BEFORE THE STATE OF NEW JERSEY
BOARD OF PUBLIC UTILITIES
BEFORE THE HONORABLE JOSEPH L. FIORDALISO, COMMISSIONER

IN THE MATTER OF A GENERIC STAKEHOLDER PROCEEDING TO CONSIDER PROSPECTIVE STANDARDS FOR GAS DISTRIBUTION UTILITY RATE DISCOUNTS AND ASSOCIATED CONTRACT TERMS AND CONDITIONS	**:**	**BPU Docket Nos. GR10100761 & ER10100762**

INITIAL BRIEF OF THE NEW JERSEY DIVISION OF RATE COUNSEL

STEFANIE A. BRAND, DIRECTOR
DIVISION OF RATE COUNSEL
31 Clinton Street, 11th Floor
P. O. Box 46005
Newark, New Jersey 07101
(973) 648-2690 - Phone
(973) 624-1047 - Fax
http://www.state.nj.us/rpa
njratepayer@rpa.state.nj.us

FILED: JANUARY 28, 2011

On the Brief:
Judith B. Appel, Assistant Deputy Public Advocate
Sarah H. Steindel, Assistant Deputy Public Advocate

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PREMLIMINARY STATEMENT

By Notice, dated October 25, 2010, the Board of Public Utilities ("Board") opened this generic proceeding. An initial meeting was held on November 15, 2010 with interested parties and a subsequent meeting was held on December 2, 2010. The Meetings resulted in a Notice being published by New Jersey's Gas Distribution Companies setting forth six issues formulated by the parties and soliciting written submissions on, but not limited to, those six issues by January 28, 2011.

Rate Counsel's comments on the six issues are set forth in the following manner: each issue is listed preceded by a Roman numeral, followed by Rate Counsel's analyses and recommendations. The Appendix is comprised of unpublished Board Orders cited in this Initial Brief.

ARGUMENT

I. The legality of charging discounted gas utility distribution rates (a) based on a customer's ability to bypass the utility's gas distribution system, (b) based on the impact on wholesale and retail electricity markets, or (c) for other policy reasons.

A. A rate discount based on a customer's demonstrated ability to physically bypass its GDC's delivery system is permissible as long as it is not "unjustly discriminatory or unduly preferential."

Pursuant to N.J.S.A. 48:2-21, the Board of has broad authority to set rates and tariffs for public utilities. The Board "may, after hearing, upon notice… [f]ix just and reasonable …rates" for those utilities. N.J.S.A. 48:3-21.

A utility may not "[m]ake, impose or exact … any unjustly discriminatory or unduly preferential individual or joint rate…for any product or service supplied or rendered by it within this state". N.J.S.A. 48:3-1.a. Nor may any public utility "adopt, maintain or enforce any regulation, practice or measurement which shall be unjust, unreasonable, unduly preferential, arbitrarily or unjustly discriminatory or otherwise in violation of law." N.J.S.A. 48:3-2. When the Board determines that "any existing rate, toll, charge or schedule…or other special rate [is] unjust, unreasonable, insufficient or unjustly discriminatory or preferential," it is authorized to "fix" those rates so that they are "just and reasonable." N.J.S.A. 48:2-21.1.

Basic ratemaking principles require that every customer must pay its fair share of the costs of providing service, which includes full payment of the customer's cost of service, plus a portion of the fixed costs of the system. Pursuant to N.J.S.A. 48: 2-21, utility rates are normally set by tariffs, which are "published schedules of rates filed by [a] public utility and, thereafter, applicable equally to all customers…." In re Application of Saddle River, 71 N.J. 14, 29 (1976); N.J. Bell Telephone Co. v. Town of West Orange, 188 N.J. Super. 455, 458 (App. Div. 1982), certif. denied 93 N.J. 283 (citing Application of Saddle River). Tariffs have the force of law, and

are binding on all customers. Id. However, the Board is authorized to approve contracts at rates different from the utility's tariff. N.J.A.C. 14:14-3-1.3(e). See, Application of Borough of Saddle River, 71 N.J. at 22-23, 29-30; Bell Telephone, 188 N.J. Super at 458. N.J.A.C. 14: 3-1.3 sets forth, in pertinent part, the filing requirements for a special contract or agreement. N.J.A.C. 14:3.13(f) requires that every filing for a special rate must include:

1. The type of service to be provided under the contract or agreement; for example, firm or interruptible service;

2. A detailed list of the costs and expenses to the utility that will result from its performance under the contract or agreement;

3. Rates and other charges that the customer will pay;

4. The effect of the contract or agreement on the utility's revenues and income, in detail;

5. The utility's reasons for entering into the contract or agreement;

6. A complete and detailed list of every way in which the contract or agreement changes of affect the utility's Board-approved tariff;

7. The rate treatment of any change in costs, expenses and/or revenues, and the predicted impact of the change on other ratepayers' of the utility; and

8. Any other potential impacts on other ratepayers, not described in (f)1 through 7 above.

The Board has approved discounted contracts after the filing of a petition with the Board, contested proceedings, and approval in a Board Order. See, e.g., I/M/O Petition of Public Service Electric and Gas Company for Approval of an Experimental Hourly Energy Pricing Tariff, and the Joint Petition of Public Service Electric & Gas Company and Co-Sell Raritan for Approval of a Related Service Agreement and Protective Order, 165 P.U.R. 4th 444 (NJBPU 1995), appeal dismissed, N.J. Super. App Div., Docket No. A-2534-95T5 (July 23, 1996).

