

**UNITED STATES DISTRICT COURT  
DISTRICT OF MASSACHUSETTS**

SIEMENS GAMESA RENEWABLE ENERGY A/S,	)	
	)	
	)	
Plaintiff,	)	
	)	
v.	)	C.A. No. 1:21-cv-10216-WGY
	)	
GENERAL ELECTRIC CO.,	)	
	)	
Defendant.	)	
	)	

**AMICUS CURIAE BRIEF OF THE STATE OF NEW JERSEY**

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## IDENTITY AND INTEREST OF AMICUS CURIAE

Offshore wind energy is a critical component in New Jersey’s clean energy plan to address the impacts of climate change, sea level rise, and carbon-based emissions. After a competitive solicitation process organized under state law, in 2019, the New Jersey Board of Public Utilities selected a bid by Orsted North America Inc. (“Orsted”) to construct the first offshore wind energy generation facilities in New Jersey, and approved the issuance of offshore wind renewable energy certificates (“ORECs”), the costs of which will be paid for by New Jersey’s electric utility ratepayers, to compensate offshore wind developers. Additionally, New Jersey has spent over \$475 million in public monies to construct port infrastructure necessary to support the Ocean Wind project and the further development of the offshore wind industry in the waters off the coast of New Jersey. Once completed, the Ocean Wind project is anticipated to generate approximately 4,850,000 megawatt-hours of clean, renewable energy annually for 20 years, or enough to meet the annual electricity needs of roughly 500,000 households. The combined economic benefit of the project and port infrastructure is estimated to add in excess of \$500 million to New Jersey’s GDP each year.

In 2018, Governor Murphy signed Executive Order 8 directing the New Jersey Board of Public Utilities to fully implement the New Jersey Offshore Wind Economic Development Act, 2010 N.J. Laws 57, and to proceed with a solicitation of offshore wind generation as a step to meeting New Jersey’s goal of 7,500 MW of offshore wind by 2035. *See* Exec. Order No. 92 at ¶ 2 (2019); N.J. Stat. Ann. § 48:3-87(d)(4). Following a competitive bidding process, on June 21, 2019, the Board selected its first offshore wind project - the Ocean Wind 1,100 MW project. [\*In the Matter of the Board of Public Utilities Offshore Wind Solicitation for 1,100 MW—Evaluation of the Offshore Wind Applications\*](#), BPU Docket No. QO 18121289 (June 21, 2019). The selection set a commercial operation date for the project in phases, reflecting three phases of development

and completion, after which ORECs can be generated and sold. *Id.* at Attachment B. Based on these dates, the project phases were set for commercial operation on May 1, 2024, September 1, 2024, and December 1, 2024. The application and approval indicated which turbine formed the technical basis of the bid, but noted that it had not made a final turbine selection. On October 2, 2019, Orsted proposed the Haliade X 12 MW turbine to the Board, and it was subsequently approved by the Board on November 13, 2019. Since the November 2019 approval of the Haliade X, all steps along the design and permitting process for the Ocean Wind project, including the draft environmental impact statement issued by the Bureau of Ocean Energy Management (“BOEM”) on June 24, 2022, have contained the built-in assumption that the Haliade X turbine would be used for the project. The Haliade X also forms the basis for the multi-year process of studies necessary to prepare the electric grid to receive electricity from the Ocean Wind project. Construction of nacelles, the parts that house the generating component of an offshore wind turbine, is currently underway for the Ocean Wind project.

New Jersey submits this amicus brief in support of General Electric Company’s Opposition to Siemens Gamesa Renewable Energy A/S’s Motion for a Permanent Injunction because an injunction that fails to provide relief to the Ocean Wind project would make it impossible to complete the project in a timely fashion, causing irreparable harm to the State and its citizenry. Without relief, there will therefore be unavoidable effects to the State’s progress in pursuing clean energy alternatives through offshore wind energy.

