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May 22, 2020

By Electronic Mail
Honorable Aida Camacho-Welch, Secretary
NJ Board of Public Utilities
44 South Clinton Avenue, 9th Floor
P.O. Box 350
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Re: In the Matter of the Petition of Public Service Electric and Gas Company for Approval of its Clean Energy Future-Electric Vehicle and Energy Storage ("CEF-EVES") Program on a Regulated Basis
BPU Docket No. EO18101111

Dear Secretary Camacho-Welch:

Please accept for filing this Reply Brief by the New Jersey Division of Rate Counsel ("Rate Counsel"), in the above-referenced matter. Copies of this brief are being provided to all parties on the service list by electronic mail only.

Please acknowledge receipt of this Reply Brief.

Thank you for your consideration and attention to this matter.

Respectfully submitted,

STEFANIE A. BRAND
Director, Division of Rate Counsel

By: */s/ Brian Weeks*
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Deputy Rate Counsel

BW
Enclosure
cc: Service List

In the Matter of the Petition of Public Service Electric and Gas Company for Approval of its Clean Energy Future-Electric Vehicle and Energy Storage ("CEF-EVES") Program on a Regulated Basis
BPU Docket No. EO18101111

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BOARD OF PUBLIC UTILITIES

In the Matter of the Petition of Public Service Electric and Gas Company for Approval of its Clean Energy Future-Electric Vehicle and Energy Storage ("CEF-EVES") Program on a Regulated Basis	))))))	**BPU Docket No. EO18101111**

REPLY BRIEF ON BEHALF OF THE DIVISION OF RATE COUNSEL

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Dated: May 22, 2020

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PRELIMINARY STATEMENT

Reducing emissions from the transportation sector is certainly an issue of great importance in New Jersey's efforts to combat the effects of climate change. To facilitate the reduction of emissions from cars and trucks, the Legislature and the Governor have called for increasing the use of electric vehicles in New Jersey. The Legislature passed the Plug-In Electric Vehicle ("PIV") Act, N.J.S.A. 48:25-1 through -11, which provides the means by which the Board of Public Utilities ("Board" or "BPU") may promote the use of electric vehicles. While draft versions of the PIV Act contained broad provisions allowing utilities to invest in electric vehicle infrastructure and charge ratepayers for the costs and profits involved in doing so, the Legislature removed such language from the Act. The version of the bill that was ultimately passed and signed by the Governor included certain specified incentives that the BPU could provide to promote the adoption of electric vehicles. Specifically, the Act permitted rebates up to $5,000 to customers purchasing electric vehicles, and rebates up to $500 to customers purchasing in-home chargers. N.J.S.A. 48:25-4, -6.

The source of the funds to be utilized to pay for these programs was also specified in the PIV Act. N.J.S.A. 48:25-7 states that both of the authorized programs are to be paid for via the "Plug-in Electric Vehicle Incentive Fund" ("PIV Fund"), to be administered by the BPU. The sources of funding for the PIV Fund are also specified in N.J.S.A. 48:25-7, and include funds collected via the Societal Benefits Charge ("SBC") and Regional Greenhouse Gas Initiative ("RGGI") for the vehicle rebates and SBC funds for the in-home charger rebates. Other than those sources, the only other funds to be deposited in the PIV Fund are further appropriations by the Legislature and the investment income of the Fund itself. The Legislature did not authorize

the Board to approve the ratepayer subsidies requested by Public Service Electric &Gas Company ("PSE&G").

Despite this clear and unambiguous statutory language, the Petitioner and several intervenors argue that the funding sources specified by the Legislature are insufficient. Citing to general language regarding BPU authority, they advocate that the Board ignore the statute's plain language and authorize a series of programs to be paid for via direct charges on customer bills. The Board lacks authority to do this. Its role is to execute the law as written, which the Legislature deemed sufficient to meet its statutory goals. Any Order allowing funding beyond what was permitted by the Legislature would be ultra vires as a matter of law.

Not only is the Petitioner seeking approval that goes beyond the clear statutory language, it is seeking approval to earn a profit on *other people's property.* This is also something the Board may not allow as it goes against decades of established law allowing utilities to earn only on "used and useful utility property." Although the Legislature has in one circumstance allowed the inclusion of energy efficiency and renewable energy investments in a utility's rate base, through Section 13 of the RGGI Act, N.J.S.A. 48:3-98.1, it chose not to do so here. There is simply no legal authority for the Board to approve the electric vehicle ("EV")-related sub-programs proposed by PSE&G in this Petition.

PSE&G and several intervenors oppose Rate Counsel's motion by citing general policy concerns about encouraging transportation electrification.[1] While these policy issues are no doubt important, they are not relevant to this motion. The Legislature, balancing environmental concerns, the desire of utilities to foster the increased sales of electricity that will come with EV adoption, and the economic concerns of customers who will be forced to pay for EV programs

[1] PSE&G's opposition brief is cited as PB; Rate Counsel's brief is cited as RCB.

whether or not they can afford to own an EV, decided to authorize certain programs and certain funding sources for those programs. The balance struck by the Legislature is even more important now, as many New Jersey families struggle with unemployment and the need to continue paying for essential utility services. Whether the Legislature struck the right balance or should have authorized more is also not relevant to this motion. The issues here are legal.

