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BOARD OF PUBLIC UTILITIES
MAIL ROOM

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STEFANIE A. BRAND
Director

March 2, 2015

Via E-Mail and Regular Mail

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Mayor Phil Greiner
Borough of Flemington
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Members of the Township Council
Township of Raritan
One Municipal Drive
Raritan, NJ 08822-1799

Members of the Borough Council
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**RE: I/M/O Raritan-Flemington Energy Procurement Cooperative
Community Aggregation Program
Township of Raritan and Borough of Flemington
BPU Dkt. No. EO15020214**

Hon. Mayors and Township and Borough Council Members:

Pursuant to documents provided by Gabel Associates ("Energy Agent"), Energy Agent for the Township of Raritan and the Borough of Flemington (collectively, "the Municipalities"), we understand that the Municipalities intend to organize an Option 2 government energy aggregation program pursuant to N.J.A.C. 14:4-6.1 et seq., the "Raritan-Flemington Energy Procurement Cooperative Community Aggregation" ("RFEPC CEA") Program. According to the Energy Agent, the Municipalities will bundle the load of qualifying residential accounts located within their municipal boundaries and solicit bids for electric generation service from duly licensed electric power suppliers through a Request for Proposal process.¹ The Township of Raritan will serve as the Lead Agency for the RFEPC CEA Program.

¹ The RFEPC CEA Program will be offered to all residents of the Municipalities who do not currently have a TPS contract. (RFP, p. 3 & p. 5 fn.2)

C. Veatch
Case Mgmt
Legal

Pursuant to N.J.S.A. 48:3-94b(1):

Thirty days prior to the commencement of public bidding the governing body shall transmit the bid notice and all bidding documents to the board and the Division of the Ratepayer Advocate² for review. The board and the Division of the Ratepayer Advocate shall have 15 days to review the bid notice and bidding documents and provide comments to the governing body, which may accept or reject the comments.

On February 13, 2015, in accordance with N.J.S.A. 48:3-94b(1) and on behalf of the Municipalities' governing bodies, the Energy Agent filed with Rate Counsel and the Board of Public Utilities ("BPU") two draft bidding documents for the RFEPC CEA Program: the Request for Proposals ("RFP") and a Master Performance Agreement ("MPA") between the selected third-party supplier ("TPS") and the Municipalities on behalf of the participating residential customers (both documents collectively, the "February 13 Filing"). Pursuant to State statute, Rate Counsel is required to review and comment on the draft bidding documents of an Option 2 energy government aggregation program for the governing body's consideration. The following are Rate Counsel's comments on the February 13 Filing.

General Overview

Rate Counsel represents and protects the interests of all utility customers, including residential, small business, and small and large industrial customers, schools, libraries, and other institutions in our communities. Rate Counsel is a party in cases where New Jersey utilities seek changes in their rates or services. Rate Counsel also gives consumers a voice in setting energy, water, and telecommunications policy that will affect the rendering of utility services well into the future.

It is clear that the February 13 Filing consists of draft documents with material terms such as price and bidder information missing and some minor typographical and cross-referencing errors. Therefore Rate Counsel's comments provided herein will touch upon broad issues and concepts, and will leave the task of creating a workable and consistent group of documents to the Municipalities and their attorney(s). If the terms of the RFP or the MPA are changed in any way after Rate Counsel's submission of comments, such changes should be reviewed by a municipal attorney retained by the Municipalities.³ Rate Counsel and the Board also will review, when submitted, the draft public notice to prospective customers of the RFEPC CEA Program, see N.J.A.C. 14:4-6.6(s), and the

² The Division of Rate Counsel ("Rate Counsel") is a New Jersey State agency that is a successor to the Division of Ratepayer Advocate.

³ Rate Counsel concurs with the provisions in the February 13 Filing that the Lead Agency will answer any questions and resolve any changes to the bidding documents in a Notice of Addendum to all bidders before the deadline for bid submission. (RFP, pp. 6, 10 & 17)

TPS Contract Summary, as per the Board's Sept. 30, 2014 Order in I/M/O Third Party Suppliers N.J.A.C. 14:4 et seq., the Board's Review of Consumer Protection Provisions of its Rules Concerning Third Party Suppliers, Docket No. EX14060579.

