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October 22, 2019

By Hand-Delivery and Electronic Mail
Honorable Aida Camacho-Welch, Secretary
New Jersey Board of Public Utilities
44 S. Clinton Avenue, 9th Floor
P.O. Box 350
Trenton, New Jersey 08625-0350

Re: In the Matter of the Exploration of Gas Capacity and Related Issues
BPU Docket No. GO19070846

Dear Secretary Camacho-Welch:

Please accept for filing this original and ten copies of the comments of the Division of Rate Counsel ("Rate Counsel") regarding the above-referenced matter. We are enclosing one additional copy of the comments. Please stamp and date the extra copy as "filed" and return it in our self-addressed stamped envelope. Thank you for your consideration and assistance.

Electronic copies of these comments are being sent to the electronic distribution list that was circulated following the stakeholder meeting held in this matter on October 1, 2019.

INTRODUCTION

This proceeding is the result of an Order of the New Jersey Board of Public Utilities ("BPU" or "Board") directing the Board's Staff ("Staff") to initiate a stakeholder process to "explore gas capacity issues and the related issue of savings achieved by residential customers served by TPSs [third party suppliers]." I/M/O the Verified Petition of the Retail Energy Supply Association to Reopen the Provision of Basic Gas Supply Service Pursuant to the Electric Discount and Energy Competition Act, N.J.S.A. 48:3-49 et seq., Docket No. GX01050394, BPU

Dkt. No. GO17121241, Decision and Order at 5 (Feb. 27, 2019 (the "RESA Order"). As explained in more detail below, this is an investigative proceeding intended to facilitate Staff's exploration of factual matters bearing upon the issues raised by RESA regarding whether the Board should consider changes to the current structure of New Jersey's market for natural gas supply. It is Rate Counsel's position that Staff's investigation should be limited to the issues specified in the RESA Order and that any factual issues impacting the rights and responsibilities of specific parties be resolved through an evidentiary "contested case" proceeding consistent with the New Jersey Administrative Procedure Act ("APA"), N.J.S.A. 52:14B-2(b); N.J.S.A. 52:14B-9, -9.1 and -10.

Rate Counsel urges Staff to exercise caution in recommending consideration of changes to the current gas supply market. The current structure was the result of lengthy negotiations among a diverse group of stakeholders. See I/M/O the Provision of Basic Gas Supply Service Pursuant to the Electric Discount and Energy Competition Act, N.J.S.A. 48:3-49 et seq., PU Dkt. No. GX01050304, Order Establishing BGSS Price Structure at 1-2 (Jan. 6, 2003 ("Generic BGSS Order"). That structure includes provision for oversight of the GDCs' gas procurement activities through their annual basic gas supply service ("BGSS") filings, and provisions in the GDCs' tariffs that contain incentives for the TPSs to meet their gas delivery obligations. The current system has functioned well for the past sixteen years, and any modifications should be approached with caution.

Finally, Rate Counsel urges Staff to avoid the GDCs' invitation to make this proceeding a vehicle for pre-approval of the GDCs' gas supply planning activities or a debate over whether the GDCs are meeting or can meet their obligations to procure adequate capacity for New Jersey's gas customers. The responsibility for maintaining adequate and cost-effective gas capacity and supply resources remains the primary responsibility of the GDCs, subject oversight and audit by the Board. This proceeding was intended to address the specific issues outlined in the RESA Order, not general issues regarding the adequacy of the GDCs' procurement of gas capacity.

FACTUAL AND PROCEDURAL HISTORY

As the Board is aware, the structure of New Jersey's market for natural gas supply, including the role of the GDCs as the provider of last resort, the structure and operation of the GDCs' BGSS clauses, and the rules and tariff provisions under which TPSs may compete to provide natural gas supply, were the result of protracted negotiations, culminating in the issuance of the Generic BGSS Order in January 2003. The current investigative proceeding was initiated by the Board as a result of a petition filed on November 27, 2017 by the Retail Energy Supply Association ("RESA"), an organization representing non-utility energy suppliers. RESA Order at 1. In that petition, RESA sought to re-open the Generic BGSS Order and initiate a formal proceeding to establish a mechanism whereby the State's GDCs would be responsible for securing capacity that could be released to the TPSs. Id. An amended petition clarifying and narrowing RESA's requests for relief was filed on March 5, 2018. Id.