It is within the Board's authority to allow rate discounts where doing so is not an "undue preference" or where the Board determines a discount is "just and reasonable". For example, where a customer asserts that it would physically bypass [1] the gas utility's distribution system, the Board has approved discounted contracts between a utility and an individual customer because all ratepayers' costs would increase if that customer bypasses. [2] In such circumstances, the Board determined that granting a discount was not an "undue preference," but helped assure just and reasonable rates for the remaining ratepayers.

B. Rate discounts should be limited to customers that have the ability to physically bypass the GDC's delivery system

Many large gas distribution company ("GDC") customers have negotiated discounted contracts based on claims that they would either move out of state, resulting in a loss of state revenues and jobs, or bypass the GDC's delivery system, resulting in a loss of revenues and higher rates to remaining customers. Certification of Richard W. LeLash dated January 28, 2011 ("LeLash Certification"), par. 5-8. Customers often seek to lower their costs, often to stay competitive. Id., par. 7.

In the past, the Board has approved special rates for customers who have asserted that they will move out of state unless they receive discounts. However, Rate Counsel opposes this practice, as it is difficult to contain and it is impossible to determine if gas distribution rates are the critical factor in a customer's decision to stay in New Jersey. *See,* LeLash Certification, par.

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[1] Bypass means a delivery of gas to a customer by means of a pipeline other than that customer's traditional supplier, for example, delivery of gas to an end user directly off a transmission pipeline without moving the gas through the end user's traditional local distribution company supplier. Oil and Gas Glossary, http://oilgasglossary.com/bypass.html.

[2] IM/O the Filing of a Special Contract by Pivotal Utility Holdings, Inc. d/b/a/ Elizabethtown Gas, BPU Dkt. No. EO08090829, Decision and Order (Jan. 28, 2009); I/M/O Elizabethtown Gas Company for Approval of an Amendment to a Contract With Roche Vitamins, Inc. BPU Dkt. No. GM99020094, Decision and Order (Sept. 11, 2003).

10. New Jersey businesses typically buy gas supply from third-party suppliers, so rates paid to utilities are only a small portion of the customer's energy costs. It is, therefore, impossible to determine whether gas distribution costs are the deciding factor, as opposed to taxes, fees, regulatory requirements, or other costs of doing business. A State is certainly free to provide economic development funds or tax breaks to keep companies in the state, but doing so is a policy decision that should be made by the Governor and Legislature, rather than one initiated by utilities. Rate preferences are simply not the appropriate means of accomplishing these policy goals. Id.

Rate Counsel further opposes the granting of gas distribution rate discounts for the purpose of attempting to equalize costs among wholesale electric generators. As explained in the accompanying Certification of Robert M. Fagan dated January 28, 2011 ("Fagan Certification"), generators with an ability to bypass have a legitimate competitive advantage, but extending that advantage to other generators would constitute an unreasonable subsidy. Fagan Certification, par. 17.

The Board has jurisdiction to address physical bypass. In the past, it has discounted rates for customers that have threatened to connect directly with an interstate pipeline and thereby avoid moving gas through the utility's delivery system. It is reasonable to extend rate discounts to customers with a credible bypass opportunity. Such customers have a competitive advantage in any event, and charging a discounted rate, provided the rate still contributes to the utility's fixed distribution system costs, lowers revenue requirements that would otherwise apply to the utility's other ratepayers. Fagan Certification, par. 17. However, granting a discount is reasonable only if the bypass threat is credible. Fagan Certifications par. 17. Although many customers claim that they can bypass the utility's delivery system, such bypass options are often

not physically or economically feasible. LeLash Certification, par. 11. The practicality of physical bypass depends upon many factors including the proximity of the transmission line to the customer's premises, the length of the necessary connecting pipeline, cost of the pipe, costs of installation, rights of way, municipal permits, and so on. As Rate Counsel's consultant Richard LeLash states, "Non-utility supply capacity is expensive, associated safety issues are complex and require increased inspection and maintenance, and bypass analyses often show that the potential bypass customer has neither the staffing nor a willingness to operate and maintain the necessary equipment." LeLash Certification, par. 11.

Rate Counsel submits that uniform standards should be set, through a rulemaking process, so that claims of bypass can be analyzed based upon a set of objective criteria. Only if a customer can demonstrate a feasible ability to physically bypass should a discounted rate be considered.

II. The legality of establishing discounted gas utility distribution rates through contracts and whether current or future contracts may be "evergreened," i.e., extended for additional terms, without Board approval; and, if it is determined that evergreen provisions are permissible, whether a utility should be required to file advance notice with the Board or obtain approval before determining not to exercise a termination right in a discounted contract.

A. Discounted rates may be established by contract, after a "contested case" and in accordance with criteria established by rulemaking.

