STATE OF NEW JERSEY
BOARD OF PUBLIC UTILITIES

IN THE MATTER OF THE PETITION OF OCEAN WIND LLC PURSUANT TO N.J.S.A. 48:3-87.1(f) FOR A DETERMINATION THAT CERTAIN EASEMENTS AND CONSENTS NEEDED FOR CERTAIN ENVIRONMENTAL PERMITS IN, AND WITH RESPECT TO, THE COUNTY OF CAPE MAY ARE REASONABLY NECESSARY FOR THE CONSTRUCTION OR OPERATION OF THE OCEAN WIND 1 QUALIFIED OFFSHORE WIND PROJECT	:	BPU Docket No. QO22050347 **OCEAN WIND LLC'S RESPONSE TO THE COUNTY OF CAPE MAY'S MOTION FOR THE RECUSAL OF THE BOARD OF PUBLIC UTILITIES, TRANSMITTAL OF THE MATTER TO THE OFFICE OF ADMINISTRATIVE LAW AND ASSIGNMENT OF AN ADMINISTRATIVE LAW JUDGE AND TO SUSPEND THE CURRENT SCHEDULING ORDER**

Petitioner Ocean Wind LLC ("Ocean Wind"), by and through its undersigned counsel, hereby submits this opposition to the County of Cape May's ("Cape May County") Motion for Recusal (the "Motion"). Specifically, the Motion seeks (i) the recusal of the Board of Public Utilities (the "Board" or "BPU"), (ii) transmittal of the matter by the Board to the Office of Administrative Law ("OAL") and assignment of an administrative law judge ("ALJ"), and (iii) to suspend the current Scheduling Order. For the following reasons, the Board should deny all aspects of Cape May County's frivolous and baseless Motion in its entirety.

I. Introduction and Background[1]

Without citation to precedent, Cape May County seeks to have the entire Board recuse itself and find itself unfit to determine the outcome of this proceeding, in essence, because the Board is doing what the New Jersey Legislature has empowered it to do – performing its responsibilities and duties in carrying out the laws of the State of the New Jersey, namely, the Offshore Wind Economic Development Act, N.J.S.A. 48:3-87.1 *et seq.* ("OWEDA"), and the Governor's Executive Orders implementing OWEDA and directing the Board to further implement the statute. The Motion is unsupported in law and fact. Unsurprisingly, Cape May County cites to no example in which an entire administrative agency recused itself from performing its duties, particularly where the Legislature has provided that agency with the explicit authority to carry out such duties. The Motion falls dramatically short of the demanding standard to legally require recusal.

The Motion also displays a lack of knowledge and experience with the administrative process before the Board, which has the discretion, but is not required, to refer matters (contested or not) to the OAL. *See* N.J.A.C. 1:1-8.2 (transmission to the OAL of contested cases); N.J.A.C. 1:1-12.1 (transmission to the OAL of uncontested cases). Under the New Jersey Administrative

[1] Ocean Wind notes that on August 29, 2022, the Nine Municipalities (that were granted participant status in the order dated August 16, 2022 in this proceeding ("August 16 Order"), as to which the Nine Municipalities have sought reconsideration, filed a motion to join the previously-filed motions of Cape May County to dismiss, for Board recusal, transmittal to the Office of Administrative Law and suspension of the procedural schedule. The Nine Municipalities (Sea Isle City, Dennis Township, Lower Township, Borough of Avalon, Middle Township, Borough of Wildwood Crest, Borough of Stone Harbor, City of Wildwood, and City of North Wildwood) have raised nothing substantively unique or new regarding recusal, transmittal to OAL and suspension of the procedural schedule that is not already covered by this instant Ocean Wind opposition to Cape May County's Motion. Moreover, as "participants", the Nine Municipalities have no standing to file any motions in this proceeding, including joining in the Cape May County motion to dismiss, *see* N.J.A.C. 1:1-16.6(c) providing that the judge shall determine the nature and extent of participation. The August 16 Order specifically states that "[p]articipants shall be permitted to argue orally and submit comments as a Public Written Comment." August 16 Order at p. 5. Therefore, the motion to join filed by the Nine Municipalities should be denied and stricken from the record.

