



October 14, 2014, by Plaintiffs/Petitioners Susan Minutella; Ronald Mavus and Linda Pompliano; Don Smith; Linda Seufert and Anthony Marcantonio; Joan Bechtle; Toni Albanese and James Albanese; Frank Delle Donne and AnneMarie Delle Donne; Lorraine Kosinski and Stanley Kosinski; Joseph Sacco and Davida Sacco; Durbin Don McDermott and Madeline McDermott; Sally Gillis and Bob Gillis; Irene Moyer; and Janice Diana and Wayne Diana (collectively, "Plaintiffs/Petitioners") against Jersey Central Power and Light ("JCP&L"); FirstEnergy Corporation ("FirstEnergy"); New Jersey Natural Gas Company ("NJNG"); New Jersey Resources Corporation ("NJR") and ABC Companies Nos. 1-10 ("Defendants/Respondents"), in the Ocean County Superior Court, Law Division, Docket No. OCN-L-2955-14 ("Minutella").

On October 27, 2014, Plaintiffs/Petitioners E.J. Harvey, Jr.; June Squillaro and Joseph Squillaro; Vincent D. Piperi; Christine O'Hagan and Michael O'Hagan; Joseph Keslo and Cathy Keslo; Marianne Jones; Kenneth Flowers and Cindy Flowers; Lily Hawryluk; Sandy Turner; Cheryl Lucky; and Dale Parisi filed a second complaint against Defendants/Respondents, in the Ocean County Superior Court, Law Division, Docket No. OCN-L-3256-14 ("Harvey").

On May 7, 2015, Plaintiff/Petitioners Michael Roudi and Lorraine Roudi; Theresa Niles; Emma Jane Decker; Eugene Durocher, Jr. and Mary Durocher; Patricia Krone; Betty Ann Fuller; and Thomas Reinhart and Susan Reinhart filed a complaint against Defendants/Respondents in the Ocean County Superior Court, Law Division, Docket No. OCN-L-1646-15 ("Roudi").

These matters have not been consolidated, but the allegations in the complaints are nearly identical. In all three actions, Plaintiffs/Petitioners are property owners and/or lessees in a neighborhood known as Camp Osborn located in Brick Township, New Jersey. Plaintiffs/Petitioners are seeking compensation for damages and destruction of their real and personal property by the fire or fires occurring on October 29, 2012 during Superstorm Sandy. Defendants/Respondents JCP&L and NJNG are electric and natural gas public utilities as defined within Title 48 of the New Jersey Statutes and provide electric and natural gas utility service to Camp Osborn. JCP&L is a subsidiary of FirstEnergy and NJNG is a subsidiary of NJR.

Specifically, Petitioners/Plaintiffs allege that the fire or fires and resulting damages and destruction were caused by the negligence, gross negligence, carelessness, and recklessness of Defendants/Respondents for the failure to de-energize electric lines and suspend the provision of natural gas services during Superstorm Sandy, despite advanced warnings. This failure of JCP&L to de-energize, according to the Plaintiffs/Petitioners, caused water from the storm surge to come into contact with a live electrical system, which resulted in short circuits in the electrical systems, resulting in fires. Plaintiffs/Petitioners also claim that the failure of NJNG to ensure that its natural gas did not escape and come into contact with sources of ignition contributed to the outbreak and extension of fires.

On January 12, 2015, NJNG filed a motion to dismiss the Harvey and Minutella complaints with prejudice in lieu of filing an answer, or in the alternative referring certain issues to the Board pursuant to the doctrine of primary jurisdiction. On January 26, 2015, JCP&L also filed a cross-motion to dismiss the complaints in the Minutella and Harvey matters, or alternatively requested that the matters be transferred to the Board. Plaintiffs/Petitioners in the Harvey and Minutella matters filed opposition to the motions to dismiss on February 19, 2015, and the Defendants/Respondents filed reply papers on or about March 9, 2015.

On March 30, 2015, the Honorable Robert A. Fall, J.S.C., Retired on Recall, denied the motions to dismiss, but granted the requests to refer the matters to the Board. Judge Fall found that "the

delivery of natural gas and electrical service to consumers is legislatively delegated to the BPU under a broad regulatory scheme” and, as such, referral of the complaints to the BPU was appropriate. See Minutella, et al. v. JCP&L, et al., OCN-L-2955 and Harvey, et al. v. JCP&L, et al., OCN-L-3256-14, decision at 33 (March 30, 2015). In referring the matters to the Board, Judge Fall specifically requested that Board determine “whether it was appropriate or necessary to suspend the delivery of electrical and natural gas service to the Camp Osborn and/or northern barrier peninsula of Ocean County in order to ensure the safety of consumers given proof and establishment of the circumstances outlined in plaintiffs’ complaints, and all related regulatory issues.” Ibid.

Following the issuance of Judge Fall’s decision, the Plaintiffs/Petitioners in this matter filed their complaint in Superior Court. See Roudi, et al. v. JCP&L, et al., OCN-L-1646-15 (Law Div. 2015). Defendants/Respondents renewed their applications to dismiss this matter with prejudice in lieu of filing an answer, or in the alternative referring certain issues to the Board pursuant to the doctrine of primary jurisdiction. On July 24, 2015, the Petitioners/Plaintiffs filed a letter brief in opposition to the motions to dismiss, and requested that their complaint be consolidated with the Minutella and Harvey matters. The Petitioners/Plaintiffs also requested that the Order entered in the Minutella and Harvey matters be entered in their case.

By Order dated July 27, 2015 (“July 27, 2015 Order”), Judge Fall once again denied the motions to dismiss, but granted the motions to refer the matters to the Board pursuant to the doctrine of primary jurisdiction. The July 27, 2015 Order further stayed the complaints filed in the Law Division pending a determination by the Board as to whether the Board intends to exercise jurisdiction as to factual determinations regarding any of the issues raised in the complaint.

By Order dated August 19, 2015 (“August 19, 2015 Order”), the Board accepted jurisdiction of the Minutella and Harvey matters. In re Minutella, et al. v. Jersey Central Power and Light Company, et al., BPU Docket No. EC15060657 and In re Harvey, et al. v. Jersey Central Power and Light Company, et al., BPU Docket No. EC15060658, (August 19, 2015). Thereafter, on October 15, 2015, the Board issued an Order (“October 15, 2015 Order”) regarding the Roudi complaint accepting primary jurisdiction. In re Roudi, et al. v. Jersey Central Power and Light Company, et al., BPU Docket No. EC15091094 (October 15, 2015). In both the August 19, 2015 and October 15, 2015 Orders, the Board found that it had the statutory authority as well as the expertise to consider whether NJNG and/or JCP&L failed to provide safe, adequate, and proper service under the circumstances then existing to the Plaintiffs/Petitioners in the underlying actions.

#### OAL Proceedings and the ID

On January 29, 2016, the matters were transmitted to the Office of Administrative Law (“OAL”) and assigned to Administrative Law Judge (“ALJ”) Irene Jones. On March 30, 2016, ALJ Jones conducted a status conference. On June 17, 2016, NJNG and JCP&L filed motions for summary decision pursuant to N.J.A.C. 1:1-12.5(b). On July 25, 2016, the Plaintiffs/Petitioners filed opposition to the motions for summary disposition. On August 12, 2016, JCP&L and NJNG filed their responses to the opposition submitted by the Plaintiffs/Petitioners. The ID summarizes the positions of the parties with regard to the motions for summary decision and, accordingly, the Board finds it unnecessary to repeat them herein.

The record in this matter was closed on October 12, 2016. On June 22, 2017, ALJ Jones issued the ID. In the ID, ALJ Jones determined that the following facts were not in dispute:

1. In October 2012 the named plaintiffs were all owners and/or lessees of real and personal property in Camp Osborn.
2. Camp Osborn was a neighborhood located on a barrier island, on the northern peninsula of Ocean County in the Township of Brick. At least one year prior to Superstorm Sandy, Camp Osborn was designated as being in a flood zone.
3. The respondent utilities, Jersey Central Power & Light Company and New Jersey Natural Gas Company, are public utilities franchised by the State of New Jersey, Board of Public Utilities, to provide electric and service gas to the public residing in their respective franchise service areas. First Energy Corporation is the parent company of JCP&L and a diversified energy corporation whose subsidiaries and affiliates are engaged in the generation, transmission, and distribution of electricity. New Jersey Resources Corporation is the parent company of NJNG and is not a public utility.
4. The utilities owned, controlled, and managed all electrical and gas systems, including power lines, utility poles, transformers, substations, gas lines and mains, and electrical panels, on or near Camp Osborn.
5. In particular, JCP&L supplied electrical service to Camp Osborn.
6. In particular, NJNG supplied gas service to Camp Osborn.
7. Superstorm Sandy was the deadliest and most destructive hurricane of the 2012 hurricane season, and the second-costliest hurricane in United States history. It was largest Atlantic hurricane on record, spanning some 1,100 miles and causing an estimated \$75 billion in damages and 233 lives in eight countries.
8. Plaintiffs contend that NJNG and JCP&L had actual notice that large portions of the New Jersey coastline, including the seaside peninsula on which Camp Osborn was located, were threatened by Superstorm Sandy with severe flooding, and that Camp Osborn and numerous neighborhoods along the New Jersey shore were in flood zones.
9. On October 26, 2012, the Friday before the storm, NJNG participated in a conference call with the BPU and other State agencies, as well as other gas and electric utilities. The purpose of the call was to: (1) establish procedures for communications with the BPU and other agencies during the storm; and (2) discuss each utility's storm preparations. NJNG advised the BPU as to the status and location of the repair trucks and personnel that would be available to respond to leak and service-interruption calls during the storm. (Lynch Cert., ¶ 2.)

10. On October 27, 2012, the Long Island Power Authority elected to de-energize Fire Island on October 29, 2009, following the completion of a mandatory evacuation of the Island. However, Fire Island was the only part of Long Island that was de-energized. (Turk Cert., Ex. B.)

11. On October 27, 2012, Governor Christie declared a state of emergency, Executive Order 104, in New Jersey and ordered the evacuation of the state's barrier islands.

12. On October 29, 2012, at approximately 6:00 p.m., JCP&L "proactively" shut down power to 25,000 customers on the barrier islands in Monmouth and Ocean counties. Substations were de-energized remotely before the high tide. (Turk Cert., Ex. C.)

13. Defendants engaged in several follow-up conference calls with the BPU and other State utilities and agencies before the storm hit. Defendants allege that there was no discussion during those calls about a preemptive suspension of gas and/or electric service by NJNG or any other utility. Rather, the discussion was about the path of the storm and the utilities' continued preparations for and in response to the storm. (Lynch Cert. ¶¶ 4, 5.)

14. It was impossible to predict with any degree of reliability where, and even if, Superstorm Sandy would hit along the New Jersey coast. (Wyckoff Cert., ¶ 7.)

