Agenda Date: 5/10/23
Agenda Item: 8B

STATE OF NEW JERSEY
Board of Public Utilities
44 South Clinton Avenue, 1st Floor
Trenton, New Jersey 08625-0350
www.nj.gov/bpu/

CLEAN ENERGY

IN THE MATTER OF THE PETITION OF INTERSECT ENERGY, LLC FOR A DECLARATORY RULING PURSUANT TO N.J.S.A. 52:14B-8 AND N.J.S.A. 2A:16-50 ET SEQ. - SOLAR CONDOMINIUMS – AND FOR ANCILLARY RELIEF	)))))	ORDER DENYING THE PETITION DOCKET NO. QO22050351

Parties of Record:

Brian O. Lipman, Esq., Director, New Jersey Division of Rate Counsel
Steven S. Goldenberg, on behalf of Intersect Energy, LLC

BY THE BOARD:

On May 23, 2022, Intersect Energy, LLC ("Petitioner") filed a petition with the New Jersey Board of Public Utilities ("Board" or "BPU") seeking declaratory rulings about the viability of condominium-type property ownership for the purposes of net metering and solar development for public entities, with the additional objective of qualifying solar projects developed under this solar condominium construct for benefits conferred on projects participating in the Successor Solar Incentive ("SuSI") Program ("Petition"). Petitioner further urged the Board to reconsider the method by which the maximum capacity size of remote net metered ("RNM") solar facilities is determined, a method which was established in the Board's September 17, 2018 Order governing remote net metering.[1]

BACKGROUND AND PROCEDURAL HISTORY

The Clean Energy Act of 2018 was signed into law by Governor Murphy on May 23, 2018. L. 2018, c. 17 ("Clean Energy Act" or "CEA"). Section 6 of the CEA required the Board to establish an application and approval process for RNM within 120 days of the law's enactment.

On July 13, 2018, Board Staff ("Staff") issued a Request for Comments on Assumptions and Questions on RNM and announced a public stakeholder meeting would be held at the New Jersey Department of Environmental Protection ("NJDEP") on July 31, 2018. Twenty-nine people attended the meeting, including 14 representatives of solar developers, as well as the electric

[1] In re the Board's Establishment of a Remote Net Metering Application and Approval Process Pursuant to the Clean Energy Act of 2018, BPU Docket No. QO18070697, Order dated September 17, 2018 ("RNM Order").

distribution companies ("EDCs"), the NJDEP, the Division of Law, and Staff. Ten sets of responses to the Request for Comments were received by the August 7, 2018 deadline, including responses from AC Power LLC, Atlantic City Electric ("ACE"), Borrego Solar Systems Inc., Conti Solar, Jersey Central Power & Light Company, New Jersey Resources, Public Service Electric and Gas Company, RE-Imagine Real Estate, LLC, Rockland Electric Company, and Soltage LLC.

On September 17, 2018, the Board issued the RNM Order, which included approval of an RNM application and process based upon stakeholder comments. The RNM Order covered the following elements of an RNM application and approval process: RNM eligibility; the definition of a Public Entity; Host Customer; Credit Receiving Customer; Total Average Usage; the determination of maximum capacity of the solar electric generation facility; the value of an RNM "Credit"; and the application and approval process.

The first RNM application, submitted for the Raritan Valley Community College ("RVCC"), was approved by the Board on August 18, 2021. Since that time, the Board has approved seven (7) additional RNM applications. The projects range from 5.2 kWdc (RVCC) to 822.6 kW (Woodbridge Township).

By Order dated December 6, 2019, the Board approved New Jersey's Transition Incentive ("TI") Program, intended to provide a bridge between the Solar Renewable Energy Certificate ("SREC") Program and a successor incentive program.[2] Subsequently, the Board codified the TI Program in rules.[3]

On July 9, 2021, L. 2021, c. 169 was signed into law ("Solar Act of 2021"), mandating the creation of a new solar incentive program to be divided into two (2) components: an administratively set incentive for net metered residential facilities, net metered non-residential facilities of five (5) megawatts ("MW") or less, and community solar facilities; and a competitive solicitation for grid supply solar projects and net metered non-residential projects above five (5) MW in size.

