

ORDER NO. 89996

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: December 1, 2021

ORDER PRELIMINARILY GRANTING PETITION FOR CLARIFICATION

1. Before the Commission is the November 24, 2021 Petition for Clarification filed by US Wind, Inc. ("US Wind") relating to the contention by Skipjack Offshore Energy, LLC ("Skipjack") that US Wind failed to enter its initial Application and its best and final bid offer ("BAFO") into the evidentiary record in the above-captioned proceeding. Skipjack argues that because these documents were not entered into the evidentiary record, the Commission should not rely on them.¹

2. In response to Skipjack's contentions, US Wind claims that it believed its July 27, 2021 Application was already in the record because the filing of the Application initiated the docketing of Case No. 9666, and because the document was approved as administratively complete pursuant to COMAR 20.61.06.02 by ICF Mondre Energy,

¹ Skipjack Brief at 10, n. 47; and 46.

Inc. (“ICF”), the Commission’s independent consultant.² US Wind further claims that its BAFO was filed with the Commission and served on all parties on October 26, 2021,³ that its entire contents were discussed on the record by US Wind witnesses Grybowski and Repsher, and that the BAFO was fully evaluated by ICF.⁴ US Wind requests that the Commission confirm that these documents will be considered as part of the evidentiary record in this case.

3. In its November 24, 2021 response, Skipjack states that Public Utilities Article (“PUA”), *Annotated Code of Maryland*, § 3-111(b)(1) requires that any evidence that the Commission or a party in a proceeding before the Commission desires to use, “shall be offered and made part of the record.”

4. On November 30, 2021, Staff filed comments asserting that “it is always preferable when the Commission rules on the merits of any application, and that applications for OSW project are not dismissed or disregarded due to procedural deficiencies or conflicts.”⁵ Staff also stated that Maryland case law recognizes the authority of administrative agencies to reopen proceedings to take additional evidence, even after the record has closed, as long as there is compliance with procedural due process.⁶

² US Wind Petition for Clarification at 1. US Wind also argues that it is standard practice before the Commission not to introduce into the record expansive documents such as its Application, the confidential version of which is 1,500 pages, because to do so would require making multiple copies for parties and the Commissioners. The Commission observes that the appropriate response in such a situation would have been to request waiver of the requirement to make additional copies, rather than failing to enter the document into the record.

³ US Wind’s BAFO is dated October 26, 2021, but it was not entered into the Case No. 9666 docket until October 27, 2021.

⁴ US Wind Petition for Clarification at 2, citing Hr’g. Tr. at 468-70; 657-658.

⁵ Staff November 30, 2021 Comments Regarding the Petition for Clarification (“Staff Comments”) at 2.

⁶ Staff Comments at 3, citing Arnold Rochvarg, *Md. Admin. Law* (2nd ed., MICPEL 2007), pp. 74-75; and *Md. State Police v. Zeigler*, 330 Md. 540, 557, 625 A.2d 914 (1993).

5. The Commission agrees with US Wind that the filing of its Application (in addition to Skipjack's) triggered the docketing of this proceeding as well as all of the party filings and testimony in response thereto, and that it was reviewed by ICF and determined to be administratively complete.⁷ US Wind also correctly states that all of the contents of its BAFO were discussed by its witnesses during the evidentiary hearing and the contents of the BAFO are therefore part of the evidentiary record.⁸

6. Pursuant to PUA § 3-111(b)(1), US Wind should have moved to formally enter into the record its Application and BAFO.⁹ In this case, however, US Wind's failure to formally enter into the record its Application appears to be an oversight given that the *raison d'être* of this proceeding is the consideration of the Applicants' bids. During the hearing, all parties and the Commissioners discussed the Application, questioned the witnesses and ICF about it, and treated it as if it were in evidence.¹⁰ Indeed, the four-day hearing was devoted to evaluating the benefits and costs of, and comparing and contrasting, the US Wind Application and the Skipjack Application.¹¹

7. Given the clear direction of the General Assembly that the Commission evaluate and compare Round 2 offshore wind projects and approve those reasonable proposals

⁷ The Commission additionally observes that US Wind witness Repsher adopted all or a portion of US Wind's Application in his prefiled Direct Testimony. *See* Repsher Direct at 6, referring to "a detailed description of my analysis results, which are presented in the exhibits contained in Appendices 5.5.1 and 5.5.2 of US Wind's Application, which I incorporate into my testimony by reference."

⁸ The BAFO is, in essence, an amendment to US Wind's July 27, 2021 Application.

⁹ *See, In the Matter of the Arbitration of Rhythms Links, Inc. and Covad Communications Company v. Bell Atlantic-Maryland, Inc. Pursuant To Section 252(B) of the Telecommunications Act of 1996*, Case No. 8842, Phase II Order No. 77074 slip op. at 4 (Jun. 29, 2001).

¹⁰ The Commission finds inapposite Skipjack's reference (Skipjack Brief at 10, n. 47) to Order No. 89868, Case No. 9655, *Potomac Electric Power Company's Application for an Electric Multi-Year Rate Plan*. First, the language cited is from a dissenting statement rather than a Commission order. Second, in that proceeding, Pepco sought to have accepted into evidence thousands of pages of its pre-filing material in its Multi-Year Rate Plan that the parties had not discussed or addressed in any way.

¹¹ During the evidentiary hearing, US Wind called several witnesses to discuss various aspects of its Application, including Jeffrey Grybowski, Mark Repsher, Laurie Jodziewicz,, Matthew Filippelli, Scott Dehainaut, and Dr. Andrew Carr-Harris.

that demonstrate positive net economic, environmental, and health benefits to the State,¹² the Commission will preliminarily grant US Wind's Petition that its Application and BAFO be considered part of the evidentiary record in this case.

8. Nevertheless, the Commission notes that had US Wind moved its Application and BAFO into the record during the evidentiary hearing, parties would have had an opportunity to object. Therefore, at this juncture, the Commission shall treat US Wind's Petition for Clarification also as a request to reopen the record for purposes of offering its Application and BAFO into the evidentiary record. If any party has a good-faith, substantive objection to the admission into the record of US Wind's Application and BAFO, it may raise that objection within three days of the date of this Order and state the ground thereof, and the Commission will schedule a brief virtual hearing to address the objection. Otherwise, the Application and BAFO will be admitted into the evidentiary record.

IT IS THEREFORE, this 1st day of December, in the year Two Thousand Twenty One by the Public Service Commission of Maryland,

ORDERED that the Petition for Clarification of US Wind, Inc. is preliminarily granted, and will become final absent the filing of a substantive objection by a party to this proceeding.

By Direction of the Commission,

/s/ Andrew S. Johnston

Andrew S. Johnston
Executive Secretary

¹² See PUA § 7-704.1(e)(6)(ii).