



State of New Jersey
DIVISION OF RATE COUNSEL
140 EAST FRONT STREET, 4TH FL
P.O. BOX 003
TRENTON, NEW JERSEY 08625

PHIL MURPHY
Governor

SHEILA OLIVER
Lt. Governor

STEFANIE A. BRAND
Director

May 18, 2018

By Hand Delivery and Electronic Mail

Aida Camacho-Welch, Secretary
NJ Board of Public Utilities
44 South Clinton Avenue
3rd Floor, Suite 314
P.O. Box 350
Trenton, NJ 08625-0350

**Re: In the Matter of Offshore Wind Renewable Energy Certificate
(OREC) Funding Mechanism
BPU Docket No. QX18040466**

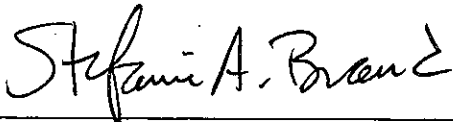
Dear Secretary Camacho-Welch:

Please accept for filing the enclosed original and ten (10) copies of comments being submitted on behalf of the New Jersey Division of Rate Counsel ("Rate Counsel") in connection with the above-captioned matter. Copies of Rate Counsel's comments are being provided to all parties on the service list by electronic mail and hard copies will be provided upon request to our office.

We are enclosing one additional copy of the comments. **Please stamp and date the extra copy as "filed" and return to our courier.**

Thank you for our consideration and attention to this matter.

Respectfully submitted,

By: 
Stefanie A. Brand, Esq.
Director, Division of Rate Counsel

SAB
Enclosure

cc: Rule.Comments@bpu.nj.gov
OCE@bpu.nj.gov
Rachel Boylan, BPU
Noreen Giblin, BPU
B. Scott Hunter, BPU
Sherri Jones, BPU
Anne McShea, BPU
Kenneth Sheehan, BPU
Michael Winka, BPU
Caroline Vachier, DAG
Michael Ambrosio, TRC

STATE OF NEW JERSEY
BEFORE THE BOARD OF PUBLIC UTILITIES

In the Matter of Offshore Wind Renewable) BPU Docket No. QX18040466
Energy Certificate (OREC) Funding)
Mechanism)

COMMENTS OF THE
NEW JERSEY DIVISION OF RATE COUNSEL
ON THE OREC FUNDING MECHANISM STRAW PROPOSAL

May 18, 2018

1. Introduction

The Division of Rate Counsel (“Rate Counsel”) would like to thank the Board of Public Utilities (“Board” or “BPU”) for the opportunity to provide comments on the Offshore Wind Renewable Energy Certificate (“OREC”) Funding Mechanism Straw Proposal issued by Staff on April 30, 2018. The Staff straw proposal was developed in response to Executive Order No. 8 (“EO8”), which directs the Board to implement the provisions of the Offshore Wind Economic Development Act (“OWEDA”). The Staff straw proposal attempts to define the broad parameters of an OREC funding mechanism that is defined in the OWEDA, which itself is designed to establish a flow of financial payments from ratepayers to offshore wind developers to financially support offshore wind (“OSW”) projects. The Staff straw proposal also attempts to define the administrative steps needed to execute and monitor the OREC payment process.

Staff’s straw proposal is limited to a basic outline of the OREC payment process and is comprised of two primary parts. The first part of the Staff straw proposal establishes an offshore wind set-aside or “carve-out,” for each approved offshore wind project. This carve out will count against Electric Distribution Companies’ (“EDCs”) Class I Renewable Portfolio Standard (“RPS”) obligations. The second part of the Staff straw proposal is a basic outline of how ORECs will be used as a tradable credit for OWEDA compliance purposes. Staff notes that the purpose of its straw proposal is limited to just the OREC portion of OWEDA and that the public will be invited to discuss “other subjects” related to OSW development at a later time. These topics, and the timing and number of anticipated public hearings to address these subjects, are not identified in the Staff straw proposal.

