



Agenda Date 1/25/11
Agenda Item: 8B

STATE OF NEW JERSEY
Board of Public Utilities
Two Gateway Center, Suite 801
Newark, NJ 07102
www.nj.gov/bpu/

CLEAN ENERGY

IN THE MATTER OF THE PETITION OF COLD)	ORDER ADOPTING OAL
TECHNOLOGY, INC. FOR RECONSIDERATION)	INITIAL DECISION AND
OF STAFF'S AND CONSULTANTS')	SETTLEMENT
EVALUATION OF 27 CUSTOM APPLICATIONS)	
SUBMITTED UNDER THE NEW JERSEY)	BPU DKT. NO. EO10030244
SMARTSTART BUILDINGS PROGRAM FOR)	OAL DKT NO. PUC 09176-2010N
INCENTIVE PAYMENTS		

Gary S. Rosensweig, Esq., 700 Alexander Park, Suite 102, Princeton, New Jersey, 08540 for the Petitioner

Alex Moreau, DAG, Division of Law, Dept. of Law & Public Safety, 124 Halsey Street, Newark, New Jersey 07101 on behalf of Staff of the Board of Public Utilities

(SERVICE LIST ATTACHED)

BY THE BOARD:¹

By Order dated January 8, 2009, Docket No. EO07030203, the Board of Public Utilities ("the Board") approved 2009 programs and budgets for the New Jersey Clean Energy Program ("NJCEP"). In this Order the Board approved the compliance filing of TRC, the Commercial and Industrial ("C&I") Energy Efficiency ("EE") program Market Manager, which included the C&I Retrofit program, also referred to as the SmartStart or SmartStart Buildings program. The C&I Retrofit program includes both "prescriptive" measures, for which a fixed incentive is provide, and a program component referred to as the "Custom" program which provides incentives determined on a customized, or project by project, basis for EE measures and technologies for which no prescriptive incentive is available. Custom program incentives are calculated based on an assessment of a project's cost and on the estimated level of energy savings, among other factors. TRC utilizes a spreadsheet referred to as the "Custom Screening Tool" to assess whether a project is eligible for a custom incentive and to calculate the level of the incentive. The Custom Screening Tool includes several cost benefit tests to ensure that proposed custom projects are cost effective.

¹ President Solomon is recused from this matter, did not participate in consideration it, and did not cast a vote.

The Custom measures program is intended to address unique and/or innovative C&I EE measures that are not currently included in the SmartStart prescriptive measures. The Custom program is not intended for continued or ongoing calculation of a C&I EE incentive. After a Custom measure is identified and calculated for an incentive, a process is initiated to move the Custom measure to a listed prescriptive measure whenever possible.

In the early spring of 2009, as part of the ongoing monthly meetings managed by Applied Energy Group ("AEG" or "Program Coordinator"), which include the NJCEP Market Managers, the utilities, and the Office of Clean Energy ("Staff") TRC discussed several issues regarding the SmartStart Custom program. There was concern that the incentives that resulted from the calculations embedded in the Custom Screening Tool were producing excessive incentives relative to the costs and estimated energy savings of certain Custom projects. Based on the discussions in the monthly meetings, TRC proposed changes to the Custom Screening Tool intended to address this issue and discussed the proposed changes with Staff.

Based on these discussions, TRC and Staff determined that in addition to using the existing cost benefit tests, TRC should use other cost effectiveness criteria, specifically a cap of \$0.16 per kWh for electric projects and \$1.60 per therm for natural gas projects to establish the appropriate level of project incentive. On July 23, 2009 at 4:36 p.m., TRC issued a notice (the "Notice") that, as an additional cost effectiveness criteria, the above cap would be applied to any new applications received subsequent to issuance of the Notice. The Notice was published on the SmartStart Buildings Program website.

Cold Technologies, Inc., ("Cold Tech" or "Petitioner") is a corporation that participates in the Custom program. Cold Tech alleged that it submitted 27 Custom program applications to TRC on July 23, 2009, prior to the time the Notice was published.² TRC determined, however, that none of the applications were received prior to the Notice or were complete applications at the time the Notice was issued. As a result of TRC's determination, the cap on the incentive levels applied to Cold Tech's applications.

