



Agenda Date: 7/18/12
Agenda Item: 8E

STATE OF NEW JERSEY
Board of Public Utilities
44 South Clinton Avenue, 9th Floor
Post Office Box 350
Trenton, New Jersey 08625-0350
www.nj.gov/bpu/

CLEAN ENERGY

IN THE MATTER OF THE APPLICATION OF)
KDC SOLAR, LLC FOR DECLARATORY RELIEF)
PURSUANT TO N.J.S.A. 52:14B-8)
)
)
) ORDER APPROVING
SETTLEMENT

) DOCKET NO. EO12030209V

Parties of Record:

Stephen J. Humes, Esq., Holland & Knight, admitted pro hac vice, on behalf of KDC Solar LLC, and **Keith E. Lynott, Esq.**, (McCarter English, LLP)
Stefanie A. Brand, Director, New Jersey Division of Rate Counsel
Gregory Eisenstark, Esq., Morgan, Lewis & Bockius, LLP, on behalf of Jersey Central Power and Light Company

BY THE BOARD¹:

This matter comes before the Board of Public Utilities ("Board") on a petition by KDC Solar LLC ("KDC Solar"), a New Jersey-based solar energy developer. On March 6, 2012, KDC Solar filed a petition for a declaratory ruling that a 11 MW solar photovoltaic facility (the "Facility" or "Project") to be installed on Kirby Farm in Bedminster, New Jersey will qualify under Electric Discount and Energy Competition Act, N.J.S.A. 48:3-49 et seq. ("EDECA"), as amended, as an "on-site generation facility" for Sanofi-Aventis US, Inc., a single end user located at 55 Corporate Drive in Bridgewater, New Jersey (the "Sanofi Campus"). KDC Solar also seeks a ruling that the Project will be deemed "behind-the-meter" and therefore eligible for the benefits of net-metered facility.

The proposed 11 MW Facility is intended to meet most of the electricity needs of the Sanofi Campus. The Sanofi Campus is separated from Kirby Farm by U.S Route 287. According to the petition, "[a] public road, Country Club Road, bisects Kirby Farm and divides the farm into two immediately adjacent parcels, Kirby-West and Kirby-East. . . . Kirby-East (east of Country Club Road) is the parcel of Kirby Farm that is closer to U.S. Route 287 and consequently closer to Sanofi than Kirby-West (west of Country Club Road). Both parcels comprising the Kirby Farm are owned by the same owner and have been so owned for decades." Petition at paragraph 13.

¹ Commissioner Joseph L. Fiordaliso did not participate.

By Order dated April 12, 2012, the Board retained jurisdiction over this matter and appointed Commissioner Fox as the hearing officer. The Board authorized the hearing officer to decide upon motions that arise during this proceeding, to set and modify the schedule for this matter, and to otherwise control the conduct of this case, without the need for full Board approval, subject to subsequent Board ratification.

On May 8, 2012, the hearing officer granted Jersey Central Power & Light's ("JCP&L") motion to intervene in this proceeding. On May 10, 2012, the hearing officer approved a pre-hearing schedule, which was formalized in an Order dated June 14, 2012. The hearing officer also granted the motion of Steven Humes, Esq. to appear on behalf of petitioner pro hac vice.

The parties engaged in discovery and settlement discussions. On June 8, 2012, KDC Solar, Board Staff, and the Division of Rate Counsel ("Rate Counsel") executed a stipulation, which was filed with the Board ("Settlement Agreement"). The Settlement Agreement is attached hereto as Exhibit A.

