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April 21, 2020

IN THE MATTER OF THE PETITION OF PUBLIC
SERVICE ELECTRIC AND GAS COMPANY FOR APPROVAL OF ITS
CLEAN ENERGY FUTURE-ENERGY CLOUD ("CEF-EC") PROGRAM
ON A REGULATED BASIS

BPU Docket No. EO18101115

VIA E-MAIL

Aida Camacho-Welch, Secretary of the Board
Board of Public Utilities
44 South Clinton Avenue, 9th Floor
Trenton, New Jersey 08625

**RE: PSEG's Opposition to Market Participants' Request for Interlocutory
Review Styled As A "Motion for Reconsideration"**

Dear Secretary Camacho-Welch:

Pursuant to *N.J.A.C.* 1:1–14.10, Public Service Electric and Gas Company ("PSE&G" or "Company") hereby opposes the "Motion for Reconsideration" filed on April 16, 2020 in the above-captioned proceeding by Market Participants¹ ("Motion"). The Motion seeks to reverse Commissioner Holden's April 1, 2020 Prehearing Order² to the extent that it denied Market Participants' Motion to Intervene and Supplemental Motion to Intervene and instead granted participant status to Market Participants. The Motion, improperly styled as a "Motion for Reconsideration," fails to present grounds for granting untimely interlocutory review or substantive reversal of Commissioner Holden's determination that the Market Participant's interests will not be specifically and directly affected by the outcome of the case. The Motion wholly ignores Commissioner Holden's careful consideration of all of the arguments set forth by Market Participants and PSE&G in pleadings to date and the rejection of the Market Participant's

¹ "Market Participants" in the instant proceeding are Direct Energy Business, LLC, Direct Energy Business Marketing, LLC, Gateway Energy Services Corporation, NJR Retail Services Company (collectively, "Direct Energy"), NRG Energy, Inc. ("NRG"), Just Energy Group Inc. ("Just Energy" and Centrica Business Solutions ("Centrica"). Motion at 1.

² *In The Matter of The Petition of Public Service Electric and Gas Company For Approval of Its Clean Energy Future-Energy Cloud ("CEF-EC") on a Regulated Basis*, BPU Docket No. EO18101115, Prehearing Order with Procedural Schedule and Order on Motions to Intervene Or Participate And For Admission Pro Hac Vice (April 1, 2020) ("Prehearing Order").

overly broad characterizations of the issues to be decided in the case.³ The Motion does not show good cause for the Board to second guess these determinations; instead, the Motion simply repeats the same inadequate, vague grounds for intervention that failed to persuade Commissioner Holden, and does so out of time for requesting interlocutory review. The Motion should be denied.

I. The Prehearing Order Properly Found That Market Participants Do Not Have a Direct Interest In This Proceeding Sufficient To Warrant Intervenor Status Versus Participant Status

The Prehearing Order, on its face, demonstrates that Commissioner Holden fully and reasonably considered and rejected all of the arguments presented by Market Petitioners in their original and supplemental motions to intervene -- the same arguments presented in the instant Motion. Yet, the instant Motion ignores the Prehearing Order's lengthy discussion of the bases for rejecting the merits of their prior motions:

After consideration of the papers of the Market Participants, including the initial and supplemental Motions for Intervention, and the opposition filed by PSE&G, and the Market Participants' responses thereto, I am persuaded by the Company's position that the Market Participants fail to satisfy the legal requirements to warrant intervention. Specifically, I am not persuaded that the Market Participants demonstrated that they will be substantially, specifically and directly affected by the outcome of the case. The Market Participants claim that they must be able to "adequately guard against being placed at a competitive disadvantage relative to a regulated utility in the provision of products and services to customers." I agree with the Company that this claim is "misguided" because the only Use Cases currently before the Board "represent core utility functions that do not infringe on the province of third party suppliers or 'other private market participants.'" Therefore, I agree with PSE&G that there is nothing about the Company's planned Release 1 AMI deployment, or advanced meters, that will suppress and/or intrude upon competitive markets at this time. Additionally, I am not persuaded that the Company's communications with its customers here will be to the competitive disadvantage of Market Participants. PSE&G's argument that it must effectively communicate with its customers before removing and installing 2.2 million meters has merit.⁴

