



STATE OF NEW JERSEY
Board of Public Utilities
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ENERGY

IN THE MATTER OF INCREASED SOLAR)
ALTERNATIVE COMPLIANCE PAYMENTS)
("SACP") IMPACTING THE 2006 AND 2007)
BGS SUPPLIER MASTER AGREEMENTS) DECISION AND ORDER

DOCKET NO. EO11040215

(NOTIFICATION LIST ATTACHED)

APPEARANCES:

Gregory Eisenstark, on behalf of the Electric Distribution Companies
Stefanie A. Brand, Esq., Director, New Jersey Division of Rate Counsel
Gregory K. Lawrence, on behalf of Morgan Stanley Capital Group, Inc.
Murray E. Bevan, Esq., on behalf of BGS Supplier Group
Colleen A. Foley, on behalf of Exelon Generation Company
Divesh Gupta, on behalf of Constellation Energy Commodities Group, Inc.
Jason A. Lewis, Esq., on behalf of JP Morgan Ventures Energy Corporation
Vilna Waldron Gaston, Esq., on behalf of PSEG Power LLC and PSEG ER&T LLC
Adam Kaufman, on behalf of Independent Energy Producers of New Jersey

BY THE BOARD:

BACKGROUND

By Order dated December 6, 2007, the New Jersey Board of Public Utilities ("Board" or "BPU") approved a plan for transition of the Board's solar program that reduced the emphasis on rebates as an incentive to spur solar installations, and that relied more heavily on market-based incentives ("Solar Transition Order"). I/M/O the Renewable Energy Portfolio Standards-Alternative Compliance Payments and Solar Alternative Compliance Payments, BPU Docket No. EO06100744, Order dated December 6, 2007. Specifically, rebates for larger solar projects were eliminated; instead, the incentive would come from the value of tradable Solar Renewable Energy Credits ("SRECs") created for each megawatt-hour ("MWH") of electricity generated by an eligible solar electric generating facility. As part of that process, the Solar Transition Order also increased the Solar Alternative Compliance Payment ("SACP") from \$300 to \$711 for energy provided beginning June 1, 2008, with the SACP declining about three percent annually thereafter through Reporting Year June 1, 2015—May 31, 2016. Because the price of SRECs is

effectively capped by the SACP, it was expected that the higher SACP would allow SREC prices to increase substantially above then-current levels.

Each Basic Generation Service ("BGS") supplier, as part of its "all requirements" obligation under a BGS contract, must do either of the following to satisfy its portion of the solar Renewable Portfolio Standard ("RPS"): (1) procure a sufficient number of SRECs or (2) pay the SACP. The increase in the SACP that resulted from the Solar Transition Order, and the corresponding increase in SREC prices, affected two sets of BGS contracts which had been entered into by winning BGS suppliers¹: those covering the period from (1) June 1, 2008 through May 31, 2009 for the BGS contracts covering June 1, 2006 through May 31, 2009 ("2006 BGS Contracts"); and (2) June 1, 2008 through May 31, 2010 for the BGS contracts covering June 1, 2007 through May 31, 2010 ("2007 BGS Contracts").

As part of its annual review of the procurement process proposed by Atlantic City Electric Company, Jersey Central Power & Light Company, Public Service Electric and Gas Company, and Rockland Electric Company (collectively, the "EDCs") to obtain electric supply needed by customers who do not purchase that supply from third parties, on January 25, 2008 ("2008 Auction Order"), the Board found it was appropriate to allow BGS suppliers with contracts that were approved in previous auctions to have an opportunity to recover reasonable and prudent incremental costs incurred due to the increased SACP resulting from the decision in the Solar Transition Order to raise the SACP from \$300 to \$711 for all electricity to be delivered beginning on June 1, 2008. In deciding to pass the costs onto ratepayers, the Board noted its concern that suppliers may bear significant additional costs for SRECs beyond what they had planned upon when they entered into these contracts. While the suppliers were on notice that the SACP could change, the Board was concerned that requiring the suppliers to bear this greatly increased cost could discourage them from participating in future auctions.

The New Jersey Division of Rate Counsel ("Rate Counsel") appealed the 2008 Auction Order, maintaining that the Board did not provide proper notice of its intention to rule on that issue within the BGS proceeding. The Appellate Division upheld the Board's action, finding that Rate Counsel was aware of the open issue from its active participation in the Solar Transition proceeding which carried over into the related BGS proceeding. In re Provision of Basic Generation Service for the Period Beginning June 1, 2008, 411 N.J. Super. 69 (App. Div. 2009). Rate Counsel then petitioned for certification to the New Jersey Supreme Court, which granted the petition.

New Jersey Supreme Court Decision and This Proceeding

On March 10, 2011, the New Jersey Supreme Court held that Rate Counsel had not received adequate notice and opportunity for comment before the Board took an administrative action not integral to its decision on the BGS process and which could potentially impact ratepayers with significantly increased energy supplier costs. In re Provision of Basic Generation Service for the Period Beginning June 1, 2008, 205 N.J. 339 (2011). Rate Counsel had claimed that the Board failed to allow interested parties an opportunity to comment and be heard prior to making its decision. The Court found that the Board's action was somewhat akin to a rulemaking, and therefore relied heavily on rulemaking procedures under the Administrative Procedure Act, finding that the Board did not provide adequate notice of its intention to rule on the request to allow possible recovery from ratepayers within the BGS proceeding. Although the Court also criticized Rate Counsel for failing to move for reconsideration or a stay, the Court nevertheless

¹ BGS contracts for residential and smaller commercial customers cover a three year period.

reversed the Appellate Division decision and remanded to the Board for a new proceeding with the opportunity for interested parties to comment on the possible pass-through of the increased SREC costs. The Court noted that the Board

must now make its decision afresh, but in light of the circumstances as they exist presently, where the BGS suppliers have in good faith completed their electricity purchase contracts as negotiated. Even if the BPU chooses the same course as before, it will be incumbent upon the agency to explain its reasons for rejecting Rate Counsel's argument on behalf of the ratepaying public.

[Id. at 362.]

Against this background, by Order dated April 27, 2011, the Board directed Board Staff ("Staff") to initiate the instant proceeding to determine whether the Board should allow the pass-through to ratepayers of the cost of SRECs above \$300 per MWH for the BGS contracts covering the period from (1) June 1, 2008 through May 31, 2009 for the 2006 BGS Contracts; and (2) June 1, 2008 through May 31, 2010 for the 2007 BGS Contracts, provided that the suppliers can show that these costs were prudently incurred ("April 2011 Order"). The April 2011 Order also adopted a preliminary procedural schedule that allowed for the filing of comments and a hearing.

