



Agenda Date: 5/25/16  
Agenda Item: 8C

**STATE OF NEW JERSEY**  
**Board of Public Utilities**  
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Post Office Box 350  
Trenton, New Jersey 08625-0350  
[www.nj.gov/bpu/](http://www.nj.gov/bpu/)

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, N.J.S.A. 48:3-87(Q)(R) AND (S) –	)	
PROCEEDINGS TO ESTABLISH THE PROCESSES	)	
FOR DESIGNING CERTAIN GRID-SUPPLY	)	
PROJECTS AS CONNECTED TO THE DISTRIBUTION	)	DOCKET NO. EO12090880V
SYSTEM;	)	
	)	
BRICKYARD, LLC	)	DOCKET NO. QO13101020

**Party of Record:**

**Steven W. Griegel, Esq.,** for Brickyard, LLC

BY THE BOARD:

**BACKGROUND AND APPLICATION PROCESS**

On July 23, 2012, L. 2012, c. 24 (“Solar Act”) was signed into law by Governor Chris Christie. The Solar Act amends certain aspects of the statute governing generation, interconnection, and financing of renewable energy. Among other actions, the Solar Act requires the New Jersey Board of Public Utilities (“Board”) to conduct proceedings to establish new standards and to develop new programs to implement its directives. By Order dated October 10, 2012, the Board directed Board staff (“Staff”) to initiate proceedings and convene a public stakeholder process to fulfill the directives of the Solar Act including those under N.J.S.A. 48:3-87(q) (“Subsection q”).<sup>1</sup>

<sup>1</sup> I/M/O the Implementation of L. 2012, C. 24, The Solar Act of 2012, Docket No. EO12090832V; I/M/O the Implementation of L.2012, C.24, N.J.S.A 48:3-87(d)(3)(b) – A Proceeding to Investigate Approaches to Mitigate Solar Development Volatility, Docket No. EO12090860V; I/M/O the Implementation of L.2012, C.24, N.J.S.A 48:3-87(e)(4) – Net Metering Aggregation Standards, Docket No. EO12090861V; I/M/O the Implementation of L.2012, C.24, N.J.S.A 48:3-87(Q), (R) and (S) – Proceedings to Establish the

Subsection q of the Solar Act provides that:

(1) During the energy years of 2014, 2015, and 2016, a solar electric power generation facility project that is not: (a) net metered; (b) an on-site generation facility; (c) qualified for net metering aggregation; or (d) certified as being located on a brownfield, on an area of historic fill or on a properly closed sanitary landfill facility, as provided pursuant to subsection t. of this section may file an application with the board for approval of a designation pursuant to this subsection that the facility is connected to the distribution system. An application filed pursuant to this subsection shall include a notice escrow of \$40,000 per megawatt of the proposed capacity of the facility. The board shall approve the designation if: the facility has filed a notice in writing with the board applying for designation pursuant to this subsection, together with the notice escrow; and the capacity of the facility, when added to the capacity of other facilities that have been previously approved for designation prior to the facility's filing under this subsection, does not exceed 80 megawatts in the aggregate for each year. The capacity of any one solar electric power supply project approved pursuant to this subsection shall not exceed 10 megawatts. No more than 90 days after its receipt of a completed application for designation pursuant to this subsection, the board shall approve, conditionally approve, or disapprove the application. The notice escrow shall be reimbursed to the facility in full upon either rejection by the board or the facility entering commercial operation, or shall be forfeited to the State if the facility is designated pursuant to this subsection but does not enter commercial operation pursuant to paragraph (2) of this subsection.

(2) If the proposed solar electric power generation facility does not commence commercial operations within two years following the date of the designation by the board pursuant to this subsection, the designation of the facility shall be deemed to be null and void, and the facility shall not be considered connected to the distribution system thereafter.

