



STATE OF NEW JERSEY
Board of Public Utilities
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ENERGY AND CLEAN ENERGY

IN THE MATTER OF THE PETITION OF PUBLIC SERVICE ELECTRIC AND GAS COMPANY FOR APPROVAL OF ITS CLEAN ENERGY FUTURE – ELECTRIC VEHICLE AND ENERGY STORAGE (“CEF-EVES”) PROGRAM ON A REGULATED BASIS)	ORDER ON MOTION TO DISMISS
)	
)	
)	DOCKET NO. EO18101111

Parties of Record:

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BY COMMISSIONER UPENDRA J. CHIVUKULA:

By this Order, I deny the New Jersey Division of Rate Counsel’s (“Rate Counsel”) Motion to Dismiss filed on April 17, 2020 in the above-captioned proceeding.

I. BACKGROUND

On October 11, 2018, Public Service Electric and Gas Company (“PSE&G” or “Company”) filed a petition (“Petition”) with the New Jersey Board of Public Utilities (“Board”) requesting approval of its Clean Energy Future – Electric Vehicle and Energy Storage Program (“CEF-EVES Program” or “Program”). The proposed Program consists of up to \$261 million of investment over a period of six (6) years and approximately \$103 million in expenses. The Petition proposes four (4)

electric vehicle (“EV”) sub-programs and five (5) energy storage (“ES”) sub-programs. According to PSE&G, the proposed CEF_EVES Program will support the widespread adoption of EVs, including multi-family and low income customers. Additionally, the Company maintains that the CEF-EVES Program will have extensive societal benefits including environmental benefits, job creation, supporting schools, mitigation of EV market barriers, and increased knowledge of how to optimize the distribution system through smart chargers with two-way communication.

By Order dated October 29, 2018, the Board retained jurisdiction over the Petition, and designated myself as the presiding officer and authorized me to rule on all motions that arise during the pendency of this proceeding, as well as to modify any schedules that may be set as necessary to secure a just and expeditious determination of the issues.¹ The October 2018 Order directed all entities seeking to intervene or participate in this matter file the appropriate application with the Board by November 13, 2018.

On April 22, 2020, I issued a Prehearing Order wherein a procedural schedule was set and motions for intervention and participation status were ruled upon. Within that schedule, the first round of discovery requests must be propounded by July 6, 2020, with a subsequent discovery round due on July 27, 2020. The evidentiary hearings are set for the week of December 7, 2020.

On or about April 17, 2020, Rate Counsel filed a motion to dismiss a portion of the Petition. Specifically, Rate Counsel seeks dismissal of the EV sub-programs. On or about May 8, 2020, PSE&G filed an opposition to Rate Counsel’s motion which was joined by intervenors, Blue Bird Body Corporation (“Blue Bird”), Climate Change Mitigation Technologies, LLC (“CCMT”), Charge Point, Inc. (“Charge Point”), Environmental Defense Fund, Natural Resources Defense Council, Environment New Jersey, and Sierra Club (hereinafter “Environmentalists”), EVgo Services, LLC (“EVgo”), Zeco Systems, Inc. d/b/a Greenlots (“Greenlots”), Burns & McDonnell Engineering Company, Inc. (“BMcD”), and Mid-Atlantic Solar & Storage Industries Association (“MSSIA”).

On May 8, 2020, Direct Energy Business, LLC, et al., NRG Energy, Inc., and Just Energy Group Inc. (collectively, the “Market Participants”) filed a letter in support of Rate Counsel’s Motion to Dismiss.

On May 22, 2020, Rate Counsel filed a reply to PSE&G’s opposition.

II. MOTION

Rate Counsel’s Motion to Dismiss

In its motion, Rate Counsel seeks dismissal of the EV sub-programs of the Petition; however, Rate Counsel does not concede that the five energy storage sub-programs are legal or appropriate.² Rate Counsel argues that its motion is based on long-held legal principle that utilities may only seek recovery of “used and useful utility property” that is dedicated to the public service. Rate Counsel (“RC”) Motion at 2. Additionally, Rate Counsel states that the Board lacks statutory authority to allow utilities to use regulated rates to fund competitive services, as defined

¹ In re the Petition of Public Service Electric and Gas Company for Approval of its Clean Energy Future – Electric Vehicle and Energy Storage (“CEF EVES”) Program on a Regulated Basis, BPU Docket No. EO18101111, Order dated October 29, 2018 (“October 2018 Order”).

