

**STATE OF NEW JERSEY
BOARD OF PUBLIC UTILITIES**

In the Matter of the Petition of : BPU Docket No. EO18101115
Public Service Electric and Gas Company :
For Approval of its Clean Energy :
Future-Energy Cloud (“CEF-EC”) Program :
On a Regulated Basis :

**MOTION FOR RECONSIDERATION
OF MARKET PARTICIPANTS**

I. INTRODUCTION

Pursuant to *N.J.A.C.* 14:1-8.6, 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 (collectively, the “Market Participants”) file this Motion for Reconsideration of the Prehearing Order of the Board of Public Utilities (“Board” or “BPU”) issued on April 1, 2020 (“April 1 Order”) in the above-captioned proceeding. The April 1 Order, among other things, denied the Market Participants’ Motion to Intervene in the proceeding initiated by Public Service Electric and Gas Company (“PSE&G”) seeking approval of its Clean Energy Future-Energy Cloud (“CEF-EC”) Program.

The rationale offered by the April 1 Order is that the Market Participants have not demonstrated that “they will be substantially, specifically and directly affected by the outcome of the case.” April 1 Order at 13. Nonetheless, finding that “the Market Participants are likely to add constructively to the case without causing undue delay or confusion,” the April 1 Order granted

them participant status, which is limited to the right to argue orally and file a statement or brief. April 1 Order at 13. This status precludes the Market Participants from engaging in discovery, submitting testimony, participating in evidentiary hearings and filing exceptions.

Through this Motion for Reconsideration, the Market Participants respectfully request that the Board modify the April 1 Order to grant them full party status as intervenors in this proceeding. Such a ruling would be consistent with the Board's Order dated November 13, 2019 in a related proceeding, where the Board reversed its previous ruling and granted the Market Participants' Motion to Intervene. *In the Matter of the Petition of Public Service Electric & Gas Company for Approval of its Clean Energy Future-Energy Efficiency ("CEF-EE") Program on a Regulated Basis*, Docket Nos. GO18101112 and EO18101113 (Order on Motion for Reconsideration effective November 23, 2019).

As the Market Participants have previously explained, the single most compelling factor supporting intervention in this proceeding relates to access by third party suppliers and other entities in the private market to the customer usage data that will be made available through PSE&G's the deployment of advanced metering structure ("AMI"). Through access to this smart meter data, the Market Participants will have the opportunity to develop innovative products and services in the competitive market. It is critical that data access issues are adequately resolved prior to deployment of smart meters. As Intervenors, the Market Participants will be able to advocate for a proper set of rules addressing access to their own customers' interval usage data produced by the smart meters being deployed. This substantial, specific and direct interest in the outcome of this proceeding appears to have been overlooked by the April 1 Order.

It is imperative that the Board modify the April 1 Order, grant the Market Participants' Motion to Intervene, and allow them full party-status as intervenors. A significant difference exists

between the ability to engage in meaningful litigation of a proceeding under participant versus intervenor status. As entities with direct and substantial interests that are entirely different from other parties so as to add measurably and constructively to the scope of the case, and who would not delay the adjudication of the proceeding, the Market Participants are entitled, under fundamental principles of due process, to have their concerns about PSE&G's filing heard and considered by the Board.

II. BACKGROUND

1. On October 11, 2018, PSE&G filed this Petition for approval of its Clean Energy Future – Energy Cloud (“CEF-EC”) Program. Around the same time, PSE&G made related filings seeking approval of its Clean Energy Future – Electric Vehicle and Energy Storage (“CEF-EVES”)¹ and Clean Energy Future – Energy Efficiency (“CEF-EE”)² Programs. Through its CEF-EC filing, PSE&G proposes to implement a five-year program, with an estimated investment of approximately \$721 million, plus operation and maintenance costs of \$73 million, to implement Advanced Metering Infrastructure (“AMI”) through its electric service territory.

2. On November 16, 2018, pursuant to *N.J.A.C.* 1:1-16.1 and 16.2, Direct Energy and Centrica Business Solutions filed a Motion to Intervene in the CEF-EC proceeding. On December 6, 2018, a Supplemental Motion to Intervene was filed adding NRG and Just Energy, collectively referring to the entities as the “Market Participants.” PSE&G filed opposition to both the Motion to Intervene and the Supplemental Motion to Intervene (“Motion to Intervene”). Direct Energy and Centrica Business Solutions filed a response to PSE&G's opposition on December 3, 2019, and the Market Participants filed a response on December 19, 2018.³

1 Docket No. EO18101111.

2 Docket Nos. GO18101112 and EO18101113.

3 All of the prior filings made by Direct Energy, Centrica Business Solutions and the Market Participants relating to intervention are hereby fully incorporated herein by reference.

