Agenda Date: 11/18/20
Agenda Item: 2E

STATE OF NEW JERSEY

Board of Public Utilities
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ENERGY

IN THE MATTER OF THE PROVISION OF BASIC GENERATION SERVICE AND COMPLIANCE TARIFF FILING REFLECTING CHANGES TO SCHEDULE 12 CHARGES IN PJM OPEN ACCESS TRANSMISSION TARIFF	)	DECISION AND ORDER BPU DOCKET NOS. ER17050499, ER17060671, ER17070752, ER17111150, ER17121278, ER18020157, ER18020158, ER18060656, ER18070711, ER18121290, ER19060763, ER19121509, ER19121540

Parties of Record:

Philip J. Passanante, Esq., on behalf of Atlantic City Electric Company
Joseph A. Shea, Jr., Esq., on behalf of Public Service Electric and Gas Company
Joshua R. Eckert, Esq., on behalf of Jersey Central Power and Light Company
John L. Carley, Esq., on behalf of Rockland Electric Company
Stefanie A. Brand, Esq., Director, New Jersey Division of Rate Counsel

BY THE BOARD:

Transmission Enhancement Charges

The Transmission Enhancement Charges ("TECs") detailed in Schedule 12 of the PJM Interconnection, LLC ("PJM") Open Access Transmission Tariff ("OATT") were implemented to compensate transmission owners for the annual transmission revenue requirements for "Required Transmission Enhancements" that are requested by PJM for reliability or economic purposes. TECs are recovered by PJM through an additional transmission charge in the transmission zones assigned cost responsibility for Required Transmission Enhancement projects.

On April 25, 2017, in Docket Nos. ER17-950-000 and ER17-940-001, the Federal Energy Regulatory Commission ("FERC") issued an Order that modified the PJM OATT as a result of the termination of a long-term firm point-to-point transmission service agreement between PJM and Consolidated Edison Company of New York, Inc. ("ConEd Wheel")("ConEd Wheel Order"). The PJM tariff revisions removed ConEd as a party responsible for cost allocation under Schedule 12 of the PJM OATT. This, in turn, required that PJM reallocate the ConEd portion to the remaining entities as these costs relate to the ConEd Wheel. The cost reallocation being implemented pursuant to the ConEd Wheel Order is subject to ongoing legal challenges and protests before

FERC by various interested entities.[1] By Order dated July 26, 2017, the Board authorized the New Jersey EDCs to begin collecting the TEC charges based upon the reallocation related to the ConEd Wheel Order, and track such collections until receipt of a Final FERC Order in the matter.[2]

On January 5, 2017, in accordance with Section 116 of the PJM OATT, Dominion Energy Services ("Dominion") filed for a Deactivation Avoidable Cost ("DAC") Rate with FERC for the Yorktown Units ("Dominion FERC Filing"). On March 2, 2017, FERC accepted Dominion's filing for DAC rates, effective January 6, 2017.

On June 14, 2017, the U.S. Department of Energy ("DOE") issued an emergency order in which it determined that the continued operation of the Yorktown Units is necessary to maintain grid reliability in the North Hampton Roads area east of Richmond, Virginia ("June DOE Emergency Order"). As a result of the June DOE Emergency Order, and based upon discussions with PJM in light of that Order, Dominion submitted a filing to FERC stating that Dominion and the Market Monitor for PJM agreed to initial rates while negotiations on the DAC Rates continued. In July 2017, PJM issued a statement that the June billing would reflect Deactivation charges/credits for the extension of the Yorktown Units, effective January 5, 2017. By Order dated December 19, 2017, the Board authorized the EDCs to begin collecting the RMR Charges related to the Yorktown Units ("Yorktown RMR") and track such collections until receipt of a Final FERC Order.[3]

On December 15, 2017, in Docket Nos. EL-17-84-000 and EL17-90-000 ("HTP and Linden VFT Orders"), FERC issued orders, effective January 1, 2018, that modified the PJM OATT as a result of a change in Hudson Transmission Partners' ("HTPs'") and Linden Variable Frequency Transformer Project's ("Linden VFT's") responsibility for certain transmission cost allocations resulting from the conversion of Firm to Non-Firm Transmission Withdrawal Rights. The revisions removed HTP and VFT as parties responsible for cost allocation under Schedule 12 of the PJM OATT. While FERC ruled on these matters through the issuance of the HTP and VFT Orders, the cost reallocations being implemented are still subject to ongoing challenges before FERC. By two (2) separate Orders dated July 25, 2018, the Board authorized the EDCs to begin collecting the TEC charges based on the reallocation related to the HTP and Linden VFT Orders and track such collections until receipt of a Final FERC Order.[4]

Through a series of subsequent Orders ("Section 15.9 Orders"), the Board approved filings made by the EDCs requesting recovery of FERC approved changes in firm transmission service related

