

submitted a request for the removal of a party, the removal of an attorney admitted pro hac vice, and a change in status from intervenor to participant.

As such, this Order will address the following four matters: 1) the Market Participants' Motion for Reconsideration; 2) AARP's Motion; 3) Landis + Gyr's Motion; and 4) EELC's various requests.

BACKGROUND

On October 11, 2018, Public Service Gas and Electric Company ("PSE&G" or "Company") filed a petition in this docket seeking approval from the New Jersey Board of Public Utilities ("Board" or "BPU") of its Clean Energy Future – Energy Cloud ("CEF-EC") program on a regulated basis ("EC-AMI Petition"). In the EC-AMI Petition, the Company requested Board approval to implement a five (5) year program, with an estimated investment of approximately \$721 million, plus operation and maintenance ("O&M") costs of \$73 million, to implement Advanced Metering Infrastructure ("AMI") throughout PSE&G's electric service territory.²

On October 29, 2018, the Board retained the EC-AMI Petition, and designated myself as Presiding Officer to rule on all motions that may arise, set and enforce a schedule, and modify any schedules, if necessary.³

MARKET PARTICIPANTS' MOTION FOR RECONSIDERATION

The April 1, 2020 Prehearing Order provided, in pertinent part, the denial of the Market Participants' Motion for Intervention, and in the alternative, granted the Market Participants participant status.⁴ On April 16, 2020, the Market Participants filed a Motion for Reconsideration seeking modification of the April 1 Order to grant them intervenor status.⁵

The Market Participants arguments in favor of reversing the April 1, 2020 decision:

1. Granting the Market Participants Intervenor status is consistent with the Board's Order dated November 13, 2019 in Docket Nos. GO18101112 and EO18101113.

Initially, the Company filed the CE-AMI Petition with the Company's Clean Energy Future - Electric Vehicle and Energy Storage ("CEF-EVES") Petition, and its Clean Energy Future-Energy Efficiency ("CEF-EE") Programs Petition. The three (3) matters were only separated into three (3) different Petitions after being filed with the Board. The Market Participants argue that denying intervenor status is at odds with the Board's Order dated November 13, 2019 where the Board

²PSE&G is not seeking to install AMI in its gas service territory at this time.

³ In re the Petition of Public Service Gas and Electric Company for Approval of its Clean Energy Future-Cloud ("CEF-EC") Program on a Regulated Basis, Order Designating a Commissioner, Setting A Bar Date and Manner of Service, BPU Docket No. EO18101115, October 29, 2018.

⁴ Market Participants' Motion for Admission pro hac vice for the admission of Karen O. Moury, Esq., and Sarah C. Stoner, Esq. was granted.

⁵ In re the Petition of Public Service Gas and Electric Company for Approval of its Clean Energy Future-Cloud ("CEF-EC") Program on a Regulated Basis, Market Participants' Motion for Reconsideration, BPU Docket No. EO18101115, April 16, 2020 ("Market Participants' Motion for Reconsideration").

granted the Market Participants' Motion to Intervene in the CEF-EE matter.⁶ Therefore, the Market Participants argue that the Board should, for consistency purposes and logical reasoning, reach the same determination here as these petitions were initially filed as one matter.

2. The Market Participants' Have a Substantial, Specific and Direct Interest in the Outcome of this Proceeding:

The Market Participants cite N.J.A.C. 1:1-16.1, arguing that “the single most compelling factor supporting [the Market Participants’] intervention in this proceeding relates to access by third party suppliers and other entities in the private market to the customer usage data that will become available through PSE&G’s deployment of AMI”. See Market Participants’ Motion for Reconsideration at p. 5-6. As Intervenor, the Market Participants argue that they can advocate for a proper set of rules addressing access to smart meters, which is a “substantial, specific and direct interest in the outcome of this proceeding” that was “overlooked by the April 1 Order.” See Market Participants’ Motion for Reconsideration at p. 5-6.

