

**BEFORE THE
STATE OF NEW JERSEY
BOARD OF PUBLIC UTILITIES**

DIVISION OF CLEAN ENERGY

IN THE MATTER OF THE PETITION OF :	
OCEAN WIND LLC PURSUANT TO :	
N.J.S.A. 48:3-87.1(f) FOR A :	MOTION OF THE COUNTY OF CAPE
DETERMINATION THAT CERTAIN :	MAY FOR THE RECUSAL OF THE
EASEMENTS AND CONSENTS NEEDED :	BOARD OF PUBLIC UTILITIES,
FOR CERTAIN ENVIRONMENTAL :	TRANSMITTAL OF THE MATTER TO
PERMITS IN, AND WITH RESPECT TO, :	THE OFFICE OF ADMINISTRATIVE
THE COUNTY OF CAPE MAY ARE :	LAW AND ASSIGNMENT OF AN
REASONABLY NECESSARY FOR THE :	ADMINISTRATIVE LAW JUDGE AND
CONSTRUCTION OR OPERATION OF :	TO SUSPEND THE CURRENT
THE OCEAN WIND 1 QUALIFIED :	SCHEDULING ORDER
OFFSHORE WIND PROJECT :	
	DOCKET NO. Q022050347

MOTION

The County of Cape May hereby respectfully moves for the recusal of the New Jersey Board of Public Utilities("the Board", "BPU"), for the reasons set forth herein below, in accordance with the common law, the New Jersey Conflicts of Interest Law, N.J.S.A. 52:13D-12 *et seq.*, the New Jersey Uniform Ethics Code, the regulations set forth in N.J.A.C. 19:61-1.1 *et seq.*, as well as the New Jersey Board of Public Utilities Supplemental Ethics Code. The County further moves for the transmittal of this matter to the Office of Administrative Law for the assignment of an Administrative Law Judge. Finally, the County moves to suspend the current Scheduling Order in this matter until such time as this motion and the County's Motion to Dismiss without Prejudice filed on June 8, 2022, are decided.

As detailed hereinbelow, when it comes to the advancement of offshore wind projects, BPU is essentially working as an agent of the Executive Branch with the obligation to promote and realize the Governor's aggressive goals for offshore wind power generation. BPU is an advocate for the construction of offshore wind generating facilities and is working in partnership

with private entities, such as Orsted, to construct such facilities as quickly as possible. These facts put BPU in a hopelessly conflicted position where it is impossible for BPU to sit as an impartial and unbiased judge of the issues attendant to the underlying Petition in this matter. It is evident that no reasonable, fully-informed citizen would believe that the County can obtain a fair disposition of this matter given the clear conflicting interests. Consequently, as a matter of law, BPU must recuse itself from this matter.

I. Prefatory Statement

The County of Cape May ("the County") has filed the within Motion for the Recusal of the Board of Public Utilities, and Transmit the Matter to the Office of Administrative Law for Assignment of an Administrative Law Judge and for Suspension of the Current Scheduling Order after very careful consideration. At the outset, the County wishes to make clear that the filing of this motion is in no way an attack upon the Board of Public Utilities or any of its members individually. The County does not suggest any corrupt intent or ethical lapse on the part of the Board or any of its members. The County's sole focus in the filing of the motion is, as required by law, to bring to the Board's attention certain conflicts of interest or bias or appearances of conflicts of interest or bias once facts arise to establish same. Again, the County has the utmost respect for the Board and its members but has an obligation to bring this motion at this juncture.