By this Decision and Order, the Board considers the comments filed by the EDCs, Rate Counsel, the Independent Energy Producers of New Jersey ("IEPNJ"), the BGS Supplier Group², Exelon Generation Company, LLC ("Exelon Generation"), Constellation Energy Group ("CCG"), PSEG Power LLC ("PS Power") and PSEG Energy Resources and Trade LLC ("PSEG ER&T") (collectively, "PS Power"), J.P. Morgan Ventures Energy Corporation ("J.P. Morgan"), Morgan Stanley Capital Group Inc. ("MSCG").

Initial Comments

On or about June 1, 2011, several parties submitted initial comments on this matter. A summary of the parties' positions is below:

EDCs

In their comments, the EDCs urge the Board to reaffirm its 2008 decision to allow the impacted BGS suppliers to recover increased compliance costs for the two BGS-FP contract periods impacted by the SACP increase. The EDCs argue that the Board's decision in the 2008 Auction Order, that customers should bear the short-term cost of the agency's decision to increase the SACP level, promotes greater confidence and stability in the BGS auction process and lower rates on a long-term basis. (EDC Initial Comments at 2). The EDCs further request that the Board re-affirm its 2008 decision that, to effectuate this pass-through for the affected BGS suppliers, the EDCs would be able to recover in rates the pass-through to ratepayers of the costs of the SRECs above \$300 per MWH for the relevant periods, if the BPU finds that these incremental costs were reasonable and prudently incurred by the BGS Suppliers. In this regard,

²Integritys Energy Services, ConEdison Solutions, Energy America, LLC, a wholly owned subsidiary of Direct Energy Services, LLC, and Hess Corporation make up the BGS Supplier Group.

the EDCs urge the Board to approve the cost recovery mechanism filed by the EDCs on May 1, 2008. (Id. at 7-8).

Rate Counsel

In its initial comments, Rate Counsel opposes the pass-through of increased SREC prices to ratepayers, stating that doing so would undermine rate stability and the contractual responsibilities of the BGS-FP suppliers without advancing the auction process and RPS goals. (RC Initial Comments at 2). According to Rate Counsel, the Supplier Master Agreements (“SMAs”), executed by BGS suppliers and approved in form by the Board, provide that the suppliers are responsible for complying with RPS requirements for the duration of the contract. (Id. at 3). Rate Counsel argues that this compliance responsibility implicitly includes the cost of acquiring SRECs, or alternatively, the cost of SACP payments in the event that not enough SRECs are procured by the supplier to satisfy the RPS requirement. (Ibid.) In addition, Rate Counsel also believes that the pass-through of increased SREC costs to ratepayers would undermine the certainty provided to ratepayers of multi-year BGS-FP supplier contracts. (Id. at 4-5).

Rate Counsel argues that approval of the pass-through of increased SREC costs to ratepayers would selectively consider only one aspect of BGS-FP supply costs without a corresponding offset for cost savings experienced by BGS suppliers. (Id. at 5). According to Rate Counsel, selectively recognizing additional BGS-FP supply costs attributable to SREC price increases without recognizing instances where BGS-FP suppliers might incur lower than expected costs to supply energy under the SMAs would unfairly burden ratepayers (Ibid.)

Additionally, Rate Counsel argues that rejecting the pass-through of increased SREC costs to ratepayers would not, in itself, adversely affect progress towards the achievement of the State's RPS goals or future BGS auction bidding. (Id. at 6). The Board's determination of which party is responsible for the increased costs attributable to SREC prices will not affect the RPS that must be met by all BGS-FP suppliers and therefore the environment will not be affected one way or the other. (Ibid.) In addition, Rate Counsel argues that by effectively altering the terms of the Board-approved SMAs to permit the pass-through of these costs, the Board might unintentionally foster more uncertainty among potential bidders. (Id. at 7).

Rate Counsel states that if the Board were to permit a pass-through, certain procedural safeguards should be put in place to protect ratepayers. (Ibid.) Specifically, Rate Counsel believes that, as a condition for recovery of claimed increased SREC costs, the Board should require EDCs to provide the specific justification for their claimed incremental costs and submit specific information that would allow the Board to make a determination that the incremental costs sought are reasonable and prudent. (Ibid.)

IEPNJ

IEPNJ states that the Board should find it appropriate to allow BGS suppliers with contracts that were approved in previous auctions to have an opportunity to recover the increased SACP. (IEPNJ Initial Comments at 2). In support of its argument, IEPNJ notes that successful bidders in these two auctions would have used \$300 per MWH as their maximum exposure for compliance with the RPS. (Ibid.) According to IEPNJ, the increase in the SACP resulted in a significantly increased compliance cost for winning BGS suppliers. IEPNJ asserts that the Board has historically recognized the importance of honoring the rules in place at the time of a BGS auction, pointing out that when the Board initially adopted the solar carve-out in April 2004,

it provided a limited exemption for existing BGS suppliers and that the instant proceedings should be governed by the same principles. (Id. at 3-4).

IEPNJ further argues that if BGS suppliers are required to pay for such increased compliance costs that were not in existence at the time of the BGS auction, the auction will ultimately be less successful in providing the lowest competitive costs for residents and businesses in the State, because BGS suppliers can be expected to place increased risk premiums on their offer prices in the BGS auction to account for potential unforeseen, and unrecoverable, Board mandated compliance costs. (Id. at 4). According to IEPNJ, if the Board does, subject to a prudence review, permit the recovery of unforeseen compliance costs by permitting the pass-through to ratepayers the costs of solar RPS compliance, ratepayers will benefit in subsequent auctions. (Ibid.)

IEPNJ further states that some BGS suppliers may be unwilling to seriously compete in New Jersey if they are subject to unforeseen compliance costs, and instead may choose to target their business in other states. This would have the effect of reducing competition by reducing the number of suppliers in the BGS auction, and will likely lead to increased prices for BGS customers. (Id. at 5).

