



STATE OF NEW JERSEY
Board of Public Utilities
44 South Clinton Avenue, 3rd Floor, Suite 314
Post Office Box 350
Trenton, New Jersey 08625-0350
www.nj.gov/bpu/

CLEAN ENERGY

IN THE MATTER OF THE PETITION OF THE COOPER)
HOSPITAL SYSTEM, A NEW JERSEY NON-PROFIT)
CORPORATION, FOR A DECLARATORY RULING)
PURSUANT TO N.J.S.A. 52:14B-8 AND N.J.S.A. 2A:16-)
50 ET SEQ.)

ORDER

DOCKET NO. QO16070727

Parties of Record:

Steven S. Goldenberg, Esq., Fox Rothschild LLP, for Cooper Health System
Stefanie A. Brand, Esq., Director, New Jersey Division of Rate Counsel

BY THE BOARD:

FACTUAL AND PROCEDURAL BACKGROUND

By letter dated July 26, 2016, the Cooper Health System ("Cooper" or "Petitioner") submitted a Petition to the Board of Public Utilities ("Board") for a declaratory ruling that its proposed combined heat and power ("CHP") project ("Cooper CHP project") will constitute an "on-site generation facility" within the meaning of N.J.S.A. 48:3-51 and N.J.S.A. 48:3-77 "and is therefore entitled to all benefits conferred upon such facilities by the Electric Discount and Energy Competition Act, N.J.S.A. 48:3-49 et seq. ("EDECA") and New Jersey law." (Petition at ¶ 1.) Cooper also requests that it be exempt from the payment of the Societal Benefits Charge ("SBC") on all electricity generated on-site by the Cooper CHP Project and supplied to Cooper and its affiliates located within the Cooper campus. Id. at ¶ 24(2)(a). Additionally, Cooper requests exemption from payment of the New Jersey Sales and Use Tax ("SUT"), N.J.S.A. 54:32B-1 et seq. Id. ¶ 24(2)(b).

Cooper is a New Jersey 501(c)(3) corporation headquartered in Camden, New Jersey which operates a multi-part health care delivery system. (Petition at ¶ 1.) According to the Petition, Cooper serves as both the Level One Trauma Center and the Medical Coordination Center for the region. Id. at ¶ 2. As such, Petitioner claims it provides essential health services to the community and region that must be available at all times and without interruption. Ibid.

Cooper's Camden campus includes Cooper University Hospital ("Hospital"), which comprises three connected buildings: the Roberts Pavilion, the Keleman, and the Dorrance buildings. Id. at ¶ 3. These three buildings are located on a property that is owned by Cooper and commonly known as One Cooper Plaza. Ibid. The Petition states that Cooper also provides health services through three other buildings, owned by two affiliated non-profit entities. Id. at ¶ 4-6.

Two Cooper Plaza houses the MD Anderson Cancer Center at Cooper ("Cancer Center") and is located across Haddon Avenue from One Cooper Plaza. Two Cooper Plaza is owned by Cooper and the Cooper Cancer Center ("CCI").¹ (Petition at ¶ 4.) CCI is a 509(a)(3) supporting organization for Cooper. Ibid. Three Cooper Plaza, located on a property directly contiguous to Two Cooper Plaza, houses various outpatient facilities, a Gamma Knife Treatment unit, and an attached parking garage. (Petition at ¶ 5.) Three Cooper Plaza is owned by Cooper Medical Services, Inc. ("CMS"). According to the Petition, CMS is a non-profit 509(c)(3) supporting organization for Cooper and Cooper is the sole member of CMS. Ibid. Lastly, the Education and Research Building ("E&R Building"), is located at 401-403 Haddon Avenue on the other side of the thoroughfare from Two Cooper Plaza and Three Cooper Plaza. (Petition at ¶ 6.) The E&R Building is also owned by CMS. Ibid. In response to discovery requests, Petitioner provided maps illustrating the above-described configuration of the various properties.

Petitioner states that Cooper was directly and adversely impacted by Superstorm Sandy and, as a result, determined to enhance the reliability of its infrastructure by installing a 4.4 MW CHP plant at One Cooper Plaza. (Petition at ¶ 10-12.) Petitioner describes the Cooper CHP project as a natural gas-fired generator which will also utilize waste heat and will operate in conjunction with the back-up diesel generators already installed. (Petition at ¶ 12, 14.) The Cooper CHP project design would require re-configuring the energy infrastructure of the four properties such that the Cooper project could operate as "a primary, resilient source of power" for Two Cooper Plaza, Three Cooper Plaza, and the E&R Building. (Petition at ¶ 10, 11.) Under the proposed Cooper CHP project design, the infrastructure changes would include new underground conduits and conductors which will cross Haddon Avenue twice to interconnect Two Cooper Plaza, Three Cooper Plaza, and the E&R Building to the CHP facility. (Petition at ¶ 13.)