If a discounted rate is justified, it may be established by contract. N.J.S.A. Title 48 does not prohibit the establishment of rates by contract. While utilities typically provide service under tariffs that apply equally to all customers, individually negotiated contracts are not prohibited. Under N.J.S.A. 48-2-21, the Board "may require every public utility to file with it complete schedules" of their rates for utility service. However, this provision does not require utility service to be provided under tariffs in all instances. Individually negotiated contracts are permitted, subject to proper review by the Board. In re Application of Saddle River, 71 N.J. 14, 22-23, 29-30 (1976). The Board's review of contracts is governed by the same principles that apply to rates—the terms and conditions must be just, reasonable, and not unduly discriminatory. Id.; N.J.S.A. 48:3-1. As discussed in Point III below, the criteria for individually negotiated contracts must be established by rulemaking, and such contracts must be approved in a "contested case" pursuant to the "contested case" procedures set forth in the New Jersey Administrative Procedure Act, N.J.S.A. 52:14B-1 to -15 ("APA").

B. "Evergreening" without Board oversight is not permissible.

Some contracts include "evergreen" provisions, typically providing that the contract will renew indefinitely for specified durations in the absence of a notification by either party that it wishes to terminate the contract. N.J.S.A. Title 48 does not permit "evergreening" without

Board oversight. Central to the broad regulatory authority granted to the Board is its authority to assure that service is provided at just, reasonable, and non-discriminatory rates. N.J.S.A. 48:2-13; N.J.S.A. 48:2-21; N.J.S.A. 48:3-1. The New Jersey Supreme Court has observed that "foremost among [the Board's] responsibilities is its duty to ensure that rates are not excessive." In re Redi-Flo Corp., 76 N.J. 21, 39 (1978). Further, the Board's duty to regulate utility rates is a continuing obligation. Rates and other terms of service that are just and reasonable when established may become unjust or unreasonable with changing conditions. Id. at 24-26 (economic downturn and fuel oil shortage rendering fuel oil pricing scheme inadequate to sustain financial viability of fuel oil utility) .

A New Jersey regulatory agency may not cede its authority to private entities that are not accountable to the public. N.J.S.P.C.A. v. N.J. Dep't of Agric., 196 N.J. 366, 400 (2008) (improper for New Jersey Department of Agriculture to defer to "techniques commonly taught by veterinary schools" and other institutions to define "humane" treatment of animals); N.J. Dep't of Transp. v. Brzoska, 139 N.J. Super. 510, 513 (App. Div. 1976) (impermissible for New Jersey Department of Transportation to allow private airport to grant or deny permission to apply for a fixed base operators license).

Allowing "evergreening," without oversight by the Board would be an abdication of the Board's authority and duty to regulate rates. A utility and its customer would be given the discretion to keep a contract in effect indefinitely, with no process for the Board to review the reasonableness of the contract rates and other contract terms in light of changing conditions. This would impermissibly undermine the Board's regulatory authority.

To the extent Board may allow "evergreen" provisions in utilities' contracts with their customers, there must be a mechanism to allow continuing Board oversight of the utility's

determination whether or not to allow the contract to renew. The utility should accordingly be required to file a petition with the Board and obtain Board approval before allowing a contract to be extended under an "evergreen" provision. This will allow the Board to determine, with input from Rate Counsel and other affected parties, whether the extension would be just and reasonable. As discussed in Section III below, the criteria for allowing the contracts to "evergreen" must be established by rulemaking.

The same principles apply to any existing contracts containing "evergreen" provisions. The Board has a continuing duty to assure that the utilities exercise their rights to terminate any contracts whose terms have become unjust or unreasonable since the Board's initial approval of such contracts. Such a requirement would not infringe on the rights of any party to an existing contract because the Board's continuing authority to review contract rates and ensure just and reasonable rates is a legal backstop to any such contract. The Board's comprehensive authority over the State's public utilities is well established, Township of Deptford v. Woodbury Terrace Sewerage Corp., 54 N.J. 418, 424 (1969). The existence of this authority can be assumed to be well known by entities that have entered into contracts with the utilities for discounted rates. Rate Counsel is unaware of any Board-approved contract that includes any provision that would pre-empt the Board's authority to oversee utilities' decisions with regard to "evergreen" provisions, and if any such contract existed, it would be illegal.

III. The criteria and process that the Board should establish to determine whether or not an entity has an ability to bypass the utility's gas distribution system and what rates should be charged to such entities; and whether the criteria and process must be established in a rulemaking.

A. Discounts based on bypass threats should only be granted based on criteria and process specified in a rule.

1. The New Jersey Administrative Procedure Act requires that the criteria and process for granting rate discounts be established by rulemaking.

The proper procedure to establish the criteria and process for granting rate discounts is to institute a rulemaking. Metromedia v. Dir., Div. of Taxation, 97 N.J. 313 (1984). In Metromedia, the New Jersey Supreme Court invalidated a determination made by the Director of the Division of Taxation, finding that the agency action constituted de facto rulemaking that did not comply with the requirements of the New Jersey Administrative Procedure Act, N.J.S.A. 52:14B-1 to -15 ("APA"). Metromedia, 97 N.J. at 338. In arriving at its decision, the Court set forth the criteria for when administrative determinations constitute rulemaking rather than adjudication. These elements, if present, define an administrative action as a rule which, in order to be valid, must be promulgated in accordance with the procedures governing rulemaking as provided by the APA. Id. at 328.

