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May 17, 2019

Via Overnight Mail and Email

Ms. Aida Camacho-Welch, Secretary
New Jersey Board of Public Utilities
44 South Clinton Avenue, 3rd Floor, Suite 314
P.O. Box 350
Trenton, New Jersey 08625-0350

Re: I/M/O the Petition of Public Service Electric & Gas Company for Approval of its Clean Energy Future – Energy Efficiency ("CEF-EE") Program on a Regulated Basis

BPU Docket Nos.: GO18101112 & EO10121113 EO18101113

Dear Secretary Camacho-Welch:

On behalf of Interveners Natural Resources Defense Council, Environment New Jersey, Sierra Club, Environmental Defense Fund, and New Jersey League of Conservation Voters, we submit herewith an original and ten (10) copies of a Post-Hearing Brief in the above-referenced matters. Thank you for your attention to this matter.

Very truly yours,

/s/ Daniel Greenhouse
Daniel Greenhouse, Esq.

Case Mgmt

Encls.

cc: BPU Service List *(via email only)*

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IN THE MATTER OF THE PETITION OF PUBLIC SERVICE ELECTRIC AND GAS COMPANY FOR APPROVAL OF ITS CLEAN ENERGY FUTURE – ENERGY EFFICIENCY ("CEF-EE") PROGRAM ON A REGULATED BASIS	STATE OF NEW JERSEY BOARD OF PUBLIC UTILITIES DIVISION OF ENERGY AND OFFICE OF CLEAN ENERGY COMMISSIONER SOLOMON BPU DOCKETS # GO18101112 & EO121113

POST-HEARING BRIEF OF THE NATURAL RESOURCES DEFENSE COUNCIL, ENVIRONMENT NEW JERSEY, SIERRA CLUB, ENVIRONMENTAL DEFENSE FUND, AND NEW JERSEY LEAGUE OF CONSERVATION VOTERS, INTERVENORS

Aaron Kleinbaum, of Counsel

Daniel Greenhouse, on the Brief

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PRELIMINARY STATEMENT

Natural Resources Defense Council ("NRDC"), Environment New Jersey ("ENJ"), Sierra Club ("Sierra"), Environmental Defense Fund ("EDF"), and the New Jersey League of Conservation Voters ("NJLCV")(collectively referred to herein as the "Environmental Interveners"), are local and national leaders in environmental issues and intervened in this matter to advocate for the instant energy efficiency ("EE") proposals by Public Service Electric and Gas Company ("PSE&G" or the "Company") because they will provide significant environmental benefits to the citizens of this State.

The New Jersey Regional Greenhouse Gas Initiative Act ("RGGI") was enacted on January 13, 2008, to reduce greenhouse gas emissions. The Legislature boldly declared, "energy efficiency and conservation measures and increased use of renewable energy resources must be essential elements of the State's energy future and that greater reliance on energy efficiency, conservation, and renewable energy resources will provide significant benefits to the citizens of this State." As part of RGGI, the Board of Public Utilities ("BPU" or the "Board") was delegated authority to provide funding to a utility for the recovery of costs invested by the utility in "energy efficiency and conservation" programs, which is

precisely what is proposed and pending before the Board in the instant matter.

PSE&G's proposal includes EE programs and associated cost recovery mechanisms called the Green Programs Recovery Charge ("GPRC") and Green Enabling Mechanism ("GEM"), which are consistent with the requirements and intent of RGGI, specifically set forth at N.J.S.A. 48:3-98.1. The Board should reject any objections in this matter regarding the timeliness of this proposal by PSE&G. It is a matter of well settled law that the Board's powers under RGGI (to now consider and approve the instant filing) are in alignment with the more recent act concerning clean energy (the "Clean Energy Act"), which was enacted on May 23, 2018. Therefore, the Company's proposal is timely and the Board should approve the EE programs so that the State can begin to reap the environmental benefits without any further delay.

ARGUMENT

1. The Board should approve PSE&G's EE proposal because, as a matter of law, RGGI and the Clean Energy Act are to be construed together "in Pari Materia" and, therefore, PSE&G's EE proposal is timely.