² Rate Counsel expressly reserves all rights with respect to the energy storage sub-programs.

in the Electric Discount Energy Competition Act (“EDECA”), N.J.S.A. 48:3-49 et seq., and similarly lacks authority for these programs in the recently enacted Plug-In Vehicle Act (“PIV Act”), P.L. 2019, c. 362, N.J.S.A. 48:25-1 to -11. Id. Rate Counsel asserts that for these reasons, the proposed EV sub-programs that are the subject of its motion cannot be approved as a matter of law, and requests that the Board grant their motion.

Used and Useful Principle

Rate Counsel argues that the law is clear — ratepayers must only pay for utility property that is used and useful in the provision of safe and adequate service, and that many aspects of PSE&G’s proposal fail to meet this basic requirement. RC at 10.

Rate Counsel asserts that much of the investment proposed in the Petition’s EV sub-programs is for Electric Vehicle Service Equipment (“EVSE”) that will not be owned by PSE&G, but rather by some customers of the Company, however all of the Company’s ratepayers will pay for the equipment. Id. at 9-10. Rate Counsel states that the equipment will not be utilized to provide safe and adequate utility service, but rather to charge personal vehicles and that not only will ratepayers be paying for individuals to own the equipment, but also for PSE&G to earn a return on the property it will never own. Id. at 10.

Rate Counsel further argues that PSE&G’s EV sub-programs are in clear violation of the used and useful principle as most of them center around PSE&G using funds to be recovered in rates to invest in property that will be privately owned. Id. at 16. Rate Counsel asserts that the offerings involve investments that are not necessary for the provision of safe, adequate and proper utility service. Id. Rate Counsel further asserts that, “[n]ot only will the investments not be owned by the utility, they will not be used for the provision of utility service.” Id. at 17. They will be used to power private personal vehicles or vehicles in commercial or government fleets. Rate Counsel argues that while those vehicles and fleets will use electricity, that is not sufficient to be considered “useful” in the provision of utility service, and if it were, then the utilities would be free to purchase any equipment that uses electricity and provide it to some customers while charging the rest. Id.

III. RESPONSES

PSE&G Opposition

On or about May 8, 2020, PSE&G filed an opposition to Rate Counsel’s motion to dismiss. PSE&G asserts that if Rate Counsel’s motion were to be granted, it would have far-reaching effects in that utilities would be barred from meaningful participation in the electrification of the transportation sector envisioned and required under the EMP and PIV Act. PSE&G Opposition at 10. PSE&G further argues that Rate Counsel’s legal arguments are flawed and do not warrant summary dismissal of PSE&G’s EV sub-program proposals. Id. at 11.

PSE&G argues that rate recovery of utility investments in customer rebates and in company-owned EV chargers is not unconstitutional pursuant to the “used and useful” principle. Id. PSE&G states that Rate Counsel’s interpretation of the used and useful principle misconstrues and misapplies the principle in a manner that is both incorrect on its face and that is belied by years of utility ratemaking in New Jersey and other states. Id. PSE&G stresses that a utility may recover its costs and earn a return on its capital investment in non-utility owned assets...and have in the past, and are now, recovering and earning returns on such investment; the utility’s assets in these

instances is a regulatory asset that reflects its capital investment dedicated to serving customers. Id. at 11-12.

PSE&G offers that the phrase “used and useful” is one important aspect of broader utility ratemaking principles that ensure both that utilities are able to recover the costs of and earn a fair rate of return...and that those investments are fairly dedicated to public use so that ratepayers as a whole reasonably benefit. Id. at 12. PSE&G states that they have presented EV programs of the type the State has legislatively decreed in the PIV Act, which will benefit utility customers, ones that are both company-owned plant-in-service and regulatory assets - that are squarely within the bounds of constitutional ratemaking. Id. 12-13.

PSE&G argues that, “it is not true, therefore, that ‘[t]he Petition seeks to place non-utility property that is not used and useful in the public service into rate base.” (quoting Rate Counsel’s Motion to Dismiss). Id. 15-16.

