IN THE MATTER OF LACEY SAND SOLAR FARM, LLC – PETITION FOR ASSIGNMENT OF "PREFERRED" TREC FACTOR FOR FLOATING PHOTOVOLTAIC SOLAR PURSUANT TO THE BOARD'S TRANSITION INCENTIVE ORDER	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO: A-000608-23 **CIVIL ACTION** ON APPEAL FROM FINAL DECISION OF NEW JERSEY BOARD OF PUBLIC UTILITIES BPU DOCKET NO: QO21020469

APPELLANT'S BRIEF AND APPENDIX IN SUPPORT OF APPEAL OF THE NEW JERSEY BOARD OF PUBLIC UTILITIES' DECISION

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PRELIMINARY STATEMENT

As with far too many situations of late, this appeal is centered upon the refusal of the New Jersey Board of Public Utilities ("BPU" or "Board") to ensure the function and success of the New Jersey legislatively mandated and long-standing solar program. Specifically, the Board refuses to approve for state incentive a floating solar development, despite the Board's clear recognition and development of just such a process. Here, the BPU, through the Order under appeal, denied the application of the Lacey Sand Solar Farm, LLC ("CEP Renewables" or "CEP") for approval of any state support, including an uprated 1.0 Transition Renewable Energy Certificate ("TREC") factor, for a proposed 22.5 MW grid-supply floating solar project. Despite the nature of the site, the existing program, the application, the Solar Act, and common sense, the BPU elected to reject the petition and instead refused to allow CEP to receive any TRECs at all in conjunction with the construction, thereby ensuring that neither the solar facility would be built nor that the sand mine to be built upon could serve a beneficial and valuable use.

The Board rejected the application based upon the "sudden" recognition that the project planned as a grid-supply project was, in fact, exactly the grid-supply project it claimed to be. Rounds of discovery, ongoing questions, and

clear indications aside, the Board determined that grid-supply was not acceptable into this program. Except, of course, unless a waiver was granted. Which it was not. Despite the Board's acknowledgement that it could issue such a waiver. For a program that it never said was grid-supply only. If this sounds confusing and deliberately obtuse, that is the same reaction felt by CEP. While trying not to cast aspersions, the decision-making process here by the Board is, hopefully, simply arbitrary and capricious.

In addition to the confusing and ad-hoc method of decision-making shown by the Board in its conclusion, the Board's decision to consider and refuse the uprate from a 0.6 TREC factor to the requested 1.0 TREC factor seems odd and, at a minimum, unnecessary and not well-founded. Despite the BPU's Order including a clear acknowledgment that floating solar requires a higher incentive than the default 0.6 TREC, coupled with unsubstantiated and non-germane concerns about the developer's ability to construct, the decision of the Board to refuse the uprated TREC factor provides another clear example of the arbitrary and capricious decision-making on the part of the Board that is and continues to be a detriment to the legislatively required support of the State's Solar agenda.

STATEMENT OF FACTS AND PROCEDURAL HISTORY[1]

On December 6, 2019, the New Jersey Board of Public Utilities ("BPU" or "Board") initiated a program for the bridging of the existing initial legislatively mandated solar incentive program and the then-to-be-developed "Successor Solar Incentive Program" ("SUSI Program"). This bridge program was to become known as the Transition Incentive Program ("TI Program"). See In The Matter of A New Jerey Solar Transition Pursuant to P.L. 2018, C.17, Order, New Jersey Board of Public Utilities, Docket No. QO19010068, dated December 6, 2019. (009a[2].) One of the elements initially missing from the initial program, but subsequently added by the Board later was the use of new and innovative solar technologies, as well as the opportunity to seek a specific TREC Factor for these innovative technologies – in essence, a percentage of the basic Transition Renewable Energy Certificate value used to finance solar incentives. See In The Matter of a New Jersey Solar Transition Pursuant to P.L. 2018, C.17, Order, New Jersey Board of Public Utilities, Docket No. QO19010068, dated January 8, 2020. (045a.) What had originally been an open question was clarified

[1] Because of they are inextricably intertwined, Appellant combined the Statement of Facts and Procedural History into one statement for better clarity and for the court's convenience.

[2] References to the Appellant's Appendix are in the form of (XXXa.)

by the Board when it noted that "new or innovative solar technology can file a petition with the Board requesting that they be assigned a TREC factorization level." Id. at 3. (048a.)

Floating solar is exactly what it sounds like. Rather than being mounted on the ground or to a rooftop, solar photovoltaic panels are mounted to a structure that floats on water, in this case the dredge pond left over from sand mining. Benefits include not using prime land for the development of solar, as well as minimizing water evaporating, restricting algae blooms, and providing a use for otherwise "useless" or underused property. Additionally, water cools the panels, making them, on average, more efficient. They are, however, more expensive to install, and the State recognized this by developing a process to allow for a higher incentive for floating solar developments. These properties are considered ideal for solar development, as shown by their inclusion as one of only 4 types of land eligible for solar development under the Board's 2023 Community Solar Energy Program. See In the Matter of The Community Solar Energy Program, Order, New Jersey Board of Public Utilities, Docket No. QO22030153, dated August 16, 2023, at 24. (051a.)

The Board then issued a decision setting the default TREC Factor for floating solar at 0.6 (or essential 60% of a full TREC value) while explicitly

authorizing petitions for higher TREC Factors. See In The Matter Of The Petition Of New Jersey-American Water Company for "Preferred" TREC Factor for Floating Photovoltaic Solar Pursuant to the Board's Transition Incentive Order, Order, New Jersey Board Of Public Utilities, Docket No. QO20020111, dated July 15, 2020, (080a). Based upon this offer, Lacey Sand Solar Farm, LLC ("CEP" or "Petitioner"), filed a petition on February 16, 2021, seeking a TREC Factor of 1.0 for the Lacey Sand Solar Farm. This facility is a 22.5 MW grid-supply solar project, to be built upon an 81.5-acre pond on a sand mine in Lacey Township, New Jersey. The project application included a report setting forth the costs and benefits of the project, showing the cost as being in excess of the costs for installation of non-residential ground mount solar, as well as describing the design and modeling. This report developed support for a TREC factor of 1.1, and CEP in turn sought permission from the Board for a 1.0 TREC factor.

Board Staff engaged in three rounds of discovery with Lacey, all of which were responded to, and which the BPU Order notes that the "responses identified the project's permitting and interconnection process, project design and site preparation, and costs." In The Matter of Lacey Sand Solar Farm, LLC – Petition for Assignment of "Preferred" TREC Factor For Floating Photovoltaic Solar Pursuant to the Board's Transition Incentive Order, Order, New Jersey Board of

Public Utilities, Docket No. QO21020469, dated September 27, 2023, (hereinafter "Order"), at 4. (001a.)

On September 27, 2023, the Board issued its Order. Ibid. In this Order, not only did the Board **not** increase the TREC Factor from 0.6 to 1.0, the Board instead rejected the entire project, on the realization that the Lacey Sand Solar Farm would be a "grid-supply" (i.e. – would direct energy into the grid) pursuant to N.J.A.C. 14:8-1.2 rather than "net metered" (i.e. – would provide energy only to the customer on site), and that the innovative solar program that the Project filed under was only designed to work for net metered projects. Order at 6. (006a.) This "restriction" occurs nowhere in the Board's prior orders, was never once mentioned by Staff during the two years of discovery, and that the Project was designed to be grid-supply was never hidden, disguised, or otherwise not disclosed by Petitioner. The Board knew the entire time that the Lacey Sand Solar Farm was grid supply, and yet never once let the developer know about this concern. In fact, the Board notes, in a footnote, that "Although Lacey's submission of a petition may be considered a formal expression of interest in the program, Staff notes that a registration would have been rejected due to the project being grid-supply." Id. at 5, n. 12. (005a.) This comment seems more than a little cynical; of course the Petition was an expression of interest, and in

no way did the Board or Board Staff, despite multiple rounds of discovery, ever ask or indicate that the project was "dead in the water" from the get-go.

Additionally, the Board then denied the approval based upon its "concern" that the development would not be done on time based upon concerns with the PJM Interconnection approval process. This argument, by its nature, accepts that the Project could be in the TI program. In fact, Board staff explicitly notes that, "Were Petitioner's project granted for a waiver so that this general grid-supply project could enter the TI Program…" Id. at 5. (005a.) Additionally, this argument is in direct contradiction to the Board's long-standing approach of approving projects that are unlikely to make the PJM timelines. See, e.g., I/M/O the Implementation of L. 2012, C.24, The Solar Act of 2012, I/M/O a New Jersey Solar Transition Pursuant to P.L. 2018, C.17, and I/M/O A New Jerey Solar Transition Pursuant to P.L. 2018, C.17 – Order Granting an up to 12-Month Extension for Projects Seeking An Incentive Pursuant to Subsection (t) in the Solar Transition Incentive Program – Motion for Reconsideration, Order, New Jersey Board of Public Utilities, Docket Nos. EO12090832V, QO19010068, and QO22090551, dated April 26, 2023 (hereinafter, "Reconsideration Order"). (088a.) Likewise, the Board noted a number of other "concerns" such as possible litigation over the site and the supposed "speculative" nature of the project, all

of which are immaterial, unconvincing, and not germane to the underlying question of the Board's decision to deny the application for approval. This project was not displacing any other construction or restricting the ability of any other developer to seek similar approval, so the concerns with ownership and constructability, mentioned as throw-ways, are not the foundation for denial.

