again, if OW1 with all of its resources cannot determine precisely what it needs for the QWOP from the County of Cape May, that burden should not be shifted to the County. BPU should require OW1 to submit specific and unequivocal requests to the County prior to coming to BPU and asking the Board to stand in the shoes of the duly elected officials of the County of Cape May.

As detailed and argued above, the satisfaction of the “request” element of N.J.S.A. 48:3-87.1(f) should not be deemed by BPU to be satisfied with equivocal and burden shifting demands.

The Eminent Domain Act

OW1 is attempting here to exercise the Constitutionally limited power of Eminent Domain, by and through BPU, to take certain real property interests from the County of Cape May, under the auspices of N.J.S.A. 48:3-87.1(f). There can be no doubt that the Petition process before BPU is the “action” for condemnation allowed under the New Jersey Eminent

¹ The County objects to BPU considering any other prefiled testimony at this point in the proceedings inasmuch as a jurisdiction determination is in question and it would be inappropriate to consider any testimony other than that of Ms. Urbish on these initial questions. Ms. Urbish’s testimony speaks to certain pre-action interaction between the County and OW1, whereas the other prefiled testimonies go to the merits of the proposed Verified Petition. Of course, much of Ms. Urbish’s testimony is belied by the contents of the letters and the actions or failures to act of OW1.

Domain Act ("EDA") N.J.S.A. 20:3-1 *et seq.* This conclusion is supported by the Legislature's incorporation by reference of the EDA in N.J.S.A. 48:3-87.1(f). The EDA defines "Action" in this context, stating:

"Action" means the legal proceeding in which

- (1) property is being condemned or required to be condemned;**
- (2) the amount of compensation to be paid for such condemnation is being fixed;**
- (3) the persons entitled to such compensation and their interests therein are being determined; and**
- (4) all other matters incidental to or arising therefrom are being adjudicated**

N.J.S.A. 20:3-2. Clearly, this Petition process is the "action" defined in the EDA that is a prelude to a taking of real property by a governmental agency, in this case, BPU on behalf of Ocean Wind 1.

Presumably, the 14-day time frame included in the April 12, 2022, OW1 letter is placed there as an attempted satisfaction of the prerequisite for bringing a condemnation action in accordance with the EDA. The Acts states, in relevant part, at N.J.S.A. 20:3-6:

no action to condemn shall be instituted unless the condemnor is unable to acquire such title or possession through bona fide negotiations with the prospective condemnee, which negotiations shall include an offer in writing by the condemnor to the prospective condemnee holding the title of record to the property being condemned, setting forth the property and interest therein to be acquired, the compensation offered to be paid and a reasonable disclosure of the manner in which the amount of such offered compensation has been calculated, and such other matters as may be required by the rules. Prior to such offer the taking agency shall appraise said property and the owner shall be given an opportunity to accompany the appraiser during inspection of the property. Such offer shall be served by certified mail. In no event shall such offer be less than the taking agency's approved appraisal of the fair market value of such property. A rejection of said offer or failure to accept the same within the period fixed in written offer, which shall in no case be less than 14 days from the mailing of the offer, shall be conclusive proof of the inability of the condemnor to acquire the property or possession thereof through negotiations.

OW1 fails to meet the prerequisites for filing such an action not only by its vague, ambiguous, equivocating and conditional demands, but also by failing to fulfill important requirements of the EDA. The EDA requires that "Prior to such offer the taking agency shall appraise said property and the owner shall be given an opportunity to accompany the appraiser during inspection of the property." This did not occur. Instead, in its letter of April 12, 2022, OW1 stated, "This offer is based on a recent appraisal of an adjacent Ocean City-owned parcel."

As a matter of first impression, OW1 now asks BPU to approve of a process that ignores the prerequisites of the EDA and to set that standard for this and all future Petitions by a QOWP. The County respectfully urges BPU to reject this approach, uphold the pre-suit requirements of the EDA and vindicate the Constitutional mandate that both N.J.S.A. 48:3-87.1(f) and N.J.S.A. 20:3-6, be liberally construed in favor of Cape May County.

