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Agenda Item: 2C

STATE OF NEW JERSEY
Board of Public Utilities
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ENERGY

IN THE MATTER OF A GENERIC PROCEEDING TO)
CONSIDER PROSPECTIVE STANDARDS FOR GAS) ORDER
DISTRIBUTION UTILITY RATE DISCOUNTS AND)
ASSOCIATED CONTRACT TERMS AND CONDITIONS) DOCKET NOs. GR10100761
ER10100762

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BY THE BOARD:

This proceeding evolved from a petition filed with the New Jersey Board of Public Utilities ("Board") on May 29, 2009 by Public Service Electric and Gas Company ("PSE&G") seeking to increase its electric and gas distribution base rates. On July 8, 2009, the petition was transmitted to the Office of Administrative Law ("OAL") and assigned to Administrative Law Judge ("ALJ") Walter M. Braswell. Motions to intervene filed by the New Jersey Large Energy Users ("NJLEUC"), and a group of electric cogeneration customers consisting of Bayonne Plant Holding LLC, Camden Plant Holding LLC, Newark Bay Cogeneration Partnership LP, Pedricktown Cogeneration Company LP, and Elmwood Park Power LLC (collectively "ECG") were granted by ALJ Braswell. Evidentiary hearings were held from February through March 2010.

On May 27, 2010, PSE&G, the Division of Rate Counsel ("Rate Counsel"), the staff of the Board ("Staff") and NJLEUC (collectively, "Signatory Parties") executed a stipulation ("Stipulation"). The Stipulation contained, among other provisions, a recommendation that the Board initiate a separate generic proceeding to address issues on a state-wide basis relating to the provision of discounted gas utility distribution rates and contracts ("Discount Agreements") and the applicability of the societal benefits charge ("SBC") to instances where there is an ability to bypass the gas utility's distribution system.

On May 28, 2010, the Board received ALJ Braswell's Initial Decision in the proceeding. ALJ Braswell found that the Stipulation was entered voluntarily by the parties, was consistent with the law, and disposed of all issues in controversy with the exception of certain issues raised by NJLEUC and ECG.

By letter dated June 2, 2010, the Company requested that the Board address the Stipulation and Initial Decision as applied to the Company's electric division since no objections had been filed to those portions of the settlement. On the gas portion of the Stipulation, it was expected that exceptions and replies to exceptions would be filed. The Signatory Parties confirmed their consent to this process. By Order dated June 7, 2010, the Board approved the Stipulation and Initial Decision with respect to PSE&G Electric Division and electric ratepayers only.

On July 9, 2010, under Docket No. GR09050422, the Board adopted the Initial Decision of ALJ Braswell approving the Stipulation, with modifications, as it pertains to PSE&G's gas ratepayers and PSE&G's gas division ("July Order"). One of the recommendations made by ALJ Braswell which the Board accepted was the recommendation to open a generic stakeholder proceeding ("Generic Proceeding") and allow all interested stakeholders to participate. The Board decided that this new Generic Proceeding should explore at least the following areas on a prospective basis: (i) Discount Agreements based on a customer's ability to bypass the gas utility's distribution system; (ii) a review of "evergreen" provisions; and (iv) the applicability of SBC, Regional Greenhouse Gas Initiative ("RGGI"), and Capital Adjustment Charges ("CAC") to customers with the ability to bypass the gas utility's distribution system. The July Order further designated Commissioner Fiordaliso as presiding officer in this matter pursuant to N.J.S.A. 48:2-32, and directed Staff to (i) open a new docket for the Generic Proceeding, (ii) notify interested parties, and (iii) post notice on the Board's website.

THE GENERIC GAS PROCEEDING

On October 25, 2010, the Board issued a notice opening a new docket for the Generic Proceeding and setting a preliminary procedural schedule ("Notice"). As directed by the Board in the July Order, Staff set up a dedicated website for this matter and posted notice of the first stakeholder meeting which was held on November 15, 2010. During this first stakeholder meeting the scope of the Generic Proceeding was delineated. Participants identified the following six issues:

1. The legality of charging discounted gas utility distribution rates (a) based on a customer's ability to bypass the utility's gas distribution system, (b) based on the impact on wholesale and retail electricity markets, or (c) for other policy reasons.
2. The legality of establishing discounted gas utility distribution rates through contracts and whether current or future contracts may be "evergreened," i.e., extended for additional terms, without Board approval; and, if it is determined that evergreen provisions are permissible, whether a utility should be required to file advance notice with the Board or obtain approval before determining not to exercise a termination right in a discounted contract.
3. The criteria and process that the Board should establish to determine whether or not an entity has an ability to bypass the utility's gas distribution system and what rates should be charged to such entities; and whether the criteria and process must be established in a rulemaking.
4. Regardless of an entity's ability to bypass the utility's gas distribution system, the criteria and process that the Board should establish to determine (a) whether other policy considerations justify discounts, (b) if so, what rates should be charged; and (c) whether the criteria and process for such discounts must be established in a rulemaking.
5. The legality of and policy considerations of applying SBC, RGGI and CAC charges prospectively to electric generating customers that purchase gas delivery services from the utility to produce electricity that is sold to electric public utility customers.
6. The applicability of SBC, RGGI and CAC charges prospectively (a) to customers with an ability to bypass the utility's gas distribution system, (b) based on the impact on wholesale and retail electric markets, or (c) for other policy reasons, and the legality of any waiver or reduction of those charges.

On December 2, 2010, the Board held a second stakeholder meeting to further discuss the six identified issues. Additional notice of the Generic Proceeding was published in newspapers in general circulation in the State soliciting public comment. The Board accepted initial written comments from participants and the public until January 28, 2011, and reply written comments until February 18, 2011. Initial comments were filed by ECG, Elizabethtown Gas Company ("Elizabethtown"), IEPNJ, the Independent Market Monitor on behalf of PJM ("IMM"), NAEA Ocean Peaking Power, LLC ("NAEA"), NJLEUC, jointly by PSE&G and New Jersey Natural Gas Company ("NJNG"), Rate Counsel, and South Jersey Gas Company ("SJG"). All except NAEA and the IMM also filed reply comments.

A third stakeholder meeting was held on March 1, 2011. During this last meeting, participants agreed that Senate Bill 2381 signed into law by Governor Chris Christie on January 28, 2011¹, addressed the issue of the legality of and policy considerations of applying SBC and RGGI charges prospectively to electric generating customers that purchase gas and gas delivery services from a utility when used to produce electricity that is sold for resale. It was also agreed that the CAC charges referred to in the Notice reflected temporary clauses by each of the utilities associated with accelerated infrastructure investments that would ultimately be rolled into the rate base and were therefore not ongoing clause mechanisms for programs like the SBC and RGGI. Therefore, these issues were deemed dropped from the scope of the Generic Proceeding. Tr. of 3/1/2011 at 3.

During the course of the stakeholder proceeding, Staff developed a questionnaire for the gas distribution companies ("GDCs"). The purpose of the questionnaire was to procure data on existing Discount Agreements including the number of contracts, the key components of and basis for the existing discount rates, as well as other information that Staff felt would be helpful to the Board in addressing the issues within the Generic Proceeding. The GDCs responded to the questionnaire providing both public and confidential versions of the information². The information provided by the GDCs indicates that there are 41 existing Discount Agreements most of which were either specifically approved by the Board or negotiated under a tariff provision that had been approved by the Board. Agreements between the GDCs and electric generators account for 24 of the 41, while the remaining 17 are agreements between the GDCs and commercial and industrial customers. There were 23 Discount Agreements entered into before the enactment of the Electric Discount and Energy Competition Act ("EDECA") in February 1999 and, therefore, before the introduction of the SBC. Finally, 27 of the Discount Agreements include evergreen clauses.

POSITIONS OF STAKEHOLDERS³

RATE COUNSEL

In its initial comments, Rate Counsel maintained that a rate discount based on a customer's demonstrated ability to physically bypass its GDC's delivery system is permissible as long as the resulting rate is not "unjustly discriminatory or unduly preferential." Rate Counsel IC at 4. Rate Counsel recognizes that pursuant to N.J.S.A. 48:2-21, the Board has broad authority to set rates and tariffs for public utilities. When the Board determines that "any existing rate, toll, charge, or schedule...or other special rate [is] unjust, unreasonable, insufficient or unjustly discriminatory or preferential," it authorized to "fix" those rates so that they are just and reasonable." N.J.S.A. 48:2-21.1

Those utility rates are normally set by tariffs, which are "published schedules of rates filed by [a] public utility and thereafter, applicable equally to all customers." Id. at 2. However, Rate

¹ Codified as N.J.S.A. 48:3-60.1.

