



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

CLEAN ENERGY

IN THE MATTER OF PETITION OF SUNPOWER)
CORPORATION - FOR DECLARATORY RELIEF)
PURSUANT TO N.J.S.A. 52:14B-1 ESQ. AND OR)
WAIVER PURSUANT TO N.J.A.C. 14:1-1.2(b)) ORDER

DOCKET NO. QO19091240

Parties of Record:

Howard O. Thompson, Esq., Russo, Tumulty, Nester, Thompson & Kelly, LLP
Stefanie A. Brand, Esq., Director, New Jersey Division of Rate Counsel
Joseph Accardo, Esq., Public Service Electric and Gas Company

BY THE BOARD:

On September 17, 2019, SunPower Corporation (“SunPower” or “Petitioner”), a solar developer, filed a petition with the Board seeking a declaratory ruling that the energy generated from the solar facility it proposes to build (“Solar Facility”) for Delaware River Port Authority (“DRPA”) will be considered “generated on the customer’s side of the meter” for the purposes of N.J.S.A. 48:3-51 and N.J.A.C. 14:8-4.1.¹ Petitioner seeks this ruling so that energy generated by the Solar Facility will be eligible to create Solar Renewable Energy Certificates (“SRECs”) and be considered a net-metered project.

BACKGROUND

A. Regulatory Framework

New Jersey offers two programs, relevant to the current petition, that are designed to incent installation of new solar energy systems: SRECs and net metering. SRECs represent the environmental attributes of one megawatt hour of solar energy and, under New Jersey’s regulatory scheme, may be sold to load serving entities and used to meet New Jersey’s renewable portfolio standard. New Jersey’s net-metering program allows power exported from an eligible solar system to offset a customer’s retail electric bill on a kilowatt-hour-for-kilowatt-hour basis, *i.e.*, it effectively allows the customer’s meter to “run backwards” when the amount of power produced by a solar system exceeds the host’s consumption, which reduces the host’s electric bill.

¹ By Secretary’s Letters dated October 21, 2019, the Board served the petition upon Public Service Electric & Gas (“PSE&G”) and upon Atlantic City Electric Company (“ACE”).

With regards to SREC eligibility, only solar projects "connected to the distribution system" are eligible to receive SRECs. Projects are deemed "connected to the distribution system" if the solar facility meets one or more of the following criteria: (1) it is net metered and located on the customer's side of the meter; (2) it is an on-site generation facility; (3) it qualifies for net metering aggregation; (4) it is owned or operated by a public utility pursuant to N.J.S.A. 48:3-98.1; (5) it is directly connected to the distribution system at 69 kilovolts or less and has been certified via Board order; or (6) it has been certified by the Board, in connection with the New Jersey Department of Environmental Protection, as being located on a brownfield, properly closed sanitary landfill facility, or an area of historic fill. N.J.S.A. 48:3-51. If a solar generation facility does not fall into one of the categories described above, the facility is not "connected to the distribution system" and, as such, the output of the facility is not eligible to create SRECs. N.J.A.C. 14:8-2.2.

With regards to net-metering, the statutory and regulatory authority for net metering is codified at N.J.S.A. 48:3-87(e) and implemented through N.J.A.C. 14:8-4. The statute limits net metering to customers "that generate electricity, on the customer's side of the meter, using a Class I renewable energy source, for the net amount of electricity supplied by the electric power supplier or basic generation service provider over an annualized period." N.J.S.A. 48:3-87(e) (1). The rules establish the criteria for determining whether a renewable generation facility is on "the customer's side of the meter" and therefore eligible for net metering.

B. SunPower Petition

Petitioner is a solar developer and seeks to have a proposed 21 MW dc facility declared eligible to generate SRECs and to have its electrical output net-metered. Petition at Pars. 5, 6. Petitioner characterizes the Solar Facility as a single facility with four subparts. Petition at Executive Summary, Part A; Attachment C at Par. 8. The panels which comprise the Solar Facility are to be located above parking areas at four train stations on the Port Authority Transit Corporation ("PATCO") rapid transit service line: Lindenwold, Ashland, Woodcrest, and Ferry Avenue stations.² Petition at Executive Summary, Parts A, C; Attachment C at Par.7. The Solar Facility will be designed to provide the DRPA with electricity in an amount less than seventy percent of the annualized energy delivered to DRPA by the EDC. Petition at Executive Summary, Part A.

