SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-002316-10

I/M/O Certificate of the Department of Environmental Protection

Civil Action

REPLY BRIEF AND APPENDIX IN SUPPORT OF PINELANDS PRESERVATION ALLIANCE'S, NEW JERSEY CONSERVATION FOUNDATION'S AND NEW JERSEY ENVIRONMENTAL LOBBY'S APPEAL.

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PRELIMINARY STATEMENT

In its response, the Department of Environmental Protection ("DEP"), for the first time in the long history of this matter, characterizes the development of the proposed Stafford Park Solar Project as a "public/private partnership" (Rb25), seeming to suggest that this private, profit-making proposed development constitutes Stage Two of the initial redevelopment project known as the Stafford Business Park. It now applies this undefined term, which appears nowhere in the applicable regulations, in order to avoid the key rules that invalidate the diversion of preserved open space at issue here - specifically, those restricting diversions to cases where it is necessary in order for a municipality to provide an "essential service" to its residents, and mandating a 4:1 ratio of replacement land where a diversion to a private company's use is permitted. By mischaracterizing the solar project as part of the original redevelopment approval - when in fact the preservation of the landfill area was required by the original approval - the DEP seeks to give the new project the patina of public benefit to justify a form of industrial development on preserved open space that currently is the home of five (5) endangered or special concern bird species and the threatened Northern Pine snake.

In fact, the solar project is a private commercial endeavor which the designated beneficiary, Walters Group,[1] says it does not even intend to carry out. At the time Stafford Township submitted its application to divert Block 25, Lot 37 to the Walters Group, the entire Stafford Business Park was owned by the Walters Group, other than Lot 37 (i.e., the landfill), and Block 25, Lot 39, on which the County Recycling Facility and Road Department are located. The Solar Project would be owned and operated by a private company for private profit. Nonetheless, DEP seeks to authorize the diversion of the very public parkland Stafford set aside to mitigate the negative impacts of the Stafford Business Park development project and satisfy its obligation to "[p]rovide an equivalent level of protection of resources of the Pinelands" as required by the Pinelands Comprehensive Management Plan ("CMP").

Labeling the diversion of parkland as a "public-private partnership" does not alter the applicable legal standards. The project does not meet the threshold standards for a permitted diversion because supplying electricity to the public is not a municipal service and the diversion would not make Stafford Township a supplier of electricity to the public. The fact that Walters has no plans actually to build the Solar Facility

[1] The Walters Group doing business as Stafford Park Solar 3 LLC (hereinafter "Walters").

because the economics are no longer favorable to it, just confirms that this development does not meet the threshold standard for a diversion. Even if the project was the kind of use that qualifies for a diversion, DEP no longer seriously contests the fact that this project must also be treated under the rules that apply to permanent transfer of ownership because it would be authorized under a lease of 25 years or more. It follows that, as a commercial development project, this diversion would have to provide a 4:1 ratio of replacement land, which Stafford has not done here, and any lease payments must be applied to Stafford's open space and recreation program. Finally, DEP arbitrarily discounts the destruction of established threatened and endangered species habitat which the project entails, and wrongly accepts land of an entirely different ecological value as replacement for this destruction.

LEGAL REPLY ARGUMENT

I. This Diversion and Lifting of a Conservation Deed Restriction Facilitates Private, Industrial Development That Is Distinct and Separate From the Initial Redevelopment Project.

Throughout its response, but in clear contradiction with the actual history of this project, DEP presents Stafford's application to divert the landfill on behalf of its redeveloper, Walters, as an integral part of the initial public landfill closure and redevelopment project. *E.g.*, Rb2 ("Stafford and the

redeveloper viewed the solar park as part of the `green building' that had been required as part of the development."); Rb10 ("the proposed diversion would further the sustainable design of Stafford Park"); Rb33 ("purpose of the Solar Project was to provide renewable energy to a public redevelopment project."). It does so to avoid the key legal standards for the diversion of properly restricted parkland, and to support Walters' insistence that the Solar Facility had to be located on a contiguous site in order to be eligible to provide electricity directly to the Business Park. (Pa36) In fact, the record is absolutely clear that the Solar Facility:

- is a separate and distinct project from the design features of the landfill closure and redevelopment project, Pa163-183;
- was proposed only years after state and local agencies approved the Business Park development, Pa156-162;
- directly contradicts the express requirements of the original project approvals that the landfill area be preserved "in perpetuity" as open space, Pa172, 178;
- was proposed at a time when all but the closed landfill and the two public buildings closest to that landfill were in Walters' ownership;