It is clear from the plain and ordinary meaning of the language in RGGI that the Board should consider a wide variety of factors in assessing the instant EE proposal, including the subsequently enacted requirements of the Clean Energy Act. In fact, the Clean Energy Act expressly cross-references the Board's authority with regard to approving cost recovery to PSE&G for its proposed EE programs, which was previously delegated to the Board in RGGI, as follows:

> Each electric public utility and gas public utility shall file an annual petition with the board to demonstrate compliance with the energy efficiency and peak demand reduction programs, compliance with the targets established pursuant to the quantitative performance indicators, and for cost recovery of the programs, including any performance incentives or penalties, pursuant to section 13 of P.L.2007, c. 340 (C.48:3-98.1).
>
> [N.J.S.A. 48:3-87.9(e).]

Thus, the Clean Energy Act did not limit or prohibit the Board from considering or approving the instant EE proposal, notwithstanding the fact that there are ongoing stakeholder processes surrounding the Board's implementation of programs intended to reduce greenhouse gas emissions. As explained in more

detail below, RGGI and the Clean Energy Act are to be read together in unity and harmony and, therefore, the Board should consider the instant proposals by PSE&G as timely under RGGI and in furtherance of the goals of the more recently enacted Clean Energy Act.

Rate Counsel's witness objected to the timeliness of PSE&G's instant filing, but there is no merit to these arguments and they should be rejected by the Board. Rate Counsel presented Ezra Hausman, Ph.D., as an expert witness in energy economics and environmental science, but not as an expert in legal analysis nor administrative procedures. See Direct Testimony of Ezra D. Hausman, Ph.D., pages 1-4. Dr. Hausman testified that "the Company is premature in its filing." Page 5.

Dr. Hausman explained his opinion that "[u]ntil the Board, the OCE and other stakeholders have had an opportunity to collaborate on implementations of the CEA and establish energy saving and peak reduction targets and QPIs, the Board should not permit the Company to 'go it alone' by supplanting state programs." Page 7. Further, during the evidentiary hearing, Dr. Hausman stated his opinion, with regard to the forthcoming Energy Master Plan ("EMP"), "I don't think it's possible to say that the Company's proposal is consistent with a plan that does not yet

exist." 1T:177-15 to 17[1]. But Dr. Hausman's opinion is based on a mistaken and faulty legal argument.

As a matter of law, Dr. Hausman's opinion about the timeliness of PSE&G's proposal is simply wrong. Dr. Hausman failed to place the Clean Energy Act (enacted on May 23, 2018) and the Board's associated activities in the proper context of the statutory requirements and intent of RGGI (enacted on January 13, 2008). Dr. Hausman does not explain or offer any specific reason or support for his opinion, from a legal perspective, to show why PSE&G's instant proposal is premature.

In constructing the meaning of New Jersey statutes, the Legislature has provided us with the following instruction:

> In the construction of the laws and statutes of this state, both civil and criminal, words and phrases shall be read and construed with their context, and shall, unless inconsistent with the manifest intent of the legislature or unless another or different meaning is expressly indicated, be given their generally accepted meaning, according to the approved usage of the language.
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> [N.J.S.A. 1:1-1.]

[1] "1T" and "2T" refers to the transcripts of evidentiary hearings in this matter with BPU Docket Numbers G018101112 & EO18101113, before Presiding Commissioner Dianne Solomon, on May 1 and 2, 2019, respectively.

Therefore, unless the relevant provision of RGGI (Section 13) is expressly or manifestly intended to be repealed or superseded by the Legislature in the Clean Energy Act, or elsewhere, then RGGI must be construed in this instance to retain its generally accepted meaning and force of law.

It has been held that "when the Court reviews two separate but related statutes, the goal is to harmonize the statutes in light of their purposes." St. Peter's Univ. Hosp. v. Lacy, 185 N.J. 1, 14 (2005). Similarly, "When reviewing two separate enactments, the Court has an affirmative duty to reconcile them, so as to give effect to both expressions of the lawmakers' will." Am. Fire & Cas. Co. v. New Jersey Div. of Taxation, 189 N.J. 65, 79-80 (2006).

