



Agenda Date: 9/28/22  
Agenda Item: 8C

**STATE OF NEW JERSEY**  
**Board of Public Utilities**  
44 South Clinton Avenue, 1<sup>st</sup> Floor  
Post Office Box 350  
Trenton, New Jersey 08625-0350  
[www.nj.gov/bpu/](http://www.nj.gov/bpu/)

CLEAN ENERGY

IN THE MATTER OF THE PETITION OF OCEAN WIND )  
LLC PURSUANT TO N.J.S.A. 48:3-87.1(f) FOR A )  
DETERMINATION THAT EASEMENTS ACROSS )  
GREEN ACRES-RESTRICTED PROPERTIES AND )  
CONSENTS NEEDED FOR CERTAIN )  
ENVIRONMENTAL PERMITS IN, AND WITH RESPECT )  
TO, THE CITY OF OCEAN CITY ARE REASONABLY )  
NECESSARY FOR THE CONSTRUCTION OR )  
OPERATION OF THE OCEAN WIND 1 QUALIFIED )  
OFFSHORE WIND PROJECT )

ORDER

DOCKET NO. QO22020041

**Parties of Record:**

**Gregory Eisenstark, Esq.**, Cozen O'Connor on behalf of Ocean Wind LLC  
**Brian O. Lipman, Esq.**, Director, New Jersey Division of Rate Counsel  
**Jay A. Gillian**, Mayor of Ocean City, New Jersey  
**Dorothy F. McCrosson, Esq.**, McCrosson & Stanton, P.C. as Ocean City Solicitor  
**Melissa Rasner**, Municipal Clerk of Ocean City

**BY THE BOARD:**

On February 2, 2022, Ocean Wind LLC (“Ocean Wind” or “Petitioner”) filed a petition (“Petition”) with the New Jersey Board of Public Utilities (“BPU” or “Board”), seeking the determination that certain easements across Green Acres-designated properties and local government approvals with respect to the City of Ocean City are reasonably necessary for the construction or operation of the Ocean Wind 1 Qualified Offshore Wind Project (“Project”).

In this Order, the Board makes the determination that the easements and consents sought under the Petition are reasonably necessary for the construction and operation of the Project.

## **BACKGROUND AND PROCEDURAL HISTORY**

The Offshore Wind Economic Development Act of 2010<sup>1</sup> (“OWEDA”) and Governor Murphy’s Executive Order No. 8 directed the Board to solicit 1,100 megawatts (“MW”) of Offshore Wind (“OSW”) capacity as a first step to meet New Jersey’s goal of 3,500 MW of OSW capacity by 2030.<sup>2</sup> In June 2019, from a pool of applicants, the Board selected and approved the Project as the first qualified OSW project.

In July 2021, Governor Murphy signed L. 2021, c. 178 into law, codified at N.J.S.A. 48:3-87.1(f)-(g), amending OWEDA and granting OSW projects the ability to petition the Board seeking to obtain property interests from local government and preemption of local government approvals “reasonably necessary” for construction or operation of the OSW project.<sup>3</sup>

On February 2, 2022, Ocean Wind filed the Petition with the Board pursuant to the 2021 Amendment. The Petition seeks the Board’s determination that certain easements across Green Acres-restricted properties Ocean City owns, and that certain municipal approvals needed for particular environmental permits in or with respect to Ocean City, are reasonably necessary for the construction or operation of the Project. The Petition was accompanied by testimony from Jason Kalwa (“Kalwa Testimony”), Pilar Patterson (“Patterson Testimony”), and Madeline Urbish (“Urbish Testimony”).

The Petitioner requests that the Board<sup>4</sup>

- (iii) *Specifically find and determine that the easements described in this Petition over property owned by Ocean City (which are Green Acres-restricted) are reasonably necessary for the construction and operation of the Ocean Wind [Project]; . . .*
- (iv) *Specifically find and determine that municipal consents or other affirmative filings needed from Ocean City that are a condition of the issuance of a permit or other approval of the [New Jersey Department of Environmental Protection (“NJDEP”)] are reasonably necessary for the construction and operation of the Ocean Wind [Project], thereby preempting and superseding any required municipal consents or approvals; and*
- (v) *Grant such other and further relief as the Board may deem appropriate or necessary.*

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<sup>1</sup> L. 2010, c. 57, See N.J.S.A. 48:3-87(d)(4) and N.J.S.A. 48:3-87.1 to -87.2.

<sup>2</sup> See Exec. Order. 8 (2018). Executive Order No. 92 expanded the OSW goal to 7,500 MW by 2035. Exec. Order 92 (2019). On September 21, 2022, Governor Murphy signed Executive Order No. 307, increasing the OSW goal to 11,000 MW by 2040. Exec. Order 307 (2022).

<sup>3</sup> N.J.S.A. 48:3-87.1(f)(3) provides “municipal or county approvals, consents or affirmative filings” are “preempted and superseded,” if the Board determines they are reasonably necessary for construction or operation of the qualified project. We use the terms “local government,” “approvals” and “preemption” for brevity.

<sup>4</sup> Petition at 18.

The Petition explains that the Project requires permanent rights of way (“ROW”) and easements, approximately 30 feet in width, for export cables and associated equipment, upon, across and under Ocean-City owned Green Acres-restricted properties. The Petition specifically identifies the Green Acres-restricted property on the Official Tax Map of Ocean City as Block 611.11, Lots 137 and 145, Block 3500, Lot 1 (including riparian grant), and Block 3350.01, Lot 17, collectively totaling 0.838 acres.

With respect to permitting approvals, the Petition identifies the following permit applications that require authority or consent from Ocean City to proceed: Waterfront Development, Wetlands Act of 1970, Coastal Area Facilities Review Act, Flood Hazard Area Control Act, and Freshwater Wetlands Protection Act Individual Permits, and a Tidelands License.<sup>5</sup> These permits and approvals are required for NJDEP to issue a federal consistency determination, which is a prerequisite for Bureau of Ocean Energy Management’s (“BOEM’s”) approval of the Project’s Construction and Operations Plan.<sup>6</sup> Additionally, the Petition notes that a New Jersey Pollution Discharge Elimination System Stormwater Construction Permit (5G3), New Jersey Pollution Discharge System Construction Dewatering Permit (B7 or BGR), Water Allocation Permit, and a Treatment Works Approval would also be required. The Paterson Testimony notes that, once construction is underway, additional NJDEP permits or approvals may be required.

On February 23, 2022, the Board retained the Petition for hearing and assigned President Fiordaliso as Presiding Officer. The President issued a procedural schedule on March 1, 2022 and requested supplemental information from the Petitioner. Ocean Wind submitted the requested supplemental information on March 14, 2022 (“OW Supplement”). On March 22, 2022, President Fiordaliso issued an Order directing Ocean City to be added as a necessary party and modifying the procedural schedule.

On March 18, 2022, the New Jersey Division of Rate Counsel (“Rate Counsel”) submitted an informal discovery request to Ocean Wind, who responded on April 4, 2022.

On April 27, 2022, Ocean City filed a response to the Petition and the OW Supplement (“Ocean City Response”). Also, on April 27, 2022, Rate Counsel filed testimony from Maximilian Chang (“Chang Testimony”).<sup>7</sup>

On April 29, 2022, Ocean Wind filed an amended petition and testimonies, revising the acreage impacted under the proposed Green Acres diversion downward to 0.647 acres (“Amended Petition”).<sup>8</sup>

On May 11, 2022, Ocean Wind filed rebuttal testimony by Matt Kaplan (“Kaplan Rebuttal”) and Pilar Patterson (“Patterson Rebuttal”).

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<sup>5</sup> Petition at 12; Patterson Testimony at 15.

<sup>6</sup> See [https://www.state.nj.us/dep/cmp/czm\\_federal.html](https://www.state.nj.us/dep/cmp/czm_federal.html).

<sup>7</sup> Earlier, Rate Counsel submitted an informal discovery request to Ocean Wind, who provided answers on April 4, 2022.

<sup>8</sup> When referring to the “Petition” in this Order, it includes the Amended Petition as well. When referring to specific testimonies, the Amended Testimonies are likewise included.

On May 19, 2022, the Board conducted two (2) virtual public hearings, one in the morning and one in the evening. Written comments from Rate Counsel (“RC Comments”) and two (2) members of the public were also received prior to the June 2, 2022 public comment deadline.

On June 16, 2022, Ocean Wind filed a response to the RC Comments and the public comments (“OW June 16 Response”).

On June 10, 2022, Board Staff (“Staff”) hosted a settlement conference which all parties attended.

On June 24, 2022, President Fiordaliso presided over Oral Argument before the full Board, where the Petitioner, Rate Counsel, and Ocean City presented their arguments.

