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 **MUNICIPALITIES ANSWER AND OPPOSITION TO THE REQUESTED RELIEF SOUGHT BY OCEAN WIND I DUE AUGUST 29, 2022**

The nine (9) municipalities (City of Sea Isle City, Dennis Township, Lower Township, Borough of Avalon, Middle Township, Borough of Wildwood Crest, Borough of Stone Harbor, City of Wildwood, and City of North Wildwood) oppose the relief sought by Ocean Wind I.

NEED FOR BPU TO DECIDE PENDING MOTIONS AND CONTINUING OBJECTIONS TO PROCEEDINGS UNTIL MOTIONS DECIDED

The municipalities in submitting this opposition to the within petition maintain all motions previously filed and all objections to the handling of this matter by the New Jersey Board of Public Utilities. As noted in other documents, on June 8, 2022, the County filed a good faith and legally supported motion to decline jurisdiction and dismiss without prejudice as unripe and non-judicable. The municipalities joined that motion on August 29, 2022. To date, the BPU has failed to dispose of those motions. On August 22, 2022 the County filed a good faith and legally

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supported motion to recuse the BPU and transmit this matter to the Office of Administrative Law. The motion also sought to suspend the scheduling order now in place. The municipalities joined in that motion with supporting legal analysis on August 29, 2022. The BPU has not responded to those motions. Additionally, the municipalities have filed a motion to reconsider on the decision to not allow the municipalities intervenor status in the pending case. The motion is pending with no decision from the BPU.

The opposition filed herein retains the continuing objections to the hearing of these matters with the jurisdictional and conflict/appearance of conflict issues pending and reserves all rights to file appeals over all pending motions and decisions of the BPU. The municipalities by filing this objection and opposition to the within petition waives none of its rights under applicable common law and state statutes.

PROCEDURAL HISTORY AND ANSWER TO COMPLAINT

The municipalities adopt the procedural history and answer filed by the County except as modified herein.

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

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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 by the BPU.

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 a 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. This was a motion for the Board to correct the denial of procedural due process and allow the filing.

On August 26, 2022 Ocean Wind, LLC filed an opposition to the motion for reconsideration. On August 29, 2022 the municipalities filed a sur-reply to the opposition.

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 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.

THE MUNICIPALITIES HAVE IDENTIFIED UNIQUE INTERESTS TO SUPPORT INTERVENTION

The actions of the Board are generally controlled by the "Administrative Procedure Act" N.J.S.A. 52:14 B–1, et seq. Under the Act "…all interested parties are afforded reasonable opportunity to submit data, views or arguments, orally or in writing, during any proceedings

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involving a permit decision" N.J.S.A. 52:14 B–3.1 (a). Due process also requires "notice and opportunity to be heard.", In re Proposed Quest Acad. Charter Sch. of Montclair Founders Grp., 216 N.J. 370, 384 (2013).

This is the starting point for any analysis of the motions to intervene before looking at the more specific administrative regulations allowing such intervention. It is clear from the plain language the Act contemplates a liberal standard affording all interested persons a reasonable opportunity to submit information and be a part of any proceedings prior to decision. Using this standard as the guiding light a motion to intervene in an administrative proceeding is governed by N.J.A.C. 1:1–16.1 (a) and the alternative relief sought by the moving parties is found under N.J.A.C. 1:1–16.6 (a) wherein participation is sought as the alternative if intervention is denied.

In reviewing a motion to intervene the regulation provides "in ruling upon a motion to intervene, the (agency) shall take into consideration the nature and extent of the movant's interest in the outcome of the case, whether or not the movant's interest is sufficiently different from that of any party so as to add measurably and constructively to the scope of the case, the prospect of confusion or undue delay arising from the movant's inconclusion, and other appropriate matters".

The standard is different for a motion to participate. A motion to participate is controlled by whether "a significant interest in the outcome of a case" is present. N.J.A.C. 1:1–16.6 (a).

The agency is bound to consider whether the participant's interest is likely to add constructively to the case without causing undue delay or confusion. N.J.A.C. 1:1–16.6 (b).

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A threshold determination needs to be made in deciding a motion for intervention as to whether the matter is classified as a contested case within the intent of the Administrative Procedure Act.

A contested case is defined under the Administrative Act as follows:

"a 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 the agency hearing …" N.J.S.A. 52:14 B–2.

