IN THE MATTER OF A NEW JERSEY SOLAR TRANSITION PURSUANT TO P.L. 2018, C. 17, I/M/O VERIFIED PETITION OF PLANKTON ENERGY, LLC FOR AN EXTENSION OF TIME TO COMPLETE PROJECT #NJSTRE1547462089 REGISTERED IN THE TRANSITION INCENTIVE PROGRAM – 1801 FEDERAL STREET, CAMDEN, NJ 08105	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO: A-686-23 *CIVIL ACTION* On appeal from: FINAL DECISION OF THE NEW JERSEY BOARD OF PUBLIC UTILITIES DOCKET NOS. BELOW: QO19010068, QO22080472

BRIEF OF APPELLANT PLANKTON ENERGY, LLC IN SUPPORT OF APPEAL

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

STATE CASES

FEDERAL STATUTES

STATUTES

REGULATIONS

TABLE OF JUDGMENTS, ORDERS, AND RULINGS BEING APPEAL

PRELIMINARY STATEMENT

This matter arises out of the September 18, 2023 Order (the "Denial Order") denying a Petition brought before the Board of Public Utilities (the "Board" or the "BPU") by Plankton Energy, LLC (hereinafter "Appellant" or "Plankton"). In its Petition, Appellant asked the Board, for good cause shown, to extend the one-year deadline to complete its solar energy project under the transitional solar energy incentive program under which the project was registered. The Board denied that extension.

At its core, the instant appeal seeks a determination that the Board improperly reached its decision by rigidly using criteria that had been outlined in a prior decision of the Board granting an extension to a different solar project. The Board effectively used its prior decision as establishing an administrative rule, but without following the rulemaking requirements of the Administrative Procedures Act for public notice and opportunity to comment.

All or substantially all of the factors determining whether improper rulemaking has occurred weigh against the Board here. Alternatively, if the Boad is not held to have engaged in improper rulemaking, the Board's denial of Appellant's request for an extension was arbitrary and capricious and lacked reasoned decision-making, because the decision was made without due consideration to the facts and circumstances outlined by Appellant below.

Accordingly, this Court should, immediately and without further delay, grant Appellant's appeal, vacate the Denial Order, hold that Appellant was entitled to an extension consistent with its petition below, and remand to the Board for further proceedings consistent with that holding, as well as grant such other and further relief as this Court deems necessary and proper.

PROCEDURAL HISTORY AND COUNTERSTATEMENT OF FACTS[1]

a. History Of Solar Incentives In New Jersey.

When the Clean Energy Act was signed into law on May 23, 2018, becoming effective immediately, the Act directed the Board to adopt rules and regulations designed to halt the acceptance of new applications for the Solar Renewable Energy Certificate ("SREC") Registration Program. See Appellant's Appendix at Aa4.[2] This would be done as soon as the Board was able to determine that 5.1% of the kilowatt-hours sold in New Jersey by third-party suppliers and basic generation service providers had been generated by solar electric power generators connected to the distribution system. Id. The Board was also directed to complete a study, eventually called the "Capstone Report", which would evaluate how best to modify or replace the SREC program to ensure the continued development of solar energy sources in New Jersey. Id.

[1] Due to their being inextricably intertwined, the Procedural History and Statement of Facts are presented together.
[2] "Aa" refers to Appellant's appendix being filed herewith.

b. The Transition Renewable Energy Certificate Program.

Following the Capstone Report, the Board established the "TI Program" on December 6, 2019 as a stopgap measure to temporarily replace the SREC program while a permanent successor incentive program was developed. Id. The TI Program was eventually codified in formal rules and provided eligible solar projects with Transition Renewable Energy Certificates ("TREC") to be applied for each megawatt-hour of electricity produced. Id. The incentives provided by TRECs were tailored by specific project through an analysis of several factors; the incentives would then be applied to a base rate of incentives so that a given project would either receive the full incentive amount available or a set portion of the full amount depending on considerations such as the project's anticipated revenue and the costs associated with it. Id.

The TI Program opened to registrants on May 1, 2020 and remained open until the successor incentive program was established. Id. Under the TI Program, project extensions were not automatic, nor were administrative extensions to projects' deadlines permitted. Id. Nevertheless, on July 29, 2020, the Board granted a blanket extension to all projects that had been or would be registered with the TI Program on or about October 30, 2020; this meant that any and all TI Program projects registered prior to that date would have a deadline of October 30, 2021 to be completed. Id. at Aa5.

On April 21, 2021, the Board's staff issued what it dubbed the New Jersey Successor Program Staff Straw Proposal (the "Straw Proposal"). Id. The Straw Proposal built from a program design suggested in the Capstone Report and provided the Board staff's recommendations for how such a program would be implemented and run. Id. Board staff conducted five public stakeholder workshops to address question about the Straw Proposal and take suggestions regarding same; one of those workshops, taking place on May 7, 2021, dealt with the transition from the TI Program to the eventual successor program. Id.

On June 24, 2021, the Board granted all projects registered with the TI Program on or before that date an automatic extension of their existing deadlines. Id. On July 9, 2021, Governor Phil Murphy signed the Solar Act of 2021 into law; taking effect immediately, it directed the Board to immediately begin developing the successor program for launch. Id. at Aa6. On July 28, 2021, the Board announced that the TI Program would close on August 28, 2021, to be replaced on that same date by the Successor Solar Incentive ("SuSI") program. Id. New registrations for the TI Program would close on August 27, 2021. Id.

c. The ADI Program.

On January 26, 2022, the Board issued an Order granting a waiver of the SuSI Program Rules, which require receipt of conditional registration in the Administratively Determined Incentive ("ADI") Program prior to the construction

of any solar facility. Id. The January 2022 Order permitted projects that both had commenced construction already and held a valid TI Program registration to apply for the ADI Program. The Board found that it would be beneficial to the solar industry to facilitate the entry of registered TI Program projects into the ADI Program while simultaneously avoiding leaving no incentives for TI Program registrants that may be unable to complete their projects within the TI deadlines. Id. The Board also granted a waiver of the ADI Program's prohibitions which would prevent TI projects from transferring to ADI. Id.

As the Board anticipated, a significant number of TI Program registrants that were unable to complete their projects by their set deadlines eventually petitioned the Board for extensions. The Board instead chose to encourage these petitioners to withdraw their TI Program registration and submit a registration in the ADI Program; if the petitioners did so, the Board would agree to waive the ADI Program rule which would have otherwise prohibited these projects from commencing construction. Id.

d. The Gibbstown Order.

On June 8, 2022, the Board issued the Gibbstown Order. Id. The Gibbstown Order purported to promulgate a rule for all requests for a TI Program extension, which purported rule requires a petitioner to demonstrate good cause for the extension under the criteria set forth therein. Id. The Gibbstown Order's criteria

requires: (1) a completed project, including the receipt of required final inspections, prior to the project's TI Program expiration date; (2) a showing that construction was proceeding because the electric distribution company ("EDC") represented that any necessary upgrades would be completed prior the expiration date; and (3) that those upgrades were fully funded by the developer, but that the estimated completion date was nevertheless extended by the EDC. Id.

The purported rule and criteria contained within the Gibbstown Order has never been formally promulgated as part of an official rulemaking process consistent with the terms of the Administrative Procedures Act ("APA").

e. Appellant's Background And Petition.

Appellant is a New York limited liability company having its principal place of business at 155 Water Street, Brooklyn, New York, 11201. Id. at Aa47. The Project at issue here is for a non-residential net metered project located at 1801 Federal Street, Camden, NJ 08105 and assigned Application Number NJSTRE1547462089. Id. at Aa49. The Project application was submitted to the Transition Incentive ("TI") program on August 23, 2021, and received a conditional acceptance on August 27, 2021. The original due date for completion of the Project was August 27, 2022. Id. at Aa49. In parallel with the submission of its application, Appellant began the utility interconnection application process with the electric distribution company, PSE&G. Id. After passing through appropriate design review

channels within PSE&G, PSE&G granted the project Conditional Interconnection Approval on October 6, 2021 based on the preliminary design and interconnection diagram drafted by Appellant's licensed professional engineer. Id.

Upon receiving the conditional approval from the TI program and PSE&G, Appellant continued development of the Project by (i) drafting civil, structural and electrical designs, (ii) submitting for City of Camden Planning & Zoning approval, (iii) attending City meetings, (iv) revising the plans per the City engineer's guidance, (v) receiving final Planning & Zoning approval, (vi) finalizing Petitioner's permit plan sets, (vii) submitting the permit plan sets to the City to receive building and electrical permits, (viii) paying for equipment and delivery, and (ix) commencing construction on a timeline that would have allowed Petitioner to complete the Project and reach commercial operations before its TI program expiration date. Id. at Aa49-50.

The construction schedule developed by Appellant was clearly feasible within the parameters of the TI Program at the time it was proposed:

Milestone	**Date**
Transition Incentive Program Acceptance	8/27/2021
Conditional Interconnection Approval	10/6/2021
Planning Board Meeting – City of Camden	11/14/2021
Final Planning & Zoning Approval from City of Camden engineers	3/11/2021
Permit plans submitted to City of Camden	3/17/2022
Equipment Deliveries to Site	4/14/2022
Meeting with PSE&G on Site	5/3/22

Milestone	**Date**
Rooftop solar system install complete	5/20/2022
Solar Parking Canopy Structure complete	7/11/22
Estimated Solar Parking Canopy panels complete	7/18/22
Final Electrical Tie-in (interconnection) complete	7/21/22
Estimated Town Inspections	7/29/22
Estimated PTO Date	8/15/22

Id. at Aa50. However, on May 3, 2022, during a scheduled and routine meeting onsite with a PSE&G metering engineer to discuss the real-time metering required by PSE&G, the PSE&G engineer advised that Appellant's proposed and accepted design was not in fact allowed and PSE&G had made a mistake in approving it. Id.

Based on PSE&G's effective reversal of its approval, Appellant was forced to redesign and resubmit its interconnection plans for approval, which required restarting the electrical interconnection design process from the beginning. Id. at Aa51. Once new design plans were finalized, Appellant resubmitted the new plan to PSE&G for approval, resubmitted the PSE&G approved plans to the City of Camden for their electrical code inspector's approval, and ordered and installed a new electric cabinet. Id. The Project was substantially completed in August 2022. Id. The City completed its inspection in March 2023, and PSE&G issued its Permission to Operate shortly thereafter, or about 7.5 months later than the originally projected date for PTO.

