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January 28, 2011

Honorable Commissioner Fiordaliso
New Jersey Board of Public Utilities
Two Gateway Center, 8th Floor
Newark, NJ 07102

Re: Comments Of Public Service Electric and Gas Company And New Jersey Natural Gas Company: In The Matter Of Generic Stakeholder Meeting To Consider Prospective Standards for Gas Distribution Utility Rate Discounts and Associated Contract Terms and Conditions

BPU DOCKET NOS. GR10100761 and ER10100762

Dear Commissioner Fiordaliso:

In this generic stakeholder proceeding, the Board is considering the justness and reasonableness of allowing New Jersey's natural gas utilities to continue to offer reduced gas distribution rates and charges to customers who meet certain criteria.¹ Specifically, comments are being sought on six specific issues related to this topic as well as to the structure of this proceeding.² Public Service Electric and Gas Company ("PSE&G") and New Jersey Natural Gas Company ("NJNG") appreciate the opportunity to participate in this process and to provide these comments.

INTRODUCTION

The discounting of utility rates in New Jersey is not a new issue. Discounting of utility services to avoid an existing or new customer from bypassing the utility system or in response to economic development objectives is something that has existed in New

¹ See Public Notice to Energy Utility Company Customer, Docket Nos. GR10100761 and ER10100762.

² Id.

Jersey for decades. Indeed, in response to requests from the Staff of the New Jersey Board of Public Utilities (“BPU” or the “Board”), the gas utilities provided information relating to discounts to 41 customers that are currently in place and that provide for some form of discount from the utility tariff or a special contract rate approved by the Board.

As stated by the Board³ and your Honor⁴, this proceeding is prospective only and is not intended to involve or re-evaluate any of these existing contracts. However, these existing contracts provide at least a glimpse of the State’s historic policy on discounts and the implementation of that policy. These special rates and discounted agreements also illustrate the important role that discounts have played in retaining some of our largest customers on the utility gas distribution systems. They also demonstrate that the basis for approving discounts has differed based upon the facts and are appropriately dependent on the circumstances present.

However, the process for granting and reviewing discounted rates should be transparent and non-discriminatory for customers, utility and regulators, while still respecting customer confidentiality. These are the appropriate goals to address in this proceeding. Each of these goals can be achieved without the necessity of a rulemaking procedure. Indeed, the Board already has the tools it needs through current regulation and through authority over utility tariffs⁵ to ensure that these goals are met.

Furthermore, PSE&G and NJNG are concerned that the unnecessary process of a rulemaking would further delay resolution of these important issues and may also result in a level of standardization that is neither necessary nor beneficial for all stakeholders,

³ Petition of PSE&G for Approval of Increase in Electric and Gas Rates, Decision and Order, Docket No. GR09050422 at 23 (N.J.B.P.U.).

⁴ Transcript of Stakeholder Meeting, Docket Nos. GR10100761 & ER10100762, November 15, 2010, T3:25 – T4:3.

⁵ See *infra* Section I.

including the Board, the utilities and customers.⁶ Instead of a rulemaking proceeding, we recommend that the Board rely upon its existing regulations and utilize utility tariffs to set forth the details of how a customer can apply for a special contract/discount with that utility and how the utility would respond.

For example, a utility tariff could standardize the eligibility criteria and materials that need to be submitted to the utility for it to consider a discount and set forth the timeline and process for how a utility would respond. This approach, discussed in more detail below, would ensure that customers have clarity on how to ask for a discount/special rate and that utilities receive the information from customers on a consistent basis. The tariff would also provide that to the extent a discounted rate is developed consistent with existing regulations, it would need to be submitted to the Board Staff and the New Jersey Division of Rate Counsel ("Rate Counsel") for review and approval by the Board.

Accordingly, PSE&G and NJNG request that the Board (1) reaffirm its historic policy to support discounted tariff rates and special contracts where justified by the circumstances present; (2) consider proposed utility rate schedules that would provide for greater transparency and standardization of the discount process; and (3) continue to review and act on petitions for discounts submitted pursuant to N.J.A.C. 14:3-1.3(e).

⁶ For example, the Board regulations at N.J.A.C. 14:3-1.3(e) already provide that to the extent a utility wants to provide a discount from a tariff rate it needs to follow the procedure set forth in the regulation. Further, the Board has also approved specific discount provisions in certain utility tariffs. A rulemaking proceeding that simply sets forth a process would be redundant with what already exists.

