



STATE OF NEW JERSEY
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ENERGY

IN THE MATTER OF THE PETITION OF PUBLIC)
SERVICE ELECTRIC AND GAS COMPANY FOR)
APPROVAL OF THE ENERGY STRONG PROGRAM)
)
)

ORDER

DOCKET NO. EO13020155
GO13020156

Parties of Record:

Tamara Linde, Esq., Vice President –Regulatory Affairs, PSEG
Stefanie A. Brand, Esq., Director, New Jersey Division of Rate Counsel
Steve Goldenberg, Esq., Fox Rothschild for NJLEUC
Janine G. Bauer, Esq., Szaferman Lakind for AARP
Roger Schwarz, Issues Management LLC for the PSE&G Unions
Aaron Kleinbaum, Esq., Eastern Environmental Clinic for the Environmental
Participants
Vincent M. Giblin, Esq., for International Union of Operators and Engineers, Local 825
Albert G. Kroll, Esq., of Kroll Heineman Carton, LLC for NJLECET
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BY COMMISSIONER JOSEPH L. FIORDALISO:

On February 20, 2013, Public Service Electric and Gas Company ("PSE&G") petitioned the Board for approval of a program and the recovery of costs to bolster its "electric and gas infrastructure to make them less susceptible to damage from wind, flying debris and water damage in anticipation" of future Major Storm Events ("Energy Strong"). PSE&G requested approval of approximately \$2.5 billion in infrastructure upgrades, with the costs to be collected from ratepayers over a period of five years through the implementation of "Energy Strong Adjustment Mechanisms" with an associated "Energy Strong Adjustment Charge" ("ESAC"). As described and proposed in paragraphs 119 through 123 of the petition, the ESAC would be implemented immediately, would be trued up annually, and would allow the company to recover the revenue requirements associated with the next annual period and any over/under collected balance from the current period through annual adjustments to the relevant ESAC. Petition at

para. 121 and 122. PSE&G further requested that the Board approve these expenditures and the recovery mechanism by July 1, 2013.

By Order dated June 21, 2013, the Board authorized PSE&G to implement certain Board Staff recommendations related to the Energy Strong Station Flood and Storm Surge Mitigation sub-program. That Order also designated me as the presiding commissioner for the proceedings on the Energy Strong petition with authority to rule on all motions that arise within the proceeding, and to modify any schedules that may be set as necessary to secure a just and expeditious determination of the issues.

By Order dated August 2, 2013, after conferring with the parties, I issued a prehearing Order to set the schedule for this proceeding and define the scope of this proceeding. As stated in the prehearing Order, the issues to be resolved include 1) the prudence, cost effectiveness and cost efficiency of the programs proposed for the first five years of the Energy Strong program, 2) the reasonableness and lawfulness of the proposed cost recovery mechanism, and 3) the reasonableness of the proposed rates. Under the adopted schedule, discovery is ongoing, and the New Jersey Division of Rate Counsel ("Rate Counsel") and intervenor testimony is due to be filed on October 18, 2013.

Rate Counsel's Motion to Compel

By letter motion dated September 25, 2013, Rate Counsel requested that PSE&G be compelled to fully respond to one of Rate Counsel's discovery requests, RCR-ROR-8, requesting copies of any presentations made to the PSE&G and Public Service Enterprise Group ("PSEG") Boards of Directors concerning the Energy Strong program. According to the motion, notwithstanding that Rate Counsel, Board Staff and PSE&G executed an Agreement of Non-Disclosure of Information Agreed to be Confidential ("Confidentiality Agreement"), PSE&G has refused to provide Rate Counsel with an unredacted copy of its original and updated responses to that discovery request, attached to the motion as Exhibits C and E. The relevant page of each exhibit, entitled Enterprise Financial Results—ESIP (Energy Strong Infrastructure Program) Scenario, is labeled REDACTED and has all columns blacked out.

According to the motion, PSE&G has objected to the request and asserted that the redacted information is confidential and questioned its relevance to this proceeding. Rate Counsel states that it has conferred with the company prior to filing this motion, and the company still refuses to provide a confidential version of the documents.

Rate Counsel requests that PSE&G be compelled to provide a confidential copy of RCR-ROR-8. Rate Counsel requests expedited treatment of this motion under N.J.A.C. 1:1-12.2(f) asserting that this information is relevant to the issues on which Rate Counsel is scheduled to file testimony on October 18, 2013.

Upon receipt by e-mail of this request, Rate Counsel was notified that it needed to provide notice to all parties of its intent to raise its request for expedited treatment of the motion, as required by N.J.A.C. 1:1-12.2(f) on the conference call already scheduled for September 26, 2013 where protocols and timing of possible site visits were to be discussed. By e-mail on September 25, 2013, Rate Counsel provided the required notice to the parties.