² Questions were raised about access to information claimed as confidential in some of the Discount Agreements. Only publically available information is discussed in this Order as relevant to the issues to be decided within the Generic Proceeding.

³ Parties' discussion of CAC charges as well as charges applicable to gas-fired generators has been eliminated. Initial Comments are referred to as IC, and Reply Comments as RC.

Counsel also recognizes that the Board is authorized to approve contracts at rates different from the utility's tariff in accordance with the procedures outlined in N.J.A.C. 14:3-13(f) which is required for filings requesting a special rate. Rate Counsel IC at 3.

Rate Counsel opposes the Board approving special rates for customers who assert that they will move out of state unless they receive discounts. Id. at 4. According to Rate Counsel, such rate preferences are simply not the appropriate means of accomplishing economic development policy goals and neither is the granting of gas distribution rate discounts for the purpose of attempting to equalize cost among wholesale electric generators. Id. at 5.

Rate Counsel believes that it is reasonable to extend rate discounts to customers with a credible bypass opportunity. However, Rate Counsel emphasized that these bypass claims must be credible and that many times these bypass options are not physically and/or economically feasible. Id. at 5-6. In order to guarantee that bypass claims are analyzed based upon specified criteria to determine their practicality, Rate Counsel proposes that uniform standards be set through a rulemaking process. Ibid.

Rate Counsel agrees that rates may be set by contract but maintains that discounted rates may only be established by contract, after a "contested case" and in accordance with criteria established by rulemaking. Id. at 7.

Rate Counsel commented that some of these discounted contracts may include an "evergreen" provision that allows a contract to renew indefinitely in the absence of a notification by either party that it wishes to terminate the contract. According to Rate Counsel, Title 48 does not permit "evergreening" without Board oversight as this would be an abdication of the Board's authority and duty to regulate rates. Ibid. Thus, Rate Counsel suggests that a mechanism be implemented which will allow continuing Board oversight of the utility's determination whether or not to allow the contract to renew, proposing that the utility be required to file a petition with the Board and obtain Board approval before allowing a contract to be extended under an "evergreen" provision. Id. at 8- 9. As rate discounts and special contracts affect the statutorily granted rights of other ratepayers, both the granting and continuation of such discounts requires that there be an opportunity for litigation as a "contested case" with notice to Rate Counsel and other interested parties. Id. at 12.

Rate Counsel believes that it is appropriate for this proposed requirement to be applied to new contracts with "evergreen" clauses as well as any existing contracts with "evergreen" provisions. According to Rate Counsel, such a requirement would not infringe on the rights of any party to an existing contract because the Board's continuing authority to review contract rates and ensure just and reasonable rates is a legal backstop to any such contract. Rate Counsel is unaware of any Board-approved contract that includes any provision that could pre-empt the Board's authority to oversee utilities' decisions with regard to "evergreen" provisions, and if any such contract existed, it would be illegal. Id. at 9.

It is Rate Counsel's view that the Board has the obligation to establish the criteria and process for determining whether or not an entity has an ability to bypass the gas utility's distribution system. In addition, this criteria and process for evaluating bypass threats must be specified in a rulemaking. Rate Counsel believes that all of the six factors outlined in the *Metromedia* case⁴

⁴ Metromedia Inc. v. Director, Division of Taxation, 97 N.J. 313 (1984).

have been met in this stakeholder proceeding, and that rulemaking is the appropriate procedure. However, even if all six Metromedia factors are not present, rulemaking to codify both bypass criteria and the parameters of bypass requirements is appropriate. For example, to be entitled to a discounted rate, a customer or potential customer should be required to demonstrate the feasibility of bypass and an analysis to justify the proposed rates and rate structure should be performed. Criteria should also be established for other contract terms such as duration, renewal provisions, and criteria for contract renewal pursuant to "evergreen" clauses. Id. at 12.

As for the applicability of RGGI charges, these should continue to be allocated in accordance with established ratemaking principles. To date, RGGI rates charged by the utilities have been established by stipulation in contested proceedings. Id. at 20. In the absence of a specific statutory directive, these proceedings have been guided by established rate design principles, which require all ratepayers to pay their fair share of the costs of RGGI programs. Rate Counsel believes this past practice is consistent with the RGGI law, and should continue. On the applicability of the SBC, Rate Counsel maintains that EDECA mandates that the SBC must apply to all electric and gas utility customers.

In its reply comments, Rate Counsel affirmed its position that gas distribution service rate discounts should be limited to customers with credible bypass threats; discounts for other reasons are beyond the Board's authority and contrary to sound policy. Rate Counsel RC at 3. It is Rate Counsel's contention that the Board's jurisdiction does not include broad responsibility to implement the State's environmental and economic policies. Id. at 4. Rate Counsel dismisses any reliance on the 1995 "rate flex" legislation in N.J.S.A. 48:2-21.24 et seq., which other stakeholders referred to as evidence that the Board can further economic goals, as this legislation only granted the Board authority to act on economic policy for a limited time, and was explicitly limited to electric utility customers. Id. at 5.

Further, Rate Counsel disagrees with ECG's proposal that the Board require the gas utilities to file tariffs establishing electric generators as a separate rate class as ECG failed to produce data or analysis to substantiate its proposal. Id. at 7. Similarly, Rate Counsel maintains that ECG's allegations of discrimination with regard to PSEG Power remain unsupported.

On the matter of Board oversight with regard to "evergreen" provisions, Rate Counsel disagrees with NJLEUC's position that requiring a utility to file a petition with the Board and get approval before allowing a contract to be extended under an "evergreen" provision would violate the prohibition on impairment of contracts contained in the federal and State constitutions. Rate Counsel argues that there can be no unconstitutional impairment unless there has been a "substantial" impairment of a party's right under a contract. It is the position of Rate Counsel that requiring a petition on notice prior to the exercise of an evergreen provision does not modify any contracts. Such action only allows the Board to exercise its authority to assure utilities act prudently in considering "evergreen" extensions. Id. at 9.

Rate Counsel restates its position that rulemaking is required for the Board to establish the criteria and process to determine whether an entity can bypass the distribution system, and what rates should be charged to entities that can successfully demonstrate the ability to bypass. Id. at 11. The criteria for demonstrating a credible bypass threat should include proof that bypass is economically and practically feasible. Furthermore, bypass applications should be evaluated based on specific and uniformly applied standards. Id. at 13. Rate Counsel maintains that the Board may not grant discounts for reasons based on the State's general economic

development and environmental policies. However, should the Board determine that it will consider rate discounts for reasons other than a customer's ability to physically bypass the utility's gas distribution system, the criteria and process for considering such discounts must be established in a rulemaking. Id. at 14.

Rate Counsel believes that EDECA does not authorize the Board to discount or waive the SBC. Further, Rate Counsel disputes NJLEUC's proposal to change the current Board approved rate designs of the gas SBC, RGGI, and CAC charges. Rate Counsel takes issue with NJLEUC's proposal for failing to present any justifiable basis for changing the cost recovery mechanisms previously approved by the Board. Id. at 18.

ECG

ECG urges the Board to recognize that gas distribution rates to gas fired electric generators ("GFEGs") involve many policy matters that go far beyond the application of ratemaking principles, and have broad impact upon New Jersey's energy policies. ECG IC at 1. ECG proposes that the Board exempt GFEGs from any obligation to pay surcharges since requiring GFEGs to pay such charges is unfair, anti-competitive and discriminatory, because other electric generators in New Jersey and other states in the PJM market that do not take distribution service from New Jersey local distribution companies ("LDCs") do not incur similar expenses). Ibid. ECG urges the Board to first set criteria for determining the base gas delivery rates that will apply to all GFEGs before it addresses questions regarding any "discounts" that may apply to those rates. Id. at 2. In order to achieve these goals, ECG urges the Board to find that GFEGs are a separate class of gas delivery customers, and that GFEGs should be subject to a separate gas delivery tariff at cost-based rates, which should be established in a second phase of this proceeding or in a follow-on proceeding.

