



Agenda Date: 7/19/13
Agenda Item: 8F

STATE OF NEW JERSEY
Board of Public Utilities
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Trenton, New Jersey 08625-0350
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CLEAN ENERGY

)	ORDER
)	
IN THE MATTER OF THE IMPLEMENTATION OF L.)	
2012, C. 24, THE SOLAR ACT OF 2012)	DOCKET NO. EO12090832V
)	
IN THE MATTER OF THE IMPLEMENTATION OF L.)	
2012, C. 24 (Q)(R)(S) PROCEEDINGS TO ESTABLISH)	
THE PROCESSES FOR DESIGNATING CERTAIN)	
GRID SUPPLY PROJECTS AS CONNECTED TO THE)	
DISTRIBUTION SYSTEM – REQUEST FOR)	
APPROVAL OF GRID SUPPLY SOLAR ELECTRIC)	
POWER GENERATION PURSUANT TO SUBSECTION)	DOCKET NO. EO12090880V
(S))	
)	
SYNCARPHA CAPITAL – (KINGWOOD) – PJM W1-076)	DOCKET NO. EO12121126V

Party of Record:

J. Ferd Convery III, Esq., on behalf of Syncarpha Capital

BY THE BOARD:

Syncarpha Capital Althea II (“Petitioner” or “Syncarpha”), the owner and developer of the Syncarpha Capital (Kingwood) solar project (“Kingwood Project”) has moved for reconsideration of the Board’s Order in the above-captioned matter (“May 10 Order”) denying its application to be designated “connected to the distribution system” pursuant to L. 2012, c. 24, sec. 3 (“Solar Act”) , codified as N.J.S.A. 48:3-87 (s) (“Subsection s”).

BACKGROUND

As described in more detail in the May 10 Order, the Solar Act, a bi-partisan effort to stabilize the solar market, was signed into law by Governor Chris Christie on July 23, 2012, and took effect immediately. The law amends N.J.S.A. 48:3-51 and N.J.S.A. 48:3-87, provisions of the Electric Discount and Energy Competition Act, which requires, among other things, that retail sellers of electricity comply with the State’s renewable portfolio standards (“RPS”). The RPS encourages the production of renewable energy.

Prior to the Solar Act, whether solar generated electricity could be the basis for an Solar renewable energy certificates (SRECs) usable for RPS compliance depended on meeting the requirements of N.J.A.C. 14:8-2, including but not limited to pre-registration through N.J.A.C. 14:8-2.4, which is commonly referred to as the SREC Registration Program ("SRP"). One of the RPS requirements is that the energy be generated at a facility issued a Certification Number through the Board's registration process. See N.J.A.C. 14:8-2.4(a). The registration process includes an application and review process to determine whether a solar facility meets SREC eligibility requirements. N.J.A.C. 14:8-2.4(f). After review is completed, and provided that SREC eligibility requirements are satisfied, the facility is issued a conditional registration. The notice of conditional registration, also known as the SRP acceptance letter, which includes an expiration date twelve months from its issuance, states that if the solar facility is constructed which meets all program eligibility requirements including compliance with all federal, state, and local laws, a Certification Number will be issued for the solar facility upon completion of construction, submission of a final as-built package, and inspection. N.J.A.C. 14:8-2.4(f)(4)(i) and (ii).

Following conditional registration, construction of the solar facility could begin, and the facility must be completed prior to the registration expiration date, although one extension is allowed. See N.J.A.C. 14:8-2.4(f)(5) and (g). It is not until after the facility owner submits a post-construction certification package that includes a copy of the approval from either the relevant electric distribution company ("EDC") or PJM Interconnection, L.L.C. ("PJM") to interconnect and energize the facility, and after inspection of the facility or waiver of inspection per N.J.A.C. 14:8-2.4(i) and (k), that a Certification Number is assigned to the facility for use in obtaining SRECs from PJM-Environmental Information Services Generation Attribute Tracking System ("PJM-EIS GATS"). N.J.A.C. 14:8-2.4(l). See N.J.A.C. 14:8-2.2 (definition of "Generation Attribute Tracking System").

