

**STATE OF NEW JERSEY
BOARD OF PUBLIC UTILITIES**

**In the Matter of a Generic Stakeholder
Proceeding to Consider Prospective
Standards for Gas Distribution Utility
Rate Discounts and Associated Contract
Terms and Conditions**

**Docket Nos. GR10100761 and
ER10100762**

**INITIAL COMMENTS
OF PIVOTAL UTILITY HOLDINGS, INC.
D/B/A ELIZABETHTOWN GAS**

**To: Honorable Joseph Fiordaliso
Commissioner**

In accordance with the schedule established at stakeholder meetings held in the above proceeding, Pivotal Utility Holdings, Inc. d/b/a Elizabethtown Gas (“Elizabethtown” or “the Company”), hereby submits these initial comments concerning the issues identified in the notice published by Elizabethtown and New Jersey’s three other gas distribution companies (“GDCs”): Public Service Electric and Gas Company (“PSEG”), New Jersey Natural Gas Company, and South Jersey Gas Company. As more fully discussed below, it is Elizabethtown’s position that the Board’s existing regulations provide a sufficient framework for the Board to consider requests for approval of special contracts between utilities and their customers when particular facts and circumstances require the utilities to offer non-tariffed services. No useful purpose would be served by attempting to develop more specific rules of general applicability for this process.

Instead, the Board should confirm that it will review requests for approval of special contracts on a case-by-case basis.

Introductory Statement

It is Elizabethtown's understanding that this proceeding was established as a result of issues that arose in a PSEG rate proceeding. Elizabethtown is not familiar with, and expresses no opinion, concerning the rates or practices of PSEG or any of the State's other GDCs. However, because certain terms used in the notice of this proceeding or by other utilities and the parties to their individual rate proceedings may have meanings that differ from the meanings that those terms have on Elizabethtown's system, the Company will first describe what its particular circumstances are with respect to special contracts, "discounted" rates and the assessment of tariff rider charges such as the Societal Benefits Charge ("SBC"), the Regional Greenhouse Gas Initiative ("RGGI") charge and the Utility Infrastructure Enhancement ("UIE") charge, and then address the specific issues posed in the Board's notice.

Elizabethtown has a number of special contracts with large customers. All of these have been explicitly approved by the Board.¹ Elizabethtown does not consider these contracts as providing for "discount" rates; rather, they are agreements designed to account for the unique circumstances faced by the customers. In some instances, these agreements have been executed in order to address the threat of physical bypass.² In other instances, these agreements address the threat of economic bypass; meaning that in

¹ In all cases, the Division of Rate Counsel has participated actively in the review of these agreements.

² The term "physical bypass" refers to a situation in which a customer located in Elizabethtown's service territory would connect directly to an interstate or intrastate pipeline, thereby bypassing Elizabethtown's distribution system.

the absence of the individually negotiated rates, there was a substantial likelihood that the customer's gas demand would be lost, to the detriment of the Company and its remaining customers.

In addition to Board-approved special contracts, Elizabethtown also has certain tariff service classifications that permit Elizabethtown either to negotiate certain rates, terms and conditions, or in a more limited case, to flex the variable transportation rate between a ceiling price and a floor price approved by the Board.³ Once again, these tariffs are designed to enable the Company to serve customers with unique requirements in a manner that benefits the Company and its customers.

Elizabethtown is confident that all of its special contract and flex-rate customers benefit the system as a whole because (i) in all instances, the customers pay rates that recover far more than the marginal cost of serving the customer, (ii) in all instances, the customers pay the full SBC and thus significantly reduce the SBC cost responsibility that would otherwise be assigned to other customers, (iii) in accordance with applicable Board-approved stipulations, the customers pay other tariff rider surcharges to the extent that those charges have been assessed by the Board,⁴ and (iv) in many cases,

³ See Service Classifications - Contract Service (CS) (Original Sheet No. 66) and Interruptible Transportation Service (ITS) (Original Sheet No. 81) in the Company's tariff, BPU No. 14-Elizabethtown Gas.

