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BOARD OF PUBLIC UTILITIES
TRENTON, NJ

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BOARD OF PUBLIC UTILITIES
TRENTON, NJ

STEFANIE A. BRAND
Director

November 19, 2019

By Hand-Delivery and 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
BPU Docket No. GO19070846**

Dear Secretary Camacho-Welch:

Please accept the original and ten copies of this letter as the Division of Rate Counsel's ("Rate Counsel") Reply to the letters submitted on behalf of New Jersey Natural Gas Company ("NJNG") and Levitan and Associates ("Levitan") in response to Rate Counsel's October 30, 2019 Motion to (1) strike the comments of Levitan and the report it prepared for New Jersey NJNG from the record in this matter, and (2) ask the Board of Public Utilities ("BPU" or "Board") to obtain a determination from the State Ethics Commission ("Commission") regarding whether Levitan may continue to serve as a consultant to the Board under its existing contracts. We are enclosing one additional copy of this letter. **Please stamp and date the extra copy as "filed" and return it in our self-addressed stamped envelope.** Thank you for your consideration and assistance.

Electronic copies of this letter are being sent to the electronic distribution list that was circulated following the stakeholder meeting held in this matter on October 1, 2019, including additions to date.

*Case mgmt
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Introduction

Rate Counsel's motion was based on Executive Order (EO) 189 (Kean), which applies to any "vendor," defined as "any person, firm, corporation or other entity which provides or offers or proposes to provide goods or services to or perform any contract for any State agency." EO 189 (Kean) states:

No vendor shall influence, or attempt to influence or cause to be influenced, any 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.

EO 189 (Kean) also requires the head of each department or agency in the Executive Branch "with the lawful authority to engage in State contracting" to adopt regulations "to include the minimum standards" set forth in the EO. Rate Counsel filed its motion because Levitan has submitted materials to the Board in support of a position advocated by NJNG, while simultaneously advising the Board on two significant matters. Rate Counsel maintains that the conflict is clear. Although Levitan's work in connection with the issuance of Zero Emissions Credits ("ZECs") and the evaluation of offshore wind applications is not related to this matter, Levitan's work for the Board gives it access to the Board's Staff and Commissioners that the other stakeholders in this proceeding do not have. At the very least, there is an appearance that greater weight will be given to the comments of a consultant that has worked closely with the Board and its Staff over an extended period of time.

In a letter dated November 8, 2018, Levitan's President, Richard Levitan, submitted a letter in which he asserts that, based on his review of the provisions relating to conflicts of interest in its consulting contracts with the Board, Levitan has not committed an ethical violation.

Levitan Response, par. 9.¹ In a letter dated November 11, 2019 NJNG asserted that Rate Counsel's motion was "groundless and should be disregarded." NJNG Response at 1. Rate Counsel disagrees. Levitan participation in this proceeding raises issues that warrant serious consideration. The Board should promptly seek guidance on these issues from the Commission and the take further action based on that guidance.

Rate Counsel's Reply Comments

Initially, Rate Counsel notes that neither Levitan nor NJNG has specifically addressed Rate Counsel's request that the Board seek guidance from the Commission. That request was an important part of Rate Counsel's motion. The Commission is the agency responsible for interpreting and enforcing the New Jersey Conflicts of Interest Law, N.J.S.A. 52:13D-12 et seq. and the ethics standards adopted thereunder. N.J.S.A. 52:13D-21. Its authority extends across the entire Executive Branch of the State's government. See, N.J.S.A. 52:13D-21(h), (i) and (o). By establishing a single State agency responsible for compliance with ethical standards, the New Jersey Legislature has expressed its intent to assure that the standards are applied uniformly by all of the State's executive-branch agencies.

The Commission's authority includes the authority to "render advisory opinions as to whether a given set of facts and circumstances would, in its option, constitute a violation of the provisions of [N.J.S.A. 52:13D-12 et seq.] or of a code of ethics promulgated pursuant to [N.J.S.A. 52:13D-23(d)]." Requests for advisory opinions are easily accessible, as the Commission's rules allow requests for advisory opinions to be "made by any person or persons." N.J.A.C. 19:61-4.1. The Board should seek such an opinion to assure that its treatment of Levitan is consistent with the treatment of similar circumstances in other agencies.

