SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
Docket No. A-3200-07T3

I/M/O THE PROVISION OF BASIC GENERATON SERVICE FOR THE PERIOD BEGINNING JUNE 1, 2008	)	Civil Action On Appeal from the January 25, 2008 Order of the New Jersey Board of Public Utilities BPU Dkt. No. ER07060379

BRIEF OF APPELLANT
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PRELIMINARY STATEMENT

The Board's 2008 BGS Auction Order effectively amended existing Board-approved three-year contracts for the purchase of electric power entered into by the State's electric utilities and electric suppliers in 2006 and 2007. The Board's ruling operates to increase rates for electric utility customers, yet was rendered without the requisite notice or hearing. The 2006 and 2007 electric purchase contracts already reflected the cost of procuring Solar Renewable Energy Certificates ("SRECs"). However, in its 2008 BGS Auction Order, the Board permitted the electric suppliers to pass-through to electric customers the current higher costs price for SRECs. The Board thereby effectively modified the terms of pre-existing Board-approved standard-form contracts of which utility customers are a beneficiary.

Rate Counsel respectfully submits that the Board's ruling should be rejected as an unconstitutional impairment of a contractual relationship governing the provision of electric supply to the State's utility customers, while not fostering any significant public purpose and not reasonably related to an appropriate government objective. In the alternative, the issue should be remanded for further proceedings. Notably, the Board rendered its ruling without adequate notice, without an evidentiary hearing or venue for opposition to be heard, and

without sufficient credible evidence in the record in support of its decision. The ruling at issue was the product of a flawed process which ultimately rendered it as arbitrary and capricious.

PROCEDURAL HISTORY

By Board Order dated June 22, 2007, the New Jersey Board of Public Utilities ("BPU" or "Board") directed the four regulated electric distribution companies ("EDCs") operating in New Jersey to file proposals by no later than July 2, 2007 "addressing how to procure the remaining one third of the State's [Basic Generation Service ("BGS") Fixed-Price ("FP")]. . . for the period beginning June 1, 2008."[1] *Aa55* The Board also invited "all other interested stakeholders to file alternative BGS procurement proposals with the Board by July 2, 2007." Id.

In accordance with the Board's schedule, on July 2, 2007 the EDCs filed a generic Joint Proposal ("Joint Proposal") for BGS procurement. *Aa67* Each EDC also filed a company-specific Addendum to the generic proposal dealing with utility-specific issues. Id. Alternative proposals were also filed by the Department of the Public Advocate, Division of Rate Counsel ("Rate Counsel") [2], Constellation Energy Commodities Group, Inc. and Constellation NewEnergy, Inc. (collectively known as "Constellation"), AARP of New Jersey, and the PJM Power Providers Group. *Aa13*

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[1]/ I/M/O the Provision of Basic Generation Service for the Period Beginning June 1, 2008, BPU Docket No. ER07060379, Decision and Order (June 22, 2007) (hereinafter the "June 22, 2007 Order").

[2]/ Rate Counsel is the statutory representative of the State's utility ratepayers. N.J.S.A. 52:27EE-49

Pursuant to the Board's schedule, initial comments on the July 2, 2007 EDC proposals were filed by interested parties on August 24, 2007, including Rate Counsel. Id.

Public hearings were held on September 24, 25, 26, and 27, 2007 in various locations throughout the State in each of the EDC's service territories. *Aa13-14*

A "legislative type" hearing was held before the Board on September 20, 2007 at which Rate Counsel and other parties presented oral and written statements. Id.

On or about September 28, 2007, final reply comments were submitted by the parties pursuant to the Board's schedule, including Rate Counsel. Id. At its public agenda meeting on November 8, 2007, the Board considered and adopted the EDC's BGS procurement proposals. *Aa13, Aa34* A Final Decision and Order memorializing the Board's ruling was issued on January 25, 2008.[3] *Aa13* Certain provisions of that Order are the focus of the instant appeal.

[3]/ I/M/O the Provision of Basic Generation Service for the Period Beginning June 1, 2008, BPU Docket No. ER07060379, Decision and Order (January 25, 2008) (hereinafter the "January 2008 BGS Order")

STATEMENT OF THE FACTS

Traditionally, electric energy was a bundled product provided by the State's regulated electric utilities, which was provided and priced together with the means to deliver electric power through a distribution network of wires. Pursuant to the restructuring of the state's electric utility industry mandated by the Electric Discount and Energy Competition Act of 1999 ("EDECA," codified at N.J.S.A. 48:3-49 et seq.), electric utility ratepayers are free to purchase electric power from an alternative energy supplier or continue to receive electric power from the local EDC serving their area. The EDECA and subsequent orders issued by the Board established a process whereby an EDC would procure electricity to serve those customers who elect not to choose an alternative supplier of energy and continue to have their electricity supply provided by their local EDC, a service known as BGS. N.J.S.A. 48:3-51. The EDCs, in turn, procure the electric supply they need to provide BGS service to their customers through a statewide auction in which non-utility suppliers bid for the right to provide BGS supply. *Aa71*

The BGS Auction Process

The BGS auction process defines the BGS auction product as a full requirements product, that is, BGS suppliers are required to serve a specific percentage of an EDC's load[4], whatever that load may be at any given point in time. *Aa76* "Having a full requirements product places the portfolio acquisition and price-risk management function in the hands of the competitive entities that can most efficiently carry out these tasks." Id. Currently, the full requirements product is procured separately for residential and small commercial and industrial customers (the "BGS-FP product") and for larger commercial and industrial customers ("the BGS-CIEP product"). Id. The BGS-FP product is procured on a three year rolling portfolio basis, that is, each year one-third of an EDCs' total BGS-FP load is put up for bid in the BGS-FP auction.[5] Id. Each winning BGS-FP bidder enters into a three year contract, the Supplier Master Agreement ("SMA"), to provide sufficient BGS supply to meet that share of the BGS load for which the winning bidder is responsible. *Aa104-05* The SMAs are standardized contract forms unique to the BGS auction process that were approved by the Board specifically for use in the auction procurement process for BGS.

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[4]/ Load means the total demand for electric service on an EDC's system representing electicity needs of customers.

[5]/ In contrast, the BGS-CIEP product is procured on an annual basis.

