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May 8, 2020

VIA ELECTRONIC DELIVERY

Aida Camacho-Welch, Secretary
New Jersey Board of Public Utilities
44 South Clinton Avenue, 9th Floor
P.O. Box 350
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**Re: In The Matter Of The Petition Of Public Service Electric and Gas Company
For Approval Of Its Clean Energy Future – Electric Vehicle And Energy
Storage (“CEF-EVES”) Program On A Regulated Basis
BPU Docket No. EO18101111**

Dear Secretary Camacho-Welch,

Public Service Electric and Gas Company (“PSE&G”), through its undersigned counsel, hereby submits its Opposition to the New Jersey Division of Rate Counsel’s Motion to Dismiss and the Affidavit of Karen Reif in support of PSE&G’s opposition in the above-referenced matter.

Pursuant to the Board’s March 20, 2020 Order regarding the COVID-19 pandemic, these documents are being electronically filed with the Secretary and electronically served to the attached service list.¹ No paper copies will follow.

Should you have any questions concerning this matter, please feel free to contact me directly.

Sincerely,

A handwritten signature in blue ink that reads "Matthew Weissman".

Matthew M. Weissman

cc: Commissioner Upendra Chivukula
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¹ I/M/O New Jersey Board of Public Utilities’ Response to the COVID-19 Pandemic for a Temporary Waiver of Requirements for Certain Non-Essential Obligations, BPU Docket No. EO20030254 (March 19, 2020).

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

**IN THE MATTER OF THE PETITION OF)
PUBLIC SERVICE ELECTRIC AND GAS)
COMPANY FOR APPROVAL OF ITS)
CLEAN ENERGY FUTURE-ELECTRIC VEHICLE)
AND ENERGY STORAGE PROGRAMS)
ON A REGULATED BASIS)**

BPU Docket No. EO18101111

**PSEG BRIEF IN OPPOSITION TO RATE COUNSEL’S
MOTION TO DISMISS**

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Dated: May 8, 2020

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PRELIMINARY STATEMENT

Public Service Electric and Gas Company (“PSE&G” or the “Company”) hereby submits its opposition to the motion to dismiss the above-captioned matter filed on April 17, 2020 by the New Jersey Division of Rate Counsel (“Rate Counsel”) with the New Jersey Board of Public Utilities (the “Board” or “BPU”). Rate Counsel’s request for summary dismissal of PSE&G’s electric vehicle (EV) programs has no merit. First, Rate Counsel mischaracterizes applicable law and the Board’s ratemaking authority in a manner that would hamstring the Board in this and future proceedings, and that would jeopardize the Board’s ability to meet legislative mandates for statewide EV deployment.¹ Then, ignoring legal authority and current public policy priorities dictating that the Board should consider PSE&G’s proposal on its merits (and ultimately approve the petition, as PSE&G will demonstrate in the case), Rate Counsel employs narrow legal gymnastics to argue that the Presiding Officer and the Board have no ability to even hear any evidence. Rate Counsel’s arguments are flawed in numerous respects and should be rejected.

PSE&G’s EV programs are designed to accelerate EV charging infrastructure in a non-discriminatory fashion across all sectors of the Company’s service area, including those that may not otherwise have access to this innovative, clean technology. The Board clearly has the authority to approve PSE&G’s EV programs, and dismissal of these programs without any opportunity for discovery or for the intervenors representing diverse interests – including EV manufacturers, developers, market participants and environmental groups – to weigh in would be contrary to law,

¹ PSE&G notes that Atlantic City Electric Company (ACE) has also filed a Petition seeking approval of EV Programs (BPU Docket No. EO18020190) that is proceeding on a similar procedural schedule, albeit a few weeks ahead of this matter. On April 13, 2020, Rate Counsel filed a motion to dismiss the majority of ACE’s proposed EV programs that is nearly identical to Rate Counsel’s motion to dismiss PSE&G’s EV programs. ACE filed its reply in opposition to Rate Counsel’s motion on May 4, 2020. Additionally, Zeco Systems, Inc. d/b/a Greenlots (“Greenlots”) and the Natural Resources Defense Council (“NRDC”) made submissions on May 4, 2020 in opposition to Rate Counsel’s motion to dismiss in ACE’s EV programs in the ACE proceeding (“NRDC Opposition Letter”). Both Greenlots and the NRDC have been granted intervenor status in PSE&G’s CEF-EVES Petition proceeding.

and is wholly inappropriate. PSE&G's proposals to support clearly articulated State policy encouraging the transition to an electric vehicle fleet, and the proposed cost recovery mechanism, are well within accepted utility practice and are consistent with all legislative and regulatory requirements and BPU precedent.

Essentially, Rate Counsel argues the Board should ignore public utility ratemaking principles, legislative mandates, and State policy that the Board has spent years helping to develop. Instead, Rate Counsel argues, the Board should dismiss this matter based on quotations taken from decades-old foundational utility rate-making decisions that either are inapplicable to this matter or are taken out of context. Rate Counsel's flawed interpretation of constitutional principles would render even express legislative authority for certain types of utility rate recovery invalid,² jeopardizing not only PSE&G's proposed EV programs, but also over two decades of energy efficiency and clean energy initiatives and rate recovery mechanisms already in place and subject to Board jurisdiction, which continue to benefit the public at large.

Rate Counsel filed its motion to dismiss more than 18 months after the EV programs were proposed and also after, among other things, issuance of the "2019 New Jersey Energy Master Plan, Pathway to 2050" ("EMP"). The EMP made clear the State policy to move toward complete electrification of the transportation sector, and expressly stated that there would be a clear role for public utility involvement in this important and challenging transition.³ The recently-enacted Plug In Vehicle Act ("PIV Act") further confirmed the State's commitment to rapid roll-out of an EV fleet and the infrastructure to support that fleet by 2025, requiring an extraordinarily rapid and ramped-up implementation pace.⁴ In light of these developments, not to mention the undisputed

² Motion to Dismiss at 13.

³ EMP at 68.

⁴ L.2019, c. 362, codified at N.J.S.A. § 48:25-1-11.

emissions benefits of a transition to electric vehicles, Rate Counsel’s narrowly-framed arguments, seeking to prevent the Board from even considering the CEF-EV filing, conflict with law, policy, and common sense.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

PSE&G’s FILING

PSE&G filed its Clean Energy Future – Electric Vehicles and Energy Storage (“CEF-EVES”) Petition (“Petition”) on October 11, 2018 in response to the State of New Jersey’s then recent passage of the Clean Energy Act (“CEA”)⁵ and Governor Murphy’s then recently issued Executive Order 28 that directed development of a new EMP for the state.⁶

The CEA, Executive Order 28, and the 2015 version of the EMP each addressed the role of electrification of the transportation sector in meeting state’s clean energy goals.⁷ In recognition of the historically slow deployment pace of EV and EV charging infrastructure in New Jersey, the environmental and economic development and job growth benefits offered by EV, and the relationship between the EV charging infrastructure and making the electric grid more reliable, resilient and safe, PSE&G proactively developed the EV and ES (energy storage) programs presented in the Petition.⁸

Specifically, the four proposed EV programs that are the subject of Rate Counsel’s request for dismissal focus on investments to remove barriers to rapid deployment of EV charging infrastructure throughout the Company’s service territory, including sectors that would otherwise be underserved by the private development market.⁹ The programs, set forth in detail in the

⁵ L.2018, c.17.

⁶ Petition at ¶ 6.

⁷ New Jersey Energy Master Plan Update 13 (Dec. 2015); Reif Testimony at 8.

⁸ Petition at ¶¶ 4-6, 11-13; Reif Testimony at 4-10.

⁹ Petition at ¶¶ 11-13; Reif Testimony at 12-34.

Petition and accompanying testimony, are summarized as follows:¹⁰

- Residential Smart Charging: rebates paid to residential customers toward their purchase and installation of networked EV chargers and rate incentives encouraging charging during off-peak periods to ensure system reliability.
- Level 2 Mixed Use Charging: Company deployment of make-ready, electrical infrastructure as well as rebates toward customer purchase and installation costs of Level 2 charging equipment targeted toward a diverse set of customers (multi-family, workplaces, fleets, municipalities, overnight lodging) and serving a variety of end-use EV charging needs.
- Public DC Fast Charging: Company deployment of make ready, electrical infrastructure as well as either Company ownership, or rebates to third-party developers for the costs and installation, of direct current (“DC”) fast charging equipment. This program also includes financial incentives to offset electricity costs for operation of the fast chargers. The Company ownership of chargers through this program is limited to geographic areas underserved by the private market whereby the Company would be a provider of last resort to ensure territory-wide deployment.
- Vehicle Innovation: incentives for school districts to purchase EV school busses and EV charging infrastructure, as well as incentives through an open-bidding process to fund high-impact EV projects for customers with non-standard medium and heavy-duty vehicle electrification needs (for example, ports, airports, or transit authorities).