Bid Price

The electric distribution utility serving residents within the Municipalities' boundaries is Jersey Central Power and Light Company ("JCP&L"). Every year, JCP&L participates in a statewide auction for Basic Generation Service ("BGS") in order to procure the electric commodity needed to serve customers who do not shop for electric generation service.⁴ The BGS price offered by JCP&L is therefore the price to compare in any type of offer for electric generation service solicited by government aggregators. Rate Counsel strongly urges all municipalities to include in any bidding documents⁵ for electric generation service explicit language that requires the bidding suppliers to offer prices that are lower than the utility's BGS tariff rate applicable to each customer class throughout the term of their aggregation program. This will ensure that each customer participating in the aggregation program is guaranteed cost savings due to a lower tariff rate during the entire supply contract period.

The RFEPC CEA Program RFP seeks bids on an "All-In, Fixed Price" basis, and defines the wide scope of costs included therein. (RFP, pp.11-12) That RFP also requires the winning bidder to offer a rate for Participating Residential Accounts that is "reasonably forecast and estimated by the Municipalities to provide, during the term of the MPA, sufficient savings to the participants over the term of the contract relative to the cost that would be incurred by RFCEA participants if they were to remain on the applicable [BGS] tariff over the contract term." (RFP, p. 2) The MPA states that the price shall be the "fixed" price per kWh as set forth in the Award Letter, "for the term of Electric Generation Service," except as otherwise provided for in the MPA. (MPA, Art. 2.2.2) A fixed price, absent more, may not remain below the BGS price throughout the contract term if, for example, the BGS price should fall during that time. Thus, under such circumstance RFEPC CEA participants may not experience savings over the term of the contract relative to the cost they would have incurred if they had remained on BGS.

The Selection and Award Process, Step 4 of Section H, includes the option that, in the event that an applicable BGS-FP⁶ tariff price drops below the Contract Price during the term of the contract, the Municipalities and the TPS may renegotiate the contract price or

⁴ See N.J.A.C. 14:4-1.2.

⁵ Any change proposed by Rate Counsel in this comment letter should be considered a global change that should be made to all relevant government energy aggregation documents including the RFP, the MPA and any other agreement entered into to further the RFEPC CEA Program.

⁶ The Board has renamed the "BGS-FP" tariff class as the BGS "Residential and Small Commercial Pricing" ("RSCP") class. See I/M/O the Provision of Basic Generation Service for the Period Beginning June 1, 2015, Docket No. ER14040370 (Nov. 24, 2014 Order) at pp. 11-12.

terminate the agreement. (RFP, p.13) The referenced Section I of the RFP, however, does not further describe that process.

The RFP also indicates that, if an applicable BGS-RSCP tariff price drops below the contract price during the term of the contract, the TPS will so advise RFEPC CEA participants and offer them the opportunity to opt out of the program. (RFP, p.14, "Post-Award Change in BGS Tariff Price")⁷ It is unclear how this notification and opt-out provision will function in the context of the Municipalities' rights to renegotiate the contract price or terminate the contract if the BGS-RSCP tariff price falls below the contract price.

Rate Counsel concurs with the concept proposed in Step 4 of Section H of the RFP, since it would require the bid price to remain below BGS throughout the term of the program. Accordingly, Rate Counsel suggests that the Municipalities amend the RFP to solicit bids that would ensure energy cost savings to participants throughout the entire term of the RFEPC CEA Program and to clarify the process to maintain the contract price below BGS and how the Municipalities' and participants' rights interact.

