

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

I/M/O THE PROVISION OF BASIC
GENERATION 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
)

REPLY BRIEF OF APPELLANT
DEPARTMENT OF THE PUBLIC ADVOCATE
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Preliminary Statement

A careful review of the record in this proceeding shows that the New Jersey Board of Public Utilities ("BPU" or "Board") approved a ratepayer increase of \$50 million based on one phrase. In one set of "final" comments, one participant suggested, for the first time, that additional costs associated with the Board's Renewable Portfolio Standards ("RPS") should be charged to ratepayers. After six months of copious filings, including initial proposals by the state's four electric utilities jointly and individually, alternative proposals regarding generation supply procurement made by other parties, extensive discovery on the submitted proposals, and initial and final comments on the filed proposals, only then did the Independent Energy Producers of New Jersey ("IEPNJ") suggest that ratepayers should assume all of the costs associated with increased solar compliance. Based on that one part of that one submission, emailed to a Board Staff member after the filing date set for final comments by Board Order, the Board announced the \$50 million rate increase.

The Board Order initiating this proceeding did not list increased solar compliance costs as an issue to be decided in this proceeding. There was no mention of a

solar compliance issue in any proposal submitted in this docket, no discovery was propounded on this issue nor did any set of initial comments raise this issue. No party spoke on this issue at any of the four public hearings held throughout the state, nor was this issue raised during the legislative type hearing held in this docket. And yet, based on one set of late-filed comments, the Board effectively modified the terms of a pre-existing Supplier Master Agreement ("SMA"), permitting pass through of increased costs to ratepayers, without giving ratepayers notice of the proposed increase and without providing ratepayers an opportunity to be heard.

Two suggestions were made in final comments. PSEG ER&T recommended that the Board "grandfather" the solar compliance price increase as applied to the BGS auctions, that is, that the increase cost of compliance be applied prospectively to new SMAs. IEPNJ echoed this "grandfather" proposal and then offered the Board a second option, the "pass through option," that is, the retroactive application of the increased costs of solar compliance to previous BGS tranches. Both options would have assured BGS suppliers of regulatory certainty, both options would have protected BGS suppliers from an allegedly unanticipated increase in solar compliance costs. However, only the second option - the

option suggested by IEPNJ - passed the increased cost of compliance onto ratepayers. In choosing this option, the Board, without opportunity to comment and without due process, imposed a \$50 million rate increase on the State's already heavily burdened ratepayers.

Finally, the respondents offer little to refute the fact that the effective modification of the terms of existing SMAs by the Board amounted to an unconstitutional impairment of ratepayer's contract rights. Ratepayers relied on the BGS-FP prices set by the pre-existing SMAs and the pass-through of additional RPS compliance costs will increase BGS-FP prices for those ratepayers by approximately \$50 million. *RCa60-61*. Yet, as set forth herein and in Rate Counsel's initial brief, the Board's action did not have a significant and legitimate public purpose nor was it based on reasonable conditions and reasonably related to appropriate governmental objectives. *RCb12-27*. Therefore, the Board's action was an unconstitutional impairment of ratepayer's contract rights.

POINT I.

THERE IS NO EVIDENCE IN THE RECORD TO SUPPORT THE BOARD'S DECISION TO PASS ON TO RATEPAYERS \$50 MILLION IN ADDITIONAL COSTS OF SOLAR COMPLIANCE.

A. Standard of Review.

In making a determination that an agency decision is "supported by sufficient credible evidence present in the record," Close v. Kordulak Bros., 44 N.J. 589, 599 (1965), the New Jersey Supreme Court has advised that:

Application of this standard requires far more than a perfunctory review; it calls for careful and principled consideration of the agency record and findings. The administrative agency must set forth basic findings of fact supported by the evidence and supporting the ultimate conclusions and final determination so that the parties and any reviewing tribunal will know the basis on which the final decision was reached.

Riverside Gen. Hosp. v. New Jersey Hosp. Rate Setting Comm's, 98 N.J. 458, 468 (1985)(citations omitted).

These fundamental principles of administrative law should control the disposition of this case. Accordingly, Rate Counsel respectfully requests that this Court remand this case to the Board for an evidentiary hearing with testimony and cross examination of witnesses on the issue of who should bear the costs of the increased SACP levels.

