



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

ENERGY

IN THE MATTER OF THE PROVISION OF BASIC )  
GENERATION SERVICE FOR THE PERIOD )  
BEGINNING JUNE 1, 2010 ) DECISION AND ORDER  
DOCKET NO. EO09050351

(E-SERVICE LIST ATTACHED)

BY THE BOARD:

This Order memorializes actions taken by the Board of Public Utilities ("Board" or "BPU") at its November 10, 2009 agenda meeting pertaining to the provision of basic generation service ("BGS") for retail customers who continue to purchase their electric supply from their electric utility company for the period beginning June 1, 2010.<sup>1</sup>

By Order dated May 20, 2009, in the within matter, the Board directed the electric distribution companies ("EDCs") consisting of Atlantic City Electric Company ("ACE"); Jersey Central Power & Light Company ("JCP&L"); Public Service Electric and Gas Company ("PSE&G"); and Rockland Electric Company ("RECO"), and all other interested parties, to file proposals by July 1, 2009 to determine how to procure the remaining one-third of the State's BGS fixed price ("FP") and the annual Commercial and Industrial Energy Pricing ("CIEP") requirements for the period beginning June 1, 2010. A procedural schedule to address the proposals was also adopted by the Board at that time, including an opportunity for initial written comments, a legislative-type hearing, and final written comments.

In its May 20, 2009 Order, the Board also directed the EDCs and other interested stakeholders to comment on the recommendations in the Boston Pacific Final Report<sup>2</sup> for the 2009 BGS

<sup>1</sup> Decisions on certain issues relating to the Retail Margin and to a proposal by LS Power Development LLC were considered at the December 1, 2009 agenda as item 2J, and are also discussed in this Order.

<sup>2</sup> Boston Pacific, Inc. was retained in December 2007 on behalf of the Board, to oversee and monitor the process proposed by the four EDCs in New Jersey to procure supplies for BGS, for three years, starting with the 2008 BGS procurement process. As part of its contract, BP provides a Final Report to the Board on the BGS procurement process, and also provides recommendations to improve future BGS procurement processes. At its April 27, 2009 Agenda meeting, the Board accepted for filing BP's Annual Final Report on the 2009 BGS FP and CIEP Auctions, dated April 22, 2009.

Auction relating to: 1) credit requirements of BGS suppliers for the FP product, and 2) the potential impact of the PJM weekly settlement process on BGS prices.

On July 1, 2009, the EDCs filed a Joint Proposal on BGS procurement ("Joint EDC Proposal") and each EDC also filed a company-specific addendum to the Joint EDC Proposal. Proposals were also submitted by the New Jersey Department of the Public Advocate, Division of Rate Counsel ("Rate Counsel"), and Constellation Energy Commodities Group/Constellation New Energy, Inc ("Constellation"). A discovery period followed.

Further on August 14, 2009 Staff of the Board of Public Utilities requested input from the EDCs and interested stakeholders on the following questions:

- Currently the statewide load cap is set at roughly 37% of the tranche target. What are the potential benefits or drawbacks with raising the statewide load cap to roughly 45% of the tranche target? In addition, would raising the statewide load cap also result in the need to raise the EDC specific load caps?
- Under N.J.S.A. 48:3-87(d) and N.J.A.C. 14:8-2, BGS providers and third party suppliers are required to comply with the Renewable Energy Portfolio Standards. Historically, the Supplier Master Agreement has required each BGS-FP supplier and each BGS-CIEP supplier to satisfy the Renewable Energy Portfolio Standards with respect to its Supplier Responsibility Share. What are the potential benefits and drawbacks of eliminating this requirement from the Supplier Master Agreement, either with respect to all of the Renewable Energy Portfolio Standards (Solar, Class I, and Class II) or with respect to one or two of those standards?<sup>3</sup>

On or about August 28, 2009, Initial Comments on the BGS proposals were received from Rate Counsel, the EDCs, Consolidated Edison Solutions, Inc./Consolidated Edison Energy, Inc. ("Con Ed") , the Retail Energy Supply Association ("RESA"), LS Power Development LLC ("LS Power"), and PSEG Energy Resources & Trade LLC ("PSEG ER&T"), .

Public hearings were held in each EDC's service territory to allow members of the public to present their views on the procurement process proposed by the EDCs, and the potential effect on customers' rates. ACE's public hearing was held on September 29, 2009; PSE&G's public hearing was held on September 24, 2009; RECO's public hearing was held on September 30, 2009, and JCP&L's public hearing was held on September 25, 2009. No members of the public appeared at any of the hearings.

The Board also held a legislative-type hearing on September 10, 2009, at its Newark hearing room, chaired by President Jeanne Fox. The purpose of the hearing was to take comments on the pending proposals. The EDCs, National Economic Research Associates ("NERA"), the EDCs' auction manager, Rate Counsel, New Jersey Business and Industry Association ("NJBIA"), RESA<sup>4</sup>, Sun Farm Network, and Constellation presented comments for the record, and were questioned by President Fox and Board Staff.

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<sup>3</sup> At its September 16, 2009 agenda meeting, the Board directed Staff to withdraw its question seeking input on the potential benefits and drawbacks of eliminating the requirement in the Supplier Master Agreement that each BGS-FP supplier and each BGS-CIEP supplier satisfy the Renewable Energy Portfolio Standards for its Supplier Responsibility Share.

<sup>4</sup> The following companies testified as a panel on behalf of RESA: Hess Corporation, and Direct Energy.

Final Comments on the issues were submitted on or about September 25, 2009 by the EDCs, Rate Counsel, RESA, NJBIA, LS Power, the PJM Power Providers Group (“P3 Group”), PSEG ER&T and Constellation.

## POSITIONS OF THE PARTIES, INITIAL COMMENTS AND FINAL COMMENTS

The Board has carefully reviewed the record in this proceeding. The parties’ filings have largely relied on previous auctions and on the Joint EDC Proposal as the baseline for proposing specific modifications and/or additions. For this reason, and because it forms the basis of much of the discussion in this Order, and because, with the modifications described below, the Joint EDC Proposal contains many elements that will be incorporated into the BGS procurement process which the Board will approve herein, this Order will summarize the main features of the July 1, 2009 Joint EDC Proposal. The Board will not, in this Order, separately summarize each party’s position in similar detail, but has carefully reviewed each party’s proposals and/or positions in reviewing the record in this matter and rendering this decision.

### JOINT EDC PROPOSAL

On July 1 2009, the four EDCs filed a generic proposal for BGS beginning on June 1, 2010, including proposed preliminary auction rules for the auctions, Supplier Master Agreements (“SMAs”), and EDC-specific addenda.

The EDCs have jointly proposed two simultaneous, multi-round, descending clock auctions (“Auctions”) for the procurement of services to meet the full electricity requirements (i.e., energy, capacity, ancillary services, transmission, etc.) of retail customers that have not chosen a third party supplier (“TPS”).

One Auction would procure the service requirements for a one-year period beginning June 1, 2010, for the approximately 2,000 larger Commercial and Industrial (“C&I”) customers on the EDCs’ systems through an Auction to provide hourly-priced service (the “BGS-CIEP Auction”). The customers in this category represent approximately 2,900 Megawatts (“MW”) of load to be procured through bidding on 41 full-requirements tranches<sup>5</sup> of approximately 75 MW each<sup>6</sup>. This is the same type of Auction that the Board approved last year in Docket ER08050310.

The second Auction would procure one-third of the service requirements for all other customers of all four EDCs<sup>7</sup>, for a three-year period beginning June 1, 2010, through a fixed-price auction (“BGS-FP Auction”) for approximately 5,600 MW of load to be served through 54 full-requirements tranches<sup>8</sup> of approximately 100 MW each. This is the same type of Auction that the Board approved last year in Docket ER08050310.

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<sup>5</sup> A tranche is a full-requirements product and represents a fixed percentage share of an EDC’s load for a specific period.

<sup>6</sup> The 75 MW tranche size is an approximate amount of BGS-CIEP eligible load for ACE, JCP&L and PSE&G tranches. However, RECO only has one tranche with an eligible load of about 38 MW.

<sup>7</sup> A portion of RECO’s service territory lies outside of the area managed by PJM as described in footnote 9. A separate procurement process is proposed for that area.

<sup>8</sup> The EDCs have previously secured two-thirds of their total FP load requirements through May 31, 2010 by means of Board-approved auctions in February 2007 and February 2008.

The competitive process by which the EDCs propose to procure their supply for BGS load for period beginning June, 1 2010 is detailed in the Joint EDC Proposal and in Appendices A and B thereto (Provisional CIEP and FP Auction Rules, respectively), and is the same type of auction process that the Board has approved for each of the past eight years. Under the Joint EDC Proposal, the retail load of each EDC is considered a separate “product” in each Auction. When a participant bids in either BGS Auction, that participant states the number of tranches that it is willing to serve for each EDC at the prices in force at that point in the Auction. In the BGS-FP Auction, a price for an EDC is the amount in cents per Kilowatt-Hour (“kWh”) to be paid for each kWh of BGS load served. In the BGS-CIEP Auction, a price for an EDC is an amount in Dollars per Megawatt-Day (“\$/MW-day”) paid for the capacity obligation of BGS-CIEP customers served. A tranche of one product (*i.e.* a tranche of the BGS load for one EDC) is a full requirements (capacity, transmission, energy, ancillary services, etc.) tranche. At the end of the Auctions, the final prices for the EDCs’ tranches may be different because of differences in the products due to each EDC’s load factor, delivery location and other factors.

The EDCs proposed that rates for BGS-FP customers be designed using a generic methodology implemented as described in the Company-specific addenda. Bidders would be provided with a spreadsheet that converts the Auction price into customer rates for each EDC, to enable bidders to assess migration risk at various Auction price levels. BGS-FP rates would be fixed tariff rates determined by converting the Auction prices to BGS-FP rates in a manner that reflects seasonality and time of use indications, where appropriate and feasible, in order to provide appropriate price signals.

The EDCs proposed that payments to winning BGS-FP bidders for June through September be adjusted to reflect higher summer costs. Payments to bidders for the remainder of the delivery period would be adjusted to reflect lower winter costs. The summer and winter factors are designed so that the overall average payment to the bidder would equal the Auction clearing price.

The EDCs proposed that for BGS-CIEP tranches, rate schedules would be designed to include the transmission and ancillary service costs, and a provision to pass through the hourly PJM<sup>9</sup> real-time energy price. Bidders would indicate how many tranches they want to supply in exchange for a \$/MW-day capacity payment and various other payments for energy, ancillary services and transmission which would be known in advance of the Auction. Under the EDCs’ proposal, winning bidders would also receive a Standby Charge of \$0.00015/kWh. The Standby Charge would essentially act as an “option fee.” The capacity payment would be charged to all CIEP customers on BGS service, while the Standby Charge would be charged to all customers in the CIEP service category whether they take BGS service or obtain service through a TPS. Winning bidders would be paid the Auction clearing price for all capacity provided for customers taking BGS-CIEP service plus the Standby Charge rate times the monthly sales to all CIEP customers, whether on BGS-CIEP or not. Under the Joint EDC Proposal, each BGS supplier would be required to assume PJM Load Serving Entity (“LSE”) responsibility for the portion of BGS load (whether BGS-CIEP or BGS-FP) served by that supplier. In accordance with the PJM Agreements required of LSEs, BGS suppliers would be physically and financially responsible for the day-to-day provision of electric supply for BGS customers. The detailed commercial terms and conditions, under which the BGS supplier would operate, including credit requirements, are set forth in the CIEP and FP Supplier Master Agreements attached to the Joint EDC Proposal as Appendix C and D, respectively.

