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July 14, 2006

Via Hand Delivery
Honorable Kristi Izzo
Board of Public Utilities
Two Gateway Center
Newark, NJ 07101

Re: I/M/O the Provision of Basic Generation Service for
The Period Beginning June 1, 2007
BPU Dkt. No. EO06020119

Dear Secretary Izzo:

Enclosed for filing please find an original and ten copies of the Division of Rate Counsel's Additional Comments on the Proposed Changes to the Supplier Master Agreement ("SMA") in the above-referenced matter.

Also, as requested in the e-mail sent on June 9, 2006 from Mr. Yochum, these comments will be circulated electronically through the electric list server used by the Board for these types of communications.

We are enclosing one additional copy of the materials transmitted. Please stamp and date the copy as "filed" and return it to our courier. Thank you for your consideration and assistance.

Sincerely yours,

SEEMA M. SINGH, ESQ.
DIRECTOR

By: *s/ Diane Schulze*
Diane Schulze, Esq.

DS/lg
c: President Jeanne M. Fox, (via hand delivery)
Commissioner Connie O. Hughes, (via hand delivery)
Commissioner Frederick F. Butler, (via hand delivery)
Commissioner Joseph L. Fiordaliso, (via hand delivery)
Commissioner Christine V. Bator, (via hand delivery)

I/M/O the Provision of Basic Generation Service ("BGS") for
The Period Beginning June 1, 2007
BPU Docket No. EO06020119

Comments of the Division of Rate Counsel Concerning the BGS Supplier Master Agreement

July 14, 2006

The Division of Rate Counsel ("Rate Counsel") is filing these comments pursuant to the email sent by Peter Yochum on June 9, 2006 requesting additional comments on proposed changes to the BGS Supplier Master Agreements ("SMA").

The within comments from Rate Counsel reflect, among other things, our comments that were previously filed on April 6, 2006 and May 5, 2006. We are including, where appropriate, red-lined sections of the SMA. Rather than repeating our previous comments at length here, Rate Counsel will only briefly refer to each of the relevant sections of our comments. As with our previously filed comments, we will primarily focus on the BGS-FP SMA unless otherwise noted.

In light of the Board's decisions announced at its June 21 agenda meeting, there are only two aspects of the SMA that require amendment at this time. For the upcoming auction, (a) the pass-through of transmission rate changes and tax changes should be eliminated, and (b) the confidentiality provisions should be enhanced to assure Board and Rate Counsel access to information necessary to evaluate the success of the auction in achieving a fully-competitive result. In addition, the preamble language describing the transaction/auction to which the SMA applies should be updated for the 2007 auction.

The other changes proposed by various other parties are either unnecessary or unsupported, and in some cases may undermine the value of the auction process, while exposing consumers to higher prices.

The following explains these positions in further detail.

1. CHANGES THAT SHOULD BE INCORPORATED IN THE 2007 SMA

a. Eliminate Pass-Through of Supplier Cost Changes

Transmission Rate Changes and Tax Cost Changes

Currently the Supplier Master Agreement (SMA) permits pass-through of changes in taxes and in transmission rates. The pass-through is not consistent with the purpose of the BGS-FP auction -- obtaining service for small customers at a **fixed price**. Pass-through is also inconsistent with what should be among the goals for BGS-FP service -- least cost supply and price stability.

The likelihood of least cost supply is enhanced if pass-through is eliminated, because (a) suppliers are in a better position than consumers to evaluate and price the risk of such increases when bidding, and (b) suppliers will have the proper incentive to make the effort required to participate in transmission rate cases before the FERC. Suppliers can oppose transmission rate increases at FERC, and as the payers of such rates, and those with day-to-day knowledge of transmission operations, they are also in a better position than consumers to have information that would be useful to support a position opposed to such rate increases.

As to price stability, pass-through of transmission rate and tax changes contributes to instability in BGS rates from the consumer perspective. There is no evidence that allowing such variation has had compensating benefits for consumers in terms of lower bid prices.

Finally, Rate Counsel notes that allowing pass-through negatively affects third party suppliers who wish to compete to serve BGS-FP customers at a truly fixed price against which customers might compare their offerings. Since the pass-through means that BGS-FP service is essentially not a fixed-price service, these third party suppliers cannot offer a direct comparison of their fixed-price alternatives to the BGS-FP supply price.

