BEFORE THE STATE OF NEW JERSEY
BOARD OF PUBLIC UTILITIES

IN THE MATTER OF THE FILINGS	)	**Docket Nos**.
OF THE COMPREHENSIVE RESOURCE	)	EX99050437
ANALYSIS OF ENERGY PROGRAMS	)	EO99050348
PURSUANT TO SECTION 12 OF THE	)	EO99050349
ELECTRIC DISCOUNT AND ENERGY	)	EO99050350
COMPETITION ACT OF 1999	)	EO99050351
		EO99050352
		EO99050353
		EO99050354

COMMENTS OF THE DIVISION OF THE RATEPAYER ADVOCATE

Blossom A. Peretz, Esq.
Director and Ratepayer Advocate
31 Clinton Street, 11th Floor
P.O. Box 46005
Newark, New Jersey 07102
(973) 648-2690 - Phone
(973) 624-1047 - Fax
www.njin.net/rpa
njratepayer@rpa.state.nj.us

Gregory Eisenstark, Deputy Ratepayer Advocate
Badrhn Ubushin, Deputy Ratepayer Advocate
Nusha Wyner, Deputy Ratepayer Advocate

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INTRODUCTION

The Board of Public Utilities ("Board" or "BPU") has conducted this Comprehensive Resource Analysis ("CRA") proceeding pursuant to the Legislature's delegation to the Board the responsibility for structuring energy efficiency ("EE") and renewable energy ("RE") programs in this State for the next eight years, within the parameters set forth in the Electric Discount and Energy Competition Act ("Act" or "Competition Act"). The Board has developed an extensive record, through written testimony, documentary evidence, evidentiary hearings before Commissioner Butler, and parties' post-hearing briefs. Two settlement proposals have been presented to the Board: one supported primarily by six of the States' seven gas and electric utilities and the NRDC ("Utility Proposal"),[1] and the other supported by the Ratepayer Advocate, a large number of environmental groups, and the majority of the energy service companies ("ESCOs") participating in these proceedings ("Intervenor Proposal"). In a nutshell, the Utility Proposal, with a few exceptions, pretty much continues "business as usual", while the Intervenor Proposal responds to the Act's emphasis on developing a competitive marketplace in EE services and renewable energy technologies.

By their own admission, the Utility Proposal was hammered out after contentious discussions, and indeed, in several respects is better than the proposals made during the evidentiary phase of this case. First, the utilities finally adopt the concept of uniform statewide programs, albeit with numerous variations permitted for individual utility programs.

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[1] The Environmental Defense Fund (EDF), ostensibly a signatory to the Utility Proposal, has subsequently indicated that they agree with key components of the Intervenor Proposal, including funding levels and the necessity for a true ISA. *See* EDF Memorandum dated February 10, 2000 (attached hereto as Appendix A). Rockland Electric has not joined either settlement proposal.

Unfortunately, the programs the utilities intend to administer still focus on "process" rather than results, with little regard for administrative costs and overhead, but well-larded with rewards for utilities in the form of lost revenues and easily-obtained performance incentives. Although the utilities conceptually accept uniformity in programs, they then neglect to take the requisite next step, which is unified statewide marketing. So, under the Utility Proposal, the Board would still be faced with seven utilities administering and marketing these programs, a very costly process that will be paid for by consumers through the SBC, leaving less money for actual programs, but enabling the utilities to market and promote their individual corporate logos and brand names with ratepayer funds.

The utilities' settlement proposal does validate the need for an Independent Statewide Administrator ("ISA"), an issue that was highly contested throughout the litigation phase of these proceedings. The Utility Proposal provides for an ISA for some of the renewable programs; however, the utility-proposed ISA would be confined to the non-customer sited renewable programs, thereby ensuring that the overwhelming amount of CRA funds (over 90%) will still remain within the utilities' control. Furthermore, the very limited ISA role envisioned by the utilities is so constrained that their proposed ISA is little more than an Energy Service Provider, with no direct access to the RE funds, and would be required to bill the utilities directly for its services.

In contrast, the Intervenor's forward-looking proposal provides uniform statewide programs with unified statewide marketing geared towards measurable results, the criterion set forth in the Competition Act. *N.J.S.A. 48:3-60(a)(3)* The result will be the creation of a competitive marketplace in EE and RE services. To achieve these objectives, the Intervenor

proposal acknowledges the inherent conflict in utility administration of EE and RE programs, and recommends the immediate appointment of a truly Independent Statewide Administrator for Renewable Energy programs, and a speedy transition process by the Board to designate an ISA for Energy Efficiency programs.

From the outset it is clear that the two proposals also differ radically on funding levels. Although there is no dispute that the utilities are collecting $256 million annually from their customers through the Societal Benefits Charge ("SBC") for past Demand Side Management ("DSM") program commitments, that is where the consensus ends. The utilities propose to use far less than half that amount ($423 million over four years) for new programs, while the Intervenor Proposal recommends that the legislatively-established funding level referenced in the Competition Act for new EE and renewable programs (a minimum of 50% of the total collected, i.e., $128 million annually or $512 over four years)), be used for those purposes. Although the Competition Act speaks of renewable energy technologies as a single category, the Utility Proposal would carve up RE into three conceptual areas, despite the fact that these subcategories were not proposed in the evidentiary hearings and are wholly without record support. The utilities propose to retain control over the area categorized as "customer-sited", but for the first time provide a role for an ISA to administer RE programs not on the customer side of the meter. While this proposal is a step in the right direction, it still has serious drawbacks, because the utilities would continue to control renewable energy technologies on the customer side of the meter, with the administrative access, marketing and company promotional logos that accompany that control. Moreover, the utilities propose to keep renewable dollars within their individual service areas, except for limited transfers through a cumbersome and convoluted procedure. The

Intervenor Proposal does not split SBC-funded RE programs into subcategories (and neither does the Act), but instead proposes that they all be administered from their inception by an ISA on a statewide basis, where they will best benefit the State's environment.

The Utility Proposal continues utility administration of EE programs much as they have been doing with DSM over the past ten years,[2] and simply ignores the inherent conflicts in such administration, by challenging the other parties to demonstrate and prove through a Board proceeding the failure of a program administrator to administer properly, at which point the administrator could always be replaced. That is turning "burden of proof" on its head, away from the utility where it properly belongs. Conversely, the Intervenor Proposal recommends that the Board commence an immediate proceeding to transition these EE programs towards administration by an ISA.

The Utility Proposal recommends significant performance incentives for utility administration -- up to 8% of program budgets. Incentives can begin to be "earned" in some instances as soon as 50% of a program's targets are reached. Most of these targets have little to do with actual measurable environmental benefits (the standard set forth in the Competition Act), but relate to simply offering programs in the field without any reference to results. Tellingly, the Utility Proposal does not include performance incentives for their proposed ISA, but nonetheless would require the ISA to achieve 100% of proposed performance targets. This double standard graphically illustrates the self-interest in the Utility Proposal to retain control over all the EE

[2] The utilities point to their past experience to justify their request to administer the SBC funds for energy efficiency and renewable programs. In reality, there is no evidence that their prior administration of DSM programs has been efficient or effective, and the Ratepayer Advocate recommends that the Board institute a focused managed audit on all the utilities' past DSM programs and expenditures.

programs and most of the RE programs. On top of that, the Utility Proposal includes recovery for lost revenues allegedly lost due to EE programs. However, because the Competition Act does not reference lost revenue recovery, the best the utilities can do is to cite to the DSM regulations, which they admit are not operational for these proceedings, and which they acknowledge must be revised in a separate rule-making proceeding. Nevertheless, the utilities then proceed to virtually rewrite those rules, by eliminating the current requirement of satisfying an earnings test and only receiving lost revenues for measurable energy savings, which are two important customer protections under the Board's current DSM rules. There is also no allowance for free riders, which was a requirement of the DSM regulations. Furthermore, the Utility Proposal completely ignores the benefit that accrues to them from EE and RE programs, in the form of decreased need to build additional transmission and distribution (T&D) plant, and new marketing opportunities for their affiliates.