## **POSITION OF THE PARTIES AND EVIDENCE**

### **Ocean Wind’s Petition and Supporting Testimony**

The Kalwa Testimony and Patterson Testimony both explain that the easements and consents sought under the Petition pertain to the onshore part of the electric transmission export cables. The Project plans for these cables to transmit the electricity the OSW turbines generate to onshore, to the New Jersey electric grid (“grid”).<sup>9</sup> Through the grid, the electricity will be further transmitted and distributed to users throughout New Jersey and the regional electric grid. The Project selected two (2) points of interconnection (“POIs”) where the electricity will enter the grid: at the existing substations located at the Oyster Creek facility in Lacey Township, Ocean County, and at the B.L. England facility in Upper Township, Cape May County.<sup>10</sup> The Project also selected a specific route, referred to as the “Preferred Route,” for connecting the offshore wind farm to the B.L. England POI.<sup>11</sup> The property rights associated with the Preferred Route for the cable making landfall in Ocean City and connecting to the B.L. England POI are at issue in the Petition.

The portion of the onshore cable at issue in the Petition will be fully underground.<sup>12</sup> The Preferred Route would make landfall using Horizontal Directional Drilling (“HDD”) at 35<sup>th</sup> Street in Ocean City, thus requiring an easement from Ocean City.<sup>13</sup> The Preferred Route would then continue underground in duct banks under Ocean City public roads until arriving at Crook Horn Creek near Roosevelt Boulevard, an offshoot of Peck Bay.<sup>14</sup> An easement would be required for the cable to

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<sup>9</sup> Petition at 6.

<sup>10</sup> Patterson Testimony at 4.

<sup>11</sup> *Id.* at 5.

<sup>12</sup> Petition at 10.

<sup>13</sup> HDD is a drilling technology wherein a hole is drilled vertically under a waterbody or land, then turns at an angle so that it runs under and parallel horizontally to certain areas along the surface. Given the depth at which HDD generally occurs, adverse surface impacts are generally limited, if such impacts occur at all. See e.g., Faruque Hossain, *Sustainable Design and Build*, at 3.1.3.4 (“Horizontal Drilling”) (2019), <https://www.sciencedirect.com/topics/engineering/horizontal-drilling>; Sohrab Zendeheboudi, et al., *Shale Oil and Gas Handbook*, at 4.1 (“Horizontal Drilling”) (2017), <https://www.sciencedirect.com/topics/engineering/horizontal-drilling>.

<sup>14</sup> Petition at 7-8. A “duct bank” is a means of providing a protected underground pathway for cables to

be installed under Crook Horn Creek using HDD.<sup>15</sup> The cable would travel further underground under public roads in Upper Township until it reaches the POI at the proposed B.L. England substation. The Kalwa Testimony explains in detail, the engineering design and construction requirements for the cable in the Preferred Route; it also explains the maintenance that will be required.<sup>16</sup>

The Patterson Testimony<sup>17</sup> and the OW Supplement<sup>18</sup> describe the process the Project followed in selecting the POI and Preferred Route. For determining the Preferred Route, three (3) sets of criteria are listed, covering:

1. The potential offshore cable routes within NJ waters,
2. The potential cable landfall locations, and
3. The potential onshore cable routes.

The Petition and Patterson Testimony explain the primary factors for selection of the Preferred Route.<sup>19</sup> According to information in the Petition and Patterson Testimony, the Preferred Route is almost exclusively located within previously disturbed State-owned and existing utility road ROW areas, and would have fewer impacts to wetlands, water bodies and residential and historic properties than would the studied alternatives.<sup>20</sup>

The Patterson Testimony details how several alternative landfall and route options to B.L. England were considered and not chosen.<sup>21</sup> This testimony specifically mentions two (2) different route alternatives through Ocean City, making landfall at 5<sup>th</sup> and 13<sup>th</sup> Streets, respectively. The Patterson Testimony discusses the routes through the Great Egg Harbor Inlet (“Inlet” and such route, the “Great Egg Harbor Route”) and the routes making landfall in Strathmere and Sea Isle City. The testimony details why these routes were not chosen due to the impacts to historic districts, natural resources, borrow areas, fishing operations, navigation, and cable route length.

The OW Supplement describes the cable route selection as a process in three (3) phases, starting with initial screening, then a detailed review of the existing resources *“including but not limited to: bathymetry, geology, contaminated soils/sediments, commercial and recreational fishing activities, navigation channels, anchorage areas, shipping activities, restricted areas, public open space, environmentally sensitive areas, known cultural and historical resources, existing infrastructure, surface waters (wetlands and watercourses), and threatened and endangered*

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travel. The cables reside in PVC pipes called “conduits.” These conduits are themselves encased in steel-reinforced concrete container.

<sup>15</sup> Id.

<sup>16</sup> Kalwa Testimony at 8-15.

<sup>17</sup> Patterson Testimony at 8-11.

<sup>18</sup> OW Supplement at 2-4.

<sup>19</sup> Petition at 8; Patterson Testimony at 8-11.

<sup>20</sup> Id.

<sup>21</sup> Patterson Testimony at 9-11.

*species.*<sup>22</sup> In addition, the Petitioner considered disruption to local residents caused by construction activities. In the final phase, the process involved site specific surveys. Throughout the process, the Petitioner claims to have included coordination with Federal and State agencies, local municipalities and various stakeholders.

The OW Supplement provides a table to describe the engineering and community / environmental constraints that led Petitioner to remove potential alternative sites from consideration.<sup>23</sup> The table specifically notes the following concerns with the Great Egg Harbor Route:

- Engineering Constraints
  - Sediments in the Inlet are dynamic; therefore, additional cable protection such as cable mattresses would be needed, resulting in additional impacts to natural resources.
  - There is an existing US Army Corps of Engineers (“USACE”) borrow area at the mouth of the Inlet. USACE typically does not authorize crossing of borrow areas or would require impracticable mitigations including burial depths of up to 80 feet below the federal project limit.
  
- Community/Environmental Constraints
  - Access to the Inlet by other vessels would be restricted during Project construction, which would result in additional impacts to other marine uses and navigation.
  - The in-water route through the Great Egg Harbor Bay and Great Egg Harbor Shipping Channel would result in 5.8 miles of cable burial within designated shellfish habitat.
  - The Great Egg Harbor Route would cross under two (2) historic bridges with low clearance, making construction significantly challenging.<sup>24</sup>

The OW Supplement also responds to other Staff inquires, including a comparison of construction-related impact, linear distance of road disturbance, potential use conflicts, and Green Acres impacts between different cable routes.<sup>25</sup> In addition, the OW Supplement offers references to support the definition of various resource classifications<sup>26</sup> and describes why the Petitioner considers the Green Acres diversion for the crossing at the Crook Horn Creek offshoot of Peck Bay next to Roosevelt Bridge, to be necessary.<sup>27</sup>

The Patterson Testimony further explains the easements sought over Green Acres-encumbered properties, for a total of 0.838 acres. Subsequently, in the Amended Petition, Petitioner revised and decreased this acreage amount to 0.647 acres. The Patterson Testimony describes the Green Acres diversion process, the Petitioner’s use of HDD as a mitigation method, and

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<sup>22</sup> OW Supplement at 4.

<sup>23</sup> *Id.* at 8-10.

<sup>24</sup> OW Supplement at 8.

<sup>25</sup> *Id.* at 5, 13-14.

<sup>26</sup> *Id.* at 7-8.

<sup>27</sup> *Id.* at 10-12.

compensation for the diversion.

With respect to the Preferred Route selection determination, the OW Supplement states:

Ocean Wind ultimately selected the proposed routes to each interconnection point based on technical feasibility of cable design, constructability, real estate availability, environmental impacts, and stakeholder considerations. Onshore components of the Project have been sited within previously disturbed areas and existing road ROWs to the maximum extent practicable to minimize environmental impacts.<sup>28</sup>

In the Petition, Petitioner argues that it has engaged in discussions with Ocean City about the Project, including the easements and consents needed, starting in 2019. Petitioner issued a formal written request to Ocean City on August 11, 2021, “requesting the easements and consents from Ocean City that are reasonably necessary for the construction and operation of the Project.”<sup>29</sup> Petitioner has not received a formal response.

### **Ocean City Position**

Ocean City opposes the Petition.