But, Dr. Hausman failed to point to any expressed or implied conflict between the relevant provision of RGGI and any subsequent law which would act to repeal or supersede the Board's authority, which was first set forth in RGGI. In the instant matter, the Board's authority pursuant to RGGI must be harmonized and reconciled with all subsequent Legislative mandates.

A review of Section 13 of RGGI is instructive. The provision of RGGI entitled "Electric, gas public utilities energy efficiency

and conservation programs, investments, cost recovery," provides that PSE&G may provide and invest in energy efficiency and conservation programs in its service territory. N.J.S.A. 48:3-98.1(a). Furthermore, RGGI mandates the following:

> An electric public utility or a gas public utility seeking cost recovery for any program pursuant to this section shall file a petition with the board to request cost recovery. In determining the recovery by electric public utilities and gas public utilities of program costs for any program implemented pursuant to this section, the board may take into account the potential for job creation from such programs, the effect on competition for such programs, existing market barriers, environmental benefits, and the availability of such programs in the marketplace.
>
> [Id. at (b).]

Critically, RGGI sets forth that PSE&G's EE proposal "...may be eligible for rate treatment approved by the board, including a return on equity, or other incentives or rate mechanisms that decouple utility revenue from sales of electricity and gas." Ibid., (emphasis added).

As a matter of law, all requirements found in the Clean Energy Act must be read "in pari materia" with the above-quoted language, which clearly sets forth the Board's authority with regard to the instant EE proposals. The New Jersey Supreme Court held, and it is well settled law in this state, "Statutes are considered to be in pari materia when they relate to the same person or thing, to

the same class of persons or things, or have the same purpose or object." Marino v. Marino, 200 N.J. 315, 330 (2009), quoting Sutherland on Statutory Construction § 51:3 (7th ed. 2008). Therefore, RGGI and the Clean Energy Act must be read in pari materia, or "construed together as a 'unitary and harmonious whole.'" (internal citations omitted), Ibid. For this reason, Dr. Hausman's mistaken legal conclusion should be wholly rejected by the Board.

Indeed, in addition to the legal propriety of the filing, the timing of PSE&G's proposal is easily understood by looking at the timeline attached to the goals of the Clean Energy Act. As outlined in Ms. Levin's rebuttal testimony, "PSE&G's CEF-EE plan can be considered as a proposal designed to meet the ambitious utility mandates - and timeline of those mandates - as outlined by the Clean Energy Act." See Rebuttal Testimony of Amanda Levin, Page 15, lines 12-14. Existing energy efficiency programs in New Jersey will have to be ramped up drastically, and new programs will have to be created and launched quickly, in order for the State to accelerate efficiency savings at the rate needed to reach its legally mandated targets.

As Ms. Levin's rebuttal testimony also discusses, PSE&G's proposal aligns well with the direction of the BPU proceeding's

and stakeholder process. In the first round of public comments, for instance, there was almost unanimous support for a decoupling mechanism, like a component of the cost recovery mechanism proposed by PSE&G. In the recent Energy Efficiency Potential Study prepared for the BPU, a societal cost test similar to the one utilized by PSE&G (in this matter) was employed to evaluate the cost-effective energy efficiency opportunities in the State. The ambition of the Clean Energy Act's timeline and the results of the stakeholder process thus provide further legal and technical support for the Board's approval of PSE&G's EE proposal.

2. The Board should approve PSE&G's proposed methodology for valuing benefits from avoided greenhouse gas emissions.

The Board should adopt PSE&G's scientifically sound method for valuing the societal benefits of avoided air pollution. According to RGGI, at N.J.S.A. 48:3-98.1(b), in determining the recovery of PSE&G's costs, the Board may consider the "environmental benefits" provided by the proposed EE programs. These proposed programs will result in a reduction of the negative effects of air pollution (which are externalities that have not already been captured by the market). As explained more fully by PSE&G's witness, Isaac Gabel-Frank, a market-based approach to valuing the avoided emissions (or reduced social costs of the

emissions) is inherently flawed because the market already failed to account for (or internalize) all of the negative externalities associated with these air pollutant emissions. See Rebuttal Testimony and Exhibits of Isaac Gabel-Frank, pages 12-28.

