STATE OF NEW JERSEY
BOARD OF PUBLIC UTILITIES

In the Matter of a Generic Stakeholder Proceeding to Consider Prospective Standards for Gas Distribution Utility Rate Discounts and Associated Contract Terms and Conditions	**Docket Nos. GR10100761 and ER10100762**

INITIAL COMMENTS OF THE NEW JERSEY LARGE ENERGY USERS COALITION

To: Honorable Joseph Fiordaliso
Commissioner

The New Jersey Large Energy Users Coalition ("NJLEUC") respectfully submits these Initial Comments in response to the issues set forth below, which are to be decided in this Generic Proceeding.

1) **The legality of charging discounted gas utility distribution rates (a) based on a customer's ability to bypass the utility's gas distribution system, (b) based on the impact on wholesale and retail electricity markets, or (c) for other policy reasons.**

For many years, the natural gas utilities and Board of Public Utilities ("Board") have permitted customers to negotiate discounted gas distribution rates in certain circumstances. Rate discounts have typically been granted to customers able to demonstrate a viable option to bypass the utility gas distribution system by interconnecting directly with an interstate pipeline, or to prevent customers from scaling back their New Jersey operations, or relocating to another state in which utility costs are lower.

These discounted rate agreements have been approved by the Board, with input from Board staff and Rate Counsel. The Board authorized this practice by approving utility tariff provisions that permit the utilities to negotiate discounted rate arrangements responsive to customer bypass threats and to accommodate customers that are forced to respond to market and competitive conditions. Thus, for example, PSE&G's rate schedule TSG-NF tariff authorizes the utility to reduce its distribution charge "at the beginning of the month and/or during the month to reflect market conditions". Elizabethtown's ITS tariff authorizes the utility to reduce its ceiling distribution charge to a stated floor rate "if the Company determines that, without a rate reduction, competitive pressures may result in the loss of load or the Customer". Several of South Jersey Gas Company's rate schedules, including the FES and EGS-LV rate schedules, authorize the utility, at its sole reasonable discretion, to offer its demand and volumetric charges on a negotiated basis, within certain stated financial parameters.

A similar provision was earlier included in the Off-Tariff Rate Law, N.J.S.A. 48:2-21.24 *et seq.*, in which the Legislature, as part of the transition to competitive markets, authorized electric utilities to enter into off-tariff rate agreements (OTRAs) with customers. The Off-Tariff Rate Law authorized the utilities to offer OTRAs to customers able to demonstrate "that the customer would have ceased to contribute to the utility's fixed costs, either because the customer would have ceased to obtain its power primarily from the utility, or because it would have relocated out of state".

The policy permitting discounted distribution rate agreements with certain customers is predicated in part on a recognition that other ratepayers and the State would be economically harmed if such agreements were not permitted. Discounted rate agreements tend to assure that "at risk" customers remain customers on the utility distribution systems, and thereby assure their

continuing contribution to the utility's fixed costs, thereby lowering costs to all other customers. Thus, although only certain customers directly benefit from discounted rates, the rates are structured in a manner that provides benefit to all customers, whose rates would otherwise increase as a consequence of the loss of the load of at-risk customers to bypass, load reduction or departure from the State. The Legislature also recognized that the agreements foster our economic development goals to attract and retain business by making them more competitive in the regional, national and international markets, retain jobs, enhance the economic vitality of the State, and contribute to the attainment of our energy efficiency and environmental goals. See, e.g., N.J.S.A. 48:2-21.24.

Therefore, the authorization of discounted gas distribution rates in these contexts, and in the others noted below, is appropriate and desirable from both legal and policy perspectives. Negotiated rates have historically contributed to business and job retention by the State and are now being used effectively to further other meritorious goals. These policies should be continued and expanded, particularly in our current economic environment in which considerable emphasis is properly being placed on the achievement of our economic development, energy efficiency, conservation and environmental goals. The Board's rate policies can be leveraged effectively in this fashion to contribute to the attainment of these goals and therefore should be supported and expanded.

2) The legality of establishing discounted gas utility distribution rates through contracts and whether current or future contracts may be "evergreened" and, if so, whether a utility should be required to file advance notice with the Board or obtain approval before determining not to exercise a termination right in a discounted contract.

NJLEUC incorporates its response to issue number 1. There is clearly ample precedent for the negotiation of discounted gas utility distribution rate agreements between utilities and their customers, and properly so. It is imperative that the utilities and Board be responsive to the financial, competitive and economic needs of the business community to enable the State's large companies to remain viable and competitive in the regional, national and international markets, and to establish more favorable economic conditions in the State. For the reasons stated in these comments, it is also good policy to allow such agreements to occur for the benefit of the affected companies and ratepayers generally, and to prevent the loss of companies to other states.

In each instance in which a discounted rate has been negotiated, the agreement has been memorialized in a contract and presented to the Board for its approval, with input by Board staff and Rate Counsel. If found to be acceptable, the contracts have been approved in formal orders issued by the Board.

An issue has been raised in this proceeding whether discounted rate agreements should be permitted to be "evergreened", or essentially perpetuated at the discretion of the contracting parties without further action required by the Board. NJLEUC urges that it is appropriate for the Board to permit such agreements on a prospective basis, as such continuing agreements afford companies the necessary certainty and assurance that is required to support a company's long-term decision to forego an opportunity to bypass the utility system or to relocate to another State. Such decisions are also made with due regard to the demands of investors and financial resources that fund the company's long- term investments. Evergreen contracts also provide needed certainty to the companies and the markets and investors they serve by minimizing regulatory risk.

