



STATE OF NEW JERSEY

Board of Public Utilities

Two Gateway Center

Newark, NJ 07102

www.nj.gov/bpu

ENERGY

IN THE MATTER OF THE PROVISION OF)	ORDER ON MOTIONS TO
BASIC GENERATION SERVICE FOR THE)	SETTLE THE RECORD
PERIOD BEGINNING JUNE 1, 2008)	
)	BPU DOCKET NO. ER07060379
)	APP DIV DOCKET NO. A-3200-07T3

(SERVICE LIST ATTACHED)

BY THE BOARD:

This matter has been opened to the New Jersey Board of Public Utilities ("Board") by the filing of motions to settle the record on appeal under the New Jersey Court Rules, R. 2:5-5(a), by the New Jersey Department of the Public Advocate, Division of Rate Counsel ("Rate Counsel") and by PSEG Energy Resources & Trade, LLC ("PSEG ER&T") and its utility affiliate, Public Service Gas and Electric Company ("PSE&G") (collectively, the "PSEG Entities"). This matter stems from the January 25, 2008 Order issued by the Board that determined the procurement process for the State's basic generation service ("BGS") needs for the period beginning June 1, 2008 (the "BGS Order"). Among the issues addressed by the Board in the BGS Order was the question of whether BGS suppliers who are responsible for procuring solar renewable energy certificates ("SRECs") and who have already committed to supply energy under contracts covering energy years 2007—2010, should be allowed to pass along to BGS customers possible increased costs of those SRECs.

Following issuance of the BGS Order, on March 10, 2008, Rate Counsel filed a notice of appeal of this portion of the BGS Order to the New Jersey Superior Court, Appellate Division. As required by R. 2:5-4(b), a Statement of Items Comprising the Record on Appeal ("SOI") was filed on behalf of the Board on April 9, 2008. After discussions, on request of Rate Counsel, an Amended SOI was filed on May 6, 2008. On May 9, 2008, both Rate Counsel and the PSEG Entities filed motions under R. 2:5-5(a) seeking to have modifications made to the Amended SOI.

PSEG Entities' Motion

The PSEG Entities seek to add five documents to the Amended SOI:

- 1 PSEG ER&T comments filed on October 23, 2006 in the non-docketed Alternative Compliance Payment ("ACP")/Solar Alternative Compliance ("SACP") Straw Proposal proceeding;

2. Request for Public Comment on ACP/SACP Levels dated November 9, 2006;
3. PSE&G and JCP&L Joint Comments dated December 11, 2006 in response to Request for Public Comment on ACP and SACP Levels;
4. Board Order dated January 19, 2007 in Docket No. EO06100744, and
5. Jersey Central Power & Light Company comments dated August 21, 2007 in Solar Market Transition /Final Straw Proposal.

On May 19, 2008, Rate Counsel filed a response to the PSEG Entities' motion. Rate Counsel objects to inclusion of the above listed documents on the grounds that the items were not filed in the BGS proceeding, and that PSE&G did not move to make the documents part of the record in the BGS proceeding. Additionally, according to Rate Counsel, there is no reason to add a Board Order to the Amended SOI as the Appellate Division can take judicial notice of such orders if warranted.

On May 28, 2008, the PSEG Entities filed a reply to Rate Counsel's response maintaining that the additional documents are relevant to the issues raised in Rate Counsel's appeal. Additionally, they assert that the documents were cited in the BGS Order, and there is no basis for keeping them out of the SOI solely because they were not "filed" in the BGS proceeding as they are on file with the agency.

Rate Counsel's Motion

Rate Counsel's motion seeks to eliminate the final comments of the Independent Energy Producers ("IEPNJ"), listed as item 26 on the Amended SOI, which Rate Counsel describes as "a critical piece of evidence" in the Board's decision. Rate Counsel maintains that it did not receive the comments and did not know about them until the Board agenda meeting on November 8, 2007. Rate Counsel challenges whether the comments were ever actually posted to the list server used for circulating comments and notices in the BGS proceeding, and maintains that the comments cannot be considered as "filed" with the Board as it alleges there is no evidence that a copy was served on the Board's Secretary as required.

On May 21, 2008, the PSEG Entities replied to Rate Counsel's motion to exclude the IEPNJ comments. According to the PSEG Entities, the comments are relevant to the decision being appealed by Rate Counsel, and Rate Counsel's objection is based solely on a claimed procedural defect. PSE&G stated that it received the IEPNJ comments from the list server, and attached an affidavit of one of its managers to that effect as Exhibit A. According to the PSEG Entities, since the Board has wide latitude in administering its procedural rules, N.J.A.C. 14:1-1.2(a), the Board had discretion to accept the comments even though they were posted to the list server one business day late.

By letter dated May 22, 2008, counsel for IEPNJ submitted a response to Rate Counsel's motion. According to the response, and the attached certification of Steven Gabel, the author of the IEPNJ comments, Staff was notified that the comments would be a little late, and the comments were sent to Staff for posting on the list server. Additionally, IEPNJ claims that since no further reply comments were due, there was no prejudice to any party by the slight delay. According to IEPNJ, Rate Counsel's motion to strike its comments misconstrues the purpose of the statement of items and a motion to settle the record since exclusion of the IEPNJ comments would deprive the reviewing court of an accurate picture of the record that was reviewed by the Board in making its decision.

