



**STATE OF NEW JERSEY**  
**Board of Public Utilities**  
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CLEAN ENERGY

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

) ORDER REVIEWING THE  
) SUPPLEMENTED RECORD ON  
) REMAND  
  
) DOCKET NO. EO11050314V

**Parties of Record:**

- Stefanie A. Brand, Esq., Director, New Jersey Division of Rate Counsel**
- Stephen B. Pearlman, Esq., Pearlman & Miranda, LLC, on behalf of Fishermen's Atlantic City Windfarm, LLC**
- Phillip J. Passanante, Esq., on behalf of Atlantic City Electric Company**
- Gregory Eisenstark, Esq., Windels Marx Lane & Mittendorf, LLC, on behalf of Jersey Central Power & Light Company**
- Alexander C. Stern, Esq., on behalf of Public Service Electric and Gas Company**
- Susan J. Vercheak, Esq., on behalf of Rockland Electric Company**

**BY THE BOARD<sup>1</sup>:**

By Order dated March 28, 2014 ("March 28 Order" or "Denial Order"), the New Jersey Board of Public Utilities ("Board") denied the petition of Fishermen's Atlantic City Windfarm, LLC ("FACW") for a determination, pursuant to N.J.S.A. 48:3-87.2, of eligibility as a qualified offshore wind facility as set forth in N.J.S.A. 48:3-87.1 et seq. and N.J.A.C. 14:8-6.5 et seq. The March 28 Order contains the extensive procedural history of this case, which is incorporated herein by reference. Among the reasons for the Board's denial was that the project, at the incentive level proposed by FACW and to be paid by ratepayers over a twenty year period, did not meet the net economic and environmental benefits test proscribed by the Offshore Wind Economic Development Act ("OWEDA"), P.L. 2010, c. 57, since the Board found that the receipt of federal subsidies in the amount of approximately \$100 million, i.e., the United States Department of

<sup>1</sup> Commissioner Upendra J. Chivukula has recused himself due to a potential conflict of interest and as such took no part in the discussion or deliberation of this matter. Commissioner Dianne Solomon was not present at the 11/21/14 agenda meeting.

Energy ("USDOE") Phase II Grant and the Investment Tax Credit ("ITC"), were not credible assumptions to include in the OREC price. The Board also found that the project did not demonstrate financial integrity.

By Order dated April 28, 2014, the Board denied FACW's motion to reopen the proceedings, to supplement the record and for reconsideration.

On May 5, 2014, FACW filed a notice of appeal with the Superior Court of New Jersey, Appellate Division, Docket No. A-003932-13. On June 30, 2014, FACW filed a motion to supplement the administrative record on appeal and to expedite Board findings on the supplemented record to reflect, that FACW was awarded the Phase II Grant from the USDOE.

On August 8, 2014, the Court granted the motion and ordered the Board to complete its findings on the supplemented record within 120 days, and that the Board shall make a good faith effort to complete the remand sooner.

On August 20, 2014, the Board appointed then President Dianne Solomon as the presiding officer overseeing the remand proceedings. On September 2, 2014, a scheduling order was issued providing the opportunity for discovery on FACW's supplemented testimony and a briefing schedule on the specific issue of whether the supplemented record materially changes the financial analysis of the project.

On September 19, 2014, following review of FACW's discovery responses, FACW, the Division of Rate Counsel ("Rate Counsel") and Board Staff ("Staff") agreed upon an Amended and Restated Stipulation on Joint Record of Exhibits ("Amended and Restated Joint Record"), which is incorporated herein by reference.

### **The Supplemental Record**

FACW supplemented the record with the direct testimony of Christopher Wissemann, Chief Executive Officer ("Wissemann Testimony") (JR-38 p. 1-6) and Attachments I and II to the Wissemann testimony<sup>2</sup>. The Wissemann testimony stated that the USDOE awarded FACW a Phase II Advanced Energy Technology Demonstration Project grant in the amount of \$46.66 million which occurred subsequent to the Board's rejection of FACW's application on March 28, 2014 and the rejection of FACW's motion for reconsideration on April 23, 2014. (JR-38 p. 2). The testimony asserted that since an OREC order is the financial equivalent of a power off-take agreement, FACW must receive an approval by the Board by June 30, 2015, or it is at risk of not receiving the remaining portion of Phase II USDOE Grant Funds.

