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April 17, 2020

**Via Electronic Mail**
Honorable Aida Camacho-Welch, Secretary
NJ Board of Public Utilities
44 South Clinton Avenue, 9th Floor
P.O. Box 350
Trenton, NJ 08625-0350

**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:

Please accept for filing this Motion to Dismiss by the New Jersey Division of Rate Counsel ("Rate Counsel"), pursuant to the March 13, 2020 procedural schedule by Board Staff in the above-referenced matter. Copies of this motion are being provided to all parties on the service list by electronic mail only.

**Please acknowledge receipt of this Motion to Dismiss.**

Thank you for our consideration and attention to this matter.

Respectfully submitted,

STEFANIE A. BRAND
Director, Division of Rate Counsel

By: */s/ Brian Weeks*
Brian Weeks, Esq.
Deputy Rate Counsel

BW
Enclosure
cc: Service List

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

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

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| **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** |

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**NEW JERSEY DIVISION OF RATE COUNSEL**
**MOTION TO DISMISS**

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Dated: April 17, 2020

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## PRELIMINARY STATEMENT

Public Service Electric and Gas Company ("PSE&G" or "Company") has filed the Petition in this case seeking Board approval of its Clean Energy Future – Electric Vehicle and Energy Storage ("CEF-EVES") Program. The Petition proposes four electric vehicle ("EV") sub-programs and five energy storage ("ES") sub-programs. This motion asks the Board of Public Utilities ("BPU" or "Board") to dismiss the Company's proposed EV sub-programs.[1]

The proposed EV sub-programs are designed to fund the installation of EV charging equipment and the associated electrical infrastructure (collectively, Electric Vehicle Service Equipment or "EVSE"), to provide incentives for customers to buy, own or operate EVSEEVSE, and to subsidize the purchase of electric buses by school districts and the electrification of customers' vehicle fleets. PSE&G's Petition proposes a grab bag of incentives that involve the Company installing certain EVSE itself, discounting the cost of installing EVSE for customers, offering customers the option to own EVSE installed on their property or allow PSE&G to own and operate the EVSE, installing "make ready" equipment for customers' use, purchasing and donating electric school buses, and unspecified "innovative" projects to electrify some customers' vehicle fleets, provide rebates to encourage off-peak EV charging and to reduce the cost of EV charging. For all of these EV sub-programs, PSE&G seeks recovery of and a return on its investments. The total net cost to ratepayers of all the EV sub-programs is estimated to be $364 million, which PSE&G seeks to recover through regulated rates from all of its customers, whether they participate in the EV sub-programs or not.

[1] Rate Counsel moves only to dismiss the EV sub-programs of PSE&G's Petition; however, Rate Counsel does not concede that the five energy storage sub-programs are legal or appropriate. Rate Counsel expressly reserves all rights with respect to the energy storage sub-programs.

In this motion, Rate Counsel seeks dismissal of the EV sub-programs in PSE&G's Petition. Rate Counsel's motion is based on the long-held legal principle that utilities may only seek recovery of "used and useful utility property" that is dedicated to the public service. It is also based on the lack of statutory authority for the Board to allow utilities to use regulated rates to fund competitive services, as defined in the Electric Discount and Energy Competition Act ("EDECA"), N.J.S.A. 48:3-49 et seq., and the lack of authority for these programs in the recently enacted Plug-in Vehicle Act ("PIV Act"), P.L. 2019, c. 362, N.J.S.A. 48:25-1-11. For purposes of this motion, Rate Counsel has accepted the descriptions of the EV sub-programs as set forth in PSE&G's Petition. For the reasons set forth at length below, the proposed EV sub-programs, that are the subject of this motion, cannot be approved as a matter of law, and Rate Counsel respectfully requests that its motion be granted.

## STATEMENT OF FACTS AND PROCEDURAL HISTORY[2]

PSE&G initiated this matter with a Verified Petition filed on October 11, 2018, pursuant to N.J.S.A. 48:2-21 and N.J.S.A. 48:2-21.1. That Petition sought approval by the Board for four EV sub-programs whereby PSE&G would fund incentives for EVSE and EVs. PSE&G would recover the total net costs of over $364 million from all of its ratepayers, whether or not they participate in any of the EV sub-programs. Some of that equipment would be owned and operated by PSE&G but much of it would be owned and operated by PSE&G's customers.

On October 29, 2018, the Board issued an Order retaining jurisdiction over this matter and designating Commissioner Upendra J. Chivukula as the presiding officer with authority to rule on certain motions, and setting a deadline of November 13, 2018 for filing motions to intervene or participate. Multiple parties sought intervention and participant status. On December 7, 2018, Rate Counsel moved to stay PSE&G's Petition until the conclusion of the Board's Electric Vehicle Stakeholder Group process. PSE&G filed its opposition to that motion on December 17, 2018, and Rate Counsel replied on December 21, 2018.

The Petition seeks to place non-utility property that is not used and useful in the public service into rate base and to permit PSE&G to offer EV services already available in the competitive market. PSE&G's program would use ratepayer funds to allow PSE&G to undercut competitors, eliminating their ability to provide those services at competitive prices without ratepayer funding.

On January 17, 2020, the Governor signed into law the Plug-In Vehicle Act ("PIV Act"), which sets goals and authorizes incentives to increase the use of PIVs in New Jersey. N.J.S.A.

[2] Due to the intertwined nature of the procedure and facts in this matter, they have been combined for the convenience of the Board.

48:25-1 -11. The legislation directs the Board to undertake certain statewide tasks, including promulgating rules, conducting studies and allocating $30 million per year from the Societal Benefit Charge ("SBC") to subsidize the purchase of certain types of EVs and EVSE in New Jersey. N.J.S.A. 48:25-7.[3] The Board is authorized to use these funds to create the Plug-in Electric Vehicle Fund and distribute rebates for the purchase of electric vehicles as well as incentives for in-home electric vehicle equipment. Id. Significantly, other than SBC funds, the PIV Act does not authorize or direct the Board to allow the investment of any ratepayer funds in its implementation. In fact, the PIV Act does not provide any role or authority for regulated public utilities to invest in or subsidize EVs or EVSE. Despite this change in law, PSE&G seeks to pursue its Petition.

Shortly after signing the PIV Act, on January 27, 2020, Governor Murphy unveiled the State's 2019 Energy Master Plan ("2019 EMP"),[4] which seeks to cost-effectively generate 100% clean energy and reduce GHG emissions more than 80% below 2006 levels by 2050. 2019 EMP, pp. 11-12. The 2019 EMP intends to reach these goals "largely through electrifying the transportation and building sectors, promoting energy efficiency, and meeting more than a doubling of load growth with 94% carbon-free electricity." Id.

