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BOARD OF PUBLIC UTILITIES  
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Director

May 6, 2015

**By Hand Delivery**

Ms. Irene Kim Asbury, Secretary  
New Jersey Board of Public Utilities  
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MAY 11 2015

BOARD OF PUBLIC UTILITIES  
SECRETARY'S OFFICE

Re: I/M/O the Verified Petition of the Retail Energy Supply Association for Board-Approved Mechanism for Third-Party Providers to Recover Incremental Costs Incurred as a Result of PJM's Capacity Performance Proposal  
BPU Docket No. EW15010092

Dear Secretary Asbury:

With this Motion, the New Jersey Division of Rate Counsel ("Rate Counsel") respectfully requests that the New Jersey Board of Public Utilities ("BPU" or the "Board") issue an Order dismissing the verified petition filed on January 20, 2015 by the Retail Energy Supply Association ("RESA") requesting that the Board create a funding mechanism to allow third party suppliers ("TPS") to collect from retail customers potential losses that could result from a change in the PJM capacity market rules.

**BACKGROUND**

At the BGS legislative hearing on September 29, 2014, several speakers advised the Board that PJM Interconnection L.L.C. ("PJM") was considering changes to the capacity market

*Case Mgmt*  
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Reliability Pricing Model (“RPM”). The speakers claimed that PJM’s proposed modifications in the RPM could result in significant increases in capacity charges assessed to BGS suppliers.

On October 7, 2014, PJM issued its updated Capacity Performance Proposal to address concerns about capacity shortfalls resulting from extreme weather events. The updated proposal called for the creation of a new capacity product, Capacity Performance (“CP”), that would impose heightened operational requirements on resources that take on the CP obligation.

Due to concerns that the PJM proposal would introduce uncertainty in the BGS procurement process, on October 8, 2014, Board Staff requested that interested parties file supplemental comments on Section XIII of the capacity performance proposal (Transition Auction Mechanism for Delivery Years 2015/16, 2016/17 and 2017/18). Supplemental comments were filed on October 22, 2014 and Reply Supplemental comments on October 29, 2014.

By Order dated November 24, 2014, the Board directed the EDCs to modify the BGS Supplier Master Agreement to allow for recovery of increased capacity prices resulting from the PJM CP proposal. I/M/O The Provision of Basic Generation Serv. For the Period Beginning June 1, 2015, BPU Docket No. ER14040370, Order dated 11/24/14. Also in that Order the Board recognized the third party supplier concerns raised by RESA and invited third party suppliers to make a filing with the Board specifying exactly how the third party suppliers would be financially harmed with proposed options for resolving “what they perceive as financial harms.” Id. at 22.

Accordingly, on January 20, 2015, RESA made the instant filing. RESA claims that its members will be financially harmed “for the same reasons BGS Providers would face financial harm from the Capacity Proposal.” *Petition*, para. 6. RESA claims that the “most fair and

efficient way to ensure equity between TPSs and BGS Providers” is for the Board to impose on ratepayers a “nonbypassable ‘wires’ charge collected by the EDC.” *Id.*<sup>1</sup> In the alternative, RESA suggests a “less equitable” solution would be for the Board to approve recovery of the TPS incremental costs pursuant to the “material change rule.”<sup>2</sup> *Id.* RESA proposes that the TPS could file a certification to support the recovery of the claimed incremental costs.

Two motions to intervene were filed: the Electric Distribution Companies (“EDCs”) on February 13, 2015 and Noble Americas Energy Solutions on March 9, 2015. Rate Counsel propounded discovery on February 27, 2015. Responses to the discovery were provided on March 31, 2015.

### ARGUMENT

#### **I. The Board Does Not Have The Legal Authority To Interfere With Negotiated Contractual Arrangements Between Third Party Suppliers And Their Customers.**

The Board has statutory authority over BGS and the amounts collected from BGS customers. Pursuant to the Electric Discount and Energy Competition Act (“EDECA”), the Board has the statutory authority to allow the pass-through of the increased capacity prices to BGS customers. N.J.S.A. 48:3-57(d) (BGS service “shall be regulated by the board and shall be based on the reasonable and prudent cost to the Supplier of providing such service.”) EDECA further provides that BGS Suppliers are entitled to recover all reasonable and prudent costs incurred in the provision of BGS service. N.J.S.A. 48:3-57(e). While the Board has relied primarily on BGS auction results to establish a BGS rate that presumptively allows for the

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<sup>1</sup> Further on in the Petition, RESA clarifies that this would be a “universal” charge collected by the EDCs and paid to TPSs. Petition, Fn 8. RESA argues that this charge should be collected by the EDCs because the EDCs “have more customer contact and leverage due to their disconnect authority.” *Petition*, para 19.

