STATE OF NEW JERSEY
BOARD OF PUBLIC UTILITIES

I/M/O Generic Stakeholder Proceeding to Consider Prospective Standards for Gas Distribution Utility Rate Discounts and Associated Contract Terms and Conditions	))))	Docket Nos. GR10100761 & ER10100762

ELECTRIC CUSTOMER GROUP COMMENTS

BEVAN, MOSCA, GIUDITTA & ZARILLO, P.C.
222 Mount Airy Road, Suite 200
Basking Ridge, NJ 07920
908-753-8300
Attorneys for Electric Customer Group

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Preliminary Statement

The Board of Public Utilities' ("Board's") Notice of Stakeholder Proceeding ("Notice") opens a generic proceeding to address, among other things, questions relating to (i) discounted gas utility distribution rates and (ii) the prospective application of the Societal Benefits Charge ("SBC"), Regional Greenhouse Gas Initiative ("RGGI") charge and the Capital Adjustment Charge ("CAC") (collectively "Surcharges") to gas delivery service customers. In addition to addressing these questions, the Electric Customer Group ("ECG") urges the Board to recognize here that gas utilities' distribution rates to gas-fired electric generators ("GFEGs") involve many policy matters that go far beyond the mere application of gas ratemaking principles and have broad impact upon New Jersey's energy policies. Because gas distribution rates affect the operation of, and competition in, the electricity market, they also affect the State's policy goals to reduce its citizens' energy costs and improve the State's overall competitive position.

The Board should exempt GFEGs from any obligation to pay Surcharges. Requiring GFEGs to pay such charges is unfair, anti-competitive and discriminatory, because other electric generators in New Jersey and other states in the PJM market that do not take distribution service from New Jersey local distribution companies ("LDCs") do not incur similar expenses. Assessing Surcharges on New Jersey GFEGs discourages these generators from taking service from BPU-jurisdictional LDCs and instead encourages them to take service from FERC-regulated pipelines. In addition, applying Surcharges to GFEGs has a "double taxation" effect on electricity users, because GFEGs employ natural gas as an input to their production of wholesale electricity that is sold to retail end users, who in turn are separately assessed Surcharges by electric utilities. Further, the cost of Surcharges increases a GFEG's electric production costs, and causes a corresponding increase in its bids into the PJM energy market,

making New Jersey generators less competitive with out-of-state generators. Burdening GFEGs with these additional costs encourages GFEGs to develop power projects in other states, is discriminatory to New Jersey GFEGs and inconsistent with the State's policy goals of supporting energy competition and reducing consumers' energy costs.

The Board's inquiries into "discounts" for GFEG gas distribution rates raise a critical threshold question: what rates should serve as the base against which discounts may be applied? The Board must first set the criteria for determining the base gas delivery rates that will apply to GFEGs before it addresses questions regarding any "discounts" that may apply to those rates. In establishing these base rates, the Board should reaffirm its commitments to treating similarly-situated customers in a non-discriminatory manner and to a ratemaking process that is transparent. It should also reject all practices that are unjust, unreasonable or unduly preferential to certain customers, particularly affiliates of LDCs. By doing so, the Board will support the State's public policy goals to promote competition in energy markets, reduce energy costs to consumers, and promote economic growth within the State.

In order to achieve these goals, ECG urges the Board to find that GFEGs are a separate class of gas delivery customers, and that GFEGs should be subject to a separate gas delivery tariff at cost-based rates, which should be established in a second phase of this proceeding or in a follow-on proceeding. GFEGs do not share cost causation, usage, or other characteristics of industrial and commercial customers. Thus, consistent with well-established regulated utility ratemaking practices, GFEGs should be recognized and treated as a distinct and separate class of LDC gas delivery service customers. Moreover, unlike separately negotiated agreements with individual customers, tariffs that are made available uniformly to all customers within a given customer class are the most efficient and effective way to ensure that the rates, terms and

conditions of service are just and reasonable, non-discriminatory to the customer, and compensatory to the utility. Therefore, LDCs' GFEG tariffs must recognize that service to these customers differs from other LDC transportation services, both because of its non-firm nature and because many GFEGs may be able to bypass the LDC's system. Accordingly, GFEG tariffs should address these factors through the creation of cost-based standard or "baseline" rates, clear standards for allowing deviations from the baseline rate based upon an individual GFEG's use of dedicated facilities, and standard non-price terms and conditions.