The Company also plans for common investments across all four programs including IT and education and outreach.¹¹

¹⁰ Reif Testimony at 2-4 and 12-34.

¹¹ Petition at ¶ 10; Reif Testimony at 3-36.

PSE&G proposes recovery of the costs of its investments in the EV programs and an opportunity to earn a fair return on those investments, as it has on similar investments in demand response, energy efficiency and solar loan programs in the past, through a new charge to the Company's tariff, the Transportation Incentive Charge or "TIC".¹² Also similar to recovery on other similar public utility investments, a portion of the payments made by PSE&G to support customer acquisition of EV facilities are rebates and a portion are booked as loans, and the Company may earn a return on both types of investment. These investments are treated as regulatory assets, depreciated based on the useful life of the EV facilities supported by the PSE&G payments.¹³ As the portion of the PSE&G payments treated as loans is repaid by customers, the dollars received are credited against the program's revenue requirements, to the benefit of customers.

On October 29, 2018, the Board issued an order that retained jurisdiction over the CEF-EVES Petition and designated Commissioner Chivukula as the Presiding Officer for this matter.

Intervenors and Participants

A Prehearing Order was issued in this proceeding on April 22, 2020. In addition to Commission Staff and Rate Counsel, a diverse group of entities have been granted intervention status or the right to participate in this proceeding.¹⁴ Parties who were granted participant status include other New Jersey electric distribution companies, an EV charger manufacturer, and an EV industry trade association/advocacy group. Parties with intervention status represent environmental advocacy groups; developers, manufacturers, and operators of EV charging and EV network infrastructure and software; a design and construction firm with extensive experience in

¹² Petition at ¶¶ 24-26; Swetz Testimony at 11-12.

¹³ Petition at ¶ 27; Swetz Testimony at 1-4.

¹⁴ Prehearing Order at 14-15.

electric vehicle charging infrastructure; a major school bus manufacturer, a large electric user customer advocacy group; third party energy suppliers; and suppliers of energy solutions. Notably, intervention status affords an entity all the rights and obligations of a party to the proceeding, including the right to conduct discovery and to help develop the factual record.¹⁵ The intervenors, through their various motions to intervene in this case, have each expressed a desire to contribute their knowledge and expertise to develop the record, including market participants for whom PSE&G objected to full intervention status but the Prehearing Order found had a direct interest in this proceeding.¹⁶ Despite the granting of intervention status to every party who requested it in this case, granting Rate Counsel's motion to dismiss would mean that none of these parties would have the opportunity to present their facts, opinions, and arguments regarding PSE&G's EV proposals. Nor will parties with participant status be permitted to present oral arguments or briefs in this case.

Rate Counsel's Motion to Stay the Company's CEF-EVES Petition

On December 7, 2018, Rate Counsel filed a Motion to Stay the proceedings in this case, arguing that the Board should wait to act on PSE&G's CEF-EVES Petition until further Board policy discussions could be held and pending development of the new EMP as directed by the Governor. (Rate Counsel now argues that consideration of the final EMP that was developed is irrelevant to this proceeding.) PSE&G opposed the delay and, as noted in the Prehearing Order, Rate Counsel's motion was deemed technically denied due to the lack of a Board decision on the motion within 60 days by operation of *N.J.A.C. 14:1-8.7(c)*. The Prehearing Order also denied the motion for lack of good cause, noting that in the time between the filing of the motion in December

¹⁵ *N.J.A.C. 1:1-16.1(b)*.

¹⁶ Prehearing Order at 10-12 and 15.

of 2018 and the issuance of the Prehearing Order in April of 2020, the Board had held policy discussions and the final EMP had been issued. In essence, however, the relief that Rate Counsel sought – to substantially delay any consideration of PSE&G’s petition – was obtained, as a year and a half has now passed since the initial filing. Rate Counsel now – 18 months later – seeks to prevent altogether any further development of the record in this case for the Board’s consideration.

Industry Developments Subsequent To the Filing of the Petition

Considering the passage of time, and in support of this opposition to Rate Counsel’s motion to dismiss, the Company sets forth additional facts, many of which are publicly available, in the attached Affidavit of Karen Reif. Importantly, there has not been significant progress in the development of EV charging infrastructure in New Jersey since the CEF-EVES Petition was filed. For example, New Jersey continues to rank lowest in the density of public chargers relative to population among states participating in California’s Zero Emissions Vehicle partnership, despite that additional states have joined since the filing of the CEF-EVES Petition.¹⁷ New Jersey’s EV registration year-over-year growth rate also decreased in 2019.¹⁸

In the face of this stagnation, on January 27, 2020 Governor Murphy issued the final version of the new EMP that recognized the Board’s and electric utilities’ roles, as well as the roles of others?, in advancing EV and EV infrastructure deployment in the state.

Also in January 2020, in reaction to the continuing slow pace of the market to drive significant progress toward deployment of EVs and EV infrastructure, the legislature passed the PIV Act, which requires substantial increases in the pace and magnitude of electric vehicle and EVES deployment in New Jersey.¹⁹ Notably, and directly relevant to this proceeding, the PIV Act

¹⁷ Reif Affidavit at ¶ 8.

¹⁸ Reif Affidavit at ¶ 5.

¹⁹ N.J.S.A. 48:25-3(a).

chose the Board, rather than the Department of Transportation for example, to implement programs to achieve the mandated and aggressive targets for electrification of New Jersey's transportation sector through EV and EV infrastructure deployment.²⁰ The PIV Act is codified as part of Title 48 of New Jersey's statutes (governing "Public Utilities") and grants the Board the broad authority to "adopt policies and programs to accomplish the goals established pursuant to this section."²¹

Based on the goals of the PIV Act and the current lackluster progress of EV charging infrastructure deployment, simple math demonstrates the challenges the Board has before it. Significantly, the annual funding levels expressly included in the PIV are inadequate to meet this challenge and will require the Board to either access additional Societal Benefits Charge proceeds, taking substantial funding away from other important programs and priorities, or find other mechanisms under the Board's broad regulatory jurisdiction to achieve these goals.

Despite its prior encouragement of the Board to delay this proceeding to await policy directives (such as the ones that have recently been issued) prior to considering PSE&G's CEF-EVES Petition, Rate Counsel's motion to dismiss now gives these developments short shrift or urges that they be ignored altogether. In light of the entire factual record in this case to date and the policy and legislative developments that have occurred while the case has been pending, it is imperative that Rate Counsel's motion be denied and that the Commissioner continue consideration of these important programs without delay.

²⁰ The Department of Environmental Protection was also granted a role in working with the Board to develop programs and additional goals, but it is noteworthy that the Board, having regulatory authority over the state's electric utilities, has major responsibility for implementing programs to timely meet the PIV Act's targets.

²¹ N.J.S.A. 48:25-3(b).

STANDARD OF REVIEW

A motion for summary dismissal may only be granted where “the papers and discovery which have been filed, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to prevail as a matter of law.” *N.J.A.C. 1:1-12.5(b)*. “[A]n adverse party in order to prevail must by responding affidavit set forth specific facts showing that there is a genuine issue which can only be determined in an evidentiary proceeding. *Id.* New Jersey Courts have found that “[t]he standard governing agency determinations under N.J.A.C. 1:1-12.5 is substantially the same as that governing a motion under Rule 4:46-2 for summary judgment in civil litigation.” *L.A. v. Bd. of Educ. of City of Trenton*, 221 N.J. 192, 203-204 (2015) (internal citation and quotations omitted). Thus, in deciding a motion for summary dismissal, the factfinder (here the Presiding Officer) is obligated to view the evidentiary materials in the light most favorable to the non-moving party and draw all reasonable inferences from the evidence in favor thereof. *L.A. v. Bd.*, *supra*, 221 N.J. at 204 (citing *Brill v. Guardian Life Ins. Co. of Am.*, 142 N.J. 520, 523 (1995)). Moreover, a motion for summary decision should be denied when the factfinder would be required to decide the motion on a meager record – especially when the ruling sought on the motion would have a far-reaching social and legal effect. *See Jackson v. Muhlenberg Hosp.*, 53 N.J. 138, 141-42 (1969); *Wilson v. Amerada Hess Corp.*, 168 N.J. 236, 253-254 (2001) (motion should be denied where discovery on material issues is incomplete).

Discovery has not yet occurred, and it is clear that granting Rate Counsel’s motion would have a far-reaching effect in that utilities would be barred from meaningful participation in the electrification of the transportation sector envisioned, and required, under the EMP and PIV. Moreover, even if the Presiding Officer does not believe there are any relevant facts in dispute,

Rate Counsel's flawed legal arguments do not warrant summary dismissal of PSE&G's EV program proposals.

