



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

STATE OF NEW JERSEY
Board of Public Utilities
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CLEAN ENERGY

IN THE MATTER OF A NEW JERSEY COMMUNITY)
SOLAR ENERGY PILOT PROGRAM PURSUANT TO)
P.L. 2018, C.17 – ATLANTIC COUNTY UTILITIES)
AUTHORITY MOTION FOR RECONSIDERATION)
ORDER ON MOTION)
FOR RECONSIDERATION)
DOCKET NO. QO18060646)
DOCKET NO. QO19091096)

Parties of Record:

Salvatore Perillo, Esq., for Petitioner, Atlantic County Utilities Authority
Stefanie A. Brand, Esq., Director, New Jersey Division of Rate Counsel

BY THE BOARD:

On January 15, 2020, the Atlantic County Utilities Authority (“ACUA” or “Petitioner”) filed a motion (“Motion”) for reconsideration of the Board of Public Utility’s (“Board”) December 20, 2019 Order In the Matter of the Community Solar Energy Pilot Program in Docket No. QO18060646, et al. (“December 20, 2019 Order”). ACUA’s Motion requests that the Board reconsider its waiver request, and allow ACUA additional flexibility in how it sells and markets subscriptions to its community solar project.

The Board **DENIES** ACUA’s motion for reconsideration because it would threaten the integrity of the Board’s Community Solar Energy Pilot Program (“Pilot Program”) and potentially eliminate important consumer protections, among other reasons, as discussed in more detail below.

BACKGROUND

The Clean Energy Act of 2018 (“CEA” or “the Act”) directed the Board, among other things, to institute the Community Solar Energy Pilot Program. Board Staff (“Staff”) conducted a robust rulemaking process, including several Staff requests for comments, written and in-person comments, and proposed rules. The rules for the Pilot Program, N.J.A.C. 14:8-9.1, et seq., were adopted by the Board on January 17, 2019, and were published in the New Jersey Register on February 19, 2019.¹ The rules at N.J.A.C. 14:8-9.10 include specific provisions relating to consumer protection.

¹ 51 N.J.R. 232(a).

Community Solar Energy Pilot Program

The Act mandated that the Board adopt rules and regulations establishing a Pilot Program within 210 days of the law's enactment. On January 17, 2019, following stakeholder engagement, the Board adopted the Community Solar Energy Pilot Program rules ("Pilot Program Rules"). 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 application period for PY1 ran from April 9, 2019 through September 9, 2019 and conditional approvals were awarded by the Board at its December 20, 2019 agenda meeting. The 45 conditional approvals total just shy of 78 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, which for purposes of community solar eligibility are defined as customers with a household adjusted gross income at or below 200 percent of the Federal poverty level. N.J.A.C. 14:8-9.2. 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 evaluation criteria adopted by the Board to score the PY1 applications awarded 30 out of 105 possible points to "low- and moderate-income and environmental justice inclusion," the highest number of points allocated to a single evaluation category. December 20, 2019 Order at 3. In light of these evaluation criteria and highly competitive applications received for PY1, 100% of the applications 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"). In the December 20, 2019 Order, the Board approved ACUA's application for a 2 MW(dc) community solar project to be located on the Site which will serve exclusively LMI customers. In the same Order, the Board denied ACUA's application for a waiver of Pilot Program Rules which require that customers can only be subscribed into the program with their affirmative written consent, either via "wet" (i.e., signed in ink) or electronic signature. December 20, 2019 Order at 4-5, 8. The requirement of a "wet" or electronic signature to ensure that the subscriber has actually assented to the change in provider is a long standing practice of the Board to cut down on the incidence of slamming. See N.J.A.C. 14:9-9.10, et seq.; N.J.A.C. 14:4-7.1, et seq.; and N.J.A.C. 14:10-11.3-8. Since this is a pilot program, the Board may review the standards for customer registration and seek to amend the rules accordingly, for future solicitations.

