



STATE OF NEW JERSEY
Board of Public Utilities
44 South Clinton Avenue, 9th Floor
Trenton, New Jersey 08625-0350
www.nj.gov/bpu/

ENERGY

IN THE MATTER OF THE EXPLORATION)
OF GAS CAPACITY AND RELATED ISSUES)
)
)
) DOCKET NO. GO19070846

Parties of Record:

Gregory Eisenstark, Esq., Cozen O'Connor on behalf of New Jersey Natural Gas
Stefanie A. Brand, Esq., Director, New Jersey Division of Rate Counsel

BY THE BOARD:

BACKGROUND

By Board Order dated February 27, 2019 in Docket Number GO17121241, the New Jersey Board of Public Utilities ("BPU" or "the Board") directed Staff to initiate a Stakeholder Process to explore the issue of whether there is sufficient gas capacity secured to meet New Jersey customer needs prospectively and to explore what savings have been provided to residential customers who have selected a third party supplier of natural gas in New Jersey ("TPS") to provide their gas supply service.¹

Pursuant to the Open Public Meetings Act, N.J.S.A. 10:4-6 et. seq., the BPU noticed a meeting to be held on October 1, 2019 inviting New Jersey's natural gas distribution companies ("GDCs"), the New Jersey Division of Rate Counsel ("Rate Counsel"), third party suppliers of natural gas in New Jersey, and all other interested parties and members of the public to meet to explore gas capacity and related issues.² BPU sought comments from these interested parties concerning the adequacy of pipeline capacity deliverable to New Jersey and the allocation of costs.

In response to the foregoing stakeholder meeting, New Jersey Natural Gas Company ("NJNG") filed comments with the BPU on October 16, 2019, attaching a technical report prepared by Levitan and Associates ("Levitan"). Separately, on October 22, 2019, Levitan filed independent comments. Levitan's report and its comments are what is at issue before the Board.

¹ I/M/O the Petition of the Retail Energy Supply Association to Reopen the Provision of Basic Gas Supply Service Pursuant to The Electric Discount And Energy Competition Act, N.J.S.A. 48:3-49 et seq., and Establish Gas Capacity Procurement Programs, BPU Docket No. GO17121241, Order dated February 27, 2019.

² The comment period set forth in the Stakeholder Notice ended October 22, 2019.

MOTION TO STRIKE

On October 30, 2019, Rate Counsel filed a motion by way of letter brief seeking to 1) strike the comments of Levitan and the Levitan technical report prepared for NJNG from the record in this matter, and 2) request that BPU obtain a determination from the New Jersey State Ethics Commission ("SEC") as to whether Levitan may continue to serve as a consultant to BPU under its existing contracts.

Rate Counsel contends that because Levitan is acting as a consultant to BPU in at least two pending matters³ Levitan's submission of comments and preparation of a technical report for a regulated entity appearing before BPU creates a conflict of interest. In support of its argument, Rate Counsel relies on Executive Order No. 189, (Kean, 1988) ("EO 189") signed by Governor Thomas H. Kean on July 20, 1988, and the Business Ethics Guide of the New Jersey Department of Treasury, Division of Purchase and Property ("Business Ethics Guide").

Rate Counsel's Objection

Rate Counsel contends that Levitan's current participation in the instant matter by way of its technical report and comments violates the ethical rules governing vendors with contracts with the State contrary to EO 189, which states in part:

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. (Rate Counsel Motion at 2.)

Rate Counsel similarly contends that the Business Ethics Guide, which has been established by the Department of Treasury, of which BPU is in but not of, establishes as grounds for debarment from state contracting, effort to "influence or attempt to influence or cause to be influenced, any State Officer or employee or special State officer or employee in his or her official capacity in any manner which might tend to impair the objectivity or independence of judgment of said officer or employee." (Rate Counsel Motion at 3 citing N.J.A.C. 17:12-6.3).

Rate Counsel alleges that the comments submitted to BPU by Levitan on behalf of itself and NJNG is an attempt to improperly influence BPU to adopt NJNG's positions on the matter before BPU. Rate Counsel reasons that by Levitan simultaneously advising BPU as a consultant on other separate and distinct matters, the independence and objectivity of BPU may be impaired, or at a minimum, it leads to the appearance of undue influence because Levitan has access to BPU and its Commissioners in a way that other commenters do not have. Rate Counsel further reasons that because Levitan is in the position of advising BPU on other matters, there is an implication that Levitan's comments in the instant matter will be given more weight than the opinions of others.

On November 8, 2019, Levitan filed its letter response to Rate Counsel's motion to strike.

