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New Jersey Board of Public Utilities  
Kenneth Sheehan, Esq., Chief Counsel  
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Re: CLEAN ENERGY  
Order Approving Settlement  
Docket No. EO12030209V

Dear Mr. Sheehan:

On July 18, 2012 the New Jersey Board of Public Utilities (“BPU”) approved a Settlement Agreement in the Matter of the Application of KDC Solar, LLC (“Petitioner” or “KDC Solar”) for declaratory relief pursuant to N.J.S.A. 52:14B-8.

The final paragraph of the BPU Order approving settlement states “ The parties are further advised that this opinion is limited specifically to the facts presented and that changing conditions, including any expansion of service or substantial variance in the proposed construction of the Facility, should be reported immediately to the Board, and could subsequently lead to the modification of the Board’s opinion as expressed in this Order.”

I am hereby reporting a “substantial variance in the proposed construction of the Facility” along with previously undisclosed facts regarding the Facility and its end user. I am therefore requesting the Board to reverse its Opinion by rescinding the Settlement Agreement in light of the following new facts brought to the Board’s attention in this matter.

### **Petition for Declaratory Ruling**

On March 06, 2012 KDC Solar filed a petition for a declaratory ruling (“Petition”) that an 11 MW solar photovoltaic facility (the “Facility” or “Project”) to be installed on Kirby Farm in Bedminster, New Jersey will qualify under Electric Discount and Energy Competition Act, N.J.S.A. 48:3-49 et seq. (“EDECA”), as amended, as an “on-site generation facility” for Sanofi-Aventis US, Inc., a single end user located at 55 Corporate Drive in Bridgewater, NJ (the “Sanofi Campus”). KDC Solar also sought a ruling that the Project would be deemed “behind-the-meter” and therefore eligible for the benefits of a net-metered facility.

**Paragraph 11** of the KDC Solar Petition states in pertinent part “. . . Exhibits A and B attached hereto and incorporated into this Petition are, respectively, *a true and accurate aerial photograph and a proposed solar facility layout.* These Exhibits show the location of the Sanofi

Campus in relation to the Kirby Farm.” (Emphasis added). Attached Exhibit A, submitted by KDC Solar as part of its Petition, is not in fact a “true and accurate aerial photograph” of the Sanofi Campus on the date of the Petition, March 06, 2012. The Exhibit A photo does not show a major expansion of the Sanofi Campus built in 2009 -2010. (See Exhibits C1-C4 attached which include the Construction Permit, Certificate of Approval and two Site Plan Sheets showing the Sanofi Campus expansion completed in 2010). Attached Exhibit D is an aerial photo that accurately displays the four story, 205,439 square foot building and 836 car parking area that are missing from Exhibit A which was represented as a “true and accurate aerial photograph” that accompanied the Petition. **Exhibit A, an integral part of the Petition, is a material misrepresentation of the Sanofi Campus. Of added importance is the fact that the omitted 4-story building is a separately owned property on the Sanofi Campus (see supra “Undisclosed Facts Regarding the Sanofi Campus End-User” on page 5 of this letter).**

**Paragraph 14**, line 1 of the Petition states “*A portion of the KDC/Sanofi Solar Facility will be located on Kirby-East, as shown on Exhibits A and B.*” (Emphasis added). **Attached Exhibit B, also submitted as part of the Petition, shows 2.2 acres of solar panels to be constructed on the Kirby-East parcel. In actuality, KDC Solar has no intention of constructing any portion of the Facility on the Kirby-East parcel (see sheet 4 of KDC Solar’s Preliminary & Final Major Site Plan submitted to the Bedminster Township Land Use Board dated 01/14/13 (“Site Plan”) – attached as Exhibit E1). KDC Solar’s abandonment of the Kirby East parcel represents a substantial variance in the construction of the Facility which, on its own, justifies the immediate reversal of the Board’s Opinion in this matter.**

#### **Two Public Thoroughfares Separate Kirby-East from the Sanofi Campus:**

**Paragraph 17** of the Petition contains an example of the misleading and incorrect assumption which is repeated throughout the Petition, the Settlement Agreement and the Order Approving Settlement, namely that “Kirby-East is located “next to [the Sanofi Campus], but separated by a public thoroughfare” – U.S. Route 287.” **In fact, the Kirby-East and Sanofi parcels are physically separated from each other not only by Route 287 but by a second public thoroughfare:** (See Exhibits F1 & F2).

