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February 8, 2024

Via Electronic Mail

Mayor Peggy Sue Juliano
Township of Lacey
818 West Lacey Road
Forked River, NJ 08731

Members of the Township Committee
Township of Lacey
818 West Lacey Road
Forked River, NJ 08731

Ms. Veronica Laureigh, Clerk and Administrator
Township of Lacey
818 West Lacey Road
Forked River, NJ 08731

**RE: I/M/O Lacey Community Energy Aggregation Program
Round 4 – Gabel Associates
Township of Lacey, Ocean County
BPU Dkt. No. EO24010063**

Dear Mayor Juliano, Members of the Township Committee and Ms. Laureigh:

Gabel Associates, Inc. (“Gabel”), the Energy Agent for the Township of Lacey, has advised us that the Township intends to organize a fourth round of an Option 2 government energy aggregation program pursuant to N.J.A.C. 14:4-6.1 et seq., the Lacey Community Energy Aggregation (“LCEA”) Program. According to the Energy Agent, the Township plans to bundle the load of qualifying residential accounts located within Lacey’s municipal boundaries and solicit bids for electric generation service from duly licensed electric power suppliers through a Request for Proposal process.

Pursuant to N.J.S.A. 48:3-94b(1):

Thirty days prior to the commencement of public bidding the governing body shall transmit the bid notice and all bidding documents to the board

and the Division of the Ratepayer Advocate¹ for review. The board and the Division of the Ratepayer Advocate shall have 15 days to review the bid notice and bidding documents and provide comments to the governing body, which may accept or reject the comments.

On January 24, 2024,² in accordance with N.J.S.A. 48:3-94b(1) and on behalf of the Township's governing body, Gabel filed with Rate Counsel and the Board of Public Utilities ("BPU") two draft bidding documents for the fourth round of the LCEA Program: the Request for Proposals ("RFP"), and a Master Performance Agreement ("MPA") between the Township and the third-party supplier (collectively, the "January 24 Filing"). Pursuant to State statute, Rate Counsel is required to review and comment on the draft bidding documents of an Option 2 government energy aggregation program for the governing body's consideration. The following are Rate Counsel's comments on the January 24 Filing.

General Overview

Rate Counsel represents and protects the interests of all utility customers, including residential, small business, and small and large industrial customers, schools, libraries, and other institutions in our communities. Rate Counsel is a party in cases where New Jersey utilities seek changes in their rates or services. Rate Counsel also gives consumers a voice in setting energy, water, and telecommunications policy that will affect the rendering of utility services well into the future.

It is clear that the January 24 Filing consists of draft documents with material terms such as price and bidder information missing, and certain terms unresolved.³ Therefore Rate Counsel's comments provided herein will touch upon broad issues and concepts, and will leave the task of creating a workable and consistent group of documents to the Township and its municipal attorney. If the terms of the RFP or the MPA are changed in any way after Rate Counsel's submission of comments, such changes should be reviewed by a municipal attorney retained by the Township. Rate Counsel and Board Staff also will review, when submitted, the draft public notice to prospective customers of the LCEA Program, see N.J.A.C. 14:4-6.6(s), and the Third-Party Supplier ("TPS") Contract Summary, as per N.J.A.C. 14:4-6.6(r).

Bid Price

The electric distribution utility company that serves the Township's residents is Jersey Central Power and Light Company ("JCP&L"). Every year, JCP&L participates in a statewide auction for Basic Generation Service ("BGS") in order to procure the electric commodity needed to serve customers who do not shop for electric generation service.⁴ The BGS prices offered by JCP&L

¹ The Division of Rate Counsel ("Rate Counsel") is a New Jersey State agency that is a successor to the Division of Ratepayer Advocate.

² On May 7, 2020, Rate Counsel provided comments on the draft bidding documents for Round III of the LCEA.

³ We recommend updating the chronology of the LCEA Program in the Introduction section of the RFP, RFP, p. 4, and other references to this program.

⁴ See N.J.A.C. 14:4-1.2.

are therefore the prices to compare in any type of offer for electric generation service solicited by government aggregators. Rate Counsel strongly urges all municipalities to include in any RFP, MPA and other Agreement⁵ for electric generation service explicit language that requires the bidding TPSs to offer prices that are lower than the utility's BGS tariff rate applicable to each customer class throughout the term of their aggregation program. This will ensure that each customer participating in the aggregation program is guaranteed cost savings due to a lower tariff rate during the entire supply contract period.

