

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

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| IN THE MATTER OF THE PETITION OF | : | BPU Docket No. QO22050347 |
| OCEAN WIND LLC PURSUANT TO | : | |
| N.J.S.A. 48:3-87.1(f) FOR A | : | OCEAN WIND LLC’S REPLY TO |
| DETERMINATION THAT CERTAIN | : | THE “ANSWER AND OPPOSITION |
| EASEMENTS AND CONSENTS NEEDED | : | OF THE COUNTY OF CAPE MAY |
| FOR CERTAIN ENVIRONMENTAL | : | TO THE WITHIN PETITION” |
| PERMITS IN, AND WITH RESPECT TO, | : | DATED AUGUST 29, 2022 |
| THE COUNTY OF CAPE MAY ARE | : | |
| REASONABLY NECESSARY FOR THE | : | |
| CONSTRUCTION OR OPERATION OF | : | |
| THE OCEAN WIND 1 QUALIFIED | : | |
| OFFSHORE WIND PROJECT | : | |
| | : | |

In accord with the procedural schedule attached to President Fiordaliso’s August 15, 2022 Order in this matter, Ocean Wind LLC (“Ocean Wind”) hereby submits its Reply to the “Answer and Opposition of the County of Cape May to the Within Petition” dated August 29, 2022 (“Answer”).

As a threshold matter, Ocean Wind is compelled to emphasize that the County of Cape May’s (“County”) Answer is not really an answer to a petition in the normal sense of that type of pleading. Rather, the Answer is a mix of legal argument in the nature of a brief, an actual Answer to the Petition, and a number of assorted, unsubstantiated factual assertions. Had the County simply filed an answer to the Petition, Ocean Wind may not have needed to file this Reply. However, due to the nature of the Answer, Ocean Wind is filing this Reply (consistent with N.J.A.C. 14:1-6.2(a)).

Reply to Sections I through III of the Answer

Sections 1 through III of the Answer are largely a compendium of the County's complaints about the instant proceeding in the context of discussing the procedural history of this matter. In fact, Section 1, pp. 1-9, largely rehashes the arguments made in the County's June 8, 2022 Motion to Decline Jurisdiction and Dismiss without Prejudice ("June 8 Motion") and August 22, 2022 Motion Seeking Recusal of the Board of Public Utilities ("August 22 Motion"). Ocean Wind has, of course, already replied to both of the County's motions and completely refuted each and every argument therein. Rather than burdening the record, Ocean Wind refers President Fiordaliso and the Board of Public Utilities ("Board") to its June 20, 2022 reply in opposition to the County's June 8 Motion, and Ocean Wind's September 1, 2022 reply in opposition to the County's August 22 Motion, and incorporates them by reference.

Reply to Section V ("Responses to the Allegations of the Petition")

Section V of the Answer (starting at p. 9) is an actual answer to the Petition. The majority of the numbered responses in this section do not merit a response and Ocean Wind leaves the County to its proofs. In this regard, much of this section of the Answer is unsubstantiated argument of counsel that is not supported by testimony. However, several parts of this Section V contain factually erroneous and unsubstantiated allegations, to which Ocean Wind is compelled to respond.

Paragraph 13. The County argues that an administrative deficiency notice issued by the New Jersey Department of Environmental Protection ("NJDEP") as part of Ocean Wind Division of Land Use Regulation ("DLUR") permit application is a reason for the Board to either delay its decision or not approved the requested easements. Ocean Wind witness Pilar Patterson testifies in response to this issue in her rebuttal testimony (Exhibit OW-2 Rebuttal). As Ms. Patterson testifies, the NJDEP's issuance of an administrative deficiency notice is not uncommon in the

agency's application review process. Moreover, Ocean Wind has already provided the additional information the NJDEP has request. *Id.* Therefore, the Board should disregard the County's comments about this aspect of the NJDEP permit process.

Various Paragraphs within Section V.

In several paragraphs of the County's answer, it alleges that "much of [Ocean Wind's] pre-field (sic) testimony is hearsay or hearsay-within-hearsay." The County did not identify any particular aspects of Ocean Wind's direct testimony that it is alleging are hearsay, not did it offer any legal or factual argument in support this claim. In fact, all of Ocean Wind's direct testimony are statements of each witness based on the witness's personal knowledge. By definition, such testimony is not hearsay. N.J.R.E. 801. Therefore, the County's argument is unsupported and without merit.