15. Plaintiffs and all residents of Camp Osborn were ordered by the State of New Jersey to evacuate their homes, as weather conditions from Superstorm Sandy were likely to cause heavy flooding, power outages, and other conditions that imperiled public safety. (Marino Cert., Exs. A, B, C.)

16. Superstorm Sandy caused peak storm surges of more than four to eight feet in New Jersey, including in Camp Osborn. (Marino Cert., Exs. A, B, C.)

17. On October 29, 2012, the Brick Township Fire Department received a call at approximately 7:20 p.m. from a Mr. Domaratus reporting a fire and exploding transformers on Camp Osborn properties. The witness further reported observing a blizzard of sparks and smoke that was consuming the entire Camp Osborn complex.

18. The Brick Township fire report states that fire trucks attempted to cross the Mantoloking Bridge to access Camp Osborn. However, the bridge was impassable because of the extreme weather and the destruction of the bridge. Numerous attempts using different routes were also unsuccessful. (Turk Cert., Exs. A, B.)

19. On November 2, 2012, the fire chief, while responding to another call on the barrier island, observed that Camp Osborn was mostly destroyed. However, due to the "devastation," no detailed investigation could be conducted.

20. Due to the condition of the camp, the fire report concluded that the cause of the fire could not be determined. (Turk Cert., Ex. C.)

21. On November 30, 2012, Mr. Domaratus was interviewed by the Brick Fire Department and gave a statement.

22. A preemptive suspension of gas services would have involved numerous logistic and technical problems for NJNG. (Wyckoff Cert., ¶ 6.)

23. Preemptively suspending service would have required NJNG to cut service to a large geographic area at the north end of its territory in Old Bridge, Middletown, and Sandy Hook, extending south along the coast in Monmouth County and through the entirety of the seaside peninsula and Long Beach Island (to the southernmost point of NJNG's territory), and stretching inland through portions of Monmouth and Ocean counties. (Wyckoff Cert., Ex. A.)

24. A widespread suspension of service would have affected tens of thousands of NJNG customers, including hospitals, governmental services, traffic controls and bridge controls.

25. To shut-down the gas valves, 150 miles of NJNG distribution and associated service lines would have required depressurization to remove vast amounts of gas.

26. Depressurization could have required NJNG to cut access points in the distribution system and thereafter blow the gas out into the environment. Due to the volume of gas trapped in the lines, the procedure would have taken several hours.

27. Depressurizing the distribution lines could cause flood water to infiltrate the gas-distribution system.

28. Flood water, particularly salt water, in the system would have led to substantial internal corrosion, which would have resulted in an increased number of gas leaks in the distribution system. (Wyckoff Cert., ¶ 11.) If water had gotten into the distribution facilities, it would have taken much longer, and been far costlier, for NJNG to get its system back up and running. (Wyckoff Cert., ¶ 12.)

29. Restoration of gas service would have prolonged the outage because it would have required NJNG to make multiple visits to each customer's house to restore service. Customers

would have been without heat and hot water for a prolonged period.

30. Without electricity, traffic signals do not work, life-support systems do not work, water pumps do not function, and communication systems cease.

[Harvey ID at 6-11.]

In the ID, ALJ Jones determined that the issue of whether a duty of care was breached by JCP&L and NJNG is a question of law. She stated that the Defendants/Respondents' tariffs provided for a discretionary suspension of service when in their own judgment it was concluded that such a suspension was warranted. ALJ Jones noted that such a judgment was made by JCP&L when it made the decision to "proactively suspend services to some 25,000 customers on the barrier islands in Monmouth and Ocean counties." Id. At 23. Since the Defendants/Respondents knew that Camp Osborn was in a flood zone, ALJ Jones found that whether their decisions to maintain service were prudent is for the jury or the fact finder, not the Board, to determine. Id. at 23-24.

ALJ Jones concluded that the Board lacked jurisdiction over this matter, as it "does not involve a tariff or a public utility regulation requiring the Board's expertise, and that the matter properly belongs before Superior Court, which has exclusive jurisdiction over questions of negligence, liability and damages." Id. at 24. Accordingly, ALJ Jones denied the motions for summary decision and ordered that the matter be dismissed and returned to Superior Court for disposition. Ibid.

The Board received the ID on June 23, 2017. Within the statutory period, the Board requested an initial 45-day extension pursuant to N.J.S.A. 52:14B-10(c) and N.J.A.C. 1:1-18.8. On July 26, 2017, the Board authorized the President to execute the extension Order on its behalf, and the time-limit for the Board to render a Final Decision was extended to September 21, 2017. A second forty-five day extension was granted upon consent of the parties and, as such, the time limit for the Board to render a Final Decision was extended to November 5, 2017 by Order dated August 23, 2017.

### JCP&L Exceptions

On July 5, 2017, JCP&L filed exceptions ("JCP&L Exceptions") to the ID.<sup>2</sup> For purposes of its exceptions, JCP&L states that it accepts the statement of the case and the procedural history as set forth in the ID "with the following corrections, clarifications or additional important detail:"

1. On or about February 19, 2015, plaintiffs in Minutella and Harvey filed their opposition to the motions to dismiss filed by NJNG and JCP&L.<sup>3</sup>
2. On or about March 9, 2015, JCP&L [and NJNG] filed their separate replies to plaintiffs' opposition in Minutella and Harvey.<sup>4</sup>

<sup>2</sup> JCP&L filed one set of exceptions in response to the IDs issued in the Roudi, Minutella and Harvey matters.

<sup>3</sup> Footnote 3 of JCP&L's exceptions states that the ID indicates that this occurred February 15, 2015. JCP&L Exceptions at 7.

3. On or about March 30, 2015, an Order (the "March 30, 2015 Order") was issued by Judge Fall, referring Minutella and Harvey to the Board (as set forth in an Opinion on Motion dated March 30, 2015 (the "Opinion on Motion"), which is incorporated into the March 30, 2015 Order), for a determination of certain "factual issues," holding in relevant part that:

.. issues of the safe delivery of natural gas and electrical service to consumers is legislatively delegated to the BPU under a broad regulatory scheme. Moreover, inconsistent rulings from a court and an administrative agency concerning the obligations and duties of utilities to its consumers could indeed, pose a danger of disrupting and/or usurping that statutory and regulatory scheme. On balance, referral to the BPU of the complaints is appropriate, at this stage of the proceedings, for a determination by the BPU should it choose to assert primary regulatory jurisdiction, of factual issues as to issues raised in these Law Division complaints (citing to the JCP&L motion at 33-34 (emphasis added).]<sup>5</sup>

4. On or about May 29, 2015, counsel for plaintiffs in Minutella and Harvey filed "petitions" with the Board (in the form of a cover letter and a copy of the respective complaints in the two matters (the "Initial Two Petitions"), seeking the Board's direction as to whether the Board would assert primary jurisdiction over the matters. While the same letter was filed for both matters, separate BPU docket numbers were assigned.<sup>6</sup>

5. On July 6, 2015, in response to the service by the Board of the Initial Two Petitions, JCP&L filed a letter in lieu of an answer urging the Board to assert its primary jurisdiction in the matters. NJNG had already filed a similar letter on June 16, 2015.<sup>7</sup>

6. On or about July 24, 2015, counsel for Plaintiffs in Roudi submitted a letter to Judge Fall, requesting consolidation of the Roudi civil case with the Minutella and Harvey civil cases, stating that Roudi should not be dismissed, and that the Order entered in Minutella and Harvey should be entered in Roudi.<sup>8</sup>

7. On or about July 27, 2015, an Order was issued by Judge Fall in Roudi, transferring jurisdiction to the Board under the

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<sup>4</sup> Footnote 4 of JCP&L's exceptions states that this was not mentioned in the ID and is provided here in the interest of completeness. Ibid.

<sup>5</sup> Footnote 5 of JCP&L's Exceptions states that neither the date, nor, more importantly, the substance of Judge Fall's Order are provided or discussed in the ID. Therefore, JCP&L provides the additional detail as shown above. Id. at 8.

<sup>6</sup> Footnote 6 of JCP&L's Exceptions states that this occurrence was not mentioned in the ID and is provided in the interest of completeness. Ibid.

<sup>7</sup>Footnote 7 of JCP&L's Exceptions states that these were not mentioned in the ID and are noted here in the interest of completeness. Ibid.

<sup>8</sup> Footnote 8 of JCP&L's Exceptions states that this entry is intended to more precisely clarify the nature of the Plaintiffs'/Petitioners' request as mentioned in the ID. Ibid.

doctrine of primary jurisdiction for a determination as to "the factual issues presented ... " consistent with the March 30, 2015 Order. Hereinafter, references to the July 27, 2015 Order are incorporated into the later references to the Opinion on Motion, the March 30, 2015 Order, and/or the Opinion and Order.<sup>9</sup>

8. On August 19, 2015, the Board issued an Order (the "August 19, 2015 Order") accepting primary jurisdiction over the Initial Two Petitions (i.e., Minutella and Harvey). In its Order, the Board found that:

In this case, the Board has the statutory authority as well as expertise to consider whether New Jersey Natural Gas Company and/or Jersey Central Power & Light failed to provide safe, adequate and proper service under the circumstances then existing to the Minutella and Harvey plaintiffs in the underlying action.

...As such, the Board accepts primary jurisdiction, will review the matter referred pursuant to Judge Fall's Order and will advise the parties how this matter will proceed. [BPU Order at p. 2-3 (emphasis added).]<sup>10</sup>

9. On October 15, 2015, the Board issued an Order (the "October 15, 2015 Order") accepting primary jurisdiction over the Roudi petition.<sup>11</sup>

10. On or about January 26, 2016, the Board transferred the Minutella, Harvey, and Roudi petitions (hereinafter, together the Initial Two Petitions and the Roudi petition are collectively referred to as the "Petitions") to the OAL for further proceedings.<sup>12</sup>

11. On or about January 29, 2015, OAL received the Petitions from the Board.<sup>13</sup>

12. On March 30, 2016, ALJ Jones held a pre-hearing conference with respect to the Petitions and directed JCP&L and NJNG to submit summary decision motions and supporting briefs under N.J.A.C. 1:1-12.5 ("Motion for summary decision") to

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<sup>9</sup> Footnote 9 of JCP&L's Exceptions states that this entry is intended to clarify, more precisely, the action taken to address Plaintiffs'/Petitioners' consolidation request in the preceding entry. Ibid.

<sup>10</sup> Footnote 10 of JCP&L's Exceptions states that although mentioned in the ID, this entry provides and underscores important details of the Board's orders regarding the Board's view of its jurisdiction and direction as to course of conduct of the proceeding, which were not mentioned or discussed in the ID. Id. at 9.

<sup>11</sup> Footnote 11 of JCP&L's Exceptions states that this entry provides clarification as to the date of the Order. In addition, please note that, collectively, the August 19, 2015 Order and the October 15, 2015 Order are sometimes also referred to, herein, as the 'Board's August and October 2015 Orders.' Ibid.

<sup>12</sup> Footnote 12 of JCP&L's Exceptions states that this entry provides clarification as to the date of the transferal. Ibid.

