

January 28, 2011

**BY MESSENGER**

Ms. Kristi Izzo  
Secretary, Board of Public Utilities  
Two Gateway Center, 8<sup>th</sup> Floor  
Newark, New Jersey 07102

Re: Generic Stakeholder Proceeding/Gas Distribution Discounts  
Docket Nos. GR10100761 and ER10100762

Dear Secretary Izzo:

Please accept the following letter in lieu of a formal brief on behalf of the Independent Energy Producers of New Jersey ("IEPNJ") regarding the legal issues raised in the Public Notice published in this proceeding. The notice identifies at least three legal issues: (1) whether there are legal constraints on the Board's ability to approve contracts for gas transportation at rates that are below tariff rates; (2) whether the renewal of a previously approved contract requires further Board approval if the renewal occurs pursuant to provisions in the previously approved contract; and (3) whether EDECA's reference to the societal benefits charge ("SBC") as being "non-bypassable" requires electric generators obtaining gas transportation service from gas public utilities to pay the same SBC as other customers of those gas public utilities.

1. The Board's Authority to Approve Contract Rates Is Broad

The long-standing statutory provisions regarding rate discounts merely require that such discounts not be "unjust" or "unreasonable." N.J.S.A. 48:3-1. "Not every discrimination as to rates is objectionable, but only such a discrimination as under the circumstances is unreasonable and unjust, so discriminations founded on reason and justice may be made, and different rates



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may be charged to different patrons where there are substantial differences in the character of the services rendered or facilities furnished, or differences in the conditions and circumstances affecting the inconvenience and expense to the company of giving the service or furnishing the facilities.” *Essex County Welfare Board v. New Jersey Bell Telephone Company*, 126 N.J. Super. 417, 423 (App. Div 1974).

There is no bright line between an “unreasonable” or “unjust” discount on the one hand and a “reasonable” or “just” one on the other. Suffice it to say that the table of discounted arrangements assembled by the local distribution companies (“LDCs”) shows that the Board has been willing to approve a substantial number of discounted arrangements over the years. Assuming the Board exercises its discretion reasonably and with sufficient support in the record, the legal constraints circumscribing Board action are not cumbersome.

2. Renewal of An Approved Contract According to its Terms Does Not Need Further Board Approval.

When the Board approves an agreement, and that agreement contains a provision allowing for renewal, either automatically or at the option of a party, approval of the agreement necessarily includes approval of the renewal provision. Accordingly, taking steps now to prevent a renewal from occurring would be tantamount to modifying an existing approval.

IEPNJ does not deny that under extreme circumstances, the Board may have the right to modify an existing below-tariff contract. *See City of Plainfield, v. Public Service Electric and Gas Company*, 82 N.J. 245, 253 (1980), where the Board set aside a long-standing contractual promise by PSE&G to provide free service to a municipality. But these circumstances are rare

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indeed, and should only be exercised when the factual basis for such a modification is compelling, such as when the service is being offered for free, as was the situation in the *Plainfield* case.

The mere fact that, with renewals, a contract may remain in place for a long time is hardly sufficient grounds to invoke the extraordinary remedy of contract modification. For example, in *Pivotal Utility Holdings, Inc. dba Elizabethtown Gas*, 2009 WL 454499 (Docket No. EO08090829, January 28, 2009), the Board approved a contract with Merck that had a term of twenty years. Therefore, something more than an extensive term needs to be present before the Board might choose to reexamine an existing approval. While it is not clear what other than a contract for free service might trigger the need for Board review, it is clear that nothing in the present record supports the conclusion that gas contracts with renewal provisions have become so inherently unreasonable to justify the extraordinary measure of undertaking a blanket review of all contracts with such renewal provisions.

3. Electric Generators Are Not Required to Pay SBC When They Purchase Gas Transportation

As of this writing, legislation is on Governor Christie's desk that would render this last point moot. S2381, which was passed by both chambers of the State Legislature and sent to the Governor on January 10, provides in Section 5 as follows: "Notwithstanding the provisions of any other law, rule, regulation, or order to the contrary, gas public utilities shall not impose a societal benefits charge pursuant to section 12 of P.L.1999, c.23 (C.48:3-60), or any other charge designed to recover the costs for social, energy efficiency, conservation, environmental or

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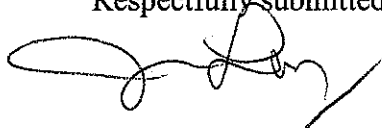
renewable energy programs, on natural gas delivery service or commodity that is used to generate electricity that is sold for resale.”

The Governor has until February 24, 2011, to consider this bill. IEPNJ therefore suggests that the Board should hold this issue in abeyance. If the bill is signed, the issue will become moot. If for any reason the bill does not become law, the parties should be allowed to submit supplemental briefing on this issue within a reasonable period after the Governor’s action.

Conclusion

Assuming S2381 is signed, one of the issues identified by the Board will have been resolved by new legislation. Apart from this, however, the issues before the Board are governed only by very general legal constraints, and the final decisions in this proceeding should be driven by policy considerations and the Board’s expertise.

Respectfully submitted,



James Laskey  
Counsel for IEPNJ