



STATE OF NEW JERSEY
Board of Public Utilities
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www.nj.gov/bpu/

CLEAN ENERGY

- IN THE MATTER OF THE IMPLEMENTATION OF L. 2012, C. 24, THE SOLAR ACT OF 2012; DOCKET NO. EO12090832V
IN THE MATTER OF THE IMPLEMENTATION OF L. 2012, C. 24, THE SOLAR ACT OF 2012, 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; AND DOCKET NO. EO12090880V
IN THE MATTER OF THE IMPLEMENTATION OF N.J.S.A. 48:3-87(R), DESIGNATING GRID-SUPPLY PROJECTS AS CONNECTED TO THE DISTRIBUTION SYSTEM - ORDER CONDITIONALLY APPROVING APPLICATIONS PURSUANT TO N.J.A.C. 14:8-2.4(G) - HCE RIVER ROAD SOLAR LLC, AC1-016 DOCKET NO. QO16020130
IN THE MATTER OF THE IMPLEMENTATION OF N.J.S.A. 48:3-87(R), DESIGNATING GRID-SUPPLY PROJECTS AS CONNECTED TO THE DISTRIBUTION SYSTEM - ORDER CONDITIONALLY APPROVING APPLICATIONS PURSUANT TO N.J.A.C. 14:8-2.4(G) - HCE STRYKERS ROAD SOLAR LLC, AC1-018 DOCKET NO. QO19030342
IN THE MATTER OF THE IMPLEMENTATION OF N.J.S.A. 48:3-87(R), DESIGNATING GRID-SUPPLY PROJECTS AS CONNECTED TO THE DISTRIBUTION SYSTEM - ORDER CONDITIONALLY APPROVING APPLICATIONS PURSUANT TO N.J.A.C. 14:8-2.4(G) - HCE STRYKERS ROAD SOLAR LLC, AC1-018 DOCKET NO. QO16020130
IN THE MATTER OF THE VERIFIED PETITION OF HCE RIVER ROAD SOLAR, LLC - FOR THE RETURN OF CERTAIN ESCROW DEPOSITS HELD BY THE NEW JERSEY BOARD OF PUBLIC UTILITIES DOCKET NO. QO19030341
IN THE MATTER OF THE VERIFIED PETITION OF HCE RIVER ROAD SOLAR, LLC - FOR THE RETURN OF CERTAIN ESCROW DEPOSITS HELD BY THE NEW JERSEY BOARD OF PUBLIC UTILITIES DOCKET NO. QO20080564
IN THE MATTER OF THE VERIFIED PETITION OF HCE STRYKERS ROAD SOLAR, LLC - FOR THE RETURN OF CERTAIN ESCROW DEPOSITS HELD BY THE NEW JERSEY BOARD OF PUBLIC UTILITIES DOCKET NO. QO20080565

Parties of Record:

Stefanie A. Brand, Esq., Director, New Jersey Division of Rate Counsel
Edward W. Purcell, Esq., Price, Meese, Shulman and D'Arminio

BY THE BOARD:

In this Order, the Board of Public Utilities (“Board”) considers the recommendation of Board staff (“Staff”) on the petitions (“Petition”) of HCE River Road Solar, LLC and HCE Strykers Road Solar, LLC (“Petitioner” or “HCE”)<sup>1</sup> for the return of the escrow deposits that Petitioner provided as part of its applications seeking designation as “connected to the distribution system” pursuant to N.J.A.C. 14:8-2.4(g) and N.J.S.A. 48:3-87(r) (“Subsection r”).

## **BACKGROUND**

N.J.A.C. 14:8-2.4(g) was promulgated by the Board to implement Subsection r, signed into law on July 23, 2012 as part of P.L. 2012, c. 24 (“the Solar Act”). The history of the Subsection r program is long and detailed; it is laid out in the Order that approved Petitioner’s applications.<sup>2</sup>

On May 23, 2018, Governor Murphy signed P.L. 2018, c. 17 (the “Clean Energy Act” or “2018 Act”), which mandated significant changes to policies underlying the state’s solar market. This Order addresses one provision of the 2018 Act – focused on the furnishing of an escrow – that is dispositive of Petitioner’s claims.

