Agenda Date: 1/27/21
Agenda Item: 8D

STATE OF NEW JERSEY

Board of Public Utilities
44 South Clinton Avenue, 9th Floor
Post Office Box 350
Trenton, New Jersey 08625-0350
www.nj.gov/bpu/

CLEAN ENERGY

IN THE MATTER OF THE PETITION FOR DCO ENERGY, LLC FOR A DECLARATORY RULING	))))	ORDER ON DCO ENERGY MOTION FOR DECLARATORY RULING DOCKET NO. QO20030191

Parties of Record:

Stefanie A. Brand, Esq., Director, New Jersey Division of Rate Counsel
Murray E. Bevan, Esq., on behalf of DCO Energy, LLC
Philip J. Passanante, **Esq.**, Atlantic City Electric Company

BY THE BOARD:

By this Order, the New Jersey Board of Public Utilities ("Board" or "BPU") grants the petition filed by DCO Energy, LLC ("DCO Energy" or "Petitioner") for a Declaratory Ruling.

I. BACKGROUND

On February 28, 2020, DCO Energy filed a petition ("Petition") with the Board requesting a Declaratory Ruling on two issues.

First, DCO Energy sought confirmation that expanding the customer base of the Midtown Thermal Control Center ("MTCC") by adding the AlantiCare Regional Medical Center ("AtlantiCare") would constitute an "on-site generation facility" within the meaning of N.J.S.A. 48:3-51 and N.J.S.A. 48:3-77 and therefore be entitled to all the benefits conferred upon such facilities by the Electric Discount and Energy Competition Act ("EDECA") and New Jersey law.

Second, DCO Energy requested that the Board find that, if it were to pursue a microgrid via a new microgrid tariff, the reductions in kilowatt hour consumption and peak demand anticipated from the new 6 (six) megawatt ("MW") combined heat and power ("CHP") commercial participants of the microgrid are qualified and may be counted under the Clean Energy Act as third-party energy efficiency gains to satisfy a portion of Atlantic City Electric Company's ("ACE") energy efficiency requirements.

On March 20, 2020, ACE filed a Motion to Intervene, taking no position on the merits of the Petition. On September 9, 2020, the Board retained the matter and, pursuant to N.J.S.A. 48:2-32, designated Commissioner Solomon as the presiding officer, granted ACE's Motion to Intervene, and set a Procedural Schedule for the proceeding ("September 9, 2020 Board Order").

On October 5, 2020, DCO Energy filed a Motion to Modify the Procedural Schedule, set forth in the September 9, 2020 Board Order. According to the motion, all parties wished to provide more of an opportunity for settlement discussions. In response, on October 8, 2020, Commissioner Solomon issued an amended procedural schedule.

DCO Energy filed an amended petition on October 23, 2020 ("Amended Petition"), narrowing its request to the sole issue of whether the AtlantiCare addition to the MTCC for the purpose of providing electrical power constituted an "on-site generation facility" under N.J.S.A. 48:3-51 and N.J.S.A. 48:3-77.

The Amended Petition details the impacts of Superstorm Sandy in 2012, describing the Petitioner's position on the vulnerability of Atlantic City to extreme weather events and the need to enhance the resiliency of the Atlantic City's critical infrastructure. As a result, the Petitioner identified several options for enhancing the MTCC facility, including an on-site generation option.

Currently, the MTCC provides steam and chilled water to a variety of casino, hotel, and entertainment venue customers in Atlantic City. The Amended Petition proposes that the MTCC expand its customer base by adding AtlantiCare as a thermal and electric customer. The Amended Petition notes that the AtlantiCare facility would be the sole electric customer of the 6 MW CHP at the MTCC.

The Amended Petition maintains that its proposal will deliver to Atlantic City energy efficiency and environmental benefits as well as significant cost savings. Additionally, the Amended Petition maintains that its proposal would increase the resilience for AtlantiCare during grid outages so that it could continue to provide medical services during such outages.

