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New Jersey Board of Public Utilities
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FR: Schneider Electric
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RE: IN THE MATTER OF CLEAN ENERGY - REQUEST FOR ENERGY SAVINGS IMPROVEMENT PROGRAM - REGULATIONS STRAW PROPOSAL Docket No. QO20080531
Public Comments on Straw Proposal

Overview

Schneider Electric is a global leader in energy management and automation, providing solutions that enable organizations to make the most of their energy resources while reducing their environmental impact. Over the years, Schneider Electric (SE) has been a successful and well-respected Energy Services Company (ESCO) nationally; implementing 960+ energy savings projects totaling over $3.7 billion in guaranteed energy savings. In New Jersey, Schneider Electric has delivered over $150M worth of energy efficiency, capital improvement, and renewable energy projects within the past decade to public sector clients under the Energy Savings Improvement Program (ESIP).

We are encouraged by the Board's effort to adopt formal rules for the ESIP program by issuing this straw proposal for comments. However, we are deeply concerned that the changes considered in this straw proposal, the statements made in the Staff Clarifying Memo (May 26, 2023), and the recent obstacles in allowing utility incentives within ESIP projects could be a major deterrent for public entities moving forward. In total, these changes could stagnate or even end a very successful ESIP program.

SE provides below a series of comments related to the rule proposal. However, there are additional issues and challenges for the program as it currently operates that we wish to highlight. We believe that the Board must consider resolving these operational challenges and we submit our recommendations, recognizing they may be outside the scope of the rule proposal.

ESIP has been the leading mechanism for public entities to improve energy efficiency and deploy renewable energy across the state. The ESIP program has provided over $1.4 billion of public sector infrastructure investments in the past 15 years, yielding significant GHG emissions reductions and countless jobs. We strongly believe that it is in the State's best interest to consider how the program can be improved, not complicated. We appreciate the opportunity to share our concerns and recommendations.

General Summary of Recommendations

1. The current and proposed initial energy audit (LGEA) requirements are unnecessarily burdensome and time consuming under the current program manager's process. The initial energy audit requirement should be eliminated entirely. Alternatively, the BPU should instead incentivize Investment Grade Audits which directly lead to ESIP projects and actual GHG emissions reductions, such as NYSERDA's FlexTech program.
2. SuSI credits (SREC-IIs) should be permissible within an ESIP cash flow analysis, as this solar incentive is fixed and reliable for 15 years.
3. New requirements suggested in this straw proposal make it more difficult on Public Entities and ESCOs to participate in the ESIP program. The rules should make the burden as light as possible for public entities to participate. Instead, this straw proposal adds additional, uncapped reporting requirements which will greatly delay projects and add costs. These additional steps are not needed and should be removed.
4. Proposed penalties under the enforcement section identifies potentially significant penalties and fines which could effectively terminate a project, or terminate the ESIP program altogether. To reduce the chilling effect that this may have on risk-averse entities, the penalties should be less severe, capped, or the rules should more clearly state what actions could lead to project termination.
5. Additional Sections are either unclear, and/or contradictory with the existing ESIP program. These areas highlighted below should be clarified.

Current incentive procurement issues must be addressed to keep the program viable

The current procurement issues plaguing the incentive programs must be addressed immediately. The Board needs to clarify what the specific issues are that have led to certain incentives being disallowed, such as Direct Install and on-bill repayment. The Board and the New Jersey Department of Community Affairs (DCA) should provide tangible, written guidance on the current issues and the path and timeline to resolution. Alternatively, the Board should leave it up to the public entities, their staff of qualified purchasing agents, and their attorneys to determine the allowability of certain incentive programs.

It has been over 2 years since the BPU transitioned the energy efficiency incentives from the NJ Clean Energy Program to the individual utilities. Not allowing public entities to take advantage of certain incentive programs will lead to the demise of the ESIP program, as public entities will see no value in ESIP. New Jersey's public entities pay significantly into the societal benefits charge (SBC), and these programs are being actively marketed to them by the utilities and their subcontractors. The public entities should not be penalized for any supposed missteps on the part of the utilities or any state agency in setting up the program properly to allow their participation.

