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VIA ELECTRONIC MAIL
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Aida Camacho-Welch
Secretary to the Board
Board of Public Utilities
44 South Clinton Avenue, 1st Floor
P.O. Box 350
Trenton, NJ 08625-0350

RE: In the Matter of the Petition of Atlantic City Electric Company for Approval of the Modification of Power Purchase Agreements with Chambers Cogeneration Limited Partnership and Logan Generating Company, L.P.
BPU Docket No. EM21121253

Dear Secretary Camacho-Welch:

On behalf of Atlantic City Electric Company (“ACE” or the “Company”), please accept this Letter Brief in lieu of more formal Reply Comments.¹ ACE has had no opposition to its request for expedited approval of the modification of the Power Purchase Agreements (“PPAs”) with Chambers Cogeneration Limited Partnership (“Chambers”) and Logan Generating Company (“Logan”) (the “Petition”). The Petition pending before the Board of Public Utilities (“Board”) will save ratepayers millions of dollars and close the last two coal-fired generation units in the State of New Jersey. Thus, ACE respectfully requests action to approve the transaction, without condition, and by Order effective immediately, at the next meeting of the Board.

I. The Company’s Request Is Unopposed.

ACE has had no opposition to its request for approval of modification of the PPAs, and environmental groups actively support the Petition. On February 7, 2022, Chambers and Logan submitted correspondence indicating their support of the timely approval of the transaction. On February 9, 2022, Sierra Club, 350NJ-Rockland, and Environment New Jersey submitted joint

¹ Consistent with the Order issued in connection with *In the Matter of the New Jersey Board of Public Utilities’ Response to the COVID-19 Pandemic for a Temporary Waiver of Requirements for Certain Non-Essential Obligations*, BPU Docket No. EO20030254, Order dated March 19, 2020, this document is being electronically filed with the Secretary of the Board of Public Utilities and the New Jersey Division of Rate Counsel, with copies to the full Service List. No paper copies will follow.

Comments in support of the transaction. On March 7, 2022, the New Jersey Division of Rate Counsel (“Rate Counsel”) submitted Comments indicating their non-opposition to modification of the PPAs. Although Rate Counsel expresses some reservations in its filing, those concerns do not rise to the level of opposition. Thus, the Petition is pending before the Board, unopposed.

It is ACE’s position that the lack of opposition arises, in part, from the efforts the Company has taken to facilitate the review by Board Staff and Rate Counsel. Recognizing that time was of the essence, the Company received the support of Chambers and Logan to file Term Sheets, which would have otherwise been part of confidential settlement negotiations.² As stated in the Petition, these Term Sheets were submitted while the settlement agreements were still being finalized for the express purpose of providing Board Staff and Rate Counsel with a jump start on their review.³ Once executed, the settlement agreements were immediately filed with the Board.⁴ The Company also participated in weekly, and then bi-weekly, discovery conferences with Board Staff and Rate Counsel. In addition, the Company responded to 75 discovery requests, often in less time than the 15 calendar days afforded by the regulations. Although neither Logan nor Chambers moved to intervene in the proceeding, which is consistent with past precedent in such proceedings before the Board,⁵ the final settlement agreements included a provision requiring that they would “reasonably cooperate with ACE in preparing the Application and obtaining the BPU approval.”⁶ Where information sought was unavailable to the Company, ACE obtained responses from Starwood Energy Group Global, Inc. (“Starwood”), investment affiliates of which are the majority owners of both Logan and Chambers,⁷ to discovery requests.⁸ Representatives for Starwood also participated in the discovery conferences, as support for the Company. ACE made these efforts to ease the expedited review of the PPA modifications, to provide needed information, and to ensure an appropriate outcome for the benefit of ratepayers.

² See Petition, Exhibits G and H.

³ See Petition, ¶ 17.

⁴ See Petition, Exhibits I and J.

⁵ See e.g. Order, *IMO Application of Jersey Central Power & Light Co. for Approval of the Termination of the Power Purchase Agreement Currently Existing Between It and Prime Energy Limited Partnership and the Execution of a New Power Purchase Agreement with Prime Power Sales LLC*, Docket No. EM05040314 (May 25, 2005) (not listing Prime Power Sales as a party to the proceeding); see also Order, *IMO Petition of Atlantic City Electric Company for Approval of Agreement to Terminate its Power Purchase Agreement with Pedricktown Cogeneration Limited Partnership*, Docket No. EE99090685 (Nov. 10, 1999) (not listing Pedricktown Cogeneration as a party to the proceeding).

⁶ See Petition, Exhibit I, ¶ 2(a) and Exhibit J, ¶ 2(a).

