



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

|  |   |                        |
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| IN THE MATTER OF THE PETITION OF         | ) | BOARD DECISION ON      |
| FISHERMEN'S ATLANTIC CITY WIND FARM, LLC | ) | STIPULATIONS BY THE    |
| FOR THE APPROVAL OF THE STATE WATERS     | ) | PARTIES                |
| PROJECT AND AUTHORIZING OFFSHORE WIND    | ) |                        |
| RENEWABLE ENERGY CERTIFICATES            | ) |                        |
|  | ) |                        |
|  | ) | DOCKET NO. EO11050314V |

**Parties of Record:**

**Stefanie A. Brand, Esq.**, Director, Division of Rate Counsel  
**Stephen B. Pearlman, Esq., Inglesino, Pearlman, Wyciskala & Taylor LLC**, on behalf of Fishermen's Atlantic City Windfarm, LLC  
**Phillip J. Passanante, Esq.**, on behalf of Atlantic City Electric Company  
**Marc B. Lasky, Esq.**, 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:**

By Order dated May 16, 2011, in Docket No. EO11050290V, the Board of Public Utilities ("Board") opened an application window for 30 days for offshore wind projects in New Jersey territorial waters pursuant to N.J.S.A. 48:3-87.2.<sup>1</sup> The Board received one application – the Petition of Fishermen's Atlantic City Windfarm, LLC ("FACW" or the "Applicant") for an offshore wind project in New Jersey territorial waters dated May 19, 2011 (the "Project"). An amended application was filed on June 1, 2012, and supplemented on March 8, 2013. This Order considers stipulations submitted by the parties to resolve the Project and to establish a joint record.

<sup>1</sup> By Order dated January 18, 2012, the Board retained this matter for review and hearing, and as authorized by N.J.S.A. 48:2-32, designated President Robert M. Hanna as the presiding officer to rule on all motions that arise during the proceedings and modify any schedules that may be set as necessary to secure just and expeditious determination of the issues.

## PROCEDURAL HISTORY

The Board adopts the procedural history as set forth in its May 29, 2013 Order and the prehearing scheduling orders issued by President Hanna on February 15, 2012, August 28, 2012, October 24, 2012, November 30, 2012, March 7, 2013, and April 18, 2013. The following procedural history summarizes and supplements those orders.

On August 19, 2010, Governor Chris Christie signed into law the Offshore Wind Economic Development Act (the "Act" or "OWEDA"), P.L. 2010, c. 57, which amends and supplements the Electric Discount and Energy Competition Act, N.J.S.A. 48:3-49 et seq. and specifically requires an applicant seeking Offshore Wind Renewable Energy Certificates ("OREC") to demonstrate a net economic benefit for New Jersey ratepayers. On February 10, 2011, the Board adopted N.J.A.C. 14:8-6.1 et seq., providing an application process and a framework under which the Board will review any application and ultimately approve, conditionally approve, or deny the application. The Board readopted N.J.A.C. 14:8-6.1 et seq. with amendments on January 23, 2013.

FACW submitted an Initial Application on May 19, 2011, in response to the Board's request for offshore wind applications pursuant to N.J.S.A. 48:3-87.1. Upon receipt of the application, the Staff of the Board ("Staff" or "Board Staff") immediately began the administrative review process pursuant to N.J.A.C. 14:8-6.4 et seq. The initial review uncovered administrative deficiencies which were outlined in letters to the applicant on June 2, 2011, and June 13, 2011. The applicant responded to the administrative deficiencies with written submissions on June 8, 2011, and June 14, 2011.

The initial application consisted of six turbines, 2.8 miles off of Atlantic City, and provided the Board with the choice of three turbine manufacturers: Siemens, GE and XEMC. Ultimately, Staff determined that the application was administratively complete as of June 14, 2011, but requested FACW designate a turbine of record. On or about June 16, 2011, FACW advised Staff that Siemens would be the turbine of record for the Board's review. On June 22, 2011, Staff provided written notice to FACW that its application was considered administratively complete as of June 14, 2011.

Staff's designation of the administrative completeness was subject to the condition that the substantive review of the project would only consider the Siemens turbine. Staff advised FACW that the use of a more technologically advanced turbine, equal to, or better than the Siemens turbine, may be submitted to the Board for consideration pursuant to N.J.A.C. 14:8-6.5(a)(2)(ii). Staff letter to Pearlman, S./FACW - Administratively Complete Application Notice (June 22, 2011).

Pursuant to the Act, the Board has 180 days to conduct its review, and to approve, conditionally approve, or deny the application. N.J.S.A. 48:3-87.1(d). Pursuant to N.J.A.C. 14:8-6.3 and 6.4, the 180-day period for the Board's review began to run on June 14, 2011, when Staff determined that FACW's application was administratively complete. Pursuant to this determination, the Board's review period was initially set to expire on December 11, 2011, unless the applicant consented to an extension of time.

On June 24, 2011, FACW entered into a Participation Agreement with XEMC New Energy ("XEMC") for a majority share in the Project. By a submission dated July 12, 2011 and titled "Designation of XEMC as turbine supplier," FACW informed the Board pursuant to N.J.A.C. 14:8-6.5(a)(2)(ii), that the XEMC turbines were "the most technically advanced and are better for FACW and New Jersey than the other currently available turbines, including the two most

recently evaluated turbine options from other vendors.” By submission dated August 3, 2011, FACW provided the Board with a letter from FACW to the Commissioner of the Department of Environmental Protection stating that: “On July 11, 2011, we finalized a Definitive Participation Agreement with XEMC New Energy, a subsidiary of the XEMC Group for the supply of six turbines, financing and long term warranty/operations support for 20 years for the Fisherman’s Atlantic City Windfarm, LLC. (FACW).”

By submission dated August 1, 2011, FACW requested an expedited review and final determination on the application by the August 18, 2011 Board meeting. By letter dated August 12, 2011, Board Staff notified FACW that “the statutory criteria for the review and approval of an application has not been met” and therefore the request for expedited review was denied. The letter detailed the issues that needed to be fully addressed by FACW before Board Staff could make a recommendation to the Board and informed FACW that “despite the fact that Board Staff is unable to make a recommendation on your petition pursuant to your expedited timeframe, we remain dedicated to completing the task of reviewing the merits of your application within the timeframe set forth in the Act.”

Following the August 12, 2011, letter Board Staff and FACW continued to work on the outstanding issues and by letter dated October 7, 2011, Board Staff provided a further update to FACW on the issues that remained outstanding.

By letter dated November 23, 2011, the Applicant consented to an additional 60 days of review, beyond the initial 180 days, which placed the requirement to act no later than February 8, 2012. By letter dated December 13, 2011, the Applicant consented to an additional extension, which placed the requirement for the Board to act on or before March 21, 2012. By order dated December 15, 2011, Docket No. EO11050314V, the Board ordered that the review period be extended to March 21, 2012.

By letter dated February 6, 2012, the Applicant consented to an additional extension of time, which required the Board to act on FACW’s application on or before April 11, 2012. By order dated February 10, 2012, Docket No. EO11050314V, the Board ordered that the review period be extended to April 11, 2012.

On February 3, 2012, Rate Counsel’s expert, Acadian Consulting Group (“Acadian”), filed testimony concerning the Project. On or about February 22, 2012, Boston Pacific Company, Inc. and OutSmart BV (collectively “Boston Pacific” or “BP”), Staff’s expert, filed a report titled Evaluating the Economics of Offshore Wind Projects: Evaluation of the Application by Fishermen’s Atlantic City Windfarm LLC.

By letter dated March 2, 2012, FACW requested an additional extension of the review period until October 31, 2012, and agreed to provide an amended application by April 20, 2012, to respond to the evaluation reports by Boston Pacific and Acadian, submitted on February 22, 2012 and February 3, 2012 respectively. By order dated March 12, 2012, Docket No. EO11050314V, the Board ordered that the review period be extended to October 31, 2012, and that FACW provide an amended application on or before April 20, 2012.

By letter dated April 2, 2012, FACW notified the Board that it would not be able to submit the amended application by April 20, 2012. Accordingly, FACW requested an extension of the deadline for the submission of the amended application to June 1, 2012, and for an extension of the review period to December 31, 2012. By order dated April 12, 2012, Docket No. EO11050314V, the Board ordered that the review period be extended to December 31, 2012.

FACW submitted the amended application on June 1, 2012 (hereinafter "Amended Application").

### **EDC MOTION TO INTERVENE**

By letter dated October 17, 2011, Atlantic City Electric, Jersey Central Power & Light Company, Public Service Electric and Gas Company, and Rockland Electric Company (collectively "the EDCs") filed a joint motion to intervene in this proceeding pursuant to N.J.A.C. 1:1-16.3.

By Order dated December 15, 2011, Docket No. EO11050314V, the Board granted the EDCs' motion to intervene. Intervention was granted, in part, because FACW's application preceded the Board's adoption of regulations concerning the OREC funding mechanism and, as such, an OREC order may impact issues related to the EDCs' interests and the nature of the funding mechanism. Specifically, the Board found that had regulations concerning the OREC funding mechanism been adopted, the Board's analysis of the EDC's motion might be different.

The Board granted the EDC's motion to intervene subject to the requirements that the EDCs: 1) abide by the schedules for the proceeding set by the Board; 2) comply with the Board's procedures governing confidentiality including, but not limited to, the non-disclosure agreement executed by the parties regarding review of FACW's application; 3) abstain from participating in negotiations regarding OREC pricing; and 4) commit to working cooperatively, to the fullest extent possible, with the other parties. The Board denied FACW's request to require the EDCs to participate as one entity, and limit the scope of the EDCs' discovery but granted its request to protect confidential trade information and trade secrets by redacting materials not relevant to the EDCs.

