



Agenda Date: 2/17/23
Agenda Item: 8E

STATE OF NEW JERSEY
Board of Public Utilities
44 South Clinton Avenue, 1st Floor
Trenton, New Jersey 08625-0350
www.nj.gov/bpu/

CLEAN ENERGY

IN THE MATTER OF THE COMPETITIVE SOLAR)
INCENTIVE (“CSI”) PROGRAM PURSUANT TO P.L.)
2021, C.169)
)
) ORDER ADDRESSING
MOTION FOR
RECONSIDERATION
)
) DOCKET NO. QO21101186

Parties of Record:

Murray E. Bevan, Bevan, Mosca & Giuditta, P.C., on behalf of the Mid-Atlantic Renewable Energy Coalition and Dakota Power Partners
Brian O. Lipman, Esq., Director, New Jersey Division of Rate Counsel

BY THE BOARD:

On December 22, 2022, pursuant to N.J.A.C. 14:1-8.6, the Mid-Atlantic Renewable Energy Coalition (“MAREC”) and Dakota Power Partners (“Dakota”) (collectively, “Petitioners”) filed a Motion for Reconsideration (“Motion”) of the New Jersey Board of Public Utilities (“Board” or “BPU”) December 7, 2022 Order Launching the Competitive Solar Incentive (“CSI”) Program.¹ Petitioners argued that the Order contains three (3) errors, namely that: 1) the controlling statute requires that the Board establish escrow fees for bidders into the CSI Program; 2) the maturity requirements of projects bid into the CSI Program solicitation are not sufficient to protect against speculative projects receiving solicitation awards; and 3) the Board incorrectly interpreted the controlling statute’s limitations regarding siting of solar projects on unpreserved farmland. In this order, the Board denies the Motion and clarifies the Board’s treatment of escrows.

¹ In re the Competitive Solar Incentive (“CSI”) Program Pursuant to L. 2021, c. 169, 2022 N.J. PUC LEXIS 367, BPU No. [QO21101186](http://www.nj.gov/bpu/) (Dec. 7, 2022) (“CSI Order”).

BACKGROUND

The Board is charged by Governor Murphy and the Legislature with affordably growing the State's solar industry, increasing green jobs, and continuing New Jersey's commitment to making solar accessible for low-and moderate-income consumers.² On July 28, 2021, the BPU voted unanimously to implement the Successor Solar Incentive ("SuSI") Program, designed to implement the Clean Energy Act of 2018 (P.L. 2018, c. 17) and the Solar Act of 2021.³ The SuSI Program sets the State on a path to double its solar capacity by 2026, with 3,750 MW of new capacity. This target reflects both New Jersey's 2019 Energy Master Plan ("EMP") and Governor Murphy's goal of achieving 100% clean energy by 2050.

The SuSI Program has two (2) components. The Administratively Determined Incentive ("ADI") Program, opened to new registrants on August 28, 2021, offers a fixed incentive for net metered residential projects, net metered non-residential solar projects of five (5) megawatts ("MW") or less, and all community solar programs. The CSI Program covers all grid supply solar projects (i.e., those selling into the wholesale markets) and net metered non-residential projects above five (5) MW in size.

Section 6 of the Solar Act of 2021 also charged the Board, in consultation with the New Jersey Department of Environmental Protection ("DEP") and the Secretary of the New Jersey Department of Agriculture, to establish a set of specific siting criteria that apply to projects eligible to participate in the CSI Program.⁴ The siting criteria implements the Legislative directives on where solar projects may be located, where solar construction is subject to restrictions, and where it is prohibited. For some prohibited locations, the Act allows the Board to grant a waiver if after consultation with DEP or the Secretary of Agriculture as appropriate, the Board deems the project to be in the public interest. All CSI-Eligible Facilities must meet the siting criteria established pursuant to Section 6 of the Act and be subject to the milestone and project maturity requirements of the CSI Program, including those projects that choose to forego incentives. This ensures that the State's interest in preserving open space and agricultural lands will be applied to all solar projects, on an equal basis, and will continue as the solar market matures even if fewer projects choose to pursue an incentive through the CSI Program.

