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June 7, 2024

**Via Electronic Mail**

Sherri Golden, Secretary  
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**Re: In the Matter of The Opening Of New Jersey's Third  
Solicitation For Offshore Wind Renewable Energy  
Certificates (OREC) Request for Waiver  
Invenergy Wind Offshore LLC  
BPU Docket No. QO22080481**

Dear Secretary Golden:

Please accept this letter on behalf of the New Jersey Division of Rate Counsel ("Rate Counsel") as our written comments regarding the above-referenced petition filed by Invenergy Wind Offshore LLC ("Invenergy" or "Petitioner") with the New Jersey Board of Public Utilities ("Board") on April 23, 2024, seeking the following relief associated with Petitioner's 2,400 megawatt ("MW") Qualified Offshore Wind Project ("QOWP"), the Leading Light Wind Project ("LLW Project"):

- i) authorization to file unaudited financial statements on a quarterly basis,
- ii) a waiver pursuant to N.J.A.C. 14:1-1.2 of the Board requirement set forth at N.J.A.C.14:8-6.5(a)(4)(v) requiring audited financial statements on a quarterly basis,

- iii) authorization to file quarterly financial statements no more than sixty days following the end of the accounting quarter,
- iv) authorization to file the first quarterly financial statement, from January 1, 2024, through March 31, 2024, no later than May 30, 2024; and
- v) authorization to file annual audited financial statements no more than ninety days following the end of the fiscal year.

Consistent with the Order issued by the Board in connection with *In the Matter of the New Jersey Board of Public Utilities' Response to the COVID-19 Pandemic for a Temporary Waiver of the Requirements for Certain Non-Essential Obligations*, BPU Docket No. EO20030254, dated March 19, 2020, these comments are being electronically filed with the Secretary of the Board and with the LLW Project. Paper copies will not follow this submission.

### **Factual Background**

On March 6, 2023, the Board issued its Third Offshore Wind (“OSW”) Solicitation.<sup>1</sup> Interested developers were encouraged to submit an Application to the Board to build an OSW facility.<sup>2</sup> The Board also released the Third Solicitation Guidance document (“Solicitation Guidelines”) which included all Application requirements, guidance on the preparation of the Application, standards and assumptions to be used in preparing an Application, a schedule, and key dates.<sup>3</sup> Specifically at issue, the Solicitation Guidelines require an “Applicant Commitment Form,” which obligates the winning applicant commit to

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<sup>1</sup> [In The Matter Of The Opening Of New Jersey’s Third Solicitation For Offshore Wind Renewable Energy Certificates \(OREC\), BPU Docket No. QO22080481 \(Mar. 6, 2023\).](#)

<sup>2</sup> [Ibid.](#)

<sup>3</sup> New Jersey Offshore Wind Third Solicitation, Solicitation Guidance Document (March 6, 2023)(available at <https://njoffshorewind.com/third-solicitation/solicitation-documents/Final-Solicitation-Guidence-Document-with-attachments.pdf>).

"file audited financial statements with the Board on a quarterly and annual basis."<sup>4</sup> This provision matches language in the Board's regulations under N.J.A.C. 14:8-6.5(a)(4)(v), which stipulates that an application seeking approval as a qualified OSW project include from the applicant "[a] commitment that audited financial statements shall be filed with the Board on a quarterly and annual basis."

In response to the Third Solicitation, the Board received Applications from four developers, Atlantic Shores Offshore Wind Project 2, LLC, Attentive Energy LLC, Community Offshore Wind (COSW) NJ 1, LLC, and Invenergy.<sup>5</sup> Invenergy's bid application included a signed Application Commitment Form that, along with other commitments, committed to filing audited financial statements on a quarterly and annual basis.<sup>6</sup>

The Board evaluated the bids against the factors that included those set forth in the Offshore Wind Economic Development Act of 2010 ("OWEDA") and N.J.A.C. 14:8-6 et seq.<sup>7</sup> After bids were deemed to be administratively complete,<sup>8</sup> the Board performed "a detailed evaluation" of each application.<sup>9</sup> Following its evaluation, the Board found that "the LLW Project meets or exceeds all of the standards for a Qualified Offshore Wind Project ("QOWP) as set forth in N.J.S.A. 48:3-87.1 et seq. and N.J.A.C. 14:8-6.5 et seq."<sup>10</sup> The Board made its determination after a complete and thorough review of the record, which included representations and warranties made by Invenergy in its Application and in its Best and Final Offer ("BAFO").<sup>11</sup> The Board noted several other factors guiding their decision,

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<sup>4</sup> Solicitation Guidance Document, 3/6/2023, Attachment 1.