On the topic of physical bypass, ECG stated that the Board should establish nondiscriminatory standards that define the manner and extent to which "bypass" or other discounts may be offered to GFEGs within the tariff structure. In particular, the Board should set criteria that will insure that discounts are either (i) justified by competitive circumstances and produce net benefits for firm gas distribution customers or (ii) produce other identifiable public policy benefits, and that any discounts are available to all other similarly-situated customers. Id. at 3.

ECG suggested that the Board use the Generic Proceeding as a vehicle to protect electric competition by enforcing the existing requirement that all GFEG affiliates of gas utilities take delivery service pursuant to nondiscriminatory terms and conditions. Specifically, the Board should require PSE&G to provide gas service to its affiliate PSEG Power pursuant to terms and conditions that are generally applicable to all GFEGs.

In its reply comments, ECG restated what it sees as a need for the Board to develop criteria for bypass discounts to more carefully guard against abuses or discriminatory practices. ECG also states that there may be special circumstances, such as those involving affiliate transactions, in which the Board may wish to scrutinize an individual transaction. For example, ECG believes it specifically demonstrated that PSE&G has consistently favored PSEG Power by not requiring its affiliate to enter into a contract or tariff for the purchase of gas utility service. ECG RC at 2.

ECC concluded its reply comments by restating that the Board should take immediate action and require that GFEG affiliates of gas utilities purchase gas utility service under the gas utilities' existing tariffs, such that the affiliates are not the beneficiaries of discriminatory terms

and conditions of service. Finally, ECG urges that the Board prospectively review any discounts that gas utilities propose for their GFEG affiliates, so that the Board can be sure that any bypass (or other) rationale for a discount is viable, verifiable and in the public interest. Ibid.

ELIZABETHTOWN

Elizabethtown asserts that the Board's existing regulations provide a sufficient framework for the Board to consider requests for approval of special contracts between utilities and their customers when particular facts and circumstances require the utilities to offer non-tariffed services. Elizabethtown IC at 1. According to Elizabethtown, no useful purpose would be served by attempting to develop more specific rules of general applicability for this process. Rather, the Board should confirm that it will continue to review requests for approval of special contracts on a case-by-case basis. Id. at 2.

Elizabethtown acknowledges that it has gotten explicit approval from the Board for all of its special contracts, and does not consider these contracts discount arrangements. Instead, it views them as agreements designed to account for the unique circumstances faced by the customers. For instance, some of these contracts were executed under the threat of physical bypass. Others were executed to address the threat of economic bypass. In some cases, the special contracts provide important additional benefits such as inexpensive sources of peaking supply.

Elizabethtown submits that the Board in this proceeding should avoid attempting to establish "cookie-cutter" rules that will be applicable in all circumstances. Instead, the Board should consider whether its current process permits the Board to review individual proposals in a thorough manner that is fair to all stakeholders. Elizabethtown believes that the Board's current regulations achieve this goal with respect to its contracts and tariffs. Id. at 5.

Elizabethtown stated there is no question that the State's utilities have the authority to propose, and the Board has the authority to approve, rates, and terms of service for individual customers. Ibid. The Board has approved tariffs for Elizabethtown that permit the company to adjust rates for individual customers or the class as a whole between a floor and a ceiling, and such tariffs clearly are legally permissible. Id. at 6.

Elizabethtown recognizes that the Board has the authority to modify the terms of Elizabethtown's contracts with its customers. As such, the company would not object if the Board were to adopt a policy or rule that would require a utility to notify the Board and Rate Counsel in advance of extending the term of a Board-approved special contract. Id. at 8. Elizabethtown states that it is more appropriate to require a utility to provide advance notice to the Board and other parties before extending the term of an existing agreement than it is to require the Company to obtain Board approval for such extensions.

Elizabethtown submits that there is no need to improve upon or modify the process that has been followed in the past. Furthermore, it would not be useful in this proceeding for the Board to attempt to establish specific criteria to support Board approval of special contracts in all instances, and there is no need for the Board to conduct a rulemaking. Id. at 9. Rulemaking is unnecessary where the Board is merely outlining policies that apply well-known statutory standards to be followed based on the facts and circumstances of individual cases, as opposed to developing new uniform rules that will attempt to apply to all regulated utilities. Id. at 11.

In relation to SBC, RGGI, and CAC charges, Elizabethtown contends that rather than creating inflexible cost allocation rules, the Board should afford Elizabethtown and the State's other gas utilities the opportunity to bring facts and circumstances to the Board. Id. at 12. Elizabethtown reaffirmed in its Reply Comments that there is no need for the Board to conduct a formal rulemaking in this proceeding. Elizabethtown contends that the Board should continue to approve individual service agreements on a case by case basis. The current regulations in N.J.A.C. 14:3-1.3 require utilities to file detailed support for any rate proposal, including a full explanation of the impact on other customers. The statutory standards that apply to these rates are the same as applied to all other utility rates, meaning that they must be just and reasonable and not unduly preferential or arbitrarily or unjustly discriminatory. Id. at 2. These legal standards are clearly and expressly provided for in the Board's enabling legislation, and applying these standards does not require the Board to implement a new administrative policy that has not been previously expressed in past proceedings or change an existing administrative policy in a significant manner. Therefore, additional rulemaking is not required under Metromedia as advocated by Rate Counsel and NJLEUC. Id. at 3.

According to the company, the Board is vested with broad discretion in its exercise of its ratemaking authority as delegated by the Legislature. Therefore, the Board is free to make pragmatic adjustments in exercising its discretion over individual utility rate and terms of service because the legislative standards governing the exercise of the Board's authority are sufficiently precise. Ibid.

Elizabethtown has entered into special contracts with customers for reasons other than bypass, and disagrees with Rate Counsel that physical bypass is the only circumstance eligible for discounted rates. Understanding Rate Counsel's concerns, Elizabethtown submits that Rate Counsel should have the ability to participate in any proceeding in which individual contracts are at issue. Id. at 4.

Elizabethtown urges the Board to reject Rate Counsel's suggestion that utilities be required to file a petition and obtain Board approval before allowing a contract to be extended under an evergreen provision as a notice requirement is more practical and reasonable if the Board determines that greater oversight is needed. Id. at 5.

Elizabethtown recognizes that Rate Counsel should be afforded an opportunity to participate in reviewing special contracts. However, Elizabethtown urges the Board to retain special contract filings and process them expeditiously without imposing inflexible and cumbersome procedures that may jeopardize agreements that require timely processing. Id. at 6.

Elizabethtown takes issue with NJLEUC's suggestion that individual customers are somehow entitled to individual contracts as long as they are able to demonstrate that they have the potential to bypass the distribution system. Elizabethtown states that while utilities may enter into individual contracts to preserve load that may otherwise be lost, they have no obligation to do so as individual contracts reflect unique circumstances, and a failure to provide similar terms to another customer is not unduly discriminatory. Elizabethtown urges the Board to confirm that utility customers are not entitled to individual special rate treatment when the utility continues to provide tariff service on a non-discriminatory basis to all customers that meet the tariff criteria. Id. at 7.

With respect to the applicability of the SBC, Elizabethtown does not believe that the Board needs to make any further rulings in this proceeding. To the extent that a need for relief from the SBC is demonstrated in future proceedings, the Board has authority to modify rates as needed. Id. at 9.

IEPNJ

IEPNJ maintains that the Board's authority to approve contract rates is broad. The statutory provisions regarding rate discounts merely require that such discounts not be "unjust" or "unreasonable." Once the Board approves an agreement, and that agreement contains a provision allowing for renewal, either automatically or at the option of a party, approval of the agreement necessarily includes approval of the renewal provision. IEPNJ IC at 2. Accordingly, IEPNJ believes that taking steps now to prevent renewal of a previously approved contract pursuant to its terms would be tantamount to modifying an existing approval. However, IEPNJ does not deny that under extreme circumstances, the Board may have the right to modify an existing below-tariff rate contract. But these circumstances are rare and should only be exercised when the factual basis for such a modification is compelling. Id. at 3.

In its reply comments, IEPNJ states that Rate Counsel and NJLEUC alone argue that a rulemaking is necessary to determine criteria for discounted gas transportation rates. IEPNJ RC at 1. PSE&G and NJNG filed joint comments, and SJG filed its own recommendations, all of which address Metromedia in detail. IEPNJ endorses the arguments set forth by the three GDCs regarding the Metromedia analysis, and asserts that even when all six criteria are present – which IEPNJ does not believe is the case here – that may not be the end of the inquiry. The presence of some or even all of the Metromedia criteria does not preclude a finding that the action to be undertaken is not a rule but rather an example of informal agency interaction with a regulated industry, in the nature of investigating, negotiating, advising and supervising, that constitutes the bulk of administrative agency action. Courts have afforded the Board broad latitude in employing hybrid procedures that provide interested parties with the opportunity to be heard. Id. at 2.