Comments on Straw Proposal

1. Current and proposed initial energy audit requirements are unnecessary and burdensome and should be removed.

The initial energy audit is no longer useful for either public entities or ESCOs. Other states have tried similar initial energy audit requirements with marginal benefit. While we understand the intent of the initial energy audit to inform the ESIP plan and proposal, it has become a "check the box" audit for public entities who wish to move forward with an ESIP. In a time when climate action is considered an urgent priority for the Governor and the state of New Jersey, the initial energy audit (LGEA program) is an obstacle that delays progress. Many public entities have had to wait over a year to complete the initial energy audit, when they are otherwise are ready to move forward with energy efficiency & renewable energy investments. Many have urgent capital needs, and due to the cumbersome and lengthy LGEA process, may choose a more direct path to meeting their needs and bypass the ESIP program altogether. Having one company perform these initial energy audits only worsens the problem. When the BPU transitioned to one company providing LGEA reports, there was a marked decline in ESIP activity, as many customer had to wait for a more lengthy process. Now, mid-size public entities are being told it may take 12 – 18 months for TRC to complete the audit. We have also heard within the last few weeks that there are currently two (2) staff at TRC who are able to perform the on-site portion of these audits. The state will not meet its energy master plan goals with these types of limitations.

The consideration to require all initial energy audits to be less than 3 years old (or 5 years if a waiver is granted) will exacerbate these problems. If the anticipated timeframe for completing the LGEA is already 12 – 18 months, why force more public entities to re-do their audits? If an entity hasn't been through the program at all, why should they have to wait even longer for others to re-do their audits? According to the NJ Clean Energy Program website, as of 6/2/2023, there were 840 local government energy audits completed for 740 entities since the LGEA program inception. Of those, only 15% (123 entities) have been completed in the past 3 years. This would render 85% of LGEA reports irrelevant, and mean that the vast majority of NJ public entities cannot consider an ESIP at this time, without doing (or-redoing) the initial energy audit. If this requirement is lifted, 100% of public entities could choose to move forward at their discretion and begin seeing energy efficiency benefits. Not to mention, this would provide significant ratepayer relief, as these funds could instead be used for programs that directly result in energy efficiency and GHG emissions reductions.

We submit the following solutions to these problems:

1. Eliminate the initial energy audit requirement. Public entities still retain verification of the audit done by their hired 3rd party reviewer.

2. Or, make the initial energy audit optional, not required. Public entities who wish to take this step still can.
3. Or, incentivize Investment Grade Audits contingent on ESIP construction contracts that lead directly to energy efficiency improvements, similar to NYSERDA's FlexTech program.
4. Alternatively, allow a pool of qualified companies to perform the initial energy audit, rather than one company, which creates a bottleneck and has delayed significant progress.

2. SuSI solar credits should be allowable within ESIP program cash flows.

The SuSI or SREC-II is a new incentive structure that was not anticipated in the existing ESIP statute or current BPU Guidelines. The statute only addresses the "Legacy" SREC program by excluding SREC credits from the savings calculation used during the procurement phase of an ESIP due to the variable, speculative nature of the SRECs. However, the SREC exclusion is explicitly limited to the procurement phase of a program. The current ESIP law (P.L. 2012 c55, pages 6-7) states the following:

> ***"36 (b) During the procurement phase of an energy savings***
> ***37 improvement program, an energy service company's proposal***
> ***38 submitted in response to a request for proposal*** *shall not include a*
> *39 savings calculation that assumes, includes, or references capital cost*
> *40 avoidance savings, the current or projected value of a "solar*
> *41 renewable energy certificate," as defined pursuant to section 3 of*
> *42 P.L.1999, c.23 (C.48:3-51), or other environmental or similar*
> *43 attributes or benefits of whatever nature that derive from the*
> *44 generation of renewable energy, and any costs or discounts*
> *45 associated with maintenance services, an energy savings guarantee,*
> *46 or third party verification of energy conservation measures and*
> *47 energy savings."*

