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State of New Jersey
DIVISION OF RATE COUNSEL
140 EAST FRONT STREET, 4TH FL
P. O. BOX 003
TRENTON, NEW JERSEY 08625

CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

June 19, 2017

STEFANIE A. BRAND
Director

Via E-Mail and Regular Mail

Mayor Jack Trotta
Township of Plumsted
121 Evergreen Road
New Egypt, N.J. 08533

Members of the Township Committee
Township of Plumsted
121 Evergreen Road
New Egypt, N.J. 08533

**RE: I/M/O Plumsted Community Energy Aggregation – Round 4
Township of Plumsted, County of Ocean
BPU Dkt. No.: EO17060595**

Dear Mayor Trotta and Members of the Township Committee:

Gabel Associates, Inc., the Energy Agent for the Township of Plumsted, has advised us that the Township intends to offer Round 4 of its Option 2 government energy aggregation program pursuant to N.J.A.C. 14:4-6.1 et seq., the Plumsted Community Energy Aggregation (“PCEA-Round 4”) Program. According to the Energy Agent, Plumsted Township will bundle the load of qualifying residential accounts located within its 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 serve as the Lead Agency for the PCEA-Round 4 Program.

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

¹ The PCEA-Round 4 Program will be offered to all residents of the Township who do not currently have a third-party supplier (“TPS”) contract or an on-site, net-metered solar energy system. (RFP, p. 4; p. 6; p. 6, n. 1; p. 8, n. 2; p. 12; pp. 13-14; p. 17) The Program will exclude solar customers “to avoid jeopardizing those customers’ net metering benefits.” (RFP, p. 14)

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

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bid notice and bidding documents and provide comments to the governing body, which may accept or reject the comments.

On June 2, 2017, 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 PCEA-Round 4 Program: the Request for Proposals (“RFP”), and a Master Performance Agreement (“MPA”) between the Township and the third-party supplier (“TPS”) (collectively, the “June 2 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 June 2 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 June 2 Filing consists of draft documents with material terms such as price and bidder information missing and certain terms unresolved. 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 attorney. 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 the Township’s municipal attorney.³ Rate Counsel and Board Staff also will review, when submitted, the draft public notice to prospective customers of the PCEA-Round 4 Program, see N.J.A.C. 14:4-6.6(s), and the 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’s 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

³ Rate Counsel concurs with the provisions in the June 2 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. 9-10, 13, 16 n. 6 & 21)

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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 RFP, MPA and other Agreement⁵ for electric generation service explicit language requiring 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 RFP seeks bids on an "All-In, Non-Variable Price" basis, and defines the wide scope of costs included therein. (RFP, pp. 7 and 15, "Pricing Products") The RFP requires the winning bidder to offer a rate for Full Requirements service for Participating Residential Accounts, (RFP, pp. 15, 16, & 21), 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 PCEA[-Round 4] participants if they were to remain on the applicable BGS tariff over the contract term." (RFP, p. 5) However, the June 2 Filing does not require the contract price to remain below the BGS price at all times.

The June 2 Filing states that the price shall be the "non-variable" price per kWh as set forth in the Award Letter, for the term of the Program, except as otherwise provided for in the MPA. (RFP, pp. 7, 15; MPA, Arts. 2.2.2 & 2.2.3) A "non-variable" or fixed price,⁶ absent more, may not remain below the BGS price throughout the contract term if, for example, the applicable BGS price should fall below the PCEA-Round 4 contract price during that time. Thus, PCEA-Round 4 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 RFP offers bidders two options in the event the average BGS-RSCP tariff price drops below the PCEA-Round 4 contract price during the term of the contract. One option is to do nothing, resulting in Program participants paying more than the BGS price. The other option gives the Lead Agency the right to renegotiate the contract price and, if the negotiations are unsuccessful, to unilaterally terminate the agreement within 14 days. (RFP, pp. 15-16; alternative proposed MPA, Art. 2.1.5) Participants would be returned to BGS service at the next available meter read date. (Id.)

If through this process either the price is renegotiated or the agreement is terminated, the selected TPS will notify PCEA-Round 4 participants in writing. (RFP, p.18, "Post-

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

⁶ The June 2 Filing does not define a "non-variable" price. It is unclear whether the PCEA-Round 4 Program intends to use this term as a synonym for a "fixed" or a "variable" price.

Award Changes in BGS Tariff Price”) The June 2 Filing does not specify the form, substance or timing of that written notice; however, those terms would be subject to review by the Lead Agency. (Id.) The TPS is to cooperate with the Township in developing that notice. (MPA, Art. 6.3.8) However, the June 2 Filing does not mention the process and party responsible for returning Program participants to BGS service.