### **REVIEW OF AMENDED APPLICATION AND PREHEARING ORDERS**

On June 1, 2012, FACW submitted an Amended Application. The Project as proposed in the Amended Application is a 25-MW nameplate capacity wind farm, which includes five 5 MW Darwind/XEMC DD115 direct drive turbines, on a monopile foundation, to be located approximately 2.8 miles offshore from the Atlantic City shoreline. The projected annual electricity output of the FACW Project is 81,421 MWh based on a P-50 production estimate.

The Amended Application materially modified the initial application. In part, FACW requested the Board to consider turbines manufactured by both XEMC and Siemens. In addition the Amended Application changed the projected output from P-90 to P-50. A P-50 output level indicates that the output estimate has a 50% chance of being exceeded.

By letter dated June 25, 2012, Board Staff notified FACW that the company had "accepted Board Staff's previous and on-going requirement that only one turbine be designated for the purposes of the review of the application," and directed FACW to "formally inform the Board and all parties to this matter of the turbine of record for the review of the amended application."

By letter dated July 3, 2012, FACW rejected Board Staff's determination that FACW must choose one turbine technology and stated that "limiting FACW to only one candidate turbine technology will prevent the Board from achieving the best possible result in this matter."

By letter dated July 13, 2012, Board Staff informed FACW that N.J.A.C. 14:8-6.5(a)(2)(i)(8) "neither requires nor encourages applicants to, in essence, ask the Board to select the turbine manufacturer for the applicant." Board Staff stated that FACW did in fact select XEMC as the turbine manufacturer in July 2011, which was reiterated in the July 3, 2012, letter and that

"Board Staff has determined that XEMC is your selected technology and will proceed with reviewing the application using that technology."

Through correspondence dated August 13, 2012, and supplemented on August 17, 2012, FACW requested that the Board "temporarily discontinue" evaluation of FACW's Amended Application until September 17, 2012, so that it could reassess its application and consider potential modifications. Rate Counsel and Board Staff consented to the suspension of review. President Hanna granted FACW's request in the August 28, 2012 Prehearing Order ("August 28<sup>th</sup> Order") by suspending the prior procedural schedule. The August 28<sup>th</sup> Order also directed FACW to provide a written statement of its assessment along with any revisions to its application by September 17, 2012 and directed the parties to confer and provide a proposed amended schedule no later than September 21, 2012. On September 17, 2012, FACW submitted a letter advising the Board that it had completed its re-evaluation of the Amended Application and concluded that no changes to the Amended Application were necessary.

The parties subsequently consented to and proposed a new procedural schedule. The Second Amended Prehearing Order dated October 24, 2012 acknowledged the consent of the parties to extend the application review period until April 30, 2013, and adopted the parties' proposed schedule. By Order dated November 20, 2012, Docket No. EO11050314V, the Board ordered that the review period be extended to April 30, 2013.

Following super storm Sandy in late October 2012, the parties advised that the storm and its aftermath significantly hindered their ability to comply with the October 24, 2012 prehearing schedule. The parties proposed and agreed to an amended procedural schedule which was memorialized in the Third Amended Prehearing Order issued by President Hanna on November 30, 2012.

Pursuant to the procedural schedule, on December 17, 2012, expert reports were filed with the Board by Boston Pacific. Following the submission of the expert reports, the New Jersey Department of the Treasury ("Treasury") informed Board Staff that a contract modification would be needed in order for Boston Pacific to perform services in support of remaining items listed in the procedural schedule. The contract modification process delayed the procedural schedule until Treasury approved the modified contract on January 23, 2013.

By February 12, 2013, the parties had consented to a new procedural schedule, which was memorialized in the Fourth Amended Prehearing Order issued on March 7, 2013. The procedural schedule required the parties' experts to submit their responses to FACW's discovery requests no later than Monday, March 11, 2013, and extend the deadline for Board action to June 30, 2013. By order dated March 20, 2013, Docket No. EO11050314V, the Board extended the deadline for its review from April 30, 2013, to June 30, 2013.

### **FACW MARCH 8, 2013 FILING**

On March 8, 2013 ("March 8<sup>th</sup> filing"), one business day before the expert responses to FACW's discovery were due, FACW submitted new documents to the Board including: 1) FACW Testimony Exhibit 26 of Chris Wissemann (Update to the New Jersey Expenditures from the Project); and 2) FACW Testimony Exhibit 27 of Chris Wissemann (Update to Proposed OREC Price). FACW characterized the filing as an update to its June 1, 2012, Amended Application and indicated that it would submit rebuttal testimony on March 25, 2013, consistent with the timeline set forth in the procedural schedule.

In its March 8<sup>th</sup> filing, FACW proposed a significant decrease in its OREC price contingent upon receipt of \$100 million in federal funding. Several factors led to the decrease in OREC price, including a \$4 million "Phase 1" grant from U.S. Department of Energy ("USDOE" or "DOE"), the potential to receive a "Phase 2" grant of \$47 million, and a potential federal Investment Tax Credit ("ITC") for renewable energy projects.<sup>2</sup> The ITC and the US DOE grants ("federal grants" or "federal subsidies") have the potential to reduce the total capital costs of the Project by approximately \$100 million. The March filing also discussed additional New Jersey expenditures, guarantees, and benefits that FACW anticipated.

Considering the nature of the filing, on March 13, 2013, the parties were requested to advise the hearing officer on whether an extension of the procedural schedule was required. Staff and Rate Counsel submitted responses on March 18, 2013. FACW submitted its reply on March 20, 2013. The EDCs did not take a position.

In Staff's March 18, 2013 letter, it explained that FACW's submission contained "significant and material changes to the project" that would require additional analysis by Staff's expert. Although Staff ultimately indicated that it could comply with the procedural schedule without an extension of time, Staff asserted that FACW's delay in providing the new information contained in the March 8<sup>th</sup> filing was "substantial and unwarranted." According to Staff, FACW had indicated in early February 2013 that the Applicant needed a final Board decision by June 30, 2013, to have sufficient lead-time to begin construction by December 31, 2013, and remain eligible for the ITC. Staff observed that FACW transmitted the filing to the Board "sixty-four days following the enactment of the Fiscal Cliff bill and thirty-five days following the representations by FACW that the ITC would significantly benefit the proposed project."

Rate Counsel indicated that FACW's March 8<sup>th</sup> filing "so fundamentally alters FACW's petition that it should be considered a new application." Rate Counsel explained that the filing contained a new OREC price, new assumptions, new project costs, new expenditures, and other new information such that the amended application was fundamentally altered. As an alternative to the Board considering the filing a new application, Rate Counsel requested eight weeks to conduct additional discovery and submit a written surrebuttal.

FACW's March 20, 2013, reply to Staff and Rate Counsel contends that the filing "complies with its obligations to update the record as new information becomes available." FACW highlighted the perceived benefits of the federal grants, without addressing the delay in supplying such information. Ultimately, FACW consented to a four-week extension of the procedural schedule.

President Hanna issued a Fifth Amended Prehearing Order on April 18, 2013. The amended procedural schedule included an extension of the Board's deadline to act on the petition from June 30, 2013 to July 31, 2013. In that order, President Hanna found that the new information contained in FACW's March 8<sup>th</sup> filing was so substantial that it could not properly be reviewed under the schedule set forth in the prior prehearing order. President Hanna further found that FACW did not provide adequate explanation for delaying its submission for sixty-four days following the enactment of the Fiscal Cliff bill and thirty-five days following the representations by FACW that the ITC would significantly benefit the proposed project. By order dated May 29, 2013, the Board extended the deadline for its review from June 30, 2013 to July 31, 2013.

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<sup>2</sup> The ITC was signed into law on January 3, 2013, as a part of the American Taxpayer Relief Act of 2012, Pub. L. No. 112-240, 126 Stat. 2313 (the "Fiscal Cliff bill").

By notice dated May 9, 2013, the hearings on this matter which were scheduled pursuant to the April 18, 2013 Fifth Amended Prehearing Order, were adjourned and the parties entered into settlement discussions.

On June 28, 2013, a stipulation signed by FACW and Rate Counsel was filed with the Board recommending that the Board issue a final Decision and Order approving the Project. Board Staff and the EDCs were not signatories to the Settlement Stipulation.

Also on June 28, 2013, a Stipulation on Joint Record of Exhibits signed by FACW, Rate Counsel and Board Staff, was filed with the Board ("Joint Record" or "Joint Record Stipulation"). The EDCs were not a signatory to the Joint Record.

## **SUMMARY OF STIPULATIONS**

### ***Joint Record Stipulation***

FACW, Rate Counsel, and Staff executed the Joint Record. Collectively, they request the Board to consider the listed exhibits as the full record pursuant to N.J.A.C. 1:1-15.1. The Joint Record includes exhibits related to FACW's Amended Application, discovery exchanged among the parties, pre-filed testimony of the parties and their experts, correspondence, and other items. In addition, the Joint Record includes documents related to FACW's initial application filed on May 19, 2011. The EDCs are not signatories to this stipulation.

### ***Project Stipulation***

FACW and Rate Counsel entered a stipulation on the merits of FACW's Amended Application. The Project Stipulation seeks to gain Board approval of the Project as "a qualified offshore wind project as defined in N.J.S.A. 48:3-51(3)" eligible to receive fixed-price ORECs for a period of twenty years.

