INGLESINO, PEARLMAN, WYCISKALA & TAYLOR, LLC

ATTORNEYS AT LAW

600 PARSIPPANY ROAD
PARSIPPANY, NEW JERSEY 07054
(T) (973) 947-7111
(FAX) (973) 887-2700
www.iandplaw.com

STEPHEN B. PEARLMAN
Direct: (973) 947-7133
spearlman@iandplaw.com

May 23, 2013

**Via Hand Delivery**
Kristi Izzo, Secretary of the Board
New Jersey Board of Public Utilities
44 South Clinton Avenue, 7th Floor
Trenton, New Jersey 08625

**RE: I/M/O the Implementation of L.2012, C.24 N.J.S.A. 48:3-87 (Q)(R)(S) Proceedings to Establish the Processes to for Designating Certain Grid Supply Projects as Connected to the Distribution System. BPU Docket No. EO12090880V.**

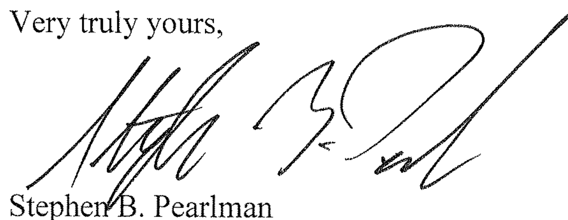
**I/M/O the Implementation of L.2012, C.24 N.J.S.A. 48-3-87, (Q)(R)(S) Proceedings to Establish the Processes for Designating Certain Grid Supply Projects As Connected to the Distribution System – Request for Approval of Grid Supply Solar Electric Power Generation Pursuant to Subsection (s). BPU Docket Nos. EO12090880V; EO12121089V-EO12121144V**

Dear Secretary Izzo,

This firm represents the Morris County Improvement Authority and the Somerset County Improvement Authority (the "IAs"). Enclosed for filing are an original and eleven copies of a Letter Brief in support of the IAs' Motion for Reconsideration of the Board of Public Utilities' Orders dated May 8, 2013 and May 10, 2013 in the above-referenced matters.

Kindly return one filed copy in the enclosed self-addressed stamped envelope. Please contact us if you need anything further.

Very truly yours,



Stephen B. Pearlman

Enclosure
cc: (via FedEx w/ Enclosure)
President Hanna
Commissioner Holden

[72-011/00125076-]

Commissioner Fox
Commissioner Fiordiliso
Tricia Caliguire, Esq.
Elizabeth Ackerman
Michael Winka

(via Regular Mail w/ Enclosure)
Service List for May 8, 2013 Board Order
Service List for May 10, 2013 Board Order

(via Electronic Mail w/ Enclosure)
John Bonanni
Mike Amorosa

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Dear Secretary Izzo,

This firm represents the Morris County Improvement Authority and the Somerset County Improvement Authority (the "IAs"). Please accept this letter brief in lieu of a more formal filing in support of the IAs' Motion for Reconsideration of the Board of Public Utilities ("BPU")'s Orders dated May 8, 2013 and May 10, 2013 in the above-referenced matters (the "Orders"). The IAs, and the Counties of Morris and Somerset (the "Counties"), are active and significant stakeholders in New Jersey's solar energy market, and have provided comments as requested by the BPU, regarding the treatment of proposed grid supply projects in the State. As was explained in our comments submitted to the BPU on November 15, 2012, the Counties have a significant vested interest and, in particular, through guarantees on public bonds issued to finance the Counties' solar projects (the "County Guarantees"), a significant financial interest in assuring a stabilized SREC market in New Jersey.

The Counties specifically request reconsideration of the findings made by the BPU in the Orders on the following grounds:

1. The Orders are contrary to law in that the BPU gave inadequate weight to the Administration's Energy Master Plan in the formulation of its decision;

2. The criteria cited in the Orders for Section (s) and subsequent deferral of decision on the status of twenty-one (21) Section (s) projects are unlawful in that they do not following the statutory requirement that the Energy Master Plan be implemented to the "maximum extent practicable and feasible"; and

3. The Orders do not address the BPU's policy relative to Section (r); thereby contributing to the very volatility that the Solar Act was intended to reduce.

