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BOARD OF PUBLIC UTILITIES
TRENTON, NJ

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BOARD OF PUBLIC UTILITIES
TRENTON, NJ

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File No.: 452218-30

March 25, 2019

VIA ELECTRONIC MAIL AND REGULAR MAIL

Aida Camacho-Welch, Secretary
Board of Public Utilities
44 South Clinton Avenue
Trenton, New Jersey 08625

**Re: In the Matter of the Petition of Public Service Electric and Gas Company
For Approval of its Clean Energy Future-Energy Efficiency ("CEF-EE")
Program On a Regulated Basis
BPU Docket Nos. GO18101112 & EO18101113**

Dear Secretary Camacho-Welch:

In accordance with N.J.A.C. 1:1-12.2(c), Direct Energy Business, LLC ("Direct Business"), Direct Energy Business Marketing, LLC ("Direct Marketing"), Direct Energy Services, LLC ("Direct Services"), Gateway Energy Services Corporation ("Gateway"), and NJR Retail Services Company ("NJR") (collectively, "Direct Energy"), NRG Energy, Inc. ("NRG"), Just Energy Group Inc. ("Just Energy") and Centrica Business Solutions ("Centrica") (collectively, the "Market Participants") hereby submit this letter in response to the March 18, 2019 letter submitted by Public Service Electric and Gas Company ("PSE&G" or "the Company") opposing the Motion for Reconsideration filed by the Market Participants on March 8, 2019 ("Letter in Opposition"). As more fully described below, the Market Participants respectfully request that the New Jersey Board of Public Utilities ("the Board") grant the Market Participants' Motion for Reconsideration, on the basis that the Market Participants have introduced new information demonstrating that they will be substantially, specifically, and directed affected by the outcome of this contested case, their interests are sufficiently different from that of any party so as to add measurably and constructively to the scope of the case, and none of the reasons relied upon in the February 27 Order justify the exclusion of the Market Participants as intervenors in this proceeding. See N.J.A.C. 1:1-16.1 and 16.3.

In its Letter in Opposition, PSE&G contends that a Motion for Reconsideration is improper at this stage of the proceeding and, if granted, would "throw the procedural schedule

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into chaos.” Letter in Opposition at 4-6. PSE&G further argues that the Market Participants do not meet the standard for reconsideration. Letter in Opposition at 6-9. For the reasons explained below, PSE&G’s arguments lack merit.

a. **The Market Participants’ Motion for Reconsideration is procedurally appropriate.**

Despite PSE&G’s claim to the contrary, the Market Participants’ Motion for Reconsideration is proper at this stage of the proceeding. In fact, the Board has considered Motions for Reconsideration that were sought under these exact circumstances. *See In re Petition of Atlantic City Electric Company, d/b/a Conectiv Power Delivery, for Approval of Amendments to its Tariff to Provide for an Increase in Rates for Electric Service*, BPU Docket No. ER02080510 (Opinion dated March 24, 2003) (“*Conectiv Power Order*”). In the *Conectiv Power Order*, the presiding Administrative Law Judge (“ALJ”) denied a motion to intervene filed by Congentrix Energy, Inc. (“Congentrix”) and, instead, granted Congentrix participation status. Congentrix then moved for interlocutory review. The Board subsequently granted the Motion for Interlocutory Review, but affirmed the decision of the ALJ (“Board’s Order”). Congentrix then filed a Motion for Reconsideration of the Board’s Order. Notably, the Board did not dismiss the Motion for Reconsideration on the grounds that it constitute a second “bite of the apple,” or that it was otherwise procedurally improper. Rather, in that case, the Board found that Congentrix did not meet the criteria for reconsideration, because the Motion merely restated arguments that were previously made. *Conectiv Power Order* at 2-6; *see also In re the Consultative Report on the Application of Verizon New Jersey Inc. for FCC Authorization to Provide In-Region, Interlata Service in New Jersey*, BPU Docket No. TO01090541 (Opinion dated Nov. 8, 2001) (“*Verizon Order*”).

