



STATE OF NEW JERSEY
Board of Public Utilities
44 South Clinton Avenue, 9th Floor
Post Office Box 350
Trenton, New Jersey 08625-0350
www.nj.gov/bpu/

ENERGY

IN THE MATTER OF THE PETITION OF PUBLIC
SERVICE ELECTRIC AND GAS COMPANY FOR
APPROVAL OF THE ENERGY STRONG PROGRAM

) ORDER REGARDING PSE&G'S
) MOTION TO TERMINATE
) INTERVENTION BY NJLEUC
) OR IN THE ALTERNATIVE
) COMPEL DISCOVERY
)

DOCKET NOs. EO13020155
& GO13020156

Parties of Record:

Tamara Linde, Esq., Vice-President Regulatory Affairs, PSEG
Stefanie A. Brand, Esq., Director, New Jersey Division of Rate Counsel
Steven Goldenberg, Esq., Fox Rothschild for NJLEUC
Janine G. Bauer, Esq., Szaferman Lakind for AARP
Roger Schwarz, Issues Management LLC for the PSE&G Unions
Aaron Kleinbaum, Esq., Eastern Environmental Clinic for the Environmental
Participants
Vincent M. Giblin, Esq., for International Union of Operators and Engineers, Local 825
Albert G. Kroll, Esq., of Kroll Heineman Carton, LLC for NJLECET
Phyllis J. Kessler, Esq. of Duane Morris for the Environmental Defense Fund
Thomas P. Scrivo, Esq. of McElroy, Deutsch, Mulvaney & Carpenter, LLP for Ferreira
Construction

BY COMMISSIONER JOSEPH L. FIORDALISO:

On February 20, 2013, Public Service Electric and Gas Company ("PSE&G") petitioned the Board for approval of a program and the recovery of costs to bolster its "electric and gas infrastructure to make them less susceptible to damage from wind, flying debris and water damage in anticipation" of future Major Storm Events ("Energy Strong"). PSE&G requested approval of approximately \$2.5 billion in infrastructure upgrades, with the costs to be collected from ratepayers over a period of five years through the implementation of "Energy Strong Adjustment Mechanisms" with an associated "Energy Strong Adjustment Charge" ("ESAC"). PSE&G further requested that the Board approve these expenditures and the recovery

mechanism by July 1, 2013.

On March 20, 2013, the Board issued an Order¹ ("March 20 Order"), which initiated a generic proceeding (hereinafter "Storm Mitigation Proceeding") to investigate possible avenues to support and protect New Jersey's utility infrastructure so that it may be better able to withstand the effects of future Major Storm Events,² and focused on a portion of the January 23 Order-Underlying Infrastructure Issues – but for all utility companies, not exclusively for the electric distribution companies ("EDCs"). It also invited all regulated utilities to submit detailed proposals for infrastructure upgrades designed to protect the State's utility infrastructure from future Major Storm Events, pursuant to the terms and level of detail requested in the January 23 Order, and found that all petitions filed in the future should be retained by the Board for review and hearing as authorized by N.J.S.A. 52:14F-8. March 20 Order at 3.

By Order dated June 21, 2013, the Board authorized PSE&G to implement certain Board Staff recommendations related to the Energy Strong Station Flood and Storm Surge Mitigation sub-program. That Order also designated me as the presiding commissioner for the proceedings on the Energy Strong petition with authority to rule on all motions that arise within the proceeding, and to modify any schedules that may be set as necessary to secure a just and expeditious determination of the issues.

On May 20, 2013, the New Jersey Large Energy Users Coalition ("NJLEUC") filed a Motion to Intervene. PSE&G filed a response on May 30, 2013, commenting that any intervention granted to NJLEUC be conditioned on NJLEUC providing the Board and PSE&G with a complete list of its members including identifying those members that are current customers of PSE&G. By letter dated June 6, 2013, counsel for NJLEUC advised that its members in PSE&G's service territory included Anheuser-Busch, Merck, Johnson Matthey, Soundview Paper Company, Princeton University and NuStar Asphalt. PSE&G did not object to NJLEUC's response. On July 2, 2013, I granted NJLEUC's motion to intervene in the pending matter.

