

April 13, 2022

VIA E-FILING & E-MAIL

Carmen Diaz, Acting Secretary
New Jersey Board of Public Utilities
44 South Clinton Avenue, 9th Floor
Post Office Box 350
Trenton, New Jersey 08625-0350
board.secretary@bpu.nj.gov

Re: I/M/O the Verified Petition of the Retail Energy Supply Association for a Rulemaking Proceeding regarding Pass-Through of Costs of Renewable Energy Portfolio Standards by Third Party Suppliers

Dear Acting Secretary Diaz,

On behalf of our client, the Retail Energy Supply Association, we submit this petition pursuant to the Administrative Procedure Act, N.J.S.A. § 52:14B-1 *et seq.*, requesting a rulemaking proceeding regarding the pass-through of costs of Renewable Energy Portfolio Standards by Third Party Suppliers.

Pursuant to the Board's Order dated March 19, 2020, in Docket No. EO20030254 temporarily waiving certain requirements for non-essential obligations, we submit these documents via electronic filing only. We will submit the \$25.00 filing fee when the Board advises that it is ready to accept such payments again.

Please do not hesitate to contact me if you have any questions. Thank you for your time and consideration and we look forward to our future correspondence.

Very truly yours,



Murray E. Bevan

Enclosure

cc: Service List (via e-mail)

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

In the Matter of the Verified Petition of)	
)	
Retail Energy Supply Association)	Docket No. _____
)	
For a Rulemaking Proceeding Regarding)	
Pass-Through of Costs of Renewable Energy)	
Portfolio Standards by Third Party Suppliers)	

PETITION

The Retail Energy Supply Association (“RESA”), by its undersigned counsel and pursuant to the Administrative Procedure Act, N.J.S.A. § 52:14B-1 *et seq.*, respectfully petitions the Board of Public Utilities (“Board” or “BPU”) to implement a rulemaking proceeding to conform the Board’s regulation, N.J.A.C. §14:4-7.6(l), to the Clean Energy Act, P.L. 2018 c. 17 (“CEA”), and in addition to allow third party suppliers (“TPSs”) to pass through all future state-mandated increases in the costs of compliance with the Renewable Energy Portfolio Standards (“RPS”) to customers who are on fixed price contracts that include a material change provision.

ARGUMENT

This Petition is submitted pursuant to N.J.S.A. § 52-14B-4(f), which provides that:

An interested person may petition an agency to adopt a new rule, or amend or repeal any existing rule. Each agency shall prescribe by rule the form for the petition and the procedure for the submission, consideration and disposition of the petition. The petition shall state clearly and concisely:

- (1) The substance or nature of the rule-making which is requested;
- (2) The reasons for the request and the petitioner's interest in the request;

(3) References to the authority of the agency to take the requested action.

The petitioner may provide the text of the proposed new rule, amended rule or repealed rule.

Within 60 days following receipt of any such petition, the agency shall either; (i) deny the petition, giving a written statement of its reasons; (ii) grant the petition and initiate a rule-making proceeding within 90 days of granting the petition; or (iii) refer the matter for further deliberations which shall be concluded within 90 days of referring the matter for further deliberations. Upon conclusion of such further deliberations, the agency shall either deny the petition and provide a written statement of its reasons or grant the petition and initiate a rule-making proceeding within 90 days. Upon the receipt of the petition, the agency shall file a notice stating the name of the petitioner and the nature of the request with the Office of Administrative Law for publication in the New Jersey Register. Notice of formal agency action on such petition shall also be filed with the Office of Administrative Law for publication in the Register.

The Board has implemented these statutory requirements through its regulations, set forth at N.J.A.C. § 14:1-5.16, which govern the form for the request and the procedure for the submission, consideration, and disposition of the petition for proposed rulemaking. Pursuant to these statutory and regulatory requirements and in support of its Petition, RESA submits the following information.

In 1999, the Electric Discount and Energy Competition Act, N.J.S.A. § 48:3-49 *et seq.* (“EDECA”), was enacted, which established the framework for restructuring the electric power industry in New Jersey. One of EDECA’s provisions directed the Board to adopt Renewable Portfolio Standards (“RPS”), which require electric power suppliers, now commonly referred to as third party suppliers (“TPS” or “Suppliers”) and basic generation service providers (“BGS Providers” or “Providers”), to annually increase the percent of the electricity sold in this State from renewable energy sources. N.J.S.A. § 48:3-87(d). After EDECA was enacted, the Board adopted N.J.A.C. § 14:4-7.6(1), which provides that a TPS may pass through a "State mandated charge" to

customers on fixed price contracts without the customers' affirmative consent only if it is a "change required by operation of law".

