



State of New Jersey  
DIVISION OF RATE COUNSEL  
140 EAST FRONT STREET, 4<sup>TH</sup> FL  
P. O. BOX 003  
TRENTON, NEW JERSEY 08625

PHIL MURPHY  
Governor

TAHESHA L. WAY  
Lt. Governor

BRIAN O. LIPMAN  
Director

July 22, 2024

**Via Electronic Mail**

Ms. Sherri Golden, Secretary  
New Jersey Board of Public Utilities  
44 South Clinton Avenue,  
9th Floor P.O. Box 350  
Trenton, New Jersey 08625  
[Board.Secretary@bpu.nj.gov](mailto:Board.Secretary@bpu.nj.gov)

**Re: In The Matter Of The Opening Of Offshore Wind Renewable Energy Certificate (OREC) Application Window For 1,200 to 2,400 Megawatts Of Offshore Wind Capacity in furtherance of Executive Order No. 8 and Executive Order No. 92  
BPU Dkt. No. QO20080555**

**In The Matter Of The Board Of Public Utilities Offshore Wind Solicitation 2 for 1,200 to 2,400 Mw – Ocean Wind II, LLC  
BPU Dkt. No. QO21050825**

Dear Secretary Golden:

On July 1, 2024, Ocean Wind II LLC (“Ocean Wind”) filed a motion to vacate (hereinafter, “the Motion”) the June 30, 2021 Order in BPU Docket Nos. QO20080555 and QO21050825.<sup>1</sup> Please accept this response on behalf of the New Jersey Division of Rate Counsel (“Rate Counsel”). According to the Motion, Ocean Wind asserts that, on May 25, 2024, “Orsted A/S, Orsted North America Inc., Orsted Wind Power North America LLC, Ocean Wind LLC, and Ocean Wind II, LLC, the State of New Jersey and the Board entered into a settlement

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<sup>1</sup> Ocean Wind II Motion to Vacate at 1 (Jul. 1, 2024).

agreement”<sup>2</sup> (hereinafter, referred to as the “Settlement Agreement”). Notwithstanding this assertion, the Settlement Agreement was not attached to the Motion.<sup>3</sup> The Motion further purports to claim that the Settlement Agreement requires “Orsted” to move to vacate the “Ocean Wind Orders and the Board Orders granting easements to certain real property owned by Ocean City and Cape May County . . . .”<sup>4</sup> The Motion further purports to claim that the Settlement Agreement states “the State consents to such vacation and agrees to take all action reasonably necessary to effectuate such vacation.”<sup>5</sup>

The Settlement Agreement states that it is between “the State of New Jersey and the New Jersey Board of Public Utilities” and “Ørsted A/S, Orsted North America Inc., Orsted Wind Power North America LLC,<sup>1</sup> Ocean Wind LLC, and Ocean Wind II, LLC” which are collectively referred to as “Orsted” throughout the document.<sup>6</sup> The Settlement Agreement lists a number of Board Order and agreements between the parties including a “standstill Agreement” dated April 24, 2024. The Settlement Agreement provides that Orsted will pay \$125 million to the State and that “[i]n the absolute sole discretion of the Board” the payment shall be used for clean energy programs “including, but not limited to, additional investments in qualified wind energy facilities, investments in one or more offshore wind component manufacturing facilities, and other clean energy programs to encourage meeting the State’s clean energy goals under the State’s Energy Master Plan.”<sup>7</sup> In return for this payment, the State agrees to release “actions, causes of action, suits, debts, damages, liabilities, obligations, and demands whatsoever, in law

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<sup>2</sup> Id. at 2.

<sup>3</sup> Rate Counsel only received the Settlement Agreement after requesting it from the Attorney General’s Division of Law.

<sup>4</sup> Ibid.

<sup>5</sup> Ibid.

<sup>6</sup> Settlement Agreement at 1.

