



Agenda Date: 07/30/08

Agenda Item: 8J

STATE OF NEW JERSEY

Board of Public Utilities

Two Gateway Center

Newark, NJ 07102

www.nj.gov/bpu/

CLEAN ENERGY

IN THE MATTER OF WAYNE ENERGY
CORPORATION – PETITION TO EXTEND
THE SOLAR ELECTRIC PROJECT
REBATE COMMITMENT

)
)

ORDER

DOCKET NO. EO08060423

(SERVICE LIST ATTACHED)

BY THE BOARD:

By this Order, the Board of Public Utilities ("Board") considers and renders its decision regarding a request of Wayne Energy Corporation ("Petitioner") for a second extension of its Customer On-site Renewable Energy ("CORE") rebate commitment deadline in order to complete a solar project for the Township of Wayne.

BACKGROUND AND PROCEDURAL HISTORY

Petitioner, a nonprofit corporation under Title 15A of the New Jersey Statutes, was created to develop a comprehensive energy project ("the Facility") for the Township of Wayne. The Facility includes combined heat and power for a number of buildings within a single complex as well as a solar installation ("the Project") and energy efficiency measures. In addition to providing energy for the town's recreation center, the municipal building, and a public school, the Facility, as planned, will generate electricity for export to the grid and includes an educational, internet component.

On May 1, 2006, Petitioner's application for a 599.625 kW solar installation was approved for a CORE rebate. The approved rebate for the Project totaled \$2,207,196.25. In order to receive the approved rebate, Petitioner was required to complete the Project and submit all the required documents to the Program Manager by May 1, 2007.

In March 2007, Petitioner requested a one-year extension of time in order to complete the Project. Petitioner informed the CORE Program Manager that its bid process had been far more complex than initially anticipated. Having commenced negotiations with one bidder in March 2007, Petitioner sought the extension because the Project could not be installed before the original twelve-month commitment date expired. On July 3, 2007, Petitioner received a one year extension to May 1, 2008 during which time Petitioner was to complete the Project.

By letter dated April 30, 2008, Petitioner contacted the CORE Program Manager and requested a second extension for an additional six months. Petitioner informed the CORE Program Manager of its efforts to actively move the Project forward during the term of the first extension. Petitioner stated in the letter that it had completed a competitive selection process and procured the solar panels. Petitioner also explained that it suffered delays when, in February 2008, its primary lender, which was "caught up in significant losses as a result of the sub-prime mortgage problem," changed its position on funding the Project. Petitioner stated that it "immediately started to search for new financing" and alleged that it was close to acquiring new financing. Once funding is in place, Petitioner represents that it is prepared to move forward so that the Project is completed during the year 2008. The CORE Guidelines for Completion Deadlines and Extensions ("the Guidelines") precluded both the CORE Program Manager and Board Staff from granting a second extension on the grounds Petitioner alleged. Therefore, by Petition for Extension received by the Board on June 18, 2008, Petitioner requested that the Board grant a second extension of the rebate commitment deadline for six months.

II. PETITIONER'S REQUEST FOR AN EXTENSION¹

As noted above, Petitioner was formed as a nonprofit corporation to develop the Facility for the Township of Wayne, which includes the Project at issue in the instant matter as well as a qualified cogeneration facility and related energy reduction components. (Pet. ¶ 1.) Petitioner was also formed to sell and supply the energy created by the Facility, in the form of electricity, hot water and chilled water to the Township of Wayne and the Wayne Board of Education for use in municipal buildings on a campus located in the vicinity of Valley Road and Nellis Drive. Ibid. Petitioner states that it has been actively moving forward with the Project. (Pet. ¶ 2.) Pepco Energy Services, selected to implement the Project, has used a subcontractor to complete the design and procure necessary solar panels, which Petitioner states are currently in a warehouse awaiting Petitioner's release of funds. Ibid. Petitioner further stated that the Township of Wayne and the Board of Education completed the Shared Services Agreement for the Purchase of Energy as well as the Energy Services Agreement during the month of December 2007. Ibid. Petitioner also states that it awaits Internal Revenue Service ("IRS") approval of its petition for 501(c)(4) status as a tax-exempt corporation, which is "a critical part of Petitioner's financing and thereby effects the execution of other contractual obligations." Ibid. Petitioner refers to its project as a "unique combination of elements" that "may very well set a new model for local governments." (Pet. ¶ 3.) Ultimately, Petitioner contends that it requires a second extension to ensure the Project's construction, because it would not be economically viable without the CORE rebate. Ibid.

