Agenda Date: 6/10/20
Agenda Item: 8A

STATE OF NEW JERSEY

Board of Public Utilities
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CLEAN ENERGY

IN THE MATTER OF A NEW JERSEY SOLAR TRANSITION PURSUANT TO P.L. 2018, C.17 – ATLANTIC COUNTY UTILITIES AUTHORITY MOTION FOR RECONSIDERATION	))))	ORDER DOCKET NO. QO19010068

Party of Record:

Salvatore Perillo, Esq., **Nehmad Perillo Davis and Goldberg**, on behalf of Atlantic County Utilities Authority

BY THE BOARD:

On December 30, 2019, the Atlantic County Utilities Authority ("ACUA" or "Movant") filed a motion for reconsideration ("Motion") of the Board's December 6, 2019 Order, docketed above ("Transition Incentive Order") and clarified on January 8, 2020 ("Clarification Order"), pursuant to N.J.A.C. 14:1-8.6. ACUA asked the Board to reconsider the factor assigned to certain Community Solar Energy Pilot Program ("Community Solar" or "Pilot Program") projects in its Transition Incentive Order. For the reasons explained below, the Board denies ACUA's motion for reconsideration.

BACKGROUND

Transition Incentive Program

On May 23, 2018, the Clean Energy Act was signed into law and became effective immediately. Among many other mandates, the Clean Energy Act directed the Board to adopt rules and regulations to close the SREC Registration Program ("SREC Program" or "SRP") to new registrations once the Board determines that 5.1 percent of the kilowatt-hours sold in the State by each TPS/BGS Provider has been generated by solar electric power generators connected to the distribution system ("5.1 % Milestone"). The Clean Energy Act also directed the Board to complete a study that evaluates how to modify or replace the SREC program to encourage the continued efficient and orderly development of solar renewable energy generating sources throughout the State.

Additionally, the Clean Energy Act established a statutory cost cap that prohibits the cost of Class I RECs (excluding the cost of offshore wind renewable energy certificates, or "ORECs") from amounting to more than 9% of the total electricity paid by customers in the State during Energy Years ("EY") 2019, 2020, and 2021 or from amounting to more than 7% of that cost during subsequent energy years. The Legislature incorporated these caps in an effort to control the cost of the ratepayer subsidies to clean energy. The tension between continuing the solar industry's "orderly and efficient development," on the one hand, and reducing the burden born by ratepayers, on the other, constitutes a challenge inherent to the development of the Transition Incentive program approved by the Board in December 2019, and to the ongoing development of a solar Successor Program.[1]

The Board decided to implement the replacement of the SREC Program in two phases. Phase 1 was the development of the Transition Incentive Program, open to projects that filed a complete SRP registration after October 29, 2018 but failed to reach PTO by the date the 5.1% Milestone has been attained; the Transition Incentive Program will remain open until the Board establishes a registration program for the Successor Program. Phase 2 is the ongoing development of the Successor Program.

As more fully set forth in the Transition Incentive Order, the Transition Incentive resulted from a year-long iterative process, which included multiple stakeholder meetings. Staff issued three Staff straw proposals for comment between August and November of 2019[2] that were revised and updated in response to stakeholder feedback and updated modeling. Stakeholder responses were summarized in the Transition Incentive Order. In its final form, the Transition Incentive is delivered via a Transition Renewable Energy Certificate ("TREC"). A TREC has a base incentive value of $152, which was tailored to various solar market segments by the application of factors "tied to the estimated costs of building the different types and to their varying revenue expectations [.]" Transition Incentive Order at 30. One of the eight market segments identified and assigned a factor was Community Solar, which was assigned a TREC factor of 0.85. In other words, community solar projects eligible for TRECs will receive an incentive of $129.20/MWh, which is $152 multiplied by 0.85.

Community Solar Program

The Clean Energy Act mandated that the Board adopt rules and regulations establishing a Community Solar Energy Pilot Program ("Pilot Program") within two hundred and ten (210) days of the law's enactment.[3] On January 17, 2019, following stakeholder engagement, the Board adopted the Community Solar rules ("Pilot Program Rules").[4] By their terms and in accordance with the statute, the Pilot Program Rules are effective for three years only, designated Program Years One, Two, and Three ("PY1", "PY2, and "PY3", respectively). N.J.A.C. 14:8-9.3(a). The

[1] In re New Jersey Solar Transition Pursuant to P.L. 2018, c17, BPU Docket No. QO19010068, Order dated December 6, 2019 ("Transition Incentive Order").
[2] Staff straws were issued on August 22, 2019; October 3, 2019; and November 14, 2019.
https://www.nj.gov/bpu/pdf/publicnotice/Revised%20Transition%20Incentive%20Straw%20Proposal%202019-10-03%20clean.pdf
https://njcleanenergy.com/files/file/Solar%20Act/Revised%20Transition%20Incentive%20Staff%20Straw%20Proposal%202019-11-14-merged.pdf
[3] N.J.S.A. 48:3-87.11
[4] The Pilot Program Rules took effect on February 19, 2019, upon publication in the New Jersey Register. 51 N.J.R. 232(a).

application period for PY1 ran from April 9, 2019 through September 9, 2019 and conditional approvals were awarded to projects by the Board at its December 20, 2019 agenda meeting.[5] The Board awarded forty-five conditional approvals representing a total of approximately 77.98 MW. December 20, 2019 Order at 7.

