



# RESOLUTION OF THE NEW JERSEY PINELANDS COMMISSION

NO. PC4-17- 01

**TITLE:** Issuing a Final Decision Denying the Motion to Stay Pinelands Resolution No. PC4-16-42 and Commission Review of Pinelands Development Application No. 2012-0056.001 Filed with the Commission on behalf of the Pinelands Preservation Alliance

Commissioner Galletta moves and Commissioner Quinn seconds the motion that:

**WHEREAS**, at its meeting on December 9, 2016, the Pinelands Commission (Commission) passed Resolution No. PC4-16-42 in response to a remand by the Appellate Division In the Matter of the Petition of South Jersey Gas Company for a Consistency Determination for a Proposed Natural Gas Pipeline et al., Docket Nos. A-1685-15, A-2705-15 and A-2706-15; and

**WHEREAS**, PC4-16-42 implements the Court's remand instructions and establishes the process by which the Commission will conduct its review of the South Jersey Gas Company's Pinelands Development Application No. 2012-0056.001 in accordance with the remand; and

**WHEREAS**, the Pinelands Preservation Alliance (PPA) filed an appeal of Pinelands Commission Resolution No. PC4-16-42 with the New Jersey Superior Court, Appellate Division on January 17, 2017; and

**WHEREAS**, on January 17, 2017, the PPA filed a Motion to Stay Pinelands Commission Resolution No. PC4-16-42 and the Commission's review of Pinelands Development Application No. 2012-0056.001 with the Pinelands Commission in accordance with R. 2:9-7; and

**WHEREAS**, R. 2:9-7 requires an appellant, on or after filing a notice of appeal with the Appellate Division of a state administrative agency decision, action or rule, to make a motion for ad interim relief or for a stay of the action under review, in the first instance to the agency whose order is being appealed; and

**WHEREAS**, in support of its Motion, the PPA submitted a supporting brief, a declaration of its Executive Director, Carleton Montgomery and, approximately, 119 pages of supporting documents (the "Motion Papers"); and

**WHEREAS**, the Commission has reviewed the resolution and the motion papers and based on such review issues the attached ORDER denying the Motion to Stay Pinelands Commission Resolution No. PC4-16-42; and

**WHEREAS**, pursuant to N.J.S.A. 13:18A-5h, no action authorized by the Commission shall have force or effect until ten (10) days, Saturdays, Sundays and public holidays excepted, after a copy of the minutes of the meeting of the Commission has been delivered to the Governor for review, unless prior to expiration of the review period the Governor shall approve same, in which case the action shall become effective upon such approval.

**NOW, THEREFORE BE IT RESOLVED** that the attached ORDER denying the Motion for a Stay of Pinelands Commission Resolution No. PC4-16-42 and the Commission's review of Pinelands Development Application No. 2012-0056.001 is **ADOPTED**.

### Record of Commission Votes

AYE NAY NP A/R*				AYE NAY NP A/R*				AYE NAY NP A/R*			
Ashmun		X		Galletta	X			McGlinchey	X		
Avery	X			Hays		X		Prickett		X	
Barr			X	Jannarone	X			Quinn	X		
Brown	X			Lloyd		X		Rohan Green		X	
Chila	X			Lohbauer		X		Earlen	X		

\* A = Abstained / R = Recused

Adopted at a meeting of the Pinelands Commission

Date: January 23, 2017

Nancy Wittenberg  
Nancy Wittenberg  
Executive Director

Sean W. Earlen  
Sean W. Earlen  
Chairman  
*Alan Avery for*

IN THE MATTER OF SOUTH JERSEY	)	<u>ADMINISTRATIVE ACTION</u>
GAS COMPANY FOR	)	ORDER DENYING STAY
AUTHORIZATION TO CONSTRUCT	)	REQUEST
A 24" PIPELINE THROUGH	)	
MAURICE TOWNSHIP IN	)	Resolution of the Pinelands
CUMBERLAND COUNTY, CITY OF	)	Commission No. PC4-16-42
ESTELL MANOR IN ATLANTIC	)	
COUNTY AND UPPER TOWNSHIP	)	Pinelands Application No. 2012-
IN CAPE MAY COUNTY NEW	)	0056.001
JERSEY	)	

