SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
Docket No. A-001229-20

IN THE MATTER OF THE VERIFIED PETITION OF THE RETAIL ENERGY SUPPLY ASSOCIATION SEEKING WITHDRAWAL OF 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

APPELLANT'S BRIEF

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PRELIMINARY STATEMENT

The Retail Energy Supply Association ("RESA") seeks appellate review of an ultra vires action by the New Jersey Board of Public Utilities ("BPU" or "Board") that violates the clear statutory language of the Clean Energy Act of 2018 ("CEA"). This appeal boils down to one very simple and straightforward statutory interpretation question: Does the CEA allow third party suppliers to pass through to customers on fixed price contracts the increased costs of compliance with solar renewable portfolio standards ("RPS")? The answer is an unequivocal yes.

The Clean Energy Act ("CEA"), enacted on May 23, 2018, increased the RPS obligations for third party suppliers ("Suppliers" or "TPS") and basic generation service ("BGS") providers ("Providers" or "BGS"). *See* P.L.2018, c.17, codified as N.J.S.A. § 48:3-87(d)(3)(c). These increased obligations also increased third party suppliers' costs, and thus placed those Suppliers at a competitive disadvantage as compared to the BGS providers. In order to prevent third party suppliers from unfairly bearing these new obligations and their attendant increased costs, the Legislature expressly directed the BPU to recognize these new CEA-imposed obligations "as a change required by operation of law." This would allow third party suppliers to pass-through the increased expenses created by the newly enacted CEA to their customers on firm or fixed-rate contracts.

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).

The Legislature clearly intended for that "change required by operation of law" language from the CEA to exactly match the language in the BPU's regulation, which permits 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(l) (emphasis added).

Based on the CEA's clear and unequivocal language, many Suppliers passed through the increased solar RPS costs to their customers on fixed price and other types of contracts after the CEA was enacted.

However, the BPU ignored the clear mandate from the Legislature to adjust its prior interpretation of the regulation regarding changes required by operation of law. In violation of the CEA, the BPU issued a "Cease and Desist" Letter to Suppliers in January 2019, and a follow-up Cease and Desist settlement instructions letter on December 2, 2020, which operated as a de

facto denial of RESA's February 2019 petition challenging the first cease and desist letter.

This appeal seeks a ruling regarding the proper interpretation of the CEA, and an order directing the BPU to withdraw its "Cease and Desist" letters, which are in direct conflict with the unambiguous statutory language and the Legislature's intent to permit Suppliers to recoup their added CEA-imposed costs from customers on fixed price contracts.

PROCEDURAL HISTORY

On April 15, 2013, the Board of Public Utilities published a rulemaking that included adding N.J.A.C. § 14:4-7.6(l) to the BPU's energy competition regulations. (Appendix at Aa107). This regulation provides as follows:

> ***(l)*** The contract may not include provisions (sometimes referred to as "material change notices") that permit the TPS to change material terms of the contract without the customer's affirmative authorization unless the change is required by operation of law. "Material terms of a contract" include, but are not limited to, terms regarding the price, deliverability, time period of the contract, or ownership of the gas or electricity. "Non-material" terms include those regarding the address where payments should be sent or the phone number to be used for customer inquiries. Changing the price to reflect a change in the Sales and Use Tax **or other State-mandated charge would be permitted as a change required by operation of law.**

N.J.A.C. § 14:4-7.6(l) (emphasis added).

During the rulemaking process, the BPU rejected comments filed by RESA[2] that recommended changes to the proposed regulatory language. (See BPU's response to Comment 21, Appendix at Aa108-109).

In 2014 RESA filed the following comments challenging this same regulation during the BPU's Solar Act implementation proceeding:

> Comment: RESA notes that as TPSs are not exempt from the increased solar obligation imposed by the Solar Act,

[2] The arguments presented by RESA in this appeal represent the position of RESA as an organization but may not represent the view of any particular member of the Association. Founded in 1990, RESA is a broad and diverse group of retail energy suppliers dedicated to promoting efficient, sustainable, and customer-oriented competitive retail energy markets.

> they are competitively disadvantaged because they must re-open all their existing contracts to pass the increased cost on to their customers. RESA's concern is that the Board's Energy Competition rules bar TPSs from changing contract prices without the consent of the customer. The sole exception to this rule is found at N.J.A.C. 14:4-7.6(1), which allows such unilateral price changes if there is a change in the Sales and Use Tax "or other state-mandated change." RESA asks that the Board amend N.J.A.C. 14:4-7.6(1) to include changes in the RPS among "state-mandated" changes.

BPU staff's response to RESA avoided addressing this part of RESA comments. (See Appendix at Aa121)

On May 23, 2018, Governor Murphy signed the Clean Energy Act into law. P.L.2018, c.17. 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).

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, which ignored the Legislature's directive in the Clean Energy Act. (Appendix at Aa016). This letter opines that any Suppliers that increased the price 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(l). The letter 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 to refund those customers the amount charged in excess within five (5) weeks of the date of the letter.

On January 25, 2019, RESA replied to the "Cease and Desist" letter, requesting that BPU Staff withdraw the "Cease and Desist" letter and issue a new letter to Suppliers advising that those Suppliers with appropriate change in law provisions in their contracts could pass through the costs from the solar RPS increase to their customers. (Appendix at Aa019). This request was entirely consistent with the CEA's statutory mandate.

On or about February 14, 2019, RESA filed a Petition with the BPU seeking withdrawal of BPU Staff's January 22, 2019, "Cease and Desist" letter because it contravenes the Clean Energy Act. (Appendix at Aa022). This Petition sets forth essentially the same arguments as in RESA's January 25, 2019, letter to the BPU and as argued by RESA in this appeal. The Petition was assigned BPU Docket No. EO19020226.

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 RESA Petition. (Appendix at Aa038). On or about February 21, 2019, Talen Energy Marketing, LLC filed a Motion to Intervene. (Appendix at Aa039).

The BPU listed the RESA Petition on the Agenda for the March 29, 2019 Board meeting. (Appendix at Aa054).

On March 27, 2019, New Jersey State Senator Bob Smith, sponsor of the CEA at issue in this appeal and Chairman of the Senate Environment & Energy Committee, sent a letter to Ms. Peterson at the BPU regarding her "Cease and Desist" letter and RESA's Petition. (Appendix at Aa052). 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.). 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.).

Two days later, the minutes from the March 29, 2019 BPU meeting reflect that RESA's Petition was "deferred." (Appendix at Aa062). On or about May 22, 2019, counsel for RESA filed a letter requesting that the BPU address the Petition at the next Agenda Meeting. (Appendix at Aa093). The BPU did not respond to

this letter, did not address RESA's Petition at the next meeting, and to date has never decided the Petition.

Over a year and one-half later, on December 2, 2020, the BPU Secretary issued a letter to all New Jersey Third Party Suppliers (including RESA members) (the "December Letter"), which referenced the January 22, 2019 "Cease and Desist" letter and provided instructions on how other Suppliers could "opt into this settlement" by issuing refunds to certain customers. (Appendix at Aa095). 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." The remainder of the December Letter sets forth the required terms for compliance. The letter further states that "[t]hose who complete compliance with the foregoing requirements will thereafter be released from the January 22 Letter."

The BPU issued the December Letter after discussion in a closed executive session. (Appendix at Aa101). The December 2, 2020, BPU meeting 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". (Appendix at Aa101).[3]

[3] On February 8, 2021, the New Jersey Attorney General filed with this Court a statement of items comprising the agency record which included several letters from third party suppliers regarding their compliance with the terms of the BPU's December 2, 2020, "cease and desist" settlement instructions letter (Item Nos. 9 – 15, 17 – 20). These letters are not at all relevant to the statutory interpretation question before this Court and lend no validity to the BPU's ultra vires actions. The only arguable relevance of these letters is their support for the timeliness and necessity of RESA's appeal. These supplier letters show that the BPU's December 2, 2020, cease and desist settlement instructions letter (which was a de facto denial of RESA's February 2019 petition) is equivalent to a final agency action.

STATEMENT OF FACTS

This appeal is focused on a purely legal question. Other than what has already been stated in the procedural history, there are no facts relevant to this appeal. Furthermore, the Attorney General ("AG"), on behalf of the BPU, stated in its earlier brief to this Court that "[t]here are no material facts in dispute".[4] The AG also stated: "Because they are closely related, the facts and procedural history are combined for efficiency and the court's convenience."[5] RESA agrees with the AG that there are no facts in dispute and the facts are intertwined with the procedural history.

[4] New Jersey Attorney General's February 5, 2021, letter brief (on behalf of the BPU) at 3.

[5] *Id.* at 3 n. 2.

ARGUMENT

I. RESA'S POSITION IS SUPPORTED BY THE PLAIN LANGUAGE AND CLEAR LEGISLATIVE INTENT OF THE CLEAN ENERGY ACT. (Raised below but de facto denied by the BPU: Aa095)

The applicable "de novo" standard of review for an appeal of an agency's interpretation of a statute has been explained by the New Jersey Supreme Court as follows:

> [W]hen an agency's decision is based on the agency's interpretation of a statute or its determination of a strictly legal issue, we are not bound by the agency's interpretation. Statutory interpretation involves the examination of legal issues and is, therefore, a question of law subject to de novo review. When discerning the meaning of a statute, our role is to discern and effectuate the intent of the Legislature. Toward that end, the plain language of the statute provides the starting point for the analysis. The language of the statute must be construed in accordance with its ordinary and common-sense meaning.

Saccone v. Bd. of Trs. of Police & Firemen's Ret. Sys., 219 N.J. 369, 380, 98 A.3d 1158, 1164 (2014) (internal quotations and citations omitted). "[T]he best indicator of legislative intent is the plain language chosen by the Legislature…. If the language leads to a clearly understood result, the judicial inquiry ends without any need to resort to extrinsic sources. *State v. Hudson*, 209 N.J. 513, 529-30, 39 A.3d 150, 159-60 (2012) (internal citations omitted).

The BPU's "cease and desist" letters have essentially required third party suppliers to fund subsidies to the solar

industry under existing contracts without any recourse or means to recover those costs. That directive exceeds the BPU's authority under the clear and express terms of the Clean Energy Act. The Legislature provided mechanisms in the CEA for both third party suppliers and BGS providers to manage existing contracts, recognizing that third party suppliers and basic generation service (BGS) providers would not otherwise be able to price the increased solar RPS obligations into contracts executed with customers before the CEA was passed. In the case of BGS providers, the CEA exempts existing contracts from the increased solar RPS requirements and requires that new BGS provider contracts account for the exempted increase. N.J.S.A. § 48:3-87(d)(3)(c). The CEA includes language in the same subsection that permits third party suppliers to pass through the RPS cost to their customers on existing fixed price contracts. *Id.*

The CEA provides, in pertinent part:

> **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).

The BPU's regulation, published five years earlier, provides:

> ***(1)*** The contract may not include provisions (sometimes referred to as "material change notices") that permit the TPS to change material terms of the contract without

> the customer's affirmative authorization unless the change is required by operation of law. "Material terms of a contract" include, but are not limited to, terms regarding the price, deliverability, time period of the contract, or ownership of the gas or electricity. "Non-material" terms include those regarding the address where payments should be sent or the phone number to be used for customer inquiries. **Changing the price to reflect a change in** the Sales and Use Tax or **other State-mandated charge would be permitted as a change required by operation of law.**

N.J.A.C. § 14:4-7.6(l) (emphasis added).

The Legislature intentionally included in the CEA statute the exact same "change required by operation of law" language that is in the Board's previously published regulation. "The words chosen by the legislature are deemed to have been chosen for a reason." *Merin v. Maglaki*, 126 N.J. 430, 435, 599 A.2d 1256, 1259 (1992) (citing *Gabin v. Skyline Cabana Club*, 54 N.J. 550, 555, 258 A.2d 6 (1969)). With this language, the Legislature was instructing the BPU to change its interpretation of its regulation going forward in order to allow third party suppliers to pass through costs associated with the increased solar RPS obligations under existing customer contracts.[6]

Although the Attorney General (on behalf of the BPU) acknowledged in its earlier brief that the "change by operation of law" language in the CEA coincides with the language in the BPU's regulation, N.J.A.C. § 14:4-7.6(l), the AG attempts to convince

[6] *See* Senator Smith's letter to the BPU (Appendix at Aa052).

this Court that the Legislature's intent regarding the pass through of solar RPS costs is nonetheless ambiguous.[7] In reality, the plain meaning of the CEA language could not be more obvious and straightforward. The BPU's regulation N.J.A.C. § 14:4-7.6(1) provides that a third party supplier may pass through a "State-mandated charge" if the charge is "required by operation of law". The CEA, N.J.S.A. § 48:3-87(d)(3)(c), directs the BPU to recognize the new solar RPS purchase obligations as a "change required by operation of law". And RESA member contracts allow them to pass through any "other state mandated charges." The BPU's conclusion that third party suppliers must "cease and desist" from passing through those charges is therefore based on flawed reasoning. The BPU regulation, when interpreted in context with the Legislature's directive to the BPU in the CEA, expressly permits third party suppliers to pass through these state-mandated charges.

II. THE BPU'S INTERPRETATION CONTRADICTS THE CLEAN ENERGY ACT AND IS THEREFORE NOT ENTITLED TO ANY DEFERENCE FROM THIS COURT. (Raised below but de facto denied by the BPU: Aa095)

In the January 2019 "cease and desist" letter the BPU stated: "[t]he rulemaking history of N.J.A.C. 14:4-7.6(1) is instructive to the facts in this matter" and went on to quote the agency's comments in 2013 regarding its own regulation.[8] However, the plain

[7] *See* New Jersey Attorney General's February 5, 2021, letter brief (on behalf of the BPU) at 9-10.

[8] Appendix at Aa016.

language of a statute may not be overridden based on an agency's conflicting interpretation of its regulation. This Court's "role is to enforce the will of the Legislature because statutes cannot be amended by administrative fiat." *In re Agric., Aquacultural, & Horticultural Water Usage Certification Rules*, 410 N.J. Super. 209, 223, 981 A.2d 99, 107-08 (App. Div. 2009) (internal citations omitted). *See also State v. Hudson*, 209 N.J. 513, 529-30, 39 A.3d 150, 159-60 (2012) ("extrinsic aids may not be used to create ambiguity when the plain language of the statute itself answers the interpretative question").

The BPU's January 2019 "cease and desist" letter also attempts to twist the plain meaning of the Clean Energy Act (P.L. 2018, c. 17) in arguing that "TPSs are not required by operation of law to change the prices that they charge to their customers as a result of P.L. 2018, c. 17. Therefore, the fact that a TPS may incur an increase in its costs as a result of P.L. 2018, c. 17 does not permit the TPS to increase fixed rates under N.J.A.C. 14:4-7.6(1), without the customer's affirmative consent."[9] This is a convoluted interpretation of the Clean Energy Act by the BPU that contradicts the plain language of the statute and the Legislature's obvious intent. As such, the BPU is not entitled to any deference from this Court. *See, e.g., N.J. Tpk. Auth. v. AFSCME, Council 73*, 150

[9] Appendix at Aa016.

N.J. 331, 351, 696 A.2d 585, 595 (1997) ("Our case law establishes, however, that if an agency's statutory interpretation is contrary to the statutory language, or if the agency's interpretation undermines the Legislature's intent, no deference is required."); *T.H. v. Div. of Developmental Disabilities*, 189 N.J. 478, 494-495, 916 A.2d 1025, 1033 (2007) ("Although we recognize the deference that an administrative agency regulation is ordinarily accorded, we repeat here the well-established principle that deference is not warranted where the agency alters the terms of a legislative enactment.").

The Deputy Attorney General similarly attempted to muddy the waters by arguing that the CEA statutory language must be interpreted within the context of a complex regulatory scheme.[10] However, "[c]lear legislative intent cannot be trumped

[10] *See* New Jersey Attorney General's February 5, 2021, letter brief (on behalf of the BPU) at 8. In his brief the DAG mischaracterizes the language in *Burnett v. Cnty. of Bergen*, 198 N.J. 408, 421 (2009), which does not state that "statutes and regulations 'must be read in their entirety'". *See* AG's brief at 8. This decision instead states that only statutes must be read in their entirety (without any mention of regulations): "To that end, statutes must be read in their entirety; each part or section should be construed in connection with every other part or section to provide a harmonious whole." *Burnett*, 198 N.J. at 421. The DAG also misconstrues a quote from *Shim v. Rutgers*, 191 N.J. 374, 390-91 (2007). *See* AG's brief at 8. That decision involved an alternative interpretation of a regulation so that it would fit within the statutory framework, but the DAG presented this decision as supporting the opposite premise – that a statute should be interpreted in a way that is consistent with a regulation. Such an argument ignores the hierarchy of administrative law and statutory interpretation. Agency regulations must not conflict with the governing statute, but "if a regulation is plainly at odds with the statute, the Court must set it aside." *Shim*, 191 N.J. at 390.

by countervailing administrative practices." *N.J. Tpk. Auth. v. AFSCME, Council 73*, 150 N.J. 331, 351, 696 A.2d 585, 595 (1997).

III. THE "NOTWITHSTANDING" CLAUSE IN THE CLEAN ENERGY ACT CLEARLY EXPRESSED THE LEGISLATURE'S INTENT TO OVERRIDE THE BPU'S PRIOR REGULATIONS AND AGENCY PRACTICE. (Raised below but de facto denied by the BPU: Aa095)

The BPU has completed ignored the "notwithstanding" clause in the CEA. The Legislature used the language "[n]otwithstanding any rule or regulation to the contrary" in the CEA to provide a clear signal to the BPU that the newly enacted statute supersedes the Board's prior regulations and prior agency practice. "[I]n construing statutes, the use of such a 'notwithstanding' clause clearly signals the drafter's intention that the provisions of the 'notwithstanding' section override conflicting provisions of any other section…..Courts "generally have 'interpreted similar "notwithstanding" language . . . to supersede all other laws…. A 'notwithstanding' clause is a fail-safe way of ensuring that the clause it introduces will absolutely, positively prevail." *Ass'n of N.J. Chiropractors v. State Health Benefits Comm'n*, No. A-5653-14T1, 2018 N.J. Super. Unpub. LEXIS 963, at *8-9 (Super. Ct. App. Div. Apr. 25, 2018) (citing *Cisneros v. Alpine Ridge Grp.*, 508 U.S. 10, 18, 113 S. Ct. 1898, 123 L. Ed. 2d 572 (1993); 3B N. Singer & S. Singer, *Statutes and Statutory Construction* § 77:6 at

315-16 (7th ed. 2011); A. Scalia & B. Garner, *Reading Law: The Interpretation of Legal Texts* 127 (2012)).[11]

The CEA requires the Board (regardless of any existing regulations or agency practice to the contrary) to treat the increased solar RPS obligations as a ''change required by operation of law," and the Board's regulations permit third party suppliers to pass through to their customers any "change required by operation of law". The Legislature's use of the "notwithstanding" clause signaled its unambiguous intent to instruct the BPU to adjust its interpretation of that regulation and allow suppliers to pass through the increased solar RPS costs to customers on fixed price contracts. "The use of such a "notwithstanding" clause clearly signals the drafter's intention that the provisions of the

[11] This unpublished New Jersey Appellate Division opinion is included in the Appendix at Aa110. *See also Cisneros v. Alpine Ridge Grp.*, 508 U.S. 10, 18, 113 S. Ct. 1898, 1903 (1993) ("As we have noted previously in construing statutes, the use of such a "notwithstanding" clause clearly signals the drafter's intention that the provisions of the "notwithstanding" section override conflicting provisions of any other section. See *Shomberg* v. *United States*, 348 U.S. 540, 547-548, 99 L. Ed. 624, 75 S. Ct. 509 (1955). Likewise, the Courts of Appeals generally have "interpreted similar 'notwithstanding' language . . . to supersede all other laws, stating that '"[a] clearer statement is difficult to imagine."'" *Liberty Maritime Corp.* v. *United States*, 289 U.S. App. D.C. 1, 4, 928 F.2d 413, 416 (1991) (quoting *Crowley Caribbean Transport, Inc.* v. *United States*, 275 U.S. App. D.C. 182, 184, 865 F.2d 1281, 1283 (1989) (in turn quoting *Illinois National Guard* v. *FLRA*, 272 U.S. App. D.C. 187, 194, 854 F.2d 1396, 1403 (1988))); see also *Bank of New England Old Colony, N. A.* v. *Clark*, 986 F.2d 600, 604 (CA1 1993); *Dean* v. *Veterans Admin. Regional Office*, 943 F.2d 667, 670 (CA6 991), vacated and remanded on other grounds, 503 U.S. 902 (1992); *In re FCX, Inc.*, 853 F.2d 1149, 1154 (CA4 1988), cert. denied *sub nom. Universal Cooperatives, Inc.* v. *FCX, Inc.*, 489 U.S. 1011, 103 L. Ed. 2d 181, 109 S. Ct. 1118 (1989); *Multi-State Communications, Inc.* v. *FCC*, 234 U.S. App. D.C. 285, 291, 728 F.2d 1519, 1525, cert. denied, 469 U.S. 1017, 83 L. Ed. 2d 358, 105 S. Ct. 431 (1984); *New Jersey Air National Guard* v. *FLRA*, 677 F.2d 276, 283 (CA3), cert. denied *sub nom. Government Employees* v. *New Jersey Air National Guard*, 459 U.S. 988, 74 L. Ed. 2d 384, 103 S. Ct. 343 (1982).").

"notwithstanding" section override conflicting provisions of any other section... A clearer statement is difficult to imagine." *Cisneros v. Alpine Ridge Grp.*, 508 U.S. 10, 18, 113 S. Ct. 1898, 1903 (1993) (internal citations omitted).

CONCLUSION

The BPU exceeded its authority by ordering third party suppliers to comply with a settlement that is based on a faulty interpretation of the Clean Energy Act's plain language. Accordingly, this Court should order the BPU to withdraw the January 2019 "Cease and Desist" letter and the December 2020 settlement letter, as both are contrary to the CEA's intent as clearly set forth in its plain language.

BEVAN, MOSCA & GIUDITTA, P.C.
Attorneys for Appellant
Retail Energy Supply Association

By: /s/ William K. Mosca, Jr.

William K. Mosca, Jr.
Murray E. Bevan
Jennifer McCave

Dated: March 25, 2021

New Jersey Judiciary
Superior Court - Appellate Division

Notice of Appeal

TITLE IN FULL (AS CAPTIONED BELOW)	ATTORNEY / LAW FIRM / PRO SE LITIGANT
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	NAME **JOHN D COYLE, Esq.** STREET ADDRESS **222 MOUNT AIRY RD STE 200** CITY: **BASKING RIDGE** · STATE: **NJ** · ZIP: **07920** · PHONE NUMBER: **908-753-8300** EMAIL ADDRESS **jcoyle@bmg.law** **asullivan@bmg.law (*)**

ON APPEAL FROM

TRIAL COURT JUDGE	TRIAL COURT OR STATE AGENCY	TRIAL COURT OR AGENCY NUMBER
	PUBLIC UTILITIES	**EO19020226**

Notice is hereby given that **RETAIL ENERGY SUPPLY ASSOCIATION** appeals to the Appellate Division from a ☐ Judgment or ☐ Order entered on _____ in the ☐ Civil ☐ Criminal or ☐ Family Part of the Superior Court ☐ Tax Court or from a

■ State Agency decision entered on **01/08/2021**

If not appealing the entire judgment, order or agency decision, specify what parts or paragraphs are being appealed.

The Board's inaction is subject to appeal pursuant to R. 2:2-3(a)(2). Twp. of Neptune v. State, Dep't of Envtl. Prot., 425 N.J. Super. 422, 432 (App. Div. 2012); Hosp. Ctr. at Orange v. Guhl, 331 N.J. Super. 322, 330 (App. Div. 2000).

For criminal, quasi-criminal and juvenile actions only:

Give a concise statement of the offense and the judgment including date entered and any sentence or disposition imposed:

This appeal is from a ☐ conviction ☐ post judgment motion ☐ post-conviction relief ☐ pre-trial detention
If post-conviction relief, is it the ☐ 1st ☐ 2nd ☐ other _____ (specify)

Is defendant incarcerated? ☐ Yes ☐ No

Was bail granted or the sentence or disposition stayed? ☐ Yes ☐ No

If in custody, name the place of confinement:

Defendant was represented below by:

☐ Public Defender ☐ self ☐ private counsel _____ (specify)

(*) truncated due to space limit. Please find full information in the additional pages of the form.

Notice of appeal and attached case information statement have been served where applicable on the following:

	Name	Date of Service
Trial Court Judge		
Trial Court Division Manager		
Tax Court Administrator		
State Agency	**PUBLIC UTILITIES**	**01/08/2021**
Attorney General or Attorney for other Governmental body pursuant to *R.* 2:5-1(a), (e) or (h)		**01/08/2021**

Other parties in this action:

Name and Designation	Attorney Name, Address and Telephone No.	Date of Service
RETAIL ENERGY SUPPLY ASSOCIATION	**JESSE C EHNERT, Esq. BEVAN MOSCA & GIUDITTA PC 222 MOUNT AIRY RD STE 200 BASKING RIDGE NJ 07920 908-753-8300 jehnert@bmg.law,jcoyle@bmg.law,asullivan@bmg.law**	**01/08/2021**
RETAIL ENERGY SUPPLY ASSOCIATION	**MURRAY ERNEST BEVAN, Esq. BEVAN MOSCA & GIUDITTA PC 222 MOUNT AIRY RD STE 200 BASKING RIDGE NJ 07920 908-753-8300 (mbevan@bmg.law)**	**01/11/2021**
PUBLIC UTILITIES	**MELISSA H RAKSA, Esq. ATTORNEY GENERAL LAW 25 MARKET ST PO BOX 112 TRENTON NJ 08625 609-984-3900 dol.appeals@law.njoag.gov (DOLAPPEALS@LPS.STATE.NJ.US,DOLAPPEALS@LPS.STATE.NJ.US)**	**01/08/2021**

Attached transcript request form has been served where applicable on the following:

	Name	Date of Service
Transcript Office		
Clerk of the Tax Court		
State Agency		

(*) truncated due to space limit. Please find full information in the additional pages of the form.

Exempt from submitting the transcript request form due to the following:

■ There is no verbatim record for this appeal.

☐ Transcript in possession of attorney or pro se litigant (four copies of the transcript must be submitted along with an electronic copy).

List the date(s) of the trial or hearing:

☐ Motion for abbreviation of transcript filed with the court or agency below. Attach copy.

☐ Motion for free transcript filed with the court below. Attach copy.

I certify that the foregoing statements are true to the best of my knowledge, information and belief. I also certify that, unless exempt, the filing fee required by *N.J.S.A.* 22A:2 has been paid.

01/08/2021
Date

s/ **JOHN D COYLE, Esq.**
Signature of Attorney or Pro Se Litigant

BAR ID # **029632001** EMAIL ADDRESS **jcoyle@bmg.law,asullivan@bmg.law**

(*) truncated due to space limit. Please find full information in the additional pages of the form.

New Jersey Judiciary
Superior Court - Appellate Division
Notice of Appeal

Additional appellants continued below

Appellant's Attorney Email Address: **jehnert@bmg.law,jcoyle@bmg.law,asullivan@bmg.law**

☐ Plaintiff ☐ Defendant ■ Other (Specify) **PETITIONER**

Name	Client
JESSE C EHNERT, Esq.	**RETAIL ENERGY SUPPLY ASSOCIATION**

Street Address	City	State	Zip	Telephone Number
222 MOUNT AIRY RD STE 200	**BASKING RIDGE**	**NJ**	**07920**	**908-753-8300**

Appellant's Attorney Email Address: **mbevan@bmg.law**

☐ Plaintiff ☐ Defendant ■ Other (Specify) **PETITIONER**

Name	Client
MURRAY ERNEST BEVAN, Esq.	**RETAIL ENERGY SUPPLY ASSOCIATION**

Street Address	City	State	Zip	Telephone Number
222 MOUNT AIRY RD STE 200	**BASKING RIDGE**	**NJ**	**07920**	**908-753-8300**

Additional respondents continued below

Additional parties continued below

Appellant's attorney email address continued below

PARTY NAME: RETAIL ENERGY SUPPLY ASSOCIATION ATTORNEY NAME: JOHN D COYLE, Esq.
jcoyle@bmg.law
asullivan@bmg.law
jehnert@bmg.law
PARTY NAME: RETAIL ENERGY SUPPLY ASSOCIATION ATTORNEY NAME: JESSE C EHNERT, Esq.
jehnert@bmg.law
jcoyle@bmg.law
asullivan@bmg.law
PARTY NAME: RETAIL ENERGY SUPPLY ASSOCIATION ATTORNEY NAME: MURRAY ERNEST BEVAN, Esq.
(mbevan@bmg.law)

Respondent's attorney email address continued below

Additional Party's attorney email address continued below

New Jersey Judiciary
Superior Court - Appellate Division

Civil Case Information Statement

Please type or clearly print all information.

Title in Full	Trial Court or Agency Docket Number
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	**EO19020226**

● Attach additional sheets as necessary for any information below.

Appellant's Attorney * Email Address: **jcoyle@bmg.law**
asullivan@bmg.law (*)

☐ Plaintiff ☐ Defendant ■ Other (Specify) **PETITIONER**

Name	Client
JOHN D COYLE, Esq.	**RETAIL ENERGY SUPPLY ASSOCIATION***

Street Address	City	State	Zip	Telephone Number
222 MOUNT AIRY RD STE 200	**BASKING RIDGE**	**NJ**	**07920**	**908-753-8300**

Respondent's Attorney Email Address: **dol.appeals@law.njoag.gov**
DOLAPPEALS@LPS.STATE.NJ.US

☐ Plaintiff ☐ Defendant ■ Other (Specify) **STATE AGENCY**

Name	Client
MELISSA H RAKSA, Esq.	**PUBLIC UTILITIES**

Street Address	City	State	Zip	Telephone Number
25 MARKET ST PO BOX 112	**TRENTON**	**NJ**	**08625**	**609-984-3900**

Give Date and Summary of Judgment, Order, or Decision Being Appealed and Attach a Copy:
01/08/2021: The Board's inaction with respect to the underlying February 14, 2019 Petition is subject to appeal pursuant to R. 2:2-3(a)(2). Twp. of Neptune v. State, Dep't of Envtl. Prot., 425 N.J. Super. 422, 432 (App. Div. 2012); Hosp. Ctr. at Orange v. Guhl, 331 N.J. Super. 322, 330 (App. Div. 2000).