In order to supply AtlantiCare with electric energy under EDECA, the MTCC facility must meet the definition of an "on-site generation facility" under N.J.S.A. 48:3-51. The statute requires on-site generation facilities to be located on "property contiguous to the property on which the end user is located." Properties will be considered "contiguous" if they are next to each other or separated by no more than one thoroughfare. N.J.S.A 48:3-51. The Petition, therefore, asks the Board to determine that AtlantiCare is located on property that is either touching the MTCC or separated by no more than one thoroughfare.

The Amended Petition provides that AtlantiCare is located kitty-corner to the MTCC facility—that is, by a diagonal crossing of Atlantic Avenue at South Ohio Avenue, a distance measuring a total of 145 feet door-to-door.

DCO Energy contends that each property—both the MTCC facility and AtlantiCare—extends to the center line of the street. With this understanding, DCO Energy maintains that the two properties therefore physically touch, meeting in the middle of the street, and no rights of way would be crossed.

Even if the two property lines do not meet in the middle of the intersection, the Petitioner reasons that the two properties are nonetheless contiguous because they are only separated by a single thoroughfare. DCO Energy states that the Board should not consider the intersection "to be two separate public thoroughfares because they each perfectly overlap at the intersection and thus the public thoroughfare land rights are not physically expanded or additionally bifurcated in any way." Amended Petition at 8.

In the alternative, DCO Energy seeks a declaratory ruling that it has the right to sell electricity to AtlantiCare even if the Board finds that the MTCC facility is an "on-site generating facility" only for purposes of its thermal energy output to AtlantiCare.

The Amended Petition concludes by stating that the diagonal crossing will become "immaterial" because AtlantiCare "will soon complete the land transfer with the New Jersey Casino Reinvestment Development Authority and therefore own the property where the new medical arts facility will be located." Amended Petition at 8. Since the property is located directly across Atlantic Avenue from the MTCC facility and directly across South Ohio Avenue from the existing AtlantiCare facility, DCO Energy argues that it will be able to provide on-site generation to the combined AtlantiCare facilities.

II. BRIEFS

DCO Energy Initial Brief

On November 4, 2020 DCO Energy filed an initial brief, requesting that the Board find that AtlantiCare is located on property contiguous to the MTCC generation facility, and thus would constitute an "on-site generation facility" under N.J.S.A. 48:3-51 and N.J.S.A. 48:3-77. In the event the Board finds that the MTCC is an "on-site generating facility" only for purposes of its thermal energy output, DCO Energy requests that the Board find that it still has the right to sell electricity to AtlantiCare if AtlantiCare becomes a thermal energy customer of the MTCC.

DCO Energy maintains that the MTCC constitutes an "on-site generation facility" because: 1) the AtlantiCare building and a soon-to-be constructed Medical Arts are a single campus; 2) no thoroughfares are crossed because each property physically touches in the middle of the street; and 3) even if the properties do not touch in the middle of the intersection, the intersection of two streets constitutes a single thoroughfare.

While the AtlantiCare building and a soon-to-be constructed Medical Arts are separated by a single street (South Ohio Avenue), DCO Energy views the two buildings "as a single hospital campus." DCO Energy Initial Brief at 4-5. These two buildings are bisected by S. Ohio Avenue and there are no intervening property owners between the two. Id. at 4. Since the "hospital campus" and the MTCC are separated by only a single thoroughfare, Atlantic Avenue, the Petition poses that the properties are contiguous as defined under an "on-site generation facility."

In the alternative, DCO Energy provides that AtlantiCare is contiguous to the MTCC because the property owners in that part of Atlantic City own to the center line of the adjacent streets. Thus, each property extends to the middle of the street, meaning the AtlantiCare property and the MTCC facility property physically touch at the middle of the intersection of Atlantic Avenue and South Ohio Avenue such that there is no thoroughfare that separates the properties. Therefore, DCO Energy contends, the two properties are contiguous.

DCO Energy contends that even if the two properties do not physically touch, the properties would nonetheless be considered contiguous because a single thoroughfare separates the two. DCO Energy requests that the Board consider the intersection of two streets—Atlantic Avenue and Ohio Avenue—to be a single thoroughfare rather than two because the two streets "perfectly overlap at the intersection and thus the public thoroughfare land rights are not physically expanded or additionally bifurcated in any way." DCO Energy Initial Brief at 6.