[N.J.S.A. 48:3-87(q)]

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Processes for Designating Certain Grid-Supply Projects as Connected to the Distribution System, Docket No. EO12090880V; I/M/O the Implementation of L.2012, C.24, N.J.S.A 48:3-87(T) – A Proceeding to Establish a Program to Provide Solar Renewable Energy Certificates to Certified Brownfield, Historic Fill and Landfill Facilities; Docket No. EO12090862V; and I/M/O the Implementation of L.2012, C.24, N.J.S.A 48:3-87(W) – A Proceeding to Consider the Need for a Program to Provide a Financial Incentive to Supplement Solar Renewable Energy Certificates for Net Metered Projects Greater than Three Megawatts; Docket No. EO12090863V (October 10, 2012); 2012 N.J. PUC LEXIS 286, (“October 10 Order”).

On November 9, 2012, the Board held a public hearing presided over by Commissioner Joseph L. Fiordaliso. In addition, the public was invited to submit written comments through November 23, 2012. Over one hundred stakeholders representing the electric distribution companies (“EDCs”), solar market participants, landfill developers, environmentalists, municipalities, and ratepayers participated in the public hearing and submitted comments. Based in part upon the comments received from the public, Staff developed an application and a form of escrow agreement to implement the requirements of Subsection q.

By Order dated May 9, 2013, the Board approved an application process, form of application and form of escrow agreement to be used in connection with the Board’s review of projects seeking designation as “connected to the distribution system” under Subsection q.<sup>2</sup> Both forms were attached to the May 9 Order. As stated above, Subsection q charges the Board with denying, approving or conditionally approving qualifying applications from certain proposed grid supply solar facilities for designation as “connected to the distribution system” during energy years 2014, 2015 and 2016<sup>3</sup> within 90 days of receipt of a completed application. Subsection q also provides that “[a]n application filed pursuant to this subsection shall include a notice escrow of \$40,000 per megawatt of the proposed capacity of the facility,” which “shall be reimbursed to the facility in full upon either rejection by the board or the facility entering commercial operation, or shall be forfeited to the State if the facility is designated pursuant to this subsection but does not enter commercial operation pursuant to paragraph (2) of this subsection.” N.J.S.A. 48:3-87(q)(1).

As described in the May 9 Order, the developer of a proposed facility must file a Subsection q application with the Board for one (1) energy year -- EY 2014, 2015 or 2016 -- with a copy provided to Rate Counsel, the proposed system must be 10 MW or less, the appropriate escrow amount must be noticed as properly funded, and all appropriate Solar Renewable Energy Certificates (“SRECs”) registration requirements must be fulfilled. Applications for EY 2014 that fulfilled these procedures would be approved on a first-in-time basis until as much as 80 MWdc of capacity was approved for EY 2014. May 9 Order at 9.

Applicants for EY 2015 and EY 2016 that fulfilled the Board’s application procedures would be conditionally approved on a first-in-time basis until up to 80 MWdc capacity was conditionally approved for the respective energy year. Full approval of a Subsection q application for EY 2015 or EY 2016 would be effective on the first day of the respective energy year subject to the conditions described below. Ibid.

To obtain final approval as “connected to the distribution system” and eligibility for SRECs for a Subsection q application for EY 2014, EY 2015 or EY 2016, the developer of a proposed facility must have submitted a Subsection q application and received approval or conditional approval from the Board; the facility must be the only facility interconnected at a distinct interconnection point; the facility must have completed construction and received authorization to energize; and

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<sup>2</sup> I/M/O the Implementation of L. 2012, c. 24, the Solar Act of 2012 and I/M/O the Implementation of L. 2012, c. 24, N.J.S.A. 48:3-87 (q)(r)and (s) – Proceedings to Establish the Processes for Designating Certain Grid-Supply Projects as Connected to the Distribution System – Subsection (q) Application and Escrow Agreement, Docket Nos. EO12090832V & EO12090880V (May 9, 2013); 2013 N.J. PUC LEXIS 112, (“May 9 Order”).

<sup>3</sup> As defined in N.J.S.A. 48:3-51, an energy year (“EY”) is the 12-month period from June 1 through May 31, numbered according to the calendar year in which it ends.

the completed system must be 10 MW or less. Additionally, applicants are required to register with the SREC Registration Program (“SRP”). Ibid.

