



STATE OF NEW JERSEY
Board of Public Utilities
44 South Clinton Avenue, 1st Floor
Post Office Box 350
Trenton, New Jersey 08625-0350
www.nj.gov/bpu/

ENERGY

IN THE MATTER OF THE VERIFIED PETITION OF THE)	ORDER
RETAIL ENERGY SUPPLY ASSOCIATION SEEKING)	
WITHDRAWAL OF STAFF'S CEASE AND DESIST AND)	DOCKET NO. EO19020226
REFUND INSTRUCTIONS LETTER AND)	
DECLARATION THAT THIRD PARTY SUPPLIERS CAN)	
PASS THROUGH SOLAR RPS COSTS UNDER THE)	
CLEAN ENERGY ACT, P.L. 2018, C. 17)	
)	
AND)	
)	
IN THE MATTER OF THE CEASE AND DESIST AND)	
REFUND INSTRUCTIONS LETTER OF JANUARY 22,)	
2019 TO THIRD PARTY SUPPLIERS)	DOCKET NO. EO20100654

Parties of Record:

Brian Lipman, Esq., Director, New Jersey Division of Rate Counsel
Murray E. Bevan, Esq., Retail Energy Supply Association

BY THE BOARD:

BACKGROUND

On February 9, 1999, the Electric Discount and Energy Competition Act, N.J.S.A. 48:3-49 to -109 (“EDECA”) was signed into law. EDECA requires compliance with New Jersey’s Renewable Portfolio Standards (“RPS”) by electric power suppliers, including third party suppliers (“TPS” or “suppliers”), and Basic Generation Service providers. N.J.S.A. 48:3-87(d). The Clean Energy Act of 2018, P.L. 2018, c. 17 (“CEA”), amended certain provisions of EDECA and increased certain RPS obligations on these providers.

Under EDECA, the New Jersey Board of Public Utilities (“Board” or “BPU”) is required to “[m]aintain adequate regulatory oversight over competitive purveyors of retail power and natural gas supply and other energy services to ensure that consumer protection safeguards inherent to traditional public utility regulation are maintained, without unduly impeding competitive markets.” N.J.S.A. 48:3-50(a)(5). EDECA also prohibits a TPS from providing service unless the company

has provided the customer with a one-page summary that is easily understandable by the general public of all the material terms and conditions of the contract, including an explanation of whether the contract is fixed or variable, and the differences between the two. N.J.S.A. 48:3-85(a)(1)(a).

In accordance with EDECA, the BPU promulgated several consumer protection rules at N.J.A.C. 14:4-7-1 et seq., including rules governing contracts between the customer and the TPS, N.J.A.C. 14:4-7.6, contract summaries, N.J.A.C. 14:4-7.6A, and fixed rates, N.J.A.C. 14:4-7.12. Notably, the rules establish that a fixed-rate contract “may not include provisions (sometimes referred to as ‘material change notices’) that permit the TPS to change material terms of the contract without the customer's affirmative authorization unless the change is required by operation of law.” N.J.A.C. 14:4-7.6(l).

PROCEDURAL HISTORY

In October 2018, following the passage of the CEA, staff of the BPU (“Staff”) learned that some TPSs were charging customers who had fixed-rate contracts rates that were higher than was agreed to in their contracts (“affected customers”). It was Staff’s understanding that the increases were a result of additional costs incurred by the TPSs under the requirements of the new RPS established by the CEA, which were being passed through to the affected customers (Pass Through).

On January 22, 2019, Staff responded to complaints filed by the affected customers by issuing a global letter to TPSs which provided an interpretation of the Board’s rules that prohibits a TPS from making changes to a customer’s rate under a fixed-rate contract without the customer’s affirmative consent, unless there had been a change required under operation of law (“2019 Cease and Desist Letter”). The 2019 Cease and Desist Letter reminded all TPSs of their obligations to comply with the Board’s rules and instructed TPSs to refund to affected customers the difference between the increased charge and the agreed upon fixed rate charge. The 2019 Cease and Desist Letter also instructed TPSs to comply with certain reporting requirements to the Board.