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<sup>9</sup> PJM, the Pennsylvania-New Jersey-Maryland Interconnection, is the Federal Regulatory Energy Commission approved regional transmission organization that manages the wholesale competitive energy market, and coordinates the movement of electricity in all or parts of a group of states including most of New Jersey.

The EDCs requested that the Board render a decision on the Auction process, and thereafter render a decision on the results of the Auctions. Specifically, they requested that the Board approve or reject in their entirety the results of the BGS-FP Auction and, separately, the results of the BGS-CIEP Auction, by the end of the second full business day after the calendar day on which the last of the two Auctions closes. The EDCs also recommended that the Board clarify that, at its discretion, it may act on one completed Auction while the second is still ongoing. Upon Board approval, the Auction results would be a binding commitment on the EDCs and winning bidders.

Each of the Company-specific addenda addresses the use of committed supply, contingency plans, accounting and cost recovery, and utility pricing and tariff sheets.

Numerous other Auction details are explained in the Joint EDC Proposal, Company-specific addenda, and attachments, including that:

- BGS suppliers must meet all New Jersey Renewable Portfolio Standards (“RPS”) requirements that may be applicable throughout the respective supply periods;
- as conditions of qualification, applicants must meet pre-bidding creditworthiness requirements; agree to comply with all rules of the Auction; and agree that if they become Auction winners, they will execute the BGS Supplier Master Agreement within three business days of Board certification of the results, and they will demonstrate compliance with the creditworthiness requirements set forth in that agreement;
- to qualify, applicants must disclose what, if any, bidder associations exist and if so, applicants will provide such additional information as the Auction Manager may require;
- qualified bidders are required to post a per-tranche bid bond; and
- the BGS-CIEP Auction is for a supply period of 12 months, and the BGS-FP Auction is to secure one-third of each EDC’s total load requirements for three years,<sup>10</sup> with the remaining two-thirds having been secured through previous BGS-FP Auctions.

In addition, as in previous years RECO is proposing a competitive bid process to secure the full service requirements of its Central and Western Divisions commencing June 1, 2010. Specifically, RECO proposes to utilize an auction format to seek separate proposals for (1) energy swap agreements for annual periods commencing June 1, 2010, 2011, and 2012, and (2) a capacity swap agreement for the entire three-year period (i.e., June 1, 2010 through May 31, 2013). RECO anticipates that it will issue an RFP in December 2009 setting forth the details of the auction process and providing potential bidders with the documentation that will be used. As before, one financial swap will pertain to the forecasted capacity requirement and the other financial swaps will pertain to the forecasted energy requirements of RECO’s BGS customers located in RECO’s Central and Western Divisions. Each of these financial swaps would be for 100% of the energy and capacity requirements of RECO’s Central and Western Divisions.

The EDCs have proposed only minor changes in their filing regarding the BGS-FP rate design this year as discussed below, with the balance of the filing essentially identical to last year.

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<sup>10</sup> While the concept is to divide the EDCs’ load requirements into thirds, the actual tranches available for any EDC for any time period may vary by EDC.

## DISCUSSION AND FINDINGS

### FP and CIEP AUCTION FORMAT

In reaching our decision regarding the provision of BGS for the period beginning June 1, 2010, the Board is mindful that the current BGS Auction process contains a set of carefully crafted and well defined features and that it is not always possible to modify one aspect of the process without disrupting the balance of the entire process. In 2001, when the Auction process was a new concept, the Board was presented with and considered many arguments for alternate processes, alternate designs within the Auction framework and varying procurement periods. The Board's decision at that time was developed after considering all of the comments received. In 2002, after a process open to all interested participants, the Board determined to retain the basic Auction design while initiating separate Auctions for both BGS-FP and BGS-CIEP customers.<sup>11</sup> For the 2003, 2004, 2005, 2006, 2007, 2008 and 2009 BGS Auctions, the Board continued to approve descending-clock Auctions for the procurement of default service while continuing to adjust certain elements of the process including changing the beginning of the supply period from August to June and expanding the size of the CIEP class.<sup>12</sup>

As previously stated, for the period beginning June 1, 2010, by Order dated May 20, 2009, the Board directed the EDCs and all other interested parties to file proposals to determine how to procure the remaining one third of the EDCs' BGS-FP and the annual CIEP requirements. Specifically, the Board afforded an opportunity for parties to file alternatives to be considered by the Board on how to procure the BGS requirements for the FP and CIEP customer classes for the period beginning June 1, 2010. At this time, while the Board is again presented with recommendations to modify certain elements of the Auction process, there have been no fully developed, concrete proposals to change the basic descending-clock Auction design. The Board believes that the Auction process that was implemented with the 2002 Auction, and which has since been modified to include a BGS-FP and BGS-CIEP Auction, has worked well and has resulted in the best prices possible at the time.

The Board appreciates the efforts of all involved to provide constructive comments and criticism in order to improve on a process important to all of the EDCs' electric ratepayers. In making its decision, the Board has considered the suggestions that were made, including several items proposed by our auction consultant Boston Pacific, potentially adjusting the BGS Load Caps, changes to the CIEP threshold, a request to eliminate the retail margin, several changes to the BGS Supplier Master Agreements, the use of a BGS Portfolio Manager, the method used for setting seasonal factors for rate design purposes, and a proposal by LS Power. The Board has attempted to reach a balance of competing interests, mindful of its statutory responsibility to ensure continued provision of BGS at just and reasonable rates. The Board will address each of these issues in this Order.

Based on the experience of previous BGS Auctions, and having considered the record which has been developed in this matter, the Board concludes and FINDS that, with certain refinements and enhancements as will be discussed herein, a BGS-FP and BGS-CIEP Auction using a descending-clock Auction format should be used for the procurement period beginning June 1, 2010.

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<sup>11</sup> Board Order dated December 18, 2002, Docket Nos. EO02070384 and EX01110754.

<sup>12</sup> Board Orders dated December 2, 2003, Docket No. EO03050394; December 1, 2004, Docket No. EO04040288; December 8, 2005, Docket No. EO050403317; December 22, 2006, Docket No. EO06020119; January 25, 2008, Docket No. ER07060379. and January 20, 2009, Docket No. ER08050310

## BGS PORTFOLIO APPROACH FOR FP CUSTOMERS

Rate Counsel supports a portfolio management approach for BGS-FP supply. Rate Counsel indicates that a portfolio management approach would allow BGS-FP supply resources to include, if economically attractive, a wider range of resource options than is currently available. They propose that the BGS-FP procurement process should allow for the procurement of economically attractive energy resources by a skilled portfolio manager, on behalf of BGS-FP customers, outside of the BGS-FP auction process. Rate Counsel further indicates that a portfolio management approach, would aim to first determine whether there are opportunities for better pricing available in the wholesale market that are not captured through the current once-a-year, limited product offering auction, and then capture those opportunities for customers. To implement this portfolio management approach for BGS-FP supply Rate Counsel recommends that the Board establish a Portfolio Management Task Force to present to the Board recommendations on how the State could best implement portfolio management in New Jersey. (Rate Counsel's Final Comments at 1-2)<sup>13</sup>.

The EDCs oppose Rate Counsel's proposal for a BGS portfolio manager. The EDCs indicate that the winning bidders in the BGS Auction manage portfolios for which there are currently 16 BGS-FP suppliers. The EDCs point out that these suppliers became winners in the BGS Auction by competing to serve BGS customers, and by striving to be the best at assembling supply components (energy, capacity, etc.) in the competitive power market, while at the same time assessing and pricing the risks associated with serving a percentage of BGS load. The EDCs argue that by assembling efficient portfolios, winning BGS bidders effectively marshal competitive forces and thereby provide the benefits of portfolio management to BGS customers.

Further, the EDCs contend that a portfolio manager of the type proposed by Rate Counsel would not be an entity disciplined by the market that assembles and manages a portfolio at its own risk, but rather, an entity that manages a portfolio for a fee and at the BGS customers' risk. They feel that it is not reasonable to believe that such an entity would face similarly strong incentives, would have the same competency at managing a portfolio or would be disciplined as strongly by competitive forces as are the current BGS suppliers who are already portfolio managers in the competitive marketplace. (EDCs' Final Comments at 15-16).

Constellation recommended that the Board should again reject the Rate Counsel proposal for a portfolio management approach. According to Constellation, the current BGS structure allows for the most capable parties – wholesale suppliers – to perform the task of portfolio management. (Constellation's Final Comments at 4). RESA maintains that Rate Counsel ignores the fact that BGS suppliers are large, sophisticated energy companies that already employ portfolio managers to procure the most cost effective bids for the BGS process as defined under the current BGS structure. RESA further points out that by moving towards a portfolio manager, Rate Counsel would be substituting the expertise and experience of multiple BGS-supplier portfolio managers with a single administratively chosen manager. (RESA's Final Comments at 2).

Based on the record presented in this proceeding, at this time the Board is concerned with how Rate Counsel's proposal could be implemented for the BGS Auction for the period beginning June 1, 2010. The Board's concerns include, but are not limited to: 1) how Rate Counsel's proposal could be implemented in time for a procurement process to obtain supplies needed for

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<sup>13</sup> Of interest is the fact that Rate Counsel attached a decision of the Department of Public Utility Control of the State of Connecticut, Docket Nos. 07-06-58, 06-01-08RE01 dated April 2, 2008 which rejected a portfolio manager option in either a for-profit or not for-profit form.

the period beginning June 1, 2010; 2) whether use of a portfolio manager, as suggested by Rate Counsel, does not undermine one of the features of the BGS Auction which puts the burden on winning bidders who have the expertise in portfolio management and do indeed use portfolios to serve their obligations to deliver full requirements service under the BGS Auction, and 3) whether a portfolio manager could outperform the market, or would such an entity be likely to enter into deals or conduct procurements at times which, with the benefit of hindsight, turn out not to be in the best interest of ratepayers. Accordingly, the Board DENIES Rate Counsel's request to include a portfolio approach, as well as the use of a portfolio manager to implement a BGS portfolio, as part of the current BGS Auction process for the period beginning June 1, 2010.

Further, for the same concerns that the Board has expressed in denying Rate Counsel's portfolio management proposal, the Board feels that Rate Counsel has provided no information in this proceeding that would lead the Board to believe that it should start a task force on how the State could best implement portfolio management in New Jersey. Accordingly, the Board DENIES Rate Counsel's request that the Board establish a Portfolio Management Task Force at this time.

#### CIEP AUCTION SUPPLY PERIOD

No party took issue with the continued use of a 12-month period for the BGS-CIEP Auction. The Board FINDS that a 12-month procurement period is appropriate and reasonable, and APPROVES that aspect of the EDCs' proposal.