These issues were fully raised in the Counties' letter of November 15, 2012, in this matter, but were not addressed by the BPU in the Orders. Accordingly, the BPU should modify and clarify its Orders to utilize the appropriate standard of review of the projects (items 1 and 2); and clarify and address its policy toward Section (r) (item 3).

**Background**:

Over the last three years, the Counties have committed to approximately 26 MW of solar projects, most of which have been completed, with several more currently under development (the "Solar Program"). The Solar Program was accomplished through innovative PPA financing structures, coupling public low cost bond financing with private investment, resulting in a 23-60% savings off current and projected utility rates to the Counties' local municipalities. The participating school districts and municipalities (and local taxpayers) enjoy stable and predictable electricity rates, significant savings, and all the advantages of onsite solar generation, including renewable energy curricula for the schools.

The Solar Program financing model assumes a modest and stable SREC market going forward. While the developers take the SREC risk in this financing arrangement, a destabilized SREC market could result in the developers defaulting on their obligations to make debt service payments on the public bonds, which would invoke the County Guarantees and force the Counties and their taxpayers to shoulder the financial burden of the Solar Program.

The Solar Act of 2012, PL 2012, c 24 (the "Solar Act"), was signed into law by Governor Christie on July 23, 2012. It is commonly understood that the policy objectives of the Solar Act, as stated in the Orders, are two-fold: 1) to stabilize the solar market, and 2) to mitigate volatility in the solar market.[1] The Solar Act designates the BPU as the authority to approve certain projects as being "connected to the distribution system" in order to earn Solar Renewable Energy

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[1] BPU Order, May 8, 2013.

Certificates (SRECs). This "connected to the distribution system" determination is an additional level of approval that was not required previously. Sections (q), (r), and (s) of the Solar Act designate three types of projects for purposes of the BPU review process. Section (t), which relates to grid supply projects on landfills, Brownfields, and areas of historic fill, is exempt from the additional review process, provided that the project receives BPU certification, the process for which would be developed jointly by the BPU and the Department of Environmental Protection (the "DEP"). Section (s) of the Solar Act applies to land actively devoted to agricultural or horticultural use that is valued, assessed, and taxed pursuant to the Farmland Assessment Act of 1964 (N.J.S.A. 54:4-23.1) at any time within the (10) year period prior to the Solar Act's effective date. Section (r) of the Solar Act applies to all proposed grid supply solar projects except for grid supply projects on a landfill or brownfield; grid supply projects approved pursuant to subsection (s) and grid supply projects approved pursuant to subsection (q).[2]

In its May 8, 2013 Order, the BPU approved three (3) of fifty-seven (57) utility-scale "grid-supply" projects proposed across this State under the provisions of Solar Act Section (s). A total of twenty-six (26) applications for these solar farms were denied, seven (7) were disqualified, and action was deferred on the remaining twenty-one (21) projects.

**Argument**:

1. **The BPU Orders failed to review this matter in the context of the legal requirement that its decisions implement the Energy Master Plan "to the maximum extent practicable and feasible".**

The BPU is legally required to implement the New Jersey Energy Master Plan ("EMP") "to the maximum extent practicable and feasible." In particular, N.J.S.A. 52:27F-15 requires that the actions, decisions, determinations, and rulings of the BPU with respect to energy shall, to the maximum extent practicable and feasible, conform to the Energy Master Plan. This legal requirement was cited in the Counties' comments of November 15, 2012. While there is a response to the Counties' comments in the Orders, this particular point was not addressed in the BPU's response to these comments in the May 8th Order, or anywhere in the May 10th Order.