The statutory exclusion of the use of SREC credits in the procurement phase leaves open the possibility of incorporating those credits into the savings calculation at a later stage of the program, such as at the time of submitting an Energy Savings Plan to the BPU. However, the existing BPU ESIP Procedures for Implementation extend the SREC exclusion to all phases of the program, stating on page 1:

> *"8. SREC values are not permitted to be used in the energy cost savings calculations."*

We believe the BPU's decision to exclude SREC's was warranted at the time, because of the speculative nature of the value of the SREC revenue in future years. However, this is no longer a concern. SuSI credits are fundamentally different than SREC's because the value is fixed for 15

years. Permitting SuSI credits to be used in the cost savings calculations and cash flow during the final Energy Savings Plan phase is consistent with the ESIP statute and the Board guidelines' focus on the procurement phase. Allowing the inclusion of SuSI credits within ESIP cash flow statements also gives BPU staff the discretion to evaluate each project individually during the ESIP review process, to ensure that each project incorporates the current incentive and rebate programs appropriately.

With the passage of the Inflation Reduction Act, public entities can now claim a direct pay (or elective pay) investment tax credit (ITC) on 30% (or more) of the cost of solar PV and other eligible project costs. This is a significant benefit that public entities can take directly, but the BPU policy of not allowing public entities to include the NJ state incentive (SuSI) make the cash flow analysis difficult. Effectively, this has forced many public entities to procure solar via power purchase agreements, rather than directly through an ESIP. Allowing the inclusion of SuSI credits within an ESIP cash flow analysis would provide the following benefits:

1. Allow public entities to take advantage of the 30% federal direct pay ITC directly
2. Enable public sector entities, rather than private investors, to reap the financial benefits of solar projects due to a lower cost of capital. Over the past few years, public entities have financed 15-20 year ESIPs at interest rates of 2-4%. PPA investors have a much higher cost of capital. The BPU/Cadmus report that informed the SuSI incentive structure ("New Jersey Solar Transition Final Capstone Report") assumes an IRR of 9.7% for PPA investors. This difference in cost of capital over 15 years makes direct ownership via ESIP more financially advantageous to NJ public entities, ratepayers, and taxpayers.
3. Make ESIP a more flexible financing tool by enabling public entities to leverage the savings created by solar projects inclusive of the SuSI credits, which will facilitate important infrastructure projects at no cost to local taxpayers
4. Empower smaller solar projects (under 300-500 kW) via ESIP, which are historically not attractive to power purchase agreement (PPA) providers. Many of the state's municipalities and school districts are too small to receive the benefits of solar through a PPA.
5. Expand the scope of economical solar projects to meet the State's Energy Master Plan goal of a "50% Renewable Portfolio Standard by 2030"

In addition, there are a few points within the Staff Clarifying Memo (May 26, 2023) that raise some concerns:

a. *"If a public entity will be purchasing a solar PV as opposed to doing a PPA, they will need to purchase a maintenance agreement."*

Nowhere is it listed that a public entity must purchase a maintenance agreement. Some public entities may have staff or in-house personnel qualified to perform basic solar maintenance. This

decision should be left up to the public entity, as it is a topic of discussion during the Investment Grade Audit. BPU staff can weigh in on this topic during the BPU review process.

b. "Neither the solar system nor the maintenance agreement can be financed within an ESIP."

It is correct that the ESIP legislation does not allow the financing of maintenance agreements. However, the ESIP legislation does define solar/renewable energy as an ECM:

8 "energy conservation measure" means an improvement that
9 results in reduced energy use, including, but not limited to,
10 installation of energy efficient equipment; demand response
11 equipment; combined heat and power systems; ***facilities for the***
12 production of renewable energy; *water conservation measures,*
13 fixtures or facilities; building envelope improvements that are part
14 of an energy savings improvement program; and related control
15 systems for each of the foregoing;

Solar is a legitimate ECM defined in the legislation, and one of the most viable cost-reduction strategies for public entities. It is a priority within the state's Energy Master Plan, and BPU ESIP policies should make renewable deployment easier and more flexible, not more difficult, for NJ public entities.

