



STATE OF NEW JERSEY
Board of Public Utilities
44 South Clinton Avenue, 9th Floor
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Trenton, New Jersey 08625-0350
www.nj.gov/bpu/

CLEAN ENERGY

IN THE MATTER OF THE IMPLEMENTATION OF)	
L. 2012, C.24, THE SOLAR ACT OF 2012; AND)	DOCKET NO. EO12090832V
)	
IN THE MATTER OF THE IMPLEMENTATION OF)	
L. 2012, C. 24, <u>N.J.S.A. 48:3-87(Q) (R) AND (S)</u> –)	
PROCEEDINGS TO ESTABLISH THE PROCESSES)	
FOR DESIGNATING CERTAIN GRID-SUPPLY)	
PROJECTS AS CONNECTED TO THE DISTRIBUTION)	
SYSTEM – SUBSECTION (Q) ROUND TWO)	DOCKET NO. EO12090880V
APPLICATIONS)	
)	
BRICKYARD LLC – MOTION FOR)	
RECONSIDERATION)	DOCKET NO. QO13101020

Parties of Record:

Steven W. Griegel, Esq., for Brickyard LLC
David C. Frank, Esq., for Hanover Solar, LLC
Patrick J. McAuley, Esq., for G&S Wantage Solar, LLC

BY THE BOARD:

Brickyard LLC (“Brickyard”) has filed a motion for reconsideration (“Motion”) with the New Jersey Board of Public Utilities (“Board”) seeking reversal in part of the Board’s February 4, 2014 Orders (“February 4 Orders”) which approved, conditionally approved or denied applications under N.J.S.A. 48:3-87(q) (“Subsection q”). Brickyard argues that the Board should reconsider its decisions because of alleged irregularities in the Subsection q application process.

BACKGROUND AND APPLICATION PROCESS

On July 23, 2012, L. 2012, c. 24 (“Solar Act”) was signed into law by Governor Chris Christie. The Solar Act amends certain aspects of the statute governing generation, interconnection, and financing of renewable energy. Among other actions, the Solar Act requires the Board to conduct proceedings to establish new standards and to develop new programs to implement its directives. On October 4, 2012, under Docket No. EO12090832V, the Board directed Board

staff ("Staff") to initiate proceedings and convene a public stakeholder process to fulfill the directives of the Solar Act including those under Subsection q. Subsection q provides that:

During the energy years of 2014, 2015, and 2016, a solar electric power generation facility project that is not: (a) net metered; (b) an on-site generation facility; (c) qualified for net metering aggregation; or (d) certified as being located on a brownfield, on an area of historic fill or on a properly closed sanitary landfill facility, as provided pursuant to subsection t. of this section may file an application with the board for approval of a designation pursuant to this subsection that the facility is connected to the distribution system. An application filed pursuant to this subsection shall include a notice escrow of \$40,000 per megawatt of the proposed capacity of the facility. The board shall approve the designation if: the facility has filed a notice in writing with the board applying for designation pursuant to this subsection, together with the notice escrow; and the capacity of the facility, when added to the capacity of other facilities that have been previously approved for designation prior to the facility's filing under this subsection, does not exceed 80 megawatts in the aggregate for each year. The capacity of any one solar electric power supply project approved pursuant to this subsection shall not exceed 10 megawatts. No more than 90 days after its receipt of a completed application for designation pursuant to this subsection, the board shall approve, conditionally approve, or disapprove the application. The notice escrow shall be reimbursed to the facility in full upon either rejection by the board or the facility entering commercial operation, or shall be forfeited to the State if the facility is designated pursuant to this subsection but does not enter commercial operation pursuant to paragraph (2) of this subsection.

(2) If the proposed solar electric power generation facility does not commence commercial operations within two years following the date of the designation by the board pursuant to this subsection, the designation of the facility shall be deemed to be null and void, and the facility shall not be considered connected to the distribution system thereafter.

