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June 7, 2024

Via Electronic Mail

Sherri Golden, Secretary
New Jersey Board of Public Utilities
44 South Clinton Avenue, 1st Floor
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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
Attentive Energy Two 1,342 MW Project
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 Attentive Energy LLC ("Attentive Energy" or "Petitioner") with the New Jersey Board of Public Utilities ("Board") on April 16, 2024, seeking the following relief associated with Petitioner's 1,342 megawatt ("MW") approved offshore wind project, ("Attentive Project" or "Project"):

- i) authorization to file unaudited financial statements on a quarterly basis for the term of the OREC order,
- 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 annual audited financial statements no more than one hundred eighty 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 Attentive Project. Paper copies will not follow this submission.

Factual Background

On March 6, 2023, the Board issued its Third Offshore Wind (“OSW”) Solicitation.¹ Interested developers were encouraged to submit an Application to the Board to build an OSW facility.² 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.³ Specifically at issue, the Solicitation Guidelines require an “Applicant Commitment Form,” which obligates the winning applicant commit to “file audited financial statements with the Board on a quarterly and annual basis.”⁴ 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.”

¹ 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) .

² Ibid.

³ 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>).

⁴ Solicitation Guidance Document, Attachment 3 Applicant Commitment Form.

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.⁵ Attentive Energy’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. Petitioner asserts that since the applicant commitment form failed to use the word “audited” when referring to quarterly and yearly financial statements in line 6, (the exact language is "file financial statements with the Board on a quarterly and annual basis,")⁶ petitioner is absolved of such a requirement.⁷ The Applicant Commitment Form, however, obligates the winning applicant commit to “ensure that the Project is compliant with all applicable Federal and State statutes and Regulations . . . and will provide proof of such compliance on an ongoing basis.”⁸

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.⁹ After the bids were deemed to be administratively complete,¹⁰ the Board performed “a detailed evaluation” of each application.¹¹ Following its evaluation, the Board found that the “Attentive Project meets or exceeds all of the standards for a Qualified OSW facility 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.”¹² The Board made its determination after a complete and thorough review of the record, which included representations and warranties made by Attentive Energy in its Application and in its Best and Final Offer (“BAFO”).¹³ The Board noted several

⁵ I/M/O The Board of Public Utilities Offshore Wind Solicitation 3 for 1,200 to 2,400 MW - the Attentive Energy Two Project 1342 MW Project, BPU Docket No. QO22080481, January 24, 2024 (Attentive Project Award Order) at 13.

⁶ Waiver Petition, Attachment A (Applicant Commitment Form, #6, from Solicitation Guidance Document 3/6/2023).

⁷ Waiver Petition at Paragraph 19.

⁸ Waiver Petition, Attachment A (Applicant Commitment Form, #4, from Solicitation Guidance Document 3/6/2023).

⁹ Attentive Project Award Order at 14,

¹⁰ Id. at 16.

¹¹ Ibid.

¹² Id. at 37.

¹³ Id. at 19

other factors guiding their decision, including that the application for the Attentive Project demonstrates financial integrity and sufficient access to capital to allow a reasonable expectation of completion of construction of the Attentive Project.”¹⁴

Notwithstanding commitments made during the application process, on April 16, 2024, Attentive Energy 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.¹⁵

In its petition, Attentive provides that audited quarterly financial statements are “not an industry standard and imposes a commercially unreasonable burden and hardship.”¹⁶ “Petitioners extensive and time-consuming audit process precludes it from having quarterly financial audited financial statements for submission to the Board.”¹⁷ Attentive outlines that deferments of travel plans and the expense of staff and accountants, among other reasons, as imposing a significant burden on its “employees and its Members and accounting service providers.”¹⁸ The Petitioner further argues that quarterly audited statements would be “materially disruptive to Petitioner’s operations.”¹⁹ Attentive also argues that quarterly financial statements are unique to these rules under N.J.A.C. 14:8- 6.5, and “is not able to identify another New Jersey state agency that requires . . . audited financial statements on a quarterly basis.”²⁰

As to the waiver, Petitioner argues that “the hardship . . . strict compliance with the OWEDA Quarterly Audit Requirement would impose upon Petitioner are set forth in detail

¹⁴ Id. at 36.