The Board should also establish nondiscriminatory standards that define the manner and extent to which "bypass" or other discounts may be offered to GFEGs within the tariff structure. In particular, the Board should set criteria that will insure that discounts are either (i) justified by competitive circumstances and produce net benefits for firm gas distribution customers or (ii) produce other identifiable public policy benefits, and that any discounts are available to other similarly-situated customers. Otherwise, the availability of discounts could be misused by some GFEGs (especially gas utilities' affiliates) to obtain an unfair cost advantage over competitive electric suppliers, to the detriment of their competitors and the rate-paying public.

Finally, the Board should use this proceeding as a vehicle to protect electric competition by enforcing the existing requirement that all GFEG affiliates of gas utilities take delivery service pursuant to nondiscriminatory terms and conditions. In particular, the Board should require PSE&G to provide gas service to its affiliate PSEG Power pursuant to terms and conditions that are generally applicable to all GFEGs.

I. ECG's Statement of Interest

The Electric Customer Group ("ECG") is comprised of five New Jersey gas-fired electric generating facilities owned and operated by Morris Energy Group ("MEG").[1] Collectively, ECG represents one of the largest independent groups of competitive electric generators in the State, with a combined capacity of over 600 MW. Each ECG member operates independently and purchases natural gas delivery services separately from gas utilities. All of the ECG members compete independently in the Pennsylvania-New Jersey-Maryland ("PJM") wholesale energy market.

Bayonne and Elmwood have output capacities of 158 MW and 67 MW, respectively. These facilities purchase interruptible gas delivery service pursuant to the terms of PSE&G's TSG-NF tariff, a general gas delivery service tariff applicable to both retail and wholesale customers. Camden and Newark Bay have capacities of 145 MW and 123 MW, respectively. Both purchase interruptible gas delivery service under separate negotiated agreements with PSE&G that expire in March, 2013. Pedricktown has a capacity of 120 MW and purchases interruptible gas delivery service under an agreement with South Jersey Gas.

The ECG members compete directly in the PJM wholesale energy market with PSE&G's affiliate PSEG Power LLC ("PSEG Power"),[2] which operates nine gas-fired electric generating facilities in New Jersey. PSEG Power purchases gas delivery service from PSE&G at a Board-approved rate that does not include any SBC charges. In addition, unlike the ECG members and

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[1] ECG includes Bayonne Plant Holding, LLC ("Bayonne"), Camden Plant Holding LLC ("Camden"), Newark Bay Cogeneration Partnership, LP ("Newark Bay"), Elmwood Park Power, LLC ("Elmwood") and Pedricktown Cogeneration Company LP ("Pedricktown"). The first four ECG members purchase gas utility service from Public Service Electric and Gas ("PSE&G"), the State's largest gas utility. Pedricktown purchases gas utility service from South Jersey Gas.

[2] PSE&G and PSEG Power are subsidiaries of Public Service Enterprise Group Incorporated.

all other competitive GFEGs in New Jersey, the gas delivery service PSE&G provides to PSEG Power is not subject to any tariff or contract terms and conditions.

As the result of a Final Stipulation of Settlement approved by the Board on December 16, 2010 ("Stipulation"), the PSE&G gas delivery service rate applicable to Bayonne and Elmwood was reduced to 42.5 cents per dekatherm ("Dth"), the same rate currently applicable to PSEG Power, with no SBC charges. All of the other terms and conditions of PSE&G's TSG-NF tariff continue to apply to Bayonne's and Elmwood's purchase of gas delivery service.[3]

The Stipulation (¶ 3) further provides that Camden and Newark Bay may continue to purchase gas delivery service under the terms of their existing contracts with PSE&G until their scheduled expiration. Upon expiration, they will pay PSE&G a total gas delivery rate of 42.5 cents per Dth, with no applicable SBC charges, and the other terms and conditions of PSE&G's TSG-NF tariff will apply to their gas delivery service. The Stipulation (¶ 3) also gave Camden and Newark Bay the right to terminate their existing contracts and take service under the tariff terms applicable to the other ECG members.[4]

Each ECG member competes directly against the other electric generation facilities in the PJM market, which operates on a lowest-cost basis. PJM schedules the generating units that are most economically able to supply customers' demands for a given hour. The cost of natural gas delivery, including the costs associated with the terms and conditions of gas delivery service, are a significant part of a GFEG's total costs, which of necessity must be incorporated into its bids to PJM. All other things being equal, the more a GFEG pays for gas delivery service, the less

[3] Stipulation, ¶ 2. A copy of the Stipulation is appended as Exhibit A to the accompanying Certification of Dennis Clarke.