<sup>2</sup> RESA clarifies that this solution is “less equitable” as the TPS would then have to notify the customer of the additional charge leading to customer dissatisfaction and casting the retail market “in a negative light.” *Petition*, para 25.

recovery of all costs, the Board has in the past allowed the pass through of certain costs imposed after the supplier master agreement has been executed. I/M/O the Provision of Basic Generation Service for Year Two of the Post Transition Period, BPU Docket No. EO03050294 (Dec. 2, 2003) (allowing the pass through of increased costs associated with the FERC-approved Open Access Transmission Tariff.) See also, I/M/O the Petition of Atlantic City Electric Company, Jersey Central Power & Light Company and Public Service Electric & Gas Company For Authorization To Increase the Transmission Related Charges to BGS-FP and BGS-CIEP Customers, BPU Docket No. EO05040368 (June 22, 2005) (allowing the pass through of Reliability Must Run charges).

On the other hand, there is no similar statutory authority allowing the Board to regulate prices paid to third party suppliers pursuant to a negotiated supply contract. EDECA grants the Board licensing authority over third party providers (N.J.S.A. 48:3-78), investigative authority to determine whether a third party supplier is acting in violation of the law (N.J.S.A. 48:3-80), and the power to suspend or revoke a third party supplier license after a finding that the supplier has engaged in misconduct, negligence or incompetence (N.J.S.A. 48:3-81). The Board has issued retail choice consumer protection standards including protections against slamming (N.J.A.C. 14:4-2), marketing standards (N.J.A.C. 14:4-7.4), credit and security deposits, and billing requirements. N.J.A.C. 14:4-7.5, N.J.A.C. 14:4-7.7. There is however no statute or Board regulation that parallels the Board's regulatory authority over BGS rates. The BPU's jurisdiction over third party suppliers and their customers is limited to licensing and consumer protection.

The BPU does not have regulatory oversight over the rates that third party suppliers charge their customers. Thus, the relief being sought in RESA's petition cannot be granted by the BPU because it falls outside of the BPU's jurisdiction. Just as the Board could not interfere

to protect consumers when energy prices rose sky high during the polar vortex, the Board cannot now interfere to protect third party suppliers from increases in capacity prices. Thus, the Board lacks authority to alter contracts between TPSs and their customers and the petition filed by RESA should be dismissed.

**II. The Board Should Not Issue a Finding Interpreting Whether a Material Change Has Occurred That Relieves Third Party Suppliers From Their Contractual Obligations.**

By its terms, the Supplier Master Agreement allows for the amendment of the agreement with the written consent of the parties and the approval of the Board. Supplier Master Agreement, Section 15.13. The Board does not have similar authority over the contracts entered into between third party suppliers and their customers. Adherence to the contract terms is the obligation of the contracting parties. Thus, the terms agreed upon by the parties will determine how and when a material change –such as a change in price – can be implemented. The Board does not, nor should it, interfere with these negotiated contracts. These are contracts freely entered into by two parties and, unless provided for in the contract, one party may not change material terms of the contract without the other party’s consent. Because it is unlikely that a TPS customer would consent to an increase in prices based on changes in the capacity market, RESA has come to the Board asking for its approval to increase prices without the need to obtain consent.

However, it is a violation of the Board’s own regulations for the Board to grant this relief and order TPS customers to compensate third party suppliers for changes in the PJM capacity market. N.J.A.C. 14:4-7.6(l). As noted by RESA, the Board’s Retail Choice Consumer Protection regulations expressly forbid contract provisions that permit a third party supplier “to change material terms of the contract without the customers affirmative authorization unless the

change is required by operation of law.” N.J.A.C. 14:4-7.6(l). That is exactly what the third party suppliers are asking the Board to do in this petition.<sup>3</sup>

By asking the Board to order the EDCs to collect funds from ratepayers due to a change in the capacity market, third party suppliers are attempting an end run around N.J.A.C. 14:4-7.6(l). If a non-bypassable ‘wires’ charge collected by the EDCs can be implemented without notice and without the consent of customers, the purpose of that regulation will have been thwarted. RESA acknowledges that if the TPS must notify customers of the increase and separately bill for that amount, this could result in “customer dissatisfaction and cast the retail market in a negative light.” *Petition*, para. 10. Presumably, RESA assumes that if the increase is billed by the EDCs as a non-bypassable charge, the increases will not be as transparent. The Board should not sanction a “remedy” that seeks to obscure rate increases that have not been disclosed or consented to by customers.