Procedure Act, N.J.S.A. 52:14B-1 *et seq.*, the OAL performs its functions as a factfinder and an initial decision is rendered by an ALJ. N.J.A.C. 1:1-18.1. Even when the Board, in its discretion, transmits a matter to the OAL, the OAL submits an initial decision to the Board for its review because the Board, and not the ALJ, is the final decision-maker. N.J.S.A. 52:14F-7(a)(Nothing in this amendatory and supplementary act shall be construed to deprive the head of any agency of the authority pursuant to section 10 of P.L.1968, c. 410 (C.52:14B-10) to determine whether a case is contested or to adopt, reject or modify the findings of fact and conclusions of law of any administrative law judge consistent with the standards for the scope of review to be applied by the head of the agency as set forth in that section and applicable case law); N.J.S.A. 52:14F-8 (Unless a specific request is made by the agency, no administrative law judge shall be assigned by the director to hear contested cases with respect to: … b. Any matter where the head of the agency, a commissioner or several commissioners are required to conduct, or determine to conduct the hearing directly and individually); N.J.A.C. 1:1-18.6 ("Within 45 days after the receipt of the [ALJ's] initial decision … the agency head may enter an order or a final decision adopting, rejecting, or modifying the initial decision."). Accordingly, even ignoring the unsupported innuendo posed by Cape May County alleging the Board's supposed bias, the ultimate relief sought by Cape May County to have the Board transmit the matter to the OAL would only delay the proceeding. The Board would still be required to finally determine the outcome of this proceeding via a final order after reviewing an ALJ's initial decision. That this Motion is plainly a delay tactic is further reflected in the Motion's request to suspend the current procedural schedule.

The Motion's disregard of both law and fact to support the drastic measure of entire agency recusal shows that Cape May County's intent in this proceeding is to mount a collateral challenge of the Board's underlying determination of the Ocean Wind project as a Qualified Offshore Wind

Project ("QOWP" or "Project") that was awarded Offshore Wind Renewable Energy Certificates ("ORECs"). Board Order, *In The Matter of The Board of Public Utilities Offshore Wind Solicitation For 1,100 MW – Evaluation of The Offshore Wind Applications*, BPU Docket No. QO18121289 (June 21, 2019) (the "OREC Award Order"). However, this proceeding is clearly not an opportunity to contest or challenge Ocean Wind's QOWP status or the Board's OREC Award Order. Instead, the process to determine the property rights and consents at stake in this proceeding is set forth by the scope and processes articulated by the New Jersey Legislature in N.J.S.A. 48:3-87.1(f). Cape May County is entitled to the process that is set forth by statute and not the different and unsupported procedure that it would desire. Accordingly, Cape May County's Motion should be denied.

II. Relevant Legal Standards

A. Legal Standard for Recusal

Under common-law principles, "[a] public official is disqualified from participating in judicial or quasi-judicial proceedings in which the official has a conflicting interest that may interfere with the impartial performance of his duties as a member of the public body." *Wyzykowski v. Rizas*, 132 N.J. 509, 523 (1993) (citation omitted). The ultimate determination in assessing whether recusal or disqualification is appropriate is "whether the circumstances could reasonably be interpreted to show that they had the likely capacity to tempt the official to depart from his sworn public duty." *Van Itallie v. Borough of Franklin Lakes*, 28 N.J. 258, 268 (1958). New Jersey courts have distilled varying conflict of interest circumstances requiring disqualification into four categories: (1) "direct pecuniary interests," (2) "indirect pecuniary interests," (3) "direct personal interests," and (4) "indirect personal interests." *Petrick v. Planning Bd. of City of Jersey City*, 287 N.J. Super. 325, 331 (App. Div. 1996) (citation omitted).