Granting Rate Counsel's Motion to Dismiss will not hamper the Company's ability to develop EV technologies. PSE&G's non-utility affiliates, unrestrained by Board regulation or public utility law, are free to invest in EV-related ventures. In fact, PSE&G's unregulated subsidiaries remain free to advance their preferred motor vehicle technologies and enter that competitive marketplace without relying on ratepayer subsidies.

No disputed factual issues preclude the issuance of the legal relief sought by Rate Counsel. Rate Counsel has taken the description of the EV-related sub-programs as stated in PSE&G's Petition. While several intervenors and PSE&G have called for further proceedings to flesh out the policy issues surrounding electric vehicle adoption, such proceedings would waste the resources of both the Board and the litigants if the requested EV programs cannot be approved as a matter of law. The Board should, and must, consider the legal issues raised by Rate Counsel's motion so that the issues in this case can be reduced to those the BPU has the legal authority to consider. Rate Counsel respectfully asks the Board to grant its motion.

POINT I

There Is No Legal Authority to Allow PSE&G to Earn on Property Owned by Others.

While acknowledging the long standing legal doctrine that utilities may only recover in rate base for "used and useful utility property," PSE&G urges the BPU to dispense with this principle in order to pursue general goals related to transportation electrification. Doing so would allow electric utilities to earn a profit on property they do not own. PSE&G has provided the BPU with no legal authority to depart from this long standing legal precedent. These precedents exist to maintain the balance between what is fair for a utility seeking to earn a reasonable return on its investments and what is fair for customers who are entitled to be charged only rates that are just and reasonable for public utility service. They are constitutionally derived, based on principles of property rights and may not be cast aside so easily. As PSE&G has provided no legal justification to deviate from well-established law, the Board should uphold these basic principles of law and fairness and grant Rate Counsel's motion.

The Company argues that its EV-related investments would be "used and useful" in providing regulated utility services because they would be accounted for as "regulatory assets." PS, 13-16. A regulatory asset is an accounting mechanism that allows a utility to defer certain costs on its balance sheet for recovery at a later date. If recovery is ultimately approved, the costs that have been deferred are then capitalized in the utility's rate base and amortized over time.[2] Referring to the costs of programs as "regulatory assets" does not determine whether the property at issue is used and useful utility property, although it does indicate that the Company is seeking to place the assets into rate base as if they were, and earn a return on them over time.

[2] See, https://www.investopedia.com/terms/r/regulatoryasset.asp

Rate Counsel is fully aware that the used and useful concept is part of a balancing performed by regulators to ensure that rates are just and reasonable. However, this does not mean that the requirement that costs being charged to ratepayers must be "used and useful utility property" has no meaning. While Rate Counsel's citations may be lengthy, PSE&G provides no citation at all for its statement that "[a] utility may recover its costs and earn a return in rates on its capital investments in non-utility owned assets, as well as in utility-owned assets not dedicated to providing the utility's core electric and gas service." PB 11. The examples cited by PSE&G in support of this proposition are matters covered by N.J.S.A. 48:98.1, in which the Legislature explicitly provided a limited exception to allow utilities to charge ratepayers for non-utility property when implementing energy efficiency and Class I renewable energy programs.[3] In that limited circumstance, the Legislature presumably believed that these investments could be made and paid for without rendering the resulting rates unjust or unreasonable. It provided no such exception for EV infrastructure in the PIV Act. While no party challenged the constitutionality of Section 13 of the RGGI Act, its enactment has not led – until now – to an argument that the "used and useful" principle has no further effect.

If utilities were simply free to include property owned by others that is not used for the provision of utility services in rate base as PSE&G argues, it is unclear what all of those lengthy quotes and citations provided by Rate Counsel mean. Even if the "used and useful utility property" principle is not a "bright line," it surely must mean something. PSE&G's interpretation would simply dispense with this long standing principle that is, as PSE&G acknowledges, an integral part of ensuring that rates are just and reasonable.

[3] It is of no importance that PSE&G filed its petition for its solar loan program before N.J.S.A. 48:98.1 was passed. The Board ruled on the filing after that statute was in effect.

PSE&G argues further that its proposal *does* involve used and useful utility property. It asserts that the used and useful utility property is its *capital investment*. PB 15. This is another argument that would obliterate the used and useful principle. If spending utility money was sufficient to satisfy the used and useful principle, then every utility program would qualify. That is clearly not supported by the extensive case law and Board precedent upholding the used and useful principle.