Petitioner indicates that each of the facilities intended to attach to and utilize the Cooper CHP project's generation provides essential health care services that must be maintained without interruption through emergencies such as major storm events and power outages. (Petition at ¶ 8.) Petitioner urges the vital nature of the services provided by the Cooper health delivery system and asserts that the Energy Master Plan ("EMP") supports the proposed Cooper CHP project. (Petition at ¶ 20, 21.)

On October 3, 2016, the Division of Rate Counsel ("Rate Counsel") filed comments ("Comments") on the Petition, arguing that the Board has no authority to rule upon the applicability of the SUT exemption. (Comments at p. 5-7.) Rate Counsel also challenges Petitioners' assertion that Cooper is a single entity, with CCI and CMS acting as non-profit 509(a)(3) supporting organizations for Cooper. (Comments at p. 9.) Specifically, Rate Counsel interprets the definition of a "supporting organization" under Internal Revenue Service regulation section 509(a)(3) to mean only that an organization provides services solely to the other public charities – not that CCI, CMS and Cooper are one and the same. (Comments at p. 9.)

Hence, Rate Counsel contends that Petitioner must provide, in verified or certified form, further documentation to support a finding that the Cooper CHP Project will serve a single end use customer. Id. at p.10,13. Rate Counsel further questions Petitioner's assertion that the properties are "contiguous" under the "onsite generation facility" definition under N.J.S.A. 48:3-51, for purposes of the Cooper CHP Project's delivery of electric and thermal output. Ibid. Rate Counsel submits that Petitioner must verify or certify the materials it has provided in response to

¹ According to the Petition, Cooper and the Cooper Foundation, Inc., a 501(c)(3) organization, are the sole members of CCI. The Petition further states that Cooper has majority membership on the Corporation's Board of Trustees and that the Cooper Foundation exists "to promote Cooper's charitable, scientific and educational programs[.]" (Petition at ¶ 4.)

Rate Counsel's formal and informal discovery before the Board can determine whether the contiguity requirement of "onsite generation facility" under N.J.S.A. 48:3-51 has been met. Id. at p. 11. In addition, Rate Counsel referred to the Board's net metering rules, N.J.A.C. 14:8-4.1(b)(1)(i) and (ii), as a guide for analyzing the issue of contiguity. Ibid.

On October 14, 2016, Petitioner filed a letter memorandum ("October 14 Letter") and supporting Certification of Gary J. Lesneski, Senior Executive Vice President General Counsel for Cooper ("Lesneski Certification"), in response to Rate Counsel's Comments in this matter. In the October 14 Letter, Petitioner alleges that the interrelationships between and among Cooper and the other property owners are sufficient to make the "Cooper Campus" a single, integrated health care delivery system of which Cooper is the direct or indirect owner. (October 14 Letter at p. 2.) Cooper further posits that the IRS information cited to by Rate Counsel underscores the strong and direct relationship that exists between the Cooper entities for purpose of the IRS Code, and establishes the symbiotic, integrated relationship between the respective entities, where the sole purpose of the supporting organizations is to act as one with the supported organization to effect the mission of the supported organization. Id. at p. 2. Cooper further emphasizes the integrated nature of Cooper by citing to the Lesneski Certification, wherein Mr. Lesneski explained that "One Cooper Plaza, Two Cooper Plaza, Three Cooper Plaza, and the E&R Building function as an integrated health services campus." (Lesneski Certification at ¶ 5(g).) In addition, Mr. Lesneski certified that Cooper has Management and Administrative Services Agreements with CCI and CMS by which Cooper provides all staff, facilities, equipment, marketing, and administrative services and that Cooper files a consolidated tax return for Cooper, CCI, CMS, and its other affiliates. Id. at ¶ 5(e). Cooper also pays for the utility bills for the properties. Id. at ¶ 5(f). Furthermore, Mr. Lesneski certified to the truth of all discovery provided. Id. at ¶ 4.