In fact, the May 8th BPU Order, in response to other comments, notes "Staff makes recommendations for BPU action as required under the Solar Act keeping in mind the provisions of the Energy Master Plan and the potential impact of additional development on the New Jersey

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[2] Subsection (q) establishes approval of up to 80 megawatts in the aggregate, for each energy year 2014, 2015 and 2016. Each project must post a required notice escrow of $40,000/MW and must not exceed 10 MW.

solar market"[3] (emphasis added). Simply put, "keeping in mind" the EMP is not the appropriate and legally required standard for consideration of the EMP; as required by N.J.S.A. 52:27F-15. Quite the reverse, the BPU is legally required to consider the EMP to the maximum extent practicable and feasible.

In its May 8, 2013 Order (page 53), the BPU accepts staff's criteria which reviewed each project's development status; and approves those projects that are at an advanced stage of development and construction in an attempt to keep speculative projects out of the SREC market because of the uncertainty their presence will cause. This approach gives inappropriate weight to the EMP's explicit preference for net metered projects and the EMP's explicit discouragement of farmland grid projects. The development status of farmland projects is simply not a controlling factor; the EMP's policies of discouraging projects on farmland; promoting net metered project development and stabilizing the SREC market *are* the controlling factors.

Nor is this approach unfair to developers of these projects because they were well aware of the EMP's direction. Clear language that strongly discouraged construction of grid supply projects on farmland was also expressly set forth in the draft EMP, which was released in June 2011. The developers of farmland grid projects proceeded to develop these projects at their own risk with complete knowledge of the draft EMP's clear discouragement of grid supply projects (and of efforts in the legislature to limit the growth of grid projects). In fact, in creating "facts on the ground," with regard to construction activities after the issuance of the draft EMP (June 2011) and the final EMP (December 2011), the developers knowingly engaged in development that was contrary to State policy. "Grandfathering" is appropriate in instances where there is an abrupt policy change and developers made expenditures under the old policy. In the instant matter, however, this is not the case. Developers have been on notice of the policy change since June 2011, and should not be awarded SREC status on the basis of expenditures they made at their own risk and with full knowledge of the change in policy. Any reasonable reliance argument is unfounded given the fact that the draft EMP, with its clear and unambiguous language disfavoring grid supply projects on farmland, was released back in June of 2011. Granting these developers SREC status simply because they made expenditures to pursue projects that were contrary to known and noticed policy is contrary to a reasonable approach to grandfathering (as when expectations change as the result of a policy change) and is in conflict with the very policies the BPU is obligated by law to advance. The mandate that the EMP be implemented to the "maximum extent practicable and feasible" has been violated by the use of these development criteria, and the BPU's Orders should be reconsidered and reversed in this regard.

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[3] BPU Order, May 8, 2013, p. 10.

In its May 10th Order, the BPU accepts staff's criteria which reviewed each project's development status and appears to establish a "weighing of interests" standard: weighing the broader interest of the State of New Jersey as expressed in the EMP (stability of the SREC market; continued development of net metered projects, and discouragement of grid projects on farmland) against each project's "progress toward completion," and the interest of individual proposed grid projects on farmland.[4] This "weighing of interests" is contrary to law and must be reversed inasmuch as N.J.S.A. 52:27F-15 clearly establishes the primacy of the EMP in BPU determinations. The EMP is to be implemented to the "maximum extent practicable and feasible" and is not to be simply "balanced" against the interests of individual grid developers. The BPU is statutorily required to change its standard of review in this regard and, on this basis, the deferred projects must be denied as they are in conflict with the EMP.

The EMP, released in December 2011, articulated a clear preference for behind-the-meter (i.e. net metered) projects because these projects offer an economic benefit that is not provided by grid supply solar projects.[5] Particularly, net metered projects provide a "dual benefit" for commercial, industrial and government energy users and the EMP directs that such projects take priority for approval.[6] Net metered projects lower the cost of electricity to energy consumers over the long term, providing stability and predictability to electricity costs in an otherwise volatile market and enhancing economic competitiveness for the users. The EMP also spoke to what it did not favor: the development of large scale solar on farmland.[7] Particularly, the EMP states unambiguously that the Christie Administration does not support the use of SRECs to turn productive farmland into grid-supply solar facilities, which has been the clear policy of this Administration since release of the draft EMP on June 7, 2011.