Essentially, Commissioner Holden determined that the Market Participants' concerns regarding competitive services and data issues are ancillary to the issues being considered in this proceeding, and as such, are not direct interests that warrant intervention status. Specifically, the issues to be resolved in the instant CEF-EC proceeding, that Market Participants have not challenged, are:

- A. The cost effectiveness and cost efficiency of the activities and programs proposed for the five (5) years of the proposed AMI program;
- B. Is the Program non-revenue producing, accelerated capital spending pursuant to the requirements of N.J.A.C. 14:3-2a 1, et. seq.;

³ Prehearing Order at 13.

⁴ *Id.*

- C. Is the AMI Program necessary accelerated capital spend;
- D. Is the eligible AMI Program spending above the baseline spending level and incremental in nature; and
- E. The reasonableness and lawfulness of the proposed cost recovery mechanism.⁵

The only other bases Market Participants offer in support of overturning Commissioner Holden's rational determination is that the Board permitted Market Participants to intervene in PSE&G's CEF-EE Proceeding.⁶ The two cases are vastly different in scope, however, and there is no obvious need for uniformity in types of intervenors between the two distinct proceedings. Market Participants' arguments in support of their intervention in the CEF-EE proceeding were specific to the far broader array of energy efficiency programs actually being offered by PSE&G in that proceeding; whereas here, as Commissioner Holden accurately assessed, the Company's proposed programs are narrowly focused on the core utility functions related to smart meter installations.

Market Participants' vague concerns regarding programs or services that Company has not proposed and the amorphous, future possibilities related to smart meter data have not been clarified or made more specific as they are reiterated in the instant Motion. PSE&G re-emphasizes here, as set forth in the Company's opposition to the original motions to intervene, that the foundation of the CEF-EC Program is the deployment of advanced metering infrastructure ("AMI"). The 22 "Release I" Use Cases of AMI deployment that are described in the Company's petition and the testimony, as updated on April 1, 2020 -- which are the only use cases that are currently before the Board -- represent core utility functions that do not infringe on the province of third party suppliers or "other private market participants". Nothing about the Release I Use Cases, the Company's planned AMI deployment, or advanced electric meters converts PSE&G into an anticompetitive entity that will suppress or even intrude upon competitive markets.

This is perhaps why the Market Participants state that "many of the products and services identified by the Petition are already being offered" in private markets, but they still fail to identify a single such product or service. Similarly, the Movants repeat their claim that "innovative energy solutions of the types referenced in the Petition are best delivered by the competitive marketplace. . .", but they continue to omit any description of those "innovative energy solutions." The Movants do not set forth anywhere in their earlier motions to intervene or in the instant Motion that they have any plans or commitments to make or receive any private investment with which the Program would conflict or that the program would impede. To the extent that Energy Cloud is a platform to enable future use cases, such uses would require further detailed evaluation, justification, and planning before they would be scheduled for implementation, are not the subject of PSE&G's request in this proceeding, and may be the subject of future proceedings in which Market Participants could re-assert their interests in support of intervenor or participation requests, as appropriate. Thus, the Prehearing Order properly concludes that, *in the instant matter*, Market Participants have not shown that they are "substantially, specifically and directly affected" by the currently proposed CEF-EE Program.

⁵ Prehearing Order at 16.

⁶ *I/M/O the Petition of the Public Service Electric and Gas Company for Approval of its Clean Energy Future – Energy Efficiency ("CEF-EE") Program on a Regulated Basis*, BPU Docket Nos. EO18101113 and GO18101112.

