



STATE OF NEW JERSEY
Board of Public Utilities
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ENERGY AND CLEAN ENERGY

IN THE MATTER OF THE PETITION OF ATLANTIC)	ORDER ON MOTION TO
CITY ELECTRIC COMPANY FOR APPROVAL OF A)	DISMISS
VOLUNTARY PROGRAM FOR PLUG-IN VEHICLE)	
CHARGING)	DOCKET NO. EO18020190

Parties of Record:

Philip J. Passanante, Esq., Atlantic City Electric Company
Stefanie Brand, Esq., Director, NJ Division of Rate Counsel
Murray E. Bevan, Esq., Bevan, Mosca & Giuditta P.C. on behalf of ChargePoint, Inc.
William Bittinger, Esq., Eastern Environmental Law Center on behalf of Environmental Movants
Kevin Auerbacher, Esq., Tesla, Inc.
Martin C. Rothfelder, Esq., EVGO Services LLC

BY COMMISSIONER UPENDRA J. CHIVUKULA:

By this Order, I deny the New Jersey Division of Rate Counsel's ("Rate Counsel") Motion to Dismiss filed on April 13, 2020 in the above-captioned proceeding.

I. BACKGROUND

On February 23, 2018, Atlantic City Electric Company ("ACE" or "Company") filed a petition with the New Jersey Board of Public Utilities ("Board" or "BPU") for approval of a Voluntary Program for Plug-In Vehicle ("PIV") Charging ("PIV Petition"). By Board Order dated March 26, 2018, the Board retained jurisdiction over the original matter, and designated myself as the presiding officer and authorized me to rule on all motions that arise during the pendency of this proceeding, as well as to modify any schedules that may be set as necessary to secure a just and expeditious determination of the issues.¹

On or about December 17, 2019, ACE filed an amended petition ("Amended Petition"), proposing a multitude of "offerings" designed to accelerate PIV adoption in New Jersey. The Amended Petition proposes a multi-year, \$42.107 million-dollar PIV program, that aims to incentivize off-

¹ In re the Petition of Atlantic City Electric Company for Approval of a Voluntary Program for Plug-In Vehicle Charging, BPU Docket No. EO18020190, Order dated March 26, 2018 ("March 2018 Order").

peak charging of PIVs, develop PIV infrastructure, provide grants to foster innovation in electrifying the transportation sector, and support for electrifying school buses.

ACE included twelve proposed PIV offerings, including:

1. A new offering to allow residential customers to utilize time-of-use ("TOU") rates designed to shift usage, including but not limited to PIV charging, to off-peak times;
2. Providing off-bill incentives to residential customers for off-peak PIV charging;
3. Providing residential customers with rebates for the purchase and installation of smart Level 2 chargers, plus incentives for off-peak PIV charging;
4. Providing customers who own or operate multi-family residential buildings with rebates for the purchase and installation of Level 2 chargers, plus a demand charge incentive;
5. Providing customers who own or operate office buildings or garages with a rebate for the purchase of Level 2 chargers, plus a demand charge incentive;
6. Providing customers who maintain vehicle fleets with a rebate for the purchase of Level 2 chargers, plus a demand charge incentive;
7. Expanding the availability of public PIV charging infrastructure through the Company's installation and operation of up to 45 public Direct Current Fast Chargers ("DCFCs") (Offering 7), and up to 200 Level 2 chargers;
8. Promoting the deployment of public PIV infrastructure by providing a rate incentive to private owners/operators of public DCFCs, plus a "make ready" work incentive;
9. Providing grants (of up to \$2 million) for innovative projects to further facilitate the electrification of the transportation sector, particularly in low-to-moderate ("LMI") and environmental justice ("EJ") communities;
10. Providing funding to encourage the deployment of electric school buses in the Company's service territory, with a focus on LMI and EJ communities;
11. Providing incentives to make electric charging infrastructure available for New Jersey Transit buses operating in the Company's service territory; and
12. Offering a voluntary "Green Adder" to customers where the electricity provided will come from renewable sources.

ACE seeks to recover \$42.107 million via a base rate case. ACE first proposes that all capital investments related to the PIV be added to rate base as it is placed in service, for recovery in a future base rate proceeding. Second, ACE seeks to establish a regulatory asset ("PIV Regulatory Asset") which would capture the Company's non-capital costs associated with the program. The PIV Regulatory Asset would also capture the incremental revenues ACE would receive from use of its public chargers, offsetting costs to ratepayers.

On April 9, 2020, I issued a Prehearing Order with procedural schedule. Within that schedule, the first round of discovery requests must be propounded by June 24, 2020, with a subsequent discovery round due on July 27, 2020. Testimony is due to be filed by Rate Counsel and any interveners in September, 2020 and the evidentiary hearing is set for the week of November 9, 2020.

On or about April 13, 2020 Rate Counsel filed a motion to dismiss a portion of ACE's Amended Petition. Specifically, Rate Counsel seeks dismissal of several offerings. On or about May 4, 2020 ACE filed an opposition to Rate Counsel's motion which was joined by interveners, Zeco Systems, Inc., d/b/a Greenlots ("Greenlots") and the National Resource Defense Council ("NRDC"). On or about May 18, 2020 Rate Counsel filed a reply to ACE's opposition.