#### CIEP CUSTOMER THRESHOLD

As previously determined by the Board in connection with the 2007, 2008 and 2009 BGS Auctions, the current threshold for mandatory inclusion in the CIEP class is 1,000 kW. RESA has long called for the gradual and orderly lowering of the CIEP threshold and therefore an expansion of the use of market reflective pricing. RESA points out that the most critical element in insuring customer choice and customer empowerment is to enable customers to see and respond to the actual costs of their energy consumption. RESA indicates that with hourly or real-time pricing, customers can make informed decisions to conserve, become more efficient or even curtail or shift load usage are times of peak demand. RESA believes that CIEP customers have long enjoyed the ability of TPS to tailor packages of energy products and services that best meet their needs in a way that FP service just cannot compare. RESA further believes an increase in the pool of CIEP customers opens the door to greater customer benefits. (RESA Initial Comments at 4). RESA recommends that the Board should lower the CIEP threshold starting June 1, 2010 with a mandate for CIEP pricing for those customers in New Jersey using 750 kw and greater, and eventually lowering the threshold to 500 kw in future years. (RESA Initial Comments at 6).

The EDCs support keeping the BGS-CIEP threshold at its current level of 1000 kW through May 2011. The EDCs point out that New Jersey customers in the 500 kW and above range actually have more choices since customers can choose to stay on the BGS-FP default service, they can choose to opt into BGS-CIEP, or they can obtain service from a TPS. (EDCs Final Comments at 4). The NJBIA opposes any efforts by the Board to make the CIEP threshold lower than 1000 Kw. (NJBIA Final Comments at 1). Rate Counsel supports maintaining the current CIEP threshold volume levels stating that no evidence has been presented that indicates a lowering of the CIEP threshold is either desired by the relevant customers or will bring net benefits to those customers. (Rate Counsel's Final Comments at 1).



The Board agrees with the EDCs that New Jersey BGS FP customers in the 500 kW to 1000 kW range have more choices than customers in the BGS CIEP Class. Based on market conditions, these customers can choose BGS-FP service and continue to receive service from their EDCs based on a rolling three-year average Auction price designed to insulated these customers from drastic increases in electricity costs, they can choose to opt into BGS-CIEP service to realize real time pricing, or they can obtain service from a TPS. After reviewing electric customer switching data provided by the EDCs, the Board has noticed that switching to a TPS by BGS-FP customers between 750 kW and 1000 kW has increased by 30% over the past year. As the Board has said in its last several BGS Orders, "...if market prices start to come down, retail suppliers may find that their prices can be more competitive than the rolling three-year average Auction price, and competition would likely increase." This decline in market prices at the present time has also made BGS-CIEP service a lower electric priced option than BGS-FP service, since hourly priced BGS-CIEP service is more reflective of current market conditions. Keeping the threshold at its current level still gives BGS-FP customers the option as discussed below to switch to hourly pricing, where these customers can employ strategies that will help them curtail their energy usage in high priced hours.

Further, the Board agrees with Rate Counsel that there has been no evidence presented in this proceeding by any of the stakeholders that indicates that lowering the CIEP threshold is either desired by the relevant customers or will bring net benefits to those customers at this time. It is for these reasons that the Board still believes that a cautious, gradual approach to any expansion of the BGS-CIEP class remains the appropriate policy at this time, and that the appropriate cutoff for mandatory inclusion in the CIEP class for the 2010 Auction is a continuation of the peak load share of 1,000 kW. Accordingly, the Board DIRECTS the EDCs to maintain the current structure of the CIEP class for the 2010 BGS-CIEP Auctions. However, the Board is committed to reviewing this decision prior to the next BGS procurement.

For the 2004, 2005, 2006, 2007, 2008 and 2009 Auctions, certain Commercial and Industrial FP customers, to the extent they could be identified and metered without a material impact on the BGS Auction process, were permitted to join the CIEP class on a voluntary basis. Voluntary enrollment in the CIEP class should again be permitted for the 2010 Auction with similar constraints. Specifically, the choice must be made in a timely manner and, once made, must be irrevocable for the term of the CIEP contract. Therefore, the Board DIRECTS the EDCs to work with Staff to develop a process and schedule for identifying and converting non-residential customers that choose to be included in the BGS-CIEP category. The process developed should be based on the foregoing parameters. It should also require a customer commitment, for participation, by no later than the second business day in January 2010. Similarly, those customers that are currently part of the CIEP class on a voluntary basis should have until the second business day in January 2009 to reconsider their decision for the upcoming 2009 Auction. The Board DIRECTS the EDCs to work with Staff to develop and implement a process to so notify voluntary customers of this "window of opportunity." The Board also DIRECTS the EDCs to post the conditions of the voluntary CIEP process in an appropriately conspicuous location on their web pages.

## LS POWER PROPOSAL

LS Power requests that the BPU establish a third BGS competitive process which utilizes longer term contracts of 15 years to competitively bid for new, efficient, in-state generation of 100 MW or larger, which, according to LS Power, will enhance the reliability of the State's power supply. Further, LS Power recommends that the BPU order a stakeholder process to design the details of this additional competitive process, and that the resulting competitive process be adopted,

conducted and completed after the February 2010 BGS Auctions, but prior to June 1 of next year for delivery commencing June 1, 2013. (LS Power Final Comments at 5-6).

The EDCs believe that LS Power's proposal for a separate BGS auction for long-term contracts is just an extreme example of the Portfolio Manager concept. According to the EDCs, it suffers from all of the weaknesses discussed in their final comments regarding the efficacy of using a portfolio manager to procure BGS. Moreover, the EDCs maintain that LS Power's approach will relegate the industry back to the Non-Utility Generation ("NUG") era under PURPA, which shifted the substantial risks inherent in long-term fixed price power purchase agreements to ratepayers, as was made manifest by the substantial over-market prices that were locked into most PURPA-era NUG contracts, many of which continue to this day. (EDCs' Final Comments at 17).

P3 Group argues that under this proposal consumers would bear the risks of the long-term contracts proposed by LS Power while under typical long-term contracts with generation facilities, fuel, operating, delivery, and other physical risks are negotiated terms, generally with some degree of prescribed risk sharing between buyers and sellers. (P3 Group Final Comments at 3). The P3 Group further points out that BGS type full requirements supply does not generally match up economically with any individual generation unit due to operating limitations, dispatch costs, and outage risks. BGS full requirements load must be served by a mix of generation, including base-load (coal and nuclear units that normally run around the clock at fixed output levels), intermediate (gas-fired combined cycle plants dispatched at higher costs and can vary their output easily to respond to changing load conditions), and peaking units (high dispatch costs, rapid response generators, critical for balancing the grid). According to the P3 Group, BGS suppliers typically use a mixed portfolio of resources to satisfy their load serving requirements. (P3 Group Final Comments at 3-4).

As submitted by the company, the LS Power proposal cannot be implemented for the BGS Auction that would take place in February 2010 for the period beginning June 1, 2010 which is the focus of this Order. Accordingly, the Board DENIES LS Power request that a third BGS competitive process which utilizes longer term contracts of 15 years be implemented for the 2010 BGS Auction process. However, the Board is always mindful of issues relating to the reliability of the bulk power electric system, and is specifically concerned with ensuring that there is enough generation to meet the electric power needs of New Jersey going forward. The Board has determined that the issues raised by LS Power are part of the larger comprehensive energy policy for the State. Therefore, the Board believes that a further review of this proposal is warranted but should be included in a discussion with stakeholders of the State's future power and capacity needs. Accordingly, the Board DIRECTS Staff to develop a process to review the State's power and capacity needs, and present this process to the Board's at its December 1, 2009 Agenda meeting for its consideration<sup>14</sup>.

## STATE WIDE LOAD CAPS

A load cap is a limit on the number of tranches that a bidder can bid and win in the Auction. Two types of limits can be imposed. An EDC specific load cap is a limit on the load that can be won for a given EDC. This provides for a diverse supplier base for a given EDC. A statewide load

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<sup>14</sup> At its December 1, 2009 Agenda meeting, In the Matter of the New Jersey Board of Public Utilities Review of the State's Electric Power and Capacity Needs, Docket No. EO09110920, the Board approved the convening of a technical conference in the first quarter of 2010 to begin the review of the State's electrical capacity needs. The Board also directed Staff to make the necessary arrangements to convene a technical conference, including inviting key stakeholders to participate.

cap is a limit on the load that can be won statewide, for all EDCs combined. This provides for a diverse supplier base for the state. In the BGS-CIEP Auction, there are no EDC specific load caps and the statewide load cap could be raised in isolation. In the BGS-FP Auction, there are both EDC specific load caps and a statewide load cap. The existing EDC specific load caps and the statewide load cap are designed to provide flexibility for bidders to win the statewide load cap in varying combinations across the four EDCs. To preserve this flexibility, raising the statewide load cap should be accompanied by increases in the EDC specific load caps.

As part of this proceeding, on August 14, 2009 Board Staff requested input from the EDCs and interested stakeholders regarding the possibility of raising the state wide load cap. Currently the statewide load cap is set at roughly 37% of the tranche target. Staff sought comment on the potential benefits or drawbacks of raising the statewide load cap to roughly 45% of the tranche target. In addition, Staff asked whether raising the statewide load cap would also result in the need to raise the EDC specific load caps.

The EDCs made two observations for the Board. First, for the BGS-FP Auction, raising the statewide and EDC load caps could potentially erode supplier diversity within each EDC territory. Second, for the BGS-CIEP Auction, the load at auction is currently small and the maximum share that a supplier can win is small (about 150 MW of actual load). The small size of the maximum share may cause potential bidders not to participate. Previous BGS-CIEP winning bidders have shown a preference for winning a larger share of load; in the previous three BGS-CIEP Auctions, over 60% of winning BGS-CIEP bidders win a number of tranches that represent half the statewide load cap or more. In contrast, in each of the past three BGS-FP Auctions, 25% or fewer of winning BGS-FP bidders win a number of tranches that represent half the statewide load cap or more. Raising the statewide load cap to 45% in the BGS-CIEP Auction could raise interest and allow suppliers that are ready and able to provide this product to do so on a larger scale. (EDCs' Final Comments at 3).

Con Ed does not see a need to increase the statewide load cap. Increasing the load cap would potentially increase the market share that a single supplier could have, thereby increasing potential market power concerns without any apparent consumer benefit. Additionally, a larger load cap would increase the adverse consequences of single supplier default for BGS customers. (Con Ed initial Comments at 1). Rate Counsel feels the potential benefits of raising the statewide load cap to roughly 45% of the tranche target are uncertain, and the potential drawbacks include lessening the degree of competition available to serve BGS supply. (Rate Counsel Initial comments at 4).

Based on the comments received, the Board agrees that the potential drawbacks of raising the statewide load cap to roughly 45% of the tranche target outweigh the potential benefits. Therefore the Board DIRECTS the EDCs to maintain the statewide load cap at roughly 37% of the tranche target.