<sup>13</sup> Footnote 13 of JCP&L's Exceptions states that this entry provides clarification as to the date of receipt by OAL. Ibid.

address the threshold legal issue described above as to whether the utilities, or either of them, had a duty under New Jersey public utility law to engage in the anticipatory, preemptive suspension of utility service in advance of, or during, Superstorm Sandy with respect to portions of their respective service territories as alleged by Petitioners in their complaints, which now constitute the Petitions, and further ordered the parties to develop a proposed briefing schedule.<sup>14</sup>

13. On June 17, 2016, NJNG and JCP&L separately filed their respective motions. In the case of JCP&L, the motion was styled as a motion for summary decision and memorandum of law in support of motion. In its memorandum, JCP&L noted that:

... Presumably, the resolution of this threshold legal issue, as a matter of judicial economy, could dispose of the Petitions ... without the need for hearings if the ALJ in her Initial Decision, and the Board in its final decision, were to conclude that, as a matter of law, there was no such duty. A contrary or equivocal determination (i.e., that there is, or may be, such a duty absolutely or under particular facts and circumstances) would set the stage for evidentiary hearings and fact-finding regarding the nature and extent of the duty, whether prospective or retroactive, and whether or not the Utilities' actions or omissions to act under the circumstances constituted a breach of such duty under applicable New Jersey public utility law....Therefore, based on the foregoing, JCP&L requests Judge Jones to issue an initial dispositive decision to the Board (for its adoption as the final dispositive decision in this matter) declaring, finding and confirming that the general duty of a New Jersey public utility to provide safe, adequate and proper service does not include or encompass 'a specific subsidiary duty to engage in the anticipatory, preemptive suspension of Utility Service in advance of, or during, an emergency such as Superstorm Sandy. . . . [T]o the extent that the ALJ may determine that there could be a public utility duty to engage in the anticipatory, preemptive suspension of utility service, under the circumstances presented by the Petitions, JCP&L urges the ALJ to schedule another pre-hearing conference to further develop the procedural schedule in this matter, including the scheduling of hearings to determine, as Judge Fall directed in his order dated March 30, 2015, the "factual issues as to whether it was appropriate or necessary to suspend the delivery of electrical and natural gas service to the Camp Osborn and/or northern barrier peninsula of Ocean County in order to ensure the safety of consumers given proof and establishment of the circumstances outlined in plaintiffs' complaints, and all related

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<sup>14</sup> Footnote 14 of JCP&L's Exceptions states this entry is intended to provide additional clarification as to the nature and substance of the prehearing conference at which time ALJ Jones also indicated the possible need for the scheduling of further proceedings with respect to the Petitions to be determined based on the disposition of the parties' respective motions for summary decision. *Id.* at 10.

regulatory issues." (Memorandum of Law at p. 4, 40 (emphasis added)).<sup>15</sup>

14. On July 25, 2016 Petitioners filed a memorandum of law and certification of counsel in opposition to respondents' motions for summary disposition.<sup>16</sup>

15. On August 12, 2016, Respondents filed their respective reply memoranda of law in response to Petitioners' memorandum of law and certification of counsel in opposition to Respondents' motions for summary disposition.<sup>17</sup>

16. On June 23, 2017 ALJ Jones issued the Initial Decision denying the respective Respondents' motions for summary disposition, and granting Petitioners' replies thereto, which the decision, sua sponte elected to treat as a cross-motion to dismiss..

17. ALJ Jones stated in the Initial Decision that "Under Title 48, New Jersey public-utility law, a New Jersey public utility has no statutory or regulatory obligation to proactively suspend its service or prophylactically de-energize its electrical systems in advance of an emergency." (ID at p. 14). However, the Initial Decision then concluded as follows:

I CONCLUDE that this matter does not involve a tariff or a public utility regulation requiring the Board's expertise, and that the matter properly belongs before the Superior Court, which has exclusive jurisdiction over questions of negligence, liability, and damages. (ID at p. 23-24.)

[JCP&L Exceptions at 7-11.]

JCP&L asserts that the ID's dismissal of the matter without developing a factual record was contrary to Judge Fall's March 30, 2015 Order referring the matters to the Board and the Board's August 19, 2015 and October 15, 2015 Orders accepting primary jurisdiction to consider whether the utilities failed to provide safe, adequate and proper service. Id. at 5-6.

JCP&L contends that the Board indicated in its Orders accepting primary jurisdiction that it would use its expertise to analyze whether the utilities complied with their obligations under the circumstances. Id. at 17. According to JCP&L, this statement by the Board implies a direction to the ALJ to engage in necessary fact-finding, which she failed to do.

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<sup>15</sup> Footnote 15 of JCP&L's Exceptions states that this entry is intended to provide additional clarification and additional detail regarding JCP&L's understanding of ALJ Jones' direction and the implications of the varied possible resolutions of the JCP&L Motion for Summary Disposition relative to the Board's August and October 2015 Orders. Id. at 11.

<sup>16</sup> Footnote 16 of JCP&L Exceptions states this entry is provided by way of clarification as to the date and the occurrence. Ibid.

<sup>17</sup> Footnote 17 of JCP&L Exceptions states this entry is provided by way of clarification as to the date and the occurrence. Ibid.

Moreover, JCP&L argues that irrespective of the absence of required fact finding, the authorities cited in the ID does not support the ALJ's conclusion that the Board lacks jurisdiction and that the matter should be returned to the Superior Court for disposition. The ID relies on the case of Brooks v. Public Service Electric & Gas Company, 1 N.J.A.R. 243, 248 (1981), for the proposition that negligence and other common law causes of action are within the jurisdiction of the Courts, rather than the Board. However, JCP&L states that finding that the Board has jurisdiction in this case is not contrary to Brooks because the Board is not making negligence determination. JCP&L Exceptions at 18-19. Here, according to JCP&L, Judge Fall only requested a final determination as to the reasonableness of the utility's decision to shut off power. Therefore, JCP&L claims that the Board should reject the ID and remand the matters for additional proceedings consistent with the Board's Orders of August 19, 2015 and October 15, 2015 and consistent with Judge Fall's March 30, 2015 Order. Id. at 20.

JCP&L further argues that the ID failed to properly address JCP&L's motion for summary disposition and misinterprets the Board's exercise of primary jurisdiction. Significantly, in denying the motions for summary disposition filed by JCP&L and NJNG at the ALJ's direction, the ID makes no mention of this rule or standard and the ALJ veered off course and her ultimate conclusions are counter to this finding. Id. at 21. Had the ALJ analyzed the motion under the proper standard and concluded that there were material issues of fact still in dispute and that JCP&L was not entitled to the relief sought as a matter of law, dismissal and referral back to the Superior Court was neither the logical or required next step. Instead, JCP&L claims that setting the matters for discovery, testimony and hearings was required as the only way in which to comply with the Board's Orders implementing Judge Fall's referral. Accordingly, JCP&L urges the Board to either reject the ID, or modify the ID to grant it's motion in whole, or in part, and, in either case, with respect to any remaining issues, either remand the matters for the purpose of providing the proper analysis and recommended decision under N.J.A.C. 1:1-12.5(b) and, if necessary, for further proceedings pursuant to N.J.A.C. 1:1-12.5 (d). (JCP&L Exceptions at 24-25.)

In addition, while JCP&L accepted the undisputed facts for purposes of its summary decision motion, JCP&L argues that once ALJ Jones treated the Plaintiffs/Petitioners' opposition as motions to dismiss, it was improper to find undisputed facts. JCP&L therefore asserts that the ID erred in its articulation of the undisputed facts. It states that some of the facts are untrue or unsupported, and JCP&L challenged those facts in its reply to the motions, but states that ALJ Jones failed to discuss JCP&L's reply. Id. at 25-26.

Specifically, JCP&L takes exception to factual findings No. 4, 8, 10, 12, and 17-21. JCP&L points out that, for instance, there is no citation to a source for finding No. 4, to the effect that the utilities owned, controlled and managed all electrical and gas systems including "electrical panels." While the utilities owned, operated and maintained their respective public utility transmission and distribution systems, such systems do not include electrical panels, which is a description of the type of electrical facilities that are generally customer-owned. Furthermore, JCP&L claims that it does not own, control and manage any privately-owned power lines, poles, transformers, substations or other electrical facilities. Id. at 26.

JCP&L indicates that finding No. 8 states the Plaintiffs/Petitioners' contention regarding the nature and extent of JCP&L's actual notice about Superstorm Sandy and the nature and extent of official flood zone designations is an undisputed fact without citation. JCP&L further states that findings Nos. 10, 12, and 17-21, some without citations, appear to be findings based on the introduction of new, unsupported and/or contradictory information by Plaintiffs/Petitioners in their opposition to the motions for summary decision, which JCP&L claims it addressed at length in the JCP&L reply. JCP&L concludes that there is no hint in the ID that the ALJ considered, let

alone analyzed and disposed of, JCP&L's arguments regarding this information before adopting these findings as undisputed for purposes of deciding the JCP&L motion. Id. at 26-27.

### NJNG Exceptions

On July 5, 2017, NJNG filed exceptions ("NJNG Exceptions") to the ID, along with an extensive compendium comprised of exhibits.<sup>18</sup> NJNG first points out that the Plaintiffs/Petitioners did not submit any evidence in opposition to NJNG's motion for summary decision that was before ALJ Jones and, as a result, did not contradict any aspect of NJNG's burden of proof. (NJNG Exceptions at 2, 6.)

Nonetheless, NJNG states that ALJ Jones properly made the following undisputed findings of fact:

1. It was impossible to predict with any degree of reliability where, when, and even if, Superstorm Sandy would hit along the New Jersey coast." (Ex. 1, Minutella ID at 8 ¶ 14).
2. A preemptive suspension of gas service would have involved numerous logistic and technical problems for NJNG. (Id. at 9, ¶ 22 ).
3. Preemptively suspending service would have required NJNG to cut service to a large geographic area at the north end of its territory in Old Bridge, Middletown, and Sandy Hook, extending south along the coast in Monmouth County and through the entirety of the seaside peninsula and Long Beach Island (to the southernmost point of NJNG's territory), and stretching inland through portions of Monmouth and Ocean counties. (Id. at 9, ¶ 23).
4. A widespread suspension of service would have affected tens of thousands of NJNG customers, including hospitals, governmental services, traffic controls and bridge controls." (Id. at 10, ¶ 24).
5. To shut-down the gas valves, 150 miles of NJNG distribution and associated service lines would have required depressurization to remove vast amounts of gas. (Id., ¶ 25).
6. Depressurization could have required NJNG to cut access points in the distribution system and thereafter blow the gas out into the environment. Due to the volume of gas trapped in the lines, the procedure would have taken several hours. (Id., ¶ 26).
7. Depressurizing the distribution lines could cause flood water to infiltrate the gas distribution system. (Id., ¶ 27).

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<sup>18</sup> NJNG filed one set of exceptions in response to the IDs issued in the Roudi, Minutella and Harvey matters.