On January 17, 2017, the Pinelands Preservation Alliance (“PPA”) filed a request for a stay (“Stay Request”) pending its appeal of the New Jersey Pinelands Commission’s (“Commission”) December 12, 2016 Resolution No. PC4-16-42 regarding the Commission’s implementation of the Appellate Division’s remand instructions in its November 7, 2016 decision in In re Petition of South Jersey Gas Company, 447 N.J. Super. 459 (App. Div. 2016) (“South Jersey Gas Appeal”). PPA asks that the Commission stay its review of a proposed natural gas pipeline pursuant to the Resolution pending the outcome of its appeal challenging the Resolution. PPA is non-profit organization with a stated mission of protecting the Pinelands, and has been involved in litigation with the Commission and Board of Public Utilities (“BPU”) regarding natural gas pipelines in the Pinelands Area.

The South Jersey Gas Appeal concerned the procedures used by the Commission and the BPU to review an application by the South Jersey Gas Company (“SJG”) to construct a natural gas pipeline which would cross the Pinelands Area. In its decision, the court ruled that the Commission had erred in its interpretation of the Pinelands Protection Act (“Pinelands Act”), N.J.S.A. 13:18A-1, et seq., and that the Commission, rather than the BPU, was required to make

a final determination regarding consistency with the Pinelands Comprehensive Management Plan (“CMP”) on a development application for which the BPU had preempted the municipal review process under N.J.S.A. 40:55D-19. The court remanded to the Commission to consider what procedures it would use to review its Executive Director’s recommendation regarding SJG’s development application, and to then make a final decision on whether the proposed pipeline conforms to the standards of the CMP.

The Commission then passed Resolution No. PC4-16-42 on December 9, 2016, which sets forth the process the Commission intends to utilize to review SJG’s application. As directed by the Appellate Division, the process chosen by the Commission provides public notice and the opportunity for the public to comment on the application, both in writing and in person during the Commission’s January 24, 2017 meeting. The Resolution also provides that in making its ultimate determination, the Commission also will review the record developed by the BPU, which included an evidentiary hearing in which PPA participated; public comment accepted by the BPU, including comments regarding whether the pipeline conforms to the CMP; the recommendations by the Commission’s Executive Director to the BPU; and public comments submitted to the Commission.

On January 17, 2017, PPA filed a Notice of Appeal with the Superior Court of New Jersey, Appellate Division of Resolution No. PC4-16-42, as well as a Motion for Summary Disposition. On that same date, PPA filed the Stay Request with the Commission.

For the reasons set forth herein, the Stay Request is DENIED.

### **Factual Background and Procedural History**

The Commission is a regional planning entity which oversees development in the Pinelands Area. Congress established the Pinelands National Reserve in 1978 in recognition of

the unique and fragile ecology of the New Jersey Pinelands. See Gardner v. N.J. Pinelands Comm'n, 125 N.J. 193, 198-200 (1991) (detailing history and significance of “the New Jersey Pine Barrens, or Pinelands”). Our Legislature then enacted the Pinelands Act, N.J.S.A. 13:18A-1, et seq., creating the State Pinelands Area, which covers most, but not all, of the Pinelands National Reserve. N.J.S.A. 13:18A-11. The Pinelands Act is intended to protect the “significant and unique natural, ecological, agricultural, scenic, cultural and recreational resources” of the Pinelands from “random and uncoordinated development and construction.” N.J.S.A. 13:18A-2. In enacting the Pinelands Act, the Legislature recognized that the "continued viability" of the Pinelands and its resources "is threatened by pressures for residential, commercial[,] and industrial development." To oversee this effort, the Legislature created the Commission to serve as the primary planning entity in the Pinelands and vested with “all the powers and duties as may be necessary in order to effectuate the purposes and provisions” of the Pinelands Act. N.J.S.A. 13:18A-4.