The statute mandates that the BPU is legally required to implement the EMP "to the maximum extent practicable and feasible." Webster's dictionary (used by the BPU to define certain common terms in the Orders) defines the term "practicable" as "capable of being put into practice or of being done or accomplished."[8] Clearly, the BPU has the capability to reject the remaining twenty-one (21) applicants, as it just denied twenty-six (26) applications. Webster's dictionary defines the term "feasible" as "capable of being done or carried out." Again, the BPU has the capability to reject the remaining twenty-one (21) applicants, as demonstrated by its denial of twenty-six (26) applications.

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[4] BPU Order, May 10, 2013, p. 57.
[5] 2011 New Jersey Energy Master Plan at p.106.
[6] Id. at 106.
[7] Id. at 107.
[8] http://www.merriam-webster.com/dictionary/practicable?show=0&t=1368543001

The use of the phrase "to the maximum extent" is also instructive. Although not a precisely defined term, in the areas of water quality, it is defined as taking all actions that are technically feasible.[9] The phrase certainly does not invite discretion on whether or not a particular policy should be followed, and provides that, if possible or feasible, such policy directives shall be followed. In this instance, following the policy directives of the EMP, as is required by law, leads to an unambiguous result and should be the primary reason for disallowing grid supply projects on farmland for designation as "connected to the distribution system."

The additional twenty-one (21) applicants should be rejected by the BPU based on the governing authority of the EMP and the policy direction contained therein. Any hesitation in rejecting these additional applications will only add unwarranted volatility to an already-unstable SREC market, which will only further jeopardize promotion of New Jersey's solar policies as articulated in the EMP.

**2. The Criteria cited in the May 8, 2013 BPU Order for Section (s) is unreasonable, unlawful and not conclusive, and creates additional uncertainty, adding to the volatility of the SREC market and undermining the intent of the Solar Act.**

While the language of the Solar Act states that "nothing in this subsection shall limit the Board's authority concerning the review and oversight of facilities," the BPU is clearly limited by existing law. In addition, the BPU should be guided by the intent of the Solar Act. In its May 8th Order, the BPU recognizes that "the Solar Act is commonly understood to have been passed to provide stability to the New Jersey SREC market."[10] Moreover, the May 8$^{th}$ Order highlights two particular policies underlying the Solar Act as instructive: first, placing limitations on the development of solar facilities on farmland; and second, directing the investigation of approaches to mitigate volatility in the New Jersey solar market. The May 8$^{th}$ Order states that these two (2) policies, taken together, frame the BPU's approval of projects as "connected to the distribution system" as limited to projects whose approval would not cause further volatility in the New Jersey solar market at this time.[11]

Currently, the New Jersey SREC market is significantly oversupplied, as the BPU recognizes in the Orders, ". . . the market for SRECs will be long through EY2016 despite the doubling of the solar RPS starting with EY2014 by the Solar Act."[12] Prior to the decisions from

[9] http://www.waterboards.ca.gov/water_issues/programs/stormwater/docs/def_mep_bj_21193.pdf
[10] BPU Order, May 8, 2013, p. 15.
[11] BPU Order, May 8, 2013, p. 19.
[12] Id. at 3.

the April 29, 2013 BPU meeting, there were 446 MW of solar projects on farmland, the status of which was unknown. This significant solar capacity, the status of which has been unclear, has played a role in suppressing SREC prices in the market for the last ten (10) months. However, in its Orders, the BPU had the opportunity to clarify the status of these projects. The BPU stated that the stage of construction completion is the most objective criteria by which to judge whether or not a project should be designated as "connected to the distribution system" for purposes of earning SRECs.[13] The BPU subsequently deferred decision on twenty-one (21) projects representing 230 MW, adding to the uncertainty (and volatility) in the market, and further delaying the status of grid supply projects on farmland which has been in limbo since the law was signed, nearly the (10) months ago.

