



Agenda Date: 2/17/23
Agenda Item: 8C

STATE OF NEW JERSEY
Board of Public Utilities
44 South Clinton Avenue, 1st Floor
Post Office Box 350
Trenton, New Jersey 08625-0350
www.nj.gov/bpu/

CLEAN ENERGY

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)
ORDER
DOCKET NO. QO22050347

Parties of Record:

- Gregory Eisenstark, Esq.**, Cozen O'Connor on behalf of Ocean Wind LLC
- Brian O. Lipman, Esq.**, Director, New Jersey Division of Rate Counsel
- Michael J. Donohue, Esq.**, Blaney Donohue & Weinberg, P.C., on behalf of Cape May County
- Gerald M. Thornton**, Commissioner Director Board of County Commissioners, Cape May County
- Kevin Lare**, Administrator Board of County Commissioners, Cape May County
- Rita M. Rothberg**, County Clerk, Cape May County
- Jeffrey R. Lindsay, Esq.**, County Counsel, Cape May County
- Dorothy F. McCrosson, Esq.**, Solicitor for the City of Ocean City, McCrosson & Stanton, P.C.
- M. James Maley, Jr., Esq.**, Maley Givens, P.C. for Upper Township

BY THE BOARD:

On May 20, 2022, Ocean Wind LLC ("Ocean Wind" or "Petitioner") filed a petition ("Petition") with the New Jersey Board of Public Utilities ("Board" or "BPU"), pursuant to N.J.S.A. 48:3-87.1(f), the Offshore Wind Economic Development Act ("OWEDA" or "2021 Amendment"), seeking the Board's determination that certain easements across properties owned by the County of Cape May, New Jersey ("County") and certain consents needed from the County for certain environmental permits in and with respect to the County are reasonably necessary for the construction or operation of Petitioner's qualified offshore wind project ("QOWP"), Ocean Wind I ("Project" or "OW1").

By this Order, the Board makes the determination that the easements and consents sought under the Petition are reasonably necessary for the construction and operation of the Project.

BACKGROUND AND PROCEDURAL HISTORY

Background Regarding Petition and Requests

The Offshore Wind Economic Development Act of 2010¹ and Governor Murphy's Executive Order No. 8 directed the Board to solicit 1,100 megawatts ("MW") of Offshore Wind ("OSW") capacity as a first step to meet New Jersey's goal of 3,500 MW of OSW capacity by 2030.² In June 2019, from a pool of applicants, the Board selected and approved the Project as the first QOWP.

In July 2021, Governor Murphy signed L. 2021, c. 178 into law, codified at N.J.S.A. 48:3-87.1(f)-(g), amending OWEDA. The 2021 Amendment grants OSW projects the ability to petition the Board to obtain property interests from local government and preempt local government approvals that are "reasonably necessary" for the construction or operation of a QOWP.³

On May 20, 2022, Ocean Wind filed the Petition with the Board pursuant to the 2021 Amendment. In the Petition, Ocean Wind seeks the Board's determination that certain easements across properties owned by the County, and that certain consents or approvals needed for particular environmental permits in or with respect to the County, are reasonably necessary for the construction or operation of the Project. The Petition was accompanied by testimony from Jason Kalwa ("Kalwa Testimony"), Pilar Patterson ("Patterson Testimony"), and Madeline Urbish ("Urbish Testimony").

The Petitioner requested that the Board find that:

1. *[C]ertain easements over property owned by Cape May County are reasonably necessary for the construction and operation of the Ocean Wind 1 QOWP;*⁴

- a. *[A] temporary easement upon, across and under Block 3350.01, Lot 17.01 on the Official Tax Map of the City of Ocean City, totaling 0.257 acres, for use during the construction phase of the onshore export cable. The duration of this temporary easement will be 18 months from the start of construction.*⁵

- b. *[A] permanent easement upon, across, and under Block 3350.01, Lot 17.01 on the Official Tax Map of the City of Ocean City, approximately 30 feet in width and totaling 0.357 acres, for the construction, reconstruction, installation, operation, maintenance, inspection, patrolling, decommissioning, replacement*

¹ L. 2010, c. 57, See N.J.S.A. 48:3-87(d)(4) and N.J.S.A. 48:3-87.1 to -87.2.

² See Exec. Order 8 (2018). Executive Order No. 92 expanded the OSW goal to 7,500 MW by 2035. Exec. Order 92 (2019). On September 21, 2022, Governor Murphy signed Executive Order No. 307, increasing the OSW goal to 11,000 MW by 2040. Exec. Order 307 (2022).

³ N.J.S.A. 48:3-87.1(f)(3) provides "municipal or county approvals, consents or affirmative filings" are "preempted and superseded," if the Board determines they are reasonably necessary for construction or operation of the QOWP. This Order use the terms "local government," "approvals," and "preemption" for brevity.

⁴ Petition at 5.

⁵ Id. at 11.

*and repair of a certain onshore export cable and associated equipment and facilities.*⁶

2. *[C]ertain County consents and approvals [with respect to the below-listed items] are preempted and superseded as they are reasonably necessary for the construction and operation of the Ocean Wind 1 QOWP;*⁷

a. New Jersey Department of Environmental Protection (“NJDEP”) Division of Land Resource Protection (DLRP) permits, including:

- i. NJDEP DLRP Multi-Permit Application;*
- ii. Waterfront Development Permit;*
- iii. Coastal Areas Facility Review Act (“CAFRA”) Permit and Coastal Consistency Determination;*
- iv. Coastal Wetlands Permit;*
- v. Freshwater Wetlands Permit, Transition Area Waiver(s);*
- vi. Geotechnical Survey Investigation Permits (if additional surveys required);*

b. Tidelands license from the NJDEP Bureau of Tidelands Management where Cape May County is the upland owner;

c. Cape Atlantic Conservation District Erosion and Sediment Control Approval for the cable installation;

d. NJDEP Short Term de Minimis General Permit (B7) for groundwater discharge resulting from construction dewatering activities; and

*e. Temporary Dewatering permits for water withdrawal from construction dewatering activities.*⁸

Ocean Wind explained that additional NJDEP consents and approvals may be necessary once Project construction is underway.⁹ With respect to the identified Lot and the need for easements, Ocean Wind explained that the identified Lot may be on a public right of way.¹⁰ However, Ocean Wind asserted that is unable to make a definitive determination, despite its contended due diligence, because it is not the “final arbiter” of the matter.¹¹

The Proceeding

On June 29, 2022, the Board retained the Petition for hearing and assigned President Fiordaliso (“President”) as the Presiding Officer. Further, the June 29, 2022 Order directed the County to be included as a necessary Party, and further directed any entities seeking to intervene or

⁶ Id. at 12.

⁷ Id. at 5.

⁸ Id. at 12-13.

⁹ Id. at 13.

¹⁰ Letter to President Fiordaliso (Nov. 2, 2022).

¹¹ Id.

participate in this matter to file the appropriate motions with the Board on or before July 15, 2022.¹² On July 5, 2022, the President issued the procedural schedule with respect to this matter. The New Jersey Division of Rate Counsel (“Rate Counsel”) objected to the procedural schedule through a letter filed on July 7, 2022 (“Rate Counsel’s July 7, 2022 Letter”). Multiple government entities also objected to the procedural schedule, requesting that the deadline to file motions to intervene be extended from July 15, 2022 to July 31, 2022. The President issued a modified procedural schedule on July 14, 2022, extending the deadline for filing the appropriate motions to July 29, 2022.

Rate Counsel filed a “discovery request” on July 15, 2022 (“Rate Counsel’s Informal Discovery Request”). Ocean Wind responded to Rate Counsel’s Informal Discovery Request on July 28, 2022 (“Ocean Wind’s Discovery Response”).

Eleven municipalities filed motions to intervene by the July 29, 2022 filing deadline. Additionally, the New Jersey League of Municipalities (“NJLM”) filed a motion to participate. On August 15, 2022, the President issued an Order further modifying the procedural schedule and granting the motions to intervene by Upper Township and Ocean City.¹³ The remaining municipalities (“Nine Municipalities”)¹⁴ were denied Intervenor status but were granted Participant status.¹⁵ The NJLM was also granted Participant status.¹⁶

On August 19, 2022, the Nine Municipalities filed a motion to reconsider the President’s August 15, 2022 Order denying the Nine Municipalities intervenor status. Ocean Wind filed a response opposing the motion for reconsideration on August 26, 2022. The Board addresses this motion in this Order.

On June 8, 2022, the County filed a motion with the Board requesting that the Board decline jurisdiction over the Petition and dismiss the Petition without prejudice as unripe for disposition and as nonjusticiable under N.J.S.A. 48:3-87.1(f) and N.J.S.A. 20:3-1 et seq. (“Motion to Dismiss”). On June 20, 2022, Ocean Wind filed a reply brief in opposition (“Dismiss Reply”); and on June 27, 2022, the County filed a reply to Ocean Wind’s Dismiss Reply (“County’s Dismiss Rebuttal”).

On August 22, 2022, the County filed a motion seeking: 1) the Board’s recusal from this matter, 2) transmission of the matter to the Office of Administrative Law (“OAL”) for the assignment of this matter to an Administrative Law Judge (“ALJ”), 3) and a suspension of the procedural schedule (“Motion to Recuse”). Ocean Wind replied (“Recusal Reply”) on September 1, 2022. The County filed a rebuttal to Ocean Wind’s Recusal Reply (“County’s Recusal Rebuttal”) on September 9, 2022.

¹² For purposes of reference, each party in this matter is referenced as a “Party,” and are collectively referenced as the “Parties;” each intervenor in this matter is referenced as an “Intervenor,” and are collectively referenced as “Intervenors;” and each participant in this matter is referenced as a “Participant,” and are collectively referenced as a “Participants.”

¹³ Order on Motions to Intervene at 4.

¹⁴ The Nine Municipalities include: (i) Borough of Avalon, (ii) Township of Dennis, (iii) Township of Lower, (iv) Township of Middle, (v) City of North Wildwood, (vi) City of Sea Isle City, (vii) Borough of Stone Harbor, (viii) City of Wildwood, and (ix) Borough of Wildwood Crest.

¹⁵ Order on Motions to Intervene at 4.

¹⁶ Id.

In addition to its Motion to Dismiss and Motion to Recuse filings, the County filed opposition to the Petition on August 29, 2022 (“County’s Opposition”). Included with the County’s Opposition, the County provided testimony from Kevin Lare and Robert Church (respectively, “Lare Testimony” and “Church Testimony”).

On August 29, 2022, Rate Counsel submitted testimony from Maximilian Chang (“Chang Testimony”).

On August 29, 2022, the Nine Municipalities filed opposition to the Petition (“Nine Municipalities’ Opposition”).

On August 31, 2022, Ocean City filed a letter to join and concur with the filings made by the County in the Motion to Dismiss and Motion to Recuse.

On September 16, 2022, Ocean Wind responded (“Ocean Wind’s Response”) to the County’s Opposition and filed rebuttal testimony.

The President issued an Order on September 28, 2022 denying the Motion to Dismiss and the Motion to Recuse (“September 28, 2022 Order” or “Order on Motion to Dismiss and Motion to Recuse”).

On September 29, 2022, the Board¹⁷ conducted two (2) virtual public hearings, one in the morning and one in the evening (“Public Hearings”). Written comments from Rate Counsel (“Rate Counsel’s Comments”), the Nine Municipalities, and 11 members of the public¹⁸ were received prior to the October 12, 2022 public comment deadline. Additionally, 115 entries were posted to the Board’s public comments tool for this docket.¹⁹ Ocean Wind replied to these comments on October 26, 2022 (“Ocean Wind’s October 26 Reply Comments”).

On November 10, 2022, Oral Argument was held on the Petition before the full Board, where the Petitioner, Rate Counsel, the County, Ocean City, and the Nine Municipalities presented their arguments.

¹⁷ On September 28, 2022, the Board appointed Commissioner Robert M. Gordon to preside over the Public Hearings.

¹⁸ The Board received comments from: (i) the Greater Atlantic City Chamber; (ii) the Chamber of Commerce Southern New Jersey; (iii) the New Jersey Business & Industry Association; (iv) Mary and Anthony D’Orsogna; (v) Robert and Joann Zuczek; (vi) Courtney Hanscom; (vii) Victor Gano; (viii) Michael Dean; (ix) Yvette Bratten; (x) an entity self-identifying as “SKYKING;” and (xi) one unidentified entity.