The Solar Act adds requirements that are not in the SRP for Board approval or designation of certain projects as being "connected to the distribution system" in order to earn SRECs. Subsection s applies to land actively devoted to agricultural or horticultural use that is valued, assessed, and taxed pursuant to the Farmland Assessment Act of 1964, N.J.S.A. 54:4-23.1 to -23.24, at any time within the 10 year period prior to the effective date of the Solar Act ("farmland"). Under Subsection s, a solar electric power generation facility on qualifying farmland that is not net-metered or an onsite generation facility (that is, the electricity is not being used to satisfy the electrical needs of structures on or adjacent to the land where the solar facility is located) is subject to a review process by the Board to determine whether the proposed project should be approved as connected to the distribution system and therefore eligible to earn SRECs. N.J.S.A. 48:3-87(s)(2). This is incremental to satisfaction of the Board's SREC Registration Program ("SRP") process.

After notice, a public hearing, and opportunity for oral and written comments, on November 30, 2012, Board Staff distributed the Subsection s(2) application via mass email distribution to renewable energy stakeholders, and posted the application form on its webpage and on the webpage of the New Jersey Clean Energy Program. Any company applying for eligibility for SRECs under N.J.S.A. 48:3-87(s)(2) was required to submit a completed application package by December 17, 2012. The application required responding to twenty seven questions, all, as noted in the May 10 Order "designed specifically to aid Staff in making a recommendation to the Board as to which proposed projects should be approved[.]" May 10 Order at 12-14.

As noted in the May 10 Order, Staff reviewed a total of fifty seven applications and ranked them according to the extent of each application's progress toward completion.¹ The key criteria utilized by Staff to judge project progress included the application submissions regarding project completion status, anticipated completion date, pictures of any completed construction, and percentage of funding expended. Based on these criteria and on its field inspections of the twelve projects which Staff determined were most advanced on the basis of the criteria, Staff recommended for approval and the Board approved three applications. In re the Implementation of L. 2012, c. 24, N.J.S.A. 48:3-87(q)(r)(s), Proceedings to Establish the Processes for Designating Certain Grid-Supply Projects as Connected to the Distribution System, Approval of Application for SunPerfect, Inc., W1-132, Approval of Application for OCI Solar Power, LLC, W1-112, Approval of Application for NJ Clean Energy Ventures, W2-056, Dkt Nos. EO12090880V, EO12121101V, EO12121106V, EO12121142V (May 8, 2013).

Staff also considered whether a project had obtained all final, non-appealable local, state, and federal approvals and permits. Question number two on the application asked explicitly whether approvals had been obtained and read as follows:

Have all final unappealable federal, state, regional and local approvals been secured? Yes or No _____.

Staff considered the possession of these approvals as a strong indicator that completion was likely as a solar project cannot lawfully be constructed without all of these approvals. When the applications which Staff was not recommending for immediate approval were reviewed using this criterion as a bright line, Staff recommended, and the Board approved, deferral of final decision for twenty of the fifty seven projects, with final determinations to be made following development of additional evaluation criteria.

Thirty four projects remained. Seven projects failed to meet the minimum statutory criteria and were denied on that basis. Finally, Staff determined that the remaining twenty seven applications were neither substantially completed nor had received all final, non-appealable approvals and permits. Staff recommended these applications be denied and the Board did so.

Among the projects denied was the Kingwood Project. According to Staff's review, the application indicated that project construction financing had not been secured, that the project had been not been installed, that construction had not commenced, and that there were currently no materials on site. In addition, the system had not been authorized to energize and was not interconnected, nor had an SREC off take contract had been secured. Lastly, the application indicated that all the requisite federal, state, regional and local approvals had not been secured. Staff, therefore, recommended denial based on its review of all of the above factors concluding that "this project is still in the early stage of completion, federal, state, regional and local approvals had not been secured by the application date, and prospects for timely completion remain speculative..." May 10 Order at 31.