By Order dated August 2, 2013, after conferring with the parties, I issued a Prehearing Order to set the schedule and define the scope for this proceeding. The issues outlined in the Prehearing Order include 1) the prudence, cost effectiveness and cost efficiency of the programs proposed for the first five years of the Energy Strong program, 2) the reasonableness and lawfulness of the proposed cost recovery mechanism, and 3) the reasonableness of the proposed rates. Under the adopted schedule, discovery is ongoing, and the parties were directed to complete all second round discovery by September 16, 2013.

PSE&G propounded discovery requests upon NJLEUC on August 2, 2013, which consisted of six (6) interrogatories and sought information with regard to the identity of each PSE&G customer that is a member of NJLEUC. PSEG-NJLEUC-1 through PSEG-NJLEUC-6. Specifically, PSE&G's interrogatories were as follows:

PSEG-NJLEUC-1

¹ In the Matter of the Board's Establishment of a Generic Proceeding to Review Costs, Benefits, and Reliability impacts of Major Storm Event Mitigation Efforts, BPU Docket No. AX13030197, March 20, 2013 ("March 20 Order").

² Major Storm Event is defined as sustained impact on or interruption of utility service resulting from conditions beyond the control of the utility that affect at least 10 percent of the customers in an operating area. March 20 Order at 2.

For each PSE&G customer that is part of its group known as NJLEUC for all purposes of this case, please provide the following:

- a. The full name and address of the customer.
- b. The type of entity they are (e.g., a New Jersey Corporation)
- c. Whether they are a PSE&G customer and if so, are they gas, electric, or both.
- d. The customer's annual expenditures on PSE&G service in 2011 and 2012 for gas and/or electric service, and the portion of those expenditures that is for the provision of gas or electric commodity.
- e. The type of business that the customer is engaged in.

PSEG-NJLEUC-2

For each customer that is a part of the group known as NJLEUC for purposes of this case, please identify the investments and expenditures made, and services and insurance obtained in the past 5 years to provide back-up or replacement service or to otherwise prepare for the possibility that PSE&G's services might not be available.

PSEG-NJLEUC-3

For each customer that is part of the group known as NJLEUC for purposes of this case, please identify (a) the investments and expenditures made, and services insurance obtained in the past 5 years (other than those identified in question 2) to harden or protect the customer's facilities and business from extreme weather conditions; and (b) the impact of those investments and expenditures on the customer's electric and gas usage.

PSEG-NJLEUC-4

For each customer that is a part of the group known as NJLEUC for purposes of this case, please describe the annual expenses that the customer incurred for gas and electric utility services by vendor for each of the last 3 years.

PSEG-NJLEUC-5

For each annual expense provided in response to Question 4, provide the percentage that this figure represents of the customer's annual expenses.

PSEG-NJLEUC-6

Please provide copies of all studies, reports, recommendations, testimonies, and any position that NJLEUC has taken in any jurisdiction regarding the return on equity capital ("ROE") that is earned or should be earned by a regulated entity.

PSEG-NJLEUC-1 through PSEG-NJLEUC-6.

NJLEUC responded to the forgoing discovery requests on August 7, 2013. NJLEUC made fifteen (15) general objections and/or responses, which raised questions as to relevancy, confidentiality, privilege and over breadth, among other issues. NLEUC also made similar individual objections to each interrogatory, and further indicated that a majority of the information requested was in PSE&G's possession.

PSE&G's Motion to Terminate or in the Alternative Compel Discovery

On September 27, 2013, PSE&G filed a Motion to Terminate Intervention by NJLEUC, or in the alternative, Compel Discovery Responses. PSE&G argues that NJLEUC's intervention should be terminated due to its failure to identify its members. PSE&G further claims that NJLEUC itself it is not a formal entity entitled to intervention pursuant to N.J.A.C. 1:16-16.1(a), and, therefore, information about the identities of the parties that make up NJLEUC and whether those parties are participating in the case as interveners is necessary. PSE&G Motion at 1-2.

PSE&G states in the motion that, to date, the discovery responses provided by NJLEUC are vague, in that they merely provided the names of entities, not necessarily the formal business names registered on the Secretary of State's website, and do not indicate whether the entities are participating in the case or are simply members of NJLEUC. Without that information, PSE&G claims that the Board is without jurisdiction to maintain an intervention of a non-entity. Accordingly, PSE&G is requesting that NLEUC's intervention be terminated for failing to meet its obligations under N.J.A.C. 1:1-16.1(a) in establishing that it is an entity entitled to do so. Id. at 6.