Summary of December 20, 2019 Order

In the December 20, 2019 Order, the Board rejected ACUA's analogy of its proposed approach to the opt-out procedure used in the Government Energy Aggregation ("GEA") program. The Staff recommendation detailed two of the key reasons for which community solar is not comparable to GEA: 1) community solar systems are limited in size and in number of subscribers allowed per MW installed capacity, unlike GEA, which is designed to serve most, if not all the residents in a

given municipality; 2) GEA is implemented via consolidated billing. That is, both the cost and the benefit received through GEA are reflected directly on customer's bills; community solar subscribers receive a separate bill from their subscriber organization. Staff also identified other differences including the fact that GEA is by definition established by, and operated on behalf of, a municipal or county entity, while community solar projects can be developed by any entity, as well as the fact that GEA does not include any specific LMI provisions. The Board found that in the interest of protecting consumers in the Pilot Program, it is critical that customers affirmatively consent to subscribing to a community solar project. December 20, 2019 Order at 4-5.

ACUA's waiver request also stated that "the 'opt-out' approach proposed [in its Application] is customer-centric and based on ACUA's established relationship with the Pleasantville Housing Authority ("PHA")," as well as "[ACUA's] position as the public entity, and its strong interest in obtaining a long-term arrangement for solar energy that is in the best interest of its participating residents." The Board agreed with Staff that ACUA's stated relationship with PHA should facilitate obtaining affirmative consent from subscribers, and that "this approach is the most customer-centric approach possible." The Board determined that compliance with N.J.A.C. 14:8-9.10(b)(1)(i) would not adversely "affect the ratepayers of a utility or other regulated entity, the ability of the utility or other regulated entity to continue to render safe, adequate and proper service, or the interests of the general public[.]" Therefore, the Board conditionally approved ACUA's proposed project, but denied ACUA's request for a waiver from N.J.A.C. 14:8-9.10(b)(1)(i).

MOTION FOR RECONSIDERATION

On January 15, 2020, ACUA filed a motion for reconsideration of the Board's December 20, 2019 Order, pursuant to N.J.A.C. 14:1-8.6. By letter dated February 19, 2020, following a Board vote, the Board notified the president of ACUA that, pursuant to N.J.A.C. 14:1-8.7(c), the Board was extending the time period for its review of the motion for reconsideration, and that ACUA needed to be represented by counsel in this matter, pursuant to N.J.A.C. 1:1-5.4(a). On February 28, 2020, the Board received a letter from Salvatore Perillo, Esq., refiling the motion for reconsideration on behalf of ACUA.

Specifically, ACUA seeks reconsideration of its request for a waiver from N.J.A.C. 14:8-9.10(b)(1)(i), which states that "a community solar subscriber may not be subscribed without their affirmative written consent, either via wet or electronic signature." ACUA argues that it can better accomplish its goal of serving LMI customers and reduce its total costs by automatically placing all customers located in a specific public housing complex into the program on an opt-out basis. As stated in its request, ACUA asked for the waiver in order to "enable the enrollment of [LMI] individually metered residential customers through a 'modified opt-out' process in a manner similar to the approach successfully used by the Board and many municipalities across New Jersey in their administration of [GEA] Programs[.]" ACUA community solar PY1 Application at p. 89.

The Motion asks that the Board reconsider and reverse its denial of ACUA's waiver request. ACUA argues that the Board's Order denying the waiver was unreasonable and contrary to the expressed policies of the Board and the Governor, not based on facts and not based on the Board's own rules. Petitioner's motion, at p. 3. Citing its long commitment to sustainable energy initiatives, including wind, compressed natural gas vehicles, a landfill to gas energy project and electric vehicle charging stations, ACUA asserts that its project would serve only LMI customers and therefore closely aligns with the Board's objectives and the Governor's goals, and that the

waiver is vital to successfully obtaining LMI community solar subscribers. Petitioner's motion, at p. 3.

In addition, ACUA notes that the Board was concerned with slamming and ACUA's motion contends that this is not a concern, stating that the GEA program rules and ACUA's offer to implement additional protections eliminates slamming concerns relating to opt-out. Petitioner's motion at p. 4-5.

STAFF RECOMMENDATION

In the December 20, 2019 Order, the Board stated that "opt-out" provisions for community solar might be explored in future Program Years, particularly in conjunction with allowing community solar developers to collect customer subscription costs on consolidated bills issued by the utility. However, the Board ruled that allowing it in current circumstances would pose an unacceptable risk of "slamming," *i.e.* having customers signed up for community solar without their full knowledge and/or consent. December 20, 2019 Order at 4-5. Nothing in ACUA's Motion convinces Staff that the Board should change its answer.