I. **THERE IS A STRONG LEGAL BASIS FOR APPROPRIATELY DISCOUNTING GAS UTILITY DISTRIBUTION RATES.**

The Board has a long history of authorizing discounted utility rates in situations where a cogent set of facts supporting that discount have been presented. Indeed “gas utilities in this State have for many years been given considerable flexibility by this Board, subject to certain restrictions, to competitively price natural gas to their large industrial customers who have alternative fuel options.”⁷

Authorizing discount rates is consistent with the Board’s broad authority over utilities and their rates.⁸ The New Jersey Supreme Court observed that “the Board of Public Utilities . . . to which the legislature has delegated its rate making power, is vested with broad discretion in the exercise of that authority.”⁹ The Board is not required to employ any particular mode of computing rates, but it must reach a result that is supportable.¹⁰ Thus, the Board is “free to make pragmatic adjustments designed to fit the circumstances.”¹¹ In keeping with BPU’s broad authority over rates and its ability to “make adjustments designed to fit the circumstances”, the BPU has authorized utilities to grant discounts through several means.

By regulation, the Board has granted utilities with the authority to charge customers for service at rates different from those rates contained in tariffs. N.J.A.C. 14:3-1.3(e). Specifically, the regulation provides:

⁷ In Re Public Service Electric and Gas Company and Bayway Refinery Company, 1993 WL 561991 (N.J.B.R.C.), at 17.

⁸ See N.J.S.A. 48:2-13 and N.J.S.A. 48:2-21.

⁹ Public Service Coordinated Transport v. State, 5 N.J. 196, 214 (1950). The Board’s rulings are entitled to presumptive validity and will not be disturbed unless there is a lack of reasonable support. See also Petition of Public Service Electric and Gas Company for an Approval of an Increase in Electric and Gas Rates and for Changes in Tariffs for Electric and Gas Service, 304 N.J. Super. 247, 264 (App. Div. 1997).

¹⁰ Id. at 265.

¹¹ Id. at 265-266.

- (e) If a gas, electric, water or wastewater utility plans to enter into a contract or agreement with a particular customer or group of customers, for service at rates different from those authorized under the utility's Board-approved tariff, the utility shall file a petition for approval, which shall include four copies of the contract or agreement, at least 30 days prior to the effective date of the agreement or contract.

The regulation goes on to provide the details of proof that the utility must make to the Board to justify its discount.

In a recent rulemaking amending N.J.A.C. 14:3-1.3(e), Rate Counsel indicated that “[w]e support the proposal in N.J.A.C. 14:3-1.3(e) to require the filing of a petition and the Board approval of any gas, electric, water or wastewater utility seeking to enter into a contract or agreement to provide service at rates not provided for in the utility’s Board-approved tariff. This is consistent with the Board’s longstanding practice and should be adopted.”¹²

In addition to this regulation, the Board has also approved certain utility tariffs that provide for discounts. The Board recently distinguished the authority of utilities to provide discounts pursuant to the regulation and discounts pursuant to approved tariff provisions by stating “It should be noted that the requirement ... applies only to off-tariff rates that are not already authorized under the utility tariff. In most instances, an individual utility’s tariff, approved by the Board through a filing, allows the utility to negotiate and make contracts or agreements with certain customer classes for rates unique to the rate class and to the utility company.”¹³

¹² 41 N.J.R. 270(a), Comment 5.

¹³ See id.

A. It is Appropriate for a Utility to Provide a Discount to Retain a Customer Who is Legitimately Threatening to Bypass.

It has been recognized both in New Jersey and in other jurisdictions that customers bypassing the distribution system have the effect of causing a shift of the utilities' costs to existing customers that remain on the distribution system.¹⁴ One of the means by which a state agency can control the risk of bypass is by authorizing the gas distribution companies to discount the utility rate.

There are numerous examples where the Board has exercised this authority and approved discounted rates to avoid a bypass. One example is Re Pivotal Utility Holdings, Inc. dba Elizabethtown Gas.¹⁵ In this proceeding, Elizabethtown obtained approval of a special discounted rate agreement with Merck & Co. Merck had approached Elizabethtown indicating that it was contemplating a complete bypass of the distribution system. The BPU approved the special contract "to avoid a bypass by Merck while preserving substantial benefits for Elizabethtown's other customers from continued contributions to distribution costs."