Restoring the fixed-price quality of the SMA can be accomplished by deleting section 15.9 "Changes in Transmission Rates for Firm Transmission Service," and the reference to Section 15.9 in the definition of Transmission Rates. It would also require deletion of the last paragraph of section 15.8 "Taxes", which is shown below:

~~If new taxes are imposed on Energy, Capacity, Firm Transmission Service or Ancillary Services after the date of this Agreement, within forty-five (45) days of the final adoption of any such new taxes, the Company will notify the BGS-FP Suppliers that such new tax has been adopted, will seek approval from the Board to collect the new taxes from BGS-FP Customers, and will provide the BGS-FP Suppliers with a copy of the Company's petition seeking such approval from the Board. Upon receipt of Board approval of the collection of the new taxes from BGS-FP Customers, the BGS-FP Supplier will be excused from liability for payment of those new taxes.~~

Other Cost Pass-Through Requests

In keeping with the above discussion, the Rate Counsel would oppose any addition of language to the SMA that would enlarge the items for which Suppliers could change rates during the term of the contract, to reflect changes in their costs. The laundry list of costs for which suppliers are seeking protection in their comments on the 2007 SMA is extensive. For example, Morgan Stanley Capital Group Inc. has proposed that the Board allow BGS Suppliers "to recoup costs associated with increases to certain Capacity and Ancillary Services." (Comments filed April 6, 2006). Morgan Stanley's proposal includes pass through of increases in charges for "RTO Scheduling, System Control and Dispatch Service;" "Reactive Supply and Voltage Control from Generation Sources Services;" "Black Start Service Charge;" "PJM Interconnection LLC Administrative Service;" "Mid-Atlantic Area Council Charge;" "Transitional Market Expansion Charge;" and "Transmission Enhancement Charges." Also included in this proposal is the pass through of "Unforeseen PJM or Other Governmental Body Charges" a completely open-ended provision.

The suppliers appear to be seeking to shift the risk of economic developments during the term of their Agreements largely to the consumers. Taken to its logical conclusion, you could have an Agreement in which there is no price per kWh bid at all, or even a payment *to* consumers for the privilege of winning the bid, and then the consumers would bear all the costs as they happen. The BGS price would reduce to a pass-through of suppliers' costs. This scenario is obviously absurd, but it demonstrates the underlying logic of the suppliers' arguments.

Indeed, there is no support in the suppliers' filings for this attempt to shift greater and greater risks to the consumers. The suppliers' assertion that they would bid correspondingly lower amounts is unproven, and cannot be demonstrated, as there are no comparable markets against which the bidding behavior in the BGS auction could be evaluated. The shift in risk is not likely to be accompanied by a compensating shift in price, contrary to suppliers' assertions.

Also, as we argue with relation to transmission rate and tax cost changes, allowing adjustments to the prices during the term of the contract for events that take place after the contract is signed will contribute to price instability. And, as well, suppliers are in a better position to anticipate and manage the various events that may affect their costs in the future than are consumers. The proposals to allow suppliers to look to consumers to protect them from risk during the term of the Agreements should be rejected, and rolled back as proposed above.

b. Access to Market Information/Confidentiality

The Board determined at its June 21 agenda meeting that it will not at this time address the question of transparency of supply sources, but will examine this issue more fully at a later date. As the Board is considering the 2007 SMA now, in preparation for the bid process, it is prudent to ensure that the SMA can accommodate the full range of Board decisions on this issue. In particular, it is important to clarify the principle that signatories to an SMA must obey Board orders with regards to supply of information, and that such information will be kept confidential.

To ensure the confidentiality of such information in the event and to the extent the Board determines it should be provided by BGS auction winners, Rate Counsel proposes moving section 6.13 "Confidentiality" (which now is limited to information on creditworthiness), and making it a new section 2.6 "Access to Information: Confidentiality" under the General Terms and Conditions, with the following changes:

> **2.6 Access to Information; Confidentiality**
>
> Information supplied by a BGS-FP Supplier in connection with ~~the~~ its creditworthiness, its sources of supply and the auction process shall be deemed confidential and not subject to public disclosure other than to the Company in evaluating the Supplier's creditworthiness, and to the BPU and the Division of the Ratepayer Advocate for the purposes of ensuring the competitiveness and fairness of the auction, unless Applicable Legal Authorities require further disclosure of the information. If information must be disclosed, then the confidentiality of the information shall be maintained consistent with the Applicable Legal Authority's rules and regulations pertaining to confidentiality. The BGS-FP Supplier will be given prompt notice of any request by ~~a third~~ any party to obtain confidential information ~~related to the BGS-FP Supplier's creditworthiness~~.