Finally, IEPNJ believes the Board should recognize that the level of the incremental compliance costs are directly related to the BPU's deliberate policy choices. (Ibid.) In this instance, the BPU increased the SACP to encourage solar development, and considered ratepayer impacts and benefits in taking this step. Therefore, according to IEPNJ, the pass-through of these incremental costs to ratepayers is fully consistent with the BPU's policy decision and imposes no more than a fair share of solar development costs on the consumers who realize the benefits. (Ibid.)

PS Power submitted a letter supporting the initial comments of IEPNJ.

BGS Suppliers Group

In its initial comments, the BGS Supplier Group urges the Board to allow the pass-through to ratepayers of the cost of SRECs and SACP's above \$300 per MWH for those BGS contracts covering the period from 1) June 1, 2008 through May 31, 2009 or the BGS contracts resulting from the 2006 BGS Auction; and 2) June 1, 2008 through May 31, 2010 for the BGS contracts resulting from the 2007 BGS Auction, provided that the BGS Suppliers can show that these costs were prudently incurred. The BGS Supplier Group also requested immediate reimbursement of these costs to the BGS suppliers.

The BGS Supplier Group argues that BGS suppliers could not have reasonably foreseen that the Board would increase the SACP applicable to pre-existing BGS supply contracts. (BGS Supplier Group Initial Comments at 3). Because the Board has determined that ratepayers would benefit from a more efficient and sustainable solar market brought by a shift from rebates to market-based incentives, the BGS Supplier Group believes the increased costs of complying with the BGS contracts for the 2006 and 2007 auctions should be passed through to ratepayers. (Ibid.)

The BGS Supplier Group also argues that passing through these costs promotes a stable and competitive wholesale marketplace, which leads to lower electricity rates. (Ibid.) Absent some level of regulatory stability, the BGS Suppliers Group believes that BGS suppliers would be discouraged from participating in future BGS auctions, and the viability of the BGS auction

format would be threatened. (Id. at 3-4). The regulatory certainty that would be provided by requiring ratepayers to bear the cost of the increase in the cost of SREC and SACP would mean lower risk premiums in bid prices, which will result in lower BGS rates for ratepayers. (Id. at 4).

Additionally, the BGS Supplier Group asserts that brokers' fees and related transaction costs are an integral part of procuring SRECs and should be eligible for reimbursement and pass-through to ratepayers. (Ibid.) The BGS Supplier Group claims that these fees and costs are typically charged as a percentage of the cost of the SREC, and therefore, BGS suppliers should be able to seek recovery of their broker fees and related transaction costs that were therefore increased as a result of the Board's decision to substantially raise the SACP level and, in turn, the cost of SRECs. (Ibid.)

J.P. Morgan and CCG submitted letters that supported the initial comments filed by the BGS Suppliers Group.

Exelon Generation

Exelon Generation filed comments in support of full recovery of all costs incurred in compliance with the Board's RPS. According to Exelon Generation, it incurred significant additional compliance costs as a result of the Board's decision to increase the SACP, and it is both fundamentally fair and in the public interest to insure that BGS suppliers are permitted to recover those additional compliance costs. (Exelon Generation Initial Comments at 2). Exelon Generation also believes that it is appropriate for those costs to be passed through to ratepayers because they benefited from the Board's RPS and from a robust and competitive BGS auction process. (Ibid.) Exelon Generation further argues that future BGS auctions may suffer if BGS suppliers are not permitted to recover the additional, unanticipated costs of compliance with regulatory decision, which will ultimately harm customers. (Id. at 2-3). Finally, Exelon Generation requests that the Board initiate an accelerated proceeding so that BGS suppliers may recover these unanticipated costs as soon as possible. (Id. at 3).

Consolidated Edison Energy, Inc.

Con Edison Energy argues in its comments that the Board should approve the pass-through of the referenced costs because: 1) it will enable the lowest long-term BGS prices via future auctions; 2) it is consistent with the longstanding Board policy and prior determinations to avoid uncertainty in the BGS auctions; 3) it is fair to the BGS providers that were awarded supply contracts in the 2006 and 2007 BGS auctions and fulfilled their obligations pursuant to the SMAs; and 4) denial of the pass-through would arbitrarily relieve customers from legitimate solar RPS costs that they pay at all other times through the normal BGS auction and rate setting process. (Con Edison Energy Initial Comments at 2).

Con Edison Energy stated that by allowing the pass-through of the reference costs, the Board will alleviate regulatory uncertainty as bidders determine whether to participate and what prices to submit in future BGS auctions. Con Edison asserted that increased regulatory certainty will mean greater bidder participation and lower risk premiums in bid price, which will result in lower BGS rates for customers over time. (Id. at 5). Conversely, Con Edison Energy argued that imposing the unexpected and substantially higher solar RPS costs on BGS suppliers for the supply contracts awarded in 2006 and 2007 will undermine the effectiveness of future auctions and contribute to higher long-term BGS prices. (Id. at 6). As a result, Con Edison Energy believes that it and other prospective BGS providers will have to: 1) determine whether such

uncertainty violates corporate risk tolerance limits and precludes participation in the auction; and 2) if participation is possible, increase the BGS bid price by including a “risk premium” to account for the un-hedgeable costs outside of its control that it may incur. (Ibid.)

Con Edison Energy further argued that the pass-through is consistent with longstanding Board policy and prior Board and Legislative determinations to avoid uncertainty in the BGS auctions, citing the Board’s treatment of Federal Energy Regulatory Commission (“FERC”) approved transmission rates.³ (Id. at 7). Con Edison Energy believes that this is essentially the same methodology the Board should approve in this proceeding for the increased SREC/SACP costs of RPS compliance. (Ibid.) In addition, Con Edison Energy asserts a decision to pass-through the referenced costs in this proceeding is consistent with Legislative policy, pointing out the fact that when the Legislature recently increased the solar RPS obligations by establishing annual statewide gigawatt hour requirements from 2011 through 2026, it exempted existing BGS contracts from the legislative increases and exempted future BGS contracts from any future increases mandated by the Board which exceed the statutory schedule. (Ibid.)

Additionally, Con Edison Energy contends that the pass-through is a matter of fairness to BGS suppliers that prevailed in the 2006 and 2007 auctions and executed SMAs because it was reasonable for BGS suppliers to expect that they would not be subject to the costs of SACP changes subsequent to the auction. (Id. at 8). Con Edison Energy believes it would be unfair, at this point, to deny BGS suppliers recovery of the increased RPS costs resulting from the Board’s decision to increase the SACP. (Ibid.)

