Agenda Date: 8/19/09
Agenda Item: 2H

STATE OF NEW JERSEY

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

ENERGY

IN THE MATTER OF THE DEFERRED BALANCES AUDIT OF PUBLIC SERVICE ELECTRIC AND GAS COMPANY, PHASE II ("MTC")	)	ORDER REJECTING INITIAL DECISION
	)	
	)	DOCKET NOS. EX02060363 & EA02060366

(SERVICE LIST ATTACHED)

BY THE BOARD:

This matter comes before the New Jersey Board of Public Utilities ("Board") as an Initial Decision from Administrative Law Judge ("ALJ") Walter M. Braswell, finding that the Board is precluded from reviewing whether any Market Transition Charge ("MTC") related refunds are due the electric customers of Public Service Electric & Gas ("PSE&G" or "Company") based upon the concepts of res judicata and collateral estoppel. Because of this legal determination, ALJ Braswell did not make express findings on the specific questions forwarded to him by the Board.

For the reasons discussed below, the Board **REJECTS** the Initial Decision, retains jurisdiction over this matter, and is establishing a schedule for briefing on the merits of the question whether any MTC-related refunds are due to the electric customers of PSE&G.

BACKGROUND

In February 1999, Governor Christine Todd Whitman signed into law the Energy Discount and Competition Act ("EDECA"), N.J.S.A. 48:3-49 et seq., which deemed electric generation to be a competitive service that, with certain limited exceptions, the Board would not regulate, and for which it would not fix or prescribe the rates, tolls, charges, rate structures, rate base, or cost of service. N.J.S.A. 48:3-56(b). EDECA also empowered the Board to require that an electric public utility functionally separate its non-competitive business functions from its competitive electric generation service or its electric power generator functions so that such services or functions are provided by a related competitive business segment of the public utility or the public utility holding company, through a process known as "restructuring." N.J.S.A. 48:3-59.

On August 24, 1999, the Board issued a Final Decision and Order in the matter of Public Service Electric and Gas Company's Rate Unbundling, Stranded Costs, and Restructuring Filings, Docket No. EO97070461, EO9707462, and EO9707463 ("Restructuring Order"). The Restructuring Order allowed PSE&G the opportunity to recover up to $540 million (net of taxes) of "unsecuritized" stranded costs over the four-year transition period from August 1, 1999 through July 31, 2003. PSE&G was to recover the $540 million on a net present value basis.

In a July 22, 2002 Board Order instituting proceedings to consider audits of utility deferrals, the Board determined that PSE&G's May 24, 2002 rate filing failed to address directives contained in the Restructuring Order and that the rate filing lacked sufficient data needed to allow a full examination of the Company's deferred accounts. The Board directed that the rate case and the deferral petition be heard separately but be consolidated into one initial decision. Pursuant to the July 22, 2002 Order the Board authorized the issuance of a Request for Proposals to hire an independent auditor to perform an audit on each of New Jersey's electric distribution companies. On September 18, 2002, the Board approved the selection of Mitchell & Titus, LLP and Barrington-Wellesley Group, Inc. as outside auditors to conduct a two-phase audit of PSE&G's restructuring-related deferred balances, with the first phase covering the first three years of the transition period (August 1999 through July 2002) ("Phase I"), and a second phase covering the fourth and final year of the transition period (August 2002 through July 2003) ("Phase II"). The auditors' Phase I Report was issued on December 16, 2002. The auditors found that "the Company complied, in all material respects, with the Board Orders regarding the deferral balances for Phase I."

After the Phase I Report was issued, Board Staff raised questions about the accounting for the MTC. These questions were considered, but not resolved, in the Phase II Audit Report covering the final year of the Transition Period. Acknowledging the unresolved issues, the Board asked the parties, via a May 13, 2005 Board Secretary's Letter, to "be fully responsive, with detailed explanation and supporting documentation" in answering the following six questions:

1. How was the net present value of the MTC over-recovery due ratepayers determined by PSE&G and was it consistent with the determination of the net present value of the MTC recovery due PSEG Power? Please explain in detail, and provide supporting documentation.