In this role, the Commission adopted the CMP, which contains regulations governing the standards for development within the Pinelands. See N.J.A.C. 7:50-1.1, et seq. Specifically, the CMP sets forth the “minimum standards for preservation of the Pinelands and reflects “the legislative determination that management and protection of the essential character and ecological values of the Pinelands require a regional perspective in the formulation and implementation of land use policies and regulations.” N.J.A.C. 7:50-2.1; N.J.A.C. 7:50-3.1(a).

As SJG’s proposed pipeline would cross the Pinelands Area, it is subject to the jurisdiction of the Commission and the CMP. The proposed natural gas pipeline consists of approximately 21.6 miles of 24 inch pipeline, which would run from Maurice River Township in Cumberland County, through the City of Estell Manor in Atlantic County to Upper Township in

Cape May County. The proposed route consists of approximately 2.2 miles of easements on private property, with the remaining 19.4 miles to be located beneath roadways within the public right-of-way. SJG has asserted the primary purpose of the pipeline is to serve the B.L. England power plant in Upper Township. Pursuant to an Administrative Consent Order entered into with the Department of Environmental Protection, B.L. England is required to replace its oil and coal-fired generators with natural gas generators by May 1, 2017, or it must shut down.

SJG's proposed pipeline first came before the Commission in 2012, when SJG filed a development application with the Commission for the project. SJG separately filed a petition with the BPU pursuant to N.J.S.A. 40:55D-19 of the Municipal Land Use Law to preempt the application of municipal ordinances to the pipeline. Commission staff initially identified an inconsistency with the CMP based upon the information provided by SJG. Staff proposed that the Commission enter into a Memorandum of Agreement ("MOA") with the BPU, which would have allowed for construction of the pipeline notwithstanding the alleged inconsistency with the CMP. The Commission did not authorize entry into the MOA. SJG appealed from the Commission's non-entry in to the MOA, but dismissed that appeal with prejudice on May 5, 2016.

On May 21, 2015, SJG submitted a revised application to the Commission, which contained new information and asserted the pipeline complied with N.J.A.C. 7:50-5.23(b)(12), which was the sole inconsistency previously identified by the Executive Director. The revised application also proposed to relocate an interconnect station to outside the Forest Area of the Pinelands.

On August 14, 2015, the Executive Director issued a Certificate of Filing ("COF") for the revised application. See N.J.A.C. 7:50-4.31(b); -4.82(b). The COF contained a preliminary

finding that, based upon the newly submitted information, the proposed pipeline was consistent with the CMP's standards. This COF allowed the BPU to continue with its review of the SJG's N.J.S.A. 40:55D-19 Petition. See N.J.A.C. 7:50-4.81(b).

At that time, the Commission did not interpret the Pinelands Act or the CMP to authorize it to directly review for conformance with the CMP any development applications that were the subject of a petition to the BPU under N.J.S.A. 40:55D-19, or to make a final determination on such applications. Rather, the Commission believed that the statute charged the BPU with ensuring that any development it approved to be constructed within the Pinelands conformed to the CMP. See N.J.S.A. 13:18A-10(c). The Commission further believed that the CMP set forth a process for Commission staff to participate in the proceedings of other agencies such as the BPU to represent the Commission's interests and provide guidance to the agency making the ultimate determination on a development application. N.J.A.C. 7:50-4.81, et seq.

Based on this interpretation, Commission staff participated in BPU's review of SJG's N.J.S.A. 40:55D-19 petition. The BPU conducted additional public hearings during which it accepted comments regarding the CMP, and held an evidentiary hearing in which PPA was a participant. The BPU then submitted its record to the Commission staff, including all public comments and documents submitted to the BPU. After reviewing these materials, the Commission's Executive Director submitted a letter to the BPU on December 14, 2015, detailing her review and stating the finding in the COF remained valid. On December 16, 2015, the BPU issued a Decision and Order granting SJG's N.J.S.A. 40:55D-19 Petition.

The Sierra Club and Environment New Jersey appealed the Executive Director's December 14, 2015 letter to the BPU. Those parties and the PPA also appealed the BPU's approval of SJG's N.J.S.A. 40:55D-19 Petition. The appeals were consolidated.

