Agenda Date: 12/01/09
Agenda Item: 8C

STATE OF NEW JERSEY

Board of Public Utilities
Two Gateway Center
Newark, NJ 07102
www.nj.gov/bpu/

CLEAN ENERGY

IN MATTER OF CUSTOMER ON-SITE RENEWABLE ENERGY (CORE) PROGRAM REBATE APPEAL:	)	ORDER
ACFD DEVELOPMENT LLC	)	
and	)	
ENGLISH CREEK SELF STORAGE	)	DOCKET NOS. EO09070550 & EO09070551

R. William Potter, Esq., Potter and Dickson, 194 Nassau St., Princeton, NJ for Petitioner

BY THE BOARD:

In this Order, the Board of Public Utilities ("Board") considers and renders a decision regarding a petition filed by the law firm of Potter and Dickson ("Counsel") on behalf of ACFD Development, L.L.C. ("Petitioner"). Petitioner is the applicant for both projects listed above.

Background of the New Jersey Clean Energy Program

On February 9, 1999, the Electric Discount and Energy Competition Act, N.J.S.A. 48:3-49 et seq. ("EDECA"), was signed into law. EDECA established requirements to advance Energy Efficiency ("EE") and Renewable Energy ("RE") in New Jersey through the societal benefits charge ("SBC"). N.J.S.A. 48:3-60(a)(3). EDECA further empowered the Board to initiate a proceeding and cause to be undertaken a comprehensive resource analysis ("CRA") of energy programs, currently referred to as the Comprehensive Energy Efficiency and Renewable Energy Resource Analysis. Ibid. After notice, opportunity for public comment, public hearing, and consultation with the New Jersey Department of "Environmental Protection ("NJDEP"), within eight months of initiating the proceeding and every four years thereafter, the Board determines the appropriate level of funding for EE and Class I RE programs that provide environmental benefits above and beyond those provided by standard offer or similar programs in effect as of February 9, 1999. Ibid. These programs are now collectively called the New Jersey Clean Energy Program ("NJCEP").

As a result of the CRA, the Board must simultaneously determine the programs to be funded by the SBC and the level of cost recovery and performance incentives for old and new programs within the NJCEP. Ibid. The Legislature mandated that the NJCEP shall include, among others, a program to provide financial incentives for the installation of photovoltaic projects in the State. Ibid. EDECA also grants the Board, in consultation with NJDEP, the authority to determine the level and total amount of such incentives. Ibid. In making these determinations, EDECA requires that the Board "tak[e] into consideration market barriers and environmental benefits, with the objective of transforming markets . . . and eliminating subsidies for programs that can be delivered in the market place without electric public utility and gas public utility customer funding." Ibid.

As required by EDECA, in 1999, the Board initiated its first comprehensive EE and RE resource analysis proceeding. At the conclusion of this proceeding, the Board issued its initial Order, dated March 9, 2001, Docket Nos. EX99050347 et seq. ("CRA I Order"). The CRA I Order set funding levels for the years 2001 through 2003, established the programs to be funded and the budgets for those programs. By Order dated July 27, 2004, Docket No. EX03110945 et seq., the Board set the funding level for 2004 and established the programs to be funded and the budgets for those programs. By Order dated December 23, 2004, Docket No. EX04040276 ("CRA II Order"), the Board concluded its second CRA proceeding, set funding levels for the years 2005 through 2008, and approved 2005 programs and budgets. The Board approved funding levels of $140 million for 2005, $165 million for 2006, $205 million for 2007 and $235 million for 2008.[1] By Order dated September 14, 2006, in that same docket, the Board approved the final programs and budgets for NJCEP for 2006. On December 22, 2006, in that same docket, the Board issued an Order ("2007 Budget Order") approving the final programs and budgets for NJCEP for 2007.

The Board noted in the 2007 Budget Order that it was transitioning many of the EE and RE programs from the utilities and the Office of Clean Energy ("OCE") to Market Managers. On August 19, 2005, the New Jersey Department of the Treasury, Division of Purchase and Property ("Treasury") issued, on behalf of the Board, Request for Proposal 06-X-38052 for NJCEP Management Services. Honeywell International, Inc. ("Honeywell") was selected as the Market Manager for residential EE and RE programs. TRC Energy Services ("TRC") was selected as the Market Manager for commercial and industrial EE programs. On October 19, 2006, Treasury issued a contract to Honeywell and to TRC to provide program management services. On March 20, 2007, Treasury issued, on behalf of the Board, Request for Proposal 07-X-38468 for NJCEP Program Coordinator Services. Applied Energy Group ("AEG") was selected to provide program coordinator services and a contract for these services was issued by Treasury on July 10, 2007. Following the issuance of these contracts by Treasury, the OCE worked closely with Honeywell, TRC and the utilities to transition the programs. Honeywell and TRC commenced management of all of the programs being transitioned by April 1, 2007.

By Order dated March 31, 2008, Docket No. EX04040276 ("2008 Budget Order"), the Board approved 2008 programs and budgets for the NJCEP. Among other things, the 2008 Budget Order approved Honeywell's 2008 compliance filing. Honeywell's compliance filing included detailed budgets and program descriptions for the EE and RE programs managed by Honeywell.

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[1] By Order dated September 30, 2009, Docket No. EO07030203, the Board concluded its third CRA proceeding and set funding levels at $245 million for 2009, $269 million for 2010, $319 million for 2011, and $379 million for 2012.