In furtherance of the integrity and objectivity of administrative agencies, it is undisputed that if public officials of an administrative agency are "tainted by actual bias" then those public officials should not decide a matter. *Matter of Carberry*, 114 N.J. 574, 585 (1989). However, an administrative agency official "does not automatically become partial or unfair merely because that person has become familiar with the facts of the case through the performance of statutory or administrative duties." *Id.* (citing *Hortonville J.S.D. NO. 1. v. Hortonville Educ. Ass'n*, 426 U.S. 482, 493 (1976) (school board was not disqualified from hearing to dismiss striking teachers despite prior involvement in unsuccessful pre-strike negotiations); *FTC v. Cement Inst.*, 333 U.S. 683, 700-03 (1948) (FTC was not disqualified from hearing to determine involvement in illegal cement-pricing scheme despite FTC's prior determination and investigation regarding illegal cement-pricing scheme)). "Nor is disqualification automatically required merely because a decisionmaker has announced an opinion on a disputed issue." *Matter of Carberry*, 114 N.J. at 585 (citing *United States v. Morgan*, 313 U.S. 409, 420-21 (1941) (Secretary of Agriculture was not disqualified from rates hearing despite previously publicly criticizing issues related to rate setting); *Kramer v. Bd. of Adjustment, Sea Girt*, 45 N.J. 268, 280-82 (1965) (statements to the press from zoning board regarding opinion on variance for a hotel did not disqualify members because there was no proof of personal interest or malice towards party seeking relief)). Typically, "actual bias is the touchstone of disqualification." *Matter of Carberry*, 114 N.J. at 586.

It is a demanding and exacting standard to justify the extreme measure of disqualification of public officials. *See Piscitelli v. Cty. of Garfield Zoning Bd. of Adjustment*, 237 N.J. 333, 353 (2019) ("Our conflict-of-interest rules, however, do not apply to 'remote' or 'speculative' conflicts because local governments cannot operate effectively if recusals occur based on ascribing to an official a conjured or imagined disqualifying interest."); *Wyzykowski*, 132 N.J. at 523-24 ("Local

governments would be seriously handicapped if every possible interest, no matter how remote and speculative, would serve as a disqualification of an official. If this were so, it would discourage capable men and women from holding public office."). Accordingly, "[t]o presume that the agency head is biased merely because he or she is applying an agency rule or regulation" in a particular context "would severely undermine the function of administrative agencies." *Matter of Carberry*, 114 N.J. at 585 (fact that superintendent of state police developed protocols on drug testing did not disqualify superintendent from considering disciplinary proceeding implementing said protocols).

B. Legal Context for this Proceeding

It is also beyond dispute that "[a]dministrative agencies are the arms of the executive branch of government that implement the laws passed by the Legislature." *Matter of Kallen*, 92 N.J. 14, 20 (1983). Administrative agencies "effectuate the programs and policies the Legislature specifically delegates to them." *Id.* Administrative agencies serve an important role in government as specialists and experts in particular contexts – here, the BPU exercises statutorily-derived authority relative to: safe and reliable service by public utilities; energy; energy efficiency; transmission of energy; rate setting for energy costs; renewable energy (including offshore wind projects); and related aspects. *See F.C.C. v. RCA Communications*, 346 U.S. 86, 97 (1953) (explaining that "a major reason for the creation of administrative agencies, [is that they are] better equipped … for weighing intangibles by specialization, by insight gained through experience, and by more flexible procedure"); *Greenwood v. State Police Training Center*, 606 A.2d 336, 342 (1992) ("Appellate courts must defer to an agency's expertise and superior knowledge of a particular field."). Particular to the BPU, the Supreme Court of New Jersey has stated the following:

> We find in these statutes, and throughout Title 48 of the Revised Statutes (1937), a legislative recognition that the public interest in proper regulation of public utilities transcends municipal or county lines, and that a centralized control must be entrusted to an agency whose continually developing expertise will assure uniformly safe, proper and adequate service by utilities throughout the State. Our courts have always construed these legislative grants to the fullest and broadest extent.

In re Public Service Elec. & Gas Co., 35 N.J. 358, 371 (1961); *accord Bergen Cnty. v. Dep't of Public Utilities*, 117 N.J. Super. 304, 312 (App. Div. 1971) ("The powers delegated by the Legislature to the Board are to be read broadly. Any exception must be carefully circumscribed.").

The Board, even when acting, *arguendo*, in a quasi-judicial capacity, is presumed to be acting objectively and impartially, reflected by the deferential standard of review by appellate courts of an agency's factual determinations. *See In re Herrmann*, 192 N.J. 19, 27-28 (2007) ("An administrative agency's final quasi-judicial decision will be sustained unless there is a clear showing that it is arbitrary, capricious, or unreasonable, or that it lacks fair support in the record."); *see also id.* ("a court owes substantial deference to the agency's expertise and superior knowledge of a particular field"). This deferential standard "is consistent with the strong presumption of reasonableness that an appellate court must accord an administrative agency's exercise of statutorily delegated responsibility." *In re Attorney General Law Enforcement Directive Nos. 2020-5 & 2020-6*, 246 N.J. 462, 489 (2021) (citation omitted). In quasi-judicial administrative functions, citizens can expect "truth, frankness and integrity" from administrative agencies as public bodies. *Driscoll v. Burlington-Bristol Bridge Co.*, 8 N.J. 433, 479 (1952).