The Retail Energy Supply Association (“RESA”), whose members are entities that offer retail electric and gas service to residential, commercial, and industrial customers in New Jersey and other competitive markets in the United States, disagreed with Staff’s interpretation of what constitutes a permissible increase to a fixed-rate contract. In a letter dated January 25, 2019, RESA argued on behalf of the organization that the CEA expressly allowed the Pass Through. RESA specifically relied on CEA provision N.J.S.A. 48:3-87(d)(3)(c), which says:

Notwithstanding any rule or regulation to the contrary, the board shall recognize these new [RPS] purchase obligations as a change required by operation of law and implement the provisions of this subsection in a manner so as to prevent any subsidies between suppliers and providers and to promote competition in the electricity supply industry.

On February 15, 2019, RESA filed a Verified Petition with the Board, contending that the Board’s regulations were superseded and invalidated by the above CEA provision (“Petition”). RESA’s Petition formally requested the Board withdraw the 2019 Cease and Desist Letter, cancel the directive to TPSs to issue refunds to affected customers, and declare that the CEA allows the Pass Through.

On February 21, 2019, Talen Energy Marketing, LLC (“TEM”), a third-party electricity provider, filed a motion seeking intervenor status in connection with the Petition, or in the alternative, clarification by BPU that the 2019 Cease and Desist Letter does not apply to it because it provides electric solely to commercial and industrial customers. The motion is pending before the Board.

On December 2, 2020, as a result of discussions between Staff and several TPSs seeking a pathway to meet Staff’s interpretation of the Board’s rules, the Secretary of the Board issued a global letter under Docket No. EO19020226 offering TPSs who have contracts with New Jersey residential customers and small commercial customers an opportunity to fully resolve the matter (“2020 Secretary’s Letter”).¹ TPSs who accepted the offer were required to refrain from collecting additional charges associated with the Pass Through and were to provide affected customers a period of time within which to request refunds for charges previously paid.²

Following the issuance of the Secretary’s Letter, on January 8, 2021, RESA filed an appeal with the Superior Court of New Jersey, Appellate Division (“Appellate Division” or “Court”) seeking a ruling from the Appellate Division on its Petition to the Board on the grounds that the Board’s inaction on the Petition constituted a de facto denial of the relief sought by RESA.

On November 18, 2021, the Appellate Division issued a decision wherein the Court concluded that the Board failed to timely address the Petition and afford RESA an opportunity to be heard.³ Consequently, the Court remanded the matter to BPU for action by the Board on RESA’s Petition, to be taken within 60 days from the date of remand.

Staff and RESA later agreed to extend the January 16, 2022 deadline by 60 days. A letter was filed by RESA on December 20, 2021 with the BPU, confirming the 60-day extension of the deadline. The New Jersey Division of Rate Counsel (“Rate Counsel”) did not object to this extension.

On March 4, 2022, Rate Counsel filed its comments with the BPU recommending, in relevant part, that, if the Board elects to rescind its 2019 Cease and Desist Letter, then the Board should ensure that only contracts that include a change in law clause are eligible to pass through the RPS costs. Further, Rate Counsel recommends that any customers who would be charged retroactively should be provided with an explanation via email and mail specifying the grounds for the pass-through, along with contact information for the BPU and the TPS. Finally, Rate Counsel argues that TPS should not be permitted to pursue collections of these sums from past customers due to the passage of time.

¹ For the purposes of the Secretary’s Letter, small commercial customers was defined as those who utilized 11,000 kWh or less per year.

² By letter dated December 16, 2020, TEM asserted that because its customers are neither residential nor small commercial customers as defined, it is not subject to the conditions set out in the Secretary’s Letter and is in effect opting in to the settlement.

³ In re the Verified Petition of the Retail Energy Supply Association Seeking Withdrawal of the Board Staff’s Cease and Desist and Refund Instructions Letter and Declaration, Slip Op. at 10, Docket No. A-1229-20 (App. Div. Nov. 18, 2021).