3. Proposed requirements will make it more onerous on public entities to participate in the ESIP program.

There are several new requirements in the straw proposal that impose obligations on the public entities which make the process for approval and operation of the project unnecessarily onerous. This straw proposal considers adding multiple stages of reporting that add no benefit to the public entity or the ESCO, but would add time, cost, and hassle to ESIP projects. The following is a list of specific references to these provisions that should be modified to make the program more effective and efficient and less burdensome to the local government:

a. "*Once finances are secured, the public entity's Project Manager shall submit the final Cash Flow Analysis to the ESIP Coordinator"*

This request places more burden on the public entity and has unclear benefits. If included, it should be the responsibility of the ESCO, not the public entity.

b. "*The Board may modify or cancel a procurement by a public entity"*

This requirement is concerning and unclear, and by itself, may be enough to discourage public entities from participating in the ESIP program. It leaves ESCOs and public entities with many

questions, including: How would the Board modify a procurement made by a public entity with a vendor? Who then becomes the responsible entity?

c. "*The public entity shall provide reports to the ESIP Coordinator according to the agreed upon milestone schedule and through the BPU selected reporting platform. The ESIP Coordinator reserves the right to set forth an additional reporting schedule if the Coordinator determines that additional reporting is needed. For the ESCO model, the public entity should work with the ESCO to set up project reporting requirements through the BPU selected reporting platform"*

We suggest clarifying the reporting platform, access, upfront and ongoing training, and anticipated cost. Any additional reporting should not be left to any subjective determination of the ESIP coordinator and any additional reporting requirements should be capped and specifically detailed in the rule.

d. The proposed rule requires post commissioning reports

What are the required elements of a post commissioning report? When is it due, to whom is it sent? Is this the responsibility of the ESCO or the public entity?

e. "Upon contract execution, the public entity shall provide the Project Contacts form to the ESIP Coordinator on a yearly basis detailing the Project Managers and the Public Entity Project Manager."

Rather than annually, we suggest contact information can be provided when there is a change in project contacts, and clarifying for how many years this requirement exists. What happens if the public entity forgets to file? Will there be a notice or reminder sent to the public entity?

f. The straw proposal requires the public entity to post an RFP notice 10 days prior to a pre bid meeting.

This is an arbitrary requirement that will hinder the public entity's ability to run the RFP the way that is best suited for them. This requirement carries the detriment of eliminating 10 days of the RFP period when the public entity could otherwise inform prospective proposers to craft their best proposals, and proposers will have less time following site visits and the pre-proposal meeting to craft their best proposal for the public.

g. As stated in the May 26, 2023 Staff Clarifying Memo:

> *"All entities must follow New Jersey Department of Community Affairs (DCA) guidance on utility programs"*

"Subsequently, the BPU is requiring that all ESIP projects consult with the DCA and follow all DCA guidance regarding the procurement of all subcontractors."

"DCA has given an opinion that local public contracting law does not allow for utility vendors to be utilized under the Direct Install or Engineered Solutions programs."

Where is this DCA guidance on utility programs? What problems exist? We have not been provided any such guidance that documents the issues and/or the solutions.

h. "No utility financing is to be utilized"

What is the basis for this position? Why?

i. "A bond rating is required for this option [Refunding Bond]"

A bond rating is not required and should remain optional. It comes at a cost to the public entity and should be determined on a case-by-case basis by the public entity, their bond counsel, and financial advisor.

j. "If the RFP proposes an expenditure greater than $2.5 million, it shall also be subject to the requirement for review by the New Jersey Office of the State Comptroller in accordance with N.J.S.A. 52:15C-10. Failure to abide by this requirement shall result in modification or rejection of the RFP by the ESIP Coordinator. Any modifications made as a result shall be forwarded to the ESIP Coordinator by the public entity."