The fact is that the examples cited by PSE&G as supporting the proposition that it has been allowed to recover for property that is not used and useful all fall under the limited exception granted for energy efficiency and class I renewable energy programs, an exception that the Legislature did not provide for EV infrastructure in the PIV Act.[4] The only exception is the Natural Gas Vehicle (NGV) tariff matter from 1994, in which the Company was permitted to do a limited pilot program to provide rebates for NGV vehicles. In re Public Service Electric and Gas Company, 1994 N.J. PUC LEXIS 14, 155 P.U.R.4th 441 (1994). In that case, the

[4] PSE&G also cites a number of out of state cases for the proposition that EV and EVSE are permitted despite the used and useful doctrine. PB 18. Those cases are not precedential in this case and their applicability is unclear since the details of the offerings, the governing statutes and the rate base treatment of the assets is not fully known. It should be noted, however, that in at least one of the cases cited by PSE&G, Southern California Edison was apparently not permitted to rate base its EV investments. Alternate Proposed Decision Regarding Southern California Edison Company's Application for Charge Ready and Market Education Programs, California Public Utility Commission, Docket No. A.14-10-014 (Jan. 16, 2016), at 19-21. In the 2018 Oregon case cited by PSE&G, the Commission was reviewing a stipulation agreed to by the parties and noted that the term "used and useful," which was included in Oregon's statute, referred to "a required prerequisite for rate recovery of a utility's capital investments." In re Portland General Elec. Co., Application for Transp. Elec. Programs, Oregon Public Utility Commission, Docket No. UM-811, Order No. 18-054 (Feb. 16, 2018), at 9. That Oregon Order specifically states that the question of recovery of invested capital would be made in a future Order and that its decision approving the stipulation and the pilot programs at issue was not intended to be precedential in any other proceeding. Id. at 12. The Maryland decision, as acknowledged by ACE, was based on the Maryland Commission's interpretation of the Maryland statute, and thus provides little guidance to any decision regarding New Jersey's statutes.

Company's request to recover rebates was reduced by the Board from $3 million to $250,000 per year, and, unlike the within petition, the Company did not seek to build the charging station with ratepayer money, proposing to use shareholder funds instead. Id.[5]

With respect to the Rockland Electric Company ("RECO") AMI[6] case, PSE&G attempts to distinguish it by saying it "could be interpreted" differently. PB at 14. In that case, the Board allowed RECO's request for pre-approval to install advanced meters throughout its entire service territory. Similar to customer-owned EVSE, because the property was located on the customer's side of the meter, the property was customer-owned. Rockland proposed to capitalize such costs in rate base similar to PSE&G's EV Sub-programs 1, 2 and 4, and a portion of Sub-program 3, and Rockland proposed to earn a return on the customer-owned property. Even though the Board believed such work was necessary for the safe installation of AMI,[7] the Board agreed with Rate Counsel that the Company's proposal "violates settled New Jersey case law." I/M/O Petition of Rockland Electric Co. For Approval of an Advanced Metering Program; and For Other Relief, BPU Docket No. ER16060524, Order dated Aug. 23, 2017 ("RECO AMI Order"),[8] at 22. It is hard to understand how the language could be read differently. The Board specifically stated that:

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[5] With respect to the New Jersey Natural Gas Program cited by PSE&G, the Order cited defers resolution of cost recovery to a future rate case. See further discussion of this case in Point II below.

[6] Advanced Metering infrastructure.

[7] In order to allow RECO to perform work on the customer side of the meter, the Board waived General Information Section No. 22 of RECO's filed tariff, which states that the customer is responsible to provide and maintain such equipment. RECO AMI Order, at 22; https://www.oru.com/en/nj-rates-tariffs, General Information Section No. 22.

[8] Available at https://www.bpu.state.nj.us/bpu/pdf/boardorders/2017/20170823/8-23-17-2F.pdf.

> [w]ith respect to the cost of such work, the Board HEREBY FINDS that RECO's proposal is contrary to settled New Jersey case law. Accordingly, the Board HEREBY DENIES RECO's request to capitalize such costs. Costs related to this work shall not be recovered from the Company's ratepayers.
>
> Id. The plain language of the Board Order clearly states its meaning.

In sum, PSE&G has failed to explain why the used and useful doctrine is inapposite here. The examples it cites where exceptions have been made were all, as noted below, authorized explicitly by statute. As discussed further below, the Legislature has not chosen to do so here. The utility here seeks not just to provide incentives to customers who seek to install charging stations at home, it seeks to place those investments into rate base via a regulatory asset. These investments are not "used and useful" in providing public utility service and may not be recovered in rates. Even if there is no "bright line," PSE&G's interpretation of this long standing legal principle, which it acknowledges is an integral part of ensuring that rates are just and reasonable, would render that principle meaningless. Its interpretation is flawed, its legal arguments insufficient. Rate Counsel's motion should be granted.

POINT II

The Board has no statutory authority to approve the EV sub-programs in PSE&G's petition.

