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September 3, 2015

VIA Hand-Delivery and Electronic Mail

Honorable Irene Kim Asbury, Secretary
NJ Board of Public Utilities
44 South Clinton Avenue, 9th Floor
P.O. Box 350
Trenton, New Jersey 08625-0350

**Re: In the Matter of the Petition of New Jersey Natural Gas Company for Approval and Authorization to Construct and Operate the Southern Reliability Link Pursuant to N.J.A.C. 14:7-1.4
BPU Docket No.: GE15040402**

**In the Matter of the Petition of New Jersey Natural Gas Company for a Determination Concerning the Southern Reliability Link Pursuant to N.J.S.A. 40:55D-19 and N.J.S.A. 48:9-25.4
BPU Docket No.: GO15040403**

Dear Secretary Asbury:

Please accept for filing an original and eleven (11) copies of the Division of Rate Counsel's ("Rate Counsel") Motion for Reconsideration and Consolidation. Please stamp and date the additional copy as "filed" and return it in the enclosed self addressed stamped envelope. Thank you for your consideration and attention to this matter.

Background

On April 2, 2015, New Jersey Natural Gas ("NJNG" or "Company"), a New Jersey public utility that supplies natural gas to approximately 510,000 customers in

Monmouth, Ocean, Morris, Middlesex and Burlington Counties, filed two petitions with the New Jersey Board of Public Utilities (“Board”) regarding the same project.

According to the petitions, NJNG’s customers at the southern end of its pipeline system, particularly those in Ocean, Burlington and Monmouth Counties are likely to be adversely affected by a supply interruption or system failure. The Company represents that their proposed “Southern Reliability Link”, a new 30-inch 30 mile gas transmission pipeline project, which will have a maximum allowable operating pressure of 722 psig (the “Project”), will alleviate those concerns. Petition of New Jersey Natural Gas Company for Approval and Authorization to Construct and Operate the Southern Reliability Link Pursuant to N.J.A.C. 14:7-1.4, BPU Dkt. No. GE15040402. The Project will have an alignment that runs through the Townships of Chesterfield, North Hanover, Upper Freehold, Plumsted, Jackson, and Manchester. Ibid.

The Project will connect the natural gas system in those counties to a new Transco supply point in Chesterfield, New Jersey, adjacent to the New Jersey Turnpike. Ibid. The Company further represents that, by creating a new redundant major feed, the Project will support safe, reliable, and resilient delivery of natural gas to its customers in Ocean, Burlington and Monmouth counties. Ibid.

In the first petition, filed on April 2, 2015 and amended on June 5, 2015, NJNG requested that the Board issue an Order pursuant to N.J.A.C. 14:7-1.4 approving and authorizing the installation and operation of the Project. In the second petition, filed and amended on the same dates, NJNG requested that the Board: (1) issue an Order pursuant to N.J.S.A. 40:55-D-19 of the New Jersey Municipal Land Use Law (“MLUL”) determining that the construction of the Project is reasonably necessary for the service,

convenience or welfare of the public; (2) specifically find that the Zoning and Land Use Ordinances and all regulations promulgated thereto by the Counties and the Townships shall have no application to the Project; and (3) approve the route through North Hanover and Chesterfield as described in the Petitions pursuant to N.J.S.A. 48:9-25.4. In the Matter of the Petition of New Jersey Natural Gas Company for a Determination Concerning the Southern Reliability Link Pursuant to N.J.S.A. 40:55D-19 and N.J.S.A. 48:9-25.4, BPU Docket No. GO15040403.

In previous cases where new intrastate pipelines have been built, the utilities have traditionally proceeded with cases sequentially to address all issues. It is unusual to have a natural gas company file two petitions regarding the same pipeline and simultaneously ask for expeditious relief for both. Prior reported cases were generally heard first under the N.J.A.C. 14:7-1.4 provision to address the siting and construction issues and then the MLUL proceeding would commence to obtain the approval for the final route. See In the Matter of the Petition of South Jersey Gas Company for Authorization to Construct a 24-Inch Pipeline through Maurice River Township in Cumberland County, City of Estell Manor in Atlantic County and Upper Township in Cape May County, New Jersey, BPU Dkt. No. GO13030202 (June 21, 2013); In the Matter of Petition of New Jersey Natural Gas Company for Authorization and Approval for Construction of a Proposed Pipeline in the Township of Hazlet, Holmdel, and Middletown Pursuant to N.J.A.C. 14:7-1.4 et seq., BPU Docket No. GO11080478 (November 9, 2011); In the Matter of the Petition and Report of New Jersey Natural Gas Company for Authorization and Approval of the Installation of a Transmission Pipeline Pursuant to N.J.A.C. 14:7-1.4, BPU Docket No. GE03070515.