<sup>7</sup> Settlement Agreement at 4.

or equity, of whatever kind or character, whether known or unknown, fixed or contingent, which against . . .” the other.

As preliminary matter, Rate Counsel notes that it was a party to the Board Order upon which Ocean Wind requests relief in the Motion. The Offshore Wind Economic Development Act, under N.J.S.A. 48:3-87.1, unequivocally states that “[a]n 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.” Moreover, in considering settlements, the Appellate Division has held that “it is important that most of the active parties participate in negotiating the settlement and that the non-consenting parties be given an opportunity to argue against the stipulations.”<sup>8</sup> Nonetheless, Rate Counsel was not invited to any “settlement discussions” that led to the Settlement Agreement. Rate Counsel was never served with a copy of the Settlement Agreement. At no time did any party seek Rate Counsel’s consent to modify this Board order. On this basis alone, the motion is premature.

Despite these procedural deficiencies, Rate Counsel does not object to the relief sought by Ocean Wind, but has a number of concerns regarding the Motion. Procedurally, Rate Counsel questions the basis on which the Board could consider the Motion. Indeed, the Board has plainly held that its “regulations do not provide for such a request after the issuance of a Final Decision.”<sup>9</sup> Rather, the Board has chosen to treat such motions as requests for rehearing, reargument, or reconsideration under N.J.A.C. 14:1-8.6. The Board should be clear that, pursuant to existing precedent, this motion shall be treated as a motion under N.J.A.C. 14:1-8.6.

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<sup>8</sup> In re Pub. Serv. Elec. & Gas Co., 304 N.J. Super. 247, 254, certif. denied 152 N.J. 12 (1997).

<sup>9</sup> Louis L. Anderson v. Verizon New Jersey, BPU Docket No. TC07060428U (Jun. 7, 2007).

While the Motion does not in fact comport with the requirements of N.J.A.C. 14:1-8.6, Rate Counsel is willing to consent to a waiver of those requirements pursuant to N.J.A.C. 14:1-1.2(b). Even with this procedural fix, it is unclear how the Settlement Agreement is before the Board, or how the Board is a party to this Settlement Agreement, when it has never approved the Settlement Agreement. While subsequent Board ratification of a stipulation has occurred, the Board cannot be bound to a stipulation of settlement without its formal approval. That did not happen in this instance, so reliance on the Settlement Agreement as the basis for the motion is inappropriate. Moreover, it is unclear how such a consequential act under N.J.S.A. 48:3-87.1 could be subdelegated to the Office of the Attorney General without it ever appearing on the Board's agenda for an open meeting or allowing the named parties to those orders an opportunity to comment on the terms of the Settlement Agreement.

Notwithstanding the questionable status of the Settlement Agreement, Rate Counsel is an independent agency tasked with representing the public interest.<sup>10</sup> As noted above, Rate Counsel was not involved in the negotiation of the terms of settlement, nor was it ever invited to become a signatory. Despite being a party in all of these matters, Rate Counsel is not a party to the Settlement Agreement. Accordingly, Rate Counsel does not deem itself bound by the terms of the Settlement Agreement and reserves all rights to bring any action in law or equity it deems appropriate.<sup>11</sup>

The Board should treat this Motion as what it is, a request from Ocean Wind to reconsider the Board's order in the above-referenced dockets. The Settlement Agreement in this

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<sup>10</sup> See 52:27EE-46 and -48.

<sup>11</sup> See 52:27EE-48.

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matter is a red herring and should be disregarded by the Board for purposes of this request. Based upon that motion, and the public record that Ocean Wind is unable or unwilling to comply with the terms of the Board's prior order, the Board should grant the Motion and reverse its decision in this matter. Moreover, the Board should direct Ocean Wind to immediately advise the Appellate Division and any other Court considering enforcement of those orders of the Board's decision and that those pending matters are now moot. Rate Counsel does not object to the Board proceeding in this manner.