[N.J.S.A. 48:3-87(q)]

On November 9, 2012, the Board held a public hearing presided over by Commissioner Joseph Fiordaliso. In addition, the public was invited to submit written comments through November 23, 2012. Over one hundred stakeholders representing the electric distribution companies ("EDCs"), solar market participants, landfill developers, environmentalists, municipalities, and ratepayers participated in the public hearing and submitted comments. Based in part upon the comments received from the public, Staff developed an application and a form of escrow agreement to implement the requirements of Subsection q.

By Order dated May 9, 2013, the Board approved an application process, form of application, and form of escrow agreement to be used in connection with the Board's review of projects seeking designation as "connected to the distribution system" under Subsection q ("May 9 Order"). As stated above, Subsection q charges the Board with denying, approving or conditionally approving qualifying applications from certain proposed grid supply solar facilities

for designation as "connected to the distribution system" during energy years 2014, 2015, and 2016¹ within 90 days of receipt of a completed application.

As approved by the Board in the May 9 Order, to obtain final approval of a Subsection q application for Energy Year ("EY") 2014 or conditional approval of a Subsection q application for EY 2015 or 2016, the developer of a proposed facility must file a Subsection q application with the Board, with a copy provided to Rate Counsel, the proposed system must be 10 MW or less, be the only facility proposed for interconnection at a distinct interconnection point, the appropriate escrow amount must be noticed as properly deposited, and all appropriate Solar Renewable Energy Certificate ("SREC") registration requirements must be fulfilled. To obtain final approval of a Subsection q application for EY 2015 or EY 2016, the developer of a proposed facility must have submitted a Subsection q application, and received conditional approval from the Board; be the only facility interconnected at a distinct interconnection point, the facility must have completed construction and received authorization to energize; the completed system must be 10 MW or less; and all applicable SREC registration and escrow requirements must have been maintained throughout the conditional approval period.

The May 9 Order was posted on the Board and New Jersey Clean Energy Program ("NJCEP") websites, and circulated via the renewable energy ("RE") stakeholder email distribution lists on or about that date. The application attached to the May 9 Order provided detailed instructions for applicants seeking to be considered eligible pursuant to Subsection q. On May 13, 2013, Staff distributed a copy of "Frequently Asked Questions regarding Subsection q" ("FAQ") via the RE stakeholder email distribution list, and posted it to the NJCEP website. Applicants were advised in these materials that to qualify pursuant to Subsection q, applicants must file Notice according to the instructions to be considered for approval for a specific Energy Year:

Applications will be accepted by the Staff...toward making recommendations for approval on a first-in-time basis for each energy year until complete applications for 80 MWdc of total capacity have been received. Time of receipt for purposes of ranking applications will be determined based on initial receipt of this one-page Notice of Intent to Apply (Notice), provided that the applicant submits the full application as described.

On August 21, 2013 the Board approved twenty one (21) applications for designation as "connected to the distribution system" pursuant to Subsection q either on a final or conditional basis from the first application round held from May 15 to 31, 2013 ("Round One"). The Board approved eleven (11) projects seeking designation in Energy Year 2014 for 68.092 MWdc of capacity, conditionally approved seven (7) projects seeking designation in Energy Year 2015 for 31.242 MWdc of capacity, and conditionally approved three (3) projects seeking designation in Energy Year 2016 for 20.65 MWdc of capacity. The Board required approved applicants to submit or resubmit SREC Registration packages within two weeks of the effective date of the Order.

In the May 9 Order announcing the initial application period for Subsection q, the Board also stated that "additional application periods may be opened, if necessary." The Board announced in the August 21 Order that "an additional application process under Subsection q will be opened beginning on October 15, 2013," and directed Staff to notify stakeholders of the process to be used ("Round Two").

¹As defined in N.J.S.A. 48:3-51, an energy year ("EY") is the 12-month period from June 1 through May 31, numbered according to the calendar year in which it ends.

