

**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  
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

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**ANSWER AND OPPOSITION OF THE  
COUNTY OF CAPE MAY TO THE  
WITHIN PETITION**

**DOCKET NO. Q022050347**

**I. CONTINUING OBJECTIONS**

The County of Cape May submits this Answer and Opposition to the within Petition subject to continuing objections.

On June 8, 2022, the County filed a good faith and legally supported Motion to Decline Jurisdiction and Dismiss without Prejudice as Unripe and Nonjusticiable. To date, BPU has refused to dispose of that motion, despite the request of Rate Counsel and the repeated requests of the County. Additionally, on August 22, 2022, the County filed a good faith and legally supported motion to the recusal of BPU and transmittal to the Office of Administrative Law. BPU has not responded in any meaningful way to either motion. Accordingly, the County submits this Answer and Opposition under continuing objections to the hearing of these matters with the jurisdictional and conflict/appearance of conflict issues pending. The County once again points out the prejudice it and its taxpayers have suffered as a result of this delay in terms of time and expense associated

with engaging multiple lawyers, experts and consultants to assist in defending the County with regard to the within Petition.

## **II. PROCEDURAL HISTORY**

Petitioner Ocean Wind, LLC, ("Orsted")<sup>1</sup> submitted the within Petition to the New Jersey Board of Public Utilities ("the Board," "BPU") on May 20, 2022, in connection with the Ocean Wind One, Qualified Offshore Wind Project. Ocean Wind One is the first of two anticipated Orsted projects that seek to place offshore wind-generation facilities in the Atlantic Ocean in close proximity to Cape May County, New Jersey. Ocean Wind One and Ocean Wind Two will collectively construct hundreds of towers and turbines visible from the beaches of Cape May County. Spearheaded by the Denmark-based multi-national corporation, Orsted, Ocean Wind One seeks to be the first major QOWP constructed off the coast of New Jersey. The Petition seeks to force the provision of as yet incompletely defined consents from the elected officials of the County of Cape May ("the County") and seeks to take certain real property interests from the County without the County's approval.

On June 8, 2022, prior to BPU's decision to retain the Petition, the County of Cape May submitted a Motion to Decline Jurisdiction and Dismiss without Prejudice as Unripe for Disposition and Nonjusticiable under N.J.S.A. 48:3-87.1(f) and N.J.S.A. 20:3-1, *et seq.* The motion argued, among other things, that Orsted had not satisfied pre-action prerequisites necessary for the Board to gain jurisdiction over the matter. The County urged the Board to not retain the Petition and instead dismiss without prejudice so that Orsted could satisfy pre-action requirements. On June 20, 2022, Orsted filed a Reply in opposition to the County's motion to dismiss without prejudice. On June 27, 2022, the County filed a Reply in response to Orsted's opposition.

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<sup>1</sup> The County has previously referred to Ocean Wind, LLC, as "OW1". However, Petitioner's exhibits are labeled OW-1, OW-2, etc. In order to prevent confusion, the County herein uses the reference "Orsted".

On June 29, 2022, BPU conducted a regular meeting of the Board. On the Board's June 29, 2022, Agenda was item 8B, which listed the title of the within Petition followed by, "The Board will consider retaining the petition and assigning a presiding Commissioner." At the meeting, the Board President referenced a "confrontation" when calling agenda item 8B. The New Jersey Board of Public Utilities utterly ignored the County's motion for dismissal without prejudice, made on jurisdictional grounds, and retained the Petition for disposition. The Board President assigned himself as the Presiding Commissioner.

Also on June 29, 2022, the Board issued an Order referencing the 8B agenda item ("the 8B Order"). In the 8B Order, BPU also completely ignored the County's pending motion, making no comment on the motion whatsoever. BPU retained jurisdiction of the Petition over the County's well-founded and legally supported objections and proceeded as if the County's motion did not exist.

On July 1, 2022, BPU issued an Order, made effective July 5, 2022 ("July 5th Order"), Modifying the Procedural Schedule. In the July 5th Order, BPU finally recognized the filing of the County's motion to dismiss without prejudice, but continued to ignore the motion stating simply, "The June 8, 2022 Motion will be addressed at a later date."

The Division of Rate Counsel, on July 7, 2022, transmitted a letter to BPU objecting to the dates within the July 5th Order, arguing, among other things, that the timeframes are too tight, do not allow adequate time for parties considering filing motions to intervene and do not allow for effective discovery. Rate Counsel, in a footnote to the July 7, 2022, letter,, also stated as follows:

**Rate Counsel notes there is also a pending Motion to Dismiss. The Order does not address this motion, but requires the parties to proceed on an expedited basis while the Board considers the motion. To the extent the motion is granted, the parties will have unnecessarily expended significant resources. A decision on the motion prior to the parties putting in significant work would result in a more efficient use of the parties' resources.**

On July 8, 2022, the County transmitted a letter to BPU joining in Rate Counsel's objections, requesting a realistic opportunity for discovery and insisting upon the disposition of the County's motion to dismiss without prejudice. The County argued that the County was being prejudiced by the fact that BPU was ignoring the motion.

On July 26, 2022, Orsted transmitted a letter to BPU contesting the objections of Rate Counsel and the County. Orsted argued that the County suffered no prejudice by BPU's delay in disposing of the County's motion to dismiss without prejudice since "the only result would be a delay in the schedule." Orsted ignored the fact that the taxpayers of Cape May County have now had to enlist the services of multiple attorneys, consultants and experts in order to compile a defensible opposition to the Petition. The majority of the municipalities in Cape May County have had to make decisions under great time pressure on whether or not to seek to intervene, also having to engage attorneys at taxpayer expense. The New Jersey State League of Municipalities was similarly forced to take action to intervene as the County's potentially dispositive motion has languished and been ignored by BPU. The prejudice to all of the parties that are not Orsted is clear.

The July 5 Order allowed parties only ten days to analyze this complex matter and make determinations about whether to seek to intervene or not. Eleven Cape May County municipalities, as well as the New Jersey State League of Municipalities ("NJSLOM") transmitted letters to BPU requesting to extend the time to file motions to intervene to at least July 31, 2022. On July 14, 2022, BPU extended the time to seek to intervene to July 29, 2022.

The following Cape May County municipalities filed motions to intervene:

- Borough of Avalon
- Township of Dennis

- Township of Lower
- Township of Middle
- City of North Wildwood
- City of Ocean City
- City of Sea Isle City
- Borough of Stone Harbor
- Township of Upper
- City of Wildwood
- Borough of Wildwood Crest

NJSLOM also filed a motion to participate. All the municipalities and NJSLOM argued, among other things, that BPU's decisions related to the authority and interpretation of N.J.S.A. 48:3-87.1(f) would have long-lasting ramifications for all New Jersey municipalities moving forward. Attorney Paul J. Baldini, Esquire indicated by separate letter that he would serve as Lead Counsel for the municipalities other than Upper Township in order to make the Intervenor's involvement more efficient.

On August 4, 2022, Orsted filed opposition to the motions to intervene of all parties except for Upper Township and Ocean City. Orsted objected to the fact that several municipalities utilize the same attorneys, the forms of motion were similar for each of the municipalities and that the municipalities other than Upper Township and Ocean City really had no interest in the proceedings since the project didn't touch their territory. Orsted ignored the fact that the project touches each coastal community in Cape May County by permanently changing the viewshed by placing an industrial power generating facility on a horizon that has been undisturbed by human beings from the beginning of time.

On August 12, Mr. Baldini sent a letter to BPU asking for time to consider and file a reply to Orsted's opposition to the motions to intervene. Mr. Baldini also pointed out that Orsted had submitted unsupported factual allegations and that a fact-finding hearing should be conducted.

BPU sided with Orsted, ignored Mr. Baldini's request to file a reply and conduct a fact-finding hearing and on August 15, 2022, issued an Order ("August 15th Order") denying Intervenor status to every municipality except for Ocean City and Upper Township. BPU granted Participant status to the other municipalities and NJSLOM.

