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BOARD OF PUBLIC UTILITIES
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CMS

September 17, 2015

VIA OVERNIGHT DELIVERY

Irene K. Asbury, Secretary
Board of Public Utilities
44 South Clinton Avenue, 9th Floor
Trenton, NJ 08625-0350

Re: In the Matter of the Petition of **Jersey Central Power & Light Company**
Pursuant to *N.J.S.A.* 40:55D-19 for a Determination that the Montville-
Whippany 230 kV Transmission Project is Reasonably Necessary for the
Service, Convenience or Welfare of the Public

BPU Dkt. No. EO15030383
OAL Dkt. No. PUC 08235-2015N

Dear Secretary Asbury:

Please accept this reply letter brief on behalf of Jersey Central Power & Light Company ("JCP&L" or the "Company") in response to the Township of Montville's ("Montville") Request for Interlocutory Review ("Interlocutory Request") dated September 15, 2015 in the above-referenced matter. Montville previously filed a motion with presiding Administrative Law Judge ("ALJ") Leland McGee seeking an order requiring JCP&L to establish and fund an escrow account to subsidize Montville's expert fees related to its intervention in this proceeding (the "Motion"). JCP&L opposed Montville's Motion, and, after considering the papers, ALJ McGee issued an order dated September 8, 2015 denying Montville's Motion. Montville's Interlocutory Request seeks the Board of Public Utilities' (the "Board" or "BPU") review of ALJ McGee's September 8, 2015 order.

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Montville's Interlocutory Request raises no new legal or factual arguments; rather it is largely a recitation of the same flawed, unsupported allegations that ALJ McGee considered and rejected in denying Montville's Motion. Moreover, the additional cases that Montville cites in its Interlocutory Request are not relevant to the escrow issue. Consequently, the Board should deny Montville's request that it review ALJ McGee's decision; or, should the Board determine to exercise its powers of interlocutory review, it should affirm ALJ McGee's decision.¹

Introduction

Montville's letter brief in support of its Interlocutory Request largely repeats the arguments it made below in its Motion to ALJ McGee, in an effort to convince the Board to order JCP&L to fund Montville's expert fees in this matter. In its Interlocutory Request, as in its Motion, Montville has failed to identify a single legal authority for requiring a utility to fund the professional expenses of an intervenor in any proceeding before the Board. Moreover, Montville's filing fails to even acknowledge, let alone satisfy, the high threshold for the Board to grant interlocutory review of an ALJ's decision.² For all these reasons, as discussed in detail in this reply letter brief, JCP&L respectfully requests that the Board deny Montville's Interlocutory Request.

¹ Should the Board decide to undertake interlocutory review, JCP&L reserves the right to file an additional pleading in opposition, pursuant to *N.J.A.C. 1:14-10(d)*.

² See *In re Uniform Administrative Procedure Rules*, 90 *N.J.* 85, 90 (1982) (holding that interlocutory review of an ALJ's order should be granted sparingly and only when the interest of justice requires such piecemeal review).

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Discussion

I. There is No Statute, Regulation, or Board Precedent that Requires, or Allows, the Board to Order a Public Utility to Fund the Expert Fees of Municipal Intervenors in a BPU Case.

As was the case with its Motion before ALJ McGee, Montville's Interlocutory Request fails to identify a single New Jersey statute, regulation, or Board order that either requires or allows the Board to order a public utility to fund the expert fees of a municipal intervenor in a BPU proceeding. There is a simple explanation for this fatal flaw in Montville's filing – no such authority exists. In fact, Montville admits that there is no legal basis for its request. *See Montville Interlocutory Request*, at p. 4.