[4] The settlement provisions were without prejudice to any party's right to argue that the terms of an existing contract should be extended beyond its initial term in accordance with its "evergreen" provisions.

competitive it is. That is because a difference in gas delivery costs can skew PJM's selection of resources (or "dispatch order"), such that a GFEG with a higher cost structure relative to its peers is dispatched less often, resulting in reduced operational run time and lower revenues. If a GFEG has a fuel delivery cost advantage, that advantage can have the effect of causing PJM to dispatch that unit out of heat rate merit order, assuming that all such entities bid into PJM on a cost basis.[5] As a result, GFEGs that are more efficient and have lower operating costs (and that would therefore have been dispatched but for higher gas delivery costs) can be disadvantaged compared to their competitors. Therefore, the rates, terms and conditions applicable to gas utilities' delivery services are of great importance to ECG members. In particular, any regulatory rules that might permit other similarly-situated GFEGs to obtain more favorable gas delivery service rates or terms and conditions of service will have a significant impact on the ECG members', and other independent GFEGs', success in the electric energy market, which is critically important to electric energy competition in the State and the corresponding benefits such competition confers on business and residential consumers.

II. New Jersey Energy Policy Relies Upon Competition to Support an Efficient Energy Infrastructure.

The New Jersey Legislature has found that "a secure, stable and adequate supply of energy at reasonable prices is vital to the State's economy and for the promotion of economic opportunity in the State, as well as for ensuring the public health, safety and welfare." N.J.S.A. 52:27H-2. The Legislature has further announced that the State's policy is to "lower the current

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[5] For example, a cost disadvantage of 60 cents per Dth (about the full cost of PSE&G's Surcharges) can offset a heat rate disadvantage of about 1,000 Btu/kWh, based on the current level of gas prices.

high cost of energy, and improve the quality of choices of service for all of th[e] State's residential, business and institutional consumers, and thereby improve the quality of life and place th[e] State in an improved position in regional, national and international markets." N.J.S.A. 48:3-50(a)(1). In order to achieve these goals, the State "[p]lace[s] greater reliance on competitive markets, where such markets exist, to deliver energy services to consumers in greater variety and at lower cost than traditional, bundled public utility service." N.J.S.A. 48:3-50(a)(2).

The Legislature and the Board have long recognized that competition cannot be successful unless dominant suppliers of utility services are required to treat similarly-situated customers in a nondiscriminatory manner. Indeed, nondiscrimination is the cardinal principle of the State's regulatory requirements for all utilities. Thus, utilities are forbidden by statute to charge "unjust or unreasonable, unjustly discriminatory or unduly preferential" rates, N.J.S.A. 48:3-1, or to "adopt, maintain or enforce any . . . practice . . . which shall be unjust, unreasonable, unduly preferential, [or] arbitrarily or unjustly discriminatory." N.J.S.A. 48:3-2.

Because the long term viability and success of competition and competitive electric suppliers is a key element of the State's energy policies and regulatory requirements, the Board should take this opportunity to adopt regulatory policies that will promote competition on the merits in energy markets. This is especially important because GFEGs produce a substantial proportion of the electricity generated in New Jersey, making it obvious that the Board's regulation of gas utilities plays an important role in assuring the success of competition in the electric market. Accordingly, ECG recommends that the Board use this generic proceeding as a vehicle to create and sustain a more viable competitive marketplace for electric energy. Specifically, ECG urges the Board to adopt new rules or enforce existing rules that:

- Find GFEGs are a separate class of gas delivery service customers;
- Exempt GFEGs from the payment of Surcharges;
- Require each LDC to develop and implement a separate cost-based gas delivery service tariff that specifies a standard or "baseline" rate, the standards for deviating from the baseline rate for GFEGs that generate lower costs (*e.g.*, by using dedicated LDC facilities), and standard non-price terms and conditions that apply to all GFEGs;
- Recognize that discounts (at rates not lower than variable cost) may be made available on a nondiscriminatory basis in specific and verifiable circumstances, *e.g.*, a GFEG's opportunity to bypass a gas utility's system when the discount produces net benefits to firm gas distribution customers or when the discount will result in other verifiable economic benefits to the State; and
- Require GFEG affiliates of gas utilities, particularly PSEG Power, to obtain gas delivery service subject to nondiscriminatory and generally available terms and conditions.