By letter dated November 16, 2009, Cold Tech filed a dispute with the NJCEP Program Coordinator, contesting the applicability of the new cost effectiveness screening criteria to the 27 applications. By letter dated January 27, 2010, AEG informed Cold Tech that based on its review it believed that TRC acted appropriately in determining that the new cost effectiveness screening criteria that took effect with the Notice would be applicable to the disputed applications. See footnote 2 below.

On March 31, 2010 Cold Tech filed a Verified Petition with the Board seeking an Order and other relief approving incentive payment applications pursuant to the New Jersey SmartStart Buildings Program Guidelines in effect prior to July 23, 2009. The Board caused this matter to be transmitted to the Office of Administrative Law ("OAL") as a contested case on July 23, 2010, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13. On August 2, 2010, the Board requested priority scheduling for the matter, which was assigned to the Honorable Walter M. Braswell, Administrative Law Judge. Judge Braswell conducted a pre-hearing conference on

² In its petition Cold Tech indicated that it submitted 27 applications on or about July 23, 2009. However, TRC is in receipt of 30 applications submitted by Cold Tech. Twenty-nine of the applications were submitted in July 2009, and one (1) application was submitted prior to July 2009. Of the 30 applications, 3 of them were duplicates. For administrative purposes, TRC and Staff evaluated all 30 applications separately.

September 15, 2010 and at that time directed Petitioner to determine which of the applications at issue were still viable and further directed Petitioner and Board Staff to engage in settlement negotiations. Judge Braswell subsequently issued a Notice of Hearing scheduling evidentiary hearings on November 12 and 16, 2010.

On October 13, 2010, Staff and the Petitioner met to discuss settlement options. The parties negotiated settlement terms acceptable to both parties, and memorialized such terms in a stipulation of settlement. Attachment A to the agreement is a table describing the applications that Petitioner submitted. The table indicates that 17 applications might still be viable projects and ten are no longer viable. In the table, the parties calculated that, pre-July 23, 2009, the estimated incentive for the 17 potentially viable applications is approximately \$3.9 million; the estimated incentive for the 17 potential applications, post-July 23, 2009, is approximately \$1.3 million.

Ultimately, the parties agreed and stipulated that the incentive level for all Eligible Applications should not exceed \$2 million; and, each Eligible Application is eligible for an incentive payment not to exceed the pre-July 23rd incentive payment level for which that application would have been eligible, subject to additional terms outline in the settlement. Petitioner executed the settlement on December 30, 2010; Staff executed the settlement on January 6, 2011 (the "Settlement Agreement").

On January 11, 2011, the OAL received the fully executed stipulation indicating the terms of settlement. On January 13, 2011, Judge Braswell entered an Initial Decision, which attached the Settlement Agreement. The OAL found that the terms of the written Settlement Agreement, were entered into voluntarily and fully dispose of all issues in controversy. The OAL concluded that the Settlement Agreement satisfied the terms of N.J.A.C. 1:1-19.1, recommended that the parties comply with its terms, and concluded the proceedings. The OAL mailed the Initial Decision to the Board on January 14, 2011, and the Board received it on January 19th.

DISCUSSION AND FINDINGS

The Board has authority pursuant to N.J.S.A. 52:14B-10 to modify, adopt, or reject an OAL Initial Decision within forty-five (45) days. If the Board fails to take action within 45 days, and does not otherwise extend such time limit, the Initial Decision shall become a final decision. Ibid.

Having reviewed the record, the OAL Initial Decision, and the Settlement Agreement, the Board **FINDS:**

1. The parties have negotiated a settlement that resolves all contested issues in this case.
2. The Settlement Agreement represents the entire agreement between the Parties.
3. The parties agreed to the settlement to amicably resolve the disputed matter without the necessity and expense of further litigation and in consideration of the promises and mutual obligations set forth in the Settlement Agreement.
4. The parties entered into the Settlement Agreement voluntarily, as evidenced by their signatures or representatives.
5. The Settlement Agreement and Initial Decision are consistent with Board policy.

Pursuant to N.J.S.A. 52:14B-10, the Board hereby **ADOPTS** the Initial Decision and the Settlement Agreement executed by the parties in its entirety. The Board's decision is limited to the instant matter and shall have no precedential value in future proceedings involving these or any other party.