The record is clear, according to IEPNJ, that at least over the last twenty years, the Board has approved a series of contracts calling for reduced gas transportation rates on a case-by-case basis, gradually building over time a set of general criteria derived from each precedent as it is decided. Any general statement of policy at the conclusion of this proceeding would presumably not represent a new policy or significant change in policy. Additionally, out of the millions of customers, only a handful have unique circumstances justifying a special contract rate, and it is not feasible to identify all of the facts and circumstance that could warrant approval of a special rate as explained in the certification of Robert Chilton. Id. at 3.

IEPNJ restates its position in its initial comments that the Board may want to direct the LDCs other than South Jersey to file an electric-generator specific tariff and to initiate a proceeding to review and consider possible modifications to South Jersey's generator tariff, all of which can be done without rulemaking. Nevertheless, the existing approval process should not become paralyzed while the Board considers what if any changes to make to its existing procedures. Ibid.

SJG

SJG states that it is unique among natural gas utilities in this state, in that in conjunction with this Board, approximately 20 years ago it developed a set of standards to determine when a generator should be entitled to a discounted contract rate. SJG IC at 2. Over the years, a number of generators requested discounted rates under SJG's special provision. In all such cases, SJG negotiated rates with these generators and submitted the contracts to the Board for approval. None of these contracts may be lower than an amount sufficient to generate a reasonable return on the company's capital investments, as well as recovering marginal and embedded costs, including depreciation, so that all of the customers contribute towards fixed costs. Id. at 3.

SJG proposes that each gas utility in this State be directed to make individual, utility-tailored filings to implement discount contract tariffs appropriate to its service area. SJG believes that similar provisions should be extended to its Rate Schedule Large Volume Service ("LVS"), applicable to large industrial customers. SJG proposes broader modifications to include its ability to discount tariff rates for those LVS customers (a) proposing to by-pass South Jersey's system,; and (b) agreeing to provide economic development within South Jersey's service area if granted a discounted natural gas service contract. Id. at 4. Each gas utility should be directed to make individual filings to implement discount contract tariffs. As each company is unique, as is its service area, individual proceedings are appropriate. Id. at 5.

SJG knows of no legal argument which would preclude a determination that rates discounted, due to a customer's ability to by-pass a distribution system or for other good and valid policy reasons, would not be just and reasonable. This Board has a long established record of discounted rates to meet other public policy considerations, and adopted economic development rates for SJG in its Economic Development Rider to its tariff. Id. at 6.

On the issue of "evergreen" provisions, South Jersey categorizes these provisions as common within the commercial context, and there is no reason to believe that the Board may not approve them and allow them to exist as well. In order for generators to obtain financing for generation projects, they frequently must demonstrate to their lenders that they have a long-term agreement for the delivery of natural gas to the generation facility. Evergreen provisions assist with such financing. Thus, SJG would support agreements without evergreen provisions that last as long as 20 years. SJG would not object to filing a notice with the Board in advance of the Board granting a contract extension through an evergreen provision. However, SJG believes a requirement of obtaining annual Board approval to exercise an evergreen would be detrimental to the development of generation in this State. Id. at 7.

SJG declares that its process to review special contracts has worked well and would like to continue in the same fashion. If each utility is directed to make its own filing, no rulemaking proceeding will be necessary. Ibid.

In its reply comments, SJG restated its proposal that each gas utility could be directed to submit an individually tailored tariff which would provide for discounted contract rates for generators like its long standing tariff. According to SJG, if the Board were to direct the GDCs to submit such tariffs, no rulemaking would be needed. SJG RC at 3.

SJG reiterated that the inclusion of "evergreen" provisions is common practice to provide businesses and their lenders with assurance of long term gas supply, and that there is a need for long term contracts to obtain financing. SJG maintains that noting in the law precludes the Board from approving evergreen provisions but if the Board were to decide not to permit them, SJG believes that agreements with terms as long as twenty years should be seriously explored. Ibid. According to the company, long term contracts not only provide assurances to the customers, but also to the utility, especially given the extensive negotiations involved in discounted contracts.

NAEA

NAEA purchases Board regulated gas transportation service for delivery of natural gas to its Lakewood facility from NJNG. This purchased service from NJNG is at full tariff rates, not a Board-approved special contract. NAEA sells into the PJM market and encourages the Board to adopt policies that "will level the uneven playing field that exists now in the competitive wholesale energy markets." NAEA IC at 1. NAEA submitted a certification of Robert B. Stoddard in support of its comments.

NAEA agrees that GDCs can offer customers discounted rates under certain circumstances, such as bypass, with Board approval, but only if the varying rates are justified by the circumstances so that the rates are not discriminatory or preferential. NAEA IC at 8. Bypass potential is clearly one of those circumstances but should not be the only instance in which the Board approves a special contract with discounted rates. Rather, NAEA believes that discounted rates should be granted in all circumstances when they are in the public interest including where such reductions would improve the dispatch position of gas fired generators which would indirectly benefit electric ratepayers. Id. at 11.

NAEA does not support the Board establishing a specific criteria and process, in this case or via a rulemaking, to determine whether a gas-fired generator with or without bypass potential should receive a discounted rate. Rather, NAEA advocates for the Board to continue to review such proposed special contracts on a case by case basis, and allow gas fired generators that cannot reach agreements with their local gas utilities to bring their own proposals to the Board. Id. at 13.

As for "evergreen" clauses, NAEA stated the Board should consider these clauses on a case by case basis and approve them only if they are in the public interest. Any approved special contract including an "evergreen" provision but no requirement that the utility seek Board approval prior to extending the term must be presumed to have been approved on its own terms because the BPU found that it was in the public interest. Therefore, NAEA does not recommend the Board amend or modify an approved special contract, including one with an "evergreen" provision, unless extraordinary circumstances require such a review following the practice at FERC. Id. at 13.

NAEA also submits that surcharges are subject to discounts for customers with bypass potential and for gas-fired generators if the Board finds that it is in the public interest. NAEA did not file reply comments.

THE IMM

The IMM maintains that this proceeding has important implications for the electric power market in New Jersey, which is regulated through competition at both wholesale and retail levels. The cost of fuel and the delivery of fuel is an important factor for generators' relative competitiveness in the wholesale power market. The IMM notes another consideration is that the manner in which costs are imposed may restrict new entry. IMM IC at 1.

The IMM stated that evaluations of bypass are difficult even in the best of circumstances. An appropriate decision depends upon full disclosure of objective and subjective information from the party attempting to justify the bypass option. It is unlikely that any evaluation process will be able to realize the goal of competition based on the economic fundamentals. Id. at 4.

The IMM did not submit reply comments.

PSE&G and NJNG

PSE&G and NJNG filed joint comments ("Joint Comments"). The two companies highlighted the long Board history of authorizing discounted utility rates in situations where a need to do so was present and the Board is vested with broad discretion in the exercise of its ratemaking authority. Joint Comments at 4. Approving discounted rates based on specific facts is indeed consistent with the Board's broad authority over utilities and their rates, and the Board has adopted regulations, supported by Rate Counsel, that require utilities to justify any discount from the Board-approved tariff rates. Id. at 5.

One of the means a state regulatory agency can mitigate the risk of bypass is by allowing GDCs to discount the utility rate. Allowing the discounted rate preserves the contributions of that otherwise lost customer to distribution system costs. Id. at 6. While bypass is the most common reason for a discount, in accord with its legislatively delegated authority, the Board has approved discounts based on other economic facts including where there is a possible closure of a facility absent an adjustment in the cost of energy. Id. at 8.

Customers making a considerable investment need to have reasonable certainty that a utility rate will be available for a reasonable period. Joint Comments at 9. Renewal clauses also referred to as "evergreen" clauses allow a contract to continue from one term to the next. According to the Joint Commenters, there is no legal impediment to the use of these clauses. Ibid. Longer contract terms are needed to allow new customers to be in a better position to obtain the necessary financing and complete a proposed project. For existing customers, a longer term allows them the flexibility to either expand their current operations or allow them to better control existing costs to keep the business running). Id. at 10.

