Agenda Date: 3/29/06
Agenda Item: 1A

STATE OF NEW JERSEY
Board of Public Utilities
Two Gateway Center
Newark, NJ 07102
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IN THE MATTER OF PETITION OF PSEG DEMAND MANAGEMENT COMPANY AND RUTGERS UNIVERSITY NEWARK FOR CLARIFICATION OF THEIR STANDARD ENERGY SAVINGS AGREEMENT, ARTICLE II WITH PUBLIC SERVICE ELECTRIC AND GAS COMPANY	CLEAN ENERGY) ORDER DOCKET NO. EO04060578

(SERVICE LIST ATTACHED)

BY THE BOARD:

On June 24, 2004, PSEG Demand Management Company ("DMC") and Rutgers University Newark ("Rutgers")(collectively " Petitioners") sought Board review of a prior Staff determination involving interpretation of a Standard Offer Agreement entered into by Petitioners and Public Service Electric & Gas Company ("PSE&G") (collectively, "Parties").

Two years earlier, at the request of DMC, Board Staff had reviewed the Standard Offer Agreement to determine whether or not a five-year extension of the Primary Term of the contract was optional or mandatory. DMC had contended that PSE&G was required to extend a ten-year "Primary Term" of a Standard Offer Agreement an additional five years, based on Petitioner's compliance with certain conditions. PSE&G contested DMC's alleged right to extend the contract. Specifically, PSE&G contended that the right to extend the contract was premised on determination of a Standard Offer price in effect at the time extension was sought. Since the Standard Offer program had been discontinued no such price existed and the contract could not be extended for that reason.

DMC requested Board Staff's interpretation of the contract. Staff agreed with PSE&G and determined that no right to extend existed. DMC and Rutgers, dissatisfied with that determination, sought Board review, challenging Staff's interpretation of the contract. They now seek a Board determination of the rights and obligations of the Parties under the original Standard Offer Agreement in question.

BACKGROUND AND PROCEDURAL HISTORY

This matter arises out of a contract entered into under the standard offer approach to Demand Side Management ("DSM"), an approach which permitted participating utilities to set a standard price for the purchase by the utility of energy savings from customers or third parties. The cost of these purchases was recovered from ratepayers. The Standard Offer Programs have since been discontinued largely as a result of the Board's interpretation of the Electric Discount and Energy Competition Act ("EDECA"), N.J.S.A. 48:3-49 et seq., and the Board's desire to adopt energy savings measures, at a lower ratepayer expense.

On December 15, 1992, the Board issued an Order approving a Stipulation of Settlement ("SO 1 Order") regarding PSE&G's DSM Resource Plan.[1] In its SO 1 Order, the Board approved the proposed form of Standard Energy Savings Agreement ("Agreement"), under which the utility, PSE&G, would pay entities which contracted to provide energy-conservation services for energy and demand savings, these payments to be based on price terms tied to PSE&G's avoided costs. These payments were funded through an adjustment factor included in PSE&G's rates. Pursuant to the SO 1 Order, PSE&G issued its Standard Offer No. 1 ("SO 1") soliciting project proposals on August 3, 1993.

Petitioners DMC and Rutgers, along with other sponsors, submitted project proposals to PSE&G in response to SO 1. DMC was the sponsor of the Southeastern Plastics and Omega 8 demand side management projects ("DMC Project"), while Rutgers sponsored its own DSM projects ("Rutgers Project").[2] These project proposals, accepted pursuant to PSE&G's DSM Resource Plan, under the authority granted by the Board in its SO 1 Order, are memorialized in agreements dated February 6, 1996, and August 3, 1993, respectively. The contracts are identical to the extent that the "Maximum Term" of any Agreement is 15 years, enabling the Parties to contract for a shorter "Primary Term" with the option to extend the contract up to the Maximum Term. Parties in this proceeding contracted for 10 years, with the option to extend for an additional five years up to the Maximum Term.

In February 1999, the New Jersey State Legislature enacted the Electric Discount and Energy Competition Act ("EDECA"), N.J.S.A. 48:3-49 et seq. EDECA established a new framework for energy efficiency measures. The new act mandated a comprehensive review of energy efficiency programs and directed a switch to a Societal Benefits Charge ("SBC") to recover the cost of efficiency and renewable energy programs. N.J.S.A. 48:3-60. The passage of EDECA made clear the Legislature's intent to allow the State to explore new and effective ways to advance efficiency goals. In response, the Board issued orders modifying its prior DSM programs.[3]

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[1] I/M/O PSE&G's Demand Side Management Resource Plan filed Pursuant to N.J.A.C. 14:12 Dkt. No. EE92020105 (Decision and Order Adopting Stipulation, December 15, 1992).

[2] The Rutgers Project collectively refers to four separate projects run by Rutgers which are covered by separate, but essentially identical, individual agreements for each project.

[3] See I/M/O the Petition of the Filings of the Comprehensive Resource Analysis of Energy Programs Pursuant to Section 12 of the Electric Discount and Energy Competition Act, Docket Nos. EX99050347 et al. (Order, March 9, 2001) ("March 2001 CRA Order") and I/M/O the Matter of Comprehensive Energy Efficiency and Renewable Energy Resource Analysis for 2005-2008, Docket No. EX04040276 ("Order, December 23, 2004").