BGS Tariff Price

The RFP, in section H, "Selection and Award Process," defines the BGS Tariff Price for the purpose of a benchmark for comparing the bids from qualified bidders in Step 4:

Residential Accounts:

The BGS Tariff Price equals the weighted average BGS-FP Tariff Price for the contract period for each residential tariff class (RS, RT and RGT), which is calculated by the Municipalities (in consultation with its energy agent) by applying individual price components of [BGS] for the applicable tariff (inclusive of energy, generation capacity, ancillary services and related cost as well as Transmission Charges and all applicable Transmission surcharges) to the applicable billing determinants for each tariff class as broken down by season, energy block and time-of-use for each applicable tariff class, where applicable and consistent with the breakdown of [BGS] charges, to develop an average annual BGS-FP tariff price for each residential rate class. For purposes of bid price evaluation, the Municipalities (in consultation with the energy agent) will also consider the impact of estimated changes to BGS-FP tariff prices during the contract term. (RFP, p. 13.)

The RFP explains the process it will use to estimate and calculate adjustments to the BGS-RSCP benchmark it will use for bid evaluation:

⁷ The requirement in that paragraph that "RFCEA customers be retained" is unclear.

BGS-FP tariff prices are adjusted on June 1st of each year based upon the EDC's revised BGS portfolio cost, and the estimated changes in the BGS portfolio cost during the contract term will be factored into the calculation of the BGS-FP tariff price benchmark against which the bid price(s) will be compared. The estimated changes in the BGS portfolio cost will be calculated by taking into account the cost of expiring BGS supply contracts, and taking into account the estimated cost of new BGS supply contracts based upon energy market prices, BGS load shape, known capacity prices, transmission tariff prices, ancillary service costs, RPS compliance market costs and applicable risk premiums and margins. (RFP, pp. 13-14, fn. 8.)

Step 2 of the RFP for the Selection and Award Process states that qualified bidders must "submit a bid price for the Participating Residential Accounts bid group that is below the applicable BGS-FP tariff rate." (RFP, p. 12.) The RFP clarifies this sentence by stating that

The bid price must be calculated by the Lead Agency to be below the weighted average BGS tariff price for the entire Bid Group, and must also be below the average BGS-FP tariff price for each residential rate class within the bid group. (RFP, pp. 12-13, fn. 7.)

Rate Counsel has two concerns with the above descriptions of the proposed use of the BGS tariff price as a benchmark to compare bids to serve residential customers. First, the RFEPC CEA Program should ensure that prices remain below the applicable BGS-RSCP tariff rate for each rate class, at all times throughout the contract period. See N.J.A.C. 14:4-6.9(d) & -6.9(e)(1) (describing calculation of benchmark price for each rate class). Using only a weighted average price could result in rates for some RFEPC CEA Program participants that, at some times during the contract period, are higher than the applicable BGS-RSCP tariff rate for their rate class. Rate Counsel recommends amending the February 13 Filing to clarify that the bid prices must remain below the applicable BGS-RSCP tariff rate at all times throughout the contract period.

Second, the RFP states that bids are to be provided for six different contract terms: 11, 17 or 23 months, beginning with the July 2015 meter read date and terminating with the June 2016, December 2016 or June 2017 meter read dates, respectively, or 9, 15 or 21 months, beginning with the September 2015 meter read date and terminating with the June 2016, December 2016 or June 2017 meter read dates, respectively, for each account (RFP, pp. 1, 2, 4 & 11; MPA Art. 2.4). "The Municipalities will select the term, if any, that is most advantageous to the Township and participating customers." (RFP, pp. 1-2.) For purposes of bid price evaluation, the Municipalities will consider among other factors the impact of estimated changes to BGS-RSCP tariff prices during the contract term. (RFP, p. 13, "Residential Accounts"). While the RFP states how the Municipalities will develop its estimate of changes to BGS-RSCP tariff prices during each contract term, due

to the structure of the auction system, BGS rates for the period after June 1, 2016 are not yet known. For this reason Rate Counsel recommends amending the February 13 Filing to clarify that the bid price must remain below the applicable BGS-RSCP tariff rate at all times throughout the contract period.