Since AtlantiCare would be an "on-site customer" for supply of electricity from the MTCC, DCO Energy asserts that as the generation facility, the MTCC facility qualifies for the exemption provided by N.J.S.A. 48:3-77(b). DCO Energy details the statutory language where "[n]one of the following charges [Societal Benefits Charge, Market Transition Charge, Transition Bond Charge, and their equivalents] shall be imposed on the electricity sold solely to the on-site customer of an on-site generating facility…." See N.J.S.A. 48:3-77(b). N.J.S.A. 48:3-77(e) also provides that those charges would be imposed for off-site end use thermal customers. DCO Energy states that AtlantiCare cannot be considered an off-site customer since the properties are contiguous and therefore, "the converse must be true – that AtlantiCare will be an "on-site customer" for the purpose." DCO Energy Initial Brief at 6.

DCO Energy supports its argument by providing that the energy resiliency goals of the 2019 NJ Energy Management Plan support a broad interpretation of the intended scope of "on-site customer" and "on-site generating facility".

DCO concludes by stating even if the Board finds that the MTCC facility and AtlantiCare are separated by more than one thoroughfare, the MTCC facility would nonetheless meet the definition of an "on-site generating facility" with respect to its thermal energy output to AtlantiCare, and therefore, be permitted to sell electricity with the only difference being that the sale of electricity would not be exempt from certain charges per N.J.S.A. 48:3-77(e).

Rate Counsel Initial Brief

On November 4, 2020, the New Jersey Division of Rate Counsel ("Rate Counsel") filed comments with the Board, taking no position on DCO's request for a declaration that it can provide on-site generation to the AtlantiCare facility. Rate Counsel did, however, note some issues that require clarification from the Board.

First, Rate Counsel notes that the Board should clarify whether properties that touch at one point are contiguous and should clarify how the boundaries of a property are defined. While Rate Counsel defers to the Board's expertise on the issue, it does believe a reasonable reading of the statutory definition would allow for the Board to interpret that facilities located diagonally across an intersection, touch at a single point, and therefore would be contiguous. Rate Counsel Initial Brief at 5.

Second, Rate Counsel asserts that the Board should clarify what definition will apply to on-site generation, if the "tax map" definition does not apply, and also clearly delineate how the geographic limits of a "property" are to be determined in the context of on-site generation.

Third, Rate Counsel maintains that DCO Energy's request for declaratory relief with regard to the expended future configuration of the AtlantiCare facility is premature. Rate Counsel maintains that allowing on-site generators to sell to multiple customers could open the door to a proliferation of unregulated mini-utilities that would bypass both the Board's regulatory authority and payment

of the Societal Benefits Charge and other surcharges that were intended to be borne by all electric generation customers.

Rate Counsel concludes by stating that if the MTCC facility does not qualify to sell electricity to the AtlantiCare facility as an "on-site generation facility," then any sales of electricity to the AtlantiCare facility must be in compliance with N.J.S.A. 48:3-77.1, and therefore, must use ACE's existing distribution infrastructure to provide electric generation service to AtlantiCare.

ACE Initial Brief

In its brief filed on November 4, 2020, ACE details its previous engagement and close coordination with DCO Energy on this project. ACE states that while it has been a "steady participant and supporter of developing a microgrid…especially to generate greater resilience for AtlantiCare", ACE has concerns about DCO Energy's "…sole focus on turning the existing MTCC facility into a microgrid, instead of taking a broader view to develop a microgrid based on the needs of Atlantic City." ACE brief at 5. To ACE, the proposed project comes at a significant costs with "questionable" benefits for the City. Ibid.

ACE asserts that the Board should use its discretion to dismiss the Petition as procedurally improper. Due to the ongoing Phase II Town Center Distributed Energy Resources ("TCDER II") microgrid proposals that are currently filed with the Board, ACE maintains that this Petition seeks to improperly prejudge the outcome of that proceeding.

