Agenda Date: 12/18/13
Agenda Item: 2C

STATE OF NEW JERSEY

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

ENERGY

IN THE MATTER OF THE PETITION OF SOUTH JERSEY GAS COMPANY FOR APPROVAL OF A STANDARD GAS SERVICE AGREEMENT (EGS-LV) AND A STANDARD GAS SERVICE AGREEMENT (EGS-LV) ADDENDUM; AND TO MODIFY RATE SCHEDULE EGS-LV- PHASE II	)	ORDER
	)	DOCKET NO. GO11100761

Parties of Record:

Ira G. Megdal, Esq., Cozen O'Connor on behalf of South Jersey Gas Company
Stefanie A. Brand, Esq., Director, New Jersey Division of Rate Counsel
Thomas P. Scrivo, Esq., McElroy, Deutsch, Mulvaney & Carpenter LLP on behalf of ACI
Martin C. Rothfelder, Esq., PSEG Services Corporation on behalf of Public Service Electric and Gas Company

BY THE BOARD:

BACKGROUND

In April 2007, Revel Entertainment Group, LLC. ("Revel") issued an RFP to provide energy services to the Revel Casino and Entertainment Complex ("Revel Casino"), a casino that Revel planned to construct in Atlantic City, NJ. South Jersey Gas Company Initial Brief ("SIB"), Wasnak Cert. at ¶ 6. DCO Energy, LLC. ("DCO") and Marina Energy, LLC. ("Marina") discussed the RFP with Revel, Id. at ¶ 7, and in December 2007, created Energenic - US, LLC ("Energenic"), a Delaware limited liability company owned 50% by DCO and 50% by Marina, for the purpose, among other things, of submitting a bid in response to Revel's RFP. Id. at ¶ 3, 7.

Energenic submitted a successful bid to Revel. South Jersey Gas Company Reply Brief ("SRB") at 5, ¶ 5. Under the bid, Energenic was required to design and construct a Central Utility Plant ("CUP"), SIB, Wasnak Cert. at ¶ 11, which would provide hot and chilled water and electricity to the Revel Casino, as well as all utility interconnections, other than natural gas service for restaurants. Id. at ¶ 23.[1] The CUP is located on property contiguous to the Revel Casino. Ibid.

[1] While some of the information used in this Order has been claimed to be confidential information on the basis that it is "competitively sensitive," no information about rates or finances will be disclosed. The Board is not persuaded that the mere existence of an agreement between two parties without disclosure of the financial details is entitled to such protection.

Energenic formed a wholly-owned subsidiary, ACR Energy Partners, LLC. ("ACR"). Id. at ¶ 17. On February 17, 2011, ACR and Revel entered into an energy sales agreement ("ACR/Revel ESA"), in which ACR agreed to design, construct, finance, and operate the CUP. Ibid. The ACR/Revel ESA also contemplated the construction and completion of a combined heat and power ("CHP") plant, which would provide electricity and hot and chilled water to the CUP. Id. at ¶ 25. Energenic created a second wholly-owned subsidiary, ACI Energy Partners ("ACI"), for the sole purpose of owning the CHP plant. Ibid. The CHP is located on property contiguous to the CUP. SRB at 4, ¶ 3.

On August 5, 2011, ACI entered into a Standard Gas Service Agreement with South Jersey Gas ("South Jersey") under South Jersey's Electric Generation Service-Large Volume ("EGS-LV") Rate Schedule and a Standard Gas Service Agreement ("EGS-LV") Addendum in October 2011 ("South Jersey/ACI Agreement"). SIB, Wasnak Cert. at ¶ 31. Pursuant to the South Jersey/ACI Agreement, ACI agreed to purchase natural gas distribution service from South Jersey at negotiated rates pursuant to Special Provision (e) of Rate Schedule EGS-LV. Ibid.

On July 17, 2012, ACI and ACR entered into an energy sales agreement ("ACI/ACR ESA"). Id. at ¶ 27. Pursuant to the ACI/ACR ESA, ACR agreed to purchase all of the electricity and hot and chilled water generated by ACI's CHP plant. Ibid.

To summarize, the series of transactions at issue involves the following parties: Revel owns and operates the Revel Casino. Energenic is owned 50% by DCO and 50% by Marina. Marina is owned indirectly 100% by South Jersey Industries, Inc. Id. at ¶ 3. ACI and ACR are both wholly-owned subsidiaries of Energenic. ACR owns and operates the CUP, and ACI owns and operates the CHP plant. South Jersey is a gas public utility. South Jersey Industries owns 100% of the common stock of South Jersey. Ibid.

The transmission of energy to the Revel Casino occurs as follows. ACI obtains gas from South Jersey. ACI's CHP plant utilizes the gas to generate electricity. Id. at ¶ 28. Secondarily to the electric generation, the CHP plant recaptures the waste heat, a by-product of the generation process, and uses the heat to produce hot and chilled water. Ibid. ACI delivers the electricity and hot and chilled water from the CHP plant to ACR's CUP. Id. at ¶ 26. A heating and cooling loop exists between the CUP and the Revel Casino. Id. at ¶ 23. Revel has heat exchangers which extract the heat and cooling from the hot and chilled water provided by the CUP. Ibid. ACR's CUP also transmits electricity from Atlantic City Electric and ACI's CHP to the Revel Casino. Id. at ¶ 5, ¶ 24.

Long-Term Capacity Agreement Pilot Program Act

The Long-Term Capacity Agreement Pilot Program Act ("LCAPP Act"), L. 2011, c. 9 (2011), became effective on January 28, 2011. It included a provision, codified as N.J.S.A. 48:3-60.1 ("Section 60.1") which states:

> Notwithstanding the provisions of any other law, rule, regulation, or order to the contrary, gas public utilities shall not impose a societal benefits charge pursuant to section 12 of P.L.1999, c.23 (C.48:3-60), or any other charge designed to recover the costs for social, energy efficiency, conservation, environmental or renewable energy programs, on natural gas delivery service or a commodity that is used to generate electricity that is sold for resale.

Prior to the adoption of Section 60.1, such sales were subject to the societal benefits charge ("SBC") pursuant to N.J.S.A. 48:3-60(a)(1), and subject to charges such as the Energy Efficiency Tracker ("EET") pursuant to N.J.S.A. 48:3-98.1(b).