The 2019 EMP assigns the Board a "rigorous" set of goals, while also upholding the Board's mission to provide a "safe, reliable, resilient and affordable" energy system for all New Jersey residents. Id. at p. 11. For example, the Board is to help support the purchase or lease of

[3] The PIV Act also allows the Board to include funds appropriated by the Legislature and utilize any return on investment of moneys deposited in the fund for the Plug-In Electric Vehicle Fund. N.J.S.A. 48:25-7a.

[4] State of New Jersey, "2019 New Jersey Energy Master Plan, Pathway to 2050," available at http://d31hzlhk6di2h5.cloudfront.net/20200127/84/84/03/b2/2293766d081ff4a3cd8e60aa/NJBPU_EMP.pdf.

330,000 ZEVs[5] by 2025. Id. at p. 29. The 2019 EMP anticipates that fully electrifying the transportation and building industries in New Jersey will increase the use of electricity enormously, by as much as 2.3 times by 2050. Id. at p. 176. The Board must work with the EDCs to develop Integrated Distribution Plans, within a year, to plan for, finance and implement the electric distribution system upgrades required for expanded EV charging. Id. at pp. 14, 176 & 194. The 2019 EMP envisions the EDCs upgrading their distribution systems to accommodate the huge anticipated load increase from EVs, but does not discuss having utilities subsidize the purchase of EVs or EVSE. Id. at p. 14 ("New Jersey must plan for, finance, and implement distribution system upgrades that will be required to handle increased electrification ...").

On March 13, 2020, Board Staff circulated a procedural schedule, including setting a deadline of April 17, 2020 for the parties to file motions. To date, no Prehearing Order has been issued. The motions to intervene or participate, as well as Rate Counsel's motion for a stay, remain outstanding. Nonetheless, Rate Counsel files this brief consistent with the schedule proposed by Staff.

[5] The term "ZEV" refers to any motor vehicle that does not emit pollutants from its tailpipe. ZEVs use engines powered by a variety of fuels including but not limited to electricity and hydrogen. Only electrically powered motor vehicles are at issue in PSE&G's petition.

**Summary of PSE&G's Petition**

The facts set forth below are those set forth in PSE&G's petition and thus are undisputed. PSE&G's Petition proposes to invest up to $261 million and incur approximately $103 million in expenses, a total of approximately $364 million over a period of approximately six years, in the four EV sub-programs. Petition, pp. 3-4. PSE&G's EV sub-programs are described in more detail below.

**PSE&G's Proposed Electric Vehicle Program**[6]

If approved, the four EV sub-programs proposed by PSE&G would result in the installation of nearly 40,000 EV charging locations. Petition, p.4. The four EV subprograms are:[7]

> **EV Sub-program 1 – "Residential Smart Charging."**[8] This subprogram provides incentives for Level 2 "networked" EV chargers at residences (37,000 charging stations; $93 million investment). PSE&G proposes to offer rebates of up to $2,000 towards the installation of a networked Level 2 charger for participating residential customers. The installation and associated wiring upgrades will be performed by PSE&G employees and approved contractors. Installation costs in excess of the rebate amount would be the responsibility of the customer. In addition, PSE&G will offer a 2 cent per kWh rebate on off-peak charging. Further, PSE&G also seeks the flexibility to adjust the rebate amounts. Finally, the Company will offer financial incentives to 500 participants for sharing charging and usage data.
>
> **EV Sub-program 2 – "Level 2 Mixed-Use Charging."**[9] This subprogram provides incentives and supports infrastructure for networked Level 2 chargers (approximately 2,200 charging stations at 600 locations; $39 million investment). The target market is a diverse set of customers, such as multi-family dwellings, workplaces, fleets, municipalities, overnight lodging and "community locations." PSE&G will provide make ready infrastructure and provide rebates, tiered by customer type, towards the upfront cost of Level 2 chargers and installation.

[6] See Petition, p. 4.
[7] See Petition, pp. 6-7.
[8] See Petition, p. 4; Direct Testimony of Karen Reif, PSE&G V.P. of Renewables and Energy Solutions, Attachment 1 to Petition, ("Reif testimony"), pp. 12-15.
[9] See Petition, p. 4; Reif testimony, pp. 15-18.

PSE&G will own and operate all "make ready" electrical infrastructure up to the utility meter and also the electrical panel, conduit, and wires up to the charger "stub." Under PSE&G's program, the participating electric customer may be different than the "host" owner of the charging site.

**EV Sub-program 3 – "Public DC Fast Charging**."[10] This subprogram would provide Make Ready infrastructure for DC Fast Chargers ("DCFC") and incentives for the installation and operation of DCFCs (450 charging stations; $62 million investment). The target market for this subprogram includes Site Hosts, EV service providers, or other third parties. PSE&G will deploy "Make-Ready" electrical infrastructure and either own or provide financial incentives (rebates} towards the upfront cost of DCFC equipment. Rebates will be tiered, based on whether the participant is a public or non-public entity. PSE&G will also provide financial incentives to defray electricity costs. Participants will have the option to pay back their share of the costs using interest-free on-bill repayments over a period of two years. PSE&G proposes two different ownership models: (1) a third party ownership model whereby a third party will own, maintain and operate the DCFC stations ("Third-Party Ownership Model"), and (2) a model where PSE&G will deploy the Make-Ready Infrastructure and install, own, maintain and operate the DC Fast Charging stations ("Utility Ownership Model"). The second model will only be utilized if the competitive market is unable to support the DCFC stations' development using the Third-Party Ownership Model. PSE&G will also provide participants with a rebate to cover the difference between the effective cost per kWh of their monthly DC Fast Charging electric usage and the subprogram "target rate," where the target rate will be determined by PSE&G "using a variety of factors, including but not limited to market dynamics affecting local customer electric rates and local DCFC economics." PSE&G proposes an investment of $62 million over a period of six years, based on an initial estimate of 150 charging locations and 450 charging stations. This subprogram will also include a pilot study involving integrated "energy storage" at five sites.

**EV Sub-program 4 – "Vehicle Innovation."**[11] This subprogram provides incentives for electric school buses and charging equipment (60 charging stations) and an open solicitation for "customized electrification projects" ($45 million investment). PSE&G proposes to provide incentives directed towards electric school buses and EV charging infrastructure for school districts in its service territory, as well as hold an open solicitation process to fund "high-impact, customized electrification projects for customers with non-standard vehicle electrification needs." The target market for the Vehicle Innovation subprogram is school districts interested in deploying electric buses, and ports, airports, transit authorities or other entities with specialized medium and heavy-duty vehicle electrification needs. For the electric school bus portion, PSE&G

[10] See Petition, p. 4; Reif testimony, pp. 19-26.
[11] See Petition, p. 4; Reif testimony, p. 26-34.