ARGUMENT

I. Rate Recovery Of Utility Investments In Customer Rebates And In Company-Owned EV Chargers Is Not Unconstitutional Pursuant to the "Used and Useful" Principle

Rate Counsel argues that the Board need not consider any further evidence in this proceeding and should dismiss out-of-hand PSE&G's EV programs because (1) it would be unconstitutional for the Board, via statutory authority or otherwise, to allow a utility to recover the costs of, or earn a return on, investments in rebates to customers as a regulatory asset or in utility-owned EV charging facilities pursuant to the "used and useful" principle,²² and (2) the Board does not have authority to approve the proposals.²³ Neither of these arguments has merit. Rate Counsel misconstrues and misapplies the "used and useful" ratemaking principal in a manner that is both incorrect on its face and that is belied by years of utility ratemaking in New Jersey and in other states. Rate Counsel also attempts to narrowly limit the scope of the Board's ratemaking authority, ignoring both statutory authority and decades of Board precedent. Rate Counsel's flawed interpretation of the law would tie the Board's hands in this and future proceedings; the Board clearly has ample authority to evaluate and approve PSE&G's proposed EV programs.

A utility may recover its costs and earn a return in rates on its capital investments in non-utility owned assets, as well as in utility-owned assets not dedicated to providing the utility's core electric and gas service. Utilities have in the past, and are now, recovering and earning returns on such investments; the utility's asset in these instances is a regulatory asset that reflects its capital

²² Motion to Dismiss at 9-20.

²³ *Id.* at 21-27.

investment dedicated to serving customers. The “used and useful” constitutional utility ratemaking principle does not prohibit this. If it did, there would be no utility energy efficiency (“EE”) programs providing customer rebates for efficient equipment and no utility solar loan programs – yet these programs exist and have been included in utility rates for some time. Indeed, nearly 30 years ago, in consideration of the 1991 version of New Jersey’s EMP, the Board allowed PSE&G to recover in rates the partial cost of providing rebates to customers who purchased natural gas vehicles (“NGVs”), through an incentive program intended to jump start the market for this cleaner transportation technology.²⁴

Rate Counsel here argues that this type of rate recovery is something the Board can never approve – pointing to the “used and useful” principle. But that principle does not apply to bar the recovery PSE&G seeks.

A. “Used and Useful” Is Not A Bright Line Or A Prohibition To Consideration Of The Company’s EV Proposals

Rate Counsel’s narrow view of utility ratemaking principles attempts to draw a bright line that simply does not exist and that ignores the flexibility inherent in ratemaking that was established in the same foundational cases upon which Rate Counsel seeks to rely. In short, and as demonstrated in these cases, the phrase “used and useful” is one important aspect of broader utility ratemaking principals that ensure *both* that utilities are able to recover the costs of and earn a fair return on their investments, *and* that those investments are fairly dedicated to public use (“used and useful”) so that ratepayers as a whole reasonably benefit.²⁵ In this case, PSE&G has presented EV programs of the type the State has legislatively decreed in the PIV Act benefit utility customers, through that Act’s dedication of utility customer funding to EV purchases via the

²⁴ *Re Public Service Electric and Gas Company*, 1994 WL 534983 (N.J.B.P.U.), 155 P.U.R. 4th 441, (Sept. 8, 1994).

²⁵ *Fed. Power Comm’n v. Hope Natural Gas Co.*, 320 U.S. 591, 603 (1994) (noting the balance utility ratemaking should achieve between utility shareholders’ interest in fair returns on investments and the ratepayers’ interest in just and reasonable rates for service).

Societal Benefits Charge.²⁶ The Company’s proposed investments are utility assets, both company-owned plant-in-service and regulatory assets – that are squarely within the bounds of constitutional ratemaking principles.

Rate Counsel seeks to rely upon lengthy quotations and citations that do not support the narrow conclusion Rate Counsel draws – that only utility-owned property or only more traditional utility-owned facilities that are directly involved in providing core service (*i.e.*, pipes and wires, but not EV charging station facilities) may be recovered in utility rates. These decisions, however, do not stand for the conclusions Rate Counsel suggests. The decisions make clear that ratemaking is focused on the achievement of just and reasonable rates and is not constrained in the way that Rate Counsel claims.

For example, the United States Supreme Court cases cited by Rate Counsel, *Munn v. Illinois*,²⁷ *Hope Natural Gas*,²⁸ and *Smyth v. Ames*,²⁹ all discuss utility property dedicated to public service, but *do not* hold that property of the public utility that is devoted to the public interest may not be in the form of a regulatory asset or assets³⁰ similar to the investment in EV chargers that Rate Counsel challenges here. These cases also do not further define “used and useful” in a manner exclusive to certain types of property, or place the strict boundaries Rate Counsel describes around what utility assets can be deployed to serve the public interest.

²⁶ *N.J.S.A.* 48:25-7; 48:3-60(a)(3).

²⁷ *Munn v. Illinois*, 94 U.S. 113, 125-126 (1877) (property becomes “clothed with a public interest when used in a manner to make it of public consequence” and thus the property can be subject to regulation).

²⁸ *Fed. Power Comm’n v. Hope Natural Gas Co.*, 320 U.S. 591 (1944).

²⁹ *Smyth v. Ames*, 169 U.S. 466 (1888). *Hope Natural Gas* and *Smyth* highlight the balance between fair returns for utility’s investors for “the value of that which [the utility] employs for public convenience” and the public’s interest in paying not more “than the services rendered by it are reasonably worth.” These cases do not limit what types of utility property can be employed for public interest – but require that ratepayers should only pay the reasonable value of those investments.

³⁰ Moreover, regulatory assets are not considered part of “rate base” as they are not included in rates as plant-in-service.

Similarly, Rate Counsel cites various New Jersey Supreme Court decisions (*In Re New Jersey Power & Light Co.*,³¹ *Atlantic City Sewerage*³² and *Industrial Sands*³³) and Board decisions (*I/M/O Petition of Suez Water*³⁴ and *I/M/O Parkway*³⁵) that discuss the fair value of property used and useful in the public service but that do not, contrary to Rate Counsel’s reading, place rigid limits around what can be deemed property useful in the public service, or restrict rate recovery of regulatory assets rather than more traditional (pipes and wires) physical plant. These cases seek to protect ratepayers from “extortionate and arbitrary” charges.³⁶ It is quite a leap, however, to suggest that these cases pronounce that all regulatory assets for customer rebates or utility-owned assets like EV chargers are extortionate and arbitrary, as a matter of law.

Rate Counsel places particular emphasis on *I/M/O Petition of Rockland Electric* – Rockland Electric’s request to include in rates costs of advanced metering infrastructure deployment, including some installation costs and ongoing maintenance on the customer’s side of the meter. Rate Counsel posits that the Board in this case denied recovery in rates of utility work on customer-owned property in a manner that set Board precedent for all utility requests for recovery of costs related to non-utility owned property, including a regulatory asset to recover on customer rebates. This conclusion is unfounded. First, the Board’s holding could be interpreted as allowing cost recovery for some AMI installation costs on the customer’s side, as opposed to the costs of ongoing maintenance unrelated to the AMI installation. Second, it is not reasonable

³¹ *In Re N.J. Power & Light Co.*, 9 N.J. 498 (1952) (stating that “rate base” is the “fair value of the property of the public utility” but not limiting the type of utility property to physical facilities).

³² *Atlantic City Sewerage Co. v. Bd. of Pub. Util. Comm’rs*, 128 N.J.L. 359 (Sup. Ct. 1942).

³³ *In Re Proposed Increased Intrastate Industrial Sand Rates*, 66 N.J. 12 (1974).

³⁴ *I/M/O Petition of Suez Water Arlington Hills Inc. for Approval of an Increase in Rates*, 2017 WL 5747744 (N.J.Bd.Reg.Com.) (Nov. 13, 2017).

³⁵ *I/M/O Petition of Parkway Water Co. for an Increase in Rates and Charges for Water Service*, 2006 WL 2715210 (N.J.B.P.U.), (Sept. 13, 2006).

³⁶ Rate Counsel cites *Petition of Suez* and *Parkway* as examples of application of the “used and useful” principal, but both of these cases involved utility assets that were once in service, but had been removed from service or were no longer operational. It is unclear how Rate Counsel draws a conclusion from these cases that “used and useful” cannot include regulatory assets that will be dedicated to the public service.

to conclude that the Board intended this case to establish forever that there would be no future recovery of utility investment in other types of regulatory assets.

Nowhere do *any* of these cases relied upon by Rate Counsel state or imply that the “used and useful” utility assets devoted to public use cannot include the types of utility capital investments PSE&G here proposes to fund the electrification of the transportation sector, including electric charging infrastructure, that the Legislature has made clear must be created.

