



Agenda Date: 7/19/13
Agenda Item: 8D

STATE OF NEW JERSEY
Board of Public Utilities
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CLEAN ENERGY

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|------------------------------------------------|---|---------------------------|
| |) | ORDER |
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| IN THE MATTER OF THE IMPLEMENTATION OF L. |) | |
| 2012, C. 24, THE SOLAR ACT OF 2012 |) | DOCKET NO. EO12090832V |
| |) | |
| IN THE MATTER OF THE IMPLEMENTATION OF L. |) | |
| 2012, C. 24 (Q)(R)(S) PROCEEDINGS TO ESTABLISH |) | |
| THE PROCESSES FOR DESIGNATING CERTAIN |) | |
| GRID SUPPLY PROJECTS AS CONNECTED TO THE |) | |
| DISTRIBUTION SYSTEM – REQUEST FOR |) | |
| APPROVAL OF GRID SUPPLY SOLAR ELECTRIC |) | |
| POWER GENERATION PURSUANT TO SUBSECTION |) | DOCKET NO. EO12090880V |
| (S) |) | |
| |) | |
| MORRIS COUNTY IMPROVEMENT AUTHORITY AND |) | DOCKET NOs. EO12121089V - |
| SOMERSET COUNTY IMPROVEMENT AUTHORITY |) | EO12121144V and |
| MOTION FOR RECONSIDERATION |) | EO13040331V |

Party of Record:

Stephen B. Pearlman, Esq., on behalf of the Morris County Improvement Authority and the Somerset County Improvement Authority

BY THE BOARD:

The Morris County Improvement Authority and the Somerset County Improvement Authority (the "IAs") have moved for reconsideration of the Board's Orders in the above-captioned matters, issued May 8, 2013 and May 10, 2013 ("May 8 Order" and "May 10 Order") arguing that the Board used the wrong legal standard when determining whether applicants should be approved as "connected to the distribution system" pursuant to L. 2012, c. 24, sec. 3 ("Solar Act"), codified as N.J.S.A. 48:3-87 (s) ("Subsection s").

BACKGROUND

As described in more detail in the May 8 and May 10 Orders, the Solar Act, a bi-partisan effort to stabilize the solar market, was signed into law by Governor Chris Christie on July 23, 2012,

and took effect immediately. The law amends N.J.S.A. 48:3-51 and N.J.S.A. 48:3-87, provisions of the Electric Discount and Energy Competition Act ("EDECA"), which requires, among other things, that retail sellers of electricity comply with the State's renewable portfolio standards ("RPS"). The RPS encourage the production of renewable energy.

Prior to the Solar Act, whether solar generated electricity could be the basis for an Solar renewable energy Certificates (SRECs) usable for RPS compliance depended on meeting the requirements of N.J.A.C. 14:8-2, including but not limited to pre-registration through N.J.A.C. 14:8-2.4, which is commonly referred to as the SREC Registration Program ("SRP"). One of the RPS requirements is that the energy be generated at a facility issued a Certification Number through the Board's registration process. See N.J.A.C. 14:8-2.4(a). The registration process includes an application and review process to determine whether a solar facility meets SREC eligibility requirements. N.J.A.C. 14:8-2.4(f). After review is completed, and provided that SREC eligibility requirements are satisfied, the facility is issued a conditional registration. The notice of conditional registration, also known as the SRP acceptance letter, which includes an expiration date twelve months from its issuance, states that if the solar facility is constructed, which meets all program eligibility requirements including compliance with all federal, state, and local laws, a Certification Number will be issued for the solar facility upon completion of construction, submission of a final as-built package, and inspection. N.J.A.C. 14:8-2.4(f)(4)(i) and (ii).

Following conditional registration, construction of the solar facility could begin, and the facility must be completed prior to the registration expiration date, although one extension is allowed. See N.J.A.C. 14:8-2.4(f)(5) and (g). It is not until after the facility owner submits a post-construction certification package that includes a copy of the approval from either the relevant electric distribution company ("EDC") or PJM Interconnection, L.L.C. ("PJM") to interconnect and energize the facility, and after inspection of the facility or waiver of inspection per N.J.A.C. 14:8-2.4(i) and (k), that a Certification Number is assigned to the facility for use in obtaining SRECs from PJM-Environmental Information Services Generation Attribute Tracking System ("PJM-EIS GATS"). N.J.A.C. 14:8-2.4(l). See N.J.A.C. 14:8-2.2 (definition of "Generation Attribute Tracking System").