II. THE MOTION

Rate Counsel's Motion to Dismiss

Rate Counsel seeks dismissal of the non-tariff Offerings, 3 through 12, with a carve out for Offering number 9, wherein Rate Counsel seeks to limit the Offering to “make-ready” work on the utility side of the meter only.

Rate Counsel makes two primary arguments. First, Rate Counsel argues that the Amended Petition violates the “Used and Useful Principle,” where utilities may only seek recovery of “used and useful utility property” that is dedicated to the public service. Rate Counsel Motion (“RC”) at 1. Second, Rate Counsel states that the Board lacks statutory authority to allow utilities to use regulated rates to fund competitive services, as defined in the Electric Discount 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. Id. Rate Counsel asserts that for these reasons, the proposed programs that are the subject of the motion cannot be approved as a matter of law, and requests that the Board grant their motion to dismiss.

Used and Useful Principle

Rate Counsel argues that the law is clear—ratepayers must only pay for utility property that is used and useful in the provision of safe and adequate service, and that many aspects of ACE's proposal fail to meet this basic requirement. RC at 11. Rate Counsel asserts that much of the investment proposed in ACE's Amended Petition is for Electric Vehicle Service Equipment (“EVSE”) that will not be owned by ACE, but rather by some customers of the Company; however, all of the Company's ratepayers will pay for the equipment. Id. Rate Counsel states that the equipment will not be utilized to provide safe and adequate utility service, but rather will be used to charge personal vehicles and that not only will ratepayers be paying for individuals to own the equipment, but also for ACE to earn a return on the property it will never own. Id.

III. RESPONSES

ACE's Opposition

On or about May 4, 2020 ACE filed an opposition to Rate Counsel's motion to dismiss. ACE asserts that if Rate Counsel's motion were to be granted, it would limit the authority of the Board, deny the full Board the opportunity to consider ACE's proposals, and curtail the Board's statutory role to facilitate the electrification of New Jersey's transportation sector. ACE Opposition at 1.

Used and Useful Principle is Misplaced

ACE argues that Rate Counsel misapplies the used and useful principle by asserting that assets included in rate base must be in-service and providing service to customers. ACE contends the principle does not bar ACE's Amended Petition or recovery of the costs related to Offerings 3 through 12. ACE Opposition at 10. ACE argues that a review of New Jersey statutes, applicable case law, prior Board decisions, and persuasive authorities from other jurisdictions demonstrates

that Rate Counsel's view of the "used and useful" principle lacks both factual and legal support and does not mandate the dismissal of ACE's Petition. Id.

Specifically, ACE contends that Rate Counsel has oversimplified the used and useful argument and that Rate Counsel rests its arguments on a century-old (now overturned) legal doctrine, that utilities cannot recover costs associated with investment in non-utility owned property and/or property that is not used/useful. Id. at 11. ACE further argues, the Supreme Court decisions cited by Rate Counsel demonstrate a preference for *flexible* and *pragmatic* ratemaking unconstrained by any rigid formulae or dogmatic processes. Id.

ACE states that the Board has consistently utilized its broad discretion to formulate ratemaking solutions based on the facts and circumstances before it. Id. at 13. ACE offers several examples that illustrate its point as to why its petition should not be dismissed as a matter of law, including the Regional Green House Gas Initiative Act ("RGGI").

ACE argues that Rate Counsel's assertion that "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," misses the mark as RGGI permits public utilities to invest in, among other things, customer-side energy efficiency ("EE") and conservation programs, and to recover the costs of those investments, plus a return, in rates. ACE Opposition at 13. ACE notes that Rate Counsel concedes that "[t]hrough the RGGI Act, the Legislature granted limited authority to allow public utilities to recover through utility rates their investments in non-utility property [,]" yet the concession, according to ACE, cannot be reconciled with Rate Counsel's constitutional argument that the "used and useful" principle "cannot be overridden by...legislation." Id. at 14. ACE argues that RGGI indeed allows public utilities to recover investments in non-utility property and that if cost recovery for non-utility programs were in fact constitutionally prohibited, existing utility administered EE programs would be frustrated. Id.

IV. DISCUSSION AND FINDINGS

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 may be granted:

[I]f 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).

When determining summary judgement motions, the standard for 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, Mercer County, 221 N.J. 192, 203-04 (2015) (internal citation and quotations omitted).

A determination whether a "genuine issue" of material fact exists requires the judge to consider if a rational fact finder could resolve the dispute with the evidence presented, or whether a genuine issue remains. Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 523 (1995). It is not the judge's function to "weigh the evidence and determine the truth of the matter but to determine whether

there is a genuine issue for trial." Brill v. Guardian Life Ins. Co. of Am., 142 N.J. at 540 (quoting Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249 (1986)). Additionally, a court must determine whether the evidentiary materials, "when viewed in the light most favorable to the non-moving party...are sufficient to permit a rational factfinder to resolve the alleged disputed issue in favor of the nonmoving party." Brill v. Guardian Life Ins. Co. of Am., 142 N.J. at 523. Applied here, the Board must view the evidence in the light most favorable to ACE, the non-moving party, to determine whether a genuine issue of material fact exists.

