



STATE OF NEW JERSEY
Board of Public Utilities
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www.nj.gov/bpu/

ENERGY

IN THE MATTER OF THE PETITION OF NEW JERSEY)
NATURAL GAS COMPANY FOR APPROVAL OF A)
MUNICIPAL FRANCHISE IN THE BOROUGH OF)
SAYREVILLE, MIDDLESEX COUNTY, STATE OF NEW)
JERSEY, TO SERVE RED OAK POWER, LLC)
DECISION AND ORDER

DOCKET NO. GE12121084

Parties of Record:

Andrew K. Dembia, Esq., on behalf of New Jersey Natural Gas Company
Steven S. Goldenberg, Esq., on behalf of TAQA Gen-X, LLC
David K. Richter, Esq., on behalf of Public Service Electric and Gas Company
Stefanie A. Brand, Esq., Director, New Jersey Division of Rate Counsel

BY THE BOARD:

This matter comes before the Board through a petition filed by New Jersey Natural Gas Company ("NJNG" or the "Company"), dated December 19, 2012, pursuant to N.J.S.A. 48:2-14 and N.J.A.C. 14:1-5.5 requesting approval of a franchise granted by the Borough of Sayreville, Middlesex County, New Jersey ("Sayreville" or "Borough") authorizing NJNG to provide gas distribution service to a power generation facility owned by Red Oak Power, LLC ("Red Oak"). The scope of the consent is limited solely to the Red Oak facility.¹

BACKGROUND

The Red Oak generation facility is a 830 MW combined-cycle, gas-fired power plant located at 832 Red Oak Lane in the Borough of Sayreville, Middlesex County, New Jersey. Red Oak currently has a tolling agreement with TAQA Gen-X, LLC ("TAQA"). Red Oak has agreed to use the generating facility to convert the natural gas fuel provided by TAQA into electric energy for delivery back to TAQA which, in turn, trades that energy in the PJM Interconnection, LLC ("PJM") wholesale energy market.

¹ Under a separate petition, NJNG has requested approval of a Gas Service Agreement ("GSA") between the Company and Red Oak, docketed as GO13010059, dependent upon approval of this municipal consent.

TAQA has a natural gas supply contract with PSEG Energy Resources & Trade ("PSEG ER&T"), an unregulated affiliate of Public Service Electric and Gas Company ("PSE&G"). The gas supply provided under this agreement reflects the Transcontinental Gas Pipe Line Company, LLC ("Transco") Zone 6-NY gas price. The initial 11-year term of this natural gas supply contract expires on or about October 1, 2013. According to the information provided, TAQA approached PSEG ER&T to negotiate updated pricing terms to apply after expiration of the supply contract's initial 11-year term. To date, PSEG ER&T and TAQA have been unable to negotiate mutually agreeable revised pricing terms for a new gas supply agreement. Pursuant to the terms of their current gas supply agreement, TAQA and PSEG ER&T have extended their existing supply contract terms for an additional year, through September 30, 2014.²

Red Oak currently receives natural gas distribution service from PSE&G and is situated within its service area as described in PSE&G's tariff. The initial term of Red Oak's current gas transportation agreement with PSE&G is due to terminate on or about October 1, 2013. TAQA sought to extend its gas transportation agreement with PSE&G but, by letter dated September 27, 2012, PSE&G informed TAQA that it would terminate the existing gas transportation agreement at the end of its initial term. PSE&G informed TAQA that Red Oak was eligible for gas transportation service under Rate Schedule Transportation Service Gas - Non-Firm ("TSG-NF") of PSE&G's tariff, and may be eligible for discounted service under PSE&G's Contract Gas Service ("CSG") rate schedule.

In early 2012, TAQA began to explore constructing a potential bypass pipeline that would interconnect Red Oak directly with Transco's interstate natural gas pipeline system. To that end, TAQA initiated discussions with Transco regarding a potential bypass project. TAQA received several bypass pipeline proposals, including cost estimates from Transco, as well as a pro forma Delivery Interconnect, Reimbursement and Operating Agreement.

While it was considering the Transco bypass option, TAQA discovered that a natural gas transmission line owned and operated by NJNG ran within 600 feet of the Red Oak plant. NJNG provides gas transportation service to the former JCP&L Sayreville Generating Station in Sayreville which is down the road from Red Oak. TAQA contacted NJNG to discuss a potential gas supply and gas distribution service agreement. On August 29, 2012, NJNG executed a 10-year GSA with TAQA to provide gas distribution service as well as supply gas to Red Oak Power. In contrast to its existing gas supply arrangement with PSEG ER&T, TAQA's GSA with NJNG, if approved by the Board, would provide TAQA with gas supply pricing based on Texas Eastern ("TETCO") M-3 and Transco Zone 6 Non-NY prices.

As Sayreville is not within NJNG's Board-approved service territory, it was necessary for NJNG to obtain a limited franchise from Sayreville authorizing it to provide gas distribution service to Red Oak. On October 12, 2012, a proposed form of Ordinance was submitted to the Sayreville Council that would grant NJNG a limited franchise to serve Red Oak for a period of fifty (50) years. The proposed ordinance was considered over three separate Council meetings convened on October 22, November 26, and December 17, 2012. In each instance, the Council's meeting agenda was posted on the Borough's web site in conformity with the New Jersey Open Public Meetings Act.

² TAQA must decide by September 30, 2013 whether to extend its supply arrangement with PSEG ER&T through September 30, 2015.

At Sayreville Council's October 22, 2012 meeting, Sayreville's Engineer presented information to the Council regarding NJNG's request to provide gas distribution service to Red Oak. At its November 26, 2012 meeting, the Sayreville Council, acting pursuant to N.J.S.A. 40-49 et seq., introduced proposed Ordinance #203-12 authorizing NJNG to serve Red Oak for a first reading. At the Council's December 17, 2012 meeting, proposed Ordinance #203-12 was presented for a second reading, pursuant to N.J.S.A. 40-49-2c and was made available for public comment. No members of the public commented, and the Sayreville Council then unanimously adopted Ordinance #203-12. Pursuant to N.J.S.A. 40-49-2d, Ordinance #203-12 subsequently was submitted for publication by the Borough Clerk's office and was published on December 22, 2012. By letter to the Sayreville Clerk dated December 19, 2012, the Company accepted and agreed to be bound by the terms and provisions of Ordinance #203-12.