Additionally, the Market Participants state the allegation that 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” overlooks “the fact that the Use Cases at issue in this proceeding include data analytics, interactive energy demand and bill management, customer segmentation and behavioral analysis, customer efficiency programs and customer distributed energy resources.” See Market Participants’ Motion for Reconsideration at p. 6. Such programs, according to the Market Participants, are exactly what is being offered by the Market Participants in the private market. Accordingly, the Market Participants argue that since PSE&G describes this proceeding as a platform to become a "leading smart energy services company," this is in direct competition with third party suppliers and other private entities, and as such, will substantially, specifically and directly affect the Market Participants. See Market Participants’ Motion for Reconsideration at p. 6.

3. Due Process Mandates that the Market Participants Be Granted Intervenor Status

The Market Participants argue that due process and fundamental fairness mandate reversal.⁷ The Market Participants claim that being afforded the ability to make oral argument and file a brief do not equate to a meaningful opportunity to be heard, which also entails the service of discovery, the cross-examination of Company witnesses, and the filing of exceptions to the initial decision. In short, they argue that full party status is necessary to ensure that the Market Participants are not restricted in their litigation strategy and ultimate appellate remedies. Additionally, the Market Participants provide that, with Intervenor testimony due on August 31, 2020, they be afforded sufficient time to conduct discovery in advance of that date, and have the ability to participate in settlement discussions with the parties. See Market Participants’ Motion for Reconsideration at p. 6.

⁶ In the Matter of the Petition of Public Service Electric & Gas Company for Approval of its Clean Energy Future-Energy Efficiency (“CEF-EE”) Program On a Regulated Basis, Order on Motion for Reconsideration; Docket Nos. GO18101112 and EO18101113, November 13, 2019 at p.4-5.

⁷ The Market Participants note that the Fourteenth Amendment of the United States Constitution provides that no state shall "deprive any person of life, liberty, or property, without due process of law." The New Jersey Constitution protects similar interests. N.J. Const., Art. I, Para. 1; see also Greenberg v. Kimmelman, 99 NJ. 552,494 A.2d 294 (1985). Due process calls for such procedural protections as fairness demands, the essential components of which are notice and an opportunity to be heard. Mettinger v. Globe Slicing Mach. Co., 153 NJ. 371, 709 A.2d 779 (1998). See State v. P.Z., 152 NJ. 86, 703 A.2d 901 (1997); see also Doe v. Poritz, 142 N.J. 1, 662 A.2d 367.

4. The Electric Discount and Energy Competition Act (“EDECA”) Obligates the Board to Consider the Impact of Utilities Offering Services Available in the Competitive Market

The Market Participants argue that, “[i]t is critical that the Board hear the perspectives of the Market Participants in considering whether to allow a significant expansion by a public utility into an area already being served by competitive markets.” See Market Participants’ Motion for Reconsideration at p. 6-7. The Market Participants claim that EDECA favors reliance upon competitive markets over bundled public utility service. See N.J.S.A. 48:3-50(a)(2). Further, “EDECA expressly prohibits public utilities from offering competitive services to retail customers” and the Board “is obligated to taken into consideration the adverse impact on the ability of the utility to offer traditional utility services in a safe and appropriate manner.” See Market Participants’ Motion for Reconsideration at p. 8 (citing N.J.S.A. 48:3-55(a)(1)). The Market Participants argue that they can provide valuable market information, and that “[w]hen programs are already available to consumers in the competitive market, it does not make sense to allow PSE&G to offer competitive services at the risk of adversely impacting its ability to offer traditional utility services in a safe and appropriate manner.”

PSE&G’s Opposition to the Market Participants’ Motion for Reconsideration:

On April 21, 2020, PSE&G filed opposition to the Market Participants’ Motion for Reconsideration, raising the following arguments:⁸

1. The CEF-EE Proceeding is different than the current matter.

PSE&G argues that PSE&G’s CEF-EE proceeding is vastly different in scope from the current matter, and there is no obvious need for uniformity in types of intervenors between the two (2) distinct proceedings. PSE&G states that the, “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, the Company’s proposed programs are narrowly focused on the core utility functions related to smart meter installations.” See PSE&G Opposition at p. 3.