¹ At page 5 of its response NJNG refers to this letter as an "affidavit." However the copy received by Rate Counsel does not appear to be a sworn statement.

Neither Levitan nor NJNG has cited any ethics decisions or other published authorities that apply directly to the circumstances involved here. Levitan has not cited any published interpretations of the applicable ethics standards, and appears to be relying on Mr. Levitan's personal review of Levitan's contract with the Board. Levitan Response, par. 9. NJNG does not cite any ethics decisions that explicitly allow a vendor to simultaneously work for an agency and appearance before that agency on behalf of a regulated entity. Instead, it cites two "examples" that did not involve the issues of consultants simultaneously working for and appearing before an agency. NJNG Response at 2-3. Rather than address Rate Counsel's motion as a matter of first impression, the Board should seek guidance from the State agency that is responsible for compliance with ethical standards statewide. This will assure that the Board acts consistently with other agencies that have faced similar circumstances.

The two "examples" discussed in NJNG's response do not sanction Levitan's appearance in these proceedings. NJNG argues that these examples show that EO 189 is intended to address only those situations in which a consultant is working for an agency and representing a private entity in the same matter. NJNG Response at 2-3. While the materials cited by NJNG involve circumstances in which a consultant represents an agency and a private entity in the same matter, they do not establish that this is the only concern addressed by EO 189.

First, NJNG cites the "Business Ethics Guide" issued by the New Jersey Department of the Treasury, which notes that a consultant may not help develop Request for Proposal ("RFP"), and then submit a response to the same RFP. NJNG Response at 2-3. NJNG argues that this specific prohibition is an indication that the "primary concern of any conflicts analysis as it relates to outside vendors" is assuring that they do not represent an agency and a private interest "in the same matter." NJNG Response at 3. Second, NJNG cites the post-employment

restrictions on the Board's employees that are provided in the New Jersey Uniform Ethics Code and the Board's Supplemental Code of Ethics. NJNG argues that the "primary concern" of the post-employment restrictions is "representing a public and private interest in the same matter." NJNG Response at 4. According to NJNG, this is the case because, after an initial period of disqualification from any appearance before the Board (one year for Commissioners and Senior Staff, and six months for other employees), former BPU employees are permitted to appear before the Board "in any matter in which they did not have direct and substantial involvement when employed by the BPU." NJNG Response at 4.

These examples are beside the point. While prohibitions on working on the same matter on behalf of both an agency and a private entity are important, this is not the only concern addressed by EO 189. The language of EO 189 aims to prohibit all conduct that "might tend to impair the objectivity or independence of judgment" of a State officer or employee. Nothing in EO 189 indicates that it is as limited as suggested by NJNG.

The Board itself, through its own ethics standards, recognizes that simultaneous work for an agency and before the agency on behalf of a private entity is a matter for concern, even if the work is on different matters. During their employment with the BPU, Commissioners and members of the Board's staff may not engage in "uncompensated or voluntary activities" outside of their employment with the Board, and unless activity would not "create a conflict of interest or the appearance of a conflict ..." BPU Supplemental Ethics Code, sec. VI.2. Further, Commissioners and other BPU employees remain subject to restrictions on representing private entities in matters before the Board even after they leave the Board. As NJNG recognizes in its response, the former Commissioners and former members of the Board's senior staff may not represent a private interest in any matter before the Board for a full year following the termination of their

employment with the Board, and a similar six-month prohibition applies to other former BPU employees. BPU Supplemental Ethic Code, sec, V.2. and V.5. These prohibitions reflect the Board's recognition that work on behalf of the Board and a regulated entity can create, at a minimum, an appearance of a conflict, even if the work involves different matters.