The 2008 CORE Budget Allocation

Among the RE programs approved in Honeywell's 2008 compliance filing was the Customer On-Site Renewable Energy ("CORE") program. The CORE program offered financial incentives to New Jersey public utility customers investing in eligible, on-site renewable electricity generation using photovoltaic, wind, biomass, and fuel cell systems. CORE rebates were awarded for the purpose of making 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.

The CORE program experienced exponential growth and overwhelmingly high participation rates, which resulted in some sectors experiencing applications in excess of available funding. Based on the substantial increase in the number of applications in 2005 and early 2006, the Board took several steps to continue the program within the four year renewable energy funding levels set by the Board in the CRA II Order. For example, the Board directed the OCE, with the review and advice of the Clean Energy Council ("CEC"), to evaluate and review the rebate levels to ensure that program objectives were met within the funding level. The Board approved a reduction in CORE rebate levels effective February 1, 2006 in an Order dated December 21, 2005, in Docket No. E004121550. Although this reduction in rebate levels was announced via various e-mail distribution lists and the NJCEP website to give the industry 30 days notice of the change, it actually resulted in a significant surge of CORE rebate applications seeking rebate commitments at the higher levels in place at that time. By Order dated February 13, 2006, in that same docket, the Board took additional steps to ensure that the program did not become over-committed. The Board directed Staff to hold all private sector applications for CORE rebates in a queue until budgeted funds became available through the cancellation or expiration of previously issued project commitments or as additional funds were transferred into the CORE program budget. The Board also provided notice to applicants that "policies and procedures for projects placed in [the] CORE program queue shall be presented to the Board for review and approval."

At its March 13, 2006 public meeting, the Board considered and approved the policies and procedures for the CORE program queue referenced in the February 13 Order. Order, I/M/O The Office of Clean Energy Customer On-Site Renewable Energy (CORE) Program, Docket No. EO04121550 (March 22, 2006). These policies and procedures were intended "to guide the process for approving any new rebate applications received by the Office of Clean Energy, as well as the rebate applications that have been received, but for which an approval letter has not yet been issued." Id. at Exhibit A. Once an application was reviewed and deemed complete, the applicant would receive a letter from OCE informing it that the project had been placed in queue in the order it was received. Ibid. If an application was incomplete, the application would be placed in queue based on the date the application was completed. Ibid. The Board directed the OCE to place a list of applications in queue on the NJCEP website. Ibid.

The Board's February 13 and March 22 Orders as well as the policies and procedures, state that commitments for CORE rebates were based on the availability of funds and the CORE program budget. At the direction of the Board, the OCE provided notice to applicants when establishing the CORE queues that placement in any queue was not a commitment of funding for a CORE rebate. Pursuant to the policies and procedures, this notice was also provided in subsequent postings of the CORE budget and queue lists. The March 22 Order indicates that placement in a queue, after meeting the requirements for placement, was intended to establish a "place in line" for a rebate commitment, should CORE funds become available.

Over $126 million in rebate applications remained in the queue in late 2007 although the estimated budget for these projects was only $57 million. On December 20, 2007, due to insufficient funds, the Board issued an Order suspending acceptance of applications for CORE solar rebates, effective immediately for private sector solar applications and effective April 1, 2008 for public sector solar applications.[2] Order, I/M/O a Request to Suspend the Acceptance and Processing of New Solar Applications in New Jersey's Customer On-site Renewable Energy (CORE) Rebate Program, Docket No. EO07100773 (December 20, 2007). Mindful of the limited CORE budget and the number of projects in queue, the OCE engaged stakeholders in an open discussion about the 2008 CORE budget allocation.

During the August, September, and October 2007 Renewable Energy Committee meetings, the OCE and the Market Managers presented and discussed several preliminary 2008 CORE budget allocations.[3] These proposed allocations were distributed to the Renewable Energy Committee for comments by stakeholders. Stakeholders provided a myriad of allocation proposals, which were considered by the Board. For example, the allocation proposed by Sun Farm would pass over certain large projects in the queue so that a greater number of smaller projects would receive a rebate approval. Rate Counsel, on the other hand, believed that more of the funding should go to residential and public projects and proposed allocating no funding to greater than 10 kW private projects. The allocation initially proposed by the Market Managers and the OCE provided for no rebates to projects greater than 100 kW, allocated sufficient funding to less than 10 kW projects and public projects to cover all of the projects in those queues, and allocated the remaining funding to greater than 10 kW private projects. Other stakeholders combined different allocations to achieve objectives similar to those sought to be achieved by the Market Managers and the OCE.

American Energy Technologies and the law firm of Potter and Dickson, on behalf of NJ Solar Power, proposed reallocating other SBC funds or increasing the Clean Energy portion of the SBC to fund projects in the queue. American Energy Technologies further commented that the BPU should monetize the demand reduction benefits of solar to fund the CORE rebates. Commenters, including the law firm of Potter and Dickson as well as American Energy. Technologies and NJ Solar Power, proposed various reallocations to the CORE program budget. For example, these commenters proposed reallocating unused EE funds to the CORE program. The same commenters recommended reallocating some of the funding set aside for the offshore wind solicitation to the CORE program. These commenters also proposed that the Board allow the various ratepayer classes to participate in the program in the way in which ratepayers contribute into the SBC that funds the NJCEP.