> proposes to grant $300,000 per bus for up to 102 electric school buses, with 100 buses assigned permanently to their respective school districts, and the other two available to rotate among different districts. PSE&G proposes to provide grants to public school districts to cover the cost of purchasing electric school buses, as well as deployment of the Make-Ready infrastructure and financial incentives towards charging equipment. The proposed investment for this subprogram is $45 million, with $33 million for the electric school bus portion and $12 million for the open solicitation portion.
>
> **Cross-Subprogram Investment.**[12] PSE&G also proposes an investment of $22 million for Information Technology ("IT") and for "education and outreach" to support its EV programs. This is in addition to the proposed $103 million administrative budget for its EV subprograms.[13]

**PSE&G's Rate Recovery Proposal**

PSE&G seeks to recover from its ratepayers the revenue requirements associated with all of its proposed EV sub-programs, on an equal per kilowatt hour basis, including a return on its net investment based upon its most recent cost of capital authorized by the Board. See Petition, pp. 9, 13. PSE&G also proposes to partially offset the amounts collected from ratepayers by any revenues derived from its EVES Program,

> including, but not limited to, EV charging revenue associated with Company-owned chargers, and any PJM revenues derived from the [energy storage] subprograms or from the assets installed in the CEF-EVES Program, such as through the PJM frequency regulation market. In addition, if the Company can derive any additional revenue in the future from these programs, all net proceeds will be credited to ratepayers as a reduction to revenue requirements.
>
> Petition, p. 9.

The proposed EV Program would require ratepayers to fund infrastructure that is not used, useful or even owned by PSE&G, and to subsidize other customers for specialized services not necessary for the Company to provide safe and adequate utility service. In this regard, as demonstrated below, PSE&G's proposal violates well-established state law and is not authorized

[12] See Petition, p. 4.
[13] See Reif testimony, p. 35.

by any statutory authority. For these reasons, the Board should enter an order dismissing the EV sub-programs in PSE&G's Petition as a matter of law.

## Standard of Review

A party may move for summary decision upon all or any of the substantive issues in a contested case. N.J.A.C. 1:1-12.5(a). A summary decision motion may be granted

> if 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. When a motion for summary decision is made and supported, an 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.
>
> N.J.A.C. 1:1-12.5(b).

A contested case before the OAL "can be summarily disposed of before an ALJ without a plenary hearing in instances where the undisputed facts, as developed on motion or otherwise indicate that a particular disposition is required as a matter of law." In re Robros Recycling Corp., 226 N.J. Super. 343, 350, (App Div.), certif. denied, 113 N.J. 638 (1988).

## ARGUMENT

### POINT I

### RATEPAYERS MAY ONLY BE CHARGED FOR PROPERTY OWNED BY THE UTILITY THAT IS USED AND USEFUL IN THE PROVISION OF UTILITY SERVICE.

In its Petition, PSE&G seeks return on and recovery of investments that will not be owned by the Company. Much of the investment proposed in this proceeding is for EVSE that will not be owned by PSE&G, but rather by customers of the Company. The individuals or

parties owning the equipment will benefit from its use; however, all of the Company's ratepayers will pay for it.[14] This equipment will not be utilized to provide safe and adequate utility service, but rather will be used to charge personal vehicles. Not only will ratepayers be paying for equipment to be owned by private individuals, ratepayers will also pay for PSE&G to earn a return on the property it will never own.[15] As set forth below, the law is clear that ratepayers can only pay for utility property that is used and useful in the provision of safe and adequate service. PSE&G's EV sub-programs fail to meet this basic requirement and therefore should be dismissed.

**A. The Used and Useful Principle**

It is well-established law on both the State and Federal level that investment that is recoverable in utility rates is limited to "the fair value of the property used and useful in the public service." Atlantic City Sewerage Co. v. Bd. of Pub. Util. Comm'rs, 128 N.J.L. 359, 365 (Sup. Ct. 1942); accord, I/M/O Petition of Pub. Serv. Coordinated Transp., 5 N.J. 196, 217 (1950); In re N.J. Power & Light Co., 9 N.J. 498, 509 (1952); Verizon Communications v. Fed. Communications Comm'n, 535 U.S. 467, 484 (2002); Duquesne Light Co. v. Barasch, 488 U.S. 299 (1989). This mandate encompasses two individual but related requirements. First, the property in question must consist of assets of the public utility. As the New Jersey Supreme Court has held, "[i]t is established that the rate base in a proceeding of this nature is the fair value of the property of the public utility…." In re N.J. Power & Light Co., supra, 9 N.J. at 209 (emphasis added). Furthermore, the property of the public utility must be "used and useful in the public service." Id.

[14] Petition, pp. 8-14 ("CEF-EVES Cost Recovery").
[15] Petition, p. 4; Reif Testimony, pp. 12-28.

The used and useful principle has its origins in the underlying justification for regulating public utilities by governmental bodies. The United States Supreme Court has held that:

> [l]ooking, then, to the common law, from whence came the right which the Constitution protects, we find that when private property is 'affected with a public interest, it ceases to be *juris privati* only'….Property does become clothed with a public interest when used in a manner to make it of public consequence, and affect the community at large. When, therefore, one devotes his property to a use in which the public has an interest, he, in effect, grants to the public an interest in that use, and must submit to be controlled by the public for the common good, to the extent of the interest he has thus created.
>
> Munn v. Illinois, 94 U.S. 113, 125-26 (1877) (quoting Lord Hale, *De Portibus Maris*).

Accordingly, owners of property that is "clothed with a public interest" – such as the property of a public utility - can be required to submit to regulation by the government. Id. This concept has been used to justify the regulation of public utilities for well over a century.

While owners of property that affects the public interest may be required to submit to governmental control, the power of government regulators is circumscribed by the Constitution. The Fifth and Fourteenth Amendments to the United States Constitution prohibit a State from depriving any person of property without due process of law. It is well settled that corporations such as public utilities are persons within the meaning of the Fourteenth Amendment. Smyth v. Ames, 169 U.S. 466, 522 (1898). Accordingly, public utilities must be sufficiently compensated for the use of their property under the Fifth and Fourteenth Amendments; to do otherwise would amount to a taking of private property without just compensation. Id. at 523. As the United States Supreme Court has stated:

> the Constitution fixes limits to the ratemaking power by prohibiting the deprivation of property without due process of law or the taking of private property for public use without just compensation.
>
> St. Joseph Stock Yards Co. v. U.S., 298 U.S. 38, 51 (1936).

Public utilities are compensated for the use of their property by being allowed to charge a reasonable rate for their services. See, e.g., Duquesne Light Co., supra, 488 U.S. at 307 ("[t]he guiding principle has been that the Constitution protects utilities from being limited to a charge for their property servicing the public which is so 'unjust' as to be confiscatory").

While public utilities are entitled to just compensation under the Fifth and Fourteenth Amendments, our courts have been equally concerned with the rights of the rate-paying public. Indeed, "the fixing of 'just and reasonable' rates involves a balancing of the investor and the consumer interests." Fed. Power Comm'n v. Hope Natural Gas Co., 320 U.S. 591, 603 (1944). While shareholders are entitled to reasonable rates in return for devoting their property to public use, the public is protected against "unreasonable exactions" solely in order to pay dividends to shareholders. Smyth, supra, 169 U.S. at 544-45. The balance required between the rights of the public and the rights of regulated utilities gave rise to the development of the "used and useful" principle. This principle, which endures to the present day, limits a utility's compensation to the value of utility property that is used and useful in the public service. See, e.g., Duquesne Light Co., supra, 488 U.S. at 307.