In support of its position, PSE&G has attached the motions for intervention filed by Princeton University and Gerdau Ameristeel Sayreville, Inc. in other matters to demonstrate that other intervening entities "properly identify who they are" as required under the rules. Id. at 6. As an example, PSE&G points out that a motion filed by Princeton University in a water case notes that the entity is part of the OIW Customer Coalition "so as to avoid any confusion regarding the identity of the intervener." Id. at 7.

Alternatively, PSE&G is requesting that the Board compel complete discovery responses from each identified member of NJLEUC. PSE&G asserts that the general objections made by NJLEUC are inappropriate under D'Agostino v. Johnson & Johnson, 242 N.J. Super. 267 (1990), requiring that a party must be specific when objecting to discovery requests. Id. at 15.

PSE&G argues that the interrogatories propounded upon NJLEUC request basic information that is relevant and appropriate to this proceeding, which consists of the following:

- (1) Their identity and energy expenditures (PSEG-NJLEUC-1);
- (2) Expenditures and investments made to address extreme weather conditions (PSEG-NJLEUC-2 & PSEG-NJLEUC-3);
- (3) Information on energy expenditures (PSEG-NJLEUC-4 & PSEG-NJLEUC-5); and
- (4) Information on past positions on utility return on equity (PSEG-NJLEUC-6)

Id. at 8-14.

Accordingly, PSE&G submits that its discovery requests seek basic information about NJLEUC which are relevant and appropriate to provide and are not objectionable, and as such, the Board should issue an order compelling the requested discovery from each NJLEUC entity. Id. at 20.

PSE&G has indicated in the motion that it will limit the information requested regarding the information as to return on equity to five (5) years and to any information contained in publicly stated positions, as opposed to privileged material.

NJLEUC'S Reply

On October 9, 2013, NJLEUC filed its reply brief. First, NJLEUC points out that, in accordance with N.J.A.C. 1:1-10.4, it submitted timely written objections and responses to requests and proposed a conference call with the Commissioner within the ten (10) day time period set forth in the rule. NJLEUC claims that PSE&G never notified the Commissioner or the parties of its intention to file a motion to compel or demonstrate "good reason" for its failure to do so as required under the rule. NJLEUC submits that PSE&G's failure to comply with the process prescribed in N.J.A.C. 1:1-10.4 is sufficient basis alone to deny the motion. NJLEUC Reply Brief at 2-3.

NJLEUC further argues that PSE&G's discovery requests are overbroad, unduly burdensome, harassing, irrelevant and not reasonably calculated to lead to the discovery of admissible evidence. NJLEUC maintains that PSE&G's request for information regarding its members is frivolous because it is a longstanding coalition that has been consistently authorized by the Board to intervene in every proceeding in which it has made an application to do so. NJLEUC further points out that New Jersey courts and administrative agencies have a longstanding policy of encouraging associations to represent and promote the common interests of their members. Id. at 3-4. Nonetheless, NJLEUC states that it has adequately identified members that are current electric and gas customers of PSE&G to establish its standing to intervene, and these customers are well known to PSE&G because they are some of PSE&G's largest customers and are longstanding members of the coalition. Id. at 4-5.

As to PSE&G's requests for information regarding self-help measures, NJLEUC argues that they are irrelevant and baseless, and the information requested is known and immediately available to PSE&G. NJLEUC contends that the requests are unnecessarily burdensome and not likely to lead to the discovery of admissible evidence, and are completely irrelevant to the main issue as to whether PSE&G's Energy Strong proposed investments are reasonable, prudent and cost effective. NJLEUC also states that any information regarding the value its members place on uninterrupted service is likewise irrelevant to the issue of whether the investments are reasonable, prudent and cost effective. Id. at 6.

NJLEUC further indicates in its response that any information requested by the interrogatories regarding its past position on utility return on equity ("ROE") is irrelevant and would not lead to the discovery of admissible evidence because prior positions taken by members of NJLEUC in various rate cases in other jurisdictions have no bearing on the instant case. Nonetheless, NJLEUC argues that its position regarding rate recovery and ROE issues in this case will be offered through testimony, cross-examination and briefing. Id. at 9-10.

