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October 12, 2022

Via Electronic Filing Only

Ms. Carmen Diaz, Acting Board Secretary

New Jersey Board of Public Utilities

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Trenton, New Jersey 08625-0350

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**Re: 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**

Dear Ms. Diaz:

The New Jersey Division of Rate Counsel ("Rate Counsel") submits these written comments regarding the above-referenced petition filed by Ocean Wind, LLC ("Ocean Wind" or "Company") with the New Jersey Board of Public Utilities ("Board") on May 20, 2022, requesting a determination that the route proposed by the Company ("Preferred Route") for its onshore export cable is reasonably necessary for the construction and operation of the 1,100 megawatt ("MW") Ocean Wind I project ("Project"). Ocean Wind also requests that the Board find and determine that the easement described in its petition over property owned by the County of Cape May ("County") is reasonably necessary for the construction and operation of the Project. Lastly, Ocean Wind requests that the Board issue an Order preempting or superseding

all consents needed from the County pertaining to New Jersey Department of Environmental Protection permits.

Comments

As preliminary matter, Rate Counsel wants to be clear on the nature of the issues before the Board and what it believes is relevant to the Board's review in this matter. Under N.J.S.A. 48:3-87.1(f), the Board must determine whether the Preferred Route of the Project's onshore export cable is "reasonably necessary for the construction or operation of the qualified offshore wind project." The existence of global warming and its effects on future generations are not part of this proceeding. Whether or where to site the Project's wind turbines are not part of this proceeding. Whether continued reliance on fossil fuels is detrimental to the public's health is not part of this proceeding.

We agree that addressing the global challenge of climate change is important. However, the Governor, the Board, and the Legislature have all developed policies, and continue to develop policies addressing climate change and New Jersey's role in regional and national efforts. One of those policies concerns the development of offshore wind. Nonetheless, a referendum on that policy is not presently before the Board.

In this proceeding, rather, the primary issue is whether the Preferred Route, as proposed by Ocean Wind, is reasonably necessary. Therefore, asking questions regarding the Preferred Route should not be conflated or confused with a position that is against the Project in general. Likewise, voicing concerns regarding the process should not be mistaken for a position that is anti-offshore wind energy. To the contrary, advocating for a thorough and robust process is in the public interest because it aids in the development of a complete record, which benefits the Board's decision-making and stakeholder interests alike. Indeed, the Board will need to make

certain findings, and requires a full record to support its findings. Rate Counsel is statutorily mandated to represent the public interest¹ and our office believes that the ratepayers of this State (who will ultimately pay for the development of offshore wind, including this Project) deserve such a process and record before the Board makes its decision in this case.

Whether the Preferred Route is Reasonably Necessary

After reviewing the petition, testimony and other exhibits, as well as the Company's responses to questions from the Board and our office, Rate Counsel has some concerns regarding Ocean Wind's determination of the Preferred Route, which, as previously mentioned, requires a temporary easement over Block 11 3350.01, Lot 17.01, in Ocean City, New Jersey.

Ocean Wind contends that this Preferred Route is the shortest route to the Project's point of interconnection ("POI") at the BLE substation. However, as Rate Counsel's witness Mr. Chang indicated in his testimony, there may be other alternatives that may be longer than the Preferred Route and may impact fewer stakeholders or may be lower cost, and thus should be considered by the Board.² Despite these potential benefits, Ocean Wind has stated that it qualitatively eliminated these alternative routes without adequate explanation provided in the record currently before the Board.³

Most importantly, Ocean Wind failed to provide the projected costs associated with the Preferred Route, or the alternatives evaluated by the Company. Although the cost of connecting to the onshore substation is acknowledged by Ocean Wind to be its responsibility, the costs associated with transmission system network upgrades beyond the onshore substation are shared

¹ N.J.S.A. 52:27EE-48.

² Direct Testimony of Maximilian Chang.

³ It is important to understand that at this time, Rate Counsel is not taking a position opposing the Preferred Route. Rather, it is Rate Counsel's position that the record is not sufficiently developed for Rate Counsel to take a position supporting or opposing the Preferred Route. As explained below, Rate Counsel believes a more fulsome record is needed before Rate Counsel can offer a position and the Board can ultimately make a determination.

between Ocean Wind and ratepayers. Accordingly, while the Company maintains that it bears some risk of the Project cost, Rate Counsel believes the Board should have the opportunity to review ongoing Project costs to ensure that the approved offshore renewable energy certificate (“OREC”) price was reasonable to incent the development of offshore wind. As mentioned previously, Ocean Wind did not provide quantitative estimates of the cost of each route. At a minimum, Ocean Wind should provide an initial cost estimate of the Preferred Route along with the cost estimate of the least cost option, if it is not the Preferred Route. Rate Counsel recommends that the Board require Ocean Wind to provide cost estimates of the Preferred Route and cost estimates of the alternatives evaluated by the Company. This information would provide support for the Board’s decision if it determines that the Preferred Route is indeed “reasonably necessary,” since the Board has determined in prior utility infrastructure proceedings that cost should be part of the “reasonably necessary” legal standard.

Although the Board has decided that the cost of the Preferred Route is not important to a determination of whether it is reasonably necessary,⁴ Rate Counsel continues to believe that the cost will necessarily inform the Board’s review of the reasonableness of the Preferred Route. Ocean Wind has admitted that it did not review the costs of any of the routes except for the Preferred Route⁵, and instead eliminated the alternatives on other bases. The quality and severity of those other bases cannot be properly assessed without knowing their cost. Accordingly, Rate Counsel recommends that the Board require Ocean Wind to provide cost estimates and more analysis of the Preferred Route and the alternatives evaluated by the Company.