¹⁹ These public comments can be viewed by accessing the Board’s Public Document Search Tool and imputing the docket for this case. Most, but not all, the comments were received before the public comment deadline. <https://publicaccess.bpu.state.nj.us/>

POSITION OF THE PARTIES AND EVIDENCE

Ocean Wind's Petition and Supporting Testimony

The Petition explained that a transmission cable will be needed to bring the electricity from the Project onshore, to the New Jersey electric grid.²⁰ Under the "Preferred Route," the cable would come onshore in Ocean City at 35th Street via Horizontal Directional Drilling ("HDD"), a trenchless construction method.²¹ The cable would travel underground in duct banks²² under Ocean City public roads until arriving at Crook Horn Creek near Roosevelt Boulevard, an offshoot of Peck Bay.²³ The cable would then travel north on State Route 9 toward the proposed point of interconnection ("POI") – where the electricity enters the grid – at a proposed substation property near the decommissioned B.L. England Generating Station ("B.L. England") in Upper Township.²⁴

The Patterson Testimony described the process the Project followed in selecting the POI and Preferred Route. The choice of POI would have a large impact on the available route options. Ocean Wind reviewed 15 potential POIs for the Project.²⁵ After initial studies – focused on engineering, environmental, and permitting constraints; available technology; and a desktop study – Ocean Wind identified three (3) viable POIs for further study. The three (3) viable sites were the Oyster Creek nuclear plant,²⁶ B.L. England, and the Higbee and Ontario substations.²⁷

²⁰ Petition at 6-7.

²¹ Petition at 6.

²² *Id.* at 10. A "duct bank," a concrete structure, is a means of providing a protected underground pathway for one or more cables to travel. The cables reside in PVC pipes within the duct bank, called "conduits." These conduits are themselves encased in a steel-reinforced concrete container.

²³ Petition at 6.

²⁴ *Id.* at 6-7.

²⁵ Patterson Testimony at 4; Petition at 7.

²⁶ The Oyster Creek Nuclear Generating Station is a facility located in Forked River, NJ, which is currently undergoing decommissioning. See U.S. Nuclear Regulatory Commission, *Oyster Creek Nuclear Generation Station*, <https://www.nrc.gov/info-finder/reactors/oc.html>.

²⁷ Patterson Testimony at 4; Petition at 7. The Higbee and Ontario substation are located in Atlantic County. Their close proximity to one another causes them to be referenced collectively as a single site location. See Atlantic City Electric, *Building a Smarter, Stronger and Cleaner Energy Grid for Atlantic County*, https://www.atlanticcityelectric.com/Documents/ACE%20Atlantic%20County_FactSheet_2021_final_ADA.pdf.

Ocean Wind determined that the Higbee and Ontario substation sites had issues that the other two (2) sites did not.²⁸ Notably, the Higbee and Ontario sites would require substantial upgrades before they could accept the Project's electricity. Further, using the Higbee and Ontario sites would impact cultural resources and overburdened communities.²⁹ Ocean Wind decided to move forward with the Oyster Creek and B.L. England sites.³⁰ Only the identified easements and consents for the "Preferred Route" to the B.L. England station are at issue in this Petition.

The Patterson Testimony explained that Ocean Wind developed resource maps to screen route options.³¹ This was done to help identify resource constraints and engineering requirements.³² According to information in the Patterson Testimony, the Preferred Route is mostly located within previously disturbed State-owned and existing utility road right of way ("ROW") areas, and would have fewer impacts to wetlands, water bodies, wildlife, and residential and historic properties than the studied alternatives.³³

The Patterson Testimony specifically identified four (4) route options that were considered but not chosen. For instance, the proposed Sea Isle City and Strathmere routes would cross extensive borrow areas, prime fishing areas, an artificial reef, and a horseshoe crab reserve.³⁴ Their onshore routes would also cross a major water tributary of an intracoastal waterway as well as crossings of underground pipelines, and would cross or abut historic priority sites and parklands.³⁵ Additionally, the Great Egg Harbor Route would have impacts on maritime uses and vessel navigation, shellfish habitats, borrow areas, and inlet sediments.³⁶

The Patterson Testimony explained that the Preferred Route would require temporary and permanent easements over County property at Block 3350.01, Lot 17.01, on the Official Tax Map of Ocean City, an area totaling 0.257 acres.³⁷

²⁸ Patterson Testimony at 5.

²⁹ Id.

³⁰ Id. The rationale was that the existing grid infrastructure at both the Oyster Creek and the B.L. England facilities would provide the "most efficient method of connecting offshore wind energy to the grid." Id. It was further thought that the sites adjacent to these facilities would be optimal for substation placement, as such site locations allow for minimized interconnection lines, take advantage of previously disturbed areas, and are consistent with existing uses. Id.

³¹ Id. at 5-13.

³² Id. at 7, 12 ("Compared to the potential alternatives, the Preferred Route is technically feasible, and has the least impacts to natural resources, including wetlands and water bodies, and residential and historic properties.").

³³ Id. at 9.

³⁴ Id. at 11.

³⁵ Id. at 11-12.

³⁶ Id. at 10-11.

³⁷ Id. at 13-14.

The Patterson Testimony also put forward the list of NJDEP permits or approvals that would be required for construction of the Preferred Route.³⁸ The testimony noted that Ocean Wind must have County consents or authority to obtain the NJDEP permits.³⁹ Further, Ocean Wind noted that the NJDEP must issue its federal consistency determination before the United States Bureau of Ocean Energy Management (“BOEM”) can issue a “Record of Decision” for the Project.⁴⁰ For its part, the NJDEP has indicated that the Project must secure the relevant NJDEP approvals and permits before NJDEP can issue a federal consistency determination.⁴¹

The Kalwa Testimony explained the mechanics of the route.⁴² The Testimony explained that the onshore cable in the County would travel underground in duct banks that would house the conduits containing the cables.⁴³ Kalwa noted that construction would create trenches to install the facilities, and the trenches would be back-filled (paved) to restore the area.⁴⁴ At landfall, the Crook Horn Creek Crossing, and near the substation in Upper Township, Ocean Wind would employ HDD technologies to perform trenchless excavation.⁴⁵ Kalwa noted that the construction schedule with respect to the onshore export cables – estimated to take one to two years⁴⁶ – was designed to minimize impacts on traffic and tourism by utilizing off-peak season timeframes where possible.⁴⁷ Ocean Wind plans to cooperate with local authorities to minimize the impacts on affected parties during construction.⁴⁸ As for maintenance and repairs, vaults will be used to access the underground facilities and minimize above-ground impacts.⁴⁹

³⁸ Id. at 15. The testimony notes that additional NJDEP permits or approvals may be necessary once construction is under way.

³⁹ Id. at 16.

⁴⁰ Id.

⁴¹ Id. at 17.

⁴² Kalwa Testimony at 5-19.

⁴³ Id. at 6, 10-11.

⁴⁴ Id. at 6, 11, 14.

⁴⁵ Id. at 10-11. Trenchless construction “is a type of underground construction that requires few or no trenches at the surface or street level.” Id. at 11.

⁴⁶ Id. at 13.

⁴⁷ Id. at 10.

⁴⁸ Id. at 15.

⁴⁹ Id. at 17-18.

The Urbish Testimony explained that Ocean Wind unsuccessfully worked to obtain the easements directly from the County.⁵⁰ The Urbish Testimony further explained that Ocean Wind has been unable to secure the required consents from the County.⁵¹ Notably, Ocean Wind issued a Letter to the County on September 28, 2021 (“September 28, 2021 Letter”) allegedly requesting the easements and identifying the needed permits.⁵² Ocean Wind also submitted a letter on April 12, 2022 (“April 12, 2022 Letter”) that offered compensation to acquire the easements from the County.⁵³

At Oral Argument, Ocean Wind summarized the Petition and the onshore route, which would all be underground.⁵⁴ Ocean Wind asserted that the “reasonably necessary” standard, the standard under the 2021 Amendment, does not mean “absolutely necessary;” and it does not mean the best or least expensive route either.⁵⁵ Ocean Wind explained it conducted an extensive analysis and chose the route with the least cumulative impacts, which it contends is reasonable.⁵⁶

Ocean Wind also addressed the timing of the Petition in relation to federal and NJDEP permitting.⁵⁷ The company explained that federal permitting requires a consistency review, which requires state permits. Therefore, it is not practical to delay the Petition when its results are needed for state and federal permitting.⁵⁸

Cape May County Position

The County argued that the Board’s process in this matter has ignored and violated the Administrative Procedure Act (“APA”), N.J.S.A. 52:14B-1 et seq., and the associated Uniform Administrative Practice Rules, N.J.A.C. 1:1-1 et seq.⁵⁹ The County contended that this matter is a “contested case,”⁶⁰ defined by the APA as

a proceeding . . . in which the legal rights, duties, obligations, privileges, benefits or other legal relations of specific parties are required by constitutional right or by statute to be determined by an agency by decisions, determinations, or orders, addressed to them or disposing of their interests, after opportunity for an agency hearing.

[N.J.S.A. 52:14B-2]

⁵⁰ Urbish Testimony at 4-14.

⁵¹ Id.

⁵² Petition at 15; Urbish Testimony at 6.

⁵³ Petition at 19; Urbish Testimony at 13.

⁵⁴ Oral Argument, Transcript at 12-19.

⁵⁵ Id. at 19-20.

⁵⁶ Id. at 21.

⁵⁷ Id. at 23-24.

⁵⁸ Id.

⁵⁹ County’s Opposition at 6-8.

⁶⁰ Id. at 6-7.

As such, the County argued that the Board was required to follow agency hearing procedures, such as the formal discovery procedures at N.J.A.C. 1:1-10.1.⁶¹ The County noted that the Board's procedural schedule did not allow for formal discovery.⁶² Therefore, the County contended that its ability to respond was hampered.⁶³ The County would have liked to depose Ocean Wind's expert and obtain the expert's "entire file underlying" the expert's opinion.⁶⁴ Accordingly, the County argued that the County's due process rights were curtailed by the lack of discovery and expedited procedural schedule.⁶⁵

The County's Opposition next went through the Petition, paragraph by paragraph, to explain its view.⁶⁶ For instance, the County contended Ocean Wind did not provide enough support to show that alternative routes were sufficiently considered or that the selected route is reasonably necessary.⁶⁷ Further, the County noted that a Board decision on the Petition may become moot depending on the outcome of the environmental review process.⁶⁸ The County questioned the long-term viability of the Project and whether it was appropriate to move forward with it, given federal patent litigation surrounding the General Electric Co.'s Haliade-X 12 MW wind turbine, the turbine model which the Project plans to use.⁶⁹

In its next argument, the County posited that this proceeding must apply the due process protections within the Eminent Domain Act ("EDA"), N.J.S.A. 20:3-1 et seq.⁷⁰ The County contended that the exercise of condemnation power must satisfy due process, which guards against any arbitrary action of delegated condemnation authority.⁷¹ In New Jersey, this is generally achieved through the EDA.⁷² Therefore, the County argued the 2021 Amendment must be read to incorporate the EDA standards.⁷³ Elsewise, the County contended that the 2021 Amendment would be an unconstitutional delegation of power that deprives the County of due process.⁷⁴

⁶¹ Id. at 7.

⁶² Id.

⁶³ Id. at 7-8.

⁶⁴ Id.

⁶⁵ Id. at 8.

⁶⁶ Id. at 9-17.

⁶⁷ Id. at 10-13.

⁶⁸ Id. at 17.

⁶⁹ Id. at 18-20. For more detailed information regarding this litigation, please consult the docket in Siemens Gamesa Renewable Energy A/S v. General Electric Co., C.A. No. 1:21-ev-10216-WGY (U.S. District Court, District of Massachusetts). Note, the Project has been granted an exception and is allowed to use the Haliade-X turbine.

⁷⁰ Id. at 20-24.

⁷¹ Id. at 23 (citing, e.g., Juzek v. Hackensack Water Co., 48 N.J. 302, 315 (1966) (explaining that grants condemnation power shall also "contemplate[] all necessary requirements to satisfy due process"))

⁷² Id. at 24.

⁷³ Id.

⁷⁴ Id.

With respect to the EDA requirements, the County argued that Ocean Wind did not satisfy the prerequisites for filing a condemnation action (citing N.J.S.A. 20:3-6).⁷⁵ The EDA requires the condemner to first attempt to obtain the property through bona fide negotiations.⁷⁶ Specifically, under the EDA, the property shall be appraised for its fair market value, and an offer must be made for the property that is at least the appraisal value. The County noted that Ocean Wind offered the County \$10,000 for the easement at issue, which was based on an appraisal of an adjacent parcel in Ocean City.⁷⁷ The County thus contended Ocean Wind did not satisfy the EDA's pre-filing appraisal requirement for the property interest at issue, and the Petition must be denied.⁷⁸

Turning to the 2021 Amendment, the statute establishes its own pre-filing requirements. The County noted that Ocean Wind must submit a "request" for the identified property interests at least 90 days before filing a petition under the 2021 Amendment.⁷⁹ The County contended that Ocean Wind's September 28, 2021 Letter failed to achieve that requirement because it was not specific enough.⁸⁰ The County stated that the September 28, 2021 Letter used qualifiers such as "if required" and "are anticipated to include."⁸¹ According to the County, such conditional statements would impermissibly shift the burden from the offshore wind developer, Ocean Wind, to the County or municipality to determine Project requirements.⁸² Further, the County argued that the Board must interpret the term "request" under the 2021 Amendment in favor of the County because of a portion of Constitution, Art. IV, Section VII, para. 11, which states that "any law concerning municipal corporations . . . or counties, shall be liberally construed in their favor."⁸³

⁷⁵ Id. at 34-37.