This definition is mirrored in N.J.A.C. 1:1–2.1 which also adds that a contested case means "an adversary proceeding". N.J.A.C. 1:1–2.1.

It is respectfully submitted that pursuant to the terms of the enabling legislation for the Board to review this matter this case is a contested case. The pertinent statute provides "in considering a petition submitted pursuant to this paragraph, the Board shall conduct, or cause to be conducted, a public hearing in order to provide an opportunity for public input on the petition." N.J.S.A. 48:3–87.1 f (2).

It is respectfully submitted taking into consideration the liberal standard for intervention, the vested interest of these nine (9) municipalities, and the independent and identified issues of each municipality to be heard intervention is appropriate for all nine (9) municipalities in this matter.

The opposition to the motions to intervene seems to be focused by Ocean Wind, LLC on two concerns, though often repeated, commonality of issues and narrow focus of the proceeding.

It is respectfully submitted these issues in opposition are not of sufficient weight to prevent intervention. Each will be dealt with separately herein.

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A review of the commonality of issues starts with a review of the timing for submission of the motions to intervene. One of the issues raised by Ocean Wind, LLC is that the parties utilized a template or pro forma motion to intervene and somehow or another that means they do not have independent interest that need to be heard.

The original scheduling order is dated June 29, 2022 and sets July 15, 2022 as the date to

file motions to intervene. A second order was entered on July 5, 2022 which did not change the set time to file motions to intervene which remained July 15, 2022. The municipalities seeking intervention requested additional time to allow for the governing bodies to appropriately review the petition and have appropriate meetings to formulate a response. This request was granted and by order dated July 14, 2022 the time for filing motions was adjusted to July 29, 2022. Clearly, these are very tight time deadlines for municipalities to take action. As the Board is well aware municipalities take action through governing bodies which must meet in compliance with the Sunshine Law and conduct all business at scheduled meetings transparent to the public. Therefore, municipalities as a general matter cannot move with the speed that private companies or individual persons can move. However, in this particular instance the municipalities, the nine (9) municipalities in this case, moved with expeditious speed in order to accommodate the deadline established in the orders setting the scheduling of this matter.

Given the relatively short time deadline to file these motions to intervene it is entirely feasible that the different municipalities utilized common forms and piggy back off of each other. The use of common forms does not change the fact that each of these municipalities has a unique perspective and unique interest at stake in the present case. Some of the municipalities run along the eastern seaboard directly on the ocean, some are directly in line with the proposed facilities and some are further down the coast, some municipalities are inland and have unique inland issues that they must contend with, and there may be commonality on some issues to all municipalities. However, all municipalities have unique issues directly affected by this proceeding for their community.

Just as municipalities operate in and open transparent environment the Board of Public Utilities is committed to do the same. In fact, the scheduling order of July 5, 2022 specifically notes "I note that P. L. 2021, c. 178 envisions a transparent and public process for the evaluation.

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In accordance with N.J.S.A. 48:3–87.1 (f) (2), the Board is required to hold a public hearing and to provide the opportunity for public comments on the petition. The public will have an opportunity to file comments and attend a public hearing."

The Board's commitment to an open and transparent and inclusive process was reaffirmed by the order entered on July 14, 2022 where the exact same language is contained in the order.

The municipalities take the Board at its word and seek to be included in the process in a meaningful fashion. By the designation of a lead counsel the municipalities are demonstrating their good faith in proceeding expeditiously and committing to working with the Board to move to a final hearing in a reasonable period of time. The request by the municipalities for intervention is reasonable, carefully considered, and appropriate under the circumstances. These municipalities have a real interest in the outcome of this matter. There is no basis for the assertion that the County of Cape May is in a position to represent the interests of the municipalities. The County has broader interest well beyond the nine (9) municipalities that are seeking intervention in this matter. Again, although there may be some commonality in issues the reality is that these parties have different issues amongst themselves and different issues from the County of Cape May. Those different issues must be recognized by the Board and a fair opportunity provided to the municipalities to intervene and be a part of the process protecting their own stated interest.

There seems to be an argument made by Ocean Wind, LLC that one law firm may represent certain municipalities and another law firm may represent other municipalities. These arguments are clearly arguments of form over substance. Attorneys have a job to do and they do it in good faith and on behalf of their clients. Whether there are overlapping municipal attorneys has no bearing on substantive issues before this Board.