Rate Counsel supports what it believes are the overall goals of Staff’s proposal: to establish market certainty for the development of OSW generation. However, the current Staff straw

proposal is incomplete: it consists of a list of 17 topics and is not a true straw proposal that can be used for rulemaking purposes in its current form. The current Staff straw proposal does not address a number of salient legal, policy and market structure issues. Further, Rate Counsel does not believe that the Staff straw proposal represents a least-cost, or efficient method for funding OSW projects. Instead, Rate Counsel believes the current Staff straw proposal will lead to continued uncertainty, and likely higher-than-necessary ratepayer costs. Lastly, Rate Counsel is dismayed at the piecemeal nature in which Staff is proposing to develop a broad set of rules to facilitate OSW development. Rate Counsel believes that a complete straw proposal, identifying all OSW development issues and mechanisms, needs to be offered to stakeholders rather than releasing a limited list of ideas on a piecemeal and unidentified schedule.

2. The Staff straw proposal does not appear to be based on competitive bidding

Staff notes that the primary purpose of its straw proposal is to define an OREC funding mechanism to support OSW developments. However, the first step in defining an appropriate OREC funding mechanism is determining of how many projects will need to get funded to achieve the State's goals and how those individual OSW projects will be selected. Indeed, the Staff straw proposal states that an OREC "carve-out" will be established each year (item 6) for OREC funding purposes. However, no further details have been provided. Rate Counsel is concerned about the manner in which OSW projects will be selected. OSW project selection is an integral part of an OREC funding mechanism. Rate Counsel recommends that the next version of the Staff straw proposal include such important details. Rate Counsel supports the use of competitive market-based mechanisms in order to assure that the most cost-effective OSW resources are being selected.

3. The Staff straw proposal is unnecessarily complex

The mechanics of the Staff Straw Proposal are unnecessarily complex and could lead to inefficiencies that drive up ratepayer costs. There are also components within the plan that seem inconsistent, at least from the general description provided by the Staff. For instance, the Staff straw proposal notes that “EDCs” will serve as the payment agents, on behalf of suppliers, for OSW developers, thereby cutting Load Serving Entities (“LSEs”) out of the OSW reimbursement process. Later, however, the Staff straw proposal suggests that the OSW project itself will transfer the appropriate number of ORECs to each supplier for retirement to meet their respective RPS requirements (item 9). The purpose of this requirement is not clear since (a) the LSEs appear to be “cut-out” of the loop in the entire OREC payment/reimbursement framework; and (b) the OSW projects themselves will likely not have the relevant information to make this transfer without some form of direct input from the EDCs and/or the proposed OREC administrator.

More importantly, the Staff straw proposal is based upon an unnecessary number of “moving parts” and would benefit from a more streamlined approach. For instance, the Staff straw proposal recommends that EDCs act as “payment agents,” on behalf of load serving entities (suppliers) to direct funding from ratepayers to OSW developers. In addition, a separate “program administrator” will be utilized to monitor, verify and true-up payments. Thus, there exists various payments flowing from EDCs, around LSEs, to program administrators to OSW developers. In addition, there is an entirely separate set of payments that allow for PJM revenue credits that flow from OSW developers to EDCs and ultimately ratepayers (item 12). What is not clear from the Staff straw proposal is whether these credits will be assessed for additional, non-contracted sales of energy and capacity from the contracted OSW project, or whether these

revenue streams represent a type of “contract for differences.” Regardless, the process appears more involved than what is implied by Item 10 of the Staff straw proposal which suggests a simple “all-in” price for an OSW project and its output.

In addition, the Staff straw envisions an entirely additional “clearing” mechanism for the environmental attributes (ORECs) associated with the OSW projects. The Staff straw proposal will lead to a new and separate OSW carve-out be established for *each* approved OSW project to count against service providers’ Class I RPS obligation (item 6). These carve-outs will be expressed as a percentage of supplier load, meaning there will not only be a carve-out for each project, but also a separate carve-out percentage for each LSE. Further, the carve-out percentages may be adjusted as necessary to meet OREC allowances (item 8). This creates yet another set of financial and regulatory obligations that will need to be monitored and audited, driving up the administrative costs of this proposal. Rate Counsel also notes that there has been no attempt to examine or quantify any ratepayer impacts associated with this proposal relative to other, potentially more streamlined alternatives.