In the following sections, the Ratepayer Advocate comments on the specific provisions of the Utility Proposal.

SECTION A. -- FUNDING[3]

Paragraphs 1 and 2

The funding levels proposed in the utility stipulation do not meet the amounts required by the Competition Act. Without the $128 million annual funding level required by the Act and contained in the Intervenor Proposal supported by the Ratepayer Advocate, the Legislature's

[3] The Ratepayer Advocate's comments follow the section and paragraph numbering of the utility proposal, for the Board's ease of reference.

goals of making New Jersey more energy efficient and preventing any adverse environmental effects due to retail energy competition may be endangered. To achieve the objectives of the Competition Act, it is vital that the Board assures that both the energy efficiency programs and renewable energy programs are fully funded. This requires the Board to reject the Utility Proposal and adopt the Intervenor Proposal supported by the Ratepayer Advocate.

The utilities propose that instead of the $128 million funding for new EE and RE programs per year required under Section 12 of the Competition Act, the Board should approve an average of approximately $106 million per year. Their proposal starts at $70 million in 2000, then $108 million in 2001, $120 million in 2002 and $125 million in 2003. Never does their proposal rise to the **minimum** annual amount of $128 million required by the Act. *See Intervenor Proposal* at ¶4, pp. 9 - 12. Cumulatively, the utility proposal would collect $423 million through 2003 instead of the $512 million ($128 million per year for 4 years) required by the Act. Thus, the utility proposal would underfund the new EE and RE programs by $89 million in the first four year CRA program alone.[4]

Section 12(a)(3) of the Competition Act requires that:

> the funding for such [new EE and RE] programs be no less than 50% of the total statewide amount being collected in public electric and gas utility rates for demand side management [DSM] programs on the effective date of this act [February 9, 1999] for an initial period of four years from the issuance of the first comprehensive resource analysis following the effective date of this act, and provided that 25% of this amount shall be used to provide funding for Class I renewable energy projects in the State.
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> [N.J.S.A. 48:3-60a(3)].

[4] The utility proposal does not state what the amounts would be in the second four-year period that is funded by the Competition Act.

The utilities have acknowledged that the total annual amount being collected in their rates for the period just prior to the effective date of the Competition Act was $256 million. *RA-22*, p. 1. Fifty percent of this figure is $128 million. This latter figure constitutes the minimum annual Statewide funding amount for energy efficiency and renewable energy programs for the initial four-year period specified in the Act and specified in the Stipulation of Settlement supported by the Ratepayer Advocate.

Despite the clear requirements of the Competition Act, the signatory parties to the Utility Proposal obviously do not feel bound by the Act's mandates.[5] They have proposed an indefensibly low minimum funding amount. It is not apparent on what legal basis they propose to reduce the annual minimum EE and RE funding from the amount required by the Act, because the utility proposal provides no explanation or justification for the proposed funding levels.

In the litigation of this proceeding, the utilities also presented a lower calculation of the funding and tried to support it by not including all of their DSM cost collections in their presentation of their funding calculation. They based their calculations on a mistaken interpretation of the Competition Act that includes only "direct program costs" in their calculations. *RA-22*, p. 2. They excluded the "indirect program costs" that are for payments under past standard offer or bidding programs, recoverable fixed cost erosion and any deferred accounting mechanisms. *Id.*

In contrast to this limited view, the Competition Act does not exclude indirect program costs from the calculation of the minimum amounts. The Act plainly states that the minimum is

[5]As previously noted, EDF, in a February 10, 2000 memorandum addressed to the CRA case service list, fully supports the $128 million minimum annual funding level mandated by the Competition Act for new programs, which is wholly consistent with the Intervenor Proposal.

based on the total statewide amount being collected in public electric and gas utility rates for demand side management programs. Competition Act, Section 12(a)(3). It does not separate costs into direct and indirect program cost categories. If that is the basis for which the utilities propose their lower funding amounts, then this basis provides no legal support for their position, and their proposal should be rejected. Instead, the Board should adopt the terms of the Stipulation of Settlement signed and supported by the Ratepayer Advocate.

The underfunding in the first four years could even become worse under the utility's proposal. The way this could happen is that the utilities propose that EE and RE funds that are not spent in a given year can be carried forward (or held in the EE and RE accounts) **for one time only** either to the next year or spread over future years. Utility Proposal, p. 13. Apparently, if the amount carried forward also goes unspent in those future years, it cannot be carried forward again and is no longer available for new EE and RE programs. In this way, the utility proposal will reduce the mandated funding for new EE and RE funds even further than their initial proposal. It is not completely clear what happens to the unspent funds; they may apparently be used to offset the utility costs for the so-called "legacy" or existing program costs.

This proposal to limit the carry-forward of unspent funds also points to another vital issue that is more fully discussed elsewhere in these comments with respect to the ISA issue. To the extent that the utilities are in control of, or administer, the EE and customer-sited RE funds, they have a tremendous incentive to avoid expending the funds for the purposes which the Legislature mandated. Because the unspent funds that are carried forward and are then still not spent in future years can apparently be used for other utility purposes rather than new EE and RE programs, the utilities would be motivated to underuse these funds and later spend them for their

own purposes, thereby letting new EE and RE opportunities go underfunded. The need for an ISA is made even more vital by this part of the utility proposal.

Paragraph 3a & b

In this paragraph, the utilities propose that "direct load control" programs be continued as currently structured, with little or no new customer enrollment. They also propose that, for the three electric utilities with existing direct load control DSM programs, only certain annual costs will be considered "new program" costs; the remainder of costs will be recovered through the "past commitments" portion of the SBC. *Utility Proposal*, ¶3a. Finally, they propose a scheme for offsetting program cost with any revenues the utility may receive if they sell the direct load control programs to third parties. *Id.*, ¶3b. The Intervenor Proposal differs in that it would require the utilities to conduct a competitive auction for the direct load control programs and assets, and use the proceeds to fund additional EE programs through the EE trust fund. *See Intervenor Proposal*, ¶24, pp. 30-31. The Intervenor Proposal is more in tune with the goal of the Competition Act to transition EE programs to the competitive marketplace, and would properly use all proceeds from the asset sale to fund additional EE programs. Thus, the Board should adopt the Intervenor Proposal.

Paragraph 3c

In this paragraph, the utilities propose an enormously bloated, unsupported request for "performance incentives earned by the utilities" of up to 8% of the total budget for all EE programs and nearly all of the RE programs. Further breakdown of the incentives the utilities

would "earn" is provided in Attachments 5 and 6 of their proposal.

As discussed at length in the Ratepayer Advocate's testimony, briefs, and the Intervenor Proposal, the utilities' proposed incentive structure is fundamentally flawed for three main reasons: (1) The performance goals are low and easily achievable, and the utilities in many instances need to achieve only 50% of what amount to meaningless implementation criteria to begin collecting incentive payments; (2) 8% is much too high for a maximum incentive level -- as the Ratepayer Advocate recommended in its testimony, the cap on any administration incentives (whether to a utility administrator or an ISA) should be 5%; (3) any "incentive" plan for administrators must include both a "deadband" performance level (in which there is no incentive earned nor any penalty assessed) and a performance "penalty" of equal magnitude to the incentive for falling significantly below the "deadband." *See RAIB* at 31-34; *RARB* at 31, Hearing Exhibit *RA-21*, p. 24; *RA- 22*, p. 11.