- was always contingent on Walters "making money" rather than meeting the energy needs of the public or the retail business and residents of the Business Park, Pa382-383; and
- could be located elsewhere to achieve the claimed public benefits of generating "clean" electricity. (Ab60-68)

An additional and independent error in Stafford's justification for the diversion lies in the record evidence indicating that the proposed Solar Facility need not be placed on the landfill cover at all. The Solar Facility as currently proposed would generate 6.5MW of electricity. As of today, 0.8MW of solar panels have been installed specifically to serve the County and Township buildings located near the landfill. (Pa379)[2] Throughout the application, including Stafford's alternatives analysis, Stafford describes the project as bringing "on-site generation of 70% of the needs of the park" (Pa31), asserts that the facility has to be "close to the energy users it will serve" (Pa639), and claims that state public utility laws "effectively limit the location of such facilities to on-site or adjacent site projects' to make them 'financially feasible.'" (Pa642) The record does not support these conclusory statements. Stafford appears to be relying on state regulations

[2]It appears that the original proposal, including both solar and wind phases, was intended to generate an estimated 12.5-13.7MW.(Pa33; Pa206)

that permit "net metering" of solar electricity generation, in which a property owner or public facility uses as much of the energy its solar panels generate as it needs, with the balance going to the grid in exchange for automatically crediting (reversing) its meter reading. Nothing in the record, however, says that the Proposed Solar Facility would or even could use "net-metering" pursuant to N.J.S.A. 48:3-87(e) and N.J.A.C. 14:8-4 *et seq.*[3] In the amended application, on remand, Stafford states:

> Finally, at Walters' expense, PJM, the regional transmission organization that coordinates the movement of wholesale electricity in a group of thirteen states, including New Jersey, recently performed a study to identify the infrastructure that would be required to support an additional 5.7MW (from completing of the landfill solar system) onto PJM's distribution system. It was preliminarily determined that a substation at a cost of over $4.5 million would be required.

(Pa383)(emphasis added); see also Aral (PJM Fact Sheet stating that project developer pays for feasibility study to estimate interconnection costs). This statement, appearing in Stafford Township's Application to Amend DEP's Approval of the Lease of the Landfill for Solar Energy Facilities, indicates that were the additional 5.7MW solar arrays built, Walters would be required to distribute the electricity generated by such panels

[3] See In the Matter of the Joint Petition of KDC Solar LLC and Six Flags Entertainment Corporation, BPU Docket No. Q014080885,

through PJM's distribution system as a commercial producer, and not through its own distribution lines directly to the Business Park. Consequently, there is no legal requirement that the facility be located adjacent to the Business Park.

In short, although it now appears the Solar Facility was discussed privately between Walters and Stafford as early as late 2006, the development of the Licensed Landfill as a Solar Facility was not part of the original redevelopment project and was not raised publicly until 2010. The closure of the landfill itself was Stafford's responsibility and was a "public" development. But Walters' desire, now abandoned, to construct a solar energy facility on the closed Landfill after the landfill closure was completed is a "private" commercial development under the Green Acres diversion rules.

Furthermore, Walters states that it has no necessary or immediate intention of proceeding with the Solar Facility, even though the Solar Facility is the one and only reason given for the diversion. The fact that Walters is only interested in proceeding with this project if it meets its financial expectations underscores the non-essential and private nature of the project. The fact that the Solar Facility will distribute electricity through the PJM system also severs its direct

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Amended Order, Feb. 18, 2015. (Ara2-7) (full discussion of "net-metering" and "net metering customers")

connection to the Business Park, permitting it to be located on a site that is not contiguous to the Park; and the fact that Walters has no foreseeable plans to the facility completely contradicts DEP's conclusion that "No Action" was not a viable alternative. (Pa640)

II. Regulations Do Not Permit Diversion For Private Utility Services And Require 4:1 Replacement When Such Diversion Involves Conveyance to a Private Entity.