Rate Counsel recommends revising the June 2 Filing to require the contract price to remain below each applicable BGS-RSCP tariff price at all times throughout the entire term of the PCEA-Round 4 Program, to ensure energy cost savings to all Program participants. In the alternative, Rate Counsel recommends revising the June 2 Filing to indicate that, if the BGS price falls below the contract price or the Program is terminated, participants must automatically be returned to BGS service. Guaranteed energy cost savings may be achievable using alternative proposed Article 2.1.5 to the MPA.

BGS Tariff Price

The RFP, in Step 4 of Section H, “Residential Accounts,” explains the calculation of the BGS Tariff Price for the contract period for the purpose of comparing bids from qualified bidders for Residential Accounts. The Township and Energy Agent will apply individual BGS-RSCP price components for the applicable tariff (inclusive of energy, generation capacity, ancillary services and related costs and all transmission charges and surcharges) to the applicable billing determinants for each tariff class broken down by season, energy block and time-of-use, to develop an average annual BGS-RSCP tariff price for each residential rate class. The bid price evaluation also will consider the impact of estimated changes to BGS-RSCP tariff prices during the contract term. (RFP, p. 17)

Step 2 of Section H of the RFP states that qualified bidders must submit a bid price for the Participating Residential Accounts pricing group that is “below the applicable BGS-RSCP tariff rate.” (RFP, p. 16) 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 Pricing Group, and must also be below the average BGS-RSCP tariff price for each residential rate class within the pricing bid group. (RFP, p. 16, n. 6)

Rate Counsel has three concerns with using the average BGS tariff price as a benchmark to compare bids for the Program. First, using average prices could result in rates for some PCEA-Round 4 participants that, at some times during the contract period, are higher than the applicable BGS-RSCP tariff rate for their rate class. Based on their usage and occupancy patterns, some ratepayers could thereby pay more than if they had remained on BGS. Moreover, while the initial price may be below the BGS-RSCP tariff rate, the PCEA-Round 4 Program should ensure that prices remain below the applicable BGS-RSCP tariff rate for each rate class, at all times throughout the Program. 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 June 2 Filing to clarify that 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 whether bidders will be provided a breakdown of usage by month and/or time of use. Current BGS-RSCP tariffs include both seasonal rates and rates that vary with usage and/or time of day. The RFP proposes to compare bids by first determining the BGS Tariff Price benchmark by applying those and other criteria to BGS price data. If monthly and/or time of use data is not provided to bidders, it is unclear how they 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 two different contract terms and start dates: 12 or 24 months, beginning with the December 2017 meter read date and terminating with the December 2018 or December 2019 meter read dates, or 15 or 21 months, beginning with the March 2018 meter read date and terminating with the June 2019 or December 2019 meter read dates, respectively, for each account. (RFP, pp. 4-5, 7-8, 15 & 20; MPA Arts. 2.4 & 2.7) 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. 17, "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. 17, n. 9), due to the structure of the auction system, BGS rates for the period after June 1, 2018 are not yet known. For this reason, too, Rate Counsel recommends amending the June 2 Filing to clarify that each bid price must remain below the applicable BGS-RSCP tariff rate at all times throughout the contract period.

Supplemental New Participants Price

The PCEA-Round 4 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 PCEA-Round 4 Program. (RFP, p. 8; MPA, Art. 6.3.7) In addition, residential customers may request inclusion in the Program. (See RFP, p. 20) Customers also may request to be excluded from future PCEA-Round 4 solicitations. (See RFP, p. 8, n. 2 "Do Not Disturb" list; p. 20, "Opt-Out Notice")

The June 2 Filing requires that the selected TPS must offer new participants, who join the Program after the initial enrollment period, the original, awarded contract price. (RFP, p. 20, "Supplemental New Participants"; MPA, Arts. 2.2.3 & 6.3.7) While the Contract Price in the Award Letter must be lower than the BGS price at the time the TPS is selected, the Contract Price offered to new enrollees may not be below the BGS-RSCP

price if the BGS-RSCP price has fallen after the Award Letter and the TPS does not lower its price accordingly.

As noted above, Rate Counsel recommends amending the June 2 Filing to clarify that bidders must offer a contract price that remains below the applicable BGS-RSCP tariff rate at all times throughout the contract period, even if the BGS-RSCP price should fall below the PCEA-Round 4 contract price during that time.