While BPU continued to ignore Rate Counsel's and the County's requests for a more formal discovery process and more time to conduct discovery and formulate responses to the Petition and made no mention of those requests in the August 15th Order, BPU did grant Orsted's request to modify the scheduling order to accommodate the vacation schedules of Orsted attorneys.

Also in the August 15th Order, BPU continued to ignore the County's motion to dismiss without prejudice filed on June 8, 2022, stating only, "The June 8, 2022, motion will be addressed in a separate Order."

On August 22, 2022, the County filed a Motion for the Recusal of the Board of Public Utilities, Transmittal to the Office of Administrative Law and Assignment of an Administrative Law Judge and to Suspend the Current Scheduling Order. Within that motion, the County requested that its jurisdictional motion filed on June 8, 2020, be transmitted to an Administrative Law Judge or otherwise dealt with by BPU.

### **III. IGNORING THE ADMINISTRATIVE PROCEDURES ACT; THE UNIFORM ADMINISTRATIVE PROCEDURE RULES AND THE BOARD OF PUBLIC UTILITIES RULES OF PRACTICE**

In this matter, BPU has chosen, in large measure, to ignore the New Jersey Administrative Procedures Act ("APA"). N.J.S.A. 52:14B-1 *et seq.* The APA specifically applies to the Board of Public Utilities. N.J.S.A. 52:14B-3.2. This matter is clearly a "Contested case," defined in the APA as "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 an agency hearing” N.J.S.A. 52:14B-2. The Uniform Administrative Procedure Rules (“UAPR”) were authorized by N.J.S.A. 52:14B-3, and appear at N.J.A.C. 1:1-1 *et seq.* Both the APA and UAPR are made specifically applicable to this proceeding in the Board of Public Utilities Rules of Procedure. N.J.A.C. 14:1-8.1.<sup>2</sup>

N.J.A.C. 1:1-10.1 through 10.6 provide discovery procedures. BPU has set them aside, opting instead for a nebulous instruction that the parties attempt to engage in some form of exchange. As has been seen in this proceeding as well as the recent Petition related to the City of Ocean City, New Jersey (Docket No. QO22020041), Rate Counsel appears to have found Orsted’s responses to Rate Counsel’s propounded questions to be evasive and incomplete. All of the questions propounded by Rate Counsel are essentially those that the County considers important and the limited, informal approach to discovery has allowed for unsatisfactory answers.

The UAPR allows for depositions and physical examination of evidence. In this matter, BPU has deprived the County of these rights. It is impossible for the County to prepare contrary expert reports without the ability to probe Orsted's proposed expert on the ultimate issue in this matter, namely whether the Orsted “preferred route” for electricity transmission lines is “reasonably necessary” for the QOWP. Under the current construct, BPU essentially looks only at the opinion of Orsted in order to answer this question. The County should have been allowed to depose Orsted’s proposed expert and to obtain the proposed expert’s entire file underlying the

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<sup>2</sup> It is clear that this is a quasi-judicial proceeding. For a full exposition of the rights of the parties in a contested case in this setting and the obligations of the tribunal, please see the County's arguments in its motion for recusal of the Board submitted on August 22, 2022, which are incorporated here by reference.

proposed expert opinions offered. Both the nebulous discovery process and the extraordinarily tight deadlines set by BPU in Scheduling Orders have caused the County great prejudice and severely restricted the County's ability to effectively respond to the petition.

Here, oral argument is now scheduled for November 7<sup>th</sup> or 10<sup>th</sup>, 2022. Yet the County's response to the Petition is due on August 29, 2022. Given the fact that the County was compelled by the facts of this matter to consume time in this extraordinarily expedited matter to file the motion to dismiss without prejudice that has been ignored by BPU, and the County's motion to recuse BPU, much of the already limited time available to the County has been consumed. The County is now compelled to submit this response to the Petition with no viable discovery mechanism and submit all arguments in writing nearly 90 days before oral argument. This is also highly prejudicial to the County's ability to offer opposition and detrimental to the County's due process rights in this setting. The County suggests that BPU modify the Scheduling Order to allow the parties to not only respond to Public Comment, but to make substantive supplemental factual and legal arguments. The County is likely to move for such a modification.

Both the County of Cape May and Rate Counsel have requested a formal discovery process with workable timeframes to vindicate the rights granted to parties under UAPR. To date, BPU has completely ignored those requests. The fully panoply of discovery mechanisms available under N.J.A.C. 1:1-10.2 should have been afforded as well as all other discovery processes allowed under the UAPR. The County sees the discovery process established in this matter to be wholly inadequate, prejudicial to the County's ability to defend and in contravention of the UPA and the UAPR. Accordingly, the County objects to this proceeding moving forward until such time that a legitimate and workable discovery process is established.



**IV. THE COUNTY'S CONTINUING DEMAND FOR DISPOSITION OF ITS JURISDICTIONAL MOTION AND CONTINUING OBJECTION TO PROCEEDINGS IN THE ABSENCE OF A DECISION ON THE MOTION**

As detailed above and in prior submissions, the County of Cape May submitted a good faith, legally supported motion to dismiss without prejudice, pointing out how certain pre-action prerequisites had not be satisfied by Orsted. This motion was filed on June 8, 2022. BPU has ignored and refused to rule upon the motion in spite of multiple demands by the County and a demand by Rate Counsel. As Rate Counsel pointed out, BPU's refusal to rule on the June 8, 2022, motion has caused the parties to engage in costly and extended administrative litigation that may all prove moot once the motion is decided.

The County has also filed a motion to recuse BPU and transmit this matter to the Office of Administrative Law for assignment of an Administrative Law Judge.

The County of Cape May demands for at least the fourth time since filing its motion to dismiss without prejudice on June 8, 2022, nearly ninety days ago, that BPU, if it denies the County's recusal motion, immediately consider the motion to dismiss without prejudice and rule on its merits. While that motion remains pending, the County objects to any further proceedings before BPU in this matter.

**V. Responses to the Allegations of the Petition**

The County offers the following responses to the numbered allegations of the Petition in this matter:

1. Admitted.
2. Admitted.
3. Admitted.

4. Denied that Orsted's interest is "indirect." The balance of the allegation is Admitted.
5. Respondent is without sufficient knowledge to admit or deny the allegation and Petitioner is left to its proofs, which Respondent reserves the right to contest.
6. Denied. This is not an allegation but a statement of law. The law speaks for itself.
7. See #6.
8. Denied as pled, for the reasons stated herein below.
9. Denied as pled, for the reasons stated herein below.
10. Admitted that these are matters of first impression. Denied as to the balance of the allegation as the case cited is eminently distinguishable and the law speaks for itself.
11. Denied.
12. Respondent is without sufficient knowledge to admit or deny the allegation and Petitioner is left to its proofs, which Respondent reserves the right to contest.
13. Denied. Orsted has yet to determine specifically how it will run its transmission lines and cables as evidenced by the fact that it gave only cursory consideration to alternatives and still has two "Preferred Routes" and has not specified which it will utilize. Furthermore, these allegations are completely speculative inasmuch as neither federal nor state environmental regulatory agencies have authorized any of Orsted's plans. In fact, on information and belief, the Ocean Wind, LLC submission to NJDEP was deemed "administratively deficient" on August 24, 2022, and will need to be corrected and revised and subject to new publication of notices. Any determination by BPU on this Petition at this juncture may be a complete waste of time, made moot and be all for naught based on the outcome of the environmental and other state and federal administrative agency reviews.