Further, ACE states that the proposed project relies on future, uncertain or contingent facts, thus warranting the Board dismissing the Petition. ACE references an "anticipated future property transfer to AtlantiCare" where it would "possibly" accept electric and thermal services from the MTCC. Id. at 11. Due to the uncertain developments, ACE contends the Board may dismiss the Petition under N.J.S.A. 52:14B-8 and New Jersey case law.

ACE further argues that the Board should dismiss the Petition because the proposed project does not constitute on-site generation, and therefore, does not qualify under N.J.S.A. 48:3-51 and N.J.S.A. 48:3-77. ACE maintains that the statutes permit only a narrow application—a single end use customer, located on property contiguous to the generation facility.

ACE contends that the definition of "on-site generation" under N.J.S.A. 48:3-51 requires a single "end use customer" that receives service from the generation facility. ACE points to the Amended Petition which states that "[t]he proposed…On-Site Generation option would serve Caesar's, Bally's, AtlantiCare, Boardwalk Hall and the energy needs of the MTCC." Ace Brief at 14 (quoting Amended Petition at 2). ACE states that, according to the Amended Petition, the project would provide thermal and electric service to AtlantiCare and develop a new CHP facility on Caesars' property to serve Caesars and Bally's.

ACE highlights that the plain reading of the statutory definition of an on-site generator requires a single end user, not plural. ACE quotes a previous Board decision "that expanding the application of on-site generation beyond a single end use customer ran the risk of establishing "a proliferation of mini utilities," contrary to the limited legislative intent of the statute." ACE Brief at 13 (quoting In re Cooper Hosp. Sys., 2017 N.J. PUC LEXIS 74, *14-*16 (Apr. 21, 2017) ("Cooper Hospital Decision")). ACE provides that in the Cooper Hospital Decision, the Board determined that three entities collectively constituted one "end user." Put differently, all entities within the project must function as part of a single integrated system to be deemed a single end user.

ACE maintains that since the "Petitioner makes no claim that the casinos, the convention center, and the hospital (and related buildings) are integrated into a single system, the Cooper Hospital Decision is not applicable. ACE plainly states, "Petitioner makes no effort to show that several customers somehow boil down to one." ACE Brief at 14. Therefore, this project does not satisfy a single end user as supported by the Cooper Hospital Decision and required by statute.

Additionally, ACE does not believe the generation facility is located on property that is contiguous to the end use customer, and therefore the project would problematically establish a mini utility that provides electric and thermal service to several customers on various properties. Further, ACE contends that DCO Energy has failed to provide adequate evidence to properly confirm the generation facility is on contiguous property, as required by the Cooper Hospital Decision.

Since ACE contends the project fails to show it is an "on-site generator", the project is not entitled to the exemptions under N.J.S.A. 48:3-77b, which provides that certain charges will not "be imposed on the electricity sold solely to the on-site customer of an on-site generating facility." Additionally, ACE maintains that N.J.S.A. 48:3-77e also does not apply, where certain charges "shall be imposed on the sale or delivery of power to an off-site end-use thermal energy services customer that is derived from the on-site generation facility serving that customer." Since this definition relies on "on-site generation", and because this project does not qualify, the statute is unavailable to the project.

ACE concludes it's brief by stating that the proposed project is out of sync with the current Energy Master Plan, particularly the decarbonization, resilience and environmental justice goals.

DCO Energy Reply Brief

DCO Energy requests that the Board find that AtlantiCare's City Campus is located on property contiguous to the MTCC and that AtlantiCare would be the sole "on-site customer" of the MTCC's CHP facility.

DCO maintains that its request for relief is not premature, and even if it is, the Board has the authority to issue an advisory opinion. While the land transfer regarding the future Medical Arts Building has not yet occurred, the plans to do so are concrete, demonstrated by money currently in an escrow account. DCO Energy stresses that "this project is moving forward and is not merely a possibility." DCO Energy Reply Brief at 4.

