Agenda Date: 04/14/10
Agenda Item: 8A

STATE OF NEW JERSEY

Board of Public Utilities
Two Gateway Center
Newark, NJ 07102
www.nj.gov/bpu/

		CLEAN ENERGY
IN THE MATTER OF WAYNE ENERGY CORPORATION – PETITION TO EXTEND THE SOLAR ELECTRIC PROJECT REBATE COMMITMENT	)	ORDER
	)	DOCKET NO. EO08060423
IN THE MATTER OF WAYNE ENERGY CORPORATION – PETITION FOR APPROVAL OF AN ENERGY SERVICES AGREEMENT	)	DOCKET NO. EM08080631

William Northgrave, Esq., McManimon & Scotland, L.L.C., for Petitioner

Cynthia L.M. Holland, DAG, Division of Law, Newark, New Jersey, on behalf of the Board of Public Utilities

BY THE BOARD

This Order memorializes action taken by the Board of Public Utilities ("Board") at its April 14, 2010 agenda meeting. At that meeting, the Board considered and rendered its decision regarding two requests of the Wayne Energy Corporation, a non-profit corporation established for the purpose of developing a comprehensive clean energy project for the sale of energy to the Township of Wayne ("Township").[1] For the reasons set forth below, the Board denies Petitioner's requests. Notwithstanding this decision, the Board encourages the Township to work with Board Staff to realize the Township's clean energy goals in a manner consistent with all relevant State and federal law.

I. FACTUAL BACKGROUND

The Township filed an application for a Customer On-Site Renewable Energy ("CORE") rebate in September 2005. The Township's application listed Princeton Energy Systems as the contractor/installer of the proposed solar project. Princeton Energy Systems informed Staff that it would act as the Township's agent as it sought bids to construct the solar project. As such, Princeton Energy Systems signed the rebate application for the Township. On May 1, 2006, the Township's application to install a 599.625 kW solar project was approved a CORE rebate of $2,207,196.25.

[1] The Board does not opine on whether Petitioner would constitute a public utility under N.J.S.A. 48:2-13.

To receive the CORE rebate, the Township had to complete the solar project and submit all the required documents to the CORE Program Manager by May 1, 2007. On October 10, 2006, the Wayne Energy Corporation ("Petitioner") formed as a non-profit corporation to manage, develop and oversee the construction of the Township's solar project as well as a cogeneration project. On this authority, Petitioner requested and received a one year extension of the Township's CORE rebate approval. The solar project was not completed before the extension expired on May 1, 2008.

By letter dated April 30, 2008, Petitioner contacted the CORE Program Manager to request a second extension for an additional six months. The CORE Program Manager informed Petitioner that the CORE Guidelines for Completion Deadlines and Extensions ("the Guidelines") did not authorize it to grant a second extension for the reasons that Petitioner provided. Therefore, Petitioner filed its request for a second extension with the Board on June 18, 2008. Petition, Wayne Energy Corp. for Extension of Solar Electric Project Rebate Commitment (June 17, 2008).

Petitioner represented that it was moving forward with the necessary contracts. The bidding process for design and construction was initiated in October 2006. Petitioner represented that, during the fourth quarter of 2006, it conducted negotiations with potential vendors. Petitioner claimed that it received best and final presentations from Pepco Energy Services ("Pepco") and Siemens in February 2007. In March 2007, a recommendation was made to Petitioner's trustees to negotiate with Pepco. During the second and third quarters of 2007, Petitioner represented that it developed a Design, Construction, Operation and Maintenance ("DCOM") Agreement with Pepco. Petitioner stated that, in August 2007, it received Township Council approval to complete contract negotiations. Petitioner claimed that it had completed an Energy Services Agreement ("ESA") with the Township during December 2007. In addition, Petitioner claims that the Board of Education authorized contract negotiations in August 2007. Petitioner further stated that the Township and the Board of Education then completed, during November and December 2007, a Shared Services Agreement for the energy. Petitioner has stated that the two agreements were the subject of formal public hearings and votes in December 2007.

Petitioner represented to the Board that it had also progressed in other ways. For example, Petitioner stated that a feasibility study was completed. That feasibility study was authorized by the Mayor and funded by the Township. Petitioner also represented that Pepco had completed the solar project design and procured the necessary solar panels. At the time it petitioned for a second extension, Petitioner claimed those solar panels were in a warehouse awaiting Petitioner's release of funds. On this basis, Petitioner claimed its solar project was near completion in 2008.

However, Petitioner informed the Board that the project was delayed due to the difficulty it encountered when seeking financing. From the third quarter of 2006 until approximately August 2007, Petitioner stated that it negotiated with Bank of America, but sought an alternative source of funding once it became apparent that Bank of America was not willing to provide financing. Petitioner further stated that it initiated negotiations with National City Energy Capital ("NCEC") in August 2007. Petitioner claimed that NCEC withdrew its offer in February 2008, which prompted Petitioner to seek funding elsewhere. Petitioner also explained that it was waiting for 501(c)(4) status determination from the Internal Revenue Service ("IRS"). Petitioner claimed that 501(c)(4) status was "a critical part of [Petitioner's] financing and thereby effect[ed] the execution of other contractual obligations."[2] Ultimately, Petitioner represented that a second

[2] On or about February 29, 2008, Petitioner filed a petition with the IRS for 501(c)(4) status as a tax-exempt corporation. E-mail from Gary M. Fechter, Managing Executive, Wayne Energy Corporation, to Noreen Giblin, Chief of Staff, Bd. of Pub. Utilities, (July 18, 2008 10:35 EST). The IRS deemed Petitioner

extension of the Township's rebate was necessary to ensure the construction of its proposed facility, because the solar project would not be economically viable without the CORE rebate.

Board Staff requested that Petitioner provide a written commitment by the solar installation company, copies of financial documents from previous as well as current banking institutions, and a clarification of the actions following execution of the DCOM Agreement. By electronic mail dated July 19, 2008, Petitioner responded to Board Staff's requests. In addition, Petitioner sought commitments from its two potential installers: Pepco and Atlantic Energy Solutions. Atlantic Energy Solutions, by letter dated July 23, 2008, stated that it was prepared, once it received a final agreement from Petitioner, to place the order with its supplier, Evolution Solar, and to have the system installed and operating by December 31, 2008. Pepco responded to Petitioner's request by stating that, while it remained committed to the project, "several requirements must happen quickly" to complete the solar project by December 31, 2008. With this factual foundation, the Board considered Petitioner's request for a second extension at its July 30, 2008 agenda meeting.

The Board granted Petitioner's request for a second extension. Order, I/M/O Wayne Energy Corporation – Petition to Extend the Solar Electric Project Rebate Commitment, Docket No. EO08050423 (Aug. 27, 2008) ("Extension Order"). The Board found that Petitioner was unavoidably and unforeseeably delayed; that Petitioner had made progress toward completion of the project; and that Petitioner's project, if completed, would provide significant public benefits. The Board also found that Board Staff had worked with the Petitioner toward the completion of Petitioner's complex project. The Board concluded that Petitioner's representations qualified it for a second extension of the rebate commitment deadline and approved a rebate commitment extension to Petitioner for six months from the date of its Order. Thus, Petitioner's CORE rebate commitment was extended until February 27, 2009.

Although the Board granted Petitioner's extension, the Board remained mindful of the need to prevent the reservation of CORE funding for solar projects unlikely to be completed. "[I]n the interest of facilitating project completion during the term of the second extension," the Board ordered Petitioner to submit monthly progress reports, commencing 30 days from the date of the Board's Order. The Board's approval of Petitioner's second extension was made subject to Petitioner's submission of the monthly progress reports. In the event a monthly progress report indicated a lack of progress toward project completion, and upon notice and opportunity for Petitioner to be heard, the Board reserved the right to terminate the second extension.

Separately, on August 25, 2008, Petitioner filed a petition with the Board for approval of its ESA pursuant to N.J.S.A. 40A:11-15(1)(c). Board Staff immediately began reviewing the petition as well as the ESA. At that time, it became apparent to Board Staff that the solar project was not progressing, because it was only one part of Petitioner's larger plan for a cogeneration and renewable energy facility.