In other paragraphs of Section V of the Answer, the County states "... 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." This statement is simply wrong. First, Ocean Wind is the Petitioner, not "Orsted" and the County's repeated use of the incorrect name of the Petitioner only serves to reveal its lack of knowledge and/or disrespect for the Board's proceeding. Second, as clearly described in the Petition and Ocean Wind's prefiled testimony, there is only one Preferred Route. *See, e.g.,* Exhibit OW-2 (Direct Testimony of Pilar Patterson) at p. 8, line 18 through p. 9, line 18 and Appendix B. In one area of the Preferred Route (the crossing of Crook Horn Creek), there are two alternatives. *Id.* Ocean Wind is pursuing both alternatives and will ultimately use the one that best suits the project and stakeholders. Moreover, Ocean Wind has clearly identified the two easements it seeks Board approval of in this proceeding.

Exhibit OW-2 at p. 13, line 7 through p. 14, line 5 and Appendix D. Thus, the County's claim that Ocean Wind hasn't clearly delineated the relief it is seeking in this matter is simply not true.

In the Answer's second Section V. (this one is subtitled "Additional Arguments" and begins on p. 17), the County refers to a patent infringement lawsuit between Siemens and General Electric involving the GE Haliade-X wind turbine (citing to *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). First, that lawsuit is completely irrelevant to this instant matter before the Board and the entire discussion of it should be stricken from the record of this matter or otherwise disregarded. Second, as the Board is likely aware, on September 7, 2022, the Federal District Court for the District of Massachusetts issued a decision and order that provided a carve out for the Ocean Wind 1 Project, so the injunctive relief related to the GE Haliade-X wind turbines does not apply to Ocean Wind 1. *See* Final Judgment Including Permanent Injunction dated September 7, 2022 (attached hereto as Exhibit A).

Reply to Section V. B.

This section of the Answer (subtitled "Application of the Eminent Domain Act and the Required Analysis") is not an "answer" at all, but instead is a misguided legal argument concerning provisions of the Offshore Wind Economic Development Act ("OWEDA") and the Eminent Domain Act ("EDA"). *See* Answer, pp. 20-24. Succinctly put, the County's arguments in this section of the Answer reveal a profound misunderstanding of the Board's jurisdiction under OWEDA and the very purpose of this proceeding.

The County first argues that the "reasonably necessary" standard is not applicable here. That argument is contrary to the plain language of N.J.S.A. 48:3-87.1(f), which states:

Notwithstanding the provisions of any other State law, rule, or regulation to the contrary, a qualified offshore wind project or an open access offshore wind transmission facility approved by the board pursuant to this section shall, after consultation with a municipality, county, or other political subdivision of the State, or any agency, authority, or other entity thereof:

* * *

(2) **be authorized to obtain easements, rights-of-way, or other real property interests on, over, or through any real property other than public streets, thoroughfares, or rights-of-way, owned by a municipality, county, or other political subdivision of the State, or any agency, authority, or other entity thereof, that are reasonably necessary for the construction or operation of a qualified offshore wind project** or an open access offshore wind transmission facility.

* * *

Following the public hearing and receipt of public comment on the petition, **the board shall 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**

Thus, despite the County’s convoluted arguments that a Qualified Offshore Wind Project (“QOWP”) is not a public utility and reference to the Municipal Land Use Law (neither of which are germane here), the statutory standard of review in this proceeding is clearly the “reasonably necessary” standard set forth in OWEDA.¹

The remainder of this section of the Answer largely repeats the arguments in the County’s June 8 Motion regarding its interpretation of the application of the EDA to this proceeding. Ocean Wind has already demonstrated, in its June 20, 2022 reply in opposition to that motion, why the County’s interpretation of EDA is inconsistent with the plain language of OWEDA, and incorporates that reply by reference.

¹ It is telling that, in a later section of the Answer (Section V.C.4. beginning at p. 37), the County appears to acknowledge the statutory “Reasonably Necessary” standard’s application here. *See* Ocean Wind’s discussion *infra*.