8. Flood water, particularly salt water, in the system would have led to substantial internal corrosion, which would have resulted in an increased number of gas leaks in the distribution system. (Id., ¶ 28).

9. If water had gotten into the distribution facilities, it would have taken much longer, and been far costlier, for NJNG to get its system back up and running. (Id., ¶ 28).

10. Restoration of gas service would have prolonged the outage because it would have required NJNG to make multiple visits to each customer's house to restore service. Customers would have been without heat and hot water for a prolonged period. (Id., ¶ 29).

[NJNG Exceptions at 9-10.]

NJNG thus concludes that ALJ Jones found every fact necessary to determine not just that NJNG's statutory and regulatory duty to provide safe, adequate, proper, and uninterrupted service did not require it to terminate service prior to Superstorm Sandy, but also that such preemptive suspension would have violated that duty and thus it was necessary for NJNG to maintain service during the storm. NJNG argues that the Board should adopt these factual findings as to preemptive suspension of NJNG's gas service, which are supported by substantial, uncontroverted evidence in the record. Id. at 9-10, 12-15.

However, NJNG urges the Board to reject ALJ Jones's determination that whether NJNG was required to suspend service before Superstorm Sandy must be answered by the fact finder in the Superior Court. NJNG states that Judge Fall sent the issue of whether the duty to provide safe, adequate and proper service required NJNG to preemptively suspend service to the Board for a determination. ALJ Jones's conclusion that a fact finder in Superior Court must make this determination, according to NJNG, misinterprets the doctrine of primary jurisdiction, which requires the Board—and not the Superior Court—to resolve the issue of whether it was prudent and necessary for NJNG to maintain service during Superstorm Sandy or instead whether the Company's statutory and regulatory duty required it to preemptively suspend service. Id. at 15. NJNG states that the Board should find that this statutory and regulatory duty did not require, and would have been violated by, the widespread preemptive suspension of service.

NJNG further argues that ALJ Jones misapplied the holding set forth in Muise v. GPU, Inc., 332 N.J. Super. 140, 159, 160 (App. Div. 2000). The Muise court held that questions regarding the safe and adequate provision of service by a public utility, including what actions are necessary to safely and adequately provide service, are within the BPU's primary jurisdiction and must be resolved by that agency, and not the courts. Id. at 165. Nonetheless, Judge Jones declined to reach the issue because she believed the issue of whether the duty of care was breached by NJNG is a question of law and whether NJNG's decision to maintain service was prudent is for the jury or the fact finder, not the BPU, to determine. This determination of whether NJNG's maintenance of service during the storm was prudent and necessary given its statutory and regulatory obligations as a utility is, for the reasons set forth above, a question that requires the BPU's expertise and knowledge, and thus must be answered by it under the doctrine of primary jurisdiction. Id. at 23.

Moreover, NJNG asserts that the undisputed facts, correctly found by ALJ Jones, establish that it was prudent and necessary to maintain gas service during Superstorm Sandy because

NJNG's statutory and regulatory duty to provide safe, adequate, proper and uninterrupted service would have been violated by widespread preemptive suspension. Id. at 24. NJNG states that the Board should therefore, make that finding in its Final Decision, as required by the doctrine of primary jurisdiction. Further, by making that finding and adopting Judge Jones's findings regarding the preemptive suspension of gas service, the Board will have resolved all issues that require its expertise and special knowledge and the interpretation of BPU regulations, and thus all issues that fall within the agency's primary jurisdiction. As a result, NJNG argues that the BPU should also return the matter to the Superior Court for a disposition consistent with its findings. Id. at 28.

The Plaintiffs/Petitioners did not file exceptions to the ID.

### **DISCUSSION AND FINDINGS**

The Board transmitted the matter to the OAL for the limited purpose of conducting a hearing on this narrow issue of whether NJNG and/or JCP&L failed to provide safe, adequate and proper service by not discontinuing utility service prior to Superstorm Sandy. Although there is some dispute with regard to the parties being in agreement that the issue was a matter of law and thus eliminating the need for an evidentiary hearing, the parties nonetheless filed motions and/or briefs concerning the issue presented in this matter.

While ALJ Jones's reasoning is correct in that the question of whether the Defendants/Respondents were negligent "does not concern a tariff rate or charge," her conclusion that it does not require the Board's expertise or any regulatory issues is misplaced. The Board agrees with ALJ Jones that disputes alleging negligence, intentional tort or any other common law cause of action for damages are within the jurisdiction of the Superior Court. However, the issue sent to the Board by Judge Fall for determination on primary jurisdiction grounds concerned JCP&L and NJNG's obligations vis a vis the Board's regulatory authority. As indicated previously, in the August 19, 2015 and October 15, 2015 Orders, the Board found that it had the statutory authority as well as the expertise to consider whether NJNG and/or JCP&L failed to provide safe, adequate, and proper service under the circumstances then existing to the Plaintiffs/Petitioners in the underlying actions.

The Board further recognizes, as stated by the court in Muise, supra, 332 N.J. Super. at 140, that even when primary jurisdiction applies, the doctrine does not confer exclusive jurisdiction on the Board, "with the attendant effect of limiting cognizable remedies to those within the agency's authority." Id. at 163. To the contrary, a court can consider all judicial remedies, including damages, which are beyond the agency's authority; a legislative intent to defeat them will be inferred only if the Legislature has "explicitly limited the availability of that remedy or relief." Ibid. (citing Boldt v. Correspondence Management, Inc., 320 N.J. Super. at 87 (App. Div. 1999) (citing Campione v. Adamar, Inc., 155 N.J. 245, 262 (1998), and Lally v. Copygraphics, 173 N.J. Super. 162, 178-79, aff'd, 85 N.J. 668, (1981)).

NJNG correctly points out that the Court in Muise found that the Board is vested with exclusive jurisdiction to determine whether the utilities provided safe, adequate and proper service. The court stated that the customer damage claims against the defendants for the negligent failure to provide such service are not within the Board's exclusive jurisdiction. Id. at 165. N.J.S.A. 48:2-13(a) vests the Board with general supervision and regulation of and jurisdiction and control over public utilities. The Legislature has also endowed the BPU with broad powers to regulate public utilities. In re Pub. Serv. Elec. & Gas Co.'s Rate Unbundling, 167 N.J. 377, 384 (2001) (internal citations and quotations omitted). The Board has jurisdiction of all services necessary for the transmission and distribution of gas electric service. N.J.S.A. 48:2-13(d). The Board has

the authority to require any public utility to furnish safe, adequate and proper service. N.J.S.A. 48:2-23. Judicial deference to administrative agencies stems from the recognition that agencies have specialized expertise. In re Adoption of Amendments to Water Quality Management Plans, 45 N.J. Super. 571, 583 (App. Div. 2014).

Therefore, the legal analysis is twofold. As indicated by Judge Fall, the Board must first make a determination as to whether the Defendants/Respondents failed to meet their statutory and regulatory obligation to provide safe, adequate and proper service in not proactively suspending utility service. After the Board makes its determination, the Superior Court must determine whether JCP&L and NJNG breached a duty of care as a matter of law by not proactively suspending utility service.

Therefore, the Board **HEREBY REJECTS** ALJ Jones's conclusion that there is no tariff or public-utility regulation requiring the Board's expertise. Nonetheless, having reviewed the record as set forth in the ID as well as the exceptions filed by the Defendants/Respondents, the Board is not persuaded that the matter should be remanded for further proceedings at the OAL. The Board can render its decision based on the record and undisputed facts set forth in the ID. NJNG and JCP&L's Exceptions to the findings of fact made by ALJ Jones are not material and have no bearing on the Board's conclusion in this matter. The parties have briefed the issues in both Superior Court and the OAL, and the Board is confident that there is enough before it in the record to render a decision.

As noted in the ID, it is undisputed that there is no statutory or regulatory obligation for a utility to preemptively suspend service in the event of a weather emergency pursuant to New Jersey Public Utility Law set forth in Title 48. ID at 14, ¶ 13. While NJNG and JCP&L's tariffs permit them to discontinue service, it is not required. Section 7.02, Compliance with Governmental Orders, of JCP&L's tariff states that it "*may* (emphasis added) curtail, discontinue, or take appropriate action with respect to Service, either generally or as to a particular Customer, as may be required by compliance in good faith with any governmental order or directive, and shall not be subject to any liability, penalty, or payment, or be liable for direct or consequential damages by reason thereof, notwithstanding that such instruction, order or directive subsequently may be held to be invalid or in error."<sup>19</sup>

Likewise, Section 9.1(c), Discontinuation of Service – Company Causes, of NJNG's tariff provides that it has the right to suspend, curtail, or discontinue its service "in the event of an emergency threatening the integrity of its system if, in the Company's *sole judgment* (emphasis added), such action will prevent or lessen the emergency condition."<sup>20</sup> Accordingly, NJNG's and JCP&L's tariffs leave it within their sole discretion whether to preemptively suspend service when there is no governmental directive to do so.

N.J.A.C. 14:3-3.1(a) also sets forth a utility's basic duty to "furnish safe, adequate and proper service, including furnishing and performance of service in a non-discriminatory manner, and in a manner that tends to conserve energy resources and preserve the quality of the environment." N.J.A.C. 14:3-3.7(a) further requires a utility to "exercise reasonable diligence to avoid interruptions, curtailment or deficiencies of service..." The occurrence of Superstorm Sandy would not have necessarily relieved NJNG and JCP&L of the obligation to avoid service

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<sup>19</sup> JCP&L's tariff is available at

<https://www.firstenergycorp.com/content/dam/customer/Customer%20Choice/Files/New%20Jersey/tariffs/BPU-12-Parts-I-II-Effective-1-1-2017.pdf>

<sup>20</sup> NJNG's tariff is available at <https://www.njng.com/regulatory/pdf/Tariff-0812017.pdf>

interruptions because N.J.A.C. 14:3-3.7(b) indicates that “this section applies to service interruptions for any reason, including, but not limited to, an act of God, weather condition, natural disaster, attack, catastrophic occurrence, accident, strike, legal process, or governmental interference.” As such, NJNG and JCP&L had the option to suspend service, but were also required to operate with all reasonableness—once again a decision to best be determined by the utilities. The Board will not, therefore, disturb the management decisions made by of NJNG and JCP&L with regard to the curtailment of utility service prior to or during Superstorm Sandy under these circumstances.

Therefore, the Board **AFFIRMS** ALJ Jones’s finding that NJNG and JCP&L were not required by any statutory provision in Title 48, Board regulation or utility tariff to preemptively suspend service.

Moreover, suspension of service could have caused further widespread service disruptions and damage. In particular, NJNG has presented undisputed evidence that a preemptive suspension would have required NJNG to terminate service to a large geographic area from Old Bridge, extending south along the coast in Monmouth County and through the entirety of the seaside peninsula and Long Beach Island, and inland through portions of Monmouth and Ocean Counties. (ID at 10, ¶ 23.) Suspension of service could have affected tens of thousands of NJNG customers, including hospitals, governmental services, traffic controls and bridge controls. Id., ¶ 24. NJNG could also have had to depressurized 150 miles of distribution and associated service lines could have required in order to remove vast amounts of gas. Id., ¶ 25.