In short, there has never been a bright line that defines what is and is not “used and useful” for rate recovery purposes – these are decisions regulators make based on the facts and circumstances of each case. Indeed, as stated by the New Jersey Supreme Court in *Atlantic City Sewerage*, utility ratemaking is “not ‘a matter of formulas,’ but rather of ‘a reasonable judgement’ grounded in a proper consideration of all relevant facts.”³⁷ There is no precedent demonstrating that PSE&G’s proposed EV Programs are barred from inclusion in utility rates as a matter of law warranting dismissal of these programs prior to any meaningful process or discovery.

B. PSE&G’s EV Proposals Seek To Include Investments In Rates That Are Used And Useful In The Public Service

Following its flawed interpretation of the “used and useful” principle, Rate Counsel has found that a utility’s capital investment in rebates to customers cannot be a “used and useful” utility regulatory asset, and that even EV charging facilities owned by a utility cannot be “used and useful” utility assets. Neither of these conclusions is supported by law or the facts.

PSE&G is proposing to use utility property – utility capital investment – to support state policy in a manner that benefits PSE&G’s ratepayers. The EV program utility assets for which PSE&G seeks recovery include both utility plant and regulatory assets. It is not true, therefore, that “[t]he Petition seeks to place non-utility property that is not used and useful in the public

³⁷ *Atlantic City Sewerage*, 128 N.J.L. at 365 (internal citations omitted).

service into rate base.”³⁸ These EV program assets as described in the Petition benefit PSE&G’s customer base in multiple ways including ensuring coordination of the deployment of EV charging in a manner that does not adversely impact the reliability of the interconnected electric distribution grid and achievement of energy efficiency goals set forth in the EMP and that are now codified in the public utility laws through the PIV. The regulatory assets created in this case are plainly used and useful in the public service.

C. New Jersey And Other States Have Approved Inclusion In Rates Of Similar Utility Investments

In this proceeding PSE&G is not proposing anything novel or new. Relying on its “used and useful” arguments, Rate Counsel unfairly mischaracterizes PSE&G’s EV proposals in ways that are inflammatory and at odds with decades of decisions by the Board and similar regulatory agencies in other states.³⁹ These decisions belie Rate Counsel’s assertion that the “used and useful” principle renders any recovery in utility rates of customer rebates or EV charging stations unconstitutional.

As Rate Counsel itself points out,⁴⁰ Section 13 of New Jersey’s Regional Greenhouse Gas Initiative Act (“RGGI”)⁴¹ permits public utilities to recover certain types of investments in non-utility property through utility rates. RGGI has been in effect since January, 2008; accordingly, PSE&G and other utilities have long had included in their rates EE programs that include customer rebates on energy efficient equipment, such as smart thermostats, for individual customer homes.⁴²

³⁸ Motion to Dismiss at 3.

³⁹ Indeed, with or without programs operated and funded directly by New Jersey’s electric distribution utilities, New Jersey’s utility ratepayers are funding incentives for the purchase by private entities of EVs and for the deployment of EV infrastructure through the Societal Benefits Charge pursuant to the PIV, as discussed further in section II of this Argument. Thus, Rate Counsel’s suggestion that this concept should be repugnant to ratepayers or that PSE&G is attempting inappropriately to charge ratepayers for a “grab bag” of incentives utility customers should not pay for is no more than smoke and mirrors intended to cast PSE&G’s Petition in a negative light.

⁴⁰ Motion to Dismiss at 25.

⁴¹ *N.J.S.A.* 48:3-98.1

⁴² *I/M/O Petition of Public Service Electric and Gas Co. for Approval of Its Energy Efficiency 2017 Program and Recovery of Associated Costs*, B.P.U. Docket No. EO17030196 (Order Adopting Stipulation, August 23, 2017) (“EE17”) (including Smart Thermostat rebate program); *I/M/O Petition of Public Service Electric and Gas Co. Offering and Energy Efficiency Economic*

Additionally, PSE&G's "Solar Loan" programs over the years have included in the Company's rates as a regulatory asset the company's investment of capital in loans to developers of solar generation facilities that are not owned by the Company.⁴³ Notably, the Solar Loan I program was filed in April of 2007 pursuant to the Board's more general ratemaking jurisdiction, prior to the enactment of the RGGI Statute. While the final order approving the Solar Loan I stipulation was issued in April of 2008 a few months following RGGI, the Board conducted a full evidentiary proceeding during 2007 to consider the program on its merits.

Rate Counsel also cries foul over the idea that utility customers would in any way contribute through rates to the costs of EV charging facilities, characterizing them as assets that could not conceivably be useful in providing utility service, even characterizing PSE&G's "Vehicle Innovation" program proposal as "seed money from ratepayers for research and development projects."⁴⁴ The Vehicle Innovation Program is a customer rebate program that encourages innovative customer proposals, but is not a research and development program.⁴⁵ New Jersey has previously approved utility investment in rebates to customers for purchasing NGV

Stimulus Program in Its Service Territory On a Regulated Basis And Associated Cost Recovery Mechanism, B.P.U. Docket No. EO09010056, (Decision and Order Approving Stipulation, August 1, 2009) ("EEE Program). The EEE Program was extended via B.P.U. Docket No. EO11010030 (July 14, 2011) ("EEE Extension I"), and B.P.U. Docket No. EO14080897 (April 15, 2015) ("EEII Program"). Throughout the history of PSE&G's Energy Efficiency programs since 2008 (EEE Program, EEE Extension I, EEII, and EE17), the Company has provided incentives for the installation of energy efficient equipment for hospital customers, multifamily building owners, and local government customers.

⁴³ *I/M/O Petition of Public Service Electric and Gas Co. for Approval of a Solar Loan III Program and Associated Cost Recovery Mechanism*, B.P.U. Docket No. EO12080726 (Decision and Order Approving Stipulation, May 29, 2013) ("Solar Loan III"); *I/M/O Petition of Public Service Electric and Gas Co. for Approval of a Solar Loan II Program and an Associated Cost Recovery Mechanism*, B.P.U. Docket No. EO09030249 (Decision and Order Approving Stipulation, November 10, 2009) ("Solar Loan II"); *I/M/O Petition of Public Service Electric and Gas Co. for Approval of a Solar Energy Program and an Associated Cost Recovery Mechanism*, B.P.U. Docket No. EO07040278 (Decision and Order Approving Settlement, April 8, 2008) ("Solar Loan I").

⁴⁴ Motion to Dismiss at 18.

⁴⁵ Notwithstanding, there is no precedent to suggest that research and development programs are constitutionally barred from utility rates. As an example, the New York Public Service Commission has improved inclusion of research and development program expenses in rates, directly contradicting Rate Counsel's assertion that such an investment could never be used and useful to utility ratepayers. See, *Proceeding on Motion of the Commission as to the Rates, Charges, Rules and Regulations of Consolidated Edison Co. of New York, Inc. for Gas Service*, NY P.S.C. Case Nos. 19-E-0065 and 19-G-0066, Joint Proposal at 51 (Oct. 2019; approved by Order issued March 15, 2018) (research and development expenses are reflected in the revenue requirement) ([available at: http://documents.dps.ny.gov/public/MatterManagement/CaseMaster.aspx?MatterCaseNo=19-G-0066&submit=Search](http://documents.dps.ny.gov/public/MatterManagement/CaseMaster.aspx?MatterCaseNo=19-G-0066&submit=Search)).

vehicles,⁴⁶ and utility ownership of NGV fueling stations.⁴⁷ EV charging stations are similar in nature to NGV fueling stations, are connected to and impact the reliability of the electric distribution system, and are assets used to deliver the commodity PSE&G provides.

Finally, there are examples from other states of utility regulating agency decisions demonstrating that the “used and useful” principle has not been treated as a prohibition against recovery in rates for such things as customer rebates or property not ultimately owned by the utility, as Rate Counsel suggests. The Oregon Public Utilities Commission has rejected the concept that the used and useful principle might preclude recovery of rebates, EV charging services, installation and operating costs,⁴⁸ the California Public Utilities Commission has allowed utility rebates to be recovered as expenses in rates,⁴⁹ and the Maryland Public Service Commission permits utilities to seek cost recovery through rates in rate case proceedings for plug in vehicle programs offering rebates.⁵⁰ Moreover, NRDC points out in the NRDC Opposition Letter in the ACE EV petition proceeding that utility regulators in 26 states have approved utility EV investment programs that are similar to those ACE proposes (and by extension, similar to those PSE&G proposes).⁵¹

⁴⁶ *Re Public Service Electric and Gas Company*, 1994 WL 534983 (N.J.B.P.U.), 155 P.U.R. 4th 441 (Sept. 8, 1994).