In concluding its letter of April 12, 2022, OW1 again attempts to shift its burden to the County of Cape May, stating, "Again, we ask that the County please confirm within fourteen (14) days of this letter whether that portion of the Property crossed by the Project is dedicated road

right-of-way.” The EDA does not require the County to provide proof of any kind or complete the condemnee’s due diligence. See, State, By Commissioner of Transportation v. Siris, 191 N.J. Super. 261, 269 (Law. Div. 1983). Nor does the EDA require the County to consider an offer with no appraisal of the property in question, quite the opposite. Respectfully, BPU is compelled by law to apply that same standard here. The importance of the process of bona fide negotiations is well settled. Casino Reinvestment Dev. Auth. v. Katz, 334 N.J. Super. 473, 480–81, 759 (Law. Div. 2000), citing, State by Commissioner of Transportation v. D’Onofrio, 235 N.J. Super. 348 (Law Div. 1989); State v. Hancock, 208 N.J. Super. 737 (Law Div. 1985), *aff’d* 210 N.J. Super. 568 (App. Div. 1985). It is impossible to conclude that negotiations here have been bona fide in light of the equivocal and conditional requests of OW1 and the complete failure on the part of OW1 to obtain an appraisal of the property in question. This approach is extremely prejudicial to the County’s ability to assess the demands of OW1. The purpose of N.J.S.A. 20:3-6 is to encourage acquisitions without litigation, thus saving both the acquiring entity and the condemnee the expense and delay of litigation. *Id.* This policy permits the landowner to receive and keep full compensation. Borough of Rockaway v. Donofrio, 186 N.J. Super. 344, 354 (App. Div. 1982).

It is beyond dispute that OW1’s so-called “requests” are not specific and that it conducted no appraisal of the property in question. Under these circumstances, our courts have made clear that the action must be dismissed.

The reasonableness of pre-negotiation disclosure centers on the adequacy of the appraisal information; it must permit a reasonable, average property owner to conduct informed and intelligent negotiations. We thus concur in the observation of the Appellate Division that an appraisal should contain an explanation of the valuation approach or methodology actually used. A property owner ordinarily needs such information to understand the appraisal and to engage in constructive negotiations. Compliance with the prelitigation requirements of the statute is jurisdictional, and failure of the condemnor to comply with the prelitigation requirements will result in dismissal of the complaint.

State by Commissioner of Transp. v. Carroll, 123 N.J. 308, 321 (1991).

There can be no doubt that the EDA’s requirements apply to OW1 in this setting. Cf., Monmouth County v. Whispering Woods at Bamm Hollow, Inc., 222 N.J. Super. 1, 9 (App. Div. 1987). The EDA “provides a uniform procedure to be followed by all entities who have the power to condemn.” Township of Hillsborough v. Robertson, 260 N.J. Super. 37, 42 (Law. Div. 1992), See also, City of Atlantic City v. Cynwyd Investments, 148 N.J. 55, 68 (1997).

The law requires strict adherence to N.J.S.A. 20:3-6 by any and all condemnees:

We know that the purpose of the Legislature in enacting N.J.S.A. 20:3–6 was, as stated by the Eminent Domain Revision Commission, to encourage entities with condemnation powers to make acquisitions without litigation. * * * This purpose is furthered by strict construction of N.J.S.A. 20:3–6. If a condemnor may ignore the statute and later cure the proceedings, the purpose of N.J.S.A. 20:3–6 will be completely frustrated. Indeed, an order for a stay so that a condemnor may then do what it should have done earlier will encourage noncompliance with N.J.S.A. 20:3–6. A condemnor will know that if it does not comply, it may nevertheless proceed. Here plaintiff completely ignored its obligation to permit defendants to accompany its appraiser on the property before the action was started. Had

plaintiff complied with *N.J.S.A. 20:3-6* in this regard, it is entirely possible that defendants might have better understood what was being taken and what would be built. At the very least, an opportunity to avoid misunderstandings would have been presented. Plaintiff can give no reason for its failure to honor the statute.