The parties agree on several points relating to DEP's diversion regulations: (1) It is the "Department's policy to strongly discourage the disposal of diversion of both funded and unfunded parkland," N.J.A.C. 7:36-26.1, cited in Rb19; Ab43; (2) a proposed diversion must fulfill a "compelling public need by mitigating a hazard to public health, safety or welfare" or "yield a significant public benefit by improving the delivery by the local government unit . . . of essential services to the public," (Rb19-20; Ab45); and (3) a diversion that is "constructed by or sponsored by a public entity" qualifies for a 1:1 land replacement ratio; otherwise, a 4:1 ratio applies, N.J.A.C. 7:36-26.10, cited in Rb25; Ab38. They disagree, however, as to whether the proposed Solar Facility improves Stafford's delivery of an essential service to the public, and whether the facility is sponsored by a public entity. Appellants also assert that Respondent's resolution of these

issues constitutes an implicit and improper rewrite of its regulations simply to permit this diversion to go forward.

A. **The Facility is Not An Essential Service Delivered By Stafford.**

The record indicates that DEP focused its analysis of whether the proposed project satisfied the diversion "thresholds in the Green Acre rules" on "the public benefits associated with (1) the overall Stafford Business Park redevelopment project and associated landfill closures and (2) utility projects in general." (Pa737). See also Pa 32-33 ("Public Need/Public Benefits"); Rb20 ("DEP explained how the Solar Development Project would yield a significant public benefit in the form of renewable energy" for a redevelopment project).

The state argues for the first time that the public benefit provided by Walters, not Stafford, is an "essential service." They do so, by importing a definition of "essential services" from the Uniform Fire Act, N.J.S.A. 52:27D-192 *et seq.*, an act in which the relevant Commissioner is the Commissioner of the Department of Community Affairs, and not DEP. Indeed, DEP itself never raised this argument in its diversion decision or justification presented to the State House Commission in support of lifting the conservation deed restriction. This *post hoc* rationalization presented by the Attorney General and not DEP clearly deserves no deference.

The term "essential services" is not defined in the Green Acres Acts or DEP's diversion regulations. Nonetheless, importing a definition from another random statute is inappropriate. This is the case, because the plain language of the diversion regulations requires the service provided or improved to be the responsibility of the municipality seeking the diversion. For example, although the Uniform Fire Code defines "essential services" to mean "the adequate supply of heat, water, hot water, electricity, gas and telephone service," only the supply of water is typically a municipal responsibility in New Jersey. The provision of electricity, gas and telephone are all privately provided, and in the energy sector, the price is neither set nor regulated by a public entity, let alone a municipality like Stafford. "Essential services" under the diversion rules cover those services that a municipality is authorized and required by law to provide its residents; such services do not include the provision of electricity.

Moreover, the fact that the solar panels may or may not be constructed, but instead are a purely discretionary business decision based solely on the profit level demanded by the private developer, plainly removes such service from the category of "essential" municipal services under the Green Acres Acts and their implementing regulations.

B. **DEP's Selective Implementation of Its Replacement**

Regulations Is Inconsistent.

In its brief, DEP continues to state that its minimum compensation table for major diversions of parkland does not apply to 30-year leases. (Rb24-25). It does so by simply ignoring the definition of the term "convey" found in both its diversion regulations, N.J.A.C. 7:36-2.1, and the GSPTA, N.J.S.A. 13:8C-3, which explicitly treat a "lease for a term of 25 years or more" as a conveyance. Notwithstanding this deliberate oversight, it looks to those same diversion regulations to determine whether the proposed replacement land is reasonably equivalent to the grassland area that comprises the former landfill. DEP then asks this Court, and the public to ignore the October 21, 2014, agreement between Stafford and Walters that applies the acquisition price and future lease payments to the Township's water and sewer budget in violation of the same diversion regulations simply because "neither DEP nor the SHC" was a party to such agreement. (Rb28) DEP is simply picking and choosing the specific provisions of its diversion regulations that suit its desire to approve this particular diversion. This inconsistent and *ad hoc* implementation of its diversion regulations is arbitrary and unlawful.

Respondent justifies its application of the 1:1 Replacement Property ratio on two grounds: The first is that the diversion is a lease of a conservation easement, not a conveyance (Rb24;

Pa380; Pa737-38); and the second is that "if Stafford's application were classified under its rules as 'public,' . . . it could qualify for a 1:1 ratio as a public project/surface easement." (Rb25;Pa738)[4] The first argument has no merit since as fully explained in Appellants' initial brief, both the GSPTA statute and DEP's Green Acre regulations treat a lease of 25 years or more as a conveyance; and, therefore, leases of such duration or longer are not governed solely by DEP's rules regarding leases generally. (Ab37-38). The second argument is also baseless for all the reasons set forth in Point II, supra. The development of the Solar Facility is not a public development because it is being financed, implemented and owned by a private entity, *i.e.*, Walters, for profit.