On July 28, 2021, the Board established the Administratively Determined Incentive ("ADI") Program, which provides incentives in the form of New Jersey Solar Renewable Energy Certificate-IIs ("SREC-IIs") and which defined eight (8) distinct market segments with unique incentive levels. The incentive levels were established based on modeling of costs and revenues characteristic of the market in 2021 and expected to be relevant to the market for the next three (3) years. The Board provided a $20 per MWh adder for public projects that would increase the incentive level over the incentive levels established for four (4) relevant project types: small and large net metered non-residential rooftop or carport and small and large net metered ground mount.[4] The SuSI Order was subsequently codified in rules.[5]

[2] In re a New Jersey Solar Transition Pursuant to P.L. 2018, c. 17, BPU Docket No. QO19010068, Order dated December 6, 2019.

[3] 52 N.J.R. 1850(a) ("TI Rules").

[4] In re a Solar Successor Incentive Program Pursuant to P.L. 2018, c.17, BPU Docket No. QO20020184, Order dated July 28, 2021 ("SuSI Order").

[5] 54 N.J.R. 368(a) ("SuSI Rules").

On December 7, 2022, the Board approved the establishment of the CSI Program, which will award SREC-IIs through a competitive solicitation, with separate solicitations for the several selected market tranches: basic grid supply, the built environment, contaminated lands, net metered over five (5) MW, and solar plus storage.

PETITION

Petitioner requested a ruling that (i) the condominium form of property ownership complies with the Clean Energy Act, P.L. 2018, c.17, the Board's solar transition and net metering orders and rules, the New Jersey Condominium and Redevelopment Laws, and the State's energy and environmental justice policies and goals; (ii) the condominium form of property ownership is a viable solar development option for public entities that seek to develop solar facilities on a shared basis; and (iii) solar condominium projects are eligible to participate in, and to receive all benefits conferred upon eligible projects in the Board's SuSI Program. Petitioner also asked the Board to reconsider, on its own motion, the portion of the RNM Order that established the method by which the maximum capacity size of a remote net metered facility is determined.

As described by Petitioner, a solar condominium would consist of a combination of several solar arrays located on property owned by a public entity such as a municipality.[6] Petitioner envisions other public entities then taking an ownership share in the property and developing a solar array corresponding to their power needs, effectively resulting in a larger solar array under a form of shared ownership. Each public entity would then apply separately for approval of an RNM agreement. Petitioner argued that the solar condominium construct would lead to faster deployment of solar, while providing benefits to participating public entities, and that the construct would "be consistent with the recent adoption of other creative approaches to solar development, such as Community Solar, Agri-Voltaics and floating water solar projects[.]"[7] Petitioner emphasized the potential for solar condominiums to make benefits of solar available to economically disadvantaged and environmental justice communities.

In support of its position, Petitioner described three (3) hypothetical public entities that, according to Petitioner, would be able and willing to host a solar installation modeled after the solar condominium construct; as described by Petitioner, other forms of solar development such as grid supply and Community Solar would be less attractive to these entities. Petitioner posited the ability to host a much larger solar facility, the availability of SuSI incentives, and the ability to interconnect outside the PJM queue process among the benefits of the RNM construct.

STAFF RECOMMENDATION

Petitioner first asked that the Board determine that the condominium form of property ownership complies with the Board's net metering rules; the Clean Energy Act and solar transition orders; the State's energy and environmental justice policies and goals; and the New Jersey Condominium and Redevelopment Laws.

Staff does not agree with Petitioner that projects developed pursuant to its "solar condominium" construct would qualify as net metered facilities. The statutory and regulatory authority for behind-the-meter net metering is codified at N.J.S.A. 48:3-87(e). This statute requires that electric power

[6] New Jersey law defines eligible public entities as any "State entity, school district, county, county agency, county authority, municipality, municipal agency or municipal authority." N.J.S.A. 48:3-87(e)(4).