The Settlement Agreement provides, in pertinent part:²

- The portions of Kirby Farm on the west side of Country Club Road ("Kirby West") and east side of Country Club Road ("Kirby East") have been under common ownership since at least 1944. The property was conveyed as one undivided parcel by deed dated March 17, 1944 to John F. and Mabelle V. Stephenson ("Stephensons"). By Deed dated March 30, 1965 the Stephensons conveyed and granted the Township of Bedminster a right of way for Country Club Road for its current location. By Deed dated February 1, 1977 the Stephensons conveyed to Fred M. Kirby, II ("Kirby") the entire property comprising Kirby East and Kirby West, except for Country Club Road. The Estate of Fred M. Kirby, II owns this property today and its Executors will enter a Ground Lease Agreement with KDC Solar to permit construction, operation and maintenance of the Facility on the Kirby Farm to serve the Sanofi Campus.
- The Facility will be constructed and installed with an electrical connection directly to the Sanofi electric system behind the existing JCP&L meter serving the Sanofi Campus.
- The Facility will not provide electricity service to any end user other than Sanofi (or any successor to Sanofi) or to any location other than the Bridgewater campus of Sanofi located at 55 Corporate Drive, Bridgewater, New Jersey. KDC Solar shall not construct or operate another facility on property adjacent or contiguous to the Kirby Farm.
- The Facility will be designed to provide kWhs equal to or less than Sanofi's total current consumption on an annual basis.

² Although summarized at some length in this Order, should there be any conflict between this summary and the Settlement Agreement, the terms of the Settlement Agreement control, subject to the findings and conclusion in this Order.

- KDC Solar will bear the entire cost of system upgrades required by JCP&L and subsequent designs will not change the basic feature that the Facility will be constructed and installed with an electrical connection directly to the Sanofi electric system behind the existing JCP&L meter serving only the Sanofi Campus.
- The Settling Parties stipulate and agree, solely for purposes of resolving this matter, that given the specific factual characteristics of the Project described herein and in the Petition, the relief sought in the Petition should be granted and the energy generated by the Facility will be credited against the electric usage of Sanofi Campus as described above, notwithstanding the presence of Rt. 287 and Country Club Road. The Settling Parties agree that these specific facts are not expected to be replicated in other sites in New Jersey and, based on these specific facts, have agreed to enter into this Stipulation.
- In constructing any of the Project's facilities to be installed in a public right-of-way, such as the transmission line underneath Rt. 287, KDC Solar shall ensure that the requirements of New Jersey's Underground Facility Protection Act, N.J.S.A. 48:2-73 et seq., and the Board's rules promulgated thereunder are satisfied. The necessary mark-outs and other activities shall be performed by a company authorized to install utility infrastructure in public rights-of-way. KDC Solar shall be responsible for maintaining the safety and reliability of these facilities, in accordance with all applicable laws and regulations, for the entire life of the Project.

JCP&L did not execute the Settlement Agreement, but submitted comments to the Board for consideration on June 15, 2012. JCP&L asserts that the Project does not qualify for net metering and that sections of EDECA related to on-site generation are irrelevant to the Board's analysis of whether the Project qualifies for net metering. In addition, JCP&L asserts that even if the Board finds the definition of "on-site generation" relevant, the Project does not qualify for net metering because it is not on a property "contiguous" to the Sanofi Campus. Last, the utility encourages the Board to reserve action in this matter until the Chapter 8 rule readoption, including new rules and amendments which might be applicable to this matter, is complete.

On July 3, 2012, KDC Solar submitted a letter in response to JCP&L's comments. The Petitioner reiterated its argument that the site of the Project was contiguous to the property of the customer and that net metering treatment was therefore appropriate.

DISCUSSION AND FINDINGS

As a threshold matter, the Board notes that this matter arises out of a request for a declaratory ruling.³ The Board, in its discretion, may render a declaratory ruling which binds the agency and the parties to the proceedings on the facts alleged, but only after the interested parties have been afforded full opportunity for hearing. KDC Solar, Rate Counsel, JCP&L, and the staff of the Board's Office of Clean Energy have agreed that there are no facts in dispute; thus, a hearing is not required. The Board **HEREBY FINDS** that it has sufficient information to

³ Declaratory rulings are governed by N.J.S.A. 52:14B-8.

proceed, and will make its determination on the basis of the facts as set forth in the petition and the applicable Board rules and policies.

