



Agenda Date: 1/27/16

Agenda Item: 2P

STATE OF NEW JERSEY
Board of Public Utilities
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Trenton, New Jersey 08625-0350
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ENERGY

IN THE MATTER OF THE PETITION OF SOUTH) ORDER DENYING PPA'S MOTION
JERSEY GAS COMPANY FOR A DETERMINATION) FOR A STAY
PURSUANT TO THE PROVISIONS OF N.J.S.A.)
40:55D-19) DOCKET NO. GO13111049

Parties of Record:

Ira Megdal, Esq., Cozen O'Connor, P.C., on behalf of South Jersey Gas Company
Stefanie A. Brand, Esq., Director, Division of Rate Counsel
Barbara L. Young, Municipal Clerk, Upper Township
Linda Costello, Acting Clerk, Maurice River Township
Fern A. Brown, Acting City Clerk, City of Estell Manor

BY THE BOARD:

Before the Board of Public Utilities ("Board") is a motion filed by Pinelands Preservation Alliance ("PPA") for a stay pending appeal of the Board's Decision and Order issued on December 16, 2015 ("December 16, 2015 Order").

BACKGROUND:

On November 4, 2013, SJG filed a petition ("Petition") with the Board pursuant to N.J.S.A. 40:55D-19, a section of the New Jersey Municipal Land Use Law ("MLUL"). In the Petition, SJG requested that the Board issue an order finding that the construction of an approximately twenty-one and sixth-tenths (21.6) miles, twenty-four (24) inch natural gas pipeline ("Project" or "Pipeline") with an alignment that runs through Maurice River Township in Cumberland County, City of Estell Manor in Atlantic County and Upper Township in Cape May County, New Jersey was reasonably necessary for the service, convenience or welfare of the public and, therefore, the zoning, site plan review and all other municipal land use ordinances and regulations promulgated under the authority of the MLUL shall not apply to the Project.

The December 16, 2015 Order discussed the procedural history of this matter in great detail. See In re the Petition of South Jersey Gas Company for a Determination Pursuant to the Provisions of N.J.S.A. 40:55D-19, Docket No. GO13111049 ("December 16, 2015 Order") at 2-16. Nevertheless, it is necessary to repeat some of the procedural history in order to provide context to the issue presently before the Board. By Order dated December 18, 2013 ("December 18, 2013 Order"), the Board retained this matter for hearing and designated

Commissioner Joseph L. Fiordaliso as the presiding officer with the authority to establish and modify schedules, decide all motions and otherwise control the conduct of this case, subject to Board ratification. Additionally, the December 18, 2013 Order established December 30, 2013 as the deadline to file motions to intervene in this matter. No motions to intervene were filed prior to the expiration of the deadline.

After notice in newspapers in general circulation within the Company's service territory, a public hearing was held on December 18, 2013, at the Upper Township Municipal Building in Petersburg, New Jersey. After similar notice, two (2) additional public hearings were held on October 19, 2015, at the Upper Township Municipal Court.

On October 9, 2015, PPA filed a motion to participate in this proceeding. On October 19, 2015, PPA also moved for the admission *pro hac vice* of Mariel R. Bronen, Esq., a member of the bar of the State of New York. By Order dated October 20, 2015 Commissioner Fiordaliso granted PPA's motions.

In the December 16, 2015 Order, the Board determined that, in accordance with N.J.S.A. 40:55D-19, the Project "is reasonably necessary for the service, convenience, or welfare of the public" to enable SJG to continue to provide safe, adequate, and reliable service to its customers; SJG should be able to construct and begin operation of the Project as proposed; and the local land use and zoning ordinances, and any other ordinance, rule or regulation promulgated under the auspices of the MLUL of the State of New Jersey shall not apply to the construction, installation and operation of the Project.