Finally, Con Edison Energy argues that denial of the pass-through would be an arbitrary determination to relieve customers from a portion of the costs of SRECs / SACP compliance in Energy Years 2009 and 2010 because the Board has determined that customers should pay such costs at all other times. (Id. at 9). According to Con Edison Energy, for all other BGS contract periods, the BGS rates paid by customers reflects these costs since they are reflected in the prices bid by providers, including in the 2008 and 2009 auctions. (Ibid.)

MSCG

In its initial comments, MSCG states that it agreed with the Board’s previous decision and reasoning to allow for the pass-through of the referenced costs to ratepayers. MSCG argues that it, along with other suppliers, value regulatory certainty, and the length of this proceeding has eroded supplier confidence in the BGS auction process to the potential detriment of ratepayers. (MSCG Initial Comments at 2). Stating that reduced confidence leads to less auction participation and the potential of risk premiums being added to the bids of participating suppliers, MSCG believes that the likelihood of higher prices for New Jersey consumers will be increased. (Ibid.)

Legislative Hearing

After notice, on June 20, 2011, the Board held a legislative hearing to take oral comments on the matter. Former BPU President, Lee A. Solomon, as well as Commissioners Joseph L. Fiordaliso and Nicholas Asselta, presided over the legislative hearing. Oral comments in this

³Currently, FERC-approved transmission costs are included in BGS suppliers’ bids. However, because transmission rates may change during the term of the SMA, the Board allows the EDCs, after review and Board approval, to increase BGS rates and reimburse BGS suppliers for increases in the FERC-approved transmission rates.

matter were submitted by the BGS Suppliers Group, Con Edison Energy, Rate Counsel, PS Power, the EDCs and IPENJ, which are summarized below.

BGS Suppliers Group and Con Edison Energy

BGS Suppliers Group and Con Edison Energy, represented by Scott Wemple of ConEdison Competitive Shared Services, continue to believe that the increased solar RPS compliance costs should be passed through to ratepayers based on cost causation principles. (TR at 17-3 to 5). In addition, with respect to how long the costs should be passed through to ratepayers, Mr. Wemple states that this is an issue of ratemaking design between the EDCs and the Board. Arguing that had the costs been recovered as they were incurred, it would have been over a two-year period, Mr. Wemple believes that two years seems to be a reasonable time frame in terms of mitigating any one-time rate increases to ratepayers. (Id. at 18-8 to 19-1). With respect to questions raised about BGS supplier foreseeability of the increase in the cost of the solar RPS, Mr. Wemple argued that this increase was not a foreseeable regulatory risk, because suppliers had confidence that the Board would not disrupt existing contracts. (Id. at 19-10 to 15).

Rate Counsel

In testimony presented at the legislative hearing, Stefanie Brand, the Director of the Division of Rate Counsel, argued that this matter is a question of fundamental fairness and the issue is who should bear the risk of the increase in the SACP. (Id. at 22-9 to 15). Rate Counsel continues to argue that the risks assumed by the BGS suppliers in the SMAs included the obligation to satisfy the RPS for their portion of the load. In addition, according to Rate Counsel, by unilaterally changing the SMA after the contracts have expired, the Board is creating regulatory risk that could cause problems for ratepayers or suppliers. (Id. at 23-4 to 24-5). Likewise, Rate Counsel argues that brokers' fees and transaction costs should not be passed through to ratepayers. (Id. at 26-24 to 27-2).

Rate Counsel believes that current BGS suppliers bid in assuming higher SREC prices than those in the marketplace, and while ratepayers are paying for those higher costs, BGS suppliers are now experiencing a windfall. (Id. at 24-11 to 17). Rate Counsel contends that BGS suppliers are asking the Board to relieve them for part of the downside of assuming risks with no benefit given to ratepayers for any upside. (Id. at 24-25 to 25-3).

With respect to the issue of foreseeability, Rate Counsels argues that there needs to be a greater showing that these costs were something that BGS suppliers could not have foreseen and that the additional costs were actually incurred. (Id. at 32-17-20).

PS Power

PS Power testifies that it firmly believes that it would serve the best interests of the State's retail energy consumers to allow the pass-through to ratepayers of the cost of SRECs prudently incurred by BGS suppliers above \$300 per MWH for the BGS contracts at issue. (Id. at 34-14 to 35-21). PS Power argues that to not allow the pass-through would result in unnecessarily higher energy prices to consumers due to the risk premiums that BGS suppliers would include in their bids as compensation for such risks. (Id. at 36-18 to 22). In addition, PS Power believes that in raising the SACP above \$300, the Board took into consideration ratepayer impacts and benefits assuming that ratepayers would ultimately bear the cost of compliance. (Id. at 37-3 to 7). Further, PS Power believes that by reaffirming its original decision allowing

pass-through of the increased compliance costs, the Board will send another strong signal to market participants that BGS suppliers can rely upon the Board to do the right thing in administering the BGS process. (*Id.* at 38-1 to 8). PS Power fully supports the May 2008 proposal submitted by the EDCs, which did not include the recovery of brokers' fees. (*Id.* at 40-12 to 41-6).

EDCs

The EDCs, represented by Gene Meehan of NERA Economic Consulting ("NERA"), continue to urge the Board to affirm its January 2008 ruling that the impacted BGS suppliers that held BGS-FP contracts from the 2006 and 2007 BGS auctions may pass through to ratepayers the cost of SRECs above \$300 per MWH. (*Id.* at 45-8 to 15). In addition, the EDCs request that the Board also reaffirm its 2008 decision that to effectuate this pass-through for the affected BGS suppliers, the EDCs will be permitted to recover in rates to pass-through to ratepayers of the cost of SRECS above \$300 per MWH for the relevant periods if the BPU finds that these incremental costs were reasonably and prudently incurred by BGS suppliers. (*Id.* at 45-19 to 46-3). Upon being questioned regarding the EDCs interest in the proceeding, NERA states that the EDCs have viewed their responsibility as, in part, seeing that the procurement process for BGS is designed to be stable and efficient, and get the best possible market price for customers. (*Id.* at 51-3-8).