14. Denied. As can be seen from the contents of Orsted's Petition, pre-filed testimony and responses to discovery requests of Rate Counsel, Orsted's consideration of alternative routes was cursory at best. The reasons for rejecting certain routes appears purely subjective and suggests that routes were eliminated based on cost and convenience for Orsted rather than impacts to the communities or the environment.
15. Denied. See #13 and #14.
16. Respondent is without sufficient knowledge to admit or deny the allegation since documentation of the allegations has not been provided and much of the pre-field testimony is hearsay or hearsay-within-hearsay. Petitioner is left to its proofs, which Respondent reserves the right to contest.
17. Respondent is without sufficient knowledge to admit or deny the allegation since documentation of the allegations has not been provided and much of the pre-field testimony is hearsay or hearsay-within-hearsay. Petitioner is left to its proofs, which Respondent reserves the right to contest.
18. Respondent is without sufficient knowledge to admit or deny the allegation since documentation of the allegations has not been provided and much of the pre-field testimony is hearsay or hearsay-within-hearsay. Petitioner is left to its proofs, which Respondent reserves the right to contest.
19. Denied. As can be seen from the contents of Orsted's Petition, pre-filed testimony and responses to discovery requests of Rate Counsel, Orsted's consideration of alternative routes was cursory at best. The reasons for rejecting certain routes appears purely subjective and suggests that routes were eliminated based on cost and convenience for Orsted rather than impacts to the communities or the environment. Also, Respondent

is without sufficient knowledge since documentation of the allegations has not been provided and much of the pre-field testimony is hearsay or hearsay-within-hearsay. Petitioner is left to its proofs, which Respondent reserves the right to contest.

20. Denied. As can be seen from the contents of Orsted's Petition, pre-filed testimony and responses to discovery requests of Rate Counsel, Orsted's consideration of alternative routes was cursory at best. The reasons for rejecting certain routes appears purely subjective and suggests that routes were eliminated based on cost and convenience for Orsted rather than impacts to the communities or the environment. Also, Respondent is without sufficient knowledge since documentation of the allegations has not been provided and much of the pre-field testimony is hearsay or hearsay-within-hearsay. Petitioner is left to its proofs, which Respondent reserves the right to contest.

21. Denied. As can be seen from the contents of Orsted's Petition, pre-filed testimony and responses to discovery requests of Rate Counsel, Orsted's consideration of alternative routes was cursory at best. The reasons for rejecting certain routes appears purely subjective and suggests that routes were eliminated based on cost and convenience for Orsted rather than impacts to the communities or the environment. Also, Respondent is without sufficient knowledge since documentation of the allegations has not been provided and much of the pre-field testimony is hearsay or hearsay-within-hearsay. Petitioner is left to its proofs, which Respondent reserves the right to contest.

22. Denied. As can be seen from the contents of Orsted's Petition, pre-filed testimony and responses to discovery requests of Rate Counsel, Orsted's consideration of alternative routes was cursory at best. The reasons for rejecting certain routes appears purely subjective and suggests that routes were eliminated based on cost and convenience for

Orsted rather than impacts to the communities or the environment. Also, Respondent is without sufficient knowledge since documentation of the allegations has not been provided and much of the pre-field testimony is hearsay or hearsay-within-hearsay. Petitioner is left to its proofs, which Respondent reserves the right to contest. Additionally, the allegation corroborates the fact that Orsted does not have a defined route but rather two routes that it prefers and has not yet delineated for the County or the Board what it actually intends to install and where.

23. Denied. As can be seen from the contents of Orsted's Petition, pre-filed testimony and responses to discovery requests of Rate Counsel, Orsted's consideration of alternative routes was cursory at best. The reasons for rejecting certain routes appears purely subjective and suggests that routes were eliminated based on cost and convenience for Orsted rather than impacts to the communities or the environment. Also, Respondent is without sufficient knowledge since documentation of the allegations has not been provided and much of the pre-field testimony is hearsay or hearsay-within-hearsay. Petitioner is left to its proofs, which Respondent reserves the right to contest.

24. Denied as pled. The law speaks for itself. Additionally, the allegation corroborates the fact that Orsted does not have a defined route but rather two routes that it prefers and has not yet delineated for the County or the Board what it actually intends to install and where.

25. Denied. As can be seen from the contents of Orsted's Petition, pre-filed testimony and responses to discovery requests of Rate Counsel, Orsted's consideration of alternative routes was cursory at best. The reasons for rejecting certain routes appears purely subjective and suggests that routes were eliminated based on cost and convenience for

Orsted rather than impacts to the communities or the environment. Also, Respondent is without sufficient knowledge since documentation of the allegations has not been provided and much of the pre-field testimony is hearsay or hearsay-within-hearsay. Petitioner is left to its proofs, which Respondent reserves the right to contest.

26. Respondent is without sufficient knowledge to admit or deny the allegation since documentation of the allegations has not been provided and much of the pre-field testimony is hearsay or hearsay-within-hearsay. Petitioner is left to its proofs, which Respondent reserves the right to contest.

27. Also, Respondent is without sufficient knowledge since documentation of the allegations has not been provided and much of the pre-field testimony is hearsay or hearsay-within-hearsay. Petitioner is left to its proofs, which Respondent reserves the right to contest.

28. Admitted that the project will need a County road opening permit. The balance of the allegation is Denied.

29. Respondent is without sufficient knowledge since documentation of the allegations has not been provided and much of the pre-field testimony is hearsay or hearsay-within-hearsay. Petitioner is left to its proofs, which Respondent reserves the right to contest.

30. Denied. As can be seen from the contents of Orsted's Petition, pre-filed testimony and responses to discovery requests of Rate Counsel, Orsted's consideration of alternative routes was cursory at best. The reasons for rejecting certain routes appears purely subjective and suggests that routes were eliminated based on cost and convenience for Orsted rather than impacts to the communities or the environment. Also, Respondent is without sufficient knowledge since documentation of the allegations, has not been

provided any referenced documentation and much of the pre-field testimony is hearsay or hearsay-within-hearsay. Petitioner is left to its proofs, which Respondent reserves the right to contest. Again, Petitioner's allegation corroborates the fact that Orsted at this juncture still is uncertain as to where and how it will construct the transmission lines, referring to one of its "Preferred Routes" as "Alternative 1" while there is an "Alternative 2." Yet Orsted demands on these vague allegations that the Board supplant the authority of the duly elected officials of Cape May County and further demands that the Board effectuate a taking of County property.

31. Denied. As detailed below, Orsted's pre-filed testimony conflicts with the letters sent to the County which make equivocal demands and follow nearly every item of supposed need with the qualifier "if necessary." This allegation ignores Orsted's own representations and is based on hearsay or hearsay-within-hearsay.

32. Denied. See #31. Also, again, here in a footnote, Orsted corroborates the fact that it does not yet now how and where it will construct its transmission lines, referring in Footnote 5 to "Alternative 2." It is impossible as it has been all along in discussion, to concretely glean from the Petition what precisely Orsted wants to do and what precisely they are demanding from BPU. Decisions such as these should be based on much more firm and precise information.

33. See #32.

34. See #32. Orsted wants BPU to abrogate the authority of duly elected officials, disenfranchise tens of thousand of voters and set aside "Home Rule" when Orsted itself cannot conclusively delineate where and how it will install these facilities.

35. Denied as stated. As detailed below, Orsted utterly misstates the nature of the communication efforts between Orsted and the County of Cape May. It was the County of Cape May who took the lead to effectuate meaningful communications with county and local elected officials who had become disenchanted and untrusting of Orsted's communications. It was the County who coordinate and organized meetings, provided meeting space and audiovisual equipment and went to extraordinarily lengths to assist Orsted in developing a positive working relationship with the County and local communities. The County's reward for these efforts was Orsted's filing of the within Petition and Orsted's efforts to supplant the duly elected officials of Cape May County from the role they were chose to perform on behalf of the people of Cape May County.