Have all the issues as to all the parties in this action, before the trial court or agency, been disposed? (There may not be any claims against any party in the trial court or agency, either in this or a consolidated action, which have not been disposed. These claims may include counterclaims, cross-claims, third-party claims, and applications for counsel fees.) ■ Yes ☐ No

If outstanding claims remain open, has the order been properly certified as final pursuant to R. 4:42-2? ☐ Yes ☐ No ■ N/A

A) If the order has been properly certified, attach copies of the order and the complaint and any other relevant pleadings to the order being appealed. Attach a brief explanation as to why the order qualified for certification pursuant to R. 4:42-2.

B) If the order has not been certified or has been improperly certified, leave to appeal must be sought. (See R. 2:2-4; 2:5-6.) Please note that an improperly certified order is not binding on the Appellate Division.

If claims remain open and/or the order has not been properly certified, you may want to consider filing a motion for leave to appeal or submitting an explanation as to why you believe the matter

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is final and appealable as of right.

Were any claims dismissed without prejudice? ☐ Yes ■ No

If so, explain and indicate any agreement between the parties concerning future disposition of those claims.

Is the validity of a statute, regulation, executive order, franchise or constitutional provision of this State being questioned? (*R.* 2:5-1(g)) ☐ Yes ■ No

Give a Brief Statement of the Facts and Procedural History:

On or about February 14, 2019, appellant RESA filed the underlying Petition (the "Petition") with the Board of Public Utilities ("BPU"), Docket No. EO19020226. The Petition sought the withdrawal of a certain Cease and Desist letter issued by BPU staff on January 22, 2019. The Petition was put on the BPU's Agenda for March 29, 2019 Board meeting. The meeting minutes for that meeting show that the Petition was "deferred." Despite RESA's subsequent attempts, BPU never considered or decided the Petition. RESA and its members have been adversely affected by the BPU's de facto denial of the Petition.

To the extent possible, list the proposed issues to be raised on the appeal as they will be described in appropriate point headings pursuant to *R.* 2:5-2(a)(6). (Appellant or cross-appellant only.):

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

If you are appealing from a judgment entered by a trial judge sitting without a jury or from an order of the trial court, complete the following:

1. Did the trial judge issue oral findings or an opinion? If so, on what date? _____ ☐ Yes ■ No
2. Did the trial judge issue written findings or an opinion? If so, on what date? _____ ☐ Yes ■ No
3. Will the trial judge be filing a statement or an opinion pursuant to *R.* 2:5-1(b)? ☐ Yes ■ No ☐ Unknown

Caution: Before you indicate that there was neither findings nor an opinion, you should inquire of the trial judge to determine whether findings or an opinion was placed on the record out of counsel's presence or whether the judge will be filing a statement or opinion pursuant to *R.* 2:5-1(b).

Date of Your Inquiry: **10/19/2020**

1. Is there any appeal now pending or about to be brought before this court which:
   (A) Arises from substantially the same case or controversy as this appeal? ☐ Yes ■ No
   (B) Involves an issue that is substantially the same, similar or related to an issue in this appeal? ☐ Yes ■ No

If the answer to the question above is Yes, state:

Case Title	Trial Court Docket#	Party Name

2. Was there any prior appeal involving this case or controversy? ☐ Yes ■ No

If the answer to question above is Yes, state:

Case Name and Type (direct, 1st PCR, other, etc.)	Appellate Division Docket Number

Civil appeals are screened for submission to the Civil Appeals Settlement Program (CASP) to determine their potential for settlement or, in the alternative, a simplification of the issues and any other matters that may aid in the disposition or handling of the appeal. Please consider these when responding to the following question. A negative response will not necessarily rule out the scheduling of a preargument conference.

State whether you think this case may benefit from a CASP conference. ☐ Yes ■ No

Explain your answer:

Appellant requested as recently as October 2020 that the Respondent act on the underlying Petition, and it has

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refused to do so.

Whether or not an opinion is approved for publication in the official court report books, the Judiciary posts all Appellate Division opinions on the Internet.

I certify that confidential personal identifiers have been redacted from documents now submitted to the court, and will be redacted from all documents submitted in the future in accordance with Rule 1:38-7(b).

RETAIL ENERGY SUPPLY ASSOCIATION	**JOHN D COYLE, Esq.**
Name of Appellant or Respondent	Name of Counsel of Record (or your name if not represented by counsel)
01/08/2021	s/ **JOHN D COYLE, Esq.**
Date	Signature of Counsel of Record (or your signature if not represented by counsel)
029632001	**jcoyle@bmg.law,asullivan@bmg.law**
Bar #	Email Address

(*) truncated due to space limit. Please find full information in the additional pages of the form.

New Jersey Judiciary
Superior Court - Appellate Division
CIVIL Case Information Statement

Additional appellants continued below

Appellant's Attorney Email Address: **jehnert@bmg.law,jcoyle@bmg.law,asullivan@bmg.law**

☐ Plaintiff ☐ Defendant ■ Other (Specify) **PETITIONER**

Name	Client
JESSE C EHNERT, Esq.	**RETAIL ENERGY SUPPLY ASSOCIATION**

Street Address	City	State	Zip	Telephone Number
222 MOUNT AIRY RD STE 200	**BASKING RIDGE**	**NJ**	**07920**	**908-753-8300**

Appellant's Attorney Email Address: **mbevan@bmg.law**

☐ Plaintiff ☐ Defendant ■ Other (Specify) **PETITIONER**

Name	Client
MURRAY ERNEST BEVAN, Esq.	**RETAIL ENERGY SUPPLY ASSOCIATION**

Street Address	City	State	Zip	Telephone Number
222 MOUNT AIRY RD STE 200	**BASKING RIDGE**	**NJ**	**07920**	**908-753-8300**

Additional respondents continued below

Additional parties continued below

Appellant's attorney email address continued below

PARTY NAME: RETAIL ENERGY SUPPLY ASSOCIATION ATTORNEY NAME: JOHN D COYLE, Esq.
jcoyle@bmg.law
asullivan@bmg.law
jehnert@bmg.law
PARTY NAME: RETAIL ENERGY SUPPLY ASSOCIATION ATTORNEY NAME: JESSE C EHNERT, Esq.
jehnert@bmg.law
jcoyle@bmg.law
asullivan@bmg.law
PARTY NAME: RETAIL ENERGY SUPPLY ASSOCIATION ATTORNEY NAME: MURRAY ERNEST BEVAN, Esq.
(mbevan@bmg.law)

Respondent's attorney email address continued below

Additional Party's attorney email address continued below

New Jersey Judiciary
Superior Court - Appellate Division

Amended Notice of Appeal

TITLE IN FULL (AS CAPTIONED BELOW)	ATTORNEY / LAW FIRM / PRO SE LITIGANT
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	NAME **JOHN D COYLE, Esq.** STREET ADDRESS **222 MOUNT AIRY RD STE 200** CITY: **BASKING RIDGE** STATE: **NJ** ZIP: **07920** PHONE NUMBER: **908-753-8300** EMAIL ADDRESS **jcoyle@bmg.law** **asullivan@bmg.law (*)**

ON APPEAL FROM

TRIAL COURT JUDGE	TRIAL COURT OR STATE AGENCY	TRIAL COURT OR AGENCY NUMBER
	PUBLIC UTILITIES	**EO19020226**

Notice is hereby given that **RETAIL ENERGY SUPPLY ASSOCIATION** appeals to the Appellate Division from a ☐ Judgment or ☐ Order entered on _____ in the ☐ Civil ☐ Criminal or ☐ Family Part of the Superior Court ☐ Tax Court or from a ■ State Agency decision entered on **01/08/2021**

If not appealing the entire judgment, order or agency decision, specify what parts or paragraphs are being appealed.

***EXPLAIN BRIEFLY THE REASON FOR AMENDING THE NOTICE OF APPEAL

Naming additional parties who appeared in the matter below. They were inadvertently omitted in the Notice of Appeal.

For criminal, quasi-criminal and juvenile actions only:

Give a concise statement of the offense and the judgment including date entered and any sentence or disposition imposed:

This appeal is from a ☐ conviction ☐ post judgment motion ☐ post-conviction relief ☐ pre-trial detention

If post-conviction relief, is it the ☐ 1st ☐ 2nd ☐ other _____ (specify)

Is defendant incarcerated? ☐ Yes ☐ No

Was bail granted or the sentence or disposition stayed? ☐ Yes ☐ No

If in custody, name the place of confinement:

Defendant was represented below by:

(*) truncated due to space limit. Please find full information in the additional pages of the form.

☐ Public Defender ☐ self ☐ private counsel _____ specify

Notice of appeal and attached case information statement have been served where applicable on the following:

	Name	Date of Service
Trial Court Judge		
Trial Court Division Manager		
Tax Court Administrator		
State Agency	**PUBLIC UTILITIES**	**01/25/2021**
Attorney General or Attorney for other Governmental body pursuant to *R.* 2:5-1(a), (e) or (h)		**01/25/2021**

Other parties in this action:

Name and Designation	Attorney Name, Address and Telephone No.	Date of Service
RETAIL ENERGY SUPPLY ASSOCIATION	**JESSE C EHNERT, Esq. BEVAN MOSCA & GIUDITTA PC 222 MOUNT AIRY RD STE 200 BASKING RIDGE NJ 07920 908-753-8300 jehnert@bmg.law,jcoyle@bmg.law,asullivan@bmg.law**	**01/25/2021**
RETAIL ENERGY SUPPLY ASSOCIATION	**MURRAY ERNEST BEVAN, Esq. BEVAN MOSCA & GIUDITTA PC 222 MOUNT AIRY RD STE 200 BASKING RIDGE NJ 07920 908-753-8300 (mbevan@bmg.law)**	**01/25/2021**
PUBLIC UTILITIES	**DAREN RICHARD EPPLEY, Esq. ATTORNEY GENERAL LAW 25 MARKET ST PO BOX 112 TRENTON NJ 08625 609-984-3900 daren.eppley@law.njoag.gov**	**01/25/2021**
PUBLIC UTILITIES	**MELISSA H RAKSA, Esq. ATTORNEY GENERAL LAW 25 MARKET ST PO BOX 112 TRENTON NJ 08625 609-984-3900 dol.appeals@law.njoag.gov**	**01/25/2021**

(*) truncated due to space limit. Please find full information in the additional pages of the form.

PUBLIC UTILITIES	**PAUL M YOUCHAK, Esq.** **ATTORNEY GENERAL LAW** **25 MARKET ST** **PO BOX 112** **TRENTON NJ 08625** **609-984-3900** **paul.youchak@law.njoag.gov,youchakp@gmail.com**	**01/25/2021**
DIVISION OF RATE COUNSEL	**STEFANIE A BRAND, Esq.** **DIVISION OF RATE COUNSEL** **140 EAST FRONT STREET 4TH FL** **PO BOX 003** **TRENTON NJ 08625** **609-984-1460** **sbrand@rpa.nj.gov**	**01/25/2021**
DIVISION OF RATE COUNSEL	**BRIAN O LIPMAN, Esq.** **DIVISION OF RATE COUNSEL** **140 EAST FRONT STREET 4TH FL** **PO BOX 003** **TRENTON NJ 08625** **609-984-1460** **blipman@rpa.nj.gov**	**01/25/2021**
DIVISION OF RATE COUNSEL	**FELICIA THOMAS-FRIEL, Esq.** **DIVISION OF RATE COUNSEL** **140 EAST FRONT STREET 4TH FL** **PO BOX 003** **TRENTON NJ 08625** **609-984-1460** **(fthomas@rpa.nj.gov)**	**01/25/2021**
DIVISION OF RATE COUNSEL	**MAURA A CAROSELLI, Esq.** **DIVISION OF RATE COUNSEL** **140 EAST FRONT STREET 4TH FL** **PO BOX 003** **TRENTON NJ 08625** **609-984-1460** **mcaroselli@rpa.nj.gov,macwoman33@yahoo.com**	**01/25/2021**
TALEN ENERGY MARKETING, LLC	**IRA G MEGDAL, Esq.** **COZEN O'CONNOR A PA PC** **457 HADDONFIELD RD STE 300** **PO BOX 5459** **CHERRY HILL NJ 08002**	**01/25/2021**

(*) truncated due to space limit. Please find full information in the additional pages of the form.

856-910-5000
imegdal@cozen.com

FREEPOINT ENERGY SOLUTIONS LLC	**FREEPOINT ENERGY SOLUTIONS LLC** **3050 POST OAK BLVD** **SUITE 1330** **HOUSTON TX 77056** **800-982-1670** **(SPATRU@FREEPOINT.COM)**	**01/25/2021**

Attached transcript request form has been served where applicable on the following:

Name	Date of Service
Transcript Office	
Court Reporter (if applicable)	
Supervisor of Court Reporters	
Clerk of the Tax Court	
State Agency	

Exempt from submitting the transcript request form due to the following:

■ There is no verbatim record for this appeal.

☐ Transcript in possession of attorney or pro se litigant (four copies of the transcript must be submitted along with an electronic copy).

List the date(s) of the trial or hearing:

☐ Motion for abbreviation of transcript filed with the court or agency below. Attach copy.

☐ Motion for free transcript filed with the court below. Attach copy.

I certify that the foregoing statements are true to the best of my knowledge, information and belief. I also certify that, unless exempt, the filing fee required by *N.J.S.A.* 22A:2 has been paid.

01/25/2021
Date

s/ **JOHN D COYLE, Esq.**
Signature of Attorney or Pro Se Litigant

BAR ID # **029632001** EMAIL ADDRESS **jcoyle@bmg.law,asullivan@bmg.law**

(*) truncated due to space limit. Please find full information in the additional pages of the form.

New Jersey Judiciary
Superior Court - Appellate Division
Amended Notice of Appeal

Additional appellants continued below

Appellant's Attorney Email Address: **jehnert@bmg.law,jcoyle@bmg.law,asullivan@bmg.law**

☐ Plaintiff ☐ Defendant ■ Other (Specify) **PETITIONER**

Name	Client
JESSE C EHNERT, Esq.	**RETAIL ENERGY SUPPLY ASSOCIATION**

Street Address	City	State	Zip	Telephone Number
222 MOUNT AIRY RD STE 200	**BASKING RIDGE**	**NJ**	**07920**	**908-753-8300**

Appellant's Attorney Email Address: **mbevan@bmg.law**

☐ Plaintiff ☐ Defendant ■ Other (Specify) **PETITIONER**

Name	Client
MURRAY ERNEST BEVAN, Esq.	**RETAIL ENERGY SUPPLY ASSOCIATION**

Street Address	City	State	Zip	Telephone Number
222 MOUNT AIRY RD STE 200	**BASKING RIDGE**	**NJ**	**07920**	**908-753-8300**

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Stacy Peterson
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CEASE AND DESIST AND REFUND INSTRUCTION

January 22, 2019

TO: Each New Jersey Licensed Third Party Supplier

RE: Increase to Fixed Rates – P.L. 2018, c. 17

It has come to Staff's attention that following the passage of P.L. 2018, c. 17, which increased the renewable portfolio standards, there are instances where New Jersey Third Party Suppliers ("TPSs") violated the Board's Energy Competition regulations when they charged a higher rate than the fixed price in the customer's contract. The TPSs increased their fixed rates, either by increasing the fixed rate or by adding a new charge to the customer's bill. This letter serves as a reminder to all TPSs of their obligations to comply with the Board's Energy Competition rules, which prohibit a TPS from changing a fixed price during the term of the contract without the customer's authorization.

Moreover, if your company has increased or charged the customer a rate that is higher than the fixed rate during the period for which the rate was fixed, you are hereby notified that your company is in violation of N.J.A.C. 14:4-7.12. If this is the case, you are instructed to **cease and desist** charging these customers a rate higher than the rate for which they contracted with your company. Further, you are instructed to **refund** to each of these customers the amount that your company charged the customer in excess of the amount it would have charged the customer had the increase not been implemented. You are instructed to complete these refunds within five weeks of the date of this letter.

Pursuant to N.J.A.C. 14:4-7.12, if a TPS signs up a customer or renews a customer for a rate that the TPS characterizes as "fixed" or "firm," or the TPS uses other language to describe the rate as not variable, the TPS may not charge the customer a rate that is higher than the fixed rate during the period for which it is fixed, except as permitted in N.J.A.C. 14:4-7.6(l), without the customer's affirmative consent. N.J.A.C. 14:4-7.6(l) states:

> The contract may not include provisions (sometimes referred to as "material change notices") that permit the TPS to change material terms of the contract without the customer's affirmative authorization unless the change is required by

> operation of law. "Material terms of a contract" include, but are not limited to, terms regarding the price, deliverability, time period of the contract, or ownership of the gas or electricity. . . . Changing the price to reflect a change in the Sales and Use Tax or other State-mandated charge would be permitted as a change required by operation of law.

The rulemaking history of N.J.A.C. 14:4-7.6(l) is instructive to the facts in this matter. Some commenters noted that in addition to a change in sales taxes, a TPS's costs can be affected by a federal or state requirement that increases its costs. As an example, they cited "A2966/S1925 [P.L. 2012, c. 24], a statute that imposes new, costly, solar renewable energy requirements on each TPS." The commenters stated that the TPS must be able to adjust their pricing to account for these changes. In rejecting the comments, the Board stated:

> A TPS may experience increased costs during the time period covered by a contract and wish to increase fixed price customer contracts to recoup these costs. However, for many customers, this would defeat the purpose of a fixed price contract. Customers who choose fixed priced contracts do so in order to avoid price risk. . . . .
>
> Regarding the inclusion of Federal or local mandates in the definition of "non-material," the Board notes that the basis for the exception for State taxes lies in the ability of the State to collect these taxes directly from the customer if not collected by the TPS. Allowing other mandated charges to be included changes the contract from a fixed rate benefiting the customer to a variable rate benefitting the TPS.
>
> [45 N.J.R. 934(b)]

As noted by the above text, TPSs are required by law to collect sales and use taxes from customers and pursuant to N.J.S.A. 54:32B-14, "all sellers of energy or utility service shall include the tax imposed by the "Sales and Use Tax Act" within the purchase price of the tangible personal property or service." TPSs are not required by operation of law to change the prices that they charge to their customers as a result of P.L. 2018, c. 17. Therefore, the fact that a TPS may incur an increase in its costs as a result of P.L. 2018, c. 17 does not permit the TPS to increase fixed rates under N.J.A.C. 14:4-7.6(l), without the customer's affirmative consent.

If your company has increased a rate for electric generation or gas supply service that it has characterized as "fixed" or "firm," or your company has used other language to describe the rate as not variable, and you have charged the customer a rate that is higher than the fixed rate during the period for which the rate was fixed, you are hereby notified that your company is in violation of N.J.A.C. 14:4-7.12. If this is the case, you are instructed to **cease and desist** charging these customers a rate higher than the rate for which they contracted with your company. Further, you are instructed to **refund** to each of these customers the amount that your company charged the customer in excess of the amount it would have charged the customer had the increase not been implemented. You are instructed to complete these refunds within five weeks of the date of this letter.

Finally, you are instructed to send a letter to me by no later than **March 1, 2019** detailing the actions your company has taken to remedy this situation. This letter shall include at a minimum, the number of customers affected, the amounts of the refunds, and the dates of the refunds.

Sincerely,

Stacy Peterson
Director

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January 25, 2019

VIA FEDERAL EXPRESS AND ELECTRONIC MAIL

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Re: January 22, 2019 Cease and Desist Letter to Third Party Suppliers

Dear Ms. Peterson:

We represent the Retail Energy Supply Association ("RESA"),[1] and are in receipt of your January 22, 2019 letter titled "Cease and Desist and Refund Instructions." This letter was sent to many RESA members. We have reviewed the arguments contained in that letter. Unfortunately, the letter overlooks controlling statutory authority that expressly permits RESA members (as well as any and all third party suppliers) to raise prices under the circumstances presented here. We respectfully request that you withdraw the letter, and that the Board not take any further actions inconsistent with relevant law.

Although the letter correctly quotes N.J.A.C. 14:4-7.6(l), it incorrectly ignores the plain language of the regulation. It also completely ignores the recent statute that specifically authorizes the price change.

N.J.A.C. 14:4-7.6(l) reads:

> The contract **may not include** provisions (sometimes referred to as "**material change notices**") that permit the TPS to change material terms of the contract without the customer's affirmative authorization **unless the change is required by operation of law.** "Material terms of a contract" include, but are not limited to, terms

[1] The comments expressed in this filing represent the position of the Retail Energy Supply Association (RESA) as an organization but may not represent the views of any particular member of the Association. Founded in 1990, RESA is a broad and diverse group of retail energy suppliers dedicated to promoting efficient, sustainable and customer-oriented competitive retail energy markets. RESA members operate throughout the United States delivering value-added electricity and natural gas service at retail to residential, commercial and industrial energy customers. More information on RESA can be found at www.resausa.org.

> regarding the price, deliverability, time period of the contract, or ownership of the gas or electricity. "Non-material" terms include those regarding the address where payments should be sent or the phone number to be used for customer inquiries. Changing the price to reflect a change in the Sales and Use Tax **or other State-mandated charge would be permitted as a change required by operation of law**.

(emphasis added). Thus, under this regulation, while a third party supplier may include a material change provision in its consumer contracts, it is only allowed to pass through changes that are required by "operation of law." The letter cites to the last sentence for the proposition that increases to the Sales or Use Tax are the only permitted increases. The regulation states no such thing. The regulation specifically permits a price change to account for any "other State-mandated charge." The operative word in the regulation is "or." This is an "A" or "B" situation. The Sales and Use Tax is "A." The "other State-mandated charge" is "B." The regulation permits a price change to account for any change in either "A" or "B."

The letter then refers to the "rulemaking history" of the regulation to provide context, and then states that any third party supplier's reliance on P.L. 2018, c. 17 is misplaced. That is incorrect. The New Jersey Legislature in P.L. 2018, c. 17 amended and supplemented various statutory provisions and established the solar renewable portfolio standards requirements at issue. In doing so, the Legislature specifically addressed and decided the very issue raised in the letter. Importantly, the Legislature decided this issue exactly contrary to the position provided in the letter. The statute 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).

Many third party suppliers provide service under contracts with their New Jersey customers, and many of these contracts include the following language (in substantial form) that specifically permits the pass through of any new or increased state-mandated charges:

> You are responsible for paying any new or increased taxes, fees or other state mandated charges imposed on [TPS] or you during the term of this Agreement.

The logic of RESA's position here is straightforward and irrefutable:

- N.J.A.C. 14:4-7.6(l) provides that a TPS may pass through a "State-mandated charge" if the charge is "required by operation of law;"
- N.J.S.A. 48:3-87(d)(3)(c) directs the Board of Public Utilities to recognize the new solar purchase obligations as a "change required by operation of law;" and
- RESA member contracts allow them to pass through any "other state mandated charges."

The conclusion that third party suppliers must "cease and desist" from passing through those charges is therefore based on flawed reasoning. The BPU regulation, read in context with the applicable legislation and the contracts in question expressly permit third party suppliers to pass through these state-mandated charges. For that reason, RESA members with the appropriate contract provisions will continue to engage in this lawful behavior. Again, we respectfully request that the Board withdraw the "cease and desist" letter and instead issue a letter advising that third party suppliers may lawfully and appropriately pass through these charges when their contracts so provide.

Should you have any questions, please contact the undersigned at your earliest convenience.

Respectfully submitted,

Murray E. Bevan

cc: Jacqueline Galka, Energy Division
Grace Strom Power, Chief of Staff
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EO 19020226

Re: In the Matter of the Verified Petition of the Retail Energy Supply Association Seeking Withdrawal of 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

Dear Secretary Camacho-Welch:

Enclosed for filing are an original and ten (10) copies of the Verified Petition of the Retail Energy Supply Association ("RESA") Seeking Withdrawal of 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.

Also enclosed is a check in the amount of $25.00 for the requisite filing fee. Please contact me if you have any questions regarding this petition.

Respectfully submitted,

Murray E. Bevan

Enclosures

Cc: Service List

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STATE OF NEW JERSEY
BOARD OF PUBLIC UTILITIES

In the Matter of the Verified Petition of the Retail Energy Supply Association Seeking Withdrawal of 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	**VERIFIED PETITION SEEKING EXPEDITED FORMAL HEARING AND ORDER** Docket No. _____

TO THE HONORABLE BOARD OF PUBLIC UTILITIES:

1. This is a Verified Petition Seeking an Expedited Formal Hearing and Order ("Petition") filed pursuant to N.J.A.C. § 14:1-1 *et seq.* under the rules of practice of the Board of Public Utilities ("Board") by the Retail Energy Supply Association[1] ("RESA" or "Petitioner").

2. This Petition seeks to enjoin the Board of Public Utilities ("Board") from contravening the Clean Energy Act ("CEA"), P.L. 2018., c. 17 by authorizing and/or allowing the issuance of "Cease and Desist" letters that place obligations on Third Party Suppliers ("Suppliers") that are contrary to the express language and intent of the CEA, and which authorization and/or

[1] The comments expressed in this filing represent the position of the Retail Energy Supply Association (RESA) as an organization but may not represent the views of any particular member of the Association. Founded in 1990, RESA is a broad and diverse group of retail energy suppliers dedicated to promoting efficient, sustainable and customer-oriented competitive retail energy markets. RESA members operate throughout the United States delivering value-added electricity and natural gas service at retail to residential, commercial and industrial energy customers. More information on RESA can be found at www.resausa.org.

issuance is inconsistent with both Board Orders and the Board's due process obligations under the Administrative Procedure Act ("APA"), N.J.S.A. 52:14B-1 to -15.

3. Because the Cease and Desist purports to place immediate obligations on Suppliers, RESA hereby requests that the Board grant an Expedited Hearing on this Verified Petition and stay the Cease and Desist until this matter can be resolved.

BACKGROUND

4. RESA is a broad and diverse group of retail energy suppliers that share a common vision that competitive retail energy markets deliver more efficient, customer-oriented outcomes than do regulated utility providers. RESA members offer retail electric and gas service to residential, commercial, and industrial customers in New Jersey, throughout PJM, and in other competitive markets across North America.

5. On May 23, 2018, Governor Murphy signed the CEA into law. This sweeping legislation requires the Board to implement a number of clean and efficient energy measures. Of critical importance, the Act increased the renewable portfolio standard ("RPS") requirements for Suppliers and Basic Generation Service ("BGS") providers ("Providers").

6. 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).

7. The Board's Energy Competition Rules, N.J.A.C. 14:4 *et seq.*, govern Supplier activities in New Jersey, and include enrollment, marketing, and customer contract requirements. More particularly, with respect to Supplier customer contracts, the Board's regulations provide:

> The contract **may not include** provisions (sometimes referred to as "**material change notices**") that permit the TPS to change material terms of the contract without the customer's affirmative authorization **unless the change is required by operation of law**. "Material terms of a contract" include, but are not limited to, terms regarding the price, deliverability, time period of the contract, or ownership of the gas or electricity. "Non-material" terms include those regarding the address where payments should be sent or the phone number to be used for customer inquiries. Changing the price to reflect a change in the Sales and Use Tax **or other State-mandated charge would be permitted as a change required by operation of law**.

N.J.A.C. 14:4-7.6(l) (emphasis added).[2]

8. In other words, the CEA requires the Board (regardless of any existing regulations to the contrary) to treat the increased solar RPS obligations as a "change required by operation of law," and the Board's regulations permit Suppliers to pass through any "change required by

[2] The State-mandated RPS is effectively a charge to customers that is assessed through either Provider contracts or Supplier contracts.

operation of law." It is clear that the CEA language, which exactly mirrors the language of the Board's regulations related to this issue and contained in a subsection of the CEA addressing the issue of existing contracts, was intended to allow Suppliers to pass through costs associated with the increased RPS obligations under existing customer contracts.

9. The vast majority of Suppliers include contractual terms in their customer contracts that allow the Supplier to pass through a price increase due to a "change required by operation of law."

10. 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.

Board Staff's "Cease and Desist and Refund Instructions" Letter

11. On January 22, 2019, Energy Division Director Stacy Peterson issued to "Each New Jersey Licensed Third Party Supplier" a "Cease and Desist and Refund Instructions" letter (the "Cease and Desist") (annexed hereto as "Exhibit A"). 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 Board's regulations, specifically N.J.A.C. 14:4-7.6(l) (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.

12. 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. 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.

13. 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. RESA's response is annexed hereto as "Exhibit B."

14. On February 6, 2019, Stacy Peterson contacted RESA counsel by phone and stated that Staff would not withdraw the Cease and Desist.

15. The issuance of the Cease and Desist has caused an irreparable harm to Suppliers' relationships with their customers and with their partners in the retail supply community.

16. The legal conclusion and direction in the Cease and Desist appears to be based on the erroneous presumption that the language from the CEA, "[n]otwithstanding any rule or regulation to the contrary," does not supersede comments made by the Board when enacting prior regulations.

17. This flawed interpretation is contrary to any theory of statutory interpretation.

18. Suppliers are obligated, by law, to purchase solar renewable energy certificates ("SRECs") based on a percentage of retail load served.

19. The Cease and Desist would require Suppliers to fund subsidies to the solar industry under existing contracts without any possible recourse or means to recover those costs.

20. The Board is obligated, under the clear and express terms of the CEA, to treat the

changes to the solar RPS as "a change required by operation of law." N.J.S.A. 48:3-87(d)(3)(c).

21. The Cease and Desist is therefore inconsistent with the express language and intent of the CEA and should be immediately withdrawn.

22. The Cease and Desist was not authorized by an Order of the Board or by a rulemaking proceeding that provided an opportunity for notice and comment; it is unsupported by Board action.

23. As such, the Cease and Desist was improperly issued; and/or issued pursuant to an improper delegation of Board authority.

Legal Argument

24. The conclusion that Suppliers must "cease and desist" from passing through increased charges due to the CEA appears to be based on the flawed reasoning that comments from the Board Staff *override* a statute that was subsequently enacted by the Senate and General Assembly of the State of New Jersey and signed into law by the Governor on May 23, 2018. The first part of N.J.S.A. 48:3-87(d)(3)(c) directs the Board to recognize and allow this pass-through, "[n]otwithstanding any rule or regulation to the contrary." The position that this mandate from the Legislature does not somehow supersede the Board's regulations is completely without merit.

25. 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.

26. 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).

27. 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 is 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.

28. The Cease and Desist is inconsistent with the requirements of the CEA, which obligates the Board to treat the increased RPS requirements as a change required by operation of law.