The used and useful principle serves to benefit both the shareholders of public utility corporations, and the public that pays those utilities' rates. In sum, "[w]hat the company is entitled to ask is a fair return upon the value of that which it employs for the public convenience. On the other hand, what the public is entitled to demand is that no more be exacted from it…than the services rendered by it are reasonably worth." Smyth v. Ames, supra, 169 U.S. at 547.[16]

[16] The "fair value" approach to utility compensation adopted in Smyth was replaced by a historical cost approach in Fed. Power Comm'n v. Hope Natural Gas Co., supra, 320 U.S. at 605. However, the "used and useful" principle that first originated in Smyth remains in effect today.

In following the Federal jurisprudence, the used and useful principle has long been the law in the State of New Jersey. In 1942 the New Jersey Supreme Court in Atlantic City Sewerage Co., supra, 128 N.J.L. at 365, held that "[t]he rate base is the fair value of the property used and useful in the public service." The Court further opined:

> A corporation of this particular class performs a public function; and the public cannot be called upon for more than the fair value of the service rendered. The utility is entitled to a just return upon the fair value of the property at the time of its employment for the convenience of the public, and the public to protection against unreasonable exactions….A rate based upon an excessive valuation or upon property not used or useful in the rendition of the service subject to such regulation obviously would lay upon the individual user a burden greater than the reasonable worth of the accommodation thus supplied.
>
> Id. at 365-66 (emphasis added).

Citing the exact language above, Atlantic City Sewerage Co. was re-affirmed by the State Supreme Court in 1950 in I/M/O Petition of Pub. Serv. Coordinated Transp., supra, 5 N.J. at 217, and again in 1974 in In re Proposed Increased Intrastate Industrial Sand Rates, 66 N.J. 12, 22 (1974).

In Industrial Sand, the Supreme Court specifically discussed the Constitutional principles underlying the used and useful principle:

> The law has thus developed, no doubt, because the system of rate regulation and the fixing of rates thereunder are related to constitutional principles which no legislative or judicial body may overlook. For if the rate for the service supplied be unreasonably low it is confiscatory of the utility's right of property, and if unjustly and unreasonably high…it cannot be permitted to inflict extortionate and arbitrary charges upon the public. And this is so even where the rate or limitation on the rate is established by the Legislature itself.
>
> 66 N.J. at 23-24.

As the Industrial Sand Court noted, because of its Constitutional nature, the used and useful principle and its corollary that rates be just and reasonable, cannot be overridden by either legislation or regulatory or judicial decisions. Rates which permit recovery for used and useful

utility property must be just and reasonable, or otherwise risk being deemed confiscatory of a utility's property rights or customers' right against unreasonable exactions.

Under the law, in addition to serving the public, property must also actually be owned by the public utility in order to be eligible for rate relief. This concept is so fundamental to the setting of rates that our courts seem to have hardly envisioned the request contained in the EV sub-programs of PSE&G's Petition, that a public utility would seek rate relief for property owned by others. Our State Supreme Court has opined that "[p]roperty affected with a public interest, such as the assets of a public utility, fulfill a societal need while providing an investment opportunity. In general, investors may expect a utility to earn a reasonable rate of return on its assets." In re Valley Rd. Sewerage Co., 154 N.J. 224, 240 (1998) (emphases added); accord Duquesne Light Co., supra, 488 U.S. at 307 ("the Constitution protects utilities from being limited to a charge for their property serving the public which is so 'unjust' as to be confiscatory.") (emphasis added).

As with our courts, the Board has, for decades, followed the used and useful principle. See, e.g., I/M/O Petition of Suez Water Arlington Hills Inc. for Approval of an Increase in Rates, BPU Docket No. WR16060510, Order dated 11/13/17 (adopting recommendation of ALJ's Initial Decision to disallow rate recovery for a pump that had been removed from service, on the basis that it was no longer used and useful); I/M/O Parkway Water Co. for an Increase in Rates & Charges for Water Service, BPU Docket No. WR05070634, 2006 N.J. PUC LEXIS 165 (2006) (adopting ALJ's recommendation to disallow from rates all costs associated with seven wells that had been contaminated by radionuclides, on the basis that such property was no longer used and useful); In re Electric Utility Nuclear Performance Standards, 120 P.U.R. 4th 620 (1990) ("Generally, utilities include the value of property used and useful in the provision of

utility service in rate base."). These are just several of the many Board decisions that have followed the used and useful principle, the entirety of which are too numerous to list.

In 2017, the Board decided a fully litigated matter that presented the exact same issue raised in this motion as to whether a utility can recover in rates an investment in customer-owned property. The Board definitively decided that such recovery is not allowed. I/M/O Petition of Rockland Electric Co. for Approval of an Advanced Metering Program; and for Other Relief, BPU Docket No. ER16060524, Order dated 8/23/17 ("RECO AMI Order").[17] In the RECO matter, Rockland Electric Company requested pre-approval to install advanced meters throughout its entire service territory. As part of its installation plan, Rockland proposed to perform work on the customer side of the electric meter in order to facilitate installation of the new meters. Similarly here, PSE&G proposes to subsidize customer-owned EVSE. Rockland proposed to capitalize such costs in rate base where, similar to PSE&G's EV sub-programs, Rockland would earn a return of and a return on customer-owned property.

The Board found Rockland's proposal to be contrary to New Jersey law. Even though the Board believed such work was necessary for the safe installation of AMI, the Board agreed with Rate Counsel that the Company's proposal "violates settled New Jersey case law." Rockland AMI Order at 22. The Board specifically found that:

> [w]ith respect to the cost of such work, the Board HEREBY FINDS that RECO's proposal is contrary to settled New Jersey case law. Accordingly, the Board HEREBY DENIES RECO's request to capitalize such costs. Costs related to this work shall not be recovered from the Company's ratepayers.
>
> Id.

It is noteworthy that the Board did not deny cost recovery of the customer-owned property to Rockland solely on the basis that Rockland proposed to "rate base" the investment. Instead, in

[17] Available at https://www.bpu.state.nj.us/bpu/pdf/boardorders/2017/20170823/8-23-17-2F.pdf

holding that "[c]osts related to this work shall not be recovered from the Company's ratepayers," the Board denied cost recovery in any form.

