Agenda Date: 10/7/19
Agenda Item: IIA

STATE OF NEW JERSEY

Board of Public Utilities
44 South Clinton Avenue, 9th Floor
Post Office Box 350
Trenton, New Jersey 08625-0350
www.nj.gov/bpu/

ENERGY

IN THE MATTER OF DONALD MCKAY, PETITIONER V. JERSEY CENTRAL POWER AND LIGHT COMPANY, RESPONDENT	))))	ORDER OF EXTENSION BPU DOCKET NO. EC17090969 OAL DOCKET NO. PUC-02000-18

(SERVICE LIST ATTACHED)

The Initial Decision of the Administrative Law Judge was received by the New Jersey Board of Public Utilities ("Board") on August 29, 2019; therefore, the 45-day statutory period for review and the issuing of a Final Decision will expire on October 13, 2019. Prior to that date, the Board requests an additional 45-day extension of time for issuing the Final Decision in order to adequately review the record in this matter.

Good cause having been shown, pursuant to N.J.S.A. 52:14B-10(c) and N.J.A.C. 1:1-18.8, **IT IS ORDERED** that the time limit for the Board to render a Final Decision is extended until **November 27, 2019.**

DATED: 10/7/19

BOARD OF PUBLIC UTILITIES
BY:[1]

JOSEPH L. FIORDALISO
PRESIDENT

ATTEST:

AIDA CAMACHO-WELCH
SECRETARY

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

[1] Authorized by Board to execute this Order of Extension on its behalf.

Date Board mailed Order to OAL: 10-7-19

cc: Service List Attached

DATED:

LISA JAMES-BEAVERS, ACTING
DIRECTOR & CHIEF
ADMINISTRATIVE LAW JUDGE

Date OAL mailed executed Order to Board: _____

Date Board mailed executed Order to Parties: _____

In the Matter of Donald McKay, Petitioner

v.

Jersey Central Power & Light Company, Respondent

BPU Docket No. EC17090969
OAL Docket No. PUC 02000-18

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State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. PUC 02000-18
AGENCY DKT. NO. EC17090969

IN THE MATTER OF DONALD MCKAY,
Petitioner,
v.
JERSEY CENTRAL POWER & LIGHT COMPANY,
Respondent.

Donald McKay, pro se

Michael J. Connolly, Esq., for respondent Jersey Central Power & Light Company (Cozen O'Connor, attorneys)

Record Closed: June 4, 2019 Decided: August 29, 2019

BEFORE **IRENE JONES**, ALJ:

CMS
K. Grehan
D. Thomas
S. Peterson
A. Hart
C. Vachier

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

On or about February 9, 2017, petitioner, Donald McKay, filed a petition for a formal hearing with the Board of Public Utilities (BPU) seeking a refund of monies paid to the respondent, Jersey Central Power & Light Company (JCP&L), for the cost associated with the installation of new utility poles on his property in Ocean Beach, New Jersey.

On October 17, 2017, the BPU forwarded a copy of the petition to First Energy Corporation, the parent company of JCP&L. On November 14, 2017, JCP&L filed an Answer to the petition.

On February 2, 2018, the BPU transmitted this matter to the Office of Administrative Law (OAL) for a hearing as contested case. The matter was assigned to the Honorable Margaret M. Monaco on April 18, 2018, who established a procedural schedule. On August 1, 2018, petitioner filed a motion to compel discovery and the hearing date was adjourned.

On November 30, 2018, this matter was reassigned to the undersigned. On March 6, 2018, an Order was issued by the undersigned granting the petitioner's Motion to Compel Discovery. On March 29, 2019, respondent filed answers to the discovery, and on April 11, 2019, a plenary hearing was held. At the hearing, petitioner and Mrs. McKay testified in support of their case. Respondent presented the manager of engineering for JCP&L, Mario Andrie. Post-hearing briefs were filed after the hearing. At the request of the undersigned, an Order of Extension was granted extending the time for issuance of this decision to September 2, 2019

UNDISPUTED FACTS

Based on the record, I **FIND** the following **FACTS** to be undisputed, and they are adopted as the **FACTS** herein:

1) Petitioner and his wife are the owners of the property located 20 East Shore Way, Ocean Beach I, Lavallette, New Jersey.