In addition to the stakeholder discussion, written comments on the 2008 CORE program budget were submitted by: Rate Counsel; EVCO Mechanical Corporation ("EVCO"); Brother Sun Solar; Solar Power; The Solar Center; Home Mortgage Finance Agency ("HMFA"); Sun Farm Network ("Sun Farm"); Jersey Solar, L.L.C. ("Jersey Solar"); Eastern Energy Services.; American Energy

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[2] The CORE program accepted applications for wind and biomass projects through December 31, 2008. After December 31, 2008, the CORE program was closed to all new applicants. In its 2009 compliance filing, Honeywell proposed a budget and program description for the Renewable Energy Program: Customer Sited - now called the Renewable Energy Incentive Program ("REIP") - to replace the CORE program. The REIP program was approved by the Board by Order, I/M/O Comprehensive Energy Efficiency and Renewable Energy Resource Analysis for 2009-2012: 2009 Programs and Budgets: Compliance Filings, Docket No. EO07030203 (January 8, 2009).

[3] The Clean Energy Council as well as its committees and working groups currently function as public stakeholder groups. They are open to public participation and input from any interested party.

Technologies; Island Wind; Pfister Energy; and the law firm of Potter and Dickson. Rate Counsel revised its recommendation to include $1.2 million for a specific group of greater than 10 kW residential applicants whose installers had filed an appeal seeking a return to their position in the queue for greater than 10 kW projects and settled with the Board returning them to their relative position in the greater than 10 kW queue. Order, I/M/O Request of New Jersey Solar Power, LLC, et al., for the Immediate Action of the Board, Docket No. EO06110825 (March 2, 2007). EVCO proposed fully funding all less than 10 kW private projects by reallocating funds from the greater than 10 kW private budget. Brother Sun Solar commented that the proposal to eliminate funding for the greater than 10 kW private projects was unfair and that no change in the percentage of funds allocated to any sector should be made after participants have applied for the program. Pfister Energy proposed that the Board should continue to allocate renewable energy funds based on ratepayer contributions. Both Solar Power and Pfister argued for fully funding projects in the greater than 10 kW queue. The Solar Center commented that most of the rebate money in the greater than 10 kW queue is linked to projects over 50 kW and that a modest amount of funding for projects less than 50 kW would clear out many of the oldest applicants in that queue. Eastern Energy Services proposed allocating almost all of the available funds to the less than 10 kW projects. Sun Farm proposed to fund projects greater than 60 kW, but to provide incentives only for the first 60 kW. Jersey Solar supported this proposal. The law firm of Potter and Dickson recommended that the Board maintain the integrity of the "first in time/first in right" policy rather than moving to an alternate allocation methodology. These comments were considered by the Board when it reviewed the OCE's recommendations.

With the goals and requirements of EDECA in mind, the OCE recommended funding levels sufficient to cover all public projects currently in the queue and to fund several projects that received Board approval or were under review by the OCE. Since the Board had suspended acceptance of applications for private sector solar rebates effective December 20, 2007 and effective April 1, 2008 for public applications, the OCE recommended that the remaining budget be allocated to the less than or equal to and greater than 10 kW private budgets in a manner that preserved the concept of "first in time, first in right." When recommending the CORE program budget, the OCE noted that the Board adopted modifications to the solar alternative compliance payment ("SACP") schedule with the intent of providing sufficient solar renewable energy certificates ("SRECs") for most projects so that they could achieve a reasonable rate of return without a rebate. Decision and Order Regarding Solar Generation, I/M/O The Renewable Energy Portfolio Standards, Docket No. EO06100744 (December 6, 2007). The analysis in that Order and documented in several reports prepared by Summit Blue during the proceeding demonstrated that the economics of larger projects (100 kW and above) permit them to more readily take advantage of the SREC financing approach. The OCE reasoned that a full rebate for solar projects equal to or greater than 100 kW would provide a significant windfall, financed by the ratepayer, to these projects. Therefore, the OCE recommended limiting new rebate approvals for private sector projects in the greater than 10 kW queue and public sector projects using a power purchase agreement to the first 100 kW of a project, entitling a project of 100 kW or more to a rebate of $245,000. This limitation on the capacity eligible for a CORE rebate, the OCE intended to prevent over-subsidization of large projects should they recover both through the rebate and also through participation in the market for SRECs.

In the 2008 Budget Order, the Board approved the OCE's proposal regarding allocation of the CORE budget and the OCE's recommendation about providing each project of 100 kW or greater the ability to receive a rebate of $245,000. The Board found that, given the decision to modify the SACP, private projects over 100 kW could effectively take advantage of the SREC financing approach and no longer required a rebate for capacity over 100 kW. The Board

further found that providing a rebate for over 100 kW capacity had the potential to result in ratepayer funding for incentives in excess of the amount necessary to make such projects economic. Additionally, the Board's decision to approve the OCE's recommendation allowed rebates to reach far more projects in queue than would have occurred without the 100 kW limitation. The Board's decision continued the policy of approving projects remaining in queue on a first in time basis. Mindful of its statutory obligation, the Board balanced the interests of various program participants and approved the rebate levels in accordance with the different parties' needs; within the constraints of the budget; and consistent with program goals. See N.J.S.A. 48:3-60(a)(3).

CORE Applications for Petitioner's Solar Projects

The foregoing discussion provides background relevant to the instant matter. On behalf of Petitioner, Counsel filed a petition disputing the rebate commitments it received for two of its three solar projects, application nos. BPU-3138 and BPU-3178 (hereafter 3138 and 3178). These applications are discussed below.