[7] Petition at Par. 3.

suppliers and basic generation providers "offer net metering at non-discriminatory rates to industrial, large commercial, residential and small commercial customers, as those customers are classified or defined by the board, that generate electricity, on the customer's side of the meter, using a Class I renewable energy source, for the net amount of electricity supplied . . . over an annualized period." The Board's rules implementing this provision provide, among other things, that if the "host" customer-generator supplies more electricity to the distribution system than they purchase on a monthly billing period, then the customer-generator receives a credit for the excess production, measured in kilowatt-hours ("kWhs"). N.J.A.C. 14:8-4.3(c). Thus, net metering generally applies only to behind the meter solar facilities, where a solar project is located behind the meter of an electricity customer, the "host" of the solar facility. Allowing net metering for a "solar condominium" would subvert these statutory and regulatory requirements.

Petitioner, however, contended that no requirement exists in the statute or prior Board orders that the meter be in active use measuring existing behind the meter generation.[8] Petition at Par. 60. This argument disregards the essence of net metering: the generation is "netted" against the customer generator's consumption. The Board's rules specify that the generation is to be sized based on average annual consumption. N.J.A.C. 14:8-4.3(a). "Average annual consumption," by definition, already exists and must, therefore, have been measured by an existing meter. While an exception is made for solar planned for new construction, new construction is not part of Petitioner's model and, in addition, even for new construction the load must be in place before the solar system will be energized. Petitioner's argument that this interpretation "would run counter to the State goal to rehabilitate vacant or unproductive properties and would undermine the State's redevelopment and clean energy goals", is no longer convincing, since the CSI Program now offers a clear avenue to solar development on these properties.[9]

Similarly, Staff does not agree with Petitioner that the RNM Order would allow the proposed projects to qualify as net metered facilities. RNM constitutes a very specific and narrow exception to the requirement that all net metered facilities reside behind a specific customer's meter. In creating RNM, the Clean Energy Act provided that "[a] public entity certified to act as a host customer may allocate credits to other public entities within the same electric public utility service territory." N.J.S.A. 48:3-87.12. The RNM Order requires the public entity to "host" its solar electric generation facility on its own property, and specifies that "the solar facility must be located on property containing at least one electric meter of the host customer."[10] As discussed above, Staff views this requirement as involving an existing meter serving a pre-existing load. In light of these requirements, a solar condominium would not qualify as RNM. No RNM projects have been authorized to date that do not have existing load located behind the same meter as the solar facility. In the solar condominium construct, on the other hand, a public entity would not be placing solar behind an existing meter at all. Petitioner points to the RNM Order, noting that it permits the use of any of the host's metered accounts, not only the host site's, "for purposes of determining and allocating RNM credits."[11] Petitioner appears to be attempting to extrapolate from the ability to allocate RNM credits an ability to deem a facility at the host site "behind the meter" of a separate receiving site. That attempt fails. A solar facility cannot be "behind the meter" if the meter measures a separate account. Likewise, Petitioner's claim that "all RNM facilities could be

[8] It appears from the context that Petitioner meant to reference "existing behind the meter consumption."

[9] Petition at Par. 60.

[10] RNM Order at 6-7.

[11] Petition at Par. 61.

portrayed as grid supply facilities"[12] because they are all designed to produce more energy than is consumed on site is a specious one. All RNM facilities to date have had production linked to the host's usage. The solar condominium concept proposed by Petitioner would effectively sever the link that binds RNM projects to the load of the host customer.

With respect to the solar transition initiated by the Clean Energy Act and further developed by the Solar Act of 2021, the Board has recognized the need for a differentiated approach to providing solar incentives. This differentiation allows a variety of New Jersey parties to benefit from solar, including but not limited to residential homeowners, commercial power users, public entities, and those involved in different segments of solar development. Starting with the TI Program, the Board has provided market segment-specific incentive structures and levels for different types of solar, with the predominant consideration being the structural differences between segments in terms of development costs and project revenues. The Board has stated repeatedly that the primary motivation to establish differentiated incentive levels has been to enable solar development in a variety of segments in New Jersey, while minimizing costs to ratepayers.