The Clean Energy Act ("CEA"), enacted on May 23, 2018, increased the RPS obligations for TPSs and BGS providers. *See* P.L.2018, c.17, *codified as* N.J.S.A. § 48:3-87(d)(3)(c). The Legislature provided mechanisms in the CEA for both TPSs and BGS providers to manage existing contracts, recognizing that TPSs and BGS providers would not otherwise be able to price the increased solar RPS obligations into contracts executed with customers before the CEA's RPS cost increase was enacted. Since BGS providers' existing contracts are exempt from the increased RPS costs in the first year of their three-year contracts, TPSs are placed at a pricing disadvantage if they do not have the ability to pass through the statutorily required RPS cost increases. In order to prevent this pricing disparity between TPSs and BGS providers, the Legislature expressly directed the BPU to recognize these new CEA-imposed RPS obligations "as a change required by operation of law."¹ This CEA provision, which quoted the language in the BPU's existing regulation, N.J.A.C. § 14:4-7.6(1), was a directive from the Legislature to allow TPSs to pass-through the increased RPS costs to their customers on fixed price contracts.

On March 9, 2022, the BPU issued an order in docket numbers EO19020226 and EO20100654, which approved RESA's interpretation of the CEA, thereby ending a three-year dispute between RESA and the Board regarding TPS pass through of RPS cost increases after the Appellate Division remanded the issue back to the Board for resolution. *See* November 18, 2021, Order, I/M/O Verified Petition of the Retail Energy Supply Association Seeking Withdrawal of the Board Staff's Cease and Desist and Refund Instructions Letter and Declaration that Third Party

¹ The Clean Energy Act of 2018 stated: "Notwithstanding any rule or regulation to the contrary, the board shall recognize these new solar 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."

Suppliers Can Pass Through RPS Costs Under the Clean Energy Act, P.L. 2018, C.17 (Superior Court Of New Jersey Appellate Division Docket No. A-1229-20).

However, the Board also stated the following in its March 9, 2022, order: “The Board **FINDS** it unnecessary to address the remainder of the issues raised in [RESA’s] 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.” BPU March 9, 2022, order at 4. This finding has makes it necessary for RESA to file this petition for proposed rulemaking regarding future RPS cost increases.

RESA proposes that the Board amend its regulation, N.J.A.C. § 14:4-7.6(l), to conform with the CEA and to allow TPSs to pass through all future state-mandated RPS cost increases by adding the following highlighted language:

The 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. "Material terms of a contract" include, but are not limited to, terms regarding the price, deliverability, time period of the contract, or ownership of the gas or electricity. "Non-material" terms include those regarding the address where payments should be sent or the phone number to be used for customer inquiries. Changing the price to reflect a change in the Sales and Use Tax, **the TPS’s RPS purchase obligations as a result of the Clean Energy Act of 2018 and any future increases of RPS obligations**, or other State-mandated charge would be permitted as a change required by operation of law.

This amendment will ensure that all RPS cost increases may be passed through by TPSs to their customers that are on fixed price contracts (with a material change provision) even if the Legislature does not include in their future statutes the magic words “change required by operation of law” and “notwithstanding any rule or regulation to the contrary”.

Without this amendment of the Board’s regulation there will not be a level playing field between TPSs and BGS providers when the RPS costs are increased in the future. The Legislature’s findings in EDECA included guidance that the Board should “place greater reliance

on competitive markets, where such markets exist, to deliver energy services to consumers in greater variety and at lower cost than traditional, bundled public utility service.” N.J.S.A. § 48:3-50(a)(2). This goal of promoting competition cannot be accomplished in a regulatory environment that promotes pricing disparities. RESA’s proposed rule amendment would remove that disparity by allowing TPSs to pass through all present and future RPS cost increases that BGS providers have historically been allowed to pass through to their customers.

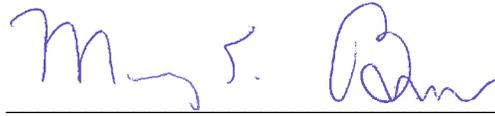
Furthermore, if TPSs do not have the ability to pass through future RPS cost increases to fixed price customers, they will be required to fund renewable subsidies without any recourse or means to recover those costs under existing fixed price contracts. In addition, amending the Board’s regulation to allow TPSs to pass through future RPS cost increases will also be a more efficient use of the state government’s time and resources as it will eliminate the need for RESA members and other TPSs to seek legislative amendments and BPU review on every occasion the RPS compliance costs are increased.

CONCLUSION

For the reasons stated above, RESA respectfully requests that the Board approve this petition for a proposed rulemaking to conform the Board’s regulation, N.J.A.C. § 14:4-7.6(l), to the CEA, and to allow TPSs to pass through all future state-mandated RPS cost increases to customers who are on fixed price contracts that include a material change notice provision.

Respectfully submitted,

By:



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Dated: April 13, 2022

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