KDC Solar's petition, cites two questions for the Board's consideration, namely, whether Kirby Farm is "contiguous" to the Sanofi Campus within the meaning of "on-site generation," and whether the Project should be considered "behind the meter" and therefore eligible for net metering. Although KDC requests a ruling on the definition of "contiguous," it has indicated that treatment as a "behind the meter" facility is "crucial to the viability and success of the [P]roject." Petition at paragraph 8:

Through the Settlement Agreement, the settling parties agreed that, subject to Board approval, the Project may operate as a net metered facility. Pursuant to N.J.A.C. 14:8-4.3(a) a customer that generates electricity on the customer's side of the meter may qualify for net metering "provided that the generating capacity of the customer-generator's facility does not exceed the amount of electricity supplied by the electric power supplier or basic generation service provider to the customer over an annualized period that the customer-generator selects" Consistent with this provision, KDC Solar has represented that the energy will be transported from the customer-generator facility to the Sanofi Campus using wires and/or other equipment behind the existing JCP&L meter. Additionally, the Facility will supply most of the electricity needs of the Sanofi Campus, and Sanofi Campus will be the only end-user of such energy. KDC Solar has also agreed to bear the entire cost of system upgrades, and will ensure that the requirements of New Jersey's Underground Facility Protection Act, N.J.S.A. 48:2-73 et seq. and other applicable laws and regulations are satisfied. Therefore, the Board **HEREBY FINDS** that based on the particular facts and circumstances of this case, the Settlement Agreement is consistent with Board policy, and if the Facility is built as described, shall be governed by the relevant provisions of N.J.A.C. 14:8-4 and 14:8-5.

The Settlement Agreement is silent on the issue of whether the Project constitutes an "on-site generation facility." Rather the signatories to the agreement have disposed of the issue by agreeing that the stipulation "resolves the issues presented in the above-referenced Petition in Docket No. E012030209V." The Board, therefore, **FINDS** that the Settlement Agreement represents a resolution of all the relevant contested issues. Therefore, the Board need not reach the question of whether the Project meets the definition of "on-site generation."

The Board is cognizant that the Settlement Agreement is not unanimous. Part of JCP&L's objection relates to uncertainty about how the Chapter 8 rule readoption would handle amendments to the net metering and interconnection rules. Notably, the Board had not approved a rule proposal at the time the parties executed the Settlement Agreement on June 8, 2012. However, on June 18, 2012, the Board approved a rule proposal, which includes, among other things, criteria for determining whether class 1 renewable energy should be deemed to be generated on the customer's side of the meter. The rule proposal also includes several amendments to N.J.A.C. 14:8-4.2, the net metering definitions. Although the rule proposal is still in the public comment period and has no binding effect, it illustrates the Board's current policy position on the issues embodied in the proposal.

Therefore, based on the facts and circumstances particular to this matter, the Board **FINDS**:

1. The parties have negotiated a settlement that resolves all contested issues in this case. The Settlement Agreement represents the entire agreement between the Parties.

2. The parties agreed to the settlement to amicably resolve the disputed matter without the necessity and expense of further litigation and in consideration of the promises and mutual obligations set forth in the Settlement Agreement.
3. The parties entered into the Settlement Agreement voluntarily, as evidenced by their signatures or representatives.
4. The Settlement Agreement is consistent with the law.


Accordingly, the Board **HEREBY APPROVES** the Settlement Agreement executed by the parties in its entirety. The Board's decision is limited to the instant matter and shall have no precedential value in future proceedings involving these or any other party.

The parties are further advised that this opinion is limited specifically to the facts presented and that changing conditions, including any expansion of service or substantial variance in the proposed construction of the Facility, should be reported immediately to the Board, and could subsequently lead to the modification of the Board's opinion as expressed in this Order.

