



Agenda Date: 9/22/17
Agenda Item: 2S

STATE OF NEW JERSEY
Board of Public Utilities
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ENERGY

IN THE MATTER OF THE PETITION OF JERSEY)	ORDER DENYING JCP&L'S
CENTRAL POWER & LIGHT COMPANY PURSUANT)	REQUEST FOR
TO <u>N.J.S.A.</u> 40:55D-19 FOR A DETERMINATION THAT)	INTERLOCUTORY REVIEW
THE MONMOUTH COUNTY RELIABILITY PROJECT IS)	
REASONABLY NECESSARY FOR THE SERVICE,)	BPU DOCKET NO. EO16080750
CONVENIENCE OR WELFARE OF THE PUBLIC)	OAL DOCKET NO. PUC 12098-16

Parties of Record:

Stefanie A. Brand, Esq., Director, New Jersey Division of Rate Counsel
Gregory Eisenstark, Esq., Windels Marx Lane & Mittendorf, L.L.P., for Jersey Central Power & Light Company, Petitioner
Murray E. Bevan, Esq., Bevan, Mosca & Giuditta, P.C., for the Townships of Middletown, Hazlet, Holmdel and Aberdeen
Peter D. Dickson, Esq., Potter and Dickson, for Residents Against Giant Electric
Michael D. Fitzgerald, Esq., Monmouth County Counsel, for County of Monmouth
Jeffrey R. Merlino, Esq., Sciarillo, Cornell, Merlino, McKeever & Osborne, L.L.P., for Middletown Township Board of Education

BY THE BOARD:

This matter is before the New Jersey Board of Public Utilities ("Board") on the September 7, 2017 request of Petitioner, Jersey Central Power and Light, ("JCP&L" or "Company") pursuant to N.J.A.C. 1:1-14.10, for interlocutory review of the August 30, 2017 Order on Evidence ("August 30, 2017 Order") issued by the Honorable Gail M. Cookson, Administrative Law Judge ("ALJ Cookson"), denying admission of portions of the redacted and confidential rejoinder reports ("Rejoinder Report") of Lawrence A. Hozempa, P.E. (marked for identification as JC-53 and JC-54) filed on June 8, 2017 by JCP&L. For the reasons noted herein, the Board denies JCP&L's request for interlocutory review of the August 30, 2017 Order.

BACKGROUND

On August 9, 2016, JCP&L, a New Jersey public utility, filed a petition with the Board pursuant to N.J.S.A. 40:55D-19, seeking a determination that a proposed 230 kilovolt ("kV") transmission line between New Jersey Transit's Aberdeen substation in Aberdeen, New Jersey, and JCP&L's Red Bank substation in Red Bank, New Jersey, as well as associated upgrades to JCP&L's Taylor Lane substation in Middletown, New Jersey ("Project") is reasonably necessary for the service, convenience or welfare of the public and therefore the Company is entitled to relief from complying with the zoning, site plan review, and other municipal land use ordinances or rules passed by municipalities along the proposed Project route under authority of Title 40, the New Jersey Municipal Land Use Law.

The Company further represents that PJM¹ has established a required in-service date of June 1, 2016 for the Project. After consultation between JCP&L and PJM, the projected achievable in-service date was established as June 1, 2019, which will allow sufficient time for JCP&L to receive all the necessary approvals for the Project and to complete its construction.

On August 10, 2016 the Board transmitted this matter as a contested case to the Office of Administrative Law ("OAL"), where it was assigned to ALJ Cookson. On September 21, 2016, ALJ Cookson entered a Case Management Order that established, *inter alia*, the schedule for discovery, the filing of pre-filed testimony, and the hearing dates. The Joint Municipal Group ("JMG") was also granted intervenor status by Order dated September 21, 2016. Resident's Against Giant Electric, Inc. ("RAGE") was granted intervenor status by Order dated October 5, 2016.

On January 13, 2017, ALJ Cookson denied JMG's motion to dismiss JCP&L's petition on the grounds that JCP&L lacked standing.² In addition, on February 8, 2017, ALJ Cookson denied JMG's motion to stay discovery pending the decision on its motion to dismiss. On February 16, 2017, JMG filed a request for interlocutory review of the denial of its motion to dismiss and stay the proceedings. On March 24, 2017, the Board denied JMG's request for interlocutory review.

Evidentiary hearings were held on April 4, 5, 6, 7, 10, 11, 12, 2017. At the April 12, 2017 hearing, RAGE presented sur-rebuttal testimony of Jeffrey Palermo, and the New Jersey Division of Rate Counsel ("Rate Counsel"), presented the sur-rebuttal testimony of its witness, Peter Lanzalotta. In light of certain analyses performed by both witnesses, ALJ Cookson ruled that JCP&L would be permitted to propound discovery with respect to the new information, respond to the testimony, and subsequently, cross examine these witnesses at a supplemental evidentiary hearing.