Finally, the Board makes a conclusory statement that it "does not believe that a 1.0 TREC factor is appropriate," based upon modeling used, as well as the understanding that there are few large-scale United States projects to use as comparison. Order at 5. (005a.) The Board further notes, however, that the costs provided by the developers – one of the few entities in the United States building such a floating project – are not the same as the model, but the Board essentially does not believe them and they do not justify a higher TREC. Id. at 6. (006a.) So not only did the Board deny the 1.0 TREC, but it denied any TREC increase, even as it acknowledges that "hypothetical" information shows a significant cost increase is justified. This is arbitrary and capricious, at a minimum.

Based upon that denial, this timely notice of appeal followed.

LEGAL ARGUMENT

THE BPU'S DECISION TO DENY THE APPLICATION IS ARBITRARY AND CAPRICIOUS (Order, at p. 6)

A. The BPU's decision-making process is subject to judicial review for arbitrary and capricious failures.

It is axiomatic that the decisions, procedures, and actions of State administrative agencies, such as the BPU, are subject to "judicial review and supervision to assure fairness in the administrative process." Hospital Center at Orange. Guhl, 331 N.J. Super. 322, 333 (App. Div. 2000); In re Arndt, 67 N.J. 432, 436 (1975). Likewise, the Court is not bound by an agency's determination of a matter, but instead must ensure that the decision was founded upon sufficient credible evidence and appropriate policy considerations. Mayflower Securities Co., Inc. v. Bureau of Securities, 64 N.J. 85, 92-93 (1973). While an agency may have been granted the authority to implement a legislative policy based upon its expertise, that agency must actually implement the specific legislative policy provided by the Legislature. The grant of authority is directly tied to this obligation to implement the specific and explicit legislative policy provided by statute. Barry v. Arrow Pontiac, Inc., 100 N.J. 57, 70-71 (1985), quoting Gloucester County Welfare Bd. v. N.J. Civ. Serv. Comm'n, 93 N.J. 384, 390 (1983) ("the grant of authority to an administrative agency is to be liberally

construed to **enable the agency to accomplish the Legislature's goals**." (Emphasis added.) As such, the court must overturn those administrative actions and decisions that are "arbitrary, capricious, unreasonable, or violative of expressed or implicit legislative policies." In re Failure by the Department of Banking and Insurance to Transmit a Proposed Dental Fee Schedule to OAL, 336 N.J. Super. 253, 263 (App. Div. 2001) (citing Campbell v. Dept. of Civil Serv., 39 N.J. 556, 562 (1963)); In re Herrmann, 192 N.J. 19, 27-28 (2007) ("An administrative agency's final quasi-judicial decision will be sustained unless there is a clear showing that it is arbitrary, capricious, or unreasonable, or that it lacks fair support in the record.").

Likewise, a reviewing court is "not bound by an unreasonable or mistaken interpretation of [a statutory] scheme, particularly one that is contrary to legislative objectives." McClain v. Bd. of Rev., 237 N.J. 445, 456 (2019). Even more significantly, a reviewing court must have a reasoned and explained analysis to review. See Matter of Thomas Orban/Square Properties, LLC, 461 N.J. Super. 57, 73 (App. Div. 2019) (the court "has no capacity to review at all unless there is some kind of reasonable factual record developed by the administrative agency and the agency has stated its reasons grounded in that

record for its action." (quoting In re Freshwater Wetlands Gen. Permits, 372 N.J. Super. 578, 595 (App. Div. 2004))).

This Court, in reviewing an administrative action of the Board, is obligated to consider three overarching issues: "(1) whether the agency's action violates express or implied legislative policies, that is, did the agency follow the law; (2) whether the record contains substantial evidence to support the findings on which the agency based its action; and (3) whether in applying the legislative policies to the facts, the agency clearly erred in reaching a conclusion that could not reasonably have been made on a showing of the relevant factors." Allstars Auto. Grp., Inc. v. N.J. Motor Vehicle Comm'n, 234 N.J. 150, 157 (2018) (quoting In re Stallworth, 208 N.J. 182, 194 (2011)). See In re Proposed Quest Acad. Charter Sch. of Montclair Founders Grp., 216 N.J. 370, 383 (2013); Mazza v. Bd. of Trs., Police & Firemen's Ret. Sys., 143 N.J. 22, 25 (1995). Of significance is the clear understanding that "[a]lthough administrative agencies are entitled to discretion in making decisions, that discretion is not unbounded and must be exercised in a manner that will facilitate judicial review." In re Vey, 124 N.J. 534, 543-44 (1991). As will be discussed, the Board's decision-making process in this matter is the very example of a decision that is arbitrary, capricious, unreasonable, and utterly lacking support in the record.

B. The BPU's decision to deny the Project based upon an undisclosed and sudden requirement for "net metering," when the Board was aware of the grid-supply nature of the Project for over two years, is arbitrary and capricious and should be reversed.

In denying this Project for TRECs pursuant to the solar floating program, the Board's primary foundation was that the program was never designed to allow for grid supply projects. See Order, at 4-5. (004a-005a.) The major problem with this is that the statement is not true. As even the Board acknowledges in the Order, a waiver was available. At no time did the Board indicate that being grid supply was an absolute bar for the approval of the project. In fact, the Board said nothing of the sort, despite having 2 years and multiple rounds of discovery on the process. No information was hidden, no surprises were sprung, no attempt to hide or even disguise the project was attempted. The Project was clear and, on its face, exactly what it was – a grid-supply project seeking approval from the Board for a TREC award.

The Board was aware of this. The Board knew that the project was a grid-supply project. The Board engaged in multiple rounds of discovery. The Board had any number of opportunities to say "this project is grid-supply and you know that is not approvable." The Board never did any of this. There is no question that a State agency has an obligation to serve the public, and to do so in a fair,

honest, and direct manner. As the New Jersey Constitution states, "Government is instituted for the protection, security, and benefit of the people," N.J. Const., Art. 1, § 2a. If the Board honestly believed that it was unable to grant the Petition on its face, the process of seeking discovery and looking for additional information was, at best, a farce.

Likewise, and as the Board itself acknowledges, this Petition functions as a waiver request, if needed. See Order, at 5. (005a.) ("Were Petitioner's project granted for a waiver so that this general grid-supply project could enter the TI Program…"). No analysis was provided for a review of a waiver. In fact, the "analysis" provided by the BPU in this Order is so cursory and shallow as to essential qualify as no analysis at all. After identifying that a waiver would allow this project to be included, the Board conducted no analysis whatsoever. Likewise, the other reason articulated by the Board, such as concerns about timing and the PJM timeframe, are concerns that the Board ignores and grants petitions for on a regular basis. See, e.g., Reconsideration Order. (088a.)

As the court has repeatedly and consistently noted, "deference does not require that we forego a careful review of administrative decisions simply because an agency has exercised its expertise. We cannot accept without question an agency's conclusory statements, even when they represent an

exercise in agency expertise. The agency is 'obliged ... to tell us why.'" Balagun v. New Jersey Dept. of Corrections, 361 N.J. Super. 199, 202-03 (App. Div. 2003), quoting In re Valley Hosp., 240 N.J. Super. 301, 306, (App. Div. 1990). As a specific example, in In re Crowley, 193 N.J. Super. 197, 214 (App. Div. 1984), the court stated that "in reviewing an agency decision to determine whether it is supported by substantial credible evidence and is not arbitrary, unreasonable or capricious, [the Court] must have a clear statement from the administrative agency as to the basis for its decision." A finding based upon evidence is not a technicality; it is "a matter of substance." Ibid., citing N.J. Bell Tel. Co. v. Communication Workers, 5 N.J. 354, 375–377 (1950). Here, the Board provides nothing more than conclusory statements, for the purpose of denying an application that otherwise satisfies the process and that has a significant amount of proof and analysis before the Board. This is a classic example of a decision that was arbitrary and capricious and should be reversed.

C. The Board's other articulated reasons for denial of the project – including timing and litigation risk – are not foundations for denial, and thus are arbitrary and capricious.

The Board's other claimed foundations for not accepting the Petition included concerns about control over the property, the timing for construction, and the ability to receive PJM approval in a timely manner. These are not

foundations for denial, and in fact have been rejected by the Board on a number of occasions. Most notably, the Board has consistently approved the inclusion of projects for the solar program that are on track to fail the PJM timeline. CEP is currently appealing a number of decisions by the Board where the approval for solar projects was provided with the clear awareness that the projects will not be able to satisfy the PJM timeline. In fact, while CEP has asked the Board to hold off on the decision pending the PJM timeline, the Board has refused to do so based upon that very foundation.

Likewise, the Board claims that the timeline would be too tight for construction and that access to the property is an open question. Yet the Board never asked about these issues, sought follow-up, or acknowledged the basic approach to development – the risk of completion is upon the developer. Not one of the claimed "reasons" for denial serves as a foundation for denial pursuant to the program – instead, they seem to raise a question of arbitrary and capricious action on the part of the Board.

D. The BPU's denial of the application functions as a refutation and inappropriate repudiation of the State's solar program and binding policy.