In its November 7, 2016 published decision, the Appellate Division in large part affirmed the BPU's order, but disagreed with the Commission's interpretation of the Pinelands Act. South Jersey Gas, supra, 447 N.J. Super. 459. The court acknowledged that the CMP's coordinated permitting provisions, N.J.A.C. 7:50-4.81, et seq., did not provide for the Commission to review a staff determination regarding the SJG application. Id. at 477. However, the court held "the Commission retains final decision-making authority as to whether SJG's proposed pipeline is consistent with the minimum standards of the CMP," and that the "Commission therefore retains 'ultimate responsibility' under the CMP to review the proposed project and render a final decision on CMP compliance." Id. at 478

The Appellate Division thus remanded the matter to the Commission, and directed the Commission to determine how to review the Executive Director's recommendation regarding the pipeline. The court's decision afforded the Commission wide discretion in what procedures it chose. In relevant part, the court instructed:

The Commission shall determine whether to review the Executive Director's decision based on the factual record developed before the [BPU], or whether the parties should be permitted to present additional evidence on the question of whether the pipeline is consistent with the minimum standards of the CMP.

The Commission also shall determine whether to refer the matter for a hearing before an Administrative Law Judge (ALJ). In that regard, we note that, under the CMP's provisions for review of municipalities with certified land use regulations, the Commission may review a preliminary approval if it raises substantial issues of CMP compliance. N.J.A.C. 7:50-4.37(a) – (b).

If so, the Executive Director must give notice of the staff's determination to the applicant, local permitting agency, and any interested persons. N.J.A.C. 7:50-4.37(b). The applicant, local permitting agency, and any interested persons may request a hearing before an ALJ. Ibid. Thereafter, the Commission may issue a final decision on the matter. N.J.A.C. 7:50-4.91(e).

The Commission shall consider whether the same or similar procedures should be followed in reviewing Wittenberg's decision. See In re Application of John Madin, 201 N.J. Super. 105, 128-34 (App. Div.) (holding that municipalities whose development ordinances have not been certified by the Commission are entitled to an evidentiary hearing on the grant of development approval), certif. granted, 102 N.J. 380 (1985), certif. vacated, 103 N.J. 689 (1986). Moreover, the public should be afforded notice and the opportunity to be heard before the Commission renders a final decision on the application. Id. at 135-136.

[Id., at 479.]

At its December 9, 2016 meeting, the Commission retired into closed session to receive legal advice regarding the decision and whether to pursue a petition to the Supreme Court, or if not, how to implement the court's remand instructions. The agenda for this meeting included the item "Resolution to Retire into Closed Session (if needed) – Personnel, Litigation and Acquisition Matters (*The Commission reserves the right to reconvene into public session to take action on closed session items.*)"

Following discussion with its Deputy Attorneys General, the Commission reconvened into open session, and an overview of the closed session discussion was provided to the public, including that the Commission had determined not to seek Supreme Court review of the Appellate Division's decision. After some discussion, the Commission then unanimously passed Resolution No. PC4-16-42, detailing how it would implement the court's remand instructions and review the proposed pipeline. The Commission also unanimously passed, with one recusal, Resolution No. PC4-16-43, authorizing the Division of Law to seek a remand of appeals related to the proposed Southern Reliability Link pipeline, which the Commission and the BPU had previously reviewed using the same procedures as the SJG pipeline.<sup>1</sup>

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<sup>1</sup> Those remand motions are pending with the Appellate Division.



The review process chosen by the Commission was modeled on the CMP's existing process to review public development applications. See N.J.A.C. 7:50-4.51, et seq. The circumstances surrounding the Commission's consideration of public development applications are similar to the situation before the Commission here, because, as with public development applications, there is no municipal approval for the Commission to review. Rather, when reviewing public development applications, the Executive Director first reviews the application and all other information submitted, and makes a determination of whether the application should be approved, approved with conditions, or disapproved. N.J.A.C. 7:50-4.54. The Commission then reviews that determination at its next monthly meeting. N.J.A.C. 7:50-4.56. The process chosen by the Commission through Resolution No. PC4-16-42 also provided the public the opportunity to comment on the SJG application at a Commission meeting, and for the submission of written comments, prior to the Commission making a final determination on the proposed pipeline.