In its April 27, 2022 Ocean City Response, Ocean City notes that it did not consent to the Petition. Ocean City also notes that the Petition involves Green Acres property and, by virtue of N.J.A.C. 7:36-26.8, Ocean City itself is entitled to initiate the diversion application. To date, Ocean City has not done so. Further, Ocean City contends that the Petition and any action taken under the 2021 Amendment could be *ultra vires* without the approval of Ocean City’s mayor or governing body.<sup>30</sup>

Substantively, the Ocean City Response explains that Ocean City was concerned about unknowns associated with the Project, namely, the Project’s effects on birds, sea life, and the fishing industry. Ocean City contends that it would be unreasonable to take a position on the Project until the environmental impacts have been fully vetted. Further, Ocean City states that Ocean Wind did not make a “compelling” case that the proposed Preferred Route is the “best alternative.”<sup>31</sup>

Instead of the Preferred Route, Ocean City contends the Great Egg Harbor Route could be the better alternative. The Ocean City Response characterizes the “utter lack of disturbance to the citizenry of Ocean City” as the greatest benefit of the Great Egg Harbor Route, and cites excavation of the city’s pristine beach, street openings, and disturbance of wetlands as disturbances worth avoiding.<sup>32</sup>

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<sup>28</sup> OW Supplement at 4.

<sup>29</sup> Petition at 14.

<sup>30</sup> Ocean City Response at 1.

<sup>31</sup> *Id.* at 2.

<sup>32</sup> *Id.*

The Ocean City Response asserts that the Great Egg Harbor Inlet is sufficiently wide to accommodate a cable route without impacting the USACE borrow area, and that the navigation restrictions during cable construction in Great Egg Harbor would not constitute a closure of the navigational channel. Furthermore, Ocean City argues that the disturbance of the 5.8 miles of shellfish habitat in Great Egg Harbor Bay can be mitigated with a monetary donation to the NJDEP fund pursuant to N.J.A.C. 7:7-17.1, et seq.<sup>33</sup> Next, Ocean City disputes the statement made in the Patterson Testimony and the OW Supplement that the Ocean City–Longport Bridge and the Route 52 Causeway Bridge – the two (2) bridges crossing Great Egg Harbor, which the cable would have to pass under – are historic and have low clearance.<sup>34</sup> Finally, Ocean City contends that the Great Egg Harbor Route “may be more expensive for Ocean Wind to implement,”<sup>35</sup> but that greater costs should not impact the Board’s analysis.

Ocean City did not provide any testimony, exhibits, or other evidence to support its claims.

During Oral Argument, Ocean City questioned the authority of the Board to consider the Petition. Ocean City explained that the 2021 Amendment disregards the will of local officials, and the statute has not been “tested” by the courts.<sup>36</sup> Ocean City further cited an excerpt from the New Jersey Constitution, which states that “any law concerning municipal corporations formed for local government or concerning counties, shall be liberally construed in their favor.”<sup>37</sup>

At Oral Argument, for the first time, Ocean City called for the Board to refer the matter to the Office of Administrative Law as a contested case.<sup>38</sup> Ocean City noted that there is a disputed fact to be adjudicated, whether the alternative Great Egg Harbor Route would cross historic bridges or not.<sup>39</sup> Ocean City added that Ocean Wind did not provide cost estimates for the proposed alternatives, and that costs are relevant to the Board’s reasonably necessary analysis.<sup>40</sup> Ocean City further contended that by its selection of the Preferred Route, Ocean Wind is promoting the most cost-expedient route, to the City’s detriment. Later, Ocean City asked the Board to allow discovery in this matter to enable the parties to look into these “unanswered questions.”<sup>41</sup>

Ocean City reiterated that the Great Egg Harbor Route should have been pursued.<sup>42</sup> Ocean City further asserted that any problems associated with the Great Egg Harbor Route could be mitigated or overcome, comparing the Great Egg Harbor Route with a cable route for a second

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<sup>33</sup> Id.

<sup>34</sup> Id.

<sup>35</sup> Id. at 3.

<sup>36</sup> Oral Argument Transcript at 25-26.

<sup>37</sup> Id. at 26 (quoting N.J. Constitution, Art. 4, Sec. 7, para. 11).

<sup>38</sup> Id.

<sup>39</sup> Id. at 27.

<sup>40</sup> Id. at 29.

<sup>41</sup> Id. at 62.

<sup>42</sup> Id. at 29.



cable the Project was separately pursuing.<sup>43</sup> Ocean City asserted that with respect to this second cable, the Project “overc[a]me similar obstacles in its Oyster Creek proposals to install cable crossing to the Barnegat Inlet.”<sup>44</sup> In support, Ocean City cites to the BOEM Draft Environmental Impact Statement, which discusses the cable route to the Oyster Creek POI (“Oyster Creek Route”).<sup>45</sup>

At Oral Argument, Ocean City asked President Fiordaliso to defer the decision on the Petition until BOEM issues a Final Environmental Impact Statement, because the easements and approvals sought under the Petition would not be reasonably necessary if the Preferred Route is not approved.<sup>46</sup>

### **Rate Counsel Position**

Rate Counsel takes the position that it has insufficient information to support or oppose the Petition.<sup>47</sup> On several occasions throughout this proceeding, Rate Counsel objected to the proceeding not including discovery. Rate Counsel has asserted that more information is necessary for the Board to make a determination with respect to the presented alternative routes. Rate Counsel referred to prior matters filed with the Board under N.J.S.A. 40:55D-19 (“Municipal Land Use Law”), which uses the same “reasonably necessary” language, where the Board has allowed for discovery, testimony, and evidentiary hearings.<sup>48</sup> Rate Counsel also alluded to notions of due process by noting the parties should have an opportunity to “know opposing evidence.”<sup>49</sup>

Rate Counsel is concerned about the lack of cost data in the proceeding. In both the Chang Testimony and the RC Comments, Rate Counsel specifically expresses concern about the lack of cost data for the alternative routes, citing the mechanism for cost sharing of Transmission System Upgrade Costs (“TSUC”) between the Project and ratepayers as the primary reason for its concerns.<sup>50</sup> In the RC Comments, Rate Counsel also broadly suggests that the Board should review ongoing Project costs to ensure the approved offshore renewable energy certificate (“OREC”) is reasonable.<sup>51</sup> In short, Rate Counsel specifically mentions cost of the alternative routes as being necessary for the Board to “adequately evaluate the different routes.”<sup>52</sup>

In its comments and testimony, Rate Counsel raises other issues. The Chang Testimony notes

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<sup>43</sup> Id. at 31-33.

<sup>44</sup> Id.

<sup>45</sup> Id. at 32.

<sup>46</sup> Id. at 34.

<sup>47</sup> Oral Argument at 36.

<sup>48</sup> RC Comments at 5-7.

<sup>49</sup> Id. at 7 (citing to cases concerning administrative due process).

<sup>50</sup> Chang Testimony at 16:2-19:6, cited to in RC Comments n.10.

<sup>51</sup> RC Comments at 4.

<sup>52</sup> Id. at 5.

that the Petition lists the Green Acres encumbered property to be 0.838 acres, while Ocean Wind's response to Rate Counsel's informational discovery indicates the size to be 0.658 acres.<sup>53</sup> The Chang Testimony also notes a concern that Ocean Wind provided limited cost information concerning the need for upgrades at the B.L. England substation, Ocean Wind's selected POI.<sup>54</sup> Further, Rate Counsel observes that the "Railroad Route"<sup>55</sup> was the shortest alternative evaluated and should be further investigated.<sup>56</sup> Last, Rate Counsel argues that the Board should consolidate the current Petition with Ocean Wind's related petition concerning property in Cape May County.<sup>57</sup> According to Rate Counsel, joining the proceedings would create the best holistic review of the Project and its requirements.

At Oral Argument, Rate Counsel did not take a position on the Petition, reiterating its position that discovery was needed.<sup>58</sup>

### **Public Comments**

During the Public Hearings, a number of Ocean City residents noted their opposition to the Project. They raised concerns about alleged electromagnetic fields, questioned the availability of alternative routes, and raised the issue of potential impacts on property values. Ocean City Council member Tom Rotondi stated that the Ocean City community is upset that home rule was taken away and that he is generally opposed to the Project.

Additionally, several members of the public voiced concern that the Public Hearing was not sufficiently advertised. President Fiordaliso on several occasions clarified that the Public Hearing was advertised in the local newspaper, as well as on the Board's website, and that notification was provided to all people listed on the Service List.

The Board also received comments in support of the Project. This included members of the public, as well as representatives from organizations such as the New Jersey League of Conservation Voters, Sierra Club New Jersey, and the New Jersey Work Environment Council. The comments noted that the Project was working to minimize environmental harms, would help provide jobs, and would help address climate change.

### **Ocean Wind's Answers and Rebuttals**

Following Rate Counsel's Testimony and informal discovery, Ocean City submitted an Amended Petition and testimony from Pilar Patterson, revising the affected Green Acres property downward from 0.838 acres to 0.647 acres.

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<sup>53</sup> Chang Testimony at 10-11.

<sup>54</sup> Id. at 8-9.

