

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
Docket No. A-

IN THE MATTER OF THE VERIFIED
PETITION OF THE RETAIL ENERGY
SUPPLY ASSOCIATION SEEKING
WITHDRAWAL OF THE BOARD STAFF'S
CEASE AND DESIST AND REFUND
INSTRUCTIONS LETTER AND
DECLARATION THAT THIRD PARTY
SUPPLIERS CAN PASS THROUGH RPS
COSTS UNDER THE CLEAN ENERGY
ACT, P.L. 2018, C.17.

Civil Action

On Appeal from the New Jersey
Board of Public Utilities

BPU Docket No. EO19020226

BRIEF IN SUPPORT OF MOTION FOR SUMMARY DISPOSITION

BEVAN, MOSCA & GIUDITTA, P.C.

A Professional Corporation
222 Mount Airy Road, Suite 200
Basking Ridge, New Jersey 07920
Murray E. Bevan 034521983
John D. Coyle 029632001
Jesse C. Ehnert 038262007
Tel. (908) 753-8300
jcoyle@bmg.law
Attorneys for the Retail Energy
Supply Association

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PRELIMINARY STATEMENT

Retail Energy Supply Association ("RESA")¹, seeks appellate review of the agency inaction of the New Jersey Board of Public Utilities ("BPU" or "Board") resulting in the effective denial of RESA's Verified Petition Seeking Expedited Formal Hearing and Order ("Petition"). This memorandum of law is submitted in support of RESA's motion to proceed summarily with this appeal.

The Clean Energy Act ("CEA"), enacted on May 23, 2018, required the BPU to implement a number of clean and efficient energy measures, including increasing the renewable portfolio standard obligations ("RPS") for Third Party Suppliers ("Suppliers") and Basic Generation Service ("BGS") providers ("Providers"). The CEA further directed the BPU to equally implement these obligations to Suppliers and Providers in order "to promote competition in the electricity supply industry."

To prevent the utilities BGS customers from unfairly bearing these new obligations, the CEA required Providers to meet these obligations beginning with new supply contracts. Similarly, to prevent Suppliers from unfairly bearing these new obligations, the CEA explicitly directed the BPU to recognize these new obligations "as a change required by operation of law." This would allow Suppliers to pass-through the increased

¹ The comments expressed in this filing represent the position of RESA as an organization but may not represent the views of any particular member of the Association.

obligations created by the newly enacted CEA to their customer on firm or fixed-rate contracts.

However, on January 22, 2019, BPU staff issued "Cease and Desist" letters to Suppliers (including RESA members) stating that the newly enacted increase in the Suppliers solar acquisition requirements contained in the RPS obligations were not a change required by operation of law. The Cease and Desist Letters also ordered Suppliers to immediately refund any amounts passed-through to fixed-rate customers.

Because the Cease and Desist letters completely and unequivocally conflicted with the CEA provision that required the BPU to treat these new obligations as a "change required by operation of law," on January 25, 2019 counsel for RESA contacted Stacy Peterson, author of the Cease and Desist letter and Director of the Division of Energy for the BPU to try and clear up this obvious mistake. On February 6, 2019, Ms. Peterson responded that the BPU would not rescind the Cease and Desist letters and directed RESA to file a petition.

Accordingly, on February 14, 2019, RESA filed the Petition which requested the BPU to enjoin the improper "Cease and Desist" letters. The BPU assigned a docket number to the Petition, parties moved to intervene, and the BPU placed the Petition on the agenda for the March 29, 2019 meeting. However, after New Jersey Senator Bob Smith, sponsor of the CEA

legislation and Chairman of the Senate Energy & Environment Committee sent a letter expressing concern that the Cease and Desist letters were "inconsistent with the explicit language in the law," the BPU "deferred" the Petition.

The Petition was never again placed on another agenda and the BPU never set a briefing schedule, opposed the Petition, or responded to subsequent written requests to move the Petition forward. In fact, nearly two years later, the BPU's online docket still lists the Petition as "under review."

Instead, on December 2, 2020, despite never formally deciding or denying the Petition, the BPU sent a letter to Suppliers reaffirming the Cease and Desist letter's interpretation of law and providing Suppliers with a refund mechanism to avoid "further obligations" due to violating the Cease and Desist letter. The December 2, 2020 letter confirmed that the BPU had *de facto* denied the Petition by refusing to even place the Petition on any BPU agenda. This appeal seeks a reversal of the BPU's denial of the Petition by inaction.