For instance, in the SuSI Order, the Board adopted Staff's recommendation for differentiated incentive levels based on the following rationale:

> "Staff believes that dividing the incentive level into multiple market segments, as shown in the table [on page 16 of the SuSI Order], each with its own incentive level, recognizes the different costs and revenues associated with different project types, and carefully balances the need for differentiation in incentive levels against the higher cost and administrative complexity associated with increasing the number of market segments in the ADI Program."[13]

As noted above, the Solar Act of 2021 specifically instructs the Board to establish an incentive program for larger scale solar, encompassing all grid supply solar as well as net metered facilities over five (5) megawatts, following competitive principles. The Board duly established the CSI, and in the CSI Order, the Board noted that "[t]he proposed CSI Program uses competitive principles to ensure that the cost of the incentive is as minimal as necessary to support new private investment in solar facilities."[14]

With more specific bearing on the solar condominium proposal, the SuSI Rules explicitly prohibit co-location within the ADI Program.[15] Co-location is defined as "siting two or more SuSI-eligible solar facilities on the same property or on contiguous properties, such that the individual facilities are eligible for a higher incentive value than they would be if they were combined into one single facility."[16] This prohibition underlines the Board's commitment to ensuring solar facilities a sufficient but not excessive incentive. By forbidding co-location, the Board sought to prevent larger solar facilities "gaming the system" in order to take advantage of programs or rules specifically designed to enable development of smaller facilities.

[12] Petition at Par. 62.

[13] SuSI Order at 17.

[14] CSI Order at 12-13.

[15] N.J.A.C. 14:8-11.4(f).

[16] N.J.A.C. 14:8-11.2.

Petitioner argued that this prohibition should not apply to its solar condominium construct because the SuSI Rules would provide the SREC-II owner with the lower of the potential incentive values.[17] Therefore, according to Petitioner, there would be no monetary incentive to choose multiple smaller facilities instead of a single larger one. Noting that co-location may be permitted in the Board's Community Solar program where the adjacent projects have separate meters and independent operation, Petitioner asserted that its solar condominium proposal should be viewed as comparable.[18]

Petitioner apparently misapprehended the prohibition on co-location. The Board has firmly established, in the implementation of the various solar programs, the principle of differentiated incentives that appropriately incentivize solar development for each segment while minimizing cost to ratepayers. The solar condominium Petitioner describes would be a large scale project whose component parts each receive the incentive for a small scale project. While this over-subsidization likely would arouse more interest in developing large-scale solar, the arrangement violates the principle of appropriate incentivization. Staff does not believe that the Board's SuSI rules authorize a large solar facility to be subdivided so that portions of the overall solar array would qualify for a specific solar incentive or program different from the solar array as a whole. Petitioner's analogy to the Community Solar program is inapposite. The Board authorized specific solar facilities under the Community Solar Pilot Program, considering the characteristics of the complete solar arrays and not component sections of the arrays attributable to individual subscribers.

Petitioner made several policy arguments in support of its position, variously speaking of the benefits to public entities, to the State's ambitious solar generation goals, and to low income and environmental justice communities.[19] None of these claims suffice to justify the heavy subsidies that the solar condominium construct would entail.

With respect to public entities, Petitioner asserted that a solar condominium program "would provide a logical corollary to the Board's enhanced financial incentive approach" for public entities.[20] The Board arrived at the $20 adder for public projects in the ADI Program by following a lengthy and iterative process that benefitted from extensive modelling and stakeholder input. By incorporating this adder into the ADI Program, the Board balanced the unique challenges faced by public entities against the cost to ratepayers of an additional subsidy. Petitioner declined to discuss the trade-offs inherent in increasing subsidies funded by ratepayers, possibly because unlike the Board, it has no basis on which to do so. Instead, Petitioner pointed to various benefits its solar condominium construct would provide for municipalities: reduced energy costs, potentially lower taxes, lease-related revenue streams, and the health and environmental benefits associated with clean energy production.[21] However, these benefits would flow to the residents of one town or county, or the members of one public entity, while the costs would be borne by all ratepayers. Ratepayers already subsidize both RNM and SREC IIs; Petitioner's concept would significantly increase that subsidy while providing the majority of ratepayers little or no benefit in return. Although Petitioner noted that the net metering aggregation program has not attracted any customers, it fails to note that other programs have produced significant solar generation by

[17] Petition at Par. 54.