### B. Application of the Used and Useful Principle to PSE&G's Petition

Each of PSE&G's EV sub-programs is in violation of the used and useful principle. Most of the EV sub-programs center around PSE&G using funds to be recovered in rates to invest in property that will be privately owned by entities other than PSE&G. Even where PSE&G will own the equipment, the EV sub-programs involve investments that are not necessary for the provision of safe, adequate and proper utility service. In the EV sub-programs, PSE&G proposes to expend approximately $364 million in investments and expenses to purchase and install EVSE such as Level 2 and DC fast chargers and related electrical equipment, directly or through incentives such as rebates, in residential homes, multifamily residences, workplaces, vehicle fleets, municipalities and overnight lodging.[18] PSE&G would also subsidize the purchase of EVSE and electrically powered school buses for school districts and the electrification of customer vehicle fleets. PSE&G will not own or operate most of this EVSE. Rather, individual customers of PSE&G will own and receive the benefit of the EVSE installed for free or at a subsidized cost, with the balance of the costs to be recovered from other ratepayers.

Most of the EVSE would not even be available to all ratepayers on a non-discriminatory basis. Access and use would be controlled solely by the owner of the property where the EVSE is installed: the Residential Smart Charging EVSE, at individual residences or multi-family dwellings of four units or less;[19] the Level 2 Mixed-Use Charging EVSE, at multi-family dwellings of greater than four units, workplaces, vehicle fleets, municipalities, overnight lodging

[18] Reif Testimony, p. 3.
[19] Id., p. 12.

and "community" locations;[20] and the Vehicle Innovation EVSE, at school districts, ports, airports, transit authorities or other entities with specialized medium and heavy-duty EVs.[21] PSE&G's Eligibility Requirements would not require any public access to the Residential Smart Charging,[22] Level 2 Mixed-Use Charging,[23] or Vehicle Innovation sites.[24] While the Public DC Chargers would be available to the public 24 hours per day, seven days per week, the site operator (whether a competitive provider of EVSE or PSE&G) would determine the fee for vehicle charging, as an electrical vehicle filling station.[25] Obviously, only ratepayers who own or operate an EV would use any of this EVSE.

Not only will these investments not be owned by the utility, they will not be used for the provision of utility service. They will be used to power private personal vehicles or vehicles in commercial or government fleets. While certainly those vehicles and fleets will *use* electricity, that is not sufficient to be considered as "useful" in the provision of utility service. If it were, then the utilities would be free to purchase any equipment that uses electricity and provide it to some customers while charging the rest.

The third proposed EV sub-program, for "Public DC Fast Charging," would invest approximately $62 million plus expenses to be recovered from ratepayers for publicly available DC fast chargers. While PSE&G would own the proportion of this EVSE that third parties do not opt to own, it is not needed to provide safe and reliable utility service to PSE&G's ratepayers. Interestingly, utility ownership and operation of EV charging stations was

[20] Id, pp. 16-17.
[21] Id., p. 27.
[22] Id., p. 14.
[23] Id., pp. 17-18.
[24] Id., p. 27.
[25] Id., pp. 24-25.

specifically deleted from the adopted PIV legislation.[26] Thus, as discussed further below, not only do the EV sub-programs violate the used and useful principle, there is no statutory authority to allow them.

In the fourth proposed EV Sub-program, for "Vehicle Innovation," PSE&G will invest up to $45 million plus expenses for "vehicle innovation" incentives to subsidize and then donate the purchase of electric school buses, along with the installation of 60 electric school bus charging stations, and the electrification of customer vehicle fleets. None of this investment will result in any property owned by PSE&G or used to provide utility service.[27] In other words, PSE&G is simply seeking permission to use funds collected through rates to purchase buses and EVs for some of its customers. To the extent that PSE&G proposes to develop "customized" electrification projects for its customers' vehicle fleets, this sub-program also essentially seeks seed money from ratepayers for research and development projects. This also does not involve utility owned property that is used and useful in the public service. It is hard to imagine any argument that the "Vehicle Innovation" sub-program of the Petition relates to the provision of safe, adequate and proper service.

Our courts have made clear that rate recovery is limited to investment in assets owned by the utility. Because most of the EV charging infrastructure PSE&G requests recovery of in its Petition will indisputably be owned by private parties, and not PSE&G, the Company cannot recover such costs in rates as a matter of law. See In re N.J. Power & Light Co., supra, 9 N.J. at 209 ("It is established that the rate base in a proceeding of this nature is the fair value of the property of the public utility that is used and useful in the public service at the time of its

[26] Compare A4819, Section 10, p. 17 http://www.njleg.state.nj.us/2018/Bills/A5000?4819_I1.HTM with P.L. 2019, ch. 362.
[27] Reif Testimony, pp. 26-28.

employment therein…."); accord In re Valley Rd. Sewerage Co., supra, 154 N.J. at 240 ("In general, investors may expect a utility to earn a reasonable rate of return on its assets.") (emphasis added). Because this charging infrastructure will never be dedicated to the public service, the public cannot be charged for any investment in it by the utility without it constituting an "unreasonable exaction" from ratepayers in order to pay dividends to shareholders. Atlantic City Sewerage Co., supra, 128 N.J.L. at 365 ("The utility is entitled to a just return upon the fair value of the property at the time of its employment for the convenience of the public, and the public to protection against unreasonable exactions.") The Board in the 2017 RECO AMI Order and in many before it recognized this limitation, finding that ratepayers cannot be asked to pay for work performed on non-utility property, and denying any form of rate recovery for investment in property that was not owned by the utility. RECO AMI Order at 22.

In addition to not being utility-owned, the customer-owned EVSE PSE&G proposes in this filing is not dedicated to the public service, and therefore ratepayers cannot be required to pay a return on and of such costs by law. See, e.g., Atlantic City Sewerage Co., supra, 128 N.J.L. at 365-66. Other than any DC fast chargers that PSE&G decides to own and operate itself under the "Public DC Fast Charging" EV sub-program, PSE&G will have no rights to use, alter or enhance the equipment for the public's benefit. Control and maintenance of the equipment will be in the private owner's purview. This infrastructure will never be employed for the public's convenience, and will not enhance or even encompass the facilities used by PSE&G in providing safe, adequate, and proper service.[28] The public simply will never be granted an interest in the use of this privately owned infrastructure, which is a prerequisite for being used and useful utility property. Munn v. Illinois, supra, 94 N.J. at 125-26. As our courts have said,

[28] See Reif Testimony, pp. 19-26.

"[t]he public is entitled to demand that no more money be extracted from it than the services rendered by the utility are reasonably worth." In re Valley Rd. Sewerage Co., 285 N.J. Super. 202, 210 (1995).

PSE&G's proposal to use ratepayer money for infrastructure to be owned by others, and earn a return of and on its investment in the process, is contrary to law. Ratepayers cannot be forced to pay for the EV sub-programs of PSE&G's Petition, which add no used and useful public utility assets to PSE&G's infrastructure. Ratepayers also cannot be forced to pay for the Public DC Fast Charging sub-program, wherein PSE&G would own some unspecified number of DC fast chargers.[29] This infrastructure also will not be used and useful in the provision of public utility service; rather, as explained below, the Public DC Fast Charging sub-program would use ratepayer funds to subsidize PSE&G's entrance into the competitive market of charging EVs. The Constitutional and judicial limitations on what can be collected in rates exist to avoid "unreasonable exactions" from ratepayers such as the ones PSE&G requests here. Accordingly, the EV sub-programs of PSE&G's Petition should be dismissed as a matter of law.