Pursuant to its statutory obligations, Rate Counsel is a party to both matters. While Rate Counsel does not generally get involved in zoning issues, it is a party to the MLUL matter to look at the necessity, costs, and route of the project. Rate Counsel also participates in the proceeding under N.J.A.C. 14:7-1.4 to monitor the company's compliance with 49 C.F.R. 192 and ensure that it has minimized the number of habitable dwellings within 100 feet of the line. In the instant matter, Rate Counsel has served discovery and the Company has provided answers and objections, or a response is pending.

On August 19, 2015, the Board issued an Order ("Board Order") denying intervention for the County of Burlington and the Townships of Chesterfield, North Hanover and Plumsted ("Government Entities") in the N.J.A.C. 14:7-1.4 matter, finding that the matter was an "uncontested case" and that as a result, the Government Entities were not entitled to intervene. The Board also stated that the Government Entities would have sufficient opportunity to raise their concerns in the MLUL matter, which involves similar issues. In the Matter of the Petition of New Jersey Natural Gas Company for Approval and Authorization to Construct and Operate the Southern Reliability Link pursuant to N.J.A.C. 14:7-1.4, BPU Order Regarding Motions to Intervene or Participate, Docket No. GE15040402 (August 19, 2015) at p. 6.

Rate Counsel seeks reconsideration of the Board's Order finding that the pipeline safety matter is uncontested. Rate Counsel asks that the Board make clear that to the extent the discovery being answered in that case demonstrates a factual issue as to whether the company is in compliance with the federal regulations or whether the company has minimized the number of habitable dwellings within 100 feet of the line,

that Rate Counsel will be able to participate in a process, including a hearing if necessary, to resolve these factual issues. In addition, Rate Counsel asks that these two matters be consolidated. The separation of these two cases is inefficient and leads to confusion regarding which issues are to be decided in each case and what discovery may be used in each case.

Argument

POINT I

THE BOARD SHOULD CLARIFY THAT RATE COUNSEL IS A PROPER PARTY TO THIS PROCEEDING AND THAT IF FACTUAL ISSUES EXIST REGARDING THE CONSISTENCY OF THE APPLICATION WITH THE NARROW ISSUES TO BE DECIDED PURSUANT TO N.J.A.C. 14:7-1.4 THAT THEY WILL BE RESOLVED THROUGH ADEQUATE PROCESS WITH RATE COUNSEL'S PARTICIPATION.

A motion for reconsideration "shall state . . . the alleged errors of law or fact relied upon" in seeking reconsideration. N.J.A.C. 14:1-8.6. Generally, a party should not seek reconsideration merely based upon dissatisfaction with a decision. D'Atria v. D'Atria, 242 N.J. Super. 392, 401 (Ch. Div. 1990). Rather, reconsideration is reserved for those cases where (1) the decision is based upon a "palpably incorrect or irrational basis" or (2) it is obvious that the finder of fact did not consider, or failed to appreciate, the significance of probative, competent evidence. Cummings v. Bahr, 295 N.J. Super. 374, 384 (App. Div. 1996). Additionally, new or additional information should be considered in the interest of justice. Ibid. The moving party must show that the action was arbitrary, capricious or unreasonable. D'Atria, supra, 242 N.J. Super. at 401.

Rate Counsel contends that in the Board's decision denying the intervention of the County of Burlington, and the Townships of Chesterfield, Hanover, and Plumsted, it

failed to consider Rate Counsel's role as a statutorily mandated intervener. See N.J.S.A. 48:2-21.24 and N.J.S.A. 52:27EE-48. As a result, the Board's Order creates confusion as to how any factual issues that arise in this proceeding will be addressed. Rate Counsel also believes the Board's decision is based in part on a misreading of the applicable legislative history associated with N.J.S.A. 48:2-32.2. Rate Counsel therefore asks that the Board reconsider and clarify its Order.