Application 3138 is for a solar clean energy system located at 1187 Ocean Heights Ave., English Creek, NJ 08234. The project is 144.768 kW and registered to Petitioner. The petition claims that N.J. Solar Power submitted application 3138 on behalf of Petitioner in March 2006. The Board approved Petitioner's CORE Rebate and authorized the issuance of a commitment letter to the Petitioner at its April 8, 2008 agenda meeting. Order, I/M/O the Clean Energy Program Authorization of Customer On-Site Renewable Energy Rebates Exceeding $100,000, Docket No. EX04040276 (May 27, 2008). On June 4, 2008, the Market Manager sent a commitment letter to Petitioner for an estimated CORE rebate of $245,000. The rebate commitment for 3138 was valid for one year from the date of the commitment letter, June 4, 2009. On June 4, 2009, N.J. Solar Power, on behalf of Petitioner, requested an extension of the rebate commitment. Petitioner received an extension to December 4, 2009.

Application 3178 is for a solar clean energy project located at Block 136-138 Lot 1, Block 141-143 Lot 1, Pleasantville, NJ 08232. The system is 650.624 kW and registered to Petitioner. The petition claims that N.J. Solar Power submitted application 3178 on behalf of Petitioner in March 2006. The Board approved this CORE Rebate and authorized the issuance of a commitment letter to the Petitioner at its June 13, 2008 agenda meeting. Order, I/M/O the Clean Energy Program Authorization of Customer On-Site Renewable Energy Rebates Exceeding $100,000, Docket No. EX04040276 (June 24, 2008). On June 27, 2008, the Market Manager sent a commitment letter for an estimated CORE rebate of $245,000. The rebate commitment for 3178 was valid for one year from the date of the commitment letter, June 27, 2009. On June 18, 2009, N.J. Solar Power, on behalf of Petitioner, requested an extension of the rebate commitment. Petitioner received an extension to December 27, 2009.

Dispute Resolution with the Program Coordinator

On behalf of Petitioner, Counsel submitted a letter, dated April 15, 2009, to the NJCEP Program Coordinator, AEG. Counsel stated that Petitioner, aided by N.J. Solar Power, could not come to a "fruitful" resolution with the Market Manager regarding the "appropriate rebate level." Counsel identified "two basic issues" claimed to be relevant to rebate applications 3138 and 3178. First, Counsel contended that both CORE rebates were "substantially" and "retroactively" reduced without prior public notice or an opportunity to be heard. (emphasis in original). Counsel claimed that the rebates were reduced after Petitioner made contractual agreements and substantial financial obligations. Second, Counsel claimed that "the OCE's reservation of its

right to modify" rebate amounts based on changes in the federal tax code is "not an appropriate 'policy.'" Counsel concluded his letter with a request for prompt dispute resolution services. On April 22, 2009, AEG responded to Counsel's dispute "concern[ing] the application of the $245,000 cap on CORE rebates imposed by the Board of Public Utilities."

AEG first explained that the funding available for solar projects includes both rebates and SRECs. AEG informed Counsel that, by Order dated December 6, 2007 in Docket No. EO06100744, the Board increased alternative compliance payments to increase the value of SRECs in light of the reduction of rebates. AEG then quoted the 2008 Budget Order, where the Board referenced the "wide range of comments and proposed allocations" and stated its rationale for reducing rebates for projects over 100 kW. AEG also indicated that the Important Terms and Conditions section of the CORE rebate application submitted by Petitioner states that "[p]rogram procedures and rebates are subject to change or cancellation without notice." Finally, AEG referenced the Board's policy that rebate applications are not approved until rebate commitment letters are sent. In the case of applications 3138 and 3178, the projects received commitment letters on June 4 and June 27, 2008. AEG advised Counsel that Petitioner's commitment letters were dated subsequent to the Board's 2008 Budget Order that imposed the rebate cap. For these reasons, AEG believed the $245,000 cap was properly applied to Petitioner's applications.

Regarding Counsel's concerns about limiting rebates based on changes to the federal tax code, AEG informed Counsel of the Board's Order dated December 31, 2008 in Docket No. EO04121550. In that Order, the Board considered changes to CORE program rebate levels in light of changes to the federal tax code, but decided that rebates would not be modified. In light of the Board's Order, AEG informed Counsel that the rebate levels stated in Petitioner's rebate commitment letters were not modified to account for changes to the federal tax code.

Petition and Supplemental Comments

Having addressed the issues raised in Counsel's April 15 letter, AEG notified Counsel that, should Petitioner wish to pursue the matter further, it could file a formal petition with the Board pursuant to N.J.A.C. 14:1-1. On behalf of Petitioner, Counsel filed a petition with the Board on July 20, 2009. The petition disputes the Board's policy of limiting incentives for solar rebate applicants with projects of 100 kW or more and requests an Order of Transmittal to the Office of Administrative Law ("OAL") for mediation services or hearing as a contested case. The petition makes several claims as "the grounds for the hearing request," which the Board will consider below.

Petitioner claims that the Board's decision to cap CORE rebates at $245,000 was "arbitrary." The petition argues that N.J. Solar Power submitted Petitioner's CORE rebate applications, which waited in queue "for an unconscionable period of time" while Petitioner awaited funding for CORE rebates. During that time, Petitioner represents that it continued to develop its facilities to support its solar projects at "substantial" cost. Petitioner also acknowledges that the Board's decision to implement the CORE rebate cap occurred while Petitioner waited in queue. The petition then alleges that the Board made its decision "without regard for the actual size of larger than 100 kw solar installations and their greater investment cost, or the need for the full rebate in order for the installation to be commercially viable" and without considering "if the impacted project had been awaiting rebate funding in the queue for years or months." In support of this claim, the petition references another of Petitioner's CORE rebate applications, BPU-3060, which received its full rebate. Ultimately, Petitioner describes the CORE rebate cap

as "arbitrary" and "far below what is necessary to permit [Petitioner] to continue with these projects on these sites."