Similarly, In the Matter of the Joint Petition of South Jersey Gas Company and its Customer for Approval of a New Service Agreement, 1997 WL 602675 (N.J.B.P.U.), South Jersey Gas ("SJG") and its customer, the Huntsman Polypropylene Corporation ("Huntsman") filed a joint petition with the BPU to implement a new Service Agreement which would provide a discounted base gas rate. In this case, the BPU approved the new discounted rate finding that, "[I]f Huntsman were to bypass the SJG system through direct connection and acquisition of gas supplies from Columbia Gas, its current

¹⁴ Petition of South Jersey Gas Company against SunOlin Chemical Company, 116 N.J. 251, 265 (1989).

¹⁵ 2009 WL 454499 (N.J.B.P.U.)

contribution to the recovery of fixed costs and RAC costs would fall on other SIG ratepayers.” Id. at 2.¹⁶

In each of these cases, the Board properly responded to a threat of bypass and approved a discount to retain the contribution to fixed costs.

B. Bypass is Certainly the Most Common Basis for a Discount, but there can be Other Valid Reasons to Approve a Discount that Should not be Dismissed.

N.J.A.C. 14:3-1.3(e) is not limited to bypass threats. Rather, the regulation simply requires that the utility justify the basis for the proposed discount when it seeks approval from the Board. Indeed, the Board has approved discounts where bypass was not being threatened.¹⁷

1. The Board’s Role in Economic Development

The State of New Jersey has been aggressive in providing incentives to businesses to provide economic development and to spur the economy in New Jersey. Historically, the Board has played an important role in supporting economic development in the State of New Jersey. As the agency responsible for ensuring that New Jersey utilities provide safe, adequate and proper service at reasonable rates,¹⁸ the Board’s regulatory decisions are critical to ensuring a vibrant State economy, which benefits all the citizens of New Jersey. The New Jersey Legislature has recognized this role by granting the Board with

¹⁶ See also In the Matter of Petition of Elizabethtown Gas Company for a Special Contract for the Sale and Transportation of Natural Gas with Ford Motor Company, 1994 WL 534870 (N.J.B.P.U.) (BPU finding that discounted rate will prevent the potential loss of load via bypass). The Board has also approved discounted rates in situations where new customers are considering bypass alternatives. In the Matter of the Petition of Elizabethtown Gas Company for Approval of Special Contracts with SB Linden LLC and SC Wood LLC, 1997 WL 377579 (N.J.B.P.U.).

¹⁷ See Petition of South Jersey Gas for Approval of a Standard Gas Service Agreement, (January 19, 2011) (where Board approved discounted rate based on economic development).

¹⁸ N.J.S.A. 48:2-23

broad authority over rates and delegating to the Board the authority to set rates as appropriate depending on the facts present.¹⁹

In 1995, the State Legislature passed the Flex Rate Act, N.J.S.A. 48:2-21.24 et seq., which permitted Off-Tariff Rate Agreements (“OTRA”) The purpose behind the Flex Rate Act was to:

Foster the production and delivery of electricity and natural gas in such a manner as to lower costs and rates and improve the quality of and choices of service for all of the State’s consumers and to thereby ensure that New Jersey remains economically competitive on a regional, and national basis, and to implement programs which effectuate the economic development goals of attracting and retaining businesses, maintaining and creating jobs and enhancing the economic vitality of the State. N.J.S.A. 48:2-21.24.

Similarly, the Legislature declared the State’s intent to promote economic development in the Electric Discount and Energy Competition Act. N.J.S.A. 48:3-50(a)(8) states that “the Legislature finds and declares that it is the policy of this State to . . . promote economic development.”

In furtherance of this authority, the BPU has approved discounted gas rates in order to promote economic development as well as avoid bypass. The Board approved a discounted gas rate for Huntsman Polypropylene Corporation where Huntsman indicated “[f]ailure to achieve this rate discount would be followed by an evaluation and possible closure of the facilities.”²⁰ In addition, the BPU stated that a shutdown of the facility would add unemployment, reduce local property tax collections and cause various

¹⁹ N.J.S.A. 48:2-21; See also Petition of Public Service Electric and Gas Company, 304 N.J. Super. 247 (App. Div. 1997).

