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December 4, 2013

Via Hand Delivery and Electronic Mail

Honorable Kristi Izzo, Secretary
New Jersey Board of Public Utilities
44 South Clinton Avenue
P.O. Box 350
Trenton, New Jersey 08625

**Re: In re Petition of Fishermen's Atlantic City Wndfarm, LLC for the
Approval of the State Waters Wind Project and Authorizing Offshore
Wind Renewable Energy Certificates
BPU Docket No. EO110050314V**

Dear Secretary Izzo:

This Office represents the Staff of the New Jersey Board of Public Utilities in the above-captioned matter. Enclosed please find an original and eleven (11) copies of Board Staff's Brief and Certification of Service. Kindly cause one of the extra copies of the papers to be stamped "Filed" and returned to us by interoffice mail. Thank you.

Respectfully yours,

JOHN J. HOFFMAN
ACTING ATTORNEY GENERAL OF NEW JERSEY

By: 

Alex Moreau
Deputy Attorney General

Enclosure

cc: Counsel of Record (w/encl.; via overnight mail and electronic mail)



STATE OF NEW JERSEY
BOARD OF PUBLIC UTILITIES

IN RE PETITION OF FISHERMEN'S
ATLANTIC CITY WINDFARM, LLC
FOR THE APPROVAL OF THE STATE
WATERS WIND PROJECT AND
AUTHORIZING OFFSHORE WIND
RENEWABLE ENERGY CERTIFICATES

BPU DOCKET NO. EO11050314V

BRIEF OF THE STAFF OF THE NEW JERSEY BOARD OF PUBLIC UTILITIES IN
RESPONSE TO INITIAL BRIEF ON BEHALF OF FISHERMEN'S ATLANTIC CITY
WINDFARM, LLC

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PRELIMINARY STATEMENT

In accordance with the procedural schedule established in this matter, the Staff of the New Jersey Board of Public Utilities ("Staff") submits the within Brief in response to the Initial Brief on Behalf of Fishermen's Atlantic City Windfarm, LLC ("FACW") submitted on November 18, 2013¹ regarding the application filed by FACW on May 19, 2011 seeking offshore wind renewable energy certificates ("ORECs") for a 25-megawatt ("MW") windfarm proposed for construction 2.8 miles off the coast of Atlantic City.

Staff has reviewed the complete record in this matter, as described in the Stipulation on Joint Record of Exhibits dated June 27, 2013. Following its review of the record, Staff is of the opinion that the application, described further below, does not meet the requirements of the Offshore Wind Economic Development Act ("OWEDA" or "the Act"), N.J.S.A. 48:3-87 et seq., and the rules promulgated thereunder, N.J.A.C. 14:8-6 et seq. ("rules"), governing Qualified Offshore Wind ("OSW") projects, and therefore Staff cannot recommend approval to the Board of Public Utilities ("Board"). As described more fully below, FACW's project, among other things, (i) does not demonstrate positive economic net benefits because it has not

¹ Fb refers to the Initial Brief submitted by FACW dated November 18, 2013.

credibly shown it will receive the federal subsidies needed to do so; and (ii) the XEMC X115 Direct Drive Turbine technology poses an unnecessary technical risk to the success of the project, due to the pre-commercial stage of the proposed XEMC technology - as evidenced by FACW's insistence on the right to switch turbines.

DISCUSSION

I. Background of OWEDA

On June 28, 2010, the New Jersey Legislature passed the Offshore Wind Economic Development Act, which Governor Chris Christie signed into law on August 19, 2010. L.2010, c.57, codified at N.J.S.A. 48:3-87. The law amends and supplements the Electric Discount and Energy Competition Act, N.J.S.A. 48:3-49 et seq., to allow for the development of an offshore wind renewable energy certificate ("OREC")² program to support at least 1,100 MW of generation from OSW projects. Under N.J.S.A. 48:3-87.1(d), the Board "shall review and approve, conditionally approve, or deny an application submitted. . . [pursuant to the Act]." Specifically, the Act directs the Board to "establish an [OREC] program to require that a percentage of the kilowatt hours sold in this State by each electric power supplier and each basic generation service provider be from offshore wind energy in order to support at least 1,100 megawatts of generation from qualified offshore wind projects³." N.J.S.A. 48:3-87(d)(4).

