

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

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

BPU Docket No.: QO22050347

**SUR-REPLY TO THE OPPOSITION TO  
THE MOTION FOR RECONSIDERATION  
FILED BY THE MUNICIPALITIES**

**RESPONSE TO OCEAN WIND, LLC'S OPPOSITION TO MOTIONS FOR  
RECONSIDERATION ON INTERVENTION**

This office has been designated lead counsel for the nine (9) municipalities seeking intervention before the Board. This response to Ocean Wind, LLC's opposition to the motions for reconsideration on intervention is filed on behalf of Sea Isle City, Dennis Township, Lower Township, the Borough of Avalon, Middle Township, the Borough of Wildwood Crest, the Borough of Stone Harbor, the City of Wildwood, and the City of North Wildwood (hereinafter referred to as "the municipalities").

**Paul J. Baldini, PA**

4413 New Jersey Ave.  
Wildwood, NJ 08260  
paul@paulbaldinilaw.com  
PJB/hkb  
1861-32  
County-Lead Counsel for  
Municipalities to Intervene -  
Ocean Wind, LLC

**PROCEDURAL BACKGROUND**

The modified procedural schedule adopted by the Board of Public Utilities provides all motions to be filed on or before July 29, 2022. The municipalities at issue in this matter all filed

prior to July 29, 2022 deadline and appropriately filed motions for intervention status. Those motions were filed pursuant to N.J.A.C. 1:1-16.1 (a), which provides that any person or entity not initially a party who will be "substantially, specifically and directly affected by the outcome of a contested case, may on motion, seek leave to intervene."

Accordingly, motions to intervene were appropriately filed by the nine (9) New Jersey municipalities as identified above.

On August 4, 2022 Ocean Wind, LLC filed a response to the motions to intervene in addition to responses to other motions of the nine (9) municipalities. On August 12, 2022 the Law Offices of Paul J Baldini, P.A. submitted a letter on behalf of the municipalities requesting time to respond to Ocean Wind, LLC's response. That request was not responded to.

On August 15, 2022 an order was entered denying the municipalities request for intervenor status without considering a reply to the opposition filed by Ocean Wind, LLC.

On August 19, 2022 the instant motion for reconsideration on the motions for intervention was filed by the Law Offices of Paul J Baldini, P.A. and providing the response to Ocean Wind, LLC response to the original motions for intervention.

On August 26, 2022 Ocean Wind, LLC filed an opposition to the motion for reconsideration.

The instant pleading is a response to the opposition to the motion for reconsideration to allow the municipalities intervention status in this matter.

It is respectfully submitted that the failure to allow the response to the opposition to the motion for intervention was a denial of procedural due process which warrants reconsideration.

It is further argued that the municipalities have demonstrated sufficient interest in the proceedings, particularly where these are proceedings of first impression and likely will have an impact as Ocean Wind II if not Ocean Wind III directly when they come before the Board. All

**Paul J. Baldini, PA**  
4413 New Jersey Ave.  
Wildwood, NJ 08260  
paul@paulbaldinilaw.com  
PJB/hkb  
1861-32  
County-Lead Counsel for  
Municipalities to Intervene -  
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parties of interest should be heard and have an opportunity to present facts to the Board of Public Utilities. Should there be a denial of procedural due process the proceedings will be tainted and subject to appropriate remedies.

### **DENIAL OF PROCEDURAL DUE PROCESS**

The failure to consider the municipalities response to Ocean Wind, LLC's opposition to the motion to intervene was a denial of due process under both the United States Constitution and the New Jersey Constitution. The United States due process clause provides both "a guarantee of fair proceedings" sometimes referred to as procedural due process and "a substantive component that bars certain arbitrary, wrongful government actions". This is sometimes referred to a substantive due process. Zinermon v. Burch, 494 U.S. 113, 126, 110 S. Ct. 975, 983 (1990).

To establish a violation of procedural due process there must be a showing that there has been a deprivation of a protected property interest and that the local and state procedures for challenging the deprivation were inadequate. DeBlasio v. Zoning Bd. of Adjustment for Twp. of W. Amwell, 53 F.3d 592, 597 (3d Cir.), cert. denied 516 U.S. 937, 116 S. Ct. 352 (1995). In order to meet its constitutional requirements a State must provide reasonable remedies to rectify a legal error by a local administrative body.

It is respectfully submitted that the governing New Jersey statute provides administrative and judicial remedies under the circumstances except same were not followed. The Administrative Procedure Act provides appropriate safeguards for procedural and substantive due process. Further, New Jersey Court rules also provide for protection of procedural due process rights.

