SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-4408-15T2

MARK NAPIER,

Petitioner-Appellant,

v.

PUBLIC SERVICE ELECTRIC AND GAS COMPANY,

Respondent-Respondent.

Argued January 23, 2018 – Decided March 14, 2018

Before Judges Yannotti, Carroll and Leone.

On appeal from the New Jersey Board of Public Utilities, BPU Docket No. EC1311051.

John J. Coughlin argued the cause for appellant.

Sheree L. Kelly, Assistant General Regulatory Counsel, argued the cause for respondent PSE&G (PSE&G Services Corporation Law Department, attorneys; Sheree L. Kelly, on the brief).

Veronica A. Beke, Deputy Attorney General, argued the cause for respondent New Jersey Board of Public Utilities (Gurbir S. Grewal, Attorney General, attorney; Andrea M. Silkowitz, Assistant Attorney General, of

counsel; Yao Xiao, Deputy Attorney General, on the brief).

PER CURIAM

Mark Napier appeals from a final determination of the Board of Public Utilities (Board), which rejected his challenge to the methodology by which Public Service Electric and Gas Co. (PSE&G) receives credit for the power generated by its pole-mounted solar panels and Solar Renewable Energy Certificates (SRECs). We affirm.

I.

The Electric Discount and Energy Competition Act (EDECA), N.J.S.A. 48:3-49 to -98.5, was enacted in 1999 to restructure the electric power industry in New Jersey. In re Ownership of Renewable Energy Certificates, 389 N.J. Super. 481, 487 (App. Div. 2007). Among other things, EDECA provides that an electric public utility may invest in renewable energy programs on a regulated basis, N.J.S.A. 48:3-98.1(a)(2), and file a petition with the Board for cost recovery, N.J.S.A. 48:3-98.1(b).

To further encourage "the development of renewable sources of electricity and new, cleaner generation technology," the Board adopted "Renewable Energy Portfolio Standards" (REPS), N.J.A.C. 14:8-1.1 to -2.12, which require suppliers of electricity to retail customers "to annually increase their reliance on renewable energy" by generating a predetermined percentage of electricity

by means of renewable sources, including solar power. N.J.S.A. 48:3-87(d); see also N.J.A.C. 14:8-2.1(a); N.J.A.C. 14:8-2.3.

In its regulations, the Board created "Renewable Energy Certificates" (RECs), and each REC "represents the environmental benefits or attributes of one megawatt-hour of generated renewable energy." Renewable Energy, 389 N.J. Super. at 484. A supplier may satisfy its renewable energy requirements by either generating renewable energy directly or purchasing an appropriate number of RECs or SRECs in the case of solar energy, from other energy producers. Id. at 488; N.J.A.C. 14:8-2.3(c); N.J.A.C. 14:8-2.8(a)(3).

Through its designee PJM Interconnection, LLC (PJM), the Board issues SRECs to solar energy producers based on the amount of solar electricity generated. N.J.A.C. 14:8-2.9(a); N.J.A.C. 14:4-1.2. PJM is a Regional Transmission Organization (RTO) that coordinates the movement of wholesale electricity in all or parts of thirteen states, including New Jersey. PJM-Environmental Information Services (PJM-EIS), a subsidiary of PJM, oversees the SREC market for New Jersey.

PJM-EIS oversees the issuance, tracking, and sale of SRECs through the Generation Attribute Tracking System (GATS). PJM-EIS also issues manuals that provide rules for measuring energy output and participating in SREC markets. N.J.A.C. 14:8-2.9(a). Energy

suppliers who participate in the wholesale PJM markets must comply with the operating rules for GATS and the PJM Manuals pursuant to contracts called Wholesale Market Participation Agreements (WMPA).

On February 10, 2009, PSE&G filed with the Board a petition for approval of a program for investment in solar generation facilities called the "Solar 4 All Program." As part of the program, PSE&G proposed a "Neighborhood Solar" plan, in which forty megawatts (MW) of solar capacity would be produced by pole-mounted solar panels located in PSE&G's service territory. PSE&G proposed to install up to 200,000 panels.

In its petition, PSE&G indicated it would meter the solar energy generated by the panels by using a sampling methodology. PSE&G noted that "each unit may not be individually metered." According to PSE&G, the hourly output of the solar systems would be determined through the use of "a calculated load profile, which will be created by metering a sample of these systems with interval meters."

At the Board's direction, a BPU commissioner conducted six public hearings on PSE&G's petition. Thereafter, PSE&G, the Board's staff, the Division of Rate Counsel, and several parties who had intervened in the matter, entered into a Settlement Agreement (SA) regarding the program, which the Board approved by order dated August 3, 2009. Among other things, the SA and order

recognized that the output from the pole-mounted solar panels would be metered and verified pursuant to the requirements and monitoring standards established by PJM.