Discounts should be offered only when they are justified, and in a manner that is sufficiently transparent to that there is adequate information for the Board to make an informed decision and other customers not feel that there has been discriminatory conduct, all while moving the process quickly enough to preserve customer interest in the deal. This proceeding should maintain the balance among these objectives by providing flexibility, transparency and certainty in any measures adopted. Id. at 11.

NJNG and PSE&G assert that authorizing utilities to have discount provisions in their individual tariffs is a reasonable approach since each utility would have to state the specific terms and conditions for the discount as well as the process for requesting it. *Ibid.* The tariff approach would allow the utilities to require customers to provide the same standard data for evaluation of a potential discount. *Id.* at 12.

PSE&G and NJNG contend that according to *Metromedia*, a rulemaking is not necessary in this matter. Applying the *Metromedia* analysis to this proceeding, it is apparent that a preponderance of the factors does not weigh in favor of a rulemaking. Further, the Board's determination in this matter has been clearly established by the Board in its own rulemaking and Board decisions over the past 20 years, and is therefore not a significant change in the Board's policy. *Id.* at 15.

PSE&G and NJNG maintain the plain language of N.J.S.A. 48:3-60(a) provides the legal support for discounting or waiving the SBC when appropriate. They assert that the plain language of the section confers the right, but not the obligation to collect the SBC Charge. *Id.* at 18.

Within their reply comments ("Joint RC"), PSE&G and NJNG reiterate that this proceeding is prospective looking only and not intended to re-evaluate existing contracts for any specific customers. Therefore, any comments received in this matter discussing or analyzing specific contracts between a utility and a customer are irrelevant, outside the scope of these proceedings and should not be considered by the Board. Joint RC at 2.

PSE&G and NJNG reaffirm their position that a rulemaking is not required to address the issues presented. The Board has discretion in determining the appropriate method for fulfilling its statutory duties, and can select the procedures that enable it to implement legislative policy. *Ibid.* Specifically, they challenge comments by Rate Counsel that a rulemaking is necessary to establish clear criteria because the Board has previously granted discounts on an ad hoc basis. Yet, the Board's previous decisions regarding discounts have been made based on the specific facts presented as required by the regulation authorizing discounts, N.J.A.C. 14:3-1.3(e), which was supported by Rate Counsel, and the Board will not be setting new precedent or establishing new policies. Only a small segment of the regulated public would be affected since out of approximately 2.9 million gas customers in the State, only 41 customers currently have Discount Agreements with the GCDs. *Id.* at 4.

PSE&G and NJNG state that not only is a rulemaking not necessary under *Metromedia*, it would not serve the Board's objectives. As in their initial comments, PSE&G and NJNG instead recommend that the Board permit each GDC to file a proposed tariff setting forth the procedures necessary for a customer to obtain a discount. The tariff process would provide the flexibility to meet individual customer needs while permitting two opportunities for review, when the tariff is filed and when the utility proposes to offer the discounted rate. This would also provide customers with certainty. *Id.* at 7.

PSE&G and NJNG assert that N.J.A.C. 14:3-1.3(e) is not limited to bypass scenarios. Rather, the regulation contemplates that there may be other reasons the utility or customer is requesting a discounted rate. The Board's decisions have been instrumental in promoting the economic policies of the State, and the Board should continue to have the flexibility to offer

incentives in appropriate circumstances. Id. at 9.

NJLEUC

NJLEUC states that the Board has permitted Discount Agreements and tariff provisions with negotiated rates for many years and for a number of reasons, with input from Board staff and Rate Counsel. The policy behind these discounts is predicated on the recognition that the State and other ratepayers would be economically harmed if “at risk” customers left the utility distribution system. NJLEUC IC at 2. NJLEUC asserts that although only certain customers directly benefit from discounted rates, the rates are structured in a manner that provides benefit to all customers, whose rates would otherwise increase as a consequence of the loss of the load of at-risk customers to bypass, load reduction or departure from the State making discounted gas distribution rates appropriate and desirable from both legal and policy perspectives. Id. at 3. Moreover, there is ample precedent for the negotiation of discounted gas utility distribution rate agreements between utilities and their customers, and it is imperative that the utilities and the Board remain responsive to the needs of the business community. Id. at 4.

NJLEUC urges the Board to continue to permit “evergreen” clauses on a prospective basis since such agreements give companies the necessary certainty that is required to support a company’s long term decision to forego an opportunity to bypass the utility system or to relocate to another a State. The Board could determine going forward, using reasonable criteria consistently applied, whether a customer’s request for evergreen treatment of a discount agreement is necessary and appropriate. With regard to current “evergreen” contracts, NJLEUC argues that there is no legal or policy basis for the Board to now interfere with, or amend, the contractual rights of customers whose agreements were negotiated and approved by the Board. Id. at 5. In addition, NJLEUC maintains that it is clear that the Board does not have the authority to now re-open and amend customer discounted rate agreements that were reviewed by Board staff and Rate Counsel and approved by the Board without violating the Contracts Clause. Id. at 9. The Board may request that the utilities provide notice of decisions to terminate or continue for informational purposes only.

While, NJLEUC believes that the Board has properly permitted the negotiation of Discount Agreements for many years, NJLEUC suggests that the Board promulgate a uniform set of guidelines to be applied consistently by each GDC on a prospective basis, to address customer requests for discounts predicated on bypass, competitive pressures, policy reasons or other circumstances. Id. at 12. Guidelines should also be developed with regard to formulas to calculate the rates to be charged to customers deemed eligible for discounted rate treatment. NJLEUC further suggests that the criteria and process to be adopted should be the subject of a rulemaking. Ibid.

NJLEUC urges the Board to fully utilize the leverage afforded by discounted rates and charges as a tool to promote energy efficiency, environmental, economic development and job creation goals). Id. at 15. NJLEUC cites the NJNG tariff which includes an economic development service classification that provides discounted commodity and demand charges to customers, and a service classification for Fostering Environmental and Economic Development (“FEED”) Service. Under FEED, a new customer must meet certain criteria in order to get the benefit of the discounts. NJLEUC commended NJNG for implementing these programs and suggests the Board direct other utilities to develop similar offerings. If the Board chooses to act on this recommendation, NJLEUC contends that a rulemaking would not be necessary since these programs could be founded under the utility’s tariff. Id. at 16.

NJLEUC has consistently argued that the SBC is a non-bypassable charge that must be paid by all customers of the State's electric and natural gas utilities. No waiver or exemption exists under current law, a position supported by an opinion issued by the Office of Legislative Services ("OLS") for Senator Bob Smith⁵. Id. at 17. According to NJLEUC, State law allows the Board to mitigate the impact of RGGI and CAC surcharges on customers. Id. at 24. While NJLEUC maintains that all customers must pay the SBC, EDECA and its legislative history underscore that different SBC rates may be charged to different customers as the Board deems appropriate, a position NJLEUC maintains is supported by the OLS Legal Opinion. Thus, NJLEUC urges that consistent with law, the Legislative intent and goals set forth in EDECA, current State energy and economic development policies, the Board may authorize certain customers, or customer classes, to pay reduced SBC costs as a mean to foster State policy. Id. at 27.

NJLEUC would like the Board to permit large energy users to self-invest in energy efficiency, conservation, and renewable projects as a way for the State to further its policy goals. Those customers that engage in these types of projects would then be given a discount on the SBC. Similar treatment could also be afforded to the RGGI and CAC charges. Additionally, NJLEUC offers three other proposals: an opt out provision, a surcharge "phase out" provision, and a "hard cap" provision. Id. at 29.

In its reply comments, NJLEUC agrees with the utilities and generators that the Board has broad legal authority to permit utilities and customers to negotiate discounted rates in circumstances that are deemed appropriate. NJLEUC RC at 1. As for Rate Counsel's opposition to the Board's discount practices, NJLEUC takes issue with what it sees as a narrow view of the Board's authority. Id. at 2. NJLEUC maintains that allowing some form of discounted rates through negotiations is consistent with the Board's longstanding policy to allow rate discounts to prevent physical and economic bypass of the distributions system, providing necessary financial relief to the businesses and to ratepayers who would otherwise be required to pay more of the utilities' costs to compensate for loss of customers. Id. at 3.