[29] PSE&G proposes a "Utility Ownership Model, where it will install, own, maintain and operate the Make-Ready Infrastructure as well as the DC Fast Chargers, but only in the case where third-party interest falls short of subprogram goals." Reif Testimony, p. 22. It is not clear how that criteria will be applied or who will decide when competitive third-party interest "falls short."

## POINT II

### BPU HAS NO STATUTORY AUTHORITY TO APPROVE FUNDING OF THE EV SUB-PROGRAMS THROUGH RATES

It is axiomatic that the authority of an administrative agency like the Board of Public Utilities is defined by the Legislature in the agency's enabling act. As our Supreme Court has stated, "an administrative agency only has the powers that have been 'expressly granted' by the Legislature and such 'incidental powers [as] are reasonably necessary or appropriate to effectuate' those expressly granted powers." N.J. Guild of Hearing Aid Dispensers v. Long, 75 N.J. 544, 562 (1978) (quoting In re Regulation F-22 Office of Milk Indus., 32 N.J. 258, 261 (1960)). While the BPU's authority over the regulation of public utilities is broad, it is not limitless**.** See In re Centex Homes, LLC, 411 N.J. Super. 244 (App. Div. 2009). The Board's authority is set forth in Title 48 of the New Jersey Statutes which establishes the parameters surrounding the Board's exercise of its authority over public utilities.

A public utility is defined in Title 48 as follows:

> The term "public utility" shall include every [entity] … that now or hereafter may own, operate, manage or control within this State any railroad, street railway, traction railway, autobus, charter bus operation, special bus operation, canal, express, subway, pipeline, gas, electricity distribution, water, oil, sewer, solid waste collection, solid waste disposal, telephone or telegraph system, plant or equipment for public use, under privileges granted or hereafter to be granted by this State or by any political subdivision thereof.
>
> N.J.S.A. 48:2-13(a).

The statute gives the BPU general regulatory supervision over public utilities with certain enumerated exceptions. Id. In 1999, EDECA introduced competition to New Jersey's retail electricity generation market. The Legislature drafted EDECA to foster the role of competition "to deliver energy services to consumers in greater variety and at lower cost than traditional, bundled public utility service." N.J.S.A. 48:3-50(a)(2). EDECA specifically maintained BPU

jurisdiction over transmission and distribution, but carved out "competitive services" from the bundled utility services subject to BPU supervision. As stated in N.J.S.A. 48:2-13(d):

> Unless otherwise specifically provided pursuant to P.L. 1999, c. 23 [N.J.S.A.. 48:3-49 et al.], all services necessary for the transmission and distribution of electricity and gas, including but not limited to safety, reliability, metering, meter reading and billing, shall remain the jurisdiction of the Board of Public Utilities. The board shall also maintain the necessary jurisdiction with regard to the production of electricity and gas to assure the reliability of electricity and gas supply to retail customers in the State as prescribed by the board or any other federal or multi-jurisdictional agency responsible for reliability and capacity in the State.

While retaining the Board's broad jurisdiction to regulate public utilities, EDECA limited the Board's authority over "competitive services." EDECA defines a "competitive service" as "any service offered by an electric public utility or a gas public utility that the [B]oard determines to be competitive pursuant to section 8 or section 10 of P.L.1999, c.23 (C.48:3-56 or C.48:3-58) or that is not regulated by the [B]oard." N.J.S.A. 48:3-51. EDECA specifically prohibited the Board from regulating competitive services except, as noted above, to ensure reliability. As stated in N.J.S.A 48:3-56, "the board shall not regulate, fix, or prescribe the rates, tolls, charges, rate structures, rate base, or cost of service of competitive services." EDECA does allow electric and gas utilities to provide certain competitive services, but only with Board approval and only under limited and specifically enumerated circumstances. N.J.S.A. 48:3-58. The Board must make certain findings before a utility may provide competitive services, including a finding that the provision of the competitive service shall not interfere with the provision of regulated non-competitive services and that the rate charged for the competitive service does not require subsidization through regulated rates. N.J.S.A. 48:3-58. In fact, one of the specific purposes of EDECA was to "ensure that rates for non-competitive public utility services do not subsidize the provision of competitive services by public utilities." N.J.S.A. 48:3-50.

Pursuant to these statutory provisions, EV charging is clearly a "competitive service." First, the purchase and installation of EVSE and the charging of EVs are not among the functions of a public utility in New Jersey that are regulated by the Board. Thus, under the definition in N.J.S.A. 48:3-51, they are competitive services. Second, installing EVSE and charging EVs are not competitive services that a regulated utility may provide subject to Board approval under N.J.S.A. 48:3-55. Those services include metering, billing, safety and reliability services, and similar services that the utility had offered prior to January 1, 1993 when their services were "unbundled." N.J.S.A. 48:3-55(f). EDECA expressly prohibits an electric public utility from providing any competitive service that was not approved or pending as of July 1, 1998. N.J.S.A. 48:3-55(i). That date passed over 20 years ago. Therefore, EV-related services are not among the competitive services that EDECA authorizes the Board to allow a public utility to provide.[30]

Finally, and perhaps most importantly, in the recently enacted PIV Act, the Legislature specifically provided that owning and operating EVSE is not a public utility function. N.J.S.A. 48:25-10 states:

> Unless otherwise provided in Title 48 of the Revised Statutes, or any other federal or State law, an entity owning, controlling, operating, or managing electric vehicle service equipment shall not be deemed an electric public utility solely because of such ownership, control, operation, or management. The charging of a plug-in electric vehicle shall be deemed a service and not a sale of electricity by an electric power supplier or basic generation service provider pursuant to P.L.1999, c.23 (C.48:3-49 et al.).

Thus, under the plain language of EDECA and the PIV Act, the construction, ownership and operation of EVSE is not a regulated public utility service, but a "competitive service" not regulated by the Board. Further, the Board is without authority to declare that EV charging is a

[30] The fact that other private companies including intervenors in this case Charge Point and Tesla seek to provide these services on an unregulated basis is further indication that these services are competitive.

competitive service that an electric public utility may provide, since none of the criteria for the Board to allow PSE&G to provide these competitive services have been met. There can be no doubt that PSE&G specifically intends to utilize rates for non-competitive services to subsidize these competitive services in direct contradiction of both the language and the purpose of EDECA. Therefore, the EV sub-programs in the Petition should be dismissed.

As further explained below, other provisions of Title 48 also do not provide the Board such authority.