²⁰ Joint Petition of South Jersey Gas Company and its Customer for Approval of a New Service Agreement, 1997 WL 602675 (N.J.B.P.U.) at 2. See also In the Matter of the Petition of Elizabethtown Gas Company for Approval of Special Contracts with SB Linden LLC and SC Wood LLC, 1997 WL 377579 (N.J.B.P.U.), (where the BPU noted that GM was attempted to reduce costs in order to compete in the GM system and to remain competitive with the domestic and international market.). See also Petition of South Jersey Gas for Approval of a Standard Gas Service Agreement, (January 19, 2011) (where Board approved discounted rate based on economic development).

negative collateral impacts on the local economy.²¹ With the special gas rate approved by the Board, however, Huntsman agreed to commit to keep the plant open and invest in capital improvements to the facility.²²

II. THE TERM OF A DISCOUNT CONTRACT NEEDS TO BE SUFFICIENTLY LONG TO COMPETE AGAINST INTERSTATE PIPELINES.

For customers that are making large-scale investments in new generation assets or new improvements at their factory, in order to properly evaluate the value of a discounted gas contract with their local utility the customer needs to know more than what the discounted rate is that the utility will charge. The customer also needs to know how long that rate will be available.

Whether the customer is comparing the rates with the interstate pipelines' for purposes of a bypass analysis, or considering whether to build their factory in New Jersey or Pennsylvania, they need to have reasonable certainty that the rate will be available for a reasonable period.

Renewal clauses (sometimes called "evergreen clauses"), which allow a contract to continue from one term to the next, are commonly used contractual provisions to provide parties with a comfort that the agreement will continue unless they receive notice to the contrary. There is no legal impediment to the use of renewal clauses in any current or future contract for gas service; it is strictly a factual determination as to whether a renewal clause should be approved in a specific circumstance based on the facts present.

Whether the Board should approve new renewal clauses in discounted contracts for gas distribution services depends on the facts presented. Often the underlying issue

²¹ Id.

²² Id.

for the customer and the utility is not the renewal clause itself, but what the provision is attempting to do.

A. 20-year Terms are Appropriate for Gas Discount Contracts that are Based on Threatened Bypass.

Providing a reasonable contract term that competes with the term of the interstate pipeline offerings will provide clarity to customers and allow new customers to be in a better position to obtain the necessary financing and complete a proposed project. For existing customers, a longer term will allow them the flexibility to either expand their current operations or allow them to better control existing costs to keep the business running. Typically, when interstate pipelines construct facilities for a customer for a new service or to bypass a utility distribution system, they will require twenty-year terms.²³

Not only does a longer-term contract enable the utility to offer terms similar to an interstate pipeline in order to retain the customer, the longer-term contract also provides the benefit to the utility of knowing that the customer will be on the system for the duration. Rate Counsel has in the past argued that a 5-year term contract represents a bad bargain for the State because the customer still maintains the option to bypass the distribution system as a long-term cost reduction strategy, thereby rendering temporary any of the benefits of the contract.²⁴

III. ALLOWING UTILITIES TO ADDRESS DISCOUNT PROCEDURES IN THEIR TARIFFS IS PREFERABLE TO A RULEMAKING.

As discussed supra, the Board has a long history of considering and ruling on proposed discounts for customers. Those discounts approved and granted have been the

²³ See Order Issuing Certificate to Texas Eastern Transmission, L.P., 133 FERC ¶ 61,220, at ¶12 and ¶15; Order issuing Certificates to Florida Gas Transmission Company and Transcontinental Pipeline Company, 132 FERC ¶ 61,040, at ¶31.

²⁴ Re Public Service Electric and Gas Company and Bayway Refinery Company, 1993 WL 561991 (N.J.B.R.C.).

product of the Board's policy to provide utilities with the flexibility needed to develop a rate that meets the needs of the individual customer and the protects the remaining customers as a whole.

It is critical that (1) discounts be offered only where they are truly justified; (2) the process for offering discounts be sufficiently transparent so that the Board has adequate information to review and consider the proposed discount and to avoid situations where the customers that are not receiving similar discounts feel discriminated against;²⁵ and (3) that the process move quickly enough to avoid losing a customer because of delay.