## **Implementation of Subsection r following Enactment of the Clean Energy Act**

On January 17, 2019, in light of the Clean Energy Act and the steps taken to implement it, the Board issued an Order directing Staff to “seek comment from all interested parties on the further steps to be taken with respect to the suspended Subsection r Rules and the Expressions of Interest received pursuant to those rules prior to their suspension.”<sup>3</sup> Staff posted a Request for Comments on Subsection r Capacity on February 11, 2019 with comments due on February 22, 2019.<sup>4</sup>

Comments were received from representatives of ten entities, including solar developers, electric distribution companies, and solar trade associations. Among the solar developers that submitted comments was Holocene Clean Energy, the parent company of the two solar entities seeking a refund. On February 27, 2019, the Board considered these comments in authorizing Staff to open an application window for certain qualifying proposed solar electric generation facilities pursuant to Subsection r.<sup>5</sup> The Board approved the application and application process recommended by Staff and directed Staff to take applications from Subsection r projects with valid Expressions of Interest (“EOI”) until March 14, 2019.

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<sup>1</sup> Both River Road Solar, LLC and Strykers Road Solar, LLC have the same parent company and are represented by the same attorney. The petitioner and the petitions are thus referred to in the singular.

<sup>2</sup> In The Matter Of The Implementation Of N.J.S.A. 48:3-87(R), Designating Grid-Supply Projects As Connected To The Distribution System - Order Conditionally Approving Applications Pursuant To N.J.A.C. 14:8-2.4(G), HCE River Road Solar LLC, AC1-016, Dkt. Nos. QO16020130 and QO19030341, Order dated March 29, 2019 (“March 29 Order”).

<sup>3</sup> I/M/O the Implementation of N.J.S.A. 48:3-87(r), Designating Grid-Supply Projects as Connected to the Distribution System – Order Implementing Certain Provisions of N.J.A.C. 14:8-2.4(g), Dkt. No. QO16020130, Order dated January 17, 2019 (“January 17 Order”). The January 17 Order also closed the Generic Solar Proceeding.

<sup>4</sup> <https://www.njcleanenergy.com/files/file/Notice%20of%20Opportunity%20to%20Review%20Subsection%20r%20Applications%20for%20Designation%2003-15-19.pdf> (“Subsection r Capacity Notice”).

<sup>5</sup> In The Matter Of The Implementation Of N.J.S.A. 48:3-87(R), Designating Grid-Supply Projects As Connected To The Distribution System - Order Implementing Certain Provisions Of N.J.A.C. 14:8-2.4(G) For Energy Year 2020, Dkt. No. QO16020130, Order dated March 6, 2019 (“March 6 Order”).

On March 1, 2019, Staff distributed the Subsection r application and escrow agreement via email to the parties responding to Staff's request for public comments on the Subsection r issued February 11, 2019, and posted the application form on its webpage and on the webpage of the New Jersey Clean Energy Program. Any company applying for eligibility for SRECs under N.J.S.A. 48:3-87(r) and that had a valid EOI submitted in 2016 or 2017 was required to submit a completed application package by March 14, 2019.

A total of five (5) Subsection r applications were received before the 5:00 p.m. March 14, 2019 deadline. Three of these applications were submitted by Petitioner. By Order dated March 29, 2019, the Board conditionally approved all five applications.<sup>6</sup>

## **PROCEDURAL HISTORY**

On June 1, 2016, HCE filed EOIs for its River Road and Stryker Road projects pursuant to the Order in which the Board established an interim process for applications pursuant to Subsection r.<sup>7</sup>

On March 14, 2019, HCE filed the applications for the two projects, further described below.

### **River Road**

The 11.085 MWdc River Road solar generation project was proposed to be located in Burlington Township, New Jersey.<sup>8,9</sup> On its application, Petitioner indicated that the project had been designed but that no further development, site clearing, construction or materials delivery had occurred. Construction was anticipated to be initiated and materials delivered onsite on July 1, 2019, with system interconnection anticipated to be completed December 31, 2019. Project financing was reported to be "in process," with no SREC offtake contract executed to date. Following review of the application and the attached maps, Staff recommended that the Board conditionally approve the application. Staff further recommended that should the project not commence commercial operations prior to achievement of the 5.1% Milestone, the Board find that the project may be eligible for an alternative incentive to be determined by the Board in an upcoming proceeding.