The Project Stipulation includes twenty-seven numbered paragraphs and two attachments. Key terms and conditions include:<sup>3</sup>

- Standards under Section 3(b) of OWEDA – this section of the Stipulation provides information relevant to the statutory criteria for approving a qualified offshore wind project, namely, compliance with the Energy Master Plan, proof of net benefits, description of a Financing Mechanism, and proof of financial integrity.
- The financing mechanism includes an Interim OREC Pricing Plan, attached to the Stipulation as Attachment A. Attachment A establishes a set of Definitions and terms by which ORECs will be paid to the Project and includes a Planning Generation Amount, and an OREC Price schedule. The generation amount for the first year of operation (EY 2016) is set at 62,505 MWhs. Between EY 2016 and EY 2035, the generation amount is 85,492 MWhs. For EY 2036, the generation amount is 22,987 MWhs.
- OREC Price & Schedule – the signatories agree that the OREC price is a fixed price, all cost overruns will be borne by FACW, and FACW will only be paid

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<sup>3</sup> This summary is not intended to replace the actual terms of the Project Stipulation. To the extent there is any inconsistency between the Project Stipulation and the Board's summary, the terms of the Project Stipulation shall govern.

ORECs for power produced. Schedule B of the OREC Pricing Plan sets the OREC Price at \$187/MWh beginning in EY 2013, increasing 3.5% each year. The price on the anticipated date of commercial operation in EY 2016 is \$207.33/MWh, and extending out twenty years to EY 2036 at \$398/MWh.

- Potential Federal Grants – the signatories reference the FACW Petition which includes a description and estimate of state and federal funds that may be associated with the Project. The signatories also indicate that all economic benefits from the federal ITC and USDOE Grants inure to the benefit of ratepayers, net of Compliance Costs, which are reflected in the OREC price.
- Contingency Fund – the signatories created a mechanism whereby the Applicant will receive \$19.2 million from ratepayer funds in the event that federal funds are not received or are insufficient for the Project to go forward. The terms of the contingency fund are set forth in the Cost Verification and Disbursement Process, Attachment B to the Stipulation.
- Abandonment and Decommissioning Escrow Fund – FACW will establish a \$4 million decommissioning escrow fund.
- Construction Escrow – FACW will provide security in the form of escrow or letter of credit for the balance of capital required to complete the project. FACW estimates the balance is \$61 million.
- Contractual Commitment to back-up Economic Benefits – FACW will require third party contractors to commit to specified New Jersey spending levels. The Stipulation does not itemize the spending levels.
- Jurisdiction – FACW consents to the jurisdiction of federal and state courts. FACW will execute a separate instrument with XEMC to gain its consent to be subject to federal and state courts.
- Certifications – FACW agrees that the OREC Pricing Plan will not be effective prior to Type A and Type B certification.
- Engineering Monitor to Review Certifications – FACW agrees to pay up to \$50,000 for an Independent Engineering Monitor (“IEM”) selected by the Board to oversee Type Certification of the Project.
- Foundation Selection – this provision allows FACW to select “the most appropriate” foundation to be used by the Project (either jacket or monopile) provided the foundation is certified for the Project location.
- Turbine Vendor – the signatories agree that if XEMC is not able to perform, FACW may use a “functionally equivalent” Siemens turbine at no additional cost to ratepayers, subject to a 30-day review period by the Board.
- EDCs to Provide Sales and Invoicing Information to the Project – the signatories recommend that the Board require the EDCs to provide certain information to FACW's OREC Invoicing Administrator.



Staff filed objections to the Project Stipulation, which are discussed below. The EDCs submitted comments on the Stipulation but did not otherwise take a position.

### **BOARD STAFF'S POSITION ON THE PROJECT STIPULATION**

Board Staff filed its response to the Project Stipulation on July 8, 2013.<sup>4</sup> Staff in conjunction with Boston Pacific, recommended that the Board reject the Project Stipulation, on the grounds that FACW's Project violates OWEDA. (Staff Position Paper at 1.) Specifically, Staff raised objections to the following provisions: 1) the contingency fund and net benefits test; 2) the construction escrow; 3) the decommissioning fund; 4) the Project description; 5) the substitution of foundations and turbines and impact on financing structure; 6) the IEM; 7) Type B certification; and 8) designation as a pilot project.

#### **Contingency Fund**

Staff asserted that the terms of the Project Stipulation call into question the net economic benefit as well as the financial integrity of the Project. *Id.* at 4-5. In Paragraph 11 of the Stipulation, read in conjunction with the Cost Verification and Disbursement Process, designated as Attachment B to the Project Stipulation and incorporated therein, Rate Counsel and FACW agreed to a contingency fund whereby FACW can discontinue the Project and recover up to \$19.2 million from ratepayers if the federal subsidies for which FACW applied are either not approved or are deficient. Specifically, the ratepayer funded contingency fund would be triggered under Section 3 of the Cost Verification and Disbursement Process, if Petitioner: a) did not receive either the US DOE grant or the ITC; or b) received a USDOE grant that was less than \$35 million; or c) remained uncertain as of December 31, 2014, whether it would be awarded the DOE Grant. *Id.* at 5.

Staff asserted that the contingency fund is in direct violation of N.J.S.A. 48:3-87.1(b)(1)(c) because it places a \$19.2 million burden on ratepayers if the Project is discontinued; the payment is not related to actual electrical output; and, if ratepayers were to absorb a \$19.2 million burden for a discontinued Project, there would be zero benefits to ratepayers and the net benefits test simply could not be met. *Id.* at 7-8 Furthermore, Staff argued that the contingency fund violates N.J.A.C. 14:8-6.5(a)(5)(iii) because it shifts the risk of FACW not obtaining federal funds to ratepayers. The contingency fund described in the Stipulation would essentially allow FACW to recover "funding" without the production of electricity, based on a calculation other than the actual electric output of the Project. *Id.* at 15.

Staff also argued that the contingency fund represents costs that should be included within the OREC price and that the OREC price is the only subsidy that ratepayers should pay. *Id.* at 8 There is no language under OWEDA to require or allow ratepayers to provide any subsidy outside of the OREC mechanism, or conversely, to entitle an offshore wind developer to ratepayer subsidization outside of the OREC mechanism.

#### **Construction Escrow**

Staff objects on the grounds that the Act's requirement – that the entity proposing the project demonstrate financial integrity and sufficient access to capital to allow for a reasonable

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<sup>4</sup> Position Paper of Board Staff Regarding the Stipulation Executed by the New Jersey Division of Rate Counsel and Fishermen's Atlantic City Windfarm, LLC, 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 (July 8, 2013) ("Staff Position Paper").

expectation of completion of construction of the project – is not met by the terms of the Stipulation. On the issue of whether FACW has demonstrated that it has sufficient capital to fund the Project, Boston Pacific expressed concerns about the financial viability of XEMC in its February and December 2012 reports. Id. at 9 (citing BP February 2012 Report at 15-16, BP December 2012 Report at 36-37). These concerns involved the financial strength of certain companies, including Xiangtan Electric Manufacturing Co., Ltd, XEMC Windpower, and XEMC Group, which provided financial statements based on Chinese accounting principles in lieu of U.S. Generally Accepted Accounting Principles (“GAAP”) standards. Ultimately, Boston Pacific concluded that FACW could demonstrate financial integrity by posting security to cover all of the required funds for development and construction.

Staff believes that the escrow amount of \$61 million agreed to under the Project Stipulation is, however, insufficient to cover the Project’s estimated development and construction costs. Staff estimates that the escrow should be funded at a level between \$120 million – \$178 million. Given the insufficiency of the construction fund escrow amount, Staff concluded that FACW has not satisfied the requirements of N.J.S.A. 48:3-87.1(b)(1)(d). Id. at 11.

### **Decommissioning Escrow**

Staff argues that a decommissioning escrow funded at \$4 million is insufficient. The Amended Application initially proposed a decommissioning and abandonment security of \$8 million as the amount necessary to adequately fund decommissioning in the unlikely event of its complete failure. In its December 12, 2012 Report, Boston Pacific characterized the \$8 million escrow amount as being adequate for that purpose at that time. Because the Project has not changed in scope or size, Staff asserts that no justification exists for reducing the estimated cost of decommissioning. Id. at 11-12.

### **Project Description**

Staff claimed that the FACW Project Description as set forth in the Project Stipulation is deficient. Staff encourages the Board to rely on the Project description which appears in the Amended Application rather than the description provided in the Stipulation. Id. at 16.

### **Foundations and Turbines**

Staff also opposed the provisions concerning foundation selections and turbine replacement. Specifically, Paragraphs 18 and 19 of the Project Stipulation permitting FACW to select the Project’s foundation and replace the XEMC turbine with the “functionally equivalent” Siemens turbine. Id. at 17.

Given the relationship between XEMC and FACW as set forth in the Petition, the substitution of the XEMC turbine for that of another manufacturer would invariably impact FACW’s Project funding source and result in additional Project costs and risks to ratepayers. The type of turbine a developer intends to use is fundamental to the application process. N.J.S.A. 48:3-87.1(a)(1) requires that the applicant provide not only the type of turbine, but give detailed information about its history-to-date, number installed globally, and a comprehensive implementation plan. Furthermore, turbine costs are the largest cost component of the Project. Any substitution of the turbine could have a material impact on the Project costs and performance and would require careful review by the Board. Id. at 18.

Also, Staff objects to placing a 30-day limit on the time for Board review of changes to technology. Allowing FACW to select the foundation at its discretion, and to switch to a functionally equivalent turbine after Project approval, upon expedited 30-day Board review, would undermine and contravene the entire OWEDA application process. Id. at 17-18.

### **Independent Engineering Monitor (“IEM”)**

Staff also opposed the language in Paragraph 17 of the Project Stipulation, insofar as it unreasonably limits the scope of duties and funding for an IEM. Id. at 20. Staff contended that Paragraph 17 of the Project Stipulation more narrowly limits the IEM’s function, is inconsistent with BP’s recommendation, and limits the duties of the IEM to the disadvantage of ratepayers. The Project Stipulation language envisions only two certification progress reviews by the IEM, which is a significantly narrower function than overseeing the certification process as recommended by BP. Furthermore, the Project Stipulation language is silent on the IEM’s authority to review FACW’s project team, assess sufficiency of safeguards, or to report to the Board. Given the scope of duties that Boston Pacific recommends that the IEM carry out, \$50,000 would be insufficient to cover that cost. Staff contended that Paragraph 17 should be rejected for those reasons. Id. at 21.