Rules 2:2-3(a)(2) and 2:2-4 permit the direct appeal of administrative agency *inaction* to the Appellate Division. Because the BPU's inaction regarding the Petition constitutes a *de facto* denial, and because a denial of the Petition constitutes a clear error of law, this Court should reverse the denial and grant the relief sought in the Petition.

STATEMENT OF FACTS

On May 23, 2018, Governor Murphy signed the CEA into law. P.L.2018, c.17. This sweeping legislation requires the BPU to implement a number of clean and efficient energy measures. Of critical importance, the Act increased the RPS requirements for both BGS Providers and TPS Suppliers.

Recognizing that Suppliers and Providers would not be able to price these increased RPS obligations into contracts entered before the CEA was passed, the CEA provides mechanisms for both Suppliers and Providers to manage existing contracts. In the case of Providers, the CEA exempts existing contracts from the increased RPS requirements and requires that new Provider contracts account for the exempted increase. N.J.S.A. 48:3-87(d)(3)(c).

By contrast, the CEA includes language in the same subsection that permits Suppliers to pass through the RPS cost increases to customers as a "change required by operation of law," regardless of other contrary law or Board regulations. In pertinent part, the CEA provides:

Notwithstanding any rule or regulation to the contrary, **the board shall recognize these new solar purchase obligations as a change required by operation of law** and implement the provisions of this subsection in a manner so as to prevent any subsidies between suppliers and providers and to promote competition in the electricity supply industry.

N.J.S.A. 48:3-87(d) (3) (c) (emphasis added).

That language from the CEA matches the BPU's own regulation permitting a Supplier to pass-through a cost increase to its fixed-price customers if the "State-mandated charge would be permitted **as a change required by operation of law.**" N.J.A.C. 14:4-7.6(1) (emphasis added).

The vast majority of Suppliers include contractual terms in their customer contracts that allow the Supplier, in accordance with BPU regulations, to pass through a price increase due to a "change required by operation of law." (Certification of Murray E. Bevan dated December 29, 2020 ("Bevan Cert."), Ex. A, ¶9). Based on the unequivocal language from the CEA, coupled with a plain reading of the Board's regulations, many Suppliers passed through the increased RPS costs to their customers on fixed price and other types of contracts. (Id., Ex. A, ¶10).

Considering the direct match between the BPU regulation and the CEA, it was shocking when on January 22, 2019, the BPU Energy Division Director Stacy Peterson issued to "Each New Jersey Third Party Supplier a "Cease and Desist and Refund Instructions" letter. (Id., Ex. B). In pertinent part, the Cease and Desist opines that any Suppliers that increased the rate of their fixed or firm price contracts following passage of the CEA are in violation of the BPU's regulations, specifically N.J.A.C. 14:4-7.6(1) (cited above), as well as N.J.A.C. 14:4-

7.12 which provides that a Supplier utilizing fixed or firm price contracts cannot charge a higher rate than the fixed or firm price provided in the customer's contract. (Id., Ex. B).).

The Cease and Desist directs Suppliers who have increased their "fixed" or "firm" rates to "cease and desist" charging customers a rate in excess of their original contracted rate and refund those customers the amount charged in excess. (Id., Ex. B). The Cease and Desist further directs Suppliers to complete these refunds within five (5) weeks of the date of the letter and send a letter to Ms. Peterson detailing any corrective action taken by the Supplier. (Id. , Ex. B).

On January 25, 2019, RESA replied to the Cease and Desist, requesting that Staff withdraw the Cease and Desist and issue a letter to Suppliers advising that those Suppliers with appropriate change in law provisions in their contracts may pass through the costs from the solar RPS increase to their customers. (Id., Ex. C).

On February 6, 2019, Stacy Peterson contacted RESA counsel by phone and stated that BPU Staff would not withdraw the Cease and Desist. (Id., ¶6).

PROCEDURAL HISTORY

On or about February 14, 2019, RESA filed the underlying Petition with the BPU. (Bevan Cert., Ex. A). The Petition was assigned BPU Docket No. E019020226.

Two additional Suppliers filed papers in the matter shortly thereafter. On or about February 15, 2019, Freepoint Energy Solutions, LLC filed a letter joining in the Petition. (Id., Ex. D). On or about February 21, 2019, Talen Energy Marketing, LLC filed a Motion to Intervene. (Id., Ex. E). To date, the BPU has not considered or decided either of those submissions.

On or about March 8, 2019, the Division of Rate Counsel filed a request to add attorneys to the service list. (Id., Ex. F).