PATCO is owned and operated by the DRPA, which has filed a verified statement in support of the petition (Attachments C, F). The DRPA is a public corporate instrumentality of the State of New Jersey and the Commonwealth of Pennsylvania. Petition at Executive Summary, Part B; N.J.S.A. 32:3-1 to 3-6.4. DRPA owns the Lindenwold, Ashland, and Ferry Avenue stations; it leases a parking area at the Woodcrest station from New Jersey Transit.³ Ibid.

PSE&G delivers power to PATCO via an electric meter located at PATCO's Westmont Station ("Westmont Meter"). Attachment C at Par. 6. The DRPA owns the Westmont station and owns and operates a distribution wire behind the Westmont Meter that distributes the electricity along the PATCO Property. Ibid. The DRPA states that its distribution line contains a switch which insures that no electricity generated in New Jersey is received in Pennsylvania, so that the

² Petitioner represents that although the Lindenwold station is located in the service territory of ACE, it is served by the same DRPA line that receives power from PSE&G through the Westmont Meter. Petition at Executive Summary, Part C.

³ The DRPA's enabling statute defines "real Property" to include leases. N.J.S.A. 32:3-6. DRPA therefore asserts that the leased parking area at the Woodcrest station forms part of the PATCO line property. Attachment C at Par.13.

electricity generated by the SunPower solar system behind the DRPA's Westmont Station meter would be used entirely in New Jersey. Attachment C at Par. 9.

The petition notes that the PATCO line and its associated train stations are exempted from taxation by New Jersey statute. Petition at Executive Summary, Part B. Petitioner further supports its position with a title report stating that "the tax maps of the applicable Camden County municipalities do not reflect any person or entity other than the DRPA as owning a tax lot that intervenes (*i.e.* is in between) where Exhibit B [which describes the property involved] indicated the subparts of the solar facility will be built and the PATCO rapid transit line." Attachment D.

On June 27, 2019, PSE&G denied Petitioner's application to interconnect as a net-metered project. According to Petitioner, PSE&G based the denial on the ground that the information provided did not confirm that the subparts of the Solar Facility, as depicted on a tax map, were within the boundaries of either the property where the energy would be consumed or a contiguous property. Petition at Section D.

Petitioner, with the support of DRPA, now asks the Board for a declaratory judgment that the energy produced by the Solar Facility will be "generated on the customer's side of the meter" for purposes of N.J.S.A. 48:3-51 and N.J.A.C. 14:8-4.1; and for a waiver of N.J.A.C.14:8-4.1 insofar as it requires that contiguity must be demonstrated "as set forth within the official tax map."

C. Intervention and Comments

By letter dated October 28, 2019, PSE&G filed a motion to intervene.

By letter dated October 29, 2019, the New Jersey Division of Rate Counsel filed a letter stating that it had no objection to PSE&G's motion.

On October 30, 2019, Petitioner filed a letter of no objection.

By Order issued November 13, 2019, the Board granted PSE&G's motion to intervene.

On November 20, 2019, Rate Counsel filed comments in opposition to the petition ("Rate Counsel Comments"). SunPower responded to these comments on the same date ("Petitioner Response").

Rate Counsel asserts that as described in the petition, the proposed project would qualify for neither on-site generation nor net-metering. Moreover, given what Rate Counsel regards as potentially significant ratepayer impacts, it does not believe the project meets the standard for receiving a waiver.

PSE&G expresses concerns about several of Petitioner's assertions, but does not object to a waiver of the Board's rules to allow the project to proceed as requested.

DISCUSSION AND FINDINGS

- I. Determination whether the Proposed Facility is "On-site Generation" within the meaning of N.J.S.A. 48:3-51.

