



Agenda Date: 5/24/23  
Agenda Item: 8E

**STATE OF NEW JERSEY**  
**Board of Public Utilities**  
44 South Clinton Avenue, 1<sup>st</sup> Floor  
Post Office Box 350  
Trenton, New Jersey 08625-0350  
[www.nj.gov/bpu/](http://www.nj.gov/bpu/)

IN THE MATTER OF THE PETITION OF OCEAN WIND	)	<u>CLEAN ENERGY</u>
LLC PURSUANT TO N.J.S.A. 48:3-87.1(f) FOR A	)	ORDER ON MOTION TO SETTLE
DETERMINATION THAT EASEMENTS ACROSS	)	THE RECORD
GREEN ACRES-RESTRICTED PROPERTIES AND	)	BPU DOCKET NO. QO22020041
CONSENTS NEEDED FOR CERTAIN	)	APP. DIV. DOCKET NO.
ENVIRONMENTAL PERMITS IN, AND WITH RESPECT	)	A-789-22T1
TO, THE CITY OF OCEAN CITY ARE REASONABLY	)	
NECESSARY FOR THE CONSTRUCTION OR	)	
OPERATION OF THE OCEAN WIND 1 QUALIFIED	)	
OFFSHORE WIND PROJECT	)	

**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  
**Jay A. Gillian**, Mayor of Ocean City, New Jersey  
**Dorothy F. McCrosson, Esq.**, McCrosson & Stanton, P.C. as Ocean City Solicitor  
**Melissa Rasner, Municipal Clerk** of Ocean City

BY THE BOARD:

The above-captioned matter is on appeal in the Superior Court of New Jersey, Appellate Division.<sup>1</sup> The New Jersey Division of Rate Counsel (“Rate Counsel”) filed a Motion to Settle the Record (“Motion”) with the New Jersey Board of Public Utilities (“Board”) pursuant to New Jersey Court Rule 2:5-5(a). By this Order, we consider Rate Counsel’s Motion.

**PROCEDURAL HISTORY**

On September 28, 2022, the Board issued an Order (“September 28, 2022 Order”) granting the February 2, 2022 petition that Ocean Wind LLC’s (“Ocean Wind” or the “Company”) filed with the Board (“Petition”), determining that certain easements across Green Acres-designated properties

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<sup>1</sup> 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, App. Docket No. A-789-22T1 (Nov. 11, 2022) (“Appeal”).

that the City of Ocean City (“Ocean City”) owns, and that certain municipal government approvals with respect to Ocean City, are reasonably necessary for the construction or operation of the Ocean Wind 1 Qualified Offshore Wind Project (“Project”).<sup>2</sup> Subsequently, on November 11, 2022, Ocean City filed an appeal in the Superior Court of New Jersey, Appellate Division (“Appellate Division”) to challenge the Board’s September 28, 2022 Order (“Appeal”). Ocean Wind and Rate Counsel are also parties in the Appeal. To date, briefs have not been filed with the court.

On January 11, 2023, pursuant to Rule 2:5-4(b), the New Jersey Division of Law – on behalf of the Board – filed a Statement of Items Comprising the Record (“SICR”) with the Appellate Division. A SICR notifies the parties and the court of the record material an agency considered in making its findings and determinations.

A party who questions whether the record fully and truly discloses what occurred in the agency below may apply on motion to that agency to settle the record. Rule 2:5-5(a). On March 1, 2023, Rate Counsel filed its Rule 2:5-5(a) motion with the Board. In its Motion, Rate Counsel contested two (2) items in the SICR, arguing that they are not part of the record and should be removed. These two (2) items, Item 8 and Item 10, are:

8. March 18, 2022: Division of Rate Counsel’s Informal Discovery Requests to Ocean Wind, LLC; and
10. April 4, 2022: Ocean Wind, LLC’s Transmittal Letter and Response to the Division of Rate Counsel’s Informal Discovery Requests.