To implement a construction timeline that would permit all necessary facilities for service to the Red Oak generating station to be placed in-service prior to October 1, 2013, NJNG requested expedited treatment of its municipal consent petition.

PROCEDURAL HISTORY

As previously stated, on December 19, 2012, NJNG submitted its petition in this docket seeking Board approval for the Sayreville municipal consent authorizing service to Red Oak. TAQA filed a motion to intervene in support of NJNG's petition on February 12, 2013.

On February 15, 2013, PSE&G filed a motion to intervene in this proceeding. In support of its motion, PSE&G stated that its gas distribution franchise includes the Borough, and that PSE&G currently provides gas distribution service to Red Oak pursuant to a gas delivery contract that is due to expire in October 2013. PSE&G further stated that in accordance with its Board-approved CSG tariff, Red Oak has requested a discount rate for delivery service based upon (a) an economically viable bypass alternative or (b) other considerations, and that PSE&G is currently evaluating TAQA's CSG application in accordance with its tariff's requirements.

PSE&G also raised policy considerations regarding (1) the respect to be accorded to established utility franchise service territories; (2) the regulatory risks associated with allowing customers to migrate from one public utility service territory to another, and (3) whether the franchise sought in the pending petition "is necessary and proper for the public convenience and will properly conserve the public interest." N.J.S.A. 48:2-14. PSE&G further argued that to avoid this type of situation, PSE&G and NJNG had entered into a Boundary Line Agreement in March 1956 ("1956 Agreement") that established the service boundaries of each company's gas distribution service territories. PSE&G asserted that the 1956 Agreement reflects that PSE&G and NJNG considered the Borough to be part of PSE&G's gas distribution territory.

NJNG responded to TAQA's motion to intervene on February 22, 2013 supporting that application. Both NJNG and TAQA responded to PSE&G's motion to intervene on February 28, 2013 taking issue with certain statements within the motion but not opposing intervention. By letter dated March 7, 2013, PSE&G replied to the NJNG and TAQA responses alleging, in part, that "NJNG may not lawfully serve an existing customer of PSE&G" within the Borough.

On March 20, 2013, the Board issued an Order granting intervention to both TAQA and PSE&G. The Board also retained the NJNG petition for hearing and designated Commissioner Mary-Anna Holden as the Presiding Officer with authority to rule on all motions arising during the proceeding and to set and modify the schedule.

Commissioner Holden convened a scheduling conference call on April 18, 2013. During this conference call, PSE&G, NJNG, TAQA, the Division of Rate Counsel ("Rate Counsel") and Board Staff, (collectively, the "Parties"), agreed to rolling discovery with all discovery requests served by May 10, 2013, and with all discovery responses due by May 24, 2013. The Parties further agreed to reconvene for a status conference on May 30, 2013 to discuss the need for an evidentiary hearing after the Parties reviewed the discovery responses submitted. In a scheduling order dated April 24, 2013 ("April 24 Order"), Commissioner Holden adopted the Parties' recommended discovery schedule. In addition, the municipal consent hearing required under N.J.S.A. 48:2-14 was scheduled for May 20, 2013. On May 1, 2013, NJNG provided the clerks of the Borough, the Middlesex County Board of Freeholders and the Middlesex County Administrator with notice of the hearing in this matter.

Commissioner Holden subsequently presided over the May 20, 2013 hearing which was limited by the agreement of the Parties to the Company's ability to provide service. At that hearing, NJNG presented Mr. Yi (Daniel) Lin, Managing Engineer. Mr. Lin was subject to cross-examination by counsel for PSE&G, Rate Counsel and by Board Staff. Without objection, Commissioner Holden accepted into evidence the following documents: the petition marked as P-1; the notice NJNG provided to the clerks and county administrator marked as P-2; and a certification of proof of service of the notice marked as P-3.

Commissioner Holden next convened the May 30, 2013 status conference call to determine the need for an additional evidentiary hearing. While PSE&G requested an additional evidentiary hearing, NJNG and TAQA opposed the request. Commissioner Holden directed PSE&G to identify in writing the alleged disputed issues of material fact warranting a hearing. PSE&G complied with this directive by letter and attachment dated June 3, 2013. NJNG and TAQA filed responses to PSE&G's submission on June 4, 2013 and June 5, 2013, respectively, and PSE&G replied to those responses by letter dated June 6, 2013. On June 7, 2013 Board Staff submitted a letter to Commissioner Holden recommending that an additional evidentiary hearing be conducted.

On June 10, 2013 Commissioner Holden issued an order determining that an additional evidentiary hearing was necessary to ensure an adequate record. The Parties subsequently agreed to conduct a one-day hearing on June 20, 2013 ("June 20th hearing").

Six witnesses appeared at the June 20th hearing. TAQA presented a witness panel consisting of Peter Ford and Michael Phenix, both of whom are employed by Morgan Stanley and have significant responsibilities for managing TAQA's relationship with Red Oak. NJNG presented Mark Sperduto, Senior Vice-President, Regulatory Affairs, and Craig Lynch, Vice President, Energy Delivery. PSE&G presented Anthony Robinson, Director of Basic Generation Service ("BGS") and Basic Gas Supply Services ("BGSS"), and Edward Sullivan, a PSE&G employee familiar with service territory issues.

