



Agenda Date: 1/19/2011 /
1/25/2011
Agenda Item: 2K / LSA

STATE OF NEW JERSEY
Board of Public Utilities
Two Gateway Center, Suite 801
Newark, NJ 07102
www.nj.gov/bpu/

ENERGY

Richard R. Snopkowski,

)

ORDER DENYING REQUEST
FOR STAY

v.

Jersey Central Power & Light Company

)

DOCKET NO. EC10120919

Richard R. Snopkowski, Randolph, New Jersey, Petitioner, appearing *pro se*.

Michael J. Connolly, Esq., Morristown, New Jersey, on behalf of Jersey Central Power & Light Company.

BY THE BOARD:

This matter involves the proposed vegetation management by Jersey Central Power & Light ("JCP&L") around its Whippany-West Wharton 230 kv transmission line ("Whippany Line"). Through this Order, the Board examines an emergent request for a stay.

On December 8, 2010, Petitioner, Richard Snopkowski filed a Petition ("Petition") seeking an order requiring JCP&L to trim and not remove certain vegetation at his residence or in the alternative seeking a stay pending a determination of the size of the right-of-way. Respondent, JCP&L filed a verified answer on January 12, 2011 ("Answer"). In its Answer, JCP&L asserts that it is obligated to remove the trees pursuant to FAC-003-01 as required by the North American Reliability Corporation ("NERC") as the designee of the Federal Energy Regulatory Commission ("FERC"). JCP&L further asserts that the trees are incompatible with the right-of-way and therefore must be removed pursuant to the Board's Vegetation Management Rules at 14:5-9.1 et seq. Respondent further asserts that it has the right to remove the trees pursuant to an easement it holds on the subject property. Petitioner filed a Reply on January 13, 2011 ("Reply").

On January 13, 2011, a hearing was held before Commissioner Joseph Fiordaliso to ascertain information regarding a stay request pursuant to N.J.A.C. 14:1-8.7(d). At the hearing, Petitioner testified on his own behalf and Respondent presented 1 witness, Scott Wirs, the Regional Supervisor for Transmission Vegetation Management for First Energy Services and the Electric Utility Arborist (as that term is defined in the Board's rules at N.J.A.C. 14:5-9.2) on

behalf of JCP&L. At the conclusion of the hearing, the parties were invited to make any additional submissions by January 14, 2011. On January 17, 2011, Respondent submitted a letter report from Rick Close, a certified tree expert, of the Davey Tree Expert Company. Mr. Close provided two alternate recommendations for resolving the issues associated with the Disputed Tree. On January 21, 2011 JCP&L filed a response to Mr. Close's report. On January 24, 2011 Petitioner filed a reply to JCP&L's January 21, 2011 letter.

The sole issue before the Board is the proposed removal of one of the trees (a double-lead ash tree hereafter referred to as the "Disputed Tree") that Scott Wirs, JCP&L's Electric utility arborist identified as diseased and incompatible vegetation under the JCP&L's Vegetation Management Plan (capable of growing to a height that could jeopardize the integrity and reliability of the a transmission line) and can harm general public welfare.

While the Company deems all of the trees subject to this docket to be incompatible, it stated that the other trees did not pose an immediate threat to the Whippany Line and agreed to a stay of cutting pending resolution of the Petition. Subject to the Board's ruling, the Petition will be considered in the ordinary course.

This matter was first addressed by the Board at its January 19, 2011 agenda meeting. At that time, the Board was not aware of the January 17, 2011 letter submitted by Petitioner.¹ As noted above, Respondent was given an opportunity to respond to the January 17, 2011 letter and this matter was subsequently heard by the Board at its January 25, 2011 Board meeting.