Relevant to this proceeding, Ocean Wind has petitioned the Board under OWEDA to exercise the power specifically delegated to the Board by the New Jersey Legislature to consider narrowly focused petitions to "determine whether the requested easement, right-of-way, or other real property interest are reasonably necessary for the construction or operation of the qualified

offshore wind project or open access offshore wind transmission facility." N.J.S.A. 48:3-87.1(f). The nature of the Board's jurisdiction and authority to decide Ocean Wind's Petition is set forth in this statute and the statute prescribes the exact procedure and process that is due. *Id.* The New Jersey Legislature provided for the requisite notice in order to bring a petition under the statute and set forth the requirement for a public hearing to inform the Board's consideration. *Id.* Ocean Wind's Petition, the relief sought therein, the venue for its consideration, and the procedures for obtaining the requisite Board approval are all explicitly set forth in N.J.S.A. 48:3-87.1(f). As should be apparent based on the legislative directives and an understanding of the function of the executive branch, the BPU cannot be considered biased or partial merely based on its proper exercise of statutorily-delegated authority.

III. Argument

A. Cape May County Cannot Satisfy the Standard for Recusal

1. Cape May County's Motion Fails to Identify a Factual Basis for Recusal

Cape May County has failed to identify a cognizable or legitimate ground to justify recusal and disqualification of the Board. Cape May County's accusations or undue characterizations of the Board as, or having the appearance of, biased and partial champions and cheerleaders of State law and State policy are without merit. (Motion at pp. 15-16). Under Cape May County's flawed reasoning, because the Board is tasked with carrying out OWEDA and implementing associated wind energy directives under the law, the Board is unable to make a fair and impartial judgment about the reasonable necessity of certain easements or consents to and for the Project in deciding the Petition under N.J.S.A. 48:3-87.1(f). Cape May County's reasoning and the arguments in support of it are irrelevant, not pertinent, and do not constitute sufficient evidence of bias or

prejudice on the part of even a single Board Commissioner, let alone, the entire Board, against Cape May County so as to merit recusal. A fair and balanced reading of the Motion displays only that Cape May County's request amounts to no more than a request that the Board find itself unfit to carry out the very law that the New Jersey Legislature charged it with implementing.

As explained above, in determining a motion for recusal, the focus of the inquiry is whether, under the circumstances, there is, or could reasonably be perceived to be, a conflict of interest or bias that would have "the likely capacity to tempt the official to depart from his sworn public duty." *Van Itallie*, 28 N.J. at 268. Cape May County's supposed indicator of bias or partiality are that the "BPU undertook to serve as the champion of and driving force behind the installation of offshore wind facilities" (Motion at p. 9). Cape May County's argument boils down to a claim that the BPU cannot act fairly and objectively in determining an ancillary case related to offshore wind because the Board is the statutory lead administrative agency that is duty-bound to implement the offshore wind laws within the State.

Cape May County's arguments fail to satisfy the demonstrable and accepted indicators of bias or partiality that would warrant recusal or disqualification under New Jersey law. *See Petrick*, *supra*, 287 N.J. Super. at 331 (explaining that evidence of direct or indirect pecuniary or personal interests supports recusal or disqualification of public officials). Cape May County has not shown that any members of the Board have a pecuniary interest of any sort in the outcome of this proceeding. Cape May County has also not shown that any members of the Board have a personal interest, whether direct or indirect, in the outcome of this proceeding. No proof has been provided or shown (or could be shown) that the Board is acting unethically in its consideration of the Petition or that the Board is not adhering to its own ethical obligations in carrying out its official functions under State law. Cape May County specifically states that it is not accusing the Board of actual

bias or a lapse of ethical conduct or of actual partiality (Motion at p. 2), but instead argues for an appearance of conflict arising from the Board carrying out its statutory and otherwise lawful duty such as to cause an average, reasonable and fully-informed citizen to find the process fair, unbiased and impartial (Motion at pp. 9-10, 15-16). Indeed, Cape May County cannot factually show that the Board exhibits, or reasonably appears to exhibit, any one of the accepted indicators of bias or prejudice under New Jersey law that would justify the Board's recusal.

