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October 31, 2022

Via Electronic Mail

Carmen D. Diaz, Acting Secretary
New Jersey Board of Public Utilities
44 South Clinton Avenue, 1st Floor
P.O. Box 350
Trenton, NJ 08625-0350

**Re: In the Matter of the Board Of Public Utilities Offshore Wind
Solicitation 2 for 1,200 to 2,400 MW - Atlantic Shores Offshore Wind
Project 1, LLC – Waiver Petition
BPU Docket No. QO21050824**

Dear Acting Secretary Diaz:

Please accept this letter on behalf of the New Jersey Division of Rate Counsel (“Rate Counsel”) as our written comments regarding the above-referenced petition filed by Atlantic Shores Offshore Wind Project 1, LLC (“Atlantic Shores” or “Petitioner”) with the New Jersey Board of Public Utilities (“Board”) on February 10, 2022, requesting: (i) authorization to file an unaudited annual financial statement for the portion of Petitioner's 2021 fiscal year; (ii) authorization to file unaudited financial statements on a quarterly basis, from September 1, 2021 through the term of the Board’s June 30, 2021 Order, regarding Docket Nos. QO20080555 and QO21050824, (“OREC Order”), in lieu of Petitioner's current commitment to provide audited financial statements on a quarterly basis; (iii) confirmation regarding the timing of the quarterly financial statements; (iv) confirmation regarding the timing of annual financial statements; and

(v) a waiver pursuant to N.J.A.C. 14: 1-1.2, of the Board requirement set forth at N.J.A.C. 14:8-6.5(a)(4)(v) requiring audited financial statements on a quarterly and annual basis.

Consistent with the Order issued by the Board in connection with *In the Matter of the New Jersey Board of Public Utilities' Response to the COVID-19 Pandemic for a Temporary Waiver of the Requirements for Certain Non-Essential Obligations*, BPU Docket No. EO20030254, dated March 19, 2020, these comments are being electronically filed with the Secretary of the Board and with Atlantic Shores Project 1, LLC ("Atlantic Shores"). No paper copies will follow.

Factual Background

On September 9, 2020, the Board issued its Second Offshore Wind ("OSW") Solicitation.¹ Interested developers were encouraged to submit an Application to the Board to build an OSW facility.² The Board also released the Second Solicitation Guidance Document ("Solicitation Guidelines") which included all Application requirements, guidance on the preparation of the Application, standards and assumptions to be used in preparing an Application, schedule, and key dates.³ Specifically at issue here, the Solicitation Guidelines required applicants to provide an "Applicant Commitment Form," which required the winning applicant to commit to "file audited financial statements with the Board on a quarterly and

¹ I/M/O the Opening of the Offshore Wind Renewable Energy Certificate (OREC) Application Window for 1,200 to 2,400 Megawatts of Offshore Wind Capacity in Furtherance of Executive Order No. 8 and Executive Order No. 92, BPU Docket No. QO20080555 (Sept. 9, 2020).

² I/M/O the Board Of Public Utilities Offshore Wind Solicitation 2 For 1,200 To 2,400 MW – Atlantic Shores Offshore Wind Project 1, LLC at 4, BPU Docket No. QO21050824 (Jun. 30, 2021) ("Atlantic Shores Award Order").

³ New Jersey Offshore Wind Solicitation #2 Solicitation Guidance Document (Sep. 10, 2020) (available at <https://www.njoffshorewind.com/solicitation-documents/Final-Solicitation-Guidance-Document.pdf>)

annual basis."⁴ This commitment, matches language in the Board's regulations under N.J.A.C. 14:8-6.5(a)(4)(v), which requires an application seeking approval as a qualified OSW project include from the applicant "[a] commitment that audited financial statements shall be filed with the Board on a quarterly and annual basis."⁵

In response to the Second Solicitation, the Board received Applications from two developers, Atlantic Shores and Ocean Wind II, LLC, with a total of six bids. Atlantic Shores' bid application included a signed Application Commitment Form that committed to filing audited financial statements on a quarterly and annual basis.⁶

The Board evaluated the bids against the factors set forth in Offshore Wind Economic Development Act of 2010 ("OWEDA") and N.J.A.C. 14:8-6 et seq.⁷ Following the curing of deficiencies by both bidders, the bids were deemed to be administratively complete.⁸ Thereafter, the Board performed "a detailed evaluation" of each application.⁹ Following its evaluation, the Board found that "the Atlantic Shores Project meets or exceeds all of the standards for a qualified OSW facility as set for in N.J.S.A. 48:3-87.1 et seq. and N.J.A.C. 14:8- 6.5 et seq."¹⁰ The Board's based its award in part on the finding that "the diversity in OSW developers realized

⁴ Solicitation Guidance Document, Attachment 3.

⁵ N.J.A.C. 14:8-6.5(a)(4)(v)

⁶ Waiver Petition at ¶ 17.

⁷ Atlantic Shores Award Order at 9.

⁸ Id. at 11.

⁹ Ibid.