An agency determination is considered an administrative rule if it:

(1) is intended to have wide coverage encompassing a large segment of the regulated or general public, rather than an individual or a narrow select group;

(2) is intended to be applied generally and uniformly to all similarly situated persons;

(3) is designed to operate only in future cases, that is, prospectively;

(4) prescribes a legal standard or directive that is not otherwise expressly provided by or clearly and obviously inferable from the enabling statutory authorization;

(5) reflects an administrative policy that (i) was not previously expressed in any official and explicit agency determination, adjudication or rule, or (ii) constitutes a material and significant change from a clear, past agency position on the identical subject matter; and

(6) reflects a decision on administrative regulatory policy in the nature of the interpretation of law or general policy.

Id. at 331-32. All six Metromedia factors are not required to be present for an agency action to constitute rulemaking, and the factors should be weighed, not tabulated. In re Request for Solid Waste Utility Customer Lists, 106 N.J. 508, 518 (1987). For a rulemaking, the APA requires proper notice to the public, broad participation of interested parties, presentation of views to the public, and the opportunity to comment on the proposed agency action, none of which has occurred here. Metromedia, supra, 97 N.J. at 331; N.J.S.A. 52:14B-4.

An analysis of the Metromedia factors demonstrates that a rulemaking is required to establish the criteria and process for granting gas distribution rate discounts based on an ability to bypass the utility, and to establish the standards for related contract terms and conditions. The criteria and process envisioned by the Board will be of general applicability and prospective in nature. They will prescribe legal standards that, while within the Board's discretionary authority, are not expressly provided by statute. Further, the Board's determinations will establish policies that have not been clearly and explicitly expressed. While the Board has in the past approved discounted gas distribution rates, it has done so on an ad hoc basis, with no clearly articulated criteria for determining whether a discounted rate is warranted, and what rate and other terms and conditions should apply. IM/O the Filing of a Special Contract by Pivotal Utility Holdings, Inc. d/b/a/ Elizabethtown Gas, BPU Dkt. No. EO08090829, Decision and Order (Jan. 28, 2009); I/M/O Elizabethtown Gas Company for Approval of an Amendment to a Contract With Roche Vitamins, Inc. BPU Dkt. No. GM99020094, Decision and Order (Sept. 11, 2003). Finally, the

Board's determinations will reflect the Board's interpretation of N.J.S.A. Title 48 and related policy determinations. Thus, all six Metromedia factors indicate that a rulemaking is required to establish the criteria and process for granting rate discounts.

2. Rule parameters

The Board should only grant rate discounts "after hearing, upon notice." N.J.S.A. 48: 2-21. The burden of proof should be on the utility and the customer to demonstrate that, absent a discount, the utility will bypass the gas distribution company. A rulemaking proceeding should be instituted in which the criteria and the parameters of bypass and requirements for discounted rates should be codified. For example, proofs should be required to demonstrate the feasibility of bypass, as well as an analysis to justify the proposed rates and rate structure. Criteria should also be established for other contract terms such as duration, renewal provisions and operational requirements. To the extent that the Board allows evergreen provisions, the rules should also establish criteria for contract renewal pursuant to any evergreen clause.

B. Rate discounts and special contracts require approval in a "contested case."

Rate discounts and special contracts affect the statutorily granted rights of other ratepayers, and therefore require the opportunity for litigation as a "contested case" with notice to Rate Counsel and other interested parties. Under the APA, a "contested case" is defined as:

> a proceeding … in which the legal rights, duties, obligations, privileges, benefits or other legal relations of specific parties are required by constitutional right or by statue to be determined by an agency by decisions, determinations or orders, addressed to them or disposing of their interests, after opportunity for an agency hearing ….

N.J.S.A. 52:14B-2(b). Thus, the APA requires a contested case whenever a hearing is required by statute or constitutional principles. The Board has the authority to order rate increases only

"after hearing, upon notice, by order in writing to determine whether the increase, change or alteration is just and reasonable." N.J.S.A. 48:2-21(d).

If a rate discount is granted to one customer, the costs to be borne by the utility's other customers will necessarily increase. The ratepayers so affected are entitled to a hearing. The requirement for a hearing is based on constitutional principles. As explained by the New Jersey Supreme Court:

> … if the rate for the service supplied be unreasonably low it is confiscatory of the utility's right of property, and if unjustly and unreasonably high … it cannot be permitted to inflict extortionate and arbitrary charges upon the public.

In re Industrial Sand Rates, 66 N.J. 12, 23-24 (1974). Thus, in establishing rates the Board is defining the property rights of parties and therefore must provide due process. Further, utility customers have a statutory right under N.J.S.A. 48:3-1 to rates and other terms of service that are not "unjustly discriminatory or unduly preferential …." Special contracts with terms and conditions that differ from the terms and conditions provided in the utility's tariff may affect the statutorily granted rights of the utility and may implicate other customers' rights to receive service under terms that are not unjustly discriminatory or unduly preferential.

