

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 Dkt. No. QO22020041

Appellate Division Docket No. A-000789-22T1

Ocean Wind LLC's Opposition to the City of Ocean City's Motion for a Stay

Petitioner Ocean Wind LLC ("Ocean Wind") submits this opposition to the City of Ocean City's ("Ocean City") April 3, 2023 Motion for a Stay (the "Motion") of the Board of Public Utilities (the "Board" or "BPU") Orders dated September 28, 2022 and November 2, 2022 pending appeal. In making this request, Ocean City fails to cite any legal authority to satisfy the requirements for the extraordinary equitable remedy to stay an administrative order. Even applying the correct standards and well-settled legal authority, Ocean City's Motion falls well below the burden to justify a stay. For the following reasons, the Board should deny Ocean City's Motion.

Background

On February 2, 2022, Ocean Wind filed a Petition with the Board, seeking the determination that certain easements across Green Acres-designated properties owned by Ocean City and certain municipal consents needed for environmental permits in, and with respect to Ocean City, are reasonably necessary for the construction of Ocean Wind's Qualified Offshore Wind Project (the "Project"). This Petition was filed pursuant to N.J.S.A. 48:3-87.1(f) and was accompanied by supportive testimony on behalf of Ocean Wind. After further proceedings, including public hearings, a settlement conference, the filing of written testimony and/or

comments by Ocean City, the Division of Rate Counsel, Ocean Wind, and members of the public, and oral argument, the Board issued an Order on September 28, 2022 granting Ocean Wind's Petition. The Board issued a subsequent Order on November 2, 2022 on the taking of the requested easements by Ocean Wind. On November 11, 2022, Ocean City filed a Notice of Appeal to the Appellate Division, challenging the Board's Orders. Motion, Ex. B.

Now, more than four months after filing its appeal, Ocean City has filed a Motion requesting the Board stay its Orders pending the outcome of the appeal pursuant to Rule 2:9-7. Motion, p. 4. Ocean City's Motion fails to cite any legal authority or the applicable standard governing motions for a stay. Ocean City appears to rely on Petitioner's submission of a road opening permit application to conduct environmental investigation as the dubious basis for requesting a stay pending appeal. Motion, p. 3. Ocean City also claims that Ocean Wind will conduct "unnecessary environmental investigation and testing" and make "unnecessary expenditures" in the event the Appellate Division remands this matter for further proceedings before the Board. Motion, p. 4. But Ocean Wind's legally supported right to obtain a road opening permit and the expenditures it will incur in the process cannot justify the extraordinary remedy Ocean City seeks in the Motion. As discussed in more detail below, Ocean City fails to carry its burden to warrant a stay of the Board's Orders. Neither the road opening permit nor Ocean Wind's own expenditures provide any basis for the Board to stay its Orders. Accordingly, Ocean City's Motion should be denied.

Relevant Legal Standards

In considering Ocean City's Motion, "the Board [should be] mindful that a stay pending appeal is an extraordinary equitable remedy" and an "exception rather than the rule." *In re Atlantic City Electric Company*, Docket No. EO06040315, 2006 WL 1409558 (BPU May 23, 2006) (citing

GTE Corp. v. Williams, 731 F.2d 676, 678 (10th Cir. 1984); *United States v. Key Oil Co., Inc.*, 460 F. Supp. 878 (D.N.J. 1978)). “[T]he party seeking such relief must clearly carry the burden of persuasion as to all of the prerequisites.” *I/M/O the Alleged Failure of Altice USA, Inc. to Comply with Certain Provisions of the New Jersey Cable Television Act*, N.J.S.A. 48:5A-1 et seq. and the *New Jersey Administrative Code*, N.J.A.C. 14:18-1.1 et seq. (hereinafter *I/M/O Altice USA, Inc.*), Docket No. CS18121288, 2019 WL 7494716 (BPU Dec. 20, 2019) (citing *U.S. v. Lambert*, 695 F.2d 536, 539 (11th Cir. 1983)). These prerequisites for a stay are as follows:

A party seeking a stay must demonstrate that (1) relief is needed to prevent irreparable harm; (2) the applicant’s claim rests on settled law and has a reasonable probability of succeeding on the merits; and (3) balancing the relative hardships to the parties reveals that a greater harm would occur if a stay is not granted than if it were. . . . When a case presents an issue of significant public importance, a court must consider the public interest in addition to the traditional *Crowe* factors.