Following receipt of Petitioner's first report, which showed little progress on the solar project, Board Staff held a conference call with Petitioner on October 10, 2008. During that call, Board Staff suggested that Petitioner consider separating the solar project from the larger proposed facility so that Petitioner could commence construction and not lose the CORE rebate. Having begun review of the ESA, Board Staff also recommended that Petitioner consult with the Division of Local Government Services within the Department of Community Affairs ("DCA") about Petitioner's contracting model.

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a 501(c)(4) entity on November 5, 2008. Letter from Gary M. Fechter, Managing Executive, Wayne Energy Corp., to Bd. of Pub. Utilities, November Progress Report, (Nov. 25, 2008).

The Board received Petitioner's second progress report on October 28, 2008. Petitioner claimed it had a verbal commitment for financing from Sun Trust Bank. Although Petitioner informed the Board that its IRS application and necessary Department of Education permits remained pending, Petitioner stated that its chairperson spoke with the Department of Education regarding project permitting.[3] Petitioner also stated that discussions with Atlantic Energy Systems ("AES") about the DCOM Agreement were ongoing. Finally, Petitioner claimed that it was preparing to contact DCA regarding Board Staff's contracting concerns.

By letter dated November 11, 2008, Petitioner contacted then Commissioner Doria of the DCA stating that "Staff at the Board of Public Utilities has indicated that Staff at the DCA questions whether [the ESA] complies with the Local Public Contracts Law" ("LPCL"). Petitioner provided a copy of the ESA as well as many of the facts discussed above. Petitioner concluded its letter by stating that it "firmly believes that the construct complies with both the spirit and the letter of the Local Public Contracts Law."

Petitioner submitted its third progress report on November 25, 2008. In that report, Petitioner indicated that it was granted 501(c)(4) status from the IRS on November 5, 2008. Petitioner stated that Sun Trust Bank was still working to complete its financial analysis, but Petitioner was expecting a final offer. Petitioner also informed the Board that it was still in the process of submitting paperwork to the Department of Education. Having received three of the six required progress reports, on December 8, 2008, Board Staff sent a letter to Petitioner reiterating the terms of the Board's Extension Order and expressing Staff's continued willingness to work with Petitioner toward the completion of its project during the term of the second extension.

On December 5, 2008, DCA responded to Petitioner's letter with several initial questions. Notably, DCA requested the facts relevant to any conflicts of interest and the legal basis supporting Petitioner's contracting model. Petitioner responded to DCA's letter on December 15, 2008. In this letter, Petitioner first indicated its reliance on certain exceptions to the LPCL's bidding requirements. Petitioner also stated that it was not aware of any conflict of interest. Following Petitioner's response, on December 17, 2008, the DCA met with Petitioner's representatives and Board Staff to discuss Petitioner's proposed project.

Petitioner's fourth progress report arrived on December 23, 2008. Petitioner claimed to have a tentative schedule of payments arranged with AES, but negotiations continued. According to Petitioner, AES had inspected the roofs and would compose a structural report for Petitioner. The Department of Education documentation, as reported by Petitioner, was nearly complete. Petitioner informed the Board that materials had been purchased and installation was expected in early 2009.

By letter dated December 23, 2008, Petitioner also responded in writing to questions raised by the DCA's counsel at the Division of Law. Petitioner's letter stated its interpretation of the exception from the bidding requirements of the LPCL under N.J.S.A. 40A:11-5(1)(v) and requested that the DCA advise the Board of its compliance. Upon review of Petitioner's claims, on January 16, 2009, the Division of Law faxed a letter to Petitioner with reference to a prior Board Order that established precedent on the application of Petitioner's claimed exception. The Division of Law requested that Petitioner explain how it would comply with prior Board precedent on the application of N.J.S.A. 40A:11-5(1)(v).

[3] At the time, Chairperson of Petitioner's Board of Trustees was also a sitting Assemblyman. Although the Board does not opine on the matter, the Board notes that such communications are the subject of N.J.S.A. 52:13D-16.

On January 23, 2009, Board Staff sent a letter to Petitioner that, among other things, questioned Petitioner's lack of progress toward completion of the solar project and raised concerns about Petitioner's reliance on N.J.S.A. 40A:11-15(1)(c) as support for its ESA. Citing the Extension Order, Board Staff informed Petitioner that the lack of progress toward completion of its solar project could jeopardize its rebate. Board Staff also informed Petitioner that several exhibits to the ESA were absent.

Petitioner's fifth progress report dated January 28, 2009 indicated that Petitioner had still not secured permanent financing to replace construction financing. However, Petitioner reported that AES made initial payments to purchase solar panels. Petitioner also informed the Board that more follow up with the Department of Education was required. The report did not state whether the solar project would be completed during the term of the second extension.

By letter dated February 2, 2009, Petitioner requested a meeting to discuss the issues raised by Board Staff and the Division of Law. Petitioner's February 5 letter did not respond to the legal questions raised by those letters. Thus, the Division of Law, on behalf of both the DCA and the Board, responded to Petitioner's request on February 19, 2009.

The Division of Law informed Petitioner that a meeting would be scheduled only if Petitioner provided detailed responses to the outstanding questions. Because Petitioner's second extension was ordered to expire on February 27, 2009, the Division of Law tentatively scheduled a meeting for February 26, 2009 contingent on Petitioner's written response to all outstanding concerns by close of business on February 23, 2009.

Among other outstanding concerns, the Division of Law's letter revisited the conflict of interest question first raised by the DCA's December 5, 2008 letter. The Division of Law specifically noted concerns about the Mayor's role as the chairperson of Petitioner's board of trustees while he served as Mayor of the Township. As the Division of Law explained, the Mayor's two roles appeared to be a conflict of interest.

Petitioner replied by letter on February 23, 2009. With regard to the apparent conflict of interest, Petitioner recognized that "in order to determine if a specific interest causes a conflict for a public official, a case by case, fact based analysis is necessary." The only facts Petitioner presented, however, were that the mayor "had and still has absolutely nothing to gain from the operation and success of [the Wayne Energy Corporation], except to save the community he serves a substantial amount of money, and in doing so, insulate the community from financial liability." Petitioner also claimed that the Board's prior precedent on the LPCL exemption "renders the exemption a nullity." Finally, Petitioner suggested possible solutions to some of Board Staff's concerns. Having received a response, the Division of Law informed Petitioner on February 25, 2009 that it would hold the scheduled meeting on Thursday, February 26, 2009.

Although the Division of Law agreed to meet with Petitioner, it noted that some information remained outstanding. The Division of Law made a second request for Petitioner to provide written responses and any supporting documentation that addressed the apparent conflict of interest. In its February 25 letter to Petitioner, the Division of Law emphasized that Petitioner has the burden of showing the absence of the apparent conflict of interest. Therefore, the Division of Law requested that Petitioner "[provide] relevant documents including, but not limited to: township meeting minutes; records related to negotiations; any documentation discussing recusal (including the former Mayor's written recusal, if any); and any other document pertinent to the apparent conflict of interest." In advance of the meeting, on February 23, 2009, Board Staff informed Petitioner of its technical concerns as well as the ESA concerns.

Representatives for Petitioner, the Board, the DCA, and the Division of Law met on February 26, 2009 to discuss outstanding matters such as the ESA; the possibility of a third CORE extension; the outstanding LPCL issues raised by Petitioner's proposed contracting model; Board Staff's technical concerns; and alternate project models available to Petitioner.[4] Petitioner acknowledged this meeting and indicated that its board of trustees would be meeting to address the concerns raised by the agencies and propose solutions. Petition, Wayne Energy Corp. for Extension of Solar Electric Project Rebate Commitment, ¶ 3 (Feb. 27, 2009). On February 27, 2009, Petitioner filed a petition for a third extension of its CORE rebate commitment deadline "to explore the solutions raised by BPU and DCA." Id. ¶ 4. Neither Board Staff nor the DCA received further information from the Petitioner regarding the meeting with Petitioner's board of trustees.