U.S. Route 287 was built between the Kirby-East and Sanofi parcels circa 1963. Between 1963 and 1965, the Kirby-East and Sanofi parcels were physically separated only by Route 287 but in 1965 when U.S. Route 78 was being built in this area, the Vincent R. Kramer Interchange (“VRK Interchange”) was constructed to link Route 78 to Route 287. As attached Exhibits F1 & F2 clearly depict, two lanes of the VRK Interchange separate Kirby-East from U.S. Route 287. Therefore, since 1965, the Kirby-East and Sanofi parcels have been physically separated from each other not only by Route 287 but also by a second public thoroughfare - 2 lanes of the VRK Interchange which link Route 78 East to the local lanes of Route 287 South and 2 lanes of the VRK Interchange which link Route 287 North to Route 78 West. (See Exhibits F1 & F2).

#### **Three Public Thoroughfares Separate Kirby-West from the Sanofi Campus:**

**Paragraph 14** of the Petition goes on to state “. . . a significant (and necessary) portion of the KDC/Sanofi Solar Facility will be separated from the Sanofi property by both Country Club Road and U.S. Route 287.” This is another statement of fact that is simply not true. **In fact, since no portion of the facility is to be built on Kirby-East as per Exhibit E1, the entire Facility will**

**now be physically separated from the Sanofi Campus by three thoroughfares** - Country Club Road, the four (4) lanes of the Vincent R. Kramer Interchange and finally nine (9) lanes of U.S. Route 287 (See Exhibits F1 & F2).

**Paragraph 15** of the Petition states “KDC Solar is applying to the Board for confirmation that the KDC/Sanofi Solar Facility satisfies the statutory definition of an “on-site generation facility” pursuant to N.J.S.A. 48:3-51, given the manifest geographic proximity of the KDC/Sanofi Solar Facility to the Sanofi Campus. A conclusion that the KDC/Sanofi Solar Facility falls within the contours of this definition is entirely appropriate despite the fact that a portion of the facility must be constructed on a parcel that is separated from the Sanofi Campus by two roads, inasmuch as that parcel is an integral part of a commonly owned tract of land that, properly viewed and in common parlance and understanding, is “next to” the Sanofi Campus.” (Emphasis added). **In fact, we now know that KDC Solar intends to construct the entire Facility on Kirby-West which is physically separated from the end-user (the Sanofi Campus) by three roads** (See Exhibits F1 & F2).

In referring to the definition of an “on-site generation facility” pursuant to N.J.S.A. 48:3-51, **Paragraph 17, line 1** of the Petition states “It is beyond debate from this definition that **Kirby-East, on which a portion of the KDC/Sanofi Solar Facility is to be located,** is contiguous to the Sanofi Campus.” (Emphasis added). Once again, in persuading the Board, KDC Solar places particular emphasis on the fact that “a portion of the KDC/Sanofi Solar Facility is to be located” on Kirby-East. As per Exhibit E1 however, **KDC no longer intends to build any portion of the Facility on Kirby-East.**

**Paragraph 19** of the Petition states “Here, both parcels of the Kirby Farm are “next to” the Sanofi Campus under any reasonable construction of that phrase, notwithstanding the presence of the two thoroughfares. Given the longstanding common ownership of the adjacent Kirby-East and Kirby-West Parcels, and **because both parcels will be used for purposes of the KDC/Sanofi Solar Facility** and will exclusively serve the Sanofi Campus, a determination that the two parcels comprising the Kirby Farm are “contiguous” to the Sanofi Campus is fully consistent with both the statutory text and intent of the Solar Act.” (Emphasis added). Once again, this statement by KDC Solar is no longer true since only the more distant parcel, Kirby-West, will house the Facility and Kirby-West is physically separated from the Sanofi Campus by three thoroughfares (See Exhibits F1 & F2).