In its response to RESA's amended petition, the New Jersey Utilities Authority ("NJUA") asserted that the GDCs obtain firm upstream capacity for their BGSS customers, but do not hold gas capacity to meet the requirement of customers who chose to purchase their gas supply from TPSs. Further, NJUA asserted that if they were required to obtain additional upstream capacity for release to the TPSs, the new capacity would be more expensive than their existing capacity. See RESA Order at 3. Following RESA's submission of reply comments and a series of informal meetings convened by Staff, the Board issued the RESA Order.

In that Order, the Board found that RESA had failed to demonstrate a basis for establishing a capacity release program as envisioned in its amended petition. RESA Order at 5. However, the Board found that the TPSs' proposal for the GDCs to secure capacity for release to the TPSs "implies that the TPSs in New Jersey may not have secured capacity to meet their customers' total needs." Id. The Board further found that it would be prudent to assess the effectiveness of competition in the natural gas supply market "by exploring if and to what extent TPSs are saving customer money on their natural gas supply, prior to considering any major changes in the January 2003 BGSS Order or the GDCs' current gas capacity release programs." Id. Based on these findings, the Board directed its Staff to initiate a stakeholder process to "… explore whether sufficient capacity has been secured to serve all of New Jersey's firm natural gas customers as well as whether and to what exten[t] TPSs are saving customers money on their natural gas supply." Id.

The current docket was initiated by a Notice dated September 10, 2019 (the "Notice") scheduling a stakeholder meeting on October 1, 2019 and setting October 22, 2019 as a deadline for written comments on a series of issues. At the stakeholder meeting, comments were presented by representatives of Direct Energy, Public Service Electric & Gas Company ("PSE&G"), South Jersey Industries on behalf of South Jersey Gas Company ("SJG") and Elizabethtown Gas Company ("ETG"), New Jersey Natural Gas Company ("NJNG"), Levitan and Associates ("Levitan"), a consultant retained by NJNG, the Environmental Defense Fund ("EDF"), and Rate Counsel. Tr. at 4, 6, 14-15, 21, 24, 33, 42 (Oct. 1, 2019). There were no speakers on behalf of RESA, or on behalf of any TPSs other than Direct Energy. No sworn testimony or supporting documentation was presented by any of the speakers.

RATE COUNSEL'S COMMENTS

As noted above, this proceeding is the result of proceedings on a petition requesting relief that was denied by the Board. As the Board found, RESA failed to establish grounds for its requested relief. RESA Order at 5. Nevertheless, the Board found that there were concerns that warranted further investigation by Staff, which was directed to "explore" those concerns. Id. At this time, Staff's investigation is at an early stage. Staff has requested comments on issues including the amounts of capacity held by the GDCs and the TPSs, the costs of incremental capacity, the costs of changing the current allocation of responsibilities for securing capacity, and the savings, if any, that the TPSs have provided to their customers. Notice at 2. The factual information sought in the Notice is within the possession of the GDCs and the TPSs. Since Rate Counsel lacks first-hand knowledge of all or most of this information, these comments will focus on the procedures that Rate Counsel believes should be followed, and on general considerations that should guide Staff's investigation. Rate Counsel reserves the right to submit further comments based on the information that is provided by other stakeholders in response to the Notice.

A. Procedural Issues

This proceeding, as envisioned by the Board, is not a formal "contested case" proceeding with discovery, evidentiary hearings and briefing. Instead, the Board directed Staff to conduct a "stakeholder proceeding" with the objective of "explor[ing] gas capacity issues and the related issue of savings achieved by residential customers served by TPSs." RESA Order. at 5. Thus, the RESA Order contemplates an investigative process in which Staff is to explore the issues specified by the Board.

It is Rate Counsel's position that this stakeholder process should not and cannot result in a Board Order that alters the current gas supply market structure. Such changes should be considered only after further proceedings in which factual issues are explored through an evidentiary process and ratepayers and other stakeholders are provided with due process. In the RESA Order, the Board recognized that changes in the current natural gas supply market structure are likely to change the allocation of costs between the GDCs' BGSS customers and the TPSs. As the Board found, if the GDCs were required to secure capacity for release to the TPSs, BGSS customers would be required to pay for a portfolio that included newer, higher cost capacity. RESA Order at 4-5. Such a change would implicate ratepayers' statutorily and constitutionally protected rights to reasonable rates for utility service. As the New Jersey Supreme Court has stated:

> The system of rate regulation and the fixing of rates thereunder are related to constitutional principles which no legislative or judicial body may overlook. For if the rate for the service supplied be unreasonably low it is confiscatory of the utility's right of property, and if unjustly and unreasonably high (bottomed as it is on the exercise of the police power of the state), it cannot be permitted to inflict extortionate and arbitrary charges upon the public.