Respectfully,

BRIAN O. LIPMAN  
DIRECTOR, DIVISION OF RATE COUNSEL

By:     /s/ T. David Wand      
T. David Wand, Esq.  
Deputy Rate Counsel

C: Service List

**Offshore Wind Solicitation  
BPU Docket Nos. QO20080555  
and QO21050825**

**SERVICE LIST**

Sherri Golden, Secretary  
Board of Public Utilities  
44 South Clinton Avenue, 1st Floor  
P.O. Box 350  
Trenton, NJ 08625  
[Board.Secretary@bpu.nj.gov](mailto:Board.Secretary@bpu.nj.gov)

Robert Brabston, Esq.  
Board of Public Utilities  
44 South Clinton Avenue  
P.O. Box 350  
Trenton, NJ 08625  
[Robert.Brabston@bpu.nj.gov](mailto:Robert.Brabston@bpu.nj.gov)

Stacy Peterson  
Board of Public Utilities  
44 South Clinton Avenue  
P.O. Box 350  
Trenton, NJ 08625  
[Stacy.Peterson@bpu.nj.gov](mailto:Stacy.Peterson@bpu.nj.gov)

Carol Artale, Esq.  
Board of Public Utilities  
44 South Clinton Avenue  
P.O. Box 350  
Trenton, NJ 08625  
[Carol.Artale@bpu.nj.gov](mailto:Carol.Artale@bpu.nj.gov)

Taryn Boland  
Board of Public Utilities  
44 South Clinton Avenue  
P.O. Box 350  
Trenton, NJ 08625  
[Taryn.Boland@bpu.nj.gov](mailto:Taryn.Boland@bpu.nj.gov)

Henry Gajda  
Board of Public Utilities  
44 South Clinton Avenue  
P.O. Box 350  
Trenton, NJ 08625  
[Henry.Gajda@bpu.nj.gov](mailto:Henry.Gajda@bpu.nj.gov)

Kim Diamond  
Board of Public Utilities  
44 South Clinton Avenue  
P.O. Box 350  
Trenton, NJ 08625  
[Kimberly.Diamond@bpu.nj.gov](mailto:Kimberly.Diamond@bpu.nj.gov)

Anthony Bevacqua, Ph.D.  
Board of Public Utilities  
44 South Clinton Avenue  
P.O. Box 350  
Trenton, NJ 08625  
[Anthony.bevacqua@bpu.nj.gov](mailto:Anthony.bevacqua@bpu.nj.gov)

Ben Witherell, Ph.D.  
Board of Public Utilities  
44 South Clinton Avenue  
P.O. Box 350  
Trenton, NJ 08625  
[Benjamin.Witherell@bpu.nj.gov](mailto:Benjamin.Witherell@bpu.nj.gov)

Farhana Rahman  
Board of Public Utilities  
44 South Clinton Avenue  
P.O. Box 350  
Trenton, NJ 08625  
[Farhana.Rahman@bpu.nj.gov](mailto:Farhana.Rahman@bpu.nj.gov)

Veronique Oomen  
Board of Public Utilities  
44 South Clinton Avenue  
P.O. Box 350  
Trenton, NJ 08625  
[Veronique.Oomen@bpu.nj.gov](mailto:Veronique.Oomen@bpu.nj.gov)

Katharine Perry  
Board of Public Utilities  
44 South Clinton Avenue  
P.O. Box 350  
Trenton, NJ 08625  
[Katharine.Perry@bpu.nj.gov](mailto:Katharine.Perry@bpu.nj.gov)

Stacy Richardson  
Board of Public Utilities  
44 South Clinton Avenue  
P.O. Box 350  
Trenton, NJ 08625  
[stacy.richardson@bpu.nj.gov](mailto:stacy.richardson@bpu.nj.gov)

