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DIVISION OF RATE COUNSEL  
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BOARD OF PUBLIC UTILITIES

JUN 26 2017

MAIL RECEIVED

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Governor

KIM GUADAGNO  
Lt. Governor

STEFANIE A. BRAND  
Director

June 22, 2017



**Via E-Mail and Regular Mail**

All Persons on the Attached Service List

**RE: I/M/O Municipal Energy Aggregation Program  
Transparent Energy  
Township of Irvington  
BPU Dkt. No. EO17060647**

Hon. Mayor Vauss and Township Council Members:

Pursuant to documents submitted by Premiere Marketing, LLC d/b/a Transparent Energy ("Aggregation Consultant" or "Transparent Energy"), Aggregation Consultant for the Township of Irvington, it is our understanding that the Township intends to organize an Option 2 government energy aggregation program pursuant to N.J.A.C. 14:4-6.1 et seq. (the "Irvington Energy Aggregation Program," or "IEAP").

According to the Aggregation Consultant, the Township will bundle the load of qualifying residential and non-residential accounts located within its boundaries and solicit bids for electric generation service from duly licensed electric power suppliers through a Request for Proposal process. The Township will serve as the Lead Agency for the IEAP.

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 Ratepayer Advocate<sup>1</sup> 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 June 9, 2017, on behalf of the governing body of the Township, the Aggregation Consultant filed with Rate Counsel and the Board of Public Utilities ("BPU") a draft of the Request for

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

*Case Mgmt  
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Proposals for the Provision of Electric Generation Service and Related Government Energy Aggregation Services for the Township of Irvington Community Energy Aggregation Program ("RFP"); an Electricity Supply Agreement for Government Energy Aggregation Program ("ESA"); a Notice to Bidders; and a letter to Irvington residents (the "June 9 Filing") in accordance with N.J.S.A. 48:3-94b(1).<sup>2</sup> See also N.J.A.C. 14:4-6.6(s). Pursuant to State statute, Rate Counsel is required to review and comment on the draft bidding documents of an Option 2 energy government aggregation program for consideration by the governing body of the Township. The following are Rate Counsel's comments on the June 9 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 June 9 Filing consists of draft documents with material terms missing and some minor typos and cross-references.<sup>3</sup> 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 attorneys.<sup>4</sup> If the terms of the June 9 Filing are changed in any way after Rate Counsel's submission of comments, such changes should be reviewed by an attorney retained by the Township.

## Scope of the Program

The June 9 Filing recites that the Program will provide the full requirements for electric generation supply service to residential and non-residential customers within the Township through a selected third-party supplier ("TPS"). (RFP, p. 2; ESA, p. 2 and Arts. 2.1.1 & 3.5) The electricity supplied by the selected TPS will replace the default Basic Generation Service ("BGS") provided through the local electric distribution utility company ("EDC"). The EDC serving the Township is Public Service Electric and Gas Company ("PSE&G"). Residential customers will automatically be included in the Program unless they opt out, and non-residential

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<sup>2</sup> We note that the June 9 Filing did not include any proposed form of agreement that would govern the relationship between the selected third-party supplier vendor and individual residential customers who participate in the IEAP, or a complete form of Opt-Out Notice (as per ESA Arts. 2.2.4 & 3.2). Accordingly, Rate Counsel will limit our comments to those documents in the June 9 Filing. At this time we recommend only that the Opt-Out Notice should comply with the September 30, 2014 BPU Order regarding Third-Party Supplier Contract Summaries, I/M/O Third Party Suppliers - N.J.A.C. 14:4 et seq., the Board's Review of Consumer Protection Provisions of its Rules Concerning Third Party Suppliers, Docket No. EX14060579.

<sup>3</sup> For example, Articles 4.1.1 and 4.6 of the ESA state that if the Agreement is not renewed or is terminated, the TPS must return all participating customers to the EDC or notify them of their right to select a TPS. In fact, the customers will never have left the EDC, which will continue to serve as their regulated public utility. Instead, we suggest that the ESA state that the selected TPS must return all participating customers to Basic Generation Service, as defined in Article 1 of the ESA, through the EDC, as also described in Article 4.3 of the ESA.