Commissioner Holden accepted into the record the exhibits of NJNG, TAQA, PSE&G and Board Staff. These exhibits were admitted into evidence during the June 20th hearing as P-4 through P-34 for NJNG; TAQA-1 through TAQA-21; PSE&G-2, and S-1 through S-25 for Staff. Initial briefs were filed on July 9, 2013 by NJNG, TAQA, and PSE&G. Rate Counsel filed comments. Reply briefs were submitted by NJNG, TAQA and PSE&G on July 23, 2013.

POSITIONS OF THE PARTIES

NJNG

NJNG maintains that it has satisfied the requirements of N.J.S.A. 48:2-14 and that its petition in this matter should be approved by the Board. NJNG notes that it has provided natural gas distribution service in the Borough since approximately 1979, and that the Company constructed, owns and operates a 16-inch, high-pressure gas transmission main, metering station and other appurtenances to provide gas service to the former JCP&L Sayreville Generating Station in the Borough. NJNG states that it has never approached any existing or potential end user of natural gas in Sayreville to interconnect with the Company's 16-inch gas transmission main, and that in this case it merely responded to a request for service from TAQA. NJNG witness Craig Lynch testified that the Company has adequate capacity on the gas transmission main to serve Red Oak, as well as the operational and financial ability to provide the service requested by TAQA.

NJNG emphasizes that TAQA is a sophisticated and knowledgeable energy consumer that has made an informed business decision that it is in its best interests to change natural gas distribution utilities. Similarly, NJNG notes that there were no objections from any member of the public when the Sayreville Council considered its limited franchise, and that the Mayor and Borough Council of Sayreville determined that it was "... in the best interest of the citizens of the Borough with regard to the entire municipality to provide this consent." NJNG urges the Board to uphold the determination made by Sayreville as to what is in the best interests of its citizens, and by TAQA regarding the natural gas distribution service that best serves its interests.

NJNG argues that natural gas distribution utility franchises are not exclusive under N.J.S.A. 48:9-5, and that approval of its petition would be fully consistent with State law. NJNG notes that the franchise it has obtained from Sayreville is limited to providing service to the Red Oak facility. NJNG maintains that the record contains no evidence that the loss of this one customer would harm either PSE&G or its customers. NJNG disputes PSE&G's suggestions that approval of NJNG's limited franchise to serve Red Oak would pose policy concerns over the stability of utility service territories, and would diminish safe and reliable service to consumers. According to NJNG, Red Oak should not be "locked-in" to receiving its gas distribution service from a monopolistic supplier, namely, PSE&G.

NJNG further observes that, if Board approval were not granted, Red Oak would have two options, both of which are less economically attractive than taking gas distribution and supply service from NJNG. Under the first option, Red Oak would remain subject to uneconomic pricing conditions under its current gas supply agreement with PSEG ER&T and revert to the interruptible rate for gas distribution service under PSE&G's current tariff, a rate approximately four times greater than TAQA's current discounted distribution rate. Under the second option, Red Oak would interconnect directly with Transco's interstate pipeline and bypass the State's utility distribution system altogether - which would result in a loss of revenues that are currently shared with the State's ratepayers.

NJNG argues that the record demonstrates that approval of its petition is necessary and proper for the public convenience and properly conserves the public interests. NJNG witness Mark Sperduto testified that NJNG's ratepayers will not pay for any of the interconnection costs associated with providing service to Red Oak; TAQA will pay all interconnection costs. Mr.

Sperduto further testified that there would be no rate increase to any of the Company's existing customers related to interconnecting and providing gas service to Red Oak. NJNG represents that its ratepayers will benefit from the revenues received from its service to Red Oak.

NJNG points out that TAQA has explored a potential bypass of PSE&G's natural gas distribution system, and has contacted and received construction proposals from Transco to connect Red Oak directly to Transco's interstate pipeline. NJNG contends that the State and NJNG's customers would lose TAQA's revenues if Red Oak interconnects with the Transco interstate pipeline.

NJNG emphasizes that it has provided natural gas distribution service in Sayreville since approximately 1979, and that the Company's existing high-pressure gas main that serves the former JCP&L Sayreville Generating Station runs within several hundred feet of the Red Oak facility. Because the infrastructure to provide service to Red Oak is currently in place, NJNG states that there should be no concern over building duplicative utility infrastructure.

Finally, NJNG rejects PSE&G's contention that the 1956 Agreement between NJNG and PSE&G should equitably estop NJNG's proposed service to Red Oak. NJNG argues that state law empowers the Board to regulate utility franchises, and that utility service territories cannot be established through private agreements between utilities. NJNG asserts that neither Sayreville nor the Board have approved the 1956 Agreement, which NJNG contends renders that document legally irrelevant to this proceeding.

TAQA

TAQA supports NJNG's petition, and urges the Board to approve it without modification, condition or delay. TAQA argues that the evidence demonstrates NJNG's ability to provide gas supply service to the Red Oak facility, as well as NJNG's willingness to provide that service. Like NJNG, TAQA notes that Sayreville has determined that NJNG's service to Red Oak would be in the best interests of the citizens of the Borough.

TAQA asserts that approval of NJNG's petition would benefit NJNG's ratepayers. TAQA maintains that only the revenues it currently pays to PSE&G for transportation service (approximately \$4.5 million in 2012) are flowed back to PSE&G ratepayers. The vast majority of revenues paid by TAQA for gas supply service are paid to PSE&G's unregulated affiliate, PSEG ER&T, for gas supply, and those revenues remain with PSEG ER&T. If it receives gas supply service from NJNG under the proposed GSA, TAQA believes that the revenues paid to NJNG for both transportation service and gas supply would be available for sharing with NJNG ratepayers.

TAQA further argues that the record contains substantial, uncontradicted evidence that the proposed gas service from NJNG would significantly reduce TAQA's cost of supplying gas to Red Oak. TAQA provided 28 months of recent pricing data demonstrating the price advantage that obtaining gas priced at the TETCO M3 or Transco Zone 6 non-NY price under the proposed service from NJNG would provide compared to TAQA's existing gas supply arrangement from PSEG ER&T, which reflects a higher Transco Zone 6-NY price. TAQA witnesses Ford and Phenix, who are responsible for overseeing TAQA's gas supply arrangements and day-to-day operations at Red Oak, testified that these lower gas supply costs would allow TAQA to offer Red Oak's output into the PJM energy markets at reduced bid prices which, in turn, could lead to PJM dispatching Red Oak more frequently.