Refreshed Customer List Price

The RFP's Section I, "Execution of MPA and Enrollment of Participating Accounts," discusses refreshing the list of eligible residential customers who did not participate in the initial phase of the RFEPC CEA Program. (RFP, p. 16, "Supplemental Opt-Out Process New Participants") The refreshed list will contain names of residential customers who, after the initial enrollment period: moved into a new home in the Township, moved into a home with a meter that the previous owner or resident had already enrolled in the RFEPC CEA Program; or dropped their TPS and returned to BGS (and therefore are now eligible to participate in the RFEPC CEA Program).⁸ (*Id.*)

The RFP states that "customers on these supplemental lists shall be included in supplemental 'opt-out' rounds at the same contract price." (RFP, p. 16) Similarly, the MPA states that the price charged to each customer who enrolls in the RFEPC CEA Program after the initial opt-out period will be the fixed price as per the Award Letter, "which shall be below the BGS-FP price." (MPA, Art. 2.2.3) The MPA also states that a refreshed opt-out process must enroll new accounts in the RFEPC CEA Program "at the Contract Price for the remaining term of this Agreement." (MPA, Art. 6.3.7) Rate Counsel concurs with this approach.

Administrative Fee and Energy Agent Fee

The Phase 2 - Submission of Bid Prices section of the RFP addresses how the Administrative Fee and Energy Agent Fee will be recovered by the Lead Agency and the Energy Agent:

Bid prices must include the cost to the supplier of the Administrative Fee and the Energy Agent Fee. The Administrative Fees consists of reimbursable out-of-pocket RFEPC CEA Program expenses incurred by the Lead Agency, and recoverable pursuant to N.J.A.C. 14:4-6.8(d), in the amount of \$____, applicable to the Participating Residential Account bid group, payable to the Lead Agency in a lump-sum within 30 days of the execution of the respective MPAs in accordance with the terms of the MPA. The Energy Agent Fee of \$0.00069/kwh will be payable directly to Gabel Associates on a monthly or quarterly basis in accordance with the

⁸ The refreshed list will not include those who opted out of the Program during the initial opt out period. (RFP, p.16)

terms of an agent agreement to be executed between the winning supplier and Gabel Associates. (RFP, p .7, footnotes omitted.)⁹

N.J.A.C. 14:4-6.8(e) states that the bid specification must state the items for which reimbursement shall be required, an estimate of the costs and the maximum amount that may be reimbursed. The Energy Agent Fee is a charge per kWh, and the RFP does not state the maximum amount that Gabel Associates may be paid. Rate Counsel suggests instituting some type of cap on the maximum amount of the Energy Agent Fee. In the alternative, Rate Counsel suggests that public notice of the RFEPC CEA Program include an estimate of the amount of the Energy Agent Fee for the Program over some time period, e.g. monthly; quarterly; or over each contract term. Indeed, a published press opinion has expressed concern over the lack of transparency in energy agent fees in New Jersey government energy aggregation programs.¹⁰

Additional Equipment

Article 5.1 of the MPA, "Additional Equipment," states:

If additional metering or monitoring equipment is required by the EDC, such metering or monitoring equipment shall be installed at the EDC's sole expense, as applicable, and each Party shall cooperate as necessary with installation of additional metering or monitoring equipment. In the event, however, that the EDC imposes such additional metering or monitoring equipment on a RFEPC CEA Participant(s) as a condition of receiving Electric Generation Service from Supplier, the RFEPC CEA Participant shall have the option to be removed from the RFEPC CEA program without penalty or fees.

Rate Counsel considers it inappropriate to indirectly charge other ratepayers for the cost of an EDC's installing any equipment necessary to enable participation in the RFEPC CEA Program. If equipment is required to implement the program, the cost of that equipment should be borne by the program participants. If JCP&L will charge for equipment necessary to participate in the RFEPC CEA Program, TPS bidders should include that charge in their bid price(s).

Board rules require that prospective residential customers must receive notice that includes "A specific statement of the cost to customers of participation in the program, and any other information necessary to enable customers to compare the program to other alternatives." N.J.A.C. 14:4-6.6(r)(3). If there are costs to the customer associated with

⁹ The Energy Agent Fee will be between one-twentieth and one-tenth of one cent per kWh.