<sup>55</sup> See OW Supplemental at 13 for a description of the Railroad Route Landfall for the route would be at 51<sup>st</sup> Street.

<sup>56</sup> Chang Testimony at 13-15; RC Comments at 3.

<sup>57</sup> RC Comments at 7-8.

<sup>58</sup> Oral Argument at 36.

Ocean Wind filed rebuttal testimony on May 11, 2022. The Patterson Rebuttal contends that there is no requirement or reason for Ocean Wind to have developed cost estimates for each alternative cable route, because many alternatives were eliminated in early stages of the cable route selection process for other reasons.<sup>59</sup> The Patterson Rebuttal goes on to list the factors for selecting the Preferred Route, including that it will:

- Minimize extreme changes in slope;
- Access and maximize the use of property availability and the existing ROW;
- Avoid known Superfund sites or sites designated as hazardous;
- Avoid known locations of historic or archaeological resources;
- Avoid or minimize the number of infrastructure (e.g., roads, bridges, culverts) crossings;
- Minimize impacts to wetlands and floodplains;
- Minimize the overall length of the route to minimize impacts to terrestrial communities, wildlife species, and sensitive habitats;
- Minimize impacts to aesthetic resources; and
- Minimize impacts to sensitive receptors such as hospitals, schools, and churches.<sup>60</sup>

In response to the Chang Testimony's urging the Board to further investigate the Railroad Route more thoroughly, the Patterson Rebuttal states that the Railroad Route was eliminated because it was a longer cable route with greater impact on wetlands and historic resources, and it would still have an impact on Green Acres-encumbered land similar to that of the Preferred Route.<sup>61</sup>

The Patterson Rebuttal responds to the claim in the Ocean City Response that the Great Egg Harbor Route would be a better alternative. Specifically, the Patterson Rebuttal restates and elaborates on the reasons given in the OW Supplement for eliminating the Great Egg Harbor Route from consideration.<sup>62</sup> The Patterson Rebuttal lists cable burial depth, risk of damage, design challenges, and cable protection challenges as negatives associated with shifting sediments within the Inlet. The Patterson Rebuttal further states that low water depth in the Inlet would restrict the placement of the subsea cable to within the limits of the authorized federal and State channel, something which would cause disruptions to vessel traffic during construction.<sup>63</sup> The Patterson Rebuttal then describes the challenges associated with underwater cable installation in an estuary with shallow water.<sup>64</sup> The Patterson Rebuttal also repeats the reasons given in the OW Supplement for not selecting the Great Egg Harbor Route, namely, concerns surrounding both the USACE borrow area and the 5.8 miles of cable burial that would occur within designated shellfish habitat. The Patterson Rebuttal acknowledges that the two (2) historic bridges that appear in the original Patterson Testimony have been replaced with newer bridges,

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<sup>59</sup> Patterson Rebuttal at 3-4.

<sup>60</sup> Id. at 4.

<sup>61</sup> Id. at 5-6.

<sup>62</sup> Id. at 7-8.

<sup>63</sup> Id.

<sup>64</sup> Id.

but indicates that the designation for each bridge to be eligible for the State's or the National Register of Historic Places, respectively, is still in place until an official finding is made otherwise.<sup>65</sup>

The Kalwa Rebuttal responds to Ocean City's concerns about the impacts of the Preferred Route. The Kalwa Rebuttal explains that there would be no surface excavation at the Ocean City beach site on which the Preferred Route would make landfall, the underground line would be installed at around 60 feet below the surface, and construction with respect to the Preferred Route would not occur during the summer months.<sup>66</sup> He further explains that there should be no long-term impacts to Ocean City once construction is complete; the areas will be restored to their previous condition.<sup>67</sup>

In its OW June 16 Response, Ocean Wind explains that the Board's decision on the Petition would have no impact on ratepayers.<sup>68</sup> This is because the Preferred Route will not impact the competitively set OREC price the Board already established. Further, Ocean Wind notes that it already explained why the Great Egg Harbor Route was not chosen.<sup>69</sup> Lastly, Ocean Wind states that "there is no reason to believe that property values or tourism will be impacted [in Ocean City], as there will be no visual or other impact from the cable facilities."<sup>70</sup>

In its June 24, 2022 Oral Argument Rebuttal, Ocean Wind objects to the issues Ocean City raised during Oral Argument, calling them inappropriate since they were not presented earlier in the proceeding and were not backed by testimony or other evidence.<sup>71</sup> Ocean Wind asserts that Ocean City had every opportunity to participate more fully in the proceeding by filing testimony or exhibits and chose not to do so.

## **DISCUSSION AND FINDINGS**

The Board recognizes segments of our State support OSW projects to promote clean energy development. The Board also recognizes that other segments of our State oppose the Project due to potential visual, environmental or business impacts. This, however, is not the matter before the Board. Rather, the matter currently before the Board is limited to whether the Petition's identified property interests and local government approvals are reasonably necessary for the construction or operation of the Project. The Board appreciates the participation of the Parties and the general public in providing the robust record before us.

### **Statutory Directive**

We start by reviewing the statutory construct and defining the scope of the Board's examination.

Pursuant to the 2021 Amendment, an OSW developer may petition the Board to obtain property

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<sup>65</sup> Id. at 8.

<sup>66</sup> Kalwa Rebuttal at 2.

<sup>67</sup> Id. at 3.

<sup>68</sup> OW June 16 Response at 1-2, 7-10.

<sup>69</sup> Id. at 7-8, 14.

<sup>70</sup> Id. at 14.

<sup>71</sup> Oral Argument at 41.

interests from local government entities and preempt local government approvals. The statute distinguishes between existing ROW, N.J.S.A. 48:3-87.1(f)(1); real property interests, N.J.S.A. 48:3-87.1(f)(2); and local government approvals, N.J.S.A. 48:3-87.1(f)(3). If the Board finds the property interests and approvals are reasonably necessary for the construction or operation of the project, the successful petitioner must record the Board order with the county recording officer and determine compensation for the property interest in Superior Court and any local government approvals are preempted or superseded. The statute creates a distinction between existing ROW, N.J.S.A. 48:3-87.1(f)(1), real property interests, N.J.S.A. 48:3-87.1(f)(2), and required local approvals for permitting, N.J.S.A. 48:3-87.1(f)(3). A petition seeking real property interests requires a written request to the affected local government entity 90 days prior to filing the petition. N.J.S.A. 48:3-87.1(f)(2). A petition seeking preemption of local government approvals requires pre-petition consultation with the affected local government. N.J.S.A. 48:3-87.1(f).

Here, Petitioner requests a determination that real property interests and local approvals are reasonably necessary for the Project. No party disputes that the 90-day written request seeking local government property interests was made.

The Eminent Domain Act, N.J.S.A. 20:3-1 et seq. (“EDA”), is recognized as a uniform procedural statute for condemnation actions. State v. 1 Howe St. Bay Head, LLC, 463 N.J. Super. 312, 340 (App. Div. 2020). However, for the first time since enactment of the EDA that we can surmise, the Legislature established a different process from the EDA for a qualified OSW project or approved open access OSW transmission facility through the 2021 Amendment. We note that the Board reviews petitions by utilities seeking condemnation authority for utility routes pursuant to N.J.S.A. 48:3-17.7. There, if the route receives Board approval, the utility then proceeds in accordance with the EDA to obtain property interests and determine compensation. The Legislature could have extended or provided a similar process to OSW projects seeking property interests from local governments; it chose not to.

The Legislature established a similar but separate process for OSW projects.<sup>72</sup> Rather than a condemnation action filed with the Superior Court under the EDA, the Legislature provided for review by the Board for a limited class of projects seeking property interests from local government. The Board is guided by the EDA process in establishing its procedures under the 2021 Amendment. However, the Board is not bound by the EDA by the plain terms of the 2021 Amendment. The 2021 Amendment provides for a written request for the necessary property interest with a 90-day waiting period before filing a petition for relief, a public hearing, and a Board determination. If the petition is approved, the successful petitioner shall record the Board Order with the appropriate county recording officer. N.J.S.A. 48:3-87.1(f)(2) (“[S]uch [Board Order] shall effectuate the [developer’s property interests] . . . and shall be recorded by the appropriate county recording officer at the request of the [developer]”). The successful petitioner will seek a compensation determination under the EDA in Superior Court, N.J.S.A. 48:3-87.1(f)(2), but that requirement is separate from the Board Order that “effectuates” the property interests.