DATED: 7/18/12

BOARD OF PUBLIC UTILITIES
BY:


ROBERT M. HANNA
PRESIDENT


JEANNE M. FOX
COMMISSIONER

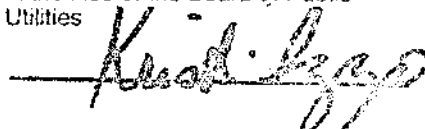

NICHOLAS ASSELTA
COMMISSIONER


MARY-ANNA HOLDEN
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 APPLICATION OF KDC SOLAR, LLC
FOR DECLARATORY RELIEF PURSUANT TO N.J.S.A. 52:14B-8
DOCKET NO. EO12030209V
SERVICE LIST

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June 8, 2012

Via Fax: 609-777-3348

Kristi Izzo
Secretary of the Board
44 South Clinton Avenue
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Re: In the Matter of the Application of KDC Solar LLC for Declaratory Relief Pursuant
to N.J.S.A. 52:14B-8 - Docket No. E012030209V - Stipulation of Settlement

Dear Secretary Izzo:

KDC Solar LLC, the Division of Rate Counsel and the Office of the Attorney General in the above-referenced matter, respectfully file herewith their Stipulation of Settlement in the above-referenced matter.

A hard copy of the Stipulation of Settlement with original signatures will follow.

Please do not hesitate to contact me if you have any questions regarding this filing.

Respectfully submitted,



Stephen J. Humes

Enclosure

cc: Service List for Docket No: E012030209V - attached - By e-mail

SERVICE LIST

In the Matter of the Application of
KDC Solar LLC for Declaratory
Relief Pursuant to N.J.S.A. 52:14B-8

BPU Dkt. No. EO12030209V

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STATE OF NEW JERSEY

BOARD OF PUBLIC UTILITIES

In the Matter of the Application : **Docket No. E012030209V**
of KDC Solar LLC for :
Declaratory Relief Pursuant to : **June 8, 2012**
N.J.S.A. 52:14B-8 :

Stipulation of Settlement

To the Honorable Board of Public Utilities:

Appearances:

Keith E. Lynott, Esq. (McCarter & English, attorneys) for the Petitioner, KDC Solar LLC

Stephen J. Humes, Esq. (Holland & Knight, admitted pro hac vice) for the Petitioner, KDC Solar LLC

Felicia Thomas-Friel, Esq., Paul Flanagan, Esq. and Kurt S. Lewandowski, Esq., Division of Rate Counsel
(**Stefanie A. Brand, Esq.**, Director)

Jennifer Hsia, Esq., Deputy Attorney General, for the Staff of the New Jersey Board of Public Utilities (**Jeffrey S. Chiesa, Attorney General of New Jersey**)

The undersigned parties respectfully request the New Jersey Board of Public Utilities ("Board" or "BPU") to consider at its next available Board Agenda Meeting the following Stipulation by and among KDC Solar LLC ("KDC" "KDC Solar"), Division of Rate Counsel ("Rate Counsel") and Board Staff, by which the parties to the Stipulation have agreed, among other things, to resolve the issues presented in the above-referenced Petition in Docket No. E012030209V (the "Petition"). Intervenor Jersey Central Power and Light Company ("JCP&L") has not joined in this Stipulation. (Collectively, KDC, Rate Counsel and Board Staff are referred to in this Stipulation as the "Settling Parties;" collectively, the Settling Parties and JCP&L shall be referred to herein as the "Parties.")

Procedural Background

On March 6, 2012, KDC filed a Petition for a declaratory ruling that a solar photovoltaic facility (the "Facility" or "Project") to be installed on two parcels of land located on either side of Country Club Road in Bedminster, New Jersey (the "Kirby Farm"), will qualify under Electric Discount and Energy Competition Act, N.J.S.A. 48:3-49 et seq. ("EDECA"), as amended, as an "on-site generation facility" for a single end user, may supply energy to a single end user, Sanofi-Aventis US, Inc., located on 55 Corporate Drive in Bridgewater, New Jersey (the "Sanofi Campus"), and have the energy netted against the usage on the Sanofi Campus. The Sanofi Campus is separated from the two parcels comprising the Kirby Farm by US Rt. 287. KDC asserts in its Petition that the generation facility on Kirby Farm should be considered "behind-the-meter" and thus eligible for all the benefits of treatment as a net-metered facility. The proposed Facility would be approximately 11 MW in size and is intended to meet most of the electricity needs of the Sanofi Campus.