¹⁰ Michael Strugatz, "N.J. power companies' three-card monte," Star-Ledger, Sept. 28, 2013, available at http://blog.nj.com/njv_guest_blog/2013/09/nj_power_companies_three-card.html (viewed 2/18/15).

installing equipment to participate in the RFEPC CEA Program, then those costs must be made known in the required customer “opt-out” notice as per N.J.A.C. 14:4-6.6(q).

The February 13 Filing should be modified accordingly, to inform bidders that they must include in their bids any indirect equipment charges and, if there is any direct equipment charge to the customer to participate in the RFEPC CEA Program, those charges must be clearly disclosed in advance of their inclusion in the Program. Prospective customers may then include those costs in their decision whether to participate in the Program.

Budget Billing

The RFP’s Section D, “Qualification Documents,” requires prospective bidders to document their capabilities to perform requested services including “confirmation that supplier will offer budget billing (equal payment plan) for RFEPC CEA participants and, describe how supplier would establish monthly budget payment amounts.” (RFP, p.9, item h.v.f.) Section F of the RFP, “Billing,” states that the Supplier must offer budget billing only to “residential customers who currently receive [BGS] from JCP&L and that have a budget billing plan with JCP&L.” (RFP, p. 10; see also RFP, p.4) (A TPS may, but is not required to, provide budget billing to all customers participating in the RFEPC CEA Program. (RFP, p.10)) Similarly, Section H of the RFP, “Selection and Award Process,” Step 4, part 3, states that bidders must offer budget billing to residents “that currently receive budget billing from JCP&L.” (RFP, p. 13.) Moreover, currently, some TPSs do not offer budget billing and it is unclear whether JCP&L offers TPS budget billing.

Rate Counsel recommends that, if JCP&L offers TPS budget billing, the RFEPC CEA Program should offer budget billing to all of its participants. This service is available to JCP&L customers who remain on BGS and, if not available to all participants in the RFEPC CEA Program, ratepayers should know of its unavailability to compare the RFEPC CEA Program to BGS. Rate Counsel therefore also recommends that, if budget billing is not offered to all participants in the RFEPC CEA Program, the notice sent to all JCP&L residential customers in the Municipalities, consistent with N.J.A.C. 14:4-6.6(r)(3), should advise of the scope of availability of fixed monthly bills.

Selection and Award Process

Rate Counsel concurs with the RFP requirement that the Lead Agency will select a TPS that will be “most advantageous” to customers participating in the RFEPC CEA Program. (See RFP, pp. 1, 2, 12 & 13.)

Section H of the RFP describes the steps in the process, and Step 4 of Section H lists the factors that the Lead Agency will consider, to determine which bidder provides the “most overall benefit” to participating residential customers. The TPS evaluation factors are:

1) the qualification ranking in Step 1; 2) the total savings for Participating Residential Accounts determined in Step 2; 3) confirmation that the supplier(s) being considered are equipped and willing to offer budget billing for the power supply costs to residents that currently receive budget billing from JCP&L; and 4) the additional benefits, if any, offered by suppliers such as the offer to add additional customers during the contract term at the original Bid Price (see Section I), or the offer to accept a contract term that allows the Municipalities to renegotiate the contract price or terminate the agreement in the event that BPU-approved BGS-FP tariff rate drops below the contract price (see Section I). (RFP, p.13)

The RFP does not state, though, the weight that will be given to each factor in determining which bid offers the most overall benefit. For example, the RFP does not explain how the Lead Agency will weigh competing bids for the six different contract terms with prices that may change with the length of the contract. Some further guidance may be helpful to bidders in this regard.

This paragraph also seems to conflict with other provisions of the February 13 Filing that require the TPS to enroll new customers, during the supplemental opt-out process, at the same contract price and terms and conditions as those who enroll during the initial opt-out process. (See e.g. RFP, p. 16; MPA, Arts. 2.2.3, 6.3.7) Rate Counsel recommends clarifying in the February 13 Filing whether the selected TPS must enroll new customers through the supplemental opt-out process at the original price and terms and conditions, or whether this is an option that may provide an “additional benefit” to the RFEP CEA Program. Similarly, Rate Counsel recommends clarifying in the February 13 Filing whether the Program intends to require the selected TPS to renegotiate the contract price or terminate the agreement in the event that the BGS-RSCP tariff rate drops below the contract price and, if so, the process that would entail.