All applicants, including those seeking approval in EY 2015 and EY 2016, are required to demonstrate that the required amounts are currently held in escrow. “Applicants seeking approval for designation in EY 2015 must acknowledge that the two year escrow forfeiture time period will not begin until June 1, 2014, and those seeking approval for designation in EY 2016 acknowledge that the two year period begins June 1, 2015.” Ibid.

In the May 9 Order, the Board opened the initial application period to begin on May 15, 2013 and extend through May 31, 2013, (“Round One”). Ibid. The May 9 Order was posted on the Board and the New Jersey Clean Energy Program’s (“NJCEP”) websites and circulated via the renewable energy (“RE”) stakeholder email distribution lists on or about that date. The application attached to the May 9 Order provided detailed instructions for applicants seeking to be considered eligible pursuant to Subsection q. On May 13, 2013, Staff distributed a copy of Frequently Asked Questions regarding Subsection q (“FAQs”) via the RE stakeholder email distribution list and posted to the NJCEP website. Through the forms attached to the May 9 Order and the FAQs, the Board reiterated the process, the qualification requirements, and the forfeiture risk associated with the Subsection q escrow. Specifically, the Instructions note:

Only those applications which meet all the statutory requirements under N.J.S.A. 48:3-87(q) will be considered for subsequent designation as “connected to the distribution system” for purposes of SREC eligibility pursuant to N.J.S.A. 48:3-87(q). An applicant must choose and identify below one and only one Energy Year, EY 14, EY 15 or EY16, for which it seeks approval, and affirm by certification in Section G, below that the applicant has submitted only one application for the Facility identified in the application. A Facility must enter commercial operation within two (2) years of the EY start date for which designation is requested or the Facility will not be eligible to earn SRECs and the escrow described at I. 4 will be forfeited.

[Subsection q Application Materials, pg. 3 of 12.]

The Escrow Agreement provides:

The sole purpose of the escrow account shall be to ensure that funds are set aside and kept available in the event that the Solar Facility is designated by the BPU as connected to the distribution system pursuant to N.J.S.A. 48:3-87q, and fails to commence commercial operation within two (2) years of the date of designation.

[Subsection q Application Materials, pg. 8 of 12.]

And, in response to a question regarding a refund of the escrow, the FAQs state:

The escrow agreement can be terminated and the funds refunded, as long as your facility hasn't been designated; ie EY 14 conditional approvals will be made by the Board with designation effective upon approval, EY15 designation will occur on June 1, 2014 and EY16 is on June 1, 2015. The law states; "the notice escrow shall be reimbursed to the facility in full upon either rejection by the Board or the facility entering commercial operation...."

[Frequently Asked Questions about the Subsection q Application Process, pg. 1 of 3.]

The one-page Notice provided by Staff was to be completed by applicants and sent as an attachment to an email to a dedicated email address no earlier than 4 p.m. on May 15, 2013 and no later than 5 p.m. on May 31, 2013. Applicants were told that they had either five days following the submission of a Notice or until May 31, 2013, whichever was earlier, to submit a completed application. Applicants were instructed that an escrow agreement executed on or prior to May 15, 2013, using the form of agreement available on NJBPU and NJCEP websites must be included with the application. Furthermore, applicants were instructed that only one (1) application would be accepted per project with a separate Notice submitted for each project. Unsuccessful applicants under N.J.S.A. 48:3-87(s) ("Subsection s") were informed of their eligibility to apply under Subsection q. Subsection q Application Materials, pg. 1 of 12.

Staff discussed the Subsection q application process and forms with RE stakeholders at the regularly scheduled stakeholder meeting on May 14, 2013. On May 15, 2013, at 4:00 p.m. per the internal clock of the Board's email servers, the "[Qnotice@bpu.state.nj.us](mailto:Qnotice@bpu.state.nj.us)" email address was activated by the Board's Information Technology staff. Twenty-eight (28) Notices were filed from 15:59:37 (3:59 p.m. on the internal clock of the Board's email server) through 19:50:37 (7:50 p.m.) on Wednesday May 15, 2013. Twenty-seven (27) of the twenty-eight (28) projects which filed the Notice also submitted an application.