Following a process similar to that used in connection with Round One, on October 1, 2013, Staff distributed, via the RE stakeholder email distribution list and posted to the NJCEP and Board websites, the instructions for participating in Round Two. The instructions included a one-page "Notice" to be completed by applicants and sent as an attachment to the dedicated "QNotice" email address no earlier than 4:00 p.m. on October 15, 2013, and no later than 4:00 p.m. on October 31, 2013. Applicants were advised that they had either five days following the submission of a Notice or until October 31, 2013, whichever was earlier, to submit a completed application. Applicants were further instructed that an escrow agreement executed on or prior to October 15, 2013 using the form of agreement available on the Board and NJCEP websites evidencing a funded escrow account must be included with the application. Additionally, applicants were instructed that only one application would be accepted per project with a separate Notice submitted for each project.

Staff discussed the Subsection q application process and forms with RE stakeholders at the regularly scheduled stakeholder meeting on October 9, 2013. Following this meeting, a revised version of the FAQ was created and distributed on October 10, 2013 to reflect questions raised at the stakeholders meeting. On October 15, 2013, shortly before 4:00 p.m. per the internal clock of the Board's email servers, the "Qnotice@bpu.state.nj.us" email address was activated by the Board's Information Technology staff.

Twenty eight (28) Notices were received from 15:59:52 (as indicated by the internal clock of the Board's email server and 15:59:51 on the world clock displayed by the US Naval Observatory) through 1701:37 (5:01 p.m.) on Wednesday October 15, 2013. Twenty seven of the twenty eight projects that filed the Notice also executed the proper escrow agreements. One (1) applicant's Notice was received by the Board's server prior to the Board approved opening of the Subsection q application window of 4:00 p.m. on October 15, 2013, and one (1) applicant by letter dated January 13, 2014, withdrew one of its Subsection q applications and sought approval for release of the funds held in escrow attributable to this withdrawn project. All applications that fulfilled the Board approved application requirements which were approved or conditionally approved were addressed in one Order, and all applications which were denied were addressed in a separate Order, both dated February 4, 2014 (collectively, "February 4 Orders").

BRICKYARD'S APPLICATION

Brickyard's Notice was received by the Board's server on October 15, 2013, at 16:00:07 (4:00 p.m.) and was the thirteenth (13) Notice received. Kevin Skudera filed the Notice on behalf of Brickyard, and the application was received the following day, October 16, 2013. Brickyard sought conditional approval for EY 2015 for a 0.362 MWdc grid supply solar facility located at Block 224, Lot 17, 17.01, 17.02, and 10 on 100 Birdsall Rd. Farmingdale, NJ 07727, Monmouth County. The requirement for an escrow agreement had been fulfilled, and \$14,480.94 was appropriately placed in escrow with Investors Bank on October 3, 2013. However, six applicants whose Notices had arrived prior to Brickyard's Notice utilized, when added with conditionally approved applicants from Round One, the maximum aggregate capacity of 80 MW for EY 2015 available under the Solar Act. Thus, the Board denied Brickyard's application so as to not exceed the maximum capacity available under Subsection q for EY 2015.

MOTION FOR RECONSIDERATION

As previously stated, under cover letter dated March 3, 2014, Brickyard filed the Motion requesting that the Board review its February 4 Orders which approved and denied applications

for solar facility projects under Round Two of Subsection q. In the Motion, Brickyard contends that the applications of two other projects -- Hanover Solar, LLC ("Hanover") and G&S Wantage Solar, LLC ("Wantage") -- were approved in error. Brickyard asserts that these applications should have been disqualified because according to Brickyard's review, they sent their Notices earlier than 4:00 p.m. Brief of Brickyard, LLC in support of motion for reconsideration by Brickyard, LLC, (2014) (No. EO12090832V; EO12090880V) at p.2. ("Brickyard Brief") Additionally, Brickyard argues that the application system "operated unfairly and unevenly," claiming that substantially different processing delays and the use of two servers with different time clocks caused its application to be incorrectly denied. The Brickyard Brief also alleges that the State utilizes two email servers as their email servers, and that these two servers may not have been synchronized within one second of each other (at p. 4).

