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March 20, 2023

Via Electronic Filing Only

Sherri Golden, Secretary
New Jersey Board of Public Utilities
44 South Clinton Avenue, First Floor
P.O. Box 350
Trenton, New Jersey 08625

**Re: In the Matter of the Petition of Ocean Wind, LLC Pursuant to N.J.S.A. 48:3-87.1(f) for a Determination that 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
Appellate Docket No. A-000789-22T1**

Dear Secretary Golden:

Please accept this correspondence in lieu of a more formal submission on behalf of the New Jersey Division of Rate Counsel (“Rate Counsel”) in response to the opposition (“Opposition”) filed by Ocean Wind, LLC (“Ocean Wind”) to our Motion to Settle the Record (“Motion”).

Rate Counsel is not disputing that informal written discovery was served on and responded to by Ocean Wind. However, these documents, specifically Items Eight and Ten in the Statement of Items, were not on file with the New Jersey Board of Public Utilities (“Board”), which is the standard for including items in the record on appeal as recognized by Ocean Wind in its Opposition. See R. 2:5-4(a) and Opposition at 2-3. In its Opposition to Rate Counsel’s

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Motion, Ocean Wind asks the Board to not only ignore its own precedent in the treatment of discovery, but also to abandon the basic foundations of the Rules of Evidence. Not all discovery is admissible evidence. This basic understanding of discovery and evidence is assumed in the Uniform Administrative Procedure Rules which states “[i]t is not ground for denial of a request for discovery that the information to be produced may be inadmissible in evidence if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.” N.J.A.C. 1:1-10.1(b) (emphasis added). Here, Ocean Wind is essentially asking the Board to abandon this basic tenet of the discovery process in favor of a precedent that would have all discovery be considered “on file” with the Board and therefore part of the record for purposes of Ocean City’s appeal. Not only would this undermine basic fairness in the administrative process, it would have serious ramifications for the exchange of discovery in all other matters currently pending before the Board, as well as, what is considered a document for purposes of the Open Public Records Act.

Contrary to Ocean Wind’s assertion that Items Eight and Ten are part of the Statement of Items because the parties were aware of them and they were referred to in written testimony and the Board’s Order, Rate Counsel reiterates that this does not mean that the documents are automatically part of the record in this matter. They were not introduced into the record, and therefore are not evidentiary material that should be included in the Statement of Items to be considered on appeal. Ocean Wind cites to the Board’s decision in In re Public Serv. Elec. & Gas Co., BPU Docket Nos. ER91111698J and GR91101574J WL 210681 (March 27, 1996), in further support of its position. That matter, however, does not support Ocean Wind’s position. In that matter, the Board found that, although the documents at issue were submitted to the

administrative law judge (“ALJ”) and were therefore a part of the Office of Administrative Law and Board case files, it did not necessarily follow that it was a part of the evidentiary record. The Board noted that the discovery response was discussed at some length during a deposition, but “neither marked nor entered into the record of the referenced deposition.” Nonetheless, the Board noted that the discovery response, unlike in this matter, was filed with the ALJ and therefore “a part of the OAL and Board case files.” However, the Board made clear that the document in question was not part of the evidentiary record. Id. at 4. This holding contradicts Ocean Wind’s position in this case that “the Board considered [the informal discovery responses] in rendering its Order.”

Even if In re Public Serv. Elec. & Gas Co. was applicable, this decision was clearly superseded by the Board’s decision in In re the Long Term Capacity Agreement Pilot Program (“LCAPP”), BPU Docket. No. EO11010026 (November 9, 2011). Ocean Wind’s claims that the order only concerned the inclusion of certain items that were subject to privilege, contradicts the plain language of the Order, which states all documents requested for discovery were excluded. The Order dealt with all discovery issues, not solely privilege issues. Ocean Wind is merely attempting to distract the Board from following its own standard on what constitutes the filing of a document and therefore being considered as part of the record within the meaning of Rule 2:5-4. Nonetheless, the Board’s policy on this issue is well-established — only items that are formally on file with the Board are included in the Statement of Items. See In re LCAPP, BPU Dkt. No. EO11010026 (Nov. 9, 2011) at 7. In fact, as Rate Counsel previously pointed out in its motion, the Board made it a point to explain when a document is considered filed or merely

received for purposes of Rule 2:5-4(a). Id. at n.13 (noting that when a document is received by the Board it is not deemed considered).

In addition, while N.J.A.C. 1:1-1.2 indicates that “all documents” presented comprise a record, Ocean Wind neglects to point out that the rule specifically references those documents presented “before, during and after the hearing and accepted by the judge for consideration in the rendering of a decision.” N.J.A.C. 1:1-2.1(emphasis added). In this matter, the Board chose not to hold evidentiary hearings where a Commissioner or Administrative Law Judge could formally preside and accept documents as evidence into the record for the Board’s consideration in rendering its decision.

Once again, Rate Counsel reiterates that Items Eight and Ten were not properly in the record before the Board and should not be included in the Statement of Items on appeal. As these documents were not filed with the Board or properly moved into the record, they should be removed from the Statement of Items.

Respectfully Submitted,

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BY: */s/ T. David Wand*
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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 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
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