Petitioner also claims that the CORE rebate cap was contrary to fundamental principles of due process, contract law, and equity. For example, the petition characterizes the CORE rebate cap as "a radical change in rebate policy which was applied retroactively to these committed projects that were awaiting the award of rebates."[4] As such, the petition argues that the Board's decision to cap these CORE rebates was "contrary to due process and . . . the implied covenant of 'good faith and fair dealing.'" The petition also contends that Petitioner reasonably relied, to its detriment, on the rebate polices in effect when the Petitioner designed its projects. The petition claims that "[i]f [Petitioner] had been informed at the time of placement into the queue that it would have to wait in the queue for 18 months, and that during that time the Board would reduce the rebates to an arbitrary level regardless of the project size or need, [Petitioner] would not have made commitments to solar, would not have expended additional sums in preparing their 'brown to green' buildings for solar, and would not waited [sic] 18 months in the queue." The petition extends the reliance argument to Petitioner's tenants, who "were induced to occupy these premises in part based on the prospect of solar PV on their roofs which in turn depended on adequate rebates." The petition further alleges that "petitioners [sic] were denied the reasonably anticipated benefits of their de facto contractual bargain with the Board that[,] if they waited [for] the availability of funds[,] the rebates would be paid in full." Based on this analysis, Petitioner argues the Board is "equitably estopped" from imposing the CORE rebate cap on applications 3138 and 3178.

In conclusion, "Petitioner [sought] an Order of the Board directing that this petition be transmitted to the Office of Adminstrative Law for mediation and hearing, as needed, on an expedited basis." The OAL "acquire[s] jurisdiction over a matter only after it has been determined to be a contested case by an agency head" and the agency has transmitted the matter to the OAL. N.J.A.C. 1:1-3.2. The New Jersey Administrative Procedure Act establishes the process for a "contested case" proceeding. N.J.S.A. 52:14B-1 to -24. However, with one exception, the APA does not confer the right to an administrative hearing. On October 2, 2009, in a Secretary's letter to Counsel, the Board explained that it did not consider Petitioner's matter a contested case requiring a hearing at the OAL. Even if it had determined that the matter was a contested case, the Board noted that it was not required to hold an evidentiary hearing when the Petitioner disputes a policy decision by the Board, such as the imposition of a cap on CORE rebates. Although an evidentiary hearing at the OAL was unnecessary, the Board afforded Petitioner an additional opportunity to provide written arguments in support of its petition.

On October 23, 2009, Counsel, on behalf of Petitioner, submitted supplemental comments for consideration by the Board. "As an initial matter," Petitioner clarified that "the petition was not intended to serve as a legal challenge to the validity of 'the Board's policy of limiting incentives for solar rebate applicants greater than 100 kilowatts.'" (emphasis in original). Petitioner claims that its petition requests a Board Order determining that the CORE rebate cap "should not be applied to these two particular projects" for several reasons.

The supplemental comments reprise some of the arguments stated in the petition. For example, Petitioner claims that it "relied to [its] detriment on the Board policy that was in effect at the time these two projects were submitted for rebate approvals." As support for this

[4] The Board notes that, elsewhere in the petition, Petitioner acknowledged that the rebate cap was implemented while Petitioner's projects were in queue, before Petitioner received its commitment letters for applications 3138 and 3178.

contention, the comments point to Petitioner's investments in reinforced roofs and specialized circuitry intended to support its large solar projects. The comments also note Petitioner's "brown to green" marketing to tenants, "who then signed leases with the developers on the express expectation and basis that they would be served by solar electric power." Petitioner also contends that it "reasonably expected that the Board would not enact a new . . . policy slashing rebates" since Petitioner claims that waiting in queue "implied that . . . [it] would be entitled to receive the rebates in effect at the time [its applications] were placed in queue." Therefore, with reference to case law on equitable estoppel, Petitioner seeks a determination that, "as a matter of equity, 'good faith and fair dealing' and 'common fairness,'" the CORE rebate cap should not be applied to Petitioner's two projects.

In addition, Petitioner contends that it "reasonably expected" that any policy capping rebates would "insert a 'grandfather clause' to exempt projects such as theirs that had substantial 'stranded costs' investment at risk in reliance on the previous rebate policy." Petitioner compares its position to that of the utilities during restructuring and requests that the Board "take official notice that it protected the 'stranded cost' assets of public utilities." Since Petitioner continued to develop its project while it waited in queue, the supplemental comments assert that "[Petitioner] was in the same vulnerable position as the public utilities which received 'stranded asset' protection when the Board policies were revised to permit divestiture and deregulation."

Petitioner also seeks "special treatment," because these projects have "transformed a former polluting landfill into a clean, modern 'brown to green' sustainable business development, the economic viability of which is now threatened by the dramatic loss of rebate funds." Citing the Legislature's declarations in the Large Site Landfill Reclamation and Improvement Law, N.J.S.A. 40A:12A-50, Petitioner represents that the "official policy of the State of New Jersey is to promote exactly what [Petitioner] and its investors have done 'by augmenting the fiscal resources of government' in various ways." According to Petitioner, "[f]or this reason alone, the Board should recognize the special importance of financially supporting this unique 'brown to green' project in every possible way, [but] notably by directing the payment of the full 'pre cap' rebates" to applications 3138 and 3178.