The goal of community solar is to enable New Jersey electric utility customers to benefit from solar energy by receiving a credit on their utility bills for solar generation that may be remotely located from their properties. In this way, community solar aims to promote access to clean energy generation for utility customers that cannot place solar generation on their own properties. In particular, the Pilot Program seeks to promote that access for low- and moderate-income ("LMI") ratepayers; the Pilot Program Rules require that at least 40% of the annual capacity limit be allocated to LMI projects, which are defined as projects for which at least 51% of the project capacity is allocated to LMI subscribers. N.J.A.C. 14:8-9.4(e). The PY1 evaluation criteria adopted by the Board and used to score PY1 applications awarded thirty (30) out of one hundred and five (105) points to "low- and moderate-income and environmental justice inclusion," the highest number of points allocated to a single category. December 20, 2019 Order at 3. The Board received 252 applications for PY1, of which 232 were for LMI projects. In light of these evaluation criteria and highly competitive applications received for PY1, 100% of the applications conditionally approved by the Board in the December 20, 2019 Order are LMI projects.

FACTUAL AND PROCEDURAL HISTORY

The ACUA, an instrumentality of Atlantic County responsible for managing solid waste and sewage for county residents, owns and operates a landfill in Egg Harbor Township ("the Site"). The Board has approved ACUA's application for a 2 MW (dc) community solar project to be located on the Site, which will serve exclusively LMI customers. December 20, 2019 Order. On December 6, 2020, the Board approved a TREC factor of 0.85 for community solar projects in the Transition Incentive Order.

Under cover of a letter dated December 26, 2019, ACUA submitted this motion for reconsideration of the Transition Incentive Order.

On February 19, 2020, the Board voted to approve a Secretary's Letter advising ACUA that the Board intended to continue its review of the motion for reconsideration beyond the 60-day period allowed under its rules. N.J.A.C. 14:1-8.7(c) provides that "[a]ny motion [for rehearing or reconsideration] which is not granted or otherwise expressly acted upon by the Board within 60 days after the filing thereof, shall be deemed denied." Having taken such action, the Board noted that accordingly, the motion for reconsideration was not deemed denied and remained open pending the Board's issuance of a final decision upon the completion of its review.

MOTION FOR RECONSIDERATION

ACUA asks the Board to reconsider its decision to assign a TREC factor of 0.85 for all community solar projects and, specifically, to create a new TREC factor of 1.2 for community solar projects that will serve only LMI subscribers. In the Movant's opinion, such preferential treatment is necessary if the State is to meet "New Jersey's energy and environmental justice goals." Motion

[5] In re Community Solar Energy Pilot Program, BPU Docket. No. QO18060646, Order dated December 20, 2019 ("December 20, 2019 Order").

at p2. ACUA contends that the existing TREC factor assigned to community solar is unreasonable because it is based solely on financial analysis and "does not consider key policy direction from the Governor and the Board[;]" because a factor of 1.2 is needed to provide savings to LMI subscribers, particularly ratepayers living in public housing which have a single utility master electricity meter on a commercial tariff; because the financial analysis on which it is based was not fully disclosed; and because the 0.85 factor does not address substantial comments submitted by ACUA during the course of the proceeding. ACUA also proposes that its proposed 1.2 factor should be applied even if such a project falls into an additional category with a lower factor; in other words, the Movant also asks the Board to waive its directive that if a project may be eligible for multiple factors, the lower factor project classification would apply.[6]

STAFF RECOMMENDATION

Staff does not believe that ACUA demonstrated that a higher factor should be assigned to that subset of community solar projects that serves only LMI customers. Movant's primary argument is one of policy – it asserts that Staff "merely" relied on financial analysis and did not include consideration for the Governor's and the Board's policy goal of helping LMI customers realize the benefits of renewable energy through the development of LMI community solar. According to Movant, Staff's approach is "unreasonable" because it does not appear to include consideration for this policy. Motion at Point I.