29. If the Cease and Desist is not withdrawn, it will amount to an improper regulatory taking of Suppliers' contractual interests and rights.

30. Therefore, RESA respectfully requests an Order from the Board withdrawing the Cease and Desist and notifying Suppliers they may pass through the increased solar RPS costs required by the CEA, pursuant to the terms of their customer contracts.

31. As set forth above, RESA further requests that the Board stay the Cease and Desist until this matter is adjudicated.

Respectfully submitted,

Murray E. Bevan
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Counsel for the Retail Energy Supply Association
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mbevan@bmg.law

Date: February 14, 2019

cc: Attached service list

mbevan@bmg.law

Date: February 13, 2019

cc: Attached service list

VERIFICATION

STATE OF Florida :
:
CITY OF Broward :

I, Garson Knapp, hereby state that I am the New Jersey State Chair of the RETAIL ENERGY SUPPLY ASSOCIATION, the Petitioner in the foregoing Petition; that I am authorized to make this Verification on behalf of the RETAIL ENERGY SUPPLY ASSOCIATION, that the foregoing Petition was prepared under my direction and supervision; and that the statements in the foregoing Petition are true and correct to the best of my knowledge, information, and belief.

Garson Knapp
New Jersey State Chair
RETAIL ENERGY SUPPLY ASSOCIATION

SWORN TO AND SUBSCRIBED before me on the 13th day of February, 2019.

Notary Public

My commission expires: June 13, 2020

MICHELLE CASTILLO
MY COMMISSION # GG001367
EXPIRES June 13, 2020

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CEASE AND DESIST AND REFUND INSTRUCTION

January 22, 2019

TO: Each New Jersey Licensed Third Party Supplier

RE: Increase to Fixed Rates – P.L. 2018, c. 17

It has come to Staff's attention that following the passage of P.L. 2018, c. 17, which increased the renewable portfolio standards, there are instances where New Jersey Third Party Suppliers ("TPSs") violated the Board's Energy Competition regulations when they charged a higher rate than the fixed price in the customer's contract. The TPSs increased their fixed rates, either by increasing the fixed rate or by adding a new charge to the customer's bill. This letter serves as a reminder to all TPSs of their obligations to comply with the Board's Energy Competition rules, which prohibit a TPS from changing a fixed price during the term of the contract without the customer's authorization.

Moreover, if your company has increased or charged the customer a rate that is higher than the fixed rate during the period for which the rate was fixed, you are hereby notified that your company is in violation of N.J.A.C. 14:4-7.12. If this is the case, you are instructed to **cease and desist** charging these customers a rate higher than the rate for which they contracted with your company. Further, you are instructed to **refund** to each of these customers the amount that your company charged the customer in excess of the amount it would have charged the customer had the increase not been implemented. You are instructed to complete these refunds within five weeks of the date of this letter.

Pursuant to N.J.A.C. 14:4-7.12, if a TPS signs up a customer or renews a customer for a rate that the TPS characterizes as "fixed" or "firm," or the TPS uses other language to describe the rate as not variable, the TPS may not charge the customer a rate that is higher than the fixed rate during the period for which it is fixed, except as permitted in N.J.A.C. 14:4-7.6(l), without the customer's affirmative consent. N.J.A.C. 14:4-7.6(l) states:

> The contract may not include provisions (sometimes referred to as "material change notices") that permit the TPS to change material terms of the contract without the customer's affirmative authorization unless the change is required by

> operation of law. "Material terms of a contract" include, but are not limited to, terms regarding the price, deliverability, time period of the contract, or ownership of the gas or electricity. . . . Changing the price to reflect a change in the Sales and Use Tax or other State-mandated charge would be permitted as a change required by operation of law.

The rulemaking history of N.J.A.C. 14:4-7.6(l) is instructive to the facts in this matter. Some commenters noted that in addition to a change in sales taxes, a TPS's costs can be affected by a federal or state requirement that increases its costs. As an example, they cited "A2966/S1925 [P.L. 2012, c. 24], a statute that imposes new, costly, solar renewable energy requirements on each TPS." The commenters stated that the TPS must be able to adjust their pricing to account for these changes. In rejecting the comments, the Board stated:

> A TPS may experience increased costs during the time period covered by a contract and wish to increase fixed price customer contracts to recoup these costs. However, for many customers, this would defeat the purpose of a fixed price contract. Customers who choose fixed priced contracts do so in order to avoid price risk. . . . .
>
> Regarding the inclusion of Federal or local mandates in the definition of "non-material," the Board notes that the basis for the exception for State taxes lies in the ability of the State to collect these taxes directly from the customer if not collected by the TPS. Allowing other mandated charges to be included changes the contract from a fixed rate benefiting the customer to a variable rate benefitting the TPS.
>
> [45 N.J.R. 934(b)]

As noted by the above text, TPSs are required by law to collect sales and use taxes from customers and pursuant to N.J.S.A. 54:32B-14, "all sellers of energy or utility service shall include the tax imposed by the "Sales and Use Tax Act" within the purchase price of the tangible personal property or service." TPSs are not required by operation of law to change the prices that they charge to their customers as a result of P.L. 2018, c. 17. Therefore, the fact that a TPS may incur an increase in its costs as a result of P.L. 2018, c. 17 does not permit the TPS to increase fixed rates under N.J.A.C. 14:4-7.6(l), without the customer's affirmative consent.

If your company has increased a rate for electric generation or gas supply service that it has characterized as "fixed" or "firm," or your company has used other language to describe the rate as not variable, and you have charged the customer a rate that is higher than the fixed rate during the period for which the rate was fixed, you are hereby notified that your company is in violation of N.J.A.C. 14:4-7.12. If this is the case, you are instructed to **cease and desist** charging these customers a rate higher than the rate for which they contracted with your company. Further, you are instructed to **refund** to each of these customers the amount that your company charged the customer in excess of the amount it would have charged the customer had the increase not been implemented. You are instructed to complete these refunds within five weeks of the date of this letter.

Finally, you are instructed to send a letter to me by no later than **March 1, 2019** detailing the actions your company has taken to remedy this situation. This letter shall include at a minimum, the number of customers affected, the amounts of the refunds, and the dates of the refunds.

Sincerely,

Stacy Peterson
Director

B M & G BEVAN, MOSCA & GIUDITTA, P.C.
ATTORNEYS AT LAW

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MURRAY E. BEVAN
mbevan@bmg.law

January 25, 2019

VIA FEDERAL EXPRESS AND ELECTRONIC MAIL

Stacy Peterson, Director Division of Energy
State of New Jersey
Board of Public Utilities
44 South Clinton Avenue, 3rd Floor, Suite 314
Post Office Box 350
Trenton, New Jersey 08625-0350

Re: January 22, 2019 Cease and Desist Letter to Third Party Suppliers

Dear Ms. Peterson:

We represent the Retail Energy Supply Association ("RESA"),[1] and are in receipt of your January 22, 2019 letter titled "Cease and Desist and Refund Instructions." This letter was sent to many RESA members. We have reviewed the arguments contained in that letter. Unfortunately, the letter overlooks controlling statutory authority that expressly permits RESA members (as well as any and all third party suppliers) to raise prices under the circumstances presented here. We respectfully request that you withdraw the letter, and that the Board not take any further actions inconsistent with relevant law.

Although the letter correctly quotes N.J.A.C. 14:4-7.6(l), it incorrectly ignores the plain language of the regulation. It also completely ignores the recent statute that specifically authorizes the price change.

N.J.A.C. 14:4-7.6(l) reads:

> The contract **may not include** provisions (sometimes referred to as "**material change notices**") that permit the TPS to change material terms of the contract without the customer's affirmative authorization **unless the change is required by operation of law.** "Material terms of a contract" include, but are not limited to, terms

[1] The comments expressed in this filing represent the position of the Retail Energy Supply Association (RESA) as an organization but may not represent the views of any particular member of the Association. Founded in 1990, RESA is a broad and diverse group of retail energy suppliers dedicated to promoting efficient, sustainable and customer-oriented competitive retail energy markets. RESA members operate throughout the United States delivering value-added electricity and natural gas service at retail to residential, commercial and industrial energy customers. More information on RESA can be found at www.resausa.org.

> regarding the price, deliverability, time period of the contract, or ownership of the gas or electricity. "Non-material" terms include those regarding the address where payments should be sent or the phone number to be used for customer inquiries. Changing the price to reflect a change in the Sales and Use Tax **or other State-mandated charge would be permitted as a change required by operation of law**.

(emphasis added). Thus, under this regulation, while a third party supplier may include a material change provision in its consumer contracts, it is only allowed to pass through changes that are required by "operation of law." The letter cites to the last sentence for the proposition that increases to the Sales or Use Tax are the only permitted increases. The regulation states no such thing. The regulation specifically permits a price change to account for any "other State-mandated charge." The operative word in the regulation is "or." This is an "A" or "B" situation. The Sales and Use Tax is "A." The "other State-mandated charge" is "B." The regulation permits a price change to account for any change in either "A" or "B."

The letter then refers to the "rulemaking history" of the regulation to provide context, and then states that any third party supplier's reliance on P.L. 2018, c. 17 is misplaced. That is incorrect. The New Jersey Legislature in P.L. 2018, c. 17 amended and supplemented various statutory provisions and established the solar renewable portfolio standards requirements at issue. In doing so, the Legislature specifically addressed and decided the very issue raised in the letter. Importantly, the Legislature decided this issue exactly contrary to the position provided in the letter. The statute 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).

Many third party suppliers provide service under contracts with their New Jersey customers, and many of these contracts include the following language (in substantial form) that specifically permits the pass through of any new or increased state-mandated charges:

> You are responsible for paying any new or increased taxes, fees or other state mandated charges imposed on [TPS] or you during the term of this Agreement.

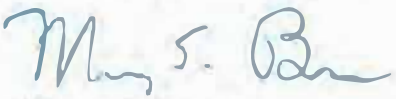
The logic of RESA's position here is straightforward and irrefutable:

- N.J.A.C. 14:4-7.6(l) provides that a TPS may pass through a "State-mandated charge" if the charge is "required by operation of law;"
- N.J.S.A. 48:3-87(d)(3)(c) directs the Board of Public Utilities to recognize the new solar purchase obligations as a "change required by operation of law;" and
- RESA member contracts allow them to pass through any "other state mandated charges."

The conclusion that third party suppliers must "cease and desist" from passing through those charges is therefore based on flawed reasoning. The BPU regulation, read in context with the applicable legislation and the contracts in question expressly permit third party suppliers to pass through these state-mandated charges. For that reason, RESA members with the appropriate contract provisions will continue to engage in this lawful behavior. Again, we respectfully request that the Board withdraw the "cease and desist" letter and instead issue a letter advising that third party suppliers may lawfully and appropriately pass through these charges when their contracts so provide.

Should you have any questions, please contact the undersigned at your earliest convenience.

Respectfully submitted,



Murray E. Bevan

cc: Jacqueline Galka, Energy Division
Grace Strom Power, Chief of Staff
Noreen Giblin, Chief Counsel
Caroline Vachier, Deputy Attorney General

freepoint energy solutions

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Houston, TX 77056

Phone: 800-982-1670
Fax: 713-583-9087

February 15, 2019

Via FedEx

The Honorable Aida Camacho-Welch
State of New Jersey
Board of Public Utilities
44 South Clinton Avenue, 3rd Floor, Suite 314
Post Office Box 350
Trenton, New Jersey 08625-0350

EO19020226

Re: Freepoint Energy Solutions Joins RESA Petition to Withdraw Cease and Desist

To the Honorable Aida Camacho-Welch:

Freepoint Energy Solutions LLC ("Freepoint") is a licensed third party supplier ("TPS") and writes today to join the Petition of the Retail Energy Supply Association ("RESA") Seeking Withdrawal of 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 (the "Petition"), filed on February 14, 2019. A copy of RESA's Petition is enclosed hereto for your reference.

Freepoint supports the position and arguments expressed by RESA, and respectfully joins in RESA's Petition.

Freepoint submits that the Clean Energy Act clearly allows TPSs to implement the increased renewable portfolio standard ("RPS") requirements by requiring the Board to recognize the increased RPS requirements as a "change required by operation of law." Freepoint submits that the Cease and Desist letter is contrary to the clear statutory mandate of the Clean Energy Act, and was further issued without Board authorization.

Freepoint joins the arguments in RESA's Petition and respectfully requests that the Board withdraw the Cease and Desist letter and stay enforcement of the letter until it acts on RESA's Petition.

Respectfully submitted,

Freepoint Energy Solutions LLC

By: _____

Simona Patru – Secretary & Legal Counsel

Case Mgmt
Clean Energy

cc: Stacy Peterson, Director, Division of Energy
Jacqueline Galka, Division of Energy
Grace Strom Power, Chief of Staff
Noreen Giblin, Chief Counsel
Paul Flanagan, Executive Director
Stefanie Brand, Director, Division of Rate Counsel
Caroline Vachier, Deputy Attorney General

COZEN O'CONNOR
A Pennsylvania Professional Corporation

Ira G. Megdal
Direct Phone 856-910-5007
Direct Fax 877-259-7984
imegdal@cozen.com

2/25/19

February 21, 2019

VIA HAND DELIVERY

RECEIVED
CASE MANAGEMENT
FEB 21 2019
BOARD OF PUBLIC UTILITIES
TRENTON, NJ

RECEIVED
MAIL ROOM
FEB 21 2019
BOARD OF PUBLIC UTILITIES
TRENTON, NJ

Aida Camacho-Welch
Board Secretary
Board of Public Utilities
44 South Clinton Ave.
3rd Floor, Suite 314
PO Box 350
Trenton, NJ 08625-0350

Re: In the Matter of the Verified Petition of the Retail Energy Supply Association Seeking Withdrawal of Board Staff's Cease and Desist and Refund Instructions Letter and Delcaration that Third Party Suppliers Can Pass Through Solar RPS Costs Under The Clean Energy Act, P.L. 2018, c. 17
Docket No. EO19020226

Dear Secretary Camacho-Welch:

This firm represents Talen Energy Marketing, LLC. ("Talen") in the referenced matter. On behalf of Talen, enclosed for filing please find an original and ten (10) copies of a Motion to Intervene.

We are also enclosing an extra copy of the Motion. Please stamp the extra copy as "Filed" and return same in the self-addressed stamped envelope.

Thank you for your attention to this matter.

Respectfully submitted,

COZEN O'CONNOR, PC

Ira G. Megdal

By: Ira G. Megdal

IGM:kn
Enclosure

cc: Service List (via email)

CMS
a. Hoth, Esq

LEGAL\40046753\1

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856-910-5007
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Attorneys for Talen Energy Corp.

STATE OF NEW JERSEY
BOARD OF PUBLIC UTILITIES

In the Matter of the Verified Petition of the Retail Energy Supply Association Seeking Withdrawal of 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	**BPU Docket No.:** EC19020226

MOTION FOR LEAVE TO INTERVENE ON BEHALF OF TALEN ENERGY MARKETING, LLC

Talen Energy Marketing, LLC ("TEM" or "Movant") by and through its undersigned counsel, hereby moves for leave to intervene in this proceeding pursuant to N.J.A.C. 1:1-16.1 et seq. TEM respectfully submits that all factors for full intervenor status, as set forth in N.J.A.C. 1:1-16.3 support the granting of TEM's motion in the above-captioned proceeding. In support of its motion for intervenor status in this proceeding ("Motion"), TEM states as follows:

Background and Procedural History

1. On or about January 22, 2019, Stacy Peterson, the Director of the Division of Energy of the Board of Public Utilities ("BPU" or "Board") issued a letter (the "Letter") that was addressed to all New Jersey Licensed Third Party Suppliers ("TPSs"). The Letter was entitled "Cease and Desist and Refund Instruction."

2. The Letter refers to the Clean Energy Act, P.L. 2018, c.17 ("CEA"), which was incorporated into N.J.S.A. 48:3-87. The Act, *inter alia*, imposed upon TPSs, such as TEM, increased renewable portfolio standard ("RPS") percentage requirements.

3. The Letter alleges that some New Jersey TPSs "violated the Board's Energy Competition regulations when they charged a higher rate than the fixed price in the customer's contract." Letter, p. 1.

4. The Letter instructs TPSs to cease and desist from charging customers a higher rate to recover, *inter alia*, the cost of additional Solar Renewable Energy Certificates ("SRECs") in order to comply with the CEA. The Letter also directs TPSs to refund to their customers the amount that the TPS has charged customers for the recovery of these increased SRECs.

5. On February 14, 2019 the Retail Energy Supply Association ("RESA") filed a Verified Petition Seeking Expedited Formal Hearing and Order (the "Petition") in this matter.

6. The Petition seeks, *inter alia*, to enjoin the Board from contravening the CEA by authorizing and/or allowing the issuance of the Letter.

TEM

7. TEM provides TPS services in New Jersey solely to electric C&I customers. Its license number is ESL-0163. Its address is 600 Hamilton Street Suite 600 Allentown, PA 18101.

8. All communications with respect to this Motion and in these proceedings should be served on the following persons:

Ira G. Megdal, Esq.
James F. Van Orden, Esq.
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A Pennsylvania Professional Corporation
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457 Haddonfield Road
Cherry Hill, NJ 08002
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jvanorden@cozen.com

Debra L. Raggio
Senior Vice President
Regulatory & External Affairs Counsel
Talen Energy
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Alexandria, Virginia 22314
Debra.Raggio@talenenergy.com

Megan Toomey
Director-Regulatory Policy & Strategy
Talen Energy
600 Hamilton Street, Suite 600
Allentown, PA 18101
Megan.Toomey@talenenergy.com

Standard for Intervention

9. The criteria for intervention are set forth in N.J.A.C. 1:1-16.1:

> [A]ny person or entity not initially a party, who has a statutory right to intervene or who will be substantially, specifically and directly affected by the outcome of a contested case, may on motion, seek leave to intervene.

10. N.J.A.C. 1:1-16.3(a) sets forth further guidance to be used to evaluate a motion to intervene:

> In ruling upon a motion to intervene, the judge shall take into consideration the nature and extent of the movant's interest in the outcome of the case, whether or not the movant's interest is sufficiently different from that of any party so as to add measurably and constructively to the scope of the case, the prospect of confusion or undue delay arising from the movant's inclusion, arid other appropriate matters.

TEM Meets the Standard for Intervention

11. In order to comply with the CEA, TEM purchased increased SRECs at significant cost.

12. TEM has certain agreements with sophisticated commercial and industrial ("C&I") customers that include contractual provisions that permit TEM to pass increased costs to its customers arising from changes in law, such as those implemented by the New Jersey Legislature in the CEA.

13. TEM's participation in this proceeding is necessary in order to ascertain the extent to which the Letter was intended to apply to the contractual relationship between TEM and its sophisticated C&I customers. TEM maintains the position that the Letter should not apply to it and respectfully requests that the BPU promptly make such a clarification.

14. The Letter is so broad-ranging that it could be read to require TEM to make refunds to certain of its C&I customers.

15. TEM could be irreparably harmed by the apparent directives of the Letter because TEM's ability -- pursuant to contracts negotiated at arms-length with C&I customers -- to pass-through increased costs arising from changes of law could be unlawfully impaired. TEM's contracts represent a carefully-negotiated balancing of risk with sophisticated customers; the BPU should not interfere with the contractual relationships.

16. TEM therefore seeks to intervene in this matter because its contractual rights may be substantially, specifically and directly affected by the outcome of this proceeding.

17. Because TEM solely provides service to electric C&I customers in New Jersey, and has unique contractual provisions that allow TEM to recover increases such as the increased cost of SRECs, no other party is impacted in the same way that TEM is impacted. Other participating TPSs have their own customer mixes (including, in some instances, residential customers), contractual provisions, and business development plans. The interests of TEM and the other TPSs, accordingly, are not necessarily aligned.

18. Nevertheless, the Movant's intervention will not add confusion to, or otherwise delay, these proceedings in any way.

Positions on the Issues

19. TEM has a separate and independent interest in the outcome of the proceeding from that of RESA and other TPSs. TEM's customer base (solely C&I), contract provisions, and business development plan differ from those of other TPSs. Indeed, TEM and the other TPSs are competitors in the retail market. Accordingly, TEM should not be bound by any position that may be taken by RESA or any other TPS in this proceeding.

20. While TEM generally supports the arguments offered by RESA, TEM urges the Board to withdraw the Letter -- to the extent that it may have been intended to apply to TEM -- for the following reasons:

a. The CEA does not prohibit a TPS from passing cost increases to customers, where, as is the case with TEM, the TPS does not describe its rates as "fixed," "firm," or otherwise not variable.

b. The CEA does not prohibit a TPS from including a "change in law" provision in a contract with C&I customers, which are typically sophisticated customers.

c. The Letter may constitute an improper delegation of Board authority to an employee of the Board.[1]

d. If applied so as to adversely impact TEM's contracts and to require refunds to C&I customers, the Letter would impair contracts in violation of the contract provisions of the United States Constitution, U.S. Const. art. I § 10, and the contract provision of the New Jersey Constitution, N.J. Const. art. IV, § 7, ¶ 3.[2]

---

[1] *See, e.g.,* In re AMICO/Tunnel Carwash, 371 N.J. Super. 199, 203, 852 A.2d 277, 279 (App. Div. 2004) (rejecting the granting of a variance by a staff level state employee as it was "not simply a ministerial act.").

[2] To determine whether there has been a violation of the Contract Clause, a law must have operated as a substantial impairment of a contractual relationship. *See* General Motors v. Romein, 503 U.S. 181, 186 (1992). The Letter has caused a substantial impairment of TEM's contracts by eliminating a key provision regarding the cost and assumption of risk for changes in law to the material detriment of TEM. Because TEM's customers are sophisticated businesses, the Letter is an unreasonable infringement of contract rights.

e. The Letter deprives TPSs of property without due process of law, in violation of the due process clause of the United States Constitution, U.S. Const., amend XIV, and the due process clause of the New Jersey Constitution, N.J. Const. art. I, § 1.

f. The Letter constitutes a *de facto* rule or regulation, which was not promulgated in accordance with the New Jersey State Administrative Procedure Act ("APA"). The failure to comply with the APA constitutes a separate violation of the federal and state due process clauses.

g. The Letter takes private property without just compensation, in violation of the United States Constitution, U.S. Const. amend. XIV, and the New Jersey Constitution. N.J. Const. art. I, § 20.

h. The Letter is arbitrary and capricious and constitutes an abuse of power, because it will lead to decreased competition and higher prices.

Conclusion

21. For the reasons set forth above, TEM respectfully requests that it be granted leave to intervene in this matter pursuant to N.J.A.C. 1:1-16.1 *et seq.* or, in the alternative, that the BPU promptly clarify that the Letter does not apply to TEM.

Respectfully submitted,

By: Ira G. Megdal

Ira G. Megdal

Dated: February 21, 2019

VERIFICATION

COMMONWEALTH OF PENNSYLVANIA)

COUNTY OF LEHIGH)

Megan Toomey, of full age, being duly sworn, upon her oath deposes and says:

1. I am the Director-Regulatory Policy & Strategy and I am authorized to make this Verification on behalf of Talen Energy Marketing, LLC in this matter.

2. I have reviewed the within Motion and the same is true and correct to the best of my knowledge, information and belief.

3. I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

By: _____
Megan Toomey

Sworn to and subscribed
before me this 20th day of
February, 2019

_____
Notary

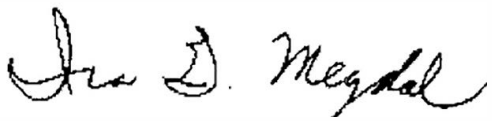
COMMONWEALTH OF PENNSYLVANIA
NOTARIAL SEAL
Patricia A. Kresley, Notary Public
City of Allentown, Lehigh County
My Commission Expires May 11, 2019
MEMBER, PENNSYLVANIA ASSOCIATION OF NOTARIES

This Verification is being submitted in facsimile form. The undersigned attorney, Ira G. Megdal, certifies that the affiant acknowledge the genuineness of the signature and that the Verification or a copy with an original signature affixed will be filed if requested by the Board of Public Utilities.

_____
Ira G. Megdal, Esq.

CERTIFICATION OF SERVICE

Ira G. Megdal, certifies that I am a member of the firm of Cozen O'Connor and on this date I caused copies of the attached Motion for Leave to Intervene of Talen Energy Marketing, LLC to be served via email upon each of the parties named on the service list attached to this filing. The above statements made by me are true. I am aware that if any statement made by me is willfully false, I am subject to punishment.



Ira G. Megdal

Dated: February 21, 2019

In the Matter of the Verified Petition of the Retail Energy Supply Association
Seeking Withdrawal of 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
BPU Docket No.: EO19020226
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NJ Board of Public Utilities
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Stacy Peterson, Director
Division of Energy
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Division of Rate Counsel
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PHIL MURPHY
Governor

SHEILA OLIVER
Lt. Governor

State of New Jersey
DIVISION OF RATE COUNSEL
140 EAST FRONT STREET, 4TH FL
P.O. BOX 003
TRENTON, NEW JERSEY 08625

STEFANIE A. BRAND
Director

3/14/19

March 8, 2019

Via US Regular Mail
Aida Camacho-Welsh, Secretary
NJ Board of Public Utilities
44 South Clinton Avenue, 3rd Floor, Suite 314
Trenton, New Jersey 08625-0350

Re: In the Matter of the Verified Petition of the Retail Energy Supply Association Seeking Withdrawal of 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.O. 2018, c. 17
BPU Docket No. EO19020226

Dear Secretary Camacho-Welsh:

Please update your service list in this matter by adding the following attorneys on behalf of the Division of Rate Counsel.

Stefanie A. Brand, Director
Division of Rate Counsel
140 East Front Street, 4th Floor
P.O. Box 003
Trenton, NJ 08625-003

Brian Lipman, Litigation Manager
Division of Rate Counsel
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Felicia Thomas-Friel, Esq.
Division of Rate Counsel
140 East Front Street, 4th Floor
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Maura Caroselli, Esq.
Division of Rate Counsel
140 East Front Street, 4th Floor
P.O. Box 003
Trenton, NJ 08625-003

The e-mail addresses are as follows:

blipman@rpa.nj.gov
fthomas@rpa.nj.gov
mcaroselli@rpa.nj.gov
smassey@rpa.nj.gov

CMS
D. Lee-Thomas

Tel: (609) 984-1460 • Fax: (609) 292-2923 • Fax: (609) 292-4991
http://www.nj.gov/rpa E-Mail: njratepayer@rpa.nj.gov

By copy of this letter I am requesting that the other parties to this matter also amend their service lists as indicated above.

Thank you for your attention to this matter.

Very truly yours,

Stefanie A. Brand, Esq.
Director, Division of Rate Counsel

By: Maura Caroselli

Maura Caroselli, Esq.
Assistant Deputy Rate Counsel

MC
c: Service list

In the Matter of the Verified Petition of the Retail Energy Supply Association Seeking Withdrawal of 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
BPU Docket No. EO19020226

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NEW JERSEY SENATE

SENATOR BOB SMITH
17TH LEGISLATIVE DISTRICT
216 STELTON ROAD, SUITE E-5
PISCATAWAY, NJ 08854
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CHAIRMAN
ENVIRONMENT COMMITTEE

MEMBER
JUDICIARY COMMITTEE

MEMBER
STATE HOUSE COMMISSION

March 27, 2019

Stacy Peterson, Director
Division of Energy
Board of Public Utilities
44 S. Clinton Avenue
Trenton, NJ 08625

Dear Ms. Peterson:

It has come to my attention that there is an issue regarding the Board of Public Utilities' implementation of the Clean Energy Act's Solar Renewable Portfolio Standard (Solar RPS) as it relates to third party suppliers.

During consideration of the Clean Energy Act, the legislature specifically included language to make clear that electricity providers, whether part of the BGS auction or a third party supplier, must be permitted to make adjustments to fixed price contracts in response to the new Solar RPS requirements imposed by the legislation. The specific language stated the following: "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**" (§ 48:3-87(d)(3)(c), emphasis added).

This language, "obligations as a change required by operation of law", was purposefully included because it was specifically taken from existing BPU regulations regarding fixed price contract to avoid any confusion about the authority of third party suppliers to make adjustments to fixed price contracts in response to the increase in the solar RPS obligation. The language from the BPU code is below.

> "§14:4-7.6(l) The contract may not include provisions (sometimes referred to as "material change notices") that permit the TPS to change material terms of the contract without the customer's affirmative authorization **unless the change is required by operation of law.... Changing the price to reflect a change in the Sales and Use Tax or other State-mandated charge would be permitted as a change required by operation of law**" (emphasis added.

I understand that despite this language, the BPU has sent cease and desist letters to third party 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.

Moreover, given the BPU may take action in Docket No. EO19020226 – In the Matter of Verified Petition of the Retail Energy Supply Association Seeking Withdrawal of 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 this Friday, March 29th, I would ask that you 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.

Very truly yours,

Senator Bob Smith
Chairman, Senate Energy & Environment Committee

CC: President Joseph Fiordaliso
Board of Public Utilities

Grace Power, Chief of Staff
Board of Public Utilities

Noreen Giblin, Chief Counsel
Board of Public Utilities

STATE OF NEW JERSEY
Board of Public Utilities
44 South Clinton Avenue, 3rd Floor, Suite 314
Post Office Box 350
Trenton, New Jersey 08625-0350
www.nj.gov/bpu/

AGENDA FOR BOARD MEETING
The meeting will be held on
Friday, March 29, 2019 – 10:00 a.m. at the
State House Annex, Committee Room 11
125 West State Street, Trenton, NJ

Executive Session

(Open Session will not reconvene until the conclusion of the Executive Session, which will commence at 10:00 a.m. The only business to be conducted in the 10:00 a.m. Open Session will be the reading of the public notice statement, roll call, and the exception, under the Open Public Meetings Act, for each item to be considered in Executive Session.)

2. ENERGY

I. Docket No. ER19010009 – In the Matter of Federal Energy (FERC) Items for 2019 – FERC Docket No. RP19-351 Tennessee Gas Pipeline Company, L.L.C. re: FERC Form No. 501-G.

8. CLEAN ENERGY

F. Docket No. QO18121289 – In the Matter of the New Jersey Board of Public Utilities Offshore Wind Solicitation for 1,100 MW – Evaluation of the Offshore Wind Applications.