### **Stryker Road**

The 1.76 MWdc Strykers Road solar generation project was proposed to be located in Lopatcong Township, New Jersey.<sup>10</sup> On its application, Petitioner indicated that the project had been designed but that no further development, site clearing, construction or materials delivery had occurred. Construction was anticipated to be initiated and materials delivered onsite on July 1,

<sup>6</sup> In The Matter Of The Implementation Of N.J.S.A. 48:3-87(R), Designating Grid-Supply Projects As Connected To The Distribution System - Order Conditionally Approving Applications Pursuant To N.J.A.C. 14:8-2.4(G), HCE River Road Solar LLC, AC1-016, Dkt. Nos. QO16020130 and QO19030341, Order dated March 29, 2019 ("March 29 Order").

<sup>7</sup> I/M/O the Implementation of N.J.S.A. 48:3-87(r), Designating Grid-Supply Projects as connected to the Distribution System, Dkt. No. QO16020130, Order dated May 25, 2016.

<sup>8</sup> [https://www.njcleanenergy.com/files/file/Solar%20Act/Application\\_of\\_River\\_Road\\_Solar\\_LLC\\_Redacted.pdf](https://www.njcleanenergy.com/files/file/Solar%20Act/Application_of_River_Road_Solar_LLC_Redacted.pdf)

<sup>9</sup> HCE filed two other applications pursuant to Subsection r on the same day, one of which is considered in a companion order on this Agenda. HCE Strykers Road Solar LLC, AC1-018, Dkt. No. QO19030341.

<sup>10</sup> [https://www.njcleanenergy.com/files/file/Solar%20Act/Redacted%20Application\\_if\\_Stryker\\_Road\\_Solar\\_LLC\\_Redacted.pdf](https://www.njcleanenergy.com/files/file/Solar%20Act/Redacted%20Application_if_Stryker_Road_Solar_LLC_Redacted.pdf)

2019, with system interconnection anticipated to be completed by December 31, 2019. Project financing was reported to be “in process,” with no SREC offtake contract executed to date. Following review of the application and the attached maps, Staff recommended that the Board conditionally approve it. Staff further recommended that should the project not commence commercial operations prior to the achievement of the 5.1% Milestone, the Board find that the project may be eligible for an alternative incentive to be determined by the Board in an upcoming proceeding.

On September 1, 2020, HCE filed one petition seeking the return of the \$40,000 escrow for River Road and one petition seeking the return of the \$40,000 escrow for Stryker Road, despite the fact that it had not commenced commercial operations at either facility.

### **Clean Energy Act**

Among many other changes, the Clean Energy Act added an escrow requirement for all solar generation facilities over twenty-five (25) kilowatts that filed applications after the 2018 Act’s enactment. The Board was directed to require an escrow in the amount of \$40 per kilowatt of DC nameplate capacity of the facility, not to exceed \$40,000. “The notice escrow amount shall be reimbursed to the applicant in full upon either denial of the application by the board or upon commencement of commercial operation of the solar electric power generation facility. The escrow amount shall be forfeited to the State if the facility is designated as connected to the distribution system pursuant to this subsection but does not commence commercial operation within two years following the date of the designation by the board.” N.J.S.A. 48:3-87(d)(3). The Board codified this requirement in its rules with an amendment adopted on June 17, 2019. N.J.A.C. 14:8-2.4(r); 51 N.J.R. 1058(a).

### **Transition Incentive Program**

On December 26, 2018, Staff issued a straw proposal and request for comments on the New Jersey Solar Transition, SREC Transition Principles, and certain Program Assumptions (“Straw Proposal”). The Straw Proposal also announced a stakeholder process for implementing an SREC Transition in compliance with statutory requirements. In introducing the Straw Proposal, Staff stated that it would be guided by seven SREC Transition Principles, of which the first was to “[p]rovide maximum benefit to ratepayers at the lowest cost.”<sup>11</sup>

On April 8, 2019, the Board issued a Staff Stakeholder Notice which proposed the creation of a separate Transition Incentive, which would facilitate the transition between the Legacy SREC Program and the Successor program and invited stakeholders to participate in two Stakeholder Workshops led by the Consulting Team, held on May 2, 2019 and June 14, 2019. At these workshops, the Consulting Team collected feedback on potential policy design for the Transition Incentive, and shared preliminary modeling assumptions and results for discussion with stakeholders.