A timely Notice was filed and an application was submitted on behalf of Brickyard, LLC. ("Brickyard") for an EY 2015 approval of a 2 MWdc grid supply solar facility proposed for 100 Birdsall Road in Farmingdale, New Jersey ("Phase I"). After review, Staff recommended that Brickyard's application be granted. After review and consideration, by Order dated August 21, 2013, the Board adopted Staff's recommendation and conditionally approved the Brickyard application and six (6) others for EY 2015.<sup>4</sup> Significantly, and consistent with the May 9 Order, the Board established June 1, 2014 as the date from which the two year construction completion period begins to run for projects approved for EY 2015. August 21 Order at 10.

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<sup>4</sup> I/M/O the Implementation of L. 2012, C. 24, the Solar Act of 2012; and I/M/O the Implementation of L. 2012, C. 24, N.J.S.A. 48:3-87(q)(r) and (s) – Proceedings to Establish the Processes for Designating Certain Grid-Supply Projects as Connected to the Distribution System – Subsection q Application Approvals, Docket Nos. EO12090832V & EO12090880V (August 21, 2013); 2013 N.J. PUC Lexis 269, ("August 21 Order").

The August 21 Order also opened an additional application process under Subsection q beginning on October 15, 2013 (“Round Two”). As directed by the Board, Staff notified stakeholders and circulated instructions for participation in Round Two. The Round Two process repeated the process used in Round One with some clarifying updates. Brickyard filed a Notice and an application in Round Two for approval in EY 2015 of an additional .362 MWdc grid supply solar facility (“Phase II”) to be built at the same location as Phase I. Based on the time of receipt as indicated by the Board’s server, Staff recommended that the application be denied to avoid oversubscribing the capacity remaining available for EY 2015. After review of the Round Two process and Staff’s recommendations, by Order dated February 4, 2014, the Board denied Brickyard’s application for Phase II along with the applications for nine (9) other projects slated for EY 2015.<sup>5</sup> In a separate Order dated February 4, 2014, the Board approved seventeen (17) applications for the remaining capacity in each of the three (3) Energy Years, including those by G&S Wantage Solar, LLC (“Wantage”) and Hanover Solar, LLC (“Hanover”), which were submitted for EY 2015.<sup>6</sup>

On or about March 3, 2014, Brickyard filed a motion for reconsideration of the February 4 Order and of the February 4 Approvals Order, challenging the process used in Round Two and the Board’s approval of the Wantage and Hanover applications. On or about March 21, 2014, while the motion for reconsideration was pending, Brickyard appealed these orders, which appeal was withdrawn by Brickyard on March 28, 2014. By Order dated July 23, 2014, the Board denied Brickyard’s motion for reconsideration.<sup>7</sup> On or about August 12, 2014, Brickyard appealed the February 4 Order, the February 4 Approvals Order, and the July 23 Order. This appeal was docketed under Docket No. A-5811-13T3 (“Subsection q Appeal”).

On or about November 26, 2014, Brickyard filed an appeal of the Board’s Order dated October 31, 2014,<sup>8</sup> setting the criteria and timing for a supplemental filing for applications which had been deferred for further consideration under Subsection s, contending that the Subsection s

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<sup>5</sup> I/M/O the Implementation of L. 2012, C. 24, the Solar Act of 2012; and I/M/O the Implementation of L. 2012, C. 24, N.J.S.A. 48:3-87(q)(r) and (s) – Proceedings to Establish the Processes for Designating Certain Grid-Supply Facilities as Connected to the Distribution System – Subsection (q) Round 2 Application Denials and Withdrawals, Docket Nos. EO12090832V & EO12090880V et al. (February 4, 2014); 2014 N.J. PUC LEXIS 20, (“February 4 Order”).