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:

Price proposals must include the cost to the supplier(s) of the Administrative Fee and the Energy Agent Fee. The Administrative Fee consists of reimbursable out-of-pocket PCEA-Round 4 Program expenses incurred by the Lead Agency, and recoverable pursuant to N.J.A.C. 14:4-6.8(d), in the amount of \$0.00 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 MPA in accordance with the terms of the MPA. The Energy Agent Fee of \$0.00062/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. 10 (footnote deleted) & pp. 21-22; MPA, Definitions, Arts. 3.5 & 10.2)

The RFP clarifies in a footnote that the amount of the Administrative Fee represents the current and prospective out-of-pocket expenses of the Township for the PCEA-Round 4 Program, including but not limited to legal fees and printing, mailing and advertising costs, and that copies of paid invoices and vouchers will be made available to the selected TPS upon request, as per N.J.A.C. 14:4-6.8(d).⁷ (RFP, p. 10, n. 3)

The June 2 Filing describes the items for which reimbursement shall be required, and requires supporting invoices and vouchers; however, it does not estimate those costs or the maximum amount that may be reimbursed. N.J.A.C. 14:4-6.8(e) requires that bid specifications provide the estimated and maximum amounts for which the Township will seek reimbursement.

With respect to reimbursement of the Energy Agent's Fee, the June 2 Filing states that the winning TPS will pay \$0.00062 per kwh sold through the PCEA-Round 4 Program directly to Gabel Associates on a monthly or quarterly basis, and will report to the

⁷ The selected TPS must reimburse the Township's Administrative Fees within 30 days of the effective date of PCEA-Round 4 Program. (RFP, p. 10; MPA, Art. 10.1)

Township quarterly the amount of energy fee paid. Rate Counsel concurs with this disclosure to the Township; however, the RFP does not estimate the cost or state the maximum amount that the Energy Agent may be paid.

Rate Counsel recommends including in the RFP and public notice of the PCEA-Round 4 Program an estimate and a maximum amount of the Administrative Fee and the Energy Agent Fee over some time period (e.g. monthly, quarterly, 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

Budget Billing

Rate Counsel concurs with the provisions in the June 2 Filing that the selected TPS must offer budget billing to all participants in the PCEA-Round 4. (RFP, p. 7, p. 12, item h.v.f. and pp. 13-14; see MPA, Art. 5.4)

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 PCEA-Round 4 Program. (See RFP, pp. 4, 5 & 16) 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 total savings for Participating Residential Accounts determined in Step 2 for each contract term as well as the value of less-frequent switches of supplier and of longer-term price certainty, if any, associated with longer contract lengths; 2) the qualification ranking in Step 1; 3) the additional benefits associated with pricing proposals for the alternative contract language that assures a fixed contract price over the full contract term by eliminating the contract term – subsection 3.2(a)(iii)(C) of the MPA – that provides the opportunity, under certain conditions and subject to certain procedures, for the supplier to implement an adjustment to the contract price as the result of an action by a regulatory, legislative or judicial body that materially impacts supplier’s cost of providing Electric Generation Service under the Agreement and similarly impacts the cost of BGS under the Utility’s BGS tariff. (RFP, p. 17)

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 6/5/17).

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 two different contract terms with prices that may change with the length of the contract, as well as the value of less-frequent switches of supplier and of longer-term price certainty. Some further guidance may be helpful to bidders in this regard. Rate Counsel also recommends, as discussed above, revising the June 2 Filing to require the selected TPS to reduce its price or terminate the agreement and return all participants to BGS service in the event the BGS-RSCP tariff rate drops below the contract price and, if so, the process that would entail. Such a term would ensure that the price paid by all PCEA-Round 4 participants would remain below each applicable BGS-RSCP tariff price at all times throughout the entire term of the Program.

Damages

Article 9.1 of the MPA, "Damages," states that the sole remedy for the Township and/or PCEA-Round 4 Participants for the TPS's failure to provide the agreed-upon Electric Generation Service will be "direct damages," defined as the additional cost, if any, above the PCEA-Round 4 contract price, to obtain electric service under the applicable BGS tariff price. (See MPA, Art. 4.1)

Since BGS tariff rates vary over time, and the period of service of the PCEA-Round 4 Program may vary from 12 to 24 months, the "applicable" BGS tariff price serving as the measure of damages should be the BGS price that PCEA-Round 4 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 PCEA-Round 4 Program participant unable to obtain its full requirements through BGS service, the measure of the TPS's damages should be the actual cost of replacing all PCEA-Round 4 participants' full requirements energy supply, not limited to the BGS price. Rate Counsel recommends amending Article 9.1 of the MPA accordingly.