⁷ An investment affiliate of Starwood signed an agreement with Atlantic Power to purchase its interest in Chambers, following which both Chambers and Logan would be 100% owned by investment affiliates of Starwood. That agreement was approved by the Federal Energy Regulatory Commission on Feb. 2, 2022, in Docket No. EC22-25.

⁸ At page 3, Rate Counsel indicates that the discovery responses were “hearsay,” which seems to suggest that Rate Counsel took issue with the Company’s responses. Under N.J.A.C. 1:1-10.1(a)-(b), the purpose of discovery is “to facilitate the disposition of cases” and admissibility as evidence is not a basis for objection to discovery. No discovery has been admitted as evidence in this proceeding, but, if it were, the evidence rules at N.J.A.C. 1:1-15.5(a) plainly state that “hearsay evidence shall be admissible.” ACE could have indicated that the information requested was not in the Company’s possession, but the Company and Starwood choose to cooperate with Board Staff and Rate Counsel by responding to all questions presented, facilitating the fair and timely disposition of this case.

II. The Company's Request Fully Satisfies the Standard of Review: No Further Conditions are Appropriate.

The applicable standard of review, as stated in the Petition and restated in Rate Counsel's Comments, is found in N.J.S.A. 48:3-61(l)(1). Pursuant to that authority, the Board may approve the renegotiation, restructuring, and/or termination of existing long-term non-utility generation ("NUG") contracts where such actions "will result in a substantial reduction in the total stranded costs of the utility, which resulting savings will be passed through to ratepayers on a full and timely basis."⁹ Rate Counsel references the statutory language prohibiting further modification, except as requested jointly by the parties to the contracts, which would be ACE, Logan, and Chambers.¹⁰ The law also provides that the Company shall be permitted cost recovery for the contracts.¹¹

Although Rate Counsel does not oppose the Company's Petition, it did offer its "observations and assessment" of the proposed PPA modifications.¹² One such observation is that, "since the proposed payment stream for the two facilities is fixed for the remainder of the current PPA contract terms, if energy prices and capacity prices increase above the ICF projections [used by the Company], then the incremental revenues would not offset the fixed payments."¹³ "In other words," Rate Counsel observes, "if PJM prices rise too far beyond the ICF projections, ACE customers would be better financially had ACE simply sold the units' capacity and energy in the PJM markets."¹⁴ Elsewhere, "Rate Counsel recognize[s] that actual energy and capacity prices may be different than the ICF forecasts."¹⁵ At the time of filing, ACE candidly acknowledged that "the transaction structure, with a payment schedule that will not move, does present some risk. However, this structure can also be an opportunity for gain if the capacity clearing prices, and energy prices are lower than what the Company modeled for this transaction."¹⁶ To evaluate the Locational Marginal Prices ("LMPs") or energy prices produced by ICF's model, "ACE leveraged the Company's internal price curve to compare to forward LMPs and found them to be consistent, reflective of market conditions, and reasonable as of September 2021."¹⁷ The Company further presented testimony on the reasonableness of ICF's capacity pricing assumptions.¹⁸ In its own assessment, Rate Counsel also concludes that it "does not believe that ICF's forecasts are unreasonable."¹⁹

⁹ N.J.S.A. 48:3-61(l)(1).

¹⁰ N.J.S.A. 48:3-61(l)(4).

¹¹ N.J.S.A. 48:3-61(a)(3). As stated in the Petition, the Company intends to address cost recovery through its well-established annual NGC reconciliation/update filing process, pursuant to which the Company currently recovers the above-market costs of the Chambers and Logan NUG agreements. Petition, ¶ 33. ACE's current NGC filing is docketed as BPU Docket No. ER22020038.

¹² Rate Counsel Comments at 10.

¹³ *Id.* at 12.

¹⁴ *Id.*

¹⁵ *Id.* at 14.

¹⁶ Direct Testimony of Mario Giovannini at 12:16-19.

¹⁷ *Id.* at 10:2-4.

¹⁸ *Id.* at 10:6-16.

¹⁹ *Id.* at 14.

Notwithstanding its conclusion that the Company's modeling was reasonable, Rate Counsel attempts to retain the right to later claim that the modified PPAs are not just and reasonable.²⁰ For example, Rate Counsel asserts that "there is some risk that the full \$28 million in ratepayer benefits will not be realized if actual energy and/or capacity prices are higher than the ICF forecasted prices."²¹ Rate Counsel also claims "this amount of savings is not guaranteed." "For this reason, Rate Counsel recommends that the Board require ACE to track how much revenue would have been earned had ACE continued to sell capacity and energy in the PJM markets rather than enter these agreements."²²

