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Agenda Item: 8D

STATE OF NEW JERSEY

Board of Public Utilities
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CLEAN ENERGY

ORDER

IN THE MATTER OF THE COMMUNITY SOLAR ENERGY PILOT PROGRAM	)	DOCKET NO. QO18060646
IN THE MATTER OF THE COMMUNITY SOLAR ENERGY PILOT PROGRAM YEAR 2 APPLICATION FORM AND PROCESS – MOTION FOR RECONSIDERATION	)	DOCKET NO. QO20080556

Parties of Record:

Alice M. Bergen, Esq., for Movant, Gabel Associates
Stefanie A. Brand, Esq., Director, New Jersey Division of Rate Counsel

BY THE BOARD:

By Order dated October 2, 2020, the Board approved the Application Form and process for Program Year 2 ("PY2") of the Community Solar Energy Pilot Program ("Pilot Program"), codified at N.J.A.C. 14:8-9 et seq. On October 19, 2020, Gabel Associates ("Gabel" or "Movant") filed a Motion for Reconsideration ("Motion") regarding several elements of the Order.

BACKGROUND

On May 23, 2018, the Clean Energy Act, P.L. 2018, c. 17 ("the Act" or "CEA"), was signed into law. Among other mandates, the CEA directed the Board of Public Utilities ("Board" or "BPU") to adopt rules and regulations within 210 days establishing a Pilot Program. As set out in greater detail in the Board's Order approving the release of the Community Solar Energy Pilot Program Year 2 Application Form,[1] rules implementing the Pilot Program were published in the New Jersey Register on February 19, 2019.[2] On March 29, 2019, the Board approved and released the Program Year 1 ("PY1") Application Form, and the Board conditionally approved 45 community solar projects, representing almost 78 MWdc, on December 20, 2019.

[1] In re the Community Solar Energy Pilot Program Year 2 Application Form and Process, BPU Docket No. QO20080556, Order dated October 2, 2020 ("PY2 Order").
[2] 51 N.J.R. 232(a).

On July 9, 2020, the Board issued a request for comments regarding lessons learned from Program Year 1. Designed to supplement Staff's assessment of the PY1 Application process, the request for comments resulted in comments being filed by 24 stakeholders, including two sets of comments by the Movant.[3] An all-day public stakeholder meeting was held on July 27, 2020.

Following this extensive stakeholder process, and drawing on lessons learned during PY1, on October 2, 2020, the Board issued the PY2 Order, which approved an application form and process for PY2 of the Pilot Program. The application period for PY2 will remain open until February 5, 2021 at 5 p.m. In a companion item on the same agenda, the Board approved the publication of two proposed amendments to the Pilot Program rules ("Rule Proposal").[4] The proposed rule amendments were published in the New Jersey Register on November 16, 2020 and are open to public comments until January 15, 2021.

As noted above, Gabel filed the Motion by letter dated October 19, 2020. Atlantic County Utilities Authority ("ACUA") filed a letter in support of this motion on November 24, 2020.[5] ACUA's arguments largely duplicate those of the Movant but any distinct claims or rationales are addressed below.

STAFF RECOMMENDATIONS

Before turning to the arguments made on the five specific issues raised in the Motion, Staff will address Gabel's assertion that the Board "[d]id not address the substantial comments filed by Gabel and other parties relative to the issues identified in this Motion." Motion at 3. The Board fully considered all comments submitted on this matter, including comments both supporting and opposing the concept of "automatic enrollment" of community solar subscribers, further discussed below in response to Movant's first argument. With respect to serving low- and moderate-income ("LMI") customers, stakeholder comments received in 2020 placed a strong emphasis on measures to improve and facilitate LMI inclusion and in particular on the need to make LMI verification less onerous. The Board took note of these comments and acted accordingly on October 2, 2020 by proposing amendments to the LMI verification rules at N.J.A.C. 14:8-9.8[6] and creating a process for PY1 projects to request a waiver from certain LMI verification rules.[7]

Gabel's first three points in its Motion relate to a new proposed method of customer enrollment for community solar projects, referred to as "automatic enrollment" or "opt-out." In response to stakeholder interest in this new method, the Board proposed to test this concept in the context of the Pilot Program. As discussed above, a proposed rule amendment that, if approved, would enable the use of automatic enrollment was proposed by the Board on October 2, 2020 and published in the New Jersey Register on November 16, 2020.[8] In order to streamline the process, the Board incorporated a reference to this proposed rule amendment in the PY2 Application Form, stating that "if the Application is selected but the proposed rule amendment is not approved by