The LCEA RFP seeks bids on an "All-In, Non-Variable Price" basis, and defines the term and the wide scope of costs included therein. (RFP, pp. 7 & 14-15, "Pricing Products") The RFP requires the winning bidder to offer a rate for Full Requirements service for Participating Residential Accounts, (RFP, pp. 14-15, 16 & 21), that does not exceed the BGS tariff price at the time of the bid and is "reasonably forecast and estimated by the Lead Agency to provide sufficient savings to the participants over the term of the contract relative to the cost that would be incurred by LCEA participants if they were to remain on the applicable BGS tariff over the contract term." (RFP, pp. 4-5)

The MPA states that the Contract Price shall be the "non-variable" price per kWh as set forth in the Award Letter, which shall not vary and shall not be changed for the term of "Electric Generation Service," except for Regulatory Contingencies as provided for in the MPA. (MPA, Arts. 2.2.2, 2.2.3 & 3.2) Although the January 24 Filing defines an "all-in, non-variable" price, (RFP, pp. 14-15), it does not define a "non-variable" price.⁶ It is unclear whether the LCEA intends to use this term as a synonym for a "fixed" price. Either a "non-variable" price or a fixed price, absent more, may not remain below the BGS price throughout the contract term if, for example, the applicable BGS price should fall below the LCEA contract price during that time and the parties do not renegotiate a lower price. Thus, LCEA participants may not experience savings over the term of the contract relative to the price they would have paid if they had remained on BGS. Moreover, certain terms in the January 24 Filing suggest that the contract price will actually be variable.

Under the current language of the MPA (referenced as "Option A" in the RFP, p. 16), if the "actual average annual" BGS-RSCP tariff price were to drop below the Contract Price during the term of the Program, the selected TPS will provide written notice to Program participants of this circumstance and of their right to opt out of the Program, and will suspend enrollment of new LCEA participants until the average annual BGS-RSCP Tariff Price price increases above the Contract Price. (RFP, p. 18, "Post-Award Changes in BGS Tariff Price"; MPA, Arts. 3.3 & 6.3.8)

⁵ Any change proposed by Rate Counsel in this comment letter should be considered a global change that should be made to all relevant government energy aggregation documents including RFPs, MPAs and any agreements entered into to further the government energy aggregation program.

⁶ The January 24 Filing states that "the All-In, Non-Variable Price shall not change during the term of the contract, except as specifically provided for in the MPA." (RFP, p. 14)

If the BGS-RSCP tariff price were to increase above the Contract Price during the term of the Program, the Township and the selected TPS have the option either to negotiate a modified Contract Price or terminate the Program and return all participants to BGS service. (MPA, Arts. 3.2(a)(iii)(C), 3.2(b) & 3.3; see RFP, pp. 16 & 18) If the parties decide to negotiate and agree upon a modified Contract Price, the selected TPS may increase the Contract Price, up to the amount of the BGS-RSCP price increase. (MPA, Arts. 3.2(a)(iii)(C) & 3.2(b))

Bids also are invited for the MPA as modified by the addition of an alternative which deletes MPA, Article 3.2(a)(iii)(C) (referenced as “Option B” in the RFP, p. 16). Deleting Article 3.2(a)(iii)(C) from the MPA would remove the option for the Township and the TPS to negotiate an increase in the Contract Price, if the BGS-RSCP tariff price were to increase during the term of the Program due to an Adverse Government Action as defined in the MPA. The Selection and Award Process, Step 4 of RFP Section H, allows consideration during the TPS selection process of potential “additional benefits, if any” that a bidder may offer through a price proposal under Option B. (RFP, p. 17)

Whether the Township renegotiates a lower price or terminates the LCEA in the face of such price changes, the January 24 Filing places the risk of BGS-RSCP price changes, if only for a short time, on Program participants. First, under Option A, the Township is not required to terminate the Program if the BGS price falls below the Contract Price. Second, participants could incur electric supply charges at a price that is either higher than at the start of the Program, if the BGS-RSCP price rises due to an Adverse Government Action and the Township and TPS negotiate an increased Contract Price, or higher than the BGS-RSCP price if the BGS-RSCP price has fallen below the Contract Price but the parties have not renegotiated a Contract Price lower than the BGS-RSCP price. These terms place the risk on LCEA participants of either promptly opting out of the Program or paying more than the BGS-RSCP price between the time of the BGS price reduction and either the reduction in the Contract Price or the participant’s opting out at the next available meter read date to opt out of the Program. That risk is even greater if the Township accepts a bid under Option A.