The State of New Jersey has a long history of viewing matters of substance over form. New Jersey jurisprudence has a long history of maintaining substantive decisions, in getting

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through the form to rendering substantive decisions on the merits of a case. Applestein v. United Bd. & Carton Corp., 60 N.J. Super. 333, 348 (Ch. Div. 1960). Further, a court is always concerned with substance, and not merely form when reviewing and deciding matters. Fortugno v. Hudson Manure Co., 51 N.J. Super. 482, 500 (App. Div. 1958).

The issues raised by each of the municipalities are valid legitimate concerns. Each of the residents of those municipalities have differing concerns than the residents of their neighboring municipalities. Even though there may be some overlap of issues does not mean that each of the municipalities do not have their own concerns and need to have their own voice heard at the table. The municipalities are committed to expediting this matter and procedurally working together to move this matter forward to a hearing however, at that hearing each of the municipalities will present the unique issues and concerns of the constituents and residents of those municipalities as they may be distinct and separate from any other municipality and from the County.

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.

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

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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 through 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.

The direct testimony of Robert Church, Engineer for the County of Cape May, dated August 29, 2022 further illustrates the issue of alternate sites and the impact of alternate sites or

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routes may have on adjoining municipalities. Mr. Church using the exhibit listed in appendix C of Mr. Patterson's testimony testified to a total of five routes that were considered as alternatives in addition to the preferred route. Robert Church testimony, page 3 line 2 through 3.

In that same testimony the County proffers a preferred route through the Great Egg Harbor which is completely out of the County right-of-way or an abandoned railroad alternative with a northerly leg extension using the Garden State Parkway. Robert Church testimony, page 4 lines 1 through 5. Regardless of which route is chosen Mr. Church further testified "the proposed installation limits the County's ability to install additional drainage or other underground utilities due to proximity regulations. This may have a long-term negative impact on coastal and roadway resiliency if appropriate drainage cannot be installed and other utilities cannot be installed or upgraded due to space limitations mandated by proximity regulations." Church testimony, page 6 lines 1 through 5.

One asks the question, how can it be credibly argued that each of the municipalities along the coastal seaboard have no direct, unique, or substantial interest where there is the possibility for long-term negative impact on coastal and roadway resiliency which may run through their municipalities. The argument lacks credibility each of these municipalities have legitimate issues that will be impacting on their unique municipality as each of the municipalities are considered whether it be in this crossing or in future crossings for transmission lines across their municipalities, in addition to the issues of coastal impact on visual sight lines etc. that have been extensively argued in the past.

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

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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

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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.

THE EMINENT DOMAIN ACT PREREQUISITES AND N.J.S.A. 48:3-87.1 PREREQUISITES APPLY SUCH THAT IT IS APPROPRIATE FOR THE BOARD OF PUBLIC UTILITIES TO DECLINE JURISDICTION AND DISMISS THE PETITION WITHOUT PREJUDICE UNTIL ORSTED COMPLIES WITH BOTH SETS OF PREREQUISITES

N.J.S.A. 48:3–87.1 subpart f does not obviate the need to comply with the Eminent Domain Act. It simply provides a mechanism for the BPU to oversee the movement through the eminent domain procedure. Essentially, after 90 days of a written request to the applicable entity there may be filed a petition with the Board seeking authority to obtain easement, right-of-way or other real estate property. Prior to the authority being given, the transmission entity must follow

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the Eminent Domain Act. One must keep in mind that a qualified off shore entity is not a governmental entity and otherwise is not permitted to take public property or private property through the eminent domain process. It seems when one reads the two statutes in Pari Materia it is clear that the Legislature intended for the BPU to be a safeguard against taking of property.

N.J.S.A. 48:3-87.1 provides that the offshore wind project "may file a petition with the Board seeking authority to obtain the easement, right-of-way, or other real property interest." Nothing in the statute preempts the Eminent Domain Act. One must keep in mind that the entity in this case, Orsted, seeking to take property has no legal authority to do so. The Legislature has developed a layer of protection requiring the BPU oversee the request to take property. The logical inference is that for the BPU to determine it is appropriate to allow the request one must comply with the Eminent Domain Act prior to BPU action much as any other governmental entity would be required to comply with the Eminent Domain Act. This is a safeguard since the statute is essentially allowing a private entity, Orsted, to take property which heretofore has never been permitted in the State of New Jersey. There is nothing in the statute allowing BPU review that provides the Eminent Domain Act is not applicable.

