



Agenda Date: 3/29/11  
Agenda Item: 2A

**STATE OF NEW JERSEY**  
**Board of Public Utilities**  
Two Gateway Center, Suite 801  
Newark, NJ 07102  
[www.nj.gov/bpu/](http://www.nj.gov/bpu/)

ENERGY

IN THE MATTER OF THE LONG-TERM CAPACITY )  
AGREEMENT PILOT PROGRAM )  
 )  
 ) DOCKET NO. EO11010026

(SERVICE LIST ATTACHED)

**BY THE BOARD:**

On January 28, 2011, Governor Chris Christie signed into law P.L. 2011, c.9, amending and supplementing P.L. 1999, c. 23, which law establishes a long-term capacity agreement pilot program ("LCAPP") to promote the construction of qualified electric generation facilities, hereinafter referred to as the LCAPP Law.<sup>1</sup> Pursuant to the LCAPP Law, on February 10, 2011, the New Jersey Board of Public Utilities ("Board") initiated this proceeding and also approved the retention, as recommended by the electric distribution utilities ("EDCs"), of an agent ("LCAPP Agent") to assist the Board in this proceeding.<sup>2</sup>

**BACKGROUND:**

Pursuant to the LCAPP Law, the Board was mandated to immediately commence a proceeding to establish an LCAPP.<sup>3</sup> The LCAPP is intended to seek offers for financially-settled Standard Offer Capacity Agreements ("SOCAs") with eligible generators.<sup>4</sup> The LCAPP Law requires selected eligible generators, with Board approved and executed SOCAs, to participate in and be accepted as a capacity resource in the base residual auction conducted by PJM.<sup>5</sup>

<sup>1</sup> The provisions of the LCAPP Law have been codified in the following sections of the New Jersey Statutes: N.J.S.A. 48:3-51, 48:3-60.1, 48:3-98.3—98.4.

<sup>2</sup> N.J.S.A. 48:3-98.3(b).

<sup>3</sup> N.J.S.A. 48:3-98.3(a).

<sup>4</sup> "Eligible generator" means a developer of a base load or mid-merit electric power generation facility including, but not limited to, an on-site generation facility that qualifies as a capacity resource under PJM criteria and that commences construction after 1/28/2011. N.J.S.A. 48:3-51.

<sup>5</sup> N.J.S.A. 48:3-98.3(a).

The Board was further required to approve the retention of an agent, recommended by the EDCs, to assist the Board in administering the LCAPP.<sup>6</sup> The LCAPP Agent, retained in accordance with the LCAPP Law,<sup>7</sup> shall, on behalf of the Board, be responsible for:

- (1) Assisting the Board with the establishment of the LCAPP that allows for developing and offering financially-settled SOCAs for the purpose of facilitating the development of eligible generators;
- (2) Pre-qualifying eligible generators for participation in the LCAPP through a showing of environmental, economic, and community benefits, and through demonstration of reasonable certainty of completion of development, construction and permitting activities necessary to meet the desired in-service date; and
- (3) Recommending to the Board its selection of winning eligible generators based on the net benefit to ratepayers of each pre-qualified eligible generator's offer price and term. Eligible generators that can enter commercial operation for energy delivery year 2015 are to be provided with a weighted preference in addition to the net benefit ratepayer test. Eligible generators shall also indicate the amount of capacity they are offering in the LCAPP.

Accordingly, the Board, at its February 10, 2011, Agenda Meeting, initiated the instant proceeding to fulfill the requirements of the LCAPP Law. At that Agenda Meeting, the Board adopted a schedule and also approved the LCAPP Agent, Levitan & Associates, Inc., as recommended by the EDCs, and named President Solomon as Presiding Officer.

### **THE PUBLIC HEARINGS**

The LCAPP law required the Board to conduct public hearings. N.J.S.A. 48:3-98.3(c) To comply with this provision, the Board held four (4) public hearings throughout the State, one in each of the service territories of the EDCs. The public hearings were open to members of the public to allow comment on the Board's LCAPP proceeding as well as on the proposed recovery through electric distribution rates of costs resulting from the LCAPP. After publication of notice, the public hearings were presided over by President Solomon, and were conducted on the following dates and locations:

A public hearing was held in the Rockland Electric Company ("Rockland") service territory on March 11, 2011 at 10:00 AM in the Township of Mahwah Court Room, 475 Corporate Drive, Mahwah, NJ 07430. At the Rockland public hearing, statements were made by the Director, Division of Rate Counsel and Rockland. No members of the public appeared.

A public hearing was held in the Public Service Electric and Gas Company ("PSE&G") service territory on March 15, 2011 at 1:00 PM at the Board's hearing room, 44 South Clinton Avenue - 1<sup>st</sup> Floor, Trenton, NJ 08625. At the PSE&G public hearing, statements were made by the

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<sup>6</sup> N.J.S.A. 48:3-98.3(b).

<sup>7</sup> Id.

Director, Division of Rate Counsel, PSE&G, the Old Bridge Town Council and the Sierra Club, New Jersey Chapter. No other members of the public appeared.

A public hearing was held in the Jersey Central Power & Light Company ("JCP&L") service territory on March 16, 2011 at 1:00 PM in the Morris County Administration & Records Building, Public Meeting Room - 5th Floor, 2123 Court Street, Morristown, NJ 07963. At the JCP&L public hearing, statements were made by the Director, Division of Rate Counsel, and JCP&L. No members of the public appeared.

A public hearing was held in the Atlantic City Electric Company ("ACE") service territory on March 17, 2011 at 1:00 PM in the Atlantic County Library/West (Hammonton Branch), 451 Egg Harbor Road, Hammonton, NJ 08037. At the ACE Public Hearing, statements were made by the Director, Division of Rate Counsel, and ACE. No members of the public appeared.

The Board's February 10, 2011 ("February 10 Order") also provided for the submission of written or electronic comments by the public sent to the attention of the Office of the Secretary at: Board of Public Utilities, Two Gateway Center, Suite 801, Newark, NJ 07102 postmarked no later than March 18, 2011 or to [board.secretary@bpu.state.nj.us](mailto:board.secretary@bpu.state.nj.us) by that same date. The Board's Office of the Secretary received 2 comments from the public.