[18] Petition at Pars. 53-55.

[19] Petition at Par. 56.

[20] Petition at Par. 57.

[21] Petition at Par. 4.

public entities. As of March 31, 2023, over 1,300 solar electric generation facilities totaling more than 410 MW have been installed at public entities throughout the State.[22]

Petitioner also asserted that, by allowing large scale solar to be located "behind the meter" on existing properties that do not currently have energy load, solar condominiums would bring development and commercial activities to "otherwise worthless or unused commercial and contaminated properties."[23] According to Petitioner, such development would support multiple State policy goals. Staff does not dispute that developing unused or contaminated properties with renewable energy is a worthy policy goal. Rather, Staff's dispute lies with Petitioner's assumption that such development should receive subsidies well in excess of what the Board's rules and policy entitle it to. As previously discussed, the solar condominium model would result a single large scale solar facility receiving incentives intended for smaller facilities. Through the SuSI Program, on the other hand, the Board already provides appropriate incentives.

Petitioner also references benefits for low and moderate income and Environmental Justice communities as a policy argument for its construct, but its costly development model would be available to all municipalities and counties. Again, the Board has already established the Community Solar Program to assist those communities.

In addition to arguing benefits for municipalities and underused land, Petitioner claimed that the State needs its solar condominium model to attain its goals for solar development. It urged the Board to view this model as a "viable and timely tool that could significantly accelerate the pace of in-State solar development[.]"[24] As previously noted, while Petitioner's model might well accelerate the pace of solar development, it would certainly accelerate the growth of the subsidies provided by ratepayers. Petitioner also refers to "the apparent downward trajectory of new projects in the SuSI program pipeline[.]"[25] Contrary to Petitioner's apparent belief, registration in the SuSI Program is not on a "downward trajectory." As of March 31, 2023, over 20,000 projects representing over 208 MW had been installed under the ADI Program, while another 207 MW were in the pipeline.

Furthermore, Staff is concerned that a solar condominium construct could be used to circumvent siting stipulations applicable to larger scale solar facilities, and thus could lead to the loss or degradation of farmland and open space, which the Legislature expressly aims to prevent. N.J.S.A. 48:3-114; N.J.S.A. 48:3-119. Recognizing that larger scale solar facilities have the potential to result in loss of farmland and open space and pursuant to the statute, the Board has instituted protections that specifically apply to all facilities that would be eligible for the CSI Program.[26] These protections would not apply to Petitioner's large scale but net metered solar condominiums, however, and thus this construct might open a loophole in the regulatory scheme and undermine the policy of preserving New Jersey's remaining open space.

[22] https://www.njcleanenergy.com/renewable-energy/project-activity-reports/project-activity-reports

[23] Petition at Par. 59.

[24] Petition at Par. 3.

[25] Petition at Par. 72.

[26] CSI Order at 35-40.

Finally, Staff sees no reason to believe that the plain language of the Condominium Act supports the solar condominium concept.[27] Petitioner has provided no evidence that the New Jersey Legislature contemplated extrapolating the applicability of the condominium construct to what would otherwise be a grid scale solar project. Further, any such argument appears to ignore the reality that net metering is designed to offset an existing electric bill. Even if Petitioner were able to support its claims regarding the applicability of the Condominium Act, such applicability would not suffice to remove the conflicts of this concept with the State's solar laws and policies. Thus, the condominium form of property ownership is not a viable solar development option for public entities, and Petitioner's third request for relief should be denied.