Petitioner has not expressly asked the Board to make a declaratory ruling that its proposed project is an "on-site generation facility" within the meaning of N.J.S.A. 48:3-51; however, this issue must be resolved before the Board proceeds to determine the applicability of its own rules. As an executive agency, the Board does not possess the authority to waive a statute. Therefore, the

Board must first determine whether the proposed solar facility constitutes an "on-site generation facility" as EDECA defines this term:

"On-site generation facility" means a generation facility, including, but not limited to, a generation facility that produces Class I or Class II renewable energy, and equipment and services appurtenant to electric sales by such facility to the end use customer located on the property or on property contiguous to the property on which the end user is located. . . . The property of the end use customer and the property on which the on-site generation facility is located shall be considered contiguous if they are geographically located next to each other, but may be otherwise separated by an easement, public thoroughfare, transportation or utility-owned right-of-way[.]

[N.J.S.A. 48:3-51 (definition of "on-site generation facility").]

For the Solar Facility to be "on-site," it must be "located on the property or on property contiguous to the property on which the end user is located." *Ibid.* For purposes of the petition, a finding that the proposed generation facility is contiguous to the end user requires that each of the four parking areas adjacent to the four relevant train stations be considered contiguous to the adjacent section of the PATCO line.

Petitioner asserts that the PATCO line, the train stations along it, and the parking areas adjacent to those train stations constitute a single property, both as a matter of fact, and relying upon the DRPA's broad powers with respect to real property. Petition at Executive Summary, Part B. Petitioner's schematics, descriptions and maps in Exhibit B show that the various parking areas are connected to the train line and comprise one large (albeit oddly shaped) parcel. DRPA argues that, pursuant to its enabling statute, the DRPA may acquire any real property in Pennsylvania or New Jersey upon determining that such property "is required for public use." N.J.S.A. 32:3-6. All political subdivisions of both states are authorized to grant any real property which the DRPA requests for public use. *Ibid.* Both Pennsylvania and New Jersey consent to "the use and occupation by [DRPA] of any real property of the said two states, or either of them, which may be, or become, necessary or convenient to the effectuation of the authorized purposes of the [DRPA]." *Ibid.* Petitioner and DRPA interpret these statutory provisions to enable the DRPA to declare the PATCO line, the train stations and their parking lots to be one property. Petition at Par. 5. Thus, Petitioner also relies upon the DRPA's declaration that "the PATCO rapid transit line from the end of the line in the Borough of Lindenwold to the Delaware River to be within the boundaries of one/single property . . . inclusive of its train stations and associated parking lots." Attachment C at Par. 12.

The Board agrees that the evidence shows that each train station and its associated parking lot may be properly considered as adjacent to its particular section of the PATCO rapid transit line. The statute says, "[t]he property of the end use customer and the property on which the on-site generation facility is located shall be considered contiguous if they are geographically located next to each other," which they are in this case. In reaching this conclusion, the Board notes that its decision that the Solar Project meets the statutory definition of "On-Site Generation" is not affected by whether the four solar systems in question constitute a single system, nor whether the PATCO line constitutes a single property. Here, Petitioner has provided a title report which concludes that the official tax maps of the relevant municipalities do not reflect any intervening property owners between any of the four solar facilities and that section of the PATCO rapid transit line next to which each station is located. There is thus no bar to the conclusion that each train station parking lot is geographically located next to a particular section of the PATCO property.

The Board need not reach Petitioner's alternative arguments on this point relating to the DRPA enabling statute and the DRPA's authority to declare disparate pieces of property, acquired under different deeds, and located in various municipalities to be one single property. Whether this is a correct statutory interpretation or not, does not impact the Board's findings.

However, the Board does not find certain of Petitioner's citation to Board precedent persuasive. Specifically, Petitioner points to the DRPA's statutory exemption from taxation, asserting that DRPA should be considered analogous to the Joint Base McGuire-Dix-Lakehurst ("Joint Base"), a U.S. military establishment which the Board found to be a single property for purposes of establishing on-site generation. I/M/O Application of NJ Land, LLC Seeking A Declaratory Judgment Pursuant to N.J.S.A. 52:148-1 Et Seq., Or a Waiver Pursuant to the Waiver Rule, N.J.A.C. 14:1-1.2(8), BPU Dkt. No. Q016040382, Order dated January 25, 2017 ("NJ Land Order"). However, the Board does not view that a bi-state authority, even one with the broad statutory authority of the DRPA, as analogous to the federal government. The Board concurs with Rate Counsel and PSE&G that much more than the military base's tax-exempt status was determinative in that matter. The NJ Land Order looked to congressional enactments, Supreme Court precedent, and ultimately the Supremacy Clause in determining that the Joint Base, though located in multiple municipalities, constituted a single property. NJ Land Order at pages 4-7.