II. The Quasi-Judicial Proceeding

"The Board of Public Utilities is considered a quasi-judicial body, meaning it functions similar to a court or judge."¹ The parties here, Ocean Wind 1 ("OW1") and the County, are in the midst of a hearing process required under N.J.S.A. 48:3-871.(f) ("87.1(f)"). As such, this proceeding is, as a matter of law, considered to be quasi-judicial in nature. See e.g., Handlon v. Town of Belleville, 4 N.J. 99 (1950). OW1 may argue that the portion of the Petition dealing with abrogation of the County's authority to withhold consent, until specific and definite requests are made, to State environmental permit applications under N.J.S.A. 48:3-87.1(f)(3) somehow fall outside of the quasi-judicial proceeding, this conclusion is unsupported by the facts and the law. Additionally, the Board has treated those matters as subject to a hearing, pre-filed testimony, opportunity for Intervenors/Participants to be included, oral argument and other accoutrements of a quasi-judicial hearing. With regard to the taking of County real property sought by OW1's petition, there can be no doubt that a hearing is required. "The power of condemnation being in derogation of private property rights, it is required to be strictly construed and all statutory prerequisites [of the Eminent Domain Act] must be established to sustain its exercise." New Jersey Highway Auth. v. Currie, 35 N.J. Super. 525 (App. Div. 1955); See also, N.J.S.A. 20:3-1 *et seq.*, The New Jersey Eminent Domain Act ("the EDA") of 1971. While OW1 has argued in previous submissions to the Board that the EDA does not apply to these matters, such arguments beg the question of how an Administrative Agency acting on behalf of a private corporation would possibly achieve a taking without complying with the EDA. As argued previously by the County, it could not have been the intention of the Legislature to set aside the entire body of jurisprudence developed since at least 1971 as to the due process and other matters prerequisite to the taking of real property by the government. Indeed, 87.1(f) itself

¹ *Board of Public Utilities, About BPU*, nj.gov.bpu/about/index.html

requires that the process for determining the value of any property deemed fit for taking by BPU in connection with an 87.1(f) petition be that contained in the EDA, which is incorporated by reference. N.J.S.A. 48:3-87.1(f)(2). Certainly, the law would not countenance nor could the Legislature have intended the complete elimination of all of the due process safeguards related to condemnation proceedings. Such a law would be Constitutionally indefensible.

The contours, authority and limitations of 87.1(f) will ultimately be determined by this process and the Courts as this matter moves forward. The above is offered to make clear that the Petition process under 87.1 is a quasi-judicial proceeding. While Handlon, *supra*, involved the New Jersey Civil Service Commission, our Supreme Court's exposition of the nature of quasi-judicial, administrative proceedings is illuminating.

Where the administrative tribunal's function partakes of the judicial, its exercise is styled 'quasi-judicial,' but it is the exercise of judicial power nonetheless, conditioned upon the observance of the traditional safeguards against arbitrary action—what Chief Justice Hughes had termed 'the rudimentary requirements of fair play.' The prefix 'quasi' is descriptive of the judicial faculty assigned to administrative agencies and public officers not a part of the judiciary...The requirement of a 'hearing' has reference to the tradition of judicial proceedings in which evidence is received and weighed by the trier of the facts and the issue determined uninfluenced by extraneous considerations which might not be exceptionable in other fields involving purely executive action. The 'hearing' is 'the hearing of evidence and argument.' The quality of the act rather than the character of the agency exercising the authority is determinative of the nature of the power and the need for procedural due process. Where the administrative tribunal is under a duty to consider evidence and apply the law to the facts as found, thereby exercising a discretion or judgment judicial in nature on evidentiary facts, the function is ordinarily quasi-judicial and not ministerial.

Handlon v. Town of Belleville, 4 N.J. 99, 103–106(1950)(internal citations omitted).

It cannot be reasonably argued that the matter now before the Board is anything other than a quasi-judicial proceeding. *c.f.*, Adolph v. Elastic Stop Nut Corporation of America 18 N.J. Super. 543 (1952). As such, any decision made by BPU must be fair, impartial, unbiased and objective. "All evidence, arguments, and comments provided at public hearings are made part of the record to ensure that the...Board is making an informed and impartial decision based upon the facts as presented by both sides." Footnote 1.

III. The Standards for Recusal

"The need for unquestionable integrity, objectivity and impartiality is just as great for quasi-judicial personnel as for judges." Randolph v. City of Brigantine Planning Board 405 N.J. Super. 215, 226 (App. Div. 2009)(quoting, Kremer v. City of Plainfield, 1010 N.J. Super. 346, 352-353(Law Div. 1968). As detailed hereinbelow, the County believes that there are serious questions related to impartiality and objectivity. "In our representative form of government, it is essential that the conduct of public officials and employees shall hold the respect and confidence of the people. Public officials must, therefore, avoid conduct which is in violation of their public trust or which creates a justifiable impression among the public that such trust is being violated." N.J.S.A. 52:13D-12. Attorneys tend to use the word "recusal" when it comes to applications to disqualify a judge while our courts tend to use the word "disqualification" in the context of quasi-judicial proceedings. The words are essentially interchangeable. Whether a particular interest is sufficient to disqualify is a question of fact which depends upon the circumstances of the particular case. Van Italie v. Borough of Franklin Lakes, 28 N.J. 258, 268 (1958).