PSE&G's Sur-Reply

On October 16, 2013, PSE&G filed a sur-reply brief asserting that NJLEUC had still failed to provide the full names and clear descriptions of the entities it represents in this case. According

to PSE&G, this failure by NJLEUC results in PSE&G and the Board having no information as to the persons or entities who are intervening as NJLEUC and, due to the requirements of the law, it urges the Board to issue an order terminating the intervention. PSE&G Sur-Reply Brief at 1.

In addition, PSE&G states that it complied with the procedural requirements regarding objections to discovery as set forth in N.J.A.C. 1:1-10.4 because its counsel contacted Deputy Attorney General Tenzer with regard to setting up a conference call with me. PSE&G refers to the electronic mail received from Deputy Attorney General Tenzer dated August 20, 2013, in which she advised the parties that the Commissioner “declines to hold a conference call at this time” and that the parties were “free to file whatever motions they feel are appropriate.” Id. at 3.

Assuming that NJLEUC is permitted to continue its participation in this matter, PSE&G argues that it nevertheless should be compelled to provide discovery because it is reasonable and does not request the names or information of NJLEUC’s general members. Rather, PSE&G is only requesting the names of and information on the individual entities intervening in this matter, and the discovery is limited in time and geographic scope. Further, PSE&G indicates that it is relevant and appropriate to request information regarding the costs to the intervening members of NJLEUC associated with the outages resulting from Superstorm Sandy, since this case concerns the hardening of utility infrastructure to make systems more resilient to natural disasters. Id. at 4-5.

Discussion and Finding

After consideration of the papers and the lack of any objections to the initial motion to intervene filed by NJLEUC, I **HEREBY FIND** that, pursuant to N.J.A.C. 1:1-16.6(b) the members of NJLEUC located in PSE&G’s territory have been sufficiently identified, NJLEUC has participated in and provided insight as a party in numerous Board matters, and its members will be directly affected by the outcome of the Energy Strong Proceeding. I have presided as Commissioner over several of the PSE&G matters in which NJLEUC has intervened, and, to my knowledge, PSE&G has not argued that NJLEUC is not an “entity” or “person” entitled to intervene as long as it identified its current members in PSE&G’s service territory. See e.g., In re the Petition of PSE&G for Approval of an Extension of a Solar Generation Investment Program and Associated Cost Recovery Mechanism and for Changes in the Tariff for Electric Service B.P.U. N.J. 15 Electric Pursuant to N.J.S.A. 48:2-21 and 48:21.1 (Solar 4 All), B.P.U. Docket No. EO 12080721 (Order dated, May 15, 2009). PSE&G has not satisfactorily explained how the current matter differs so as to make the information requested regarding specific NJLEUC members, necessary to evaluate the proposed storm mitigation measures. Although PSE&G asserts that a proper evaluation of the cost-effectiveness of the proposed measures must take into account the value its customers place on avoided outages even though it has not proposed a value of service cost recovery, there is no evidence that the company has made or intends to make similar inquiries to all PSE&G customers, and I expect it would be expensive and unwieldy to do so.

Accordingly, pursuant to the authority granted to me under the June 21, 2013 Order, I **HEREBY DENY** the PSE&G motion to terminate intervention of NJLEUC for insufficient identification of its members within PSE&G’s service territory.

In addressing the motion to compel discovery, I note that my role, as the presiding commissioner, is to help develop a full and complete record for review by the full Board in making its decisions on the relief requested by the petition, in this case approval of the first five (5) years of Energy Strong as well as the cost recovery method requested by PSE&G. As has

been noted in any number of discovery orders, discovery before an agency such as the Board is guided by the Uniform Administrative Procedure Rules, specifically N.J.A.C. 1:1-10.1, *et seq.* The purpose of discovery, as set forth in N.J.A.C. 1:1-10.1 is to provide litigants with access to “facts which tend to support or undermine their position or that of their adversary.” Likewise, discovery is appropriate “if the information sought appears to reasonably calculated to lead to the discovery of admissible evidence.” N.J.A.C. 1:1-10.1(b), and the test used for reviewing a discovery motion requires a weighing of “the specific need for the information, the extent to which the information is within the control of the party and matters of expense, privilege, trade secret and oppressiveness.” N.J.A.C. 1:1-10.1(c).