Staff, in cooperation with its consultant Daymark Energy Advisors ("Daymark"), conducted a preliminary stakeholder meeting on the design of the CSI Program in November 2021, and issued a straw proposal on the CSI Program design ("CSI Straw") on April 26, 2022. After the release of the CSI Straw, three (3) more in-depth topical stakeholder meetings were held in May and June 2022. After both rounds of stakeholder meetings, there was opportunity for written comments.

In addition, Staff worked with DEP, the Department of Agriculture, and the State Agriculture Development Committee ("SADC") to develop recommendations and issue a straw proposal specifically on siting requirements ("Siting Straw") on March 26, 2022. Two (2) stakeholder meetings were held in March and April 2022 on this topic, and written comments were accepted until April 22, 2022, a deadline later extended to May 31, 2022.

² See, e.g., Exec. Order No. 7 (Jan. 28, 2018), 50 N.J.R. 886(a) (Feb. 20, 2018); Exec. Order No. 28 (May 23, 2018), 50 N.J.R. 1394(b) (June 18, 2018); 2019 New Jersey Energy Master Plan: Pathway to 2050, nj.gov, https://nj.gov/emp/docs/pdf/2020_NJBPU_EMP.pdf; Solar Act of 2021, L. 2021, c. 169.

³ In re a Solar Successor Incentive Program Pursuant to P.L. 2018, c. 17, 2021 N.J. PUC LEXIS 300, BPU No. [QO20020184](#), (July 28, 2021).

⁴ L. 2021 c.169 §6.

Staff received 12 written comments on the CSI Straw, and 11 comments on the Siting Straw. Commenters included the New Jersey Division of Rate Counsel, various industry representatives, utilities, agricultural boards, environmental organizations, public entities and members of the general public.

By Board Order on December 7, 2022, the Board approved the establishment of the CSI Program. The CSI Program will award New Jersey Solar Renewable Energy Certificate-IIs (“SREC-IIs”) through a competitive solicitation, with separate solicitations for the several selected market tranches: basic grid supply, the built environment, contaminated lands, net metered over 5 MW, and solar plus storage. Rules establishing the CSI Program and addressing accompanying siting criteria were approved by the Board on December 7, 2022 for publication in the New Jersey Register. The prequalification window for the first solicitation was scheduled to open February 1, 2023, and the bid submission will close on March 31, 2023 at 11:59:59 PM.

MOTION FOR RECONSIDERATION

On December 22, 2022, Petitioners filed the Motion seeking three (3) modifications of the December 7, 2022 Order: establishment of an escrow fee for bidders; more stringent project maturity requirements; and an alternative reading of the statutory 5 percent cap on the development of grid supply and large net metered solar facilities on lands that are classified as Agricultural Development Areas within any given county.

Petitioners first contend that by not establishing an escrow fee for bidders into the CSI Program, the CSI Order is out of compliance with the Solar Act of 2021. Petitioners pointed to the statement that “[t]he solicitation process shall . . . “include requirements designed to ensure successful completion of projects, including, but not limited to, the imposition of appropriate escrow fees.” N.J.S.A. 48:3-117(c)(7). Petitioners argued that the CSI Order fails to include an escrow fee for bidders into the CSI Program, and further fails to state that an escrow fee would be established at a later date. Petitioners contended that the low bid fee of \$1,000/MW does little to discourage speculative projects from bidding into the solicitation, and expressed concerns with needless delays in reaching New Jersey’s clean energy goals caused by the Board awarding projects that would be unlikely to reach commercial operation. Petitioners urged the Board to consider imposing an escrow fee of \$40,000/MW.

Petitioners next took issue with the maturity requirements set by the Board, asserting that rather than completion of a Feasibility Study with PJM the Board should require a completed System Impact Study and an executed Facility Study agreement with PJM, as well as demonstration of site control, right of way control, and evidence of community engagement.