² An OREC is "a certificate, issued by the board or its designee, representing the environmental attributes of one megawatt hour of electric generation from a qualified offshore wind project." N.J.S.A. 48:3-51.

³ A qualified offshore wind project means "a wind turbine electricity generation facility in the Atlantic Ocean and connected to the electric transmission system in this State, and includes the associated transmission-

The Act provides specific criteria that OSW developers must meet in order to become a "qualified offshore wind project," which is the only entity that can receive ORECs. The Legislature authorized the Board to consider applications for wind projects and directed that, to be approved, applications must satisfy the following conditions:

(a) the filing is consistent with the New Jersey energy master plan, adopted pursuant to section 12 of P.L.1977, c.146 (C.52:27F-14), in effect at the time the board is considering the application;

(b) the cost-benefit analysis, submitted pursuant to paragraph (10) of subsection a. of this section, demonstrates positive economic and environmental net benefits to the State;

(c) the financing mechanism is based upon the actual electrical output of the project, fairly balances the risks and rewards of the project between ratepayers and shareholders, and ensures that any costs of non-performance, in either the construction or operational phase of the project, shall be borne by shareholders; and

(d) the entity proposing the project demonstrates financial integrity and sufficient access to capital to allow for a reasonable expectation of completion of construction of the project.

(2) In considering an application for a qualified offshore wind project, submitted pursuant to subsection a. of this section, the board shall also consider:

(a) the total level of subsidies to be paid

related interconnection facilities and equipment, and approved by the Board."
N.J.S.A. 48:3-51.

by ratepayers for qualified offshore wind projects over the life of the project; and

(b) any other elements the board deems appropriate in conjunction with the application.

[N.J.S.A. 48.3-87.1(b).]

II. The Amended Application Does Not
Demonstrate Positive Economic Net
Benefits To The State of New
Jersey

Staff does not dispute that the application filed by FACW on May 19, 2011 was considered administratively complete on June 14, 2011 consistent with N.J.A.C. 14:8-6.4. (In the Matter of the Petition of Fishermen's Atlantic City Windfarm, LLC for the Approval of the State Waters Project and Authorizing Offshore Wind Renewable Energy Certificates, Board Decision on Stipulations by the Parties, Docket No. EO11050314V, dated July 29, 2013, hereinafter, the "Order", at 18.) Staff notes the Board adopted the description of the proposed project as stated in the Amended Application, filed on June 1, 2012. (Order at 26).

The description of the proposed project comports with the definition set forth in N.J.S.A. 48:3-87.2. Specifically, the project is proposed to be located in State territorial waters 2.8 miles offshore of Atlantic City, New Jersey, a municipality in which casino gaming is authorized, and would not be more than twenty-five megawatts (25 MW) in nameplate capacity. Staff notes the Board found that FACW's proposed project is consistent with the Energy Master Plan, N.J.S.A. 48:3-87.1(b)(1)(a), because it would provide up to 25 MW of generation and the project has the

potential to create "direct, indirect, and induced economic benefits for the State." (Order at 19.)

FACW bears the burden of proving that its application satisfies the requirements of OWEDA and the Board rules. See, e.g., Canada Dry Ginger Ale, Inc. v. F & A Distributing Co., 28 N.J. 444, 453 (1958) (suggesting that the petitioner must bear the burden of proof in an administrative proceeding). The standard of proof in administrative proceedings is by a preponderance of the competent, relevant and credible evidence. In re Polk, 90 N.J. 550 (1982); Atkinson v. Parsekian, 37 N.J. 143 (1962). Precisely what is needed to satisfy the standard must be decided on a case-by-case basis. The preponderance of the evidence must "be such as to lead a reasonably cautious mind to the given conclusion." Bornstein v. Metro. Bottling Co., 26 N.J. 263, 275 (1958). And, in this type of proceeding, the applicant has and must sustain its burden of proof. See, e.g., Medici v. BPR Co., 107 N.J. 1, 25 (1987).