On April 3, 2009, the Board received Petitioner's sixth and seventh progress reports for the months of February and March, respectively. In its sixth progress report, Petitioner stated that it was still negotiating with AES and had not received permanent financing. Petitioner also noted that it had been in contact with DCA and the Board regarding various issues. Petitioner also informed the Board that its solar design team was completing a packet of final documents for the Department of Education. According to Petitioner, solar panels were ordered and payments were made for the delivery of those panels. In its seventh progress report, Petitioner stated that it had acquired permanent financing. Petitioner then reported that neither DCA nor the Board "provided any additional information related to the approval of the Energy Service Agreement with Wayne Township." In Petitioner's seventh progress report, it claimed that the two agencies' purported failure to respond to Petitioner was "the only matter blocking this project moving forward."

Having received no information regarding the apparent conflict of interest, on May 5, 2009, the Division of Law made a third and final request. The Division of Law specifically sought a written explanation from Petitioner explaining how the apparent conflict of interest – first raised in the DCA's December 5, 2008 correspondence – was resolved. The letter informed Petitioner that prior communications had not resolved the outstanding issues.

Petitioner responded to the Division of Law's request by letter dated May 18, 2009. No documents regarding the conflict of interest were provided to the Board. Instead, Petitioner stated the following:

> Scott Rumana served as the Mayor of the Township of Wayne at the time WEC was formed; he served and serves as the chairman of WEC. . . . Mr. Rumana does not receive any stipend, compensation or other remuneration of any sort from his involvement in WEC. The only arguable benefit accruing to Mr. Rumana and the other trustees, Dr. Martin Ludwig and Mr. Robert Simpson, are the reduction in taxes which will occur as the result of the cost savings from this program and the satisfaction of having been instrumental in causing the Township of Wayne to reduce its carbon footprint and its reliance on non-renewable sources of energy.

[4] Assemblyman and former Mayor Rumana appeared at the Board on behalf of Petitioner and expressed his intent to attend the February 26 meeting as the Chairperson of Petitioner's Board of Trustees. At that time, the Board's counsel at the Division of Law requested that he excuse himself and referenced the prohibition codified in N.J.S.A. 52:13D-16. The Division of Law memorialized this conversation in a letter that day and offered Petitioner an opportunity to respond. Petitioner has never directly responded.

Petitioner's May 18 letter also discussed the LPCL concerns noted in prior letters, but did not advance new arguments about those matters.

On June 3, 2009, the Division of Law responded by stating the facts known to the Board. The Division of Law noted that Petitioner did not deny that the ESA was negotiated with the Township while the Township's Mayor also served as chairperson of Petitioner's board of trustees. The Division of Law also noted that Petitioner had failed to provide any documentation showing recusal or any other document pertinent to the apparent conflict of interest. On that factual record, the Division of Law informed Petitioner that the matter would proceed to the Board for a final determination.

By letter dated June 15, 2009, Petitioner informed the Division of Law that

> [t]here are no documents, other than those previously cited, which WEC has with regard to the conflict. Because WEC's mission and the interest of the Township of Wayne are not in conflict, i.e. WEC was formed to advance the interest of the Township vis-à-vis its purchase of energy at a lower cost and a lower environmental impact, no recusal by then Mayor Rumana was necessary. It should be noted that then Mayor Rumana did not vote on the ESA and did not execute the Energy Service Agreement ("ESA") on behalf of the Township; execution awaits BPU approval.

Petitioner further claimed that the "ESA could be ratified by the current Council, without the possibility of any conflict caused by Mr. Rumana's involvement as WEC's chairman because Mr. Rumana is no longer Mayor of the Township." Petitioner also requested that the Board revisit the LPCL exception, because, according to Petitioner, the Board's interpretation "blocks a $20 million investment in the Township that will lead to lower energy costs for the Township and a reduced carbon footprint, all at no risk to the Township of Wayne and its citizens." Finally, Petitioner contended that its project "is entirely legal, consistent with applicable law, including but not limited to the Local Public Contracts Law, and advances a progressive, 21st century view towards energy production and consumption."

At its July 1, 2009 public agenda meeting, the Board considered both the petition for approval of its ESA and the petition for a third rebate extension. The Board decided to seek the material information relevant to Board Staff's technical concerns before rendering a decision on the ESA. The Board directed Staff to afford Petitioner one last opportunity to provide the outstanding information and set July 23, 2009 as the deadline for submittal of this information. The Board also directed Staff to meet with the parties to discuss an appropriate rebate amount, if any further extension would be granted.

Petitioner requested a meeting with Board Staff to discuss the ESA and the CORE rebate. By letter dated July 2, 2009, Petitioner also requested a list of all missing information necessary for the Board's consideration of its ESA. Board Staff forwarded its concerns to Petitioner on July 9, 2009 and scheduled a meeting with Petitioner on July 14, 2009.

Petitioner's July 2 letter also proposed a process to "avoid[ ] the conflict issue" and resolve the LPCL concerns. Petitioner stated that it would apply for self-certification from FERC; request Board approval of the "form of ESA" to be supplemented by additional information and conditioned upon receipt of FERC certification; and resubmit the ESA to the Township Council for approval. By letter dated July 13, 2009, the Division of Law informed Petitioner that modifications to the petition should be made formally with the Board. The Division of Law also noted that Petitioner did not address all of the LPCL concerns raised throughout the pendency of this matter. As to the apparent conflict, the Division of Law informed Petitioner of its

opinion that presenting the existing ESA to the current Township Council for ratification would not cure the appearance of a conflict in the negotiation of the terms of that ESA.

The Petitioner's representatives met with Board Staff, the DCA, the Township, and the Division of Law on July 14, 2009. Immediately following the meeting, the Township informed the Board that it would not participate in any proposal that "require[s] funding in any amount from the Township." Rather, the Township was "looking for the $20 Million Dollars in energy cost savings that the Co-Generation [sic] plan was originally designed to give to the Township." By letter dated July 20, 2009, Petitioner notified the Board that the meeting had been "very productive" and that, "due to the complexity of the discussions," it required additional time "to present a comprehensive proposal to the Board."

At its July 29, 2009 agenda meeting, the Board considered Petitioner's request to defer consideration of the matter pending receipt of a comprehensive proposal. The Board directed Staff to continue "work[ing] with the officials of Wayne in a very aggressive way" and "to continue to meet with them" to serve the citizens of the Township and the State. To that end, on August 20, 2009 Board Staff, the DCA, the Division of Law and the Petitioner convened a conference call to discuss Petitioner's progress and schedule an in person meeting. Petitioner requested a meeting to discuss the Energy Savings Improvement Program ("ESIP") legislation.

Staff from the agencies, the Division of Law, and Petitioner met at the Board's Trenton Office on September 11, 2009. At the meeting, the DCA explained in detail the alternative ESIP legislation. Board Staff addressed the CORE rebate extension and recommended reducing Petitioner's rebate to $245,000, the level currently approved by the Board for all systems greater than 100 kW. Board Staff also noted that questions identified in earlier Staff correspondence would need to be addressed before Staff would recommend approval of the petitions. Ultimately, Board Staff urged Petitioner to revise or withdraw its petitions.

By letter dated September 15, 2009, Petitioner informed the Board that the September meeting with Staff "furthered the progress on our discussions but additional meetings will be necessary to work out specific procurement issues" in order for Petitioner to present a comprehensive proposal to the Board. Petitioner requested that the Board defer consideration until October 2009. The Board deferred consideration of the matter from its September 16, 2009 agenda meeting. Board Staff and the DCA further explored the ESIP legislation and its relationship to the pending petitions at informal meetings. Throughout the process, Board Staff understood that the Petitioner would be sending its comprehensive proposal, including a proposal on the CORE rebate, to the Board for consideration.

Once meetings ceased, Board Staff contacted Petitioner by letter dated January 15, 2010. Staff's letter requested that Petitioner provide its comprehensive proposal, its response to the outstanding concerns, or a letter indicating the current posture of the project. Petitioner did not respond. To date, the Board has received neither correspondence from Petitioner nor the comprehensive proposal. Thus, the Board renders its decision based on the petitions as originally filed and the record stated above.