Finally, Petitioners contended that the CSI Order erroneously interpreted the Solar Act of 2021 with regards to siting of solar projects on unreserved prime agricultural soils and soils of Statewide importance located in Agricultural Development Areas (“covered agricultural lands.” Specifically, Petitioners asserted that the CSI Order conflicts with section 6(f) of the Solar Act of 2021. N.J.S.A. 48:3-119(f). Section 6(f) includes the statement that “in no case shall the projects approved by the board pursuant to this section occupy more than five percent of the unreserved land containing prime agricultural soils and soils of Statewide importance . . . located within any county’s designated Agricultural Development Area[.]”

Petitioners argued that, under its reading of the Solar Act of 2021, whereas the 2.5 percent Statewide limit applies to all projects on prime agricultural soils, the 5 percent per county concentration limit does not. Petitioners interpret the language to apply the 5 percent county

concentration limit only to projects that are seeking a waiver from the Board to site a solar power electric generation facility on prohibited land uses as laid out in section 6(c). Thus the 2.5 percent statewide cap could be reached, and parties could still petition the Board for a waiver to develop on additional lands with agricultural soils until the five percent county concentration limit is reached. The parties proposed that Board modify its Order to conform to this interpretation of the statute.

STAFF RECOMMENDATIONS

Escrow Fee

Staff agrees with Petitioners that the statute requires imposition of an appropriate escrow fee and that the CSI Order should have explicitly addressed this statutory requirement. As a preliminary matter, Staff notes that the \$1,000 per MW non-refundable participation fee was not intended to and does not constitute a substitute for the statutory escrow fee, which Staff believes should be set independently. Discouraging speculative projects through fees and project maturity requirements is important to the success of the program. Thus, the optimal maturity requirements, including whether and what size fee should be imposed, were the subject of extensive stakeholder comment as well as analysis by Staff and Daymark. As noted by Petitioners, MAREC participated in this process, putting forward the same recommendation for a \$40,000 per MW escrow fee presented in the Motion under review. All of these comments, as well as a review of the programs implemented by other states and Daymark's analysis, formed the record that the Board considered before making its decision.

In implementing the statutory directive to design the program "to ensure successful completion of projects," the Board considered not only the escrow fee but a range of criteria for program participants. The full suite of project maturity requirements contemplated in the Order includes but is not limited to a completed Feasibility Study or executed Part 1 Interconnection agreement, a site plan signed and sealed by a licensed professional engineer, evidence of qualification for the tranche for which the project is intending to bid, and evidence of compliance with relevant Board approved siting criteria. In implementing these and other requirements, Staff believes that the Board properly exercised its judgment to balance the need to encourage development with the need for significant project maturity requirements that meet the statutory requirements.

Staff notes that the CSI Program is a new program, and it is reasonable for the Board to wait until the Board and the State have gained experience with this new program before imposing a potentially chilling escrow fee such as the \$40,000/MW proposed by Petitioners. Therefore, Staff believes that an escrow fee of zero for the first solicitation would be most appropriate and would allow the Board to avoid negatively impacting participants in the first round of this novel program. The experience gained in the first round of the CSI Program will enable the Board to evaluate the effectiveness of the existing maturity requirements and the participation fee, and it will inform the Board's decision of what the appropriate escrow fee is in subsequent rounds. Further, Staff notes that PJM recently has already introduced significant new project maturity requirements, including additional deposits, as part of its recent interconnection reform efforts that will apply to many of the projects participating in the CSI process. These new requirements were taken into consideration as well in electing to gain some experience with the program before imposing a non-zero escrow requirement.

Project Maturity Requirements

As noted by Petitioners, MAREC's member company ENEL argued for the same project maturity

requirements in comments submitted in this docket and considered by the Board.⁵ The Board did not concur with this reasoning then and Staff does not now. In establishing project maturity requirements, the Board sought to balance the level of competition in the solicitation against the need to ensure that participating projects have a reasonable chance of reaching commercial operation within the timelines established by the program. Too little competition, and prices would tend to rise above the economically optimal level. However, as Petitioners note, there is also a danger that allowing immature projects into the solicitation can lead to projects receiving awards that have a very low likelihood of ever reaching completion. These speculative projects may “crowd out” more realistic projects and drive prices below the economically optimal level.