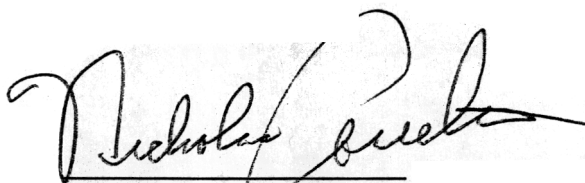
DATED:

1/25/11

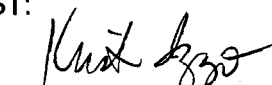
BOARD OF PUBLIC UTILITIES
BY:


JEANNE M. FOX
COMMISSIONER

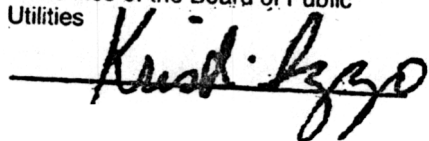

JOSEPH L. FIORDALISO
COMMISSIONER


NICHOLAS ASSELTA
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 The Matter of the Petition of Cold Technology, Inc. for Reconsideration of Staff's and Consultants' Evaluation of 27 Custom Applications Submitted Under the New Jersey SmartStart Buildings Program for Incentive Payments

DOCKET NO. EO010030244

SERVICE LIST

Kristi Izzo, Secretary
Board of Public Utilities
Two Gateway Center
Newark, NJ 07102

Michael Winka, Director
Office of Clean Energy
Board of Public Utilities
P.O. Box 350
Trenton, NJ 08625-0350

Mona Mosser
Office of Clean Energy
Board of Public Utilities
P.O. Box 350
Trenton, NJ 08625-0350

Marisa Slaten, DAG
Division of Law
Dept. of Law & Public Safety
124 Halsey Street
P.O. Box 45029
Newark, NJ 07101

Rachel Boylan, Legal Specialist
Office of Chief Counsel
Board of Public Utilities
Two Gateway Center
Newark, NJ 07102

Allison E. Mitchell
Office of Clean Energy
Board of Public Utilities
P.O. Box 350
Trenton, NJ 08625-0350

Gary S. Rosensweig, Esq.,
Archer & Greiner
700 Alexander Park, Suite 102
Princeton, New Jersey, 08540

Alex Moreau, DAG
Division of Law
Dept. of Law & Public Safety
124 Halsey Street
P.O. Box 45029
Newark, NJ 07101

Frank Vadino, Vice President,
Engineering Division
Cold Tech, Inc.
1001 Lower Landing Road
Blackwood, NJ 08012



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

RECEIVED
MAIL ROOM
11 JAN 20 AM 9:22
BOARD OF PUBLIC UTILITIES
NEWARK, N.J.

CMB
Beslow
Holland
JAG
RPA
OCE
See Thomas

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. PUC 09176-10

AGENCY DKT. NO. E010030244

**IN THE MATTER OF A CLEAN ENERGY APPEAL
OF SMARTSTART REBATES FOR COLD
TECHNOLOGY, INC.**

Gary S. Rosenweig, Esq., for petitioner (Archer & Greiner, PC)

Alex Moreau, Deputy Attorney General, for respondent (Paul T. Dow, Attorney
General of New Jersey, Attorney)

Record Closed: January 11, 2011

Decided: January 13, 2011

BEFORE WALTER M. BRASWELL, ALJ:

On August 30, 2010, this matter was transmitted to the Office of Administrative Law (OAL) for hearing as a contested case pursuant to N.J.S.A. 52:14B-1 to-15 and N.J.S.A. 52:14F 1 to- 13. The matter was scheduled for a prehearing conference on September 15, 2010 and the evidentiary hearings were scheduled for November 12 and 16, 2010. Prior to the November hearing dates, as a result of extensive settlement discussions, the parties reached a settlement and therefore requested that the scheduled hearing dates be adjourned. On January 11, 2011 the OAL received the fully executed Stipulation indicating the terms of settlement. A copy of the Stipulation of Settlement is attached and made part hereof.

I have reviewed the record and terms of the Stipulation of Settlement and **FIND:**

1. The parties have voluntarily agreed to the settlement as evidenced by the signatures of the parties or their representatives.
2. The settlement fully disposes of all issues in controversy and is consistent with law.