In sum, the Utility Proposal would "reward" the utilities for achieving easily attainable "performance goals" that do not contain any meaningful measurement of environmental benefits. The result would be a <u>reduction</u> in the statutory funding levels for EE and RE programs of up to 8% annually, without proof of any achievement of environmental benefits for the State. While the Competition Act permits the Board to include "performance incentives" in program cost recovery, what the utility proposal actually does is grant non-performance based cash payments to the utilities for achieving meaningless administrative milestones. For example, in the year 2000, the utilities could earn the full 8% incentive for "grid-side" renewables by merely "provid[ing] to the Board a detailed program implementation plan" and "issu[ing] the first solicitation" for the programs. *Utility Proposal*, Attachment 4, p. 25. Similar, meaningless milestones would also

allow the utilities to "pocket" 8% of the CRA budget for "incentives" in the EE programs. *See, e.g., Utility Proposal*, Attachment 6, Schedules 1 through 10.[6] In other words, the utilities have proposed that they receive (or more accurately, simply retain) up to 8% of the total CRA budget for the year 2000 merely for finalizing and beginning to implement programs. These are not "performance incentives" -- rather, the utility proposal is merely an attempt to allow them to retain 8% of the CRA statewide budget for doing the minimum things they are required to do under the Act -- finalize and implement CRA programs! The Board should give short shrift to the utilities' self-serving, useless "performance incentive" proposal, and instead adopt a meaningful performance incentive/penalty matrix as recommended in the Intervenor Proposal and Ratepayer Advocate testimony.

Paragraph 3e

In one of the most one-sided, out-of-record proposals in the entire Utility Proposal, Paragraph 3e would allow GPU Energy to unilaterally discontinue measurement and verification ("M&V") of its existing DSM programs (referred to as "legacy" programs) and receive something dubbed a "Transition Payment" in lieu of lost revenues and performance incentives[7] for these old

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[6] Particularly emblematic of the one-sided, inflated incentive proposal of the utilities is the "General Note 2" in reference to the "performance metrics" for the proposed C&I Energy Efficient Construction program, where the utilities state that "dollar amounts of incentives add up to 120% of the proposed 8% cap on incentives. This means that utilities can fail to fulfill some of the metrics and still achieve their maximum benefits." *Utility Proposal*, Attachment 6, Schedule 8. Thus, the utilities **have admitted** that their proposal is so skewed in their favor that it would allow them to achieve the maximum incentive without even achieving all of their own, insufficient "metrics."

[7] The utility proposal does not identify what GPU performance incentives it is referring to (continued...)

programs. Moreover, the "funding" of its M&V from its legacy programs would be "reallocated to new energy efficiency and renewable energy programs." *Utility Proposal*, ¶3e.

The Board must reject this proposal on all counts.[8] First, this proposal is entirely outside the evidentiary record. In order to be adopted, settlement proposals (including non-unanimous ones) must be based on evidence in the record. *In re Petition of Public Serv. Elec. & Gas Co.*, 304 *N.J. Super*. 247, 265 (App. Div.), certif. den. 152 *N.J.* 12 (1997). Second, **there is nothing in the Act, the Board's current DSM rules, or any Board order that would permit a utility to recover an annual "transition payment" based on estimated lost revenues**. In fact, this proposal is directly at odds with all past Board orders on DSM lost revenue recovery and M&V protocols. Finally, under Section 12 of the Act, GPU may not transfer costs that are directly associated with "existing DSM commitments" to the "new program side" of the SBC funding. The Act clearly distinguishes and allocates 50% of the existing total DSM cost recovery to new programs; the remaining 50% is for funding past DSM commitments. *N.J.S.A.* 48:3-60a(3). Thus, the utility/GPU proposal violates another, fundamental element of Section 12 of the Act, by proposing to shift costs from its "past commitment" side of the SBC to the "new programs" side. All told, the paragraph 3e proposal is clearly unlawful and may not be adopted by the Board.

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[7](...continued)
in this paragraph.

[8] This paragraph does contain a "fallback" provision stating that, if the Board rejects the proposal to discontinue M&V by GPU and reallocate the funds to new programs, the parties thereto agree to use the M&V data GPU collects to (somehow) form a basis for new EE programs. While not as objectionable as the rest of paragraph 3e, this provision is nonsensical and should be rejected as well -- it is unclear how M&V data GPU collects on its old DSM programs could form the basis for either its own or other utilities' new EE programs.

Paragraphs 4 and 5

In paragraphs 4 and 5, the utilities again request recovery of lost transmission and distribution (T&D) revenues for EE programs. Apparently, the request of certain utilities for lost revenues associated with renewable energy programs has been dropped. *Utility Proposal*, ¶5. In addition, the utility proposal states that they "may collect lost revenues associated with energy efficiency programs through the SBC, but these costs shall be excluded from the calculation of new program funding." *Id*. What this means is that the utilities will book lost revenues associated with new EE programs to the "legacy" or old programs side of the SBC account. In another new wrinkle, the utilities also propose, for the first time, that "lost revenues associated with the new programs addressed herein will not be subject to an earnings test."[9] Needless to say, there is no reference to any offset for free riders, as required by the DSM regulations. *N.J.A.C. 14:12-1:2.*

The Ratepayer Advocate has already established, in both the evidentiary record of this case and in its post-hearing briefs, why the utilities' request for lost revenue recovery is both unlawful and unnecessary under the CRA provisions of the Competition Act. *See RAIB* at 35-40, *RARB* at 29-30. In summary, the Board should reject the utilities request for lost revenue recovery because (1) it is not allowed under the Act; (2) contrary to the intent of Section 12 of the Act to transition EE programs to the competitive marketplace; (3) simply unnecessary given the statutory *mandate* for new, customer-funded EE programs.

There was arguably a rationale for lost revenue recovery prior to the passage of the Competition Act, when it was deemed essential to obtain utility cooperation and voluntary

[9] Under the Board's existing DSM regulations, lost earnings (also called "fixed cost revenue erosion") are only recoverable if the utility establishes that its earning are not above the Board-approved rate of return. *N.J.A.C.* 14:12-4.2.

compliance for the DSM programs. The Act has changed that framework, by transforming DSM charges into a Societal Benefits Charge, which is being imposed on all ratepayers in the nature of a tax, for societally beneficial purposes. The utilities should now be nothing more than the means by which the State-mandated EE and renewables funds are collected. The mandates of the Act are not only obligatory on New Jersey's ratepayers, but obligatory on the utilities as well. In that context, it is no longer necessary to "buy" utility cooperation through financial incentives, such as alleged "lost revenue" recovery. By restructuring the energy market in New Jersey, the Competition Act has provided competitive opportunities to utilities and their affiliates previously not available to them.

Tellingly, the NRDC, which is now a signatory to the Utility Proposal, previously agreed with the Ratepayer Advocate's rationale on this issue, and opposed utility recovery of lost revenues for new EE or RE programs in its own post-hearing brief in this case:

> The restructured electric industry no longer operates under the paradigm of integrated resource planning. Instead, the purpose of investing in energy efficiency and renewable energy programs is to maximize the public benefits they deliver. The utilities have the opportunity to administer these programs, but they are not required to do so. [*NRDC IB* at 9].

For some reason, the NRDC has now succumbed to the utility "mantra" and agreed to lost revenue recovery by signing the Utility Proposal.

Notably, the lost revenue recovery requested in the Utility Proposal would substantially increase the portion of SBC funds that are paid to the utilities for "lost revenues." Under the Board's existing DSM rules, lost revenues were only available for utilities "performance-based" DSM programs, were subject to M&V standards, required an offset for "free riders", and were

subject to the earnings test review in *N.J.A.C.* 14:12-4.2. Thus, only a few of the State's seven electric and gas utilities were eligible for lost revenue recovery and only for their performance-based DSM programs.[10] Under the new proposal, apparently all "new" EE programs of all seven utilities would be eligible for lost revenue recovery, the earnings test would not apply, there is no allowance for free riders[11], and measurement and verification of actual fixed cost margins would be done under a still-undefined protocol that the utilities would apparently set forth in a future (July 1, 2000) "compliance" filing. *Utility Proposal*, ¶5.

Furthermore, the provision in the Utility Proposal stating that lost revenue recovery "shall be excluded from the calculation of new program funding" offers no benefits to utility consumers. Utility Proposal, ¶5. Whether the utilities account for these costs on the "old programs" or "new programs" side of the SBC ledger, their customers would still be forced to pay for these unnecessary utility "benefits." The end result is that less SBC funds would go to pay for "societal benefits" and would instead end up boosting utility earnings.