3. On April 1, 2020, Commissioner Holden issued a Prehearing Order, where she, among other things, denied the Motion to Intervene of the Market Participants. April 1 Order at 13. Finding that “the Market Participants are likely to add constructively to the case without causing undue delay or confusion,” the April 1 Order granted them participant status, which is limited to the right to argue orally and file a statement or brief. April 1 Order at 13. The April 1 Order also established a procedural schedule.

4. Through this Motion for Reconsideration, the Market Participants respectfully request that the Board modify the April 1 Order to grant them full party status as intervenors in this proceeding. A significant difference exists between the ability to engage in meaningful litigation of a proceeding under participant versus intervenor status. As entities with direct and substantial interests that are entirely different from other parties so as to add measurably and constructively to the scope of the case, and who would not delay the adjudication of the proceeding, the Market Participants are entitled, under fundamental principles of due process, to have their concerns about PSE&G’s filing fully heard and considered by the Board.

III. ARGUMENT

5. *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 BPU is instructed to evaluate: (1) the nature and extent of the movant’s interests in the outcome of the case; (2) determination of 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*.

6. In denying the Market Participants’ Motion to Intervene, the April 1 Order finds that Market Participants have not demonstrated that “they will be substantially, specifically and directly affected by the outcome of the case.” April 1 Order at 13. This result is wholly at odds with the Board’s Order dated November 13, 2019 in a related proceeding, where the Board reversed its previous ruling and granted the Market Participants’ Motion to Intervene. *In the Matter of the Petition of Public Service Electric & Gas Company for Approval of its Clean Energy Future-Energy Efficiency (“CEF-EE”) Program on a Regulated Basis*, Docket Nos. GO18101112 and EO18101113 (Order on Motion for Reconsideration effective November 23, 2019, at 5) (Board found “that the nature and extent of Market Participants’ interest warrants intervenor status” and that the “Market Participants’ inclusion will add measurably and constructively to the record in this proceeding”). Inasmuch as the Market Participants were granted intervention status in the related CEF-EE proceeding by showing that they would be substantially, specifically and directly affected by the outcome of the case, the Board should – for consistency purposes and logical reasoning – reach the same determination here.

A. The Market Participants’ Have Shown a Substantial, Specific and Direct Interest in the Outcome of this Proceeding

7. As the Market Participants have previously explained, the single most compelling factor supporting their intervention in this proceeding relates to access by third party suppliers and other entities in the private market to the customer usage data that will become available through PSE&G’s deployment of AMI. Through access to this smart meter data, the Market Participants will have the opportunity to develop innovative products and services in the competitive market.

8. It is critical that access issues are adequately resolved prior to deployment of smart meters. As Intervenors, the Market Participants will be able to advocate for a proper set of rules

addressing access to smart meter. This substantial, specific and direct interest in the outcome of this proceeding appears to have been overlooked by the April 1 Order.

9. Additionally, the April 1 Order states that the only “Use Cases” currently before the Board as part of the CEF-EC proceeding “represent core utility functions that do not infringe on the province of third party suppliers or ‘other private market participants.’” April 1 Order at 13. This statement overlooks the fact that the Use Cases at issue in this proceeding include data analytics, interactive energy demand and bill management, customer segmentation and behavioral analysis, customer efficiency programs and customer distributed energy resources. Attachment 1 (Testimony of Gregory C. Dunlap).

10. Contrary to the observation in the April 1 Order, these types of programs are far from being representative of “core utility functions” and are exactly the sort of offerings being made to consumers in the private market by the Market Participants. Accordingly, the outcome of this proceeding, which PSE&G describes as a platform enabling it to become a “leading smart energy services company,” (Attachment 1 at 6), in direct competition with third party suppliers and other private entities, will substantially, specifically and directly affect the Market Participants.