<sup>6</sup> I/M/O the Implementation of L. 2012, C. 24, the Solar Act of 2012; and I/M/O the Implementation of L. 2012, C. 24, N.J.S.A. 48:3-87(q)(r) and (s) – Proceedings to Establish the Processes for Designating Certain Grid-Supply Facilities as Connected to the Distribution System – Subsection (q) Round 2 Application Approvals, Docket Nos. EO12090832V & EO12090880V et al. (February 4, 2014); 2014 N.J. PUC LEXIS 19, (“February 4 Approvals Order”). Reiterating the designation date for EY 2015 projects, the Board, on page 11, established June 1, 2014 as the date from which the two year construction completion period begins to run for projects approved for EY 2015 on page 11. February 4 Approvals Order at 11.

<sup>7</sup> I/M/O the Implementation of L. 2012, C. 24, the Solar Act of 2012; and I/M/O the Implementation of L. 2012, C. 24, N.J.S.A. 48:3-87(q)(r) and (s) – Proceedings to Establish the Processes for Designating Certain Grid-Supply Projects as Connected to the Distribution System – Subsection (q) Round Two Applications – Brickyard LLC – Motion for Reconsideration, Docket Nos. EO12090832V, EO12090880V & QO13101020 (July 23, 2014); 2014 N.J. PUC LEXIS 205, (“July 23 Order”).

<sup>8</sup> I/M/O the Implementation of L. 2012, C. 24, the Solar Act of 2012; and I/M/O the Implementation of L. 2012, C. 24, N.J.S.A. 48:3-87(q)(r) and (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) – Additional Application Criteria, Docket Nos. EO12090832V & EO12090880V (October 31, 2014); 2014 N.J. PUC LEXIS 321.

process was prejudicial to applicants under Subsection q. This appeal was docketed under Docket No. A-1579-14T3 (“Subsection s Appeal”).

Subsequently, Brickyard and Board Staff executed a settlement agreement on April 6, 2015 (“Settlement”), resolving the Subsection s and Subsection q appeals. Paragraph 1 of the Settlement provides in relevant part that:

1. Staff will recommend that the Board approve the Settlement and thereby approve the Project for designation as connected to the distribution system under Subsection q for EY 2015 under the same terms and conditions as applied to projects approved by the Board’s February 4 Approvals Order.
2. Within two weeks of the effective date of Board approval, Brickyard will file a new SRP registration package to reflect the additional .362 MWdc as a Phase II to the 2 MWdc solar Phase I project at the same location which was previously approved by the Board under Docket No. EO13060541 by Order dated August 21, 2013, and assigned SRP number 21356. The combined Phase I and Phase II will each comply with the EY 15 requirements, and be independently completed using the same interconnection point as previously approved for Phase I. Brickyard will also provide evidence of the funding of a recalculated escrow reflecting both Phase I and Phase II and the total 2.362 MWdc capacity of the solar project.
3. Brickyard shall comply with all of the requirements of Subsection q orders.

Mindful of the State’s strong public policy favoring settlement, the Board approved the Settlement by Order dated April 15, 2015.<sup>9</sup> The Board found that the terms of the Settlement were fair and reasonable. April 15 Order at 5. The Board further found that allowing Brickyard “to move forward at a revised capacity (including Phase I and Phase II) comports with the requirements of Subsection q, and eliminates the need for additional litigation over the Subsection q process and the projects approved under that process.” *Ibid.* Accordingly, the Board adopted the Settlement in its entirety, incorporating its terms, and directed the parties to comply with the Settlement. *Id.* at 6. Additionally, the Board directed Board Staff to promptly process the SRP registration package for Phase II upon Brickyard’s submission to Staff evidence of the dismissal with prejudice of the Subsection q and Subsection s Appeals. *Ibid.*

Thereafter, Brickyard registered its Phase II project with the SRP. On June 23, 2015, referencing the April 15 Order, the RE Market Manager issued Brickyard an SRP Acceptance Letter, notifying Brickyard that its Phase II was assigned SRP number 38812, acknowledging that Brickyard’s project has been accepted for Energy Year 2015, and advising that Brickyard must complete construction and submit a Final-As-Built Packet no later than May 31, 2016.