Like it did in its Motion, Montville again relies upon a voluntary decision by Public Service Electric and Gas Company ("PSE&G") to create an escrow account for use by seven intervening municipalities opposing PSE&G's request that the Board issue an order pursuant to *N.J.S.A. 40:55D-19* overriding local zoning laws.³ *Interlocutory Request*, pp. 5-6. While Montville admits that the Board denied the underlying motion for an escrow account in that matter, tellingly, it fails to explain how a voluntary funding offer by a utility that was seeking approval of a billion dollar transmission project provides any support for its request in the instant matter. Rather, Montville simply ignores the Board's actual finding and Order in that matter and instead pretends (without citation and contrary to reality) that the Board did not actually decide

³ *I/M/O the Petition of Public Service Electric & Gas Company for a Determination Pursuant to the Provisions of N.J.S.A. 40:55D-19* (Susquehanna-Roseland), BPU Docket No. EM09010035 ("Susquehanna-Roseland"). This matter involved a utility request for Board approval for the siting of a 500 kV transmission line.

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anything but instead deferred to the PSE&G decision to voluntarily fund a municipal litigation support escrow account.

However, it is clear that PSE&G's voluntary establishment of an escrow fund in the context of the Susquehanna-Roseland case, in which the Board actually denied the motion and declined to order PSE&G to establish the fund, provides no support whatsoever for the instant Interlocutory Request. Indeed, the suggestion that PSE&G's voluntary actions in the Susquehanna-Roseland case serve as a precedent for the Board to reverse ALJ McGee's decision and direct JCP&L to provide the requested relief in this proceeding, without citation to any other authority before or after the Board's contrary determination in 2009, clearly demonstrates that Montville's request has no relevant, substantive underpinning. While a utility may voluntarily decide to give money to an intervenor for any purpose it may choose, it is beyond dispute that there is no authority, no precedent, and no public policy reason to order JCP&L to establish such a fund for Montville in this case. For all of these reasons, the Interlocutory Request should be denied.

Similarly unavailing is Montville's reliance on the unpublished decision in *In re Public Service Elec. and Gas Co.*, 2013 WL 490171 (App. Div. 2013). That unpublished opinion involved an environmental group's appeal of the Board's decision in the above-cited Susquehanna-Roseland matter. The opinion (along with the earlier cases cited therein) does not discuss, and has no relevance to, an intervenor's request to have the utility fund an escrow account to pay for the intervenor's expert fees. Although Montville has accurately quoted from

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the unpublished opinion, it has merely cited to some of the standards the Board applies in a petition filed pursuant to *N.J.S.A.* 40:55D-19. While the Board will apply those standards in its consideration of the Company's underlying Petition filed in this matter, they offer no support to Montville's Request for Interlocutory Review or its underlying escrow funding request. The fact that a party may desire to retain experts in a proceeding does not give rise to any right to have an opposing party fund the cost of such experts.

Contrary to Montville's statements on page 5 of its Interlocutory Request, the two Board decisions that JCP&L cited and relied on in its response to Montville's Motion are directly on point here. First, the Board decision to deny the intervenors' motion for an escrow fund in the Susquehanna-Roseland matter is relevant for the reasons discussed above. Second, the Board's more recent 2013 decision to deny a request by a municipal intervenor seeking to have JCP&L fund its participation in the Company's base rate case is directly on point. As the Board ruled in that proceeding:

Having carefully considered the submissions, and having reviewed the applicable statutes and cases, the Board HEREBY FINDS no legal authority to support Marlboro's request to compel JCP&L to establish an escrow to cover the fees and costs of counsel, experts and assistants retained by the municipalities. * * *

Therefore after reviewing the submissions of Marlboro, JCP&L and Rate Counsel, and after due consideration of the arguments and the law, the Board HEREBY AFFIRMS the decision of ALJ McGill denying Marlboro's motion to compel JCP&L to establish an escrow fund for the use of Marlboro and other municipal Interveners to fund expenses of attorneys and other professionals.⁴

⁴ *I/M/O the Verified Petition of Jersey Central Power & Light Company for Review and Approval of Increases in and Other Adjustments to Its Rates and Charges For Electric Service, et al., BPU Docket No. ER12111052, OAL Docket No. PUC 16310-2012N* (Order dated June 21, 2013, at pp. 7-8).