Rate Counsel cannot attach strings to this transaction in the form of additional reporting to later confirm, to Rate Counsel's satisfaction, "the true financial value of this transaction."²³ By not opposing the PPA modifications,²⁴ for which the Company seeks Board approval pursuant N.J.S.A. 48:3-61(l)(1), Rate Counsel has effectively *conceded* to the Company's position that the proposed PPA modifications "'will result in a substantial reduction in the total stranded costs of the utility."²⁵ If Rate Counsel truly believed that the reduction in total stranded costs "remains to be seen,"²⁶ it could have opposed the transaction. Here, Rate Counsel chose not to oppose. The Company also submits that it is not Rate Counsel's role to "confirm that the payments are just and reasonable."²⁷ Rate Counsel is a party to this proceeding, not the final arbiter. If the contracts are approved by the Board, ACE is permitted cost recovery.²⁸ With that understanding, the Company urges the Board to recognize Rate Counsel's alignment with the Company's position; the parties to this proceeding are not opposed.

²⁰ Rate Counsel claims that it "cannot confirm that the payments required under the Settlement Agreements are just and reasonable." The Company finds this to be a curious argument given Rate Counsel's acknowledgement of the reasonableness of the forecast used by ACE, as well as Rate Counsel's failure to identify any deficiencies with the manner in which the Company arrived at the proposed PPA modifications.

²¹ Rate Counsel Comments at 13.

²² *Id.*

²³ *Id.*

²⁴ *Id.* at 14.

²⁵ *Id.* at 10 and 15 (quoting N.J.S.A. 48:3-61(l)(1)) (emphasis in Rate Counsel Comments).

²⁶ *Id.* at 15. The Company notes that Rate Counsel has supported buyouts of PPAs with far less substantial ratepayer benefits. For example, in Docket No. EM05121072, Rate Counsel stipulated a settlement with Rockland Electric Company enabling it to terminate a PPA with two years remaining on the contract term that achieved approximately \$250,000 in customer savings.

²⁷ *Id.* at 14.

²⁸ N.J.S.A. 48:3-61(a)(3).

Furthermore, conditioning the Board's approval on additional reporting, as Rate Counsel suggests, could undermine the transaction for no good reason.²⁹ It is unlikely that reporting on this data will "assist in negotiating future agreements," as ACE's NUG contracts are the last. Rate Counsel appears to recognize this fact by later abandoning that claim when it concludes that "[p]roper reporting will allow the Board to at least see if the predictions were accurate."³⁰ Again, if approved by the Board, the Company is permitted to recover the costs for the proposed PPA modifications regardless of later claims about the accuracy of the predictions currently deemed reasonable by both Rate Counsel and the Company.

Conditioning approval of the Petition on the provision of such an analysis for the purpose of satisfying Rate Counsel's curiosity is both difficult and dangerous. The capacity component comprises the majority of customer payments under the existing PPA agreements. The Company mitigates these above-market capacity costs by offering the units' capacity into PJM's capacity market. Rate Counsel does not account for the risk in monetizing capacity revenue at PJM, as penalties for non-performance could eliminate some, if not all, capacity revenue. Even if capacity prices do increase compared to ICF's reasonable projection, the capacity performance risk is still there and should not be ignored in such an analysis. As to the energy component, market settlement amounts presented in the modified PPAs were based on a set of assumptions at a given moment in time. These assumptions include unit dispatch costs, outages, environmental costs, and other factors that impact the projected monthly MWH output of the units. On the other hand, the energy costs under the existing PPAs are *not* static. Power prices moving higher compared to ICF's reasonable projection does not guarantee that customers would have been better off had the existing agreements continued. Cost can and does also rise.³¹ In the end, if the Board approves the proposed transaction, it is impossible to know the actual dispatch of these plants had the contracts reached their term. Therefore, the Company urges the Board not to condition the approval on such challenging reporting, which, among other things, runs the risk of undoing a transaction acknowledged as providing substantial financial benefits to ratepayers, as well as environmental benefits.³²

²⁹ As in any other stipulated settlements submitted to the Board for approval, ACE, Logan, and Chambers can renegotiate or terminate the pending settlement agreements upon the issuance of a BPU order with conditions or modifications. See Exhibit I, ¶ 2(b) and Exhibit J, ¶ 2(b); see e.g. Order, *IMO Combined and Consolidated Application of Atlantic City Electric Company to Adjust the Level of its 'Rider RGGI' Rate Associated with its Legacy Solar Renewable Certificate ("SREC I") Financing Program, its Successor Solar Renewable Energy Certificate ("SREC II") Financing Program, and its Solar Transition Incentive*, Docket No. ER21070980 (Feb. 23, 2022) (approving a settlement among BPU Staff and Rate Counsel including paragraph 13, which allows any party, including Rate Counsel, to not proceed with the settlement if "any particular provision of this Stipulation is not accepted and approved in its entirety by the Board" or if the Stipulation is not adopted in its entirety).

³⁰ Rate Counsel Comments at 15.