This requirement is already documented elsewhere and does not need to be restated here. It also is not relevant for the RFP phase of the ESIP, only at final construction contract approval. As stated on the NJ OSC form, *"POST-AWARD NOTICE FOR CONTRACTS VALUED AT MORE THAN $2.5M BUT LESS THAN $12.5M. Submit to contracts@osc.nj.gov no later than 20 business days after the award."*

This is listed as a notice, not a review, and also allows for award after the contract, which would be after BPU approval of the ESP, not prior to the RFP, when the scope and dollar amount of the contract is unknown.

k. "All proposals shall utilize the current market rate as set by the BPU annually."

It is unclear if this is meant to mean interest rates, utility rates, or utility escalation rates. Clarity is needed. However, all 3 of these rates can vary significantly amongst clients, utilities, and times during the year. We suggest that utility rates & interest rates are determined with discretion based on each unique circumstance by the client and/or ESCO. Escalation rates should be

established annually, and defined not just for electric and gas, but for water, sewer, other fuels, operations and maintenance, and other costs.

l. The terms "business days" and "days" are used interchangeably.

All references to "business days" should be replaced with "days" for consistency and a more streamlined process.

m. *"Public entities shall arrange for an M&V analysis one (1) year after the operational date of the project. The M&V analysis shall be conducted by a qualified third party to ensure that the savings projected in the ESP have been achieved."*

Is this language intended to mean the existing 3rd party review requirement that happens after construction? Or is this a new requirement? One year of 3rd party M&V will come at a considerable cost to the public entity, on top of what is already required. This should be optional and at the discretion of the public entity to decide if it is appropriate given the public entity's expertise, unique scope of work, and potential variability of savings associated with the project.

4. **Proposed penalty/enforcement section introduces significant risk and uncertainty due to the lack of providing clear parameters for compliance and defined penalties for specific violations**.

   a. The straw proposal at 14:4A-3 "Enforcement" states that *"Failure to comply with any provision of this chapter shall subject the violator to the following penalties in accordance with the Board's regulatory and statutory authority"*

This provision is vague and concerning in that failure to comply with "any provision of this subchapter" could result in modifying or cancelling a procurement by a public entity, financial penalties including withholding incentives from an energy savings project, or even initiating "revocation proceedings".

SE understands and supports the intent of this draft subchapter which allows the Board to take action against bad actors that intentionally disregard the ESIP rules. However, the rules as drafted in the straw proposal regarding enforcement leave open ended what sanction will apply for even the most minor violation.

For instance, if a public entity holds a pre-filing meeting 9 days following publication of an RFP rather than after 10 days as would be required by the straw proposal, would this public entity be at risk of losing incentives or being revoked from the program? If an annual report on year 8 is not submitted on time, then could the project be revoked?

14:4A-3(b) establishes criteria for the Board to consider in determining the appropriate sanction but this leaves open the possibility for minor violations to result in significant penalties. This section of the straw proposal should be amended to provide the certainty that minor violations such as missing an annual reporting deadline will not expose the public entity to losing their incentives or being revoked from the program.

Having 30+ years of experience nationally, and more than a decade of experience working within the NJ ESIP program, SE has not seen sufficient evidence of bad actors to justify this open-ended enforcement provision and the consequences for noncompliance can be severe. The ESIP program has been successful, as evidenced by high customer satisfaction and the desire to do more projects amongst end users. We believe many public entities will not consider an ESIP given the risks of this open-ended enforcement language.

If the Board is committed to including this provision in the formal rule proposal then SE requests that more clarity is provided in the rule as to what constitutes "failure to comply with any provision" and, most importantly, which specific violations would be considered for revocation or significant financial penalties.