The utility request for lost revenue recovery also ignores the many benefits that a distribution utility will receive from EE programs. That, coupled with the fact that all of the utilities are likely to see continued sales growth over the next four years, and thus will experience no actual revenue erosion at all, makes customer-funded lost revenue payments particularly

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[10] It is also worth emphasizing that only PSE&G and GPU requested lost revenue recovery for CRA programs in the evidentiary phase of this case. Therefore, there is no record evidence that the Board can rely on to approve lost revenue recovery for any of the other five utilities. *See In re Petition of Public Serv. Elec. & Gas Co.*, *supra*, 304 *N.J. Super*. 247, 265.

[11] As the Ratepayer Advocate established in its testimony in this case, should the Board allow any lost revenue recovery, an appropriate lost rider offset should be applied. *See Hearing Exhibit RA-25* (Supplemental Testimony of David Nichols, November 19, 1999).

inappropriate for new CRA programs. During cross-examination, PSE&G's witness admitted that the Company benefited from energy efficiency programs, by the reduced need to build additional transmission and distribution plant. The witness stated that the utility benefit would be a long term effect, but admitted that DSM programs have been around for a long time (Tr. 586) and that they have undoubtedly affected the need for new plant. Tr. 587. Moreover, PSE&G's witness acknowledged that the Company's sales have not decreased, and in fact have been growing at an annual rate of 1%. Tr. 609-610. Thus, neither PSE&G nor any other utility has presented evidence that its alleged lost revenues will not be fully offset by the benefits it receives and will receive from EE and renewable programs in not having to build new T&D plant. Moreover, the Utility Proposal completely ignores the fact that, under the Competition Act, there are additional, revenue-enhancing opportunities that will benefit utility shareholders, because of the competitive opportunities open to their marketing and generation affiliates. For instance, PSE&G's marketing affiliate captured a substantial portion of the Standard Offer market in PSE&G's service territory. Tr. 1014. All of these factors also strongly mitigate against the Board approving any lost revenue recovery for EE programs in the new, competitive marketplace.

In sum, for all these reasons, the Board must reject the utilities proposal for lost revenue recovery for new EE programs.

Paragraph 7

In this paragraph, the utilities make the conclusory statement that "natural gas fuel cells are a Class I renewable energy technology under the Act and shall receive the same treatment as other Class I renewable energy technologies." However, as the Ratepayer Advocate has

established in the record of this case and in its post-hearing briefs, the Act only states that "fuel cells" are in the Class I renewable category — it does not state that **natural gas powered** fuel cells are in that category. Moreover, the Utility Proposal does not give natural gas fuel cells the "same treatment as other Class I technologies" — rather, it devotes 100% of the gas utilities renewable energy funding to gas-power fuel cells. *Utility Proposal*, Attachment 4. Moreover, this funding amounts to 25% of the total RE funding during the four-year CRA period. *Utility Proposal, ¶8a, p.10; Also Att. 1*. This is clearly inappropriate.

First, there is no reason that gas utilities or their customers should be funding renewable energy programs. The goal of renewable energy programs is to reduce reliance on non-renewably fueled electric generating plants — not to reduce natural gas usage. Thus, in both the Ratepayer Advocate's witness' testimony and in the Intervenor Proposal, the Competition Act's renewable funding mandate is properly allocated to the electric utilities. Notably, none of the electric utilities explicitly objected to this proposal in their post-hearing briefs.

More fundamentally, there is no reason that the Board should approve the use of such a large percentage of the Statewide RE funding on a single technology — gas fired fuel cells. Natural gas fuel cells do show promise in providing energy benefits. However, as Ratepayer Advocate witness Dr. Nichols testified, gas usage should not be promoted through the renewable energy charge collected from ratepayers. *RA-22* at 8. In fact, it is apparent that the gas utilities consider natural gas fuel cells a promising marketing approach, as evidenced by NJNG's parent establishing an affiliate to fund the development of natural gas fuel cells, signing a formal marketing agreement with a fuel cell manufacturer, and the Company's willingness to use some of its own money in that process. *Gas Utilities IB* at 25. That is perfectly appropriate and is the

way natural gas fuel cells should be funded -- directly by the utilities' shareholders and not through the SBC.

Paragraph 8

In this paragraph, the utilities discuss renewable energy program funding. Like the overall funding proposal, the utilities' renewable energy funding scheme is in direct contravention of the Act's funding requirements. The utilities propose collecting (but not necessarily spending) $71.85 million for new RE programs from 2000-2003. *Utility Proposal*, Attachment 1. First of all, this averages only 17% per year of their total proposed EE and RE budgets. The Act plainly requires that 25% be spent on RE programs, so this proposal is clearly in direct contravention of the Act's mandates. *Act*, § 12a(3), *N.J.S.A.* 48:3-60a(3). What makes the utility proposal even more objectionable is that the total proposed RE budget is $56 million less than the minimum required by the Competition Act. In contrast, the Intervenor Stipulation of Settlement supported by the Ratepayer Advocate clearly satisfies the Competition Act's requirement by allocating 25% of the $128 million total annual funding, or $32 million, to RE programs. *Intervenor Proposal* at ¶4f, p. 11. Over the first four years of the CRA provided for by the Act, the Intervenor proposal would provide $128 million for RE programs, or 78% more than the utilities' proposal ($128 million ÷ $71.85 million = 1.78).

It should be beyond dispute that the Legislature did not create this new mandate of RE funding with the expectation that the state's electric and gas utilities would refuse to comply with it. Their proposal violates the clear language and intent of the Competition Act and must be rejected. While the intent of the language is less than clear, paragraph 8e of the utility

proposal states that they remain obligated to allocate 25% to new RE programs over the period from 2000-2008. Page 13 of 20. That would require a larger allocation of 33% on the average over the second four-year period. However, because the utilities only propose a budget for the years 2000-2003, there is no commitment in the Utility Proposal for higher funding in the second four-year CRA period. Moreover, this proceeding only involves the initial four-year CRA period (i.e., 2000 through 2003). In any event, even if the utilities are proposing such a back-end loaded RE funding scheme, such a proposal also clearly violates the Act. Section 12(a)(3) of the Act requires that:

> the funding for such programs be no less than 50% of the total statewide amount being collected in public electric and gas utility rates for demand side management [DSM] programs on the effective date of this act [February 9, 1999] **for an initial period of four years from the issuance of the first comprehensive resource analysis following the effective date of this act, and provided that 25% of this amount shall be used to provide funding for Class I renewable energy projects in the State**.
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> [N.J.S.A. 48:3-60a(3), emphasis added].

Thus, the Competition Act plainly requires that 25% of the total funding be allocated to RE programs during the *initial* four year CRA period.

Finally, the utilities propose that instead of administering its own budget, the ISA be required to "bill" the utilities individually and periodically for the programs administered by the ISA. [12] So, despite the terminology "Independent Statewide Administrator," the utilities' funding concept undercuts the independence of the ISA in a fundamental way from the very beginning, by not allowing the proposed ISA to control even the very limited funding associated with the few

[12] "In order to accumulate the funds budgeted for programs administered by an ISA, the ISA will bill each electric utility periodically, on a pro-rated basis in accordance with the funding allocations set forth in this Agreement." *Utility Proposal*, p. 10-11, ¶ 8a.

programs it would be allowed to administer. Furthermore, it is quite likely that the utilities will require back-up documentation from the ISA to support its "billing" of the utilities. Not only would this requirement denigrate the ISA and increase administrative costs, but it would also make the ISA accountable to the utilities, rather than to the Board. In many ways this utility proposal is simply a continuation of current practice, where utilities hold ESCOs accountable and even penalize them if contractual targets are not met. Also, in light of past experience, it is probable that the utilities will charge an administrative fee for processing the ISA bills, thereby increasing administrative expenses and decreasing monies available for programs. Finally, not only would the independence of the ISA be compromised, so would its statewide status, because under the Utility Proposal the ISA will be strictly limited to utility franchise territories. The Board should reject this entire approach, and adopt the Intervenors' proposal to place the renewable monies in a separate trust fund to be administered by a truly independent ISA. *Intervenor Proposal* at ¶3, ¶4(k).