Ocean Wind filed an opposition to the Motion on March 13, 2023 (“Opposition”), and Rate Counsel filed its reply (“Reply”) on March 20, 2023. Ocean City has not provided any input on the Motion. To place the Motion in context, we review the relevant procedural history in this docket that culminated with the September 28, 2022 Order.

## **BACKGROUND**

On February 2, 2022, Ocean Wind filed the Petition with the Board under the 2021 Amendment to the Offshore Wind Development Act (“OWEDA”), codified at N.J.S.A. 48:3-87.1(f) (“2021 OWEDA Amendment”). The 2021 OWEDA Amendment tasked the Board with determining whether the easements and consents identified in the Petition relating to Ocean City were reasonably necessary for the construction of Ocean Wind’s Project, the first offshore wind project proposed to be built in New Jersey. On February 23, 2022, the Board retained the matter and designated President Fiordaliso as the Presiding Officer.<sup>3</sup>

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<sup>2</sup> 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, Order dated September 28, 2022 (“September 28, 2022 Order”).

<sup>3</sup> 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, Order dated February 23, 2022.

President Fiordaliso issued a procedural order on March 1, 2022.<sup>4</sup> The order directed: a set of supplemental questions from Board Staff (“Staff”), requiring answers and documents in support of those answers from Ocean Wind; the opportunity for parties to submit opposing testimony and arguments; a public hearing and deadline for public comments; a settlement conference; the opportunity for Ocean Wind to respond to filed testimony, arguments, and public comments; and oral argument. The order did not provide for formal discovery or evidentiary proceedings.

On March 18, 2022, Rate Counsel, on its own and separate from Staff’s questions, issued a set of discovery questions to Ocean Wind (“Informal Discovery Questions”).<sup>5</sup> All persons and entities on the docket’s service list, including the Board Secretary, were copied on Rate Counsel’s email submission. Early the next week, on March 22, 2022, President Fiordaliso issued a revised procedural order.<sup>6</sup> There, the President noted Rate Counsel’s discovery request to Ocean Wind, and explained that the proceeding for this docket did not have a formal discovery period. The order went on to state that “[t]he parties will have an opportunity to present evidence and arguments to satisfy due process and aid in the Board’s deliberation.”<sup>7</sup> The order further directed the parties to “work cooperatively with each other to the fullest extent possible in the interests of reaching a just determination in this proceeding, including the exchange of information that is relevant to the Board’s inquiry.”<sup>8</sup>

Ocean Wind filed an electronic response to Rate Counsel’s Informal Discovery Questions on April 4, 2022 (“Informal Discovery Response” and together with the Informal Discovery Questions, the “Informal Discovery Process” or “Informal Discovery”), copying all persons and entities on the docket’s service list, including the Board Secretary.

It appears that Rate Counsel and Ocean Wind each reviewed and incorporated the Informal Discovery Questions and Informal Discovery Responses in their later filings and arguments. For instance, Rate Counsel filed testimony on April 27, 2022 that notes Ocean Wind’s Informal Discovery Response did not provide cost estimates for alternative routes and provided a different size for the Green Acres parcel than the size noted in Ocean Wind’s Petition. Ocean Wind later amended the Petition with a new value for the Green Acres parcel size on April 29, 2022. Rate

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<sup>4</sup> 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, Order dated March 1, 2022.

<sup>5</sup> We refer to the discovery as informal because it was submitted outside the formal procedural schedule.

<sup>6</sup> The schedule was revised to name Ocean City as a necessary party to the proceeding and adjust the schedule accordingly.

<sup>7</sup> 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, Order Modifying the Procedural Schedule and Updating the Parties of Record, BPU Docket No. QO22020041, Order dated March 22, 2022 at 2.

<sup>8</sup> Ibid.

Counsel<sup>9</sup> and Ocean Wind<sup>10</sup> – at Oral Argument – each acknowledged the Informal Discovery Questions and the Informal Discovery Responses.