In the *Verizon Order*, the Board considered a Motion seeking reconsideration of a **Procedural Order**. The Board explained why it is appropriate to consider a Motion for Reconsideration of a non-final Order, as follows:

Pursuant to N.J.S.A. 48:2-40, the Board may at any time modify an order made by it. See also, N.J.A.C. 14:1-8.6(b). A new development, new evidence or a material misapprehension concerning an essential matter, which is critical to an agency determination, can constitute a reasonable basis for reconsideration. In re Trantino Parole Application, 89 N.J. 347, 365 (1982).

Verizon Order at 18. As such, Board precedent establishes that the Market Participant’s Motion for Reconsideration of the Board’s February 27 Order is appropriate if there is a new development, new evidence, or a material misapprehension concerning an essential matter, which was critical to the Board’s determination.

Here, the Board's February 27 Order considered the interventions of both Keystone Energy Efficiency Alliance ("KEEA") and the Market Participants, among others. In granting the intervention of KEEA and denying the intervention of the Market Participants, the Board pointed to KEEA as a party having similar interests to the Market Participants. February 27 Order at 11. This finding is critical in determining whether the Market Participants meet the standard for intervention and have an interest that is "sufficiently different from that of any party so as to add measurably and constructively to the scope of the case." *See* N.J.A.C. 1:1-16.3.

In their Motion for Reconsideration, the Market Participants demonstrated that the interests of KEEA are not similar to those of the Market Participants, as the Board had indicated. The Market Participants attached to their Motion for Reconsideration an executed affidavit of KEEA, declaring that it does not intend to represent the interests of the Market Participants in this proceeding. Therefore, the Market Participants have presented a new development that is critical to the Board's determination to deny the Market Participants' intervention in its February 27 Order.

This new information also raises the concern that a failure to reverse the February 27 Order will deprive the Market Participants of due process by denying them an opportunity to be heard on valid issues to which they have a direct and substantial interest. If, in fact, KEEA intended to represent the interests of the Market Participants in this proceeding, the issue of due process may be moot. That, however, is not the case.

As the Market Participants have introduced a new development concerning an essential matter critical to the Board's determination, the Motion for Reconsideration is procedurally appropriate at this time.

b. The Market Participants' Motion for Reconsideration will not cause undue delay or otherwise disrupt the procedural schedule.

Also contrary to PSE&G assertion, the Market Participants' Motion for Reconsideration will not cause undue delay or otherwise disrupt the procedural schedule. The Market Participants filed a timely Motion to Intervene in this case. They also timely filed their Motion for Interlocutory Review, Motion for Reconsideration, and all responsive filings. In anticipation of being granted intervenor status, the Market Participants even served timely discovery in this case, to which PSE&G did not respond. Direct Energy and Centrica, jointly, and Just Energy, individually, also submitted written testimony during the public input hearing in this proceeding on March 21, 2019.

The Market Participants have consistently stated that their intervention would not delay or otherwise disrupt the adjudication of this proceeding, and the Market Participants maintain that position. Through their intervention, the Market Participants do not seek to modify or

otherwise delay the procedural schedule. As noted by PSE&G in its Letter in Opposition, evidentiary hearings are set for May 1-2. If granted intervenor status at this time, the Market Participants will still have time to receive responses to their already-served discovery requests and fully participate in the evidentiary hearings and any further settlement discussions without delaying the procedural schedule. The Market Participants should not be denied this opportunity because, through no fault of their own, they were not immediately granted intervenor status.

c. The Market Participants have met the standard to reverse or modify the Board's February 27 Order to grant the Market Participants full party status as intervenors in this proceeding.

The Market Participants have met the standard to reverse or modify the Board's February 27 Order to grant the Market Participants full party status as intervenors in this proceeding. The Board will reverse an Order as a result of reconsideration when: (1) the decision is based upon a "palpably incorrect or irrational basis;" or (2) it is obvious that the finder of fact did not consider, or failed to appreciate, the significance of probative, competent evidence. *E.g. Cummings v. Bahr*, 295 N.J. Super. 374, 384 (App. Div. 1996). The moving party must show that the action was arbitrary, capricious or unreasonable. *D'Atria v. D'Atria*, 242 N.J. Super. 401, 401 (Ch. Div. 1990).