Garden State Equality v. Dow, 216 N.J. 314, 320 (2013) (citing *McNeil v. Legis. Apportionment Comm’n*, 176 N.J. 484, 486 (2003); *Crowe v. De Gioia*, 90 N.J. 126, 132-34 (1982)). “The moving party has the burden to prove each of the *Crowe* factors by clear and convincing evidence.” *Id.*; see also *I/M/O Altice USA, Inc.*, 2019 WL 7494716 (“The factors cited above must be clearly and convincingly demonstrated.”).

Moreover, the remedy of a stay “is not a matter of right, even if irreparable harm may otherwise result.” *In re Atlantic City Electric Company*, 2006 WL 1409558 (citing *Yakus v. United States*, 321 U.S. 414 (1944)). Rather, granting a stay “requires an exercise of sound judicial discretion; the propriety of its issue is dependent upon the entire circumstances of a particular case, and ‘consideration of justice, equity and morality.’” *I/M/O Altice USA, Inc.*, 2019 WL 7494716 (citing *Virginian Ry. Co. v. United States*, 272 U.S. 658, 672-73 (1926)); see also *Coskey’s Television & Radio Sales & Serv., Inc. v. Foti*, 253 N.J. Super. 626, 639 (App. Div. 1992) (describing a preliminary injunction, which is evaluated under the same standard as a stay, as “an

extraordinary equitable remedy, utilized primarily to forbid or prevent irreparable injury, and it must be administered with sound discretion”).

Argument

Ocean City did not cite to any legal authority in its Motion to Stay, and therefore failed to satisfy its burden for establishing the *Crowe* prerequisites to justify a stay pending appeal. As the movant, it is Ocean City’s burden to satisfy each factor by “clear and convincing evidence.” *Garden State Equality*, 216 N.J. at 320. Even if Ocean City had attempted to satisfy its burden of persuasion by applying the correct and well-settled legal standard, it would be unable to satisfy the demanding burden for an extraordinary equitable remedy. *See In re Atlantic City Electric Company*, 2006 WL 1409558.

A. Ocean City Cannot Establish Irreparable Harm

Irreparable harm requires “a showing of immediate and irreparable injury”—“mere injuries, however substantial, in terms of money, time and energy necessarily expended in the absence of a stay, are not enough.” *Zoning Bd. of Adjustment of Sparta Twp. v. Serv. Elec. Cable Television of N.J., Inc.*, 198 N.J. Super. 370, 381-82 (App. Div. 1985) (citing *Virginia Petroleum Job Ass’n v. Federal Power Comm’n*, 259 F.2d 921, 925 (D.C. Cir. 1958)).

Ocean City has made no attempt to show any harm, much less irreparable harm, to justify a stay pending appeal. Ocean City references that Ocean Wind has submitted a road opening permit application to the Ocean City Engineering Department as provided for pursuant to N.J.S.A. 48:3-87.1(f), for the purposes of conducting environmental investigation borings and utility test pits. Motion, p. 3. This road opening permit application is completely separate from the issues on appeal and the applicable Board Orders. The Project has authority to site its facilities within the public road right-of-way under N.J.S.A. 48:3-87.1(f)(1), and the statute only requires that the

Project consult with the municipality, which Ocean Wind has done multiple times. Therefore, the permit application is not premature because the Project has authority to seek a road opening permit under the statute. Furthermore, this road opening permit is unrelated to the appeal of the BPU Orders and the process to acquire the necessary easements.

Ocean City's Motion claims that "[a] stay by the BPU will not only protect Ocean City from Petitioner's unnecessary environmental investigation, but a stay will also prevent Petitioner from unnecessary expenditures in the event the Appellate Division remands this matter for additional hearings." Motion, p. 4. To be clear, Ocean City is claiming that a stay is warranted because *Ocean Wind* will undergo "unnecessary expenditures." It should be obvious that a party moving for a stay pending appeal must show irreparable harm to itself as the moving party. Even so, the expenditure of time and money is insufficient to satisfy the demanding standard for a stay. *Zoning Bd. of Adjustment of Sparta Twp.*, 198 N.J. Super. at 381-82.