TAQA maintains that the more frequent dispatching of Red Oak would produce additional public benefits. In light of Red Oak's significant generation capabilities and efficiency, TAQA asserts that the lower Red Oak bid prices made possible by service from NJNG potentially would reduce market clearing prices, thereby contributing to lower power costs for New Jersey consumers. TAQA maintains that these potential cost savings would be significant even if Red Oak's bids reduced PJM market clearing prices only on a handful of peak days each year.

Furthermore, TAQA contends that increased utilization of Red Oak would provide environmental benefits, as power from its state-of-the-art, gas-fired generation facility would displace power from less environmentally friendly sources such as coal plants and older, less efficient gas-fired generators. TAQA also maintains that increasing utilization of Red Oak would be the equivalent of adding hundreds of megawatts of in-state generation. TAQA notes that these environmental and in-state generation benefits are consistent with several of the goals outlined in the State's Energy Master Plan. TAQA witness Phenix also explained that more frequent dispatching of Red Oak would enhance both plant and grid reliability.

Like NJNG, TAQA emphasizes that approval of NJNG's petition would avert a more traditional bypass pipeline from Red Oak to the Transco pipeline system. While it has decided to pursue its GSA with NJNG, TAQA points to undisputed evidence demonstrating the feasibility of a Transco bypass, and that a Transco bypass remains more economically attractive than TAQA's current gas supply arrangements with PSE&G/PSEG ER&T. TAQA avers that it continues to view a Transco bypass as a viable option if NJNG's petition is rejected by the Board.

TAQA further maintains that the increased utilization of Red Oak would benefit the Borough. TAQA anticipates that increased running times at Red Oak would produce additional hours of employment at the plant, as well as engender additional plant maintenance and miscellaneous services, providing more work for both skilled and unskilled labor. TAQA maintains that this increased employment would inject more money into the local economy, leading to greater local economic activity and additional State and local tax revenues. TAQA asserts that no party contests that approval of NJNG's petition would benefit Sayreville.

TAQA contends that the foregoing consumer benefits from approval of NJNG's petition would be realized at no cost to New Jersey consumers. TAQA confirms that it would be solely responsible for bearing the potentially significant costs associated with implementing the GSA with NJNG, and that no subsidies from New Jersey ratepayers or consumers would be required.

Like NJNG, TAQA argues that natural gas utility franchises in the State are not exclusive unless such exclusivity is expressly conferred by the underlying municipal consent, and that PSE&G does not possess an exclusive franchise to serve Sayreville. TAQA further argues that PSE&G has produced no evidence that it holds any franchise from the Borough, let alone an exclusive franchise. TAQA contends that the 1873 Special Act of the Legislature ("1873 Act") on which PSE&G relies for its authority to serve Sayreville does not purport to grant an exclusive right to provide service, and that subsequent enactment of N.J.S.A. 48:9-5 explicitly eliminated any claim of exclusivity that could be made regarding the 1873 Act. TAQA further asserts that any claim of exclusivity by PSE&G is undermined by NJNG's long-standing service to the former JCP&L Sayreville Generating Station. TAQA argues that the record demonstrates that PSE&G routinely shares responsibility for serving individual municipalities with other gas distribution companies.

TAQA further states that PSE&G's current service to Red Oak is the product of a competitive bidding process in which NJNG also participated. TAQA maintains that PSE&G will have been fully compensated for its investment in a lateral pipeline to serve Red Oak by the conclusion of the initial 11-year term of that contract. TAQA argues that the fact that PSE&G continues to meet its contractual obligations to provide service to Red Oak, under a contract that PSE&G has now terminated, does not afford PSE&G an exclusive right to continue providing service to Red Oak just because it is willing to do so.

TAQA maintains that approval of NJNG's petition would not create significant regulatory policy concerns. TAQA notes the narrow scope of the franchise granted to NJNG by Sayreville, and argues that the unique facts and circumstances surrounding NJNG's proposed service to TAQA, as well as the Red Oak plant's unique load profile, make similar petitions from other ratepayers unlikely. According to TAQA, PSE&G admits that it has conducted no studies or analyses to substantiate its concern over mass customer migration resulting from approval of NJNG's petition. Because NJNG's gas transmission main already is in place nearby the Red Oak plant, TAQA asserts that there should be no concern over the construction of duplicative gas utility infrastructure. In addition, TAQA states that any potential burdens to the public from additional street openings would have been considered by Sayreville at the time it approved NJNG's franchise. TAQA rejects the suggestion that NJNG's proposed service to Red Oak could cause customer confusion or diminish safe and reliable service, noting that NJNG has provided service to the former JCP&L Sayreville Generating Station in Sayreville for thirty years without causing such confusion or diminished service reliability.

TAQA urges the Board to dismiss PSE&G's contention that the evidence of public benefits adduced by TAQA and NJNG is speculative. TAQA notes that PSE&G failed to adduce countervailing evidence on many of the points it contests, and that regulatory agencies routinely rely on estimates and projections of future benefits in making determinations. TAQA argues that the courts, the Board, the State, and even PSE&G have all recognized the propriety of relying on economic projections and estimated future benefits in assessing the merits of various regulatory programs and proposals. TAQA further argues that PSE&G has failed to substantiate its contentions regarding either potential harm to PSE&G ratepayers from approval of NJNG's petition, or the impact that future pipeline construction might have on gas supply prices.