In their Motion for Reconsideration, the Market Participants have demonstrated that the Board's decision was palpably incorrect, based upon an irrational basis, and unreasonable for the following reasons:

(1) the interests of [KEEA] are not similar to the Market Participants, as evidenced by the executed affidavit of KEEA [...] declaring that it does not intend to represent the interests of the Market Participants in this proceeding;

(2) the Electric Discount and Energy Competition Act of 1999 ("EDECA") favors reliance on competitive markets, where such markets exist, over bundled public utility service, N.J.S.A. 48:3-50(a)(2), and expressly prohibits public utilities from offering competitive services to retail customers without the prior express written approval of the Board, which is obligated to consider the adverse impact on the ability of the utility to offer traditional poles and wires services in a safe, adequate and proper manner, N.J.S.A. 48:3-55(a)(1);

(3) the perspectives of the Market Participants are critical for the Board to hear and understand in considering whether to allow a significant expansion by a public utility into an area already being served by competitive markets; and

(4) the proposed expenditure of a massive amount of funds - \$2.8 billion, as compared to \$95.3 million in the last energy efficiency proceeding, which are involved in this proceeding - warrants careful and thorough scrutiny by the Board, and the Market Participants are uniquely positioned to offer evidence showing that further utility penetration into established competitive markets is unnecessary and inappropriate.

Motion for Reconsideration at 2, 6-11.

PSE&G's argument that KEEA is not intended to be a substitute for each and every private business that may be impacted by the Company's proposal lacks merit. *See* Letter in Opposition at 8. Because KEEA does not intend to represent the interests of the Market Participants, the logical conclusion is that the Market Participants have an interest that is "sufficiently different from that of any party so as to add measurably and constructively to the scope of the case," which warrants intervenor status in this case. *See* N.J.A.C. 1:1-16.3.

Additionally, PSE&G's argument that the role of the utility in implementing energy efficiency programs has long been established completely ignores the express language of the EDECA in favoring reliance on the competitive markets. *See* Letter in Opposition at 8-9. Surely, if the role of the utility and the proper implementation of energy efficiency programs was as clear-cut as PSE&G attempts to portray, there would be no need or basis at all for investigating and holding evidentiary hearings on these issues. The fact that PSE&G may not agree with the position that the Market Participants seek to advance is no basis to prohibit the Market Participants intervention in a case in which they have a direct and substantial interest.

Finally, as for PSE&G's claim that "the scope of the CEF-EE filing as compared to the EE 2017 filing supports the Board's rationale that not every private market entity with individual interest – of which there are many – can be granted full party rights," completely ignores the proper standard for intervention in a Board proceeding. *N.J.A.C. 1:1-16.1* provides that "[a]ny person or entity not initially a party, who has a statutory right to intervene or who will be substantially, specifically and directly affected by the outcome of a contested case, may on motion, seek leave to intervene. *N.J.A.C. 1:1-16.1(a)*. In ruling on a Motion to Intervene, the Board is instructed to evaluate: (1) the nature and extent of the movant's interests in the outcome of the case; (2) whether the movant's interest is sufficiently different from that of any party so as to add measurably and constructively to the scope of the case; (3) the prospect of confusion or undue delay arising from the movant's inclusion; and, (4) any other appropriate matters. *N.J.A.C. 1:1-16.3*. The number or magnitude of issues raised in a proceeding is not a consideration in granting intervenor status. As demonstrated in their Supplemental Motion to Intervene, Motion for Interlocutory Review, and Motion for Reconsideration, the Market Participants have fully satisfied all factors required for intervention.

For the reasons explained above, the Market Participants respectfully request that the Board of Public Utilities modify the February 27 Order to grant them full party status as intervenors in this proceeding. Given the 180-day statutory timeframe for this case, the Market Participants request that the Board grant their Motion to Intervene on an expedited basis.

Respectfully Submitted,



Christopher E. Torkelson

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cc: Certificate of Service