The Board could determine prospectively, using reasonable criteria consistently applied, whether a customer's request for evergreen treatment of a discounted rate agreement is necessary and appropriate. Once approved, however, the sanctity of any contract that includes an evergreen provision must be respected. In a number of instances the Board has afforded the utilities similar forms of long term rate relief and assurances that their investments would be fully protected—see, e.g. EDECA's extensive and irrevocable guaranteed recovery of utility stranded investments—and there is no reason why similar relief should not be afforded to utility customers in appropriate circumstances.

With regard to current evergreen contracts, NJLEUC respectfully urges that there is no legal or policy basis for the Board to now interfere with, or to seek to amend after-the-fact, the contractual rights of customers whose agreements were negotiated with the utilities and duly approved by the Board. These contractual obligations were undertaken in good faith by the customers involved, and their investors and financiers, all of whom reasonably relied upon the sanctity of the contracts. These contracts cannot simply be undone at this juncture, solely at the whim of the Board or Rate Counsel, particularly in the absence of a compelling public policy reason to do so.

Both the State and Federal Constitutions contain "contract clauses", whose purpose is to encourage trade and credit by promoting confidence in the stability of contractual obligations by prohibiting *ex post facto* laws. Home Building & Loan Association v. Blaisdell, 290 U.S. 398, 427 (1934); U.S. Constitution, Article I, section 10, clause 1, ("No State shall...pass any...Law impairing the Obligation of Contracts"); New Jersey Constitution, Article IV, Section VII, paragraph 3 ("Legislature shall not pass any...law impairing the obligation of contracts, or depriving a party of any remedy for enforcing a contract which existed when the contract was

made"). It has therefore long been held that the Contract Clause limits the power of the States to modify their own contracts and to regulate those between private parties. United States Trust Company of New York v. State of New Jersey, 431 U.S. 1, 16 (1977). However, the proscription against the impairment of contracts is not an absolute one, and every contract is deemed to be made subject to the condition that its fulfillment may be frustrated by a proper exercise of the police power. El Paso v. Simmons, 397 U.S. 497, 509 (1965) ("the power of a State to modify or affect the obligation of contract is not without limit", but the State has the "sovereign right to protect the general welfare of the people"); South Hamilton Associates v. Mayor and Council of Town of Morristown, 99 N.J. 437, 444-445 (1985).

Although the Contracts Clause does not prohibit the states from repealing or amending statutes, or enacting legislation with retroactive effects, private contracts are not subject to unlimited modification under the police power. Rather, where a law has the effect of impairing a contractual obligation, it must be demonstrated that the impairment is reasonable and necessary to serve an important public purpose, furthered by rational means. United States Trust, *supra,* 431 U.S. at 22, 25. South Hamilton Associates v. Mayor and Council of Morristown, *supra*. Thus, a reviewing court must engage in a two step analysis in which it first determines whether an impairment of a contract right or remedy has occurred and, if so, whether the impairment violated the Contract Clause. United States Trust, *supra*, at 431 U.S. 20-21. The court's role is to reconcile the rights afforded a private party under the Contracts Clause against the rights reserved to the sovereign power of the state to safeguard the welfare of its citizens. *Id.*

A brief analysis of several leading cases is therefore instructive regarding how the protection of private contract rights has been balanced against exercises of the police powers of a state. In United States Trust, the United States Supreme Court reversed a ruling by the New

Jersey Supreme Court and ruled that the retroactive repeal of a statutory covenant between the Port Authority of New York and New Jersey and certain bondholders impaired the States' contract with the bondholders in violation of the Contracts Clause. The repeal of the covenant eliminated an important security provision for the bondholders that placed a limitation on the Port Authority's deficits. The covenant had required the Port Authority to protect its general reserves from depletion, to secure and assure the marketability of the bonds used to finance the construction of the World Trade Center and certain railroad operations. The Supreme Court held that the subsequent repeal of the covenant eliminated an important security provision and impaired the obligation of the States' contract. The Court rejected the Port Authority's justification that its policies had changed and found that the repeal was neither necessary to the achievement of the new policy nor reasonable in light of the circumstances ("a State is not free to impose a drastic impairment when an evident and more moderate course would serve its purposes equally well".) United States Trust, *supra*, at 431 U.S. at 29-30.

In South Hamilton Associates, our Supreme Court held that a municipality could not correct a defective rent control ordinance by retroactively enacting another ordinance that interfered with contracts rights established during the period between the enactment of the two ordinances. The retroactive application of the ordinance was held to violate the contract clause because the only justification offered to support the retroactive application of the second ordinance was that it would enable the Morristown Town Council to correct its prior mistake by eliminating a vacancy decontrol ordinance the Council thought it had accomplished months earlier. In the interim, certain of South Hamilton's rent-controlled tenants had vacated their apartments and the landlord relet the apartments at higher rents permitted under the first rent decontrol ordinance. In these circumstances, the Supreme Court found that no rational public

purpose existed sufficient to support the retroactive application of the subsequent ordinance when it would interfere with leases entered into in good faith between South Hamilton and its new tenants. South Hamilton Associates, *supra*, at 99 N.J. at 447-448.