Reply to Section V.C.

Most of Section V.C. of the Answer (pp. 24-34) is merely a “cut-and-paste” of arguments from the County’s June 8 Motion. Ocean Wind has fully refuted these arguments in its June 20, 2022 Reply in Opposition, and incorporates those arguments by reference herein.

Reply to Section V.C.4.

In this section of the Answer, the County seemingly acknowledges that the applicable standard of review the Board must apply in this matter is the “reasonably necessary” criteria under N.J.S.A. 48:3-87.1(f). *Answer*, pp. 38-40. However, the County proceeds to argue, without reference to any cogent evidence², that Ocean Wind cannot establish that the two easements at issue or the consents to NJDEP permits satisfy the applicable standard. *Id.* As discussed in detail in Ocean Wind’s Petition, prefiled direct testimony and prefiled rebuttal testimony, Ocean Wind has clearly established the basis for the selection of the Preferred Route and the corresponding need for the two easements at issue, as well as the NJDEP permits. There is no accurate, meaningful testimony from the County (or any other party) that in any way refutes Ocean Wind’s testimony. Accordingly, this section of the Answer provides no basis for the Board to not grant the relief Ocean Wind has requested.

Reply to Section V.C.5.a.

In this section of the Answer, the County argues that N.J.S.A. 48:3-87.1(f) is unconstitutional. *See Answer*, pp. 40-41. While Ocean Wind vigorously disagrees with this claim, it is beyond dispute that the Board does not have jurisdiction to rule on whether a statute is

² The only testimony the County refers to in this section of the Answer is the prefiled testimony of Robert Church. In the rebuttal testimonies of Jason Kalwa and Pilar Patterson, Ocean Wind completely refutes all of Mr. Church’s testimony. *See Exhibits OW-1 Rebuttal and OW-2 Rebuttal.*

constitutional; such a determination is left to the courts. Under the New Jersey Constitution, the judicial power is vested in the courts and not administrative agencies. N.J.S.A. Const. Art. 6, § 1 (judicial power and jurisdiction of courts); *State v. Buckner*, 223 N.J. 1, 14 (2015) (stating that “courts exercise the power to invalidate a statute on constitutional grounds”). Accordingly, questions concerning the constitutionality of state statutes are reserved for the courts and are outside of the jurisdiction of administrative agencies such as the Board. *See Abbott v. Burke*, 100 N.J. 269, 298-99 (1985) (explaining that “although an agency may base its decision on constitutional considerations, such legal determinations do not receive even a presumption of correctness on appellate review” and that “constitutional challenges to statutes should be judicially resolved”). Therefore, that issue is not before the Board in this proceeding and the County’s argument in Section V.C.5.a of its Answer must be disregarded.

Reply to Section V.C.5.b.

In this section of the Answer, the County argues that the “prior public use” doctrine precludes the Board granting the two easements Ocean Wind seeks in this matter. This argument must fail because it is both factually inaccurate and wholly-inconsistent with the clear language of N.J.S.A. 48:3-87.1(f).

As a threshold matter, the “prior public use” doctrine is not applicable to the instant proceeding under the very case law that the County relies upon. In *Weehawken Township v. Erie Railroad Co.*, 20 N.J. 572, 579 (1956), the New Jersey Supreme Court held that the prior public purpose doctrine does not apply if “the authority [to condemn] has been expressly given by the Legislature or must necessarily be implied.” Here, under OWEDA, the Legislature has expressly conferred upon the Board the right to approve a QOWP’s acquisition of property via eminent domain. N.J.S.A. 48:3-87.1(f).

Moreover, the parcel in question (a portion of Block 3350, Lot 17.01) over which Ocean Wind seeks a temporary and a permanent easement has no public use that would be impacted by the underground electric line. While that parcel may be owned in fee by the County, it is currently occupied by a road with vacant road shoulder land adjacent.