³ Docket No. EO18080899; I/M/O the Implementation of L 2018, C. 16 Regarding the Establishment of a Zero Emission Certificate Program for Eligible Nuclear Power Plants, and Docket No. QO18121289; I/M/O the Board of Public Utilities Offshore Wind Solicitation for 1,100 MW – Evaluation of OSW Applications.

Levitan's Opposition

In its letter brief in opposition to Rate Counsel's motion to strike, Levitan explains that the comments it submitted on October 22, 2019 concerning the adequacy of pipeline capacity deliverable to New Jersey was merely a summary of the findings of the independent study undertaken by Levitan comparing capacity entitlements in pipeline customer indices filed with the Federal Energy Regulatory Commission ("FERC") for Q1 2019 to the New Jersey GDCs' forecasts of Basic Gas Supply Service ("BGSS") design day requirements as filed in May 2018. Levitan further explains that the study objectives did not include delineation of, or any advocacy regarding a specific solution or solutions to resolve any identified capacity shortfall. Levitan continues by saying the study findings do not have any relevance to the other contracted matters between Levitan and BPU. Levitan explains that its submission of comments and technical report was solely for the purpose of presenting a description of the GDCs' aggregated design day demands, which were previously filed with BPU, and the contractual disposition of pipeline capacity in New Jersey, as filed with FERC. Levitan denies the allegations of Rate Counsel that it was seeking to influence BPU Staff or Commissioners in any way that would impair the objectivity or independence or judgment of BPU Staff.

On November 11, 2019, NJNG, by and through its attorneys, Cozen O'Connor, filed its letter response to Rate Counsel's motion to strike.

NJNG's Opposition

In its letter brief in opposition to the motion to strike, NJNG maintains that Rate Counsel mischaracterizes the type of conduct that EO 189 is designed to address. NJNG contends that Levitan's role as a consultant to BPU in discreet, unrelated matters is not the vendor-behavior targeted by EO 189, and thus cannot 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. NJNG further referenced the New Jersey Uniform Ethics Code ("Ethics Code") and BPU Supplement Code of Ethics ("Supplemental Code") in its argument that Rate Counsel's application and imposition of ethical duties upon Levitan is improper. NJNG further argued that Rate Counsel has failed to cite any actions by Levitan that suggests Levitan's conduct or comments in the instant matter were performed in a manner that would impair the objectivity or independence of BPU in that BPU is not beholden to Levitan and that Levitan's role was strictly limited to the provision of technical support. NJNG further argued that the study performed by Levitan lacked even the appearance of ethical impropriety in that Levitan 1) did not engage anyone at BPU to discuss the report; 2) the report was based strictly on inputs from the public domain and not from confidential information gathered from any other proceeding; 3) the study came to a conclusion regarding capacity shortfalls but did not advocate for any specific solutions and therefore lacked even suggestive force; and 4) Levitan took steps to guard against any suggestion of impropriety. Lastly, NJNG argues that Rate Counsel has improperly imposed a standard on a vendor that applies to a public official under the applicable ethical codes in its argument that Levitan's participation leads to the appearance of a conflict of interest.

On November 19, 2019, Rate Counsel filed its letter reply to both Levitan and NJNG's respective responses to Rate Counsel's motion of October 30, 2019.

Rate Counsel's Reply to Levitan and NJNG's Responses to Motion to Strike

In its letter brief replying to the respective responses of Levitan and NJNG to Rate Counsel's motion to strike, Rate Counsel focused its argument on its second request for relief in its motion,

which asked BPU to seek an advisory opinion from SEC as to whether Levitan's participation in the instant case creates an issue of public perception. Rate Counsel argued that neither Levitan nor NJNG cited any ethics decisions or published authorities that explicitly allow a vendor to simultaneously work for an agency and appear before that agency on behalf of regulated entity. Rate Counsel cites the Supplemental Code in providing an example of simultaneous work for an agency and before an agency on behalf of a private entity as it applies to Commissioners and members of BPU staff who may not engage in activities outside their employment with BPU if the activity were to create a conflict of interest or the appearance of a conflict. Rate Counsel argued that this provision in the Supplemental Code demonstrates this as a matter for concern that should be extended to Levitan and NJNG.

