



Agenda Date: 10/11/23
Agenda Item: 8C

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 A NEW JERSEY SOLAR
TRANSITION PURSUANT TO P.L. 2018, C.17

ORDER ON MOTION FOR
RECONSIDERATION

IN THE MATTER OF THE VERIFIED PETITION OF)
POWERFLEX SYSTEMS LLC FOR AN ORDER)
APPROVING THE WAIVER AND EXTENSION OF THE)
SOLAR TRANSITION RENEWABLE ENERGY)
CERTIFICATE PROGRAM DEADLINE FOR UNITED)
NATURAL FOOD INC'S ROOFTOP SOLAR)
GENERATION PROJECTS IN HOWELL)
NJSTRE1547462345, NJSTRE1547522643)

DOCKET NO. QO19010068

DOCKET NO. QO22080544

Parties of Record:

Barbara J. Koonz, Esq., Greenbaum, Rowe, Smith & Davis, LLP, on behalf of PowerFlex Systems, LLC

BY THE BOARD:

By Order dated November 9, 2022, the New Jersey Board of Public Utilities (“Board” or “BPU”) denied PowerFlex Systems, LLC’s (“Petitioner” or “PowerFlex”) petition seeking extensions of time for registrations within the Transition Incentive (“TI”) Program for two (2) solar projects in Howell, New Jersey with TI Application Numbers NJSTRE1547462345 and NJSTRE1547522643 (collectively, “Projects”).¹ On December 1, 2022, PowerFlex filed a Motion for Reconsideration (“Motion”), requesting the Board reverse its decision in the November 2022 Order denying the Petitioner’s requested extensions.

BACKGROUND AND PROCEDURAL HISTORY

On May 23, 2018, Governor Murphy signed the Clean Energy Act of 2018 (“CEA” or “Act”), L. 2018, c. 17 (N.J.S.A. 48:3-87.8 *et al.*), into law. In pertinent part, the CEA directed the Board to adopt rules and regulations closing the Solar Renewable Energy Certificate Registration Program (“SRP”) to new applications once the Board determines that 5.1 percent of the kilowatt-hours of electricity sold in the State of New Jersey (“State”) by Third Party Suppliers and Basic Generation

¹ In re a New Jersey Solar Transition Pursuant to P.L. 2018, c. 17, BPU Docket Nos. QO19010068 *et al.*, Order dated November 9, 2022 (“November 2022 Order”).

Service providers is generated by solar electric power generators connected to the distribution system (“5.1% Milestone”). N.J.S.A. 48:3-87(d)(3).

On December 6, 2019, the Board established the TI Program as a bridge between the legacy SRP and the to-be-developed Successor Solar Incentive (“SuSI”) program.² The TI Program Rules, N.J.A.C. 14:8-10.1 *et seq.* (“TI Rules”), permit eligible projects to receive Transition Renewable Energy Certificates for each megawatt-hour of electricity produced through solar generation. The TI Program portal opened to new applications on May 1, 2020, and, pursuant to Board Order dated January 8, 2020, remained open to new registrations until the establishment of the SuSI Program.³ The TI Program rules do not provide for automatic or administrative extensions to the projects’ conditional registration expiration dates.⁴

By Order dated July 29, 2020, the Board granted projects registered in the TI Program on or before October 30, 2020 a one (1)-year extension of time in which to reach commercial operation, extending the deadline through October 30, 2021.⁵ By the July 2020 Order, the Board found that the solar industry was, at that time, adjusting to significant changes from both the COVID-19 pandemic and changes in solar incentive programs and, under those circumstances, waiving the Board’s rules to permit additional time for project completion appropriately balanced the needs of the solar industry with the cost to ratepayers.

By Order dated June 24, 2021, the Board found that the solar industry required further time to adjust to the requirements of the CEA and the impacts of the COVID-19 Pandemic, granting projects registered in the TI Program on or before the effective date of the June 2021 Order a six (6)-month extension to the deadline established by N.J.A.C. 14:8-10.4.⁶

On July 9, 2021, Governor Murphy signed L. 2021, c. 169 into law, directing the Board to immediately initiate a proceeding to develop and launch the TI successor program, among other requirements. By Order dated July 28, 2021, the Board announced the closure of the TI Program in anticipation of the SuSI Program launch.⁷ By Order dated July 28, 2021, the Board opened the SuSI Program.⁸

By Order dated January 26, 2022, the Board waived N.J.A.C. 14:8-11.4(b) which requires receipt of conditional registration in the Administratively Determined Incentive (“ADI”) Program prior to

² In re a New Jersey Solar Transition Pursuant to P.L. 2018, c. 17, BPU Docket No. QO19010068, Order dated December 6, 2019.