However, we do agree that as a "public corporate instrumentality," the DRPA stands upon a different footing than a private entity. It is deemed to be "exercising an essential governmental function" when it acts to enable the construction, acquisition, operation and maintenance of railroad or other facilities; for the "promotion as a highway of commerce of the Delaware River [;]" and when engaged in various other activities related to its governmental function. N.J.S.A. 32:3-2. As noted by Petitioner, the DRPA's enabling statute also grants the agency broad powers with respect to property, including eminent domain. N.J.S.A. 32:3-6. The courts have recognized this bi-state agency's special status in other contexts. See, e.g., Stinson v. Delaware River Port Authority, 935 F. Supp. 531, 538 (D.C.N.J. 1996) (Relying upon the DRPA's creation by an interstate compact, its power to exercise eminent domain, and its tax-exempt status; the Court found that the port authority was a "political subdivision" of the state rather than an "employer" within the meaning of the LMRA).

Rate Counsel's arguments on this point are unavailing. Rate Counsel cites to the Board's net-metering rules as evidence that the Solar Facility does not meet the definition of on-site generation. While we address the application of the net metering rules to the Solar Project below, we note that those rules require that to be "on-site" for purposes of net-metering, the facility must be on or contiguous to the property on which the energy is used "as set forth within the official tax map." N.J.A.C. 14:8-4.1. Rate Counsel notes that the solar generation facilities and the PATCO property where the energy would be used are located in eight municipalities over numerous tax lots.⁴ Although acknowledging that the reference to the official tax map appears only in the Board's rules, Rate Counsel goes on to assert that "the geographic limitations set forth in the rule also apply to on-site generation." In support of this assertion, Rate Counsel states that the Board incorporated the statutory definition into its rules and then added the reference to the tax map to appropriately narrow eligibility for net metering. Rate Counsel comments at 6.

This reasoning is tenuous at best. While the Board did incorporate the statutory language on contiguity into the rule and also added the reference to the official tax map to assist in preventing over-extension of eligibility for net metering, those rulemaking decisions do not act to alter a prior

⁴ In this statement, Rate Counsel clearly refers to the entire PATCO property rather than to the specific train station parking lots whereon the proposed solar generation facilities would be located.

legislative enactment. As an administrative agency, the Board may interpret, but not edit statutory language.

Nor does the Board consider the fact that one of the proposed PATCO train stations is located in ACE territory to be a concern, as asserted by Rate Counsel. Ibid. PSE&G serves this station for unrelated historical reasons; PSE&G was already providing service to PATCO when PATCO added a station in ACE territory. Whether that station is host to a net-metered solar generation facility does not impact either service territory, nor does it have any bearing on PSE&G's service.

Lastly, the Board rejects Rate Counsel's claim that a solar facility cannot be both on-site generation and also eligible for net-metering. In making this claim, Rate Counsel points to the component of the statutory definition that requires the generating facility to be located either on the same property as the end user or on a contiguous property. Rate Counsel contends that net metering necessarily incorporates exporting energy to the grid, and thus cannot be "on-site" within the meaning of the statute. Rate Counsel Comments at 5. The circular logic of this contention ignores the fact that just as on-site generation is defined to include location of generation on the same or on adjacent property, so too is net metered generation defined as located behind the meter, whether on the same property as the end user or on an adjacent property. If the fact of a potential export to the grid could negate "on-site" location, there would be no net-metering in the State.

Therefore, the Board **FINDS** that the Lindenwold, Ashland, and Ferry Avenue stations and the leased parking area at the Woodcrest station are each "on-site" of the end use customer for purposes of N.J.S.A. 48:3-51. The Board **FURTHER FINDS** that each of the four proposed generation facilities constitutes an "on-site generation facility" within the meaning of the statute.