Since Rate Counsel is already an intervenor in the matter, it did not file a motion to intervene in this case. It also did not participate in the consideration of movants' petitions for intervention. However, because the Board's Order denying the intervention motions impacts Rate Counsel's ability to fulfill its statutory mandate, Rate Counsel seeks an Order clarifying that the Board did not intend to foreclose Rate Counsel's participation in this matter, did not intend to thwart the ongoing discovery, and will provide adequate process if that discovery yields factual issues that must be resolved.

In its Order, the Board reasoned that the Government Entities could not prevail with their Motions to Intervene since they did not have a statutory or constitutional right to a hearing. Board Order, pgs. 5 & 6. The Board stated that this statutory or constitutional right to a hearing is required pursuant to the definition of a contested case in N.J.A.C. 1:1-2.1. The Board concluded that in this case "there is no statutory or constitutional requirement that the Board provide an adjudicatory hearing prior to making a final administrative agency determination concerning the Project." Board Order, p. 5. This was stated despite the fact that the Board set a June 30, 2015 deadline for Intervention Motions on May 19, 2015 in the N.J.A.C. 14:7-1.4 proceeding.

At the Board's August 19, 2015 public meeting, the Board's Chief Counsel explained that Motions to Intervene were filed in both dockets and they were granted in the MLUL proceeding. She stated that the N.J.A.C. 14:7-1.4 pipeline safety case is "deemed an uncontested matter." T3-L13 to 15. She continued: "Uncontested doesn't mean that the matter doesn't have opposition. Uncontested means that it's a case where there's no adjudicatory hearing. And as a pipeline safety case, there's no requirement for an evidentiary hearing. There is an agency determination whether the pipeline meets the State and Federal pipeline regulations and - risk to dwellings within 100 feet of the proposed pipeline." T3-L15 to 22.

The Board Order correctly states that the "the Board's review of the petition is narrow in scope, and it is only tasked with determining whether the Project is conformity with state and federal natural gas pipeline regulations and ensuring that the number of habitable dwelling within one-hundred (100) fee of the Project is minimized." Board Order, p. 5. However, in order for the Company to truly demonstrate that it is minimizing the amount of habitable dwellings within 100 feet of the pipeline, the Board must consider facts such as the number of dwellings that are currently near the route, the nature of these dwellings, and how many dwellings would be within 100 feet of another viable route. The information currently before the Board pursuant to N.J.A.C. 14:7-1.4 in NJNG's April 2, 2015 petition states that there are 138 structures with human occupancy within 100 feet of the proposed 722 psi pipeline. Petition of New Jersey Natural Gas Company for Approval and Authorization to Construct and Operate the Southern Reliability Link Pursuant to N.J.A.C. 14:7-1.4, BPU Dkt. No. GE15040402 at p. 4, para. 9. An update of these numbers was not provided after the amended petition in

MLUL matter was filed on June 5, 2015 with a change in the route. Therefore, the updated number of dwellings within 100 feet of the Project is currently unknown but subject to further discovery.

Rate Counsel acknowledges the limited scope of this proceeding, but believes that if the discovery currently being conducted shows that factual issues exist regarding matters within that limited scope, there must be some process for resolving those issues or the discovery process is meaningless. A record must be created to form the basis for any Board decision as to whether the regulatory requirements have been met. If, for example, the Board rejects the petition on the grounds that it fails to minimize the residences within 100 feet, the Company would be entitled to an explanation for how the Board reached that conclusion and an opportunity to rebut any evidence on which the Board relied. A record must therefore be created to support the Board's decision. Thus, Rate Counsel asks for clarification that it is not precluded from raising issues that may arise as a result of discovery and its participation in the N.J.A.C. 14:7-1.4 proceeding, and that the Board will conduct a process consistent with due process to resolve any such issues, and create a record to support any decision it reaches.