### **THE LCAPP PROCEEDING**

As previously stated, the Board's February 10 Order initiating the instant proceeding adopted, among other things, specific milestones to be achieved.<sup>8</sup> The LCAPP Agent undertook the following activities to achieve the milestones:

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<sup>8</sup> The following milestones are set forth at page 5 of the Board's February 10, 2011 Order:

Proposed SOCA Submission	Monday, 2/14/2011
Application Data Sheets Issued by Agent	Tuesday, 2/15/2011
Application Data Sheets Due	Tuesday, 2/22/2011
Initial Comments to Proposed Form of SOCA	Tuesday, 2/22/2011
Reply Comments to Proposed Form of SOCA	Friday, 2/25/2011
Final Form of SOCA Issued	Tuesday, 3/1/2011
Final SOCP Bids Due	Monday, 3/7/2011
Initial Recommended SOCA Proposals	Tuesday, 3/15/2011
Issue Agent's Report Supporting Selection	Monday, 3/21/2011
Public Comments on Agent's Report	Thursday, 3/24/2011
Reissue Agent's Report Supporting Selection	Monday, 3/28/2011
Board Order on Recommended SOCAs	Wednesday, 3/30/2011

Note that the Board Order on Recommended SOCAs was initially stated as a March 30, 2011 milestone and was changed to March 29, 2011 to comply with the sixty day (60) requirement set forth in the LCAPP Law.

On February 10, 2011, the LCAPP website ([www.nj-lcapp.com](http://www.nj-lcapp.com)), administered by the LCAPP Agent, was activated. The Agent's website served as a document repository and information portal for the LCAPP process for eligible generators and other interested parties.

On February 11, 2011, a form was developed by the Agent to assist interested parties in submitting a proposed SOCA, was posted on the LCAPP website. Also on this date, the Board's Order Initiating the Proceeding and Approving the Agent was posted on the LCAPP website as well as on the Board's website.

On February 14, 2011, application Data Sheets and other prequalification materials, developed by the Agent, in consultation with Board Staff, were posted on the LCAPP website. This was one day ahead of schedule for this key milestone.

Also, on February 14, 2011, proposed forms of the SOCA, as well as comments regarding the SOCA, were submitted by interested parties.<sup>9</sup> These documents were posted for review and comment on the LCAPP website as well as on the Board's website.

On February 18, 2011, the EDCs collectively submitted proposed terms of security to be included in the SOCA (security agreement and escrow agreement). These documents were posted on the LCAPP website for review and comment.

On February 22, 2011, entities interested in participating in the LCAPP proceeding submitted pre-qualification application data sheets detailing their respective electric generation units to be evaluated by the Agent.<sup>10</sup>

Also on February 22, 2011, Initial Comments to the proposed forms of SOCA were submitted by interested parties and were subsequently posted on the LCAPP website as well as the Board's website for public review and comment.

On February 23, 2011, a Standard Offer Capacity Price ("SOCP") Bid Form and an Officer Certification Form required for bid submission, were posted on the LCAPP website. Information regarding Bid Letters of Credit, including Forms and Instructions, was also posted on the LCAPP website.

Also on February 23, 2011, the LCAPP Agent's Initial Draft SOCA was posted on the LCAPP website for public review and comment. Although not a milestone in the Board's February 10, 2011 Order, to afford the public and interested parties an opportunity to review and comment on the SOCA before final issuance, an initial draft of the proposed SOCA was posted on the LCAPP website.

On February 25, 2011, Reply Comments to the proposed forms of SOCA submitted on February 14, 2011, as well as comments on the Agent's Initial Draft SOCA, were submitted by interested parties<sup>11</sup> and subsequently posted on the LCAPP website and the Board's website.

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<sup>9</sup> Submissions were made by the following entities: the electric distribution companies ("EDCs"), Division of Rate Counsel, Exelon, Hess Corp., LS Power, Competitive Power Ventures ("CPV"), GenOn Energy, and NRG Energy Inc.

<sup>10</sup> 34 applications were received totaling approximately 7500 MWs. Several entities submitted multiple applications for different generating units.

<sup>11</sup> Submissions were made by the following entities: the EDCs, Division of Rate Counsel, Exelon, Hess

On February 27, 2011, the security-related documents, namely, the security agreement and escrow agreement, submitted by the EDCs in their reply comments, were posted on the LCAPP website for review and comment.

Again, although not required by the Board's February 10 Order, to afford the public and interested parties an additional opportunity to review and comment on the SOCA before final issuance, on February 28, 2011, a revised Draft SOCA was posted on the LCAPP website for public review and comment.

On March 1, 2011, after review of all of the comments, the final proposed SOCA was posted on the LCAPP website and subsequently on the Board's website.

Also on March 1, as set forth in the Board's February 10 Order, the EDCs collectively submitted a proposed rate recovery mechanism.

On March 7, 2011, entities that previously submitted pre-qualification applications submitted their binding bid price and term to be evaluated by the Agent, along with the Officer Certification Form and Bid Letter of Credit. The Agent, through the LCAPP website<sup>12</sup> and the electronic subscriber service list, informed all interested parties that the bids submitted by interested generators must conform to the final proposed form of SOCA, except for minor technical corrections. All eligible generators were on notice that any bid predicated on a substantive modification to the final proposed form of SOCA would not be considered by the Agent. Bids predicated on substantial revisions to the final proposed form of SOCA would make it impossible for the Agent to reasonably compare a generator(s) non-conforming bid(s) submitted with the conforming bid(s) submitted by the other generators.

Eighty (80) questions regarding the proceeding, as well as many technical questions, have been answered by the Agent to provide guidance to interested parties. These questions and answers were posted on the LCAPP website in a timely manner so that the information was available to all interested parties simultaneously.

On March 15, 2011, the LCAPP Agent's recommended selection of qualified bidders was submitted to the Board. The Agent's recommended selection was posted on the LCAPP website as well as on the Board's website.

On March 21, 2011, the Agent's Report supporting the selection of qualified bidders setting forth the detailed analysis supporting the Agent's selection of qualified bidders was submitted to the Board. The Agent's Report was posted on the LCAPP website as well as on the Board's website for public review and comment.

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Corp., LS Power, Competitive Power Ventures ("CPV"), NextEra Energy Resources, and NRG Energy Inc.  
<sup>12</sup> LCAPP Question No. 64: Will non-conforming bids that are conditioned on modification(s) to the March 1, 2011 SOCA, including modifications that were previously submitted through the comment process, be considered or rejected outright?