NJLEUC finds Rate Counsel's opposition to the Board's practice of approving special rates for customers that threaten economic bypass or for other reasons surprising in light of the State's economic development policies and current financial challenges. Id. at 4. As for Rate Counsel's argument that the Governor or Legislature, not the Board, should provide promote economic development policy, NJLEUC claims the Legislature has spoken on this subject in the Flex Rate Act and EDECA which favor the use of discounted utility rates to achieve the State's economic development goals. Rate Counsel offers no rational basis for distinguishing between discounts designed to retain a business by reducing its costs as to physical bypass and between those designed to retain a business that might otherwise leave the State. Id. at 5.

While NJLEUC would like more transparency and consistent standards for those customers submitting a bypass application, it does not advocate for the adoption of "uniform standards" and does not believe that Rate Counsel has offered any evidence to suggest that the grant of discounts based on bypass of large customers has been abused. Id. at 6. NJLEUC agrees with the utilities that each bypass opportunity is unique and flexibility is needed to evaluate each

⁵ Office of Legislative Services Legal Opinion addressed to Senator Bob Smith, dated May 27, 2010, attached to NJLEUC IC.

instance. Id. at 7.

NJLEUC also agrees with the GDCs that long term certainty with regard to Discount Agreements is appropriate and lawful once those agreements are approved by the Board. NJLEUC believes that these agreements benefit both utilities and ratepayers by assuring that customers who forego bypassing the distribution system remain on the system for an extended period of time. Ibid. Rate Counsel would require that, under both existing and future contracts, the utility be required to file a petition and obtain Board approval before extending a contract under an evergreen provision. NJLEUC believes that this argument ignores the fact that all Discount Agreements were reviewed by the Board and Rate Counsel prior to approval, and that Rate Counsel has not identified any instance in which a contract has been improperly extended. Id. at 8. NJLEUC asserts that such contracts once approved cannot be modified absent extraordinary circumstances. Id. at 9.

While NJLEUC acknowledges that bypass determinations are made on a case-by-case basis, based on the unique circumstances of each case, it reiterates the need to adopt clearly articulated, consistent and transparent rules and procedures for rate discount candidates to fully apprise candidates of the required proofs. Id. at 11. NJLEUC is open to discuss whether the inclusion of a generalized set of uniform criteria and procedures could be included in the utilities' tariffs or in a Board order rather than in a rulemaking. However, NJLEUC opposes Rate Counsel's recommendation that all applications for Discount Agreements be treated as contested cases as erecting a significant procedural hurdle that will prevent the quick response necessary to meet competitive challenges to prevent load from leaving the system. Id. at 12.

NJLEUC and the utilities agree that the Board and the Legislature have played an historical role in fostering economic development through the Board's ratemaking authority. None of the cited authorities limit the Board's authority to approved discounted rates to customers solely to bypass situations. SJG and NJNG have adopted specific economic development tariffs, and NJLEUC encourages these efforts and urges the Board to actively pursue the establishment of additional programs to foster the economic health of the business community. Id. at 14. However, NJLEUC does not support providing discounts to generators solely because other generators receive a discount. As with all other applications for Discount Agreements, a generator should be required to prove that the requested is justified under the established criteria. Id. at 16.

With respect to the various clauses, NJLEUC agrees with the utilities that SBC and RGGI relief may and should be afforded to customers in appropriate circumstances. Id. at 19. NJLEUC takes issue with Rate Counsel's positions on assessment of the SBC and RGGI charges, and believes that apportionment should be guided by dictates of fairness, not strictly on a usage basis, and should be limited as recommended in its initial comments. Id. at 21.

DISCUSSION AND FINDINGS

As stated at the outset, the PSE&G base rate case was the catalyst for this Generic Proceeding which was intended to focus on a fairly limited set of circumstances: if and under what conditions should the Board continue to approve Discount Agreements for GDCs. It is appropriate for the Board to review its past practice before determining whether those practices should continue or whether change is needed.

The Board solicited input from all stakeholders, including the GDCs, customers and Rate Counsel, to adequately evaluate the appropriateness of allowing gas utilities to continue to offer discounted distribution rates in New Jersey, and to consider the creation of standards that would determine whether or not a gas distribution customer may request a reduced rate, based on documented criteria, as well as to consider mandating statewide uniformity in contracting terms and conditions for such discounts. The information provided in this proceeding lends perspective on the issues to be addressed. There currently exist 41 Discount Agreements which have been in effect for varying periods over the last two decades. In contrast, the Draft Energy Master Plan indicates that there are approximately 2.9 million gas customers in the State⁶.

However, it is important to evaluate whether on a going forward basis even a small segment of the customer population should be permitted to receive utility service at rates other than those paid by other members of the relevant rate class as set in each utility's base rate case, and published in each utility's tariff. As clearly stated in the Notice, the Generic Proceeding is intended to look to the future to help the Board structure its policies for application after the date of this Order. With one exception discussed below, this Order will not address the rights of parties to currently existing contracts as those rights can only be addressed within a contested case after notice to the parties.⁷

The courts have recognized that the Board has broad discretion in the exercise of its Legislatively delegated rate making authority, In re Public Service Electric and Gas Company's Rate Unbundling, Stranded Costs and Restructuring Filings, 167, N.J. 377, 384 (2001) ("PSE&G Unbundling"). In determining whether to approve any rates, under a tariff or under a special contract, the Board is guided by the statutes and by certain time honored principles. Public utility rates are valid so long as they enable the utility to operate successfully, maintain its financial integrity, attract capital and compensate its investors for the risk assumed. FPC v. Hope Natural Gas Co., 320 U.S. 591 (1944). On the other hand, public utility rates can only be valid if they are "just and reasonable," N.J.S.A. 48:2-21, and are not "unjustly discriminatory or unduly preferential." N.J.S.A. 48:3-1.

Within this framework, the Board turns to the issues presented to the stakeholders in the Generic Proceeding.

Authority of the Board to Approve Discounted Rates

As stated above, and not disputed by any of the stakeholders, the Board's general statutory powers under N.J.S.A. 48:2-21 and N.J.S.A. 48:2-13 provide it with the authority to fix rates and to supervise the property and activities of the regulated utilities. Nothing in the statutes dictates the exact methodology by which the Board establishes utility rates, as long as the result is just and reasonable. The Board has a history of authorizing discounted gas utility rates when circumstances warrant deviation from the Board approved tariff, and has enacted a regulation that outlines the procedure and proof required for approval of special contracts. N.J.A.C. 14:3-1.3(e). The courts have recognized the authority of the Board to permit utilities to establish rates by contract subject to the approval of the Board.⁸ In their comments the stakeholders

⁶ Draft Energy Master Plan, section 5.1. June 7, 2011.

⁷ See discussion of the renewal of contracts with evergreen clauses.

⁸ In re Application of the Borough of Saddle River, 71 N.J. 14, 25 (1976).

provided examples of instances where the Board approved special contracts including when there was a threat that the customer would otherwise bypass the distribution system, but also when the utility wished to implement a new service, in each case finding that there were benefits to the other customers of the utility. See, In re Cogen Technologies Linden Venture, L.P., PSE&G and Elizabethtown Gas Company, Order Acceptance Stipulation, GM90090949 (12/23/1991); In re Petition of New Jersey Natural Gas Company for Approval of Forked River Service Agreement, GE90040254 (5/29/1991).

In this proceeding, no party has contested the authority of the Board to allow discounted rates where a customer has demonstrated that it can otherwise bypass the distribution system and connect directly to an interstate pipeline. Rate Counsel has questioned whether the Board has the authority to approve discount gas rates for reasons other than physical bypass threats. While physical bypass has, in many cases, been the rationale for Board approval of Discount Agreements in the past, the Board has considered and approved discounts based on other factors. For example, the Board approved a discounted gas rate for Huntsman Polypropylene Corporation⁹ as the company indicated it would have to shut down its operations if it could not realize a rate discount which would have resulted in job losses and a broad reaching negative impact on the local community. In another example, the Board approved a Discount Agreement where the utility maintained that doing so preserved an additional benefit, cost effective peaking service for the company's firm gas customers. In re Application of PSE&G for Approval of an Amendment to the Gas Purchase Agreement Currently Existing between It and North Jersey Energy Associates, GM03080643 (11/5/2003). The Board has, as discussed above, approved tariff provisions in SJG's tariff that allow, subject to Board approval, discounting of rates to new and existing customers.