**III. PJM Changes To The Capacity Market Are Made On a Regular Basis And Do Not Qualify As An “Operation of Law” That Would Justify Mid-Contract Changes.**

RESA asks the Board to find that changes to the PJM capacity market qualify as an “operation of law.” N.J.A.C. 14:4-7.6(l). Reliance on this consumer protection regulation is misplaced. The regulation provides only that a TPS 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.” It does not allow for an automatic change if there is a change required by operation of law. Rather, it allows the TPS to include such a term in its contract. As RESA refused to provide any contracts in discovery, it is unknown whether the contracts contain

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<sup>3</sup> Although RESA refused to provide copies of contracts in discovery, we assume for the purposes of this motion that the contracts at issue comply with N.J.A.C. 14:4-7.6(l).

such a provision, however, that fact is irrelevant for purposes of this motion. Simply, the regulation authorizes the TPS to include a contract term. If the contracts contain that term, and if there is a change required by operation of law, the TPS is free to exercise its rights under the contract. To the extent there is a contractual dispute between the TPS and its customers, that is not a matter for the Board.

This filing is another attempt to get around the contractual and regulatory provisions requiring the customer's permission before changing the price for supply. As noted above, under the Board's regulations, a third party supplier cannot change material terms of the contract with its customers without the customer's consent, unless the change is required by "operation of law." *Id.* The Board's regulation goes on to clarify that "changing the price to reflect a change in the Sales and Use Tax or other State-mandated charge would be permitted as a change required by operation of law." *Id.*

If RESA members are truly confident that the Capacity Performance Proposal constitutes a change "required by operation of law," they currently have all necessary legal authority to invoke those material change provisions. Instead, RESA here seeks the Board's imprimatur to declare a change of law that would allow them to change the executed contracts. It is not the Board's role to make such a finding and come down on one side of a contractual issue between two private parties.

Moreover, the Board cannot make a finding that any increases that may occur from PJM's proposal are due to "the operation of law." Changes in the PJM capacity market do not qualify as government-mandated charges, and therefore RESA's reliance on this contract provision is misplaced. PJM is not a government agency, nor did it issue its updated CP Proposal pursuant to a legislative mandate, conditions that would be necessary for a finding of

the “operation of law” exception. It is a private entity that sets the rules for an administratively created market. While its market rules are regulated by the Federal Energy Regulatory Commission, (“FERC”) any increased capacity prices that may result from the updated CP Proposal will be the result of changing market conditions caused by a number of factors of which the CP Proposal is merely one. Indeed, PJM changes the market rules with regularity.<sup>4</sup> If such changes were interpreted as a change in “law,” supply charges could be altered by the TPSs regularly, creating havoc in the retail market.<sup>5</sup> The parties entered a contract with a bargained for price and confidence in the market depends on that bargain being respected. The Board should recognize the need for consistency and certainty in the contractual relationship between third party suppliers and their customers and dismiss RESA’s petition.

### CONCLUSION

The Board should dismiss RESA’s request to have the Board order the EDCs to collect for third party suppliers’ losses incurred through participation in the PJM capacity market. Both third party suppliers and customers opted to participate in the competitive market. Third party suppliers have the freedom to determine what products and services to offer, they also have to ability and the option to address unexpected regulatory changes through those retail contracts. Third party suppliers have the ability to craft their contracts to set forth what costs will be passed-through to retail customers. Creating a non-bypassable charge for TPS customers would shift business risk and costs to the customers and ignore what the customers may have negotiated

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<sup>4</sup> For example, PJM altered the Minimum Offer Price Rule in 2011 (NJBPU v. FERC, 744 F.3d 74 (3d Cir. 2014)), regularly changes the Cost of New Entry (E.g. FERC Dkt. No. ER14-2940 (November 28, 2014)), recently changed the Variable Resource Requirement Charge Id. and has changed the calculations for offer caps in the Energy Markets (FERC Dkt No. EL15-31 (January 16, 2015)). Indeed, PJM changed the very dates of its Base Residual Auction. (FERC Dkt. No. ER15-1470 (April 24, 2015)). All these changes to the rules can impact prices in the PJM market construct.

<sup>5</sup> If RESA’s request was granted, customers would presumably be able to invoke this term if market rule changes reduced prices, further disrupting the retail market.



for in their existing agreements. Third Party suppliers must be responsible for their own individual contractual obligations. This is a fundamental premise of competitive markets.

For these reasons, Rate Counsel asks that its motion to dismiss RESA's petition be granted.

Respectfully submitted,



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Stefanie A. Brand  
Director, Division of Rate Counsel

- c: Honorable Richard S. Mroz, President (via hand delivery)
- Honorable Joseph L. Fiordaliso, Commissioner (via hand delivery)
- Honorable Diane Solomon, Commissioner (via hand delivery)
- Honorable Mary-Anna Holden, Commissioner (via hand delivery)
- Honorable Upendra J. Chivukula, Commissioner (via hand delivery)
- Service List (Via Electronic & USPS Regular Mail)

**I/M/O of the Verified Petition of the Retail  
Energy Supply Association for  
Board-Approved Mechanism for Third  
Party Suppliers to Recover Incremental  
Costs Incurred as a Result of PJM's  
Capacity Performance Proposal  
BPU Docket No. EW15010092**

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