



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

**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/)

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 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 DENYING MOTION TO )  
STAY )  
BPU DOCKET NO. QO22020041 )  
APP. DIV. DOCKET NO. )  
A-789-22T1 )

**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., Ocean City Solicitor  
**Melissa Rasner, Municipal Clerk** of Ocean City  
**Jennifer B. Barr**, Cooper Levinson on behalf of City of Ocean City

**BY THE BOARD**

Before the New Jersey Board of Public Utilities (“BPU” or “Board”) is a letter brief, dated April 3, 2023 (“Letter Brief”), in lieu of a formal submission on behalf of the City of Ocean City, New Jersey (“Ocean City”), in support of Ocean City’s Motion to Stay (“Motion”) both the Board’s orders dated September 28, 2022 and November 2, 2022.<sup>1</sup>

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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, BPU Docket No. QO22020041, Order dated September 28, 2022 (“September 28, 2022 Order”); 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

## **BACKGROUND AND PROCEDURAL HISTORY**

### **Offshore Wind Economic Development Act (“OWEDA”)**

The Offshore Wind Economic Development Act of 2010<sup>2</sup> (“OWEDA”) 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.<sup>3</sup> In June 2019, from a pool of applicants, the Board selected and approved as New Jersey’s first Qualified Offshore Wind Project an OSW project from Ocean Wind LLC (“Ocean Wind” or “Petitioner”), Ocean Wind I (“Project”).

In July 2021, Governor Murphy signed L. 2021, c., codified at N.J.S.A. 48:3-87.1(f)-(g), amending OWEDA to grant OSW projects the ability to petition the Board to seek and obtain property interests from local government and to preempt local government approvals “reasonably necessary” for construction or operation of the OSW project.<sup>4</sup>

On February 2, 2022, Ocean Wind filed a petition with the Board pursuant to N.J.S.A. 48:3-87.1(f) (“Petition”). The Petition sought the Board’s determination that certain easements across Green Acres-restricted properties Ocean City owns, and that certain municipal approvals needed for particular environmental permits in or with respect to Ocean City, are reasonably necessary for the construction or operation of Petitioner’s Project.

In the Petition, Petitioner requested that the Board:<sup>5</sup>

*(iii) Specifically find and determine that the easements described in this Petition over property owned by Ocean City (which are Green Acres-restricted) are reasonably necessary for the construction and operation of the Ocean Wind [Project]; . . .*

*(iv) Specifically find and determine that municipal consents or other affirmative filings needed from Ocean City that are a condition of the issuance of a permit or*

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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 November 2, 2022 (“November 2, 2022 Order”).

<sup>2</sup> L. 2010, c. 57, See N.J.S.A. 48:3-87.1 et seq.

<sup>3</sup> Exec. Order No. 8, 50 N.J.R. 887(a) (Feb. 20, 2018) (“EO 8”). Since the issuance of EO 8, the OSW goal has been raised twice. First, Executive Order No. 92 expanded the OSW goal to 7,500 MW by 2035. Exec. Order No. 92, 51 N.J.R. 1817(b) (Dec. 16, 2019) (“EO 92”). Next, on September 21, 2022, Governor Murphy signed Executive Order No. 307, increasing the OSW goal to 11,000 MW by 2040. Exec. Order No. 307, 54 N.J.R. 1945(a) (Oct. 17, 2022) (“EO 307”).

<sup>4</sup> 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 qualified project. We use the terms “local government,” “approvals” and “preemption” for brevity.

<sup>5</sup> Petition at 18.

*other approval of the [New Jersey Department of Environmental Protection (“NJDEP”)] are reasonably necessary for the construction and operation of the Ocean Wind [Project], thereby preempting and superseding any required municipal consents or approvals; and*

*(v) Grant such other and further relief as the Board may deem appropriate or necessary.*

Petitioner explained that the Project required permanent rights of way and easements, approximately 30 feet in width, for export cables and associated equipment, upon, across and under Ocean City owned Green Acres-restricted properties. The Petition specifically identified the Green Acres-restricted property on the Official Tax Map of Ocean City as Block 611.11, Lots 137 and 145, Block 3500, Lot 1 (including riparian grant), and Block 3350.01, Lot 17, collectively totaling 0.838 acres. On April 29, 2022, Ocean Wind filed an amended petition and testimonies, revising the acreage impacted under the proposed Green Acres diversion downward to 0.647 acres (“Amended Petition”).