I **CONCLUDE** that the agreement meets the requirements of N.J.A.C. 1:1-19.1 and therefore, it is **ORDERED** that the parties comply with the settlement terms and that these proceedings be and are hereby concluded.

hereby **FILE** my initial decision with the **BOARD OF PUBLIC UTILITIES** for consideration.

This recommended decision may be adopted, modified or rejected by the **BOARD OF PUBLIC UTILITIES**, which by law is authorized to make a final decision in this matter. If the Board of Public Utilities does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

1-13-11
DATE

Date Received at Agency:

Date Mailed to Parties:
lib

Walter M. Braswell
WALTER M. BRASWELL, ALJ

January 14, 2011

January 14, 2011

Laura Sanders
DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

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

In the Matter of the Petition of Cold Technology, Inc. for
Reconsideration of Staff's and Consultants' Evaluation
of 27 Custom Applications Submitted Under the New
Jersey SmartStart Buildings Program for Incentive
Payments.)
)
)
)
)
)

DOCKET NO. EO10030244
OAL DOCKET NO. PUC
09176-2010N

SETTLEMENT AGREEMENT

APPEARANCES:

Gary S. Rosensweig, Archer & Greiner, P.C., for Petitioner, Cold Technology, Inc.

Alex Moreau, Deputy Attorney General and Caroline Vachier, Deputy Attorney General,
for the Staff of the New Jersey Board of Public Utilities (Paula T. Dow, Attorney General
of New Jersey)

WHEREAS, the New Jersey Board of Public Utilities ("Board") is an agency within the
Executive Branch of State Government, with principal offices at 2 Gateway Center,
Newark, New Jersey; and

WHEREAS, Cold Technology, Inc. ("Petitioner"), 1001 Lower Landing Road, Suite
203, Blackwood, New Jersey, 08012 ("Petitioner") is a corporation acting as authorized
agent for various commercial ratepayers in New Jersey; and

WHEREAS, the Board, through the New Jersey Clean Energy Program ("NJCEP"),
manages the SmartStart Buildings Program ("the Program"); and

WHEREAS, the Program includes both "prescriptive" measures, for which the
incentives are already defined and designated by the Program, and "custom" measures,

RECEIVED
2011 JAN 11 P 4: 09
OFFICE OF ATTORNEY GENERAL
STATE OF NEW JERSEY

which involve measures not covered by a prescriptive rebate that the applicant believes will entail energy savings in advance of the measures embodied in the prescriptive measures; and

WHEREAS, incentives for custom measures are calculated using a computerized screening tool ("Custom Screening Tool"); and

WHEREAS, a change to the Custom Screening Tool took effect at 4:36 p.m. on July 23, 2009, when it was published on the Program's website; and

WHEREAS, Petitioner filed a Verified Petition ("Petition") with the Board on March 31, 2010 seeking an Order and other relief approving incentive payment applications pursuant to the New Jersey Smart Buildings Program Guidelines in effect prior to July 23, 2009 at 4:36 p.m. The Petition was assigned Docket Number EO10030244; and

WHEREAS, the purpose of the Petition was to contest various determinations of the staff administering the Program ("Program Staff") with respect to the incentive calculation in the Custom Screening Tool applicable to twenty-seven (27) applications for custom measures submitted by Petitioner on or about July 23, 2009; and

WHEREAS, the Board caused this matter to be transmitted to the Office of Administrative Law ("OAL") as a contested case on July 23, 2010; and

WHEREAS, on August 2, 2010, the Board requested priority scheduling for the matter, which was assigned to the Honorable Walter M. Braswell, Administrative Law Judge, who conducted a pre-hearing conference on September 15, 2010 and at that time directed Petitioner to determine which of the applications at issue were still viable and further directed Petitioner and Board Staff to try settlement; and, Judge Braswell subsequently issued a Notice of Hearing scheduling evidentiary hearings on November 12 and 16, 2010; and

WHEREAS, Board Staff and Petitioner propounded discovery requests on each other, but, before either responded to the requests, decided to engage in discussions and negotiations in hopes of achieving a just and reasonable outcome without the need for costly and protracted litigation; however, Petitioner during this proceeding made a request under the Open Public Records Act, N.J.S.A. 47:1A-1 et seq., which the Board answered; and