II. FAILURE TO PROSECUTE PETITIONS

The Board begins its analysis by addressing a procedural matter. Petitioner filed its request for approval of the ESA on August 27, 2008. Throughout 2008 and 2009, Board Staff continuously requested information from Petitioner to support the petition. Petitioner filed its request for a third extension of the CORE rebate commitment on February 27, 2009, but further information to support that petition also remains outstanding. Rather than supporting the petitions as filed, Petitioner has repeatedly represented that it would present a "comprehensive proposal" to

the Board. The Board has never received this proposal and the petitions remain as originally filed. The factual background stated above shows the continued effort of Board Staff and the DCA to obtain necessary information from Petitioner. The factual background also shows Petitioner's continued failure to provide the necessary information. As recently as January 15, 2010, Board Staff sent a letter to Petitioner about its petition with no reply. The Board **HEREBY CONCLUDES** that Petitioner has failed to prosecute its petitions. Thus, the Board **HEREBY DENIES** the petitions.

III. PETITION FOR APPROVAL OF THE ENERGY SERVICES AGREEMENT

Notwithstanding the support for the procedural denial, the Board now turns to the merits of Petitioner's petition for approval of its ESA. First, the Board considers whether Petitioner's ESA qualifies for an exception to the LPCL's bidding requirement at N.J.S.A. 40A:11-5(1)(v). Second, the Board considers Petitioner's claim to exception under N.J.S.A. 40A:11-15(1)(c) to the LPCL's contract duration provisions. The Board then considers whether the ESA is in the public interest. The Board's analysis of the petition and conclusions are stated below.

A. BIDDING PURSUANT TO LOCAL PUBLIC CONTRACTS LAW

Pursuant to the Extension Order, Board Staff endeavored to facilitate Petitioner's completion of the solar installation during the term of the second extension. For example, in discussions following Petitioner's first progress report, Board Staff recommended alternatives to Petitioner's complex contracting model so that Petitioner could complete its solar project before December 31, 2008. Board Staff also urged Petitioner's cooperation with the DCA to ensure Petitioner's compliance with the LPCL.

Although Petitioner expressed its belief that the ESA "complies with both the spirit and letter of the [LPCL]," it requested a meeting with DCA and Board Staff to discuss the subject. By letter dated December 5, 2008, DCA requested written responses or previously prepared documents that, among other things, "explain[ed] the statutory authority that allowed the agreement between [Petitioner] and the Township of Wayne." Petitioner cited N.J.S.A. 40A:11-5(1)(v), an exception to the LPCL's public bidding requirement, as support for its ESA. In response, the Division of Law noted that the Board had considered the scope of the claimed exception in a prior Order, I/M/O the Borough of Hightstown's Power Purchase Agreement with Worldwater & Power Corporation, Docket No. EO07020089 (Oct. 25, 2007) ("Hightstown Order").

In the Hightstown Order, the Board addressed the scope of the bidding exceptions codified at N.J.S.A. 40A:11-5(1)(v). The Board began its analysis with reference to the "strong public policy in favor of public advertising . . . and public bidding." Hightstown Order at 8 (citing Hillside v. Sternin, 25 N.J.317, 322 (1957)). Public bidding statutes "should be construed with sole reference to the public good." National Waste Recycling, Inc. v. Middlesex County Improvement Auth., 150 N.J. 209, 220 (1997). With that in mind, "statutory exceptions to public bidding requirements should be strictly construed so as not to dilute this policy or permit a public body to avoid pertinent legislative enactments." Autotote Ltd. v. N.J. Sports & Exposition Auth., 85 N.J. 363, 370 (1981). The Court has also reasoned, however, that "'the exceptions should not be read out of the statute, thereby frustrating the intent of the Legislature in its grant of power to the contracting authority.'" Borough of Princeton v. Board of Chosen Freeholders of the County of Mercer, 169 N.J. 135, 160 (2001) (quoting National Waste Recycling, 150 N.J. at 223.) Cognizant of this well-established body of law, the Board considered the exceptions and explained that "[p]ublic advertising for bids and bidding is not required when the contract is covered by N.J.S.A. 40A:11-5(1)(v), which exempts contracts for the purchase of electricity from a qualifying small power production facility . . . as defined in 16 U.S.C. § 796." Hightstown Order at 9 (citing N.J.S.A. 40A:11-5(1)(v)).

Here, Petitioner has stated that it relies on the bidding exceptions codified at N.J.S.A. 40A:11-5(1)(v), because it will "sell steam and electricity from a qualifying cogeneration facility and electricity from a qualifying small power production facility, both as defined in 16 U.S.C. § 796." See Letter from William W. Northgrave, Attorney for Petitioner, to Julie Cavanagh, Deputy Attorney General (Dec. 23, 2008). The Board has reasoned that N.J.S.A. 40A:11-5(1)(v) relies on the language contained in that federal statute. Hightstown Order at 9. In its December 23rd letter, Petitioner also acknowledged that "the plain language of the New Jersey statute requires that the facility meet the requirements defined in the federal statute." Thus, further review requires an understanding of the federal statute.

For each facility, two sections of the federal statute are relevant. Section 796(17)(A) defines a "small power production facility" as a facility that produces energy by renewable resources and has a maximum power production capacity of 80 megawatts. Building from that definition, section 796(17)(C) describes a *qualifying* small power production facility as "a small power production facility that the [Federal Energy Regulatory Commission ("FERC")] determines, by rule, meets such requirements . . . as [FERC] may, by rule, prescribe." Hightstown Order at 9. Likewise, section 796(18)(A) defines a "cogeneration facility" as a facility that produces electric energy and "steam or forms of useful energy (such as heat) which are used for industrial, commercial, heating, or cooling purposes." A *qualifying* cogeneration facility is "a cogeneration facility that the [FERC] determines, by rule, meets such requirements . . . as [FERC] may, by rule, prescribe." 16 U.S.C. § 796(18)(B). Thus, N.J.S.A. 40A:11-5(1)(v) mandates that a small power production facility or a cogeneration facility first comply with the requirements for qualification found in the federal code of regulations.

A small power production facility or cogeneration facility becomes a qualifying facility ("QF") if it meets the applicable criteria established in 18 C.F.R. § 292.203. 18 C.F.R. § 292.207. Section 292.203(a), states that a small power production facility becomes a QF if it:

> (1) Meets the maximum size criteria specified in § 292.204(a);
> (2) Meets the fuel use criteria specified in § 292.204(b); and
> (3) Has filed with [FERC] a notice of self-certification . . . or has filed with [FERC] an application for [FERC] certification . . . that has been granted.

The Board has noted that the requirements of 18 C.F.R. § 292.204(a)-(b) parallel the definition of a small power production facility found in 16 U.S.C. § 796(17)(A). Hightstown Order at 9. Petitioner's December 23rd letter also parallels the first two criteria and the definition of a small power production facility. In light of this analysis, the Board has concluded that the distinction between a small power production facility and a *qualifying* small power production facility, the term used in the New Jersey statute, is the certification.

Likewise, § 292.203 states that a cogeneration facility becomes a QF if it:

> (1) [m]eets any applicable operating and efficiency standards specified in § 292.205(a) and (b); and
> (2) [h]as filed with the [FERC] a notice of self-certification . . . or has filed with the [FERC] an application for [FERC] certification . . . that has been granted.

Referencing the Hightstown Order, the Division of Law's January 16th letter stated that "N.J.S.A. 40A:11-5(1)(v) similarly provides that a cogeneration facility must be a 'qualified cogeneration facility' in accordance with 16 U.S.C. § 796 in order for the exemption to apply." Petitioner also claims that "[t]he FERC [c]ertification requirement, whether applied to a qualified cogeneration facility or a qualified small power production facility, is the same." See Letter

from William W. Northgrave, Attorney for Petitioner, to Cynthia Holland, Deputy Attorney General (Feb. 23, 2009). Therefore, the analysis in the Hightstown Order and its emphasis on certification is relevant here.