Accordingly, the Board ordered that neither N.J.S.A. 40:55D-1 et seq., nor any other government ordinances or regulations, permits or license requirements made under the authority of N.J.S.A. 40:55D-1 et seq. shall apply to the siting, installation, construction, or operation of the Project. On December 23, 2015, PPA filed an appeal of the December 16, 2015 Order and provided the Board with a copy of the Notice of Appeal, Civil Case Information Statement and Court Transcript Request filed with the New Jersey Superior Court, Appellate Division.

THE MOTION:

PPA

On December 24, 2015, PPA filed a Motion for a Stay Pending Resolution of Claims on Appeal ("Motion"), brief in support thereof, Certification and form of Order with the Board. PPA asserts that a stay of the December 16, 2015 Order is in the public interest and necessary to prevent imminent and irreparable harm to the Pinelands, PPA and its members during the pendency of the appeal. Specifically, PPA alleges that the construction of the Project will cause irreparable harm to the unique and natural resources of the Pinelands. PPA states that development in the Forest Area of the Pinelands is strictly limited to projects "intended to primarily serve the needs of the Pinelands" citing N.J.A.C. 7:50-5.23(b)(12). According to PPA, when a project such as the one at hand fails to meet this standard or there is reasonable doubt as to whether the standard is met, a stay ensuring that development does not go forward is necessary to prevent irreparable harm.

PPA also argues that the Board was arbitrary and capricious in granting the relief requested in the Petition because the Board unreasonably declined to consider evidence and arguments submitted by PPA. PPA further argues that BPU's failure to consider evidence and argument

submitted by PPA unreasonably disenfranchised not only the PPA and its members, but also a large and important segment of the public, effectively ensuring that the Project would be approved because only SJG's submissions were given any weight. PPA states that most of the documents it submitted following the evidentiary hearing contained important arguments and analysis of the evidence submitted by SJG. Given its participant status, PPA asserts that these materials were entirely appropriate and should not have been ignored.

PPA further claims that the Board was arbitrary and capricious in approving a project that violates the Pinelands Comprehensive Management Plan ("CMP"). PPA states that the Board cannot approve development that violates the CMP and that the MLUL does not allow the Board to waive CMP compliance or Pinelands laws. It argues that the New Jersey Pinelands Commission ("Pinelands Commission") and SJG have both recognized that the Project does not primarily serve the needs of the Pinelands. PPA contends that independent analysis likewise demonstrates that the Pipeline is not intended to primarily serve the needs of the Pinelands. It states that the Pinelands Commission has previously found that the Pipeline violates the CMP, and the amended application has not cured the Project's inconsistency with applicable law. Moreover, PPA argues that neither the Certificate of Filing ("COF") issued by the Pinelands Commission, nor or the letter issued by the Executive Director of the Pinelands Commission opining on the Project's compliance with the CMP, constitute a formal finding of compliance with the CMP.

In addition, PPA contends that the Pipeline does not comply with the CMP for independent reasons, including that the repowering of the B.L. England power plant ("B.L. England") would not primarily serve the needs of the Pinelands, that the Pipeline will have a broader use than repowering B.L. England and that the Project is designed to increase reliability service to SJG's existing customers and not the needs of the Pinelands.

Finally, PPA asserts that the Board was arbitrary and capricious in finding that the Pipeline is reasonably necessary for the service, convenience or welfare of the public. PPA states that, since the Pipeline violates the Pinelands CMP, it cannot be consistent with the public welfare, and restoring B.L. England to full-time operation is not reasonably necessary. PPA also alleges that the Project poses serious threats to the natural resources of the Pinelands, which should be measured against any supposed benefit of the Project and alternative routes exist that would ease the burden on the natural resources.

PPA reiterates that the public interest and a balance of the equities favor granting a stay, and there is a strong public interest in upholding the law and protecting the environment for the benefit of human health and welfare. According to PPA, the potential harm to the Pinelands and the cost of non-compliance with New Jersey law far outweigh the potential impact of a stay. Furthermore, PPA asserts that the start of the construction before the appeal has the potential of harming ratepayers because the Company may incur costs which it will inevitably seek to require ratepayers to cover even if the project is determined to be unlawful and work subsequently ceases.