"Officials must be free of even the potential for entangling interests that will erode public trust in government actions." Thompson v. City of Atlantic City, 190 N.J. 359, 374 (2007). Conflict analysis includes assessments of how public officials operating in a quasi-judicial capacity may be impacted by their own statements and beliefs in any setting and "the potential for psychological influences cannot be ignored." Barrett v. Union Township, 230 N.J. Super. 195, 201 (App. Div. 1989).

The standards for conflict analysis at their core are well established and have been restated in the law on many occasions and include:

The standard for recusal is whether “a reasonable, fully informed person [would] have doubts about the judge's impartiality.”

State v. Dalal, 221 N.J. 601, 607 (2015) (quoting DeNike v. Cupo, 196 N.J. 502, 517 (2008)).

Under our common law, a public official is disqualified from participating in judicial or quasi-judicial proceedings in which the official has a conflicting interest that may interfere with the impartial duties as a member of the public body.

Wyzykowski v. Rizas, 132 N.J. 509, 523 (1993). And:

In determining whether there is a reasonable basis to conclude that an appearance of impropriety exists, the court “adopts the perspective of an informed citizen.” In re Opinion No. 653, 132 N.J. 124, 132 (1993); see, also In Re Determination of Executive Commission on Ethical Standards, 116 N.J. 216, 228 (1989) (holding that the court must look to how a “well-informed member of the public” might view the potential conflict).

In re Bator, 395 N.J. Super. 120, 127 (App. Div. 2007).

While much of the jurisprudence in New Jersey on the question of recusal in the quasi-judicial setting arises out of situations in local government, our Courts have found the analysis to be essentially the same and have applied those holdings for State administrative agencies, including BPU. See, Wyzykowski v. Rizas, 132 N.J. 509, 523 (1993). The New Jersey Uniform Ethics Code ("NJUEC") applicable to state agencies states, "A state officer or employee or special State officer is required to recuse him/herself on an official matter if he/she has a financial or personal interest that is incompatible with the proper discharge of his/her public duties." New Jersey Uniform Ethics Code, Section IX (2022). While this section of the NJUEC lists specific items that may warrant recusal, the listing contains the caveat, "includes, but is not limited to..." Id. The NJUEC provides guidance for the analysis, stating that interests

that "might reasonably be expected to impair a State official's objectivity and independence of judgment in the exercise of his/her official duties or might reasonably be expected to create an impression or suspicion among the public having knowledge of his or her acts that he/she may be engaged in conduct violative of his/her trust as a State official" warrant recusal. Id.

Here, trust is placed in the members of the Board of Public Utilities in this quasi-judicial setting to be impartial and unbiased so that the parties to an adversarial proceeding such as this under N.J.S.A. 48:3-87.1(f) get a fair hearing and, just as importantly, the public perceives that the decision making process was fair and impartial. Conducting a fair hearing is a matter with Constitutional ramifications and a minimal requirement in a quasi-judicial administrative proceeding. See, Ohio Bell Telephone Company v. Public Utilities Commissioner of Ohio, 301 U.S. 292, 57 S. Ct. 724 (1937). "There can be no compromise on the footing of convenience or expediency, or because of a natural desire to be rid of harassing delay, when that minimal requirement has been neglected or ignored." Id.

The New Jersey Board of Public Utilities Supplemental Ethics Code ("SEC") incorporates the New Jersey Conflicts of Interest Law, N.J.S.A. 52:13D-12 *et seq.*, as well as the NJUEC and the regulations set forth in N.J.A.C. 19:61-1.1 *et seq.* N.J.A.C. 19:61-7 contains language similar to the NJUEC in terms of the process for recusal, but adds, "An incompatible financial or personal interest may exist in other situations which are not clearly within the provisions of (d) and (e) above, depending on the totality of the circumstances. A State official should contact his or her agency ethics liaison officer of the Commission for guidance in such cases." N.J.A.C. 19:61-7.4(f). The rules goes on to state, "A State official must seek the advice of the State agency's counsel, agency ethics officer or the Commission as to the propriety of

participation in a matter if any person requests that a State official recuse himself or herself from that matter...." N.J.A.C. 19:61-7.4(g).