¹⁰ Id. at 25.

by the two awards will create robust competition, which will drive down the cost of future solicitations.”¹¹

Notwithstanding, on February 10, 2022, Atlantic Shores requested that it be permitted to file unaudited annual financial statement for Petitioner's 2021 Fiscal Year.¹² In its petition, Atlantic Shores states that its internal process for the procurement is “extensive” and “time-consuming” and therefore, does not anticipate having retained an auditor until the fourth quarter of 2022.¹³ Additionally, Atlantic Shores asserts that “an audited annual financial statement for Petitioner's 2021 Fiscal Year would provide little value to the Board.”¹⁴ Based on this, Atlantic Shores requests that the OREC Order be supplemented or amended to allow for the submission of an unaudited annual financial statement for the 2021 Fiscal Year.¹⁵ Atlantic Shores plans to provide audited annual financial statements for the remainder of the OREC term.¹⁶

Regarding quarterly financial statements, Atlantic Shores argues that audited quarterly financial statements is “not industry standard and imposes a commercially unreasonable burden and hardship.”¹⁷ The Petitioner further argues that quarterly audited statements would “impose a significant burden on Petitioner and its employees” and be “materially disruptive to Petitioner's operations.”¹⁸ Atlantic Shores also argues that quarterly financial statements are unique to these

¹¹ Atlantic Shores Award Order at 24. The Board also found “The diversity in economic benefits, including supply chain, port utilization, and support services, will provide benefits to a broader range of New Jersey residents than any single award. Moreover, the specific economic benefits associated with the awarded Projects will further position New Jersey as a supply chain hub for all projects along the East Coast.” Ibid.

¹² Waiver Petition at ¶21.

¹³ Id. at ¶23.

¹⁴ Id. at ¶32.

¹⁵ Ibid.

¹⁶ Ibid.

¹⁷ Id. at ¶34.

¹⁸ Id. at ¶43.

rules under N.J.A.C. 14:8- 6.5, meaning that no other regulatory agency requires it.¹⁹ Further, Atlantic Shores asserts that audited quarterly financial statements are unnecessary and that all “necessary” information would be in the unaudited statements.²⁰

Last, Petitioner asserts that the “hardship or inconvenience” of complying with retaining an auditor for the 2021 Fiscal Year and providing audited quarterly would impose upon Petitioner the difficulty described above and that waiver of this requirement is appropriate.²¹

Comments

Preliminarily, Rate Counsel notes that the Board rejected removing audited financial requirements from its rules under N.J.A.C. 14:8-6.5 because “the Board needs to have a high degree of confidence that the project will be able to obtain development and construction financing.”²² The Board further stated that “[t]he financial statements will be evaluated in conjunction with the proposed method of financing the project proposed in accordance with N.J.A.C. 14:8-6.5(a)(4).”²³ None of the stakeholders specifically objected to the requirements under N.J.A.C. 14:8- 6.5(a)(4)(v).²⁴ When reviewing the bid application of Atlantic Shores, the Board noted that Petitioner planned to finance the Project “utilizing the balance sheets of EDF and Shell,” and that “Atlantic Shores' ability to commercialize . . . is not predicated upon the parent organizations' ability to line up project financing.”²⁵

¹⁹ Id. at ¶36.

²⁰ Id. at ¶44.

²¹ Id. at ¶51.

²² 45 N.J.R. 336(a).

²³ Ibid.

²⁴ Ibid.

²⁵ Atlantic Shores Award Order at 22.

In this case, it does not appear that audited financial statements of Atlantic Shores would add a substantive degree of confidence in the financial fitness of the Petitioner. However, because Atlantic Shores is utilizing the “balance sheets” of its parent companies, the Board should investigate whether audited financial statements from those companies would satisfy the requirement under the Board’s rules. Rate Counsel also recommends that the Board establish process for review, in the event that Atlantic Shores’ audited annual financial statements vary significantly from their unaudited quarterly financial statements.

While Rate Counsel does not have any specific concerns regarding the Atlantic Shores’ ability to provide audited quarterly financial statements, Rate Counsel has general concerns regarding the waiver of Offshore Wind Solicitation requirements after the bids have been submitted. Changing the bidders’ requirements following the close of bidding can undermine the competitive contracting process as a whole. Atlantic Shores has asserted that the audited quarterly financial statements are a commercially unreasonable burden, a hardship, and materially disruptive.²⁶ Assuming this is true for the industry as a whole, it is unknown how many bidders chose simply not to bid based on these same conditions or other conditions. It is unknown if these potential bidders would have proposed bids even more advantageous to New Jersey residents and the State’s electric ratepayers, if these conditions were not part of the Solicitation. It is also unknown if the bids submitted in either of the last two solicitations contained any premium due to this allegedly burdensome requirement.

²⁶ Ibid.

The Board found that “the diversity in OSW developers . . . will create robust competition, which will drive down the cost of future solicitations.”²⁷ Post-award waiver of bid requirements undermines that goal. Therefore, if the Board chooses to waive the audited quarterly financial statement requirement, it should reconsider enforcing the commitment in future solicitations, or revising the regulations, because it may result in even better results in future solicitations and more competitive bids from more bidders. The Board should also review its solicitation to determine if there are additional requirements that could serve as a burden to entry that the Board is willing to remove. Continuing to require a commitment which will not be enforced undermines the entire competitive solicitation process.

Rate Counsel thanks for the Board for the opportunity to make these comments. Thank you for your attention to this matter.

Respectfully,

By: */s/ Brian Lipman*
Brian O. Lipman
Director, Division of Rate Counsel

cc: Service List (via electronic mail only).

²⁷ Atlantic Shores Award Order at 24.

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