By Secretary's letter dated June 21, 2011, the New Jersey Board of Public Utilities ("Board") set forth a procedure to effectuate Section 60.1, which requires gas public utilities to obtain an annual certification ("Annual Certification") from each customer seeking exemption from paying the SBC and the other charges described in Section 60.1. The Annual Certification requires the customer to certify what percentage of the gas it purchased is used to generate electricity that is "sold for resale" for purposes of Section 60.1. SIB, Wasnak Cert. at ¶ 33.

PROCEDURAL HISTORY

South Jersey filed a petition for approval of the South Jersey/ACI Agreement on October 28, 2011. The New Jersey Division of Rate Counsel ("Rate Counsel") and Board Staff propounded discovery upon South Jersey. In addition to the written discovery, South Jersey, Rate Counsel, and Board Staff held discovery conferences. South Jersey's discovery responses stated that it would be collecting the SBC and EET. Rate Counsel Reply Brief ("RRB") at 12. However, on March 27, 2012, South Jersey circulated a copy of ACI's Annual Certification to Rate Counsel and Board Staff stating that 100% of the gas supplied by South Jersey to ACI is used to produce the electricity that ACI's CHP generated which ACI asserts is sold for resale for purposes of Section 60.1, Rate Counsel Initial Brief ("RIB") at 6, and revised its discovery response to reflect the omission of SBC and EET charges. RRB at 12, n.7

On August 2, 2012, South Jersey, Rate Counsel and Board Staff executed a stipulation ("Stipulation") that stated that the parties agreed on the terms of South Jersey's gas service with ACI pursuant to South Jersey's tariff and the terms of the South Jersey/ACI Agreement. The Stipulation also stated that the parties did not agree on whether the SBC and EET charges could be imposed on South Jersey's gas service to ACI but that the parties agreed to submit to the Board for separate decision the issue of whether South Jersey's sales of gas to ACI are subject to the SBC and EET charges and, if not, whether the sales of electricity connected with ACI's CHP facility are subject to the electric SBC and EET charges. The Stipulation was approved by the Board in an Order dated August 15, 2012 ("August 15 Order") which also designated President Hanna as the presiding officer on the reserved issue.

A procedural schedule for briefing was established in an August 20, 2012 Order issued by President Hanna, which was subsequently amended by an Order dated September 25, 2012, which also granted ACI's Motion to Intervene and Public Service Electric and Gas Company's Motion to Participate.

On September 28, 2012, South Jersey and ACI filed briefs and certifications. On November 27, 2012, Rate Counsel filed its initial brief. South Jersey and ACI propounded discovery upon Rate Counsel, which Rate Counsel responded to on December 14, 2012. On December 20, 2012, South Jersey filed a reply brief and a supplemental certification. On December 21, 2012, ACI filed a reply brief. On January 18, 2013, Rate Counsel filed a reply brief.

POSITIONS OF THE PARTIES

SOUTH JERSEY

South Jersey contends that the series of transactions between South Jersey, ACI, ACR, and Revel fall within the language of Section 60.1. According to South Jersey, "ACI purchases natural gas services that it uses to generate electricity that is sold to ACR for resale to Revel." SIB at 13. Thus, South Jersey argues, Section 60.1 prohibits it from collecting an SBC on sales of gas to ACI. South Jersey also argues that Section 60.1 prohibits it from collecting EET charges on such sales, because EET charges fall within the scope of the phrase "any other charge designed to recover the costs for social, energy efficiency . . . programs . . . ." SIB at 13 (quoting Section 60.1). In response to Rate Counsel's claim that the "tariff governing the EET charge does not include a similar clause exempting EGS-LV gas sales customers from the EET charge based on the application of N.J.S.A. 48:3-60.1," RIB at 11, South Jersey argues that "the mere fact that [South Jersey's] tariff governing the imposition of the EET charge does not provide for an exemption of the EET is irrelevant. The Act trumps [South Jersey's] tariff." SRB at 13.

In response to Rate Counsel's argument that prohibiting South Jersey from collecting the charges does not further the legislative intent underlying Section 60.1, RIB at 8-9, South Jersey argues that the legislative intent behind Section 60.1 is irrelevant because the plain meaning prohibits South Jersey from collecting the charges on its sale of gas to ACI. SRB at 8-10. In addition, South Jersey advances two arguments against Rate Counsel's position that the Legislature only intended for Section 60.1 to prohibit a gas public utility from collecting an SBC in cases where another entity in the distributional chain is already collecting an SBC. RIB, at 8-9. First, South Jersey argues that assuming Rate Counsel is correct in that the legislative intent of Section 60.1 "was to avoid a double recovery of the SBC," then Section 60.1 "can only apply, in theory, to electric generation in New Jersey that is sold into the grid and ultimately resold to an end-use customer in New Jersey." SRB at 11. South Jersey argues that it is "illogical" to suppose that "[t]he legislature could . . . have intended to protect [this] abstract class of customers." Ibid. Second, South Jersey argues that the "SBC . . . charges collected by . . . gas utilities are fundamentally different and not interchangeable with the charges collected by the electric utilities" because they are allocated toward different programs. Ibid. For example, South Jersey asserts that a portion of an SBC collected by a gas public utility is allocated towards charges imposed pursuant to the Remediation Adjustment Clause, which "is unique to natural gas utilities." Ibid. What this demonstrates, according to South Jersey, is that where a gas public utility and an electric public utility are involved in the same distributional chain, the fact that both utilities collect SBCs does not amount to a double recovery. Since there is no double recovery, it is implausible to suppose that Section 60.1 was intended to prevent double recovery. Ibid.

With respect to Rate Counsel's argument that the term "non-bypassable" in N.J.S.A. 48:3-60(a)(1) requires that at least one entity in the distributional chain collect an SBC, RIB at 9, South Jersey asserts that the "Board has previously approved discounted contract rates that specifically exclude collection of the SBC despite the 'non-bypassable' . . . provision. . . ." SRB at 13.

