

**STATE OF NEW JERSEY
BOARD OF PUBLIC UTILITIES**

I/M/O Verified Petition of)	
)	
PRESIDENTIAL PLACE REALTY, LLC)	Docket No. _____
)	
For An Extension of Time to Complete)	
a Six-Rooftop Multi-Family Project Located)	
at Presidential Drive in Lebanon, NJ, 08833)	
and Registered in the Transition Incentive)	
Program:)	
 NJSTRE1547439926 (Building 1))	
NJSTRE1547451075 (Building 2))	
NJSTRE1547451203 (Building 3))	
NJSTRE1547455670 (Building 4))	
NJSTRE1547451989 (Building 5), and)	
NJSTRE1547455618 (Building 6))	
)	

VERIFIED PETITION

Presidential Place Realty, LLC, a limited liability company having its principal place of business at 2 Executive Drive Suite 430, Fort Lee, NJ 07024 (“Petitioner”), by its undersigned counsel, and pursuant to applicable rules of the New Jersey Board of Public Utilities (“Board”), hereby requests the Board to grant it an extension of time to complete a solar project being developed by Petitioner’s solar developer, Accord Power, Inc. (the “Project”) and registered in the Transition Incentive Program (“TI Program”).

The Board’s Order in connection with *I/M/O Request for an Extension of Time to Complete NJSTRE1545046932 in Transition Incentive Program - 480 South Democrat Road, Gibbstown NJ ESNJ-Key-Gibbstown, LLC*, BPU Dkt. No. QO22030156, dated June 8, 2022 (“Gibbstown Order”), promulgated a rule for all requests for a TI Program extension, which rule

requires a petitioner to demonstrate extremely narrow criteria to establish good cause for the extension. While the Board was properly motivated by the unjust effects facing the Gibbstown petitioner in the absence of an extension, namely a substantial investment of time and money gone to waste, the Gibbstown Order's rule amounted to unlawful rulemaking because, among other things, it concerns policy issues affecting a significant segment of solar project developers, which should have triggered formal rulemaking. Nevertheless, the Gibbstown Order's rule was adopted without notice and opportunity for comment.

The Gibbstown Order's rule is also so narrow as to render it effectively inapplicable to virtually any other would-be petitioner except the Gibbstown petitioner. It requires (1) a completed project, including the receipt of required final inspections, prior to the project's TI Program expiration date, (2) a showing that construction was proceeding because the electric distribution company ("EDC") represented that any necessary upgrades would be completed prior the expiration date, and (3) that those upgrades were fully funded by the developer, but that the estimated completion date was nevertheless extended by the EDC. While Petitioner's circumstances do not fit precisely in the four corners of the "good cause" criteria set forth in the Gibbstown Order, the reasons for Petitioner's predicament are similar in substance and the potential consequences just as unfair as those that would have been suffered by the Gibbstown petitioner.

Like the Gibbstown petitioner, the Petitioner in this proceeding has been rendered unable to timely complete its Project because of circumstances which were completely unforeseen and outside of Petitioner's control. As described in more detail below, despite the timely submissions and reasonable subsequent actions of Petitioner, the local approval process on both the County and municipal side has been held up for nearly eight months, all while Petitioner, a small family-

owned real estate investment company, has incurred more than \$350,000 in investment costs. This lapse of time is much longer than Petitioner (or anyone) could have reasonably expected. The requirement imposed by the Board that all solar developers seeking an extension of a TI Program project must be in *exactly* the same circumstances as Gibbstown in order to establish good cause for an extension is arbitrary and capricious.

Thus, even if the rule announced in the Gibbstown Order is deemed to be a proper exercise of the Board's authority, Petitioner is entitled to a review of its Petition on its own merits to determine if the Petition has established good cause for a waiver of the strict application of the Gibbstown Order factors in favor of meeting the substantive objective of the Order and in order to avoid an unjust outcome. These are the principles required by *N.J.A.C.* 14:1-1.2(b) (governing applications for a waiver of Board rules), and the review of this Petition will lead inevitably to the conclusion that the grant of an extension to Petitioner is necessary to prevent an unfair result.

In support of this Petition, Petitioner states as follows:

I. THE PETITIONER'S PROJECT

The Project at issue in this Petition is a multi-family housing net metered project for solar arrays located on the rooftops of six buildings located on Presidential Drive in Lebanon, NJ.¹ The Project applications for the six buildings were submitted to the Transition Incentive ("TI") program by Petitioner's solar developer, Accord Power, Inc. ("Accord"),² on August 16, 2021,

¹ Two of the six buildings in the Project have been assigned street numbers by JCP&L, and the remainder have no assigned street numbers. The two Project buildings with street numbers are Building 1, located at 111-144 Presidential Dr., assigned NJSTRE1547439926 and Building 2, located at 211-244 Presidential Dr., assigned NJSTRE1547451075.