Regarding the effect of the Phase II USDOE grant, the Wissemann testimony stated:

Given the removal of the uncertainty surrounding receipt of the Phase II USDOE Grant, FACW unequivocally proposes an OREC Price of \$199.17/MWh, not the \$263/MWh employed by the Board in the Denial Order. FACW assumes the risk that the ITC will not be re-approved by Congress and that FACW will qualify if re-approved. Even if Congress fails to re-approve the ITC, the below-market rate of return on the Project would be acceptable to

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<sup>2</sup> USDOE letters to Mr. Wissemann dated May 22, 2014 and June 26, 2014, respectively (JR-39 p. 7-11).

FACW. In light of the award of the Phase II USDOE Grant, I can unequivocally state that any prior testimony that the Board interprets as suggesting that an OREC Price of \$199.17/MWh is contingent upon receipt of the Federal Subsidies, or that the potential rate of return without receipt of both Federal Subsidies is insufficient, is retracted and replaced by this testimony. Taking into consideration the removal of uncertainty with regard to the Phase II USDOE Grant and the current state of the law with respect to the ITC, FACW seeks approval of an OREC Price of \$199.17/MWh.

[JR-38 p. 4-5.]

Following the remand of this matter, Board Staff served discovery on FACW to determine the actual amount of new funds FACW has received. FACW stated in its response that:

Future payments to be made to FACW by the USDOE are on the basis of reimbursement of payments made by FACW for expenses incurred. The USDOE reimburses FACW for 80% of expenses incurred through July 2015 up to \$6,666,667. Reimbursements are made by wire transfer within 10 days of receipt of properly documented invoices. After July 2015, the USDOE is to reimburse FACW up to 50% of expenses incurred, but no greater than \$13,333,333 annually, up to an aggregate total of \$46,666,667.

[JR-39 p. 9-10.]

FACW also provided the Assistance Agreement between USDOE and FACW dated August 8, 2014 in response to Board Staff's Discovery Request S-FACW-Remand-1. The agreement states that \$6,000,000.00 has been obligated in the most recent action for a total of \$9,425,000.00 (JR-39(a) p.1) and that the purposes of the modification dated August 8, 2014 are, among other things, to allow for the continuation of the application and "[p]rovide incremental funding for Budget Period 2" up to the total amount of \$9,425,000.00, as noted on the contract. (JR-39(a) p.1-2). Budget Period 2 ends on July 31, 2015 at which time the USDOE will make a "Go/No-Go" review based on the project's ability to meet certain milestones and may subsequently "determine to discontinue the award" if the milestones are not met. (JR-39(a) p. 1, p. 22).

### **Positions of the Parties**

#### **FACW**

On September 5, 2014, FACW filed its initial brief in the remand proceedings. FACW argues that "the financial analysis with respect to FACW's Application has materially changed, and in light of such changes, issuance of an OREC Order by the Board is warranted." FACW Initial Brief on Remand at 1. In furtherance of this argument, FACW claims that "in light of the Supplemental Record, all record evidence now unequivocally establishes that FACW's proposed OREC Price is \$199.17/MWh. FACW claims that this fundamentally impacts the economic analysis of the project, because at this OREC Price, all parties agree that FACW's Application generates net economic benefits for the State. *Id.* at 5. FACW also asserts that

the impact of the supplemental record also mitigates the Board's findings on the ratepayer subsidy, the project's compliance with the Energy Master Plan ("EMP") and FACW's financial resources and financial capacity based upon the criteria for the awarding of the Phase II USDOE grant. Id. at 5-6.

On September 26, 2014, FACW replied to Staff's response described below. FACW rejected Staff's argument that the receipt of the Phase II USDOE grant is not material to the financial analysis of the application and should not alter the Board's denial of the application. FACW claims that the Appellate Division "has already rejected that argument, and directed the Board to consider FACW's Supplemental Record precisely because it is material and is likely to affect the outcome of the Board's decision." FACW also argues that "Staff's remaining arguments about the financial analysis of the Application should also be rejected because they disregard both the unrebutted record in this matter and the legal test laid out by the Board in the Denial Order. FACW Reply Brief on Remand at 1. FACW reiterated its claims that it was willing to negotiate with Staff and entertain changes to the application and that "the only material obstacle to FACW realizing the entirety of the Phase II USDOE Grant funds is the issuance of an OREC Order by the Board." Id. at 2.

