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August 4, 2023

New Jersey Board of Public Utilities
44 So. Clinton Avenue
Trenton, New Jersey 08625
Attention: Records Custodian

Re: IN THE MATTER OF THE OPENING OF NEW JERSEY'S THIRD SOLICITATION FOR OFFSHORE WIND RENEWABLE ENERGY CERTIFICATES (OREC)

DOCKET NO. QO22080481

Application by Atlantic Shores Offshore Wind Project 2, LLC ("ASOW" or the "Company"), Including all Appendices and Supporting Documentation in Connection Therewith, Submitted August 4, 2023 (the "Application")

SUBSTANTIATION OF CONFIDENTIALITY CLAIM

This Substantiation of Confidentiality Claim is hereby submitted on behalf of ASOW, pertaining to the Company's Application submitted to the Board of Public Utilities (the "Board" or "BPU") in connection with the offshore windfarm project proposed by ASOW, including, without limitation, any associated infrastructure (all as more fully described in the Application and inclusive of any alternatives related thereto, the "Project").

The Application includes private, proprietary commercial and/or financial information and trade secrets in connection with the proposed Project. The Company asserts that certain information contained in the Application is confidential under New Jersey's Open Public Records Act, N.J.S.A. 47:1A-1 et seq. ("OPRA") and specifically the OPRA exemptions applicable to "trade secrets and proprietary commercial or financial information" and in addition as "information which, if disclosed, would be likely to cause damage to either a competitive or bidding position" pursuant to N.J.A.C. 14:1-12.1(b).

The Application contains confidential information regarding the Company and its proposed Project and also information from affiliated representatives, consultants, vendors, and suppliers, each detailing proprietary commercial and/or financial information and trade secrets

belonging to the Company, which the Company asserts as being confidential and not subject to disclosure. *The New Jersey Offshore Wind Solicitation #3: Solicitation Guidance Document: Application Submission for Proposed Offshore Wind Facilities* (the “*Third Guidance Document*”) provides that: “the Board will require all Applicants to submit public (redacted) and confidential (unredacted) versions of their Applications” and that “[f]or the confidential version of the Application, Applicants must include a statement identifying each type of data or materials it asserts are exempt from public disclosure under OPRA and/or the common law, and explaining the basis for the proposed redaction.”¹

In addition, pursuant to the New Jersey State Treasury Regulations (the “*Treasury Regulations*”) for competitive procurement, a bidder may identify information in its proposal that is exempt from disclosure and provide an explanation for same. N.J.A.C. 17:12-1.2(b) provides in relevant part:

After the opening of sealed proposals, all information submitted by bidders in response to a solicitation of proposals is considered public information, notwithstanding any disclaimers to the contrary submitted by a bidder except when an RFP contains a negotiation component or as may be exempted from public disclosure by the Open Public Records Act, N.J.S.A. 47:1A-1 et seq. (OPRA), and the common law. As part of its proposal, each bidder may identify any data or materials it asserts are exempt from public disclosure under OPRA and/or the common law, explaining the basis for such assertion.²

Please accept this Substantiation of Confidentiality Claim as the Company’s written explanation for its assertion that certain identified information contained in its Application is exempt from public disclosure pursuant to the above authorities.

I. The Request for Proposals Contains a Negotiation Component and Responses Thereto are Exempt from Public Disclosure.

As an initial matter, the Treasury Regulations provide that when a request for proposals (“*RFP*”) contains a “negotiation component,” proposals submitted pursuant to the RFP are not considered public information upon the opening of sealed proposals.³

Through the question-and-answer portal (the “*Questions and Answers*”) related to the Third Guidance Document, a prospective bidder inquired as follows: “Will BPU be requesting a best and final offer, and if so, what will be the parameters of that request?” Board staff responded as follows:

¹ Third Guidance Document, Section 2.5.

² N.J.A.C. 17:12-1.2(b).

³ Id.

RESPONSE: BPU Staff may request a best and final offer (BAFO) from all Applicants. If a BAFO is requested, Applicants will be allowed to offer a lower first year OREC price, and/or a reduction in the escalation rate for both the Project and Prebuild Infrastructure components. Applicants will be required to describe the changes to the Application related to their BAFO submission, however no changes to the project design will be allowed. Additional details on the BAFO parameters will be provided if or when the BAFO is issued.⁴

Thus, to the extent that the BPU determines that it shall negotiate with bidders, the Company submits that the Application and all of its attachments shall remain confidential upon the opening of sealed bids and shall not be publicly disclosed until after negotiations have been completed and the notice of intent to award as been issued, subject to a determination regarding confidentiality asserted by the applicant below. We note that in the Third Guidance Document the Board has agreed that the public versions of applications will not be made public until after the Board has rendered its decision in the solicitation: “The Board intends to make all public versions of submitted Applications available to the general public *following the Board Decision.*”⁵

In addition, the Company requests that all information claimed to be confidential be treated as such in perpetuity, as such information may be relevant to future offshore wind solicitations and related proceedings in which the Company may participate.

