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November 20, 2019

By Hand-Delivery and Electronic Mail

Honorable Aida Camacho-Welch, Secretary
New Jersey Board of Public Utilities
44 S. Clinton Avenue, 9th Floor
P.O. Box 350
Trenton, New Jersey 08625-0350

**Re: SunPower Corporation Filing of Petition for Declaratory Relief
Pursuant to N.J.S.A. 52:14B-1 et seq. and/or a Waiver Pursuant to
N.J.A.C. 14:1-1.2(b)
BPU Docket No. QO19091240**

Dear Secretary Camacho-Welch:

Please accept for filing this original and ten (10) copies of comments on behalf of the Division of Rate Counsel ("Rate Counsel") regarding the above-referenced matter. Enclosed is one additional copy. **Please stamp and date the copy as "filed" and return to our courier.**

Thank you for your consideration and attention to this matter.

INTRODUCTION

In the above-referenced Petition, SunPower Corporation ("SunPower") a solar developer, seeks a declaration from the Board that a proposed solar project that includes four separate solar fields in four different municipalities, and is intended to provide power to a rapid transit line and associated infrastructure located in eight municipalities, will qualify as both an on-site generation facility and a net-metered facility. Rate Counsel respectfully opposes this request. In the alternative, the Petitioner seeks a waiver of the strict application of the Board's rules. No waiver should be granted because the proposed facility does not present a special case, and because a

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waiver would neither support the general purpose and intent of the rules nor serve the public interest.

FACTUAL BACKGROUND

SunPower is proposing to develop four solar generating facilities with capacities totaling approximately 21 Megawatts ("MW") (direct current) for the Delaware River Port Authority ("DRPA"). Petition, par. I.A. DRPA is a regional transportation agency that operates four bridges over the Delaware River, and also operates a transit line between Camden County, New Jersey and Center City Philadelphia through its Port Authority Transit Corporations ("PATCO"). Petition, par. I.B. See also DRPA website at: <http://www.drpa.org/about/>. The New Jersey portion of the PATCO line originates in Lindenwold, and runs through Somerdale, Voorhees, Cherry Hill, Haddonfield, Haddon, Collingswood and Camden before crossing the Benjamin Franklin Bridge into Philadelphia. Petition, Exhibit D, Schedule 2. Although portions of the PATCO line are located in both the Public Service Electric and Gas Company ("PSE&G") and Atlantic City Electric Company ("ACE") service territories, it receives electric service through a single PSE&G electric meter located at the Westmont Station in Haddon Township. Petition, par. I.C n. 4 & Exhibit B. DRPA distributes the electricity to the PATCO trains and the associated infrastructure via a DPRA-owned distribution line. Petition, par. I.C.

The proposed solar facilities would be built on parking lots adjoining four stations, as follows: 8.3 MW at the Lindenwold Station in Lindenwold Borough, 3.4 MW at the Ashland Station in Voorhees Township, 5.3 MW at the Woodcrest Station in Cherry Hill Township, and 3.9 MW at the Ferry Station in the City of Camden. Petition, par. I.C n. 4 & Exhibit B. The Lindenwold Station is located in ACE's service territory, and the other three stations, as well as the master meter, are located in PSE&G's service territory. Petition, par. I.C. The transit line

occupies portions of numerous tax lots in the eight municipalities it traverses. Petition, Exhibit D. Three of the four proposed solar facilities would cover multiple tax lots, as follows: seventeen lots at the Lindenwold Station, twenty lots at the Ashland Station, and three lots at the Ferry Station. Petition, Exhibit C. These three sites are owned by DRPA. Petition, par. I.C. & Exhibit C. The Ferry Station parking lot, which covers a single tax lot in Cherry Hill, is owned by New Jersey Transit and leased to DRPA. Petition, par. I.C. & Exhibit C.

RATE COUNSEL'S COMMENTS

SunPower is seeking relief based on two concepts under the Electric Discount and Energy Competition Act ("EDECA") N.J.S.A. 48:3-49 et seq. As stated in the Petition, SunPower is requesting a declaration from the Board that the proposed solar project will qualify for SRECs and other solar incentives because it is "connected to the distribution system" as that term is defined in N.J.S.A. 46:3-87(q).¹ SunPower is relying on two bases for such qualification: (1) that the proposed facility will be "net-metered," and (2) that it will be "an on-site generation facility." N.J.S.A. 46:3-87(q)(1)(a) & (b). Petition, par. IV & Conclusion. In the alternative, SunPower is seeking a waiver of the strict application of N.J.A.C. 14:8-4.1, the rule defining the facilities that may be net-metered. Petition, Par. VI & Conclusion. The proposed project as described in the Petition would not qualify as either net-metered facility or an on-site generation facility.