In order to afford the required statutory and constitutional protections to the ratepayers that may be affected by a proposed rate discount, requests for approval of rate discounts should be conducted as "contested cases." As provided by the APA, all parties should be afforded reasonable notice. If any party objects to the discount, they are entitled to an opportunity to present evidence and argument on all issues, and a decision must be based on the record. N.J.S.A. 52:14B-9 and -10. This process should begin with the filing of a petition or petitions that comply with the Board's Rules of Procedure, which include the proofs to be specified in the rate discount rulemaking discussed above. To the extent Rate Counsel or other interested parties

contest the discounted rate, they should be afforded an opportunity for discovery, and an opportunity to conduct cross examination and present responsive testimony and argument in accordance with the New Jersey Uniform Administrative Procedure Rules and the Board's Rules of Practice. N.J.A.C. 1:1-1.1 et seq.; N.J.A.C. 14:1-1.1 et seq.

IV. Regardless of an entity's ability to bypass the utility's gas distribution system, the criteria and process that the Board should establish to determine (a) whether other policy considerations justify discounts, (b) if so, what rates should be charged; and (c) whether the criteria and process for such discounts must be established in a rulemaking.

See Points I, II and III.

V. The legality of and policy considerations of applying SBC, RGGI and CAC charges prospectively to electric generating customers that purchase gas delivery services from the utility to produce electricity that is sold to electric public utility customers.

The Societal Benefits Charge ("SBC"), the Regional Greenhouse Gas Initiative ("RGGI") charges and the Capital Adjustment Charges ("CAC") are each based on different legal and regulatory foundations. Thus, different legal and policy considerations govern the applicability of each charge. For this reason, the SBC, RGGI and CAC charges will be discussed separately below.

A. The SBC does not apply to gas-fueled electric generators that sell into the wholesale electric market.

The SBC, established under section 12 of the Electric Discount and Energy Competition Act of 1999 ("EDECA"), N.J.S.A. 48:3-60, does not apply to gas-fueled electric generators that supply electricity for resale. Under N.J.S.A. 48:3-60(a), the SBC "shall be collected as a non-bypassable charge imposed on all electric public utility customers and gas public utility customers, as appropriate …." The term "customer" is defined in section 3 of EDECA as follows:

> "Customer" means any person that is an end user and is connected to any part of the transmission and distribution system within an electric public utility's service territory or a gas public utility's service territory within this State.

N.J.S.A. 48:3-51 (emphasis supplied). Thus, the applicability of the SBC is limited to entities that are "end users" of energy. Electric generators that sell their output for resale are not end

users. The natural gas supplied to them is transformed into electric energy, which is then supplied to the end users, who pay the SBC based on their electric usage.[3]

Eliminating the SBC for all wholesale electric generators is not only consistent with the statutory language, it is also sound policy, as it may improve the efficiency of the wholesale electric market and lead to lower retail electric prices. As explained in the accompanying Certification of Robert M. Fagan, currently the SBC is applied unequally to gas-fueled wholesale electric generators located in New Jersey. The presence of such an unequally applied charge can have a distorting effect on the market, causing some less efficient units to be dispatched ahead of higher-efficiency units subject to a higher SBC charge. Fagan Certification, par. 14, 15. Charging the SBC to wholesale electric generators who sell their electric output in New Jersey also will result in double recovery from end users of energy. As Mr. Fagan explains in his Certification, the PJM energy market is a single clearing price market. Prices for each hourly interval are based on the highest of the prices offered by all of the units needed to operate the system reliably in that interval. The same price paid to the highest-priced unit, known as the marginal unit, is paid to all other generators in the applicable region for that interval. Fagan Certification, par. 7. The addition of the SBC may increase the market clearing price for wholesale electricity whenever generators paying the SBC are the marginal generators in New Jersey. Fagan Certification, par.

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[3] Senate Bill 2381, which has passed the New Jersey legislature and is currently awaiting signature by the Governor, would clarify that the SBC does not apply to gas-fueled generators that sell electricity for resale. Specifically, Section 5 of S2381 provides as follows:

> Notwithstanding the provisions of any other law, rule, regulation, or order to the contrary, gas public utilities shall not impose a societal benefits charge pursuant to section 12 of 45 P.L.1999, c.23 (C.48:3-60), or any other charge designed to recover the costs for social, energy efficiency, conservation, environmental, or renewable energy programs, on natural gas delivery service or commodity that is used to generate electricity that is sold for resale.

Under this provision, gas utilities would be prohibited from charging the SBC to wholesale generators, and this issue would not require resolution by the Board in this matter.

8. These increased wholesale prices would be embedded in retail electric rates, which would then be subject to additional SBC charges.

At the current time most gas-fired generators pay either no SBC, or a reduced amount. As shown in Table 1 of Mr. Fagan's Certification, 66% of the gas volumes delivered to electric generators by New Jersey's natural gas utilities pay no SBC, and another 27% of the volumes pay a reduced SBC charge. An attempt to impose the SBC on all generators could result in decision to bypass, increased electric prices, or both.