This paragraph from the Selection and Award Process also seems to conflict with the budget billing provisions set forth elsewhere in the February 13 Filing. The RFP for the Program states that the selected Supplier must offer budget billing to residential customers who currently receive BGS from JCP&L and who already have a budget billing plan with JCP&L. (RFP, pp. 4 & 10) This paragraph, however, suggests that the Program will consider, as an additional factor in determining which bidder would provide the “most overall benefit” to participating customers, whether the bidder is “equipped and willing to offer budget billing for the power supply costs to residents that currently receive budget billing from JCP&L.” (RFP, p.13) Rate Counsel recommends clarifying in the February 13 Filing whether offering budget billing to residents who currently receive BGS and budget billing from JCP&L is required of all bidders or whether it is an option that they may or may not offer and that would merit extra consideration in the evaluation of competing bids.

Damages

Article 9.1 of the MPA, “Damages,” states:

The sole remedy for the Government Aggregator and/or RFEPC CEA Participants for a failure of Supplier to provide Electric Generation Service in accordance with this Agreement shall be the liability of Supplier for direct damages, defined as the positive difference, if any, between the cost of Electric Generation Service obtained and received by RFEPC CEA Participants to replace the Electric Generation Service that Supplier failed to provide, and the Contract Price, provided that the cost of such replacement Electric Generation Service shall not exceed the applicable BGS tariff price.

Since BGS tariff rates vary over time, and the period of service of the RFEPC CEA Program may vary from 9 to 23 months, the “applicable” BGS tariff price serving as the measure of damages should be the BGS price that RFEPC CEA Program participants must pay, to replace the Electric Generation Service that the Supplier failed to provide, from the time of the Supplier’s default until the conclusion of the period of service for which the Supplier was to have provided Electric Generation Service. Moreover, should the Supplier’s default leave any RFEPC CEA Program participant unable to obtain BGS service, the measure of the Supplier’s damages should be the actual cost of replacing all RFEPC CEA participants’ full requirements energy supply.¹¹ Rate Counsel recommends amending Article 9.1 of the MPA accordingly.

Confidentiality

Article 12 of the MPA should include an appropriate reference to the Board rules requiring the confidentiality of customer information, consistent with the RFP, at page 4. The MPA currently addresses the confidentiality only of TPS proprietary information.

Assignment

Article 3.4 of the MPA allows the TPS to assign its agreement with the Municipalities only upon the Municipalities’ express written consent. However,

transfer or assignment to an affiliate or subsidiary of Supplier shall be permitted without express written permission of Government Aggregator, provided that: a) Supplier provides a minimum 60

¹¹ It is also unclear whether, as a matter of law, the Municipalities can waive participating customers’ potential damage claims or if the selected TPS can disclaim all warranties. (See MPA, Art. 11.2)

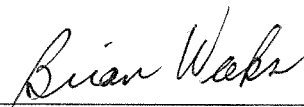
days prior written notice to Government Aggregator of the proposed transfer or assignment; and b) the Supplier certifies in such written notification that transferee or assignee will maintain Supplier's Government Energy Aggregation and Electric Generation Service capabilities. (MPA, Art. 3.4)

Rate Counsel is concerned that certification by the transferor or assignor TPS may not ensure performance by its transferee or assignee. Rate Counsel recommends that the transferee or assignee TPS also should certify to its ability to perform. The Municipalities also should have the right to reasonably satisfy itself as to the transferee's or assignee's ability to perform its obligations under the MPA, and to terminate the agreement if it is not reasonably assured of the transferee's or assignee's ability to satisfactorily perform all obligations to the RFEPC CEA Program.

Please have a municipal attorney review the RFEPC CEA Program's February 13 Filing and Rate Counsel's comments herein for further guidance on this matter.

Respectfully submitted,

STEFANIE A. BRAND
DIRECTOR, DIVISION OF RATE COUNSEL

By: 
Brian Weeks
Deputy Rate Counsel

c: Service List (via e-mail and Regular Mail)

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