B. Response to Brief of the Board.

The BPU repeatedly claims that there is sufficient credible evidence in the record to support its decision, without one citation to the record to support this claim. *BPUb13,-15,-16,-19¹*. The Board claims that before reaching its decision, comments were reviewed and concerns were discussed "at its open public meeting." *BPUb17*. However, as discussed above, the comments properly filed during the course of this proceeding did not address whether the Board should retroactively pass on to BGS ratepayers the additional costs associated with solar compliance. Only two parties, in the final round of comments, addressed the issue of increased solar compliance costs, and one suggested that the Board pass increased solar compliance costs onto ratepayers retroactively. Further, while the suggestion may have been offered, there is nothing in the IEPNJ comments to support the Board's choice of the "retroactive pass through" option over the "prospective or grandfather" option. Thus, even if the Board reviewed the comments submitted, and "discussed" IEPNJ's suggestion at

^{1/} In this Reply brief, the brief of the Board of Public Utilities will be cited as *BPUb*, the brief of the Joint Respondents will be cited as *JRb*. The Appendix of the BPU will be cited as *BPUa* and the Appendix of the Joint Respondents will be cited as *JRa*. The citation to Rate Counsel's initial brief will be *RCb* and Rate Counsel's appendix will be cited as *RCa*.

its public meeting, this is insufficient support in the record for a \$50 million increase.

Further, the November 8 meeting at which this issue was "discussed" was a BPU agenda meeting. At these meetings, the Board will usually announce its decision on an agenda item, so, any "discussion" would have occurred immediately before the decision was rendered. In addition, while this may be an "open public meeting," there is no input accepted from the public at these meetings. Accordingly, any "discussion" at a Board agenda meeting does not substitute for public notice and hearing and does not provide a sufficient record to support the decision in this case.

Second, the Board claims that its decision was justified by its concern that without retroactive pass through there would be reduced participation in the BGS Auction. *BPUb17*. There is not one iota of evidence in the record in this proceeding that could support the supposition that if the Board does not pass through increased solar compliance costs to ratepayers, bidders will not participate in future BGS-FP auctions. Nor is there any evidence the Board can point to of a past regulatory change that resulted in reduced participation by BGS-FP suppliers. Certainly, not one BGS-FP supplier has

threatened in this proceeding to withdraw from the BGS-FP auction if the Board did not pass through to ratepayers the additional cost of solar compliance.

The Board further claims that the perceived risk to "robust participation" in the upcoming auction is not an "adjudicative fact that can be vetted at an evidentiary hearing" but rather "is clearly an exercise of the BPU's predictive judgment where reliance on its own expertise is appropriate." *BPUb17-18*.

In support of this contention the BPU relies on Golden Nugget Atlantic City Corp v. Atlantic City Elec. Co. 229 N.J. Super 188 (App. Div. 1988). In Golden Nugget, the court upheld a BPU determination regarding what would be considered a reasonable recovery period for a transmission extension project. In Golden Nugget, the appellant had provided testimony at an evidentiary hearing regarding what would be considered a reasonable time frame for cost recovery purposes. The Golden Nugget Court noted that the BPU had considered this testimony and then determined a shorter recovery period was appropriate based on "BPU policy and regulations on extensions of service, prior and current policies of ACE on extensions of service, the actual experience of H-TC and the magnitude of the risk associated with the heavy loads and expensive facilities

required to serve casinos." Id. at 126. The Court further found that the issue was "largely academic" as the development on the property had ceased. Id. Thus, the Golden Nugget Court did not find that the Board's exercise of administrative expertise was independent of the record but found instead that the Board's decision was clearly explained in the Board Order and was based on existing Board policy, Board regulations, actual experience with high tension wire recovery periods and the risks associated with those facilities.

The determination made by the Board in the instant proceeding does not have the same support relied upon by the Board in Golden Nugget. There was no testimony supporting any position regarding the retroactive pass through of increased solar compliance cost, indeed, it was not even known that this was an issue to be decided in this proceeding until the Board's agenda meeting where a decision was announced. There is no existing Board regulation or Board policy relied upon by the Board to support its action. There has been no claim by any BGS-FP bidder in this proceeding that this action will have any impact on bidder behavior. There is only the unsupported speculation that bidders may abandon the \$6.5 billion BGS auction if the Board does not relieve bidders of the risk

of increased costs of solar compliance, a risk that was known to the bidders at the time of the bids. *RCa29*.