- ii. Request for Declaratory Ruling that the Proposed Facility Constitutes an "On-site Generation Facility" Within the Meaning of N.J.A.C. 14:8-4.1

Petitioner also seeks a declaratory judgment that the four solar facilities are "contiguous" to the DRPA rapid transit service line under the Board's net metering rules at N.J.A.C. 14:8-4.1. Some of the municipalities through which the PATCO lines runs and where Petitioner intends to locate solar panels have designated tax blocks and lots for DRPA property. The Board's rule makes the meaning of "contiguous" more precise, as it specifies that the term be defined with reference to municipal tax maps:

- ii. Within the legal boundaries of a property, as set forth within the official tax map, that is contiguous to the property on which the energy is consumed. The property on which the energy is consumed and the property on which the renewable energy generation facility is located shall be considered contiguous if they are geographically located next to each other, but may be otherwise separated by an existing easement, public thorough fare, or transportation or utility-owned right-of-way and, but for that separation, would share a common boundary.

[N.J.A.C. 14:8-4.1(b) (1) (ii) (emphasis added).]

As discussed above, Rate Counsel contends that the project as described cannot qualify for net-metering because the solar generation facilities and the PATCO property where the energy would be used are located, in total, in eight municipalities over numerous tax lots. The Board has already noted that it added the reference to the official tax map to clarify that eligibility for net-metering would be appropriately limited. In the matter under review, however, that clarification is not

needed. New Jersey has removed DRPA's real property from all state taxation by statute, N.J.S.A. 32:3-12 and N.J.S.A. 32:3-13.54. Rate Counsel argues that the statutory provisions exempting DRPA from New Jersey property taxation have no bearing on the meaning of the Board's rules. Rate Counsel Comments at 7. However, the Board concludes that the DRPA's tax-exempt status is an appropriate consideration in applying its net metering rules to the facts of this matter and **FINDS** that the reference to the official tax map in N.J.A.C. 14:8-4.1 is not applicable or determinative in considering eligibility for net metering. The Board additionally **FINDS**, in the alternative, that it grants the Petitioner any necessary waiver of the tax lot requirement to allow the project to move forward, given that it would elevate form over substance to apply the tax lot requirement to an entity exempt from normal taxing authority.

Given this conclusion, the Board need not reach Rate Counsel's argument regarding possible precedential impacts. Rate Counsel avers that if the Board were to find that DRPA was not bound by the requirements of the Board's net-metering rules, the Board would risk undermining its own objective of placing clear geographic limits on the availability of net metering. Since the Board is not making such a finding, Rate Counsel's concerns are moot.

The Board now addresses Petitioner's alternative request for a waiver of N.J.A.C. 14:8-4.1.

iii. Request for Waiver of N.J.A.C. 14:8-4.1(b)(1)(ii)

Petitioner requests, in the alternative, a waiver of the Board's rules pursuant to N.J.A.C. 14:1-1.2(b):

(b) In special cases and for good cause shown, the Board may, unless otherwise specifically stated, relax or permit deviations from these rules.

1. The Board shall, in accordance with the general purposes and intent of its rules, waive section(s) of its rules if full compliance with the rule(s) would adversely affect the ratepayers of a utility or other regulated entity, the ability of said utility or other regulated entity to continue to render safe, adequate and proper service, or the interests of the general public [.]

The general purpose of the Board's net-metering rules, as set out in a former rule proposal, is to "facilitate investment in distributed renewable energy (renewable energy located close to the source of energy consumption)." 44 N.J.R. 2043(a) (August 6, 2012). The Board noted that in addition to the reduction in pollution and need for construction of new power plants, positive impacts from all renewable energy has the added benefits of helping alleviate the demand for large electric transmission and reducing congestion on existing electric distribution lines, "thus reducing power outages and improving the reliability of electric service to all customers." Ibid.

As discussed above, the four solar facilities constitute a total of 21 MW dc. This is a sizeable installation and will make a significant contribution to reducing congestion on local transmission and distribution lines, as well as providing clean, potentially resilient power to the DRPA and PATCO. These goals are consistent with those the Board's rules seek to further. "In the long term, the Board's programs for developing renewable energy use and generation can act as a spur to development of renewable energy markets, thus reducing use of environmentally damaging fossil fuels and decreasing U.S. dependence on foreign oil imports. Ultimately, this will have an important beneficial economic impact on the country as a whole." 44 N.J.R. 2043(a).

