



STATE OF NEW JERSEY
Board of Public Utilities
44 S. Clinton Avenue – P.O. Box 350
Trenton, NJ 08625
www.nj.gov/bpu/

ENERGY DIVISION

IN THE MATTER OF THE LONG-TERM)	ORDER ON MOTION TO
CAPACITY AGREEMENT PILOT PROGRAM)	SETTLE THE RECORD
)	
)	APP DOCKET NO. A-5192-
)	10T1
)	DOCKET NO. EO11010026

Parties of Record:

- Phillip J. Passanante, Esq.**, Assistant General Counsel, representing Appellant, Atlantic City Electric Company
- Marc B. Lasky, Esq.**, Morgan, Lewis & Bockius, LLP, for Appellant, Jersey Central Power & Light Company
- William O’Shaughnessy, Esq.**, McCarter & English LLP, for Appellant, Public Service Electric & Gas Company
- James C. Meyer, Esq.**, Riker, Danzig, Scherer, Hyland & Perretti, LLP, for Appellant, Rockland Electric Company
- Gregory Eisenstark, Esq.**, Morgan, Lewis & Bockius, LLP, for Joint Appellant-Movants, the EDCs
- John A. Hoffman, Esq.**, Wilentz, Goldman & Spitzer, P.A., for Respondent, Hess Newark, LLC
- David R. King, Esq.**, Herrick, Feinstein LLP, for Respondent, NRG Energy, Inc.
- Stefanie A. Brand, Esq.**, Director, NJ Division of Rate Counsel

BY THE BOARD:

This matter has been opened to the New Jersey Board of Public Utilities (“Board”) by the filing of a Motion to Settle the Record (“Motion”) comprising items on appeal, pursuant to Rules 2:5-4(a)(b) and 2:5-5(a), by the State’s electric distribution companies (“EDCs”)¹. Although notice of an appeal of the Board’s March 29, May 4, and May 20, 2011 Orders was filed, appellate briefs on the merits have not yet been filed. By this Order, the Board considers and disposes of the Motion.

¹ The EDCs are, collectively, Atlantic City Electric Company, Jersey Central Power & Light Company, Public Service Electric and Gas Company, and Rockland Electric Company.

Procedural History

On January 28, 2011, Governor Christie signed into law P.L. 2011, c.9, amending and supplementing P.L. 1999, c. 23, which establishes a long-term capacity agreement pilot program (“LCAPP”) to promote the construction of qualified electric generation facilities, hereinafter referred to as the LCAPP Act.² The LCAPP Act establishes a procedure to solicit offers for a Standard Offer Capacity Agreement (“SOCA”)³ with eligible generators.⁴ The LCAPP Act mandates the Board to initiate and complete a proceeding within sixty days to determine an approved form of a SOCA consistent with LCAPP requirements that it be a long-term and financially-settled agreement, and to “award and execute” the Board-approved form of SOCA within thirty days of determining its approved form.⁵ The LCAPP Act further requires the EDCs to pay or receive refunds pursuant to an annually calculated load-ratio share of the capacity of the SOCA based upon each EDC’s annual forecasted peak demand, as determined by PJM.⁶ The LCAPP Act additionally requires a selected generator to both participate in and be accepted as a capacity resource in the base residual auction⁷ conducted by PJM.⁸ The LCAPP Act mandates the Board to use the services of an EDCs-retained and Board-approved agent (the “LCAPP Agent”)⁹ to administer the LCAPP, charging the LCAPP Agent with responsibilities in assisting the Board with offering financially-settled SOCAs to develop eligible generators, prequalifying eligible generators, and recommending selected generators from eligible generator bids based upon a net benefit to ratepayers.¹⁰

On February 10, 2011, the Board adopted a sixty-day schedule to initiate and complete a proceeding to comply with the LCAPP Act. The February 10, 2011 Order approved the EDCs-retained LCAPP Agent. The Order further directed interested parties to submit proposed forms of a SOCA for consideration by the LCAPP Agent and the Board.

² The LCAPP Act is codified at N.J.S.A. 48:3-51, -60.1, -98.3 and -98.4.