Renewable Portfolio Standards

The EDECA also contains provisions designed to reduce New Jersey's reliance on fossil fuels. The Legislature directed the Board to promulgate Renewable Energy Portfolio Standards requiring that the electricity provided by each electric power supplier and each BGS provider include a percentage of energy from renewable, non-fossil energy sources, such as solar, wind, or biomass. N.J.S.A. 48:3-87(d)(1)(2). The EDECA further provides that an electric power supplier or BGS provider may satisfy its renewable energy requirement by participating in a renewable energy trading program approved by the Board. Id.

Accordingly, the Board adopted regulations known as Renewable Portfolio Standards ("RPS") which mandated increasing levels of energy from qualified renewable sources to be included in the State's energy mix. N.J.A.C. 14:8-2.1 et seq. Under the standards, no less than a specified percentage of the kilowatt-hours sold each year to retail electric customers within the State must come from renewable sources. N.J.S.A. 48:3-87(d)(1). The minimum percentages apply to each retail electric supplier in the state, including both non-utility suppliers and electric utilities as providers of BGS. N.J.S.A.48:3-87(d)(1),(2); N.J.A.C. 14:8-2.1 to -2.3. Pursuant to the Board's regulations each supplier or provider of electricity must file an annual

report with the Board demonstrating compliance with the RPS standards. N.J.A.C. 14:8-2.11. To comply with the solar electric generation portion of the RPS, suppliers and providers obtain and use Solar Renewable Energy Certificates ("solar RECs" or "SRECs")[6] A supplier or provider who holds too few SRECs to meet the RPS can make up for the shortfall by paying the higher priced Solar Alternative Compliance Payment ("SACP"). N.J.A.C. 14:8-2.3(e); N.J.A.C. 14:8-2.10.

The 2008 BGS Order

By Order dated June 22, 2007, the Board "initiate[d] a proceeding, consistent with the procedure employed for the past six years, to determine what type of process should be used to procure BGS FP and CIEP Service for the period beginning June 1, 2008." *Aa55* The Board directed the EDCs to file by July 2, 2007 their proposals for BGS procurement for the period beginning June 1, 2008. ("Joint EDC Proposals") Id. The Board also invited other interested stakeholders to file alternative proposals by July 2, 2007. Id. In addition to directing the parties to file proposals regarding BGS procurement, the Board directed the parties to address the recommendations in the Boston Pacific ("BP") BGS Final Report relating to "RPM and

[6]/ A solar REC represents the environmental benefits or attributes of one megawatt-hour (MWh) of solar electric generation. N.J.A.C. 14:8-2.2.

CIEP; Three One-Year Products; and Random Element of Decrements within the BGS Auction process." *Aa56*

The procedural schedule set forth in the June 22, 2007 Order directed that Initial Comments on all proposals be filed by August 24, 2007, with Final Comments filed by September 28, 2007. *Aa57* The June 22, 2007 Order further directed that all comments should be filed with the Board's Secretary and also circulated electronically through the Board's electric list server on the designated filing dates. *Aa55* The Order also directed all parties to adhere to the schedule attached thereto unless otherwise directed. Id. A legislative type hearing was later scheduled for Septemeber 20, 2007.

In accordance with the Board's schedule, on July 2, 2007, the EDCs filed their "Joint Proposal for Basic Generation Service Requirements to be Procured Effective June 1, 2008." *Aa67* In that filing, the EDCs presented their proposal for a seventh BGS auction to be held in February 2008. Also at that time, filings were made by Constellation Energy, AARP, Rate Counsel and the PJM Power Providers Group. *Aa13* These filings addressed the specific issues set forth in the Board's June 2007 Order.

Initial comments were filed on August 24, 2007 by four parties, including Rate Counsel and, on September 28, six parties submitted final comments. Additional comments were

submitted to a member of Board staff by the Independent Energy Producers of New Jersey (IEPNJ) on September 30, 2007. *Aa37*

The IEPNJ's only filing in this proceeding, filed on September 30, 2007, argued that BGS suppliers that entered into SMAs in the 2006 and 2007 BGS auctions should be insulated from increases in the cost of solar supply. *Aa40* The IEPNJ proposed that the Board either 1) implement the increase in the SACP level prospectively thereby insulating previous auction contracts from increase SACP levels; or 2) the Board should allow suppliers to pass-through the increased cost of solar supply to ratepayers supplied pursuant to the 2006 and the 2007 BGS-FP SMAs. Id.

The Board approved the pass through to ratepayers of the increased cost of complying with the RPS requirements as a result of the increase in the SACP level, as memorialized in its January 2008 BGS Order. *Aa34* Specifically, the January 2008 BGS Order permitted utilities to pass through to ratepayers the cost of SRECs above $300 up to $711 per megawatt-hour for:(1) June 1, 2008 through May 31, 2009 for the BGS contracts covering June 1, 2006 through May 31, 2009; and (2) June 1, 2008 through May 31, 2010 for the BGS contracts covering June 1, 2007 through May 31, 2010. *Aa28-29, Aa34* The instant appeal emanates from that portion of the Board's January 2008 BGS Order. The Board also ordered the EDCs to submit to the BPU for approval by June 1,

2008 a proposed rate recovery mechanism for future expenses of additional SREC related costs. *Aa29*

POINT I

THE BOARD'S AUTHORIZATION OF THE PASS-THROUGH OF ADDITIONAL RPS COMPLIANCE COSTS CONSTUITUTES AN UNCONSTITUTIONAL IMPAIRMENT OF CONTRACT RIGHTS.

The Board's action amounted to an unconstitutional impairment of the contract rights of the State's BGS-FP ratepayers. The Board effectively modified the terms of existing multi-year electric power supply contracts, thereby increasing costs for BGS-FP ratepayers.

The procurement processes approved by the Board for BGS service beginning June 1, 2006 and for BGS service beginning June 1, 2007 provided that electric power to serve one-third of each EDC's BGS-FP load be procured for a 36-month period. *Aa131,Aa140* Hence, a portion of the BGS-FP load served by contracts approved in the 2006 BGS procurement process extended into the June 1, 2008 through May 31, 2009 BGS period addressed by the Board's January 2008 BGS Order. Similarly, a portion of the BGS-FP load served by contracts approved in the 2007 BGS procurement process extended into the June 1, 2008 through May 31, 2009 BGS period addressed by the Board's January 2008 BGS Order, and into the subsequent June 1, 2009 through May 31, 2010 period.

The contracts entered into by BGS-FP suppliers and the EDCs to supply electric power for BGS customers are standardized

contracts unique to the BGS procurement process, known as Supplier Master Agreements ("SMAs"), which were approved in form by the Board specifically for use in procuring BGS power. *Aa132,Aa141* BGS-FP ratepayers, largely residential and small commercial electric utility customers, are explicitly recognized as third party beneficiaries of the BGS-FP SMAs:

> This agreement [SMA] is intended solely for the benefit of the Parties hereto including Customers for which the Company is executing this agreement as agent.