Initially, Rate Counsel emphasizes that net-metering and on-site generation are two different concepts. As explained below, "on-site" generating facilities produce power for use on

¹ Under the Clean Energy Act (P.L.2018, c.17) the current the current SERC program will be closed to new applicants once solar generation reaches 5.1 percent of total retail sales. N.J.S.A. 48:3-87(d)(2). Irrespective of the Board's determination in this docket, the proposed solar project will not be entitled to SRECs under the current program if it does not apply under the Board's current SREC Registration Program before this threshold is reached.

site, while net-metering involves the export of power into the grid. Since DRPA apparently intends to net-meter, the proposed facility would not be “on-site” generation.

In addition, under EDECA as further defined by the Board in N.J.A.C. 14:8-4.1 (b), both net-metered and on-site facilities are limited to those located on the same property or two contiguous properties, as defined by the applicable municipal tax maps. The proposed solar project would not meet this requirement because it would span many tax lots in eight municipalities. SunPower’s request for a waiver of the Board rule also should be denied because the proposed solar project does not meet the criteria for a waiver under N.J.A.C. 14:1-1.2(b)

A. The Proposed Solar Facilities Would Not Qualify as an On-Site Generating Facility or a Net-Metered Facility.

EDECA defines an on-site generation facility as follows:

“On-site generation facility” means a generation facility, including, but not limited to, a generation facility that produces Class I or Class II renewable energy, and equipment and services appurtenant to electric sales by such facility to the end use customer located on the property or on property contiguous to the property on which the end user is located. An on-site generation facility shall not be considered a public utility. The property of the end use customer and the property on which the on-site generation facility is located shall be considered contiguous if they are geographically located next to each other, but may be otherwise separated by an easement, public thoroughfare, transportation or utility-owned right-of-way, or if the end use customer is purchasing thermal energy services produced by the on-site generation facility, for use for heating or cooling, or both, regardless of whether the customer is located on property that is separated from the property on which the on-site generation facility is located by more than one easement, public thoroughfare, or transportation or utility-owned right-of-way.

N.J.S.A. 48:3-51. Net-metering is addressed in N.J.S.A. 48:3-87(e)(1) and the Board’s implementing regulations at N.J.A.C. 14:8, subchapter 4. N.J.S.A. 48:3-87(e)(1) required the Board to adopt standards to

require electric power suppliers and basic generation service providers to offer net metering at non-discriminatory rates to industrial, large commercial, residential and small commercial customers, as those customers are classified or defined by the board, that generate electricity, on the customer's side of the meter, using a Class I renewable energy source, for the net amount of electricity supplied by the electric power supplier or basic generation service provider over an annualized period.

A net-metering customer is allowed to generate power in excess of the customer's usage, as long as the customer's usage exceeds generation over an annualized period, receiving a credit that may be used during times when usage exceeds generation. Id.

Under these two provisions, a facility cannot be both an "on-site generation facility" and qualified for net-metering. Under the above-quoted definition, an "on-site generation facility" provides power to an "end use customer located on the property or on property contiguous to the property on which the end user is located." Since net-metering customers, by definition, are permitted to export electric power into the grid, they do not meet the definition of "on-site generation facility." Although the Petition does not state specifically whether the proposed solar project would export to the grid, its request for a declaration that it would qualify for net-metering suggests that the proposed facility will, at least potentially, export some power. For this reason, it appears that the proposed solar project would not qualify as an "on-site generation facility."