Any bid predicated on a substantive modification to the Final Proposed Form SOCA dated March 1, 2011, will not be considered. Bids that identify technical corrections merely for consistency sake to the Final Proposed Form SOCA will be considered, however.

This response was posted on the LCAPP website on March 4, 2011.

On March 25, 2011, nine comments regarding the Agent's Report were submitted by interested parties.

### **APPROVAL OF THE FORM OF THE SOCA**

The SOCA, as defined in the LCAPP Law, is a financially settled transaction agreement that allows eligible generators to receive payments from or make payments to the EDCs for a defined amount of electric capacity for a term specified by the Board not to exceed fifteen (15) years. Pursuant to the LCAPP law, these payments are implemented through a fully non-bypassable irrevocable charge.<sup>13</sup>

The Board's February 10 Order directed interested parties to submit proposed forms of the SOCA for the LCAPP Agent's and the Board's consideration. On February 14, 2011 the Board received SOCA submissions from several interested parties, as well as comments regarding the SOCA.<sup>14</sup> Subsequently, on February 18, 2011, the EDCs collectively submitted proposed terms of security to be included in the SOCA (security agreement and escrow agreement).

On February 22, 2011, Initial Comments to the proposed forms of SOCA were submitted by interested parties. On February 23, 2011, the LCAPP Agent's Initial Draft SOCA was posted on the LCAPP website for public review and comment. Although not a milestone in the Board's February 10, 2011 Order, to afford the public and interested parties an opportunity to review and comment on the SOCA before final issuance, an initial draft of the proposed SOCA was posted on the LCAPP website.

On February 25, 2011, Reply Comments to the proposed forms of SOCA submitted on February 14, 2011, as well as comments on the Agent's Initial Draft SOCA, were submitted by interested parties<sup>15</sup> and subsequently posted on the LCAPP website and the Board's website.

On February 27, 2011, the security-related documents, namely, the security agreement and escrow agreement, submitted by the EDCs in their reply comments, were posted on the LCAPP website for review and comment.

Again, although not required by the Board's February 10, 2011 Order, to afford the public and interested parties an additional opportunity to review and comment on the SOCA before final issuance, on February 28, 2011, a revised Draft SOCA was posted on the LCAPP website for public review and comment.

On March 1, 2011, a Final Proposed Form of SOCA was posted on the LCAPP website and the Board's website. Subsequently, several parties submitted substantive comments on the Final Proposed Form of SOCA. Some potential eligible generators raised concerns expressing their belief that the some of the terms and conditions of the final proposed form of SOCA, as well as the initial draft and revised draft SOCA, would not be acceptable to a financial lender and

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<sup>13</sup> N.J.S.A. 48:3-51.

<sup>14</sup> Submissions were made by the following entities: the EDCs, Division of Rate Counsel, Exelon, Hess Corp., LS Power, Competitive Power Ventures (CPV), GenOn Energy, and NRG Energy Inc.

<sup>15</sup> Submissions were made by the following entities: the EDCs, Rate Counsel, Exelon, Hess Corp., LS Power, CPV, NextEra Energy Resources, and NRG Energy Inc.

therefore, the potential new generation project would not be able to obtain financing to construct the facility. These potentially eligible generators also maintained that the final proposed form of SOCA, as well as the initial draft and revised draft SOCA, did not comport with the LCAPP Law regarding irrevocability of the SOCA. The EDCs, on the other hand, believed that the final proposed form of SOCA, as well as the initial draft and revised draft SOCA, did not comport with the LCAPP Law for other reasons. The EDCs argued for terms and conditions that would automatically terminate the SOCA, including, but not limited to, failure of a SOCA recipient to clear in the first Base Residual Auction ("BRA") it bid into. The EDCs along with their substantive comments, submitted technical modifications to the Final Proposed Form of SOCA. These technical modifications were primarily limited to incorrect paragraph cross references and definition references. Rate Counsel submitted comments on the terms and conditions of the final proposed form of SOCA, as well as on the initial draft and revised draft SOCA. Based upon a review of all the comments received on the initial draft and revised draft SOCA, Board Staff believes that the final proposed form of SOCA strikes a fair and reasonable balance regarding the issues and concerns raised by all the interested parties.

### **DISCUSSION AND FINDING**

As noted above, parties have taken issue with the provisions that allow a SOCA to continue even if the generator does not clear the BRA after achieving the Commencement Date, that allow modification of the SOCA under certain circumstances, and that terminate the SOCA if the LCAPP Law is voided or a change in the law makes performance under the SOCA illegal. The Board **HEREBY FINDS** that these provisions do not violate the LCAPP Law or the law of this State. While it is true that N.J.S.A. 48:3-98.3(c)(12) requires that eligible generators with executed SOCAs must participate in and clear the annual BRA, the statute does not dictate the ramifications for failure to clear the BRA. The proposed final form of the SOCA allows the contract to continue but ratepayers do not pay anything under that scenario, and the potential benefit if the generator does clear in a succeeding BRA is preserved. Objectants claim that allowing any modification of the SOCA violates N.J.S.A. 48:3-98.3(f) which bars the Board and other governmental agencies from modifying or amending a SOCA after approval. But the proposed form of the SOCA only provides for modifications on consent of the parties with Board approval only after the parties reach an agreement, and thus these modifications do not violate the Act. Finally, the provision terminating the SOCA in the event of certain changes in the law is only intended to provide some degree of certainty in a situation that is beyond the control of the Board, and reflects the basic and fundamental understanding that the Board can not and should not indicate a commitment to a course of action if the legislative or judicial branch finds that action illegal or incorrect.

Based upon the Board's review of the Final Proposed Form of SOCA, and the comments submitted, the Board **HEREBY ACCEPTS AND APPROVES** the Final Proposed Form of SOCA, modified to incorporate the technical corrections set forth in the EDCs comments dated March 4, 2011. The Board agrees with the LCAPP Agent that the Final SOCA appropriately balances the risks between ratepayers and generators while satisfying the expressed goals of the LCAPP Law, and respecting other principles of the law of this State. See Wilentz v. Hendrickson, 135 N.J. Eq. 244 (1944); Gallenthin Realty Dev., Inc. v. Paulsboro, 191 N.J. 344 (2007).

