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May 31, 2022

Via Electronic Mail board.secretary@bpu.nj.gov

Secretary of the Board
44 South Clinton Avenue, 1th Floor
P.O. Box 350
Trenton, NJ 08625-0350

**Re: In the Matter of Competitive Solar Incentive (“CSI”) Program
Pursuant to P.L. 2021, c.169
BPU Docket No. QO21101186**

Dear Secretary:

Please accept for filing these comments being submitted on behalf of the New Jersey Division of Rate Counsel in accordance with the Notice issued by the Board of Public Utilities (“Board”) in this matter on March 16, 2022 and updated on April 19, 2022. In accordance with the Notice, these comments are being filed electronically with the Board’s Secretary at board.secretary@bpu.nj.gov.

Please acknowledge receipt of these comments.

Thank you for your consideration and attention to this matter.

Respectfully submitted,

Brian O. Lipman, Esq.
Director, Division of Rate Counsel

By: */s/ Sarah Steindel*
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Enclosure

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STATE OF NEW JERSEY
BEFORE THE BOARD OF PUBLIC UTILITIES

In the Matter of Competitive Solar)	Docket No. QO21101186
Incentive (“CSI”) Program Pursuant to)	
<u>P.L.</u> 2021, c. 169)	

COMMENTS OF THE
NEW JERSEY DIVISION OF RATE COUNSEL
CONCERNING SOLAR SITING STRAW PROPOSAL

May 31, 2022

INTRODUCTION

The Division of Rate Counsel (“Rate Counsel”) appreciates the opportunity to provide input to the Board of Public Utilities (“Board”) Staff (“Staff”) concerning the Solar Citing Straw Proposal (“Straw Proposal”) that was issued with the Board’s March 16, 2022 Notice in this matter. Rate Counsel participated in March 29, 2022 and April 8, 2022 stakeholder meetings that were held to discuss the Straw Proposal, and is pleased to present additional input in accordance with the Board’s Notice, as updated on April 8, 2022.

I. Registration and Coordination With CSI Program

At page 6 of the Straw Proposal, Staff states its intention that the development of the Board’s solar siting rules will be in a proceeding that is separate from, but conducted in parallel with, the proceeding to develop the market rules for the CSI Program. Rate Counsel agrees with this approach. The siting rules will affect which projects are eligible to participate in the CSI program, and what steps projects must take to qualify. As Staff recognizes, the siting rules will be an integral part of the CSI Program rules. It is important that the siting rules be structured in coordination with the remainder of the CSI Program rules in a way that assures that the CSI Program will harness competitive forces to minimize cost to ratepayers.

Staff has recognized the importance of competition with its proposal to require all grid supply and net metered solar projects over five megawatts to register with the Board whether or not they participate in the CSI Program. As indicated by Staff in the Straw Proposal, this will allow the projects to be monitored and ensure that project developers are not “hoarding” available space or participating in other anti-competitive activity. Straw Proposal at 7-8. Rate Counsel further supports Staff’s proposal to limit registration to projects that meet the maturity requirements to be established for the CSI Program. These measures should help assure a

competitive result by limiting the developers' ability to increase prices by withholding potential projects for the Board's solicitations.

The Board can also help assure a competitive result by coordinating the registration process with the timing of and capacity targets for the CSI Program. In order to harness competitive forces to minimize the cost of solar development for ratepayers, it is important to assure that there is an ample supply of potential project to bid into each solicitation. Therefore, the Board should schedule and set targets for each solicitation based on consideration of the number of projects that are expected to qualify to participate.

At the March 29, 2022 stakeholder meeting, some representatives of the solar industry expressed concerns that a registration requirement would force them to disclose confidential information. These concerns should not deter the Board from implementing a registration requirement. The Board has procedures in place to accommodate the submission of information that is claimed to contain information that should be protected from disclosure. N.J.S.A. 14:1-12.1 et seq. The Board's procedures can be invoked to protect information that is claimed to contain trade secrets, energy trade secrets or other energy information submitted pursuant to N.J.S.A. 52:27F-18, proprietary commercial or financial information, or information which if disclosed, would be likely to cause damage to either a competitive or bidding position or national security" N.J.A.C. 14:1-12.1(b). These procedures should be sufficient to protect from any disclosures that would adversely affect solar developers' ability to compete fairly in the Board's solicitation process.