On July 29, 2022, Appellant filed a petition before the Board to extend the completion deadline for the Project, asserting that the criteria outlined in I/M/O

Request for an Extension of Time to Complete NJSTRE1545046932 in Transition Incentive Program - 480 South Democrat Road, Gibbstown NJ ESNJ-Key-Gibbstown, LLC, BPU Dkt. No. QO22030156 (the "Gibbstown Order") were too narrow but also that Appellant's circumstances nevertheless fit the spirit of the Gibbstown Order. Id. at Aa47-59. Thereafter, on March 17, 2023, Appellant filed a second petition on the same docket, the Petition which is the subject of the instant appeal, reiterating that the Gibbstown Order constituted a rule, asserting that its project should be considered as meriting an extension under that rule or its waiver, and including a status update on the progress made. Id. at Aa60-74.

In the subject Petition below, Appellant argued that it had done everything it could reasonably do to meet the completion deadline, however the delays it encountered were solely due to PSE&G change of its requirements. Id. at Aa64-65. Appellant argued that it had invested considerable time and money into a Project that would otherwise have been timely constructed were it not for the conduct of PSE&G. Id. at Aa65. Appellant argued that to disallow a reasonable extension under the circumstances would unfairly penalize Appellant, and Appellant therefore requested that the Board find good cause to grant an 8-month extension to complete the Project, which was roughly equal to the number of days between Appellant's receipt of conditional interconnection approval from PSE&G and the date on which PSE&G reversed its approval. Id. Appellant argued it was rendered unable to timely

complete its Project solely because of circumstances caused by an EDC which were completely unforeseen and outside of Appellant's control. Id. Appellant also argued that the requirement imposed by the Board that all solar developers seeking an extension of a TI Program project must be in exactly the same circumstances as Gibbstown in order to establish good cause for an extension is arbitrary and capricious. Id.

On September 18, 2023, the Board issued the Denial Order. Id. at Aa1-46. Throughout the Denial Order, the Board argued that the Gibbstown Order does not constitute a rule subject to the APA, instead that it was an "an adjudication upon the specific facts presented in that petition and as such, validly acted upon in the Board's quasi-judicial capacity." Id. at Aa17, Aa19-23, Aa25. The Board also argued that Appellant had somehow failed to "demonstrate all the required elements in the Gibbstown Order." Id. at Aa23. The Board implausibly drew a distinction between a delay caused by PSE&G construction activity and a delay caused by PSE&G's engineering reversal, and it also penalized Appellant for the delay in municipal inspection, even though that delay was also beyond the reasonable control of Appellant. Id. at Aa23-24. The Board ultimately denied Appellant's Petition. Id. at Aa24.

On November 2, 2023, Appellant filed the instant appeal. Id. at Aa75-78.

LEGAL ARGUMENT

I. THE BOARD ERRED IN DENYING APPELLANT'S PETITION SEEKING EXTENSION OF CERTAIN DEADLINES WITH THE BOARD'S SOLAR TRANSITION INCENTIVE PROGRAM (Aa1-Aa46).

In denying Appellant's Petition, the Board erred in two ways. First, the Board erred in relying upon the criteria set forth in the Gibbstown Order because the Gibbstown Order constitutes an invalid rule adopted in violation of the requirements of the APA. Second, in the alternative, even if the Gibbstown Order were not an invalid rule under the provisions of the APA, the Board nevertheless still erred in denying Appellant's Petition because Appellant meets the Gibbstown Order's criteria as relaxed by N.J.A.C. 14:1-1.2(b).

a. Standard of Review For Setting Aside Board Orders (Aa1-Aa46).

According to N.J.S.A. 48:2-46,

> The Superior Court, appellate division is hereby given jurisdiction to review **any order of the board** and to set aside such order in whole or in part when it **clearly appears that there was no evidence before the board to support the same reasonably** or that the same was without the jurisdiction of the board.
>
> No order shall be set aside in whole or in part for any irregularity or informality in the proceedings of the board **unless the irregularity or informality tends to defeat or impair the substantial right or interest of the appellant**.

(emphasis added). When the reviewing court finds irregularities in the proceedings of the Board that impair the interests of either or both of the public and the regulated

parties, it should not hesitate to step in and correct same. See, e.g., In re: Provision of Basic Generation Service for Period Beginning June 1 2008, 205 N.J. 339, 343-44 (2011) (". . . we do find significant irregularity in [the Board's] proceedings that impaired the interest of the rate-paying public.").

Here, the Denial Order unreasonably relied on the record before the Board in denying Appellant's Petition. Further, the Denial Order was based on an irregularity/informality in the form of the Gibbstown Order's criteria, which impaired the substantial rights and interests of Appellant. Accordingly, the Denial Order should be vacated, this Court should hold that Appellant was entitled to an extension consistent with its petition below, and this matter should be remanded to the Board for further proceedings consistent with that holding.

b. The Gibbstown Order Is Invalid As It Constitutes Unlawful Rulemaking (Aa1-Aa46).

The Board erred in relying on the criteria set forth in the Gibbstown Order to deny Appellant's Petition chiefly because the Gibbstown Order constitutes an invalid rule adopted in violation of the provisions of the APA.

While

> [a]dministrative agencies possess wide latitude in selecting the appropriate procedures to effectuate their regulatory duties and statutory goals . . . [and] agencies enjoy great leeway when selecting among rulemaking procedures, contested hearings, or hybrid informal methods in order to fulfill their statutory mandates . . . "[a]n agency's ability to select procedures it deems

> appropriate is limited by 'the strictures of due process and of the [APA].'"

Matter of Board's Review of Applicability and Calculation of Consolidated Tax Adjustments, 2017 WL 4105226 at *5 (App. Div. September 18, 2017) (quoting In re: Consider Distrib. of Casino Simulcasting Special Fund, 398 N.J. Super. 7, 16 (App. Div. 2008)) (internal citations omitted). Indeed, "[a]n agency's 'discretion to act formally or informally is not absolute.'" Tax Adjustments, 2017 WL 4105226 at *5 (quoting In re: N.J.A.C. 7:1B–1.1 Et Seq., 431 N.J. Super. 100, 133 (App. Div.), certif. denied, 216 N.J. 8 (2013)).

"'If an agency determination or action constitutes an administrative rule, then its validity requires compliance with the specific procedures of the APA that control the promulgation of rules.'" Tax Adjustments, 2017 WL 4105226 at *5 (quoting In re: Auth. For Freshwater Wetlands Statewide Gen. Permit 6, Special Activity Transition Area Waiver For Stormwater Mgmt., Water Quality Certification, 433 N.J. Super. 385, 413 (App. Div. 2013)); accord I/M/O Provision of Basic Generation Serv., 205 N.J. 339, 347 (2011). Agencies

> "should act through rulemaking procedures when the action is intended to have a 'widespread, continuing, and prospective effect,' deals with policy issues, materially changes existing laws, or when the action will benefit from rulemaking's flexible fact-finding procedures."

Provision of Basic Generation Serv., supra, 205 N.J. at 349–50 (quoting Metromedia, Inc. v. Div. of Taxation, 97 N.J. 313, 329–31 (1984)).

The Supreme Court of New Jersey has long established a five-part test to determine if APA rulemaking requirements are implicated by any agency action. See Tax Adjustment, 2017 WL 4105226 at *5 (citing Metromedia, 97 N.J. at 331-32). Agency determinations must be considered administrative rules subject to the requirements of the APA

> if it appears that the agency determination, in many or most of the following circumstances, (1) is intended to have wide coverage encompassing a large segment of the regulated or general public, rather than an individual or a narrow select group; (2) is intended to be applied generally and uniformly to all similarly situated persons; (3) is designed to operate only in future cases, that is, prospectively; (4) prescribes a legal standard or directive that is not otherwise expressly provided by or clearly and obviously inferable from the enabling statutory authorization; (5) reflects an administrative policy that (i) was not previously expressed in any official and explicit agency determination, adjudication or rule, or (ii) constitutes a material and significant change from a clear, past agency position on the identical subject matter; and (6) reflects a decision on administrative regulatory policy in the nature of the interpretation of law or general policy.

Ibid. The Metromedia factors do not need to be given equal weight, as "'some factors will clearly be more relevant in a given situation than others' . . . and '[n]ot all factors need be present for an agency action to qualify as an administrative rule'". Ibid. (quoting Doe v. Poritz, 142 N.J. 1, 97 (1995); Provision of Basic Generation Serv., supra, 205 N.J. at 350). "'The pertinent evaluation focuses on the importance and weight of each factor, and is not based on a quantitative compilation of the

number of factors which weigh for or against labeling the agency determination as a rule.'" Ibid.

In Tax Adjustment, for example, the Division of Rate Counsel appealed a Board order "revising its policy for calculating the consolidated tax saving adjustment (CTA) the Board utilizes in part to determine just and reasonable utility rates". 2017 WL 4105226 at *1. Rate counsel and the other interested parties in the appeal argued that the revised CTA was "not supported by adequate findings of fact, [was] not founded on sufficient evidence in the record, and constitute[d] a rule that was not enacted in accordance with the Administrative Procedure Act . . . and due process requirements." Id. The Board, in turn, argued that the revised CTA "did not constitute rulemaking requiring compliance with the APA, is supported by the evidentiary record, and constitutes a proper exercise of the Board's discretion." Id. The Appellate Division ultimately concluded that the revised CTA did constitute rulemaking and was not done in compliance with either the APA or due process requirements. Id. In so holding, the Tax Adjustment court held that the revised CTA contained in the Board's subject order did meet all of the Metromedia factors for the following reasons: (1) "the modified CTA applie[d] to all of the utility companies whose tax returns are filed as part of the consolidated returns of their respective holding companies"; (2) "the modified CTA generally and uniformly applie[d] to all regulated utilities whose tax returns are filed as part of consolidated returns"; (3)

"the Board's order direct[ed] that the modified CTA applie[d] prospectively, including in those cases that were not yet decided but where the record remained open at the time the order was entered"; (4) "the modified CTA prescribe[d] a legal standard [and] directive that is not otherwise expressly provided by or clearly and obviously inferable from the [Board's] enabling statutory authorization . . . The Board is required to set just and reasonable rates . . . but there is no statutory directive establishing the methodology for calculating a utility's real, as opposed to hypothetical, tax payments to determine its rate base, and no statute directs the use of a CTA"; (5) while the Board's "use of a CTA and the Rockland methodology were previously expressed in the Board's determinations in adjudicated cases, the shortened and finite review period, the allocation of the tax savings, and the elimination of electric transmission assets constitute 'material and significant change[s]' to the Board's prior CTA policy"; and (6) "the modifications reflect the Board's decision on a regulatory policy 'in the nature of an interpretation of law or general policy.'" Id. at *6 (internal quotations omitted). The Tax Adjustment court concluded that the Board's failure to follow proper rulemaking procedures,

> deprived Rate Counsel of substantial rights and interests under the APA: the right to obtain the Board's assessment of the economic impact of the proposed modified CTA and responses to Rate Counsel and the other stakeholders' submissions, and the right to provide evidence and argument in opposition to them. The failures are of particular significance here because of the conflicting evidence presented concerning the modified CTA's

> potential economic impact on ratepayers. We are therefore convinced that the Board's failure to comply with the APA's requirements in its adoption of the modified CTA constituted an irregularity that tended to defeat and impair the rights and interests of Rate Counsel and the other stakeholders.