TAQA also maintains that PSE&G's discount transportation rate proposal under Rate Schedule CSG affords no basis for denying NJNG's petition. TAQA contends that PSE&G's proposal is not equivalent to either TAQA's proposed GSA with NJNG or TAQA's Transco bypass option. TAQA witnesses Ford and Phenix testified that PSE&G's proposal addressed only the more limited aspect of transportation service, and that the aspect of PSE&G's proposal intended to make less expensive gas supply available was at best conceptual in nature, required additional steps and potential regulatory approval prior to implementation, and imposed an unacceptable level of risk on TAQA in comparison to its other options.

TAQA agrees with NJNG that the 1956 Agreement affords no basis on which to equitably estop NJNG's proposed service to Red Oak. TAQA maintains that PSE&G has not adduced facts sufficient to sustain a claim of equitable estoppel. TAQA contends that PSE&G's witness could not authenticate the 1956 Agreement or testify credibly about it, and that PSE&G has produced no evidence to demonstrate that it submitted the 1956 Agreement for Board review or that the Board actually approved that agreement. TAQA further submits that PSE&G's claim of detrimental reliance on the 1956 Agreement as the basis for extending service to Red Oak is

belied by undisputed evidence describing the competitive bidding process through which PSE&G obtained its current contract to serve Red Oak. In addition, TAQA points to the fact that PSE&G will be fully reimbursed for its investment in its lateral line to Red Oak by the conclusion of the initial 11-year contract term as further undermining PSE&G's detrimental reliance claim.

TAQA also rejects PSE&G's claim of inadequate notice regarding the Sayreville Council's grant of a municipal consent to NJNG or NJNG's subsequent petition to the Board for approval of that consent. TAQA claims that PSE&G had no right to individualized notice in either instance, but that it received ample public notice of the Sayreville Council's action, and informal, actual notice regarding NJNG's petition.

PSE&G

PSE&G argues that NJNG's request for approval of Sayreville's municipal consent to serve Red Oak should be denied because neither NJNG nor TAQA has provided sufficient evidence to satisfy the standard set forth in N.J.S.A. 48:2-14. PSE&G states that it has been providing safe, adequate and proper service to Red Oak for the past 11 years and to other areas of Sayreville for a longer period of time. PSE&G argues that because it has discharged its statutory duty to provide safe, adequate and proper service to Sayreville and Red Oak, NJNG cannot meet its statutory burden to prove that it is necessary and proper for the public convenience for NJNG to serve the same area.

PSE&G questions whether NJNG will share the Red Oak distribution and supply-related revenues with its ratepayers. PSE&G suggests that NJNG has been equivocal regarding the rate treatment it would afford to these revenues, and that NJNG has not provided specific evidence of how its ratepayers would benefit if the Board approves NJNG's petition. Conversely, PSE&G argues that if PSE&G loses the right to serve Red Oak, the harm to PSE&G's ratepayers would be real and quantifiable. PSE&G offered evidence that in each of the past two years, more than \$4 million in transportation revenues from Red Oak has been shared with PSE&G's firm customers and that these revenues would be lost if NJNG's franchise is approved. PSE&G urges that disputes regarding utility service territories should be resolved on the basis of the financial impact upon local customers and the general public, rather than the fact that one utility can provide service at a lower rate to a customer than the other.

PSE&G dismisses as speculative the public and ratepayer benefits that NJNG and TAQA assert would result from approval of NJNG's petition. PSE&G contends that only NJNG and TAQA, rather than ratepayers, will benefit if the Board approves NJNG's petition. PSE&G argues that the record does not support NJNG's and TAQA's claims that (i) the requested franchise would reduce the Red Oak's gas supply and distribution costs sufficiently to enable Red Oak to submit lower bids into PJM and increase its dispatch rate, (ii) Red Oak's increased dispatch will lower the price of electricity to consumers when the Red Oak is the price-setting PJM unit, and (iii) Red Oak's increased dispatch will result in reduced environmental impacts. PSE&G states that many variables must fall into place for TAQA's premises to be realized, and that on most days the cost of gas to TAQA would be irrelevant to electric prices because Red Oak typically is not the price setting unit in PJM.

PSE&G also disputes that ratepayers will benefit if TAQA remains on a local utility distribution system rather than bypassing directly to Transco. PSE&G claims that the evidence suggests that TAQA will not opt to bypass to Transco due to time and cost considerations, and there is a risk that Transco could move TAQA's constraint point to a location that would result in TAQA

having to take the same Transco Zone 6-NY gas supply it now seeks to avoid. PSE&G argues that the construction of additional proposed pipelines could also relieve existing constraints and offset the price disparity between Transco Zone 6-New York and Transco Zone 6 non-New York gas in the future.

PSE&G argues that the Rate Schedule CSG proposal it offered TAQA would significantly reduce TAQA's current transportation costs and would enable TAQA to gain access to Transco Zone 6 non-New York gas that is comparable in price to TETCO M3 gas, if TAQA were willing to become a point operator on the pipeline and assume certain administrative duties with Transco, including load balancing. PSE&G states that, consistent with the Board's Affiliate Relations Standards, it has not discussed gas supply options with TAQA. PSE&G concludes that the Transco bypass alternative would not provide real benefits when compared with PSE&G's proposal, and suggests that TAQA advances the prospect of a Transco bypass merely to obtain leverage to switch to a different distribution utility.

PSE&G asserts that it has a right to serve the Borough and the Red Oak facility. PSE&G argues that NJNG may not lawfully serve an existing customer of PSE&G within Sayreville as this would alter PSE&G's franchise service territory. PSE&G maintains that because PSE&G stands ready to serve Red Oak, Red Oak's only options are to take service from PSE&G or take no service at all.