³ A “SOCA” is defined in the LCAPP Act as a financially-settled transaction agreement approved by board order that provides for eligible generators to receive payments from the electric public utilities for a defined amount of electric capacity for a term to be determined by the board but not to exceed 15 years. N.J.S.A. 48:3-51.

⁴ “Eligible generator” means a developer of a base load or mid-merit electric power generation facility including, but not limited to, an on-site generation facility that qualifies as a capacity resource under PJM criteria and that commences construction after January 28, 2011. N.J.S.A. 48:3-51.

⁵ N.J.S.A. 48:3-98.3(a).

⁶ “PJM” means the privately-held, limited liability corporation that is a FERC-approved Regional Transmission Organization, or its successor, that manages the regional, high-voltage electricity grid serving all or parts of 13 states including New Jersey and the District of Columbia, operates the regional competitive wholesale electric market, manages the regional transmission planning process, and establishes systems and rules to ensure that the regional and in-State energy markets operate fairly and efficiently. N.J.S.A. 48:3-51.

⁷ A “base residual auction” is the auction conducted by PJM, as part of PJM’s reliability pricing model, three years prior to the start of the delivery year to secure electrical capacity as necessary to satisfy the capacity requirements for that delivery year. N.J.S.A. 48:3-51.

⁸ N.J.S.A. 48:3-98.3(a).

⁹ The LCAPP Agent is Levitan & Associates, Inc.

¹⁰ N.J.S.A. 48:3-98.3(b)(1-3).

By Order dated March 29, 2011, the Board accepted the LCAPP Agent's recommendations in its LCAPP Agent Report ("Report") dated March 21, 2011, and the Board accepted and approved the Final Proposed Form of SOCA, modified to incorporate the technical corrections set forth in the EDCs' comments dated March 4, 2011, and the Board awarded the SOCAs to three qualified generation facilities identified by the LCAPP Agent: Hess Newark Energy Project, NJG Old Bridge Clean Energy Center, and CPV Woodbridge Energy Center. The Board also directed the EDCs to submit a confidential, executed SOCA that included the respective generators' SOCA bid prices and a public, redacted executed SOCA that did not disclose the respective generators' SOCA bid price. The Board further ordered that the SOCA bid prices submitted would not be publicly disclosed, and the SOCA bid prices would remain confidential for a limited period of time (until after the PJM Base Residual Auction).

By Order dated May 4, 2011, the Board approved the executed SOCAs as LCAPP compliant. The Board also ordered the SOCA bid prices submitted would not be publicly disclosed and would remain confidential for a limited period of time, for which the bid price would be made publicly available upon a generator submitting a bid and participating in the respective PJM Base Residual Auction as set forth in its SOCA. On May 20, 2011, the Board denied the EDCs' motion for reconsideration of the March 29, 2011 Order.

On June 24, 2011, the EDCs jointly filed an appeal challenging due process¹¹ provisions of the LCAPP Act and the Order dated March 29, 2011 accepting the Report and LCAPP Agent's recommendations, the Order dated May 4, 2011 approving execution of the SOCAs, and the Order dated May 20, 2011 denying reconsideration. On July 21, 2011, the Board filed its Statement of Items ("SOI") comprising the record on appeal with the Superior Court, Appellate Division under Docket No. A-5192-10T1. Briefs have not been filed with the Appellate Division, and the merits of the case have not yet been heard.

On September 2, 2011, Appellants-Movants, the EDCs, filed the within Motion. Respondent-Opponent Hess Newark, LLC ("Hess") filed Opposition papers ("Opposition") dated September 12, 2011. ~~Staff of Respondent Board of Public Utilities ("Staff") filed a Response to the Motion~~ dated September 16, 2011. The EDCs submitted a Reply to Opposition and Response ("Reply") dated September 23, 2011. In its Reply, the EDCs moved to amend the Motion to include an additional item.