¹⁵ Waiver Petition pp 1-2.

¹⁶ Id. at 25.

¹⁷ Ibid.

¹⁸ Id. at 26.

¹⁹ Id. at 28.

²⁰ Id. at 30.

elsewhere in this Petition.²¹ Attentive also indicates that “the Board granted a similar waiver request made by Atlantic Shores [Offshore Wind Project 1] ²² regarding the financial reporting requirements related to its offshore wind project. . . to submit unaudited quarterly financial statements, finding that unaudited quarterly financial statements are reasonable and audited annual financial statements are reasonable.²³ Citing the Atlantic Shores ²⁴ decision approving their Waiver request, petitioner sets forth the Board position as one of flexibility, “the intent of N.J.A.C. 14:8-6.5(4)(v) was not to serve as an onerous hurdle that would place additional, non-industry standard financial requirements on a Board-selected [qualified offshore wind project].”²⁵

The remaining issue is the timing for submission of the financial statements. Attentive indicates that it is “committed to transparency and accountability, and . . . remain committed to providing the Board with financial statements on a quarterly and annual basis.”²⁶ Petitioner proffers that neither “OWEDA regulations nor the Applicant Commitment Form are clear regarding the deadline for providing financial statements for any given accounting period.”²⁷ Based on these reasons, Attentive requests i) to file quarterly unaudited financial statements no later than sixty days following the end of applicable fiscal quarter, and ii) to file annual audited financial statements no later than one hundred eighty days following the end of the applicable fiscal year²⁸ for the remainder of the OREC term.

²¹ Id. at 38.

²² 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”).

²³ Waiver Petition at 38 and 40.

²⁴ Atlantic Shores Award Order.

²⁵ Waiver Petition at Paragraph 41

²⁶ Id. at Paragraph 42.

²⁷ Ibid.

²⁸ Id. at Paragraph 43.

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.”²⁹ The Board further stated 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).”³⁰ None of the stakeholders specifically objected to the requirements under N.J.A.C. 14:8-6.5(a)(4)(v).³¹ When reviewing the bid application and looking at the financial strength and financial plan of Attentive Energy, the Board noted that Attentive Energy “is jointly owned and controlled by TotalEnergies OFW US1, LLC (“TotalEnergies US”), LLC and Corio OSW Investments LLC (“Corio).”³² Indicating that Attentive Energy is relying on the balance sheets of its parent companies, the Board provided that “France-based TotalEnergies SE, the Parent of TotalEnergies US has a balance sheet exceeding \$300 billion in assets, while Corio’s parent, the Australia-based Macquarie Group Limited, reported \$575 Billion in assets under management.”³³

In this case, it does not appear that audited financial statements of Attentive Energy would add a substantive degree of confidence in the financial fitness of the Petitioner. However, because Attentive Energy is utilizing the “balance sheets” of its parent companies, 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

²⁹ 45 N.J.R. 336(a).

³⁰ Ibid.

³¹ Ibid.

³² Attentive Project Award Order at 20.

³³ Ibid.

process for review, if Attentive Energy's audited annual financial statements vary significantly from their unaudited quarterly financial statements.

Rate Counsel does not have any specific concerns regarding Attentive Energy's ability to provide audited quarterly financial statements. As for the timing for the submission of the financial statements, Rate Counsel questions under what basis the one hundred eighty-day request is made (to file annual audited financial statements no later than one hundred eighty days following the end of the applicable fiscal year). This time frame seems excessive if Staff is to timely provide a response if an issue arises with an audit.

Rate Counsel also 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 Attentive'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.

Petitioner has asserted that the audited quarterly financial statements are a commercially unreasonable burden, a hardship, and materially disruptive.³⁴ 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

³⁴ Waiver petition at 15 & 28.

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.”³⁵ Post-award waivers 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 intention of enforcing. Continuing to require a commitment which will not be enforced undermines the entire competitive solicitation process.

³⁵ 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
Attentive Waiver Motion
BPU Docket No. QO22080481**

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