Finally, to buttress its equity claim, Petitioner again references its CORE rebate application, BPU-3060, which received a full rebate. Petitioner maintains that all three project applications were submitted at the same time, which caused Petitioner to "logically reason[ ]" that the three applications would be treated the same. Petitioner asserts that "[i]t also shows that the OCE may have acted arbitrarily in denying a full rebate to [applications 3138 and 3178] but providing a full rebate funding for [application 3060]. Thus, the supplemental comments conclude with a request for "special treatment" for this "special case."

Discussion and Findings

The Board begins its analysis by considering the claim that the cap on CORE rebates was an "arbitrary" decision made "without regard for the actual size of larger than 100 kW solar installations and their greater investment cost, or the need for the full rebate in order for the installation to be commercially viable" and without considering "if the impacted project had been awaiting rebate funding in the queue for years or months." This assertion is factually inaccurate. A review of the 2008 Budget Order shows that the Board considered system size, investment cost, and the lengthy queue when it made its decision to cap CORE rebates at 100 kW, or $245,000. The Board found that the economics of larger projects (100 kW and above) allow them to effectively take advantage of the SREC financing approach. Although Petitioner claims the CORE rebate is "far below" what it needs to build its projects, the petition and supplemental

comments make no mention of the availability of SRECs. In making a determination to cap CORE rebates, the Board found that ratepayer funding of a full rebate in addition to SRECs would provide a windfall to larger projects. As stated previously, EDECA empowers the Board to set incentive levels with the objective of transforming markets by eliminating subsidies for programs that can be delivered in the marketplace without ratepayer funding. N.J.S.A. 48:3-60(a)(3). Awarding rebates determined to be windfalls would harm the ratepayers and frustrate the goals of EDECA. Furthermore, the Board noted that a rebate cap allowed the limited CORE program budget to reach far more projects in the lengthy queue (including other projects impacted by the cap) than would have occurred without the cap. When faced with over $126 million in rebate applications in the queue and an estimated budget of $57 million, the Board considered the comments of public stakeholders and guidance from the Legislature before making its decision. Thus, the Board **HEREBY FINDS** that the cap on CORE rebates was a reasoned determination in accord with EDECA.

In its petition and supplemental comments, Petitioner contends that the principles of equitable estoppel prohibit the Board from applying the CORE rebate cap to its projects, because Petitioner relied, to its detriment, on Board policies and continued to develop its solar projects while waiting in queue for rebates. "Equitable considerations are relevant to assessing governmental conduct . . . and may be invoked to prevent manifest injustice . . . ." O'Mallev v. Department of Energy, 109 N.J. 309, 316 (1987). To that end, the New Jersey Supreme Court has defined equitable estoppel as "a knowing and intentional misrepresentation by the party sought to be estopped under the circumstances in which the misrepresentation would probably induce reliance, and reliance by the party seeking estoppel to his or her detriment." Id. at 317.

Neither the petition nor the supplemental comments allege any intentional or knowing misrepresentation by the Board or its Office of Clean Energy. Rather, Petitioner claims that it would not have pursued solar power if it "had been informed at the time of placement into the queue that it would have to wait . . . for 18 months, and that during that time the Board would reduce the rebates." According to Petitioner, waiting in queue "implied" that it would be entitled to receive the rebates in effect at the time its applications were placed in queue. Petitioner then focuses on its claim of detrimental reliance "on the Board policy that was in effect at the time these two projects were submitted for rebate approvals." Petitioner specifically references its investment in the projects and its "brown to green" marketing efforts. Petitioner claims that it only took these actions because it reasonably anticipated a full CORE rebate.

In addressing a similar claim, the Board noted that "[s]ince the inception of the CORE program[,] the Board has consistently stated that the Board's commitment to issue a rebate only arises, if at all, upon the submission of a complete rebate application (which now results in the application being placed in queue) *and* the issuance of an approval or extension letter from the Office of Clean Energy." I/M/O the Request of New Jersey Solar Power, LLC, et al. for the Immediate Action of the Board, Non-Docketed (September 22, 2006) ("September 22 Order").[5] The Board explained that "[e]ven this commitment is qualified by the absolute condition that any payment obligation is ultimately subject to the availability of budgeted funds." Ibid. The Board also maintained that it "has long reserved the right to alter rebate levels at any time." Ibid. The

[5] In Counsel's letter to AEG, the Board notes that Counsel misinterprets the settlement approved by the Board subsequent to the appeal of this Order. I/M/O The Request of New Jersey Solar Power, LLC, et. al. for Immediate Action of the Board, Docket No. EO06110825 (March 2, 2007). Contrary to Counsel's statement, the Board, within the settlement agreement, maintains that the procedural changes to the CORE program were lawful and necessary and reiterates the Board's sole discretion in determining issuance of commitment letters.

Board concluded that "[t]o the extent Petitioners have negotiated contracts without considering these program requirements, they have done so at their own risk." Ibid.