By Order dated April 12, 2012, the Board determined that this matter should be retained by the Board for review and hearing and, as authorized by N.J.S.A. 48:2-32, designated Commissioner Jeanne M. Fox as the presiding officer who is authorized to rule on all motions that arise during the proceeding and modify any schedule that may be set as necessary to secure a just and expeditious determination of the issues.

JCP&L filed a petition to intervene in this matter, which petition was granted by Board Order on May 8, 2012. No party filed in opposition to KDC's Petition.

On May 10, 2012, Commissioner Fox approved a schedule for this docket pursuant to which the parties would engage in briefing of the legal issues presented and oral argument after which the Board would render a decision on this contested case proceeding.

Thereafter, the Parties exchanged discovery (the "Discovery") and engaged in a number of meetings and discussions to review outstanding issues and explore settlement. As a result of those meetings and related settlement discussions prior to the schedule for briefing and oral argument, the Settling Parties, solely in order to resolve the issues presented in the Petition without litigation, have agreed to the following Stipulation.

Stipulation

1. There are no issues of fact in dispute. The Settling Parties are relying on the relevant factual statements set forth in the Petition as fundamental reasons for their agreement to enter into the Stipulation. Notwithstanding the generality of the foregoing, the specific material facts relied on by the Settling Parties herein are as follows:
 - a. The portions of Kirby Farm on the west side of Country Club Road ("Kirby West") and east side of Country Club Road ("Kirby East") have been under common ownership since at least 1944. The property was conveyed as one undivided parcel by deed dated March 17, 1944 to John F. and Mabelle V. Stephenson ("Stephensons"). The 1944 Deed makes no reference to Country Club Road and relates to the entire property comprising Kirby East and Kirby West. By Deed dated March 30, 1965 the Stephensons conveyed and granted the Township of Bedminster a right of way for Country Club Road for its current location. By Deed dated February 1, 1977 the Stephensons conveyed to Fred M. Kirby, II ("Kirby") the entire property comprising Kirby East and Kirby West, except for Country Club Road. The Estate of Fred M. Kirby, II owns this property today and its Executors will enter a Ground Lease Agreement with KDC Solar to permit construction, operation and maintenance of the Facility on the Kirby Farm to serve the Sanofi Campus.
 - b. The Facility will be constructed and installed with an electrical connection directly to the Sanofi electric system behind the existing JCP&L meter serving the Sanofi Campus.
 - c. The Facility will not provide electricity service to any end user other than Sanofi (or any successor to Sanofi) or to any location other than the Bridgewater campus of Sanofi located at 55 Corporate Drive, Bridgewater, New Jersey. KDC Solar shall not construct or operate another facility on property adjacent or contiguous to the Kirby Farm.
 - d. The Facility will be designed to provide kWhs equal to or less than Sanofi's total current consumption on an annual basis.
2. JCP&L has not yet conducted a system impact study or determined the nature or extent of any changes to utility infrastructure that are necessary to accommodate the project. KDC Solar expects these and other matters relating to the Project will be addressed in due course following disposition of the Petition, which seeks a threshold legal determination that is not in any way dependent upon the specific engineering details of the Project. KDC Solar will bear the entire cost of system upgrades required by JCP&L and subsequent designs will not change the basic feature that the Facility will be constructed and installed with an electrical connection directly to the Sanofi electric system behind the existing JCP&L meter serving only the Sanofi Campus.
3. The Settling Parties stipulate and agree, solely for purposes of resolving this matter, that given the specific factual characteristics of the Project described herein and in the Petition, the relief sought in the Petition should be granted and the energy generated by the Facility will be credited against the electric usage of

Sanofi Campus pursuant to NJAC 14:8-4 and 5, notwithstanding the presence of Rt. 287 and Country Club Road. The Settling Parties agree that these specific facts are not expected to be replicated in other sites in New Jersey and, based on these specific facts, have agreed to enter into this Stipulation.