Paragraphs 8b & c

These paragraphs describe that individual utility budgets for the customer-sited RE programs can be adjusted and exceeded, subject to certain caps, and that monies can be shifted among renewable and energy efficiency programs as well as among utilities. It also provides an option for a utility to ask the Board for an order directing the ISA to provide additional funding from surplus funds, which paragraph A.8.c. defines as funds not spent or committed by the ISA during the previous year. This is particularly ironic, since, as discussed *supra*, the utilities would provide no funding control to the ISA, but merely allow the ISA to bill the utilities for its services.

Furthermore, the ISA would have no reciprocal right to request excess funds from the utility-controlled RE programs.

This entire convoluted process, which has few objective parameters and would clearly add unnecessary administrative costs, illustrates precisely why an ISA, and not the utilities, should administer all the renewable funding. It is immediately apparent that despite the utilities' lip-service to uniformity of programs, their proposal does not provide for real program uniformity, and it is largely left to the individual utilities to set up and run the programs and determine how much money should be spent on particular programs. There are no objective results-oriented targets, nor are there any penalties for the utilities not achieving the minimal objectives set forth in their Attachment 4.[13] Also, because each utility would operate its own customer-side programs, any efficiency and economy in setting up statewide programs is lost. The Utility Proposal also loses the benefit of statewide unified marketing, and allows the utility the opportunity of individual marketing, with the utility logo and brand identification that goes with it. These are valuable assets in a competitive world which, under the Utility Proposal, would be fully underwritten by ratepayer money. It is also strikingly apparent that the administrative costs for seven utilities running these programs will be high, and that any coordination efforts will also be included in administrative costs. As was demonstrated over and over throughout these hearings,

[13] Attachment 4 of the Utility Proposal describes the Renewable Energy Programs. Page 13 of Attachment 4 is a budget worksheet for the renewable energy programs, and shows a budget for year 2000 of close to $3 million for customer-sited "clean"energy, of which slightly over $1 million is targeted for program incentives. The remainder is for administration ($625,000) , monitoring, etc. Thus, only approximately one third is designated for direct renewable programs, and 20% is acknowledged to be for administration. This also does not take into account that the utilities propose to pay themselves up to 8% of the total program budgets as a performance incentive, for doing little more than setting up the programs.

the costs for the utilities administering for over a ten year period the Demand Side Management Programs were very high, and there was no effort by the utilities to constrain those costs. Indeed, PSE&G's witness during the hearings freely admitted to not even knowing the administrative costs associated with the one billion dollars PSE&G, or rather PSE&G's ratepayers, spent on those programs. Tr. 628. That mistake should not be repeated here. The Board should reject the process recommended by the utilities, and require that the SBC renewable monies be placed in a separate trust fund. The Board then should appoint an ISA, whether it be a state agency or the result of an RFP process, to administer and run all the renewable programs, on a truly independent and statewide basis, subject to regulatory oversight by the Board, with a cap on administrative overhead. *See Intervenor Proposal* at ¶3, page 5.

Paragraph 8d

In this paragraph the Utility Proposal places some limits on allocating funding among renewable programs. It also allocates renewable funding 50/50 between the customer-sited programs (controlled by the utilities) and the programs administered by the ISA. Thus, of the 17% initially allocated by the utilities to renewable programs, the ISA gets to administer half of that, with the result that under the Utility Proposal over 90% of the total SBC funding remains solely within their control. The utilities also state that some allocation of funds among programs may be required to ensure competition among technologies.

In contrast, the Intervenor Proposal emphasizes the creation of a competitive marketplace for the renewable technologies through a bid and auction process geared towards measurable results (*Intervenor Proposal* at ¶22, p. 26), and advocates appointment of an ISA as the best way

to reach that goal, with the ISA having the ability to oversee all the renewable programs, not artificially carved into three separate programs, and not limited arbitrarily to individual utility franchise territories. *Intervenor Proposal*, ¶3(b) at p.7

In sum, the Utility Proposal espouses funding levels and criteria that do not comply with the Competition Act, and are burdensome and likely to cause more consumer dollars to flow back to the utilities for administrative costs, rather than funding actual EE and RE programs with environmental benefits. For all these reasons, the Board should reject the Utility funding proposals, which clearly defy the Act's requirements, and instead adopt those in the Intervenor Proposal, which satisfies the Act's mandates.

SECTION B -- PROGRAM DESIGN AND ADMINISTRATION

Paragraph 1

In this paragraph the utilities state that they have agreed to a single set of statewide programs for EE and RE, as set forth in Attachments 1 through 6, which include program descriptions and goals, performance incentive metrics and structures, customer incentives, market indicators and starting dates. However, they also state that individual utilities "may go beyond common program framework according to available funding and market opportunities." Further, they state that Board approval will include approval of their transition plans, including implementation pilot programs, and offering incentives and services on a pilot basis for the Customer Sited program.

It is immediately apparent that each utility can vary the agreed-upon programs, if they so

desire. So much for consistency or uniform, statewide programs. It is also completely up to the utilities whether to implement the programs in a joint or coordinated fashion. Indeed, each individual program has a specified transition period before there is even a requirement for implementation consistency. *See, e.g., Utility Proposal*, Attachment 2 (timeline/transition plan portion for each individual utility program). Throughout the proposed EE program descriptions in Attachment 2, the utilities describe the extensive coordination and negotiation required to implement their proposed uniform programs through seven different utilities. Common sense tells us that this coordination and negotiation process is more expensive and less efficient than a single, independent statewide administrator, which would make this entire process completely unnecessary. There is also no utility commitment to statewide marketing, but merely a reference to uniform marketing plans. This is a serious flaw, for seven marketing plans will be far more expensive and less effective than a single, unified statewide marketing plan. The Board should insist on true statewide uniformity of plans, with statewide marketing, under the aegis of an ISA.

The Board should also deny the utilities "automatic approval" approach of the programs listed in Attachment 2, which are different from what had been reviewed through these proceedings, and include a number of new programs first mentioned in this Settlement filing, particularly the pilot programs. Should the Board approve any of these utility-proposed programs, any review necessary should be done by the Advisory Committee proposed by the Intervenors, in an expedited time frame, to ensure that they are appropriate for the marketplace. *See Intervenor Proposal*, ¶ 5, at p.13-14; ¶ 6 at p.14-15.

Paragraphs 1b and 1c

Here, the Utility Proposal recommends a series of studies and analyses to document the cost-effectiveness of programs by projecting the future amount and value of a wide variety of potential benefits, including savings in gas, oil, water, utility transmission and distribution costs, electric generation capacity, external environmental and economic benefits, and presumably any other conceivable benefit for which one might forecast a value. This is a recipe for costly academic studies assessing "cost-effectiveness" based on streams of conjectural future benefits. However appropriate this may have been under the old DSM regime reflected in the existing regulations (during which regime the utilities delayed and fought against doing cost--effectiveness studies and in some cases never did them), those regulations are now moot. Instead, the Competition Act, with its market-oriented framework, gives us a much more straightforward and real approach to cost-effectiveness. In the competitive marketplace cost-effectiveness consists in getting the greatest demonstrated bang for the ratepayer buck. That means performance-based programs that deliver the greatest amount of measured energy savings that can be delivered by the market for the dollars at hand, or the greatest amount of demonstrated delivery of the highest efficiency equipment that the market can deliver for the dollars available. Successful delivery of these programs, as outlined in the Intervenors' proposal, **maximizes cost-effectiveness** by definition. *See Intervenor Proposal* at ¶ 7, p. 15. No elaborate new set of conjectural prospective cost-effectiveness definitions and studies is needed.

The Utility Proposal continues the old model, with the utilities in the driver seat controlling access to their customers and judging the worthiness of the various players in the energy markets. However, the Competition Act has instituted a new paradigm, that provides customer choice and promotes the establishment of a competitive marketplace. Accordingly,

under the Intervenor Proposal, the energy efficiency service providers implementing programs in the field will report the multiple benefits from those programs as they occur. *Intervenor Proposal*, ¶15, at p.22. Those reports will be part of the contracts governing pay-for-performance programs. *Id*., p.22. The ISA will want to report cost-effectiveness as reported and verified results accumulate. *Id*., ¶14, at p. 22.