Furthermore, the County's reference to Mr. Church's testimony in support of this argument is misplaced. Mr. Church's testimony refers (erroneously, as explained in Ocean Wind's rebuttal testimony) to potential impacts to existing roadways and utility infrastructure. Similarly, the Answer states "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." *Answer*, pp. 41-42. However, this Petition does not request easements over public rights-of-way ("ROWS") – precisely because the statute directly grants a QOWP the right to occupy such public ROWs with the type of underground facilities at issue here. N.J.S.A. 48:3-87(f)(1), which provides:

(f) Notwithstanding the provisions of any other State law, rule, or regulation to the contrary, a qualified offshore wind project or an open access offshore wind transmission facility approved by the board pursuant to this section shall, after consultation with a municipality, county, or other political subdivision of the State, or any agency, authority, or other entity thereof:

(1) have authority to place, replace, construct, reconstruct, install, reinstall, add to, extend, use, operate, inspect, and maintain wires, conduits, lines, and associated infrastructure, whether within, under, or upon the public streets, thoroughfares, or rights-of-way of any municipality, county, or other political subdivision of the State, or any agency, authority, or other entity thereof, provided that the wires, conduits, lines, and associated infrastructure are located underground, except to the extent necessary as determined by the board. [emphasis added]

Therefore, the County's arguments that placing the Project's underground electric lines within public ROW or through the requested easements would somehow interfere with existing

public uses is contrary to the statutory grant of authority to use the public ROW. And, as explained in Ocean Wind's direct and rebuttal testimony, the facilities at issue, whether in the public ROW or within the easements, will not interfere with any public use in any event. *See* Exhibits OW-1 and OW-1 Rebuttal.

Reply to Section V.C.5.c.

In this final section of the Answer, the County suggests that the Board should bifurcate this proceeding and only rule on Ocean Wind's request regarding consents for NJDEP permits. *Answer*, pp. 42-43. This request is similar to arguments made in the County's June 10 Motion and must fail for the same reasons set forth in Ocean Wind's June 20, 2022 reply in opposition to that motion. In short, there is no reason for the Board to bifurcate this proceeding, which would only result in additional delays. Ocean Wind had filed testimony establishing the need for both the easements and the permit consents, the record in the matter is complete, and there is no basis to bifurcate the proceeding.

Conclusion

For all the foregoing reasons, along with the evidence set forth in its prefiled direct testimony and exhibits and prefiled rebuttal testimony and exhibits, Ocean Wind respectfully requests that the Board:

- (i) Determine that the relief requested in the Petition is reasonably necessary for the construction and operation of the Project;
- (ii) Specifically find and determine that that the temporary and permanent easements described in the Petition over property owned by Cape May County are reasonably necessary for the construction and operation of the Ocean Wind 1 QOWP; and issue an Order approving the

acquisition of the necessary easements across the County Property, as defined in the Petition, which shall then be recorded in the Cape May County recording office.

(iii) Specifically find and determine that County consents or other affirmative filings needed from Cape May County that are a condition of the issuance of a permit or other approval of the NJDEP are reasonably necessary for the construction and operation of the Ocean Wind 1 QOWP, thereby preempting and superseding any required municipal consents or approvals; and

(iv) Grant such other and further relief as the Board may deem appropriate or necessary.

Respectfully submitted,
COZEN O'CONNOR, PC
Attorneys for Ocean Wind LLC

Dated September 16, 2022

By: _____



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UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

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| SIEMENS GAMESA | |) | |
| RENEWABLE ENERGY A/S, | |) | |
| | |) | |
| | Plaintiff, |) | |
| | |) | |
| | v. |) | CIVIL ACTION |
| | |) | NO. 21-10216-WGY |
| GENERAL ELECTRIC CO., | |) | |
| | |) | |
| | Defendant. |) | |
| <hr/> | | | |

YOUNG, D.J.

September 7, 2022

FINAL JUDGMENT INCLUDING PERMANENT INJUNCTION

Pursuant to Rule 58 of the Federal Rules of Civil Procedure, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED THAT JUDGMENT IS HEREBY ENTERED IN THIS MATTER AS FOLLOWS:

1. For purposes of Fed. R. Civ. P. 54, Plaintiff Siemens Gamesa Renewable Energy A/S ("SGRE") is the prevailing party in this action.
2. Defendant General Electric Company ("GE") has infringed claims 1 and 2 of SGRE's U.S. Patent No. 9,279,413 ("'413 Patent") under the doctrine of equivalents by offering for sale and selling Haliade-X wind turbines.
3. GE has literally infringed claims 8 and 11 of the '413 Patent by offering for sale and selling Haliade-X wind turbines.