II. Protection of Forested Lands

N.J.S.A. 48:3-119(6)(c)(3) , (c)(5) and (c)(6) define the following three categories of forested land where solar facilities may not be sited unless the Board grants a waiver: (1) land

designated as forest area in the Pinelands Comprehensive Management Plan adopted pursuant to N.J.S.A. 13:18a-11(N.J.S.A. 48:3-119(6)(c)(3)) , (2) lands located within the Highlands Preservation Area as designated in N.J.S.A. 13:20-7 (N.J.S.A. 48:3-119(6)(c)(5)), and (3) forested lands as defined by the Board in consultation with the New Jersey Department of Environmental Protection (“NJDEP”) (N.J.S.A. 48:3-119(6) (c)(6)). As the Board points out at page 11 of the Notice, the first two of these categories are self-effectuating, as the boundaries of are defined by statute. To define the third category, the Board proposed to use the NJDEP’s modified Anderson Code Classification of Forested Lands. Notice at 12. During the March 29, 2021 stakeholder meeting, a representative of the Highlands Council noted that there are forested areas in the Highlands region outside of the Highlands Preservation Area, and it has developed maps of these which may be more detailed than NJDEP’s mapping. Rate Counsel concurs that the Highlands Council’s maps should be used to identify forested areas in the areas covered by these maps.

III. Protection of Farmland

One of the important objectives of the Solar Act, as stated in the legislative findings, is to encourage solar development while not compromising the State’s commitment “to preserving and protecting open space and farmland;” N.J.S.A. 48:3-114(c). The Straw Proposal includes a number of proposed measures to implement statutory restrictions on the development of solar facilities on farmland, and proposed “Agricultural Mitigation Guidelines” to minimize the impact of solar facilities that are permitted to be located on farmland. While Rate Counsel supports many aspects of the Straw Proposal concerning solar development on farmland, it could be strengthened in some areas.

As explained in the Board's Notice, there are two sources of restrictions on the siting of solar project on farmland. First, N.J.S.A. 4:1C-32.4, governs the siting of solar facilities on preserved farmland. This provision is administered by the State Agriculture Development Committee and the Straw Proposal would not alter the process for siting facilities on preserved farmland. Straw Proposal at 6.

Second, section 6 of the Solar Act of 2021 established limits on the installation of grid-supply projects and net metered projects with capacities over five megawatts on "prime agricultural soils or soils of Statewide importance" that have been identified as such by the United States Department of Agriculture and are located in Agricultural Development Areas certified by New Jersey's State Agricultural Development Committee. N.J.S.A. 48:3-119(c)(7), (d)(1) & (f). Under N.J.S.A. 48:3-119(c)(7) and (d)(1), up to 2.5% of such lands may be utilized for solar projects, after which no further projects are allowed unless the Board grants a waiver. In addition, N.J.S.A. 48:3-119(f) provides, in part, that "in no case shall the projects approved pursuant to this section occupy more than five percent of the unpreserved land containing prime agricultural soils and soils of Statewide importance, as identified by the United States Department of Agriculture's Natural Resources Conservation Service, located within any county's designated Agricultural Development Area, as determined by the State Agriculture Development Committee."

In the Straw Proposal, Staff identified a threshold issue concerning the application of these two restrictions, i.e. whether the five percent limitation on solar development in a single county is an unconditional limitation, or whether it can be enforced only after the 2.5 percent statewide cap is reached. Staff concluded that the five percent limitation within each county was intended be applied independently of the 2.5% statewide cap. Straw Proposal at

13. Rate Counsel agrees with this interpretation. N.J.S.A. 48:3-119(f) clearly provides that projects approved under the Board's siting rules may "in no case" occupy more than five percent of the unpreserved land containing prime or important agricultural soils within a single county. The provisions defining the 2.5 percent statewide cap do not purport to modify this categorical prohibition.