The Plug-in Vehicle Act

The PIV Act directs the Board to undertake certain statewide tasks, including promulgating rules, conducting studies and allocating $30 million a year from funds collected through the Societal Benefit Charge to provide incentives for the purchase of certain types of EVs and EVSE in New Jersey. N.J.S.A. 48:25-7. Outside of the SBC, the legislation sets forth only two other sources of funding for these incentives: funds appropriated by the Legislature and any return on investment of moneys that have been deposited into the Plug-In Electric Vehicle Fund. N.J.S.A. 48:25-7(a). Outside of those specifically enumerated sources, the PIV Act does not authorize the Board to allow utilities to invest any ratepayer funds in its implementation. In fact, the PIV Act does not provide any role for public utilities in subsidizing purchases or other activity related to EVs or EVSE. The PIV Act delegated to the Board the responsibility to adopt policies, programs and rules to develop a comprehensive approach to the expansion of EVs in New Jersey. However, while the legislature authorized the Board to allocate $300 million of SBC funds to promptly begin subsidizing the purchase and installation of EVs and EVSE, the PIV Act did not authorize the Board to allow subsidies of EV-related activities through electric utility rates. In fact, language allowing the utilities to construct charging infrastructure through

regulated rates was included in the original version of the bill that ultimately became the PIV Act, but that authority was removed by the Legislature before enactment.[31] As noted above, the PIV Act specifically lists the sources of funds that the BPU may use to provide incentives for EVs and EVSE and regulated rates are not among them. N.J.S.A. 48:25-7. Since the PIV Act does not authorize the Board to approve the ratepayer-funded EV and EVSE projects proposed by PSE&G, the EV sub-programs of the Petition should be dismissed.

The Clean Energy Act

The Clean Energy Act ("CEA") also provides no statutory authority for the relief sought in the EV sub-programs of PSE&G's Petition. The CEA directs the Board to require each EDC to annually reduce its customers' use of electricity by two percent. N.J.S.A. 48:3-87.9. The statute states that calculating those reductions must take into account the growth in the use of EVs. N.J.S.A. 48:3-87.9(c). That is the extent of the discussion of EVs in the CEA. The CEA only sets forth how EV load will be factored into the energy savings and demand reduction calculations. It did not otherwise direct or authorize EDC involvement in funding EV purchasing, charging or infrastructure.

N.J.S.A. 48:3-98.1 ("Section 13 of RGGI")

Finally, N.J.S.A. 48:3-98.1, often referred to as Section 13 of the Regional Greenhouse Gas Initiative ("RGGI") Act, also does not support the EV sub-programs in PSE&G's Petition. Through the RGGI Act, the Legislature granted limited authority to allow public utilities to recover through utility rates their investments in non-utility property, but only for Board-regulated energy efficiency, energy conservation or Class I renewable energy projects. Framed

[31] Compare A4819, Section 10, p. 17, http://www.njleg.state.nj.us/2018/Bills/A5000?4819_I1.HTM with P.L. 2019, ch. 362.

as an exception to the prohibition on regulated utilities performing "competitive services" under EDECA, N.J.S.A. 48:3-98.1 provides:

> Notwithstanding the provisions of any other law or rule or regulation to the contrary:
>
> (1) an electric public utility or a gas public utility may provide and invest in energy efficiency and conservation programs in its respective service territory on a regulated basis pursuant to this section, regardless of whether the energy efficiency or conservation program involves facilities on the utility side or customer side of the point of interconnection;
>
> (2) an electric public utility or a gas public utility may invest in Class I renewable energy resources, or offer Class I renewable energy programs on a regulated basis pursuant to this section, regardless of whether the renewable energy resource is located on the utility side or customer side of the point of interconnection.
>
> N.J.S.A. 48:3-98.1(a)1 and 2.

The RGGI Act defines an "energy efficiency and energy conservation program" as

> any regulated program, including customer and community education and outreach, approved by the board pursuant to this section for the purpose of conserving energy or making the use of electricity or natural gas more efficient by New Jersey consumers, whether residential, commercial, industrial, or governmental agencies.
>
> N.J.S.A. 48:3-98.1(d).

EV charging is not energy efficiency, energy conservation or Class I renewable energy as defined in N.J.S.A. 48:3-98.1(d). In fact, the use of EVs will increase electricity consumption. Thus, since the plain language of N.J.S.A. 48:3-98.1 does not apply to EV charging, that statutory provision is not sufficient to bestow authority on the BPU to allow PSE&G to participate in the proposed competitive services on a regulated basis.

In sum, there is no statutory authority in either EDECA, the PIV Act, the Clean Energy Act, the RGGI Statute or any other statute that provides specific authority for the BPU to allow PSE&G to perform the competitive services outlined in the EV sub-programs of the Petition on a

regulated basis and fund them through rates. Absent such authority, the Board may not approve PSE&G's proposed EV sub-programs and those aspects of the Petition should be dismissed.

## POINT III

### THE BOARD MAY NOT EXTEND ITS AUTHORITY TO FURTHER POLICY GOALS OUTSIDE OF THE JURISDICTION GRANTED TO IT BY THE LEGISLATURE.

The Board may not utilize general policy goals or documents to provide authority where the Legislature has not. The Board may only expand its expressly enumerated powers to "'incidental powers [as] are reasonably necessary or appropriate to effectuate' those expressly granted powers." N.J. Guild of Hearing Aid Dispensers v. Long, supra, 75 N.J. at 562 (internal quoted cite deleted). Thus, the 2019 Energy Master Plan, general concerns regarding environmental goals and general statutory goals are insufficient to grant the necessary authority for the Board to approve the EV sub-programs of PSE&G's Petition.

As noted above, it is well established that the Board cannot implement state policy through the Board's ratemaking powers without an explicit grant of authority from the Legislature. See In re Centex Homes, LLC, 411 N.J. Super. 244 (App. Div. 2009). In Centex Homes, the Court reviewed the Board's amendments to its Main Extension regulations that sought to implement the goals of the State's Development and Redevelopment Plan ("State Plan") to foster "smart growth." The Court recognized that the State Plan carries no regulatory effect and, therefore,

> a state agency may only make modifications to its regulations to reflect the State Plan "if such modifications are within the scope of the agency's authority. If the necessary modifications would exceed the agency's authority, it should seek to obtain the authority through normal legislative . . . processes."
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> Id., citing In re Protest of Coastal Permit Program Rules, 354 N.J. Super. 293, 357 (App. Div. 2002).

The Court recognized that the regulation functioned "to protect the environment and encourage smart growth," Centex Homes at 261, but that the legislative intent of the statute

governing the Board's Main Extension rules "does not have land use or environmental concerns as its main purpose." Id. at 262.