The Board does not interpret the limited reference to the compensation determination to compel the application of other EDA requirements on the 2021 Amendment process where the Legislature provided a process before the Board rather than the Superior Court and established a “reasonably necessary” standard for the Board’s review. Instead, if the Board makes a “reasonably

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<sup>72</sup> The Legislature was clearly aware of the EDA process when it included reference to the EDA process in the 2021 Amendment for purposes of determining compensation. N.J.S.A. 48:3-87.1(f)(2).

necessary” finding, the OSW developer should prepare a form of Board Order – in recordable form – for the Board President’s review and signature. The OSW developer can then submit the approved Board Order to the applicable county’s recording officer for recording, when appropriate.

The 2021 Amendment regarding condemnation is limited in scope, applying only to OSW projects seeking property interests from local government. The Legislature was clearly aware of the EDA and its associated procedure, yet elected to provide a different process and different forum before the Board for this limited class. As to this limited class, the 2021 Amendment controls, and the Board has complied with its requirements.  Tp. of Mahwah v. Bergen County Bd. of Taxation, 98 N.J. 268, 281 (1985) (“Every reasonable construction should be applied to avoid a finding of implied repealer.”); Chasin v. Montclair State Univ., 159 N.J. 418, 447 (1999), (holding, however a later expression of legislative will clearly in conflict with an earlier statute on the same subject will control if legislative intent to supersede earlier law is found).

**a. Constitution, Art IV, Section VII, para. 11**

Ocean City contends that the 2021 Amendment’s provisions must be liberally read in favor of municipalities and localities because of the New Jersey Constitution. While Ocean City has not explained how the liberal treatment would be applied here, the Board finds that neither the New Jersey Constitution nor the 2021 Amendment require liberal treatment.

The Constitution, Art. IV, Section VII, para. 11 states:

*The provisions of this Constitution and of any law concerning municipal corporations formed for local government, or concerning counties, shall be liberally construed in their favor. The powers of counties and such municipal corporations shall include not only those granted in express terms but also those of necessary or fair implication, or incident to the powers expressly conferred, or essential thereto, and not inconsistent with or prohibited by this Constitution or by law.*

First and foremost, the cited Constitutional provision does not apply if there is a clear intent to supersede local laws. In re Petition of Hackensack Water Co., 196 N.J. Super. 162, 169-70 (App. Div. 1984) (explaining that local powers can be superseded if the statute clearly provides for doing so; explaining that with respect to a similar statute, the Board can make a “reasonably necessary” finding to overcome municipal consents). Here, the 2021 Amendment intends to supersede local consents to advance the State’s public policy in favor of OSW development.

However, the Legislature understood that local communities should have an opportunity for public input under the 2021 Amendment process. In this context, the Board’s power to make a “reasonably necessary” finding was designed to protect communities. Jersey Cent. Power & Light Co., 166 N.J. Super. at 545 (explaining that a similar statute “requires advance approval by the [Board] of any utility’s exercise of its power of condemnation. It was designed as protection against arbitrary exercise of a utility’s condemnation power; it empowers the [Board] to prevent condemnation, not compel it”). This is why the Board directed that Ocean City, as the property owner of the land in question, be named as a necessary party to ensure its participatory opportunity.

The Board must therefore weigh the need for the requested property interests and approvals. The balance, however, is not in the locality’s favor; the analysis recognizes that the greater public interest must be favored over the local interest. In re Public Service Electric & Gas Co., 35 N.J. 358, 376-77 (1961) (holding the BPU “must weigh all interests and factors in light of the entire

factual picture and adjudicate the existence or non-existence of reasonable necessity therefrom” and “if the balance is equal, the utility is entitled to the preference, because the legislative intent is clear that the broad public interest to be served is greater than local consideration.”).

Combining these principles – (1) advancing the policies of OSW development, and (2) providing municipalities an opportunity to participate in the process – the Board must ensure that the OSW developer is not arbitrarily abusing the powers the 2021 Amendment grants to it. The Board must also ensure that a municipality cannot unreasonably impede or thwart efforts by the OSW developer to move forward with its project. New York C. R. Co. v. Ridgefield, 84 N.J. Super. 85, 94 (App. Div. 1964) (explaining that a similar law was created to prevent local governments from impeding or “thwart[ing]” interests of the public good). The Board views this as the core purpose behind the 2021 Amendment’s direction for the Board to make a reasonably necessary determination.

#### **b. Ultra Vires Analysis**

Ocean City contends that the Petition under N.J.S.A. 48:3-87.1(f) is ultra vires without approval from Ocean City’s mayor or governing body. Specifically, it notes that a local government unit is the entity entitled to initiate an application for the diversion of Green Acres lands, under New Jersey Department of Environmental Protection regulations. N.J.A.C. 7:36-26.8.

The State’s courts explain that an agency action can be ultra vires for two (2) reasons. First, if the action is beyond the authority of acting body. City Council of City of Orange Tp. v. Edwards, 455 N.J. Super. 261, 272 (App. Div. 2018). Second, if the action is within the body’s authority, but the action was taken improperly. Id. at 273.

Ocean City appears to be making a claim under the first of these two (2) reasons. N.J.A.C. 7:36-26.8 would normally apply to Green Acres lands. However, the 2021 Amendment creates a clear process for Green Acres-encumbered land. N.J.S.A. 48:3-87.1(f)(2). The legislative process, to be clear, was developed to supersede “the provisions of any other State law, rule, or regulation to the contrary.” See Shim v. Rutgers, 191 N.J. 374, 390 (2007) (noting that a regulation that conflicts with a statute “must be set aside”). The Board finds, through this clear language, that the 2021 Amendment was designed to work when the consent of local government is lacking. “A court should ascribe to the statutory words their ordinary meaning and significance, and read them in context with related provisions so as to give sense to the legislation as a whole. . . . Ultimately, a court’s role when analyzing a statute is to give effect to the Legislature’s intent as evidenced by the language of [the] statute, the policy behind it, concepts of reasonableness and legislative history.” D’Ambrosio v. Dep’t of Health & Senior Servs., 403 N.J. Super. 321, 334 (App. Div. 2008) (internal citations omitted).

The Board **HEREBY FINDS** that the legislation grants authority for the Board to make a “reasonably necessary” finding, notwithstanding the provisions of N.J.A.C. 7:36-26.8.

#### **Due Process Issues**

Over the course of this proceeding, Rate Counsel and Ocean City have requested further proceedings than those the Board has provided. We turn to these concerns and explain the procedure the Board has employed.

Courts recognize that State agencies retain substantial discretion to set the processes before them. Texter v. Dep’t of Human Servs., 88 N.J. 376, 383 (1982) (“Administrative agencies have

wide discretion in selecting the means to fulfill the duties that the Legislature delegated to them.”). State agencies are also expected to be “flexible” so that they can “respond to changing conditions.” Id. at 385. We further note that the Petition is the first petition to be filed under the 2021 Amendment. The Board has established a process that is guided by consideration of the EDA, public utility authorization of eminent domain pursuant to N.J.S.A. 48:3-17.7, and the review of municipal agency action affecting public utilities pursuant to the Municipal Land Use Law (“MLUL”) at N.J.S.A. 40:55D-19. The Board used these processes to inform the process to implement the 2021 Amendment.

The Board used its discretion to establish an appropriate procedure for the Petition. Under the EDA, discovery procedures are not routinely employed. State by Comm’r of Transp. v. Carroll, 123 N.J. 308, 320 (1991) (“[P]arties to a condemnation proceeding may not employ the normal discovery devices except by leave of court, implying that prelitigation ‘reasonable disclosure’ under N.J.S.A. 20:3-6 would ordinarily not be as extensive as discovery during litigation.”). Under the MLUL provision, where the Board is also tasked with making a “reasonably necessary” finding, the statute expressly requires the Board to hold an evidentiary hearing – an instruction not made by the 2021 Amendment. Here, the Legislature instructs the Board to provide a public hearing. The 2021 Amendment did not, however, define the procedures the Board should otherwise use to make its findings. The absence of such defined procedures means the Board has discretion to determine the procedures it, in its own discretion, deems appropriate. Lastly, under N.J.S.A. 48:3-17.7, the burden is on the property owner to explain how a proposed taking would cause it to suffer injury or harm. Norfolk Southern Ry. Co. v. Intermodal Proprs., L.L.C., 424 N.J. Super. 106, 128-129 (App. Div. 2012). Considering these items together, the Board **HEREBY FINDS** that, similar to the EDA, there is a high bar that a party would need to overcome to establish the need for detailed evidentiary proceedings, particularly when a petitioner under the 2021 Amendment is able to meet its burden to produce evidence that shows its request is “reasonably necessary”, and when the property owner of the land in question has an opportunity to show that it would be burdened by that petitioner’s request.