2. The Prehearing Order Properly Found That the Market Participants Do Not Have a Direct Interest in This Proceeding Sufficient to Warrant Intervenor Status

PSE&G claims that the Market Participants have “vague concerns” regarding programs or services that have not been proposed, and can only be deemed as “future possibilities related to smart meter data [that are not] clarified or made more specific” in the Motion for Reconsideration. See PSE&G Opposition at p. 3. PSE&G states that this is consistent with the April 1 Prehearing Order determination that the Market Participants’ concerns regarding competitive services and data issues were ancillary to the issues being considered in this proceeding, and as such, are not direct interests that warrant intervention. PSE&G states that, “[n]othing about the Release 1 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.” Id.

⁸In re the Petition of Public Service Gas and Electric Company for Approval of its Clean Energy Future-Cloud (“CEF-EC”) Program on a Regulated Basis, PSE&G’s Opposition to Market Participants’ Motion for Reconsideration, BPU Docket No. EO18101115, April 21, 2020 (“PSE&G Opposition”).

However, PSE&G then makes the following statement in its Opposition:

“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.”

See PSE&G Opposition at p. 3. Therefore, PSE&G concludes that if the Energy Cloud requires future detailed evaluation, which “may be the subject of future proceedings,” at that time the Market Participants’ could re-assert their intervenor request.

3. Market Participants Do Not Provide a Basis for Untimely Interlocutory Review or for Rehearing

PSE&G claims that the Motion for Reconsideration was improperly filed, and 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. See PSE&G Opposition at p. 4. PSE&G argues that 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.

The Market Participants Response to PSE&G’s Opposition:

On April 27, 2020 the Market Participants filed a Response to PSE&G’s Opposition stressing the following items:⁹

1. The Clean Energy Future Programs Are Related

The Market Participants seek to address what they consider “an obvious inconsistency in rulings by the [Board] in related proceedings, namely PSE&G’s CEF-EE proceeding and the present [CEF-AMI proceeding.” See Response at p. 2. The Market Participants claim that these proceedings address similar and intertwined issues relating to PSE&G’s energy efficiency and related programs, and as such, “the Market Participants filed the Motion for Reconsideration to make the presiding officer and Board aware of the inconsistent rulings in hopes of achieving a prompt modification of the April 1, 2020 Prehearing Order to grant them full intervenor status.” Id.

2. PSE&G’s Energy Cloud Proceeding Proposes Programs Go Beyond Core Utility Functions.

The Market Participants claim that many of the Use Cases are exactly the type of offerings that are being made to consumers in the private market. Furthermore, they provide that “almost every function identified by PSE&G’s CEF-EC filing is being performed by suppliers in other states where AMI data access rules are already in place.” See Response at p.3. While the Market Participants do not take issue with PSE&G’s request regarding accounting treatment, deployment or cost estimates, they do take issue with allowing PSE&G to obtain the data and use it to create

⁹ In re the Petition of Public Service Gas and Electric Company for Approval of its Clean Energy Future-Cloud (“CEF-EC”) Program on a Regulated Basis, Market Participants’ Response to PSE&G’s Opposition to the Motion for Reconsideration, BPU Docket No. EO18101115, April 27, 2020. (“Response”).

products that the competitive market should be developing in New Jersey and, in fact, is in other states. The Market Participants emphasize that, “it is critical to get appropriate data access rules in place before AMI is deployed.” Id.

3. The Market Participants Were Not Required to Seek Interlocutory Review

The Market Participants claim that the regulations permit, but do not mandate, interlocutory review. The Market Participants note that the regulation merely authorizes parties to seek interlocutory review of orders issued during the pendency of proceedings. It does not mandate that parties exclusively use that processor in lieu of seeking reconsideration by the presiding officer.