The Solar Act adds requirements that are not in the SRP for Board approval or designation of certain projects as being "connected to the distribution system" in order to earn SRECs. Subsection s applies to land actively devoted to agricultural or horticultural use that is valued, assessed, and taxed pursuant to the Farmland Assessment Act of 1964, N.J.S.A. 54:4-23.1 to - 23.24, at any time within the 10 year period prior to the effective date of the Solar Act ("farmland"). Under Subsection s, a solar electric power generation facility on qualifying farmland that is not net-metered or an onsite generation facility (that is, the electricity is not being used to satisfy the electrical needs of structures on or adjacent to the land where the solar facility is located) is subject to a review process by the Board to determine whether the proposed project should be approved as connected to the distribution system and therefore eligible to earn SRECs. N.J.S.A. 48:3-87(s)(2). This is incremental to satisfaction of the Board's SREC Registration Program ("SRP") process.

After notice, a public hearing, and opportunity for oral and written comments, on November 30, 2012, Board Staff distributed the Subsection s(2) application via mass email distribution to renewable energy stakeholders, and posted the application form on its webpage and on the webpage of the New Jersey Clean Energy Program. Any company applying for eligibility for SRECs under N.J.S.A. 48:3-87(s)(2) was required to submit a completed application package

by December 17, 2012. The application required responding to twenty-seven questions, all, as noted in the May 10 Order "designed specifically to aid Staff in making a recommendation to the Board as to which proposed projects should be approved[.]" May 10 Order at 12-14.

As noted in the May 10 Order, Staff reviewed a total of fifty-seven applications and ranked them according to the extent of each application's progress toward completion.¹ The goal was to use the most objective standard possible—progress toward construction completion. The key criteria utilized by Staff to judge project progress included the application submissions regarding project completion status, anticipated completion date, pictures of any completed construction, and percentage of funding expended. Based on these criteria and on its field inspections of the twelve projects which Staff determined were most advanced on the basis of the criteria, Staff recommended for approval and the Board approved three applications. In re the Implementation of L. 2012, c. 24, N.J.S.A. 48:3-87(q)(r)(s), Proceedings to Establish the Processes for Designating Certain Grid-Supply Projects as Connected to the Distribution System, Approval of Application for SunPerfect, Inc., W1-132, Approval of Application for OCI Solar Power, LLC, W1-112, Approval of Application for NJ Clean Energy Ventures, W2-056, Dkt Nos. EO12090880V, EO12121101V, EO12121106V, EO12121142V (May 8, 2013).

Staff also considered whether a project had obtained all final, non-appealable local, state, and federal approvals and permits. Question number two on the application asked explicitly whether approvals had been obtained and read as follows:

Have all final unappealable federal, state, regional and local approvals been secured? Yes or no: _____.

Staff considered the possession of these approvals as a strong indicator that completion was likely as a solar project cannot lawfully be constructed without all of these approvals. When the applications which Staff was not recommending for immediate approval were reviewed using this criterion as a bright line, Staff recommended, and the Board approved, deferral of final decision for twenty of the fifty-seven projects, with final determinations to be made following development of additional evaluation criteria and submission of additional information. May 10 Order at 50, 57.

Thirty-four projects remained. Seven projects failed to meet the minimum statutory criteria and were denied on that basis. Finally, Staff determined that the remaining twenty-seven applications were neither substantially completed nor had received all final, non-appealable approvals and permits. Staff recommended that these applications be denied and the Board did so.