The Utility Proposal also ignores the fact that the Act specifies a standard for EE and Class 1 renewable programs, namely that they should provide "environmental benefits above and beyond those provided by standard offer or similar programs in effect as of the effective date of this act." *N.J.S.A.* 48:3-60(a)(3). In order to meet that standard, it will be necessary to have baseline data, so that it will be possible to measure the increased environmental benefits. Attachment 3, entitled Program Research and Evaluation, lists numerous evaluation activities to achieve a wide variety of goals, including a proposal for determining energy savings. However, it is clear that among the myriad of studies listed, only two are needed -- the baseline study that will determine the starting point from which to measure the environmental benefits "above and beyond"[14] and a methodology to measure the environmental savings. There currently exists a widely accepted methodology to measure such savings, the International Performance Monitoring and Verification Protocols (IPMVP), a publication of U.S. D.O.E. As recommended by the Intervenors, these and similar protocols can be structured by the ISA and the Advisory Committee, for application to specific programs. *Intervenor Proposal* at ¶ 15, at p.22.

It should not be a long and complicated process to determine appropriate baselines, and to

[14]Unfortunately, the Xenergy Study commissioned by the utilities did not directly provide that baseline data, although it can be culled from it.

establish performance measurement protocols for the various programs. The Advisory Committee recommended by the Intervenors should be able to devise an appropriate time table to complete the necessary studies, set the necessary benchmarks, finalize the uniform statewide programs, and to institute statewide marketing, preferably under the aegis of an ISA. The timetables proposed by the utilities and the Intervenors for program start-up are not that different. What is very different is that the utilities propose a closed process, and the Intervenors an open process. The details of program design should be decided by the Advisory Committee, representative of the full spectrum of program participants, public interest and environmental groups, working in a public process under the direction of the Board, not by a small group of utility managers and their consultants, working behind closed doors, with the objective of presenting to the Board a *fait accompli*.

In that regard, it should be noted that the utilities, at least in the Renewable Energy area, also endorse the concept of an Advisory Committee, albeit in a two part format, one called a "Renewables Working Group" (Att. 4, p. 7), and a second called a "Renewables Advisory Panel." *Utility Proposal*, Att. 4, p. 7- 8. The Renewables Working Group would be convened by the Board and be comprised of representatives from utilities, the renewable industries, consumer advocates and environmental organizations, and would work collaboratively with the administrators to develop new program strategies and program modifications. The Renewables Advisory Panel would also be appointed by the Board, but is conceived as a small group of independent advisors to recommend funding allocations, modifications to grid supply programs, R & D project selection and incentives, market development, program process and submit annual reports to the Board. The ISA would work with this panel and funding for this Panel is to come

directly from the ISA budgets. *Id*., p. 7-8. The distinction seems to be that the Renewables Working Group is for customer-sited programs (i.e., the programs run by the utilities), and the Renewables Advisory Panel is to oversee the ISA.

The Utility-proposed split approach to renewables is counterproductive, because it would prevent reviewing RE programs in a comprehensive fashion and would obviously create duplicative administrative costs and functions. In contrast, the Intervenors proposed a single Advisory Committee to oversee <u>all</u> aspects of both the EE programs and the RE programs, together with the ISA. *Intervenor Proposal*, ¶5. This is the most effective way to provide uniform policy directives, set forth program objectives, and maximize the environmental impact of the ratepayer dollar.

Several additional features of the Utility Proposal require comment. Hidden on page 3 of Attachment 3, the utilities propose ongoing evaluation activities to be submitted annually for BPU approval. Once baselines have been established and an evaluation system accepted by the Board, it should be unnecessary to perform continuous annual evaluations. The Competition Act contemplates a four- year CRA cycle, to be succeeded by a second four year CRA cycle. The utilities propose unnecessary and costly annual evaluation procedures, far beyond what is required by the Act, which would interpose barriers to the development of a competitive marketplace, and would take funding away from actual programs.

In Attachment 3, page 2 , the utilities also propose to implement measurement and evaluation plans for all programs to be implemented in 2000, in a compliance filing by July 1, 2000. However, the common understanding of a “compliance filing” is a filing that comports with previously announced standards or Board determinations. That is not the case here. If the

utilities wish to submit additional plans, whether for measurement and evaluation or on any other issue, that should not be done through an after-the-fact "compliance filing", but through a proceeding where all the stakeholders in these proceedings, who are the parties in this case, can review, analyze, and comment on the utilities' filings, and supply their own evidence, if so desired.

The Ratepayer Advocate also points out that throughout Attachment 3 the utilities propose various plans and studies for the individual programs, all of which place the responsibility for development and implementation of these plans solely within the province of the utilities. Once again, the utilities propose to proceed as if the Act had not been enacted. A competitive marketplace has many players and relies on open access. The closed process proposed by the utilities will not address the needs of the marketplace. In contrast, the Intervenor Proposal recommends an Advisory Committee comprised of representatives of all stakeholders. *Intervenor Proposal*, ¶ 5, at p. 13. Such an open, multi-stakeholder collaborative, subject to the Board's overview, is a far better process for working out program details, not the closed door utility approach.

Paragraph 1d

In this paragraph the utilities reference the renewable energy programs, which they have carved into three segments, and which are further outlined in Attachment 4. The inadequate funding associated with these RE programs, the impermissible inclusion of natural gas fuel cells as a renewable technology, both by a misreading of the Act and the reference to a generic "clean" technology, as well as the lack of independence for the ISA are discussed *supra*. However,

several additional points need to be made with respect to this part of the Utility Proposal.

First, Attachment 4 divides the renewable energy programs into three categories. The utilities propose to retain control over RE programs on the customer side of the meter (fuel cells, photovoltaics, and small wind -- all technologies that utility affiliates are or soon plan to be developing and marketing, (*see Utility Proposal*, Att. 4, p.2)), to which they allocate 50% of the total funding available for renewable energy programs. The remaining 50% is allocated to the other two categories: (1) projects for grid supply and (2) research, development, and commercialization projects and market development, to be administered by an ISA.

The customer-sited programs are left to the devices of the individual utilities. No specific program plans are submitted and no standards are set forth. The entire Utility Proposal discussion of these programs is in generalities, which obviously leaves enormous discretion in the hands of the seven utility administrators. Compare this to the programs advocated by the Intervenors, which are specific as to technology, range of incentives, and spending allocations, and rely on the competitive marketplace for guidance in program development. *Intervenor Proposal* at ¶22, at p.26-29. At Page 13 of Attachment 4, the utilities propose budgets for the renewable programs over the initial four year CRA cycle. Of the total allocated to the Customer- Sited "Clean" Energy Generation Program, only the Incentive category directly funds renewable technologies. Approximately 20% is for administration and marketing overhead, but there is no specified cap on administrative overhead. The Intervenors recommend a cap on administration costs, similar to the 5% cap imposed in several other states, including New York. *Intervenor Proposal* at ¶ 3(b), at p. 5-6.

The Intervenors also made distinctions in programs that are ready for the market now,

and emerging programs that need renewable funding to develop and grow. *Intervenor Proposal*, ¶ 21, at p.25-26. It is obvious that the gas utilities intend to use their renewable funding solely to support natural gas fuel cells, the fuel cell technology that New Jersey Natural Gas Company ("NJNG") has entered into a formal agreement to promote and market. The Ratepayer Advocate submits that this technology requires no ratepayer funded support. The Plug-Power system espoused by NJNG that it intends to promote throughout its and the other gas utilities service territories, is amply funded, and well-financed.[15] That technology is nearly market-ready and should not be eligible for SBC supported renewable funding, to the detriment of funding other technologies that are only now emerging and require SBC support to become market ready. *RA-22*, at 8.