In considering an application for a qualified offshore wind project, N.J.S.A. 48:3-87.1(b)(1)(b) requires the Board to determine that the cost-benefit analysis ("CBA") demonstrates positive economic and environmental net benefits to the State. Following its review of the record, Staff disagrees that the proposed project provides positive net economic benefits to the State.

Staff's consultants, Boston Pacific Company, Inc. and OutSmart BV (hereinafter, "BP"), in its December 2012 report on the amended application found that the project failed to demonstrate a positive net economic benefit while noting that the project continued to pose financial and technical risks if approved. (JR-19 at 19-28). In fact, the BP evaluation found that the project had a net cost to the state of \$186.8 million. (JR-19 at 20). On March 8, 2013, FACW further amended the application (JR-1(y)(z)), and further supplemented the application with rebuttal testimony filed on March 25, 2013 (JR-21(a-i)). These filings detailed up to \$100 million in new federal funding that could benefit the project, of which a \$4 million Phase I, Department of Energy (DOE) grant had been awarded. FACW stated that it would compete with other OSW projects for up to an additional \$47 million in Phase II of the DOE grant and relied on funds from the Investment Tax Credit ("ITC"), which expires on December 31, 2013. (JR-34⁴ at 3:12-24). Presumed receipt of these federal funds allowed FACW to submit a revised OREC price of \$199.17. (JR-34 at 6). Staff disputes the validity of the revised OREC price, however, since it is not substantiated by the record. Most importantly, FACW

⁴ The executed Consent Order filed Nov. 8, 2013 amended the Joint Record to include supplemental filings dated August, 2013. FACW's 8/9/2013 Updated Testimony of C. Wissemann, Exh. 1 is referenced as JR-34. FACW's 8/9/2013 Updated Testimony of S. Gabel, Exh. 2, is referenced as JR-35. Division of Ratepayer Advocate's Supplemental Testimony of D. Dismukes is referenced as JR-36.

has failed to credibly demonstrate that it will actually receive, at this late date, all the federal subsidies needed to achieve a price of \$199.17 per megawatt hour ("MWh").

Based upon findings noted above, Staff has determined that the full receipt of the federal funds is imbedded in the OREC price proposed by FACW. With the exception of the award of the \$4 million from the DOE, the record does not reflect that FACW has received any additional federal funds. Staff has reviewed the record and makes its recommendation based upon the actual status of the application, not what may happen prospectively. While Staff recognizes that FACW has agreed to assume the risk of receipt of the federal funds (J-34 at 7, lines 9-13), FACW does not present Staff with any likelihood that the funds will be received nor does FACW explain the project consequences if the full \$100 million is not received. In fact, nothing in the record supports FACW's claim that it will take on this risk since no financial documentation or plans exist to show how these funds have been absorbed into the project, the effect on the project if FACW receives anything less than the full \$100 million, and/or the alternate financing FACW will rely on in the absence of federal funds.⁵ Staff must also note that, at present, to qualify for the ITC, FACW would have to demonstrate

⁵ Even if the State were to agree that FACW assumes all the risk of not obtaining federal funds, the State would still take on the significant risk that an underfunded project would fail.

that it will have spent 5 percent (5%) of the eligible capital costs by the end of this year. The production tax credit ("PTC"), and the opportunity for PTC-eligible technologies to opt for the ITC, is set to expire by the end of 2013 and Staff cannot make any assumptions on the prospects for its renewal. As no further filings were made with respect to FACW's receipt of federal funds since the time of the Order, Staff must recommend that the Board not rely upon FACW's potential receipt of these funds in evaluating its current Amended Application.