In other rent control-related cases, the courts supported State actions where exercises of the police power were found to override the contractual interests of private parties. Thus, for example, in Edgewater Investment Associates v. Borough of Edgewater, 103 N.J. 227 (1986), our Supreme Court upheld the constitutionality of the Senior Citizens and Disabled Protected Tenancy Act (which created protected tenancies and governed the amount of rent increases that developers could charge to recoup condominium conversion charges) and rejected a landlord's claim that the law violated the "takings" and "contract" clauses of the State and Federal Constitutions. The landlord complained that the retroactive application of the law, which increased the duration of the statutory tenancy afforded to qualifying elderly and disabled tenants, interfered with the landlord's earlier conversion of an apartment complex from rental housing to condominiums. The court held that the public interest in avoiding the forced eviction and relocation of poor senior citizen and disabled tenants outweighed the impairment of the private rights of the landlord. Edgewater Investment Associates, *supra*, at 236-237. See, also Troy, Ltd. V. Renna, 727 F.2d 287, 297 (3rd Cir. 1984), a case involving similar contracts clause and takings claims by a landlord under the Senior Citizens and Disabled Protected Tenancy Act, ("...there is no question that the State has justified (the contract impairment) by showing a broad remedial purpose in protecting the mental and physical health of citizens who could suffer greatly by evictions".)

Against the backdrop of these cases, it is clear that the Board does not have the authority to now re-open and retroactively amend customer discounted rate agreements that were reviewed

by Board staff and Rate Counsel, and approved by the Board. There should be no question that these agreements were of great economic consequence to the customers that entered into them. In reasonable reliance on the enforceability of the agreements, customers elected to forego gas pipeline bypass opportunities, or made substantial financial commitments to the State, including large investments of capital in existing and expanded facilities instead of relocating their operations to other states with lower energy costs. To the extent that the discounted rate agreements contain "evergreen" provisions, these provisions were and are justified in the circumstances, given the customers' (and their investors and financial backers') reasonable reliance on these agreements.

The retroactive elimination of contractual "evergreen" provisions would clearly impair the contracts and the benefits conferred on the customers. These customers relied on the enforceability of the "evergreen" provisions as the basis for significant corporate decisions having long term consequences. While the impairment and prejudice that would result from the retroactive elimination of the "evergreen' provisions is clear, the Board's public policy justification for doing so is not. The cited precedents make clear that significantly more is required to interfere with these contracts than regulatory whim.. Simply questioning the wisdom of "evergreen" provisions with the benefit of hindsight would not survive scrutiny, any more than the erroneous ordinance adopted by the Morristown Town Council in the *South Hamilton Associates* case or the change in policy belatedly adopted by the Port Authority in *United States Trust*.

NJLEUC urges that the sanctity of all customer agreements, including those with "evergreen" provisions, should be respected by the Board and the other stakeholders to this proceeding. While the Board may request the utilities to provide notice to the Board regarding

decisions to terminate or continue an "evergreened" contract, the notice should be for informational purposes only, rather than to provide a basis for further action by the Board.

3) The criteria and process that the Board should establish to determine whether or not an entity has an ability to bypass the utility's gas distribution system and what rates should be charged to such entities; and whether the criteria and process must be established in a rulemaking.

As noted above, for many years customers have negotiated reduced distribution rates with utilities based upon a customer's demonstrated ability to (i) bypass the utility's gas distribution system and to interconnect directly with an interstate pipeline, or (ii) scale back its New Jersey-based operations or relocate entirely to another state where energy costs are lower in order to remain financially viable. The Board has properly deemed it appropriate to permit this practice to avoid the loss of significant customer load on the utility distribution systems, which would inure to the detriment of the utility's remaining customers who would pay increased rates to offset the departing customers' lost contributions to the utility's fixed and other costs. It has therefore been deemed to be in the public interest to permit negotiated rate agreements in these circumstances.

However, what has consistently been lacking with regard to these arrangements is a consistent and transparent set of rules and guidelines to guide customers and utilities in determining whether a credible bypass threat exists and, if so, what discounted rates may properly be offered to a customer as an incentive to abandon the bypass or relocation option and remain on the utility system. As noted in response to issue number 1, while the utility tariffs

authorize them to negotiate discounted rates with customers to "meet competition", the word "bypass" does not even appear in any tariff and no criteria have been established to determine appropriate customer discounts.

Instead, the Board appears to authorize bypass-related discounted rate agreements on a case-by-case basis, and has not promulgated a general set of bypass guidelines or established a specific burden of proof for customers. The Board's approvals appear to have generally addressed whether the discounted rates negotiated by the parties are just and reasonable in the circumstances presented and in the public interest. The rationale for Board approvals has apparently been the desirability of avoiding bypass while preserving benefits to other customers by continuing the bypass customer's contribution to the utility's distribution costs and, presumably, payment of the Societal Benefits Charge.

The need for uniform rules is underscored by the apparent *ad hoc* basis on which the utilities evaluate bypass threats. In the PSE&G rate case, the company's witness, Mr. Schirra, testified that PSE&G has never reduced a customer's rates in response to a bypass threat. It is known that other utilities have negotiated contracts based on threats of bypass or relocation in certain circumstances but have refused to do so in others. It is not known what criteria the utilities have applied to analyze the merits of a bypass or relocation threat, or whether the same criteria have been adopted by each of the utilities and applied to all customers on a consistent basis.

Mr. Schirra's testimony shed some light on the criteria utilized by PSE&G to evaluate a threat of bypass. These criteria include the cost of the bypass to the customer, whether the customer has a viable route for its proposed pipeline to interconnect with the interstate pipeline, whether the customer has secured all necessary rights of way and easements for its pipeline, and

the length of the payback period for the customer's investment. (Schirra 2/24/10 Testimony, beginning at p. 828). Other considerations relevant to the viability of a bypass would include environmental considerations, financing arrangements, and engineering issues.