³ In re a New Jersey Solar Transition Pursuant to P.L. 2018, c. 17, BPU Docket No. QO19010068, Order dated January 8, 2020 (“January 2020 Order”).

⁴ The conditional registration “expiration dates” are also referred to as the registration deadline.

⁵ In re a New Jersey Solar Transition Pursuant to P.L. 2018, c. 17 – Order Providing Extensions to Solar Transition Projects, BPU Docket Nos. QO19010068 & QO20070484, Order dated July 29, 2020 (“July 2020 Order”).

⁶ In re a New Jersey Solar Transition Pursuant to P.L. 2018, c. 17 – Order Addressing Requests for Extension for Projects in the Solar Transition Incentive Program, BPU Docket Nos. QO19010068 & QO21060883, Order dated June 24, 2021 (“June 2021 Order”).

⁷ In re a New Jersey Solar Transition Pursuant to P.L. 2018, c. 17, BPU Docket No. QO19010068, Order dated July 28, 2021.

⁸ In re a Solar Successor Incentive Program Pursuant to P.L. 2018, c. 17, BPU Docket No. QO20020184, Order dated July 28, 2021.

beginning construction on a solar facility, with regard to projects with a valid TI Program registration that already commenced construction and allowing them to apply for registration in the ADI Program.⁹

By Order dated June 8, 2022, the Board granted a conditional extension in the TI Program to ESNJ-KEY-GIBBSTOWN, LLC, subject to a showing that certain specified conditions applied.¹⁰ By the Gibbstown Order, the Board found good cause to grant a conditional extension to the petitioner's project because the project was electrically and mechanically complete, secured all necessary permits, and was prevented from meeting its TI Program deadline by a unilateral agreement change made by the electric distribution company ("EDC") to the interconnection requirements. By the Gibbstown Order, the Board further established a process by which petitioners similarly situated may apply for extensions to their TI Program registration, subject to their making a similar showing.

On August 30, 2022, PowerFlex filed a petition with the Board to extend the TI Program completion deadlines for two (2) rooftop solar projects on behalf of United Natural Food Inc., in Howell, New Jersey, by one (1) year. The first project ("Project A") was accepted into the TI Program on September 13, 2021, and the second project ("Project B") was accepted into the TI Program on August 30, 2021. The Board accepted both projects into the TI Program on the condition that Project A complete solar installation and commence commercial operation on or before September 13, 2022, and Project B by August 30, 2022. According to PowerFlex, the projects were designed as separate systems to accommodate limitations of an on-site meter and the limited capacity of the existing EDC transformers. PowerFlex noted, however, that Project B cannot become operational and secure permission to operate ("PTO") until Project A is fully installed because the supervisory control and data acquisition communication for both projects is relayed through Project A.¹¹ In its extension request, PowerFlex asserted that an extension is warranted due to unforeseeable delays by the EDC's failure to timely inform the Petitioner of new interconnection requirements for Project A. PowerFlex asserted that the new interconnection design required it to purchase new equipment for the projects the lead times for which ranged from 30 to 40 weeks. PowerFlex noted the EDC's imposition of these last-minute construction requirements is "the sole reason" the projects could not be completed before the TI Program expiration dates, and both projects would have achieved timely commercial operation but for these delays.

By the November 2022 Order, the Board denied 28 petitions for an extension of time to participate in the TI Program, including PowerFlex's two (2) projects in Howell, New Jersey. On December 1, 2022, the Petitioner filed the Motion, requesting the Board reverse the November 2022 Order with regard to its projects.

⁹ In re a Solar Successor Incentive Program Pursuant to P.L. 2018, c.17, Order Modifying ADI Program Eligibility Conditions, BPU Docket No. QO20020184, Order dated January 26, 2022 ("January 2022 Order").

¹⁰ In re a New Jersey Solar Transition Pursuant to P.L. 2018, c. 17 – In re Request for an Extension of Time to Complete NJSTRE1545046932 in Transition Incentive Program – 480 South Democrat Road, Gibbstown, NJ ESNJ-KEY-GIBBSTOWN, LLC, BPU Docket Nos. QO19010068 & QO22030156, Order dated June 8, 2022 ("Gibbstown Order").

¹¹ Supervisory control and data acquisition is also referred to by the acronym "SCADA."