On July 10, 2019, the Board issued an Order<sup>12</sup> stating that a recommendation on the incentive structure, payment mechanics, and terms and conditions for the Transition Incentive program would be presented to the Board following development through the Solar Transition public stakeholder process.

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<sup>11</sup>[https://njcleanenergy.com/files/file/Renewable\\_Programs/Solar%20Transition%20Straw%20Proposal%20-%202018-12-26%20clean%20\(final\).pdf](https://njcleanenergy.com/files/file/Renewable_Programs/Solar%20Transition%20Straw%20Proposal%20-%202018-12-26%20clean%20(final).pdf)

<sup>12</sup> In re A New Jersey Solar Transition Pursuant to P.L. 2018, C.17, Dkt. No. QO19010068, Order dated July 10, 2019 (“July 10 Order”).

On August 22, 2019, Staff issued a Straw Proposal regarding the 2019-2020 Transition Incentive (“Transition Incentive Straw” or “TI Straw”), accompanied by the consultant’s *New Jersey Transition Incentive Supporting Analysis and Recommendations*.<sup>13</sup>

In the TI Straw, Staff proposed the development of a Transition Incentive intended to be based on the creation and sale of Transition Renewable Energy Certificates (“TRECs”) in conjunction with specific TREC Factors. The TREC Factors were intended to ‘right-size’ the value of a TREC to the specific incentive needs of specific types of distributed solar photovoltaic projects.

Following the concurrent release of the Second Staff Straw Proposal and the Consultant TI report, Staff offered several opportunities for public stakeholder comment, including:

- a webinar held August 23, 2019, to outline the TI Straw; and
- two public hearings, on August 28, 2019, and September 4, 2019, to allow stakeholders to provide comments on the TI Straw in person.

Staff also scheduled a follow-up stakeholder Technical Session with the Consulting Team on September 6, 2019.

As a result of the concerns raised, Staff issued a revised Staff Straw Proposal (“October Revised TI Straw”) on October 3, 2019. On October 11, 2019, another stakeholder meeting was held, with the Consulting Team present via webinar to answer questions. Written comments from stakeholders on the October Revised TI Straw were accepted through October 18, 2019 (extended from the deadline previously set for September 13, 2019).

On November 14, 2019, Staff issued an updated straw proposal, which included additional revisions to the Consulting Team’s analysis (“November Revised TI Straw”) and sought further public comment. The November Revised TI Straw reflected Staff’s consideration of the Consulting Team’s most recent modeling results, verbal comments made by stakeholders in public meetings, and written comments submitted to the Board by October 18, 2019. Written comments from stakeholders on the November Revised TI Straw were accepted through November 27, 2019.

On December 6, 2019, the Board issued an Order laying out the Transition Incentive program and the proposed incentive.<sup>14</sup>

## **STAFF RECOMMENDATION**

The history summarized above indicates that Petitioner has no support in the record for the relief it seeks. Petitioner attempts to argue that the Board had a duty to provide it with “specific” information on the level of future incentives. No such duty exists. Moreover, the history of Subsection r implementation, as well as the procedural history of this matter, demonstrate that Petitioner made a fully informed decision to proceed with its project despite having requested and been denied specific information and despite being aware that no timetable for the provision of such guidance existed.

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<sup>13</sup> Available at the following link: <https://njcleanenergy.com/renewable-energy/program-updates-and-background-information/solar-proceedings>

<sup>14</sup> I/M/O A New Jersey Solar Transition Pursuant to P.L. 2018, C.17, Dkt. No. QO19010068, Order dated December 6, 2019 (“Transition Incentive Order”).