II. The Application Contains Confidential, Proprietary Information and Trade Secrets.

As explained more fully below, the Application contains confidential, proprietary information and trade secrets, which, if disclosed would likely cause damage to either a competitive or bidding position to the Company. It is for these reasons that the Company contends that the information identified by it as being confidential be exempted from public disclosure pursuant to OPRA and the common law.

a. Developer Information

Developer Information, submitted pursuant to N.J.A.C. 14:8-6.5(a)(1), contains resumes of key employees and identities of third party contractors, vendors, suppliers, and other Project partners that the Company asserts are exempt under OPRA because public access to same would invade the individuals’ reasonable expectation of privacy to same. OPRA does recognize a privacy exception, as set forth in the public policy of the statute:

[A] public agency has a responsibility and an obligation to safeguard from public access a citizen’s personal information with

⁴ Question and Answer No. 162.

⁵ Third Guidance Document, Section 2.5 (emphasis added).

which it has been entrusted when disclosure thereof would violate the citizen's reasonable expectation of privacy.⁶

Citizens of course endeavor to maintain privacy for any number of reasons, including, without limitation, those related to the safety of themselves and family members, and records may be withheld under OPRA "where it shall appear that the information requested or to be examined will jeopardize the safety of any person."⁷

In addition, a noted OPRA exception excludes the disclosure of "personnel or pension records of any individual in the possession of a public agency[.]"⁸ The statute does not define "personnel record", but the case law interpreting this provision of OPRA tends to favor the protection of confidentiality.⁹ Resumes are documents summarizing a person's educational background and experiences and are typically used to secure new employment.¹⁰ Certainly, a resume would be a document found in a personnel file, which would fall squarely within the exemption.

A core purpose of OPRA is "to maximize public knowledge about public affairs in order to ensure an informed citizenry and to minimize the evils inherent in a secluded process."¹¹ Thus, a person's privacy concerns must be balanced against any public interest in the requested information. Here, the resumes of key employees contain personal information concerning the employees' education, training, skills, certifications, and employment history. Private citizens employed by private companies have a reasonable expectation that such information will not be disclosed to the public. Therefore, their interests in maintaining the confidentiality of such information should weigh in favor of any stated interest for disclosure.

Finally, the Developer Information includes the identifies of third-party suppliers, contractors, vendors, and other Project partners which we assert to be confidential for the reasons explained in II(b) and II(c) below.

b. Project Description

The Project Description, submitted pursuant to N.J.A.C. 14:8-6.5(a)(2), contains specific details about the proposed Project, including, but not limited to: (1) maps, surveys, and other visual aids; (2) the type, size, and number of proposed turbines and foundations; (3) the proposed manufacturer of the turbines and foundations; and (4) the identities and financial strengths of third party vendors. In addition, the Application has further details about the Project Description throughout various sections of the Application, including, plans for decommissioning,

⁶ N.J.S.A. 47:1A-1.

⁷ N.J.S.A. 47:1A-3.

⁸ N.J.S.A. 47:1A-10.

⁹ See North Jersey Media Group, Inc. v. Bergen County Prosecutor's Office, 405 N.J. Super. 386 (App. Div. 2009); see also Michelson v. Wyatt, 379 N.J. Super. 611 (App. Div. 2005).

¹⁰ <https://www.dictionary.com/browse/resume>

¹¹ Asbury Park Press v. Ocean County Prosecutor's Office, 374 N.J. Super. 312, 329 (Law Div. 2004).

permitting, interconnection, local content and workforce development, operations and maintenance, scheduling, risks, opportunities, mitigations, and environmental and fisheries protection, which constitute trade secrets and proprietary commercial or financial information. The information related to the Project Description and identified as confidential in this section and throughout the Application is exempt from public disclosure as being trade secrets and proprietary commercial or financial information.