With respect to permits and approvals (collectively, “Permits and Approvals”), the Petition identified the following permit applications that require authority or consent from Ocean City to proceed: Waterfront Development, Wetlands Act of 1970, Coastal Area Facilities Review Act, Flood Hazard Area Control Act, and Freshwater Wetlands Protection Act Individual Permits, and a Tidelands License.<sup>6</sup> Additionally, the Petition noted that a New Jersey Pollution Discharge Elimination System Stormwater Construction Permit (5G3), New Jersey Pollution Discharge System Construction Dewatering Permit (B7 or BGR), Water Allocation Permit, and a Treatment Works Approval would also be required.

On May 19, 2022, the Board conducted two (2) virtual public hearings, one in the morning and one in the evening. On June 24, 2022, President Fiordaliso presided over Oral Argument before the full Board, where the Petitioner, the New Jersey Division of Rate Counsel, and Ocean City presented arguments.

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<sup>6</sup> Petition at 12; Pilar Patterson Testimony at 15.

### September 28, 2022 Order

In the September 28, 2022 Order, among other things, the Board ratified the orders in the docket that the President issued while serving as Presiding Commissioner. The Board also determined that the property interests, the easements, rights of way, and consents sought under Ocean Wind's Petition (collectively, "Easements" or "Property Interests"), are reasonably necessary for the construction and operation of the Ocean Wind Project. Additionally, the Board found that the proposed cable route, known as the "Preferred Route," is reasonably necessary for the construction or operation of the Project.<sup>7</sup> The Board directed Ocean Wind to prepare a proposed form of Order reflecting the findings in the September 28, 2022 Order for recording with the County Clerk, to submit such item to the Board President for review and approval, and, upon securing such approval, to submit such Order to the Cape May County recording officer for recording, as required pursuant to N.J.S.A. 48:3-87.1(f).<sup>8</sup>

### November 2, 2022 Order

On November 2, 2022, President Fiordaliso, as Presiding Commissioner, issued the November 2, 2022 Order. The November 2, 2022 Order stated that the September 28, 2022 Order effectuated Ocean Wind's acquisition of the requested Easements set forth in its Petition. The November 2, 2022 Order further stated that once both the attached September 28, 2022 Order and it are recorded in the Cape May County recorder's office, Ocean Wind will be the legal or record owner of such Property Interests, in accordance with N.J.S.A. 48:3-87.1(f)(2) and N.J.S.A. 46:26A-2q, thereby entitling Ocean Wind to have the right to possess and enter upon the Easements. The November 2, 2022 Order also mandates that Ocean Wind be responsible for the restoration and maintenance of the Easements and pay Ocean City the fair market value for them.

### Ocean City's Appeal

On November 11, 2022, Ocean City filed a Notice of Appeal with the New Jersey Superior Court, Appellate Division on behalf of Ocean City ("Appeal"), challenging the Board's findings in the September 28, 2022 Order and the November 2, 2022 Order. The Appeal is currently pending.

### **THE MOTION**

On April 3, 2023, Ocean City filed its Motion with the Board Secretary. Ocean City requested that the Board stay both its September 28, 2022 Order and its November 2, 2022 Order, pending the outcome of the Appeal.

The Motion acknowledged that Ocean Wind submitted to the Ocean City Engineering Department an application for a road opening permit within 35<sup>th</sup> Street in Ocean City that would allow for

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<sup>7</sup> September 28, 2022 Order at 24.

<sup>8</sup> Ibid.

environmental investigation borings and utility test pits (“Permit Application”).<sup>9</sup> The Motion further acknowledged that N.J.S.A. 48:3-87.1(f)(1) requires that a municipality shall not withhold the issuance of a road opening permit on a public right of way.<sup>10</sup> Ocean City argued that notwithstanding both of these factors, Ocean Wind’s filing of the Permit Application is premature, given that the reasonableness of the Preferred Route is at issue in the Appeal.