<sup>5</sup> I/M/O The Board of Public Utilities Offshore Wind Solicitation 3 for 1,200 to 2,400 MW - the Leading Light Wind 2,400 MW Project, BPU Docket No. QO22080481, January 24, 2024 (LLW Project Award Order) at 12-13.

<sup>6</sup> Waiver Petition at Paragraph 6.

<sup>7</sup> LLW Project Award Order at 13,

<sup>8</sup> Id. at 15.

<sup>10</sup> Id. at 34.

<sup>10</sup> Id. at 34.

<sup>11</sup> Id. At 18.

including choosing these “two projects due to their significant generation of clean energy to combat climate change [and. . . awarding] an American OSW developer, representing a significant step forward for OSW in the United States.”<sup>12</sup> The Board also noted that the application for the LLW Project demonstrates financial integrity and sufficient access to capital to allow a reasonable expectation of completion of its construction.<sup>13</sup>

Notwithstanding commitments made during the application process, on April 23, 2024, Invenergy filed a request for a waiver pursuant to N.J.A.C. 14:1-1.2 of the Board requirement set forth at N.J.A.C. 14:8-6.5(a)(4)(v) requiring audited financial statements on a quarterly basis, and requested to file unaudited financial statements on a quarterly basis.<sup>14</sup>

In its petition, Invenergy asserts that the filing of “audited quarterly financial statements is not an industry standard and imposes a commercially unreasonable burden and hardship on the Petitioner.”<sup>15</sup> Invenergy also argues that “they are not aware of other New Jersey state agencies that require audited financial statements on a quarterly basis.”<sup>16</sup> Invenergy indicates that the “Board previously waived these requirements for the developer of another OSW project.”<sup>17</sup> Invenergy acknowledged “the Board’s interest in monitoring the fiscal health of the LLW Project but believes the provision of unaudited quarterly financial statements is a reasonable balancing of the Board’s important oversight role with the administrative and financial burdens placed on the LLW Project to provide timely information.”<sup>18</sup> Petitioner further argued that the submission of audited quarterly financial statements would be “materially disruptive to Petitioner’s operations and provide the Board

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<sup>12</sup> Id. at 33.

<sup>13</sup> Id. at 34.

<sup>14</sup> Waiver Petition at Paragraph 1.

<sup>15</sup> Id. at Paragraph 14.

<sup>16</sup> Ibid.

<sup>17</sup> Id. at Paragraph 15.

<sup>18</sup> Ibid.

with little, if any, information that is not otherwise available through the quarterly unaudited financial statements and annual audited financial statements.”<sup>19</sup>

As to the waiver, Petitioner argues that it is appropriate due to “the hardship and/or inconvenience”<sup>20</sup> strict compliance with N.J.A.C. 14:8-6.5(a)(4)(v) would impose on Petitioner. Such hardships, according to Invenergy, include “the additional time and attention required for the preparation of quarterly audited financial statements, as well as staff and auditor resources, in addition to the incremental cost of such activities.”<sup>21</sup> Petitioner also refers to the Atlantic Shores Offshore Wind Project 1<sup>22</sup> decision and provides, “the Board previously granted a waiver of N.J.A.C. 14:8-65(a)(4)(v) to another QOWP and should do so here.”<sup>23</sup>

The remaining issue is the timing for submission of the financial statements. Invenergy indicates that it is “committed to transparency and accountability. . . [and] remains committed to providing the Board with financial statements on a quarterly and annual basis.”<sup>24</sup> Petitioner proffers that. . . “Neither the OWEDA Regulations nor the Applicant Commitment Form are clear regarding the deadline for providing financial statements for any given accounting period or for when such filing should commence.”<sup>25</sup> Based on these reasons, Invenergy requests i) to file unaudited quarterly financial statements no more than sixty days following the end of the accounting quarter; ii) to file the first quarterly financial statement, from January 1, 2024 through March 31, 2024, no later than May 30, 2024<sup>26</sup>; and

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<sup>19</sup> Id. at Paragraph 16.

<sup>20</sup> Id. at Paragraph 21.

<sup>21</sup> Id. at Paragraph 22.

<sup>22</sup> I/M/O 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 (Jun. 30, 2021) (“Atlantic Shores Award Order”) at 23.

<sup>23</sup> Waiver Petition at Paragraph 23.

<sup>24</sup> Id. at Paragraph 18.

<sup>25</sup> Ibid.

<sup>26</sup> Has this occurred as the date has passed?

iii) to file annual audited financial statements no more than ninety days following the end of the fiscal year.