Aa114,Aa123

At issue here is the Board's ruling which effectively altered the provisions of the SMAs and thereby shifted responsibility for certain significant compliance costs from BGS-FP suppliers to BGS-FP ratepayers. The Board provided that one-third of the energy for BGS-FP customers procured pursuant to the SMAs must be for a three-year term. *Aa131,Aa140* Furthermore, the executed SMAs also originally provided that the BGS-FP suppliers were responsible for complying with the RPS requirements for the duration of the contract.[7] Therefore, that

[7]/ As memorialized in its BGS Orders, the Board ordered that the EDCs are ultimately responsible for RPS compliance, yet also ordered that the EDCs "should contractually require the BGS suppliers to comply with the Board's RPS requirements." *Aa131, Aa140* In turn, the executed Board-approved SMAs provided: "Each BGS-FP Supplier hereby agrees severally, but not jointly, as follows: … (vi) to satisfy the Renewable Energy Portfolio Standards [RPSs] with respect to its BGS-FP Supplier Responsibility Share...." See 2006 SMA, pp. 13-14, *Aa110-11*; 2007 SMA, pp. 13-14 *Aa118-19*.

responsibility would have included the cost of acquiring SRECs or, alternatively, the cost of SACP payments in the event that not enough SRECs are procured by the BGS-FP supplier to satisfy the RPS requirements.

Subsequently, the Board effectively modified the terms of the executed SMAs, affecting the latter periods of the multi-year SMAs entered into as a result of the BGS procurement processes for service beginning June 1, 2006 and June 1, 2007. The Board thereby permitting BGS-FP suppliers to pass-through to BGS-FP ratepayers the additional RPS compliance costs associated with an increase in the SACP level, beginning June 1, 2008.[8] Prior to the issuance of its 2008 January BGS order, the Board increased the SACP level from $300 to $711 for the BGS period beginning June 1, 2008, which the Board concluded "may allow SREC prices to increase substantially above current levels," since price of SRECs is effectively capped by the SACP established by the Board.[9] *Aa28* Following that reasoning,

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[8]/ The Board memorialize its ruling on the pass-through of RPS compliance costs in its January 2008 BGS Order:

> Subject to the conditions described within this Order, the Board approves the pass through to ratepayers of the cost of SRECs above $300 per megawatt-hour for (1) June 1, 2008 through May 31, 2009 for the BGS contracts covering June 1, 2006 through May 31, 2009; and (2) June 1, 2008 through May 31, 2010, for the BGS contracts covering June 1, 2007 through May 31, 2010. *Aa34*

[9]/ The SACP would decrease by about three percent annually thereafter, through the period ending May 31, 2016. *Aa28*

raising the "cap" set by the SACP from $300 to $711 would, in turn, increase the cost of complying with the RPS requirements for service beginning June 1, 2008. In short, the Board shifted the responsibility for those SACP-related costs of complying with the RPS requirements from BGS-FP suppliers to BGS-FP customers.

Now, as a result of the Board's action, BGS-FP ratepayers face the very real prospect of higher rates. The costs to be passed-through to ratepayers are not insignificant, estimated by Board Staff to be as high as $50 million, *Aa61,* whereas, the Board's stated rationale for the contract modification is largely speculative and not sufficiently tied to any governmental objective, as set forth below.

Both the United States Constitution and the New Jersey Constitution embody prohibitions against State action impairing the obligation of contracts. The contracts clause of the Constitution of the United States sets forth a prohibition against State action "impairing the obligation of contracts." U.S. Const. art. 1, sec. 10, cl. 1. Similarly, New Jersey's State Constitution embodies a prohibition against legislative action impairing the obligation of contracts: "[t]he Legislature shall not pass any…law impairing the obligation of contracts." N.J. Const. art. 4, sec. 7, par. 3. The Federal and state constitutional prohibitions against the impairment of contract

are construed in the same way. Fidelity Union Trust Co. v. N.J. Highway Auth., 86 N.J. 277, 299-300 (1981).

However, Courts have ruled that the constitutional prohibition is not absolute. The contracts clause "must be accommodated to the inherent police power of the states to safeguard the vital interests of their residents." In re PSE&G Co.'s Rate Unbundling, 330 N.J. Super 65, 93 (App. Div.)aff'd. 167 N.J. 377 (2000), quoting In Re Recycling & Salvage Corp., 246 N.J.Super.79, 100 (App. Div. 1991). In determining whether a state regulatory measure is constitutionally valid under the contract clause, New Jersey Courts have applied a three-prong test, asking "(1) has it substantially impaired a contractual relationship? (2) if so, does it have a significant and legitimate public purpose? and (3) is it based on reasonable conditions and reasonably related to appropriate governmental objectives?" In re PSE&G Co.'s Rate Unbundling, supra, 330 N.J. Super. at 93, citing State Farm Mut. Auto. Ins Co. v. State, 124 N.J. 32, 64 (1991).

The Board's action substantially impaired the contractual relationship between ratepayers and the BGS-FP suppliers evidenced by the SMA. Furthermore, by permitting BGS-FP suppliers to pass-through additional costs associated with the increase in the SACP level to BGS-FP ratepayers, the Board did not foster any clean energy objective or other identifiable

societal objective. Nor did the Board's action reasonably foster the objective of lower electric rates for the State's BGS-FP ratepayers. The Board simply selectively modified one aspect of a multi-year BGS-FP contract, shifting a significant cost of compliance with the RPS requirements from BGS-FP suppliers to BGS-FP ratepayers.

Furthermore, as set forth in a separate section of this brief, ratepayers were denied their due process right to challenge the Board's modification of the executed contracts.

A. The Board Substantially Impaired the SMAs of Which Ratepayers were Third-Party Beneficiaries.

A threshold issue in a determining whether the State action was unconstitutional is whether the action impaired the contractual relationship. Cold Indian Springs Corp. v. Tp. Of Ocean, 154 N.J. Super 75, 109 (Law Div.) aff'd 81 N.J. 502 (1977), citing U.S. Trust Company v. New Jersey, 431 U.S. 1 (1977). More specifically, the first prong of the three-part test for determining whether a State action is an unconstitutional impairment of a contractual relationship is whether the State's action "substantially impaired a contractual relationship." In re PSE&G Co.'s Rate Unbundling, supra 330 NJ Super at 93, citing State Farm Mut. Auto. Ins Co. v. State, 124 N.J. 32, 64 (1991). Here, the Board's action substantially impaired the benefits of the SMA accruing to ratepayers.

