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Agenda Date: 1-8-03  
Agenda Item: 2B



**STATE OF NEW JERSEY**  
**Board of Public Utilities**  
**Two Gateway Center**  
**Newark, NJ 07102**  
**www.bpu.state.nj.us**

IN THE MATTER OF THE PETITION OF	)	<u>DIVISION OF ENERGY</u>
ATLANTIC CITY ELECTRIC COMPANY,	)	
D/B/A CONECTIV POWER DELIVERY,	)	ORDER ON MOTION FOR
FOR APPROVAL OF AMENDMENTS TO	)	INTERLOCUTORY REVIEW
ITS TARIFFS TO PROVIDE FOR AN INCREASE	)	
IN RATES FOR ELECTRIC SERVICE,	)	BPU DOCKET NO. ER02080510
MOTION FOR INTERLOCUTORY REVIEW	)	OAL DOCKET NO. PUC 6917-02

(SERVICE LIST ATTACHED)

BY THE BOARD:

This matter is before the Board to consider a motion by Cogentrix Energy, Inc. ("Cogentrix") for interlocutory review, pursuant to N.J.A.C. 1:1-14.10, of an Order issued by Administrative Law Judge ("ALJ") Diana C. Sukovich on December 9, 2002, denying Cogentrix's Motion to Intervene in the above-captioned matter. While the ALJ denied Cogentrix intervenor status, finding that the criteria for intervention in N.J.A.C. 1:1-16.3(a) were not satisfied, she granted Cogentrix participant status, pursuant to N.J.A.C. 1:1-16.6, limited to the filing of post-hearing briefs and to the filing of exceptions to an Initial Decision. For the reasons set forth herein, the Board has determined to grant interlocutory review and to affirm the decision of the ALJ.

**Background and Procedural History**

On August 1, 2002, Atlantic City Electric Company ("ACE") filed a petition seeking to increase rates and to recover appropriate levels for certain charges in ACE's tariffs, specifically, its Market Transition Charge ("MTC"), Net Non-Utility Generation ("NUG") Charge ("NTC"), and Societal Benefits Charge ("SBC") in compliance with the Final Order issued in ACE's restructuring, rate unbundling and stranded costs proceeding, In the Matter of Atlantic City Electric Company--Rate Unbundling, Stranded Costs and Restructuring Filings, BPU Docket Nos. EO97070455, et al., (March 30, 2001) ("Final Order"). ACE's petition was transmitted by the Board to the Office of Administrative Law ("OAL") as a contested case on August 29, 2002. Discovery is ongoing in the case; a pre-hearing conference was held on November 26, 2002 and hearings are scheduled to begin in February of this year.

Cogentrix, which is not a customer of ACE, filed a motion to intervene on October 25, 2002, based on its claim that it had substantial interests in the proceeding because of its "extensive economic and property interest in two cogeneration facilities located in the Atlantic City Electric/Conectiv ("ACE") service area." (Motion to Intervene at 1).

ACE opposed Cogentrix's motion to intervene in a filing on November 12, 2002, asserting that: 1) the contract terms between ACE and the two cogeneration facilities, Chambers Cogeneration Limited Partnership ("CCLP") and Logan Generating Company, LP ("LGCLP"), were not the subject of this proceeding; and 2) in any event, CCLP and LGCLP were represented through a trade association, Independent Energy Producers of New Jersey ("IEPNJ"), which had already moved to intervene, and that Cogentrix's intervention would be duplicative and not substantially different from IEPNJ's.

By Order dated December 9, 2002, ALJ Sukovich denied Cogentrix's motion. The ALJ reasoned as follows:

Cogentrix has not demonstrated a substantial, specific or direct interest in the current matter. Movant's interest is based upon its articulated status as a general partner within a partnership owning and operating two large cogeneration plants, Chambers Cogeneration Limited Partnership (CCLP) and Logan Generating Company, LP (LGCLP) having long-term purchase power agreements, until 2004, with petitioner. As petitioner argues, the terms of that contract cannot be adjusted in the current matter. In the Matter of the Petition of Atlantic City Electric Company, 310 N.J. Super. 357 (App. Div. 1998). In addition, the certification filed by Cogentrix in support of its motion states that movant, through wholly owned affiliates, is a general partner with affiliates with PG&E National Energy Group ("PG&E") in the cogeneration facilities in question. It is noted that a motion to intervene filed on behalf of the Independent Energy Producers of New Jersey ("IEPNJ") references that PG&E is not only a member of IEPNJ, but a member of its Executive Board. To the extent that Cogentrix has an arguable interest in the current matter warranting intervention, which I am persuaded it does not, movant does not demonstrate that its interest is sufficiently different from that of PG&E, a member of IEPNJ, which, pursuant to a separate order of this judge, was granted intervention in the current matter. For the foregoing reasons, granting movant's motion would not add measurably and constructively to the scope of the current matter and raises the prospect of confusion and undue delay.