4. The Staff straw proposal shifts risks onto ratepayers

The Staff straw proposal shifts a number of risks onto ratepayers. One of the most important risks, as noted earlier, is the regulatory risk associated with OSW resource selection. The Staff straw proposal offers no guidance or specific guidelines as to how an OSW project will be selected. The Staff proposal makes no reference to Rate Counsel’s preferred approach, which is to put the capacity requirements to the market through a competitive bid on a regularly scheduled basis. Thus, there are only two other logical approaches. The first would be to acquire OSW capacity on a “queue” or “first-come first-serve” basis. The second would be to secure OSW capacity on an administratively-determined basis where projects that meet a pre-

defined “screen” will be allowed to proceed to the final selection and contracting process. Either approach could lead to considerable inefficiencies and excess ratepayer costs.

There is nothing in a queue approach that would assure that the most cost-effective OSW resource is being procured for ratepayers. The entire risk associated with the procurement costs, therefore, would be shifted entirely onto ratepayers. The other approach, an administratively-determined approach, would have its own set of deficiencies depending upon how the screening process was conducted. Rate Counsel, therefore, prefers an appropriately designed competitive-bidding process to ensure transparency and credibility to assure ratepayers are getting the best deal.

Other states are currently using competitive bidding processes to procure renewable capacity and specifically OSW capacity. In Massachusetts, the investor-owned EDCs and the Massachusetts Department of Energy Resources issued a joint Request for Proposal (“RFP”) in June 2017 for at least 400 MW of OSW and associated transmission.¹ The solicitation allows bidders to offer proposals of up to 800 MW if it is determined that a larger-scaled proposal is superior and is “likely to produce significantly more economic benefits to ratepayers.”² Bidders were required to submit a price for OSW generation and/or associated RECs on a fixed \$/MWh or \$/REC basis for a contract length of 15 to 20 years. This is the first solicitation in a staggered procurement plan to acquire 1,600 MW of OSW by 2027. Similarly, in Connecticut, the Department of Energy and Environmental Protection (“DEEP”) issued an RFP on January 31,

¹ Dvorak, P. 2017. Massachusetts issues new RFP for 400 MW of offshore wind energy projects; December 2017 bid deadline. Windpower Engineering Development. Available at: <https://www.windpowerengineering.com/offshore-wind/massachusetts-issues-new-rfp-400-mw-offshore-wind-energy-projects-december-2017-bid-deadline/>; and Delony, J. 2017. Bids are in for Massachusetts offshore wind procurement; storage included. Renewable Energy World. Available at: <https://www.renewableenergyworld.com/articles/2017/12/bids-are-in-for-massachusetts-offshore-wind-procurement-storage-included.html>.

² Massachusetts Department of Energy Resources, Request for Proposals for Long-Term Contracts for Offshore Wind Energy Projects. June 29, 2017.

2018 to procure up to 825,000 MWh per year of generation (or about 200 MW) from offshore wind under 20-year contracts.³

In addition, the implied structure of the Staff Straw Proposal places a considerable amount of the market and economic risk of future OSW capacity development on ratepayers. For instance, the Staff straw proposal appears to tether the OREC funding mechanism to the PJM market and suggests that any PJM revenues received would offset the cost of the OREC to ratepayers. Thus, ratepayers are not getting any of the hedging value of a fixed price renewable resource, and, instead, will have the effective price based upon the vagaries of PJM energy and capacity markets. This represents another form of risk shifting that should be avoided in any future OSW financial support mechanism.

