



Agenda Date: 4/23/14
Agenda Item: 8G

STATE OF NEW JERSEY
Board of Public Utilities
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Trenton, New Jersey 08625-0350
www.nj.gov/bpu/

CLEAN ENERGY

IN THE MATTER OF THE VERIFIED PETITION OF)
FEDERAL REALTY INVESTMENT TRUST SOLAR,)
INC. PETITION TO EXTEND THE SOLAR)
RENEWABLE ENERGY CERTIFICATE PURCHASE)
SALE AGREEMENT WITH JERSEY CENTRAL)
POWER & LIGHT) DOCKET NO. EO12090809V

Parties of Record:

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Michael J. Connelly, Esq. Morgan, Lewis & Bockius, LLP, on behalf of Jersey Central Power & Light Company
Kevin J. Moore, Esq., Sills Cummis & Gross P.C., on behalf of FRIT Solar, Inc.

BY THE BOARD:

In this Order, the New Jersey Board of Public Utilities (“Board”) considers the petition of FRIT Solar, Inc. (“FRIT” or “Petitioner”) for an extension of time, as within time, to complete a solar energy project (“Project”) under a Solar Renewable Energy Certificate (“SREC”) Purchase and Sale Agreement (“PSA”) with Jersey Central Power & Light (“JCP&L” or “the Company”). Specifically, FRIT requested a 6-month extension of the construction deadline, through March 7, 2013.¹ Additionally, the petition requested what was described as correction of the “erroneous” customer account information listed in the PSA. Petition at 7-8.

JCP&L’s SREC based contracting program (“Program”) was approved by Board Order dated March 27, 2009.² That Order authorized and directed JCP&L to enter into long-term contracts for the purchasing of SRECs generated by specific solar photovoltaic projects within its service

¹ As that date has passed, the Board will consider Petitioner’s request to run from the effective date of an Order, if any, granting an extension.

² In re Atlantic City Electric Company Renewable Energy Portfolio Standard – Amendments to the Minimum Filing Requirements for Energy Efficiency, Renewable Energy, and Conservation Programs; and for Electric Distribution Company Submittals of Filings in Connection with Solar Financing, Dkt. No. EO08100875 and In re the Verified Petition of Jersey Central Power & Light Company Concerning a Proposal for an SREC-based Financing Program under N.J.S.A. 48:3-98.1, Dkt. No. EO08090840 (March 27, 2009).

territory. In response to that Order, JCP&L issued Requests for Proposals ("RFP") from solar developers which were evaluated and then submitted to the Board for approval. JCP&L would then enter into long term PSAs with those successful bidders.

According to the petition, Federal Realty Investment Trust ("Trust") was a successful bidder in response to one of the RFPs, and entered into a PSA with JCP&L on September 7, 2011 for the Project. That same day, Trust assigned its rights under the PSA to its subsidiary, FRIT, and FRIT agreed to build, develop, and own the Project that would generate the SRECs to be purchased by JCP&L under the PSA. Petition at 4. The PSA with JCP&L had an effective date of September 7, 2011, and required that construction be completed on the Project and commercial operation commence by September 7, 2012 ("Commencement Date"). Ibid.

According to the petition, the Project is a 287.875 kW system to be located on the roof at the Troy Hills Shopping Center ("Shopping Center") at 1111-1159 Route 46 East, Parsippany, New Jersey. The Shopping Center is owned by the Trust. FRIT sells the electricity generated by solar facilities such as the Project to the Trust for use at the Shopping Center. Petition at 2-3. According to the petition, FRIT entered into a photovoltaic system Engineering, Procurement, and Construction Agreement with Safari Energy LLC ("Safari") on September 23, 2011, and the Project was fully designed and engineered, and had the approvals necessary for construction permits. FRIT represents that it had also procured photovoltaic modules but did not have them on site and had not received the construction permits at the time the petition was filed³. Petition at 5-6.

In the petition, FRIT stated that the Project was designed to provide electricity to the Pathmark store in the Shopping Center and that due to the pending bankruptcy of Pathmark's parent, there were unforeseen delays in the execution of the necessary interconnection application and power purchase agreement. Petition at 6-7. As previously stated, the petition also requested correction of what FRIT asserted was an incorrect customer account number for the Project which FRIT stated was included in the PSA without its knowledge. Petition at 7.