It is evident that the Board needs to take a lead role in adopting a reasonable set of guidelines to establish customer eligibility for discounted distribution rate agreements and to determine appropriate discounted rates. It is certainly fair to question whether it is appropriate for the utilities, which have an obvious concern about their own bottom lines, to make such determinations based on undisclosed, non-uniform criteria that have not been specifically approved by the Board.

Accordingly, NJLEUC urges the Board to promulgate a uniform set of guidelines, to be consistently applied by each utility on a prospective basis, to address customer requests for discounted distribution rates predicated on bypass, competitive pressures, policy reasons or other circumstances in which the provision of discounted rate treatment appears reasonable. The Board should establish specific, uniform guidelines and approval parameters for the financial, pipeline viability, engineering, environmental, cost, payback and other factors and issues associated with all such requests. It is envisioned that these guidelines would be implemented essentially using the same procedures as today—e.g. negotiation of a discounted rate agreement, review by Rate Counsel and Board staff, and approval by the Board.

Guidelines should also be developed with regard to appropriate formulas to calculate the rates to be charged to customers deemed eligible for discounted rate treatment. It is assumed that the discounted rate would include a floor margin reflecting a minimum contribution to the utility's fixed distribution costs, and to the Societal Benefits Charge and other charges, all in amounts to be determined.

Because the policies to be adopted in this proceeding would represent broad policy guidelines that would (i) establish the eligibility of customers to receive discounted gas distribution rates, (ii) determine how discounted rates will be calculated, and (iii) would be generally applied on a prospective basis to all future discounted rate applications, NJLEUC respectfully suggests that the criteria and process to be adopted should be the subject of a rulemaking proceeding.

As defined by the Administrative Procedures Act, N.J.S.A. 52:14B-2(e), a "rule" means "each agency statement of general applicability and continuing effect that implements or interprets law or policy". The seminal case that guides determinations whether administrative decision-making should be deemed adjudicative, between the parties to a specific proceeding, or an administrative rule-making is Metromedia, Inc. v. Director, Division of Taxation, 97 N.J. 313 (1983). In that case, our Supreme Court observed that the nature of a rule is its "widespread, continuing and prospective effect", and the intention that it be applied as a general standard with widespread coverage, and "not otherwise expressly authorized by or obviously inferable from the specific language of the enabling statute". Metromedia, *supra*, 97 N.J. at 328-329. The Supreme Court noted that "(w)here the subject matter of the inquiry reaches concerns that transcend those of the individual litigants and implicate matters of general administrative policy, rule-making procedures should be invoked":

> ...an agency determination must be considered an administrative rule when all or most of the relevant features of administrative rules are present and preponderate in favor of the rule-making process. Such a conclusion would be warranted if it appears that the agency determination, in many or most of the following circumstances, (1) is intended to have wide coverage encompassing a large segment of the regulated or general public, rather than an individual or a narrow select group; (2) is intended to be applied generally and uniformly to all similarly situated persons; (3) is designed to operate only in future cases, that is,

> prospectively; (4) prescribes a legal standard or directive that is not otherwise expressly provided by or clearly and obviously inferable from the enabling statutory authorization; (5) reflects an administrative policy that (i) was not previously expressed in any official and explicit agency determination, adjudication or rule, or (ii) constitutes a material and significant change from a clear, past agency position on the identical subject matter; and (6) reflects a decision on administrative regulatory policy in the nature of the interpretation of law or general policy. These relevant factors can, either singly or in combination, determine in a given case whether the essential agency action must be rendered through rule-making or adjudication. *Id.* at 331, 332.

It is readily apparent that the determinations to be made in this proceeding satisfy each of these factors. There is little question that the Board will, for the first time, articulate the specific standards and procedures to be satisfied by future applicants for discounted distribution rates in response to bypass threats, and to competitive, market and other circumstances. These determinations will constitute an administrative policy declaration that will apply uniformly to all utilities and similarly situated customers that seek future rate relief, and will prescribe standards that do not currently exist. Rulemaking is necessary and appropriate in the Generic Proceeding, given the absence of uniform standards and procedures and the *ad hoc* nature of prior determinations.

4) Regardless of an entity's ability to bypass the utility's gas distribution system, the criteria and process that the Board should establish to determine (a) whether other policy considerations justify discounts, (b) if so, what rates should be charged; and (c) whether the criteria and process must be established in a rulemaking.

NJLEUC incorporates its responses to issues number 1 and 3.

NJLEUC urges that the Board fully utilize the leverage afforded by discounted rates and charges as a tool to achieve the State's energy efficiency, conservation, environmental, economic development and job creation goals. Just as the State and Federal governments use the tax laws to incentivize or discourage certain behaviors, the Board could similarly leverage discounted utility rates to spur economic development and job creation and increased energy efficiency, given the significant "bang for the buck" that commercial and industrial customers consistently deliver in energy projects.

Discounted rates have already been permitted to advance certain policy goals of the Board and State, underscoring the direct linkage between lower energy costs and the achievement of these goals. Thus, for example, the New Jersey Natural Gas Company tariff includes an Economic Development service classification that provides discounted commodity and demand charges to eligible customers located in certain communities. To establish eligibility, customers must demonstrate, among other things, that service is being provided to a new building or a building that has been vacant for at least twelve months or, for existing customers, that the space utilized for its continuing operations has been expanded by more than 5,000 square feet. In addition, customers must add at least two permanent full-time employees at a location in the utility's service territory.