Thereafter, PSE&G worked with PJM to establish the metering system for the solar panels. PSE&G entered into a WMPA, which indicated it would submit to PJM hourly generation data for fifty groups of pole-mounted panels. Each group includes a sample panel with a PSE&G revenue-grade meter. PSE&G uses the metering data to place daily aggregate production information into hourly bins.

PSE&G sends this information to PJM, and the PJM Settlement Group uses it to issue payments for energy sales for the pole-mounted units. At the end of each month, the PJM Settlement Group provides the data to PJM-EIS, which determines the amount of SRECs that should be issued. By September 24, 2014, PSE&G had installed approximately 174,366 pole-mounted solar panels.

In January 2013, Napier filed a complaint in the Law Division against PSE&G. He asserted claims on his own behalf and as representative of a putative class of persons who had a financial stake in New Jersey's SREC market from 2009 to 2012. Napier claimed that in the relevant period, PSE&G had received more SRECs than it was entitled to receive because it had not complied with certain energy-reporting requirements.

Napier alleged that as a result, the value of "legitimately-obtained" SRECs had been devalued, causing him and other members of the putative class to sustain economic losses. Napier sought damages under theories of unfair competition and unjust enrichment.

In lieu of an answer, PSE&G filed a motion to dismiss the complaint pursuant to Rule 4:6-2(e), arguing that Napier failed to state a claim upon which relief could be granted. The trial court granted the motion and dismissed the complaint with prejudice. Napier appealed.

While the appeal was pending, Napier filed a petition with the Board seeking to bar PSE&G from receiving SRECs for its pole-mounted solar panels. Napier alleged that PSE&G's panels have not been metered, as required by the Board's rules and regulations; and that PSE&G was receiving "far more energy credit" for solar power than its system was actually producing. Napier asked the Board to deny PSE&G any SRECs and solar energy credits going back to 2009, when it approved PSE&G's "Solar 4 All Program." The Board referred the matter to the Office of Administrative Law (OAL) for a hearing as a contested case.

On July 15, 2014, we affirmed the trial court's dismissal of Napier's civil action, but modified the court's order to state that the dismissal was without prejudice to claims Napier may

present to the Board on any viable legal theory and any causes of action he might in good faith assert. Napier v. Pub. Serv. Elec. & Gas Co., No. A-4532-12 (App. Div. July 15, 2014) (slip op. at 19).

On October 1, 2014, PSE&G filed a motion in the OAL for summary decision pursuant to N.J.A.C. 1:1-12.5. PS&G argued that Napier failed to allege sufficient facts to support his allegations that PSE&G was not complying with the Board's rules and regulations, and his claim that PSE&G was not accurately measuring the solar power generated by the pole-mounted panels. In support of the motion, PSE&G submitted a certification from Todd Hranicka, its Director of Solar Energy.

On October 20, 2014, Napier filed a motion to compel discovery. In the motion, Napier reviewed his discovery requests and the answers that PSE&G had provided. He asserted it was not possible to substantiate his allegations without the information he was seeking from PSE&G. PSE&G opposed the motion for discovery. In a separate submission, Napier argued that PSE&G's motion for summary decision should be denied.

After hearing oral argument on the motions, the Administrative Law Judge (ALJ) issued an initial decision. The ALJ found that further discovery was not warranted, and that there was no genuine issue of material fact as to whether PSE&G was

authorized to use a sampling methodology to determine the solar power generated by the pole-mounted panels and the appropriateness of that methodology. The ALJ therefore concluded that PSE&G's motion for summary decision must be granted and Napier's petition dismissed. Napier filed exceptions to the ALJ's initial decision, and PSE&G filed a response.

On April 27, 2016, the Board issued its final decision and order dismissing Napier's petition. The Board noted that in its petition for approval of the "Solar 4 All Program," PSE&G indicated, among other things, that it planned to use a sampling methodology to determine the solar power generated by the pole-mounted panels. The Board stated that it did not reject the use of a sampling methodology. The Board observed that the WMPA required PSE&G to use metering equipment for the pole-mounted panels, and that PSE&G had installed the panels in accordance with the PJM Manuals.

The Board also noted that PJM had been designated as the Regional Transmission Authority and, as such, has responsibility for ensuring the reliability of electric power supply in numerous states. The Board commented that PJM had accepted the data produced by sampling PSE&G's pole-mounted panels. PJM also had accepted the use of modeling algorithms to determine the amount of power

generated collectively by all of the solar panels and the amount of SRECs that should be issued.

The Board accepted the ALJ's finding that there was no genuine issue of material fact regarding the regulatory authority for PSE&G's sampling methodology, the sufficiency of that methodology, and the SRECs created on that basis. The Board therefore concluded that PSE&G was entitled to summary decision. This appeal followed.

II.