The ACUA motion contends that, in denying the request for a waiver, the Board failed to act in accord with the Governor's environmental justice policy. Staff disagrees. The Governor's policies on low- and moderate-income inclusion are fully embodied within the Community Solar Energy Pilot Program itself. At minimum forty percent of the annual Pilot Program capacity is allocated to LMI projects for each of the three years of the Pilot Program. In the evaluation of a community solar Application, 30 out of a possible 105 points depend on a community solar application being LMI. That was the greatest single factor considered in the evaluation of PY1 applications. This policy focus was fully reflected in the applications that were received in PY1: 232 out of the 252 total PY1 applications received were for LMI projects, indicating a strong stakeholder commitment in developing LMI projects in line with New Jersey's policy priorities. As a result, every project conditionally approved by the Board will be an LMI project, serving a subscriber base that is at minimum fifty-one percent LMI.

In support of its argument that the Board erred in denying ACUA's request for a waiver, Petitioner makes three additional arguments.

First, Petitioner states that the Board's denial failed to account for existing rules relating to the "opt-out" model of subscribing customers. Staff believes that Petitioner is referencing the rules at N.J.A.C. 14:4-6.5 and N.J.A.C. 14:4-6.6, which specifically apply to GEA programs. Staff recommends that the Board find that there is no basis in law or in fact for Petitioner's assertion that a waiver of a subsection of the Community Solar Energy Pilot Program rules would lead to GEA rules and the protections afforded therein being applied to a community solar project.

Second, Petitioner argues that that community solar and GEA are comparable, and that the differences between community solar and GEA only make "opt-out" easier under community solar. Staff does not believe that customers in the two programs are necessarily similarly situated, or that the rules and processes developed for the "opt-out" model in GEA would adequately protect customers participating in the Pilot Program. For example, community solar necessarily involves payment of a subscription fee separate from the customer's usual electric bill, while GEA programs utilize consolidated utility billing. Staff further reiterates its concerns with giving any entity a blanket authority to sign up customers without their affirmative consent and without appropriate consumer protection measures. This concern is made even more acute given that,

due to the limited size of community solar projects, an “opt-out” sign-up process for community solar may not apply equally to all residents in a given municipality, unlike the “opt-out” process in GEA which applies to everyone.

Third, Petitioner states that the “opt-out” method of subscriber acquisition is vital to subscribing LMI customers. Staff agrees that LMI subscriptions have been one of the key challenges in community solar programs in other States. Staff highly encourages continued conversations with stakeholders about methods to support LMI access to community solar; however, Staff stresses that implementation of “opt-out” is far from being the only potential policy structure that can help facilitate LMI subscriptions, and encourages stakeholders to think about all possible options. Staff notes that the Community Solar Energy Pilot Program is in its infancy; projects selected in PY1 will provide valuable experience about the implementation of community solar projects and provide information on which to base future recommendations for changes to the community solar rules and regulations, either in the Pilot Program or in the permanent program set to begin in 2022. Staff further notes that 232 out of the 252 applications received in PY1 were for LMI projects, and only three of which (including ACUA) requested a waiver of the existing “opt-in” rules.

Further, in the Spring of 2019, Board Staff issued a request for comments that specifically asked about the potential areas for integration between GEA and community solar. Most stakeholders indicated that, while there may be some potential compatibility between GEA and community solar, they remain very different programs and their integration would be challenging and require significant review and modification of existing rules.

Finally, Staff adds that allowing one winning bidder to change the rules risks undermining the highly competitive process run by the Board by providing one awardee an advantage over other projects that submitted conforming bids that incorporated the costs of obtaining express customer consent.

FINDINGS AND DISCUSSION

Upon thorough consideration of ACUA’s motion and Staff’s recommendation, and the entire record in this case, the Board **FINDS** that nothing in ACUA’s motion for reconsideration requires the Board to modify or otherwise reconsider its decision.

Pursuant to N.J.A.C. 14:1-8.6(a) a motion for rehearing, re-argument, or reconsideration of a proceeding may be filed by any party within 15 days after the effective date of any final decision or order by the Board. In a motion for reconsideration, the moving party must allege "errors of law or fact" that were relied upon by the Board in rendering its decision. N.J.A.C. 14:1-8.6(a)(1). Reconsideration should not be based on the movant’s dissatisfaction with the decision, D’Atria v. D’Atria, 242 N.J. Super. 392, 401 (Ch. Div. 1990) and should be based on a decision, with “a “palpably incorrect or irrational basis,” or where it is obvious that the finder of fact did not consider, or failed to appreciate, the significance of probative, competent evidence. Cummings v. Bahr, 295 N.J. Super. 374, 384 (App. Div.1996). Further, the moving party must show that the action was arbitrary, capricious or unreasonable. D’Atria, supra, 242 N.J. Super. at 401.