Id. at *9. The Tax Adjustment court did not even need to reach the question of whether or not the Board's decision lacked sufficient support in the record or was otherwise contrary to applicable law. Id. It simply reversed on the grounds that the Board had engaged in improper rulemaking. Id.

In Provision of Basic Generation Serv., the Division of Rate Counsel claimed that the Board "failed to comply with basic notice and opportunity for comment obligations before taking an action, by administrative order, that paved the way for potentially $50 million in increased energy supplier costs to be passed through to ratepayers." 205 N.J. at 343. The Appellate Division had sided with the Board, arguing that it was not clearly apparent that there was no evidence before the Board which could have supported its decision reasonably, and that the substantial right or interest of the appellant had not bee impaired or defeated by any procedural irregularities or informalities. Id. The Supreme Court of New Jersey disagreed, however, holding that there was in fact "significant irregularity in these proceedings that impaired the interest of the rate-paying public." Id. at 343-44. Specifically, the Supreme Court held that the Board had improperly "blurred the lines between distinct proceedings" such that "in the muddled circumstances that transpired, the

duty to provide clear notice that would enable a meaningful opportunity for comment" was not met by the Board. Id. Further, the Supreme Court held that all of the Metromedia factors had been met: (1) "because [the narrow group of] electricity suppliers and electricity distribution companies [affected by the pass-through of costs] represent a segment of the regulated public, and because the pass-through will impact the general public in its rate-paying capacity, the first Metromedia factor would support closer adherence to rulemaking procedures"; (2) "the BPU's January 2008 Order is to be 'applied generally and uniformly to all similarly situated persons'"; (3) while "the January 2008 Order only applies to existing basic generation contracts [and] is prospective in the sense that it establishes a framework that will be applied in the future in respect to those individual parties, it is not prospective in the sense that it will not necessarily apply to controversies or parties in unrelated future proceedings. Regardless, insofar as the [Board]'s policy decision does fill in statutory gaps, the agency cannot avoid rulemaking obligations by framing a potentially far-reaching policy choice as if it only applied to the instant parties"; (4) "there was no statutory direction on how a BPU decision to raise solar alternative compliance payments would affect already settled basic generation contracts and the BPU had not taken a position on the issue previously"; (5) "the policy decision reflected in the Order 'was not previously expressed in any official and explicit agency determination, adjudication or rule.'"; and (6) "the decision to

pass through the costs to ratepayers might be viewed as a 'general policy' which was to be applied later in individual rate-recovery hearings . . . However, because the policy was formulated in regard to a single determination of how to allocate costs, it also might be viewed as not implicating a more 'general policy' of the agency. Being that sound arguments exist in both directions, this factor does not advance the analysis in any compelling way." Id. at 350-52 (internal citations omitted). The Supreme Court ultimately reversed the subject Board order and remanded the matter to the Board "to commence the process anew, in order to provide the regulated parties and the public with notice and an opportunity to comment on the proposed pass-through of increased energy supplier costs." Id.

In In re: Adoption of Regional Affordable Housing Development Program Guidelines, the Appellate Division considered whether new housing development guidelines adopted by the Council on Affordable Housing constituted rules and regulations which should have been adopted in accordance with the APA. 418 N.J. Super. 387, 389 (App. Div. 2011). Applying the Metromedia factors, the court concluded that the guidelines were in fact required to be promulgated pursuant to the APA. Id. at 391-92. The Program Guidelines court held that the guidelines were intended to have wide coverage over a large segment of regulated municipalities because they "set forth standards under which any of the 181 municipalities [to be regulated] may transfer up to 50% of their affordable housing obligations to other

municipalities within that regional planning entity's jurisdiction." Id. at 391-92 (internal quotation omitted). The guidelines were also held to be "'intended to be applied generally and uniformly to all' the municipalities under the jurisdiction of these regional planning entities and that they operate[d] only 'prospectively' to determine those municipalities' affordable housing obligations." Id. at 392 (internal quotation omitted). The guidelines also prescribed "'a legal standard or directive that [was] not otherwise expressly provided by or clearly and obviously inferable from the enabling statutory authorization.'" Id. (internal quotation omitted). The guidelines also reflected "'an administrative policy that . . . was not previously expressed in any official and explicit agency determination, adjudication or rule,' . . . because they constitute[d] [the agency's] first and only expression of its position concerning the manner by which regional planning entities and the municipalities under their jurisdiction may undertake regional planning". Id. at 392-93 (internal citation omitted). Finally, the guidelines reflected "'a decision on administrative regulatory policy in the nature of the interpretation of law,' . . . specifically the interpretation and implementation of N.J.S.A. 52:27D–329.9(c)(2)." Id. at 393 (internal quotation omitted). The guidelines were ultimately invalidated and the matter was remanded to the agency so that it could properly adopt rules and regulations in accordance with the APA. Id. at 395.

In Bueno v. Board of Trustees, the appellant sought review of the final

decision made by the Board of Trustees of the Teachers' Pension and Annuity Fund, Division of Pensions and Benefits, "denying her application for retroactive service retirement benefits as untimely because it was filed more than thirty days after the Board denied her application for ordinary disability retirement benefits." 422 N.J. Super. 227, 230 (App. Div. 2011). The subject agency had based its decision on it own November 2006 letter, which purported to require that appellant file an application within 30 days from the date of the agency's decision or her effective retirement date, whichever was later. Id. at 238. Appellant had failed to comply with this timeline. Id. at 237. The Appellate Division, however, noted that "no controlling statute, regulation, or case precedent expressly limited the time period for conversion of a member's existing retirement application to thirty days while an appeal is still pending", meaning that the agency's sudden directive imposing a time limitation may have constituted improper rulemaking. Id. at 238. The Appellate Division ultimately applied the Metromedia factors, finding that the second, third, fourth, fifth, and sixth factors weighed in favor of finding rulemaking had occurred. Id. at 240. The court was also not concerned that the first Metromedia factor was not satisfied, despite the decision at issue only affected a essentially one person at that time. Id. The decision of the agency was reversed. Id.at 242.

Here, similarly to the foregoing cases, the Board's application of the Gibbstown Order meets all of the Metromedia factors, meaning the purported rule it

sets forth is invalid as it was not enacted pursuant to the requirements of the APA. First, the Gibbstown Order is "intended to have wide coverage encompassing a large segment of the regulated or general public, rather than an individual or a narrow select group". Metromedia, 97 N.J. at 331-32. The Gibbstown Order's criteria purport to be applicable to any and all entities registered with the TI Program who attempted to persuade the Board they deserved an extension. See Aa6 ("The Gibbstown Order also established a process for petitioners who believe that they are similarly situated to apply for extensions to their registration, subject to making a similar showing."). Even if this group were found to be narrow, however, the narrowness of the group is not dispositive in favor of finding no rulemaking occurred, as demonstrated clearly in Bueno above.

Second, the Gibbstown Order "is intended to be applied generally and uniformly to all similarly situated persons". Metromedia, 97 N.J. at 331-32. There is no language indicating any variance in the applicability of the Gibbstown Order among any particular set of TI Program registrants. Indeed, the Order specifically stated only that good cause for a deadline waiver could be show if the registrant is a "similarly situated party" seeking an extension "on comparable terms." See Aa79. As a result, this factor weighs in favor of improper rulemaking having occurred.

Third, the Gibbstown Order "is designed to operate only in future cases, that is, prospectively". Metromedia, 97 N.J. at 331-32. The terms of the Gibbstown

Order could only operate prospectively, as in order to obtain relief thereunder a petition for same would have to be made to the Board. As a result, this factor weighs in favor of improper rulemaking having occurred.

Fourth, the Gibbstown Order "prescribes a legal standard or directive that is not otherwise expressly provided by or clearly and obviously inferable from the enabling statutory authorization". Metromedia, 97 N.J. at 331-32. As to this factor, there is no language in the statute creating the TI Program which sets forth any criteria whatsoever for obtaining a waiver of deadlines under same. In fact, the Gibbstown Order admits that the "rules do not provide for extensions, and that omission was intentional." See Aa37. As a result, this factor weighs in favor of improper rulemaking having occurred.

Fifth, the Gibbstown Order "reflects an administrative policy that was not previously expressed in any official and explicit agency determination, adjudication or rule". Metromedia, 97 N.J. at 331-32. The Gibbstown Order was the first time the Board had attempted to set forth specific criteria for obtaining a waiver of the TI Program deadline upon application to the Board. As a result, this factor weighs in favor of improper rulemaking having occurred.

Finally, the Gibbstown Order "reflects a decision on administrative regulatory policy in the nature of the interpretation of law or general policy". Metromedia, 97 N.J. at 331-32. As the Gibbstown Order itself clearly states, there is no provision

for extensions in the TI Program rules, yet the Board nevertheless recognized that exceptions should be made as a matter of regulatory policy, given the fact that TI Program registrants should not be held responsible for missing their deadlines as a result of changes outside the control of the developer. See Aa6. As a result, this factor weighs in favor of improper rulemaking having occurred.

The Board therefore engaged in improper rulemaking in violation of the APA when it utilized the Gibbstown Order as an ironclad, rigid test for denying Appellant's application for an extension of his TI Program deadline. Accordingly, because the Gibbstown Order is an invalid rule adopted in violation of the provisions of the APA, the Board erred in relying upon it to deny Appellant's Petition. The Denial Order should therefore be vacated, this Court should hold that Appellant was entitled to an extension consistent with its petition below, and this matter should be remanded to the Board for further proceedings consistent with that holding.

c. Even If The Board Was Not Applying Gibbstown Order As A Rule, The Board's Failure To Grant Appellant An Extension Was Arbitrary and Capricious (Aa1-Aa46).

Even if this Court were to hold that the Gibbstown Order is not an invalid rule, this Court should still hold that the Board's failure to grant Appellant an extension was arbitrary and capricious, especially pursuant to N.J.A.C. 14:1-1.2(b).