Following the meeting, Commission staff provided posted notice on December 9, 2016 that the Commission would take public comment regarding the SJG application at its January 24, 2017 meeting, and accept written comments until that date. The Commission subsequently changed the location of the meeting to accommodate the significant attendance anticipated, and provided public notice on January 3, 2017.

On January 4, 2017, PPA submitted a letter objecting to the adoption of Resolution No. PC4-16-42, including specifically the review process set forth in the Resolution. The Executive Director responded to that letter on January 11, 2017, explaining why PPA's concerns were unfounded. Unsatisfied with that answer, PPA then filed an appeal of Resolution No. PC4-16-42

with the Appellate Division on January 17, 2017, and simultaneously filed the Stay Request with the Commission.

The Commission then scheduled and provided public notice of a special meeting for January 23, 2017, so it could consider the Stay Request prior to taking comment on the proposed pipeline at its regularly scheduled January 24, 2017 meeting.

## **DISCUSSION**

### **Standard for Granting of Stay**

Rule. 2:9-7 requires that motions for stay of administrative agency decisions be “made in the first instances to the agency whose order is appealed from and, if denied, to the Appellate Division.” R. 2:9-7. PPA contends it has met the standards for a stay, and requests that the Commission stay Resolution No. PC4-16-42 and its review of the proposed SJG pipeline pursuant to that Resolution pending the outcome of its appeal and motion for summary disposition filed with the Appellate Division.

The Commission is not required to grant a stay request simply because its decision is under review by the Appellate Division. Rather, to be entitled to a stay, a movant must demonstrate each of the following: (1) the threat of irreparable harm; (2) a reasonable probability of success on the merits based on settled legal rights; and (3) that public interest and relative hardships to the parties favor a stay. Crowe v. DeGioia, 90 N.J. 126, 132-34 (1982). The party seeking the stay bears the burden of demonstrating it meets each of these standards by clear and convincing evidence. Garden State Equal. v. Dow, 216 N.J. 314, 320 (2013).

The Commission finds that PPA’s Stay Request falls short of satisfying these criteria, and hereby DENIES the request.

### **Irreparable Harm**

A stay “should not issue except when necessary to prevent irreparable harm.” Crowe, supra, 90 N.J. at 132-33. PPA claims irreparable harm will result here because the Commission’s determination regarding the pipeline’s conformance with the CMP is the last approval needed by SJG prior to commencing construction. PPA asserts environmental harm will be caused by pipeline construction, as well as claiming there is risk of leakage of natural gas into the Pinelands’ aquifer and streams. PPA also argues approval of the pipeline will create additional development pressure along the pipeline route.

The Commission finds that PPA’s claims of irreparable harm are premature, as any such harm resulting from pipeline construction will not be caused by Resolution No. PC4-16-42. The Resolution does not approve the SJG pipeline. Rather, it merely details the process by which the Commission will effectuate the court’s remand and evaluate whether the proposed pipeline conforms to the minimum standards of the CMP. These procedures will allow the Commission to weigh the evidence contained in SJG’s application, the record developed before the BPU, written and verbal comments submitted by the public including PPA, and recommendations of staff. Indeed, in this context, the Commission will consider the comments by PPA, including environmental considerations, and how they relate to whether the proposed pipeline conforms to the CMP’s requirements. The Commission will then make its final determination on whether SJG’s proposed development is consistent with the minimum standards of CMP.

Therefore, PPA faces no irreparable harm at this juncture. The irreparable harm it purports will result from the proposed development could only result if the Commission ultimately approves the proposed development. Should the Commission adopt such a resolution

in the future, PPA would have standing to appeal that resolution, and to seek a stay pending that appeal. But because Resolution No. PC4-16-42 does not authorize any development, but instead merely implements the Appellate Division's remand instructions and sets forth the process by which the Commission will review SJG's application and take public comment, none of the alleged irreparable environmental harms can result from Resolution No. PC4-16-42.

