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RECEIVED

October 29, 2015

OCT 30 2015

BOARD OF PUBLIC UTILITIES
 MAIL ROOM

Via E-Mail and Regular Mail

Mayor Robert Parisi
 Township of West Orange
 66 Main Street, Room 106
 West Orange, NJ 07052

Members of the Township Council
 Township of West Orange
 66 Main Street
 West Orange, NJ 07052

Mr. John Gross, CFO
 Township of West Orange
 66 Main Street
 West Orange, NJ 07052

**RE: I/M/O Government Aggregation Program
 Township of West Orange - Round 2
 BPU Dkt. No. EO15101203**

Dear Mayor, Members of the Township Council and Mr. Gross:

Gabel Associates, Inc., the Energy Agent for the Township of West Orange, has advised us that the Township intends to continue its Option 2 energy government aggregation program pursuant to N.J.A.C. 14:4-6.1 et seq., with a second round of the West Orange Community Energy Aggregation Program (“WOCEA-Round 2”). According to the Energy Agent, the Township will bundle the load of qualifying residential accounts located within West Orange’s municipal boundaries and solicit bids for electric generation service from duly licensed electric power suppliers through a Request for Proposal process.¹ The Township will continue to serve as the Lead Agency for the WOCEA-Round 2.

¹ The WOCEA-Round 2 Program will be offered to all residents of the Township who do not currently have a TPS contract and those who currently are participating in the WOCEA, excluding those who opted out during Round 1, (RFP, pp. 3, 4, 5, 14, 16), and potentially to non-residential customers as well. (RFP, p. 3). The Program will exclude solar customers, (RFP, pp. 12 & 16), but the October 20 Filing does not explain that decision.

*Case Mgmt
 J. Kane*

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 October 20, 2015, in accordance with N.J.S.A. 48:3-94b(1) and on behalf of the Township governing body, the Energy Agent filed with Rate Counsel and the Board of Public Utilities (“BPU”) two draft bidding documents for the WOCEA-Round 2 Program: the Request for Proposal notice (“RFP”), and a Master Performance Agreement (“MPA”) between the Township and the third-party supplier (collectively, the “October 20 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 October 20 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 Township’s October 20 Filing consists of draft documents with material terms such as price and bidder information missing and certain terms unresolved.³ 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 Township and its municipal attorneys. 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 Township.⁴ Rate Counsel and Board Staff also will review, when submitted, the draft public notice to prospective customers of the WOCEA-Round 2 Program, see N.J.A.C. 14:4-6.6(s), and

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 As examples, the reference to business accounts on p. 13 of the RFP is unclear, and the terms of service in Article 2.3 of the MPA differ from those elsewhere in the October 20 Filing.

⁴ Rate Counsel concurs with the provisions in the October 20 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. 8, 11 & 18)

the Third-Party Supplier (“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 company serving residents within the Township boundaries is Public Service Electric and Gas Company (“PSE&G”). Every year, PSE&G 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.⁵ The BGS price offered by PSE&G 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 RFP, MPA and other Agreement⁶ for electric generation service explicit language that requires the bidding TPSs 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 WOCEA-Round 2 Program RFP seeks bids on an “All-In, Fixed Price” basis, and defines the wide scope of costs included therein. (RFP, p.13) The RFP requires the winning bidder to offer a rate for Full Requirements service for Participating Residential Accounts that does not exceed the BGS tariff price at the time of the bid and is “reasonably forecast and estimated by the Lead Agency to provide sufficient savings to the participants over the term of the contract relative to the cost that would be incurred by WOCEA participants if they were to remain on the applicable BGS tariff over the contract term.” (RFP, p. 4) The MPA, however, does not contain such language. The MPA, in Article 2.2.2, 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. An “unchanged” or fixed price, absent more, may not remain below the BGS price throughout the contract term if, for example, the applicable BGS price should fall below the Lead Agency’s forecasts or estimates during that time. Thus, WOCEA-Round 2 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, refers to potential “additional benefits, if any” that a bidder may offer, such as “the offer to accept a contract term that allows the Township to renegotiate the contract price or terminate the agreement in the event that BPU-approved BGS-RSCP tariff rate drops below the contract price” during the term of the contract. (RFP, p.14) This part of Section H refers to Section I; however, Section I

⁵ See N.J.A.C. 14:4-1.2.

⁶ 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 RFPs, MPAs and any agreements entered into to further the government energy aggregation program.

does not further describe that process or its implementation, and the October 20 Filing does not provide any further explanation of this potential additional benefit.

The RFP also indicates that, if the “actual average annual” BGS-RSCP tariff price drops below the contract price during the term of the contract, the selected TPS will “retain” WOCEA-Round 2 participants and notify them of their ability to opt out of the Program. (RFP, p.15, “Post-Award Change in BGS Tariff Price”) It is unclear whether the Township will have the right to renegotiate the contract price or terminate the contract if the BGS-RSCP tariff price falls below the contract price. It also is unclear why the Township would want the TPS to retain its participating residents in a Program charging them more than they would pay on BGS.