¹¹ On May 20, 2011, the Board disposed of the EDCs' motion for reconsideration. During LCAPP proceedings, the EDCs challenged procedural and substantive due process of law as to a lack of sufficient information to evaluate the LCAPP Agent's Report, a lack of opportunity to cross-examine witnesses and to conduct discovery, a lack of sufficient time to conduct analysis or to prepare alternate proposals or a method for the evaluation of benefits from proposed SOCAs. The EDCs further raised several arguments at that time, including the Board's failure to consider their comments on the Report and proposed SOCA, a failure to independently verify the LCAPP Agent's conclusions and recommendations, and a failure to adequately address the EDCs' concerns. The EDCs also allege that the Final Form of SOCA did not conform to the LCAPP Act because the Final Form of SOCA failed to require that the selected generators clear the PJM capacity market every year of the SOCA. In the Matter of the Long-Term Capacity Agreement Pilot Program, Docket No. EO11010026, May 20, 2011, at 2.

Motion to Settle the Record

The EDCs seek the Board to file a revised SOI comprising the record on appeal with the Appellate Division to include the following ten items:

1. Any written/electronic materials that were either considered or relied upon by the Agent (Levitan and Associates) or by the Board to evaluate (any) displacement of incumbent generation that (may) occur as a result of the executed/Board-approved SOCA contracts (Report, at 4);
2. Any written/electronic material that were either considered or relied upon by the Board to support the socio-economic benefits to the State form of the Board-approved SOCAs, including studies and evaluation of estimated job creation (Report, at 6);
3. The matrix developed by the Agent that defined the expectations and minimum requirements for factors that contribute to benefits/risks associated with each of the four LCAPP prequalification criteria and any documents submitted by bidders and considered by Agent to prepare the matrix (Report, at 28-36, Transcript, at 19-20)¹²;
4. The Agent Question Sets sent to all project sponsors who submitted Prequalification Applications and all responses (Report, at 38);
5. All written/electronic materials, including work papers, models, model runs, assumptions, input data and output data used by the Agent to create the LCAPP Agent's Report;
6. Any written/electronic presentations, memorandum or briefing materials provided by the Agent to the Board with respect to the implementation of the LCAPP Act or the evaluation of the bids received through the LCAPP process (Transcript, at 49, Transcript at 68);
7. All bids received (Report, at 42);
8. All other documents considered by the Board or the Agent in preparing the form of SOCA or the Agent's Report, including without limitation, all documents prepared by Staff and provided to the Agent considering the interpretation of the LCAPP Act, the assumptions used in modeling of costs and/or benefits under the Agent's Report and scope of the analysis or review undertaken by the Agent;
9. The confidential and public versions of the SOCAs (confidential SOCAs or public SOCAs) executed by the EDCs, as well as each EDC's Protest Letter concerning the SOCA; and
10. A letter from Assemblyman Upendra J. Chivukula to Board President Solomon dated March 10, 2011, concerning the Board's implementation of the LCAPP Act, as his letter

¹² The Transcript refers to a transcript of the Board Agenda Meeting held on March 29, 2011 and referenced in the SOI filed on July 21, 2011 as item no. 76.

was filed with the Board during the pendency of these proceedings and is argued as a part of the record. (Reply, at 9).

The EDCs contend that the SOI does not include relevant documents that the Board considered or relied upon in reaching its determinations on March 29, 2011, May 4, and May 20, 2011. (Motion, at 2). In motion papers, the EDCs argue that the Board considered items 1 – 9 in reaching its determinations and although these items were not “explicitly disclosed or provided to the parties”, items 1 – 9 are on file with the Board therefore the Motion should be granted and items 1 – 9 should be included in a Revised SOI on appeal. (Motion, at 3-5). The EDCs note that there was no formal evidentiary record established, and the EDCs contend that their position on appeal will be prejudiced, absent these additional items 1 – 9, as the reviewing court will not have a complete record on appeal as to “what transpired at the agency”. (Motion, at 5). The EDCs cite to In re New Jersey Bell Telephone Co., Docket No. TT92030358, 1993 WL 562032 at *6-7 (Dec. 15, 1993)(finding documents considered by the Board in reaching its determination are properly included within a revised SOI) and to I/M/O the Petition of Pub. Serv. Elec. & Gas Co., Docket Nos. ER91111698J and GR91101574J, 1996 WL 210681 (Mar. 27, 1996)(finding motions to settle are to be granted where documents were considered by the Board in reaching its decision and would more fully disclose what occurred below). (Motion, at 6).

