

Adam L. Peterson, Esq.
110 Edison Place, Suite 301
Newark, NJ 07102
Telephone: 973-707-3563
Telefax: 973-893-5962
Email: apeterson@pearlmanmiranda.com

September 13, 2023

VIA ELECTRONIC MAIL

Secretary of the Board
New Jersey Board of Public Utilities
board.secretary@bpu.nj.gov
Attention: Hon. Sherri L. Golden

**Re: Reply Brief to Petitioner's Reply to Motion to Dismiss
In Re: Petition of Save LBI, Inc. Requesting a Hearing and Reduction of
OREC Price In the Matter of the Board of Public Utilities Offshore Wind
Solicitation 2 for 1,200 to 2,400 MW – Atlantic Shores Offshore Wind Project
1, LLC
BPU Docket No.: QO21050824**

Dear Secretary Golden:

This firm represents Atlantic Shores Offshore Wind Project 1, LLC ("Atlantic Shores") in the above-captioned matter.

Please find enclosed for filing, on behalf of Atlantic Shores, a Letter Brief as a reply to Petitioner, Save LBI, Inc.'s Reply to Atlantic Shores' Motion to Dismiss dated September 7, 2023 (the "Reply Brief").

I hereby certify that copies of the within Reply Brief have this day been transmitted to all persons on the attached Service List via electronic mail. No paper copies will follow. We would appreciate if the Board Secretary's office would please acknowledge receipt of this Reply Brief.

Thank you for your consideration.

Very truly yours,

/s/ Adam L. Peterson

Adam L. Peterson, Esq.

Enclosure
Ecc: Service List

SERVICE LIST

<p><u>Law Office of Thomas Stavola, Jr., LLC</u> 209 County Road 537 Colts Neck, New Jersey 07722</p> <p>Thomas Stavola, Jr., Esq. tstavolajr@stavolalaw.com</p> <p><u>Board of Public Utilities</u> Board of Public Utilities 44 South Clinton Avenue, 1st Floor Post Office Box 350 Trenton, NJ 08625-0350</p> <p>Sherry Golden, Secretary board.secretary@bpu.nj.gov</p> <p>Taryn Boland Chief of Staff taryn.boland@bpu.nj.gov</p> <p>Robert Brabston, Esq. Executive Director robert.brabston@bpu.nj.gov</p> <p>Michael Beck, Esq. General Counsel michael.beck@bpu.nj.gov</p> <p>Ben Witherell, PhD. Chief Economist Benjamin.Witherell@bpu.nj.gov</p> <p>Kelly Mooij, Esq. Director, Division of Clean Energy Kelly.Mooij@bpu.nj.gov</p> <p>James Ferris, P.E., CEM Bureau Chief of New Technology, Division of Clean Energy Jim.ferris@bpu.nj.gov</p> <p><u>Division of Rate Counsel</u> Division of Rate Counsel 140 East Front Street, 4th Floor P.O. Box 003 Trenton, NJ 08625-0003</p> <p>Brian O. Lipman, Esq., Director blipman@rpa.nj.gov</p> <p><u>Atlantic Shores Offshore Wind Project 1, LLC</u> Atlantic Shores Offshore Wind Project 1, LLC Brooklyn Navy Yard, Dock 72 Brooklyn, NY 11205</p> <p>Julia Pettit Julia.Pettit@atlanticshoreswind.com</p> <p>Joris Veldhoven Joris.Veldhoven@AtlanticShoresWind.com</p> <p>Nathalie Jouanneau Nathalie.Jouanneau@AtlanticShoresWind.com</p>	<p><u>Pearlman & Miranda, LLC</u> Pearlman & Miranda, LLC 110 Edison Place, Suite 301 Newark, New Jersey 07102-4908</p> <p>Stephen B. Pearlman, Esq. spearlman@pearlmanmiranda.com</p> <p>Adam L. Peterson, Esq. apeterson@pearlmanmiranda.com</p> <p>Grace Chun, Esq. gchun@pearlmanmiranda.com</p> <p><u>Levitan & Associates, Inc.</u> Levitan Associates, Inc. 20 Custom House Street, Suite 830 Boston, MA 02110</p> <p>Richard L. Levitan, President & Principal rl@levitan.com</p> <p>Ellen G. Cool, Ph.D., Vice President & Principal egc@levitan.com</p> <p><u>Division of Law</u> Division of Law Public Utilities Section R.J. Hughes Justice Complex, 7th Floor West 25 Market Street, P.O. Box 112 Trenton, NJ 08625</p> <p>David Apy, Assistant Attorney General david.apy@law.njoag.gov</p> <p>Daren Eppley, Deputy Attorney General Section Chief daren.eppley@law.njoag.gov</p> <p>Pamela Owen, Deputy Attorney General Assistant Section Chief pamela.owen@law.njoag.gov</p> <p>Paul Youchak, Deputy Attorney General Paul.youchak@law.njoag.gov</p>
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Newark, New Jersey 07102
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September 13, 2023