In re Proposed Increased Intrastate Industrial Sand Rates, 66 N.J. 12, 23-24 (1974). Under the New Jersey Administrative Procedure Act, ratepayers must be accorded the right to an evidentiary hearing to resolve any disputed factual issues affecting their rights to reasonable rates for utility service. N.J.S.A. 52:14B-2(b); N.J.S.A. 52:14B-9, -9.1 and -10.

If, as a result of its investigation, Staff finds facts that warrant further proceedings, then the affected party or parties may file a petition seeking the appropriate relief, or the Board can initiate further proceedings on its own motion. In either event, the Board should assure proper notice of the specific actions that are being considered. See, In re Provision of Basic Generation Service for the Period Beginning June 1, 2008, 205 N.J. 339 (2011).

B. General Considerations

At this preliminary stage, Rate Counsel wishes to provide general considerations to guide Staff as it evaluates the materials to be provided by the other stakeholders involved in this proceeding. Rate Counsel reserves its rights to submit further comments after review of the factual information to be submitted by other stakeholders.

First, it is important to be mindful of the history of New Jersey's competitive natural gas supply market. The current system was the result of lengthy arms-length negotiations among stakeholders including the GDCs, TPSs and Rate Counsel, and has been in place since 2003. See Generic BGSS Order at 1-2. Under this structure, the GDCs' and TPSs' provision of gas supply is governed by two separate mechanisms. The GDCs, as regulated utilities, manage their gas capacity and supply portfolios subject to oversight by the Board. The reasonableness and cost-effectiveness of the GDCs' gas capacity and supply procurement activities are subject to review annually as part of their BGSS cost recovery filings. The TPSs are subject to only limited regulation by the Board, and thus are not required to share this gas capacity and supply procurement activities with the Board. Instead, the GDCs' tariffs provide the TPSs with incentives to meet their obligations to deliver gas to the GDCs. [1]

At this time, there is no record before the Board to suggest that the current gas supply market structure is inadequate to assure sufficient supplies of natural gas to New Jersey

[1] See, for example, the Credit Requirements and Imbalance Cash-Out Procedures contained in the Third Party Supplier Requirements section of PSE&G's Tariff for Gas Service. These provisions appear on Original Sheets 116 through 122 of the PSE&G Tariff.

consumers.[2] While the Board has found that a lack of sufficient capacity may have been "implicit" in RESA's proposal to restructure the market, this has not been shown by any evidence in the record. RESA has not claimed that the State's TPSs lack sufficient resources to meet their delivery obligations. RESA's concern appears to be the cost, rather than the availability, of capacity. RESA Amended Petition, par. 9 (March 5, 2018).

The cost issues apparently faced by RESA are not a reason to consider modifying the current market structure. The Electric Discount and Energy Competition Act of 1999 authorized the Board to allow competition in the retail gas supply market, and required the GDCs to unbundle their rate schedules to facilitate competition. N.J.S.A. 48:3-50(c)(1); N.J.S.A. 48:3-58(a). It did not, however, require the State's GDCs or their customers to make a market for TPSs. The GDCs are required to use their resources in a competitively neutral manner, but neither they nor their customers are required to contribute resources to create competitive "headroom" for competitive suppliers. N.J.S.A. 48:3-58.

Rate Counsel also respectfully urges the Board and its Staff to proceed with caution with regard to any proposed changes in the process for overseeing the GDS's procurement and management of gas capacity and supply resources. At the October 1, 2019 stakeholder meeting in this matter, representatives of three of the GDCs, ETG, SJG and NJNG, asserted that additions of new long-term pipeline capacity resources would be necessary in the near future to meet the needs of their BGSS customers. Tr. at 16-17, 30-31 (Oct.1, 2019). If the GDCs' intent is to seek

[2] At the stakeholder meeting, NJNG and Levitan discussed a report commissioned by NJNG from Levitan. As noted in comments that will be submitted by EDF, there are significant questions regarding whether that report accurately considers capacity available to the New Jersey GDCs or TPSs. There is also a question as to whether the Board may consider that report or what weight it may be afforded due to the conflict or appearance of a conflict that results from Levitan's simultaneous work for NJNG and the Board. These issues can be addressed in evidentiary hearings.

the Board's endorsement for long-term commitments for pipeline transportation and storage capacity, on the proposed PennEast pipeline or other projects,[3] the Board should reject this request. The primary responsibility for providing a reliable supply of gas at a reasonable cost lies with the GDCs' managements. The Board's proper role is oversight, not joint responsibility for the GDCs' management decisions.