[3] Those comments are available for review on the New Jersey Clean Energy Program website. https://njcleanenergy.com/files/file/CommunitySolar/CommSolarCommentsCombined.pdf
[4] 52 N.J.R. 2039(a) and 52 N.J.R. 2041(a), November 16, 2020 ("Rule Proposal").
[5] ACUA's application for a project to serve exclusively LMI customers was accepted into PY1 of the Pilot Program.
[6] 52 N.J.R. 2039(a), November 16, 2020.
[7] In re Income Verification Measures in the Community Solar Energy Pilot Program, BPU Docket No. 20080588, Order dated October 2, 2020.
[8] 52 N.J.R. 2041(a), November 16, 2020.

the Board, the project will be required to proceed using affirmative consent (i.e. "opt-in") subscriber enrollment rules, as currently provided for in the Pilot Program rules at N.J.A.C. 14:8-9.10(b)(1)." PY2 Application Form, page 23. It is important to emphasize that permission to utilize automatic enrollment is conditioned upon the Board's further consideration and approval of the proposed rule amendment on this matter. As a matter of process, Movant's first three arguments are therefore more relevant to the proposed rule amendment than to the PY2 Order and PY2 Application Form. Staff looks forward to receiving comments in response to this proposed rule amendment and anticipates that the Board will fully consider and respond to those comments as appropriate. Staff's responses to the substantive arguments contained within the Motion should therefore be considered with the caveat that the rulemaking process provides further opportunities for stakeholder comment and discussion.

Gabel's first substantive argument focuses upon government ownership of solar projects. Stating that "government entities do not own solar projects," Movant contends that "the BPU's finding on page 6 that a municipality that implements an opt-out community solar project must own the project should be reconsidered and revised."[9] Staff notes that the Board agreed with the comments of Gabel and other likeminded stakeholders when it included in the Rule Proposal a model for municipal automatic enrollment projects. However, in the interest of maintaining accountability in the context of a new initiative within the Community Solar Energy Pilot Program, the Board intentionally proposed that automatic enrollment be limited to local government entities. Staff anticipates that the Board will carefully consider comments to the Rule Proposal on this issue.

Movant's second substantive argument takes issue with the Board's decision to limit the experiment with an opt-out provision to municipalities rather than allow counties and their "instrumentalities" to make use of this mechanism.[10] To support its position, Movant points to the ACUA, arguing that the ACUA is a public entity that is answerable to the Atlantic County Freeholders and to the people of Atlantic County; the ACUA reiterates this argument and also notes that it is working with the Pleasantville Housing Authority, "a municipal housing authority serving the municipality of Pleasantville."[11] The Board made the policy decision to propose a rule amendment that would limit testing of the opt-out model to municipalities precisely because municipalities are directly answerable to their residents. Staff does not view the Movant's arguments to the contrary as persuasive. Nevertheless, Staff recommends that this concern be raised in the context of the pending rulemaking proceeding, where it can be most appropriately resolved.

Third, Gabel contends that "ownership duration" for government solar projects should be clarified. Referencing a previous statement that government entities generally enter into long term agreements with owner vendors, Gabel asserts that these agreements allow for long term private ownership of the project, "well beyond the period of temporary third-party tax credit investor ownership."[12] As noted above, the Board intentionally chose to propose municipal ownership; its decision to carve out a temporary third-party ownership to address the tax equity issue recognized in Gabel's argument was also intentional.

Gabel proposes a model of its own for automatic enrollment in municipal projects, based on its experience in municipal aggregation, but this description is not a statement of fact, nor is it the

[9] Motion at 4.
[10] Motion at 5.
[11] ACUA Letter at 2.
[12] Motion at 6.

model embodied in the Board's current proposal. Movant may be correct in its statement that New Jersey solar projects are rarely owned by public entities;[13] however, the Rule Proposal as currently introduced by the Board specifically sought to address some of the key barriers to municipal ownership of projects. By way of example, the Rule Proposal allows municipalities to contract for all aspects of project development and operations, as well as to temporarily turn over ownership to a third party if necessary to enable tax equity financing. Furthermore, the Board approved in the PY2 Order exploration of a mechanism by which interested governmental entities can be contacted by community solar developers.[14] Again, Staff believes Movant's arguments here directly implicate the Rule Proposal and are more appropriately made in the rulemaking forum. Staff looks forward to reviewing comments on this matter, particularly from Gabel or any other stakeholder who believes that the Rule Proposal does not adequately reflect the needs of municipalities seeking to implement automatic enrollment.