In addressing the specific information requested by PSE&G’s interrogatories, I HEREBY FIND as follows:

PSEG-NJLEUC-1

This interrogatory requests information pertaining to the identity of NJLEUC’s members and their annual expenditures on PSE&G service. NJLEUC has sufficiently identified the current members that are PSE&G electric and natural gas customers, and these members should be known to PSE&G because they are among its largest customers. Further, the information requested regarding each member’s annual expenditures is not relevant to this litigation. Even assuming *arguendo* that it has some relevancy to these proceedings, PSE&G is in possession of this information as the utility provider.

PSEG-NJLEUC-2 and PSEG-NJLEUC-3

These requests concern the preparation, investments and expenditures made by members of NJLEUC to harden and protect their facilities and businesses in light of extreme weather conditions. This information regarding NJLEUC members’ storm-related expenditures and hardening efforts is irrelevant to the review of the Energy Strong proposal that is the subject matter of this proceeding. PSE&G, as the utility provider, has the obligation to ensure safe and adequate service and, in the present matter, to demonstrate that it’s proposed storm-related investments are reasonable and cost-effective. Accordingly, the actions taken by PSE&G’s customers to harden their own facilities have no bearing on the outcome of this proceeding.

PSEG-NJLEUC-4 and PSEG-NJLEUC-5

The information requested by these interrogatories concerns the usage and expenditures made by NJLEUC’s members for electric and gas services. As indicated previously, PSE&G has failed to show how the information requested regarding each member’s annual expenditures is relevant to this proceeding, and has failed to show that it does not have this information in its role as the EDC.

PSEG-NJLEUC-6

Inasmuch as positions on the appropriate ROE relate to PSE&G’s requested cost recovery mechanism for its proposed infrastructure program, NJLEUC has indicated that it will address its current position on this issue through pre-filed

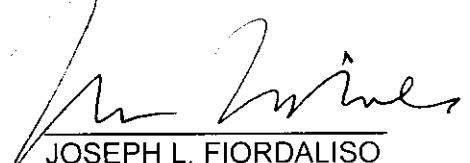
testimony, cross-examination and briefing. On October 28, 2013, NJLEUC filed the direct testimony of Jeffry Pollock which includes NJLEUC's position on cost recovery. PSE&G will therefore have an opportunity to explore NJLEUC's position on the appropriate ROE for the requested cost recovery mechanism in this matter.

Therefore, I **HEREBY FIND** that the discovery requested by PSE&G is not relevant to the issues being reviewed in this proceeding—namely the reasonableness, prudence and cost effectiveness of the proposed Energy Strong investments and the reasonableness of the proposed cost recovery mechanism --nor are the discovery requests reasonably calculated to lead to the discovery of admissible evidence such that NJLEUC should be compelled to provide responses. Based on all of the foregoing, the motion to compel is **HEREBY DENIED**.

This provisional ruling is subject to ratification or other alteration by the Board as it deems appropriate during the proceedings in this matter.

DATED: October 30, 2013

BY:



JOSEPH L. FIORDALISO
COMMISSIONER

IN THE MATTER OF THE PETITION OF PUBLIC SERVICE ELECTRIC AND GAS COMPANY
FOR APPROVAL OF THE ENERGY STRONG PROGRAM
BPU DOCKET NOS. EO13020155 AND GO13020156