First, the amount at issue is not insignificant by any measure, some $50 million in additional RPS compliance costs are likely to be recovered from ratepayers pursuant to the ruling permitting the pass-through of additional RPS compliance costs related to the increase in the SACP levels. *Aa61*

Second, in approving the SMAs, the Board specifically stressed the certainty afforded by multi-year contracts. The multi-year energy purchases covered by the SMAs at issue were intended to provide BGS-FP ratepayers with a measure of certainty for BGS-FP electric rates over the three-year length of the contracts:

> An Auction process for one-third of the EDC's BGS-FP load for a 36 month period balances risks and provides a reasonable opportunity for price stability under current conditions;….

Aa131, Aa140

The Board recognized that the contracts of a shorter duration did not insulate ratepayers from fluctuations in energy costs. *Aa126-27,Aa135* Here, the Board's action had the opposite effect. Rather than insulate ratepayers from fluctuations in energy costs, the Board's ruling burdened ratepayers with the additional costs associated with the SACP increase.

Finally, in determining whether a contract impairment is substantial, New Jersey Courts have considered whether the industry was regulated in the past. In re PSE&G Co.'s Rate Unbundling, supra, 330 NJ Super at 93, citing Allied Structural

Steel Co. v. Spannaus, 438 U.S. 234, 242 n. 13 (1978). That determination focuses on whether the parties anticipated further State action affecting the contract. Here, ratepayers had no reasonable expectation that the Board would effectively alter the terms of the SMA. In fact, in response to parties suggesting changes to the SMAs in the course of an earlier BGS proceeding, the Board expressed its reluctance to modify the terms of the SMAs absent a procedural process whereby interested parties may comment on proposed changes:

> Therefore, the Board … will require that, for future auctions of this nature, parties show new or changed facts or a real or perceived change in industry structure affecting the way industry participants conduct business before it will consider revisions to these Agreements [SMAs].

Aa129 (quoting from Order dated December 2, 2003 in BPU Docket Number EO03050394).

Subsequently, in 2006 the Board convened a proceeding to consider changes to the SMA. *Aa136-39* Notably, the Board did not convene a similar proceeding to consider the changes to the SMA of the sort made necessary by its ruling on the additional SACP-related RPS compliance costs at issue here.

On the other hand, even the Board recognized that BGS-FP suppliers were "on notice" that the SACP level might change:

> [T]he the suppliers were on notice that the SACP could change, since the BPU's current regulations provide for the Board to re-evaluate the SACP at least annually….

Aa29

In contrast to ratepayers who reasonably expected that the Board would not effectively change the terms of the SMA, BGS-FP suppliers were aware that the SACP level might increase and, therefore, cause suppliers to incur additional costs under the original terms of the SMAs.

In sum, by effectively eliminating the price certainty afforded by a multi-year contract and increasing the cost of energy for BGS-FP ratepayers, the Board's ruling substantially impaired the contractual rights of BGS-FP ratepayers. Furthermore, the shift in contract obligations ordered by the Board could not have been reasonably anticipated by ratepayers, although BGS-FP suppliers could have reasonably foreseen that the SACP level could increase.

B. The Board's Modification of the SMAs Lacked a Significant and Legitimate Public Purpose.

The second prong of the three-part test for determining whether a State action is an unconstitutional impairment of a contractual relationship is whether the State's action has "a significant and legitimate public purpose." In re PSE&G Co.'s Rate Unbundling, supra, 330 N.J. Super at 93, citing State Farm Mut. Auto. Ins Co. v. State, 124 N.J. 32, 64 (1991). Here, lower electricity prices for BGS-FP ratepayers and a cleaner environment are significant and legitimate public policy goals. However, as set forth below, the Board's ruling fostered neither

lower electric rates nor a cleaner environment. Insulating BGS-FP suppliers from cost increases cannot be said to have a significant and legitimate public purpose.

The Board reasoned that its effective modification of the SMA contract terms in order to permit the pass-through to ratepayers of additional RPS compliance costs related to the SACP increase was necessary in order to provide some comfort to bidders in future BGS-FP auctions:

> … the Board is concerned that requiring the suppliers to bear this cost [additional SACP-related costs] could discourage them from participating in future Auctions, including the upcoming Auction.
> *Aa29*

The underlying rationale is that increased participation in future auctions would increase competition, thereby yielding the lowest BGS-FP rates possible in future auctions. However, the Board's rationale for effectively amending the SMA contract terms – that to do otherwise would discourage suppliers from participating in future auctions – is specious at best, compared to the near certainty of increased electricity costs for BGS-FP ratepayers. While lower electricity prices are a worthy policy goal, effectively modifying the SMA to insulate BGS-FP suppliers from cost increases with the hope of encouraging future bidders cannot be said to have a significant and legitimate public purpose.

The Board's ruling amounted to cost shifting, under the veneer of a cited rationale to reduce uncertainty for future BGS-FP bidders, who were certainly aware of, and accounted for, this uncertainty. The Board ignored the fact that BGS-FP suppliers understood that risk when they entered the SMAs, as explicitly acknowledged in the SMA language:

> Each BGS-FP Supplier hereby represents, warrants and covenants to the Company as follows:…
> g) it has entered into this agreement [SMA] with a full understanding of the material terms and risks of the same, and it is capable of assuming those risks;….

Aa112-13,Aa120-21

Notably, as set forth above, the Board also recognized that BGS-FP suppliers were "on notice" that the SACP level could change. *Aa29* Hence, it is quite clear that BGS-FP suppliers understood the risks of entering a multi-year agreement. BGS-FP suppliers assume multiple risks when participating in the market, including fluctuations in the electricity market, capacity payments and other costs. They accept these variables as participants in a competitive market. Therefore, it is unreasonable to assume that holding suppliers to the terms of their bargain would discourage them from bidding in future BGS-FP auctions.

Ironically, by effectively altering the terms of the SMAs, the Board might have instead unwittingly fostered more uncertainty among potential bidders. Potential future bidders

now have reason to expect that the Board might again alter the terms of the SMAs in the future, perhaps to their detriment. It would not be unreasonable to believe that such uncertainty might adversely affect the price outcome of future auctions. However, unlike the additional RPS cost burden placed on BGS-FP ratepayers, such uncertainty is difficult if not impossible to measure or translate into dollars and cents terms. In short, while BGS-FP ratepayers will be burdened with the pass-through of the additional RPS compliance costs related to the increase in the SACP level, BGS-FP ratepayers have no assurance that the Board's ruling would have any positive effect on future BGS–FP supply auctions. As such, the Board's action lacked a significant or legitimate purpose.