Borough of Rockaway v. Donofrio, 186 N.J. Super. 344, 353-54 (App. Div. 1982).

The New Jersey Supreme Court has held that the relief afforded to a condemnee when a condemnor fails to strictly comply with *N.J.S.A. 20:3-6*, is dismissal of the action seeking condemnation. *Id.* See also, N.J. Housing and Mortgage Finance Agency v. Moses, 215 N.J. Super. 318, 329 (App. Div. 1987); State by Commissioner of Transportation v. Hancock, 210 N.J. Super. 568, 510 (App. Div. 1985), affirming State v. Hancock, 208 N.J. Super. 737 (Law Div. 1985), Monmouth County v. Whispering Woods at Bamm Hollow, Inc., 222 N.J. Super. 1, 9 (App. Div. 1987), State, by Commissioner of Transportation v. Siris, 191 N.J. Super. 261 (Law Div. 1983).

Accordingly, the Petition must be dismissed inasmuch as the demands required under the EDA was equivocal and conditional and the appraisal required to be performed prior to the submission of any offer was never conducted by OW1.

Additionally, OW1 should not have the benefit of filing the Petition after the expiration of 14 days after its purported offer via its April 12, 2022, letter. If OW1 had fulfilled its legal obligations prior to the April 12, 2022, letter, which it has not, the 90-day waiting period would not expire until after July 11, 2022.

Under any scenario the Petition is untimely, unripe and nonjusticiable inasmuch as OW1 has not fulfilled its mandatory pre-action requirements. Respectfully, it appears clear BPU does not have a legal basis to take jurisdiction of the Petition given those deficiencies. Even if the Board somehow ignored all of those deficiencies, BPU is legally unable to take jurisdiction until the 90-day period has elapsed. Either way, the Petition must be dismissed. The County, also seeks a determination by BPU that both the "requests" for consents and the demand for real property interests made by OW1 here where insufficiently specific to support the BPU taking jurisdiction of the Petition. The County feels strongly that BPU must send a strong message to QOWPs that more than vague, ambiguous and conditional demands are required to be made before a QOWP can bring a County or Municipality into litigation before the BPU.

The qualified and conditional demands of OW1 coupled with the fact that no appraisal was conducted thus denying the County of an important due process safeguard, requires that the Petition be dismissed with prejudice.

The County's Cooperation

Lest Cape May County's silence be taken for acquiescence with regard to the implication of the Direct Testimony of Madeline Urbish that the County has been uncooperative, the County denies the allegations. As detailed in the Certification of County Administrator Kevin L. Lare, the County has attempted to be cooperative and keep lines of communication open. The County of Cape May went to great lengths to facilitate meetings with OW1 representatives and both

County and local officials in Cape May County. These meetings were coordinated, arranged and hosted by the County of Cape May. OW1 seems to confuse acquiescence with cooperation. They are not the same thing. The County has been eminently cooperative. County elected officials have obligations to broad constituencies, especially along coastal counties when it comes to the installation of industrial facilities that will impact the county for a generation or more. The OW1 timeline is not the time continuum for all others. Cape May County has proceeded responsibly and with due expedience under all the circumstances here. Responsibility for any delay at this point should be borne by OW1 for failing to conform to the pre-action requirements when it comes to the extraordinary step of asking the Board of Public Utilities to set aside and supersede the authority of the duly elected representatives of the people of Cape May County. Again, it cannot be the obligation of Cape May County to point out deficiencies in the pre-action requirements that OW1 must fulfill. Orsted and its partners are highly sophisticated actors with extraordinary legal and administrative resources, far beyond those of any New Jersey County. BPU should make clear that the burden of fulfilling all pre-action requirements rest solely upon OW1. The implication that the County of Cape May has been in any way uncooperative, dilatory or obstructionist is false. The further implication that the County's actions have in some way impacted OW1's ability to fulfill its pre-action obligations is equally untrue.