### **Certification**

Staff indicates that the Project Stipulation contravenes Boston Pacific’s recommendation as to the timing of Type B certification. Ibid.

Boston Pacific recommends that the Board refrain from approving the Project until after FACW receives Type B certification.<sup>5</sup> Contrary to Boston Pacific’s recommendations, Paragraph 15 of the Project Stipulation indicates that FACW would not receive ORECs until receiving Type A and Type B certification. To the extent Paragraph 15 of the Project Stipulation is inconsistent with Boston Pacific’s recommendations, the Project Stipulation should be rejected. Ibid.

### **Pilot Project**

Staff also objects to the Project Stipulation’s characterization of the Project as “pilot” in scale. Id. at 22. Staff stated that there is no statutory authority in the Act to consider this or any other offshore wind project as a pilot project and, therefore, no basis for the Board to review the Project under an alternative standard.

## **RATE COUNSEL’S REPLY TO STAFF’S POSITION PAPER**

In its July 12, 2013, Reply Brief,<sup>6</sup> Rate Counsel argues that the Project Stipulation is consistent with OWEDA. (RC Reply at 3.) In part, Rate Counsel argues that the Project Stipulation provides net benefits to the State’s ratepayers because “the Stipulation . . . offers ratepayers \$136 million in savings relative to FACW’s original proposal,” which is a “significant decrease in costs.” Id. at 12. Furthermore, Rate Counsel claims that Boston Pacific’s Surrebuttal Testimony states that FACW’s application (as amended March 25, 2013) demonstrates positive net benefits. Finally, Rate Counsel argues that the Project Stipulation in fact includes an OREC price lower than the amount referred to in Boston Pacific’s Surrebuttal Testimony. In addition, Rate Counsel responded to each of Staff’s arguments:

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<sup>5</sup> Type B certification commonly covers the design of the turbine but does not include full performance measurements or manufacturing process evaluations. Staff Position Paper at 21 (Citing BP Surrebuttal Testimony).

<sup>6</sup> Reply Brief by the New Jersey Division of Rate Counsel, 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 (July 12, 2013) (hereinafter “RC Reply”).

### **Contingency Fund**

Rate Counsel argues that the contingency fund is consistent with OWEDA for several reasons. Rate Counsel states, "Non-performance," as defined in OWEDA, only applies to the "construction or operational phase of the project." Id. at 4. Rate Counsel argues that, by contrast, the \$19.2 million contingency provision of the Project Stipulation "only addresses the pre-construction and pre-operational costs of the project." Ibid. Thus, Rate Counsel claims that "[a]ll costs of non-performance, in either the construction or operational phase of the project are still borne by the shareholders and not the ratepayers." Ibid.

Furthermore, Rate Counsel finds error with several of Staff's conclusions. First, Rate Counsel takes issue with Staff's characterization that FACW can unilaterally "abandon its project . . . and receive over \$19 million in subsidies." Id. at 5. Rate Counsel argues FACW cannot do this unilaterally because it can only collect \$19 million if "it's U.S. DOE Phase II grant is insufficient or rejected," meaning the decision is "made by DOE, not FACW." Ibid. Rate Counsel provides a list of conditions that must be met for FACW to recoup funds from the contingency fund. Id. at 5-6.

Rate Counsel argues that the contingency fund "reduces ratepayer exposure" because such exposure is "limited" to \$19.2 million, "an amount far less than ratepayers would pay if this risk was reflected in the OREC price proposed by FACW in its Rebuttal Testimony." Id. at 7. Rate Counsel notes that FACW's original application "proposed an OREC approximately 40 percent more than the amount in the stipulation." Id. at 8. Rate Counsel emphasizes that the risk of ratepayers is minimal because FACW has a good chance of receiving the federal funds.

Finally, Rate Counsel disputes Staff's contention that OREC payments should be the only payment ratepayers make to FACW. Id. at 7. Rate Counsel argues that no language in OWEDA limits such payments to only OREC payments.

### **Construction Escrow**

Rate Counsel argues that Staff's position – that the amount in escrow must cover "all project costs" – is a "tortured reading of the statute." Id. at 9-10. Instead, Rate Counsel argues that the amount to be held in escrow is "the balance of the capital required to complete the Project . . . net of costs already incurred as of that date." Id. at 9 (emphasis omitted). In addition, Rate Counsel asserts that requiring applicants to post the entire project cost would be cost-prohibitive for most applicants and effectively preclude offshore wind development in New Jersey.

### **Decommissioning Fund**

Rate Counsel argues that the \$4 million decommissioning fund amount is sufficient because it "is large enough to be reasonable, but not so large as to create future decommissioning cost inefficiencies." Id. at 12. Rate Counsel states that a reduction in the decommissioning fund to the \$4 million amount is appropriate because "the OREC price associated with FACW's Original Application has fallen by almost the same level." Id. at 10. Second, Rate Counsel believes that Staff's expectation that FACW place the entire amount of its decommissioning costs into an up-front insurance fund is unreasonable because the Project Stipulation "creates a very stable and secure financial platform from which FACW should be able to develop its project." Id. at 11. Third, Rate Counsel argues that the amount placed in escrow for decommissioning purposes "is almost certainly reflected in the OREC price" already. Ibid.

### **Foundation and Turbine Replacement**

Rate Counsel disputes Staff's allegation that the Project Stipulation violates OWEDA by allowing substitution of the project foundation and turbine technology which may increase costs to ratepayers." Id. at 14. Rate Counsel qualifies that any substitution is "only to increase the

chan[c]es of obtaining USDOE funding, and only if the selected foundation is certified by the American Bureau of Shipping (ABS).” Ibid. Furthermore, “FACW has agreed to accept any additional costs if such substitution is necessary.” Ibid.

### **Independent Engineering Monitor**

Rate Counsel argues that FACW's agreement to adopt the recommendation of an IEM chosen by the Board and to fund, up to a proposed cap of \$50,000.00, does not violate OWEDA or place ratepayers at risk. Id. at 15. Rate Counsel states this is not a problem because the Board has the authority to include in any order approving an offshore wind application that the applicant reimburse the Board and the State for costs related to regulatory review and monitoring of the Project.

Rate Counsel argues that Staff's insistence that the Project Stipulation is invalid because some of its consultants' recommendations were not expressly adopted is misplaced. Rate Counsel argues that if FACW were to implement Boston Pacific's recommendation to wait until receipt of Type B certification, it would severely hamper the financing and completion of the Project. Thus, alternatively, the Project Stipulation included the express provision that no ORECs would be issued until all certification were achieved.

### **Other Benefits of the Project Stipulation**

Rate Counsel argues that the Board is allowed to consider, and the Project Stipulation contains, other benefits not mandated by OWEDA. Id. at 16. First, FACW has agreed to place the turbine designs “in escrow for the life of the Project to be accessed by FACW as needed,” which could be useful in case of any future maintenance issues. Ibid. Second, the Project Stipulation states that XEMC is subject to the jurisdiction of both federal and NJ courts. Finally, the Project Stipulation incorporates an Interim OREC Pricing Plan, which could serve as an opportunity for the Board to examine the practical application of a financing mechanism.

## **FACW'S RESPONSE TO STAFF'S POSITION PAPER**

On July 12, 2013, FACW submitted a response to Staff's Position Paper.<sup>7</sup> FACW defended the merits of the Project Stipulation and, in the alternative, offered potential remedies to fully address Staff's concerns. FACW's defense of the Project Stipulation focuses almost exclusively on the legality of the contingency fund.

### **Contingency Fund**

FACW claims that Staff's assertion that the contingency fund violates the net benefits standard of OWEDA misconstrues the plain language and framework of OWEDA, as well as the fundamental nature of the contingency fund. (FACW Reply at 14.) FACW asserts that the contingency fund is consistent with OWEDA, achieves the lowest possible costs for ratepayers, and the Board should find it permissible under the Act. Id. at 14-15.

FACW argues that under Staff's assumption that the Project would not be constructed resulting in a \$19.2 million obligation to the ratepayers, no project could satisfy the net benefits test, and therefore, Staff's application of the statute is not reasonable and runs counter to the standard required by OWEDA. Id. at 15.

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<sup>7</sup> Reply Brief of Fishermen's Atlantic City Windfarm LLC to the Staff Position Paper, 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 (July 12, 2013) (“FACW Reply”).

FACW claims that under Staff's application of the net benefit test set forth in N.J.S.A. 48:3-87.1(a)(10), Staff assumes that the Project will not be constructed, concludes that no benefits will accrue, and then recommends to reject the proposal. But, the Act clearly requires that the benefits should be measured from the assumption that the Project will be constructed. Id. at 15-16. FACW also argues that the regulation and OWEDA requires that the Project as a whole result in net benefit to the State; each individual prong does not need to result in a benefit. Because Staff ignored this critical point, and analyzed impacts to ratepayers in isolation, its arguments are inapplicable. Id. at 16. FACW also asserts that under Staff's approach, no project can satisfy the net benefits standard as to the ratepayers. Id. at 17.

FACW argues that because the tax incentives are not currently available, ratepayers can only benefit in the event that such incentives are actually realized. Therefore, the contingency fund is not a mechanism that passes a burden to taxpayers, but rather is a mechanism that allows for ratepayers to benefit from a lower OREC price should possible subsidies be realized. Ibid.