36. See #35.

37. See #35.

38. See #35.

39. See #35.

40. See #35.

41. See #35.

42. See #35.

43. See #35.

44. See #35.

45. See #35.

46. See #35.

47. See #35.

48. See #35.



49. See #35.

50. See #35. Since the filing of this Petition Orsted has made no contact with the County with an eye toward further discussions or resolution of these matters. The only communication that the County is aware of was a representative of Orsted inappropriate reaching out to the County's Tourism Director to attempt to enlist her support for the project.

51. Denied. There is nothing causing any time pressure on Orsted when it comes to the items BPU has jurisdiction to handle. A determination by BPU in this matter may end up being completely moot and worthless depending on the outcome of the environmental review process. This Petition is perhaps years premature and there is a strong possibility that Orsted will have to re-do the BPU process based on the outcome of other permitting activities.

52. Neither admitted nor denied. The referenced documents speak for themselves.

53. See #52.

54. Neither admitted nor denied as this is not an allegation.

With regard to the "Conclusion" section of the Petition, the County repeats each and every objection made in this submission and other submissions made by the County to BPU and renews its motions to dismiss without prejudice and/or transmit this matter to the Office of Administrative Law.

**V. Additional Arguments**

**A. The Undisclosed Patent Infringement Case – Long Term Viability of this Project? Impact on Rate Payers?**

Orsted has contracted to purchase nearly one hundred General Electric (“GE”) Haliade-X wind turbines for installation as part of the Ocean Wind One project, which is the subject of this Petition. Orsted has failed to disclose to the County, and presumably to Rate Counsel, as part of this proceeding that Siemens Gamesa Renewable Energy A/S (“SGRE”) recently obtained a judgment after jury trial establishing that GE has infringed SGRE’s patents. Siemens Gamesa Renewable Energy A/S v. General Electric, Case 1:21-cv-10216-WGY, U.S. Federal District Court for the District of Massachusetts. BPU, Division of Clean Energy submitted a Certification in support of the State of New Jersey’s *Amicus Curiae* brief before the Federal District Court. Id. Document 457-2. The federal court either has issued or is considering issuing an injunction on GE’s manufacturing and sale of the Haliade-X in its current, patent-infringing configuration. The public court records appear to indicate that Orsted is seeking a carve-out from the judgment to allow GE to continue with its sale of Haliade-X turbines to Orsted for use in the Ocean Wind One project. Id. Document 450. However, there also appears to be a proposed \$30,000.00 surcharge payable to SGRE for each megawatt generated by the Ocean Wind One project.

Orsted has not disclosed if the \$30,000.00 surcharge per megawatt is a one time surcharge based on potential maximum output of the project or if the surcharge continues for every megawatt ever generated by the project. As a one time surcharge, this amounts to \$33,000,000.00. Orsted has not disclosed whether or not the cost of this surcharge will be passed on to New Jersey ratepayers.

More importantly, it does not appear that a final judgment has been entered by the federal court. Consequently, it remains unknown whether or not Orsted will obtain its "carve out" and be able to purchase the GE turbines. On August 15, 2022, the BPU Division of Clean Energy told the federal court, "If the court grants the injunction...Orsted may be required to file a petition for

delay, seeking the Board's approval of any injunction-caused delay of project completion. Alternatively, depending on the underlying economics and business considerations, Orsted may choose to abandon the Ocean Wind project altogether..." Siemens Gamesa Renewable Energy A/S v. General Electric, Case 1:21-cv-10216-WGY, U.S. Federal District Court for the District of Massachusetts, Document 457-2. The state of New Jersey, also on August 15, 2022, told the federal court that "Changes in technology at this late date also risk requiring the project to restart its process for interconnecting the offshore wind farm to the electrical grid, which could add years onto the process and threaten completion of the project." Id. Document 457-1. It is inconceivable that Orsted would not disclose this litigation as part of this Petition, yet here we are. The matter is headed to a final judgment that may make this BPU process utterly moot and a complete waste of time. All of the efforts of all of the parties and the Board and the Board's staff that are happening now should have been avoided until this federal court judgment was in place and all of the parties knew whether the project will proceed as planned or be significantly delayed, perhaps for years.

The fact that GE will no longer be able to produce the Haliade-X turbine, a fact that is not in doubt, raises substantial questions with regard to the Ocean Wind One Project. Will Orsted be able to obtain replacement parts for the turbines? Will Orsted or GE be capable of servicing the turbines over the life of the project without access to the components that have been found to infringe SGRE's patent(s)? In the event of a turbine failure that requires replacement of the turbine, what turbine will Orsted be able to install?<sup>3</sup> Will the supply chain facilities being

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<sup>3</sup> *Siemens Gamesa Shares Drop as Turbine Parts Fall in the Sea: Orsted seeks no-sail zone near sites of same model turbine*, <https://www.bloomberg.com/news/articles/2022-04-06/denmark-s-orsted-seeks-no-sail-zones-after-turbine-blades-fall>; *The Block Island wind farm has largely shut down*, <https://www.theday.com/local-columns/20210807/the-block-island-wind-farm-has-largely-shut-down/>

constructed in New Jersey need to be redesigned in order to accommodate the assembly of turbines other than the Haliade-X?

All of these questions support the proposition that the current Petition is premature and any relief BPU may grant to Orsted in this setting may ultimately be meaningless. It is possible that this project will have to be the subject of further proceedings on the current demands within the Petition once Orsted and BPU have fully assessed the impact of the potential unavailability of Haliade-X components, or turbines themselves, in the future. Indeed, it would appear that Orsted should be applying to BPU for modifications to its Construction and Operations Plan (“COP”) since the COP as currently constituted specifically authorizes the installation of the Haliade-X. This authorization within the COP presumes Orsted’s ability to effectively maintain each Haliade-X turbine for the next 25-30 years. Clearly, BPU and the State of New Jersey should have concrete assurances that Orsted will be able to maintain its Haliade-X turbines in the absence of patent-infringing components before granting further approvals to Orsted for this project. Certainly, it is unreasonable to continue to force the County and other parties to engage in this administrative litigation while these questions remain unanswered and the final configuration of this project remains unsettled.

**B. Application of the Eminent Domain Act and the Required Analysis**

Both BPU and Orsted have misstated the analysis required before the Board can grant Orsted any relief under the current Petition. The position take by BPU and Orsted is that Orsted need only establish that their preferred route for transmission lines is “reasonably necessary” for the project. This approach may be convenient but it misstates the law. Nowhere in New Jersey law, regulation or jurisprudence is a company constructing a QOWP held to be a “public utility” as that term has been understood for decades. Consequently, there is no way to determine

whether or not a QOWP such as this is entitled to the full benefit of the law developed in New Jersey over many years related to the rights and protections afforded to public utilities or the authority of the BPU to condemn real property on behalf of private interests. Cape May County argues that Orsted is not a public utility, but simply a private developer of industrial energy facilities and as such is not entitled to the rights and protections reserved for actual public utilities and is not an entity on behalf of which BPU would have the right to exercise the power of Eminent Domain. Accordingly, the County of Cape May objects to this entire procedure as lacking in legal sufficiency capable of effectively granting extraordinary powers, including the power to disenfranchise voters and the power of Eminent Domain to a discrete, private development project under the guise of the authority of BPU.

In fact, the only status granted to this QOWP is that expressed through a somewhat convoluted incorporation by reference of various statutes. N.J.S.A. 48:3-87.1(g) states, “A qualified offshore wind project or an open access offshore wind transmission facility approved by the board pursuant to this section shall be deemed to be an electric power generator for the purposes of section 10 of the ‘Municipal Land Use Law...’ C.40:55D-19.” This section of the Municipal Land Use Law then refers to the definitions section of the Energy Rate Competition statute, N.J.S.A. 48:3-51. That statute then defines “electrical power generator” as “an entity that proposes to construct, own, lease, or operate, or currently owns, leases or operates, an electric power production facility that will sell or does sell at least 90 percent of its output, either directly or through a marketer, to a customer or customers located at sites that are not on or contiguous to the site on which the facility will be or is located.” A “customer” is defined as “any person that is an end user and is connected to any part of the transmission and distribution system within and electric public utility’s service territory...” N.J.S.A. 49:3-51.