For its part, the Board's September 28, 2022 Order noted that informal discovery was exchanged.<sup>11</sup> When reviewing the opportunities the parties took to comment and respond to Ocean Wind's filings and testimony, the September 28, 2022 Order observed that Rate Counsel "filed voluntary discovery" on Ocean Wind.<sup>12</sup> The Order did not otherwise address the contents of the Informal Discovery.

## **POSITION OF THE PARTIES**

### **Rate Counsel's Motion**

Rule 2:5-4(b) states that the "record on appeal shall consist of all papers on file in the court or courts or agencies below, with all entries as to matters made on the records of such courts and agencies." In other words, the record is to reflect the evidence and information the agency considers in its decision making. Taylor v. Jersey Cent. Power and Light Co., BPU Docket No. EC06020077U (Oct. 30, 2009) (citing Mt. Olive Complex v. Twp. of Mt. Olive, 340 N.J. Super. 511, 527 (App. Div. 2001)). Rate Counsel focused on the term "on file" in the context of R. 2:5-4(b). According to Rate Counsel, a document must be on file at the Board before it can be considered by the Board during the proceeding.

Rate Counsel cited Board precedent to support its position. In re the Long Term Capacity Agreement Pilot Program ("LCAPP"), BPU Document No. EO11010026, Order dated November 9, 2011 ("In re the LCAPP"), defines the distinction between a "filed" document and a "received" document. Specifically, "the 'filed' document is deemed considered by the Board" and is part of the record, "whereas when a document is marked 'received' there is no correlation to that document having been considered by the Board." Id. at 6 n. 13.

In this proceeding, Rate Counsel acknowledged that its Informal Discovery request was submitted to Ocean Wind, and the persons and entities on the service list were copied on the email transmission. The Board Secretary and Staff were included on this service list. However, Rate Counsel contended that mere email delivery to the Board Secretary and Staff does not suffice to place a document on file and accord it "filed" status.

Rate Counsel uses this matter's procedural history to provide context for its position. First, Rate Counsel asserted that the procedural schedule set by President Fiordaliso did not provide an opportunity to conduct formal discovery. Consequently, there was no opportunity for adjudicatory hearings to introduce any discovery into the record. Second, Rate Counsel asserted that the

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<sup>9</sup> 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, Oral Argument Transcript at 36 (June 24, 2022) ("Oral Argument Transcript") (noting that Ocean Wind "answer[ed] some of our questions, but not all of our questions").

<sup>10</sup> Id. at 43 ("Rate Counsel served discovery on the Company's direct testimony. We responded to all of the questions that Rate Counsel asked.").

<sup>11</sup> September 28, 2022 Order at 3, 10.

<sup>12</sup> Id. at 17.

Informal Discovery was not publicly available because it was never posted on the Board's electronic docket, the Public Document Search tool. Third, Ocean Wind's Informal Discovery Response to the Informal Discovery Questions noted that the Company reserved the right to object to any of its Informal Discovery Responses being admitted into the record. According to Rate Counsel, this response demonstrated that Ocean Wind did not consider the information contained in its Informal Discovery Responses to be part of the record merely because it was electronically transmitted to the service list.

### **Ocean Wind's Opposition**

Ocean Wind opposed Rate Counsel's Motion to remove Items 8 and 10 from the SICR. In its Opposition, the Company contended that Rate Counsel is attempting to distort the record in effort to support its expected position during the Appeal.<sup>13</sup> Ocean Wind argued that Rate Counsel's Motion is flawed in two (2) related aspects.

First, Ocean Wind contended that Rate Counsel misstated the legal standard in its Motion. According to Ocean Wind, documents do not need to be formally "filed" or moved into evidence to be part of the record, at least in agency proceedings like this one that have no evidentiary hearing. Ocean Wind asserted the better standard comes from the Uniform Rules Administrative Procedure, which defines the "record" as all ". . . testimony, documents, and arguments presented . . . and accepted by the judge for consideration in the rendering of a decision." N.J.A.C. 1:1-2.1.