⁷⁶ Id. at 34.

⁷⁷ Id.

⁷⁸ Id. at 36.

⁷⁹ Id. at 25.

⁸⁰ Id. at 27.

⁸¹ Id. at 26-27.

⁸² Id. at 28. The County further notes that Ocean Wind sent the April 12, 2022 Letter, see Urbish Testimony at Appendix J, where Ocean Wind explained the identified lot – the identified easement land – was not Green Acres restricted, that also used conditional language. Additionally, the April 12, 2022 Letter noted that Ocean Wind could not determine whether the identified property was a public right-of-way. See supra notes 11-11 and associated text.

⁸³ Id. at 25.

With respect to the identified consents, in addition to the use of the above-noted conditional language, the County argued that the Petition is deficient in two (2) ways. First, the September 28, 2021 Letter identified three (3) items that could only be granted by autonomous or semi-autonomous agencies, not the County of Cape May.⁸⁴ The County contended the September 28, 2021 Letter could not satisfy the pre-filing requirement for these consents because it was not submitted to the correct authority. Second, the County notes that Ocean Wind asked the County to sign a “Property Owner Certification Form” without providing the proper background information and context.⁸⁵ The County argued that, without this information, this form should not satisfy the 2021 Amendment’s pre-filing requirement.

In its filed County’s Opposition, the County closed by raising three (3) issues. First, the County contended the 2021 Amendment is an unconstitutional delegation of power because the law contains no standards to protect parties from arbitrary government action.⁸⁶ Second, the County argued the 2021 Amendment does not authorize a taking that would supplant a “prior public use.”⁸⁷ Third, the County asked the Board to bifurcate the proceeding – separating the easement and consent questions – because the easement issue is allegedly premature given ongoing environmental review.⁸⁸

With the County’s Opposition, the County filed testimony from two (2) experts, Kevin Lare and Robert Church. The County contended the testimony from these experts shows that the Petition leaves too many questions unanswered and cannot meet the “reasonably necessary” standard.⁸⁹ The Church Testimony generally noted that Ocean Wind did not include a “no build” alternative in its analysis, and that any determination on the route should wait for an environmental review by the NJDEP and federal agencies.⁹⁰

In his testimony, Mr. Church reviewed and discussed the Patterson Testimony. He first noted limitations in the alternative route analysis. Mr. Church compared the Sea Isle City route and contends it would have similar or lesser impacts than the “Preferred Route” that crosses Roosevelt Boulevard.⁹¹ Furthermore, Mr. Church noted that the Patterson Testimony did not discuss the Preferred Route’s proximity to some historic areas, such as the Tuckahoe Inn.⁹² Mr. Church also posited that the alternative route analysis should have included a hybrid version of the assessed routes. For instance, a studied alternative route option could have been combined with the Garden State Parkway route.⁹³

⁸⁴ Id. at 29.

⁸⁵ Id. at 30.

⁸⁶ Id. at 40-41.

⁸⁷ Id. at 41-42.

⁸⁸ Id. at 42-43.

⁸⁹ Id. at 39-40.

⁹⁰ Church Testimony at 1.

⁹¹ Id.

⁹² Id.

⁹³ Id.

The Church Testimony explained that, from the County's perspective, routes that have no resident impacts should have been preferred.⁹⁴ The Great Egg Harbor Route and the abandoned railway route – using the Garden State Parkway extension – would eliminate resident impacts during construction and maintenance.⁹⁵ Generally, the Church Testimony noted that the County's concerns were not weighed in relation to the regulatory obstacles presented for the alternative routes.⁹⁶

The Church Testimony also contended that Ocean Wind did not provide enough detail to describe the impacts of the Preferred Route on the County's rights of way.⁹⁷ For instance, the Ocean Wind testimony did not provide details on traffic impacts or how crossings with utility water mains will be addressed.⁹⁸ Additionally, according to the Church Testimony, Ocean Wind did not explain how it would address potential future issues, such as latent electricity imparted on surrounding soils or whether future road or utility work could impact the underground transmission line.⁹⁹

The County also presented testimony from Kevin Lare, who discussed the pre-filing communications between Ocean Wind and the County. In the Lare Testimony, Lare explained that he found the September 28, 2021 Letter and subsequent requests to be unclear.¹⁰⁰ He also explained that the County attempted to have productive discussions with Ocean Wind, but talks soured after local officials became upset after the 2021 Amendment was introduced in the New Jersey Legislature.¹⁰¹

At Oral Argument, the County opened by explaining the “main reason” for its objection. Specifically, the County stated that it feels that the 2021 Amendment allows the Board to stand in the shoes of elected officials, disenfranchising the local community.¹⁰² Further, the County contended that Ocean Wind never even made clear what it wanted through the bilateral discussion it held with the County.¹⁰³

The County argued that the EDA and its pre-filing requirements should apply to this proceeding because it is implicitly incorporated into the 2021 Amendment as a due process requirement.¹⁰⁴ The County further argued that there was no pre-action appraisal because Ocean Wind presented

⁹⁴ Id. at 2.

⁹⁵ Id.

⁹⁶ Id.

⁹⁷ Id. at 2-3.

⁹⁸ Id.

⁹⁹ Id. at 5-6.

¹⁰⁰ See generally, Lare Testimony.

¹⁰¹ Id. at 2-5.

¹⁰² Oral Argument, Transcript at 26.

¹⁰³ Id. at 31.

¹⁰⁴ Id. at 33-35, 43-44. Later, the County explained that the Board “does not have to adopt the entire [EDA], although [the County] should note a portion of it is specifically incorporated by reference in [the 2021 Amendment].”

an appraisal of an adjacent property, not the property in question.¹⁰⁵ The County acknowledged, however, that Ocean Wind provided an appraisal for the property in question well after the Petition was filed.¹⁰⁶

The County then put forward its interpretation of the reasonably necessary standard: “to look at all the facts and circumstances, engage in a balancing of interest to determine whether this particular route must be the one [] . . . that only this route is the one that will work.”¹⁰⁷ The County argued that Ocean Wind did not meet its burden to show that the Preferred Route is reasonably necessary.¹⁰⁸ The County presented three (3) major points that it claims Ocean Wind overlooked: (1) the opposition of the local community, (2) the long-term environmental impacts of the Preferred Route, and (3) the alleged lack of a detailed analysis looking at the alternative routes.¹⁰⁹

The County next argued that the Petition should not proceed because of the ongoing environmental reviews at the federal and state level.¹¹⁰ The County questioned how, after all, could the “reasonably necessary” standard be met if the environmental review may require changes to the route.¹¹¹

For rebuttal at Oral Argument, the County reiterated that elected officials matter and should not be put aside.¹¹² On the substance, ultimately, the County argued that the proper procedures were not followed in this proceeding insofar as there was no way to test the evidence put forward by Ocean Wind without discovery.¹¹³

¹⁰⁵ Id. at 37.

¹⁰⁶ Id. at 35.

¹⁰⁷ Id. at 27.

¹⁰⁸ Id. at 38.

¹⁰⁹ Id. at 39-43.

¹¹⁰ Id. at 29.

¹¹¹ Id. at 30, 43.

¹¹² Id. at 76.

¹¹³ Id. at 78.

Ocean City Position

On August 31, 2022, Ocean City filed a letter to join and concur with the filings made by the County in the Motion to Dismiss and Motion to Recuse.

At Oral Argument, Ocean City noted that it was going to reiterate the argument made in Docket No. QO22020041.¹¹⁴ The Board does not repeat here the arguments made in such other docket. Rather, the Board directs stakeholders to the September 28, 2022 Order issued in QO22020041.¹¹⁵ Notably, at Oral Argument, Ocean City largely contends the Great Egg Harbor Route should be further explored before finding the Preferred Route to be reasonably necessary.

Upper Township Position

Upper Township has participated in this proceeding by making an appearance during the Public Hearings¹¹⁶ and at Oral Argument.¹¹⁷ Upper Township has not provided a substantive position on the Petition.

Rate Counsel Position

Rate Counsel's July 7, 2022 Letter found the procedural schedule in this matter lacking. Rate Counsel contended that the schedule would not allow it or the Parties sufficient opportunity to develop a record because there was no opportunity for formal discovery.¹¹⁸ Rate Counsel identified "potential" factual disputes concerning whether the property interests and consents at issue are reasonably necessary.¹¹⁹

The Chang Testimony, filed by Rate Counsel, noted Ocean Wind did not provide cost estimates for the Preferred Route or the studied, "qualitatively evaluated" alternative routes.¹²⁰ Chang agreed that Ocean Wind would bear the costs of the transmission route, but opined that cost estimates should be provided because the offshore wind renewable energy certificate ("OREC") structure is based upon the Project's bid costs.¹²¹ Further, Mr. Chang posited that there is a "nexus between the decision about. . . the export cable routes and the. . . POI for the project," which in turn impacts transmission upgrade costs that may be borne by ratepayers.¹²² Therefore, Mr. Chang contended, the Board should review costs for the different POI options before

¹¹⁴ Oral Argument, Transcript at 47-54.

¹¹⁵ See In re 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, BPU Docket No. QO22020041, Order dated September 28, 2022 ("September 28, 2022 Order").

¹¹⁶ 5:30 PM Public Hearing, Transcript at 38-42.

¹¹⁷ Oral Argument, Transcript at 54.

¹¹⁸ Rate Counsel's July 7, 2022 Letter at 2.

¹¹⁹ Id.

¹²⁰ Chang Testimony at 7-8.

¹²¹ Id. at 7.

¹²² Id. at 10.

determining whether a route is reasonably necessary or not.¹²³

In addition to its noted concerns over costs, the Chang Testimony noted that Ocean Wind did not provide a quantitative analysis on each route alternative to support its claim that the Preferred Route would have the least impact on the environment compared to the alternatives.¹²⁴

Rate Counsel's Comments build upon the Chang Testimony, with Rate Counsel contending that Ocean Wind did not adequately explain why it plans to move forward with the Preferred Route.¹²⁵ With respect to costs, Rate Counsel asserted cost estimates are needed to determine whether the Preferred Route is reasonably necessary. As an example, Rate Counsel stated that the chosen POI may affect ratepayer costs.¹²⁶ Additionally, Rate Counsel argued that route cost estimates would allow the Board to review the reasonableness of the OREC price.¹²⁷

Rate Counsel's Comments also take issue with the lack of formal discovery in the proceeding. According to Rate Counsel, a more robust evidentiary proceeding is required, so that Parties have "the opportunity to know opposing evidence."¹²⁸

Rate Counsel opened Oral Argument by asserting the Board already made its decision in this proceeding because it granted the Petition in Docket No. QO22020041.¹²⁹ Rate Counsel contends the two (2) proceedings should have been consolidated; according to Rate Counsel, because the Board did not consolidate these matters, the Board "deprived the [P]arties in this matter the ability of being heard."¹³⁰ On a similar note, Rate Counsel contended this proceeding violated the Parties' due process rights because there was no formal discovery.¹³¹ Substantively, Rate Counsel took no position on the Petition at Oral Argument based on its procedural concerns.¹³²

Position of the Nine Municipalities

The Nine Municipalities filed their opposition to the Petition on August 29, 2022. In the Nine Municipalities' Opposition, the Nine Municipalities reassert that they each hold unique interests, sufficient for qualifying each one of them to receive Intervenor status, which was denied in earlier proceedings regarding this matter.¹³³ The Nine Municipalities note that some of Ocean Wind's

¹²³ Id. at 18-19.

¹²⁴ Id. at 12-14.

¹²⁵ Rate Counsel's Comments at 3.

¹²⁶ Id. at 5.

¹²⁷ Id. at 4.

¹²⁸ Id. at 6-7 (quoting Moore v. Dep't of Corr., 335 N.J. Super. 103, 108 (App. Div. 2000)).

¹²⁹ Oral Argument, Transcript at 55.

¹³⁰ Id. at 56.

¹³¹ Id. at 56-57.

¹³² Id. at 59.