IV. BPU Commissioners as Judges

There can be no doubt but that this matter is a "contested case" as defined under the administrative law in New Jersey. N.J.A.C. 1:1-2.1 states as follows:

“Contested case” means an adversary proceeding, including any licensing proceeding, in which the legal rights, duties, obligations, privileges, benefits or other legal relations of specific parties are required by constitutional right or by statute to be determined by an agency by decisions, determinations, or orders, addressed to them or disposing of their interests, after opportunity for an agency hearing. N.J.S.A. 52:14B-2. The required hearing must be designed to result in an adjudication concerning the rights, duties, obligations, privileges, benefits or other legal relations of specific parties over which there exist disputed questions of fact, law or disposition relating to past, current or proposed activities or interests. Contested cases are not informational nor intended to provide a forum for the expression of public sentiment on proposed agency action or broad policy issues affecting entire industries or large, undefined classes of people.

A more apt description of what is taking place in connection with the instant Petition could not be possible. Both with regard to OW1's application to have the BPU supplant the authority of the duly elected County Commissioners of the County of Cape May and OW1's application to have BPU take real property interests from the County of Cape May and transfer them to OW1 fall squarely within this definition.

The Board will be sitting as the judges of these contested matters. The Uniform Administrative Procedure Rules define the term Judge in this quasi-judicial proceeding and for purposes of the rules as follows: "'Judge' means an administrative law judge of the State of New Jersey or any other person authorized by law to preside over a hearing in a contested case unless

the context clearly indicates otherwise. The term includes the agency head when presiding over a contested case under N.J.S.A. 52:14F-8(b)." N.J.A.C. 1:1-2.1. Also, N.J.S.A. 52:14F-8(b) indicates that an Administrative Law Judge is not assigned unless a specific request for such an assignment is made in "Any matter where the head of the agency, a commissioner or several commissioners are required to conduct, or determine to conduct a hearing directly or individually." Id. It appears that the Board has determined that hearings required in contested matters such as this matter under N.J.S.A. 48:3-87.1(f) will be heard by the entire Board with the Board President acting as the Presiding Commissioner. Thus, The Board sits as the "judge" in this contested case. Consequently, the entire body of law with regard to recusal and disqualification of judges is applicable to the Board in this instance.

V. Indicators of Bias and/or Partiality or Strong Perception of Bias and/or Partiality²

The County of Cape May submits that once BPU undertook to serve as the champion of and driving force behind the installation of offshore wind facilities, it lost the ability to appear to act as a fair and impartial judge in quasi-judicial proceedings under N.J.S.A. 48:3-87.1(f). Again, such a conclusion does not impugn the integrity of the Board or any of its members, but it is an inescapable conclusion nonetheless. BPU is the lead agency in New Jersey in charge of getting wind mills installed off the New Jersey coast as quickly as possible.³ As detailed herein below, there is little chance that a reasonable, fully-informed citizen of New Jersey would

² The County points out that there are a number of employees of the Board, of Orsted and of Orsted's representatives that have past or current ties to BPU, the Murphy Administration and/or Rate Counsel. While the County alleges no ethical violations on the part of any of these individuals, this fact adds to the appearance of impropriety in this proceeding.

³ NJ Government YouTube Channel - 2018 Sustainability Summit, <https://youtu.be/BleYjeghtKM>

conclude that the Board could sit in judgment of a contested case in a fair, impartial and unbiased fashion serving as an advocate and lead agency promoting installation of offshore wind facilities.

The County does not have the burden in this application of demonstrating that the Board as a whole has or individual members have an intention to act in a biased fashion. Officials must be free of even the potential for entangling interests that will erode public trust in government actions. Thompson v. City of Atlantic City, 190 N.J. 359, 374 (2007). Under our common law, a public official is disqualified from participating in judicial or quasi-judicial proceedings in which the official has a conflicting interest that **may** interfere with the impartial duties as a member of the public body. Wyzykowski v. Rizas, 132 N.J. 509, 523 (1993)(emphasis added).