Petitioner also asks the Board to revisit, on its own motion, the method by which the maximum capacity size of RNM solar facilities is determined. The Clean Energy Act authorizes public entities to host a solar energy project "with a capacity up to the total average usage of the electric public utility accounts for the host public entity customer." N.J.S.A. 48:3-87.12(a). As noted above, Staff sought public comment on several terms in the statute, including the definition of "total average usage" and its use in determining maximum generating capacity. Following the stakeholder process, Staff recommended and the Board approved the following calculation of total average usage: take the total usage in kilowatt-hours (kWh) of the account(s) selected by the host for the previous twelve months; divide the sum by the number of accounts, if more than one is used; and divide the result by 1,200 annual kWh per kilowatt ("kWdc"). RNM Order at 7.

Petitioner resurrected several arguments considered and rejected by the Board in approving the existing definition of "total average usage." Petitioner contended that rather than averaging the average annual usage of a public entity's energy accounts, the public entity should sum the average annual usage of its accounts and divide that sum by 1,200 kWh per kilowatt. As Petitioner correctly noted, this approach would enable significantly larger solar facilities. Petitioner errs, however, in alleging that such an approach would be more "straightforward."[28] Since the statute requires that generation be sized on the basis of "average annual usage," taking the average of the customer's accounts cleaves more closely to the plain language of the statute than adding those accounts together. Petitioner also claimed that in standard net metering methodology, a homeowner or business may sum its individual accounts to arrive at the average annual usage on which its generation size is based. This argument mischaracterizes the Board's net metering rules, which do not in fact allow for such summing. Summing accounts at different locations where, in Petitioner's construct, generation would go entirely or primarily into the grid, finds no support in the rules. Petitioner has failed to demonstrate that the Board has ignored the plain language of the statute or any relevant facts.

Staff recommends that the Board deny the request to reconsider its methodology for calculating average annual capacity.

In sum, the solar condominium model does not comply with the Clean Energy Act, the Board's solar transition and net metering order and rules, the New Jersey Condominium and Redevelopment Laws, or the State's energy and environmental justice policies and goals. Thus, this form of property ownership is not a viable solar development option for public entities, and such projects would not be eligible for the benefits of the SuSI Program. Nor has Petitioner provided any convincing rationale for its request that the Board reconsider its methodology for calculating the maximum capacity size of a remote net metered facility.

[27] N.J.S.A. 46:8B-1 et seq.

[28] Petition at Par. 67.

Staff recommends denying the Petition on all counts.

DISCUSSION AND FINDINGS

New Jersey has a strong and diverse landscape of solar development, and the Board has a long history of facilitating its continued health and expansion in order to meet Governor Murphy's clean energy goals and offer economic opportunities to a variety of commercial players. Through its array of Solar programs, the Board provides opportunities to many different types of consumers seeking to take advantage of the benefits of solar, and to many different types of companies providing the materials and services needed to deliver these benefits. The diversification of solar has increasingly led to a diversification of needs, both in terms of incentives, and in terms of rules governing development.

The differences in program specifics, caused by these inherently different needs, has led to attempts by some parties to qualify for the program they view as most advantageous. It is difficult to not see the solar condominium construct advocated for by Petitioner as an attempt to qualify essentially larger grid supply projects as a combination of smaller net metered projects. Allowing this construct would run counter to the principles that the Board has established, which have shaped the framework of solar programs rules, and will continue to do so. It is incumbent upon the Board to delineate the requirements for each program in a way that safeguards both an appropriate level of diversity in New Jersey solar development and an appropriate level of subsidy. The Board thus scales incentives to reflect the costs and benefits to each segment. Net metering, while remaining an important tool to facilitate the transition to clean energy, comes at substantial cost to ratepayers in the form of a decreased basis for recovery of electric power distribution costs. The applicable statutes authorize it for projects meeting specific criteria, and the Board has implemented it for those projects only. The solar condominium model advanced by Petitioner was not contemplated by the Legislature and does not accord with the Board's principle of providing the appropriate incentive to each class of project.

The Board recognizes the importance of larger-scale solar development in meeting the State's clean energy goals. To promote such development and in compliance with the legislative mandate, the Board has established the CSI Program. As required by statute, the structure of the CSI Program promotes use of the lowest necessary incentive by developers. By contrast, the solar condominium construct enables large scale development in tandem with receipt of incentives designed for much smaller behind-the-meter facilities. The Board **FINDS** that the solar condominium model proposed by Petitioner does not comport with the Board's mandate to promote solar development at the lowest cost to ratepayers.