A trade secret is “any information that can be used in the operation of a business or other enterprise and that is sufficiently valuable and secret to afford a potential economic advantage over others.”¹² “A trade secret can also relate to other aspects of business operations such as pricing and marketing techniques or the identity and requirements of customers.”¹³ The New Jersey Trade Secrets Act (the “NJTSA”),¹⁴ was signed into law in 2012 and established greater clarity as to what constitutes a “trade secret” under New Jersey law. The NJTSA broadly defines “trade secret”:

“Trade secret” means information, held by one or more people, without regard to form, including a formula, pattern, business data compilation, program, device, method, technique, design, diagram, drawing, invention, plan, procedure, prototype or process that: (1) derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use; and (2) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.¹⁵

Information relating to customers, merchandising, costs, and pricing may also be considered trade secrets.¹⁶

The Project Description correlates to information provided by third party contractors, vendors, and suppliers, and the related pricing the Company received from same. Disclosure of this information would allow the Company’s competitors to calculate the Company’s actual costs with a high degree of precision, allowing the competitors to underbid the Company and cause the Company competitive harm. Given the broad definition of what constitutes a trade secret, it is clear that information relating to the Project and associated third party vendors and pricing must not be disclosed.

With respect to the preferred turbine specifically, it has not yet been publicly announced that such turbine will be a component of the Company’s Application, and therefore the nature of

¹² Communication Workers of America v. Rousseau, 417 N.J. Super. 341, 361 (App. Div. 2010) (internal citation omitted).

¹³ Trump’s Castle Assocs. v. Tallone, 275 N.J. Super. 159, 162 (App. Div. 1994).

¹⁴ N.J.S.A. 56:15-1 et seq.

¹⁵ N.J.S.A. 56:15-2.

¹⁶ Lamorte Burns & Co. v. Walters, 167 N.J. at 299 (internal citations omitted).

such turbine is considered highly sensitive information to the turbine supplier. As a condition for the Company's inclusion and disclosure of the turbine information within this Application, all mention of and information related to the turbine shall be deemed confidential and not for public disclosure. This includes, without limitation, the identity of the turbine supplier, overall turbine quantities, and Project capacities from which the turbines' individual nominal capacity could be derived.

In addition, the Equipment & Manufacturing Plan, Construction Plan, Energy Production Estimate, Project Financing Plan, Project Revenue Plan, Economic Development Plan, Stakeholder Engagement Plan, Environmental Protection Plan, Fisheries Protection Plan, Project Timeline, Interconnection Plan, Permitting Plan, Operations and Maintenance Plan, and Decommissioning Plan each contain trade secrets and proprietary commercial or financial information that are exempt from disclosure under OPRA. The Equipment & Manufacturing Plan is the product of in-depth studies used to identify the most valuable technology and supplies. The Construction Plan includes a carefully drafted schedule to ensure deliverability of the Project, in coordination with suppliers and contractors. The Energy Production Estimate includes an assessment of the available wind resource in the Project Area to support design optimization. The Project Financing Plan includes a detailed project financial plan and method to ensure deliverability of the Project. The Project Revenue Plan includes heavily-vetted forward projections for energy and capacity market revenues. The Economic Development Plan includes information developed by the Company's third-party vendor and the strategy reflected in the Company's Economic Development Plan may form the foundation for proposals in future offshore wind solicitations. The Stakeholder Engagement Plan includes details regarding the Company's stakeholder engagement philosophy and activities. The Environmental Protection Plan was developed by the Company's third-party vendor and contains details regarding the environmental impacts, benefits, and mitigation measures, as well as the net environmental effects of the Project. The Fisheries Protection Plan reflects four (4) years of engagement and collaborations with representatives of the fishing industries to ensure responsible development and co-existence with New Jersey fisheries. The Project Timeline is a proprietary timeline developed by the Company as a result of the Company's unique knowledge and experience of the industry and knowledge of specific construction technology. The Interconnection Plan is also the product of studies conducted by third party vendors and was developed after the Company invested much research into determining the most feasible and optimal locations for interconnection, including the path for reaching the point of interconnection. The Permitting Plan includes information related to the Company's third-party vendors and suppliers. The Operations and Maintenance Plan details the financial capacity and technical expertise of the Company, its shareholders, and partners used to ensure safe and reliable energy delivery. Finally, the Decommissioning Plan provides projected costs of decommissioning the Project, which plan was the result of a study conducted by a third-party vendor.