Finally, South Jersey argues that the Board cannot require either ACI or ACR to collect SBCs or EET charges. SIB at 13-14. South Jersey cites N.J.S.A. 48:2-13(e) for the proposition that the Board "shall not have the authority to regulate the sale or production of steam or any other form of thermal energy, including hot and chilled water, to non-residential customers." Id. at 13. South Jersey further argues that "neither ACI nor ACR qualify as public utilities within the

general jurisdiction of the Board." Id. at 14. South Jersey supports this position by citing N.J.S.A. 48:3-51 for the proposition that facilities that qualify as either "[c]ombined heat and power facilit[ies]" or "on-site generation facility[ies]" shall not be considered public utilities. Id. at 13-14. In response to Rate Counsel's argument that neither ACI nor ACR can avoid collecting the charges because they are both affiliates of South Jersey, South Jersey argues that "[a]t no point in time did Energenic, nor any of its related entities, contemplate structuring ACI or ACR as separate business entities in order to avoid imposition of the charge clauses . . . ." Id. at 14.

ACI

ACI also argues that South Jersey may not collect an SBC from ACI because the series of transactions between SJG, ACI, ACR, and Revel falls within the language of Section 60.1. ACI Initial Brief ("AIB") at 4-5. Similarly, ACI argues, South Jersey may not collect an EET from ACI because EET charges fall within the scope of the phrase "'charge designed to recover the costs of [sic] . . . energy efficiency . . . programs' (such as the EET Charge) . . . ." Id., at 5 (quoting N.J.S.A. 48:3-60.1) (alterations in original).

In response to Rate Counsel's position that the Legislature only intended for Section 60.1 to prohibit a gas public utility from collecting the charges in cases where another entity in the distributional chain is already collecting the charges, RIB at 8-9, ACI argues that the legislative intent behind Section 60.1 is irrelevant because the plain meaning prohibits South Jersey from collecting the charges on its sale of gas to ACI. ACI Reply Brief ("ARB") at 2-4. ACI further provides two arguments for why Rate Counsel's position on the legislative intent underlying Section 60.1 is incorrect. First, ACI argues, Rate Counsel failed to respond to discovery requests asking Rate Counsel to provide evidence of its position regarding the legislative intent behind Section 60.1. Id. at 6. Second, ACI argues, there is no support for Rate Counsel's double recovery argument in either the legislative findings and declarations contained in LCAPP, Id. at 5 (citing 2011 N.J. Laws, c.9 at Section 1) or in a Statement submitted by the Assembly Telecommunications and Utilities Committee prior to the enactment of LCAPP. Id. at 6.

In response to Rate Counsel's argument that the "non-bypassable" provision in N.J.S.A. 48:3-60(a)(1) should be construed as limiting Section 60.1 to only those cases where another entity in the distributional chain collects an SBC, ACI argues that the phrase in Section 60.1 "notwithstanding the provisions of any other law, rule, regulation, or order to the contrary" means that N.J.S.A. 48:3-60.1 supersedes the "non-bypassable" provision in N.J.S.A. 48:3-60(a)(1). Id. at 7.

Like South Jersey, ACI argues that the Board cannot require either ACI or ACR to collect the charges. AIB at 5-6. ACI supports this position by citing N.J.S.A. 48:3-60(a)(1) for the proposition that SBCs can only be collected by public utilities, and by citing N.J.S.A. 48:3-98.1 for the proposition that EET charges can only be collected by public utilities. Id. at 6. ACI cites N.J.S.A. 48:3-51 for the proposition that neither ACI nor ACR is a public utility. Ibid.

Finally, ACI argues that "imposition of the Clause Charges would have negative impacts on the providers of . . . [CHP] facilities in general, and on the Revel Project in particular." Id. at 6. ACI supports this position by citing the 2011 New Jersey Energy Master Plan (Dec. 6, 2011), which provides that the State is committed to developing CHP facilities, notwithstanding the high capital costs of such facilities. AIB at 7. In regard to the Revel Project, ACI argues that Revel's agreement to buy power from ACR was necessary for ACI to obtain financing for its CHP facility, and that Revel's agreement was based on the lower energy costs made possible by non-assessment of the SBC and EET. Id. at 8. ACI further argues that since the SBC and EET

charges are "variable costs incurred if the CHP operates," imposition of the charges "will increase the number of hours that the project curtails production to avoid financial losses." Ibid.

RATE COUNSEL

Rate Counsel argues that since N.J.S.A. 48:3-60(a)(1) provides that SBCs are "non-bypassable," at least one of the entities in the distributional chain--SJG, ACI, or ACR-- must collect an SBC. RIB at 9. In support of this position, Rate Counsel cites the principle that "[w]hen reviewing two separate enactments, the Court has an affirmative duty to reconcile them, so as to give effect to both expressions of the lawmaker's will." RRB, at 6 (quoting Ramapo River Reserve Homeowners Ass'n v. Borough of Oakland,186 N.J. 439,466-7 [2006]). Rate Counsel argues that the "non-bypassable" provision in N.J.S.A. 48:3-60(a)(1) conflicts with Section 60.1, and that the Board should reconcile this conflict by construing Section 60.1 as only prohibiting collection of the SBC in cases where another entity in the distributional chain is collecting the SBC. RRB at 6. Such a construal is consistent with Section 60.1, Rate Counsel argues, because the legislative intent underlying this section was merely to ensure that in cases where "natural gas is supplied by a gas public utility to power an electric generating facility," ratepayers would not be burdened with a double assessment of the SBC. RIB at 8. Applying this construction of N.J.S.A. 48:3-60(a)(1) and Section 60.1, Rate Counsel argues that Section 60.1 does not prohibit South Jersey from collecting an SBC from ACI because neither ACI nor ACR collects an SBC. Id. at 8-9.

Rate Counsel provides two arguments in support of its position that the "non-bypassable" nature of the SBC requires at least one of the entities in the distributional chain to collect an SBC. First, Rate Counsel cites N.J.S.A. 48:3-51 for the proposition that the legislature's intent in requiring public utilities to contribute toward Social Benefit Funds was "'to provide assistance to a group of disadvantaged customers, to provide protection to consumers, or to accomplish a particular societal goal . . . .'" RRB at 10 (quoting N.J.S.A. 48:3-51). Rate Counsel argues that construing Section 60.1 as allowing every entity in a distributional chain to avoid paying an SBC "could result in only applying the SBC to a smaller subset of ratepayers," which "would defeat the legislative intent to spread the costs of such social programs among ratepayers more generally." Ibid. Second, in response to South Jersey's argument that the "Board has previously approved discounted contract rates that specifically exclude collection of the SBC despite the 'non-bypassable' provision," SRB at 13, Rate Counsel asserts that the Board has only held that it can approve SBC discounts upon deeming such discounts appropriate, not that it can allow an entity to forgo paying the SBC in its entirety. Id. at 7-8 (citing In re a Generic Proceeding to Consider Prospective Standards for Gas Distribution Utility Rate Discounts and Associated Contract Terms and Conditions, Docket Nos. GR10100761, ER10100762, [August 18, 2011]).