For example, Rule 1:6-3 provides for the filing of motions generally "a notice of motion shall be filed ... any opposing affidavits ... shall be filed ... reply papers responding to opposing

affidavits or certification shall be filed ..." New Jersey Court Rule 1:6-3.

Clearly, New Jersey Courts and the Administrative Procedure Act recognized procedural due process. In the present case it is respectfully submitted that the municipalities have been denied procedural due process by being denied an opportunity to have responded to opposing papers to motion duly filed by the municipalities. The failure to review the moving papers where a timely request was made to file a response is classic denial of due process.

It is beyond dispute at this point in time in New Jersey jurisprudence that a "full opportunity to be heard" must be afforded in order to meet procedural due process requirements. See, Matter of Shack, 177 N.J. Super. 358 (App. Div. 1981), certification denied 87 NJ 352.

More to the point, the Administrative Procedure Act prescribes procedures to be followed in the event an administrative hearing is required by statutory law or constitutional mandate. Application of Mod. Indus. Waste Serv., Inc., 153 N.J. Super. 232 (App. Div. 1977).

It is respectfully submitted that for procedural due process requirements to be met there must be a realistic opportunity to be heard and a decision by a neutral decisionmaker. The motion for reconsideration is simply the mechanism to bring this matter back before the Board to be heard. The motion for reconsideration is particularly useful where an opinion or order deals with unlitigated or unargued matters. Calcaterra v. Calcaterra, 206 N.J. Super. 398, 403-404 (App. Div. 1986). As noted, in this particular case an entire responsive pleading was left unheard and unargued. This was occasioned despite knowledge to the BPU at least three days prior to a decision on the motion that the municipalities sought to respond to the opposition to the motion for intervenor status. One of the primary goals of procedural due process is to make sure that people, the people which these municipalities represent, have been treated fairly, have been listened to, and have had fair opportunity to have their side of the story before the deciding tribunal. It has been held in New Jersey where an order denying reconsideration of dismissal of

municipal court appeal erroneously barred defendant access to the court and was an abuse of discretion. State v. Lawrence, 445 N.J. Super. 270, 274, 277 (App. Div. 2016).

The due process clause is essentially a guarantee of basic fairness. It is respectfully submitted fairness can have several components and does; notice, an opportunity to be heard at a meaningful time in a meaningful way, and a decision supported by substantial evidence. In the present case by denying the opportunity to be heard one of the essential elements of the due process clause is not present and has been denied.

The denial of intervenor status denies the municipalities the right to pre-deprivation hearing, the right to cross-examine witnesses, the right to submit factual and substantive evidence before the Board, and is relegated to oral argument on issues that will dramatically and forever alter the landscape of the Atlantic Ocean adjacent to these municipalities.

### **THE MUNICIPALITIES HAVE IDENTIFIED UNIQUE INTERESTS TO SUPPORT INTERVENTION**

The argument that the nine (9) municipalities failed to identify specific interest to support intervention is without merit. Each of the municipalities has its own unique risk and obligation to its citizens to be involved in the process. One must keep in mind that this is a process of first impression in the State of New Jersey. Subsequent to Ocean Wind 1 there will be an Ocean Wind II. The processes developed under Ocean Wind I will impact the processes to be used for Ocean Wind II. To argue otherwise is naïve and misses the point. Where Ocean Wind II and possibly an Ocean Wind III will come ashore in this County of Cape May and which municipalities it will impact is unknown. Therefore, each and every municipality that seeks to be involved needs to be involved in Ocean Wind I to ensure that the process is fair and when it comes to their municipalities will be fair to their citizens.

**Paul J. Baldini, PA**

4413 New Jersey Ave.  
Wildwood, NJ 08260  
paul@paulbaldinilaw.com  
PJB/hkb  
1861-32  
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Ocean Wind's own experts have acknowledged in sworn testimony before the Board of Public Utilities that alternate routes have been considered which alternate routes would transverse at least two of the municipalities seeking intervention status Sea Isle City and Dennis Township. In direct testimony Pilar Paterson acknowledged that his business address is Orsted North America, Inc. Orsted is the parent company for the Ocean Wind project. Exhibit OW-2 direct testimony of Pilar Patterson page 1 lines 2 through 11.

He acknowledges in that direct testimony "in June 2020, I joined Orsted as permit manager for Ocean Wind 1. In November 2021, I was promoted to New Jersey program permit manager, in March 2022 I was promoted to head of mid-Atlantic permitting." Exhibit OW-2 pages 1 and 2 line 23 on page 1 and lines 1 through 8 on page 2.