"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." Allstars Auto Grp., Inc. v. N.J. Motor Vehicle Comm'n, 234 N.J. 150, 157 (2018) (quoting Russo v. Bd. of Trs., Police & Firemen's Ret. Sys., 206 N.J. 14, 27 (2011)). A reviewing court is "'in no way bound by [an] agency's interpretation of a statute or its determination of a strictly legal issue.'" Allstars Auto Group, Inc. v. New Jersey Motor Vehicle Commission, 234 N.J. 150, 158 (2018)(quoting Dep't of Children & Families, DYFS v. T.B., 207 N.J. 294, 302 (2011) (alteration in original) (quoting Mayflower Sec. Co. v. Bureau of Sec., Div. of Consumer Affairs, 64 N.J. 85, 93 (1973)).

"It is clear that when an administrative body renders a decision and fails to make adequate findings of fact and express reasoning which, when applied to the found facts, led to the conclusion below, the decision cannot stand." In re: Board's Investigation and Review of Local Exchange Carrier Intrastate Exchange Access Rates, 2012 WL 2344585 at *17 (App. Div. June 21, 2012) (citing Lister v. J.B. Eurell Co., 234 N.J. Super. 64, 73 (App. Div. 1989). "Those findings must be 'sufficiently specific under the circumstances of the particular case to enable the reviewing court to intelligently review an administrative decision and ascertain if the facts upon which the order is based afford a reasonable basis for such order.'" Exchange Access Rates, 2012 WL 2344585 at *17 (quoting Lister, 234 N.J. Super. at 73). "Indeed, our courts 'cannot accept without question an agency's conclusory statements, even when they represent an exercise in agency expertise.'" Exchange

Access Rates, 2012 WL 2344585 at *17 (quoting Balagun v. N.J. Dep't of Corr., 361 N.J. Super. 199, 202–03 (App. Div. 2003)). "It is settled that an 'administrative agency must set forth basic findings of fact supported by the evidence and supporting the ultimate conclusions and final determination so that the parties and any reviewing tribunal will know the basis on which the final decision was reached.'" Exchange Access Rates, 2012 WL 2344585 at *17 (quoting Riverside Gen. Hosp. v. N.J. Hosp. Rate Setting Comm'n, 98 N.J. 458, 468 (1985)). "Without findings of fact supported by the record and supporting the ultimate determination, the agency decision is an arbitrary, capricious, and unreasonable action." Exchange Access Rates, 2012 WL 2344585 at *17 (citing In re: Issuance of a Permit by Dep't of Envtl. Prot. to Ciba–Geigy Corp., 120 N.J. 164, 173 (1990)). "Justice requires 'a clear and concise demonstration that the litigants have been heard and their arguments considered.'" Exchange Access Rates, 2012 WL 2344585 at *18 (quoting Bailey v. Bd. of Review, 339 N.J. Super. 29, 33 (App. Div. 2001)).

In an analogous case, Matter of Rios, the Appellate Division considered whether the Civil Service Commission had improperly classified the appellant as a "community aide" when she was laid off despite the fact that she maintained she was a "teacher's aide." 2017 WL 712777 at *1 (App. Div. February 23, 2017). The appellant argued she had been wrongfully terminated during a reduction in the work force because in her true position she had seniority over six other teacher's aides

who were not laid off. Id. In considering her original application, the Civil Service Commission had recognized the appellant's seniority but had ruled against her after assessing her solely "through a mechanical consideration of the precise title assigned to her without a fair consideration of the nature of her employment." Id. The Appellate Division agreed with the Appellant, holding that because the Civil Service Commission had done nothing more than rigidly rely upon the incorrect title assigned to appellant by her employer, without considering all of the facts surrounding what appellant was hired to do and what she actually did do, the decision must be reversed and the proceedings remanded for an evidentiary hearing. Id.

Here, in the Petition, Appellant asked the Board to apply N.J.A.C. 14:1-1.2(b) (allowing for relaxation or deviation of rules for good cause) to determine either that Petitioner falls within the Gibbstown Order rule or is entitled to a waiver of the Gibbstown Order rule. Much like the appellant in Matter of Rios, Appellant here asked the Board to reject rigid application of the Gibbstown Order and consider all of the extenuating facts and circumstances surrounding Appellant's need for an extension. While Appellant's circumstances did not fit precisely into the four corners of the "good cause" criteria set forth in the Gibbstown Order, because final inspections did not timely occur due to other delays caused by the EDC, the reasons for Appellant's predicament are sufficiently similar in substance and the potential consequences just as unfair as those that would have been suffered by the Gibbstown

petitioner. Id. at Aa48. Appellant here did everything it could reasonably do to meet the completion deadline. Id. at Aa64. The delays it encountered were solely due to PSE&G change of its requirements. Id. at Aa64-65. This is fully consistent with the Gibbstown Order, where the Board made clear that its motivation for permitting TI Program extensions was to provide relief for solar developers who would otherwise be penalized for unforeseen delays due to the actions or inactions of an EDC. Id. at Aa53, Aa61, Aa6, & Aa85.

The circumstances that befell Appellant in this matter are clearly within the realm of harm contemplated by the Board. Appellant invested considerable time and money into a Project that would otherwise have been timely constructed were it not for the conduct of PSE&G. Id. at Aa53-54. To disallow a reasonable extension under the circumstances would unfairly penalize Appellant, and Appellant therefore requested that the Board find good cause to grant an 8-month extension to complete the Project, which is roughly equal to the number of days between Appellant's conditional interconnection approval and the date on which PSE&G reversed its approval. Id. at Aa64, Aa65. Like the Gibbstown petitioner, Appellant was rendered unable to timely complete its Project because of circumstances caused by an EDC which were completely unforeseen and outside of Appellant's control. Id. at Aa53, Aa61, & Aa65. The EDC reversed its initial approval of Appellant's proposed design after considerable time and investment had been made, rendering the Project

unviable. Id. at Aa61. The requirement imposed by the Board that all solar developers seeking an extension of a TI Program project must be in exactly the same circumstances as in Gibbstown in order to establish good cause for an extension is arbitrary and capricious. Id. at Aa53 & Aa61.

Appellant was therefore entitled to a review of its Petition on its own merits to determine if the Petition established good cause for an extension of its TREC deadline, in order to avoid an unjust outcome. Id. at Aa49 & Aa61. These are the principles required by N.J.A.C. 14:1-1.2(b) (governing applications for a waiver of Board rules), and the review of the Petition should have lead to the conclusion that the grant of an extension to Appellant was necessary to prevent an unfair result. Id. at Aa61. Instead, much like the Civil Service Commission in Matter of Rios, the Board here rigidly stuck to the narrow criteria outlined in the Gibbstown Order and refused to consider all of the other facts and circumstances which necessitated an extension for Appellant. As with the decision in Matter of Rios, the Board's decision here should be reversed.

Accordingly, because Appellant meets the criteria set forth in the Gibbstown Order, as relaxed by N.J.A.C. 14:1-1.2(b), the Board erred denying Appellant's Petition. The Denial Order should therefore be vacated, this Court should hold that Appellant was entitled to an extension consistent with its petition below, and this matter should be remanded to the Board for further proceedings consistent with that

holding.

CONCLUSION

For the reasons stated here, this Court should, immediately and without further delay, grant Appellant's appeal, vacate the Denial Order, hold that Appellant was entitled to an extension consistent with its petition below, remand this matter to the Board for further proceedings consistent with that holding, and grant such other and further relief as this Court deems necessary and proper.

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By: */s/ James H. Laskey*
James Laskey, Esq.

Dated: March 14, 2024

	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO.: A-000686-23
IN THE MATTER OF A NEW JERSEY SOLAR TRANSITION PURSUANT TO P.L. 2018, c. 17, et al. I/M/O VERIFIED PETITION OF PLANKTON ENERGY, LLC FOR AN EXTENSION OF TIME TO COMPLETE PROJECT #NJSTRE1547462089 REGISTERED IN THE TRANSITION INCENTIVE PROGRAM – 1801 FEDERAL STREET, CAMDEN, NJ 08105	CIVIL ACTION ON APPEAL FROM A FINAL AGENCY DECISION OF THE BOARD OF PUBLIC UTILITIES DOCKET NOS. BELOW: QO19010068, QO22080472

BRIEF ON BEHALF OF RESPONDENT BOARD OF PUBLIC UTILITIES
Date Submitted: June 14, 2024

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TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

PAGE(s)

Cases

Statutes

Other Authorities

PROCEDURAL HISTORY AND STATEMENT OF FACTS[1]

This appeal arises from a September 18, 2023 order of the Board of Public Utilities which denied certain requested extensions to construction deadlines for solar projects in the Board's solar Transition Incentive (TI) program. (Aa1).

New Jersey's Solar Program Prior to 2021

Prior to the passage of the Clean Energy Act, the Board administered a program to incentivize solar development known as the Solar Renewable Energy Certificate (SREC) program. (Aa1; see also Solar Act of 2012, L.2012, c. 24). The SREC program provided payment to solar energy generators in the form of SRECs, which are tradeable certificates representing one Megawatt-hour (MWh) of solar energy generated by a facility connected to the electric distribution in this State. The value of an SREC was driven by the energy market. See L. 2012, c. 24 § 1. The SREC program was open to different types of projects and had different rules depending on project type. See L. 2012, c. 24 § 2(t) (projects on brownfields or landfills), § 2(q) (applying to most solar generation projects).

The Clean Energy Act was signed into law in 2018 and required the Board to close the SREC program to new applications once the Board determined that a solar generation milestone established by the legislation had been met, and to complete a

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

study for how to replace the SREC program to encourage continued solar development in the State. (Aa4). After closing the SREC program as mandated by statute, the Board established the TI program by order on December 6, 2019 to provide solar generation projects a bridge between the SREC and the subsequent Successor Solar Incentive program. (Aa4, see also 52 N.J.R. 1850(a)).

The TI program rules set forth a base incentive level of $152/MWh. N.J.A.C. 14:8-10.5(a). (Aa4.) This base incentive value is then multiplied by the project's specific TI factor, which varies depending on project type. N.J.A.C. 14:8-10.5(b). The project at issue in this appeal, under the TI rules, would be eligible for a TI factor of 1.0, and a corresponding incentive of $152/MWh. (Aa4).

The TI program opened to new registrations on May 1, 2020. (Aa4). Under the rules, once a solar developer registers in the TI program, they must complete construction of the solar project and submit a post-construction certification package within one year. See N.J.A.C. 14:8-10.4(f)(4)ii(2). The TI rules do not provide for extensions to project completion deadlines. (Aa4).