Furthermore, to be clear, the Board's action also did not affect the significant and legitimate public purpose of procuring energy from renewable sources for the benefit of the environment. The Board's determination of who is responsible for the additional RPS compliance costs associated with the SACP increase will not alter the renewable portfolio standards that must be met by all BGS-FP suppliers. Hence, the environment will not be affected one way or the other. The RPS requirements are not at issue here. The questions of how many SRECs must be obtained by BGS suppliers, the number of SACP payments to be made, and whether the RPS requirements will be met for the

benefit of the environment are not presented here. The RPS requirements are clear and did not change as a result of the Board's action.

The question raised and answered by the Board – notwithstanding the provisions of the SMAs which clearly placed the burden of RPS compliance on BGS-FP suppliers - was who will bear the additional costs associated with the higher SACP levels. Here, the Board simply set aside the SMA contract language - which placed responsibility for the full cost of RPS compliance on BGS-FP suppliers, including SACP costs - and shifted to BGS-FP ratepayers the additional costs incurred to meet RPS requirements as a result of the SACP increase.

In sum, the Board's shifting of the responsibility for the additional RPS compliance costs to BGS-FP ratepayers lacked a significant and legitimate public purpose. The Board's action did not foster the goals of lowering electric rates or of protecting the environment. The Board's attempt to reduce supplier uncertainty without regard to any adverse impact on ratepayers cannot be said to have a significant and legitimate public purpose.

C. The Board's Modification of the SMAs was not based on Reasonable Conditions and was not Reasonably Related to Appropriate Governmental Objectives.

The third prong of the three-part test for determining whether a State action is an unconstitutional impairment of a contractual relationship is whether the State's action is "based on reasonable conditions and reasonably related to appropriate governmental objectives." In re PSE&G Co.'s Rate Unbundling, supra, 330 N.J. Super at 93, citing State Farm Mut. Auto. Ins Co. v. State, 124 N.J. 32, 64 (1991). The Board's effective modification of the terms of the SMAs is not reasonably related to an appropriate government objective.

The Board implicitly stated that the goal for the BGS auction underlying the SMAs is to provide BGS-FP ratepayers with the lowest prices for electric energy: "[t]he Board believes that the auction process … has worked well and has resulted in the best prices possible at the time." *Aa17, Aa125* Here, as set forth above, the Board's action will not ensure that more suppliers will participate in future BGS-FP auctions. Hence, the Board's action cannot be said to be reasonably related to more competitive future auctions resulting in lower electric prices for BGS-FP ratepayers.

Additionally, the multi-year energy purchases set forth in the SMAs were designed to provide some price certainty to BGS-FP

customers. *Aa126,Aa135* However, the Board's action at issue here nullifies the policy goal of rate certainty annunciated earlier by the Board which manifested itself in a multi-year SMA supply contract. By effectively modifying the terms of the SMA to permit BGS-FP suppliers to pass-through additional RPS compliances costs to BGS-FP ratepayers, the price-certainty provided by a multi-year power purchase was lost.

Notably, the Board's ruling operated only one-way, to the detriment of ratepayers. While the Board recognized that BGS-FP suppliers would face additional costs to comply with RPS requirements, the Board did not recognize instances where BGS-FP suppliers might incur lower than expected costs to supply energy under the SMAs. Hence, the prospect of increased charges for ratepayers was not met with a corresponding decrease if BGS-FP suppliers experienced reductions in their expected costs to supply energy under the SMAs. Over the term of the SMA contract, a BGS-FP supplier might conceivably experience lower-than-expected costs to procure energy or finance their operations, among other costs. However, the Board did not order a corresponding pass-through to ratepayers of any unanticipated savings experienced by BGS-FP suppliers. The Board's action was asymmetrical in terms of the contract burden imposed on ratepayers vis-à-vis BGS-FP suppliers and cannot reasonably be

viewed as a measure designed to yield the lowest possible energy costs for BGS-FP ratepayers.

Here, as set forth above, the Board's action imposes quantifiable additional costs on ratepayers without the assurances of lower BGS-FP rates in the future. While the Board expounded on how the pass-through of additional SACP costs might encourage potential bidders in future BGS-FP auctions, ratepayers have no assurances of savings. In contrast, the likely costs imposed on ratepayers as a result of the Board's action are quantifiable.

Here, for the reasons set forth above, it cannot be said that the Board's ruling was based on reasonable conditions and reasonably related to appropriate governmental objectives. Hence, the Board's ruling action amounted to an unconstitutional impairment of a contractual relationship and should, accordingly, be set aside.

POINT II.

THERE ARE COMPELLING LEGAL AND POLICY REASONS WHY THE BOARD'S PASS THROUGH TO BGS-FP RATEPAYERS OF ADDITIONAL RPS COMPLIANCE COSTS SHOULD BE REMANDED FOR PROPER NOTICE AND EVIDENTIARY HEARINGS.

The Board's decision in this BGS proceeding, to pass on to ratepayers any increase in SREC prices, without notice and without hearing violates New Jersey statutes, the New Jersey Administrative Procedures Act ("APA") and the case law construing the APA. In its January 25, 2008 Order, the Board imposed a rate increase upon the State's ratepayers without notice to the parties that it was contemplating such an increase and without giving the parties an opportunity to be heard on this issue. In light of the fact that this action could cost ratepayers millions of dollars,[10] the Board's action clearly conflicts with controlling law.

The APA defines a "contested case" as

> A proceeding . . . in which the legal rights, duties, obligations, privileges, benefits or other legal relations of specific parties are required by constitutional right or by statute to be determined by an agency by decisions, determinations or orders, addressed to them or disposing of their interests, after opportunity for an agency hearing. N.J.S.A. 52:14B-2(b).