MOTION

By the Motion, the Petitioner argued that the Board failed “to appreciate the significance of probative, competent evidence demonstrating that the Petitioner has shown good cause sufficient for the Board to grant the extension request” and that the “mechanically complete” requirement as set forth in the Gibbstown Order is arbitrary and capricious. The Petitioner argued that the Board’s improper application of the “mechanically complete” standard in this case amounted to a misapplication of the “good cause” standard set forth in N.J.A.C. 14:1-1.2 and an arbitrary denial of the Petitioner’s request for an extension. Further, the Petitioner argued that the Gibbstown Order set forth a standard by which the Board could grant administrative extensions without requiring the filing of a formal petition; it did not define the only circumstances under which an extension could be issued and should not be construed as a replacement for the good cause standard, which is evaluated on a case-by-case basis.

The Petitioner further argued that it satisfied the good cause standard because last-minute imposition of new interconnection requirements from the EDC, one (1) year after interconnection was approved, prevented the Petitioner from completing its project. The Petitioner noted that this delay occurred through no fault of the Petitioner, was beyond the Petitioner’s control, and was the reason the Petitioner could not achieve mechanical completion prior to its request for an extension. Further, the Petitioner argued that requiring such mechanical completeness as a condition of a showing of good cause is unreasonable and arbitrary, especially in an instance such as this where mechanical completeness was delayed through no fault of the Petitioner.

The Petitioner asserted that denial of its request for an extension will result in an injustice to the Petitioner, noting that the Board may grant Motions for Reconsideration when the Board’s action constituted an injustice.¹² The Petitioner further contended that the November 2022 Order constituted an injustice for which the Board may reconsider its position because requiring the Petitioner to register in the ADI Program would reduce its expected revenue from the projects.

Finally, the Petitioner argued that, had the extension been granted, it would have been able to achieve PTO “well within the timeframe of the requested extension.” The Petitioner noted that, as of the time of the Motion, Project B was “mechanically, electrically complete” and Project A was nearing completeness, with both able to achieve PTO within three (3) months of filing the Motion.

DISCUSSION AND FINDINGS

The Board has long supported New Jersey’s solar industry. It endeavors, at all times, to support the industry’s continued growth while at the same time minimizing the costs to ratepayers to the greatest extent possible. As a part of pursuing these twin goals, the TI Rules and the timelines contained therein were designed to provide a smooth transition to the SuSI Program. As such, the TI Program was designed to be a limited bridge between the SRP and the SuSI Program. N.J.A.C. 14:8-10.1.

Following extensive review of the Motion, the underlying petitions, and Staff’s prior recommendations, the Board **HEREBY FINDS** that nothing in the Petitioner’s Motion requires the Board to modify or otherwise reconsider its decision. A motion for reconsideration requires the

¹² In re the Implementation of L. 2012, c. 24, The Solar Act of 2012, BPU Docket Nos. EO12090832V, EO12090880V, EO12121089V, EO12121144V, and EO13040331V, Order dated July 19, 2013.

moving party to allege “errors of law or fact” that were relied upon by the Board in rendering its decision. N.J.A.C. 14:1-8.6(a)(1). Generally, a party should not seek reconsideration based upon mere 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.” 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, 242 N.J. Super. at 401. However, 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. In re the Petition of Public Service Electric & Gas Company for Approval of its Clean Energy Future – Energy Efficiency (“CEF-EE”) Program on a Regulated Basis, BPU Docket Nos. GO18101112 & EO18101113, Order dated November 13, 2019; In re Michael Manis and Manis Lighting, LLC—New Jersey Clean Energy Program Renewable Energy Incentive Program, BPU Docket No. QS14040316, Order dated April 15, 2015.

Absent a legislative restriction, administrative agencies have the inherent power to reopen or to modify and rehear prior decisions, e.g., In re Trantino Parole Application, 89 N.J. 347, 364 (1982). As to the Board, N.J.S.A. 48:2-40 provides that the Board may, at any time, revoke or modify its orders. See Twp. of Deptford v. Woodbury Terrace Sewerage Corp., 54 N.J. 418, 425 (1969); see also N.J.A.C. 14:1-8.6(b). Further, an administrative agency may invoke its inherent power to rehear a matter “to serve the ends of essential justice and the policy of the law.” Handlon v. Town of Belleville, 4 N.J. 99, 106-107 (1950). In addition, administrative agencies may invoke the power to reappraise and modify their prior determinations “to protect the public interest and thereby to serve the ends of essential justice.” Trap Rock Industries, Inc. v. Sagner, 133 N.J. Super. 99, 109 (App. Div. 1975).