PSE&G also offers that it is proposing to use utility property – utility capital investment – to support State policy in a manner that benefits PSE&G’s ratepayers and that the recovery sought includes both utility plant and regulatory assets. Id. at 15. PSE&G asserts that there is no precedent demonstrating that the proposed EV sub-programs are barred from inclusion in utility rates as a matter of law that would warrant dismissal prior to any meaningful process or discovery. Id. Instead, PSE&G points to several similar programs that have been included as a regulatory asset, such as its Solar Loan programs which have been included in the Company’s rates as a regulatory asset. There is also a customer rebate program, the Vehicle Innovation Program, which encourages innovative customer proposals, and is not a research and development program. Id. at 17. PSE&G also highlights that New Jersey has previously approved utility investment in rebates to customers, such as the purchasing of Natural Gas Vehicles (“NGV”) and utility ownership of NGV fueling stations. Plainly put, the EV charging stations are similar in nature according to PSE&G. Id. at 18.

Finally, PSE&G offers that other regulatory agencies and legislatures in other states have allowed recovery for utility cost support and investment in PIV charging infrastructure. Notably, the Oregon Public Utility Commission rejected the concept that the used and useful principle might preclude recovery of rebates, EV charging services, installation and operating costs, the California Public Utilities Commission has allowed utility rebates to be recovered as expenses in rates and the Maryland Public Service Commission permits utilities to seek cost recovery through rates in rate case proceedings for plug in vehicle program offerings. Id.

CCMT Opposition

On or about May 8, 2020 CCMT filed an opposition with the Board regarding Rate Counsel’s motion to dismiss. CCMT initiates its opposition by stating the dismissal of the EV sub-programs in the Petition is premature and the Board should exercise its right in allowing the parties to develop a full record. CCMT Opposition at 3.

CCMT goes on to argue that even if the “used and useful” principle is applicable, it would only narrowly apply to the physical assets and not the incentive and rebate sub-programs. Id. at 3-4. CCMT claims that services located on private property not generally accessible to the public are not conclusively barred from being considered part of the grid and thus providing a used and useful public service. Id. For example, interactive two-way vehicle-to-grid charging may allow

utilities to dynamically manage energy storage contained in both public and private fleet, and then provide the public service of providing zero carbon peaker plants employed during summertime peak load conditions. Id.

EVgo Opposition

On or about May 8, 2020, EVgo filed an opposition to Rate Counsel's motion to dismiss PSE&G's EV sub-programs. Like the other interveners, EVgo argues that dismissal of the Petition is premature and that the basic factual development has not occurred and therefore should proceed. EVgo Opposition at 1-2.

MSSIA Opposition

On or about May 8, 2020, MSSIA filed an opposition letter with the Board regarding Rate Counsel's motion to dismiss PSE&G's EV sub-programs. MSSIA believes that consideration of EV sub-programs, and the creation of a full record on the issues, is of great importance to the solar industry and to the State. MSSIA Opposition at 1.

Greenlots Opposition

On or about May 8, 2020, Greenlots filed an opposition to Rate Counsel's motion to dismiss PSE&G's EV sub-programs. Greenlots argues that dismissal of the Petition is premature and the proposed EV sub-programs should be addressed "within the established protocol of a docketed proceeding." Greenlots Opposition at 1.

BMcD Opposition

On or about May 8, 2020, BMcD filed a letter with the Board, opposing Rate Counsel's motion to dismiss. BMcD contends that such a dismissal at this stage would prevent it from providing the Board "its insights regarding the need for electric vehicle charging infrastructure to prepare for the growing demand of the electric vehicle market." BMcD Opposition Letter at 1. BMcD goes on to assert that Rate Counsel seeks to block the deliberative process which would otherwise allow for development of a full record that would address all relevant fact and policy issues. Id.

Blue Bird Opposition

One or about May 8, 2020, Blue Bird filed an opposition to Rate Counsel's motion to dismiss. Blue Bird argues that the motion to dismiss is premature and the EV subprograms should be addressed on the merits. Blue Bird Opposition at 1. Blue Bird also contends its "contributions to this proceeding are critical to the Board's informed consideration and judgment as to how this proceeding can further the state's goals." Id. at 3.