New Jersey Natural's tariff also includes a service classification for Fostering Environmental and Economic Development (FEED) Service. To qualify for discounted rates under FEED service, a new customer must intend to utilize natural gas to provide significant environmental or economic development benefits within the utility's service territory or in a manner that increases system utilization. An existing customer must materially expand its use of natural gas or provide significant environmental or economic development benefits or increase

system utilization. Customers must intend to create new jobs or avoid potential job reductions or otherwise provide material benefits in economic development or infrastructure enhancements not otherwise attained without FEED service, or install or modernize equipment that is more energy efficient, reduces carbon emissions, or produce measurable benefits that will help achieve State or Federal environmental goals.

NJLEUC commends New Jersey Natural for implementing these programs and urges the Board and the other utilities to develop other such creative offerings. Over the years, the Board has rewarded the utilities for developing energy efficiency, renewables, demand response, environmental, carbon capture, and other such worthy programs. There is no reason why the Board should not also reward utility customers for engaging in similar activities. NJLEUC therefore encourages the Board to use this proceeding to pursue the establishment of customer-based programs for which special utility tariffs could be implemented that would provide rate discounts to incentivize certain behaviors and, if deemed appropriate, penalties should program objectives not be achieved as projected. Because variations of these types of programs already exist, and because the programs could be established under participating utility tariffs or by specific orders of implementation from the Board, rulemaking would not appear to be necessary in this context.

NJLEUC commits to pursuing customer-oriented energy efficiency, renewables and other programs in this proceeding.

5) The legality of and policy considerations of applying SBC, RGGI and CAC charges prospectively to electric generating customers that purchase gas delivery services from the utility to produce electricity that is sold to electric public utility customers.

NJLEUC has argued repeatedly that there is no current legal basis to fully excuse a power generator or other end use utility customer from paying the SBC, which the Legislature established in EDECA as a non-bypassable charge, payable by all customers of the electric and gas utilities. N.J.S.A. 48:3-60. We recognize that A3442, the so-called LS Power bill that was recently approved by the Legislature, would exempt generators from payment of the SBC on the gas used to generate electricity. However, the bill still awaits action by the Governor and, if signed into law, may be subject to challenge before the Federal Energy Regulatory Commission or in the Federal Courts. Therefore, until the LS Power bill is signed into law, and a final determination is made whether the law survives Federal scrutiny, NJLEUC responds to this question on the basis of current law.

NJLEUC has consistently argued that by its clear terms, the SBC is a non-bypassable charge that must be paid by all customers of the State's electric and natural gas utilities. N.J.S.A. 48:3-60. Thus far, the Legislature has carved out only a single exemption from payment of the SBC for the hosts of on-site generation facilities. N.J.S.A. 48:3-77. Power generators have only been exempted in certain situations from payment of the sales and use tax on purchases of gas used to generate electricity for resale, but not from payment of the SBC. N.J.S.A. 54:32B-1 *et seq*. and P.L. 2009, ch. 240. The inclusion of the proposed SBC exemption for power generators in an amendment to the LS Power bill confirms that our analysis is correct.

Our analysis regarding the non-bypassability of the SBC is also supported by the Legal Opinion recently issued by the New Jersey State Legislature Office of Legislative Services on May 27, 2010 in response to a request from Senator Bob Smith. (attached). The OLS Legal Opinion, which was predicated on a detailed analysis of EDECA, its legislative history, relevant

precedents, and the rules of statutory construction, concluded that "looking to the plain meaning of the statute, we conclude that "all" customers of a utility with an SBC included in its rates are subject to an SBC...(W)e read that statute as applying to every individual or entity receiving electric or gas service from a utility within its service territory in New Jersey". (OLS Opinion at p. 2)(emphasis supplied).

The SBC was established by Section 12 of EDECA which provides, in pertinent part, that:

> ...the board shall permit each electric public utility and gas public utility to recover some or all of the following costs though a societal benefits charge that shall be collected as a non-bypassable charge imposed on all electric public utility customers and gas public utility customers, as appropriate... N.J.S.A. 48:3-60.

Given this statutory language, NJLEUC has consistently argued, and OLS agrees, that EDECA's clear language establishes the SBC as a "non-bypassable" charge that must be assessed against "all customers" of the electric public utilities and gas public utilities. Therefore, all end-use customers, including electric generators, that are connected to a gas or electric utility distribution system in this State must pay the SBC. No waiver provision or exemption exists under current law by which a customer can avoid payment of the SBC.

However, it has been suggested by some that in its current form, Section 12 of EDECA lends itself to an interpretation that would allow the SBC to be bypassed in certain circumstances. Several parties to this proceeding have suggested that the "as appropriate" language of Section 12 modifies the reference to "non-bypassable" so that the SBC would not be deemed to be non-bypassable in all instances. NJLEUC takes issue with this interpretation and urges that it is inconsistent with the clear language of Section 12. NJLEUC urges that the "as appropriate" language refers to the various categories of costs that comprise the SBC, as are

delineated in the remainder of Section 12, thus affording the Board the authority to include those costs within the SBC as the Board deems appropriate.

This interpretation is fully supported by the rules of statutory construction. These rules state that when interpreting a statute, a court's role is to effectuate the will of the Legislature. The court looks first to the words of the statute, and if the language is clear, the court interprets the statute consistent with its plain meaning. Fairway Dodge v. Decker Dodge, 191 N.J. 517, 522 (2007), Franklin Tower One LLC v. N.M., 157 N.J. 602, 613 (1999). When interpreting a statute or regulation, a court endeavors to give meaning to all words and to avoid an interpretation that would render any word in the statute to be inoperative, superfluous or meaningless, or to mean something other than its ordinary meaning. DKM Residential Properties Corp. v. Township of Montgomery, 182 N.J. 296, 307 (2005), Seigel v. New Jersey Department of Environmental Protection, 395 N.J. Super. 604, 618 (App. Div. 2007).