[Order on Motion to Intervene, at 1-2].

As part of her Order, the ALJ granted Cogentrix participant status pursuant to N.J.A.C. 1:1-16.6, limited to the right to file post-hearing briefs and to file exceptions to an Initial Decision.

On December 26, 2002, Cogentrix filed a motion for interlocutory review by the Board of the ALJ's December 9, 2002 Order<sup>1</sup>. Cogentrix's motion was not filed within five working days of the ALJ's Order, as required by N.J.A.C. 1:1-14.10(b). Cogentrix did not offer any explanation for the timing of its filing, other than the following statement: "Regrettably, the ALJ did not

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<sup>1</sup>A faxed copy of the motion was sent to the Board on December 24, 2002.

render any decision until December 9, which was not received here until December 16.” (Cogentrix Motion at 2).<sup>2</sup> Cogentrix argued that its motion for interlocutory review should be granted, because its “intervention is vital to protect its contract interests and the public interest...” ( Id.).

In its response, filed December 31, 2002, ACE opposes the motion for interlocutory review on several grounds, including that: 1) Cogentrix’s motion is not timely since it was not filed within five working days of the ALJ’s Order, dated December 9, 2002,<sup>3</sup> and 2) this proceeding is to determine what rates ACE can recover from ratepayers and the setting of certain charges in ACE’s tariffs; the terms of the power purchase agreements (“PPA’s”) with ACE in which Cogentrix has an interest are not the subject of this proceeding. (ACE Response, at 4).

Cogentrix filed a reply on January 7, 2003, wherein it responded to ACE’s submission and reiterated its prior arguments in support of intervention. Significantly, Cogentrix did not respond to ACE’s contention that its motion was untimely.

On December 30, 2002, Cogentrix filed a second motion with the Board, seeking to modify the procedural schedule set by the ALJ, to allow it an opportunity to submit testimony within three weeks after the receipt of discovery, should its motion for intervention be granted.

### **Discussion and Findings**

Before analyzing the specific arguments of the parties, it is useful to begin with a review of the applicable legal standards.

The legal standard for accepting a matter for interlocutory review is set forth in In re Uniform Administrative Procedure Rules, 90 N.J. 85 (1982). In that case, the Court concluded that the agency has the right to review ALJ orders on an interlocutory basis “to determine whether they are reasonably likely to interfere with the decisional process or have a substantial effect upon the ultimate outcome of the proceeding.” Id. at 98. The Court indicated that the agency head has broad discretion to determine which ALJ orders are subject to review on an interlocutory basis. However, it noted that the power of the agency head to review ALJ orders on an interlocutory basis is not itself totally unlimited, and that interlocutory review of ALJ orders should be exercised sparingly. In this regard, the Court noted:

In this respect, the analogy to the courts is appropriate. In general, interlocutory review by courts is rarely granted because of the strong policy against piecemeal adjudications. See Hudson v. Hudson, 36 N.J. 549 (1962); Pennsylvania Railroad, 20 N.J. 398. Considerations of efficiency and economy also have pertinency in the field of administrative law. See Hackensack v. Winner, 82 N.J. at 31-33; Hinfey v. Matawan Reg. Bd. of Ed., 77 N.J. 514 (1978). See infra at 102, n.6. Our State has long favored uninterrupted proceedings at the trial level, with a single and complete review, so as to avoid the possible inconvenience,

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<sup>2</sup>Even accepting Cogentrix’s assertion that it did not receive a copy of the ALJ’s order until December 16, 2002, its motion would have been due by December 23, 2002.

<sup>3</sup>Counsel for ACE asserts that it was not served with Cogentrix’s motion papers until December 27, 2002; in addition, no certificate of service was attached to Cogentrix’s papers. (ACE response at 2).

expense and delay of a fragmented adjudication. Thus, "leave is granted only in the exceptional case where, on a balance of interests, justice suggests the need for review of the interlocutory order in advance of final judgment." Sullivan, "Interlocutory Appeals," 92 N.J.L.J. 162 (1969). These same principles should apply to an administrative tribunal.