### **Board Staff**

On September 19, 2014, Staff filed its response brief to FACW's initial brief. Staff asserted that the Supplemental Record does not materially change the financial analysis of the application and even if the Board accepts the premise of the Supplemental Record that FACW has received a conditional award of up to \$46.66 million from the USDOE, the Supplemental Record does not defeat the Board's previous findings that an OREC Price of \$199.17/MWh is viable only if FACW's OSW project receives the complete amount of federal subsidies of \$100 million represented in its March 8, 2013 filing, which included the entire USDOE grant and the ITC. Staff Response Brief on Remand at 1-2, 14-17. Staff also claims that the Supplemental Record does not guarantee that FACW will actually receive the full amount of the conditional USDOE grant and that the receipt of some or all of the federal monies does not address the financial integrity of the project. Id. at 2, 16.

### **Rate Counsel and Intervenors**

On September 19, 2014, Rate Counsel advised that it would not file a response brief to FACW's initial brief on remand but would instead rely upon all of its previous filings, which had been accepted into the record. On September 23, 2014, the EDC<sup>3</sup> Intervenors advised that they would not file a brief addressing the supplemental record.

### **DISCUSSION AND FINDINGS**

Pursuant to the authority to oversee the remand proceedings, on September 2, 2014, then President Solomon issued a scheduling order providing the parties with the opportunity to conduct discovery on FACW's supplemented testimony and a briefing schedule on the specific issue of whether the supplemented record materially changes the financial analysis of the project. The Board now **ADOPTS** the September 2, 2014 procedural order.

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<sup>3</sup> The electric distribution company Intervenors are Atlantic City Electric, Jersey Central Power & Light, Public Service Electric and Gas, and Rockland Electric Company.

On September 19, 2014, FACW, Rate Counsel and Staff executed an Amended and Restated Joint Record and requested that the Board consider the listed exhibits as the full record according to N.J.A.C. 1:1-15.1. Upon review of the Amended and Restated Joint Record, the Board **APPROVES** the Amended and Restated Joint Record as comprising the full record in this matter, with the following exception. Paragraph 34 of the Amended and Restated Joint Record indicates that certain itemized documents relate to "FACW's original Application dated February 8, 2011 . . . ." The Board rejects any assertion that it received an application filed pursuant to N.J.S.A. 48:3-87.1 from FACW prior to May 19, 2011. The Board did not open an application window for offshore wind projects until May 16, 2011. Thereafter, FACW filed an application on May 19, 2011, which was considered administratively complete on June 14, 2011. Therefore, the Board **FINDS** that any information submitted by FACW prior to May 19, 2011, did not constitute a properly filed application and is not considered part of the record.

On March 28, 2014, the Board denied FACW's request for approval of its project and found that "the FACW Project does not pass the standard for a qualified offshore wind facility as set forth in N.J.S.A. 48:3-87.1 et seq. and N.J.A.C. 14:8-6.5 et seq." (March 28 Order at 29). The issue presented to the Board on remand is whether the supplemented record materially affects the financial analysis of FACW's proposed project.

In its brief, Staff argued:

FACW must satisfy its burden of proof on remand and continues to bear the burden of proving that its application satisfies the requirements of OWEDA and the Board rules. See, e.g., Maglies v. Estate of Guy, 193 N.J. 108, 127 (2007) (on remand, a party must develop in the record the facts to satisfy its burden of proof); Medici v. BPR Co., 107 N.J. 1, 25 (1987) (the applicant has to sustain its burden of proof on remand).

[Staff Response Brief on Remand at 15.]

The Board agrees with Staff's position and **FINDS** that the burden lies with FACW to prove that the application, based on the supplemented record, satisfies the provisions of OWEDA.

FACW asserts that all parties agree that the project meets the net economic and environmental benefits test proscribed by OWEDA. FACW Initial Brief on Remand at 5. This is not an accurate representation of the record. Boston Pacific did not consider FACW's proposed OREC Price of \$199.17 in isolation. Rather, it evaluated the \$199.17 OREC Price with the assumed receipt of approximately \$100 million dollars from both the Phase II DOE Grant and the ITC and with construction beginning in 2013. (JR-22(a) 10-20 to 11-4). By its own testimony in the supplemental record, FACW has not received the full \$100 million dollars in federal subsidies.