The Board continues to thwart the intention and desire of the legislature and the Executive Branch to accept and encourage the use of distressed property,

be that brownfield, landfill, or other underutilized property such as the proposed former sand mine in the state for solar development. This is not a new position by the State and has been a key policy since at least the original Solar Act, P.L. 2012, c. 24. In the 2017 New Jersey Department of Environmental Protection Solar Siting Analysis Update,[3] the NJDEP identifies distressed properties such as landfills and brownfields as "preferred lands" for solar siting. Siting Analysis Update, at 13. This specific analysis was expressly adopted and embraced by the 2019 Energy Master Plan,[4] which remains the current statement by the State on its energy policy. See New Jersey Energy Master Plan, at 112. In fact, it was amplified and reinforced when the Energy Master Plan noted that: "For solar energy, investments should be steered toward rooftops, carports, and **marginalized land** and away from open space." Ibid. (emphasis added).

This purpose has been recognized by the Court. In In re Implementation of L. 2012, C. 24, Solar Act of 2012, Docket No. A-4666-15T3, 2017 WL 4700553, at *1 (App. Div. Oct. 20, 2017) (165a), the Court explicitly stated that: "Suffice to say that the purpose of the Act is to encourage the development of solar energy".

[3] Available online at: https://www.nj.gov/dep/aqes/SSAFINAL.pdf.
[4] Available online at: https://www.nj.gov/bpu/pdf/publicnotice/NJBPU_EMP.pdf.

Likewise, the purpose has been recognized by the Board, as recently as less than a year ago. While not explicitly identified as contaminated land or landfill property, the use of a sand pit for solar is well supported. In the I/M/O Competitive Solar Incentive ("CSI") Program Pursuant to P.L. 2021, C. 169, Docket No. QO21101186, dated December 7, 2022, the Board noted:

> The Board has long recognized the benefits of solar development on contaminated sites and landfills, with approximately 254 MW operational under the subsection (t) program of the Solar Act of 2012 as of October 31, 2022. This is not least because such development has enabled clean-up and mitigation activities on such sites, and because, given the limited availability of land in New Jersey, using contaminated sites and landfills for solar development reduces development pressure on open space.
>
> [Id. at 16. (106a, 122a.)]

And again, the Board confirmed this at the end of 2023. In I/M/O the Community Solar Energy Pilot Program; I/M/O the Community Solar Energy Pilot Program Year 2 Application Form and Process; I/M/O A New Jersey Solar Transition

Pursuant to P.L. 2018, C. 17; I/M/O the Verified Petition of Pennsville Landfill Solar, LLC For Approval of an Extension of the Community Solar Energy Pilot Program Year 2 Project Completion Deadline for Pennsville Landfill Solar Projects (A) and (C); I/M/O the Petition of Greenpower Developers, LLC for Extension of Commercial Operation Deadline For Conditionally Approved Year 2 Community Solar Projects Under Docket No. QO21020564 Due To Delays in Utility Upgrade Plan and Uncertainty in Timing and Cost of Utility Costs; I/M/O Community Solar Energy Pilot Program Year 2 – Solar Landscape Developnment, LLC – 1300 Wheaton Avenue; and I/M/O Community Solar Energy Pilot Program Tear 2 – Solar Landscape Development, LLC – 1401 Wheaton Avenue, Orders, New Jersey Board of Public Utilities, Docket Nos. QO18060646, QO20080556, QO19010068, QO22110708, QO23080623, QO21020474, and QO21020475, dated October 25, 2023, at 6, (116a, 122a), the Board expressly noted that solar projects located on landfills and similar undervalued land comprise the type of "redevelopment [that] is favored by Board and State policy."). Yet the actions taken by the Board do not support this policy, and in fact run directly counter to them. The Energy Master Plan is a policy document, but one required by statute, and which has been vetted by the Administration. While not binding as law, the statements made are clear and

unambiguous statements of policy, and are designed to serve as a guide for the State and state agencies. As the Energy Mater Plan ("EMP") Statue states, "The plan shall include long-term objectives but shall provide for the interim implementation of measures consistent with said objectives." N.J.S.A. 52:27F-14(b). In fact, the EMP statute provides both that the Division of Energy Planning and Conservation was authorized to intervene in any action, including before the BPU, to "insure the proper consideration by any such State instrumentalities of the State energy master plan," N.J.S.A. 52:27F-15(a), as well as the explicit statement that:

> It being the intention of the Legislature that the actions, decisions, determinations and rulings of the State Government with respect to energy shall to the maximum extent practicable and feasible conform with the energy master plan….
>
> [N.J.S.A. 52:27F-15(b).]

The Energy Master Plan notes that landfill, brownfields and similar underutilized property are preferred land types to use for solar development, and the Energy Mater Plan shows that the legislature intends the Energy Master Plan to guide the behavior agencies such as the BPU. No such guidance occurred

here; in fact, at no point does the BPU acknowledge the policy of the State is to encourage – and not discourage – the use of property such as the sand pit pond for the use of solar development. Not only has the Board not been guided by the Energy Master Plan, the BPU has expressly and deliberately denied and ignored it. This refusal to abide by the clear policy determinations of the State, especially without clear articulation of the reasons, is arbitrary, capricious, and grounds for reversal.

E. The BPU's denial of the 1.0 TREC Factor based upon unrefuted submissions is arbitrary and capricious and should be reversed.

The Board's decision to deny the 1.0 TREC valuation, despite rejecting the TREC entity, is at best dicta. But even as such, it is fundamentally wrong, arbitrary, and capricious. The Board, in the Order, makes the conclusory and unfounded statement that it "does not believe that a 1.0 TREC factor is appropriate." Order, at 6. The Board claims that generic modeling used by the Board in developing the solar program did reflect a higher value being required than the 0.6 TREC provided, but nonetheless indicated that the answer to an uncreased TREC value was simply "no." Despite this prior modeling, which shows a 19% greater cost than a typical ground-mount system, the Board not only denied the 1.0 TREC value, but refused to even allow the 19% that its own

data provided. Even if the information provided by the Petitioner was "unbelievable," the Board's own information justifies a 19% increase.

Furthermore, the Board then goes on to expressly identify and recognize that the costs provided by developer – one of the few entities in the United States building such a floating project – are not the same as the model, and reflect actual costs and actual construction and not simply a hypothetical installation. In response, the Board "believes these [costs] are not characteristic of floating solar projects." Order, at 6. (006a.) The Board states this about the actual costs submitted for the actual construction of an actual floating solar project. Perhaps the Board could have found these costs inflated or unjustified; the Board did not. Instead, the Board simply decided to not believe them. Without reason, without cause, and without justification.

Based upon this "gut reaction", the Board not only denied the 1.0 TREC, but it denies even the 19% its own prior and incomplete review showed for floating solar. This appears to be a textbook example of arbitrary and capricious behavior.

CONCLUSION

For the foregoing reasons, and as discussed above, the decision on the part to the New Jersey Board of Public Utilities to deny the application of CEP Renewables, LLC for approval of a floating solar project and for an increase TREC valuation demands that this Court find the decision arbitrary, capacious, and thus the decision should be overturned and reversed.

Respectfully submitted,

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Dated: May 24, 2024

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August 23, 2024

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Re: In The Matter Of Lacey Sand Solar Farm, LLC – Petition For Assignment Of "Preferred" TREC Factor For Floating Photovoltaic Solar Pursuant To The Board's Transition Incentive Order

Docket No. A-000608-23

Civil Action: On Appeal from a Final Agency Decision of the Board of Public Utilities

Letter Brief and Appendix on Behalf of Respondent, Board of Public Utilities

Dear Mr. Orlando:

On behalf of Respondent, the New Jersey Board of Public Utilities, please accept this letter-brief and appendix pursuant to R. 2:6-2(b) on the merits of the appeal.

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PROCEDURAL HISTORY AND COUNTERSTATEMENT OF FACTS[1]

This appeal arises from a September 27, 2023 order of the Board of Public Utilities ("Board" or "BPU") denying the petition of Appellant, Lacey Sand Solar Farm, LLC ("Lacey") to participate in the State's solar Transition Incentive ("TI") program. Lacey sought approval for a grid supply floating solar project under the regulatory framework of the TI program under N.J.A.C. 14:8-10.4(a). The Board denied the petition based on the project's ineligibility as a grid supply project to enter the TI program and its conclusion that it did not warrant a waiver under the Board's rules as the project was "inherently speculative." (Aa5).

The Board established the solar TI program as a temporary bridge solar incentive program to provide an orderly transition from the Solar Renewable Energy Certificate ("SRP" or "SREC") program established under the Clean Energy Act, L. 2012, c. 24, to the Successor Solar Incentive ("SuSI") program established under L. 2021, c. 169. (Aa2)[2]. The Board closed the SREC program

[1] Because they are closely related, these sections are combined for efficiency and the court's convenience.

[2] "Aa" refers to Appellant's appendix; "Ab" refers to its brief; "Ra" refers to the Board's appendix.

to new applications once the Board determined that solar generation met a set statutory threshold pursuant to N.J.S.A. 48:3-87(d)(3)[3]. (Aa1).