**Paragraph 21** of the Petition in pertinent part states “. . . Portions of the (single end user) generation facility will be placed on both parcels”. . . Here again KDC Solar is relying on a fact that is no longer true, the generation facility will in fact not be placed on both parcels (See Exhibit E1). The Facility will be placed only on the more remote of the two parcels which is separated from the end user by three thoroughfares. (Exhibits F1 & F2).

**Paragraphs 22-24** of the Petition attempt to convince the Board that “. . . the Kirby Farm can, and should, be considered as, in essence, a single, undivided property, the entirety of which is located next to the Sanofi Campus, . . .” Despite the Petition’s attempt to portray the two parcels of land as a single, undivided parcel the fact is they are separately deeded lots that don’t share the same Block or Lot number. Kirby-West is Block 62, Lot 10 and Kirby-East is Block 71.02, Lot 1. In fact, the Kirby Farm is not “a single, undivided property” as the Petition claims,

because the two Kirby parcels are legally independent, fee-simple lots, which may be sold to different owners prior, during or after construction of the Facility.

### **Board Order Approving Settlement**

The Board's Order Approving Settlement of July 18, 2012 states "The Board, in its discretion, may render a declaratory ruling which binds the agency and the parties to the proceedings *on the facts alleged*, . . . The Board **HEREBY FINDS** that it has sufficient information to proceed, and *will make its determination on the basis of facts as set forth in the petition* and the applicable Board rules and policies." (Italics added). As shown previously, the "facts alleged" and the "facts as set forth in the petition" have been substantially changed by KDC Solar.

### **Stipulation of Settlement**

In describing the procedural background of the case, the first page of the Stipulation of Settlement document dated June 08, 2012 makes a material statement of fact that is no longer true: "On March 6, 2012 KDC filed a Petition for a declaratory ruling that a solar photovoltaic facility (the "Facility" or "Project") **to be installed on two parcels of land located on either side of Country Club Road** in Bedminster, New Jersey . . . " (Emphasis added). As we now know, the Facility will **not** in fact be installed on "two parcels of land located on either side of Country Club Road" but rather will be built only on the one parcel of land located on the West side of Country Club Road, the parcel farthest from the end user and which is physically separated by three thoroughfares: a two lane township road, 4 lanes of a U.S. Highway Interchange System and 9 lanes of Route 287 (See Exhibits F1 & F2).

Page 2, paragraph 1 of the Stipulation of Settlement states the fundamental premise underlying the agreement between the parties: "There are no issues of fact in dispute. The Settling Parties are relying on the relevant factual statements set forth in the Petition as fundamental reasons for their agreement to enter into the Stipulation. . ." **Clearly, the particular facts and circumstances of this case are not the same now as they were when the Settlement Agreement was approved and the Facility is not going to be built as described in the Petition and the Settlement Agreement.**

### **"Kirby Farm is the Only Available Land on Which to Build the Facility"**

Page 2 of the BPU Order dated 04/12/12, in pertinent part, reads "Because the Kirby Farm has approximately 55 acres available for the Solar Facility, KDC SA believes the Kirby Farm is the only available land on which to build the proposed KDC/Sanofi Solar Facility." The State of New Jersey's Energy Master Plan (EMP) encourages the development of renewable resources but it does not support the subsidized conversion of productive farmland to solar energy uses (NJ 2011 EMP, p. 107). **The conversion of the Kirby Farm to solar energy development is inconsistent with state policy particularly since the Sanofi Campus has ample impervious**

**cover available to house the Facility.** Exhibit C3 lists a total of 46.62 acres (32.26 + 9.76 + 4.60) of impervious cover on the 149.154 acre Sanofi Campus (Lot 1, Block 485). As per Exhibit E1, the Kirby-West parcel is 107.22 acres in size and, as per KDC Solar’s Engineer, Exhibit E2 states lot coverage of the Facility as 27.24% (or 29.21 acres of lot coverage). **Clearly, the 149+ acre Sanofi Campus could easily accommodate the 29.21 acre Facility on the Campus’ 46.62 acres of existing rooftops, parking lots and other impervious cover.**