Furthermore, depressurization could have required NJNG to cut access points in the distribution system and thereafter blow the gas out into the environment. Due to the volume of gas trapped in the lines, the procedure would have taken several hours. Id., ¶ 26. Depressurizing the distribution lines could cause flood water to infiltrate the gas distribution system. Id., ¶ 27. Flood water, particularly salt water, in the system would have led to substantial internal corrosion, which would have resulted in an increased number of gas leaks in the distribution system. Id., ¶ 28. It would have taken much longer and been more expensive for NJNG to get its system back up and running if water had entered the distribution facilities. Id., ¶ 28. Restoration of gas service would have prolonged the outage because it would have required NJNG to make multiple visits to each customer’s house to restore service. Id. at 11, ¶29.

Had JCP&L preemptively suspended service, traffic signals, life support systems, water pumps and communications systems would not operate. Id. at 11, ¶ 30.

Additionally, as noted in the ID, the Board did not order or direct JCP&L or NJNG to preemptively suspend service. The Board further takes Judicial Notice of its own investigation into utility responses to Superstorm Sandy (which was also referenced in the ID at 14-15) wherein the Board did not focus on the lack of anticipatory or preemptive suspension of utility service. See In re the Board’s Review of the Utilities’ Response to Hurricane Sandy, BPU Docket No. EO12111050 (May 29, 2013). While it is clear that JCP&L and NJNG had the regulatory authority to preemptively shut off service, in their discretion, the Board finds no basis in the record to conclude that NJNG or JCP&L violated their obligations to provide safe, adequate and proper service under Title 48. In fact, there are numerous undisputed facts that set forth why service was not preemptively discontinued.

The Board **HEREBY MODIFIES** the ID in part as set forth herein. However, the Board **AFFIRMS** ALJ Jones’s conclusions with regard to tort and common law claims being appropriately addressed by a court of proper jurisdiction and therefore makes no findings regarding such claims.

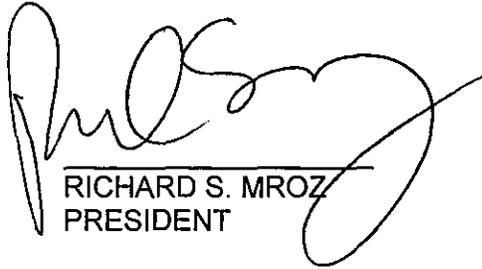
In summary, the Board **CONCLUDES** that JCP&L and NJNG's determinations not to preemptively discontinue service do not constitute a failure to provide safe adequate and proper service.

As such, the Board refers this matter back to the Superior Court, Law Division, Ocean County, for any appropriate proceedings on the issues beyond the Board's statutory and regulatory authority. The Board does not retain jurisdiction.

This Order shall be effective on October 30, 2017.

DATED: 10/20/17

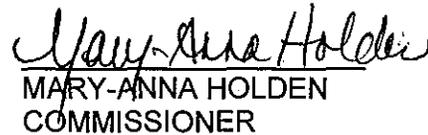
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BY:



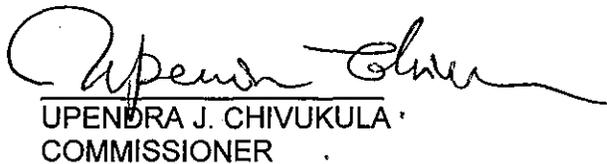
RICHARD S. MROZ  
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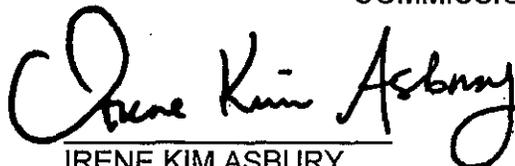
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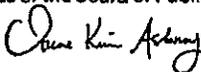
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UPENDRA J. CHIVUKULA  
COMMISSIONER

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 HARVEY, ET AL.,

v.

JERSEY CENTRAL POWER AND LIGHT; FIRST ENERGY  
CORPORATION; NEW JERSEY NATURAL GAS  
COMPANY; NEW JERSEY RESOURCES  
CORPORATION AND ABC COMPANIES NOS. 1-10

BPU DOCKET NO. EC15060658 & OAL DOCKET NO. PUC 01589-2016

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**State of New Jersey**  
OFFICE OF ADMINISTRATIVE LAW

**INITIAL DECISION**

**DENYING MOTION FOR SUMMARY**

**JUDGMENT**

**IN THE MATTER OF HARVEY, ET AL.**

Petitioner,

v.

**JERSEY CENTRAL POWER & LIGHT  
COMPANY; FIRST ENERGY CORPORATION;  
NEW JERSEY NATURAL GAS COMPANY;  
NEW JERSEY RESOURCES CORPORATION  
AND ABC COMPANIES Nos. 1-10,**

Respondents.

OAL DKT. NO. PUC 01589-16

AGENCY DKT. NO. EC15060658

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**Hugh M. Turk, Esq.,** for petitioners (Sullivan, Papain, Block, McGrath & Cannavo, attorneys)

**Michael J. Connelly, Esq.,** and **Gabrielle A. Figueroa, Esq.,** for respondent Jersey Central Power & Light Company (Windels Marx Lane & Mittendorf, LLP, attorneys)

**Stephen A. Rudolph, Esq.,** for respondent Jersey Central Power & Light Company, First Energy Corporation (Rudolph & Kayal, P.A., attorneys)

**Kevin H. Marino, Esq., and John A. Boyle, Esq.,** for respondent New Jersey Natural Gas Company, New Jersey Resources Corporation (Marino, Tortorella & Boyle, P.C., attorneys)

Record Closed: October 12, 2016

Decided: June 22, 2017

BEFORE IRENE JONES, ALJ:

**STATEMENT OF THE CASE AND PROCEDURAL HISTORY**

On October 14, 2014, plaintiffs Susan Minutella, Ronald Mavus, and Linda Pompliano; Don Smith; Linda Seufert and Anthony Marcantorio; Joan Bechtle; Toni Albanese and James Albanese; Frank Delle Donne and Annmarie Delle Donne; Lorraine Kosinski and Stanley Kosinski; Joseph Sacco and Davida Sacco; Durbin Don McDermott and Madeline McDermott; Sally Gillis and Bob Gillis; Irene Moyer; and Janice Diana and Wayne Diana filed a complaint in the New Jersey Superior Court, Law Division, Ocean County, against defendants Jersey Central Power & Light Company (JCP&L), First Energy Corporation; New Jersey Natural Gas Company (NJNG), New Jersey Resources Corporation; and ABC Companies Nos. 1–10 (collectively, defendants or defendant, respondents) seeking compensation for damages and destruction of their real and personal property that the plaintiffs alleged was caused by a fire or fires in Camp Osborn, Brick Township, NJ, on October 29, 2012, during Superstorm Sandy. Plaintiffs alleged in their complaint that the fire(s) and resulting destruction of their property were the result of the negligence, gross negligence, carelessness, and recklessness of the defendants in their operation of utility equipment, both gas and electric.

On October 27, 2014, plaintiffs E.J. Harvey, Jr.; June Squillaro and Joseph Squillaro; Vincent D. Piperi; Christine O'Hagan and Michael O'Hagan; Joseph Keslo and Cathy Keslo; Marianne Jones; Kenneth Flowers and Cindy Flowers; Lily Hawryluk; Sandy Turner; Cheryl Lucky; and Dalel Parisi filed a complaint in the New Jersey Superior Court, Law Division, Ocean County, against defendants Jersey Central Power

& Light Company, First Energy Corporation; New Jersey Natural Gas Company, New Jersey Resources Corporation; and ABC Companies Nos. 1–10 (collectively, defendants or defendant, respondents) seeking compensation for damages and destruction of their real and personal property that the plaintiffs alleged was caused by a fire or fires in Camp Osborn, Brick Township, NJ, on October 29, 2012, during Superstorm Sandy. Plaintiffs alleged in their complaint that the fire(s) and resulting destruction of their property were the result of the negligence, gross negligence, carelessness, and recklessness of the defendants in their operation of utility equipment, both gas and electric.

On June 10, 2015, plaintiffs Michael Roudi and Lorraine Roudi; Theresa A. Niles; Emma Jane Decker; Eugene Durocher, Jr., and Mary Durocher; Patricia Krone; Betty Ann Fuller; Thomas Reinhart and Susan Reinhart, filed a complaint in the New Jersey Superior Court, Law Division, Ocean County, against defendants Jersey Central Power & Light Company, First Energy Corporation; New Jersey Natural Gas Company, New Jersey Resources Corporation; and ABC Companies Nos. 1–10 (collectively, defendants or defendant, respondents) seeking compensation from the defendants for damages and destruction of their real and personal property that was allegedly caused by a fire or fires in Camp Osborn, Brick Township, NJ, on October 29, 2012, during Superstorm Sandy. Plaintiffs alleged in their complaint that the fire(s) and resulting destruction of their property were the result of the negligence, gross negligence, carelessness, and recklessness of the defendants in their operation of utility equipment, both gas and electric.

The plaintiffs are the owners or leasers of real property located in Camp Osborn, an ocean-front neighborhood of single-story beach bungalows situated on the northern peninsula of Ocean County in the township of Brick. The defendants/respondents,<sup>1</sup> JCP&L and NJNG, are utilities in the state of New Jersey and, as such, hold franchises to provide electric and gas utility service in their respective franchise areas. JCP&L

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<sup>1</sup> JCP&L and NJNG are designated as defendants in the Superior Court actions. In this matter they are the respondents. The respondents moved for summary decision; they are the movants, or petitioners. However, to avoid confusion they will be referred to as respondents. They will be referred to interchangeably as defendants/respondents or respondents.

provided electric service and NJNG provided gas service to Camp Osborn. JCP&L and NJNG are subsidiaries of First Energy Corporation and New Jersey Resources Corporation, respectively. Camp Osborn was located within the franchise service territory of both utilities.

On October 22, 2012, Hurricane Sandy, also known as Superstorm Sandy, formed in the Caribbean Sea, and on October 29, 2012, the storm landed on or near Brigantine, New Jersey, as a Category 1 hurricane with winds of 115 mph. Superstorm Sandy was the deadliest and most destructive hurricane of the 2012 hurricane season, and the second-costliest hurricane in United States history. It was also the largest Atlantic hurricane on record, spanning some 1,100 miles and causing an estimated \$75 billion in damages and 233 lives in eight countries.<sup>2</sup>

The Plaintiffs allege in their Superior Court complaints that despite advance warnings of Superstorm Sandy, the defendants/respondents failed to de-energize their powerlines, transformers, wires, and substations. This failure to de-energize caused severe flooding, which resulted in short circuits in the electrical systems, resulting in fire. The Plaintiffs further allege that defendants did not act like the other utilities in the area that proactively and or preemptively shut down power in other beachfront communities that were threatened by Superstorm Sandy. Indeed, the plaintiffs allege that while Camp Osborn was not de-energized, electrical services to Fire Island were de-energized or suspended by JCP&L in advance of Superstorm Sandy.

