

November 11, 2019

VIA OVERNIGHT DELIVERY & ELECTRONIC MAIL

Honorable Aida Camacho-Welch, Secretary
New Jersey Board of Public Utilities
44 South Clinton Avenue, 9th Floor
P.O. Box 350
Trenton, New Jersey, 08625-0350

**Re: In the Matter of the Exploration of Gas Capacity and Related Issues
New Jersey Natural Gas Company's Response to Rate Counsel Motion to Strike
Levitan & Associates, Inc.'s Comments and Report
BPU Docket No. GO19070846**

Dear Secretary Camacho-Welch:

This firm represents New Jersey Natural Gas Company ("NJNG") in the above-referenced matter.

NJNG is in receipt of an October 30, 2019 Motion by the Division of Rate Counsel ("Rate Counsel") to strike the comments and report of Levitan & Associates, Inc. ("LAI") in *In the Matter of the Exploration of Gas Capacity and Related Issues*, BPU Docket No. GO19070846 (the "Gas Capacity Matter"). As the Board is aware, LAI has consulted with the Board in unrelated proceedings pertaining to the issuance of Zero Emission Credits ("ZECs") and the BPU's solicitation for offshore wind in New Jersey. Separately, NJNG retained LAI to perform an objective and independent assessment of natural gas capacity in New Jersey to independently confirm NJNG's concerns regarding future challenges in providing reliable service. Rate Counsel's Motion accuses LAI of state ethics violations due to its involvement in unrelated, BPU proceedings and argues that LAI's involvement tends to "impair the independence and objectivity of the Board." Rate Counsel's accusation and suggestion are groundless and should be disregarded.

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H. Westland, Esq.

A. Rate Counsel's Interpretation of EO 189 Does Not Align With General Principles in Ethics Law.

Rate Counsel misconstrues language in Executive Order 189 ("EO 189") signed by Governor Thomas H. Kean on July 20, 1988. This language states as follows:

No vendor shall influence, or attempt to influence or cause to be influenced, any State officer or employee or special State officer or employee in his official capacity in any manner which might tend to impair the objectivity or independence of judgment of said officer or employee.

This language was later codified at N.J.A.C. 17:12-6.3(a)17. See also 21 N.J.R. 3930, 3931 (Dec. 18, 1989). In Rate Counsel's opinion, providing an evidence-based report based on publicly-available information is an improper attempt to influence the Board. Under Rate Counsel's logic, doing any consulting work for the Board renders the consultant so close to the Board that it can influence its decisions and is, therefore, unable to work on any other matters before the Board, even if they are totally unrelated. Assisting the Board as its consultant in discreet, unrelated matters is not the vendor-behavior targeted by EO 189 and cannot possibly be construed to act as a bar to a vendor providing evidence or opinion in a public forum in an entirely different and distinct matter. That is certainly not the approach seen in other areas of ethics law.

For example, the New Jersey Department of Treasury, Division of Purchase and Property, has promulgated a "Business Ethics Guide" ("Ethics Guide"), *available at* <https://www.nj.gov/treasury/purchase/pdf/BusinessEthicsGuide.pdf>, for vendors of the State. It provides six guiding principles reflecting "current Conflicts of Interest Law." Ethics Guide § 1. Nowhere is there a suggestion that a consultant cannot do work on behalf of a private entity in an unrelated matter. Instead, it states, *inter alia*, as follows:

Consultants can provide State agencies with expert assistance in the development of complex technical scopes of work to be used as the basis of an RFP or other solicitation. However, State agencies must be mindful that while consultants may

assist in scope of work development, it is ultimately the responsibility of the State agency to develop and deliver the scope of work to the Division. Further, any materials developed by a Consultant during the course of its work remain the property of the State and cannot be distributed to any outside party. Consultants engaged by State agencies for purposes of assisting in RFP development may be required to execute a confidentiality agreement prior to the commencement of work. ***In addition, Consultants and any parent, subsidiary, or affiliate companies, cannot submit a response to an RFP that the Consultant was hired to help develop.***

Id. § 5.1. The above language makes clear that the consultant is not the governing body and does not make final decisions. Further, the language makes clear that the consultant cannot represent a private interest in the same matter in which it is performing work for the government body.¹ That appears to be the primary concern of any conflicts analysis as it relates to outside vendors—representing a public and private interest in the same matter. Clearly, that is not what occurred here.