As explained in the November 2022 Order, the Board is mindful that its decisions have a public policy impact. It is in the nature of the evolving energy policy that situations change and require reevaluation. Under these circumstances, the Board considered the Petitioner’s positions and, in so ruling, the Board emphasizes that it is not legally compelled to reconsider mere re-arguments, but it has exercised its discretion to consider all arguments on their merits.

Pursuant to N.J.A.C. 14:8-10.4, the Petitioner must have commenced commercial operations on its projects and submitted a post-construction certification package prior to the expiration of its conditional registrations. Pursuant to N.J.A.C. 14:8-10.4(f), the Petitioner’s projects contain a twelve-month registration expiration, with no provision for automatic or administrative extensions to the deadlines.¹³

The Petitioner’s argument contests, largely, the Gibbstown Order’s application to its request to extend the TI Program deadlines. The Petitioner noted that the Board may waive its rules upon a showing of good cause and that the Gibbstown Order effectively eliminates any case-by-case “good cause” analysis as enumerated in the TI Program Rules. N.J.A.C. 14:1-1.2(b). The Petitioner argued that the Gibbstown Order was an adjudication of the specific facts presented in that petition and applies to projects with similar facts. The Petitioner further argued that the Board used this standard to supplant the “good cause” standard, applying it to every TI project thereafter

¹³ The conditional registration expiration dates vary based on the type of project, with Community Solar and Subsection (t) projects having different timelines, as well as when the project registered in the TI Program relative to the 5.1% Milestone. See generally N.J.A.C. 14:8-10.4.

seeking an extension. The Petitioner therefore argued that “[t]he Board’s application of the Gibbstown requirement to the circumstances of PowerFlex is unreasonable” and the “blind application” of the Gibbstown Order standard constitutes an injustice.

Contrary to the Petitioner’s claims, the Board fully examined the individual circumstances of the Petitioner’s TI extension request and fully considered the delays resulting from additional requirements imposed by the EDC. As recognized by the Petitioner, the TI Rules, by design, contain no provision for extensions; the Board must waive its rules to grant an extension. As explained in the November 2022 Order, the Board based prior extensions upon specific circumstances faced by the TI Program registrants at the time, coupled with uncertainty that still surrounded the establishment of a successor program. With the establishment of the ADI and SuSI Programs, that uncertainty was eliminated and, as such, the need for the Board to waive its rules to allow registrants to receive project incentives no longer exists.

Further, contrary to the Petitioner’s claim, the Gibbstown Order was an individual adjudication finding good cause to waive portions of the Board’s TI rule pursuant to N.J.A.C. 14:1-1.2. The Petitioner correctly asserts that the Board may choose to “relax or permit deviations” from its rules “[i]n special cases and for good cause shown.” N.J.A.C. 14:1-1.2(b). Where the Board permitted applicants with the exact factual prerequisites to administratively apply for an extension, it did so on a non-discriminatory basis as a means of administrative efficiency with the understanding that it likely applied to a very narrow subset of projects: those that were registered in the TI Program, were electrically and mechanically complete, had secured all necessary permits, and were prevented from meeting the TI Program deadline only by a unilateral EDC change to the interconnection agreement, specifically the time in which EDC interconnection upgrades would be completed following the developer’s reliance on the original terms. If a developer could demonstrate the underlying facts supporting the Board’s decision to grant a conditional waiver to the Gibbstown project, the Board also found good cause for the petitioner.

Here, after the Petitioner applied for a waiver of the TI deadlines, the Board applied the “good cause” standard set forth at N.J.A.C. 14:1-1.2. The Gibbstown Order did not set establish a new standard of “good cause” that the Board applied to the Petitioner’s request for an extension of the TI Program deadline. The Board **FINDS** that the Gibbstown Order did not alter, modify, or replace the standard enumerated by N.J.A.C. 14:1-1.2 and clarifies that all projects that sought waivers of the TI Program rules were individually evaluated by the Board pursuant to N.J.A.C. 14:1-1.2. As such, the Board **HEREBY FINDS** that the argument that the Board, by the Gibbstown Order, erroneously set the standard for good cause fails.

