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**I/M/O the Provision of Basic Generation Service (“BGS”) for
the Period Beginning June 1, 2015
BPU Docket No. ER14040370**

**Comments of Stefanie A. Brand,
Director, New Jersey Division of Rate Counsel
at a Legislative-Type Hearing
Before the Board of Public Utilities
September 29, 2014**

Good morning, my name is Stefanie A. Brand and I am the Director of the New Jersey Division of Rate Counsel. I want to thank you for the opportunity to appear before you today on behalf of New Jersey ratepayers. Rate Counsel has previously filed with the Board our general comments on the 2015 BGS proposal filed by the Electric Distribution Companies (“EDCs”). Today I would like to focus my comments on the specific “concerns” expressed by the Retail Energy Supply Association (RESA) regarding the “structure and components of the current BGS Fixed Price (“BGS-FP”) product.”¹ I would also like to address the issue of BGS administrative costs, specifically, the legal costs associated with the BGS patent claims.

¹ Initial Comments of the Retail Energy Supply Association, Sept. 3, 2014, page 1. (hereinafter RESA comments)

1. Pass-through of Changes to Transmission Related Costs

RESA argues that the Board should not market BGS-FP as a “fixed price” product as the current BGS-FP product “does not meet the same requirements imposed upon TPS’ when marketing ‘fixed price’ products.”² RESA cites the pass-through of transmission related cost increases as one of factors causing BGS-FP price fluctuations and argues that similar price fluctuations would prevent a TPS from marketing a product as a “fixed price” product.³ To resolve this issue, RESA recommends that the Board either require the EDCs to account for transmission related charges as part of a non-bypassable charge that is assessed to all customers or, in the alternative, the Board should re-name the BGS-FP product to reflect the price fluctuations caused by the pass-through of these transmission related charges.

Since 2006, hundreds of millions of dollars in transmission-related increases have been passed through to BGS-FP customers pursuant to Section 15.9 of the SMA.⁴ Rate Counsel agrees with RESA that the pass through of increases in transmission related charges is contrary to the concept of a “fixed price” product. On the other hand, Rate Counsel disagrees with RESA’s position that a non-bypassable charge be established for all customers, whether they are BGS or TPS customers, to pay for transmission related charges due to FERC tariff changes. As we argued in the past, BGS and TPS providers are better equipped and have the resources necessary to intervene in FERC and PJM proceedings setting transmission rates. With a non-bypassable charge directly passing any increases in transmission related charges to ratepayers,

² RESA comments, page 2.

³ The Supplier Master Agreement (“SMA”) at Section 15.9, permits the pass-through in BGS rates of increases (decreases) in FERC-approved transmission charges, subject to certain conditions.

⁴ See e.g., the response to discovery request RCR-0023 in which PSE&G states that for the energy year June 2013 – May 2014, PSE&G billed BGS customers \$106,784,143 in transmission related costs pursuant to Section 15.9 of the SMA. Since June 1, 2006 PSE&G has billed \$281,818,652 in transmission related charges.

the generators and marketers of supply in New Jersey will have no incentive to fight for reasonable transmission rates. We therefore encourage the Board to discontinue the pass through of changes to transmission related costs to BGS customers as is currently the practice.

RESA argues that Third Party Suppliers (TPS) receive a different treatment compared to BGS provider counterparts with regards to various PJM transmission related charges. RESA specifically mentions three types of wholesale charges that RESA claims are “out-of-market” charges that are regularly passed on to BGS customers: :

- 1) PJM Network Integration Transmission Services (NITS),
- 2) PJM Transmission Enhancement Charges (TECs,) and
- 3) PJM Deactivation Charges or Reliability Must Run (RMR) charges.

RESA argues that these “cost components, which are regularly reconciled for BGS customers, are best suited for the utilities to handle as part of a nonbypassable charges (sic).”⁵

Rate Counsel urges the Board not to establish a non-bypassable charge to cover these costs. BGS suppliers and TPS providers should manage all of their costs and account for them in their fixed price bids. These PJM charges are not sprung upon suppliers with no prior notice or forewarning. Presumably both BGS suppliers and RESA members actively participate in PJM proceedings where such tariff changes are proposed and discussed. Therefore both BGS providers and TPS providers can incorporate this information into competitive bids to offer a fixed price product on an equal basis.

Given that BGS providers and TPSs have the risk management tools, knowledge, experience and capital necessary to manage changes in the marketplace, RESA’s proposal should be rejected. It is not necessary, and even harmful to shift the risk of PJM charges onto New Jersey ratepayers. As discussed above, it is Rate Counsel’s position that none of these costs

⁵ RESA comments page 4.

should be passed through to BGS customers but should be included in the BGS bid price. While the assumption of additional risk may cause competitive suppliers to raise their offer prices in the BGS auction, one of the purposes of the auction is to maintain competition among potential suppliers such that competitive suppliers are managing risk to offer the lowest price at which they can still expect to make a profit. Thus, rather than burdening ratepayers with additional nonbypassable charges, Rate Counsel believes that none of these costs should be directly passed through to ratepayers but should be integrated into the cost of supply as part of a full requirements fixed price product.

2. Reconciliation Charges

RESA recommends that the BGS reconciliation charges should be uniformly calculated, quarterly on a forward looking basis, by the four New Jersey EDCs.⁶ RESA argues that “a uniform reconciliation charge will better facilitate a transparent and forward looking price to compare.”⁷ RESA believes that this will allow customers to more effectively shop for a competitive energy provider.