2) After Hurricane Sandy hit New Jersey, petitioner commenced work in February 2015 to elevate his house. (R-3.)

3) On or about February 20, 2015, respondent became aware of the petitioner's elevation of his house. The elevation brought the house within three feet of electrical infrastructure (poles).

4) The National Electrical Safety Code (NESC) governs the construction and maintenance of electrical facilities. NESC requires a safe clearance of seven-and-one-half feet of distance between utility facilities and standing structures.

5) Respondent concluded that petitioner's construction project also created a worker safety hazard in violation of the Occupational Health and Safety Administration (OSHA) rules, which required a ten-foot safe-distance work requirement. JCP&L required that petitioner cease construction.

6) Pursuant to Section 5.01 of its tariffs, the company is permitted to install and maintain facilities on a customer's premises at the customer's cost when the company determines that a customer's installation does not conform to NESC and State and municipal regulations, subject to mutual agreement as to the installation and maintenance cost.

7) Section 5.03 of the company's tariffs also allows for a contribution in aid of construction when there is a violation of National Electrical Code in those instances where the company incurs or will incur greater than normal investments cost or operating expense in order to meet the customer's special or unusual service requirements.

8) JCP&L alleges that corrective measures were needed to address the petitioner's elevated structure, which violated NESC code requirements, so it could provide safe electrical service in compliance with NESC clearance requirements. The work was provided on a least-cost design.

9) The parties executed a Fixed Cost Agreement (FCA) on March 11, 2015, for $4,328.21. (R-1.)

10) After payment was received, JCP&L performed the work during May and June and completed the project on June 23, 2015.

11) On February 9, 2017, petitioner sent a letter to respondent seeking a refund/reimbursement of his funds.

12) JCP&L replied to letter on March 23, 2017, refusing the refund/reimbursement request.

13) In its letter denying the refund/reimbursement request the company set forth an explanation for the charges.

14) Petitioner does not dispute that neither he nor his builder notified JCP&L of the construction of his house. It was only after the house was built that JCP&L became aware of the elevated premises.

TESTIMONY

The McKays testified that they have owned the property in Ocean Beach for forty years and are well acquainted with their neighbors. During Hurricane Sandy their home had two feet of water, and they were forced by new FEMA and municipal regulations to elevate their house. Mr. McKay testified that although the existing utility pole on their land was ten years old with a fifty-year life span, respondent required them to replace the pole. The cost was shared with their next-door neighbor. The cost of the new pole was $6,000 and JCP&L charged $4,000, which they split with their neighbor. (P-9.) The street poles across were replaced allegedly at no cost to the homeowner. (P-8.) He acknowledges that JCP&L issued a stop-work order because his construction was within three feet of the power lines.

Mr. McKay further notes that all of the lots in Ocean Beach are the same size, 30x50. The houses are also identical, but the charges for utility poles were all different, ranging from $4,000 to $21,000. The cost for a new utility pole depended on who you knew and if you were politically connected. Mr. McKay further acknowledged that in

response to his discovery request on pole 4391, JCP&L conceded that it did not charge the homeowner because the pole was damaged by Hurricane Sandy and thus had to be replaced. Indeed, he is aware that some of his neighbors who lived across the street from him were not assessed any charges when their poles were replaced.

McKay further alleges that (in 2016) the State received $17 billion in Sandy aid, with $3.9 million being earmarked for utility infrastructure. In 2017 the entire town received new utility poles as a "maintenance upgrade."

Elizabeth McKay testified that she spoke to many of her neighbors, who related that they were not charged to have their poles removed or replaced, thus, not every customer was treated equally. Further, she alleges that at least one neighbor was able to negotiate a lower price with JCP&L.