Cooper also disputes Rate Counsel's proposed use of the Board's net metering rules as a guide to construing the statutory definition of "on-site generation facility." Ibid. Cooper further maintains that a Board ruling upon SUT would be appropriate because EDECA's definition of on-site generation is almost identical to the definition of "self-generation unit" under New Jersey tax law. Id. at p. 5.

DISCUSSION AND FINDINGS

Petitioner requests that the Board declare that the proposed Cooper CHP project constitutes an "on-site generation facility" within the meaning of N.J.S.A. 48:3-51, N.J.S.A. 48:3-77, and N.J.S.A. 54:32B-2. Petitioner further requests a ruling that Petitioner may avail itself of the benefits provided by EDECA and New Jersey law, as follows: that Petitioner and its affiliates be exempt from payment of the SBC and from payment of the SUT; that Petitioner and its affiliates be authorized to own and maintain the CHP plant and all associated infrastructure; and that neither Petitioner nor its affiliates be deemed a public utility. (Petition at ¶ 24.) After a careful review of the record, and as set out in more detail below, the Board **FINDS** that the proposed facility does constitute an on-site generation facility within the meaning of N.J.S.A. 48:3-51. The Board further **FINDS** that, in accordance with the provisions of N.J.S.A. 48:3-77(b), the SBC shall not be imposed on the electricity generated by the Cooper CHP Project for use by Cooper as outlined in the Petition and summarized above.

N.J.S.A. 48:3-51 defines "on-site generation facility" as follows:

"On-site generation facility" means a generation facility, including, but not limited to, a generation facility that produces Class I or Class II renewable energy, and equipment and services appurtenant to electric sales by such facility to the end

use customer located on the property or on property contiguous to the property on which the end user is located. An on-site generation facility shall not be considered a public utility. The property of the end use customer and the property on which the on-site generation facility is located shall be considered contiguous if they are geographically located next to each other, but may be otherwise separated by an easement, public thoroughfare, transportation or utility-owned right-of-way, or if the end use customer is purchasing thermal energy services produced by the on-site generation facility, for use for heating or cooling, or both, regardless of whether the customer is located on property that is separated from the property on which the on-site generation facility is located by more than one easement, public thoroughfare, or transportation or utility-owned right-of-way.

[N.J.S.A. 48:3-51].

As noted by Rate Counsel, to find that a facility meets this definition, the Board must determine that an end use customer is located on property contiguous to the generation facility. (Comments at p. 8-9.) Rate Counsel goes on to suggest that the Board's net metering rules, which reference the official tax map as the determinant of contiguity, are an appropriate guide to determining contiguity under N.J.S.A. 48:3-51. The Board disagrees. First, Petitioner seeks a determination that it qualifies for on-site generation and, as Rate Counsel concedes, the proposed Cooper CHP Project does not involve a net metered project. (Comments at p. 11.) Second, the net metering rule upon which Rate Counsel asks the Board to rely addresses the applicable criteria to determine whether class I renewable energy can be deemed "generated on the customer's side of the meter," N.J.A.C. 14:8-4.1(b)(1)(i) and (ii), which is not at issue here.

After reviewing the record in the light of N.J.S.A. 48:3-51, the Board **FINDS** that the end use properties are contiguous to the proposed Cooper CHP project for purposes of its electric and thermal output. For purposes of thermal output, the property containing the CHP and the property to which the thermal output is delivered may be separated by "more than one easement, public thoroughfare, or transportation or utility-owned right -of-way..." N.J.S.A. 48:3-51. For purposes of electric output, a property is "contiguous" if it is located "geographically next to" the property containing the CHP, except that it "may be otherwise separated by an easement, public thoroughfare, transportation, or utility-owned right of way..." Ibid.

In response to discovery propounded by Rate Counsel, Petitioner supplied a map showing the proposed routing of the CHP services; a map prepared by Langan, an engineering and environmental firm, which includes the Cooper CHP Project, the buildings it would service, the electric and steam lines to provide service, and the public thoroughfares to be crossed; and a boundary survey, also prepared by Langan, detailing the legal boundaries of each of the parcels making up the properties at issue. (Responses to RCR-1, 2, and 6.) With respect to electricity output, these maps establish that each of the properties to be served conforms to the statutory requirement that it be separated from the proposed facility by no more than "an easement, public thoroughfare, transportation or utility-owned right-of-way." Specifically, the CHP plant will be located on One Cooper Plaza, which is separated from Two Cooper Plaza and Three Cooper Plaza by Haddon Avenue and, but for that thoroughfare, is located geographically next to those properties. The E&R Building is also separated from Cooper Plaza One by a single public thoroughfare, Benson Street and, but for that separation, would also be geographically located next to Cooper Plaza One. In brief, the record demonstrates that, as configured, the proposed Cooper CHP project meets the statutory definition of "contiguous" cited in N.J.S.A. 48:3-51.