On December 6, 2019, the Board, via order, established the TI program following a year-long process. (Aa2). Solar projects eligible for the TI program received financial incentives by generating Transition Renewable Energy Certificates ("TRECs") for each megawatt hour of electricity produced. (Aa2). TRECs are ratepayer-funded subsidies made available to certain types of solar projects, provided they meet regulations promulgated by the Board. Ibid.

Leading up to the closure of the SREC market and prior to the opening of the TI program in May 2020, the Board issued a number of clarifying orders on program implementation. First, on January 8, 2020, BPU clarified that new or innovative solar technologies, such as floating solar, could "file a petition with the Board requesting that these type of projects be assigned a TREC factorization level" within the TI program ("January 2020 Order"). (Aa45). While the January 2020 Order provided that "new or innovative solar technologies" could file a petition with the Board, it did not expand eligibility of grid supply projects for inclusion in the TI program, and any such project

[3] No later than 180 days after the date of enactment of P.L.2018, c. 17, the Board shall adopt rules and regulations to close the SREC program to new applications upon the attainment of 5.1 percent of the kilowatt-hours sold in the State. N.J.S.A. 48:2-87(d)(3).

seeking a change in the TREC factorization level in the TI program would still have to meet the other criteria for participation in the program. (Aa3-4).

In March 2020, the Board issued an order that provided guidance to participants in the SREC market on the procedures to be followed during the closure of the SREC program. In the Matter of the Closure of the SREC Registration Program Pursuant to P.L. 2018, c.17, 2020 N.J. PUC LEXIS 269, 18 (March 27, 2020). With respect to the limitations of grid supply eligibility within the TI program, the Board determined "that grid supply projects that are not proposed on landfills, brownfields or areas of historic fill [Subsection (t)] and that have not previously been approved by the Board as 'connected to the distribution system' pursuant to Subsection (r) shall not be eligible for SRECs or for the Transition Incentive program." Ibid. This effectively excluded the Lacey grid supply floating solar project from the TI program unless a waiver of the Board's rules was requested and approved.

On July 15, 2020, the Board received a petition for a net metered floating solar project under the new and innovative standard of the January 2020 Order. (Aa5; Aa81). In approving that project and assigning a 0.6 TREC factor, the Board determined that floating solar projects "may petition the Board to request a factor greater than 0.6 based upon the specific facts and circumstances attributable to an individual project." (Aa5; Aa85).

The rules codifying the TI program became effective on October 5, 2020. N.J.A.C. 14:8-10.1 to 10.6. Consistent with the March 2020 Order, the rules defined eligible projects as those which had registered in the pre-existing SREC program; conditionally certified solar projects on a brownfield, an area of historic fill or a properly closed sanitary landfill facility pursuant to N.J.S.A. 48:3-87(t) ("Subsection (t)"); conditionally certified solar projects for rooftop or ground mounted solar pursuant N.J.S.A. 48:3-87(r) ("Subsection (r)"); and net-metered projects[4]. N.J.A.C. 14:8-10.4 to -10.5; (Aa2). The Board's TI rules set forth project eligibility criteria and incentive factors in eight discrete solar project categories. N.J.A.C. 14:8-10.5(b)(1). Grid supply floating solar projects are not eligible under the TI program. (Aa5).

The TI program closed to new registrations on August 27, 2021, and the Board launched the SuSI program a day later, via order on August 28, 2021. (Aa2). The SuSI program is multifaceted, but includes both an Administratively Determined Incentive ("ADI") program meant for relatively smaller solar generation facilities and a Competitive Solar Incentive ("CSI") program, which is intended for larger, "grid supply" solar generation projects. Ibid.

[4] Net metered facilities are solar facilities that provide energy to the customer site.

Lacey filed its petition with the Board on February 16, 2021, proposing a 22.5 megawatt ("MW") grid supply floating solar project and requesting a TREC factor of 1.0. (Aa4). As Lacey's proposed floating solar project was grid supply, it did not fall into any of the projects eligible for the TI program such as new net-metered projects, community solar project projects, and grid supply projects previously granted conditional certification in the SREC program under the Subsection (r) program or under the Subsection (t) program. (Aa4; See N.J.A.C. 14:8-10.4). Nor did Lacey seek a waiver of the Board's rules for entry into the TI program. (Aa5). However, Lacey commissioned a study, the Gabel Report, to support its request for an increase from the default TREC factorization of 0.6 for floating solar to 1.0. (Aa4).

According to the petition, Lacey's proposed solar project would be a revenue-generating use of an abandoned waterbody. (Aa4). The proposed site is located on a sand mine that has a series of dredge ponds formed from mining pits. (Aa4). According to the proposal, the ponds would be connected to form a single, larger 81.5 acre pond. (Aa4). The project would be constructed in phases as the property is mined. (Aa4). Lacey provided a lease agreement between itself and the property owner, Lacey Natural Sand, LLC, as well as a letter from the Pinelands Commission ("Commission") stating that the proposed facility was consistent with the land use priorities of the Pinelands

Comprehensive Management Plan; however, the Commission did not receive an application for a Pinelands Comprehensive Management Plan. (Aa4).

In response to Lacey's petition, Board Staff ("Staff") submitted three sets of discovery questions. (Aa4; Ra1-19). Staff sought information relating to the project's permitting and electric grid interconnection process, project design, site preparation, and costs. (Aa4; Ra1-19). In seeking clarification of Lacey's interconnection process, Staff inquired as to whether an interconnection application had been filed with the regional electric grid operator PJM[5], what type of interconnection equipment will be utilized, and the costs of interconnection. (Ra1-19). Despite the extensive responses and attachments provided by Lacey, Lacey could not provide a date as to when its project would have approval to connect to the grid or provide clarity as to the excavation times of the mining operations in order to commence construction of the solar array in the time permitted in the TI program. (Aa5).

On September 27, 2023, the Board denied Lacey's petition. First, Staff noted that Lacey's project was grid supply, and therefore ineligible for the TI program absent a waiver of the TI rules under N.J.A.C. 14:1-1.2(b). (Aa5). Lacey never petitioned for such a waiver. (Aa5). No other solar grid supply

[5] PJM Interconnection is the regional transmission organization that coordinates the movement of wholesale electricity in 13 states and the District of Columbia.

projects had been accepted into the TI program outside of Subsection (t) and (r). Ibid.

However, Staff noted that if Lacey's project was granted a waiver so its proposed grid supply project could register and enter the TI program, Staff had concerns regarding the project's ability to reach commercial operation before the one-year expiration date established by the TI program rules. Ibid. First, Staff noted that Lacey's project remains in the System Impact Study phase of the PJM interconnection queue process, meaning that it is uncertain if or when the proposed project might obtain approval from the regional electric grid operator to connect to the grid. Ibid. Second, Staff noted that Lacey's proposed project would be built on dredge ponds as mining operations proceed, but the ponds are not yet combined to accommodate floating solar. Ibid. Third, Staff noted the ongoing litigation between Lacey and the landowner regarding compliance with various terms of the lease. Ibid. Lacey did not demonstrate it had site control or submit a finalized plan for project configuration. Ibid. Based on these factors, Staff found that Lacey's project lacked maturity to enter the TI program and was "inherently speculative." (Aa5).

Addressing Lacey's request for an increased TREC factorization from 0.6 to 1.0, Staff found that Lacey failed to show that the project merited the change based on its diligent review of the project's costs and revenues as well as its

experience with floating solar technology in New Jersey and the country. Ibid. Staff relied on a report ("Cadmus Report") it previously developed in consultation with Cadmus Group, LLC[6], ("Cadmus") to determine that Lacey's proposed project did not warrant a TREC factorization of 1.0. Ibid. The Cadmus Report was developed for the Board's ADI program, which employed modeling using System Advisory Model ("SAM"), which can determine a solar project's anticipated internal rate of return, or alternatively, an incentive level required to provide a given incentive rate of return. (Aa6). Cadmus performed an analysis of floating solar costs as compared to ground-mount solar costs, modeling representative cases for floating solar in each of the state's electric distribution company service areas. Ibid. Cadmus concluded that despite additional costs associated with floating solar, floating solar projects in New Jersey "do not warrant a full 1.0 TREC factor." (Aa6). Staff therefore recommended denial of Lacey's petition and encouraged Lacey to consider its project for the Board's CSI program. (Aa6).

The Board, agreeing with Staff's recommendation, denied Lacey's petition, stating that it is important to "balance the interest of supporting New Jersey's solar industry and the implementation of novel technologies in the State

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[6] Cadmus is a contract consultant retained by the Board in 2018 to assist in completing a study evaluating how to modify or replace the SREC program. (Aa11).

with minimizing the costs to ratepayers and compliance with its rules to the greatest extent possible." Ibid. The Board agreed that the record did not support Lacey's request for eligibility and TREC factor assignment in the TI program. (Aa6). The Board further determined that, "because the TI [p]rogam was not open to grid supply projects, other than those certified under Subsection (t) or Subsection (r) or previously registered in the SRP, the [Lacey] project is not eligible for entry into the TI [p]rogram…." (Aa6).

This appeal followed.

ARGUMENT

THIS COURT SHOULD AFFIRM THE BOARD'S REASONABLE DETERMINATION AS IT IS SUPPORTED BY SUBSTANTIAL CREDIBLE EVIDENCE.

A. The Board properly determined that Lacey was not eligible to participate in the solar Transition Incentive program without a waiver.