## **AGENT'S RECOMMENDATION OF QUALIFIED ELIGIBLE GENERATORS AND COMMENTS**

### **THE LCAPP AGENT'S REPORT**

After evaluating the conforming SOCP bids, the Agent identified three qualified generation facilities to be recommended for SOCA awards,<sup>16</sup> with a total unforced capacity ("UCAP") of 1,948.5 MW, as follows:

	<b>Newark Energy Center</b>	<b>Old Bridge Clean Energy Center</b>	<b>Woodbridge Energy Center</b>
Sponsor	Hess Newark, LLC	New Jersey Power Development LLC	CPV Shore, LLC
UCAP	625.0 MW	660.1 MW	663.4 MW
Location	Newark, NJ	Old Bridge, NJ	Woodbridge, NJ
Technology Type	Combined Cycle	Combined Cycle	Combined Cycle
Fuel Type	Natural Gas	Natural Gas	Natural Gas
First SOCA Year	2016-2017	2015-2016	2015-2016

The LCAPP Agent has determined that the recommended SOCA portfolio of the Newark Energy Project, Old Bridge Clean Energy Center, and Woodbridge Energy Center (the recommended SOCA portfolio) offers substantial net economic benefits on an expected value basis over the relevant planning horizon to New Jersey's electric customers.<sup>17</sup> These net economic benefits are ascribable to the expected value of the SOCA portfolio in relation to the forecasted capacity market clearing price under PJM's Base Residual Auction ("BRA"), as well as the reduction in wholesale energy prices in New Jersey, all other things being the same. In addition, other economic benefits may be realized, but have not been counted.

The Agent has determined that the recommended SOCA portfolio offers substantial socio-economic benefits to the State of New Jersey on an expected value basis.<sup>18</sup> These benefits are primarily due to the expansion of direct employment for the duration of the associated construction phases of the projects, and the new on-site permanent jobs associated with operation and maintenance of the new generation facilities during their operating lives. In addition, employment and incomes are expected to increase due to the indirect impacts of increasing the demand for goods and services procured from New Jersey firms during the construction and operations phases, giving rise to what is known as an economic multiplier effect. Though not quantified, an additional economic benefit to New Jersey's electric customers is the expected reduction in wholesale power costs which would be passed on to electric customers, giving rise to increased expenditures on other goods and services.

<sup>16</sup> LCAPP Agent Report, Sec. 7.1 at 71.

<sup>17</sup> LCAPP Agent Report, Sec. 7.2 at 72 - 78.

<sup>18</sup> Id. at 76-78.

The Agent has determined that the recommended SOCA portfolio also offers significant environmental benefits to New Jersey's electric customers.<sup>19</sup> These environmental benefits result from the displacement of incumbent generation with the portfolio of cleaner, gas-fired generation, resulting in lower net emissions of NO<sub>x</sub>, SO<sub>2</sub>, and mercury across the PJM region, much of which is upwind of New Jersey. In addition, two of the three projects, the Newark Energy Center and the Woodbridge Energy Center, will be located on brownfield sites. The beneficial reuse of formerly impaired properties represents a significant environmental benefit that may ultimately confer additional economic benefits as well.

### **COMMENTS ON THE AGENT'S REPORT**

As previously noted, on March 24, 2011, nine comments from various interested parties<sup>20</sup> were received regarding the Agent's Report dated March 21, 2011. The following is a summary of each interested party's comments:<sup>21</sup>

Middlesex Power Partners ("Middlesex"):

Middlesex believes that the Agent should continue the solicitation process by allowing the four leading projects to adjust their proposed MWs downward by an identical percentage such that the total procurement is precisely 2,000 MW. According to Middlesex, a total of 2,000 MWs is required by the LCAPP law.

Middlesex further believes that the Agent should identify the proposed equipment manufacturer for each recommended project and should recommend projects with diverse major equipment manufacturers. Diversification among major equipment suppliers and proposed turbine models is a key risk mitigation strategy which should be addressed when finalizing the recommended projects. Middlesex asserts that this evaluation does not appear in the Agent's report.

NextEra:

NextEra asserts that the LCAPP Act requires that eligible generators with executed SOCAs shall participate in and clear the annual base residual auction conducted by the PJM as part of its reliability pricing model for each delivery year of the entire term of the agreement. NextEra agrees with the EDCs and argues that this statutory requirement is unambiguous and thus cannot be changed through interpretation, such as the Agent presumes to do by allowing the SOCA to continue but without any payment to the generator.

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<sup>19</sup> Id. at 72-76

<sup>20</sup> Comments were received from the following entities: the EDCs, Rate Counsel, PSEG Power, NextEra Energy Resources, West Deptford Energy, Exelon, Middlesex Power Partners, Rockland Capital and Township of West Deptford.

<sup>21</sup> This summary is intended for informational purposes only and is not a verbatim recitation of each party's comments.

PSEG Power:

According to PSEG Power, the Agent failed to support its prequalification decisions. The Agent disqualified nearly two thirds of the prequalification applicants because they were tied to existing generation units and therefore, according to the Agent, did not meet the condition of being a new generation facility. The LCAPP Law did not define "generation facility" as a stand-alone generation facility. PSEG Power further asserts that the definition of "eligible generator" does not even use the term "new." Instead, the definition creates a "new" requirement by requiring that construction commence after the Statute's enactment. Expansion projects and up-rates require construction of substantial new physical facilities that result in new capacity. According to PSEG Power, the Statute contains no indication that these types of new facilities should be excluded, and their consideration is consistent with allowing any new capacity for which construction commences after the Statute's enactment.

Rate Counsel:

Rate Counsel is in general agreement with most aspects of the Agent's report, with an important caveat that Rate Counsel has not had the opportunity to review any of the bids submitted, nor does the report identify the specific SOCA pricing for the selected projects. Rate Counsel understands such information is to be held confidential at the present time. The Agent's report provides pricing and customer impact information on the winning SOCA projects largely in aggregate form. For that reason, Rate Counsel cannot comment on the individual specific bid evaluation results and project rankings.