2. How should the ratepayer MTC over-recovery have been booked during each year of the transition period, i.e., as an allocated portion of the estimated net present value of the over-recovery as of August 1, 1999, as determined and booked by PSE&G, or as the estimated over-recovery occurring in each year of the transition period, in that year's dollars?

3. Should interest have been booked on the ratepayer MTC over-recovery occurring in each year of the transition period, and if so, what is the appropriate rate? If not, why not?

4. In determining the net present value of the MTC recovery, should the discount rate have been applied monthly or annually? Please explain in detail with supporting documentation.

5. Is it appropriate to adjust the determination of the MTC recovery to reflect the fact that under IRS rulings and court decisions, monies properly belonging to ratepayers, such as fuel cost over-recoveries, are not taxable? Please explain in detail, with supporting documentation.

6. Are there any other quantification issues the Board should consider? Please list them and provide the reasons why the Board should consider them, with appropriate rationales and documentation.

On January 31, 2007, PSE&G requested that the reconciliation of its MTC collections be transmitted to the Office of Administrative Law ("OAL") for the development of an evidentiary record, conduct of an evidentiary hearing, and an initial decision. By Board Order of Transmittal date February 7, 2007 the matter was transferred to the OAL for "a review of the issue of the method of calculation of the MTC over-recovery and the amount due ratepayers."

Based on discussion at a pre-hearing conference held on April 24, 2007, ALJ Braswell directed PSE&G to file a motion for summary decision. PSE&G did so on May 25, 2007. On September 28, 2007, ALJ Braswell denied PSE&G's motion and scheduled evidentiary hearings, which were to focus on the responses to the six questions asked in the Board Secretary's Letter of May 13, 2005. Initial Decision, at 11.

After motion practice and the evidentiary hearings, ALJ Braswell issued an Initial Decision on January 14, 2009. The Initial Decision concluded that the doctrines of collateral estoppel and res judicata barred the Board from "re-open[ing] that portion of the case that has a Board-approved audit." Initial Decision, at 20. The Initial Decision did not address the six questions in the Board Secretary's May 13, 2005 letter. The proceedings before ALJ Braswell did, however, result in the development of a thorough record regarding those six questions.

PSE&G, Rate Counsel and Board Staff filed exceptions to the Initial Decision. PSE&G endorsed the decision of the ALJ in nearly all aspects, highlighting the Company's belief that the ALJ carefully considered both the evidence and the arguments presented and found that the Board had previously adopted the methodology used for calculating the MTC such that reopening the analysis would violate the tenants of collateral estoppel and res judicata. The Company emphasized the ALJ's findings that the Board and its auditors had accepted the methodology throughout the prior proceedings without comment, that the undisputed facts point to an understanding that the Phase I audit should "close the book" on the issue, and that the policy considerations for imposing collateral estoppel and res judicata clearly exist in this situation. The Company further asserted that the ALJ's comments about applying a change in the methodology for calculating the MTC for the Phase II audit, covering the final year of the transition period, would be unacceptable to the Company, as any change in the methodology for calculating the MTC would violate the basic underlying substantive analysis of the process, previously approved by the Board.

Rate Counsel, in its exceptions to the Initial Decision, contends that "PSE&G owes ratepayers $138 million plus interest." Rate Counsel Exceptions, at 2. Rate Counsel calls upon the Board to reject the Initial Decision in its entirety, as the ALJ failed to answer the questions expressly put to him by the Board, and the conclusions of fact and law contained in the Initial Decision are without support in the record. Rate Counsel points out that the ALJ's decision allows PSE&G to

retain a substantial sum based upon "inference regarding the Board's thought process in issuing prior orders." Id. Specifically, Rate Counsel states that the Initial Decision "concedes that the issues are not squarely addressed in the Board's prior orders," but nonetheless "infers an implicit decision and then gives that inference preclusive effect." Id. at 11. Rate Counsel therefore contends that the Initial Decision "misapplied res judicata and collateral estoppel," and "failed to recognize the Board's continuing authority and statutory duty to review the policy issues surrounding the MTC." Rate Counsel further states that the Initial Decision was not based upon the evidence entered into the record, did not answer the questions posed in the Board Secretary's letter, and leads to an inequitable result.