### **Undisclosed Facts Regarding the Sanofi Campus End-User**

The following previously undisclosed facts illustrate how and why the proposed solar facility would function as and assume the characteristics of a public utility:

1. The Sanofi Campus is not owned by Sanofi-Aventis. **The Sanofi Campus (Block 485, Lot 1 in Bridgewater Township, NJ) is a 149.154 acre parcel separated by a Master Deed into three separate fee-simple properties** (“Properties” or “Units”) – (See Exhibit G1 attached -Page 1 of Master Deed) and (See Exhibit G2 attached – Page 1 & 2 of Unit IV Deed). **The three properties that comprise the Sanofi Campus are shown on attached Exhibit H- Tax Map and Exhibit I – three property tax sheets).** **The three properties are owned by two different entities who currently lease the three properties to Sanofi-Aventis:**

Buildings I & II (Unit I/II) & Building III (Unit III) are currently owned by:  
Inland America, LLC  
c/o Inland Real Estate Investment Corporation  
2901 Butterfield Road  
Oak Brook, IL 60523

Building IV (Unit IV) is currently owned by:  
55 Corp Unit IV LLC  
c/o Mack Cali Realty Corporation  
343 Thornall Street  
Edison, NJ 08837

Unit IV, a 4-story, 205,439 S.F. building was omitted from Exhibit A of the Petition—the “true and accurate aerial photograph.” (Compare Exhibit A with the correct photo in Exhibit D).

**Will KDC Solar split up its 11 MW Facility into three separate systems – one for each individually metered property on the Sanofi Campus? Each of the three systems would need to be sized to not exceed each individual property’s annual usage and each property would need to be wired separately behind that property’s own meter. Will the generation Facility supply electricity “behind the meter” to the three separate meters on the three separately-owned properties?**

In “Responses of Petitioner KDC Solar LLC to Discovery Requests of Rate Counsel” dated May 23, 2012 (See Exhibit J), the response to RCR-2b states “. . . the entire Sanofi project will be installed behind the meter. . .”. RCR-2g requests Petitioner to “Please identify all customers unaffiliated with Sanofi-Aventis, but located within the Sanofi Campus, that **may** take power from the proposed solar project. Are these customers sub-metered, separately metered, or

not metered. If these customers are separately metered, will they receive electricity generated from the proposed solar facility?” (Emphasis added). Petitioner’s response to RCR-2g was “None. No offtakers, other than Sanofi (or any successor to Sanofi on the Bridgewater Campus), will receive power from the solar system that is the subject of the Petition. There will be no separate sub-metering on the Sanofi campus.” This response from Petitioner flies in the face of the Campus Master Deed which requires separate meters for each property (or Unit) located on the Campus (See attached Exhibit K – Article 11, Sec. 2 (b) of Master Deed).

2. The Campus Master Deed provides for a fifth and sixth building to become part of the Campus Association in the future. So the Campus would eventually contain 6 buildings owned via 5 separate and distinct fee-simple deeds (See Exhibit L).
3. Although Sanofi-Aventis currently occupies the multiple, separately owned properties comprising the Bridgewater Campus, **a Bridgewater Township ordinance permits multiple occupants on the Campus** – (See attached Exhibit M). Therefore, the solar generating Facility will potentially supply electricity to multiple customers on the separately owned properties comprising the Campus.
4. Although the proposed Facility is being built to serve the current occupant of the Bridgewater Campus (Sanofi-Aventis), the Facility may potentially service multiple customers on the Campus by transmitting power across multiple geographic boundaries to properties of widely disparate ownership.

Given the above previously undisclosed facts, the proposed Facility would function as and assume the characteristics of a public utility. Therefore, under EDECA, N.J.S.A. 48:3-49 et seq., the Facility should not be deemed “behind the meter” and does not qualify for the benefits of a net-metered facility.

For the reasons stated above, please rescind the July 18, 2012 Board Order Approving Settlement.

Respectfully,

*Paul J. Matinho*

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Enclosures