The Board's reliance on In re Application of New Jersey Bell Telephone Co. for Approval of its Plan for an Alternative Form of Regulation, 291 N.J Super. 77, 89 (App. Div. 1996.) is similarly inapposite. *BPUb18*. In New Jersey Bell, the Court did not find that the Board's exercise of administrative judgment did not require support in the record. In fact, the New Jersey Bell Court found that "there was ample evidence on all sides of every issue considered by the Board." *Id.* Such a finding could not be made in the instant proceeding.

C. Response to Joint Respondent's Brief

In responding to the points raised in Joint Respondent's Brief, Rate Counsel will not repeat the various arguments made in our Initial Brief. However, Rate Counsel is disturbed by repeated innuendo in the Joint Respondent's brief that IEPNJ's comments were received by this office in a timely manner through the BPU's electronic list server. *JRb33*. Rate Counsel has represented to the Board, in a signed affidavit, and to this Court, in our Initial Brief that the IEPNJ comments were not received in this office until well after the Board's agenda meeting.

Rate Counsel provided a certification to this effect to the Board with its Motion to Amend the Statement of Items Comprising the Record but it is not included in the record in this case because it was not relied upon by the Board in reaching its decision. Rate Counsel will provide the certification to the Court if requested.

Furthermore, the Board in its initial Order establishing the issues to be decided in this proceeding also set forth the procedural schedule and filing requirements. While posting documents electronically may be "an accepted method for distributing comments in the BGS dockets," providing a written copy to the Board's Secretary is the Board's established procedure. That established procedure was not followed by IEPNJ. The comments were untimely and not properly filed with the Board's Secretary.

Joint Respondents admit that the Board's decision to pass on \$50 million in increased solar compliance costs was based solely on two documents: the comments of PSEG ER&T, a BGS supplier, and IEPNJ, an association of electric generation companies, not a participant in the BGS-FP auction. *JRb34*. Joint Respondents claim that Rate Counsel has failed to consider PSEG ER&T's comments that "also requested that the Board take action to address the SACP increase in the BGS matter." Joint Respondents fail to

inform the Court however that the "action" urged upon the BPU by PSEG ER&T was that:

[T]he board should make clear the level of SACP will be applicable to the upcoming BGS auction and expressly state that Tranches awarded in previous BGS auctions (February 2007 and prior) are grandfathered at the existing \$300 level so that the new SACP will only apply prospectively to Tranches awarded at future BGS auctions.

RCa35.

Rate Counsel certainly received PSEG ER&T's comments and has never implied otherwise. However, as PSEG ER&T's requested "action" would have had no impact on BGS-FP rates, there was no need for Rate Counsel to respond. PSEG ER&T merely asked that the Board maintain the status quo regarding previous auctions, hardly a controversial request.

PSE&G ER&T's comments requesting that the Board "grandfather" previous BGS contracts in no way support the Board's finding that these costs are properly passed on to ratepayers retroactively. Certainly, there is no discussion in the Board's Order explaining why the Board chose to reject PSEG ER&T's recommendation that the previously awarded tranches be "grandfathered" at the existing level and why the Board chose instead to reach back to prior contracts and to amend these contracts to

pass these costs on to ratepayers.² Both options would have addressed the Board's expressed concern of regulatory certainty. But only one option passes the cost of solar compliance onto ratepayers retroactively. There is nothing in the record in this proceeding to justify this pass through.