Petitioner provided a factual chronology via electronic mail on July 18, 2008 in response to Board Staff inquiries. Petitioner stated that, on September 7, 2005, Princeton Energy Systems informed Staff that it would act as Petitioner's agent as it sought bids to construct the Facility. Petitioner also authorized Princeton Energy Systems to sign the rebate application forms as the contractor/installer. The bidding process was initiated in October 2006. During the third and fourth quarters of 2006, Petitioner conducted negotiations with potential vendors. Petitioner also negotiated at this time with the Bank of America, which Petitioner claims "provided assurances" that financing would be completed.

¹Following receipt of the petition, Board Staff made several requests for the information necessary for the Board's review of this matter. The facts contained herein are the oral and written representations made by Petitioner in its request for a second extension, electronic mail to Board Staff, and conversations with Board Staff during the pendency of this matter.

Petitioner further states that it received best and final presentations from Pepco Energy Services ("Pepco") and Siemens in February 2007. In March 2007, a recommendation was made to Petitioner's trustees to negotiate with Pepco. During the second and third quarters of 2007, Petitioner represents that it developed a Design, Construction, Operation and Maintenance ("DCOM") Agreement with Pepco.

In response to a Board Staff inquiry Petitioner stated, in a revised factual chronology submitted by electronic mail on July 19, 2008, that it continued negotiating with Bank of America until approximately August 2007. At that time, Petitioner explains that it "determined that [Bank of America] might not be able to complete the transaction" and sought an alternative source of funding. Petitioner further stated that it initiated negotiations with National City Energy Capital ("NCEC") in August 2007. Petitioner reports that Bank of America formally withdrew its financing in September 2007. Petitioner also states that it completed a feasibility study and received Township Council and Board of Education approval to complete negotiations of the Shared Services Agreement (between the Township and the Board of Education) and the Energy Services Agreement (between the Township and Petitioner). Petitioner provided Board Staff scanned copies of these agreements by electronic mail on July 8, 2008. Subsequently, the Township of Wayne and the Board of Education completed the Shared Services Agreement for the Purchase of Energy as well as the Energy Services Agreement during the months of November and December 2007. Those agreements were the subject of formal public hearings and votes in December 2007. The Ground Lease ordinance was approved December 30, 2007.

Petitioner states that NCEC issued a letter of intent and a commitment letter in October 2007. In response to a Board Staff inquiry, Petitioner also provided a Term Sheet executed by NCEC. However, Petitioner explains that, in February 2008, NCEC withdrew its offer, which prompted Petitioner to seek funding elsewhere during the first and second quarters of 2008. On or about February 29, 2008, Petitioner filed a petition with the IRS for 501(c)(4) status as a tax-exempt corporation. During a conference call on July 18, 2008, counsel for Petitioner indicated that, while Petitioner has been in contact with the IRS regarding its petition, it has yet to receive the necessary approval. Petitioner states that the pending IRS approval impacts its financing as well as its ability to execute other relevant contracts.

As noted above, by letter dated April 30, 2008, Petitioner informed the CORE Program Manager and explained that it suffered delays when its primary lender, which was "caught up in significant losses as a result of the sub-prime mortgage problem," changed its position on funding the Project. The Petition of Extension also states that 501(c)(4) status is "a critical part of Petitioner's financing and thereby effects the execution of other contractual obligations." Nevertheless, Petitioner represents that it is currently engaged in negotiations for new financing and is ready to move forward once funding is in place.