IEPNJ

In its testimony at the legislative hearing, IEPNJ reiterated the majority of the arguments presented in its initial comments. In addition, IEPNJ responded to questions regarding the foreseeability of the increased RPS costs. IEPNJ argued that the increase in the SACP was an unforeseen regulatory risk that was not built into the risk premium in BGS suppliers' bids for the 2006 and 2007 BGS Contracts. (*Id.* at 60-10 to 13). Responding to Rate Counsel's assertion about potential windfall profits in recent years due to reduced SREC prices, IEPNJ testified that if unanticipated revenue results from some regulatory action or other unforeseen action, then perhaps that's something the Board should look into. (*Id.* at 64-11-15).

Final Comments

On or about July 1, 2011, several parties submitted final comments on this matter. A summary of the parties' positions is below.

EDCs

In their final comments, the EDCs request that the Board reject Rate Counsel's arguments and reaffirm its 2008 decision to allow the impacted BGS suppliers to recover increased compliance costs for the two BGS-FP contract periods affected by the SACP increase, as well as approve the cost recovery mechanism filed by the EDCs on May 1, 2008.

The EDCs assert that Rate Counsel's arguments against cost recovery stem from its failure to acknowledge the difference between market risks and regulatory risk. (EDC Final Comments at 1). In support of their position, the EDCs cited the BGS suppliers' testimony that they understood that they are responsible for market risks, but did not bear the risk of regulatory actions that would impact previously-approved BGS supply contracts. (*Ibid.*)

In addition, the EDCs argue that the SMAs do not guarantee that retail customers will pay the exact same rate for the three-year term, pointing out several adjustments that are made to the BGS rates to reconcile over and under recoveries, as well as for changes to FERC transmission rates. (Id. at 3-5). The EDCs assert that the treatment of these costs is essentially the same methodology that the Board has approved here for the increased RPS compliance cost. (Id. at 4).

With respect to Rate Counsel's argument that allowing the pass-through of increased compliance costs could result in higher bid prices in future BGS auctions, the EDCs argue that this claim has no basis and is not supported by the record. (Id. at 6). On the contrary, several BGS suppliers testified that, if the Board does not affirm its prior decision to allow the pass-through, it would inject increased risk and uncertainty (and correspondingly higher bid prices) into future BGS auctions. (Ibid.) In addition, the EDCs assert that there is no evidence that the Board's approval of the pass-through in 2008 has adversely impacted participation in the 2009, 2010, or 2011 BGS auctions, all of which were deemed competitive and resulted in progressively lower- BGS-FP supply prices. (Ibid.)

Finally, the EDCs support Rate Counsel's argument that the Board should approve a process under which BGS suppliers must support the amount of their increased compliance costs, and that their actions in procuring SRECs and/or paying the SACP during the relevant period were prudent. (Id. at 7). The EDCs believe that their May 1, 2008, filing proposed such a cost recovery mechanism, and should be approved by the Board. (Ibid.)

Rate Counsel

As set forth in its initial comments, Rate Counsel continues to oppose the pass-through of increased SREC prices to ratepayers. However, Rate Counsel states that if the Board were to permit a pass-through, any claimed costs should be subject to careful scrutiny in a formal proceeding and the categories of recoverable costs should be limited. (Rate Counsel Final Comments at 2).

Rate Counsel maintains that permitting the pass-through will actually increase regulatory risk to a greater extent. Rate Counsel bases this argument on the belief that the Board, by introducing the prospect of altering pre-existing BGS supply contracts for the benefit of BGS-FP suppliers, opens up the prospect of altering SMAs to the detriment of the BGS-FP suppliers in the future. (Id. at 3). In Rate Counsel's opinion, rejecting the pass-through of increased SREC costs to ratepayers would not necessarily adversely affect bidding in the future and, in fact, the 2009, 2010, and 2011 auctions attracted bidders and were quite robust with steadily declining BGS-FP electricity prices. (Id. at 3-4).

Additionally, Rate Counsel asserts that regulatory risk is one of the accepted business risks faced by participants in energy markets, and the participants should account for such risks. (Id. at 4-5). According to Rate Counsel, there is already a risk premium to account for business risk included in BGS-FP bids and if the SMAs were amended to permit the recovery of costs related to the SACP increase, the uncertainty surrounding the finality of future contracts would likely add to the perceived risk and the attendant risk premium. (Id. at 5). Rate Counsel further argues that the Board's numerous orders addressing the RPS and SACP levels effectively placed the BGS suppliers on notice that the SACP levels were subject to Board action. (Id. at 6). With respect to the of the State's policy to "grandfather" existing contracts, as enacted by the Solar Energy Advancement and Fair Competition Act as well as IEPNJ's citation to the 2004 "solar carve-out," Rate Counsel noted that the legislation was enacted after the BGS auctions at

issue were held. (Ibid.) Rate Counsel believes it is too late to exempt the BGS suppliers from effects of the increase in SACP prices, and absent the ability to grandfather the existing SMAs, the issue presented in this case remains whether ratepayers or BGS suppliers should bear the additional costs attributable to SACP prices. (Ibid.)

PS Power

In its final comments, PS Power agreed with Rate Counsel that “fundamental fairness” is a key consideration, but believes that principles of fundamental fairness support the pass-through of prudently incurred costs. (PS Power Final Comments at 1). PS Power argues that BGS suppliers reasonably relied on one of the primary functions of the SACP – to provide suppliers with a fixed cap on the cost of compliance with the RPS. (Id. at 2). PS Power believes that increasing the SACP in the middle of an existing Board approved BGS contract, without providing a mechanism to provide relief from higher compliance costs, would thwart the purpose of the provision, and would completely undermine the reasonable expectation of the BGS suppliers as market participants. (Ibid.) Additionally, PS Power asserts that BGS suppliers cannot reasonably manage the regulatory risk associated with changes to the RPS rules that may occur during the term of a BGS contract. (Ibid.) Agreeing with the BGS Supplier Group, PS Power believes that changes in Board regulations as they apply to existing Board approved BGS contracts are not a category of risk that BGS suppliers can reasonable manage. (Id. at 3).

Additionally, PS Power disagrees with Rate Counsel’s assertion that BGS suppliers could be deemed to have contractually assumed the risk of an increase in the SACP under the terms of the BGS contract. (Id. at 3-4). PS Power argues that the Board’s decision did not alter the terms of the SMA and the BGS suppliers, in fact, did fully comply with the contract by procuring the required levels of SREC and other RECs. According to PS Power, the question posed before the Board at this time is not whether the BGS suppliers met their contractual obligations, but whether they should be reimbursed for certain of the incremental costs of meeting those obligations. (Id. at 4).