The Board is “subject . . . to the due process clauses of the federal and local constitutions.” Port of New York Authority v. Heming, 34 N.J. 144, 154 (1961) (noting that the “power of eminent domain has long been recognized as a prerogative of the Legislature”); N.J.S.A. 52:14B-2 (establishing that a “contested case” is a proceeding where an agency hearing is required by statute or the constitution). In terms of due process, a person minimally has a right to be informed of the matter and a right to be heard. Brody v. Vill. of Port Chester, 434 F.3d 121, 129 (2nd Cir. 2005). “The opportunity to present reasons, either in person or in writing, why proposed action should not be taken is a fundamental due process requirement.” Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 546 (1985). Due process requires parties to have an opportunity to respond to arguments and know opposing evidence. Silviera-Francisco v. Board. of Educ. of City of Elizabeth, 224 N.J. 126, 141 (2016). Here, the parties had notice of the proceeding, an opportunity to review Ocean Wind’s filing and testimony, and an opportunity to present testimony and arguments in response. In short, the parties were informed, knew the opposing evidence, and were able to respond with their own evidence or arguments.

Notwithstanding the foregoing, in certain cases, further processes are required. Courts will apply the three-part test from Mathews v. Eldridge, 424 U.S. 319, 335 (1976) to evaluate the full extent of the required process. Brody, 434 F.3d at 133; High Horizons Dev. Co. v. State, 120 N.J. 40, 51-52 (1990); J.E. ex rel. G.E. v. State, 131 N.J. 552, 567-68 (noting discovery when addressing due process requirements). The three Mathews factors are:



- (1) the private interest at stake;
- (2) the risk of erroneous deprivation of that interest through the use of agency procedures and the probable value of additional or substitute safeguards; and
- (3) the State interest, including the burdens entailed by additional procedural requirements.

While Ocean City's property interests weigh heavily, the Board notes that the exercise of eminent domain and related procedures over property interests are itself a Legislative function. Brody, 434 F.3d at 135. It is fair, then, to say that the Board's role is only to "patrol the borders" of the power the Legislature granted to Ocean Wind. Id. After all, the Board does this while recognizing that "the government clearly has a strong interest not only in completing projects necessary for public use, but in completing them in a timely and efficient manner." Id. at 136. Ocean Wind notes that timeliness is important so that it can meet construction and operation deadlines, some of which stem from the Board's earlier solicitation award.<sup>73</sup>

Taken together, the Board has to consider the risks of an erroneous deprivation of property interests and the marginal benefits that would be achieved as a result of additional procedures. Id. This conforms to the High Horizons standard, which states that it is the "presence of disputed adjudicative facts, not the vital interests at stake" that should drive the need for detailed fact-finding procedures. High Horizons Dev., 120 N.J. at 53.

Of course, "the mere existence of disputed facts is not conclusive." J.D. ex rel. D.D.H. v. New Jersey Div. of Developmental Disabilities, 329 N.J. Super. 516, 525 (App. Div. 2000). The disputed facts must be material. Id. Further, "bald allegations or naked conclusions" do not warrant further procedures either. Id. The Board notes that this analysis has been repeated, even when discussing whether a matter falls under the "contested case" rubric. Frank v. Ivy Club, 120 N.J. 73, 98 (1990) ("It is well-established that where no disputed issues of material fact exist, an administrative agency need not hold an evidential hearing in a contested case.")<sup>74</sup>

Ocean Wind filed its Petition in February 2, 2022. On March 1, 2022, the Board transmitted a set of clarifying questions to Ocean Wind. While the Procedural Schedule did not provide for discovery, the Parties in this proceeding had an opportunity to review Ocean Wind's filings and respond with testimony and comments. Rate Counsel filed voluntary discovery on Ocean Wind. Ocean Wind largely responded to the questions Rate Counsel posed. Rate Counsel later filed testimony and a set of comments. Ocean City, for its part, did not file any testimony and provided a set of comments that spanned only two pages.

Rate Counsel and Ocean City contend that the Board should have provided formal opportunities to challenge Ocean Wind's testimony. The Board closely monitored the filings in this proceeding and did not find that formal discovery was needed. Rate Counsel's concerns were partly

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<sup>73</sup> In re the Board of Public Utilities Offshore Wind Solicitation for 1,100 MW – Evaluation of OSW Applications, BPU Docket No. QO18121289, Order date June 21, 2019 ("June 21, 2019 Order").

<sup>74</sup> The Board notes that there is a three-part test to determine whether a case is contested. Bd. of Educ. of Upper Freehold Reg'l Sch. Dist. v. State Health Benefits Comm'n, 314 N.J. Super. 486, 494 (App. Div. 1998). Here, the Board's analysis reflects the first part of the test, whether a "hearing [is] required by statute or constitutional provision." Id. This invokes the due process analysis.

immaterial – such as cost of the proposed routes – or were addressed by Ocean Wind to the Board’s satisfaction. Ocean City did not ask for more formal information gathering opportunities until Oral Argument. In fact, it was only at Oral Argument that Ocean City alleged that this proceeding should be considered a contested case. Notably, Ocean City failed to present any issue that rose to the level of a material disputed fact that would merit this proceeding being considered a “contested” case.

Ocean City had adequate opportunity to prepare testimony or engage expert witnesses. The record demonstrates that Ocean City was on notice of Ocean Wind’s interest in the identified parcel, based on Ocean Wind’s attempts to engage Ocean City in substantive discussions on the matter starting in 2019.<sup>75</sup> Here, the Board found that it did not need to provide an opportunity for formal discovery or evidentiary hearings because the Board did not find any disputed facts that would provide a marginal benefit to further the proceeding. In re Public Service Elec. and Gas Company’s Rate Unbundling, Stranded Costs and Restructuring Filings, 330 N.J. Super. 65, 106 (App. Div. 2000) (“[A]dministrative agencies have the discretion to decide whether a case is to be classified as “contested” [and] whether to reopen a hearing to admit further evidence before the entry of a final decision”).

In its filed testimony and comments, Rate Counsel presented a few concerns and asserted that further discovery would help the Board decide them. First, Rate Counsel claimed that cost information is needed to access whether the routes are reasonably necessary. As explained in the next section, the Board does not consider costs to be material for purposes of this proceeding. Second, Rate Counsel contends that further information is needed to evaluate the Great Egg Harbor Route. As explained in the next section, the Board found that Ocean Wind provided sufficient environmental and engineering evidence to show why it did not choose that route. Rate Counsel has not produced any facts to seriously question that finding.

At this time, it remains unclear whether the bridges identified along the Great Egg Harbor Route are historic or not. Irrespective of such determination, the Board **HEREBY FINDS** the historic status of each bridge to be immaterial to this proceeding.

Lastly, Rate Counsel argues that it needs discovery to verify whether the requested easements, amended by Ocean Wind to cover 0.647 acres, are necessary. The Board is satisfied that Ocean Wind reviewed the acreage and related matters before submitting the Amended Petition. There is little marginal benefit to discovery on this particular issue.

In their filed comments, Ocean City alleges that there was a “lack of consensus” surrounding the environmental impacts of the Project, including the impacts on wildlife and the fishing industry. It also asserted that the alternative Great Egg Harbor Route may be a better route than the Preferred Route. Ocean City notes that while the Great Egg Harbor Route has challenges, they could be overcome. If so, then the Preferred Route, which runs through Ocean City lands, would be avoided. Ocean City’s statements do not rise above bald allegations or naked conclusions. The Board finds this insufficient to warrant further time and investigation.

The parties reiterated their claims at Oral Argument. Ocean City argued that the matter was a contested case and required further proceedings. Ocean City further noted three (3) issues of fact: first, whether cost information was needed before the Board could make a decision; second,

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<sup>75</sup> Petition at 12-15.

whether the bridges near the Great Egg Harbor Route were historic or not; and third, whether the environmental and engineering concerns surrounding the Great Egg Harbor Route could be mitigated. Here, Ocean City noted that Ocean Wind surmounted similar environmental and engineering concerns regarding the Oyster Creek Route. The Board has already addressed the first two (2) of these issues. The third issue fails to raise an issue of material fact warranting further investigation. The Board notes that Ocean City's claims are not supported by expert testimony. Ocean City had an opportunity to present testimony and, instead, made bald allegations during the last minute of the Oral Argument proceeding. Further, even if the information Ocean City presented through its claims during Oral Argument came from a BOEM Draft Environmental Impact Statement that could be judicially noticed, the environmental and engineering concerns raised do not create a material dispute relevant to the matter at hand.

In sum, neither Rate Counsel nor Ocean City have demonstrated that there is significant benefit to undertaking further evidentiary procedures. The Petitioner has provided a satisfactory rationale for its selected, Preferred Route and has addressed various alternative routes. The Board **HEREBY CONCLUDES** that the Board's procedure sufficiently meets the High Horizons standard and balances the Mathews factors. As the risk of an erroneous deprivation is low, the procedural schedule the Board selected is appropriate.