With respect to the thermal output, the Board likewise **FINDS** that the maps provided by Petitioner reveal that the contiguity provision of N.J.S.A. 48:3-51 has been met. This is because

Section 51 expressly allows for the relevant property to be “more than one easement, public thoroughfare, or transportation or utility-owned right-of-way” away from the generation facility when thermal energy is being delivered. N.J.S.A. 48:3-51.

Nevertheless, Rate Counsel avers that the record does not support a finding that Petitioner’s CHP plant is an on-site generation facility. (Comments at p. 8.) Specifically, Rate Counsel asserts that N.J.S.A. 48:3-51 references “the end use customer” and “the customer” while the Petition allegedly identifies three end use customers: Cooper, CCI, and CMS. (Comments at p. 9.) Rate Counsel further argues that allowing an on-site generator to sell to multiple customers could result in “a proliferation of mini-utilities” that could bypass the SBC as well as other surcharges intended to be borne by all ratepayers. Ibid. The Board will thus consider whether the proposed facility will serve an end-use customer.

Based on an application of the facts in this matter to the applicable statutory construct, the Board finds that there is sufficient evidence to find that, under the current configuration, Cooper is an end-use customer. As certified by the Petitioner, all of the entities and properties to which the Cooper CHP project will provide energy are operated as a single integrated health care delivery system. (October 14 Letter at p. 2; Lesneski Certification at ¶ 5(g).) All facilities are managed and staffed by Petitioner. (Petition at ¶ 1, 7; Lesneski Certification at ¶ 5(a)-(e).) Petitioner submits a consolidated tax return, which includes Cooper, CCI, and CMS. (Lesneski Certification at ¶ 5(e).) Cooper also pays all utility bills for the properties. Id. at ¶ 5(f). Ownership of the properties not directly owned by Cooper rests with “an affiliate corporation” identified in the Petition as a 501(c)(3) entity and “a 501(9)(a) supporting organization of which Cooper is the sole and controlling member.” (Petition at ¶ 4, 5; Lesneski Certification at ¶ 5(c), (e).) Petitioner also offers that its affiliates’ identities as 501(9)(a) entities under the IRS regulations further establishes the symbiotic, integrated relationship between the respective entities, where the sole purpose of the supporting organizations is to act as one with the supported organization to effect the mission of the supported organization. (October 14 Letter at p. 2.) Additionally, Petitioner seeks to secure its resiliency in order to continue to provide crucial medical services in the event of an extreme weather event or other emergency situation. (Petition at ¶ 10.) Under these circumstances, the Board **FINDS** that the proposed Cooper CHP Project will serve an end-use customer in accordance with N.J.S.A. 48:3-51. Based on the Board’s finding that Cooper is an “end-use customer,” we **FIND** that Rate Counsel’s concern regarding the sale of on-site generation to multiple customers resulting in a proliferation of mini-utilities does not apply here.

The Board further notes that the December 2015 New Jersey Energy Master Plan Update (“EMP Update”) supports the Cooper CHP project.² The EMP Update includes a new section devoted to “the increased priority that the State is placing on improving the resiliency of our energy infrastructure to respond and recover from significant disruptions caused by severe weather events.” EMP Update at p. 55. Among the areas highlighted are increasing the use of Distributed Energy Resources (“DER”) which can operate in “Island Mode.”³ Id. at p. 51. The Board also notes that Petitioner’s proposed facility is just such a DER and that, as a medical delivery system, it will serve “critical infrastructures and, by extension, the communities they serve” as recommended in the EMP. Id. at p. 53. The EMP Update also recommends encouraging the development of DER, and “local energy resiliency measures” through Energy Resilience Bank (“ERB”) grants such as that which has been awarded to Petitioner. Id. at p. 51-

² New Jersey Energy Master Plan – Update, New Jersey Board of Public Utilities and New Jersey Department of Environmental Protection (December 2015).

³ ‘Islanding’ refers to the condition when a portion of the grid becomes temporarily isolated from the main grid but remains energized by its own distributed generation resource(s).” IEEE Standard 1547.