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<sup>9</sup> I/M/O the Implementation of L. 2012, C. 24, the Solar Act of 2012; and I/M/O the Implementation of L. 2012, C. 24, N.J.S.A. 48:3-87(q)(r) and (s) – Proceedings to Establish the Processes for Designating Certain Grid-Supply Projects as Connected to the Distribution System – Brickyard, LLC, Docket Nos. EO12090832V, EO12090880V & QO13101020 (April 15, 2015); 2015 N.J. PUC LEXIS 118, (“April 15 Order”).

On April 4, 2016, Brickyard filed a Notice of Motion/Application for Relief (“Application”) and a Supporting Brief and Attachments (“Supporting Brief”) with the Board, requesting an extension of time to finish construction of Phase II. Specifically, Brickyard requests that the Board modify the designation date for its EY 2015 Phase II project, from June 1, 2014 to April 15, 2015, the date the Board approved the Settlement. Alternatively, Brickyard asks that the Board extend by six (6) months the date by which it must commence commercial operation, that is, from May 31, 2016 to approximately November 30, 2016. Supporting Brief at 5. On May 24, 2016, Brickyard supplemented its Application by attaching a copy of an order entered by the Board in February 2016.<sup>10</sup> Brickyard alleges that its circumstances are similar to the circumstances in the True Green Order; therefore, the Board should similarly grant Brickyard’s request to extend its designation date.

### **STAFF RECOMMENDATION**

Brickyard states that it needs an extension because its “commercial operator” has informed Brickyard that it needs additional time and will not install the project without a Board-approved extension. Id. at 1. In support of its request, Brickyard argues that Phase II is in a unique position because “all [other] projects were provided a two year period, after approval, to be built.” Id. 3. Brickyard also avers that the Board has the ability to grant an extension and that such an extension would not prejudice any other person. Id. at 1-2, 3.

Brickyard maintains that it knows of no other project in a similar situation to its own; all other projects, according to Brickyard, had two years to complete construction. Id. at 3. Brickyard appears to misapprehend the requirements of the Settlement, the April 15 Order, Subsection q, and the February 4 Approvals Order governing the conditional approvals of the other EY 2015 projects.

Brickyard asserts that “[t]he settlement agreement in this matter does not specify a deadline for completion of [Phase II].” Id. at 4. On the contrary, the Settlement is quite specific. “Board Staff shall recommend that the Board approve this Agreement, and thereby approve the Project under Subsection q for EY 2015 on terms substantially similar to those set for in the February 4 [Approval] . . . Order.” Settlement at ¶ 1. “Phase I and Phase II will each comply with the EY 15 requirements.” Settlement at ¶ 1(a). And, “Brickyard shall . . . [a]gree to comply with the remaining provisions of the Subsection q orders.” Settlement at ¶ 1(c).

Subsection q, as quoted in each of the Subsection q Orders, including the August 21 Order – under which Brickyard has received approval for its Phase I EY 2015 project – and the February 4 Approvals Order, provides:

If the proposed solar electric power generation facility does not commence commercial operations within two years following the date of the designation by the board pursuant to this subsection, the designation of the facility shall be deemed to be null and void,

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<sup>10</sup> I/M/O the Implementation of L. 2012, C. 24, the Solar Act of 2012; and I/M/O the Petition of True Green Capital Management LLC for an Extension of the Designation Date Set Forth in the Matter of Augusta Solar Farms (Docket No. QO13101014) Pursuant to N.J.S.A. 48:3-87(Q), Docket Nos. EO12090832V & QO16020108 (February 24, 2016); 2016 N.J. PUC LEXIS 58, (“True Green Order”).

and the facility shall not be considered connected to the distribution system thereafter.”

[N.J.S.A. 48:3-87(q)(2).]