Thereafter, JCP&L filed the Rejoinder Report of its witness, Lawrence A. Hozempa, P.E. On June 22, 2017, Rate Counsel filed a motion to suppress the Rejoinder Report. On June 24, 2017, RAGE filed a motion to strike the Rejoinder Report. By correspondence dated June 26, 2017, JMG joined in the motions and filed a letter brief in support of the applications.

¹ PJM, the Pennsylvania-New Jersey-Maryland Interconnection, LLC, is the privately-held, limited liability corporation approved by the Federal Energy Regulation Commission as a Regional Transmission Organization that manages the regional, high-voltage electricity grid serving all or parts of thirteen (13) states, including New Jersey. PJM also operates the regional competitive wholesale electric market and manages the regional transmission planning process. N.J.S.A. 48:3-51.

² The January 13, 2017 Order was not served on the parties until February 8, 2017.

On July 6 and 7, 2017, ALJ Cookson presided over supplemental evidentiary hearings. At the hearings, JCP&L cross-examined Mr. Lanzalotta and Mr. Palermo. In addition, ALJ Cookson acknowledged that the motion to suppress Mr. Hozempa's Rejoinder Report was still pending, and thus indicated that the parties should present testimony with respect to the report and she would subsequently issue a written decision regarding the motion.

On August 30, 2017, ALJ Cookson issued an Order, finding that the Rejoinder Report (including appendices) and any corresponding oral examination or cross-examination "will be stricken from the record, except Sections 1.0 (but only through the third bullet point on Palermo), 2.1, 2.2, 3.1, 4.1 (first two (2) paragraphs only), 4.2 (only to include paragraphs above Table 4.2.1 and one (1) paragraph below Table 4.2.1, and remaining narrative below Table 4.2.2 but not that table), 4.3, 4.4, 4.5 (first paragraph only)." I/M/O Petition of JCP&L for Pursuant To N.J.S.A. 40:55D-19 for a Determination that the Monmouth County Reliability Project is Reasonably Necessary for the Service, Convenience or Welfare of the Public, OAL Docket No. PUC 12098-16, at 11 (August 30, 2017).

REQUEST FOR INTERLOCUTORY REVIEW:

JCP&L's Motion

On September 7, 2017, pursuant to N.J.A.C. 1:1-14.10, JCP&L filed a request for interlocutory review of the August 30, 2017 Order arguing: (1) the August 30, 2017 Order contains significant errors of both fact and law; (2) the errors, if left unreviewed would deprive it of a meaningful opportunity to respond to RAGE's new, alternative proposal; and (3) the August 30, 2017 Order would result in an incomplete evidentiary record, thus making the Board's task in issuing a Final Decision more difficult. Moreover, JCP&L claims that if the Board does not undertake interlocutory review now, the parties would have to file post-hearing briefs based on the rulings in the August 30, 2017 Order.

JCP&L also submits it has established that ALJ Cookson's ruling excluding significant portions of the Rejoinder Report, and Mr. Hozempa's related oral testimony cannot stand because the August 30, 2017 Order is replete with errors of fact and law and completely contrary to ALJ Cookson's oral ruling that allowed JCP&L to provide rejoinder testimony in response to the new alternative. As a result, JCP&L argues that the August 30, 2017 Order is arbitrary, capricious and unreasonable. For the foregoing reasons, under the applicable "interests of justice" standard, JCP&L urges the Board to exercise its discretion and, on interlocutory review, reverse ALJ Cookson's ruling and allow the entire Rejoinder Report and associated oral testimony into the record.

JMG's Opposition

On September 11, 2017, JMG filed opposition to JCP&L's request for interlocutory review of the August 30, 2017 Order. JMG first emphasizes that the Company does not contest ALJ Cookson's findings with respect to the Rejoinder Report and testimony. JMG then argues that JCP&L should not be granted interlocutory review for the following reasons: (1) JCP&L has failed to meet the stringent standard for interlocutory review; (2) ALJ Cookson correctly found that JCP&L acted improperly when it did not disclose its analysis and preparation of its Rejoinder Report, either upon its commencement or when RAGE sought an order requiring JCP&L to perform a power flow analysis and cost estimate of the alternative system solution

proposed by Mr. Palermo; (3) ALJ Cookson correctly found that JCP&L's cascade analysis of Mr. Palermo's proposed alternative is beyond the proper scope of the rejoinder report and untimely; (4) ALJ Cookson correctly excluded sections of the Rejoinder Report outside of the knowledge of Mr. Hozempa; and (5) ALJ Cookson correctly concluded that portions of the Rejoinder Report and testimony should have been offered as part of Mr. Hozempa's rebuttal testimony.