[1] With the exception of a protest filed by the Board, the entities [i.e., Linden VFT, HTP, and New York Power Authority (collectively, "Merchant-related Protestors")] challenging the cost reallocation allege that less costs should be allocated to them and more costs should be allocated to the zones of the New Jersey electric distribution companies ("EDCs"). The EDCs are Atlantic City Electric Company, Jersey Central Power and Light Company, Public Service Electric and Gas Company and Rockland Electric Company.
[2] <u>In re the Provision of Basic Generation Service and Compliance Tariff Filing Reflecting Changes to Schedule 12 Charges in PJM Open Access Transmission Tariff—May 12, 2017 Filing</u>, BPU Docket No. ER17050499, Order dated July 26, 2017 ("July 2017 Order").
[3] <u>In re the Provision of Basic Generation Service and Tariff Sheets Reflecting Proposed Revisions to Reliability Must Run Charge- November 2017 Yorktown Filing,</u> BPU Docket No. ER17111150, Order dated December 19, 2017 ("December 2017 Order").
[4] <u>In re the Provision of Basic Generation Service and the Compliance Tariff Filing Reflecting Changes to Schedule 12 Charges in PJM Open Access Transmission Tariff - February 2018 Joint Filing Related to JCP&L TECs</u> AND <u>In re the Provision of Basic Generation Service and the Compliance Tariff Filing Reflecting Changes to Schedule 12 Charges in PJM Open Access Transmission Tariff - February 2018 Joint Filing</u>, BPU Docket Nos. ER18020157 and ER18020158, Orders dated July 25, 2018 ("July 2018 Orders")

charges.[5] The proposed rates in those filings included the rate adjustments resulting from the ConEd Wheel Order, the HTP and Linden VFT Orders and the Yorktown RMR Order (collectively, "FERC Orders").

In its Order dated December 2, 2003, Docket No. EO03050394, the Board found that the pass through of any changes in charges associated with the FERC approved OATT is appropriate. Furthermore, by subsequent Orders, the Board approved Section 15.9 of the Supplier Master Agreements ("SMAs") as filed by the EDCs, which requires that the EDCs file for Board approval of any increases or decreases in their transmission charges that have been approved by FERC.

The SMAs also authorize the EDCs to increase or decrease the rates paid to suppliers for FERC approved rates and changes to Firm Transmission Services once approved by the Board. The Board Orders further require that the EDCs review and verify the requested FERC-authorized changes. Section 15.9 of the SMA requires the EDCs to remit payment of the increased charges to suppliers upon, among other things, the issuance of a "Final FERC Order" approving the Firm Transmission Service rate change.

In the Board's Order dated November 21, 2017 in Docket No. ER17040335, the Board found that the current construct provides a balance between the protection of ratepayers and the concerns of Basic Generation Service ("BGS") suppliers regarding risk, while allowing the Board discretion on a case by case basis.

In its November 13, 2019 Order, the Board directed Board Staff ("Staff") to work with the parties prior to the filing of the 2021 BGS Auction proposals in an attempt to find a resolution to issues

[5] In re the Provision of Basic Generation Service and Compliance Tariff Filing Reflecting Changes to Schedule 12 Charges in PJM Open Access Transmission Tariff – JCP&L, PSE&G, and Rockland June 22, 2017 Filing, BPU Docket No. ER1706067, Order dated August 23, 2017; In re the Petition of Atlantic City Electric Company for Approval to Implement FERC-Approved Changes to ACE's Retail Transmission (Formula) Rate Pursuant to Paragraphs 15.9 of BGS-RSCP and BGS-CIEP Supplier Master Agreements and Tariff Filing Reflecting Changes to Schedule 12 Charges in PJM Open Access Transmission Tariff (2017), BPU Docket No. ER17070752, Order dated August 23, 2017; In re the Provision of Basic Generation Service and the Compliance Tariff Filing Reflecting Changes to Schedule 12 Charges in PJM Open Access Transmission Tariff- December 8, 2017 Joint Filing, BPU Docket No. ER17121278, Order dated January 31, 2018; In re the Provision of Basic Generation Service and Compliance Tariff Filing Reflecting Changes to Schedule 12 Charges in PJM Open Access Transmission Tariff – JCP&L, PSE&G, and Rockland- June 20, 2018 Filing, BPU Docket No. ER18060656, Order dated August 29, 2018; In re the Petition of Atlantic City Electric Company for Approval to Implement FERC-Approved Changes to ACE's Retail Transmission (Formula) Rate Pursuant to Paragraphs 15.9 of BGS-RSCP and BGS-CIEP Supplier Master Agreements and Tariff Filing Reflecting Changes to Schedule 12 Charges in PJM Open Access Transmission Tariff (2018), BPU Docket No. ER18070711, Order dated August 29, 2018; In re the Provision of Basic Generation Service and the Compliance Tariff Filing Reflecting Changes to Schedule 12 Charges in PJM Open Access Transmission Tariff- December 6, 2018 Joint Filing, BPU Docket No. ER18121290, Orders dated January 17, 2019 and March 13, 2019; In re the Provision of Basic Generation Service, the Compliance Tariff Filing Reflecting Changes to Schedule 12 Charges in PJM Open Access Transmission Tariff, and the Submission of Revised Tariff Sheets Related to Reliability Must Run Charges for Yorktown 1 and 2 and B.L. England Generating Units- June 27, 2019 Filing, BPU DOCKET NO. ER19060763, Order dated August 7, 2019; In re the Provision of Basic Generation Service, the Compliance Tariff Filing Reflecting Changes to Schedule 12 Charges in PJM Open Access Transmission Tariff - December 2019 Joint Filing, BPU DOCKET NO. ER19121509, Order dated January 22, 2020; and In re the Provision of Basic Generation Service, the Compliance Tariff Filing Reflecting Changes to Schedule 12 Charges in PJM Open Access Transmission Tariff - December 2019 JCP&L NITS Joint Filing, BPU DOCKET NO. ER19121540, Order dated January 22, 2020.

related to transmission payments.[6] Between March 2020 and September 2020, Staff convened several meetings with the EDCs, the New Jersey Division of Rate Counsel ("Rate Counsel"), and BGS suppliers to discuss issues related to costs that have been collected from customers, but not yet paid to suppliers. One option discussed in the meetings was a letter of credit ("LC") to be secured by suppliers for their portion of the held funds to be released.