In October 1999, the Board approved one more PSE&G Standard Offer ("SO 3"). The Board's Order made it clear that the approval of PSE&G's third DSM plan was provisional and would end either upon the completion of the then-pending Comprehensive Resource Analysis ("CRA") or a Board decision to discontinue the plan.[4] The CRA referenced in the SO 3 Order was completed, and its initial program and budgetary decision announced, in the March 2001 CRA Order. In that Order, the Board rejected proposals to continue Standard Offer programs, finding no support in the Act for their continuation.[5]

Subsequent to this determination by the Board, on October 11, 2002, DMC contacted PSE&G and requested the extension of its Agreement to a maximum term of 15 years, under Article II of the Agreement. By letters dated October 16, 2002 and December 2, 2002, PSE&G denied DMC's request for an extension. On April 2, 2004, Rutgers requested PSE&G to extend its Agreement an additional five (5) years up to the 15 year Maximum Term, under Article II of the Agreement. By letter dated May 5, 2004 PSE&G denied Rutgers' request for an extension.

On February 12, 2003, DMC filed a request for clarification of the Article II language with Board Staff. By letter dated March 25, 2003, PSE&G informed Staff that it would not object to an extension of the contract if the Board Staff determined that PSE&G's costs were fully recoverable in rates. By letters dated May 12, 2003 and March 4, 2004, Staff concurred with PSE&G's assessment that no Standard Offer price was available, and as such, earlier denial of DMC's request for extension was appropriate.

On June 24, 2004, Petitioners filed the instant petition. On August 3, 2004, PSE&G filed its answer. On February 3, 2005 the parties participated in a scheduling conference and a schedule for submissions was subsequently memorialized in a February 7, 2005 letter from Staff's counsel. March 18, 2005 was set as the deadline for Initial Comments and Reply Comments were due by April 1, 2005.

In addition to initial and reply comments of the Petitioners and PSE&G, comments also were received from the Division of the Ratepayer Advocate ("Advocate"). The Advocate submitted that the Board should deny the requested contract extensions.

The matter is now before the Board for a determination as to whether Petitioners are entitled to an extension of the Agreements they entered into under SO1.

DISCUSSION AND FINDINGS

The Board has carefully considered the comments submitted by DMC, Rutgers, PSE&G and the Advocate. The petition raises several related issues: contract interpretation in the light of regulatory policy, the Board's authority to mold and modify policy in response to changing events, and the implications of analysis of an individual contract when that contract involves matters of public concern such as energy policy.

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[4] I/M/O the Consideration and Determination of Public Service Electric and Gas Company's Demand Side Management (DSM) Plan Filed Pursuant to N.J.A.C. 14:12, Dkt. No. EE98060402 (October 1, 1999) at 50.

[5] March 2001 CRA Order at 69.

The starting point of the Board's analysis is Petitioners' assertion that the plain meaning of the terms of the Standard Offer Agreement entitles the parties to an extension. The operative language is contained in Article II of the Agreement:

> In the event that the Primary Term is less than the maximum term specified in the Offer, the Primary Term, upon written notification to PSE&G two (2) years prior to termination of Primary Term, shall be subject to an extension of up to such maximum term. The Standard Offer Payment that shall be applicable during such extension term shall be the lower of the Standard Offer Payment under this Agreement or the Standard Offer Payment applicable at such time as the seller provides notice to PSE&G of its election to extend as provided herein.

Both Petitioners contracted for a Primary Term of ten years and now seek to extend to the maximum fifteen-year term, arguing that Article II confers an automatic extension upon timely notification to the utility. PSE&G advised Rutgers and DMC that, "there is no Standard Offer pricing available or applicable at which energy savings payments could be paid during the requested extended term."

The contract assumes a Standard Offer Payment is available. As noted by the Advocate, notwithstanding the fact that payments are still being made pursuant to the agreements entered into in the past, no Standard Offer program is currently being offered. Because the program is no longer being offered, there cannot be an "applicable" Standard Offer payment, as described in the contract. Therefore, no such Payment is available. Staff agrees with PSE&G and the Advocate that the Petitioners' interpretation of the Agreement is incorrect in that it assumes there is an applicable Standard Offer Payment.