STATE OF NEW JERSEY
Board of Public Utilities
44 South Clinton Avenue, 3rd Floor, Suite 314
Post Office Box 350
Trenton, New Jersey 08625-0350
www.nj.gov/bpu/

CONSENT AGENDA FOR BOARD MEETING
The meeting will be held on
Friday, March 29, 2019 – 10:00 a.m. at the
State House Annex, Committee Room 11
125 West State Street, Trenton, NJ

I. AUDITS

A. Energy Agent, Private Aggregator and/or Energy Consultant Initial Registrations

EE19020203L	America Approved Commercial, LLC	I – EA
EE18111224L	NuEnergen, LLC	I – EA
EE18121344L GE18121345L	Pennell & Wiltberger, Inc. d/b/a PWI Engineering, Inc.	I – EA/PA
EE19010035L GE19010036L	Lower Watt, LLC	I – EA/PA/EC
EE19020195L GE19030315L	SunLight Energy Group, LLC	I – EA/EC
EE17111197L GE17111198L	Biofuels Technology, LLC d/b/a Energy Connection	I – EA/EC

Energy Agent, Private Aggregator and/or Energy Consultant Renewal Registrations

EE19010014L	Amerex Brokers, LLC d/b/a Amerex Energy Services	R – EA
EE19010069L	Aspen Energy Corporation	R – EA
EE19020218L	Gold Star Energy, LLC d/b/a GSEUSA	R – EA
EE19020266L	Lightstar Energy Group, LLC	R – EA

I. AUDITS (CONT'D)

EE19020223L	Live Energy, Inc.	R – EA
EE19020272L	Open Energy Services, LLC	R – EA
EE19020199L GE19020200L	Arcadia Power, Inc.	R – EA/PA
EE19020224L GE19020225L	Integrity Energy, LTD d/b/a Integrity Energy	R – EA/PA

Electric Power and/or Natural Gas Supplier Initial Licenses

EE19010039L	Rushmore Energy, LLC	I – ESL
EE19020174L GE19020173L	Tomorrow Energy Corp. f/k/a Sperian Energy Corp.	I – EGSL

Electric Power and/or Natural Gas Supplier Renewal Licenses

EE19010144L GE19010143L	UGI Energy Services, LLC	R – EGSL

Document Link

II. ENERGY

A. Docket No. ER19010009 – In the Matter of Federal Energy (FERC) Items for 2019 – FERC Docket No. EL19-47 Independent Market Monitor for PJM v. PJM Interconnection L.L.C.

III. CABLE TELEVISION

A. Docket No. CE18020192 – In the Matter of the Petition of Comcast of South Jersey, LLC for a Renewal Certificate of Approval to Continue to Construct, Operate and Maintain a Cable Television System in and for the Town of Hammonton, County of Atlantic, State of New Jersey. Document Link

IV. TELECOMMUNICATIONS

A. Docket No. TM19020217 – In the Matter of the Verified Joint Petition of DSCI, LLC, U.S. TelePacific Holdings Corp., and Pensare Acquisition Corp. for Approval to Transfer Indirect Control of DSCI, LLC to Pensare Acquisition Corp. Document Link

V. WATER

NO ITEMS FOR CONSIDERATION

VI. RELIABILITY & SECURITY

A. Docket Nos GS19010025K, et al. – In the Matter of Alleged Violations of the Underground Facility Protection Act, N.J.S.A. 48:2-73 to -91. Document Link

VII. CUSTOMER ASSISTANCE

NO ITEMS FOR CONSIDERATION

VIII. CLEAN ENERGY

NO ITEMS FOR CONSIDERATION

IX. MISCELLANEOUS

A. Approval of the Minutes for the February 27, 2019, Agenda Meeting.

STATE OF NEW JERSEY
Board of Public Utilities
44 South Clinton Avenue, 3rd Floor, Suite 314
Post Office Box 350
Trenton, New Jersey 08625-0350
www.nj.gov/bpu/

AGENDA FOR BOARD MEETING
The meeting will be held on
Friday, March 29, 2019 – 10:00 a.m. at the
State House Annex, Committee Room 11
125 West State Street, Trenton, NJ

1. AUDITS

NO ITEMS FOR CONSIDERATION

2. ENERGY

A. Docket No. ER18111242 – In the Matter of FERC Approved Changes to Rockland Electric Company Transmission Rate Pursuant to Paragraphs 15.9 of the BGS-RSCP and BGS-CIEP Supplier Master Agreements and Tariff Filing Reflecting Changes to Schedule 12 Charges in PJM Open Access Transmission Tariff. Document Link

B. Docket No. GR18060608 – In the Matter of the Petition of Pivotal Utility Holdings, Inc. d/b/a Elizabethtown Gas to Review its Periodic Basic Gas Supply Service Rate. Document Link

C. Docket No. GR18070832 – In the Matter of the Petition of South Jersey Gas Company to Change the Levels of its Societal Benefits Clause ("SBC") and its Transportation Initiation Clause ("TIC"). Document Link

D. Docket No. GR18060606 – In the Matter of the Petition of Public Service Electric and Gas Company's 2018/2019 Annual BGSS Commodity Charge Filing for its Residential Gas Customers Under its Periodic Pricing Mechanism and for Changes in its Balancing Charge. Document Link

E. Docket No. GR18060605 – In the Matter of the Petition of Public Service Electric and Gas Company's 2018 Annual Margin Adjustment Charge ("MAC"). Document Link

F. Docket No. ER18060681 – In the Matter of the Petition of Public Service Electric and Gas Company for Approval of Changes in its Electric Solar Pilot Recovery Charge ("SPRC") for its Solar Loan I Program. Document Link

2. ENERGY (CONT'D)

G. Docket No. GR18091055 – In the Matter of the Petition of New Jersey Natural Gas Company for the Annual Review and Revision of Societal Benefits Charge Factors for Remediation Year 2018. Document Link

H. Docket GR19020278 – In the Matter of the Petition of New Jersey Natural Gas for Approval to Implement an Infrastructure Investment Program ("IIP") and Associated Cost Recovery Mechanism Pursuant to N.J.S.A. 48:2-21 and N.J.A.C. 14:3-2A. Document Link

I. Docket No. ER19010009 – In the Matter of Federal Energy (FERC) Items for 2019 – FERC Docket No. RP19-351 Tennessee Gas Pipeline Company, L.L.C. re: FERC Form No. 501-G – **Executive Session.**

J. Docket No. EO19020226 – In the Matter of Verified Petition of the Retail Energy Supply Association Seeking Withdrawal of 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.

3. CABLE TELEVISION

NO ITEMS FOR CONSIDERATION

4. TELECOMMUNICATIONS

NO ITEMS FOR CONSIDERATION

5. WATER

A. Docket No. WE18080926 – In the Matter of the Petition of Village Utility, LLC for Approval of a Municipal Consent to Provide Sewerage Service to a Portion of the Township of Sparta, for Approval of Implementation of an Initial Tariff for Wastewater Service within the Township of Sparta, and for Other Required Approvals. Document Link

B. Docket No. WR18111241 – In the Matter of New Jersey-American Water, Inc. for Authorization to Change the Level of its Purchased Water Adjustment Clause("PWAC") and Purchased WasteWater (Sewerage) Treatment Adjustment Clause ("PSTAC"). Document Link

6. RELIABILITY & SECURITY

A. Docket No. GO18101190 – In the Matter of the Joint Petition of the Gas Distribution Companies for Approval of a Meter Selective Sampling Program. Document Link

6. RELIABILITY & SECURITY (CONT'D)

B. Docket No. EO18101187 – In the Matter of the Verified Petition of Jersey Central Power and Light Company for Authorization to Revise: the Statistical Sampling Aspects of its Electric Meter Testing Program Pursuant to N.J.A.C. 14:5-4.2, and the Form of Quarterly Reporting of Meter Test Results Pursuant to N.J.A.C. 14:3-4.7. Document Link

C. Docket No. EO18101159 – In the Matter of the Joint Petition of Public Service Electric and Gas Company for Approval of an Electric Meter Selective Sampling Program. Document Link

D. Docket No. EO18101189 – In the Matter of the Petition of Atlantic City Electric Company to Revise and Update its Meter Selective Sampling Program Pursuant to N.J.A.C. 15:5-4.2, and the Form of Quarterly Reporting of Meter Test Results Pursuant to N.J.A.C. 14:3-7. Document Link

E. Docket No. EO18101188 – In the Matter of the Meter Sampling Plan of Rockland Electric Company. Document Link

7. CUSTOMER ASSISTANCE

NO ITEMS FOR CONSIDERATION

8. CLEAN ENERGY

A. Docket No. EO12090832V – In the Matter of the Implementation of P.L. 2012, c. 24, The Solar Act of 2012;

Docket No. EO12090862V – In the Matter of the Implementation of P.L. 2012, c. 24, N.J.S.A. 48:3-87(T) – A Proceeding to Establish a Program to Provide SRECs to Certified Brownfield, Historic Fill and Landfill Facilities; and

Docket No. QO18050592 – AC Power 2 LLC – Winzinger Landfill. Document Link

B. Docket No. QO18121331 – In the Matter of the Petition of Helios Solar Energy, LLC – Request for Solar Renewable Energy Certificate Extension (SREC). Document Link

C. Docket No. QO16020130 – In the Matter of the Implementation of N.J.S.A. 48:3-87(R), Designating Grid Supply Projects as Connected to the Distribution System – Order Implementing Certain Provisions of N.J.A.C. 14:8-2.4(G) for Energy Year 2020.

D. Docket No. QO18040393 – In the Matter of the Clean Energy Programs and Budgets for Fiscal Year 2019 – True-Up and Revised Budget. Document Link

8. CLEAN ENERGY (CONT'D)

E. Docket No. QO18060646 – In the Matter of the New Jersey Community Solar Energy Pilot Program. Document Link & Community Solar Energy Pilot Program

F. Docket No. QO18121289 – In the Matter of the New Jersey Board of Public Utilities Offshore Wind Solicitation for 1,100 MW – Evaluation of the Offshore Wind Applications – **Executive Session.**

9. MISCELLANEOUS

NO ITEMS FOR CONSIDERATION

Agenda Date: 5/8/19
Agenda Item: IXA

STATE OF NEW JERSEY
Board of Public Utilities
44 South Clinton Avenue, 3rd Floor, Suite 314
Post Office Box 350
Trenton, New Jersey 08625-0350
www.nj.gov/bpu/

MINUTES OF THE REGULAR MEETING OF THE BOARD OF PUBLIC UTILITIES

A Regular Board meeting of the Board of Public Utilities was held on March 29, 2019, at the State House Annex, Committee Room 11, 125 West State Street, Trenton, New Jersey 08625.

Public notice was given pursuant to N.J.S.A. 10:4-18 by posting notice of the meeting at the Board's Trenton Office, on the Board's website, filing notice of the meeting with the New Jersey Department of State and the following newspapers circulated in the State of New Jersey:

Asbury Park Press
Atlantic City Press
Burlington County Times
Courier Post (Camden)
Home News Tribune (New Brunswick)
North Jersey Herald and News (Passaic)
The Record (Hackensack)
The Star Ledger (Newark)
The Trenton Times

The following members of the Board of Public Utilities were present:

Joseph L. Fiordaliso, President
Mary-Anna Holden, Commissioner
Dianne Solomon, Commissioner
Upendra J. Chivukula, Commissioner
Robert M. Gordon, Commissioner

President Fiordaliso presided at the meeting and Aida Camacho-Welch, Secretary of the Board, carried out the duties of the Secretary.

It was announced that the next regular Board Meeting would be held on April 18, 2019 at the State House Annex, Committee Room 11, 125 West State Street, Trenton, New Jersey 08625.

Agenda Date: 5/8/19
Agenda Item: IXA

Proclamation:
Governor Philip Murphy proclaimed April 2019 as Underground Damage Prevention Month in New Jersey, and commended the New Jersey Board of Public Utilities and underground facility personnel for their commitment to the safety of the New Jersey residents. The New Jersey Board of Public Utilities, which oversees the Underground Facilities Protection Act, in partnership with underground facility operators and the New Jersey Common Ground Alliance, will be engaging in a campaign to heighten public awareness as to the importance of damage prevention, and to promote the use of the one-call damage Prevention System.

CONSENT AGENDA

I. AUDITS

A. Energy Agent, Private Aggregator and/or Energy Consultant Initial Registrations

EE19020203L	America Approved Commercial, LLC	I – EA
EE18111224L	NuEnergen, LLC	I – EA
EE18121344L GE18121345L	Pennell & Wiltberger, Inc. d/b/a PWI Engineering, Inc.	I – EA/PA
EE19010035L GE19010036L	Lower Watt, LLC	I – EA/PA/EC
EE19020195L GE19030315L	SunLight Energy Group, LLC	I – EA/EC
EE17111197L GE17111198L	Biofuels Technology, LLC d/b/a Energy Connection	I – EA/EC

Energy Agent, Private Aggregator and/or Energy Consultant Renewal Registrations

EE19010014L	Amerex Brokers, LLC d/b/a Amerex Energy Services	R – EA
EE19010069L	Aspen Energy Corporation	R – EA
EE19020218L	Gold Star Energy, LLC d/b/a GSEUSA	R – EA
EE19020266L	Lightstar Energy Group, LLC	R – EA
EE19020223L	Live Energy, Inc.	R – EA
EE19020272L	Open Energy Services, LLC	R – EA
EE19020199L GE19020200L	Arcadia Power, Inc.	R – EA/PA

Agenda Date: 5/8/19
Agenda Item: IXA

I. AUDITS (CONT'D)

EE19020224L GE19020225L	Integrity Energy, LTD d/b/a Integrity Energy	R – EA/PA

Electric Power and/or Natural Gas Supplier Initial Licenses

EE19010039L	Rushmore Energy, LLC	I – ESL
EE19020174L GE19020173L	Tomorrow Energy Corp. f/k/a Sperian Energy Corp.	I – EGSL

Electric Power and/or Natural Gas Supplier Renewal Licenses

EE19010144L GE19010143L	UGI Energy Services, LLC	R – EGSL

BACKGROUND: The Board must register all energy agents and consultants, and the Board must license all third party electric power suppliers and gas suppliers, an electric power supplier, gas supplier, or clean power marketer license shall be valid for one year from the date of issue, except where a licensee has submitted a complete renewal application at least 30 days before the expiration of the existing license, in which case the existing license shall not expire until a decision has been reached upon the renewal application. An energy agent, private aggregator or energy consultant registration shall be valid for one year from the date of issue. Annually thereafter, licensed electric power suppliers, gas suppliers, and clean power marketers, as well as energy agents, private aggregators and energy consultants, are required to renew timely their licenses in order to continue to do business in New Jersey.

Staff recommended that the following applicant be issued initial registrations as an energy agent, private aggregator and/or energy consultant for one year:

- America Approved Commercial, LLC
- NuEnergen, LLC
- Pennell & Wiltberger, Inc. d/b/a PWI Engineering, Inc.
- Lower Watt, LLC
- SunLight Energy, LLC
- Biofuels Technology, LLC d/b/a Energy Connection

Staff also recommended that the following applicants be issued renewal registrations as an energy agent, private aggregator and/or energy consultant for one year:

- Amerex Brokers, LLC d/b/a Amerex Energy Services
- Aspen Energy Corporation
- Gold Star Energy, LLC d/b/a GSEUSA
- Lightstar Energy Group, LLC
- Live Energy Inc.
- Open Energy Services, LLC
- Arcadia Power, Inc.
- Integrity Energy, LLC d/b/a Integrity Energy

Staff further recommended that the following applicants be issued initial license as an electric power and/or natural gas supplier for one year:

- Rushmore Energy, LLC
- Tomorrow Energy Corp. f/k/a Sperian Energy Corp.

Finally, Staff recommended that the following applicants be issued renewal licenses as an electric power and/or natural gas supplier for one year:

- UGI Energy Services, LLC

DECISION: The Board adopted the recommendation of Staff as set forth above.

II. ENERGY

A. Docket No. ER19010009 – In the Matter of Federal Energy (FERC) Items for 2019 – FERC Docket No. EL19-47 Independent Market Monitor for PJM v. PJM Interconnection LLC.

BACKGROUND: Staff, on behalf of the Board, filed a doc-less intervention in this proceeding as an "interested state commission" under the Federal Energy Regulatory Commission (FERC) Rules of Practice and Procedure on March 4, 2019. The FERC e-filing rules allow for doc-less interventions, which serve to establish the Board as a party to the proceeding.

As a background, on February 21, 2019, the Independent Market Monitor (Market Monitor or IMM) for PJM Interconnection, LLC (PJM) filed a formal Complaint against PJM requesting that FERC direct PJM to revise the expected number of Performance Assessment Intervals used to set the default Market Seller Offer Cap.

On February 21, 2019, the Independent Market Monitor (IMM) for PJM filed a formal Complaint against PJM requesting that FERC direct PJM to revise the expected number of Performance Assessment Intervals used to set the default Market Seller Offer Cap (MSOC).

The IMM argued that PJM's MSOC has been inflated by the "unreasonable and unsupported" expectation of 30 performance assessment hours annually and the current rules around Capacity Performance assumptions allow sellers to exercise market power.

The IMM concluded that market power was exercised in the 2021/2022 Base Residual Auction as a result of the fact that the MSOC exceeded the competitive offer level for most resources.

Staff recommended that the Board ratify the doc-less intervention.

DECISION: The Board adopted the recommendation of Staff as set forth above.

Agenda Date: 5/8/19
Agenda Item: IXA

III. CABLE TELEVISION

A. Docket No. CE18020192 – In the Matter of the Petition of Comcast of South Jersey, LLC for a Renewal Certificate of Approval to Continue to Construct, Operate and Maintain a Cable Television System in and for the Town of Hammonton, County of Atlantic, State of New Jersey.

BACKGROUND: On February 26, 2018, Comcast of South Jersey, LLC, filed a petition for an Automatic Renewal Certificate of Approval for the Town of Hammonton (Town) based on the automatic renewal provision.

The petition is based on the Town's ordinance granting renewal municipal consent, which was adopted on May 24, 2004. The Town's ordinance granted a term of 15 years with an automatic renewal term of 10 years. The initial term expired on January 26, 2018.

Staff recommended that the Board approve the proposed Automatic Renewal Certificate of Approval. This Certificate shall expire on January 26, 2028.

DECISION: The Board adopted the recommendation of Staff as set forth above.

IV. TELECOMMUNICATIONS

A. Docket No. TM19020217 – In the Matter of the Verified Joint Petition of DSCI, LLC, U.S. TelePacific Holdings Corp., and Pensare Acquisition Corp. for Approval to Transfer Indirect Control of DSCI, LLC to Pensare Acquisition Corp.

BACKGROUND: On February 15, 2019, DSCI, LLC (DSCI), U.S. TelePacific Holdings Corp. (TPx Holdings), and Pensare Acquisition Corp. (Pensare) (collectively, the Petitioners) submitted a Petition to the Board requesting approval to transfer indirect control of DSCI to Pensare. Following closing of the transaction, the same services will continue to be offered in New Jersey at the same rates, terms, and conditions to customers.

Having reviewed the Petition and supporting documents, Staff did not find any reason to believe that there will be an adverse impact on rates, competition in New Jersey, the employees of the Petitioners, or on the provision of safe, adequate and proper service to New Jersey consumers. Moreover, a positive benefit may be expected from the strengthening of the Petitioners' competitive posture in the telecommunications market. Therefore, Staff recommended that the Petitioners be allowed to proceed with the transaction, finding that there will be no adverse effect to customers in New Jersey.

DECISION: The Board adopted the recommendation of Staff as set forth above.

Agenda Date: 5/8/19
Agenda Item: IXA

V. WATER

There were no items in this category.

VI. RELIABILITY & SECURITY

A. Docket Nos GS19010025K, et al. – In the Matter of Alleged Violations of the Underground Facility Protection Act, N.J.S.A. 48:2-73 to -91.

BACKGROUND: Commissioner Gordon recused himself from this matter. This matter involved settlements of alleged violations of the Underground Facility Protection Act (Act) by both excavators and operators of underground facilities. This matter did not contain settlements involving catastrophic situations, death or major property damage. The categories of infraction include failure to provide proper notice, failure to use reasonable care and mismarking of facilities. The cases have been settled in accordance with a penalty strategy which escalates the penalty ranges in relationship to the aggravating factors such as injury, property damage, fire, evacuation, road closure, and other public safety concerns. Moreover, the strategy seeks to establish appropriate disincentives for actions which violate the Act.

Pursuant to the Act, the Board through the Bureau of One-Call supervises and enforces the One-Call Underground Damage Prevention System. The Act subjects violators of its provisions to civil penalties of not less than $1,000.00 and not more than $2,500.00 per violation per day, with a $25,000.00 maximum for a related series of violations. Violations involving a natural gas or hazardous liquid underground pipeline or distribution facility are subject to civil penalties not to exceed $100,000.00 for each violation for each day with a $1,000,000.00 maximum for any related series of violations.

The number of settlements are 52 and total penalty of $152,000.00.

Staff employed a single order to close multiple cases in order to create a more streamlined and effective enforcement process. Staff recommended that the Board approve all those cases in which offers of settlement and payment have been received.

DECISION: The Board adopted the recommendation of Staff as set forth above.

VII. CUSTOMER ASSISTANCE

There were no items in this category.

VIII. CLEAN ENERGY

There were no items in this category.

Agenda Date: 5/8/19
Agenda Item: IXA

IX. MISCELLANEOUS

A. Approval of the Minutes for the February 27, 2019, Agenda Meeting.

BACKGROUND: Staff presented the minutes of February 27 2019, and recommended that they be accepted.

DECISION: The Board adopted the recommendation of Staff as set forth above.

After appropriate motion, the consent agenda was approved.

Roll Call Vote:	**President Fiordaliso**	**Aye**
	Commissioner Holden	**Aye**
	Commissioner Solomon	**Aye**
	Commissioner Chivukula	**Aye**
	Commissioner Gordon	**Aye (with noted recusal)**

Agenda Date: 5/8/19
Agenda Item: IXA

AGENDA

1. AUDITS

There were no items in this category.

2. ENERGY

Stacy Peterson, Director, Division of Energy, presented these matters.

A. Docket No. ER18111242 – In the Matter of FERC Approved Changes to Rockland Electric Company Transmission Rate Pursuant to Paragraphs 15.9 of the BGS-RSCP and BGS-CIEP Supplier Master Agreements and Tariff Filing Reflecting Changes to Schedule 12 Charges in PJM Open Access Transmission Tariff.

BACKGROUND AND DISCUSSION: On November 14, 2018, Rockland Electric Company (RECO or Company) filed a petition (November 2018 Petition) with the Board seeking to establish the methodology by which it will translate final transmission rate into the retail rates that will be paid by RECO's customers for transmission service. The November 2018 Petition relates to a May 14, 2018 filing (May 14 Filing) made by RECO with the Federal Energy Regulatory Commission (FERC). Additionally, RECO requested that the Board waive its 30-day filing requirement so that RECO can expeditiously implement any rate reduction that may occur as a result of the pending FERC order.

RECO requested Board approval to implement revised retail rates to reflect the change in the Company's transmission rate, after issuance of the pending FERC Order in Docket No. ER18-1585. The November 2018 Petition indicated that RECO would submit an amended filing with the final, proposed tariff leaves that reflect the final transmission rate in FERC Docket No. ER18-1585 into the Service Classification specific retail rates contained in the electric tariff. RECO will credit its Basic Generation Service (BGS) Reconciliation Charge for any change in revenues that result from the change in the transmission rate to the date that the new retail rates become effective.

In the November 2018 Petition, RECO requested that the Board: 1) accept the final, proposed RECO tariff sheets that would be submitted upon a FERC Order in ER18-1585, 2) approve a reduction in RECO's payments to RECO's Commercial and Industrial Pricing (BGS-CIEP) suppliers, and 3) in the event FERC establishes a refund date, approve RECO's collection of the reduction in transmission rate from RECO's Residential and Small Commercial Pricing (BGS-RSCP) and BGS-CIEP suppliers.

On February 13, 2019, RECO filed an amendment (February 2019 Amended Filing) to the November 2018 Petition indicating that on November 15, 2018, FERC issued an Order (November 15 FERC Order) in Docket No. ER18-1585 directed the following:

1. RECO's Network Integration Transmission Service (NITS) rate decrease as a result of the lower, federal corporate tax rate, from $44,799 per megawatt per year to $42,548 per megawatt per year;

2. The effective date of RECO's new, lower NITS rate be retroactive to March 21, 2018; and

3. RECO refund to its transmission customers the difference between its existing and the new, lower NITS rates, with interest, from March 21, 2018 to November 15, 2018.

Staff recommended that the Board issue an order accepting the proposed tariff changes and approving implementation of changes to RECO's retail transmission rates as approved by FERC.

Staff also recommended that the Board direct RECO to file tariffs and rates consistent with the Board's findings by May 1, 2019.

DECISION: After discussion, the Board adopted the recommendation of Staff as set forth above.

Roll Call Vote:	**President Fiordaliso**	**Aye**
	Commissioner Holden	**Aye**
	Commissioner Solomon	**Aye**
	Commissioner Chivukula	**Aye**
	Commissioner Gordon	**Aye**

B. Docket No. GR18060608 – In the Matter of the Petition of Pivotal Utility Holdings, Inc. d/b/a Elizabethtown Gas to Review its Periodic Basic Gas Supply Service Rate.

BACKGROUND AND DISCUSSION: On May 31, 2018, Pivotal Utility Holdings, Inc. d/b/a Elizabethtown Gas (Elizabethtown or the Company) filed a petition (2018 BGSS Petition) with the Board seeking to decrease its then current per therm Basic Gas Supply Service (BGSS-P) rate from $0.4540 per therm to $0.4237 per therm, to be effective October 1, 2018 through September 30, 2019 (BGSS Period). As stated in its 2018 BGSS Petition, the Company projected that it would have an estimated under recovery balance as of September 30, 2018 of approximately $1.9 million including interest. The 2018 BGSS Petition also indicated that the proposed BGSS-P rate of $0.4237 per therm was designed to bring the BGSS balance to approximately zero as of September 30, 2019.

The 2018 BGSS Petition further indicated that the projected impact of the BGSS-P rate of $0.4237 per therm was a decrease in gas cost recoveries of approximately $7.1 million before taxes in the year ending September 30, 2019 as compared to the amount that would otherwise be recovered by the Company under the current BGSS-P rate of $0.4540 per therm. The 2018 Petition also indicated that the Company, using the current volume forecast, under the BGSS-P rate of $0.4540 per therm, would collect approximately $107.0 million before taxes. Under the proposed BGSS-P rate of $0.4237 per therm, Elizabethtown would collect approximately $100.0 million before taxes.

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On September 17, 2018, the Board issued an Order (September 2018 Provisional Order) in this proceeding approving a stipulation for provisional rates executed by Elizabethtown, the New Jersey Division of Rate Counsel (Rate Counsel) and Board Staff (collectively, Parties). The September 2018 Provisional Order authorized the Company to implement a BGSS-P rate of $0.4237 per therm, on a provisional basis, subject to refund, effective October 1, 2018. Based on this rate approved in the September 2018 Provisional Order, the monthly bill of a residential heating customer using 100 therms decreased by $3.03 from $91.83 to $88.80, a decrease of 3.3%.

The 2018 BGSS Petition was subsequently transmitted to the Office of Administrative Law. The matter was subsequently assigned to Administrative Law Judge (ALJ) Gail M. Cookson.

On December 27, 2018, Elizabethtown submitted a notice to the Board and the Rate Counsel of Elizabethtown's intent to self-implement a BGSS-P rate adjustment based on a 5% increase of the monthly bill of a typical residential customer using 100 therms to be effective February 1, 2019. That self-implementing adjustment increased the BGSS-P rate from $0.4237 per therm to $0.4691 per therm. The self-implemented BGSS-P rate increased the monthly bill of a typical residential heating customer using 100 therms by $4.54 from $90.78 to $95.32, an increase of 5% based on rates in effect at the time of the increase.

On March 6, 2019, the Parties executed a Stipulation for Final Rates (Stipulation) in which the Parties agreed that the $0.4691 per therm BGSS-P rate should be made final. On March 12, 2019, ALJ Cookson issued her Initial Decision recommending Board approval of the Stipulation finding that the Parties voluntarily agreed to the Settlement and that the Settlement fully disposed of any issues in controversy and was consistent with the law.

The existing rate of $0.4691 per therm will be maintained causing no change in monthly bills.

Staff recommended that the Board issue an Order adopting the Initial Decision and Stipulation which seeks to finalize Elizabethtown's BGSS-P rate. Staff also recommended that the Board direct Elizabethtown to file tariffs consistent with its Order by April 15, 2019.

DECISION: After discussion, the Board adopted the recommendation of Staff as set forth above.

Roll Call Vote:	**President Fiordaliso**	**Aye**
	Commissioner Holden	**Aye**
	Commissioner Solomon	**Aye**
	Commissioner Chivukula	**Aye**
	Commissioner Gordon	**Aye**

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C. Docket No. GR18070832 – In the Matter of the Petition of South Jersey Gas Company to Change the Levels of its Societal Benefits Clause (SBC) and its Transportation Initiation Clause (TIC).

BACKGROUND AND DISCUSSION: On July 31, 2018, South Jersey Gas Company (SJG or Company) filed a petition with the Board requesting approval to change the rates pertaining to its Transportation Initiation Clause (TIC), and two elements of the Company's Societal Benefits Charge (SBC): the Remediation Adjustment Clause (RAC) and the Clean Energy Program (CLEP).

SJG sought approval to decrease the revenues recovered through the RAC, CLEP, and TIC by approximately $3.4 million. The increase in the SBC charge was the result of a $0.4 million increase in the level of its RAC related to expenditures for the remediation year August 1, 2017 to July 31, 2018 and a $4.0 million decrease to the revenue recovered through its CLEP for the period November 1, 2018 through October 31, 2019. Additionally, SJG sought authorization to increase its TIC revenues by approximately $0.2 million.

In response to discovery requests, the Company updated its petitioned recovery amounts and rates based upon actual data through September 30, 2018, and projected information for the period October 2018 through October 2019. Based upon the updates, the total recovery sought was modified to a decrease of $2.2 million.

On March 5, 2019, following review of the Petition and discovery responses, SJG, the New Jersey Division of Rate Counsel and Board Staff (collectively, Parties) executed a stipulation of settlement (Stipulation).

Staff recommended that the Board issue an Order approving the Stipulation of the Parties. In addition, Staff recommended that the Board direct SJG to file tariff sheets consistent with the terms and conditions of the Order by May 1, 2019.

DECISION: After discussion, the Board adopted the recommendation of Staff as set forth above.