Here, Petitioner's claims are the same as those raised in the September 22 Order. The Board's policies and procedures for the CORE rebate queue are contained in the February 13 and March 22 Orders. CORE rebates were reduced on February 1, 2006. Following that rebate reduction, the Board's February 13 Order immediately established a queue for CORE rebate applications. The Board stated that CORE rebate commitments would not be issued until more funding became available. The February 13 Order also reduced rebates and cited forthcoming policies and procedures for the queue. At its March 13, 2006 public meeting, the Board considered the policies and procedures for the queue. These policies and procedures did not specify wait time, but notified applicants that commitments for CORE rebates were based on the availability of funds. Furthermore, the CORE rebate application that Petitioner submitted to the Board reserved the right to modify or withdraw the CORE program and stated that CORE program procedures and rebate levels were subject to change or cancellation without notice. Petitioner's completion of this CORE rebate application was a necessary step toward placement in the queue and consideration for a CORE rebate. Finally, while Petitioner waited in queue, public stakeholders were aware that the 2008 Budget Order would likely include modifications to rebates and were invited to submit comments and recommendations for consideration by the Board. The Board **HEREBY FINDS** that Petitioner was or should have been on notice that it would have to wait in queue and, during that time, CORE rebates may be reduced. The Board **FURTHER FINDS** that Petitioner, like its installer and Counsel, had an opportunity to raise its concerns during the public stakeholder process preceding the 2008 Budget Order. Therefore, the Board **HEREBY CONCLUDES** that Petitioner's claim to have taken action in anticipation of a full CORE rebate was not reasonable or otherwise induced by Board policies.

Petitioner also bases its equitable claims on a "de facto" contractual relationship it believes to exist between itself and the Board. According to the Petitioner, if it waited in queue for the availability of funds, it was entitled to receive a full rebate. Presupposing this contractual relationship exists, Petitioner contends that the Board has violated the principle that contracts between government and private citizens require "good faith and fair dealing" by both parties.

For a contractual relationship to form, there must be intent to contract manifested in an offer and acceptance. Restatement 2d of Contracts § 23. Here, the Board's CORE rebate program was not presented as or intended to be an offer of a contact. As noted above, the very CORE rebate application that Petitioner submitted to the Board stated that CORE program procedures and rebate levels were subject to change or cancellation without notice. Furthermore, the policies and procedures in place when Petitioner applied to the CORE rebate program distinguish a letter of rebate commitment or extension from "a letter notifying the applicant that the application was found to be complete and . . . the project has been placed in queue." March 22 Order, Exhibit A. Thus, Petitioner's application to the CORE rebate program does not constitute acceptance of an offer to contract. See Cutler-Hammer, Inc. v. United States, 194 Ct. Cl. 788, 794-95 (1971) ("It requires a distortion of plain English to infer that making an application in conformity with the terms of this Regulation would constitute an acceptance of an offer whereby the United States intended to bind itself."); Tree Farm Development Corp. v. United States, 218 Ct. Cl. 308, 319-20 (1978).

Similarly, the Supreme Court has stated that even in the face of a legislative act for the disposition of state lands, "the offer of a State does not necessarily imply a contract. It may be of encouragement merely, 'holding out a hope but not amounting to a covenant.'" Banning Co. v. California, 240 U.S. 142, 152 (1916). Citing Wisconsin & Michigan Ry. v. Powers, 191 U.S.

379, 386, the Banning Court opined that the offer of an exemption from taxation and claimed acceptance of the offer, through the construction of a railroad, did not constitute a contract. Id. at 153. Drawing on that analysis, the Banning Court explained "that the filing of the application does not constitute a binding contract upon the part of the applicant and the State." Ibid. In Virgo Corp. v. Paiewonsky, the Third Circuit likewise held that tax exemptions and subsidies provided for a particular enterprise, but later revoked, were merely announcements of policy addressed to no one in particular and not a binding contract. 384 F.2d 569, 585 (3d Cir. 1967) (discussing Pentheny, Ltd. v. Government of Virgin Islands, 360 F.2d 786 (3d Cir. 1966) (holding that vested rights to tax exemption and subsidies were not acquired by the mere application therefore)).

The Board's September 22 Order also explains the Board's position that "placement in the queue does not serve to lock in a certain rebate amount or rate, and does not abrogate the fundamental and oft-stated program requirement that the only binding rebate commitment made by the Board to a CORE applicant, if any, is that set forth in the rebate approval and commitment letter submitted to the applicant by OCE Staff." September 22 Order. The queue was established as a mechanism to maintain the applicant's place in line when the Board received applications in excess of its limited funding. The Board's February 13 and March 22 Orders make no guarantee of full funding for rebates. Even the application submitted by Petitioner expressed the dynamic nature of the CORE program. Finally, Petitioner has acknowledged that it only received rebate commitments subsequent to the Board's approval of the CORE rebate cap. In light of the foregoing, the Board **HEREBY CONCLUDES** that Petitioner's completed applications, which were placed in queue, did not amount to a contract with the Board.

In addition, Petitioner contends that the Board has violated its right to "good faith and fair dealing," but supports that contention with citations to case law that deals with parties that had already entered a contract. For instance, in W.V. Pangborne & Co. v. New Jersey DOT, the plaintiff had entered and begun performance of a contract with the state agency. 116 N.J. 543, 546 (1989). Likewise, the parties in Sons of Thunder v. Borden, Inc. signed an eleven-page contract. 148 N.J. 396, 400 (1997). It is only "[i]n every contract" that "there is an implied covenant of good faith and fair dealing." W.V. Pangbrone & Co., supra, 116 N.J. at 560; accord, Sons of Thunder, supra, 148 N.J. at 421. In the instant matter, the Board has found that Petitioner's application to the CORE program did not form a contract. The Board has also found that Petitioner was on notice that it would have to wait in queue and, during that time, CORE rebates may be reduced. Therefore, the Board **HEREBY FINDS** that the covenant of good faith and fair dealing that arises only under contract is not applicable. Nonetheless, the Board **FURTHER FINDS** that Petitioner was been treated fairly and equitably under the circumstances.