Cape May County's arguments fail to acknowledge that the BPU is simply carrying out the law as set forth by the New Jersey Legislature as an arm of the executive branch of government. *See Matter of Kallen*, 92 N.J. at 20 (administrative agencies "effectuate the programs and policies the Legislature specifically delegates to them"). The New Jersey Legislature specifically and explicitly delegated to the BPU certain powers under OWEDA in order to implement the statute. As it pertains to this proceeding, the New Jersey Legislature specifically entrusted the BPU to "determine whether the requested easement, right-of-way, or other real property interest are reasonably necessary for the construction or operation of the qualified offshore wind project." N.J.S.A. 48:3-87.1(f). In other words, the BPU's consideration of Ocean Wind's Petition is mandated by the statute. The New Jersey Legislature determined that the public interest is best served by centralized control in an agency with the requisite experience in the regulation of public utilities that "transcends municipal or county lines" and accordingly New Jersey law interprets this legislative grant of authority to the BPU "to the fullest and broadest extent." *In re Public Service Elec. & Gas Co.*, 35 N.J. at 371.

This is even more so the case where the present proceeding involves the onshore connection of the Project into the existing public utility infrastructure, which is already regulated and subject to oversight by the BPU. It cannot be said that the BPU is biased or partial where the

New Jersey Legislature, which was clearly aware that the Board would review and determine applications for QOWP status, and award ORECS, in other subsections of the same statutory provision, has further determined that the BPU, specifically, should be the agency that should decide this matter under subsection 87.1(f). Cape May County's arguments would not only contravene State law, but it would turn the rules of statutory construction on its head. *See State v. Rivastineo*, 447 N.J. Super. 526, 529 (App. Div. 2016) (stating that the "primary purpose of statutory interpretation is to determine and effectuate the Legislature's intent" and that courts [and administrative agencies] cannot rewrite statutes or "presume that the Legislature intended something other than that expressed by way of the plain language").

2. *Cape May County's Motion Is Unsupported by the Law*

As a matter of law, the Cape May County request in its Motion is plainly unprecedented. Cape May County has not cited to any case in which an entire administrative agency recused itself, particularly where the law requires the administrative agency to rule on a specific matter before it. In addition, most instances involving the issue of recusal or disqualification pertain to individual members of an agency with alleged pecuniary or personal interests, not an entire agency creating the need for the creation of extra-statutory procedural remedies (as discussed below).

The cases cited by Cape May County in support of recusal are inapposite and unpersuasive. Each cited case involves different facts from those at issue here. Those cases involve the recusal of an individual as opposed to an entire administrative agency and where that individual had an individual conflict, or appearance of a conflict of interest, in the outcome of the matter before them. *See, e.g., Thompson v. City of Atlantic City*, 190 N.J. 359, 375-79 (2007) (finding disqualification necessary where municipal public officials held pecuniary and personal interests in outcome of settlement agreement they were tasked to approve); *Wyzykowski*, 132 N.J. at 523

(building official who also served as member of planning board should have been disqualified from considering mayor's application for building development where building official held salaried positions approved by mayor); *In re Bator*, 395 N.J. Super 120, 128-29 (App. Div. 2007) (individual Commissioner of the Board asked to recuse herself from reviewing work product submitted by the Commissioner's sister); *Barrett v. Union Twp. Comm.*, 230 N.J. Super. 195, 204-05 (App. Div. 1989) (township committee councilman was disqualified from voting on amending zoning ordinance in favor of facility where councilman's mother had resided in the facility). Recusal would be appropriate, for example, if a member of the Board held stock in Ocean Wind and had a pecuniary interest in Ocean Wind's success, or if a member of the Board's family worked for Ocean Wind. However, no such facts exist that would warrant the Board's recusal here. In addition, Cape May County acknowledges that most of the case law involving disqualification and recusal pertains to municipal employees as opposed to state-level administrative agencies. (Motion at p. 6).