DEP also asserts for the first time that once Stafford agreed to restrict land it already owned (and Walters agreed to make an "additional rent payment" of $114,500 to "acquire" that property), it "was not required to provide any additional compensation" through the collection and allocation of lease payments to its open space and recreation program. (Rb27) This

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[4] DEP has not asserted that the 1:1 ratio applies because Walters is providing compensation through a combination of replacement land and monetary compensation. See N.J.A.C. 7:36-26.10(d)(3). It cannot do so, because monetary compensation must be used for parkland improvements or land acquisition, which is not the case herein. See 7:36-26.10(c)(1)(iii) (requiring that monetary compensation provided in a combination with replacement land must meet the requirements of subsection (e)) (Ab41).

position is contrary to the express terms of N.J.A.C. 7:36-26.10(c)(2)(ii) (which requires Stafford to use lease payments for expenses related to its funded parkland or to its recreation program as a whole), but also to the findings of the Commissioner, who approved the diversion in part because Walters' lease payments were to be used by Stafford for its funded parkland. See Ab42 (citing Pa729, Pa380 and Pa740). The Commissioner repeated this finding in his Amended Certificate of the DEP Granting Partial Release of Conservation Restrictions, dated December 1, 2015. (Ra8)

Accordingly, Respondent cannot simply waive away Appellants' argument that the Commissioner's approval must be overturned because Stafford in fact has no intention of using the "acquisition" price and any future lease payments for its funded parkland or recreation program. The Memorandum of Understanding ("MOU") between Walters and Stafford, in which Stafford agreed to give Walters a credit (due to a water and sewage overcharge) against all lease payments, is "properly" in the record, and "before this court." (Rb28) The MOU, dated October 14, 2014, was acted upon by Stafford on the same night that it passed Resolution 2014-332, authorizing and approving the execution of the First Addendum to the Lease Agreement between Stafford and Walters regarding the Solar Facility. (Pa754-761) It was subsequently provided to the Green Acres

program by PPA prior to DEP's and the SHC's respective decisions approving the diversion; it is thus properly in the record. The fact that neither DEP nor SHC is a party to this MOU is simply irrelevant.

Finally, Respondent's interpretation of its regulation to equate "ecologically significant in their own right" with "reasonably equivalent or superior" quality is not reasonable, as Respondent asserts. (Rb26-27) Because the replacement and diverted lands are of fundamentally different habitat types and the replacement land cannot compensate for or mitigate the loss of and damage to snake and grassland bird habitat that will follow from the proposed diversion, the replacement parcels are not of equivalent quality or value for conservation purposes. See (Ab40-41)

In short, DEP's application of its diversion regulations to this transaction violates the Green Acres regulations and its legislative purposes. Valuable habitat that is supporting rare species would be diverted with no compelling need or public benefit as defined by the regulations; quality grassland would be lost in exchange for preserving with forest and wetlands on a 1:1 rather than 4:1 ratio; and the private developer "acquired" replacement land already owned by Stafford, but there will be no actual payment since Stafford is permitting Walters to offset a water and sewer overcharge against the acquisition price and

future lease payments.

III. DEP's Refusal to Halt Further Development of This Project In Light of Several Endangered and Special Concern Species Renders Its Obligations Pursuant to Relevant Regulatory Schemes Meaningless.

In its Response Brief, DEP asserts that "[n]either the GSPTA nor DEP's regulations preclude [it] from approving a diversion due to the presence of, or potential impact on, T&E habitat." (Rb29)(emphasis added) Appellants do not make this argument; rather, Appellants assert that, under the changed circumstances, it was unreasonable for DEP to authorize the destruction of T&E habitat, especially since DEP did not obtain a new finding from the Pinelands Commission that the proposed Solar Facility was consistent with the CMP. See N.J.A.C 7:50-4.81(a) (stating that no state agency, such as DEP, may issue any approval "for the construction of any structure or disturbance of any land in the Pinelands Area, unless such approval or grant is consistent with the minimum standards of the CMP").