In the May 9 Order, establishing the process for submitting applications, the Board approved Staff’s recommendation that “the applicant must agree to the application terms and conditions, including facility completion within two years or forfeiture of the escrowed funds.” May 9 Order at 7. The Board also referenced the two-year escrow forfeiture time period in relationship to the designation date when it stated, “Applicants seeking approval for designation in EY 2015 must acknowledge that the two-year escrow forfeiture time period will not begin until June 1, 2014”. Id. at 9.

In the August 21 Order approving Phase I, the Board quoted the relevant Subsection q language and again noted the two-year period for construction completion, referencing each of the three (3) energy years, including Energy Year 2015: “Applicants seeking approval for designation in EY 2015 must acknowledge that the two year escrow forfeiture time period will not begin until June 1, 2014[.]” August 21 Order at 4. In another section of the August 21 Order concerning projects approved for EY 2015, the Board reiterated the designation date, leaving no uncertainty as to when each applicant – including Brickyard – had to commence commercial operation. Specifically, the Board said, the “Board **HEREBY ESTABLISHES** June 1, 2014 as the date from which the two year period for each conditionally approved application to complete construction begins to run.” Id. at 10.

In light of the clear language in the statute and in prior Subsection q Orders, to which Brickyard committed to abide by in the Settlement, Staff recommends that the Board deny Brickyard’s request for an extension of time.

## **DISCUSSION AND FINDINGS**

The Board concurs with Staff’s analysis. The Settlement specifically binds Brickyard to the requirements of Subsection q, which states that a project must achieve commercial operation within two years of the designation date – which for EY 2015 means that Brickyard has until May 31, 2016 to complete construction – or “the facility shall not be considered connected to the distribution system thereafter.” N.J.S.A. 48:3-87(q)(2).

The Board agrees with Brickyard that the Settlement should be regarded as a contract. A settlement agreement between parties to a lawsuit is a contract. Pascarella v. Bruck, 190 N.J. Super. 118, 124 (App. Div.), certif. denied, 94 N.J. 600 (1983). The courts have held that settlement agreements should be honored and enforced like other contracts “absent a demonstration of ‘fraud or other compelling circumstances.’” Id. at 125 (quoting Honeywell v. Bubb, 130 N.J. Super. 130, 136 (App. Div. 1974)). See also, DeCaro v. DeCaro, 13 N.J. 36, 44 (1953) (party could be compelled to specifically perform under a contract because the terms of the agreement did not shock the conscience and where there was no showing of any artifice or deception, lack of independent advice, abuse of confidential relation, or similar indicia).

Brickyard has not alleged lack of independent advice. Brickyard was represented by counsel when it voluntarily settled its Subsection s and Subsection q appeals. Indeed, the first page of the April 15 Order notes that Brickyard was represented by the same counsel who filed the instant Application. Additionally, Brickyard has not alleged or shown deception. Therefore, the Board will not re-visit its approval of the Settlement because Brickyard subsequently determined that it would benefit from a longer time for construction completion than that agreed to in the Settlement.

Brickyard contends that the Board should look beyond the express language of the Settlement and rely on extrinsic evidence to further the intent of the Settlement. Supporting Brief at 4-5, citing Porreca v. City of Millville, 419 N.J. Super. 212 (App. Div. 2011); Conway v. 287 Corporate Ctr. Assocs., 187 N.J. 259 (2006); and Atl. N. Airlines, Inc. v. Schwinner, 12 N.J. 293 (1953)). In Brickyard's view, both Brickyard and Board Staff desired Phase II to be completed. Petition at 5.

Brickyard is mistaken. Both the terms of the Settlement and the April 15 Order reflect that resolution of the Subsection s and Subsection q appeals was paramount. April 15 Order at 5-6 and Settlement at 2-3. And, both documents reflect that adherence to Subsection q and to the terms and conditions of the February 4 Approvals Order was a necessary condition of the designation of Phase II as "connected to the distribution system" under Subsection q. Specifically, as part of the Settlement, Brickyard agreed to: 1) file a new SRP to reflect the Phase II capacity, 2) comply with the Energy Year 2015 requirements, 3) provide evidence of the funding of a recalculated escrow reflecting both Phase I and Phase II and the total 2.362 MW DC capacity of the solar project, and 4) comply with the remaining provisions of the Subsection q orders. Settlement at 2. The Board, finding the Settlement fair and reasonable and comporting with the requirements of Subsection q, adopted the Settlement and directed the parties to comply with its terms. April 15 Order at 5-6.