Even Cape May County's requested relief to cure or address the Board's supposed bias is legally nonsensical. Cape May County's argument demonstrates a lack of understanding of administrative processes and State law. Even if the Board were to agree with Cape May County that the matter should be transmitted to the OAL, an appointed ALJ would consider the matter and render an initial decision before sending it back to the Board for its review and approval. *See* N.J.A.C. 1:1-18.1 (explaining the process for ALJ review and issuance of an initial decision). The Board, not an ALJ and not the OAL, is the ultimate decision-maker for this proceeding, even in proceedings that are transmitted to the OAL. *See* N.J.A.C. 1:1-18.6 (providing for administrative

agency final decision after review of ALJ's initial decision).[2] Cape May County's request would only serve to delay resolution of this proceeding.

Despite its reference to "the common law, the New Jersey Conflicts of Interest Law, N.J.S.A. 52:13D-12 *et seq.*, the New Jersey Uniform Ethics Code, the regulations set forth in N.J.A.C. 19:61-1.1 *et seq.*, as well as the New Jersey Board of Public Utilities Supplemental Ethics Code" (Motion at p. 1), Cape May County cites no specific provision of any case, statute, code or regulation that pertains directly to the facts of this case. Instead, Cape May County desperately weaves a web of innuendo in the hope that it will add up to a totality of circumstances conveying the appearance of a conflict of interest that justifies a recusal of the entire Board. The New Jersey Conflicts of Interest Law prohibits state employees from accepting certain gifts and generally describes conflicts of interest as having a pecuniary interest or familial relationship in an official state matter. *See* N.J.S.A. 52:13D-12 *et seq.* The New Jersey Uniform Ethics Code provides specific grounds for recusal of a state officer or employee, including if the state official had prior involvement in the matter before joining state employment, if the matter involves someone who made a campaign contribution to the state official, or if the state official has a personal or financial

[2] Ocean Wind notes that N.J.A.C. 1:1-18.9, which Cape May County does not cite, authorizes an administrative agency to empower an ALJ to issue a final agency decision under certain limited circumstances, while explicitly recognizing that the decision to allow an ALJ to issue a final agency decision rests solely within the discretion of the administrative agency. N.J.A.C. 1:1-18.9. While there is little case law applying or interpreting this regulation (which suggests that it is rarely used), the OAL has itself described this regulation as an exception to the general rule that administrative agencies, and not ALJs, issue final decisions. *See* Initial Decision, *J.D. v. N.J. Comm. for the Blind & Visually Impaired*, OAL DKT. NO. HCB 15347-19, 2020 WL 12175791, at *11 (OAL May 1, 2020); *see also Penpac, Inc. v. Passaic Cnty. Utilities Auth.*, 367 N.J. Super. 487, 498-99 (App. Div. 2004) (generally describing that an administrative agency is required to take action to transform an ALJ's initial decision into the agency's final decision). Before proceeding to follow the provisions of OWEDA in this proceeding, the Board would have already been aware of its discretionary authorization under this rule. Yet, the fact remains that the Board did not exercise such discretion whether or not it believed such exercise to be appropriate at all under OWEDA (which specifically directs the Board to decide) where such decisions require the exercise of the Board's specialized expertise and experience in the energy-related regulatory framework.

interest in the matter. N.J. Uniform Ethics Code § IX. Cape May County's Motion acknowledges that the Uniform Ethics Code does not provide direct support and accordingly the County relies upon "including but not limited to" language from the Ethics Code for indirect support for "other" grounds for recusal (Motion at p. 6).

The same is true of the regulations set forth in N.J.A.C. 19:61-1.1 *et seq.*, which are the regulations of the State Ethics Commission. N.J.A.C. 19:61-7.4 provides specific grounds for recusal of a state official for having a personal or pecuniary interest in the matter. Again, Cape May County cites only to qualifying language in the regulation for indirect support: "[a]n incompatible financial or personal interest may exist in other situations … depending on the totality of the circumstances." (Motion at p. 7 (quoting N.J.A.C. 19:61-7.4)). However, even this language is still couched with a requirement of personal or financial interests to justify recusal. Finally, the Board's Supplemental Ethics Code provides additional guidance on recusal and conflicts of interest applicable to Board Commissioners—these largely follow the same rules and case law defining conflicts of interest as personal interests or relationships and financial interests in the outcome of matter. Under Cape May County's strained vision, executive agencies with quasi-judicial roles could never avoid the appearance of a conflict of interest unless the executive agency was not bound by the very law it was designated and empowered to implement and carry out. This is an absurd and impractical vision of the mechanics of government. In sum, none of the authorities cited by Cape May County support recusal of the Board.