The authority of an administrative agency, like the Board, is defined by the Legislature in the agency's enabling act. As our Supreme Court has stated, "an administrative agency only has the powers that have been 'expressly granted' by the Legislature and such 'incidental powers [as] are reasonably necessary or appropriate to effectuate' those expressly granted powers." N.J. Guild of Hearing Aid Dispensers v. Long, 75 N.J. 544, 562, (1978) (quoting In re Regulation F-22 Office of Milk Indus., 32 N.J. 258, 261 (1960)). The New Jersey Constitution directs that our State government has three branches, and authorizes the Legislature to write the laws and the Executive to implement the laws. See Enourato v. New Jersey Bldg. Auth., 90 N.J. 396, 400-01 (1982), citing N.J. Const. (1947), Art. III, para. 1 (discussing Constitutional roles of legislative and executive branches). Thus, while the Board's authority over the regulation of public utilities is broad, it is not limitless**.** See In re Centex Homes, LLC, 411 N.J. Super. 244 (App. Div. 2009).

The premise of PSE&G's argument that statutory authority exists for the EV sub-programs in its Petition, is that the Legislature did not go far enough in the PIV Act to achieve its goals and those of the EMP, and thus the Board should interpret the Act not based on its plain meaning, but based on the utility's view of what is necessary to achieve the goals set forth in the statute and the 2019 State Energy Master Plan ("2019 EMP").[9] See, Affidavit of Karen Reif, PSE&G Vice President of Renewables and Energy Solutions, May 8, 2020. However, PSE&G's arguments fail to acknowledge that the 2019 EMP is a creation of the Executive Branch and thus

[9] State of New Jersey, "2019 New Jersey Energy Master Plan, Pathway to 2050," available at https://nj.gov/emp/docs/pdf/2020_NJBPU_EMP.pdf.

cannot confer additional authority on the BPU beyond its enabling statutes, and that the Legislature was fully aware that the utilities sought to do work such as that requested in this Petition, but chose to delete the language that would authorize it.

Contrary to PSE&G's brief, PB at 19-22, the Board's extensive supervisory and regulatory authority over public utilities, absent specific legislation, does not expand the scope of the Board's jurisdiction. If that were the case, then In re Centex Homes, supra, would have been decided differently. There, the court found that the Board did not have authority to regulate land use under the guise of utility regulation. Here, the Board does not have authority to allow EV transportation investments to be recovered through utility rates under the guise of public utility service. Allowing such utility investment into the transportation industry would not be an "incidental" power, but an entirely new area of the utility's business. Contrary to the assertion by PSE&G, the programs that are the subject of this motion do not encompass the traditional utility work that would be involved with broad EV adoption, *i.e.* work on the distribution system to ensure that it can handle the substantial increase in load that would occur. Rate Counsel recognizes that ratepayers may pay for the distribution system upgrades that will be required as that is clearly work that is necessary to ensure utility reliability. The work PSE&G seeks authority to perform in this case is *in addition to* the distribution upgrades that will be paid for through rates. This may be why the Legislature wisely limited the further use of ratepayer funds in the statute.[10] Such a broad expansion of public utility investment into the transportation

[10] Indeed, BPU Staff recently issued a Straw Proposal that also focuses utility involvement on the necessary distribution upgrades, and limits any utility charging station construction to the "last resort." New Jersey Electric Vehicle Infrastructure Ecosystem 2020 Straw Proposal, I/M/O Straw Proposal on Electric Vehicle Infrastructure Build Out, BPU Docket No. QO20050357, May 18, 2020, at 7, 8, 9, 12 & 13, available at https://www.nj.gov/bpu/pdf/Final_EV_Straw_Proposal_5.18.20.pdf.

industry has no basis in any statutory language. Accordingly, the Board has no authority to allow PSE&G to recover its EV-related investments through utility rates.

The PIV Act does not authorize approval of PSE&G's EV proposals.

PSE&G points to the legislative goals in the PIV Act for expanding EV adoption in New Jersey and the directions to the Board and the DEP to take certain actions. Those actions, however, do not include expanding the scope of public utility services or authorizing the Board to approve the EV-related programs proposed by PSE&G and to recover their investments through utility rates.

Through the PIV Act, the Legislature authorized the use of $300 million in ratepayer-provided SBC funds to pay incentives to encourage the purchase of EVs, and additional SBC funds to pay for rebates for in-home chargers up to $500. Contrary to PSE&G's argument, the Legislature did not authorize the recovery of other EV-related investments through utility rates. See PB at 16-17, 20 & 25-30. PSE&G fails to accurately describe the operative provisions of the PIV Act, citing only N.J.S.A. 48:25-1 (Findings, Declarations), N.J.S.A. 48:25-3 (establishing State goals), and N.J.S.A. 48:25-11 (allowing the Board to issue rules and regulations). The provisions establishing how the Legislature has authorized state agencies to achieve the PIV Act's goals are largely missing. This omission is crucial, as the operative sections of the PIV Act plainly do not authorize the EV-related approvals sought in this Petition.