The petitioner in the Hightstown Order relied on N.J.S.A. 40A:11-5(1)(v), because its project met the definition of a small power production facility and it had filed a notice of self-certification with FERC. Hightstown at 9. However, the petitioner entered into its contract on May 12, 2006 and the notice of self-certification was filed with FERC on or about April 6, 2007. Ibid. The Board considered the plain language of the exception and concluded that the petitioner "[did] not give meaning to the term 'qualifying,' but focus[ed] on the federal statute's definition of a small power production facility." Id. at 10. The Board opined that QF status is "a legislatively prescribed prerequisite" that the petitioner failed to meet until 10 months after it executed the contract. Ibid. The Board ultimately concluded that the statutory exception from public advertising and bidding set forth in N.J.S.A. 40A:11-5(1)(v) did not apply unless the entity has first complied with the FERC certification requirements. Ibid. Because Petitioner claims the same exemption in the instant matter, the Division of Law's January 16, 2009 letter requested that Petitioner provide documentation "indicating that these [f]ederal certification requirements have been fulfilled prior to the execution of the [ESA] in order for the contract to fall within the scope of N.J.S.A. 40A:11-5(1)(v)."

On February 23, 2009, Petitioner claimed that the Board's Hightstown Order "took [it] by surprise." See Letter from William W. Northgrave, Attorney for Petitioner, to Cynthia Holland, Deputy Attorney General (Feb. 23, 2009). Petitioner further claimed that the Board's interpretation of N.J.S.A. 40A:11-5(1)(v) "renders the exemption a nullity, raising the question of why the Legislature would have seen fit to grant an exemption that is qualified in a way that no party could ever meet its requirements." Ibid. According to Petitioner, "the only rational interpretation" is one where

> the Municipal Customers would have no authority to purchase the energy from anything other than a FERC certified facility, i.e. until the Contractor achieves FERC certification, the Municipal Customers have no ability to purchase energy from [Petitioner] and conversely, [Petitioner] would have no obligation to make any payment to the Contractor leaving the Contractor (and any of its debt or equity investors) solely at risk.
>
> [Ibid.]

Nevertheless, Petitioner requests approval of the ESA pursuant to the exception before its project has receiving QF status or even been built.

Petitioner continued to discuss the FERC certification issue in several letters. In its December 23, 2008 letter, Petitioner stated "that negotiations and proposed contracts with potential Contractors have included explicit obligations on the Contractor *to . . . achieve* and maintain the certification required under FERC, without which the Township would not have authority to maintain the ESA with [Petitioner]." Ibid. (emphasis added). For example, Petitioner explained that "[t]he design, construction, operation and maintenance agreement [Petitioner] *will* enter into with its contractor *will* require performance . . . in excess of the efficiency standards set forth in [18] C.F.R. § 292.205 and requires that the contractor meet those standards so that [Petitioner] can continue to self-certify its status as a qualifying cogeneration facility and qualifying small power production facility consistent with [18] C.F.R. § 292.207." Ibid. (emphasis added). In its June 15, 2009 letter, Petitioner requested that the Board revisit its interpretation of the FERC certification requirement. Finally, in its July 2, 2009 letter, Petitioner stated that it would apply for self-certification. Petitioner then requested Board approval of the "form of ESA," which it

intended to supplement with additional information. Petitioner requested that the Board condition its approval of the "form of ESA" on receipt of FERC certification.

In response to Petitioner's July 2 letter, the Division of Law informed Petitioner that the changes requested required it to amend its petition formally with the Board. Despite several meetings and letters assuring the Board that Petitioner would return with a "comprehensive proposal," Petitioner has never formally amended its petition to reflect the proposal stated in the July 2 letter. Therefore, the Board considers the petition as originally filed and does not opine on the proposal stated in the July 2 letter.

After careful consideration of the record in this matter, including all submissions by or on behalf of Petitioner, the Board **HEREBY FINDS** that Petitioner has not bid its ESA. The Board **FURTHER FINDS** that Petitioner is not a Qualifying Small Power Purchase Facility or a Qualifying Cogeneration Facility as required by N.J.S.A. 40A:11-5(1)(v). The Board recognizes that it may be Petitioner's intent to seek QF status at a later date, but Petitioner's interpretation of the law would replace the requirement that a facility "has filed" the FERC certification with a future requirement that the facility "will file" the FERC certification. The Board **HEREBY CONCLUDES** that the principles of statutory construction support the Hightstown Order, specifically the Board's conclusion that QF status is a legislatively prescribed prerequisite.

In rendering this decision, the Board has also carefully considered the Court's caution that, while the exceptions should be narrowly construed, "the exceptions should not be read out of the statute." National Waste Recycling, supra, 150 N.J. at 223. Contrary to Petitioner's contentions, the inapplicability of the exception to Petitioner's project does not nullify it. For example, the petitioner in the Hightstown Order would have qualified for the exception but for a ten-month miscalculation of time. The Hightstown Order thus balances the public policy in support of bidding with the Legislature's intent in carving out the exception. Having reviewed and analyzed the applicable law, the Board **HEREBY CONCLUDES** that the statutory exception from public advertising and bidding set forth in N.J.S.A. 40A:11-5(1)(v) may not be invoked in this situation.

Moreover, N.J.S.A. 40A:11-5(1)(v) allows a local government to negotiate and award a contract without bidding only if the subject matter consists of "[t]he purchase of steam or electricity from, or the rendering of services directly related to the purchase of such steam or electricity" from a QF. In the Hightstown Order, the contract at issue also included an option to purchase a solar installation at a mutually agreed upon price at the end of a 10-year term. The Board found that N.J.S.A. 40A:11-5(1)(v) did not provide an exception for the purchase of solar panels. The Board concluded that the petitioner could not secure with a contract exempt from public advertising and bidding that which would otherwise fall within N.J.S.A. 40A:11-4, the provision requiring public advertising and bidding. The Board's analysis in the Hightstown Order is relevant to the instant matter.

By letter dated January 16, 2009, the Division of Law first noted that Petitioner's ESA was not limited solely to the purchase of steam or electricity. Paragraph 12.1 on page 10 of the ESA provides that "ownership and title" to certain Energy Conservation Measures ("ECMs") "will automatically transfer to the Township" upon satisfaction of certain contractual requirements. Petitioner responded on February 23, 2009 that the ECMs were included in the overall project, but viewed as "merely ancillary to the main object of the project." To address the concerns raised by the Division of Law, Petitioner stated that it could donate the ECMs or remove the ECMs from the overall project. However, Petitioner expressed reservations about the latter approach, which it claimed "elevates form over substance while ignoring the very basis for the Local Public Contracts Law in the first place – to assure that the taxpayer receives the greatest possible benefit from the tax dollar."

The Division of Law again informed Petitioner that amendments to the petition should be filed with the Board. Despite several meetings and letters assuring the Board that it would present a "comprehensive proposal," Petitioner has never formally amended its petition or the ESA to reflect the proposal stated in the February 23 letter. Therefore, the Board must consider the petition and ESA as originally filed and will not opine on the proposal stated in the February 23 letter.

Upon review of the record in this matter, including all submissions by or on behalf of Petitioner, the Board **HEREBY FINDS** that ¶12.1 of the ESA provides that "ownership and title" to certain ECMs "will automatically transfer to the Township" upon satisfaction of certain contractual requirements. In the Hightstown Order, the Board reasoned that a municipality could not acquire property without bidding through an exception for the purchase of energy. Similarly, the Board **HEREBY CONCLUDES** that the acquisition of ECMs is not exempt from the public advertising and bidding requirements of the LPCL. Therefore, the Board **FURTHER CONCLUDES** that the statutory exception from public advertising and bidding set forth in N.J.S.A. 40A:11-5(1)(v) may not be invoked in this situation.

The Board has determined that Petitioner did not comply with the LPCL's bidding requirement. The Board remains mindful of the strong public policy in favor of public advertising and public bidding. Having concluded that Petitioner's ESA is not exempt from public bidding, the Board **HEREBY DENIES** the petition for approval of the ESA.