DISCUSSION AND FINDINGS

The Board reviewed the submissions of Levitan and NJNG and finds Rate Counsel's arguments as to perceived conflict of interest concerns to be unfounded. The Board finds that the comments submitted by Levitan relative to the adequacy of pipeline capacity deliverable to New Jersey was merely a summary of the findings of its independent study. The Board finds that the study undertaken by Levitan for NJNG and its resulting technical report was based on publicly-available information and not on any information gleaned from Levitan's work on other matters for the Board. The Board finds that nothing in EO 189 or the Ethics Codes or the Supplemental Codes is intended to bar consultants from appearing before the Board in completely unrelated matters. Moreover, other than alleging that Levitan has "access to the board and its Commissioners that other commenters do not have", Rate Counsel failed to cite any examples that would indicate that Levitan's relationship with BPU was "so close as to threaten, or appear to threaten, objective regulation in the public interest." (See NJNG Letter in Opposition at page 7 citing Executive Comm'n on Ethical Standards v. Salmon, 295 N.J. Super. 86).

The Board appreciates Rate Counsel's stated concerns, as the Board consistently endeavors to maintain and hold the public trust and confidence by providing unbiased service to the public and the ratepayers of New Jersey. The Board does not find that Levitan's conduct in submitting comments summarizing its report and NJNG's submission of Levitan's technical report in any way jeopardizes BPU's ability to make an informed decision in this matter or creates an appearance of undue influence based upon Levitan's perceived access to the Commissioners. The Board remains cognizant of its duty to maintain public confidence in the integrity of its proceedings.

The Board and its staff are sophisticated and accustomed to working with contractors and consultants in technical and complex proceedings. In this matter, as in all matters before the Board, the Board reviews and gives appropriate weight to the submissions of parties. However, the ultimate decision of the Board is impartially made by the vote of the Commissioners based upon substantial credible evidence in the record and not the advocacy of any party, contractor or consultant. The Board's undivided loyalty is to serve the public good. The Board finds no evidence that Levitan or NJNG through their submissions attempted to influence or cause to be influenced, any Commissioner or staff member of the BPU in his or her official capacity in an any manner which might tend to impair the objectivity or independence of the BPU's judgment. Additionally, a reasonable interpretation of the Board's rules reveals no prohibition on the Board from accepting Levitan's comments in the ordinary course along with all others submitted in this matter.

Finally, the Board notes that the type of conflict of interest claim raised by Rate Counsel, implicates the jurisdiction of the SEC, which is the entity responsible for enforcing the rules governing ethical conduct. Typically, the statutes and rules prescribed in the Ethics Codes pertain

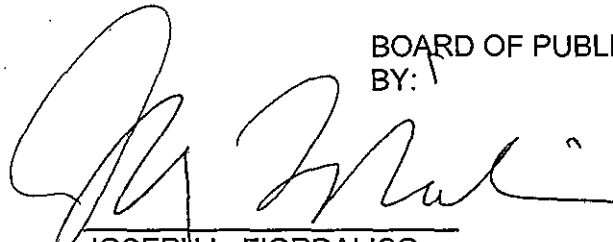
to state employees, subject to limited exemptions that do not appear to be at issue here. The Board is unpersuaded by Rate Counsel's argument that it has an obligation to seek an advisory opinion on the conduct of Levitan as requested by Rate Counsel or that BPU's Supplemental Code applies to parties outside of BPU. Rate Counsel failed to cite any case wherein the authority of the SEC has been extended to govern the conduct of non-State employees or an entire state agency. Rate Counsel accurately points out that BPU's Supplemental Code restricts the activities of its employees. However, the Supplemental Code does not govern vendors or contractors. To the extent that Rate Counsel argues that Levitan is an employee of BPU, and not a contractor, such that the Ethics Code and Supplemental Code would apply, the Board rejects that argument in its entirety. It has been widely accepted and established that a party providing services under a contract for services awarded through the procurement process is a contractor and not an employee.

For all the foregoing reasons, the Board **HEREBY DENIES** Rate Counsel's Motion to 1) strike from the record the comments of Levitan and the technical report it prepared for New Jersey NJNG in this matter, and 2) request BPU to obtain a determination from the State Ethics Commission regarding whether Levitan may continue to serve as a consultant to the Board under its existing contracts.

The effective date of this Order is December 30, 2019.

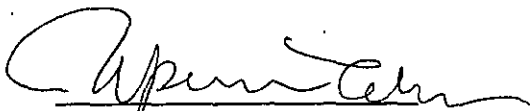
DATED: 12/20/19

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ATTEST: 
AIDA CAMACHO-WELCH
SECRETARY

I HEREBY CERTIFY that the within document is a true copy of the original in the files of the Board of Public Utilities.

IN THE MATTER OF THE EXPLORATION OF GAS CAPACITY AND RELATED ISSUES

DOCKET NO. GO19070846

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