The Eminent Domain Act provides significant and important safeguards to property owners as required by the New Jersey and Federal Constitutions. The statute requires under N.J.S.A. 20:3–6 that before any offer on a taking can be made the taking agency must a. appraise the property, b. provide the owner an opportunity to accompany the appraiser during inspection of the property, c. serve any offer upon the owner of the property by certified mail, d. provide no less than 14 days from mailing of the offer to negotiate the sale of the property. Further, the statute goes on and provides protections for the property owner once these preliminary steps have been met by requiring the matter to be reviewed by the court and three commissioners appointed for the valuation of the property. The BPU is acting as the court and all prerequisites of the Eminent

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Doman Act must be met before filing with the BPU.

Stated otherwise, the aggrieved property owner can both challenge the legitimacy of the taking and the valuation of the property or compensation to be paid to the aggrieved property owner. It is respectfully submitted this process remains intact and N.J.S.A. 48:3-87.1 adds the approval of the BPU in place of a judge and before Orsted can attempt filing with the BPU it must comply with the Eminent Domain Act.

It is clear from a review of the County's documentation submitted with its motion that Orsted has failed to meet the pre-action requirements of the Eminent Domain Act and has not met the pre-action requirements under N.J.S.A. 48:3–81.1. When taking real estate from an entity vague and generalized requests simply will not meet the statutory requirements nor the constitutional requirements placed on an agency attempting to take real property from an owner. The failure to follow the statutory procedures is jurisdictional.

Even further, it appears from the paperwork submitted by the County that Orsted has not only failed to meet the pre-action requirements but has failed to supply needed information for the County to appropriately review the request and move forward in agreement. This failure to provide information clearly needed in order to sign certifications by the County is confusing at best. It would seem the entity seeking the property would provide everything needed in order to review and sign the appropriate statements needed to be signed by the County. Perhaps the failure to do so comes from a misunderstanding of the statute's interplay discussed herein. Orsted it seems believes it can bypass the Eminent Domain Act and go directly to the BPU for an order of taking. Quite simply, that is not what the statute says. The statute is clear on its face, it says that if the BPU is to determine the need for the property to be used for the offshore transmission facility it shall conduct a hearing upon appropriate notice. The statute then further goes on and places specific requirement as follows "payment of fair compensation for the easement, right-of-way, or

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other real property interest shall be made to the appropriate entity pursuant to the procedures set forth in the 'Eminent Domain Act of 1971,' P. L. 1971, c. 361 (C. 20:3–1 et seq.)." N.J.S.A. 48:3–87.1 (f) (2). Clearly the only way to get to commissioners to set fair compensation as set forth in the Eminent Domain Act is by compliance with its prerequisites and without the required appraisal, notice to attend appraiser visit, service of the appraisal and 14 days for owner to consider there is no right to file for a taking before a court (in this case the BPU).

As indicated before, the Legislature specifically requires the following of the Eminent Domain Act procedural protections. It seems logical this must occur before the Board has jurisdiction to Act. Under the Eminent Domain Statues one cannot file a lawsuit for a taking until the procedural requirements of the Act are met. Similarly, one cannot file to the BPU until the procedural prefiling requirements of the Eminent Domain Act and N.J.S.A. 48:3-87.1 are met.

It is respectfully submitted to the Board that at best the Board has jurisdiction to determine a taking is appropriate (reasonably needed) only after the Eminent Domain Act prerequisites are met and after a full hearing. After the hearing on whether the taking is reasonably needed for the project and a determination of such than the matter is ripe for submitting the appraisal to the commissioners to set value.

Essentially, since this is a private entity seeking to take property from another against their will the Legislature has put in place an additional safeguard in addition to prerequisites of the Eminent Domain Act by requiring the BPU to look at the need for the taking, hold public hearings upon notice for everybody and in the event there is a determination that it is reasonable to then order the following of the Eminent Domain Act as to valuation.

The process starts with prerequisite compliance with the Eminent Domain Act and the "request" by Orsted. What the County is arguing is that the matter is not ripe for review by the Board of Public Utilities since Orsted has not submitted the Eminent Domain Act and N.J.S.A.