A. Executive Order 8, the 8D Order and Executive Order 92

By Order, BPU awarded a contract to OW1 for construction of a Qualified Offshore Wind Project and delivery of electricity thereby generated into the electrical power grid. BPU Docket No. Q018121289, Agend Date 6/21/19, Agenda Item 8D ("8D Order"). The parties to the matter that was the subject of the 8D Order were New Jersey Division of Rate Counsel, EDF Renewables, Inc., Orsted and Equinor Wind US. Orsted was awarded a contract by BPU. Orsted partnered with PSEG Renewable Generation, LLC, to form Ocean Wind which eventually became known as Ocean Wind One.

BPU specifically stated that its award to Orsted was "in furtherance of Governor Phil Murphy's Executive Order No. 8 (2018) ("EO8"). EO8 references the Offshore Wind Economic Development Act ("OWEDA"). In EO8, the Governor of the State of New Jersey specifically "Orders and Directs" that "The Board of Public Utilities...shall take all necessary actions to

implement OWEDA in order to promote and realize the development of wind energy off the coast of New Jersey to meet a goal of 3,500 megawatts of offshore wind energy generation by the year 2030." The New Jersey Board of Public Utilities has accepted the order of the Governor of the state of New Jersey to achieve the Governor's goal of the installation of industrial, offshore wind-generating facilities to deliver 3,500 megawatts of electricity by 2030.

This directive was furthered by Executive Order 92 ("EO92"), which ordered

The BPU, the DEP, and all other New Jersey state agencies with responsibilities arising under OWEDA shall take all necessary actions to implement OWEDA in order to promote and realize the development of wind energy off the coast of New Jersey to meet a goal of 7,500 megawatts of offshore wind energy generation by the year 2035.

These Executive Orders are not only statements of Executive policy, they are specific directives for certain agencies to advance the Executive's policies. Notably, EO 92 orders BPU to implement OWEDA "in order to promote and realize the development of wind energy off the coast of New Jersey..." BPU has expressly accepted this directive. It is BPU's job to "promote and realize" the construction of the OW1 offshore wind facilities. That is BPU's prerogative and perhaps a laudable goal. But it would likely be impossible to find a reasonable, fully-in formed citizen who would not believe that BPU has already chosen sides in this contested case and cannot possibly sit as a fair and impartial judge of the issues before it in the instant matter.

The New Jersey Board of Public Utilities describes itself as "in but not of the Department of Treasury."⁴ This "in but not of" designation for an administrative agency is designed to signal the independence of that agency from the Executive or the Executive Department in which the administrative agency is placed. See, e.g., New Jersey Turnpike Authority v. Parsons, 3 N.J. 235 (1949); In Re Abolition of the Council on Affordable Housing, 214 N.J. 444 (2013). The "in but

⁴ NJBPU History, nj.gov/bpu/about/history.html

not of" designation allows an administrative agency the independence to act as the agency deems appropriate, even if that action is contrary to the interests and policies of the Executive or the Executive Department. See, id.

Here, BPU has abandoned its "in but not of" independence when it comes to offshore wind development and expressly seeks to advance the Governor's policies contained in Executive Orders 8 and 92. BPU is operating as an advocate for wind energy and the corporations constructing wind energy facilities.⁵ Again, it is not for the County of Cape May to judge the efficacy of such an approach. That decision is for BPU. Clearly, BPU has committed countless hours on the part of its members and staff pursuing that advancement of offshore wind energy and advocating for its rapid construction in furtherance of the Governor's goals. BPU's efforts have been highly professional and impressive. Consequently however, BPU does not operate in this proceeding as an impartial arbiter of the contested case between OW1 and the County of Cape May. Instead, BPU operates under Executive Orders as an interested party bound to the success of offshore wind development in the very near term.

In the 8D Order BPU specifically stated that the 8D Order was "in furtherance of Governor Phil Murphy's Executive Order No.8..." BPU says that "Global climate change is among the most pressing threats facing New Jersey's economy and represents an imminent danger to the health, safety and welfare of our citizens." And further that "Combating this crisis demands swift local action and focused state leadership." Again, the taking of such positions and adoption of such policies is a matter for BPU. But the average, reasonable, fully-informed

⁵See, e.g., WoodbridgeTV YouTube Channel - *Greenable Woodbridge, Guest: Joseph Fiordaliso, President, NJ Board of Public Utilities*. (2019). "We are working with our partners in Denmark and in the United Kingdom and in Germany."; nbcphiladelphia.com, *Meet the Former High School Teacher in Charge of NJ's Offshore Wind Expansion*, "We wanted to promote wind power." NJ Government YouTube Channel, *2018 Sustainability Summit*, "The Board of Public Utilities is the lead agency in our offshore wind initiative. We have become an international...go-to entity for offshore wind because of our aggressive goals laid out by Governor Murphy."

citizen can only conclude that BPU has a vested and more than substantial interest in the success of Ocean Wind 1 and other wind projects. That clear mutual interest with a party to this contested case absolutely requires the recusal of the Board of Public Utilities in this matter. No reasonable citizen would find this process fair, unbiased and impartial.