DCO Energy states that its TCDER II application is not at all related to this proceeding because the microgrid-related request was removed from the Amended Petition. DCO Energy maintains that it has no plans to run a private wire network to any of the other casinos or Boardwalk Hall. Id. at 5. DCO Energy emphasizes that the Amended Petition focuses narrowly on the AtlantiCare campus.

DCO requests that the Board find that its on-site generation facility (the 6MW CHP at the MTCC) will serve a single on-site end-use customer (AtlantiCare), and that the electricity provided is eligible for the benefits listed under N.J.S.A 48:3-77(b). DCO Energy states that the CHP will be connected only to the MTCC and the AtlantiCare campus. It will *not* serve Caesar's, Bally's nor any other MTCC customer. DCO Energy maintains that there will be a single power purchase agreement between DCO Energy and AtlantiCare for the entire campus, further demonstrating that the project will supply energy to a single end user.

DCO also asserts that the new Medical Arts Building will "unequivocally be part of the same downtown Atlantic City hospital campus as AtlantiCare." DCO Energy Reply Brief at 5. The buildings will function as a single integrated healthcare delivery system, consistent with the findings in the Cooper Hospital Decision. DCO Energy provided multiple exhibits to demonstrate that the two buildings are "related corporate entities who share the same parent company." Id. at 7.

DCO Energy affirms that the 6MW CHP at the MTCC will provide more resilient and environmentally responsible power to the AtlantiCare campus. DCO Energy points to the Board's existing Clean Energy programs that continue to provide funding for such projects, demonstrating that the project is aligned with the State's current Energy Master Plan.

Rate Counsel Reply Brief

On November 18, 2020, Rate Counsel submitted a letter with the Board stating that it would not be filing reply comments, but would rest upon the comments it previously submitted on November 4, 2020.

ACE Reply Brief

ACE filed a reply brief with the Board on November 18, 2020 reiterating its previous arguments and providing additional details.

ACE maintains that the requested relief is procedurally improper as it would effectively prejudge the outcome of the currently-ongoing TCDER II proceeding. ACE believes that DCO Energy seeks to obtain a competitive advantage in that proceeding through a predetermination of project eligibility.

ACE also contends that the proposed project is unaligned with the State's current Energy Master Plan, specifically with the stated goal of supporting local, clean power generation. ACE highlights that the proposed project is fueled by natural gas. ACE also questions the resilience benefits of the project since AtlantiCare did not lose power during recent storms.

ACE asserts that the Board must dismiss the Amended Petition as premature because it "relies upon future, contingent, and uncertain facts." ACE Reply Brief at 11. ACE takes issue with the current status of the Medical Arts Building, stating that because it is not yet constructed, it cannot "constitute a single hospital campus" as claimed. Ibid. ACE also states that DCO Energy has not demonstrated that AtlantiCare currently owns the property that will eventually host the Medical Arts Building and that the sale is not complete. Since these facts remain contingent, ACE requests that the Board dismiss the Amended Petition as premature.

If the Board does address the merits of the Petition, ACE also requests that the Board deny the requested relief because it does not fit within the definition of on-site generation for two reasons.

One, ACE believes that crossing an intersection diagonally violates N.J.S.A. 48:3-51 because the properties are not "geographically located next to each other", and thus may not be considered contiguous. Statutes should be given their plain meaning and as such, "diagonal is not the same as 'next to' in geometry or the law." ACE Reply Brief at 8. ACE urges the Board to apply a narrow interpretation as it contends was intended by the Legislature. ACE also points to federal case law to support its interpretation that touching corners do not constitute contiguous. Ibid.

Therefore, the diagonal crossing proposed by the project includes two public thoroughfares and thus violates N.J.S.A. 48:3-51.

Two, ACE maintains that the statute permits only a single end use customer to receive a discounted rate. ACE points to DCO Energy's Reply Brief which references "MTCC *customers*" ACE Reply Brief at 6 (quoting DCO Energy Initial Brief at 1-2). ACE goes on to state that the two facilities—AtlantiCare and the Medical Arts Building—may not necessarily be the same customer. ACE claims that DCO Energy has failed to clearly identify the customer of the to-be-constructed Medical Arts Building, and therefore, the Board is unable to determine whether the project would deliver to a single end user in accord with the Cooper Hospital Decision.