Hess opposes the Motion and requests that it be denied because it seeks to improperly broaden the administrative record to include documents and materials that were neither filed with nor considered by the Board in reaching its determinations. (Opposition, at 2). Hess has taken the position that documents referenced in the LCAPP Agent Report should be included, whereas documents that have neither been referenced in the Report nor made on file with the Board should be excluded. (Opposition, at 2-3). Hess cites New Jersey Bell, *supra*, at *7 for the proposition that materials provided to Staff should be excluded from the record when not considered by the Board in reaching its determinations. Here, Hess argues that documents not within the Board’s possession could not have informed its decision. (Opposition, at 3).

Staff seeks the Motion to be denied as to items 1 – 9, confidential SOCAs. Staff argues these documents either were not considered by the Board in its deliberative process or are privileged. (Response, at 1-2). Staff notes that documentation “on file” with the Board is publicly available and was posted on the websites of the Board and LCAPP Agent. (Response, at 7-8). On items 1 - 5 regarding requests to include research, matrices developed, and formulas used by the LCAPP Agent in creating and compiling the Report, Staff responds that “the Board did not rely on the ... documents or information in making its determinations since the Board relied on the Report itself, along with the publicly available comments”. (Response, at 8). As to items 1 - 8, Staff responds that these items were not part of the record. (Response, at 3-4, 7-9, 10). On item 8, Staff responds that these documents, comprising internal memoranda and materials prepared involving legal counsel, are therefore protected by attorney-client privilege from disclosure. (Response, at 8). On item 9, Staff responds that the Board possesses this documentation. (Response, at 9-10). Staff does not contest including item 9, the public SOCAs and the EDCs’ protest letters, within a revised SOI. (Response, at 4, 10). However, Staff contests disclosure of the confidential SOCAs.

The EDCs state that all items at issue are referenced in the Board’s Orders, the Report, or the Transcript. (Reply, at 4). The EDCs challenge Staff’s assertions that the Board did not have possession of the documents at issue and that the Board did not consider items 1 – 9 in reaching its determinations. (Reply, at 8). The EDCs reply that the Transcript refers to a

briefing of the Commissioners by the LCAPP Agent (Reply, at 5, Transcript, at 68) and a packet of handouts that the Commissioners had on their possession and reviewed at that meeting (Reply, at 5, Transcript, at 36-38). This argument is raised for the first time in the Reply papers.

The EDCs state that it is premature for Staff to assume that the EDCs' arguments on appeal will be limited to points identified in the Civil Case Information Statement ("CIS"). (Reply, at 5). The EDCs reply that the documents at issue are directly related to all three issues cited in the CIS, and the documents are necessary for appellants to properly brief issues on appeal and for a reviewing court to evaluate the Board's decision. (Reply, at 6). On item 8, the EDCs state that its scope is broader than what falls within attorney-client privileged communications and that not all documents exchanged among the LCAPP Agent, Board and Staff is subject to privilege.

On item 8, the EDCs argue that not all documents exchanged among the LCAPP Agent, Board and Staff is attorney-client privileged from disclosure, and the scope of this request to include documentation is broad.

By Reply, the EDCs additionally move the Board to amend the contents of the Motion to include item 10, a letter from Assemblyman Upendra J. Chivukula to Board President Solomon dated March 10, 2011, concerning the Board's implementation of the LCAPP Act, as his letter was filed with the Board during the pendency of these proceedings and is arguably part of the record. (Reply, at 9). Because the request to include item 10 was raised for the first time by Reply, other parties have not submitted a position on item 10.

Discussion and Findings

The Board notes that requirements for composition of the SOI on appeal are governed by Rule 2:5-4(a)(b). That Rule allows a "party who questions whether the record fully and truly discloses what occurred in the... agency below shall, except as herein provided, (to) apply on motion to that... agency to settle the record, and describes composition of the record on appeal as consisting of

all papers on file in the... agencies below, with all entries as to matters made on the records of such... agencies, the stenographic transcript or statement of the proceedings therein, and all papers filed with or entries made on the records of the appellate court...

