



**STATE OF NEW JERSEY**  
**Board of Public Utilities**  
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[www.nj.gov/bpu/](http://www.nj.gov/bpu/)

CLEAN ENERGY

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 )  
MOTION TO REOPEN THE  
PROCEEDINGS TO  
SUPPLEMENT THE RECORD  
AND FOR RECONSIDERATION  
DOCKET NO. EO11050314V

**Parties of Record:**

**Stefanie A. Brand, Esq.**, Director, Division of Rate Counsel  
**Stephen B. Pearlman, Esq.**, **Pearlman & Miranda, LLC**, on behalf of Fishermen's Atlantic City Windfarm, LLC  
**Phillip J. Passanante, Esq.**, on behalf of Atlantic City Electric Company  
**Gregory Eisenstark, Esq.**, 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:**

Fishermen's Atlantic City Windfarm, LLC ("FACW") moved to reopen the proceedings to supplement the record and for reconsideration of the March 28, 2014 Order ("March 28 Order") issued by the New Jersey Board of Public Utilities ("Board") in the above-captioned matter.

**Background**

By Order dated March 28, 2014, the Board denied the petition of FACW for a determination pursuant to N.J.S.A. 48:3-87.2, of eligibility as a qualified offshore wind facility as set forth in N.J.S.A. 48:3-87.1 et seq. and N.J.A.C. 14:8-6.5 et seq. The March 28 Order contains the extensive procedural history of this case, which is incorporated here by reference.

On April 7, 2014, FACW filed a motion to reopen the proceeding to supplement the record and for reconsideration. In support of the motion, FACW filed a notice of motion, brief, and exhibits. The exhibits included a sworn affidavit of FACW's CEO, Christopher Wissemann, among other items.

Specifically, FACW alleged that the Board relied on seven errors of fact or law that necessitate reversing the March 28 Order or reopening the proceeding to receive additional evidence:

1. The Board erred in analyzing FACW's Petition with a proposed OREC Price of \$263 instead of \$199.17.
2. The Board erred in concluding that FACW failed to assume the risk of non-receipt of the ITC and USDOE Grant ("federal subsidies").
3. The Board erred in shifting the risk of non-receipt of the federal subsidies to ratepayers.
4. The Board erred in applying a financial viability analysis to FACW's internal rate of return as opposed to following the standard under the Offshore Wind Economic Development Act ("OWEDA"), P.L. 2010, c. 57.
5. The Board erred in not reviewing the translated financial statements of XEMC, which are in the record.
6. The Board erred in overlooking record evidence by Boston Pacific and Board Staff.
7. The Board erred by interpreting N.J.A.C. 14:8-6.5(b)(16)(6) to require audited financial statements when "other evidence of adequate financial capacity" is also permissible.

FACW also objected to the procedural history in the March 28 Order on the grounds that it omitted information related to the parties efforts to negotiate the Application. No responses to the motion were filed by the other parties to this matter.

On April 21, 2014, FACW submitted a written request for the Board to delay its decision on the present motion until the United States Department of Energy ("USDOE") issues a determination on FACW's application for federal subsidies. In addition, regardless of whether the Board acts on the present motion before or after the USDOE determination, FACW requests an opportunity for oral argument on either the Petition or the Motion. No responses to the April 21, 2014 letter were filed by the other parties to this matter.

For substantially the same reasons described in the March 28 Order, the Board **FINDS** "that the lengthy procedural history of this case does not warrant additional delay." March 28 Order, at 9. As such, the request for an extension of time and the request for oral argument are **HEREBY DENIED**.

In addition, the Board **DENIES** FACW's request to amend the procedural history. The procedural history accurately reflects that the parties' efforts at settlement negotiations failed.

## **DISCUSSION AND FINDING**

Under N.J.A.C. 14:1-8.6(a), a motion for reconsideration may be filed with the Board within fifteen days of the issuance of any final decision or order by the Board. The Order denying FACW's petition was issued on March 28, 2014. FACW's Motion was filed with the Board on or about April 7, 2014. A motion for reconsideration requires the moving party to allege "errors of law or fact" that were relied upon by the Board in rendering its decision. N.J.A.C. 14:1-8.6(a)(1). In addition, pursuant to N.J.A.C. 14:1-8.6(a)(2) where an opportunity is sought to introduce additional evidence, that evidence shall be stated briefly with the reasons for failing to provide it previously.