In lieu of an Answer, on January 12, 2015, NJNG filed a motion to dismiss the complaints with prejudice. Alternatively, NJNG sought a stay of the proceeding and requested that the matters be referred to the Board of Public Utilities (BPU or Board) for disposition. On January 26, 2015, defendant JCP&L filed a cross-motion to dismiss the complaint, wherein it too requested that the matters be transferred to the BPU.

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<sup>2</sup> Source: <[https://en.wikipedia.org/wiki/Hurricane\\_Sandy](https://en.wikipedia.org/wiki/Hurricane_Sandy)>.

On February 15, 2015, the plaintiffs filed their answers opposing the motions to dismiss. After JCP&L and NJNG filed their replies to the opposing motions, the Honorable Robert A. Fall, J.S.C., Retired on Recall, issued an Order granting the request for referral, but denying the motions to dismiss. The Order concluded that the BPU had primary jurisdiction over the matter and stayed the matter pending the Board's determination as to whether it would exercise primary jurisdiction on any of the issues raised in the complaints.

On or about July 24, 2015, the plaintiffs in In re Roudi submitted a letter to Judge Fall in opposition to the motions to dismiss, and requested that their complaint be consolidated with the In re Minutella and In re Harvey matters. The plaintiffs also requested that the Order entered in the In re Minutella and In re Harvey matters be entered in their case.

On August 19, 2015, the Board issued an Order accepting primary jurisdiction over the In re Minutella and In re Harvey petitions. Thereafter, on October 15, 2015, the Board issued a second Order regarding the In re Roudi complaint that also accepted primary jurisdiction. See In re Minutella, BPU Dkt. No. EC15060657, and In re Harvey, BPU Dkt. No. EC15060658 (Order dated August 19, 2015); In re Roudi, BPU Dkt. No. EC15091094 (Order dated October 15, 2015). In both Orders, the Board found that it had the statutory authority as well as the expertise to consider whether the utilities failed to provide safe, adequate, and proper service under the circumstances then existing to the plaintiffs in the underlying actions.

On January 29, 2016, the Board transmitted the matter to the Office of Administrative Law (OAL) for hearing as a contested case. The Board's Order accompanying the transmittal noted that it had the authority to determine "whether JCP&L and NJNG failed to provide safe, adequate and proper service" under the circumstances then existing to the plaintiffs in the underlying action. The Board further accepted jurisdiction pursuant to Judge Fall's Order.

On March 30, 2016, an in-person conference was held before the undersigned.<sup>3</sup> The parties agreed that the issue of whether the utilities had a duty to proactively and preemptively de-energize their gas and electric in advance of or during Superstorm Sandy was a strictly legal one, and, accordingly, suitable for summary decision. It is worth noting that while the Board requested that the three matters be assigned to the same administrative law judge (ALJ) for hearing, the matters are not consolidated.

The respondents filed motions on June 20, 2016. Thereafter, the plaintiffs filed pleadings in opposition to the motion on July 26, 2016. Notably, the plaintiffs did not file a cross motion to dismiss. The respondents filed a reply brief on August 13, 2016. During the pendency of this matter, the undersigned retired on June 30, 2016. On October 10, 2016, the undersigned was recalled to the OAL and assigned to preside over this matter on October 12, 2016.

The plaintiffs contend that the motion for summary judgment should be denied because the motion is premature as the matter has not been subject to any discovery, thus all the facts which the respondents possess are not known. Further, plaintiffs argue that the respondent's tariffs do not define the standard of care owed to the plaintiffs in a negligence case.

As noted, the plaintiffs have not filed a cross motion, however, I have sua sponte, elected to treat the plaintiffs' opposition pleadings as a cross motion to dismiss this administrative proceeding and to return the matter to the Honorable Judge Fell, J.S.C. for disposition.

### **UNDISPUTED FACTS**

I **FIND** the following to be the undisputed **FACTS** of this case:

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<sup>3</sup> The parties to this case are the utilities and the plaintiffs. The Board Staff and the Division of Rate Counsel declined to participate in this matter.

1) In October 2012 the named plaintiffs were all owners and/or lessees of real and personal property in Camp Osborn.

2) Camp Osborn was a neighborhood located on a barrier island, on the northern peninsula of Ocean County in the Township of Brick. At least one year prior to Superstorm Sandy, Camp Osborn was designated as being in a flood zone.

3) The respondent utilities, Jersey Central Power & Light Company and New Jersey Natural Gas Company, are public utilities franchised by the State of New Jersey, Board of Public Utilities, to provide electric and service gas to the public residing in their respective franchise service areas. First Energy Corporation is the parent company of JCP&L and a diversified energy corporation whose subsidiaries and affiliates are engaged in the generation, transmission, and distribution of electricity. New Jersey Resources Corporation is the parent company of NJNG and is not a public utility.

4) The utilities owned, controlled, and managed all electrical and gas systems, including power lines, utility poles, transformers, substations, gas lines and mains, and electrical panels, on or near Camp Osborn.

5) In particular, JCP&L supplied electrical service to Camp Osborn.

6) In particular, NJNG supplied gas service to Camp Osborn.

7) Superstorm Sandy was the deadliest and most destructive hurricane of the 2012 hurricane season, and the second-costliest hurricane in United States history. It was largest Atlantic hurricane on record, spanning some 1,100 miles and causing an estimated \$75 billion in damages and 233 lives in eight countries.

8) Plaintiffs contend that NJNG and JCP&L had actual notice that large portions of the New Jersey coastline, including the seaside peninsula on which Camp Osborn was located, were threatened by Superstorm Sandy with severe flooding, and

that Camp Osborn and numerous neighborhoods along the New Jersey shore were in flood zones.

9) On October 26, 2012, the Friday before the storm, NJNG participated in a conference call with the BPU and other State agencies, as well as other gas and electric utilities. The purpose of the call was to: (1) establish procedures for communications with the BPU and other agencies during the storm; and (2) discuss each utility's storm preparations. NJNG advised the BPU as to the status and location of the repair trucks and personnel that would be available to respond to leak and service-interruption calls during the storm. (Lynch Cert., ¶ 2.)

10) On October 27, 2012, the Long Island Power Authority elected to de-energize Fire Island on October 29, 2009, following the completion of a mandatory evacuation of the Island. However, Fire Island was the only part of Long Island that was de-energized. (Turk Cert., Ex. B.)

11) On October 27, 2012, Governor Christie declared a state of emergency, Executive Order 104, in New Jersey and ordered the evacuation of the state's barrier islands.

12) On October 29, 2012, at approximately 6:00 p.m., JCP&L "proactively" shut down power to 25,000 customers on the barrier islands in Monmouth and Ocean counties. Substations were de-energized remotely before the high tide. (Turk Cert., Ex. C.)

13) Defendants engaged in several follow-up conference calls with the BPU and other State utilities and agencies before the storm hit. Defendants allege that there was no discussion during those calls about a preemptive suspension of gas and/or electric service by NJNG or any other utility. Rather, the discussion was about the path of the storm and the utilities' continued preparations for and in response to the storm. (Lynch Cert. ¶¶ 4, 5.)

14) It was impossible to predict with any degree of reliability where, and even if, Superstorm Sandy would hit along the New Jersey coast. (Wyckoff Cert., ¶ 7.)

15) Plaintiffs and all residents of Camp Osborn were ordered by the State of New Jersey to evacuate their homes, as weather conditions from Superstorm Sandy were likely to cause heavy flooding, power outages, and other conditions that imperiled public safety. (Marino Cert., Exs. A, B, C.)

16) Superstorm Sandy caused peak storm surges of more than four to eight feet in New Jersey, including in Camp Osborn. (Marino Cert., Exs. A, B, C.)

17) On October 29, 2012, the Brick Township Fire Department received a call at approximately 7:20 p.m. from a Mr. Domaratius reporting a fire and exploding transformers on Camp Osborn properties. The witness further reported observing a blizzard of sparks and smoke that was consuming the entire Camp Osborn complex.

18) The Brick Township fire report states that fire trucks attempted to cross the Mantoloking Bridge to access Camp Osborn. However, the bridge was impassable because of the extreme weather and the destruction of the bridge. Numerous attempts using different routes were also unsuccessful. (Turk Cert., Exs. A, B.)

19) On November 2, 2012, the fire chief, while responding to another call on the barrier island, observed that Camp Osborn was mostly destroyed. However, due to the "devastation," no detailed investigation could be conducted.

20) Due to the condition of the camp, the fire report concluded that the cause of the fire could not be determined. (Turk Cert., Ex. C.)

21) On November 30, 2012, Mr. Domaratius was interviewed by the Brick Fire Department and gave a statement.

22) A preemptive suspension of gas services would have involved numerous logistic and technical problems for NJNG. (Wyckoff Cert., ¶ 6.)

23) Preemptively suspending service would have required NJNG to cut service to a large geographic area at the north end of its territory in Old Bridge, Middletown, and Sandy Hook, extending south along the coast in Monmouth County and through the entirety of the seaside peninsula and Long Beach Island (to the southernmost point of NJNG's territory), and stretching inland through portions of Monmouth and Ocean counties. (Wyckoff Cert., Ex. A.)

24) A widespread suspension of service would have affected tens of thousands of NJNG customers, including hospitals, governmental services, traffic controls and bridge controls.

25) To shut-down the gas valves, 150 miles of NJNG distribution and associated service lines would have required depressurization to remove vast amounts of gas.

26) Depressurization could have required NJNG to cut access points in the distribution system and thereafter blow the gas out into the environment. Due to the volume of gas trapped in the lines, the procedure would have taken several hours.

27) Depressurizing the distribution lines could cause flood water to infiltrate the gas-distribution system.

28) Flood water, particularly salt water, in the system would have led to substantial internal corrosion, which would have resulted in an increased number of gas leaks in the distribution system. (Wyckoff Cert., ¶ 11.) If water had gotten into the distribution facilities, it would have taken much longer, and been far costlier, for NJNG to get its system back up and running. (Wyckoff Cert., ¶ 12.)

29) Restoration of gas service would have prolonged the outage because it would have required NJNG to make multiple visits to each customer's house to restore service. Customers would have been without heat and hot water for a prolonged period.

30.) Without electricity, traffic signals do not work, life-support systems do not work, water pumps do not function, and communication systems cease.

**LAW AND TARIFFS**

1) The Board of Public Utilities has "general supervision and regulation of and jurisdiction and control over all public utilities . . . and their property, property rights, equipment, facilities and franchises so far as may be necessary for the purpose of carrying out the provisions of this Title." N.J.S.A. 48:2-13(a).

2) The Board is statutorily empowered to [f]ix just and reasonable standards, classifications, regulations, practices, measurements or service to be furnished, imposed, observed, and followed thereafter by any public utility." N.J.S.A. 48:2-25(a).