By notice dated September 17, 2020, Staff sought comments on the appropriate percentage of the total held funds that suppliers should be required to post to secure their obligations should a future court decision require the return of some or all of the funds to ratepayers. Comments were due on October 9, 2020, and are summarized below.

Vitol

In its comments, Vitol Inc. ("Vitol") argued that the unresolved cases at FERC regarding the allocation of transmission costs have led to a precarious situation for BGS suppliers who have experienced significant shortfalls in reimbursements of certain pass-through transmission costs associated with their BGS obligations. As calculated by the EDCs, the cumulative total through May 31, 2020 is at least $125,967,786 in retained funds, and is likely much higher now.[7] (Vitol Comments at 1). Vitol asserted that there is general support among the parties, including Vitol, for the LC option, but there is no universal consensus among the parties on how to set the amount of the LC for the affected BGS suppliers. (Id. at 2).

In the EDCs' proposal filed in the 2021 BGS proceeding, the EDCs submitted two (2) commercially reasonable solutions to stop the future accumulation of Collect-Don't-Pay Costs by advocating for the following improvements: (1) change the BGS SMA, section 15.9, to shift responsibility for transmission and transmission-related costs from the BGS suppliers to the EDCs, for the BGS products for the period beginning June 1, 2021[8] and (2) amend the SMAs for prior BGS products to remove these same costs on a going forward basis.[9] Vitol maintained that the EDCs appropriately recognized that requiring BGS suppliers to be a pass-through entity for these costs adds risk to the BGS product. This arrangement can cause and, as is clearly evident by the significant amount of Collect-Don't-Pay Costs in the current case, actually has caused significant financial harm to BGS suppliers. (Ibid.)

With respect to the appropriate amount of an LC to secure the payment of Collect-Don't-Pay Costs to each affected BGS supplier, Vitol requested that the Board consider an amount, or a methodology to calculate the amount, that is commercially reasonable and balances risk appropriately. Vitol stated that as it stands now, BGS suppliers are financially harmed by the non-payment of 100% of these costs. According to Vitol, any LC amount or methodology must enable the expedited payment of 100% of these costs to BGS suppliers but without automatically requiring an LC amount that equals 100% of these costs. (Ibid.). While Vitol understands the desire expressed by some parties to hold financial assurance from the BGS suppliers until final adjudication of the regulatory and legal proceedings regarding the transmission costs in question,

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[6] In re the Provision of Basic Generation Service (BGS) for the Period Beginning June 1, 2020, BPU Docket No. ER19040428, Order dated November 13, 2019 ("November 2019 Order").
[7] See EDCs' *Response to Discovery Request: RCR-BGS-0001*, BPU Docket No. ER20030190, pp. 7-8 (August 5, 2020).
[8] See EDCs' joint filing *Proposal for Basic Generation Service Requirements to Be Procured Effective June 1, 2021*, BPU Docket No. ER20030190, p. 8 (July 1, 2020).
[9] Id p. 20. Vitol supports the EDCs' proposed improvements. See *Vitol Inc.'s Initial Comments on the Electric Distribution Companies' Basic Generation Service Proposals*, BPU Docket No. ER20030190 (September 4, 2020).

Vitol contended that automatically requiring an LC amount of 100% does not allow for any consideration of the financial health of the BGS suppliers and is not commercially reasonable and does not balance risk appropriately. (Ibid.)

According to Vitol, the evaluation of the amount for an LC should include the fact that BGS suppliers have been vetted for credit risk against the entirety of their BGS auction participation and the supply obligations that they won and fulfilled. SMA Article 6 delineates the credit requirements that each BGS supplier must comply with, which includes an Independent Credit Requirement and Independent Credit Threshold. Vitol contended that a supplier satisfying these obligations indicates that the supplier has satisfactorily addressed all of the credit risk associated with supplying its BGS requirements, which include all costs and revenues. (Id. at 2 to 3). In considering that BGS suppliers have not realized revenue payments for the Collect-Don't-Pay Costs but have met the full credit requirements of the SMA, Vitol believes it is reasonable to require an LC amount much less than 100% in order for the BGS suppliers to receive full payment for these costs. Vitol suggested a 50% LC requirement. (Id. at 3).

Vitol further stated that at the very least, each BGS supplier should have the opportunity to qualify for a reduction based upon a creditworthiness evaluation, similar to or exactly the same as, the Independent Credit Threshold evaluation criteria described in the SMA Article 6 as is criteria that has been approved by the Board and accepted by all BGS stakeholders. (Id. at 3). Vitol asserted that it is commercially reasonable in the broader electricity markets for one party to perform an evaluation of a counterparty's financial health, and where it is merited, allow for unsecured credit against transaction obligations and calculating financial assurance to secure the payment of Collect-Don't-Pay Costs to BGS suppliers should not be treated differently.