DISCUSSION AND FINDING

One of the main goals of EDECA is to ensure adequate consumer protection in light of the restructuring of the electric and gas utility industries. N.J.S.A. 48:3-50(a)(5). To that end, the Legislature included several consumer protection provisions in EDECA and delegated to the Board the authority to promulgate customer protection regulations. The Board takes seriously the need to protect shopping consumers against unexpected increases to otherwise “fixed” price retail electricity contracts, which is a concern highlighted by Rate Counsel. Stringent enforcement of consumer protection rules is critical to promoting retail competition for New Jersey customers and the Board enacted N.J.A.C. 14:4-7.6(l) to ensure effective and fair competition.

To comply with the Appellate Division’s November 18, 2021 opinion and remand order, the Board now considers RESA’s Petition, which contends the Board Rule is superseded – for limited purposes – by the CEA. Specifically, the issue is whether a TPS may pass through its added CEA RPS obligations to its fixed-rate contract customers. The Board **HEREBY FINDS** that the Legislature directed these added costs as eligible to be passed through as a matter of law. This is stated by the plain language of N.J.S.A. 48:3-87(d)(3)(c) (“the board shall recognize these new [RPS] purchase obligations as a change required by operation of law”). Compare with N.J.A.C. 14:4-7.6(l) (establishing that a fixed-rate contract “may not . . . permit the TPS to change material terms of the contract without the customer’s affirmative authorization unless the change is required by operation of law”). Given the clear and plain language, the Board’s interpretative process is at an end. In re Ridgefield Park Bd. of Educ., 244 N.J. 1, 18 (2020).

The Board **GRANTS** RESA’s Petition and **HEREBY WITHDRAWS** the 2019 Cease and Desist Letter.

The Board agrees with Rate Counsel that any TPSs seeking to pass through additional costs must notify the affected customer by email and mail, including contact information for the BPU and the TPS. Further, as Rate Counsel correctly notes, not all underlying TPS contracts include a change in law provision that authorizes the pass through of additional RPS costs. As N.J.A.C. 14:4-7.6(l), explains, the pass through of additional RPS charges is permissible only where the fixed-rate contract expressly allows the TPS to modify rates as “required by operation of law.” However, the Board finds no basis to comment on whether the passage of time deprives a TPS of the legal right to recover costs from past customers.

The Board **FINDS** it unnecessary to address the remainder of the issues raised in the Petition, or to address speculative questions around how future changes to New Jersey’s RPS, without the language specifically included in the CEA, would be treated.

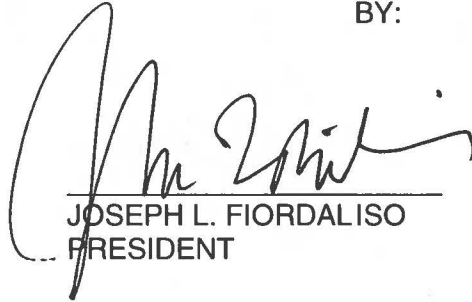
As to TEM’s motion in connection with the 2019 Cease and Desist Letter and RESA’s Petition, the Board **HEREBY FINDS** the motion as moot based on the action taken by the Board herein.

Further, the Board **HEREBY DECLARES** that agreements previously entered into in connection with the docketed matters herein are considered settled. The Board shall not take any additional action with respect to previous agreements or commercial decisions made by TPSs in response to the 2019 Cease and Desist Letter and the 2020 Secretary’s Letter.

This Order shall be effective immediately.

DATED: March 9, 2022

BOARD OF PUBLIC UTILITIES
BY:



JOSEPH L. FIORDALISO
PRESIDENT



MARY-ANNA HOLDEN
COMMISSIONER



DIANNE SOLOMON
COMMISSIONER



UPENDRA J. CHIVUKULA
COMMISSIONER



ROBERT M. GORDON
COMMISSIONER

ATTEST: 
AIDA CAMACHO-WELCH
SECRETARY

In the Matter of the Verified Petition of the Retail Energy Supply Association Seeking Withdrawal of Staff's Cease and Desist and Refund Instructions Letter and Declaration that Third Party Suppliers Can Pass Through Solar RPS Costs Under the Clean Energy Act, P.L. 2018, C. 17

In the Matter of the Cease and Desist and Refund Instructions Letter of January 22, 2019 to Third Party Suppliers

Docket Nos. EO19020226 and EO20100654

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