As noted above, through the Solar Act's language, the stakeholder process, the application form, the application instructions, the escrow agreement, the FAQs, the Subsection q orders, the Settlement, the April 15 Order, and the SRP Acceptance Letter, Brickyard was on notice that the designation date for EY 2015 projects was June 1, 2014, and that it had two (2) years from June 1, 2014, or May 31, 2016, to commence commercial operations for Phase I and Phase II. Brickyard was on further notice of the forfeiture risk of its escrow and of its eligibility to earn SRECs if the two (2) year construction deadline was not met. On this record, Brickyard's arguments are unpersuasive.

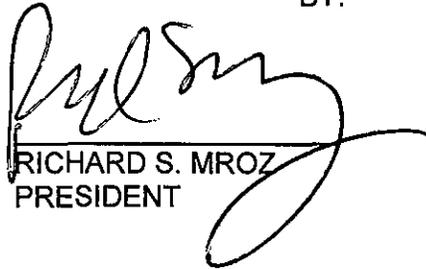
In addition, the Board rejects Brickyard's argument that the Board's rationale in granting True Green's extension request equally applies to Brickyard's request. Without distinguishing all of the circumstances between True Green and Brickyard, the Board notes that the principal distinction between the two developers is that Brickyard voluntarily executed a settlement agreement on April 6, 2015, in which it knowingly agreed to comply with the EY15 requirements, including the requirement that its Phase II was to enter commercial operations by May 31, 2016. Having had the benefit of the bargain – the Board's approval of Brickyard's Phase II project in lieu of protracted litigation – Brickyard now seeks to avoid its commitment to a firm construction completion date of May 31, 2016.

The Board **HEREBY DENIES** Brickyard's request for an extension of time beyond May 31, 2016 to complete construction of Phase II.

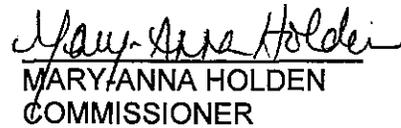
The effective date of this Order is May 30, 2016.

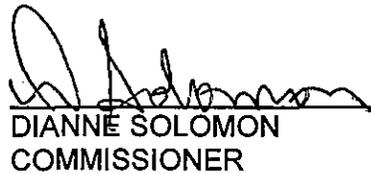
DATED: *May 25, 2016*

BOARD OF PUBLIC UTILITIES  
BY:

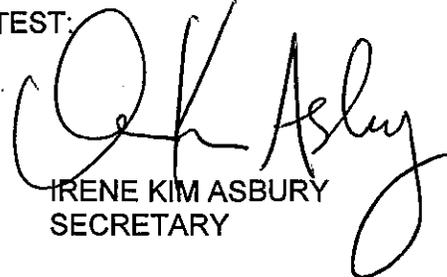
  
RICHARD S. MROZ  
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JOSEPH L. FIORDALISO  
COMMISSIONER

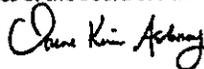
  
MARYANNA HOLDEN  
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COMMISSIONER

  
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ATTEST:  
  
IRENE KIM ASBURY  
SECRETARY

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



Docket No. EO12090832V – In the Matter of the Implementation of L. 2012, C. 24,  
The Solar Act of 2012;

Docket No. EO12090880V – In the Matter of the Implementation of L. 2012, C. 24, N.J.S.A.  
48:3-87(q)(r) and (s) – Proceedings to Establish the Processes for Designing Certain Grid-  
Supply Projects as Connected to the Distribution System;

Docket No. QO13101020 – Brickyard, LLC

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