Petitioner represents that the Board provided no guidance by way of rule or order as to what the incentive following the SREC program would be prior to opening up the Subsection r application process. Petition at Par. 13. By “guidance,” Petitioner appears to mean information specific enough to determine whether or not to proceed with the project. As described above, the process of developing the Transition Incentive program was an iterative one. While open and transparent, it was not designed to produce results on the timeline most convenient to a specific market segment such as Subsection r, much less the timeline preferred by an individual developer.

Petitioner states that its project became “economically infeasible” as a result of the TREC factor assigned to grid supply projects, into which category Subsection r projects like that of Petitioner fall. Petition at Par. 24. Petitioner implies that this factor came as a complete surprise to it when the TI Order was issued in December 2019 and that up until that time, Petitioner had no reason to suspect that the successor incentive to the SREC might not be as favorable as Petitioner wished. Petition at Pars. 19-22. However, as previously noted, the process of developing the Transition Incentive was open and transparent; moreover, it was referenced in the Board’s response to Petitioner’s comments on the Subsection r Capacity Notice and in the Order approving Petitioner’s application. March 6 Order at 5; March 29 Order at 5. Petitioner knew or should have known that a vigorous public debate over the appropriate incentive for the various market segments had begun a year earlier with the issuance of the first Staff Straw.

Moreover, Petitioner is poorly placed to contend that it has been harmed by not knowing the incentive that would be available to it until months after it had submitted its application. The record reflects that Petitioner was well aware of the uncertainty surrounding the amount of the incentive that would be available to it prior to submitting its application. Petitioner first sought this specific information prior to filing its application. In its comments on the Subsection r Capacity Notice, Petitioner asserted that the Board had an obligation to provide such information and went on to state that in the absence of such information, “there will likely be no project financing available to continue to support a solar program in New Jersey”.<sup>15</sup> In response, the March 6 Order noted that Staff had undertaken a stakeholder process toward developing a transition incentive, including the dates of some of the past and ongoing stakeholder engagement proceedings, and that “[e]ligibility, terms and conditions for a transition incentive program will be components of the program design.” March 6 Order at 14.

Thus, Petitioner asked for specific incentive information prior to committing itself to an application and received an unambiguous response that no specific information was available. Moreover, that response makes no mention of a date certain by which such specifics would be available. Notwithstanding this knowledge, and despite its expressed belief that “there will likely be no project financing available,” Petitioner chose to file an application less than two weeks later. Having made an informed decision to gamble that the as-yet-unknown transition incentive would be favorable to it, Petitioner cannot now cry “foul.” Staff notes, furthermore, that Petitioner successfully developed one of the three proposed projects approved by the March 29 Order, achieving commercial operation within the two-year time frame, and that two other developers whose projects were approved in the March 29 Order have also done so.<sup>16</sup>

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<sup>15</sup>[https://njcleanenergy.com/files/file/Renewable\\_Programs/Subsectio%20rRequestforCommentsdue022219.pdf](https://njcleanenergy.com/files/file/Renewable_Programs/Subsectio%20rRequestforCommentsdue022219.pdf) at p. 29.

<sup>16</sup> HCE Campus Drive Solar LLC, AC1-017 DOCKET NO. QO19030343 – completed in August 2020, eligible for TI program. Lakehurst Solar LLC, AB1-138 Dkt. No. QO19030344 – completed in time to be eligible for the SRP. Ben Moreell Solar Farm LLC, AA2-184 Dkt. No. QO19030345, completed in time to be eligible for the SRP.

Petitioner also contends that its project was “undermined by the Board’s rules on effectuating an early market closure.” Petition at Par. 25. The rules to which Petitioner refers were adopted by the Board to effectuate the Clean Energy Act’s directive to close the SRP once the Board determined that 5.1 percent of the kilowatt hours installed in the State by each electric power supplier and each basic generation supplier came from solar electric power generators connected to the distribution system (“5.1% Milestone”). Pursuant to these rules and their process for determining when the 5.1% Milestone had been attained, the Board closed the SRP on April 30, 2020. According to Petitioner, it was not aware of these rules until the issuance of the rule proposal on August 7, 2019. “This market closure effectively eliminated Petitioner’s ability to commence commercial operations. Had Petitioner been aware of this rule, it would not have applied to participate in the subsection r program because the practical effect of this change undermines the economic viability of Petitioner’s project.” Id.