Upon remand, DEP was required to reconsider its decision based on the presence of the three endangered bird species and two bird species of special concern. DEP initially represented to the Court that it would consult with the Pinelands Commission, but now confirms that,

> it did not request that the Pinelands Commission revisit its prior determinations about threatened and

> endangered species impacts associated with the project as originally anticipated since neither the 2006 nor 2010 MOAs addressed impacts on grassland bird species. (Pa740) cited in (Rb31)

However, because of the changed circumstances on the site, consultation with the Pinelands Commission was not optional. The entire project is in the Pinelands Area. The Pinelands Protection Act and its implementing regulations required DEP, prior to approving the Solar Facility on remand, to secure a new decision from the Commission finding that the diversion, with the presence of threatened bird species on site, did not violate the CMP. N.J.A.C 7:50-4.81(a). See also N.J.S.A. 13:18A-27 ("Enforcement of provisions of this act over inconsistent or conflicting acts") and N.J.A.C. 7:50-6.33 ("Protection of threatened or endangered wildlife required").[5]

Furthermore, DEP had an obligation under its own regulations, N.J.A.C. 7:36-26.1(e)(6), to reconsider whether the presence of threatened species, such as the Horned Lark, Grasshopper Sparrow, American Kestrel, and Northern Pine Snake changed its initial approval of the diversion. Merely stating that it had no obligation to protect threatened or endangered species that were not on site at the time of the initial

[5] N.J.A.C. 7:50-6.33 states : "No development shall be carried out unless it is designed to avoid irreversible adverse impacts on habitats that are critical to the survival of any local populations of those threatened or endangered animal species designated by the [DEP] pursuant to N.J.S.A. 23:2A-1 et seq."

approval or were not the "intended beneficiary" of the conservation easement does not pass muster. DEP was not entitled to be passive. By the time DEP acted on the amended application, five rare bird species were using the 27 acres of open grassland either for breeding or foraging for several years (Pa769-772), and the Pine Snakes had returned to the area. Nonetheless, there is no evidence in the record, that DEP even contacted, let alone consulted with, the program within the agency that is responsible for enforcing the Endangered and Nongame Species Conservation Act ("ENSCA"), N.J.S.A. 23:2A-1 et seq.; the program, which under both the 2006 and 2010 MOAs, was to be informed that endangered and special concern species have been observed on the site.

DEP's approval upon remand is thus fatally flawed: The Pinelands Commission has yet to reconsider whether the Solar Facility is consistent with the CMP, thus rendering DEP's approval invalid as a matter of law, and DEP has not properly considered whether the presence of endangered species on the site, that were not present in 2010, has changed its initial analysis. DEP's approval must thus be reversed.

IV. The Deed Restriction's Language "In Perpetuity" Must Be Interpreted to Impose a Severe Burden On Any Applicant Seeking To Lift Such Restriction That Stafford Has Not Satisfied.

In the Amended Certificate granting partial release of the

conservation restriction, the Commissioner states that he is granting the release "for substantially the same reasons outlined in [his] November 7, 2010 approval of the Township's Green Acre diversion application and my October 1, 2014 approval of the Amended Application." (Ra9) In this way, the DEP erroneously limited its conservation restriction decision solely to its diversion decision,[6] and did not analyze the public interest in defending the integrity of a conservation easement that purported to be "in perpetuity" and in preserving the lands in their natural state with respect to the specific conditions imposed on the land covered by the deed at the time the restriction was created. Nor did DEP consider the impact of the diversion action on the CMP and its strong protection of threatened and endangered species habitats within the Pinelands. See Ab26-33.

In its response, DEP downplays the public's interest in preserving the closed landfill in its natural state by stating that the language in the Conservation Deed "did not indicate an intent to create habitat," (Rb40), and asserting that the

[6] In its response brief, DEP states: "[T]he Commissioner considered a multitude of factors related to the public's interest in preserving the land covered by the Conservation Restriction in its natural state. These factors included the public need and public benefit associated with the Solar Project, the environmental impact of the Solar Project and possible alternatives to the Project." (Rb 38)

"[l]andfill was not restricted for its natural resource value." (Rb41)(quoting Pinelands Commission's analysis justifying amendment of 2006 MOA). The record shows that these premises are patently false. In its Memorandum to the SHC in September 2014, DEP admitted that in fact the "conservation restriction being placed on the former landfill was intended to implement measures to protect to endangered plant species and two endangered animal species . . . and mitigate damage to their habitats." (Pa735) From the public's perspective, the 2006 Conservation Deed Restriction was an integral component of the actions Stafford undertook to satisfy its obligation to "provid[e] an equivalent level of protection" of Pinelands resources (as required by the Pinelands CMP), because the MOA authorizing the Business Park also authorized destruction of so much protected habitat. (Ab6-7). Given the factual record, it is incredible that DEP would now claim the grassland habitat was not created for exactly the conservation purposes it is now serving, including habitat for rare species.