Vitol urged the Board to issue an order on the LC amount and implement the LC option on an expedited basis so that the affected BGS suppliers can receive payment for the Collect-Don't-Pay Costs by December 31, 2020. Given the long duration of this significant outstanding issue and given that the 2021 BGS auction is approaching quickly, Vitol asserted that the Board can send a strong message to all stakeholders, particularly BGS suppliers, that it is serious about maintaining the integrity of the BGS Auction and will endeavor to minimize regulatory risk exposure for BGS suppliers and, ultimately, New Jersey customers. (Ibid.)

Hartree

In its comments, Hartree Partners, LP ("Hartree") indicated that requiring an incremental LC as collateral for credit that is owed to the suppliers under the BGS contracts is problematic as it suggests that a party can unilaterally change credit terms after the fact and does not support the use of it to resolve this issue. (Hartree Comments at 1). Additionally, Hartree indicated that the BGS contract already has a clearly-defined process for assessing credit of counterparties and it has worked well since the beginning of the auction process. (Ibid.).

Hartree asserted that the use of a 100% LC requirement as the metric for posting of collateral in exchange for release of the funds is more troubling as credit and default metrics by definition are based on probabilities and expectations. To assume 100% as the LC requirement is the equivalent of saying that 100% of the suppliers will default 100% of the time. (Ibid.). Hartree contended that if the Board does agree with use of an LC requirement, using industry standards for credit default calculations suggests that the LC requirement should be closer to 10% and no more than 20% of the notional exposure. Hartree stated that requiring suppliers to post a higher LC amount is problematic because of the precedent, which if expanded, will increase credit risk to suppliers and their financial exposure in future auctions. (Id. at 2).

According to Hartree, small to medium suppliers, whose participation makes the auction process a robust and competitive process, typically have to fund such credit requirements with cash and a 100% LC requirement will meaningfully increase the carry costs for suppliers, discourage them from participating in future auctions, and could likely result in lower participation and competition, and higher rates for ratepayers. (Ibid.)

BGS auctions have a clearly-demonstrated history of success in facilitating robust competition to determine market-based prices for BGS customers. However, Hartree argued that this particular issue illustrates an aspect of the auctions that warrants improvement. (Ibid.) While the proposal made by the EDCs in the 2021 BGS proceeding for future contracts to remove certain transmission and transmission-related costs from the BGS suppliers' responsibility is helpful, the immediate resolution of the Collect, Don't Pay issue, without a burdensome LC mandate, can only improve competition. (Ibid.)

ExGen

Exelon Generation Company, LLC ("ExGen") asserted that it did not agree that an LC is necessary for repayment of the Collected Amounts. To the extent that the Board believes it appropriate to secure repayment of the Collected Amounts with an LC, ExGen submitted that it is unreasonable to require posting at 100%. (ExGen Comments at 2). ExGen argued that the BGS rules, specifically Article 6 of the SMA, which includes detailed provisions related to the credit worthiness of BGS suppliers, are instructive. BGS suppliers, such as ExGen, that are Investment Grade are eligible for substantial unsecured lines of credit from the EDCs. Investment Grade ratings are based on detailed analysis by rating agencies, who look for strong financial ratios, stable cash flows and adequate liquidity. ExGen asserted that where a supplier's unsecured credit lines are larger than the Collected Amounts owed to that supplier, arguably there is no need for that supplier to post collateral. (Ibid.). Given the sensitivity around ratepayer costs, however, ExGen suggested supplementing a supplier's Investment Grade ratings and unsecured credit lines with an LC at not more than 20-25% of the Collected Amounts. (Ibid.)

TCPM

In its comments, TransCanada Power Marketing Ltd. ("TCPM") indicated that it has divested its Northeast US Power business and is no longer serving BGS load but incurred significant transmission holdback expenses, particularly during the 2017 – 2019 timeframe when last active in the New Jersey BGS market. These funds continue to be held. (TCPM Comments at 2). TCPM stated that it does not support the use of LCs for any portion of the held funds, and argued that the carrying cost for maintaining an LC is not competitive when compared with borrowing costs of replacement funds. (Ibid.) In its case, TCPM asserted that portions of these funds have been held for over three (3) years, with no resolution in sight and in its opinion, the cost of an indefinite term LC cannot be reasonably justified, particularly in light of the slim margins in the underlying BGS contracts. (Ibid.) TCPM maintained that it would favor the use of corporate guarantees to secure the return of the held funds. Although it is no longer a supplier of BGS load, TCPM utilized corporate guarantees to secure its BGS contract obligations from 2010 – 2019. TCPM noted that it seems odd that an LC would be required now that it no longer has any underlying contract obligations, particularly when an LC was never required in the past. TCPM further pointed out that guarantees continue to be accepted by the EDCs in support of BGS contract obligations and are accepted by PJM Settlement in support of New Jersey BGS load bidding and market clearing expense. (Ibid.) TCPM reiterated that while it supports the Board's ongoing efforts to find resolution on this issue, it is opposed to the use of LCs to secure the return of withheld transmission funds and urged the Board to reconsider the use of corporate guarantees. (Ibid.)