This court should affirm the Board's September 27, 2023, denial of Lacey's floating solar petition and request for an increase of the default TREC factor from 0.6 to 1.0. The Board carefully considered Lacey's petition and, after a thorough review of the record, reasonably exercised its discretion in

denying Lacey's request. The Board's decision is supported by substantial credible evidence and should be affirmed.

The Legislature vested BPU with broad discretion in the exercise of its authority under Title 48. In re Pub. Serv. Elec. & Gas Co.'s Rate Unbundling, Stranded Costs and Restructuring Filings, 167 N.J. 377, 384 (2001). Our Supreme Court recognized that "[t]he Public Utilities Act specifically prohibits courts from reversing BPU decision" except for the grounds enumerated in N.J.S.A. 48:2-46. Ibid. As the Supreme Court recognized, under N.J.S.A. 48:2-46, "a reviewing court may set aside an order of the Board only 'when it clearly appears that there was no evidence before the board to support the same reasonably.'" In re Pub. Serv. Elec. & Gas Co.'s Rate Unbundling, 167 N.J. at 393 (quoting N.J.S.A. 48:2-46); accord In re Herrmann, 192 N.J. 19, 27-28 (2007). When reviewing an agency's factual findings the courts defer to the agency's expertise. In re Pub. Serv. Elec. & Gas Co.'s Rate Unbundling, 167 N.J. at 384.

The standard of review of an agency decision is well settled and subject to "an arbitrary and capricious standard." Zimmerman v. Sussex Cnty., Educ. Servs. Comm'n, 237 N.J. 465, 475 (2019). See Melnyk v. Bd. of Educ. of Delsea Reg'l High Sch. Dist., 241 N.J. 31, 40 (2020). Under this standard, "[a]n administrative agency's final quasi-judicial decision will be sustained unless

there is a clear showing that it is arbitrary, capricious, or unreasonable, or that it lacks fair support in the record." Saccone v. Bd. of Trs., Police & Firemen's Ret. Sys., 219 N.J. 369, 380 (2014). If an agency decision "could reasonably have been reached on sufficient credible evidence present in the record, considering the proofs as a whole," courts must respect the agency's conclusions. Jackson v. Concord Co., 54 N.J. 113, 117 (1969). Appellate review of administrative action is generally limited to whether the agency's action agency followed the law, whether the record contains substantial evidence to support the agency's action, and whether the agency clearly erred in reaching a conclusion that could not reasonably have been made on a showing of the relevant factors. Allstars Auto. Grp., Inc. v. N.J. Motor Vehicle Comm'n, 234 N.J. 150, 157 (2018) (quoting In re Stallworth, 208 N.J. 182, 194 (2011)). "When an agency's decision meets those criteria, then a court owes substantial deference to the agency's expertise and superior knowledge of a particular field." Herrmann, 192 N.J. at 28.

The Board's decision in this matter warrants deference by this court as the Board appropriately applied the regulatory and statutory framework of the TI program. Lacey filed its petition under the regulatory framework of the TI program and the January 2020 Order that permitted a party to file a petition

requesting assignment of a TREC factor for "new or innovative" technology. (Aa1-6); N.J.A.C. 14:8-10.2 to 10.6.

Here, Lacey's grid supply floating solar project is not a project type that is eligible for entry in the TI program absent a waiver. The Board identified market segments eligible for entry into the TI program ("Subsections") and assigned each a TREC factor, ranging from 0.6 to 1.0. (Aa3; N.J.A.C. 14:8-10.5). A grid supply project is eligible for the TI program only if it is based on a "landfill, brownfield, [and] areas of historic fill" pursuant to Subsection (t) or when it had been conditionally certified as "ground mount[ed]" pursuant to Subsection (r) in the legacy SRP. (Aa3). Lacey's project does not meet that criteria, so it is not eligible for the TI program. Ibid. See (Aa5) (stating that "Staff does not recommend the Board grant eligibility in the TI [p]rogram for a grid supply project that was not certified under Subsection (r) or (t)."). As Board Staff noted, "no other general grid supply projects were accepted into the TI [p]rogram" and Staff does not recommend waiving the rules in this closed TI program. (Aa5). Further, while the January 2020 Order stated that "new or innovative solar technologies can file a petition with the Board requesting that they be assigned a TREC factorization level", it did not change the eligibility requirements for the TI program. (Aa4-5).

While Lacey claims that the TI program allows for grid supply projects, the very fact that it would have needed a waiver for its project demonstrates that the program did not expressly contemplate grid supply projects outside of those enumerated in Subsection (t) or (r). (Ab12). Nor is it true, as Lacey contends, that the "restriction" of grid supply projects "occurs nowhere in the Board's prior orders". (Ab6). The Board specifically addressed grid supply projects in its March 27, 2020 Order which provided additional guidance to participants in the SREC market following the closure of the SREC program.[7] Specifically, the Board ordered that grid supply projects, outside of those projects proposed on landfills, brownfields or areas of historic fill [Subsection t] and that have not previously been approved by the Board as "connected to the distribution system" pursuant to Subsection r shall not be eligible for SRECs or for the TI program. Ibid; See N.J.S.A. 48:3-87 (r) and (t). That Order was then codified in its regulations at N.J.A.C. 14:8-10.1 to 10.6. Therefore, the Board properly determined Lacey's grid supply floating solar project would not be eligible in the TI program absent a waiver.

[7] In the Matter of the Closure of the SREC Registration Program Pursuant to P.L. 2018, c.17, 2020 N.J. PUC LEXIS 269, 18 (March 27, 2020).

B. The Board's determination that Lacey was not eligible for a waiver was reasonable and should be affirmed.

As discussed above, the Board's denial of Lacey's petition was based, in part, on the ineligibility of its grid supply project for entry in the TI program. (Aa6). Lacey never sought a waiver of those eligibility requirements. Yet the Board still carefully considered Lacey's project for entry in the TI program and eligibility for a waiver even though no such request was made. (Aa4-5). "When faced with a petition seeking a waiver of the timelines in the TI Program Rules . . . the Board carefully reviews the facts and circumstances of each such petition to determine whether such an extension is in the public interest." (Aa112); N.J.A.C. 14:1-1.2(b).

Despite Lacey's failure to formally petition for a waiver in the TI program, Board Staff noted that Lacey's submission could be considered a formal expression of interest in the program. (Aa5). But Lacey made no "showing of good cause" to properly request any relaxation or deviations from the rule. N.J.A.C. 14:1-1.2(b). Still, Staff not only reviewed Lacey's petition, but also sent three sets of discovery questions regarding the project's permitting and interconnection processes, project design and site preparation, as well as costs. (Aa4).

Following a thorough review of Lacey's submissions, the Board found that a waiver was not appropriate here, given the inherently speculative nature of Lacey's project. (Aa5-6). As Board Staff noted, "[w]ere [Lacey's] project granted a waiver so that this general grid supply project could enter the TI program, Staff has concerns the project's ability to reach commercial operation…." (Aa5). The TI program grants projects one year from conditional registration to reach commercial operation. (Aa5). Here, there is substantial evidence in the record to support the Board's denial of Lacey's petition for its proposed grid supply solar project because it lacked maturity to reach commercial operation before the applicable expiration date. (Aa5).

First, as of September 15, 2023, Lacey's project "remain[ed] in the System Impact Study phase of the PJM Interconnection queue process," making it uncertain when the proposed project might be approved to connect to the electric grid by the regional grid operator.[8] (Aa5). Second, Lacey indicated that it would

[8] The September 27, 2023 Order referenced the PJM Interconnection Service Request site for Lacey, Request Project ID AG1-188 at footnote 14. (Aa5). Subsequently, Lacey received its Impact and Facilities Study from PJM in July 2024, which reflects a 24-month construction schedule and a commercial operation date of June 30, 2027 for its facility, well beyond the TI program's expiration date. The Facilities Study estimates the time required to obtain property rights and permits for construction of the required facilities. https://www.pjm.com/planning/service-requests/serial-service-request-status, Accessed August 20, 2024.

take "considerable time" to build the project on dredge ponds and to combine the ponds, so it was "unclear that both excavations of the mine and construction of the solar array can be completed in the time permitted in the TI [p]rogram." Ibid. Plus, there was "[n]othing provided by [Lacey that] indicates that this work has yet begun." Ibid. Third, there is "litigation between [Lacey] and Lacey Natural Sand regarding compliance with various terms of the lease," which remains pending[9], suggesting that Lacey "does not currently have control over the site or a finalized plan for project configuration"; the project is "inherently speculative" considering Lacey did not demonstrate site control or provide a finalized plan for project configuration when Lacey filed its petition in February 2021. Ibid; see also In re Freshwater Wetlands Prot. Act Rules, 180 N.J. 415, 422-23 (2004) (suggesting that lack of control over development sites or finalized plans for project configuration are germane concerns because "applicant[s] seeking to engage in regulated activities . . . [can only do so if they] apply for and secure either a general or an individual permit.") The TI program provided a one year expiration after receiving conditional registration for certain facilities to reach commercial operation. (Aa5).

[9] Lacey Sands Solar Farm v. Lacey Natural Sand, Superior Court Chancery Division – Ocean County. Docket No. OCN-C-31-22. (Open).

