Agenda Date: 5/16/11
Agenda Item: 2G

STATE OF NEW JERSEY

Board of Public Utilities
Two Gateway Center, Suite 801
Newark, NJ 07102
www.nj.gov/bpu/

ENERGY DIVISION

IN THE MATTER OF THE LONG-TERM CAPACITY AGREEMENT PILOT PROGRAM	)	ORDER ON MOTION FOR RECONSIDERATION
	)	DOCKET NO. EO11010026

BY THE BOARD[1]:

On January 28, 2011, Governor Christie signed into law P.L. 2011, c. 9, amending and supplementing P.L. 1999, c. 23, establishing a long-term capacity agreement pilot program ("LCAPP") to promote the construction of qualified electric generation facilities for the benefit of New Jersey's electric consumers. By Order dated February 10, 2011, the New Jersey Board of Public Utilities ("Board") initiated this proceeding to implement the actions the Board is required to undertake by P.L. 2011, c. 9, the LCAPP Law[2]. That Order adopted a schedule to allow this proceeding to result in financially settled capacity purchase agreements ("SOCAs") between the State's electric distribution companies ("EDCs")[3] and eligible generators, as defined in the statute, by the end of April.

This Order considers a motion for reconsideration of the Board's March 29, 2011 Order ("March Order") filed by the EDCs regarding implementation of the LCAPP Law ("EDC Motion"). The motion is opposed by the New Jersey Division of Rate Counsel ("Rate Counsel").

THE MOTION

On April 8, 2011, the EDCs filed a motion requesting that the Board reconsider its ruling in the March Order. The EDCs argue that the utilities were denied their due process and that the final

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[1] Commissioner Nicholas Asselta did not participate in this matter.
[2] The provisions of the LCAPP Law have been codified in the following sections of the New Jersey Statutes: N.J.S.A. 48:3-60.1, 48:3-98.3—98.4.
[3] The EDCs are, collectively, Atlantic City Electric Company, Jersey Central Power & Light Company, Public Service Electric and Gas Company, and Rockland Electric Company

SOCA violates the LCAPP Law's requirement that selected eligible generators must clear the PJM Base Residual Auction ("BRA") each delivery year of the SOCA. Specifically, the EDCs request that the Board (1) convene a new expedited proceeding; and (2) modify the form of the SOCA so as to comply with what the EDCs maintain is required by the LCAPP Law. To the extent that the Board requires additional time to complete these necessary steps, the EDCs request that the Board suspend the schedule as authorized by Section 4 of the LCAPP Law. EDC Motion at 2.

The EDCs assert that fundamental due process failures occurred in the following areas: 1) lack of sufficient information to evaluate the LCAPP Agent's Report; 2) lack of opportunity to cross-examine witnesses with respect to the LCAPP Agent's Report and to conduct discovery in preparation for such hearings; and 3) lack of sufficient time to conduct analysis or to prepare alternate proposals or methods of evaluation of benefits from proposed SOCAs. The EDCs maintain that the Board failed to consider their comments on the Agent's Report and proposed SOCA, failed to independently verify the Agent's conclusions and recommendations, and failed to adequately address their concerns due to the short time frame for review and decision.

The EDCS also allege that the final form of SOCA does not conform to the LCAPP Law because it fails to require that the Board approved generators clear the PJM capacity market every year of the SOCA. The EDCs state that "The LCAPP Law requires that approved eligible generators with executed SOCAs "shall participate in ***and clear*** the annual base residual auction ["BRA"] conducted by the PJM as part of its reliability pricing model ***for each delivery year of the entire term*** of the agreement." LCAPP Law § 3(c) (12) (emphasis supplied)." EDC Motion at 14. According to the EDCs, this means that the SOCA must terminate if the generator fails to clear, or, at a minimum, must sanction the generator for the remainder of the term if the SOCA does not terminate or "ratepayers may be deprived of the 'net value'" that is the basis for the SOCA. Id. at 15.

RESPONSE TO THE MOTION

On April 21, 2011, Rate Counsel submitted a letter brief in opposition to the EDC Motion ("Rate Counsel Opposition").[4] In its response, Rate Counsel asserts that the EDC Motion is simply a restatement of prior motions filed with the Board. Rate Counsel Opposition at 2. According to Rate Counsel, the Motion recycles the same due process arguments and earlier claims that the procedural schedule did not provide adequate opportunity for fact finding and deliberation by the Board that have already been rejected by the Board. Rate Counsel requested that the Board deny the Motion and disallow any costs and attorneys' fees incurred for this filing as well as for the previous ones Id. at 2.