Petitioner also claims that it "reasonably expected" that the Board would provide it "stranded cost" recovery, because it continued to develop its project while it waited in queue and was in "the same vulnerable position as the public utilities" during deregulation. Prior to deregulation, the Board had approved some recovery in rate base for the generation built by the State's utilities. Pursuant to EDECA, the Board allowed some stranded cost recovery for these utilities. Here, Petitioner does not allege that it experienced a loss as a result of statutorily mandated divestiture of its generation assets. Rather, Petitioner compares that process with its continued project development while in queue for CORE rebates. The Board **HEREBY FINDS** that Petitioner is not a public utility, which qualifies for stranded cost recovery. The Board **FURTHER FINDS** that Petitioner's expenditures were not previously approved by the Board nor has Petitioner been required by law to sell its assets. Thus, the Board **HEREBY CONCLUDES**

that the two situations are not analogous. Petitioner assumes some entitlement to CORE rebate funding, but Petitioner proceeded at its own risk.

In addition to its equity arguments, Petitioner requests special treatment because one of its two projects is a converted landfill. Petitioner characterizes itself as a "special case." To support this claim, Petitioner quotes the introductory Finding and Declarations section of Large Site Landfill Reclamation and Improvement Law ("LSLR"), which states "it is a public purpose and compelling State interest . . . to facilitate the redevelopment of large landfill sites in areas in need of redevelopment within municipalities that are attempting to create economic growth and thereby to promote job creation and economic development." N.J.S.A. 40A:12A-50. Petitioner also represents that the "official policy of the State of New Jersey is to promote exactly what [Petitioner] and its investors have done 'by augmenting the fiscal resources of government' in various ways." (quoting N.J.S.A. 40A:12A-50). Although the Board believes that redevelopment of a former landfill is indeed commendable, the Board notes that the LSLR does not authorize the Board to direct ratepayer funds to support such projects. The LSLR provides its own incentives for landfill redevelopment and the Board urges Petitioner to take advantage of those incentives. A decision as Petitioner requests would be based on preference rather than reason or fact. The Board can do no such thing.

Although Petitioner claims that it does not make a challenge the legality of the Board's decision to cap CORE rebates, Petitioner refers to the cap as contrary to due process and retroactive. It appears that Petitioner feels the Board did not provide an opportunity to be heard, but the Board has already found that Petitioner had notice and ample opportunity to comment on the process. With regard to Petitioner's claim that the cap was instituted retroactively, the Board has already explained that an application to the CORE program does not entitle the applicant to a rebate. As discussed above, the Board's commitment to rebate funding arises, if at all, only after the commitment letter has been sent. Petitioner applied to the CORE program in March 2006 and the cap was applied to queued projects in the 2008 Budget Order. Thereafter, in June of 2008, Petitioner received commitment letters for its projects. The Board **HEREBY CONCLUDES** that the CORE rebate cap did not apply retroactively.

Finally, the petition and supplemental comments cite Petitioner's CORE rebate application, BPU-3060, as indication that "the OCE may have acted arbitrarily in denying a full rebate to [applications 3138 and 3178]." The supplemental comments state that the three applications were submitted the same day and should have been treated the same. This claim fails to account for the policies and procedures adopted in the March 22 Order. To efficiently and fairly process the enormous influx of CORE rebate applications, the application processing team set aside incomplete applications and only placed applications in queue on the date they were received if those applications did not require any further information to be processed. Once incomplete applications were completed, they were placed in the queue as of the date they were completed. As Petitioner would have been aware during its 18 months in queue, applications 3138 and 3178 occupied lower places in queue than application 3060. Application 3060 was approved by the Board and received a commitment letter prior to the 2008 Budget Order, where the Board instituted the CORE rebate cap. When the 2008 Budget Order made additional funding available to the CORE program, the Board approved applications 3138 and 3178 and Petitioner received commitment letters reflecting the CORE rebate cap. Thus, the Board **HEREBY FINDS** that Petitioner's projects were properly provided commitments for rebates of $245,000 after the cap was instituted.

For the foregoing reasons, the Board **HEREBY DENIES** Petitioner's requests for full funding of its CORE rebates at the pre-2008 Budget Order level. However, the Board notes that Petitioner

has received rebate commitment letters that reflect accurate rebates of $245,000 each. These projects have received extensions of their CORE rebate commitments. Notwithstanding the denial of Petitioner's requests in this matter, if Petitioner complies with the conditions necessary for rebate payment, the Board **HEREBY DIRECTS** the Market Manager to process rebates for payment in accord with the commitment letters Petitioner has received.

DATED: 12/1/09

BOARD OF PUBLIC UTILITIES
BY:

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PRESIDENT

FREDERICK F. BUTLER
COMMISSIONER

JOSEPH L. FIORDALISO
COMMISSIONER

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COMMISSIONER

ATTEST:

KRISTI IZZO
SECRETARY

I HEREBY CERTIFY that the within document is a true copy of the original in the files of the Board of Public Utilities

IN MATTER OF CUSTOMER ON-SITE RENEWABLE ENERGY (CORE) PROGRAM REBATE APPEAL: ACFD DEVELOPMENT LLC and ENGLISH CREEK SELF STORAGE

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