Since the proposed project does not constitute on-site generation under N.J.S.A. 48:3-51, ACE maintains that the exemptions under N.J.S.A. 48:3-77b are not available.

ACE highlights that while N.J.S.A. 48:3-77e permits a project to sell electricity, without a discount, to an off-site end use thermal energy services customer, the project must nonetheless show compliance under N.J.S.A. 48:3-51 which requires a single end use customer and a contiguous property. Further, ACE states that the statute requires an existing off-site end use thermal customer. ACE points to the Amended Petition that the project would require "building a thermal connection to AtlantiCare." See Amended Petition at 3-4. Since it has not yet been built, the statutory definition has not been met.

ACE concludes by requesting that if the Board does not deny the Amended Petition, it must still find that any sales of electricity to AtlantiCare must be compliant with N.J.S.A. 48:3-77.1, which requires any electric power from an on-site generation facility to an off-site end use thermal energy services customer utilize the existing locally franchised public utility electric distribution infrastructure. This provision seeks to avoid duplication of existing public utility electric distribution infrastructure, and to maximize economic efficiency and electrical safety. ACE asks that the Board find using its infrastructure will maximize efficiency and be responsible for any costs associated with necessary upgrades.

III. DISCUSSIONS AND FINDINGS

Petitioner requests that the Board determine that the proposed MTCC facility constitutes an "on-site generation facility" within the meaning of N.J.S.A. 48:3-51, and thus be entitled to all the benefits conferred upon such facilities by EDECA. After careful review of the record, and as set forth in more detail below, the Board **FINDS** that the proposed facility does constitute an on-site generation facility within the meaning of N.J.S.A. 48:3-51, and therefore in accordance with N.J.S.A. 48:3-77(b), certain charges shall not be imposed on the on-site customer of the on-site generation facility.

EDECA defines "on-site generation facility" as

> A generation facility, including, but not limited to, a generation facility that produces Class I or Class II renewable energy, and equipment and services appurtenant to electric sales by such facility to the end use customer located on the property or on property contiguous to the property on which the end user is located. An on-site generation facility shall not be considered a public utility. The property of the end use customer and the property on which the on-site generation facility is located shall be

> considered contiguous if they are geographically located next to each other, but may be otherwise separated by an easement, public thoroughfare, transportation or utility-owned right-of-way…
>
> [N.J.S.A 48:3-51.]

Among other things, the definition includes two key elements which the Board will consider here: 1) there may only be one end use customer; and 2) the end use customer must be located on property contiguous to the generation facility.

As stated by the Board in its Cooper Hospital Decision, an "on-site generation facility" may only serve a single end use customer. While the existing AtlantiCare facility sits across a street from the future Medical Arts Building, there is sufficient evidence to demonstrate that the two properties will serve as a single campus ("AtlantiCare Campus"). DCO Energy provides that "AtlantiCare's new Medical Arts Building will unequivocally be part of the same downtown Atlantic City hospital campus" and function as a single "integrated healthcare delivery system." DCO Energy Reply Brief at 5-6. Further, AtlantiCare and the new Medical Arts building share a parent company as demonstrated by Internal Revenue Service paperwork, media coverage and testimony submitted by Petitioner. In consideration of the evidence presented, the Board **HEREBY FINDS** that the existing AtlantiCare facility and the new Medical Arts Building are intended to function a single hospital campus, acting as single entity.

DCO Energy affirms that the MTCC's 6 MW CHP will be connected only to the AtlantiCare Campus, will not serve electric power to any other entities, and will operate under a single power purchase agreement between DCO Energy and AtlantiCare. DCO Energy Reply Brief at 5. As such, the Board **FINDS** that the proposed facility will serve a single end use customer.

Having established that the proposed facility will serve a single end use customer, the Board must also examine whether the AtlantiCare Campus is located on property contiguous with the MTCC.