Market Participants Letter in Support of Motion to Dismiss

On or about May 8, 2020, Market Participants submitted a letter to the Board in support of Rate Counsel's motion to dismiss. Market Participants argue that the Board should not permit PSE&G to require ratepayers to fund EV infrastructure that is not owned by PSE&G and subsidize certain specialized services not necessary to provide safe and adequate utility services. Market Participant Letter at 1.

ChargePoint Response

On or about May 8, 2020, ChargePoint filed a response with the Board that takes no substantive position on the legal arguments of Rate Counsel, but rather indicates that PSE&G's complex Petition requires the disposition of law and fact that can only be adequately addressed with the benefit of a robust factual record. ChargePoint Response at 2.

Rate Counsel Reply Brief

On May 22, 2020, Rate Counsel filed a Reply Brief ("Rate Counsel Reply"), emphasizing that PSE&G is "seeking approval to earn a profit on *other people's property*," which is prohibited by established law. Rate Counsel Reply at 3.

Rate Counsel stresses that while the State Legislature previously permitted the "inclusion of energy efficiency and renewable energy investments in a utility's rate base, through Section 13 of the RGGI Act, N.J.S.A. 48:3-98.1, it chose not to do so here". Id. Further, the 1994 NGV tariff was limited to a pilot program, amounted to \$250,000 per year and "unlike the within petition, the Company did not seek to build the charging station with ratepayer money, proposing to use shareholder funds instead." Id. at 7-8.

Rate Counsel concludes by stating that no disputed factual issues preclude the Board from granting its motion. Id. at 4. The Board should not permit the proceeding to continue, Rate Counsel maintains, since it would "waste the resources of both the Board and the litigants if the requested EV programs cannot be approved as a matter of law." Id.

IV. DISCUSSION AND FINDINGS

A party may move for summary decision upon all or any of the substantive issues in a contested case. N.J.A.C. 1:1-12.5(a). A summary decision may be granted:

[I]f the papers and discovery which have been filed, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to prevail as a matter of law. When a motion for summary decision is made and supported, an adverse party in order to prevail must by responding affidavit set forth specific facts showing that there is a genuine issue which can only be determined in an evidentiary proceeding.

N.J.A.C. 1:1-12.5(b).

When determining summary judgement motions, the standard for agency determinations under N.J.A.C. 1:1-12.5 is "substantially the same as that governing a motion under Rule 4:46-2 for summary judgment in civil litigation." L.A. v. Bd. Of Educ. of City of Trenton, Mercer County, 221 N.J. 192, 203-04 (2015) (internal citation and quotations omitted).

A determination whether a "genuine issue" of material fact exists requires the judge to consider if a rational fact finder could resolve the dispute with the evidence presented, or whether a genuine issue remains. Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 523 (1995). It is not the judge's function to "weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." Brill v. Guardian Life Ins. Co. of Am., 142 N.J. at 540 (quoting

Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249 (1986)). Additionally, a court must determine whether the evidentiary materials, “when viewed in the light most favorable to the non-moving party...are sufficient to permit a rational factfinder to resolve the alleged disputed issue in favor of the nonmoving party.” *Brill v. Guardian Life Ins. Co. of Am.*, 142 N.J. at 523. Applied here, the Presiding Officer must view the evidence in the light most favorable to PSE&G, the non-moving party, to determine whether a genuine issue of material fact exists.

The pleadings filed by Rate Counsel, PSE&G and the other parties present mixed questions of fact and law. Based on the evidence filed to date, there exists disagreement on certain issues that go to the heart of the “used and useful” principle, and what is and is not necessary to provide safe and reliable utility services. The record would benefit from a full factual exploration of whether the proposed EV program assets benefit PSE&G ratepayers and are used and useful in the public service to be appropriately placed into PSE&G’s rate base. A robust record would also assist the Board in determining whether the proposed investments are factually similar to energy efficiency infrastructure investments, which are allowed, regardless of ownership.³

For example, Rate Counsel asserts that most of the investment proposed in the Petition’s EV sub-programs is unnecessary for safe and reliable service, and will not be owned by PSE&G, but rather by only some customers of the Company at the expense of all of the Company’s ratepayers. PSE&G disagrees arguing that RGGI allows public utilities to recover investments in non-utility property and asserting that, as a factual matter, the type of EV investments here are comparable to allowed energy efficiency investments. PSE&G further contends that Rate Counsel has oversimplified the used and useful principle and rests its arguments on a flawed foundation while ignoring issues of fact surrounding whether or not PSE&G’s offerings are necessary for safe and reliable service, which presents another factual disagreement. Finally, Rate Counsel and PSE&G both point to common practices regarding rebates, incentives and funding of programs that exist in New Jersey and other states. Given that the parties cite to the same programs, yet reach varying conclusions, a comprehensive understanding of other programs, which are inherently fact specific, is key to applying the used and useful precedent. Therefore, I **HEREBY FIND** that, in viewing the evidence most favorable to the non-moving party, genuine issues of material fact exist.