Staff notes, however, that the Governor's environmental justice policy is embodied in the Community Solar Energy Pilot Program itself. As noted above, thirty out of a possible one hundred and five points in the PY1 evaluation criteria depended on a community solar application being an LMI project. That is the greatest single factor in the evaluation, and its effect is seen in the results of the evaluation – every project approved by the Board in PY1 committed to allocating at least fifty-one percent of project capacity to LMI subscribers. Staff further notes that the Pilot Program Rules do not distinguish between projects that allocate fifty-one percent of their capacity to LMI subscribers and projects that allocate one hundred percent of their capacity for purposes of defining an LMI project. The Transition Incentive program, unlike community solar, does not have the explicit goal of increasing LMI access to solar. As noted above, the Legislature has charged the Board with encouraging the efficient and orderly development of all solar renewable energy generating sources throughout the State. Furthermore, ACUA proposes that the Board should go even further in the Transition Incentive Program than it has in community solar by making a distinction that the Pilot Program Rules do not make and singling out those projects that serve only LMI customers by assigning those projects a factor of 1.2. Staff notes that the highest factor in the Transition Incentive program is 1.0. Movant has not and cannot point to any basis for the Board to take such drastic action in an incentive program that must not only encourage orderly development of the solar market as a whole but must also remain cognizant of the impact on ratepayers.

Nor is Movant's claim that the factor assigned to community solar projects does not reflect its comments supported by the record, as Movant did not submit any comments into the record of the Transition Incentive proceeding. More importantly, the factors approved by the Board were determined by an in-depth cost build-up, as more fully described in the Transition Incentive Order. Costs constituted a fundamental piece of the equation that produced those factors. See, e.g., "Cost of Entry" slides from Solar Transition Workshop 2 (June 14, 2019); Transition Incentive Supporting Analysis and Recommendations (attached to Staff Straw released August 22, 2019,

[6] Transition Incentive Order at 30; Clarification Order at 3.

reissued with updates on October 3, 2019 and November 14, 2019); "Modeling Workshop" slides from Technical Work Session (September 6, 2019).

Finally, ACUA relies upon the fact that the financial analysis on which the TI program factors are based was not fully disclosed. This reliance is misplaced. It is true that the model used was a proprietary one and as such not susceptible to full public disclosure. However, Staff published many of the underlying assumption models, and facilitated opportunities for stakeholders to speak directly with The Cadmus Group, LLC and Sustainable Energy Advantage, LLC ("Consultant") to discuss the modeling. Had Movant chosen to participate in the process that produced the Transition Incentive, it could have submitted comments on these models and queried the Consultant upon them.

In Staff's opinion, Movant's failure to take part in the public stakeholder process when it was occurring precludes consideration of its out-of-time arguments. Moreover, such a change at this time would be unfair to all of the stakeholders that did participate in the process and that have not had the opportunity to respond to Movant's arguments. Staff urges the Board to disregard the Motion.

Staff recommends that the Board deny the Motion for Reconsideration and affirm the existing factorization scheme that assigns a factor of 0.85 to all community solar projects. Staff notes that this denial would reaffirm that community solar projects are only eligible to fall into one TREC factorization category. As a result, the Board would also be denying the request to exempt Community Solar projects serving only LMI customers from the directive that if a project falls into multiple categories the lower of the applicable factors shall apply.

DISCUSSION AND FINDINGS

As a threshold matter, the Board notes that Movant is not entitled to reconsideration of the factor assigned to community solar projects. The courts have ruled that litigants may not use a motion for reconsideration to raise arguments which were available at the time of the initial proceeding but which through oversight or a tactical decision were not raised at that time. Fusco v. Bd. of Educ. of City of Newark, 349 N.J. Super. 455, 461-62, (App. Div.), *certif. denied* 174 N.J. 544 (2002); *see also* Morey v. Wildwood Crest, 18 N.J.Tax 335, 340-41 (App.Div.1999) (holding that plaintiff is not entitled to reconsideration on the basis of evidence it had available and overlooked in its initial argument), *certif. denied,* 163 N.J. 80 (2000).

Like the movants in the above matters, ACUA was in possession of the facts it now raises in support of its policy argument prior to the issuance of the Transition Incentive Order. Aside from ACUA's own experience and whatever research it may have conducted, another commenter proposed the same factor for the same subset of community solar projects in a letter dated September 12, 2019, responding to the Staff Straw Proposal issued on August 22, 2019.[7] As noted above, this was the first of three straw proposals issued during mid-2019 as part of the iterative process used to arrive at Staff's final recommendation to the Board. Thus the Movant was aware or should have been aware of this issue and of the facts it now alleges in support of its position well before the Transition Incentive Order issued. Whether it chose not to raise this issue at that point or simply failed to make it, Movant must now abide the consequences. The motion for reconsideration amounts to an attempt to get "a second bite at the apple" and as such

[7] https://solarreports.s3.amazonaws.com/Comments.pdf at 57-58.

the Board need not consider it. The Board **FINDS** that Movant is not entitled to reconsideration of the factor assigned to community solar projects.