The Board can find nothing in the statutes that would support limiting the Board's authority to permit Discount Agreements to bypass situations, and the Board can find nothing in the legislative history cited by stakeholders that supports such a limitation. See, PSE&G Unbundling, 167 N.J. 377,383. Indeed, the New Jersey Supreme Court has specifically recognized that the Board considers economic factors in making its decisions. See, In re Petition of South Jersey Gas Company Against Sunolin, 116 N.J. 251 (1989).

The Board is not persuaded that the recent ruling in Centex¹⁰ holds otherwise. The Appellate Division recognized in Centex that the Legislature, in Title 48, intended to delegate the widest range of regulatory power over public utilities to the Board, and the incidental powers necessary to fulfill its statutory mandate. In particular, the Appellate Division recognized the Board's broad power to regulate economic aspects of utilities and the Board's broad discretion over ratemaking. Id. at 265. The Appellate Division, however, cautioned that an agency's construction of its authority under the statutes cannot constitute an "extreme departure" from the purpose of the statute or give the statute greater effect than its language allows. In this context, construing the Board's general statutory powers as allowing for Board consideration of a variety of factors in approving discounted gas rates does not constitute an "extreme departure" from the language of the statute nor does it give the statutory provisions mentioned a greater effect than their language allows. In fact, any Board determination that a discount rate is just and reasonable may not be based exclusively on one factor (i.e. threat of physical bypass) but on the case specific set of circumstances that justify such an exceptional treatment

⁹ In the Matter of the Joint Petition of South Jersey Gas Company and its Customer for Approval of a New Service Agreement, 1997 WL 602675.

¹⁰ 411 N.J. Super 244, 254 (App. Div. 2009).

and take into account the impact on the utility's other ratepayers. N.J.A.C. 14:3-1.3(f).

The Board disagrees with the implication that by their very nature Discount Agreements are subsidized by other ratepayers. In by-pass cases there is, almost by definition, no subsidization since the primary objective of granting a discount is to avoid losing revenues from the potential by-pass customer with the fixed costs eventually being assumed by the remaining customers. For reasons other than by-pass, e.g. South Jersey Gas' EGS-LV rate discount provision, the Board requires that the proposed rate produce revenue that, at a minimum, results in a return that equals the class average return. It is critical to note that absent a discount, revenues would either drop, in the case of the loss of an existing customer, or additional revenues would not materialize, in the case of a new customer or an expansion of service to an existing customer. If those lost revenues exceed the incremental cost of maintaining or expanding service or providing service to a new customer, the remaining customers will eventually have to make up for this lost revenue as the fixed costs of the system would be spread over lower throughput.

Evergreen Provisions

The Board agrees that so called "evergreen" provisions have been part of previously approved Discount Agreements. No stakeholder has provided evidence that the Board's current approach towards the approval and implementation of evergreen provisions has harmed ratepayers. To avoid unnecessarily burdensome requirements, the Board will not direct the utilities to submit petitions for Board approval of renewals of approved Discount Agreements pursuant to existent evergreen provisions.

However, the Board does support the recommendations made by Elizabethtown and SJG which advocated requiring the gas utility to provide advance written notice prior to the expiration of the primary term of the contract. The Board believes requiring a notice is more appropriate and would not amount to contract impairment because no party's rights under the contract would be changed by such Board action. On a going forward basis, the Board will continue to review all phases of the proposed Discount Agreement, including any proposed evergreen provision, with input from Rate Counsel, as part of the entire deal to determine whether the agreement is in the best interests of the utility and its ratepayers.

Criteria for Discount Agreements and Rulemaking

Currently, the Board's regulations under N.J.A.C. 14:3-1.3 set up filing requirements for petitions for special rate contracts but do not establish specific eligibility criteria for customers seeking approval of discount rates. The Board must apply general ratemaking criteria when approving any discount rates, and must find that the discount is just and reasonable and not unduly discriminatory or preferential; nothing in the statutes dictates the methodology the Board must apply in making those determinations. On the contrary, the courts have recognized that the Board must have flexibility in choosing the appropriate approach for resolving the complex problems presented in the exercise of its jurisdiction. "Generally, an administrative agency has discretion to exercise its statutory authority either by adjudication or rule-making. Case-by-case determinations are preferable where, as here, it is doubtful whether any generalized standard could be framed which would have more than marginal utility." In re Dept. of Community Affairs Order of March 15, 1988, 232 N.J. Super. 136,143 (App. Div. 1989) (citations omitted). The Board is persuaded that this is particularly appropriate when dealing with Discount Agreements, and that rulemaking is not required.

Rate Counsel has argued that the Board must establish criteria specifying the factual findings that are required to determine whether physical bypass is feasible. Rate Counsel opposes the approval of discount rates based upon factors other than verifiable physical bypass but states that if the Board decides to consider other factors as the basis for Discount Agreements, the criteria and process for considering those factors should also be established by rulemaking. Furthermore, according to Rate Counsel, the Metromedia standards require rulemaking in this instance and thus the Board should reject other stakeholder proposals to include discount criteria in tariffs or to continue with the current case-by-case approach.

In Metromedia the Supreme Court of New Jersey¹¹ listed six factors that characterize administrative rules, and established that an agency determination must be considered an administrative rule and thus rendered through rulemaking when all or most of these factors are present. The Board believes that the Metromedia factors do not apply to the Board's determinations in this Order.

First, Metromedia requires that the Board action be intended to have wide coverage encompassing a large segment of the regulated or general public, rather than an individual or a narrow select group. In this case, the Board is not establishing widely applicable criteria for approving discount rates. The Board is not departing from the general rule that it has followed and which is already embodied in N.J.A.C. 48:3-1.3: the utility's tariff provides the terms and conditions of service and special contracts are only permissible when specific circumstances make a different rate treatment just and reasonable.

Second, Metromedia requires that the Board action be intended to be applied generally and uniformly to all similarly situated persons. However, there is nothing general or uniform about the situations that the Board has found to satisfy the requirements for Discount Agreements. Rather, as exceptions to the general rule, the Board recognizes the case-specific nature of discount agreements, and the need to consider all the unique factors and circumstances leading to a Board finding that a Discount Agreement is just and reasonable. This has been the ongoing Board policy for many years.

Third, Metromedia requires that the action be designed to operate only in future cases, that is, prospectively. Certain aspects of this Order will apply prospectively. In the future, the Board will require: (i) that the GDCs seek Board approval to renew or extend the term of discount rate agreements approved by the Board after the date of this Order; and (ii) that customers applying for discount rates on the basis of possibility of physical bypass file certain information to be considered by the Board. Neither of these prospective changes is significant enough to require a rulemaking process.

Fourth, Metromedia requires that the Board's action prescribe a legal standard or directive that is not otherwise expressly provided by clearly and obviously inferable from the enabling statutory authorization. As previously discussed, the Board believes it has statutory authority to approve Discount Agreements based on the potential to bypass the utility's distribution system and other economic factors, and has utilized this authority in the past. This proceeding is looking at means to further clarify the manner in which the Board exercises its statutory authority on this matter, not at establishing new legal standards.

¹¹ See, Metromedia Inc. v. Director, Division of Taxation, 97 N.J. 313 (1984).

Fifth, Metromedia requires that the action reflect an administrative policy that (i) was not previously expressed in any official and explicit agency determination, adjudication or rule, or (ii) constitutes a material and significant change from a clear, past agency position on the identical subject matter. The Board has established precedents and practices during the past twenty years of approving Discount Agreements on a case-by-case basis which it currently intends to follow to the extent applicable. Submissions in this Generic Proceeding have not persuaded the Board that any significant or material change to the Board's approach to approving Discount Agreements is needed at this time.

Sixth, Metromedia requires that the Board's action reflects a decision on administrative regulatory policy in the nature of interpretation of law or general policy. This Generic Proceeding has not resulted in the Board making any new policy decisions or reinterpreting the law or general policy. The Board has, however, clarified and affirmed some aspects of the Board's authority in this matter that were questioned during the Generic Proceeding.