Board Staff, in its exceptions to the Initial Decision, likewise calls upon the Board to reject the Initial Decision. Staff maintains that the Board never issued a final decision on the MTC over-recovery and the underlying issues associated with determining the process by which PSE&G would make that calculation.

On February 23, 2009, both PSE&G and Rate Counsel filed reply exceptions to the Initial Decision. PSE&G once again expressed its support for the ALJ's decision, asserting that it was based upon the facts in the record as well as appropriate legal and policy considerations, especially as they relate to the issues of res judicata and collateral estoppel. Likewise, the Company claims that the Initial Decision correctly recognizes that the Board is forbidden from re-opening its prior decisions in the absence of changed circumstances. Finally, PSE&G contends that the Initial Decision was founded upon evidence clearly in the record, and that it should be accepted in its entirety.

Rate Counsel, in its reply to exceptions, continues to emphasize the ability and the authority for the Board to conduct periodic reviews over the MTC, and to invoke changes if necessary to ensure that PSE&G does not over-recover from the ratepayers. In light of this duty, Rate Counsel asserts that res judicata and collateral estoppel have no role in confining the role of the Board in this matter. Rate Counsel rejects the application of res judicata and collateral estoppel because the Board would never have transmitted this matter to the OAL for adjudication, and would have not found it necessary to pose the six questions in the Board Secretary's letter, had the Board considered these matters to have been settled in the Restructuring Order. The simple fact that the matter was transferred, claims Rate Counsel, precludes a finding of res judicata or collateral estoppel. Rate Counsel also emphasizes its belief that the ALJ's decision is without support in the record, and points to a number of instances where quoted language disagrees with Rate Counsel's understanding of the evidence. Rate Counsel looks for the Board to reject the Initial Decision and instead find that PSE&G has improperly retained over $140 million in MTC–related funds.

On July 23, 2009, PSE&G requested that the Board permit the parties to present their positions directly to the Board, and that the members of the Board be provided an opportunity to question the parties' representatives, in advance of the Board's issuance of a Final Decision. On July 30, 2009, Rate Counsel requested that the Board deny PSE&G's request, stating that the factual record in this matter is complete, that briefs submitted by the parties fully set forth their arguments, and that oral argument would unnecessarily delay the Board's Final Decision. On July 31, 2009, PSE&G responded with a suggestion that any delay would be insignificant when balanced against the benefits that might flow from allowing the Board to question the parties themselves.

DISCUSSION

As an initial matter, PSE&G requested oral arguments before the Board on this matter, citing the significant nature of the matter and the complexity of the associated arguments. Rate Counsel opposed this request, noting that the parties had opportunity to fully brief the matter on a number of occasions, and that no benefit would accrue to the Board. Based upon the arguments presented, and the understanding that the granting of oral arguments falls within the discretion of the Board, the Board **DENIES** the request for oral arguments, as the Board does not believe they are necessary in this matter.

Moving on, the doctrines of collateral estoppel and res judicata are both based upon equity, and are predicated upon the idea that, once a decision has been made by a court of competent jurisdiction, judicial efficiency and fairness to the parties requires that the decision be awarded a level of finality. The Initial Decision declined to allow any further examination of the MTC over-recovery addressed by the Board in the Phase I audit, stating that such an examination "would not only be unfair, but also barred by the legal concept of res judicata and collateral estoppel." Initial Decision, at 20.

The Board disagrees, for several reasons. First, the doctrines of res judicata and collateral estoppel do not preclude the Board from examining an issue on its own initiative, although the Board can invoke those doctrines to preclude a party from re-litigating issues. Second, those doctrines do not apply, because the questions set forth in the Board Secretary's May 2005 letter have not been previously litigated and the Board has not previously made determinations on them. Finally, the Board has statutory obligations that specifically contemplate periodic and continuing reviews of recoveries through the MTC.