There are several flaws in this logic. First, Petitioner claims that had it been aware of the rule proposal, it would not have submitted an application pursuant to Subsection r. However, while Petitioner may not have known the exact language in the rule proposal prior to the Board’s approval of it, Petitioner was certainly aware before filing its application of the methodology being used to estimate attainment of the 5.1% Milestone, as well as the possibility that it would be attained before the project at issue attained commercial operations. While the March 6 Order notes that “[i]t is impossible at this time to determine when this milestone will be attained,” that Order also states that “[i]t is likely that the milestone will be attained prior to EY21.” March 6 Order at 13, 9. The Order goes on to explain that this estimate “is based upon the assumption of constant retail sales at EY18’s 73.6 million megawatt hours and solar productivity of 1200 MWh per MW installed.” March 6 Order at 16.

In addition, Petitioner’s own comments in the record and the responses that it received indicate its awareness both that “applications approved after October 29, 2018 must commence commercial operations prior to the milestone’s attainment” and that its own projects were unlikely to make that cut-off. Responding to a comment from the Petitioner that all remaining Subsection r projects should be allowed to apply for SREC eligibility and keep that eligibility, the Board pointed out that “[p]articipants in the SREC market have been placed on notice that registrations and applications deemed complete after October 29, 2018 must commence commercial operations prior to the Board’s determination that the 5.1% milestone has been achieved in order to be eligible for SRECs.”<sup>17</sup> In addition to all of the above, Staff issued monthly reports on installed capacity in the SRP and capacity in the SRP development pipeline, and the Board published its proposed methodology as early as February 2019 with an estimated date of attainment of the 5.1% Milestone.<sup>18</sup> The methodology for calculation of percentage of retail sales attained from solar electricity was the subject of rulemaking and monthly reports issued starting in January 2020 until the closure of the SRP on April 30, 2020.

In brief, Staff believes that the record demonstrates that Petitioner filed its application to develop this project with full understanding that the project might not be completed in time to be eligible for the SRP; that the transition incentive to follow the SRP was not yet known; and that no representations as to the amount of this incentive or the time at which it would be known had been made.

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<sup>17</sup>[https://njcleanenergy.com/files/file/Renewable\\_Programs/Subsectio%20rRequestforCommentsdue022219.pdf](https://njcleanenergy.com/files/file/Renewable_Programs/Subsectio%20rRequestforCommentsdue022219.pdf), generally pp. 27-29; March 6 Order at 13.

<sup>18</sup> In The Matter Of The Modification Of The Solar Renewable Portfolio Standard And Solar Alternative Compliance Payment Schedules And The Reduction Of The Qualification Life For Solar Renewable Energy Certificates For Solar Facilities, Dkt. No. QO18070698, Order dated February 27, 2019.

Petitioner also makes several legal and policy arguments. According to Petitioner, the statutory escrow requirement does not apply to it. Petitioner also makes arguments under the Fifth and Fourteenth Amendments of the United States Constitution. Petitioner contends that keeping its escrow payment would deprive Petitioner of its property without the “due process of law” guaranteed by the Fourteenth Amendment. Petitioner also points to the Fifth Amendment’s prohibition on taking property for public use “without just compensation” and claims that the forfeiture of its escrow would be such a “taking.”

Staff recommends that the Board find all of Petitioner’s arguments to be without merit and deny the petitions.

## **DISCUSSION AND FINDINGS**

The Board concurs with Staff’s reasoning and its recommendation. The Board will also discuss Petitioner’s legal and policy arguments. The most important of these is Petitioner’s attempt to evade the statutory requirement that an escrow payment must be forfeited if a project does not achieve commercial operations within two years. The language is unambiguous; there is no room for any discretion on the part of the Board, and the Board does not have any authority to waive the statute.