Rate Counsel responds to two arguments against its position that Section 60.1 was enacted to avoid double assessment of the SBC. First, Rate Counsel responds to ACI's argument that it has failed to provide any evidence of legislative intent in discovery by stating that "as the New Jersey Legislature rarely bequeaths a 'legislative history' upon a bill's enactment into law, it is precisely the role of the administrative agency charged with implementing the statute to interpret ambiguities in the statute to 'accomplish the Legislature's goals.'" Id. at 9 (quoting In re Public Serv. Elec. & Gas Co.'s Rate Unbundling, 167 N.J. 377, 384 [2001]). Second, Rate Counsel responds to South Jersey's argument that double recovery of an SBC could only occur "in theory, to electric generation in New Jersey that is sold into the grid and ultimately resold to an end-use customer in New Jersey." SRB at 11. Rate Counsel provides an alternative (and impliedly, more realistic) example:

> if an in-state electric generator were subject to the SBC charge, and electricity from that generator was then sold for resale to an in-state retail electric customer who takes service through a regulated electric distribution utility ("EDC"), then the SBC would be collected twice absent the N.J.S.A. 48:3-60.1 exemption.
>
> [RRB, at 9].

Rate Counsel makes three arguments for why SJG must collect EET charges from ACI. First, Rate Counsel argues that while the EGS-LV tariff governing South Jersey's sale of gas to ACI states that customers are not required to pay SBCs where Section 60.1 applies, the "tariff governing the EET charge does not include a similar clause exempting EGS-LV gas sales customers from the EET charge based on the application of N.J.S.A. 48:3-60.1." RIB at 11. Second, Rate Counsel applies its argument regarding "non-bypassable" and double assessment to EET charges. While the "non-bypassable" language in N.J.S.A. 48:3-60(a)(1) only applies to SBCs, and not EET charges, Rate Counsel argues that when the Board gave South Jersey permission to collect EET charges, it "provided that the EET charge was non-bypassable . . . ." RIB at 12 (citing In re SJG, BPU Dkt. Nos. EO09010056 and GO0900059 [July 24, 2009]). Rate Counsel further argues that since neither ACI nor ACR is collecting an EET, Id. at 3, Section 60.1 does not prohibit South Jersey from collecting an EET from ACI. Rate Counsel's third argument for why South Jersey must collect the EET is that since "SJG provided ACI with $1 million for its CHP facility, funded through EET charge collections from SJG's other ratepayers, . . . it would be manifestly unjust for ACI to partake of benefits funded by the EET surcharge while not subject to the charge itself." Id. at 12-13.

Rate Counsel emphasizes that South Jersey, ACI, and ACR are all affiliates. Rate Counsel notes that South Jersey's sale of gas to ACI is subject to Board review as an affiliate transaction pursuant to N.J.A.C. 14:4-3, and argues that "the Board's continuing jurisdiction over that transaction allows it to require collection of the SBC." RRB at 13. Rate Counsel further argues that due to the ease with which parties can add additional sales to a series of transactions by creating affiliated LLCs, "greater scrutiny should be applied for proposed exemptions from payment of the SBC, particularly in cases involving affiliated entities." Id. at 14-15.

Rate Counsel contends that the Board has the authority to require either ACI or ACR to collect the SBC and EET. Rate Counsel supports this position by noting that ACI and ACR are both affiliates of South Jersey, and argues that "[i]f a public utility can simply utilize corporate affiliations to avoid the BPU's jurisdiction, the Board's authority would be severely undermined." RRB at 10. Rate Counsel argues that the premise that ACI and ACR cannot be required to collect the charges, if true, supports the conclusion that South Jersey must collect the charge, because otherwise no entity in the distributional chain would be collecting the charge. Ibid.

In response to ACI's argument that "imposition of the Clause Charges would have negative impacts on the providers of . . . [CHP] facilities in general, and on the Revel Project in particular," AIB at 6-8, Rate Counsel asserts that South Jersey contemplated the imposition of the non-bypassable charges on its gas service to ACI." RIB at 13. Rate Counsel explains that "[a]t the time of the approval of [South Jersey's] proposed modification of its EEP CHP program providing the $1 million incentive to ACI, the documents provided by [South Jersey showed that the SBC and EET were going to be paid by ACI." RRB at 12. RC further asserts that "[i[t was only later - after the entry of the EEP Modification Order - that Rate Counsel learned that [South Jersey] sought to have its gas sales to ACI exempt from the SBC and EET charges." Ibid.

Finally, Rate Counsel requests that the Board implement several prospective measures relating to Section 60.1. First, Rate Counsel requests that the Board "initiate a rule-making procedure to track electricity 'sold for resale' claims and the related gas sales made pursuant to N.J.S.A. 48:3-60.1 to ensure such exempt gas sales do not adversely impact other New Jersey utility ratepayers." RIB at 14-15. Second, Rate Counsel suggests that when a party seeks exemption from the charges pursuant to Section 60.1, the Board should "require that a Petition be filed, which will allow interested parties and the Board the opportunity to review the matter and confirm the applicability of the exemption from paying the SBC to the transaction." RRB at 14, n.8.

DISCUSSION AND FINDINGS

The goal of statutory construction is to effectuate legislative intent in light of the language used and the object sought to be achieved. McCann v. Clerk of Jersey City, 167 N.J. 311, 320 (2001). An act's language is, in most instances, the "surest indicator" of the Legislature's intent. Ibid. N.J.S.A. 1:1-1 provides:

> [W]ords and phrases shall be read and construed with their context, and shall, unless inconsistent with the manifest intent of the legislature or unless another or different meaning is expressly indicated, be given their generally accepted meaning according to the approved usage of the language. Technical words and phrases, and words and phrases having a special or accepted meaning in the law, shall be construed in accordance with such technical or special and accepted meaning.