By letter dated May 30, 2008, Rate Counsel replied to the responses of IEPNJ and the PSEG Entities. Rate Counsel maintains that the issue remains whether the IEPNJ comments were properly filed and properly a part of the record, not whether the Board considered the comments. According to Rate Counsel, the formal filing procedures established by the Board serve a purpose, ensuring that the file would be complete, accurate and available to all parties, and those procedures must not be summarily dismissed.

DISCUSSION

The Board notes that the requirements for the SOI are governed by the New Jersey Court Rules. Specifically, R. 2:5-4(a) describes what should be included in an SOI, and in relevant part states that "[t]he record on appeal shall consist of all papers on file in the ... agencies below, with all entries as to matters made on the records of such...agencies." A party "who questions whether the record fully and truly discloses what occurred in the court or agency below shall...apply on motion to settle the record." R. 2:5-5(a). If evidence material to the issues on appeal from an agency decision was "unadduced in the proceeding below," a party may move to supplement the record. R. 2:5-5(b).

Rate Counsel's Motion

Rate Counsel requests that the Board remove the comments of IEPNJ from the Amended SOI. Rate Counsel contends that the comments should be excluded because it was not aware of them until the Board's November 8, 2007 agenda meeting. This is not a justifiable reason to exclude the comments from the SOI. The purpose of an SOI is to provide the reviewing court with a record that fully and truly discloses what occurred before the agency, and properly accounts for the evidence that was considered in reaching the decision on appeal. Since, as reflected in the BGS Order, the Board clearly considered the comments, the document is properly listed in the SOI.

It is also noted that, notwithstanding Rate Counsel's claim that the IEPNJ comments were "critical" to the Board's determination, PSEG ER&T filed substantially similar comments, listed as item 24 on the Amended SOI, which Rate Counsel does not deny receiving. The PSEG ER&T comments gave Rate Counsel notice that the issue of the SREC/ SACP level for previously bid but unfilled BGS-FP contracts was an issue that the Board was being asked to address within the BGS proceeding.

Because the IEPNJ comments were posted to the list server by a member of Staff at the request of IEPNJ as evidenced by the PSE&G affidavit that the comments were available from the list server, there was no reason for the Board to believe that the comments were not distributed in the ordinary course. To eliminate the IEPNJ comments from the Amended SOI for failure to file a hard copy with the Board's Secretary, would elevate procedure over substance, and leave a record that does not actually reflect what occurred before the Board. See, Townsend v. Columbia Operations, 667 F.2d 844 (9th Cir. 1982).

As the goal is to present the Appellate Division with a record that "fully and truly discloses what occurred" before the Board, R. 2:5-5(b), Rate Counsel's request to delete the IEPNJ comments from the Amended SOI is HEREBY DENIED.

PSEG Entities' Motion

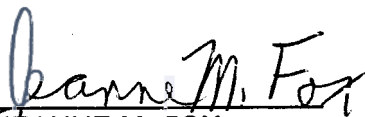
PSE&G and PSEG ER&T's motion requests that comments, a Board notice and a Board Order from other proceedings be added to the Amended SOI. As previously stated, the purpose of the SOI is to provide the reviewing court with a record that fully and truly discloses what occurred before the agency, and properly accounts for the items reviewed by the Board in its deliberative process. As the Amended SOI already includes materials necessary for the appellate court to view the issues on appeal in context, Drake v. Dept. of Human Services, 186 N.J. Super. 532 (App. Div. 1982), documents from other proceedings should not be added to the Amended SOI in this matter. The PSEG ER&T comments filed in this proceeding clearly raise the issue that Rate Counsel is appealing — whether the liability of BGS-FP suppliers should be effectively capped at the prior SACP level of \$300. The Amended SOI already includes the Board Order dated December 6, 2007, which memorialized the decision made at the Board's September 12, 2007 agenda meeting, setting that higher SACP level and including a reference to a comment by JCP&L in that proceeding which raised the same issue raised by the PSEG ER&T comments in this proceeding, and a reference to the January 19, 2007 Order. Accordingly, the Amended SOI contains the material necessary for the reviewing court to view the issues on appeal in context. Additionally, as indicated by Rate Counsel, the PSEG Entities had the opportunity to add the listed documents to the BGS proceeding but failed to do so.

Accordingly, and in light of the need to provide the Appellate Division with a listing of the items considered by the Board in its deliberative process, the Board HEREBY DENIES the request of the PSEG Entities to add the listed documents to the Amended SOI.

In so ruling, the Board does not take a position, at this time, on any motion by the PSEG Entities to supplement the record on appeal or to request that the appellate court take judicial notice of the documents at issue.


DATED: 6/16/08


BOARD OF PUBLIC UTILITIES
BY:


JEANNE M. FOX
PRESIDENT


FREDERICK F. BUTLER
COMMISSIONER


JOSEPH L. FIORDALISO
COMMISSIONER

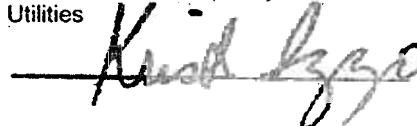

CHRISTINE V. BATOR
COMMISSIONER


NICHOLAS ASSELTA
COMMISSIONER

I HEREBY CERTIFY that the within document is a true copy of the original in the files of the Board of Public Utilities

ATTEST:


KRISTI IZZO
SECRETARY



**I/M/O THE PROVISION OF BASIC GENERATION SERVICE FOR THE PERIOD BEGINNING
JUNE 1, 2008 - BPU DOCKET NO. ER07060379 - APP DIV DOCKET NO. A-3200-07T3**

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