PSE&G traces its franchise to serve the Borough and Red Oak to the 1873 Act, which granted a franchise to PSE&G's predecessor company to "make, manufacture, use and sell such gas for the purpose of illuminating and heating or for any other purpose or purposes within the State of New Jersey... (and) to lay pipes and conductors within all appurtenances thereto and erect the necessary posts and lights in any and all the roads, streets, highways and public grounds in the State of New Jersey." PSE&G states that the 1873 Act has not been overturned by subsequent enactments of the Legislature and therefore remains a valid basis for PSE&G's franchise. PSE&G further argues that the fact that its gas tariff includes the Borough within the PSE&G gas service territory evidences its right to serve Red Oak. PSE&G also relies on the 1956 Agreement to support its right to serve Red Oak. According to PSE&G, the 1956 Agreement was executed by PSE&G and NJNG to establish the service territory boundaries between the two companies, and it places the Borough on PSE&G's side of the utilities' respective boundary lines. PSE&G claims that it extended service to Red Oak in reliance upon the 1956 Agreement.

PSE&G argues that NJNG's request to serve Red Oak, a customer located within the PSE&G service territory, violates the sanctity of utility service territories, as well as the policy against the creation of duplicative and redundant utility infrastructure and overlapping utility service territories. PSE&G argues that the construction of duplicative utility infrastructure would impose a wasteful financial burden on ratepayers and inconvenience to municipalities. PSE&G argues that the proliferation of duplicative infrastructure also would cause uncertainty regarding utility service obligations, which would contravene a utility's regulatory obligation to serve all customers located in its service territory. PSE&G maintains that overlapping utility service would cause customer confusion regarding which utility to call for emergencies and restorations of service in outages, potentially creating safety and reliability concerns.

PSE&G also expresses concern that approval of NJNG's petition would encourage other customers, regardless of their size or rate class, to seek to switch to other utilities that can offer lower rates. PSE&G argues that such customer switching would adversely affect the sanctity of

utility franchises and require utilities to offer rate discounts to avoid customer switching beyond what was contemplated by the Board's generic proceeding on bypass prevention rate discounts.

PSE&G also suggests that NJNG's proposal to provide both transportation and commodity supply services to TAQA constitutes a "bundled" utility service that contravenes the Affiliate Relations Standards that were enacted pursuant to the Electric Discount and Energy Competition Act, N.J.S.A. 48:3-49, -101 ("EDECA").

RATE COUNSEL

Rate Counsel participated actively in the proceeding and does not object to the Board approving NJNG's petition and granting NJNG a limited, fifty year municipal franchise to serve Red Oak in a manner consistent with the terms of the Franchise Ordinance approved by the Borough. Rate Counsel states that NJNG has accepted and agreed to be bound by the terms and conditions of the franchise grant, and has complied with all statutory and administrative requirements necessary for approval by the Board pursuant to N.J.S.A. 48:2-14.

Based upon the petition and the evidence presented, Rate Counsel has no objection to the Board's approval of the franchise to NJNG. Rate Counsel reserves its rights with respect to any determination regarding the reasonableness and appropriateness of the costs and expenses related to the franchise, including costs of construction and capital improvements, and the allocation of such costs and expenses or other rate impacts in an appropriate subsequent proceeding.

DISCUSSION AND FINDINGS

NJNG's petition requests Board approval for a municipal consent granted by Sayreville authorizing NJNG to provide gas distribution service solely to the Red Oak facility, located in Sayreville, for a period of fifty (50) years. TAQA, which is responsible for arranging Red Oak's natural gas supply, supports NJNG's petition because, in TAQA's view, Red Oak's current gas supply and transportation costs would be reduced significantly under the proposed service from NJNG. NJNG and TAQA argue that the arrangement is consistent with Board policies and would benefit both TAQA and the public at large, thereby satisfying the requirements of N.J.S.A. 48:2-14.

Red Oak is a natural gas transportation customer of PSE&G pursuant to an 11-year transportation contract that PSE&G has terminated, effective October 1, 2013. Red Oak currently obtains its natural gas supply from PSE&G's unregulated affiliate, PSEG ER&T pursuant to a supply contract that currently extends through September 30, 2014. PSE&G is willing to continue serving Red Oak under its Rate Schedule TSG-NF or, alternatively, under a discounted transportation rate pursuant to Rate Schedule CSG, and opposes approval of NJNG's petition.

Under N.J.S.A. 48:2-14, NJNG's limited municipal franchise from Sayreville does not become effective until approved by the Board. In assessing whether to approve NJNG's municipal franchise, N.J.S.A. 48:2-14 requires the Board to determine whether the proposed franchise "is necessary and proper for the public convenience and properly conserves the public interests." In making this determination, based on a careful review of the record and the arguments presented by the parties, the Board must consider (i) whether there exist any legal bars to approving NJNG's petition; (ii) whether the record contains evidence sufficient to satisfy the

standard for approval set forth in N.J.S.A. 48:2-14; and (iii) whether approval of NJNG's petition would have negative policy consequences.

The Board recognizes, and the parties concede, that PSE&G is the incumbent natural gas distribution utility in Sayreville. PSE&G acknowledged that neither Sayreville nor the Board has approved a municipal ordinance authorizing PSE&G to provide gas service to Sayreville on either an exclusive or non-exclusive basis. PSE&G also has acknowledged that it does not currently serve all customers located in Sayreville. PSE&G relies on the 1873 Act and the listing of the Borough in its tariff as evidence of the company's right to provide service to Sayreville.

However, PSE&G contends that its 1956 Agreement with NJNG bars approval of NJNG's petition on equitable estoppel grounds. The Board disagrees. Utility service franchises cannot be established through private agreements between or among utilities. As previously stated, N.J.S.A. 48:2-14 requires that the Board approve any franchise grants, and the record contains no evidence that the 1956 Agreement was ever presented to either the Borough or the Board for approval. PSE&G failed to produce a Board Order authorizing the 1956 Agreement. Therefore, the 1956 Agreement cannot support any claim of an exclusive right to provide gas distribution service in Sayreville.

Further, PSE&G's claim of equitable estoppel also fails because PSE&G did not demonstrate the detrimental reliance required to sustain such a claim. PSE&G did not show that it relied on either its existing service to Sayreville or the 1956 Agreement in extending service to Red Oak. Instead, the record shows that PSE&G obtained the right to serve Red Oak through a competitive bidding process conducted during 2002, in which NJNG and others participated. Moreover, the record shows that PSE&G will have been fully reimbursed for its investment in serving the Red Oak plant by the conclusion of its 11-year service agreement.