The CSI Program also implements the Legislature's directive to balance the development of large scale solar with protections for the State's remaining open space and farmland. The Board concurs with Staff that the model proposed by Petitioner would potentially enable large scale solar facilities not subject to the legislative protections built into the CSI Program. The Board **FINDS** that the solar condominium model, if approved, would potentially enable large scale solar at the detriment of the State goal of preserving open space and farmland.

The Board now turns to Petitioner's request that the Board reconsider, on its own motion, its methodology for determining the maximum capacity size of RNM solar facilities. Pursuant to 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 effective date of any final decision or order by the Board. Pursuant to N.J.A.C. 14:1-8.6(a)(1), the moving party must allege "errors of law or fact"

that were relied upon by the Board in rendering its decision. Reconsideration should not be based on the movant's dissatisfaction with the decision, D'Atria v. D'Atria, 242 N.J. Super. 392, 401 (Ch. Div. 1990), and should be based on a decision with a "palpably incorrect or irrational basis" or where it is obvious that the finder of fact did not consider, or failed to appreciate, the significance of probative, competent evidence. Cummings v. Bahr, 295 N.J. Super. 374, 384 (App. Div. 1996). Further, the moving party must show that the action was arbitrary, capricious, or unreasonable. D'Atria, 242 N.J. Super. at 401. 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, the Board will not modify an Order.[29]

Petitioner proposed that the Board alter the calculation of "total average usage" to mean summing, rather than averaging, the average usage of its selected accounts. As noted above, the supporting arguments advanced by Petitioner were considered and rejected by the Board in approving the existing definition. Moreover, the Board believes that the existing definition comports with both the legislative intent and with the plain language of the statute. Petitioner has failed to demonstrate that the Board has ignored the plain language of the statute or any relevant facts.

Petitioner asked "[w]hat countervailing public policy justifies the State foregoing or artificially restricting these solar development opportunities [afforded by summing the accounts rather than averaging them]"?[30] While this question appears to be rhetorical, the Board believes that the foregoing discussion illustrates the important public policy that supports the approved methodology: appropriately limiting the subsidies applicable to this narrow exception to standard net metering and thereby balancing the need to limit the ratepayers' burden with the goal of promoting solar development.

The Board **FINDS** that the definition of "average annual usage" adheres to the plain language of the statute. The Board **FINDS** that this definition resulted from an open stakeholder process. The Board **FURTHER FINDS** that the existing definition of "average annual usage" appropriately balances the twin legislative goals of promoting solar development by and for public entities and protecting the pocketbook of the ratepayers.

[29] In re the Petition of Public Service Electric & Gas Company for Approval of its Clean Energy Future – Energy Efficiency ("CEF-EE") Program on a Regulated Basis, BPU Docket Nos. GO18101112 and EO18101113, Order dated November 13, 2019, at 4; In re Michael Manis and Manis Lighting, LLC—New Jersey Clean Energy Program Renewable Energy Incentive Program, BPU Docket No. QS14040316, Order dated April 15, 2015, at 3.

[30] Petition at Par. 71.

The Board **HEREBY DENIES** the Petition from Intersect Energy, LLC.

The effective date of this Order is May 17, 2023.

DATED: May 10, 2023

BOARD OF PUBLIC UTILITIES
BY:

JOSEPH L. FIORDALISO
PRESIDENT

MARY-ANNA HOLDEN
COMMISSIONER

DIANNE SOLOMON
COMMISSIONER

DR. ZENON CHRISTODOULOU
COMMISSIONER

ATTEST:

SHERRI L. GOLDEN
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 INTERSECT ENERGY, LLC FOR A DECLARATORY RULING PURSUANT TO N.J.S.A. 52:14B-8 AND N.J.S.A. 2A:16-50 ET SEQ. - SOLAR CONDOMINIUMS – AND FOR ANCILLARY RELIEF

DOCKET NO. QO22050351

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