Assignment

The selected TPS may 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 and transferee/assignee both certify in such written notification that transferee or assignee will maintain Supplier's

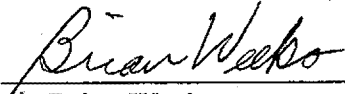
Government Energy Aggregation and Electric Generation Service
capabilities. (MPA, Art. 3.4)

Rate Counsel is concerned that certification alone by the selected TPS, as transferor or assignor, and its affiliated or subsidiary transferee or assignee, may not ensure performance by the transferee or assignee. Rate Counsel recommends that 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 PCEA-Round 4 Program, and to terminate the agreement if the Township is not reasonably assured of the transferee's or assignee's ability to do so.

Please have a municipal attorney review the June 2 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)

IMO GOVERNMENT AGGREGATION
PROGRAM
TWP. OF PLUMSTED, NJ
BPU DKT. No. EO17060595

Mayor Jack Trotta
Plumsted Twp. Mun. Offices
121 Evergreen Road
New Egypt, New Jersey 08533

Deputy Mayor Eric Sorchik
Plumsted Twp. Mun. Offices
121 Evergreen Road
New Egypt, New Jersey 08533

Mike Wysong, Committee Member
Plumsted Twp. Mun. Offices
121 Evergreen Road
New Egypt, New Jersey 08533

Vince Lotito, Committee Member
Plumsted Twp. Mun. Offices
121 Evergreen Road
New Egypt, New Jersey 08533

Herb Marinari, Committee Member
Plumsted Twp. Mun. Offices
121 Evergreen Road
New Egypt, New Jersey 08533

Dorothy Hendrickson, Municipal Clerk
Plumsted Twp. Mun. Offices
121 Evergreen Road
New Egypt, New Jersey 08533

Nancy Hendrickson, Deputy Mun. Clerk
Plumsted Twp. Mun. Offices
121 Evergreen Road
New Egypt, New Jersey 08533

Peter Ylvisaker
Plumsted Twp. Mun. Utilities Authority
121 Evergreen Road
New Egypt, New Jersey 08533

Walter Bronson
Plumsted Twp. Mun. Utilities Authority
121 Evergreen Road
New Egypt, New Jersey 08533

Edward Weirsky, Jr.
Plumsted Twp. Mun. Utilities Authority
121 Evergreen Road
New Egypt, New Jersey 08533

Robert Minter
Plumsted Twp. Mun. Utilities Authority
121 Evergreen Road
New Egypt, New Jersey 08533

Harry Miller
Plumsted Twp. Mun. Utilities Authority
121 Evergreen Road
New Egypt, New Jersey 08533

Ronald Dancer
Plumsted Twp. Mun. Utilities Authority
121 Evergreen Road
New Egypt, New Jersey 08533

Robert Chilton
Gabel Associations
417 Denison Street
Highland Park, NJ 08904

Bryan Rubio
Gabel Associations
417 Denison Street
Highland Park, NJ 08904

Jesse Castellanos
Gabel Associations
417 Denison Street
Highland Park, NJ 08904

Jackie Galka
Bd. of Public Utilities
44 So. Clinton Ave., P O Box 350
Trenton, New Jersey 08625

Irene Kim Asbury
Bd. of Public Utilities
44 So. Clinton Ave., P O Box 350
Trenton, New Jersey 08625

Thomas Walker
Bd. of Public Utilities
44 So. Clinton Ave., P O Box 350
Trenton, New Jersey 08625

Brian Lipman, Esq.
Div. of Rate Counsel
140 E. Front St., 4th Floor
P O Box 003
Trenton, NJ 08625

DAG Caroline Vachier
Dept. of LPS, Div. of Law
124 Halsey St., P O Box 45029
Newark, New Jersey 07101

Stefanie Brand, Director
Div. of Rate Counsel
140 E. Front St., 4th Floor
P O Box 003
Trenton, NJ 08625

Lisa Gurkas
Div. of Rate Counsel
140 E. Front St., 4th Floor
P O Box 003
Trenton, NJ 08625

Ami Morita, Esq.
Div. of Rate Counsel
140 E. Front St., 4th Floor
P O Box 003
Trenton, NJ 08625

Brian Weeks, Esq.
Div. of Rate Counsel
140 E. Front St., 4th Floor
P O Box 003
Trenton, NJ 08625

Celeste Clark
Div. of Rate Counsel
140 E. Front St., 4th Floor
P O Box 003
Trenton, NJ 08625