LANDIS+GYR TECHNOLOGY, INC. MOTION TO INTERVENE

Landis+Gyr is a global provider of integrated energy management solutions for the utility sector, offering products and services that address complex industry challenges, including multi-purpose AMI network platforms. Landis+Gyr argues that the decisions in this matter will have an effect on its business operations, and therefore, they will be substantially, directly and specifically affected by the relief provided in this matter. Landis+Gyr claims a significant interest in the Board’s review of PSE&G’s EC-AMI Petition due to Landis+Gyr’s experience in AMI deployment and implementation as it relates to energy efficiency, customer savings, system reliability, and the environment. Landis+Gyr argues that its expertise and interest is distinct from other parties in this case. Thus, no other party will represent the interests or insights of Landis+Gyr, and Landis+Gyr will coordinate its representation with other similarly situated entities in this docket to the extent it finds such action appropriate. Therefore, Landis+Gyr claims its participation as an Intervenor in this proceeding is likely to add measurably and constructively to the scope of the proceeding. Landis+Gyr will abide by any schedule set for this proceeding and the granting of this Motion will not cause undue delay or confusion.

AARP MOTION TO PARTICIPATE

AARP’s Motion provides that its interest is to protect the affordability, reliability, efficiency and safety of utility services for its New Jersey members who are concurrently residential ratepayers in the PSE&G electric service area aged 50 and over. According to the AARP Motion, these individuals are less likely to be able to increase their income to meet higher rates of service and costs. In New Jersey, AARP has 1.3 million members aged 50+ including hundreds of thousands residing in PSE&G service territory. AARP argues that Rate Counsel’s presence in this proceeding does not preclude their participant status because N.J.A.C. 1:1-16.3(b) provides that “In cases where one of the parties is a State agency authorized by law to represent the public interest in a case, no movant shall be denied intervention solely because the movant’s interest may be represented in part by said State agency.” See AARP Motion at p. 5. Therefore, AARP argues that its members’ interests are substantially different from those of any other party, including Rate Counsel. Additionally, AARP further argues that “neither PSE&G nor any other party will be prejudiced” by hearing the Motion now because “when this Petition was first filed, a moratorium was imposed on implementation of smart meter technology until after the Rockland Electric Company test, subject to prudence review, under the Board’s 2017 RECO AMI Order (Docket No. ER16060524).” Id. at p. 3.

On May 21, 2020, PSE&G filed an Opposition to AARP’s Motion to Participate (“Opposition to AARP Motion”). PSE&G argued that despite the title of the Motion, the relief AARP requests is intervention pursuant to N.J.A.C., 1:1-16.3. See Opposition to AARP Motion at p.1. While

objecting to intervention status, the Company states it does not object to AARP's inclusion in the proceeding as a participant. Ibid. Moreover, the Company notes that AARP missed *two* opportunities to file a timely motion in this case: First, the Board's October 29, 2018 Order retaining jurisdiction in this matter set a bar date of November 16, 2018 for motions to intervene or participate; and second, the Presiding Officer's April 1, 2020 Prehearing Order included a procedural schedule that set May 4, 2020 as a deadline for any further motions in this proceeding. Ibid.

EELC'S REQUEST TO REMOVE A PARTY, REMOVE AN ATTORNEY ADMITTED PRO HAC VICE, AND TO CHANGE STATUS FROM INTERVENOR TO PARTICIPANT

EELC submitted a Motion to Intervene on behalf of Environment New Jersey ("ENJ"), the Environmental Defense Fund ("EDF"), Sierra Club, and Natural Resources Defense Council ("NRDC") on November 16, 2018. By motion supported by an affidavit dated November 10, 2018. Arron Kleinbaum, Esq. moved for the admission pro hac vice of John Finnigan, Esq. as attorney for ENJ, EDF, Sierra Club, and NRDC. The April 1, 2020 Procedural Order granted EELC's Motion to Intervene and the admission pro hac vice of John Finnigan, Esq.

On May 29, 2020, EELC provided notice of EDF's withdrawal from this proceeding along with a Notice of Withdrawal of Counsel from John Finnigan, Esq. The notice provided that EELC will continue to represent NRDC, ENJ, and Sierra Club, but requested that (1) Aaron Kleinbaum (who no longer works at EELC) be removed from the service list for this proceeding and (2) EELC Staff Attorney William D. Bittinger be added to the service list.