With respect to the process to be followed, Rate Counsel notes that due process is a flexible concept that calls for procedural protections as fairness requires. The amount of process that is due varies based on the circumstances of each case, taking into account the interest of those affected. See Matthews v. Eldridge, 424 U.S. 319, 334-335 (1976). An opportunity to be heard is an essential component of fundamental due process. Mettinger v. Globe Slicing Mach. Co., 153 N.J. 371, 389 (1998). To satisfy the requirements of procedural due process a party must, at a minimum, be provided with

adequate notice, a chance to know the opposing evidence, and to present evidence and argument in response. High Horizons Dev. Co. v. Dep't of Transp., 120 N.J. 40, 53 (1990). See also, In re Amico Tunnel Carwash, 371 N.J. Super. 199, 215 (App. Div. 2004) (finding on remand that appellants should be afforded an opportunity to review and comment upon any evidence or recommendations the agency may consider in reaching its decision.)

In the past, the Board has referenced the following standards to determine whether a pipeline should be approved pursuant to N.J.A.C. 14:7-1.4:

- 1) The construction and installation of the Proposed Pipeline is necessary and is in the public interest;
- 2) The Board is satisfied that the proposed construction cannot be reasonably avoided;
- 3) The Board has not received any objections from persons whose homes or business establishments are located within 100 feet of the Proposed Pipeline; and
- 4) The standards that Petitioner will use in the design, construction and testing of the Proposed Pipeline will comply with all applicable State and Federal Codes, and inspections of the pipelines will be performed by personnel of the Board's Bureau of Pipeline Safety.

I/M/O The Petition And Report Of New Jersey Natural Gas Company For Authorization And Approval Of The Installation Of A Transmission Pipeline Pursuant To N.J.A.C. 14:7-1.4, BPU Dkt. No. GE03070515 (December 18, 2003) at p. 2. Any procedure employed by the Board in this case should address each of these standards, especially given that at the public hearings for these matters, many objections were voiced regarding homes and businesses within 100 feet and alternate routes were recommended to minimize the number of dwellings within 100 feet of the pipeline.¹

¹ See Transcripts of the July 28, 2015 Public Hearings for In the Matter of the Petition of New Jersey Natural Gas Company for Approval and Authorization to Construct and Operate the Southern Reliability Link Pursuant to N.J.A.C. 14:7-1.4, BPU Dkt. No. GE15040402 and In the Matter of the Petition of New

A statement of the reasons for an agency's action is another minimum requirement of due process. As Rate Counsel's involvement is aimed at creating a record upon which the agency may base a decision, its role is constitutionally related. "The orderly functioning of the process of review requires that the grounds upon which the administrative agency acted be 'clearly disclosed and adequately sustained.'" Plainfield-Union Water v. Mountainside, 11 N.J. 382,396 (1953) (quoting Sec. and Exch. Comm'n v. Chenery Corp. 318 U.S. 80, 63 S. Ct. 454, 87 L. Ed. 626 (1943)). Similarly, it is well-established that, at a minimum, an agency's decision must be based on "sufficient credible evidence present in the record." Close v. Kordulak Bros., 44 N.J. 589, 599 (1965).

Rate Counsel also notes that the determination that the Government Entities were not entitled to intervention is based on a misreading of the legislative history. The Township of Chesterfield argued that N.J.S.A. 48:2-32.2(a) permits its intervention which states in pertinent part:

Every municipality may intervene alone or jointly with another municipality in any hearing or investigation held by the board which involves public utility rates, fares or charges, service or facilities, affecting the municipality or municipalities or the public within the municipality or municipalities...

Additionally section (b) of N.J.S.A. 48:2-32.2 provides, "The governing body of any county shall have all the rights of intervention...which are conferred upon municipalities."

The Board argued that the Government Entities incorrectly relied upon N.J.S.A. 48:2-32.2 since the legislative history of that statute makes clear that the “cited provision is intended to be limited to matters involving ‘rate adjustments, discontinuance, curtailment or abandonment of utility services, or the fixing of standards for measuring the quality and quantity of utility products or services, and any hearing involving utility surcharge collections.’” Board Order, p. 6, *quoting* Senate County and Municipal Government Committee Statement of Senate Bill No. 2040 at 1 (October 18, 1984).

The Board’s reading of the legislative history is incomplete and therefore incorrect since the Board’s Order omits the immediately preceding language in the legislative history which states that the 1984 amendments were intended to: “**a. Limit specific procedural requirements of the bill to hearings or investigations involving rate adjustments, discontinuance, curtailment or abandonment of utility services, or the fixing of standards for measuring the quality and quantity of utility products or services, and any hearing involving utility surcharge collections.**” Senate County and Municipal Government Committee Statement of Senate Bill No. 2040 at 1 (emphasis added). The procedural requirements referred to intended to change the requirements that utilities notify local governments only of the aforementioned types of hearings or investigations. Ibid. The 1984 amendments did not change the original language in sections (a) and (b) which outlines the types of hearings where local governments may intervene. Ibid.