JMG argues the determinations made by ALJ Cookson should not be disturbed, and the Board should deny the Company's motion. JMG states that the Company will have an opportunity to argue this matter before the Board during the exceptions process following the issuance of ALJ Cookson's Initial Decision on the merits in this matter with the benefit of a full and complete record. Should the Board wish to revisit this ruling, JMG states it can do so at that point and require the parties to submit additional briefing and testimony.

Rate Counsel's Opposition

On September 12, 2017, Rate Counsel filed opposition to JCP&L's request for interlocutory review of the August 30, 2017 Order. Rate Counsel accepts ALJ Cookson's decision with respect to the portions of the Rejoinder Report allowed as evidential, and submits that it reflects a judicious analysis of the issues, evidence and law. Rate Counsel claims a review of the Order is not necessary by the Board at this time, as after a review of the entire record Rate Counsel believes the Board would reach the same decision with respect to the evidentiary ruling by ALJ Cookson regarding the Rejoinder Report.

Citing to N.J.A.C. 1:1-18.6(c), Rate Counsel states that to overturn the August 17, 2017 Order, the Board would be required to find that ALJ Cookson's decision was "arbitrary, capricious or unreasonable, or is not supported by sufficient, competent, and credible evidence in the record." On its face, the August 30, 2017 Order is both sound in its legal reasoning and factual support, indicating that Board review is unnecessary and duplicative to resolve the ultimate issue raised by the petition, according to Rate Counsel. Rate Counsel notes that ALJ Cookson in the August 30, 2017 Order parsed those portions of the Rejoinder Report responsive to the issues raised by the initial sur-rebuttal.

In conclusion, Rate Counsel argues that granting interlocutory review at this time will only serve to delay this matter and not aid the Board in understanding the issues to any further degree. It asserts that the Board, following any final decision by Judge Cookson, will be able to "reject or modify conclusions of law, interpretations of agency policy, or findings of fact" as set forth in N.J.A.C. 1:1-18.6. After the issuance of ALJ Cookson's Initial Decision, Rate Counsel states that the Board can appropriately review the issue. Therefore, Rate Counsel respectfully objects the Board granting review of the Judge's Order at this time. However, should the Board decide to accept review of the August 30, 2017 Order, Rate Counsel requests the opportunity to file an additional brief with respect to the issues raised.

RAGE Opposition

On September 13, 2017, RAGE filed opposition to JCP&L's request for interlocutory review of the August 30, 2017 Order. RAGE argues in favor of four (4) reasons outlined in the August 30, 2017 Order for ALJ Cookson's decision to exclude the Rejoinder Report. RAGE states all four (4) reasons are eminently correct, and anyone of them would be grounds for the decision. According to RAGE, the excluded portions of the report that are the product of deliberate tactical

decisions by JCP&L are: (1) disingenuous; (2) unreliable and untrustworthy hearsay; (3) beyond the proper scope of rejoinder testimony; and (4) a net opinion.

RAGE adds that it is not necessary for the Board to entertain this piecemeal motion. RAGE argues that interlocutory appeals are very rarely entertained in contested cases. Mr. Palermo's STATCOM alternative was presented in January 2017 in his pre-filed direct testimony, and when it was validated in the power flow study he presented in his sur-rebuttal testimony, it was not new information. The Company also fails to explain why the issue cannot be addressed by the Board if it's included in post-hearing briefs and exceptions to the Initial Decision. Accordingly, RAGE requests that the Board deny leave to appeal, or, in the alternative, summarily deny the appeal.

DISCUSSION AND FINDINGS:

As the Board has noted in previous Orders, an order or ruling of an ALJ may be reviewed on an interlocutory basis by an agency head at the request of a party. N.J.A.C. 1:1-14.10(a). Pursuant to N.J.A.C. 1:14-14.4(a), a rule of special applicability that supplements N.J.A.C. 1:1-14.10, the Board shall determine whether to accept the request and conduct an interlocutory review by the later of (i) ten (10) days after receiving the request for interlocutory review or (ii) the Board's next regularly scheduled open meeting after expiration of the ten (10) day period from receipt of the request for interlocutory review.

In addition, under N.J.A.C. 1:14-14.4(b), if the Board determines to conduct an interlocutory review, it shall issue a decision, order, or other disposition of the review within twenty (20) days of that determination. Finally, it should be noted that N.J.A.C. 1:1-14.10(i), in relevant part, provides that "any order or ruling reviewable interlocutorily is subject to review by the agency head after the judge renders the initial decision in the contested case, even if an application for interlocutory review: (1) was not made; (2) was made but the agency head declined to review the order or ruling; or (3) was made and not considered by the agency head within the established time frame."