Kira Lawrence  
Board of Public Utilities  
44 South Clinton Avenue  
P.O. Box 350  
Trenton, NJ 08625  
[Kira.Lawrence@bpu.nj.gov](mailto:Kira.Lawrence@bpu.nj.gov)

Earl Thomas Pierce  
Board of Public Utilities  
44 South Clinton Avenue  
P.O. Box 350  
Trenton, NJ 08625  
[Earl.Pierce@bpu.nj.gov](mailto:Earl.Pierce@bpu.nj.gov)

Kevin Dillon  
Board of Public Utilities  
44 South Clinton Avenue  
P.O. Box 350  
Trenton, NJ 08625  
[Kevin.Dillon@bpu.nj.gov](mailto:Kevin.Dillon@bpu.nj.gov)

Bailey Wild  
Board of Public Utilities  
44 South Clinton Avenue  
P.O. Box 350  
Trenton, NJ 08625  
[Bailey.Wild@bpu.nj.gov](mailto:Bailey.Wild@bpu.nj.gov)

Jack Streppone  
Board of Public Utilities  
44 South Clinton Avenue  
P.O. Box 350  
Trenton, NJ 08625  
[Jack.Streppone@bpu.nj.gov](mailto:Jack.Streppone@bpu.nj.gov)

Paul Youchak, Esq.  
Board of Public Utilities  
44 South Clinton Avenue  
P.O. Box 350  
Trenton, NJ 08625  
[Paul.Youchak@bpu.nj.gov](mailto:Paul.Youchak@bpu.nj.gov)

Genevieve DiGiulo  
Board of Public Utilities  
44 South Clinton Avenue  
P.O. Box 350  
Trenton, NJ 08625  
[genevieve.digiulio@bpu.nj.gov](mailto:genevieve.digiulio@bpu.nj.gov)

Joseph DeLosa  
Board of Public Utilities  
44 South Clinton Avenue  
P.O. Box 350  
Trenton, NJ 08625  
[Joseph.Delosa@bpu.nj.gov](mailto:Joseph.Delosa@bpu.nj.gov)

David Apy, DAG  
Department of Law & Public Safety  
Division of Law  
R.J. Hughes Justice Complex  
25 Market Street, P.O. Box 112  
Trenton, NJ 08625  
[David.Apy@law.njoag.gov](mailto:David.Apy@law.njoag.gov)

Pamela Owen, DAG  
Department of Law & Public Safety  
Division of Law  
R.J. Hughes Justice Complex  
25 Market Street, P.O. Box 112  
Trenton, NJ 08625  
[Pamela.Owen@law.njoag.gov](mailto:Pamela.Owen@law.njoag.gov)

Daren Eppley, DAG  
Department of Law & Public Safety  
Division of Law  
R.J. Hughes Justice Complex  
25 Market Street, P.O. Box 112  
Trenton, NJ 08625  
[Daren.Eppley@law.njoag.gov](mailto:Daren.Eppley@law.njoag.gov)

Terel Klein, DAG  
Department of Law & Public Safety  
Division of Law  
R.J. Hughes Justice Complex  
25 Market Street, P.O. Box 112  
Trenton, NJ 08625  
[Terel.Klein@law.njoag.gov](mailto:Terel.Klein@law.njoag.gov)

Brian Lipman  
Division of Rate Counsel  
140 East Front Street, 4th Fl.  
Trenton, NJ 08625  
[blipman@rpa.nj.gov](mailto:blipman@rpa.nj.gov)

T. David Wand, Esq.  
Division of Rate Counsel  
140 East Front Street, 4th Fl.  
Trenton, NJ 08625  
[dwand@rpa.nj.gov](mailto:dwand@rpa.nj.gov)

Maura Caroselli, Esq.  
Division of Rate Counsel  
140 East Front Street, 4th Fl.  
Trenton, NJ 08625  
[mcaroselli@rpa.nj.gov](mailto:mcaroselli@rpa.nj.gov)