[R. 2:5-4(a)(2011)(Emphasis added).]

The standard governing disposition of a motion to settle the record comprising items on appeal, pursuant to 2:5-5(a), consists of an agency review of all "papers on file"¹³ "by the record as it existed at the time of (the determination)"¹⁴ where the items at issue are either "all fairly within the ambit of R. 2:5-4" as part of the Board's record below or their inclusion "more fully discloses

¹³ R. 2:5-4(a). When a document is stamped "filed" with the agency, the filed document is deemed considered by the Board, within the meaning of R. 2:5-4 to be made a part of the record on appeal, whereas when a document is marked "received" there is no correlation to that document having been considered by the Board.

¹⁴ D.Y.F.S. v. M.M., 189 N.J. 261, 278 (2007).

what occurred below"¹⁵. As to the contents comprising a Revised SOI on appeal: first, all documents on file with the Board but inadvertently not included in the SOI are included; second, all documents duplicative of items already listed in the SOI are excluded (e.g., duplicate copy requests by movants); third, all documents not on file with the Board are excluded (e.g., correspondence between the parties and not on file with the Board); and fourth, all documents requested for discovery and/or to seek confidential information are excluded (e.g., Staff materials which were not considered by the Board in reaching its determinations, internal communications subject to deliberative process, legal memoranda or other documents subject to discovery or confidentiality or privilege are excluded).¹⁶ The scope of the record on appeal is limited to whether the lower court's decision is supported by the record as it existed at the time of trial. M.M., 189 N.J. at 278 (2007) (emphasis added). R. 2:5-4(b) provides for notice of the record by way of a filed statement of items comprising the record on appeal, where the statement of items itself facilitates an understanding of what proofs, exhibits, stipulations and the like the agency considered in reaching its determination. Pressler & Verniero, Comment 2 to R. 2:5-4(b)(2011).

The SOI filed July 21, 2011 is the Board's statement of all items considered or relied upon in reaching its determinations. As Staff notes, items 1 - 8 were not part of the record below. (Response, at 3-4, 7-9, 10).

Following review and consideration, the Board FINDS that items 1 – 8, 9, the confidential SOCAs, and 10 should be excluded for the reasons discussed below. The Board further FINDS that item 9, the public SOCAs and the EDCs' protest letters, should be included for the reasons discussed below. The Board's reasoning is set forth in more detail, as follows.

On Item 1, materials either considered or relied upon by the LCAPP Agent or by the Board to evaluate any displacement of incumbent generation that may occur, this request is in the nature of discovery and the gathering of this additional information would be an improper inclusion in the SOI consistent with New Jersey Bell, supra, at *7. Furthermore, the Board FINDS it neither considered nor relied upon this item in reaching its determinations. (Response, at 8). Therefore, item 1 is excluded.

On item 2, materials considered or relied upon by the Board to support socio-economic benefits, including studies and evaluations of job creation estimates, this request is in the nature of discovery and the gathering of this additional information would be an improper inclusion in the SOI consistent with New Jersey Bell, supra, at *7. Furthermore, the Board FINDS it neither considered nor relied upon this item in reaching its determinations. (Response, at 8). Therefore, item 2 is excluded.

On item 3, the matrix developed by the LCAPP Agent that defined the expectations and minimum requirements for factors that contribute to benefits/risks associated with each of the four LCAPP prequalification criteria and any documents submitted by bidders and considered by Agent to prepare the matrix, this category of documentation involves privileged trade secrets¹⁷ of the LCAPP Agent protected from disclosure pursuant to N.J.S.A. 2A:84-26 and the

¹⁵ PSE&G, supra, 1996 WL210681 at *3.

¹⁶ In re New Jersey Bell, 1993 WL562032.