At the December 2, 2010 stakeholder meeting in this matter, Marketing Analytics, LLC, the independent Market Monitor for PJM, suggested that the Board impose the SBC on all New Jersey gas fired generators including those taking service directly from a federally-regulated interstate pipeline. In addition to raising serious issues concerning the Board's authority to collect the SBC from generators not taking service from a New Jersey utility, this approach is contrary to the language and intent of EDECA, which clearly imposes the SBC on end-users and seeks to create a fair competitive playing field among generators.

With respect to PSEG Power, an electric generator served by PSE&G that does not currently pay the SBC, there are additional policy reasons for not imposing the SBC. PSE&G Power currently pays a Gas Reservation Charge of $0.425 per dekatherm. I/M/O the Petition of Public Service Electric and Gas Co. for Approval of an Increase in Electric and Gas Rates and for Changes in the Tariffs for Electric and Gas Service, BPU Dkt. No. GR09050422, Decision and Order Adopting Stipulation of Settlement (Supplemental Proceeding) at 5 (Dec. 12, 2010) ("PSE&G Supplemental Order"). The Gas Reservation Charge, which is approximately $35 million per year is credited to the Basic Gas Supply Service ("BGSS") clause, (two-thirds to residential customers and one-third to commercial and industrial customers), which results in

lower gas commodity charges for PSE&G's BGSS ratepayers. This arrangement was originally set to compensate ratepayers for PSEG Power's continued use of interstate pipeline transportation and storage assets for which utility ratepayers had paid while PSEG Power was part of PSE&G's regulated Electric Business Unit.[4]

Payment of the SBC by PSEG Power could result in an increase in PSEG Power's cost to produce electricity, which would presumably be reflected in PSEG Power's electricity prices, and overall prices if a PSEG Power unit were the marginal unit. Requiring PSEG Power to pay the SBC could also result in it bypassing PSE&G's delivery system. Bypass may be feasible for PSEG Power because several gas pipelines cross, or are contiguous to, PSEG property. Such bypass would result in neither the SBC nor the Gas Reservation Charge being paid by PSEG Power.[5] PSEG Power would of course have to establish its ability to bypass pursuant to the rules adopted by the Board in this proceeding.

There are also sound policy reasons why the amount of money paid as the Reservation Charge by PSEG Power to PSE&G should not be applied to the SBC. Such a change would divert the funds from their intended beneficiaries, PSE&G's BGSS ratepayers, and would leave those ratepayers uncompensated for the pipeline and storage assets that they paid for when PSE&G owned the generation assets.

As noted earlier, there is a bill currently before the Governor that would exempt wholesale electric generators from paying the SBC. If this bill is signed, the issue of PSEG

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[4] PSEG Power's failure to pay the SBC was raised in PSE&G's base rate case by large industrial and other electric generators that were required to pay it. After supplemental hearings the parties came to an agreement, and, by Decision and Order dated Dec, 10, 2010, the Board adopted the Stipulation of Settlement. That settlement continued PSEG Power's exemption from paying the SBC for a set period of time, but required it to provide the industrial intervenors with a credit of $0.30 per dekatherm. PSE&G Supplemental Order at 5.

[5] The Board, in its Decision and Order in the Supplemental Proceeding in PSE&G's base rate case, specifically found that, "Nothing in the Stipulation shall affect the right of PSEG Power… to bypass PSE&G's gas distribution system. " PSE&G Supplemental Order at 5.

Power's Gas Reservation Charge payments would be resolved. PSEG Power would not have to pay the SBC and the Gas Reservation Charge would continue to be credited to PSE&G's BGSS. See LeLash Certification, par. 18.

For the above reasons, the SBC should not be applied to electric generators supplying the wholesale electric market. The statutory definition of "customers" contained in EDECA does not include wholesale electric generators and, the current system of unevenly applied charges likely distorts the wholesale electric market and results in higher retail electric prices.

B. RGGI charges should continue to be allocated in accordance with established ratemaking principles.

RGGI charges were authorized under P.L. 2007, c. 340 (the "RGGI Law"). Section 13 of the RGGI Law allows New Jersey's electric and gas public utilities to invest in energy efficiency, conservation, and Class I renewable energy programs within their service territories, and to seek rate recovery from the Board for the costs of such programs. N.J.S.A. 48:3-98.1. Section 13 of the RGGI Law further provides that utilities seeking rate recovery for such programs must file a petition with the Board, and authorizes the Board to grant rate recovery by means of ratemaking treatment that "may include placing appropriate technology and program cost investments in the respective utility's rate base, or recovering the utility's technology and program costs through another ratemaking methodology approved by the board, including, but not limited to, the societal benefits charge established pursuant to section 12 of [EDECA]." N.J.S.A. 48:3-98.1(b). Based on this statutory provision, the level and design of the utilities' existing RGGI charges has been determined in contested proceedings before the Board. E.g. I/M/O Energy Efficiency Programs and Associate Cost Recovery Mechanisms, BPU Dkt. Nos. EO09010056 et al. Order Adopting Schedule (Feb. 25, 2009). To date, the RGGI rates charged by the utilities have been established by Stipulation in those contested proceedings. E.g. I/M/O