The Initial Decision properly states that res judicata "is a principle of law that precludes a party from re-litigating issues which were previously fairly and finally litigated and determined." Initial Decision at 13, citing Lubliner v. Paterson Bd. Of Alcoholic Bev. Control, 33 N.J. 428, 435 (1960). The Initial Decision also correctly stated that:

> It clearly is sound regulatory policy to allow the Board the right to deny a litigant's request to re-litigate an issue already decided by the Board. The legal principles of res judicata and collateral estoppel are not binding on the Board but in this case can be used to carry out the responsibilities of the Board.
>
> [Initial Decision at 13.]

In other words, an administrative agency can apply the doctrine of res judicata to preclude a party from re-litigating issues. The same is true of collateral estoppel. However, these doctrines do not bar the agency from rehearing and reconsidering issues. On the contrary, "administrative agencies have inherent power, comparable to that possessed by the courts . . . , to rehear and reconsider." Cohen v. Borough of Fair Lawn, 85 N.J. Super. 234 (App. Div. 1964), 237, citing Central Home Trust Co. v. Gough, 5 N.J. Super. 295, 301 (App. Div. 1949). Furthermore, administrative agencies "have the inherent authority to reopen, modify, or rehear even final orders." In re Kallen, 92 N.J. 14, 24 (1983). This inherent authority is buttressed by the Board's express statutory authority to "order a rehearing and extend, revoke or modify an order made by it," and to do so "at any time." N.J.S.A. 48:2-40.

Although these authorities are clear, the Board would not exercise them casually. The need for finality and repose underlying the doctrine of res judicata before the courts is also present in

proceedings before the Board, so that the parties can rely on an order resolving issues that have already been "fairly and finally litigated and determined."

The New Jersey Supreme Court has pointed out that the decision to apply doctrines such as res judicata and collateral estoppel to administrative agencies, the potential of these doctrines to achieve sound results "must be tempered by a full appreciation of an administrative agency's statutory foundations, its executive nature, and its special jurisdictional and regulatory concerns." Hackensack v. Winner, 82 N.J. 1, 38 (1960), citing Gordon Cty. Broadcasting Co. v. F.C.C., 446 F.2d 1335, 1338 (D.C. Cir. 1971), and Grose v. Cohen, 406 F.2d 823, 824-25 (4th Cir. 1969). The Court pointed out that an administrative agency's decision to apply these doctrines must depend not only on the agency's regulatory responsibilities toward the particular parties appearing before it; the decision must also depend on the nature of the agency's regulatory responsibilities toward the subject matter of the controversy. Id. The Court further stated:

> Moreover, because administrative agencies serve in part to effectuate the constitutional obligation of the executive branch to see that laws are faithfully executed, N.J. Const. (1947), Art. V, § I, par. 11, the public interest is an added dimension in every administrative proceeding. That interest is necessarily implicated in agency adjudications, and, in a sense, the public is an omnipresent party in all administrative actions.
>
> [Id. at 38-39].

Rate Counsel and Staff have contended that errors were present in PSE&G's calculation of the amount to be refunded to ratepayers, with the result that ratepayers are owed more than $140 million. The Board's responsibility toward this subject matter is clear. If such errors are present, and if they have resulted in a shortfall of this magnitude in the amount refunded to ratepayers, the Board cannot simply refuse to consider the public interest and refuse to review the matter simply because the errors went temporarily undetected.

Furthermore, as discussed in more detail below, there is no clear indication that issues of concern here were previously litigated and determined. No previous decision by the Board stated or considered that PSE&G could retain the benefit of interest associated with the MTC over-recovery. No previous decision by the Board stated or considered that PSE&G was authorized to discount on an annual basis the value of a stream of monthly payments. No previous decision by the Board stated or considered that PSE&G had fully returned to ratepayers all amounts received above and beyond the $540 million authorized under the MTC.