For these reasons, PPA has not demonstrated irreparable harm sufficient to warrant the entry of a stay.

### **Likelihood of Success on the Merits**

The second element that PPA must demonstrate is reasonable probability of success on the merits. Crowe, supra, 90 N.J. at 133. "Temporary relief should be withheld when the legal right underlying [the party's] claim is unsettled. Ibid. To succeed on the merits of an appeal from an agency's decision, PPA must make "a clear showing that it is arbitrary, capricious, or unreasonable, or that it lacks fair support in the record." In re Hermann, 192 N.J. 19, 28 (2007).

PPA claims the Commission violated the Administrative Procedure Act "(APA)", N.J.S.A. 52:14B-1, et seq., when it passed Resolution No. PC4-16-42. PPA further argues the review process set forth in the Resolution violates the Pinelands Act and PPA's due process rights. For the following reasons, the Commission disagrees and finds PPA is unlikely to succeed on the merits of these claims on appeal.

### **PPA's Claim that Resolution No. PC4-16-42 Violates the APA**

PPA asserts that Resolution No. PC4-16-42 is an administrative rule, and that compliance with the APA's rulemaking procedures was required. The Commission disagrees. Resolution No. PC4-16-42 was an implementation of the Appellate Division's remand instructions in South Jersey Gas. Nothing in the court's opinion directed the Commission to initiate rulemaking or

amend the CMP prior to reviewing SJG's application. Rather, the court remanded the matter to the Commission and directed it to consider how it would review the Executive Director's recommendation regarding SJG's development application, and then make a final decision on the application. The Commission followed the Appellate Division's directions in passing Resolution No. PC4-16-42.

Moreover, the Commission acted consistent with well-established precedent regarding administrative agency action. As the Supreme Court has recognized, "[a]dministrative agencies enjoy great leeway when selecting among rulemaking procedures, contested hearings, or hybrid informal methods in order to fulfill their statutory mandates." In re Provision of Basic Gen. Serv., 205 N.J. 339, 347 (2011).

The Supreme Court has set forth factors for consideration in determining whether adherence to the APA's formal rulemaking procedures is required. Metromedia, Inc. v. Dir., Div. of Tax, 97 N.J. 313, 331-332 (1984). Courts apply a multi-factor test in determining whether rulemaking requirements are implicated, looking at whether the agency's decision:

1) is intended to have wide coverage encompassing a large segment of the regulated or general public, rather than an individual or a narrow select group; (2) is intended to be applied generally and uniformly to all similarly situated persons; (3) is designed to operate only in future cases, that is, prospectively; (4) prescribes a legal standard or directive that is not otherwise expressly provided by or clearly and obviously inferable from the enabling statutory authorization; (5) reflects an administrative policy that (i) was not previously expressed in any official and explicit agency determination, adjudication or rule, or (ii) constitutes a material and significant change from a clear, past agency position on the identical subject matter; and (6) reflects a decision on administrative regulatory policy in the nature of the interpretation of law or general policy.

[Ibid.]

PPA asserts those factors are present here. With regard to the first factor, it claims Resolution No. PC4-16-42 applies to a large segment of the public regulated by the Commission, noting its potential application to three infrastructure projects pending before the Commission. It also asserts this factor is met because any development approved following the process in the Resolution will impact persons living in the Pinelands.

The Commission disagrees that the Resolution is intended to have wide coverage. Although the Resolution notes the Commission's awareness of other applications filed under N.J.S.A. 40:55D-19 that could come before it, at this time the Commission is only aware of two other such applications. The Commission expressed in the Resolution its intent to expeditiously undertake amendments to the CMP to formalize the process for future applications. In addition, as stated in the Executive Director's January 11, 2017 letter to PPA, pending amendments to the CMP, the Commission will address the procedures to be used to review any subsequent applications at the appropriate time, taking into account the specific circumstances of the application as well as the principles and direction contained in the South Jersey Gas opinion, and determine whether alternate procedures should be used. Hence, Resolution No. PC4-16-42 is limited in scope.