SJG Opposition

On December 29, 2015, SJG requested an extension to file its responsive submission by January 11, 2016. By letter dated December 29, 2015, the Board Secretary, Irene Kim Asbury, advised SJG that its extension had been granted. Accordingly, SJG filed its Brief in Opposition to the Motion to Stay ("Opposition") on January 11, 2016. In its Opposition, SJG argues that the issuance of a stay is an extraordinary remedy, and PPA has failed to recite facts or present

argument in its moving papers that meet the legal requirements entitling it to the relief requested. SJG states that PPA relies upon Crowe v. DeGioia, 90 N.J. 126 (1982), in support of its request for a stay. In order to prevail pursuant to Crowe, a movant must establish that it has a "settled legal right supporting its claim." Since PPA's brief sets forth no such settled legal right, SJG contends that PPA's request must fail.

SJG also claims that the public interest does not demand that a stay be granted. According to SJG, a stay could potentially mean that B.L. England¹ would not be able to operate and would potentially put more than 141,000 customers at risk of loss of natural gas service. SJG also states that as the Board has found, the operation of B.L. England will effectuate the goals of this State's Energy Master Plan and that the Board also found, upon the evidence of record, that there is a need for electric capacity in the area of B.L. England, which a stay would only delay.

Moreover, SJG gas asserts that the benefit of any relief to the PPA from the granting of the stay is clearly outweighed by any harm to the SJG customers and those in need of electric service. Essentially, PPA is alleging environmental harm. The Board considered PPA's comments on environmental harm, and concluded that the route chosen by the Company is the most environmentally advantageous route. In light of these circumstances, SJG argues that irreparable harm will result if the stay is granted.

SJG also argues in its Opposition that, as a participant, PPA lacks standing to appeal the Board's decision and its motion should be denied. PPA was granted the limited right to be heard on the issues it presented by virtue of filing its brief, but was never granted direct involvement in the proceeding. The Company cites to In re Bell Atlantic Corp., Docket No. TM98101125, 1999 WL 641828 (Order dated June 21, 1999), for the proposition that participant status affords an interested party any opportunity to be heard on issues it deems important through the filings of briefs, but does not allow direct involvement in the proceeding. SJG contends that, to allow the PPA to obtain a stay and "shape the course of these proceedings" would not only be inappropriate, but beyond the limitations afforded to a participant in an administrative proceeding.

SJG also cites to In re the Certificate of Williams, BOE Docket No. 241, Agency Docket No. EDE 3889-94, 1995 WL 748414, 95 N.J.A.R.2d (EDE) 11 (1995), wherein the New Jersey State Board of Education ("Board of Education") denied a participant's motion for leave to appeal a stay granted by the Board of Examiners. The Board of Education found that a participant did not have standing to appeal the action taken in light of its limited participant status.

SJG further argues that the December 16, 2015 Order is well-reasoned, adequately sustained, in accordance with the law and supported by substantial evidence in the record. According to SJG, it meets the standards which would be applied by a reviewing court, since the Board applied the standards established in In re Public Service Electric & Gas Company, 35 N.J. 358, 377 (1961), and correctly concluded that the Project was needed. SJG contends that the Board correctly concluded that SJG selected the most appropriate route the estimated cost of the Project is reasonable.

¹ SJG is contractually required to provide natural gas to B.L. England, a Pinelands business, 95% of the time.

In addition, SJG alleges that the issuance of the Certificate of Filing ("COF") by the New Jersey Pinelands Commission ("Pinelands Commission") staff, the issuance of the Executive Director's December 14, 2015 letter to the Board and the Board reliance thereon are wholly in accord with the Pinelands Protection Act and the Comprehensive Management Plan ("CMP"), as endorsed by the New Jersey Supreme Court in Application of Madin/Lord Land Dev. Int'l for Pinelands Dev. Approval, 103 N.J. 689, 695 (1986). SJG states that any argument by the PPA that the Board, by issuing the December 16, 2015 Order, has somehow circumvented or violated the CMP is incorrect. Accordingly, the Board should determine that the issuance of the COF and the Executive Director's December 14, 2015 letter to the Board and the Board's reliance thereon fulfilled the requirements of the CMP and New Jersey law.