Rate Counsel recommends revising the January 24 Filing to allow bids only under Option B, to require the Contract Price to remain below each applicable BGS-RSCP tariff price at all times throughout the entire term of LCEA, and for the Contract Price not to increase during the term of the Program, to ensure energy cost savings to all participants, or in the alternative for the Program to automatically terminate before participants are charged more than the BGS-RSCP price. To the extent the contract allows the price to increase during the term of the LCEA Program, this is a variable price contract and cannot be considered fixed under the Board’s rules. See N.J.A.C. 14:4-6.9(c) (a pricing structure that allows for fluctuations in price during the life of the contract is not a fixed price).⁷

⁷ The draft public notice to prospective customers of the LCEA Program also must clarify this distinction. A GEA Program Summary must advise participants whether the contract is for a fixed rate or a variable rate; and provide a brief explanation of the difference between a fixed rate and a variable rate that is “easily understandable by the general public.” N.J.A.C. 14:4-6.6(r)(9)vi & vii.

BGS Tariff Price

The RFP, in Step 4 of Section H, “Residential Accounts,” explains the calculation of the BGS Tariff Price for the contract period for the purpose of comparing bids from qualified bidders for Residential Accounts. (RFP, p. 17) The Township and Energy Agent will apply individual BGS-RSCP price components for the applicable tariff (inclusive of energy supply, generation capacity, transmission, ancillary services, line losses, Renewable Portfolio Standard compliance costs and supplier margin, as well as all applicable taxes and the Administrative Fee and Energy Agent Fee)⁸ to the applicable billing determinants for each tariff class broken down by season, energy block and time-of-use, to develop an average annual BGS-RSCP tariff price for each residential rate class. (RFP, pp. 4-5, 14-15, 18 & 18 n. 10)

Step 2 of Section H of the RFP states that qualified bidders must submit a bid price for each Participating Residential Accounts pricing group that is lower than the applicable JCP&L BGS-RSCP tariff rates. (RFP, pp. 4, 7, 13, 14, 17 & 21) The RFP clarifies the method for calculating the bid price and ensuring it is below both the weighted average BGS tariff price for the entire pricing group and the average BGS-RSCP tariff price for each residential rate class within the pricing group. (RFP, p. 17, n. 8)

Rate Counsel has two concerns with the proposed use of the weighted average BGS tariff price as a benchmark to compare bids for the LCEA. First, using weighted average and average prices could result in rates for some Program participants that, at some times during the contract period, are higher than the applicable BGS-RSCP tariff rate for their rate class, even though the initial price must be below the BGS-RSCP tariff rate. The January 24 Filing should address this contingency by requiring that prices remain below the applicable BGS-RSCP tariff rate for each rate class at all times. See N.J.A.C. 14:4-6.9(d) & -6.9(e)(1) (describing calculation of benchmark price for each rate class). Rate Counsel recommends amending the January 24 Filing accordingly.

Second, the bid price evaluation also will consider the impact of estimated changes to BGS-RSCP tariff prices during the contract term. (RFP, p. 18, “Residential Accounts” & p. 18, n. 10) While the RFP explains how the Township will develop an estimate of changes to BGS-RSCP tariff prices during each contract term, (RFP, p. 18, n. 10), due to the structure of the auction system, BGS rates for the period after June 1, 2024 are not yet known. For this reason, too, Rate Counsel recommends amending the January 24 Filing to clarify that each bid price must remain below the applicable BGS-RSCP tariff rate at all times throughout the contract period.

Energy Agent Fee

The RFP’s Section C, “RFP Process,” Phase 2 - Submission of Bid Prices, addresses how the Energy Agent Fee will be recovered by the Lead Agency and the Energy Agent:

⁸ Price proposals also must include 6.625% State sales and use tax. (RFP, pp. 10 & 14-15)

Price proposals must include the cost to the supplier(s) of the Administrative Fee and the Energy Agent Fee. The Administrative Fee consists of reimbursable out-of-pocket LCEA Program expenses incurred by the Lead Agency, and recoverable pursuant to N.J.A.C. 14:4-6.8(d), in the amount of \$927.30 applicable to the Participating Residential Account pricing group, payable to the Lead Agency in a lump-sum within 30 days of the execution of the MPA in accordance with the terms of the MPA. The Energy Agent Fee of \$0.00042/kwh will be payable directly to Gabel Associates on a monthly or quarterly basis in accordance with the terms of an agent agreement to be executed between the winning supplier and Gabel Associates. (RFP, pp. 9-10)

The RFP clarifies in a footnote that the Administrative Fee of \$927.30 includes the actual and anticipated out-of-pocket expenses incurred by the Township of \$100 for translation services to create a Spanish language version of the Program Summary and \$77.30 in public advertisement costs, as well as a reserve fund of up to \$750 for JCP&L's expenses related to the LCEA. The Township does not anticipate incurring any legal fees relating to the LCEA. Copies of paid invoices and vouchers will be made available to the selected TPS upon request and in accordance with N.J.A.C. 14:4-6.8(d). The Township will place any un-expended funds in a reserve fund for unspecified future expenses of implementing the LCEA Program. (RFP, p. 9, n. 4)