⁴⁷ *I/M/O Petition of New Jersey Natural Gas Co. for Approval Of A Pilot Program For The Installation Of Compressed Natural Gas Infrastructure And An Associated Recovery Mechanism With The Approval Of Changes In The Company's Tariff For Gas Service Pursuant To N.J.S.A. 48:2-21 and 48-2-23, et seq.*, 2012 WL 3646794 (N.J.Bd.Reg.Com.), (June 18, 2012) (order approving stipulation, over Rate Counsel's objection, for NJNG's pilot program to construct, own, and operate NGV fueling stations and for provisional rate recovery).

⁴⁸ Oregon Public Utilities Commission Docket No. UM 1461, Order 12-13, at 10 (Jan. 19, 2012) (available at: https://www.cobar.org/Portals/COBAR/TCL/2020/February/Feb_Features-Energy.pdf); *In Re Portland General Elec. Co., Application for Transp. Elec. Programs*, Docket No. UM-811, Order No. 18-054 (OPUC, Feb 16, 2018) (available at: <https://apps.puc.state.or.us/orders/2018ords/18-054.pdf>).

⁴⁹ *Alternate Proposed Decision Regarding Southern California Edison Company's Application for Charge Ready and Market Education Programs*, CPUC Docket No. A-14-10-014, at 20-21 (Jan. 16, 2016), (available at: <http://docs.cpuc.ca.gov/PublishedDocs/Published/G000/M157/K682/157682806.PDF>).

⁵⁰ *In Re Petition of the Electric Vehicle Work Group for Implementation of a Statewide Electric Vehicle Portfolio*, Case NO. 9478, Order No. 88997, at 77 (MPSC Jan. 14, 2019) (available at: <https://www.psc.state.md.us/wp-content/uploads/Order-No.-88997-Case-No.-9478-EV-Portfolio-Order.pdf>).

⁵¹ NRDC Opposition Letter at 2-3, 6.

In summary, there is no blanket constitutional prohibition against the Board's consideration of the EV programs and recovery mechanisms PSE&G has proposed. The Presiding Officer in this matter should reject Rate Counsel's "used and useful" arguments and allow this case to proceed to discovery and a decision on the merits.

II. The Board is Authorized To Consider The Merits Of PSE&G's Petition Under Statutory Law, Clearly Stated New Jersey Policy, And Board Precedent

In addition to the flawed claim discussed in section I. that the petition is somehow unconstitutional, Rate Counsel argues that the Board is not authorized to grant the relief requested. Rate Counsel's cramped construction of statutory language and rejection of regulatory principles would prevent the Board from performing a fundamental task assigned to it by the Legislature directly through the PIV, as well as indirectly through legislative adoption of the EMP. As detailed below, all applicable legal authority and public policy directives require that the Board consider PSE&G's proposal on its merits.

A. The Board Has The Authority To Consider The CEF-EV Petition Even Absent The PIV Act

Title 48 itself is clear that the Board "shall have general supervision and regulation of and jurisdiction and control over all public utilities . . . so far as may be necessary for the purpose of carrying out the provisions of this Title."⁵² As the Supreme Court of New Jersey has observed, the Legislature intended that the BPU have "the widest range of regulatory power over public utilities."⁵³ The courts have also been clear that "[l]egislative grants of jurisdiction to the Board have traditionally been liberally construed to grant the widest range of regulatory and investigatory power over utilities subject to its jurisdiction."⁵⁴

⁵² N.J.S.A. 48:2-13.

⁵³ See *Chickara v. Jersey Central Power & Light Co.*, 2013 WL 3184636 (N.J. Sup. Ct., App. Div. 2013) (citing, inter alia, *Deptford v. Woodbury Terrace Sewerage Corp.*, 54 N.J. 418, 424 (1969)).

⁵⁴ *I/M/O the Request for Solid Waste Utility Customer Lists*, 205 N.J. Super. 390 (App. Div. 1985) (citations omitted).

Consistent with these principles, the powers expressly granted to the Board by the Legislature are in turn attended by “those incidental powers which are reasonably necessary or appropriate to effectuate the specific delegation.”⁵⁵ As the Supreme Court has stated, the BPU's powers extend beyond those expressly granted by statute “to include incidental powers that the agency needs to fulfill its statutory mandate.”⁵⁶ While the Board’s authority is not wholly unbounded, the Board’s general authority to consider PSE&G’s EV programs is no different now than it was when it conducted a full proceeding on the merits of PSE&G’s Solar Loan I program in 2007, prior to the adoption of the RGGI statute.⁵⁷

In the PIV Act, the Legislature built upon the Board’s broad authority to regulate public utility rates and services, and in particular to provide service “in a manner that tends to conserve and preserve the quality of the environment.”⁵⁸ It is also well-established that the Board is authorized to permit and regulate utility investment in “energy efficiency and energy conservation programs,” including both programs that conserve energy and programs for making the use of electricity more efficient, including on the customer’s side of the interconnection.⁵⁹ The CEF-EV Petition clearly satisfies this requirement; indeed, the EMP expressly states that “electrified transportation is **considerably more efficient than conventional transportation**, particularly if properly planned with managed charging”⁶⁰ Similarly, “[l]ight-duty (passenger car) EVs are three to five times more efficient per mile traveled than their gas-fueled counterparts,” and

⁵⁵ See *New Jersey Guild of Hearing Aid Dispensers v. Long*, 75 N.J. 544, 562, 384 A.2d 795 (1978).

⁵⁶ *In re Public Service Electric and Gas Co.*, 167 N.J. 377, 384 (2001) (quoting *In re Valley Road Sewerage*, 154 N.J. 224, 235 (1998)).

⁵⁷ See p. 17 and n.43, *supra*.

⁵⁸ See N.J.S.A. 48:2-21, -23 and -25(a).

⁵⁹ See N.J.S.A. 48:3-98.1.

⁶⁰ EMP, at 60 (bolded emphasis added).

“[t]ransitioning from conventional to battery or fuel cell (hydrogen) EVs will reduce New Jersey’s overall energy consumption.”⁶¹

Rate Counsel argues incorrectly that the *Centex Homes*,⁶² constrains the Board’s authority to consider PSE&G’s EV Programs. In *Centex Homes* the court, while acknowledging the Board’s broad authority to regulate utilities,⁶³ held that the Board’s attempt to incorporate urban planning factors into main extension regulations in furtherance of the goals of the State Planning Act would have “drastically changed” the intent of the public utility statute governing main extensions and that the Board was outside its primary function as a public utility regulator when it attempted to regulate urban sprawl in a manner the Court found to be *directly in conflict* with the main extension statute.⁶⁴ Additionally, in *Centrex Homes*, the State Planning Act that the Board relied on did not include the Board as a relevant state agency charged with developing rules or furthering the goals of that legislation. In this matter; however, there is no statute that comparably constrains the Board with respect to regulating EV deployment. Moreover, the Board need not “expand its authority” to address the electrification of transportation goals of the PIV and EMP. First, electrification of transportation has a direct and significant impact on the reliable operation of the electric distribution system – that is clearly within the Board’s primary function as the utility regulator. Second, as discussed further below, the Board’s authority to regulate in the EV space was recently clarified by the PIV. Indeed, the PIV expressly permits the Board to “adopt policies and programs to accomplish the goals [of the PIV]” and to adopt rules and regulations necessary for implementation of the PIV Act. In this matter, not only is there a direct correlation between EV

⁶¹ *Id.*

⁶² *In Re Centrex Homes, LLC*, 411 N.J. Super. 244 (App. Div. 2009).

⁶³ *Centrex Homes*, 411 N.J. Super at 254 (noting that Board’s powers extend beyond those expressly granted by statute and include incidental powers that the agency needs to fulfill its “statutory mandate” to regulate public utilities).

⁶⁴ *Id.* at 260-262 (“[Given the] drastic refocusing of the BPU’s Main Extension Regulations to reflect smart growth goals, we are constrained to conclude that it changes the meaning of the [main extension] statute under the guise of interpretation and therefore must be invalidated”).

charging and the Board's obligations to ensure safe, adequate, and proper utility service under Title 48, but there is also a specific statutory obligation designating EV charging responsibilities to the Board (the PIV Act). Additionally, the Board has a statutory role in the preparation, adoption, and implementation of the periodic EMPs.⁶⁵ Thus, *Centex Homes* is totally inapplicable.

Given its authority to regulate public utility rates and services, in a manner that protects the environment and saves energy, the Board plainly is authorized to grant the relief requested in the CEF-EVES Petition.