SERVICE LIST

<p>PSE&G:</p> <p>Tamara Linde, Esq. Public Service Electric and Gas 80 Park Plaza- T5 Newark, NJ 07102-4194 tamara.linde@pseg.com</p> <p>Matthew Weissman, Esq. General Regulatory Counsel – Rates PSEG Services Corp. 80 Park Plaza, T5C Newark, NJ 07102 matthew.weissman@pseg.com</p> <p>Martin Rothfelder, Esq. Associate General Regulatory Counsel PSEG Services Corp. 80 Park Plaza, T5C Newark, NJ 07102 martin.rothfelder@pseg.com</p> <p>Dennis M. Toft, Esq. John Valeri, Jr. Esq. Wolff & Samson PC One Boland Drive West Orange, New Jersey 07052 dtoft@wolffsamson.com jvaleri@wolffsamson.com</p> <p>Constance Lembo PSEG Services Corp. 80 Park Plaza, T5C Newark, NJ 07102 constance.lembo@pseg.com</p> <p>Board of Public Utilities:</p> <p>44 South Clinton Avenue, 9th floor Post Office Box 350 Trenton, NJ 08625-0350</p>	<p>Rate Counsel:</p> <p>Division of Rate Counsel 140 East Front Street, 4th Floor Post Office Box 003 Trenton, N.J. 08625</p> <p>Stefanie Brand, Esq., Director s.brand@rpa.state.nj.us</p> <p>Kurt Lewandowski, Esq. k.lewando@rpa.state.nj.us</p> <p>Ami Morita, Esq. a.morita@rpa.state.nj.us</p> <p>Henry Ogden, Esq. h.ogden@rpa.state.nj.us</p> <p>Diane Schulze, Esq. d.schulze@rpa.state.nj.us</p> <p>Lisa Gurkes l.gurkes@rpa.state.nj.us</p> <p>Deputies Attorney General:</p> <p>Division of Law 124 Halsey Street Post Office Box 45029 Newark, New Jersey 07101</p> <p>Caroline Vachier, Esq. caroline.vachier@dol.lps.state.nj.us</p> <p>Alex Moreau, Esq. alex.moreau@dol.lps.state.nj.us</p> <p>Babette Tenzer, Esq. babette.tenzer@dol.lps.state.nj.us</p> <p>David Wand., Esq. david.wand@dol.lps.state.nj.us</p>
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Division of Energy

Jerry May, Director
Alice Bator
Tom Walker
Rosalie Serapiglia
Robert Schultheis
Nanik Aswani
David Ballengee
Rene Demuyndck
Henry Rich
Ricky John

Executive Director

Paul Flanagan, Esq.

Counsel's Office

Tricia Caliguire, Esq.
Bethany Rocque-Romaine, Esq.
Megan Lupo, Esq.

Economist Office

Mark Beyer
Christine Lin
Dr. Son Lin Lai
Jackie O'Grady

NJLEUC:

Steven S. Goldenberg, Esq.
Fox Rothschild LLP
997 Lenox Drive, Bldg. 3
Lawrenceville, New Jersey 08648
sgoldenberg@foxrothschild.com

Paul Forshay, Esq.
Sutherland Asbill & Brennan LLP
1275 Pennsylvania Avenue, NW
Washington, DC 20004
paul.forshay@sutherland.com

Environmental Defense Fund:

Phyllis J. Kessler, Esq.
Duane Morris
1540 Broadway
New York, NY 10036
pjessler@duanemorris.com

The Unions- Local 94:

Roger Schwarz
Issues Management, LLC
100 Overlook Center- 2nd Floor
Princeton, NJ 08540
rschwarz@issuesllc.com

Kenneth Thoman
IBEW Local Union 94
219 Franklin Street
Hightstown, NJ 08520
bud@ibew94.org

AARP:

Jim Dieterle, New Jersey State Director
Evelyn Liebman, Associate State Director for
Advocacy
AARP
101 Rockingham Row Forrestal Village
Princeton, NJ 08540
jdieterle@aarp.org
eliebman@aarp.org

Janine G. Bauer, Esq.
Szaferman, Lakind, Blumstein & Blader, P.C.
101 Grovers Mill Road, Suite 200
Lawrenceville, NJ 08648
jrbauer@szaferman.com

Environmental Participants:

Aaron Kleinbaum, Seq.
Eastern Environmental Law Clinic
744 Broad Street, Suite 1525
Newark, NJ 07102
akleinbaum@easternenvironmental.org

NJLECET

Albert G. Kroll, Esq.
Kroll Heineman Carton, LLC
99 Wood Avenue South, Suite 301
Iselin, NJ 08830
akroll@krollfirm.com

Ferreira Construction:

Thomas P. Scrivo, Esq.
Michael Rato, Esq.
McElroy, Deutsch, Mulvaney & Carpenter, LLP
1300 Mt. Kemble Avenue
P.O. Box 2075
Morristown, NJ 07962
tscrivo@mdmc-law.com
mrato@mdmc-law.com

Local 825:

Vincent M. Giblin, Esq.
Manilo Di Preta, Esq.
10 Broadway, 28th Floor
New York, NY 10271
vgiblin@pittagiblin.com
mdipreta@pittagiblin.com