Despite this limitation, Rate Counsel notes that the LCAPP process appears at this stage to have met its objective of fostering the construction of approximately 2,000 MW of modern gas-fired combined cycle capacity in the region. According to Rate Counsel, if completed, this will foster the goals identified in the LCAPP legislation, -- a financial hedge on the cost of capacity; customer savings (particularly in the energy market); economic development/ fiscal benefits (since all three new projects are to be sited in New Jersey); enhanced reliability from 2,000 MW of physical new capacity that likely would not otherwise have been built; and environmental benefits from displacement of other "dirtier" sources of electric generation in the region. The addition of these new generation sources (if constructed) will also enhance the competitiveness of power supply markets by creating market entry. Rate Counsel states that there were two notable observations from the Agent's analysis. The first is that over the 15 year SOCA contract lives, the RPM credit will fully offset the SOCA payments to the three generators. This demonstrates that, at least on an expectational basis and given the Agent's assumptions that the SOCAs will function as a financial capacity hedge for both the developers and consumers—not as a "subsidy" as had been incorrectly characterized. The financial hedge is clearly needed to facilitate project development. Beyond the capacity hedge, the Agent estimates energy market savings (which appears to be at least in part reduced congestion costs) of roughly \$1.8 billion, net present value, for New Jersey customers.

Rockland Capital - BL England:

Rockland Capital believes that its proposed new gas-fired combined cycle generating facility provides substantial and unique benefits to the local community as well as the State at-large, as set forth in its submissions. Unfortunately, according to Rockland Capital while the various unique attributes may have been taken into account during the eligibility and/or prequalification process, there is no indication in the LCAPP Agent's Report that these substantial and unique benefits were taken into account during the bid evaluation and final project selection process. Nor is there any indication in the LCAPP Agent's Report that an assessment was performed by the Agent of whether the selected projects could have or would have been developed without a SOCA.

Rockland Capital makes a general observation that all three recommended generators are located in Northeast New Jersey within about 25-30 miles of each other, in a corridor where many gas-fired electric generating facilities, electric transmission and gas transportation facilities currently exist. In that sense, there is very little geographic diversity offered in terms of new generation or incremental economic activity beyond that associated directly with the construction and operation and maintenance of the power plant.

West Deptford Energy - LS Power:

WDE asserts that it has secured all of the necessary real estate rights and obtained all of the major permits and approvals necessary to begin construction of its proposed generating facility. According to WDE, its facility is the only combined cycle facility in New Jersey positioned to start construction in 2011 and achieve commercial operations prior to June 1, 2014. WDE submitted bids for consideration that would enable construction of the WDE to begin this year. Based on information contained within the Agent Report, WDE is the only bidder certain to provide the anticipated benefits beginning in 2014. According to WDE, the bid provided by WDE represents the lowest cost bid received in the LCAPP process whereby, based on the Agent's Resource Clearing Price ("RCP") forecast, WDE would essentially pay the electric utilities each and every year of the Standard Offer Capacity Agreement. According to WDE, ratepayers would be expected to receive over \$300 million in payments from WDE under the SOCA. WDE states that it is willing to accept this "below market" pricing in exchange for certainty. In addition to receiving over \$300 million in direct payments, WDE believes New Jersey will receive significant additional benefits associated with the construction and operation of the WDE's facility including additional economic, environmental and community benefits. The Agent did not evaluate the bid from WDE due to changes requested by WDE to the proposed form SOCA. According to WDE, these changes are consistent with the LCAPP Law and industry standard agreements including the Basic Generation Service-Fixed Price Supplier Master Agreement used by the EDCs in New Jersey. According to WDE, these changes are necessary to ensure the SOCA remains valid and enforceable, which is a predicate for the SOCA to provide value.

WDE further notes that all of the recommended projects are located within a radius of approximately 20-miles in northern New Jersey. According to WDE, this concentration of plants in such close proximity poses additional risk to completion of the projects and

reduced energy market benefits to the State (energy market benefits become saturated). Selection of WDE provides geographic diversification resulting in a greater likelihood of success for the remaining selected bidders and broader environmental, economic, community and energy market benefits to the State.

WDE asserts that the quantification of net benefits to ratepayers presented in the Agent Report are overstated for both the assumed RCP credit and energy market benefits attributed to each of the recommended projects. This is more pronounced for the second and third recommended projects as fewer benefits are associated with incremental generation. The premise for selection of the third recommended project is flawed to an extent that it is questionable if the project would provide any net benefit to ratepayers.

#### EDCs:

The EDCs believe the Agent's Report fails to provide the necessary details to fully evaluate its findings and conclusions. In addition, the Report apparently does not consider all relevant impacts on the net benefits calculation such as the long-term impacts on capacity market prices. The EDCs respectfully submit that the Board should direct the LCAPP Agent to prepare a revised report that provides much needed granularity with respect to the analyses performed and the support for the assumptions and forecasts utilized. Furthermore, the EDCs recommend that the Board convene hearings to allow cross-examination of the LCAPP Agent and to allow the presentation of additional expert testimony to validate the Report's findings and to suggest possible alternatives.

According to the EDCs, if the recommendations set forth in the Report are accepted, New Jersey ratepayers will become obligated to pay up to an amount that the EDCs estimate is in the range of \$1.3 billion in net present value obligations (nominally about \$2.6 billion), under 15-year contracts based on an incomplete and highly subjective analysis that renders the prospective net benefits speculative at best. The EDCs do not believe that this analysis provides a proper basis upon which to impose such costs on ratepayers.

The LCAPP process was touted by the State as being open and transparent. Yet, if the prices are withheld, then the process will be entirely opaque – lacking disclosure of the amount for which ratepayers will be at risk. Neither the parties nor the public can evaluate the costs and benefits of the program without this information. Were the Board to require the EDCs to sign the SOCAs without disclosing the prices of the winning bidders, the Board would be approving a de facto rate increase without providing public notice to customers of a fundamental element impacting that rate increase.

The EDCs note that the actual capacity prices that the Report reflects are extremely speculative. Specifically, The Report indicates an RPM clearing price for New Jersey and the rest of RTO for most of the contract term to be over \$300/MW-day. Yet, the capacity prices in RPM have never gone to \$300/MW-day. If the Report were to use the RPM clearing price from last years' auction and used a SOCA price of \$300/MW-day, then the total net SOCA cost would increase to over \$1.3 Billion. This one change in RPM clearing prices would result in the costs to ratepayers going from the Report's estimate of a \$100 Million to \$200 Million credit to a \$1.3 Billion cost.