The IAs, representing Morris and Somerset Counties, are among the stakeholders submitting comments to the Board in regards to proposed grid supply projects in the State after passage of the Solar Act. See November, 15, 2012, letter from Inglesino, Pearlman, Wyciskala & Taylor, LLC on behalf of the IAs. Both counties have provided financing through bonds for 26 megawatts of net-metered solar energy projects, and in their comments thoroughly detailed their dependency on a stable SREC market to make these projects cost-effective. Ibid. They further claim that any grid-supply project approvals would cause the trading value of an already over-supplied SREC market to further decrease. Ibid. Thus, the IAs advised the Board to be very

¹ "Completion" includes all the activities required in developing a project, including but not limited to construction.

stringent when considering grid-supply project applications, and to strictly adhere to the Energy Master Plan's (the "EMP") preference for net-metered projects pursuant to N.J.S.A. 52:27F-15. The Board noted the IAs comments in its May 8 Order, and advised that the Board awards under Subsection s were based upon "the most objective standard possible: progress toward construction completion. Receipt of all federal, state and local approvals has also been deemed relevant to determining the status of a project." See May 8 Order at 8.

MOTION FOR RECONSIDERATION

On May 23, 2013, the IAs filed a Letter Brief in support of their Motion for Reconsideration of the Board's May 8, 2013 and May 10, 2013 Orders ("IA Brief"). The IAs generally request that the Board reconsider its findings in the May Orders as failing to give adequate weight to the Energy Master Plan ("EMP"), failing to implement the EMP to the "maximum extent practicable and feasible," and for failing to address policies under N.J.S.A. 48:3-87(r) ("Subsection r"). IA Brief at 1-2.

First, the IAs argue that the Board failed to adhere to the dictates of N.J.S.A. 52:27F-15 when reviewing Subsection s applications, *i.e.* that all of its decisions must implement the EMP "to the maximum extent practicable and feasible." See IA Brief at 3-6. The IAs further maintain that the EMP articulates a clear preference for net metered projects and strongly discourages farmland projects. Id. at 4. Thus, all Subsection s applicants that began developing farmland projects after the issuance of the draft EMP did so "at their own risk," and any claim by the applicants that they should be awarded SREC status based on project expenditures is irrelevant because their projects are statutorily disfavored. Ibid. The IAs further claim that the Board never directly addressed this concern when responding to their comments, and the Board only noted that it would take action under the Solar Act "keeping in mind" the provisions of the EMP. Id. at 3-4. Thus, the Board was effectively creating a balancing test whereby it weighed the need to offset SREC market volatility with the concomitant need for additional market participation, a test which the IAs argue is in complete contravention to the mandates of the EMP. Id. at 4-5. The IAs claim that the Board is thus statutorily required to change its standard of review, and implement the EMP to the "maximum extent practicable and feasible" when reviewing each application. Id. at 5. The IAs assert that utilizing this standard of review will lead to an "unambiguous result," and that all twenty-one (21) applications which were previously deferred will be summarily rejected by the Board. Id. at 6.

Second, the IAs argue that the criteria cited in the May 8 order are "unreasonable, unlawful, and not conclusive, and thus creates additional uncertainty, adding to the volatility of the SREC market and undermining the intent of the Solar Act." Id. at 6-8. The IAs note that the Board recognizes that the SREC market is oversupplied and the Solar Act was passed to provide stability to the New Jersey SREC market, and claim the May 8 order makes clear that the Board's approval of projects "as connected to the distribution system" is limited to projects that would not cause further volatility in the New Jersey solar market. Id. at 6. However, the IAs further argue that the Board contributed to this market volatility by adding construction completion as its key approval criterion. Id. at 7. More specifically, the IAs claim that the Board's deferral of twenty-one (21) projects totaling 230 MW creates uncertainty in the SREC market and will have an immediate economic impact on net-metered projects (*i.e.*, those statutorily preferred by the EMP). Ibid. Finally, the IAs assert that the Solar Act created Subsection q to permit grid-supply developers to continue development of their projects without creating market uncertainty. Ibid. Therefore, the IAs demand that the Board reject the

remaining projects as “expeditiously as possible” to create certainty and be in line with the intent of Solar Act. Ibid.