On July 29, 2020, the Board, via Order, waived its rules and granted a one-year blanket extension to project deadlines for projects registered in the TI program. (Aa5). At that time, the Board found that the solar industry was adjusting to changes caused by COVID-19 and changes to statewide solar incentive programs, which warranted extensions of project completion deadlines. (Aa5). On June 24, 2021,

the Board granted projects registered in the TI program an additional six-month deadline extension. (Aa5). The Board found that the solar industry was still adjusting to the impact of COVID-19, and to the regulatory uncertainty caused by the pending launch of the (then-under-development) Successor Solar Incentive program. (Aa5). Under those circumstances, the Board found that waiving existing TI completion deadlines would support the solar industry and protect ratepayers from potential market disruptions associated with many TI projects expiring, potentially causing the projects to be abandoned. (Aa5).

The Solar Act of 2021

The Governor signed the Solar Act of 2021, L. 2021, c. 169, into law on July 9, 2021. (Aa6). That Act directed the Board to develop and launch the Successor Solar Incentive (SuSI) program. (Aa6; L. 2021, c. 169, § 2). Accordingly, on July 28, 2021, the Board announced the closure of the TI program, to be effective thirty days later. (Aa6). 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. (Aa6). The SuSI program is multifaceted, but includes both an administratively determined incentive (ADI) program meant for relatively smaller solar generation facilities and a competitive incentive (CSI) program, which is intended for larger, "grid-supply" solar generation projects. See Aa5-6, N.J.S.A. 48:3-115 to -117; see also N.J.A.C. 14:8-11.4 (detailing the eligibility criteria for different classes of solar

projects applying for incentives through the SuSI program); N.J.A.C. 14:8-11.5(d)(1) (describing the information a solar facility applying to the ADI program for an incentive must submit to the Board or its designee).

In January of 2022, the Board issued an order which permitted projects registered in the TI program, but likely not to meet their relevant deadlines, to migrate into the relevant SuSI program segment. (Aa6). The Board did this by waiving certain technical requirements of the ADI program, as set forth in the Board's orders and rules, which prohibit registration into the ADI program if a facility has commenced construction. (Aa6); see N.J.A.C. 14:8-11.4(b). The order permitted facilities registered in the TI program (which may have commenced construction and thus were ineligible under the ADI registration rules) to transition into the ADI program to avoid stranding projects registered in the TI program. (Aa6).

The *Gibbstown* Order

On June 8, 2022, the Board issued an order granting conditional extensions to TI program deadlines to a solar project in Gibbstown, Gloucester County. See Extension of time to complete NJSTRE154046932 in Transition Incentive program – 480 South Democrat Rd., Gibbstown NJ ESNJ-KEY-GIBBSTOWN, LLC, 2022 N.J. PUC LEXIS 187 (June 8, 2022) (hereinafter Gibbstown). (Aa6; 75). In Gibbstown, the Board found that the solar generation

facility which sought an extension of its TI program deadlines (and to ultimately preserve its TI eligibility) demonstrated "good cause," under N.J.A.C. 14:1-1.2(b), for a waiver of the Board's rules regarding construction and operation deadlines in the TI program.

The Gibbstown project is a carport solar generation facility which was accepted into the TI program on June 15, 2020, approximately one month after the program was opened for registration. (Aa77). After receiving the two extensions provided by the Board to projects registered in the TI program, its deadline to submit its post-construction certification package was April 30, 2022. (Aa77). In support of its request to extend its deadline beyond April 30, 2022, the Gibbstown petitioner alleged that its project was mechanically complete, that it had promptly paid all invoices by its local interconnecting electric utility, and that it had relied on the utility's initial representation that necessary off-site upgrades would be completed in April 2022, rather than fall 2022. (Aa77-78).

Board Staff noted that it generally disfavors extensions of TI deadlines, observing that the "rules do not provide for extensions, and that absence of an extension policy was intentional." (Aa79). However, in the case of the Gibbstown facility, Staff found several facts which required "making an exception" and granting the Gibbstown petitioner an extension. First, Staff

noted that the petitioner did everything in its power to complete its project prior to the expiration date, including "completing electrical and mechanical construction, submitting post-construction certification packages, securing and satisfying all necessary permits, and energizing the portion" of the project it was permitted to energize by the local electric utility prior to the completion of off-site upgrades. (Aa79). Second, the Gibbstown petitioner "acted expeditiously to receive an interconnection agreement" and "promptly paid any and all outstanding invoices for the upgrades required"; Staff noted favorably that the petitioner was willing to "put capital at risk in funding the necessary upgrades." (Aa79). Third, Staff noted that the utility initially promised to complete offsite upgrades which were agreed to by both the utility and petitioner—this stage of interconnection issues distinguished the Gibbstown project from less mature projects where, for instance, interconnection studies take longer than expected or interconnection agreement negotiations take longer than anticipated. (Aa79). Fourth, the Gibbstown developer submitted its interconnection application in March 2020 (months before registering into the TI program) and had "diligently pursued its interconnection since" which meant this was not a case of an "underdeveloped project development plan" entering the TI program. (Aa80).

In granting the extension, the Board listed factors which it considered relevant to the "good cause" inquiry under N.J.A.C. 14:1-1.2(b), which included

1) that the project was electrically and mechanically complete, 2) had secured all necessary permits, and 3) was prevented from meeting its TI deadline by "a unilateral change to the interconnection agreement requirements" with the electric distribution utility. (Aa82-83). The Board required the Gibbstown developer to submit certain technical documents and other evidence which would substantiate the claims made by it in its petition seeking an extension of TI deadlines. And concerned that the circumstances affecting the Gibbstown developer may not be unique, Staff recommended that projects with "active registrations in the TI program that can demonstrate . . . the project is fully ready to energize, but for the lack of permission to operate from the [electric utility], due to factors that are the sole responsibility of the [utility]," and that the initial TI expiration date provided enough time to complete construction of any agreed-upon upgrades in an interconnection agreement, be eligible to seek an extension. (Aa81). Acting on Staff's recommendation, the Board provided an opportunity for projects to seek such an extension by uploading certain technical documents into the TI program online portal (the same portal where applicants would submit their post-construction paperwork) administered by the Board's contracted program administrator. (Aa83-84).

A significant number of projects petitioned[2] the Board for extensions of TI program deadlines. (Aa6). In August 2022, the Board issued an order denying fifteen (15) petitions seeking extensions of deadlines in the TI program, but allowing those projects to migrate to the successor ADI program. (Aa6-7). Similarly, in November 2022, the Board issued an order denying twenty-eight (28) petitions seeking extensions of deadlines in the TI program. (Aa7).

Appellant Plankton's, Petition

On September 18, 2023, the Board issued an order denying seventeen (17) petitions seeking extensions of their TI program deadlines, including the petition filed by this appellant, Plankton Energy LLC. (Aa1). Plankton registered a net-metered non-residential rooftop solar facility into the TI program on August 23, 2021, four days prior to the deadline for new registrations in the TI program. (Aa37). The project, as per the one-year rule, had a completion deadline of August 27, 2022. (Aa37). In its petition for a waiver,[3] Plankton argued that its

[2] Certain projects were informed by the Board's program administrator that they did not meet the requirements for a waiver as set forth in the Gibbstown order, and were informed they would have to petition the Board for a "good cause" waiver of the Board's TI rules. Other projects, realizing they did not meet the Gibbstown elements, elected to petition the Board for a waiver of their rules directly rather than file an application for a Gibbstown waiver with the program administrator.

[3] Prior to the filing of the petition, BPU Staff had proposed that Plankton may apply for a Gibbstown waiver, but it became apparent in subsequent communications that they could not make the same showing. (Aa23 n.37).

project was allegedly on schedule to meet its TI program deadlines, but that it was prevented from meeting its deadline due to PSE&G reversing its interconnection conditional approval during a site visit by a PSE&G engineer. (Aa23). After the engineer's site visit, appellant had to redesign its system, resubmit permitting applications, and restart the interconnection design process. (Aa23). Appellant would ultimately achieve permission to operate its facility on March 27, 2023. (Aa96).

The order addressing Plankton's petition noted that the Board was "cognizant of the Legislature's directives to the Board in both the Clean Energy Act and the Solar Act of 2021," which directed the Board to provide an orderly transition away from the SREC program and "to continually reduce the cost of achieving the State's solar energy goals." (Aa41 (citing N.J.S.A. 48:3-87(d)). The Board also found the Legislature's direction to promote solar generation "with the least cost and the greatest benefit to consumers" in the Solar Act of 2021 instructive. (Aa38, citing N.J.S.A. 48:3-114).

The Board noted that it must balance developers' interests in projects against the public's interest in timely completion of projects, the ratepayers' interest in controlling the cost of solar subsidies, and the State's interest in ensuring a smooth transition between solar programs. (Aa39). In these petitions, the public interest outweighed any of the petitioner private developers'

reliance on the TI program as a means to develop a project in light of the availability of incentives through the ADI program, the temporary nature of the TI program, and the fact that TI incentive values "were designed for projects that had registered in the [SREC program] and expected to construct in 2019 and 2020." (Aa41). The Board found strict compliance with the TI rules furthered the public interest in an orderly transition from the legacy SREC program to the SuSI program and in reducing the cost of achieving the State's solar energy goals. (Aa41).

After review of his application, Board Staff did not believe that Plankton demonstrated good cause to waive the Board's TI rules. (Aa37). Staff noted that the project was registered in the closing days of the TI program, and that at the time it entered the TI program, appellant knew that the program was closing, and that it provided only one year to achieve commercial operation, and provided no automatic extensions. (Aa24). Staff, after considering the construction timelines submitted by appellant, noted that "the estimated time to receive municipal inspection and [permission to operate] in its initial schedule was likely unrealistic." (Aa24). Additionally, Staff found appellant's claim that but for PSE&G's engineering reversal the project would have been completed on time "erroneous" and recommended against granting appellant a waiver of

the Board's TI rules. (Aa24). The Board, acting on Staff's recommendation, denied appellant's request for a waiver of the TI program rules. (Aa39-40).

The Board specifically rejected the factual bases advanced in favor of Plankton's petition. (Aa40). The Board noted that some petitioners, including Plankton, alleged they were delayed by "municipal, county or state agencies" requiring permits. Ibid. The Board found that these issues were "necessarily related to project maturity." (Aa40). For the same reason, the Board rejected interconnection delays as a basis warranting extensions of the TI program deadlines: "the Board **FINDS** that ongoing interconnection negotiation necessarily relates to project maturity." Ibid. In other words, the Board found that delays allegedly caused by supply chain, permitting, or interconnection issues were indications that the TI program, with its limited construction window, was not the correct program for these early-phase projects. The Board explained: "By virtue of the operation of the expiration dates established by rule at N.J.A.C. 14:8-10.4, TI Program eligibility was always intended to be limited to those projects mature enough to complete in twelve months." (Aa40). The Board found Plankton's project to not be mature enough for the TI program, that the delays alleged in the petition were foreseeable at the time the project was registered in the program, and that they were insufficient to warrant waiver of the Board's TI rules. (Aa40). This appeal followed.

