

January 10, 2001

**VIA HAND DELIVERY**

Frances Smith, Secretary  
Board of Public Utilities  
Two Gateway Center  
Newark, New Jersey 07102

Re: I/M/O the Electric Discount and Energy Competition Act of 1999 -  
Customer Account Services - New Jersey Natural Gas Co., Atlantic  
City Electric Company d/b/a Conectiv Power Delivery; Jersey  
Central Power and Light Co. d/b/a GPU Energy and Public Service  
Electric & Gas Co.  
BPU Docket No. EX99090676

Dear Secretary Smith:

Enclosed for filing, in letter brief form, please find an original and eleven copies of the Division of the Ratepayer Advocate's **Motion for Reconsideration of Certain Issues** in the Board of Public Utilities' (Board or BPU) Orders dated December 6, 2000 (December 6 Order) and December 22, 2000 (December 22 Order) (collectively "Orders") in the above referenced matter. Please date-stamp the extra copy as "filed" and return it to the courier.

Thank you for your assistance in this matter.

**INTRODUCTION**

The Division of the Ratepayer Advocate (Ratepayer Advocate) seeks reconsideration of certain limited issues addressed in the Board's December Orders referenced above. It must initially be noted that pursuant to N.J.A.C. 14:1-8.6, parties seeking reconsideration of any final decision rendered by the Board must file such a motion within 15 days of the date of the order at

issue. However, although the New Jersey Natural Gas Order is dated December 6, 2000, the Ratepayer Advocate “unofficially” received a faxed copy on December 19, 2000 and has yet to receive a copy from the Secretary’s office of the Board. With respect to the December 22, 2000 Order, the Ratepayer Advocate did not receive a copy of the signed Order until January 2, 2001. Therefore, this Motion is timely.

The Ratepayer Advocate specifically requests reconsideration of the following issues:

(1) the Board’s decision to modify the Stipulations by deferring consideration of the customer response card until such time as the Board undertakes the rulemaking proceeding on Consumer Protection and Anti-Slamming Standards, rather than approving that integral provision of the Stipulations (*see* Orders, p.6); and

(2) the Board’s modification of the Stipulations that would authorize the President of the Board to act on its behalf to, “when possible”, unilaterally rule on contested technical implementation issues in connection with the Technical Implementation Task Force (*see* Dec.6 Order, p. 6; Dec. 22 Order p.7).

## ARGUMENT

### **1. THE BOARD SHOULD APPROVE THE PROVISION OF THE STIPULATIONS REGARDING THE CUSTOMER DATA RESPONSE CARD BECAUSE ANY OTHER ACTION IS A MODIFICATION OF THE STIPULATIONS THAT IS CONTRARY TO LAW AND PUBLIC POLICY**

The Ratepayer Advocate respectfully requests that the Board reconsider and rescind the portions of the December 6 and December 22 Orders that modify the Stipulations with respect to the one-time bill insert of a generic customer response card. The Stipulation, relative to the December 22 Order, specifies the following with respect to the customer response card:

The undersigned parties agree to collaborate in good faith on developing upgraded access to pre-enrollment and post-enrollment meter data in the interest of facilitating the intent and terms of this Settlement. In this regard, the undersigned parties agree that a one-time generic response card, as described in Attachment F, will be provided in the regularly scheduled customer bill to assist licensed TPSs, registered aggregators, and government entities interested in pursuing aggregation in locating and marketing to customers interested in soliciting competitive offers, subject to the approval of the Board.

Stipulation, para. 13, p. 9. The New Jersey Gas Company Stipulation relative to the December 6 Order contains a substantially similar provision regarding an “interested customer response card”.<sup>1</sup>

*See* New Jersey Gas Co. Stipulation, para. E, p. 10 (attached to December 6, 2000 Order). The Ratepayer Advocate is a signatory to both relevant Stipulations and is also one of the parties that negotiated in good faith for this provision to aid customers and the competitive market in New Jersey.

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<sup>1</sup> The Ratepayer Advocate notes that the customer response card provision in the Stipulation relative to the December 22 Order must receive Board approval prior to printing, however the Stipulation relative to the December 6 Order contains no such language. Thus at least with respect to electric customers, the Board is free to enhance the notice and cautionary statements made to the customer on the proposed card prior to approving it.