In balancing these competing considerations, the Board spent considerable time evaluating the interconnection process administered by New Jersey’s regional grid operator, PJM Interconnection, LLC. As PJM itself has recognized, its process for reliably connecting to the electrical grid new generation projects, including those participating in the CSI solicitation, is facing significant challenges. Projects that, on paper, would normally be expected to complete the three-stage interconnection process in under two (2) years have instead seen multi-year delays.⁶ Because the Board is dependent on the PJM interconnection process, these delays threaten to decrease the level of competition in the CSI Program.

Indeed, many stakeholders raised concerns regarding the uncertainty faced by grid supply projects as a result of the delays in PJM’s timeline to interconnect new projects. While stakeholders largely agreed that the state of the PJM interconnection process presents challenges to prospective CSI Program projects, recommendations on how to accommodate these timelines in the CSI Program design were highly mixed. One set of stakeholders noted that requiring a project to be at an advanced stage, such as having a completed Facilities Study, would result in a high degree of certainty regarding interconnection costs and remaining timeline and an ability to commence operation within approximately two (2) years. However, several stakeholders opposed requiring a project to be at such an advanced stage, noting that the current PJM queue delays may mean that such a requirement would prevent prospective projects from qualifying for the CSI Program for several years, thereby reducing competition and potentially preventing quality projects from participating in the solicitation.

In making recommendations for the Order establishing the CSI Program, Staff and its consultant analyzed the timing of each of the three (3) PJM studies, the point at which attrition of projects has historically taken place, and the number of projects currently in the queue that would be eligible to compete if a solicitation were held in the near future, under each scenario. The analysis showed that the greatest uncertainty in timing has recently occurred before the completion of a Feasibility Study, and that the process of moving through the queue after this milestone has been reasonably predictable. Staff considered the ongoing PJM queue reform efforts as well. As of January 2023, the PJM Interconnection process will begin transitioning to a more streamlined process designed to move projects through the process in approximately two (2) years. Additionally, Staff notes that PJM has recently significantly increased the financial consequences of participating in the PJM interconnection queue and believes that the increased costs of

⁵ [Comments of ENEL](#), (June 20, 2022), [In re competitive solar incentive \(“CSI”\) program pursuant to L. 2021, c. 169, BPU No. QO21101186](#).

⁶ In order to interconnect, prospective generators generally need to complete a feasibility study, a system impact study, and a facilities study. The new interconnection process being phased in by PJM likewise involves three studies, known as the Phase I, II and III studies. However, during the transition to the new process, many projects will continue to undergo feasibility, system impact and facilities studies.

participating in the PJM process will also help to address the concerns raised by petitioners on both project maturity and cost.