[Id. at 100].

The Court held that in the administrative arena, as in a court case, interlocutory review may be granted "only in the interest of justice or for good cause shown." Id. The Court found that an agency has the right to review orders of an ALJ on an interlocutory basis pursuant to N.J.A.C. 1:1-14.10:

whenever in the sound discretion of the agency head, there is a likelihood that such an interlocutory order will have an impact upon the status of the parties, the number and nature of the claims or defenses, the nature or scope of issues, the presentation of evidence, the decisional process or the outcome of the case.

[Id.].

If the Board determines to review the ALJ's ruling on an interlocutory basis, it must then consider whether the ALJ's ruling on the motion to intervene should be modified in any respect. In determining whether to grant a motion to intervene, N.J.A.C. 1:1-16.3(a) requires that the decision maker take into consideration the following:

- 1) the nature and extent of the movant's interest in the outcome of the case;
- 2) whether that interest is sufficiently different from that of any other party so as to add measurably and constructively to the scope of the case;
- 3) the prospect for confusion and delay arising from the movant's inclusion; and
- 4) other appropriate matters.

After reviewing the filings in this matter, the Board FINDS that Cogentrix's motion, which was filed on December 26, 2002, is not timely. The ALJ's Order was issued on December 9, 2002. Cogentrix's counsel asserts that it did not receive the Order until December 16, a full seven days after the ALJ's Order was issued. Even assuming that length of time to be accurate, Cogentrix's motion was not filed within five working days of its receipt of the Order (December 23, 2002), and thus is untimely pursuant to N.J.A.C. 1:1-14.10 (b). Cogentrix offered no explanation for its filing being untimely. Thus, the Board could refuse to grant interlocutory review of Cogentrix's motion on the grounds that it is untimely. However, consistent with the above discussion, the Board may exercise its discretion to grant interlocutory review of Cogentrix's motion in the interest of justice or for good cause shown. While the decision whether or not to grant interlocutory review is discretionary with the Board and is to be exercised sparingly, since resolution of the matter will promote the efficient adjudication of the underlying rate case, the Board HEREBY GRANTS interlocutory review of the ALJ's decision.

As to whether or not to modify the ALJ's ruling and grant Cogentrix's request for intervenor status, the Board must weigh the factors set forth in N.J.A.C. 1:1-16.3(a), as discussed above. Based on a review of the filings and the facts and circumstances of this case, the Board concludes that the ALJ was correct in denying Cogentrix's request for intervention, and instead granting Cogentrix participant status.

Cogentrix is a partner in two separate cogeneration facilities, CCLP and LGCLP, which have long-term purchase power agreements with ACE. Neither the contract terms nor the rates received by CCLP and LGCLP will be affected by this proceeding. Rather, the instant proceeding will, among other things, consider how ACE's above-market NUG contract costs will be recovered by ACE from its ratepayers. Cogentrix also is not a customer of ACE. The ALJ is correct in her finding that Cogentrix does not have a substantial interest in the outcome of this case. N.J.A.C. 1:1-16.3(a)(1). Moreover, this case does not involve the interpretation by the Board of these contracts, and as such, testimony regarding such contracts by Cogentrix would not add materially to this case and would likely result in confusion and delay. Cogentrix's assertion in its reply filed on January 7, 2003,<sup>4</sup> that the schedule for discovery has been delayed by other parties does not alter the fact that permitting Cogentrix's intervention to testify concerning issues not relevant to the underlying issues in this proceeding will likely serve only to confuse and delay these proceedings.