Under this standard, Ocean Wind stated that the Informal Discovery conducted and the evidence gathered through the Informal Discovery Process was presented to and considered by the Board during the proceeding. Ocean Wind argued that the documents were served on all parties and the Board Secretary, and, later in the process, filings and arguments by the parties referenced the Informal Discovery. Further, Ocean Wind stated that the Board's September 28, 2022 Order considered the documents because the Order referenced the Informal Discovery and Informal Discovery Responses several times.

Second, Ocean Wind argued that Rate Counsel's cited precedent – including the In re the LCAPP case – does not support Rate Counsel's position. Ocean Wind argued that the case asks, similar to N.J.A.C. 1:1-2.1, whether the Board considered a document in its decision-making process. The Company concluded that because the Board considered the Informal Discovery Questions and Informal Discovery Responses during the proceeding, these Informal Discovery documents should be included in the SICR.

### **Rate Counsel's Reply**

In its reply, Rate Counsel argued that "basic fairness in the administrative process" requires that the Informal Discovery Questions and related Informal Discovery Responses be removed from the SICR. Rate Counsel explained that discovery generally remains unfiled in an administrative proceeding unless it is moved into evidence. This general practice ensures that the exchange of information during the discovery process remains open and free. After all, Rate Counsel noted, parties often seek discovery of information that may be inadmissible as evidence. A contrary rule, Rate Counsel opined, would undermine and chill the discovery process.

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<sup>13</sup> The Company explained that it expects Rate Counsel to argue that it was denied due process by, in part, not being permitted to conduct discovery. Ocean Wind opposition at 2.

Rate Counsel also asserted that N.J.A.C. 1:1-2.1 does not support Ocean Wind's position. Rate Counsel further argued that there was no evidentiary hearing where the Board could accept documents as evidence into the record.

## **DISCUSSION AND FINDINGS**

We determine that the Informal Discovery and responses are not part of the record and should not have been included in the SICR. We start by reviewing the applicable rule.

Rule 2:5-4(b) indicates that the record on "appeal shall consist of all papers on file in the court or courts or agencies below, with all entries as to matters made on the records of such courts and agencies." In other words, the record on appeal is defined to include the record in the agency below. The definition is not entirely helpful where parties disagree as to what is part of the record in the agency below.

Rate Counsel looks to the court rule and argues that the term "on file" settles the matter. According to Rate Counsel, the informal discovery was not on file with the Board because it was never moved into evidence. In support, Rate Counsel pointed to Board precedent – In re LCAPP at 6 n. 13 – that notes a document received by the Board Secretary is not necessarily filed with the Board. Ocean Wind responded and contended that the Informal Discovery is deemed on file and part of the record because the parties mentioned the documents in later filings and the Board referenced the documents in its September 28, 2022 Order. We do not agree with Ocean Wind.

While the parties may have referenced the Informal Discovery in later filings and arguments, the Board did not accept or consider the Informal Discovery its decision-making. The Board's September 28, 2022 Order referenced the Informal Discovery, but these references merely noted that the informal discovery and responses were exchanged. Neither the Board's analysis nor its conclusions independently relied on the information contained in the Informal Discovery. As Rate Counsel noted in its moving papers, Ocean Wind's responses to the Informal Discovery specifically reserved "the right to object to the admission of any material contained in the enclosed responses into the record in this proceeding." No party stipulated to the Informal Discovery being in evidence or sought to move it into the record.<sup>14</sup> Here, the Informal Discovery was not part of the Board's deliberative process. Later filings by Rate Counsel and Ocean Wind, which are an uncontested part of the record, cited the Informal Discovery. The Board did rely on and consider those later filed record documents.