In construing Section 60.1, the Board notes that the phrase "sale for resale" appears in several statutes governing federal jurisdiction over energy. 15 U.S.C. 717(b) ("Section 717") provides that federal jurisdiction "shall apply . . . to the sale in interstate commerce of natural gas for resale for ultimate public consumption . . . ." 16 U.S.C. 824 ("Section 824") provides that federal jurisdiction "shall apply to the transmission of electric energy in interstate commerce and to the sale of electric energy at wholesale in interstate commerce . . ." and defines "sale of electric energy at wholesale" as "a sale of electric energy to any person for resale." Given that Section 60.1, like Section 717(b) and Section 824, applies to the transmission of natural gas and electricity, the Board is persuaded that the Legislature was aware of the meaning of "sale for resale" and it is therefore appropriate to construe the phrase to have a similar meaning to "sale for resale" in Sections 717(b) and 824.

In construing "sale for resale" in the context of federal jurisdiction, courts and FERC have relied on numerous factors to determine whether a transfer of energy is a sale for resale. In Alexander v. Fed. Energy Regulatory Com., 609 F.2d 543, 546 (D.C. Cir. 1979) ("Alexander"), the court stated that whether the Army's transfer of natural gas to Defense Family Housing ("DFH") was a resale, as opposed to an "interdepartmental transfer within the Army," was a question of law. In concluding that the transfer was not a resale, the court noted that the forms used to complete the DFH transactions used different terminology than the "forms used by the Army when it contract[ed] to sell utility services to a source within the private sector," Id. at 549, and that the metering and billing procedure the Army used for the DFH transactions differed from the metering and billing procedures it used for small commercial users. Id. at 550.

FERC subsequently expanded on the Alexander court's approach in People's Elec. Coop., 84 F.E.R.C. P61,229 (Sept. 16, 1998) ("People's Electric"), and referred to additional factors that are relevant to whether a transfer between entities is a "sale for resale." In People's Electric,

Peoples, a rural electrical cooperative, filed rate schedules and transmission service agreements with FERC for the sale of electricity at wholesale. Id. at 62,104-05. People's claimed that it was selling electricity to the Byng Authority, a municipal trust, and to the Chickasaw Authority, an entity created by a sovereign Indian Nation to provide utility service, for resale to each authority's respective customers. Id. at 62,104. FERC issued an initial decision concluding that People's was not selling at wholesale because the alleged resellers, the Byng Authority and the Chickasaw Authority, were "paper entities," and that People's was actually selling electricity directly to retail customers.[2] However, FERC later reversed the initial decision, and held that "[t]he Byng Authority has the necessary attributes of a retail seller of electric energy," Id. at 62,124, and that the Chickasaw Authority possessed sufficient "indicia of a reseller of electric energy." Id. at 62,130.

In concluding that "[t]he Byng Authority ha[d] the necessary attributes of a retail seller of electric energy," Id. at 62,124, FERC stated:

> It is a separate entity that: (a) has established its own rate schedules and terms and conditions of service; (b) takes title to electric energy before that energy flows to the authority's customers; (c) leases facilities for the provision of electrical service to its customers; (d) with respect to its older customers, leases and controls the facilities used to serve them, and with respect to its newer customers owns the facilities with which it serves them; (e) has a separate power sales agreement with each customer; (f) individually meters the residences and the industrial customer it serves; (g) owns the meters, bills the customers and collects the money due for the electric energy that it supplies; and (h) handles the collection of its customers' bills separately from its payment of its bills to its suppliers.
>
> [Ibid.].

In concluding that the Chickasaw Authority possessed sufficient "indicia of reseller of electric energy" Id. at 62,130, FERC stated: "Owning and maintaining facilities for the distribution of electric energy, repairing customers' facilities, metering, billing and collecting, and obtaining alternate sources of power and energy are all indicia of a reseller of electric energy." Ibid.

FERC again applied these factors in Prairieland Energy, Inc., 85 F.E.R.C. P61446 (December 21, 1998). Prairieland, a wholly-owned subsidiary of the University of Illinois, applied to FERC for an order under Section 211 of the Federal Power Act ("FPA") requiring the Commonwealth Edison Company to provide service to Prairieland under the terms of Commonwealth Edison's tariff. In support of its application, Prairieland claimed that it qualified as an "electric utility," as defined by 16 U.S.C. 796(22),[3] because it was selling electricity to the University of Illinois, its parent corporation. Id. at 62,665. In rejecting Prairieland's application, FERC stated that it had

---

[2] The presiding judge based his conclusion that the Byng Authority and the Chickasaw Authority were "paper entities" on: "the nature and extent of the facilities that [the Byng and Chickasaw Authorities] own, lease, or operate[,]" and on the findings that: (a) most of the customers that the Byng and Chickasaw Authorities serve used to be customers of People's; and (b) it is People's, not the Byng or the Chickasaw Authorities, that transforms (steps down) the electric energy to household voltage.[People's Electric, supra, 84 F.E.R.C. at 62,114 (quoting People's Electrical Cooperative, 60 F.E.R.C. P63,004 (July 21, 1992) (alterations in original)].

[3] "The term "electric utility" means a person or Federal or State agency (including an entity described in section 201(f) [16 USCS 824(f)]) that sells electric energy." 16 U.S.C. 796(22).

provided "no support demonstrating the indicia of a sale." Id. at 62,666. FERC distinguished Prairieland from the Byng Authority, which it had found to be a reseller in People's Electric, and stated that Prairieland had failed to provide "rate terms, billing provisions or other information that might be pertinent to the proposed transaction" and "details regarding the facilities it claims it will control or the extent of the control it will exercise." Ibid.

As these cases demonstrate, the phrase "sale for resale" has an accepted meaning in energy law, which encompasses numerous indicia relating to the metering and billing practices underlying the alleged sales, as well as the nature of the facilities involved. By including the phrase "sold for resale" in Section 60.1, the Legislature expressed its intent for collection of the SBC and EET to be prohibited only in circumstances where the indicia of a true "resale" are present. Thus, the Board cannot simply defer to South Jersey and ACI's claim that the electricity generated by ACI's CHP plant from the gas supplied by South Jersey under the South Jersey/ACI Agreement is "sold for resale."