Moreover the EDCs assert that the Report does not sufficiently analyze the risk imposed on ratepayers of relying on a speculative projection of capacity prices—exactly the risk that developers claim investors are unwilling to take. The EDCs further argue that the Report fails to explain or support its analysis of energy market impacts, and ignores the fact that these supposed benefits are as susceptible to possible changes in PJM's mitigation rules as are the capacity market impacts that the Agent “decided to exclude.”

The EDCs believe that the environmental benefits of the recommended portfolio are overstated. They also state the report does not consider the long-term harmful impacts to competitive markets.

The EDCs noted that the Agent correctly decided to reject requests by some generators to modify the final proposed form of SOCA after the bidding occurred. This rejection was necessary because such a change would undermine the competitiveness and credibility of the LCAPP bidding process. If the Board were to change the form of SOCA and to select generators who refused to rely on the form of SOCA that the Agent required all other participants and potential participants to rely on, then it would undermine the entire LCAPP process. At a minimum, the Board would have to conduct an entirely new bid process.

According to the EDCs, while it would be inappropriate for the Board to change the form of SOCA after the parties submitted their bids, the form of SOCA contains some terms that highlight the risks to ratepayers that the Report failed to evaluate in calculating net benefits. First, the form of SOCA does not provide that the SOCA will terminate if a generator fails to clear in any RPM auction during the term of the SOCA. The EDCs previously explained that this departure from the statute undermines ratepayers' ability to receive the full “net value” of a SOCA, imposes financial costs on ratepayers, and allocates additional risk to ratepayers. The EDCs believe that the form of SOCA does not provide for adequate credit and security requirements. According to the EDCs, such requirements are necessary to protect ratepayers from the risks that the Agent has failed to properly evaluate.

The EDCs continue to encourage the Board to consider whether a suspension of the schedule is appropriate. Such a suspension is fully authorized by the statute and in the discretion of the Board, without any requirement to undergo a standard legal evaluation that would normally accompany a request for a stay. Such a pause would allow the Board to evaluate the outcome of the stakeholder process before burdening New Jersey ratepayers with these significant costs.

Exelon:

Exelon continues to assert the LCAPP Law is unconstitutional and that the proceeding be stayed.

Exelon believes that the Agent's Report provides no specific information about the individual rankings or weighting of any of the LCAPP criteria. According to Exelon, it appears that the applicants, bidders and the public-at-large will never know how the Agent reached its recommendations. Given the pending cases at FERC and U.S.

District Court, neither the Board nor its Agent can accurately quantify what benefits, if any, will accrue to the State.

According to Exelon, the public interests of New Jersey customers are not served by subjecting them to the costs and risks of the LCAPP with nothing more than the speculative hope that overall energy prices might decline. If the BPU is confident in the Agent's forecast of capacity prices in the \$300 -\$400 range for the next 15 years, Exelon posits that the BPU should consider a proceeding with the EDCs to immediately enter into as many capacity agreements as possible.

Exelon believes that the Agent should have considered 12, 816MW of new additions in coal, bio-mass, hydro, nuclear, oil and solar and an additional 2700 MW of wind. Furthermore, according to Exelon, the two year grace period for clearing the PJM auction contravenes the Act.

Exelon believes that the Agent employed an overly circumscribed interpretation of the term "eligible generator" and summarily eliminated any applicant that proposed a project involving the expansion of an existing facility, including uprates to existing nuclear units.

#### West Deptford Township:

According to West Deptford Township, LS Power has purchased 302 acres of land for \$14M which property is designated as a Redevelopment Zone and the Township is to receive \$107M in PILOT payments over 30 years. The land has sat fallow for a long time with minimal tax receipts for the Township. The Township has invested heavily in working on this project, not to just develop property, but to do so in a way that will provide extraordinary benefits to its residents.

The process by which the Agent has justified refusing to even evaluate the merits, the extremely short Comment Period, and the haste with which the process appears to be moving all suggest that critical mistakes are about to be made. The Township requests that more time be provided for consideration and the Agent's recommendations be rejected.

Upon review of the comments received, no new information was submitted by any interested party that necessitated the LCAPP Agent to re-issue its March 21, 2011 Report. Based upon a review of the comments received, the Agent did not modify its recommendation to the Board.

#### **DISCUSSION AND FINDING**

The Board **HEREBY FINDS** that the LCAPP process was open and transparent, contrary to the assertions of several of the commentators. Notwithstanding the legislatively-mandated timeline to conclude the LCAPP proceeding in sixty (60) days, the LCAPP Agent, Board Staff and Counsel endeavored to solicit public input throughout the proceeding. For instance, interested parties were given the opportunity to comment on two draft versions of the SOCA before the Agent published its final proposed form of SOCA. This opportunity for public input was not a criterion in the legislation; however, the Board sought the comments of all parties, the Agent,

Board Staff in order to assist in promulgating a SOCA that is fair and reasonable and comports with the LCAPP Law.

Although the Agent's evaluation criteria and underlying analysis were questioned by certain commentators, the LCAPP Agent's analysis and resulting Report was thorough, rigorous, and in accord with standards of professional excellence. The LCAPP Agent's analysis was based on a comprehensive and substantial quantitative as well as qualitative analysis. In its evaluation, the LCAPP Agent relied upon various proprietary-licensed market simulation and price forecasting models as well as the Agent's own in-house proprietary financial models. Furthermore, the LCAPP Agent worked closely with Board Staff and Counsel, as well as New Jersey Department of Environmental Protection throughout the proceeding in order to seek input relating to issues of specific relevance to New Jersey. The Board further notes that the LCAPP Agent has extensive expertise in developing, designing, implementing, administering and monitoring wholesale power procurements.<sup>22</sup> The Board believes that the Agent's experience and work in other jurisdictions on similar issues as those before the Board in the instant matter, and the scope and detail of the Agent's Report, that the Board has been provided with sufficient information upon which to make an informed decision.

Based upon the Board's review of the LCAPP Agent's report, the public comments and the LCAPP Agent's presentation to the Board at the March 29, 2011 Agenda Meeting, the Board **HEREBY ACCEPTS** the Agent's recommendations as set forth in the Agent's report dated March 21, 2011, and **HEREBY AWARDS** SOCAs to the following qualified generators: Hess Newark Energy Project, NRG Old Bridge Clean Energy Center, and CPV Woodbridge Energy Center.