¹³³ Nine Municipalities' Opposition at 3-11, 21-23.

alternative routes may cross their land.¹³⁴ Under this argument, the Nine Municipalities implied that they should have standing in this matter. The Nine Municipalities also argue that the Board should recuse itself, mirroring the arguments the County presented in its Motion to Recuse.¹³⁵

In the Nine Municipalities' Opposition to the Petition, they contended that the Petition needs to comply with EDA procedures, such as its pre-filing requirements, asserting that "nothing in the [2021 Amendment] preempts the EDA."¹³⁶ The Nine Municipalities also asserted that the Board is required to conduct a full "hearing."¹³⁷

At Oral Argument, the Nine Municipalities explained that they support the County and the arguments it put forward.¹³⁸ The Nine Municipalities asserted that if there is a route that can take the power to the grid that does not run through Ocean City or the County, then it should be pursued.¹³⁹ Such a route would be reasonable to the residents of the Nine Municipalities, who support the Great Egg Harbor Route.¹⁴⁰ The Nine Municipalities also argued that cost should be a factor in the route analysis.¹⁴¹

At one point during Oral Argument, the Nine Municipalities argued that the presence of wind farms on the horizon would be detrimental to residents.¹⁴² The President reminded the Parties that the location or presence of wind turbines was not at issue in this proceeding.¹⁴³ The Nine Municipalities acquiesced but maintained that the matter was important to discuss.¹⁴⁴

Public Comments

During the two (2) Public Hearings conducted on September 29, 2022, and in the written public comments and entries in the Board's public comments tool, a number of County residents and stakeholders noted their opposition to the Project. They raised concerns about alleged electromagnetic fields, questioned the availability of alternative routes, and raised the issue of potential negative impacts on the environment, fishing industry, the visual horizon, tourism, and property values.

Ocean City's business administrator, George Savastano, presented for the City during the Public Hearings. He asserted that the proceeding should be referred to the OAL and that Ocean Wind

¹³⁴ Id. at 9-10.

¹³⁵ Id. at 18-21.

¹³⁶ Id. at 13.

¹³⁷ Id. at 15. 24

¹³⁸ Oral Argument, Transcript at 60.

¹³⁹ Id. at 62.

¹⁴⁰ Id. at 66.

¹⁴¹ Id. at 69.

¹⁴² Id. at 64.

¹⁴³ Id.

¹⁴⁴ Id.

should disclose the costs of Project construction.¹⁴⁵ He also asserted that the issues associated with the Great Egg Harbor Route could be overcome because similar issues were overcome by Ocean Wind in its route to the Oyster Creek POI.¹⁴⁶ To close, he noted that it would be prudent to wait until the Project's environmental reviews are complete to rule on the Petition.¹⁴⁷

Additionally, several members of the public noted their confusion over the September 28, 2022 Order in Docket No. QO22020041¹⁴⁸ that found property interests and consents in Ocean City to be reasonably necessary for the Project. Commissioner Gordon explained that the two (2) proceedings were distinct and would have separate records.¹⁴⁹

The Board also received comments in support of the Project. This included members of the public, as well as representatives from the following organizations: the Alliance for Action, the Greater Atlantic City Chamber, the Chamber of Commerce Southern New Jersey, and the New Jersey Business & Industry Association. The comments noted that the Project was working to minimize environmental harms, would help provide jobs, and would help address climate change.

Ocean Wind's Answers and Rebuttals

In response to Rate Counsel's July 7, 2022 Letter, Ocean Wind noted that the 2021 Amendment does not by its terms require an evidentiary hearing.¹⁵⁰ Further, Ocean Wind argued that the Parties received due process and would have an opportunity to respond to Ocean Wind's Petition and testimony.¹⁵¹

¹⁴⁵ 5:30 PM Public Hearing, Transcript at 27-29.

¹⁴⁶ Id. at 31-35. The Oyster Creek POI and its associated route are not at issue in this proceeding.

¹⁴⁷ Id. at 36.

¹⁴⁸ See September 28, 2022 Order, supra note 115.

¹⁴⁹ 5:30 PM Public Hearing, Transcript at 94.

¹⁵⁰ Ocean Wind's July 26, 2022 Letter at 2.

¹⁵¹ Id. at 2-3.

In response to Rate Counsel's Informal Discovery Request, Ocean Wind further detailed the criteria used to screen alternative route options.¹⁵² These criteria were applied in phases, and considered the routes' "technical feasibility of cable design, constructability, real estate availability, environmental impacts, and stakeholder considerations."¹⁵³ Ocean Wind also provided more details with respect to their data sources, for instance how they defined wildlife management areas.¹⁵⁴ Ocean Wind provided a table that summarized the constraints for the primary route alternatives it considered.¹⁵⁵ The company also confirmed that they did not quantify costs for routes other than the Preferred Route. However, Ocean Wind clarified that the interconnection costs for the selected POI would not differ between the alternative routes studied.¹⁵⁶

In response to the County's Opposition and filed testimony, Ocean Wind noted that many of the issues the County raises were already raised in the Motion to Dismiss.¹⁵⁷ With respect to new arguments, Ocean Wind contended the constitutionality of the 2021 Amendment is not for the Board to decide.¹⁵⁸ Ocean Wind also argued that the prior public use doctrine does not apply where the authority to condemn has been expressly authorized by the Legislature.¹⁵⁹ In any event, Ocean Wind asserted, the requested easements would not impact any prior existing public use.¹⁶⁰

Ocean Wind also filed rebuttal testimony in response to the Church Testimony, the Lare Testimony, and the Chang Testimony. The Kaplan Rebuttal reasserted that transmission upgrade costs are outside the scope of this proceeding because they will be fully borne by Ocean Wind, and not ratepayers.¹⁶¹ In any event, the Kaplan Rebuttal noted that Ocean Wind's POI choice was cost effective; upgrade costs at B.L. England would cost around \$59 million, and upgrade costs at Higbee would cost approximately \$273 million.¹⁶² Further, the upgrade cost at B.L. England could be avoided through the purchase of capacity injection rights ("CIRs").¹⁶³

The Patterson Rebuttal contended that Ocean Wind is not required to develop cost proposals for any of the alternative routes it considered.¹⁶⁴ She reiterated that Ocean Wind eliminated many of the alternative routes it was considering at an early stage in the route evaluation process, due to

¹⁵² Ocean Wind's Discovery Response at 2-4.

¹⁵³ Id. at 4.

¹⁵⁴ Id. at 6.

¹⁵⁵ Id. at 8-9. They also explained the constraints involved in the alternatives to the Peck Bay crossing at the Roosevelt Bridge Id. at 11.

¹⁵⁶ Id. at 15.

¹⁵⁷ See, e.g., Ocean Wind's Response at 6.

¹⁵⁸ Id. at 7.

¹⁵⁹ Id. (citing Weekawken Twp v. Erie Railroad Co., 20 N.J. 572, 579 (1956)).

¹⁶⁰ Id. at 8.

¹⁶¹ Kaplan Rebuttal at 3.

¹⁶² Id. at 5.

¹⁶³ Id.

¹⁶⁴ Patterson Rebuttal at 2.

qualitative factors that would make it imprudent to develop cost estimates for those routes that Ocean Wind determined were infeasible.¹⁶⁵ With respect to the analysis, and taking into account the minimization of impacts on “natural, cultural, and socioeconomic resources,”¹⁶⁶ she explained that the Preferred Route was selected, due to it being “sited within existing previously disturbed road ROW areas, and [it] minimiz[ing] impacts on residences, wetlands, water bodies, and residential historic properties.”¹⁶⁷ Further, she explained the analysis was comprehensive and there were no other viable alternatives to be analyzed, noting that “[w]hile the Preferred Route may have greater indirect impacts on adjacent residences than the Great Egg Harbor Route, the increased potential for direct impacts on natural, cultural, and socioeconomic resources, as well as engineering constraints, made the evaluated alternative routes either impracticable or more impactful” than the Preferred Route.¹⁶⁸ According to Patterson, it was for these reasons that the other routes were eliminated from Ocean Wind’s further consideration.¹⁶⁹

In response to the Church Testimony, Patterson first asserted that the “no build” option is not relevant to this proceeding.¹⁷⁰ Second, Patterson clarified that this matter does not require the Board to determine whether an alternative route is “better” than the Preferred Route, but only requires the Board to determine whether the easements requested for the Preferred Route are “reasonably necessary.”¹⁷¹ Patterson then explained that the NJDEP has made clear that it will not complete its environmental review, which is in turn needed for the federal environmental review, in advance of a Board decision in this matter.¹⁷²

The Patterson Rebuttal next answered the alternative route suggestions put forward by the Church Testimony. According to Patterson, the Sea Isle City route presented a number of issues. These issues included such route requiring a longer onshore cable than the Preferred Route, as well as such route crossing streams, historic districts, parks, and groundwater contamination areas; the route would also require offshore cables that cross borrow areas, fishing areas, a reef and crab reserves.¹⁷³ Patterson also noted that pairing the Sea Isle City Route with the Garden State Parkway would present its own set of issues; specifically, there would be additional regulatory and permitting restrictions involved with installing a utility ROW along the Parkway, as well as construction and engineering limitations in addition to considerations that would need to be taken into account given that the Parkway itself is considered to be a historic district.¹⁷⁴

For the “abandoned railway” route, Patterson explained that the route, a historic railroad ROW area, would have a greater impact to wetlands and waterways than would the Preferred Route.¹⁷⁵

¹⁶⁵ Id.

¹⁶⁶ Id. at 6.

¹⁶⁷ Id.

¹⁶⁸ Id. at 5.

¹⁶⁹ Id.

¹⁷⁰ Id. at 7.

¹⁷¹ Id. at 8.

¹⁷² Id. at 7-8.

¹⁷³ Id. at 8-9.

¹⁷⁴ Id. at 9.

¹⁷⁵ Id. at 10.

As Patterson explained, such route contained a portion of the old railroad ROW that Ocean City potentially still owned, would result in a longer cable route that would result in greater impacts to wetlands and waterways than would the Preferred Route, would create difficulties due to construction of underground electric lines needing to occur in wetlands, and would cause impacts to a New Jersey historic district.¹⁷⁶

For the Great Egg Harbor Route, Patterson explained the various concerns that led Ocean Wind to eliminate that alternative. According to Ms. Patterson, the Great Egg Harbor Route “was extensively evaluated” and was eliminated due to a number of reasons. First, there are concerns with laying and maintaining the burial depths of the offshore cable, due to shallow waters and the shifting sediments and shifting sands in the inlet.¹⁷⁷ Second, construction would disrupt vessel access, vessel navigational routes, and other marine uses of the inlet.¹⁷⁸ Also, the presence of a borrow area at the mouth of the inlet would require deep cable burial at a non-technically feasible depth for the project, and would require additional regulatory review, making burial requirements in the inlet impracticable.¹⁷⁹ Moreover, the route would require in-water cable burial that transverses 5.8 miles of designated shellfish habitat.¹⁸⁰

Turning to the Kalwa Rebuttal, Kalwa reiterated that construction of the Preferred Route would follow typical utility-type construction methods such as HDD, a trenchless construction method that utilities typically use to cross waterbodies similar to Crook Horn Creek,¹⁸¹ and improvements that are routinely installed along public roads in “nearly every municipality in New Jersey.”¹⁸² He also explained that construction along the Preferred Route should have lower traffic impacts than the alternative routes.¹⁸³ Ocean Wind would also work with the County and local utilities to minimize impacts and issues during construction.¹⁸⁴ The Kalwa Rebuttal closed by noting that the area along the Preferred Route would be restored to its prior condition, with no visible impacts on the beach and only manhole covers to the vaults visible in the public ROW, once construction is completed.¹⁸⁵

The Urbish Rebuttal was filed to rebut the Lare Testimony. In the Urbish Rebuttal, Urbish contended that Ocean Wind’s communications and requests to the County were clear.¹⁸⁶ With respect to the September 28, 2021 Letter’s qualifying, “if required” language, the Urbish Rebuttal asserted the “County knew exactly what Ocean Wind requested, even if Ocean Wind later could

¹⁷⁶ Id.

¹⁷⁷ Id. at 11-12.

¹⁷⁸ Id. at 12.

¹⁷⁹ Id.

¹⁸⁰ Id.

¹⁸¹ Kalwa Rebuttal at 3.

¹⁸² Id.

¹⁸³ Id. at 3-4, 7-8.

¹⁸⁴ Id. at 7-11.

¹⁸⁵ Id. at 13.