Rate Counsel asserts that "[t]he EDCs have failed to demonstrate that discovery, cross examination of witnesses, and evidentiary hearings are constitutionally required to protect their private interests." *Id.* at 3. Since "administrative agencies enjoy a great deal of flexibility in selecting the proceedings most appropriate to enable the agency to implement legislative policy." I/M/O Public Service Electric and Gas Company's Rate Unbundling, Stranded Costs and Restructuring Filings, 330 N.J. Super. 65, 106 (App. Div. 2000), aff'd 167 N.J. 377 (2001), unless there is a fundamental deficiency in procedure, exercises of administrative judgment will

[4] By letter dated April 13, 2011, Rate Counsel advised the parties that it would file its reply to the EDC Motion on April 21, 2011 since it had not received a hard copy of the EDC Motion and the deadline for filing its response was unclear. No opposition to that timeline was received.

be affirmed as long as they are based on sufficient credible evidence and do not result in arbitrary or unreasonable consequences. Id. at 3.

Rate Counsel asserts that "[t]he EDCs have failed to demonstrate that discovery, cross examination of witnesses, and evidentiary hearings are constitutionally required to protect their private interests." Ibid. Rate Counsel argues "...that administrative agencies enjoy a great deal of flexibility in selecting the proceedings most appropriate to enable the agency to implement legislative policy. I/M/O Public Service Electric and Gas Company's Rate Unbundling, Stranded Costs and Restructuring Filings, 330 N.J. Super. 65, 106 (App. Div. 2000), aff'd 167 N.J. 377 (2001). Unless there is a fundamental deficiency in procedure, exercises of administrative judgment will be affirmed as long as they are based on sufficient credible evidence and do not result in arbitrary or unreasonable consequences.

Regarding the EDCs' assertion that an adequate record was not developed, Rate Counsel argues that the record in this proceeding fully supports the Board's approval of the LCAPP Agent's Report and the adoption of the proposed SOCA. Rate Counsel asserts that the EDCs have failed to demonstrate that discovery, cross examination of witnesses, and evidentiary hearings are constitutionally required to protect their private interests.

The EDCs' allegation that the Board's proceeding initiating and implementing the LCAPP deprived them of due process is without merit. Rate Counsel argues that, "[i]n evaluating whether a particular procedure satisfies the requirements of due process, a reviewing court will consider three factors, first, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and third, the government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." Mathews v. Eldridge, 424 U.S. 319, 334-35 (1976). Rate Counsel argues that the assertions articulated by the EDCs are insufficient to demonstrate the harm to a private utility interest necessary to trigger the procedural protections demanded by the utilities. The Board's process to implement this legislation has fully protected the private interest of the utility shareholders with the promise of full recovery from ratepayers for utility costs associated with the approved SOCAs. N.J.S.A. 48:3-98.3d. Therefore, no deprivation of due process has occurred. Id. at 4.

Regarding the EDCs' contention that the final SOCA does not comply with the LCAPP Law, Rate Counsel maintains that the final SOCA reflects the Board's reasonable implementation of the LCAPP Law. According to Rate Counsel, the Board's interpretation is within reasonable bounds, reflects a careful balancing of the various commentators to the proposed SOCA, and addressed the needs of the generators for a long term commitment while protecting ratepayers from paying under the contract for capacity that does not clear the BRA. Rate Counsel concludes that this solution is reasonable, is not inconsistent with the LCAPP law, and promotes the intent of the Legislature to encourage the development and construction of new efficient capacity. Haddock v. Passaic Dept. of Community Dev., 217 N.J. Super. 592, 596-97 (App.Div.) certif. den. 108 N.J. 645 (1987); Fiola v. N.J. Treasury Dept., 193 N.J. Super. 340, 347 (App.Div.1984) (administrative agencies charged with implementing a particular statute must do so in a manner that effectuates the intention of the Legislature.). Id. at. 8-9.

No other filings were received.