After the next BPU Board Meeting on March 13, 2020, BPU Chief Counsel Noreen Giblin informed counsel for RESA that BPU staff hoped to have the Petition on the March 29, 2019 BPU Agenda. (Id., ¶10). Accordingly, the BPU listed the RESA Petition on the Agenda for the March 29, 2019 Board meeting. (Id., Ex. G). On March 27, 2019, New Jersey State Senator Bob Smith, sponsor of the CEA and Chairman of the Senate Energy & Environment Committee, sent a letter to Ms. Peterson, regarding the Cease and Desist and the Petition. (Id., Ex. H). Senator Smith's letter cited the above-referenced provisions of the CEA and added:

I understand that despite this language, the BPU has sent cease and desist letter to suppliers in response to adjustments made to their fixed price contracts as a result of the Clean Energy Act's increased Solar RPS.

I am concerned that the BPU's action is inconsistent with what the Legislature intended and inconsistent with the explicit language in the law.

(Id., Ex. H). Senator Smith then concluded by requesting that Ms. Peterson:

provide my office with an explanation for the Board's position on this and what steps can be taken to bring the BPU's action more in line with the legislative authorization prior to Friday's BPU meeting.

(Id., Ex. H).

The minutes from the March 29, 2019 BPU meeting reflect that the Petition was "deferred." (Id., Ex. I).

On or about May 22, 2019, counsel for RESA filed a letter requesting that the BPU address the Petition at the next Agenda Meeting. (Id., Ex. J). The BPU did not respond, did not address the Petition at the next meeting, and to date has never decided the Petition. (Id., ¶ 15).

On October 16, 2020 the BPU listed in Newly Docketed Matters, a matter: IN THE MATTER OF THE CEASE AND DESIST AND REFUND INSTRUCTIONS LETTER OF JANUARY 22, 2019 TO THIRD PARTY SUPPLIERS, 10/14/2020, Docket No. EO20100654. (Id., ¶ 16). Counsel for RESA discussed this matter with the Board's Chief Counsel Abe Silverman on October 19, 2020. (Id., ¶ 17). Mr.

Silverman said the Board Staff were working on a settlement with a third-party supplier to resolve its violation of the cease and desist letter. (Id., ¶ 17). Counsel for RESA renewed his request to have the Board act on the Petition. (Id., ¶ 17). Instead of acting on the Petition, the Board placed the EO20100654 matter on its December 2 Agenda for Executive Session consideration. (Id., ¶ 18; Ex. L).

By letter to all New Jersey Suppliers (including RESA members) dated December 2, 2020 (the "December Letter"), the BPU referenced the Cease and Desist and provided instructions on how Suppliers should comply. (Id., Ex. K). The December Letter purports to provide a "pathway" for Suppliers to "reach resolution and to close out the matter by certifying that they have substantively complied with the terms of this subsequent Secretary's Letter." (Id., Ex. K, p.1). The remainder of the December Letter sets forth the required terms for compliance. (Id., Ex. K at pp.2-3).

ARGUMENT

POINT I

THE BPU'S INACTION ON THE VERIFIED PETITION IS APPEALABLE AS OF RIGHT.

N.J.S.A. 48:2-43 provides that "[a]ny order made by the [BPU] may be reviewed by appeal to the appellate division of the Superior Court." Here, no order was ever entered. Indeed, the

BPU is not permitted to prevent a party from obtaining appellate review by simply leaving a petition "under review." This is because Rules 2:2-3(a)(2) and 2:2-4 empower the Appellate Division to review not just agency action, but inaction. Hosp. Ctr. at Orange v. Guhl, 331 N.J. Super. 322, 329 (App. Div. 2000) ("the Appellate Division has exclusive jurisdiction to consider a claim of state administrative agency inaction").

The Appellate Division in Twp. of Neptune v. State, Dep't of Env'tl. Prot., outlined the steps for obtaining appellate review of agency inaction:

The appropriate procedural route for a party claiming to be adversely affected by the inaction of a state administrative agency is to file a notice of appeal and motion for summary disposition accompanied by a supporting brief, certification and other relevant factual materials. The agency's response to such a motion affords the Appellate Division an opportunity to determine whether there is any dispute concerning the factual allegations upon which an inaction claim is grounded. If there is no dispute, th[e Appellate Division] can proceed to a prompt disposition of the claim. If there is a dispute, the matter can be remanded to the agency, an Administrative Law Judge or the Law Division to develop a record and make appropriate factual findings."

425 N.J. Super. 422, 427 (App. Div. 2012) (quoting Hosp. Ctr., 331 N.J. Super. at 330).

A motion for summary disposition in this Court serves a purpose similar to a motion for summary judgment at the trial

court level. See R. 2:8-3(b). It can be used by a respondent to seek dismissal of an appeal prior to full briefing, but it can also be used by an appellant seeking reversal where an agency "was patently in error." Id. cmt. 2. It is in that latter context that this motion is submitted.