PSE&G correctly notes that N.J.S.A. 48:25-4 establishes the Light Duty Plug-in Vehicle Incentive Program, but fails to acknowledge that the funding source for that program was specified by the Legislature. That provision of the PIV Act directs the Board to establish a program to provide one-time payments of up to $5,000 to customers buying light duty plug-in vehicles. The next section, N.J.S.A. 48:25-5, establishes how the sellers and lessors of plug-in

vehicles shall administer the Light Duty Plug-in Vehicle Incentive Program. N.J.S.A. 48:25-6 provides that the Board "may establish and implement a program to provide incentives for the purchase and installation of in-home electric vehicle service equipment." If the Board does establish such a program, N.J.S.A. 48:25-6(c) provides that the incentive shall be a one-time payment no more than $500 per person.[11] N.J.S.A. 48:25-7 establishes the Plug-in Vehicle Incentive Fund ("PIV Incentive Fund"), and provides that "moneys in the fund shall be used by the board solely for the purpose of disbursing the incentives established pursuant to sections 4 and 6" of the Act. The sources of funding for the PIV Incentive Fund and their uses are specifically enumerated in subsection (b) of N.J.S.A. 48:25-7. For the Light Duty Plug-in Vehicle Incentive Program, they include $30 million of money collected from the SBC, moneys made available to the Board from the Regional Greenhouse Gas Initiative, and "other funding as determined by the Board." For the incentive program for the purchase and installation of in-home vehicle chargers, N.J.S.A. 48:25-7(b) limits the funding source to "additional amounts from the societal benefits charge." All funding sources must be deposited into the PIV Incentive Fund, along with other funds that may be appropriated by the Legislature and the return on investments earned by the Fund.

The plain language of these statutory provisions is virtually ignored by PSE&G. The Company acknowledges the express limits on incentives in N.J.S.A. 48:25-7, but then claims that this funding is insufficient and therefore the Legislature must have meant to authorize additional funding from utility investments. PB p. 27. This is an absurd reading of the statute. Nowhere

[11] Although the statute clearly limits incentives for in-home chargers to $500, PSE&G, without justification or discussion, proposes higher incentives here. Its proposals should be rejected on that basis as well.

does this section of the statute authorize additional funding through customer rates.[12] Such speculation cannot override the Legislature's plain language. See State v. Hudson, 209 N.J. 513, 529 (2012) ("extrinsic aids may not be used to create ambiguity when the plain language of the statute itself answers the interpretative question").

PSE&G also attempts to argue that if there is no explicit prohibition in the statute for BPU to allow utilities to pay for and earn on PIV programs through regulated rates, then BPU is free to do so. This is absolutely not consistent with the law, which limits executive agencies to the powers granted to them by the Legislature. General Assembly of New Jersey v. Byrne, 90 N.J. 376, 393 (1982). Moreover, the implications of adopting such an argument are vast, as it would allow the BPU to authorize just about anything to be placed on the bills of captive ratepayers. No statute could reasonably list everything the Legislature doesn't want an agency to do. This tortured legal argument clearly has no merit and cannot possibly form the basis of an agency decision that is counter to the plain language of the statute.

Outside of those specifically enumerated funding sources, the PIV Act does not authorize the Board to allow utilities to invest any ratepayer funds in its implementation. The PIV Act does not provide any role or authority for regulated public utilities to invest in or subsidize EVs or EVSE. In fact, the Legislature specifically deleted utility ownership and operation of EV charging stations from the adopted PIV legislation.[13] PSE&G offers the outlandish hypothesis that the Legislature removed utility ownership and operation of EV charging stations from the

[12] The remaining sections of the statute include provisions defining EV-related terms, N.J.S.A. 48:25-2, requiring the development of a website, N.J.S.A. 48:25-8, public education, N.J.S.A. 48:25-9, and the provision discussed in Rate Counsel's initial brief providing that an entity owning charging equipment shall not be deemed a public utility and that charging shall be considered a "service" and not the sale of electricity. N.J.S.A. 48:25-10.

[13] Compare A4819, Section 10, p. 17 http://www.njleg.state.nj.us/2018/Bills/A5000?4819_l1.HTM with P.L. 2019, ch. 362.

PIV Act because implementing such a provision would have been unduly complex and time-consuming. PB at 29, n. 97. The Company offers no reason to suggest that the Legislature is incapable of crafting language to achieve its objectives. The Legislature simply removed that language from the PIV Act because it determined that such authority should not be in there.

Moreover, PSE&G's assertion that "there is no language in the PIV Act limiting the types of programs the Board may consider" is incorrect. PB at 26. The PIV Act expressly limits the Board's authority with regard to EVs to that conferred by existing law:

> The board and the [DEP] may, pursuant to [this bill] and any other *existing* statutory authority, adopt policies and programs to accomplish the goals established pursuant to this section.

N.J.S.A. 48:25-3(b) (emphasis added). The PIV Act clearly does not extend the Board's authority, but reiterates that the Board must adopt any EV-related policies and programs within the scope of its existing statutory authority. Through the PIV Act, the Legislature authorized cost recovery through SBC funds, and not through utility rates, for EV-related incentives. Even if some of PSE&G's proposals may be similar to those in the PIV Act, see PB at 26-27, the Legislature specified the amount of authorized incentives and the source of their funding. Nothing in the PIV Act allows the recovery of EV-related investments through utility rates.