¹⁸⁶ Urbish Rebuttal at 3-5.

potentially determine that certain requests may be unnecessary.”¹⁸⁷ Further, she claimed Ocean Wind offered to meet with the County multiple times to discuss the Project and its needs.¹⁸⁸ Ocean Wind also submitted Open Public Records Act (“OPRA”) requests to the County to confirm whether certain property was a public ROW, which Ms. Urbish claimed were not fully answered with the level of certainty needed to confirm its status.¹⁸⁹

Ocean Wind’s October 26 Reply Comments constituted the last of Ocean Wind’s filings. Ocean Wind pointed to the record to show that sufficient evidence exists that provide reasons for Ocean Wind’s Preferred Route selection.¹⁹⁰ To close, Ocean Wind stated that there is no reason to believe property values or tourism would be impacted in the long term because the on-shore property would be restored after construction.¹⁹¹

Ocean Wind provided a rebuttal during Oral Argument.¹⁹² First, in response to the County, Ocean Wind noted the Legislature had the power to enact the 2021 Amendment and supersede local objections to the Project.¹⁹³ Next, with respect to concerns over the route selection, Ocean Wind directed Parties to its filed testimonies and rebuttal testimonies, which Ocean Wind argued was sufficient to meet its burden of proof under the “reasonably necessary” standard with respect to the Preferred Route.¹⁹⁴ Last, with respect to ongoing environmental reviews that may elicit changes to the Project, or the potential future changes to road structures or bridges that may occur, Ocean Wind noted that those issues are speculative and should not alter the analysis and record before the Board.¹⁹⁵

DISCUSSION AND FINDINGS

The Board recognizes certain constituents in our State support OSW projects to promote clean energy development. The Board also recognizes that other constituents in our State oppose the Project due to potential visual, environmental, or business impacts. None of these issues, however, is the matter before the Board. Rather, the matter currently before the Board is narrowly limited to whether the Petition’s identified property interests and local government approvals are reasonably necessary for the construction or operation of the Project. The Board appreciates the participation of the Parties, Intervenors, Participants, and the general public in providing the robust record before us.

In this proceeding, the County filed a Motion to Dismiss and a Motion to Recuse. The President denied these motions in the September 28, 2022 Order. Many of the issues raised by the County, Ocean City, Rate Counsel, and the Nine Municipalities were addressed in that Order. Here, we adopt the findings and articulated rationale of the President, as presented in the September 28,

¹⁸⁷ Id. at 5.

¹⁸⁸ Id. at 5-6.

¹⁸⁹ Id. at 9.

¹⁹⁰ Ocean Wind’s October 26 Reply Comments at 4-6, 9-14.

¹⁹¹ Id. at 16.

¹⁹² Oral Argument Transcript at 70.

¹⁹³ Id. at 71.

¹⁹⁴ Id. at 74.

¹⁹⁵ Id.

2022 Order. To complement the President's Order on Motion to Dismiss and Motion to Recuse, and to create a complete record, we also address here the issues raised in opposition to the Petition.

Statutory Directive

We start by reviewing the statutory construct and defining the scope of the Board's examination.

Pursuant to the 2021 Amendment, an OSW developer may, after consultation with the affected local government entity, petition the Board to obtain property interests from local government entities and preempt local government approvals. The statute distinguishes between existing ROWs, N.J.S.A. 48:3-87.1(f)(1); real property interests, N.J.S.A. 48:3-87.1(f)(2); and local government approvals, N.J.S.A. 48:3-87.1(f)(3). If the Board finds the property interests and approvals are reasonably necessary for the construction or operation of the project, the successful petitioner must record the Board Order with the county recording officer and determine compensation for the property interest in Superior Court and any local government approvals are preempted or superseded. A petition seeking real property interests requires a written request to the affected local government entity 90 days prior to filing the petition. N.J.S.A. 48:3-87.1(f)(2).

Here, Petitioner requests a determination by the Board that Cape May County real property interests and local approvals are reasonably necessary for the Project.

a. The Eminent Domain Act and the 2021 Amendment

In the County's Opposition, the County argued that the Board must apply EDA procedures to this matter. Specifically, the County contended that the 2021 Amendment incorporates the EDA's pre-filing requirements under N.J.S.A. 20:3-6 (establishing that a condemner must present a proper appraisal, make an offer in writing, and hold *bona fide* negotiations with the condemnee before filing an action under the EDA). We reviewed the 2021 Amendment and find that a Petition does not need to comply with the EDA's pre-filing requirements. The President also dismissed this issue in his Order on the Motion to Dismiss and Motion to Recuse, which as stated before, we adopt and incorporate here.

We first look to the plain text of the 2021 Amendment and give the language its "ordinary meaning and significance." DiProspero v. Penn, 183 N.J. 477, 492 (2005). The Board understands that the EDA is recognized as a uniform procedural statute for condemnation actions. State v. 1 Howe St. Bay Head, LLC, 463 N.J. Super. 312, 340 (App. Div. 2020). However, for the first time since enactment of the EDA that we can surmise, the Legislature established a different process from the EDA for a QOWP through the 2021 Amendment.

The Legislature established a similar but separate process for QOWPs.¹⁹⁶ Rather than a condemnation action filed with the Superior Court under the EDA, the Legislature provided for review by the Board for a limited class of offshore wind projects seeking property interests from local government. The Board is guided by the EDA process in establishing its procedures under the 2021 Amendment. However, the Board is not bound by the EDA by the plain terms of the 2021 Amendment. The 2021 Amendment provides for a written request requirement for the necessary property interest with a 90-day waiting period before a developer (i.e., a potential petitioner) may file a petition for relief, have a public hearing held with respect to that petition, and

¹⁹⁶ The Legislature was clearly aware of the EDA process when it included reference to the EDA process in the 2021 Amendment for purposes of determining compensation. N.J.S.A. 48:3-87.1(f)(2).

receive a Board determination on that petition. If after such waiting period the petition is filed and approved, and the Board makes a determination on it, the successful petitioner shall record the Board Order articulating such determination with the appropriate county recording officer. N.J.S.A. 48:3-87.1(f)(2) (“[S]uch [Board Order] shall effectuate the [developer’s property interests] . . . and shall be recorded by the appropriate county recording officer at the request of the [developer]”). The successful petitioner will seek a compensation determination under the EDA in Superior Court, N.J.S.A. 48:3-87.1(f)(2), but that requirement is separate from the Board Order that “effectuate[s]” the property interests.

The Board does not interpret the limited reference to the EDA’s compensation determination provision to compel the application of other EDA requirements on the 2021 Amendment process. The 2021 Amendment provided its own pre-filing requirement, the 90-day written request requirement, and establishes a “reasonably necessary” standard for the Board’s review.

The Legislature was clearly aware of the EDA and its associated procedure, yet elected to provide a different process and different forum before the Board for this limited class, QOWPs. As to this limited class, the 2021 Amendment controls, and the Board has complied with its requirements. Tp. of Mahwah v. Bergen County Bd. of Taxation, 98 N.J. 268, 281 (1985) (“Every reasonable construction should be applied to avoid a finding of implied repealer.”); Chasin v. Montclair State Univ., 159 N.J. 418, 447 (1999), (holding, however a later expression of legislative intent clearly in conflict with an earlier statute on the same subject will control if legislative intent to supersede the earlier law is found).

To show that the Legislature knows how to incorporate EDA procedures when they are applicable, we note that the Board regularly reviews petitions by utilities seeking condemnation authority for utility routes pursuant to N.J.S.A. 48:3-17.6 and -17.7. Under such statutes, if the route receives Board approval, then the utility proceeds in accordance with the EDA to obtain property interests and determine compensation. The Legislature could have extended or provided a similar process for QOWPs seeking property interests from local governments; however, it chose not to do so. We therefore **HEREBY FIND** that there is no reason for us to assess whether Ocean Wind’s appraisal would have met the EDA’s bona fide negotiations requirement.

Having found that the 2021 Amendment does not incorporate the EDA pre-filing requirements, at least by its plain language, we address whether the EDA must be incorporated by necessity.¹⁹⁷ The County argued it must, because without the EDA procedures, the 2021 Amendment would be an “unconstitutional, arbitrary, and unreasonable delegation of legislative authority . . . [that] deprives the County of due process.”¹⁹⁸

In support of this argument, the County cited New Jersey Housing and Mortgage Finance Agency v. Moses, 215 N.J. Super. 318 (App. Div. 1987) and Juzek v. Hackensack Water Company, 48 N.J. 302 (1966). We find that neither case supports the County’s bold position. Instead, New Jersey Housing explains that a law granting condemnation powers must provide standards to protect against arbitrary action. 215 N.J. Super. at 327-28. Juzek, for its part, stands for the unremarkable principle that a condemnation proceeding must adhere to the requirements of due process. 48 N.J. at 314-15. We do not read either case to suggest the EDA is the only method that satisfies these rules. While the EDA is generally used to satisfy these requirements, 1 Howe

¹⁹⁷ The County did not raise this iteration of its EDA argument in its Motion to Dismiss.

¹⁹⁸ County’s Opposition at 24, 40-41.

St. Bay Head, 463 N.J. Super. at 340, the Legislature is not restricted to only using the EDA.

In this instance, the Legislature chose to develop a separate process for QOWPs through the 2021 Amendment.¹⁹⁹ The statute makes clear that an OSW developer has condemnation power to support its QOWP. That 2021 Amendment guards against arbitrary action by implementing the “reasonably necessary” standard, administered by the Board. While a Board proceeding under the 2021 Amendment must follow due process requirements, it need not employ the EDA procedures. The 2021 Amendment, after all, has its own pre-filing requirement, the 90-day written request requirement, which is analogous to the EDA’s bona fide negotiations requirement. As addressed later in this Order, this proceeding satisfies due process.

Before moving forward, we address a concern raised by the County, Ocean City, and the Nine Municipalities that the 2021 Amendment takes the decision-making process away from local elected officials. We understand the frustration; indeed, many of us on the Board have been elected officials. Local officials work hard for their constituents and will advocate for their local interests. But, as we explain in the next subsection, the Legislature passed the 2021 Amendment so that local interests could be balanced against state interests.

To be clear, the Legislature has the authority to enact a statute, like the 2021 Amendment, that permits the taking of local land. The law in the state has held as much since at least State Highway Commission v. Elizabeth, 102 N.J. Eq. 221 (N.J. Ch. 1928). There, the court noted that “All rights and powers of [local governments] are derived from the state and all its property is held subject to the inherent right of the state to appropriate it to public use whenever the public good may require it. The state gave and the state may take away.” Id. at 226. This holds true even when the land in question was being held for a prior public use. 1A Nichols on Eminent Domain § 2.17; Weekawken Twp. V. Erie R. Co., 20 N.J. 572, 579 (1956). This history shows that local land interests can be superseded when so directed by state lawmakers.

b. The 2021 Amendment’s Request Requirement

In their Opposition, the County argued that Ocean Wind did not satisfy the 2021 Amendment’s pre-filing requirement. The President dismissed this issue in his Order on the Motion to Dismiss and Motion to Recuse, which as stated before, we adopt. We reiterate the President’s following observations, comments, and findings.

The County argued that Ocean Wind’s September 28, 2021 Letter was not specific enough to satisfy the statutory requirement. Also, the County argued that the Property Owner Certificate Form proffered by Ocean Wind – which, if signed, would provide the County’s consent to Ocean Wind for it to conduct project activities on the identified site and submit permit applications to the NJDEP for review – likewise fails to meet the statutory requirement.

As noted above, the statute creates a distinction between existing rights of way, 48:3-87.1(f)(1), real property interests, 48:3-87.1(f)(2), and required local consents for permitting, 48:3-87.1(f)(3). For the OSW developer to supersede either real property interests or local consents, the Board

¹⁹⁹ To be clear, we find that the 2021 Amendment itself is not an unconstitutional delegation of power. New Jersey Housing notes that the Legislature may delegate its power only if appropriate standards are put in place to: (1) ensure the Legislature does not abdicate its political responsibility; (2) take advantage of agency expertise; (3) prevent the arbitrary use of agency discretion. 215 N.J. Super. at 326-27. The 2021 Amendment satisfies these requirements. A different finding would upend administrative law principles that have developed over the past fifty to one-hundred years.

must find that the identified properties and consents are reasonably necessary for the QOWP. However, only a petition regarding real property interests requires a 90-day written “request” to the applicable entity. N.J.S.A. 48:3-87.1(f)(2). To use existing rights of way or file a petition concerning local permitting consents, the OSW developer only needs a “consultation” with the appropriate governing body before moving forward. N.J.S.A. 48:3-87.1(f); *compare* 48:3-87.1(f)(2) (containing a 90-day written request requirement) *with* N.J.S.A. 48:3-87.1(f)(1) and 87.1(f)(3) (containing no 90-day written request requirement). The 2021 Amendment does not define “request” or “consultation.”

The County contended that the Constitution requires that these terms of the 2021 Amendment be construed in favor of local governments. We find that not to be the case. Further, the analysis below will help guide the interpretation of the 2021 Amendment.

The Constitution, Art. IV, Section VII, para. 11 states:

The provisions of this Constitution and of any law concerning municipal corporations formed for local government, or concerning counties, shall be liberally construed in their favor. The powers of counties and such municipal corporations shall include not only those granted in express terms but also those of necessary or fair implication, or incident to the powers expressly conferred, or essential thereto, and not inconsistent with or prohibited by this Constitution or by law.