WHEREAS, Board Staff and Petitioner have now agreed to resolve all outstanding issues raised by Petitioner and, in that regard, agree to the following definitions:

1. "Petitioner" means Cold Technology, Inc., as well as its principals, directors, officers, parent corporations, subsidiaries, affiliates, employees, agents, representatives, successors, assigns, shareholders, independent contractors/third-party distributors, any trustee in bankruptcy or other trustee, and/or any receiver appointed pursuant to proceedings in law or in equity;
2. "Contested Applications" means those applications identified in Attachment A;
3. "Eligible Applications" means those applications filed by Petitioner with the Program on or about July 23, 2009, which Program Staff has determined, within 30 days of the submission of all required information, are complete and ready for the issuance of an incentive payment approval letter; and
4. "Custom Screening Tool" means the computerized tool used by Program Staff to calculate the appropriate incentive for an application submitted for a custom measure.

NOW THEREFORE, in order to amicably resolve this matter without the necessity and expense of further litigation and in consideration of the promises and mutual obligations herein set forth, Board Staff and the Petitioner (collectively, "the Parties") hereby agree as follows:

1. Following consultation with its clients, Petitioner will seek incentives for the Eligible Applications identified in Attachment A.
2. Within 30 days of the issuance of a Board Order approving this Settlement:
 - a. Petitioner will identify all Eligible Applications and the incentive payment Petitioner seeks for each application.
 - b. Program Staff shall promptly review all Eligible Applications and inform Petitioner of any and all outstanding questions and items of information required to complete their review of these applications.
 - c. Should any information be missing, Petitioner shall have 30 days from the date Program Staff informs Petitioner of the deficiency to complete these applications.
 - d. Incentive approval letters shall be issued within 30 days of the submission of all required information, or, for projects with estimated incentives that exceed \$300,000, will be forwarded to the Board for approval within 30 days of the submission of all required information.
3. Each Eligible Application shall be eligible for an incentive payment not to exceed the pre-July 23, 2009 incentive payment level for which that application would have been eligible as these levels are determined by Program Staff after receipt of all information requested pursuant to Paragraph 2, provided the Eligible Application is complete and all program requirements are met.
4. The sum of all final incentive payments for all Eligible Applications shall not exceed \$2,000,000 dollars.
5. Issuance of incentive payment commitment letters and/or payment of incentives shall be authorized and made by Program Staff in accordance with pre-established Program guidelines and Board Orders, including, but not limited to, the availability of NJCEP funds, provided, however, that all issued incentive payment letters shall be

deemed to be committed funds to be treated like committed funds for budgeting purposes.

a. Incentive payments shall be made in accordance with Program Guidelines. Program Staff shall make a good faith effort to perform post-inspections within 15 days following receipt of final invoice documents and after a request for a post-inspection is made. Program Staff shall make a good faith effort to issue payments within 60 days of the post-inspection of the work, provided all final documentation has been received.

6. In consideration of the foregoing, Petitioner shall also forever release, waive and forego any and all claims, demands, suits, allegations, complaints, penalties, or offsets, known or unknown, asserted or unasserted, actual or potential, that relate to or arise out of the allegations in the Petition, against the Board or any individual commissioner or employee thereof in his or her official or personal capacity. Such waiver shall include any and all claims for eligibility for a custom rebate per the pre-July 23, 2009 incentive calculation for those applications identified on Attachment A. Such waiver shall apply to any project identified on Attachment A, including those that do not receive a rebate approval letter per Paragraph 2 above.

7. This Settlement Agreement is further subject to the Board's issuance of a written decision and order in which the Board accepts this Settlement Agreement in its entirety and executes same without change, based on the mutual compromise by Petitioner and Board Staff, except that if, for any reason, the Board wishes to impose new, altered, or additional conditions or changes to this Settlement Agreement, Petitioner will have ten (10) business days following receipt of said Board Order to accept or reject this Settlement Agreement based on the Board's proposed changes in same. This Settlement Agreement represents a mutual balancing of interests, contains interdependent provisions and, therefore, is intended to be accepted and approved in its entirety.

8. The execution of this Settlement Agreement by the Board is for the sole purpose of avoiding costly and time-consuming litigation, and shall not be deemed an admission by the Board or any individual commissioner or employee thereof, or Petitioner, of any violation of law, statute or regulation, or any wrongdoing whatsoever. The Parties shall

bear all of their own costs.