In considering whether or not to grant a motion for reconsideration, the moving party must show that the court acted in an arbitrary, capricious or unreasonable manner. D'Atria v. D'Atria, 242 N.J. Super. 392, 401 (Ch. Div. 1990). A party should not seek reconsideration merely based upon dissatisfaction with a decision. Ibid. Rather, reconsideration is reserved for those cases where (1) the decision is based upon a "palpably incorrect or irrational basis;" or (2) it is obvious that the finder of fact did not consider, or failed to appreciate, the significance of probative, competent evidence. See e.g., Cummings v. Bahr, 295 N.J. Super. 374, 384 (App. Div. 1996).

### Wissemann Affidavit

In support of its motion, FACW attached a sworn affidavit of FACW CEO Chris Wissemann. In part, the affidavit states that FACW will construct the Project at an OREC price of \$199.17, irrespective of the company's receipt of the full federal subsidies. However, this affidavit is outside the record and cannot be relied upon by the Board. FACW is well-aware that the paper record closed on August 9, 2013. In addition, and equally important, Mr. Wissemann's affidavit conflicts with other testimony in the record. The Board **FINDS** no reason to accept additional evidence at this late juncture. In addition, FACW has not offered a compelling reason for the Board to accept additional evidence that conflicts with FACW's unrecanted testimony in the Joint Record.

### OREC Price

In this motion, FACW argues that the Board erred in analyzing the project at an OREC price of \$263 rather than \$199.17; erred in concluding that FACW failed to assume the risk of non-receipt of the federal subsidies; and erred in shifting the risk of non-receipt of the federal subsidies to the ratepayers. The Board **FINDS** that these arguments misconstrue the March 28 Order, do not represent an error of law or fact, and are without merit.

First, the record in the matter shows that the OREC price of \$199.17 was evaluated and fully considered by the Board. The Board rejected the price of \$199.17 on the basis that it was not adequately substantiated. March 28 Order, at 19-21.

Second, in the March 28 Order, the Board found that the "Phase 2 DOE Grant of \$50 million and the ITC are not credible assumptions to include in the OREC price." March 28 Order, at 21. The Board determined that "subsidies that are not known or measurable with any degree of certainty should be excluded from the OREC price." March 28 Order, at 20.

Rather than end the analysis with a rejection of the OREC price of \$199.17, and because FACW had not recanted any prior testimony, the Board reviewed the entire Joint Record to determine if FACW had presented testimony to substantiate any other OREC price. In so doing, the Board determined that the OREC price of \$263 was the only price in the record that was reasonably supported by credible evidence.

Third, the Board rejects FACW's claim that the Board's decision shifted the risk of non-receipt of the federal subsidies to ratepayers. The Board denied FACW's Application and did not place any burden on ratepayers.

Accordingly, the Board, upon complete review of the record, **FINDS** that there are no errors of law or fact with respect to the review of the OREC price and **REAFFIRMS** its finding that the Project does not provide a net economic and environmental benefit to New Jersey ratepayers. March 28 Order, at 26.

### Rate of Return

Fourth, FACW's motion claims that the Board erred in applying a financial viability analysis to FACW's internal rate of return. This argument misinterprets the Board's decision. The Board considered rate of return within the context of whether the project could be built without federal subsidies. March 28 Order, at 20. On this issue, the Board relied on Mr. Wissemann's prior testimony that the project could not proceed with a rate of return lower than 9.78%. *Id.* at 19. FACW did not recant or amend Mr. Wissemann's testimony during the course of the hearing. Thus, it was proper for the Board to rely on such testimony in the March 28 Order and the Board

**FINDS** that there are no errors of law or fact with respect to the rate of return.

### **Financial Integrity**

Fifth, concerning translated financial records, the Board acknowledges that FACW submitted translated XEMC financial statements as an attachment to its December 11, 2012 discovery response to Rate Counsel (JR-9). The translation, however, does not alter the Board's initial analysis because FACW provided insufficient documentation. Therefore, the Board **FINDS** that FACW has not demonstrated financial integrity pursuant to OWEDA for the reasons stated in the March 28 Order.