## RETAIL MARGIN

The EDCs assert that there are several reasons for the Board to reduce, phase-out, or eliminate the 5 mil charge on certain CIEP customers known as the retail margin ("Retail Margin") at this time. First, with switching levels stable for BGS-CIEP customers, it seems clear to the EDCs that the customers who have not switched are unlikely to do so in large numbers. Second, the EDCs asset that the Retail Margin has served its purpose since large customers in New Jersey have a wide array of competitive TPSs to choose from. The incubating purpose of the Retail Margin has been realized, and it is no longer required. Third, at this point the Retail Margin may well be a deterrent to customers electing hourly pricing. A customer who may want hourly

pricing and the ease of accessing the hourly market through BGS-CIEP will have to pay the retail margin. This may well discourage such a customer from electing BGS-CIEP and from taking hourly service. Therefore, the Retail Margin may be discouraging price responsive hourly load, and the Board should consider eliminating the retail margin or at least to beginning a phase-out through a reduction in the level of the retail margin. (EDC's Initial Filing at 15).

In its Order in Docket Nos. EX01110754 and EO02070384 dated December 18, 2002, the Board approved the imposition of the Retail Margin as a way to reflect within BGS prices those costs of providing electric service at retail, including marketing costs and administrative expenses, which must be absorbed by third party suppliers seeking to compete for that market. The Board imposed the Retail Margin on larger customers, those with a load above 750 kW, in the belief that these customers should be encouraged to shop for retail electric supplies, and that this group of larger customers would be more attractive to licensed suppliers.

To determine if the retail margin is still serving its intended purpose, the Board has decided to request comments from the EDCs and interested stakeholders on the potential reduction, phase-out, or elimination of the Retail Margin which was proposed in their Joint EDC Proposal in this matter. Accordingly, the Board DIRECTS that a Secretary's Letter be issued requesting comment on the potential reduction, phase-out, or elimination of the Retail Margin. The Board would also like to receive input on the following questions:

- 1) Does the imposition of the Retail Margin still accurately reflect within the BGS price those costs of providing electric service at retail, including marketing costs and administrative expenses, which must be absorbed by third party suppliers?
- 2) In the event that a commenter proposes a reduction in the Retail Margin, what would be the appropriate level to reflect the costs of providing electric service at retail which must be absorbed by third party suppliers? and;
- 3) If the commenter supports the phasing out of the Retail Margin, what should be the level of the Retail Margin and the timing of the phase-out?

On November 12, 2009, a Secretary's Letter was issued requesting comments from the EDCs and interested stakeholders on the potential reduction, phase-out, or elimination of the Retail Margin which was proposed by the EDCs. Comments were due by November 20, 2009, and were received in a timely manner from the EDCs, RESA, NJBIA, the National Energy Marketers Association, Constellation, PPL EnergyPlus LLC and Rate Counsel. RESA and Constellation both maintained that the schedule set forth in the Secretary's Letter for the submission of comments and the rendering of a Board decision did not allow adequate time for the careful consideration of all the business issues involved, and recommended that there be additional time for comments, discovery and hearings.

After reviewing the comments received from stakeholders, the Board believes that the complexity of the issues involved in this matter do merit a greater amount of time and consideration than the current schedule would allow. Accordingly, the Board DIRECTS that no change be made in the Retail Margin for the period beginning June 1, 2010. However, the Board DIRECTS Staff to initiate a proceeding, upon conclusion of the 2010 BGS Auction, regarding the potential reduction, phase-out, or elimination of the Retail Margin so that a decision in this matter can be rendered prior to the filing of the EDCs' BGS procurement process for the period beginning June 1, 2011. It is the Board's intent that this proceeding allows all stakeholders and interested parties to submit written comments and to present oral testimony at a legislative type hearing. Further the Board DIRECTS Staff to expand the

proceeding to include consideration of any adjustments to the CIEP threshold as part of this proceeding because of its connection to the Retail Margin issue.

#### METHOD USED FOR SETTING SEASONAL FACTORS FOR RATE DESIGN PURPOSES

The EDCs' rate design methodology uses the current 12-month forward energy prices, and also uses actual RPM and transmission prices to calculate a summer and winter BGS supplier payment factor. The summer payment factor is applied to the Auction price in each of the four summer months (June, July, August and September), while the winter payment factor is applied in all other months.

The pattern of 12-month forward energy prices at the time of the EDCs' July 1 filing, coupled with the actual RPM capacity and transmission prices which are not seasonally differentiated resulted in winter payment factors that were higher than summer payment factors for some of the EDCs. In each previous BGS-FP Auction, the summer payment factors were higher than the winter payment factors for each of the EDCs.

The EDCs believe that using these inverted seasonal factors based on an atypical 12-month forward price pattern for the three years of the upcoming BGS-FP contract period would not accurately reflect the cost of electricity during the relevant period. The EDCs have requested that the Board allow for a possible revision to the seasonal factors. The EDCs propose to apply the methodology contained in the July 1 filing (or the methodology as approved by the Board) at the time of the compliance filing using data available at that time. If the rate design methodology using updated data continues to result in an inverted summer and winter for an EDC (i.e., a summer factor below 1.0 and a winter factor above 1.0), the EDCs request that the Board allow the affected EDC to set both its winter and summer payment factors to 1.0. If the rate design methodology using updated data results in a normal pattern of summer and winter payment factors (i.e., a summer factor above 1.0 and a winter factor below 1.0), then the EDCs will use the actual summer and winter payment factors calculated in the filed rate design methodology.

Therefore the Board believes that the EDCs proposal is reasonable and appropriate, and APPROVES the EDCs' proposal to set the summer and winter payment factors to 1.0 in the event the approved rate design methodology would otherwise result in inverted summer and winter payment factors.

#### SUPPLIER MASTER AGREEMENT

Constellation asserts that the Board should and must consider its proposed improvements to the SMAs in order to encourage the most robust participation in the BGS Auctions. (Constellation Initial Filing at 3). Constellation recommended that the Board order the EDCs to make the following changes in the SMA: provide for weekly settlements in order to reflect PJM's move to a weekly settlement process; revise the SMAs' credit thresholds to be more in line with those utilized in other jurisdictions' procurements for EDC load supply products similar to BGS; eliminate the SMAs' Independent Credit Requirement; require bidders in the BGS Auction process to post pre-bid collateral no earlier than one business day prior to the start of the BGS Auctions; make the SMAs' "Notional Quantity Language" optional at the supplier's discretion; amend the SMAs to reflect that the EDCs will be responsible for transmission service, and transmission-related services, in order to (1) add efficiency, rather than complexity, to the BGS Auction process, and (2) provide benefits to ratepayers through more competitive prices for BGS supply; require that the EDCs make additional improvements to the types and frequency of data provided to BGS Suppliers; and the EDCs and NERA Economic Consulting review and make appropriate improvements to the Application and Auction Process to limit undue burdens

on potential bidders. (Constellation Final Comments at 2-3). The EDCS have opposed these proposed changes, and in many cases have indicated that these same suggestions have been reviewed and previously rejected by the Board. (EDCs Final Comments).

One of the issues that was raised this year for the first time was the possible change from monthly to weekly settlement could create administrative difficulties as contracts governed by the prior SMAs would remain on the monthly schedule, and maintaining that schedule has not been shown to impose an undue burden on BGS suppliers. This is the eighth year in which the Board has considered issues concerning the SMA. The Board is always interested in proposals that may increase the number of bidders in the BGS Auction. Additionally, given that participation in the BGS Auction is robust, that there is a lack of support for all of the proposed changes, and the fact that the Board in previous BGS proceeding rejected most of these proposed changes and has not been presented with any new evidence to support them, the Board APPROVES the EDCs' BGS- FP SMA and the BGS-CIEP SMA as filed for the 2010 BGS Auctions.

#### AUCTION CONSULTANT

The Board will utilize the services of BP, its BGS procurement process consultant, to provide oversight of the 2010 BGS procurement process. The Board DIRECTS that the EDCs include the cost of the Auction consultant's contract in the tranche fees collected from winning bidders. Each EDC's percentage of the cost will be based on its total load in the BGS-FP Auction. Further, the Board DIRECTS the EDCs to transfer the full amount of the contract costs based on these percentages to the Department of Treasury upon written request by Board Staff.

#### CONFIDENTIALITY

The EDCs have requested that the Board approve a confidentiality order as in prior years. The integrity of the Auction process depends on a fair set of rules that promotes dissemination of information in a non-discriminatory manner, and results in no bidder or bidders having an advantage over any other. From the Board's experience with prior BGS Auctions, it appears that certain information pertaining to the Auction design methodologies, including, but not limited to, the starting price and volume adjustment guidelines, if made public, could have the potential to distort the Auction results. Furthermore, information provided in the bidder application forms and specific bidder activity during the Auction may be information that, if disclosed, could place bidders at a competitive disadvantage, and/or potentially distort the Auction results. The Board considered and ruled upon Auction confidentiality issues in its December 1, 2004 Order (Docket No. EO04040288). The Board found that certain financial and competitive information should be protected, not only as a matter of fairness to potential bidders, but also to ensure that these and any future BGS Auctions are competitive. These provisions were adopted and applied in subsequent Auctions. The Board FINDS that the confidentiality provisions of its December 1, 2004 Order in Docket No. EO04040288 remain necessary and appropriate for the continued success of the BGS Auctions, and HEREBY APPROVES the same confidentiality provisions for the 2010 BGS Auctions and incorporates the reasoning and relevant provisions of its December 1, 2004 Order as if set forth at length herein. A copy of that Order is attached hereto as Attachment C.

#### AUCTION PROMOTION/DEVELOPMENT

The Board concludes that a successful BGS procurement can be achieved with a well-designed simultaneous descending clock Auction, provided that the rules and details are specified and implemented correctly, and provided that the Auction process provides sufficient awareness

among qualified potential bidders so that a competitive procurement takes place. To maximize participation and competition, the Auction process requires a marketing and promotion plan aimed at ensuring exposure and awareness among qualified potential bidders. This year, as in past years, the EDCs and the Auction Manager will attempt to facilitate the process and increase the number of prospective bidders by publicizing the Auctions and by educating potential bidders about the proposed Auctions. Among the steps to be undertaken are the following:<sup>15</sup>

- Bidder Information Sessions in Philadelphia and Washington, D.C.;
- An Auction web site at [www.bgs-auction.com](http://www.bgs-auction.com) which publicizes new developments, allows interested parties to download documents related to the Auctions, has FAQs (Frequently Asked Questions with answers) so all bidders are similarly informed, provides potential bidders with data relevant to the bidding process, and has links to PJM and other useful sites;
- Press releases to newspapers and trade publications; and
- Direct e-mails to interested parties to inform them of any new developments or any new documents posted to the web site.

The Board HEREBY FINDS that the foregoing marketing efforts by the EDCs and the Auction Manager should increase the chances that a successful BGS procurement will be achieved. Accordingly, the Board HEREBY APPROVES continuation of the above-referenced Auction promotion initiatives.

#### BOARD APPROVAL PROCESS

As with previous Auctions, and as noted above, the Board believes that a successful BGS procurement can be achieved with a well-designed simultaneous descending clock Auction process, as described above, provided that the rules and details are specified and implemented correctly. Therefore, barring some unforeseen emergency, the timing of the Auction process approved with this Order, including certification of the Auction results, needs to take place according to a pre-approved schedule. As indicated in Attachment A, *Tentative Approvals and Process*,<sup>16</sup> there are a number of decisions/actions that need to be made after Board approval of the Auction process. Each of these decisions/actions needs to take place according to such a schedule in order that the bidders are prepared for and comfortable with participating in the Auctions, and the Auctions result in competitive market-based BGS prices.