In assessing whether the transaction at issue possesses sufficient indicia of a sale for resale, the Board notes that "[i]n an administrative proceeding, the petitioner bears the burden of proof by a preponderance of the competent, credible evidence." Atkinson v. Parsekian, 37 N.J. 143 (1962). Like Prairieland, South Jersey and ACI have failed to provide any documentary evidence of the transactions at issue, such as the RFP between Energenic and Revel, the ACR/Revel ESA, or the ACI/ACR ESA or to provide any of the documentation used to memorialize the transaction at issue or any description of the accounting for it. As such, South Jersey and ACI have failed to carry their burden with respect to several "necessary attributes" of a sale for resale, People's Electric, supra, 84 F.E.R.C. at 62,124, including whether ACR is liable to ACI whether or not it collects payments from Revel, whether the profits generated from ACR's sales to Revel are retained by ACR or flow through to Energenic and/or back to ACI, and whether ACR handles the collection of bills from Revel separately from its payment of its bills to ACI. Ibid.[4] These attributes are especially pertinent here because ACI and ACR are both wholly-owned subsidiaries of Energenic, created to satisfy Energenic's obligation to supply energy to the Revel Casino. In contrast to ACR, the alleged reseller here, the reseller in People's Electric, the Byng Authority, was "neither a part of People's nor a subsidiary of People's," Id. at 62,118, and "came into existence . . . presumably well before People's, or anyone else, contemplated engaging in the transactions at issue." Id. at 62,119. Thus, South Jersey and ACI have failed to show that the transaction between ACI, ACR, and Revel falls within the accepted meaning of "sale for resale."

In considering the affiliation between ACI and ACR as a relevant factor for its finding that the transaction at issue is not a sale for resale, the Board finds guidance in Drugstore.com, Inc. v. Director, Div. of Taxation, 23 N.J. Tax 624 (Tax Ct. 2008), appeal dismissed, No. A-3603-07T3, 2009 N.J. Super. Unpub. LEXIS 1333 (App. Div. 2009). Drugstore.com, Inc. was a Delaware corporation that operated a web site from the State of Washington through which it sold medicine and prescription drugs. Id. at 626-27. The issue before the court was whether the Director of the Division of Taxation ("Director") could assess a sales tax on Drugstore.com's sales to New Jersey based on the statutory requirement that a sale is taxable only if the seller has a principal place of business in New Jersey and the sale is made to New Jersey customers. See N.J.S.A. 54:32B-2(i)(1)(B). The Tax Court characterized the transaction as a sale to New Jersey customers from DS Distribution, which was a wholly owned subsidiary of Drugstore.com

[4] In noting that "Byng Authority handle[d] the collection of its customers' bills separately from the payment of the authority's bill to People's," FERC stated, "For example, in an effort to assure good customer relations, the Byng Authority has allowed at least one customer to pay on the installment plan, while, in turn, paying its supplier, People's, in full and on time." People's Electric, supra, 84 F.E.R.C. at 62,119.

that distributed the merchandise from its New Jersey warehouse, and Drugstore.com as co-vendors. Id. at 627, 643.

Drugstore.com opposed the assessment on the ground that the transaction at issue was a sale for resale. According to Drugstore.com, DS Distribution sold the merchandise to DSNP Sales, another wholly owned subsidiary of Drugstore.com which had no physical presence in New Jersey, Id. at 626, which then resold it to New Jersey customers. Id. at 638. Drugstore.com argued that the "Director [could] not require DSNP Sales to collect sales tax because that corporation did not have a substantial nexus with New Jersey," Id. at 637, and that neither Drugstore.com nor DS Distribution could be required to collect sales tax because they were "not [] vendor[s] at all and [were] not [] agent[s] for or representative[s] of DSNP Sales in New Jersey." Id. at 639. The Tax Court rejected this argument, finding that "there was no actual sale of merchandise by DS Distribution to DSNP Sales." Ibid. The court based this conclusion in part on the fact that "the corporations [were] all related" inasmuch as "[b]oth DS Distribution and DSNP Sales [were] wholly owned by [Drugstore.com]." Ibid. The court also noted that Drugstore.com "was the only entity issuing inter-company invoices," Id. at 640, and that "[n]o money ever changed hands. Inter-company transactions were 'zeroed out or trued up' on a quarterly basis, by additions to or subtractions from plaintiff's paid-in-capital account in each subsidiary." Ibid.

Drugstore.com supports the conclusion that the transaction between ACI and ACR is not a sale, and thus cannot result in a sale for resale. Like DS Distribution and DSNP Sales, ACI and ACR are both subsidiaries of the same parent corporation (Energenic). Furthermore, as discussed above, South Jersey and ACI have failed to provide any of the documentation used to memorialize the transaction at issue or any description of the accounting for it. Thus, South Jersey and ACI have failed to establish that the accounting methods pertaining to the ACI-ACR transaction differ in any material respects from the accounting methods that the Drugstore.com court found significant.

The Board's conclusion that the transaction at issue is not a sale for resale is also consistent with the principle that "[s]tatutes that deal with the same matter or subject matter should be read in pari materia and construed together as a unitary and harmonious whole." In re Petition for Referendum on Trenton Ordinance 09-02, 201 N.J. 349, 359 (2010) (quoting St. Peter's Univ. Hosp. v. Lacy, 185 N.J. 1, 14-15 [2005]). Here, Section 60.1 should be construed together with two provisions of the Electric Discount and Energy Competition Act of 1999, L. 1999, c. 23 (1999): N.J.S.A. 48:3-77 ("Section 77") and the definition of "[o]n-site generation facility" contained in N.J.S.A. 48:3-51 ("Section 51"). Both of these provisions "deal with the same . . . subject matter" that the Board must address here, In re Petition for Referendum on Trenton Ordinance, 201 N.J. at 359, namely the imposition of SBCs on energy consumed by a customer of an on-site generation facility. As explained below, Sections 77 and 51 indicate that the Legislature contemplated the transmission of energy from an on-site generation facility to an on-site end-use customer as constituting one sale. Thus, the Legislature did not intend the phrase "sold for resale" in Section 60.1 to encompass an arrangement like the one at issue here, where electricity is transmitted from an on-site generation facility (ACI's CHP plant) to an on-site end use customer (Revel). See State v. Grunow, 102 N.J. 133, 144 (N.J. 1986) ("Generally speaking, the Legislature is presumed to be "thoroughly conversant with its own legislation . . . ." (quoting Brewer v. Porch, 53 N.J. 167, 174 [1969]) (alterations in original).