EDECA provides that properties shall be considered "contiguous" if they are geographically next to each other or if they are separated by no more than one easement, public thoroughfare, transportation or utility-owned right-of-way. N.J.S.A 48:3-51. ACE asserts that in geometry, case law and the dictionary, "contiguous" means "touching along all or most of one side." Bergen Ridge Homeowners Ass'n v. Twp. of N. Bergen, No. A-2358-06 (App. Div. Dec. 17, 2007) (interpreting "contiguous" in the context of a private sale of municipal property subject to the requirements of N.J.S.A. 40A:12-13b). Yet, the New Jersey Legislature in drafting EDECA specifically stated otherwise—that contiguous could also mean separated by "an easement, public thoroughfare, transportation or utility-owned right-of-way", and therefore, *not* necessarily touch along all or most of one side. N.J.S.A. 48:3-51. The Board is bound by the statutory definition in this circumstance and cannot apply the definition of contiguous as proposed by ACE.

Since parts of the AtlantiCare Campus are located diagonally across the intersection of Atlantic Avenue and South Ohio Street, the Board must determine whether such crossing falls under the definition of contiguous. The Board concludes that it does. Petitioner asserts that the two properties indeed do "touch" in the middle of the relevant street and therefore do not cross any rights of ways, easements, or public thoroughfares. If this is so, then this case is an easy one, because two properties that actually touch clearly satisfy the statutory definition of contiguous. While the Board **FINDS** that when two properties physically touch they are contiguous and this fact alone would be sufficient, the Board does not need to fully rely on this assertion.

When two streets bisect, the intersection created is fundamentally one single thoroughfare for the purposes of EDECA. First, the intersection can only serve vehicles traveling on one street at a time; otherwise, a collision would inevitably occur. To avoid such collisions, each street utilizes the intersection at separate and distinct times. As such, an intersection acts as a single street at any given moment. In the Cooper Hospital Decision, we found that the CHP plant located at One Cooper Plaza was "contiguous" to its customer at Three Cooper Plaza. Id. at *13. We held that the two properties, separated by Haddon Avenue, were separated by no more than "an easement, public thoroughfare, transportation or utility-owned right-of-way" and thus "contiguous" under N.J.S.A. 48:3-51. Cooper Hospital Decision at *13. The AtlantiCare Hospital Site is separated from the MTCC Cogeneration site by Atlantic Avenue, and we see no principled reason that distinguishes the geographic relationship between these properties from the geographic relationship between One and Three Cooper Plaza.

Second, public utility law grants certain regulated utilities an exclusive franchise within their geographic service territory. In passing EDECA, the Legislature sought to permit narrow exemptions to the exclusive franchise to "…improve the quality and choices of service…; [p]rovide diversity in the supply of electric power…; authorize the Board of Public Utilities to approve alternative forms of regulation in order to address changes in technology and the structure of the electric power and gas industries…; and to promote economic development…" N.J.S.A. 48:3-50(a). EDECA then grants a limited exception to that exclusive franchise for an on-site generator so long as its customer is within certain proximity requirements. Allowing single diagonal crossings is fully consistent with the Legislature's stated desire to promote on-site generation, while also ensuring that on-site generation facilities and their customers remain within certain geographical limits.

Upon thorough review of the language in EDECA and the practical application of intersections, the Board **FINDS** that, similar to a vertical or horizontal crossing, a diagonal crossing through an intersection crosses a single thoroughfare for the purposes of N.J.S.A. 48:3-51.

To sum, the Board **HEREBY FINDS** that the MTCC facility, as proposed, does constitute an on-site generation facility within the meaning of N.J.S.A. 48:3-51 as it is located on property contiguous to its end use customer, the AtlantiCare Campus. In accordance with N.J.S.A. 48:3-77(b), the Board **HEREBY FINDS** that certain charges shall not be imposed on the electricity sold solely to the AtlantiCare Campus.

