

STAFF LETTER

From: Abraham Silverman, General Counsel
Robert Brabston, Executive Director

Date: November 4, 2021

Re: Ability of “Solar Condominium” Projects to Participate in New Jersey Solar Incentives

Staff of the New Jersey Board of Public Utilities (“Staff”) has been made aware that certain solar developers have been promoting a construct referred to as “solar condominiums.” Staff has been asked by several potential contracting parties to provide its analysis of the solar condominium concept. Given the importance of providing the solar industry consistent guidance, Staff is providing its viewpoint in this public Staff Letter.

Staff’s view is that this proposed business model does not appear to be premised on a valid interpretation of New Jersey’s laws and regulations. Staff cautions potential investors in solar condominiums that there are significant regulatory risks involved in the development of solar condominiums that have not been formally presented to the Board for adjudication.

Staff notes that the views expressed in this Staff Letter are not binding on the Board and are based only on Staff’s initial understanding of the solar condominium concept. However, Staff strongly urges any parties exploring a solar condominium concept to exercise extreme care until such time, if any, that the Board is presented with a petition or other vehicle for formally adjudicating a solar condominium proposal.

Factual Situations Covered by the Staff Letter:

While project designs vary, solar condominiums, as described to Staff, appear to generally involve a solar developer (“Proponent”) constructing a solar array on a property without significant on-site load and then subdividing ownership of the solar array into separate “condominiums.” The individual condominiums may then be sold to various third-party owners, resulting in each purchasing entity owning a portion of the larger solar array, purportedly with fee simple ownership.

In some cases, the Proponent may sell ownership of portions of the solar array to public entities (which is defined as “any State entity, school district, county, county agency, county authority, municipality, municipal agency or municipal authority”¹), with the intent of qualifying such facilities for New Jersey’s Remote Net Metering program. The Proponent may also seek solar incentives tied to the Board’s Transition Incentive Program (“TI Program”) or its recently adopted Successor Solar Incentive Program (“SuSI Program”) (the SuSI Program, collectively with the TI Program, are referred to as the “New Jersey Solar Incentive Program”). In the SuSI Program, the value of the incentives offered to qualified facilities varies in part based on their size and land-use type.

¹ N.J.S.A. 48:3-87(e)(4)

Concerns:

Staff sees several independent areas of concern, all of which Staff believes the Board would need to formally address prior to a solar condominium project receiving incentives from the New Jersey Solar Incentive Program. *First*, Staff does not believe that the Board's proposed SuSI rules authorize a large solar facility to be subdivided so that portions of the overall solar array would qualify for a specific solar incentive.² Thus, in Staff's view, solar condominium Proponents cannot rely on the incentives provided in either the TI Program or the SuSI Program, but would instead have to file a petition with the Board to address the co-location and other issues discussed in the Board's SuSI Program Order.³

Second, Staff is concerned that the proposed projects in the solar condominium proposals may not qualify as net metered facilities. Net metering generally applies only to behind-the-meter solar facilities, where a solar project is located behind-the-meter of an electricity customer (i.e., the "host" of the solar facility). The statutory and regulatory authority for behind-the-meter net metering is codified at N.J.S.A. 48:3-87(e), a section of the larger clean energy law originally promulgated through the Electric Discount and Energy Competition Act, c. 1999, c. 23, which has been amended multiple times since its adoption ("Statute"). The net metering provision of the Statute is implemented through N.J.A.C. 14:8-4. The Statute requires that electric power suppliers and basic generation providers:

. . . offer net metering at non-discriminatory rates to industrial, large commercial, residential and small commercial customers, as those customers are classified or defined by the board, that generate electricity, on the customer's side of the meter, using a Class I renewable energy source, for the net amount of electricity supplied . . . over an annualized period.

The Board's rules implementing the Statute provide, among other things, that if the "host" customer-generator supplies more electricity to the distribution system than they purchase on a monthly billing period, then the customer-generator receives a credit for the excess production, measured in kilowatt-hours ("kWhs").⁴ It appears, based on Staff's initial review, that solar condominium projects are effectively grid supply facilities that should be selling electricity at wholesale.

Third, Staff has been asked whether a solar condominium facility could qualify for Remote Net Metering. Staff does not believe that it could. The Remote Net Metering program creates a narrow exception to the requirement that all net metered facilities reside behind a specific customer's meter. Remote Net Metering was authorized in the Clean Energy Act of 2018, L. 2018, c. 23 ("Clean Energy Act"). The Clean Energy Act provides that "[a] public entity certified to act as a host customer may allocate credits to other public entities within the same electric public utility

² See, e.g., Proposed Rules in Docket No. QX21040728 at N.J.A.C. 14:8-11, prohibiting co-location of projects without a Board order. See also *In re Solar Successor Incentive Program Pursuant to P.L. 2018, c. 17*, BPU Docket No. QO20020184, Order dated July 28, 2021 at p. 27.

³ *Id.*

⁴ See "Net metering definitions," at N.J.A.C. 14:8-4.2.

service territory[.]” N.J.S.A. 48:3-87.12. The Clean Energy Act requires the public entity to “host” its solar electric generation facility behind an existing meter currently serving the public entity’s load. Staff questions whether a solar condominium structure meets these requirements. In particular, it appears that the solar condominium construct does not entail a public entity putting solar behind an existing meter where the public entity takes retail electricity service. It appears to Staff that allowing net metering in these circumstances would subvert the statutory and regulatory requirements.

Fourth, Staff has concerns about whether the plain language of the Condominium Act supports the solar condominium concept. Nothing suggests that the New Jersey legislature contemplated extrapolating the applicability of the condominium construct to what would otherwise simply be considered a grid scale solar project.

Conclusion:

Based on Staff’s initial review and understanding of the “solar condominium” concept, neither New Jersey’s law governing solar incentives and net metering programs nor its law governing condominiums supports the proposed “solar condominium” construct. Staff recommends that Proponents and potential customers exercise caution and seek formal guidance from the Board before proceeding with a solar condominium model. Staff may direct its New Jersey Solar Incentive Program administrator to reject such applications. In addition, Staff may recommend that the Board take enforcement action against solar condominium projects that seek incentives from the New Jersey Solar Incentive Program or other solar programs administered by the Board, without authorization.

Staff strongly suggests that any party interested in proceeding with such a “solar condominium” seek formal guidance from the Board through the filing of a petition.