The following facts were undisputed and acknowledged by all parties:

It is undisputed in the record that JCP&L holds an easement on a portion of petitioner's property that was granted to the Company's predecessor, the New Jersey Power & Light Company, by Petitioner's predecessor in interest, Elias Johnson and his wife, Augusta. The easement was dated February 10, 1927, and was subsequently recorded with the Clerk of the County of Morris. In addition to giving the Company the right to enter upon the property to "...erect, inspect, operate, replace, repair and perpetually maintain...poles and towers with necessary wires, cross arms, guy wires, push braces and other usual fixtures and appurtenances used or adapted for the transmission of electric current...", the easement continues, "[t]ogether also with the right to trim, cut and remove at any and all times such trees and underbrush as in the judgment of Grantee may interfere with or endanger said lines or any of their appurtenances when erected."

Additionally, the parties agree that the "Disputed Tree" is a double lead ash tree with V shaped crotch. One lead leans towards the Whippany Line and has a scar from the previous loss of a large branch or third lead by its base. The scar is at least 8 inches across and 6 feet tall. A picture of this tree is part of the record of this proceeding. It is further agreed that this tree is within the right-of-way and that pursuant to the Board's Vegetation Management Rules, the tree could be removed.

¹ The Board notes that Petitioner has not complied with the Board's filing rules in this matter, including serving a copy of any submission on all parties. This led to confusion regarding Petitioner's January 17, 2011 filing. Due in part to the emergent nature of this proceeding, the Board has allowed some leeway in accepting filings. The Board reminds all parties that they must comply with all substantive and procedural rules in this matter.

Position of the Parties

Petitioner

The Petitioner testified that the Disputed Tree lost a large branch at its base approximately 19 years ago. He testified that the tree has withstood numerous wind and snow storms within this period and is not in danger of falling or affecting the Whippany Line. Petitioner asserts that the tree is not in immediate danger of failing and that JCP&L can use alternate means to manage the Disputed Tree. Petitioner further asserts that if the tree is removed prior to a conclusion of the proceeding he will be irreparably harmed as the tree cannot be replanted.

Following the hearing before Commissioner Fiordaliso, Petitioner submitted a letter from Rick Close, the District Manager of the Davey Tree Expert Company. Mr. Close submitted information that he has 16 years of experience with the company. He further indicated that he has a Masters Degree in Forestry from Michigan State University, and is a Certified Arborist through the I.S.A. (#OH-579), and a New Jersey Certified Tree Expert (#555).² Mr. Davey concluded that (1) "the decayed lead does not appear to be in imminent risk of failure"; (2) "there exists a potential for included bark and decay to be present in and below the v-shaped crotch" (although no decay was indicated); (3) the "main trunk and buttress root show no sign of decay, cracking or deterioration"; (4) "significant callusing around the decay cavity indicates that the tree has good vigor and overall health"; and (5) the other lead shows no sign of defect. Therefore, Mr. Close recommends either pruning the tree and installing a steel cable to stabilize the decaying lead or removing the decaying lead only. Mr. Close indicates that his recommendations are the "best recommendations to keep the utility lines safe, yet allow you to be able to keep the tree as a part of the aesthetics of your property".

Finally in response to JCP&L's January 21, 2011 submission, Petitioner notes that Mr. Close does not recommend removal of the entire tree and provided Resistograph testing and analysis of the tree in support of this position.

JCP&L

JCP&L relied on the testimony of Mr. Scott J. Wirs, who is a Regional Supervisor for Transmission Vegetation Management for First Energy Services responsible for vegetation management for three First Energy utilities, including JCP&L, for transmission lines ranging from 69kV through 500 kV. Mr. Wirs has worked in utility vegetation management for 34 years. He has worked for various utilities across the country. He has worked for First Energy since 2007 and been their regional supervisor since 2008. He is responsible for bulk transmission line management on lines from 69kv to 500kv. He is also an ISA certified arborist and certified utility specialist. Mr. Wirs testified as an expert in utility vegetation management issues. He is an electric utility arborist as that term is defined in the Board's rules. Mr. Wirs identified that the tree in question is within the R-O-W and is an incompatible vegetation (is any vegetation that can reach a height that could affect conductors). He further testified that the said tree is 72 feet ash tree with a large wound and decay in its base and because of this decay

² For purposes of the stay request the Board has accepted the letter submission from Mr. Close as well as certain copies of his credentials. Pursuant to the rules, the same will have to be properly submitted in order to be considered at any future proceeding in this matter.

the tree cannot indefinitely support the height and weight of itself. In addition, since the Company had identified the tree as an imminent threat, not removing it could subject JCP&L to penalties imposed by the Board and NERC if service was interrupted because of vegetation located in the R-O-W.