EDCs

In May 2020, the EDCs circulated a proposal to the parties to expedite the payment of the outstanding funds to BGS suppliers ("May 2020 Proposal"). The May 2020 Proposal included the creation of a "Supplier Funding Agreement," which would be a standard agreement applicable to all BGS suppliers and EDCs, the terms of which supersede certain terms and conditions of the existing BGS SMAs. Under the Supplier Funding Agreement, the EDCs would pay outstanding funds to the BGS suppliers in accordance with the following provisions:

1. Board approval of the form of Supplier Funding Agreement and its use to expedite payment of the outstanding funds to the BGS suppliers in the absence of a Final FERC Order not subject to refund;

2. Each BGS supplier would post an LC for the benefit of the relevant EDC in an amount equal to the outstanding funds to be paid to the BGS supplier;

3. The LC would be in a form approved by the EDCs. The face amount of the LC would be updated to reflect the sum of all outstanding funds delivered to the BGS supplier prior to the receipt of the relevant Final FERC Order not subject to refund;

4. The obligation to provide an LC would survive the term of the SMA until a Final FERC Order or non-appealable ruling was issued by a Federal court of competent jurisdiction. An assignee of a tranche of a BGS supplier would also be required to provide an LC; and

5. Upon receipt of the LC, the EDC would pay the outstanding funds to the relevant BGS supplier.

In their comments, the EDCs continued to recommend that the BGS suppliers provide an LC (in a form and format acceptable to the EDCs) for 100% of the outstanding funds to be paid prior to the issuance of a Final FERC Order not subject to refund. (EDC Comments at 3).

The EDCs asserted that a collateral requirement of less than 100% of the outstanding funds shifts significant risks from BGS suppliers to BGS customers. By withholding "contested" transmission-related funds pursuant to the SMA, the EDCs contended that they provide important protections to BGS customers in the event the underlying litigation requires the BGS suppliers to refund those amounts to the EDCs for the benefit of BGS customers. (Id. at 3 and 4). The EDCs maintained that the withholding of funds is critical because it mitigates the risk to customers, as it avoids the scenario where the EDC must seek recovery of those costs from a BGS supplier that may be insolvent or otherwise fails to remit the funds to the EDC. According to the EDCs, any change from the current process to one that requires the remittance of payments in advance of a Final FERC Order needs to consider and assure that customers will "get their money back" if the resolution of legal issues (and a Final FERC Order) results in such an outcome. (Id. at 3 to 4). The EDCs argued that utilizing a collateral-percentage that is less than 100% would simply shift risk to BGS customers, leaving those customers exposed should the EDC be unable to recover the outstanding funds from BGS suppliers following the resolution of a contested proceeding. (Id. at 4).

The EDCs' asserted that the May 2020 Proposal recognizes that BGS customers experience risk beyond the creditworthiness of the BGS suppliers. If it is ultimately resolved that transmission costs should have been allocated not to BGS suppliers, but to other members of PJM such as, for example only, a merchant transmission project ("MTP") where PJM will credit BGS suppliers and debit the MTP for those costs. If the MTP subsequently failed to pay for the transmission costs allocated by PJM, the EDCs stated that it is their understanding based upon discussions with PJM that the BGS suppliers would likely assume the risk of not receiving the related credit from the MTP, i.e., if PJM cannot collect the transmission costs from the MTP, such costs would not be socialized to all PJM members. (Id. at 4 to 5). The EDCs argued that this incremental risk further supports the May 2020 Proposal and amplifies the risk to customers if the Board permits the BGS suppliers to provide less than 100% collateral.

The EDCs noted that in their proposal in the 2021 BGS proceeding, the EDCs (rather than the BGS suppliers) would assume the responsibility for payment of transmission-related costs to PJM for BGS Load. If approved by the Board, the EDCs asserted that this change would cease the go-forward growth of any "collect, don't pay" amounts, and eliminate potential risk premiums in bids and risks to bidder participation. As such, the EDCs recommend that the Board consider the collateral requirements associated with the payment of the outstanding funds and the EDCs' transmission proposal in its 2021 BGS Auction filing concurrently, and opt for a collateral requirement that does not expose customers to additional risk and potential costs. (Id. at 5).

The EDCs also maintained that the May 2020 Proposal aligns the required collateral requirement with actual risk – as the majority of the outstanding funds are related to contested proceedings that are expected to result in an "all or nothing" reallocation. The largest contributor to the total outstanding funds are associated with the reallocation of costs due to the conversion of Firm Transmission Withdrawal Rights ("FTWRs") to Non-Firm Withdrawal Rights ("Non-FTWRs") for HTP and Linden VFT. This conversion resulted in a significant reallocation of transmission costs from HTP-VFT to BGS suppliers, particularly those serving PSE&G customers. The legal challenges will determine whether the conversion from FTWRs to Non-Firm FTWRs was appropriate. If the pending appeal is successful, both HTP and Linden VFT Transmission will revert to pre-conversion status, i.e., both HTP and Linden VFT will be responsible for 100% of the costs that were transferred to BGS suppliers. If the appeal is not successful, the cost allocation will not change, and BGS suppliers will remain responsible for all of the related transmission costs. As a result, the EDCs asserted that the outcome of this litigation will yield an "all or nothing" result, which the EDCs believe supports their recommendation that collateral be required in an amount equal to 100% of the outstanding funds to be delivered to BGS suppliers before a Final FERC Order not subject to refund. Establishing a percentage of collateral for any amount less than 100% would be arbitrary and inconsistent with the basic risk management concepts. (Id. at 6).