The lack of transparency on OREC price described below, and lack of sufficient federal funding to support the proposed OREC price creates an unacceptable risk for Board approval of FACW's Amended Application. Additionally, FACW has not substantiated its claim that it would be able to build the project absent receipt of the full \$100 million.⁶ Therefore, Staff has determined that FACW has failed to show that its project meets the net benefits test prescribed in OWEDA and the Board's rules and, thus, recommends that the Board find similarly.

Furthermore, the record reflects that, if the Amended Application were approved, New Jersey ratepayers will never pay an OREC price of just \$199.17. In its updated testimony, FACW proposes an OREC price calculated from Energy Year ("EY") 2013,

⁶ This claim raises the question why, if FACW can proceed without this significant sum, the amount they seek to recover from the State is not similarly reduced.

the anticipated year of approval, then re-stated to commence concurrent with a commercial operations date of 2016. The fixed rate price escalation would continue until it reached \$439.39/MWh in EY2036. (JR-35 at 4, lines 7-11). FACW's proposed OREC price of \$199.17/MWh of electricity produced is re-stated to reflect a price of \$220.82/MWh in 2016, which escalates at a fixed rate. (Fb at 22). FACW has proposed its OREC price of \$199.17 for EY2013 would increase to \$206.14 for EY2014, \$213.36 for EY2015, and \$220.82 for EY2016. (JR-35 at Att. B, Schs. B & C). Thus, on timing of OREC payment alone, Staff contends that the Annual OREC Price, as shown on Schedules B and C, should be calculated from EY 2016, when the project is projected to begin generating energy, not from EY 2013 (\$199.17), before construction has begun.

FACW asks the Board to evaluate its project based upon a starting OREC of \$199.17, escalating every year after EY 2013 for 20 years. The statute provides that ORECS will not be paid until energy is produced from a qualified wind energy facility. N.J.S.A. 48:3-87.1(c)(1)(2) (requiring that the Board, in considering an application for a qualified offshore wind project, submitted pursuant to subsection a. of that section, determine that the application satisfies these and other conditions: (1) no OREC shall be paid until electricity is produced by the qualified offshore wind project; and (2) ORECS

shall be paid on the actual electrical output of the project that is delivered into the transmission system of the State). The first year which the FACW project could produce energy is EY 2016, at which point the cost of ORECs will be \$220.82. Ratepayers will never pay the lower OREC price, but will begin paying at a rate of \$220.82.

Finally, as the Act requires the Board to consider the total level of subsidies to be paid by ratepayers for qualified offshore wind projects over the life of the project, the price discussion should include subsidy. BP takes the word subsidy to mean the extent to which payments to the FACW project would exceed estimated market prices for electric energy, capacity, and ancillary services in the PJM Market. (JR-22(a) at 11:17-12:3). Even at the \$199.17 OREC price, BP has assessed that the subsidy over the life of the project would be \$125.5 million or 3.3 times the present value of revenues FACW would be expected to earn from its sales into PJM markets. (JR-22(a) at 12:3-10). Staff is of the view that an OREC price, which is 3.3 times market price, represents an unacceptably high cost for ratepayers over the life of the project relative to the risks posed by the project, pursuant to N.J.S.A. 48:3-87.1(b)(2)(a).

III. FACW's turbine selection presents significant technological risks

FACW represents that it has selected the XEMC Darwind turbine. (JR-34 at 12:17-21). However, the XEMC X115 Direct Drive Turbine technology poses an unnecessary technical risk to the success of the project, which contributes to Staff's current recommendation. Substantial technological risks are reflected in FACW's insistence that it has the right to switch turbine brands, and, more broadly, alter project design with Board approval pursuant to N.J.A.C.14:8-6.5(a)(2)(ii). The Board has already found that "[t]he repeated back-and-forth concerning turbine manufacturer fails to instill confidence in the viability of the Project." (Order at 28). This would be true with any project, but it is especially true with FACW due to XEMC's overall involvement with the project. XEMC is the turbine manufacturer, the project financier, the holder of a 70% interest in the project, and the entity providing long-term maintenance on the OSW project. This multi-faceted role of XEMC further complicates any potential necessary technology change by FACW, making it difficult to switch to a turbine with a more demonstrated track record of performance in an off-shore wind setting. In Staff's opinion, if XEMC withdraws or is replaced, this project is surely at risk of unraveling. While OWEDA and

the rules allow for an applicant to seek Board approval for a technology change that is in the best interest of New Jersey ratepayers, in this case a change in wind turbine technology would so fundamentally alter the application as to require a new application to the Board.