First and foremost, the Constitutional provision does not apply if there is a clear intent to supersede local laws. In re Petition of Hackensack Water Co., 196 N.J. Super. 162, 169-70 (App. Div. 1984) (explaining that local powers can be superseded if the statute clearly provides it; explaining that in a similar statute, the Board can make a reasonably necessary finding to overcome municipal consents). When necessary to accomplish State policies and objectives, the authority of governmental subdivisions of the State may be abridged. Id. at 170. Here, the 2021 Amendment intended to supersede local consents to advance the public policy in favor of OSW development.

Additionally, the Legislature understood that local communities should have a say in the process. In this context, the Board’s power to make a “reasonably necessary” finding was designed to protect communities. Jersey Cent. Power & Light Co., 166 N.J. Super. at 545 (“[N.J.S.A. 48:3-17.7] requires advance approval by the PUC of any utility’s exercise of its power of condemnation. It was designed as protection against arbitrary exercise of a utility’s condemnation power; it empowers the PUC to prevent condemnation, not compel it.”).

This analysis is buttressed by understanding the role of the 2021 Amendment. OSW development concerns the state as a whole, not only local municipalities. Electricity, once on the grid, is distributed where needed throughout the State. Accordingly, the Project effectively impacts, relates to, pertains to, affects, and involves every county in New Jersey, not just the County alone. In this context, every New Jersey county, as well as the State, is necessarily “concerned” with both the Project and the outcome of the decision on the Petition.

The Board, therefore, weighs the need for the requested property interests. The balance, however, is not in the locality’s favor; the analysis recognizes that the greater public interest must be favored over the local interest. In re Public Service Electric & Gas Co., 35 N.J. 358, 376-77 (1961) (the BPU “must weigh all interests and factors in light of the entire factual picture and adjudicate the existence or non-existence of reasonable necessity therefrom” and “if the balance

is equal, the utility is entitled to the preference, because the legislative intent is clear that the broad public interest to be served is greater than local consideration.”).

Combining these principles – (1) advancing the policies of OSW development, and (2) providing local government a say in the process – the Board must ensure that the OSW developer is not arbitrarily abusing the powers the 2021 Amendment grants to it. The Board must also ensure that a local government cannot unreasonably impede or thwart efforts by the OSW developer to move forward with its QOWP. New York C. R. Co. v. Ridgefield, 84 N.J. Super. 85, 94 (App. Div. 1964) (explaining that a similar law was created to prevent local governments from impeding or “thwart[ing]” interests of the public good). These core purposes guide our interpretation of the 2021 Amendment.

When interpreting the statute, we must first look to the statutory language. Matter of Ridgefield Park Bd. of Educ., 244 N.J. 1, 18-19 (2020). If the language is clear, the interpretive analysis is at an end. If it is not, we can consider extrinsic materials to assist in the analysis. Id. Here, the plain language is not clear.

The County claimed “request” must be read to require a specific request. According to the County, the request must therefore be specific and cannot use any conditional language. The County explained that it should not be its burden to determine what is actually required for the QOWP.

We do not read the statute to require the type of specificity the County demands. Instead, we find that applying a reasonable request standard best satisfies the Legislature’s intent. As noted above, the 2021 Amendment seeks to ensure that the OSW developer is not abusing the powers that were granted to it by the statute. However, that power is balanced so that local government cannot unilaterally impede an important public policy project.

Under a reasonable request standard, the OSW developer must notify and explain that it is developing a project that implicates local land use interests. The request must also explain what these local land interests may be, ensuring that local governments have an opportunity to understand and discuss the project requirements. In this way, the request should work to open a dialogue between the OSW developer and the local interest. A local government may respond to the request by noting the property interests that are most important to its community or by presenting alternative solutions.

Within this framework, we agree with the County that the burden to identify the necessary property interests is on the OSW developer. However, the identified property interests need not be unconditional or set in stone. The request is always going to be conditional. It will be conditional on feedback from the local government; it will be conditional as the developer solidifies its plans. To hold otherwise – finding a request deficient because it uses an “if required” qualifier – would elevate form over substance. Ferreira v. Rancocas Orthopedic Assocs., 178 N.J. 144, 154 (2003) (explaining that a good rule must encourage parties to “act diligently”). However, the OSW developer must be reasonable and give the County a reasonable opportunity to understand the request. The OSW developer must identify actual property rights and consents, and it cannot ask for everything imaginable. It must be clear that the OSW developer has worked to narrow the scope of its request so that the local government can make an assessment.

The September 28, 2021 Letter identified one real property interest, which is repeated in the Petition. We find the September 28, 2021 Letter satisfies the requisite standard for the real property interest at stake, even though it employed conditional “if required” language. This notice contained sufficient specificity for the County to understand the request.

Turning to the identified consents, we find it necessary to note the different directives under the 2021 Amendment. State v. Courtney, 243 N.J. 77, 85 (2020) (“The statute’s plain language is the best indicator of legislative intent.”) (citation omitted). The Legislature only included the written request requirement for real property interests intentionally. Ge Solid State v. Director, Division of Taxation, 132 N.J. 298, 308 (1993) (“[W]here the Legislature has carefully employed a term in one place and excluded it in another, it should not be implied where excluded.”). Therefore, an offshore wind developer need only have a “consultation” before filing a petition with respect to consents.

We find that the Property Owner Certification Form comes under the consultation requirement of N.J.S.A. 48:3-87.1(f)(3) instead of the request requirement. The Property Owner Certification Form does not grant any real property interests. It is aimed at providing local consent to perform regulated activities and NJDEP reviews. Likewise, the other consents identified by the September 28, 2021 Letter do not fall under the request requirement. We find that the September 28, 2021 Letter identified and sufficiently explained the likely consents needed. Together, the September 28, 2021 Letter and the Property Owner Certification Form²⁰⁰ explained what consents Ocean Wind was requesting, which was sufficient to open the dialogue we envision with the reasonable request standard.²⁰¹

While we find that the term “request” coupled with the 90-day requirement expresses a more formal process than “consultation,”²⁰² we need not fully define the distinction. We find that the September 28, 2021 Letter satisfies the request requirement for the easement, and also satisfies the less formal consultation requirement for consents and approvals – even though the September 28, 2021 Letter used conditional language.

Due Process Issues

Over the course of this proceeding, the County, Rate Counsel, Ocean City, and the Nine Municipalities have requested further proceedings than those the Board has provided. We turn to these concerns and explain the procedure the Board has employed. These issues were also addressed in the September 28, 2022 Order in Docket No. QO22020041. We note that these concerns are largely related to Ocean Wind’s alternative route analysis.

Courts recognize that State agencies retain substantial discretion to set the processes before them. Texter v. Dep’t of Human Servs., 88 N.J. 376, 383 (1982) (“Administrative agencies have wide discretion in selecting the means to fulfill the duties that the Legislature delegated to them.”). State agencies are also expected to be “flexible” so that they can “respond to changing conditions.” Id. at 385. We further note that the Petition is the second petition to be filed under

²⁰⁰ While Ocean Wind should have presented more details to the County with its Property Owner Certification Form, we find it was sufficient for the purposes of the 2021 Amendment. Whether the Form would have satisfied DEP requirements, we need not address.

²⁰¹ We also note that the County contends a few of the consents should have instead been directed toward autonomous or semi-autonomous bodies. The County could have reasonably consulted with or directed any inquiry to those entities under its jurisdiction. However, should an autonomous body’s consent or approval be found outside the scope of this petition, Ocean Wind can file an expedited petition with the Board to resolve the issue.

²⁰² Compare request: the act of politely or officially asking for something, Cambridge Dictionary, available at <https://dictionary.cambridge.org/us/dictionary/english/request>, with consultation: a meeting to discuss something or to get advice, available at <https://dictionary.cambridge.org/us/dictionary/english/consultation>.

the 2021 Amendment. The Board has established a process that is guided by consideration of the EDA, public utility authorization of eminent domain pursuant to N.J.S.A. 48:3-17.7, and the review of municipal agency action affecting public utilities pursuant to the Municipal Land Use Law (“MLUL”) at N.J.S.A. 40:55D-19. The Board used these processes to inform the process to implement the 2021 Amendment.

The Board used its discretion to establish an appropriate procedure for the Petition. Under the EDA, discovery procedures are not routinely employed. State by Comm'r of Transp. v. Carroll, 123 N.J. 308, 320 (1991) (“[P]arties to a condemnation proceeding may not employ the normal discovery devices except by leave of court, implying that prelitigation ‘reasonable disclosure’ under N.J.S.A. 20:3-6 would ordinarily not be as extensive as discovery during litigation.”). Under the MLUL provision, where the Board is also tasked with making a “reasonably necessary” finding, the statute expressly requires the Board to hold an evidentiary hearing – an instruction not made by the 2021 Amendment. Here, the Legislature instructs the Board to provide a public hearing. The 2021 Amendment did not, however, define the procedures the Board should otherwise use to make its findings. The absence of such defined procedures means the Board has discretion to determine the procedures it, in its own discretion, deems appropriate. Lastly, under N.J.S.A. 48:3-17.7, the burden is on the property owner to explain how a proposed taking would cause it to suffer injury or harm. Norfolk Southern Ry. Co. v. Intermodal Props., L.L.C., 424 N.J. Super. 106, 128-129 (App. Div. 2012). Considering these items together, the Board finds that, similar to the EDA, there is a high bar that a Party would need to overcome to establish the need for detailed evidentiary proceedings, particularly when a petitioner under the 2021 Amendment is able to meet its burden to produce evidence that shows its request is “reasonably necessary,” and when the property owner of the land in question has an opportunity to show that it would be burdened by that petitioner’s request.

As stated earlier, even though the 2021 Amendment does not define the procedures needed for this proceeding, the Board proceeding is still “subject . . . to the due process clauses of the federal and local constitutions.” Port of New York Authority v. Heming, 34 N.J. 144, 154 (1961) (noting that the “power of eminent domain has long been recognized as a prerogative of the Legislature”); N.J.S.A. 52:14B-2 (establishing that a “contested case” is a proceeding where an agency hearing is required by statute or the constitution). In terms of due process, a person minimally has a right to be informed of the matter and a right to be heard. Brody v. Vill. of Port Chester, 434 F.3d 121, 129 (2d Cir. 2005). “The opportunity to present reasons, either in person or in writing, why proposed action should not be taken is a fundamental due process requirement.” Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 546 (1985). Due process requires parties to have an opportunity to respond to arguments and know opposing evidence. Silviera-Francisco v. Board of Educ. of City of Elizabeth, 224 N.J. 126, 141 (2016). Here, the Parties had notice of the proceeding, an opportunity to review Ocean Wind’s filing and testimony, and an opportunity to present testimony and arguments in response. In short, the Parties were informed, knew the opposing evidence, and were able to respond with their own evidence or arguments.

Notwithstanding the foregoing, in certain cases, further processes are required. Courts will apply the three-part test from Mathews v. Eldridge, 424 U.S. 319, 335 (1976) to evaluate the full extent of the required process. Brody, 434 F.3d at 133; High Horizons Dev. Co. v. State, 120 N.J. 40, 51-52 (1990); J.E. ex rel. G.E. v. State, 131 N.J. 552, 567-68 (noting discovery when addressing due process requirements). The three (3) Mathews factors are:

- (1) the private interest at stake;
- (2) the risk of erroneous deprivation of that interest through the use of agency procedures and the probable value of additional or substitute safeguards; and

- (3) the State interest, including the burdens entailed by additional procedural requirements.

While the County's property interests weigh heavily, the Board notes that the exercise of eminent domain and related procedures over property interests are itself a legislative function. Brody, 434 F.3d at 135. It is fair, then, to say that the Board's role is only to "patrol the borders" of the power the Legislature granted to Ocean Wind. Id. After all, the Board does this while recognizing that "the government clearly has a strong interest not only in completing projects necessary for public use, but in completing them in a timely and efficient manner." Id. at 136. Ocean Wind notes that timeliness is important so that it can meet construction and operation deadlines, some of which stem from the Board's earlier solicitation award.²⁰³

Taken together, the Board has to consider the risks of an erroneous deprivation of property interests and the marginal benefits that would be achieved as a result of additional procedures. Id. This conforms to the High Horizons standard, which states that it is the "presence of disputed adjudicative facts, not the vital interests at stake" that should drive the need for detailed fact-finding procedures. High Horizons Dev., 120 N.J. at 53.

Of course, "the mere existence of disputed facts is not conclusive." J.D. ex rel. D.D.H. v. New Jersey Div. of Developmental Disabilities, 329 N.J. Super. 516, 525 (App. Div. 2000). The disputed facts must be material. Id. Further, "bald allegations or naked conclusions" do not warrant further procedures either. Id. The Board notes that this analysis has been repeated, even when discussing whether a matter falls under the "contested case" rubric. Frank v. Ivy Club, 120 N.J. 73, 98 (1990) ("It is well-established that where no disputed issues of material fact exist, an administrative agency need not hold an evidential hearing in a contested case.")

