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August 2, 2023

Via Electronic Mail

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**Re: I/M/O the New Jersey Board of Public Utilities' Response
to the COVID-19 Pandemic
BPU Docket No. AO20060471**

Dear Secretary Golden:

Please accept for filing this letter brief of the New Jersey Division of Rate Counsel ("Rate Counsel") in further opposition to the motion for reconsideration of the Board's June 7, 2023 Order, filed by Atlantic City Electric Company ("ACE") on June 22, 2023. Consistent with the March 19, 2020 Order of the New Jersey Board of Public Utilities ("BPU" or the "Board") in *I/M/O 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. 20030254, copies of this letter brief are being filed with each person on the service list by electronic mail. No paper copies will follow. **Please acknowledge receipt of this letter brief.** Thank you for your consideration and attention to this matter.

PRELIMINARY STATEMENT

ACE's July 19th reply brief and PSE&G's July 18th letter brief, both in support of ACE's June 22nd motion for reconsideration of the Board's June 7th Order, are impermissible filings far out of time. The Board rule governing motions for reconsideration does not provide for a party to file a reply, so ACE had no basis to file its July 19th reply brief. Neither party has alleged any error of law or fact in the Board's June 7th Order. Instead, the positions of these utilities are inconsistent with governing Board rules, Orders and statutes. These filings are merely an attempt by ACE and PSE&G to avoid Board review of their claims for incremental costs related to the COVID-19 pandemic and a collateral attack on their pending NGC/SBC filings. Since they lack any legal or factual support, ACE's and PSE&G's July 18th and 19th filings should be rejected and ACE's June 22nd motion for reconsideration should be denied.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

The Board issued an Order over three years ago, on July 2, 2020, setting forth the procedure for addressing the utilities' incremental costs arising from the COVID-19 pandemic. The utilities were authorized to establish a regulatory asset to account for their prudently incurred incremental costs, and to request recovery of those incremental amounts through a filing either in this COVID-19 proceeding or in a base rate case.¹ This process would enable the Board to review the prudence of each utility's claims, and to exercise its discretionary authority to determine the types and amounts of each claim that are recoverable. That July 2, 2020 Board Order was clear and unambiguous about the procedures it established.

¹ I/M/O the New Jersey Board of Public Utilities' Response to the COVID-19 Pandemic, BPU Docket No. AO20060471, July 2, 2020 ("July 2020 Order")

The Board's June 7, 2023 Order in this proceeding stated that all filings for cost recovery of COVID-19 regulatory asset balances will be evaluated on a case-by-case basis, and reiterated that those claims may be presented as part of a base rate case or a separate proceeding. That Order did not decide the types or amounts of cost claims that a utility may recover. Instead, it listed the required elements of a cost recovery proposal if a utility chooses to request recovery of COVID-19 regulatory asset balances independent of a base rate case. The June 7, 2023 Board Order did not change the two available options for a utility to request recovery of its incremental COVID-related cost claims.

On June 22nd, ACE moved for Board reconsideration of the June 7, 2023 Order. ACE's motion asked the Board to change the portion of the June 7, 2023 Order that reiterated the procedure for cost recovery of COVID-19 regulatory asset balances set forth in the Board's July 2, 2020 Order. The July 2, 2020 Order authorized the utilities to establish a regulatory asset to account for their prudently incurred incremental costs, and to request recovery of those incremental amounts through a filing either in this COVID-19 proceeding or in a base rate case. The June 7, 2023 Order did not change that cost recovery procedure. Rate Counsel filed its opposition to ACE's June 22nd motion five days later, on June 27th. Rate Counsel files the current letter brief in further opposition to ACE's June 22nd motion for reconsideration.

On July 18th, three weeks after Rate Counsel filed its opposition brief, PSE&G filed a letter brief purportedly in response to ACE's June 22 motion. PSE&G's filing was 26 days after ACE's motion and 21 days after Rate Counsel's response. The next day, on July 19, ACE filed a "reply" brief. The Board rules governing a motion for reconsideration do not contemplate a

reply brief. N.J.A.C. 14:1-8.6 and -8.7. ACE's filing was 27 days after ACE's motion and 22 days after Rate Counsel's response.

DISCUSSION

For procedural and substantive reasons, the Board should reject both PSE&G's July 18th letter brief and ACE's July 19th reply brief, and deny ACE's June 22nd motion for reconsideration.

1. Both PSE&G's July 18th letter brief and ACE's July 19th reply brief should be rejected as untimely.

The Board rules governing a motion for reconsideration are found at N.J.A.C. 14:1-8.6 and N.J.A.C. 14:1-8.7. A party may move for reconsideration within 15 days of a Board Order, N.J.A.C. 14:1-8.6(a), and an answer to a motion for reconsideration must be brought within 10 days. N.J.A.C. 14:1-8.7(b).