As a last issue, Rate Counsel contends that this proceeding should have been consolidated with Ocean Wind's petition concerning property interests in Cape May County ("Cape May County Petition"). The Board has the discretion to join the cases or not, given the facts at hand. Mystic Isle Dev. Corp. v. Perskie & Nehmad, 142 N.J. 310, 322-23 (1995). Here, the Petition and the Cape May County Petition were filed months apart. These petitions each involve different property owners. Additionally, this proceeding involves a Green Acres property issue, whereas the Cape May County Petition does not. Given the different property interests at stake, as well as the different timelines for the two (2) petitions, the Board **HEREBY FINDS** no cause to consolidate the cases.

### **Reasonably Necessary Analysis**

We now turn to the core of the Board's analysis: whether the identified property interests and local consents are reasonably necessary for the Project. The analysis can be divided into three (3) parts:

- (1) Whether an export cable to the B.L. England substation is reasonably necessary to operate the Project;
- (2) Whether the route for the export cable is reasonable; and
- (3) Whether the easements and consents sought are needed in order to construct the export cable following the proposed route.

Points (1) and (3) above are essentially uncontested in this case, so that the Board need only address Point (2). Notwithstanding this fact, the Board addresses each of these three (3) points below.

Turning to Point (2), Ocean Wind contends that the Board is not required to approve any route because the choice of route is left to Ocean Wind.<sup>76</sup> Ocean Wind is partially correct, insofar as the Board is not approving any route in this proceeding. However, Ocean Wind's position may

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<sup>76</sup> OW June 16 response at 3.

be oversimplified, because any needed property interests could be avoided if another route was chosen. Therefore, if the Board is determining that the identified property interests are reasonably necessary given the chosen, Preferred Route, the Board must also determine whether this chosen route itself is reasonable. The Board is not tasked with determining whether the chosen, Preferred Route would be the one the Board would choose. See Borough of Glassboro v. Grossman, 457 N.J. Super. 416, 430 (App. Div. 2019) (explaining that a reviewing body must give deference to the condemners “determinations of necessity so long as it is ‘reasonable’”).

a. **Defining “Reasonably Necessary”**

The 2021 Amendment does not define the term “reasonably necessary.” Therefore, the Board relies on its experience implementing N.J.S.A. 48:3-17.7 and N.J.S.A. 40:55D-19 and case law for guidance.

Case law explains that property interests and consents must be “reasonably, not absolutely or indispensably, necessary.” In re Public Service Electric & Gas Co., 35 N.J. 358, 377 (1961), Borough of Glassboro, 457 N.J. Super. at 432. Further, the Board must look at the identified properties, given their unique characteristics, and “weigh all interests and factors in the light of the entire factual picture.” In re Public Service Electric & Gas Co., 35 N.J. at 377. This includes the presence of alternative sites, and their comparative advantages and disadvantages. Id. In order to make this determination, the Board first turns to the evidence the proposed condemner has presented. Borough of Glassboro, 457 N.J. Super. at 436-37. This enables the current land owner to have an opportunity to present evidence that disproves a claim that the property interests and consent are reasonably necessary. Id. at 437.

The Board thus takes a holistic approach to the facts. Ocean Wind bears the burden of providing supporting evidence to show that the property interests and consents are reasonably necessary. Ocean City, on the other hand, bears the burden of providing evidence disproving that showing. This approach conforms with OWEDA’s purpose of advancing OSW goals while providing an affected local government the opportunity to review and participate in the process. In making its determination, the Board notes that the requested property interests and consents need not be indisputably necessary; rather, these property interests need only be reasonably necessary.

Further, the Board must respect Ocean Wind’s choices – for instance, regarding its route selection – so long as the selection is a reasonable one. This holds true even if the Board, in its own discretion, may have chosen differently. See Borough of Glassboro v. Grossman, 457 N.J. Super. at 430. Reasonableness can be established if the OSW developer uses a process and factors that are reasonable to select the property interests, and if the eventual selection reasonably follows from the analysis conducted following the application of such process and factors. See Id. at 432-33 (noting that the important issue is evidential, not substantive).

Before moving to the analysis, the Board considers whether cost is a material factor it needs in order to make its determination. Ocean Wind did not provide cost estimates for its alternative routes analysis and contends that cost estimates do not exist – at least for some of the alternative routes – because its route analysis focused on other factors.

Rate Counsel and Ocean City contend that the Board needs to consider costs when conducting a detailed evaluation of cable routes as part of this proceeding. Rate Counsel cites In re Public Service Electric to support its position that detailed cost estimates are required before the Board can make its “reasonably necessary” finding. 35 N.J. at 377. There, the court explained that cost was a factor to be weighed when looking at the advantages of alternative site selections.

Substantively, Rate Counsel claims the costs could have an impact on ratepayer energy prices. For its part, Ocean City notes that an OSW developer should not choose sites based on costs alone and should make its selection based on other factors.

The Board notes that cost was an important factor in In re Public Service Electric because there, the costs would be included in a public utility's rate base and would be passed on to consumers. Here, the costs of the cable route would not be passed on to consumers, beyond the already-approved OREC. Ocean Wind is not a public utility; it is compensated through the OREC mechanism. The Board previously approved the OREC for Ocean Wind. The OREC will not be adjusted based on the chosen transmission route, whether that route is the Preferred Route or any other route. To be clear, the cost for the export cable has no consequence for the Transmission System Upgrade Costs ("TSUC") as described in the June 21, 2019 Board Order awarding the Ocean Wind Project.<sup>77</sup> Therefore, the route selection has no impact on the TSUC, nor on the OREC price or ratepayer cost already approved.

In sum, this distinction minimizes the importance of costs in the Board's evaluation when compared to an evaluation under the type of proceeding as that in In re Public Service Electric.

To clarify, the Board is not finding that costs could never be a material factor in a determination. However, as explained below, the Board **HEREBY FINDS** that the engineering and environmental considerations Ocean Wind provided are sufficient to show that the property interests and consents for the Preferred Route are reasonably necessary, irrespective of the cost differences between such route and any alternative route. The Board **HEREBY FURTHER FINDS** no evidence that the Preferred Route was chosen primarily because it was the least expensive route or despite being a route that possesses an excessive cost.

**b. The Board's Reasonably Necessary Findings**

The permanent ROW and easements that Ocean Wind seeks under the Petition are approximately 30 feet in width, and are intended for the purposes of construction, reconstruction, installation, operation, maintenance, inspection, patrolling, decommissioning, replacement and repair of a certain export cable and associated equipment, upon, across and under Ocean City-owned Green Acres-restricted properties. The properties are identified on the Official Tax Map of Ocean City as Block 611.11, Lots 137 and 145, Block 3500, Lot 1 (including riparian grant); and Block 3350.01, Lot 17, totaling 0.647 acres, collectively.

With respect to permitting consents, the Petition identifies the following permit applications that require authority or consent from Ocean City to proceed: Waterfront Development, Wetlands Act of 1970, Coastal Area Facilities Review Act, Flood Hazard Area Control Act, Freshwater Wetlands Protection Act Individual Permits, and a Tidelands License.<sup>78</sup> These permits and approvals are required for NJDEP to issue its federal consistency determination, which is a necessary step in BOEM's process for approval of the Project's Construction and Operations Plan. Additionally, the Petition notes that a New Jersey Pollution Discharge Elimination System Stormwater Construction Permit (5G3), New Jersey Pollution Discharge System Construction Dewatering Permit (B7 or BGR), Water Allocation Permit, and a Treatment Works Approval would also be required. The

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<sup>77</sup> June 21, 2019 Board Order, supra note74.

<sup>78</sup> Petition at 12; Patterson Testimony at 15.

Paterson Testimony notes that, once construction is underway, additional NJDEP permits or approvals may be required.

With respect to Point (1), as explained in the introduction to this section, it is self-evident that the power generated at the wind farm Project site needs to be exported to a POI onshore. Therefore, the determination on this issue depends on whether Ocean Wind's selection of B.L. England as the POI is reasonable. Rate Counsel notes that, while it sees no reason to disagree with Ocean Wind about the selection of B.L. England as the POI, Rate Counsel lacks the specific cost data to validate such selection.<sup>79</sup> However, the Kaplan Rebuttal testimony specifically references the cost of interconnection at the B.L. England substation, noting such cost as \$1.5 million.<sup>80</sup> Also, the OW Supplement lists costs for upgrades at the alternative Higbee and Ontario routes, as in excess of \$350 million.<sup>81</sup> The record further contains evidence that the PJM Interconnection Service Agreement<sup>82</sup> has been executed, which makes detailed cost estimates of interconnection at B.L. England available in the public domain, which confirm the Kaplan Rebuttal estimate.<sup>83</sup>

Ocean Wind selected the POI at B.L. England based on the criteria listed in the OW Supplement, notably, the capability of the POI to accept the power from the Project with minimal upgrades, as well as minimal impact to environmental and other natural resources.<sup>84</sup> The Board **HEREBY FINDS** that these factors provide a sufficient basis for Ocean Wind's choice of locating the POI at B.L. England to be considered reasonable.