This generic proceeding should retain the balance that exists between these objectives by providing:

- (1) Flexibility to discount rates to meet individual customer needs as appropriate to ensure just and reasonable rates;
- (2) Transparency to ensure that customers and regulators understand the process; and
- (3) Certainty that the process will be followed and that discounts when granted will remain in effect for the terms established.

An approach that meets each of these criteria would be to authorize utilities to have discount provisions in their specific tariff(s). Each utility could have a tariff that contains the specific terms and conditions upon which that utility would consider granting a discount and spell out the process starting from how the customer requests a discount to how the discount must be filed with the Board for approval. This flexibility is necessary because each utility service territory may be slightly different depending on the demographics of that region and its customers' needs.

²⁵ With New Jersey's strict requirements for confidentiality of utility information (N.J.S.A. 48:3-85(b)) this transparency can be challenging to achieve.

For example, a utility could have tariff provisions that provides that the utility will consider granting a special rate, subject to Board approval, to avoid the customer bypassing the utility system. The tariff provisions could contain the specific evidence that the utility requires to process the request so that all requests are considered on a comparable basis. The utility tariff could set forth that once a completed application for a discount was received, that the utility could negotiate an appropriate rate for the circumstances and present that to the Board for review and approval, or the tariff could in the alternative provide for a more formulaic approach to develop a discount.

Another benefit of this approach is that it could provide for standardization of the process. One of the biggest challenges in evaluating customer requests is that the information customers provide is not standardized. The tariff approach would allow the utilities to require customers to provide the same standard data for evaluation of a potential discount. While the facts surrounding each case are different, a tariff provision that required each customer to provide for example a pipeline report of their bypass feasibility, cost and timeline would allow utilities to approach discount requests on a more standard basis eliminating any concerns of undue discrimination.

A. Based on Metromedia, a Rulemaking is not Necessary in this Case.

The issue as to whether a State agency's determination needs to be encompassed in a rule-making and follow the procedures set forth in the Administrative Procedure Act has been analyzed in the Supreme Court case of Metromedia Inc. v. Director, Division of Taxation, 97 N.J. 313 (1984). Metromedia established six (6) factors that should be analyzed to determine if a rulemaking is warranted (the "Metromedia Analysis"). An

agency's determination must be considered a rulemaking 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 interpretation of law or general policy.

Metromedia at 331-32. An "agency determination must be considered an administrative rule when most or all of the relevant features of administrative rules are present and predominate in favor of the rule-making process. Id. at 331.

"[A]n agency is afforded considerable discretion in choosing the method by which it fulfills its legislative duties." Gonzalez v. New Jersey Property Liability Insurance Guaranty Association, 412 N.J. Super. 406, 418 (App. Div. 2010). The Court in Dragon²⁶ added:

This flexibility includes the ability to select those procedures most appropriate to enable the agency to implement legislative policy. In that regard, an agency has the discretion to choose between rulemaking, adjudication, or any informal disposition in discharging its statutory duty.

²⁶ Dragon v. Department of Environmental Protection, 405 N.J. Super. 478, 492 (App. Div. 2009).

Applying the Metromedia Analysis to the present matter, it is apparent that a preponderance of the factors does not weigh in favor of a rulemaking. For example, to determine whether and how large gas customers, with the potential to bypass the distribution system or for other policy reasons, would be eligible for a discounted rate and what that rate may be does not have wide coverage encompassing a large segment of the regulated or general public. On the contrary, this determination will affect only a small percentage of utility customers. A review of the number of gas customers that currently have discounted contracts is instructive on this point. A total of 41 customers in New Jersey currently have some form of discounted gas rate. Whereas, the total number of gas customers in the State of New Jersey is approximately 2.9 million. Clearly, the issues in this case relate only to a narrow select group and would weigh in favor of not implementing a rulemaking.

In addition, the Board's determination in this matter has been clearly established by the Board in its rulemaking and Board decisions over the past 20 years and is therefore not a significant change in the Board's policy. On the contrary, if the Board were to implement the tariff procedures set forth above, the Board would be preserving both its and the State's previously established policies.²⁷

The Board is authorized by statute to "fix just and reasonable rates . . . observed and followed thereafter by any public utility."²⁸ It is also clearly established in the BPU regulations at N.J.A.C. 14:3-1.3(e) that utilities are permitted to charge a discounted rate if warranted. Unless the Board chooses to prohibit discounts or standardize the discount

²⁷ See supra Section I.