The Petitioner additionally argued that the Board “applied an unreasonably narrow standard” under the Gibbstown Order to PowerFlex’s extension request, introducing new information regarding the status of each project in support. The Petitioner noted that Project A was expected to be electrically and mechanically complete by mid-January 2023 with PTO anticipated by mid-February 2023. Project B was awaiting a local permit with an inspection scheduled in December 2022; PTO was anticipated to be achieved soon after the inspection. As explained in the November 2022 Order, the project timeline more appropriately aligned with that of the ADI Program rather than the now-closed TI Program. The Petitioner’s updates to the projects’ status does not introduce new information which warrants the re-evaluation of the Board’s decision on the original extension request. The Petitioner registered this project in the closing weeks of the TI Program, which it knew or should have known does not provide for extensions. Further, as noted above, the Board applied the “good cause” standard to the Petitioner’s request. The Gibbstown Order does not serve to supplant the “good cause” standard as a new, narrower standard; it is one example of an instance where good cause has been shown when requesting

the Board waive its rules. As such, the Board **FURTHER FINDS** that it did not improperly apply the “good cause” standard to the Petitioner’s case and the Petitioner’s argument that the Board applied an unreasonably narrow standard therefore fails.

The Petitioner lastly argued that denial of its Motion will result in injustice to the Petitioner and that the Board has historically granted such motions where injustice would result. The Petitioner noted that it made “a substantial investment” and has “a vested interest in completing this project”; therefore, according to the Petitioner, a denial of its request would result in undue hardship on the Petitioner. The Petitioner further noted that transferring the project to the SuSI program would reduce its expected return on investment. However, the Petitioner had ample notice that the TI Program existed only as a bridge between the legacy program and the SuSI Program and, as such, knew or should have known that the one-year TI Program timeline would be strict. Additionally, denial of the Petitioner’s request does not amount to an injustice because the Petitioner may still apply for ADI Program incentives. A mere reduction in expected revenue does not amount to an injustice. As such, the Board **FURTHER FINDS** that the Petitioner’s argument that denying the Petitioner’s request for an extension amounts to an injustice does not show an error in fact or law, does not show that the Board failed to consider or appreciate significant probative evidence, and therefore fails.


Accordingly, having carefully considered the Motion, the underlying petitions, and Staff’s recommendations, the Board **FURTHER FINDS** that nothing in the Motion requires the Board to reconsider or modify its prior decision to deny the Petitioner’s request for an extension of time to complete its projects within the TI Program. The Board **FURTHER FINDS** that the Motion does not present new evidence, does not demonstrate that the Board’s prior decision concluded on an incorrect or irrational basis, and does not show that the Board failed to adequately appreciate or consider the weight of sufficient, probative evidence. As such, the Board **HEREBY DENIES** the Motion and **HEREBY AFFIRMS** its prior decision denying the Petitioner’s request for extensions.

Although mindful of the investment made by the developer of these proposed projects, the Board continues to believe that the public’s interest in timely completion of projects, the ratepayers’ interest in controlling the cost of solar subsidies, and the State’s interests in ensuring a smooth transition between solar programs outweighs investment in prior programs. The Board **FINDS** that, with the establishment of the ADI Program, the circumstances faced by the Petitioner here are not equivalent to those prior registrants granted relief by the July 2020 Order and June 2021 Order. For the reasons stated above, the Board **HEREBY DENIES** the request for reconsideration of the November 2022 Order. The Board reiterates that the ADI Program is open and accessible to these projects and **FINDS** that the ADI Program provides the Petitioner with an alternative path to project completion.

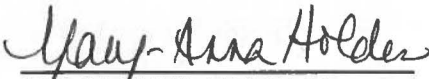
The effective date of this Order is October 18, 2023.

DATED: October 11, 2023

BOARD OF PUBLIC UTILITIES
BY:




CHRISTINE GUHL-SADQVY
PRESIDENT



MARY-ANNA HOLDEN
COMMISSIONER

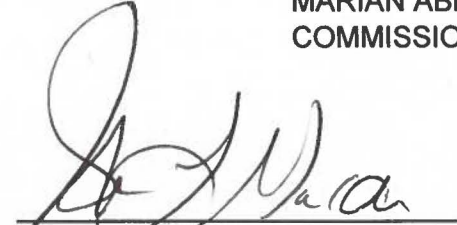


DR. ZENON CHRISTODOULOU
COMMISSIONER



MARIAN ABDOU
COMMISSIONER

ATTEST:



SHERRIL L. GOLDEN
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 A NEW JERSEY SOLAR TRANSITION PURSUANT TO P.L. 2018, C.17
DOCKET NO. QO19010068

IN THE MATTER OF THE VERIFIED PETITION OF POWERFLEX SYSTEMS LLC FOR AN ORDER APPROVING
THE WAIVER AND EXTENSION OF THE SOLAR TRANSITION RENEWABLE ENERGY CERTIFICATE PROGRAM
DEADLINE FOR UNITED NATURAL FOOD INC'S ROOFTOP SOLAR GENERATION PROJECTS IN HOWELL
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