Ocean City argued that a stay is needed “in order to protect the residents of Ocean City” from Project “access through Ocean City along the Preferred Route.”<sup>11</sup> Specifically, a stay would protect Ocean City from “unnecessary environmental investigation and testing” along the Preferred Route that Ocean Wind would conduct.<sup>12</sup> Ocean City described such investigation and testing as “unwarranted.”<sup>13</sup>

Additionally, Ocean City indicated that the Board’s issuance of a stay would be beneficial to Ocean Wind if the Appellate Division later reversed or remands the matter. Ocean City argued that a stay at this time would serve as a preventative measure, enabling Ocean Wind to forego any “unnecessary expenditures” associated with the environmental investigation and testing Ocean Wind would otherwise encounter if Ocean City granted the Permit Application.

### Ocean Wind’s Response

On April 11, 2023, Ocean Wind filed its opposition to the Motion (“Opposition”). Ocean Wind argued that Ocean City failed to cite any authority for the Board to grant its Motion, and failed to satisfy the standards enumerated in Crowe v. De Gioia, 90 N.J. 126, 132-34 (1982) by clear and convincing evidence as required under Garden State Equality v. Dow, 216 N.J. 314, 320 (2013).<sup>14</sup>

Ocean Wind stated that Ocean City cannot establish irreparable harm, and made no attempt to show any harm, much less irreparable harm to justify a stay pending appeal.<sup>15</sup> Ocean Wind argued that the road opening permit application is separate from the issues on appeal because N.J.S.A. 48:3-87.1(f)(1) directly provides Ocean Wind the authority to cite facilities within a public right-of-way after consulting with the municipality which, Ocean Wind stated, was done multiple

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<sup>9</sup> Letter Brief at 3.

<sup>10</sup> Id. N.J.S.A. 48:3-87.1(f)(1) specifically states that “[n]otwithstanding the provisions of any other State law, rule, or regulation to the contrary, a qualified offshore wind project . . . approved by the [B]oard pursuant to this section shall, after consultation with a municipality . . . have authority to place, replace, construct, reconstruct, install, reinstall, add to, extend, use, operate, inspect, and maintain wires, conduits, lines, and associated infrastructure, whether within, under, or upon the public streets, thoroughfares, or rights-of-way of any municipality, county, or other political subdivision of the State. . . .”

<sup>11</sup> Letter Brief at 3.

<sup>12</sup> Id. at 3, 4.

<sup>13</sup> Id. at 4.

<sup>14</sup> Opposition at 4.

<sup>15</sup> Ibid.

times.<sup>16</sup> Ocean Wind further stated that Ocean City did not identify harms to itself, rather it identified unnecessary expenditures that Ocean Wind would bear. This is inappropriate because harms to the nonmoving party do not meet Ocean City's burden.<sup>17</sup> In any event, "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 Wind further argued that Ocean City is required to establish a likelihood of success on the merits but made no attempt to do so. According to Ocean Wind, the Board's record contained sufficient evidence to show that the identified easements and consents are reasonably necessary. Ocean Wind noted that Ocean City's Motion made no effort to suggest otherwise.

Additionally, Ocean Wind stated that balancing the equities and the public interest at stake favor a denial of the Ocean City's Motion.<sup>18</sup> According to Ocean Wind, the public interest is relevant in considering whether a stay is justified in this matter. Garden State Equality, 216 N.J. at 329 (citing Crowe, 90 N.J. at 134). Ocean Wind stated that it is in the public interest for the Project to move forward in a timely and efficient manner, and upon a balancing of the equities and public interest that the Motion should be denied.<sup>19</sup>

## **DISCUSSION AND FINDINGS**

The Board carefully considered the Motion as well as the Opposition. Ocean City seeks injunctive relief in the form of a stay of the Board's September 28, 2022 and November 2, 2022 orders. In considering Ocean City's Motion, the Board is mindful that a stay pending appeal is an extraordinary equitable remedy which "will be granted only for good cause shown." N.J.A.C. 14:1-8.7(d). The criteria for reviewing an application for injunctive relief are well settled. The moving party must demonstrate the following:

- (1) The movant will suffer immediate and irreparable harm if the emergency relief is not granted;
- (2) The legal right underlying the movant's claim is well-settled;
- (3) There is a reasonable probability that the moving party will succeed on the merits; and
- (4) The balance of the equities in granting or denying relief weighs in the movant's favor.