Additionally, the IAs argue that the Board erred by not clarifying the review process under Section (r) in the May 8 and May 10 Orders, further adding to the uncertainty and volatility in the SREC market. See IA Brief at 8. The IAs note that while the Board has stated in several stakeholder meetings that grid-supply projects are not eligible to apply under Subsection r until Energy Year 2017, the Board has erred by not putting this time frame in writing in either of its Orders on the Subsection s applications. The IAs claim there are nearly 290 MW of solar projects that could potentially fall under Subsection r, and the Board’s lack of written clarification of the start date for review of these projects contributes to volatility and uncertainty in the SREC market at large. Ibid.

DISCUSSION AND FINDINGS

Following review, the Board **FINDS** that nothing in the IAs’ request requires the Board to modify or otherwise reconsider its decisions in the May 8 and May 10 Orders. Generally, a party should not seek reconsideration merely based upon dissatisfaction with a decision. D’Atria v. D’Atria, 242 N.J. Super. 392, 401 (Ch. Div. 1990). Rather, reconsideration is reserved for those cases where (1) the decision is based upon a “palpably incorrect or irrational basis;” or (2) it is obvious that the finder of fact did not consider, or failed to appreciate, the significance of probative, competent evidence. E.g., Cummings v. Bahr, 295 N.J. Super. 374, 384 (App. Div. 1996). The moving party must show that the action was arbitrary, capricious or unreasonable. D’Atria, supra, 242 N.J. Super. at 401.

N.J.A.C. 14:1-8.6 requires that a request for rehearing or reconsideration be done by a motion that enumerates the alleged errors of law or fact, and where an opportunity is sought to introduce additional evidence, that evidence shall be stated briefly with the reasons for failing to provide it previously. The IAs’ motion does not conform to this rule because it only argues that the Board made an incorrect policy determination, not that the Board incorrectly interpreted Subsection s or made a factual error when considering any of the grid supply project applications. The Board will not modify an Order in the absence of a showing that the Board’s action constituted an injustice or that the Board misunderstood or failed to take note of a significant element of fact or law. Here, the Board does not find that the issues raised by the IAs are sufficient to warrant reconsideration or modification.

While a significant element of the request renews the arguments made by the IAs in their November 15, 2012 comments seeking to have the Board reject all Subsection s applications, the Board has considered each of the arguments. The Board is mindful that its decisions have a public policy impact. It is in the nature of evolving energy policy that situations require evaluation and reevaluation. Under these circumstances, the Board has considered the IAs’ positions whether or not the arguments fall strictly under the standards for reconsideration. In so ruling, however, the Board emphasizes that it is not legally compelled to reconsider mere re-arguments, but rather it has exercised its discretion to consider all of the arguments on the merits.

The IAs’ request for reconsideration fails to provide new facts or a legal basis which would justify the Board reversing its decision. The IAs base their entire claim on a subjective interpretation of the EMP and of the legislative intent of the Solar Act. Relying almost exclusively on three paragraphs of the EMP (a nearly 150 page document), the IAs claim that

the section heading "Promoting Solar PV Installations that Provide Economic and Environmental Benefit by Limiting SREC Eligibility" indicates a categorical rejection of any grid-supply project developed on farmland. See 2011 New Jersey Energy Master Plan, December 6, 2011 at 106-107. But the IAs fail to acknowledge that in that very same passage, the EMP states that the "BPU should be provided with the review and certification authority for such projects to ensure compatibility with land use, environmental, and energy policies." *Id.* at 107. Therefore, although the EMP states a general preference to limit grid supply solar development projects on farmland, it also recognizes that the Board needs to have the discretion to balance competing policy goals, and be able to approve such projects when they are compatible with broader energy, environmental and land use policies. The Board did just that, and adhered to this principle by using "construction completion" as a limiting criterion, and only approving three projects that were ready or almost ready to begin commercial operations, and deferring others that had already received all State and local approvals needed to begin construction. Those projects will be subject to continued review to determine viability. As stated in the May 10 Order, that process will be open and public, and will continue to provide information to the solar community and the SREC market.