Board rules governing a motion for reconsideration do not contemplate a reply brief. See N.J.A.C. 14:1-8.6 and -8.7. For this reason, it is unclear what legal basis either PSE&G or ACE had to file any briefs. Even if there were to authority to file briefs, the failure to file an answer to a motion within ten days shall be deemed to be a waiver of any objection to the granting of the motion. N.J.A.C. 14:1-8.7(b). Rate Counsel did not file a motion, so this rule is illustrative at best. Nonetheless, under that rule, both PSE&G's July 18th letter brief and ACE's July 19th reply brief were untimely. Accordingly, PSE&G and ACE had no right to file and clearly filed

out of time, having waived their objections to Rate Counsel response and their filings should be denied.²

Moreover, as explained in Rate Counsel's June 27th opposition to ACE's motion, ACE's June 22nd motion in fact asked the Board to modify its July 2, 2020 Order in this matter. The July 2, 2020 Order authorized the utilities to establish a regulatory asset to account for their prudently incurred incremental costs, and to request recovery of those incremental amounts through a filing either in this COVID-19 proceeding or in a base rate case. ACE's motion asked the Board to "confirm" that ACE may request recovery of its incremental COVID-related costs through its SBC filings. PSE&G's July 18th filing requested the same relief. However, neither the Board's June 7, 2023 Order nor its July 2, 2020 Order authorized the electric utilities to request recovery of their incremental COVID-related costs through their SBC filings. A motion asking the Board to reconsider the process it established for handling incremental COVID-related cost claims should have been filed by July 17, 2020.

As discussed below, the stipulation addressing PSE&G's COVID-19 related costs in its 2020 SBC filing did not alter the July 2, 2020 Board Order or establish a precedent for other electric utilities, and did not estop the Board from exercising its statutory authority over SBC filings under N.J.S.A. 48:3-60.

² If the Board does not grant ACE's motion for reconsideration within 60 days, i.e., by August 21, it will be deemed denied. N.J.A.C. 14:1-8.7(c).

2. ACE's June 22nd motion and July 19th reply brief, and PSE&G's July 18th letter brief, do not comply with Board rules governing motions for reconsideration and should be rejected.

Board rules require that a motion for reconsideration “shall state in separately numbered paragraphs the alleged errors of law or fact relied upon.” N.J.A.C. 14:1-8.6(a)1. Neither ACE nor PSE&G has complied with this rule, or even attempted to show any “error of law or fact” in the Board’s June 7, 2023 or July 2, 2020 Orders.

Board rules also require that, if a party seeks leave to “introduce additional evidence” to support its motion for reconsideration, “the evidence to be adduced shall be stated briefly together with reasons for failure to previously adduce said evidence.” N.J.A.C. 14:1-8.6(a)2. Neither ACE nor PSE&G has complied with this rule either.

Neither ACE nor PSE&G has identified any errors of law or fact by the Board, or any newly discovered evidence of such Board errors, to support reconsideration, or any reason for the Board to ignore its own rules governing a motion for reconsideration. ACE’s June 22nd motion, as well as the ACE and PSE&G filings of July 18th and July 19th, are untimely and do not meet the requirements for reconsideration under N.J.A.C. 14:1-8.6(a). Neither ACE nor PSE&G has presented any errors of law or fact by the Board, or any reason to consider their untimely filings. The ACE and PSE&G filings of July 18th and July 19th should be rejected, and ACE’s June 22nd motion should be denied.

3. ACE's June 22nd motion and July 19th reply brief, and PSE&G's July 18th letter brief, are without merit and should be rejected.

If the Board decides to waive its own rules governing motions for reconsideration, and consider the merits of ACE's and PSE&G's out of time filings, the contents of those documents provide ample basis for their dismissal. ACE's June 22nd motion, and the PSE&G and ACE filings on July 18th and July 19th, provide no basis for the Board to reconsider its July 2, 2020 Order setting forth the procedure for parties to request recovery of their incremental uncollectibles and other expenses related to the COVID-19 pandemic. ACE and PSE&G merely repeat their dissatisfaction with the cost recovery procedures set by the Board. The reports and comments solicited by the Board in the COVID-19 proceeding reflected the wide range of parties' opinions; they did not effect a change in the July 2, 2020 Board Order. ACE and PSE&G merely reiterate their refusal to comply with that Order.³

The Board's June 7, 2023 Order in this proceeding reiterated that all claims for cost recovery of COVID-19 regulatory asset balances may be presented as part of a base rate case or a separate proceeding. That Order did not decide the types or amounts of cost claims that a utility may recover, but stated that those filings will be evaluated on a case-by-case basis. The June 7, 2023 Order listed the required elements of the filing if a utility requests recovery of COVID-19 regulatory asset balances independent of a base rate case. The June 7, 2023 Board Order did not change the two available options for a utility to request recovery of its incremental COVID-related cost claims.