Turning to Point (2), the cable route that Ocean Wind selects does not have to be the best route available. In fact, designation of "best" is highly subjective insofar as it depends on how different resources and disturbances are valued relative to each other. The record shows that Ocean Wind has considered a broad range of interests. Ocean Wind's eventual selection of the Preferred Route follows from those considerations. The evidence can be summed up by quoting the Patterson Testimony:

*"Compared to the potential alternatives, the Preferred Route is technically feasible, and has the least impacts to natural resources, including wetlands and water bodies, and residential and historic properties."<sup>85</sup>*

The Board **HEREBY FINDS** that, from an environmental perspective, the choice of the Preferred

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<sup>79</sup> Chang Testimony at 8-9.

<sup>80</sup> After the Board approved the purchase of Capacity Interconnection Rights in Docket No. QO18121289.

<sup>81</sup> Kaplan Rebuttal at 3-6.

<sup>82</sup> The Interconnection Service Agreement is an agreement between PJM, the Interconnected Transmission Owner, and the party requesting interconnection, specifying the technical upgrades needed for a generating unit to interconnect while maintaining PJM's standards for safety, reliability and operability of the grid, and cost estimates for these upgrades.

<sup>83</sup> Interconnection Service Agreement for PJM queue position AE-104, [https://www.pjm.com/pub/planning/project-queues/isa/ae1\\_104\\_isa.pdf](https://www.pjm.com/pub/planning/project-queues/isa/ae1_104_isa.pdf).

<sup>84</sup> OW Supplement at 2.

<sup>85</sup> Patterson Testimony at 11.

Route, one that predominantly follows previously disturbed property and an already-established ROW, is reasonable, particularly when compared with alternative routes that would create more extensive environmental disturbances. The technical feasibility comparison<sup>86</sup> similarly indicates the choice for the Preferred Route to be a reasonable one, as this route avoids challenges associated with the alternative routes. Finally, the Board is satisfied that minimizing the impact on commercial interests and limiting road disturbance by choosing a route with less linear distance<sup>87</sup> relative to other routes is reasonable.

Finally, with respect to Point (3), the Board has reviewed the easements and local government consent preemption sought under the Petition. The Board **HEREBY FINDS** that, given the selection of the Preferred Route, these easements and consent preemption are reasonably necessary. Again, the Board notes that whether the easements, consents and approvals are reasonably necessary given the proposed route, is uncontested. The Board understands that, given Ocean City's opposition to the Project, there is no expectation that Ocean City would provide easements, consents and approvals voluntarily.

c. **Issues Raised Concerning the Selected Cable Route**

Ocean City contends that the Great Egg Harbor Route may be feasible and preferable.<sup>88</sup> Specifically, during Oral Argument, Ocean City made the point that Ocean Wind could have overcome the challenges the Great Egg Harbor Route presents because the Project is overcoming similar challenges in its other export cable route with respect to the Oyster Creek POI. The Board understands that, from the perspective of Ocean City, the Great Egg Harbor Route may be the best one. This does not mean, however, that the Preferred Route is an unreasonable one.

The Oyster Creek Route and the Great Egg Harbor Route are two (2) unique routes, and they each have their own set of positive and negative factors. The Board does not need to make a direct comparison between these routes and the Preferred Route. Regardless of whether the Preferred Route is comparable to any other cable route, the Board does not need to determine if the Preferred Route is "the best" route. All the Board needs to determine is whether the Preferred Route is reasonable in and of itself.

The Patterson Rebuttal details the basis for elimination of the Great Egg Harbor Route. In particular, it includes specific constructability issues associated with the shifting sediments and shallow depths of the Great Egg Harbor Inlet, conflicts with navigational use, conflicts with an existing USACE borrow area, significant environmental impacts associated with cable burial through 5.8 miles of designated shellfish habitat, and the necessity for more environmentally intrusive technology because of the characteristics of the estuary. The Board **HEREBY FINDS** that the detailed rationale provided in the Patterson Rebuttal constitutes a satisfactory basis for Ocean Wind's elimination of the Great Egg Harbor Route.

Ocean City also claims that the two (2) bridges through the Great Egg Harbor Route, which Ocean Wind alleged were historic properties, are not historic properties. Ocean Wind acknowledges this

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<sup>86</sup> OW Supplement, Table 1-2 at 8-9.

<sup>87</sup> *Id.* at 14.

<sup>88</sup> Ocean City Response at 2; Oral Argument at 27-35.

point, but claims that the bridges are nevertheless listed in the State's or National Register of Historic Places. Ocean Wind further states that the route selection process would have resulted in the same outcome, regardless of the historic status of the bridges. The Board is satisfied that, irrespective of the bridges' historic designation, there is sufficient engineering, use conflict, and environmental issues associated with the Great Egg Harbor Route to make the Preferred Route a reasonable selection.

Rate Counsel contends that Ocean Wind should have considered the abandoned Railroad Right of Way as its route. Ocean Wind explained in the OW Supplement why such route was not chosen. Specifically, the route would impact several historic properties and districts.<sup>89</sup> The Board **HEREBY FINDS** Ocean Wind's explanation regarding its elimination of the abandoned Railroad Right of Way route and its selection of the Preferred Route over that route sufficient to meet the "reasonably necessary" standard.

The question before the Board is whether Ocean Wind showed that its proposed route was reasonably necessary, and it did so with respect to the Preferred Route. The question before the Board is not whether the Great Egg Harbor Route or another alternative is viable. Rather, the question is whether the Preferred Route is a reasonable route, and, as such, whether the property interests associated with this Preferred Route are reasonably necessary. Ocean Wind has demonstrated that its requested property interests for the Preferred Route, in fact, are reasonably necessary.

### **CONCLUSIONS AND FINDINGS**

The Board **HEREBY FINDS** that Ocean Wind satisfied the requirement to provide a written request to Ocean City regarding the real property interests for the identified parcels over 90 days prior to the filing of the Petition. None of the parties contest this issue.

After review of the record, the Board **HEREBY GRANTS** Ocean Wind's Petition. The Board **HEREBY FINDS** that the requested property interests and consent preemption are reasonably necessary for construction and operation of the Ocean Wind Project. The Board **HEREBY FINDS** that an electricity export cable from the Project to the B.L. England substation is reasonably necessary to operate the Project. The Board **HEREBY FINDS** that the proposed cable route, referred to as the "Preferred Route" is reasonably necessary for the construction or operation of the Project.

The Board **HEREBY DIRECTS** Ocean Wind to prepare a proposed form of Order reflecting this Board Order for recording with the County Clerk. The Board **HEREBY FURTHER DIRECTS** Ocean Wind to submit such item to the Board President for review and approval. Ocean Wind shall submit the approved Order to the Cape May County recording officer for recording as required by the 2021 Amendment.

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<sup>89</sup> OW Supplement, question 13.



With this Order, the Board **HEREBY RATIFIES** the Orders issued by the President while Presiding Commissioner.

The effective date of this Order is October 5, 2022.

DATED: September 28, 2022


BOARD OF PUBLIC UTILITIES  
BY:



\_\_\_\_\_  
JOSEPH L. FIORDALISO  
PRESIDENT

  
\_\_\_\_\_  
MARY-ANNA HOLDEN  
COMMISSIONER  
\_\_\_\_\_  
DIANNE SOLOMON  
COMMISSIONER  
\_\_\_\_\_  
ROBERT M. GORDON  
COMMISSIONER  
\_\_\_\_\_  
DR. ZENON CHRISTODOULOU  
COMMISSIONER

ATTEST:   
\_\_\_\_\_  
ROBERT M. GORDON  
COMMISSIONER

  
I HEREBY CERTIFY that the within document is a true copy of the original in the files of the Board of Public Utilities.

IN THE MATTER OF THE PETITION OF OCEAN WIND LLC PURSUANT TO N.J.S.A. 48:3-87.1(f) FOR A DETERMINATION THAT EASEMENTS ACROSS GREEN ACRES-RESTRICTED PROPERTIES AND CONSENTS NEEDED FOR CERTAIN ENVIRONMENTAL PERMITS IN, AND WITH RESPECT TO, THE CITY OF OCEAN CITY ARE REASONABLY NECESSARY FOR THE CONSTRUCTION OR OPERATION OF THE OCEAN WIND 1 QUALIFIED OFFSHORE WIND PROJECT

DOCKET NO. QO22020041

SERVICE LIST

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