By separate order, issued December 9, 2002, the ALJ granted the motion to intervene of Independent Energy Producers of New Jersey ("IEPNJ") based on its finding that IEPNJ's members include customers of petitioner and that, on that basis, IEPNJ had demonstrated a "substantial, specific and direct interest in the current matter." (Order, Motion to Intervene, IEPNJ, at. 1). IEPNJ members include PG&E National Energy Group ("PG&E"), which sits on the Executive Board of IEPNJ, and is a general partner in the two PPA's in which Cogentrix has an interest. The ALJ was also correct in her finding, in denying Cogentrix's motion to intervene, that "(t)o the extent that Cogentrix has an arguable interest in the current matter warranting intervention, which I am persuaded it does not, movant does not demonstrate that its interest is sufficiently different from that of PG&E, a member of IEPNJ, which pursuant to a separate order of this judge, was granted intervention in the current matter." (Order on Motion to Intervene at 1-2)

Accordingly, for these reasons, the ALJ is correct in her finding that Cogentrix also fails the second and third prong of the standards for intervention set forth in N.J.A.C. 1:1-16.3(2), (3), because its interests are not sufficiently different from IEPNJ, and because its intervention would likely add confusion and delay to the underlying proceeding.

The ALJ did grant participant status pursuant to N.J.A.C. 1:1-16.5, which allows Cogentrix to file a brief and raise issues of concern to it to the Board. Thus, Cogentrix will have an opportunity to raise its issues of concern, to the extent they are relevant to the instant proceeding, to the ALJ and the Board. Accordingly, for all these reasons the Board AFFIRMS the Order of the ALJ, denying intervenor status to Cogentrix, and granting it participant status, limited to the right to file post-hearing briefs and to file exceptions to the Initial Decision.

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<sup>4</sup>The Board notes that N.J.A.C. 1:1-14.10 does not provide for a reply. The Board has, however, exercised its discretion and has reviewed and considered Cogentrix's reply.

Cogentrix's motion, filed on December 30, 2002, to amend the prehearing order to modify the ALJ's procedural schedule to grant it the opportunity to file testimony is moot in light of the Board's above ruling and is therefore DISMISSED.

DATED: 1/15/03

BOARD OF PUBLIC UTILITIES  
BY:

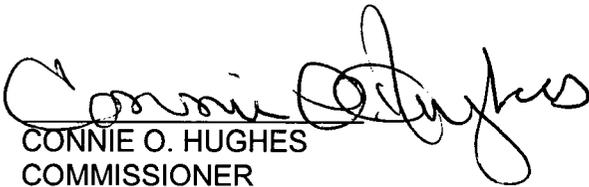
  
JEANNE M. FOX  
PRESIDENT



FREDERICK F. BUTLER  
COMMISSIONER



CAROL J. MURPHY  
COMMISSIONER



CONNIE O. HUGHES  
COMMISSIONER



JACK ALTER  
COMMISSIONER

ATTEST:

  
KRISTI IZZO  
SECRETARY

**SERVICE LIST**  
**I/M/O the Petition of Atlantic City Electric Company**  
**d/b/a Conectiv Power Delivery for Approval of Amendments to**  
**its Tariff to Provide for an Increase in Rates for Electric Service**  
**BPU Docket No. ER02080510**  
**OAL Docket No. PUCRL 06917-02S**

Kristi Izzo, Secretary  
Board of Public Utilities  
Two Gateway Center  
Newark, NJ 07102

George Riepe  
Asst. Director  
Division of Energy  
Board of Public Utilities  
Two Gateway Center  
Newark, NJ 07102

Dennis Moran  
Asst. Director  
Division of Energy  
Board of Public Utilities  
Two Gateway Center  
Newark, NJ 07102

Robert Glowacki  
Board of Public Utilities  
Two Gateway Center  
Newark, NJ 07102

Henry Rich  
Board of Public Utilities  
Two Gateway Center  
Newark, NJ 07102

Jacqueline Galka  
Bureau Chief  
Division of Energy  
Board of Public Utilities  
Two Gateway Center  
Newark, NJ 07102

Alice Bator  
Division of Energy  
Board of Public Utilities  
Two Gateway Center  
Newark, NJ 07102

Robert Schultheis  
Division of Energy  
Board of Public Utilities  
Two Gateway Center  
Newark, NJ 07102

Mark Beyer  
Office of the Economist  
Board of Public Utilities  
Two Gateway Center  
Newark, NJ 07102

Larry Gentieu  
Board of Public Utilities  
Two Gateway Center  
Newark, NJ 07102

Rene Demyunck  
Division of Energy  
Board of Public Utilities  
Two Gateway Center  
Newark, NJ 07102

James Brown  
Division of Energy  
Board of Public Utilities  
Two Gateway Center  
Newark, NJ 07102

Sheila Iannacone  
Board of Public Utilities  
Two Gateway Center  
Newark, NJ 07102