Megan Lupo, Esq.  
Division of Rate Counsel  
140 East Front Street, 4th Fl.  
Trenton, NJ 08625  
[mlupo@rpa.nj.gov](mailto:mlupo@rpa.nj.gov)

Robert Glover, Esq.  
Division of Rate Counsel  
140 East Front Street, 4th Fl.  
Trenton, NJ 08625  
[rglover@rpa.nj.gov](mailto:rglover@rpa.nj.gov)

Debora Layugan  
Division of Rate Counsel  
140 East Front Street, 4th Fl.  
Trenton, NJ 08625  
[dlayugan@rpa.nj.gov](mailto:dlayugan@rpa.nj.gov)

Carlana Morrison  
Division of Rate Counsel  
140 East Front Street, 4th Fl.  
Trenton, NJ 08625  
[cmorrison@rpa.nj.gov](mailto:cmorrison@rpa.nj.gov)

David Dismukes, Ph.D.  
Acadian Consulting Group  
5800 One Perkins Place Drive  
Building 5, Suite F  
Baton Rouge, LA 70808  
[daviddismukes@acadianconsulting.com](mailto:daviddismukes@acadianconsulting.com)

Nathalie Jouanneau  
Atlantic Shores Offshore Wind Project  
1, LLC  
Brooklyn Navy Yard, Dock 72  
Brooklyn, NY 11205  
[Nathalie.Jouanneau@AtlanticShoresWind.com](mailto:Nathalie.Jouanneau@AtlanticShoresWind.com)

Joris Veldhoven  
Atlantic Shores Offshore Wind  
Project 1, LLC  
Brooklyn Navy Yard, Dock 72  
Brooklyn, NY 11205  
[Joris.Veldhoven@AtlanticShoresWind.com](mailto:Joris.Veldhoven@AtlanticShoresWind.com)

Madeline Urbish  
Ocean Wind II, LLC  
520 Pacific Avenue,  
Atlantic City, NJ 08401  
[maurb@orsted.com](mailto:maurb@orsted.com)

Christian Bjor  
Ocean Wind II, LLC  
520 Pacific Avenue,  
Atlantic City, NJ 08401  
[chbjor@orsted.com](mailto:chbjor@orsted.com)

Richard Levitan  
Levitan & Associates, Inc.  
20 Custom House Street, Suite 830  
Boston, MA 02110  
[rl@levitan.com](mailto:rl@levitan.com)

Ellen Cool, Ph. D.  
Levitan & Associates, Inc.  
20 Custom House Street, Suite 830  
Boston, MA 02110  
[egc@levitan.com](mailto:egc@levitan.com)

Sara Wilmer  
Levitan & Associates, Inc.  
20 Custom House Street, Suite 830  
Boston, MA 02110  
[sw@levitan.com](mailto:sw@levitan.com)

Jennifer Spricigo  
First Energy  
300 Madison Avenue  
Morristown, NJ 07960  
[jspricigo@firstenergycorp.com](mailto:jspricigo@firstenergycorp.com)

John L. Carley, Esq.  
Consolidated Edison Co. of NY  
Law Dept., Room 1815-S  
4 Irving Place  
New York, NY 10003  
[carleyj@coned.com](mailto:carleyj@coned.com)

Margaret Comes,. Sr.  
Consolidated Edison Co. of NY Law  
Dept., Room 1815-S  
4 Irving Place  
New York, NY 1000  
[comesm@coned.com](mailto:comesm@coned.com)

Jodi Moskowitz, Esq.  
PSEG Service Corp.  
80 Park Plaza, T5  
Newark, NJ 07101  
[Jodi.Moskowitz@pseg.com](mailto:Jodi.Moskowitz@pseg.com)

Cara Lewis, Esq.  
PSEG Service Corp.  
80 Park Plaza, T5  
Newark, NJ 07101  
[cara.lewis@pseg.com](mailto:cara.lewis@pseg.com)