Moreover, the Board’s Order should not have relied on legislative history alone since the intent expressed in the cited legislative history is codified at N.J.S.A. 48:2-32.2a under the 1984 amendments and states in pertinent part:

The specific notification procedures set forth in this amendatory and supplementary act shall apply to any hearing or investigatory function involving: a. Any adjustment of public utility rates....b....discontinuance, curtailment or abandonment of any essential public service; c. The fixing of standards for the measurement of a public utility product or service....d....surcharge collections....(emphasis added).

Thus, the statute itself clarifies that the limitation to certain types of cases was only intended to apply to specific notification procedures in the statute, not the intervention procedures. In this case, NJNG proposes to increase its facilities and service with the construction of the Southern Reliability Link pipeline. This proposal fits squarely within the parameters of N.J.S.A. 48:2-32.2(a) which allows local government to intervene in “any hearing or investigation...which involves public utility service or facilities”² which affect the municipality or county and its residents.

In sum, Rate Counsel is concerned with the blanket designation of the pipeline safety proceedings as “uncontested.” As a statutory intervener before all proceedings at the Board, Rate Counsel’s mission is to protect the utility ratepayers and help create a record before the agency. In this particular proceeding, if the discovery served by Rate Counsel yields a factual issue, there must be some mechanism to have it addressed. Otherwise, this proceeding, and the work being done by the parties to create a record to support any decision by the Board, will be meaningless. Rate Counsel therefore asks for clarification.

² See N.J.S.A. 58:1B-8 which includes utility pipes within the definition of “public utility facilities” in the eminent domain context.

POINT II

THE TWO PETITIONS ADDRESSING THE SOUTHERN RELIABILITY LINE SHOULD BE CONSOLIDATED.

The New Jersey Supreme Court has recognized there are important goals to be “achieved from the prudent and selective application in administrative proceedings of such doctrines as . . . the single controversy rule.” Hackensack v. Winner, 82 N.J. 1, 31 (1980), cited with approval in Sheeran v. Progressive Life Insurance Co., 182 N.J. Super. 237, 251 (App. Div. 1981). Similarly, the New Jersey Court rules provide that when actions involving a “common question of law or fact arising out of the same transaction or series of transactions are pending in the Superior Court, the Court on a party’s or its own motion may order the actions consolidated.” N.J.C.R. 4:38-1(a).³ Similarly, the Board’s procedural regulations at N.J.A.C. 14:1-5.3(a) permit a petitioner to “join in a single petition more than one independent or alternative request for relief...,” and provides the Board discretion to “sever matters so joined for hearing and determination or take such other action as may be in the public interest.”

While the Company has filed two separate petitions, they both concern the same pipeline with the same route. Both are proceeding simultaneously before the Board. Both have requested expeditious approval. Proceeding in two separate dockets creates confusion and unnecessary additional procedures. At the May 19, 2015 BPU Agenda meeting, a Deputy Attorney General described the MLUL proceeding as a “multi-jurisdictional project [where] the utility has the option of either going for approvals or waivers of zoning from each of the municipalities where

³ While the Court Rules are not binding in administrative proceedings, they are often used as a guide where specific administrative rules do not provide a clear answer to a procedural question. N.J.A.C. 1:1-1.3(a).

it will be moving the line or come to the Board and bring everyone together in a single proceeding which is what they have chosen.” T4-L23 to T5-L3.

The N.J.A.C. 14:7-1.4 construction petition was described by the same Deputy Attorney General as involving a “related but distinct issue based on reliability and security. If the line passes within 100 feet of an occupied or humanly habitable edifice, staff – a petition has to be filed with the Board to be reviewed by the Reliability and Security staff to determine ways to minimize any exposure or any kind of incident to those dwellings. That is all that petition looks at.” T5-L9 to L18.