Finally, the Prehearing Order reasonably grants Market Participants the right to participate in the CEF-EC proceeding, whereby Market Participants may present oral arguments and briefs that can influence the outcome of the proceeding.⁷

II. Market Participants Have Not Provided A Basis For Untimely Interlocutory Review or For Rehearing

The Motion was improperly filed as a Motion for Reconsideration pursuant to N.J.A.C. 14:1-8.6, when in fact, the Motion constitutes an untimely request for interlocutory review pursuant to N.J.A.C. 1:1-14.10 and 1:14-14.4. Orders on motions to intervene are interlocutory and do not constitute final Board action subject to reconsideration.⁸ Market Participants are well aware of the distinction between a request for review of a final Board Order pursuant to N.J.A.C. 14:1-8.6 and a request for interlocutory review pursuant to N.J.A.C. 1:1-14.10, including the five-day deadline for filing such a request, as Market Participants properly filed a Motion for Interlocutory Review of Commissioner Solomon's prehearing order that denied their intervention and instead granted participant status in PSE&G's EE proceeding.⁹ Therefore, the Motion should have been filed on or before April 8, 2020, and the Board must determine, at the outset, whether to grant interlocutory review.¹⁰

Notwithstanding the untimeliness of the Motion, the Motion glaringly lacks any justification for granting either interlocutory review or reconsideration of Commissioner Holden's Prehearing Order. Interlocutory review should be granted sparingly to avoid piecemeal adjudication and only where, in the Board's discretion, in the interest of justice or for good cause exists.¹¹ Similarly, a party seeking reconsideration must show that the action was arbitrary, capricious or unreasonable, and rehearing is not proper when a party is simply dissatisfied with the decision.¹² The Motion is totally silent on any grounds for the Board to either take interlocutory review or that would justify rehearing; rather, the Motion simply re-iterates its arguments in favor of intervention that were properly considered and rejected by Commissioner Holden, as stated above. Market Participants simply seek a different result from the same arguments presented before a different decision-maker. This is precisely the type of piecemeal decision-shopping the standards for review and rehearing seek to avoid.

⁷ N.J.A.C. 1:1-16.6; Prehearing Order at 13.

⁸ *I/M/O Standard Offer Capacity Agreements*, BPU Docket No. EO12020145 (May 7, 2012 Order, p. 5) (noting that it was improper for the movant to seek reconsideration of an order granting it participant status, as opposed to intervenor status, because the order was interlocutory and not final).

⁹ Notably, the cover letter to the Motion for Interlocutory Review in the CEF-EE proceeding shows that Market Participants took extra steps to ensure compliance with the five working day deadline for interlocutory review considering that a state emergency had caused the closure of the Board's offices on the afternoon of the due date, preventing a hand delivery of their motion. It is inexplicable, therefore, why the same Market Participants in this matter failed to properly request interlocutory relief within five working days of Commissioner Holden's April 1, 2020 Prehearing Order, and instead waited until April 16 to file a Motion for Reconsideration.

¹⁰ N.J.A.C. 1:14-14.4(a).

¹¹ *I/M/O the Petition of Public Service Electric and Gas Company for Approval of the Energy Strong Program*, BPU Docket Nos. EO13020155 and G013020156 (Sept. 18, 2013 Order on Interlocutory Appeal, p. 4-5).

¹² *I/M/O Standard Offer Capacity Agreements*, BPU Docket No. EO12020145 (May 7, 2012 Order, p. 5).

While dismissal on the sole basis of such a procedural error is rare, in this matter, the procedural error taken together with the lack of substantive justification for overturning Commissioner Holden's Prehearing Order warrants denial of the Motion.

Very truly yours,

A handwritten signature in blue ink that reads "Katherine E. Smith". The signature is written in a cursive style with a long horizontal flourish at the end.

Katherine E. Smith

Attachment
Cc: Attached Service List