B. CONTRACT DURATION UNDER LOCAL PUBLIC CONTRACTS LAW

Petitioner has also requested Board approval of its ESA pursuant to N.J.S.A. 40A:11-15(1)(c), an exception to the LPCL's contract duration limit. Petitioner's claimed exception covers contracts for the "[s]upplying of [t]hermal energy produced by a cogeneration facility, for use for heating or air-conditioning or both, for any term not exceeding 40 years, when the contract is approved by the Board of Public Utilities." N.J.S.A. 40A:11-15(1)(c). Petitioner provided the most recent version of the ESA, dated December 11, 2007, with its petition.

In the petition and even in the Recitals of the ESA, Petitioner states its intent "to engage a contractor to develop and construct a cogeneration facility . . . along with . . . certain other energy efficiency upgrades and renewable energy systems . . . on land owned by the Township and ground leased to [Petitioner]." By letter dated January 23, 2009, Board Staff stated its understanding that the statute only exempts the thermal energy produced and supplied by a cogeneration facility for heating or cooling. Board Staff specifically stated its concern that the "related energy reduction components," such as geo-thermal, solar, wind, and the ECMs, referenced in both the petition and the ESA were not covered by the exception. Despite Petitioner's collective reference to the cogeneration, energy efficiency, and renewable energy components as one facility, Board Staff believes that these energy efficiency upgrades and renewable energy systems are separate and additional to the cogeneration facility. Therefore, the Board **HEREBY FINDS** that the ESA covers more than the supply of thermal energy from a cogeneration facility to include, among other things, electricity from the solar project.

Petitioner did not deny that the ESA is more than a cogeneration contract. Rather, by letter dated February 23, 2009, Petitioner claimed that "[t]he ESA does not extend beyond the two year period allowed under Local Public Contracts Law for the sale of electricity, whether generated by the cogeneration plant or the solar array." Paragraph 3.5 of the ESA establishes a termination date 17 years from when Petitioner commences operation of the complete facility, including the solar project and the cogeneration facility. However, ¶ 3.7 of the ESA states that "[t]he provision of electricity is subject to independent 24 month renewals." According

to Petitioner, "[t]he only commitment is to buy the thermal energy produced by the cogeneration plant for the duration of the ESA, which is allowed under N.J.S.A. 40A:11-15." Thus, Petitioner claims that the ESA, "as written[,] is in full compliance with N.J.S.A. 40A:11-15(1)(c)."

The public policy underlying the LPCL's limitations on contract duration informs the Board's review of Petitioner's claim to exception pursuant to N.J.S.A. 40A:11-15(1)(c). The Supreme Court of New Jersey spoke about the purpose of the duration limitations in Borough of Princeton, supra, 169 N.J. at 153.

> By requiring that contracts subject to the [LPCL] be open to re-bidding on a regular basis, the LPCL contract duration limits provide increased opportunity for companies that are new to the relevant market, or have become more competitive within it, to compete for public contracts and provide a potentially more favorable package of service to the public. Likewise, the limits ensure that the public does not find itself bound in the long-term to contracts that, while advantageous at the time of execution, become unfavorable as a consequence of changes in market conditions.
>
> [Ibid.]

The very "purpose of the public bidding requirement is to 'secure for the public the benefits of unfettered competition[,]' and to 'guard against favoritism, improvidence, extravagance, and corruption." National Waste Recycling, supra,150 N.J. at 219. Thus, if Petitioner's ESA is not exempt from the LPCL contract duration limitation, the ESA "would work to impose 'a continuing violation of the public rights' because the reduction in competition . . . constitutes a continuing impairment . . . of the public's right to the protections afforded by the open market." Borough of Princeton, supra, 169 N.J. at 154 (quoting Reilly v. Brice, 109 N.J. 555, 559 (1988)).

The Board believes that ¶ 3.7 of the ESA must be viewed in light of Petitioner's claimed exemption from the LPCL's public bidding requirement. The ESA states that "[t]he provision of electricity is subject to independent 24 month renewals," but Petitioner has argued that the ESA is exempt from the public bidding requirement. Petitioner relies on an exception to the bidding requirement for the purchase of electricity from Petitioner's solar and cogeneration projects. Petitioner's intent is clear. The 24 month renewals will not open the process to new bidders and the public policy favoring re-bidding through the duration limits will not be served. Instead, the ESA would provide electricity from Petitioner's solar and cogeneration projects for the full 17 year term. Based on Petitioner's representations and notwithstanding ¶ 3.7 of the ESA, the Board **HEREBY CONCLUDES** that Petitioner does not intend to re-bid the contract for the provision of electricity from its solar and cogeneration project.

In effect, Petitioner contends that the entire ESA is exempt under N.J.S.A. 40A:11-15(1)(c). The plain language of the exception limits its applicability to contracts for "[s]upplying . . . [t]hermal energy produced by a cogeneration facility." N.J.S.A. 40A:11-15(1)(c). The Board has found that the ESA covers more than merely the supply of thermal energy from a cogeneration facility. "[I]t is axiomatic that statutory exemptions to the public bidding requirements should be strictly construed so as not to dilute [the policy of public bidding] or permit a public body to avoid pertinent legislative enactments." Autotote, supra, 85 N.J. at 370. Therefore, the Board **HEREBY CONCLUDES** that the statutory exception to the duration limit set forth in N.J.S.A. 40A:11-15(1)(c) may not be invoked in this situation.

Having determined that Petitioner's ESA is not exempt under N.J.S.A. 40A:11-15(1)(c), the Board's approval of Petitioner's ESA would result in the sort of injustice the LPCL intends to guard against. "Statutes directed toward these ends are for the benefit of the taxpayers and not the bidders; they should be construed with sole reference to the public good . . . ." Hillside, supra, 25 N.J. at 322. Therefore, with reference to the public good, the Board **HEREBY DENIES** the petition for approval of the ESA.

C. THE ENERGY SERVICES AGREEMENT

The Board has also reviewed the parties to and the terms of the ESA. When drafting N.J.S.A. 40A:11-15(1)(c), the Legislature granted the Board the authority to approve a contract claimed to be exempt from the LPCL's requirements. As discussed above, the LPCL's duration limit is intended to open contracts to re-bidding and the "purpose of the public bidding requirement is to 'secure for the public the benefits of unfettered competition[,]' and to 'guard against favoritism, improvidence, extravagance, and corruption." National Waste Recycling, supra, 150 N.J. at 219 (quoting Terminal Construction Corp. v. Atlantic County Sewerage Auth., 67 N.J. 403, 410 (1975)). "Public bidding statutes . . . should be construed with sole reference to the public good." Id. at 220. Therefore, the Board considers the ESA with these goals in mind.

Petitioner claims that the ESA will allow the Township to receive reliable service at a low cost from Petitioner.[5] Board Staff first questioned Petitioner's claims in the January 23rd and February 25th letters. Discussions about the ESA then continued throughout 2009. Despite repeated representations that it would address Board Staff's concerns, Petitioner has not amended its petition to the Board. Thus, the Board considers the ESA as it was originally filed.

Many details that should be included within the ESA or attached thereto were not included in the December 11, 2007 draft provided to the Board. For example, the ESA states that Petitioner "shall furnish all labor, materials and equipment," but no list of the materials and components has been provided. ESA ¶ 1.2.1. Similarly, the ESA includes ECMs discussed above, but the ESA neither lists the measures nor the savings to be achieved. ESA ¶ 1.2.2. The ESA states that dispute resolution will be conducted in accordance with the procedures set forth at Schedule P, which has not been provided. The ESA also does not identify the entity(ies) responsible for metering energy use, calibrating the meters, or performing Quality Assurance/Quality Control. In sum, the ESA leaves much undefined.