¹⁷ A trade secret is defined as any information that can be used in the operation of a business or other enterprise and that is sufficiently valuable and secret to afford an actual or potential economic advantage

documentation submitted by bidders to prepare the matrix is confidential bid information of competitors to the EDCs in the energy industry that is protected from disclosure.¹⁸ Moreover, the bids were sent to and maintained by the LCAPP Agent and not provided to Staff or the Board. Therefore, the Board FINDS it neither considered nor relied upon this item in reaching its determinations. (Response, at 8). Therefore, item 3 is excluded.

On item 4, Agent Question Sets¹⁹ sent to all project sponsors who submitted Prequalification Applications and all responses, an electronic posting of the Agent Question Sets, numbered 1 - 80, posted February 11, 2011 through March 21, 2011 remains publicly available for viewing on the LCAPP Agent's website at <http://www.nj-lcapp.com/qa.html> by tabbing "Q&A" on the homepage. Furthermore, the filed SOI contains item 85, dated May 25, 2011, described as "Website – Questions and Answers posted by the LCAPP Agent between 02/11/2011 to 03/21/2011", which is a duplicate of publicly available information. Therefore, the Board FINDS it considered and relied upon this item in reaching its determination. However, as information and documentation on the Agent Question Sets and responses are both made publicly available online and duplicative of information already included in paper form within the filed SOI, item 4 is excluded from the Revised SOI consistent with New Jersey Bell, supra, at *6.

On item 5, work papers, models, model runs, assumptions, input data and output data used by the LCAPP Agent to create the Report, this request is outside the scope of the proper administrative record on appeal. The Board acknowledges it relied upon the Report itself and public comments, both of which are included in the SOI. The Board FINDS it neither considered nor relied upon this category of documentation or information in reaching its determinations. (Response, at 8). Therefore, item 5 is excluded.

On item 6, presentations, memoranda or briefing materials provided by the LCAPP Agent to the Board with respect to the implementation of the LCAPP Act or the evaluation of the bids received through the LCAPP process. The LCAPP Agent prepared a document for the initial briefing, but same was neither maintained nor retained by the Board. Moreover, this category of documents is protected from disclosure under the deliberative process privilege. In Golden Nuggett v. Atlantic City Elec., 229 N.J. Super. 118, 126 (App. Div. 1988), the Appellate Division

over others. Trump's Castle Assoc. v. Tallone, 275 N.J. Super. 159, 162 (App. Div. 1994). The Board acknowledges that the LCAPP Agent may seek to claim trade secret protection over its matrices, similar to a formula, pattern, device or compilation of information which is used in its business and which gives him an opportunity to obtain an advantage over competitors who do not know or use it, pursuant to N.J.S.A. 2A:84-26. While the press and public have a presumptive right of access to papers filed with a court with respect to civil litigation, as in pleadings or motion papers, that right does not extend to trade secrets... Hammock by Hammock. v. Hoffman-LaRoche, Inc., 142 N.J. 356, 375-376, 379-380 (1995)(granting a R. 4:10-1 protective order to restrict circulation of the documentary discovery concerning the subject drug of a products liability before allowing its release). R. 1:38-11 allows information in a court record to be sealed by order for good cause shown, where disclosure would likely cause a clearly defined and serious injury to an entity and the entity's interest in privacy substantially outweighs the presumption that the court or administrative record is open for public inspection. N.J.R. 1:38-11(a)(b)(1-2)(2011). And See R. 1:2-1, allowing for open court proceedings to be sealed by order for good cause shown.

¹⁸ Further support is listed at the item 7 discussion.

¹⁹ Agent Question Sets or data requests are described as first round data requests sent on Feb. 24, 2011, second round data requests sent on Feb. 27, 2011, a data request sent on Mar. 3, 2011 and a final set of clarifying questions sent on Mar. 6, 2011 within the Report. (Report, at 38). This period of time encompasses the Prequalification Evaluation process period.