This last point is important, because the County has argued that this case must be treated as a contested case under the New Jersey APA. There is a three-part test to determine whether a case is contested. Bd. of Educ. of Upper Freehold Reg'l Sch. Dist. v. State Health Benefits Comm'n, 314 N.J. Super. 486, 494 (App. Div. 1998). Each part of the test must be answered affirmatively. Id. First, whether a "hearing [is] required by statute or constitutional provision." Id. Second, whether the "hearing [would] result in an adjudication concerning rights, duties, obligations, privileges, benefits or other legal relations." Id. Third, whether the "hearing involve[s] specific parties rather than a large segment of the public." Id. The last two parts of the test appear to be satisfied here. The first part, however, asks whether a hearing is required by statute or the constitution. We have explained that it is not required by statute. The question is thus, whether constitutional due process requirements demand an evidentiary hearing.

We have shown that the analysis depends on whether there are material facts in dispute. We turn to that analysis. Given the Mathews factors, we find that a fact is material and disputed where the marginal benefit of additional procedures is sufficient to overcome the state's interest in completing public policy projects in a timely manner. We, the Board, must determine whether the facts before us are sufficiently robust to issue a ruling under the reasonably necessary standard.

Ocean Wind filed its Petition on May 20, 2022. While the Procedural Schedule did not provide for formal discovery, the Parties in this proceeding had an opportunity to review Ocean Wind's filings and respond with testimony and comments. Rate Counsel filed voluntary discovery on Ocean Wind. Ocean Wind largely responded to the questions Rate Counsel posed. Rate

²⁰³ In re the Board of Public Utilities Offshore Wind Solicitation for 1,100 MW – Evaluation of OSW Applications, BPU Docket No. QO18121289, Order dated June 21, 2019 ("June 21, 2019 Order").

Counsel later filed testimony and a set of comments. The County also filed testimony with its opposition.

Rate Counsel and the County contend that the Board should have provided formal opportunities to challenge Ocean Wind's testimony. The Board closely monitored the filings in this proceeding and did not find that formal discovery was needed. Rate Counsel's concerns were partly immaterial – such as cost of the proposed alternative routes – or were addressed by Ocean Wind to the Board's satisfaction. The County's opposing testimony challenged Ocean Wind's experts on a few issues, but we are satisfied that they were appropriately addressed by Ocean Wind's rebuttal testimony. Here, the Board finds that there would be little marginal benefit to further proceedings. To be clear, we could have and would have reopened the proceeding for a hearing if the record so demanded. In re Public Service Elec. and Gas Company's Rate Unbundling, Stranded Costs and Restructuring Filings, 330 N.J. Super. 65, 106 (App. Div. 2000) (“[A]dministrative agencies have the discretion to decide whether a case is to be classified as “contested” [and] whether to reopen a hearing to admit further evidence before the entry of a final decision”).

In its filed testimony and comments, Rate Counsel presented two (2) main concerns and asserted that further discovery would help the Board decide them. First, Rate Counsel claimed that cost information is needed to access whether the routes are reasonably necessary. As explained in the next section, the Board does not consider costs to be material for purposes of this proceeding. Second, Rate Counsel's expert contended that Ocean Wind did not provide a quantitative analysis to show that the preferred route would have the least environmental impacts of the studied alternative routes. Ostensibly, without this kind of analysis, Ocean Wind could not adequately explain why it chose its preferred route. On this point, we do not find that more detailed information is needed, and, in any event, formal discovery would likely not expose these details.²⁰⁴ We have reviewed the qualitative and quantitative analysis provided in the Kalwa, Patterson, and Kaplan testimonies, and we find them sufficient to meet the reasonably necessary standard.

The County, the Nine Municipalities, and Ocean City question the alternative route analysis and whether the Great Egg Harbor Route, or other alternatives – including the no route alternative²⁰⁵ –, could be used instead of the Preferred Route. As explained in the next section, the Board finds that Ocean Wind provided sufficient environmental and engineering evidence to show why it did not choose the alternative routes and why it chose to pursue to Preferred Route. The County's expert, when taking Ocean Wind's testimonies into consideration, did not produce any facts to seriously question that finding.

In sum, neither Rate Counsel nor the County have demonstrated that there is marginal benefit to undertaking further evidentiary procedures. The Petitioner has provided a satisfactory rationale for its selected, Preferred Route and has addressed various alternative routes. The Board finds that the Board's procedure sufficiently meets the High Horizons standard and balances the Mathews factors. As the risk of an erroneous deprivation is low, the procedural schedule the Board selected is appropriate.

²⁰⁴ Ocean Wind's alternative route analysis likely did not produce the level of quantitative details Rate Counsel demands.

²⁰⁵ The Board does not consider the no route alternative to be a viable option here. Ocean Wind is developing an OSW project and it must bring the electricity to the onshore grid.

Before moving forward, we address two (2) issues. First, Rate Counsel and the County contend that this proceeding should have been consolidated with Ocean Wind's petition concerning property interests in Ocean City. The Board has the discretion to join the cases or not, given the facts at hand. Mystic Isle Dev. Corp. v. Perskie & Nehmad, 142 N.J. 310, 322-23 (1995). Here, the Petition and the Ocean City petition were filed months apart. Parties in this proceeding had an opportunity to present their own evidence and arguments and were not deprived due process merely because similar arguments and facts were raised in an earlier proceeding.

Second, the County and other stakeholders suggest the Board should delay this proceeding – in whole or in part – in deference to environmental review. According to the County, it would be premature to grant the petition while environmental review is pending because the review could necessitate a change in the Project. We do not find this a cause for delay.²⁰⁶ As Ocean Wind has noted, NJDEP and federal environmental review will not proceed until Board action here. If future changes are required due to the environmental review, they can be addressed at that point.

Reasonably Necessary Analysis

We now turn to the core of the Board's analysis: whether the identified property interests and local consents are reasonably necessary for the Project. The analysis can be divided into three parts:

- (1) Whether an export cable to the B.L. England substation is reasonably necessary to operate the Project;
- (2) Whether the route for the export cable is reasonable; and
- (3) Whether the easements and consents sought are needed in order to construct the export cable following the proposed route.

Points (1) and (3) above are largely uncontested in this case. Notwithstanding this fact, the Board addresses each of these three (3) points below.

Turning to Point (2), which has been substantially challenged, if the Board is determining that the identified property interests are reasonably necessary given the Preferred Route, the Board must also determine whether this chosen route itself is reasonable. However, the Board is not tasked with determining whether the chosen, Preferred Route would be the one the Board would choose. See Borough of Glassboro v. Grossman, 457 N.J. Super. 416, 430 (App. Div. 2019) (explaining that a reviewing body must give deference to the condemners "determinations of necessity so long as it is 'reasonable'").

a. Defining "Reasonably Necessary"

The 2021 Amendment does not define the term "reasonably necessary." Therefore, the Board relies on its experience implementing N.J.S.A. 48:3-17.7 and N.J.S.A. 40:55D-19 as well as case law for guidance.

Case law explains that property interests and consents must be "reasonably, not absolutely or indispensably, necessary." In re Public Service Electric & Gas Co., 35 N.J. 358, 377 (1961),

²⁰⁶ The County also suggests we should delay until ongoing patent litigation is settled. We disagree. The trial court has granted Ocean Wind the permission to use the disputed turbine in its Project.

Borough of Glassboro, 457 N.J. Super. at 432.²⁰⁷ Further, the Board must look at the identified properties, given their unique characteristics, and “weigh all interests and factors in the light of the entire factual picture.” In re Public Service Electric & Gas Co., 35 N.J. at 377. This includes the presence of alternative sites, and their comparative advantages and disadvantages. Id.

In order to make this determination, the Board first turns to the evidence the proposed condemner has presented. Borough of Glassboro, 457 N.J. Super. at 436-37. This enables the current land owner to have an opportunity to present evidence that disproves a claim that the property interests and consents are reasonably necessary. Id. at 437.

The Board thus takes a holistic approach to the facts. Ocean Wind bears the burden of providing supporting evidence to show that the property interests and consents are reasonably necessary. The County and opposing stakeholders, on the other hand, bear the burden of providing evidence disproving that showing. This approach conforms with OWEDA’s purpose of advancing OSW goals while providing an affected local government the opportunity to review and participate in the process. In making its determination, the Board notes that the requested property interests and consents need not be indisputably necessary; rather, these property interests need only be reasonably necessary.

Further, the Board must respect Ocean Wind’s choices – for instance, regarding its route selection – so long as the selection is a reasonable one. This holds true even if the Board, in its own discretion, may have chosen differently. See Borough of Glassboro v. Grossman, 457 N.J. Super. at 430. Reasonableness can be established if the OSW developer uses a process and factors that are reasonable to select the property interests, and if the eventual selection reasonably follows from the analysis conducted in the application of such process and factors. See Id. at 432-33 (noting that the important issue is evidential, not substantive).

Before moving to the analysis, the Board considers whether cost is a material factor it needs in order to make its determination. Ocean Wind did not provide cost estimates for its alternative routes analysis and contends that cost estimates do not exist – at least for some of the alternative routes – because its route analysis focused on other factors.

Rate Counsel and the County contend that the Board needs to consider costs when conducting a detailed evaluation of cable routes as part of this proceeding. In In re Public Service Electric, the court explained that cost was a factor to be weighed when looking at the advantages of alternative site selections. 35 N.J. at 377. Substantively, Rate Counsel claims the costs could have an impact on ratepayer energy prices.

The Board notes that cost was an important factor in In re Public Service Electric because there, the costs would be included in a public utility’s rate base and would be passed on to consumers. Here, the costs of the cable route would not be passed on to consumers, beyond the already-approved OREC. Ocean Wind is not a public utility; it is compensated through the OREC mechanism. The Board previously approved the OREC for Ocean Wind. The OREC will not be adjusted based on the chosen transmission route, whether that route is the Preferred Route or any other route. To be clear, the cost for the export cable has no consequence for the Transmission System Upgrade Costs (“TSUC”) as described in the June 21, 2019 Board Order

²⁰⁷ The County is incorrect to suggest the reasonably necessary analysis requires a showing that the selected route is the only one that would work.

awarding the Ocean Wind Project.²⁰⁸ Therefore, the route selection has no impact on the TSUC, nor on the OREC price or ratepayer cost already approved. We also find that there is an insufficient nexus between future OREC prices and the route selection in this proceeding to require a cost analysis here.

In sum, this distinction minimizes the importance of costs in the Board's evaluation when compared to an evaluation under the type of proceeding in In re Public Service Electric.

To clarify, the Board is not finding that costs could never be a material factor in a determination. However, as explained below, the Board finds that the engineering and environmental considerations Ocean Wind provided are sufficient to show that the property interests and consents for the Preferred Route are reasonably necessary, irrespective of the cost differences between such route and any alternative route. The Board further finds no evidence that the Preferred Route was chosen primarily because it was the least expensive route or despite being a route that possesses an excessive cost.

b. The Board's Reasonably Necessary Findings

The temporary and permanent easements that Ocean Wind seeks under the Petition²⁰⁹ total 0.257 and 0.357 acres – approximately 30 ft in width – (respectively) and are intended for the purposes of construction, installation, operation, maintenance, and repair of a certain export cable and associated equipment, upon and across County Property.²¹⁰ The properties are identified on the Official Tax Map of Ocean City as Block 3350.01, Lot 17.01.

With respect to permitting consents, the Petition²¹¹ identifies the following NJDEP permit applications that require authority or consent from the County to proceed: A DLRP Multi-Permit Application; Waterfront Development; Coastal Area Facilities Review Act; Coastal Wetlands Permit; Freshwater Wetlands Protection Act, Transition Area Waiver; and Geotechnical Survey Investigation Permits. The Petition also identifies a Tidelands License, a Cape Atlantic Conservation District Erosion and Sediment Control Approval, and short-term and temporary permits for water withdrawal and grand water discharge. These permits and approvals are required for NJDEP to issue its federal consistency determination, which is a necessary step in BOEM's process for approval of the Project's Construction and Operations Plan. The Petition notes that, once construction is underway, additional NJDEP permits or approvals may be required.

With respect to Point (1), as explained in the introduction to this section, it is self-evident that the power generated at the wind farm Project site needs to be exported to a POI onshore. Therefore, the determination on this issue depends on whether Ocean Wind's selection of B.L. England as the POI is reasonable. Rate Counsel's expert and filed comment note that it lacks the specific cost data to validate such selection. However, the Kaplan Rebuttal testimony specifically

²⁰⁸ June 21, 2019 Board Order, supra note 203.

²⁰⁹ Petition at 5, 11.

²¹⁰ The Board understands that there is debate as to whether the identified property is within a public right-of-way. We also understand that Ocean Wind cannot make a determination on the matter at this time, because it may involve issues outside the scope of this proceeding. For purposes of this proceeding, we assume that it is not within a public right-of-way.