<sup>4</sup> 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 the RFP, ESA and any other agreement entered into to further the Program.



customers may opt in to the Program. (RFP, p.2; ESA, Arts. 1.28, 1.29, 1.32, 2.3.1 & 2.3.4; N.J.A.C. 14:4-6.4(g)(2))

The June 9 Filing invites proposals with fixed price bids, with a rate quoted per kilowatt hour (kWh). (RFP, pp. 7-9 & 15; ESA, Art. 1.36) Bidders also are invited to offer a price match guarantee. (RFP, p. 8; ESA, p. 26) Under that guarantee, if the BGS price should decrease below the IEAP contract price, the selected TPS will either reduce its price to the same as or lower than the BGS price, or transfer all participants customers to BGS by the next meter read date possible. (RFP, p. 8) The June 9 Filing does not describe the required attributes of a Base Bid with a "fully fixed rate," especially how it would operate if the BGS price falls lower than the IEAP contract price. (See RFP, p. 8) Rate Counsel recommends revising the June 9 Filing to require that the price paid by participating customers must be lower than the BGS price at all times during the Program, to ensure their participation ensures actual savings.

The RFP indicates that the price for residential and non-residential customers will be the "indicative" pricing. (RFP, p. 5) While the term "indicative" is undefined, the RFP indicates that prices for residential and non-residential customers will be determined through a reverse auction process. (RFP, pp. 2 & 7-9) However, the June 9 Filing does not describe the reverse auction process or how it will interact with other criteria for selecting bids through the RFP process.

The Township, as Lead Agency, requests bids for a variety of terms of service: a Base Bid and three Alternates (1-3) for either 13 or 25 months, and an Alternative (4) for 10, 15 or 25 years. (RFP, pp. 7-8) Two Alternatives (3 & 4) would either exceed the Renewable Portfolio Standard by at least 30% (3) or would offer 100% Class I Renewable energy (4). (*Id.*)

### **Selection and Award Process**

The Township will select the bid that is "most advantageous" for participants and below the applicable BGS tariff price. (RFP, pp. 2 & 10) However, the June 9 Filing does not explain how the Township will weigh competing proposals that may offer different rates for different terms of service (e.g. a lower price for 13 months versus a slightly higher price for 25 months), with or without a "price match guarantee," and with different amounts of renewable energy. For example, it is unclear how the Lead Agency would choose between a fixed-price bid that offers the lowest price per kWh and a "price match" bid that is initially higher but would be reduced below BGS if the applicable BGS-RSCP price should fall below the contract price or a bid with a higher proportion of renewable energy. Comparing bid prices over several years (up to 25 are solicited) will be challenging, especially since BGS-RSCP rates beyond June 1, 2018 are not yet known.

Rate Counsel recommends revising the June 9 Filing to describe the required attributes of a guaranteed savings product bid and to clarify how dissimilar bids would be compared. Rate Counsel also recommends revising the June 9 Filing to require each bid price option that meets the Renewable Portfolio Standard to remain below each applicable BGS-RSCP tariff price at all times throughout the entire term of the Program, to ensure energy cost savings to all participants.



For bids that propose to exceed the Renewable Portfolio Standard, prices likely will exceed BGS-RSCP rates. If so, Rate Counsel recommends that public notice of the IEAP clearly advise prospective customers of the amount they will pay above BGS-RSCP rates for each enhanced renewable energy option offered.

### **Contract Renewal**

The Township, by mutual agreement with the TPS, may renew the Agreement for an unspecified term. (RFP, p. 11, ESA §§ 4.1 & 4.4.2 & p. 26) However, the June 9 Filing does not describe the process for renewing the contract; for example, whether the Township will solicit bids from other qualified TPSs before negotiating renewal terms with the TPS selected for the first round of the IEAP. If the Agreement is not renewed, all participating customers will be returned to utility service through the EDC.<sup>5</sup> (RFP, p. 11; ESA, Art. 4.1.1)

Rate Counsel recommends revising the June 9 Filing to explain the criteria and process that the Township would use to decide whether to renew the Agreement. This is particularly important for the longer terms, such as 25 years. Rate Counsel also recommends modifying the June 9 Filing to require the Township, Aggregation Consultant<sup>6</sup> or TPS to notify participating customers if any material terms of the Agreement are changed as a result of negotiations to renew the Agreement or to respond to a regulatory contingency. (See N.J.A.C. 14:4-6.11 (notice required for program changes))

### **Addenda to the June 9 Filing**

The Township will accept comments and questions regarding the form of the ESA and may issue addenda to the ESA. (RFP, pp. 5, 6 & 11; Notice to Bidders) Rate Counsel suggests clarifying that any addenda to the ESA would be offered to all bidders. Should the Township agree to make any material change to the June 9 Filing, Rate Counsel asks to review the revised document(s) before they are finalized. In any event, if the terms of the June 9 Filing are changed in any way after Rate Counsel's submission of comments, such changes should be reviewed by the Township's attorney and notice of any material changes should be provided to all participating customers.