FACW also asserts that the contingency fund is entirely consistent with and in fact mandated by N.J.A.C. 14:8-6.5(a)(5)(iv). since it has unequivocally "demonstrate[d] a commitment to pass along tax credits or other governmental benefits to ratepayers that are greater than projected." If these subsidies materialize, the savings immediately pass to ratepayers through the lower OREC price and if they are not realized, then the contingency fund is triggered and the benefits cannot be passed onto ratepayers. Id. at 18.

Finally, FACW asserts that the contingency fund is not a financing mechanism which places the costs of non-performance on ratepayers. Rather, it is merely an interim measure to ensure that the lowest possible OREC price is secured for ratepayers. Id. at 19.

Last, FACW argues that Staff has misinterpreted the statutory silence in OWEDA regarding other potential ratepayer subsidies. Because the statute is silent, there is no requirement that ORECs be the only form of ratepayer subsidy. Therefore, the contingency fund is consistent with the legislative intent to achieve the lowest possible OREC price for ratepayers and it is permissible for the Board to consider it under the Act. Id. at 19-21.

#### **Proposed Modifications to the Project Stipulation**

FACW stated that it believed that Staff's core objection to the Project Stipulation was the contingency fund of \$19.2 million. In order to overcome this objection, while not conceding that the Project Stipulation constitutes an unreasonable approach, FACW agreed to remove the contingency fund from the Project Stipulation as well set forth the parameters of its acceptance of all of Staff's recommendations in its Position Paper. FACW stated that the elimination of the contingency fund along with seven additional changes to the Project Stipulation would, if implemented, address Staff's objections. Id. at 3.

FACW's proposal to eliminate the contingency fund leads to the following pricing tiers with each tier reflecting benefits to ratepayers from the receipt of a federal subsidy:

1. Initial OREC price: \$251 per MWh;
2. ITC price adjustment bringing the initial OREC price to \$220 per MWh based upon receipt of the benefits of the ITC;
3. USDOE price adjustment without the ITC, brings the initial OREC price to \$214 per MWh based on receipt of USDOE Grant commitments; and
4. USDOE price adjustment along with ITC, which results in an initial

OREC price of \$187 per MWh based upon receipt of USDOE grant commitments and receipt of the benefits of the ITC.

[Id. at 4-5.]

FACW noted that for each tier, the other terms and conditions are set forth in Attachment A to the Project Stipulation. In addition, FACW proposes to address Staff's concerns that the Project Stipulation does not meet the net benefits test required by OWEDA. FACW agrees to:

1. Eliminate the contingency fund, eliminating Staff's concern relative to the impact of the contingency fund on realizing net benefits; and
2. Require its contractors to commit to certain local expenditures and job creation metrics. To the extent that the Board wants the amounts stated, FACW has provided these amounts in its rebuttal testimony.

[Id. at 6.]

With respect to Staff's concerns about the financial integrity of XEMC and specifically Staff's concern about the sufficiency of the \$61 million of construction funds to be placed in escrow, FACW proposes to:

1. Eliminate any reference to \$61 million, but otherwise retain the language as it appears in the Project Stipulation such that it is clear that the balance of funds required to complete construction will be posted up to \$120 million; or
2. Place a higher, Board determined amount in escrow 30 days prior to the commencement of office construction date, provided that the OREC price is modified to reflect the cost such that for every \$10 million increase in the escrow amount above \$61 million, the initial OREC price increases by \$0.45/MWh.

[Id. at 7-8.]

With respect to Staff's concerns regarding the provisions in the Project Stipulation permitting FACW to change the foundation technology and providing the Board with 30 days to approve the change in turbine technology, FACW agrees to either:

1. If acceptable to the Board at the time of the OREC order, amend the Project definition such that a jacket is designated as the foundation selection and eliminate the 30-day review limitation on foundations or turbines; or
2. Accept the Project definition as it appears in the amended application and agree that any changes to either turbine or foundation will be subject to a Board review of a duration chosen by the Board. Any such requested change would be accompanied by sufficient supporting information to facilitate an expedient review, such as technical details, designs, history of use, and financing implications.

[Id. at 9-10.]

Regarding Staff's concern about the sufficiency of the \$4 million contained in the decommissioning fund, FACW agrees to either:

1. Keep the decommissioning fund at \$4 million provided for in the Project Stipulation and reflected in the OREC price levels identified in Section I(A) of its response; or
2. Increase the decommissioning fund to \$8 million accompanied with an elimination of the \$4/MWh discount by modifying the OREC price levels identified in Section I(A) of its response.

[Id. at 10-11.]

In response to Staff's position that the Project Stipulation unreasonably limits the scope of the IEM and unreasonably limits its cost to \$50,000, FACW agrees to an expansion of the IEM's role as determined by the Board but believes that the potential costs of such an expanded role must be addressed by including a provision for an unlimited IEM scope that would be paid by FACW, so long as the initial OREC price increases by \$0.10 per \$100,000 in cost above \$50,000. Id. at 11.

Finally, FACW seeks to alleviate Staff's issues with the Project Stipulation relating to Type B certification by agreeing that either:

1. The Board order issued in this matter would not be effective until Det Norske Veritas ("DNV") Type B certification is received; or
2. In the event that this is deemed inadequate by the Board, FACW will commit to providing DNV Type B certification by August 20, 2013 and understands that no Board Order will be issued until such occurs.

[Id. at 11-12]

FACW believes that its proposed modifications should result in the recommendation of Board Staff for the approval of the FACW Petition and provide a basis for a Board approval in accord with the terms discussed in its response. Id. at 12.

In a letter filed with the Board on July 17, 2013, Rate Counsel advised that it does not support FACW's alternative proposal and that the proposal is materially different from the Project Stipulation.

### **INTERVENOR'S POSITION ON THE STIPULATION**

The EDCs jointly filed their response to the stipulations on July 8, 2013. ("Intervenor Response"). The EDCs offered comments on the Project Stipulation but did not take a position on the document or the attachments.

The Intervenor noted that, despite being granted Intervenor status by the Board, as well as negotiating and executing a confidentiality agreement with FACW, they were never supplied with non-public testimony and discovery responses. Instead, they were only provided with heavily redacted documents based upon FACW's unduly broad interpretation of a condition in the Board's intervention order that granted a request to protect confidential trade information and trade secrets by redacting materials not relevant to the Intervenor. In addition, during the



settlement discussions, the Intervenor was not permitted to participate in settlement meetings at any time during which OREC pricing or related financial issues were discussed.

While the Intervenor did not challenge the limitations placed on them by the Board's intervention order or FACW's interpretations of the order, they were unable to meaningfully analyze the application or the settlement documents, and are not in a position to comment on the record since they were denied access to highly-relevant portions of the record and were precluded from meaningful participation in the settlement process. (Intervenor Response at 2.)

The Intervenor also noted that the Stipulation appropriately reflects that they will receive full and timely recovery of those costs associated with the \$19.2 million in abandonment costs from their respective ratepayers through specified existing adjustment clause mechanisms.

With respect to the "OREC Pricing Plan," the Intervenor noted that, if approved, the OREC Pricing Plan would impose obligations on the EDCs, including:

- annual provision of Third Party Supplier ("TPS") and Basic Generation Service ("BGS") supplier information to Petitioner;
- monthly provision to Petitioner of retail sales data for each third party supplier and Basic Generation Service provider; and
- crediting offshore wind energy and capacity revenues back to ratepayers.

With respect to the OREC price, the Intervenor noted that, while it is a fixed price, Petitioner and Rate Counsel have agreed to a fixed annual inflation adjustment of 3.5% per Energy Year.

### **ANALYSIS AND FINDINGS**

An applicant seeking to develop a qualified offshore wind project must demonstrate that it has satisfied the criteria outlined in N.J.S.A. 48:3-87.1 and N.J.A.C. 14:8-6.1 et seq. Pursuant to N.J.S.A. 48:3-87.1, the applicant must provide fourteen different categories of information for the Board's review:

- (1) a detailed description of the project . . . ;
- (2) a completed financial analysis of the project . . . ;
- (3) the proposed method of financing the project, including identification of equity investors, fixed income investors, and any other sources of capital;
- (4) documentation that the entity has applied for all eligible federal funds and programs available to offset the cost of the project or provide tax advantages;
- (5) the projected electrical output and anticipated market prices over the anticipated life of the project . . . ;
- (6) an operations and maintenance plan for the initial 20-year operation of the project . . . ;
- (7) the anticipated carbon dioxide emissions impact of the project;
- (8) a decommissioning plan for the project including provisions for financial assurance for decommissioning as required by the applicable State and federal governmental entities;
- (9) a list of all State and federal regulatory agency approvals, permits, or other authorizations required pursuant to State and federal law for the offshore wind project, and copies of all submitted permit applications and any issued approvals and permits for the offshore wind project;

- (10) a cost-benefit analysis for the project . . . ;
- (11) a proposed OREC pricing method and schedule for the board to consider;
- (12) a timeline for the permitting, licensing and construction of the proposed offshore wind project;
- (13) a plan for interconnection, including engineering specifications and costs; and
- (14) any other information deemed necessary by the board in order to conduct a thorough evaluation of the proposal. . . .

FACW provided information responsive to each of the categories noted above and its application was considered administratively complete pursuant to N.J.A.C. 14:6-6.4 on June 14, 2011. Since then, FACW amended its application on June 1, 2012, and supplemented the application on March 8, 2013. The parties conducted extensive discovery on each iteration of the FACW application.

The parties subsequently participated in settlement discussions, which resulted in two stipulations: 1) a Stipulation on Joint Record of Exhibits, signed by FACW, Rate Counsel, and Staff ("Joint Record"); and 2) a Stipulation on the terms of the Project, signed by FACW and Rate Counsel ("Project Stipulation"). Staff opposed the Project Stipulation between FACW and Rate Counsel. The EDCs did not file an objection to either stipulation.