In addition, the proposed project does not meet the qualifications for either on-site generation or net-metering, because of its geographic scope. The geographic limits of both types of facilities were clarified by the Board in N.J.A.C. 14:8-4.1. The Board's regulation provides, in relevant part, as follows:

(b) For the purposes of this subchapter, class I renewable energy that meets all of the following criteria shall be deemed to be generated on the customer's side of the meter:

1. The renewable energy generation facility is located either:
 - i. Within the legal boundaries of the property, as set forth within the official tax map, on which the energy is consumed; or
 - ii. Within the legal boundaries of a property, as set forth within the official tax map, that is contiguous to the property on which the energy is consumed. The property on which the energy is consumed and the property on which the renewable energy generation facility is located shall be considered contiguous if they are geographically located next to each other, but may be otherwise separated by an existing easement, public thoroughfare, or transportation or utility-owned right-of-way and, but for that separation, would share a common boundary. The fact that a public thoroughfare may be encumbered by third-party easements does not alter a determination as to whether two properties would be considered contiguous;

N.J.A.C. 14:8-4.1(b). Although this provision is part of the Board's net-metering rules, the geographic limitations set forth in the rule also apply to on-site generation. As the Board explained in its decision in I/M/O Application of NJ Land, LLC Seeking a Declaratory Judgment Pursuant to N.J.S.A. 52:14B-1 et seq. or a Waiver Pursuant to the Waiver Rule, N.J.A.C. 14:1-1.2(b), BPU Dkt. No. QO160402382 (Jan. 25, 2017) ("NJ Land"), the Board incorporated the current definition of an "on-site generation facility" to define a geographic limit for a net-metering installation. NJ Land at 2. Further, the Board defined the term "property" with reference to the official tax map "to clarify that 'contiguous' was to be strictly interpreted and that eligibility for net-metering would be appropriately limited." NJ Land at 7. The proposed solar project does not meet this requirement because the solar generation facilities and the location where the energy would be used cover numerous lots on the tax maps of eight different municipalities spanning the service territories of two electric distribution utilities. Petition, par. I.C. & Exhibit D.

SunPower's Petition contends that, notwithstanding the clear language of the above-quoted provision in N.J.A.C. 14:8-4.1(b)(ii) that "the legal boundaries of a property" are the boundaries "set forth within the official tax map," the Board is required to consider the PATCO line and the adjacent parking facilities as a single "property." According to the Petition, this conclusion follows from N.J.S.A. 32:3-6, which confers limited eminent domain authority on the DRPA,² and N.J.S.A. 32:3-12 and N.J.S.A. 32:3-13.54, which exempt the DRPA's property from state and local taxation. Petition, par. I.B & Exhibit C. This argument should be rejected. The cited provisions of the New Jersey Statutes have no bearing on the meaning or intent of the Board's rules. Those provisions provide the DRPA with the necessary authority to conduct its operations, but they do not purport to dictate the meaning of the Board's rules. Further, there is nothing in the Board's rules to suggest that they are not intended to apply to entities such as DRPA. If DRPA's argument were to prevail, every entity possessing eminent domain authority and tax exemptions would be entitled to over-ride the Board's geographic limitations on net-metering. As an example, there could be a net-metering project that spanned New Jersey Transit's entire system of rail lines, or the full length of the New Jersey Turnpike. Rate Counsel respectfully submits that the Board did not intend this result.

Contrary to the arguments contained in the Petition, the Board's decision in NJ Land does not require a finding that the entire PATCO line and the adjoining parking areas are a single "property" for the purpose of the Board's net-metering rule. NJ Land involved a solar project designed to provide power to the United States Military's Joint Base-McGuire Dix Lakehurst

² The DPRA's eminent domain authority is limited to property which is needed for its authorized purposes, and, with respect to property owned by local government units, the eminent domain authority may not be exercised without the consent of the government unit, unless expressly authorized by the State. N.J.S.A. 32:3-6.

(“Joint Base”). Id. at 2. The proposed solar facility was to be built on a site located across a public thoroughfare from the Joint Base. Id. at 3. That Petition requested a declaration that the proposed facility would qualify as an “on-site generation facility” under N.J.S.A. 48:2-51 and N.J.A.C. 14:8-4.1. NJ Land at 2. In the alternative, the Petitioner sought a waiver of strict application the definition of contiguity in N.J.A.C. 14:8-4.1. Id.

Throughout its Order in NJ Land, the Board emphasized the unique nature of the Joint Base. As the Board explained, under federal law, a military base is a federal enclave that operates under the administration of the base commander. NJ Land at 6. The base operates under the exclusive jurisdiction of the United States military, which has the right to require all visitors to obtain permission to enter. Id. at 5-6. These “unique properties” were the basis of the Board’s finding that the official tax maps should not be determinative or applicable when considering the project involved in that proceeding. Id. at 7. It was for this reason that the Board determined that the Joint Base could be considered a single “property” despite spanning multiple tax lots. Id.