In response to a Staff inquiry, Petitioner explained that more than \$785,000 has been expended on the Project to date. Among the expenses listed by Petitioner were \$35,000 for the feasibility study conducted by Princeton Energy Systems and \$65,000 for legal fees. According to Petitioner, Pepco has also committed down payments to hold materials, including \$50,000 to hold solar panels that were delivered to their subcontractor, First Solar. Petitioner has also represented that, without the CORE rebate, the Project, and possibly the entire Facility, is not viable.

During the conference call on July 18, 2008, Staff also requested a written commitment by the solar installation company, copies of financial documents from previous as well as current banking institutions, and a clarification of the actions following execution of the DCOM

Agreement. By electronic mail dated July 19, 2008, Petitioner informed Board Staff that it would seek commitment letters from its potential installers: Pepco and Atlantic Energy Solutions. Petitioner also responded to Board Staffs other requests by submission of additional chronologies of past and future events. Atlantic Energy Solutions, by letter dated July 23, 2008, responded to Petitioner that it is prepared, once it receives a final agreement from Petitioner, to place the order with its supplier, Evolution Solar, and have the system installed and running by December 31, 2008. Pepco responded to Petitioner's request on July 28, 2008 with the statement that, while it remained committed to the Project, "several requirements must happen quickly" in order for the Project to be complete by December 31, 2008. Pepco reminded Petitioner that "[t]ime is critical."

III. DISCUSSION AND FINDINGS

As noted above, the petition in this matter relates to a rebate under the CORE program, which aims to support the sustained and orderly development of markets for distributed renewable electric generation in New Jersey. The program offers financial incentives to New Jersey public utility customers investing in eligible, on-site renewable electricity generation using photovoltaic, wind, biomass, and fuel cell systems. Rebates are offered to make renewable energy investments more cost-effective by offsetting a portion of the initial installation cost as well as a number of market support services, including inspections and the facilitation of registration for renewable energy credits. CORE rebates are not intended to cover the entire system cost; rebates should reduce the installation cost in order to make cost-effective investments available for as wide an array of ratepayers as possible.

To be eligible for a CORE rebate, an applicant must be a ratepayer of an electric or natural gas utility regulated by the Board. The CORE program serves residential, commercial, institutional, and industrial market segments. The program is available to private and public (school, State, county, and municipal) customers in all rate classes.

The Guidelines state that all public projects over 10 kW in size will be given twelve calendar months, starting from the date on the rebate commitment letter, for project completion, which is defined as the date when the Program Manager receives the final rebate application. Customer On-site Renewable Energy (CORE) Program Update, 14 (Aug. 17, 2006). If the customer/contractor cannot complete the project within the initial twelve month period, that customer/contractor may apply for an extension. Ibid. Extension applications "must include detailed documentation regarding the reasons for delay." Ibid.

The Guidelines state that the Program Manager will grant extensions when the applicant can document significant progress toward completion of the project and the delay was unavoidable and unforeseeable at the time of the rebate application. Id. at 13-14. In determining whether significant progress has been made, the Program Manager looks at a number of specific factors: whether physical construction has started at the customer's site; whether irrevocable orders have been placed with manufacturers of the major items of equipment; whether construction permits have been approved; whether engineering and design work has started and progressed to a significant degree; and whether material has been received from the manufacturer (either on-site or in storage). Ibid. In addition to these factors, when the applicant is a public entity, the Program Manager will also consider "procurement (i.e. customer contracting) and/or related litigation delays." Id. at 14. If granted, the initial extension would be for twelve calendar months. Ibid. Under the Guidelines, a public entity may receive a second extension in "cases where litigation related to public entity contract award can be documented."

Ibid. If granted, this second extension for the public entity applicant would be for six months.
Ibid.