The Initial Decision provides scant basis for its findings that these issues had been previously litigated. The Initial Decision describes the Deferral Order as determining "the appropriate amount of the MTC over-recovery to be refunded to ratepayers," and states that "this is "ultimately the same issue that BPU staff and Rate Counsel want to re-litigate here." The Initial Decision follows this description with an inference that "the Board implicitly approved the methodology used by the Company when the Board approved the Stipulation in the Deferral proceeding," because "there is nothing in the Board's Deferral Order that indicates that the Board did not accept the Company's methodology in ordering a $255 million refund." Id. However, there is also nothing in the Board's Deferral Order indicating that the Board approved the details of the methodology, because no such explicit methodology was set forth in the Order or in the Stipulation that the Order approved. The absence of an express rejection of specific details of the Company's methodology is best interpreted together with the absence of anything

in the record indicating that the parties negotiated those specific details into the Stipulation, and the absence of anything in the record indicating that the Board considered those specific details in issuing the Deferral Order. The best inference that can be drawn is that the specific details of PSE&G's methodology were neither previously litigated nor previously determined.

The Board's statutory authorities provide additional bases to consider the concerns raised by Rate Counsel and Board Staff. N.J.S.A. 48:2-1 et seq. provides the Board with general authority and jurisdiction over utility companies in the State. N.J.S.A. 48:2-16.1 provides the Board with explicit authority to audit books and records of public utilities. Finally, N.J.S.A. 48:3-61(g) provides the Board with explicit authority to perform exactly the type of review currently involved in this proceeding. N.J.S.A. 48:3-61(g) is part of EDECA, and forms the legislative foundation for the MTC. The statute sets forth the following duty for the Board:

> The board shall conduct a periodic review and, if necessary, adjust the market transition charge or implement other ratemaking mechanisms in order to ensure that the utility will not collect charges that exceed its actual stranded costs.

This provision imposes a duty on the Board to prevent over-recovery. The requirement for a "periodic review" makes clear that this is a continuing duty, recognizing the Board's unique and specific role in mediating the relationship between ratepayers and the regulated entity. As a result, res judicata and collateral estoppel do not preclude the Board from examining the specific details of PSE&G's methodology; on the contrary, the Board cannot escape its duty to do so.

The Board has considered the absence of any clear indication that the issues addressed in this Order had previously been fairly and finally litigated and determined, and considered its statutory and other inherent powers and obligations to rehear and reconsider. Cohen v. Borough of Fair Lawn, 85 N.J. Super. 234 (App. Div. 1964), 237, citing Central Home Trust Co. v. Gough, 5 N.J. Super. 295, 301 (App. Div. 1949); N.J.S.A. 48:2-40; N.J.S.A. 48:3-61(g). Based on those considerations, the Board **FINDS** that it is appropriate to consider whether PSE&G has fully returned to ratepayers all amounts received above and beyond the $540 million authorized under the Restructuring Order and, if not, the amount that should be returned to ratepayers.

The Board therefore **REJECTS** the Initial Decision. The Board notes that it is unnecessary to remand this matter to the Office of Administrative Law, because the proceedings before ALJ Braswell developed a thorough factual record as requested in the Board Secretary's May 2005 letter. However, much of the briefing in the Office of Administrative Law, as well as the exceptions to the Initial Decision, concerned the issues of collateral estoppel and res judicata that have been resolved in this Order. Accordingly, the Board hereby **DIRECTS** that the parties may submit briefs addressing the following issues:

1. Whether PSE&G should have stopped discounting all amounts received above and beyond the authorized $540 million;

2. Whether PSE&G should have discounted on an annual basis the value of a stream of monthly payments;

3. Whether PSE&G should retain the benefit of interest associated with any MTC over-recovery; and

4. Based upon the response to the above issues, calculate any refund due to PSE&G's electric customers as of August 31, 2009, and provide the basis for the Board to calculate any additional refund that may be due based upon the date of issuance of a Final Order in this matter.

The Board further **DIRECTS** that briefing be in accordance with the following schedule:

Initial Briefs shall be submitted by no later than September 25, 2009, and Reply Briefs shall be submitted by no later than October 23, 2009.

DATED: 9/3/09

BOARD OF PUBLIC UTILITIES
BY:

JEANNE M. FOX
PRESIDENT

FREDERICK F. BUTLER
COMMISSIONER

JOSEPH L. FIORDALISO
COMMISSIONER

NICHOLAS ASSELTA
COMMISSIONER

ELIZABETH RANDALL
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