These definitions raise complicated legal issues. It does not appear from public records describing Orsted's proposed activities that Orsted will be selling electricity to "customers" as defined in the statute. If that is the case, then it is impossible to consider Orsted an "electric power generator" as that definition is contemplated by the law. If Orsted is considered an "electric power generator," the law precludes Orsted from selling electricity to any person or entity that is "on or contiguous to the site on which the facility will be or is located." Id. Clearly, the law has yet to catch up with the intricacies of offshore wind power generation. This leaves entities like the County of Cape May forced to defend their interests before BPU in a process such as this at a distinct disadvantage which undoubtedly has a negative impact on the due process the County should be afforded in this instance. Regardless, N.J.S.A. 48:3-87.1(g) only grants Orsted "electric power generator" status "for the purposes of section 10 of the 'Municipal Land Use Law'." The law is silent as to what Orsted's status is with regard to the abrogation of the authority of duly elected officials and/or the condemnation of real property by BPU. What is certain, is that N.J.S.A. 48:3-87.1(f) has created a completely new and untested process and an ambiguous authority vested in BPU. The County submits that the extraordinary exercise of governmental authority by BPU that is urged here should be built upon a much more clearly legal and Constitutional basis.

Although the power of eminent domain is the exclusive province of the Legislature, it may delegate the exercise of that right. Twp. of Hillsborough v. Robertson, 260 N.J. Super. 37, 40, 614 A.2d 1374, 1375 (Law. Div. 1992), citing, N.J. Housing and Mortgage Finance Agency v. Moses, 215 N.J. Super. 318, 326 (App. Div. 1987), Wes Outdoor Advertising Company v. Goldberg, 55 N.J. 347, 351 (1970); State v. Lanza, 27 N.J. 516, 530 (1958), app. diss., 358 U.S. 333, (1959).

In a letter to the Board dated July 26, 2022, Orsted stated that “the Board’s Procedural Schedule affords Rate Counsel and the County all the ‘process’ they are due.” This statement could not possibly be more legally unsound. In its Reply in opposition to the County’s jurisdictional motion to dismiss without prejudice, which BPU has so far refused to dispose of, Orsted argued, “The County’s argument with respect to the E[minent] D[omain] A[ct] must fail because the procedures it references are not applicable to this Petition under N.J.S.A. 48:3-87.1(f).” Again, this statement completely misapprehends the law.

“[T]he Legislature may not vest unbridled or arbitrary power in an administrative agency,” ... but “[a]s long as the discretion of administrative officers is ‘hemmed in by standards sufficiently definitive to guide its exercise,’ the delegation of legislative powers is not unconstitutional.” Keyes Martin and Company v. Director, Division of Purchasing, 99 N.J. 244, 254 (1985). “[T]he agency’s exercise of discretion is subject to review by the courts for arbitrariness” [and] “the procedural safeguards of the Eminent Domain Act of 1971, *N.J.S.A.* 20:3–1 *et seq.*, help to guard against arbitrary action by the agency.” New Jersey Hous. & Mortg. Fin. Agency v. Moses, 215 N.J. Super. 318, 328 (App. Div. 1987). “An appellate court can consider the purposes of the...act and reject as arbitrary any condemnation which does not serve those purposes.” Id. “Thus, it is obvious that” a statute that allows an administrative agency to... “exercise the right of condemnation also contemplates all necessary requirements to satisfy due process.” Juzek v. Hackensack Water Co., 48 N.J. 302, 315 (1966).

As a matter of law, although N.J.S.A. 48:3-87.1(f) does not spell it out with excruciating clarity, our courts have long held that administrative agencies engaging in condemnation must do so with a watchful eye on the purposes and due process safeguards of the Eminent Domain Act.

Here, there are two possible interpretations: (1) The “Orsted Option” which argues that N.J.S.A. 48:3-87.1(f) does not incorporate the due process safeguards of the Eminent Domain Act or (2) The “Legal Option” which clearly holds that it does. If BPU selects “The Orsted Option,” then N.J.S.A. 48:3-87.1 is by definition an unconstitutional, arbitrary and unreasonable delegation of legislative authority by statute that, on its face and as applied, deprives the County of due process. There can be little doubt that a court would so hold. If BPU selects the “Legal Option,” then BPU can possibly salvage this new statute but must consider the due process safeguards of the Eminent Domain Act.

A distillation of the above analysis with regard to the Eminent Domain Act indicates that the Legislature may delegate the power of condemnation to an Executive Administrative Agency, but when it does so, the process utilized must contain the level of due process protection generally afforded under the Eminent Domain Act. If not, Appellate Courts are free to set aside the decisions of the Administrative Agencies.

**C. Orsted has Failed to Satisfy Pre-Action Requirements Requiring Dismissal and the Petition is Unripe for Disposition also Requiring Dismissal**

As detailed above, BPU has so far refused to issue a ruling on the County's June 8, 2022, jurisdictional motion. The County incorporates all of its submissions related to that motion herein by reference and restates its argument, in part, here.

Orsted submitted the within Petition to the Board on May 20, 2022.. The Petition seeks to force the provision of as yet incompletely defined consents from the elected officials of Cape May



County and makes equivocal demands for certain real property interests from the County without the County's approval.

In its Petition, Orsted relies on certain letters that it sent to the County. N.J.S.A. 48:3-87.1(f), requires that Orsted wait until after 90 days have elapsed from the time Orsted submitted a written request for "an easement, right-of-way, or other real property interest from a county." The County argues again that the letter of Orsted to the County of September 28, 2022, was grossly inadequate to begin the clock on the 90 day period required. The County also argues that the 90 day provision should apply to Orsted's attempt to have the Board stand in the shoes of the elected officials of Cape May County when it comes to consent for the submission of certain regulatory permits that include the use of County lands and rights-of-way.

Orsted's September 28, 2021, includes certain items, which are analyzed below in detail, which Orsted claims were the "requests" referenced in N.J.S.A. 48:3-87.1(f). Orsted seeks to utilize the September 28, 2021, date in order to satisfy the 90 day requirement of the statute. Orsted's April 12, 2022, letter includes a demand from Orsted for certain real property interests from the County and makes an offer of \$10,000.00 in compensation for those interests.

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

favor of the County. The County argues that where the Board is faced with competing but similarly weighted arguments by the Petitioner and the County, the Constitution compels the Board to resolve the issue in favor of the County.

**1. The September 28, 2021, Letter and the Property Owner's Certification**

Orsted submits at paragraph 39 of the Petition, that its letter of September 28, 2021, was in satisfaction of the requirements of N.J.S.A. 48:3-87.1(f), “providing the requisite 90-day statutory notice and requesting the specific approvals, consents and easements from Cape May County that are reasonably necessary for the construction and operation of the Project.” The Board is respectfully urged to give attention to the word “specific” in that averment. The word is misplaced, at best. A dissection of the various parts of the September 28, 2021, letter clearly indicates that it was anything but a “specific” request to the County.

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

countdown within 87.1(f). Surely, the above cannot meet a reasonable standard of specificity.

The conclusion that this language is unreasonably nonspecific is reinforced by the remainder of the September 28, 2021, letter, which becomes even more vague, ambiguous and conditional as the letter goes on. The letter states:

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

(Emphasis added).

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

must state, with specificity sufficient to allow the County/Municipality the ability to make a fully informed decision, those precise consents and property interests the QOWP is requesting. Qualifying each request with the words “if required” or “it is anticipated” attempts to shift the burden of determining what is required from the QOWP to the governmental Respondent or to BPU. This is unreasonable and contrary to the requirements of the EDA, New Jersey jurisprudence and the New Jersey Constitution.