²¹¹ Petition at 5, 12-13.

references the cost of interconnection at the B.L. England substation, noting such cost would be around \$59 million and the costs at an alternative POI, Higbee, would be around \$273 million.²¹² The record further contains evidence that the PJM Interconnection Service Agreement²¹³ has been executed, which makes detailed cost estimates of interconnection at B.L. England available in the public domain, which confirm the Kaplan Rebuttal estimate.²¹⁴

Ocean Wind selected the POI at B.L. England based on cost and the lower impacts on cultural resources and overburdened community.²¹⁵ With the limited opposition from Rate Counsel, which Ocean Wind addressed, the Board finds that these factors provide a sufficient basis for Ocean Wind's choice of locating the POI at B.L. England to be considered reasonable.

Turning to Point (2), the cable route that Ocean Wind selects does not have to be the best route available. In fact, designation of "best" is highly subjective insofar as it depends on how different resources and disturbances are valued relative to each other. The record shows that Ocean Wind has considered a broad range of interests. Ocean Wind's eventual selection of the Preferred Route follows from those considerations. The evidence can be summed up by quoting the Patterson Testimony:

"Compared to the potential alternatives, the Preferred Route is technically feasible, and has the least impacts to natural resources, including wetlands and water bodies, and residential and historic properties."²¹⁶

The Board finds that, from an environmental perspective, the choice of the Preferred Route, one that predominantly follows previously disturbed property and an already-established ROW, is reasonable, particularly when compared with alternative routes that would create more extensive environmental disturbances. The technical feasibility comparison similarly indicates the choice for the Preferred Route to be a reasonable one, as this route avoids challenges associated with the alternative routes. Finally, the Board is satisfied that minimizing the impact on commercial interests and limiting road disturbance by choosing a route with less linear distance relative to other routes is reasonable. Ocean Wind will also work to minimize disturbances during the tourist season, and they will restore the land to its prior condition because the cables will be underground.

We address issues raised concerning the route selection below. We appreciate input from the County and stakeholders, but find that Ocean Wind has met its burden to show that the route is reasonable.

Finally, with respect to Point (3), the Board has reviewed the easements and local government consent preemption sought under the Petition. The Board finds that, given the selection of the

²¹² Kaplan Rebuttal at 5.

²¹³ The Interconnection Service Agreement is an agreement between PJM, the Interconnected Transmission Owner, and the party requesting interconnection, specifying the technical upgrades needed for a generating unit to interconnect while maintaining PJM's standards for safety, reliability and operability of the grid, and cost estimates for these upgrades.

²¹⁴ Interconnection Service Agreement for PJM queue position AE-104, https://www.pjm.com/pub/planning/project-queues/isa/ae1_104_isa.pdf.

²¹⁵ Patterson Testimony at 4-5.

²¹⁶ Patterson Testimony at 12.

Preferred Route, these easements and consent preemption are reasonably necessary. Again, the Board notes that whether the easements, consents and approvals are reasonably necessary given the proposed route, is largely uncontested.²¹⁷ The Board understands that, given the County's opposition to the Project, there is no expectation that the County would provide easements, consents, and approvals voluntarily.

c. **Issues Raised Concerning the Selected Cable Route**

The County and Rate Counsel contend that Ocean Wind did not provide enough information to substantiate their route analysis. For example, the County, through its expert, claimed that the analysis did not adequately account for the long-term implications of building a route; such as whether future road or utility work would be limited. The County also questioned how construction and maintenance would affect traffic and utility mains in the area.

Ocean Wind addressed these concerns. The Kalwa Rebuttal noted that construction along the preferred route would be coordinated with the County to minimize traffic impacts, which should be lower for the Preferred Route than many alternatives.²¹⁸ He also explained that Ocean Wind was implementing a plan to accommodate or alter existing utility lines.²¹⁹ As for the potential of future road or utility work, Ocean Wind asserted that those issues are speculative, and we agree.

The County also raised concerns about whether other routes were adequately explored. According to the County, a route without resident impacts should be preferred over one that does have resident impacts. The County specifically offered the Great Egg Harbor Route, and a hybrid Sea Isle City Route as alternatives. Similarly, the County asserts Ocean Wind erred by not expressly including local opposition to the Project in the alternative route analysis.

The Patterson Rebuttal answered these concerns. Patterson noted that the Sea Isle City route would need an offshore cable that crosses borrow, fishing, and crab reserve areas.²²⁰ Onshore, the Sea Isle City route, whether hybrid or not, would be longer and create its own set of regulatory and engineering constraints. The route would either cross streams and groundwater contamination areas, or it would need to develop a utility right-of-way along the historic Garden State Parkway.²²¹

With respect to the Great Egg Harbor Route, Patterson explained the various issues surrounding the offshore cable route.²²² In particular, there are specific constructability issues associated with the shifting sediments and shallow water depths of the Great Egg Harbor Inlet, it also conflicts with navigational use, conflicts with an existing USACE borrow area, has significant environmental impacts associated with cable burial through 5.8 miles of designated shellfish habitat, and presents the necessity for more environmentally intrusive technology because of the characteristics of the estuary.

²¹⁷ Whether Ocean Wind met the written request and consultation requirement set forth in the 2021 Amendment is an issue addressed separately.

²¹⁸ Kalwa Testimony at 7-8.

²¹⁹ Id. at 10-11.

²²⁰ Patterson Rebuttal at 7-9; Patterson Testimony at 11-12.

²²¹ Patterson Rebuttal at 7-9.

²²² Patterson Rebuttal at 11-12; Patterson Testimony at 10-11.

These issues are important to emphasize because the Great Egg Harbor Route was not only mentioned by the County, but it was put forward as the better alternative by Ocean City and the Nine Municipalities. This is understandable because the Great Egg Harbor Route would have lower impacts on local residences. However, the route analysis must be all inclusive. We find that Ms. Patterson said it well, “While the Preferred Route may have greater indirect impacts on adjacent residences than the Great Egg Harbor Route, the increased potential for direct impacts on [resources], as well as engineering constraints” made this alternative route less practical and more impactful.²²³ We find Ocean Wind’s analysis reasonable and thorough, and we find no cause to disapprove of their route choice.

Relatedly, Ocean City made the point that Ocean Wind could have overcome the challenges the Great Egg Harbor Route presents because the Project is overcoming similar challenges in its other export cable route with respect to the Oyster Creek POI. However, the Oyster Creek Route and the Great Egg Harbor Route are two unique routes, and they each have their own set of factors and competing alternative routes. The Board does not need to make a direct comparison between these routes. Regardless of whether the proposed Great Egg Harbor Route is comparable to any other cable route, the Board does not need to determine if the Preferred Route is “the best” route.

The question before the Board is whether Ocean Wind showed that its proposed route was reasonably necessary, and it did so with respect to the Preferred Route. The question before the Board is not whether the Great Egg Harbor Route or another alternative is viable. Rather, the question is whether the Preferred Route is a reasonable route, and, as such, whether the property interests associated with this Preferred Route are reasonably necessary. Ocean Wind has demonstrated that its requested property interests for the Preferred Route, in fact, are reasonably necessary.

CONCLUSIONS AND FINDINGS

The Board **HEREBY FINDS** that Ocean Wind satisfied the requirement to provide a written request to the County regarding the real property interests for the identified parcels more than 90 days prior to the filing of the Petition. Ocean Wind also satisfied the consultation requirement for the identified consents.

After review of the record, the Board **HEREBY GRANTS** Ocean Wind’s Petition. The Board **HEREBY FINDS** that the requested property interests and consent preemption are reasonably necessary for construction and operation of Ocean Wind’s QOWP, the Ocean Wind I Project. The Board **HEREBY FINDS** that an electricity export cable from the Project to the B.L. England substation is reasonably necessary to operate the Project. The Board **HEREBY FINDS** that the proposed cable route, referred to as the “Preferred Route,” is reasonably necessary for the construction or operation of the Project.

The Board **HEREBY DIRECTS** Ocean Wind to prepare a proposed form of Order reflecting this Board Order for recording with the County Clerk. The Board **HEREBY FURTHER DIRECTS** Ocean Wind to submit such item to the Board President for review and approval. Ocean Wind shall submit the approved Order to the Cape May County recording officer for recording as required by the 2021 Amendment.

²²³ Patterson Rebuttal at 6.

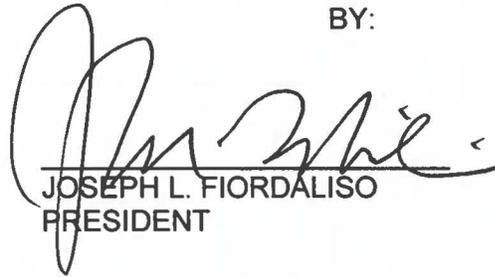
We also close the loop on the Nine Municipalities and their motion for reconsideration. The Board **HEREBY FINDS** that the Nine Municipalities did not present any information to suggest they have interests that warrant party status. We note, however, that the Nine Municipalities filed opposition and presented at Oral Argument. Their substantive arguments, which align with the County's, have been addressed in this Board Order.

With this Order, the Board **HEREBY RATIFIES** the Orders issued by the President while Presiding Commissioner.

The effective date of this Order is February 24, 2023.

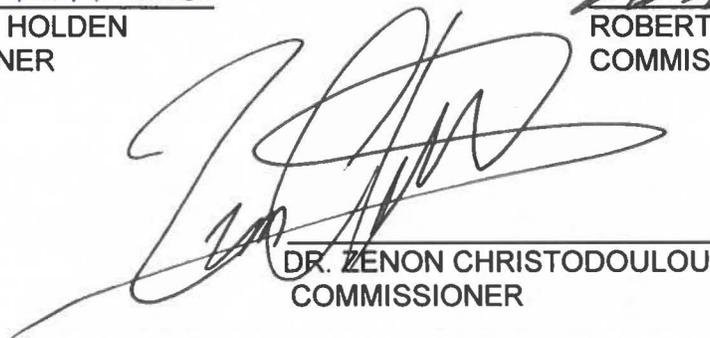
DATED: February 17, 2023

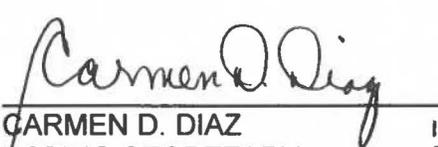
BOARD OF PUBLIC UTILITIES
BY:

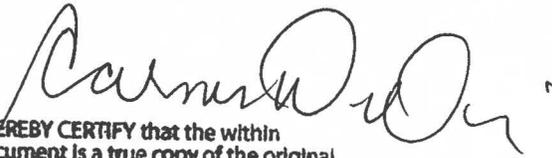

JOSEPH L. FIORDALISO
PRESIDENT


MARY-ANNA HOLDEN
COMMISSIONER


ROBERT M. GORDON
COMMISSIONER


DR. ZENON CHRISTODOULOU
COMMISSIONER

ATTEST: 
CARMEN D. DIAZ
ACTING SECRETARY


I HEREBY CERTIFY that the within document is a true copy of the original in the files of the Board of Public Utilities.

FINAL VOTE ON AGENDA ITEM 8C, February 17, 2023

Commissioner Holden	Yes	
Commissioner Solomon		No
Commissioner Gordon	Yes	
Commissioner Christodoulou	Yes	
President Fiordaliso	Yes	

Commissioner Dianne Solomon Dissent

The legislation giving the Board authority to act in the stead of local municipalities in this and the Ocean City matter confers upon us the obligation to see that a full, complete and transparent record is developed. I appreciate that as we move forward in our energy transition we need to move swiftly and remove hurdles that impede progress however this petition and the Ocean City petition are the first of its kind and we should be as diligent in our review of this infrastructure project as we would of any other.

Clearly, this is a contentious if not contested matter and frankly I agree with Rate Counsel that the Board would have been better served if it had referred these matters to the ALJ to develop the record. In hindsight, I also believe we erred in our decision in the Ocean City matter. I agree with Rate Counsel that the record is lacking for us to determine if the preferred route is reasonably necessary and I further agree that we are entitled to information regarding the cost of the route.

Given the situation in which we find ourselves under the legislation passed, we should be seeking more information not less.

By voting no, I am not expressing opposition to the petition. Rather I am objecting to the procedures in bringing this petition to a Board vote today.

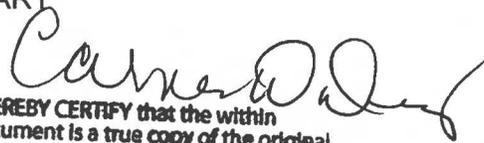


**DIANNE SOLOMON
COMMISSIONER**

Date: February 17, 2023

ATTEST: 

**CARMEN D. DIAZ
ACTING SECRETARY**



**I HEREBY CERTIFY that the within
document is a true copy of the original
in the files of the 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

DOCKET NO. QO22050347

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