#### **CONFIDENTIAL TREATMENT OF SOCA BID PRICE**

Several generators raised concerns over the public release of their respective SOCA price bids. The generators believe that public disclosure of their respective SOCA bid prices may provide an undue competitive advantage to other generators. Furthermore, the generators also believe that public disclosure of their respective SOCA bid price may impact bidding behavior in the relevant PJM BRAs. Based upon these concerns, the Board agrees with the generators that public disclosure of their respective SOCA bid prices may provide an undue advantage to their competitors, and may have the potential to affect bidding behavior in the relevant PJM BRAs. Therefore, the Board **HEREBY ORDERS** that any of the SOCA bid prices submitted will not be publicly disclosed and will remain confidential for a limited period of time. Upon a generator submitting a bid and participating in the respective PJM BRA as set forth in its SOCA, the Board **HEREBY ORDERS** that the SOCA bid price for that generator will be made publicly available and the SOCA bid price will no longer be confidential.

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<sup>22</sup> The LCAPP Agent is currently advising the Maryland Public Service Commission on matters related to the formulation of a Request For Proposals for new capacity resources. The LCAPP Agent also served as the "prosecutorial arm" of the Connecticut Department of Public Utility Control in Connecticut's peaking generation procurement process. The LCAPP Agent also currently serves as procurement administrator for capacity, energy renewable energy credits, and long-term renewable energy contracts on behalf of the Illinois Power Agency as well as the administering long-term power contracts for the New York Power Authority and the Long Island Power Authority. It should be noted that many of the interested parties herein should be quite familiar with the LCAPP Agent's underlying methodology as many of the interested parties in the LCAPP proceeding were participants in one or more of the other states' proceedings.

## **COST AND RATE RECOVERY ISSUES**

N.J.S.A. 48:3-98.3 (d) provides that: “[f]he board shall order the full recovery of all costs associated with the electric public utilities’ resulting SOCAs, and the costs of the agent retained pursuant to subsection b. of this section, from ratepayers through a non-bypassable, irrevocable charge.”

In the February 10 Order, the Board ordered the EDCs to defer any and all reasonably and prudently incurred costs associated with retention of and work performed by the agent retained by the EDCs to assist the Board, for prospective recovery in each of the respective EDC’s next electric distribution base rate proceedings. The Board further ordered the EDCs to maintain all invoices for work performed by said agent as well as records associated with any and all amounts paid to said agent, for the Board’s review and consideration, should the EDCs seek recovery of the respective EDC’s portion of the agents’ costs. February 10 Order at 7.

On February 24, 2011, the four EDCs collectively filed a Motion For Reconsideration of the February 10 Order pertaining to the recovery of costs incurred by the EDCs in implementing the LCAPP as well as the recovery of the Agent’s costs. The EDCs requested the ability to recover all of the costs they incur associated with the LCAPP through an irrevocable, non-bypassable charge now, and not in their next respective base rate cases.

On March 4, 2011, Rate Counsel filed a response to the EDCs’ Motion For Reconsideration. Rate Counsel opposes the EDCs’ request and supports the recovery of the EDCs’ costs in the context of their next respective base rate cases where such costs would be subject to full prudence review. On March 11, 2011, the EDCs collectively filed an answer to Rate Counsel’s response denying that they were claiming that costs were not subject to a prudence review, but reiterating that recovery through a clause mechanism comports with the LCAPP Law.

As cited above, the LCAPP Law allows the utilities to recover all costs “associated with the electric public utilities’ resulting SOCAs, and the costs of the agent retained pursuant to subsection b. of this section, from ratepayers through a non-bypassable, irrevocable charge.” Based upon this provision, the Board is persuaded that the EDCs should not have to wait until final resolution of their next distribution base rate proceedings to recover these costs.

Therefore, based upon the Board’s review of the Motion For Reconsideration and the responses and answers filed, the Board **HEREBY MODIFIES** its February 10 Order regarding the recovery of costs incurred by the EDCs. This modification is solely limited to the issue of rate recovery by the EDCs of direct costs incurred by the EDCs in implementing the LCAPP as well as the recovery of the LCAPP Agent’s costs. The Board **HEREBY AUTHORIZES** the EDCs to include in their SOCA Rate Recovery Mechanisms, all reasonably and prudently incurred direct costs associated with the EDCs’ resulting SOCAs, and the costs of the agent, after notice, the opportunity for comment and public hearing, subject to review and approval by the Board. These costs shall be deferred for recovery until the EDCs’ prospective SOCA Rate Recovery Mechanism filings when the EDCs seek authority to implement the SOCA rate.<sup>23</sup> This deferred accounting treatment shall include carrying costs at a rate of interest based on two year Treasury notes plus

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<sup>23</sup> Based upon the Agent’s Report and Recommendations, a rate would not be established by the Board until on or after June, 1, 2015, the first Delivery Year that payments to or from the generators would be triggered under the SOCA.

60 basis points. In the alternative, the Board **HEREBY AUTHORIZES** the EDCs to request recovery of all reasonably and prudently incurred direct costs associated with the EDCs' resulting SOCAs, and the costs of the agent, in a distribution base rate proceeding filed with the Board.

Pursuant to the February 10 Order, on March 1, 2011, the EDCs collectively submitted a proposed method to provide selected eligible generators with the requisite payments from the EDCs for the difference between the SOCP and the Resource Clearing Price ("RCP") multiplied by the SOCA capacity in the event the SOCP is greater than the RCP for any applicable delivery year, and to provide the EDCs with refunds from the selected eligible generators for the difference between the SOCP and the RCP multiplied by the SOCA capacity in the event the RCP is greater than the SOCP for any applicable delivery year, hereinafter referred to as the SOCA rate recovery mechanism.

On March 1, 2011, Gerdau Ameristeel Corporation ("Gerdau"), filed comments regarding the EDCs' proposed SOCA rate recovery mechanism. Gerdau requested that the non-bypassable LCAPP charge be assessed to ratepayers on the basis of customers' Peak Load Contributions ("PLC"), which, according to Gerdau, is the basis for assessment of other capacity-related charges.<sup>24</sup> Gerdau is authorized to represent that the New Jersey Large Energy Users Coalition, of which Gerdau is an active member, supports the recommendation and requests that any LCAPP non-bypassable charges be assessed on the basis of customers' PLCs.