The Board unilaterally modified the stipulated customer response card provision in both Orders, while purporting to “approve” said Stipulations. The December 22, 2000 Order states in relevant part:

In addition, paragraph 13 and Attachment F of the Stipulation indicate that Conectiv, GPU and PSE&G will provide a customer response card as a one-time bill insert to customers to assist TPSs and aggregators in locating and marketing to interested customers. The customer response card would be completed by those customers interested in receiving marketing information.

While the Board is interested in facilitating aggregation, it is currently in the process of proposing new Consumer Protection and Anti-Slamming Standards for comment and adoption. The Board believes that this proposal to obtain customer sensitive information should be considered in the context of the Consumer Protection and Anti-Slamming Standards rulemaking. Therefore, the Board DIRECTS that the issues and proposals in paragraph 13 and Attachment F of the Stipulation be deferred and considered in the context of the forthcoming Consumer Protection and Anti-Slamming Standards rulemaking.

December 22 Order, p.6. The December 6 Order contains essentially identical language with respect to the interested customer response card. Dec.6 Order, p. 6.

The Board refers to a concern regarding customer “sensitive” information. The Ratepayer Advocate respectfully reminds the Board that the customer would be **voluntarily** returning such a card upon receiving it as a bill insert from the utility. In any event, the Board does not have the authority to modify a stipulation in contravention of the expressed terms of the agreement, over the objection of a party. *Dept. Of the Public Advocate v. New Jersey Board of Public Utilities, et. al.*, 206 N.J. Super 523, 531 (App. Div. 1985).

The Ratepayer Advocate is one of the signatories to the Stipulation that negotiated and made certain concessions to obtain the provision for the customer response card. The Board has made a significant modification to the Stipulation by indefinitely deferring “**consideration**” of the

customer response card to the rulemaking proceeding on Consumer Protection and Anti-Slamming Standards. Those standards were just re-adopted without modification at the Board's January 5, 2001 agenda meeting and there was no discussion as to when revised standards would be approved for publication -- thus, there is no future date certain for the rulemaking proceeding that the Board defers to. Further, pursuant to the Orders, the Board will merely **consider** the issue of the customer response card-- approval of the printing and distribution of such a card has not been guaranteed. Therefore, although deferment of consideration of a customer response card is an unacceptable modification of the Stipulations, the Board's actions could effectively completely eliminate the customer response card as a term of the Stipulations. The Stipulations are unequivocally to be taken in their entirety or not at all.

With respect to modifications by the Board, the Stipulation relative to the December 22 Order contains the following explicit language:

The undersigned parties agree that this Settlement contains mutually balancing and interdependent provisions **and is intended to be accepted and approved in its entirety**. In the event any particular aspect of this Settlement is not accepted and approved by the Board, or is subsequently overturned by any future decision or in any court this Settlement shall be null and void and the undersigned parties shall be placed in the same positions that they would have been in had this Settlement not been executed.

Stipulation, para. 18, p. 12 (emphasis added).<sup>2</sup>

The Board and the New Jersey Courts have "acknowledged the strong public policy in this jurisdiction favoring settlement of litigation and will strain to give effect to the terms of a settlement wherever possible." *In re Public Service*, 304 N.J. Super 247, 259 (quoting the BPU

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<sup>2</sup> See paragraph J of the Stipulation relative to the December 6 Order, concerning New Jersey Natural Gas Company for substantively the same language regarding the entirety of the Stipulation.

Order under appeal) (App. Div. 1997); see *Dept. Of the Public Advocate v. New Jersey Board of Public Utilities*, 206 N.J. Super 523, 528 (App. Div. 1985). The Court has also clearly stated that the Board of Public Utilities is prohibited from modifying a provision of a settlement against the objection of a party.

In *Dept. Of Public Advocate*, the New Jersey Appellate Division had the following response to a previous matter in which the Board attempted to modify, yet implement a stipulation:

In our view the beginning point of this analysis is the strong public policy in this state in favor of settlements. (citation omitted.) The point of this policy is not the salutary effect of settlements on our overtaxed judicial and administrative calendars (although this is an undeniable benefit) but the notion that the parties to a dispute are in the best position to determine how to resolve a contested matter in a way which is least disadvantageous to everyone. In recognition of this principle, courts will strain to give effect to the terms of a settlement wherever possible. **It follows that any action which would have the effect of vitiating the provisions of a particular settlement agreement and the concomitant effect of undermining public confidence in the settlement process in general, should not be countenanced. That is what we have here.** *Dept. Of the Public Advocate v. New Jersey Board of Public Utilities*, 206 N.J. Super 523, 528 (App. Div. 1985) (emphasis supplied).