Roll Call Vote:	**President Fiordaliso**	**Aye**
	Commissioner Holden	**Aye**
	Commissioner Solomon	**Aye**
	Commissioner Chivukula	**Aye**
	Commissioner Gordon	**Aye**

D. Docket No. GR18060606 – In the Matter of the Petition of Public Service Electric and Gas Company's 2018/2019 Annual BGSS Commodity Charge Filing for its Residential Gas Customers Under its Periodic Pricing Mechanism and for Changes in its Balancing Charge.

BACKGROUND AND DISCUSSION: On June 1, 2018, Public Service Electric and Gas Company (PSE&G or Company) filed a petition (2018 BGSS Petition) with the Board requesting authority to decrease the Company's Basic Gas Supply Service (BGSS) Residential Gas Service (BGSS-RSG) rate from $0.368938 per therm (including losses and Sales and Use Tax (SUT) to $0.349579 per therm (including losses and Sales and Use Tax (SUT). The decrease in the BGSS-RSG would result in a decrease in annual

BGSS revenues of approximately $24.8 million (excluding losses and SUT). The Company also sought authority to increase PSE&G's Balancing Charge, which recovers the cost of providing storage and peaking services, from its current charge of $0.090052 per therm (including losses and SUT) to a charge to $0.102825 per therm (including losses and SUT).

Subsequent to the June 1, 2018 filing, the Company made a compliance filing on August 31, 2018 in response to the Board's Order in the Company's Petition for Approval of Electric and Gas Base Rate Adjustments Pursuant to the Energy Strong Program (Energy Strong) in Docket Nos. ER18040358 and GR18040359. As a result of the Energy Strong Rate Adjustment Order, the Company's BGSS-RSG Commodity Charge was decreased from $0.368938 per therm (including losses and SUT) to $0.358937 per therm, effective September 1, 2018.

On September 10, 2018, the Company, the New Jersey Division of Rate Counsel and Board Staff (the Parties), executed a stipulation of settlement (Stipulation) whereby the Parties requested the Board accepting the Stipulation which sought to implement provisional changes in the Company's BGSS-RSG and Balancing Charge rates subject to refund to be effective as of October 1, 2018 as final.

On September 17, 2018, the Board issued an Order (September 2018 Provisional Order) in this docket approving a stipulation executed by the Parties. The September 2018 Provisional Order authorized PSE&G to implement its proposed BGSS-RSG and Balancing Charge rates on a provisional basis, subject to refund, effective on and after October 1, 2018. As approved in the September 2018 Provisional Order, the annual bill for a typical residential heating customer using 165 therms per winter months and 1,010 therms annually from $879.16 to $867.45 would decrease by $11.71, or approximately 1.3% based on rates in effect on June 1, 2018 and for those customers who receives BGSS service from PSE&G.

On September 20, 2018, the Board transmitted this matter to the Office of Administrative Law as a contested case where it was subsequently assigned to Administrative Law Judge (ALJ) Jacob S. Gertsman.

Subsequent to the Board's issuance of the September 2018 Provisional Order, PSE&G made compliance filings in response to the Board's Orders in two matters. First, on October 30, 2018, PSE&G made a compliance filing as a result of a Board Order in PSE&G's 2018 base rate case. As a result of the Base Rate Case Order, the BGSS-RSG rate was decreased from the provisional approved rate of $0.349579 per therm (including losses and SUT) to $0.349129 per therm (including losses and SUT) effective November 1, 2018. Second, on December 28, 2018, PSE&G made a compliance filing in response to a Board Order resolving the Company's filing related to its Gas System Modernization Program based rate adjustment case. As a result of the GSMP Roll In Order, PSE&G's BGSS-RSG rate was further decreased from $0.349129 per therm (including losses and SUT) to $0.349059 per therm (including losses and SUT) effective January 1, 2019.

On March 11, 2019, the Parties executed a Stipulation of Settlement whereby the Parties request the Board approve PSE&G' Provisional BGSS Rates as updated per the Base Rate Case Order and GSMP Roll In Order, as Final. On March 14, 2019, ALJ Gertsman issued an Initial Decision approving the Stipulation finding that the Parties had voluntarily agreed to the terms of the Stipulation and that the Stipulation fully disposed of all matters and is consistent with the law.

Staff recommended that the Board issue an Order approving the Initial Decision and the Stipulation. In addition, Staff recommended that the Board direct PSE&G to file tariff sheets consistent with its Order by April 15, 2019.

DECISION: After discussion, the Board adopted the recommendation of Staff as set forth above.

Roll Call Vote:	**President Fiordaliso**	**Aye**
	Commissioner Holden	**Aye**
	Commissioner Solomon	**Aye**
	Commissioner Chivukula	**Aye**
	Commissioner Gordon	**Aye**

E. Docket No. GR18060605 – In the Matter of the Petition of Public Service Electric and Gas Company's 2018 Annual Margin Adjustment Charge.

BACKGROUND AND DISCUSSION: On June 1, 2018, Public Service Electric and Gas Company (PSE&G or Company) filed a petition with the Board seeking authority to adjust its Margin Adjustment Charge (MAC). The MAC was established to ensure margins from Non-Firm Transportation customers are credited to firm gas customers in recognition that both firm and non-firm customers should contribute toward off-setting the costs associated with maintaining the Company's distribution system. In the filing, PSE&G projected that, based on actual data through April 2018, the net MAC balance including cumulative interest at September 30, 2018 would have an over- collected balance of $25.32 million including interest. This translated to a change in the per therm MAC rate from the then existing credit rate of $0.006758, including Sales and Use Tax (SUT) to a credit of $0.010873 per therm, a decrease of 0.004115 per therm.

The Company updated the information in the filing to include actual data through September 2018, which supported a credit rate of $0.006598 per therm, including SUT. However, since the change was negligible, the Company proposed maintaining the current MAC credit of $0.006758 per therm.

On March 7, 2019, the Company, the New Jersey Division of Rate Counsel and Board Staff (collectively, the Parties) executed a Stipulation of Settlement (Stipulation) by which the Parties agreed that the current per therm MAC credit rate of $0.006758 should be maintained.

Staff recommended that the Board approve the Stipulation of the Parties. Staff also recommended that the Board direct PSE&G to file revised tariff prior to April 15, 2019.

DECISION: After discussion, the Board adopted the recommendation of Staff as set forth above.

Roll Call Vote:	**President Fiordaliso**	**Aye**
	Commissioner Holden	**Aye**
	Commissioner Solomon	**Aye**
	Commissioner Chivukula	**Aye**
	Commissioner Gordon	**Aye**

F. Docket No. ER18060681 – In the Matter of the Petition of Public Service Electric and Gas Company for Approval of Changes in its Electric Solar Pilot Recovery Charge for its Solar Loan I Program.

BACKGROUND AND DISCUSSION: On June 29, 2018, Public Service Electric and Gas Company (PSE&G or the Company) filed a petition (2018 Solar Pilot Recovery Charge (SPRC) Filing) with the Board seeking approval of an increase in its electric tariff SPRC rate. The 2018 SPRC Filing requested an increase in the SPRC revenues of approximately $2.6 million for the period October 1, 2018 through September 30, 2019. The rates proposed for the SPRC were designed to recover approximately $8.2 million in revenue on an annual basis.

Subsequently, PSE&G updated the revenue requirement to include actual data through September 30, 2018. Based on this update, the total revenue to be recovered from ratepayers was approximately $7.2 million.
On March 7, 2019, PSE&G, Board Staff and the New Jersey Division of Rate Counsel (collectively, the Parties) executed a stipulation of settlement (Stipulation) agreeing to a proposed increase to the SPRC to $0.000184 per kWh, including Sales and Use Tax (SUT).

Staff recommended that the Board issue an Order accepting the Stipulation of the Parties, which seeks to implement an SPRC rate of $0.000184 per kWh, including SUT. Staff also recommended that the Board order PSE&G to file tariffs consistent with the Board's Order by May 1, 2019.

DECISION: After discussion, the Board adopted the recommendation of Staff as set forth above.

Roll Call Vote:	**President Fiordaliso**	**Aye**
	Commissioner Holden	**Aye**
	Commissioner Solomon	**Aye**
	Commissioner Chivukula	**Aye**
	Commissioner Gordon	**Aye**

G. Docket No. GR18091055 – In the Matter of the Petition of New Jersey Natural Gas Company for the Annual Review and Revision of Societal Benefits Charge Factors for Remediation Year 2018.

BACKGROUND AND DISCUSSION: On September 21, 2018, New Jersey Natural Gas Company (NJNG or Company) filed a petition with the Board requesting approval to change rates for two components of its Societal Benefits Charge (SBC): the Remediation Adjustment (RA) and the New Jersey Clean Energy Program (NJCEP).

NJNG sought approval to increase the Company's per therm after-tax RA rate, approval to increase the NJCEP per therm after-tax rate, and approval of the remediation expenditures incurred by the Company for the period July 1, 2017 through June 30, 2018.

The Company proposed to increase the per therm after-tax RA rate from $0.0106 to $0.0127 and increase the per therm after-tax NJCEP rate from $0.0194 to $0.0222. These rates combined with the existing Universal Service Fund rate of $0.0103 per therm establish the proposed SBC after-tax rate of $0.0452 per therm. The RA revenues would increase by approximately $1.50 million, while the NJCEP revenues would increase by approximately $2.01 million over what is currently being collected in rates on an after-tax basis.

On March 13, 2019, NJNG, the New Jersey Division of Rate Counsel and Board Staff executed a stipulation of settlement (Stipulation). Based on the Stipulation, the annual bill impact on a typical residential heating customer using 1,000 therms per year is an increase of approximately $4.90 or 0.49%.

Staff recommended that the Board issue an Order approving the Stipulation of the Parties. In addition, Staff recommended that the Board direct NJNG to file tariff sheets consistent with the terms and conditions of the Order by April 1, 2019.

DECISION: After discussion, the Board adopted the recommendation of Staff as set forth above.

Roll Call Vote:	**President Fiordaliso**	**Aye**
	Commissioner Holden	**Aye**
	Commissioner Solomon	**Aye**
	Commissioner Chivukula	**Aye**
	Commissioner Gordon	**Aye**

H. Docket GR19020278 – In the Matter of the Petition of New Jersey Natural Gas for Approval to Implement an Infrastructure Investment Program (IIP) and Associated Cost Recovery Mechanism Pursuant to N.J.S.A. 48:2-21 and N.J.A.C. 14:3-2A.

BACKGROUND AND DISCUSSION: On February 28, 2019, New Jersey Natural Gas Company (NJNG or the Company) filed a petition (2019 IIP Petition) with the Board seeking approval for its Infrastructure Investment Program (IIP or Program), including an associated cost recovery mechanism. NJNG proposed to invest $507 million over a five year period from July 1, 2019 through June 30, 2023. NJNG sought authority to implement a cost recovery mechanism for its proposed IIP. The Company proposed that NJNG's investment cost will be recovered utilizing the cost recovery mechanism utilized in the Company's SAFE Extension (SAFE II) Program, which was approved by the Board in the Company's last base rate case.

The proposed program includes seven projects estimated to cost $288.2 million excluding Allowance for Funds Used during Construction. The proposed projects include: (1) reliability and resiliency projects, adding 65.9 miles of reinforcement mains to the system; (2) replacement and reinforcement of 7.7 miles of main as well as install a new regulator station; (3) LNG transmission interconnection from the Howell LNG facility to the Company's backbone transmission system; (4) reconstruction of a regulator station in order to mitigate existing storm – related risks; (5) replace older steel mains with state of the art steel mains; (6) Excess Flow Valve (EFV) installation of approximately 16,000 EFV's in potential storm-affected areas of the Company's service territory; and (7) Protection of Regulators, approximately 60,000 protective devices on regulator vents in flood areas.

In addition, NJNG proposed an integrated information technology investment referred to as NEXT. The Company anticipated that NEXT's total capital cost to be approximately $219 million. According to the petition, NEXT will support and modernize the business process and technology platforms, while increasing the security of the information. The Company has broken down the NEXT project into five major components: (1) Finance and Accounting; (2) Customer Experience; (3) Customer Information and Billings; (4) Work Force and Asset Management; and (5) the technical foundational platforms required for IT integration, reporting and content management.

The Company proposed to utilize the after-tax Weighted Average Cost of Capital (WACC) approved by the Board in the Company's recent base rate case filing (BPU Docket No. GR15111304). The WACC is 6.90 percent (6.40 percent after-tax), based on the Board's Order in NJNG's last base rate case proceeding in. The initial WACC is based on the return on equity of 9.75 percent and an equity component in the capital structure of 52.50 percent.

Staff recommended that the Board retain this matter for hearing at the Board and designate Commissioner Robert M. Gordon as the presiding officer. Staff also recommended that any entity seeking to intervene or participate in this matter file the appropriate application with the Board by April 29, 2019. Also, any party wishing to file a motion for admission of counsel *pro hac vice* do so, concurrently with any motion to intervene or participate.

DECISION: After discussion, the Board adopted the recommendation of Staff as set forth above.

Roll Call Vote:	**President Fiordaliso**	**Aye**
	Commissioner Holden	**Aye**
	Commissioner Solomon	**Aye**
	Commissioner Chivukula	**Aye**
	Commissioner Gordon	**Aye**

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I. Docket No. ER19010009 – In the Matter of Federal Energy (FERC) Items for 2019 – FERC Docket No. RP19-351 Tennessee Gas Pipeline Company, LLC re: FERC Form No. 501-G – See Executive Session.

BACKGROUND AND DISCUSSION: This matter was first discussed in executive session. Staff recommended that the Board ratify its consent to the recommendation given in executive session.

DECISION: After discussion, the Board adopted the recommendation of Staff as set forth above.

Roll Call Vote:	**President Fiordaliso**	**Aye**
	Commissioner Holden	**Aye**
	Commissioner Solomon	**Aye**
	Commissioner Chivukula	**Aye**
	Commissioner Gordon	**Aye**

J. Docket No. EO19020226 – In the Matter of Verified Petition of the Retail Energy Supply Association Seeking Withdrawal of 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.

This matter was deferred.

3. CABLE TELEVISION

There were no items in this category.

4. TELECOMMUNICATIONS

There were no items in this category.

5. WATER

Michael Kammer, Director, Division of Water, presented these matters.

A. Docket No. WE18080926 – In the Matter of the Petition of Village Utility, LLC for Approval of a Municipal Consent to Provide Sewerage Service to a Portion of the Township of Sparta, for Approval of Implementation of an Initial Tariff for Wastewater Service within the Township of Sparta, and for Other Required Approvals.

BACKGROUND AND DISCUSSION: Village Utility LLC, (Petitioner or Village Utility) filed a petition with the Board, seeking approval of the following: (1) a municipal consent adopted by Ordinance No. 18-07 (Ordinance) on August 14, 2018, by the Township of Sparta (Township), County of Sussex; and (2) the implementation of an initial tariff for wastewater service within the Township.

Village Utility was formed in order to own and operate a wastewater collection and treatment facility to serve the needs of the North Village at Sparta (North Village), a new mixed-use development in the Township.

On February 12, 2019, a municipal consent hearing was held at the Board's Office. Megan Lupo, Esq. presided over the hearing at which representatives of Village Utility LLC, the New Jersey Division of Rate Counsel (Rate Counsel) and Staff appeared. No members of the public appeared at the hearing.

Village Utility, the Rate Counsel and Board Staff (collectively, Signatory Parties) entered into a Stipulation of Settlement (Stipulation) to resolve this matter.

Staff recommended that the Board approve the Stipulation of the Signatory Parties.

DECISION: After discussion, the Board adopted the recommendation of Staff as set forth above.

Roll Call Vote:	**President Fiordaliso**	**Aye**
	Commissioner Holden	**Aye**
	Commissioner Solomon	**Aye**
	Commissioner Chivukula	**Aye**
	Commissioner Gordon	**Aye**

B. Docket No. WR18111241 – In the Matter of New Jersey-American Water, Inc. for Authorization to Change the Level of its Purchased Water Adjustment Clause and Purchased WasteWater Treatment Adjustment Clause.

BACKGROUND AND DISCUSSION: On November 15, 2018, New Jersey-American Water Company, Inc. (Petitioner or Company) filed a petition with the Board for authorization to change the levels of its existing Purchased Water Adjustment Clause charge and Purchased Sewerage Treatment Adjustment Clause charges, with respect to increased purchased water expense and increased purchased wastewater treatment expense. The total amount originally requested was an overall increase of $1,678,816.00 or 0.25%. On January 25, 2019, the Company filed an amended petition. The total amount in the Petition was an increase of annual revenues by $1,946,639.00 or 0.29% above the total Company revenues. As a result of settlement discussions, the Signatory Parties have agreed to a total overall stipulated increase of $1,946,639.00 or 0.29% above total Company revenues of $676,800,000.00.

This matter was transmitted to the Office of Administrative Law on November 16, 2018, as a contested case and was assigned to Administrative Law Judge (ALJ) Gertsman. A telephonic prehearing conference was held on December 12, 2018, with ALJ Gertsman during which, the ALJ directed that public hearings be held on this matter. On November 26, 2018, Middlesex Water Company (Middlesex) filed a motion to intervene in the instant proceeding, and no party opposed the motion, which was subsequently granted.

After proper notice, a public hearing was held on February 28, 2019 in Howell Township at 5:30 p.m. No members of the public attended the public hearing and no written comments were received.

Subsequent to the public hearing, the Petitioner, the New Jersey Division of Rate Counsel, Staff and Middlesex (Signatory Parties) engaged in settlement negotiations which resulted in entering into a Stipulation of Settlement (Stipulation) on March 1, 2019. Middlesex filed a letter indicating that it did not object to the Stipulation.

ALJ Gertsman issued his Initial Decision recommending adoption of the Stipulation executed by the Signatory Parties, finding that they had voluntarily agreed to the Stipulation and that the Stipulation fully disposes of all issues and is consistent with the law.

Staff recommended that the Board adopt the Initial Decision and approve the Stipulation executed by the Signatory Parties in this matter becoming effective on March 29, 2019 with rates to become effective April 1, 2019.

DECISION: After discussion, the Board adopted the recommendation of Staff as set forth above.

Roll Call Vote:	**President Fiordaliso**	**Aye**
	Commissioner Holden	**Aye**
	Commissioner Solomon	**Aye**
	Commissioner Chivukula	**Aye**
	Commissioner Gordon	**Aye**

6. RELIABILITY & SECURITY

James Giuliano, Director, Division of Reliability and Security, presented these matters.

A. Docket No. GO18101190 – In the Matter of the Joint Petition of the Gas Distribution Companies for Approval of a Meter Selective Sampling Program.

BACKGROUND AND DISCUSSION: The four regulated gas distribution companies (GDCs) in New Jersey are Public Service Electric and Gas Company, New Jersey Natural Gas Company, Elizabethtown Gas Company and South Jersey Gas Company. The role of Board Staff is to monitor the GDCs' meter testing programs.

Staff convened a comprehensive work group with the GDCs. The purpose of this work group was to come to a consensus for implementation of a national standard that conforms to the rules and guidelines set forth by the Board.

Pursuant to N.J.A.C. 14:6-4.2, Periodic meter testing, (a) No gas utility shall allow a gas meter to remain in service for a period longer than 10 years, except where a sampling program has been established in accordance with American National Standards Institute (ANSI) B109 and approved by the Board. To date each Company has had its' own Board Order passed.

ANSI B109.1 is published by the American Gas Association. Pursuant to ANSI B109, 4.3.1, Objectives: The primary purpose of in-service performance testing is to provide service-life information on which the user may base a meter utilization program. The testing and maintenance procedures, meter design and the level of accuracy specified

must be such that a realistic balance exists between the benefits realized from high accuracy levels and the cost of achieving these levels. Any program established should be reviewed periodically with a view toward improvement in light of the current state of the art.

ANSI Z1.4, a nationally accepted standard, shall be incorporated into the Companies' meter sampling program. ANSI Z1.4 will be used in conjunction with other applicable rules to improve the current gas metering sampling protocol which was last updated in 1983. Hence, approval of this Board Order will create uniformity with respect to N.J.B.P.U.'s gas meter accuracy sampling program. The ANSI Z1.4 publication is titled: American National Standard prepared by The Statistics Subcommittee of the Accredited Standards Committee Z1 on Quality Environment, Dependability and Statistics.

Staff recommended that the Board adopt ANSI Z1.4, Natural Gas Sampling Standard and protocols for the four natural gas operators in the State.

DECISION: After discussion, the Board adopted the recommendation of Staff as set forth above.

Roll Call Vote:	**President Fiordaliso**	**Aye**
	Commissioner Holden	**Aye**
	Commissioner Solomon	**Aye**
	Commissioner Chivukula	**Aye**
	Commissioner Gordon	**Aye**

B. Docket No. EO18101187 – In the Matter of the Verified Petition of Jersey Central Power and Light Company for Authorization to Revise: the Statistical Sampling Aspects of its Electric Meter Testing Program Pursuant to N.J.A.C. 14:5-4.2, and the Form of Quarterly Reporting of Meter Test Results Pursuant to N.J.A.C. 14:3-4.7.

BACKGROUND AND DISCUSSION: The Board has jurisdiction to oversee the electric meter sampling program pursuant to N.J.A.C. 14:5-4.2, Periodic Testing of Electric Meters. The primary purpose of this rule is to establish a meter sampling techniques to ensure electric meter accuracy. The four regulated electric distribution companies in the State of New Jersey are Public Service Electric and Gas Company, Atlantic City Electric, Jersey Central Power and Light (JCP&L) and Rockland Electric Company, (EDCs).

Staff convened a comprehensive work group with the EDCs. The purpose of this work group was to reach a consensus for implementation of a national standard that conforms to the rules and guidelines set forth by the Board.

Board rules require a statistical sampling plan approved by the Board to be used by the EDCs. Staff has consensus with the EDCs on a comprehensive sampling plan which will streamline meter sampling by setting a universal protocol for electric meter sampling. In addition to the new testing protocol, updated reporting forms will be utilized by the EDCs.

Staff determined that a national standard consistent with American National Standards Institute (ANSI) guidelines should be adopted. Staff held multiple meetings with the EDCs to discuss updating the sampling techniques, to agree upon a uniform methodology that would be consistent with national guidelines, and to come to a consensus on a single plan which would benefit the public.

The New Jersey Division of Rate Counsel had no objection to the EDCs' petitions.

Staff recommended that the Board approve the petition of JCP&L to revise its statistical sampling methods to conform to ANSI Z1.9.

DECISION: After discussion, the Board adopted the recommendation of Staff as set forth above.

Roll Call Vote:	**President Fiordaliso**	**Aye**
	Commissioner Holden	**Aye**
	Commissioner Solomon	**Aye**
	Commissioner Chivukula	**Aye**
	Commissioner Gordon	**Aye**

C. Docket No. EO18101159 – In the Matter of the Joint Petition of Public Service Electric and Gas Company for Approval of an Electric Meter Selective Sampling Program.

BACKGROUND AND DISCUSSION: The Board has jurisdiction to oversee the electric meter sampling program pursuant to N.J.A.C. 14:5-4.2, Periodic Testing of Electric Meters. The primary purpose of this rule is to establish a meter sampling techniques to ensure electric meter accuracy. The four regulated electric distribution companies in the State of New Jersey are Public Service Electric and Gas Company (PSE&G), Atlantic City Electric, Jersey Central Power and Light and Rockland Electric Company, (EDCs).

Staff convened a comprehensive work group with the EDCs. The purpose of this work group was to come to a consensus for implementation of a national standard that conforms to the rules and guidelines set forth by the Board.

Board rules require a statistical sampling plan approved by the Board to be used by the EDCs. Staff has consensus with the EDCs on a comprehensive sampling plan which will streamline meter sampling by setting a universal protocol for electric meter sampling. In addition to the new testing protocol, updated reporting forms will be utilized by the EDCs.

Staff determined that a national standard consistent with American National Standards Institute (ANSI) guidelines should be adopted. Staff held multiple meetings with the Companies to discuss updating the sampling techniques, to agree upon a uniform methodology that would be consistent with national guidelines, and to come to a consensus on a single plan which would benefit the public.

The New Jersey Division of Rate Counsel had no objection to the EDCs' petitions.

Staff recommended approval of the petition of PSE&G to implement its Electric Metering Sampling Program in the form of ANSI Z1.9.

DECISION: After discussion, the Board adopted the recommendation of Staff as set forth above.

Roll Call Vote:	**President Fiordaliso**	**Aye**
	Commissioner Holden	**Aye**
	Commissioner Solomon	**Aye**
	Commissioner Chivukula	**Aye**
	Commissioner Gordon	**Aye**

D. Docket No. EO18101189 – In the Matter of the Petition of Atlantic City Electric Company to Revise and Update its Meter Selective Sampling Program Pursuant to N.J.A.C. 15:5-4.2, and the Form of Quarterly Reporting of Meter Test Results Pursuant to N.J.A.C. 14:3-7.

BACKGROUND AND DISCUSSION: The Board has jurisdiction to oversee the electric meter sampling program. 14:5-4.2, Periodic Testing of Electric Meters. The primary purpose of this rule is to establish a meter sampling techniques to ensure electric meter accuracy. The four regulated electric distribution companies in the State of New Jersey are Public Service Electric and Gas Company, Atlantic City Electric, Jersey Central Power and Light and Rockland Electric Company, (EDCs).

Staff convened a comprehensive work group with the EDCs. The purpose of this work group was to come to a consensus for implementation of a national standard that conforms to the rules and guidelines set forth by the Board.

Board rules require a statistical sampling plan approved by the Board to be used by the EDCs. Staff has consensus with the EDCs on a comprehensive sampling plan which will streamline meter sampling by setting a universal protocol for electric meter sampling. In addition to the new testing protocol, updated reporting forms will be utilized by the EDCs.

Staff determined that a national standard consistent with American National Standards Institute (ANSI) guidelines should be adopted. Staff held multiple meetings with the Companies to discuss updating the sampling techniques, to agree upon a uniform methodology that would be consistent with national guidelines, and to come to a consensus on a single plan which would benefit the public.

The New Jersey Division of Rate Counsel had no objection to the EDCs' petitions.

Staff recommended approval of the petition of Atlantic City Electric to update similarly its meter sting program to conform with that same standard.

DECISION: After discussion, the Board adopted the recommendation of Staff as set forth above.

Roll Call Vote:	**President Fiordaliso**	**Aye**
	Commissioner Holden	**Aye**
	Commissioner Solomon	**Aye**
	Commissioner Chivukula	**Aye**
	Commissioner Gordon	**Aye**

E. Docket No. EO18101188 – In the Matter of the Meter Sampling Plan of Rockland Electric Company.

BACKGROUND AND DISCUSSION: The Board has jurisdiction to oversee the electric meter sampling program. Periodic Testing of Electric Meters. The primary purpose of this rule is to establish a meter sampling techniques to ensure electric meter accuracy. The four regulated electric distribution companies in the State of New Jersey are Public Service Electric and Gas Company, Atlantic City Electric, Jersey Central Power and Light and Rockland Electric Company, (EDCs).

Staff convened a comprehensive work group with the EDCs. The purpose of this work group was to come to a consensus for implementation of a national standard that conforms to the rules and guidelines set forth by the Board.

Board rules require a statistical sampling plan approved by the Board to be used by the EDCs. Staff has consensus with the EDCs on a comprehensive sampling plan which will streamline meter sampling by setting a universal protocol for electric meter sampling. In addition to the new testing protocol, updated reporting forms will be utilized by the EDCs.

Staff determined that a national standard consistent with American National Standards Institute (ANSI) guidelines should be adopted. Staff held multiple meetings with the Companies to discuss updating the sampling techniques, to agree upon a uniform methodology that would be consistent with national guidelines, and to come to a consensus on a single plan which would benefit the public.

The New Jersey Division of Rate Counsel had no objection to the EDCs' petitions.

Staff recommended approval of the petition of Rockland Electric to revise its sampling program to the same standards.

DECISION: After discussion, the Board adopted the recommendation of Staff as set forth above.

Roll Call Vote:	**President Fiordaliso**	**Aye**
	Commissioner Holden	**Aye**
	Commissioner Solomon	**Aye**
	Commissioner Chivukula	**Aye**
	Commissioner Gordon	**Aye**

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7. CUSTOMER ASSISTANCE

There were no items in this category.

8. CLEAN ENERGY

Scott Hunter, Manager, Division of Clean Energy, presented these matters.

A. Docket No. EO12090832V – In the Matter of the Implementation of P.L. 2012, c. 24, The Solar Act of 2012;

Docket No. EO12090862V – In the Matter of the Implementation of P.L. 2012, c. 24, N.J.S.A. 48:3-87(T) – A Proceeding to Establish a Program to Provide SRECs to Certified Brownfield, Historic Fill and Landfill Facilities; and

Docket No. QO18050592 – AC Power 2 LLC – Winzinger Landfill.

BACKGROUND AND DISCUSSION: On May 17, 2018, AC Power 2. LLC (AC Power 2 or Applicant) submitted an application to the Board to have its project certified as being located on a properly closed sanitary landfill facility pursuant to N.J.S.A. 48:3-87(t) (Subsection (t)) of the Solar Act. AC Power 2's 6.5 MWdc project is proposed to be constructed on property owned by Robert T. Winzinger, Inc. and located at Block 1504, Lots 1–9, at Pearce Road in Egg Harbor Township, Atlantic County, New Jersey.

Subsection (t) of the Solar Act of 2012, P.L. 2012, c. 24, enacted July 23, 2012, codified in part at N.J.S.A. 48:3-87 (t), provides for Board establishment of a certification program for approval of certain grid supply solar electric power generation facilities located on properly closed landfills, brownfields, and areas of historic fill that seek eligibility for Solar Renewable Energy Certificates (SRECs). On January 23, 2013, after conducting a public proceeding that the Board commenced on October 4, 2012, the Board established a certification program and directed staff to work with New Jersey Department of Environmental Protection (NJDEP) to develop an application.

Staff received advisory recommendations from NJDEP for the application described below and recommends that the Board grant conditional certification to AC Power 2 for its proposal to build a 6.5 MWdc solar facility project at Winzinger Landfill located in Egg Harbor Township, New Jersey.

Staff consulted with NJDEP about AC Power 2's request for certification of its potential solar generation facility pursuant to Subsection (t) of the Solar Act. On the basis of NJDEP's determination, information contained in the application, and other relevant factors, Staff recommended that the Board conditionally certify the applicant's project as a "properly closed sanitary landfill" pursuant to Subsection (t). NJDEP determined that the 22 acre area on which the solar electric power generation facility will be located constitutes a "properly closed sanitary landfill" pursuant to the Solar Act. Staff also recommended that the Board direct the Applicant to file its SREC registration within 14 days of the date of the Order and explicitly grant conditional certification.