Mr. Wirs also stated that Ash trees are a faster growing brittle hardwood species. He also stated that there was no way to tell how far the decay had advanced in the base and the decay was already compromising the root crown of the tree and "continued bark" which can result in the two leads not making an adequate junction and hiding additional decay. Because of the decay and the potential for this tree to fail at any time, Mr. Wirs expressed his professional opinion that the tree should be removed immediately. He stated that even if the tree was topped, the root structure would still be intact and the tree would actually grow faster to make up for the portion that had been removed, thus increasing the stress already on the tree. He also stated that if the tree affected the 230 kV transmission line, it could have serious implications for thousands of the Company's customers, as well as liability to NERC.

In response to Mr. Close's submission, Mr. Wirs asserts that on balance, Mr. Close agrees with his position. He further asserts that Mr. Wirs recommendations are an attempt to balance the reliability of the lines with Petitioner's desire to keep the tree, without considering JCP&L's rights under the easement, the incompatibility of the tree and JCP&L's obligations to the Board and NERC. Mr. Wirs further asserts that Mr. Close's recommendations are inconsistent with Integrated Vegetation Management.

DISCUSSION

A stay will only be granted for good cause pursuant to N.J.A.C. 14:1-8.7(d). The standard for motion for a stay requires the movant to make a showing of: (1) a likelihood of success on the merits, (2) irreparable injury to the movant absent a stay, (3) no substantial harm to other parties, and (4) no harm to the public interest. Crowe v. DeGioia, 90 N.J. 126, 132-34 (1982).

Petitioner has shown and JCP&L does not dispute that if the tree is removed, it cannot be replanted. Petitioner asserts that this represents an irreparable harm. On the other hand, JCP&L has demonstrated that harm to other parties and harm to the public interest could result if the Board issued a stay and the tree subsequently failed prior to a final decision in this matter. Mr. Wirs, in his testimony, repeatedly identified the Disputed Tree as an imminent threat and not removing it could subject JCP&L to penalties imposed by the Board and NERC but also result in serious implications for thousands of JCP&L customers because the 230 kV Whippany Line would be affected by this tree if it is to fall (which is just a matter of time given its diseased status).

While Petitioner presents testimony that trimming and bracing the tree or removing the decaying lead could ameliorate the risks identified by JCP&L, Petitioner's testimony continues to identify risks and dangers associated with the base and two leads of the Disputed Tree.

As mentioned above JCP&L has an easement right to enter upon the Petitioner's property. The record indicates that both parties agree that the language of the easement permits the Company to remove trees when it deems it so necessary. Petitioner also agrees that the tree in question is located within the area covered by the easement.

Under the Vegetation Management Rules, JCP&L is following the guidelines set up by the Board

to ensure the integrity of transmission lines. Vegetation Management Rules N.J.A.C. 14:5-9.1 et seq. The purpose and scope of Subchapter 9, as set out in N.J.A.C. 14:5-9.1, provides that all electric distribution companies (EDCs) shall follow the prescribed requirements contained therein with regard to "...managing vegetation in proximity to an energized conductor in order to ensure public safety and the efficient and reliable supply of electric power." (Emphasis added.)

The Board's vegetation management rules contain many specific requirements to be followed by an EDC to ensure the integrity of transmission lines including, but certainly not limited to:

Perform vegetation management on vegetation close enough to pose a threat to energized conductors at least every four years. N.J.A.C. 14:5-9.4(b).

If the EDC becomes aware of any vegetation close enough to its energized conductors to affect reliability or safety prior to the next required management activity, the EDC shall ensure that the necessary vegetation work will be performed. N.J.A.C. 14:5-9.4(c).