Furthermore, it is because preserving the closed landfill as natural habitat was integral to permitting the Business Park to go forward that the parties agreed that the Deed Restriction would be "in perpetuity." Such duration sets a very high bar to overcome, which Appellants assert Stafford has not met. Appellants acknowledge that the terms of the Restriction permit

amendment (Rb41-2), but amending the restriction is not the same as lifting it. That is, amendment language in the Deed contemplates changes to the restriction so long as such changes do not diminish the landfill's role as "equivalent protection" for purposes of the CMP; not to lift it in its entirety, as is the case herein.

It is also disturbing to learn that Stafford signed the Deed Restriction in December 2006 at a time that it now says it had already commenced private talks with Walters about repurposing the closed landfill as a Wind and Solar Facility. (Pa31) If such discussions did in fact occur in late 2006, as the record indicates, it is unclear how Stafford could have agreed to preserve the landfill as open space in perpetuity to satisfy its obligations under the CMP. Stafford's agreement to the preservation of the land area, and its recording of the conservation restriction, now takes on the appearance of a "bait and switch." Appellants reasonably relied on Stafford's commitment to maintain the closed landfill as natural grassland habitat in perpetuity when they settled their legal challenge to the 2006 MOA. For Stafford to now say in effect "We always intended to lift the Conservation Deed Restriction in order to permit Walters to build a Solar Facility" would constitute a gross misrepresentation, if not a fraud. Cf. Jewish Center of Sussex County v. Whale, 86 N.J. 619, 624-625 (1981)(discussing

the difference between equitable fraud and legal fraud). If "in perpetuity" in a deed restriction recorded pursuant to a legal process is to have any meaning, the diversion action on appeal must be reversed and the integrity of the conservation restriction, and all the statutes and regulations behind it, restored.

CONCLUSION

For the foregoing reasons, Appellants request that DEP's approval of the diversion and lifting of the Conservation Deed must be reversed.

Respectfully submitted,

Renée Steinhagen, Esq.
NJ APPLESEED PILC

--and-

EASTERN ENVIRONMENTAL LAW CENTER

Date: July 11, 2016

PJM Interconnection administers the connection of new generating facilities to the grid as part of its role as a regional transmission organization. PJM coordinates the planning process for connecting new generation, analyzes the reliability impact of proposed generating projects and oversees the construction of the facilities required to interconnect new generation to the grid.

PJM plans the expansion and enhancement of the grid on a regional basis. The long-range Regional Transmission Expansion Planning process determines what changes and additions to the system are needed to maintain and enhance reliability.

The RTEP process employs a 15-year planning horizon to more effectively deal with reliability needs, upgrades that support economic sales of power across the region and major developments like power-plant retirements. Because the planned interconnection of new generating units and proposed increases in the output capability of existing generating units affect the overall operation of the grid and its reliability, they are reviewed as part of the RTEP process.

The process begins with a party proposing a new generating facility or an increase in the capability of an existing generating facility submitting an interconnection request to PJM. The process continues as follows:

- **Proposal** – New project proposals are entered in a calendar-based queue.
- **Feasibility Study** – PJM conducts a feasibility study to estimate interconnection costs and construction time, and provides feedback to the project developer.
- **System Impact Study** – PJM conducts impact studies to perform more detailed analyses and develop more precise estimates for system upgrade costs and timing.
- **Interconnection Facilities Study** – Detailed design work is performed for all required network transmission upgrades and attachment facilities.
- **Interconnection Service Agreement** – An Interconnection Service Agreement is executed among the generation developer, the transmission owner to which the generator will be interconnected, and PJM. The agreement establishes the terms and conditions that will govern the interconnection and the rights that accrue to the generation developer.

The project developer pays for the studies. The process places increasing financial obligations on the developer, who has the right to withdraw the project at any point. PJM does not approve projects. It studies a project's impact on the grid and the costs to interconnect it while meeting reliability standards. It is up to the developer to evaluate those costs in terms of the project's viability.