DECISION: After discussion, the Board adopted the recommendation of Staff as set forth above.

Roll Call Vote:	**President Fiordaliso**	**Aye**
	Commissioner Holden	**Aye**
	Commissioner Solomon	**Aye**
	Commissioner Chivukula	**Aye**
	Commissioner Gordon	**Aye**

B. Docket No. QO18121331 – In the Matter of the Petition of Helios Solar Energy, LLC – Request for Solar Renewable Energy Certificate Extension (SREC).

BACKGROUND AND DISCUSSION: This matter involved Helios Solar Energy, LLC and e2/ECTA (Petitioners) requesting the Board to extend the deadline by which a complete Solar Renewable Energy Certificates (SRECs) Registration Program application must be filed in order for a project to receive a fifteen-year SREC Qualification Life (QL). The Board issued an Order setting midnight of October 29, 2018 as the cut-off period for submitting a complete application for which a project would receive a fifteen-year SREC QL. The Board reaffirmed that deadline in an Order issued at the February 27, 2019 Agenda Meeting. The Petitioners represented that through no fault of its own it was unable to complete the applications for seven solar projects until the following day and requested that the Board extend the deadline for twenty-four hours, through midnight October 30, 2018.

Staff recommended that the Board find that all market participants were all noticed that the Board would implement the reduction, thereby, bringing its rules and practice into conformity with the Clean Energy Act at the earliest feasible time and the solar market participants were equally uncertain as to the time of the Board's implementation.

Staff also recommended that the Board reaffirm the implementation of the reduction in the qualification life in the October 29 order and find that it would be inequitable to make an exception for the Petitioner. Staff further recommended that the Board provided the Petitioners' seven projects identified that having been complete after midnight on October 2018, meet all other requirements of the RPS and state and federal law, that the Board direct staff to apply 10-year qualification life to the identified projects. Finally, Staff recommended the Board deny the petition of Helios solar and e2/ECTA.

DECISION: After discussion, the Board adopted the recommendation of Staff as set forth above.

Roll Call Vote:	**President Fiordaliso**	**Aye**
	Commissioner Holden	**Aye**
	Commissioner Solomon	**Aye**
	Commissioner Chivukula	**Aye**
	Commissioner Gordon	**Aye**

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C. Docket No. QO16020130 – In the Matter of the Implementation of N.J.S.A. 48:3-87(R), Designating Grid Supply Projects as Connected to the Distribution System – Order Implementing Certain Provisions of N.J.A.C. 14:8-2.4(G) for Energy Year 2020.

BACKGROUND AND DISCUSSION: The Solar Act of 2012 (Solar Act or 2012 Act) sought to transition away from providing solar incentives for construction of large grid scale solar on farmland and open space. The law provided a four year window for accommodating the farmland projects under development at that time via Subsections s and q. Subsection r added criteria for protecting ratepayers, the electric distribution system and open space preservation from large scale solar development.

Subsection r mandates that the Board evaluate all proposed "grid supply" projects, other than those submitted pursuant to Subsection t (i.e., landfills, brownfields and areas of historic fill), for which applications are submitted on or after June 1, 2016.

By Order dated February 27, 2019, the Board approved the opening of an application round for solar electric generation facilities seeking Solar Renewable Energy Certificates (SRECs) approval pursuant to Subsection r from March 1 through March 14 and an application form and escrow agreement for immediate release.

Five applications were received by the March 14, 2017 deadline. As required by statute, Staff provided public notice of the opportunity to comment on the applications. Staff recommended that the Board conditionally approve each of the five applications for SREC eligibility conditioned upon the facility commencing commercial operations prior to the Board's determination that the state has attained 5.1% of its electricity from solar generated kilowatt hours.

On March 14, 2019, applicant HCE Strykers Road Solar LLC submitted an application under Subsection r for designation as connected to the distribution system so that the project would be eligible to generate SRECs. Applicant's 1.76 MW dc, 1.38 MW ac project is located in Lopatcong Township, New Jersey.

On March 14, 2019, applicant HCE River Road Solar LLC submitted an application under Subsection r for designation as connected to the distribution system so that the project would be eligible to generate SRECs. Applicant's 11.085 MW dc, 8.79 MW ac project is located in Burlington Township, New Jersey.

On March 14, 2019, applicant HCE Campus Drive Solar LLC submitted an application under Subsection r for designation as connected to the distribution system so that the project would be eligible to generate SRECs. Applicant's 4.78 MW dc, 3.72 MW ac project is located in Burlington Township, New Jersey.

On March 14, 2019, applicant Lakehurst Solar Farm LLC submitted an application under Subsection r for designation as connected to the distribution system so that the project would be eligible to generate SRECs. Applicant's 14.99 MW dc, 9.6 MW ac project is located in Manchester, New Jersey.

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On March 14, 2019, applicant Ben Moreell Solar Farm LLC submitted an application under Subsection r for designation as connected to the distribution system so that the project would be eligible to generate SRECs. Applicant's 28.56 MW dc, 20 MW ac project is located in Tinton Falls, New Jersey.

Staff reviewed the applications individually in light of the statutory and regulatory requirements for Board approval. With respect to potential impact on the SREC market, Staff advises the Board's consideration of the requirement of the Clean Energy Act of 2018 (CEA) to close the Solar Registration Program to new registrations upon attainment of 5.1%. The five projects, if built to the full capacity proposed, would equal 61.175 MWdc, less than 15% of the total solar capacity anticipated to enter the market.

Staff recommended that the Board conditionally approve each of the five applications for SREC eligibility conditioned upon the facility commencing commercial operations prior to the Board's determination that the state has attained 5.1% of its electricity from solar generated kilowatt hours.

DECISION: After discussion, the Board adopted the recommendation of Staff as set forth above.

Roll Call Vote:	**President Fiordaliso**	**Aye**
	Commissioner Holden	**Aye**
	Commissioner Solomon	**Aye**
	Commissioner Chivukula	**Aye**
	Commissioner Gordon	**Aye**

D. Docket No. QO18040393 – In the Matter of the Clean Energy Programs and Budgets for Fiscal Year 2019 – True-Up and Revised Budget.

Sherri Jones, Assistant Director, Division of Clean Energy, presented this matter.

BACKGROUND AND DISCUSSION: This matter involved reallocations of funds per staff's authorization, the trued up expenses from FY18, reallocation of funds for FY 19 and new initiatives for the New Jersey Clean Energy Program (NJCEP), revisions to the detailed budgets and updated savings projections. The FY19 programs and budgets were established through a Board Order entered In the Matter of the Clean Energy Programs and Budget for FY19, BPU Dkt. No. QO18040393 (June 22, 2018). By Order dated June 22, 2018, the Board approved a funding level of $344,665,000.00 for FY19 via the Comprehensive Resource Analysis (CRA).

In a separate Order also dated June 22, 2018, the Board approved FY19 programs and budgets for the NJCEP (FY19 Budget Order). The Division of Clean Energy initially establishes annual budgets based, in part, on estimated expenses for the previous year. Once actual expenses are known, the Board then issues a revised budget Order to "true up" any differences between actual and estimated expenses. The June 22, 2018 FY19 Budget Order included estimated carry-over of unspent funds from previous years, plus new funding of $344,665,000.00, as set out in the June 22, 2019 CRA Order.

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On March 13, 2019, staff released the proposal for public comment on the trued up expenses from FY18, reallocation of funds for FY19 and new initiatives for the NJCEP, revisions to the detailed budgets and updated savings projections. Comments were due on March 20, 2019.

Comments were received by the New Jersey Division of Rate Counsel (Rate Counsel) and New Jersey Natural Gas (NJNG) in support of the changes; however, Rate Counsel stressed that they would like more information, such as, participation rates, forecasts and more detailed explanations. NJNG also expressed concern on the implementation of the Energy Efficiency Goals for the utilities via the Clean Energy Act.

On February 11, 2019, staff issued a proposal for public comment to move $1,000,000.00 from the C&I Buildings Program to LGEA to fund an increase in applications. Staff represented a reasonable approach to maintaining the NJCEP programs through the remainder of the fiscal year, and recommended that the budget maintains consistency in programs and incentives levels through the remainder of the fiscal year.

Staff recommended the available funds be distributed as follows:

- $2.5 million to the Comfort Partners Program;
- $15 million towards state facilities;
- 350,000 towards marketing;
- 750 towards reinstating of Clean Energy Conference;
- $2.3 million towards a New Community Energy Grant Initiative; and
- $250,000.00 for software.

In addition to the reallocation of the true-up funds, staff also proposed reallocating $12.7 million among and within programs to align budgets with the program performance. Of that 12.7, staff recommended the following increases:

- One million towards Energy Efficiency Products Program;
- $4 million to the C&I Buildings Program;
- 5 million to Direct Install;
- 2.7 million for evaluation; and
- an additional 3,500 for services provided by NJIT.

Staff further proposed the following reductions:

- $500,000.00 from the Residential New Construction Program;
- $5 million from the Multi-Family Program;
- 6.2 million from CHP and storage; and
- $915,000.00 from outreach and education.

Additionally, staff sought approval for a staff authorization budget reallocation that happened in February of 2019 where $1 million was moved from the C&I Buildings Program to fund an unexpected increase of applications in the Local Government Energy Audit Program.

Finally, Staff sought approval for the updated energy savings to reflect these budget adjustments.

DECISION: After discussion, the Board adopted the recommendation of Staff as set forth above.

Roll Call Vote:	**President Fiordaliso**	**Aye**
	Commissioner Holden	**Aye**
	Commissioner Solomon	**Aye**
	Commissioner Chivukula	**Aye**
	Commissioner Gordon	**Aye**

E. Docket No. QO18060646 – In the Matter of the New Jersey Community Solar Energy Pilot Program.

Ariane Benrey, Program Administrator, Office of Clean Energy, presented this matter.

BACKGROUND AND DISCUSSION: On May 23, 2018, P.L. 2018, c.17 (the Clean Energy Act) was signed into law, directing the Board to adopt rules and regulations establishing a Community Solar Energy Pilot Program within 210 days.

On July 6, 2018, the Board released a Request for Comments which provided an opportunity for interested stakeholders to provide input on the design of the Pilot Program. A public meeting s held on July 24, 2018. Written comments were solicited with a deadline of receipt by the Board on July 31, 2018. On August 29, 2018, the Board approved the Proposed Rules for the Pilot Program.

The Proposed Rules were published in the New Jersey Register on October 1, 2018 and subject to a 60-day public comment period, which closed on November 30, 2018. Additionally, the Board held two public hearings on the Proposed Rules on November 8, 2018.

Additional stakeholder engagement was solicited as part of the development of the Pilot Program's Application process. A draft Application Form was published on November 28, 2018, along with drafts of the Community Solar Subscriber Organization Registration Form and the Community Solar Subscriber Disclosure Form. Written comments were received until December 21, 2018. Three public meetings were held on December 6, December 13, and December 17, 2018.

With strong support for the Proposed Rules and no substantive changes, the Board adopted the Community Solar Energy Pilot Program on January 17, 2019. The adopted Rules were filed with the Office of Administrative Law and published in the New Jersey Register on February 19, 2019. The final Rules provide the framework necessary for the development and implementation of community solar in New Jersey.

Staff recommended that the Board approve and release the Community Solar Energy Pilot Program application form. Staff further recommends that the Board approve the Board order clarifying the interconnection process for community solar projects in the pilot program.

DECISION: After discussion, the Board adopted the recommendation of Staff as set forth above.

Roll Call Vote:	**President Fiordaliso**	**Aye**
	Commissioner Holden	**Aye**
	Commissioner Solomon	**Aye**
	Commissioner Chivukula	**Aye**
	Commissioner Gordon	**Aye**

Staff recommended that the Board Order clarifying the interconnection process for community solar projects in the Community Solar Energy Pilot Program.

DECISION: After discussion, the Board adopted the recommendation of Staff as set forth above.

Roll Call Vote:	**President Fiordaliso**	**Aye**
	Commissioner Holden	**Aye**
	Commissioner Solomon	**Aye**
	Commissioner Chivukula	**Aye**
	Commissioner Gordon	**Aye**

F. Docket No. QO18121289 – In the Matter of the New Jersey Board of Public Utilities Offshore Wind Solicitation for 1,100 MW – Evaluation of the Offshore Wind Applications – See Executive Session.

Andrew Kuntz, Deputy Attorney General, Division of Law, presented this matter.

BACKGROUND AND DISCUSSION: This matter was first discussed in executive session and it involved Staff recommending that the Board, consistent with the discussions in executive session ratify Staff's selection of the contractor in this matter.

DECISION: After discussion, the Board adopted the recommendation of Staff as set forth above.

Roll Call Vote:	**President Fiordaliso**	**Aye**
	Commissioner Holden	**Aye**
	Commissioner Solomon	**Aye**
	Commissioner Chivukula	**Aye**
	Commissioner Gordon	**Aye**

9. MISCELLANEOUS

There were no items in this category.

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EXECUTIVE SESSION

After appropriate motion, the following matters, which involved pending litigation attorney/client privilege and contract negotiations to the Open Public Meetings Act at N.J.S.A. 10:4-12(b)7 was discussed in Executive Session.

2. ENERGY

I. Docket No. ER19010009 – In the Matter of Federal Energy (FERC) Items for 2019 – FERC Docket No. RP19-351 Tennessee Gas Pipeline Company, LLC re: FERC Form No. 501-G.

The substance of this discussion shall remain confidential except to the extent that making the discussion public is not inconsistent with law.

8. CLEAN ENERGY

F. Docket No. QO18121289 – In the Matter of the New Jersey Board of Public Utilities Offshore Wind Solicitation for 1,100 MW – Evaluation of the Offshore Wind Applications.

The substance of this discussion shall remain confidential except to the extent that making the discussion public is not inconsistent with law.

After appropriate motion, the Board reconvened to Open Session.

There being no further business before the Board, the meeting was adjourned.

Aida Camacho-Welch

AIDA CAMACHO-WELCH
SECRETARY OF THE BOARD

DATE: May 8, 2019

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May 22, 2019

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Via Email and Regular Mail

The Honorable Aida Camacho-Welch
Secretary, Board of Public Utilities
44 S Clinton Avenue
3rd Floor, Suite 314
Trenton, NJ 08625

Re: I/M/O the Verified Petition of the Retail Energy Supply Association Seeking Withdrawal of 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.
BPU Docket No. EO19020226

Dear Secretary Camacho-Welch:

I am writing on behalf of the Retail Energy Supply Association ("RESA")[1] to request that the Board of Public Utilities ("Board") at its next Agenda Meeting address the RESA Petition, filed February 14, 2019, that seeks to have Staff withdraw its cease and desist letter dated January 22, 2019. Staff's letter specifically directs all third party suppliers ("TPSs") with fixed or firm rate customer contracts to "cease and desist" charging customers for the new solar RPS costs at a rate in excess of the original contract rate and to refund any excess solar costs already collected. Staff issued this directive despite the Clean Energy Act's express instruction to the Board to "recognize these new solar purchase obligations as a change required by operation of law." As RESA noted in its Petition, Staff's cease and desist letter irreparably harms TPSs in number of ways.

The need for expedited consideration of RESA's Petition is clear. The letter created regulatory mandates – although they are of questionable legal validity and are not being enforced by the Board – that are causing TPSs to operate under a fog of regulatory uncertainty. The Board must address RESA's Petition to clear this matter. There have now been five Board Agenda

[1] The comments expressed in this filing represent the position of the Retail Energy Supply Association (RESA) as an organization but may not represent the views of any particular member of the Association. Founded in 1990, RESA is a broad and diverse group of retail energy suppliers dedicated to promoting efficient, sustainable and customer-oriented competitive retail energy markets. RESA members operate throughout the United States delivering value-added electricity and natural gas service at retail to residential, commercial and industrial energy customers. More information on RESA can be found at www.resausa.org.

meetings where the RESA Petition was not considered. The Board's failure to address RESA's Petition is aggravating the harm caused to TPSs.

On March 27 Senator Smith, the prime sponsor of the Clean Energy Act, wrote the Board to express his concern that Staff's cease and desist letter "is inconsistent with what the legislature intended and inconsistent with the explicit language in the law." Senator Smith went on to say that "the legislature specifically included language to make clear that electric providers, whether part of the BGS auction or a third party supplier, must be permitted to make adjustments to fixed price contracts in response to the new Solar RPS requirements imposed by the legislation." RESA urges the Board to heed Senator Smith's guidance and to clear up the confusion Staff's letter created, and to do so without further delay.

In summary, RESA asks that its Petition be scheduled for consideration at the Board's next Agenda meeting and repeats its request that Staff's letter be withdrawn as it is inconsistent with the clear language of the Clean Energy Act.

Respectfully Submitted,

Murray E. Bevan,
Counsel, Retail Energy Supply Association

cc: President Joseph Fiordaliso
Commissioner Dianne Solomon
Commissioner Mary-Anna Holden
Commissioner Upendra Chivukula
Commissioner Bob Gordon
Grace Strom Power, Chief of Staff
Stacy Peterson, Director, Division of Energy
Senator Bob Smith

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/

DATE: December 2, 2020

TO: Each New Jersey Licensed Third Party Supplier

RE: In The Matter of the Cease and Desist and Refund Instructions Letter of January 22, 2019 to Third Party Suppliers; Docket No. EO20100654

On January 22, 2019, in response to complaints filed with the Board of Public Utilities (the "Board"), Board Staff issued a letter to all Third-Party Suppliers ("TPSs") licensed to sell retail electricity in the State of New Jersey, interpreting the Board's rules regarding changes to a fixed price for electricity during the term of the contract, without the customer's prior authorization (the "January 22 Letter"). A copy of the January 22 Letter is appended hereto.

Background:

The January 22 Letter advised that, pursuant to N.J.A.C. 14:4-7.12, any contract to sell electricity at rates characterized as "fixed" or "firm", "not variable" or other similar language (collectively referred herein as a "fixed rate"), could not be increased during the pendency of the contract, without the customer's affirmative consent, as permitted in N.J.A.C. 14:4-7.6(l). The January 22 Letter set forth Staff's view that changes to the solar carve-out in the 2018 solar renewable portfolio standard law, P.L. 2018, c. 17 ("2018 Solar RPS Law"), were not an acceptable justification for charging more than the fixed rate.

Remedy:

In an effort to resolve this matter, Staff has developed a pathway for TPSs 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. Entities wishing to discuss options for substantive compliance are encouraged to contact Lanhi Saldana at Lanhi.Saldana@bpu.nj.gov.

TPSs who charged customers a rate that was higher than the fixed rate, without the customer's affirmative consent, including because of the charges associated with the 2018 Solar RPS Law, hereinafter referred to as "2018 Solar RPS Costs", may be released from further obligations associated with the January 22 Letter, if they certify that they have taken the following actions:

1. For any contracts that remain in effect, refrain from collecting additional 2018 Solar RPS Costs from New Jersey residential customers or small commercial customers (defined as those who utilized 11,000 kWh or less per year and hereinafter referred to as "SCC");

2. Provide a refund to all qualifying residential customers and SCC as follows:

    a. TPSs shall place an electronic banner on the main page of its website for residential customers or SCC, which will appear when the webpage is accessed by a New Jersey IP address, that will inform the customer that they may be eligible for a refund of 2018 Solar RPS Costs. The electronic banner will act as a hyperlink to a webpage where the customer may submit information to determine whether the customer is eligible for a refund of the 2018 Solar RPS Costs. For identification purposes, the residential or SCC customer must supply information that includes, but is not limited to, the name, address, telephone number, and e-mail address of the account holder. The customer may, but is not required to, provide the account number against which the 2018 Solar RPS Costs were billed. The electronic banner shall appear on the TPSs' website within sixty (60) business days from the date of this Notice and remain on the TPSs' website and available to SCC or residential customers for a period of thirty (30) calendar days after the banner first appears. TPSs shall take all reasonable measures to ensure the webpage and any associated hyperlinks upon which the residential customer or SCC is relying to make a request for a refund is fully functional and operating within the TPSs' control. TPSs shall address any technical issues within a reasonable period of time once notified of any technical difficulties experienced by any residential or SCC customer seeking information about a refund.

    b. Once the residential customer or SCC has been identified as a customer of the TPS, the TPS shall review the customer's account status, contract terms, and usage in order to determine the customer's eligibility for a refund of the 2018 Solar RPS Costs and calculate the potential refund within a reasonable period of time. The TPSs shall not unreasonably delay or cause delays in making timely evaluations of the residential or SCC customer's eligibility for a refund. The evaluation shall consider objectively verifiable metered data in determining the customer's eligibility.

    c. In order for a residential customer or SCC to receive a refund, if eligible, the residential or SCC customer must be in good standing with the TPS. If the residential or SCC customer owes any sum to the TPS, any refund due to the residential or SCC customer shall first be deducted from the customer's outstanding balance and any remaining refund shall be issued as set out in section (d) below.

    d. If a residential or SCC customer is eligible for a refund, the TPS shall issue a check to the residential or SCC customer and mail same to the residential or SCC customer's address on record within sixty (60) days from the date eligibility was determined.

    e. Upon the expiration of the thirty (30) days of the electronic banner appearing on the main page of the TPSs' webpage, TPSs shall send a letter to the Director of Energy of the Board within ten (10) days detailing the actions taken by the TPS to comply with this Notice. Additionally, the letter shall include 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 TPS.

f. TPSs are not required to take any additional actions related to non-residential customers, other than those described above as SCC.

TPSs seeking to opt into this settlement may 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. Those who complete compliance with the foregoing requirements will thereafter be released from the January 22 Letter.

Aida Camacho-Welch
Secretary of the Board

State of New Jersey
Board of Public Utilities
44 S. Clinton Avenue, 3rd Floor, Suite 314
P.O. Box 350
Trenton, NJ 08625-0350

Stacy Peterson
Director
Division of Energy

Telephone: (609) 292-3960
Fax: (609) 341-5781

CEASE AND DESIST AND REFUND INSTRUCTION

January 22, 2019

TO: Each New Jersey Licensed Third Party Supplier

RE: Increase to Fixed Rates – P.L. 2018, c. 17

It has come to Staff's attention that following the passage of P.L. 2018, c. 17, which increased the renewable portfolio standards, there are instances where New Jersey Third Party Suppliers ("TPSs") violated the Board's Energy Competition regulations when they charged a higher rate than the fixed price in the customer's contract. The TPSs increased their fixed rates, either by increasing the fixed rate or by adding a new charge to the customer's bill. This letter serves as a reminder to all TPSs of their obligations to comply with the Board's Energy Competition rules, which prohibit a TPS from changing a fixed price during the term of the contract without the customer's authorization.

Moreover, if your company has increased or charged the customer a rate that is higher than the fixed rate during the period for which the rate was fixed, you are hereby notified that your company is in violation of N.J.A.C. 14:4-7.12. If this is the case, you are instructed to **cease and desist** charging these customers a rate higher than the rate for which they contracted with your company. Further, you are instructed to **refund** to each of these customers the amount that your company charged the customer in excess of the amount it would have charged the customer had the increase not been implemented. You are instructed to complete these refunds within five weeks of the date of this letter.

Pursuant to N.J.A.C. 14:4-7.12, if a TPS signs up a customer or renews a customer for a rate that the TPS characterizes as "fixed" or "firm," or the TPS uses other language to describe the rate as not variable, the TPS may not charge the customer a rate that is higher than the fixed rate during the period for which it is fixed, except as permitted in N.J.A.C. 14:4-7.6(l), without the customer's affirmative consent. N.J.A.C. 14:4-7.6(l) states:

> The contract may not include provisions (sometimes referred to as "material change notices") that permit the TPS to change material terms of the contract without the customer's affirmative authorization unless the change is required by

> operation of law. "Material terms of a contract" include, but are not limited to, terms regarding the price, deliverability, time period of the contract, or ownership of the gas or electricity. . . . Changing the price to reflect a change in the Sales and Use Tax or other State-mandated charge would be permitted as a change required by operation of law.

The rulemaking history of N.J.A.C. 14:4-7.6(l) is instructive to the facts in this matter. Some commenters noted that in addition to a change in sales taxes, a TPS's costs can be affected by a federal or state requirement that increases its costs. As an example, they cited "A2966/S1925 [P.L. 2012, c. 24], a statute that imposes new, costly, solar renewable energy requirements on each TPS." The commenters stated that the TPS must be able to adjust their pricing to account for these changes. In rejecting the comments, the Board stated:

> A TPS may experience increased costs during the time period covered by a contract and wish to increase fixed price customer contracts to recoup these costs. However, for many customers, this would defeat the purpose of a fixed price contract. Customers who choose fixed priced contracts do so in order to avoid price risk. . . . .
>
> Regarding the inclusion of Federal or local mandates in the definition of "non-material," the Board notes that the basis for the exception for State taxes lies in the ability of the State to collect these taxes directly from the customer if not collected by the TPS. Allowing other mandated charges to be included changes the contract from a fixed rate benefiting the customer to a variable rate benefitting the TPS.
>
> [45 N.J.R. 934(b)]

As noted by the above text, TPSs are required by law to collect sales and use taxes from customers and pursuant to N.J.S.A. 54:32B-14, "all sellers of energy or utility service shall include the tax imposed by the "Sales and Use Tax Act" within the purchase price of the tangible personal property or service." TPSs are not required by operation of law to change the prices that they charge to their customers as a result of P.L. 2018, c. 17. Therefore, the fact that a TPS may incur an increase in its costs as a result of P.L. 2018, c. 17 does not permit the TPS to increase fixed rates under N.J.A.C. 14:4-7.6(l), without the customer's affirmative consent.

If your company has increased a rate for electric generation or gas supply service that it has characterized as "fixed" or "firm," or your company has used other language to describe the rate as not variable, and you have charged the customer a rate that is higher than the fixed rate during the period for which the rate was fixed, you are hereby notified that your company is in violation of N.J.A.C. 14:4-7.12. If this is the case, you are instructed to **cease and desist** charging these customers a rate higher than the rate for which they contracted with your company. Further, you are instructed to **refund** to each of these customers the amount that your company charged the customer in excess of the amount it would have charged the customer had the increase not been implemented. You are instructed to complete these refunds within five weeks of the date of this letter.

Finally, you are instructed to send a letter to me by no later than **March 1, 2019** detailing the actions your company has taken to remedy this situation. This letter shall include at a minimum, the number of customers affected, the amounts of the refunds, and the dates of the refunds.

Sincerely,

Stacy Peterson
Director

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/

AGENDA FOR BOARD MEETING
The meeting will be held on
Wednesday, December 2, 2020 – 10:00 a.m.

Listen Via Teleconference: 1 301 715 8592 – **Webinar ID**: 938 7618 4944
Passcode: 212413

Watch Online: https://youtu.be/6SZMwRNpKXw

Executive Session

(Open Session will not reconvene until the conclusion of the Executive Session, which will commence at 10:00 a.m. The only business to be conducted in the 10:00 a.m. Open Session will be the reading of the public notice statement, roll call, and the exception, under the Open Public Meetings Act, for each item to be considered in Executive Session.)

2. ENERGY

E. Docket No. EO20100654 – In the Matter of the Cease and Desist and Refund Instructions Letter of January 22, 2019 to Third Party Suppliers.

This matter 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. The Secretary's Letter provides instructions on how other Third Party Supplies may opt-into the settlement and provide refunds to affected customers.

STATE OF NEW JERSEY
Board of Public Utilities
44 South Clinton Avenue, 9th Floor
Post Office Box 350
Trenton, New Jersey 08625-0350
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CONSENT AGENDA FOR BOARD MEETING
The meeting will be held on
Wednesday, December 2, 2020 – 10:00 a.m.

Listen Via Teleconference: 1 301 715 8592 – **Webinar ID**: 938 7618 4944
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Watch Online: https://youtu.be/6SZMwRNpKXw

I. AUDITS

NO ITEMS FOR CONSIDERATION

II. ENERGY

A. Docket No. EF20080522 – In the Matter of the Petition of Atlantic City Electric Company for Authority to Issue Up to $600 Million of Long-Term Debt Securities Pursuant to N.J.S.A. 48:3-9 (2021-2022).

In this matter, Atlantic City Electric Company seeks authorization from the Board to issue up to $600 million of aggregate long-term debt with various lengths of maturity. If approved, the Company will have until December 31, 2022 to issue debt under this authorization. This debt, if issued, will be for the purpose of converting existing short-term debt into long-term debt and for funding capital construction programs through 2022.

B. Docket No. EF20060400 – In the Matter of the Petition of Public Service Electric and Gas Company, Pursuant to N.J.S.A 48:3-9 and N.J.A.C. 14:1-5.9, for Authority to Issue and Sell Short-Term Obligations Not Exceeding $1.0 Billion Aggregate Principal Amount at any One Time Outstanding Through January 3, 2023.

In this matter, PSE&G seeks authorization from the Board to issue up to $1.0 billion of aggregate short-term debt with various lengths of maturity. If approved, the Company will have until January 3, 2023 to issue debt under this authorization. This debt, if issued, will be for various short-term utility purposes, including but not limited to current tax obligations, working capital, and purchase of energy and gas.

III. CABLE TELEVISION

NO ITEMS FOR CONSIDERATION

IV. TELECOMMUNICATIONS

NO ITEMS FOR CONSIDERATION

V. WATER

NO ITEMS FOR CONSIDERATION

VI. RELIABILITY AND SECURITY

NO ITEMS FOR CONSIDERATION

VII. CUSTOMER ASSISTANCE

A. Docket No. GC18080939U – In the Matter of Dawn Macrillo, Petitioner v. South Jersey Gas, Respondent – Request for Extension.

This petition involves a billing dispute between Dawn Macrillo and South Jersey Gas Company. Ms. Macrillo alleges she was improperly billed by the company.

VIII. CLEAN ENERGY

NO ITEMS FOR CONSIDERATION

IX. MISCELLANEOUS

A. Approval of Minutes for the September 23, 2020 Agenda Meeting.

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/

AGENDA FOR BOARD MEETING
The meeting will be held on
Wednesday, December 2, 2020 – 10:00 a.m.

Listen Via Teleconference: 1 301 715 8592 – **Webinar ID**: 938 7618 4944
Passcode: 212413

Watch Online: https://youtu.be/6SZMwRNpKXw

1. AUDITS

NO ITEMS FOR CONSIDERATION

2. ENERGY

A. Docket No. ER20060473 – In the Matter of the Verified Petition of Jersey Central Power and Light Company Constituting its Annual Filing With Respect to the Non-Utility Generation Charge Clause of its Filed Tariff ("2019 NGC Filing").