The utilities have created a separate category for grid-supply "clean" energy generation program. Indeed, throughout Attachment 4, the utilities refer numerous times to "clean" energy, which is not the same as renewable energy. Therefore, it is important to closely review what the specific programs are, to ensure that they are properly categorized into the Renewable Energy category. As discussed in Attachment 4, p. 2 and 3, the utilities claim that grid supply programs would complement the Renewable Portfolio Standard (RPS). The Intervenors addressed this issue in our proposal, in that market ready technology should not be supported directly by renewable funding, but should be encouraged through the RPS requirement of Section 38 of the Competition Act. *N.J.S.A.* 48:3-87(d). *Intervenor Proposal* at ¶ 21, at p. 25. The Ratepayer Advocate therefore opposes allocating renewable dollars to these programs, because the intent of

[15]A recent Wall Street Journal article described the rise and volatility in fuel-cell stocks with particular emphasis on Plug Power. WSJ, Feb. 16, 2000, p. C-1-2.

the Act is to foster renewable technologies within the State of New Jersey that are not yet ready for marketplace competition. These grid supply programs are and should be funded by the marketplace through the RPS requirement, and be subject to whatever net-metering rules are in effect.

The third Utility RE category is simply a dressed up variation of research, development and training, and should be a subset of the other programs. Indeed, under the Intervenors proposal much of the programs included in this category are to be supplied by vendors participating in the competitive marketplace, as part of the Market Development Program. *Intervenor Proposal*, ¶ 22, at p. 26. Finally, the Utility Proposal calls for approximately 25% of the total RE budget to be devoted to the R&D category. *See* Attachment 4, p. 13. This is far too high. The Intervenor Proposal acknowledges that some R&D spending is appropriate for RE, and includes it as part of a general category that also covers economic development and demonstration projects, all of which *in toto* do not comprise more than 15% of total funding. *Intervenor Proposal*, ¶ 22(c)(1), at p. 29. R & D funding by itself should be capped at 10%, as originally proposed by the Ratepayer Advocate. *RA-21*, p. 17.

Paragraph 2

In this section, the utilities propose an ongoing collaborative process, limited to the utility signatories and the NRDC, to develop new program strategies for EE and small-scale renewables, modify existing programs, and develop cost-effectiveness methodologies, and evaluation plans. The utilities intend to fund collaborative consultants, the costs of which shall be treated as new program costs. The collaborative would finalize statewide program designs and plans, to be

implemented no later than January 1, 2001, as well as provide a wide variety of services and recommendations and reports, set forth in subparagraphs a. through k. on page 16 of the Utility Proposal.

First of all, the heading of this section is a misnomer. This is not a "statewide" collaborative, but merely a closed group of utility managers and their ally the NRDC, attempting to place themselves in charge of energy efficiency and renewable technologies in this State. Compare this to the open process recommended by the Intervenors, who propose to place much of the same functions in an Advisory Committee composed of a broad spectrum of participants. *Intervenor Proposal* at ¶ 5, p. 13-14. The Board should reject this narrow, closed, and one-sided approach in favor of the open process recommended by the Intervenors.

Secondly, the utilities previously made a nearly-identical proposal to the Board at the outset of these proceedings, when they recommended the Board choose a consultant through an RFP process to guide this CRA process. In its Order Establishing Procedures, the Board rejected that concept, and wisely chose to retain control over the CRA process through an open proceeding. *Order Establishing Procedures*, dated June 17, 1999, at p. 8. The Board should similarly reject this new attempt by the utilities to seize control of this process, and shut out participation by other interested parties.

Thirdly, the Utility Proposal once again would not properly use ratepayer money. Not content with reducing monies for actual programs through proposed utility administration incentives (up to 8%), myriads of studies, high administrative costs, and "lost" revenue recovery, the utilities also propose to shrink the available funding even more by hiring "collaborative consultants." A quick review of many of the functions to be performed by the collaborative,

shows that many of them are appropriately performed by an ISA, as the Intervenor Proposal recommends. *Intervenor Proposal*, ¶ 3, at p. 5-5. Specifically, an ISA should be better able to assist in program implementation, provide coordination, foster public understanding, review performance targets, prepare regular reports to the Board, meet filing dates, meet with parties and Board Staff, etc., rather than the utility collaborative.

Finally, the problem with this "collaborative" is crystallized in paragraph B2(e), which proposes that this collaborative, composed only of the utilities and the NRDC, review whether and to what extent the utilities have met individual performance targets and make recommendation to the Board on the level of utility performance incentives. Not only is this a clear conflict, but it is hard to conceive of anything more self-serving than this proposal.

The Ratepayer Advocate recommends that all of the stated functions can be performed by the Advisory Committee and the ISA, in an open forum, far more conducive to results that will strengthen the competitive marketplace envisioned by the Competition Act. The Board should reject the Utility "collaborative" proposal, which was not in the record, and is contrary to all notions of procedural due process, and instead adopt the Intervenor Proposal.

Paragraph 3 - Program Administration

In this paragraph the utilities propose to administer the EE programs set forth in their Attachment 2 and those RE programs denoted as Customer-sited, set forth in their Attachment 4. They will consent to a limited ISA, for a small portion of the RE programs. The utilities then set forth a list of "minimum requirements" for program administrators, which we assume includes utility administrators. Among those requirements are: (a) adherence to affiliate relations

standards; b) meeting minimum performance requirements for each program; c) file timely reports; d) incorporate evaluation results into programs; e) maintain statewide consistency in program design and implementation; and f) adequately staff and implement programs. If any program administrator does not meet these requirements, any Party may request the Board to initiate a proceedings to remove the administrator.

It is immediately apparent that (a) through (e) of these minimum requirements are more easily and better achievable by an ISA. In particular, an ISA would not require adherence to affiliate relations standards, since an ISA, by definition, is neutral and would have no inherent conflicts. This is not a minor matter, for utility administration of EE and RE programs is subject to enormous potential for conflict, because all of the utilities either now or in the future will likely have affiliates in the business of providing competitive EE or RE services. Just policing either this real or apparent conflict will be costly to the Board and the parties, and even more costly to the public if it impedes the development of a competitive marketplace. It is also obvious that a statewide ISA would be far more able to maintain statewide consistency in program design, implementation, and marketing. The programs as proposed by the utilities, although conceptually "uniform" and "statewide", allow for great individual utility variation.

The last minimum requirement the utilities mention, adequate staffing, is simply a red herring. Seven utility administrations, with all the redundant staffing that encompasses, are clearly more costly, and likely less efficient, than a single ISA.[16] Like any other entity, the ISA would need to staff appropriately to perform its functions. However, the utilities here again

[16] The energy efficiency and renewable energy industries are in a dynamic mode and should be able to employ any excess utility staff, if an ISA administers these programs.

ignore that the Act has instituted a new model for EE and RE programs, one that looks towards the competitive marketplace. The ISA's task, as set forth in the Intervenor Proposal, looks towards the competitive marketplace to supply the EE and RE programs, as set forth in the Act. *Intervenor Proposal* at ¶ 3(c), at p. 9. This would also include reliance on vendors to market their programs. This is diametrically contrary to the Utility Proposal, which continues "business as usual" by retaining control over program design, implementation, and marketing, rather than responding to the competitive marketplace.

Besides more efficient administration not subject to real or potential conflicts, an ISA should be subject to performance standards. An ISA would have to abide by performance goals, and would be subject to penalties or replacement if those goals are not met.[17] Under the Utility Proposal, there is no requirement that the utility administrators meet performance targets. While performance targets would only come into play if the utilities seek to "earn" performance incentives, in some instances these incentives begin to kick in if only 50% of the utility devised targets are met. *See, e.g., Utility Proposal*, Attachment 6, Schedule 1 ("incentives increase linearly between 50 and 100% of the goal"). Moreover, for some of the programs the utilities can easily "earn" their full 8% "commission", since the system devised by the utilities would establish the performance targets at 120%, of which the utilities only need to achieve 100% to "earn" the full 8% cash incentive. *See Utility Proposal*, Attachment 6, Schedule 8, p. 3 of 4, General Note 2 on Metrics; *also* Att. 6, Summary of Schedules 8, 9, and 10. There is also no penalty if the

[17] Financial performance incentives and penalties would be appropriate for a private-sector ISA appointed by the Board under a competitive bidding process. However, should the Board appoint a state agency as the ISA, such as the Office of Sustainable Business ("OSB"), it would likely not be subject to financial incentives or penalties.

proposed targets are not achieved. Finally, most of the utility performance targets are for "process" rather than measurable results, the standard set forth in the Act. *See, e.g., Utility Proposal*, Attachment 6, Summary of Schedules 8, 9, 10 (showing that only 37% of metrics are for energy savings, out of a possible total of 120%).