Rate Counsel's motion to compel PSE&G to provide an unredacted response to RCR-ROR-8 and its request for expedited treatment of the motion under N.J.A.C. 1:1-12.2(f) was discussed during the September 26, 2013 telephone conference. There were no objections to expediting

this review, and I agreed to consider the motion on an expedited basis. The following schedule was agreed to on the call.

PSE&G Response-- by 10/2/13

Replies -- by 10/7/13

Decision -- by 10/11/13

Notice of this schedule was sent to all parties on the e-service list as of the date of the call.

PSE&G's Response

By letter dated October 2, 2013, PSE&G asserted that disclosure of the requested information, projected earnings for PSE&G as well as for unregulated PSEG companies, is not relevant and carries risks associated with its disclosure that mandate denial of Rate Counsel's motion. PSE&G Response at 1-2. PSE&G also submitted supporting certifications of M. Courtney McCormick, General Corporate Counsel and Corporate Secretary to PSEG ("McCormick Cert."), and of Daniel J. Cregg, Vice President of Finance for the PSEG Services Corp ("Cregg Cert.").

According to the response, the redacted portion of the response to RCR-ROR-e provides projected financial information for companies owned by PSEG, including those that are not subject to regulation by the Board, and includes results "assuming the pursuit of other programs" without breaking out those programs. Id. at 2, Cregg Cert. at para. 3. PSE&G maintains that disclosure of this information will not lead to the discovery of admissible evidence, and Rate Counsel has failed to show how this information is relevant to the stated focus of this proceeding: to determine whether the proposed Energy Strong programs are reasonable and appropriate, and whether the proposed recovery mechanism is reasonable. Id. at 3. To the extent that the redacted information reflects estimates of how much PSEG will earn on Energy Strong, this estimate is privileged information prepared based in part on the advice of counsel as stated in the Cregg certification. Giving such information to other parties entering into settlement negotiations is inappropriate and unfair. Id. at 4. PSE&G asserts that this is just a "fishing expedition" as there is no explanation of how this information is relevant to determining the efficiency of the proposed investments as against other alternatives which could arguably be less profitable for PSE&G and its affiliates. Id. at 5.

PSE&G asserts that Rate Counsel has failed to provide any reason for its request for this data for companies other than PSE&G. PSE&G specific information is only contained in one line of the chart and in the bottom bullet. Information as to the other companies is irrelevant because they are not implementing Energy Strong. Ibid. Additionally, PSE&G's objection to providing this small amount of data is reasonable in light of all of the other information that has been provided. PSEG has real and reasonable concerns about publically disclosing anything more than its current-year forecasted earnings as this information, if disclosed even inadvertently, could be used to unfairly trade in PSEG stock on the basis of that information. Id. at 6. Earnings projections for five years are the ultimate material insider information which the company maintains is not disclosed except to members of a limited group that needs this information to carry out their responsibilities. Id. at 7. PSE&G has not disclosed information of this type in connection with Board proceedings, except possibly in connection with the solicitation of shareholder approval for the proposed PSE&G merger with Exelon Corporation in a filing with the SEC. Ibid., McCormick Cert. at para. 7,8.

PSE&G maintains that the standard confidentiality agreement executed by parties to this matter does not adequately protect the company from possible liabilities which could flow from release of this information to the public. The standard confidentiality agreement does not expressly

prohibit recipients of the information from trading in PSEG securities. The fact that PSE&G has provided arguably irrelevant data to maintain the flow of information and avoid discovery disputes should not outweigh the company's valid concerns regarding potential disclosure or inappropriate use of this information. Id. at 9.

Rate Counsel's Reply

By letter dated October 7, 2013, Rate Counsel filed its reply. According to Rate Counsel, while PSE&G seeks advanced ratepayer funding of almost four billion dollars, it continues to insist that its projected financial results over the five year period are irrelevant to the regulatory review process. Rate Counsel seeks to compel PSE&G to provide a confidential copy of RCR-ROR-8, and maintains that the request must be granted if the information appears reasonably calculated to lead to the discovery of admissible evidence relying on N.J.A.C. 1:1-10.1(b). Rate Counsel Reply at 1-2.

Notwithstanding PSE&G's statements to the contrary, financial projects of PSE&G, its parent and affiliates are clearly relevant to the question of whether ratepayers should be required to provide upfront funding of these investments. PSE&G's proposal also lacks any safeguards that would protect ratepayers from potential over-earning by the utility and inappropriate subsidization of profits. The projected earnings of PSE&G, its affiliates and parent are relevant to the Board's determination of whether the proposed recovery mechanism is necessary and appropriate. Ibid.