Sixth, FACW argues in its motion that the Board's findings in the March 28 Order are contrary to the Board's July 29, 2013 Order ("July 29 Order") rejecting the Project Stipulation agreed to by FACW and Rate Counsel, and the previous testimony of Board Staff and Boston Pacific with regard to the funding of the construction escrow account. The Board rejects FACW's interpretation of the July 29 Order. The Board summarized Staff's position, but it did not make any determination concerning FACW's financial integrity. Further, the Board made no finding that the mere existence of the construction escrow account would be sufficient for the project to demonstrate financial integrity.

Notably, FACW has not quoted any Board finding or conclusion from the July 29 Order that conflicts with the March 28 Order. FACW's argument that the Board is disregarding its previous finding is wholly without merit.

With regard to Boston Pacific's testimony, the Board is under no obligation to accept the position of any single expert. The Board must review the entire record and consider the positions of all of the parties when rendering a decision. Further, the language cited by FACW represents a legal opinion, which was outside the scope of Boston Pacific's expertise. The Board is not required to adopt the legal opinion of any expert witness. Accordingly, the Board **FINDS** that this issue does not present an error of fact or law.

Last, FACW claims that the Board is misrepresenting the requirements of N.J.A.C. 14:8-6.5(b)(16)(6) because the regulation allows an applicant to "submit audited financial statements or other evidence of adequate financial capacity." FACW submits that the escrows should qualify as such alternate proof of financial integrity. For the reasons stated in the March 28 Order, we disagree that the escrows constitute sufficient proof of financial integrity. Accordingly, the Board **FINDS** that this issue does not present an error of fact or law.

The Board has reviewed the complete record on this issue and **REAFFIRMS** its findings from its March 28 Order that "even if FACW has demonstrated "sufficient access to capital" as required by the second prong of N.J.S.A. 48:3-87.1(b)(1)(d), it has not demonstrated financial integrity." March 28 Order, at 27.

The Board therefore **FINDS** that FACW's claims of errors with respect to the financial integrity of the project are without merit.

**Conclusion**

In sum, for the reasons stated above, FACW's request for an adjournment of the Board's decision on its motion for reconsideration is **DENIED**; FACW's request for oral argument is **DENIED**; the request to amend the procedural history is **DENIED**; and the motion to reopen the proceedings to supplement the record and for reconsideration is **DENIED**.

DATED: 4/28/14

BOARD OF PUBLIC UTILITIES  
BY:



DIANNE SOLOMON  
PRESIDENT



JOSEPH L. FIORDALISO  
COMMISSIONER



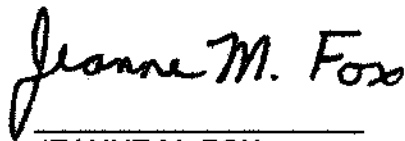
MARY-ANNA HOLDEN  
COMMISSIONER

CONCURRENCE BY COMMISSIONER JEANNE M. FOX

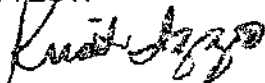
Although I agree with the Board's denial of FACW's motion, I do not agree with the totality of the Board's reasoning in coming to this conclusion. Therefore, along with reaffirming my concurrence from the March 28 Order, I concur with this Board decision separately.

As I stated in my concurrence to the March 28 Order and reaffirm here, neither N.J.S.A. 48:3-87.1 nor N.J.S.A. 48:3-87.2 create different standards for small projects. Therefore the Board must conduct the cost benefit analysis for FACW's project under the same standards as would be applied to commercial scale projects. While I acknowledge that FACW has assumed the risk of non-receipt of the federal subsidies, I do not believe that the record shows sufficient financial integrity to allow for a reasonable expectation for a successful project over the 20 year term of an OREC order. My concern stems from FACW's failure to provide full disclosure to the Board on XEMC's financial standing by the submission of financial documentation under the US GAAP standards or a submission from a global accounting firm attesting to the financial strength of XEMC as requested. Finally, I also reaffirm my concurrence from the March 28 Order where I stated that despite FACW's commitment to establish construction and decommissioning escrow accounts, the financial integrity standard has not been met.

I remain committed to the establishment of a uniform standard for the review of multiple competitive applications under OWEDA, which I strongly believe is necessary to reach the ultimate goal of large offshore projects in federal waters.

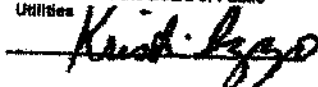
  
\_\_\_\_\_  
JEANNE M. FOX  
COMMISSIONER

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  
DOCKET NO. EO11050314V

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