

know the mind of the elected officials of the County of Cape May in stating that the County's instant motion is motivated by its opposition to this project. Orsted states this as fact with not a speck of evidence. Assuming, *arguendo*, that the County is or becomes publicly opposed to the project, that fact would not form a law-based counter to the County's legal arguments put forward in this matter. The legal standard here is not, "does the opposition agree with Orsted?" Or "does this issue potentially slow down Orsted's project?" The legal standard is what the law requires as interpreted by the Board and the Courts.

It is unlikely that a reasonable, fully informed citizen would not have serious doubts about the objectivity and impartiality of the Board of Public Utilities under all of the circumstance detailed in the County's underlying motion. Orsted wishes to limit any conflict or perceived conflict to those specifically named in the applicable laws, regulations and codes. This is an absolute misstatement of the law of conflicts of interest which always includes items not specifically enumerated which may create a conflict or the appearance of a conflict of interest. There is no doubt that in this matter there is a clear and inescapable appearance of a conflict of interest between the Board's stated "partnership" with Orsted, the Board's public pronouncements and Orders stating the Board's intention to see this project built as soon as possible and the interests of the County in vindicating the franchise of its voters and insisting on strict compliance with the law of eminent domain.

One need not assume, *arguendo*, that this is a quasi-judicial proceeding. No assumption is required. It is a fact. The Board describes itself as a quasi-judicial body on its own website and the law, regulations and jurisprudence in the State of New Jersey make clear that this is a quasi-judicial proceeding. Again, this may be inconvenient for Orsted, but it is a fact.

As the County made clear in its Brief in Support, the County casts no aspersions upon the Board as a whole or any of its individual members. Also, the County does not begrudge BPU's desire to be the champion of offshore wind power. The County simply points out that BPU cannot be that champion while at the same time demonstrating to the public that it can be fair and impartial in this quasi-judicial proceeding where the County takes positions contrary to those of Orsted and consequently contrary to the states goals of BPU. When a quasi-judicial body finds itself in such a clear appearance of conflict of interest, recusal is the required outcome. Additionally, the remedy for failure to recuse where recusal is required is that the proceeding is a nullity and must begin anew before a non-conflicted arbiter. This begs the question as to why BPU and Orsted would want to ignore this conflict and risk what would be an extraordinarily long delay retrying the matter after appeal.

Orsted interprets the fact that the County did not outline the procedures following recusal of the Board and decision by an Administrative Law judge as a lack of understating on the part of the County in the realm of Administrative Law. While the County is certain that Orsted, with at least eight attorneys on the Service List in this case, has much greater legal resources than the County of Cape May, Orsted's argument is simply *ad hominem* and not factual. The fact of the matter is that the next step after a decision by an ALJ here after recusal is so obvious as to not require exposition. BPU, having recused itself in that scenario, would remain in conflict and unable to issue the final agency decision and the procedure under N.J.A.C. 1:1-18.9, outlined by Orsted in footnote 2 of its opposition, would essentially be compulsory. In fact, the process detailed in the regulations, flowing from N.J.S.A. 15:14B-10(f), is perfectly suited for the current situation. The BPU President, after finding grounds for recusal, can simply issue an order directing that all petitions submitted by a Qualified Offshore Wind Project will be referred to an

ALJ and the ALJ shall be empowered to render the final agency decisions. This would eliminate the obvious appearance of impropriety here and clear the way for BPU to aggressively advance the interests of each QOWP moving forward without the conflict hanging over the proceedings. The legal process for disposing of Petitions would remain entirely intact before an arguably better-positioned arbiter of what are complex legal issues, namely an Administrative Law Judge. This outcome would remove the conflict and allow BPU to focus all of its efforts and resources on advancing offshore wind energy development without the burden of impartiality.

Orsted essentially argues that no administrative agency could ever be subject to recusal since that Agency has the ultimate decision making authority, even after a decision of an Administrative Law Judge. This is an absurd argument in light of the process established by the Legislature and adopted by the Executive branch via N.J.S.A. 15:14B-10(f) and N.J.A.C. 1:1-18.9.

Viewing this situation from a contrary angle is illustrative. What if the public pronouncements of BPU had been statements demonstrating opposition to the the Governor's policies advanced in EO 8 and EO 92? What if the lapel pins worn by Board members and staff said, "No Windmills"? Under those circumstances would Orsted think that it could get a fair hearing from BPU on its Petition? The answer is plainly, "No." Windmill lapel pins are certainly fine when you are the windmill company but not if you are the impartial, quasi-judicial decision makers. Pointing out the clearly biased message that those lapel pins send is not a frivolous argument. No doubt, if the lapel pins said "No Windmills," Orsted would be arguing for recusal of the Board.

The County of Cape May, in the context of the recusal question here, asks only for a fair, impartial and traditional application of the law. Orsted asks the Board to ignore the law since

applying the law might cause some sort of delay. This is not a legitimate legal standard. The law does not set itself aside based on corporate or governmental timeframes for development. The law does not place itself into a subservient position to public or private agendas. The law, consisting of statutes, regulations and jurisprudence, is there to guide quasi-judicial bodies to fair, objective and impartial decisions or to recuse themselves where such an untainted decision is not possible due to conflicts or the appearance of conflicts of interest.

The Board should not consider the fact that the County did not specifically address an argument or arguments in Orsted's Opposition as the County conceding on those points. The County respectfully refers the Board to its Brief in Support as to all issues and submits that Orsted has not presented any argument that undermines the County's arguments.

For the reasons stated above as well as those stated in the County's Brief in Support, the County moves for the recusal of the Board of Public Utilities and transmittal to the Office of Administrative Law for assignment of and Administrative Law Judge.

September 9, 2022

Respectfully submitted

A handwritten signature in blue ink, appearing to read 'MJD', is written over a horizontal line.

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