The Board's conclusion that even if Lacey had submitted a waiver request for entry in the TI program under N.J.A.C. 14:1-1.2(b), it did not adequately demonstrate that it should receive a higher TREC factorization was also reasonable. Lacey's petition included the Gabel Report to support its application for a TREC factor of 1.0. (Aa4). Staff, relying on the Cadmus Report modeling representative cases for floating solar in each service territory in New Jersey, concluded that additional costs associated with floating solar in New Jersey does not warrant a full 1.0 TREC factor. (Aa6). The Board noted it relied on the project's proposed costs and revenues, as well as the Board's experience with this technology in New Jersey and its consultant, finding that Lacey's proposed project would not warrant a 1.0 TREC factor. (Aa5).

Considering the uncertainty surrounding Lacey's ability to reach commercial operation and Lacey's failure to petition for a waiver in the first place, the Board's determination is consistent with the law and supported by the record. However, Staff recommended Lacey consider petitioning for the CSI program which is designed for larger grid supply projects. (Aa5). The Board's denial of Lacey's petition should be affirmed.

CONCLUSION

For the reasons stated above, this court should affirm the Board's determination.

Respectfully submitted,

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Re: In The Matter Of Lacey Sand Solar Farm, LLC – Petition For Assignment Of "Preferred" TREC Factor For Floating Photovoltaic Solar Pursuant To The Board's Transition Incentive Order (Docket No. A-000608-23)

Civil Action: On Appeal from a Final Agency Decision of the Board of Public Utilities

Supplemental Brief on Behalf of Respondent, Board of Public Utilities

Dear Mr. Orlando:

Please accept this supplemental brief on behalf of Respondent, the New Jersey Board of Public Utilities ("Board" or "BPU"), in response to the court's January 7, 2025, request that the parties address the issues discussed further below.

PROCEDURAL HISTORY AND STATEMENT OF FACTS[1]

Respondent relies upon the facts and procedural history set forth in its August 23, 2024, merits brief.

LEGAL ARGUMENTS

POINT I
APPELLANT SEEKS BUT IS NOT ENTITLED TO TRECS. (Responding to Court's Questions 1 & 2)

Appellant, Lacey Sand Solar Farm, LLC ("Lacey") asks this court to deem its grid supply project eligible for participation in the TI program and require the Board to award Lacey TRECs, or a similar incentive, to allow it to generate and receive the higher incentive value of the TREC under the TI program than what is currently available in the Competitive Solar Incentive ("CSI") program. This appeal is not moot because applications filed before the TI program closed remain pending. But that does not change the outcome because the Board's finding that Lacey's project lacked maturity to reach commercial operation within the applicable one-year expiration date is supported by the record and the court should defer to the Board's exercise of its expertise. (Aa5). When the Board closed the TI program to new applicants on August 27, 2021 it noted that projects meeting certain requirements before the closure date could "remain in

[1] "Aa" refers to Appellant's appendix; "Ab" refers to its brief; "Rb" refers to the Board's Brief; "Ra" refers to the Board's appendix.

the TI program." In re New Jersey Solar Transition Pursuant to P.L.2018, c.17, 2021 N.J. PUC LEXIS 299 (July 28, 2021). Lacey timely filed its petition but failed to show its project is mature enough to reach commercial operation within the one-year deadline established by the TI rules. (Rb9; Aa5). Additionally, the Board found that due to the speculative nature[2] of the project, it found a waiver of those rules inappropriate, which prohibits grid-supply projects outside of subsection (r) and (t). (Aa6). There remains no basis to disturb those findings.

POINT II
THE JUDICIARY CANNOT COMPEL THE BOARD TO EXPEND FUNDS THAT ARE NOT WITHIN A CURRENT LEGISLATIVE APPROPRIATION. (Responds to Court's Question 3.)

In the absence of a constitutional violation, the Judiciary does not have the power to compel the Board to expend funds that are not within a current legislative appropriation. Karcher v. Kean, 97 N.J. 483, 490 (1984) ("With the ultimate constitutional responsibility for appropriations vested in the Legislature, . . . the judiciary has accepted its own absence of authority to compel either the Legislature to make a specific appropriation or the Governor to recommend or approve one."); accord N.J. Div. of Youth & Family Servs. v. D.C., 118 N.J. 388, 399 (1990); City of Camden v. Byrne, 82 N.J. 133, 148

[2] The Board noted the ongoing litigation with Lacey and the landowner regarding compliance with its lease which is ongoing, with a trial date scheduled for February 13, 2025.

(1980); see also Fitzgerald v. Palmer, 47 N.J. 106, 108 (1966) (citing Appropriations Clause in holding that even if court imposed payment obligation on State, courts "could not enforce a judgment"); Gallena v. Scott, 11 N.J. 231, 238 (1953) (it would be impermissible "judicial intrusion upon the legislative and executive authorities" to mandate expenditure of "moneys in excess of the sum appropriated"). In this case, the money "is collected from utility customers" under statutory authority; "the amount of the charge is determined by the BPU, which is a state agency"; and the "BPU determines the specific purposes to which the money . . . is allocated." Mid-Atlantic Solar Energy Industries Ass'n v. Christie, 418 N.J. Super. 499, 506 (App. Div. 2011); see also N.J.S.A. 48:3-87(d)(2-3). Thus, "the Legislature has authorized its collection and directed the purposes to which it may be allocated." Id. at 507. A current legislative appropriation for the expenditure of the monies at issue here does exist and, with one important caveat, the court may order BPU to expend the monies on Appellant. Specifically, General Language Provision 2 (GP2) of the 2025 Appropriations Act provides: "All dedicated funds are hereby appropriated for their dedicated purposes." See L. 2024, c. 22; see also Mid-Atlantic Solar Energy, 418 N.J. Super. at 506-07 (noting that statutorily dedicated clean energy funds are appropriated pursuant to GP2). The caveat is that there is a critical distinction between "budgeted revenue" and "appropriated

revenue" in the Appropriations Act. Karcher, 97 N.J. at 491. While budgeted revenue is "a reservation or designation of a specific amount of money for a particular purpose," appropriated revenue is "reflected in the budget not as a specific numerical figure but by means of general language committing funds in an unspecified amount for a particular purpose." Ibid. Funds appropriated pursuant to GP2 constitute appropriated revenue may only be expended to the extent they are collected. Cargill Meat Solutions Corp. v. Direc., Div. of Taxation, 477 N.J. Super. 85, 106-07 (App. Div. 2023). Therefore, the court may only order the BPU to expend monies on Appellant to the extent sufficient funds are received; if sufficient funds are not received, the court may not order the expenditure of funds in excess of the appropriated funds.

CONCLUSION

The Board of Public Utilities decision should be affirmed.

Respectfully submitted,

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IN THE MATTER OF LACEY SAND SOLAR FARM, LLC – PETITION FOR ASSIGNMENT OF "PREFERRED" TREC FACTOR FOR FLOATING PHOTOVOLTAIC SOLAR PURSUANT TO THE BOARD'S TRANSITION INCENTIVE ORDER	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO: A-000608-23 **CIVIL ACTION** ON APPEAL FROM FINAL DECISION OF NEW JERSEY BOARD OF PUBLIC UTILITIES BPU DOCKET NO: QO21020469

APPELLANT'S SUPPLEMENTAL BRIEF IN SUPPORT OF APPEAL OF THE NEW JERSEY BOARD OF PUBLIC UTILITIES' DECISION

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TABLE OF AUTHORITY

PRELIMINARY STATEMENT

As requested by the Court, Lacey Sand Solar Farm, LLC ("CEP") addresses the following three questions:

1. What exactly is the specific remedy appellant seeks from this court, other than a generic "reversal" of the agency decision? Is that remedy lawfully available since, as it appears from the briefing, the program has been terminated by the Legislature?
2. Is the appeal moot, given the cessation of the program?
3. Does the Judiciary have the power to compel an agency to expend funds or provide financial benefits that are not within a current legislative appropriation, in a situation in which the expenditure is not necessary to remedy a constitutional violation?

In response, Appellant seeks reversal of the denial order and issuance of Transition Renewable Energy Certificates ("TRECs") in the Transition Incentive ("TI") Program, that, while not accepting new applications, remains not only active, but with applications pending. The appeal is not moot, as the Board has recently made other TI Program awards and other applications remain pending in the TI Program. Although the TI Program is closed to new applications, it is not gone altogether. Likewise, the TREC funding is not based upon legislative appropriation, but upon BPU Orders that obligate load serving entities ("LSEs") to purchase the TRECs and for the electric distribution companies ("EDCs") to recover the costs through utility ratemaking. As such,

CEP's request is reasonable, viable, and legal, and needs no legislative approval or action.

LEGAL ARGUMENTS

A. CEP seeks the granting of TRECs as the appropriate remedy

CEP seeks to have the Board award TRECs or a similar form of Solar Renewable Energy Certificate ("SREC") for the application for floating solar in this matter, based upon the original TI Program. CEP's application was made timely, and the TI Program, while not accepting new applications in light of the Successor Program, is not "closed" in that TREC awards are ongoing, open applications remain in front of the Board for approval or denial, and TRECs granted under this Program will continue for the next 15 years at a fixed rate. The only "closed" element of the Program is that no **new** applications are being accepted; but at least one application for a TREC project remains pending before the Board and awaiting a decision,[1] and the matter pending in this appeal was timely filed.