Joint Respondents and the Board argue that Rate Counsel should have anticipated the Board's action because this issue was raised in the "SACP proceeding." *BPUb17, JRb29, JRb33*. The SACP proceeding was a lengthy, draw-out proceeding. Twenty five parties provided written comments in that docket. *JRa6-7*. Twenty-five parties provided comments at the public hearing. *JRa7*. The Office of Clean Energy received an additional twenty-three responses to requests for public comment on two straw proposals. Id. That one comment, out of these hundreds of pages of comments, raised the issue of the impact of increased SACP prices on current BGS auction contract holders is in no way

^{2/} In fact, there seems to be some confusion on the part of the Board regarding whether it was "grandfathering" as suggested by the PSEG, a BGS supplier or whether it was passing on costs to ratepayers, as requested by IEPNJ, a non-participant in the BGS-FP Auction. Neither set of comments refers to the pass through of increased costs to ratepayers as "grandparenting" and yet the Board's order states: "The suppliers are seeking to have those prior contracts "grandparented" so that the ratepayers, rather than the suppliers, would bear any additional costs . . . "

sufficient to put Rate Counsel on notice that the Board would, in this BGS proceeding, add a pass through to prior BGS contracts of the increased cost of solar compliance resulting from that SACP proceeding. Nor is it sufficient to provide ratepayers due process for what amounts to a \$50 million increase.

POINT II.

DUE PROCESS RIGHTS MUST STILL BE AFFORDED WHEN THE BOARD IS MAKING A "POLICY" DECISION.

Rate Counsel discussed at length in its Initial Brief the Board's denial of ratepayers' due process rights. Rate Counsel relies on its initial brief and in this Reply Brief will limit its discussion to issues raised in the Board's and the Joint Respondent's briefs.

The Board and Joint Respondents both argue that ratepayers received all the process that was due. Both the Board and the Joint Respondents cite to the length of the BGS proceeding and to the length of the SACP proceeding and to the provision for filing proposals and comments in these proceedings as Rate Counsel's "notice and opportunity to be heard to satisfy the mandates of due process". *BPUB26*. Indeed, the Board even relies on the length of time between the Board's agenda meeting and its written decision. Not once do the Board or the Joint Respondents cite to an item

in the record where the Board provided notice to the public that the issue of who will pay for the increased cost of solar compliance would be decided in the BGS proceeding. It was not until the November agenda meeting at which the Board announced its decision to pass these costs onto ratepayers retroactively that Rate Counsel was given any notice that this issue was to be decided by the Board at its November agenda meeting. By no stretch of regulatory procedure can this constitute notice and opportunity to be heard to satisfy the mandates of due process.

The Board next makes a somewhat confusing argument that to give Rate Counsel notice of a policy decision before it is made is "illogical and requires a fortuneteller." *BPUb26-27*. If by this, the BPU means that even the BPU did not know it was going to make this decision, then Rate Counsel agrees, a fortuneteller would be necessary. But it is fundamentally arbitrary and capricious for the Board to make a decision at the spur of the moment. It would seem at a minimum, before imposing a \$50 million rate increase on already heavily burdened ratepayers, the Board would request information from various sources, thereby informing the Board, and all the other parties, it was considering making a decision on a specific issue, and thereby creating a record to support

its decision. The Board's argument that it cannot provide notice and opportunity to be heard when making a policy determination defies logic.

The Board next compares the instant proceeding with the valuation of PSE&G's generation assets in the restructuring proceedings. In re Public Service Elec. and Gas Company's Rate Unbundling, Stranded Costs and Restructuring Filings, 330 N.J. Super. 65 (App.Div.2000). In the PSE&G case relied upon by the Board, the Court did not say that a decision regarding the valuation of stranded assets could properly be based on one document not properly in the record. Rather the Court stressed that the issue of valuation of assets had a long history in the proceeding, that the ALJ had addressed the valuation issue in the Initial Decision and that the issue was addressed by the parties in exceptions to the Initial Decision and in reply exceptions. The Court noted that the Board had convened a working group to try and reach resolution on the issue. It was only after the working group could not agree that the auditor's report was commissioned. The fact that the Board relied on an auditor's report that was not in evidence was found by the PSE&G Court to be outweighed by the fact that the parties had received copies of the report ten months before any decision was made, that the parties knew that a

decision was to be made, and that the various parties had used the report in their stranded cost calculations. Thus, the due process protections afforded in that case only highlight the lack of any due process afforded to ratepayers in this proceeding.