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Therefore, it is clear the all the BPU precedent relevant to Montville's Interlocutory Request has held that a utility cannot be compelled to fund an intervenor's expert fees in a BPU proceeding.

II. Montville's Unsupported Allegations Regarding JCP&L's Willingness to Consider the Township's Concerns are Untrue and Offer no Support for its Interlocutory Request.

Throughout its Interlocutory Request, Montville makes unsupported allegations that suggest that JCP&L has been unwilling to listen to Montville's concerns or has otherwise been uncooperative. *See, e.g., Interlocutory Request* at pp. 2, 4. It is telling that Montville has provided no citations to any record or other substantiation of these claims, which are simply untrue.

Contrary to Montville's suggestions, JCP&L conducted extensive public outreach concerning the Project prior to filing its Petition with the Board. Much of this outreach was directed specifically at Montville Township. As explained in the pre-filed Direct Testimony of Peter W. Sparhawk (Exhibit JC-6 to the Petition, at pp. 24-27), JCP&L met with Montville on several occasions prior to filing the Petition and made a presentation at a Montville Township Committee meeting in 2014. In addition, the Company held additional public information sessions in Montville Township in late 2014 to accommodate Montville's specific request that JCP&L do so. *Id.* While JCP&L had originally planned to file its Petition in late 2014, these additional public outreach efforts, undertaken largely to accommodate Montville's requests and to solicit additional public input, delayed the filing of the Petition until March 2015.

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Second, this proceeding has just begun and Montville has not even filed testimony or otherwise identified any changes to the Project that it seeks. If and when Montville does so, JCP&L will carefully consider the Township's concerns.

Finally, whatever JCP&L's position may eventually be regarding Montville's concerns about the Project, it has no bearing on whether JCP&L should be forced to pay for Montville's expert expenses. Montville is an adverse party in a contested administrative proceeding that is taking litigation positions to further its parochial interests. The fact that Montville is doing so lends no support whatsoever to its Interlocutory Request.

III. The Statutes of Idaho, California, Wisconsin and Minnesota that Montville Cites Have no Legal Authority in New Jersey; Furthermore, Montville has Misstated what those Statutes Provide.

Montville cites to certain provisions of Idaho, California, Wisconsin, and Minnesota law in support of its escrow request. *Interlocutory Request*, at p. 6. As a threshold matter, the laws of those states have no legal authority or relevance in New Jersey.

Moreover, Montville goes too far in arguing that "several other states routinely engage in the practice of providing financing assistance to intervenors." *Id.* In fact, a close look at the statutes of the other states that Montville cites reveals otherwise. Under the Idaho Code, all intervenors collectively in a utility filing *may be* eligible to be awarded up to \$40,000 (jointly) in any proceeding before the state commission. However, this money is only awarded *after* the conclusion of the case and only if the Idaho Commission finds that all of the following criteria are met:

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- (a) A finding that the participation of the intervenor has materially contributed to the decision rendered by the commission; and
- (b) A finding that the costs of intervention are reasonable in amount and would be a significant financial hardship for the intervenor; and
- (c) The recommendation made by the intervenor differed materially from the testimony and exhibits of the commission staff; and
- (d) The testimony and participation of the intervenor addressed issues of concern to the general body of users or consumers.

See Idaho Code § 61-617A2.⁵

In regard to the provision of California law that Montville cites to, Montville fails to mention that the statutory definitions explicitly exclude public entities (such as municipalities) from those customers that may be eligible to collect expert fees after the conclusion of the case. *See Cal.Pub.Util.Code* § 1802(b)(2) (“Customer does not include any state, federal, or local government agency, any publicly owned public utility, or any entity that, in the commission's opinion, was established or formed by a local government entity for the purpose of participating in a commission proceeding.”). Therefore, under California law, a municipality is specifically prohibited from collecting expert fees from a utility.