[1] The open matter is Harmony Sand Solar Farm, with a BPU Docket Number of QO21081097, that was timely filed in August of 2021 and which, as of January 13, 2025, remains open and pending decision before the Board. If the Board were to approve the Harmony Sand application, the Harmony Sand project would receive TRECs in the TI Program and be subject to TI Program rules.

B. The matter is not moot as the application was timely filed and considered as part of the program.

The underlying Program continues despite the Board's decision to not accept additional applications. The Board has not asserted that the Program has ceased; only that no new applications are being accepted, and as such there is no impediment to this Court – or the Board – allowing CEP's project to be accepted and granted TRECs. Despite this decision to not accept new applications, the TREC Program continues to purchase and retire TRECs, and will do so for no less than 15 years from the date of the last TREC-producing solar project to come on-line. December 6, 2019, Order, at 34 (043a).[2] Additionally, this closure of the TI Program is not predicated upon a legislative mandate, but is instead a function of the Board's Program and design, with a termination date set by Board operation. January 8, 2020, Order, at 3 (048a).[3]

[2] I/M/O A New Jerey Solar Transition Pursuant to P.L. 2018, C.17, Order, New Jersey Board of Public Utilities, Docket No. QO19010068, dated December 6, 2019, provided in Appellant's Initial Appendix.
[3] I/M/O A New Jersey Solar Transition Pursuant To P.L. 2018, C.17, Order, New Jersey Board of Public Utilities, Docket No. QO19010068, dated January 8, 2020, provided in Appellant's Initial Appendix.

C. TREC funding is not predicated upon legislative appropriation and instead is a creature of Board regulatory development and the various Solar Acts

The Board's issuance of TRECs involves no expenditure of State funds, and thus no legislative appropriation is implicated.

While SRECs, and the new SRECs-II, have some legislative foundation, N.J.A.C. 14:8-2.2, TRECs are creations of the Board, December 6, 2019, Order, at 33 (042a). That Order set the price, the obligation for the purchase of these TRECs by the LSEs, and the designation of a TREC Administrator by the EDCs, for the purpose of administering this program. Id. at 34 (043a). Specifically, the Order explicitly notes:

> The Board **HEREBY ORDERS** that the EDCs may recover reasonable and prudent costs for TRECs procurement and TREC Administrator fees. Recovery shall be based on each EDC's proportionate share of retail electric sales. Each EDC shall make an annual filing for its costs and the recovery method, which shall be subject to approval by the Board. [Ibid.]

This Order makes clear that the financial foundation, and source of payment to the TREC owners, is not in any way based upon or predicated on a

legislative appropriation. If the Board were to approve the still-pending Harmony Sand project, or be directed to approve this pending matter, the source of funding would be the same as for all existing TREC projects – the obligation for the load serving entities to purchase and the EDCs to recover through the Board's ratemaking process. Thus, even if the program were "over" such that pending and timely applications were simply capable of being unilaterally ignored – which it is not – the additional costs associated with the ability to create and sell TRECs would still be purely an administrative process through the Board, the TREC Administrator, and the EDCs.

CONCLUSION

For the foregoing reasons, and as discussed above and previously, CEP seeks approval of a floating solar project and for the issuance of the base level plus the cost-based increased TREC valuation in light of the Board's arbitrary and capricious refusal.

Respectfully submitted,

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Dated: January 15, 2025
#17680976v2 (23857.015)

IN THE MATTER OF LACEY SAND SOLAR FARM, LLC – PETITION FOR ASSIGNMENT OF "PREFERRED" TREC FACTOR FOR FLOATING PHOTOVOLTAIC SOLAR PURSUANT TO THE BOARD'S TRANSITION INCENTIVE ORDER	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO: A-000608-23 **CIVIL ACTION** ON APPEAL FROM FINAL DECISION OF NEW JERSEY BOARD OF PUBLIC UTILITIES BPU DOCKET NO: QO21020469

APPELLANT'S REPLY BRIEF IN SUPPORT OF APPEAL OF THE NEW JERSEY BOARD OF PUBLIC UTILITIES' DECISION

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PRELIMINARY STATEMENT

At core, the New Jersey Board of Public Utilities ("BPU" or "Board"), in its response, makes clear the understanding of the situation was correct – the Board's decision to deny Lacey Sand Solar Farm, LLC ("CEP Renewables" or "CEP") application because CEP must and should have known that floating solar was required to be net metered is unfounded and a mistake, and should be rectified in the interest of fairness and in supporting the State's policy of building solar on underused and otherwise undervalued property. To the contrary, the Board announced a policy that applied to "ALL" floating solar projects. Never once did the Board draw a distinction between grid-supply floating solar and net-metered floating solar, until, that is, it denied this petition.

The Board, through its entire run of its "innovative technology" Orders as laid out in CEP's initial brief, never once noted the need for floating solar to be net metered to be eligible under the innovative technology program. In fact, the Board made clear from the first Order setting up the TI program that grid supply could and would be allowed, by explicitly including grid supply rooftop, ground mount, and landfill options. Then, in the first Order touching upon floating solar, the Board explicitly notes the possible wholesale nature of these projects, while expressly comparing floating solar to grid-supply ground mount facilities.

Finally, in the second floating solar Order, the Board once again was silent on the so-called need for floating solar to be net metered. It was only in the last Order – the Order under appeal – that the Board suddenly introduced this requirement.

The sudden and changed element of this decision can be further seen when the Board set the 0.6 TREC factor for "ALL" floating solar projects, without any comment on the need for net metering, and then issued a second floating solar Order well after CEP's submission, again without any reference to either the need for net metering or the restriction against grid supply. Again – the mistake is palpable.

In a similar manner, the Board's decision to consider and refuse the uprate from a 0.6 TREC factor to the requested 1.0 TREC factor, coupled with unsubstantiated and non-germane concerns about the developer's ability to construct, appears to show at minimum, a mistake and at worse a clear example of arbitrary and capricious decision-making on the part of the Board, in significant detriment to the legislatively required support of the State's Solar agenda. As such, CEP seeks reversal of the Board's decision.

LEGAL ARGUMENT

THE BPU'S DECISION TO DENY THE APPLICATION IS ARBITRARY AND CAPRICIOUS, AND SHOULD BE REVERSED

A. The BPU's decision-making process failed to abide by the Board's own Orders and precedent.

The Board has been unable and continues to fail to show that the last-minute decision to limit floating solar to only net metered projects was anything but, at best, an accident and mistake, and, at worst, a deliberate attempt to deny this one particular project for no rational reason. As such, this Court should reverse the decision and direct the Board to make a fair and reasonable conclusion based upon the actual facts and the reasonable policy on this matter.

In the Order denying the Lacey Sand project, In The Matter of Lacey Sand Solar Farm, LLC – Petition for Assignment of "Preferred" TREC Factor For Floating Photovoltaic Solar Pursuant to the Board's Transition Incentive Order, Order, New Jersey Board of Public Utilities, Docket No. QO21020469, dated September 27, 2023, (hereinafter "Order"), at 4. (001a.), the Board refused to allow the project based upon a newly-articulated "policy" and understanding that floating solar was required to be net metered. This was "news" to CEP, and seemingly news to the Board as well, based upon all of the prior Orders in the chain of the floating solar development.

In the Order the BPU claims speaks to this topic, the Board, in I/M/O the Closure of the SREC Registration Program Pursuant to P.L. 2018, C. 17, Order, New Jersey Board of Public Utilities, Docket No. QO18070698, dated March 27, 2020, provided the following statement:

> Finally, the Board **FINDS** that in light of the SRP closure, any expression of interest for Energy Year 2021 that may be submitted pursuant to Subsection r (N.J.A.C. 14:8-2.4(g)) shall not be considered for the Transition Inventive program. Thus, the Board **ORDERS** that grid supply projects that are not proposed on landfills, brownfields or areas of historic fill and that have not previously been approved by the Board as "connected to the distribution system" pursuant to Subsection r shall not be eligible for SRECs or for the Transition Incentive program.
>
> [Id., at 7.]

The Board appears to believe that this statement is not only germane but is dispositive on the question of allowing an innovative technology floating solar

project to receive TRECs when it is designed as a grid supply project. It is neither.

As an initial matter, the Board's expressly states that the foundation for this Order clause concerns "expressions of interest for Energy Year 2021 that may be submitted pursuant to Subsection r". The Lacey Sand application was not submitted pursuant to Subsection r. The Lacey Sand project is not a Subsection r project, or, in fact, any Subsection project. By its very nature, the floating solar projects are creatures of Board orders, and not subsections of the Solar Act.

The first description of the new technology category is found in I/M/O a New Jersey Solar Transition Pursuant to P.L. 2018, C.17, Order, New Jersey Board of Public Utilities, Docket No. QO19010068, dated January 8, 2020 (045a) where the Board explicitly noted that "new or innovative solar technologies can file a petition with the Board requesting that they be assigned a TREC factorization level." Id., at 3. The definition of the floating solar option is then found in I/M/O The Petition Of New Jersey-American Water Company for "Preferred" TREC Factor for Floating Photovoltaic Solar Pursuant to the Board's Transition Incentive Order, Order, New Jersey Board Of Public Utilities, Docket No. QO20020111, dated July 15, 2020, (080a), where the

Board granted a floating solar facility a 0.6 TREC factor. The Board did not designate floating solar as Subsection r, or, for that matter, as any type of Subsection, as floating solar is not a Solar Act category. As such, it is unambiguous that the Ordering clause of the Board, expressly predicated upon the designation of Subsection r, does not apply to non-Subsection r projects such as floating solar. Therefore, the restrictions upon grid supply that flow from this predicate are immaterial to the floating solar program as designed and set forth by the Board.