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48:3-87.1 prerequisite, by failing to submit appraisal and request that is clear and precise enough for the County to review it and make a determination if it is reasonable to comply. Further, the County is arguing that information needed for full and complete review was missing. Therefore, the County makes the argument that the Board of Public Utilities should decline jurisdiction in this matter until there are sufficient facts that warrant the BPU holding a hearing and moving forward on determining whether the property can or should be taken by the offshore facility. After a review of the motion the municipalities agree with the County's position. There is no action for the BPU to take at the present time since this matter is not ripe to be heard by the BPU because the failures of Orsted to provide information required by the Eminent Domain Act and legitimately requested by the County, needed by the County to sign the documents requested by Orsted and vague letters are not sufficient under New Jersey laws to establish the need for a taking.

Based on these facts, before the BPU, the argument by Orsted that the County has failed to cooperate lacks merit. It is clear from the documents submitted in the certification of the County Business Administrator, Kevin Lare, that the County has in fact cooperated. In fact, it appears the County has bent over backwards to try and address issues, hold meetings and move the matter forward but Orsted has taken the position that it does not need to deal with the County because it can go to the BPU and have the BPU take over the process. This is a clear misunderstanding of the statutory scheme put in place by the Legislature. The Legislature was not putting in place a plan by which a private entity could take land from another entity without affording appropriate due process. It is respectfully submitted the BPU is nothing more than a gatekeeper before that process can begin, same as any court, and it seems even under the statute the process cannot begin unless the private entity seeking to take land has complied with the Eminent Domain Act prerequisites and dealt in good faith with the land owner, provided 90 days written request. It is

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respectfully submitted that for a written request to have meaning it must be specific, clear and unequivocal on its face anything less is not a written request. No written request, no jurisdiction for the BPU to act.

In summary, it is respectfully requested that the BPU decline jurisdiction and dismissed the petition without prejudice. It is respectfully submitted the petition must be dismissed as a matter of law for failing to meet the requirements of N.J.S.A. 48:3–87.1 and the Eminent Domain Act.

The paperwork submitted by the County in its motion makes clear that Orsted has made only vague, ambiguous and expressly conditional "requests" for consent from the County. It is respectfully submitted that on its face it would be impossible for any person or in this case the County to know precisely what Orsted is "requesting".

The BPU is urged to be mindful of the Constitution of the State of New Jersey of 1947, Article IV, Section 311, paragraph 11, which requires "any law concerning municipal corporations formed for local government, or concerning counties, shall be liberally construed in their favor." Such that a higher standard of specificity in this matter is required.

In dismissing the petition it is respectfully submitted that the BPU should advise Orsted that prior to coming back to the BPU it has an obligation to prove compliance with the Eminent Domain Act and to provide information and documents in order for the County to make an informed determination as to whether it will sign requested certifications or agree to requested “requests”.

At this point, it is clear that Orsted has failed to meet even the basic requirements of the Eminent Domain Act in providing speculative and shifting demands for the real property interest upon the County. Orsted has failed to provide an appraisal of the property at issue to the County. Orsted has failed to comply with N.J.S.A. 48:3-87.1.

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RECUSAL OF THE NEW JERSEY BOARD OF PUBLIC UTILITIES IS MANDATORY

"The spirit and the meaning of our courts do not lie in the material settings we provide for them, but in the living ideas which they enshrine." Harry Truman June 27, 1950. Give 'em hell, harry, published Universal Award House, Inc. 1975, page 163.

The County of Cape May filed a motion seeking the recusal of the BPU from considering the present application of Ocean Wind, LLC on August 22, 2022. In summary, the County relies upon the common law, the New Jersey Conflicts of Interest Law, N.J.S.A. 52:13 D–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 in making that application. It is respectfully submitted that the BPU should recuse itself from further involvement in this matter.

As stated by the County, the need for recusal is not intended to be a reflection upon the great work the BPU does nor upon individual members of the BPU however, when required all individuals and entities acting in a judicial manner must respect and follow the rules of conflicts and ethical removal. This is one of those cases.

After review of the moving paperwork the conclusion is mandatory that the BPU is essentially working as an agent of the executive branch with the stated obligation to promote and realize the Governor's aggressive goals for offshore wind power generation. Though these goals may be laudable the involvement of the BPU in the implementation of those goals creates the conflict and requires recusal.

There is little doubt that the public hearing anticipated for the BPU to participate in with findings of fact and decisions by the BPU is a quasi judicial function. Stated otherwise, the Board of Public Utilities is acting in a quasi judicial capacity functioning similar to a judge. The specific

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detail and case sightings for this analysis can be found in the County of Cape May's motion for recusal and will not be restated here.