⁴ I/M/O the Petition of Ocean Wind, LLC Pursuant to N.J.S.A. 48:3-87.1(f) for a Determination that Easements Across Green Acres Restricted Properties and Consents Needed for Certain Environmental Permits in, and with Respect to, the City of Ocean City are Reasonably Necessary for the Construction or Operation of the Ocean Wind 1 Qualified Offshore Wind Project at 21, BPU Docket No. QO22020041 (Sept. 28, 2022).

⁵ See Response to RCR-INF-14 (stating costs were not quantified for alternative routes).

Rate Counsel has additionally expressed concerns about how the decisions in this proceeding will impact the transmission upgrade cost sharing mechanism approved by the Board. Rate Counsel provided testimony explaining that there is a nexus between the Board's decisions about the easements for the export cable routes and the transmission upgrade requirements.⁶ This is relevant to the Board's determination of the Preferred Route. As the courts have explained, "[t]he Board's obligation is to weigh all interests and factors in the light of the entire factual picture"⁷ The courts have expressly noted that the entire factual picture includes "availability of other locations" and "the possibility of other methods of attaining the needed improvement or addition to facilities not involving the site at all."⁸ Notwithstanding the Board's decision on September 28, 2022 that found the cost for the export cable has no consequence for the Transmission System Upgrade Costs ("TSUC"), the chosen POI does affect those costs. Therefore, our office continues to urge the Board to require Ocean Wind to demonstrate that its Preferred Route is also the least-cost plan when including the transmission cost upgrades to minimize the cost impact to ratepayers.

Limited Review of the Preferred Route Proposal

Rate Counsel also has concerns regarding the procedural process afforded to the responding parties in this matter. The Board has taken a unique and unprecedented procedural approach to this case, which has resulted in limited opportunities for stakeholders to provide input to the Board as Ocean Wind embarks on its venture to install 1,100 MW of offshore wind. In prior matters filed with the Board under N.J.S.A. 40:55D-19 ("Municipal Land Use Law"), which uses the same "reasonably necessary" language, the Board allowed for discovery,

⁶ Direct Testimony of Maximilian Chang.

⁷ Pub. Serv. Elec. & Gas Co., 35 N.J. at 377.

⁸ In re Hackensack Water Co., 41 N.J. Super. 408, 426 (App. Div. 1956).

testimony, and public and evidentiary hearings.⁹ However, this is not occurring here, and Rate Counsel finds it unsettling that the process employed by the Board in this case does not afford the same level of participation and development of an evidentiary record as the Board has provided in prior infrastructure siting cases filed under the Municipal Land Use Law.

It is important to understand the legal context of this case. Clearly, it is different than proceedings under the Municipal Land Use Law. The decision before the Board, however, is not a simple eminent domain proceeding either. Under the “Eminent Domain Act of 1971,”¹⁰ referenced in N.J.S.A. 48:3-87.1(f), a court is required to determine if a party seeking condemnation has the authority to condemn the property and then the matter proceeds to a hearing on the issue of valuation. The Board’s statute has an additional requirement that the Board find the easements required by the Preferred Route are reasonably necessary. Clearly a route to a POI is necessary, so the Board’s inquiry must be something more. In order for the Board to grant Ocean Wind’s petition, it must make an explicit finding that the Preferred Route is reasonably necessary. The Board requires a factual record on which to base this decision. As explained above, the criteria for determining the reasonable necessity of the Preferred Route is well-settled. While not an identical fit, the Municipal Land Use Law is clearly a closer fit to the statute being applied here. Without additional opportunities to develop the record in this case, it is unclear on what basis the Board will make these determinations. "Administrative due process

⁹ See e.g., In re the Petition of New Jersey Natural Gas Company for a Determination Concerning the Southern Reliability Link Pursuant to N.J.S.A. 40:55D-19 and N.J.S.A. 48:925.4, BPU Docket No. GO1504040; In re the Petition of South Jersey Gas Company for a Determination Pursuant to the Provisions of N.J.S.A. 40:55D-19, BPU Docket No. G013111049; In re the Petition of Public Service Electric and Gas Company for a Determination Pursuant to the Provisions of N.J.S.A. 40:55D-19 (Susquehanna – Roseland Transmission Line), BPU Docket No. EM09010035.

¹⁰ Codified under N.J.S.A. 20:3-1 et seq.

is generally satisfied if the parties had adequate notice, a chance to know opposing evidence, and the opportunity to present evidence and argument in response" ¹¹

Ocean Wind's claims regarding the Preferred Routes and alternative routes form the bases for its relief before the Board. However, Rate Counsel not had an opportunity to probe the veracity of the factual claims made by Ocean Wind and therefore cannot agree that sufficient evidence has been provides that demonstrates the Preferred Route is reasonably necessary.

Conclusion

Rate Counsel emphasizes that the limited development of the evidentiary record and limited opportunity for stakeholder involvement materially affects the record on which the Board is being asked to make its decision. Rate Counsel recommends that the procedural schedule be modified to:

(1) Permit additional investigation into the Preferred Route and its potential alternatives, including cost; and

(2) Provide an additional opportunity to propound discovery to verify Ocean Wind's claims; and

Rate Counsel thanks the Board for this opportunity to provide these written comments and looks forward to working with all parties throughout this proceeding.

Very truly yours,

Brian O. Lipman, Esq.
Director, Division of Rate Counsel

By: /s/ David Wand
T. David Wand, Esq.
Deputy Rate Counsel

¹¹ Moore v. Dep't of Corr., 335 N.J. Super. 103, 108 (App. Div. 2000)(emphasis added)(internal quotation marks omitted)(quoting In re Dep't of Ins.'s Order Nos. A-89-119 & A-90-125, 129 N.J. 365, 382 (1992)).

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BPU Docket No. QO22050347
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