The Court then went on to hold that the modification was improper and could not stand. *Id.*, at 532. The Board has clearly violated this holding and policy in the instant matter. For the above reasons, the Board must reconsider and rescind this modification of the Stipulations.

**2. THE BOARD SHOULD RESCIND ITS MODIFICATION OF THE STIPULATION THAT AUTHORIZES THE PRESIDENT OF THE BOARD TO ACT ON ITS BEHALF AND RULE ON CONTESTED TECHNICAL ISSUES IN CONNECTION WITH THE TECHNICAL IMPLEMENTATION TASK FORCE**

Pursuant to the Stipulations, the parties agreed to establish a Technical Implementation Task Force.<sup>3</sup> The language of the Stipulations specifies that the Technical Implementation Task Force will be chaired by a Board Commissioner, or his designee and will include a representative from each utility, union representatives, Board Staff, the Ratepayer Advocate, marketers, trade organizations and any other party that wishes to participate. As to the function of the Task Force, the Stipulation contains the following language:

It is the intention of the undersigned parties to utilize this Task Force to identify and resolve Competitive Customer Account implementation issues through **negotiation** by this technically competent group.

Stipulations, para. 15 and E (emphasis supplied).

The Board Orders found that the creation of the Task Force is appropriate. Dec. 22 Order, p. 7; Dec. 6 Order p.6. However, the Board then expanded and modified the Stipulation by authorizing the President of the Board to act on its behalf, “to review and, when possible, rule on contested technical implementation issues.” *Id.* The Orders further include an expedited, summary memo review process for the other two Commissioners, under which, if there are no objections within one day, the ruling by the President stands. *Id.*

The language of the Stipulation is clear, the Task Force is to be **chaired** by a Commissioner and is to handle disputes **through a negotiation process**. The Stipulation authorizes no special review process on the part of the Board or the President of the Board. The

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<sup>3</sup> Both stipulations contain identical language with respect to this issue. See Stipulation attached to Dec. 6 Order, para. C and Stipulation attached to December 22 Order, para. 15.

Board, by authorizing the President of the Board to make unilateral rulings, has made a modification which is contrary to the Stipulations themselves, law and public policy as discussed in section 1 of this Motion, above. Moreover, such “single Commissioner” ruling power has not been authorized by the Legislature and is in violation of the statutes empowering the Board and the Administrative Procedures Act.

The New Jersey statute pertaining to orders of the Board of Public Utilities is clear: “[a] **majority vote of the board shall be necessary to the making of an order.**” N.J.S.A. 48:2-40 (emphasis supplied). Further, pursuant to the Administrative Procedures Act, the final decision in a contested case must be rendered by the “head of the agency”. N.J.S.A. 52:14B-10(c). The “head of the agency means and includes the individual or **group of individuals constituting the highest authority** within any agency authorized or required by law to render an adjudication in a contested case.” N.J.S.A. 52:14B-2(d) (emphasis supplied). The Order contains the following language: “the Board [hereby authorizes] the President of the Board to act on its behalf, to review and, when possible, **rule on contested technical implementation issues.**” Order, p.7. The delegation of authority to the President of the Board to render a unilateral decision in a contested matter is clearly contrary to the statutes requiring a majority vote of the Board and cannot stand.



**CONCLUSION**

For all of the foregoing reasons, the Ratepayer Advocate respectfully requests that the Board reconsider certain aspects of its December 6, 2000 and December 22, 2000 Orders and (1) approve and adopt the terms of the Stipulations with respect to the customer response card; and (2) rescind the authority given to the President of the Board to rule on contested technical implementation issues as chair of the Technical Implementation Task Force.

Respectfully Submitted,

BLOSSOM A. PERETZ, ESQ.  
RATEPAYER ADVOCATE

By: \_\_\_\_\_  
Susan E. McClure, Esq.  
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c: Service List