However, Staff should reconsider its methodology for calculating the 2.5 percent of prime and important soils that may be occupied by solar project without a waiver from the Board. Staff's proposal is to calculate the 2.5 percent based on the amount of prime agricultural soils and soils of statewide importance including soils located on preserved farmland. As was suggested in one of the comments during the March 29, 2022 stakeholder meeting, the Board should consider excluding preserved farmland from this calculation. March 29, 2022 meeting replay at 40:23-41.25. As noted above, the siting of solar facilities on preserved farmland is not within the Board's jurisdiction. Thus, while not explicit in the statutory language, is it reasonable to infer that the legislature intended the 2.5 percent to be calculated based the quantity of prime and important soils located on unpreserved farmland.

In addition to defining the farmland that is subject to restrictions on solar development, it is also important to assure that, where development is allowed, it is carried out consistently with the legislative directive to preserve the State's agricultural resources. Rate Counsel supports the Board's inclusion of mitigation guidelines as an integral part of its solar siting proposal, but has a number of suggested improvements.

First, it should be clear that the guidelines apply to all CSI Program projects located on lands containing prime agricultural soils or soils of statewide importance. While the text at pages 15-16 of the Straw Proposal indicates an intention for the guidelines to apply to all

such projects, the draft guidelines are entitled “Agriculture’s Proposal for Agricultural Mitigation Guidelines for Grid Scale Solar Construction Projects on Specific Farmlands in Agricultural Development Areas.” Straw Proposal at 21 (emphasis added). The rules to be adopted by the Board should clarify that the mitigation guidelines apply to both grid supply projects and net metered projects with capacities over five megawatts.

Rate Counsel also has concerns about the stated objective of the guidelines, which is “to ensure the integrity of specific agricultural land impacted by solar development, so that these lands can be returned to agricultural use at the end of life of the solar installation, if so desired.” Straw Proposal at 21. Based on this statement, it appears that the guidelines assume that the land occupied by the solar facilities will be taken out of use as farmland for as long as the solar facility remains in operation. Instead, the continued productive use of farmland should be encouraged. Solar panels can be compatible with continued agricultural production. For example, a farm in Colorado is successfully growing crops including carrots, kale, tomatoes, garlic, beets, radishes and lettuce beneath solar panels.¹

Rate Counsel notes also section 8 of the Solar Act of 2021 requires the Board and NJDEP, to establish, no later than July 9, 2022, “standards for the use of pollinator-friendly native plant species and seed mixes in grid supply solar facilities, which are designed to reduce storm water runoff and erosion, and provide native perennial vegetation and foraging habitat beneficial to gamebirds, songbirds, and pollinators, and which consider compatibility with the security and reliability of grid supply solar facilities.” N.J.S.A. 13:1B-15.178. This is a clear expression of the Legislature’s intent that, at a minimum, land that is not maintained as farmland should be used to grow native, pollinator-friendly vegetation.

¹ M. Simon, “Growing Crops Under Solar Panels? Now There’s a Bright Idea,” Wired (Oct. 14, 2021) (available at: <https://www.wired.com/story/growing-crops-under-solar-panels-now-theres-a-bright-idea/>).