Hon. Sherri L. Golden
Secretary of the Board
New Jersey Board of Public Utilities
Docket No. QO21050824
Submitted electronically to: Board.Secretary@bpu.nj.gov

**Re: Reply Brief to Petitioner’s Reply to Atlantic Shores Offshore Wind LLC’s Motion to Dismiss In the Matter of the Board of Public Utilities Offshore Wind Solicitation 2 for 1,200 to 2,400 MW – Atlantic Shores Offshore Wind Project 1, LLC
BPU Docket No.: QO21050824**

Dear Secretary Golden,

As you know, this firm represents Atlantic Shores Offshore Wind Project 1, LLC (“*Atlantic Shores*”) in the above captioned proceeding. Please accept this letter brief as a reply brief to Petitioner, Save LBI, Inc.’s Reply to Atlantic Shores’ Motion to Dismiss dated September 7, 2023.

I. The Board Has No Authority to Hear Petitioner’s Challenge.

“Administrative agency power derives solely from a grant of authority by the Legislature.”¹
Thus, an administrative agency possesses only “expressly granted” powers and “those incidental powers which are reasonably necessary or appropriate to effectuate the specific delegation.”²
“Where there exists reasonable doubt as to whether such power is vested in the administrative

¹ General Assembly of State of N.J. v. Byrne, 90 N.J. 376, 393 (1982).

² New Jersey Guild of Hearing Aid Dispensers v. Long, 75 N.J. 544, 562 (1978) (quoting In re Regulation F-22 of the Office of Milk Indus., 32 N.J. 258, 261 (1960)).

body, the power is denied.”³ Accordingly, the determination as to whether to confer quasi-judicial decision-making authority upon an administrative agency, and the scope of any such authority, is a policy question within the Legislature’s *exclusive* domain.⁴

a. Petitioner’s reliance on N.J.S.A. 48:2-13 is misguided because it confers no authority upon the Board to adjudicate a challenge to the OREC Order.

N.J.S.A. 48:2-13 sets forth the general jurisdiction of the Board to regulate utilities. The statutory grant of jurisdiction to the Board is interpreted broadly to provide the Board with the regulatory control that is reasonably associated with those aspects of the Board’s activities specifically within its delegated authority.⁵ Petitioner argues that Atlantic Shores “is ostensibly a producer of electricity for the State of New Jersey, and because the BPU maintains jurisdiction over the production of electricity” pursuant to N.J.S.A. 48:2-13, a hearing of this matter before the Board is “legally appropriate.” However, Petitioner cites no authority to support its conclusion that N.J.S.A. 48:2-13 confers authority upon the Board to conduct a hearing on its Petition. While the general subject matter jurisdiction of the Board is not disputed, the Legislature would have had to confer quasi-judicial decision-making authority to the Board to hear Petitioner’s request for a review of the OREC Order. Just because the subject matter of the OREC Order relates to the production of electricity does not automatically confer that authority to the Board.

³ In re Closing of Jamesburg High School, 83 N.J. 540, 549 (1980).

⁴ See Burlington County Evergreen Park Mental Hosp. v. Cooper, 56 N.J. 579, 598 (1970) (“In our judgment, a policy question of that significance [regarding whether the Employer-Employee Relations Act conferred authority upon the Public Employment Relations Commission (PERC) to adjudicate unfair labor practice charges] lies in the legislative domain and should be resolved there. A court should not find such authority in an agency unless the statute under consideration confers it expressly or by unavoidable implication.”)

⁵ State, Bd. of Public Utilities v. Helen Kramer Sanitary Landfill, 171 N.J. Super. 500 (App. Div. 1979).

Here, the Legislature did not confer any authority upon the Board to adjudicate a challenge to a Board approval for any OSW project for ORECs. None of OWEDA, the OWEDA Regulations, the Board Rules of Practice, or the Second Solicitation Guidance Document provide for an administrative hearing in connection with the OREC applications. Instead, the Legislature expressly and unequivocally provided that “[a]ny order made by the Board may be reviewed by appeal to the appellate division of the Superior Court.”⁶ Since Petitioner seeks a review of the OREC Order, the Appellate Division is the only appropriate venue for such review.⁷ Therefore, the Petition must be dismissed with prejudice.

b. Even if the Board has the authority to hold a hearing in connection with OSW procurements generally, the Board has already determined not to exercise such discretion in connection with the Application.