Orsted includes the sentence at the beginning of the September 28, 2022, letter, “Pursuant to N.J.S.A. 48:3-87.1 et seq., Ocean Wind, LLC (“Ocean Wind”) is writing to formally provide the County of Cape May (“County” or “Cape May County”) with notice of specific requests pertaining to the Ocean Wind One Project (“Ocean Wind One” or “Project”).” Orsted will certainly argue that this statutory reference serves to make the letter the trigger starting the 90 day clock. One is reminded of President Lincoln’s famous exposition of a similar issue, when he stated, “If we call a dog’s tail a leg how many legs does a dog have? Four! Simply calling it a leg does not make it so.” Similarly, simply including the statutory reference does not create the “request” required by the statute. “‘Request’ is defined in Black’s Law Dictionary \* \* \* as ‘an asking \* \* \*, the expression of a desire to some person for something to be granted or done.’ ‘To request’ is defined in Webster’s Third New International Dictionary as ‘to ask to do something.’” State v. Community Distributors, Inc., 123 N.J. Super. 589, 595, (County Court 1973), aff’d, 64 N.J. 479, 317 A.2d 697 (1974). The contents of the September 28, 2021, Orsted letter does not conform to the accepted definition of the word “request.” Instead, Orsted provided a series of undefined items that may or may not be required for the QOWP. These items are, at best, conditional. “Conditional” is defined in West’s

Encyclopedia of American Law, 2005, as “Subject to change; dependent upon or granted based on the occurrence of a future, uncertain event.” Certainly, the Legislature could not have intended that requests under 87.1 (f) be allowed to be so vague and ambiguous and conditioned on the QOWP determining at some later date whether or not the items is even required. Even more clearly, the Legislature could not possibly have intended to shift the burden of determining what is actually required from the QOWP to a County governing body.

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

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

These items can only be granted by autonomous or semi-autonomous agencies and not by the County of Cape May. Again, as a matter of first impression, it would appear only reasonable that BPU would conclude that Orsted could only come to the Board after the exhaustion of the normal application process to these entities. N.J.S.A. 48:3-87.1 expressly recognizes the obligation of the QOWP to conform to the normal processes of these agencies. The statute states at paragraph (f), “after consultation with a municipality, county, or other political subdivision of the State, or any agency, authority, or other entity thereof,” the QOWP may file a Petition with BPU seeking to compel certain consents and/or property rights. The County of Cape May is not legally competent to make decisions on behalf of the Cape Atlantic Conservation District or the County Planning Board. Only those agencies can do so. These items also cannot be

appropriately characterized as “requests” to the County under 87.1(f). Orsted has utterly failed to comply with the prerequisites of N.J.S.A. 48:3-87.1(f) when it comes to the processes of autonomous or semi-autonomous agencies. The Petition must be dismissed on that basis alone.

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

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

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

required for a County official to make such a certification. In order to do so, the County would need to review everything that was submitted by Orsted to NJDEP as part of its multi-part permit application. This information has not been supplied. Now, Orsted argues that the County should have asked for the information. As pointed out by the County Administrator in his Direct Testimony, it was not and is not the obligation of the County to undertake the effort needed to determine what Orsted is actually requesting or fill in the information gaps created by Orsted's failure to conform to its legal obligations in connection with its request for the County's execution of the POC. Those obligations belong solely to Orsted and they have not been fulfilled. Consequently, the Petition must be dismissed.

The County respectfully urges the Board to conclude that the Orsted letter of September 28, 2021, does not qualify as the "request" required under the statute. Furthermore, the County urges BPU to find that Orsted has not complied with the requirements to supply all information and documents related to its permit applications for review by the County. Consequently, the within Petition is not justiciable until such time as specific and unconditional requests are submitted to the County and the County has had a real opportunity to review all the information and documents, with the assistance of an expert, in order to make an informed assessment of the propriety of executing the Property Owner Certification form. No competent requests that would satisfy the requirements of N.J.S.A. 48:3-87.1(g), liberally construed in favor of the County as the Constitution requires, having been made, the Petition is untimely, unripe and no justiciable and the BPU should decline jurisdiction and dismiss the petition without prejudice.

2. **The April 12, 2022, Letter**

On April 12, 2022, Orsted submitted a letter to Cape May County ostensibly seeking real property interests. Yet, even this letter was equivocal, stating, "\* \* \* the Project **may** include the

proposed construction of an underground onshore export cable under Cape May County's (County) road right of way (Roosevelt Boulevard), identified on the Official Tax Map of Ocean City as Block 3350.01, Lot 17.01 (Property)". (Emphasis added). The letter begs the question, "Will the project require the granting of real property interests from the County to Orsted or won't it?" This letter also sought to shift the burden of establishing certain QOWP construction aspects to the County. Orsted required the County to "Kindly confirm, within fourteen (14) days of this letter, whether the County agrees that the portion of the Property crossed by the Project is dedicated road right-of-way." After receiving from Orsted over an extended period of time detailed and complex questions related to real property status and decisions made by the County of Cape May, including insistence that the County and/or its officials explain the reasoning for certain decisions and/or prove or disprove certain property status, the County pointed out to Orsted that it was not the obligation of the County to perform Orsted's due diligence and that Orsted would need to utilize the New Jersey Open Public Records Act ("OPRA"), N.J.S.A. 47:1A-1 *et seq.*, in order to obtain documents responsive to its demands. This is confirmed by Orsted, "The County has requested that Ocean Wind submit requests through the New Jersey Open Public Records Act, but has also indicated that it may be preparing responses to Ocean Wind's requests. As of the date of this filing, outside of the OPRA process, Ocean Wind has not received responses from the County to its questions." *Direct Testimony of Madeline Urbish*, P12:12-16. One is left to wonder why Orsted would believe it would receive responses "outside of the OPRA process" when the County expressly stated that Orsted would need to utilize the OPRA process. To date, Orsted has not submitted any OPRA request to the County that would lead to the provision of documents perhaps capable of allowing Orsted to complete its due



diligence on its property questions. The County of Cape May will not allow Orsted to shift this burden to the County.

As detailed and argued above, the satisfaction of the “request” element of N.J.S.A. 48:3-87.1(f) should not be deemed by BPU to be satisfied with equivocal and burden shifting demands. BPU cannot possibly find that Orsted submitted a satisfactory demand to the County of Cape May with regard to real property needs when the letter was equivocal and did not include an appraisal of the property.

It is a "very basic rule that the land to be condemned must be described with such certainty as to leave no room for doubt or misapprehension as to the land actually to be taken. Failure in this respect is a violation of substantive due process and will vitiate the proceedings." Housing Authority of Atlantic City v. Atlantic City Exposition, Inc., 62 N.J. 322, 328 (1973). The April 12, 2022, letter cannot possibly satisfy this legal prerequisite. Additionally, in its Pre-filed Testimony, Orsted presents a "Preferred Route" with "Alternative 1" and "Alternative 2." (Pilar Patterson at P12 *et seq.*). Orsted continues to attempt to shift the burden to the County, stating, "Ocean Wind has not been able to definitively ascertain from the County whether the County recognizes the area crossed by Alternative 1 as a County road ROW or other County-owned property." Id. As detailed in the argument above and the fact that Orsted appears to have never made an Open Public Records Act request for documents related to these questions, Orsted has not done its due diligence and the County will not allow Orsted to shift this burden. It is unknown to the County whether Orsted enlisted the services of a title search company or other service provider in order to search the historical public records to answer these questions. It would appear that Orsted has not done so and instead continually seeks to shift that burden to the County. Consequently, Orsted at this late date cannot specifically identify for BPU what

property interests it may need BPU to take from the County of Cape May. "Failure in this respect is a violation of substantive due process and will vitiate the proceedings." Id.