DISCUSSION AND FINDINGS

Following extensive review, the Board **FINDS** that nothing in the EDC Motion requires the Board to modify or otherwise reconsider its decision. Generally, a party should not seek reconsideration merely based upon dissatisfaction with a decision. D'Atria v. D'Atria, 242 N.J. Super. 392, 401 (Ch. Div. 1990). Rather, reconsideration is reserved for those cases where (1) the decision is based upon a "palpably incorrect or irrational basis;" or (2) it is obvious that the finder of fact did not consider, or failed to appreciate, the significance of probative, competent evidence. E.g., Cummings v. Bahr, 295 N.J. Super. 374, 384 (App. Div. 1996). The moving party must show that the action was arbitrary, capricious or unreasonable. D'Atria, supra, 242 N.J. Super. at 401

This Board is not bound to modify an Order in the absence of a showing that the Board's action constituted an injustice or that the Board misunderstood or failed to take note of a significant element of fact or law. Here, the Board is not persuaded that the issues raised by the EDCs are sufficient to warrant reconsideration or modification of the March Order.

Absent a legislative restriction, however, administrative agencies have the inherent power to reopen or to modify and rehear prior decisions. E.g., In re Trantino Parole Application, 89 N.J. 347, 364 (1982). As to the Board, N.J.S.A. 48:2-40 expressly provides that the Board at any time may order a rehearing and/or extend, revoke or modify an order made by it. E.g., Tp. of Deptford v. Woodbury Terrace Sewerage Corp., 54 N.J. 418, 425 (1969). An administrative agency may invoke its inherent power to rehear a matter "to serve the ends of essential justice and the policy of the law." Handlon v. Town of Belleville, 4 N.J. 99, 107 (1950). The power to reappraise and modify prior determination may be invoked by administrative agencies to protect the public interest and thereby to serve the ends of essential justice. Trap Rock Industries, Inc. v. Sagner, 133 N.J. Super. 99, 109 (App. Div. 1975).

Therefore, while a significant element of the EDC Motion renews arguments previously rejected by the Board, the Board has considered each of the arguments. The Board is mindful that its decisions have a public policy impact. Therefore, the Board has considered the EDCs' positions whether or not the arguments fall strictly under the standards for reconsideration. In so ruling, however, the Board emphasizes that it is not legally compelled to reconsider mere re-arguments, but rather it has exercised its discretion to consider the arguments on the merits.

The EDCs claim that the process chosen by the Board to implement the LCAPP Law did not provide (1) sufficient information to evaluate the LCAPP Agent Report; (2) opportunity to cross-examine witnesses and conduct discovery; and (3) sufficient time to adequately evaluate the benefit of the proposed SOCA. EDC Motion at 4.

As stated in the March Order, the Board believes that its implementation of the LCAPP was open and transparent, and provided opportunity for public input and comment. March Order at 15. As referenced in Rate Counsel's Opposition, administrative agencies enjoy a great deal of flexibility in selecting the proceedings most appropriate to enable the agency to implement legislative policy. I/M/O Public Service Electric and Gas Company's Rate Unbundling, Stranded Costs and Restructuring Filings, 330 N.J. Super. 65, 106 (App. Div. 2000), aff'd 167 N.J. 377 (2001). Unless there is a fundamental deficiency in procedure, exercises of administrative judgment will be affirmed as long as they are based on sufficient credible evidence and do not

result in arbitrary or unreasonable consequences. Rate Counsel Opposition at 3.

The Board agrees with Rate Counsel that the EDCs have failed to articulate a property interest sufficient to trigger the due process rights that they claim have been impaired by the Board's implementation of the LCAPP Law. The EDCs state they are "interested parties," seeking to ensure "adequate protections [for] New Jersey ratepayers." EDC Motion at 2. However, the EDCs have articulated no actual private property interest that will be affected by the Board's implementation of the LCAPP. The EDCs state that additional time should be permitted to afford community organizations more time to become involved in the proceeding. Rate Counsel maintains that such concerns do not constitute a private interest of the utilities that implicates additional due process protections for the EDCs. Rate Counsel Opposition at 4. Based on the circumstances described below, the Board agrees.

The LCAPP Law set specific timelines that the Board had to comply with. The LCAPP law required that the Board conduct public hearings. N.J.S.A. 48:3-98.3(c) To comply with this provision, the Board held four (4) public hearings throughout the State, one in each of the service territories of the EDCs. The public hearings were open to members of the public to allow comment on the Board's LCAPP proceeding as well as on the proposed recovery through electric distribution rates of costs resulting from the LCAPP. Public hearings were conducted after proper publication of notice in newspapers of general circulation throughout each of the EDC's respective service territories. The public had adequate notice and opportunity to be heard on this matter, and comments were received from various community and environmental groups.