Five Percent (5%) Cap

Staff does not share Petitioners' views on the county concentration limit. Section 6(f) of the statute, which addresses the Board's ability to grant waivers, specifically states that: "...in no case shall the projects approved by the board pursuant to this section occupy more than five percent of the unreserved [covered agricultural lands]." Staff reads this language as directing the Board to prohibit projects that would result in excess of 5% of covered agricultural lands in a particular county, which includes both through the waiver process as well as the underlying requirement. Indeed, the requirement that the Board restrict development "... pursuant to this section..." serves to underscore the Legislature's goal of ensuring that encouraging large scale solar development does not operate to undermine the State's agricultural industry and to cabin the Board's use of the waiver process. In the CSI Order, the Board explained that it interpreted the Solar Act of 2021 as imposing two (2) distinct requirements, one that imposes development limits at the statewide level, and another that imposes development limits on a county-by-county level, which the Board referred to as the "county concentration limit." The Board explained that, "Staff, in cooperation with the Department of Agriculture, SADC, and DEP, has developed the recommendation based on the agencies' common understanding of section 6(f) of the Solar Act of 2021; namely the 5% county concentration limit is a separately enforceable statutory requirement." Further, the Board explained "...that the Solar Act of 2021 specifically excludes preserved farmland from the designation of the 5 percent County Concentration Limit, but does not exclude preserved land in the designation of the 2.5 percent Statewide threshold." The Board thus properly interpreted the Solar Act of 2021 as imposing both a limit on the amount of agricultural lands that can be used for solar development on a state-wide basis, as well imposing a limit on agricultural land use on a county-by-county basis. In both cases, the statute directed the Board to limit solar development to 5 percent of covered agricultural lands. The County concentration limit language evolved from a clear reading of the statute, and multiple rounds of engagement and consensus building between several State agencies, as well as an extensive stakeholder process. While some stakeholders supported the Petitioners' viewpoint, other stakeholders have argued for far more restrictive implementation language.

Thus, Staff believes the reading adopted by the Board is consistent with the plain language of the statute and legislative policy. Nor does Staff find persuasive Petitioners' claim that the legislative intent behind the 5% percent county threshold was to permit development of an additional 2.5 percent of prime farmland beyond the statewide limit until the 5% percent cap was reached. Petitioners point to two (2) statements in the legislative history that include the phrase "[a]fter the 2.5 percent threshold is reached, a waiver would be required for the remaining 2.5 percent of the lands with agricultural soils until the five percent cap on the use of lands with those soils for solar facilities is reached."⁷ Petitioners contended that the phrase "those soils" in this sentence refers to the statewide figure, not to specific counties. Again, Petitioners read a meaning into the language that is not there. There is no ability to increase the 2.5 percent statewide cap to five percent; thus, "the five percent cap" can only refer to the five percent cap established in that section, N.J.S.A. 48:3-119(f), on development within a given Agricultural Development Area.

⁷ Assembly Budget Committee Statement on A4554, 3 (L. 2021, c. 169); Senate Budget and Appropriations Committee Statement on S2605, 3 (L. 2021, c. 169).

Staff recommends that the Board deny the Motion and grant it in part, clarifying the CSI Order with respect to the dollar value appropriate escrow fee pursuant to N.J.S.A. 48:3-117(c)(7).

DISCUSSION AND FINDINGS

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. Disagreement with a Board Order is not a basis to grant a motion for reconsideration. Ibid. 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.⁸

Throughout the design process, the Board sought to provide full information to stakeholders and to address stakeholder concerns through a transparent process, eliciting feedback through straw proposals and stakeholder sessions on both the CSI Program and the solar siting criteria. The dialogue with stakeholders, which began in 2018, involved multiple meetings, modeling sessions, and opportunities for stakeholders to provide feedback. Throughout the process, the Board has received stakeholder input on a wide array of issues. This exchange culminated in the release of the March 2022 Siting Straw Proposal and the April 2022 CSI Straw Proposal for public comment. The Board received a total of 27 formal comments on the two (2) documents, which are summarized in the CSI Order. Staff also held two (2) formal stakeholder meetings to take feedback on specific sections of the Siting Straw, as well as three (3) stakeholder meetings on various aspects of the design of the CSI Program. Given the extensive public process and multiple rounds of stakeholder comments upon the Daymark Report and the CSI Straw Proposal, the CSI Program Order was based upon substantial evidence in the record.

The Board now clarifies the CSI Order regarding the establishment of an appropriate escrow fee as required by the statute. The Board **FINDS** that the appropriate escrow fee for the first competitive solicitation is zero. The Board **FINDS** that experience with the first solicitation and the effectiveness of the administrative fee and the maturity requirements will enable it to better determine the appropriate level for an escrow fee for subsequent solicitations.