**Stipulation on the Joint Record**

The signatories to the Stipulation on the Joint Record request the Board to consider the listed exhibits as the full record pursuant to N.J.A.C. 1:1-15.1. The signatories also represent that the exhibits "collectively comprise all parties' cases-in-chief and the entire record in this matter." (Joint Record at 2.) The signatories also agreed "to abide by their continuing obligation to update and correct any and all relevant information pertaining to the application, as soon as such information becomes known or available until the Board determines the record is closed." Id. at 3.

Upon review of the stipulation, the Board **APPROVES** the Joint Record as comprising the full record in this matter, with the following exception. Paragraph 34 of the Joint Record indicates that certain itemized documents relate to "FACW's original Application dated February 9, 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, FACW filed an application on May 19, 2011, and that application 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.

The parties shall have ten (10) days from the effective date of this Order to submit any additional relevant information. After that time, the record shall be closed and may not be supplemented absent an appropriate order from the Board or the hearing officer. If a party submits additional documents for the record prior to the closing date and any other party determines that rebuttal evidence is necessary, the aggrieved party shall make an application to the hearing officer.

### **Project Stipulation between FACW and Rate Counsel**

FACW and Rate Counsel request that the Board approve a Project Stipulation executed by the two signatories and issue a final decision and order. To approve the Project Stipulation as a qualified offshore wind project, the Board must find that the following conditions are satisfied:

(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.

[N.J.S.A. 48:3-87.1(b)(1)].

The Board must also consider "the total level of subsidies to be paid by ratepayers for qualified offshore wind projects over the life of the project" and "any other elements the Board deems appropriate." N.J.S.A. 48-3-87.1(b)(2).

### **Energy Master Plan (EMP)**

The signatories assert that the FACW Petition is consistent with the 2011 EMP because the State has articulated a commitment to offshore wind and the Project will provide net economic benefit to the State. Stip. at ¶ 5(a). The Board agrees that "[o]ffshore wind has been supported by the Christie Administration" and that OWEDA aims to create an OREC program supporting up to 1,100 MW of generation capacity off the coast of New Jersey. 2011 Energy Master Plan, at 101 (available at [http://nj.gov/emp/docs/pdf/2011\\_Final\\_Energy\\_Master\\_Plan.pdf](http://nj.gov/emp/docs/pdf/2011_Final_Energy_Master_Plan.pdf)).

The EMP supports offshore wind, in part, because it is "renewable, has no carbon output, and has the potential to develop a manufacturing and support industry within the State, thereby creating direct, indirect, and induced economic benefits for many years to come." *Ibid.* The Board **FINDS** that FACW's Project is consistent with the EMP 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." The Board must now consider whether the Project demonstrates the actual positive economic benefits that OWEDA requires.

### **Cost Benefit Analysis**

Pursuant to N.J.S.A. 48:3-87.1(b)(1)(b), the Project must demonstrate "positive economic and environmental net benefits to the State." To demonstrate such benefits N.J.S.A. 48:3-87.1(a)(10) and N.J.A.C. 14:8-6.5(a)(11) require the applicant to submit information, including but not limited to, in-State spending levels, manufacturing, employment, and indirect business

taxes.

The signatories rely on the entire Joint Record in asserting that the Project satisfies this requirement. Stip. at ¶ 5(b). The Project Stipulation does not articulate which facts within the record demonstrate a net economic benefit. The Project Stipulation also fails to describe anticipated New Jersey spending levels, means to achieve goals for job creation, or calculate a specific benefit to the State. See id. at ¶¶ 5, 13. The Project Stipulation merely states that FACW will request third party contractors to commit to New Jersey spending levels. See also (FACW Reply, supra, at 6.)

FACW's Supplemental Testimony, filed on March 8, 2013, provides detail concerning local expenditures and employment metrics. (FACW Testimony Exhibit 26, supra; FACW Rebuttal Testimony Exhibit 3 of Steve Gabel). It appears that FACW continues to rely on these estimates in support of the stipulation. (FACW Reply, supra, at 6.)

The signatories point to Surrebuttal Testimony filed by Staff's expert, Boston Pacific, as further evidence that the Project creates net benefits. Boston Pacific testified:

FACW's guarantee of direct jobs and direct expenditures in New Jersey, and its substantiation with vendor quotes, provides documentation of economic benefits of \$156.5 million (net present value). With documented economic benefits and a lower OREC price, even if FACW's claimed benefits for tourism, environmental impacts, merit order effect, and lessons learned are excluded, the Project provides net benefits of \$33.4 million (net present value). The Project then meets the requirement to demonstrate net benefits to the State as required under the Act.

[BP Surrebuttal at 18:7-16.]

The Board notes that while the signatories accurately quote the Boston Pacific Surrebuttal Testimony, they leave out pertinent information that misrepresents its finding. In fact, Boston Pacific evaluated the March 8<sup>th</sup> filings and March 25<sup>th</sup> rebuttal testimony "[w]ith the price at \$199.17/MWh and the risk of securing the federal assistance falls on FACW, rather than New Jersey ratepayers." Id. at 11:4-6. Additionally:

Several factors have led to the decrease in OREC price, including a reduction in estimated capital cost, the assumed receipt of U.S. Department of Energy (DOE) grant funding, and the assumed receipt of the federal investment tax credit (ITC) for renewable energy projects.

[Id. at 10:16-19.]

Boston Pacific's testimony supports a conclusion that an OREC price less than \$199 would produce net benefits, given the Project's anticipated expenditures and related guarantees. Considering the testimony of Boston Pacific, the Supplemental testimony of Wissemann, and FACW's promise to require subcontractors to commit to job creation and spending levels, the Board finds the lack of detailed explanation in the stipulation is not a bar to approving the application.

### Contingency Fund

Staff denies that the Project Stipulation demonstrates a net economic benefit to the State because the signatories propose to establish a “contingency fund” to collect an additional \$19.2 million from ratepayers. See Stip. at ¶ 10, Attachment B. The proposed contingency fund sets forth a process whereby certain project costs incurred by FACW in its attempt to “secure the maximum level of federal subsidies” will be eligible for reimbursement by ratepayers if FACW obtains insufficient federal subsidies and is unable to continue the Project. Stip. Attachment B at 1, 3. Eligible costs include, but are not limited to, “planning, designing, permitting, acquiring, construction, installing, testing, certifying, approving, financing, and otherwise developing the Project[.]” Id. at 2.

Essentially, the contingency fund embraces an “all-or-nothing” approach to the Project. It creates a mechanism “to allow the project to proceed *only* in the event *both* Federal Subsidies, the ITC and the USDOE Grant, become available to reduce the OREC Price.” (FACW Reply, supra, at 4 (emphasis in the original)). Staff highlights that the contingency fund would obligate ratepayers to reimburse FACW up to \$19.2 million even if the Project is never built. The argument continues that ratepayers will not receive any benefit from paying \$19.2 million for an abandoned project.

FACW concedes that “no benefits can accrue if a project is not constructed.” (Id. at 16.) The company argues, however, that Staff’s analysis is flawed. FACW counters that in order to calculate net benefits, the Board must assume that the Project will be built. Essentially, no project would ever be able to pass the net benefits test if it is evaluated on the presumption that the project will fail. Ibid. Even if the Board accepts FACW’s argument that the \$19.2 million should not be considered in the Board’s evaluation of the net benefits test, the question remains – on what basis should the Board assign to ratepayers the risk of the Project not receiving adequate federal subsidies?

On this point, Rate Counsel views the contingency fund as a fair solution that reduces the OREC price by \$50 million and caps ratepayers’ risk exposure at \$19.2 million. “[R]atepayers are agreeing to a low-probability maximum risk of \$19.2 million in exchange for a \$50 million OREC cost savings.” (RC Reply, supra, at 7.) “The contingency fund is therefore necessary to prevent FACW from [transferring] that risk [of not obtaining federal funds] to ratepayers through a higher OREC price.” Ibid.

Rate Counsel explains “the Stipulation was established as an innovative way to provide a ‘backstop’ to the project developer” if the company is not able to receive the Phase 2 federal grant through no fault of its own. Id. at 4. Rate Counsel emphasizes that the Stipulation requires FACW to exercise “all commercially reasonable efforts to obtain the USDOE Grant Commitments and the ITC in the maximum amount available for the Project.” Id. at 5. In describing the specific terms under which FACW may recoup money from the contingency fund, Rate Counsel states the following:

If FACW fails to continue to compete for these funds, or drops out of the DOE program, it will not be eligible for cost recovery from the Contingency Fund. Equally important, if FACW fails to deliver its Phase 1 deliverables to DOE in a timely fashion, thereby jeopardizing its potential Phase 2 funding, the project will also be ineligible for any cost recovery from the Contingency Fund. Further, if FACW fails to provide a satisfactory grant application, or is denied Phase 2 funding for any grant performance issue, it will not be eligible for cost recovery from the Contingency Fund.

Lastly, FACW will only be reimbursed for the expenses and investments it has incurred up to \$19.2 million if its Phase 2 DOE funding request is rejected.

[(RC Reply, supra, at 5-6.)]

Rate Counsel did not cite to the Cost Verification and Disbursement Process in support of the above description and the Board could not find such express terms upon its own reading of the Stipulation. There is no indication whether FACW would agree with Rate Counsel's characterization of the terms of the contingency fund. Notwithstanding, the signatories agree that the contingency fund is consistent with OWEDA because it enables the State to achieve the lowest OREC price.

The Board also notes that the Verification and Disbursement Process requires FACW to petition the Board and obtain, what the signatories described as, a "Disbursement Order" prior to collecting funds from ratepayers. The petition, described in the Stipulation as a "Verification Filing," would be subject to scrutiny by Rate Counsel and Staff for prudence, etc. See Stip. Attachment B. These safeguards, however, do not allay the Board's policy concerns.