ARGUMENTS

POINT I

THIS COURT SHOULD AFFIRM THE BOARD'S SEPTEMBER 18, 2023 ORDER AS IT WAS REASONABLE, SUPPORTED BY THE RECORD AND NOT ARBITRARY AND CAPRICIOUS.

The Board's September 18, 2023 order should be affirmed and this court should reject Plankton's challenge to the disposition of its petition. Plankton argues that the Board acted in an arbitrary and capricious fashion by denying its petition for a waiver of the Board's TI rules, but it is wrong. The Board's actions on Plankton's petition, and the other petitions disposed of in the September 18, 2023 order, are consistent with the Legislature's chosen solar policies and the Board's goals of providing a smooth transition from solar incentive programs as directed by the Solar Act of 2021. Plankton presents no basis to disturb the Board's thorough and comprehensive order, so the order should be affirmed.

The standard of review in this matter is well settled. When administrative agencies act "within the scope of legislatively-delegated authority, [the] administrative agents' actions are presumptively valid." Gormley v. Lan, 88 N.J. 26, 38 (1981); In re Restrepo Dep't of Corrs., 449 N.J. Super. 409, 417 (App. Div. 2017) ("An appellate court affords a 'strong presumption of reasonableness' to an administrative agency's exercise of its statutorily

delegated responsibilities.") (quoting Lavezzi v. State, 219 N.J. 163, 171 (2014)). The deference accorded to agencies flows from two central principles.

The first is rooted in the separation of powers. "In light of the executive function of administrative agencies, judicial capacity to review administrative actions is severely limited." In re Musick, 143 N.J. 206, 216 (1996). The second recognizes the subject-matter expertise of administrative agencies. See Gloucester County Welfare Bd. v. State Civil Serv. Comm'n, 93 N.J. 384, 390 (1983) (deference is owed because "the administrative agency acquires expertise in technical matters and a comprehensive knowledge of its particular field"); Greenwood v. State Police Training Ctr., 127 N.J. 500, 513 (1992) (same).

Thus, when an administrative agency interprets a statute it is charged with enforcing, that interpretation "is entitled to great weight." Nelson v. Bd. of Educ., 148 N.J. 358, 364 (1997); see also Tall Timbers Prop. Owners Ass'n v. N.J. Dep't Cmty. Affairs, 413 N.J. Super. 54, 62 (App. Div. 2010) ("[A]n administrative agency's interpretation of a statute it is charged with enforcing will be upheld unless it is plainly unreasonable" (quotation omitted)). "Deference is particularly appropriate when, as here, the agency must construe and implement a new statute . . . ." In re Adoption of N.J.A.C. 7:26E-1.13, 377 N.J. Super. 78, 98 (App. Div. 2005).

An agency's factual determinations are also entitled to heightened deference. If the 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)) (quotation omitted); accord Messick v. Bd. of Review, 420 N.J. Super. 321, 325 (App. Div. 2011) ("if [an agency's] factual findings are supported by sufficient credible evidence, courts are obliged to accept them" (quotation omitted)).

In the context of decisions from the Board, this level of deference is codified by statute. As the Supreme Court has recognized, "[t]he Public Utilities Act specifically prohibits courts from reversing a Board decision" unless it is for the grounds enumerated in N.J.S.A. 48:2-46. In re PSE&G Rate Unbundling, 167 N.J. 377, 393 (2001). Under that statute, "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.'" Ibid. (quoting N.J.S.A. 48:2-46).

This appeal must be viewed in the full context of the State's solar incentive laws, and the Board's broad authority and responsibility on the subject. The Board's license to manage the TI program stems from several statutes, including the Clean Energy Act, the Solar Act of 2021, the Electric Discount

and Energy Competition Act, and the Solar Act of 2012. Taken together, these statutes, and the implementing rules and orders, create a thorough and comprehensive system of solar energy regulation and provide incentives for solar energy development, which are funded by utility ratepayers. Given the technical complexity of the industry, and the multi-year regulatory and legislative effort to support solar energy development in New Jersey, this court should be particularly reticent to disturb the Board's policy judgment or technical expertise absent a clear abuse of discretion, which appellant cannot show here.

Following passage of the Clean Energy Act in 2018, the Board found that the Act's 5.1% solar energy generation milestone had been met and closed the legacy SREC program effective April 30, 2020. See L. 2018, c. 17; (Aa032). Prior to closing the SREC program, pursuant to mandates in the Clean Energy Act, the Board conducted a proceeding and solicited stakeholder and public input regarding an incentive to replace the SREC program, and how to provide for the further orderly development of solar generation within the State. The Board issued a proposal for public comment which set forth a series of transition principles to govern how the Board might provide a transition incentive program from the legacy SREC program into the to-be-developed successor program. Following public input, the Board launched the TI program by order on

December 6, 2019, which was subsequently codified in rules. See N.J.A.C. 14:8-10.1 et seq. The program was open to registrations from May 1, 2020 to August 27, 2021.

The Solar Act of 2021 was signed into law on July 9, 2021, which directed the Board to develop and launch the Successor Solar Incentive Program. N.J.S.A 48:3-115. The Act directs the Board, as part of the SuSI program, to develop a "small solar facilities incentive program" to incentivize certain types of solar generation facilities, including the class affected by the Board's September 18, 2023 order addressing multiple petitions. See N.J.S.A. 48:3-116. The Board fulfilled this mandate by closing the TI program to new registrations on August 27, 2021, and opening the SuSI program to new registrations the following day. (Aa6; see also N.J.A.C. 14:8-11.1 to -11.8). The Act further directed the Board to promote investment in solar generation facilities "with the least cost and greatest benefit to consumers." N.J.S.A. 48:3-114; see also Aa38. The Board emphasized that the TI program was meant to be a limited bridge in order to enable a smooth transition from the legacy SREC program to the now-implemented SuSI program, and that the Legislature's clear mandate in the solar energy statutes over the preceding years was to increase the State's solar capacity while minimizing ratepayer costs. (Aa128). The Board's actions in

the September 18, 2023 order are consistent with the Legislature's intent, with the stated intent of the TI program, and are not arbitrary and capricious.

A solar generating facility seeking an incentive through the TI program has to first register with the program. N.J.A.C. 14:8-10.4(f). Following registration, the Board issues the applicant a notice which states the facility "must commence commercial operations and submit a post-construction certification package prior to the expiration of the conditional registration." N.J.A.C. 14:8-10.4(f)4iii. Plankton registered its project in the TI program in the closing days of the program, after the Board had announced the program's imminent closure and subsequent roll-out of the SuSI program, and was unable to meet relevant deadlines. See Aa23-25. In July 2022, Plankton sought an extension of the deadlines in the Board's TI rules, arguing that PSE&G's interconnection engineering decision was unforeseeable and caused the project to be delayed beyond relevant TI deadlines. (Aa23).

N.J.A.C. 14:1-1.2(b) states that "[i]n special cases and for good cause shown, the Board may, unless otherwise specifically stated, relax or permit deviations" from its rules. N.J.A.C. 14:1-1.2(b). The burden is on the petitioner seeking a waiver of the rules to demonstrate their entitlement to such a waiver. N.J.A.C. 14:1-1.2(b)(2). In support of its petition, Plankton alleged delays related to interconnection design, and subsequent permitting delays. The Board

did not find this to be a sufficient good cause showing for waiving the TI post-construction submission rules.

The Board specifically rejected interconnection and permitting delays such as those experienced by Plankton. (Aa39). Additionally, the Board noted that Plankton's project was registered in "the closing days of the TI program," which "did not provide any automatic extension" with an initial project timeline schedule that Board Staff characterized as "likely unrealistic." (Aa24). Ultimately, the Board found that the developer's interest in the specific TI incentive level was outweighed by "the ratepayers' interest in limiting the extent to which the subsidies provided through a time-limited program should be extended past that program's end." (Aa24).

As the Board explained, the public interest in the TI program deadlines, which overall operate to constrain the ratepayer cost of solar incentives, outweighed any individual developer's interest in the TI incentive level, as opposed to the lower ADI incentive level, in a given project. See Aa40-42. The purpose of the TI program was not to preserve an incentive level based on old price and cost modeling (see Aa41), but rather to provide an orderly transition from one solar program to another. The Board fulfilled this purpose by providing petitioners who were denied TI rule waivers in the September 18, 2023 order an opportunity to register in the ADI program and preserve their

overall eligibility for a state incentive. Ibid. With the ADI program in operation, the Board was not persuaded that Plankton demonstrated good cause to waive its rules and to receive an incentive via a now-closed program. This finding is consistent with the evidence before it, the law, and the State's evolving solar policies, and should be affirmed by this court.

POINT II

THE BOARD'S SEPTEMBER 18, 2023 ORDER WAS CONSISTENT WITH THE ADMINISTRATIVE PROCEDURE ACT AND THE METROMEDIA DOCTRINE.

Plankton also argues that the Board's Gibbstown order was a rule issued without rulemaking processes in violation of Metromedia v. Dir., Div. of Taxation, 97 N.J. 313 (1984). This position is belied by the text of the Gibbstown order, which discusses the specific solar facility developer's actions in detail, and which limits the ordered relief to the petitioner-solar facility. The Board's actions in the solar incentive realm broadly, and in the September 2023 order on appeal specifically, are consistent with the Administrative Procedure Act, N.J.S.A. 52:14B-1 to -15.

"Administrative agencies enjoy great leeway when selecting among rulemaking procedures, contested hearings, or hybrid informal methods in order to fulfill their statutory mandates." In re Provision of Basic Generation Service

for Period Beginning June 1, 2008, 205 N.J. 339, 347 (2011). When an agency's action is intended to have a widespread, continuing and prospective effect; when it deals with policy issues; when it materially changes existing law; or when the agency would benefit from flexible fact-finding procedures, the agency should act through rulemaking. Id. at 350; see also Metromedia, 97 N.J. at 331-32 (detailing six factors for courts to apply when considering whether an agency action must be considered an administrative rule). In contrast, individual adjudications under the APA encompass "final determination, decision or order made or rendered in any contested case." N.J.S.A. 52:14B-2(c). A contested case is a proceeding "in which the legal rights, duties, obligations . . . of specific parties are required by constitutional right or by statute to be determined by an agency by decisions . . . after opportunity for an agency hearing." N.J.S.A. 52:14B-2(b).