A better analogy to the current circumstance may be that addressed in Klug v. Bridgewater Township Planning Board, 407 N.J. Super 1 (App. Div. 2009), which interpreted the Local Government Ethics Law, N.J.S.A. 40A:9-22.1 et seq. That statute prohibits local officials from appearing before agencies for which they work or taking on any employment, compensated or uncompensated, that "might reasonably be expected to prejudice his independence of judgement" N.J.S.A. 40A:9-22.5. The Appellate Division interpreted this statute to prohibit a planner who prepared a report for a zoning applicant from also serving as the Township Planner, but found that the conflict had been cured when the Township's planning board reconsidered the application based on a record that excluded the planner's report. Klug, supra, 407 N.J. Super at 11-12.

Furthermore, Executive Comm'n on Ethical Standards v. Salmon, 295 N.J. Super 86 (1996), cited at page 7 of NJNG's response, also does not sanction Levitan's appearance in this matter. That decision involved a BPU Commissioner found in violation of ethics standards for conduct including working with a representative of a regulated utility to organize "pick-up" basketball games during NARUC conferences. Id. 295 N.J. Super. at 101. In the language quoted by NJNG, the Court characterized this activity as an example of "open and amicable interface opportunities between regulators and the regulated," and therefore not an ethical violation. 295 N.J. Super. at 102.

Levitan's simultaneous consulting work for the Board was not simply activity that promoted "open and amicable interface" between the Board and regulated entities. It was intensive work on important substantive matters. Levitan worked closely with the Board's Staff concerning two significant matters, the ZEC proceedings in Docket No. EO18080899, and the Offshore Wind proceedings in BPU Docket No. QO18121289. In both of these still-pending matters, Levitan engaged with members of the Board's Staff for an extended period of time, providing analyses that were relied upon by the Board and its Staff. Levitan also had direct access to the Commissioners themselves, including the ability to address the Board in Executive Session at Board agenda meetings. Moreover, both proceedings are of broad public interest, and Levitan's involvement in the ZEC proceeding has been reported in the press.² This creates a public impression that the Levitan analysis submitted in this matter would be accorded special credibility by the Board and its Staff. Accordingly, Levitan's appearance in this proceeding, at a minimum, creates an appearance that it and NJNG are trading on Levitan's ongoing relationship with the Board to advance NJNG's interests. Contrary to NJNG's suggestion at page 4 of its response, this appearance exists regardless of whether Levitan has engaged in ex parte communications with the Board or its Staff in connection with this matter.

NJNG's argument appears to be that as long as a consultant for the Board is not also appearing before the Board in the same matter, no conflict exists. However, if that argument is accepted, an example of its application would be that the Board could hire one of Rate Counsel's

²Tom Johnson, "Finally, Major Movement on Governor's Promises for Offshore Wind," NJ Spotlight, June 24, 2019, available at: <https://www.njspotlight.com/2019/06/19-06-23-finally-major-movement-on-governors-promises-for-offshore-wind/>; Tom Johnson, "As Decision on Nuclear Subsidies Nears, Where is Consultant's Report?" N.J. Spotlight, Apr. 16, 2019, available at: <https://www.njspotlight.com/2019/04/19-04-15-with-decision-on-nuclear-subsidies-looming-groups-ask-where-is-consultants-report/>; Mike Catalini, "Report: New Jersey Nuclear Plants Getting Subsidy are Viable," Associated Press, Apr. 19, 2019, available at: <https://apnews.com/5320f33e88da4385a5e4e7c2cb3c7525>.

consultants to perform consulting work for the Board in any case in which Rate Counsel was not using that consultant. That consultant could continue to work for Rate Counsel in additional, concurrent matters as long as they were different matters. It is hard to believe in that circumstance that NJNG or any other New Jersey utility would not consider this to be a conflict.


Conclusion

For the reasons stated above and in Rate Counsel's Motion, the Board should reject Levitan's and NJNG's suggestions that Rate Counsel's concerns are not substantial enough to warrant serious consideration. Levitan's appearance in these proceedings creates a public perception that a consultant can trade on its ongoing association with a state agency to influence that agency on behalf of a regulated entity. Rate Counsel's motion raises serious concerns. The Board should seek an advisory opinion from the State Ethics Commission and take further action consistent with the Commission's guidance.

Respectfully submitted,

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Director, Division of Rate Counsel

By:



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