### 3. Additional Application of the EDA to this Matter

Orsted is attempting here to exercise the Constitutionally limited power of Eminent Domain, by and through BPU, to take certain real property interests from the County of Cape May. As discussed above, BPU must evaluate its use of eminent domain in light of the procedures and due process protections of the EDA. The EDA states, in part:

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

N.J.S.A 20:3-6. Orsted fails to meet the prerequisites for filing such an action not only by its vague, ambiguous, equivocating and conditional demands, but also by failing to fulfill important requirements of the the EDA. The EDA requires that "Prior to such offer the taking agency shall appraise said property and the owner shall be given an opportunity to accompany the appraiser during inspection of the property." This did not occur. Orsted offered the County \$10,000.00 for an easement it "may" need in its letter of April 12, 2022. Orsted stated, "This offer is based on a recent appraisal of an adjacent Ocean City-owned parcel." By its own admission, Orsted

never conducted a pre-action appraisal of the property and did not allow the County to participate in any appraisal process. As a matter of law this is fatal to Orsted's application for a taking by eminent domain through BPU.

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

The provisions of the EDA typically apply to the taking by the State of County real property interests. See, e.g., N.J.S.A. 20:3-6; State Highway Commissioner v. Union County Park Commission, 89, N.J. Super. 202 (Law Div. 1965) and authorities cited therein.

In concluding its letter of April 12, 2022, Orsted again attempts to shift its burden to the County of Cape May, stating, “Again, we ask that the County please confirm within fourteen (14) days of this letter whether that portion of the Property crossed by the Project is dedicated road right-of-way.” The EDA does not require the County to provide proof of any kind or complete the condemnee’s due diligence. See, State, By Commissioner of Transportation v. Siris, 191 N.J. Super. 261, 269 (Law. Div. 1983). Nor does the EDA require the County to consider an offer with no appraisal of the property in question, quite the opposite. Respectfully, BPU should apply that same standard here. The importance of the process of bona fide negotiations is well settled. Casino Reinvestment Dev. Auth. v. Katz, 334 N.J. Super. 473, 480–81, 759 (Law. Div. 2000), citing, State by Commissioner of Transportation v. D'Onofrio, 235 N.J. Super. 348 (Law Div. 1989); State v. Hancock, 208 N.J. Super. 737 (Law Div. 1985), *aff'd* 210 N.J. Super. 568 (App. Div. 1985). The purpose of N.J.S.A. 20:3-6 is to encourage acquisitions

without litigation, thus saving both the acquiring entity and the condemnee the expense and delay of litigation. *Id.* This policy permits the landowner to receive and keep full compensation. Borough of Rockaway v. Donofrio, 186 N.J.Super. 344, 354 (App.Div.1982).

It is undisputed that Orsted conducted no appraisal of the property in question. “The reasonableness of pre-negotiation disclosure centers on the adequacy of the appraisal information; it must permit a reasonable, average property owner to conduct informed and intelligent negotiations. We thus concur in the observation of the Appellate Division that an appraisal should contain an explanation of the valuation approach or methodology actually used. A property owner ordinarily needs such information to understand the appraisal and to engage in constructive negotiations.” State by Commissioner of Transp. v. Carroll, 123 N.J. 308, 321 (1991). Compliance with the prelitigation requirements of the statute is jurisdictional, and failure of the condemnor to comply with the prelitigation requirements will result in dismissal of the complaint. *Id.* There can be no doubt that the EDA’s requirements apply to Orsted in this setting. See e.g., Monmouth County v. Whispering Woods at Bamm Hollow, Inc., 222 N.J. Super. 1, 9 (App. Div. 1987). The EDA “provides a uniform procedure to be followed by all entities who have the power to condemn.” Township of Hillsborough v. Robertson, 260 N.J. Super. 37, 42 (Law. Div. 1992), See also, City of Atlantic City v. Cynwyd Investments, 148 N.J. 55, 68 (1997). It is that procedure that BPU is required to be cognizant of as it decides the issues here. lest the process be determined to be arbitrary and unreasonable and in deprivation of the County's due process rights in the Eminent Domain setting.

The EDA and New Jersey jurisprudence require strict adherence to N.J.S.A. 20:3-6 by any and all condemnees:

**We know that the purpose of the Legislature in enacting N.J.S.A. 20:3–6 was, as stated by the Eminent Domain Revision Commission, to encourage entities**

with condemnation powers to make acquisitions without litigation. Such a procedure thereby saves both the acquiring entity and the condemnee the expenses and delay of litigation. It permits the landowner to receive and keep full compensation. This purpose is furthered by strict construction of *N.J.S.A. 20:3–6*. If a condemnor may ignore the statute and later cure the proceedings, the purpose of *N.J.S.A. 20:3–6* will be completely frustrated. Indeed, an order for a stay so that a condemnor may then do what it should have done earlier will encourage noncompliance with *N.J.S.A. 20:3–6*. A condemnor will know that if it does not comply, it may nevertheless proceed. Here plaintiff completely ignored its obligation to permit defendants to accompany its appraiser on the property before the action was started. Had plaintiff complied with *N.J.S.A. 20:3–6* in this regard, it is entirely possible that defendants might have better understood what was being taken and what would be built. At the very least, an opportunity to avoid misunderstandings would have been presented. Plaintiff can give no reason for its failure to honor the statute.

Borough of Rockaway v. Donofrio, 186 N.J. Super. 344, 353–54 (App. Div. 1982). Here, Orsted can give no reason for its failure to complete an appraisal of the County property rather than refer to a different property's appraisal. Such an approach is contrary to the letter of the EDA and the spirit of the EDA of which BPU must be cognizant.

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

#### **4. The "Reasonably Necessary" Standard**

Orsted and BPU seek to limit this proceeding by referring to the language of N.J.S.A. 48:3-87.1(f). BPU's Order Ruling on Motions and Modifying the Procedural Schedule of August 15, 2022, states on page 5:

**All parties, including intervernors and participants, are reminded that this proceeding is limited in scope to whether certain easements across properties owned by the County and certain consents needed from the County for the construction or operation of Project.**

There is zero jurisprudence interpreting what "reasonably necessary" means in the context of N.J.S.A. 48:3-87.1(f). It is likely, however, that our courts would look to prior decisions, especially in the administrative law and takings contexts. The case of Borough of Glassboro v. Gorssman, 457 N.J. Super. 416 (App. Div. 2019), provides what a court would likely find an illustrative analysis. The "reasonably necessary" standard is a rather low bar. Yet, it is not nothing. Most importantly, our courts have held that "It is reasonable necessity...in light of all the facts and circumstances and balancing of interests." Id at 429; In Re Application of Hackensack Water Company, 41 N.J. Super. 408 (App. Div. 1956). Here, BPU "must make an independent determination...on the facts." Application of Hackensack Water Company, 41 N.J. Super. 408, 419 (App. Div. 1956), citing, Fornarotto v. Board of Public Utility Commissioners, 105 N.J.L. 28, 33 (Sup. Ct. 1928). The Court in Grossman, supra, in dealing with similar language in the Local Redevelopment and Housing Law, stated that the law "requires the condemning authority to articulate a definitive need to acquire the parcel." And further, "That articulated need must be more specific than mere 'stockpiling' of real estate that might, hypothetically, be useful for a ...project..." The Court stated that "[T]he condemning authority ...must present at least some evidence -- consisting of facts, expert opinion or both -- that provides reasonable substantiation of the need. To hold otherwise and allow the condemning

authority merely to proclaim a need, without having any obligation to substantiate its existence, would improperly read the term 'necessary' out of the Legislative enactment."

Here, as argued above, Orsted's demands remain nebulous, conditional, optional and hypothetical. The necessity of the Orsted proposed route(s) for transmission lines is essentially absent given the viability of less disruptive alternative routes (see below) and problems with the viability of the proposed route(s). BPU's "duty in the instant type of case...goes far beyond a mere rubber stamp of approval" of the relief sought in the Petition. Application of Hackensack Water Company, 41 N.J. Super. 408, 419 (App. Div. 1956). An Administrative Agency, "especially one experienced and of demonstrated competence, must assume a real responsibility in weighing and considering the facts and judicially adjudicating the controversy before it." Id., citing, In re Larsen, 17 N.J. Super. 564 (App. Div. 1952).