5. The Staff straw proposal has important, unaddressed jurisdictional issues

Rate Counsel is particularly concerned with the potential for state/federal jurisdictional conflicts that could arise from the Staff straw proposal. The Staff straw proposal seems to envision that OSW projects will be required to utilize PJM revenues as a ratepayer crediting mechanism (item 13). Presumably, under the Staff straw proposal, the higher PJM energy and capacity prices, the higher the OSW revenue credits that will be used to offset ratepayer OREC contributions. Thus, the effective price that ratepayers will pay in any given year will be a direct function of what is occurring in competitive, federally-regulated wholesale markets. In addition, the Staff proposal appears to allow PJM revenues to be used by an OSW developer to address lag in OREC payments or to cover obligations until OREC payments are made (item 14).

The Staff proposal is silent on the specifics of how energy and capacity revenues from PJM will be generated by OSW projects and Rate Counsel can only assume that the straw

³ Connecticut Department of Energy & Environmental Protection. Notice of Request for Proposals from Private Developers for Clean Energy. January 31, 2018.

proposal includes a requirement that all approved OSW projects will bid their generation into the PJM market. This requirement has the ability to influence the outcomes of competitive, FERC-regulated wholesale markets and, therefore runs contrary to a recent Supreme Court decision in *Hughes v. Talen Energy Marketing, LLC*.⁴ It also disregards the decision by the U.S. District Court for the District of New Jersey overturning a similar New Jersey statute in *PPL Energyplus, LLC v. Hanna*.⁵

The *Hughes* case arose in 2011 when the Maryland Public Service Commission solicited construction proposals for a new power plant and issued an order requiring utilities to enter into contracts with the winning bidder, Competitive Power Ventures (“CPV”). Like traditional bilateral contracts for electricity and capacity, the Maryland contract guaranteed revenues at a specified rate for a 20-year period. However, the contracts required CPV to bid its electricity and capacity into the PJM market. If CPV’s bids cleared the PJM market, CPV would be guaranteed fixed revenues. These revenues would be the difference between the specified contract price and the amount received from PJM. However, if CPV’s bids did not clear the market, then CPV would be required to pay the utilities the difference. This arrangement is known as a “contract for differences.”⁶ This contract for differences is what is implied by the Staff straw proposal in Item 13 that states, “All PJM Revenues generated by an approved OSW Project will be returned to ratepayers, through the EDCs, to offset the cost of the OREC.”

⁴ *Hughes v. Talen Energy Mktg.*, 136 S.Ct. 1288 (2016).

⁵ United States District Court, D. New Jersey. 977 F.Supp.2d 372 (D.N.J. 2013).

⁶ Walton, R. 2016. What the *Hughes v. Talen* Supreme Court decision means for state power incentives. Utility Dive. Available at: <https://www.utilitydive.com/news/what-the-hughes-v-talen-supreme-court-decision-means-for-state-power-incen/418046/>; Cicale, N and K. Osborne. 2016. U.S. Supreme Court blasts Maryland for distorting PJM’s capacity market. FERC Blog. Available at: <http://www.fercblog.com/2016/04/19/u-s-supreme-court-blasts-maryland-distorting-pjm-capacity-market/>; and Farmer, M. 2016. Why the Supreme Court’s decision in *Hughes* is good for clean energy. NRDC. Available at: <https://www.nrdc.org/experts/miles-farmer/why-supreme-courts-decision-hughes-good-clean-energy>.

Because it required CPV to participate and condition its price in the PJM market, the Supreme Court stated that the State of Maryland had overstepped and interfered with FERC's exclusive rights over wholesale rates.⁷

Exercising this authority, FERC has approved the PJM capacity auction as the sole rate setting mechanism for sales of capacity to PJM, and has deemed the clearing price *per se* just and reasonable. Doubting FERC's judgment, Maryland—through the contract for differences—requires CPV to participate in the PJM capacity auction, but guarantees CPV a rate distinct from the clearing price for its interstate sales of capacity to PJM. By adjusting an interstate wholesale rate, Maryland's program invades FERC's regulatory turf.