Further, the EDCs do not believe they should be required to assume risks for any costs that are unrecoverable from BGS suppliers as the EDCs are required to provide BGS for customers that are not served by Third Party Suppliers. The EDCs assume this responsibility through the annual BGS process, for which the EDCs do not receive any financial consideration and therefore should not be required to assume any risk (financial or otherwise) in the provision of BGS to customers – including risks related to the instant issue. (Id. at 6 to 7). Accordingly, the EDCs requested that any Board Order resulting hereunder clearly state that BGS customers are only owed refunds to the extent that the EDCs are able to recover such amounts from BGS suppliers. (Id. at 7).

The EDCs reiterated their belief that an LC is the most prudent form of collateral and will provide comfort that the EDCs are able to recover outstanding funds from BGS suppliers and refund those funds to BGS customers (including in cases of BGS supplier bankruptcy). The EDCs noted that the risks related to the payment of the outstanding funds prior to the issuance of a Final FERC Order, not subject to refund, are material, significant, and are incremental to and apart from the risks that customers typically experience related to BGS, which are addressed through the credit terms contained within the BGS SMA (and other credit provisions in the BGS Auction process as a whole). (Id. at 7). The EDCs maintained that the collateral requirements related to this issue should be considered independent from those specified in the BGS Agreement. The EDCs argued that if the BGS suppliers insist on payment of the outstanding funds prior to the receipt of a Final FERC Order not subject to refund (in contravention of the BGS SMA), the Board should require BGS suppliers to provide collateral that ensures BGS customers will receive their money in a timely fashion, including in the case of a BGS supplier bankruptcy. (Ibid.).

Rate Counsel

In its comments, the New Jersey Division of Rate Counsel ("Rate Counsel") indicated that it believes changes to the SMAs currently in effect should be avoided whenever possible. As stated in Rate Counsel's comments to the Board in the 2021 BGS proceeding, the sanctity of an agreement entered into by the parties should be preserved. (Rate Counsel Comments at 1). Accordingly, Rate Counsel does not believe any changes to the 2019 and 2020 SMAs are warranted. However, Rate Counsel indicated that if the Board wished to allow changes to the SMA regarding the transmission charges held by the EDCs, such amendments should not result in increased risk to BGS customers. (Ibid.)

Rate Counsel's comments addressed how the Board should use the PJM's Billing Line Item Transfer ("BLIT") tool to stop the increase in amount of transmission charges retained by the EDCs and provided recommendations regarding the appropriate level of security for the release of the transmission charges to BGS suppliers. Rate Counsel noted that its comments also underline its concerns about the additional implications that this proceeding could have on bidding in future BGS auctions. (Ibid.)

Rate Counsel noted that the Board has consistently found that Section 15.9 of the SMAS "provides a balance between the protection of ratepayers and the concerns of BGS suppliers regarding risk, while allowing the Board discretion on a case by case basis." (Id. at 2). In the Board's Order approving the 2020 BGS Auction process, the Board noted that the amount retained by the EDCs has increased over the years and directed Staff to work with the parties prior to the filing of the 2021 BGS Auction proposals in an attempt to find a resolution to this issue. (Ibid.) Rate Counsel pointed out that the parties appear to have reached a consensus regarding a solution to address tracked and retained transmission charges on a prospective basis through use of PJM's BLIT tool which allows PJM participants to transfer charges or credits to other participants electronically through their PJM billing. However, the parties were unable to reach a consensus regarding the treatment of transmission charges already tracked and retained as the BLIT tool cannot address these past charges. (Id. at 3).

Separately, Rate Counsel stated that in the EDCs' Joint Filing seeking Board approval of their proposed 2021 BGS Auction process, the EDCs have proposed to remove the transmission component of the 2021 BGS product and to amend the existing SMAs in effect by removing the transmission charge component of the 2019 and 2020 BGS product. Under the proposal, the EDCs would assume that responsibility and pay PJM directly, which would eliminate the terms of the current Section 15.9 of the SMA. (Ibid.) As noted, in its Initial and Final Comments to the Board under the 2021 BGS Auction proceeding docket, Rate Counsel agreed with the EDC proposal to alter the 2021 BGS product by removing transmission service charges, but opposed altering the existing 2019 and 2020 SMAs in the same manner. (Ibid.)

Rate Counsel asserted that changing the terms of the SMA should be undertaken carefully and applied judiciously. The SMA is posted on the BGS auction website months before the auction occurs, and bidders and interested parties rely on the terms of the agreement posted when formulating their bids or deciding whether to participate in the auction. Rate Counsel stated that potential BGS bidders are sophisticated market participants able to quantify the risks associated with the terms of the SMA in any given year before bidding and making material changes to the terms of the SMA after the auction can create uncertainty and may cause a chilling effect on future auction participation. Accordingly, Rate Counsel believes the Board should avoid allowing changes to the SMA, except under the most urgent circumstances. (Ibid.) Should the Board find that an amendment to the current policy is warranted in this case, Rate Counsel recommended that, with respect to prospective tracked and retained transmission charges, the BGS Suppliers and EDCs use the PJM BLIT tool because it operates as an automatic refund to the EDCs when the final FERC Order is issued and poses no additional risk to BGS customers. (Id. at 4).