Here, the BPU clearly erred by failing even to address the Petition. Its *de facto* denial of the Petition through the December Letter was also error, because the law is clear and does not permit the cease-and-desist order or more generally any prohibition against adjusting fees to account for the new charges imposed by the Clean Energy Act. This case is therefore amenable to summary disposition, because the "ultimate outcome is so clear as not to require full perfection and hearing for decision." R. 2:8-3(b) cmt. 2.

The BPU failed to address the Petition filed nearly two years ago. No responsive filing was made in opposition to the Petition. See N.J.A.C. 14:1-6.2(a) (answer must be filed within 20 days). The BPU cannot plausibly argue that it properly decided the Petition, because such order must be in writing and by a majority vote of the board. N.J.S.A. 48:2-40(a)-(b). No written order was ever served on RESA, and no order appears on the BPU's online docket. The BPU declined even to determine whether to hear the Petition as a contested or uncontested case pursuant to N.J.A.C. 14:1-8.1 through -9.6.

When RESA's counsel filed a further request with the BPU in May 2019 to have the Petition placed on the next meeting agenda, the request went ignored. (Bevan Cert., Ex. I). The BPU's December 2, 2020 letter to third-party suppliers confirmed its *de facto* denial of the Petition. Therefore, we respectfully submit that this matter is properly before the Appellate Division for summary disposition.

POINT II

**THE PETITION SHOULD HAVE BEEN GRANTED
BECAUSE THE BPU'S CEASE-AND-DESIST LETTER IS
IN DIRECT CONFLICT WITH THE CLEAN ENERGY
ACT.**

RESA submitted its Petition as the representative of its members, the Suppliers who suffered threatened injury as a result of the Cease & Desist. See In re Middlesex Reg'l Educ. Servs. Com'n Name Change Request, 453 N.J. Super. 243, 250-51 (App. Div. 2018) (explaining representative standing).

The Cease and Desist violates clear and unambiguous statutory language. Suppliers are obligated by law to purchase solar renewable energy certificates ("SRECs") based on a percentage of retail load served. However, when the CEA increased the RPS requirements for Suppliers and Providers, it specifically exempted existing contracts:

The solar renewable portfolio standards requirements in this paragraph shall exempt those existing supply contracts which are

effective prior to the date of enactment of P.L.2018, c.17 (C.48:3-87.8 et al.) from any increase beyond the number of SRECs mandated by the solar renewable energy portfolio standards requirements that were in effect on the date that the providers executed their existing supply contracts. This limited exemption for providers' existing supply contracts shall not be construed to lower the Statewide solar sourcing requirements set forth in this paragraph. Such incremental requirements that would have otherwise been imposed on exempt providers shall be distributed over the providers not subject to the existing supply contract exemption until such time as existing supply contracts expire and all providers are subject to the new requirement in a manner that is competitively neutral among all providers and suppliers. Notwithstanding any rule or regulation to the contrary, the board shall recognize these new solar purchase obligations as a change required by operation of law and implement the provisions of this subsection in a manner so as to prevent any subsidies between suppliers and providers and to promote competition in the electricity supply industry.

N.J.S.A. 48:3-87(d) (3) (c).

The BPU's regulations provide that a Supplier's contract "may not include provisions (sometimes referred to as 'material change notices') that permit the [Supplier] to change material terms of the contract without the customer's affirmative authorization **unless the change is required by operation of law.**" N.J.A.C. 14:4-7.6(1). That exception is clearly invoked by the above-quoted statute: it specifically requires that the BPU "**shall recognize these new solar purchase obligations as a**

change required by operation of law.” N.J.S.A. 48:3-87(d)(3)(c). Under any reasonable statutory interpretation, the above language permits Suppliers to adjust contracts in force at the time the CEA was enacted under the “operation of law” exception.

The Cease and Desist letter stated just the opposite. It required Suppliers to fund subsidies to the solar industry under existing contracts without any recourse or means to recover those costs. (Bevan Cert., Ex. B). That directive exceeds the BPU’s authority under the clear and express terms of the CEA treating the changes to the RPS as “a change required by operation of law.” N.J.S.A. 48:3-87(d)(3)(c).