The RGGI Act does not authorize approval of PSE&G's EV proposals.

In contrast to the PIV Act, in section 13 of the RGGI Act, N.J.S.A. 48:3-98.1, the Legislature expanded the scope of utility services recoverable through utility rates. There, the Legislature authorized the use of utility rates to recover the costs of Board-approved energy conservation, energy efficiency and Class I renewable energy projects. Through N.J.S.A. 48:3-98.1 and N.J.S.A. 48:3-60, the Legislature authorized cost recovery through both SBC funds and utility rates for Board-approved energy efficiency, conservation and renewable energy projects.

Clearly, the Legislature knows how to specify the scope of programs that a public utility may recover through utility rates.

PSE&G tries to claim that its EV-related proposals are energy conservation or efficiency projects. However, PSE&G's effort to evade unambiguous statutory language should be rejected here as well. EV charging is not conservation, since it increases electric load and demand. In section 13 of the RGGI Act, the Legislature defined an "energy efficiency and energy conservation program" as a regulated program "for the purpose of conserving energy or making the use of electricity or natural gas more efficient by New Jersey consumers." N.J.S.A. 48:3-98.1(d). However, fully electrifying the transportation and building industries in New Jersey will increase the use of electricity by as much as 2.3 times by 2050.[14] This is hardly "conservation" of electricity. PSE&G's argument is an absurd reading of the statute and is not a fair assessment of the Legislature's intent to allow utility investments in energy conservation and energy efficiency programs as defined in N.J.S.A. 48:3-98.1(d). Since the plain language of N.J.S.A. 48:3-98.1 does not apply to EV charging, that statutory provision is not sufficient to bestow authority on the BPU to allow PSE&G to participate in the proposed competitive services on a regulated basis.

PSE&G also offers no support for its interpretation that the increase in electricity use from EV adoption constitutes "energy efficiency." First, there is nothing in the Company's Petition that attempts to justify its sub-programs as "energy efficiency under N.J.S.A. 48:3-98.1. Despite a "catch-all," citing "any other authority" of the Board, the Petition cites the Board's general authority over rates, N.J.S.A. 48:2-21 and N.J.S.A. 48:2-21.1 as the statutory basis for its filing, PSE&G attempts to support its claim that its proposed EV Programs are "energy

[14] State of New Jersey, "2019 New Jersey Energy Master Plan, Pathway to 2050," p.176.

efficiency" by citing a statement from the 2019 EMP that "Light-duty (passenger car) EVs are three to five times more efficient per mile traveled than their gas-fueled counterparts." 2019 EMP at 60; PB at 20-21. However, as noted above, N.J.S.A. 48:3-98.1 clearly defines energy efficiency programs as those programs that encourage more efficient use of "electricity and natural gas." It says nothing about gasoline. Simply declaring its programs to be "efficient" is not enough to override the statutory language. Accordingly, N.J.S.A. 48:3-98.1 does not authorize including EV-related programs as energy conservation and energy efficiency projects whose costs are recoverable through utility rates. PB at 16-17 & 20-21.

The 2019 EMP does not authorize approval of PSE&G's EV proposals.

The Company claims authority for its EV-related proposals in the 2019 EMP. PB at 22-25. Such authority, however, simply is not there. The 2019 EMP is a creation of the executive branch of government, which may guide an administrative agency in the implementation of a statute, but it does not itself provide statutory authority that the legislative branch has not granted. The 2019 EMP is not a statute and cannot change the scope of the Board's jurisdiction. It does not add to the Board's powers or change well-established ratemaking principles. As the court explained in Centex Homes, above, Board action based on a policy document such as the 2019 EMP would be ultra vires and void.

The 2019 EMP sets forth ambitious EV-related goals, but does not authorize the approval that PSE&G requests. The 2019 EMP envisions certain actions that EDCs and the Board may appropriately undertake with respect to EVs that are consistent with their statutory authority. These include working together to develop Integrated Distribution Plans, within a year, to plan for, finance and implement the electric distribution system upgrades required for expanded EV charging. Id. at pp. 14, 176 & 194. The 2019 EMP envisions the EDCs upgrading their

distribution systems to accommodate the huge anticipated load increase from EVs, but does not discuss having utilities subsidize the purchase of EVs or EVSE. Id. at p. 14 ("New Jersey must plan for, finance, and implement distribution system upgrades that will be required to handle increased electrification ..."). Thus, the EMP does not purport to create additional authority for the Board to approve PSE&G's EV programs, even if it could.