³¹ Recently, the units have experienced coal price increases, longer outages, and higher environmental costs that increased their marginal cost to PJM. These factors could cut into any potential margin offered by higher energy prices. Ultimately, it is impossible to know what would have been.

³² Although the Company opposes the reporting conditions sought by Rate Counsel, the Company has been transparent with its data inputs and assumptions throughout the discovery process. The Company is willing to provide what data it has available to inform a Rate Counsel analysis but does so within reason and without conceding the very real concerns associated with the data and analysis stated above. Ultimately, the Company maintains that the data analysis will not provide the "true" evaluation that Rate Counsel requests.

III. ACE's Request Will End Coal-Fired Generation in New Jersey.

Simply stated, the Petition enables the Board to bring coal-fired generation in New Jersey to an end. As demonstrated by the various policy documents issued by the Murphy Administration, the end of coal-fired generation is important to the State.³³ Rate Counsel contends that the modified PPAs would “accelerate cessation of coal-fired generation in New Jersey,”³⁴ which is to incorrectly suggest that use of coal would have otherwise immediately stopped at the end of the existing PPAs. Rate Counsel has no foundation for that assumption.³⁵ But for the settlement agreements being reviewed in this matter, Chambers and Logan could continue with coal combustion well beyond the term of the PPA.³⁶ Indeed, Logan and Chambers’ permanent halt of coal-fired electric generation was a negotiated term in the settlement agreements, offered in exchange for the fixed payments.³⁷ The settlement agreements even include terms requiring Logan and Chambers to cause any future owners of the units or the associated real property not to combust coal at the units or at the associated real property.³⁸ Thus, it is only because ACE has successfully negotiated the settlement agreements with Logan and Chambers that the parties now have certainty that coal-fired generation will end in the State of New Jersey.

IV. The Settlement Agreements Anticipate a Final Decision

Rate Counsel is correct to acknowledge that a final Board Order is a condition precedent to closing of these contracts.³⁹ Assuming issuance of a Board Order on March 23, 2022, the Company is willing to accept a letter from Rate Counsel indicating that it would not appeal the Order, if that is Rate Counsel’s position. If Rate Counsel does not timely consent to not appealing the Order, effectively delaying the finality of this proceeding despite its non-opposition, the Company will explore other reasonable options to ensure that ratepayers receive the benefits of these PPA modifications. After at least a decade of good faith negotiations to modify these PPAs, and where Rate Counsel has found no cause for opposition, the Company hopes that Rate Counsel sees no reason to delay finality.

³³ At page 14, Rate Counsel asserts that “the BPU regulates utility rates not air emissions, and on that basis Rate Counsel believes there is sufficient reason to not oppose this transaction.” The Company acknowledges and accepts Rate Counsel’s willingness to align with the Company by not opposing the transaction. Although ACE questions Rate Counsel’s very limited interpretation of the Board’s regulatory authority, the Company would also accept approval based solely on N.J.S.A. 48:3-61(l)(1).

³⁴ Rate Counsel Comments at 2.

³⁵ At page 11, Rate Counsel cites discovery response S-ACE-27, which asked the Company to estimate the total volume of coal that would be used over the next three years in the absence of the transaction. That question and response does not support the assumption that Logan and Chambers would have simply stopped operating their coal units without the PPAs.

³⁶ Petition, ¶ 19.

³⁷ Petition, Exhibit G, Plant Operations; Petition, Exhibit H, Plant Operations; Petition, Exhibit I, ¶ 9(b)-(c); Petition Exhibit J, ¶ 9(b)-(c).

³⁸ Petition, Exhibit I, ¶ 9(c); Petition, Exhibit J, ¶ 9(c).

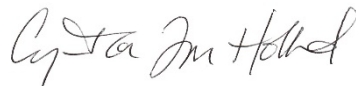
³⁹ Rate Counsel Comments at 4.

V. Conclusion

In conclusion, ACE respectfully requests that the Board approve the transaction, without condition and by Order effective immediately, at the next meeting. Rate Counsel does not oppose the Company's position that Board approval is appropriate here. Other entities, including environmental advocates and the unit owners, have submitted comments in support of the transaction due to its benefits to customers and the environment. Where Rate Counsel appears to request conditions to the approval, the Company urges the Board to recognize this request as unnecessary and likely to jeopardize those benefits by undermining the pending transaction. Last, if the Board acts at its next open public meeting, the Company will seek finality in this proceeding, ideally with Rate Counsel consenting that it will not appeal, but by other appropriate means, if and as necessary, to ensure that ratepayers receive the benefit of these modified PPAs.

The Company appreciates the cooperation and all courtesies extended in this proceeding.

Respectfully submitted,



Cynthia L.M. Holland
An Attorney at Law of the
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cc: Service List

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BPU Docket No. EM21121253

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