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December 22, 2017

VIA HAND DELIVERY

Honorable Upendra J. Chivukula
Commissioner and Presiding Officer
New Jersey Board of Public Utilities
44 South Clinton Avenue
3rd Floor, Suite 314
P.O. Box 350
Trenton, NJ 08625-0350

Re: **I/M/O the Verified Petition of Rockland Electric Company for
Approval of an Energy Efficiency Stimulus Program and Associated
Rate Recovery
BPU Docket No. ER17080869**

**Reply to Rockland Electric Company's Motion to Amend the
Prehearing Order**

Dear Commissioner Chivukula:

Please accept this letter (original and two copies) as the Division of Rate Counsel's ("Rate Counsel") opposition to Petitioner Rockland Electric Company's ("Rockland," "the Company" or "RECO") December 14, 2017 letter Motion ("Motion") to Amend the Prehearing Order in this matter. In its Motion, the Company states that the following issue should be removed from presiding Commissioner Upendra J. Chivukula's November 8, 2017 Prehearing Order ("the Prehearing Order") at Section 1(A):

The cost effectiveness and cost efficiency of the activities and programs of the proposed RECO Low Income III program.

*Case Memo
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For the reasons set forth herein, Rate Counsel asserts that this issue should remain in the Prehearing Order.

BACKGROUND

On August 10, 2017, Rockland filed a Petition ("Petition") with the New Jersey Board of Public Utilities ("Board") seeking Board approval to administer an energy efficiency ("EE") program and to implement an associated cost recovery mechanism. More specifically, Rockland invoked a statutory provision, N.J.S.A. 48:3-98.1, of the RGGI Act as the authority under which it may invest in such a program.¹ Petition, p. 3. In relevant part, N.J.S.A. 48:3-98.1 *inter alia* sets forth the basis by which regulated public utilities may implement and invest in energy efficiency ("EE") programs. Notably, the RGGI Act set a 180-day time period for Board review of utility filings made pursuant to its provisions.² The Board subsequently issued an Order specifically setting forth the supporting material and documents, referred to as the Minimum Filing Requirements ("MFRs"), which must accompany a utility petition made pursuant to the RGGI Act's provisions.³ Here, Section V of the MFRs is in focus. Section V requires the submission of a Cost Benefit Analysis ("CBA") and supporting information, although the requirements of Section V may be waived for certain small scale and pilot EE programs.

In accordance with a review procedure set forth in the 2008 MFR Order, Rockland's Petition in the instant case was initially rejected by the Board as "administratively deficient," as memorialized in a letter from Board Staff dated September 7, 2017 which cited several

¹ P.L. 2007, c. 340, Section 13, effective Jan. 13, 2008 ("RGGI Act").

² N.J.S.A. 48:3-98.1(b)

³ *IMO Electric Public Utilities and Gas Public Utilities Offering Energy Efficiency and conservation Programs Investing in Class 1 Renewable Energy Resources, and Offering Class 1 Renewable Energy Programs in Their Respective Service Territories On a Regulated Basis Pursuant to N.J.S.A. 48:3-98.1 – Minimum Filing Requirements*, BPU Docket No. Q017091004, (October 20, 2017) ("2008 MFR Order").

deficiencies. Rockland subsequently filed supplemental information on September 25, 2017 and its Petition was deemed "administratively complete," as memorialized in a letter from Board Staff dated October 6, 2017.

REPLY ARGUMENT

I. Rockland's Exemption from the Requirements of Section V of the Minimum Filing Requirements Does Not Preclude a Review of the Cost Effectiveness of its Proposed Programs in This Proceeding.

Pursuant to the filing requirements set forth in the 2008 MFR Order, Rockland characterized its proposed EE program as a "pilot" program and was accepted as such by Board Staff, thereby exempting it from the Section V CBA filing requirement. However, Rockland's argument that its exemption from Section V of the MFRs precludes a review of the cost effectiveness ignores the reasoning underlying the MFRs and, moreover, fails to recognize the need to examine the cost-effectiveness of utility programs filed pursuant to the RGGI Act. Rockland ostensibly confuses compliance with the MFRs with approval of its filing without further review. As set forth below, Rockland's argument fails on its merits and should be rejected.

The MFRs are not to be viewed as a "checklist" whereby simple compliance with the MFRs' filing requirements constitutes sufficient support for Board approval without more. The purpose of the MFRs is to help expedite the Board's review a petition in light of the RGGI Act's relatively short 180-day review period. In the 2008 MFR Order, the Board clarified this by noting:

These minimum filing requirements have been designed to enable interested parties and the Board to review proposed programs on a timely basis and for the

Board to issue an order in accordance with the [RGGI] Act's [mandated 180-day] time frame.⁴

Clearly, the MFRs are intended to provide filing guidance to the Company as a direct result of the RGGI Act's 180-day deadline and permit Rate Counsel and the Board to evaluate filings in a timely manner. In sum, the MFRs provide only the bare minimum basic supporting material needed to initiate a review of the Petition. Exemption from the MFRs' Section V CBA requirements does not obviate the need to assess the cost-effectiveness of the proposed EE programs.