Further, “[i]t is inappropriate to grant summary judgment where the suit is in an early stage and the evidence has not been fully developed.” *D’Alia v. Allied-Signal Corp.*, 260 N.J. Super. 1, 12 (1992); *Wilson v. Amerada Hess Corp.*, 168 N.J. 236, 253-254 (2001) (motion should be denied where discovery on material issues is incomplete); *Salomon v. Eli Lilly & Co.*, 98 N.J. 58, 61 (1984) (a complaint should not be dismissed in the absence of an adequate record). Additionally, denial of summary judgement is also appropriate when the issue at hand has “highly significant policy considerations” and the record is inadequate. *Jackson v. Muhlenberg Hosp.*, 53 N.J. 138, 141-42 (1969). For proceedings where the ruling would reach far beyond the particular case, “[t]he disagreement must not be nebulous or contingent but must have taken on fixed and final shape so that a court can see what legal issues it is deciding, what effect its decision will have on the adversaries, and some useful purpose to be achieved in deciding them.” *Public Service Com. v. Wycoff Co.*, 344 U.S. 237, 243-244 (1952).

³ See e.g., N.J.S.A. 48:3-98.1(a).

According to the procedural schedule, the first round of discovery on the Petition is to be propounded by July 6, 2020, with Company responses due by July 20, 2020. At the time Rate Counsel filed its Motion to Dismiss, no discovery had taken place on the Petition. Further, there are now numerous interveners in this proceeding who have the right to conduct discovery and help develop the factual record. At the time of Rate Counsel's motion, none of these interveners had an opportunity to issue discovery nor the opportunity to present their facts and arguments on the Petition. I, therefore, **HEREBY FIND** the record is presently incomplete and thus will benefit from additional time to develop.

The issues here are sure to have extensive implications beyond this proceeding, which intensifies the need for a full and adequate record. There is another petition currently filed with the Board with near identical issues which would be significantly impacted by the outcome of this proceeding.⁴ Additionally, the Board is presently conducting an extensive stakeholder process on the very topic at the center of the EV portion of PSE&G's Petition. This stakeholder process will inform the State's policies on electric vehicles. With two ongoing processes—a separate petition and a stakeholder process—that both center around electric vehicles, I **HEREBY FIND** that the decision on the Petition's EV sub-programs has significant reach beyond this proceeding and thus demands a full record.

I **HEREBY DENY** Rate Counsel's Motion to Dismiss for the following reasons:

- 1) The record shows there are genuine issues as to material facts;
- 2) The scant evidentiary record due to the lack of discovery on the Petition and early stage of the proceeding precludes summary decision; and
- 3) The outcome of this proceeding will have significant and far-reaching policy considerations.

The within denial is without prejudice.

I **HEREBY ORDER** the parties to continue to move through the procedural schedule so that the record may benefit from discovery.

I **HEREBY DIRECT** that this Order be posted on the Board's website.

This provisional ruling is subject to ratification or other alteration by the Board as it deems appropriate during the proceedings in this matter.

DATED: July 1, 2020

BY:



UPENDRA J. CHIVUKULA
COMMISSIONER

⁴ In the Matter of the Petition of Atlantic City Electric Company for Approval of a Voluntary Program for Plug-In Vehicle Charging - Amended Petition, BPU Docket No. EO18020190.

IN THE MATTER OF THE PETITION OF PUBLIC SERVICE ELECTRIC AND GAS COMPANY
FOR APPROVAL OF ITS CLEANENERGY FUTURE – ELECTRIC VEHICLE AND ENERGY
STORAGE (“CEF-EVES”) PROGRAM ON A REGULATED BASIS
BPU DOCKET NO. EO18101111

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