With respect to ratepayer impacts, PS Power asserts that BGS ratepayers will be best served by a Board determination that confirms its commitment to honoring the rules it had in place at the time of the BGS auction. According to PS Power, this will foster a stable regulatory environment for future BGS bidders and thereby reduce or eliminate risk premiums which would otherwise be passed on to ratepayers in BGS bids. (Id. at 5). PS Power claims that, relying on both the SACP’s function as a ceiling on solar RPS compliance costs and on the Board’s history of honoring existing BGS contracts when it entered into these BGS contracts, it did not include “regulatory risk” premiums for its RPS obligations. (Ibid.) PS Power argues that if the Board puts BGS suppliers on notice that it could change its rules at any time and it expects the BGS suppliers to absorb the costs of any future regulatory changes, BGS bidders will likely feel compelled to include risk premiums in future bids with a potentially significant impact on ratepayers. (Ibid.)

PS Power contends that it is inappropriate to consider changing market prices as a factor in deciding whether or not to provide relief to BGS suppliers from a rule change that occurred in the midst of a previously existing BGS contract. (Id. at 7). Citing the fact that energy prices rose significantly in 2007 and 2008, PS Power claims that winning bidders of the 2006 and 2007 auctions appropriately absorbed these higher costs. In addition, if a BGS supplier purchased SRECs on a forward basis or under multi-year contracts, it may not be in a position to take advantage of falling SREC prices and, in fact, may be buying SRECs that are currently above market. PS Power argues that because the BGS auction is a competitive procurement process,

BGS suppliers could actually be in a position of pricing previously procured SRECs into future BGS auctions at a loss. (Id. at 7-8). In addition, PS Power asserts that BGS suppliers change from year to year, and the suppliers who won the BGS tranches in the 2006 and 2007 auctions are not necessarily the same BGS suppliers servicing load today. (Id. at 8). PS Power notes that the SREC prices did not decline during the duration of the BGS contracts in question. (Ibid.)

Finally, PS Power believes that the pass-through mechanism developed by the EDCs is simple, straightforward and fair, and should be approved. In addition, PS Power asserts that the information Rate Counsel would require, including individual contracts, to provide proof as to their actual SREC compliance costs, would create a significant burden on BGS suppliers. Alternatively, PS Power suggests that an affidavit, certified by an officer of the company under penalty of perjury would be sufficient to establish a BGS supplier's actual cost of compliance. (Id. at 8-9).

BGS Supplier Group

In its final comments, the BGS Supplier Group states that immediate reimbursement should be made to the BGS suppliers for the increase in SREC and SACP costs, inclusive of brokers' fees and related transaction costs. In addition, the BGS Supplier Group responded to several claims made in Rate Counsel's initial comments and testimony at the legislative hearing.

First, the BGS Supplier Group argues that, contrary to Rate Counsel's assertions, the suppliers' assumption of this risk was not foreseeable. (BGS Supplier Group Comments at 2). The BGS Supplier Group believed that the Board would continue to follow historical precedent and either pass-through the increased costs to ratepayers as it did in the Solar Transition Order or "grandfather" existing contracts, as the legislature did in the Solar Advancement and Fair Competition Act, P.L. 2007, c.340. (Ibid.) Additionally, with respect to Rate Counsel's argument that BGS suppliers should be assigned the risk of the ups and downs of the SREC market, the BGS Supplier Group asserts that Rate Counsel fails to account for the fact that the current decrease in SREC prices is the natural result of market forces rather than a regulatory change. (Id. at 3). The BGS Supplier Group also points out that the current decrease is much less than the prior increase and, most importantly, that there are different BGS suppliers supplying various load amounts each year.⁴ (Ibid.)

Further, the BGS Supplier Group argues that the Board's decision in this matter will directly and significantly affect the BGS Supplier Group's participation in future auctions, contrary to Rate Counsel's suggestion, especially for relatively small BGS suppliers who typically do not provide more than one or two tranches per BGS auction. (Ibid.) The BGS Supplier Group points to the fact that while the amount of money to be recovered has a financially material impact on these small BGS suppliers, it represents less than 1% of a single year's cost of BGS supply to ratepayers. (Ibid.)

Finally, the BGS Supplier Group continues to assert that BGS suppliers should be able to seek recovery of brokers' fees and related transaction costs as they are an integral part of SREC procurement, were incurred, and were increased as a result of the Board's decision to substantially raise the SACP level. (Id. at 4).

⁴ Members of the BGS Supplier Group who were awarded tranches in the 2006 and 2007 auctions currently do not provide BGS supply, and are therefore not benefiting from the SREC price drop.

CCG

In its final comments, CCG continues to argue that BGS suppliers should not be expected to bear risks for regulatory changes that significantly impact the very structure of the market, such as those which are the subject of the instant proceeding. (CCG Final Comments at 2). CCG reiterates that imposing such an obligation upon the BGS suppliers will inject a new degree of uncertainty into the BGS auction process, and will likely cause BGS suppliers in future BGS auctions to factor risk premiums into their BGS bids for such potential increases in RPS compliance costs, regardless of whether regulatory changes actually occur. (*Ibid.*) CCG continues to support the expedited pass-through of BGS suppliers' prudently incurred costs of solar RPS compliance above \$300 per MWH for the 2006/2007 BGS auction contracts.

Exelon Generation

In its final comments, Exelon Generation argues that Rate Counsel, the only party to oppose any cost recovery, failed to recognize that the SREC costs at issue were set and imposed at the sole discretion of the Board, and cannot be compared to price fluctuations in competitive capacity or fuel markets. (Exelon Final Comments at 1). In addition, Exelon Generation claims that Rate Counsel's assertion that rejection of SREC cost recovery will not adversely impact future BGS bidding is baseless. (*Id.* at 2). Exelon Generation claims that if BGS suppliers must now assume all of the financial risk of increased compliance costs, they will either elect not to bid or will increase their bid prices to account for the unknown and un-quantified regulatory risk. (*Ibid.*) With respect to Rate Counsel's argument that a pass-through of increased SREC compliance costs would nullify the Board's policy goal of price certainty to customers, Exelon Generation states that this argument fails to acknowledge that the Board has multiple policy goals at work with respect to BGS supplies. (*Ibid.*)

Finally, Exelon Generation expressed its concern that the documentation that Rate Counsel professes to need to review the reasonableness of the increase in costs goes well beyond what is reasonable and appropriate. (*Ibid.*) Exelon Generation requests that should the Board authorize SREC compliance cost recovery, the Board should provide detailed guidance on this issue with the goal of creating a streamlined and timely process for quantifying recoverable costs. (*Ibid.*) Exelon Generation continues to request that the Board initiate an accelerated proceeding at its earliest convenience so that the BGS suppliers may recover these unanticipated costs as soon as possible. (*Id.* at 3).