Rate Counsel's witness, Dr. Dismukes, offered his opinion that the Board should reject PSE&G's proposed approach and instead adopt a "market-based approach." See Direct Testimony of David E. Dismukes, Ph.D., pages 8-16. However, Dr. Dismukes' opinion is fatally flawed because he does not take into account the fundamental premise of this crucial environmental issue.

The air pollution that PSE&G is going to reduce (or avoid) by its proposed EE programs is referred to as a "negative externality" that the market has completely failed to account for. Greenhouse gas emissions from the burning of fossil fuels for energy is a classic textbook example of a market failure, in that the costs (or damages) to the public goods (natural resources like air and water) are not reflected in the price of the energy itself. The fact that the costs (or damage to a shared public good) are external to the cost of energy, is precisely why the costs are referred to as negative externalities. Dr. Dismukes' suggestion that the price of these negative externalities be found in the marketplace is illogical and impractical for the Board's purposes.

Gabel-Frank said "The markets used as examples by Dr. Dismukes are not free markets able to capture all benefits related to avoided emissions … not all externality costs are captured in the RGGI market." Page 16, lines 17-20. Gabel-Frank explained, "RGGI is not a true 'market' for emissions benefits, but rather an administratively established proxy mechanism intended to achieve a policy goal." Page 17, lines 1-3. Gabel-Frank intelligently pinpointed Dr. Dismukes' flawed approach, "The value of energy efficiency, renewable energy, and clean energy initiatives and programs overseen and administered by the BPU will be seriously undervalued if valued against market-based costs such as RGGI allowances." Page 17, lines 6-9.

Gabel-Frank correctly distinguishes the Board's holding in a prior order as inapplicable here, stating:

> This CEF-EE case offers the Board the opportunity to clarify and align its policy with the Governor's and Legislature's vision for New Jersey to be a leader in fighting climate change and to create a vibrant clean energy economy. By not properly valuing the benefits of reduced emissions, the Board would undermine its own policy goals.
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> [Page 21, lines 11-15.]

The Environmental Interveners wholly support Gabel-Frank's policy analysis in this regard and, therefore, strenuously urge the Board to reject the use of market-based costs for emissions benefits

(reverse its cited findings in the Nautilus case) and adopt the Company's proposed methodology for valuing avoided emissions in this matter.

3. States that have achieved the greatest amount of energy efficiency savings are those that have implemented rate decoupling mechanisms similar to the GEM.

As noted in Ms. Levin's rebuttal testimony, making energy efficiency work for utilities is often portrayed as a three-legged stool, with three distinct elements: recovery of program and administrative costs, recovery of lost revenues, and incentive payments. See Rebuttal Testimony of Amanda Levin, Pages 8-9. Each of these legs solves a separate and distinct obstacle to utility energy efficiency achievement. To reach the State's savings goals most cost-effectively, mechanisms related to each of these three legs should be implemented. Therefore, addressing lost revenues due to lost sales is an essential part of developing a strong, utility-led energy efficiency portfolio.

The Clean Energy Act includes provisions, specifically at N.J.S.A. 48:3-87.9, that address all three of these legs: ensuring that utilities can file for prudent recovery of program costs; ensuring that utilities can file for prudent recovery of revenue losses associated with sale loss from a number of measures

including, but not limited to, energy efficiency and other demand-side measures; and developing financial incentives and penalties related to program performance.

As one leg, decoupling is a necessary, but, by itself, an insufficient, piece of the puzzle. Decoupling merely eliminates the potent disincentive a utility has to promote energy efficiency. Performance-based targets and standards incentivize utilities to achieve high levels of savings and develop strong efficiency programs. Performance incentives support targets to be floors rather than ceilings on energy savings for customers.