5. Additional Sections that are unclear or contradictory and should be clarified.

a. *"The only ECMs eligible for Demand Response are those that do not receive utility incentives."*

We believe this statement confuses demand response, which includes many voluntary programs, With the permanent demand reduction credit that is available to customers but claimed on many of the utility forms. Because each utility manages their own incentive programs, this should not be a blanket statement that covers the whole state. This should be handled on a case by case basis, as it may apply in some utility territories, but not others. Furthermore, it may change as demand response programs, either from the utility or from grid operators, may change over time. Thus, this language should be eliminated. Otherwise, BPU should clarify which specific demand response / capacity reduction programs this applies to.

b. *"ESCO fees proposed during the RFP phase shall not increase post-award. These fees include such items as hard costs, ESCO profit, ESCO overhead, and such other costs as may be shown to be necessary to implement the ESIP project."*

"ESCO fees" should be replaced with "ESCO fee percentages," to be consistent with the current program, as the RFP scope and hard cost estimates change from RFP to final project.

c. *"Any subsequent modifications or changes to the ESP shall be submitted again to the ESIP Coordinator. Such submittal will reset the 14-day BPU review period."*

This is not consistent with current ESIP legislation, which states, *"If the board does not disapprove of the contract within 14 days of receipt thereof, the contract shall be deemed approved."* The legislation does not provide for a reset feature, which could lead to significant delays for public entities.

d. *"[Energy-related capital] improvements required to properly implement the ECM may be funded through the ESIP as long as the total cost of the improvement does not exceed 15 percent of the total cost of the work"*

This statement is not consistent with the current legislation and should be removed. The ESIP legislation states:

11 (6) Energy-related capital improvements that do not reduce
12 energy usage may be included in an energy savings improvement
13 program but the cost of such improvements shall not be financed as
14 a lease-purchase or through energy savings obligations authorized
15 by subsection c. of this section. Nothing herein is intended to
16 prevent financing of such capital improvements 1 through otherwise
17 authorized means.

Energy-related capital improvements can be included, but they much be funded separately, either through capital reserve, outside grant funding, traditional general obligation bond financing, or "otherwise authorized means."

e. *"Contracted third party utility rates may only be used to calculate energy savings for the term of the contract up to a maximum of five (5) years."*

Is this statement meant to apply to PPAs as well as traditional third party electric and gas supply agreements? PPAs are 15-year agreements, and savings from PPAs should be used for the full term of the agreement, which is typically 15 years. Clarification is needed.

Additional Suggestions Which May Require Changes to Legislation

There are a number of ESIP provisions that relate to the operations and financing of projects and we have commented on several above as they also pertain the to the rule proposal. However, we also recognize that the underlying ESIP legislation might not allow the Board to make such revisions. Therefore, we provide comments to certain aspects of the ESIP program that SE believes would make the program much more vibrant and attractive to public entities as well as to ESCOs and other industry players. The following provisions we believe should be considered, which may require legislative revision:

1. Initial energy audit requirement

We suggest eliminating the requirement completely or make it optional for the reasons articulated above.

2. SuSI credits for solar should be allowed in ESIP cash flows

We believe SUSI credits are allowable (besides the procurement phase) under the current legislation. However, if BPU staff determines otherwise, we advocate for a legislative change on this topic. We believe that this limitation should be eliminated as it is no longer relevant. It was only relevant when the SRECs were a volatile market-based incentive. Now, they are a fixed value, reliable for 15 years. The ESIP program therefore should allow solar credits as renewable energy is a valid ECM, defined in the legislation.

3. Extend Financing Term Length

The maximum ESIP financing term is currently 15 years, or 20 years if CHP is included. As more public entities complete low-hanging fruit projects (like LED lighting), payback periods will extend. For public entities to fund desired projects, and for the State to achieve building decarbonization and deeper energy retrofits, the State should consider extending the 20-year financing term for all ESIP projects, regardless of whether CHP is included. Oftentimes, CHP has been installed to allow for the 20-year financing, but there may be other more valuable ECMs or capital needs that public entities would prefer to include instead of CHP. Alternatively, the State should consider financing terms of up to 25 years, if the average weighted useful life of the equipment is determined to be 25 years or greater, which could be the case with renewable energy assets, electrical infrastructure, geothermal systems, and/or advanced decarbonization technology.

4. Self-funding requirement (savings must cover debt service payments)

This requirement hinders deep energy retrofits, decarbonization of building and vehicle fleets, and energy resiliency investments to name a few. We believe that more flexibility or a complementary financing structure would allow public entities to address sustainability and resiliency goals through a proven ESIP process.