⁴ As discussed more fully *infra*, in accordance with Board-approved stipulations, Elizabethtown's RGGI surcharge is not assessed to customers with Board-approved special contracts. Elizabethtown's UIE surcharge is assessed to all firm customers.

Elizabethtown's special contracts provide important additional benefits, such as inexpensive sources of peaking supply, to the Company and its customers.⁵

In considering the legal and policy issues identified in this proceeding, the parties should recognize that Board-approved special contracts and tariff flexibility are not new phenomena, but have been part of Elizabethtown's array of services for many years. In addition, Elizabethtown requests the Board to bear in mind the following unassailable economic principles:

(1) As a for-profit corporation, Elizabethtown has every incentive, under normal circumstances,⁶ to maximize the revenue that it derives from the services it provides to its customers; and

(2) As long as a customer pays rates that exceed the marginal cost incurred by the Company to serve that customer, it is more economically beneficial to other customers to serve an incremental customer than to withhold service.

Elizabethtown recognizes that Board Staff, Rate Counsel and other parties have a legitimate interest in reviewing the terms of any special contracts or tariffs that permit rate and/or service flexibility for individual customers. To that end, Elizabethtown has consistently presented its contracts and tariffs to the Board in a transparent manner consistent with the terms of New Jersey's Public Utility Law and the Board's regulations. This practice has permitted the Board to consider the unique facts and circumstances

⁵ For example, a number of Elizabethtown's special contracts permit the Company to interrupt its customers and obtain access to their gas supplies on a limited number of peak days. These "take-back" arrangements are frequently far less costly than incremental peak day supply.

⁶ Elizabethtown recognizes that there may be special circumstances, such as those involving affiliate transactions, in which the Board may wish to more carefully scrutinize an individual transaction. However, such circumstances are rare and should be evaluated on a case-by-case basis.

surrounding the Company’s proposals. Elizabethtown submits that these unique facts and circumstances have been, and will continue to be, critical to the determination of whether particular contracts or tariffs are just, reasonable and not unduly discriminatory. For these reasons, Elizabethtown submits that the Board in this proceeding should avoid attempting to establish “cookie-cutter” rules that will be applicable in all circumstances. Instead, the Board should consider whether its current process permits the Board to review individual proposals in a thorough manner that is fair to all stakeholders. Elizabethtown submits that the Board’s current regulations have achieved this goal with respect to Elizabethtown’s contracts and tariffs.

Specific Comments

I. The legality of charging discounted gas utility distribution rates (a) based on a customer’s ability to bypass the utility’s gas distribution system, (b) based on the impact of wholesale and retail electric markets, or (c) for other policy reasons.

There is no question that the State’s utilities have the authority to propose, and the Board has the authority to approve, rates and terms of service for individual customers. *N.J.S.A.* 48:2-21(b)1. and 2. (West 2011) permits the Board to require utilities to file all rates including “individual” rates and permits utilities to propose to increase such “individual” rates. Several other sections of Title 48, Public Utilities similarly recognize the existence of customer-specific contracts and off-tariff rate agreements and implicitly acknowledge their legality.⁷ Finally, the Board has adopted regulations that establish a

⁷ See, e.g., *N.J.S.A.* 48:2-21.26, 48:2-21.27 and 48:2-21.31.

process for the filing of individual, off-tariff rate agreements. *See N.J.A.C. 14:3-1.3(e)* and (f).