The legal standard for accepting a matter for interlocutory review is stated in In re Uniform Administrative Procedure Rules, 90 N.J. 85 (1982). In that case, the New Jersey Supreme Court concluded that an agency has the right to review ALJ orders on an interlocutory basis "to determine whether they are reasonably likely to interfere with the decisional process or have a substantial effect upon the ultimate outcome of the proceeding." Id. at 97-98. The Court held that the agency head has broad discretion to determine which ALJ orders are subject to review on an interlocutory basis. However, the Court also noted that the power of the agency head to review ALJ orders on an interlocutory basis should be exercised sparingly. Id. at 100. In this regard, the Court observed:

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

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

[90 N.J. at 100].

The Court held that interlocutory review may be granted "only in the interest of justice or for good cause shown." Ibid. The Court further stated:

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

[Ibid.].

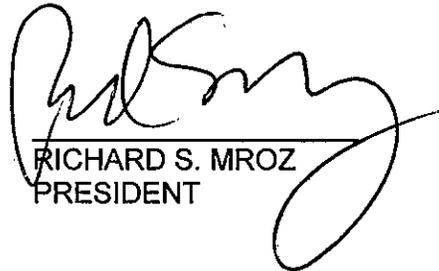
As indicated above, the decision to grant interlocutory review is committed to the sound discretion of the Board, and is to be exercised sparingly to avoid piecemeal adjudication. Having reviewed JCP&L's application and the opposition submitted by RAGE, JMG and Rate Counsel in response to the request, the Board is not persuaded that it is appropriate to grant interlocutory review. The Board deems it unnecessary to review the merits of this matter at this stage, and instead will review the proceeding in its entirety, following the filing of briefs, the issuance of ALJ Cookson's Initial Decision and any exceptions filed thereto. As the Board previously stated in its Order addressing JMG's request for interlocutory review, the Board reiterates that it is inefficient and not in the interest of judicial economy to conduct a piecemeal review of this matter prior to the rendering of a final decision. I/M/O Petition of JCP&L for Pursuant To N.J.S.A. 40:55D-19 for a Determination that the Monmouth County Reliability Project is Reasonably Necessary for the Service, Convenience or Welfare of the Public, OAL Docket No. PUC 12098-16, at 8 (March 24, 2017). Rather, the Board believes that the decision made by ALJ Cookson who, consistent with N.J.A.C. 1:1-14.6, has the power to develop the record and render an initial decision dispositive of the issues before the OAL, should remain undisturbed at this juncture. The parties will be afforded the opportunity to address the issue prior to the Board's issuance of a final decision. Likewise, the Board is free to revisit this matter, including the credibility of witnesses, and, if necessary, require the parties to further brief the issue and "reject or modify conclusions of law, interpretations of agency policy, or findings of fact" in ALJ Cookson's Initial Decision, pursuant to N.J.A.C. 1:1-18.6.

Accordingly, the Board **HEREBY DENIES** JCP&L's motion for interlocutory review of ALJ Cookson's August 30, 2017 Order.

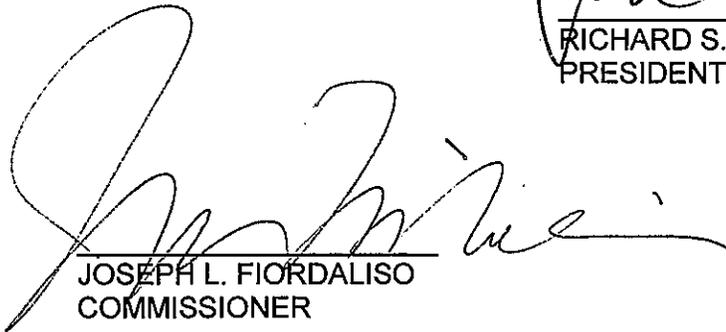
This Order shall become effective on October 1, 2017.

DATED: 9/22/17

BOARD OF PUBLIC UTILITIES
BY:



RICHARD S. MROZ
PRESIDENT



JOSEPH L. FIORDALISO
COMMISSIONER



MARY-ANNA HOLDEN
COMMISSIONER

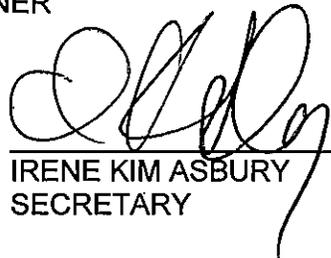


DIANNE SOLOMON
COMMISSIONER



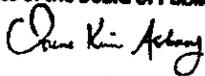
URENDRA J. CHIVUKULA
COMMISSIONER

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 JERSEY CENTRAL POWER & LIGHT COMPANY
PURSUANT TO N.J.S.A. 40:55D-19 FOR A DETERMINATION THAT THE MONMOUTH
COUNTY RELIABILITY PROJECT IS REASONABLY NECESSARY FOR THE SERVICE,
CONVENIENCE OR WELFARE OF THE PUBLIC

BPU DOCKET NO. EO16080750 & OAL DOCKET NO. PUC 12098-16

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