Also, as to section 2.2 (a)(ii) "Obligations of BGS-FP Supplier", the Rate Counsel proposes the changes below. The proposed changes allow access by the BPU, and Rate Counsel, to information concerning the supplier's transactions within PJM that PJM maintains as confidential. Rate Counsel contemplates that the supplier would provide whatever release is necessary under the PJM Operating Agreement, in order to allow access to this information by the BPU. Rate Counsel urges that the Board also make such information available to Rate Counsel.

> (ii) to cooperate with the Company in any regulatory compliance efforts that may be required to maintain the ongoing legitimacy and enforceability of the terms of this Agreement and to fulfill any regulatory reporting requirement associated with the provision of BGS-FP Supply, before the BPU, FERC or any other regulatory body asserting jurisdiction, including, but not limited to, meeting the reporting requirements of the BPU's Environmental Information Disclosure Standards, N.J.A.C. 14:4-4.1 et seq., and Renewable Energy Portfolio Standards, N.J.A.C. 14:4-8.1 et seq., providing such confidential information as is requested by the BPU and the Ratepayer Advocate pursuant to the protections set out in Section 2.5,and facilitating access by the BPU and the Ratepayer Advocate to information concerning the Supplier and its transactions within PJM that is maintained by PJM as confidential;

Rate Counsel also proposes a change to the definition of "Applicable Legal Authorities." The proposed change would include orders of regulatory agencies and courts as set out below:

> Applicable Legal Authorities – generally, those federal and New Jersey statutes and administrative rules and regulations that govern the electric utility industry in New Jersey, and orders of federal and state regulatory agencies and courts.

This proposed change would make it clear that the parties to the SMA have to abide by, not just statutes and regulations, but also orders of regulatory agencies and the courts.

Rate Counsel finally proposes that failure to provide information to the Board or Rate Counsel pursuant to the SMA should be considered an Event of Default. Language incorporating this provision should be inserted in Subsection xiii of Section 5.1, as follows:

(xiii) fails to satisfy any other material obligation under this Agreement not listed above, including but not limited to failure to provide information as required to the BPU and the Ratepayer Advocate pursuant to the terms of Section 2.5 above;

c. Effective Period for the SMA

The third "Whereas" clause on the first page of the SMA should be changed to reflect that this SMA only covers contracts for the winning bidders of the February 2007 BGS auction that is effective for the section of load and the term of years that the BPU specifies will be subject to the descending clock auction in its future order on that auction.[1]

2. CHANGES THAT SHOULD NOT BE MADE TO THE SMA

a. "Bilateral" Creditworthiness

Suppliers have on numerous occasions suggested changes to the SMA to apply to the Companies the same creditworthiness requirements now applied to the Suppliers. As Rate Counsel has previously argued, these proposals should be rejected.

There is a common thread running through these arguments (and in the reasoning advanced to support most of the proposals filed by BGS bidders): if the change is not made, fewer suppliers will bid, and they will include their estimate of the cost of their

[1] Also, if the Board moves forward on pending proposals that would require certain tranches of supply to be provided via mechanisms other than the auction process (such as the Rate Counsel proposal in the pending Exelon/PSEG merger docket to flow through certain benefits and risk mitigation funds to all New Jersey consumers via reasonably-priced tranches of BGS power, or Rate Counsel proposal in this Docket to add longer-termed procurements and alternative, integrated least cost planning resources to the BGS, for example), provision would have to be made to reflect the fact that the auction is designed to produce less than 100% of the BGS service.

exposure as a premium in the bid, raising the price they bid.[2] The logical extreme of this argument is that ratepayers should shoulder *all* risk, in which case there may be more bidders and their initial prices could be lower. But, the BGS bidder making such a suggestion glosses over the very real transfer of risk to consumers by their proposals. This transfer of risk would not occur at zero price to consumers. Ultimately the consumers would pay, and Rate Counsel avers that consumers will pay more over time if suppliers are allowed to shift these risks to consumers. .

In the case of allegedly asymmetric creditworthiness provisions, the reality is that the EDC, as a regulated buyer for a non-shopping load, is inherently more likely to be able to fulfill its side of the bargain. The EDC's purchase of power is backed by the purchasing power of the BGS customers. By contrast, suppliers do not have a cash flow backed by practically guaranteed sales, beyond the particular SMA in question. The suppliers may have nothing more than the one SMA itself as a secure source of cash.