New generators are responsible for paying the cost of the facilities needed to interconnect the generator to the grid, as well as the cost of the transmission upgrades needed to deal with the impact to the system of the generator's interconnection. PJM's studies determine the required upgrades – upgrades that would not be necessary but for the interconnection of the new generator.

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Agenda Date: 2/11/15
Agenda Item: 8G

STATE OF NEW JERSEY

Board of Public Utilities
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CLEAN ENERGY

IN THE MATTER OF THE JOINT PETITION OF KDC SOLAR LLC AND SIX FLAGS ENTERTAINMENT CORPORATION SEEKING A DECLARATORY JUDGMENT PURSUANT TO N.J.S.A. 52:14B-1, ET SEQ., OR A WAIVER PURSUANT TO THE WAIVER RULE, N.J.A.C. 14:1-1.2(B)	)	AMENDED ORDER[1] DOCKET NO. QO14080885

Parties of Record:

Keith E. Lynott, Esq., McCarter & English, on behalf of Petitioners
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BY THE BOARD[2]:

On August 6, 2014, KDC Solar LLC ("KDC"), a solar developer headquartered in Bedminster, New Jersey, and Six Flags Entertainment Corporation ("Six Flags") (collectively, "Petitioners") filed a joint petition with the New Jersey Board of Public Utilities for a declaratory ruling concerning the Board's rules pertaining to net metering, found at N.J.A.C. 14:8-4.1. Specifically, Petitioners seek a declaratory ruling that "(i) the provisions of N.J.A.C. 14:8-4.1(b)(2) are satisfied by the [proposed solar PV facility], despite the anomalous circumstance whereby JCP&L owns the wires and other equipment on Great Adventure property downstream of the point of interconnection and meter; and (ii) Six Flags qualifies as a 'net metering customer' pursuant to N.J.A.C. 14:8-4.2." Petition at para. 14. In the alternative, Petitioners seek a waiver of N.J.A.C. 14:8-4.2, pursuant the Board's authority under N.J.A.C. 14:1-1.2(b).

BACKGROUND

Petitioners propose to develop and net-meter a 17 MW photovoltaic facility at Six Flags' Great Adventure & Safari theme park ("Great Adventure") located in Jackson Township, New Jersey. According to the petition, the solar facility will be located entirely on property owned by Great

[1] This Order supercedes the February 11, 2015 Order to further reflect the Board's action.
[2] Commissioner Upendra J. Chivukula recused himself due to a potential conflict of interest and as such took no part in the discussion or deliberation of this matter.

2nd

N.J.A.C. 14:8-4.1(b)(1); and 3) that the project obtain all approvals and pay associated costs of the interconnection process with JCP&L.

STAFF RECOMMENDATION

The statutory and regulatory authority for net-metering is codified at N.J.S.A. 48:3-87(e) and implemented through N.J.A.C. 14:8-4. In part, the statute limits net metering to customers "that generate electricity, on the customer's side of the meter, using a Class 1 renewable energy source, for the net amount of electricity supplied by the electric power supplier or basic generation service provider over an annualized period." N.J.S.A. 48:3-87(e)(1). The rules establish four criteria for determining whether a renewable generation facility is on the "customer's side of the meter" and therefore eligible for net metering.

First, N.J.A.C. 14:8-4.1(b)(1) limits the physical location of the generation as it relates to the end-user and sets other constraints. The generator must be located on the property of the end-user or on contiguous property. Petitioners have described the general plan for the development, but have not asked the Board to approve a plan as the exact configuration of the project is still under development. Instead, Petitioners represent that the solar facility will be built on property owned by Six Flags or on property contiguous to Great Adventure but that they will return to the Board with the final site plan to confirm whether the project satisfies this portion of the rule. Petition at para. 4-7. Accordingly, this question is not currently before the Board.

Second, N.J.A.C. 14:8-4.1(b)(2) prohibits the use of EDC equipment to deliver energy from the generation facility to the net-metering customer.

> [C]lass I renewable energy that meets all of the following criteria shall be deemed to be on the customer's side of the meter:
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> . . . .
>
> 2. The renewable energy is delivered from the generation facility to the property on which the energy is consumed through wires and/or other equipment installed, owned, and operated by an entity other than the EDC . . . ." N.J.A.C. 14:8-4.1(b)(2).