In addition, certain terms of the ESA may cause the Township additional expense. For example, the ESA provides for only one change from heating to cooling and one from cooling to heating services each year. Petitioner expects that "this transition will occur seasonally (Fall and Spring)." ESA ¶ 4.3. The contract provides that further transitions "shall be made . . . at additional expense." Ibid. It is the Board's experience that New Jersey's weather patterns in the fall and spring rarely accommodate a single switch as contemplated by the ESA. As a result, this provision virtually guarantees additional expense for the Township. The ESA also states that "[Petitioner] has determined the baseline energy consumption of the Buildings based upon the Energy Assessment attached as Schedule F," but Schedule F is blank. ESA ¶ 2.1. The Energy Assessment should state the type of use and the hours of operation, both of which impact the determination of baseline costs. If the type of use and hours of operation are overstated, the enlarged baseline costs figure can result in inflated charges to the Township.[6]

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[5] At this time, the Board does not opine on whether Petitioner is a public utility under N.J.S.A. 48:2-13.

[6] The Legislature has prohibited the use of an energy audit performed by an energy services company subsequently hired to develop an energy savings improvement program for a municipality. P.L. 2009, c. 4 (amending N.J.S.A. 18A:18A-4.6 and N.J.S.A. 40A:11-4.6). Although this project is not a part of an

Similarly, the service rates in the ESA will include fixed facility charges that "shall be comprised of the cost of the design, development, construction, financing, maintenance and operation of the [f]acility." ESA ¶ 5.1. Certain capital costs are identified within these charges without limitation and the ESA provides no means by which these costs will be accounted for and verified. The Board is concerned that these provisions may result in over charges to the Township.

Furthermore, if the Township does not appropriate and budget sufficient funds to pay its obligations to Petitioner, the ESA will terminate and the Petitioner will have the right to take possession of all materials installed "including those materials comprising the facility located in the [b]uildings."[7] ESA ¶ 8.1. Paragraph 8.1 states that "the Township agrees to peaceably surrender possession of all material installed in the [b]uildings." Ibid. Depending on the modifications made to the Township's mechanical, electrical, and plumbing systems, allowing Petitioner to "take possession of all materials installed" could render the Township's municipal complex completely useless. At a minimum, if this remedy is exercised, the Township's buildings would be left in a dysfunctional state.

On the other hand, in the event Petitioner fails to provide service for 24 hours, the Township may procure energy services from a third party and collect damages from Petitioner. ESA ¶ 9.2.2.3. The Township can only collect the difference between the cost of service from the Petitioner and the cost of service from the third party as damages. Ibid. The ESA does not allow the Township to recover for physical damages, such as frozen and damaged pipes, which can and do occur when energy service is interrupted. The ESA also fails to recognize that the Township could suffer a much greater loss in the event that its buildings are no longer habitable. No damages are provided in the ESA to cover such obvious potential losses to the Township. Ultimately, the ESA presented to the Board for approval does not leave the Township in a favorable position.

In addition to the concerns about the terms of the ESA, the Board has become aware of the appearance of a conflict of interest. Specifically, the DCA and the Division of Law have questioned the involvement of Scott Rumana, the Township's former Mayor and chairperson of Petitioner's board of trustees, in the negotiation of the ESA. The Board considers the apparent conflict of interest as part of its review of the ESA presented to the Board for approval.

"The primary purpose of conflict of interest laws is to ensure that public officials provide disinterested service to their communities and refrain from self-dealing." Thompson v. City of Atlantic City, 190 N.J. 359, 363 (2007). The Local Government Ethics Law, codified at N.J.S.A. 40A:9-22.1 et seq., is a supplement to the common law conflict of interest doctrines governing the conduct of municipal officials. Id. at 375. The Legislature enacted the Local Government Ethics Law as part of its continuing efforts to combat official corruption, to advance public confidence in government, and to prevent conflicts between private interests and duties of public officers. See Dep't of Community Affairs, Local Fin. Bd. v. Cook, *282* N.J. Super. 207, 209 (App. Div. 1955). Simply stated, the law "demands that an officeholder discharge duties with undivided loyalty." McDougall v. Weichert, 144 N.J. 380, 401 (1996).

In determining whether recusal is necessary, the Supreme Court of New Jersey has stated that "'the question will always be whether the circumstances could reasonably be interpreted to show that they had the likely capacity to tempt the official to depart from his sworn public duty.'"

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energy savings improvement program, the Board shares the Legislature's concerns that, without third party validation, reliance on Petitioner's energy audit lead to inflated charges not in the public interest.

[7] Without opining on the issue, the Board notes that "those materials comprising the facility" may constitute fixtures to the Township's real property that may not be removed.

Wyzykowski v. Rizas, 132 N.J. 509, 523 (1993) (quoting Van Itallie v. Borough of Franklin Lakes, 28 N.J. 258, 268 (1958)). The Court has also opined that "it is the existence of such interests which is decisive, not whether they were actually influential." Griggs v. Borough of Princeton, 33 N.J. 207, 219 (1960). The appearance of a conflict, rather than proof of an actual conflict, is sufficient. Thompson, supra, 190 N.J. at 374. Ultimately, as Petitioner has acknowledged, the determination of a conflict of interest is factual in nature and depends upon the circumstances of the case.

In its first letter to Petitioner, the DCA questioned whether there were any conflicts of interest between the Petitioner and the Township. By letter dated May 18, 2009, Petitioner informed the Board that Mr. Rumana "served as the Mayor of the Township of Wayne at the time [Petitioner] was formed; he served and serves as the chairman of [Petitioner]." Petitioner has not denied that the former Mayor occupied these roles at the time Petitioner and the Township negotiated the ESA. Petitioner has also represented that the former Mayor did not vote on the ESA as Mayor and has not received compensation for his role as chairperson. On the other hand, Petitioner described the project as the former Mayor's "brainchild." Several progress reports to the Board disclose his activity in furtherance of Petitioner's objectives. Other correspondence states that the former Mayor authorized the project's feasibility study. Petitioner has also claimed that the former Mayor will receive "the satisfaction of having been instrumental in causing the Township of Wayne to reduce its carbon footprint" along with a possible "reduction in taxes which will occur as the result of the cost savings from this program." Ultimately, Petitioner maintains that "[its] mission and the interest of the Township of Wayne are not in conflict" and "no recusal by Mayor Rumana was necessary."

In several cases before the courts and administrative agencies, a personal, non-pecuniary interest has been found to conflict with an official's interest in serving the public. Wyzykowski, supra, 132 N.J. at 533. In Wyzykowski, the Supreme Court of New Jersey found a planning board member, who was appointed by the mayor, subject to a disqualifying personal conflict of interest when he voted to approve a development contract involving the mayor. Id. at 526. The Appellate Division found that a planning board member, who voted on an ordinance effecting a zone revision that would benefit his church, had an indirect personal conflict of interest sufficient to invalidate the ordinance. Zell v. Borough of Roseland, 42 N.J. Super. 75, 83 (App. Div. 1956). Likewise, the Local Finance Board adopted an Initial Decision holding that a city council member, who was also a member of a non-profit organization, had a conflict of interest when dealing with that organization. Schaer v. Local Finance Board, OAL Docket No. CFB 5525-00, LFB Docket No. 98-014 (April 10, 2002). In Schaer, as in Zell, the officials' service as members of the organizations created the appearance of a desire to promote the well being of the organizations that could outweigh the officials' responsibility to the public. Thus, a personal interest, not necessarily a financial interest, may create a conflict of interest such that recusal is necessary.

If such a personal interest is found, an official need not vote on a matter to have a conflict of interest. In Thompson, the mayor insulated himself from the settlement negotiations while members of his staff negotiated the details. Thompson, supra, 190 N.J. at 377-78. Although the mayor was not directly involved, the Court pointed to the entangled relationships of the staff to the settlement agreement in determining that the conflicts of interest gave the appearance of self-dealing. Id. at 377. Similarly, in Scott v. Town of Bloomfield, 94 N.J. Super. 592, 600-01 (Law Div. 1967), the court found that, although the mayor did not vote, a conflict of interest arose when he was present for meetings and voiced his opinion about giving a lease to an organization he served as both a member and a director. Therefore, it is not the act of voting on a matter that creates the conflict of interest.