Suppliers operate in a more volatile market, the generation market, as opposed to the more stable distribution industry. The generation industry has had recent experience with bankruptcies of major players in the competitive market. The credit quality of the EDCs, on the other hand, is subject to the Board's oversight and the threat of expedited Board action in response to any action taken by the EDC that would compromise the utility's credit rating. (Comments of EDCs filed May 4, 2006). It makes sense to protect consumers against the risk of suppliers' inability to fulfill their obligations. Putting the corresponding requirements on the Companies adds expense without lowering any corresponding risk, and should be rejected.

[2] This, for example, is the chief argument advanced in favor of making the BGS price adjustable to accommodate all cost-input changes post-signing.

b. Suppliers' Alternative Creditworthiness Revisions

Mark to Market credit exposure reduced to 1.0
No set off of positive with negative numbers in calculation of credit exposure
Increase minimum credit limit amounts
Removal of Independent Credit Agreement

In addition to so-called bilateral credit requirements (or in the alternative if the bi-lateral proposal is rejected), a number of suppliers have proposed other changes to the creditworthiness provisions of the SMA. For example, in its mark-up of the Agreement, PPL again proposes that the total Mark-to-Market ("MtM") credit exposure be equal to 1.0 times the sum of the MtM credit exposures for each Billing Month, as opposed to the 1.1 factor in the Agreement. PPL also proposes that negative numbers in the credit exposure calculation should be summed with positive numbers, rather than having negative numbers ignored as occurs under the current system.

In addition to the proposals set forth in its mark-up of the Agreement, PPL requested in its comments of June 23 that the Board also consider increasing the minimum credit limit amounts applicable to credit worthy suppliers, which credit limits establish the point at which a Supplier must provide an EDC with actual collateral amounts. PPL states that it would anticipate comparable credit limits for the EDCs with which PPL transacts business under the BGS program. Similar proposals are contained in the ConEd filing of June 23 including the proposed deletion of the Independent Credit Requirement contained in section 6.3.

The proposed alternative credit provisions should be rejected. The suppliers' have not supported the need to make the requested changes. As to the impact on prices, the suppliers merely assert that these provisions increase the price of the bids, but do not show this to be the case. As with the proposals for bi-lateral creditworthiness provisions,

discussed above, the proposals for these alternative credit provisions shift risk but do not assure compensating benefits for consumers.

Also, as discussed below, FPL argues that the definition of "Merger Event" should be modified to add the phrase "or its guarantor" after the words "and the resulting entity". This would make it clear that a merged entity can still qualify under the agreement so long as its guarantor qualifies. The Rate Counsel opposes this proposal. This change would allow a merged entity that itself was not creditworthy to escape the result of such a designation, because allowing a merged entity to rely on the creditworthiness of its guarantor raises risks to the Company and its ratepayers without providing a compensating benefit. The risks are raised because it puts the Company in a position of having to enforce a guarantee agreement made between the Supplier and another party, to which the Company was not a party. It could take time and resources to enforce such an agreement if the supposed guarantor does not agree that it has the obligations at issue, even if it were ultimately effective. In the meanwhile, the Company and its ratepayers are dealing with an entity with no clear creditworthiness.

c. Pass-Through of Additional Supplier Cost Changes

Rate Counsel opposes the expansion of pass-through provisions in the SMA, for the reasons discussed above.

3. MISCELLANEOUS OTHER UNNECESSARY OR ILL-ADVISED CHANGES PROPOSED BY SUPPLIERS

a. Volumetric Risk Reduction Mechanism

With its June 23 mock-up of a melded Master Supply Agreement ("MSA"), ConEd supplied a copy of a volumetric risk reduction mechanism as used in some states to shield suppliers from the risk associated with large movements of customers off BGS service to alternative supplies. Rate Counsel opposes the imposition of such a mechanism. Customers should be free to shop. It is also unrealistic to anticipate large migrations away from BGS such that such a risk reduction mechanism would be necessary, given the stability of the BGS auction to date. Rate Counsel suggests that building in a mix of longer-term and alternative BGS resources (such as demand management and efficiency) is a better way to ensure the stability of loads for any given SMA, by helping to keep prices as low as reasonably possible and as stable as reasonably possible.

b. Melding two SMAs into one MSA

Consolidated Edison has put forward a proposal to merge the BGS-FP SMA with the BGS-CIEP SMA into one MSA. The avowed reason for this proposal is to eliminate a potential supplier's obligation to review two documents. Rate Counsel submits that this proposal unnecessarily complicates this proceeding and reduces flexibility regarding future modifications to either agreement.