Based on the Board's experience with the previous BGS Auctions, a fundamental concern driving the approval process is that uncertainty or delay concerning the period between the submission of bids and the approval of the bid results by the Board is of substantial concern to bidders. Paramount among the actions that need to be taken by the Board is prompt certification of the Auctions' results. Because of the volatility of the electric markets, bids cannot remain viable for any prolonged period of time. If bidders perceive that there may be a delay in

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<sup>15</sup> These actions have occurred for past Auctions and in anticipation of a favorable Board ruling herein, some of these actions may have already been undertaken for the 2009 Auction.

<sup>16</sup> Attachment A is labelled "Tentative" to indicate that the Auction Manager, in consultation with Staff, has discretion to make minor adjustments to these dates in order to provide for an orderly implementation process, not to indicate that the Board anticipates any significant changes to this schedule.

certifying the results, the additional risk to bidders could be reflected through higher bid prices. Furthermore, the Auctions have been designed to secure supply for all four EDCs at the same time. The structure of the Auctions that permits and encourages bidder movement among EDC products implies to the bidders that, while being different products, tranches will be viewed on equal terms by the Board. It is important to the efficiency and economy of the process that bidders do not impute unwarranted uncertainty into the Auction results of any EDC. Therefore, as with past Auctions, the Board will consider the results of the BGS-FP Auction in their entirety and consider the results of the BGS-CIEP Auction in their entirety and certify the results of each Auction for all of the EDCs or for none of them. The Board will also commit to addressing the results of the BGS-FP Auction and the BGS-CIEP Auction no later than the second business day after the last Auction closes. At its discretion and depending on circumstances, the Board may address the results of one Auction that has closed while the second Auction continues. However, under all circumstances, the Board intends to have considered the outcome of both Auctions by no later than the second business day after the last Auction closes.

Another decision that requires Board approval is acceptance of the EDCs' Compliance Filings. Because of the significance of this proceeding, the Board DIRECTS the EDCs to make a Compliance Filing by November 24, 2009. The Board will consider approval of the Compliance Filings at its next scheduled Board meeting thereafter.<sup>17</sup>

Either the EDCs or the Auction Manager, in consultation with Staff and the Board's consultant, may make other Auction decisions as identified in Attachment A to this Order. These decisions include establishing minimum and maximum starting prices, establishing specific starting prices, the resolution of association issues, specific bidder application and credit issues, load cap and volume adjustment decisions, Auction price decrements and other decisions, which might be required throughout the implementation process. Some of the aforementioned areas, such as bidder application and credit issues, are subject to rules spelled out in the Joint EDC Proposal. Other areas, such as load caps and volume adjustment decisions, establishing minimum and maximum starting prices, establishing specific starting prices, the resolution of association issues, and Auction price decrements are either Company-specific concerns, are determined directly from algorithms included in and approved as part of the Joint EDC Proposal, or are areas that need to be addressed by the Auction Manager based on its experience in this field. In the event that the other areas need to be addressed by the Auction Manager, the Board DIRECTS that the Auction Manager include in its Final Report a description of any such actions. Should any unforeseen circumstances occur during the Auction decision-making process, the Board DIRECTS Staff to immediately bring the matter to the Board's attention.

For the final certification of the Auctions' results, the Board will schedule a special agenda meeting for the first day of the Auctions, as a forum to consider any unforeseen circumstances, should any develop. When the Auctions are complete, the Board will review and consider the results within the time frame set forth above. Prior to Board certification of the results, the Auction Manager will provide a Final Report to the Board on the results of the Auctions and how the Auctions were conducted, including the post-Auction evaluation forms in Attachment B. The Auction Manager will also provide a redacted version of the Final Report, consistent with the confidentiality provisions of this Order, to the EDCs and Rate Counsel. The Board's Auction consultant shall provide a Pre-certification Report to the Board, including completed post-Auction evaluation forms in the form of Attachment B to this Order, prior to Board certification of the results.

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<sup>17</sup> Prior to issuance of this Order, the EDCs submitted the required Compliance Filings, which the Board approved at its December 1, 2009 agenda meeting. Parties were so notified by Secretary's letter of the same date.



## FINDINGS AND CONCLUSIONS

Based on the foregoing and after carefully reviewing the record in this proceeding, the Board FINDS that:

This has been an open proceeding, with all parties desiring to present written or oral comments on the record having been afforded the opportunity to do so;

The Joint EDC Proposal, as modified herein, is consistent with the Electric Discount and Energy Competition Act, N.J.S.A.48:3-49 et seq., and the EDCs' Final Restructuring Orders;

The Joint EDC Proposal, as modified herein, can and should be implemented in a timely fashion so as to secure BGS service for the BGS customers beginning June 1, 2010;

The Joint EDC Proposal, as modified herein, appears to be the best means to secure BGS service for the 2010 period for BGS-CIEP customers, and for the remaining one-third of the needs of BGS-FP customers, as well as a portion of the BGS-FP service required for the 2011 and 2012 periods;

An Auction process for one-third of the EDCs' BGS-FP load for a 36 month period balances risks and provides a reasonable opportunity for price stability under current conditions;

An Auction process for procurement of the entire non-shopping BGS-CIEP load for a 12-month period is appropriate;

The EDCs' BGS-FP rate design is an appropriate methodology to translate final BGS-FP bids into customer rates for the purpose of this Auction;

The application of seasonal payment factors to the tranche-weighted Auction prices, determined in the manner prescribed herein is appropriate;

Recovery of increases or decreases in rates for Firm Transmission Service from both FP and CIEP customers, and payment of such increases or downward adjustments to rates paid to BGS Suppliers, as provided in Section 15.9 of the SMAs is appropriate, subject to review and verification by the EDCs ;

Consistent with the Board's policy that all CIEP customers benefit and should pay the costs of having BGS-CIEP service available, capacity is the bid product in the CIEP Auction and the CIEP Standby Fee will be assessed to all CIEP customers;

The EDCs shall continue to remit to the State Treasurer on a quarterly basis all retail margin monies hereafter collected with accrued interest, holding the retail margin monies in a separate interest bearing account pending such remittance;

The EDCs are the parties responsible to the Board for compliance with the RPS requirements;

The EDCs will prepare the RPS reports required by the Board on behalf of the BGS suppliers, and will contractually require the BGS suppliers to comply with the Board's RPS requirements;

The EDCs have designated NERA to continue to act as the Auction Manager for the 2010 Auctions;

Fulfillment of their Auction obligations will not cause successful bidders in the BGS Auction to be “Electric Power Suppliers” as defined in N.J.S.A. 48:3-51 and N.J.A.C. 14:4-2.2 and, thus, successful bidders do not need to obtain a New Jersey electric power supplier license to fulfill their Auction obligations;

All Auction rules, algorithms and procedures that were unchanged in this proceeding, and were approved in prior Board Orders, as well as the Auction rules, algorithms and procedures that were modified in this proceeding, including changes in the decrement formulas, are deemed reasonable for the purpose of these Auctions;

Certain information and processes associated with the Auctions may be competitively sensitive by nature, and the Board has incorporated herein a Protective Order addressing treatment of this competitive information;

The accounting and cost recovery processes identified in the EDC-specific Addenda to the Joint EDC Proposal, as modified herein, are reasonable and consistent with the Board’s Final Unbundling Orders;

The EDC-specific Contingency Plans are reasonable;

The Tentative Approvals and Decision Process Schedule in Attachment A reasonably balance process efficiency with Board oversight;

BP will be the Board’s Auction Advisor for the 2010 Auctions and will oversee the Auctions on behalf of the Board consistent with the terms of its contract;

A designee from the Board’s Energy Division and its consultant, BP, shall observe the Auctions for the Board;

The Auction Advisor will provide the post-Auction evaluation forms in Attachment B to the Board and a redacted version to the EDCs and Rate Counsel, on the results of the Auctions and how the Auctions were conducted, prior to Board certification of the results;

BP shall also provide a completed post-Auction evaluation form in the form of Attachment B to the Board, prior to Board certification of the results;

The Board will consider the results of the BGS-FP Auction and the BGS-CIEP Auction each in its entirety and certify the results of each for all of the EDCs or for none of them no later than the second business day after the last Auction closes. At its discretion and depending on circumstances, the Board may address one Auction that has closed while the second continues;

Nothing herein is in any way intended to relieve the EDCs and/or the Auction Manager of their responsibilities to conduct the Auction in a lawful manner, including obtaining any appropriate licenses that may be required by law; and

For RPS compliance purposes, winning bidders in the 2010 BGS Auction, through the EDCs, will be credited with an equivalent level of non-utility generation (“NUG”) RECs as would be available to them through the EDCs.

Accordingly, for the foregoing reasons, the Board APPROVES the Joint EDC Proposal, including the BGS-FP and BGS-CIEP Auction Rules, the EDC-specific addenda and the

Supplier Master Agreements, with the modifications described herein. The Board reserves the right, at the certification meeting, to reject the BGS-FP Auction results and/or the BGS-CIEP Auction results.

Furthermore, the Board DIRECTS that the Joint EDC Proposal be modified consistent with the foregoing, and that the EDCs make compliance filings consistent with this decision by November 24, 2009.<sup>18</sup> The Board FURTHER DIRECTS the EDCs to work with Staff and BP to ensure that any supplemental documents are fair and consistent with this decision, and that the review procedures for bidder applications are applied in a consistent and non-discriminatory manner.

DATED: 12/10/09

BOARD OF PUBLIC UTILITIES  
BY:

  
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PRESIDENT

  
FREDERICK F. BUTLER  
COMMISSIONER

  
JOSEPH L. FIORDALISO  
COMMISSIONER

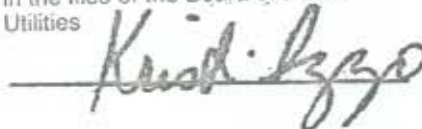
  
NICHOLAS ASSELTA  
COMMISSIONER

  
ELIZABETH RANDALL  
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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



<sup>18</sup> As previously noted, in order to maintain the timeline requirements imposed by the Auction process, on November 24, 2009 the EDCs made the compliance filings based on the decision at the Board's November 10, 2009 agenda meeting. Those filings were subsequently approved on December 1, 2009.

**In the Matter of the Provision of Basic Generation Service  
For the Period Beginning June 1, 2010  
Docket No. EO09050351  
Service List**

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For the Period Beginning June 1, 2010  
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## ATTACHMENT A

### Tentative 2010 Auction Approvals and Decision Process

This document sets forth a high level view of the proposed approval and interaction process. For purposes of the decision making schedule, the following abbreviations apply:

1. EDCs – These are decisions for which the EDCs are solely responsible. The EDCs may draw upon the Auction Manager (AM) or consultants as they desire.
2. EDCs/BA – These are decisions for which the EDCs are solely responsible, where the Board Advisor (Staff and/or BP<sup>1</sup>) will have an opportunity to observe the decision process, but for which consensus or approval is not requested.
3. EDCs/AM/BA – These are decisions for which the EDCs are responsible, but where the Auction Manager may advise, and the Board Advisor (Staff and/or BP) will have an opportunity to observe.
4. AM/BA – These are actions for which the Auction Manager is responsible, and on which the BA will have the opportunity to observe and advise.
5. BPU – These are actions to be taken by the Board.
6. AM/EDCs – These are actions for which the Auction Manager is responsible and for which the Auction Manager acts in concert with the EDCs.