Additionally, EELC requested that NDRC, ENG and Sierra Club's status be changed from intervenors to participants, arguing that since it was already determined that they met the standard for intervention under N.J.A.C. 1:1-16.3, they clearly can satisfy the lower standard for participation.

DISCUSSION AND FINDINGS

MARKET PARTICIPANTS' MOTION FOR RECONSIDERATION:

N.J.S.A. 48:2-40 expressly provides that the Board at any time may revoke or modify an order made by it. See Twp. of Deptford v. Woodbury Terrace Sewerage Corp., 54 N.J. 418, 428 (1969); see also N.J.A.C. 14:1-8.6(b). N.J.A.C. 14:1-8.6 requires that a request for rehearing or reconsideration be done by a motion that enumerates the alleged "errors of law or fact" that the Board relied upon in rendering its decision. Additionally, where an opportunity is sought to introduce additional evidence, that evidence shall be stated briefly with the reasons for failing to provide it previously.

Generally, a party should not seek reconsideration merely based upon dissatisfaction with a decision. D'Atria v. D'Atria, 242 N.J. Super. 392, 401 (Ch. Div. 1990). Rather, reconsideration is reserved for those cases where (1) the decision is based upon a "palpably incorrect or irrational basis" or (2) it is obvious that the finder of fact did not consider, or failed to appreciate, the significance of probative, competent evidence. Ibid. See Cummings v. Bahr, 295 N.J. Super. 374, 384 (App. Div. 1996). The moving party must show that the action was arbitrary, capricious, or unreasonable. D'Atria, 242 N.J. Super. at 401. The Board "will not modify an Order in the absence of a showing that the Board's action constituted an injustice or that the Board failed to take notice of a significant element of fact or law". In the Matter of the Implementation of L. 2012, c. 24. the

Solar Act of 2012, Docket No. EO12090832 (July 19, 2013) at 5; In the Matter of Michael Manis and Manis Lighting, LLC - New Jersey Clean Energy Program Renewable Energy Incentive Program, Docket No. QS14040316 (April 15, 2015).

There are new facts presented here that warrant consideration. The Company conceded that the Market Participants could be substantially, specifically and directly affected at some point as to warrant intervention while the Company's AMI Program is before the Board. This is a key element of fact. See In the Matter of the Implementation of L. 2012, c. 24, the Solar Act of 2012, Docket No. EO12090832 (July 19, 2013) at 5; In the Matter of Michael Manis and Manis Lighting, LLC - New Jersey Clean Energy Program Renewable Energy Incentive Program, Docket No. QS14040316 (April 15, 2015). PSE&G acknowledged that there may be future proceedings wherein it could be appropriate for the Market Participants to re-assert their claim for intervenor status. Therefore, it is important that they intervene now, allowing all parties to be involved in the process from the beginning, and ultimately not delay the matter. See N.J.S.A. 48:2-40 (the Board at any time may revoke or modify an order) See Twp. of Deptford v. Woodbury Terrace Sewerage Corp., 54 N.J. 418, 428 (1969); see also N.J.A.C. 14:1-8.6(b); N.J.A.C. 14:18.6.

This is not a situation where a party is simply dissatisfied with a decision. See D'Atria v. D'Atria, 242 N.J. Super at 4401. Instead, based upon new facts, specifically the Company's own representation that at some point it may be appropriate for the Market Participants to intervene, I find this new information significant, probative, competent evidence.

Therefore, I **HEREBY GRANT** the Market Participants' Motion for Reconsideration. I **HEREBY FIND** that the nature and extent of the Market Participants' interests warrants Intervenor status. I **HEREBY FIND** that the Market Participants' inclusion will add measurably and constructively to the record in this proceeding. Therefore, I **HEREBY FIND**, pursuant to N.J.A.C. 1:1-16.3, that the Market Participants have met the standards for intervention, and I **HEREBY GRANT** the Motion for Intervention on behalf of the Market Participants.