[10]/ At the November 8, 2007 agenda meeting approving this action, Board Staff opined that "the SACP could lead to an aggregate increase in costs up to $50 million for the two BGS auctions that we're talking about." *Aa60-61*

The 2008 BGS procurement proceeding was established to determine the process through which the State's utilities would procure power for their BGS customers and to fix the BGS rate for the upcoming 2008 energy year. The Board has the authority to fix rates "after hearing, upon notice, by order in writing to determine whether the increase, change or alteration is just and reasonable." N.J.S.A. 48:2-21(d). Thus, the Board's decision to pass through increases in SREC costs directly affects BGS-FP customer rates, the Board was statutorily mandated to hold a hearing. Further, the statutory mandate that requires a hearing before new rates can be fixed renders this BGS proceeding a contested case. [11]

New Jersey law provides that, in a contested case, all parties shall be afforded an opportunity for a hearing after reasonable notice. N.J.S.A. 52:14B-9(a). The statute provides that the parties shall be afforded an opportunity "to respond, appear and present evidence and argument on all issues involved." N.J.S.A. 52:14B-9(c). Findings of fact must be based solely on the evidence and on matters officially noticed. N.J.S.A. 52:14B-9(f). The Board denied New Jersey ratepayers these basic protections when it decided to pass on to BGS-FP ratepayers increased solar supply costs without notice and

[11]/ Application of Modern Indus. Waste Serv., Inc., 153 N.J. Super. 232 (App. Div. 1977) (the APA requires a hearing where one is required by statute).

without allowing all parties opportunity to be heard on this issue.

The decision to pass onto ratepayers the increased cost of solar supply was never identified by the Board as an issue to be determined in this proceeding. On June 22, 2007, the Board issued an Order which set out the "issues involved" and set forth procedural guidelines under which this case was to proceed. *Aa55-56* Therein, the Board set out the following parameters: the utilities were directed to file by July 2, 2007 proposals addressing the future procurement of BGS supply; other interested parties were invited to make alternative proposals; and the parties were informed that recommendations made by the Board's hired consultant Boston Pacific Company, Inc ("BP") in its final report to the Board would also be considered in this BGS proceeding. *Aa56*

The Board established a schedule for discovery on the July 2,2007 proposals submitted by the EDCs and the other parties. On the August 24, 2007 date established for the filing of initial comments, various parties submitted comments on the July 2 proposals and on the recommendations made by the BP in its final report to the Board. The IEPNJ did not file initial comments in this proceeding. *Aa13* The "legislative type hearing" took place on September 20, 2007, before the BPU President Fox and Commissioner Bator with testimony by the

parties on the various positions set out in the initial comments. The IEPNJ did not appear at these hearings. *Aa14* Public hearings providing the opportunity for public comment were held throughout the state. *Aa41-49* And, as established in the June 22, 2007 Order, final comments were submitted by the parties on September 28, 2007. In general, final comments submitted by the parties were all limited to reiteration of comments made earlier in this 2007 BGS proceeding and in response to comments filed by other parties. PSEG ER&T, in its final comments, introduced an issue that "has recently arisen" regarding the new level of solar alternative compliance payment [SACP] set by the Board. *Aa35* PSEG ER&T requested that the Board "grandfather" at the $300 SACP level energy procured in the 2006 and 2007 BGS auctions and direct that the new level of solar alternative compliance payments apply prospectively only, that is for future BGS procurements. *Aa36*

On September 30, 2007, two days after the comment period ended, a member of Board Staff accepted from the IEPNJ an email submitting final comments. *Aa37* The IEPNJ argued that BGS suppliers should be insulated from increases in the SACP levels and proposed that the Board either grandfather previous auction contracts from increase SACP levels or allow a pass-through of the increased SACP prices to BGS-FP ratepayers. *Aa40*

Based on that e-mail and the attached comments, on January 22, 2008, the Board issued an Order passing onto ratepayers the increased SREC procurement costs. That Order revised prices set in contracts approved by the Board in two prior BGS proceedings by adopting the suggestion of the IEPNJ that increased costs associated with SRECs should be directly passed onto ratepayers. This suggestion was adopted without being subject to discovery, notice, or comments, nor was this suggestion discussed at any hearing in this proceeding.

Indeed, prior to the IEPNJ's final comments, no party to this proceeding suggested, at any point in this BGS process, that the Board pass on to ratepayers any increases in "solar supply" costs. Only the IEPNJ in final comments recommended that the Board protect winning bidders from previous auctions by passing on to BGS-FP customers any increases in costs for solar supply. The IEPNJ characterized its comments as "Reply Comments," and submitted them to a member of Board Staff for distribution via the Board's list server, after the September 28 filing deadline. The Board never informed the parties to this BGS proceeding that the Board was considering increasing BGS-FP prices from the 2005 and 2006 BGS auctions. Nor did the Board advise the parties that it was considering adopting the suggestion of one party, raised for the first time in that party's "Reply" comments, without scheduling hearings and

without soliciting further comments from the other parties in the BGS proceeding.

Under the definition of a contested case, the Board may make a determination regarding ratepayers' legal rights only after parties are afforded the opportunity for an agency hearing. Here, there was no hearing at which the parties to this BGS proceeding could have presented testimony on this issue, testimony which could have exposed the flaws in the Board's chosen option and testimony which could have offered other alternatives, such as the "grandfathering" option offered by both PSEG ER&T and the IEPNJ, which would have instituted changes to the SACP prospectively. The Board adopted the position of the energy producers while denying energy customers the opportunity to present evidence regarding the impact this decision would have on their electric rates or the legality of the Board's decision to modify the BGS-FP rates set in previous auctions. Instead, the Board adopted the IEPNJ's suggestion without evidentiary support or legal basis.

Finally, in addition to the Board's failure to hold evidentiary hearings on this issue, the Board failed to comply with its statutory mandate to hold public hearings in every service area affected by the proposed increase in rates. N.J.S.A. 48:2-32.4. Although public hearings were held through the state to provide notice to New Jersey customers that new BGS

supply procurement proposals were under consideration at the Board, there was never any public notice that prices set in previous years would also be increased and certainly no public hearings were held on this issue. *Aa41-49*

The EDCs originally filed public notices informing customers of the auction process proposal and advising customers that rates for 2008 BGS-FP would be a blend of the 2008 auction prices with the prices procured from the previous two auctions, the 2006 auction and the 2007 auction. Customers were told that the price for 2008 BGS supply was a final price, not that this price could subsequently be modified by the Board, without notice and without hearing, to reflect increases in supplier costs. By failing to inform BGS customers of a possible increase in rates from prior years, the public hearings held in this proceeding did not fulfill the Board's statutory mandate and deprived New Jersey ratepayers of an important protection provided by the legislature. N.J.S.A. 48:2-32.4.