JCP&L presented one witness, Mario Andrie (Andrie). At the time of the incident, Andrie was manager of engineering services. He is now employed at West Penn Power, a wholly owned subsidiary of First Energy and a sister company to JCP&L. His career at First Energy Companies has spanned some twenty-nine years. As a manager of engineering services at JCP&L he supervised a staff of 120 employees. Further, he was responsible for the engineering functions related to planning and system-reliability improvements. He also designed the distribution infrastructure.

He became aware of this matter when field employees reported the violation to him in February 2015. In March 2017 he corresponded with McKay concerning his February 9, 2017, letter petition that was subsequently filed with the BPU. (R-3.) He had no further correspondence with McKay. When McKay's contractor elevated his home, it was constructed too close to a high-voltage line that was adjacent to their house. The NESC required that power lines have seven-and-a-half-feet clearance, and a conduction must be three feet from the house. The company's field employee completed a violation notice (R-4) and issued a work-stop order because there were employees working on the back of the house in proximity of the electrical infrastructure. Exhibits R-5 and R-6 are enlarged photographs of the house. While NESC requires

seven-and-one-half feet of clearance, OSHA requires ten-and-one-half feet of clearance.

Prior to the elevation, a single-level house sat on the property at ground level. After the renovations and elevation, a double-story house sat on the property. The homeowners did not notify the company of the proposed construction, thus precluding any prior planning to avoid potential NESC violations. The issue is one of safety for the general public and for the utility workers when they are forced to work on utility infrastructure. In cases where the general public is too close to an energized line it could result in a serious injury or a fatality.

The witness recounted the process to remove the violations. He conceded that it took some two-and-one-half months to complete the work, as the project was unscheduled and had to be fit into already planned infrastructure projects. As to cost of the project, the McKays were required to pay because the company had to move an existing utility pole to eliminate the NESC violation. The new fifty-five-foot pole replaced a standard pole, but the petitioner was only charged the difference between the two because the existing forty-five-foot pole was damaged. A new pole was also placed immediately behind the house, for which the entire cost was billed. This pole was replaced with a primary pole or higher voltage line that included both a primary and a secondary line.

Andrie disputes the petitioner's contention that the company's 2017 Resiliency Project that replaced many of the back-lot lines and poles in the petitioner's neighborhood resulted in him paying for this replacement when it was done two years later at no cost to his neighbors. At the time of the petitioner's project, the 2017 Resiliency Project did not exist. The project was post Hurricane Sandy and was done to remove high-voltage lines from behind houses and to replace them with a lower voltage line from street to street. The higher voltage lines were moved to the end of the house, where they are easily accessible via the streets. The project was done to improve resiliency on the barrier island. Respondent's project was totally different in scope from the petitioner's project, which was done to cure a violation. The 2017 Resiliency Project did not assess any cost to any customers; the costs are included as part of the

company's rate base. Andrie noted that he wrote a letter to the petitioner on March 23, 2017, explaining the NESC violation and the attendant costs. (R-3.) The letter also addressed the 2017 Resiliency Project. Andrie also noted that much of the work that was done in 2015 at the McKay residence was replaced in 2017 because of the Resiliency Project.

With respect to the seven poles that the petitioner asserts were installed at no cost to his neighbors in 2015, the witness noted that one (No. JC4391DVT) was replaced because it was severely leaning, probably due to Hurricane Sandy. Three of the seven were replaced or installed by Verizon. Poles numbers 2, 3, and 4 on R-9 also involved customer billing. Those poles belonged to the petitioner. (R-9; R-3.) Andrie further testified that he is unaware that JCP&L received any federal funding for utility infrastructure. The 2017 Resiliency Project was funded by the Company and ratepayers.

DISCUSSION, FINDINGS, AND CONCLUSIONS

It is axiomatic that in an administrative proceeding, the petitioner bears the burden of proof to establish by a preponderance of the competent credible evidence that he is entitled to the requested relief. Here, petitioner seeks a refund/reimbursement of monies paid to the respondent for the installation/replacement of utility poles.