B. The Strategic Plan and the Office of Clean Energy

BPU commissioned the creation of the New Jersey Offshore Wind Strategic Plan. ("WSP").⁶ Published in September 2020, the WSP "is a comprehensive road map for achieving Governor Murphy's goal of 7,500 megawatts of installed capacity by 2035..." Id. Here again, BPU makes clear, public indications that it is an advocate for the advancement of offshore wind facility construction in the Governor's aggressive timeframe.

The Offshore Wind Strategic Plan ("Strategic Plan") was prepared by Ramboll US Corporation ("Ramboll") and its subcontractors for the Board of Public Utilities ("the Board") as a planning document under the directive of Executive Order No. 8 ("EO8") and Executive Order No. 92 ("EO92"). Among other things, EO8 called for the Board to engage stakeholders and solicit input from the public "to promote and realize the development of wind energy off the coast of New Jersey.

Again, BPU is expressly working on and invested in the promotion and realization of the development of wind energy off the coast of New Jersey. As such, respectfully, BPU cannot possibly retain even the public perception that it can be fair and impartial in these proceedings and must recuse itself.

⁶ New Jersey Offshore Wind Strategic Plan, https://www.nj.gov/bpu/pdf/Final_NJ_OWSP_9-9-20.pdf

The New Jersey Office of Clean Energy ("OCE") was placed within the Board of Public Utilities. The OCE "promotes...the development of clean renewable sources of energy including...wind..."⁷ Again, the goals of OCE are laudable. OCE does important work in the public interest in a very professional manner. Yet, the inclusion of OCE and its mission within BPU is a further indication that BPU's express duties includes promoting the construction of offshore wind facilities, making it essentially impossible for a reasonable member of the public to conclude that the County of Cape May can get a truly fair and impartial hearing in this matter before BPU.

C. The Wind Mill Lapel Pins

The wearing of lapel pins has been held to be an expression of belief and "speech" depending on context. Communications Workers of America v. Ector County Hospital District, 392 F. 3d 733 (5th Cir. 2004); U.S. Department of Justice., I.N.S., Border Patrol, El Paso, Tex. v. Federal Labor Relations Authority, 955 F.2d 998 (5th Cir. 1992). While New Jersey Courts appear to have not dealt with this issue in a reported case, no reasonable person would argue that lapel pins are not speech and typically designed to send a message related to the beliefs of the wearer.

Members of BPU and BPU staff have taken to wearing a lapel pin that illustrates the blades of a wind turbine. Photographs and video in the public domain, including recordings of BPU public meetings, depict multiple BPU Commissioners and staff wearing the wind mill lapel

⁷ Board of Public Utilities, About BPU, nj.gov.bpu/about/edep

pin.⁸ These lapel pins are worn as a demonstration of BPU's desire to "promote wind power."⁹

Again, the County of Cape May does not begrudge the desire of BPU Commissioners and staff to wear the wind mill lapel pin as a demonstration of their commitment to their mission to promote and advance wind energy. That is not the point. It has been held that where, as here, impartiality and neutrality are required to be displayed, the wearing of a lapel pin that signals a message undermines that requirement. Communications Workers of America v. Ector County Hospital District, 392 F. 3d 733 (5th Cir. 2004); U.S. Department of Justice., I.N.S., Border Patrol, El Paso, Tex. v. Federal Labor Relations Authority, 955 F.2d 998 (5th Cir. 1992).