Rate Counsel has concerns about the Administrative Fee and the Energy Agent Fee. N.J.A.C. 14:4-6.8(e) requires that bid specifications must state the items for which reimbursement shall be required, an estimate of the costs and the maximum amount that may be reimbursed. Government aggregators such as the Township may be reimbursed for their costs actually incurred in establishing or operating a government energy aggregation program. N.J.A.C. 14:4-6.8(d). However, bidders may not be required to pay a concession fee, finders' fee or other direct monetary benefits to a government aggregator. N.J.S.A. 48:3-92c; N.J.A.C. 14:4-6.8(d).

Rate Counsel recommends including in the RFP and public notice of LCEA an estimate of the cost of the Energy Agent Fee that the selected TPS must reimburse, over some time period (e.g. monthly, quarterly), or stating the maximum amount of the Energy Agent Fee over the duration of the Program, and that the Township and the Energy Agent periodically report publicly the amount of the Energy Agent Fee that has been paid. Doing so will help to allay any public concerns about transparency in energy agent fees in New Jersey government energy aggregation programs. Advance estimates also would allow bidders to accurately include those fees in their bid prices. Rate Counsel reminds the Township that only actual costs incurred in establishing and operating the Program can be recovered from participants. N.J.S.A. 48:3-92c; N.J.A.C. 14:4-6.8(d).

Rate Counsel recommends that the RFP should specify that the selected TPS must reimburse only the Township's actual expenses and that any excess funds be returned or credited to ratepayers (for example, through an offset to the Administrative Fee) rather than held in a reserve fund. This would ensure that LCEA participants pay only for actual services delivered and that the Township's ratepayers understand and have confidence in the fees they are paying.

Selection and Award Process

Rate Counsel concurs with the RFP requirement that the Lead Agency will select a TPS that will be “most advantageous” to customers participating in the LCEA. (See RFP, pp. 4 & 16) Section H of the RFP describes the steps in the process, (RFP, pp. 16-17), and Step 4 of Section H lists the factors that the Lead Agency will consider, to determine which bidder provides the “most overall benefit” to participating customers. (RFP, p. 17)

The RFP does not state though, the weight that will be given to each factor in determining which bid offers the most overall benefit. For example, the RFP does not explain how the Lead Agency will weigh competing bids for three different contract terms⁹ with prices that may change with the length of the contract. Some further guidance may be helpful to bidders in this regard. Rate Counsel also recommends, as discussed above, revising the January 24 Filing to require the Contract Price to remain below each applicable BGS-RSCP tariff price at all times throughout the entire LCEA Program.

Damages

Article 9.1 of the MPA, “Damages,” states that the sole remedy for the Township and/or LCEA Participants for the TPS’s failure to provide the agreed-upon Electric Generation Service will be “direct damages,” defined as the additional cost, if any, to obtain electric service under the applicable BGS tariff price. Should the TPS’s default leave any LCEA participant unable to obtain BGS service to replace the Electric Generation Service that the TPS failed to provide, the measure of the TPS’s damage liability should be the actual cost of replacing all LCEA participants’ full requirements energy supply, not limited to the cost of BGS service. Rate Counsel recommends amending Article 9.1 of the MPA accordingly.

Assignment

Article 3.4 of the MPA allows the selected TPS to assign its agreement with the Township only upon the Township’s express written consent, unless both the TPS and the transferee or assignee certify that the transferee or assignee is able to perform all the assignor’s obligations to the Program. Rate Counsel suggests that the Township should have the rights to reasonably satisfy itself as to the transferee’s or assignee’s ability to perform all LCEA obligations, and to terminate the agreement if it is not reasonably assured.

Please have a municipal attorney review the draft LCEA RFP and MPA and Rate Counsel’s

⁹ Bids are requested for three different contract terms, of 12, 17 or 24 months, to begin with the July 2024 meter read date. (RFP, pp. 4, 7, 14, 16 & 21; MPA, Arts. 2.4 & 2.7)

Mayor Curatolo, Members of the Township Committee, and Ms. Laureigh
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comments herein for further guidance on this matter.

Respectfully submitted,

BRIAN O. LIPMAN
DIRECTOR, DIVISION OF RATE COUNSEL

By: /s/ Brian Weeks
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Deputy Rate Counsel

BW/ac

c: Service List (via e-mail)

**I/M/O LACEY COMMUNITY
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PROGRAM ROUND 4
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