Moreover, Rate Counsel opposed including the federal subsidies in its cost benefit analysis and refused to evaluate the \$199.17/MWh OREC price because the price "is speculative and based upon the award of a 'Phase 2' grant from the U.S. Department of Energy that cannot be guaranteed and is not known or measurable with any degree of certainty." (JR-22(b), 74-13 to 17 and 75-3 to 17). The Board agreed with Rate Counsel's approach and found that "subsidies that are not known or measurable with any degree of certainty should be excluded from the OREC price." (March 28 Order at 20). The Board also found that:

To the extent that FACW applied for certain federal subsidies and has committed to pass along the benefits to ratepayers, the company has complied with N.J.A.C. 14:8-6.5(a)(5) and N.J.A.C. 14:8-6.5(a)(11)(viii). The Board, however, is not required to assume that FACW will receive such subsidies when computing the cost-benefit analysis. Pursuant to N.J.A.C. 14:8-6.5(a)(11)(vii) and (xi), the Board may evaluate the credibility of FACW's economic assumptions and may "rerun the model with other assumptions and inputs to be provided by the Board staff." N.J.A.C. 14:8-6.5(a)(11)(vii) and (xi).

[March 28 Order at 19.]

In reviewing the supplemental record, the Board is tasked with considering FACW's current testimony in light of the record evidence and the Board's previous findings that "the March 8, 2013, OREC price proposal, including the sliding scale, represents the costs that the Project needs to be viable" and which accepted FACW's previous testimony that "an OREC price of \$199.17/ MWh is viable only if the Project receives the ITC and full \$50 million USDOE Grant." (March 28 Order at 19). The sum total of these federal subsidies as represented by FACW is approximately \$100 million.

In reviewing the record, the Board agreed with Rate Counsel's testimony, which remains unrecanted, that subsidies that are not known and measurable should be excluded from the OREC Price. (March 28 Order at 20). More importantly, the OWEDA rules provide that the Board may evaluate the credibility of FACW's economic assumptions. Specifically, the Board stated in its March 28 Order that "essentially, FACW assumes that 100% of the federal subsidies will materialize and commits that the Project will pass such benefits along to ratepayers in a reduced OREC price of \$199.17/MWh. The Board must determine whether this is a credible assumption." (March 28 Order at 19).

FACW now asserts that the project is viable at an OREC price of \$199.17, even if only one-half of the approximately \$100 million of federal subsidies is received, and that it would accept a lower rate of return if the ITC is not reauthorized and FACW does not qualify for the ITC. Other than FACW's assertions that the \$199.17 OREC price makes the project viable, the record contains no evidence to substantiate FACW's contention that the \$199.17 OREC price is realizable without the full receipt of the subsidies.

In fact, nothing in the supplemental record includes any financial analysis, or other quantitative evidence, to demonstrate how the project would be viable without 100% of the federal subsidies. Nor does the record, as supplemented, explain how the lower rate of return FACW alludes to - and does not specify - would affect the project over the twenty year term of the OREC order.

Additionally, nothing in the record, supplemented or otherwise, explains why the Board should revise its findings that the complete receipt of the federal subsidies is necessary for FACW's proposed OREC price of \$199.17 to be viable. Board approval of the project is predicated upon the project delivering a "net economic benefit" which was estimated by Boston Pacific, the Board Staff's consultant in this matter, to only materialize upon full receipt of the \$100 million of federal subsidiaries. Without receipt of the full federal subsidies, the project does not pass this threshold and thus may not be deemed eligible to receive ORECs per the requirements of OWEDA.

In its analysis of the federal subsidies in the March 28 Order, the Board stated that “a qualified wind facility must be able to survive scrutiny and pass the net benefits test even if such funds never materialize.” (March 28 Order at 20). Additionally, the Board stated that

If the Board were to approve an OREC price based on an applicant’s optimism that it will successfully compete, qualify, and receive federal subsidies, the Board runs the risk of approving a project that is artificially inflated and underfunded. OWEDA does not require the Board to approve such a project.

[Ibid.]