4. The parties recognize that the Project is a substantial one, involving very significant, long term financial and other commitments by KDC, Sanofi, a third-party financing source and other parties. In the circumstances presented, these parties are not able or willing to make these significant commitments, unless the Board issues a Final Decision and Order approving this Stipulation. The parties enter the Stipulation solely for purposes of facilitating the construction and operation of this Project.
5. In constructing any of the Project's facilities to be installed in a public right-of-way, such as the transmission line underneath Rt. 287, KDC Solar shall ensure that the requirements of New Jersey's Underground Facility Protection Act, N.J.S.A. 48:2-73 et seq., and the Board's rules promulgated thereunder are satisfied. The necessary mark-outs and other activities shall be performed by a company authorized to install utility infrastructure in public rights-of-way. KDC Solar shall be responsible for maintaining the safety and reliability of these facilities, in accordance with all applicable laws and regulations, for the entire life of the Project.
6. The Settling Parties agree that upon approval of this Stipulation by the Board, KDC Solar and Sanofi will be subject to and have the benefits of the rules and regulations regarding interconnection of the Facility to JCP&L's system pursuant to NJAC 14:8-4 and 5.
7. The Settling Parties further acknowledge that any resolution of any issue agreed to in this Stipulation, shall become effective upon service of the Board Order on all parties of record unless a later date is indicated in the Order.

Conclusion

8. The Settling Parties agree that this Stipulation shall be binding on them for all purposes herein.
9. It is specifically understood and agreed that this Stipulation is entered solely in order to effect a settlement of this contested case. The contents of this Stipulation shall not be in any way considered, cited or otherwise used by any of the undersigned Settling Parties as evidence of any Settling Party's position as to any other project or any related or other issue litigated in any other proceeding or forum, except as necessary to enforce the terms of this Stipulation. This Stipulation shall have no precedential effect for Third Parties.
10. The Settling Parties agree that this Stipulation is intended to be accepted and approved in its entirety. In the event any particular provision of this Stipulation is not accepted and approved in its entirety by the Board, or is modified by a court of competent jurisdiction, then any Settling Party aggrieved thereby shall not be bound to proceed with this Stipulation and shall have the right, upon written notice to be provided to all Parties within ten (10) days after receipt of any such adverse decision, to litigate all issues addressed in the Petition or herein to a conclusion. More particularly, in the event this Stipulation is not adopted in its entirety by the Board in an appropriate Order, or is modified by a court of competent jurisdiction, then any Settling Party hereto is free, upon the timely provision of such written notice, to pursue its then available legal remedies with respect to all issues addressed in the Petition or this Stipulation, as though this Stipulation had not been executed.
11. This Stipulation may be executed in any number of counterparts, each of which shall be considered one and the same agreement, and shall become effective when one or more counterparts have been signed by each of the Settling Parties.

WHEREFORE, the Settling Parties hereto have duly executed and do respectfully submit this Stipulation to the Board, and recommend that the Board issue a Final Decision and Order adopting and approving this Stipulation in its entirety in accordance with the terms hereof.

KDC SOLAR LLC

By: _____
Matthew E. Kamine
Vice President

Dated: _____

JEFFREY S. CHIESA
ATTORNEY GENERAL OF NEW JERSEY
ATTORNEY FOR THE STAFF OF THE
NEW JERSEY BOARD OF PUBLIC UTILITIES

By: _____
Jennifer S. Hsia
Deputy Attorney General

Dated: _____

STEFANIE A. BRAND, ESQ.
Director, Division of Rate Counsel

By: _____
Felicia Thomas-Friel, Esq.
Deputy Rate Counsel

Dated: _____