### **ARGUMENT**

This Court should not enjoin the use of the Haliade-X turbines for the Ocean Wind project. As this Court is aware, there is no “rule that an injunction automatically follows a determination that a [patent] has been infringed.” *eBay v. MercExchange, LLC*, 547 U.S. 388, 392-93 (2006). To

obtain an injunction, a plaintiff must show it has suffered irreparable harm, that money damages are an inadequate remedy, that “the balance of hardships between the plaintiff and defendant” favor an injunction, and that “the public interest would not be disserved by permanent injunction.” *Id.* at 391. An injunction is a drastic remedy, and if a less drastic remedy is sufficient to redress a plaintiff’s injury, then “no recourse to the additional and extraordinary relief of an injunction [is] warranted.” *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 166 (2010).

SGRE cannot establish that the public interest is served by granting its requested injunction as to the Ocean Wind project. It is not enough for a plaintiff to argue, as SGRE does, that the public is best served by a robust system of patent enforcement; if that were how the analysis proceeded, the public interest factor would be rendered meaningless as it would weigh in favor of an injunction in nearly every instance. Instead, the public interest factor concerns whether an injunction, both in scope and effect, strikes a workable balance between protecting the patentee’s rights and protecting the public from the injunction’s adverse effects. *i4i Ltd. P’ship v. Microsoft Corp.*, 598 F.3d 831, 863 (Fed. Cir. 2010). Courts consider several factors including the type of patent involved, the impact on the market, the impact on the patent system, and any other factor that may impact the public at large. *MercExchange*, 500 F. Supp. 2d at 568.

In particular, “[d]irect effects on innocent third parties have frequently grounded courts’ denials of injunctions.” *SAS Inst., Inc. v. World Programming Ltd.*, 874 F.3d 370, 388 (4th Cir. 2017); *see also id.* (confirming that a “broad, abstract rule of law concern[]” is insufficient to defeat more concrete harms to innocent third parties). Courts have repeatedly exercised their discretion in crafting injunctive remedies to minimize the harm to the public and greater market. *See, e.g., i4i Ltd. P’Ship*, 598 F.3d at 863 (affirming the narrow scope of the lower court’s injunction and reasoning that a carve-out exempting users who purchased or licensed the infringing product

before the injunction's effective date minimized disruptions to the market and public); *J&M Indus., Inc. v. Raven Indus., Inc.*, No. 16-2723-JWB, 2021 WL 5769360, at \*12 (D. Kan. Dec. 6, 2021) (injunction applies prospectively from date of order). And where that innocent third party is a State, and the harm from the injunction would be interference with the State's implementation of its own laws, those concerns are only magnified. *Cf., e.g., Maryland v. King*, 133 S. Ct. 1, 3 (2012) (Roberts, C.J., in chambers) (emphasizing that a State is irreparably harmed anytime an injunction interference with implementation of its laws).

Considering those factors compels the conclusion that whatever the scope of the injunction in this case generally, this Court should exclude the Ocean Wind project from that remedy. The Ocean Wind project is a core component of New Jersey's efforts to effectuate its Offshore Wind Economic Development Act. Planning, permitting, and design activities have been underway for years, with the New Jersey Board of Public Utilities approving Orsted's selection of the GE turbine in 2019, nearly three full years before the jury verdict issued in this case. Changes in technology at this late date also risk requiring the project to restart its process for interconnecting the offshore wind farm to the electrical grid, which could add years onto the process and threaten the completion of the project. Furthermore, New Jersey has marshalled resources all across its executive branch in an effort to facilitate the development of port infrastructure to support offshore wind electricity generation and transmission of electricity onshore into New Jersey's grid, for the benefit of its nearly 9 million residents. And for years, New Jersey's efforts were based on the planned for and scheduled availability of the Haliade-X—as part of a contract between Orsted and GE. Although SGRE argues that no electricity is being provided to US customers via the GE turbine, SGRE ignores that building an installation is a costly, multi-year endeavor just on the design, planning and permitting side. New Jersey's interest in the Ocean Wind project, and in the

development of the offshore wind industry generally, cannot be so easily set aside in favor of a robust patent enforcement SGRE seeks, and from which it admits it derives no commercial benefit, as it does not practice or license the patent at issue.