9. Board Staff maintains its position that the change in the Custom Screening Tool which took effect on July 23, 2009 was properly applied to the Contested Applications in this matter.

10. This Settlement Agreement represents the entire agreement between the Parties, and may be signed in counterparts.

11. This Settlement Agreement shall be governed by the laws of the State of New Jersey.

12. In the event any particular aspect of this Settlement Agreement is not accepted and approved in its entirety by the OAL or the Board, the Petitioner or Board Staff, if aggrieved thereby, shall not be bound to proceed with this Settlement Agreement and shall have the right to litigate all issues addressed herein to a conclusion, and shall be free to pursue all available legal remedies with respect to all issues addressed in this Settlement Agreement as though it had not been signed.

PAULA T. DOW
ATTORNEY GENERAL OF NEW JERSEY
Attorney for the Staff of the New Jersey
Board of Public Utilities

By: 

Alex Moreau
Deputy Attorney General

Dated: 01/06/11

ARCHER & GREINER, PC
Attorney for Cold Technology, Inc.

By: 

Gary S. Rosensweig

Dated: 12/30/11

ATTACHMENT A

ELIGIBLE APPLICATIONS Application #	Customer Name	Exhibit C-2 Reference #	Estimated Incentive - Pre 7/23/2009	Estimated Incentive - Post 7/23/2009
*05573	Asian Food Market - Plainsboro	1	<u>\$190,462</u>	<u>\$63,981</u>
06761	Supremo Foods- Lalor Street	31	<u>\$182,201</u>	<u>\$59,671</u>
06763	McCaffrey's- Princeton	10	<u>\$235,472</u>	<u>\$81,246</u>
06764	McCaffrey's-West Windsor	11	<u>\$162,319</u>	<u>\$54,556</u>
06770	Food Rite- Incolingo's of Salem	3	<u>\$185,117</u>	<u>\$61,780</u>
06772	Food Rite- Incolingo's of Pennsgrove	2	<u>\$188,761</u>	<u>\$65,275</u>
06773	Marin Varella, Inc.	8	<u>\$112,006</u>	<u>\$42,184</u>
06776	ShopRite- Bottino's of Upper Deerfield	15	<u>\$196,591</u>	<u>\$64,139</u>
06778	ShopRite- Eickhoff Lumberton	19	<u>\$330,953</u>	<u>\$114,283</u>
06779	ShopRite- Eickhoff Delran	18	<u>\$339,492</u>	<u>\$115,287</u>
06780	Murphy's- Tabernacle	14	<u>\$160,083</u>	<u>\$54,011</u>
06782	Murphy's- Medford	13	<u>\$276,908</u>	
06784	Supremo Foods- 130 & Browning Rd	35	<u>\$203,890</u>	<u>\$78,590</u>
06785	Supremo Foods- Pennsauken	33	<u>\$344,637</u>	<u>\$113,912</u>
06786	Supremo Foods- Pennington Ave	32	<u>\$208,182</u>	<u>\$69,677</u>
06787	Supremo Foods- Irvington	29	<u>\$341,357</u>	<u>\$115,487</u>
06788	Supremo Foods- Elizabeth	28	<u>\$282,815</u>	<u>\$93,828</u>
17			<u>\$3,941,246</u>	<u>\$1,343,061</u>

**No Longer Viable
Projects**

Notes

06760	ShopRite- Foodarama Hamilton Square	25	
06762	ShopRite- Foodarama Bordentown	21	
06765	ShopRite- Foodarama Pennington	27	
06766	ShopRite- Foodarama Mercer Mall	26	
06767	ShopRite- Foodarama Hamilton Marketplace	24	
06768	ShopRite- Foodarama Ewing	23	
06769	ShopRite- Foodarama East Windsor	22	
06771	Asian Food Market- Plainsboro	NA	Duplicate application
06774	Marrazzo's Thriftway- Robbinsville	7	
06775	Supremo Foods- Plainfield	NA	Duplicate application
06777	ShopRite- Eickhoff Willingboro	NA	Cancelled
06781	ShopRite- Browns Deptford	17	
06783	Supremo Foods- Jersey City	NA	Duplicate application

6167462v