Energy Efficiency Programs and Associate Cost Recovery Mechanisms (Public Service Electric and Gas Co.), BPU Dkt. Nos. EO09010056 and EO09010058, Decision and Order Approving Stipulation (July 16, 2009). In the absence of a specific statutory directive, these proceedings have been guided by established rate design principles, which require all ratepayers to pay their fair share of the costs of RGGI programs. See, e.g. Id. at 18. (July 16, 2009) (finding that the allocation of energy program costs on an equal per-kWh or per-therm basis was reasonable in light of expected benefits to all customers).[6] This process is consistent with the RGGI Law, and should continue.

C. Capital Adjustment Charges ("CACs") are temporary charges based on extraordinary circumstances, which should not be addressed in this proceeding.

Three of the four gas utilities, Public Service Electric and Gas Company ("PSE&G"), Elizabethtown Gas Company ("ETG") and South Jersey Gas Company ("SJG"), currently have in effect surcharges, referred to herein as "Capital Adjustment Charges" or "CACs".[7] The CACs are all temporary charges that were implemented due to extraordinary economic circumstances. There is no need to address the applicability of the CACs in this proceeding.

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[6] Section 5 of S2381 if enacted, would prohibit natural gas utilities from imposing "other charge designed to recover the costs for social, energy efficiency, conservation, environmental, or renewable energy programs, on natural gas delivery service or commodity that is used to generate electricity that is sold for resale." This provision would prohibit the State's natural gas utilities from imposing RGGI charges on wholesale electric generators. As noted above, the utilities' existing RGGI charges have been established by stipulation. For the same reasons set forth in Point II.B. above, any reallocation of the existing RGGI charges will affect the rights of Rate Counsel and other parties to the Stipulations that established the existing charges. Thus, if S2381 is enacted, to the extent wholesale generators are paying existing RGGI charges, the relevant proceedings should be re-opened for consideration of the impact of the new legislation on the stipulated RGGI rates.

[7] For PSE&G, the charge is referred to as the "Capital Adjustment Charge" or "CAC." PSE&G Tariff for Gas Service, Original Sheets Nos. 48 and 49 (available at http://www.pseg.com/family/pseandg/tariffs/gas/pdf/gas_tariff.pdf). Similar charges in effect for ETG and SJG are referred to, respectively, as the "Utility Infrastructure Enhancement" or "UIE" rider, and the "Capital Investment Recovery Tracker" or "CIRT". Elizabethtown Gas Tariff for Gas Service, First Revised Sheet No. 118 and Original Sheet No. 119 (available at http://www.elizabethtowngas.com/Repository/Files/elizabethtown_tariff.pdf); South Jersey Gas Tariff, Original sheet No. 71 (available at http://www.southjerseygas.com/108/tariff/Tariff.pdf). For the purpose of this brief, all three charges will be referred to as CACs.

The CACs were implemented to provide for cost recovery of accelerated infrastructure investment programs that were implemented in furtherance of the Economic Stimulus Plan announced by Governor Jon Corzine in October 2008. Under these programs, the utilities have accelerated their planned capital spending for certain projects that were specified in a Board-approved Stipulation for each utility. The CACs were implemented as temporary surcharges to allow the utilities to receive contemporaneous recovery until these investments could be rolled in to each utility's base rates in base rate proceedings. I/M/O the Proceeding for Infrastructure Investment and a Cost Recovery Mechanism for All Gas and Electric Utilities (Public Service Electric and Gas Co.), BPU Dkt. Nos. EO09010049 & EO09010050, Decision and Order Approving Stipulation at 4-6 (April 28, 2009) (referred to hereinafter as the "PSE&G Infrastructure Order"); I/M/O the Proceeding for Infrastructure Investment and a Cost Recovery Mechanism for All Gas and Electric Utilities (Elizabethtown Gas Co.), BPU Dkt. Nos. EO09100049 & GO09010053, Decision and Order Approving Stipulation at 4-6 (April 28, 2009) (referred to hereinafter as the "ETG Infrastructure Order"); I/M/O The Proceeding for Infrastructure Investment and a Cost Recovery Mechanism for All Gas and Electric Utilities (South Jersey Gas Co.), BPU Dkt. Nos. EO09010049 & GO09010051, Decision and Order Approving Stipulation at 4-6 (April 28, 2009) (referred to hereinafter as the "SJG Infrastructure Order").

NJNG does not have a CAC mechanism. Since this Company had completed a base rate proceeding in October of 2008, it was allowed to recover for its capital investment program by means of adjustments to its base rates, to be reviewed in supplemental proceedings in the base rate docket. I/M/O the Proceeding for Infrastructure Investment and a Cost Recovery Mechanism for All Gas and Electric Utilities (New Jersey Natural Gas Co.), BPU Dkt. Nos. EO09010049,

GO09010052 and GR07110889, Decision and Order Approving Stipulation at 4-6 (April 28, 2009) (referred to hereinafter as the "NJNG Infrastructure Order").