Furthermore, each time the Board discussed the innovative technology and/or floating solar programs, the Board never once identified the need or restriction between net metered and grid supply. In I/M/O A New Jersey Solar Transition Pursuant to P.L. 2018, C.17, Order, New Jersey Board of Public Utilities, Docket No. QO19010068, dated January 8, 2020, not a single mention was made of the need for the project to be net metered; in fact, all the Board stated was "floating solar projects may request from Staff assignment of a preliminary 0.6 TREC factor and may petition the Board to request a factor greater than 0.6 based upon the specific facts and circumstances attributable to an individual project." Id., at 6. Even further, the Board stated that "[e]qually important to the development of an appropriate factor is the need to understand

the revenue streams available to projects within the market segments, particularly the ability of projects to access net meter revenues, **or otherwise earn more than would be expected from the wholesale market**." Id., at 5 (emphasis added). The Board, in this Order, directly recognized that wholesale revenue – i.e., grid supply revenue – was part of the consideration and calculation for the TREC factor. Of what possible purpose would be the need to consider wholesale revenue in a TREC calculation if a TREC automatically meant that no wholesale revenues were possible? It is simply nonsensical.

Again, when the Board explicitly designed the floating solar program, in I/M/O the Petition of New Jersey-American Water Company for "Preferred" TREC Factor for Floating Photovoltaic Solar Pursuant to the Board's Transition Incentive Order, Order, New Jersey Board of Public Utilities, Docket No. QO20020111, dated July 15, 2020, absolutely nothing in the entire Order commented upon, set requirements, limited or defined floating solar as requiring either net metering or grid supply. Instead, when the Board set out the types of projects that could be included in the TREC awards, grid supply projects were included, and thus the idea that "all" grid supply projects were somehow obviously not allowed under the TREC program was simply untrue.

The Board's reliance upon a statement about not allowing grid supply projects based upon a Subsection r discussion is of no significance to the newly designed and innovative floating solar program. Instead, as CEP has consistently noted, the Board made a simple mistake in claiming that floating solar is forbidden from being grid supply, and the Board should reverse this decision, allow the project, and take full credit for the installation and operation of a significant and successful solar development.

As previously noted, it is axiomatic that the decisions, procedures, and actions of State administrative agencies, such as the BPU, are subject to "judicial review and supervision to assure fairness in the administrative process." Hospital Center at Orange. Guhl, 331 N.J. Super. 322, 333 (App. Div. 2000); In re Arndt, 67 N.J. 432, 436 (1975). This Court, in reviewing an administrative action of the Board, is obligated to consider three overarching issues: "(1) whether the agency's action violates express or implied legislative policies, that is, did the agency follow the law; (2) whether the record contains substantial evidence to support the findings on which the agency based its action; and (3) whether in applying the legislative policies to the facts, the agency clearly erred in reaching a conclusion that could not reasonably have been made on a showing of the relevant factors." Allstars Auto. Grp., Inc. v. N.J. Motor Vehicle

Comm'n, 234 N.J. 150, 157 (2018) (quoting In re Stallworth, 208 N.J. 182, 194 (2011)). See In re Proposed Quest Acad. Charter Sch. of Montclair Founders Grp., 216 N.J. 370, 383 (2013); Mazza v. Bd. of Trs., Police & Firemen's Ret. Sys., 143 N.J. 22, 25 (1995). Here, the Board's decision-making process in this matter is the very example of a decision that is arbitrary, capricious, unreasonable, and utterly lacking support in the record.

In denying this Project for TRECs pursuant to the solar floating program, the Board's primary foundation was that the program was never designed to allow for grid supply projects. See Order, at 4-5. (004a-005a.) The major problem with this is that the statement is not true. As even the Board acknowledges in the Order, a waiver was available. At no time did the Board indicate that being grid supply was an absolute bar for the approval of the project. In fact, the Board said nothing of the sort, despite having 2 years and multiple rounds of discovery on the process. No information was hidden, no surprises were sprung, no attempt to hide or even disguise the project was attempted. The Project was clear and, on its face, exactly what it was – a grid-supply project seeking approval from the Board for a TREC award.

The Board was aware of this. The Board knew that the project was a grid-supply project. The Board engaged in multiple rounds of discovery. If the Board

honestly believed that it was unable to grant the Petition on its face, the process of seeking discovery and looking for additional information was, at best, a farce.

Likewise, and as the Board itself acknowledges, this Petition functions as a waiver request, if needed. See Order, at 5. (005a.) ("Were Petitioner's project granted for a waiver so that this general grid-supply project could enter the TI Program…"). No analysis was provided for a review of a waiver. In fact, the "analysis" provided by the BPU in this Order is so cursory and shallow as to essential qualify as no analysis at all. After identifying that a waiver would allow this project to be included, the Board conducted no analysis whatsoever. Likewise, the other reason articulated by the Board, such as concerns about timing and the PJM timeframe, are concerns that the Board ignores and grants petitions for on a regular basis. See, e.g., Reconsideration Order. (088a.)

As previously set forth, the court has repeatedly and consistently noted that "deference does not require that we forego a careful review of administrative decisions simply because an agency has exercised its expertise. We cannot accept without question an agency's conclusory statements, even when they represent an exercise in agency expertise. The agency is 'obliged ... to tell us why.'" Balagun v. New Jersey Dept. of Corrections, 361 N.J. Super. 199, 202-03 (App. Div. 2003), quoting In re Valley Hosp., 240 N.J. Super. 301,

306, (App. Div. 1990). Here, the Board provides simply conclusory statements, and thus this decision should be reversed.

B. The Board's other articulated reasons for denial of the project are not reasonable and should be rejected, especially in light of the State's policy.

As noted, and as not significantly repudiated by the Board, the remaining foundations for denying the Petition are and remain irrelevant and insufficient to justify the Board's actions. The concerns about control over the property, the timing for construction, and the ability to receive PJM approval in a timely manner are all nonsensical in terms of the Board's decision, and many have been previously ignored in other decisions to approve by the Board. Most notably, the Board has consistently approved the inclusion of projects for the solar program that are on track to fail the PJM timeline.

As CEP has raised a number of times in a number of different matters, the Board continues to thwart the intention and desire of the legislature and the Executive Branch to both develop solar and to maximize the use of brownfield, landfill, or other underutilized property for such development. CEP is not the source of this policy; it comes directly from State law – at least since the original Solar Act, P.L. 2012, c. 24. No question exists that the NJDEP identifies distressed properties such as landfills and brownfields as "preferred lands" for

solar siting. Siting Analysis Update, at 13. Likewise, the 2019 Energy Master Plan, the Board's CSI programs and the Community Solar programs, and even the Court, all of which is cited in the original brief, all state the same thing: the purpose of the State policy is to build solar, and the preferred location to build solar is land just like this.

Yet the actions taken by the Board do not support this policy, and in fact run directly counter to them. Be it statute, regulation, the Energy Master Plan, or common sense, the BPU refuses to support the use of landfill, brownfields and similar underutilized property for solar development. This refusal to abide by the clear policy determinations of the State, especially without clear articulation of the reasons, is arbitrary, capricious, and grounds for reversal.

C. The BPU's denial of the 1.0 TREC Factor based upon unrefuted submissions is arbitrary and capricious and should be reversed.

The Board's decision to deny the 1.0 TREC valuation has no foundation and should be reversed. The Board simply stated that it "does not believe that a 1.0 TREC factor is appropriate." Order, at 6. This, despite an explicit recognition that the generic modeling used by the Board in developing the solar program **did** reflect a higher value being required than the 0.6 TREC default. Yet the Board's response was simply "no." Despite this prior modeling, which

shows a 19% greater cost than a typical ground-mount system, the Board not only denied the 1.0 TREC value, but refused to even allow the 19% that its own data provided. Even if the information provided by the Petitioner was "unbelievable," the Board's own information justifies a 19% increase.

Again, the Board then acknowledges that the costs provided by developer – one of the few entities in the United States building such a floating project – are not the same as the model, and do reflect actual costs and actual construction and not simply a hypothetical installation. In response, the Board just waved its hand and dismissed it based upon no evidence at all; the Board simply decided to not believe them. Without reason, without cause, and without justification.

Based upon this "gut reaction", the Board not only denied the 1.0 TREC, but it denies even the 19% its own prior and incomplete review showed for floating solar. This remains a textbook example of arbitrary and capricious behavior.

CONCLUSION

For the foregoing reasons, and as discussed above, the decision on the part to the New Jersey Board of Public Utilities to deny the application of CEP Renewables, LLC for approval of a floating solar project and for an increase TREC valuation demands that this Court find the decision arbitrary, capacious, and thus the decision should be overturned and reversed.

Respectfully submitted,

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