III. The Board Should Find that GFEGs are a Separate Customer Class for Gas Delivery Service.

There are many reasons why GFEGs should be treated as a separate and distinct class of gas delivery service customers. As a threshold matter, GFEGs are larger than commercial and industrial natural gas distribution customers. For example, gas consumption by the 20 electric generation customers to which PSE&G provides gas distribution service was, on average, over 35 times the average consumption of customers purchasing service under PSE&G's TSG-NF tariff.[6] Thus, sheer size alone distinguishes GFEGs as a discrete set of natural gas delivery service users.

Even more important, however, is the fact that GFEGs use natural gas for a different purpose than retail customers. GFEGs do not use natural gas as a stand-alone end product for

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[6] Rebuttal Testimony of Robert Chilton on behalf of Independent Energy Producers of New Jersey, BPU Docket No. GR09050422, October 1, 2010, pp. 11-12.

process purposes, such as burning in on-site boilers to ake steam and hot water at nearby premises. Rather, they use natural gas as an input to their production of electric energy that is sold competitively in the wholesale market and then on to retail consumers. Moreover, some GFEGs, such as Bayonne, Camden and Newark Bay, are served by facilities that were constructed specifically for them and are not part of the serving utility's integrated system, further separating them from typical retail users. Because of these and additional factors, such as some GFEGs' proximity to alternative gas pipelines and their increased likelihood of bypass, the public policy issues related to GFEGs' use of natural gas are far more complex and significant than those relating to other customers. Given these unique factors, ECG strongly urges the Board to find that GFEGs are a separate customer class for natural gas delivery services offered by New Jersey gas utilities.[7]

IV. The Board Should Permanently Exempt GFEGs from Surcharges.

The Notice requests comments on the policy and legal considerations regarding the application of Surcharges to GFEGs. ECG strongly urges that the Board permanently exempt these customers from all obligations to pay Surcharges. These charges were adopted to support various societal programs, including energy efficiency and renewable energy programs, universal service programs and environmental cleanup. Such programs all serve laudable public purposes, but the application of Surcharges to GFEGs (as opposed to natural gas end users) is unfair,

[7] Assuming that the Board adopts ECG's proposal to treat GFEGs as a separate class of gas delivery customers, ECG's remaining comments are limited to the regulations applicable to this customer class.

discriminatory, and counterproductive to the State's policy goals of competition, lower energy costs and greater economic opportunity.[8]

First, requiring GFEGs that take distribution service from LDCs to pay Surcharges imposes significant additional costs on GFEGs that are not imposed upon their energy supplier competitors. Other electric generators in New Jersey, and in other states in the PJM market, who do not take distribution service from New Jersey LDCs do not incur similar expenses. For example, when applied in full to the gas delivery rates in PSE&G territory, Surcharges amount to over 60 cents per Dth, which is substantially more than the price paid for the actual delivery of natural gas under the Stipulation. This represents a massive increase in gas delivery costs that New Jersey GFEGs, but not other electric producers in the PJM market against which they compete, must pass through in their bids to PJM.

In addition, applying Surcharges to GFEGs creates a "double taxation" effect, because they would first be paid by GFEGs (and necessarily included in their wholesale costs of supplying electricity) and then imposed again on retail electric end users. Thus, electric customers that use New Jersey GFEG-produced energy would have to bear Surcharges twice, which raises their electricity costs. Further, unlike end users, who may be eligible to obtain benefits from the societal purposes supported by Surcharges, GFEGs do not participate in and are not the beneficiaries of any of these programs.