However, with respect to the already collected and tracked transmission charges held by the EDCs, Rate Counsel noted that the PJM BLIT tool cannot transfer these charges automatically, and stated that if the Board believes that the change to existing SMAs is warranted to permit the transfer of the already retained amounts to the BGS suppliers, the Board should require a robust LC be posted by the BGS suppliers. (Ibid.) Rate Counsel recommended that the transfer of these funds be released only based upon the posting of surety that covers the entire amount being released to BGS Suppliers stating that anything less than surety covering the full amount forces BGS customers to assume additional risk without any corresponding benefit. (Ibid.)

Should the Board wish to pass through the transmission charges currently held by the EDCs, Rate Counsel recommended that an LC covering 100% of the total withheld funds in question be posted by the BGS suppliers to secure their obligation in the event that a future court decision reverses a FERC decision and requires return of some or all of the transmission charges to New Jersey BGS customers. Rate Counsel also recommended that the security of funds be by an LC and not a novation agreement, which was an alternative discussed among parties regarding this issue. (Ibid.)

Rate Counsel argued that an LC for the full value of the BGS suppliers' obligation is appropriate under the circumstances since BGS customers are at risk in the event that a supplier defaults with PJM, goes bankrupt, or otherwise does not return the full amount of the funds following the reversal of a prior FERC decision. Under the current terms of the SMAs, BGS customers do not face the same level of risk regarding these funds, because the EDCs collected the full amount and are withholding payments until a final FERC Order. (Ibid.)

Rate Counsel maintained that it does not see a reasonable basis to increase the risk to BGS customers under these circumstances or a reason why the EDCs and ultimately BGS customers should bear the additional burden of pursuing the return of funding from BGS suppliers in the future. Imposing additional risk on BGS customers is inconsistent with the Board's finding that the "Collect-Don't Pay" policy "strikes an appropriate balance between protecting ratepayers and the concerns of BGS suppliers." Allowing its removal upsets that balance and exposes BGS customers to more risk and would undermine the integrity of the SMA and regulatory certainty of the SMA terms in future BGS auctions as bidders would not be able to confidently rely on the form of SMA posted before the auction. (Id. at 5).

Further, Rate Counsel expressed concern that an EDC may not be in the best position to pursue the recovery of any amounts owed by a supplier as any legal action would involve additional costs which the EDCs would most likely seek to have compensated by BGS customers. (Ibid.) Likewise, an out-of-court settlement with the defaulting supplier, the most common litigation outcome, would mean BGS customers only receive a fraction of the amount owed and the terms of the existing SMAs do not specifically address such a scenario and therefore may be ill-suited to resolve such an issue, if it arises. Additionally, since they are not a party to the SMA, BGS customers appear to have limited recourse to be made whole. (Ibid.) Therefore, Rate Counsel argued that allowing the "Collect, Don't Pay" funds to be released without a security requirement covering the full value, increases the possibility that BGS customers will be left short-changed. (Ibid.)

Additionally, Rate Counsel emphasized that it objects to amending existing SMAs to release amounts already collected by the EDCs, but stated that if the Board decided to permit amendments to the SMA which would release the collected transmission charges to BGS Suppliers, it should be contingent on consideration and benefit to BGS customers in exchange. (Ibid.)

Rate Counsel argued that the discussions among the parties have not presented any compelling reason why BGS customers should bear the risk of those retained, transmission charge funds being less than fully secured, and that the only reasoning advanced for changes to existing SMAs is the anticipated benefits to competitive bidding in future BGS auctions. However, Rate Counsel believes that concerns about bidder participation in future auctions have already been addressed by the EDCs Joint Filing regarding the 2021 BGS Auction, which removes the responsibility of transmission charges from the BGS product. Rate Counsel reiterated that it is supportive of this change going forward and believes that the concerns about the effect of the "Collect, Don't Pay" policy on future BGS auctions does not apply to existing contracts, because the bids have already been accepted and the contracts awarded. Accordingly, Rate Counsel believes that choosing to amend existing contracts provides no additional benefit to BGS customers. (Id. at 6).

Additionally, changing existing contracts could have a chilling effect on bidders and cause regulatory uncertainty for future auctions, if potential bidders perceive the SMA as a document that could easily be amended retroactively. The number of parties relying upon the form of SMA is not limited solely to the winning bidders as potential bidders and losing bidders also rely on the terms of the SMA when deciding whether to participate in the auction or formulating their bids. Similarly, the BGS Suppliers were aware of the SMA terms when choosing to bid in the auction and accepted those SMA terms when they signed the contracts shortly after their bids were accepted. (Ibid.) Rate Counsel further noted that the Board specifically rejected removing or changing the "Collect-Don't Pay" provision, Section 15.9 of the SMA, and instead found that the provision "strikes an appropriate balance between protecting ratepayers and the concerns of BGS suppliers. Allowing the removal of the protections contained in Section 15.9 of the SMA upsets that balance and unnecessarily exposes BGS customers to more risk. (Ibid.)