MOTION FOR RECONSIDERATION

On June 3, 2013, Syncarpha filed a motion for reconsideration by the Board. Petitioner seeks to have its application "deferred rather than "denied." According to the motion, Staff erred in determining that Syncarpha had not received all final non-appealable approvals because its last

¹ "Completion" includes all the activities required in developing a project, including but not limited to construction.

local approval was received before it filed its application, and had become non-appealable before the Board issued the May 10 Order. In addition, Petitioner contends that its project is in fact further advanced than a number of those which were deferred rather than denied. Petitioner's brief at 1-2.

In support of its request, Petitioner has furnished the certification of Clifford Chapman, ("Chapman Certification"), who states that he has direct personal knowledge of the Kingwood Project. Chapman Certification at para. 5. Mr. Chapman states that the Kingwood Township Planning Board ("Planning Board") voted to approve the final site plan for the Kingwood Project the day before Petitioner's submittal of its Subsection s application to the Board, and that a copy of the Planning Board agenda was included with that application. Chapman Certification at para. 8. Mr. Chapman acknowledges that the forty-five day appeal period had not yet run, and in fact did not begin to run until the Planning Board had memorialized its approval in a Resolution adopted on January 10, 2013, three weeks after the application deadline. Chapman Certification at para. 6, 7. However, Petitioner argues that the Board should have based its decision on the facts at the time of its decision rather than at the time of application. Petitioner's brief at 4. Mr. Chapman claims that the Board "should have known that our Final Site Plan Approval, in unappealable form, would exist long before the Board's May 10, 2013 Order." Chapman Certification at para. 10. Mr. Chapman asserts that because Petitioner's application stated that no appeal was anticipated, Staff's characterization of the application as lacking final, non-appealable approvals was inaccurate. Chapman Certification at para. 9, 10. Mr. Chapman also states that if the Board or Staff had checked with Petitioner or with Kingwood Township, the Board and/or Staff would have been aware that no appeal was filed. Chapman Certification at para. 10,11.²

Syncarpha maintains that the Board erred in not treating the Kingwood Project as it treated other projects with final approvals. Syncarpha asserts that all projects with final, nonappealable approvals were deferred and, since the Kingwood Project's approvals became final before the Board acted on the applications, the Kingwood Project should be deferred as well. Petitioner's brief at 5-6.

DISCUSSION AND FINDINGS

Following review, the Board **FINDS** that nothing in Syncarpha's request requires the Board to modify or otherwise reconsider its decision. Generally, a party should not seek reconsideration merely based upon dissatisfaction with a decision. D'Atria v. D'Atria, 242 N.J. Super. 392, 401 (Ch. Div. 1990). Rather, reconsideration is reserved for those cases where (1) the decision is based upon a "palpably incorrect or irrational basis;" or (2) it is obvious that the finder of fact did not consider, or failed to appreciate, the significance of probative, competent evidence. E.g., Cummings v. Bahr, 295 N.J. Super. 374, 384 (App. Div. 1996). The moving party must show that the action was arbitrary, capricious or unreasonable. D'Atria, supra, 242 N.J. Super. at 401.

N.J.A.C. 14:1-8.6 requires that a request for rehearing or reconsideration be done by a motion that enumerates the alleged errors of law or fact, and where an opportunity is sought to

² Mr. Chapman has provided a timeline of the Kingwood Project's permitting process which indicates that approvals from the County Soil Conservation District and Delaware Raritan Canal Commission were not received until February 2013, Chapman Certification at para. 6, which further supports Staff's conclusion that all final, non-appealable approvals were not received prior to the application deadline of December 17, 2012.

introduce additional evidence, that evidence shall be stated briefly with the reasons for failing to provide it previously. Syncarpha's motion substantially conformed to the requirements of the regulation. But this Board will not modify an Order in the absence of a showing that the Board's action constituted an injustice or that the Board misunderstood or failed to take note of a significant element of fact or law. Here, the Board does not find that the issues raised by Petitioner are sufficient to warrant reconsideration or modification.