Decision point	Decision process	Timing
Joint EDC Filing	EDCs	July 1, 2009
Decision on 2010 Process	BPU	November 10, 2009
Compliance Filing	EDCs	November 24, 2009
Approval of Compliance filing	BPU	December 1, 2009
Final Auction Rules and Supplier Agreements available	AM/EDCs	December 1, 2009
Announce minimum and maximum starting prices	AM/BA	November 12, 2009
Announce Tranche Targets	AM	November 12, 2009
Announce Load Caps	AM/BA	November 12, 2009
Information session for potential bidders	AM/EDCs	December 4, 2009
Review Part I applications	AM/BA	December 15-18, 2009

<sup>1</sup> Boston Pacific Company, Inc.

## ATTACHMENT A

### Tentative 2009 Auction Approvals and Decision Process

Review Part 2 applications	AM/BA	January 12-20, 2010
Setting of target limit exposure to contingency plan	EDCs/BA	Mid January
Information Session for registered bidders	AM/EDCs	January 26, 2010
Trial Auction	AM	January 28, 2010
Establish EDC-specific starting prices	EDCs/AM/BA	Announced to bidders for CIEP Auction on February 2, 2010, for FP Auction on February 3, 2010
BGS-CIEP Auction starts		February 5, 2010
BGS-FP Auction starts		February 8, 2010
Provide full factual report to Board	AM/BA	Upon completion of FP Auction
Board decision on Auction results	BPU	No later than by end of 2 <sup>nd</sup> business day following the calendar day on which the last auction closes.

**ATTACHMENT B  
DOCKET NO. EO09050351**

**POST-AUCTION CHECKLIST FOR THE NEW JERSEY  
2010 BGS-CIEP AUCTION**

---

Prepared by: \_\_\_\_\_ [Company].

[Introductory comments, if any]

Auction began with the opening of Round 1 at [x:xx am] on Friday, February 5, 2010

Auction finished with the close of Round ## at [xxx] on [xxx]

	Start of Round 1	Start of Round 2 * (after volume reduction in Round 1, if applicable)	Start of Round n * (after post-Round 1 volume reduction, if applicable)
# Bidders	_____	_____	_____
Tranche target	## tranches	## tranches	## tranches
Eligibility ratio	_____	_____	_____
Statewide load cap	## tranches	## tranches	## tranches

\* Note: [No volume adjustment was made during the CIEP auction, so the pre-auction tranche target and the statewide load cap were unchanged for the auction. / Or alternatively, note details of volume adjustments if they occurred.]

**ATTACHMENT B  
DOCKET NO. EO09050351**

**Post-Auction Checklist for the New Jersey 2010 BGS-CIEP Auction**

Table 1 below shows pertinent indicators and measures for the auction.

**Table 1. Summary of BGS-CIEP Auction**

	<b>PSE&amp;G</b>	<b>JCP&amp;L</b>	<b>ACE</b>	<b>RECO</b>	<b>Total</b>
BGS-CIEP peak load share (MW)					
Total tranches needed					
Starting tranche target in auction					
Final tranche target in auction					
Tranche size (%)					
Tranche size (approximate MW)					
Starting load cap (# tranches)					
Final load cap (# tranches)					
Quantity procured (# tranches)					
Quantity procured (% BGS-CIEP load)					
# Winning bidders					
Maximum # of tranches procured from any one bidder					
Minimum and maximum starting prices prior to indicative bids (\$/MWh)					
Starting price at start of auction (\$/MWh)*					
Final auction price (\$/MWh)**					

\* Price shown in "Total" column is an average across the EDCs weighted by each EDC's "Starting tranche target in auction".

\*\* Price shown in "Total" column is an average across the EDCs weighted by each EDC's "Final tranche target in auction".



**ATTACHMENT B**  
**DOCKET NO. EO09050351**

**Post-Auction Checklist for the New Jersey 2010 BGS-CIEP Auction**

**Table 2. Overview of Findings on BGS-CIEP Auction**

	<b>Question</b>	<b>Comments</b>
1	BP's/NERA's recommendation as to whether the Board should certify the CIEP auction results?	
2	Did bidders have sufficient information to prepare for the CIEP auction?	
3	Was the information generally provided to bidders in accordance with the published timetable? Was the timetable updated appropriately as needed?	
4	Were there any issues and questions left unresolved prior to the CIEP auction that created material uncertainty for bidders?	
5	From what BP/NERA could observe, were there any procedural problems or errors with the CIEP auction, including the electronic bidding process, the back-up bidding process, and communications between bidders and the Auction Manager?	
6	From what BP/NERA could observe, were protocols for communication between bidders and the Auction Manager adhered to?	
7	From what BP/NERA could observe, were there any hardware or software problems or errors, either with the CIEP auction system or with its associated communications systems?	
8	Were there any unanticipated delays during the CIEP auction?	
9	Did unanticipated delays appear to adversely affect bidding in the CIEP auction? What adverse effects did BP/NERA directly observe and how did they relate to the unanticipated delay?	
10	Were appropriate data back-up procedures planned and carried out?	
11	Were any security breaches observed with the CIEP auction process?	

**ATTACHMENT B  
DOCKET NO. EO09050351**

**Post-Auction Checklist for the New Jersey 2010 BGS-CIEP Auction**

	<b>Question</b>	<b>Comments</b>
12	From what BP/NERA could observe, were protocols followed for communications among the EDCs, NERA, BPU staff, the Board (if necessary), and BP/NERA during the CIEP auction?	
13	From what BP/NERA could observe, were the protocols followed for decisions regarding changes in CIEP auction parameters (e.g., volume, load cap, bid decrements)?	
14	Were the calculations (e.g., for bid decrements or bidder eligibility) produced by the CIEP auction software double-checked or reproduced off-line by the Auction Manager?	
15	Was there evidence of confusion or misunderstanding on the part of bidders that delayed or impaired the auction?	
16	From what BP/NERA could observe, were the communications between the Auction Manager and bidders timely and effective?	
17	Was there evidence that bidders felt unduly rushed during the process? Should the auction have been conducted more expeditiously?	
18	Were there any complaints from bidders about the process that BP/NERA believed were legitimate?	
19	Was the CIEP auction carried out in an acceptably fair and transparent manner?	
20	Was there evidence of non-productive "gaming" on the part of bidders?	
21	Was there any evidence of collusion or improper coordination among bidders?	
22	Was there any evidence of a breakdown in competition in the CIEP auction?	
23	Was information made public appropriately? From what BP/NERA could observe, was sensitive information treated appropriately?	

**ATTACHMENT B**  
**DOCKET NO. EO09050351**

**Post-Auction Checklist for the New Jersey 2010 BGS-CIEP Auction**

	<b>Question</b>	<b>Comments</b>
24	Does the CIEP auction appear to have generated a result that is consistent with competitive bidding, market-determined prices, and efficient allocation of the BGS-CIEP load?	
25	Were there factors exogenous to the CIEP auction (e.g., changes in market environment) that materially affected the CIEP auction in unanticipated ways?	
26	Are there any concerns with the CIEP auction's outcome with regard to any specific EDC(s)?	

**ATTACHMENT B  
DOCKET NO. EO09050351**

**POST-AUCTION CHECKLIST  
FOR THE NEW JERSEY 2010 BGS-FP AUCTION**

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Prepared by: \_\_\_\_\_ [Company]

[Introductory comments, if any.]

Auction began with the opening of Round 1 at [x:xx am] on Monday, February 8, 2010

Auction finished with the close of Round ## at [xxx] on [xxx]

	Start of Round 1	Start of Round 2 * (after volume reduction in Round 1, if applicable)	Start of Round n * (after post-Round 1 volume reduction, if applicable)
# Bidders	_____	_____	_____
Tranche target	<u>## tranches</u>	<u>## tranches</u>	<u>## tranches</u>
Eligibility ratio	_____	_____	_____
PSE&G load cap	<u>## tranches</u>	<u>## tranches</u>	<u>## tranches</u>
JCP&L load cap	<u>## tranches</u>	<u>## tranches</u>	<u>## tranches</u>
ACE load cap	<u>## tranches</u>	<u>## tranches</u>	<u>## tranches</u>
RECO load cap	<u>## tranches</u>	<u>## tranches</u>	<u>## tranches</u>
Statewide load cap	<u>## tranches</u>	<u>## tranches</u>	<u>## tranches</u>

\* Note: [No volume adjustment was made during the FP auction, so the pre-auction tranche target and EDC-specific load caps were unchanged for the auction. / Or alternatively, note details of volume adjustments if they occurred.]



**ATTACHMENT B  
DOCKET NO. EO09050351**

**Post-Auction Checklist for the New Jersey 2010 BGS-FP Auction**

Table 1 below shows pertinent indicators and measures for the auction.

**Table 1. Summary of BGS-FP Auction**

	PSE&G	JCP&L	ACE	RECO	Total
BGS-FP peak load share (MW)					
Total tranches needed					
Starting tranche target in auction					
Final tranche target in auction					
Tranche size (%)					
Tranche size (approximate MW)					
Starting EDC load caps (# tranches)					
Starting statewide load cap (#tranches)					
Final EDC load caps (# tranches)					
Final statewide load cap (#tranches)					
Quantity procured (# tranches)					
Quantity procured (% BGS-FP load)					
# Winning bidders					
Maximum # of tranches procured from any one bidder					
Minimum and maximum starting prices prior to indicative bids (cents/kWh)					
Starting price at start of auction (cents/kWh) *					
Final auction price (cents/kWh) **					

\* Price shown in "Total" column is an average across the EDCs weighted by each EDC's "Starting tranche target in auction".

\*\* Price shown in "Total" column is an average across the EDCs weighted by each EDC's "Final tranche target in auction".

**ATTACHMENT B**  
**DOCKET NO. EO09050351**

**Post-Auction Checklist for the New Jersey 2010 BGS-FP Auction**

**Table 2. Overview of Findings on BGS-FP Auction**

	<b>Question</b>	<b>Comments</b>
1	BP/NERA's recommendation as to whether the Board should certify the FP auction results?	
2	Did bidders have sufficient information to prepare for the FP auction?	
3	Was the information generally provided to bidders in accordance with the published timetable? Was the timetable updated appropriately as needed?	
4	Were there any issues and questions left unresolved prior to the FP auction that created material uncertainty for bidders?	
5	From what BP/NERA could observe, were there any procedural problems or errors with the FP auction, including the electronic bidding process, the back-up bidding process, and communications between bidders and the Auction Manager?	
6	From what BP/NERA could observe, were protocols for communication between bidders and the Auction Manager adhered to?	
7	From what BP/NERA could observe, were any hardware or software problems or errors observed, either with the FP auction system or with its associated communications systems?	
8	Were there any unanticipated delays during the FP auction?	
9	Did unanticipated delays appear to adversely affect bidding in the FP auction? What adverse effects did BP/NERA directly observe and how did they relate to the unanticipated delays?	
12	Were appropriate data back-up procedures planned and carried out?	
11	Were any security breaches observed with the FP auction process?	