3) "[A]ll services necessary for the transmission and distribution of electricity and gas, including but not limited to safety, reliability, metering, meter reading and billing, shall remain the jurisdiction of the Board of Public Utilities." N.J.S.A. 48:2-13(d).

4) The Board is statutorily required to

adopt . . . standards for the inspection, maintenance, repair and replacement of the distribution equipment and facilities of electric public utilities. The standards may be prescriptive standards, performance standards, or both, and shall provide for high quality, safe and reliable service. The board shall also adopt standards for the operation, reliability and safety of such equipment and facilities during periods of emergency or disaster. The board shall adopt a schedule of penalties for violations of these standards.

[N.J.S.A. 48:3-96(a).]

5) The Board is required to "consider cost, local geography and weather, applicable industry codes, national electric industry practices, sound engineering judgment, and past experience" when adopting the aforementioned required standards. N.J.S.A. 48:3-96(b).

6) Under N.J.A.C. 14:3-3.7(a), utilities are required to “exercise reasonable diligence to avoid interruptions, curtailments or deficiencies . . . of service and, when such interruptions occur, service shall be restored as promptly as possible consistent with safe practice.”

7) Further, utilities “shall make reasonable efforts to be aware of all service interruptions and to comply with all reporting deadlines in this section. If a utility fails to meet the deadlines . . . , the burden of proof shall be upon the utility to show good cause for the failure.” N.J.A.C. 14:3-3.7(a).

8) The aforesaid regulations apply to service interruptions for any reason, including “an act of God, weather condition, natural disaster, attack, catastrophic occurrence,” and others. N.J.A.C. 14:3-3.7(b). Said outages often require reporting to the Board, depending on the nature and extent of the interruptions. N.J.A.C. 14:3-3.7(d); see also N.J.A.C. 14:5-8.9 (“Major event report”).

9) Pursuant to its tariff, JCP&L may interrupt service to any customer(s) in an emergency that is threatening the integrity of its system or to aid in the restoration of service if, in its sole judgment, such action will alleviate the emergency condition and enable it to continue or restore service consistent with the public welfare.

10) Section 7.02 of JCP&L’s tariff provides that the Company may curtail, discontinue, or take appropriate action with respect to service, either generally or as to a particular customer, as may be required by any governmental order or directive, and shall not be subject to any direct or consequential damages by reason thereof, notwithstanding that such instruction, order, or directive subsequently may be held to be invalid or in error. Verbal or written orders of police, fire, public health, or similar officers, acting in the performance of their duties, shall be deemed to come within the scope of this subsection.

11) NJNG's tariffs allows it to discontinue service on order by the government or in case of an emergency or when in its own judgment it deems that suspension is necessary to protect the overall system.

12) Title 48 of New Jersey Statutes Annotated confers on the Board the widest range of power over utilities. Township of Deptford v. Woodbury Terrace Sewerage Corp., 54 N.J. 418, 424 (1969). However, this power is not without limitations. Indeed, disputes alleging negligence, intentional tort, or any other common-law cause of action for damages are within the jurisdiction of the courts and cannot constitutionally be entertained by the Board either on liability or damages issues. Brooks v. Pub. Serv. Electric & Gas Co., 1 N.J.A.R. 243, 248 (1981).

13) Under Title 48, New Jersey public-utility law, a New Jersey public utility has no statutory or regulatory obligation to proactively suspend its service or prophylactically de-energize its electrical systems in advance of an emergency.

14) Governor Christie's October 27, 2012, declaration of a state of emergency (Executive Order 104) acknowledged the likelihood of power outages and evacuations and authorized the State Director of Emergency Management to activate elements of the State Emergency Operations Plan as necessary. The Order does not generally or specifically address, or call for, the anticipatory, preemptive suspension of utility service in any part of the state that was anticipated to be impacted.

15) The Board, in conducting its own investigations of the response of the electric-distribution companies to Hurricane Irene and Superstorm Sandy, did not focus on anticipatory, preemptive suspension of utility service even in the context of its discussion of flood mitigation at substations. Indeed, the Board's Order addressing Superstorm Sandy, which had already occurred prior to the issuance of, and was acknowledged in, the January 23, 2013, Order addressing Hurricane Irene, did not mention preemptive de-energization or substation-flood mitigation. In re The Board's Review of the Utilities' Response to Hurricane Irene, BPU Dkt. No. EO11090543

(January 23, 2013), <<http://www.state.nj.us/bpu/agenda/orders/>>; In re The Board's Review of the Utilities' Response to Hurricane Sandy, BPU Dkt. No. EO12111050 (May 29, 2013), <<http://www.state.nj.us/bpu/agenda/orders/>>.

### **ARGUMENTS**

JCP&L contends that its tariff does not require it to engage in a preemptive shutoff of electrical power. Indeed, a prior determination must be made by the Board if it is concluded that public utilities have a duty to engage in any anticipatory, preemptive suspension in advance of or during an anticipated emergent condition. In such a case, it is critical that the Board set forth standards and provide guidance as to the circumstances in which the "preemptive" duty applies. Without such, the duty will be exercised on a "nonuniform and or ad-hoc basis." Moreover, if such a duty is found to exist, it must be on a prospective basis only.

NJNG maintains that its goal during Superstorm Sandy was to maintain safe gas service to its customers, as its core obligation is to provide safe and reliable uninterrupted gas service to its customers, particularly during a storm, when they are the most vulnerable. This responsibility requires it to resolve any gas leaks as soon as possible so as to prevent explosions and fires, while taking all steps to keep service up and running for its customers. The company formulated procedures for responding to leak and service-interruption calls during and after the storm.

Moreover, the BPU and other State agencies knew that the utilities all planned to maintain service during the storm. At no time during the utilities' pre-storm conversations with the BPU was there any discussion of a preemptive suspension of service or any suggestion that it might be prudent to do so.

NJNG further submits that a preemptive suspension would have resulted in damage to its system. The major financial cost of repairing such damage would have been passed on to its ratepayers. Since it did not shut off its system, it could maintain

gas pressure in its distribution lines during the storm, thus avoiding flood water infiltrating its distribution facilities. Consequently, it could avoid the damage, safety hazards, and delays that a preemptive suspension would have caused. Further, the distribution mains running north to south on the seaside peninsula of Camp Osborn remained untouched during the storm, so service would have been suspended for no reason.

NJNG contends that without a preemptive suspension of service, it could restore service to the seaside peninsula after the storm damage by the end of 2012. However, had there been water infiltration in the distribution apparatus from a preemptive suspension to the entire peninsula, restoration of service would have taken much longer and would have been much costlier. Those costs ultimately would have been passed on to the ratepayers.

NJNG further argues that if gas service had been suspended, the company could not simply have flipped a switch to instantaneously turn service back on after the storm. Preemptive suspension would have required its employees to go to each of the affected premises to manually turn off the gas at each service line, and then inspect and repair any damage. Thereafter, it would have to re-pressurize the gas mains, and return to each individual property to manually turn the gas back on and re-light the pilot for each appliance and furnace. To do otherwise could have resulted in gas explosions.

The process to restore gas service to the tens of thousands of affected premises would have taken months. The majority of those properties were likely to suffer no or minimal damage during the storm, but nonetheless would have been without gas service for weeks, if not months, during the coldest months of the 2012–13 winter. Indeed, if NJNG had preemptively suspended service and Superstorm Sandy did not hit New Jersey or cause the devastation it did, NJNG would have deprived tens of thousands of customers of gas service for an extended period for no reason. Without natural gas to heat the undamaged homes in the cold winter months after the storm,

thousands of water pipes in those houses could have frozen and cracked, causing substantial damage to walls, floors, carpets, and furniture.

Considering these technical, safety, and practical concerns, NJNG never gave any consideration during the storm preparations to preemptively suspending service before Superstorm Sandy. To the contrary, the company's intention was to take all reasonable steps, consistent with keeping its personnel safe, to maintain service to its entire service territory and to restore service as quickly as possible to those who suffered an interruption.

Petitioners aver that the recouping of the cost of service restoration after a preemptive shutoff is irrelevant to the question of whether a utility acted with due care. The flooding of Camp Osborn was foreseeable, as the area was in a flood zone. In support, petitioners rely on Weinberg v. Dinger, 106 N.J. 469 (1987), where the Supreme Court discussed the issue of liability for a water company:

It is argued that a rule imposing liability on water companies for negligently failing to provide adequate water pressure to fire hydrants would expose water companies to extraordinary losses at great cost to the public that ultimately pays the water rates established by law. The fear of limitless liability and litigation has marked many advances in tort law. See [People Express Airlines, Inc. v. Consolidated Rail Corp., 100 N.J. 246, 253–54 (1985)]; H. Rosenblum, Inc. v. Adler, 93 N.J. 324, 348 (1983). As we said in People Express, “[t]he answer to the allegation of unchecked liability is not the judicial obstruction of a fairly grounded claim for redress. Rather, it must be a more sedulous application of traditional concepts of duty and proximate causation to the facts of each case.” 100 N.J. at 254. Reasonable care is not a standard beyond the reach of any enterprise.

[106 N.J. at 493–94 (footnote omitted).]

The Court further noted:

we must keep in mind the central goals of the law of torts. As we said in People Express, supra, 100 N.J. at 255, the primary purpose of the tort law is “that wronged persons should be compensated for their injuries and that those responsible for the wrong should bear the cost of their tortious conduct.”

[Id. at 486–87.]

Plaintiffs further assert that NJNG’s and JCP&L’s reliance on their tariffs to support their arguments is misplaced, noting that it is settled law that tariffs do not, alone, define the duty a utility owes to a customer. In support, they quote the Appellate Division’s decision in Muise v. GPU, 332 N.J. Super. 140, 167–68 (App. Div. 2000), where the court stated:

Years before Weinberg, our Supreme Court rejected the proposition which defendants advance here, namely, that if a utility is in compliance with the Board’s regulations and other standards for installations, operations, and maintenance, then as a matter of law it cannot be held liable for a service outage which occurs despite such compliance. In Black v. Public Serv. Elec. & Gas, Co., 56 N.J. 63, 76–77, 265 A.2d 129 (1970), the utility was in compliance with the National Electrical Safety Code, which the Board had “approved.” The Court held that such compliance failed to establish as a matter of law that the utility could not be held liable, because the industry standards were minimums for the handling of electrical wires that “do not establish the complete duty of the utility under all circumstances.” Ibid.

Nor is there authority for defendants’ proposition that the tariff as a matter of law states the entirety of the relationship between a utility and its customers and is the sole source of the duties between them, much less the proposition’s implication that a tariff can defeat or eviscerate common-law causes of action for negligence or breach of contract simply by failing to mention them. The chief cases defendants rely upon, In re Application of Borough of Saddle River, 71 N.J. 14, 29, 262 A.2d 552 (1976), and Essex County Welfare Bd. v. New Jersey Bell Tel. Co., 126 N.J. Super. 417, 421–22, 315 A.2d 40 (App. Div. 1974), do not go this far. These cases say only that a tariff is “the law” and “not a mere

contract,” with the effect that subscribers are bound by it whether or not they are aware of its provisions. Ibid. They do not address the meaning of a tariff’s omissions, much less suggest that they can serve to preclude rights customers would otherwise have at common law. These authorities do not preclude a judicial trial.