ACE also requests that the Board dismiss the Amended Petition as premature since it presents a "variety of future, contingent, and uncertain facts." ACE Initial Brief at 11. Under N.J.S.A. 52:14B-8, the Board may act upon a petition, in its discretion, and issue a declaratory ruling. ACE correctly notes that "declaratory judgment is not an appropriate way to discern the rights or status of parties upon a state of facts that are future, contingent, and uncertain." ACE Initial Brief at 9 (quoting Independent Realty Co. v. Twp. of N. Bergen, 376 N.J. Super. 295, 302 (App. Div. 2005). ACE points to the future property transfer of the Medical Arts Building and that the sale is contingent on the satisfaction of the terms of the contract. ACE Reply Brief at 11.

While the Medical Arts Building has not yet been constructed, it is only part of the proposed project. Further, as the record shows, this construction is neither contingent nor uncertain. Money has been placed into an escrow account, additional spending has been approved for the project, and construction was scheduled to begin in 2020, but due to the COVID-19 pandemic, those plans were postponed. Permits have also been submitted and public hearings conducted. Upon thorough review of the full record in this proceeding, the Board **HEREBY FINDS** that the Amended

Petition is not premature and the Board has the appropriate discretion to issue a decision per N.J.S.A. 52:14B-8.

ACE finally requests that the Board dismiss the Amended Petition for seeking to predetermine and advance Petitioner's position in the separate Board proceeding, citing that the relief sought here would predetermine DCO Energy's project eligibility in the TCDER II incentive program. DCO Energy submitted an application for the TCDER II program and the Board's decision on this matter is still pending.

Upon review of the full record in this proceeding, the Board **HEREBY FINDS** that in issuing this decision, it is not making a predetermination on the separate, ongoing TCDER II proceeding related to microgrids. The Amended Petition provided a narrow request of the Board—that the MTCC be found to be an "on-site generation facility." The Amended Petition does not seek any ruling on any issues related to a microgrid option.

Based on the above, the Board **HEREBY FINDS** that the AtlantiCare Campus is located on property contiguous to the MTCC and it will be the sole customer of the 6 MW CHP at the MTCC. The Board's findings are subject to the following conditions:

1. Any changes to the relationship between the existing AtlantiCare building and the soon-to-be constructed Medical Arts building, including but not limited to sale of the property to another entity or change in ownership of one or all corporate entities, will render this Order null and void and require the filing of a new or amended petition for Board determination as to whether the on-site generation provision of N.J.S.A. 48:3-51, or exemption from SBC Charges under N.J.S.A. 48:3-77(b) should apply;

2. Any changes to the configuration of the proposed project as outlined in this proceeding's record, including but not limited to, changes to where the on-site generation facility is located, change to the type of CHP service (e.g. thermal or electricity) provided to the AtlantiCare Campus, any change to or addition or deletion of a property that receives heat or electricity from the MTCC CHP project, or re-routing of the project through any additional easements, public thoroughfares, transportation or utility-owned right-of-ways, will render this Order null and void and require the filing of a new or amended petition for Board determination as to whether the on-site generation provision of N.J.S.A. 48:3-51, or exemption from SBC charges under N.J.S.A. 48:3-77(b) should apply.

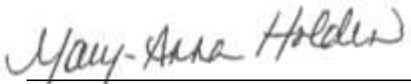
The Board **FURTHER ORDERS** Petitioner to comply with all applicable laws.

This Order shall be effective on February 6, 2021.

DATED: January 27, 2021

BOARD OF PUBLIC UTILITIES
BY:

JOSEPH L. FIORDALISO
PRESIDENT



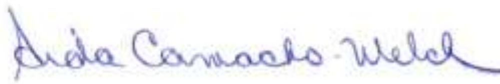
MARY-ANNA HOLDEN
COMMISSIONER

DIANNE SOLOMON
COMMISSIONER

UPENDRA J. CHIVUKULA
COMMISSIONER

ROBERT M. GORDON
COMMISSIONER

ATTEST:



AIDA CAMACHO-WELCH
SECRETARY

In the Matter of the Petition for DCO Energy, LLC for a Declaratory Ruling
BPU Docket No. QO20030191

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