Finally, SJG argues that the Board acted in accordance with the law, by not making an independent determination of compliance with the CMP. SJG argued that the Board lacked jurisdiction to make such a finding, and the argument advanced by PPA that the Board erred in failing to make such an independent finding is erroneous. They further argue that SJG's Petition, filed with the Board in this proceeding was made in accordance with the Board's authority set forth in the MLUL, which requires the Board to determine whether the Project is necessary for the service, convenience or welfare of the public. Moreover, SJG states that the Board properly considered the submissions made by PPA as public comments, rather than evidence.

PPA Reply

On January 19, 2016, PPA filed a reply brief ("Reply") in response to SJG's opposition to the Motion. PPA argues that SJG incorrectly claims that PPA lacks standing to pursue this motion because it is a participant, rather than a party or intervenor, in the underlying action. However, PPA states that its standing in this matter depends on its right to appeal the Order, not its status as a participant, citing N.J. Ct. R. 2:9-7. As a nonprofit organization dedicated to the protection of the Pinelands, PPA reiterates that it and its members have a significant interest in the outcome of the appeal. Thus, PPA asserts that it has standing to appeal the Order and thus standing to seek a stay pending resolution of its claims on appeal.

PPA also argues that it has satisfied the standard for obtaining a stay of the Order pending appeal. In support of this allegation, PPA states that the construction will commence absent equitable relief, leading to irreparable environmental harm. It states that the Board was arbitrary and capricious in approving a project for which the Pinelands Commission has not issued an approval under the CMP and which violates the CMP. PPA emphasizes that, given the history of the Pipeline, including the Pinelands Commission's prior finding of non-compliance, its vote not to approve the Memorandum of Agreement and the outpouring of criticism from the public regarding the Pipeline's non-compliance with the CMP, it is especially important that the Pinelands Commission fulfill its "ultimate responsibility for implementing and enforcing the provisions of the Pinelands Protection Act and the [CMP]" by holding a public hearing and putting the issue of the Proposed Pipeline's compliance with the CMP to a vote, citing N.J.A.C. 7:50-1.11. Until it does, the Board does not have the authority to approve the Pipeline Project, according to PPA.

PPA further asserts that it is likely to succeed on the merits of its appeal of the Order because the Board's finding that the Pipeline is reasonably necessary for the service, convenience or welfare of the public is not supported by the record. The Board, according to PPA unreasonably discounted evidence and argument submitted by PPA and, since the Pipeline violates the CMP, it cannot be consistent with the public welfare. Furthermore, PPA asserts

that, even if the Project was not consistent with New Jersey law, it nor the restoration of B.L. England is reasonably necessary.

Finally, PPA claims that the harm caused to the public interest by denying the stay outweighs the harm that a grant of the stay will cause to SJG and its customers and, accordingly, the balance of equities strongly favors granting the stay.

DISCUSSION AND FINDINGS:

The Board has carefully considered PPA's Motion, SJG's Opposition, and PPA's Reply. PPA seeks injunctive relief in the form of a stay of the Board's December 16, 2015 Order. In considering PPA's Motion, the Board is mindful that a stay pending appeal is an extraordinary equitable remedy which "will be granted only for good cause shown." N.J.A.C. 14:1-8.7(d). The criteria for reviewing an application for emergency relief pursuant to N.J.A.C. 1 :1-12.6 are the same as those which apply to injunctive relief and are well settled. The moving party must demonstrate the following:

- (1) The movant will suffer immediate and irreparable harm if the emergency relief is not granted;
- (2) The legal right underlying the movant's claim is well-settled;
- (3) There is a reasonable probability that the moving party will succeed on the merits; and
- (4) The balance of the equities in granting or denying relief weighs in the movant's favor.