On appeal, Napier argues that the Board erred by granting PSE&G's motion for summary decision. He contends there were at least three unresolved issues of material fact that precluded the grant of PSE&G's motion.

The scope of our review of a final decision of an administrative agency is limited and we will not reverse such a decision unless it is "arbitrary, capricious, or unreasonable, or [] not supported by substantial credible evidence in the record as a whole." In re Stallworth, 208 N.J. 182, 194 (2011) (citing Henry v. Rahway State Prison, 81 N.J. 571, 579-80 (1980)). In making that determination, we consider:

> (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.
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> [Ibid. (citing In re Carter, 191 N.J. 474, 482–83 (2007)).]

We note, however, that a court is "in no way bound by [an] agency's interpretation of a statute or its determination of a strictly legal issue." Carter, 191 N.J. at 483 (quoting Mayflower Sec. Co. v. Bureau of Sec., 64 N.J. 85, 93 (1973)). "Because an agency's determination on summary decision is a legal determination, [appellate] review [of that decision] is de novo." L.A. v. Bd. of Educ. of City of Trenton, 221 N.J. 192, 203 (2015) (citing Contini v. Bd. of Educ. of Newark, 286 N.J. Super. 106, 121–22 (App. Div. 1995); Manalapan Realty, LP v. Twp. Comm., 140 N.J. 366, 378 (1995)).

The standard for motions for summary decision under N.J.A.C. 1:1-12.5 is "substantially the same as that governing a motion under Rule 4:46-2 for summary judgment in civil litigation." L.A., 221 N.J. at 203 (citing Contini, 286 N.J. Super. at 121–22). Thus, an agency must ascertain "whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party in consideration of the applicable evidentiary standard, are sufficient to permit a rational factfinder to resolve the alleged disputed issue in favor of the

non-moving party." Id. at 204 (quoting Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 523 (1995)).

Here, Napier argues there were at least three unresolved issues that precluded the Board from granting PSE&G's motion for summary decision. He contends: (1) the Board never specifically approved PSE&G's method for determining the solar energy generated by its pole-mounted panels; (2) the Board's regulations do not permit PSE&G's sampling methodology; and (3) PSE&G failed to show there was no genuine issue of material fact and it was entitled to summary decision as a matter of law.

We note that Napier did not specifically raise the first two issues before the ALJ and the Board. In his petition, Napier claimed that PSE&G's panels were not metered as required, and PSE&G was receiving credit for more solar power than its system was actually producing. He asked the Board to deny PSE&G credit for the solar power generated by pole-mounted panels from 2009 to 2015.

Ordinarily, we will not consider issues raised for the first time on appeal unless the issues are jurisdictional in nature or have a substantial effect upon the public interest. N.J. Div. of Youth & Family Servs. v. M.C. III, 201 N.J. 328, 339 (2010). The issues Napier has raised for the first time on appeal are not jurisdictional and do not substantially affect the public

generally. Nevertheless, we have decided to consider the issues that Napier has raised.

Napier first argues that the Board never approved the manner by which PSE&G measures the solar energy generated by the pole-mounted panels. We disagree.

As we have explained, PSE&G petitioned the Board for approval of its "Solar 4 All Program," and in its petition, PSE&G indicated that it planned to measure the solar power generated by the panels by metering samples of the panels and using modeling algorithms. As noted, the Board approved PSE&G's petition under the terms and conditions set forth in the SA.

By approving PSE&G's petition, the Board sanctioned the use by PSE&G of the sampling and modeling algorithms to measure the solar power generated collectively by all of the pole-mounted panels. In its decision on Napier's petition, the Board found that PSE&G had regulatory authority to use a sampling method and modeling algorithms to measure the power generated by the pole-mounted units, and SRECs had been validly issued on that basis. There is sufficient credible evidence in the record to support the Board's findings.

Next, Napier argues that PSE&G's sampling methodology is not permitted by the Board's regulations. In support of this argument, Napier cites N.J.A.C. 14:8-2.9(c), which states:

> Beginning December 4, 2012, in measuring generation to determine the number of RECs or SRECs to issue, the Board or its designee shall accept only readings of a meter that records kilowatt-hour production of electrical energy, and which meets all applicable requirements at (c)1 and 2 below. The readings may be taken or submitted by any person, but shall be verified by the Board or its designee:
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> > 1. The American National Standards Institute (ANSI) Standard C12.1-2008, Electric Meters Code for Electricity Metering, incorporated herein by reference, as amended or supplemented; and
> >
> > 2. Any additional requirements in the PJM-EIS Generation Attribute Tracking System Operating Rules, Revision 6, September 2010; and the PJM-EIS Generation Attribute Tracking System Terms of Use, last modified on January 3, 2011; which are incorporated herein by reference, as amended and supplemented, and can be found at www.PJM-EIS.com.
> >
> > [N.J.A.C. 14:8-2.9(c).]