In addition, as discussed above, the Board has approved tariffs for Elizabethtown that permit the Company to adjust rates for individual customers or for the class as a whole between a floor and a ceiling. Such tariffs clearly are legally permissible. It is well-settled that (i) in setting just and reasonable rates, the Board is not bound by any particular ratemaking methodology,⁸ and (ii) just and reasonable rates can fall within a range of acceptable outcomes.⁹

As discussed *supra*, the Board has approved a number of special contracts over the years that have enabled Elizabethtown to avoid physical bypass.¹⁰ Elizabethtown's Board-approved tariff also contains economic development service discounts that provide incentives for customers seeking to open new businesses or grow their existing businesses in certain parts of the Company's service territory.¹¹ In every case, the Board's approval of these types of arrangements was grounded in the reasonable assumption that it is better for the Company to obtain incremental revenue as long as the

⁸ *See In re Petition of Elizabethtown Water Co.*, 107 N.J. 440, 449, 527 A.2d 354, 358 (1987) (quoting the BPU, "[t]he Board is not bound by any particular methodology so long as the methodology it selects is reasonable"); *PenPac, Inc. v. Passaic County Util. Auth.*, 367 N.J. Super. 487, 843 A.2d 1153 (App. Div. 2004) ("[t]he general rate-setting statute is silent on any required methodology to establish 'just and reasonable' utility rates.").

⁹ *In Re New Jersey Power & Light Co.*, 9 N.J. 498, 89 A.2d 26 (1952) ; *See also Permian Basin Area Rate Cases*, 390 U.S. 747, 767 (1967)(a rate within the "zone of reasonableness will not be set aside.").

¹⁰ *See, e.g., I/M/O The Petition of Elizabethtown Gas Company For (1) Approval Pursuant to N.J.A.C. 14:5-9.6 Of A Special Contract For The Sale and Transportation Of Natural Gas With Ford Motor Company et al.*, BPU Docket Nos. GM93120549 and GM95100514, "Decision and Order" (February 7, 1996); *I/M/O The Petition of Elizabethtown Gas Company For Approval Of Special Contracts With SB Linden LLC and SB Wood LLC*, BPU Docket Nos. GM96090656 and GM96090657, "Decision and Order" (June 24, 1997).

¹¹ *See, e.g., Service Classifications - Small General Service (SGS)* (Original Sheet No. 41) and *General Delivery Service (GDS)*(Original Sheet No. 45).

Company is, in fact, recovering more than its marginal cost of service. The Board's orders concerning these matters were fully consistent with applicable law and sound policy.

At the same time, Elizabethtown is not aware of any instance in which an order setting Elizabethtown's rates has been predicated solely upon its impact on wholesale or retail electricity markets. While there is no reason why the Board would be precluded from considering the impact of a rate order involving the Company's service to electric generation customers on those customers and the markets they serve, a desire to consider such issues should not distract the Board from ensuring that any such rates are appropriately compensatory to the Company and do not require undue subsidization for other service classes. Other customers should not pay higher rates to subsidize electric generation customers.

II. The legality of establishing discounted gas utility distribution rates through contracts and whether current or future contracts may be "evergreened," i.e., extended for additional terms without Board approval; and, if it is determined that evergreen provisions are permissible, whether a utility should be required to file advance notice with the Board or obtain approval before determining not to exercise a termination right in a discounted contract.

A number of Elizabethtown's special contracts, as approved by the Board, contain provisions that extend the primary term of the agreements subject to rights of termination exercisable by, in most cases, either party. The Board's orders approving these contracts do not require the Company to notify the Board or otherwise seek its approval prior to extending the term. There is nothing that is *per se* unlawful about these provisions.

Because utilities generally have the same rights as other corporations,¹² there is nothing that prevents them from agreeing to contracts with evergreen or other term extension clauses.

Nonetheless, the Company acknowledges that the Board has the authority to modify the terms of the Company's contracts with its customers.¹³ Accordingly, Elizabethtown would not object if the Board were to adopt a policy or rule that would require the Company to notify the Board and the Division of Rate Counsel in advance of extending the term of a Board-approved special contract. Such notification, submitted well enough in advance, would give the Board, its Staff and Rate Counsel the opportunity to periodically review existing contracts.