Petitioner argues that the Board should not apply the statutory escrow requirement to its application because Petitioner had submitted its EOI in 2016, prior to the enactment of the Clean Energy Act. Petition at Par. 31. However, Petitioner errs in conflating the EOI with its application. While a valid and timely filed EOI was a prerequisite for filing an application pursuant to Subsection r, the EOI in no way replaced the application. Most importantly, the submittal of an EOI did not commit the person submitting it to completion or even commencement of a solar facility.<sup>19</sup> The acceptance of Petitioner’s application, on the other hand, did by its terms commit Petitioner to achieving commercial operations prior to the expiration of the two-year term or else to losing its escrow. The March 29 Order notes this statutory requirement very clearly: “Additionally, the Clean Energy Act mandates that if an approved solar electric generation facility does not commence commercial operations within two years of the Board Order conditionally approving that facility’s designation as connected to the distribution system, the facility must forfeit its escrow.” March 29 Order at 12 (citing N.J.S.A. 48:3-87(d)(3)).

Moreover, Petitioner was aware that this requirement would be imposed before the filing of the application. The Subsection r Capacity Notice included a question on what additional information should be required to demonstrate a reasonable likelihood of commencing commercial operations within two years. In response, Petitioner stated that the forfeiture of the required escrow would be sufficient surety.<sup>20</sup> The Board **FINDS** that Petitioner’s argument that the statutory escrow requirement should not apply to it lacks merit.

Petitioner also makes two constitutional arguments. First, Petitioner contends that keeping its escrow payment would violate the Fourteenth Amendment because Petitioner would be deprived of its property “without due process of law.” Petition at Par. 32. Petitioner asserts that it was “required” to submit applications and escrow deposits before the Board issued the rules which, according to the Petition, “determined whether or not those projects would be economically

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<sup>19</sup> 19 EOIs were submitted; 5 applications were filed.

<sup>20</sup> [https://njcleanenergy.com/files/file/Renewable\\_Programs/Subsectio%20rRequestforCommentsdue022219.pdf](https://njcleanenergy.com/files/file/Renewable_Programs/Subsectio%20rRequestforCommentsdue022219.pdf) at p. 30.

viable.” Thus, reasons Petitioner, its failure to achieve commercial operations prior to the close of the SRP was the fault of the Board and the Board cannot “take the escrow deposits as a penalty for a failure that it itself caused.” Id.

The Board notes, first, that Petitioner was not “required” to submit its application; as discussed above, Petitioner made a fully informed choice to submit its application. Petitioner’s characterization of the rule proposal approved in August 2019 as determining whether or not its project would be viable is likewise incorrect. As previously explained, Petitioner was aware of the methodology later codified in the rule proposal prior to submitting its application and knew or should have known that its project would not be eligible for the SRP. The Board **FINDS** that Petitioner made a fully informed decision to make an escrow deposit for its project after being advised that the SRP would be closing and that the incentive to follow it was not yet known. The Board **CONCLUDES** that Petitioner’s Fourteenth Amendment rights were not violated.

Petitioner also makes a Fifth Amendment argument, claiming that applying the statutory escrow requirement to Petitioner’s project would constitute an illegal takings under that Amendment. Petition at Par. 33. According to Petitioner, “the State, by operation of law, seeks to deprive Petitioner of its property by way of penalty provision and without compensating same for its loss.” Id. The Board notes that the escrow requirement is not a “penalty provision,” but rather, and as recognized by Petitioner in comments submitted prior to filing its application, a means of ensuring a “reasonable likelihood of commencing commercial operations within two years[.]”<sup>21</sup> There is no loss for which to compensate Petitioner, since Petitioner received the opportunity for which it applied: the chance to construct its project and earn an incentive. The Board **FINDS** that the retention of the escrow payment by the State is the legitimate consequence of a legal obligation voluntarily entered into by Petitioner and **CONCLUDES** that there was no violation of Petitioner’s Fifth Amendment rights.

Finally, the Board addresses Petitioner’s claim that “equitable considerations” should move the Board to grant the return of its escrow. According to Petitioner, the Board’s actions rather than its own caused it to miss its deadline so that it should not be held accountable for this failure. Petition at Par. 30. In support of its argument, Petitioner cites to a prior Board order that granted an extension under a separate provision of the Solar Act. I/M/O the Petition of True Green Capital Management LLC for an Extension of the Designation Date Set Forth in the Matter of Augusta Solar Farms (Docket No. QO13101014) Pursuant to N.J.S.A. 48:3-87(Q), Dkt. Nos. EO12090832V and QO16020108, Order dated February 24, 2016 (“True Green Order”). Id.