While decoupling is not by itself a panacea, utilities and states with decoupling mechanisms tend to have much stronger energy efficiency performance. On the evidentiary record before the Board, it is undisputed that only states with a decoupling mechanism have achieved savings in line with the two percent minimum savings requirement set forth in the Clean Energy Act. Rate Counsel's witness, Dr. Dismukes, testified that he was unaware of and could not provide any example of a state that had achieved these types of reductions in energy consumption without a decoupling mechanism. 2T:160-23 to 161-4. In fact, 14 of the top 15 states for energy efficiency (New Jersey ranks 29th) have decoupling; only one state (Arizona) has a lost revenue adjustment

mechanism (or LRAM). See Rebuttal Testimony of Amanda Levin, at Page 6. All states in the top 15 have some type of mechanism to recover lost revenue. Ibid.

Research further supports the assertion that decoupled utilities have superior efficiency performance, compared to non-decoupled peers. As cited in Ms. Levin's rebuttal testimony, at Page 5:

> decoupled utilities achieved an average of 1.4 percent annual energy savings, compared to non-decoupled, non-LRAM utilities' average of 0.5 percent savings. Unlike decoupling, LRAM was not associated with higher or lower energy savings, with LRAM utilities achieving average savings of 0.6 percent.

No evidence to the contrary was submitted to the Board in this matter and, therefore, it is an undisputed fact that decoupled utilities exhibit superior energy savings.

4. The proposed GEM would also likely result in better customer outcomes than a narrower lost revenue adjustment mechanism, given the state's other policy goals promoting beneficial electrification.

Beyond energy efficiency, a decoupling mechanism may have other customer benefits, as compared to either a LRAM or no mechanism as all, given the likely direction of the State's electric and broader energy system moving forward. The State already has and is considering other policies to support the

electrification of vehicles (and other sectors) as part of its goal to reduce greenhouse gas emissions economy-wide, and from the region's transportation system specifically.

Although opinions were raised in this matter that decoupling would provide the Company with an opportunity to recover costs associated with reductions in usage per customer due to any reason (besides energy efficiency), these opinions should not be given great weight in this matter. As set forth in detail in Gabel-Frank's rebuttal testimony, a narrower lost revenue mechanism that would only allow cost recovery for verified utility-sponsored energy efficiency savings would run counter to the State's other policy objectives. Decoupling is a symmetrical mechanism: it takes into account all factors that reduce or increase sales and weighs all these factors to determine if the utility has under- or over-recovered its' fixed costs. Ibid.

Consider the following hypothetical case: In 2024, PSE&G is running a successful EE portfolio that achieves the 1.8 percent incremental savings envisioned in this filing (or 735,205 MWh of incremental savings). At the same time, state and utility programs that support EV charging infrastructure and vehicle sales have resulted in 100,000 EVs on the road in PSE&G's territory. While

PSE&G's verified EE savings are 735,205 MWh, the EVs have boosted sales by 450,000 MWh annually in 2024.

In that hypothetical scenario, for the sake of this argument, an LRAM would only consider those verified savings: allowing the utility to recover the fixed costs associated with those 735,205 MWh of lost sales. However, a decoupling mechanism would look at not only those efficiency savings, but also consider the increase in sales from EVs (in addition to other drivers, like weather or the economy). In this very simple example (assuming no other drivers had an impact), a decoupling mechanism would only charge customers for the lost fixed costs associated with the net change in usage per customer (i.e. the reduction in usage due to EE plus the average increase in per-customer usage due to EV sales). Customers would see a much smaller increase in rates and bills under a decoupling mechanism, rather than a LRAM, in this instance because the decoupling mechanism is considering the other elements that are increasing sales (and a utility's fixed cost recovery) and mitigating the financial impacts to a utility's cost recovery from successful EE programs. Therefore, as explained by PSE&G's witnesses and the Environmental Intervener's witness, decoupling is a more accurate (and holistic) accounting that also benefits customers, and should be approved by the Board so that the customers can begin reaping the benefits as soon as possible.

CONCLUSION

For all the above-mentioned reasons, and all the reasons set forth in the substantial record in this matter, the Board should approve the Company's proposals (with the inclusion of the Environmental Intervener's suggestions).

Dated: May 17, 2019

*/s/*Daniel Greenhouse
Daniel Greenhouse, Esq.