Thus, the scope of the "reasonably necessary" analysis goes beyond the contents of the Petition and encompasses "all the facts and circumstances" surrounding the Petition and the relief requested within it, including all of the arguments made by the County in this and its other submissions to BPU. It also requires a "balancing of interests" as between Orsted and the County of Cape May as well as the Intervenors and Participants. In other words, it is not merely the representations of Orsted in the Petition or the interests of Orsted in construction of the project that BPU must consider, but rather all of the facts and circumstances and the interests of the other parties must be part of the analysis for this process to be legally defensible.

In addition to and in support of the above, the Board is respectfully referred to the Direct Testimony of the County Engineer Robert Church, including as Exhibit CMC-PA, and incorporated here by reference. Mr. Church outlines many important considerations that are part of the facts and circumstance of this matter with regard to the proposed cable routes. It is clear

that the Petition is premature and many unanswered questions remain. It is also clear that Orsted has supplied the Board is a fatally limited record. The Board cannot possibly determine from the Petition and exhibits whether or not the proposed route(s) is/are reasonably necessary for the project, since the long term viability of the route(s) is not established, the reasons for rejection of alternatives have not been adequately detailed, and mitigation of issues raised by the County have not been considered and accounted for.

## **5. Preservation of Other Issues**

Recognizing that the jurisdiction of the Board of Public Utilities is limited and that the legal issues with a brand new statute may be virtually endless, and cognizant of the Board's interest in quasi-judicial economy, the County touches briefly on these additional arguments.

### **a. N.J.S.A. 48:3-87.1(f) is an Unconstitutional Delegation of the Power of Eminent Domain**

While it is undisputed that the Legislature may delegate the power of eminent domain, it cannot do so without providing "standards sufficiently definitive to guide its exercise." Keyes Martin and Company v. Director, Division of Purchase, 99 N.J. 244, 254 (1985). If the statute purporting to effectuate such delegation does not include such standards, it is unconstitutional. Id. The reasoning for this constitutional requirement is as follows:

**Standards must accompany the delegation of power for three reasons: First, [they] prevent the Legislature from abdicating its political responsibility and prevent undemocratic, bureaucratic institutions from wielding all-encompassing, uncontrollable government power. Second, limiting standards define the area in which the agency develops the experience and expertise that the legislature has neither the time nor resources to develop. With too broad a standard the agency stands in no better position than the legislature that created it. Third, and most important, standards facilitate judicial review of agency decisions, which guards against arbitrary and capricious governmental action. As long as the statutory standards achieve these purposes, such standards should be considered sufficiently definite to pass constitutional muster.**



New Jersey Housing and Mortgage Finance Agency v. Moses, 215 N.J. Super. 318, 326–27 (App. Div. 1987); See also, Keyes Martin and Company v. Director, Division of Purchase, 99 N.J. 244, 254 (1985).

N.J.S.A. 48:3-87.1(f) contains no such standards. There is not a "definitions" section to provide guidance as to what the terms in the statute mean. There is no inclusion of the typical standards and due process protections required in the eminent domain setting. There is no language or reference to other statutory or regulatory language that would inform the statute or, more importantly, the parties, with regard to the inclusion of the constitutionally required standards. In short, N.J.S.A. 48:3-87.1 is unconstitutional on its face as a result of this deficiency. Whether the application of the statute is also unconstitutional will need to abide at least the first decision by BPU under the statute but the County reserves its right to bring all constitutional challenges that might apply. Regardless, lacking the required standards, the statute is unconstitutional as written.

**b. The "Prior Public Use" Doctrine Preclude a Taking Here**

The "prior public use" doctrine holds that "the power of eminent domain may not be exercised to take property devoted to an existing public use unless the authority to do so has been expressly given by the Legislature or must necessarily be implied." Weehawken v. Erie Railroad Company, 20 N.J. 572, 579 (1956). The County argues that given the constitutional infirmity of N.J.S.A. 48:3-87.1(f), The Petitioner here cannot establish that a taking is authorized for a public purpose since the property or properties in question are already committed to public use and, as detailed by the County Engineer, the taking will disrupt and supplant that public use. The public use already extant is the provision of public roads, the provision of electricity, the provision of water and sewer services and public facilities provided for the crossing of bodies of

water. All of these public uses compete with the public use alleged by Petitioner and there are alternatives available to Petitioner that would allow it to avoid the implication of the "prior public use" doctrine. Under all the facts and circumstances here, the County argues that the "prior public use doctrine" act to preclude the taking being sought by Orsted.

c. **BPU Should Bifurcate this Proceeding and Dismiss the Portion of the Petition Seeking a Taking, Without Prejudice**

Orsted has filed a single petition seeking to have BPU stand in the shoes of County elected officials in order to grant certain consents to the submission of Orsted's environmental applications to the New Jersey Department of Environmental Protection and also seeking the taking of County real property interests. Based on the above, it is clear that the necessity and viability of the Orsted preferred route for its transmission cable cannot be determined. Indeed, if the federal court in the patent infringement case cited above denies Orsted's carve out, Orsted will need to look for alternative turbines and rewrite its Construction and Operations Plan. It is unknown how the issues identified by the County Engineer will impact the viability of the preferred route and those issues may require an alternative route to be pursued.

Orsted continually stresses the need to avoid delay and serially accuses the County of engaging in delaying tactics. The bifurcation of this matter would likely help Orsted avoid delay. BPU has the discretion to take on only the question of the County's consent to the submission of the environmental applications and leave the takings question for the appropriate time. Afterall, the outcome of those applications and the federal environmental applications may result in Orsted having to pursue a completely different route for its transmission lines. The takings application is clearly premature and deciding it now may well be a complete waste of time. The County continues all of its objections to the abrogation of the authority of the duly

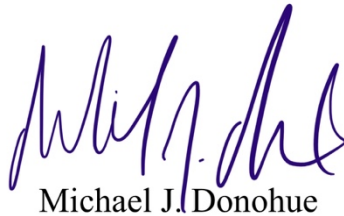
elected officials of Cape May County but points out that by bifurcating the proceeding and deciding the consent question, BPU, if it finds in favor of Orsted, could allow for Orsted's state environmental applications to move forward. This is not an outcome that the County believes is supported by the law given the vague and ambiguous requests Orsted has made, but the process for ruling on those applications is expected to take months and in the case of the federal applications, many months. The County has standing to, and in all likelihood will, challenge Orsted's entitlement to the relief ultimately requested of the environmental and other state and federal agencies. Orsted would be in no way prejudiced by such a bifurcation and will suffer no delay on the takings question, since it can revive that application if necessity dictates. Bifurcation at this point would also allow Orsted to cure the defects in its takings application that are detailed herein above. Such an approach would also perhaps allow the parties a "cooling off" period which may lead to further negotiations and perhaps avoid time consuming appeals to the Superior Court from certain decisions of BPU.

VI. **CONCLUSION AND PRAYER FOR RELIEF**

For the reasons stated herein above, the County of Cape May respectfully urges the Board of Public Utilities to dismiss the within Petition. The Petition must be dismissed as a matter of law. It is beyond dispute that Orsted has not made specific, definite requests for consent from the County, has not supplied all required information and documents in order for the County to provide consent, did not obtain an appraisal of the property in question or afford the County its right to be present at the property in connection with an appraisal. Orsted urges BPU to ignore the due process protections that the law affords to the County in this setting. N.J.S.A. 48:3-87.1(f) is clearly constitutionally deficient. For all of the reasons set forth herein, the Petition should be dismissed and the requested relief denied.

August 29, 2022

Respectfully submitted,

A handwritten signature in blue ink, appearing to read "Michael J. Donohue", is positioned above the printed name.

Michael J. Donohue

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