recognized that the Board is able to draw upon its own expertise in rendering a determination, and observed that “findings may be based on an agency’s expertise, without supporting evidence” and “this is especially true of determinations which... are primarily of a judgmental or predictive nature. It is well established that intra-agency memoranda reflective of the deliberative or policy-making process of an agency are entitled to a high degree of confidentiality. McClain v. College Hosp., 99 N.J. 346, 360 (1985). Furthermore, in New Jersey Bell Tel. Co. v. State, 162 N.J. Super. 60 (App. Div. 1978), the Appellate Division considered and rejected an argument that the Board had relied upon data and recommendations not of record in violation of the Administrative Procedure Act, N.J.S.A. 52:14B-1 et seq. In rejecting the argument that the Board had violated the Administrative Procedure Act, the Appellate Division noted “nowhere does the A.P.A. attempt to regulate the working relationship between agency head and their subordinates; in fact, the statute specifically recited ‘the agency’s experience, technical competence, and specialized knowledge may be utilized in the evaluation of the evidence. Id. at 82 citing N.J.S.A. 52:14B-10(b). Thus, the interrelation between the Board and the staff simply formed a part of the agency’s reasoning process by which it arrived at an institutional decision. N.J. Dep’t of Public Advocate v. N.J. Bd. of Public Utilities et al., 189 N.J. Super. 491, (App. Div. 1983)(citing N.J. Bell Tel. Co., 162 N.J. Super. 60, 83 (1978) and referring to N.J.S.A. 52:14B-10(b) stating nowhere does the statute attempt to regulate the working relationship between the agency heads and their subordinates, in fact, the statute specifically recites the agency’s experience, technical competence, and specialized knowledge may be utilized in the evaluation of evidence). Thus, all presentations, memoranda or briefing materials are confidential intra-agency documents covered under the deliberative process privilege and protected from disclosure. Therefore, the Board FINDS item 6 is excluded.

On Item 7, all bids received, and on item 9, confidential SOCAs, these requests are in the nature of discovery and seek confidential documentation. On March 29, 2011, the Board directed the EDCs to submit a confidential, executed SOCA that included the respective generators’ SOCA bid prices and a public, redacted executed SOCA that did not disclose the respective generators’ SOCA bid price. The Board further ordered that the SOCA bid prices submitted would not be publicly disclosed, and that the SOCA bid prices would remain confidential for a limited period of time until after the PJM Base Residual Auction. There is a strong public interest in maintaining the confidentiality of proprietary business information regarding competitors in the energy industry, and the Board entered a continuing enforcement order on March 29, 2011 providing that this confidential information shall not be disclosed at this time to protect the sensitive, proprietary, confidential commercial information. See also N.J.A.C. 14:1-12. In doing so, the Board sealed the record as to item 7 after balancing the public interest in disclosure as against the potential for serious injury to a business. The Board found that the business’s privacy interests substantially outweighed the presumption that the record of confidential bids should be open to public inspection. See also R. 1:38-11. Here, while bidder identities were published in the Report, which is included in the SOI as item 62 as a means of public disclosure, bid content was maintained as confidential until a date certain pursuant to the March 29, 2011 continuing enforcement order and consistent with R. 1:38-11. Therefore, the Board FINDS item 7 and item 9 are confidential and exempt, therefore excluded.

On Item 8, documents used to prepare the form of SOCA and the Report, LCAPP interpretive documents prepared by Staff, and assumptions, analysis and review undertaken by the LCAPP Agent, this request seeks privileged and confidential materials protected from disclosure. First, documents comprising internal memoranda and materials prepared involving legal counsel are attorney-client privileged communications protected from disclosure, pursuant to N.J.S.A. 2A:84A-20. To the extent that these items encompass memoranda prepared by the Board’s

legal advisor or of notes of a meetings involving legal advice, these items are excluded consistent with New Jersey Bell, supra, at *10. Second, LCAPP interpretive documents prepared by Staff are deliberative process privileged documents, also exempt from disclosure. Third, as noted above, the methodologies used by the LCAPP Agent to prepare the Report is trade secret privileged and protected from disclosure, as described above. Therefore, the Board FINDS item 8 is privileged and exempt, therefore excluded.

On item 9, the public SOCAs and the EDCs' protest letters, the request is not contested by Staff. The Board FINDS it did consider and rely upon the public SOCAs and the EDCs' protest letters, in reaching its determinations on May 4 and 20, 2011, therefore the exclusion of these documents was an inadvertent omission. Item 9, the public SOCAs and the EDCs' protest letters with signature pages, are to be included in a Revised SOI consistent with New Jersey Bell, supra, at *7, to reconstruct the record as it existed at the time of the Board's decision.