The Board has reviewed the case law and the record in this matter. The Board **HEREBY FINDS** that, as the chairperson of Petitioner's board of trustees, the former Mayor had a personal interest in the completion of Petitioner's ambitious project. The Board **FURTHER FINDS**, and Petitioner has not denied, that the former Mayor occupied that public office as well as the role of chairperson of Petitioner's board of trustees at the time the ESA was negotiated. In addition, the Board **FURTHER FINDS** that both the DCA and the Division of Law repeatedly requested documentation to support Petitioner's position that no conflict existed, but Petitioner has failed to produce such documentation. The Board **HEREBY CONCLUDES** that these facts raise the appearance of a conflicting personal interest in the negotiation of the ESA presented to the Board for approval.

Petitioner has presented the ESA to the Board for approval pursuant to the LPCL. The LPCL is intended to secure for the public the benefits of unfettered competition and guard against improvident and extravagant contracts. The Board **HEREBY FINDS** that the ESA lacks material information necessary for approval. The Board **FURTHER FINDS** that several provisions of the ESA leave the Township exposed to unreasonable risks, the extent and impact of which are impossible to project.

Having reviewed the ESA and considered the record in this matter, the Board **HEREBY CONCLUDES** that approval of the ESA is not in the public interest. The ESA does not promote the goals of the LPCL. In addition, the Board cannot undermine the public confidence by approving a contract overshadowed by the appearance of a conflict of interest. Accordingly, the Board **HEREBY DENIES** the petition.

III. PETITION FOR A THIRD CORE REBATE EXTENSION

The Board now considers Petitioner's request for a third extension of the Township's CORE rebate commitment. Over 2.2 million dollars have been reserved for the Township's solar project since May 1, 2006. In waiving the CORE Guidelines to provide Petitioner a second extension, the Board "remain[ed] mindful of the need to prevent the reservation of CORE funding for solar projects that are unlikely to be completed." The Board required Petitioner to submit progress reports during the term of the second extension. Those reports consistently showed little progress toward installation of the solar project, despite the assistance Petitioner received from two State agencies. Petitioner then filed this petition on the date the Board ordered its second extension to expire.

In the time this CORE rebate has been held for Petitioner, economic circumstances in the State have changed dramatically. During a national economic crisis, the Board worked with the electric and gas utilities to formulate plans for enhanced investment in infrastructure and energy efficiency with the goal of stimulating job growth in the State. On April 28, 2009, the Board Staff approved stipulations of settlement in the accelerated investment in several of the infrastructure matters wherein the Board noted that "these are not ordinary times." See Order, I/M/O the Proceeding for Infrastructure Investment and a Cost Recovery Mechanism for all Electric and Gas Utilities, Docket No. EO09010049 (Apr. 28, 2009). The State currently finds itself in a fiscal emergency, which will require the Board to reevaluate its programs and budgets for the New Jersey Clean Energy Program to ensure that the State and the ratepayers receive the maximum benefit from limited funds. Continuing to hold this CORE rebate for Petitioner will limit the funding available for "shovel ready" projects in need of financial assistance. At the significantly reduced level of rebates currently available in the solar rebate program, $2.2 million could be applied to 2,750 kW of solar capacity in the non-residential market.

Furthermore, Petitioner's substantial CORE rebate is no longer necessary to make the Township's solar project economically viable. Since Petitioner's $2,207,196.25 rebate was approved in 2006, the solar marketplace in New Jersey changed to increase the value of other incentives available to solar systems. Included among those other incentives are the Solar Renewable Energy Certificates ("SRECs") available for the production of solar energy. When this substantial CORE rebate is combined with the increased income available from the sale of SRECs at current market values, the project could pay for itself in its third year and then begin to generate a very high level of return for Petitioner. Stated another way, Petitioner's rebate approval now appears to be an excessive award for a single solar project, which, despite the considerable support of Board Staff, has not contributed to New Jersey's energy goals. While in 2006 SRECs were routinely traded in the $200 to $250 per MWh range, the weighted average SREC price most recently reported for the Reporting Year 2010 through February 28th was $552.69 with the highest trade reported at $685.

Petitioner's later progress reports, on the other hand, allege that the delay in project completion is due to the actions of Board Staff and the DCA. The background and procedural history summarized above do not support this claim. The record shows Board Staff's efforts to facilitate the development of the solar project even before the second extension. Following the Extension Order, on October 10, 2008, Board Staff convened a conference call with Petitioner suggesting an alternative approach to eliminate any risk of losing its solar rebate. Board Staff continued to work with Petitioner throughout 2009 and into 2010. Petitioner has consistently failed to respond.

After receiving two extensions of its CORE rebate, Petitioner requested a third extension "to explore the solutions" raised by Board Staff and the DCA at the February 26, 2009 meeting. However, since Petitioner filed its petition for a third CORE rebate extension, Petitioner has made no showing that it is indeed exploring those solutions. The Board **HEREBY FINDS** that Petitioner's previous filings stated that it would complete the solar project by December 31, 2008, but Petitioner's reports to the Board show that it has still not begun construction. As indicated by Petitioner's continued course of action -- which has yet to result in construction of the solar facility -- Petitioner is not receptive to Board Staff's suggestions. The record is replete with instances where Petitioner has failed to respond to inquiry or otherwise accommodate the Board's review. Thus, the Board **HEREBY CONCLUDES** that Petitioner cannot credibly claim that it needs a third extension of its CORE rebate to explore Board Staff's suggestions.

The Board's policy as stated in the CORE Program Guidelines does not provide for a third extension of the CORE rebate commitment. To date, Petitioner has done nothing to support the goals of the New Jersey Clean Energy Program, the New Jersey Energy Master Plan, or the Board's Renewable Portfolio Standard. The Board is doubtful whether Petitioner's solar project, as currently envisioned, will ever be built. As a result, the Board **HEREBY CONCLUDES** that it is inappropriate to continue to reserve ratepayer funding for this solar project at the expense of other "shovel ready" projects. Therefore, the Board **HEREBY DENIES** the petition for a third extension of the CORE rebate commitment and **HEREBY ORDERS** the release of the funds previously held for Petitioner's CORE rebate.

IV. CONCLUSION

Although the Petitioner's requests have been denied, the resources and expertise of the Board and the DCA are available to help the Township. Board Staff can provide technical assistance to the Township. The DCA has also shown its willingness to assist the Township realize its goals in a manner consistent with State contract law. The Board encourages the Township to take advantage of these resources and continue developing energy efficiency and renewable energy plans to serve its residents and the State of New Jersey.

DATED: 4/16/10

BOARD OF PUBLIC UTILITIES
BY:

LEE A. SOLOMON
PRESIDENT

JEANNE M. FOX
COMMISSIONER

JOSEPH L. FIORDALISO
COMMISSIONER

NICHOLAS ASSELTA
COMMISSIONER

ELIZABETH RANDALL
COMMISSIONER

ATTEST:

KRISTI IZZO
SECRETARY

I HEREBY CERTIFY that the within document is a true copy of the original in the files of the Board of Public Utilities

SERVICE LIST

Gary Fechter, Managing Executive
Wayne Energy Corporation
William W. Northgrave, Esq.
McManimon & Scotland, L.L.C.
One Riverfront Plaza, 4th Floor
Newark, NJ 07102-5408

John McKniff, Esq.
Township of Wayne
475 Valley Road
Wayne, NJ 07470-3586

Nathanya Simon, Esq.
Wayne Twp. Board of Education
50 Nellis Drive
Wayne, NJ 07470-3576

Julie Cavanagh, DAG
Department of Law & Public Safety
Division of Law
44 South Clinton Ave.
Trenton, NJ 08625

Marc Pfieffer, Acting Director
Department of Community Affairs
Division of Local Government Services
101 South Broad Street
P.O. Box 803
Trenton, NJ 08625-0803

Michael Winka, Director
Mona Mosser
B. Scott Hunter
Allison Mitchell
Board of Public Utilities
Office of Clean Energy
Two Gateway Center
Newark, NJ 07102

Rachel Boylan, Esq.
Board of Public Utilities
Counsel's Office
Two Gateway Center
Newark, NJ 07102

Cynthia Holland, DAG
David Wand, Esq.
Peter Hamner
Department of Law & Public Safety
Division of Law
124 Halsey Street
P.O. Box 45029
Newark, NJ 07101