B. The EMP And the PIV Act, Finalized and Adopted Since The CEF-EC Petition Was Filed, Require Board Consideration Of The CEF-EV Petition And Dismissal Of Rate Counsel's Motion

i. *The EMP Requires Utility Involvement In EV Infrastructure Deployment And Cannot Simply Be Ignored*

The CEF-EVES Petition was designed in a manner consistent with, and that would further, state energy and environmental policy in 2018, and the program is even more in step with those policies today. In the October 2018 CEF-EVES filing, PSE&G noted then-recent legislative and executive action in New Jersey establishing a general State policy in support of electric vehicle development. PSE&G cited the Clean Energy Act as well as Governor Murphy's Executive Order No. 28, which called for the development of a revised New Jersey EMP that would explore methods "to incentivize the use of clean, efficient energy and electric technology alternatives in New Jersey's transportation sector and at New Jersey's ports."⁶⁶

The final EMP was issued in January 2020, and was consistent with the Governor's Executive Order. Specifically, the EMP declares that "the transportation sector should be almost entirely electrified by 2050, with an early focus on light-duty (passenger) vehicles and short-range

⁶⁵ *N.J.S.A. 52:27F-14.*

⁶⁶ *See* Petition, at ¶ 6.

medium and heavy-duty vehicles, particularly in environmental justice communities.”⁶⁷ The EMP also emphasizes utility involvement in EV ratemaking as well as infrastructure development. The EMP provides, for example, that “[i]n order to ensure that the required grid improvements to support the accelerated deployment of electric vehicles can be implemented cost effectively, NJBPU must work with the state’s electric public utilities to implement innovative EV-specific rates that encourage charging at times of the day that minimize the stress on the grid.”⁶⁸

Similarly, the EMP specifically notes New Jersey’s commitment to the State Zero-Emission Vehicle Programs MOU and the “Partnership to Plug-In”, which involves collaboration among utilities and others “to establish an implementation roadmap . . . to install charging infrastructure in strategic and critical locations,” including “assessing the distribution of Level 2 and DC Fast Charging stations” and “identifying a clear role for regulated utilities” as well as the private sector in building out the infrastructure.

[T]his shared responsibility model ensures that utility providers and other stakeholders can offer a significant opportunity for widespread charging deployment across multiple transportation modes and sectors (i.e., residential, multifamily, workplace, fleets, and public DC fast charging), using both rate-based and non-rate-based solutions, and resulting in diminished consumer “range anxiety” and increased EV adoption rates.⁶⁹

Clearly the proposals set forth in the CEF-EVES Petition regarding ratemaking mechanisms and providing for “widespread charging deployment across multiple transportation modes and sectors”, and the participation of numerous EV market participants and other stakeholders to help shape the Board’s treatment of those proposals, are clearly called for by the EMP.

⁶⁷ EMP at 12.

⁶⁸ Rate Counsel’s arguments throughout its motion focus on the aspects of PSE&G’s EV Programs involving EV rebates and construction, ownership, and operation of EV charging infrastructure, but largely ignore the rate incentive aspects of PSE&G’s proposals. In seeking dismissal of all of the Company’s EV proposals in their entirety and as a matter of law, Rate Counsel is throwing the baby out with the bathwater.

⁶⁹ EMP at 68.

Rate Counsel attempts to negate the role of the EMP in guiding the Board's decision in this case by pointing out that the EMP "has no regulatory effect" and warning the Board against "expanding its authority" due to policy considerations,⁷⁰ citing the *Centex Homes* decision, which, as stated above, does not limit the Board's authority in this case.

For decades, the Board has cited various versions of New Jersey's EMPs as a basis for justifying rate recovery mechanisms of utility-sponsored programs designed to help meet those EMP goals that impact the public utility sector. Recently in the Board's decision directing all of the State's electric distribution utilities to file proposals for AMI deployment, the Board stated:

[T]he 2019 Energy Master Plan: Pathway to 2050 ("EMP") provides that the Board "direct the electric public utilities to develop plans that integrate grid modernization and capacity improvements that support demand growth from electrification, demand flexibility, [Distributed Energy Resources] penetration, grid resilience, and grid efficiency." See EMP 5.1, p. 176. The EMP provides that AMI is a means to achieve this objective. . . . Therefore, the Board HEREBY FINDS that AMI is a means to achieve the goals provided in the EMP.⁷¹

Similarly, in its 2012 order approving a settlement stipulation regarding New Jersey Natural Gas's petition to build, own and operate NGV fueling stations, the Board cited the 2011 EMP, stating:

The EMP recognized a need for New Jersey to encourage the creation and expansion of clean energy transportation solutions. Specifically, the EMP states:

Natural Gas Vehicles ("NGVs") offer a complementary technology to other new technologies designed to supplant gasoline and diesel fuel usage for transportation. . . . High diesel fuel costs coupled with expensive emission compliance costs make compressed natural gas ("CNG") a viable alternative to conventional diesel engine and internal combustion vehicles.⁷²

⁷⁰ Motion to Dismiss at 29-30.

⁷¹ *I/M/O Petition of Rockland Electric Co. for Approval of an Advanced Metering Program*, 2020 WL 1472147 (N.J.Bd.Reg.Com.), (Feb. 19, 2020).

⁷² *I/M/O Petition of New Jersey Natural Gas Co. for Approval of a Pilot Program For The Installation Of Compressed Natural Gas Infrastructure and an Associated Cost Recovery Mechanism*, 2012 WL 3646794 (N.J.Bd.Reg.Com.), (June 18, 2012).

Even as long ago as 1994, in granting rate recovery of a portion of the costs of PSE&G's NGV rebate program, the Board stated:

Based on a review of the record, it is clear that natural gas as an alternative transportation fuel can play a vital role in providing for the future environmental and energy needs of the State of New Jersey. The mandates provided by the Federal Clean Air Act Amendments of 1990, the Energy Policy Act of 1992, and New Jersey's proposed Low Emission Vehicle Program will require increased use of alternative transportation fuels. Since natural gas is the cleanest burning fossil fuel, it may provide substantial societal benefits to the State. In addition, the 1991 New Jersey Energy Master Plan endorses the use of alternative motor fuels such as compressed natural gas (CNG) in government and commercial fleets (Energy Master Plan, p. 124). The 1991 New Jersey Energy Master Plan also recognizes that a network of natural gas fueling stations must be in place concurrent with the introduction of CNG vehicles.⁷³

The Board went on to note the objection of Rate Counsel to recovery in rates of the NGV rebate program, but concluded “[w]hen considered in toto, the proposed rebate program warrants some measure of ratepayer support.”⁷⁴ The similarities between NGV and EV need not be extensively stated. To borrow a phrase from Rate Counsel’s motion, it is “hard to imagine” how Rate Counsel conceives the Board could simply ignore the EMP in this matter and summarily dismiss PSE&G’s program proposals.

ii. *The PIV Act Authorizes The Board To Consider Utility Programming To Enable Achievement Of Statutory Goals*

Prior to the issuance of the final EMP, in January 2020 the Legislature passed and the Governor signed the PIV Act, expressly endorsing the transition to an electrified transportation sector set forth in the EMP, further confirming the State’s commitment to the roll-out of an electric vehicle fleet and associated charging infrastructure,⁷⁵ and creating a statutory obligation within the

⁷³ *Re Public Service Electric and Gas Co.*, 1994 WL 534983 (N.J.B.P.U.), 155 P.U.R. 4th 441 (Sept. 8, 1994) (pagination within the decision is not available).

⁷⁴ *Id.*

⁷⁵ In the PIV Act, “[t]he Legislature finds and declares . . . that vehicle electrification offers a wide range of benefits” and can “contribute significantly to attainment of existing State air pollution and energy goals, including the objectives of the . . . Global Warming Response Act . . . and the State’s Energy Master Plan . . .”. N.J.S.A. 48:25-1.

public utility law for the Board to accomplish an extensive enumerated list of goals by December 31, 2025.⁷⁶ The PIV Act expressly grants the Board broad authority to consider and adopt other programs to meet these goals,⁷⁷ and there is no language in the PIV Act limiting the types of programs the Board may consider or excluding utilities from proposing such programs.

The PIV Act goals include accelerated deployment of plug-in electric vehicles as well as “the development of plug-in electric vehicle charging infrastructure in the State to support that use.”⁷⁸ There are specific goals related to DC Fast Chargers for public use in travel corridors and community locations, for Level 2 chargers, and for at least 10 percent of the new bus purchases made by the New Jersey Transit Corporation to be zero emission buses by December of 2024, increasing to 50 percent by December, 2026 and 100 percent by December 31, 2032 and thereafter, with a priority on low-income, urban, or environmental justice communities.⁷⁹

However, in the face of these expansive and challenging statutory goals, the PIV Act expressly recognizes two types of specific programs, which are incentives for purchasing light duty EVs and “in home” EV chargers.⁸⁰ Aside from the fact that these provisions authorize specific portions of the CEF-EVES Petition that are challenged by Rate Counsel (incentives for in-home chargers), it is also evident that to accomplish *all* goals related to EV charging (e.g., DC Fast Charging and Level 2 charging goals not specifically addressed by either of the two incentive programs referenced), the Board necessarily may rely on its authority to adopt other policies and

⁷⁶ N.J.S.A. 48:25-3.