Only if the words of a statute are ambiguous does a court look for extrinsic evidence of the Legislature's intent. If there is ambiguity in the statutory language that leads to more than one plausible interpretation, the court may turn to extrinsic evidence including legislative history, committee reports, contemporaneous construction and established canons of construction, for assistance in discerning the Legislature's intent. In re Attorney General's Directive on Exit Polling, 200 N.J. 283, 296-297 (2009), State v. Fleischman, 189 N.J. 539 (2007).

NJLEUC asserts that the language of Section 12 is clear on its face and compels the conclusion that the SBC is non-bypassable and must be paid by all customers on the gas and electric utility distribution systems within the State. The inclusion of the "as appropriate" language does not detract from this conclusion, but merely underscores that the Legislature afforded the Board discretion in establishing the amount of the SBC charge that must be paid by

customers and determining which of the delineated "categories of costs recoverable"-e.g. social program costs, Universal Service Fund costs, nuclear plant decommissioning, demand side management programs, gas plant remediation costs, and consumer education costs-- may properly be included within the SBC.

The argument that the "as appropriate" language means that the SBC may be avoided entirely in certain undefined circumstances violates the cited rules of statutory construction, as the word "non-bypassable" would, under this interpretation, be rendered "inoperative, meaningless or superfluous", or interpreted to mean something other than its ordinary meaning. In essence, this interpretation would completely eliminate the word "non-bypassable"—clearly an important word in this context, and one with clear meaning—from the statute. The Legislature certainly can not be said to have intended such a result.

In the PSE&G Rate case and in this proceeding, several additional arguments have been advanced to justify an SBC exemption for generators: a) the sale of natural gas to generators is a wholesale sale and therefore not subject to the SBC; b) payment of the SBC both on the gas used to generate electricity and on the electricity that is produced is tantamount to double taxation; and c) an exemption from payment of the SBC on the gas used to generate electricity will reduce the rates paid by electric customers. NJLEUC responds to these arguments as follows:

a) The sale of natural gas to electric generators is a retail sale and therefore subject to payment of the SBC.

EDECA Section 12 imposes the SBC "on all electric public utility customers and gas utility customers", N.J.S.A. 48:3-60(a). EDECA defines a utility "customer" as "any person that is an end user and is connected to any part of the transmission and distribution system within an electric public utility's service territory or a gas public utility's service territory within this State." N.J.S.A. 48:3-51. It is clear that a generating plant is an end user of natural gas, as it consumes the gas to generate electricity. There is therefore no "sale for resale" of the gas, which is the classic definition of a wholesale sale. This point was conceded during the PSE&G rate case, in which PSE&G's rate witness, Mr. Schirra, acknowledged that PSEG Power is the largest retail customer on the PSE&G gas system. Thus, the sale of gas to generators in these circumstances fits the definition of a retail sale to an end-use customer, so that payment of the SBC is required under EDECA.

b) The validity of the double taxation argument is not apparent and must be substantiated.

While the double taxation argument may have superficial appeal, its factual underpinnings must be further addressed in this proceeding. For example, with regard to the Hess plant now being constructed, whose output will be sold exclusively into New York, it is clear that no SBC will be paid on the electricity delivered to New York customers, and therefore no double taxation will occur. Thus, an SBC exemption for the gas used to generate electricity will

serve only to reduce the plant's costs and increase its profits as no SBC contribution will be made.

As a general proposition, it cannot be said that electricity generated within New Jersey is necessarily consumed within New Jersey and, therefore, subject to payment of the SBC. For example, efforts were made several years ago to determine the sourcing of the power that goes into the Basic Generation Service auction (for the purpose of reviewing the potential for exercises of market power by suppliers). The argument made in opposition to this investigation was that the sources of power into the auction were essentially unknowable, given the complicated and ever-changing portfolios of power that are maintained and called upon by winning bidders. Therefore, because the movement of electrons intrastate and interstate through the PJM region cannot be traced, it is difficult, if not impossible to determine the extent to which double taxation may occur, if at all.

The proponents of the exemption should be made to assume the burden of demonstrating that such an exemption is appropriate as a matter of law, fact and public policy, and proving to a reasonable certainty that the electricity produced is actually consumed in New Jersey and subject to payment of the SBC, e.g. through production of bilateral contracts or demonstration of a clear path to the BGS auction. The proponents should also demonstrate why they should be exempted from payment of that portion of the SBC that supports the Board's low income programs and the Universal Service Fund.

c) The exemption could increase rates to ratepayers.

It is believed that electric generators are responsible for between 30-40% of total gas usage on certain gas utility systems. Therefore, if all generators are exempted from payment of

the SBC, the other customers of the gas utilities that are responsible for the remaining 60-70% of gas usage will be required to pay 100% of the utility's allotted SBC costs, rather than the lesser share otherwise attributable to them. The difference represents a significant subsidy of generators by utility customers. This was the issue litigated regarding PSEG Power in the PSE&G rate case.