As noted above, the Board’s goal is to balance the competing needs to foster competition, while also prioritizing consideration of projects that have a clear line of sight to reaching commercial operation within the appropriate timeline. After consideration of relevant factors and input from stakeholders, the Board adopted the prequalification step of demonstrating either completion of a PJM Feasibility Study or new Phase I Study, or evidence of an executed Part 1 Interconnection agreement. The Board **FINDS** that this requirement continues to reasonably balance these

⁸In re Pub. Serv. Elec. & Gas Co. for approval of its clean energy future-energy efficiency (“CEF-EE”) program on a regulated basis, 2019 N.J. PUC LEXIS 363 at *9 (Nov. 13, 2019); In re Michael Manis and Manis Lighting, LLC—New Jersey clean energy program renewable energy incentive program, 2015 N.J. PUC LEXIS 99 at *7 (April 15, 2015).

needs, particularly in light of the evolving situation at PJM, which is significantly limiting interconnection of new projects. The Board thus sees the recommended project maturity process, in concert with an escrow fee informed by program experience, as the best requirements for projects seeking to bid into the solicitation.

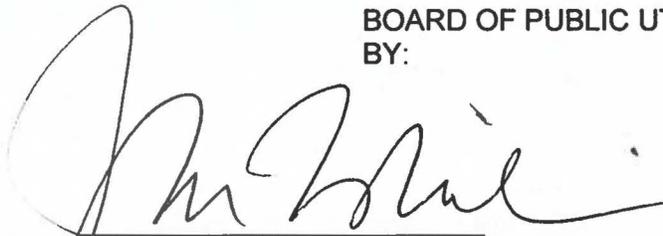
The Board **FINDS** that its interpretation of these statutory provisions struck an appropriate balance between facilitating development and safeguarding New Jersey's agricultural heritage and open space.

In sum, Petitioners have failed to demonstrate any palpable error of law or fact with regard to the CSI Program maturity requirements or the Board's interpretation of the statutory caps on solar development on farmland. As previously noted, Petitioners' disagreement with the Board's decision does not constitute grounds for reconsideration. The Board **HEREBY DENIES** in part the Motion for Reconsideration brought by MAREC and Dakota. The Board **GRANTS** the motion with respect to the need for the CSI Order to address the statutory escrow fee. The Board **CLARIFIES** that it has considered the appropriate escrow fee pursuant to the statute and **FINDS** that the appropriate escrow fee at this time is zero. The Board **FURTHER FINDS** that revisiting the level of the escrow fee following the first solicitation is warranted.

The effective date of this Order is February 24, 2023.

DATED: February 17, 2023

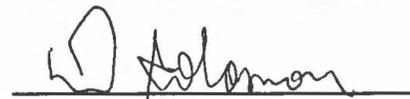
BOARD OF PUBLIC UTILITIES
BY:



JOSEPH L. FIORDALISO
PRESIDENT



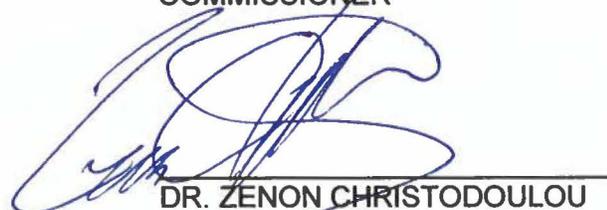
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DIANNE SOLOMON
COMMISSIONER

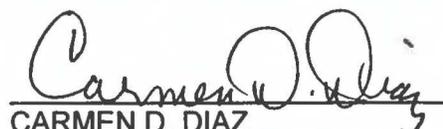


ROBERT M. GORDON
COMMISSIONER



DR. ZENON CHRISTODOULOU
COMMISSIONER

ATTEST:



CARMEN D. DIAZ
ACTING SECRETARY

I HEREBY CERTIFY that the within document is a true copy of the original in the files of the Board of Public Utilities.

IN THE MATTER OF THE COMPETITIVE SOLAR INCENTIVE ("CSI") PROGRAM PURSUANT TO P.L. 2021, C.169

DOCKET NO. QO21101186

SERVICE LIST

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