Elizabethtown respectfully submits that it is more appropriate to require the Company to provide advance notice to the Board and other parties before extending the term of an existing agreement than it is to require the Company to obtain Board approval for such extensions. Imposing a requirement to obtain Board approval would be administratively burdensome, inconsistent with the Board's orders approving the contracts in the first place, and would create unnecessary uncertainty for large customers, some of whom are among the largest employers in the Company's service territory. A prospective requirement that the Company give the Board three- or six-months advance notice before extending the term of an existing contract would create more transparent

¹² *N.J.S.A.* §48:1-1 ("In addition to the powers conferred upon it by this title, [a public utility] shall have the general powers and privileges conferred by Title 14, Corporations, General.").

¹³ See *Hackensack Water Co. v. Board of Public Utility Commissioners et al.*, 96 N.J.L. 184, 115 A. 528 (1921); *The State, Ex. Rel., The New Jersey Suburban Water Co. v. Riordan*, 4 N.J. Misc. 256; 132 A. 318 (1926), *aff'd*, 103 N.J.L. 498, 135 A.919 (1926); *Application of Borough of Saddle River*, 71 N.J. 14, 362 A.2d 552 (1976).

processes without imposing unnecessary requirements on utilities or their large customers.

III. The criteria and process that the Board should establish to determine whether or not an entity has an ability to bypass the utility's gas distribution system and what rates should be charged to such entities; and whether the criteria and process must be established in a rulemaking.

Elizabethtown submits that there is no need to improve upon or modify the process that Elizabethtown has followed in the past to obtain approval of special contracts or new tariff service classifications. That process is outlined in *N.J.A.C.* 14:3-1.3(e) and (f) and requires the utility to file special contracts with the Board at least thirty days in advance of their effectiveness and to provide information about the proposed rates and terms of service, the utility's reasons for offering those rates and terms, and a discussion of the impact of those proposed terms on other customers. In Elizabethtown's experience, its filing commences a process that leads to a Board order addressing the special contract. In the past, Elizabethtown has been able to arrive at stipulations that are supported by all parties, including Board Staff and Rate Counsel, concerning particular special contracts.

Elizabethtown submits that it would not be useful in this proceeding for the Board to attempt to establish specific criteria necessary to support Board approval of special contracts in all instances. As discussed *supra*, the facts and circumstances that may justify a special contract are likely to be different in each case. Moreover, the rates that may be negotiated in each case are dependent on the individual facts and circumstances

of each customer. Thus, there is no need or justification for the Board to conduct a rulemaking or other process to consider the criteria and process applicable to special contracts. Rather, the Board should continue to process individual utility contract filings on a case-by-case basis.

IV. Regardless of an entity's ability to bypass the utility's gas distribution system, the criteria and process that the Board should establish to determine (a) whether other policy considerations justify discounts, (b) if so, what rates should be charged, and (c) whether the criteria and process for such discounts must be established in a rulemaking.

For the reasons discussed in response to Issue III above, Elizabethtown submits that there is no need for the Board to attempt to develop a more detailed generic process and criteria that would apply to the approval of special contracts in all cases. Elizabethtown believes that the existing process has served the needs of all affected parties on Elizabethtown's system well. Moreover, Elizabethtown believes that each of the State's gas distribution utilities faces somewhat different facts and circumstances that would unnecessarily complicate any rules of generic applicability. As there does not appear to be any need for further generic agency action in this case, there is no need for the Board to conduct a rulemaking. *See Metromedia, Inc. v. Director, Division of Taxation*, 97 N.J. 313, 478 A.2d 742 (1984) (setting forth the facts that must be analyzed to determine whether an agency determination should be made by rulemaking). Rulemaking is unnecessary where the Board is merely outlining policies that apply well-known statutory standards and will be followed based on the facts and circumstances of

individual cases as opposed to developing new uniform rules that will apply to all regulated utilities.