Unlike the Joint Base, the PATCO line is not unique. While the Petitioner in NJ Land cited the Joint Base’s tax exempt status, the Board’s determination relied on the unique characteristics of military bases, which are not shared by the PATCO line. NJ Land at 5-6. The characteristics cited in the current Petition, that is, its eminent domain authority and its tax-exempt status, are not unique. Those characteristics are shared by other publicly owned rail lines, roads, and other facilities. If the DRPA’s argument is accepted, then the geographic limits on on-site generation and net-metering will not apply to a large class of public entities, some of which span large portions of the State. This would undermine the Board’s objective of placing appropriate limits on net-metering and on-site generation. NJ Land at 7. The Board’s decision in NJ Land should not be extended beyond the unique circumstances involved in that matter.

B. The Proposed Project Does not Meet the Criteria for a Waiver of the Strict Application of the Board's Rules.

Further, the Board should reject SunPower's request to waive the strict application of N.J.A.C. 14:8-4.1. N.J.A.C. 14:1-1.2 (b) allows waivers of the Board's rules to "relax or permit deviations" from its rules only "[i]n special cases and for good cause shown" The criteria for waivers of the Board's rules are stated in N.J.A.C. 14:1-1.2 (b)(1), which provides as follows:

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

As explained in Section A above, the DRPA's eminent domain authority and tax exemptions do not make it unique. For this reason, the proposed project does not present a "special case" that would support the Board's consideration of a deviation from its rule. In addition, allowing net-metering for the proposed project would not meet the criteria stated in N.J.A.C. 14:1-1.2 (b)(1). This provision establishes a two-part test: waiver of the rule (1) must support the general purpose and intent of the rule, and (2) not adversely affect the interests of ratepayers, the ability of the utility to provide safe, adequate and proper service, or the interests of the general public. Id. See NJ Land at 7.

With regard to the first part of the two-part test, SunPower relies on the Board's finding in NJ Land that the general purpose of the rule is to "facilitate investment in renewable energy close to the source of consumption." Petition, par. VI. 26 & VI.27, citing NJ Land at 7. The project proposed in the current Petition does not meet this standard. As the Board explained in NJ Land, the regulation refers to the official tax map "to clarify that 'contiguous' was to be strictly interpreted and that eligibility for net-metering would be appropriately limited." A waiver

that would open the door to net-metering installations spanning the State via its rail lines and roadways would be contrary to the objective of limiting net-metering to energy generated close to the source of consumption.

With respect to the second part of the two-part test, SunPower argues that full compliance with the rule would “adversely affect the interest of the public” because it would deny “the opportunity to receive less expensive energy from a non-polluting/non-fossil fuel source” to an entity that provides governmental services to the public. Petition, par. VI. 31. This argument disregards the specific language of N.J.A.C. 14:1-1.2 (b)(1), which requires consideration of the impact of a proposed waiver on ratepayers, the relevant public utilities, and the general public.

In NJ Land, the Board found that this standard was met but under circumstances that were substantially different from those presented here. In finding that the requested waiver was in the public interest, the Board focused on the importance of the Joint Base for the State as a whole. The Board noted that the Joint Base was “under constant review for force or mission reduction and base closure,” and that supporting the military’s efforts to secure a more resilient and lower-cost energy supply would serve “the State policy supporting federal military installation(s) within the State.” NJ Land at 8. SunPower has not identified any similar statewide interest that would be served by the current proposal. While the proposed waiver could benefit the members of the public that use the DRPA’s facilities, this is not a statewide benefit similar to the benefits provided by a military base. In addition, the potential impact on the State’s electric distribution utilities and ratepayers of exempting a large class of public facilities from the Board’s rule far exceed the impact of an exemption that applies only to military bases. Based on these limited benefits and potentially high costs to ratepayers, the Petition does not meet the “public interest” requirement of the Board’s waiver rule.

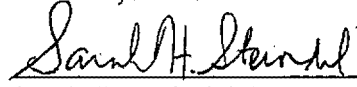
CONCLUSION

For the foregoing reason, the Board' should deny the Petitioner's request for a declaration that the proposed solar facility would qualify as an on-site generation facility or a net-metered facility. Further, the Petitioner's alternative request for a waiver of the strict application of N.J.A.C. 14:3-8 should be denied.

Respectfully submitted,

STEFANIE A. BRAND
Director, Division of Rate Counsel

By:



Sarah H. Steindel, Esq.
Assistant Deputy Rate Counsel

c: Service List

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