While the subsidy of generators that results in this scenario is certain and knowable, it is less certain whether the generators granted an SBC exemption necessarily pass these cost savings through to electric ratepayers. In any event, any resulting actual savings on electric costs would have to be netted against the gas SBC subsidy that the customers provide to generators in this scenario. It is therefore incumbent upon generators to provide factual support for their argument that ratepayers obtain a net benefit from the exemption, as no such proofs have been offered and these net "savings" are by no means apparent.

As more fully discussed below, although the RGGI and CAC charges were not established as non-bypassable, the same arguments would apply to their application to electric generators. To the extent that generators are excused from paying these charges, other ratepayers must essentially pick up the slack. Here, too, it is incumbent upon the generators to demonstrate a net benefit to ratepayers from providing RGGI and CAC exemptions to electric generators..

6) The applicability of SBC, RGGI and CAC charges prospectively (a) to customers with an ability to bypass the utility's distribution system, (b) based on the impact on wholesale and retail electric markets, or (c) for other policy reasons, and the legality of any waiver or reduction of those charges.

The same arguments in favor of discounted distribution rates to bypass customers, customers with a demonstrated need to meet competition and market conditions, and in other appropriate circumstances, apply with regard to the SBC, RGGI and CAC charges.

With regard to the RGGI charges, NJLEUC has consistently argued that New Jersey law affords the Board discretion to mitigate the impact of RGGI surcharges on customers. Neither Section 13 of the RGGI Law, N.J.S.A. 48:3-98.1(b), nor EDECA mandate a specific recovery method for costs associated with RGGI programs. Instead, Section 13 commits to the Board's discretion the manner in which RGGI program costs are recovered from ratepayers, and specifically authorizes the Board to adopt "another ratemaking methodology" other than a flat, per dekatherm charge to recover these costs. Nor does Section 13 establish the RGGI charge as non-bypassable.

The Capital Adjustment Charge ("CAC") was established by Board Orders entered in the utilities' Economic Stimulus Infrastructure Investment Program dockets, which were implemented in response to then-Governor Corzine's efforts to stimulate economic activity through investment in expedited utility infrastructure projects. The Board's various Orders in these dockets authorized the utilities to recover the costs associated with their qualifying infrastructure projects through the CAC. The Board did not establish the CAC charge as non-bypassable, and authorized the utilities to collect the CAC on a usage-based, per therm basis. See, e.g. PSE&G Capital Adjustment Charges, set forth at sheets 48 and 49 of the utility's current gas tariff.

With regard to the SBC, NJLEUC reiterates that under the clear language of EDECA Section 12, the SBC is non-bypassable and must be paid by all customers of the State's electric and gas utilities. N.J.S.A. 48:3-60(a). However, while all customers must pay the SBC, EDECA

and its legislative history underscore that different SBC rates may be charged to different customers as the Board deems appropriate.

As acknowledged in the Legal Opinion of the Office of Legislative Services, the Legislature intended to afford the Board discretion with regard to the amount of the SBC that could be charged to particular customers in certain circumstances. Thus, for example, EDECA defines the SBC to mean "a charge imposed by an electric (or gas) public utility, at a level determined by the board, pursuant to, and in accordance with, Section 12 of PL 1999, c.23 (C. 48:3-60)". N.J.S.A. 48:3-51.

The Legislative findings set forth for EDECA in N.J.S.A. 48:3-50 include declarations that it is the policy of this State to, among other things:

> (1) Lower the current high cost of energy, and improve the quality and choices of service, for all ...consumers";
> (8) Authorize the Board of Public Utilities to approve alternative forms of regulation in order to address changes in technology and the structure of the electric power and gas industries; and to promote economic development;
> (9) Prevent any adverse impacts on environmental quality in this State...;
> (10) Ensure that improved energy efficiency and load management practices, implemented via marketplace mechanisms or State-sponsored programs, remain part of this State's strategy to meet the long-term energy needs of New Jersey consumers...

Thus viewed, the "as appropriate" language in Section 12, the statutory definition of "Societal Benefits Charge", and the Legislative findings and declarations of policy compel the conclusion that the Board has been granted the authority to fix SBC rates, and the discretion to establish specific SBC rates to be charged to customers that participate in Board-sponsored programs that will advance the State's energy, environmental and economic development policies and goals.

While the Legislative intent in this regard appears clear, to the extent that the cited sections of EDECA are considered ambiguous, the rules of statutory construction cited above permit reference to the legislative history and contemporaneous construction given to the statute by committee reports and similar sources.

The Statements of the Assembly Policy and Regulatory Oversight Committee regarding Assembly Bill number 10 and the Senate Economic Growth, Agriculture and Tourism Committee Statement regarding Senate Bill number 5 (the Assembly and Senate versions of EDECA), both dated January 7, 1999, stated the following with regard to the SBC:

> The committee substitute authorizes the BPU to establish an <u>adjustable</u> societal benefits charge (SBC), as a <u>non-bypassable</u> charge on <u>all</u> electric and gas public utility customers and authorizes (the) BPU to allow electric and gas public utilities to impose an SBC, beginning on the starting date of retail choice, to recover costs associated with socially beneficial programs... (Emphasis supplied).

The Committees' use of the word "adjustable" in describing the SBC is consistent with a grant of authority and discretion to the Board with regard to the establishment of different SBC rates in certain circumstances. The further reference to the SBC as a "non-bypassable charge on all electric and gas public utility customers" adds further support to NJLEUC's argument that the SBC cannot be fully waived under current law.