**ATTACHMENT B  
DOCKET NO. EO09050351**

**Post-Auction Checklist for the New Jersey 2010 BGS-FP Auction**

<b>Question</b>		<b>Comments</b>
12	From what BP/NERA could observe, were protocols followed for communications among the EDCs, NERA, BPU staff, the Board (if necessary), and BP during the FP auction?	
13	From what BP/NERA could observe, were the protocols followed for decisions regarding changes in FP auction parameters (e.g., volume, load caps, bid decrements)?	
14	Were the calculations (e.g., for bid decrements or bidder eligibility) produced by the FP auction software double-checked or reproduced off-line by the Auction Manager?	
15	Was there evidence of confusion or misunderstanding on the part of bidders that delayed or impaired the auction?	
16	From what BP/NERA could observe, were the communications between the Auction Manager and bidders timely and effective?	
17	Was there evidence that bidders felt unduly rushed during the process? Should the auction have been conducted more expeditiously?	
18	Were there any complaints from bidders about the process that BP/NERA believed were legitimate?	
19	Was the FP auction carried out in an acceptably fair and transparent manner?	
20	Was there evidence of non-productive "gaming" on the part of bidders?	
21	Was there any evidence of collusion or improper coordination among bidders?	
22	Was there any evidence of a breakdown in competition in the FP auction?	
23	Was information made public appropriately? From what BP/NERA could observe, was sensitive information treated appropriately?	

**ATTACHMENT B**  
**DOCKET NO. EO09050351**

**Post-Auction Checklist for the New Jersey 2010 BGS-FP Auction**

<b>Question</b>		<b>Comments</b>
24	Does the FP auction appear to have generated a result that is consistent with competitive bidding, market-determined prices, and efficient allocation of the BGS-FP load?	
25	Were there factors exogenous to the FP auction (e.g., changes in market environment) that materially affected the FP auction in unanticipated ways?	
26	Are there any concerns with the FP auction's outcome with regard to any specific EDC(s)?	





Agenda Date: 10/22/04  
Agenda Item: 2A

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

ENERGY

IN THE MATTER OF THE PROVISION OF )  
BASIC GENERATION SERVICE FOR )  
YEAR THREE OF THE POST-TRANSITION )  
PERIOD – CONFIDENTIALITY ISSUES )

DECISION AND ORDER

DOCKET No. EO04040288

(SERVICE LIST ATTACHED)

BY THE BOARD:

This matter concerns the confidentiality of certain information to be utilized during the upcoming Basic Generation Service ("BGS") Auction.

At its October 22, 2004, public agenda meeting the Board approved an auction process for the procurement of BGS supplies for the period beginning June 1, 2005 ("Year Three of the post-Transition Period" or "Year Three"), which process is substantially similar to the process which was utilized for the past three years. In each of those auctions, the Board directed that certain sensitive information and processes would be afforded confidential treatment. At this time, in response to a request by the electric distribution companies ("EDCs") (EDC's Initial Proposal at 10-11), the Board is reaffirming the proprietary and confidential nature of the same procurement information and processes for Year Three bidding as it did in its previous Orders. The following areas are covered by this Order:

- (1) **The Logic Processes and Algorithms:** The auction manager, National Economic Research Associates ("NERA"), uses logic processes and algorithms to foster a competitive auction.
- (2) **Starting Prices:** EDC - specific minimum and maximum starting prices and final starting prices in effect during the bidding phase of the first round of the auction. Each EDC, in consultation with Staff, NERA and the Board's consultant, Charles River Associates ("CRA") sets its own starting prices. The EDC-specific final starting prices are announced to approved bidders only, shortly before the start of the auction.
- (3) **Indicative Offers:** The number of tranches that a qualified bidder is willing to supply at the maximum starting price and the number of tranches a qualified bidder is willing to supply at the minimum starting price. Indicative offers are used to determine

eligibility for participation in the auction and are considered in determining final starting prices.

(4) **Round Prices and Individual Bids:** The price set by NERA for each round of the auction, the number of tranches bid by each qualified bidder during each round of the auction, and any other information submitted by the bidder in each round to fully specify its bid, such as exit prices and switching priorities.

(5) **Bidder Information:** The bidder identities and information supplied to NERA on the application forms to become a bidder in the New Jersey BGS Auction.

## DISCUSSION

The Open Public Records Act ("OPRA"), N.J.S.A. 47:1A-1 et seq., which amended the former Right to Know Law concerning the public's access to government records, became effective on July 8, 2002. One of the modifications includes an expansion of the definition of a government record from only those documents required to be made, maintained or kept on file by law, to information received, made, maintained or kept on file by a public agency in the course of its official business, except for advisory, consultative or deliberative material. N.J.S.A. 47:1A-1.1. The statute goes on to list information which shall not be included in the definition of a government record and shall be deemed confidential, including trade secrets, proprietary commercial or financial information, and information which, if disclosed, would give an advantage to competitors or bidders. Id.

OPRA also changed procedures regarding government records by setting forth new format and timing requirements for making and responding to requests for access. As a result, many public agencies proposed new rules and regulations to redesign their record request operations in compliance with OPRA. The proposed new rules of the Board of Public Utilities appeared in the July 1, 2002, New Jersey Register, and were adopted in the July 21, 2003 publication of the New Jersey Register.

As part of the new procedures established concerning the public's access to its records and for claimants asserting confidentiality claims, the Board authorized its custodian of records to determine whether information requested by the public is a government record within the meaning of OPRA or is confidential. N.J.A.C. 14:1-12.6. Additionally, the Board reserved its authority to make a confidentiality determination when appropriate:

Nothing herein shall limit the Board's authority to make a confidentiality determination within the context of a hearing or other proceeding or with regard to any other matter, as the Board may deem appropriate.

[N.J.A.C. 14:1-12.6(d).]

Accordingly, the Board may make confidentiality determinations regarding information gathered in proceedings such as the within matter. In ruling on the Year Three procurement processes, the Board has determined that an auction process similar to the ones approved for the past three years are the most appropriate means for obtaining energy prices consistent with those achieved by a competitive market, as required by N.J.S.A. 48:3-57(d).

Simulating market conditions, however, requires that the auction participants know that their competitive positions will not be compromised. Based on the experience and expertise gained



in the previous auctions, as well as the advice of its consultant, the Board recognizes the need to alleviate any doubts about its treatment of competitively sensitive information.

The Board has approved the use of a descending clock auction process for Year Three. The auction process, at its most basic level, includes three groups of contributors. The first group is made up of the four electric distribution companies the purchasers of the BGS supply, who rely on maximum participation by qualified bidders in order to ensure a competitive procurement for its BGS customers. The second group consists of the qualified bidders or BGS suppliers, which proffer the competitive bids to supply tranches<sup>1</sup> of power to the EDCs. In order to become a qualified bidder, BGS suppliers must meet certain general, financial and credit requirements. Qualified bidders are made up of two groups: (a) those that provide direct supply and (b) those that provide supply through market purchases. The third contributor is the Auction Manager, National Economic Research Associates, who administers the auction in consultation with the EDCs, the Board Staff and the Board's consultant, Charles River Associates.

During the course of the auction, the auction manager solicits bids through a series of auction rounds. The first round begins as the BGS suppliers bid the number of tranches they are willing to supply at each EDCs-specific starting prices. Assuming the number of tranches bid are greater than those needed by an EDC, the next auction round proceeds at a lower price. With each new price in the rounds, BGS suppliers may change their bids by modifying the number of tranches they are willing to supply. Rounds in the auction continue until the total number of tranches bid equals the total demand from the EDCs.

The auction process is expected to simulate a competitive market. The object is to allow prices to tick down round by round until the final price is one that approximates a price that could be achieved on an open market. To ensure that the EDCs get a competitive price, the BGS suppliers must bid based on their individual assessments of a fair market value or at least their assessment of individual ability to provide BGS supply at a particular rate. If the bidders knew each other's "market" positions or bid positions, the process would fail to create competition. Similarly, if bidders knew all of the details of the auction process they might also be able to determine their exact position in relation to other bidders and also circumvent the competitive intent of the process.

The Board is charged with overseeing the EDCs acquisition of BGS supply at market value. In order to achieve this goal, the Board FINDS and CONCLUDES that it must provide a certain amount of protection to the information supplied by the participants and to the formulas, algorithms and logic used to develop critical auction particulars. The Board's analysis of the need to treat certain information as competitively sensitive and confidential is set forth below.

#### **I. THE LOGIC PROCESSES AND ALGORITHMS THE AUCTION MANAGER USES TO FOSTER A COMPETITIVE AUCTION**

The auction manager will set the parameters for the auction, including the minimum and maximum starting prices. The EDCs must use this price range, as well as their own calculations to set their EDC-specific starting prices. Likewise, the qualified bidders must submit indicative offers using the minimum and maximum starting prices. Though the minimum and maximum starting prices are released publicly prior to the auction, the method used to determine these

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<sup>1</sup> A tranche of one product (i.e. a tranche of the BGS load for one EDC) is a full requirements tranche. A tranche for an EDC is a fixed percentage share of the BGS load of that EDC for Year Three of the post-Transition Period beginning June 1, 2004.



prices is confidential information. Revealing this thought process could prejudice the independent evaluation of market prices that qualified bidders would perform. Furthermore, it would impede the competitive nature of the auction. So long as the bidders do not know the rationale behind the auction prices, they must bid based on independent methodologies. As a result, the bidders are more likely to make bids of varying degrees because their valuations will be based on diverse variables.

Just as minimum and maximum starting prices are used to promote competition, volume adjustments during the auction rounds must be used to ensure that the EDCs receive the most competitive bids. The auction manager is given the authority to make two volume adjustments to ensure that the prices not only continue to decrease, but that bidding remains competitive. The auction manager may reduce the auction volume (reduce the number of tranches that the EDCs will purchase) after review of the first round bids. Again, simple market theories apply - if demand is larger than supply, the price remains high. Therefore, the auction rules allow for a volume adjustment after the first round, and once more in a later round. If the guidelines/ algorithms used to make these adjustments were disclosed, the bidders might be able to manipulate the system.

In short, the methodologies used to determine the starting prices, as well as volume adjustments, are integral to the competitive bidding process. Both categories of information fall under an OPRA exception to the definition of a government record because they would provide an advantage to competitors or bidders. As stated above, the Legislature has required the Board to procure energy prices consistent with market conditions. N.J.S.A. 48:3-57(d). The Board is therefore simulating a market scenario through the use of supply and demand theory. Releasing these auction parameters would result in an advantage to all of the bidders, at the expense of higher energy prices for the EDC's customers. Thus, as long as the Board continues to rely on a similar auction process to procure BGS supply, this information continues to require confidential treatment.

The Board HEREBY FINDS and CONCLUDES that this information, if disclosed would provide an advantage to competitors or bidders to the detriment of BGS customers, and shall be deemed confidential and not included as a government record pursuant to OPRA.