Even if, *arguendo*, the Board has discretion to allow for hearings in OSW procurements generally, the plain fact is that the Board has affirmatively determined not to exercise such discretion and has made clear that OSW procurements are not contested cases.

As noted in Atlantic Shores’ moving brief, it has been clearly established that the OSW procurements “will not be treated as a contested case with intervenors. Interested parties and stakeholders, including other applicants or potential applicants for QOWP status, will not therefore have standing to intervene or participate in QOWP application proceedings of other applicants.”⁸ Petitioner does not refute this fact.

Furthermore, for the Board to reverse course at this late date would jeopardize the viability of New Jersey’s OSW wind industry going forward, before a single project has been constructed.

⁶ N.J.S.A. 48:2-3.

⁷ *Id.*

⁸ See Board Staff Response to Question 22.

As explained in Atlantic Shores' moving brief, certainty of process is essential in the context of the Board's OREC procurements, particularly given the substantial magnitude of funds required to be invested to pursue OSW projects. By way of reference, in the most recent New York Bight OSW lease auction held by the Bureau of Ocean and Energy Management, bidders expended in excess of four billion dollars (\$4,000,000,000) on securing OSW leases,⁹ and various of the entities that secured OSW leases through that auction submitted applications into the Board's recent third OSW solicitation.¹⁰

Atlantic Shores respectfully submits that if the Board were to add material procedural hurdles to establish the validity of the OREC Order more than two (2) years after award, with a risk that such additional hurdles could result in a reduction to the previously approved OREC price, then the bankability of New Jersey's OREC structure and the corresponding ability to finance New Jersey OSW projects would not only be undermined, but indeed would be entirely eroded. As such, Atlantic Shores implores the Board to adhere to its previously established procedure and to dismiss the Petition with prejudice.

c. A challenge to the OREC Order must be appealed to the Appellate Division within 45 days of the notice of the OREC Order.

The Legislature expressly directed that the review of any order of the Board be appealed to the Appellate Division pursuant to N.J.S.A. 48:2-3. The Appellate Division's scope of review of the OREC Order is limited to four inquiries: (1) whether the agency's decision offends the State or Federal Constitution, (2) whether the agency's action violates express or implied legislative

⁹ See <https://www.boem.gov/renewable-energy/state-activities/new-york-bight#:~:text=Commercial%20Leases,On%20Feb.,companies%20totaling%20approximately%20244.37%20billion.>

¹⁰ See [https://abcnews.go.com/US/wireStory/new-offshore-wind-power-project-proposed-new-jersey-102031266.](https://abcnews.go.com/US/wireStory/new-offshore-wind-power-project-proposed-new-jersey-102031266)

policies, (3) whether the record contains substantial evidence to support the findings on which the agency based its actions, and (4) whether in applying the legislative policies to the facts, the agency clearly erred in reaching a conclusion that could not reasonably have been made on a showing of the relevant factors.¹¹ Accordingly, the Appellate Division’s function “is to determine whether the administrative action was arbitrary, capricious, or unreasonable.”¹² “Absent arbitrary, unreasonable or capricious action, the agency’s determination must be affirmed.”¹³

Petitioner did not timely bring its challenge of the OREC Order to the Appellate Division, and it is not entitled to any hearing before the Board. Since Petitioner’s argument is that the Board “violated the statutory provisions of N.J.S.A. 48:3-87.1(b)(1)(b) through their findings that the Atlantic Shores’ bid produces a cost/benefit ratio greater than 1.0[.]” its challenge would fall squarely within the Appellate Division’s jurisdiction – specifically, in applying the legislative policies to the facts, did the Board clearly err in reaching a conclusion that could not reasonably have been made on a showing of the relevant factors? However, Petitioner appears to want to circumvent the procedural mandates set forth in the relevant statutes because it is clearly out of time to challenge the OREC Order, and Petitioner would likely want to avoid having to meet the Appellate Division’s high bar for the standard of review and deference afforded to the Board in issuing the OREC Order.

However, rules of procedure were devised and promulgated to promote reasonable uniformity in the expeditious and even administration of justice and to facilitate just dispositions on the merits and to avoid determinations on the basis of procedural niceties.¹⁴ Appeals to the

¹¹ Mullarney v. Board of Review, 343 N.J. Super. 401, 406 (App. Div. 2001).