The Company has invested significant time and money into developing all of these plans, each of which have a unique economic value to the Company because of the details contained in them for the Project. These plans are not publicly available and are protected by Non-Disclosure Agreements with the vendors who developed them. If this information were disclosed to the public, it would be detrimental to the Company because it would give a threefold advantage to

competitors: (1) it would permit other potential offshore wind developers an opportunity to take advantage of the effort, investment, and experience of the Company in designing and developing an offshore wind project, formulating OREC calculations and a pricing plan, and negotiating related agreements; (2) it would allow competitors to know the extent of the Company's investment, planning, and strategy in developing the Project; and (3) it would reveal the contracts and/or negotiations the Company has entered into with its contractors, vendors, and suppliers and undermine those relationships and the competitive position of the Company, which would ultimately affect the pricing for ratepayers. If the public were permitted access to this information, it would undermine the labor and efforts of the Company and would allow competitors to exploit same to offer a competitive project to the Board to the detriment of the Company. Disclosing trade secrets provided to the Board would negatively impact the business interests of the Company and their vendors by undermining their position in the marketplace and will injure the Company's relationships with its vendors, each of whom the Company has entered into Non-Disclosure Agreements.

c. Financial Information

OPRA affirmatively excludes from the public's reach "trade secrets and proprietary commercial or financial information obtained from any source."¹⁷ The Supreme Court has set forth guidance as to what elements to consider when determining whether commercial financial information is proprietary.¹⁸ The elements to be considered are: (1) "the relationship of the parties at the time of disclosure"; (2) "the intended use of the information"; and (3) "the expectation of the parties."¹⁹ "Information need not rise to the level of a trade secret to be protected."²⁰

Financial information identified by the Company as being confidential includes, but is not limited to financial analyses, financial statements, financial incentives, output and pricing, cost benefit analysis, OREC pricing schedule, the Project Financing Plan, the Project Revenue Plan, and the Economic Development Plan. A competitor's knowledge of a particular vendor's pricing and packaging requirements gives the competitor the ability to design a project that gives it an advantage over competitors who do not have this information.²¹

The financial information's value is at least in part based on the fact that it is not generally known and readily ascertainable by the public and thus, not known or available to any competitors to the Company. In addition, Company has solicited and negotiated the Project design, construction, technology, and marketing proposals from various consultants, contractors, vendors, and suppliers, who have each provided detailed information used by the Company to develop this Project and to formulate its OREC price calculations. Each of these pieces of information contributes to and factors into the Company's overall Project development strategy.

¹⁷ N.J.S.A. 47:1A-1.1.

¹⁸ Lamorte Burns & Co. v. Walters, 167 N.J. 285 (2001).

¹⁹ Id. at 299-300.

²⁰ Id.

²¹ See Platinum Management, Inc. v. Dahms, 285 N.J. Super. 274, 295-96 (Law Div. 1995).

The various quotes negotiated by the Company (either individually or collectively) from potential sub-contractors and the extensive budget details and information relating to the technology and terms of the financing plans associated with the potential turbine manufacturers are the result of extensive work on the part of the Company. This information is known only to the Company and the respective consultants, vendors, and suppliers that provided them and their respective counsels and representatives. Where this information has been referenced in the Application, it has been redacted. Thus, the Company is claiming that this information is confidential proprietary commercial and/or financial information and trade secrets that must not be disclosed to the public.

The Supreme Court has suggested a three-part test to determine whether certain information constitutes proprietary commercial or financial information: (1) a party has expended its resources developing the information; (2) the information is not generally disclosed to the public; and (3) if the information is disclosed, it is disclosed for a limited purpose with a provision for confidentiality.²²

Here, the Application contains a compilation of information, which includes, but is not limited to, confidential company financial information, vendor budget proposals, financial analyses and calculations, the structure and associated terms of the joint venture agreement between the Company's shareholders, and Project manufacturing, construction, and design strategies. The Company has expended its resources hiring and/or negotiating with consultants, contractors, vendors, and suppliers to develop the information, all of which have been integral to the development of the Project and Project alternatives and the forecast of the economics of same. The Company has not disclosed any of the information to the general public and, in fact, has entered into separate Non-Disclosure Agreements with each and every one of its consultants, contractors, vendors, and suppliers to keep all information exchanged confidential. Thus, the Company has not disclosed any of the information contained in the Application to anyone except to responsible officers, directors, members, partners, and employees, including their consultants, agents, financial investors and legal, tax, and accounting advisors. Except for publicly available information related to governmental permitting approvals made in connection with this Application, the information contained in the Application is not available to the public. The Application's submission by the Company to the Board for the consideration of this Project is a permitted disclosure under the applicable Non-Disclosure Agreements, subject to all applicable governmental or judicial protection available for such information.