⁷⁷ N.J.S.A. 48:25-3(b).

⁷⁸ *Id.*

⁷⁹ “[T]here will be at least 400 DC Fast Chargers available for public use at no fewer than 200 charging locations in the State,” with stringent requirements that certain numbers of those Fast Chargers be located at travel corridors (at least 75) and at “community locations” (at least 100), including locations near concentrations of multi-family dwellings and “there will be at least 1,000 Level Two chargers available for public use across the State.” *Id.*

⁸⁰ The Board “shall” establish an incentive program for the purchase of light-duty EVs. N.J.S.A. 48:25-4. The Board “may” establish an incentive program for “**in-home** electric vehicle service equipment.” N.J.S.A. 48:25-6 (bolded emphasis added). Importantly, there is no language limiting the Board from considering utility-sponsored incentive programs that can complement any programs the Board intends to operate.

programs.⁸¹ Thus, it is clear that the Board has the *authority* pursuant to the PIV Act to consider PSE&G's programs. Indeed, under this statutory construct, achieving the PIV Act's statutory goals cannot realistically be achieved without the active involvement and investment of New Jersey utilities like PSE&G.

For example, as compared with the goal of 330,000 light duty electric vehicles by the end of 2025, there were approximately 15,700 EVs in New Jersey at the end of 2017,⁸² and at the end of 2019, there were only 30,017.⁸³ Simple math shows that to reach the statutory goal, New Jersey must achieve double-digit growth in EV registration year-to-year, yet this growth rate declined from 2018 to 2019.⁸⁴ Equally daunting, the PIV Act includes specific requirements for travel corridor locations associated with the public EV charging goals of 75 charging locations for public use by December, 2025,⁸⁵ but the New Jersey Department of Environmental Protection's map of public charging locations reveals that there are currently only three current and two planned charging stations that meet the PIV Act's qualifications.⁸⁶ Notably, the PIV Act establishes a "Plug-in Electric Vehicle Incentive Fund" but limits the use of the funds "**solely** for the purpose of providing incentives established pursuant to sections 4 and 6 of the act."⁸⁷ Sections 4 and 6 of the Act are the light-duty EV incentive and the incentives for "in-home" chargers. Thus the funding mechanism identified in the PIV is insufficient to allow the Board to accomplish all the other goals of the Act, without adopting other "policies and programs"⁸⁸ that include other funding sources – such as investments by utilities regulated by the Board.⁸⁹ Considering the Board's broad

⁸¹ *N.J.A.C.* 48:25-3(b).

⁸² Reif Testimony at 8.

⁸³ Reif Affidavit at ¶ 4.

⁸⁴ Reif Affidavit at ¶ 5.

⁸⁵ *N.J.A.C.* 48:25-3.

⁸⁶ Reif Affidavit at ¶ 7.

⁸⁷ *N.J.A.C.* 48:25-7.

⁸⁸ *N.J.A.C.* 48:25-3(b).

⁸⁹ It should also be noted that utility investment programs are a beneficial way to fund the additional programs needed to achieve the PIV Act's goals, considering that recovery of costs through utility rates spreads the costs over years through amortization,

authority to adopt policies and programs and the absence of any limitations or exclusions in the PIV Act as to the types of programs that could be considered, the Board should exercise this authority to responsibly and fully evaluate proposals put before it, such as PSE&G's, that can help fund and achieve the PIV Act goals.

Rate Counsel suggests an opposite, and clearly incorrect, interpretation of the PIV Act – arguing that the Act bars the Board from even considering utility-sponsored EV programs. The New Jersey courts have noted that “[s]tatutory interpretations should turn on the breadth of the legislative objectives and the common sense of the situation.”⁹⁰ The court’s task is “to harmonize the individual sections and read the statute in the way that is most consistent with the overall legislative intent.”⁹¹ Furthermore, it is well-established that a statute’s plain language governs its interpretation, and courts must “enforce the legislative will as expressed by the clear language of the statute, and not presume that the Legislature intended something not expressly stated.”⁹² In light of all the facts and circumstances – that is, “the legislative objectives and common sense of the situation” – it is clear that the Board has the authority to consider, and should consider, the CEF-EVES Petition. These facts and circumstances include but are not limited to: the PIV Act’s recognition of the EV policy set forth in the EMP, and the EMP’s recognition of a role for utilities in EV infrastructure development and charger deployment; the aggressive schedule dictated by the PIV and the extent to which the CEF-EV program is targeted to achieving important elements of that schedule, including making the benefits of vehicle electrification available to low and

whereas full costs of programs funded through the Societal Benefits Charge are recovered in the same year they are incurred. Utility customers pay these costs in either case, but through the Societal Benefits Charge, today’s customers inequitably pay more now for benefits future ratepayers enjoy. Amortizing the program costs through utility rates more equitably spreads those costs over the life of the received benefits, and the ability to earn a return encourages utilities to make these types of investments on behalf of current and future customers.

⁹⁰ *County of Camden v. South Jersey Port Corp.*, 312 N.J. Super. 387, 396, 711 A.2d 978 (App. Div.), *certif. denied*, 157 N.J. 542, 724 A.2d 801 (1998).

⁹¹ *Fiore v. Consolidated Freightways*, 140 N.J. 452, 466, 659 A.2d 436 (1995).

⁹² *Gonzalez v. Bd. of Education of the Elizabeth School Dist., Union County*, 325 N.J. Super. 244, 253 (App. Div. 1999).

moderate income customers;⁹³ and the Board’s express authority to “adopt programs” to achieve the goals of the Act.

Rate Counsel’s assertion that the PIV Act *precludes* utility involvement is contrary to the clear legislative intent of the PIV Act, violates applicable principals of statutory interpretation, and defies common sense. There is no language in the PIV Act that precludes the Board from approving utility programs to help meet its goals. Neither a court, the Presiding Officer in this matter, nor Rate Counsel may read such a provision into the PIV Act.⁹⁴ As both ACE’s EV program filing and PSE&G’s CEF-EVES Petition were pending at the time the PIV Act was being drafted and was passed and the draft EMP also clearly contemplated utility involvement, the Legislature could have expressly precluded utility programs.⁹⁵ Instead, the statute grants the Board express, yet flexible, authority to adopt programs to accomplish the PIV Act’s goals.⁹⁶ There is no reason to lend any credence to Rate Counsel’s invitations to look beyond the plain language of the PIV Act to infer legislative intent, nor is there any evidence in the plain language of the statute supporting Rate Counsel’s interpretation.⁹⁷

⁹³ The CEF-EV subprograms will support the widespread adoption of EVs in all sectors of the economy, including multi-family and low-income customers, as well as customers residing in communities most impacted by air pollutants and GHG. Petition, ¶ 12.

⁹⁴ *Gonzalez, supra*.

⁹⁵ Indeed, the Board did exactly that when it expressly precluded utility involvement in the Community Solar pilot program required under the Clean Energy Act of 2018. The CEA directed the Board to adopt rules and regulations establishing that program, and when adopted in December 2019 those rules were clear that “Board staff will not accept applications for [Electric Distribution Companies] to develop, own, or operate community solar projects . . .” See *N.J.A.C.*, 14:8-9.3(c)4.

⁹⁶ *N.J.S.A.* 48:25-3(b).

⁹⁷ There is also a reasonable alternative interpretation of the legislative history Rate Counsel highlights involving removal of language regarding utility programs from an earlier draft of the PIV. The removed language would have involved complex and time consuming filing requirements for utility proposals that were inconsistent with the urgency and timeframe for meeting goals otherwise expressed in the statute. Assembly Bill No. 4819, §§ 4, 8-10, *available at* https://www.njleg.state.nj.us/2018/Bills/A5000/4819_11.HTM. Rate Counsel interprets removal of this language from the final statute as the equivalent of a prohibition against utility programs. Notwithstanding that it is more plausible that the language was removed because the complex approach was untenable with achievement of goals than, as Rate Counsel claims, that it was removed to create a barrier against utility filings, the mere fact that there can be such disagreement about the meaning of a statute’s legislative history highlights why statutory construction principals generally discourage consideration of legislative history. The Presiding Officer should ignore Rate Counsel’s arguments regarding what they believe is implied and instead focus on the plain language of the PIV Act, which grants the Board broad authority to consider other programs.

It is clear that Rate Counsel's narrow interpretation of the Board's authority under the PIV Act is inconsistent with New Jersey law and the Legislature's intent, and its motion to dismiss should be denied.