As we stated previously, by approving PSE&G's "Solar 4 All Program," the Board recognized that the output from PSE&G's pole-mounted solar panels would be metered using a sampling methodology and the data would be verified pursuant to the requirements established by PJM. The regulation Napier relies upon does not preclude the use of a sampling methodology. The Board's interpretation and application of the rule is consistent with its

plain language. Moreover, the record shows that PSE&G's sampling method uses readings from meters that comply with the rule's requirements.

Napier further argues that PSE&G failed to establish that its sampling method complies with "the monitoring standards in the PJM Manuals." However, in his certification, Hranicka stated that PSE&G worked with PJM to establish an acceptable monitoring system. Furthermore, Hranicka stated that PJM has accepted PSE&G's methodology and the data collected to determine hourly output from all of PSE&G's solar-mounted panels.

In addition, Napier argues that Hranicka's certification failed to establish that there was no genuine issue of material fact and PSE&G was entitled to summary decision. He contends that in certain respects, statements in the certification are not consistent with PSE&G's responses to his discovery requests.

We are convinced, however, that Hranicka's certification provided sufficient facts to support the ALJ's and Board's decisions that PSE&G was entitled to summary decision. In responding to PSE&G's motion, Napier had the burden of presenting evidence that raised a genuine issue of material fact regarding PSE&G's compliance with the Board's 2009 order, the applicable regulations, and the PJM monitoring standards. The ALJ and the Board correctly found that he had not carried that burden.

III.

Napier argues that the ALJ erred by failing to refusing to grant his motion for discovery. He contends the ALJ did not comply with N.J.A.C. 1:1-10.1, which states, "[i]n considering a discovery motion, the judge shall weigh the specific need for the information, the extent to which the information is within the control of the party and matters of expense, privilege, trade secret and oppressiveness." Napier argues the ALJ failed to weigh his specific need for the information he was seeking.

We note that in his motion to compel discovery, Napier asked the ALJ to order PSE&G to produce: (1) the Smart Energy Platform information for all metered pole-mounted panels; (2) the full report of energy output from the panels; (3) the reports for so-called "aggregators" that reflect production data from 38,000 pole-mounted units; (4) data reported by certain sample meters; (5) installation information and technical data regarding the panels; (6) information regarding the location of the panels; (7) maintenance records regarding panels that were damaged or inoperable; and (8) evidence showing that PSE&G used competitive bidding to acquire the panels. In his motion, Napier noted that PSE&G had provided some of the information he requested, but claimed its responses were incomplete.

We are convinced that the ALJ did not err by refusing to order further discovery. The ALJ noted that PSE&G had provided reasonable responses to Napier's discovery requests and further discovery was not warranted. The Board agreed.

The additional discovery that Napier requested would not support his claim that PSE&G did not have regulatory authority to use the sampling method to measure the solar energy generated by the pole-mounted units. The discovery also would not show that PSE&G was calculating the solar energy generated by its pole-mounted units in a manner that was not permitted by the Board or its regulations. Therefore, the ALJ and the Board did not err by refusing to grant Napier's motion to compel discovery.

IV.

Napier also argues that we should not defer to the Board's decision because the Board allegedly did not use its expertise when it dismissed his petition. He contends PSE&G failed to present the documentation and information that the ALJ and the Board needed to make an informed decision on his petition. We disagree.

"The Legislature has endowed the BPU with broad power to regulate public utilities . . . . [and] considerable discretion in exercising those powers." In re Public Serv. Elec. & Gas Co.'s Rate Unbundling, 167 N.J. 377, 384-85 (2001) (quoting In re Elizabethtown Water Co., 107 N.J. 440, 449-50 (1987)). The Board's

decisions are presumed to be valid "and will not be disturbed unless [the court] find[s] a lack of 'reasonable support in the evidence.'" Id. at 385 (quoting In re Jersey Cent. Power & Light Co., 85 N.J. 520, 527 (1981)).

In this matter, there is sufficient credible evidence in the record to support the ALJ and Board's decisions. We reject Napier's contention that the ALJ and the Board lacked sufficient evidence to make an informed decision in this matter. We also conclude that the Board used its regulatory expertise in deciding the issues before it.

Napier further argues that PSE&G's method for calculating the solar energy produced by the pole-mounted panels is inconsistent with the State's policy to increase the production of solar energy. He contends PSE&G's method of estimating the power generated by its pole-mounted panels hinders the State's policy by artificially inflating the market price of solar facilities.

There is, however, no evidence in the record to support these allegations. The Board determined that PSE&G's metering methodology is consistent with the Board's 2009 order approving the "Solar 4 All Program," the applicable regulations, and PJM requirements. The Board's decision is supported by sufficient

credible evidence in the record, and it is not arbitrary, capricious, or unreasonable.

Affirmed.