Contrary to Rockland's arguments, an analysis of the cost effectiveness of its proposed EE programs is a relevant and necessary inquiry in this proceeding. The controlling statute in this matter, N.J.S.A. 48:3-98.1, defines "Program costs" associated with utility energy efficiency programs which are subject to recovery from ratepayers as "all reasonable and prudent costs incurred in development and implementing energy efficiency...." Here, cost-effectiveness is a necessary component of an inquiry into the reasonableness of costs for which recovery from ratepayers is sought.

Furthermore, to omit the issue of cost-effectiveness in this review is contrary to the scope of the review set forth in the 2008 MFR Order. Therein, the Board recognized cost-effectiveness as an issue:

To effectuate the Legislature's findings, this Order outlines an expedited process for developing energy efficiency, conservation and Class I renewable energy programs, with the goal of maximizing the benefits and cost-effectiveness of the programs, and minimizing, to the extent possible, for all parties the administrative

⁴ 2008 MFR Order, p. 3.

burden of program development and review, and unnecessary delay in program approval. [Emphasis added.]⁵

Therefore, Rate Counsel maintains that the November 8, 2017 Prehearing Order in the instant matter should not be amended at Section A(1) to exclude cost effectiveness as an issue since the Board has expressly stated the cost-effectiveness of the program is an integral aspect of evaluating energy efficiency programs.

Additionally, exemption from Section V of the MFRs does not preclude seeking additional information through discovery. The Board specifically recognized that the scope of information provided in the course of its review is not limited by the MFRs:

The minimum filing requirements...may be modified by Board Staff as determined on a case by case basis...The modification of the minimum filing requirements for a particular petition shall not preclude a subsequent request being made for the information.⁶

Thus, as a practical matter, although the Company is exempt from Section V of the MFRs, it is not exempt from responding to discovery regarding the cost-effectiveness or other aspects of its proposed program. Rate Counsel cannot be precluded from propounding discovery on cost-effectiveness simply because the information is not required as an MFR.

Finally, Rockland's questioning of which party bears the burden of proof misses the point entirely. Motion, p. 2. The burden of proof increase does not change as a result of the Prehearing Order. The burden of proof was and continues to rest on the Company. N.J.S.A. 48:2-21(d). In matters before the Board, the Company must meet its burden of proof to demonstrate the proposed program should be approved by "a fair preponderance of the evidence." Matter of

⁵ 2008 MFR Order, p. 3.

⁶ 2008 MFR Order, p. 4.

Polk, 90 N.J. 550 (1982). To meet its burden of proof, the Company is required at a minimum to set forth evidence of its own analysis of why the program costs should be deemed prudent and reasonable in light of the proposed benefits to ratepayers. At this point, absent sufficient information supporting the cost-effectiveness of its proposed programs, the Company has not met its burden of proof to demonstrate that its proposed EE program should be approved.

II. Rate Counsel Has Not Imposed an Expert on Petitioner

Contrary to Rockland's assertions, Rate Counsel has not insisted that the Company use the CBA performed by the Rutgers University Center for Energy, Economic & Environmental Policy ("CEEPP") or that the Company retain CEEPP as an expert in this matter. Motion, pp. 3-4. In fact, Rockland selected CEEPP to perform a CBA and CEEPP's CBA, dated January 17, 2017 ("CEEPP CBA"), is the only support provided by Rockland to assess the cost-effectiveness of its proposed EE program.⁷ Furthermore, in its Petition, Rockland cites the CEEPP CBA's conclusions regarding the relative effectiveness of the Company's EE programs. Petition, p. 6. Rockland cannot now claim that Rate Counsel insisted on using the CEEPP CBA and using CEEPP as an expert witness when, in fact, Rockland itself chose CEEPP to perform a CBA for its EE programs, cited the CEEPP CBA for support in its Petition, and also included the CEEPP CBA as an attachment to its Petition. Petition, Exhibit H.

The Company correctly noted in its Motion that the Stipulation of Settlement ("Stipulation") approved by the Board in its Low Income Audit and Direct Install Energy

⁷ Without CEEPP as a witness in this case, Rate Counsel is deprived of its right to probe the CBA and Rockland does not have any witness able to introduce the CBA at hearing. Thus, at this point, there will be no evidence of cost-effectiveness in the record. Again, it is Rockland's burden to prove its case, and it may do so as its sees fit, but basic rules of discovery, evidence and due process must be met.

Efficiency II Program ("LIAP II") required Rockland to perform a CBA and provide it to Board Staff and Rate Counsel. Specifically, the Stipulation did not require Rockland to use the services of CEEEP and gave the Company the discretion to select either CEEEP or itself to perform the CBA:

The cost-benefit analysis will be performed by CEEEP or in house by the Company, at the discretion of the Company, and will be provided to BPU Staff and Rate Counsel. [Emphasis added]⁸

Rockland – not Rate Counsel or Board Staff - selected CEEEP to perform the CBA. Moreover, Rockland, without protest, included the CEEEP CBA as part of its Petition in the instant case and cited its conclusions in support of its case. Petition, p. 6 and Exhibit H.