Item 10, Assemblyman Chivukula's letter, is a new record on file with the Board as of September 26, 2011. The Board notes that the EDCs first requested that the item be included in their Reply. The parties have had no opportunity to respond. The record on appeal comprises the record already in existence, not a new record to be made. The Board may only review items before it at the time of its determinations. The Board FINDS it neither considered nor relied upon this item in reaching its determinations. Therefore, item 10 is excluded.

The Board HEREBY ORDERS that the Motion regarding items 1 – 8 and 10 is DENIED, and these items are to be excluded.

The Board FURTHER ORDERS that the Motion regarding item 9, the confidential SOCAs, is DENIED, and these items are to be excluded.

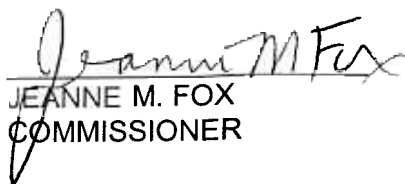
The Board FURTHER ORDERS that the Motion regarding item 9, public SOCAs and the EDCs' protest letters, is GRANTED, and these items are to be included. The Board FURTHER DIRECTS Staff to prepare a Revised SOI to be filed with the Superior Court, Appellate Division, under the above-referenced docket. By this Order, the Board deems the record comprising the items on appeal settled.

DATED: 11/9/11

BOARD OF PUBLIC UTILITIES
BY:



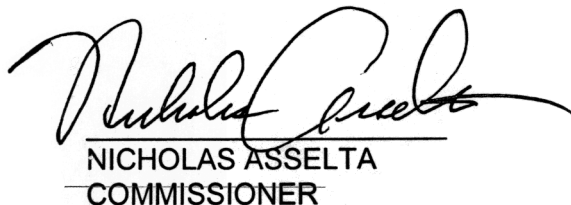
LEE A. SOLOMON
PRESIDENT



JEANNE M. FOX
COMMISSIONER



JOSEPH L. FIORDALISO
COMMISSIONER



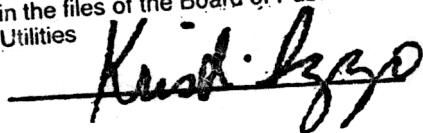
NICHOLAS ASSELTA
COMMISSIONER

ATTEST:



KRISTI IZZO
SECRETARY

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

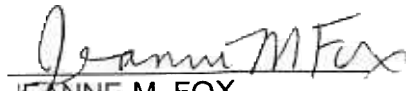


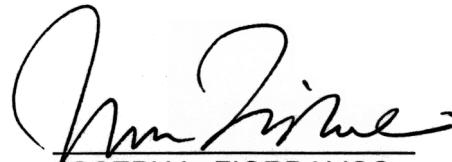
The Board FURTHER ORDERS that the Motion regarding item 9, public SOCAs and the EDCs' protest letters, is GRANTED, and these items are to be included. The Board FURTHER DIRECTS Staff to prepare a Revised SOI to be filed with the Superior Court, Appellate Division, under the above-referenced docket. By this Order, the Board deems the record comprising the items on appeal settled.

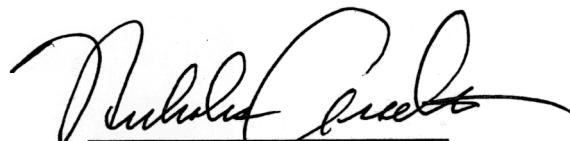
DATED: 11/9/11

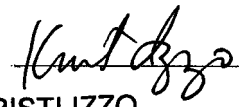
BOARD OF PUBLIC UTILITIES
BY:


LEE A. SOLOMON
PRESIDENT


JEANNE M. FOX
COMMISSIONER


JOSEPH L. FIORDALISO
COMMISSIONER


NICHOLAS ASSELTA
COMMISSIONER

ATTEST:

KRISTI IZZO
SECRETARY

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