In this regard, Rate Counsel notes that the GDCs do not contract for upstream pipeline capacity to meet all of their gas requirements. Other resources used by the GDCs include on-system peaking facilities (LNG and propane), and short-term contracts for gas delivered at the GDC city gate. Contracts for delivered supplies are typically arranged annually, through a

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[3] PennEast is a joint venture owned by Spectra Energy Partners, LP together with subsidiaries of New Jersey Resources ("NJR"), South Jersey Industries ("SJI"), UGI Energy Services, LLC and Public Service Energy Group ("PSEG"). Of the twelve shippers that have subscribed to Project capacity, five of them are affiliates of companies that collectively own PennEast. These include three New Jersey GDCs that have contracted with Penn East for firm capacity. ETG and SJG, both subsidiaries of SJI, have contracted for, respectively, 100,000 Dth/day and 105,000 Dth/day of firm capacity, and NJNG, a subsidiary of NJR, has contracted for 180,000 Dth/day. In addition, PSEG Power, a subsidiary of PSEG, has contracted for 125,000 Dth/day.

On October 4, 2019, PennEast filed a "Petition for Declaratory Order and Request for Expedited Action" with the Federal Energy Regulatory Commission seeking expedited treatment for authorization to condemn property in which the state holds an interest. In its Petition, PennEast seeks a ruling by November 1, 2019, and cited this proceeding to support its request. NJ Rate Counsel opposed the Petition by filing a Protest on October 18, 2019 asserting that the Petition should be rejected for procedural and substantive reasons, including *res judicata* as the Third Circuit already decided the issue adversely to PennEast. There the Court held that the Natural Gas Act had not abrogated states' sovereign immunity nor delegated to Certificate holders of public convenience and necessity the Federal government's ability to overcome that immunity. In re: PennEast Pipeline Company, L.L.C., No. 19-1191, slip op. at 33 (3d Cir. Sept. 10, 2019). As a result of the Third Circuit decision, the D.C. Circuit Court of Appeals proceeding, which included the issue of need for the pipeline, has been held in abeyance. Delaware Riverkeeper Network and Maya van Rossum v. Federal Energy Regulatory Commission, No. 18-1128, (Order dated October 1, 2019).

competitive procurement process, to supplement firm gas supplies for the coming winter.[4] In addition, the GDCs all are pursuing demand-side measures through their energy efficiency programs. The GDCs' annual BGSS filings already provide a vehicle for the Board to review the reasonableness of the GDCs' gas capacity and supply portfolios, including pipeline capacity and other resources. The Board and its Staff should reject any attempts to use this process to prioritize pipeline capacity additions over other resources that may be available to provide reliable gas supplies to their customers.

[4] See, for example, In the Matter of the Petition of Elizabethtown Gas Company to Review its Periodic Basic Gas Supply Service Rate, BPU Dkt No. GR19050678, Direct Testimony of Leonard J. Willey, pp. 20-21 ("The Company has identified the need for winter peaking supply above the level of capacity currently under contract and plans to secure these contracts through negotiations with vendors who respond to request for proposal solicitations made by the Company.... The short-term nature of these contracts allows the Company to adjust its supply portfolio from year to year as its loads and load profiles change.")

CONCLUSION

For the reasons stated above, Rate Counsel recommends that: (1) changes to the current retail gas supply market structure should be considered only after further proceedings that provide due process to affected stakeholders; (2) further proceedings should be recommended only based on evidence showing that the current market structure is inadequate, and (3) this proceedings should not be used as a vehicle to prioritize pipeline capacity additions outside of the existing BGSS review process.

Rate Counsel reserves its right to file further comments based on its review of the factual information to be submitted by other stakeholders.

Respectfully submitted,

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