The CORE program has experienced exponential program growth in each of the past four years. As a result of this growth, many applications for CORE rebates have been placed in queues established for their respective market segments. These applications remain in queue until funding sufficient for the CORE program to issue a rebate commitment to a given application becomes available. Furthermore, the demand for rebates from public sector applicants has increased so significantly since Petitioner received its approval that rebates for public sector projects have since been reduced. In light of funding concerns and the queue of solar projects, the policy on extensions intends to prevent the reservation of CORE funding for solar projects that are unlikely to be completed at the expense of other projects that may be approved at lower rebate levels.

In the instant matter, Petitioner seeks a second extension as a result of its loss of funding due to the sub-prime mortgage problem. A second extension application for any reason other than public contract litigation constitutes a request for a waiver of the Guidelines. Any request for a waiver requires the Board to engage in a two pronged analysis before rendering its decision. See N.J.A.C. 14:1-1.2(b)(1). First, the Board determines if the requested waiver is in accord with the general purpose and intent of its Guidelines. Ibid. Second, the Board determines whether full compliance with the Guidelines would adversely affect the interest of the public. Ibid. The Board reviews Petitioner's request as follows.

The Board determines whether Petitioner's request is in accord with the general purpose and intent of the Guidelines. See N.J.A.C. 14:1-1.2(b)(1). The Guidelines expressly state that the Program Manager will grant initial extensions when the delay was unavoidable and unforeseeable at the time of the rebate application. In terms of general purpose, the Guidelines suggest that initial extensions are permissible where the delay was beyond the control of the applicant.

Here, Petitioner seeks a second extension as a result of unavoidable and unforeseen delays. Petitioner represents that it lost financing on two separate occasions due to the sub-prime mortgage problem. Because CORE rebates are only intended to cover a portion of the cost of the installation, the Board is aware that applicants may require financing to complete projects. The Board also recognizes that the sub-prime mortgage problem has had a significant impact on borrowers and lenders. Therefore, based upon Petitioner's representations, the Board views the cause for delay as unavoidable and unforeseen.

According to the Guidelines, initial extensions will be granted when the applicant can document significant progress toward completion. Petitioner has stated that its spending on the Project exceeds \$785,000. Petitioner also explains that its subcontractor has completed the design and procured the necessary solar panels. While Petitioner has only submitted some supporting documentation and this Order will be conditioned upon the submission of further supporting documentation, these representations appear to be substantial, good faith efforts to advance the Project toward completion.

In addition, the Board notes the two limitations on second extensions. First, second extensions are only available for public entities, such as Petitioner. Second, the Guidelines limit second extensions to documented instances of public contract litigation. The use of public contract litigation as a justification highlights the underlying purpose of the Guidelines, because it shows the intent to extend deadlines for public entities where the unforeseen delays are associated

with the peculiarities of public contracting and procurement. In the instant matter, Petitioner's complex public project has been delayed as a result of unforeseen financing and contracting issues, such as the loss of funding and need for IRS approval, which arose as Petitioner made significant progress toward project completion. Thus, based upon Petitioner's representations, the Board considers Petitioner's request for a second extension in accord with the purpose and intent of the Guidelines governing second extensions.

The Board also determines whether full compliance with the Guidelines would adversely affect the public interest. See N.J.A.C. 14:1-1.2(b)(1). Petitioner's project is unique at this time. Here, the solar project is one piece of a larger municipal plan, which combines renewable energy, combined heat and power equipment, and energy efficiency elements to supply heat and electricity to a number of government buildings. These buildings serve different levels of municipal and county government in a district-wide approach. The Facility as presented to the Board appears to be an innovative approach to pursuing energy savings, which could potentially provide a model for other municipalities seeking to surmount increasing energy costs in today's environment. While providing energy for the town's recreation center, the municipal building, a public school, and county facilities, Petitioner plans for the Facility to also generate electricity for export to the grid. In addition, Petitioner states that the Facility will include an educational, internet component through the district schools. However, without the CORE rebate, Petitioner has stated that it is unlikely that the Facility will be economically viable. Therefore, in this instance, the Board considers the rigid application of the Guidelines on second extensions contrary to the public interest, which would otherwise be well-served by the Project.