He specifically acknowledged "I am testifying on behalf of petitioner Ocean Wind in support of its petition ..." Exhibit OW-2 page 2 line 20-21.

He describes two alternate routes considered by Ocean Wind that being Strathmere landfall and Sea Isle City landfall and route. Exhibit OW-2 page 11 lines 6 through 23 and page 12 lines 1 through 9.

He describes for both routes transversing the City of Sea Isle City and the Township of Dennis Township. Appendix C attached to Exhibit OW-2 graphically illustrates the routes that would transverse through Sea Isle City and Dennis Township, one Route landing in Strathmere and running along the main thoroughfare of Sea Isle and out through Sea Isle Boulevard and the second landing in the middle of the City in one of its busiest beaches and transversing across Sea Isle Boulevard. To try to argue in good faith that these municipalities do not have a vested interest in intervenor status belies what the eyes see. If the preferred route is not accepted one would assume that Ocean Wind will look to alternate routes two of which transit directly through two of the municipalities seeking intervenor status.

Ocean Wind II is on the horizon, literally. Where Ocean Wind II will hit shore is unknown, likely municipalities are Sea Isle City, Avalon, Stone Harbor, or North Wildwood all municipalities seeking intervention. Depending on where Ocean Wind II makes landfall the likelihood it will transverse through Dennis Township, Middle Township, and possibly parts of Lower Township.

Anticipating an Ocean Wind III it is very likely that those generating windmills will need to hit land fall further south then Ocean Wind I and Ocean Wind II directly impacting North Wildwood, Wildwood, and Wildwood Crest. Again, these would directly impact Lower Township, Middle Township, and Dennis Township on its way to the BL England generating plant.

To say these municipalities do not have a vested interest in the process and do not have a stake in the outcome is ignoring reality. None of these municipalities have opposed wind generation however all municipalities seek a fair opportunity to be heard on significant issues that are yet to be decided by the Board of Public Utilities. Those issues are argued and briefed in other pleadings before the Board. However, to deny these municipalities intervenor status leaves out a significant portion of the residents of Cape May County that have unique and important issues that need to be heard during the process and during the establishment of rules and regulations on how the process will move forward.

For example, what is the interplay of the eminent domain statute to the charge under the new statutes for the BPU. Once this groundwork is laid it will impact all future attempts at eminent domain impacting all of the municipalities just mentioned. They have a right to be at the table, influence rules and regulations, and ensure that the process is a fair process for all.

These municipalities have substantive due process rights that participant status really does not afford them the opportunity to protect. These municipalities have the right to reply

substantively to the process the BPU is presently involved in, in a meaningful way as interveners.

Orsted's own experts and employees have established the right of these municipalities to intervention. Their experts make it clear that they are looking around Cape May County to find the best locations for placing of facilities to allow for appropriate and safe generation of electricity from the windmills. No problem, except that Orsted now comes to the BPU to oppose the stakeholders in this matter having a say and opportunity to be heard. Orsted cannot in one sense say well we want to use site one, preferred site, but if site one is not feasible we have these other sites that will go directly through municipalities but those municipalities should not be heard. We have eyes on Ocean Wind II and possibly an Ocean Wind III but those municipalities should have no say in what happens in setting the rules down during Ocean Wind I that will affect Ocean Wind II and Ocean Wind III. This argument is not the way business is conducted in New Jersey. Transparency and participation should be paramount.

The BPU is charged with open and transparent review of the process. One cannot have open and transparent review of the process if all of the stakeholders are not present and given a fair opportunity to be heard. Further, their substantive due process rights must also be protected. The time to protect those rights is now while the ground rules are being set forward and the matters in an influx rather than after they have been established and they no longer have a right to be heard.

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## CONCLUSION

It is respectfully submitted that the municipalities are absolutely entitled to be interveners in the process for the BPU, have established the sufficient direct interest and are entitled to intervenor status. Further, the failure to have considered supporting documents for the application on behalf of the intervenors by the BPU is a clear and unequivocal denial of procedural due process necessitating the reconsideration of the motion for intervention and the granting of the motion for intervention under substantive due process arguments.

Respectfully submitted,  
PAUL J. BALDINI, P.A.

Dated: August 29, 2022

/s/*Paul J. Baldini*  
Paul J. Baldini, Esquire  
Lead Attorney for Nine (9) Municipalities

**Paul J. Baldini, PA**

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Wildwood, NJ 08260  
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