The BGS-FP Agreement and the BGS-CIEP Agreement, carefully crafted documents created through a long process and with many participants advocating different interests, should not be lightly discarded. Indeed, as an examination of the

details of ConEd's mark-up reveals, the merger of these two documents might easily introduce unintended changes in the substantive allocation of rights and responsibilities in the SMAs.

For example, there is the potential for unintended consequences of providing for the offsetting of settlement amounts in the event of termination, as suggested by ConEd in various provisions in section 5. The express ability to offset competing obligations between different SMAs might have the purpose of facilitating assignment, but the entire question of the extent to which multiple assignments and reassignments of the contracts is advantageous or risky for consumers should be debated more thoroughly before an untested provision is added merely for that purpose. Another example of a substantive change included in ConEd's melded MSA section 2.8 is its proposal to revise outstanding Agreements annually to conform to the latest version of the SMA.

The job of melding the two SMAs into one MSA is fraught with this type of situation, where there is a potential for changing the underlying obligations without being clear that this is the intent. Rate Counsel recommends that two SMAs be retained until the Board has had further opportunity to explore in detail each language change proposed to meld the SMAs. If the Board determines that melding the SMAs is desirable, the Rate Counsel requests further opportunity to examine the specific language advanced by ConEd for this purpose.

c. Revision of all previous SMAs to conform to most recent SMA terms and conditions (ConEd- June 23 -----proposed section 2.8).

As noted above, ConEd's proposed section 2.8 of the melded Master Supply Agreement (MSA) would change and "update" the terms of any given BGS transaction entered into before a new Master Supply Agreement is issued, to reflect the new MSA. Perhaps ConEd did not contemplate the kinds of changes that the Board from time to time finds prudent to require in the SMA when it drafted this language, and so ignored the risks that such an updating would pose to parties entering an SMA. On the other hand, perhaps each SMA should be updated to incorporate the new provisions of later versions of the SMA. After all, the Board arguably should be able to implement its policy refinements as it goes along. This ConEd proposal should not be adopted without further discussion on the implications of such a change.

d. Redefinition of Force Majeure (FPL June 23)

FPL asks that the ability of the Company to claim that its default is excused by Force Majeure (section 10.2) be amended to add the requirements that such events "could not be anticipated or were not the result of the actions of the claiming party."

The first proposed condition, that such events "could not be anticipated," would destroy the entire purpose of the Force Majeure exemption from liability and should be rejected. For example, severe storms can usually be anticipated, at least by a day or two. But that fact does not make it any more within the utility's control to prevent their effects in any given case (presuming a reasonable reliability program and follow-through).

As to the second proposed limitation on Force Majeure, that such events "were not the result of the actions of the" party claiming Force Majeure, such a change is not necessary. By definition, a Force Majeure event is one outside the control of the party claiming its protection. See Section 10.2. If the actions of the party claiming the protection caused the event claimed to be Force Majeure, then the event was definitely within the control of the claiming party, and the Force Majeure provision does not apply.

e. Waiver of Jury Trial (FPL June 23)

FPL argues that, "[b]ecause the New Jersey customers under the agreement would make up the jury pool in any litigation, it would be appropriate to have a 'waiver of jury trial' provision inserted in Section 15.4."

This proposal is an insult to all the citizens of New Jersey, and should be summarily rejected by the Board. There is no reason to assume that because a fact-finder and adjudicator is a ratepayer (as even the Judge is likely to be), he or she cannot fairly find the facts and make judgments in Section 15.4 dispute cases.

f. Replacement of Section 11.2 with new Section 12.3 – Mobile/Sierra (Con-Ed, June 23)

ConEd proposes deleting the agreement in section 11.2 (and the binding term agreement in section 15.12) that the interpretation of the Agreement is subject to the "public interest" test of the Mobile-Sierra doctrine. ConEd proposes replacing it with a new section 12.3, which not only requires the use of the Mobile-Sierra "public interest"

standard, but would have the signatories agree to what steps they will take if the FERC makes certain decision in a pending NOPR that might have bearing on the application of the Mobile/Sierra doctrine. Rate Counsel opposes the changes. ConEd does not show that the current language is inadequate and does not show that the proposal to lock in now the response to a hypothetical FERC decision in the pending rulemaking is warranted.

g. Alteration of Section 5.4 (PPL, June 23)

PPL suggests making the basis for the estimation of damages set out in section 5.4 flexible, giving suppliers the option of having the estimate made based on sound business judgment, rather than by the application of a formula including the expressly quantified ("notional") number of mWh the supplier had provided in the most recent year (if available). PPL has not shown why such a change is needed.