Having reviewed the Petition and the facts presented by the Petitioner, the Board FINDS that the facts and circumstances alleged as the cause for delay were unavoidable and unforeseeable. The Board also FINDS that the facts alleged show that Petitioner has made significant progress toward project completion. Furthermore, the Board FINDS that the facts presented indicate that the financing and contracting issues alleged by Petitioner are in accord with the general purpose and underlying intent of the Guidelines. In addition, the Board FINDS that Petitioner's project, if completed, will provide significant public benefits, which may be denied without a CORE rebate. The Board also FINDS that Board Staff has worked with the Petitioner to assist in the completion and development of this complex Project in harmony with the Board's policy and procedures.

The Board CONCLUDES that Petitioner's representations qualify it for a waiver of the Guidelines so as to allow for a second extension of the rebate commitment deadline. The Board further CONCLUDES that any change to the facts represented by Petitioner may change the Board's final decision. Accordingly, the Board HEREBY APPROVES a rebate commitment extension to Petitioner for six months from the date of this Order.

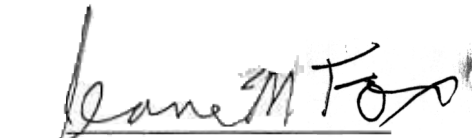
The Board ORDERS that Petitioner shall submit documentation supporting its representations and makes its approval of this second extension contingent upon Petitioner's submittal of the documentation necessary to support the facts alleged pursuant to the Board's policy on waivers and the CORE Guidelines. The Board HEREBY DIRECTS Petitioner to provide documentation substantiating its claims of unforeseen delay – including, but not limited to, documents detailing the commitment and subsequent withdraw of Bank of America and NCEC; receipts and/or invoices detailing the expenditure of funds; copies of financial documents from current banking institutions regarding their review and/or approval of Petitioner's request for financing; as well as the IRS Petition and any further correspondence regarding the pending IRS approval. The Board further DIRECTS Petitioner to submit these documents within 30 days of the date of this Order. The Board further DIRECTS Petitioner to submit any additional documentation, which

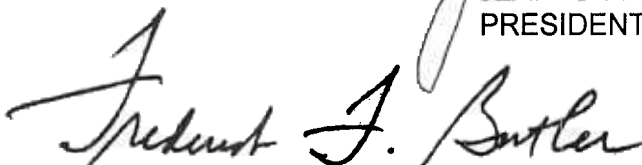
Board Staff may determine to be necessary to support the facts alleged, within 30 days of the date of this Order.


In addition, the Board remains mindful of the need to prevent the reservation of CORE funding for solar projects that are unlikely to be completed. While Petitioner has stated that it will complete the Project by December 31, 2008, the Board HEREBY ORDERS Petitioner to submit monthly progress reports, commencing 30 days from the date of this Order, to Board Staff and the CORE Program Manager in the interest of facilitating project completion during the term of the second extension. The Board HEREBY DIRECTS that these monthly reports shall state any information relevant to project completion – including, but not limited to, its progress in contracting, financing, and obtaining necessary approvals (such as IRS approval as a nonprofit corporation) as well as such further information as Board Staff may require. Approval of the second extension granted by this Order is subject to the submission of the monthly progress reports, which shall demonstrate progress toward project completion. If a monthly progress report indicates a lack of progress toward project completion, the Board may consider whether to terminate the extension prior to the expiration of the six month period upon notice and opportunity for Petitioner to be heard as to why such action should not be taken.

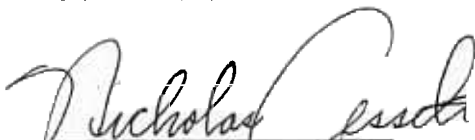
DATED: 8/27/08


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BY:


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FREDERICK F. BUTLER
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JOSEPH L. FIORDALISO
COMMISSIONER


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ATTEST:

KRISTI IZZO
SECRETARY

I HEREBY CERTIFY that the within
document is a true copy of the original
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