Having reviewed the entire record, I **FIND** no credible evidence that refutes the respondent's contentions that the petitioner's elevation of his home violated NESC/OSHA clearance requirements. Further, at no time did petitioner present any evidence that it notified the respondent of his construction project. Indeed, petitioner at no time even remotely suggested otherwise.

I further **FIND** that the petitioner's allegations that his neighbors did not pay for the poles that were replaced at their respective homes are nothing other than hearsay. Even assuming, arguendo, that there were some customers who did not pay, the allegation is inherently unreliable. Hearsay, while admissible in an administrative proceeding, "shall be accorded whatever weight the judge deems appropriate taking in

account the nature, character and scope of the evidence, the circumstances of its creation and production, and, generally, its reliability."[1] N.J.A.C. 1:1-15.5(a). However, hearsay alone cannot be used as the sole basis for the ultimate finding of fact or making a legal determination. N.J.A.C. 1:1-15.5(b); see Weston v State, 60 N.J. 36, 51 (1973) (finding that the residuum rule was violated where a police chief's decision to deny a firearms purchaser identification card was based on information contained in an investigation report where the information was provided to the investigators by a third party and neither the party nor the investigator was present); In re Analysis of Walsh Trucking Occupancy & Sprinkler Sys., 215 N.J. Super. 222, 231 (App Div. 1987) (where residuum rule was violated where an agency's decision was based on an engineering report and neither the author of the report nor anyone else was called as a witness to be subject to cross-examination or to defend the conclusions of the report).

N.J.A.C. 1:1-15.5(b), also known as the residuum rule, provides, "Notwithstanding the admissibility of hearsay evidence, some legally competent evidence must exist to support each ultimate finding of fact to an extent sufficient to provide assurances of reliability and to avoid the fact or appearance of arbitrariness." DeBartolomeis v. Bd. of Review, 341 N.J. Super. 80 (App. Div. 2001). The underlying rationale of the rule is that an administrative determination should "not rest upon evidence which the unsuccessful party was *incapable* of impeaching or rebutting." Application of Howard Savings Bank, 143 N.J. Super. 1, 9 (App. Div. 1976) (emphasis added).

In the case at bar, I **FIND** that petitioner failed to produce any competent evidence, such as the testimony of a neighbor(s) whose situation was exactly the same as his, but the neighbor was not charged. It is not enough to assert allegations of discriminatory treatment without supporting evidence.

I further **FIND** that the respondent's tariffs provided for the charging of expenses incurred by the company to eliminate the NESC/OSHA violation. (R-10.)

[1] Hearsay is defined as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." N.J.R.E. 801(c).

As noted by the respondent, petitioner is bound by the provisions of the tariff. The Court has consistently held that a tariff is not a mere contract, it is the law, thus its provisions are binding on a customer whether he knows them or not. In re Application of Saddle River, 71 N.J. 14, 29 (1976). Here, the respondent's tariff provides for a contribution in aid of construction where the work performed is solely for the benefit of an individual customer. (R-10.)

I **FIND** that petitioner failed to prove that the utility companies, respondent in particular, received federal funding for utility infrastructure. As the company noted, the BPU has ruled that investor owner utilities are not eligible for cost recovery from FEMA for restoration costs. 42 U.S.C.A. § 5172 (a)(1)(B) and 44 C.F.R. § 206.221(e) (2018).

Further, I **FIND** credible the testimony of witness Andrie that the company's 2017 Resiliency Program did not exist in 2015.

Finally, I **FIND** that the work done at petitioner's home was done to eliminate a NESC/OSHA violation. I **CONCLUDE** that the petitioner failed to meet the required burden of proof that he was improperly charged for the work done by the respondent in response to NESC/OSHA violations. For the foregoing reason, the petition is hereby dismissed.

ORDER

It is therefore **ORDERED** that this matter be and is hereby **DISMISSED**.

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.

August 29, 2019
DATE

IRENE JONES, ALJ (Ret. on recall)

Date Received at Agency: August 29, 2019

Date Mailed to Parties:

mm