In support of the Motion, Brickyard submitted certifications of Kevin Skudera and David Falkenberg. Mr. Skudera's certification ("Skudera Certification") alleges that, by following the red-lettered instructions given, Brickyard was at a disadvantage to those applicants who sent their Notice prior to 4:00 p.m. exactly. Skudera Certification at ¶¶8. He also contends that the disqualification of another applicant whose Notice was received prior to 4:00 p.m. by the Board's servers, further strengthens Brickyard's argument, and that it would be "patently unfair" not to disqualify anyone who submitted Notice prior to 4:00 p.m. *Id.* at ¶7. Mr. Falkenberg's certification ("Falkenberg Certification") alleges that the Wantage and Hanover's Notices were sent twenty seven (27) seconds and one (1) second early, respectively. Also, the Falkenberg Certification presents a time stamp analysis to show that Brickyard's Notice was held by the system for six seconds, what Brickyard alleges is the longest time compared to the other submissions, and that some of the Notices were time stamped with times which "moved backwards." Falkenberg Certification at E and F.

Hanover and Wantage submitted opposition to the Motion. Hanover first makes a procedural argument, claiming that Brickyard's Motion is not timely, as a motion for reconsideration under N.J.A.C. 14:1-8.6(a) must be filed within fifteen days of the issuance of the Order. Hanover Brief at I. Hanover also asserts that the time stamp given upon receipt of the Notice by the Board's server is the only relevant time stamp. *Id.* at II.d. Hanover further contends that Brickyard's argument is inconsistent, as Brickyard relies on the very time stamps it attempts to discredit to disqualify other applicants. *Id.* at III. Additionally, Hanover argues that its approval need not be reopened, as the application was approved based on the guidelines of the Subsection q application process. *Id.* at IV. Wantage argues that there is no implication that the time the email was sent is relevant, as the time the Board server receives the email is the controlling time according to the instructions. Letter from Patrick J. McAuley, representing Wantage, to Kristi Izzo, Secretary to the Board (March 13, 2014) at 2. Wantage additionally contends that a stakeholders meeting clarified that the time of receipt was the relevant time for determination of priority, not the time the Notice was sent. *Ibid.*

Brickyard submitted a reply ("Reply"), with additional certifications ("Skudera Certification 2" and "Falkenberg Certification 2"), and two exhibits ("Exhibit A and Exhibit B"). Brickyard contends that Exhibit A supports its position concerning the importance of the time the Notice was sent, as per the instructions for Round 2 which highlighted that Notices should not be sent before 4:00 p.m. in red lettering. According to Brickyard, Exhibit B shows time stamps from servers other than those of the Board, which Brickyard maintains confirm that the Wantage and Hanover Notices were sent prior to 4:00 p.m. Both the Reply and the supporting certifications assert that the stakeholder meeting did not imply the send time was irrelevant. Rather, according to Brickyard, the meeting fortified its position that the send time was an important qualifying factor. Skudera Certification 2 at ¶2.

DISCUSSION AND FINDING

The Board must determine whether, under the standards of N.J.A.C. 14:1-8.6 and the relevant case law, to grant reconsideration as requested by Brickyard. N.J.A.C. 14:1-8.6 requires that a request for rehearing or reconsideration be done by a motion that enumerates the alleged errors of law or fact, and where an opportunity is sought to introduce additional evidence, that evidence shall be stated briefly with the reasons for failing to provide it previously. The Motion substantially conforms to the rule. However, the Board also looks to the relevant case law that sets out the substantive standard which must be met.

Generally, a party should not seek reconsideration merely based upon dissatisfaction with a decision. D'Atria v. D'Atria, 242 N.J. Super. 392, 401 (Ch. Div. 1990). Rather, reconsideration is reserved for those cases where (1) the decision is based upon a "palpably incorrect or irrational basis;" or (2) it is obvious that the finder of fact did not consider, or failed to appreciate, the significance of probative, competent evidence. E.g., Cummings v. Bahr, 295 N.J. Super. 374, 384 (App. Div. 1996). The moving party must show that the action was arbitrary, capricious or unreasonable. D'Atria, supra, 242 N.J. Super. at 401. This Board will not modify an Order in the absence of a showing that the Board's action constituted an injustice or that the Board misunderstood or failed to take note of a significant element of fact or law.