¹² Burris v. Police Dept., West Orange, 338 N.J. Super. 493, 496 (App. Div. 2001).

¹³ Wnuck v. N.J. Div. of Motor Vehicles, 337 N.J. Super. 52, 56 (App. Div. 2001).

¹⁴ Fotopak Corp. v. Merlin, Inc., 34 N.J. Super. 343 (App. Div. 1955).

Appellate Division from State agency decisions or actions must be made within forty-five (45) days from the date of service of the decision or notice of the action taken.¹⁵ This period may be enlarged for a period not exceeding thirty (30) days, upon a clear showing of good cause and the absence of prejudice, provided that application therefor is made within said thirty (30) days.¹⁶

Petitioner brings its challenge of the OREC Order to the Board, and not the Appellate Division, more than two (2) years after its effective date. Petitioner would clearly be time-barred by the Appellate Division to challenge the OREC Order, and any hearing by the Board on the OREC Order now would open the potential to challenges by any ratepayer without any foreseeable finality and undermine the viability of New Jersey's OSW industry going forward. Thus, the Petition must be dismissed with prejudice.

d. Modification of the OREC Order must be jointly agreed to by the parties, and Atlantic Shores does not agree to Petitioner's modification.

N.J.S.A. 48:3-87.1(c) provides in relevant part:

An order issued by the board pursuant to this subsection shall not be modified by subsequent board orders, unless the modifications are jointly agreed to by the parties.

Statutes should be interpreted in accordance with their plain meaning, and where a statute is clear and unambiguous, courts may not impose an interpretation other than the statute's ordinary meaning.¹⁷ "Where the statutory language is 'clear and unambiguous,' courts will implement the statute as written without resort to judicial interpretation, rules of construction, or extrinsic matters."¹⁸

¹⁵ R. 2:4-1(b).

¹⁶ See Cabrera v. Tronolone, 205 N.J. Super. 268 (App. Div. 1985), certif. den., 103 N.J. 493 (1986).

¹⁷ National Waste Recycling, Inc. v. Middlesex County Improvement Auth., 150 N.J. 209, 223 (1997).

¹⁸ Bergen Commercial Bank v. Sisler, 157 N.J. 188, 202 (1999) (quoting In re Estate of Post, 282 N.J. Super. 59, 72 (App. Div. 1995)).

Here, Petitioner does not dispute the interpretation or validity of N.J.S.A. 48:3-87.1(c), which requires Atlantic Shores' agreement to modify the OREC Order. However, the remedy that it seeks – a reduction of OREC pricing – cannot be achieved without a modification of the OREC Order, and a modification of the OREC Order cannot be achieved without agreement by Atlantic Shores. Thus, the Petition must be dismissed with prejudice.

Indeed, even the New Jersey Legislature itself is precluded from amending N.J.S.A. 48:3-87.1(c) to rob Atlantic Shores of the protection against a modification of the OREC Order without its consent. The contract clause of the United States Constitution limits the power of the States to modify their own contracts.¹⁹ A statute may be treated as a contract “when the language and circumstances evince a legislative intent to create private rights of a contractual nature enforceable against the State.”²⁰ The statutory language of OWEDA provides OSW developers— and, by extension, their financing parties—certainty that the legal framework surrounding the OREC Order will remain in place unless otherwise agreed to by the developer. It is this certainty that will induce OSW developers to undertake OSW projects at considerable expense in the absence of a more traditional direct purchase and sale arrangement for ORECs such as those put forth in certain other states (such as New York, Rhode Island, Massachusetts, and Maine). That the New Jersey Legislature itself is constitutionally precluded from disregarding this essential protection for OSW developers, Petitioner's assertion that the Board can ignore it should not be considered.

Atlantic Shores stands by its position as set forth in its moving brief, that N.J.S.A. 48:3-87.1(c) provides essential protections to OSW developers and is an inviolate principle that must

¹⁹ U.S. Trust Co. of New York v. New Jersey, 431 U.S. 1, 17 (1977).

²⁰ Id. at n. 14.

be upheld, as it underpins the entire OSW industry in New Jersey. As such, the Petition must be dismissed with prejudice.

II. Conclusion.

For all the foregoing reasons, the Motion to Dismiss the Petition of Save LBI, Inc. must be granted and the Petition dismissed with prejudice. To the extent the Board nonetheless denies Atlantic Shores' Motion to Dismiss, Atlantic Shores requests leave to file an Answer to the Petition.

Respectfully submitted,



Adam L. Peterson, Esq.

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