Understanding and accepting that the Board is acting in a quasi judicial function one then turns to the standards to be followed by the Board. It is beyond dispute that the Board must have unquestionable integrity, objectivity, and impartiality. Randolph v. City of Brigantine Plan. Bd., 405 N.J. Super. 215, 226 (App. Div. 2009). The County has raised serious questions related to the impartiality and objectivity of the Board. The Board must be honest in retrospect and look at those issues regarding impartiality and objectivity and the appearance of the lack of impartiality and objectivity in deciding these applications.

It is long standing law in the state of New Jersey that public officials must be free of even the potential of entangling interests that will erode public trust in governmental action. Thompson v. City of Atl. City, 190 N.J. 359, 374 (2007). The County sets forth the interlacing and intertwining of Ex. Ord. 8, the 8 D order, and Ex. Ord. 92 demonstrating the intricate weaving of the BPU into the overall process and moving the BPU over into executive action. The comments made by the BPU in awarding Orsted its contract are concerning. The comments made by members of the BPU to local news media and national news media are disconcerting. These statements and comments clearly demonstrate that the BPU has transitioned from its quasi judicial function into an arm of the executive branch. It is clear that the BPU through its representatives has made clear the BPU was operating as an advocate for wind energy and the corporations constructing wind energy facilities as detailed in the County's motion. The municipalities take no exception to that except to argue that such clearly disqualifies the BPU from acting in a quasi judicial capacity where decisions have to be made that affect the timeline and in some cases whether wind energy will happen in the State of New Jersey in this case. Even deciding the

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amount of just compensation and the speed at which that timing will occur is of concern. The scheduling orders in place have been almost draconian in the time frames permitted. The municipalities have had to request extensions of time some of which were granted some of which were ignored. This is disconcerting. The need for the BPU to step away from this process is clear and unequivocal. To not grant reasonable opportunity for the municipalities to have responded to objection to their motion to intervene is a classic example of concerns that the general public and the municipalities have as to the objectivity and the ability of the BPU to be fair in deciding these cases. It may very well be the request was not responded to for good and valid reason however it is clear the perception that the BPU would not slow down its schedule hovers in the background, even at the expense of fairness to the municipalities. It taints these proceedings and presents the image that the Board intends to proceed at breakneck speed no matter the consequences to opportunity to be heard or procedural due process.

The County's laying bare the BPU activities wherein the BPU is expressly working on and invested in the promotion and realization of the development of wind energy off the Coast of New Jersey is unrefutable. One cannot be an advocate and a judicial official. One has to be one or the other. In this case based upon the motion and facts submitted in the motion by the County for recusal it is clear the BPU is no longer in a position to act as a judicial arbiter on issues involving the statutes regulating wind generation offshore of the Jersey Coast. Accordingly, it is respectfully submitted the BPU is not in a position to retain even the public perception that it can be fair and impartial in these proceedings.

One may find the wearing of lapel pins to be a minor issue however when the public is watching each step and action that is taken by a governmental body small things like the wearing of lapel pin favoring one of the parties in an action is big. It creates the perception that the Board

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has already made up its mind and is not open to and responsive to the party not in line with the pin.

The case law cited where there is no longer a dispute over whether pins are considered speech is compelling against the BPU. The case law from the federal courts cited in the County's brief is compelling. The lapel pins worn by members of the Board and staff of the Board are speech and are speech contrary to the interests potentially of the municipalities as well as the County. They demonstrate a potential bias of the Board which cannot be ignored.

The analogy of the County's brief comparing the wearing of biased pins to the acceptance by the public of an Administrative Law Judge or Judge of the Superior Court acting in such a fashion is a dramatic illustration of the impact to the public of even perceived bias. The inevitable conclusion is set forth "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 Judge. N.J.A.C. 1:1–2.1; N.J.S.A. 52:14 F–8 (b). Recusal is required here as a matter of law as detailed hereinabove."

As difficult as it is to self-police and recognize actions taken in the past the Board must and is obligated to do so in this case. There is no other alternative for the Board then recusal.

DENIAL OF PROCEDURAL DUE PROCESS BY IGNORING THE ADMINISTRATIVE PROCEDURES ACT; THE UNIFORM ADMINISTRATIVE PROCEDURE RULES AND THE BOARD OF PUBLIC UTILITIES RULES OF PRACTICE

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The failure to consider the municipalities response to Ocean Wind, LLC's opposition to the motion to intervene and the BPU's failure to abide by the New Jersey Administrative Procedures Act, the Uniform Administrative Procedure Rules and its own Board of Public Utilities Rules of Practice in the handling of this matter is 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 in adequate. 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 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. They will be denied procedural due process if this answer and opposition are not accepted.