The New Jersey Natural Gas ("NJNG") compressed natural gas vehicle ("NGV") matter cited by PSE&G does not support approval of the EV programs in this case.[15] That proposal involved a very limited pilot program, hardly comparable to the proposal here, which calls for construction of up to 40,000 charging stations. While PSE&G correctly notes that Rate Counsel objected to the stipulation in that case between the Board and the utility. The Order cited defers resolution of cost recovery to a future rate case.[16] It appears that program was modified later,[17]and the Orders in NJNG's subsequent rate cases do not explain what, if any, recovery was permitted through rates, although they do indicate that customers using the stations were charged a rate for refueling to offset costs to ratepayers.[18]

The 1994 NGV case cited by PSE&G is similarly inapposite. See, 1994 N.J. PUC LEXIS 14, 155 P.U.R.4th 441 (1994). As noted above, that case was also a limited pilot and

[15] I/M/O Petition of NJNG for Approval of a Pilot Program for the Installation of Compressed Natural Gas Infrastructure and an Associated Recovery Mechanism, 2014 N.J. PUC LEXIS 85, 2012 WL 3646794 (NJBPU) (June 18, 2012), p. 3 (Order approving stipulation, over Rate Counsel's objection, for NJNG pilot program to construct, own and operate CNG vehicle fueling stations and for provisional rate recovery).

[16] https://www.nj.gov/bpu/pdf/boardorders/2012/20120618/6-18-12-2E.pdf.

[17] https://www.state.nj.us/bpu/pdf/boardorders/2015/20151120/11-16-15-2H.pdf.

[18] See, https://www.nj.gov/bpu/pdf/boardorders/2016/20160923/9-23-16-2A.pdf and https://www.nj.gov/bpu/pdf/boardorders/2019/20191113/11-13-19-2D.pdf .

PSE&G in that instance did not seek ratepayer money to build the NGV charging stations, proposing that it would be paid for with shareholder funds. Id.

EDECA does not Authorize Approval of PSE&G's Proposals

Finally, EDECA does not authorize approval of the proposed EV programs. As discussed at length in Rate Counsel's initial brief, the services to be provided by the utility in its proposal are "competitive services" that, under EDECA, may not be provided by regulated utilities. The Company denies that its EV-related proposals are "competitive services" that are prohibited by EDECA and the PIV Act. PB at 30-33. First, PSE&G claims that EV charging is a Board-regulated public utility function, and not a service, because the PIV Act broadly encourages adoption of EVs. PB at 30-31. That ignores the plain language of the PIV Act, which specifically provides that owning and operating EVSE is a service and not the sale of electricity by a public utility. N.J.S.A. 48:25-10. Then, PSE&G claims that the "service" of EV charging, as stated in the PIV Act, cannot be a "competitive" service, as defined in EDECA. PB at 31. This too makes no sense, logically or legally.

PSE&G would interpret the provision of the PIV Act declaring that EV charging is a service, not a public utility function, to implicitly repeal the provision of EDECA that prohibits a public utility from offering such competitive services. The plain language and clear meaning of the words "service" and "competitive service" in EDECA and the PIV Act demonstrate that PSE&G's interpretation of the statutes is not permissible. The Appellate Division has explained rules of statutory construction that apply here:

> Words contained within the statute should be given their plain meanings and "read in context with related provisions so as to give sense to the legislation as a whole." … Moreover, when reviewing two separate but related statutes, "the goal is to harmonize the statutes in light of their purposes," to give effect to the Legislature's intent as evidenced by its "language[,] . . . the policy behind it, concepts of reasonableness and legislative history." Therefore, a reviewing court

> should assume that the Legislature did not use "any unnecessary or meaningless language," and should instead "try to give effect to every word of [a] statute . . . [rather than] construe [a] statute to render part of it superfluous." "We must presume that every word in a statute has meaning and is not mere surplusage, and therefore we must give those words effect and not render them a nullity."
>
> Finkel v. Township Committee of Tp. of Hopewell, 434 N.J. Super. 303, 319 (App. Div. 2013) (internal citations and quotations omitted).

The Board must give the language of EDECA and the PIV Act its plain meaning and read them in harmony to uphold each provision of both statutes.

EDECA set forth the scope of services that a regulated public utility may perform at the time that the Legislature "unbundled" the services formerly provided by vertically integrated utilities. While retaining the Board's broad jurisdiction to regulate public utilities, EDECA limited the Board's authority over "competitive services" to ensuring reliability. N.J.S.A. 48:2-13(d). EDECA defines a "competitive service" as "any service offered by an electric public utility or a gas public utility that the [B]oard determines to be competitive pursuant to [N.J.S.A. 48:3-56 or 48:3-58] or that is not regulated by the [B]oard." N.J.S.A. 48:3-51 (emphasis added). Under N.J.S.A 48:3-56, "the board shall not regulate, fix, or prescribe the rates, tolls, charges, rate structures, rate base, or cost of service of competitive services." Under N.J.S.A. 48:3-58, public utilities may provide certain competitive services, but only with Board approval and only under limited, specifically enumerated circumstances. The Board must make certain findings, including that the provision of the competitive service will not interfere with the provision of regulated non-competitive services and that the rate charged for the competitive service does not require subsidization through regulated rates. N.J.S.A. 48:3-58. In fact, one of the specific purposes of EDECA was to "ensure that rates for non-competitive public utility services do not subsidize the provision of competitive services by public utilities." N.J.S.A. 48:3-50.