The pleadings filed by Rate Counsel and ACE present mixed questions of fact and law. Based on the evidence filed to date, there exists disagreement on certain issues that go to the heart of the "used and useful" principle, and what is and is not necessary to provide safe and reliable utility services. The record would benefit from a full factual exploration of whether some or all of the investments proposed by ACE would be owned by the Company, whether the public would benefit from those investments, and whether the proposed investments are factually similar to energy efficiency infrastructure investments, which are allowed,² regardless of ownership.

For example, Rate Counsel asserts that most of the investment proposed in the Amended Petition is for EVSE that is unnecessary for safe and reliable service, and will not be owned by ACE, but rather by only some customers of the Company at the expense of all of the Company's ratepayers. ACE disagrees arguing that RGGI allows public utilities to recover investments in non-utility property and asserting that, as a factual matter, the type of EV investments here are comparable to allowed energy efficiency investments. ACE further contends that Rate Counsel has oversimplified the used and useful principle and rests its arguments on a flawed foundation while ignoring issues of fact surrounding whether or not ACE's offerings are necessary for safe and reliable service, which presents another factual disagreement. Finally, Rate Counsel and ACE both point to common practices regarding rebates, incentives and funding of programs that exist in New Jersey and other states. Given that the parties cite to the same cases that refer to "flexible and pragmatic" ratemaking principles, yet reach varying conclusions, a comprehensive understanding of other programs, which are inherently fact specific, is key to applying the used and useful precedent. Therefore, I **HEREBY FIND** that, in viewing the evidence most favorable to the non-moving party, genuine issues of material fact exist.

Further, "[i]t is inappropriate to grant summary judgment where the suit is in an early stage and the evidence has not been fully developed." D'Alia v. Allied-Signal Corp., 260 N.J. Super. 1, 12 (1992); Wilson v. Amerada Hess Corp., 168 N.J. 236, 253-254 (2001) (motion should be denied where discovery on material issues is incomplete); Salomon v. Eli Lilly & Co., 98 N.J. 58, 61 (1984) (a complaint should not be dismissed in the absence of an adequate record). Additionally, denial of summary judgement is also appropriate when the issue at hand has "highly significant policy considerations" and the record is inadequate. Jackson v. Muhlenberg Hosp., 53 N.J. 138, 141-42 (1969). For proceedings where the ruling would reach far beyond the particular case, "[t]he disagreement must not be nebulous or contingent but must have taken on fixed and final shape so that a court can see what legal issues it is deciding, what effect its decision will have on the adversaries, and some useful purpose to be achieved in deciding them." Public Service Com. v. Wycoff Co., 344 U.S. 237, 243-244 (1952).

According to the procedural schedule, the first round of discovery on the Amended Petition was propounded by June 24, 2020, with responses due by July 9, 2020. At the time Rate Counsel filed its Motion to Dismiss, very limited discovery had taken place on ACE's original filing and no discovery had been propounded on the substantially different Amended Petition. I, therefore,

² See e.g., N.J.S.A. 48:3-98.1(a).

HEREBY FIND the record is presently incomplete and thus will benefit from additional time to develop.

The issues here are sure to have extensive implications beyond this proceeding, which intensifies the need for a full and adequate record. There is another petition currently filed with the Board with near identical issues which would be significantly impacted by the outcome of this proceeding. Additionally, the Board is presently conducting an extensive stakeholder process on the very topic at the center of ACE's Amended Petition. This stakeholder process will inform the State's policies on electric vehicles. With two ongoing processes—a separate petition and a stakeholder process—that both center around electric vehicles, I **HEREBY FIND** that the decision on the Amended Petition has significant reach beyond this proceeding and thus demands a full record.

I **HEREBY DENY** Rate Counsel's Motion to Dismiss for the following reasons:

- 1) The record shows there are genuine issues as to material facts;
- 2) The scant evidentiary record due to the lack of discovery on the Amended Petition and early stage of the proceeding precludes summary decision; and
- 3) The outcome of this proceeding will have significant and far-reaching policy considerations.

The within denial is without prejudice.

I **HEREBY ORDER** the parties to continue to move through the procedural schedule so that the record may benefit from discovery.

I **HEREBY DIRECT** that this Order be posted on the Board's website.

This provisional ruling is subject to ratification or other alteration by the Board as it deems appropriate during the proceedings in this matter.

DATED: June 26, 2020

BY:



UPENDRA J. CHIVUKULA
COMMISSIONER

IN THE MATTER OF THE PETITION OF ATLANTIC CITY ELECTRIC COMPANY FOR
APPROVAL OF A VOLUNTARY PROGRAM FOR PLUG-IN VEHICLE CHARGING
BPU DOCKET NO. EO18020190

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