On or about August 22, 2013, the Petitioner filed what was denominated as an Amendment of Verified Petition and Affidavit of Verification (the "Amendment"). The Amendment stated that when FRIT filed the petition on September 12, 2012, all of the information in Paragraphs 26 and 28 of the petition was true and correct. Paragraph 26 of the petition stated that "A&P has recently agreed to sign the interconnection application and the PPA. FRIT anticipates that A&P will sign the interconnection application and the PPA during the week of September 10, 2012. Once A&P signs the interconnection application and the PPA, FRIT, through Safari, will pull the permits for and commence construction of the Project." Paragraph 28 of the petition stated that, "[d]ue to the unavoidable delays in commencing the construction of the Project caused by the Bankruptcy, FRIT will not be able to complete the construction and commence the commercial operation of the Project by the Commencement Date. Based on its estimated construction schedule, FRIT requests an extension of the Commencement Date through March 7, 2013. If this extension is not granted and JCP&L terminates the PSA, the Project will not be economically feasible for FRIT and the Project will not go forward."

³ By Order dated March 12, 2013, the Board authorized the EDCs to grant a first extension of six months provided certain conditions were met. FRIT concedes that it has not met these conditions and thus could not obtain an extension from JCP&L without Board approval.

In its February 7, 2014 letter updating the petition and Amendment, FRIT reiterated that as of the date of the Amendment, A&P had signed the interconnection application and caused its wholly owned subsidiary, Pathmark Stores, Inc. to sign the PPA. The Amendment also noted that, accordingly, in anticipation of the Board granting the petition, FRIT had pulled the permits for the construction of the Project and completed construction of the Project on or about January 20, 2014. February 7, 2014 Letter at 2. Additionally, the letter stated that the Board's Office of Clean Energy ("OCE") had issued an SRP number for the 290.16 kW Project on May 13, 2013, and that Petitioner was waiting for permission to operate from JCP&L, and therefore requested that the Commencement Date be extended to the later of March 7, 2014 or the date JCP&L issues permission to operate the Project. Ibid.

In an additional letter dated February 24, 2014, FRIT reaffirmed its request that the Board switch the customer account number in the PSA from L.A. Fitness to Pathmark for the Project which Petitioner represented remained the same size, and to allow the extension of the Commencement Date of the PSA as the bankruptcy of Pathmark's parent company, A&P, had caused an unforeseen delay in construction. Petitioner noted that since filing the petition, it had moved forward with the construction of the Project and that as of January 20, 2014, the Project had been fully constructed. February 24 Letter at 2. Petitioner further stated that it had received a new SREC registration number ("SRP Number") Number from the OCE on May 13, 2013, and that the interconnection application and the PPA with Petitioner were signed. Petitioner restated that it commenced construction of the Project in August 2013, and added that it completed construction as of January 20, 2014. Petitioner contends that the PSA and the Program's RFP Rules do not specifically prohibit a change in the customer for an approved project as the definition of customer in the rules is broad enough to cover both the original and revised customers. February 24 Letter at 2-3. FRIT therefore maintains that the RFP Rules and the PSA permit the change in the customer account information provided that the location and "other materials aspects of a project remain the same as the approved project." February 24 Letter at 3. FRIT represents that the location, size, type and manufacturer all remain the same for the Project and that the only change is the customer account number. Additionally, Petitioner maintains that it has satisfied the "Dobco" test previously adopted by the Board because it has demonstrated significant progress toward completion, and the cause of the delay in construction was unavoidable and unforeseeable at the time the Trust applied for inclusion into the Program. Id. at 4-5.

JCP&L submitted letters responding to the petition, Amendment and updates submitted by FRIT.

In a letter dated March 12, 2013, JCP&L stated that it had just learned that on September 7, 2012, FRIT filed a petition for extension of its PSA for the Project identified as SRP-03189 with a customer account number of 100078384300. See March 12 Letter at 1-2. JCP&L asserted that in August of 2012, approximately one month or less prior to the Commencement Date, Just Energy (the Project Developer), advised JCP&L, for the first time, that it wanted to change the customer account number and the customer for the Project. On August 24, 2012, JCP&L advised the Project Developer of JCP&L's position that, under the circumstances, "because all of the information provided by the Project Developer referred to information regarding facts occurring after (i) the bid closing date of June 10, 2011 and (ii) the Board Order, dated July 14, 2011, awarding the Contract, which (even though continuously available to the Project Developer and FRIT) were never previously disclosed to JCP&L, the Program Solicitation Manager or the BPU, JCP&L did not believe that it had authority to change the Contract." March 12 Letter at 3. JCP&L asserts it was advised by Just Energy that the original customer