See generally, Crowe v. DeGioia, 90 N.J. 126, 132-34 (1982); McKenzie v. Corzine, 396 N.J. Super. 405, 413 (App. Div. 2007). In addition, the factors must be clearly and convincingly demonstrated. Waste Management of New Jersey v. Union County Utilities Authority, 399 N.J. Super. 508, 520 (App. Div. 2008); see also, Brown v. City of Paterson, 424 N.J. Super. 176, 183 (App.Div.2012).

A stay is not a matter of right, even if irreparable harm may otherwise result. Yakus v. United States, 321 U.S. 414 (1944). Rather, it is an exercise of sound judicial discretion; the propriety of its issue is dependent upon the entire circumstances of a particular case, and "consideration of justice, equity and morality." Virginia Railway Company v. United States, 272 U.S. 658, 672-73 (1926); Coskey's T.V. & Radio Sales, 253 N.J. Super. 639 (quoting Zoning Bd. of Adj., 198 N.J. Super. at 379).

Because a stay is the exception rather than the rule, GTE Corp. v. Williams, 731 F.2d 676, 678 (10th Cir. 1984), the party seeking such relief must clearly carry the burden of persuasion as to all of the prerequisites. United States v. Lambert, 695 F.2d 536, 539 (11th Cir. 1983). Further, mere monetary loss alone does not constitute irreparable harm. Morton v. Beyers, 822 F.2d 364, 372 (3d Cir. 1987).

One (1) of the requirements for a temporary stay is that a movant must make a preliminary showing of "a reasonable probability of ultimate success on the merits." Crowe, supra, 90 N.J. at 133. Here, the PPA has failed to make that showing. Rather, PPA's Motion is largely a restatement of substantive arguments concerning the Pipeline's failure to comply with the CMP that PPA previously addressed in its post-hearing brief, and which the Board addressed in great detail in the December 16, 2015 Order. To the extent that PPA raises the same arguments,

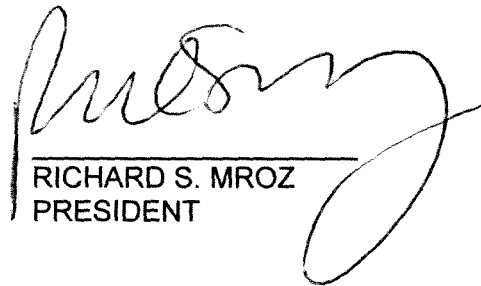
albeit restated in different terms, the Board notes its careful analysis in its Order and will not modify its decision. The Board declines to find that its determinations in the Order of December 16, 2015 were arbitrary or capricious. Further, because PPA has failed to meet one (1) of the four (4) prongs to obtain the extraordinary relief of a stay, the Board does not address the other prongs.

After carefully considering PPA's Motion, SJG Opposition and PPA's Reply, the Board **HEREBY FINDS** that PPA has not met its burden of proving the likelihood of success on the merits, one of the prerequisites for a motion for a stay. Therefore, the Board **HEREBY DENIES** PPA's Motion for a stay.

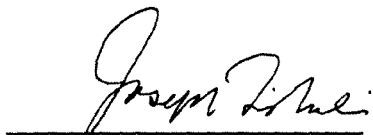
This Order shall be effective on February 6, 2016.

DATED: 1/28/16

BOARD OF PUBLIC UTILITIES
BY:



RICHARD S. MROZ
PRESIDENT




JOSEPH L. FIORDALISO
COMMISSIONER



MARY-ANNA HOLDEN
COMMISSIONER



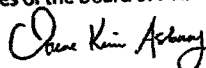
DIANNE SOLOMON
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UPENDRA J. CHIVUKULA
COMMISSIONER

ATTEST: 
IRENE KIM ASBURY
SECRETARY

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



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.
DOCKET NO. GO13111049

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