4. Claims 1, 2, 8, and 11 of the '413 Patent are not invalid and are not unenforceable.
5. GE does not infringe asserted claims 1, 2, 3, 6, and 7 of SGRE's U.S. Patent No. 8,575,776 ("'776 Patent").
6. Claims 1, 2, 3, 6, and 7 of the '776 Patent are not unenforceable and are not invalid as anticipated but are invalid as obvious.
7. Claims 1, 2, 3, 6, and 7 of the '776 Patent are invalid for lack of written description.
8. Pursuant to 35 U.S.C. § 283 and Rule 65 of the Federal Rules of Civil Procedure, the Court finds that SGRE would suffer irreparable injury if GE is not enjoined from infringing the '413 Patent, that remedies at law are inadequate to compensate SGRE for such injury, that the balance of hardships warrants entry of a permanent injunction as set forth below, and that such injunction would not disserve the public interest.
9. Except as provided in the "Carve Outs" set forth below in paragraph 10, GE, its subsidiaries, agents, servants, employees, counsel, and all persons and entities acting in concert therewith (the "Enjoined Parties") are hereby permanently enjoined for the life of the '413 Patent (through June 12, 2034) from making, using, offering for sale, selling, importing (into), or

installing in the United States (including on or attached to the Outer Continental Shelf):

- a. the adjudged infringing Haliade-X wind turbines, and
- b. any wind turbines that are substantially similar to and/or not more than colorably different from the adjudged infringing Haliade-X wind turbines with respect to those elements proven to satisfy the limitations of claims 1, 2, 8 and 11 of the '413 Patent.

10. Carve Out A: This permanent injunction shall not prevent the Enjoined Parties from making (e.g., manufacturing and assembling), using (e.g., installing, operating, repairing, maintaining, servicing, and replacing), or importing 62 (sixty-two) infringing Haliade-X turbines for the Vineyard Wind 1 Offshore Energy Project in accordance with the Turbine Supply Agreement and/or the Service and Maintenance Agreement between GE and Vineyard Wind 1, LLC, both dated June 4, 2021 ("GE-Vineyard Wind 1, LLC Agreements"), and any amendments thereto. For avoidance of doubt, the total number of Haliade-X wind turbines permitted under this Carve Out is limited to 62 (sixty-two) turbines, regardless of any amendments to the GE-Vineyard Wind 1, LLC Agreements.

Carve Out B: This permanent injunction shall not prevent the Enjoined Parties from making (e.g., manufacturing and assembling), using (e.g., installing, operating, repairing, maintaining, servicing, and replacing), or importing infringing Haliade-X turbines for the Ocean Wind 1 Project, on Bureau of Energy Management Lease OCS-A 0498 under development by Ocean Wind LLC, pursuant to a Turbine Supply Agreement between Ocean Wind and LLC and GE dated December 18, 2020, and any schedules, annexes, and amendments thereto (see TX-0081), provided that 100% of the funds to be paid to GE after the date of this injunction shall be deposited in an interest bearing account in the registry of this Court until, upon further hearing, this Court determines an appropriate exemplary royalty rate for this project.

11. For each infringing Haliade-X wind turbine installed at Vineyard Wind 1 Offshore Energy Project, GE shall pay SGRE a royalty consisting of \$30,000 per megawatt of rated capacity within 30 days after the end of the month in which the Haliade-X wind turbine was installed.

12. GE shall provide a copy of this Judgment Including Permanent Injunction to each of its existing and prospective customers that GE has had discussions with developing wind farms in the United States (including on

or attached to the Outer Continental Shelf) within 20 days of the date this Judgment is entered.

13. Nothing in this injunction shall prohibit the Enjoined Parties from designing around SGRE's valid and infringed '413 patent claims and application to modify this injunction on this ground may be made to this Court at any time.

14. This Court shall retain jurisdiction to enforce the provisions of this injunction.

SO ORDERED.

/s/ William G. Young
WILLIAM G. YOUNG
DISTRICT JUDGE