### **BGS Tariff Price**

Although the current BGS-FP (fixed price) tariff includes both seasonal rates and rates that vary with usage and/or time of day, it is not clear from the RFP if the bidders will be provided a breakdown of usage by month and/or time of use or which party will develop an estimate to use for comparison purposes. If no such breakdown or estimate is provided, it is unclear how the BGS-RSCP tariff prices will be compared with the bid prices. It is also unclear if the billing

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<sup>5</sup> As noted in footnote 3 above, participating customers will never have left the EDC, which will continue to serve as their regulated public utility. They will instead change suppliers to the TPS selected for the Program. We suggest that the ESA state that the TPS must return all participating customers to Basic Generation Service, as defined in Article 1.8 of the Supply Agreement, through the EDC, as also described in Article 4.3 of the ESA.

<sup>6</sup> The June 9 Filing also refers to the Aggregation Consultant as the "Energy Agent." (E.g. RFP, pp. 7-8)



determinants for the participating residential tariff classes, broken down by season, energy block and time-of-use, will be provided to the bidders by these parameters or if the bidders will receive only the total annual residential load within the Township. Rate Counsel recommends clarifying this issue.

### **Program Enrollments after Initial Opt-Out Period**

New customers may enroll in the IEAP after the initial opt-out period. (ESA, Arts. 2.3.3 & 3.8) However, the June 9 Filing does not describe the refreshed Opt-Out process. Rate Counsel suggests cross-referencing those Articles to each other and describing the refreshed Opt-Out process; for example, whether it will be the same as the initial Opt-Out process.

### **Changes in Price**

The June 9 Filing defines a “regulatory event” broadly, to include any material change to an existing or a material new charge, fee, cost or obligation, imposed by an ISO, RTO, independent transmission provider or federal law or government agency, that would not allow a party to perform the IEAP “economically.” (ESA, Art. 4.4.3) Occurrence of a regulatory event would trigger negotiations that may increase the price of electricity to IEAP participating customers. Rate Counsel does not agree that every price increase resulting from any federal or state regulatory action or the actions of the regional transmission operator (not a governmental entity) is a “Regulatory Event.” (See ESA, Art. 4.4.3) Moreover, inclusion of this term, or other pricing adjustments (e.g. ESA, Art. 5.4), would render the price variable, and public notice of the IEA Program should characterize its price as variable not fixed.

### **Damages and Liability**

The June 9 Filing is unclear as to whether, in the event of early termination of the Program, customers would be returned to BGS service, (ESA, Art. 4.3), or receive notice of their right to return to BGS service, (ESA, Art. 4.6). Rate Counsel recommends clarifying the process for returning participating customers to BGS service in the event the Program terminates early.

The damages provisions in the June 9 Filing also could benefit from clarification. The TPS would not be liable for any damages resulting from early termination, such as a higher price to obtain an electricity supply. (ESA, Art. 4.3) However, if the Program terminates early due to the acts or omissions of the TPS, the TPS would be responsible to make arrangements to continue to serve customers and bear any costs to do so. (ESA, Art. 5.1) The TPS also would be liable for any direct damages incurred by participating customers to obtain a replacement electricity supply due to the TPS’ failure to deliver customers’ full requirements for the full term of the Program. (ESA, Art. 5.4.2) Rate Counsel recommends reconciling these terms to ensure that customers do not incur any damages as a result of participating in the Program, by ensuring that they never pay more than the BGS price at any time for any reason (such as early Program termination or failure to deliver sufficient supply).

Similarly, the liability terms of the June 9 Filing seem unclear. The ESA recites at one point that the TPS would “in no event” be liable for any damages resulting from performance or non-



performance of the Agreement. (ESA, Art. 9.1) However, the TPS is to defend and indemnify the Township against any and all claims, damages and costs, including any claims for the TPS' own improper or illegal actions. (ESA, Art. 12.1) Rate Counsel recommends revising the June 9 Filing to ensure that the TPS will be responsible for any liability found to be caused by its actions and to indemnify the Township for any damages arising from such claims. The Township and its taxpayers and participating customers should not incur any costs as a result of the actions of the TPS relating to the IEA Program.

### **Additional Equipment**

Article 5.2 of the ESA, "Additional Equipment," states:

If additional metering or monitoring equipment is required by the [EDC], such metering or monitoring equipment shall be installed at the [EDC]'s or the Participating Customers' sole expense, as applicable, and each Party shall cooperate as necessary with installation of additional metering or monitoring equipment. In the event, however, that the [EDC] imposes such additional metering or monitoring equipment on a Participating Customer(s) as a condition of receiving Electric Generation Service from the Supplier, the Participating Customer shall have the option to be removed from the Aggregation Program without penalty or fees.