Finally, the provision of Minnesota law that Montville references (*Minn. Stat.* §136B.16, subd. 10) does not actually exist. And, the provision of Minnesota law that does govern the potential for intervenor compensation in public utility proceedings limits such compensation to a “nonprofit organization” or an “individual” in utility rate cases. *See Minn. Stat.* §216B.16, subd. 10(a). The instant proceeding is not a rate case and Montville Township is neither a nonprofit organization nor an individual.

⁵ The provisions of Wisconsin law cited to have similar requirements, including a showing of financial hardship, to those of Idaho. *See Wisc. Stat. Ann.* §196.31.

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IV. Montville Has Not Claimed Financial Hardship and Has Already Budgeted for and Retained an Expert for this Matter; Moreover, New Jersey Law Contemplates and Provides Municipalities with a Mechanism to Fund their Participation in BPU Proceedings.

Notably, Montville does not claim that paying for its own experts would cause it any financial hardship. At most, Montville claims that, if JCP&L were forced to pay for the Township's experts, it would free up funds for other purposes. *Montville Interlocutory Request*, at p. 3. Indeed, as JCP&L established in its reply to Montville's Motion before ALJ McGee, Montville has passed municipal budgets and resolutions that explicitly contain funding for the municipality's participation in and hiring of experts for this very proceeding, and in fact, has retained experts. *See* Township of Montville Resolutions (Attachment A); *see also* Township of Montville 2015 Budget, Sheet 3c-2 (which contains line items for "Professional Fees to Fight JCPL Project – 2015" in the amount of \$85,000 and "2014 Deferred Charge - Emergency for JCPL Project" in the amount of \$50,000).⁶ Indeed, Montville admits that "the Township did allocate space in its budget for 2015 to cover the costs of expert fees" *Montville Interlocutory Request*, at p. 3. Moreover, Montville just served 76 written discovery requests on JCP&L in this matter, most of which were clearly developed by an expert. Accordingly, it is clear that Montville does not require financial assistance to participate in this proceeding.

Furthermore, to the extent that Montville is making a financial hardship argument in support of its Motion, that argument is also unavailing. The same statutory provision that

⁶ Montville's 2015 municipal budget is publicly available on its website: <http://www.montvillenj.org/docs/2015MunicBudAdopt.pdf> (and a copy of the cited pages is also included herewith as part of Attachment A).

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permits the intervention of a municipality in BPU cases makes clear that such intervention should be undertaken at the municipality's own cost and expense. *N.J.S.A.* 48:2-32.2 provides:

Municipal, county rights of intervention; notice

a. Every municipality may intervene alone or jointly with another municipality or municipalities in any hearing or investigation held by the board, which involves public utility rates, fares or charges, service or facilities, affecting the municipality or municipalities or the public within the municipality or municipalities and may employ such legal counsel, experts and assistants as may be necessary to protect the interest of the municipality or municipalities or the public within the municipality or municipalities. Such municipality or municipalities may by emergency resolution raise and appropriate the funds necessary to provide reasonable compensation and expenses of such legal counsel, experts and assistants. [*Emphasis added.*]

It is noteworthy that the New Jersey legislature specifically contemplated that municipalities may: (a) want to intervene Board proceedings and should be permitted to do so; (b) want to employ counsel, experts and assistants to protect the municipal interest in such proceedings and should be permitted to do so; and (c) want or need to raise municipal funds to pay for such experts and should be permitted to do so. Had the legislature contemplated that intervenors such as Montville should be entitled to have their expenses for employing counsel or experts paid for or subsidized by New Jersey public utilities or their ratepayers,⁷ the legislature could have provided for it, just as it did in the context of land use proceedings before municipal boards under certain circumstances.⁸ However, the legislature did not do so.

⁷ Such costs, whether imposed by the legislature or by an order in a Board proceeding, would presumably be eligible for recovery through the utility's transmission rates.

⁸ See *N.J.S.A.* 40:55D-53.

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Moreover, the legislature even foresaw that the funding of municipality participation in Board proceedings might not be something budgeted for by the municipality in the normal course and, for that reason, specifically provided the municipality with the power “by emergency resolution [to] raise and appropriate the funds necessary to provide reasonable compensation and expenses of such legal counsel, experts and assistants.”