Similarly, PPA has not demonstrated that Resolution No. PC4-16-42 meets the second Metromedia factor. Although the Resolution provides that the Commission may use this process for other applications for which the municipal review process is preempted pending amendments to the CMP, the Commission will address and may modify these procedures as appropriate taking into account the specifics of each application. Thus, the Resolution is not "intended to be a rule of unvarying application to all similar cases." See Metromedia, *supra*, 97 N.J. at 335.

Nor is the Resolution purely designed to operate in only future cases. Indeed, the purpose of its adoption by the Commission was to deal with past cases – one remanded to the Commission by the Appellate Division, and another the Commission anticipates will be remanded shortly with similar instructions. The Commission has obligated itself to expeditiously undertake amendments to the CMP to formalize the process by which it will address future applications.

With regard to the fourth Metromedia factor, PPA argues the process adopted by the Resolution is not inferable from the enabling statute, the Pinelands Act, because it claims the Pinelands Act requires a public hearing on all Commission decisions. PPA is incorrect. N.J.S.A. 13:18A-15, relied upon by PPA, only mandates a public hearing when the Commission reviews permitting decisions by local government entities. No such local government decision is present here. Rather, consistent with the Appellate Division's interpretation of the Pinelands Act, the court's remand instructions, and the Commission's existing procedures for other applications which come before it without a prior municipal approval to review, the Commission chose a process which ensures a full record is presented to it, and that the public is provided with notice and an opportunity to comment before the Commission.

The Commission also disagrees that the fifth Metromedia factor is met. Although the CMP currently lacks a process for Commission review of applications for which the BPU preempted the municipal review process, the process chosen by the Commission to review the SJG application on remand hews closely to existing procedures in the CMP for applications that come before the Commission in a similar posture. As noted, the Commission used its review procedures for public development applications as a guide, because those applications, like the SJG application, come to the Commission without a prior municipal approval to review. There,

like here, the Commission reviews a recommendation of the Executive Director, receives public comment at a regular meeting, and then votes on the application's conformance with the CMP. Thus, the process was previously expressed and does not constitute a material departure from existing procedures.

Finally, the sixth Metromedia factor is not met here. The Resolution does not "reflect[] a decision on administrative regulatory policy in the nature of the interpretation of law or general policy." Id. at 332. Rather, it simply details how the Commission will implement the court's remand and review whether SJG's application complies with the Commission's regulations after providing an opportunity for the public to comment during that review. The substantive regulations of the CMP remain unchanged, and the Commission will only approve the proposed pipeline if it determines the pipeline conforms with all of the CMP's standards. Thus, the Resolution does not reflect a change in agency policy.

For these reasons, Resolution No. PC4-16-42 is not an administrative rule, and the Commission was not required to follow the APA's formal rulemaking procedures. Therefore, the Commission finds PPA is has not shown it has a reasonable likelihood of success on the merits of this claim in its appeal.

#### PPA's Claim that Resolution No. PC4-16-42 Violates the Pinelands Act and its Due Process Rights

PPA also asserts the process set forth by Resolution No. PC4-16-42 violates its due process rights and the Pinelands Act because it does not provide for a public hearing. The Commission disagrees that a public hearing is required in these circumstances and thus finds PPA is unlikely to succeed on the merits of this claim as well.

Notably, in its remand instructions the Appellate Division did not require a public hearing, but left it to the Commission to determine whether a public hearing was warranted.



South Jersey Gas, *supra*, 447 N.J. Super. at 479. The court expressly gave the Commission the option of making its determination based on the record developed before the BPU, and only required the Commission to provide public notice and to take additional public comment. *Ibid.*

PPA asserts a hearing is required by the Pinelands Act and by the Appellate Division's ruling in Madin, *supra*, 201 N.J. Super. at 134. However, the Pinelands Act only mandates a public hearing where the Commission is reviewing a final municipal or county development approval. N.J.S.A. 13:18A-15. And Madin concerned whether municipalities whose land use ordinances had not been certified by the Commission were entitled to a hearing prior to the Commission's approval of applications for developments in those municipalities. Madin, *supra*, 201 N.J. Super. at 119. Those circumstances are not present here. Instead, the circumstances are more akin to those present during the Commission's review of public development applications, N.J.A.C. 7:50-4.51, *et seq.*, and the Commission modeled its review of the SJG application off those procedures.