²⁸ N.J.S.A. 48:2-21.

process, there is nothing in this generic proceeding that would suggest a significant change from past BPU decisions.

In fact, the process before the Board is not dissimilar to the Board's actions in Re The Universal Services Fund²⁹, where the Board created a permanent program pursuant to a Board Order. When issues arose in the screening process, the Board held a stakeholder process and amended the eligibility requirements. One of the comments to the Board's proposal was that it required a rulemaking. Id. at 18. However, the Board disagreed and found:

After weighting the different factors that were set forth by the New Jersey Supreme Court in Metromedia, Inc. v. Director, Division of Taxation, 97 N.J. 313 (1984), the Board does not believe that the action taken in this Order requires adoption through formal rulemaking process. The action taken in this Order relates to a small segment of the public and the policy set forth in this Order is meant to clarify the April 2003 Order, which set forth the parameters of the permanent USF program. Additionally, the enabling statute states that the Board shall determine the level of funding and appropriate administration of the fund and the purpose and programs to be funded with monies from the fund. Id.³⁰

Based on the Metromedia Analysis and the case law implementing that analysis, the Board's determination in this matter does not need to be subject to a rulemaking proceeding. In addition, the Board "is afforded considerable discretion in choosing the method by which it fulfills its legislative duties." Gonzalez at 418. Since the determinations in this matter are simply a continuation of long-standing State and Board policy, it is evident that the Board has the authority to proceed without a rulemaking.

The benefits of the approach set forth in Section III will allow the Board to expeditiously resolve this matter with the appropriate regulatory oversight while

²⁹ 2008 WL 4065863 (N.J.B.P.U.).

³⁰ See also Gonzalez v. N.J. Prop. Liability Ins., 406, 412 (App. Div. 2010) (applying Metromedia in determining that rulemaking is not required because rule merely restated what was already in existence and was not a material change to agencies position.)

providing new customers the certainty to know the costs associated with gas service. Given Senate Bill 2381³¹, which encourages the construction of 2000 megawatts of electric generation, there may be an immediate influx of new generation proposed in New Jersey that will need to have certainty regarding how much they will pay for gas delivery service. Embarking on an unnecessary rulemaking proceeding at this time would only serve to delay resolution of the important issues in this proceeding.

IV. THE NEW JERSEY LEGISLATURE HAS INTRODUCED A NEW TWIST IN THE SBC ISSUE; HOWEVER EVEN IF THAT EXEMPTION DOES NOT BECOME LAW, THE SBC SHOULD NOT APPLY TO GAS SOLD TO WHOLESALE GENERATORS.

A. Senate Bill 2381 Provides for an Exemption from the SBC and RGGI Rate Clauses to Electric Generating Customers that Sell at Resale.

On January 10, 2011, the New Jersey Legislature approved Senate Bill 2381, which states:

Notwithstanding the provisions of any other law or rule, regulation, or order to the contrary, gas public utilities shall not impose a societal benefits charge pursuant to N.J.S.A. 48:3-60 or any other charge designed to recover the costs for societal, energy efficiency, conservation, environmental or renewable energy on natural gas delivery service or commodity that is used to generate electricity that is sold for resale.

If Senate Bill 2381 becomes law, the question of whether the SBC and similar charges are applicable to electric generation facilities that sell at resale will be unequivocally answered.

Even if Senate Bill 2381 is not signed into law, good public policy would dictate that electric generators that sell at resale should not pay the SBC, RGGI, or other societal charges. The application of societal benefits charges on electric generators unnecessarily increases the costs of electricity to electric utility customers who are already paying their

³¹ S2381, 214 Leg. (N.J. 2010).

share of societal benefit charges in their electric utility bills. For electric generators that convert that natural gas into electricity and then sell it into the market place, these same charges are again tacked on to the sale of electricity – placing natural gas fired electricity at a disadvantage because the end product must pay these significant charges twice during the production of the product. Since the price of electricity paid by New Jersey retail customers already includes a SBC and these other clause charges, the electricity that is produced by a gas-fired electric generation facility that is assessed the SBC and RGGI charge is essentially “double-charged”, once by the fact that the SBC charges increased the cost of electricity and once again when paid as part of their electric utility bill.