On March 14, 2011, Rate Counsel submitted comments regarding the EDCs' SOCA rate recovery mechanism. Rate Counsel proposed that the payments/recoveries from eligible generators be handled in a similar fashion to other Board approved charges, that is, through a per kWh rate that will be trued-up and re-set annually.

On March 18, 2011, the EDCs filed reply comments reiterating their support for the proposal made on March 1, 2011.

On March 24, 2011, Rate Counsel filed comments replying to Gerdau's request that the Board base payments to be made under the LCAPP legislation on the basis of PLC. Rate Counsel opposes that suggestion as ignoring that the LCAPP payment is a financial hedge, and not a contract for capacity, and that the SOCA is intended to provide benefits in addition to those related to capacity including environmental and other economic benefits, including lower energy prices which will certainly benefit high load factor and high energy use customers. Rate Counsel also addressed the propriety of the Board's previous ruling that LCAPP costs be deferred for recovery in the EDCs' next base rate cases.

Based upon the Board's review of the EDCs' proposed SOCA Rate Recovery Mechanism and the comments received, the Board **HEREBY REJECTS** the EDCs' SOCA rate recovery mechanism, **HEREBY REJECTS** Gerdau's request that the non-bypassable LCAPP charge be assessed to ratepayers on the basis of customers' Peak Load Contributions, and **HEREBY ACCEPTS** the Rate Counsel proposed rate recovery mechanism. The Board agrees with Rate Counsel's rationale that Rate Counsel's proposed SOCA rate recovery mechanism has several advantages over the SOCA rate recovery mechanism proposed by the EDCs. Among those advantages are ease of administration, more transparency and openness to review. Therefore, the Board **HEREBY ORDERS** the EDCs, individually, to file with the Board, at such time when

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<sup>24</sup> Gerdau Comments at 2.

payments to or recoveries from the selected generators are triggered pursuant to the SOCA, a SOCA rate recovery mechanism as set forth herein. Specifically, each EDC's SOCA rate will be recovered or refunded, through a per kWh rate that will be true-up and re-set annually. For each Delivery Year<sup>25</sup>, the EDC rate will be filed with the Board by March 1 of the prior Delivery Year with an effective date of June 1. The rate will be based on the Transaction Amounts<sup>26</sup> calculated by each EDC that will be provided to the eligible generators at the beginning of each Delivery Year pursuant to the executed SOCA. Interest will be two-way, calculated monthly on a net of tax basis, using the average monthly balance and using an interest rate based on two year Treasury notes plus 60 basis points. Interest will be accrued separately but rolled into the under/over recovered balance when the next Delivery Year's rate is set. Also, for each year after the first Delivery Year, there will be a true-up filing with the Board which must be filed by August 1 of the subsequent Delivery Year.

## **EXECUTION OF THE SOCAS**

The LCAPP Law requires eligible generators, approved by the Board, to enter into a SOCA with each of the State's four EDCs provided that each EDC shall pay or receive refunds pursuant to an annually calculated load-ratio share of the capacity of the SOCA based upon each EDC's annual forecasted peak demand as determined by PJM.<sup>27</sup> The resulting SOCA shall bind the EDCs to the Board approved SOCAs with selected eligible generators for the term of the SOCA; the selected eligible generators with executed SOCAs shall offer the capacity, electricity, and ancillary services into the PJM wholesale markets as required by the PJM market rules; and that selected eligible generators with executed SOCAs shall participate in and clear the annual base residual auction conducted by the PJM as part of its reliability pricing model for each delivery year of the entire term of the Agreement.

Pursuant to the LCAPP law, the Board shall award the SOCA(s) within thirty (30) days after the Board's approval of the form of the SOCA (i.e. by April 28, 2011). The Board **HEREBY ORDERS** each of the state's four (4) EDCs, namely PSE&G, JCP&L, Rockland and ACE, to individually execute the SOCAs, as approved by the Board herein, with each of the qualified generators as recommended in the Agent's reissued report, namely the Hess Newark Energy Project, NRG Old Bridge Clean Energy Center, and CPV Woodbridge Energy Center. The EDCs are **HEREBY ORDERED** to file with the Board, within ten (10) business days of the date of this Order, executed SOCAs for the Board's consideration. The EDCs shall submit a confidential executed SOCA that includes the respective generator's SOCA bid price and a public, redacted executed SOCA that does not disclose the respective generator's SOCA bid price.

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<sup>25</sup> Delivery Year is defined in the SOCA as "each 12-month period from June 1st through May 31st numbered according to the calendar year in which it ends beginning on the Commencement Date and ending on the Conclusion Date.

<sup>26</sup> The calculation of the Transaction Amounts is detailed in Section 2.2 of the SOCA.

<sup>27</sup> N.J.S.A. 48:3-98.3 (c)(9).

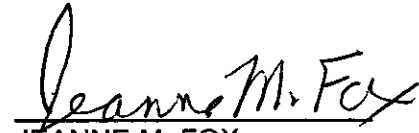
On February 18, 2011, and March 3, 2011, Motions To Stay the instant proceeding were filed on behalf of certain electric generators and the State's four EDCs, respectively, which were opposed by Rate Counsel and Board Staff. On March 21, 2011, President Solomon, as the Presiding Officer, issued an Order denying the indefinite stay requested by the Movants. The Board **HEREBY RATIFIES** President Solomon's Order for the reasons stated in his Order.

DATED: 3/29/11

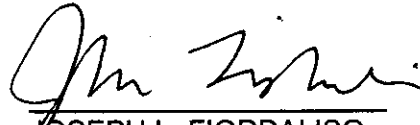
BOARD OF PUBLIC UTILITIES  
BY:



LEE A. SOLOMON  
PRESIDENT



JEANNE M. FOX  
COMMISSIONER



JOSEPH L. FIORDALISO  
COMMISSIONER



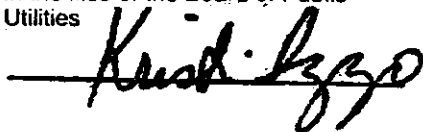
NICHOLAS ASSELTA  
COMMISSIONER

ATTEST:



KRISTI IZZO  
SECRETARY

I HEREBY CERTIFY that the within document is a true copy of the original in the files of the Board of Public Utilities



**LONG-TERM CAPACITY AGREEMENT PILOT PROGRAM (LCAPP)  
BPU DOCKET NO.: EO11010026**

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