"While estoppel is rarely applied to state and local government units, the doctrine is invoked where 'the interests of justice, morality and common fairness dictate that course'" Middlesex Water Company v. Perth Amboy, 1997 WL 532905 (N.J.B.P.U. 1997) (citing Anske v. Borough of Palisades Park, 139 N.J. Super. 342, 348 (App. Div. 1976) ("Middlesex Water"). "Courts have recognized that estoppel may apply, where a utility undertakes substantial expenditures to provide a service, in reasonable reliance upon the municipality's actions recognizing or approving the utility's operation." Id. at 10.

In Middlesex Water, the Perth Amboy municipal water utility originally supplied water service to Chevron. However, upon impending expansion, Chevron sought a zoning variance. The Perth Amboy Board of Adjustment granted the variances conditioned on Chevron obtaining all of its water supply from Middlesex Water Company (or some other water company) except for its office and dock area. Without objection by Perth Amboy, Middlesex Water Company supplied water to Chevron for almost 18 years before the Perth Amboy Council rescinded the requirement to purchase water elsewhere and mandated that Chevron purchase water from Perth Amboy. The claim of estoppel was upheld against Perth Amboy based on its initial action requiring that Chevron seek service from a water utility, and its silence for almost 20 years while Middlesex invested in infrastructure and provided service to Chevron.

Here, PSE&G was the successful bidder for an 11-year contract to provide gas service to Red Oak. Although PSE&G has made substantial expenditures, the record is undisputed that PSE&G has performed the contract, and will have been fully compensated for all costs and

services rendered, including the costs associated with the development of pipeline facilities needed to serve Red Oak, by the time the contract terminates. Additionally, PSE&G terminated the contract of its own volition, subject to potential renegotiation and renewal. Accordingly, the Board **HEREBY FINDS** that the facts and circumstances presented do not support a claim of equitable estoppel.

The Board declines to address in this proceeding PSE&G's claim that EDECA poses a legal bar to NJNG's petition due to issues related to the proposed GSA, a matter outside the scope of this docket. PSE&G's questions the legality of the gas supply service to be provided by NJNG pursuant to its proposed GSA with TAQA. PSE&G's concerns are better addressed in Docket No. GO13010059, which will examine the proposed GSA between NJNG and TAQA.

We next consider whether NJNG and TAQA have met their burden of proof under N.J.S.A. 48:2-14 to show that approval of the franchise granted NJNG by Sayreville "is necessary and proper for the public convenience and properly conserves the public interests." In reviewing the evidence, we are mindful that we must view this matter from the perspective of the public convenience and the public interest. "The concept of public necessity is itself flexible... [n]ecessity need not be shown in the sense of essential or absolutely indispensable, and that [i]t is sufficient if the proposed service be found to be reasonably requisite to serve the public convenience." In re Mason, 134 N.J. Super 500,507(App. Div. 1975)(citations omitted). Our review of the record concludes that approval of NJNG's petition would yield public benefits sufficient to justify approval of the petition.

The Board **FINDS** that record contains ample evidence of the benefits accruing from NJNG's proposed service to Red Oak. NJNG ratepayers will benefit from the anticipated sharing of the transportation and gas supply revenues received by NJNG from TAQA, if the GSA is subsequently approved by the Board. We do not agree with PSE&G that the record suggests that NJNG has changed its stated intent to share TAQA revenues with its ratepayers, and in any event, the Board is well-positioned to ensure that ratepayers receive the benefits of revenue sharing going forward just as it has done in the past.

Currently, NJNG has in place incentive programs which generate BGSS savings for the Company's customers. The Company's incentive programs include the Off-System Sales and Capacity Release ("OSS-CR") program. The Board's August 2011 Order extended the OCC-CR program through 2015.³

As in previous Orders the Board approved a sharing formula that requires a sharing of the net revenues from these sales so that 85 percent goes to the Company's BGSS customers with 15 percent retained by the Company.

Looking solely at the municipal consent, the issue before us in this matter, there is the Statewide benefit from retaining Red Oak as a customer served by a local distribution company, avoiding the loss via a direct connection to Transco with its commitment loss of both taxpayer and rate payer benefits. In addition, the record illustrates that NJNG's ratepayers will not be subsidizing any of the interconnection costs as TAQA will pay all interconnection costs. Along

³ August 18, 2011 New Jersey Board of Utilities Docket No. GR11040195 available at <http://www.nj.gov/bpu/pdf/boardorders/2011/20110818/8-18-11-2B.pdf>

the same lines, TAQA has paid PSE&G all of PSE&G's costs for the gas infrastructure constructed by PSE&G to serve Red Oak leaving no stranded cost issues⁴.

As noted above, we have concluded that approval of NJNG's petition would benefit the public by avoiding a bypass of the State's gas distribution systems by Red Oak. The record contains evidence demonstrating that TAQA has actively pursued a bypass pipeline to Transco as an alternative to its present service from PSE&G and PSEG ER&T. To that end, TAQA received several proposed bypass routes and budget estimates from Transco, and had initiated the process of negotiating a construction agreement with the pipeline. The Board is satisfied that Transco provides a potential bypass option to TAQA, and that TAQA was prepared to proceed with the Transco bypass when TAQA became aware of the possibility of service from NJNG. The Board does not agree with PSE&G's assessment of TAQA's Transco bypass option as a mere negotiating ploy. TAQA offered evidence supporting its assertion that the Transco bypass option was not being actively pursued at this time in favor of TAQA's NJNG alternative, but that TAQA still considers a Transco bypass to be a feasible and preferable alternative to its present gas supply service. The record also does not support PSE&G's suggestion that its Rate Schedule CSG proposal effectively matched TAQA's Transco bypass option. The record reflects that TAQA found PSE&G's proposal unacceptable because it proposed only a transportation rate discount together with an undeveloped proposal that TAQA become the "point operator" for its lateral gas supply pipeline to address TAQA's supply concerns, a proposal that TAQA rejected due to what TAQA perceives is an unacceptable level of risk.