² Pursuant to an Agreement between Accord and Petitioner, Accord is the developer of the Project and is responsible, as Petitioner's agent, for acquiring the TREC registrations as well as

and each received conditional acceptance on various dates in mid-to late August 2021, with corresponding one-year completion due dates in mid-to late August 2022. Specifically, the TREC completion due dates for each of the six buildings in the Project are as follows: Building 1 – August 19, 2022; Building 2 – August 24, 2022; Building 3 – August 19th, 2022; Building 4 – August 25, 2022; Building 5 – August 24, 2022, and; Building 6 – August 25, 2022.

In parallel with the submission of its applications, Accord began the utility interconnection application process with the electric distribution company, JCP&L, which granted the Project approvals in late September 2021.

Mindful of supply-chain issues, construction equipment was proactively procured in late 2021, at a significantly elevated cost, and all necessary solar equipment for the six buildings have been delivered to the site

Upon receiving the approval from the TI program and JCP&L, Accord continued development of the Project by submitting for County of Hunterdon approval on January 28th, 2022. While the County subsequently issued approval letters, the letters were initially sent to Lebanon Township instead of Lebanon Borough. At this point, the County had to redraft and reissue approval letters to the correct contacts at the Borough of Lebanon, which did not take place until February 10th, 2022. Now able to proceed, Accord secured approval from the Borough on March 8, 2022. However, such approvals must be ratified by the Lebanon Borough Planning Board Committee at a public meeting, which in the Borough are only scheduled once per month. While it was realistic to expect a placement on the Borough's April 12, 2022 meeting, the Petitioner's approval ratification was delayed to May 8, 2022 because the Borough's lawyer did not review the resolution he asked Petitioner's attorney to draft.

all necessary building, electrical, land use approvals, and the EDC interconnection agreement. Petitioner and Accord worked closely together in these activities.

Meanwhile, in an attempt to expedite review of building permit applications, on March 29, 2022 Accord filed the Petitioner's building, electrical, and fire subcode applications with the New Jersey Department of Consumer Affairs ("DCA"), which agency acts as the Building Department for municipalities, like the Borough of Lebanon, that do not have dedicated staff to conduct building reviews. Despite numerous follow up attempts by Accord and its architect, the DCA has experienced significant delays in reviewing Petitioner's applications due to severe staffing shortages and has denied Accord's request for expedited review.

In short, while the Project is fully staged, it will not meet the TI Program deadlines.

It is obvious in this case that Petitioner timely took all of the steps necessary to have allowed Petitioner to complete the Project and reach commercial operations before its TI program expiration dates. Indeed, Petitioner has invested more than \$350,000 in development costs, including nearly \$175,000 to re-roof each of the six buildings to accommodate the new solar installations. This amount of money is especially substantial for a small family-owned company.

II. LEGAL ARGUMENT

When, as is the case with the Gibbstown Order, "agency action is concerned with 'broad policy issues' that affect a large segment of the regulated or general public, rule-making as such is implicated." *Metromedia, Inc. v. Dir., Div. of Tax'n*, 97 N.J. 313, 330 (1984), citing *Crema v. New Jersey Dept. of Env'tl. Protection*, 94 N.J. 286, 301-302 (1983).

[A]gency determination must be considered an administrative rule when all or most of the relevant features of administrative rules are present . . . Such a conclusion would be warranted if . . . the agency determination, in many or most of the following circumstances, (1) is intended to have wide coverage encompassing a large segment of the regulated or general public, rather than an individual or a narrow select group; (2) is intended to be applied generally and uniformly to all similarly situated

persons; (3) is designed to operate only in future cases, that is, prospectively; (4) prescribes a legal standard or directive that is not otherwise expressly provided by or clearly and obviously inferable from the enabling statutory authorization; (5) reflects an administrative policy that (i) was not previously expressed in any official and explicit agency determination, adjudication or rule, or (ii) constitutes a material and significant change from a clear, past agency position on the identical subject matter; and (6) reflects a decision on administrative regulatory policy in the nature of the interpretation of law or general policy. These relevant factors can, either singly or in combination, determine in a given case whether the essential agency action must be rendered through rule-making or adjudication.

Id. at 331-332.

The Gibbstown Order encompasses all solar developers in the State facing an imminent TI Program deadline but encountering obstacles beyond their control³, applies on its face to all future petitions for extensions of such solar developers, and the inflexible criteria laid out in the Gibbstown Order rule was not previously expressed in any past Board determination. The rule promulgated by the Order should therefore have been effected in compliance with the requirements of the Administrative Procedures Act *N.J.S.A.* 52:14B-1 to -15, including notice and the opportunity for affected parties to participate in the process.