VI. BPU Must Recuse Itself from this Matter

A simple analogy clearly illustrates the inevitability of this conclusion. One need only imagine Ocean Wind One and the County of Cape May entering a courtroom in front of an Administrative Law Judge or Judge of the Superior Court who has, on multiple occasions over a number of years, publicly announced his or her vested interest and absolute commitment to promote and realize bringing the OW1 offshore wind project to fruition. Additionally, that judge is wearing a wind mill lapel pin. No reasonable person could possibly conclude that the judge could be fair, impartial and unbiased in adversarial proceedings such as these. Here, BPU is that

⁸ See, e.g., nbcphiladelphia.com, *Meet the Former High School Teacher in Charge of NJ's Offshore Wind Expansion*; nj.gov/bpu June 24, 2022; *Ocean Wind adv. Ocean City webcast*; *NJ Board of Public Utilities (NJBPU) (@NJBPU/Twitter)*; *The Murphy Administration Speaks at NJBIA Energy Summit*, <http://youtu.be/ZjpdTXA0BZ0>; *The State of Clean Energy in NJ and the Impact of COVID-19*, <http://youtu.be/hkw15bBBJE4>

⁹ nbcphiladelphia.com, *Meet the Former High School Teacher in Charge of NJ's Offshore Wind Expansion*, "All the fervor around the burgeoning industry has made [President] Fiordaliso a familiar face in New Jersey politics, and the wind turbine brooch he wears on his lapel each BPU meeting clearly states his purpose. 'We wanted to promote wind power,' he said of the brooch, which an aide found."

Judge. N.J.A.C. 1:1-2.1; N.J.S.A. 52:14F-8(b). Recusal is required here as a matter of law as detailed hereinabove.

VII. Transmittal to OAL

In accordance with N.J.A.C. 1:1-8.1(b), and N.J.S.A. 52:14F-8, for the reasons set forth above, the County of Cape May respectfully moves the New Jersey Board of Utilities to transmit this matter to the Office of Administrative Law for assignment of an Administrative Law Judge for disposition.

VIII. Suspension of the Current Scheduling Order

The latest Scheduling Order in this matter was issued on or about August 15, 2022. The County of Cape May respectfully moves that BPU suspend that order and allow the scheduling of further proceedings to abide the outcome of pending motions. The law requires BPU to give due consideration of this motion for recusal and the outcome may send the matter to an Administrative Law Judge for disposition. The parties should have the benefit of knowing the outcome of the motion, considering any appellate rights and moving forward at that point. Additionally, should the matter be referred to an Administrative Law Judge, that judge should be afforded the deference to deal with scheduling matters as his or her docket may dictate.

Additionally, the County of Cape May filed a Motion to Deny Jurisdiction and Dismiss without Prejudice on June 8, 2022, nearly 90 days ago. Despite the repeated requests of the County and the request of Rate Counsel for disposition of that motion, BPU has so far ignored the County's motion indicating in one sentence in Scheduling Orders only that it will decide the motion later. While OW1 argues that the County suffers no prejudice by BPU's delay in

deciding the motion, this is not true. County and state taxpayers continue to pay for the continuation of these proceedings, which may not even be ripe for disposition. Given the very tight schedule BPU has set in this matter over the objections of the County, Rate Counsel and Intervenor, which the County would argue has already prejudiced the County's ability to effectively participate, the County has had to engage attorneys and multiple consultants and experts in order to evaluate the OW1 Petition, Pre-Filed Testimony and Exhibits in order to compile a credible and defensible response to the Petition. BPU's inexplicable ignoring of the County's jurisdictional motion, retention of the Petition while ignoring the motion and the setting of an extraordinarily tight schedule of deadlines have placed all of the parties hereto in a troubling legal limbo. The Board should transmit the jurisdictional motion, along with the entirety of this matter, to the Office of Administrative Law and ultimately to an Administrative Law Judge for disposition.

Given that both the instant motion and the County's Motion to Dismiss without Prejudice may well impact scheduling issues, the County again requests that BPU suspend the current Scheduling Order until such time as these motions are decided and the parties have a clear understanding of the trajectory of this matter.

The County does not request oral argument but is prepared to participate in oral argument if directed by the Board.

August 22, 2022

Respectfully submitted,



Michael J. Donohue

Attorney for the County of Cape May

CERTIFICATION OF SERVICE

In accordance with the current standing Order of the New Jersey Board of Public Utilities, I cause this motion to be served upon the persons and entities known to me to be on the Service List via electronic mail on August 22, 2022. I certify that this statement is true and if willfully false I am subject to punishment.


Michael J. Donohue