The "fatal defect" with the Maryland contracts was that the State conditioned the payment of funds on CPV's capacity clearing the auction.⁸ But the Court also noted that its holding is limited. The Court emphasized that Maryland's program was rejected because it disregards an interstate wholesale rate required by FERC. "So long as a State does not condition payment of funds on capacity clearing the auction, the State's program would not suffer from the fatal defect that renders Maryland's program unacceptable." The Court also emphasized that it need not and did not address other measures that may be used to encourage production of new or clean generation resources "untethered to a generator's wholesale market participation."⁹

In *PPL Energyplus* the Court addressed whether the New Jersey Long Term Capacity Pilot Project ("LCAPP") was constitutional. The LCAPP was a law enacted in 2011 with the support of the BPU to foster development of new natural gas generation and require utilities to enter into long-term contracts with chosen developers. Standard Offer Capacity Agreements or "SOCAs" would be issued to eligible generators, representing the difference between PJM capacity auction prices and actual generator development costs. The Court found the SOCAs to

⁷ *Hughes* at 1297.

⁸ *Hughes* at 1299.

⁹ *Hughes* at 1299.

be unconstitutional as they intruded on FERC's jurisdiction in establishing PJM capacity prices.¹⁰

The Staff straw proposal appears to run afoul of both the *Hughes* decision and the *PPL Energyplus* decision. Further discussion and analysis of this potential conflict needs to be addressed before any straw proposal utilizing wholesale markets as a crediting mechanism can be included as a component part of the rules facilitating New Jersey-based offshore wind development.

6. The OREC funding mechanism should be structured as a PPA

Rate Counsel recommends that Staff implement a "request for proposal" ("RFP") process to solicit offers for OSW capacity of a specified amount. A competitive RFP process results in least-cost, market-based pricing while supporting renewable energy and climate goals. It would also result in ratepayers receiving competitively-priced, low cost renewable energy.

A traditional bi-lateral contract or power purchase agreement ("PPA") has numerous economic benefits for both developers and ratepayers and payment is not tethered to the market. The PPA contract between the EDCs and an approved OSW project would be based on a fixed rate for all energy, capacity and environmental attributes (or ORECs) for the generation produced. This ensures a fixed and committed rate for ratepayers while also guaranteeing project developers a consistent revenue stream. For the developer, a signed PPA contract with credit-worthy utility would help facilitate project financing and completion. Without competitive pressure to ensure the lowest cost to ratepayers and a contract at a fixed non-variable

¹⁰ *Hanna, supra*, at 409. See also, Cassell, B. 2013. Federal court knocks down a second state generation law. Transmission Hub. Available at: <https://www.transmissionhub.com/articles/2013/10/federal-court-knocks-down-a-second-state-generation-law.html>; and Cannon, G. Federal court finds New Jersey's Long-Term Capacity Pilot Project Unconstitutional. Akin Gump. Available at: <https://www.akingump.com/en/experience/industries/energy/speaking-energy/federal-court-finds-new-jersey-s-long-term-capacity-pilot.html>.

rate, Rate Counsel does not believe that the projects will be able to demonstrate a net benefit to ratepayers.

As previously noted, in Massachusetts an RFP for OSW capacity was issued in June 2017. In total, 20 separate bids were submitted by the December 2017 deadline. The utilities stated that their RFP for OSW projects “resulted in a robust and sophisticated suite of proposals for offshore wind energy generation and associated transmission networks.”¹¹ A decision is expected by the end of May, 2018. In Connecticut, three OSW proposals were received in response to the DEEP RFP.¹² The bids were due in April 2018 and projection selections (if any) will be announced in June.¹³ Rate Counsel recommends that Staff consider moving to an auction/competitive bidding process that has the following characteristics:

- The Board would direct each EDC to support a target amount of offshore wind energy.
- EDCs would jointly conduct a Request for Proposal (“RFP”) process, overseen by a third-party administrator.
- Offshore wind developers would submit fixed 20-year bids for the ORECs generated by their projects. The OREC prices would reflect an “all-in” price for the construction, operation, maintenance, inter-connection, upgrades to the grid, and decommissioning of the OSW wind farm for the specified term of the program. This “all-in” price includes the price of energy, capacity and environmental attributes.
- EDC OREC contracts would be for the specific price and quantity offered in the bid, not a market clearing price. New Jersey ratepayers would contract for, and be assured to acquire all energy, capacity and environmental attributes from the contracted OSW project in return for their long-term financial support.
- There will be a BPU hearing process to evaluate the net benefits associated with winning OSW offers. The BPU will only approve contracts that have clear findings of net ratepayer benefits as required by OWEDA.

¹¹ Lilian, B. 2018. Massachusetts offshore wind project selection delayed. North American Wind Power. Available at: <https://nawindpower.com/massachusetts-offshore-wind-project-selection-delayed>.

¹² Proposals were received for three offshore wind farms, 20 fuel cell projects and four anaerobic digestion projects.

¹³ Lurye, R. Fuel cell, offshore wind projects under consideration by state. Hartford Courant. Available at: <http://www.courant.com/business/hc-biz-energy-generating-projects-20180420-story.html>.

- Rejected bids would not be allowed to participate (serve as supply sources) until the next RFP process.
- EDCs will be required to enter into long-term contracts with offshore wind energy developers only, not any other third party, for OSW projects located in New Jersey state waters, federal waters attributable to New Jersey, or other offshore locations that are in close proximity to New Jersey and are interconnected or contracted in such a way that New Jersey ratepayers will receive the energy, capacity and environmental attributes of the contracted OSW project.

7. Comments on the individual OREC items in the Staff Notice

The remainder of Rate Counsel's comments are offered in response to the Staff Straw Proposal's list of topics.

1. The Electric Distribution Companies (EDCs) shall act as payment agents, on behalf of suppliers, to efficiently direct OREC funding from ratepayers to OSW developers.

Comment: Rate Counsel is not opposed to using EDCs as the vehicle for collecting ratepayer financial contributions to OSW projects. However, Rate Counsel is concerned that the provisions that are in the Staff straw proposal are incomplete on how the mechanics of this process will work, and how those mechanics are supported by, or potentially run counter to, New Jersey and federal laws. Rate Counsel recommends that the Staff completely and thoroughly lay out the mechanics of its straw proposal in the next iteration of comments on this subject. Rate Counsel recommends that these mechanism be clearly laid out for stakeholders prior to any further public workshop or hearings on this matter.

More importantly, the contracting provisions associated with this proposed reimbursement scheme are not clear and potentially have important financial implications for EDCs since some rating agencies or other financial analysts could interpret this requirement as a liability, like a long term debt instrument, that will impact utility financial credit metrics and their bond ratings. The staff proposal does not address this and whether or not any debt imputation would be required or allowed and, if allowed, how this debt imputation amount would be determined and recovered from ratepayers.

2. EDCs shall make monthly OREC payments to the OSW developers based on the actual number of MWhs produced by the offshore wind project and consistent with the Board Approved OREC Allowance.

Comment: Rate counsel is unsure about the nature of these payments and the contractual nature to which these payments will be bound. The Staff straw proposal is unclear about "who" will be contracting with "whom" for "what" under this OSW/OREC arrangement.

3. An OREC Program Administrator shall be utilized by the EDCs to monitor and verify that OREC payments are correct, that the correct amount of PJM revenues are refunded to ratepayers, and to provide annual true-ups and verification of all obligations and payments.

Comment: The staff straw proposal needs to clarify (a) whether the EDCs will be required to use one, common administrator or if each utility will secure their own administrator (b) how the EDCs will secure an administrator such as through a competitive bid and (c) whether a EDC themselves can serve as administrator without using a third party.

4. The Board may direct the EDCs to enter into a joint contract to retain an OREC Program Administrator.

Comments: See Rate Counsel comments to (3) above.