The Board finds that Sections 51 and 77 are relevant here because they apply to "on-site generation facilit[ies]." As South Jersey states in its brief, "ACI and ACR . . . meet the definition of an 'on-site generation facility' in that the electric generation facility is located on the property

or on property contiguous to the property of the end user." SIB, at 14 (citing N.J.S.A. 48:3-51).[5] Section 51 defines "on-site generation facility" as "a generation facility . . . and equipment and services appurtenant to electric sales by such facility to the end use customer located on the property or on property contiguous to the property on which the end user is located." (Emphasis added).

Here, ACI's CHP plant is the "generation facility." Revel is the "end use customer." ACR's CUP falls within the meaning of "equipment and services appurtenant to electric sales" by ACI to Revel. Such "equipment and services" are "located . . . on property contiguous to the property on which the end user is located." See SIB, Wasnak Cert. at ¶ 23 ("The CUP is located on property contiguous to Revel."). Thus, the arrangement at issue here falls squarely within the the definition of "on-site generation facility." Critically, Section 51 describes this arrangement as a "sale by [the] facility to the end use customer." Thus, under the language of Section 51, the transfer of energy from ACI's CHP plant, to ACR's CUP, to the Revel Casino constitutes one sale. This undermines South Jersey and ACI's position which posits two sales: one from the "generation facility" to the "equipment and services," and a subsequent resale from the "equipment and services" to the "end use customer."

Section 77 also supports the conclusion that the Legislature would characterize the transfer of energy from ACI's CHP plant, to ACR's CUP, to the Revel Casino as one sale. Section 77 addresses the applicability of the SBC and other charges to power generated by an on-site generation facility. Of the five subsections of section 77, one applies in cases such as this one, where the power is consumed by an on-site customer:

> b. None of the following charges shall be imposed on the electricity sold solely to the on-site customer of an on-site generating facility, except pursuant to subsection c. of this section:
>
> (1) The societal benefits charge or its equivalent, imposed pursuant to section 12 of P.L.1999, c.23 (C.48:3-60);
>
> (2) The market transition charge or its equivalent, imposed pursuant to section 13 of P.L.1999, c.23 (C.48:3-61); and
>
> (3) The transition bond charge or its equivalent, imposed pursuant to section 18 of P.L.1999, c.23 (C.48:3-67).
> [N.J.S.A. 48:3-77].

This language demonstrates that the Legislature contemplated a scenario in which power from an on-site generation facility is consumed by an on-site end use customer as one where "electricity [is] sold solely to the on-site customer of an on-site generating facility . . . ." N.J.S.A. 48:3-77(b). The phrase "sold solely" indicates that the Legislature viewed such a transaction as consisting of one sale.

Construing Section 60.1, 51, and 77 as a "unitary and harmonious whole," In re Petition for Referendum on Trenton Ordinance, supra, 201 N.J. at 359, the Board **FINDS** that the phrase "sold for resale" in Section 60.1 does not apply to the transmission of electricity from an on-site generation facility to an on-site customer. Sections 51 and 77 reflect the Legislature's assumption that arrangements where power is transmitted from an on-site generation facility to an on-site end-use customer constitute one sale. To conclude that the Legislature intended for

[5] Rate Counsel has not disputed this conclusion.

the phrase "sold for resale" to describe a scenario that is has previously referred to as constituting one sale would run contrary to the presumption that the Legislature is "thoroughly conversant with its own legislation," Grunow, supra, 102 N.J. at 144, and thus must be rejected.

Here, accepting South Jersey's and ACI's claim that the ACI/ACR/Revel portion constitutes "on site generation," the transmission of electricity from ACI's CHP plant to ACR's CUP and then to the Revel Casino falls within the language of Sections 51 and 77, and thus constitutes one sale. As noted above, South Jersey has stated in its brief that ACI's CHP plant and ACR's CUP satisfy the definition of "on-site generation facility" found in Section 51. SIB at 14. In addition, the Board has previously found that a similar transaction where an additional entity was interposed between the CHP and the end use customer satisfied the definition of "on-site generation facility" as well as Section 77(b). See In re Petition of NRG Thermal, LLC. for a Declaratory Ruling Pursuant to N.J.S.A. 52:14B-8 and N.J.S.A. 2A:16-50ing Pursuant to N.J.S.A. 52:14B-8 and N.J.S.A. 2A:16-50, BPU Dkt. No. EO09080667 (Sep. 29, 2009). NRG Thermal involved a proposed transaction in which NRG Thermal, the owner of a CHP plant located on the site of a Medical Center, would transmit electricity to an affiliated company (the "Interposed Entity"), which would then transmit the electricity to the hospital. Id. at 1-2. The Board concluded that under the proposal, NRG Thermal's CHP plant would satisfy Section 51's definition of "on-site generation facility," Id. at 3, and that the hospital qualified as an "on-site customer of an on-site generation facility" within the meaning of Section 77(b). Id. at 4. The Board concluded that the transaction qualified as on site generation "notwithstanding the inclusion of the Interposed Entity as an intermediary between the Medical Center and the CHP facility . . . ." Ibid. As NRG Thermal demonstrates, the fact that the sales of electricity from ACI's CHP plant to the Revel Casino involve an intermediary—ACR—does not bring them outside the scope of Sections 51 and 77. Because the transmission of electricity from ACI's CHP facility, to ACR's CUP, to the Revel Casino falls within the language of Sections 51 and 77, and thus constitutes one sale, it cannot at the same time satisfy the "sold for resale" requirement of Section 60.1.

The Board is not persuaded that In re Jersey Central Power & Light Company, 170 P.U.R. 4th 66 (May 26, 1996) supports a finding that the transaction at issue here is a sale for resale. There, Parlin Cogeneration, the owner of a cogeneration facility, proposed to transmit steam and electricity to NPI, a wholly-owned subsidiary of Parlin Cogeneration, which NPI would then transmit to a plant owned by Dupont. Id. at 67-68. The Board issued a Declaratory Order that NPI was not a public utility because "the electric lines and other facilities necessary for the transmission of power from Parlin Cogeneration to Dupont" would be owned and operated entirely by Parlin Cogeneration and/or Dupont, and not by NPI, and that "the electric lines and other facilities utilized [would] not cross, pass over or occupy public streets, highways, roads or other public places . . . ." Id. at 69. In addition, the Board approved an agreement between Parlin Cogeneration and Jersey Central, another purchaser of energy from Parlin Cogeneration, wherein Jersey Central consented to the formation of NPI. Ibid.