Yet, accepting for a moment OW1's implications, this Petition still cannot survive the fact that OW1's "requests" were all vague, ambiguous and conditional, OW1 failed to obtain an appraisal of the property in question and even if BPU were to ignore all of that, this Petition would not be justiciable until the passage of the 90 day waiting period of 87.1(f), which does not expire until July 11, 2022. Frankly, the County should not be penalized for having to bring this motion and, respectfully, will be compelled to move to toll the 90 day period for the time devoted to this motion practice should BPU retain jurisdiction at this juncture.

CONCLUSION AND PRAYER FOR RELIEF

For the reasons stated herein above, the County of Cape May respectfully urges the Board of Public Utilities to decline jurisdiction and dismiss the Petition without prejudice. The Petition must be dismissed as a matter of law.

It is beyond dispute that OW1 has made only vague, ambiguous and expressly conditional "requests" for consent from the County. On their face, it would be impossible for any person to know precisely what OW1 is "requesting." BPU is urged to set a higher standard of specificity in this matter of first impression.

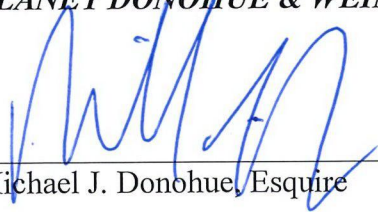
OW1 has not supplied all required information and documents in order for the County to provide consent via the Property Owner Certification. Presuming that a County elected official or County Administrator would blindly sign such a Certification without the due diligence required to make such a statement essentially under oath, was a mistake that OW1 made. The County should not now be punished for that mistake.

OW1 provided a speculative and burden shifting demand for real property interests, did not obtain an appraisal of the property in question or afford the County its right to be present at

the property in connection with an appraisal. As a matter of law, the action must be dismissed without prejudice and will not become justiciable until such time that OW1 fulfills its pre-action obligations in this regard. The law is clear on this point.

Jurisdiction cannot yet lie at BPU. Dismissal without prejudice is the only appropriate outcome until such time as Ocean Wind 1 submits clear, unambiguous and non-conditional requests to the County and fulfills its pre-action obligations under the law.

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



Dated: June 7, 2022

Michael J. Donohue, Esquire

September 28, 2021

Kevin Lare, Acting Administrator
Board of County Commissioners, Cape May County
4 Moore Road
Cape May Courthouse, NJ 08210

Re: Ocean Wind 1 Qualified Offshore Wind Project

Dear Mr. Lare:

Pursuant to N.J.S.A. 48:3-87.1 *et seq.*, Ocean Wind, LLC (“Ocean Wind”) is writing to formally provide the County of Cape May (“County” or “Cape May County”) with notice of specific requests pertaining to the Ocean Wind 1 Project (“Ocean Wind 1” or “Project”). Ocean Wind and the County have been engaged in ongoing discussions related to the Project since the New Jersey Board of Public Utilities approved Ocean Wind 1 as a Qualified Offshore Wind Project in June 2019.¹

As discussed further below, Ocean Wind will require certain permits, approvals and consents from Cape May County for the Project. Ocean Wind therefore respectfully requests that the County provide the following:

Permits/Approvals for the Onshore Cable Route:

- Cape May County’s consent for the Project to apply for New Jersey Department of Environmental Protection (NJDEP) Division of Land Resource Protection (DLRP) permits. This consent includes: (1) approval to perform the regulated activities on County land/property; (2) consent for the NJDEP to enter County property; and (3) Cape May County sign-off on Property Owner Certification Form as required for application submission relevant to County property/roads/rights-of-ways. NJDEP DLRP permits requiring Cape May County consent are anticipated to include:
 - NJDEP DLRP Multi-Permit Application
 - In-Water Waterfront Development Permit for HDD installation below mean high water
 - Coastal Areas Facility Review Act (CAFRA) Permit and Coastal Consistency Determination
 - Coastal Wetlands Permit
 - Freshwater Wetlands Permit, Transition Area Waiver(s)
 - Geotechnical Survey Investigation Permits (if additional surveys required)

¹ *In re Bd. of Pub. Utilities Offshore Wind Solicitation for 1,100 MW*, NJ BPU Docket No. QO18121289 (June 21, 2019).