53.⁴ The Board supports the goals of the EMP. N.J.S.A. 52:27F-15 (the actions of State departments, agencies and commissions "shall to the maximum extent practicable and feasible conform to the [EMP].")

Based on the above, the Board **FINDS** that the Cooper CHP Project, as currently planned, meets the definition of an on-site generation facility in accordance with N.J.S.A. 48:3-51. As the Board has found that the Cooper CHP Project is an on-site generation facility, the Board **FINDS** that Petitioner shall not be considered a public utility of the State of New Jersey pursuant to N.J.S.A. 48:3-51.

With respect to Petitioner's request for exemption pursuant to N.J.S.A. 48:3-77 from payment of the SBC on the electricity generated on-site by the Cooper CHP Project and supplied to Cooper and its affiliates located within the Cooper campus, the Board **FINDS** that Petitioner is entitled to that relief. N.J.S.A. 48:3-77(b) provides that the SBC, or its equivalent, shall not be imposed on the electricity sold solely to the on-site customer of an on-site generating facility, except pursuant to subsection c. of that section.⁵

Having met the criteria outlined in N.J.S.A. 48:3-77(b), the Board **FINDS** that Cooper is exempt from payment of the SBC for the electricity generated solely for use by Cooper, subject to the conditions outlined in N.J.S.A. 48:3-77(c).

Based on the above, the Board **HEREBY APPROVES** the Petition with respect to the status of the proposed CHP facility as an on-site generation facility, subject to the following conditions:

1. This declaratory ruling applies only to the specific circumstances as detailed in this Petition and the current record before the Board;
2. Any changes to the corporate structure of Cooper, including but not limited to sale of the property, change in ownership of one or all corporate entities that comprise the Cooper facility - Cooper Health System, the Cooper Cancer Center, and Cooper Medical Services, Inc. - will render this Order null and void and require the filing of a new or amended Petition for Board determination as to whether the on-site generation provision of N.J.S.A. 48:3-51, or exemption from SBC Charges under N.J.S.A. 48:3-77(b) should apply; and

⁴ The ERB is an energy resiliency financing program managed by the EDA with federal Community Development Block Grant funds. The focus of the ERB is on increasing energy efficiency and resiliency, specifically the three major types of distributed energy resources: CHP, fuel cells, and battery storage. The Board provides technical assistance to the ERB.

⁵ Subsection (c) provides that:

"Upon finding that generation from on-site generation facilities installed subsequent to the starting date of retail competition as provided in subsection a. of section 5 of P.L.1999, c.23 (C.48:3-53) has, in the aggregate, displaced customer purchases from an electric public utility by an amount such that the kilowatt hours distributed by the electric public utility have been reduced to an amount equal to 92.5 percent of the 1999 kilowatt hours distributed by the electric public utility, the board shall impose, except as provided in subsection d. of this section, the charges listed in subsections a., b., and c. of this section on the on-site customer. Such charges shall not be levied on any power consumption that is displaced by an on-site generation facility that is installed before the date of such finding."

[N.J.S.A. 48:3-77(b).]

3. Any change to the routing or configuration of the project, including but not limited to, changes to where the on-site generation facility is located, change to the type of CHP service (e.g. thermal or electricity) provided to a Cooper building, any change to or addition or deletion of a property that receives heat or electricity from the Cooper CHP project, or re-routing of the project through any additional easements, public thoroughfares, transportation or utility-owned right-of-ways, will render this Order null and void and require the filing of a new or amended Petition for Board determination as to whether the on-site generation provision of N.J.S.A. 48:3-51, or exemption from SBC charges under N.J.S.A. 48:3-77(b) should apply.

The Board **FURTHER ORDERS** Petitioner to comply with all applicable laws.

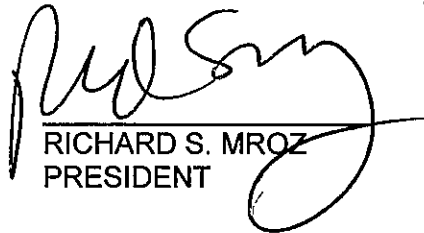
Lastly, the Board **DENIES** without prejudice Petitioner's request for a ruling that it is exempt from the SUT. The Board concurs with Rate Counsel that jurisdiction over taxation and tax exemptions is vested in the New Jersey Department of Treasury and, thus, lacking jurisdiction to rule on that inquiry, the Board will not reach this issue. The Petitioner may pursue relief from the Department of Treasury or elsewhere as appropriate.