Fourth, Movant expresses its belief that the Board has erred by focusing on "Third Party Supplier (TPS)" consolidated billing rather than on "BGS [Basic Generation Supply] consolidated billing."[15] Movant refers to a Staff recommendation in the PY2 Order that "the Board direct the EDCs to work with Staff to implement consolidated billing for community solar, building upon the existing consolidated billing mechanisms employed for Third Party Suppliers when relevant." Staff acknowledges that the reference to "TPS consolidated billing" may have been inarticulate and takes this opportunity to clarify. Consolidated billing has been the subject of numerous Board proceedings over the years, and this sentence merely acknowledged this prior work and was intended to suggest "building upon" existing consolidated billing mechanisms, "where relevant." Staff clarifies that it was not intending to limit the discussion or mandate a particular outcome, and if existing precedents are not relevant, then they are not relevant. Lastly and most importantly, Movant appears to misunderstand the Board's actions on this issue. While Movant references both a Staff recommendation on page 5 and "the Board's related ordering sentence on page 9," there is no ordering sentence related to this recommendation; instead, the Board directed the EDCs "to work with Staff to develop options to implement consolidated billing for community solar[.]"[16] The Board intentionally did not dictate that the EDCs study one particular model of consolidated billing. Thus, Gabel's allegation that the Board did not consider its comments on consolidated billing is inaccurate, and the various policy arguments made in favor of BGS consolidated billing by Gabel and the ACUA are misplaced. The EDCs are to present "actionable recommendations" for implementation by February 26, 2021.[17] To the extent that Movant's argument can be construed as asking the Board to tell the EDCs and Staff to look only at one option, Staff believes that this request is inappropriate and should be denied.

Lastly, Gabel argues that the Board should clarify the Evaluation Criteria siting preference given to Pilot Program projects that are located on water that is located "on a former mine, specifically where water has filled in a former sand and gravel pit."[18] As set out in the PY2 Order, "former sand and gravel pits" and "former mines" receive a higher siting preference, while "floating solar"

[13] Motion at 4-5.
[14] PY2 Order at 7.
[15] Staff notes that the term "BGS Consolidated Billing" is not one used by the Board. BGS refers to electric generation service that is provided to any customer that has not chosen an electric power supplier. Utilities procure electricity for these customers and then sell it to them. If a customer has chosen a supplier (a TPS) the utility does not own the power supply and simply delivers it. The utility still charges the customer for the delivery service. The board uses the term "consolidated billing" to refer to the practice of allowing both the utility's charge and the TPS charge to appear on the same bill.
[16] PY2 Order at 9 (emphasis added).
[17] PY2 Order at 9.
[18] Motion at 9.

receives only a medium preference.[19] Movant seeks an express statement by the Board that a site that is both floating solar and within a sand and gravel pit will receive the higher preference given to land-based solar within these areas. According to Movant, such sites are already zoned for industrial use, do not infringe upon open space, and typically already possess electrical infrastructure that will facilitate interconnection.[20]

Staff reached out to the New Jersey Department of Environmental Protection ("NJDEP") for its position on this siting issue. NJDEP has responded by recommending a higher preference for floating solar at those sand and gravel pits that have little to no established floral and faunal resources; it recommends keeping floating solar that do not fall into this category at the "medium" preference. Additionally, NJDEP noted that "former mine" is often used interchangeably with "former sand and gravel pits," but that it not a clearly defined term. NJDEP therefore recommends deleting the term "former mine" from the Evaluation Criteria. Staff believes that the Board may rely on the NJDEP's expertise on this issue and recommends that the Board incorporate this more nuanced siting preference into the evaluation of applications received for PY2.