Therefore, should a request for this information be made to the Board's custodian, the Board DIRECTS that such information be treated as confidential and that any requests for access be denied.

## II. EDC-SPECIFIC STARTING PRICES

There are two types of starting prices used in the auction. First, there are the minimum and maximum starting prices, which are released to potential bidders shortly before the application process to provide a basis for the EDC-specific starting prices and the BGS suppliers' indicative offers. The second type consists of the EDC-specific starting prices that will be in effect for the first round of the auction. These prices must fall somewhere between the minimum and maximum starting prices, and are released to the qualified bidders shortly before the auction. The EDC-specific starting prices are derived from the indicative offers and the value judgments of the EDCs, Board Staff, CRA and Auction Manager regarding the future price of energy.

Both types of starting prices are intended to attract qualified bidders to the auction. The financial community and/or the general public could misinterpret the EDC-specific starting prices if they were to be made public prior to the release of the final auction results.



Rather than having qualified bidders making independent business judgments on the value assigned to a product, their bids could be influenced by outside perception. For example, should the starting prices create lofty expectations regarding energy prices on the part of shareholders or financial analysts, BGS suppliers might not bid as aggressively as necessary to create market conditions. In short, releasing this information prior to the public announcement of the final auction results could put the entire auction process at a competitive disadvantage. While some individual bidders in the auction might not suffer, distorted financial perceptions could lead to a less competitive auction, ultimately disadvantaging the ratepayers through inflated prices.

The Board HEREBY FINDS and CONCLUDES that this information would provide an advantage to competitors or bidders, and shall be deemed confidential and not included as a government record pursuant to OPRA.

Therefore, should a request for this information be made to the Board's custodian, the Board DIRECTS that such information be treated as confidential and that any requests for access be denied until the Board has released the auction results.

### III. INDICATIVE OFFERS

Indicative offers are the number of tranches that a qualified bidder is willing to supply at the maximum starting price and at the minimum starting price. The number of tranches the bidder offers to supply at the maximum starting price determines the bidder's initial eligibility for the auction. The indicative offer creates two limitations for the bidder. First, the total number of tranches the BGS supplier can bid in any round of the auction is now capped at its initial eligibility. As such, bidders are encouraged to make an indicative offer for the maximum number of tranches they would be willing to serve. Second, the bidder is now required to post a financial guarantee proportional to its initial eligibility.

Clearly, the indicative offer contains proprietary commercial and financial information, N.J.S.A. 47:1A-1.1. The BGS supplier is making a business judgment regarding the amount of load it is willing to supply. These judgments could be based on many factors. For instance, a direct supplier might indicate a willingness to supply a high number of tranches because it has a limited number of supply contracts compared to its available plant capacity. On the other hand a supplier who buys its energy from the market may only be willing to supply a low number of tranches because it has already entered into a number of contracts at the time of the auction. As stated, the indicative offers also reveal information concerning the amount of credit a BGS supplier may or may not have at hand.

Not only do the indicative offers constitute proprietary commercial and financial information, but their release would provide an advantage to competitors, including those not participating as bidders in the auction. N.J.S.A. 47:1A-1.1. BGS suppliers compete in a market place outside of the auction. If such information were to become public, the BGS suppliers' competitors would be given otherwise confidential information, providing an opportunity to speculate on the individual supplier's market position. If the Board does not keep sensitive market data confidential, it will not be able to simulate an arms-length negotiation. Moreover, release of this proprietary commercial and financial information would have a chilling effect on the BGS suppliers' willingness to participate in this or any future auctions.

Accordingly, the Board HEREBY FINDS and CONCLUDES that this information is proprietary commercial and financial information that would provide an advantage to competitors or bidders, and shall be deemed confidential and not included as a government record pursuant to OFRA.

Therefore, should a request for this information be made to the Board's custodian, the Board DIRECTS that such information be treated as confidential and that any such requests for access be denied for a period of three years from the close of the auction. Three years after the conclusion of the auction, the Board will consider the indicative bids public information, unless prior to the expiration of the three years a party formally requests that this information remain confidential. If a request for continuing confidentiality is made, the information shall remain confidential pending a further decision by the Board.

#### **IV. ROUND PRICES AND INDIVIDUAL BIDS**

Each round of the auction produces two sets of information: (a) the price for each round as determined by the auction manager and (b) the individual bids.

For similar reasons to those set forth above in Indicative Offers, the individual bids contain proprietary commercial and financial information. N.J.S.A. 47:1A-1.1. Furthermore, release of either the round-by-round price or the number of tranches individually bid in a round would allow the bidders to mathematically work backwards and determine the incremental algorithm used by the auction manager to make volume adjustments during the course of the auction. As explained in Section I, *supra*, revealing this methodology could impede the current and any future competitive process to the detriment of customers.

Accordingly, the Board FINDS and CONCLUDES that this information could provide an anti-competitive advantage to competitors or bidders, and shall be deemed confidential and not considered a government record pursuant to OPRA.

Therefore, should a request for the round-by-round prices be made to the Board's custodian, the Board DIRECTS that such information be treated as confidential and that any requests for access be denied.

Should a request for the individual bids be made to the Board's custodian, the Board DIRECTS that such information be treated as confidential and that any such requests be denied for a period of three years from the close of the auction. Three years after the conclusion of the auction, the Board will consider the individual bids public information, unless prior to the expiration of the three years a party has formally requested that this information remain confidential. If a request for continuing confidentiality is made, the information shall remain confidential pending a further decision by the Board.

#### **V. BIDDER INFORMATION**

While the upcoming auction will be held in February 2005, the period of power supply being procured will not begin to flow until June 1, 2005. For all past auctions, the list of bidders obtaining contracts was announced with the Board Order approving the auction results. Approximately one month before the load was to be served, when suppliers had presumably locked up their contracts, the list of bidders with BGS contracts along with the volumes and prices for each contract were released. The reason for the delayed release of this information was to ensure that the bidders were not placed at a competitive disadvantage. As stated above,



there are two types of BGS suppliers - those who supply directly from their own plants and those that purchase power from the market for resale. Power marketers must go to the market and fulfill the BGS requirements they have won by negotiating contracts. If their competitors knew the volumes that the bidder had already contracted to supply as a result of the auction, the successful bidder might be at a competitive disadvantage. The same can be said for direct suppliers who must market their product. If buyers knew the amount of their plant supply already locked up due to the BGS auction, it could put them at a competitive disadvantage for negotiation of other contracts.

The Board also believes that if it were to release the names of all of the auction participants, those suppliers that participated in the auction but failed to obtain a contract could be prejudiced in the private sector energy market. Specifically, the financial community might interpret loss of the contracts as a sign of weakened financial position. Furthermore, releasing the names of everyone who participated but failed to leave the auction with a contract, could lead to speculation by the financial community that might have a chilling effect on the BGS suppliers' willingness to participate in this or any future auctions. As such, the Board could be damaging the competitive nature of its own auction by making the financial risk of participation unpalatable to participants. The ultimate result would be higher energy prices passed on to consumers.

Based on its experience with the past three BGS auctions and the expert recommendations of the Board's consultant, CRA, the Board believes that releasing the winning bidders' volume and price information before contracts for the supply period are locked up, could put those suppliers participating in the auction at a disadvantage in the greater energy market, making such information an exemption to the definition of a government record. N.J.S.A. 47:1A-1.1. Additionally, releasing the list of unsuccessful participants could impair the competitive nature of the auction by making the financial risk of participation unpalatable to participants and resulting in higher energy prices for consumers therefore making such information an exemption to the definition of a government record. N.J.S.A. 47:1A-1.1.

The Board HEREBY FINDS and CONCLUDES that this information is proprietary commercial and financial information that could provide an advantage to competitors or bidders, and that such information shall be deemed confidential and not included as a government record pursuant to OPRA.

Therefore, should a request for the names of winning bidders be made to the Board's custodian, the Board DIRECTS that such information be treated as confidential and all requests for access be denied, until May 1, 2005.

Should a request for the names of unsuccessful participants be made to the Board's custodian, the Board DIRECTS that such information be treated as confidential and that all requests for access be denied.

Once the Board has determined that the winning auction suppliers have had sufficient time to lock in their BGS supply for the designated period of time, information such as volume and the identities of the successful participants may be released. In the past, this information has been released approximately a month before the beginning of the supply period. Identification information would also include all of the public information supplied to NERA on the application forms to become a qualified bidder in the New Jersey Basic Generation Service Auction. For example, information such as name, authorized representative, authorized legal representative, name of the entities' directors are of a public nature and must be disclosed as a government record. On the other hand, both the Part 1 and Part 2 Application Forms contain confidential business information of bidders that is not available publicly. The following information from the

applications is non-public proprietary commercial or financial information, which is not considered a government record pursuant to OPRA. N.J.S.A. 47:1A-1.1.

Part 1 Application Form:

Bidding Agreements

Financial and Credit Requirements, except for the supplemental data which includes the following public information:

- (i) Two most recent annual Reports
- (ii) Most recent SEC Form 10-K;
- (iii) Applicant's senior unsecured debt rating from Moody's, Standard & Poor's, and Fitch, if unavailable, the issuer rating may be provided instead.

Guarantor's Information

Justification for Omissions

Part 2 Application Form:

Qualified Bidder's Indicative Offer and Calculation of Required Bid Bond

Qualified Bidder's Preliminary Maximum Interest in Each EDC

Additional Financial and Credit Requirements

Bidder Certifications Concerning Associations and Confidential Information

Justification for Omissions

If the information above were to become public as a result of participation in the BGS Auction, some bidders might elect not to participate in order to maintain the confidentiality of their proprietary commercial and financial information. This could impair the ability of the Auction to obtain a market price and could be detrimental to the interests of the EDCs' customers.

The Board HEREBY FINDS and CONCLUDES that the information listed above is proprietary commercial and financial information, and shall be deemed confidential and not included as a government record pursuant to OPRA.

Therefore, should a request for the public bidder information provided to NERA concerning successful bidders be made to the Board's custodian, the Board DIRECTS that such information be treated as confidential and that all requests for access be denied, until such time as the Board releases the final names and volumes for successful bidders.

Should a request for the public bidder information provided to NERA concerning non-successful bidders be made to the Board's custodian, the Board DIRECTS that such information be treated as confidential and that all requests for access be denied, since such information would identify the non-successful bidders.

Should a request for the non-public bidder information provided to NERA be made to the Board's custodian, the Board DIRECTS that such information be treated as confidential and that all requests for access be denied.



At its October 22, 2004, public agenda meeting the Board approved a descending clock Auction to procure needed BGS supplies for Year Three as well as for Year Four (supply period beginning June 1, 2006). It is anticipated that, should a request for confidentiality be made, similar reasoning to that described above would apply.

DATED: 12/1/04

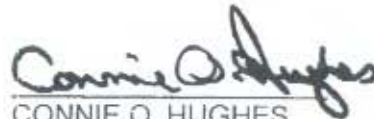
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PRESIDENT



FREDERICK F. BUTLER  
COMMISSIONER



CONNIE O. HUGHES  
COMMISSIONER



JACK ALTER  
COMMISSIONER

ATTEST:



KRISTI IZZO  
SECRETARY