Rate Counsel maintains that PSE&G cannot petition for expedited rate recovery of future capital investments and at the same time claim that its projected financial results from those investments are not relevant to the Board's review. Id. at 3.

PSE&G claims that the information it refuses to provide relates to non-regulated entities that are not implementing the Energy Strong program. However, from the title of the document – "Enterprise Financial Results—ESIP Scenario¹," the document itself appears to show how other entities that are part of PSEG may be in a position to profit from approval of Energy Strong. As the statutory representative of ratepayers, Rate Counsel has the right to know where ratepayer money is going and ensure that there is no subsidization of non-regulated affiliates as prohibited by N.J.S.A. 48:3-59. Ibid.

According to Rate Counsel, PSE&G's attempt to claim that the financial projections presented to the Board of Directors is somehow entitled to be withheld under attorney-client privilege lacks any merit. The privilege does not extend to facts calculated by a client following the receipt of legal advice; it only protects the communications between a lawyer and client in the course of the professional relationship. Projections of anticipated profits are financial advice falling outside the scope of the attorney-client privilege. Id. at 3-4.

Wild speculation about the possible consequences of inadvertent disclosure leading to unfair trading of securities does not provide a basis for withholding this information. Rate Counsel has signed the confidentiality agreement and there is no basis for PSE&G's claims where a confidentiality agreement has been signed, an agreement that PSE&G relies on when it wishes. Id. at 5. The fact that PSE&G claims that it has only disclosed this type of information in one prior instance does not support its refusal to provide that information now in light of the never before seen magnitude of this request for pre-approval for and upfront funding of four billion

¹ "ESIP" stands for Energy Strong Infrastructure Program.

dollars of capital investment. Id. at 5.

DISCUSSION AND FINDING

My role, as the presiding commissioner, is to help develop a full and complete record for review by the full Board in making its decisions on the relief requested by the petition, in this case approval of the first five years of the Energy Strong program as well as the cost recovery method requested by PSE&G. As has been noted in any number of discovery orders, discovery before an agency such as the Board is guided by the Uniform Administrative Procedure Rules, specifically, N.J.A.C. 1:1-10.1 et seq. The purpose of discovery, as set out by N.J.A.C. 1:1-10.1, is to provide litigants access to "facts which tend to support or undermine their position or that of their adversary." Likewise, discovery is appropriate "if the information sought appears reasonably calculated to lead to the discovery of admissible evidence," N.J.A.C. 1:1-10.1(b), and the test used for reviewing a discovery motion requires a weighing of "the specific need for the information, the extent to which the information is within the control of the party and matters of expense, privilege, trade secret and oppressiveness," N.J.A.C. 1:1-10.1(c).

Weighing these factors, I HEREBY FIND that the above discovery request is relevant to the issues being reviewed in this proceeding, specifically the appropriateness of the proposed cost recovery mechanism as well as the evaluation of costs and benefits of the proposed programs, and therefore, that an unredacted response should be provided. Disclosure of this information also comports with the terms of the order that authorized the transfer of PSE&G's stock to the PSEG holding company, In re the Petition of Public Service Electric and Gas Company, Docket No. EM8507774 (Order dated Jan. 17, 1986), requiring that full access be provided to any books and records and other information of any kind of the holding company or its subsidiaries "which pertain to any issue or transaction affecting or related to PSE&G and which may be deemed relevant by the Board." Order at 4. Because the parties have executed the Confidentiality Agreement, I am not persuaded that PSE&G's asserted need for nondisclosure outweighs the need for this information which will be used solely to evaluate the programs and cost recovery for which PSE&G seeks Board approval under Energy Strong.

Accordingly, the motion to compel is HEREBY GRANTED. PSE&G shall provide an unredacted response to RCR-ROR-8 no later than October 15, 2013.

Understanding the claimed sensitivity of the information that is to be provided, I remind any party receiving this information to treat it as confidential information, until declared otherwise, and to prevent its disclosure to anyone who has not executed the Confidentiality Agreement except as permitted under the terms of that agreement.

This provisional ruling is subject to ratification or other alteration by the Board as it deems appropriate during the proceedings in this matter.

DATED: October 11, 2013

BY:


JOSEPH L. FIORDALISO
COMMISSIONER

IN THE MATTER OF THE PETITION OF PUBLIC SERVICE ELECTRIC AND GAS COMPANY
FOR APPROVAL OF THE ENERGY STRONG PROGRAM
BPU DOCKET NOS. EO13020155 AND GO13020156

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