As the administrator of the State's societal benefit programs (*see* N.J.S.A. 48:3-60), the Board has inherent authority to determine which costs for such programs may be recovered from

[8] This exemption should not be viewed as a "discount" to GFEGs. Rather, it is a public policy decision that will promote the State's goals of greater energy competition and lower energy costs for consumers.

which customers or customer classes.[9] The Board's authority to do so is further demonstrated by the fact that it has *already permitted* PSEG Power, the State's largest GFEG and an affiliate of the State's largest gas utility, to avoid paying such charges up to this time. In fact, in discovery in its recent rate case, PSE&G acknowledged that it only assessed Surcharges on 4 of the 20 GFEG facilities it serves in New Jersey, including 2 ECG facilities that are now exempt from these charges pursuant to the Stipulation.[10] In all events, the Board may not, consistent with the statutory nondiscrimination obligations described above and the mandates of N.J.A.C. 14:4.3-3,[11] continue to exempt PSEG Power from paying such charges without exempting *all* competing electricity generators. Thus, if the Board allows PSEG Power to continue to avoid Surcharges, it must allow all competing electricity generators to avoid paying these charges as well. Conversely, if the Board requires non-affiliated GFEGs to pay Surcharges, it must also require PSEG Power to do the same. Any other policy would conflict directly with the Board's statutory duty to ensure non-discrimination.

In sum, it is lawful, economically rational and sound public policy for the Board permanently to exempt all GFEGs from payment of Surcharges to any gas utility. The Board

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[9] N.J.S.A. 48:3-60 provides that "the board shall permit each . . . gas public utility to recover *some or all* of the following costs through a societal benefits charge that shall be collected as a non-bypassable charge imposed on all . . . gas utility customers, *as appropriate*" (emphasis added).

[10] Response to MEG Request ECG-PHASE-II-91 in BPU Docket No. GR 09050422.

[11] A "gas public utility shall not unreasonably discriminate against any competitor in favor of its affiliate(s)." N.J.A.C. 14:4-3.3(a). *See also* N.J.A.C. 14:4-3.3(c) (a "gas public utility shall not provide a related competitive business segment of its public utility holding company . . . any preference (including, but not limited to, terms and conditions, pricing, or timing) over non-affiliated suppliers").

should resolve this matter as soon as possible, in order to facilitate the negotiation of expiring and future contracts.[12]

V. <u>All LDCs Should be Required to File Cost-Based GFEG Tariffs.</u>

LDCs wield market power over gas delivery services that are essential to GFEGs. Therefore, establishment of a cost-based tariff requirement is the most efficient and effective means to balance all parties' interests, both private and public. On the one hand, cost-based tariff rates that have been reviewed and approved by the Board will protect LDCs' property rights and assure they receive fair compensation for the service they provide. On the other hand, Board reviewed and approved tariffs will protect GFEGs' and the public's interests generally in avoiding high energy costs and in assuring that the applicable rates, terms and conditions of gas delivery service are just, reasonable and non-discriminatory between and among all GFEG competitors.

Given the Board's long-standing commitments to treating similarly-situated customers in a nondiscriminatory manner and to a transparent ratemaking process, as well as the vital importance of GFEGs' success to the achievement of the State's energy policy goals, it is both reasonable and appropriate for the Board to require LDCs to adopt tariffs that are tailored to those customers' specific needs. Currently, at least some utilities, particularly PSE&G, have no such tariff. As a result, PSE&G requires GFEGs to purchase gas delivery services under the generic TSG-NF tariff, which is applicable to both retail and wholesale customers, or to obtain service under individually negotiated contracts. ECG recommends that the Board fill this void

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[12] Stipulation, ¶ 15.

promptly by requiring all LDCs to file for public review and comment a GFEG-specific tariff with cost-based rates for interruptible delivery service.[13]

The Board should facilitate the utilities' development of cost-based rates for GFEGs by describing the applicable costing principles in its order issued pursuant to the Notice. Established principles for determining non-firm (interruptible) cost-based rates dictate that services provided through the use of an integrated system should cover all the direct costs of such service and make a contribution to the recovery of the system's fixed costs. However, for GFEGs that are served primarily by dedicated facilities, customer-specific costs should be directly assigned in lieu of a cost allocation. In addition, all customers should be allocated a share of billing and customer accounting costs, and there should be a nominal allocation of fixed system costs.