Petitioner has mischaracterized both its own actions and those of the Board. As has been discussed previously, the Board is not responsible for Petitioner’s failure to achieve commercial operations prior to the 5.1% Milestone. Petitioner chose to file an application pursuant to Subsection r in the knowledge that the SRP was coming to an end and that the next incentive program and amount were not yet known. Petitioner’s informed choice is not the Board’s responsibility. Nor is this matter analogous to that ruled upon in the True Green Order, where the “prolonged, unforeseen and particular delays” referred to were extreme weather and delays on the part of that petitioner’s contract partners. The Board, indeed, stated that “these actions and efforts of the Petitioner in response, are unique to these circumstances.” Id. at p. 4. The Board **FINDS** that no equitable considerations support the return of Petitioner’s escrow.

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<sup>21</sup> Subsection r Capacity Notice;

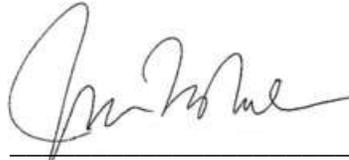
[https://njcleanenergy.com/files/file/Renewable\\_Programs/Subsectio%20rRequestforCommentsdue022219.pdf](https://njcleanenergy.com/files/file/Renewable_Programs/Subsectio%20rRequestforCommentsdue022219.pdf) at p. 30.

After review of the record and Staff's recommendations, and based on the above findings, the Board **HEREBY DENIES** the petitions.

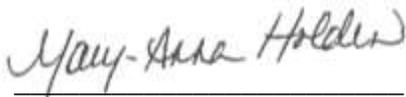
This Order will take effect on December 26, 2020.

DATED: December 16, 2020

BOARD OF PUBLIC UTILITIES  
BY:



JOSEPH L. FIORDALISO  
PRESIDENT



MARY-ANNA HOLDEN  
COMMISSIONER



DIANNE SOLOMON  
COMMISSIONER

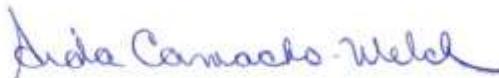


UPENDRA J. CHIVUKULA  
COMMISSIONER



ROBERT M. GORDON  
COMMISSIONER

ATTEST:



AIDA CAMACHO-WELCH  
SECRETARY

IN THE MATTER OF THE IMPLEMENTATION OF L. 2012, C. 24, THE SOLAR ACT OF 2012;

IN THE MATTER OF THE IMPLEMENTATION OF L. 2012, C. 24, THE SOLAR ACT OF 2012, 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;

IN THE MATTER OF THE IMPLEMENTATION OF N.J.S.A. 48:3-87(R), DESIGNATING GRID-SUPPLY PROJECTS AS CONNECTED TO THE DISTRIBUTION SYSTEM - ORDER IMPLEMENTING CERTAIN PROVISIONS OF N.J.A.C. 14:8-2.4(G) - HCE RIVER ROAD SOLAR LLC, AC1-016

IN THE MATTER OF THE IMPLEMENTATION OF N.J.S.A. 48:3-87(R), DESIGNATING GRID-SUPPLY PROJECTS AS CONNECTED TO THE DISTRIBUTION SYSTEM - ORDER CONDITIONALLY APPROVING APPLICATIONS PURSUANT TO N.J.A.C. 14:8-2.4(G) - HCE STRYKERS ROAD SOLAR LLC, AC1-018

IN THE MATTER OF THE VERIFIED PETITION OF HCE RIVER ROAD SOLAR, LLC - FOR THE RETURN OF CERTAIN ESCROW DEPOSITS HELD BY THE NEW JERSEY BOARD OF PUBLIC UTILITIES

IN THE MATTER OF THE VERIFIED PETITION OF HCE STRYKERS ROAD SOLAR, LLC - FOR THE RETURN OF CERTAIN ESCROW DEPOSITS HELD BY THE NEW JERSEY BOARD OF PUBLIC UTILITIES

DOCKET NOS. EO12090832V, EO1200880V, QO16020130, QO19030342, QO19030341, QO20080564, QO20080565

**SERVICE LIST**

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