To help explain why the Board was correct to not consider the Informal Discovery, we look toward first principles. Rule 2:5-4(b) "is intended to give notice to litigants that a reviewing court will not consider evidentiary material which is not in the trial court's record." Mt. Olive Complex, 340 N.J. Super. at 527 (emphasis added). This statement reflects a basic principle of appellate practice and administrative review – an appellate court is a court of error; it does not review evidence or arguments in the first instance. "[A]ppellate courts will not ordinarily consider evidentiary material which is not in the record below by way of adduced proof, judicially noticeable facts, stipulation, admission or a recorded proffer of excluded evidence." Pressler & Verniero, Current N.J. Court Rules, comment 1 on Rule 2:5-4 (2023). This practice, in part, ensures that an appellate court

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<sup>14</sup> The Board notes that Rate Counsel likely should have moved to include the Informal Discovery and responses into the record if it intended to heavily cite and rely on them in its testimony and arguments. We also note that a document may be a record document even if it is not included in the Board's Public Document Search tool. Board Staff works to ensure the Public Document Search tool is complete, but it should not be relied upon to define the record.

can give deference when questions of fact are presented at the agency. See New Jersey Div. of Youth and Family Services v. M.M., 189 N.J. 261, 279 (2007) (278-79) (explaining that an appellate court’s review is limited to the material presented below, where and questions of fact are due deference); In re License Issued to Zahl, 186 N.J. 341, 353-54 (2006) (noting the deference, and rationale, appellate courts give to agency decisions). It also ensures that an agency and parties cannot use post hoc rationalizations for decisions when on appellate review. Burlington Truck Lines, Inc. v. United States, 371 U.S. 156, 168 (1962) (“The agency must make findings that support its decision, and those findings must be supported by substantial evidence.”); Application of Howard Sav. Institution, 32 N.J. 29, 52 (1960) (noting that an administrative agency must set forth its findings, supported by evidence, so that a “reviewing tribunal” can determine if the decision is “sufficiently and soundly grounded.”).

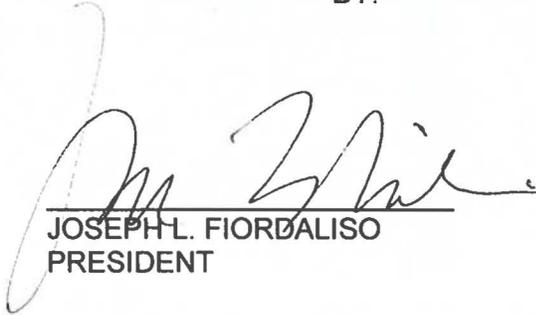
These principles show it is important that all parties, the Board, and subsequent tribunals understand what is part of the record. Therefore, the Board must work to ensure there is proper notice and certainty over the record. Here, Rate Counsel filed the Informal Discovery Questions outside the procedural schedule and no party subsequently moved to include the Informal Discovery into the record. Therefore, there was no clear indication or notice that the Board would accept the Informal Discovery for consideration. N.J.A.C. 1:1-2.1 (stating that an item must be “accepted by the judge for consideration” for it to be part of the “record”). Without this clear indication, it would have been inappropriate for the Board to subsequently consider the informal discovery and responses during its deliberative process. The Board did not do so here – while the parties may have referenced the Informal Discovery in later filings and arguments, the Board did not accept or consider it in its decision-making. Further, the Board’s September 28, 2022 Order referenced the informal discovery, but these references merely noted that the informal discovery and responses were exchanged – and the informal discovery should not have been included in the SICR.

The Board **HEREBY FINDS** that the Informal Discovery Questions and the Informal Discovery Responses are not part of the record in this proceeding. The Board **GRANTS** Rate Counsel’s Motion to Settle the Record. The Board **DIRECTS** Staff and the New Jersey Division of Law to amend the SICR that is before the Appellate Division to remove Items 8 and 10. By this Order, the Board deems the SICR on appeal to be settled.

The effective date of this Order is May 31, 2023.

DATED: May 24, 2023

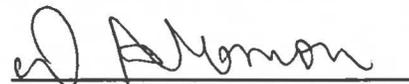
BOARD OF PUBLIC UTILITIES  
BY:



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PRESIDENT



MARY-ANNA HOLDEN  
COMMISSIONER



DIANNE SOLOMON  
COMMISSIONER



DR. ZENON CHRISTODOULOU  
COMMISSIONER

ATTEST:



SHERRI L. GOLDEN  
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 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  
 APP. DIV. DOCKET NO. A-789-22T1

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