The Board appreciates the EDCs' articulated concern for their customers and various community groups in each of their respective service areas. However, it is the Board that has the ultimate responsibility to ensure that adequate safeguards and protections are in place to protect New Jersey's ratepayers, and to take appropriate steps consonant with the directives of the Legislature to ensure that sufficient capacity is available to maintain the reliability of the State's electric supply. The EDCs have failed to demonstrate the harm to a private utility interest necessary to trigger the procedural protections demanded. The Board's process to implement this legislation has fully protected the private interest of the utility shareholders with the promise of full recovery from ratepayers for all utility costs associated with the approved SOCAs. N.J.S.A. 48:3-98.3(d), March Order at 16--18. Therefore, the Board **FINDS** that no deprivation of due process rights of the EDCs has occurred.

The EDCs assert that the Board had an obligation to show that it independently verified the recommendations of the LCAPP Agent, as failure to do so results in "uncritical reliance upon one set of untested modeling data." EDC Motion at 13. However, the LCAPP Law specifically authorized the retention of the LCAPP Agent for the express purpose of assisting the Board in establishing the LCAPP and developing the SOCA, prequalifying eligible generators, and recommending the selection of winning eligible generators. N.J.S.A. 48:3-98.3(b). As pointed out by Rate Counsel, the courts have found that the Board's reliance on an independent auditor's report was appropriate where the report was distributed to all parties who were provided with an opportunity to review and comment. Rate Counsel Opposition at 6. The EDCs were provided with the LCAPP Agent's Report, and had an opportunity to comment which they exercised. The fact that the Board did not specifically reply to those comments does not support the EDCs' conclusion that the Board did not review those comments. It simply did not find them sufficiently persuasive as to require comment or discussion.

The EDCs contend that the final SOCA does not comply with the LCAPP Law. As stated in the March Order, the Board believes that the Final SOCA does, in fact, comply with the LCAPP Law. March Order at 7. The Board continues to believe that its interpretation is within reason, and reflects a careful balancing of the various comments submitted by interested parties to the proposed SOCA.

The LCAPP Law requires that approved eligible generators with executed SOCAs "shall participate in and clear the annual base residual auction ["BRA"] conducted by the PJM as part of its reliability pricing model for each delivery year of the entire term of the agreement." N.J.S.A. 48:3-98.3 (c) (12). As stated in the March Order, the Board concluded that the Final SOCA appropriately balances the risks between ratepayers and generators while satisfying the expressed goals of the LCAPP Law, and respecting other principles of the law of this State. See Wilentz v. Hendrickson, 135 N.J. Eq. 244 (1944); Gallenthin Realty Dev., Inc. v. Paulsboro, 191 N.J. 344 (2007). The Board addressed the needs of the generators for a long term commitment while protecting ratepayers from paying under the contract for capacity that does not clear the BRA. The Board appropriately balanced the ramifications with the actions, allowing termination of the SOCA for failure to take action within the control of the generator (bidding into the BRA and offering energy and capacity into the PJM market) while continuing the SOCA without payment when the generator's failure to satisfy a contract requirement (clearing the BRA after bidding in conformance with PJM rules) lies outside its control. This solution is reasonable, is not inconsistent with the LCAPP law and promotes the intent of the Legislature that the law would encourage the development and construction of new efficient capacity. Haddock v. Passaic Dept. of Community Dev., 217 N.J. Super. 592, 596-97 (App.Div.) certif. den. 108 N.J. 645 (1987); Fiola v. N.J. Treasury Dept., 193 N.J. Super. 340, 347 (App.Div.1984) (administrative agencies charged with implementing a particular statute must do so in a manner that effectuates the intention of the Legislature.). The EDCs have failed to show how termination of the SOCA after failure to clear any BRA preserves "net value" for the benefit of ratepayers.

Accordingly, the Board **FINDS** that nothing in the EDC Motion changes the conclusions reached in the March Order. The EDCs have not established any grounds for reconsideration as their arguments have already been considered by the Board and rejected. Therefore, for the reasons stated above, the Board **HEREBY DENIES** the EDCs' Motion for Reconsideration of the March Order.

DATED: 5/20/11

BOARD OF PUBLIC UTILITIES
BY:

LEE A. SOLOMON
PRESIDENT

JEANNE M. FOX
COMMISSIONER

JOSEPH L. FIORDALISO
COMMISSIONER

ATTEST:

KRISTI IZZO
SECRETARY

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