By selecting construction completion criteria as its key criteria, the BPU acted contrary to the direction of the EMP (discouraging solar on farmland), and did not follow the EMP as mandated by law. From a market and policy viewpoint, the Orders in fact contributed to market volatility by applying an improper standard of review. In addition to the mandates of the EMP, the criterion that the BPU should primarily utilize is one that is in line with the intent of the Solar Act, as listed first in the criteria provided for Section (r) projects, and as stated in the May 8th BPU Order itself: approval of projects should not have a detrimental impact on the SREC market or on the appropriate development of solar power in the State (toward net metered projects and away from grid projects on farmland).[14]

Moreover, given a significantly oversupplied market and the mandate of the EMP, the BPU should have concluded that all twenty-one (21) projects should be rejected as expeditiously as possible. Approval of any one of the proposed projects cannot be rationalized given the significantly oversupplied market, and the clear policy directives and legal requirements surrounding the EMP. To the extent that any grid developer believes this is unfair, the Solar Act wisely created Section (q), which permits developers to continue the development of their projects. The twenty-one (21) potential projects should be denied for the reasons discussed above; their approval is contrary to law and the EMP and will only serve to further volatize the SREC market, frustrate the Administration's energy policy goals and invite further unnecessary risk on the Counties and their taxpayers.

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[13] Id. at 8.
[14] Id. at 19.

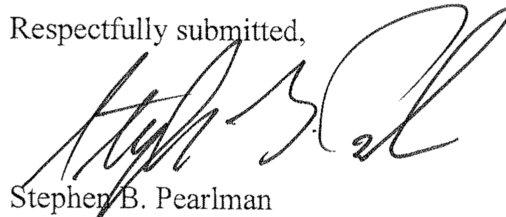
**3. Clarification with respect to the review process under Section (r) adds to the uncertainty and volatility in the SREC market, undermining the intent of the EMP and Solar Act.**

Section (r) applies to all proposed grid solar projects, except for those projects approved under Section (s); qualified as landfill or brownfield projects; or approved pursuant to subsection (q).[15] In several stakeholder meetings, the BPU staff has stated that projects are not eligible to apply under Section (r) until EY2017. However, to date, the BPU has not placed this time frame in writing. There are nearly 290 MW of solar projects in this category with conditional SRP registration for which the SREC market has not received a clear signal. Uncertainty contributes to market volatility, and written clarification is needed on the start date for Section (r) project review. We respectfully request that the BPU clarify the timing (i.e. the start date) for review under Section (r) in writing as expeditiously as possible. Failure to do so undermines the intent of the Solar Act by causing more uncertainty and volatility.

**Conclusion**:

For the foregoing reasons, the Counties respectfully request that the New Jersey Board of Public Utilities reconsider its Orders of May 8, 2013 and May 10, 2013, and: 1) follow the specific requirements of N.J.S.A. 52:27F-15 requiring the BPU to implement policies in the EMP to the maximum extent practicable and feasible; 2) disallow the twenty-one (21) grid supply projects on farmland that were deferred from receiving designation as "connected to the distribution system," because grid projects on farmland are a type of project explicitly discouraged in the EMP (particularly in light of the current over-supplied SREC market); 3) clarify the effective date of the Section (r) review process; and, 4) move as expeditiously as possible on all of the above to send clear signals to the SREC market and avoid adding additional volatility in the New Jersey solar market undermining the intent of the EMP and the Solar Act.

Respectfully submitted,



Stephen B. Pearlman

[15] Subsection (q) establishes approval of up to 80 megawatts in the aggregate, for each energy year 2014, 2015 and 2016. Each project must post a required notice escrow of $40,000/MW and must not exceed 10 MW.