While the Board mentioned in passing that NPI's plan contemplated that NPI would continue "to purchase power from Parlin Cogeneration exclusively for resale to Dupont," Ibid., it does not follow that the accepted meaning of "for resale" encompasses a scenario, like In re Jersey Central, where electricity is transmitted between contiguous facilities owned by affiliated entities. First, the Board was merely reiterating verbatim the terms of the agreement between Parlin Cogeneration and Jersey Central. Id. at 68 (quoting letter agreement signed by Jersey Central on April 29, 1996). There was no reason for the Board to dispute the parties' characterization because it was not material to the Board's finding that NPI was not a public utility or to the Board's approval of the agreement between Parlin Cogeneration and Jersey Central. Furthermore, given that In re Jersey Central was issued before the passage of EDECA, it in no

way reflects an interpretation of EDECA that is contrary to the one the Board reaches here — that the transmission of electricity from an on-site generation facility to an on-site customer constitutes one sale.

Accordingly, the Board **HEREBY FINDS** that the transfer of electricity from ACI's CHP Plant to ACR's CUP and then to the Revel Casino does not fall within the meaning of the phrase "sold for resale" so as to qualify for the exemption from the SBC and EET charges claimed under Section 60.1. To construe "sold for resale" as applicable here would run contrary to the Legislature's description of on-site generation facilities in Sections 51 and 77, as well as to the meaning that "for resale" has in energy law. Thus, the Board **HEREBY FINDS** that Section 60.1 does not prohibit South Jersey from imposing an SBC or EET on its sale of gas to ACI based on the circumstances presented here[6]. Since the Board finds that the charges do apply to the South Jersey-ACI transaction, it does not reach the issue of whether ACI or ACR must collect the electric equivalent of these charges.

DATED: 12/18/13

BOARD OF PUBLIC UTILITIES
BY:

ROBERT M. HANNA
PRESIDENT

JEANNE M. FOX
COMMISSIONER

JOSEPH L. FIORDALISO
COMMISSIONER

MARY-ANNA HOLDEN
COMMISSIONER

DIANNE SOLOMON
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

[6] While the Board understands that this decision may increase the costs of running ACI's CHP, ACI is already the beneficiary of both a discounted gas service agreement and a $1 million grant through the Office of Clean Energy.

IN THE MATTER OF THE PETITION OF SOUTH JERSEY GAS COMPANY FOR APPROVAL OF A STANDARD GAS SERVICE AGREEMENT (EGS-LV) AND A STANDARD GAS SERVICE AGREEMENT (EGS-LV) ADDENDUM; AND TO MODIFY RATE SCHEDULE EGS-LV- PHASE II
DOCKET NO. GO11100761

NOTIFICATION LIST

Jerome May, Director
State of New Jersey
Board of Public Utilities
44 South Clinton Avenue, 9th Floor
Post Office Box 350
Trenton, NJ 08625-0350

Alice Bator, Chief
State of New Jersey
Board of Public Utilities
44 South Clinton Avenue, 9th Floor
Post Office Box 350
Trenton, NJ 08625-0350

Stacy Peterson
State of New Jersey
Board of Public Utilities
44 South Clinton Avenue, 9th Floor
Post Office Box 350
Trenton, NJ 08625-0350

Kristi Izzo, Secretary
State of New Jersey
Board of Public Utilities
44 South Clinton Avenue, 9th Floor
Post Office Box 350
Trenton, NJ 08625-0350

Stefanie A. Brand, Esq., Director
State of New Jersey
Division of Rate Counsel
140 East Front Street, 4th Floor
Post Office Box 003
Trenton, NJ 08625-0003

Caroline Vachier, DAG
State of New Jersey
Department of Law & Public Safety
Division of Law
124 Halsey Street
Post Office Box 45029
Newark, NJ 07101-45029

Felicia Thomas- Friel, Esq.
State of New Jersey
Division of Rate Counsel
140 East Front Street, 4th Floor
Post Office Box 003
Trenton, NJ 08625-0003

Kurt Lewandowski, Esq.
State of New Jersey
Division of Rate Counsel
140 East Front Street, 4th Floor
Post Office Box 003
Trenton, NJ 08625-0003

Maria Novas- Ruiz, Esq.
State of New Jersey
Division of Rate Counsel
140 East Front Street, 4th Floor
Post Office Box 003
Trenton, NJ 08625-0003

Brian Kalcic
Excel Consulting
Suite 720F
25 S. Meramec Avenue
St. Louis, Missouri 63105

Babette Tenzer, DAG
State of New Jersey
Department of Law & Public Safety
Division of Law
124 Halsey Street
Post Office Box 45029
Newark, NJ 07101-45029

Steven R. Cocchi, Director
Rates and Revenue Requirements
South Jersey Gas Company
One South Jersey Plaza
Route 54
Folsom, NJ 08037

Alex Moreau, DAG
State of New Jersey
Department of Law & Public Safety
Division of Law
124 Halsey Street
Post Office Box 45029
Newark, NJ 07101-45029

Ira G. Megdal, Esq.
Cozen O'Connor
457 Haddonfield Road
Suite 300
Cherry Hill, NJ 08002

Stacy Mitchell, Esq.
Cozen O'Connor
457 Haddonfield Road
Suite 300
Cherry Hill, NJ 08002

John Stanziola, Director
Regulatory Affairs
South Jersey Gas Company
One South Jersey Plaza
Route 54
Folsom, NJ 08037

Renee Farmer, Mgr.
Rates and Revenue Requirements
South Jersey Gas Company
One South Jersey Plaza
Route 54
Folsom, NJ 08037

Thomas P. Serivo
McElroy, Deutsch, Mulvaney & Carpenter LLP
Three Gateway Center
100 Mulberry Street
Newark, NJ 07102

Michael Rato
McElroy, Deutsch, Mulvaney & Carpenter LLP
1300 Mount Kemble Avenue
Post Office Box 2075
Morristown, NJ 07962

Martin C. Rothfelder, Esq.
Associate General Regulatory Counsel
PSEG Services Corporation
80 Park Plaza, T5
Newark, New Jersey 07102