5. Reasonable administrative costs related to an OREC Administrator and/or for acting as a payment agent shall be recoverable by the EDCs as pass-through charges.

Comment: Staff needs to define what is meant by “reasonable administrative costs.”

6. The Board shall establish an OSW carve-out for each OSW approved project to be expressed as a percentage of Supplier load, and which will count against the Suppliers’ and BGSPs’ Class I RPS obligation.
7. Any adjustments to the OSW carve-out shall be made three-years in advance of the applicable energy year.
8. The OREC Administrator shall assist the BPU in setting the appropriate OSW carve-out, expressed as a percentage of supplier load, and may periodically recommend adjusting the percentage as necessary to meet the OREC Allowance approved by the Board.
9. **Comment:** Rate Counsel wants to assure that the primarily responsibility for establishing these levels will rest with the BPU staff and that the OREC administrator is only providing technical assistance in determining these levels. The OSW project shall transfer the appropriate number of ORECs to each supplier for retirement in compliance with the Supplier’s RPS OSW obligation.

Comment: As Rate Counsel noted above in its general comments, the Staff straw proposal includes a number of cumbersome details that need to be streamlined in order to minimize administrative costs and reduce the regulatory risk that such structures are likely to impose on ratepayers. Rate Counsel recommends that Staff move to the use of a competitive bidding process and streamline the OREC payment mechanism through the use of a straightforward, fixed-price PPA. A competitively-bid PPA contract is the most efficient way to balance the interests of ratepayers and OSW developers since it provides the certainty developers need for financing purposes and the pricing stability ratepayers deserve from making renewable energy-based investments.

10. The OREC for each approved OSW project will reflect an “all-in” price for the construction, operation, maintenance, inter-connection, upgrades to the grid, and decommissioning of the OSW wind farm for the specified term of the program.

Comment: Rate Counsel agrees that the OREC price should reflect an “all-in” price for the construction, operation, maintenance, inter-connection, upgrades to the grid, and decommissioning of the OSW wind farm for the specified term of the program. This OREC price should be the agreed upon contract price in the form of a PPA between EDCs and an approved OSW project. Further, the “all-in” contract price should be fixed so that ratepayers receive the benefits of non-fossil generation. Rate Counsel does not support the use of revenue credits and other complicated schemes as “work arounds” design to get a “PPA-type” outcome that, in fact, really does not look like traditional PPAs.

Rate Counsel also believes that the Staff straw proposal needs to find a way in which the energy and capacity associated with any New Jersey OSW contract is secured for New Jersey ratepayers that will be bearing the risk associated with the project’s development. Lastly, Rate Counsel believes that the only way to assure that New Jersey is getting the best deal possible for an OSW project is through some form of competitive bidding process. Rate Counsel does not support the use of administrative-determined prices for New Jersey OSW contracts.

11. OREC Funding for each approved OSW project will be based on an initial 20 year term.

Comment: This proposal appears to be somewhat arbitrary and unsupported since the Staff has not indicated why a 20 year term is more appropriate than any other term. Rate Counsel notes, per our earlier comments, that some bids in the Massachusetts and Connecticut process were as short as 15 years. Generally, Rate Counsel supports letting the market decide the appropriate contract term. Rate Counsel believes that the Staff straw rule should subject these potential contracts to the market and rather than focus on a specific contract term, develop a methodology by which contracts will be evaluated on a net present value payment stream basis so that competitive bids of differing terms can be evaluated on an “apples-to-apples” basis.

12. The total OREC Allowance which reflects the total number of megawatt hours for which a qualified OSW Project is eligible to receive ORECs on an annual basis shall not be subject to reduction or modification during the term of each OREC, unless agreed upon by the parties.