### Comments

Preliminarily, Rate Counsel notes that in 2013, in response to comments by offshore wind developers, the Board rejected removing audited financial requirements from its rules under N.J.A.C. 14:8-6.5 because “the Board needs to have a high degree of confidence that the project will be able to obtain development and construction financing.”<sup>27</sup> The Board further provided that “[t]he financial statements will be evaluated in conjunction with the proposed method of financing the project proposed in accordance with N.J.A.C. 14:8-6.5(a)(4).”<sup>28</sup> None of the stakeholders specifically objected to the requirements under N.J.A.C. 14:8-6.5(a)(4)(v).<sup>29</sup> When reviewing the bid application and looking at the financial strength and financial plan of Invenergy, the Board noted that “Invenergy is owned by York Bight Offshore Holdings, LLC, a joint venture comprised of five investors. The LLW Project will be developed by an Invenergy equity holder, Forward Power Offshore LLC, (“Forward Power”), an Invenergy equity holder, which is a 50/50 joint venture of two American-led companies: lead developer Invenergy Renewables LLC and co-developer energyRe LLC.”<sup>30</sup> Referring to the financial strength of the Invenergy Project, the Board noted that the LLW Project is backed by the Forward Power joint venture and four financial investors, three American firms and one Canadian firm, all four are asset management firms which “possess the experience and financial capital needed to ensure construction of the

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<sup>27</sup> 45 N.J.R. 336(a).

<sup>28</sup> Ibid.

<sup>29</sup> Ibid.

<sup>30</sup> LLW Project Award Order at 19-20.

LLW Project.”<sup>31</sup>

In this case, it does not appear that audited financial statements of Invenergy would add a substantive degree of confidence in the financial fitness of the Petitioner. However, because Attentive Energy is utilizing the financial strength of its equity holder Forward Power, and its financial investors, the Board should investigate whether audited financial statements from those companies would satisfy the requirement under the Board’s rules. Rate Counsel also recommends that the Board establish a process for review, if Invenergy’s audited annual financial statements vary significantly from their unaudited quarterly financial statements.

While Rate Counsel does not have any specific concerns regarding Invenergy’s ability to provide audited quarterly financial statements, nor to timely provide same, Rate Counsel has general concerns regarding the waiver of Offshore Wind Solicitation requirements after the bids have been submitted. Changing the bidders’ requirements following the close of bidding undermines the competitive contracting process as a whole. In fact, we are already seeing the repercussions of the post-award waiver in the Atlantic Shores decision, as it is being cited as authority for Invenergy’s waiver application. Intentional or not, the Atlantic Shores decision has set a precedent where the bid received is not the bid, but merely a foot in the door to negotiate the actual deal post-award. The BPU’s decision to allow post award modifications for bids has fostered an environment where promises made as part of a bid are not binding, which in turn is eroding the goals of a competitive solicitation process.

Invenergy has asserted that the audited quarterly financial statements are a

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<sup>31</sup> Id at 20.

commercially unreasonable burden, a hardship, and materially disruptive.<sup>32</sup> Assuming this is true for the industry as a whole, it is unknown how many bidders chose simply not to bid based on these same conditions or other conditions. It is unknown if these potential bidders would have proposed bids even more advantageous to New Jersey residents and the State's electric ratepayers if these conditions were not part of the Solicitation. It is also unknown if the bids submitted in either of the last two solicitations contained any premium due to this allegedly burdensome requirement.

The Board previously held that “the diversity in OSW developers. . .will create robust competition, which will drive down the cost of future solicitations.”<sup>33</sup> Post-award waiver of bid requirements undermines that goal. Therefore, if the Board chooses to waive the audited quarterly financial statement requirement, it should reconsider enforcing the commitment in future solicitations or revising the regulations, because it may result in even better results in future solicitations and more competitive bids from more bidders. The Board must also make clear that this waiver, in this instance, is not setting a precedent by which the bid is not the bid. Failure to establish this fact will ultimately result in underbidding with an assumption the bid can be fixed after the award; undermining competition, and potentially resulting in winning bidders withdrawing, further complicating New Jersey's offshore wind goals.

The Board should review its solicitations to determine if there are additional requirements that could serve as a burden to entry that the Board has no intentions of ever enforcing. Continuing to require a commitment which will not be enforced undermines the entire competitive solicitation process.

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<sup>32</sup> Waiver petition at Paragraph 14 & 16.

<sup>33</sup> I/M/O the Board Of Public Utilities Offshore Wind Solicitation 2 For 1,200 To 2,400 MW – Atlantic Shores Offshore Wind Project 1, LLC at 4, BPU Docket No. QO21050824 (Jun. 30, 2021) (“Atlantic Shores Award Order”) at 24.



Rate Counsel thanks the Board for the opportunity to make these comments.

Respectfully Submitted,

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**OffShore Wind Third Solicitation  
Invenergy Waiver Motion  
BPU Docket No. QO22080481**

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