The Board is also satisfied that Sayreville would benefit from approval of NJNG's petition. The construction projects associated with implementing the municipal consent, as well as the increased employment and need for additional services generated by additional hours of operation at Red Oak, if the GSA is subsequently approved, can be expected to inject more money into the local economy and stimulate economic activity that would produce additional State and local tax revenues. PSE&G did not contest these local economic benefits, and Sayreville approved NJNG's franchise as in the best interests of the Borough's citizens.

Based on a careful review of the record and the arguments presented by the parties, the Board **FINDS** that the record amply supports a determination that NJNG's petition is necessary and proper for the public convenience and properly conserves the public interests.

Having found that the record would sustain approval of NJNG's petition, the Board still must consider whether that approval would engender countervailing policy concerns sufficient to warrant rejection of the petition. Based on the record before us, the Board **FINDS** no credible policy concerns that justify rejecting NJNG's petition.

The Board understands PSE&G's concern regarding the sanctity of utility service territories, but our State's laws generally do not provide for exclusive or inviolable utility service territories. N.J.S.A. 48:9-5 permits exclusive gas utility franchises only under narrow circumstances which, as discussed above, are not present in this case. Moreover, N.J.S.A. 48:2-13 (a) empowers the Board to regulate utility franchise territories in accordance with N.J.S.A. 48:2-14, which establishes the standards applicable to approval of municipal franchises, the very issue presented by this matter. Thus, while the Board certainly remains committed to maintaining the orderly functioning of utility service territories, we decline PSE&G's invitation to exercise our

⁴ Testimony of TAQA witnesses Ford and Phenix, T19:L2-8 (June 20, 2013).

authority to establish exclusive utility franchises absent a clear indication by the municipality granting such consent of its intention to do so.

Moreover, we cannot conclude that the facts of this case portend a destabilizing trend of customer migration between utility service territories. Approval of the municipal consent at issue here does not seem to involve a calculated invasion of PSE&G's service territory by a competing utility. NJNG's petition seeks approval of a municipal franchise limited to a single customer, in response to a request for service by that customer in unique circumstances – where the major portion of the necessary infrastructure is already in place, the customer has committed to paying for any additional infrastructure needed for the provision of service, and the utility is already providing service in the franchise area. While PSE&G expresses concern that this proceeding could foster mass customer migration, there is no evidence that this is likely to occur.

The Board is also not persuaded by PSE&G's concern that approval of NJNG's petition would open the floodgates to customer rate discount applications based on the Red Oak example. The Board notes that Red Oak, as an 830 MW generation plant, does not represent a typical PSE&G customer, making it unlikely that approval of NJNG's petition would provide a meaningful precedent for future rate discount applications by other PSE&G customers. In any event, the Board specifically limits its conclusions to the facts of this matter and is not articulating any statement of general policy in this Order.

Therefore, after a full review of the entire record, the Board **HEREBY FINDS** that the municipal consent granted by Sayreville to NJNG to provide gas distribution service to the Red Oak facility for a period of fifty (50) years, is necessary and proper for the public convenience and properly conserves the public interest, and that NJNG has the ability to install, operate and maintain the appropriate infrastructure to allow it to provide safe, adequate and proper service. The Board **FURTHER FINDS** that the Company has the necessary experience, financial capability, capacity and facilities to continue to provide adequate and appropriate service to its existing customers. Accordingly, the Board, pursuant to N.J.S.A. 48:2-14, **HEREBY APPROVES** the consent granted to NJNG by the Borough of Sayreville for the provision of gas service to the Red Oak facility as sought in the Company's petition.


The approvals granted hereinabove shall be subject to the following provisions:


1. This Order shall not be construed as directly or indirectly fixing for any purposes whatsoever the value of any tangible or intangible assets now owned or hereafter to be owned by NJNG.
2. The rates for service to NJNG's customers shall continue to be those set in the Company's current tariff approved by and on file with the Board. These rates shall remain in effect until otherwise approved by the Board.
3. This Order shall not effect nor in any way limit the exercise of the authority of this Board of the State in any future petition or in any proceedings with respect to rates, franchises, services, financing, accounting, capitalization, depreciation, or in any other matters affecting NJNG.

4. In an appropriate subsequent proceeding, NJNG shall have the burden of demonstrating whether, and to what extent, any of the costs associated with this petition shall be allocated to ratepayers.
5. Approval of this municipal consent does not constitute Board approval of any costs or expenses associated with this petition. Any determination as to the appropriateness or reasonableness of the costs and expenses related to the franchise, including but not limited to, cost of construction, contributions in aid of construction, depreciation on contributed plant, the cost of connection, or any related capital improvements, and the allocation of such costs and expenses, shall be made in an appropriate subsequent proceeding.

DATED: 8/21/13

BOARD OF PUBLIC UTILITIES
BY:


ROBERT M. HANNA
PRESIDENT


JEANNE M. FOX
COMMISSIONER


JOSEPH L. FIORDALISO
COMMISSIONER

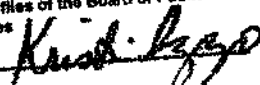

MARYANNA HOLDEN
COMMISSIONER


DIANNE SOLOMON
COMMISSIONER

ATTEST:

KRISTI IZZO
SECRETARY

I HEREBY CERTIFY that the within document is a true copy of the original in the files of the Board of Public Utilities



**IN THE MATTER OF THE PETITION OF NEW JERSEY NATURAL GAS COMPANY FOR
APPROVAL OF A MUNICIPAL FRANCHISE IN THE BOROUGH OF SAYREVILLE,
MIDDLESEX COUNTY, STATE OF NEW JERSEY, TO SERVE RED OAK POWER, LLC
BPU DOCKET NO. GE12121084**

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