In sum, the Board's January 25, 2008 decision, approving the pass-through of BGS suppliers' increased SREC costs, was contrary to state law and regulations. The Board, without notice and without hearing, decided to increase prices set in the 2006 and 2007 BGS auctions apparently based solely on the final comments of the IEPNJ in the 2008 BGS proceeding. Indeed, the entire gamut of statutory protections afforded to the rate-

paying public was ignored by the Board in modifying the 2006 and 2007 contracts and approving the pass through of any increased costs to BGS-FP ratepayers. The Board's action was unfair to New Jersey ratepayers and should be remanded by this court for discovery and evidentiary hearings and further comment.

POINT III.

THE BOARD'S DECISION IN THIS MATTER IS ARBITRARY, CAPRICIOUS AND CONTRARY TO PRINCIPLES OF ADMINISTRATIVE DUE PROCESS AND FUNDAMENTAL FAIRNESS.

Even if this Court finds that this matter is not a "contested case" that requires an evidentiary hearing under the APA, principles of administrative due process apply to protect against arbitrary action. George Harms Constr. Co. v. N.J. Tpk. Auth.137 N.J. 8, 19 (1994). The agency must select a "procedure that satisfies the fundamental requirements of procedural due process and administrative fairness by providing adequate notice, a chance to know the opposing evidence, and to present evidence and argument in response." High Horizons Devel. Co. v. State, Dep't of Transp., 120 N.J. 40, 52-53 (1990). See also, In re Amico Tunnel Carwash, 371 N.J. Super. 199, 215 (App. Div. 2004) (finding on remand that appellants should be afforded an opportunity to review and comment upon any evidence or recommendations the agency may consider in reaching its decision.)

In this 2008 BGS proceeding, the Board ignored these basic principles and decided to modify prices set in 2006 and 2007, without notice to the parties that it was contemplating such an action, without providing the parties with an opportunity to vet the evidence in support of an increase in rates, and without

providing the parties an opportunity to present evidence and argument in response.

The Board never provided notice to the parties in this proceeding that it was considering increasing customer rates established in prior BGS proceedings. Nowhere in the Board Order establishing the ground rules for this 2008 BGS proceeding did the Board inform the parties that it was considering a modification of the 2007 and 2006 BGS-FP SMAs to pay BGS-FP suppliers for increased RPS compliance costs.

On July 2, 2007, the EDCs filed their "Joint Proposal for Basic Generation Service Requirements to be Procured Effective June 1, 2008." *Aa67* In that filing, the EDCs presented their proposal for a seventh BGS auction to be held in February 2008. Rate Counsel could find no mention in the Joint Filing of a proposed increase in BGS-FP auction prices established in previous years. Similarly, each Company-Specific Addendum to the Joint Proposal is devoid of any proposal to increase 2006 and 2007 BGS-FP rates to accommodate BGS-FP suppliers. Also at that time, filings were made by Constellation Energy, AARP, Rate Counsel and the PJM Power Providers Group. These filings addressed the specific issues set forth in the Board's June 2007 Order. There was no reference in any of these alternative filings to a pass through of increased RPS compliance costs for 2006 and 2007 BGS-FP contracts.

Initial comments were filed on August 24, 2007 by four parties, including Rate Counsel. None of these comments even suggested that the Board should consider increasing BGS-FP prices to accommodate potential increases in the cost of RPS compliance.

On September 28, six parties submitted final comments. The comments submitted by Rate Counsel, the EDCS, Constellation, RESA and the NJBIA discussed issues raised in the Board Order, at the hearing or in previously filed comments. Only the comments submitted by PSEG ER&T went beyond the scope of those issues to introduce an issue that "has recently arisen" regarding the new SACP level set by the Board. *Aa35* PSEG ER&T requested that the Board grandfather at the $300 SACP level energy procured in the 2006 and 2007 BGS auctions and direct that the new level of solar alternative compliance payments will apply prospectively only, that is for future BGS procurements. *Aa35-36*

Subsequently, through a Sunday night e-mail to a member of Board Staff, and without a hard copy filed with the Board Secretary, the IEPNJ submitted comments regarding the rate treatment of increased RPS compliance costs related to the SACP level. *Aa37* The IEPNJ's comments argued that BGS suppliers should be insulated from increases in the SACP levels and proposed that the Board either "grandfather" previous auction

contracts from increase SACP levels, that is apply increased SACP levels prospectively only, or allow a pass-through of the increased SACP prices to BGS-FP ratepayers. Without soliciting any other comments from interested parties, the Board simply adopted the pass-through recommendation found in the IEPNJ comments.

Central to procedural fairness is a chance to know the opposing evidence and to present evidence and argument in response. Tosco Corp. v. Dep't of Transp.and Marketfair, 337 N.J. Super. 199,208 (App. Div. 2001) (citations omitted). In deciding to pass through increased RPS compliance costs to ratepayers in this case, the Board evidently relied solely on the IEPNJ's comments, which were neither timely nor officially filed with the Board's Secretary.

The IEPNJ's comments were e-mailed to a member of Board Staff and purportedly circulated to other parties via the BGS list server. *Aa37* While sending documents to the parties via the BGS list server is certainly convenient, it is fraught with inexactness. Rate Counsel can find no indication that these comments were received in Rate Counsel's office through the BGS list server. In fact, Rate Counsel did not receive a copy of the IEPNJ's comments until after the Board's Order was issued. The Board's reliance on material that has not been provided to all parties is troubling and warrants a remand by this Court.

In Tosco, the court remanded an agency highway siting decision in which the agency relied on undisclosed evidence. The agency admitted that it had "permitted and invited comment" and conceded that some of the material it received was not provided to the plaintiff prior to the agency's decision. The Tosco court found that the agency's reliance on undisclosed material "extremely troubling" reasoning that "[o]ne of the core values of judicial review of administrative actions is the furtherance of accountability." Tosco, supra, 337 N.J. Super. at 208. The court concluded that "an agency is never free to act on undisclosed evidence that parties have had no opportunity to rebut." Id. (citations omitted). The Tosco court remanded for a new hearing at which plaintiff could meet and contest the evidence relied on by the agency.

Rate Counsel, as the statutory representative of all utility customers in New Jersey, should have been afforded the opportunity to review and rebut any "evidence" the Board relied on in approving this pass through of increased RPS compliance costs to ratepayers. The issue of the recent increase in the SACP level was first touched upon in the September 28, 2007 final comments submitted by PSEG ER&T. In those comments, PSEG ER&T suggested that the Board clarify that the new SACP level would apply prospectively only, that is, the new SACP level

would not apply to contracts from previous BGS proceedings. The Board, with no discussion, rejected this option.