The Board will, nonetheless, address the merits of ACUA's motion. In so doing, the Board looks first to the standards of N.J.A.C. 14:1-8.6 and the relevant case law. N.J.A.C. 14:1-8.6 requires that a motion for rehearing or reconsideration enumerate 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 Motion substantially conforms to the rule. However, the Board also looks to the relevant case law that sets out the substantive standard which must be met.

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. This 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.

The Board concurs with Staff's analysis of Movant's argument, but will make some further observations. ACUA has not made the showing required by New Jersey law to compel reconsideration of an agency action. It contends that the Board should have assigned a 1.2 factor – higher than any factor actually assigned – to the subset of community solar projects serving exclusively LMI customers. Presumably to support a claim that not doing so constituted an injustice, ACUA asserts that the Community Solar program is intended to provide the benefits of renewable energy to low- and moderate-income customers and that this intent accords with Governor Murphy's "strongly stated policy" to help LMI customers participate in the solar market. Motion at Point I. The Board does not dispute this assertion. As discussed above, the Board adopted Pilot Program rules and approved PY1 evaluation criteria that have ensured that this policy goal is met.

ACUA asserts that unless the Transition Incentive program favors community solar by incorporating ACUA's proposed 1.2 factor, customer savings for LMI customers "will be eliminated or reduced to a level which substantially harms program development, customer participation, and customer savings." Motion at Introduction. This assertion might be more compelling if Movant had provided data to support it. Instead, Movant simply states that "many" LMI ratepayers live in public housing that is metered through a single master meter on a commercial tariff. Movant follows this rather vague claim with the bald assertion that these customers are particularly disadvantaged by the existing 0.85 community solar TREC factor "because demand charges are not included in the credit calculation in the Community Solar program." Motion at Point I. No data, calculations, or analysis is provided to support this assertion. Nor does Movant provide an explanation for introducing into the Transition Incentive program a preference for projects serving exclusively LMI customers that does not exist in the Pilot Program itself. As noted by Staff, the Pilot Program currently makes no distinction between projects that serve fifty-one percent LMI subscribers and those like the ACUA Project that propose to serve one hundred percent LMI subscribers. Whether or not ACUA chooses to advocate for such a change for Program Years 2 and 3 or in the permanent program, an eleventh-hour alteration to the factors in the Transition Incentive program is not the appropriate way to draw this distinction.

By contrast, the existing factors in the Transition Incentive program resulted from a significant stakeholder process and reflect a substantial amount of stakeholder input. The year-long process is briefly summarized above and at more length in the Transition Incentive Order. ACUA could have participated in this process and presented its position there, but it did not. Even in the motion under review, as noted above, Movant presented no factual support and very little in the way of policy analysis to support its requested modification to the program. When weighed against the substantial input received during the development of the Transition Incentive and the modeling done by the Board's consultants, the motion provides no basis to award a higher factor to community solar projects that serve solely LMI customers.

Movant also argues that Staff ignored the "strongly stated policy" of helping LMI customers realize the benefits of renewable energy. In support of its argument, Movant points to Staff's statement that market segments receive factors based on "the estimated costs of building the different types and to their varying revenue expectations." The Board notes that Movant has mischaracterized Staff's statement of the basis for its recommendations. Staff in fact explained its reason as follows: "[Staff] has fully considered the modeling results and sensitivities developed by the Consultant, the experiential data and recommendations contained in the various comments received to date, its own internal analyses, and the importance of the solar industry to the State of New Jersey. Staff carefully weighed each of these considerations and did not rely on any one set of findings, but instead attempted to balance the various competing arguments." Transition Incentive Order at 29.

Finally, the Board concurs with Staff that to reward Movant for its out-of-time attempt to influence the outcome of the public stakeholder process would be both inappropriate and unfair. The factors assigned in the Transition Incentive Order reflect the lengthy and iterative public process that was designed to allow all stakeholders a chance to state their views and present their evidence. The Board declines to alter the results of the public process at the behest of a single party after the fact.

After carefully reviewing the record and Staff's recommendation, the Board **FINDS** that nothing in ACUA's motion for reconsideration causes or requires the Board to reconsider its December 6, 2019 Order or the factors assigned to solar projects. ACUA's request for reconsideration provides no legal or factual basis which would compel the Board to reverse its decisions. For the aforementioned reasons, the Board **AFFIRMS** that 0.85 remains the appropriate TREC factor for all community solar projects approved by the Board and eligible for the Transition Incentive program and **DENIES** the Motion.

The effective date of this order is June 20, 2020.

DATED: June 10, 2020

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BY:

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AIDA CAMACHO-WELCH
SECRETARY

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