Comment: Rate Counsel agrees that OREC eligibility should not be subject to modification in order to uphold the integrity of the contract with the OSW developer. However, there could be situations where non-performance could be grounds for changing the OREC allowance. Further, New Jersey ratepayers will be supporting this financial contribution/subsidy. Rate Counsel is uncertain about whether the Staff straw proposal guarantees OSW capacity and energy will be committed to New Jersey customers and if not, whether there should be reductions in OREC allowances to developers if they decide to sell their capacity and energy into more lucrative wholesale markets (structured or bilateral).

Rate Counsel envisions situations where this allowance could be reduced if the OSW developer decides to seek more lucrative markets for its output.

13. All PJM Revenues generated by an approved OSW Project will be returned to ratepayers, through the EDCs, to offset the cost of the OREC.

Comment: A This provision, as it is written, begs a number of questions about the specifics and mechanism of how an OSW contract will be developed that are simply not addressed in the Staff straw proposal. Rate Counsel is concerned about the entire PJM revenue credit process. First, the Staff straw proposal is not clear on whether it will (or even can) mandate that any OSW project receiving a contract will be required to make revenue credits to New Jersey ratepayers. Second, the Staff straw proposal is not clear about whether other revenue credits could be or should be, credited to New Jersey ratepayers such as potential bi-lateral sales of capacity and energy, or sales of capacity and energy to other RTOs/ISOs like New York. Third, there are clear state/federal jurisdictional issues here that are not addressed. Rate counsel is concerned about the extent to which New Jersey can require these revenue credits and the commitments of capacity and energy to New Jersey without a standard PPA. This appears to be tying the outcomes and payments of a state contractual obligation to a wholesale market that is governed by the FERC. Fourth, tying the contractual outcomes to wholesale markets will shift the risk associated with an OSW project away from developers and to ratepayers. In this example, OSW projects will always be made whole for market changes impacting their project economics and returns. Rate Counsel does not believe this degree of risk shifting is appropriate.

14. PJM revenues may be held by the OSW developer for up to 3 months for use by a qualified OSW project for some specific uses which may include: to address the lag time for OREC payment; to cover the full obligation until payment is made; or for purposes deemed necessary to ensure that the OSW project receives their full approved OREC revenues on a timely basis.

Comment: See Rate Counsel comments to Item 13. Further, this requirement appears somewhat arbitrary. Rate Counsel questions why a three month lag has been used as opposed to any other time period. Rate Counsel also questions the risk shifting nature of this proposal since it shifts cash flow risks away from OSW developers and onto New Jersey ratepayers and minimizes the incentives for OSW developers to mitigate cash flow issues with their project.

15. All PJM Revenues shall be independently verified.

Comment: Rate Counsel supports revenue verification but questions whether or not New Jersey can force this verification if the revenue credit process itself is not mandated or required. Further, Rate Counsel also suggests that if the revenue credit process is required, that part of this verification process be subjected to a prudence review: namely, that OSW projects assure they are appropriately seeking revenue generating opportunities, and the highest return opportunities, for generating offsetting revenue credits for New Jersey ratepayers.

16. Rules must address the potential scenario in which an OSW project experiences a period of insufficient OREC demand.

Comment: If the contract between EDCs and OSW projects were structured as a PPA, as recommended by Rate Counsel, this scenario of insufficient OREC demand should not be an issue. Further, Rate Counsel does not believe this condition would be required if a PPA is subjected to a competitive bidding process since those projects that can insulate and mitigate the financial implications associated with changing demand and will be more likely to offer competitive bids relative to other OSW developers. As a general matter, Rate Counsel does not believe that New Jersey ratepayers should be guaranteeing revenue stability, or completely insulating OSW projects from business risk, part of which includes fluctuations in electricity demand.

17. The Board will determine the terms and conditions for an entity to operate the wind farm following the initial OREC period for an OSW project.

Comment: Rate Counsel is unsure about the meaning of this provision. Staff needs to clarify this proposed provision. However, as a general matter, Rate Counsel is opposed to “re-entry” clauses in long term OSW contracts since allowing such provisions shift a considerable amount of regulatory risk away from OSW projects and developers onto ratepayers.