The Board also attempts to justify the lack of notice in this case by claiming that the Board "accepted" comments filed by Rate Counsel after the due date. *BPUB29*. This is not an accurate characterization. Rate Counsel did not file comments with the Board after the Board established due date for filing comments. Rate Counsel's comments in this proceeding were properly filed on a timely basis, addressing those issues specified by the Board in its Order and responding to various proposals and, in the case of our final comments, responding to issues raised by other participants in initial comments and at the public and "legislative-type" hearings. The "comments" referred to in the Board's brief was in fact a legal memorandum researched and written by this office for the Board, at the specific request of the Board President at the September 20, 2007 "legislative-type" hearing in this docket. This document was not submitted pursuant to the schedule established by the Board in its initial Order, and did not include "comments" filed by Rate Counsel. In fact, this document

was not included in the Board's Amended Statement of Items Comprising the Record. For Rate Counsel to use this document to insert comments on issues raised by other parties in their final comments would have been inappropriate, non-responsive to the Commissioner's request, and unfair to other parties in this proceeding.

Finally, Joint Respondents argue that the Board's decision is a "policy" decision and therefore ratepayers need not be afforded basic procedural protections. They argue that the Board has merely "reviewed a unique set of circumstances and rendered a policy decision." *JRb32* (citing I/M/O Jersey Central Power & Light Co., 85 N.J. 520 (1981)). It is incorrect to say that a determination of which costs are to be included in rates is a "policy" issue that does not require notice and a hearing. Such a policy would be arbitrary and capricious on its face. Indeed, this argument has already been reviewed and rejected by the New Jersey Supreme Court.

In I/M/O New Jersey American Water Company, 169 N.J. 181 (2001), Rate Counsel appealed the Board's policy of including in base rates 50% of a utility's charitable contributions. Rate Counsel argued, inter alia, that the inclusion of these costs in rates was

not supported by the record evidence. The Court agreed:

Nor does the deferential standard of review require the Court to ignore the lack of evidence supporting the BPU's decision. The BPU's April 6, 1999 order is barren of any analysis that might indicate a connection between the utility's specific contributions and a measurable benefit to its ratepayers. We are satisfied that the effects of a utility's charitable gifts as asserted by the BPU, for example, better bill paying by ratepayers, are too abstract and attenuated to justify continued application of its 50/50 sharing policy. Similarly, the BPU has cited no fact or proof in the record to support its general contention that there is a close nexus between a utility's contributions and the claimed benefits to actual consumers. Accordingly, the BPU's policy is arbitrary and lacks an evidentiary basis both in its general formulation and as applied in this instance.

Id. (citing In re Petition of Pub. Serv. Coordinated Transp., 5 N.J. 196,225 (1950)).

Finally, both the Joint Respondents and the Board argue that Rate Counsel will have an opportunity to "review and respond to any application for recovery of the incremental SREC costs." The Board offers this further review as a cure "for any possible irregularity or informality in the BGS proceeding." This is an empty promise. Once the Board has made the initial determination that these costs are recoverable, only a finding that the costs were imprudent or unreasonable will preclude inclusion of these costs in rates. The threshold decision,

that these costs are recoverable is the decision that the Board has made without notice, without hearings and without a basis in the record, it is that decision that has denied ratepayers due process and that decision that should be reversed by this Court.

POINT III.

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

Contrary to the arguments put forth by Staff and the Joint Respondents, 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 above those set forth by the original Supplier master Agreements ("SMAs"). The Board's actions amounted to an unconstitutional impairment of contract rights, as evidenced by an application of three-prong test applied by New Jersey Courts. That test, cited by both Board Staff and the Joint Respondents,³ considers the following factors

³/ BPUb21, JRb22.

in determining whether the state action was an unconstitutional impairment of contract: "(1) has it substantially impaired the contractual relationship? (2) if so, does it have significant and legitimate public purpose? and (3) is it based on reasonable condition and reasonably related to appropriate governmental objectives?" In re Public Service Elec. and Gas Company's Rate Unbundling, Stranded Costs and Restructuring Filings, 330 N.J. Super. 65, at 93 (App. Div. 200), aff'd, 167 N.J. 377, cert. denied, Co-Steel Raritan v. N.J. Bd. Of Pub. Utils, 543 U.S. 813, 122 S.Ct. 37, 151 L.Ed. 11 (2001) ("Public Service").