Clearly, the performance incentive program proposed by the utilities is improperly designed, and encourages underachievement. Interestingly, the utilities' ISA plan for a portion of the renewable programs does require that the ISA meet <u>all</u> the performance targets. The ISA's performance will be measured on its ability to meet identified milestones (*Utility Proposal*, Attachment 4, at p. 25), and failure to meet its milestones will result in loss of incentives. However, nowhere in the Utility Proposal are there even any specified incentives for the ISA. In contrast, the Intervenors propose a workable performance incentive plan, which will reward for performance, and penalize for under performance. Additionally, due to the pay-for-performance nature of the competitive procurement process advocated for the EE and RE programs, good performance will be automatically rewarded through higher payments and poor performance will earn smaller payments. The Board should reject the utilities request to administer the EE programs and the customer-sited RE programs. The Board should adopt the Intervenor Proposal and immediately designate an ISA, or institute an RFP process to select an ISA for the renewable energy programs. Additionally, the Board should commence a proceeding to transition the EE programs to administration by an ISA as speedily as possible.

<u>Paragraph 4 -- Program Filings</u>

In this paragraph the utilities have set forth a proposed timetable: July 1, 2000 for

program compliance filings; October 1 annually for program and budget updates; January 1, 2001for implementation of statewide programs, and May 1 annually for performance incentive awards for prior years. The Ratepayer Advocate has addressed several of these issues (the "compliance" filings, the utilities' proposed "performance" incentives) elsewhere in these comments.

In reply to the proposed utility timetable, the Ratepayer Advocate advances the following timelines, assuming that the Board issues its decision by March 15, 2000 adopting the Intervenor Proposal; as part of that decision appoints a state agency as the ISA for Renewables; and orders the establishment of an Advisory Committee, comprised of a broad spectrum of stakeholders, to provide policy guidance.

The following schedule will achieve the set of tasks required to finalize the Intervenor-proposed programs and ISA implementation. Although the overall time frame under our schedule is not that different from that proposed by the utilities, there are two critical differences between our proposed tasks and the work outlined by the utilities. The first is that our tasks are clearly focused on satisfying the Legislative mandate of measurable results leading to a competitive market place, while the utilities are focused on their own, self-defined goals, mostly centering on process rather than measurable benefits. The second difference is that the Intervenors propose to accomplish our work in an open process, supervised by the Board, with full representation of all interested parties. The utilities propose a closed-door process, with participation only by utilities and their allies, and mostly independent of direct Board supervision.

PROPOSED TIMELINE

Renewable Energy Programs

- No later than March 30, 2000, the ISA for Renewables commences the review for RE programs. Utilities will be directed to deposit the RE monies directly into a trust fund or Treasury Account established for that specific purpose.

- By May 1, 2000 the ISA will have completed the review of RE programs, and submit the recommended programs to the Advisory Committee for comment. Report will be submitted to Board on final programs. RE Programs will be put out for bid no later than July 1, 2000.

Energy Efficiency Programs

- No later than March 30, 2000, the Advisory Committee meets to set up administrative procedures to commence its review of EE programs, EE administration (i.e., appointment of an ISA for EE), and Evaluation Protocols. Specific tasks will be assigned, with the directive to complete program design tasks and appropriate interim budgets by June 1, 2000. Report will be submitted to Board with programs and their budgets.

- July 1, 2000. Commence bidding out uniform statewide EE programs as proposed in Intervenor Proposal and as reviewed by Advisory Committee, through a series of successive RFPs over a six-month period.

- By July 1, 2000, Advisory Committee will recommend an ISA for EE to the Board, or recommend that the Board initiate an RFP process for an ISA for EE.

- August 1, 2000 - Board designates an ISA or issues RFP for EE ISA.

- October 16, 2000 - Board chooses ISA for EE (if the RFP process is used). Utilities will be directed to deposit EE money directly into a separate EE Trust Fund to be administered by the ISA for EE.

- By January 2, 2001, the EE ISA, together with the Advisory Committee, finalizes and submits to the Board a plan to transition from the year 2000 EE programs to the programs to be administered by the EE ISA. This should include final program budgets and evaluation measures.

Paragraph 5

In this paragraph the utilities propose that the parties commence a wholly new process for targeting “clean” distributed resources to reduce T&D costs. The utilities also propose exploring

alternative forms of regulation ostensibly for removing "any potential disincentive to promote investments that reduce throughput."

As discussed above, the utilities have neglected to define "clean" but have apparently used it interchangeably with "renewable." Clearly, renewable energy projects and "clean" resources are not necessarily the same, particularly when the term "clean" is undefined. Moreover, the Board has already adopted interim environmental disclosure rules; and "clean" power claims and issues should be explored when these rules will need to be replaced by permanent regulations. In any event, the utilities' paragraph 5 does not belong in these Comprehensive Resource Analysis proceedings. The exploration of alternative forms of regulation clearly does not belong in these proceedings. It is not discussed at all in Section 12 of the Act, which provides the legislative authority for this entire process.[18] The utilities' inclusion of this proposal, however, acknowledges the inherent conflict with utilities administering programs that would result in decreased throughput on their systems and again points out the absolutely necessity of an ISA for RE as well as EE programs.

Paragraph 6

In this paragraph the utilities and the NRDC agree to work together through the previously described collaborative to revise the current DSM Regulations, *N.J.A.C.* 14:12. This is wholly inappropriate. First, rule-making is governed by the New Jersey Administrative Procedures Act. *N.J.S.A.* 52:14B-1 *et seq.* Second, if the Board wishes to conduct an informal,

[18] It is possible that the utilities are requesting this inappropriate exploration of these issues in these CRA proceedings so they can request payment for their costs as administrative expenses as part of the CRA "new program" costs.

pre-proposal initiative for new CRA regulations, it should do so with all stakeholders, not just the utilities and the NRDC. The closed collaborative suggested by the utilities is just plain objectionable. Additionally, during these hearings all the parties agreed that revisions of DSM regulations, although appropriate, are not part of these proceedings, and should be left to a later rule-making.

It may well be that by placing this recommendation in the CRA proceeding, the utilities hope to get reimbursed for participating in such a rule-making as part of the CRA new program administrative costs. The Ratepayer Advocate recommends that the Board reject this proposal, and that it set forth a schedule to commence a rulemaking proceeding consistent with the due process requirements of the Administrative Procedure Act.

CONCLUSION

The Board's decision in this matter is crucial to determining whether the competitive marketplace and environmental benefits the Legislature mandated in the Act are successful or not. For all the foregoing reasons, the Division of the Ratepayer Advocate respectfully requests that the Board issue an Order adopting the February 9, 2000 Intervenor Settlement Proposal supported by the Ratepayer Advocate and a wide range of environmental, consumer, and energy service company parties, so that the energy efficiency and renewable energy goals of the Act are realized. Should the Board not adopt the Intervenor Proposal in its entirety, in the alternative, the Ratepayer Advocate recommends that the Board adopt the CRA programs and other recommendations set forth in the Ratepayer Advocate's testimony and post-hearing briefs.

Respectfully submitted,

BLOSSOM A. PERETZ, RATEPAYER ADVOCATE
N.J. DIVISION OF THE RATEPAYER ADVOCATE

Dated: February 24, 2000

By:

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Gregory Eisenstark, Deputy Ratepayer Advocate
Badrhn Ubushin, Deputy Ratepayer Advocate
Nusha Wyner, Deputy Ratepayer Advocate