Even if the Gibbstown Order is viewed as a valid rule properly implemented by the Board, Petitioner asks the Board to apply *N.J.A.C.* 14:1-1.2(b) (allowing for relaxation or deviation of rules for good cause) to determine if Petitioner is entitled to a waiver of the Gibbstown Order rule. Notwithstanding the Board's own citation in the Gibbstown Order to

³ There are over 1215 TI Program non-residential projects which were received after the June 24, 2021 blanket 6-month extension and before the close of the TI Program on August 27, 2021. Over 565 are scheduled to expire in the month of August 2022 and nearly 630 are scheduled to expire in the month of September 2022 alone. See <https://njcleanenergy.com/renewable-energy/project-activity-reports/project-activity-reports>. Moreover, at least twenty-two (22) petitions requesting a TR Program extension have been newly docketed since the Gibbstown Order.

N.J.A.C. 14:1-1.2(b) as underpinning its finding that Gibbstown was entitled to an extension⁴, the Board promulgated the following, hyper-specific and exclusive factors that serve as the only mechanism to establish good cause for an extension:

1. The project can demonstrate that it was electrically and mechanically complete prior to its TI Program expiration date, which the Board interprets as a project that could be energized, but for the lack of a necessary permission to operate from the EDC due to factors that are the sole responsibility of the EDC;
2. The project can demonstrate that it had received and satisfied all necessary permits from all authorities having jurisdiction over the project prior to its TI Program expiration date, including required final inspections; and
3. Project construction was proceeding based on a representation from the EDC that any necessary interconnection upgrades would be completed prior to the project's TI Program expiration date, that the upgrades were fully funded by the project developer, but that despite the developer's best efforts, the estimated upgrade completion date was unilaterally extended by the EDC.

Gibbstown Order at *8-9. The Board's development of these almost-impossible-to-meet factors flies in the face of *N.J.A.C.* 14:1-1.2(b), the explicit purpose of which is to permit the Board to "secure just and expeditious determination of issues" if strict compliance "would adversely affect [the rendering of] safe, adequate and proper service or the interests of the general public."

Blindly applying the Gibbstown Order rule to every petitioner seeking an extension, irrespective of whether strict compliance results in an unjust outcome or is adverse to the public interest in the completion and operation of solar projects that may otherwise be abandoned, is

⁴ The Board applied its waiver analysis to the TI Program deadlines provided by *N.J.A.C.* 14:8-10.4. In this proceeding, whether the Board applies *N.J.A.C.* 14:1-1.2(b) to the Gibbstown Order rule or the TI Program deadlines regulation, the outcome remains the same – the Petition should be granted.

nothing short of arbitrary and capricious, and adversely affects the public's interest in the expansion of solar energy projects, rather than their failure.

In the Gibbstown Order, the Board made clear that its motivation for permitting TI Program extensions was to provide relief for solar developers who would otherwise be penalized for unforeseen delays due to the actions or inactions of an EDC. *See* Gibbstown Order at *8. The circumstances that befell Petitioner in this matter are clearly within the realm of harm contemplated by the Board. Petitioner has invested considerable time and money into a project that would otherwise have been timely constructed were it not for circumstances beyond its control. To disallow a reasonable extension would unfairly penalize Petitioner, and the Petitioner therefore respectfully requests the Board find good cause to grant a 9-month extension to complete the Project.⁵

III. DESIGNATED CONTACTS

Questions, correspondence or other communications concerning this Petition should be directed to Petitioner's counsel of record:

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⁵ The Board found that granting similarly situated parties a “comparable” 6-month extension, which was afforded to Gibbstown, is warranted for projects that can also make a showing of just cause. Petitioner asserts that a 9-month extension is comparable to a 6-month extension given the unique facts of its Project.

IV. PUBLIC INTEREST CONSIDERATIONS

Grant of this Petition will serve the public interest of New Jersey because Petitioner's Project is not viable under the Successive Solar Incentive, or SUSI, program and Petitioner, a small family-owned enterprise, will suffer catastrophic financial loss absent its eligibility for the TI program. This outcome would be in direct contravention to New Jersey's stated goal of reaching 100% clean energy by 2050.

V. CONCLUSION

For the foregoing reasons, Petitioner submits that the public interest, convenience, and necessity would be furthered by grant of this Petition. Petitioner asks the Board to grant it a 9-month extension to complete its TI Program Project and such other relief as may be just and proper.

Respectfully submitted,



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Counsel to the Petitioner

Dated: August 16, 2022

Verification

I, Lincoln Xia, verify the foregoing petition as follows:

1. I am employed as Vice President, Corporate Development of Accord Power, Inc. and am authorized to sign this verification on Petitioner's behalf.

2. I have read the foregoing petition and verify that the facts contained therein are true to the best of my knowledge, and the opinions contained therein are correct to the best of my belief.

I hereby certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.



Lincoln Xia

Dated: 8-16-22