B. The Plain Language of N.J.S.A. 48:3-60(a) Provides the Legal Support for Discounting or Waiving the SBC When Appropriate

N.J.S.A. 48:3-60(a) provides:

the BPU shall permit each electric public utility and 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 electric public utility customers and gas public utility customers, as appropriate.” (emphasis added)

In construing a statute, a court will attempt to determine the intent of the Legislature and generally, the best indicator of that intent is the statutory language. DiProspero v. Penn, 183 N.J. 477, 492 (2005). A clear and unambiguous statute is not open to construction or interpretation. O’Connell v. State, 171 N.J. 484, 488 (2002). When interpreting a statute or regulations that an agency is charged with enforcing, substantial deference should be provided to the agency’s interpretation. In the Matter of Raymour and Flanigan Furniture, 405 N.J. Super. 367, 376 (App. Div. 2009).

The analysis of the legality of the SBC charge to customers then starts with the plain language of the statute. N.J.S.A. 48:3-60 states that “the BPU shall permit a . . . utility to recover some or all of the following costs through a societal benefits charge that shall be collected as a non-bypassable charge on . . . customers, as appropriate.” (Emphasis added). The plain language confers the right, but not the obligation to collect the SBC Charge. If the Legislature wanted to mandate the collection of the SBC Charge, it could have written the language to say just that. The language could have read, “the utility shall recover” the SBC charge.

This reading is further supported by the phrase “as appropriate”, which is set off from the rest of the provision by a comma. Punctuation is part of an act and may be considered in its interpretation. Commerce Bancorp, Inc. v. Interarch, Inc., 2010 WL 5108755 (N.J. App. Div.). The use of a comma to separate a modifier from an antecedent phrase indicates an intent to apply the modifier to all previous antecedent phrases. N.J. Bank v. Palladino, 77 N.J. 33, 45 (1978). Therefore, in N.J.S.A. 48:3-60, the use of the comma prior to “as appropriate” indicates an intent to apply “as appropriate” to the antecedent phrase permitting the utilities to collect the SBC charge. This interpretation of the statute is also consistent with the fact that the statute is drafted to focus on what the utilities may collect from customers, rather than requiring the Board to utilize a particular standard or procedure in reviewing or approving the SBC charges. Thus, a plain reading of the statute authorizes the Board to determine under what circumstances the utility should collect the SBC. To ignore these aspects of the statute would be inconsistent with the legislative intent.

Indeed, after N.J.S.A. 48:3-60(a) was adopted, the Board has approved numerous special contracts and rates customers that do not contain an SBC or in some cases which discount the SBC.³² Certainly, the Board did not simply ignore N.J.S.A. 48:3-60(a) when it approved these rates, but asserted its discretion under the statute to discount and waive the SBC when it deemed appropriate.

³² For e.g., see Application of Public Service Electric and Gas Company for the Approval of an Amendment to the Gas Purchase Agreement Currently Existing Between It and North Jersey Energy Associates, LP, BPU Docket No. GM03080643, (where the BPU approved an Amended Gas Supply Agreement that did not collect any portion of the SBC.); See also Re Public Service Electric and Gas Company, 2007 WL 1174075 (N.J.B.P.U.).

CONCLUSION

Based on the above, PSE&G and NJNG respectfully request that the Board (1) reaffirm its historic policy to support discounted tariff rates and special contracts where justified by the circumstances present, (2) consider proposed tariff provisions and rate schedules that will be reviewed on a utility-specific basis in order to provide for greater transparency and standardization of the discount process and (3) continue to review and act on petitions for discounts submitted pursuant to N.J.A.C. 14:3-1.3(e).

Respectfully Submitted,

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Dated: January 28, 2011
Newark, New Jersey

CONCLUSION

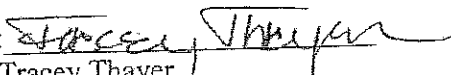
Based on the above, PSE&G and NJNG respectfully request that the Board (1) reaffirm its historic policy to support discounted tariff rates and special contracts where justified by the circumstances present, (2) consider proposed rate schedules that will be reviewed on a utility-specific basis in order to provide for greater transparency and standardization of the discount process and (3) continue to review and act on petitions for discounts submitted pursuant to N.J.A.C. 14:3-1.3(e).

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