The Board argued "that it has a statutory mandate under N.J.S.A. 48:2-23 to 'conserve and preserve' the environment," and therefore properly included environmental concerns in its Main Extension rule amendments. Centex Homes, 411 N.J. Super. at 253. The Court acknowledged that "the BPU's powers extend beyond those expressly granted by the statute 'to include incidental powers that the agency needs to fulfill its statutory mandate'"; however, "we cannot say that the language of N.J.S.A. 48:2-23 demonstrates a legislative intent to integrate an environmental factor into the [main extension] analysis in such a way as to drastically change the function of the statute from a regulation of public utilities to the regulation of urban and suburban sprawl." Id. at 264-5. "While the BPU was 'intended by the Legislature to have the widest range of regulatory powers over public utilities,' that power has never been cast in environmental terms." Id. at 265-66, quoting A.A. Mastrangelo, Inc. v. Comm'r of the Dep't of Envtl. Prot., 90 N.J. 666, 685 (1982). The Court continued, "the cases examining the environmental language of N.J.S.A. 48:2-23 have never construed it to provide a general mandate as broad as is urged by the BPU in this case." Centex Homes, at 266. The Court concluded:

> Surely, the language of the State Planning Act suggests that the BPU, as an "agency," should use the plan in exercising its discretionary authority where its decisions affect land use. However, we find that the language of the State Planning Act does not evince a legislative intent that the State Planning Act be integrated into the BPU's non-discretionary legislative mandate to determine the allocation of costs for service extensions in designated areas of the State Planning Map. If the Legislature wishes to grant the BPU authority to take smart growth principles into account in ordering service extensions, it should explicitly say so, as it did by amending CAFRA.
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> Id. at 267.

Thus, in the absence of enumerated authority, BPU cannot use general policy goals or environmental concerns to grant itself authority the Legislature did not bestow upon it. Moreover, any reliance on the 2019 EMP to support a change in utility law and statutes would likewise be invalid. The 2019 EMP, like the State Plan, has no regulatory effect. See, N.J.S.A. 52:27F-14 and -15. Thus, the Board can only enforce it to the extent such enforcement is within the scope of the Board's authority. As explained above, allowing PSE&G to collect a return on and of property that will not be owned by the utility or will not be used or useful in the provision of safe and adequate utility service is beyond the scope of the Board's authority, and there is no statute that grants BPU regulatory authority to allow utilities to provide incentives for EVs or EVSE through regulated rates. The Board can utilize the 2019 EMP in exercising its discretionary authority; however, the 2019 EMP cannot be used to expand BPU's authority beyond that granted by the Legislature. Accordingly, the 2019 EMP provides no authority to the Board to approve the EV sub-programs of PSE&G's Petition.

## POINT IV

### PSE&G MAY PERFORM "MAKE READY" WORK ON THE UTILITY SIDE OF THE METER, BUT ONLY IN CONFORMANCE WITH THE BOARD'S MAIN EXTENSION RULES.[32]

In each of the EV sub-programs in the Petition, PSE&G proposes to install EV-related "make-ready" equipment to connect its electric distribution system to the EVSE.[33] PSE&G describes "make-ready" infrastructure as "all electrical infrastructure up to the utility meter and also the electrical panel, conduits and wires up to the charger stub."[34] As explained above, PSE&G's proposals to subsidize EVSE and EV charging do not comport with fundamental ratemaking principles. Its proposal for ratepayers to subsidize the "make ready" portion of EVSE installation costs should also be rejected, since it does not comport with Board rules governing extensions to provide regulated services, the "Main Extension Rules." N.J.A.C. 14:3-8.1 to-8.14. The Main Extension Rules govern the payment of deposits by an applicant for extension of new utility service to a property currently unserved by that utility, and whether and at what rate the regulated utility must refund those deposits after service has commenced.

The Board has authority to determine whether a public utility service extension to a new customer is reasonably practical and economically viable.

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[32] Rate Counsel limits Point IV to Residential Smart Charger installations that involve the extension of new service.

[33] The Petition uses the term "Make-Ready" to refer to such investment for three of its EV sub-programs, Level 2 Mixed-Use Charging, Public DC Fast Charging and Vehicle Innovation. Reif Testimony, pp. 15, 19 and 27. While PSE&G does not use the term "Make-Ready" with reference to the Residential Smart Charging sub-program, it proposes such investment for that sub-program as well. PSE&G will perform or pay for "any associated electrical work required to support" the EVSE, and to "upgrade the utility service to the home, at no cost to the customer, if such upgrade is required to support the new load from the EV charger." Id., p. 13.

[34] Reif Testimony, p. 15. PSE&G states that its "Make-Ready" investment includes distribution circuits, service drops, transformers, conductors, connectors, conduits, electric meters and breaker panels. Direct Testimony of Stephen Swetz, Senior Director - Corporate Rates and Revenue Requirements, Attachment 3 to Petition, p. 4, n. 1.

> The board may, after hearing, upon notice, by order in writing, require any public utility to establish, construct, maintain and operate any reasonable extension of its existing facilities where, in the judgment of the board, the extension is reasonable and practicable and will furnish sufficient business to justify the construction and maintenance of the same and when the financial condition of the public utility reasonably warrants the original expenditure required in making and operating the extension.
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> N.J.S.A. 48:2-27 (emphasis added).

The purpose of the Main Extension Rules is to ensure that the cost of extending a public utility's facilities is borne initially by the customer requesting the service, and ultimately by the utility, in the event that the extension generates "sufficient business." Van Holten Group v. Elizabethtown Water Co., 121 N.J. 48, 52 (1990). The Main Extension Rules apply to new service extensions[35] by all regulated utilities, to provide service to all residential and nonresidential customers. N.J.A.C. 14:3-8.1. Public utilities are to negotiate with the customer the cost of a service extension and its refund, but if they cannot agree the utility may petition the Board to calculate the amount of the deposit and any annual refund. N.J.A.C. 14:3-8.5(a).

The Main Extension Rules allocate to the customer requesting the extension the risk that the expected load might not materialize, and allows the utility to require that customer to pay a deposit to cover the cost of the extension. Then, as the new use begins generating revenues for the utility, the customer who paid to install the extension may receive annual refunds, up to the cost of the extension. Application of the Main Extension Rules to the EV sub-programs of PSE&G's Petition is necessary to protect ratepayers from the risk of imprudent investments in EVSE that will not generate sufficient business. PSE&G has shown no reason to deviate from the Main Extension Rules or to guarantee a certain payment to the owner of the EVSE. In fact,

[35] "'Extension' means the construction or installation of plant and/or facilities to convey new service from existing or new plant and/or facilities to a structure or property for which the applicant has requested service." N.J.A.C. 14:3-8.2.

PSE&G has cited no authority for the Board to waive its own Main Extension Rules to allow EV-related subsidies. Such action would be an ultra vires act by the Board. See Centex Homes, supra, 411 N.J. Super. 244. Accordingly, to the extent the EV sub-programs in the Petition propose EV-related "make-ready" work on customer-owned property, it should be dismissed; any make-ready work on utility property may only be authorized consistent with the Board's Main Extension Rules.

## CONCLUSION

For all the reasons set forth above, Rate Counsel respectfully requests that the Board enter an order dismissing the EV Sub-Programs of PSE&G's Petition as a matter of law.

Respectfully submitted,

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