LANDIS + GRY AND AARP MOTIONS TO INTERVENE AND PARTICIPATE

In ruling on a motion to intervene, N.J.A.C. 1:1-16.3(a) requires that the decision-maker consider the following factors:

1. The nature and extent of the moving party's interest in the outcome of the case;
2. Whether that interest is sufficiently different from that of any other party so as to add measurably and constructively to the scope of the case;
3. The prospect for confusion and delay arising from inclusion of the party; and
4. Other appropriate matters.

If the standard for intervention is not met, N.J.A.C. 1:1-16.5 provides for a more limited form of involvement in the proceeding as a "participant," if, in the discretion of the trier of fact, the addition of the moving party is likely to add constructively to the case without causing undue delay or confusion. Under N.J.A.C. 1:1-16.6(c), such participation is limited to the right to argue orally, file a statement or brief, file exceptions, or all of these as determined by the trier of fact.

As the Board stated in previous proceedings, application of these standards involves an implicit balancing test. The need and desire for development of a full and complete record, which involves

consideration of a diversity of interests, must be weighed against the requirements of the New Jersey Administrative Code, which recognizes the need for prompt and expeditious administrative proceedings by requiring that an intervenor's interest be specific, direct and different from that of the other parties so as to add measurably and constructively to the scope of the case. See In the Matter of the Joint Petition of Public Service Electric and Gas Company and Exelon Corporation for Approval of a Change in Control, BPU Docket No. EM05020106, Order dated June 8, 2005.

With regard to the Landis+Gyr's Motion, I **HEREBY FIND** that Landis+Gyr has a significant interest in this matter as it pertains to AMI due to Landis+Gyr's experience in AMI deployment and implementation. Landis+Gyr's expertise and interest is distinct from other parties in this case. Thus, no other party will represent the interests or insights of Landis+Gyr, and Landis+Gyr agrees to coordinate its representation with other similarly situated entities in this docket to the extent any should exist. Therefore, I **HEREBY FIND**, pursuant to N.J.A.C. 1:1-16.3, that Landis+Gyr has met the standards for intervention, and having received no objection, I **HEREBY GRANT** the Motion for Intervention of Landis+Gyr.

With regard to AARP's Motions to Participate, I **HEREBY FIND**, pursuant to N.J.A.C. 1:1-16.6(b), that AARP will add constructively to the case without causing undue delay or confusion. Therefore, with the Company not objecting to AARP's inclusion in this proceeding as a Participant, I **HEREBY FIND** that AARP has met the standards for participation in this matter. Accordingly, I **HEREBY GRANT** the Motion to Participate of AARP on the basis of their representation that they will adhere to the scope of the issues to be addressed in this proceeding, and limited to the right to argue orally and file a statement or brief as set out in N.J.A.C. 1:1-16.6(c)(1) and (2).

EELC'S REQUEST TO REMOVE A PARTY, REMOVE AN ATTORNEY ADMITTED PRO HAC VICE, AND CHANGE STATUS FROM INTERVENOR TO PARTICIPANT

I **HEREBY ACCEPT** EDF'S withdrawal from this matter, and I **HEREBY ACCEPT** the withdrawal of the admission pro hac vice of John Finnigan, Esq. as attorney for EELC.

With regard to EELC's request for NRDC, ENJ, and Sierra Club status to be changed from intervenor to participant, I **HEREBY FIND**, pursuant to N.J.A.C. 1:1-16.6(b), that they will add constructively to the case without causing undue delay of confusion. As NRDC, ENJ, and Sierra Club previously met the more stringent standard for intervention, I **HEREBY FIND** that they have satisfied the less stringent requirements for participant in this proceeding. As such, I **HEREBY GRANT** EELC's request to change their status from intervenor to participant, thereby limiting EELC to the right to argue orally and file a statement or brief as set out in N.J.A.C. 1:1-16.6(c)(1) and (2)

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 5, 2020



MARY-ANNA HOLDEN
COMMISSIONER

**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

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