Indeed, PPL seems to misunderstand section 5.4. It is a placeholder estimate of the damages flowing from a default, rather than the mechanism to determine the ultimate net settlement amount for such damages. The actual net settlement of damages under the Agreement is calculated under section 5.3, and is based on an after-the-fact determination using the actual mWh that were not delivered (or accepted, as the case may be) as the result of a default. This amount is not "notional" because it is not a fixed determination in

advance of the event – rather, it is an amount that can be known only after the event. Section 5.3 raises no problems of the application of FAS 133.[3]

Because section 5.4 is not a final settlement provision, the fact that it uses notional amounts as the basis for the estimate of damages does not trigger FAS 133 concerns.

h. Elimination of Section 5.2(iii) and 5.3 (ConEd June 23)

Along with its proposed amendment to Section 5.4, ConEd proposes eliminating Section 5.2(iii) and 5.3. The effect would be to make Section 5.4 the sole determinant of damages. Such a change would also eliminate the carefully constructed provisions of the SMA as it now exist, which allow a non-defaulting party to obtain some compensation for damages pending a final determination of damages, but make the final determination dependent on actual results on the market, rather than some forecast made at the time of termination and the beginning of the damages calculation. Sections 5.2(iii) and 5.3 should remain unchanged.

[3] FAS 133 is the Financial Accounting Standards Board Statement on Accounting for Derivatives and Hedging Activities. It requires mark-to-market accounting for forward contracts that are considered derivatives, so that at the time of every report to shareholders and the public on the firm's assets and liabilities, the impact of derivative forward contracts on the company's financial health must be reevaluated against the then-current market conditions. FAS 133 provides for a definition of derivatives, as well as identification of certain exceptions to the definition. Most forward contracts are derivatives. So-called "normal purchases and sales" are exempt from the definition of "derivatives." Normal purchases and sales are identified as contracts that are expected to be satisfied with physical transfer of a commodity, for example, as opposed to being bought and sold as financing vehicles and regularly settled out upon the sale or purchase of the contract. Some firms prefer that a forward contract be considered a normal purchase and sale agreement, since meeting this FAS 133 exception allows the firm to use accrual accounting for the contract. That is, the firm does not need to recalculate its exposure to market risk every quarter or so, but reflects the impacts of the transactions under the forward contract on its balance sheet only after they are complete (i.e., if the contract is for 3 years, and it's the end of the second year, the balance sheet would reflect years 1 and 2, but would not have to reflect the impact of market conditions on the riskiness of the 3rd year of the obligation). A benefit of accrual accounting is more stable earnings, because their earnings do not fluctuate with the change in the present value of the executory contract as measured from time to time when earnings are reported (as happens with "mark-to-market" accounting).

i. Revisions to Section 5.6 (ConEd June 23)

ConEd's June 23 mock-up of a combined MSA rewrites the set-off provisions of section 5.6 so as to eliminate the designations of priorities for application of the set-off. ConEd does not explain why such a change is desirable, and does not support the change. The Rate Counsel opposes making such a change to the SMA in use for several years, absent a foundation showing that the change will be an improvement in the agreement and redound to the consumers' benefit.

j. Merger Event/Guarantor's Creditworthiness

FPL argues that the definition of "Merger Event" should be modified to add the phrase "or its guarantor" after the words "and the resulting entity". This would make it clear that a merged entity can still qualify under the agreement so long as its guarantor qualifies. Rate Counsel opposes this proposal.

This change would allow a merged entity that itself was not creditworthy to escape the result of such a designation, because allowing a merged entity to rely on the creditworthiness of its guarantor raises risks to the Company and its ratepayers without providing a compensating benefit. The risks are raised because it puts the Company in a position of having to enforce a guarantee agreement made between the Supplier and another party, to which the Company was not a party. It could take time and resources to enforce such an agreement if the supposed guarantor does not agree that it has the obligations at issue, even if it were ultimately effective. In the meanwhile, the Company and its ratepayers are dealing with an entity with no clear creditworthiness.