On a related issue, Rate Counsel has concerns about the provisions in the proposed mitigation guidelines that permit the removal of topsoil. As was noted during the April 8, 2022 stakeholder meeting, the State’s prime agricultural soils and soils of statewide importance are valuable resources that should be preserved. April 8, 2022 meeting replay at 42:03-42:18. Further, any movement of topsoil can compromise its integrity. April 8, 2022 meeting replay at 41:37-42:18 and 51:31-52:07. This appears to be recognized in the guidelines, which would require the movement of topsoil to be minimized “to limit compaction and the destruction of aggregates.” Straw Proposal at 24. Further, while based on the discussion at the April 8, 2022 stakeholder meeting it appears that the intent of the guidelines is to require the topsoil to be replaced and planted with vegetation immediately following construction; this is not explicit in the guidelines. Rate Counsel recommends that the guidelines be amended to be more protective of the State’s valuable topsoil resources. Solar developers should be required to utilize construction techniques that eliminate or minimize the need to move topsoil. If moving topsoil is unavoidable, it should be subject to strict requirements to replace it and plant appropriate vegetation promptly.

Finally, Staff should be mindful of the need to assure that the mitigation guidelines are not evaded through transfers of ownership of the affected land. In Island Venture Associates v. NJ Department of Environmental Protection, 179 N.J. 485 (2004), the New Jersey Supreme Court held that a restriction on the use of property contained in a coastal permit issued by the NJDEP was not binding on a subsequent owner that had purchased the property without actual notice of the restriction. In order to assure that the mitigation guidelines have their intended effect, it may be necessary to reflect some permit conditions as deed restrictions that are recorded promptly with the clerk of the county where the property is located. See, Id.

IV. Waiver Process

Under N.J.S.A. 48:3-119 (c) and (f) there are several categories of land where solar facilities are not prohibited but may be sited only if the Board grants a waiver, namely:

- Land preserved under the Green Acres Program
- Land located within the preservation area of the Pinelands
- Land designated as forest area in the Pinelands comprehensive management plan
- Land located within the Highlands preservation area
- Land designated as freshwater wetlands or coastal wetlands
- Forested lands
- Projects that would exceed two and a half percent of NJ land containing prime agricultural soils and soils of Statewide importance located within any Agricultural Development Area

These categories of land include areas that are of considerable importance to the environment and to the quality of life in this State. For this reason, it is important that the waiver process include sufficient safeguards to assure that solar development is consistent with preserving these important resources.

The Straw Proposal includes a provision to establish an expedited process for waivers for projects that are proposed to be sited within the protected areas, but on the built environment or on an impervious surface. Straw Proposal at 17. Rate Counsel supports this proposal to establish an expedited process for projects proposed to be sited on the built environment, as this appears consistent with the legislative objective of directing solar development “toward marginal land and the built environment and away from open space.” N.J.S.A. 48:3-114(c). This process should include a requirement that the applicant provide documentation that the construction was properly permitted as a permanent structure.

However, Rate Counsel has concerns about the proposal to also extend the expedited process to any project proposed to be developed on any “impervious surface.” Impervious surfaces that are not part of the built environment could include open spaces where solar development should not be encouraged.

The Straw Proposal further includes a proposal that, in determining whether a project is in the public interest, the Board and its sister agencies consider mitigation measures and the proposed donation of other land into permanent conservation. Straw Proposal at 17. While such considerations may be valid, the rules regarding obtaining a waiver should make it clear that mitigation may not be used as a substitute for the statutory requirement that the project be “consistent with the character of the specific parcel” where the solar facility is proposed to be located.

Finally, Rate Counsel has concerns about the transparency of the waiver process. First, there is a need to define the criteria the Board will apply in granting waivers, so that waiver requests will be determined based on clear, objective standards. Rate Counsel concurs with the suggestions made during the March 29, 2022 stakeholder meeting that the process include opportunities for public review and input on waiver applications. See March 29, 2022 meeting replay at 42:26-43:16 and 57:02-57:17. Since waiver applications seek authorization to install solar facilities in areas that implicate the public interest, members of the public should have the opportunity to weigh in on these applications. At the March 29, 2022 stakeholder meeting, members of the solar industry also expressed concerns about the potential disclosure of locations before the developers have had the opportunity to conduct public outreach. March 29, 2022 meeting replay at 48:06-49:11. Solar developers can remedy this concern by adjusting the timing of their public outreach efforts.