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 will not modify an Order. Disagreement with a Board Order is not a basis to grant a motion for reconsideration. In re the Implementation of L. 2012, c. 24, the Solar Act of 2012 et seq., Docket.

Nos. E012090832V, E012090862V and Q013111136, 2014 N.J. PUC LEXIS 66 (March 19, 2014).

The Board agrees with Staff's reasoning and recommendations and, therefore, **DENIES** the Motion for reconsideration and **HEREBY AFFIRMS** its prior decision denying ACUA's request for a waiver from N.J.A.C. 14:8-9.10(b)(1)(i). The December 20, 2019 Order included three separate grounds for rejecting ACUA's request for waiver, and the Board continues to find these rationales compelling. *First*, the Board continues to find that waiving the rules to allow opt-out signups would pose an unacceptable risk of "slamming," *i.e.*, having customers signed up for community solar without their full knowledge and/or consent. December 20, 2019 Order at 4-5. *See also* N.J.S.A. 48:3-86(a)-(b)1. *Second*, the Board continues to find that community solar subscribers are not similarly situated to entities enrolling in GEA programs, and the GEA rules are not applicable to protect community solar customers against abuse. December 20, 2019 Order at 4-5. *Third*, the Board likewise continues to find that "ACUA's stated relationship with [the public housing authority] should facilitate obtaining affirmative consent from subscribers, and that this approach is the most customer-centric approach possible." December 20, 2019 Order at 5. To these compelling rationales, the Board agrees with Staff that allowing one winning bidder to change the rules undermines the highly competitive process run by the Board by providing one awardee an advantage over other projects that submitted conforming bids that incorporated the costs of obtaining express customer consent.

Having reviewed the motion, the Board **FINDS** that the motion does not present new evidence, and does not otherwise satisfy the standards for interlocutory review or reconsideration. In promulgating the Community Solar Energy Program Rules, N.J.A.C. 14:8-9.1, et seq., the Board specifically provided for consumer protection by requiring that community solar subscribers must obtain affirmative consent of the customers by wet or electronic signature. N.J.A.C. 14:8-9.10(b)1(i).

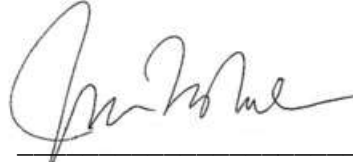
The Board **FURTHER FINDS** that nothing in the Board's decision is intended to bar ACUA from requesting that process improvements that may result from future stakeholder proceedings be made applicable to this project, or discourage parties from active participation in trying to improve acquisition of customers for community solar, particularly with respect to LMI customers, who often present additional levels of complexity.

The Board **FURTHER REITERATES** that, if a Conditionally Approved project fails to comply with the requirements of this Order, the rules at N.J.A.C. 14:8-9, or fails to be built and operated as it was proposed in its original Application, this failure may be grounds to cancel the Board's conditional approval of a project.

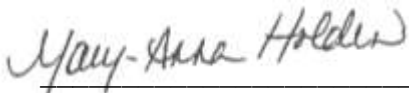
The effective date of this order is June 20, 2020.

DATED: June 10, 2020

BOARD OF PUBLIC UTILITIES
BY:



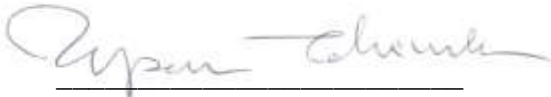
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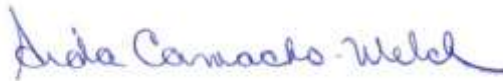


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COMMISSIONER



ROBERT M. GORDON
COMMISSIONER

ATTEST:



AIDA CAMACHO-WELCH
SECRETARY

IN THE MATTER OF A NEW JERSEY COMMUNITY SOLAR ENERGY PILOT PROGRAM
PURSUANT TO P.L. 2018, C.17 – ATLANTIC COUNTY UTILITIES AUTHORITY MOTION FOR
RECONSIDERATION - DOCKET NO. QO18060646 and QO19091096

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