The MPA also is unclear whether the selected TPS must drop its contract price if the applicable BGS price falls lower than the contract price. The MPA requires that the price charged to each customer who enrolls in the WOCEA-Round 2 Program after the initial opt-out period will be the fixed price as per the Award Letter, “which shall be below the BGS-RSCP price.” (MPA, Art. 2.2.3) The price offered to new enrollees may not be below the BGS-RSCP price if the BGS-RSCP price has fallen after the Award Letter.

Rate Counsel recommends revising the October 20 Filing to require the contract price to remain below each applicable BGS-RSCP tariff price at all times throughout the entire term of the WOCEA-Round 2 Program, to ensure energy cost savings to all Program participants.

BGS Tariff Price

The RFP, in section H, “Selection and Award Process,” defines the BGS Tariff Price for the purpose of comparing the bids from qualified bidders for Residential Accounts in Step 4:

Residential Accounts:

The BGS Tariff Price equals the weighted average BGS-RSCP Tariff Price for the contract period for each residential tariff class (RS, RHS, and RLM), which is calculated by the Township (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-RSCP tariff price for each residential rate class. For purposes of bid price evaluation, the Township (in consultation with the energy agent) will also consider the impact of estimated changes to BGS-RSCP tariff prices during the contract term. (RFP, pp. 14-15)

Step 2 of the RFP for the Selection and Award Process for residential customers states that qualified bidders must “submit a bid price for the Participating Residential Accounts bid group that is below the applicable BGS-RSCP tariff rate.” (RFP, p. 14) 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-RSCP tariff price for each residential rate class within the bid group. (RFP, p. 14, fn. 6)

Rate Counsel has three concerns with the above descriptions of the proposed use of the weighted average BGS tariff price as a benchmark to compare bids for the Program. First, using only a weighted average price could result in rates for some WOCEA-Round 2 Program participants that, at some times during the contract period, are higher than the applicable BGS-RSCP tariff rate for their rate class. Moreover, while the initial price may be below the BGS-RSCP tariff rate, the WOCEA-Round 2 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). Rate Counsel recommends amending the October 20 Filing to clarify that the bid prices must remain below the applicable BGS-RSCP tariff rate for each rate class at all times throughout the contract period.

Second, the RFP does not state the method that the Township and its energy agent will use to calculate a single bid that is both below the weighted average BGS tariff price for the entire Bid Group and below the average BGS tariff price for each residential rate class within the bid group. Since the current BGS-RSCP tariff includes both seasonal rates and rates that vary with usage and/or time of day, the RFP should state whether the bidders will be provided a breakdown of usage by month and/or time of use. If no such breakdowns are provided, it is unclear how the bidders can calculate BGS-RSCP Tariff Price benchmarks to compare with their proposed bid prices.

Third, the RFP states that bids are to be provided for three different contract terms: 9, 14 or 21 months, beginning with the March 2016 meter read date and terminating with the December 2016, May 2017 or December 2017 meter read dates, respectively, for each account (RFP, pp. 3, 5, 6 & 13; MPA Art. 2.4). “The Township will select the term, if any, that is most advantageous to the participating customers.” (RFP, p. 3) For purposes of bid price evaluation, the Township will consider among other factors the impact of “estimated changes to BGS-RSCP tariff prices” during the contract term. (RFP, p. 15, “Residential Accounts”) While the RFP explains how the Township will develop its estimate of changes to BGS-RSCP tariff prices during each contract term, (RFP, p. 15, fn. 8), 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 October 20 Filing to clarify that the bid price must remain below the applicable BGS-RSCP tariff rate at all times throughout the contract period.

Supplemental New Participants Price

The WOCEA-Round 2 Program would allow new participants to enroll at any time. The TPS may periodically refresh the list of Township residents, who are not enrolled in the Program and not serviced by a TPS, with those who, after the initial enrollment period: moved into an existing home in the Township, moved into a new home in the Township, or dropped their TPS and returned to BGS after the beginning of the WOCEA-Round 2 Program. (MPA, Art. 6.3.7) In addition, residential customers may request inclusion in the Program. Customers also may request to be excluded from future WOCEA-Round 2 solicitations.

The October 20 Filing is unclear as to whether the selected TPS must offer new participants, who join the Program after the initial enrollment period, the original, awarded contract price. The October 20 Filing includes this as a requirement. (RFP, Section I, p. 17; MPA Arts. 2.2.3, 6.3.7) But the RFP, in the Selection and Award Process, refers to potential “additional benefits, if any” that a bidder may offer, such as “the offer to add additional customers during the contract term at the original Bid Price...” (RFP, Section H, Step 4, p.14) Rate Counsel recommends clarifying the RFP as to whether enrolling new customers at the original price is a requirement or an additional benefit that bidders may offer at their option.