In its September 2023 order, the Board clarified that the Gibbstown order "was an individual adjudication finding good cause to waive portions of the Board's TI rules pursuant to N.J.A.C. 14:1-1.2, based upon the very specific facts presented in that petition." (Aa40). It further reiterated that "all projects that sought waivers of the TI rules were individually evaluated by the Board pursuant to N.J.A.C. 14:1-1.2." Ibid. While appellant contends the Gibbstown order implemented a new "good cause" standard to be applied in the future, this

position ignores the text of the Gibbstown order. There, it is clear that the Board was addressing the legal rights of a specific party (i.e. the solar developer's rights under N.J.A.C. 14:1-1.2). After specifically detailing the history of the solar facility, the Board found that it had demonstrated "good cause to waive the deadline established at N.J.A.C. 10:8-10.4(e) or (f)" pursuant to N.J.A.C. 14:1-1.2(b). (Aa82).

The order noted that "the circumstances alleged by [the Gibbstown developer] may not be unique" and permitted other similarly situated parties to seek extensions by making an application directly to the Board's outside program administrator. In other words, the Gibbstown order merely informed the relatively small community of New Jersey solar developers that had already registered projects into the TI program of the unique circumstances the Board deemed to constitute good cause to waive the TI program deadlines, given the availability of incentives through the permanent SuSI program. And while the Board permitted projects similarly situated to the Gibbstown project this degree of administrative expediency, other developers retained the ability to file petitions, see N.J.A.C. 14:1-4.1(a)1 (defining "petition" to be a "pleading filed to initiate a proceeding invoking the jurisdiction of the Board"), based on their specific circumstances for waivers of N.J.A.C. 14:8-10.4(e) or (f). (Aa82-84). So developers were then free to decide to pursue a waiver under facts and

circumstances similar to those deemed sufficient in the Gibbstown precedent (by submitting documents to the Board's program administrator), petition the Board to try to demonstrate good cause to remain in the TI program, or migrate to the relevant SuSI program segment, which for Plankton would be the ADI program.

A review of the September 2023 order, as applied to Plankton, makes plain that the Board merely applied its existing rules to the factual circumstances alleged by appellant. (Aa22-24). See N.J.A.C. 14:8-10.1 to -10.7 (TI program rules); see also N.J.A.C. 14:1-1.2(b)2 (requiring a petitioner seeking a waiver of the Board's rules to include the specific provision, specific reason for the waiver, and documentation to substantiate the request). While, in the past, the Board has found that certain factual circumstances have demonstrated good cause under N.J.A.C. 14:1-1.2 to waive certain TI rules, those individual adjudications have no impact beyond their terms or their affected entities. Nor do prior instances of the Board granting waivers transform an instance of a granted or denied waiver petition into a violation of the Metromedia doctrine. As the Board found after individually evaluating Plankton's petition for a waiver, it did not demonstrate good cause for a waiver of the Board's TI rules. That finding is reasonable and should be affirmed by this court.

In the context of solar incentive programs, the Board has adopted rules which are generally applicable via rulemaking, see N.J.A.C. 14:8-10.1 to -10.7,

and has dealt with individual petitions, including the Gibbstown petition, via individual adjudications. Even if the court accepts appellant's argument that the Gibbstown order constituted rulemaking, the remedy for such a finding would be rescission of the Gibbstown order and any order which allegedly relies on it as precedent. Removing the Gibbstown order entirely from the analysis would leave only the "good cause" standard and procedures already in the Board's rules at N.J.A.C. 14:1-1.2. As explained above, the Board explicitly found that the facts alleged by Plankton did not constitute "good cause" under N.J.A.C. 14:1-1.2, and accordingly denied the application for a waiver of N.J.A.C. 14:8-10.4(f)(4)(ii)(2); this finding was well within the Board's discretion, and must be affirmed whether the court concludes that the Gibbstown order was an improper rule or not.

CONCLUSION

For the foregoing reasons, the Board of Public Utilities September 2023 order should be affirmed.

Respectfully submitted,

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IN THE MATTER OF A NEW JERSEY SOLAR TRANSITION PURSUANT TO P.L. 2018, C. 17. I/M/O VERIFIED PETITION OF PLANKTON ENERGY, LLC FOR AN EXTENSION OF TIME TO COMPLETE PROJECT #NJSTRE1547462089 REGISTERED IN THE TRANSITION INCENTIVE PROGRAM – 1801 FEDERAL STREET, CAMDEN, NJ 08105	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO: A-686-23 *CIVIL ACTION* On appeal from: FINAL DECISION OF THE NEW JERSEY BOARD OF PUBLIC UTILITIES DOCKET NOS. BELOW: QO19010068, QO22080472 ORAL ARGUMENT REQUESTED

REPLY BRIEF OF APPELLANT PLANKTON ENERGY, LLC IN FURTHER SUPPORT OF APPEAL

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

STATE CASES

NEW JERSEY STATUTES

TABLE OF JUDGMENTS, ORDERS, AND RULINGS BEING APPEALED

PRELIMINARY STATEMENT

Respondent has utterly failed to rebut the arguments presented in Appellant's initial brief[1]. Respondent's arguments are replete with generalities and do not address the substance of Appellant's claim that the Denial Order was arbitrary and capricious, lacked reasoned decision-making, and was made without due consideration to the facts and circumstances detailed by Appellant. Alternatively, all or substantially all of the factors determining whether improper rulemaking has occurred weigh against the Board here, and the Board has not even attempted to engage in the analysis necessary to establish otherwise.

Accordingly, this Court should, immediately and without further delay, grant Appellant's appeal, vacate the Denial Order, hold that Appellant was entitled to an extension consistent with its petition below, and remand to the Board for further proceedings consistent with that holding, as well as grant such other and further relief as this Court deems necessary and proper.

LEGAL ARGUMENT

I. RESPONDENT HAS FAILED TO DEMONSTRATE THAT THE BOARD'S ORDER IS ENTITLED TO BE AFFIRMED

Respondent's arguments in opposition to this appeal are ineffective. First, the decision of the Board below was arbitrary and capricious and Respondent has failed to establish otherwise. Second, in the alternative, the Gibbstown Order rigidly

[1] Terms used herein shall have the same meaning as those defined in Appellant's initial Brief.

adhered to by the Board below constituted unlawful rulemaking despite Respondent's attempts to launder same as an individualized opinion.

a. Respondent Has Failed To Refute Appellant's Showing That the Decision Below Was Arbitrary And Capricious.

Despite the arguments made in Respondent's Brief, the decision of the Board below was arbitrary and capricious, as Appellant established good cause for an extension of its project under the TI program. The Board made no attempt to consider the particulars of Appellant's showing, but merely cast it aside with sweeping language that perhaps fit other applications, but not Appellant's.

While the boilerplate case law cited by Respondent on pages 12-14 of its brief is accurate on its face regarding the deference typically afforded to factual findings reached by the BPU, and the presumption of validity for an agency acting within its legislatively-delegated authority, none of it is applicable to the instant dispute. Where the agency's decisions is shown to have been "arbitrary, capricious, or unreasonable, or that it lacks fair support in the record", it will not be sustained. Allstars Auto Grp., Inc. v. N.J. Motor Vehicle Comm'n, 234 N.J. 150, 157 (2018) (quoting Russo v. Bd. of Trs., Police & Firemen's Ret. Sys., 206 N.J. 14, 27 (2011)). Indeed, the simple act of finding **some** facts is not enough to earn Respondent's decision a presumption of validity, because "when an administrative body renders a decision and fails to make **adequate** findings of fact and express reasoning which, **when applied to the found facts**, led to the conclusion below, the decision cannot

stand." In re: Board's Investigation and Review of Local Exchange Carrier Intrastate Exchange Access Rates, 2012 WL 2344585 at *17 (App. Div. June 21, 2012) (emphasis added) (citing Lister v. J.B. Eurell Co., 234 N.J. Super. 64, 73 (App. Div. 1989). "Those findings must be '**sufficiently specific** under the **circumstances of the particular case** to enable the reviewing court to intelligently review an administrative decision and ascertain if the facts upon which the order is based afford a reasonable basis for such order.'" Exchange Access Rates, 2012 WL 2344585 at *17 (emphasis added) (quoting Lister, 234 N.J. Super. at 73). "Indeed, our courts 'cannot accept without question an agency's **conclusory statements**, even when they represent an exercise in agency expertise.'" Exchange Access Rates, 2012 WL 2344585 at *17 (emphasis added) (quoting Balagun v. N.J. Dep't of Corr., 361 N.J. Super. 199, 202-03 (App. Div. 2003)). "It is settled that an 'administrative agency must set forth basic findings of fact supported by the evidence and supporting the ultimate conclusions and final determination so that the parties and any reviewing tribunal will know the basis on which the final decision was reached.'" Exchange Access Rates, 2012 WL 2344585 at *17 (quoting Riverside Gen. Hosp. v. N.J. Hosp. Rate Setting Comm'n, 98 N.J. 458, 468 (1985)). "Without findings of fact supported by the record and supporting the ultimate determination, the agency decision is an arbitrary, capricious, and unreasonable action." Exchange Access Rates, 2012 WL 2344585 at *17 (citing In re: Issuance of a Permit by Dep't of Envtl. Prot. to Ciba–

Geigy Corp., 120 N.J. 164, 173 (1990)). "Justice requires 'a clear and concise demonstration that the litigants have been heard and their arguments considered.'" Exchange Access Rates, 2012 WL 2344585 at *18 (quoting Bailey v. Bd. of Review, 339 N.J. Super. 29, 33 (App. Div. 2001)).

Here, Appellant asked the Board to consider all the extenuating facts and circumstances surrounding Appellant's need for an extension. While Appellant's circumstances did not fit precisely into the four corners of the "good cause" criteria set forth in the Gibbstown Order, because the EDC-precipitated delays were due to last-minute changes in project design required by the EDC rather than delays in interconnection, the reasons for Appellant's predicament are sufficiently similar in substance and the potential consequences to Appellant are just as unfair as those that would have been suffered by the Gibbstown petitioner. See Appellant's Appendix at Aa48. Appellant here did everything it could reasonably do to meet the completion deadline. Id. at Aa64. The delays it encountered were solely due to PSE&G's unilateral change of what Appellant was permitted to do, without consulting Appellant, **8 months** after Appellant's original design was approved for interconnection. Id. at Aa64-65. This is fully consistent with the Gibbstown Order, where the Board made clear that its motivation for permitting TI Program extensions was to provide relief for solar developers who would otherwise be penalized for unforeseen delays due to the actions or inactions of an EDC. Id. at Aa53, Aa61, Aa6,

& Aa85. Like the Gibbstown petitioner, Appellant was rendered unable to timely complete its Project because of circumstances which were completely unforeseen and outside of Appellant's control. Id. at Aa47 & Aa50. The requirement imposed by the Board that all solar developers seeking an extension of a TI Program project must be in exactly the same circumstances as in Gibbstown in order to establish good cause for an extension is arbitrary and capricious. Id. Further, the Board inexplicably downplaying the significant interconnection issues that arose for Appellant as a result of PSE&G's unilateral design changes, referring to them as simply "alleged delays related to interconnection design" without further context, only further underscores how arbitrary and capricious the Denial Order was. See Respondent's brief, pages 17-18.