³ ACE has filed a base rate case but has not requested its incremental COVID-related costs in that proceeding. I/M/O The Petition of Atlantic City Electric Company for Approval of Amendments to its Tariff to Provide for an Increase in Rates and Charges for Electric Service Pursuant to N.J.S.A. 48:2-21 and N.J.S.A. 48:2-21.1, and for other Appropriate Relief (2/2023), BPU Docket No. ER23020091.

ACE's June 22nd motion, and the ACE and PSE&G filings on July 18th and July 19th merely repeat their own comments during the COVID-19 proceeding as if they were controlling precedent. Despite ample comments by other parties to the contrary, ACE and PSE&G argue that they should recover their entire incremental cost claims related to the COVID-19 pandemic through their annual SBC filings, without Board review. No Board Order has directed this outcome or waived its statutory authority to review properly filed SBC claims. Instead, the July 2, 2020 Board Order set forth the procedure for requesting cost recovery of COVID-19 regulatory asset balances. The Board's June 7, 2023 Order did not change that cost recovery procedure.

PSE&G's late-filed argument, that the resolution of its 2020 SBC filing⁴ somehow changes the COVID-19 regulatory asset cost recovery procedures, is immaterial and meritless. As a threshold matter, the reliance of PSE&G's July 18th filing upon the stipulation approved in the 2020 PSE&G SBC Order is inappropriate. PSE&G ignores the express terms of that stipulation, which prohibit its use in another matter. Paragraphs 9 and 11 of the 2020 PSE&G SBC Stipulation state:

9. This Settlement is being entered into exclusively for the purpose of resolving the issues in these matters.

11. The undersigned Parties hereby agree that this Settlement has been made exclusively for the purpose of this proceeding and that this Settlement, in total or by specific item, is in no way binding upon them in any other proceeding, except to enforce the terms of this Settlement.

⁴ I/M/O the Petition of PSE&G for Approval of Changes in its Electric and Gas Societal Benefits Charge, Decision and Order Approving Stipulation, BPU Docket Nos. ER20110734 and GR20110735 (Aug. 18, 2021) (the "2020 PSE&G SBC Order").

Nevertheless, in the 2020 PSE&G SBC Order, the Board balanced various components of PSE&G's 2020 SBC filing, allowing PSE&G to recover more than the five-year pre-COVID average of its uncollectibles to offset a potential decrease in the energy efficiency and renewable energy (EE&RE) component of PSE&G's 2020 SBC filing. That Order discussed the amortization of the balance of PSE&G's uncollectible claim from its 2020 SBC filing, which included actual collections and expenses of the social programs component of its SBC filing through December 31, 2020. That Order set a PSE&G 2020 SBC rate that also included anticipated collections and expenses during the subsequent period based solely on PSE&G projections. Those projections, like every other claim in an SBC filing, are subject to a complete Board review during PSE&G's next SBC filing. N.J.S.A. 48:3-60(a). While the stipulation agreed to allow PSE&G to recover its deferred uncollectibles in a future SBC proceeding (next and/or a subsequent SBC proceeding, if necessary), that was clearly an agreement to allow collection once that amount was deemed prudently expended. There was no guarantee at any time that PSE&G would be permitted to recover 100% of its COVID-19 uncollectibles in the SBC, especially given that the total amount was not calculated or even known at the time of the 2021 Stipulation. Indeed, to date no prudency review of any COVID-19 expenditures has been conducted for any electric distribution company, other than the amount of PSE&G's "actual SBC costs and expenses incurred through December 31, 2020" that were attributable to "social programs" and included in PSE&G's 2020 SBC filing, a Board finding that went beyond the terms of the stipulation.

PSE&G filed its latest SBC filing on January 9, 2023.⁵ Despite the Board's July 2, 2020 Order, PSE&G asked the Board to allow it to recover all of its incremental bad debt expense claim through that SBC filing.

PSE&G submitted its cost filing in this COVID-19 proceeding on July 17, 2023.⁶ Despite the Board's July 2, 2020 Order, PSE&G did not include in the filing any claim for "incremental bad debt expense." Instead, as noted, PSE&G asked the Board to allow it to recover all of its incremental bad debt expense claim in its latest SBC filing.