- Permissions / easement for NJDEP Bureau of Tidelands Management Tidelands Grant or License for portion of the onshore cable route across mapped tidelands where Cape May County is the upland owner (if required).
- Road Opening permits and Highway Occupancy permits (if required) from Cape May County Department of Public Works for the portion of the onshore cable route within County rights-of-ways, including Roosevelt Boulevard (CR-623), Bay Avenue (CR-656) and part of 35th Street in Ocean City and utility/access agreements from the County to support maintenance and operation of the onshore cable within County rights-of-ways.
- Road opening permits from the Cape May County Department of Public Works for the portion (if required) of the onshore cable route along County roadways (Sea Isle Boulevard (CR-623) and the crossing of Landis Avenue (CR-619)) and utility/access agreements from the County to support maintenance and operation of the onshore cable within County rights-of-way.
- Cape Atlantic Conservation District Erosion and Sediment Control Approval for the cable installation.
- Signatures / approval on NJDEP Short Term de Minimis General Permit (B7) for groundwater discharge resulting from construction dewatering activities (if required).
- Signatures on NJDEP Temporary Dewatering permits for water withdrawal from construction dewatering activities (if required).
- Cape May County's consent to an application to the NJDEP for a diversion of Green Acres property within Ocean City (if required). The Green Acres diversion involves the following property:

| Requirement | Property Name/Description | Owner | Municipality | Block | Lot |
|-------------------------|---|-----------------|--------------|---------|-------|
| HDD onshore cable route | Roosevelt Blvd bridge crossing South (East) | Cape May County | Ocean City | 3350.01 | 17.01 |

Permits/Approvals for BL England Substation:

- Cape May County Planning/Site Plan Approval from Cape May County Planning Department for construction.
- Cape Atlantic Conservation District Erosion and Sediment Control Approval for the substation construction.

Ocean Wind looks forward to our continued collaboration with Cape May on the items described above.

Sincerely,

Marc Reimer

Marc Reimer
Project Development Director

C: Gerald M. Thornton, Commissioner Director
Leonard Desiderio, Commissioner Vice Director

April 12, 2022

BY FEDEX AND & ELECTRONIC MAIL

Michael Donohue, Esq., Special Counsel
Board of County Commissioners, Cape May County
4 Moore Road
Cape May Courthouse, NJ 08210

Re: Ocean Wind, LLC
Block 3350.01, Lot 17.01 in Ocean City
Ocean Wind Offshore Wind Farm Project

Dear Mr. Donohue:

As you know, the New Jersey Board of Public Utilities (BPU) approved the Ocean Wind Offshore Wind Farm Project (Project) proposed by Ocean Wind, LLC (Ocean Wind) on June 21, 2019 (June 21 BPU Order) (enclosed), determining that the Project is a qualified offshore wind project. Among other things, the Project may include the proposed construction of an underground onshore export cable under Cape May County's (County) road right of way (Roosevelt Boulevard), identified on the Official Tax Map of Ocean City as Block 3350.01, Lot 17.01 (Property).

As you also know, Ocean Wind sent a letter to the County on September 28, 2021, requesting the County's consent to Ocean Wind's filing of an application to the New Jersey Department of Environmental Protection (NJDEP) for a Green Acres diversion, if required. After further research, Ocean Wind now believes that the Property is not Green Acres-restricted. The Property is not listed on the Recreation and Open Space Inventory (ROSI) on file with Green Acres. At the time the County acquired the Property in 1960, there was no Green Acres funding. In addition, based on the express language in the vesting deed, a copy of which is enclosed herewith, there is no evidence that the County ever intended to use the Property for recreational or open space purposes. In fact, given the 1960 vesting deed, it is clear that the Property is purely a public right-of-way.