As a threshold matter, the Board considers Hanover's claim that the Motion should be dismissed as untimely. Under N.J.A.C. 14:1-8.6(a), "[a] motion for rehearing, re-argument or reconsideration of a proceeding may be filed by any party within 15 days after the issuance of any final decision or order by the Board." Here, the Order was issued by the Board on February 4, 2014 and served within a few days, but was not effective until February 14, 2014. Brickyard filed the Motion on March 4, 2014, citing the effective date of the Order as the start of the fifteen day window, noting that the fifteenth and sixteenth days were a Saturday and Sunday, and that the Board was closed due to inclement weather the Monday thereafter. The Board does not agree that the period for the filing of a motion for reconsideration runs from any date other than the date of issuance of the Order. However, under N.J.S.A. 48:2-40, the Board can "extend, revoke or modify an order" at any time and, therefore, has determined to address the Motion on the merits.

First, Brickyard contends that Hanover and Wantage were incorrectly approved because, allegedly, their Notices were sent prior to the official start time of the application process. Brickyard asserts that Exhibit A to the Reply presents evidence of the importance of the time of submission in the original instructions for the Round 2 application process, and Exhibit B to the Reply shows the alleged time infractions through time stamps given to the emails by various receiving servers. Brickyard asserts that, because time stamps from these servers (not of the Board) show the messages were transported between them seconds (or fractions of a second) before 4:00:00 p.m., and because the instructions used red lettering on the section which includes the term "send," the two applicants should be disqualified, thus freeing up the capacity needed to cover Brickyard's proposed solar facility within the strictures of Subsection q. Brickyard Brief at p. 2.

As previously described, both Hanover and Wantage contest this allegation. Hanover contends that its email was sent on October 15, 2013 at 4:00 p.m., and that this is clearly viewable by looking at the "sent" line of its email provided in Exhibit B to the Falkenberg Certification. Hanover Brief at II.b. Hanover also contends that the time the email was sent, and the time stamps given by any server other than the Board's, are irrelevant, as only the Board receipt time matters. Id. at II.d. Wantage also cites a stakeholders' meeting discussion as clarifying that the

time the email is received is the governing time, not the time the email is sent. Wantage at p. 2. Brickyard has contended in its reply that this is not the case, and that the meeting actually fortified the importance of the time the Notice is sent. Skudera Certification 2 at ¶2.

The Board does not find Brickyard's argument to be persuasive. The instructions for Round 2 clearly stated that "No Notice will be *accepted* prior to 4 p.m. on October 15, 2013. *The time stamp of the NJBPU's server will control.*" (Emphasis added). The instructions are fairly straightforward that the time the Board's servers receive the email would qualify as the time the Notice is submitted. This is consistent with the Board's decision to disqualify an application based on the time the Notice was received by the Board's server, where no consideration was given to the time the message was sent. This was also specifically addressed in the updated FAQ circulated to all interested parties. In answer to a question about application of the "first in time rule," the response was that "[f]irst in time is ranked by receipt of the Notice on our email server subject to fulfillment of all other criteria." The February 4 Order denying Brickyard's application reiterated this fact, and also concluded that using time of receipt comports with the practice under the Court rules. See Comments to R. 1:5-6[2].

Accordingly, the Board is not persuaded that Brickyard's proffered evidence concerning time of receipt of other applicants' Notices by other servers is probative and relevant to the ranking of the Subsection q applications in Round 2. Since servers may be synchronized to different clocks, may experience lag, and because all individual computers are not specifically synchronized to the same clocks, there is a high possibility of variance in time from one system to the next. This is the very reason the instructions use the Board's servers to determine the time of receipt of the Notice. The clocks of the Board's servers were synchronized with the US Naval Observatory clock, and therefore, are the only servers which provide a useable and consistent time stamp for the submissions.