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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 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.

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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.

Turning to the matter as a whole rather than the isolated motion, it is respectfully submitted the above analysis applies equally to the entire process. As argued in a different section in this answer this matter is by all definition a "contested case". The fact that this is a contested case clearly implicates the need to follow the Administrative Procedures Act and the Uniform Administrative Procedure Rules and the Board of Public Utilities Rules Of Practice. These Rules are made applicable specifically to these proceedings by Board determination and N.J.A.C. 14:1–8.1.

The parties are afforded under these Rules depositions and physical examination of evidence. The BPU has deprived the municipalities of these rights. It is impossible for the municipalities to prepare expert reports and develop physical evidence without the ability to have a reasonable period of time to develop these facts and engage in meaningful discovery. A review of the scheduling order demonstrates the lack of compliance with these Statutes and Rules. Motions were due July 15, 2022 and only changed upon request of the municipalities to July 29, 2022. However, interestingly enough the time to file opposition and testimony from the parties was only moved by one month to August 29, 2022. Under any scenario, it was virtually impossible for the municipalities to provide or obtain discovery, meaning depositions and factual documentation in the time frame allowed. Stated otherwise, the ability of the municipalities to adequately and appropriately participate in this matter was foreclosed by the extremely tight deadline to obtain factual information and exchange discovery. The failure to provide for meaningful exchange of information, taking of depositions and fact-finding by the parties prior

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to the requirement to file opposition and testimony was and is a denial of due process in addition to a failure to abide by the statutory requirements.

The New Jersey Administrative Code is clear and provides specifically for discovery procedures. N.J.A.C. 1:10–10.1 through 10.6. The allowance of only one month to the municipalities for such to occur rendered meaningless this Administrative Code obligation.

Further, the BPU has failed to abide by the Uniform Administrative Procedure Rules which specifically allow for depositions and physical examination of evidence. The municipalities have been denied this right. Quite frankly, it is impossible for the municipalities to have sufficient time to obtain expert reports let alone obtain facts needed for experts to render reports. Essentially, this leaves Orsted with the only facts and experts before the Board. A clearly tainted proceeding.

These municipalities have a right to be heard over Orsted's "preferred route" and whether the preferred route or some other route is "reasonably necessary". These critical questions will be left only to the information provided by Orsted because the municipalities have essentially been frozen out of the process. Clearly, the tight deadlines imposed by the BPU in various scheduling orders have caused the municipalities great prejudice and severely restricted the municipalities' ability to effectively participate in this proceeding.

The BPU must also recognize that a great deal of time has been spent by the municipalities fighting for the right to even be heard in this case. But for the dilatory tactics of Orsted in opposing each application and reasonable request by the municipalities the municipalities would have been involved in this matter sooner. The BPU has an obligation to recognize the need to be fair and open in all these proceedings and the failure to allow a sufficient period of time for the municipalities to intervene in this case and have a meaningful opportunity to be heard should be addressed by the Board. The BPU should reconsider allowing the municipalities to participate as an intervenor and after allowing such intervention which is reasonable, there are mechanisms in

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place under these Statutes and Administrative Code which clearly provide for the discovery to occur in a reasonable fashion.

As the municipalities have committed in the past they will move expeditiously to engage in the process. However, in order to engage in a process there must be a process and there must be a reasonable opportunity for the municipalities to participate in the process in compliance with the Administrative Procedures Act, the Uniform Administrative Procedures Rules and the Board of Public Utilities own Rules of Practice. Failing to allow such process to occur is a denial of procedural due process and will result in great harm to the municipalities.

ADDITIONAL ARGUMENT

The additional arguments made by the County are joined in by the municipalities. They commence on page 17 through page 42 of Cape May County brief.

CONCLUSION

The nine (9) municipalities (City of Sea Isle City, Dennis Township, Lower Township, Borough of Avalon, Middle Township, Borough of Wildwood Crest, Borough of Stone Harbor, City of Wildwood, and City of North Wildwood) hereby request the BPU to consider this answer and opposition as the matter progresses forward.

Respectfully submitted,
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Dated: August 29, 2022

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