Energy Agent Fee

The RFP’s Section C, “RFP Process,” Phase 2 - Submission of Bid Prices, addresses how the Energy Agent Fee will be recovered by the Lead Agency and the Energy Agent:

Bid prices must include the cost to the supplier(s) of the Energy Agent Fee. There are no Administrative Fees (i.e. reimbursable out-of-pocket WOCEA Round 2 Program expenses incurred by the Lead Agency). The Energy Agent Fee of \$0.00071/kwh will be payable directly to Gabel Associates on a monthly or quarterly basis in accordance with the terms of an agent agreement to be executed between the winning supplier and Gabel Associates. (RFP, p. 8)

N.J.A.C. 14:4-6.8(e) requires that bid specifications must state the items for which reimbursement shall be required, an estimate of the costs and the maximum amount that may be reimbursed. With respect to reimbursement of the Energy Agent’s Fee, the RFP states that the winning TPS will pay \$0.00071 per kwh sold through the aggregation program directly to Gabel Associates on a monthly or quarterly basis. However, the RFP does not estimate the cost or state the maximum amount that the Energy Agent may be paid.⁷

⁷ While the RFP, p. 8, states that there are no Administrative Fees for the WOCEA-Round 2, the MPA, Art. 10.1, requires the selected TPS to reimburse those fees within 30 days.

Rate Counsel recommends including in the RFP and public notice of the WOCEA-Round 2 Program an estimate of the cost of the Energy Agent's Fee over some time period (e.g. monthly, quarterly), or stating the maximum amount of the Energy Agent's Fee over the duration of the Program. Indeed, a published press opinion has expressed concern over the lack of transparency in energy agent fees in New Jersey government energy aggregation programs.⁸

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 WOCEA Participant(s) as a condition of receiving Electric Generation Service from Supplier, the WOCEA Participant shall have the option to be removed from the WOCEA 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 WOCEA-Round 2 Program. If equipment is required to implement the Program, the cost of that equipment should be borne by the Program participants not by other PSE&G ratepayers. If PSE&G will charge for equipment necessary to participate in the WOCEA-Round 2 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 installing equipment to participate in the WOCEA-Round 2 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 October 20 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 WOCEA-Round 2 Program, those charges must be clearly disclosed during the Program's initial opt-out period and each subsequent

⁸ 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 10/26/15).

enrollment of additional customers. 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 WOCEA participants." (RFP, p. 10, item h.v.f.) This requirement is not limited to any subset of WOCEA-Round 2 participants. However, other provisions of the RFP require the TPS to offer budget billing only to residential customers who currently receive BGS from PSE&G and have a budget billing plan with PSE&G. (RFP, pp. 6, 12 & 14) Moreover, currently, some TPSs do not offer budget billing and it is unclear whether PSE&G offers TPS budget billing.

Rate Counsel recommends that, if PSE&G offers TPS budget billing, the WOCEA-Round 2 Program should offer budget billing to all of its participants. This service is available to PSE&G customers who remain on BGS and, if not available to all participants in the WOCEA-Round 2 Program, ratepayers should know of its unavailability to compare the Program to BGS. Rate Counsel therefore also recommends that, if budget billing is not offered to all participants in the WOCEA-Round 2 Program, the notice sent to all PSE&G residential customers in the Township, 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 WOCEA-Round 2 Program. (See RFP, pp. 3, 4, 14 & 15.) 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 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 PSE&G; 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 Township to renegotiate the contract price or terminate the agreement in the event that BPU-approved BGS-RSCP tariff rate drops below the contract price (see Section I). (RFP, p. 14)

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 three 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. Rate Counsel also recommends clarifying in the October 20 Filing whether the Program intends to require the selected TPS to renegotiate the contract price or terminate the agreement in the event the BGS-RSCP tariff rate drops below the contract price and, if so, the process that would entail.

Damages

Article 9.1 of the MPA, "Damages," states:

The sole remedy for the Government Aggregator and/or WOCEA 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 WOCEA 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 WOCEA-Round 2 Program may vary from 9 to 21 months, the "applicable" BGS tariff price serving as the measure of damages should be the BGS price that WOCEA-Round 2 Program participants must pay, to replace the Electric Generation Service that the TPS failed to provide, from the time of the TPS's default until the conclusion of the period of service for which the TPS was to have provided Electric Generation Service. Moreover, should the TPS's default leave any WOCEA-Round 2 Program participant unable to obtain BGS service, the measure of the TPS's damages should be the actual cost of replacing all WOCEA-Round 2 participants' full requirements energy supply. Rate Counsel recommends amending Article 9.1 of the MPA accordingly.

Confidentiality

Rate Counsel recommends amending Article 12 of the MPA to include an appropriate reference to the Board rules requiring the confidentiality of customer information, consistent with the citation in the RFP, at page 5.

Assignment

Article 3.4 of the MPA allows the selected TPS to assign its agreement with the Township only upon the Township's 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 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 selected TPS, as transferor or assignor, 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 Township also should have the right to reasonably satisfy itself as to the transferee's or assignee's ability to perform its obligations to the Program, 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 WOCEA-Round 2 Program.

Please have a municipal attorney review the WOCEA-Round 2 RFP and MPA 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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