Notwithstanding the Board's determination that adoption of generally applicable criteria is not appropriate in the unique situations that arise in discount rate cases, the Board agrees with stakeholders like NJLEUC and ECG that certain standard information should be required from customers seeking to enter into Discount Agreements. The Board will therefore order that each gas utility shall file with the Board tariff sheets that include certain minimum information requirements, as set forth in our findings below, that must be submitted by a customer seeking a discounted rate based on a physical by-pass threat. In addition, we will require that each utility file with this Board tariff sheets that establish criteria it will use to determine whether a customer is eligible for a discounted rate on any other grounds, or in the alternative, explain why it believes its existing tariff provisions are adequate. The Board clarifies that, regardless of the criteria set forth in the GDCs' tariffs, each GDC must seek Board approval for any and all rates that differ from the standard tariff rates.

Authority of the Board to Approve Discounts of SBC, and RGGI Charges

The passage of N.J.S.A. 48:3-60.1 settled the issue of whether these charges apply to the gas and/or gas delivery service used by gas-fired generators to produce electricity sold at resale. The question of the authority of the Board to approve SBC discounts to other customers remains open. N.J.S.A. 48:3-60(a) provides that "the board shall permit each electric public utility and gas public utility to recover some or all of the following costs through a societal benefits charge that shall be collected as a non-bypassable charge imposed on all electric public utility customers and gas public utility customers, as appropriate ..." followed by categories of charges. In interpreting this statute, the Board is guided by the words of the New Jersey Supreme Court:

When considering the meaning of a statutory provision, absent any legislative intent to the contrary, courts must give effect to the language of the provision. When a statute is ambiguous, however, "[w]e are...warranted in placing considerable weight on the construction of the statute...by the administrative agency charged by the statute with the responsibility of making it work.

[PSE&G Unbundling, 167 N.J. 377, 383. (citations omitted).]

The literal interpretation of this language states that the Board must determine the specific costs that are recoverable under the SBC for that electric or gas utility ("some or all of the following costs"), and secondly, must allow these charges to be recovered through a "non-bypassable charge." Nothing in the statute directly addresses the allocation of these non-bypassable charges, and the fact that the SBC is a non-bypassable charge does not in and of itself circumscribe the authority of the Board to adjust the SBC in appropriate circumstances. All customers not otherwise exempt would be paying the SBC, just at different levels

Rate Counsel has argued that any interpretation of N.J.S.A. 48:3-60(a) allowing the Board to adjust the SBC for selected customers at any non-zero amount would be contrary to the legislature's intent to establish a broad-based charge for purposes that benefit society as a whole¹². While the Board agrees that the SBC is a broad-based charge, there is nothing in the statute that shows a legislative intent that the SBC be applied to all customers at the same level, and in practice the SBC charge varies between the utilities. As the agency "with the responsibility of making it work,"¹³ the Board believes that in the appropriate circumstances, it can permit variation from the strict standard rate per therm that has been the norm for assessing the SBC from gas customers.

We will not address in this proceeding NJLEUC's suggestion with respect to varying the SBC rate as a means of encouraging investment in energy efficiency and conservation measures. The focus of this proceeding is discount rate issues, and we address the ability of the Board to also approve discounting of the SBC in that context. The Board has approved a pilot program which provides incentives to larger business and industrial customers by in essence returning some of their previously paid SBC charges when qualifying investments are made. See, In the Matter of the Comprehensive Energy Efficiency and Renewable Energy Resource Analysis for Years 2009—2012; Revised 2011 Programs and Budgets, EO07030203 and EO010110865, Order dated June 20, 2011 at 6.

On the issue of the Board's authority to discount RGGI charges assessed by the utilities for their programs approved by the Board under N.J.S.A. 48:3-98.1, the Board agrees that there is no statutory or regulatory impediment for doing so in the appropriate circumstances. However, the Board underscores that any requested adjustment must be justified and must satisfy the previously articulated standards for approval of rates.

As clearly stated, the focus of the Generic Proceeding is strictly prospective. This was initiated and conducted as a stakeholder proceeding to gather information and receive input from interested parties. This was not an adversarial proceeding, and was not intended to modify the rights of parties under currently existing Discount Agreements which can only be done within a contested case.

Therefore, the Board **HEREBY AFFIRMS** that the relevant statutes discussed herein provide the Board with sufficient authority to approve Discount Agreements whether because there is a threat of physical bypass or because other factors warrant this special treatment provided that the resulting rates are just and reasonable.

¹² Rate Counsel RC at 16-19.

¹³ NJLEUC had submitted an OLS opinion that supports the Board's conclusion. However, it is the Board and not the OLS that has the both the authority and the expertise to interpret the provisions of EDECA.

In an effort to maximize transparency, the Board **HEREBY DIRECTS** the GDCs to provide written notice to the Board and Rate Counsel ninety (90) days prior to the earlier of the following for currently existing Discount Agreements: the expiration date of the primary term of any Discount Agreement that contains an evergreen provision or the date by which the utility must give notice of its intent not to extend under the initial exercise of the evergreen provision. For any future Discount Agreements, any proposed evergreen provision will continue to be reviewed as part of the process under N.J.A.C. 14:3-1.3 (f).

The Board further **FINDS** that generally applicable criteria cannot be applied in discount rate cases because of the specific nature of gas discount rates and the unique circumstances surrounding each customer seeking to enter into a Discount Agreement. Therefore, the Board **FINDS** that a further rulemaking process is not appropriate in this instance, and that the current rule in N.J.A.C. 14:3-1.3, as clarified by this Order, provides a sufficient procedural framework for review of proposed Discount Agreements.

To create more transparency, the GDCs are **HEREBY DIRECTED** to file proposed tariff sheets within 30 days of this Board Order that set forth the minimum information that a customer must submit to the GDC when requesting a discounted rate due to the ability to bypass the GDC's facilities. At a minimum, the following information should be provided ("Minimum Filing Requirements"): (i) a statement from the interstate pipeline that the proposed interconnection is operationally viable, that sufficient capacity is available and the pipeline would serve the party if requested; (ii) maps or flow diagrams should identify the route of the pipeline from the interconnection with the pipeline and the customer's site, the size of the connecting pipeline and any other appurtenant facilities required; (iii) engineering studies related to the estimated cost(s) to complete construction; and (iv) status of all reliability and environmental permits from State and Federal agencies. This standard information filing requirement does not amount to customer eligibility criteria or criteria towards Board factual findings on discount cases and, therefore, does not require rulemaking. Any resulting agreement will be subject to analysis under N.J.A.C. 48:3-1.3 (f).

The Board **HEREBY DIRECTS** the GDCs to file proposed tariff sheets, within 30 days of this Board Order, delineating how rate discounts based on circumstances other than physical bypass will be evaluated by the utility, and describing the process for applying for those special rates.

The Board **HEREBY AFFIRMS** that it has the necessary authority to approve SBC and RGGI discounts in appropriate circumstances. The Board agrees with stakeholders that CAC charges should be left out of this proceeding entirely, as well as the issue of RGGI and SBC charges to electric customers that purchase gas and gas delivery services from a public utility to produce electricity sold for resale. Each request must be evaluated on its own merits taking into account the impact on the GDC's other ratepayers, among other factors.

The Board **HEREBY RATIFIES** the decisions made by Commissioner Fiordaliso during the course of the Generic Proceeding for the reasons stated for his rulings.

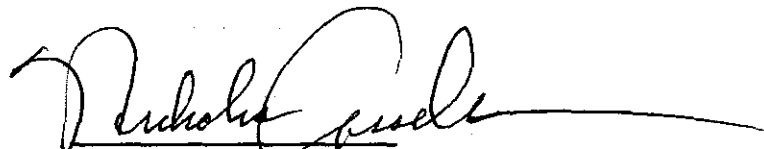
DATED: 8/18/11

BOARD OF PUBLIC UTILITIES
BY:


LEE A. SOLOMON
PRESIDENT


JEANNE M. FOX
COMMISSIONER

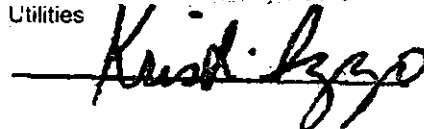

JOSEPH L. FIORDALISO
COMMISSIONER


NICHOLAS ASSELTA
COMMISSIONER

ATTEST:


CARMEN DIAZ
ACTING SECRETARY

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



IN THE MATTER OF A GENERIC PROCEEDING TO CONSIDER PROSPECTIVE
STANDARDS FOR GAS DISTRIBUTION UTILITY RATE DISCOUNTS AND ASSOCIATED
CONTRACT TERMS AND CONDITIONS
BPU DOCKET NOS. GR10100761 & ER10100762

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