Moreover, after Madin was decided, the Administrative Procedure Act was amended to preclude agencies from granting hearings to third parties regarding permitting decisions. N.J.S.A. 52:14B-3.1 and -3.3. Agencies may only grant hearings to persons with particularized property interests or a right to a hearing under a statute. N.J.S.A. 52:14B-3.1; In re Freshwater Wetlands Gen. Permits, 185 N.J. 452, 463-64 (2006). Here, SJG has not been aggrieved by an action of the Executive Director as contemplated by N.J.A.C. 7:50-4.37, and has not requested an adjudicatory hearing. The Commission is unaware of any parties with a particularized property interest to have standing for a hearing, and PPA has not sought to establish such an interest.

Further, the Supreme Court has been clear that a hearing is not required to satisfy the public's due process rights. See In re Freshwater Wetlands Statewide General Permits, *supra*,

185 N.J. at 470. As the Court held, “[a] third-party objector’s due process rights may be satisfied by an agency’s review process, even absent trial-type procedures.” Ibid. In determining whether due process has been satisfied, “the administrative process . . . cannot be viewed in isolation,” and consideration must be given to proceedings conducted before other government entities. Id. at 472.

Based on the above, the Commission concluded that a hearing was not needed to develop the factual record in this matter. An extensive record was developed before the BPU, which included: public comments before the BPU on whether the proposed pipeline conforms to the CMP’s standards; an evidentiary hearing in which PPA was a participant, and made submissions concerning the CMP; and recommendations and discussions by the Executive Director made during the MOA proceeding, in the COF, and after review of the BPU’s record. In addition, as instructed by the Appellate Division, the Commission has provided public notice and the opportunity to comment, both in writing and in person before the Commission at its January 24, 2017 meeting. South Jersey Gas, supra, 447 N.J. Super. at 479. Thus, PPA and the public have been afforded substantial due process during the consideration of the proposed pipeline by the BPU and the Commission.

The review process developed by the Commission for the SJG application is consistent with the Appellate Division’s interpretation of the Pinelands Act and its remand instructions, and satisfies PPA’s due process rights. Accordingly, the Commission finds PPA is unlikely to succeed on the merits of this claim.

#### **Balance of Hardships**

The final prong of the test for a stay is consideration of the relative hardships to the parties in granting or denying relief. Crowe, supra, 90 N.J. at 134. PPA asserts the equities favor

the grant of the stay because there is a strong public interest in protecting the environment and upholding the law, and that ratepayers could be harmed if construction commences prior to resolution of the appeal. PPA claims SJG will not be harmed if a stay is granted.

However, as discussed above, the irreparable harm PPA asserts will only result, if at all, if the Commission ultimately authorizes the proposed pipeline. No irreparable harm will result to PPA or the public from Resolution No. PC4-16-42. Rather, PPA and the public will be entitled to comment to the Commission, and have their concerns considered in the Commission's evaluation of whether the proposed pipeline conforms to the minimum standards of the CMP.

In contrast, the delay caused if a stay of the Commission's review of the proposed pipeline is granted could cause hardship to SJG and BL England. The Commission is aware that the Administrative Consent Order entered into between BL England and the Department of Environmental Protection requires the plant to cease operations if not repowered to natural gas by May 1, 2017.

Thus, the Commission finds that the balance of hardships does not weigh in favor of granting a stay.

### **CONCLUSION**

For the reasons set forth herein, PPA has not demonstrated: (1) irreparable harm; (2) a likelihood of success on the merits based on settled legal rights; or (3) that the balance of hardships favors a stay. Accordingly, PPA's request for a stay is DENIED.

**SO ORDERED.**