The lack of record evidence to substantiate FACW’s claims as contained in the supplemental record gives the Board no basis to accept FACW’s proposed new paradigm to analyze the project at its proposed OREC price of \$199.17. Therefore, the Board’s analysis from the March 28 Order must stand.

The Board does acknowledge that FACW has been awarded the Phase II USDOE Grant conditioned upon certain project milestones and that it has received a portion of the \$46.66 million that comes with that award. FACW has testified that the award of the grant removes the uncertainty of the full award of the \$46.66 million. However, their testimony also indicates that full receipt is contingent on Board approval of the project by June 30, 2015 and that the USDOE “will make a ‘Go/No-Go’ review based on the project’s ability to meet certain milestones and may subsequently ‘determine to discontinue the award’ if the milestones are not met.” (JR-39(a) p. 1, p. 22). Pursuant to our analysis above, an approval of the project by that date remains uncertain. However, even if the Board fully accepted FACW’s assertion that the \$46.66 million was in fact received, it would not cure the lack of receipt of the other half of the federal subsidies in the amount of approximately \$50 million from the ITC.

Moreover, the supplemental record does not support the Board revisiting its findings that the project has not demonstrated financial integrity. In the supplemental record, FACW asserts that the mere fact that the USDOE has approved the project pursuant to its standards necessitates a Board finding that the project meets the financial integrity test. The Board notes that notwithstanding the criteria the USDOE utilizes in its review, the only standard the Board may apply is OWEDA. The supplemental record provides insufficient evidence for the Board to change its prior finding that the project does not demonstrate financial integrity. (March 28 Order at 27).

Therefore, the Board makes the following **FINDINGS**:

1. FACW has not demonstrated receipt of \$100 million in federal subsidies;
2. FACW has not adequately substantiated the viability of the project at an OREC price of \$199.17 absent complete receipt of those subsidies; and
3. The supplemental record does not materially change the Board’s financial analysis of the project.

Accordingly, the Board **REAFFIRMS** the following findings from its March 28, 2014 Order:

1. The project does not provide a net economic and environmental benefit to New Jersey ratepayers. (March 28 Order at 26); and

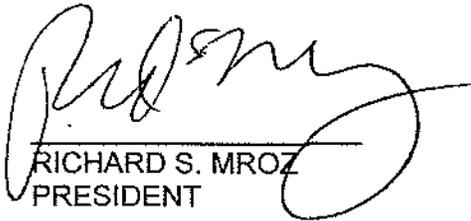
2. Even if FACW has demonstrated "sufficient access to capital" as required by the second prong of N.J.S.A. 48:3-87.1(b)(1)(d), it has not demonstrated its financial integrity. (March 28 Order at 27.)

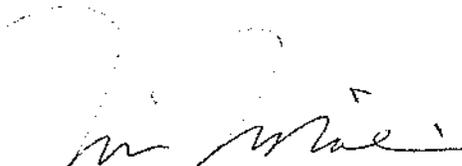
**CONCLUSION**

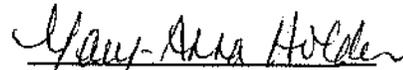
For the reasons stated above, the Board **ADOPTS** the September 2, 2014 procedural order. The Board **ALSO APPROVES** the Amended and Restated Joint Record as comprising the full record in this matter, with the exception that any information submitted by FACW prior to May 19, 2011, is not part of the record. Further, having duly considered the supplemental record, the Board **REAFFIRMS** its finding that the FACW project does not pass the standard for a qualified offshore wind facility as set forth in N.J.S.A. 48:3-87.1 et seq. and N.J.A.C. 14:8-6.5 et seq. FACW's request for approval is **HEREBY DENIED**.

DATED: 11/21/14

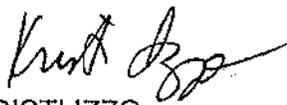
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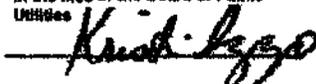
  
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I HEREBY CERTIFY that the within document is a true copy of the original in the files of the Board of Public Utilities



IN THE MATTER OF THE PETITION OF FISHERMEN'S ATLANTIC CITY WIND FARM, LLC  
FOR THE APPROVAL OF THE STATE WATERS PROJECT AND AUTHORIZING OFFSHORE  
WIND RENEWABLE ENERGY CERTIFICATES  
DOCKET NO. EO11050314V

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