Rate Counsel notes that the EDCs have proposed changes in this proceeding to more accurately calculate the BGS reconciliation charge. Accordingly, Rate Counsel recommends that the Board not introduce further changes in the reconciliation charge calculation until the EDCs’ proposed changes have been implemented and evaluated.

3. Proposed Changes to the BGS-FP product

RESA continues to argue that the Board should promote a “more competitive marketplace” by further lowering the CIEP threshold to include customers with usage over 400 kW and that the Board should direct the installation of interval meters for those customers to

⁶ RESA comments, page 3.

⁷ RESA comments, page 3-4.

give them “the opportunity to actively monitor and respond to the cost of their electricity on a real-time or hourly basis.”⁸ RESA also recommends that the Board abandon the BGS-FP laddered three year contract procurement process for a more frequent BGS procurement process of shorter term contracts.

Rate Counsel has addressed these issues at length in previous comments and will fully express our concerns in our final comments to be filed on October 7, 2014. It bears repeating here however that before forcing even more customers onto hourly pricing, the Board should establish a formal review process to determine whether the move to real-time pricing was beneficial to BGS customers above 500 kW. In addition, the Board must consider the additional costs associated with RESA’s recommendations that the Board conduct more frequent BGS procurements and require the installation of interval meters for all customers above 400kW prior to June 1, 2016. The Board has an obligation to determine that the modifications suggested by RESA benefit New Jersey ratepayers as well as the competitive energy suppliers.

4. Legal costs associated with the BGS auction patent defense.

In last year’s BGS proceeding, the Board agreed with Rate Counsel that “the Board should review the BGS auction patent legal fees paid to date and the recovery of these fees from ratepayers.”⁹ This review has not occurred. At that time, the Board directed the EDCs to submit a report to Staff and Rate Counsel “detailing the total amount of BGS auction patent legal fees paid to date and the recovery of these fees from ratepayers. After receipt and review of this information by Staff, Staff will inform Rate Counsel and the EDCs how it plans to proceed before making any recommendation to the Board.”¹⁰ On April 3, 2014, PSE&G provided to the

⁸ RESA comments, page 6.

⁹ I/M/O the Provision of Basic Generation Service For The Period Beginning June 1, 2014, BPU Docket No. ER13050378, Decision and Order, 11/22/15, p. 12.

¹⁰ Id. at 13.

Board on behalf of the EDC's a sheet of paper listing the "Annual Patent Legal Fees Charged." Through February, 2014 the total legal fees charged to ratepayers was \$2.4 million.

On August 22, 2014, Rate Counsel propounded additional discovery to update this number and identify additional legal costs associated with the BGS patent claim defense. Rate Counsel also requested a copy of the Board Order authorizing the recovery of these costs from ratepayers. We received a virtually identical response from each of the EDCs to all of Rate Counsel's questions on this issue:

[EDC] objects to this discovery request because it has been served out-of-time and in conflict with the procedural Order for this proceeding, which allows for a single round of discovery with all discovery requests served no later than July 22, 2014. See, Order dated May 21, 2014, Attachment A.

Without waiving this objection, [EDC] also objects on the grounds that the Board specifically concluded in its Decision and Order dated November 22, 2013 in Docket No. 13050378 (pp.12-13) that a BGS proceeding is not the appropriate forum for the review of these patent claim issues.¹¹

Since the EDCs filing on April 3, 2014 no further action has been taken by Staff.

Rate Counsel questions whether it is appropriate for ratepayers to pay millions of dollars in legal fees for this patent litigation. Accordingly, Rate Counsel respectfully requests that the Board initiate a proceeding to fully investigate this issue and, as a preliminary matter, direct the EDCs each to respond to Rate Counsel's discovery requests propounded in this proceeding and provide the legal basis for the continued recovery of these amounts from ratepayers.¹²

¹¹ RCR-75, RCR-76, RCR-77, RCR-78, RCR-82, RCR-83, RCR-84, RCR-85, RCR-88, RCR-89, RCR-90, RCR-91, RCR-93, RCR-94, RCR-95, and RCR-96.

¹² As part of this review, Rate Counsel asks that other amounts paid through the BGS administrative charge also be reviewed. For example, in 2012 PSE&G paid over \$1.14 million in fees associated with NERA's services as BGS Auction Manger, including lease payments for NERA's Newark office. At a minimum, Rate Counsel questions the continued need for ratepayer funding of NERA's Newark office.

5. Conclusion

Rate Counsel urges the Board not to impose changes to the BGS procurement process that negatively affect customers in order to subsidize competitive businesses. EDECA was enacted to foster competition for the purpose of lowering customers' rates. We cannot forget that New Jersey still has some of the highest residential electricity rates in the country. We cannot lose our focus on trying to lower that number. The goal at the time EDECA was enacted was to lower energy prices through competition. This must remain the goal today.

It is essential that the process for procuring Basic Generation Service is managed with the concerns of customers foremost in everyone's mind. The process must be administered to assure affordable and stable electricity prices for residential customers. The goal must be the lowest price for BGS-FP supply with reasonable price stability over the term of the procurement plan for this service. The driving force for making any change to the current BGS procurement process should flow from an analysis that demonstrates that a proposed change will result in lower prices for BGS customers.

Thank you for allowing me to present this testimony. Further details of our recommendations can be found in our written comments filed on September 3, 2014 and in the comments we will be filing early next month. We are, of course happy to take any questions you may have regarding our testimony.