Rate Counsel considers it inappropriate to indirectly charge PSE&G's other ratepayers for the cost of installing any equipment necessary to enable participation in the IEA Program. If equipment is required to implement the Program, the cost of that equipment should be borne by the Program participants not by other PSE&G ratepayers. If PSE&G will charge for equipment necessary to participate in the Program, TPS bidders should include that charge in their bid price(s).

Board rules require that prospective residential customers must receive notice that includes "A specific statement of the cost to customers of participation in the program, and any other information necessary to enable customers to compare the program to other alternatives."

N.J.A.C. 14:4-6.6(r)(3). If there are costs to the customer associated with installing equipment to participate in the Program, then those costs must be made known in the required customer "opt-out" notice as per N.J.A.C. 14:4-6.6(q).

The June 9 Filing should be modified accordingly, to inform bidders that they must include in their bids any indirect equipment charges and, if there is any direct equipment charge to the customer to participate in the Program, those charges must be clearly disclosed in advance of their inclusion in the Program. If any additional equipment charges are added, participating customers should be specifically advised of those charges so they have a meaningful opportunity to exercise their right to opt out of the Program without penalty or fees. Customers may then



include those costs in their decision whether to participate or continue to participate in the Program.<sup>7</sup>

### **Energy Agent Fee and Administrative Fee**

BPU rules allow reimbursement of administrative fees for a municipality's out-of-pocket costs actually incurred in establishing or operating the aggregation program, "as reflected in invoices or vouchers authorized and paid by the government aggregator." N.J.A.C. 14:4-6.8(d). Moreover, N.J.A.C. 14:4-6.8(e) requires bid specifications to state the items for which reimbursement shall be required, an estimate of the costs and the maximum amount that may be reimbursed.

The June 9 Filing requires bid prices to include a variety of fees, costs and taxes, including the Township's Administrative Fees and an Aggregation Consultant Fee (a/k/a "Energy Agent" Fee) to Transparent. (RFP, pp. 7-8; ESA, Arts. 1.6 & 6.5) The selected TPS must pay the Aggregation Consultant Fee each month, calculated at \$0.001 for each kilowatt-hour (kWh) of electricity sold during the entire term of the Program. (*Id.*) The June 9 Filing also requires the selected TPS to pay Administrative Fees of \$8,250 to Transparent to reimburse out-of-pocket expenses incurred by the Township. (RFP, p. 8; ESA, Arts. 1.2 & 6.4)

BPU rules require that any reimbursement made by the TPS to the government aggregator must be for expenses actually incurred by the aggregator in establishing or operating the program, as reflected in invoices or vouchers. N.J.A.C. 14:4-6.8. Rate Counsel recommends that the Township and the Energy Agent document all their out-of-pocket direct expenses to ensure that their fees are consistent with BPU rules and reimbursable.

The June 9 Filing does not state or estimate the total amount of the Aggregation Consultant Fee. Rate Counsel suggests either setting a cap on the amount of the Aggregation Consultant Fee, or providing public notice, along with the per kWh charge, of the estimated total amount of that Fee over time, e.g. monthly or over the full contract term. See N.J.A.C. 14:4-6.6(r)(3) (TPS must disclose cost information to residential customers). Indeed, a published press opinion has expressed concern over the lack of transparency in energy agent fees in New Jersey government energy aggregation programs.<sup>8</sup>

Additionally, an EDC (such as PSE&G) may not charge a customer a fee to switch from BGS to a TPS. See N.J.A.C. 14:4-6.7(c)(4). While the EDC may require the Township to reimburse the EDC's actual costs of assisting with implementation of the energy aggregation program, N.J.A.C. 14:4-6.7(b)(3), (e.g., RFP, p. 8), the EDC may not charge the Township more than "the actual, incremental costs incurred," N.J.A.C. 14:4-6.7(c)(4). Accordingly, there should be no switching fees involved in the Program and the term requiring their reimbursement is moot. (ESA, Art. 6.1)

<sup>7</sup> See ESA, Art. 2.2.4(iii) (notice to Eligible Customers shall include specific statement of the costs and terms of the IEA Program).

<sup>8</sup> Michael Strugatz, "N.J. power companies' three-card monte," *Star-Ledger*, Sept, 28, 2013, available at [http://blog.nj.com/njv\\_guest\\_blog/2013/09/nj\\_power\\_companies\\_three-card.html](http://blog.nj.com/njv_guest_blog/2013/09/nj_power_companies_three-card.html) (viewed 6/13/17).