Any disclosure of the private, proprietary information asserted as confidential in the Application has the potential to not only seriously prejudice the Company in its Application and to delay, frustrate, or otherwise render impracticable the financing and development of the Project for which the Application is being submitted to the Board, but also to prejudice the Company in negotiations with other parties and partners regarding the potential windfarm technologies being modeled, leading to loss of business and increased unfair competition. Specifically, the release of the confidential calculations, forecasted revenues, and other financial information to other windfarm developers and turbine competitors would be extremely damaging

²² LaMorte Burns & Co. v. Walters, 167 N.J. 285, 299-201 (2001).

to the Company's future efforts to pursue windfarm development along the East Coast or elsewhere. Because the Application is the end product of innovation and substantial effort and investment by the Company, the information contained in the Application for which the Company has proposed redactions constitutes trade secrets and proprietary commercial or financial information that must not be disclosed to the public.

III. Measures Taken To Prevent Disclosure

As indicated above, the Company has taken measures to prevent disclosure of this confidential information to others, by entering into Non-Disclosure Agreements with each and every vendor and not taking any action to publicize the material or release any detailed information about the Project to the press. In addition to this, the Company has studiously refrained from making any public comment about its negotiations for manufacturing, financing, or providing turbines.

The information being submitted here by the Company is not contained in any materials that are routinely available to other government agencies nor the general public and has not been disclosed beyond those involved in this endeavor. Additionally, there are no existing determinations by the Board, any other state or Federal agency or a court of competent jurisdiction on the confidentiality of the referenced material.

IV. Communications

All communications and notices related to this Substantiation of Confidentiality Claim and/or related to requests by the public to access information claimed to be confidential shall be directed to:

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apeterson@pearlmanmiranda.com

Julia Pettit, Esq.
General Counsel
Atlantic Shores Offshore Wind, LLC
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Brooklyn, NY 11205
julia.pettit@atlanticshoreswind.com

V. Conclusion

The information asserted as confidential is not currently available to the public and we respectfully request that it remain so. Its value is at least in part derived from this private nature and its disclosure has the potential to prejudice the Company in implementing the transaction contemplated by its Application to the Board, as well as in future business marketing and operations. We respectfully request that the confidential information identified in the enclosed confidential copy be withheld from public review.

PEARLMAN & MIRANDA LLC

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Newark, NJ 07102

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(973) 893-5962 (FAX)

Counsel for Applicant, Atlantic Shores Offshore Wind Project 2, LLC (the “*Company*”)

**IN THE MATTER OF THE OPENING OF
NEW JERSEY’S THIRD SOLICITATION
FOR OFFSHORE WIND RENEWABLE
ENERGY CERTIFICATES (OREC)**

STATE OF NEW JERSEY
BOARD OF PUBLIC UTILITIES

**AFFIDAVIT IN SUPPORT OF
SUBSTANTIATION OF
CONFIDENTIALITY CLAIM**

DOCKET NO. QO22080481

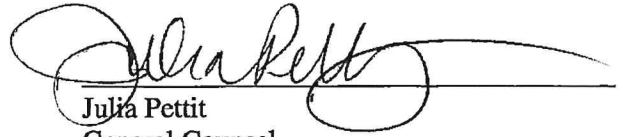
I, Julia Pettit, being of full age and duly sworn, deposes and say:

1. I am the General Counsel of Atlantic Shores Offshore Wind, LLC, the sole member and manager of the Company.

2. I have personal knowledge of the content of that certain Substantiation of Confidentiality Claim (the “*Substantiation*”), dated August 4, 2023, in connection with that certain application by the Company, including all appendices and supporting documentation in connection therewith, submitted to the New Jersey Board of Public Utilities on August 4, 2023 (the “*Application*”), all in accordance with that certain “*New Jersey Offshore Wind Solicitation #3: Solicitation Guidance Document: Application Submission for Proposed Offshore Wind Facilities*”.

3. All of the statements and declarations contained in the Substantiation are truthful and accurate.

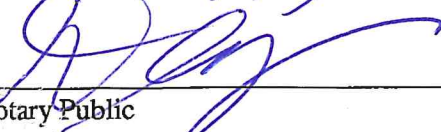
[*Signature Page Follows*]



Julia Pettit
General Counsel
Atlantic Shores Offshore Wind, LLC

Sworn and subscribed to before me

On this 4th day of August, 2023.



Notary Public

DAVID WAINGER
A Notary Public of New Jersey
My Commission Expires August 25, 2026