The Board does not support a ratepayer "backstop" to protect FACW against future, possible failure to obtain a federal grant or ITC. The regulations specifically recognize the potential for tax benefits to change for any number of reasons, even due to a change in federal law. N.J.A.C. 14:8-6.5(a)(5)(iii) ("The applicant shall commit that the cost difference in the event that . . . tax benefits do not materialize for any reason including changes in tax laws, will not be made up by ratepayers . . ."). Construing the regulation, the financial consequence of not obtaining federal assistance should be borne by the developer, not ratepayers. Ibid. Accordingly, the Board **FINDS** that the contingency fund is not consistent with OWEDA.

#### OREC Price

In the event that the Board rejected the contingency fund, FACW asks the Board to consider an alternative pricing schedule submitted pursuant to N.J.A.C. 14:8-6.5(a)(5)(iv):

- i) Initial OREC Price of \$251/MWh;
- ii) ITC price adjustment bringing the Initial OREC Price to \$220/MWh based on receipt of the benefits of the ITC;
- iii) DOE price adjustment without the ITC, brings the Initial OREC Price to \$214/MWh based on receipt of USDOE Grant Commitments;
- iv) DOE price adjustment along with the ITC, which results in an initial OREC Price of \$187/MWh based on receipt of USDOE Grant Commitments and receipt of the benefits of the ITC.

For each tier the other terms and conditions are as set forth in Attachment A to the Stipulation, with the appropriate proportionate corresponding changes to the OREC Price.

[(FACW Reply, supra, at 5.)]

Tier 1 sets FACW's OREC Price at \$251/MWh if the company does not receive any federal subsidies. Tier 2 reduces the OREC Price to \$220/MWh if FACW receives the ITC. Tier 3 reduces the OREC Price to \$214/MWh if FACW receives the Phase 2 grant, but not the ITC.

Tier 4 reduces the price to \$187/MWh if FACW receives the ITC and the Phase 2 grant.

Rate Counsel does not support the alternative proposal because it is materially different from the Project Stipulation. The Board agrees with Rate Counsel on this issue. Only the Stipulation is before the Board for consideration. Conceptually, however, a pricing tier is one method an applicant may use to demonstrate its commitment to pass along "tax credits or other governmental benefits to ratepayers that are greater than projected" as required by N.J.A.C. 14:8-6.5(a)(5)(iv). The Board does not make any findings as to the amounts listed in the tiers.

Rate Counsel advocates for the Board to approve an OREC price of \$187/MWh, per the Project Stipulation, because FACW is in a good position to win the DOE Phase 2 grant. According to Rate Counsel, FACW's competition for the grant – Baryonyx and Dominion – do not have commercial operation dates and they are located in states without "legislatively created offshore wind financial structures in place. The Statoil project in Maine just announced . . . that it was suspending its project due to regulatory uncertainty . . . [and] the Principle Power project has no announced commercial operation date and indicated earlier in the year that its scope of work was still undefined." (RC Reply, supra, at 7.) For these reasons, Rate Counsel asserts that the risk to ratepayers is minimal.

FACW has acknowledged that the federal subsidies are not currently available and are quite uncertain at this point in time. (FACW Reply, supra, at 17.) "These are not subsidies that can be 'applied for' as of the date of this filing, nor can it presently be determined that the Project 'will qualify for' such subsidies." Id. at 18. The uncertainty of the funds is not an automatic bar to their inclusion in the OREC price provided "the risk of securing the federal assistance falls on FACW, rather than New Jersey ratepayers." See N.J.A.C. 14:8-6.5(a)(5)(iii); (BP Surrebuttal at 11:1-7.)

Although the Board strongly encourages applicants to apply for all available federal funding, N.J.S.A. 48:3-87.1(a)(4), N.J.A.C. 14:8-6.5(a)(5), it is premature for the Board to rely on FACW's receipt of such funds at this time. Based on the information known to date, and absent the contingency fund, the company appears to propose an Initial OREC price of \$251/MWh.<sup>8</sup> Rate Counsel has not agreed to FACW's alternative proposal, therefore, the Board **FINDS** that a settlement on the OREC price no longer exists. The Board **WILL DEFER** its decision on the initial OREC price until the parties have an opportunity to be heard on the issue.<sup>9</sup>

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<sup>8</sup> Absent federal funding and absent a contingency fund it appears that FACW would propose an initial OREC price of \$251/MWh. We note, however, that this price is lower than the amount FACW proposed in the Amended Application and the pricing tier is different than what was presented in the March 8<sup>th</sup> filing. To avoid any ambiguity, FACW should provide written confirmation concerning its proposed OREC price.

<sup>9</sup> In addition, the Amended Application lists an initial OREC price commencing on June 1, 2013, with an annual escalation of 3.5%. (FACW Testimony Exhibit 19 of Steve Gabel, Attachment 1, Section 2.2.) The Settlement Stipulation lists an initial OREC price commencing on June 1, 2012, with an annual escalation of 3.5%. Stip. Attachment A at B-1. Absent unique circumstances and compelling justification, the Board is not inclined to approve an initial OREC price for a date that precedes the commercial operation date.

### **Financing Mechanism**

Although OWEDA left the design of the financing mechanism to the discretion of the Board, the Act requires that “the financing mechanism [be] 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[.]” N.J.S.A. 48:3-87.1(b)(1)(c).

The signatories drafted a document titled “Interim OREC Pricing Plan” attached to the stipulation as Attachment A, to describe the proposed funding mechanism. The Pricing Plan presumed an initial OREC price of \$187/MWh for EY 2013 and increased the OREC annually by 3.5% until EY 2036.

The Pricing Plan also includes procedures for OREC invoicing and administration. Neither Staff nor the EDCs took a position on the details of the invoicing and administration process. Because the Project fails to satisfy the other elements of OWEDA, it is not necessary for the Board to issue findings and conclusions on the administrative aspects of the pricing plan.

### **Financial Integrity**

The fourth criteria relates to the financial integrity of the applicant. N.J.S.A. 48:3-87.1(b)(1)(d). According to the rebuttal testimony of Wissemann, “XEMC Group is a (75) year old company that is the parent company of XEMC Manufacturing and XEMC New Energy. XEMC Group, XEMC Manufacturing, and XEMC New Energy (together, the ‘XEMC Entities’) had annual revenues of more than \$1.6 billion in 2011 . . . . XEMC Group is 100% owned by the Hunan Province and as such, provides the financial backing for XEMC in completing this project.” (FACW Rebuttal Testimony Exhibit 2, supra, at B-4 to -5.)

The Project Stipulation suggests that FACW has demonstrated “financial integrity and sufficient access to capital to allow for a reasonable expectation of completion of construction of the project” because FACW has agreed to provide construction security for the “balance of capital required to complete the Project[.]” Stip. at ¶ 12; (FACW Rebuttal Testimony Exhibit 2, supra, at B-5.) FACW estimates this balance is approximately \$61 million. Stip. at ¶ 12.

Staff agrees that a construction guarantee would provide reasonable assurances about FACW’s financial integrity. However, Staff opposes the Project Stipulation on the grounds that a \$61 million guarantee is insufficient to cover the balance of construction costs. Staff estimates that the total costs of the Project are \$120 million or more. (Staff Position Paper at 11.)

According to Staff’s expert, a construction guarantee is necessary because they “could not verify the financial capability of XEMC, the debt and equity investor in the FACW Project.” (BP Surrebuttal at 13.) Boston Pacific’s December 2012 evaluation of the project specifically stated:

In this case, we could not rely on the financial statements that were provided since they are presented based on Chinese accounting principles. During our review of the initial application we asked that these financial statements be either presented in U.S. GAAP, or be accompanied with an opinion from a global accounting firm that attests to the financial strength of these companies. In response, Applicant did not provide financial statements in U.S. GAAP, but provided letters from their auditors confirming that they had audited the 2011 financial statements



based on Chinese accounting principles. However, these letters were not sufficient to demonstrate the financial strength of these companies under U.S. GAAP. The auditor for Xiangtan Electric Manufacturing Co.<sup>82</sup>, the manufacturer of the turbines, provided a letter that only states that they conducted an audit of the 2011 financial statements. However, no information was provided about the financial strength of the company. XEMC Group was audited by Hunan Jianye CPA Company Limited. This company provided a letter indicating that they had audited the 2011 financial statements; however, the letter did not provide enough information to demonstrate the financial strength of the company. Financial statements were only provided for two contractors: Weeks Marine and DCO Energy, an affiliate of Energenics, both provided audited financial statements in U.S. GAAP. These firms, through tangible net worth calculations, demonstrate their solvency. We could not assess the financial strength of the other firms, as no financial statements were provided for them.

[Expert Report of Boston Pacific, pgs. 36-37 (December 12, 2012) (hereinafter "BP December 2012 Report")].

Boston Pacific's analysis in December 2012 and May 2013 led Staff to conclude that an escrow for the total cost of construction is necessary for FACW to demonstrate financial integrity.

Rate Counsel describes Staff's position on this issue as unreasonable because there is no statutory requirement for an applicant to provide a guarantee against the entire project cost. Rate Counsel also explains that FACW only promised to commit a guarantee against capital costs, not all project costs. See (FACW Rebuttal Testimony Exhibit 2, supra, at B-5:14-20.) Wissemann testified, "Petitioner will agree to security in the form of escrow, letter of credit or other form to be agreed upon, for the balance of the capital required to complete the Project . . ." Id. It appears that Boston Pacific interpreted this language to mean that "all of the required funds for development and construction will be provided in escrow to cover construction costs." (BP Surrebutal at 13:18-19.)