account number and customer were changed because there was no contract between FRIT and the originally identified customer. *Ibid.* According to JCP&L, the customer account number is the reference number for the customer, a JCP&L ratepayer, at the premises where the Project is situated. It is the customer that will use the electricity generated by the Project (on a net-metered basis) and the customer that will sign the interconnection agreement with JCP&L with respect to the Project. The customer account number (100078384300) shown in Appendix B of the Contract is the customer account number provided by, or on behalf of, the Trust as part of its bid in the Program that ultimately resulted in the Board awarding the PSA. According to JCP&L, it is the same customer account number that was included in Appendix B of the PSA as sent to the Trust for execution and included in Appendix B of the executed PSA. JCP&L March 12 Letter at 3. JCP&L states that the bidding rules for the Program require that qualified bidders provide specific information related to specific projects, including the applicable customer account numbers for the customers utilizing the electricity from the proposed Projects that will also sign the interconnection agreement with JCP&L. JCP&L March Letter at 3-4. JCP&L maintains that it had no knowledge of an alleged mistake in the customer information prior to August 2012 while the Trust (or FRIT) apparently had information concerning the customer account prior to the time the PSA was executed on September 7, 2011. JCP&L maintains that because it did not know about the issue, it did not have the opportunity to determine whether it was authorized under the Program rules to execute the PSA or seek resolution from the Board. Additionally, the SRP for the Project as bid into the program, SRP-03189, had expired at the time FRIT filed the petition. *Id.* at 5. According to JCP&L, the information provided calls into doubt the existence of a viable project at the time there was a bid into the Program, at the time the PSA was executed, and at the time the petition for extension of the PSA was filed. *Id.* at 6-7. JCP&L also sought certain additional findings and assurances if the Board were to grant the request for the PSA extension and customer account change, including a determination of the extent of the extension and a specific authorization to amend the PSA to reflect the change in customer. *Id.* at 9.

By electronic mail dated February 6, 2014, JCP&L notified FRIT that it was reserving its rights with respect to the PSA extension request notwithstanding the operational decisions that the Company might make with respect to an interconnection agreement with A&P/Pathmark and the request for authority to operate the solar facility constructed at the Project location specified in the PSA.

In its response letter dated February 27, 2014, JCP&L contends that Petitioner now acknowledges that it is attempting to switch customer account numbers, rather than asserting that a clerical error had been made regarding the account numbers when the PSA was executed in 2011. JCP&L further argues that Petitioner is incorrectly asserting that the identity of the customer is not important in this situation. JCP&L states that FRIT incorrectly contends that the identification of the customer is, essentially, interchangeable under the Program rules as long as the technical aspects of the proposed solar facility have not changed. JCP&L states that, at the time of its bid, Petitioner intentionally, not mistakenly, used the customer account number of L.A. Fitness to represent that L.A. Fitness was the customer for the Project. See JCP&L February 27 Letter at 2. Furthermore, at the time the Board's Order was issued on July 14, 2011, awarding the contract to Petitioner's predecessor in interest, the proposed Project involved or concerned L.A. Fitness. *Id.* at 3. JCP&L states that "[a]lthough no details are provided in the Petition or Petitioner's counsel's letters regarding L.A. Fitness, it appears that at no time prior to the bid closing date (June 11, 2011) or the issuance of the Board's Order did Petitioner have authorization to represent to JCP&L, NERA or the Board that it had any customer (either L.A. Fitness or Pathmark) for this Project." *Ibid.*

According to JCP&L, Petitioner never received a corrected or revised SRP (originally the registration number was SRP-03189, designating L.A. Fitness) for the Project from the OCE. In addition, Petitioner's registration for the L.A. Fitness project expired on July 28, 2012, and Petitioner subsequently received an entirely new SRP registration number, SRP-18687, which was issued on May 13, 2013, approximately 8 months after the filing of the petition, for the new Pathmark project. Ibid. JCP&L contends that these facts reemphasize JCP&L's concerns, expressed in its March 12, 2013, Letter regarding the existence of any viable project at the relevant times. JCP&L further contends that not before August 2013, more than two years after the bid closing date and the Board's Order, did Petitioner have any authority to represent that it had any customer whatsoever for the Project. JCP&L asserts that it is an entirely new project, with a different customer, A&P/Pathmark instead of L.A. Fitness, and a new project registration number (SRP-18687) that Petitioner now seeks to switch for the former proposed customer (L.A. Fitness) and the former, now-expired, project registration number (SRP-03189). Moreover, Petitioner did not actually commence construction of the Project until August 2013, when it finally had obtained the authority of a committed customer. However, Petitioner's registration for the L.A. Fitness project had already expired on July 28, 2012. According to JCP&L, Petitioner seeks to change its petition to allow the PSA extension to apply to a new project and a new customer, new registration number, and different location, albeit one in close proximity to the previous location.

JCP&L submitted an additional letter to the Board on March 12, 2014, stating that FRIT's February 28, 2014 Letter "does not address, and has not caused JCP&L to change, the Company's position with respect to the original Petition (and, as it has been amended), as such position was initially set forth in our letter dated March 12, 2013, and as further clarified in our subsequent letter dated February 27, 2014." JCP&L March 12, 2014 Letter at 1.