Respondent takes apparent issue with the fact that "Plankton's project was registered 'in the closing days of the TI program,' which 'did not provide any automatic extension'", however nowhere in the extensive legislative history lesson regurgitated by Respondent in its brief is there any indication that the timing with which the project is registered prevents the registrant from seeking an extension of the deadlines. The regulatory provision cited by Respondent in support of this argument on page 17 of its brief, N.J.A.C. 14:8-10.4(f)4iii, merely states that the facility "must commence commercial operations and submit a post-construction certification package prior to the expiration of the conditional registration." As

Respondent itself admits on page 17 of its brief, N.J.A.C. 14:1-1.2(b) expressly provides that deviations from the Board's rules are permitted for good cause shown. When Appellant became aware that the outside factors causing delays to the project would prevent it from complying with this regulation, Appellant sought an extension of time precisely to avoid a scenario in which the project would not be completed prior to the expiration of the conditional registration. That Respondent arbitrarily decided not to grant the requested extension does not automatically mean the project and Appellant failed to comply with the regulation.

Respondent further takes issue with the support provided by Appellant for its application. First, Respondent simply parrots its own conclusion below, that the "alleged delays related to interconnection design, and subsequent permitting delays" did not constitute "sufficient good cause" to justify application of the Gibbstown Order for an extension. See Respondent's Brief, page 17. As will be described in greater detail below, this argument is curious given that Respondent claims the Gibbstown Order is not a rule and yet the rigid rejection of Appellant's grounds for relief is in fact a direct application of the Gibbstown Order's text. That said, Respondent at no point takes issue with the accuracy of Appellant's documentation supporting its need for an extension, only with whether or not the need proven by Appellant is sufficient good cause.

Additionally, Respondent in its brief did not even attempt to refute

Appellant's citation to the analogous case described on pages 26-29 of Appellant's brief. See Matter of Rios, 2017 WL 712777 at *1 (App. Div. February 23, 2017). Much like the Civil Service Commission in Matter of Rios, Respondent here rigidly stuck to the narrow criteria outlined in the Gibbstown Order and refused to consider all of the other facts and circumstances which necessitated an extension for Appellant. Indeed, the Denial Order below dedicates barely more than a single page of text to the analysis of Appellant's specific extension request. Further, Respondent could not possibly have given the full, fair, and thorough analysis required by the controlling case law when it was considering Appellant's extension request alongside **seventeen (17) other extension requests**. The hastiness with which Appellant and its fellow petitioners were dispensed with in the Denial Order only further underscores the arbitrary and capricious nature of same.

Finally, Respondent claims that Appellant was properly denied an extension under the TI program, the program under which it was properly registered, because at the same time it denied Appellant's extension request it also gave Appellant "an opportunity to register in the ADI program and preserve [its] overall eligibility for a state incentive." See Respondent's Brief, pages 18-19. Respondent claims that Appellant could not have demonstrated good cause for its TI extension request because the ADI program was "in operation" and, as a result, Appellant should not "receive an incentive via a now-closed program." Id. The foregoing is a

disingenuous argument given the fact that, when Appellant attempted to register for the ADI program as a stopgap pending the instant appeal, it was told that its ADI program application could not be processed while the instant appeal is pending. As a result, the very incentive program that Respondent claims is sufficient to meet the needs of participants in the solar industry, the one that has supposedly replaced the "now-closed" TI program, is not available to Appellant while the instant appeal plays out. This also belies Respondent's contention that the TI program is "now-closed", as if Appellant was not still a participant in that program then its application to the ADI program would have been processed. Respondent therefore cannot use either the availability of the ADI program, nor the false assertion that the TI program is no longer available to Appellant, as a basis for denial of this appeal.

Accordingly, because the Denial Order was arbitrary and capricious, and due to Appellant having successfully demonstrated good cause below for its requested extension, this Court should grant the instant appeal in its entirety.

b. <u>Respondent Has Failed To Disprove That The Gibbstown Order Constitutes Unlawful Rulemaking.</u>

Respondent's argument that the text of the Gibbstown Order is consistent with the Administrative Procedures Act rings hollow for a number of reasons, all of which combine to establish that the Gibbstown Order constitutes unlawful rulemaking by the Board.

While, again, the boilerplate case law cited by Respondent on pages 19-21 of

its brief is an accurate recitation of the standards applicable to agency rulemaking, none of it operates to vindicate the unlawful process employed by the Board in adopting the Gibbstown Order as a rule. While the Board is entitled to a degree of leeway when selecting among methods of fulfilling its statutory mandate, "[w]hen a reviewing court, such as the Appellate Division, finds irregularities in the proceedings of the Board that impair the interests of either or both of the public and the regulated parties, it should not hesitate to step in and correct same. See, e.g., In re: Provision of Basic Generation Service for Period Beginning June 1 2008, 205 N.J. 339, 343-44 (2011) (". . . we do find significant irregularity in [the Board's] proceedings that impaired the interest of the rate-paying public."). "An agency's ability to select procedures it deems appropriate is limited by 'the strictures of due process and of the [APA].'" Matter of Board's Review of Applicability and Calculation of Consolidated Tax Adjustments, 2017 WL 4105226 at *5 (App. Div. September 18, 2017) (quoting In re: Consider Distrib. of Casino Simulcasting Special Fund, 398 N.J. Super. 7, 16 (App. Div. 2008)) (internal citations omitted). Indeed, "[a]n agency's 'discretion to act formally or informally is not absolute.'" Tax Adjustments, 2017 WL 4105226 at *5 (quoting In re: N.J.A.C. 7:1B–1.1 Et Seq., 431 N.J. Super. 100, 133 (App. Div.), certif. denied, 216 N.J. 8 (2013)).

Respondent attempts to clean up its error by arguing on pages 20-21 of its Brief that the Denial Order somehow "clarified that the Gibbstown order 'was an

individual adjudication finding good cause to waive portions of the Board's TI rules . . . based upon the very specific facts presented in that petition." Respondent then spends a significant portion of its argument citing the Denial Order in an effort to launder the defect of improper rulemaking from the text of the Gibbstown Order. This position is belied by the very text of the Gibbstown Order itself. The Gibbstown Order's criteria purport to be applicable to any and all entities registered with the TI Program who attempted to persuade the Board they deserved an extension. See Aa6. There is no language indicating any variance in the applicability of the Gibbstown Order among any particular set of TI Program registrants; the Order specifically stated only that good cause for a deadline waiver could be show if the registrant is a "similarly situated party" seeking an extension "on comparable terms." See Aa79. The terms of the Gibbstown Order could only operate prospectively, as in order to obtain relief thereunder a petition for same would have to be made to the Board. The Gibbstown Order admits that the "rules do not provide for extensions, and that omission was intentional." See Aa37. The Gibbstown Order was the first time the Board had attempted to set forth specific criteria for obtaining a waiver of the TI Program deadline upon application to the Board. As the Gibbstown Order itself clearly states, there is no provision for extensions in the TI Program rules, yet the Board nevertheless recognized that exceptions should be made as a matter of regulatory policy, given the fact that TI Program registrants should not be held

responsible for missing their deadlines as a result of changes outside the control of the developer. See Aa6.

The foregoing having been said, the text of the Denial Order itself further belies the idea that the Gibbstown Order somehow did not constitute unlawful rulemaking. As noted above, Respondent claims the Gibbstown Order is not a rule while at the same time arguing to uphold the Denial Order's rigid rejection of Appellant's stated grounds for a TI program extension. See Respondent's Brief, pages 17-18. The rigid rejection of Appellant's stated grounds for an extension by the Board is a direct application of the Gibbstown Order's unlawful rule, which the Board admitted in the Denial Order. See Aa37 ("Staff is likewise reluctant to recommend that extensions be provided for . . . interconnection issues **beyond those allowed for in the Gibbstown Order**." (emphasis added)). The Denial Order even succinctly sets forth the test it espoused in the Gibbstown Order, what can be referred to as the unlawful "Gibbstown Rule", in a single sentence, writing that an extension of the TI program shall be granted when: (1) "a project is mechanically and electrically complete"; (2) "has all necessary permits and inspections;" and (3) "is prevented from receiving PTO because of unforeseeable delays in the EDC's completion of interconnection upgrades that occurred after the execution of an interconnection agreement." Id. The Denial Order further summarizes the Board's application of the unlawful Gibbstown Rule as follows: "In other words, if a

developer could demonstrate the underlying facts supporting the Board's decision to grant a conditional waiver to the *Gibbstown* project, then the Board also found good cause has been shown for that project." Id. at Aa40. The Board's self-serving finding in the Denial Order that the Gibbstown Order did not constitute unlawful rulemaking therefore does not stand up to the barest scrutiny.

Respondent also did not even attempt to walk through the entire Metromedia analysis with regard to the Gibbstown Order in order to set forth factor-by-factor why same was not unlawful rulemaking. Appellant further cited to four cases directly on point for this issue in support of its argument that the Gibbstown Order constitutes unlawful rulemaking, none of which Respondent has even attempted to distinguish. See Matter of Board's Review of Applicability and Calculation of Consolidated Tax Adjustments, 2017 WL 4105226 at *5 (App. Div. September 18, 2017); In re: Provision of Basic Generation Service for Period Beginning June 1 2008, 205 N.J. 339, 343-44 (2011); In re: Adoption of Regional Affordable Housing Development Program Guidelines, 418 N.J. Super. 387, 389 (App. Div. 2011); Bueno v. Board of Trustees, 422 N.J. Super. 227, 230 (App. Div. 2011). These four analogous opinions only further demonstrate the Gibbstown Order's unconstitutionality.

As a result of the foregoing, this Court should hold that the Gibbstown Order constitutes unlawful rulemaking in violation of the Administrative Procedures Act,

and the instant appeal should be granted in its entirety.

CONCLUSION

For the reasons stated herein, as well as the reasons presented in Appellant's initial Brief, this Court should, immediately and without further delay, grant Appellant's appeal, vacate the Denial Order, hold that Appellant was entitled to an extension consistent with its petition below, remand this matter to the Board for further proceedings consistent with that holding, and grant such other and further relief as this Court deems necessary and proper.

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Dated: July 22, 2024