ACE's June 22nd motion, and the ACE and PSE&G out of time filings, suggest that their incremental COVID-19 uncollectibles claims are somehow exempt from Board review under N.J.S.A. 48:3-60, the statute establishing the SBC. To avoid Board review of their COVID-related cost claims as contemplated by the July 20, 2020 Order, ACE's motion and PSE&G's filing propose to recover 100% of their incremental COVID-related cost claims through their annual SBC filings, without any Board review of the types or amounts claimed. That argument is contrary to the express language of the SBC statute. That statute does not guarantee full recovery of claims for uncollectibles, but authorizes the Board to permit a utility to recover "some or all" of its SBC cost claims, "as appropriate." The legislature expressly authorized the Board to exercise its discretion to determine which cost claims are recoverable through the SBC,

⁵ BPU Docket Nos. ER23010010 and GR23010009.

⁶ BPU Docket No. AO20060471, Verified Petition, p. 4, "PSE&G COVID-19 Cost Summary."

stating:

[T]he board shall permit each electric public utility and gas public utility to recover some or all of the following costs through a societal benefits charge that shall be collected as a non-bypassable charge imposed on all electric public utility customers and gas public utility customers, as appropriate.

N.J.S.A. 48:3-60(a) (emphases added).

ACE's motion misrepresented the statute as requiring recovery of all claimed uncollectible amounts in the SBC, quoting only a portion of the statute and deleting the critical phrases "some or all" and "as appropriate." Compare N.J.S.A. 48:3-60(a) with ACE's June 22nd motion, p. 3. ACE omitted the language that expressly authorizes the Board to determine the appropriately recoverable portion of uncollectibles in an SBC cost claim. ACE's motion deletes those essential statutory phrases, and thereby asks the Board to ignore the plain language of the statute and divest itself of its authority to review the recoverability of ACE's SBC claims. PSE&G's July 18th filing ignores the SBC statute entirely, instead arguing that resolution of its 2020 annual SBC filing exempts its incremental COVID-related uncollectible claims from Board review. Reading the statute as written plainly shows that it requires the Board to reject the ACE and PSE&G arguments that they must recover 100% of their incremental COVID-related cost claims through their annual SBC filings.

Careful Board review of incremental COVID-19 cost claims also is consistent with the Board's statutory duty to set just and reasonable rates in all of its proceedings. N.J.S.A. 48:2-21. Rate setting in this context requires review of each utility's incremental COVID-related uncollectible claims for prudence and other appropriate indicia of recoverability. In fact, in its June 7, 2023 Order, the Board reiterated that a utility's compliance with the filing requirements

in that Order “does not guarantee Board approval of requested COVID-19 regulatory asset cost recovery.” *Id.*, p. 4. Board review is essential to ensure just and reasonable resolution of the types and amounts of expense claims allowed, the return on those amounts, and the allocation of a portion of the economic harm from the COVID-19 pandemic to all affected parties.

Well-established principles of administrative law also recognize the Board’s discretion to select the procedures that it uses, and requires the Board to ensure all parties have notice of those procedures. The Board has done so, directing the utilities to file claims to recover their incremental COVID-19 related costs in either this COVID-19 proceeding or in a base rate case, and to continue to request recovery of their average pre-pandemic level of uncollectibles through an SBC filing.⁷ The parties to this proceeding may not ignore or alter those procedures just for themselves merely because they do not like them.

ACE and PSE&G simply refuse to comply with the Board’s direction set forth in its July 2, 2020 Order and reiterated in its June 7, 2023 Order, for the procedures to request recovery of their incremental COVID-related uncollectible claims. This argument and its embodiment in these filings must be denied.

CONCLUSION

Since ACE’s motion for reconsideration lacks any legal or factual support, has not identified a single error of law or fact in the June 7, 2023 or July 2, 2020 Board Orders, is in any event far out of time, and contrary the Board’s prior orders, motion rules and the relevant statute,

⁷ See In re Provision of Basic Generation Service for the Period Beginning June 1, 2008, 205 N.J. 339, 347 (2011) (stating New Jersey agencies enjoy great leeway when selecting the procedures and methods to fulfill their statutory mandates).

Secretary Sherri Golden

August 2, 2023

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the motion should be denied. The July 18th and 19th filings by ACE and PSE&G are out of time and do not comply with Board rules governing reconsideration motions, and should be rejected as well.

Respectfully submitted,

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**In the Matter of the New Jersey
Board of Public Utilities'
Response to the COVID-19
Pandemic
BPU Docket No. AO20060471**

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