NJLEUC's interpretation of Section 12 is fully supported by the OLS Legal Opinion. The OLS letter expressed the following opinions with regard to the three legal issues posed by Senator Bob Smith regarding the SBC:

> You are advised, for the reasons stated below, that EDECA provides that "all" customers of an electric or gas public utility are subject to an SBC. <u>However, it appears that the board is authorized</u>

> to allow different energy customers to be charged an SBC at dissimilar rates. Also, you are advised, for the reasons stated below, that no provision of EDECA "grandfathers" contracts existing at the time of its passage and it does not appear that a contract, existing at the time of EDECA's enactment, could provide that a party not be subject to an SBC. Any contract entered into subsequent to EDECA's passage, including the renewal of a pre-existing contract, would be subject to its provisions. (OLS Opinion Letter, at p. 1)(emphasis supplied).

The OLS Opinion Letter, citing the same rules of statutory interpretation noted above, focused on the legislative grant of authority to the Board to impose the SBC "at a level determined by the board". N.J.S.A. 48:3-51. The OLS observed that EDECA provides "no formula or calculation to aid the board in making the determination of how much a particular customer, or customer class, must pay under the SBC requirement". (OLS Opinion, at p. 3). The OLS cited case law acknowledging the Legislature's "sweeping grant of power to the Board" to accomplish the Legislature's goals, and delegation of the "widest range of regulatory power over the utilities" which "extends beyond the powers expressly granted by statute to include incidental powers that the agency needs to fulfill its statutory mandate", as the basis for OLS' conclusion that absent any explicit limitation in EDECA, "it appears that the Board may allow dissimilar SBC rates for different customers", citing In re Public Service Electric and Gas Company's Rate Unbundling, 167 N.J. 377, 384; Board of Public Utilities v. Valley Road Sewerage Co., 154 N.J. 224, 235 (1998), and Bergen County v. Board of Public Utility Commissioners, 137 N.J. Super. 448 (App. Div. 1975).

NJLEUC therefore urges that, consistent with existing law, the Legislative intent and goals set forth in EDECA, and current State energy and economic development policies, the Board may authorize certain customers, or classes of customers, to pay reduced SBC costs, particularly as a means to foster State policy. Therefore, as part of this proceeding, the parties

should formulate policies that would enable customers that participate in programs that foster the State's energy efficiency, conservation, renewables and economic development goals to pay reduced SBC costs.

NJLEUC has repeatedly urged the Board to permit large energy users to self-invest in energy efficiency, conservation and renewables projects as a means for the State to advance its policy goals, and to foster business and job retention and growth by allowing the State's businesses to operate more efficiently and thereby increase their competitiveness in the regional, national and international markets. Because commercial and industrial energy efficiency projects unquestionably provide the largest returns on investment and greatest energy efficiency and environmental benefits of all programs sponsored by the Office of Clean Energy, fostering such programs would clearly be a win/win for the State and the business community.

Therefore, consistent with the proposals made in the RGGI proceeding and NJLEUC's proposed Commercial and Industrial Customer Self-Directed Investment Pilot Program, NJLEUC proposes that reductions in the SBC equivalent to, at minimum, a customer's contribution to that portion of the SBC that funds the Office of Clean Energy (OCE) energy efficiency and renewables programs, be provided to customers that engage in energy efficiency, conservation, sustainability, combined heat and power and renewable energy projects that are generally consistent with similar programs currently funded by the OCE for other customers. The size of the SBC discount to each customer would be determined on a case-by-case basis, based upon the customer's contribution, in the prior year, towards the portion of the Clean Energy Program budget devoted to funding these projects.

This proposal is consistent with the credit against the SBC that would be allowed to corporations pursuant to A2528, a bill introduced by Assemblyman Chivukula to create

bifurcated SBC budgets for residential, commercial and industrial ratepayers, and to establish a credit against the SBC for certain customers. Under A2528, Section 3, a credit against the SBC would be allowed to corporations in an amount "equal to that portion of the costs incurred by the corporation during the preceding calendar year for the purchase and installation of products or services that are intended for energy efficiency or renewable energy purposes, that would be eligible for incentives under programs that the board shall have determined to fund by the societal benefits charge pursuant to paragraph (3) of subsection a. of section 12 of P.L. 1999, c.23 (C.48:3-60)." A2528 would authorize the Board to determine the amount of the credit to be allowed, which amount would not exceed 100% of the corporation's liability for the SBC that would otherwise be due in the calendar year.

Under these proposed approaches, eligible commercial and industrial companies would be entitled to a credit against the SBC paid by the customer in the prior calendar year. We encourage the Board to adopt this approach and to establish the necessary rules regarding, among other things, customer and project eligibility, formulas to derive the SBC credit for customer-applicants, rate treatment and carry-forward rules for unused credits, among others.

Similar treatment could also be afforded to the RGGI and CAC charges, which are not non-bypassable, but are recovered on a usage basis. In the alternative, NJLEUC has previously proposed three alternative cost recovery mechanisms for the RGGI and CAC charges: (i) an opt-out provision, that would allow a large commercial and industrial customer to opt-out of a utility-sponsored RGGI Section 13 or infrastructure program if the customer meets certain criteria; (ii) a surcharge "phase-out" provision, that would establish usage-based tiers with the surcharge amount decreasing as consumption increases; and (iii) a "hard cap" provision, that would place an annual cap on charges payable by large commercial and industrial customers for RGGI

Section 13 and CAC infrastructure programs. These alternative cost recovery mechanisms are consistent with alternatives already available in other States, including neighboring states that compete with New Jersey.

NJLEUC appreciates the opportunity to provide these comments and to further address these issues in the Generic Proceeding.

Respectfully submitted,

New Jersey Large Energy Users Coalition

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