If the EDC determines that vegetation poses an immediate safety hazard, it shall not be bound by the notice requirements but shall, to the extent possible, make a reasonable effort to notify customers and property owners prior to performing the vegetation work. N.J.A.C. 14:5-9.4(d).

Vegetation management is performed in accordance with accepted standards and procedures. N.J.A.C. 14:5-9.5(a).

Where multiple standards would apply or conflict, the EDC's vegetation manager shall select the most appropriate method. N.J.A.C. 14:5-9.5(b).

Each EDC shall develop its own standards and guidelines consistent with Subchapter 9 which shall prioritize work based upon, in part, the extent of the potential for vegetation to interfere with an energized conductor, N.J.A.C. 14:5-9.5(c), the rate at which each vegetation species is likely to grow back, the potential movement of the conductor during various weather conditions and the utility's legal right to access the area. N.J.A.C. 14:5-9.5(f)1., 3., and 5.

At a minimum, an EDC shall meet the requirements for minimum clearance between a transmission line and the closest vegetation set forth in the North American Electric Reliability Corporation (NERC) FAC-0003. N.J.A.C. 14:5-9.6(b). Clearing under transmission lines shall be wide enough within the EDC's R-O-W so that no vegetation will grow or fall into the transmission lines. N.J.A.C. 14:5-9.6(e)1.

On the other hand, an EDC may leave trees and other woody vegetation within the R-O-W under certain conditions, including that an easement executed before January 1, 2007, expressly permits vegetation to be located within the R-O-W, and trees that are located within an inactive transmission corridor and at mature height will allow a space of more than 150 percent of the clearance requirements for an electrical path to ground as forth in the National Electric Safety Code (NESC). N.J.A.C. 14:5-9.6(f)1. and 3.

The Board's rules also provide that each EDC shall employ a vegetation manager who: (1) is an electric utility arborist who is to be given the authority and resources to administer all aspects

of the utility's vegetation management; program and (2) shall be responsible for compliance with the Board's rules. N.J.A.C. 14:5-9.3(d).

An "electric utility arborist" is defined as a person certified as a Utility Specialist by the International Society of Arboriculture and has also been certified as a Tree Expert by the New Jersey Department of Environmental Protection, Board of Tree Experts and as a Certified Arborist by the International Society of Arboriculture. N.J.A.C. 14:5-9.2.

There is no evidence in the record to conclude that JCP&L is not in compliance with the Board's vegetation management rules or the outside standards and requirements (NERC, NESC, etc.) that are adopted by reference therein. Additionally, JCP&L is separately required to comply with FAC-003-01 and is subject to NERC fines for failure to comply. Furthermore, because of the easement, JCP&L is within its rights to remove the disputed tree.

CONCLUSION

In reviewing these requirements and the stay standard under Crow, the Board HEREBY FINDS that the Petitioner has not satisfied the standard for a stay. Of particular note are the potential risks associated with the Disputed Tree in conjunction with the fact that Petitioner has failed to show that he is likely to succeed on the merits. Therefore, the Board HEREBY ORDERS that JCP&L can proceed with removing the Disputed Tree.


Additionally, pursuant to the agreement of the parties, the Board HEREBY IMPOSES a stay as to other cutting on Petitioner's property pending the conclusion of this matter. However, the consensual stay is HEREBY MODIFIED to clarify that it does not prevent JCP&L from taking emergent action it deems necessary to protect the reliability of the Whippany Line. If such emergent action is necessary, JCP&L shall immediately notify the Petitioner, Board Staff and the presiding officer or administrative law judge. This consensual stay may be modified by the presiding officer or administrative law judge as appropriate.

DATED: 1/25/11

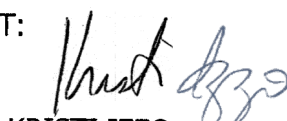
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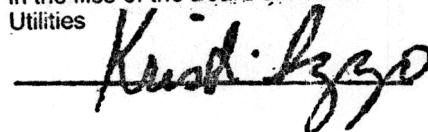
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I HEREBY CERTIFY that the within document is a true copy of the original in the files of the Board of Public Utilities



CAPTION

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