Ocean Wind's application for a road opening permit and the associated environmental work are not valid bases to justify a stay. The road opening permit is completely unrelated and independent of the issues on appeal and the Board Orders, and the only party impacted by the expenditure of time and money in connection with the environmental work is Ocean Wind—the nonmoving party. Ocean City has failed to demonstrate irreparable harm, and importantly Ocean Wind cannot establish any irreparable harm to satisfy its burden for this extraordinary equitable remedy.

B. Ocean City Cannot Establish a Likelihood of Success on the Merits

A likelihood of success on the merits requires Ocean City to demonstrate that the "underlying legal claim is settled" and that it has "a reasonable probability" of succeeding on appeal. *Garden State Equality*, 216 N.J. at 325 (citing *Crowe*, 90 N.J. at 133). Again, Ocean City

makes no attempt to establish by clear and convincing evidence that it will succeed on the merits of the appeal. The record provides sufficient evidence to support the BPU's conclusions that the easements and N.J. Department of Environmental Protection permit applications are reasonably necessary, and Ocean City's Motion has made no argument to the contrary. Any argument concerning the BPU's process or the nature of the underlying statute is either a "rehashing of arguments raised in earlier" proceedings or are not based on a legal right that "is well settled." *See In re Jersey Central Power & Light Company*, Docket No. EE95080349, 1996 WL 453911, at *3 (BPU Aug. 1, 1996).

Moreover, Ocean City's Motion mischaracterizes the governing standard under the statute. The BPU need only determine if the Preferred Route is a "reasonable" one, not the best route and not whether the Preferred Route is "reasonably necessary." N.J.S.A. 48:3-87.1.¹ Ocean City's inability to articulate the correct standard before the Board on the very issue that is relevant to its appeal undermines and negates any argument concerning its probability of success on appeal. Ocean City's rehashing of arguments or recharacterization of the standard does not come close to meeting its burden to provide objective support in the form of applicable well-settled law upon which the Board may conclude that Ocean City is likely to prevail on appeal. Therefore, Ocean City cannot demonstrate a reasonable probability of success on the merits to justify a stay.

C. Balancing the Equities and the Public Interest Favor Denial of a Stay

Granting a stay requires establishing that, on balance, the relative hardships of the parties favor a stay. *Garden State Equality*, 216 N.J. at 327 (citing *Crowe*, 90 N.J. at 134). Additionally, the public interest is relevant in considering whether a stay is justified. *Id.* at 329 (citing *McNeil*, 176 N.J. at 484). Ocean City's Motion does not identify *any* hardships and does not engage in the

¹ September 28, 2022 Order at 24 ("Rather, the question before the Board is whether the Preferred Route is a reasonable route, and, as such, whether the property interests associated with this Preferred Route are reasonably necessary.").

necessary balancing of equities to justify a stay. Ocean City's Motion also fails to identify any public interest to support a stay. Again, Ocean City has failed to satisfy its burden in making its Motion.

In applying the correct standard for a stay, a balancing of the equities and the public interest favors the denial of a stay. As the Board's September 28, 2022 Order explains, Ocean Wind filed its Petition in order to obtain necessary property interests and municipal approvals for the Project to proceed and meet its expected timeline to deliver clean energy to the State of New Jersey. Order at 17. This is important as "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.* (quoting *Brody v. Village of Port Chester*, 434 F.3d 121, 136 (2d Cir. 2005)). Ocean Wind established that "timeliness is important so that it can meet construction and operation deadlines, some of which stem from the Board's earlier solicitation award." *Id.* (citing *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). Moving forward with the Project while this matter is on appeal is not only legally justified but is in the public interest. The only potential hardship if the Appellate Division remands for further proceedings before the Board would be borne by Ocean Wind. Therefore, the balancing of the equities and public interest do not support a stay.

Conclusion

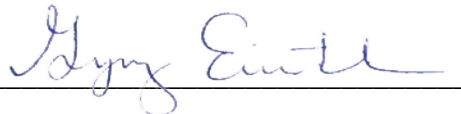
Ocean City has not made the necessary showing for the extraordinary remedy of a stay. Its brief does not cite the applicable and well-established legal standard or apply this standard to the facts at hand. As the moving party, Ocean City bore the burden of supporting its request for a stay. *See R.* 2:9-7. A stay is an extraordinary equitable remedy, and a weighing of the *Crowe* factors

does not support such relief here. Ocean City cannot show irreparable harm, a likelihood of success on the merits, or that the balance of hardships and public interest support a stay. For the foregoing reasons, the Board should deny Ocean City's Motion.

Respectfully submitted,

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