The actions taken by Staff in issuing the Cease and Desist also fall woefully short of the Board’s basic administrative law obligations under the APA, pursuant to which the Board must act with transparency through the provision of prior notice and an opportunity for comment. See, e.g., In re Provision of Basic Generation Service for the Period Beginning June 1, 2008, 205 N.J. 339 (2011). Simply stated, the issuance of a mandate from Staff to Suppliers, without official Board action through an Order or the provision of notice and an opportunity for public comment, is not an appropriate exercise of the Board’s authority, as the letter itself was sent unsanctioned by the Board.

An agency such as the Board has many means to implement legislative policy, including rulemaking proceedings, contested hearings, and hybrid informal methods. However, an agency's action, and its discretionary choice of action, "are valid only when there is compliance with the provisions of the [APA], and due process requirements." Id. at 347 (internal citation omitted).

In the instant action, RESA members do not have the benefit of a Board Order which was the case in In re Provision of Basic Generation Service, supra, although it was still not sufficient to overcome the requirements of the APA. Nor has there been notice and an opportunity for comment, as there would be in a formal rulemaking proceeding. There was only a letter issued by Board Staff, unsupported by the CEA, and without any consideration for the due process requirements that should have been afforded to Suppliers.

Because the Cease and Desist is not withdrawn, it amounted to an improper regulatory taking of Suppliers' contractual interests and rights.

The December Letter only compounded the BPU's error. The BPU enacted the December Letter as an Order entered in closed executive sessions. (Bevan Cert., Ex. L (agenda for December 2, 2020 meeting)). The agenda states that the December Letter is a "settlement agreement issued by way of Secretary's Letter

to Third Party Suppliers in response to a Cease and Desist Letter sent by Staff on January 22, 2019 concerning certain rate increases on fixed term contracts" -- in other words, the same Cease and Desist challenged herein.

The December Letter expressly referenced the January 2019 Cease and Desist, correctly noting that it was issued by "Board Staff," and "set forth Staff's view that changes to the solar carve-out in the 2018 solar renewable portfolio standard law [in the CEA] were not an acceptable justification for charging more than the fixed rate." (Bevan Cert., Ex. K at p.1).

The December Letter went on to require each Supplier to do the following:

- Certify to the BPU that they complied with the terms of the December Letter;
- Refrain from maintaining the price adjustments for existing contracts as a result of increased RPS costs;
- Provide a refund to certain residential customers;
- "[P]lace an electronic banner on the main page of its website for residential customers and [small commercial customers utilizing 11,000 kWh or less per year]," for a period of 60 days, which links customers to another webpage for the purposes of applying for refunds;

- Calculate refunds based on each applicant's "account status, contract terms, and usage" and state "the number of customers who sought a refund, the number of customers deemed ineligible and the reasons for the ineligible classification, the number of refunds actually issued and pending, the dates and amounts of the refunds or projected refunds, and all other information that may be relevant in the Board's evaluation of compliance by the [Supplier]."

(Id., Ex. K, pp.2-3).

The December Letter further directed that any discussion should be via email to Lanhi Saldana. (Id., Ex. K, p.1). It directed any Supplier seeking to opt into the "settlement" to "notify the Secretary of the Board of their intent to comply by sending a letter to board.secretary@bpu.nj.gov, which will be placed into the public record of this docket." (Id., Ex. K, p.3). Finally, the December Letter provided that those in compliance with the above terms would "thereafter be released from the January 22 Letter." (Id.).

Thus, not only did the BPU sidestep the Petition by entering the above "Order" in "settlement" of the dispute, but it did so in closed session with no opportunity for notice or comment.

The Cease and Desist from January 2019, as enforced by the December Letter in 2020, is contrary to law, and the BPU acted outside its authority by effectively imposing new rules while ignoring the Petition for nearly two years. Because the law is clear, the Petition should have been granted and the Cease and Desist letter withdrawn.

CONCLUSION

The Cease and Desist letter lacks the force of law and was properly opposed by RESA nearly two years ago. RESA properly filed the Petition to challenge the Cease and Desist. The BPU has refused to place the Petition on any agenda or oppose the Petition as required by law. Instead, nearly two years later, the Petition remains "under review." The BPU's failure to address it has effectively denied it, and the recent December Letter *de facto* confirms that denial.

The law is clear: The majority of Suppliers, whose contracts permit them to pass through a price increase due to a "change required by operation of law," are expressly permitted to do so for contracts in force when the CEA was enacted. Both the BPU Staff's Cease and Desist Letter, and the BPU's December Letter, exceed the BPU's authority by imposing requirements that clearly contradict statutory law.

Accordingly, the *de facto* denial of the BPU should be reversed, and the Petition should be granted.

BEVAN, MOSCA & GIUDITTA, P.C.
Attorneys for Appellant

By: s/ John D. Coyle
John D. Coyle

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