The Board will consider the Non-Utility Generation Charge rates of Jersey Central Power and Light Company. The parties have executed a stipulation, which if approved by the Board, will result in no changes to customer bills.

B. Docket No. EM19111460 – In the Matter of the Verified Petition of Jersey Central Power and Light Company Seeking Approval of the Transfer and Sale of the Company's 25% Interest in the Three Mile Island Unit 2 Nuclear Generating Facility, and the Transfer of its Associated Nuclear Decommissioning Trust, Pursuant to N.J.S.A. 48:3-7, and a Waiver of the Advertising Requirements of N.J.A.C. 14:1-5.6(B).

The Board will consider the proposed sale of Jersey Central Power and Light Company's 25% Interest in the Three Mile Island Unit 2 Nuclear Generating Station.

2. ENERGY (CONT'D)

C. Docket No. GM20020170 – Notice of Transfer of Property by South Jersey Gas Company in the Ordinary Course of Business Pursuant to N.J.A.C. 14:1-5.6.

The Board will consider South Jersey Gas Company's request to sell real property in Bridgeton, New Jersey.

D. Docket No. ER20100672 – In the Matter of the Provision of Basic Generation Service, and the Compliance Tariff Filing Reflecting Changes to Schedule 12 Charges in PJM Open Access Transmission Tariff – October 23, 2020 Filing.

The Board will consider a filing made by the electric distribution companies requesting authorization to update transmission rates related to FERC approved cost reallocations.

E. Docket No. EO20100654 – In the Matter of the Cease and Desist and Refund Instructions Letter of January 22, 2019 to Third Party Suppliers – **Executive Session.**

This matter 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. The Secretary's Letter provides instructions on how other Third Party Supplies may opt-into the settlement and provide refunds to affected customers.

F. Docket No. ER20010003 – In the Matter of Federal Energy Items for 2020 – FERC Docket Nos. ER18-1314 and EL18-178 PJM Interconnection, LLC re: 206 Proceeding to Determine Just and Reasonable Replacement Rate; and

Docket No. ER20010003 – In the Matter of Federal Energy Items for 2020 – FERC Docket No. EL16-49 – Calpine Corporation, et al. v. PJM Interconnection, LLC.

The Board will consider ratification of the Request for Clarification, or in the Alternative, Rehearing, which was filed by Staff, on behalf of the Board, in these Dockets on November 16, 2020.

3. CABLE TELEVISION

NO ITEMS FOR CONSIDERATION

4. TELECOMMUNICATIONS

NO ITEMS FOR CONSIDERATION

5. WATER

A. Docket Nos. BPU WR20010056 and OAL PUC 01318-2020S – In the Matter of the Petition of Aqua New Jersey, Inc. for Approval of an Increase in Rates for Wastewater Service and Other Tariff Changes.

The Board will consider Aqua New Jersey's petition for a wastewater rate increase. The Parties have executed a stipulation, which, if approved by the Board, will result in an overall increase of $500,000 for wastewater service. The impact on individual customer bills will vary by system. The Stipulation also agrees that Aqua will establish a uniform systemwide Purchased Sewerage Treatment Adjustment Clause, which will apply to all wastewater customers.

6. RELIABILITY AND SECURITY

A. Docket No. EX20090613 – In the Matter of the Proposed Readoption with Substantial Changes of New Jersey Administrative Code ("N.J.A.C.") 14:2 "Protection of Underground Facilities: One Call Damage Prevention System".

The Board will consider proposing to readopt, with substantial changes, the Board's existing rules contained within the New Jersey Administrative Code, N.J.A.C. 14:2 et seq.

7. CUSTOMER ASSISTANCE

A. Docket No. EC20020144U – In the Matter of Christine Smith, Petitioner v. Atlantic City Electric, Respondent – Billing Dispute.

This petition involves a billing dispute between Christina Smith (Ms. Smith) and Atlantic City Electric Company. Ms. Smith alleges she was improperly billed by the company.

8. CLEAN ENERGY

A. Docket No. QO20090584 – In the Matter of Revisions to New Jersey's Clean Energy Program – Fiscal Year 2021 Protocols to Measure Resource Savings.

The Board will consider adoption of the Fiscal Year 2021 Protocols to Measure Resource Savings.

9. MISCELLANEOUS

NO ITEMS FOR CONSIDERATION

Take notice that the Division of Gaming Enforcement shall, pursuant to N.J.S.A. 5:12-69.e, conduct an experiment for the purpose of determining whether an optional bonus wager in the authorized games of Three Card Poker and Four Card Poker is suitable for casino use.

The experiment will be conducted in accordance with temporary rules, which shall be available in each casino participating in the experiment, and shall also be available from the Division upon request.

The test would allow a casino licensee which wishes to participate in the experiment, and which meets all the terms and conditions established by the Division, to implement the new wager in its casino.

This experiment could begin on or after April 22, 2013, and continue for a maximum of 270 days from that date, unless otherwise terminated by the Division or any of the participating casino licensees prior to that time, pursuant to the terms and conditions of the experiment.

Should the temporary amendments prove successful, in the judgment of the Division, the Division will propose them for final adoption, in accordance with the public notice and comment requirements of the Administrative Procedure Act and N.J.A.C. 1:30.

(a)

DIVISION OF GAMING ENFORCEMENT

Fantasy Sports Tournaments

Temporary New Rules: N.J.A.C. 13:69P-1.1

Authority: N.J.S.A. 5:12-22, 24, 69, and 76.

Take notice that, pursuant to N.J.S.A. 5:12-69.e, the Division of Gaming Enforcement shall temporarily adopt new rules governing the implementation and conduct of fantasy sports tournaments in New Jersey casinos.

The temporary adoption of the new rules shall become effective on April 22, 2013, and shall continue for a maximum of 270 days from that date, subject to such terms and conditions as the Division may deem appropriate, for the purpose of determining whether such new rules should be adopted on a permanent basis.

Should the temporary amendment and new rules prove successful, in the judgment of the Division, the Division will propose them for final adoption, in accordance with the public notice and comment requirements of the Administrative Procedure Act and N.J.A.C. 1:30.

PUBLIC UTILITIES

(b)

BOARD OF PUBLIC UTILITIES

Energy Competition Standards

Adopted Amendments: N.J.A.C. 14:4-2.3, 3.2, 3.4, 3.5, 6.3, 6.5, 6.6, 6.7, 6.9, and 7.6

Adopted New Rules: N.J.A.C. 14:4-6.11 and 7.12

Proposed: May 21, 2012 at 44 N.J.R. 1589(a).

Adopted: March 20, 2013 by the Board of Public Utilities, Robert M. Hanna, President; Jeanne M. Fox, Joseph L. Fiordaliso, and Mary-Anna Holden, Commissioners.

Filed: March 21, 2013 as R. 2013 d.067, **with substantial and technical changes** not requiring additional public notice and comment (see N.J.A.C. 1:30-6.3).

Authority: N.J.S.A. 48:2-1 et seq., in particular 48:2-13, 48:2-16 through 19, 48:2-23, 48:2-29.1 and 21.2, 48:2-37, and 48:2-51.1; 48:3-7 et seq.; and 48:3-51 et seq.

BPU Docket Number: EX12020158.

Effective Date: April 15, 2013.

Expiration Date: April 11, 2019.

The New Jersey Board of Public Utilities ("Board" or "BPU") is adopting new rules and amendments to multiple sections of N.J.A.C. 14:4 addressing energy competition standards. The new rules and amendments apply to energy anti-slamming, affiliate relations, government energy aggregation programs, and retail choice consumer protection.

Summary of Public Comments and Agency Responses:

The following commenters submitted timely comments on the notice of proposal:

Murray E. Bevan, Retail Energy Supply Association (RESA);

Usher Fogel, Dominion Energy Solutions. (DES);

Craig G. Goodman, National Energy Marketers Association (NEM);

AARP New Jersey (AARP); and

Gregory Eisenstark, Jersey Central Power & Light Company and on behalf of Atlantic City Electric Company, Public Service Electric and Gas Company and Rockland Electric Company. (EDCs).

General Comments:

1. COMMENT: The proposed changes are particularly timely as retail energy competition continues to gain momentum in New Jersey and tens of thousands of consumers are receiving marketing information and numerous, often times confusing solicitations from third-party suppliers.

Upon review of the proposed changes, we find that most of the proposed rule changes improve current energy competition standards by providing additional clarity where needed and expanding important consumer protections in this growing market.

The proposed rules will protect consumers while fostering transparency and fair competition. AARP applauds the Board's efforts in this area and supports the notice of proposal in its entirety. (AARP)

RESPONSE: The Board appreciates the commenter's support of the adopted new rules and amendments.

2. COMMENT: We appreciate this opportunity to provide comment on the proposed amendments and proposed new regulations to be added to the Board's Energy Competition Standards. We appreciate the on-going opportunity to provide insights into the impact of the regulations applicable to the competitive energy market. (NEM)

RESPONSE: The Board appreciates the commenter's support of the adopted new rules and amendments.

3. COMMENT: We appreciate the opportunity to submit these comments and assist the Board in this matter. (DES)

RESPONSE: The Board appreciates the commenter's support of the adopted new rules and amendments.

4. COMMENT: We appreciate the Board's leadership and the collaborative approach it has taken to analyzing the energy competition rules adopted in New Jersey to permit customers to purchase electric and gas supplies from third-party suppliers (TPSs). We fully support the broad strokes of the energy competition rules adopted in New Jersey to permit customers to purchase electric and gas supplies from TPSs. (EDCs)

RESPONSE: The Board appreciates the commenter's support of the adopted new rules and amendments.

N.J.A.C. 14:4-2.3(c)2 and 5

5. COMMENT: The intent behind the proposed changes is to require that the change order verification requirements set forth in paragraph (c)2 apply to all telephonic enrollments, including customer-initiated calls. In the April 2012 readoption of N.J.A.C. 14:4, the Board decided to allow a marketer or third-party agent to perform telephonic enrollments, including customer-initiated calls. However, the Board further decided to require recordation of the entire duration of the call. The Board stated in a response to a commenter in the notice of readoption that the phrase "made by an independent third party or by a TPS" was intended to refer to the recording, not the call itself, and that the "requirement for the recording refers to calls made to and from customers." The Board noted its intent to clarify this issue in this rulemaking. We previously commented in opposition to the requirement that the entire marketing portion of the call be taped, noting that the requirement to tape all calls and then retain these voluminous records would be extremely expensive. We recommended, and continued to maintain, that the supplier's recordation of the verification portion of the call should be sufficient, and this practice is commonly utilized in other jurisdictions as sufficient to

is necessary, the TPS shall send the residential customer a copy of the renewal contract within five business days after the customer authorizes contract renewal.

We believe that this modified language represents the appropriate balance between market conditions and the needs of residential customers. (RESA)

RESPONSE TO COMMENTS 17, 18, AND 19: The Board recently reduced the amount of time provided by N.J.A.C. 14:4-7.6(b)4 that a customer has to rescind a TPS contract from 14 to seven days. Therefore, it is essential that the customer be given the contract on a timely basis since all the terms and conditions are not disclosed during the marketing process. To the extent that the TPS is in a position to enroll a customer, accept a renewal of a customer, or submit a change order to the LDC, the TPS should also be in a position to provide the customer with a copy of the contract. However, the Board has determined that changing the timeframe from 24 hours to one business day would provide the flexibility sought by the commenters without weakening the consumer protections that extending the period to three or five days could entail. Therefore, the Board has made this change upon adoption.

N.J.A.C. 14:4-7.6(l)

20. COMMENT: We understand the relevance of ensuring that customers are afforded the protection of the lasting nature of the terms and conditions under which service from the TPS was agreed to. Nonetheless, the realities of the market and regular swirl of changes in regulatory mandates that impact retail energy service necessitate a realistic application and appraisal of the limitations placed on modifying an existing contract term. To this end it is important to differentiate between "material" and "non-material" changes to a customer's contract as underscored in the language noted above. However, the categories exempt from prior notice and authorization should include in addition to non-material contract changes, those changes that benefit a consumer. These types of modifications can include, for example, a price reduction, additional protections, etc. Where the consumer is directly benefited prior notice should not be required.

We concur with the recommendation that changes occurring by operation of law do not require prior authorization. Nonetheless, the ambit of such category requires a more expansive view. The Board in describing what could constitute a change by operation of law, provides the following example: "Changing the price to reflect a change in the Sales and Use Tax or other State-mandated charge would be permitted as a change required by operation of law." The emphasis here is only on a "State" mandated "charge." This fails to take into account that there are also Federally mandated charges that can impact on the uncontrolled costs incurred by a TPS.

Moreover, it does not underscore that in addition to a direct change in a particular government charge, such as sales or excise taxes, a TPS can also be affected by a Federal or State "mandate" that has the direct impact upon the ability of a TPS to provide service and the costs related thereto. Just recently, the New Jersey Legislature passed A2966/S1925, a statute that imposes new, costly, solar renewable energy requirements on each TPS. This represents a State mandate, outside the control of the TPS that will impose significant additional costs on the TPS providing electricity in New Jersey.

Finally, governmental changes can also occur at the local municipal level that impact upon energy choice and the operations of the TPS. This can occur in the areas of taxation, bonding, and others.

In view of these considerations, we request that the description of a change required by operation of law include as follows:

Changing the price to reflect a change in the Sales and Use Tax or other State Federal or local mandated charge or any State, Federal or local mandate impacts upon the provision or cost of service by a TPS would be permitted as change required by operation of law.

Further, we request that the Board clarify that the requirement of affirmative authorization where deemed otherwise applicable would not apply to month-to-month contracts or to those that transfer automatically to a variable-price agreements. In view of the limited and short term of such contracts which are cancellable on 30 days' notice, it would be highly impractical and unnecessary to require a TPS to comply with this requirement. Further, imposing such a prior authorization obligation would also pose a conflict with N.J.A.C. 14:4-7.6(j). (DES)

21. COMMENT: We do not support the Board's proposed addition of this subsection, which would require that:

The contract may not include provisions (sometimes referred to as "material change notices") that permit the TPS to change material terms of the contract without the customer's affirmative authorization unless the change is required by operation of law. "Material terms of a contract" include, but are not limited to, terms regarding the price, deliverability, time period of the contract, or ownership of the gas or electricity. "Non-material" terms include those regarding the address where payments should be sent or the phone number to be used for customer inquiries. Changing the price to reflect a change in the Sales and Use Tax or other State-mandated charge would be permitted as a change required by operation of law.

First, this new subsection imposes added risk on TPSs, which will likely lead them to price their products in an upward manner. Second, this rule will increase administrative complexity for TPSs, as well as confusion among customers, as TPSs will be motivated to lengthen their contracts and make them more vague to protect themselves from any type of market change that may arise. Third, we are not aware of any particular public outcry or examples of TPSs using amendment provisions in an inappropriate manner. Indeed, material change provisions are common in contracts for all kinds of products (credit cards, mortgages, etc.). Finally, this rule is unnecessary, because customers are always free to reject contracts with "material change" clauses and choose BGS service or shop with another TPS that does not have such a provision.

For the foregoing reasons, we believe that the proposed new provision should be altogether rejected. However, should the Board determine that there is a need to explicitly prohibit "material change clauses" absent a customer's affirmative consent, we submit that the rule should be modified in such a way as to mitigate the mechanical and practical challenges it poses for TPSs. First, the rule should not apply to non-residential customers, which are more sophisticated than residential customers and frequently execute contracts that include provisions permitting amendments under certain circumstances. Second, the rule should provide similar flexibility for non-material changes as it provides for material changes. The current proposed language leaves the definition of "material change" open to additions ("including, **but not limited to**" (emphasis added)), but does not leave the definition of a "non-material change" open to such additions. Similar flexibility should be provided for non-material changes, to allow TPSs to make ministerial changes without affirmative consent from the customer. Third, the rule should exclusively apply to any new contracts entered into after the effective date of the rule since having to revise existing contracts would be burdensome and cost prohibitive. Finally, the rule should be amended to provide that execution of specific pricing provisions in an original contract are not a "material change." For example, if the contract is for an introductory fixed rate with a variable price after month three, then the TPS should be free to change the price starting in month four without obtaining affirmative consent. Similarly, if the contract provides for the pass-through of certain cost items as they change, then the TPS should be able to update the price for those items without providing customer notice each time.

To address the aforementioned concerns, we submit that the proposed language at the end of this subsection should be modified to:

Residential contracts entered into after the date this rule goes into effect may not include provisions (sometimes referred to as "material change notices") that permit the TPS to change material terms of the contract without the customer's affirmative authorization unless the change is required by operation of law. "Material terms of a contract" include, but are not limited to, terms regarding the price, deliverability, time period of the contract, or ownership of the gas or electricity. "Non-material" terms include, but are not limited to, those regarding the address where payments should be sent or the phone number to be used for customer inquiries. Changing the price to reflect a change in the Sales

and Use Tax or other State-mandated charge would be permitted as a change required by operation of law. Changing the price in a manner specifically agreed to by a customer in the original contract shall not be considered a "material change."

As another alternative to this proposed rule, we believe that the Board might enact a rule requiring that TPSs provide language in their residential contracts providing that material change would not be valid without notice to the customer within 15 days of the change and the opportunity for the customer to rescind the contract. Such a requirement would inform residential customers of any changes to their contracts and also allow them to cancel without incurring early termination fees or other types of charges. (RESA)

22. COMMENT: We submit that a clear distinction should be drawn with respect to the types of changes to a contract and the correspondingly appropriate notice to be provided to the consumer. In the case of contract changes that benefit a consumer (that is, a reduction in price), changes that occur by operation of State or Federal law, as well as non-material changes to a contract, we recommend that notice to the consumer should not be required. In addition, a consumer should not be required to provide affirmative consent to a contract renewal with a rate change when they have received prior advance notice. Advance notice of the change should be sufficient, provided that the consumer is afforded the ability to opt-out of the contract without penalty.

Notwithstanding the above recommendations, we request that the Board clarify that it did not intend that the affirmative authorization requirement of this subsection was to apply to month-to-month contracts or to a contract that automatically converts to a monthly variable-priced agreement. From a general standpoint, requiring affirmative authorization for the renewal of a month-to-month contract would be impracticable to comply with and would also conflict with N.J.A.C. 14:4-7.6(j). Moreover, given that these contracts are terminable under 30 days notice anyway, the application of such affirmative authorization requirement would be excessive and unnecessarily costly.

We also recommend that the language be modified to explicitly recognize that Federally mandated charges are changes that are required by operation of law. Federally mandated charges, like State taxes, are beyond the control of TPSs and should be classified similarly in this subsection. In addition, there are other State and Federally mandated changes that directly impact suppliers' costs of doing business, that should also be included within the scope of price changes that take effect by operation of law. For example, legislation can change applicable solar renewable energy requirements, such as the recent A2966/S1295, and significantly increase suppliers' costs of doing business. Suppliers must be able to adjust their pricing to account for these changes, which as was previously mentioned, are outside of the scope of their control and occur without meaningful notice that would have permitted the supplier to have contemplated or anticipated that any such change may occur. We recommend that the language therefore be modified as follows (additions in boldface **thus**):

Changing the price to reflect a change in the Sales and Use Tax or other **federally-mandated** or State-mandate charge **or any State, federal or local mandate that impacts the provision or cost of service by a TPS** would be permitted as a change required by operation of law.

RESPONSE TO COMMENTS 20, 21, AND 22: A TPS may experience increased costs during the time period covered by a contract and wish to increase fixed price customer contracts to recoup these costs. However, for many customers, this would defeat the purpose of a fixed price contract. Customers who choose fixed priced contracts do so in order to avoid price risk. For example, a customer may choose a TPS offer that is higher than its utility's price to compare because the TPS is offering a fixed price. The customer in this case has chosen to pay a higher price because the customer believes that even if the TPS's costs go up the customer will continue to pay the same rate. If the TPS is permitted to impose a rate increase to this customer through a material change clause in the contract because the TPS's costs increase, this customer will pay the higher rate and then be denied the benefit of the fixed rate when the TPS's costs go up. Even if the TPS allows the customer to leave the contract without a penalty or exit fee, the customer would still be denied the benefit of the fixed price after paying the higher rate for the initial portion of the contract. For a customer receiving variable rate service from a TPS, this subsection will not prohibit the TPS from changing the variable rate pursuant to the contract terms. However, if contract includes a formula for the variable rate, for example the utility price to compare minus two cents, the TPS cannot use a material change clause to change the variable formula.

Regarding the inclusion of Federal or local mandates in the definition of "non-material," the Board notes that the basis for the exception for State taxes lies in the ability of the State to collect these taxes directly from the customer if not collected by the TPS. Allowing other mandated charges to be included changes the contract from a fixed rate benefiting the customer to a variable rate benefitting the TPS.

The Board believes that the terms of a fixed rate contract, which the customer has agreed to for a predetermined amount of time, provide appropriate consumer protection and the changes suggested by the commenters could require the Board and/or staff to make determinations on whether the modifications favor the consumer when it may not be clear. This produces an additional ambiguity into the contract and therefore, the commenters' suggested change have not been made

Additionally, regarding the commenter's request for a change to the definition of non-material change open to open to additions ("including, **but not limited to**"), the Board believes that this change would expand the possibility for an argument that any change is not material and that this provision is meant to primarily address administrative changes. Therefore, the commenter's suggested change has not been made.

N.J.A.C. 14:4-7.6(j)

23. COMMENT: The proposed language would explicitly recognize that TPSs can obtain consent for renewal through telephonic, electronic, and written means. We support this change as it provides TPSs with the increased ability to cost-effectively renew consumers using all of the currently approved and utilized methods of enrollment without reducing any measure of consumer protection. (NEM)

RESPONSE: The Board appreciates the commenter's support of the adopted amendment.

N.J.A.C. 14:4-7.12

24. COMMENT: In view of the language in proposed N.J.A.C. 14:4-7.6(l), as it pertains to changes in price that occur by operation of law, NEM suggests that N.J.A.C. 14:4-7.12 should be modified to explicitly recognize that these changes may be made without the customer's affirmative authorization without implicating this section. As mentioned in our comments regarding N.J.A.C. 14:4-7.6, changes that occur by operation of law are beyond the control of competitive suppliers. As such, N.J.A.C. 14:4-7.12(a)2 is recommended to be modified as follows (additions indicated in boldface **thus**):

The TPS may not charge the customer a rate that is higher than the fixed rate during the period for which it is fixed, **except as permitted in N.J.A.C. 14:4-7.6(l),** without the customer's affirmative consent.

We additionally request Board clarification that the proposed language is not intended to include or be applicable to changes in utility delivery rates. In other words, changes to the utility delivery rate that impact the overall customer bill should not be factored into the characterization of a TPS "fixed" rate contract. The fixed portion of the rate referenced in N.J.A.C. 14:4-7.12 should pertain solely to the charge from the competitive supplier. (NEM)

25. COMMENT: Under this section the Board requires that in the case of fixed or firm contracts the TPS must identify the applicable term and is precluded from changing the price without prior customer authorization. DES concurs with this approach, but would suggest the need for two clarifications.

First, a price change caused by an operation of law should not require prior authorization consistent with the proposed N.J.A.C. 14:4-7.6(l).

Second, the rates deemed to be considered "fixed" or "firm" only apply to charges from the TPS, and would not incorporate modifications in the utility delivery rates. (DES)

26. COMMENT: We have several concerns with the new provision's requirement that:

Ass'n of N.J. Chiropractors v. State Health Benefits Comm'n

Superior Court of New Jersey, Appellate Division

May 9, 2017, Argued; April 25, 2018, Decided

DOCKET NO. A-5653-14T1

Reporter
2018 N.J. Super. Unpub. LEXIS 963 *; 2018 WL 1937026

ASSOCIATION OF NEW JERSEY CHIROPRACTORS, INC., and STEVEN CLARKE, DC, Appellants, v. STATE HEALTH BENEFITS COMMISSION, STATE HEALTH COMMISSION, STATE HEALTH BENEFITS PROGRAM PLAN DESIGN COMMITTEE, SCHOOL EMPLOYEE HEALTH BENEFITS COMMISSION, SCHOOL EMPLOYEE HEALTH BENEFITS PROGRAM DESIGN COMMITTEE, and STATE OF NEW JERSEY, DIVISION OF PENSIONS & BENEFITS, Respondents.

Core Terms

reimbursement, chiropractic, out-of-network, chiropractors, Benefits, coverage, costs, state health, deductibles, maximums, plans, in-network, provisions, amounts, charges, co-pays, health insurance, public meeting, acupuncture, provider, modify, provision of law, customary, employees, session, issuer, cause of action, sole discretion, public body, meetings

Notice: NOT FOR PUBLICATION WITHOUT THE APPROVAL OF THE APPELLATE DIVISION.

PLEASE CONSULT NEW JERSEY *RULE 1:36-3* FOR CITATION OF UNPUBLISHED OPINIONS.

Subsequent History: Certification denied by *Ass'n of N.J. Chiropractors v. State Health Benefits Comm'n, 2018 N.J. LEXIS 1244 (N.J., Oct. 3, 2018)*

Prior History: [*1] On appeal from the State Health Benefits Plan Design Committee, Division of Pensions and Benefits.

Counsel: Jeffrey B. Randolph argued the cause for appellants.

Amy Chung, Deputy Attorney General, argued the cause for respondents (Christopher S. Porrino, Attorney General, attorney; Jean P. Reilly, Assistant Attorney General, of counsel and on the brief; Eileen S. Den Bleyker, Senior Deputy Attorney General, on the brief).

Budd Larner, PC, attorneys for amicus curiae National Guild of Acupuncture & Oriental Medicine - New Jersey Chapter (Donald P. Jacobs, on the brief).

Judges: Before Judges Fisher, Leone, and Moynihan.

Opinion by: LEONE

Opinion

The opinion of the court was delivered by

LEONE, J.A.D.

The Association of New Jersey Chiropractors and Steven Clarke, D.C. (collectively "appellants"), appeal from a July 6, 2015 Resolution by the State Health Benefits Plan Design Committee (Committee). We affirm.

I.

On July 6, 2015, the Committee considered a resolution "limiting out of network coverage for [chiropractic and acupuncture] services." The resolution provided that, "to maintain adequate access to certain services for its members through in-network provided care," "out-of-network coverage for chiropractic and acupuncture services [*2] effective for Plan Year 2016 will be no more than $35 a visit for chiropractic and $60 a visit for acupuncture or 75% of the in-network cost per visit, whichever is less." The resolution also requested that its vendors/carriers "implement an increase in the in-network rates for these same services in order to help grow the network to adequate levels." The resolution stated "[t]he success of the vendor/carriers to increase network size may determine whether or not the PDC will expand, at some later date, the elimination of out-of-network coverage to other therapies and services."

In a Q&A sheet for the Committee, the plan administrator, Horizon Blue Cross Blue Shield of New Jersey (Horizon), "highlight[ed] Chiropractic, Physical Therapy, and Behavioral Health as categories experiencing year over year declines in overall in-network participation. These categories provide the best opportunity for savings." Horizon supplied the Committee with a PowerPoint presentation noting "several benefit categories that qualify as outliers relative to the overall network participation rate": Physical Therapy, Acupuncture, Chiropractic, and Behavioral Health. In its July 2015 recommendations for Plan [*3] Year 2016, the plan actuary, Aon Hewitt, estimated the reduction in plan payments for out-of-network chiropractic and acupuncture services would result in "[a] 0.2% reduction ($3 million) in projected Plan Year 2016 medical claims."

At the July 6 meeting, the Committee adopted the resolution without discussion or dissent. The Committee later explained the resolution would "[r]estrict plan payments for out-of-network chiropractic and acupuncture services to drive in-network utilization which produces projected savings of $2 million."

Appellants appealed the Committee's resolution directly to the Appellate Division. We denied appellants' motion for a stay. We permitted participation as amicus curiae by the National Guild of Acupuncture & Oriental Medicine — NJ Chapter (Guild).

II.

We must hew to our standard of review. "Our review of agency determinations is quite limited." *Murray v. State Health Benefits Comm'n, 337 N.J. Super. 435, 442, 767 A.2d 509 (App. Div. 2001)*. "We will ordinarily defer to the decision of a State administrative agency unless the appellant establishes that the agency's decision was arbitrary, capricious, or unreasonable, or that it was unsupported by sufficient credible, competent evidence in the record." *Green v. State Health Benefits Comm'n, 373 N.J. Super. 408, 414, 861 A.2d 867 (App. Div. 2004)*. To make that

determination, we must examine

> "(1) whether [*4] the agency's action violates express or implied legislative policies, that is, did the agency follow the law; (2) whether the record contains substantial evidence to support the findings on which the agency based its action; and (3) whether in applying the legislative policies to the facts, the agency clearly erred in reaching a conclusion that could not reasonably have been made on a showing of the relevant factors."
>
> [*In re Stallworth, 208 N.J. 182, 194, 26 A.3d 1059 (2011)* (citations omitted); *see Markiewicz v. State Health Benefits Comm'n, 390 N.J. Super. 289, 296, 915 A.2d 553 (App. Div. 2007)*.]

"Courts afford an agency 'great deference' in reviewing its 'interpretation of statutes within its scope of authority[.]'" *N.J. Ass'n of Sch. Adm'rs v. Schundler, 211 N.J. 535, 549, 49 A.3d 860 (2012)* (citations omitted). Nonetheless, "when an agency's decision is based on the 'agency's interpretation of a statute or its determination of a strictly legal issue,' we are not bound by the agency's interpretation. Statutory interpretation involves the examination of legal issues and is, therefore, a question of law subject to de novo review." *Saccone v. Bd. of Trs. of Police & Firemen's Ret. Sys., 219 N.J. 369, 380, 98 A.3d 1158 (2014)* (citation omitted).

III.

Appellants argue the cap on chiropractic reimbursement violates *N.J.S.A. 52:14-17.29(C)*. That section governs the conduct of the State Health Benefits Commission ("Commission" or "SHBC") and provides that "[t]he contract or contracts purchased by [*5] the commission pursuant to [*N.J.S.A. 52:14-17.28(c)*] shall include the following provisions regarding reimbursements and payments" for the "successor plan." *N.J.S.A. 52:14-17.29(C)*.[1] Since 2007, that section has provided:

> In the successor plan, the co-payment for doctor's office visits shall be $10 per visit with a maximum out-of-pocket of $400 per individual and $1,000 per family for in-network services for each calendar year. The out-of-network deductible shall be $100 per individual and $250 per family for each calendar year, and the participant shall receive reimbursement for out-of-network charges at the rate of 80% of reasonable and customary charges, provided that the out-of-pocket maximum shall not exceed $2,000 per individual and $5,000 per family for each calendar year."
>
> [*N.J.S.A. 52:14-17.29(C)(1)*.]