Crowe v. DeGioia, 90 N.J. at 132-34 (1982). In addition, the factors above must be clearly and convincingly demonstrated. Garden State Equality v. Dow, 216 N.J. 314, 320 (2013).

A stay is not a matter of right. Yakus v. United States, 321 U.S. 414 (1944). Rather, it is 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." Zoning Bd.

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<sup>16</sup> Ibid.

<sup>17</sup> Id. at 5.

<sup>18</sup> Ibid.

<sup>19</sup> Id. at 7.

of Adjustment of Sparta Twp. v. Serv. Elec. Cable Television of N.J., Inc., 198 N.J. Super. 370, 379 (App. Div. 1985); Virginia Railway Company v. United States, 272 U.S. 658, 672-73 (1926). And where a matter presents an issue of “significant public importance,” a court must consider the public interest in addition to the traditional Crowe factors. Garden State Equal. v. Dow, 216 N.J. at 321.

One of the requirements for the issuance of a stay is that a movant must make a showing of irreparable, non-monetary harm. Crowe, supra, 90 N.J. at 132-33. Ocean City moves here to stay the Board’s September 28, 2022 and November 2, 2022 orders ostensibly “to protect the residents of Ocean City” from Project access “through Ocean City along the Preferred Route along the Preferred Route.”<sup>20</sup> However, the only specific harm identified by and to Ocean City is the “unnecessary environmental investigation and testing” related to a road opening permit application submitted to the Ocean City Engineering Department pursuant to N.J.S.A. 48:3-87.1(f)(1).<sup>21</sup>

Even were the Board to agree with Ocean City that the pending environmental investigation might ultimately be unnecessary, it is not clear why this harm would be irreparable. Therefore, after reviewing the record and carefully considering the positions set forth by the parties, for the Board **FINDS** that Ocean City has not met its burden of proving, by clear and convincing evidence, that injunctive relief is necessary to prevent irreparable harm.

Further, Ocean City failed to even address the other three prongs necessary to obtain the extraordinary relief of a stay. Ocean City’s moving papers failed to examine 1) whether the legal right underlying the movant’s claim is well-settled; 2) whether it has a reasonable probability of success on the merits; and 3) whether the balance of the equities in granting relief weighs in the movant’s favor. Where irreparable harm has not been shown and no support was provided for the balance of the Crowe factors, the Board **FINDS** that Ocean City has not met the burden of proof necessary for the issuance of a stay. Therefore, the Board **HEREBY DENIES** Ocean City’s Motion to Stay.

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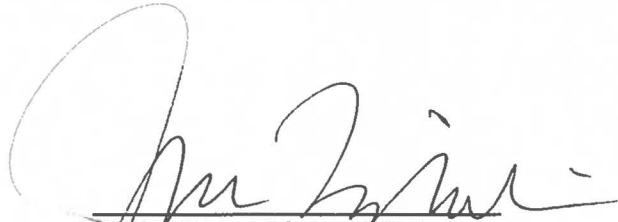
<sup>20</sup> Motion at 3.

<sup>21</sup> Id. at 4.

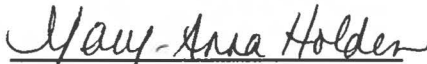
The effective date of this Order is May 31, 2023.

DATED: May 24, 2023

BOARD OF PUBLIC UTILITIES  
BY:



JOSEPH L. FIORDALISO  
PRESIDENT



MARY-ANNA HOLDEN  
COMMISSIONER



DIANNE SOLOMON  
COMMISSIONER



DR. ZENON CHRISTODOULOU  
COMMISSIONER



SHERRI L. GOLDEN  
SECRETARY

ATTEST:

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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