Thus, the omission from NJNG’s and JCP&L’s tariffs of immunity from liability for damage resulting from the imprudent continuation of service that causes harm is in keeping with longstanding negligence law, as set forth in Muise.

Moreover, plaintiffs aver by way of analogy that NJNG’s and JCP&L’s tariffs allow the utilities to discontinue service in case of an emergency, if ordered by the government, or in their sole judgment, to protect the overall system, without fear of being sued for damages. See JCP&L Tariff, Sections 4.01, 4.04 and 7.02; NJNG Tariff, Section 9.1. Thus, it follows that the defendants could have discontinued service prior to the suspension.

### **DISCUSSION AND CONCLUSIONS**

Whether a duty exists between the utility and a customer has been the subject of much debate. The debate has centered on the type of duty owed, the relationship between the utility and the aggrieved party, and whether the matter lies in tort or whether the issue is one that calls for Board expertise. Tort actions have been instituted against water companies for failure to have available sufficient water pressure for firefighting. See Weinberg v. Dinger, supra, 106 N.J. 469; Likewise, a tort action was filed against an electric company for failure to timely restore power. Brooks v. Pub. Serv. Electric & Gas Co., supra, 1 N.J.A.R. 243. The Weinberg v. Dinger case makes clear that a cause of action will lie against a water company for failing to supply sufficient water for firefighting even where there is no express contractual or statutory basis. The claim lies in a tort action for negligent performance of a duty. The essential issue is whether the water company owed the injured party a duty of reasonable care.

Weinberg v. Dinger, *supra*, 106 N.J. at 485 (citing Kelly v. Gwinnett, 96 N.J. 538, 544 (1984)).

The standard of care ordinarily imposed by negligence law is well established. To act non-negligently is to take reasonable precautions to prevent the occurrence of foreseeable harm to others. What precautions are reasonable depends upon the risk of harm involved and the practicability of preventing it. *Id.* at 484. And, a defendant's conduct is to be evaluated on the prudent-man standard, what a prudent man would have done in the defendant's circumstances. *Ibid.* Thus, the question here is whether reasonable care could have prevented the destruction of Osborn Camp. This is a question of fact for the fact finder.

The law has not changed since the decisions were rendered. In Brooks v. Public Service Electric and Gas Company, *supra*, 1 N.J.A.R. 243, the petitioner therein filed an action in the Bergen County District Court seeking damages from the utility on the basis that PSE&G had negligently failed to restore power within a reasonable time. Petitioner contended that PSE&G failed to notify him that power would not be restored for a substantial time so that he could take steps to preserve his frozen-food supply. PSE&G moved to have the matter transferred to the BPU, alleging that the agency had jurisdiction on the issue of the supply or nonsupply of power. The BPU then transmitted the matter to the OAL for hearing.

ALJ Dower-LaBastille concluded that disputes concerning the propriety of any tariff, or charge, or costs of line extensions are within the exclusive jurisdiction of the Board. However, disputes alleging negligence, intentional tort, or any other common-law cause of action for damages are within the jurisdiction of the courts and cannot constitutionally be heard by the Board either on liability or damages issues. Brooks v. Pub. Serv. Electric & Gas Co., *supra*, 1 N.J.A.R. at 248. Thus, it was for the court and jury to determine whether the petitioner's damages arose directly or consequently from an act of God or from the negligence of the utility company.

However, in Daaleman v. Elizabethtown Gas Co., 77 N.J. 267 (1978), the plaintiff therein brought a class action under the Consumer Fraud Act (N.J.S.A. 56:8-1) alleging that Elizabethtown's gas rate under its Purchased Gas Adjustment Clause was too high due to a fraudulent manipulation and an overstatement of the cost of purchased gas. The Court found that this issue concerned an approved tariff rate, thus it was within the exclusive jurisdiction of the Board. The instant matter does not concern a tariff rate or charge. Thus, Daaleman is distinguishable from this matter, and therefore not controlling herein.

I have carefully considered the respondents' contentions that their tariffs do not require them to engage in a preemptive shutoff, and that the core obligation of each utility—to maintain uninterrupted service—precluded any consideration of a suspension of service. I have also considered the attendant costs and the logistics associated with a suspension. First, it must be emphasized that the respondents' tariffs do allow for a suspension of service in emergent situations, and where the utilities determine in their own discretion that a suspension is warranted. See JCP&L Tariff, Sections 4.01, 4.04 and 7.02; NJNG Tariff, Section 9.1.

Moreover, as noted by the petitioners, the tariffs do not provide immunity from liability when there is a breach in the duty of care. As was recognized by the Muise Court, tariffs do not establish the complete duty of a utility under all circumstances and tariffs do not defeat a common-law cause of action. Muise, supra, 332 N.J. Super. at 167.

Somewhat analogous to the case at bar is the matter of San Diego Gas and Electric Company (SDG&E), where the company, in 2008, filed an application with the California Public Utilities Commission seeking approval of a proactive de-energization plan (Power Shut-off Plan) whereby SDG&E would turn off electricity to certain regions during periods of high fire danger. A shutoff would prevent its overhead power lines from igniting potentially catastrophic wildfires. SDG&E's de-energization plan was part of a multi-pronged program designed to reduce the likelihood of power-line fires

resulting from strong, dry, offshore winds (Santa Ana winds) that occur annually in Southern California during the fall and early winter. The purpose of the plan was to de-energize overhead power lines when certain criteria were met in order to eliminate power lines as an ignition source when the fire risks were high. Decision Denying Without Prejudice San Diego Gas & Electric Company's Application to Shut Off Power During Periods of High Fire Danger, No. 09-09-030, Calif. Pub. Util. Comm. (September 10, 2009), <[http://docs.cpuc.ca.gov/PUBLISHED/AGENDA\\_DECISION/106702.htm](http://docs.cpuc.ca.gov/PUBLISHED/AGENDA_DECISION/106702.htm)>.

The Commission denied the application, without prejudice, because it determined that SDG&E failed to meet its burden to demonstrate that the benefits of shutting off power outweighed the significant costs, burdens, and risks that would be imposed on customers and communities in the areas where power was shut off. Id. at §1. In its denial, the Commission first noted that SDG&E's application to shut off power under specified circumstances to eliminate the risk of power-line fires was subject to Pub. Util. Code §451, which required it to furnish and maintain such adequate, efficient, just, and reasonable service, instrumentalities, equipment, and facilities as are necessary to promote the safety, health, comfort, and convenience of its patrons, employees, and the public. Id. at §5.

Specifically, the Commission found that SDG&E had a duty under §451 to provide electric service in a way that protects the safety of its customers, employees, and the public at large. Thus, the central issue to be determined was whether SDG&E should be relieved of its duty when it asserts that there is a heightened risk that its power lines could ignite a catastrophic wildfire. Ibid. Noting that the provision of electricity to the public carries a certain degree of inherent risk,<sup>4</sup> utilities are nonetheless required to fulfill their duty of providing electricity despite such risks. To minimize such risks, the Commission has promulgated safety regulations governing electric utility operations and facilities. Also, and most importantly, SDG&E, like all utilities, could suspend service when necessary to protect the public safety. Ibid. Notably, the Commission concluded that SDG&E retained the power to shut off power in an

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<sup>4</sup> For example, electrocution, or fires ignited by foreign objects touching power lines.

emergent situation when necessary to protect public safety. Indeed, the Commission found:

***SDG&E's statutory obligation to operate its system safely requires SDG&E to shut off its system if doing so is necessary to protect public safety.*** For example, there is no dispute that SDG&E may need to shut off power in order to protect public safety if Santa Ana winds exceed the design limits for SDG&E's system and threaten to topple power lines onto tinder dry brush. Any decision by SDG&E to shut off power under its existing statutory authority may be reviewed by the Commission pursuant to its broad jurisdiction over matters regarding the safety of public utility operations and facilities. The Commission may decide at that time whether SDG&E's decision to shut off power was reasonable and qualifies for an exemption from liability under Tariff Rule 14.

[Id. at §7.2.6 (emphasis added) (footnote omitted).]

"The question of whether a duty exists is a matter of law properly decided by the court, not the jury, and is largely a question of fairness or policy." Wang v. Allstate Ins. Co., 125 N.J. 2, 15 (1991) (citing Strachan v. John F. Kennedy Memorial Hosp., 109 N.J. 523, 529 (1988)). The fundamental question is whether "the plaintiff's interests are entitled to legal protection against the defendant's conduct." Wytupeck v. Camden, 25 N.J. 450, 461–62 (1957) (citation omitted). In the absence of a duty, there can be no claim for negligence. City Check Cashing, Inc. v. Manufacturers Hanover Trust Co., 166 N.J. 49, 57 (2001); Ryans v. Lowell, 197 N.J. Super. 266, 275 (App. Div. 1984), certif. denied, 101 N.J. 211 (1985). (JCP&L Motion at 19, 20.)

The issue of whether the duty of care was breached by JCP&L and NJNG is a question of law. The respondents' tariffs provided for a discretionary suspension of service when in their own judgment it was concluded that such a suspension was warranted. Indeed, such a judgment was made by JCP&L when it decided to proactively suspend services to some 25,000 customers on the barrier islands in Monmouth and Ocean counties. Since the respondents knew that Camp Osborn was in

a flood zone, whether their decisions to maintain service were prudent is for the jury or the fact finder, not the BPU, to determine.

I **CONCLUDE** that this matter does not involve a tariff or a public-utility regulation requiring the Board's expertise, and that the matter properly belongs before the Superior Court, which has exclusive jurisdiction over questions of negligence, liability, and damages.

**ORDER**

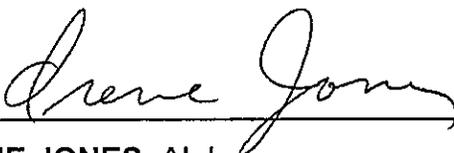
It is therefore **ORDERED** that the motion for Summary Judgment is hereby **DENIED**; and it is further **ORDERED** that this matter be **DISMISSED** and returned to the Honorable Judge Robert A. Fall, J.S.C., for disposition.

I hereby **FILE** my Initial Decision with the **BOARD OF PUBLIC UTILITIES** for consideration.

This recommended decision may be adopted, modified or rejected by the **BOARD OF PUBLIC UTILITIES**, which by law is authorized to make a final decision in this matter. If the Board of Public Utilities does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **SECRETARY OF THE BOARD OF PUBLIC UTILITIES, 44 South Clinton Avenue, P.O. Box 350, Trenton, NJ 08625-0350**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

June 22, 2017  
DATE

  
IRENE JONES, ALJ

Date Received at Agency: June 22, 2017

Date Mailed to Parties: June 22, 2017  
sej

sej