Cape May County's discussion of the Executive Orders and Strategic Plan also do not support the Board's recusal. Cape May County's argument is that the BPU has abandoned its "in but not of" independence with respect to offshore wind energy and that the BPU is thereby "an interested party bound to the success of offshore wind development." (Motion at pp. 11-12). In

fact, the Board is acting pursuant to a delegation of authority by the New Jersey Legislature under N.J.S.A. 48:3-87.1. While it is true that the Board's award of ORECs to Ocean Wind was also in furtherance of the Governor's Executive Orders to achieve the clean energy goals set forth in the Strategic Plan (Motion at pp. 10-14), the fact remains that, in this instance, the Board is nonetheless acting under authority explicitly delegated to the Board under OWEDA. Where the Board is acting under a statutory delegation of authority, Cape May County cannot point to any authority to support the claim that the Board has abandoned its independence as an administrative agency.

Cape May's argument is clearly based on its objection to the Board's 2019 approval of the Ocean Wind Project. Again, this proceeding is not an opportunity to revisit the Board's award of ORECs to Ocean Wind, which award was also made through an express delegation of power by the New Jersey Legislature and not solely in furtherance of Executive Orders or State policy. *See* OREC Award Order at pp. 4-5 (citing N.J.S.A. 48:3-87.1(d)). Moreover, under New Jersey law, executive orders that are within the scope of, or supplemented by, an express delegation of authority by the New Jersey Legislature carry the force of law. *See Sczesny v. New Jersey*, No. 22-2314, 2022 WL 2047135, at *8 (D.N.J. June 7, 2022) (explaining that Governor Murphy's COVID-19 executive orders carry the force of law because they were issued pursuant to the Civil Defense and Disaster Control Act). Governor Murphy, in directing the BPU to implement OWEDA through Executive Orders, which refer to his constitutional and statutory powers, was not creating new substantive law that would exceed the scope of his powers. Rather, Governor Murphy was directing the Board to follow the OWEDA statute and implement the OWEDA statute, and the Board in so-acting is adhering to the statute. Accordingly, because the Executive Orders must be seen in light of the express delegation of authority by the Legislature, while effective, they carry the force of law as set forth in OWEDA.

Cape May County's argument that the Board's carrying out of OWEDA compromises or negates its "in, but not of" agency independence is illogical and misplaced. The concept is generally only relevant to determining whether the creation or reorganization of administrative agencies as arms of the Executive Branch satisfies the New Jersey constitution. *See In re Plan for Abolition of Council on Affordable Housing*, 214 N.J. 444, 462 (2013) (determining whether Governor has the authority to abolish independent agencies that were created by legislative action); *N.J. Turnpike Auth. v. Parsons*, 3 N.J. 235, 238-39 (1949) (considering whether creation of the New Jersey Turnpike Authority in the State Highway Department satisfied the State Constitution); *see also Executive Com'n v. Byrne*, 238 N.J. Super 84, 89-91 (App. Div. 1990) ("BPU is 'in, but not of' the Department of Treasury and is independent of any supervision or control by the Department."). It is clearly not relevant to a discussion of agency partiality or bias that, if followed, would demand an administrative agency to act in contravention of State law. Cape May County has cited no authority for the proposition that the BPU in implementing State law has abandoned its agency independence. Instead, the BPU in implementing OWEDA is acting pursuant to authority that derives from the Legislature, not purely in furtherance of the Governor's agenda or State policy. The BPU maintains its agency structure and independence by performing multiple functions delegated to it under OWEDA and this unsupported argument does not support the Board's recusal.[3]

[3] Cape May County's argument regarding Board members wearing wind turbine lapel pins is so frivolous that it does not merit discussion. Nonetheless, wearing wind turbine lapel pins does not rise to the level of a disqualifying interest in this proceeding that would justify recusal or disqualification. The County's argument is again unsupported by law or fact. Wind turbine lapel pins are not evidence of an actual, or apparent, bias or partiality and Cape May County cites to no relevant binding law to support recusal on this basis, or that support for or against offshore wind energy even has anything at all to do with the matters/issues actually before the Board in this proceeding under N.J.S.A. 48:3-87.1(f).