A. The Board's Modification of the SMAs is a Substantial Impairment of the Contract Rights of BGS-FP Ratepayers.

Contrary to the assertions of the respondents⁴, the Board's action effectively modified the terms of the SMAs and substantially impaired the contract rights of BGS-FP ratepayers. The executed SMAs originally provided that the BGS-FP suppliers would be responsible for the cost of compliance with the RPS, implicitly including the responsibility for the cost of acquiring SRECs and making

⁴/ BPUb20-21; JRb19.

SACP payments.⁵ The Board's action shifted responsibility for the cost of RPS compliance from BGS-FP suppliers to BGS-FP ratepayers. The increased RPS compliance costs will be flowed-through to BGS-FP ratepayers. Placing the responsibility for RPS compliance costs on ratepayers will increase the price paid by BGS-FP ratepayers for by approximately \$50 million.⁶ Surely, there was a substantial impairment of the contract rights of BGS-FP ratepayers, as recognized beneficiaries of the SMAs.⁷

The Board's basis for refuting a contract rights impairment claim rests on circular reasoning. The Board claims that since an SMA provision provides that the EDCs and BGS suppliers remain subject to "all existing or future duly-promulgated orders or other duly authorized actions" ⁸ of the Board there was no modification of the SMA. BPUb20. However, the Board's argument does not square with the Board's effective modification of the SMA which shifted the RPS compliance burden to ratepayers. If the Board's reasoning were followed, any modification of the SMA terms by the Board would not only be permissible, but protected from any legal challenge. That result is untenable.

⁵/ RCa110-111; RCa118-119.

⁶/ RCa61-62 (6T14-20 to -22).

⁷/ RCa114, 123.

⁸/ BPUb20, BPUa14.

Additionally, contrary to the Board's assertion, BGS-FP ratepayers were harmed by the Board's action. The Board argues that the increased costs of RPS compliance emanating from the Board's action and their affect on rates will not be known until the resulting BGS rates are "blended in" with other charges to form a final BGS charge. *BPUB21-22*. The Board goes on to say that the final rates for BGS service are not based solely on the auction, but are subject to adjustment. *BPUB22*. However, the Board fails to point out that the process of "blending" BGS prices taken from various BGS-FP auctions into a final BGS-FP rate and the cited adjustments are simply mechanical functions. The Joint Respondents make a similar argument with respect to the "Reconciliation Charge," and parse words in their argument that the shifting of RPS compliance costs does not increase BGS-FP auction supply "prices." *JRb19,21*. Notably, the respondents avoid addressing the central ruling at issue here, which shifts the cost responsibility to ratepayers:

Therefore, subject to the conditions described below, the Board APPROVES the pass-through to ratepayers of the cost of SRECs above \$300 per megawatt-hour Further, the EDCs will be permitted to recover in rates beginning June 1, 2008, the pass through to ratepayers of the cost of SRECs above \$300 per megawatt-hour for the periods mentioned above provided that the Board finds that these incremental costs were

reasonably and prudently incurred. The EDCs are DIRECTED to submit to the Board for approval by June 1, 2008 a proposed rate recovery mechanism, including a method for demonstrating that any incremental costs were reasonably and prudently incurred, which process will provide for an opportunity to be heard by Rate Counsel and other parties. As part of the rate recovery mechanism, BGS suppliers will be required to provide documentation justifying recovery, and the EDCs will be required to review and verify the costs requested to be recovered in rates and included in the filing.⁹

The anticipated June 1, 2008 filings and the associated reasonableness and prudence test do not alter the basic ruling that provides that ratepayers will now bear the additional SACP-related costs for the prior SMAs. The respondents fail to point out that shifting the burden for the additional SACP-related RPS compliance costs will increase the price for power paid by BGS-FP ratepayers and the blended rates and other adjustments will do nothing to dull the effect of the \$50 million cost shift.

Similarly, the Joint Respondents' assertion that the pass-through of transmission costs is analogous to the RPS compliance cost issue is off the mark. *JRb19-21*. Unlike the pass-through of SACP-related cost increases at issue here, the transmission cost pass-throughs cited by the Joint Respondents are explicitly permitted by the terms of

⁹/ RCa29.

the SMAs and reflect the result of an earlier Board proceeding.¹⁰ In contrast, the instant matter involves the Board's modification of the terms of existing SMAs.