In its Motion, Rockland cites what it considers deficiencies in the CEEEP CBA as it relates to the instant case yet makes no mention of any efforts by the Company to address those deficiencies. Rockland asserts that the CEEEP CBA does not "address" the cost effectiveness of its proposed EB programs and that it does not "show" the cost effectiveness of its proposed EE program. Motion, p. 3. Rockland's factual assertions have yet to be fully vetted in this case. However, as set forth above, the burden of proof to support its cases rests with Rockland.

Additionally, exemption from Section V of the MFRs does not preclude seeking additional information through discovery.⁹ The Board specifically recognized that the scope of information provided in the course of its review is not limited by the MFRs:

The minimum filing requirements...may be modified by Board Staff as determined on a case by case basis...The modification of the minimum filing

⁸ See *IdO The Verified Petition of Rockland Electric Company for Approval of an Energy Efficiency Stimulus Program and Associated Rate Recovery*, BPU Docket No. ER13060535 (Order dated April 23, 2014) ("LIAP II Order"), p. 5 and Stipulation, p. 8.

⁹ Although not referenced in the Motion, Rockland has asserted elsewhere that because it is not required to support the CEEEP CBA, it need not respond to discovery regarding the CEEEP CBA, particularly RCR-EE-12.

requirements for a particular petition shall not preclude a subsequent request being made for the information.¹⁰

Thus, as a practical matter, although the Company is exempt from Section V of the MFRs, it is not exempt from responding to discovery regarding the cost-effectiveness or other aspects of its proposed program. Rate Counsel cannot be precluded from propounding discovery on cost-effectiveness simply because the information is not required as an MFR.

III. The Prehearing Order is Not Procedurally Defective

The Company also argues that the Prehearing Order is procedurally defective. Motion, p. 4. This argument is misplaced since the New Jersey Administrative Code specifies that “procedural rules may be relaxed or disregarded if the judge determines that adherence would result in unfairness or injustice” at the discretion of the judge. N.J.A.C. 1:1-1.3. In this instance, the matter has been retained by the Board and is being heard by Commissioner Chivukula who sits as the presiding Commissioner and may, at his discretion, relax procedural rules under the aforementioned circumstances. While Rate Counsel maintains that this particular situation falls within the rule, even assuming *arguendo* that there was a procedural defect, curing it would result in unfairness to Rockland’s ratepayers if Rate Counsel and the Board are unable to evaluate the cost effectiveness of the proposed program.

The instant case is the third permutation of Rockland’s EE programs implemented pursuant to the RGGI Act and subject to the Board’s 2008 MFR Order. As such, Rockland cannot now reasonably view the issues listed in the Prehearing Order as unexpected or novel. The fact that the Prehearing Orders in other RGGI Act EE cases did not list issues is of little

¹⁰ 2008 MFR Order, p. 4.

merit in the instant case. Motion, p. 4. In each of Rockland's prior RGGI Act EE cases, cost effectiveness was addressed.

The Board Order approving Rockland's first EE program under the RGGI Act, its Low Income Audit and Direct Install Energy Efficiency I Program ("LIAP I"), cited cost effectiveness and the need to evaluate cost effectiveness.¹¹ Similarly, as noted above, the language in the Stipulation and Board Order in the LIAP II matter addressed the issue of cost effectiveness.¹² Hence, the Company was duly on notice that the Board had specific concerns regarding the cost-benefit analysis in the Company's energy efficiency program. For the Company to now state that it should be exempt from providing any such analysis for a continuation of its energy efficiency program is disingenuous.

Furthermore, the Company even noted that at the pre-filing meeting for the instant matter, the Board Staff specifically requested the CBEPP cost benefit analysis of the LIAP II program to be annexed to the petition when filed.¹³ It is clear from that request that the Board had an interest in the issue.

Finally, the instant Motion is untimely. Rockland's Motion was filed on December 14, 2017, which was over one month after the Prehearing Order was issued and a scant four days before the scheduled filing date for intervenor testimony. The first two rounds of discovery were completed and Rate Counsel filed the testimony of its expert witnesses on December 18, 2017.

¹¹ See *IMO the Verified Petition of Rockland Electric Company for Approval of an Energy Efficiency Stimulus Program and Associated Rate Recovery*, BPU Docket Nos. EO09010056 and EO09010061 (Order dated November 23, 2009) ("LIAP I Order"), pp. 6, 11-13.

¹² See LIAP II Order, pp. 4-5, Stipulation, p. 8.

¹³ Motion, p. 3.

CONCLUSION

For the above reasons, Rate Counsel respectfully requests that Rockland's letter Motion to amend the Prehearing Order in this matter be denied.

Respectfully submitted,

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By:



Kurt S. Lewandowski, Esq.
Assistant Deputy Rate Counsel

cc: Hon. Irene Kim Asbury, Secretary (via Hand-Delivery – 10 copies)
Service List (via electronic and regular mail)

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