Accordingly, as contemplated by the legislature, Montville has already budgeted for and retained experts for this matter, in accord with *N.J.S.A.* 48:2-32.2, and there is no basis for the Board to grant interlocutory review of ALJ McGee’s decision that denied Montville’s Motion seeking to require JCP&L to fund or otherwise reimburse the municipality’s expert expenses.

V. Montville’s Request is at Odds With Board Precedent and Policy, Would Result in an Increase in Costs that would be Recoverable from all JCP&L Customers, and Would Establish an Inappropriate and Dangerous Precedent for Future Board Proceedings.

Finally, granting Montville’s Motion would establish an inappropriate and dangerous precedent for future Board proceedings. It is therefore important for the Board to affirm its prior Orders denying similar requests for utility funding of intervenors’ experts. Other than the single instance where a utility voluntarily funded an escrow account for municipal experts and advisers, Montville has not provided, and JCP&L’s research has not revealed, any other instance where an escrow fund for intervenor experts and advisers was ordered (or even voluntarily created) in the context of a Board proceeding. In other contexts, the Board has promoted a policy that a utility and its customers should not have to assume the expenditures associated with an individual party’s pursuit of its own interests. *See, e.g., Van Holten Group v. Elizabethtown Water*

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Company, 121 N.J. 48, 61-62 (1990) (affirming the Board's determination that a developer should pay the upfront costs associated with extending water utility service to a proposed development and not the utility or its ratepayers). Similarly, a municipality like Montville that is seeking to protect its parochial interests should fund its own litigation efforts.

Through annual utility assessments, which are reflected in utility rates, utility customers in New Jersey already fund the Board, Board Staff and Rate Counsel, thus ensuring that appropriate expertise is brought to bear in fully reviewing utility matters and protecting the interests of ratepayers and the public. Thus, if JCP&L were required to set up an escrow fund for Montville in this proceeding, JCP&L and/or its ratepayers would be paying not only for this comprehensive agency review and Rate Counsel review, but also, unfairly, for a review by Montville's own experts and advisers. Indeed, such a precedent would turn legislative intent on its head by changing a statutory grant of the right for a municipality (at its own expense) to choose to intervene in Board proceedings into an absolute right to intervene (at the utility's expense) similar to that of Rate Counsel.

Establishing an escrow for Montville's use here would also create a dangerous precedent in New Jersey that could be applicable to all Board proceedings, which are often contentious and cost-intensive. A decision requiring a utility to fund the expenses of one municipal intervenor would invariably lead to funding the expenses of each and every municipal party that voluntarily participates in any matter before the Board involving any of the regulated utilities. Such a result is legally unsupportable, contrary to sound public policy, and would increase regulatory costs

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and ratepayer expenses significantly. Accordingly, the Board should deny Montville's Interlocutory Request.

Conclusion

For all the foregoing reasons, JCP&L respectfully requests that the Board deny Montville's Request for Interlocutory Review or, should the Board determine to exercise its powers of interlocutory review, it should affirm ALJ McGee's decision.

Respectfully submitted,



Gregory Eisenstark

c: Hon. Richard S. Mroz, President, BPU
Hon. Joseph L. Fiordaliso, Commissioner, BPU
Hon. Mary-Anna Holden, Commissioner, BPU
Hon. Dianne Solomon, Commissioner, BPU
Hon. Upendra J. Chivukula, Commissioner, BPU
Hon. Leland McGee, ALJ (via regular mail)
Clerk, OAL (via regular mail)
Service List (via email only)

SERVICE LIST

In the Matter of the Petition of **Jersey Central Power & Light Company**
Pursuant to *N.J.S.A. 40:55D-19* for a Determination that the Montville-Whippany 230 kV
Transmission Project is Reasonably Necessary for the Service,
Convenience or Welfare of the Public

BPU Docket No.: EO15030383
OAL Docket No. PUC 08235-2015N

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