The Board, in its March 2001 CRA Order, clearly addressed the status of Standard Offer programs. In its Order, the Board made a determination that these types of programs should not continue. The Board's policy with regard to energy efficiency programs has been significantly modified through the passage of EDECA, CRA and the Clean Energy Program. There is no Standard Offer program currently available, and therefore, no applicable Standard Offer Payment. PSE&G similarly advised Rutgers in its initial May 2004 response that "there is no Standard Offer pricing available or applicable at which energy savings payments could be paid during the requested extended term." In fact, the most recent Standard Offer, SO 3, closed to new proposals on July 10, 2000, and there have been no new Standard Offers since 2000, due to the regulatory changes described herein. This change has come about for a variety of reasons: the costly nature of Standard Offer Programs, the Board's implementation of EDECA, and the great changes in the structure of the electric industry brought about by that statute

The SO I Agreement must be construed in the context of the Board's DSM policy and the Standard Offer Program which existed at the time the Agreement was executed. <u>See</u> <u>Great Atlantic & Pacific Tea Co. v. Checchio</u>, 335 <u>N.J</u>. <u>Super</u>. 495, 501 (App. Div. 2000). Therefore Article II's requirement that the parties identify the Standard Offer Payment "applicable at such time as seller provides notice" must mean that the parties are required to identify the Standard Offer Payment being offered at that time. That interpretation is the one which is consistent with the Board's policy goals in implementing the program: if the Standard Offer Payment being offered to others was lower than what the sponsor has been receiving, the sponsor had the choice of receiving the going rate or declining to continue the contract. If the current Standard Offer Payment was higher than what the sponsor had received up to that time, the sponsor might continue to receive what it originally bargained for if it so chose. In either case, the intent of the original Agreement was carried out.

Having chosen to bargain for the shorter Primary Term, Petitioners assumed the regulatory risk associated with the changes in the energy industry, as described herein. Article II must be construed in the light of existing Board policies. Petitioners' interpretation of Article II implicates the Board's continuing regulatory responsibility to ensure whether State programs continue to provide benefits to ratepayers and the State of New Jersey. Petitioners' interpretation would undermine the Board's authority to modify its policies or to implement new ones in response to changing circumstances. Specifically, the proposed interpretation suggests that the Board relinquished all authority to determine, going forward, whether extending Standard Offer agreements would be sound energy policy and in the best interests of ratepayers.

The Board, however, articulated its continuing oversight responsibilities in the 1991 Standard Offer 1 Order. The Board stated that although the DSM rules were intended to provide the utilities with incentives to invest in DSM, "the Board must continue to use its regulatory oversight to balance these incentives against the Board's responsibility to keep rates as low as possible." The Board clearly anticipated in its 1991 Order that energy efficiency programs could evolve over time, in order to ensure ratepayers were charged the lowest possible rates.

Since the 1991 Order and with the passage of EDECA in 1999, modifications were made to energy efficiency programs in the State of New Jersey. In the Board's SO3 Order, the Board further articulated its intent to move away from Standard Offer programs, stating that the DSM 3 plan approved by the SO3 Order "should remain in effect until the Comprehensive Resource Analysis process established pursuant to EDECA provides a replacement, or otherwise until this plan is modified or discontinued by the Board."

When the Comprehensive Resource Analysis was finished, the Board rejected the Standard Offer approach to encouraging DSM, finding that "it is more expensive to pay for the value of energy savings [in a standard offer program] than it is to provide incentives for the technology directly."[6]

Put simply, Petitioners' interpretation of the contracts limits the Board's authority to protect ratepayers from programs that have proven to be costly over time. Such an interpretation not only limits the Board's basic statutory authority but ignores the Board's clear intention, in the original SO 1 Order to continue to exercise full regulatory authority over the Standard Offer program. Further, while the contract does not explicitly refer to the end of Standard Offer Programs, the contract does contain a regulatory risk provision, which essentially recognizes that the parties are subject to future regulatory actions by the Board. ,Therefore, the inclusion of the regulatory risk provision in the contract is further support that the contract was not to preclude the Board from undertaking such regulatory actions as determined to be appropriate if the contract was subject to such "regulatory risk."

Another significant consideration for the Board is the number of outstanding Standard Offer Agreements in existence. The Board must consider the potential aggregate impact on ratepayers and regulatory policy if all contracts pursued extensions to the maximum term. The responses to Staff's discovery in this proceeding indicate that other Standard Offer Agreements with similar extension provisions exist. The cost of extending the

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[6] March 2001 CRA Order at p. 70.

contracts herein would total at least $800,000 and the cost of granting extensions to similar contracts that may seek to extend their terms under a similar rationale would total in excess of $14 million. Therefore, a decision favorable to Petitioners would result in significant costs to ratepayers, costs which are unsupported by EDECA or the adoption of current clean energy programs. Based on the foregoing, Staff recommends that the ruling requested by the petition be denied.

The Board **FINDS** that the Petitioners assumed the regulatory risk that the Board's policy with regard to Standard Offers could shift before the parties could exercise their option to extend the contract beyond the primary term.

The Board **FINDS** that Petitioners' request to continue the Standard Offer projects is not supported by and is contrary to current Board policy. The Board **FINDS** that the Standard Offer program was discontinued due to the cost inefficiencies associated with the program and the changes in the State's electric industry. The Board also **FINDS** that the existing clean energy programs reflect current Board policy and that allowing extension of contracts entered into under a discontinued program would limit the Board's oversight responsibilities and undermine the Board's authority to regulate State programs. Accordingly, the Board **HEREBY DENIES** the ruling requested by the petition.

DATED: 3/29/06

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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

Kristi Izzo

Public Service Electric & Gas Co. & Rutgers
University Newark Clarification of Their
Standard Energy Savings Agreement
BPU Docket No. EO04060578

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Public Service Electric & Gas Co. & Rutgers
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