Con Edison Energy

Con Edison Energy argues that the record in this proceeding has established that a denial of the pass-through would create uncertainty among potential BGS suppliers regarding the impact of future Board actions and risk long-term BGS price increases because: (1) fewer suppliers may participate in the auction, and (2) suppliers would include additional, new risk premiums in their bids to provide BGS supply. (Con Edison Energy Final Comments at 3).

Con Edison Energy contends that Rate Counsel erroneously disregarded the potential long-term impact on BGS prices (and consumer costs) from the uncertainty created by denial of the pass-through of the BGS suppliers' incremental SACP / SREC costs for the specified contracts. (*Id.* at 7-8). Con Edison Energy argues that Rate Counsel's primary focus is on the immediate impact of the pass-through, but the impacts on the BGS prices from denial of the pass-through will be unlimited in duration and amount. This will be due to the uncertainty created, and will lead to reduced bidder participation and the inclusion of additional risk premiums over the long-

term in all future BGS auctions going forward. (Id. at 8). Con Edison Energy believes that the potential recurring impact to ratepayers from increased prices in future auctions, where billions of dollars of BGS supply are procured on behalf of customers every year will likely dwarf the temporary limited cost of the pass-through. (Ibid.) In response to Rate Counsel's assertion that there has not been a negative impact on auction pricing from the appeal, Con Edison Energy asserts that this is because, to date, the Board has maintained that the pass-through should be approved to protect the stability of the auction. Con Edison Energy believes that a reversal by the Board in this case would introduce substantial new uncertainty for bidders and will likely cause a long-term increase in BGS prices. (Id. at 9).

Con Edison Energy argues that the Board should approve the pass-through as a matter of basic fairness to the BGS suppliers that entered into the BGS Supply Contracts in 2006 and 2007. (Id. at 10). As set forth in its initial comments, Con Edison Energy contends that the BGS suppliers based their participation and bids in the 2006 and 2007 auctions on the \$300 MWh SACP that was then in place, and the suppliers had no reason to believe that they would be subject to the incremental costs. (Id. at 10-11).

Con Edison Energy refutes Rate Counsel's testimony that current BGS suppliers that are supplying load today assumed higher SREC prices and might now be experiencing reduced SREC prices that will not be passed on to ratepayers. (Id. at 15). Con Edison Energy contends that the BGS suppliers currently servicing load are not the same suppliers that entered into the 2006/2007 SMAs, and do not hold the same supply obligations. (Ibid.) Con Edison Energy further argues that a comparison between: (1) current SREC prices that fluctuate with the market and (2) the doubling of SREC / SACP costs to the 2006/2007 BGS auctions' winners as a result of the Board's actions in the Solar Transition Order is misleading. (Id. at 17). As was argued by other suppliers, Con Edison Energy asserts that today's SREC prices are the result of market forces, not regulated changes. (Ibid.)

Con Edison Energy also states in its final comments that changes to other normal, hedgeable aspects of BGS supply costs are irrelevant to the issue of the pass-through that is the subject of the instant proceeding. While recognizing that BGS suppliers are fully responsible for the costs of BGS supply which they can control and hedge, the pass-through before the Board involves a circumstance where the Board increased the cost of regulatory compliance, after the BGS auction occurred and in a manner that was entirely outside the BGS suppliers' control. (Id. at 17). Con Edison Energy asserts that there is no unfairness to permitting the pass-through to address this unique situation of regulatory change without addressing the various costs of BGS supply that are borne by the BGS suppliers under the normal BGS procurement. (Ibid.)

Con Edison Energy further argues that Rate Counsel has not presented any legitimate reason to insulate ratepayers from a portion of the full cost of SREC compliance during energy years 2009 and 2010 when they are responsible for such costs at all other times. (Ibid.) For instance, the compliance costs at the increased SACP levels were included in suppliers' bids for the portions of their supply in these energy years that were the subject of the 2008 and 2009 auctions. (Id. at 18). Additionally, Con Edison Energy asserts that the level of the incremental compliance costs were a direct result of the Board's public policy choices to encourage solar development and therefore, the pass-through would merely impose the costs of this policy on those consumers who realize the benefits of that change. (Ibid.)

Con Edison Energy argues that the Board should disregard Rate Counsel's initial comments regarding procedural safeguards because they are outside the scope of the current proceeding. Con Edison Energy asserts that the Board has assumed that suppliers will need to show that

these costs were prudently incurred. (Id. at 19). According to Con Edison Energy, the issue of the process and mechanism for the suppliers to make the required showing to recover incremental SREC costs has been addressed in a separate proceeding. I/M/O the Provision of Basic Generation Service for the Period Beginning June 1, 2008- BGS SREC Recovery Proceeding, BPU Docket No. ER07060379, Decision and Order dated October 15, 2009. Con Edison Energy believes that the Board should render its determination on the BGS SREC recovery mechanism in that separately docketed proceeding based on the record developed therein. (Con Edison Energy Final Comments, supra, at 19-20). Con Edison Energy recommends that the Board adopt the BGS Supplier Group's proposed methodologies which include a summary of BGS suppliers' SREC costs, an affidavit by an officer, and immediate payments from the EDCs to BGS suppliers upon Board approval of the filing. (Id. at 20).

With respect to questions raised at the legislative hearing regarding foreseeability of the Board's post-auction SACP action, Con Edison Energy submits that the Board can render its policy decision in this case without consideration of whether the relevant change was foreseeable. (Ibid.) Con Edison Energy contends that the record of comments and testimony in this matter establishes that failure to approve the pass-through would create uncertainty among potential BGS suppliers regarding the impact of future Board regulatory actions, and risk long-term BGS price increases because: (1) fewer suppliers may participate in the auction and (2) suppliers would include additional risk premiums in their bids to provide BGS supply. (Ibid.)