Another example of the proper scope of the ethics inquiry can be seen in the New Jersey Uniform Ethics Code (“Ethics Code”)², which addresses post-employment restrictions on former government employees. The Ethics Code provides for a one-year restriction on certain, high-level officials before they can then appear before the government body they previously worked for. *Ethics Code* at p. 11. It does not apply to all employees. More generally, there is one restriction that lingers relating to specific matters the former employee (high level or not) was directly and substantially involved in.

At no time subsequent to the termination of his/her office or employment in any State agency may a former State officer or employee or special State officer or employee represent, appear for, negotiate on behalf of, or provide information or services not generally available to members of the public, or agree to perform any of those activities, for any party other than the State ***in connection with a specific cause, proceeding, application or matter with which the State officer or***

¹ Cf. National Society of Professional Engineers Code of Ethics § II.4.d, available at <https://www.nspe.org/sites/default/files/resources/pdfs/Ethics/CodeofEthics/NSPECodeofEthicsforEngineers.pdf> (“Engineers in public service as members, advisors, or employees of a governmental or quasi-governmental body or department shall not participate in decisions with respect to services solicited or provided by them or their organizations in private or public engineering practice.”).

² Available at <https://www.state.nj.us/ethics/docs/ethics/uniformcode.pdf>.

employee or special State officer or employee had been substantially and directly involved at any time during the course of his/her office or employment. N.J.S.A. 52:13D-17.

Id. (emphasis added). The Board’s Supplemental Code of Ethics adopted July 22, 2015 (“BPU Supp. Code”)³ reiterates the above guidance with respect to post-employment restrictions. Section V specifically provides that the one-year ban applies to former Commissioners and Senior Staff (Chief of Staff, Executive Director, Board Secretary, and Chief Counsel). BPU Supp. Code § V.2. A sixth-month ban applies to other BPU employees. Id. § V.5. After these periods have passed, the former Commissioner, Senior Staff member, or employee may appear before the Board “in any matter in which they did not have direct and substantial involvement when employed by the BPU.” Id. §§ V.4, 7. Again, the primary concern is representing a public and private interest in the same matter.

LAI is neither a high-ranking official nor an employee of the Board, so the above timelines would not apply. In addition, it is clear that each of the matters in which LAI is involved are distinct and unrelated. It is simply not plausible that LAI’s discreet involvement as a consultant to the Board in unrelated matters is so compelling that LAI’s mere appearance in this matter would be enough to impair the Board’s objectivity and independence of judgement in the current matter. More importantly, there is no indication in EO 189, the Ethics Guide, the Ethics Code, or the BPU Supp. Code that the provision Rate Counsel cites to was meant to bar consultants from appearing before the government body in unrelated matters.

³ Available at <https://www.nj.gov/ethics/docs/ethics/bpucode.pdf>.

B. LAI's Comments in this Matter Were Not Provided in a Manner Tending to Impair Objectivity or Independence of the Board's Decision Making Abilities.

Rate Counsel also ignores language that is critical to the language it cites to for the alleged ethical violation. It is only when the attempt to influence the Board is done "*in any manner which might tend to impair the objectivity or independence of judgment of said officer or employee*" that the vendor has gone too far. N.J.A.C. 17:12-6.3(a)17 (emphasis added). This language must guide the analysis.

Rate Counsel has failed to indicate *how* the LAI report, provided in an open forum for public comment and discussion, might impair the Board's critical decision-making abilities due to unrelated matters in which LAI is involved. Rate Counsel cites to no action by LAI that suggests LAI's conduct or comments in the Gas Capacity Matter were performed in a manner that would "impair the objectivity or independence of the Board." First, as indicated above, the Board is not beholden to LAI. The Board was the decision maker in the prior matters. LAI's role was strictly limited to the provision of technical support. Second, as demonstrated in the affidavit provided by LAI to the Board on November 8, 2019 (the "LAI Affidavit"), the study LAI performed lacked even the appearance of ethical impropriety in a variety of ways:

- (1) LAI did not engage with the Board or its Staff to discuss the Gas Capacity Matter or its forthcoming report. LAI Affidavit ¶¶ 7–8.
- (2) The report was based, strictly, on inputs from the public domain and not from confidential information gathered in the ZEC or offshore wind proceedings.⁴ *Id.* ¶ 4.
- (3) The study came to a conclusion regarding capacity shortfalls beginning in 2020–21, but did not advocate for any specific solutions. It lacked suggestive force in that regard. *Id.* ¶ 5.