DISCUSSION AND FINDING

In the Board's Order dated December 2, 2003, Docket No. EO03050394, the Board found that the pass through of any changes in the NITS charge and other charges associated with the FERC-approved OATT, is appropriate. Furthermore, by subsequent Orders, the Board approved Section 15.9 of the SMAs as filed by the EDCs which requires that the EDCs file for Board approval of any increases or decreases in their transmission charges that have been approved by FERC. The SMAs also authorize the EDCs to adjust the rates paid to suppliers for FERC-approved rates and increases to Firm Transmission Services once approved by the Board. The Board Orders further require that the EDCs review and verify any requested FERC authorized increases.

The Board's December 22, 2006 Order at page 12 provides as follows:

> "Upon receipt of Board approval for the increase in the rates charged to BGS Customers, the EDCs would begin collecting the increase from BGS Customers, tracking that portion of the rates charged to BGS Customers attributable to the rate increase, and retaining such tracked amounts for the ultimate benefit of the BGS Suppliers. Upon approval by the FERC of a proposed rate increase, in a Final FERC Order not subject to refund, the EDCs would increase, by the amount approved by the Board, the BGS-FP auction price paid to BGS-FP Suppliers, and the BGS-CIEP Transmission Charge paid to BGS-CIEP Suppliers, and would pay each BGS Supplier, in proportion to its BGS Supplier Responsibility Share, the amounts tracked and retained for the benefit of BGS Suppliers until the date final FERC approval was received."

In the Board's Order dated November 21, 2017 in Docket No. ER17040335, the Board found that the current construct provides a balance between the protection of ratepayers and the concerns of BGS suppliers regarding risk, while allowing the Board discretion on a case by case basis. The Board notes that at the time of its decisions in the Section 15.9 Orders, the length of the delays and backlog at FERC could not have been anticipated. The Board continues to monitor the delays at FERC and the uncertainty regarding the timing of resolution of the FERC Orders. In the November 2019 Order, the Board expressed concern about the continued delays at FERC and the growing backlog of pending matters. The Board considered all comments received related to this issue.

The Board notes, that as pointed out by several commenters in a joint filing dated July 1, 2020, the EDCs proposed two (2) changes to the BGS product with respect to transmission procurement.[10] In that filing, the EDCs recommended that the Board approve the transfer of the obligation for transmission and transmission-related costs from the BGS Supplier to the EDCs in the proposed 2021 BGS SMA. The EDCs also recommended that the existing SMA contracts, entered into for the 2018, 2019 and 2020 BGS Auctions, be amended so future transmission obligations are transferred from the winning BGS Supplier to the EDCs. Based upon the EDCs' proposal, the EDCs would assume transmission payment obligations to PJM through a specific transmission charge on behalf of BGS customers and then directly charge those customers. The Board notes that this specific proposal, which would address transmission cost obligations going forward, is addressed in BPU Docket No. ER20030190.

The Board **HEREBY FINDS** that given the continued delays in issuing Final Orders at FERC it is reasonable to release the funds currently held by the EDCs to BGS suppliers once BGS suppliers have submitted an LC on mutually agreeable terms to cover 50% of their owed amounts. Based upon the comments submitted, the 50% LC will provide a balance between remedying the BGS suppliers' concerns and protecting ratepayers. Any such LC can be renewable, but credit must be in place at all times. A full 100% LC would not be commercially reasonable in this instance given the fact that carrying costs on the LC could possibly exceed the costs of simply borrowing the same amount or the returns that could be earned on such capital. Moreover, a collateral amount of less than full value acknowledges that bidders are not at 100% risk of default and the suppliers have been previously vetted as commercially viable entities via their participation in the

[10] In the Matter of the Provision of Basic Generation Service (BGS) for the Period Beginning June 1, 2021, BPU Docket No. ER20030190.

BGS Auction. A 50% LC mitigates these issues while ensuring that there is sufficient collateral set aside should a supplier not fulfill their obligations to return any refunded amounts.

The Board **HEREBY DIRECTS** the EDCs to release the funds held for each supplier upon receipt of a satisfactory LC to secure the obligation. Any such LC should include an explicit agreement on remedies should a supplier fail to maintain appropriate credit; fail to refund as required, or if final refund amounts are different from disbursed amounts.

The Board emphasizes that this decision is based upon the facts and circumstances specific to this issue and does not have a precedential effect.

The EDCs' rates remain subject to audit by the Board. This Decision and Order does not preclude the Board from taking any actions deemed to be appropriate as a result of any Board audit.

The effective date of this Order is November 28, 2020.

DATED: November 18, 2020

BOARD OF PUBLIC UTILITIES
BY:

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ROBERT M. GORDON
COMMISSIONER

ATTEST:

AIDA CAMACHO-WELCH
SECRETARY

Agenda Date: 11/18/20
Agenda Item: 2E

IN THE MATTER OF THE PROVISION OF BASIC GENERATION SERVICE AND COMPLIANCE TARIFF FILING REFLECTING CHANGES TO SCHEDULE 12 CHARGES IN PJM OPEN ACCESS TRANSMISSION TARIFF

BPU DOCKET NOS. ER17050499, ER17060671, ER17070752, ER17111150, ER17121278, ER18020157, ER18020158, ER18060656, ER18070711, ER18121290, ER19060763, ER19121509, ER19121540

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