Robert Catona  
Board of Public Utilities  
Two Gateway Center  
Newark, NJ 07102

Walter P. Szymanski  
Director, Division of Audits  
Board of Public Utilities  
Two Gateway Center  
Newark, NJ 07102

Joseph Quirolo, Esq.  
Legal Specialist  
Board of Public Utilities  
Two Gateway Center  
Newark, NJ 07102  
[Joseph.Quirolo@bpu.state.nj.us](mailto:Joseph.Quirolo@bpu.state.nj.us)

Helene Wallenstein, DAG  
Division of Law  
124 Halsey Street  
P.O. Box 45029  
Newark, NJ 07101

Todd C. Steadman, DAG  
Division of Law  
124 Halsey Street, 5<sup>th</sup> Fl.  
P.O. Box 45029  
Newark, NJ 07101

Alex Moreau, DAG  
Division of Law  
124 Halsey Street, 5<sup>th</sup> Fl.  
P.O. Box 45029  
Newark, NJ 07101

David Brooks, DAG  
Division of Law  
124 Halsey Street, 5<sup>th</sup> Fl.  
P.O. Box 45029  
Newark, NJ 07101

Seema Singh  
Acting Director  
Div. of the Ratepayer  
Advocate  
31 Clinton Street, 11th Fl.  
P.O. Box 46005  
Newark, NJ 07101

**SERVICE LIST**  
**I/M/O the Petition of Atlantic City Electric Company**  
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**BPU Docket No. ER02080510**

Ami Morita, Esq.  
Div. of the Ratepayer  
Advocate  
31 Clinton Street, 11<sup>th</sup> Fl.  
P.O. Box 46005  
Newark, NJ 07101  
[fthomas@rpa.state.nj.us](mailto:fthomas@rpa.state.nj.us)

Judy Appel, Esq.  
Div. of the Ratepayer  
Advocate  
31 Clinton Street, 11<sup>th</sup> Fl.  
P.O. Box 46005  
Newark, NJ 07101  
[jappel@rpa.state.nj.us](mailto:jappel@rpa.state.nj.us)

Kurt S. Lewandowski, Esq.  
Div. of the Ratepayer  
Advocate  
31 Clinton Street, 11<sup>th</sup> Fl.  
P.O. Box 46005  
Newark, NJ 07101  
[klewando@rpa.state.nj.us](mailto:klewando@rpa.state.nj.us)

James Rothschild  
Rothschild Financial  
Consulting Service  
115 Scarlet Oak Drive  
Wilton, CT 06897  
[jimrothschild@rothschildfinancial.com](mailto:jimrothschild@rothschildfinancial.com)

Andrea Crane  
The Columbia Group, Inc.  
38 C Grove Street  
Ridgefield, CT 06877  
[ctcolumbia@aol.com](mailto:ctcolumbia@aol.com)

Stephen B. Genzer, Esq.  
LeBoeuf, Lamb, Greene &  
MacRae, LLP  
One Riverfront Plaza  
Newark, NJ 07102-5490

Mark L. Mucci, Esq.  
LeBoeuf, Lamb, Greene &  
MacRae, LLP  
One Riverfront Plaza  
Newark, NJ 07102-5490

Charles F. Morgan, Jr.  
Manager Restructuring  
Conectiv Power Delivery  
5100 Harding Highway  
Suite 155  
Mays Landing, NJ 08330

Randall V. Griffin, Esq.  
Conectiv  
Legal Department  
800 King Street  
P.O. Box 231  
Wilmington, DE 19899

Elizabeth Lemkul  
Barrington - Wellesley  
Group  
4157 Lakeshore Ave.  
Oakland, CA 94610

Steven S. Goldenberg, Esq.  
Greenbaum, Rowe, Smith,  
Ravin, Davis and Himmel,  
LLP  
Metro Corporate Campus One  
P.O. Box 5600  
Woodbridge, NJ 07095-0988

Steve Gabel  
Gabel Associates  
417 Denison Street  
Highland Park, NJ 08904

Mally Becker  
Gabel Associates  
417 Denison Street  
Highland Park, NJ 08904

Andrew L. Indeck, Esq.  
Scarinci & Hollenbeck, LLC  
100 Valley Brook Avenue  
P.O. Box 790  
Lyndhurst, NJ 07071-0790

R. William Potter, Esq.  
Potter & Dickson  
194 Nassau Street  
Princeton, NJ 08542