C. Board Consideration Is Not Barred By EDECA Or the PIV Act Since The CEF-EVES Petition Proposes A BPU-Regulated Program, And Does Not Seek Authority To Offer A Competitive Service

Rate Counsel argues that the Board has no authority to consider the EV proposals included in the CEF-EVES Petition because Rate Counsel believes EV charging is a "competitive service" as that term is defined under the Energy Discount and Energy Competition Act ("EDECA")⁹⁸ and pursuant to the PIV Act.⁹⁹ EDECA defines "competitive service" as "any service offered by an electric public utility or a gas public utility that the board determines to be competitive pursuant to [N.J.S.A. 48:3-56 or N.J.S.A. 48:3-58] **or that is not regulated by the board.**"¹⁰⁰ Implicit in this definition is the fact that a service that is regulated by the Board is not a competitive service.

In fact, the provision of incentives for EV charging infrastructure through a program like CEF-EVES is in fact a Board regulated activity pursuant to the PIV Act that, thus, cannot be deemed "competitive" under EDECA. The PIV Act's very purpose is to encourage the "the use of plug-in electric vehicles and the development of plug-in electric vehicle charging infrastructure [.]"¹⁰¹ As is demonstrated in Section II.B, above, the PIV Act granted the Board express authority to regulate EV charging incentives, both through programming for residential (in home) charging

⁹⁸ N.J.S.A. 48:3-49 *et seq.*

⁹⁹ Motion to Dismiss at 21-24.

¹⁰⁰ N.J.S.A. 48:3-51 (bolded emphasis added).

¹⁰¹ N.J.S.A. 48:25-3.

incentives¹⁰² and through its ability to “adopt policies and programs to accomplish” the EV charging infrastructure goals set forth in the Act.¹⁰³

In arguing that Section 10 of the PIV Act somehow renders EV charging a “competitive service” pursuant to EDECA,¹⁰⁴ Rate Counsel again inappropriately ignores the plain language of the statute, contrives legislative intent that is not expressed, and infers meaning that is not included in the express terms of the statute. Section 10 of the PIV Act states that “an entity owning, controlling operating, or managing electric vehicle equipment shall not be deemed a public utility solely because of such ownership, control, operation, or management” and goes on to conclude that EV Charging shall be deemed “a service and not a sale of electricity by an electric power supplier or a basic generation service provider pursuant to [EDECA].”¹⁰⁵ First, the statute expressly defines EV Charging as “a service” – not “a competitive service,” which is the defined term under EDECA. Had the Legislature intended to make EV Charging a “competitive service” it would have done so expressly.¹⁰⁶ Second, the language and intent of this section is plain – to ensure that a *non-utility* entity would not be regulated by the Board, thus removing what could be a significant barrier to non-utility entities seeking to provide EV charging services. As stated above, there is no language *anywhere* in the PIV Act that prohibits the Board’s adoption of utility EV charging programs to help meet the Board’s obligation to achieve state EV goals set forth in the statute.

Moreover, the CEF-EVES filing itself is clear that by offering to provide a Board-regulated public utility investment program under CEF-EVES, PSE&G could not possibly be seeking

¹⁰² N.J.S.A. 48:25-6. See also N.J.S.A. 48:25-7 and 48:3-60(a)(3) (amending EDECA to specifically include EVs and EV charging infrastructure programs among the enumerated costs public utilities can recover via the societal benefits charge).

¹⁰³ N.J.S.A. 48:25-3(b).

¹⁰⁴ Motion to Dismiss at 23.

¹⁰⁵ N.J.S.A. 48:25-10.

¹⁰⁶ Gonzalez, *supra*.

approval to provide a competitive service as that term is defined in EDECA, or to compete with existing or prospective market providers. The intent of the CEF-EVES Program is “to help establish New Jersey as a national leader in clean energy, advanced technology development, and environmental excellence [and] support the deployment of EV charging infrastructure and accelerate [vehicle] electrification . . . across a wide range of customers and sectors [t]o provide considerable benefits **not just to EV owners**, but to all PSE&G customers, local communities, those traveling through the state, and especially those residing in neighborhoods most impacted by air pollutants and greenhouse gas emissions.”¹⁰⁷ With respect to the competitive market itself, the primary purpose of the program is the “[m]itigation of EV market barriers.”¹⁰⁸ Specifically, “[t]he EV subprograms will address critical barriers in the EV market such as lack of consumer awareness, higher upfront cost of electric vehicles, gaps in public charging coverage, and range anxiety (*i.e.*, fear of running out of charge).”¹⁰⁹ The program will function in a pro-competitive and forward-looking manner. For example, “PSE&G will ensure that qualified EV chargers are sourced from a variety of vendors and are consistent with current market technology.”¹¹⁰ It is clear that the purpose of the CEF-EVES program is to support the competitive market, not to take part in it.¹¹¹

Finally, to the extent the Board has questions about the nature of the regulated EV services that PSE&G will provide under the CEF-EVES Petition or, for that matter, questions about any aspect of the EV market in New Jersey and the impact of the Company’s proposals on that market, Rate Counsel’s motion should be denied and this case should go forward according to the schedule

¹⁰⁷ Reif Testimony at 1-4. (Bolded emphasis added).

¹⁰⁸ *Id.* at 5-6.

¹⁰⁹ *Id.*

¹¹⁰ *Id.* at 12.

¹¹¹ Even where the Company’s proposals contemplate ownership of EV chargers, it is only as an owner of last resort in areas not served by market providers.

established in the Prehearing Order. In that order, the Presiding Officer granted intervenor and participant status to several EV industry participants who are now available to provide input to the Board.¹¹²

Granting Rate Counsel's motion to dismiss and depriving the Board, the intervenors and participants in this case, and the public from evaluating the efficacy of the proposed PSE&G CEF-EVES Petition would be inconsistent with the Board's broad jurisdiction over the activities of public utilities, and would be contrary to the EMP and the clear intent of the PIV Act.

III. Make-Ready Work for EV Charging Is Not A Main Extension

Rate Counsel's final argument is that the aspects of PSE&G's EV proposals under which PSE&G would install the facilities on the Company's side of the meter to facilitate EV charging equipment (the "make ready" work) should be dismissed because the Company has not proposed to apply the regulations governing main extensions to this work.¹¹³

First, this is not an appropriate grounds for outright dismissal of PSE&G's EV Programs. There are not sufficient facts on the record for the Presiding Officer or the Board to even determine whether or not this work should be treated as a main extension. Moreover, Rate Counsel's arguments speak to *how* the Company's proposals should be treated under the regulations – not whether the proposals are invalid as a matter of law.

PSE&G disagrees that EV charging make ready work is a main extension pursuant to the regulations and the Company's tariff. Notwithstanding, this is an issue that should be considered

¹¹² Those intervenors and participants include Blue Bird Body Company, Burns & McDonald Engineering Company, Inc., Environment New Jersey, Sierra Club, Environmental Defense Fund, NRDC, Greenlots, Mid-Atlantic Solar Energy Industries Association, Climate Change Mitigation Technologies LLC, EVgo Services, LLC, Tesla, Inc., ChargePoint, Inc., Enel X North America, Inc. and Electric Motor Werks, Inc., New Jersey Large Energy Users Coalition, Direct Energy Business, LLC, Centrica Business Solutions, NRG, Just Energy Group, Inc., SunRun Inc., Atlantic City Electric Company, Alliance For Transportation Electrification, Jersey Central Power & Light Company, SemaConnect, and Rockland Electric Company.

¹¹³ Motion to Dismiss at 31.

following additional discovery that could make more clear the nature and locations of make ready work necessary for EV charging infrastructure.

Second, to the extent the Presiding Officer concludes, following a full proceeding and development of the record, that application of the main extension rules is required for any of the make-ready work, the Board could waive these regulations. Indeed, the entire purpose behind PSE&G's EV program proposals, including the make-ready incentives, is to remove the significant cost barriers to the deployment and installation of EV charging infrastructure. Application of the main extension rules would likely result in additional costs to the developers and customers installing EV chargers – adding additional barriers to broad deployment of EV charging infrastructure. This barrier, however, is not one that could not be overcome through thoughtful examination of evidence and debate put forth by the parties in this case – assuming the case is permitted to proceed.

CONCLUSION

For all of the reasons set forth above, Rate Counsel's motion to dismiss PSE&G's EV programs should be denied. Particularly considering the State's urgency in meeting transportation electrification goals, the Presiding Officer, the Board, the intervenors and participants in this case, and the Company's customers deserve a fully developed record, a meaningful opportunity to be heard, and the Board's full consideration on the merits of PSE&G's entire CEF-EVES Petition. Summary dismissal is not only unsupported by the law and the meager record in this proceeding to date; it is simply the wrong result.

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