Syncarpha claims that the Board had a legal obligation to review developments in its local approval process subsequent to the submittal of its application and that it erred in failing to do so. Petitioner states that by not considering the fact that the Planning Board's approval became non-appealable prior to the issuance of the May 10 Order, the Board failed to consider relevant evidence. Petitioner's brief at 4. However, Staff recommended, and the Board approved, as a key criterion whether final, non-appealable approvals had been received as of the time of application. The application did not ask whether final, non-appealable approvals would be received at some point following the submittal of the application. Having selected prior attainment of final, non-appealable approvals as a criterion, the Board had no obligation to consider whether approvals subsequently became final. Such a development was irrelevant to its review. As noted above, information provided by Petitioner clearly supports the conclusion that the necessary approvals were not final as the County Soil Conservation District and Delaware Raritan Canal Commission approvals were not received until more than two months after the application was filed.

The second flaw in Petitioner's argument is its apparent assumption that the Board or its Staff had a duty to supplement the application materials submitted by Petitioner. Mr. Chapman appears to impute an obligation on the part of the Board or its staff to conduct outreach to applicants following the submittal of their applications. Chapman Certification at para. 10,11. The questions on the application, as noted above, were designed to assist Staff in making a recommendation to the Board; they were not intended as the first step in an on-going investigation into new developments in the status of individual projects.

Petitioner also asserts that denial of its application is unfair because, according to Petitioner's calculations, its progress is as great or greater than that of many projects which were deferred. More specifically, Petitioner points to its expenditure of \$1.5 million as being larger than the amounts spent by thirteen of the twenty deferred projects. Petitioner's brief at 2. According to Mr. Chapman, "our Project equals or exceeds [the] deferred projects in many of these project development categories, especially in regards to the amount of money we have spent." Chapman Certification at para. 13. This statement is followed by a table listing the status of Petitioner and the twenty deferred projects on a number of indices: approvals, percentage of costs expended, purchase and placement of equipment, whether Construction Service Agreements and Interconnection Service Agreements have been executed and funded, whether money has been "safe harbored" pursuant to Treasury Section 1603, and progress at the project site. *Ibid.* Petitioner, in effect, is proposing to substitute evaluation by a subset of criteria which it believes favor its own application for the key criteria selected by the Board: progress toward completion and the possession of final, non-appealable governmental approvals as of the date of filing. Petitioner is not entitled to substitute its own judgment for that of the Board. Certainly Petitioner may not "cherry pick" from the criteria selected by the Board those which tend to favor it and ignore the rest. Although only the issue of the finality of the approval was raised by the motion, the Board notes that Staff evaluated the proposed project using all of the criteria described above and found it wanting in various other respects.


The Board has reviewed the motion for reconsideration, the supporting documentation, and Staff's prior recommendation. The Board **FINDS** that Petitioner had not received all final, non-appealable state and local approvals as of the time of the filing of the application, and therefore, Petitioner did not satisfy the criteria for approval which the Board applied to all proposed projects that were otherwise eligible under Subsection s.


Accordingly, the Board **HEREBY DENIES** the Petitioner's request that the Board modify the May 10 Order and reclassify the Kingwood project as deferred rather than denied.

DATED: 7/19/13
July 19, 2013

BOARD OF PUBLIC UTILITIES
BY:


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PRESIDENT


JEANNE M. FOX
COMMISSIONER


JOSEPH L. FIORDALISO
COMMISSIONER

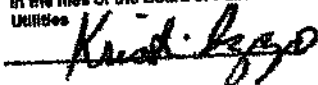

MARY-ANNA HOLDEN
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COMMISSIONER

ATTEST:

KRISTI IZZO
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 IMPLEMENTATION OF L. 2012, C. 24, THE SOLAR ACT OF 2012

IN THE MATTER OF THE IMPLEMENTATION OF L. 2012, C. 24 (Q)(R)(S) PROCEEDINGS
TO ESTABLISH THE PROCESSES FOR DESIGNATING CERTAIN GRID SUPPLY
PROJECTS AS CONNECTED TO THE DISTRIBUTION SYSTEM – REQUEST FOR
APPROVAL OF GRID SUPPLY SOLAR ELECTRIC POWER GENERATION PURSUANT TO
SUBSECTION (S)

SYNCARPHA CAPITAL – (KINGWOOD) – PJM W1-076

DOCKET NOS. EO12090832V, EO12090880V & EO12121126V

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