11. With Intervenor testimony due on August 31, 2020, it is imperative that the Market Participants be afforded sufficient time to conduct discovery in advance of that date and to have the ability to participate in settlement discussions with the parties. While the Board ultimately made the correct decision in PSE&G’s CEF-EE Program proceeding to grant the Market Participants’ Motion to Intervene, this ruling was not made until well after the close of the record and, as such, denied the Market Participants an opportunity to fully participate in the litigation of the proceeding. It is critical that the Board hear the perspectives of the Market Participants in

considering whether to allow a significant expansion by a public utility into an area already being served by competitive markets.

12. Due process mandates that the Board afford the Market Participants an adequate and meaningful opportunity to be heard on the issues they have raised. The Fourteenth Amendment of the United States Constitution provides that no state shall “deprive any person of life, liberty, or property, without due process of law.” The New Jersey Constitution protects similar interests. N.J. Const., Art. I, Para. 1; *see also Greenberg v. Kimmelman*, 99 N.J. 552, 494 A.2d 294 (1985). Due process calls for such procedural protections as fairness demands, the essential components of which are notice and an opportunity to be heard. *Mettinger v. Globe Slicing Mach. Co.*, 153 N.J. 371, 709 A.2d 779 (1998).

13. Moreover, New Jersey recognizes a doctrine of fundamental fairness that provides protections beyond those guaranteed by the United States and New Jersey Constitutions. *See State v. P.Z.*, 152 N.J. 86, 703 A.2d 901 (1997); *see also John Doe v. Poritz*, 142 N.J. 1, 662 A.2d 367 (1995). New Jersey Courts have recognized the applicability of this doctrine to parties participating in administrative proceedings before the Board of Public Utilities. *See e.g. In re Public Service Elec. and Gas Company's Rate Unbundling, Stranded Costs and Restructuring Filings*, 330 N.J. Super. 65, 748 A.2d 1161 (N.J. Super. 2000) (“*PSEG Rate Unbundling Case*”).

Specifically, in the *PSEG Rate Unbundling Case*, the New Jersey Superior Court held:

Where constitutional protections do not adequately safeguard an important interest, principles of fundamental fairness come into play. New Jersey’s doctrine of fundamental fairness protects against “unjust and arbitrary governmental actions, and specifically against governmental *procedures* that tend to operate arbitrarily.

Id. (Emphasis in original, internal citations omitted). While the New Jersey Superior Court noted that courts allow administrative agencies “the fullest exercise of administrative discretion,” the Court specifically added “[u]nless there is a fundamental deficiency in procedure.” *Id.*⁴

14. Being afforded the ability to make oral argument and file a brief do not equate to a meaningful opportunity to be heard, which also entails the service of discovery, the cross-examination of Company witnesses and the filing of exceptions to the initial decision. In short, full party status is necessary to ensure that the Market Participants are not restricted in their litigation strategy and ultimate appellate remedies.

B. The EDECA Obligates the Board to Consider the Impact of Utilities Offering Services Available in the Competitive Market

15. The Electric Discount and Energy Competition Act (“EDECA”) favors reliance on competitive markets, where such markets exist, over bundled public utility service. N.J.S.A. 48:3-50(a)(2).

16. Further, the EDECA expressly prohibits public utilities from offering competitive services to retail customers without the prior express written approval of the Board. During the Board’s review, it is obligated to taken into consideration the adverse impact on the ability of the utility to offer traditional utility services in a safe and appropriate manner. N.J.S.A. 48:3-55(a)(1).

17. In this proceeding, the perspectives of the Market Participants are critical for the Board to hear and understand before deciding whether to allow a significant expansion by PSE&G into an area that is already being served by competitive markets. The Market Participants can provide valuable information showing how robust this market is, such that it is not appropriate to

⁴ The New Jersey Superior Court found there was no violation of due process or fundamental fairness in the *PSEG Rate Unbundling Case*, because there was a hearing on certain issues and an opportunity to present comments on other issues. As such, the New Jersey Superior Court concluded that because the parties had notice and an opportunity to be heard, they received the essential requirements of due process. The same can certainly not be said for the Market Participants in this case.

divert PSE&G from performing its critical poles and wires functions. When programs are already available to consumers in the competitive market, it does not make sense to allow PSE&G to offer competitive services at the risk of adversely impacting its ability to offer traditional utility services in a safe and appropriate manner.

IV. CONCLUSION

For the reasons explained above, the Market Participants respectfully request that the Board of Public Utilities modify the April 1 Order to grant them full party status as intervenors in this proceeding.

Respectfully Submitted,



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