⁴ Relying on public information is a clear means of avoiding crossing any ethical line. For example, Ethics Code App. H states, "Section 17 prohibits former State officers and employees or special State officers or employees from providing information not generally available to the public. The Commission normally solicits input from the former officer's or employee's agency and also considers whether the information is available under the Open Public Records Act, N.J.S.A. 47:1A-1 *et seq.*" LAI attests that it took care to make sure this line was not crossed, and that it used only public information.

LAI took steps to guard against any suggestion of impropriety. It certainly did not provide the report or its comments "in any manner" that would indicate undue influence on the Board. Instead, as any other interested party could, LAI used public information to generate a report provided in an open forum for public review and commentary. Nothing about this procedure suggests impropriety on the part of LAI.

C. LAI's Participation Does Not Lead to Even an Appearance of Undue Influence, Nor is this the Appropriate Inquiry.

Rate Counsel qualifies its suggestion that LAI, in fact, attempted to influence the Board by stating, "At minimum, [LAI's involvement] leads to the appearance of undue influence as [LAI] has access to the Board and its Commissioners that other commenters do not have." *Rate Counsel Motion* at p. 3. As explained above, there is no basis (in fact or in ethics principles) to conclude that LAI attempted to influence the Board. Assisting the BPU in previous, unrelated matters is simply not enough to make such an inference. Moreover, it does not lead to the appearance of undue influence, nor is that any standard that is applicable to a private entity doing business with the state.

The law imposes a high standard on public officials, specifically, by barring even the appearance of unethical behavior. Under New Jersey Conflicts of Interest Law, public officials must "avoid conduct which is in violation of their public trust or which creates a **justifiable impression** among the public that such trust is being violated." N.J.S.A. 52:13D-12(b) (emphasis added). This is restated in subpart 3.c. of EO 189, which bans a commercial or entrepreneurial relationship between the vendor and state official where that relationship presents "the potential, actuality or appearance of a conflict of interest." Rate Counsel has turned the "appearance of a conflict of interest" on the part of the public official into an

“appearance of undue influence” standard imposed on the vendor. That is clearly not the standard.

Moreover, even if it were, the facts used by Rate Counsel would not support a finding of even the appearance of undue influence. Rate Counsel cites to “access to the Board and its Commissioners that other commenters do not have.” Of note, LAI has attested that it did not engage with the Board or its Staff to discuss the Gas Capacity Matter or its report. LAI Affidavit ¶¶ 7–8. In any event, simply engaging with a public body does not lead to a conclusion of holding undue influence. As explained by the New Jersey Superior Court, Appellate Division:

There are salutary reasons for open and amicable interface opportunities between regulators and the regulated, e.g., to foster the promotion of satisfactory and efficient services for the benefit of the public. What must be guarded against are the development of associations so close as to threaten, or appear to threaten, objective regulation in the public interest, or which violate express ethics mandates.

Executive Comm'n on Ethical Standards v. Salmon, 295 N.J.Super. 86, 102 (1996). Rate Counsel has cited nothing to indicate that LAI's relationship with the Board was “so close as to threaten, or appear to threaten, objective regulation in the public interest,” nor could it. *Id.* If hiring a consultant on two separate occasions could lead to such a suggestion, the ability of the government to procure the best and most cost-effective vendors would be seriously impaired. It is also clear that LAI's conduct did not violate any express ethics mandates after review of EO 189, the Ethics Guide, the Ethics Code, or the BPU Supp. Code.

In sum, Rate Counsel's accusation that LAI violated ethical standards and its suggestion that LAI did or attempted to influence the Board in a way that jeopardized the Board's ability to make an informed decision in the Gas Capacity Matter (or that there is the appearance of undue influence) have no basis in law or fact. For these reasons, the Motion to strike LAI's report and/or comments should be denied.

We have enclosed one additional copy of this letter. At your earliest convenience, please date stamp the extra copy as filed and return it in the self-addressed, stamped envelope provided.

Respectfully submitted,

COZEN O'CONNOR



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