In previous cases where new intrastate pipelines have been built, the utilities have traditionally proceeded with cases sequentially to address all issues. Prior reported cases were generally heard first under the N.J.A.C.14:7-1.4 provision, and many of them garnered little opposition.⁴ In 2013, South Jersey Gas (“SJG”) proposed a new 22 mile 24-inch pipeline through three municipalities in two counties. In that case, unlike this one, “no members of the public voiced opposition to the proposed pipeline alignment” at the public hearings. In the Matter of the Petition of South Jersey Gas Company for Authorization to Construct a 24-Inch Pipeline through Maurice River Township in Cumberland County, City of Estell Manor in Atlantic County and Upper Township in Cape May County, New Jersey, page 4, BPU Dkt. No. GO13030202 (June 21, 2013). Although the N.J.A.C. 14:7-1.4 proceeding is concluded in that case, the MLUL

⁴ In a July 8, 2015 letter to the Board, the Company explained its opposition to the instant Intervention Motions from the Governmental Entities by stating the pipeline safety proceeding is an uncontested case. The Company cited no authority other than a statement from a Deputy Attorney General that these filings have “traditionally” been considered uncontested. As noted above, simply because some previous applications have not been contested does not require that all similar petitions are deemed uncontested when issues of fact do arise.

proceeding is still pending before the Board. In the Matter of the Petition of South Jersey Gas Company for a Determination pursuant to the provisions of N.J.S.A. 40:55D-19, BPU Docket No. GO13111049.

In 2015, SJG sought to modify the Board's 2013 approval by moving the regulator station and agreeing not to connect a customer within the Forest Area of the Pinelands Comprehensive Management Plan unless ordered to do so by the Board. At the public hearing for that proceeding, supporters and detractors both spoke. The Board also received over 200 written comments expressing opposition to the pipeline. In the Matter of the Petition of South Jersey Gas Company for Authorization to Construct a 24-Inch Pipeline through Maurice River Township in Cumberland County, City of Estell Manor in Atlantic County and Upper Township in Cape May County, New Jersey, BPU Dkt. No. GO13030202 (July 23, 2015) at p. 5. Again, that matter proceeded pursuant to N.J.A.C. 14:7-1.4 while the N.J.S.A. 40:55D-19 proceeding remains pending.

Other reported pipeline safety cases also proceeded under N.J.A.C. 14:7-1.4 first. None had reported opposition, according to the Board orders. In two such cases, both pipelines were replacing or located alongside existing pipe and neither case generated opposition. In the Matter of Petition of New Jersey Natural Gas Company for Authorization and Approval for Construction of a Proposed Pipeline in the Township of Hazlet, Holmdel, and Middletown Pursuant to N.J.A.C. 14:7-1.4 et seq., BPU Docket No. GO11080478 (November 9, 2011) and In the Matter of the Petition and Report of New Jersey Natural Gas Company for Authorization and Approval of the Installation of a Transmission Pipeline Pursuant to N.J.A.C. 14:7-1.4, BPU Docket No. GE03070515.

Thus, the procedural process in the instant matters is unusual, in that both matters are proceeding simultaneously and public opposition is present.

Accordingly, Rate Counsel submits that both dockets should be consolidated in order to avoid confusion about which issues are to be addressed in which proceeding. Such confusion is already evident. For example, the MLUL proceeding determines the route of the proposed pipeline but the pipeline construction proceeding also looks at the route to determine whether it appropriately minimizes the impact on habitable dwellings. If an issue arises as to whether the route does minimize the impact on dwellings or public safety it is unclear where that issue will be resolved. In the Board's Order, it notes that the rejected intervenors will be able to raise their issues in the MLUL proceeding. If that is the case, then the entire controversy should be heard in a single matter. See Highland Lakes Country Club & Cmty. Ass'n v. Nicastro, 201 N.J. 123, 125 (2009). In the interest of avoiding confusion and promoting judicial economy, Rate Counsel therefore asks that the matters be consolidated.

Conclusion

For all the foregoing reasons, Rate Counsel respectfully requests that the Board grant our Motion for Reconsideration and Consolidation.

Respectfully submitted,

By: 
STEFANIE A. BRAND
DIRECTOR, DIVISION OF RATE COUNSEL

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In the Matter of the Petition of New
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In the Matter of the Petition of New
Jersey Natural Gas Company for a
Determination Concerning the
Southern Reliability Link Pursuant to
N.J.S.A. 40:55D-19 and N.J.S.A.
48:9-25.4
BPU Docket No.: GO15040403

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