To further streamline the process for establishing cost-based GFEG tariffs, the Board should require all gas utilities to submit proposed tariffs for review and comment within 60 days of the order establishing the requirement and set a comment and reply cycle that concludes within 60 days. Any hearings on those proposed tariffs should commence promptly and be

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[13] The rates, terms and conditions for non-interruptible ("firm") delivery service are substantially different from those applicable to interruptible ("non-firm") service, which is ordered in much smaller quantities and incurs higher costs. Demand for interruptible service is substantially greater than the total demand for firm service, and service to some GFEG customers such as Bayonne, Camden and Newark Bay is provided over dedicated, largely depreciated facilities that have a far lower cost than the average firm delivery service customer. Thus, the rates and terms of existing tariffs for non-interruptible service are not an appropriate model or starting place for interruptible delivery service tariffs.

concluded in no more than 90 additional days, with a goal of tariff approval and implementation within 9 to 10 months of the initial order.[14]

In light of the Board's historic policy of honoring contracts, it should permit all existing contracts between gas utilities and independent GFEGs to run their course (including continuation under mutually agreed "evergreen" provisions) before requiring those GFEGs to take service under the new tariffs. Because those agreements were negotiated at arm's length and those customers have placed business reliance and expectations on the existing contract terms, their expectations should not be upset. However, in order to permit independent GFEGs to receive nondiscriminatory rates, terms and conditions as soon as practicable, ECG recommends that GFEGs under contract be given the right to terminate their contracts and adopt the terms of the new tariffs any time after they are approved.[15]

VI. Discounts for GFEGs Should be Subject to Appropriate Limitations.

The Notice seeks comments as to whether the Board may or should permit an LDC to charge discounted delivery rates based upon a customer's ability to bypass the utility's gas distribution system, and if so, the criteria and process that should apply with respect to such discounts. EGC believes that if the Board sets appropriate cost-based rates for GFEGs, the need for any discounts will be reduced. Nevertheless, EGC recommends that the Board provide for discounts off GFEG tariffed rates in carefully controlled circumstances that (i) limit any discounts to cases where the subject GFEG makes a verifiable showing that bypass is both

[14] The Board should assure that the rates approved in the Stipulation continue in effect during the pendency of such proceedings, regardless of how long it takes for the GFEG tariffs to be approved and become effective.

[15] In contrast, GFEG affiliates of gas utilities should be required to take service under the new GFEG tariffs as soon as they become effective.

economically and practicably feasible and/or that the discount will provide other economic benefits to firm service customers or to the State in general; and (ii) assure that any discounts are publicly announced and made available to all similarly-situated customers.

The policy justification underlying any "bypass" discount from approved, cost-based tariff rates is that the discount is necessary to retain a customer that has an alternative to the tariffed service and would not buy that service from the utility absent a discount from the tariffed rate. Thus, if the utility did not make the reduced rate available to that customer, it would abandon the utility's service altogether, resulting in zero revenues and reduced capacity usage for the utility's system as a result of the bypass. However, nondiscrimination must always be the guidepost for defining exceptions to GFEGs' obligation to obtain service at cost-based tariffed rates. Thus, any rules permitting bypass discounts for GFEGs must be carefully designed and monitored so that no such customers – all of which compete against one another in the PJM market – are able to "game" the system with unsupportable bypass claims and thereby obtain discriminatory discounts that give them an unfair competitive advantage.

Thus, for example, a GFEG that claims it has a bypass opportunity should be required to demonstrate its proximity to an interstate pipeline or other alternative source of transport, and that the payback period for accessing the alternative facility is reasonably brief based upon the volumes of gas to be transported. Further, to the extent that a GFEG purports to meet these criteria, there must also be a means to assure that its bypass claim can be verified. Therefore, ECG recommends that before a gas utility may offer a bypass discount to a GFEG, it must obtain a statement under oath from a responsible representative of the relevant customer (especially including GFEGs that are utility affiliates) attesting to the truthfulness of the bypass claim.

In addition, the Board should adopt rules that assure all discounts are properly administered so that they do not upset the competitive balance. In particular, all discounts should be subject to reasonable pricing constraints as to the maximum allowable discount. The lowest permissible rate should be the variable cost of providing delivery service to the subject GFEG, because any lower rate would require other customers to subsidize that GFEG's use of the utility's pipeline. In addition, the discounted rate and evidence supporting the discount should be (i) publicly disclosed within 24 business hours in a manner that is viewable by all GFEGs; (ii) transparent and adequately described; and (iii) available upon request to all similarly-situated customers. ECG notes in this context that the procedures in N.J.A.C. 14:4-3.3(q), which currently apply only to discounts made available to a utility's affiliates, could likely be adapted to apply generally to all discounts a utility offers because of a GFEG's bypass claim. Finally, complaints regarding the utility's failure to provide a nondiscriminatory discount to similarly-situated GFEGs should be enforceable using expedited complaint procedures, and the utility should bear the burden of proof to justify all discounts or other negotiated terms or conditions of service it offers, particularly any discounts or other special terms it offers to a GFEG affiliate.