FINDINGS AND DISCUSSION

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. Pursuant to N.J.A.C. 14:1-8.6(a)(1) the moving party must allege "errors of law or fact" that were relied upon by the Board in rendering its decision. 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, 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.[21]

As a threshold issue, the Board notes that the first three objections Movant raised to the PY2 Order also bear directly upon the pending rule proposal. The Board **FINDS** that municipal ownership of Pilot Program projects, participation by local government entities other than municipalities, and the temporary nature of private ownership are all implicated in the Rule Proposal. As such, the Board believes that arguments on these topics would better be made in the rulemaking public comment process and urges Movant to make use of that forum. The Board will again consider the comments received from stakeholders prior to final adoption of the Rule Proposal.

Movant implies, however, that the issues it raises are too urgent to await the rulemaking process, alleging that without "prompt and timely reconsideration" local government entities will be prevented from "mov[ing] forward" with community solar.[22] Movant goes so far as to assert that the policy goal of improving access to solar energy will not be realized without granting its

[19] PY2 Order at 4, Table 2.
[20] Motion at 9.
[21] In re the Implementation of L. 2012, c. 24, the Solar Act of 2012 et seq., BPU Docket Nos. E012090832V, E012090862V and Q013111136, 2014 N.J. PUC LEXIS 66 (March 19, 2014).
[22] Motion at 2.

requests.[23] According to Movant, the PY2 Order "[d]id not give appropriate weight" to New Jersey's strong policy focus on environmental justice.[24] These allegations are unsupported and incorrect. As described in further detail below, the Board does not believe that the Motion presents new evidence to suggest that municipalities would not participate in the new "automatic enrollment" process currently proposed in the rule proposal. Even if that were the case, the proposed rule provides a new way for municipalities to conduct customer acquisition but does not otherwise prevent municipalities from participating in the Pilot Program without utilizing the automatic enrollment process. Several government entities are already participating in PY1 community solar projects and were doing so even in the absence of the proposed rule (including a project by ACUA). Additionally, the Board responded to the statutory directive to implement community solar by creating a program that, in its first year, served exclusively LMI projects, defined as projects that allocate at least 51% of project capacity to LMI customers. As noted in the PY2 Order, the Pilot Program has grown in its second year; all evidence so far is that the Community Solar program has been very successful in serving a majority of LMI customers, beyond even what was originally foreseen. In fact, according to a 2020 National Renewable Energy Laboratory ("NREL") report, New Jersey is the current national leader in planned community solar capacity serving LMI customers.[25]

With respect to Movant's substantive arguments, the Board concurs with Staff's reasoning. Upon thorough consideration of the moving papers, supporting correspondence, and Staff's recommendation, the Board **FINDS** nothing in the motion record that requires the Board to modify or otherwise reconsider its decision. In particular, the Board reiterates that several of these arguments must properly be made in the pending rulemaking proceeding. The Board will not act on them in this Order. Having reviewed the motion, the Board **FINDS** that the motion does not present new evidence and does not otherwise satisfy the standards for reconsideration. Therefore, the Board **HEREBY DENIES** the motion for reconsideration. However, the Board will take action regarding two of the concerns raised by Movant that are not implicated in the Rule Proposal.

With respect to the issue of consolidated billing, the Board is cognizant of the value of obtaining input from various parties when considering an action that will affect multiple stakeholders and, in particular, residential ratepayers. Therefore, with respect to the issue of consolidated billing, the Board **HEREBY CLARIFIES** its direction to the EDCs to work with Staff to develop options for implementing consolidated billing in the Pilot Program. The Board **DIRECTS** the EDCs to consider multiples options for the implementation of consolidated billing for community solar and to incorporate a robust stakeholder process.

The Board also **FINDS** that the NJDEP recommended that floating solar located at sand and gravel pits that have little to no established floral and faunal resources receive a "higher" preference in the siting category of Board's PY2 Evaluation Criteria and recommended eliminating reference to "former mines." The Board **DIRECTS** Staff to modify the Evaluation Criteria to reflect the recommendations of the NJDEP and to incorporate the modified criteria in the evaluation of applications for PY2.

[23] Id.
[24] Motion at 3.
[25] U.S. Department of Energy, National Renewable Energy Laboratory, "Community Solar 101" by Jenny Heeter, Kaifeng Xu, and Emily Fekete. https://www.nrel.gov/docs/fy20osti/75982.pdf

The effective date of this order is January 7, 2021.

DATED: January 7, 2021

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