In Rate Counsel's opinion, a waiver would not support the general intent and purpose of the rule because waiving the rules for DRPA would "open the door" for every entity possessing eminent domain authority and tax exemptions. Rate Counsel foresees net-metering installations on

roadways and railroads running across the State. Rate Counsel Comments at 9-10. While the Board appreciates this policy concern, it does not share Rate Counsel's forebodings. Neither DRPA's eminent domain authority nor its tax exempt status have figured in the Board's determination that waiving its rules for this 21 MW dc solar generation facility is in accord with the goal of facilitating investment in distributed renewable energy. The Board **FINDS** that the proposed solar generation facilities accord with the general purpose and intent of the net-metering rules.

The Board next considers whether strict adherence to the Rule's requirements would adversely affect the public interest. Here, the Solar Facility is intended to provide less costly power to a public transportation system. As such, it will tend to reduce both the expense and the emissions associated with a public transportation system. This result comports with the Governor's and Legislature's actions intended specifically to reduce emissions from the transportation sector. "Recognizing that the transportation sector is the leading source of greenhouse gas emissions in New Jersey, the Clean and Reliable Transportation will . . . identify methods to incentivize the use of clean, efficient, technological advances in commercial and public transportation operations.

"5

Rate Counsel maintains, however, that a waiver would adversely affect the interest of ratepayers and the interests of the public. Rate Counsel opposes Petitioner's analogy of its situation to that of the Joint Base in NJ Land because Rate Counsel believes that in this matter the benefits would be limited to a small segment of New Jersey and its residents rather than being statewide. In addition, Rate Counsel reverts to its concerns regarding the potential impact of exempting a large class of entities with eminent domain authority and tax exempt status. Rate Counsel asserts that the potential harm would be much greater than the limited benefit. Rate Counsel Comments at 10.

The Board does not concur. As noted above, reducing emissions from the PATCO line dovetails precisely with the actions of the Governor and the Legislature to reduce emissions specifically from the transportation sector. Moreover, the successful completion of the proposed project will tend to reduce costs on public transportation, making it potentially more competitive with gas-fueled automobiles. Thus, Petitioner has met the second prong of the waiver analysis and demonstrated that the public interest will be adversely affected should the Board require strict adherence to its rules in this matter. The Board **FINDS** that full compliance with the Rule requirements would adversely affect the interest of the public and **APPROVES** the request for a waiver.

The Board **DIRECTS** the Petitioner to submit a separate SREC Registration including dedicated SREC metering for each of the four distinct solar electric generation facilities.

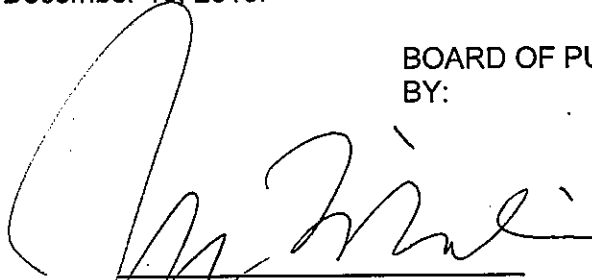
Finally, as acknowledged by Petitioner, the existing SREC system for incentivizing solar energy development is in the process of closing. Petition at footnote 14; see N.J.S.A. 48:3-87(d) (3)). Thus, the Board **DECLARES** that if the Solar Facility does not achieve commercial operation prior to the Board's determination that 5.1 percent of the State's electric generation comes from solar facilities, the energy produced by the Solar Facility will not be eligible for an SREC. The Board **FURTHER ORDERS** that since Petitioner's application was not complete by October 29, 2018, if Solar Facility achieves commercial operations prior to the above determination by the Board, the Solar Facility shall have a Qualification Life of ten (10) years.

⁵ Notice of New Jersey 2019 Energy Master Plan (EMP) Clean and Reliable Transportation Stakeholder Meeting Discussion Points September 20, 2018, See also Executive Order 28 at par. 5.