VII. PSE&G Must Immediately be Brought into Compliance with Fundamental Nondiscrimination Requirements.

The Board's regulations expressly prohibit a utility from "unreasonably discriminat[ing] against any competitor in favor of its affiliate(s)." N.J.A.C. 14:4-3.3(a). N.J.A.C. 14:4-3.3(c) expressly prohibits gas utilities from providing to "a related competitive business segment of its public utility holding company . . . any preference (including but not limited to terms and conditions, pricing or timing) over non-affiliated suppliers . . . in the provision of products and or

services offered by the . . . gas public utility." Despite these express prohibitions, by allowing its affiliate to obtain gas delivery service that is not subject to a tariff or other generally available terms and conditions, PSE&G has unfairly benefitted PSEG Power with several preferences, including the following:

- PSEG Power is not required to maintain a balance between its gas deliveries to the PSE&G system and its gas usage, nor is it subject to penalties and additional charges if it fails to maintain a balance. Thus, unlike ECG members, PSEG Power is not required to pay PSE&G a premium for gas it purchases from PSE&G if it under-delivers gas to PSE&G's system. Conversely, PSEG Power, unlike ECG members, is not required to sell gas to PSE&G at a discount if it over-delivers gas to PSE&G's system.
- Unlike ECG members, PSEG Power is not subject to restrictions on its annual, daily and hourly deliveries to PSE&G, is not under an obligation to interrupt deliveries on eight hours notice, and need not comply with terms relating to its choice of gas suppliers.
- Unlike Bayonne and Elmwood, which are subject to the TGS-NF tariff, PSEG Power is apparently not required to incur the costs of maintaining filled petroleum storage tanks as an alternate fuel source.
- It does not appear that PSEG Power is required to incur the costs of posting a security deposit with PSE&G.

PSE&G's failure to impose nondiscriminatory terms and conditions of service on its provision of gas delivery service to PSEG Power should be corrected immediately, not in a future proceeding. Therefore, the Board should immediately find that PSE&G's provision of

gas delivery service to PSEG Power in the absence of generally available terms and conditions is unlawfully discriminatory. Moreover, the Board should require PSE&G to provide gas delivery service to PSEG Power under the same terms and conditions that are generally applicable to PSEG Power's competitors. Failure to act now would continue to harm competitors and competition and violate the State's policies and rules requiring fair competition in energy markets.

Requiring PSEG Power to take interruptible natural gas delivery service from PSE&G at the recently stipulated rate (42.5 cents per dekatherm) and subject to the non-rate terms and conditions of PSE&G's TSG-NF tariff is a reasonable interim step for the Board to take until it approves a PSE&G tariff applicable to all GFEGs. This is required by the applicable statues and the Board's own rules, and it is necessary to eliminate the preferences PSE&G has given to PSEG Power over ECG members and other GFEGs that buy PSE&G gas delivery service. There is no excuse that would support further delay.[16]

Conclusion

For the reasons stated above, ECG recommends that the Board:

- Find GFEGs are a separate class of gas delivery customers;
- Exempt all GFEGs from payment of Surcharges;
- Require LDCs to establish specific, cost-based GFEG gas delivery service tariffs; and

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[16] If PSEG Power objects to the application of any specific term or condition of the TSG-NF tariff, the Board should not approve any such exception unless it applies the exception generally to all GFEGs or PSE&G meets its burden of proof to show that applying the requested exemption to PSEG Power alone would be just, reasonable, non-preferential and nondiscriminatory.

- Require PSE&G to provide gas delivery service to PSEG Power under the terms of its existing TSG-NF tariff until PSE&G's GFEG tariff is effective.

In addition, discounts for GFEGs should be subject to appropriate rules that will assure any discounts offered to such customers, particularly a utility's affiliated GFEGs, are economically viable, verifiable and available to all GFEGs on a nondiscriminatory basis.

Respectfully submitted,

BEVAN, MOSCA, GIUDITTA & ZARILLO, P.C.

By: Murray E. Bevan /WKM

Murray E. Bevan, Esq.
William K. Mosca, Jr., Esq.
Attorneys for Electric Customer Group

222 Mount Airy Road, Suite 200
Basking Ridge, NJ 07920
908-753-8300
mbevan@bmgzlaw.com
wmosca@bmgzlaw.com

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