DISCUSSION AND FINDINGS

The Board has previously ruled upon requests for an extension made by participants in long-term SREC contracts. In reviewing such requests, the Board has looked first at whether the applicant could document significant progress toward completion of the project, and, second, whether the delay was unavoidable and unforeseeable at the time of the execution of the PSA. I/M/O Smart Energy Capital, LLC. – Extension Request for SREC Purchase and Sale Agreement with JCP&L, Dkt No. EO02010081V (February 10, 2012) ("Smart Energy"); I/M/O GLC(NJ) NACR2, LLC – Extension Request for SREC PSA with Rockland Electric Company, Docket No. EO02060555V (August 15, 2012) ("GLC"); I/M/O Dobco, Inc. – Request Extension for SREC Purchase Sale Agreement with JCP&L and I/M/O Request for Extensions of Project Completion in the SREC Registration Program REIPNR-06120, REIPNR-06121 REIPNR-06621 REIPNR-06631 REAPNO-06744 REIPNR-06745, Docket Nos. EO11050269V and EO08090840 (July 1, 2011).

In applying this two-part standard, the Board has looked at the representations made in the petitions as well as in the various supporting certifications concerning the reasons for the delays as well as the extent of the progress toward completion. FRIT has maintained that it has satisfied both prongs of this standard because the Project is now completed and the delays related to the A&P bankruptcy and their impact on Pathmark, the party identified by FRIT as the actual customer of the Project, were both unforeseeable and unavoidable. However, the petition and its requests for a "correction" of the customer account information (now acknowledged as an actual change in the customer) as well as an extension of the

Commencement Date, raises novel issues not previously addressed by the Board. In reviewing this request, the Board is guided by the Program rules and the knowledge that the payments under the PSA are ratepayer funded to the extent that the sale of the SRECs purchased under the PSA fails to cover the costs of the Program.

As described above, FRIT maintains that the Program rules do not prevent the substitution of a different customer for the customer identified in the Qualification Package as described in Article 4 of the Program RFP, as long as the location and other material aspects of a project remain the same as the project approved under the Program. FRIT has represented that nothing about the Project has changed except the customer. FRIT therefore concludes that the Board can simply apply the "Dobco" test and based on the fact that the Project is completed, extend the PSA.


The Board is not persuaded that the PSA for the Project can be extended by simple application of this standard. According to the petition, the customer account information was "erroneous" and the incorrect customer information included in the bid package and PSA was unknown to the Trust (or its assignee, FRIT) until sometime after the execution and assignment of the PSA. However, copies of e-mails inquiring about an "incorrect" account number appear to predate the execution of the PSA. See, attachments to JCP&L Letter of March 12, 2013. FRIT did not acknowledge that it was seeking an actual change in the customer for the Project until more than a year after the filing of the petition.


The integrity of the Program is dependent on the accuracy of the information provided by applicants, with applications that require certifications as to their accuracy for the protection of ratepayers. FRIT has represented that there are no other changes in the Project other than the identity of the customer. However, while the petition stated the Project size as 287.875 kW, FRIT's February 7, 2014 letter states that the Project size is now 290.16 kW. This change raises an additional concern as to the extent of the ratepayer commitment if the Board were to grant this extension given the SREC price in the PSA as contrasted with current market conditions. Additionally, as pointed out by JCP&L, the SRP number used in the application and PSA expired before the petition was even filed giving rise to the probability that there was no project maintained in the SRP for this PSA until after the filing of the petition when a new SRP number was issued to Pathmark as the customer whose account will be used for purposes of net metering, and determining (and crediting) the output of the Project. Finally, notwithstanding that the petition and Amendment asserted that the Project could and would not be built unless the PSA was extended, the Project (in its current form) has been built and has been given approval to operate and generate SRECs. See, JCP&L February 27 Letter, Attachment B.


Therefore, based on the circumstances described above, the Board **HEREBY DENIES** the Petitioner's request for a change in the customer under the PSA and an extension of the Commencement Date for the completion of the Project as described in the Program documents and the PSA.

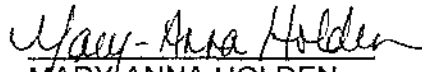
DATED: 4/24/14

BOARD OF PUBLIC UTILITIES
BY:


DIANNE SOLOMON
PRESIDENT

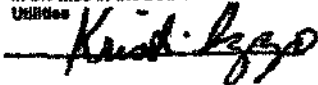

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COMMISSIONER


MARYANNA HOLDEN
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 FEDERAL REALTY INVESTMENT TRUST SOLAR PETITION TO
EXTEND THE SOLAR RENEWABLE ENERGY CERTIFICATE PURCHASE SALE
AGREEMENT WITH JERSEY CENTRAL POWER & LIGHT – REQUEST FOR EXTENSION -
DOCKET NO. EO12090809V

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