The IEPNJ comments, which recommended that the Board pass on to ratepayers increased BGS solar supply costs, were provided only informally by email to a Staff person after the Board's established deadline for filing Final Comments. At the time these comments were sent, Rate Counsel had already properly filed its final comments as directed by the Board on the issues raised and discussed at the hearing and in previously filed initial comments. The pass-through to ratepayers of increased RPS compliance costs was not raised or discussed at the hearing nor in previously filed comments, despite ample opportunity for the parties to raise the issue. By adopting, without meaningful discussion, the IEPNJ's proposal to pass on to ratepayers increased RPS compliance costs, the Board has denied ratepayers fundamental due process rights and has frustrated any chance for meaningful appellate review.

Ratepayers were denied the opportunity to test the evidential worth of the IEPNJ's submittal and to argue that BGS-FP ratepayers should not be burdened with these increased costs. Ratepayers were also denied the opportunity to make alternative proposals or to more carefully scrutinize the different proposals offered by PSEG ER&T and IEPNJ. "[N]o court or administrative agency is so knowledgeable that they can make

fair findings of fact without providing both sides the opportunity to be heard." Paco v. Am. Leather 213 N.J. Super. 90, 97 (App. Div. 1986). This matter should be remanded for further hearing.

POINT IV.

THE BOARD'S DECISION SHOULD BE REVERSED BECAUSE IT IS ARBITRARY AND CAPRICIOUS, AND IS NOT BASED ON CREDIBLE EVIDENCE IN THE RECORD.

The Board's decision allowing the pass through of SREC costs fails a fundamental standard of appellate review -- it is not based on sufficient credible evidence in the record. In re Musick, 143 N.J. 206 (1996). Under long-established case law of this State, in order to withstand challenge on appeal, the Board's decision must be based on credible evidence in the record, may not be arbitrary and capricious, and must be in accordance with applicable law. Id. In this proceeding, the complete absence of any evidence in the record to support the Board's decision makes appellate review impossible. Avant Indus., v. Kelly, 127 NJ Super. 550,553 (App. Div. 1974)(citation omitted).

The case law of this state is clear that the Board must base its decisions on credible evidence in the record. In re Parlow, 192 N.J. Super. 247 (App. Div. 1983). It cannot base its decision on out-of-record material that parties to the case have not had the opportunity to confront or contest. Id. In Parlow, the Appellate Division ruled that it was clear error for an agency to take into consideration a document not admitted into evidence at the hearing before an ALJ. Similarly, in High

Horizons Devel. Co., supra, 120 N.J. at 53, the Court found it "extremely troubling" that the agency in that case relied on undisclosed evidence, which "could not be contested." As stated by the Court:

> One of the core values of judicial review of administrative action is the furtherance of accountability. Thus, an agency is never free to act on undisclosed evidence that parties have had no opportunity to rebut.

Id.(citing Brotherhood of R.R. Trainmen v. Palmer, 47 N.J. 482, 487).

Without providing the parties to the BGS proceeding the opportunity to rebut IEPNJ's "pass-through" proposal, and without developing an adequate record, the Board simply adopted the IEPNJ's suggestion, costing ratepayers, in Staff's estimation, $50 million. *Aa67-68* Citing PSEG ER&T's and the IEPNJ's unsupported concerns "that suppliers may bear significant additional costs for SRECs beyond what they had planned upon when they entered into these contracts," the Board approved the pass-through to ratepayers of increased SACP costs associated with multi-year BGS fixed price contracts executed in 2006 and 2007. *Aa28*

Any speculation about what costs suppliers had planned for at the time bids were submitted is not supported in this record. PSEG ER&T asserts that the increase in SACP levels would "subject BGS suppliers to a regulatory charge which was not

known at the time of their bid," and the IEPNJ asserts that the increase was "a regulatory action that was wholly unanticipated and not predictable at the time of those previously held auctions." *Aa35, Aa40* These assertions are directly contradicted by the Board's finding that suppliers were on notice that the SACP could change as the Board's regulations require the Board to re-evaluate the SACP "at least annually." *Aa28*

Furthermore, the Board allowed the pass through of increased prices to ratepayers based on the concern that "requiring the suppliers to bear this cost could discourage them from participating in future Auctions . . . ." *Aa29* This finding is also unsupported in the record. Neither PSEG ER&T nor the IEPNJ threatened not to participate in future BGS auctions if suppliers were not compensated for the SREC increase, they only speculated that higher BGS prices would result. Through its action in this case, the Board has ensured those higher prices.

The Board never explains why it rejected the first option offered by both PSEG ER&T and by the IEPNJ, that is, the option of making the SACP increases prospective and maintaining the 2006 and 2007 contracts at the previous SACP levels. Certainly this option has the advantage of preserving existing contractual agreements and minimizing the detriment to ratepayers. The

Board did not discuss this "phase-in" option, it merely "found" that if suppliers had to pay increased costs, it would discourage supplier participation in future BGS auctions. *Aa29*

Finally, there is no information in this proceeding about what information bidders used in developing bid prices for the 2006 and 2007 BGS auctions. It is very possible that the BGS bidders included in their bids a "risk premium" to hedge for this known eventuality as well as for other regulatory actions. By passing this risk onto ratepayers, it may be that ratepayers are being charged twice, once for the risk premium and then again when the anticipated risk materializes. The Board's decision to increase rates based upon unsupported speculation about what bidders knew or didn't know will result in unreasonable rates.

Accordingly, this Court should reverse that portion of the Board's January 25, 2008 decision that allowed the pass through of increased SACP levels to ratepayers and remand the matter with direction to conduct additional evidentiary hearings on whether it is appropriate to pass through increase the cost of RPS compliance to customers. In re Musick, 143 N.J. 206 (1996).

CONCLUSION

For the forgoing reasons, Rate Counsel respectfully requests that this court reject the 2008 BGS Board Order as an unconstitutional impairment of a contractual relationship governing the provision of electric supply to the State's utility customers, while not fostering any significant public purpose and not reasonably related to an appropriate government objective. In the alternative, Rate Counsel requests that this court remand this matter back to the Board for further proceedings. Notably, the Board rendered its ruling without adequate notice, without an evidentiary hearing or venue for opposition to be heard, and without sufficient credible evidence in the record in support of its decision. The ruling at issue was the product of a flawed process which ultimately rendered it as arbitrary and capricious.

Respectfully submitted,

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