B. The Board Is Acting Objectively and Impartially in this Proceeding

The Board is tasked with, and assumed to be, acting impartially, ethically, and objectively, even in a quasi-judicial capacity. *See In re Attorney General Law Enforcement Directive Nos. 2020-5 & 2020-6*, 246 at 489 (describing the "strong presumption of reasonableness" that is accorded an administrative agency's exercise of its statutorily delated duties). Assuming, for the purposes of argument, that the Board is acting in a quasi-judicial capacity in determining this Petition under N.J.S.A. 48:3-87.1(f), Cape May County cannot establish that the Board is, or even appears to be, biased, such as to justify the Board's recusal. As explained above, courts defer to an administrative agency's final quasi-judicial decision and will not disturb the agency's decision "unless there is a clear showing that it is arbitrary, capricious, or unreasonable, or that it lacks fair support in the record." *In re Herrmann*, 192 N.J. at 27-28. Cape May County cannot claim, particularly without support, that the Board is, or appears to be, biased and will not be objective in rendering a decision in this proceeding – especially where the Board is legislatively tasked with deciding this proceeding under OWEDA.

Under OWEDA, the Board is required to determine the reasonable need for certain onshore, land-related, easements or consents necessary for the interconnection of the Project with the onshore electric grid, as well as to carry out the process that is due as explicitly set forth by the Legislature under subsection (f) of N.J.S.A. 48:3-87.1. Cape May County is not entitled to substitute its own judgment or wisdom for that of the Board, or for the New Jersey Legislature for that matter, and determine that it should be subject to a different procedure than that which is explicitly set forth under the statute. To treat Cape May County differently in this proceeding by allowing the County a different process than that provided by statute would itself run afoul of due process considerations of future and similarly-situated parties in interest. The process that Cape

May County is due in this proceeding is the process explicitly laid out in OWEDA by the New Jersey Legislature. The Board, in implementing OWEDA and considering this proceeding through the procedure set forth under the statute is acting fairly and objectively as an administrative agency entrusted to determine such matters by the Legislature.

Particularly here, as discussed above, where the Petition entails the onshore portion of the Project, including the connection to the existing public utility infrastructure that is already regulated by the Board, the New Jersey Legislature saw fit to delegate additional responsibility to the Board that is squarely within its broad and specialized authority to regulate and implement the laws affecting or relating to public utilities and the transmission of energy within the state. *See In re Public Service Elec. & Gas Co.*, 35 N.J. at 371. The Board's powers are interpreted broadly in light of the agency's expertise and in furtherance of the public interest in centralized control to "assure uniformly safe, proper and adequate service by utilities throughout the State." *Id.* The Board cannot be said to be acting unfairly or partially where it is acting within the authority specifically delegated to it by the New Jersey Legislature.

The Motion has not and cannot satisfy the standard for recusal of the Board, and the Board, in presiding over Ocean Wind's Petition is assumed to be acting fairly, ethically, impartially, and objectively as an arm of the executive branch and a trusted administrative agency.[4] *See In re Herrmann*, 192 N.J. at 27-28 (describing the deferential standard of review of administrative agencies in their exercise of quasi-judicial functions); *see also* N.J.S.A. 52:13D-12 (explaining

[4] Cape May County has not shown that the Board should recuse itself; therefore, its additional request to suspend the current Scheduling Order should be denied. The Board is plainly capable of determining the outstanding motion to dismiss while the proceedings otherwise move forward. Furthermore, Ocean Wind would be prejudiced by suspending the Scheduling Order as Ocean Wind made clear that it filed this Petition in order to comply with upcoming Project deadlines. As discussed herein, Cape May County's Motion is clearly yet another in a series of delay tactics, and the Board should not entertain Cape May County's request to further delay proceedings.

that all citizens have certain specific interests in the decisions of government and that "the activities and conduct of public officials should not, therefore, be unduly circumscribed").

IV. Conclusion

For the foregoing reasons, Cape May County's Motion for recusal of the Board, transmittal of this matter to the OAL and assignment of an ALJ, and to suspend the current scheduling should be denied in its entirety.

Respectfully submitted,

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