DISCUSSION AND FINDING

The Board has reviewed the extensive record in this matter, including the transcripts of the legislative hearing and the comments submitted by the parties. As previously stated, the decision on the BGS appeal noted that the Board would need to make its decision in this matter taking into account the current state of facts, including that the BGS suppliers have completed performance of their contracts in good faith, and would need to provide an explanation for any Board decision to pass-through incremental SREC costs. In re Provision of Basic Generation Service for the Period Beginning June 1, 2008, 205 N.J. 339, 362 (2011).

At the time of the 2008 BGS proceeding, the Board was in the process of revising its approach to the financing of the renewable energy market with the intent to transition from rebates to market based incentives. At that time, additional solar installations were needed to satisfy the RPS, and the Board - and ratepayers - would have been unable to keep pace with the then-current demand for rebates to help finance these additional solar installations. An RPS transition working group was formed in July 2006 to develop alternatives to rebates. The studies and reports of that working group were circulated to interested parties, including Rate Counsel. In the Solar Transition Order, the Board adopted an 8 year SACP schedule to signal financial markets of predictability in SREC prices, and made that decision "effective immediately" to help jump-start the market transition. However, while the treatment of current BGS suppliers with already bid contracts was raised, it was not directly addressed in that proceeding or in the Solar Transition Order.

Therefore, as part of the 2008 BGS proceeding, the Board decided to allow BGS suppliers that had entered into contracts based on the prior SACP level to have an opportunity to collect incremental costs of compliance with the solar RPS from ratepayers as in keeping with the stated legislative mandate that BGS customers are responsible for the reasonable and prudent costs of providing BGS — including the costs of compliance with the RPS. The Board's decision was intended to implement the solar transition and keep BGS customers responsible

for BGS costs as required by statute, provided that those costs are reasonable and prudent. N.J.S.A. 48:3-57(e).

While exempting the BGS load that was already under contract was offered as an alternative, the Board did not simply cap exposure because that would not serve to fund the solar transition. Such an exemption would have essentially taken the already under contract BGS load out of market unless SREC prices were less than \$300 at a time when competition in the emerging solar market was critical. Additionally, under the law in place at the time, the SACP money collected could be used to continue to fund the smaller solar projects that still qualified for rebates, and to support development of the market by keeping a single SACP in place for all purchasers in the SREC market.

The Board's 2008 Auction Order indicated the Board was concerned that requiring the BGS suppliers to bear the costs related to the increase in SREC and SACP costs could discourage them from participating in future auctions. The comments in this proceeding have not lessened that concern. As noted by the Court, the BGS suppliers have now satisfied their obligations under the relevant contracts in good faith. We believe that it would not be fair to deny the BGS suppliers the opportunity to recover incremental costs that were the direct result of a Board determination made without knowledge by those suppliers of the magnitude of the increase when they bid on those contracts. While we agree with Rate Counsel that the BGS suppliers may legally be held contractually subject to all market and business risks, the extent to which these suppliers should, in fact, be subject to the regulatory risk created by a doubling of the SACP after the suppliers had entered into contracts, is a question of fairness and a matter of policy committed to the sound discretion of the Board. The Board **FINDS**, on balance, that given these specific circumstances, and in light of the requirements of N.J.S.A. 48:3-57(e) authorizing recovery of "reasonable and prudently incurred costs incurred in the provision of basic generation services," the BGS suppliers should not be forced to assume the results of the Board's regulatory action. The Board made a similar determination when it decided that any change in transmission rates approved by FERC subsequent to a BGS Auction should be allowed to be passed through to ratepayers, after notice and review by the EDCs and the Board, rather than be absorbed by the BGS suppliers. I/M/O the Provision of Basic Generation Service for Year Two of the Post Transition Period, BPU Docket No. EO03050394, Order dated December 2, 2003.

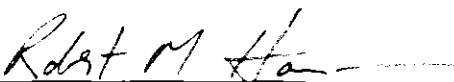
Therefore, having provided notice and an opportunity for comment, and having duly reviewed those comments, the Board **HEREBY APPROVES** the pass-through to ratepayers of the costs of SRECS above \$300 per MWH for (1) June 1, 2008 through May 31, 2009 for the 2006 BGS Contracts; and (2) June 1, 2008 through May 31, 2010 for the 2007 BGS Contracts, provided that those costs were reasonably and prudently incurred.

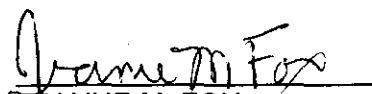
The Board recognizes that the EDCs, in compliance with the 2008 Auction Order, submitted a rate recovery proposal and that there were comments submitted by several entities. However, given the amount of time that has passed since the May 2008 filing, as well as the changed circumstances and the comments submitted in this proceeding, the EDCs are **HEREBY DIRECTED** to resubmit their filing to the Board no later than July 1, 2012, with revisions if necessary to account for the fact that all of the contracts have now been fulfilled. The filing should provide a proposed rate recovery mechanism and a method for BGS suppliers to demonstrate that any incremental costs were reasonably and prudently incurred. As was noted in the 2008 Auction Order, as part of the rate recovery mechanism, BGS suppliers will be required to provide documentation justifying recovery, and the EDCs will be required to review and verify any costs requested to be recovered in rates.

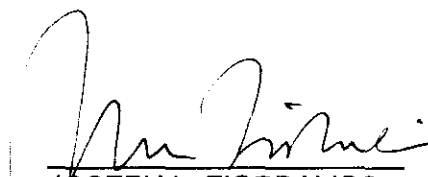
To expedite the review of the above referenced filing, as authorized by N.J.S.A. 48:2-32, the Board **HEREBY DESIGNATES** President Robert M. Hanna as the presiding officer who is authorized to rule on all motions that arise during the proceedings and modify any schedules that may be set as necessary to secure just and expeditious determination of the issues.

DATED: 5/1/12

BOARD OF PUBLIC UTILITIES
BY:


ROBERT M. HANNA
PRESIDENT


JEANNE M. FOX
COMMISSIONER


JOSEPH L. FIORDALISO
COMMISSIONER

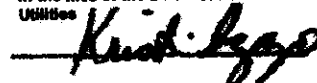

NICHOLAS ASSELTA
COMMISSIONER


MARY-ANNA HOLDEN
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



**In the Matter of Increased Solar Alternative Compliance Payments Impacting the 2006
and 2007 BGS Supplier Master Agreements**

**BPU Docket No. EO11040215
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