Brickyard proposes the analogy of a false start in a race to describe an early transmission and why the time sent should control. Brickyard Reply at 1. The Board is not persuaded by this analogy. A race is a controlled and structured event with all participants beginning on equal footing. Due to varying processing speeds from server to server and differently-synchronized clocks as mentioned above, it is highly impractical to use the time stamps given by any system other than those of the Board. The Board is not concerned with a varying starting point; rather, it focuses on the finish line which is clearly defined and is the most controlled variable in the situation at hand. This position is even further supported by the fluctuations present in time stamps in Brickyard's own Exhibit B to the Reply. The emails from both Hanover and Wantage are both explicitly marked with a send time of 4:00 p.m.; however, the time stamps of email servers have given both emails time stamps a few seconds before that send time. The lack of consistency between various servers, and even the argument that some emails were recorded as reversing in time (as pointed out in the Falkenberg Certification) supports the Board's decision to follow only the time markings given by its servers as a more than reasonable decision.

Finally, Brickyard contends that different processing speeds for the received Notices and an unusually long holding time for its Notice put it at an unfair disadvantage. Brickyard Brief at 3. Brickyard alleges that its Notice was received prior to the Notices of other approved projects, but that "the State's internal computers held Brickyard LLC'[s] e-mail longer than others, for six seconds." Ibid. The situation would not be any different if the Board had required physical delivery of the Notices and various roadways had varying levels of traffic that increased or decreased travel time. In either case, the Board has no control over delays encountered

between the dispatch of a Notice and its receipt at the Board and these delays are irrelevant to which Notice arrives first.

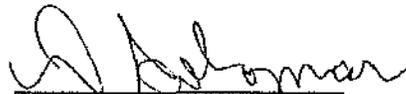
The Board, like other state agencies, utilizes the Office of Information Technology ("OIT") as its provider/gateway to the Internet. The Board has no control and does not oversee the details of OIT's inner workings or infrastructure. The OIT and the Board share a relationship not unlike that between private consumers and their utility ISP entity. Therefore, the Board based its decision on the time the Board's exchange servers accepted and marked the emails as delivered.

Accordingly, the Board **FINDS** that nothing in Brickyard's motion for reconsideration causes or requires the Board to reconsider its February 4 Orders, denying the application of Brickyard pursuant to restrictions placed on aggregate megawatt capacity for EY 2015 under Subsection q, and approving Hanover and Wantage's applications under Round 2 of Subsection q. Brickyard's request for reconsideration fails to provide any legal basis which would compel the Board to reverse its decisions. For the aforementioned reasons, the Board **HEREBY DENIES** Brickyard's motion for reconsideration of its February 4 Orders approving and denying applications for Round Two under Subsection q of the Solar Act.

The effective date of this Order is August 3, 2014.

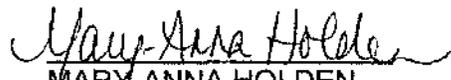
DATED: 7/23/14

BOARD OF PUBLIC UTILITIES
BY:


DIANNE SOLOMON
PRESIDENT


JEANNE M. FOX
COMMISSIONER

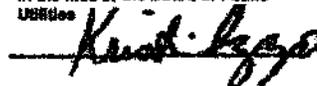

JOSEPH L. FIORDALISO
COMMISSIONER


MARY-ANNA 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



Docket No. EO12090832V – In the Matter of the Implementation of L. 2012, C. 24,
The Solar Act of 2012; and

Docket No. EO12090880V – In the Matter of the Implementation of L. 2012, C. 24, N.J.S.A.
48:3-87(q), (r) and (s) – Proceedings to Establish the Processes for Designating Certain Grid-
Supply Projects as Connected to the Distribution System – Subsection (q)
Round Two Applications

Docket No. QO13101020 – Brickyard Solar Farms, LLC – Motion for Reconsideration

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