Nonetheless, FACW has clarified that the "[t]he intention of the language in the Stipulation is to cause FACW to post the balance necessary for construction – whatever that is, whether it is \$60 million or \$120 million. The sentence in which the \$61 million is referenced is not governing but simply an estimate." (FACW Reply, supra, at 7.) The Board is unaware whether Rate Counsel would agree with its interpretation of the Stipulation.

Notwithstanding, the Board **FINDS** that the plain language of this provision in the stipulation is clear. Namely, FACW will post security "for the balance of the capital required to complete the Project." Considering FACW's clarification, the Board **FINDS** that FACW has committed to funding the escrow with "the balance of funds required to complete construction . . . up to \$120 million." See (FACW Reply, supra, at 8, para (i).) The Board makes no determination as to the actual amount of funds required to complete construction.

### **Other Factors**

The signatories have provided additional information for the Board's consideration. Although the additional elements presented for the Board's consideration do not cure the deficiencies related to N.J.S.A. 48:3-87.1(b)(1), certain provisions warrant discussion.<sup>10</sup>

Concerning Paragraph 1, the procedural history, the Board rejects any notion that it received a properly filed application by FACW pursuant to N.J.S.A. 48:3-87.1 or N.J.S.A. 48:3-87.2 prior to May 19, 2011. The Board **FINDS** that any reference to a February 2011 submission is improper.

Concerning Paragraph 2, the Board **FINDS** that the project description lacks certain specific detail. The Board **ADOPTS** Staff's description of the project as stated in the Amended Application.

Paragraph 7, in part, discusses the demonstration nature of the Project. The Board understands that FACW considers a project of 25 MW to be a pilot-scale project. In addition, the Board acknowledges receipt of a letter from DOE expressing support of pilot-scale offshore wind projects.<sup>11</sup> The DOE did not offer an opinion on the merits of the FACW Project. The Board **FINDS** that N.J.S.A. 48:3-87.2 provides for no alternative (or pilot) evaluation criteria. Therefore, for the purpose of evaluating the Project, the Board will apply the standard of review as articulated in OWEDA.

Paragraph 11 indicates that FACW will fund a decommissioning escrow in the amount of \$4 million. Staff complains that this funding level is a downward departure from FACW's representation in its June 1, 2012 Amended Application that \$8 million would be an appropriate level. See (FACW Pre-Filed Direct Testimony Exhibit 13 of Chris Wissemann, at 6-7.)

FACW argued that the minimum decommissioning cost should be \$3 million and therefore, the \$4 million decommissioning fund in the Project Stipulation was sufficient. FACW also indicated that decreasing the decommissioning cost helped to achieve the \$187 OREC price. (See FACW Reply at 10-11.) Rate Counsel also points out that the decommissioning cost was reduced in similar proportion to the total cost of FACW's Original Application. Based on these specific facts and circumstances, the Board **FINDS** that the decommissioning fund is sufficient, provided FACW commit to covering the total cost of decommissioning, even if such amount is greater than \$4 million.

In Paragraph 15 of the Project Stipulation, the signatories agree that the OREC pricing plan shall not be effective until the project receives both Type A and Type B certification from Det Norske Veritas ("DNV"). Staff objected to this provision since it is contrary to Boston Pacific's recommendation that that the Board refrain from approving the Project until after FACW receives Type B certification. (BP Surrebuttal at 33, 36.) This recommendation was based upon Boston Pacific's analysis identifying the additional risk associated with a pre-commercial stage technology and partners and its finding that "with respect to partnership risk, XEMC is a much lower-profile partner than others would be. For example, other companies already have a

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<sup>10</sup> The Board's failure to specifically address any particular paragraph within the Stipulation should not be construed in favor or against the terms outlined in such paragraph.

<sup>11</sup> Letter from U.S. Department of Energy Assistant Secretary Danielson to N.J. Board of Public Utilities President Hanna and Commissioners Fiordaliso, Fox and Holden (May 1, 2013).

foothold in the extensive offshore wind developments seen in Europe." Id. at 15.

Rate Counsel opposes Staff's position and notes that if FACW were to implement Boston Pacific's recommendation to wait until receipt of the Type B certification, it would severely hamper the financing and completion of the project and would effectively nullify the FACW Project before it could begin. (RC Reply, supra, at 15-16.)

FACW believes that the terms of the Project Stipulation satisfied Staff's concerns because they would not receive an OREC payment until Type B certification is obtained and thus ratepayers would bear no risk. (FACW Reply, supra, at 11-12.) FACW also presented testimony that it is following a development pathway of "design a turbine, build operating prototypes on land, certify the turbine, build it at demonstration scale offshore and then build utility scale projects." (FACW Rebuttal Testimony Exhibit 2, supra, B-14:15-19.)

Notwithstanding the signatories' defense of the provision, FACW has proposed two alternative solutions:

1. The Board order issued in this matter would not be effective until DNV Type B certification is received; or
2. In the event that this is deemed inadequate by the Board, FACW will commit to providing DNV Type B certification by August 20, 2013 and understands that no Board Order will be issued until such occurs.

[(FACW Reply, supra, at 12.)]

The Board is concerned about the delay FACW has experienced in obtaining Type B certification and is persuaded that Boston Pacific's concerns are warranted. Specifically, more than two years have passed since FACW notified Staff of its intention to use the XEMC turbine. FACW has been aware since the time of its Initial Application that it did not have Type B certification for the XEMC turbine. Although FACW has made progress toward obtaining Type B certification, it is still pending. Given the specific facts and circumstances of the FACW application, the Board **FINDS** that Type B certification is necessary to fully evaluate the Project. Additionally, in light of FACW's representation that it will obtain Type B certification in the near future, FACW should supplement its application upon receipt. Accordingly, the Board **REJECTS** Paragraph 15 of the stipulation.

In Paragraph 17 of the stipulation, the signatories attempt to circumscribe the regulatory authority of the Board. This provision indicates that FACW will hire an IEM chosen by the Board and pay for the IEM's professional services, up to \$50,000. Staff complains that this provision is inconsistent with its expert's recommendation.

N.J.S.A. 48:3-87.1(c)(4) states, "the applicant will reimburse the board and the State for all reasonable costs incurred for regulatory review of the project, including but not limited to consulting services, oversight, inspections, and audits." Accordingly, if the Board determines that an IEM is necessary for regulatory review of the Project, FACW will be required to reimburse the Board and the State for all reasonable costs. The statute does not cap the reimbursement level or the scope of the Board's regulatory authority. Any attempt to circumscribe the Board in such manner is **DENIED** as it would violate N.J.S.A. 48:3-87.1(c)(4).

Paragraph 18 describes a process whereby FACW may change the foundation selected for the Project if such a change would increase its chances of obtaining federal funding; and,

Paragraph 19 indicates that FACW may change the turbine manufacturer if XEMC is no longer able to perform. Paragraph 19 acknowledges that Board approval is necessary for a change in technology, but requires the Board to act within 30 days of the petitioner's request. Paragraph 18 does not acknowledge that Board approval is necessary for a change in technology.

FACW's potential need to make material changes to its Project after two years of review by the Board is troubling. The application filed on May 19, 2011, contemplated three turbine manufacturers: GE, XEMC, and Siemens. In July 2011, FACW advised Staff that XEMC is its turbine of choice. In the June 2012 Amended Application, however, FACW requested the Board to review both XEMC and Siemens. Staff informed FACW that promoting two different turbine manufacturers was essentially equivalent to asking the Board to review two different applications and Staff insisted that FACW select which technology it desired the Board to review. In September 2012, FACW confirmed that it desired the Board to evaluate the XEMC technology.

Through this Project Stipulation, FACW advises the Board that it may need to change turbine manufacturers again. The repeated back-and-forth concerning turbine manufacturer fails to instill confidence in the viability of this Project. Nonetheless, the Board acknowledges that under N.J.A.C. 14:8-6.5(a)(2)(ii) "[f]or actual construction, successful candidates are permitted to replace or update equipment identified in the proposal with more technologically advanced equipment that is equal to or better than the equipment identified in the proposal, subject to Board approval." The Board also acknowledges that a change in turbine manufacturer in this case would likely materially impact the financing structure due to XEMC's role in debt and equity financing of the Project.

Applying N.J.A.C. 14:8-6.5(a)(2)(ii), FACW may update its equipment, subject to Board approval. The statute does not place a time period for the Board's review of such requests, and the Board rejects FACW's attempt to impose one. Therefore, Paragraphs 18 and 19 are denied to the extent they eliminate Board approval for a change in technology or otherwise require Board action within a set period of time.

Paragraph 20 designates the Project as a qualified offshore wind project and is **DENIED** for the reasons set forth herein.

Paragraph 21 is approved to the extent that it states the term of the OREC order is twenty years from the commercial operation date. This provision is **DENIED** in all other respects.

CONCLUSION


For the above reasons, the Board is satisfied the Project Stipulation does not meet the standard for a qualified offshore wind facility pursuant to N.J.S.A. 48:3-87.1. As of this point there is no resolution of the underlying Amended Application. In order to resolve the dispute in a timely manner, the presiding officer may set a hearing schedule for the parties to litigate their positions. If FACW desires to proceed on the papers in lieu of a hearing, FACW shall advise the Board in writing within ten (10) days of the effective date of this Order.

This order shall be effective on July 30, 2013.

DATED: 7/29/13

BOARD OF PUBLIC UTILITIES  
BY:

  
ROBERT M. HANNA  
PRESIDENT

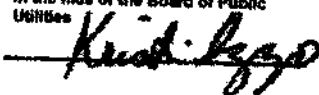
  
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ATTEST:  
  
KRISTI IZZO  
SECRETARY

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 – REQUEST FOR EXTENSION OF TIME FOR  
APPLICATION REVIEW  
DOCKET NO. EO11050314V

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