In short, this is one of those cases in which the egg was scrambled for an innocent sovereign State—and a disruptive injunction, in place of traditional money damages, cannot be the proper remedy. The New Jersey Board of Public Utilities approved Orsted’s selection of the GE Haliade-X turbine years before the jury verdict here. Since that approval, all of the design and permitting activities have centered on an assumption that the Haliade-X turbine would be used in the Ocean Wind Project. Indeed, BOEM’s draft environmental impact statement, issued on June 24, 2022, and currently in public comment period, assumes not only that the project will use the Haliade-X turbine, but that Orsted will design and build wind arrays consistent with using the Haliade-X turbines. As the Jonathan Kennedy certification provides, the work to construct the port infrastructure to facilitate the construction of the Ocean Wind project is already underway, with a State investment in excess of \$475 million in public funds, and is currently generating jobs in an economically impoverished county. *See Kennedy Cert.* at ¶ 27.

New Jersey understands the “normal” delays often associated with major infrastructure projects. While the Ocean Wind project has not actually placed windmills in water, it has commenced construction of nacelles designed to accommodate the Haliade-X, and has proceeded apace with the schedule toward commercial operation. In addition, New Jersey’s executive branch agencies have taken proactive measures to support this initiative through economic development opportunities directly supporting offshore wind energy. Orsted has already explained to this Court



that any prohibition in the use of the Haliade-X will further delay<sup>1</sup> the Ocean Wind project, and in the State's view, will thus cause detrimental economic effects to New Jersey's nascent offshore wind construction and service industry. The delays associated with failure to provide relief for the Ocean Wind project may require revisiting fundamental approvals related to design, operating plans, and the currently pending draft environmental impact statement. A "return to square one" scenario is not in the public interest. Moreover, it will cause irreparable harm to the residents of New Jersey, who will be forced to source electricity needs from other sources, which may increase the Garden State's carbon emissions in the short term and imperil its greenhouse gas policy objectives in the long term in addition to thwarting the State's clean energy objectives. Any harm to SGRE attendant to the use of the Haliade-X turbines, as already approved by the New Jersey Board of Public Utilities years before the jury verdict in this case, can be redressed with damages, not by irreparably harming the State and its citizens.

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<sup>1</sup> Due its inability to secure a lease from BOEM during a moratorium on offshore wind leases imposed by the Trump Administration, on June 14, 2021, Orsted filed a petition with the Board seeking to extend the dates for commercial operation.. The Board has not taken action on the petition. But that fact does not mitigate the deleterious consequences that would be caused by further delay associated with an injunction pertaining to use of Haliade-X turbines.

## CONCLUSION

The State of New Jersey urges this Court to give significant weight to the negative effects on the public interest that a broad injunction would pose. There is a significant public benefit in constructing offshore wind energy farms. U.S. domestic policy supports the broad deployment of offshore wind electricity generation, and New Jersey has sought to develop offshore wind generation capacity for more than a decade. The public interest simply does not favor the broad injunctive relief sought by SGRE here, and the Court should exercise its discretion to provide relief as to the Ocean Wind project.

Respectfully Submitted,  
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Dated: August 15, 2022

**CERTIFICATE OF COMPLIANCE WITH LOCAL RULE 7.1**

I, George Cohen, hereby certify that on August 12, 2022, counsel for New Jersey conferred with counsel for the parties. Counsel for Defendant does not object to the motion. As of the time of filing, counsel for New Jersey have not received a definitive response from counsel for Plaintiff.

Dated: August 15, 2022

/s/ George N. Cohen

George N. Cohen

**CERTIFICATE OF SERVICE**

I hereby certify that this document filed through the ECF system will be sent electronically to the registered participants as identified on the Notice of Electronic Filing (NEF), and paper copies will be sent via mail to those indicated as non-registered participants on August 15, 2022.

Dated: August 15, 2022

/s/ George N. Cohen

George N. Cohen