After careful review of the XEMC technology, BP concluded that "the proposed project poses significant technical risk because it will use wind turbines that have not been commercially proven." (JR-19 at 12). Further, on the adequacy of the proposed XEMC wind turbines, BP opined that

In the amended application, Applicant proposes to use the same XEMC DD115/5MW turbines specified in the initial application. We remain concerned with the proposed use of the XEMC turbines, which still pose significant risks to the Project's performance. The XEMC turbines employ direct drive technology which, unlike conventional turbines, has no gearbox, thus minimizing the number of moving parts in the drivetrain. Although direct drive technology may result in increased reliability and performance, the XEMC turbine has no commercial operating history. Further increasing the risk of the project, the turbines will be the first in the 5 MW class to use direct drive technology. In terms of mitigating risk, we believe there is no substitute for commercial operating experience to uncover design and malfunctioning flaws and allow time for such flaws to be corrected.
[(JR-19 at 52).]

On industry standard type and project certifications, Staff acknowledges that FACW received provisional Type B certification for the XEMC turbines from Det Norske Veritas on July 12, 2013, a copy of which was submitted to the Board and is a part of the record in this matter. (JR-34 at 14, lines 1-6). Type B Certification of the turbine is a step in the right direction, but a turbine that is not commercially proven has the risk of technical issues not detected during the prototype stage and testing. (JR-19 at 12). But, Staff continues to hold serious concerns regarding the viability of the project's wind turbine technology, considering its pre-commercial stage of development, where even with certification a turbine that is not commercially proven has the risk of technical issues arising well after installation, which is not a guarantee of desired performance. (JR-19 at 53) ⁸.

⁸ Regarding FACW's proposed OREC pricing plan, Staff recommends the Board reject any notion that the interim plan "shall not be modified by subsequent order or other action of the Board, unless agreed to in writing by Petitioner." (Fb at 19.) As FACW is well aware, Staff has undertaken a lengthy and complicated stakeholder process to resolve this issue. Once the rules are proposed and adopted, they will equally apply to all approved projects, without exception. Staff therefore recommends the Board reject any pricing plan which would place FACW or any subsequent applicant in a superior position to other stakeholders.

IV. Conclusion

In making its recommendation, Staff recognizes that FACW has made significant modifications to its application to address the concerns of Staff, BP, and Rate Counsel. While FACW is to be commended for its efforts to make this project more viable, at this point Staff cannot find that the Amended Application meets the requirements of OWEDA and the rules. For the foregoing reasons, Staff recommends that FACW's application be denied.

Respectfully submitted,

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ACTING ATTORNEY GENERAL OF NEW JERSEY
Attorney for Staff of the Board of
Public Utilities

By:



Alex Moreau
Deputy Attorney General

Dated: December 4, 2013

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CERTIFICATION OF SERVICE

I certify that I today caused an original and eleven (11) copies of Brief of the Staff of the New Jersey Board of Public Utilities to be filed by hand delivery upon the Honorable Kristi Izzo, Secretary, New Jersey Board of Public Utilities, 44 South Clinton Avenue, P.O. Box 350, Trenton, New Jersey 08625. Also, I caused a copy of the same to be delivered by overnight mail and electronic mail to all counsel of record.

Pursuant to R. 1:4-4, I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are wilfully false, I am subject to punishment.

By: 

Alex Moreau
Deputy Attorney General

Dated: December 4, 2013