For all three of the natural gas utilities that have CACs, the parties to the relevant Stipulation agreed that the CAC would be implemented as a per-therm charge, subject to a permanent allocation of costs when the investments associated with the accelerated projects were rolled into each utility's base rates. PSE&G Infrastructure Order at 5-6; ETG Infrastructure Order at 5-6; SJG Infrastructure Order at 5-6. Since the initial establishment of the CACs, all three utilities have completed base rate proceedings. All three utilities have now reflected some of the accelerated projects in their base rates in subsequent base rate proceedings, and those same base rate proceedings will be re-opened for the purpose of reflecting the remaining projects in base rates, at which time the CACs will be eliminated. I/M/O the Petition of Pivotal Utility Holdings, Inc. d/b/a Elizabethtown Gas for Approval of Increased Base Tariff Rates and Charges for Gas Services and Other Tariff Revisions, BPU Dkt. No. GR09030195, Decision and Order Approving Stipulation and Adopting Initial Decision at 5 (Dec. 17, 2009) I/M/O the Petition of Public Service Electric and Gas Co. for Approval of an Increase in Electric and Gas Rates and for Changes in the Tariffs for Electric and Gas Service, BPU Dkt. No. GR09050422, Decision and Order Adopting Initial Decision with Modifications for Gas Division at 10 (July 9, 2010); I/M/O Petition of South Jersey Gas Co. for Approval of Increased Base Tariff Rates and Charges for Gas Service and Other Tariff Revisions, BPU Dkt. No. GR10010035, Decision and Order Approving Stipulation and Adopting Initial Decision at 3 (Sept. 17, 2010).

As can be seen from the above discussion, utilities' accelerated infrastructure investment programs, and the departures from normal ratemaking practices for cost recovery, were implemented in response to the extraordinary circumstances that existed following the

worldwide economic downturn in late 2008. These charges are all temporary, and will be eliminated when the remaining accelerated capital investments associated with these charges are rolled into each utility's base rates. There is accordingly no reason for the Board to address the prospective application of the CACs in this generic proceeding.

VI. The applicability of SBC, RGGI and CAC charges prospectively (a) to customers with an ability to bypass the utility's gas distribution system, (b) based on the impact on wholesale and retail electric markets, or (c) for other policy reasons, and the legality of any waiver or reduction of those charges.

A. EDECA mandates that the SBC must apply to all electric and gas utility customers.

EDECA provides that SBC is a non-bypassable charge for all electric and gas utility customers. As noted in Point V.A. above, N.J.S.A. 48:3-60 (a), provides that the SBC "shall be collected as a non-bypassable charge imposed on all electric public utility customers and gas public utility customers, as appropriate." The term "customer" is defined in section 3 of EDECA as follows:

> "Customer" means any person that is an end user and is connected to any part of the transmission and distribution system within an electric public utility's service territory or a gas public utility's service territory within this State.

N.J.S.A. 48:3-51 (emphasis supplied). The meaning of the quoted provisions is clear—the SBC must be applied to end users of natural gas that are connected to the distribution systems of New Jersey's natural gas utilities. The statutory language does not exempt customers with an ability to bypass, or based on impacts on wholesale or retail electric markets or other policy consideration. The SBC must continue to be applied to all end users of natural gas who receive their gas supplies through the New Jersey gas utilities' distribution systems.

B. RGGI charges should be allocated in accordance with established rate design principles.

As explained in Point V.B. above, in accordance with the RGGI Law the allocation of RGGI charges is determined in contested proceedings that are initiated with the filing of petitions by the utilities proposing to implement RGGI projects. As noted above, RGGI does not mandate a specific cost allocation methodology, and the allocation of RGGI charges has been guided by established rate design principles, which require all ratepayers to pay their fair share of the costs

of RGGI programs. This process is in accordance with the RGGI law, and should continue for future RGGI charges.

C. CAC charges should not be addressed in this proceeding.

For the reasons explained in Point V.C. above, the applicability of the CAC charges in effect for PSE&G, ETG and SJG should not be addressed in this generic proceeding.

CONCLUSION

For the foregoing reasons, Rate Counsel respectfully submits that the Board should (1) allow gas distribution rate discounts only based on a customer's demonstrated ability to bypass a GDC's delivery system; (2) allow such discounts and related special contract terms and conditions only after a "contested case" and in accordance with criteria and standards established by rulemaking; (3) affirm that "evergreening" of special contracts without Board oversight is impermissible; (4) affirm that the SBC does not apply to gas-fueled electric generators that sell their electricity output for resale; (5) affirm that RGGI charges should continue to be allocated in "contested cases" in accordance with established ratemaking principles; and (6) determine that CAC charges need not be addressed in this proceeding.

Respectfully submitted,

STEFANIE A. BRAND, DIRECTOR
DIVISION OF RATE COUNSEL

By: Judith B. Appel
Judith B. Appel
Assistant Deputy Rate Counsel

Sarah H. Steindel
Sarah H. Steindel
Assistant Deputy Rate Counsel

DATED: January 28, 2011