"'Reasonable and customary charges' means charges based upon the 90th percentile of the usual, customary, and reasonable (UCR) fee schedule determined by the Health Insurance Association of America or a similar nationally recognized database of prevailing health care charges." *N.J.S.A. 52:14-17.29(C)(3)*.

However, "[i]n 2011, the Legislature enacted Chapter 78, making numerous and significant changes to public employee pension and health care benefits." *Rosenstein v. State, Dept. of Treasury, Div of Pensions and Benefits, 438 N.J. Super. 491, 494, 105 A.3d 1140 (App. Div. 2014)*. "As part of this overhaul, [*6] the Legislature provided the State Health Benefits Plan Design Committee . . . with the exclusive authority to design state health benefits plans — a power previously possessed by the State Health Benefits

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[1] The "successor plan" is "a State managed care plan that shall replace the traditional plan and that shall provide benefits as set forth in [*N.J.S.A. 52:14-17.29(B)*] with provisions regarding reimbursements and payments as set forth in [*N.J.S.A. 52:14-17.29(C)(1)*]." *N.J.S.A. 52:14-17.26(j)*.

Commission[.]" *Ibid.*

> The committee shall have the responsibility for and authority over the various plans and components of those plans, including for medical benefits, prescription benefits, dental, vision, and any other health care benefits, offered and administered by the program. *The committee shall have the authority to create, modify, or terminate any plan or component, at its sole discretion*. Any reference in law to the State Health Benefits Commission in the context of the creation, modification, or termination of a plan or plan component shall be deemed to apply to the committee.
>
> [*L.* 2011, *c.* 78 § 45(b) (emphasis added) (codified at N.J.S.A. 52:14-17.27).]

Thus, "the Legislature eliminated the SHBC's former authority in this regard," and "transferred the authority to design all aspects of the state health plan to the [Committee]." *Rosenstein, 438 N.J. Super. at 500-01*. The Legislature similarly created a School Employees' Health Benefits Plan Design Committee (SEHBPDC) and transferred to it the authority to design plans for school employees [*7] which had previously been exercised by the School Employees' Health Benefits Commission (SEHBC). *L.* 2011, *c.* 78, § 46(e) (codified at N.J.S.A. 52:14-17.46.3(e)). "With the enactment of Chapter 78, the Legislature has vested the Design Committees with the 'sole discretion' to create, modify, or terminate any plan or component, as well as to set amounts for maximums, co-pays, deductibles, and other participant costs for all plans offered." *Teamsters Local 97 v. State, 434 N.J. Super. 393, 416, 84 A.3d 989 (App. Div. 2014)*.

The Legislature also amended N.J.S.A. 52:14-17.29 to make clear the Committee had this exclusive discretion notwithstanding any other provision of law.

> Beginning January 1, 2012, the State Health Benefits Plan Design Committee shall provide to employees the option to select one of at least three levels of coverage each for family, individual, individual and spouse, and individual and dependent, or equivalent categories, for each plan offered by the program differentiated by out of pocket costs to employees including co-payments and deductibles. *Notwithstanding any other provision of law to the contrary, the committee shall have the sole discretion to set the amounts for maximums, co-pays, deductibles, and other such participant costs for all plans in the program*.
>
> [*L.* 2012, *c.* 78, § 47(j) (emphasis added) [*8] (codified at N.J.S.A. 52:14-17.29(J)).]

When construing a statute, our primary goal is to discern the meaning and intent of the Legislature. "In most instances, the best indicator of that intent is the plain language chosen by the Legislature." *State v. Gandhi, 201 N.J. 161, 176, 989 A.2d 256 (2010)*. "The inquiry thus begins with the language of the statute, and the words chosen by the Legislature should be accorded their ordinary and accustomed meaning. If the language leads to a clearly understood result, the judicial inquiry ends without any need to resort to extrinsic sources." *State v. Hudson, 209 N.J. 513, 529, 39 A.3d 150 (2012)* (citation omitted).

The plain language of N.J.S.A. 52:14-17.29(J) dictates that the Committee's exercise of discretion under N.J.S.A. 52:14-17.29(J) cannot be defeated by claiming it conflicts with N.J.S.A. 52:14-17.29(C). "[I]n construing statutes, the use of such a 'notwithstanding' clause clearly signals the drafter's intention

that the provisions of the 'notwithstanding' section override conflicting provisions of any other section." *Cisneros v. Alpine Ridge Grp., 508 U.S. 10, 18, 113 S. Ct. 1898, 123 L. Ed. 2d 572 (1993)*; *see* 3B N. Singer & S. Singer, *Statutes and Statutory Construction* § 77:6 at 315-16 (7th ed. 2011). Thus, the "notwithstanding" clause expresses the Legislature's intention to override any potential limitation *N.J.S.A. 52:14-17.29(C)(3)* or any other section might otherwise have on the Committee's discretion to set participant costs. Courts "generally [*9] have 'interpreted similar "notwithstanding" language . . . to supersede all other laws, stating that "'[a] clearer statement is difficult to imagine."'" *Cisneros, 508 U.S. at 18* (citations omitted). A "notwithstanding" clause "is a fail-safe way of ensuring that the clause it introduces will absolutely, positively prevail." A. Scalia & B. Garner, *Reading Law: The Interpretation of Legal Texts* 127 (2012).

Here, there is a conflict between the two sections. *N.J.S.A. 52:14-17.29(C)* sets fixed amounts for maximums, co-pays, deductibles, and reimbursement level for "the participant."[2] However, the Legislature more recently enacted *N.J.S.A. 52:14-17.29(J)* giving the Committee "sole discretion to set the amounts for maximums, co-pays, deductibles, and other such participant costs for all plans in the program." The Legislature included a "notwithstanding" clause to allow the Committee to carry out that command and exercise that discretion to modify the co-pays, maximums, deductibles, and other "participant costs" fixed in earlier legislation. *N.J.S.A. 52:14-17.29(J)*. To read the "notwithstanding" clause otherwise would nullify the Legislature's grant of discretion.

The Committee's resolution modified participant costs by limiting the amount of reimbursement for out-of-network [*10] visits to "no more than $35 a visit for chiropractic . . . or 75% of the in network cost per visit, whichever is less." Thus, the resolution represented the Committee's exercise of its discretion under *N.J.S.A. 52:14-17.29(J)*. The Committee may exercise that discretion "[n]otwithstanding any other provision of law to the contrary," *ibid.*, including *N.J.S.A. 52:14-17.29(C)(1)*'s provision that "the participant shall receive reimbursement for out-of-network charges at the rate of 80% of reasonable and customary charges[.]" Thus, *N.J.S.A. 52:14-17.29(J)* allows the Committee to supersede the participant cost provision in *N.J.S.A. 52:14-17.29(C)(1)*. *See Teamsters Local 97, 434 N.J. Super. at 417* (holding *N.J.S.A. 52:14-17.29(J)* superseded *N.J.S.A. 52:14-17.36(b)*).

"When we review separate legislative enactments, we have "'an affirmative duty to reconcile them, so as to give effect to both expressions of the lawmakers' will."'" *Redd v. Bowman, 223 N.J. 87, 118, 121 A.3d 341 (2015)* (citations omitted). Our reading reconciles the two separately-enacted *subsections (C)* and *(J)* of *N.J.S.A. 52:14-17.29*. *Subsection (C)*'s maximums, co-pays, deductibles, and participant costs enacted in 2007 continue to govern unless the Committee exercises its discretion to modify them given by the Legislature's 2011 enactment of *subsection (J)*. The latter does not repeal the former in full but simply allows it to be modified by the Committee.

The legislative history confirms that Chapter 78 "confers on [*11] the committees the responsibility for plan design. . . . The bill requires the committees for both programs to set the amounts for maximums, co-pays, deductibles, and other such participant costs[.]" S. 2937, 214th Legis., Sponsors' Statement 5 (June 13, 2011); *accord* Senate

[2] "Participant" refers to the employee participating in the plan and receiving services from providers. *See, e.g.*, *N.J.S.A. 52:14-17.26(g)*, *(i)*.

Budget & Appropriations Comm. Statement to S. 2937, 214th Legis., at 5 (June 16, 2011); Assembly Budget Comm. Statement to A. 4133, 214th Legis., at 5 (June 20, 2011). Granting an administrative agency the discretion to modify the monetary details of the health benefit coverage is a rational legislative choice that we must respect. The Legislature could conclude that, to control spiraling health benefits costs and negotiate more cost-effective health care plans with carriers and providers, such specific monetary amounts should be set by administrative action rather than by legislation.

Our reading also serves the "legitimate public policy goal" of Chapter 78 to address "the serious fiscal issues that confront the State[.]" *DePascale v. State, 211 N.J. 40, 63-64, 47 A.3d 690 (2012)*. Like prior legislation, Chapter 78 reflects the State's "legitimate interest[s] in controlling the cost of health care benefits," "ensuring that the programs that make health care coverage available to public employees remain viable for both current [*12] and future employees," and "minimizing taxpayer burdens." *Teamsters Local 97, 434 N.J. Super. at 423*.

Appellants do not address the effect of *N.J.S.A. 52:14-17.29(J)* on *N.J.S.A. 52:14-17.29(C)(1)*. Instead, they rely on an unpublished decision interpreting the latter's equivalent for school employees, *N.J.S.A. 52:14-17.46.7*, which required the SEHBC to offer a plan "paying for 80% of reasonable and customary charges as defined herein," and used the same definition of "reasonable and customary charges" as appears in *N.J.S.A. 52:14-17.29(C)(3)*. However, that unpublished decision reviewed an SEHBC decision issued in 2009. In enacting Chapter 78 in 2011, the Legislature transferred the authority to design plans from the SEHBC to the SEHBPDC, and gave the SEHBPDC "the sole discretion to set the amounts for maximums, co-pays, deductibles, and other such participant costs," "[n]otwithstanding any other provision of law to the contrary." *L.* 2011, *c.* 78, § 48(g) (codified at *N.J.S.A. 52:14-17.46.6(g)*); *see L.* 2011, *c.* 78, § 49 (codified at *N.J.S.A. 52:14-17.46.7*). The unpublished decision did not involve a modification under Chapter 78's amended provisions, did not consider the Chapter 78's amendments, and is neither persuasive here nor binding precedent. *R. 1:36-3*.

Therefore, appellants cannot use *N.J.S.A. 52:14-17.29(C)* to prevent the Committee's exercise of its discretion under *N.J.S.A. 52:14-17.29(J)* to reduce the rate [*13] of reimbursement. Because the Committee merely reduced, but did not eliminate, reimbursement for chiropractic services, we need not address the Guild's concern that out-of-network reimbursements may ultimately be eliminated.

IV.

Appellants also argue the resolution discriminates against chiropractors in violation of *N.J.S.A. 17B:27-51.1*. That statute provides:

> Notwithstanding any provision of a policy or contract of group health insurance, hereafter delivered or issued for delivery in this State, whenever such a policy or contract provides for reimbursement for any service which is within the lawful scope of practice of a duly licensed chiropractor, *a person covered under such group health policy or contract or the chiropractor rendering such service shall be entitled to reimbursement* for such service when the said service is performed by a chiropractor. The foregoing provision shall be liberally construed in favor of reimbursement of chiropractors.
>
> [*N.J.S.A. 17B:27-51.1* (emphasis added).]

However, *N.J.S.A. 17B:27-51.1* cannot trump

N.J.S.A. 52:14-17.29(J), which applies "[n]otwithstanding any other provision of law[.]" By contrast, *N.J.S.A. 17B:27-51.1* only trumps provisions of a "policy or contract," not a statute like *N.J.S.A. 52:14-17.29(J)*.

Additionally, *N.J.S.A. 17B:27-51.1* would not bar the Committee's resolution even in the [*14] absence of *N.J.S.A. 52:14-17.29(J)*. First, *N.J.S.A. 17B:27-51.1* only addresses a "policy or contract of group health insurance[.]" Its legislative history indicated "[t]he purpose of this bill is to provide the health care consumer who is insured by a group health policy with *payment by the company* issuing the health insurance policy[.]" A. 23, 196th Legis., Sponsors' Statement at 1 (pre-filed for 1974) (emphasis added). Another bill similarly addressed individual "policy of health insurance," *N.J.S.A. 17B:26-2(f)*, with the purpose of providing the insured "with payment by the company issuing the health insurance policy," A. 22, 196th Legis., Sponsors' Statement at 3 (pre-filed for 1974). The State Health Benefits Program (SHBP) was not mentioned in either statute, their sponsors' statements, or the discussion of the bills in the lengthy public hearing. *Public Hearing on Assembly Nos. 21, 22, and 23 Before Senate Comm. on Labor, Indus. & Professions*, 196th Leg. (1975).[3]

When the Legislature wishes to bind both private insurers and the SHBC to provide the same coverage, it amends the statutes governing both. *E.g., L.* 2011, *c.* 188, §§ 5, 9; *L.* 2008, *c.* 126, §§ 6, 10. Thus, when the Legislature passed a law requiring privately-issued health insurance contracts [*15] and policies to provide coverage for biologically-based mental illness (BBMIs), it passed a "companion statute," *N.J.S.A. 52:14-17.29e*, "with the stated purpose of requiring that the Commission provide the same coverage for BBMIs to persons covered under the State Health Benefits Program," and we founded our ruling on the statute addressed to the Commission, using the private insurance law only as part of the legislative history. *Micheletti v. State Health Benefits Comm'n, 389 N.J. Super. 510, 516-17, 520-22, 913 A.2d 842 (App. Div. 2007)*. Here, there is no such statute addressed to the SHBP. Nor was there a statute in *Micheletti* giving the agency discretion "[n]otwithstanding any other provision of law to the contrary." *N.J.S.A. 52:14-17.29(J)*.

Second, *N.J.S.A. 17B:27-51.1* only provides that a person "shall be entitled to reimbursement" if a service is provided by a chiropractor. It does not dictate the level of reimbursement, or require the reimbursement be the same as it would be if the service was performed by another type of provider. The Committee's resolution provides reimbursement for such services when performed by chiropractors, but at a reduced rate if they are out-of-network. We note the Commissioner of Banking and Insurance has issued an order that "Horizon is not required under *N.J.S.A. 17B:27-51.1* to pay Doctors of Chiropractic in the same amounts it reimburses [*16] other health care providers" for similar services. *Am. Chiropractic Ass'n v. Horizon Blue Cross Blue Shield of N.J.*, NJODBI Order No. A09-113, Docket No. BKI 6230-04 at 15 (Oct. 7, 2009). We reject appellants' claim that the Committee's resolution violated *N.J.S.A. 17B:27-51.1* or that order.

Respondents contend *N.J.S.A. 17B:27-51.1* does not grant a private cause of action, but that issue is not presented in this case. "A private cause of action is essential when the

[3] The only mention of State-paid health benefits, *id. at 69*, concerned a third bill which would have required medical service corporations to pay chiropractors. A. 21, 196th Legis., Sponsors' Statement at 4 (pre-filed for 1974). That bill was not enacted.

plaintiff seeks damages for injury or loss suffered as a consequence of another's violation of a statute or to compel another private party to comply with a statute." *N.J. Dental Ass'n v. Metro. Life Ins. Co., 424 N.J. Super. 160, 165, 36 A.3d 1066 (App. Div. 2012)*. Here, appellants do not sue a private party or seek damages; instead, they appeal the Committee's resolution. "A statutory cause of action is not needed to challenge governmental action; one aggrieved by improper official action has a constitutional right to seek judicial review." *Id. at 166*. Thus, appellants' "ability to challenge the legality of the Commi[ttee]'s action does not turn on whether the Legislature expressly granted or implied a private cause of action." *Id. at 164-65*.[4]

V.

Appellants also claim a violation of *Section 2706(a) of the Patient Protection and Affordable Care Act (ACA), P.L. 111-148*. Section 2706(a), codified at *42 U.S.C. 300gg-5(a)*, provides:

> [*17] A group health plan and a health insurance issuer offering group or individual health insurance coverage shall not discriminate with respect to participation under the plan or coverage against any health care provider who is acting within the scope of that provider's license or certification under applicable State law. This section shall not require that a group health plan or health insurance issuer contract with any health care provider willing to abide by the terms and conditions for participation established by the plan or issuer. Nothing in this section shall be construed as preventing a group health plan, a health insurance issuer, or the Secretary from establishing varying reimbursement rates based on quality or performance measures.

We assume without deciding that Section 2706(a) applies to the SHBP.[5] We also assume without deciding that appellants do not need a private cause of action to appeal the Committee's resolution on the grounds that it violates Section 2706(a).[6]

However, "the definition of 'discrimination' under § 2706 of the ACA is a contested issue[.]" *Dominion Pathology Labs., 111 F. Supp. 3d at 738*. The United States Departments of Labor, Treasury, and Health & Human Services have stated that, after a Senate report questioned [*18] their original interpretation of Section 2706(a), and after 1,500 public comments, the Departments revoked their prior interpretation and announced

> their current enforcement approach to PHS Act section 2706(a)[:] Until further guidance is issued, the Departments will not take any enforcement action against a

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[4] By contrast, respondents rely on an unpublished opinion where the plaintiffs sued Horizon, a private entity, as part of a complaint seeking damages; we transferred for agency review the claim that Horizon violated *N.J.S.A. 17B:27-51.1*.

[5] *See 42 U.S.C. § 300gg-91(a)(1)* (defining "group health plan" by incorporating ERISA's definition in *29 U.S.C. § 1002(1)*); *see also 42 USCS § 300gg-21(a)* (stating when "[t]he requirements of subparts 1 and 2 [*42 USCS §§ 300gg et seq.* and *300gg-11 et seq.*] shall apply with respect to group health plans" that are either a "governmental plan" or a "nonfederal governmental plan"); *42 U.S.C. § 300gg-91(d)(8)* (defining "governmental plan" by incorporating ERISA's definition in *29 U.S.C. § 1058(32)*); *cf. 29 U.S.C. § 1003(b)(1)* (excluding a "governmental plan" from ERISA's coverage); *see generally Ohio v. United States, 849 F.3d 313, 319-20 (6th Cir. 2017)*.

[6] *See Dominion Pathology Labs., P.C. v. Anthem Health Plans of Va., Inc., 111 F. Supp. 3d 731, 736, 739 (E.D. Va. 2015)* (stating that "[t]he parties, and the court, agree that § 2706 of the ACA does not create a private cause of action" against a private insurer and that "Congress did not create a private right of action to enforce § 2706 of the ACA and reserved its enforcement to the states"); *cf. Ohio, 849 F.3d at 319* ("the Federal Government exercises enforcement authority over 'group health plans that are non-Federal governmental plans'" (quoting *42 U.S.C. § 300gg-22(b)(1)(B)*)).

> group health plan, or health insurance issuer offering group or individual coverage, with respect to implementing the requirements of PHS Act section 2706(a) as long as the plan or issuer is using a good faith, reasonable interpretation of the statutory provision[.]
>
> [*FAQs About Affordable Care Act Implementation (Part XXVII)* at 3-4 (May 26, 2015).[7]]

As the federal Departments responsible for implementing the ACA are still uncertain of the meaning of Section 2706(a), and further guidance has not yet issued, we will not attempt to divine its meaning. Following the Departments' current approach, we simply rule that the Committee's resolution, which permits chiropractic providers to participate in the SHBP but caps their out-of-network reimbursement, does not appear to be a bad faith or unreasonable interpretation of Section 2706(a).

Appellants complain that the Committee only capped the out-of-network reimbursements for chiropractors even though Horizon "highlight[ed] Chiropractic, Physical Therapy, and Behavioral Health as categories" with waning "in-network [*19] participation" which provided "the best opportunity for savings," and Horizon stated the differential between out-of-network and in-network allowances is much higher for surgeries than for chiropractic services. However, these comparisons with specialties providing different services do not clearly evidence discrimination. Appellants argue doctors of osteopathy perform similar procedures to chiropractors, but concede they bill using different CPT codes.

In any event, we cannot say the Committee's exercise of discretion to address reimbursement for out-of-network chiropractors constituted discrimination. Appellants provide "SHBP Claims Paid Data By Provider Specialty" showing that the number of claims paid to chiropractors dwarfs the number of claims by other specialists, and that the $24 million the SHBP paid to chiropractors is the third highest amount, after only "outpatient hospital" and "orthopedic surgery." An administrative agency is not barred from addressing a prominent problem area because it has not yet addressed all problem areas.

VI.

Finally, appellants argue that, in issuing the resolution, the Committee violated [*20] the *Open Public Meetings Act ("OPMA" or "the Sunshine Act"), N.J.S.A. 10:4-6 to -21*. They cite the OPMA's preamble:

> The Legislature finds and declares that the right of the public to be present at all meetings of public bodies, and to witness in full detail all phases of the deliberation, policy formulation, and decision making of public bodies, is vital to the enhancement and proper functioning of the democratic process; . . . and hereby declares it to be the public policy of this State to insure the right of its citizens to have adequate advance notice of and the right to attend all meetings of public bodies at which any business affecting the public is discussed or acted upon in any way except only in those circumstances where otherwise the public interest would be clearly endangered or the personal privacy or guaranteed rights of individuals would be clearly in danger of unwarranted invasion.
>
> [*N.J.S.A. 10:4-7*.]

However, "the aforesaid rights are implemented pursuant to the provisions of this act." *Ibid.* The operative provisions of the

[7] https://www.cms.gov/CCIIO/Resources/Fact-Sheets-and-FAQs/Downloads/ACA-FAQs-Part-XXVII-MOOP-2706-FINAL.pdf.

OPMA generally require a public body to give adequate notice of its meetings, *N.J.S.A. 10:4-9(b)(3)*, make its meetings open to the public, *N.J.S.A. 10:4-12(a)*, and keep minutes available to the public, *N.J.S.A. 10:4-14*. Here, the Committee gave notice of the July 6, 2015 public meeting, issued an agenda [*21] attaching the proposed resolutions, held the public meeting, and issued minutes. The minutes and the transcript of the public meeting show the Committee briefly discussed two resolutions, voted on all the resolutions, and made closing comments. The chiropractic resolution was voted on without further discussion.

The agenda contained a "Sunshine Act Statement," which stated that adequate notice had been given and added:

> RESOLUTION TO GO INTO EXECUTIVE SESSION TO REQUEST/RECEIVE ATTORNEY/CLIENT ADVICE FROM THE DEPUTY ATTORNEY GENERAL
>
> "In accordance with the provisions of the *Open Public Meeting Act, N.J.S.A. 10:4-13*, be it resolved that the SHBP Plan Design Committee go into closed (executive) session to discuss matters falling within the attorney-client privilege, and/or matters in which litigation is pending or anticipated, pursuant to *N.J.S.A. 10:4-12[(b)](7)*. . . ."

At the beginning of the public meeting, at which two Deputy Attorney Generals were present, a staff member read the "Sunshine Act Statement" into the record. *See N.J.S.A. 10:4-10*.

There was no evidence such a closed session was held. To the contrary, one of the Deputy Attorneys General certified as follows: The Committee's regular practice is to read such a resolution into [*22] the record. If the Committee wishes to go into a closed session to receive legal advice, members make a motion, second it, and vote to pass the resolution. *See N.J.S.A. 10:4-13*. No such actions were taken on July 6 and there was no closed meeting.

In any event, it would not violate the OPMA to have a closed part of the meeting to discuss "pending or anticipated litigation . . . in which the public body is, or may become, a party, or matters falling within the attorney-client privilege, to the extent that confidentiality is required in order for the attorney to exercise his ethical duties as a lawyer[.]" *N.J.S.A. 10:4-12(b)(7)*. Moreover, there was no indication the chiropractic resolution was discussed in a closed session.

Appellants claim the administrative record reveals that "presentation, discussion, and deliberation" was done in a closed session. However, they cite only the documents and PowerPoint printouts Horizon allegedly submitted to the Committee before the meeting, and Aon Hewitt's post-meeting report on the changes adopted. Nothing in OPMA bars members of public bodies from receiving and reviewing documents prior to a public meeting. Indeed, OPMA does not cover discussions by "a public official with subordinates [*23] or advisors." *N.J.S.A. 10:4-7*.

There could be no violation of OPMA absent a closed meeting "attended by, or open to, all of the members of a public body . . . to discuss or act as a unit upon the specific public business of that body." *N.J.S.A. 10:4-8(b)*. *See In re Consider Distribution of Casino Simulcasting Special Fund, 398 N.J. Super. 7, 16-17, 939 A.2d 230 (App. Div. 2008)* (finding an OPMA violation where "[b]y the Chairman's admission, [a commission] made its decision based on a discussion that did not take place at the public meeting," and then voted in public). Here, "the record does not support the

allegation that action taken at a prior meeting led to the predetermined adoption of the [July 6] resolutions," and "we reject the conjecture of [appellants] that those resolutions were the product of a private meeting." *See* *Witt v. Gloucester Cty. Bd. of Chosen Freeholders, 94 N.J. 422, 431-32, 466 A.2d 574 (1983)*.

The OPMA was not violated merely because the documents were not presented and discussed during the public meeting before the chiropractic resolution was passed. Nothing in the OPMA requires any particular level of deliberation; it simply prohibits private meetings except in specified circumstances. Absent evidence of such a meeting, appellants' OPMA claim fails.

Affirmed.

End of Document

Agenda Date: 5/21/14
Agenda Item: 8E

STATE OF NEW JERSEY

Board of Public Utilities
44 South Clinton Avenue, 9th Floor
Post Office Box 350
Trenton, New Jersey 08625-0350
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CLEAN ENERGY

IN THE MATTER OF THE IMPLEMENTATION OF THE SOLAR ACT L. 2012, C. 24, N.J.S.A. 48:3-87 (D)(3)(C): THE LIMITED EXEMPTION OF CERTAIN BASIC GENERATION SERVICE PROVIDERS FROM THE INCREASED SOLAR REQUIREMENTS	)	ORDER DOCKET NO. QO14050402

Parties of Record:

Stefanie A. Brand, Esq., Director, New Jersey Division of Rate Counsel
Philip J. Passanante, Esq., Atlantic City Electric Company
Margaret Comes, Esq., Rockland Electric Company
Marc B. Lasky, Esq., Morgan, Lewis & Bockius, LLP, on behalf of Jersey Central Power & Light Company
Tamara L. Linde, Esq., Public Service Electric and Gas Company

BY THE BOARD:

On July 23, 2012, Governor Christie signed into law L. 2012, c. 24, codified at N.J.S.A. 48:3-51 - 87 ("Solar Act"), effective immediately. The Solar Act effected many changes to the legal and regulatory framework for solar development. Among these were an increase in the solar portion of the Renewable Portfolio Standard ("RPS"), beginning in Energy Year 2014 ("EY14")[1], and a change in the way each Basic Generation Service ("BGS") provider and third party electric power supplier ("TPS") was to calculate its obligations under the solar portion of the RPS from EY14 forward. Specifically, the Solar Act provides:

> "[T]he board shall . . . adopt . . . renewable energy standards that shall require . . . (3) that the board establish a multi-year schedule, applicable to each electric power supplier or basic generation service provider in this State . . . the following number or percentage, as the case may be, of kilowatt-hours sold in this State by each electric power supplier and each basic generation service provider to be from solar electric power generators connected to the distribution system in this State:

An Energy Year or EY is defined as the period beginning on June 1 and ending on May 31 of the next year, numbered according to the calendar year in which it ends. N.J.S.A. 48:3-51.

Comment: RESA notes that BGS-Fixed Price contracts are of three-year duration while BGS-Commercial and Industrial Energy Pricing contracts last for only one-year, it appears that two years of BGS-FP contracts will be exempted from the new solar requirements while no BGS-CIEP contracts are exempt. Although pleased that no TPSs are required to make up the exempt BGS Providers' share of the solar obligation, the commenter questions whether it is fair to require non-exempt BGS-CIEP providers to make up the solar obligation of exempt BGS-FP providers. However, RESA acknowledges that the Solar Act makes no distinction between the two types of BGS contracts, and that Staff's straw proposal appears to be consistent with the legislative intent.

Response: Staff thanks RESA for its confirmation that the proposed methodology is consistent with the law.

Comment: RESA notes that as TPSs are not exempt from the increased solar obligation imposed by the Solar Act, they are competitively disadvanged because they must re-open all their existing contracts to pass the increased cost on to their customers. RESA's concern is that the Board's Energy Competition rules bar TPSs from changing contract prices without the consent of the customer. The sole exception to this rule is found at N.J.A.C. 14:4-7.6(1), which allows such unilateral price changes if there is a change in the Sales and Use Tax "or other state-mandated change." RESA asks that the Board amend N.J.A.C. 14:4-7.6(1) to include changes in the RPS among "state-mandated" changes. Lastly, RESA would like more information on the Board's RPS compliance calculation and feels that an understanding of the calculation would be "beneficial in determining whether or not the calculations proposed are equitable as to BGS providers."

Response: Staff's straw proposal provides regulated/licensed entities with guidance on how Staff intends to implement the Solar Act, particularly the methodology for allocating the increased RPS obligation from exempt BGS providers to non-exempt BGS providers. The proposal was designed to accurately apply the changes in the law to RPS compliance. Staff provided, as a courtesy to market participants, a straightforward one sentence explanation of how third party electric suppliers calculate their new solar obligation. An application for exemption from or amendment to the Board's Energy Competition rules for third party suppliers is outside the scope of this straw proposal.

STAFF RECOMMENDATION

Staff has reviewed the comments set forth above and considered the clarifications suggested carefully. In light of the comments received, Staff has identified several clarifications to definitions and applicability of the straw proposal that it proposes to add to its annual communication of compliance instructions sent to regulated entities and published on the New Jersey Clean Energy Program website.

Staff recommends that the straw proposal, as modified by the clarifications discussed above, be approved by the Board. Staff further recommends that the Board direct Staff to promptly initiate a formal rulemaking proceeding so that the process for implementing the Solar Act's changes to the solar portion of the RPS requirements may go through a formal public comment process and be incorporated into the Board's rules with all deliberate speed.

Staff also recommends that the Board approve an extension in the time for filing of the solar portion of the RPS compliance Annual Report to December 1, 2014 for the compliance period ending May 31, 2014.