B. The Board's Modification of the SMAs did not have a Significant and Legitimate Public Purpose.

Contrary to the assertions of the Joint Respondents, 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 lower BGS-FP electric rates or any clean energy objective. *JRb* 23-26. Instead, 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.

First, the Board's action offsets the benefits to ratepayers gained from multi-year SMAs. 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. *RCa131,140*. Neither the Board nor the Joint Respondents considered the negative effect of the Board's ruling on the significant public purpose of providing price

¹⁰/ *RCa131, 140, JRa74-79*.

certainty to ratepayers via multi-year SMAs. Here, by allowing the pass-thru of additional costs to ratepayers, the Board's ruling works against the price certainty afforded BGS-FP ratepayers by the multi-year contracts memorialized by the SMAs.

Second, although the Board and the Joint Respondents respectively argue that the Board's ruling was necessary so that an increase in the RPS compliance cost would not "undermine confidence" in the BGS auction and that the ruling "permits greater confidence and stability in the BGS auction process," the Board's ruling may work, instead, to undermine bidder confidence in the process. *BPUb24-25*; *JRb23-24*. Up until the time of the ruling at issue here, the Board had not retroactively altered the terms of a SMA. In the case at bar, the Board's modification of the SMAs operated to the detriment of BGS-FP ratepayers. However, that should not bring any solace to future potential BGS bidders. The important point is that the Board amended a pre-existing BGS supply agreement, albeit to the detriment of ratepayers. From the perspective of potential BGS suppliers, it is now not unreasonable to envision the prospect of amendments of pre-existing supply agreements in the future, perhaps to their detriment. Hence, contrary to the assertions of the respondents, it is reasonable to

conclude that the Board's ruling will not foster BGS bidder confidence and lower BGS bid prices in the future.

With respect to the regulatory risk associated with a change in the SACP, in its ruling the Board acknowledged that the BGS suppliers were aware of that risk. *RCa29*. Thus, contrary to the assertions of the Board, the risk of an SACP-related increase in the cost of complying with the RPS standards was a risk that the BGS suppliers could reasonably have foreseen and adjusted their BGS-FP bids accordingly. *BPUB24-25*. Moreover, 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 when the alternative is a certain increase in the price of BGS-FP power for ratepayers.

Finally, contrary to the assertions of the Board, the Board's ruling does nothing to provide additional revenue for solar energy projects. *BPUB25*. Instead, the ruling at issue merely shifts responsibility for the additional costs associated with the SACP increase from BGS-FP suppliers to BGS-FP ratepayers.

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." Public Service at 93. The Joint Respondents argue that a future proceeding to examine the rate recovery mechanism and the prudence and reasonableness of the SACP-related increases sought to be recovered from ratepayers amounts to "reasonable conditions" on the recovery of those costs from ratepayers. *JRb26-27*. However, the future proceeding cited by the Joint Respondents does not address the fact that the Board shifted the increased cost of compliance with the RPS from BGS-FP suppliers to ratepayers.

As set forth hereinabove and in Rate Counsel's initial brief, the Board's ruling was not reasonably related to any appropriate government objective. *RCb25-27*. The price-certainty for ratepayers made possible by multi-year power purchases was lost, without any guarantee that future auction prices will reflect less risk or result in lower prices.

Notably, the Board's ruling operated only one-way, to the detriment of ratepayers. The prospect of increased BGS-FP energy prices for ratepayers related to the increased SACP was not met with a corresponding decrease if BGS-FP suppliers experienced reductions in their expected costs to supply energy under the SMAs. Since the Board's cost pass-through ruling was asymmetrical in that it did not offer a corresponding pass-through to ratepayers of any unanticipated savings experienced by BGS-FP suppliers, it cannot reasonably be viewed as a measure reasonably designed to yield the lowest possible energy costs for BGS-FP ratepayers. In sum, it cannot be said that the Board's ruling was based on reasonable conditions and reasonably related to appropriate governmental objectives. As set forth above and in Rate Counsel's initial brief, the Board's ruling amounted to an unconstitutional impairment of contract rights. *RCb12-27*.

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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