The plain language of EDECA clearly indicates that EV charging is a "competitive service." First, the purchase and installation of EVSE and the charging of EVs are not among the functions of a public utility in New Jersey that are regulated by the Board. Thus, under the definition in N.J.S.A. 48:3-51, they are competitive services. Second, installing EVSE and charging EVs are not competitive services that a regulated utility may provide subject to Board approval under N.J.S.A. 48:3-55. Those services include metering, billing, safety and reliability services, and similar services that the utility had offered prior to January 1, 1993 when their services were "unbundled." N.J.S.A. 48:3-55(f). EDECA expressly prohibits an electric public utility from providing any competitive service that was not approved or pending as of July 1, 1998. N.J.S.A. 48:3-55(i). Therefore, EV-related services are not among the competitive services that EDECA authorizes the Board to allow a public utility to provide.[19]

Under the plain language of EDECA and the PIV Act, the construction, ownership and operation of EVSE is not a regulated public utility service, but a "competitive service" not regulated by the Board. Further, the Board is without authority to declare that EV charging is a competitive service that an electric public utility may provide, since none of the criteria for the Board to allow PSE&G to provide these competitive services have been met. There can be no doubt that PSE&G specifically intends to utilize rates for non-competitive services to subsidize its proposed EV-related competitive services in direct contradiction of both the language and the purpose of EDECA. Therefore, EDECA also does not provide the requisite statutory authority for the EV sub-programs in the Petition.

PSE&G makes an attempt to argue that, by virtue of the PIV Act, EV charging and incentives *are* regulated by the Board. PB at 30-31. Despite the clear language in N.J.S.A.

[19] The fact that other private companies including several intervenors in this case provide these services on an unregulated basis is further indication that these services are competitive.

48:25-10 saying otherwise, the Company argues that because EV incentives are discussed in the PIV Act those activities "regulated" by the Board. This is an absurd reading of both statutes. The BPU does not and has never regulated the sale, purchase or use of electric vehicles or EVSE. It does not set the prices to be charged or anything else concerning the EV industry. Adopting PSE&G's interpretation would vastly expand the Board's regulatory authority that is not consistent with the Legislature's language or intent.

Accordingly, there is no statute granting authority for the BPU to approve the EV programs proposed by PSE&G as a matter of law. Rate Counsel's motion should be granted.

POINT III

PSE&G May Perform "Make Ready" Work on the Utility Side of the Meter, but only in conformance with the Board's Main Extension Rules.

PSE&G's opposition brief claims that the Board's Main Extension Rules may not apply to its proposals because there are alleged questions of fact as to whether they are proposing service main extensions. PB at 33-34. The Company then argues that the Rules are no obstacle, since the Board can waive them. PB at 34. No questions of fact preclude dismissal of the EV sub-programs in the Petition under the Main Extension Rules. First, PSE&G proposes to construct or install plant and/or facilities to convey new service to new structures holding electric car charging equipment. See N.J.A.C. 14:3-8.2. Second, the Board's waiver rule sets forth conditions to waive a rule in special cases and for good cause shown. N.J.A.C. 14:1-1.2(b).

> The Board shall, in accordance with the general purposes and intent of its rules, waive section(s) of its rules if full compliance with the rule(s) would adversely affect the ratepayers of a utility or other regulated entity, the ability of said utility or other regulated entity to continue to render safe, adequate and proper service, or the interests of the general public. N.J.A.C. 14:1-1.2(b)1.

Waiving the application of the Board's entire Main Extension Rules would adversely affect ratepayers, since it would allow PSE&G to recover from ratepayers its investments in

property not used and useful in providing public utility service, to subsidize the provision of competitive services and to pay for approvals that the Board has no authority to grant. PSE&G has not shown any adverse effects on its utility operations from applying the Main Extension Rules. The broad policies encouraging EV adoption cited by PSE&G are insufficient to overturn those legal principles.

Moreover, PSE&G does not propose a case-by-case waiver of a Board rule; instead, the proposed "make ready" work relies entirely on a wholesale exemption from the Main Extension Rules so the Company can recover these investments from ratepayers. The PSE&G Petition would require ratepayer subsidies, without even a gesture in the direction of complying with the Main Extension Rules. Waiving the Main Extension Rules also would shift onto ratepayers the risk that service extensions to EV charging equipment may generate insufficient business or otherwise prove unprofitable. The purpose of the Rules is to ensure that the customer requesting the service extension and the utility bear the risk. Accordingly, the "make ready" proposals as requested in the EV sub-programs in the Petition should be dismissed.

CONCLUSION

For all the reasons set forth above, Rate Counsel respectfully requests that the Board enter an order dismissing the EV Sub-Programs of PSE&G's Petition as a matter of law.

Respectfully submitted,

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