Specifically, the vesting deed from Ocean City to the County provides that the Property was being acquired by the County for "relocating a portion of Roosevelt Boulevard (County Road No. 623) for the purpose of constructing a new bridge over Crook Horn Thorofare" The vesting deed further provides that "said tract of meadow-land is designated as Parcel No. 10 and is shown on a filed plan entitled 'Plan of Right-of-Way to be acquired by the County of Cape May for relocating a portion of Roosevelt Boulevard (County Road No. 23) Ocean City, Cape May

EXHIBIT CMC-B

April 12, 2022

Page 2

County, N.J., November 1959'. The filed map (Filed Map #1371) is enclosed herewith and delineates the boundaries of the Property as the "proposed ROW line". Based on the language in the vesting deed, coupled with the express designation on the Filed Map #1371 of the Property conveyed as road right-of-way, the evidence is clear that the County intended to acquire and use the Property for roadway purposes. To further bolster this conclusion, there is a 1963 construction plan for the Roosevelt Boulevard Bridge, a copy of which is enclosed herewith, that depicts the Property as "ROW Line". In addition, the County issued Ocean Wind a highway occupancy permit to erect a temporary sign within the Property outside of the paved street, suggesting that the County considers the Property as road right-of-way.

At various times over the past several months, Ocean Wind has requested to meet with County representatives to discuss the Project and to confirm, among other things, that the portion of the Property where Ocean Wind is proposing to cross is road right-of-way. Kindly confirm, within fourteen (14) days of this letter, whether the County agrees that the portion of the Property crossed by the Project is dedicated road right-of-way. If we do not hear back from you within fourteen (14) days, Ocean Wind will continue to assume that the Property is road right-of-way.

If the County does not agree that the portion of the Property crossed by the proposed Project is road right of way, Ocean Wind will then require a permanent right of way and easement, approximately 30 feet in width, upon, under or across the Property, totaling 0.357 acres, as depicted on the drawing enclosed herewith. In addition, Ocean Wind will require, but only during the course of construction of the Project, a temporary workspace easement, totaling 0.257 acres, also depicted on the drawing. For the permanent and temporary easements across the Property, Ocean Wind is offering the County \$10,000. This offer is based on a recent appraisal of an adjacent Ocean City-owned parcel identified as Block 3350.01, Lot 17, which was valued at \$3,400 per acre. Ocean Wind has applied a multiple of slightly over 10 times the estimated appraised value. Again, we ask that the County please confirm within fourteen (14) days of this letter whether that portion of the Property crossed by the Project is dedicated road right-of-way. If it is not, Ocean Wind is ready and willing to discuss this offer and other matters related to the Project at the County's earliest convenience and hopes to meet in person with County leadership again in the near future.

I trust you will forward this letter to County Administration and look forward to hearing from you soon. Thank you.

Sincerely,

Marc Reimer

Marc Reimer, Project Development Director
Ocean Wind, LLC

April 12, 2022

Page 3

By electronic mail (only) with enclosures:

cc: Greg Werkheiser, Founding Partner, Cultural Heritage Partners
Madeline Urbish, Head of Government Affairs & Policy, Ørsted Offshore North America
Aaron Bullwinkel, Esq., Senior Counsel, Ørsted Offshore North America
Richard Grist, Lead Real Estate Manager, Ørsted Offshore North America

Enclosures: 1960 Vesting deed for Block 3350.01 Lot 17.01
Filed Map #1371
1963 construction plan for Roosevelt Boulevard Bridge
Ocean Wind Proposed Easement Drawing for Block 3350.01 Lot 17.01
June 21 BPU order