The effective date of this order is May 1, 2017.

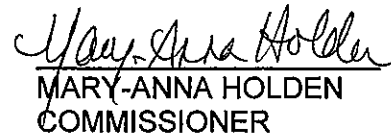
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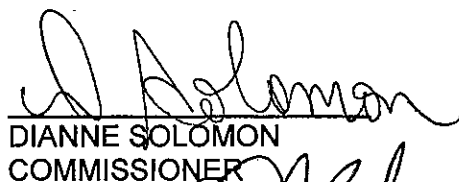
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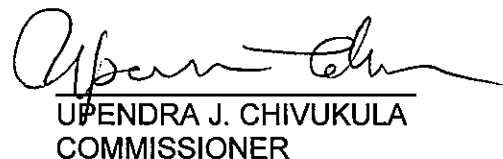
BOARD OF PUBLIC UTILITIES
BY:


RICHARD S. MROZ
PRESIDENT

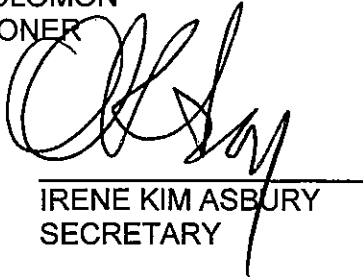

JOSEPH L. FIORDALISO
COMMISSIONER


MARY-ANNA HOLDEN
COMMISSIONER

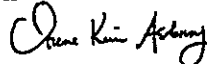

DIANNE SOLOMON
COMMISSIONER


UPENDRA J. CHIVUKULA
COMMISSIONER

ATTEST:


IRENE KIM ASBURY
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 THE COOPER HOSPITAL SYSTEM, A NEW
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N.J.S.A. 52:14B-8 AND N.J.S.A. 2A:16-50 ET SEQ. DOCKET NO. QO16070727

SERVICE LIST

Steven S. Goldenberg, Esq.
Fox Rothschild, LLP
997 Lenox Drive, Building 3
Lawrenceville, NJ 08648-2311
sgoldenberg@foxrothschild.com

Stefanie A. Brand, Esq., Director
Division of Rate Counsel
140 East Front Street, 4th Floor
Post Office Box 003
Trenton, NJ 08625-0003
sbrand@rpa.state.nj.us

Carolyn McIntosh
Department of Law & Public Safety
Division of Law
124 Halsey Street
Post Office Box 45029
Newark, NJ 07101-45029
Carolyn.McIntosh@dol.lps.state.nj.us

Emma Yao Xiao
Department of Law & Public Safety
Division of Law
124 Halsey Street
Post Office Box 45029
Newark, NJ 07101-45029
emma.xiao@dol.lps.state.nj.us

Caroline Vachier
Department of Law & Public Safety
Division of Law
124 Halsey Street
Post Office Box 45029
Newark, NJ 07101-45029
caroline.vachier@dol.lps.state.nj.us

Benjamin S. Hunter
Board of Public Utilities
44 South Clinton Avenue, 3rd Floor
Post Office Box 350
Trenton, NJ 08625-0350
benjamin.hunter@bpu.nj.gov

Irene Kim Asbury, Esq.
Secretary of the Board
Board of Public Utilities
44 South Clinton Avenue, 3rd Floor, Suite 314
Post Office Box 350
Trenton, NJ 08625-0350
Irene.asbury@bpu.nj.gov

Andrew McNally, Esq.
Chief Counsel
Board of Public Utilities
44 South Clinton Avenue, 3rd Floor, Suite 314
Post Office Box 350
Trenton, NJ 08625-0350
Andrew.McNally@bpu.nj.gov

Rachel Boylan, Esq.
Counsel's Office
Board of Public Utilities
44 South Clinton Avenue, 3rd Floor, Suite 314
Post Office Box 350
Trenton, NJ 08625-0350
Rachel.boylan@bpu.nj.gov

Marisa Slaten, Director
Office of Clean Energy
Board of Public Utilities
44 South Clinton Avenue, 3rd Floor, Suite 314
Post Office Box 350
Trenton, NJ 08625-0350
Marisa.Slaten@bpu.nj.gov

Allison Mitchell
Office of Clean Energy
Board of Public Utilities
44 South Clinton Avenue, 3rd Floor, Suite 314
Post Office Box 350
Trenton, NJ 08625-0350
Allison.Mitchell@bpu.nj.gov