Subsection s plainly states that a grid supply project "shall only be considered 'connected to the distribution system' if the facility has been approved as 'connected to the distribution system' by the board." N.J.S.A. 48:3-87(s). Thus, the legislature intended to allow the Board to approve some grid supply projects on farmland, because to construe the statutory language otherwise would make it "inoperative, superfluous, or meaningless," a practice which is "to be avoided." N.J. Carpenters Apprentice Training & Educ. Fund v. Borough of Kenilworth, 147 N.J. 171, 179-180. (1996).

Moreover, the IAs claim that the Board did not consider the EMP to the "maximum extent practicable and feasible" because doing so would make market volatility the Board's sole concern and thus lead to the denial of all deferred projects. However, Subsection s already makes clear the threshold requirements for approving a grid supply project: that PJM issued a System Impact Study for the facility on or before June 30, 2011 and that the facility files a notice with the Board within 60 days of the effective date of the Solar Act. N.J.S.A. 48:3-87(s)(2), and then commits the approval of the project to the discretion of the Board. The Solar Act incorporates the EMP's preference for net-metered projects by defining those projects as "connected to the distribution system" in N.J.S.A. 48:3-51, while requiring that most grid supply projects be subject to a Board approval process. With regard to proposed grid supply projects on farmland, if the legislature wanted to add more threshold requirements for Subsection s approval, it clearly could have done so. Unlike the evaluation of proposed projects under N.J.S.A. 48:3-87(r), the legislature left development of the additional criteria to the Board. The Board determined, per its discretion in approving projects, that the stage of development of new grid supply projects must be taken into account in the approval process, and it did not altogether discount market volatility because it used "construction completion" as a limiting criterion for approval.


Although the Board fully acknowledges the importance of clarifying Subsection r requirements, that is not the subject of its May 8 and May 10 Orders. The Board limited its May 8 and May 10 Orders to the matters before it -- whether or not to approve the 57 Subsection s project applications for designation as "connected to the distribution system" to qualify for SRECs. The Board has been informed that Staff has begun the stakeholder process that will develop the procedures to be incorporated into rules for projects seeking designation under Subsection r. The IAs are welcome to participate fully in that proceeding.


The Board has reviewed the motion for reconsideration, the supporting documentation, and Staff's prior recommendation. The Board **FINDS** that it acted within its statutorily granted discretion to approve or deny Subsection s applications pursuant to the criteria developed by Board Staff with the goal of determining the likelihood of construction completion and thereby reduce uncertainty in the solar market. Notwithstanding the IAs' claim that Morris and Somerset Counties may suffer economic hardship if volatility continues in the SREC market and therefore all grid supply applications should be rejected, the Board must consider a broader statewide policy for solar market development, as well as implications for individual project development, and properly did so when reviewing applications pursuant to the May 8 and May 10 Orders.

Accordingly, the Board **HEREBY DENIES** the IAs' request that the Board modify the May 8 and May 10 Orders and deny all applications which the Board has previously deferred.

DATED: 7/19/13

BOARD OF PUBLIC UTILITIES
BY:


ROBERT M. HANNA
PRESIDENT


JEANNE M. FOX
COMMISSIONER


JOSEPH L. FIORDALISO
COMMISSIONER

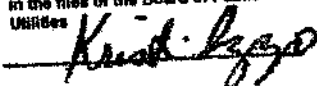

MARY-ANNA HOLDEN
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DIANNE SOLOMON
COMMISSIONER

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 IMPLEMENTATION OF L. 2012, C. 24, THE SOLAR ACT OF 2012 -
DOCKET NO. EO12090832V

IN THE MATTER OF THE IMPLEMENTATION OF L. 2012, C. 24 (Q)(R)(S) PROCEEDINGS TO
ESTABLISH THE PROCESSES FOR DESIGNATING CERTAIN GRID SUPPLY PROJECTS AS
CONNECTED TO THE DISTRIBUTION SYSTEM – REQUEST FOR APPROVAL OF GRID
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MORRIS COUNTY IMPROVEMENT AUTHORITY AND SOMERSET COUNTY IMPROVEMENT
AUTHORITY MOTIONS FOR RECONSIDERATION - DOCKET NOS. EO12121089V -
EO12121144V and EO13040331V

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