The plain language of the rule states that to qualify as energy generated on the customer's side of the meter, the renewable energy must be distributed from the generation source using equipment that is not "installed, owned, and operated" by an EDC. In practice, this rule prohibits an entity from qualifying for net-metering if the on-site renewable generator distributes the energy using equipment that is EDC-installed, owned, and operated.

As applied to the facts of this petition, one reading of the situation would result in the Petitioners being prohibited from qualifying for net metering because JCP&L installed, owns, and operates the distribution equipment that serves Great Adventure. The 1994 Agreement, including the monthly service fee, demonstrates JCP&L's ongoing ownership and maintenance of the distribution equipment on the property. Accordingly, the project may not comply with N.J.A.C. 14:8-4.1(b)(2). Because of this open question, Staff recommends that the Board deny Petitioners' request for a declaratory ruling that the proposed facility satisfies the requirements for net-metering.

However, Staff does finds that the project is consistent with the intent of the statute and rules, and therefore, a waiver of N.J.A.C. 14:8-4.1(b)(2) is appropriate, pursuant to the Board's

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distribute the electric power from the solar generation facility to the substation will be owned and maintained by KDC Solar and the substation will be owned by Six Flags or KDC Solar and maintained by KDC Solar.

[Petition at para 11; see also Petition at para 18-19.]

No utility equipment will be used in delivering the energy from the generator site to the new substation. Therefore, Staff supports a waiver of N.J.A.C. 14:8-4.1(b)(2), subject to certain conditions.

A financial benefit of net metering is that it enables customers to obtain full retail credits against all variable charges on their utility bills for each kWh of electricity their system produces over an annualized basis. The retail credit normally includes the costs for generation, transmission and distribution. As a net metered customer, Petitioner will be eligible to receive a retail credit, including its share of the "common" distribution surcharge. Regarding distribution equipment that is behind the meter, Great Adventure will continue to pay the GP tariff rate plus the monthly service fee.

Last, it should not be ignored that this project will be the largest net-metered project in the State. To this end, and to mitigate the impact of this project on the New Jersey solar market, Staff recommends that Petitioners implement all cost-effective energy efficiency measures with a goal of reducing the system size. Any reduction in load will create a reduction in the size of the solar field, and will also provide Great Adventure with cost savings.

DISCUSSION AND FINDINGS

The Board has the power to relax its administrative rules if doing so is in the public interest. N.J.A.C. 14:1-1.2. The Board is persuaded that the public would benefit from relaxation of N.J.A.C. 14:8-4.1(b)(2) in this instance because the proposed project furthers the State's interest in balancing renewable on-site generation and reducing the energy costs of large commercial customers. The Board **FINDS** that but for JCP&L's ownership of the wires, switches, and transformers used on the Great Adventure property behind the meter, this project is consistent with the intent of N.J.A.C. 14:8-4.1(b)(2) to encourage the use of on-site, clean, generation. The Board also **FINDS** that the proposed customer-owned substation will guarantee that the solar facility connects behind-the-meter to the point of interconnection. In addition, the Board **FINDS** that Great Adventure is the sole user of the EDC's distribution equipment located on the theme park's property, and that it will continue to pay for the cost of the equipment pursuant to the 1994 Agreement. The Board **ACCEPTS** Petitioners' representation that the 1994 Agreement was negotiated pursuant to the EDC's Board-approved Tariff.

Therefore, the Board **HEREBY GRANTS** a waiver of N.J.A.C. 14:8-4.1(b)(2) as in the interests of the public by providing clean distributed generation which reduces dependency on the grid, (2011 EMP at 7.2.6) subject to the following conditions:

1) The discussion and findings herein are based on the particular facts and circumstances of this petition and shall not be deemed precedential;
2) Petitioners must submit a site plan to the Board demonstrating that the configuration of the solar facility satisfies all of the remaining requirements of N.J.A.C. 14:8-4.1, including the "contiguous property" requirement in N.J.A.C. 14:8-4.1(b)(1);

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IN THE MATTER OF THE JOINT PETITION OF KDC SOLAR LLC AND SIX FLAGS ENTERTAINMENT CORPORATION SEEKING A DECLARATORY JUDGMENT PURSUANT TO N.J.S.A. 52:14B-1, ET SEQ., OR A WAIVER PURSUANT TO THE WAIVER RULE, N.J.A.C. 14:1-1.2(B)
DOCKET NO. QO14080885

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