

P E A R L M A N & M I R A N D A, L L C

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May 18, 2018

Aida Camacho [Rule.Comments@bpu.nj.gov]
Secretary, New Jersey Board of Public Utilities (the “Board” or “BPU”)
44 South Clinton Avenue, 3rd Floor, Suite 314, CN 350
Trenton, New Jersey 08625

RE: Docket No. QX18040466 – In the Matter of Offshore Wind Renewable Energy Certificate (OREC) Funding Mechanism
Written Comments on OREC Mechanism Straw Proposal, dated April 27, 2018 (the “Straw Proposal”)

Under the Board’s regulations implementing the Offshore Wind Economic Development Act, all PJM revenues realized by an offshore wind developer are to be refunded back to ratepayers. As such, it is anticipated that OREC payments will be the sole source of revenue to the offshore wind developer in connection with such offshore wind project. As such, potential providers of debt and equity for offshore wind projects will look very closely at the OREC Funding Mechanism to ensure it provides the necessary certainty that an offshore wind developer will realize the OREC payments, provided the respective project produces energy as intended. Unless such payment certainty is accomplished, there will be an increased cost of capital in connection with such projects to account for such risk, which will in turn necessitate higher OREC prices, and concomitant increased costs to ratepayers. Accordingly, Pearlman & Miranda, LLC hereby submits the following comments in connection with the Board’s Straw Proposal, in the context of mitigating such risks, and thereby reducing the cost of capital in connection with offshore wind projects.

1. In certain circumstances, payments made by one entity to another, may be subject to “recapture,” to the extent the payor files a bankruptcy petition subsequent to making payment to the payee. In the context of the OREC Funding Mechanism, the concern is that OREC payments received by the offshore wind developer could be recaptured, to the extent certain of the entities in the OREC payment chain file a bankruptcy petition. This comment is made in the context of “preference proofing” such payments made to

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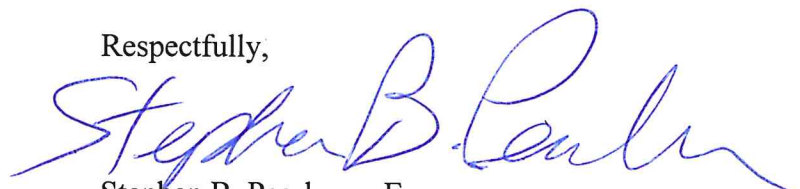
offshore wind developers to avoid recapture in the event that an entity in the payment chain files bankruptcy.

Certain payments made by a debtor prior to any bankruptcy proceeding have potential recapture exposure as “preferences” under the Bankruptcy Code. Specifically, section 547(b) of the Bankruptcy Code provides, in pertinent part, that a transfer of property of an interest of the debtor may be avoided as a preference when such transfer is made: (1) to or for the benefit of a creditor; (2) for or on account of an antecedent debt owed by the debtor prior to the transfer; (3) while the debtor was insolvent; (4) on or within ninety (90) days before the date of the filing of a bankruptcy petition; and (5) that enables such creditor to receive more than such creditor would receive in a Chapter 7 liquidation and the transfer had not been made. Transfer includes every “mode, direct or indirect, absolute or conditional, voluntary or involuntary, of disposing of or parting with...property or an interest in property.” 11 U.S.C. section 101(54). Thus, if the OREC payments made to offshore wind developers would be considered property of the debtor’s estate (whether such debtors are the EDCs or others), payment thereof within ninety (90) days prepetition could be attacked as preferential and subject to disgorgement by the offshore wind developers. By definition, however, transfers of funds on the ninety-first (91st) day prior to a bankruptcy filing are immune from preference attack. Accordingly, we recommend that the payment mechanism be structured whereby the OREC payments are paid by the EDCs to a third party fiduciary (potentially the same independent entity that acts as the “OREC Program Administrator”) which first ages these funds for ninety (90) days prior to transferring the payments to the payee offshore wind developers. These transfers to the offshore wind developers after ninety (90) days should be immune from preference attack, and should therefore prevent a bankruptcy court from disgorging such payments from offshore wind developers. Such a structure will mitigate risk and assist in rendering offshore wind projects financeable via the OREC Funding Mechanism.

2. The Straw Proposal (item 14) states that “Rules must address the potential scenario in which an OSW project experiences a period of insufficient OREC demand.” Not only should the rules “address” such scenario, but the rules should include a mechanism to preclude such a circumstance from occurring, including properly setting the OREC set-aside to meet expected supply, and using the ability for banking of ORECs to assure their use, since ORECs have a three year life.

Incorporating the comments contained herein will assist in providing assurance to potential providers of debt and equity of the integrity of payment flow and the timeliness of payments in offshore wind projects.

Respectfully,

A handwritten signature in blue ink that reads "Stephen B. Pearlman". The signature is fluid and cursive, with the first letters of the first and last names being capitalized and prominent.

Stephen B. Pearlman, Esq.

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