

ORDER NO. 89958

Skipjack Offshore Energy, LLC and US
Wind, Inc.’s Offshore Wind Applications
under the Clean Energy Jobs Act of 2019

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BEFORE THE
PUBLIC SERVICE COMMISSION
OF MARYLAND

CASE NO. 9666

Issue Date: October 6, 2021

Order Denying Motion to Disqualify

1. On September 9, 2021, Skipjack Offshore Energy, LLC (“Skipjack”), filed a Motion to Disqualify in Part US Wind, Inc.’s Application for a Proposed Offshore Wind Project (“Motion to Disqualify.”) For the reasons discussed below, the Motion to Disqualify is denied.

Background

2. On December 22, 2020, after a determination by the Commission’s independent consultant, ICF Resources, LLC (“ICF”), that a potential offshore wind application had been received and deemed administratively complete, the Commission issued a notice¹ commencing the Round 2, Year 1 Offshore Wind Application Period (“Application Period”). The notice was issued pursuant to the requirements of the Clean Energy Jobs

¹ Maillog No. 233058.

Act of 2019,² and opened a 180-day window during which other persons could submit offshore wind applications.³

3. At the close of the Application Period, ICF provided notice that five offshore wind bids were received by two entities – namely US Wind, Inc. (“US Wind”) and Skipjack. ICF determined that all five bids were administratively complete pursuant to COMAR 20.61.06.02, and that they all met the minimum threshold criteria provided in COMAR 20.61.06.03.5.

4. US Wind submitted three mutually exclusive bids for projects with commercial operation dates (“CODs”) of 2026, 2027, and 2028. Specifically, US Wind submitted: Bid 1, which proposes a 411.6 MW project with a COD of 2026; Bid 2, which proposes that 411.6 MW be built and commence operation in 2026, with a second tranche of 396.9 MW to be built and commence operation in 2027; and Bid 3, which proposes that 411.6 MW be built and commence operation in 2026, with a second tranche of 793.8 MW to be built and commence operation in 2028.

5. In its Motion to Disqualify, Skipjack argues that Bids 2 and 3 of US Wind’s application do not meet the statutory requirements of *Annotated Code of Maryland*, Public Utilities Article (“PUA”) § 7-704.1(a)(4)(i). That provision requires that offshore wind project proposals submitted during the Application Period for Round 2, Year 1 begin creating offshore wind renewable energy credits (“ORECs”) “not later than 2026.” Skipjack claims that in contravention of that requirement, the price schedules included in US Wind’s Bids 2 and 3 “will not begin creating ORECs until 2027 or later,” and fall

² The Clean Energy Jobs Act of 2019 directed the Commission to provide offshore wind application periods to facilitate the construction of at least 1,200 MW of Round 2 offshore wind projects. 2019 MD. Laws, Ch. 757.

³ The Application Period commenced on December 23, 2020 and concluded on June 21, 2021.

outside the scope of applications the Commission is permitted to consider during the Round 2, Year 1 Application Period.⁴

6. Skipjack argues that “[i]f the Legislature intended to allow the consideration of a project proposed in the Round 2, Year 1 application period to also include projects that were to be considered in the Round 2, Year 2 application period,” it would not have required separate application periods.⁵ Skipjack further contends that differences between the Round 1 requirements of the Offshore Wind Energy Act of 2013 and the Clean Energy Jobs Act of 2019 “demonstrate[s] a legislative intent to regulate the OREC application process in a way that places equal burdens on each developer to propose project plans that achieve OREC creation by the same date.”⁶

7. In its September 17, 2021 Response to Motion to Disqualify, US Wind argues that its application fits within the plain meaning of the statutory text, asserting that Bids 1, 2 and 3 each propose projects that would begin creating ORECs no later than 2026. Specifically, US Wind contends that each of the projects would begin creating 411.6 MW of ORECs by that date, with Bid 2 creating an additional 396.9 MW by 2027 and Bid 3 creating an additional 793.8 MW by 2028.⁷ US Wind argues that nothing in the statute requires that an applicant “create the entirety of their ORECs not later than 2026,” and that the plain meaning of the word “begin” is to commence, not to complete.⁸

8. US Wind further argues that the legislative intent of the statute supports its application, because “the intent of ...§ 7-704.1(a)(4) is to ensure that, by 2026, at least

⁴ Skipjack Motion to Disqualify at 1, 5.

⁵ *Id.* at 7.

⁶ *Id.* at 8.

⁷ US Wind Response to Motion to Disqualify at 2-3.

⁸ *Id.* at 3.

400 MW are put in operation ... and that there will be additional MWs in operation by 2028 and 2030.”⁹

9. Finally, US Wind argues that Skipjack’s Motion to Disqualify asks the Commission to perform a fact-finding function, because Skipjack has asked the Commission to consider factors outside the pleadings, such as legislative intent.¹⁰ US Wind claims a motion to dismiss that requires the deciding body to consider matters outside the pleadings is converted into a motion for summary judgment, and that such a motion cannot be granted at this stage of the proceeding, where there are disputes as to material issues of fact.

10. On September 22, 2021, Skipjack filed a Response to US Wind. On September 24, 2021, the Commission issued a Notice of Virtual Hearing on Motion to Disqualify, which was held on September 29, 2021.

Commission Decision

11. Both Skipjack and US Wind made arguments based on legislative intent in their respective briefs and during oral argument, raising issues that go beyond the pleadings. Therefore, the Motion to Disqualify is better considered as a motion for summary judgment. See *Advance Telecom Process LLC v DSFederal, Inc.*, 224 Md.App. 164, 175 (2015) (“[W]here matters outside of the allegations in the complaint and any exhibits incorporated in it are considered by the trial court, a motion to dismiss generally will be treated as one for summary judgment.”). However, the Commission has not had the opportunity to hear from witnesses, who are not scheduled to begin testifying until the evidentiary hearings commence on October 27, 2021. See *Antigua Condominium Assoc.*

⁹ *Id.* at 4.

¹⁰ *Id.* at 5, citing Skipjack Motion to Disqualify at 7-9.

v Melba Investors Atlantic, Inc., 307 Md. 700, 719 (1986) (In the event that a trial court decides to treat a motion as one for summary judgment, it must provide the parties with “a reasonable opportunity to present additional pertinent material”).

12. The Commission finds that it would be inappropriate to grant Skipjack’s Motion to Disqualify at this time. Skipjack’s Motion to Disqualify is therefore denied without prejudice. The parties may further address the factual and legal arguments raised in the Motion to Disqualify and responses during the October evidentiary hearings, and on brief, as appropriate.

IT IS THEREFORE, this 6th day of October, in the year Two Thousand Twenty One by the Public Service Commission of Maryland;

ORDERED: That the Motion to Disqualify of Skipjack Offshore Energy, LLC is denied without prejudice as provided herein.

By Direction of the Commission,

/s/ Andrew S. Johnston

Andrew S. Johnston
Executive Secretary