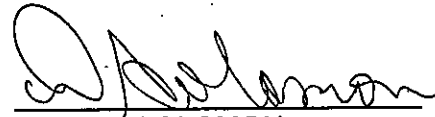
This order shall be effective December 16, 2019.

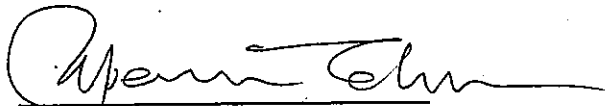
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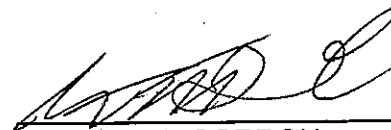
BOARD OF PUBLIC UTILITIES
BY:




JOSEPH L. FIORDALISO
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MARY-ANNA HOLDEN
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COMMISSIONER

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SECRETARY

I HEREBY CERTIFY that the within
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DOCKET IN THE MATTER OF PETITION OF SUNPOWER CORPORATION - FOR
DECLARATORY RELIEF PURSUANT TO N.J.S.A. 52:14B-1 ESQ. AND OR WAIVER
PURSUANT TO N.J.A.C. 14:1-1.2(b)
DOCKET NO. QO19091240

SERVICE LIST

Sunpower Corporation

Howard O. Thompson, Esq.
hthompson@russotumulty.com

Public Service Electric and Gas Company

PSEG Services Corporation
80 Park Plaza, T5
P.O. Box 570
Newark, NJ 07102

Matthew M. Weissman, Esq.
General State Regulatory Counsel
matthew.weissman@pseg.com

Joseph F. Accardo, Jr., Esq.
Deputy General Counsel and Chief
Regulatory Officer
joseph.accardo@pseg.com

Justin B. Incardone, Esq.
Associate General Regulatory Counsel
justin.incardone@pseg.com

Michele Falcao
Regulatory Filings Supervisor
michele.falcao@pseg.com

Caitlyn White
Regulatory Case Coordinator
caitlyn.white@pseg.com

Division of Rate Counsel

140 East Front Street, 4th Floor
Post Office Box 003
Trenton, NJ 08625-0003

Stefanie A. Brand, Esq., Director
sbrand@rpa.nj.gov

Board of Public Utilities

44 South Clinton Avenue, 9th Floor
Trenton, NJ 08625-0350

Aida Camacho-Welch
Secretary of the Board
board.secretary@bpu.nj.gov

Paul Flanagan, Esq.
Executive Director
paul.flanagan@bpu.nj.gov

Division of Clean Energy

Sara Bluhm Gibson, Director
sara.bluhm@bpu.nj.gov

Benjamin S. Hunter, Manager
Bureau of Clean and Renewable Energy
benjamin.hunter@bpu.nj.gov

Counsel's Office

Abe Silverman, Esq.
Chief Counsel
abe.silverman@bpu.nj.gov

Rachel Boylan, Esq.
rachel.boyland@bpu.nj.gov

Charles Gurkas, Paralegal
charles.gurkas@bpu.nj.gov

Division of Rate Counsel (continued)

Brian O. Lipman, Esq., Litigation Manager
blipman@rpa.nj.gov

Felicia Thomas-Friel, Esq.
Managing Attorney – Gas
ftthomas@rpa.nj.gov

Kurt Lewandowski, Esq.
Assistant Deputy Rate Counsel
klewando@rpa.nj.gov

Sarah H. Steindel, Esq.
Assistant Deputy Rate Counsel
ssteinde@rpa.nj.gov

Maura Caroselli, Esq.
Assistant Deputy Rate Counsel
mcaroselli@rpa.nj.gov

Shelly Massey
smassey@rpa.nj.gov

New Jersey Division of Law

R.J. Hughes Justice Complex, 7th Floor West
25 Market Street, P.O. Box 112
Trenton, N.J. 08625

Pamela Owen, Assistant Section Chief
pamela.owen@law.njoag.gov

Michael Beck, DAG
Michael.beck@law.njoag.gov

Emma Yao Xiao, DAG
emma.xiao@law.njoag.gov