- V. The legality, and policy considerations, of applying SBC, RGGI and CAC charges prospectively to electric generating customers that purchase gas delivery services from the utility to produce electricity that is sold to electric public utility customers.**
- VI. The applicability of SBC, RGGI and CAC charges prospectively (a) to customers with an ability to bypass the utility's gas distribution system, (b) based on the impact on wholesale and retail electric markets, or (c) for other policy reasons, and the legality of any waiver or reduction of those charges.**

Elizabethtown will address these issues together. Under *N.J.S.A. 48:3-60(a)*, the Board is given the discretion to determine how the SBC will be applied. The statute states:

... the Board 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).

The use of the words “as appropriate” in the statutory provision clearly provides the Board with discretion to determine whether and to what extent the SBC will be applied to various customer classes. Because the best indicator of the legislature’s intent is the statutory language,¹⁴ it is readily apparent that the Board has discretion to determine the “appropriate” assessment of the SBC in particular cases.

Similarly, under the legislation that implemented the RGGI, the Board is given broad discretion to determine how to permit recovery of the costs associated with energy

¹⁴ See *DiProspero v. Penn et al.*, 183 N.J. 477, 492, 874 A.2d 1039, 1048 (2005).

efficiency, conservation or renewable energy programs. *N.J.S.A.* 48:3-98.1. The Board may permit utilities to recover such costs through the SBC or by other means. Under the Board's August 3, 2009 order concerning Elizabethtown's RGGI-related cost recovery rider in BPU Docket No. GO9010060, RGGI-related costs are not recovered from special contract customers.¹⁵

In the case of the UIE, the Board has determined that this charge is recovered from all firm customers.¹⁶ Thus, any new special contract customers that receive firm service would pay the UIE charge.

While the Board certainly has the legal discretion to determine the assignment of particular types of costs to particular classes of customers, the policy questions inherent in determining how particular costs are allocated are best left to the proceedings in which the allocation of specific costs is considered. Elizabethtown is generally aware that Board policy in the past, as applied to the Company, has resulted in a broad allocation of SBC costs across customer classes. For this reason, Elizabethtown has negotiated special contracts that have permitted the Company to assess costs such as the SBC to special contract customers. However, this may not be an economically viable course in all circumstances. Once again, rather than creating inflexible cost allocation rules, the Board should afford Elizabethtown and the State's other gas utilities the opportunity to bring particular facts and circumstances before the Board. Rigid rules will not serve the public

¹⁵ See *I/M/O Energy Efficiency Programs And Associated Cost Recovery Mechanisms et al.*, BPU Docket Nos. EO09010056 and GO09010060, "Decision and Order Approving Stipulation" (August 3, 2009).

¹⁶ *I/M/O The Proceeding For Infrastructure Investment And A Cost Recovery Mechanism For All Gas And Electric Utilities et al.*, BPU Docket Nos. GO09010049 and GO09010053, "Decision and Order Approving Stipulation" (April 28, 2009).

interest in the face of economic or physical circumstances that allow a customer to completely bypass Elizabethtown's system.

Elizabethtown understands that pending legislation identified as Senate Bill 2381 may create an exemption from SBC or RGGI-related charges for any natural gas delivery service that is used to generate electricity that is sold for resale. If this legislation becomes law, then the cost responsibility of certain electric generation customers¹⁷ will be reduced and the cost responsibility of other utility customers will be increased. The prospect of these increases amplifies the need for flexibility in the Board's approach to allocating these costs in the future. If Elizabethtown is required to increase the SBC, RGGI or UIE charges assessed to customers with economic alternatives, then such increased assessments may be sufficient to drive those customers off the system. Such an end result is not in the best interest of Elizabethtown, its remaining customers or the State of New Jersey. Once again, flexibility is called for to determine the optimal allocation of costs on a going-forward basis.

¹⁷ The law apparently does not apply to natural gas delivery services that are used to produce electricity that is not sold for resale.

Conclusion

For all the foregoing reasons, Elizabethtown respectfully requests that the Board confirm that it will continue to follow its existing policy of approving special contracts between utilities and their large customers on a case-by-case basis.

Respectfully submitted,

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