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March 2, 2016

Hand Delivery
Mr. Joseph Orlando, Clerk
Superior Court of New Jersey
Appellate Division
Hughes Justice Complex
25 West Market Street
P.O. Box 006
Trenton, NJ 08625

Re: In The Matter of The Petition Of Jersey Central Power And 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

Dear Mr. Orlando:

We enclose for filing on behalf of New Jersey Division of Rate Counsel, an original and five copies of a (1) Brief in Opposition to Motion to Leave to Appeal and (2) Certification of Service in the above referenced matter.

We also enclose one additional copy of each of the above documents. Please stamp and date one copy of each "filed" and return it in the enclosed self-addressed envelope.

Thank you for your attention to this matter.

Very truly yours,

STEFANIE A. BRAND, ESQ.
DIRECTOR, DIVISION OF RATE COUNSEL

By: Brian Weeks
Brian Weeks, Esq.
Deputy Rate Counsel

Encl.

c: Honorable Leland McGee, ALJ
Attached Service List

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IN THE MATTER OF THE PETITION OF JERSEY CENTRAL POWER AND 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	ON APPEAL FROM: BOARD OF PUBLIC UTILITIES BPU DKT. NO. EO15030383 OFFICE OF ADMINISTRATIVE LAW OAL DKT. NO. PUC 08235-2015N Civil Action **CERTIFICATION OF SERVICE** Sat Below: BPU President, Richard S. Mroz Honorable Leland S. McGee, ALJ

Brian Weeks, an Attorney at Law of the State of New Jersey, hereby certifies as follows:

1. I am a Deputy Rate Counsel with the New Jersey Division of Rate Counsel.

2. I hereby certify that on March 2, 2016, I caused to be served via UPS Overnight Mail to the parties on the attached service list two copies of Rate Counsel's Brief in Opposition to Motion for Leave to Appeal in the above captioned matter.

3. I certify that the foregoing statements made by me are true. I understand that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

STEFANIE A. BRAND
DIRECTOR, DIVISION OF RATE COUNSEL

By: Brian Weeks
Brian Weeks
Deputy Rate Counsel

DATED: March 2, 2016

In The Matter of the Petition of Jersey Central Power and 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
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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

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	))))))	Civil Action On Motion for Leave to Appeal from an Interlocutory Order of the State of New Jersey, Board of Public Utilities BPU Docket No. EO15030383 OAL Docket No. PUC 08235-2015N Sat Below: BPU President Richard S. Mroz Hon. Leland S. McGee, ALJ

BRIEF ON BEHALF OF STATE OF NEW JERSEY DIVISION OF RATE COUNSEL IN OPPOSITION TO MOTION FOR LEAVE TO APPEAL BY INTERVENOR, TOWNSHIP OF MONTVILLE

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PRELIMINARY STATEMENT

Rate Counsel respectfully requests that the Court deny Montville's request for interlocutory review because establishing an escrow account is contrary to law and prior Board decisions, and imposes an unnecessary charge to JCP&L's ratepayers, imposing additional costs on the Company that will ultimately be passed through to the Company's ratepayers.

There is no compelling reason to grant the atypical relief requested here. Leave to appeal at this point is not required to redress any injustice or prevent irreparable harm. It will not save judicial resources, but instead may delay this important public utility project.

The underlying legal questions are well settled. The Board of Public Utilities, not any single municipality, is vested with jurisdiction to review this electric transmission line which runs through three municipalities. One of those municipalities has been granted leave to intervene in this matter, but as a party that must fund its own costs.

It would be unfair to require all of JCP&L's ratepayers to pay for a single municipality's costs to protect its own interests. Accordingly, Rate Counsel respectfully requests that the Court deny the Township's motion.

the utility and not a single municipality). JCP&L has 1.1 million customers in 236 municipalities in New Jersey. [Ia41, ¶1] Rate Counsel is concerned with the effects of the Montville-Whippany 230 kV Transmission Project (the "Project"), including reliability and costs, on all of JCP&L's ratepayers, not just on ratepayers located in the Township of Montville. JCP&L will seek to recover from its ratepayers the costs needed to complete the Project, including consultant fees of its own or of any other party. [See Sept. 4, 2015 JCP&L brief in opposition to Township cross-motion to establish an escrow, Ia182, n.5]

The second clarification concerns the scope of the Project. The Project is a new 230 kilovolt (kV) electric transmission line between JCP&L's Whippany substation, located in East Hanover, New Jersey and its Montville substation, located in Montville, New Jersey, along with the associated upgrades to those substations. [Ia40; Ia43, ¶7] The Project will run through three municipalities, the Townships of East Hanover, Parsippany-Troy Hills and Montville, all in Morris County. [Ia44, ¶10] The Project is necessary to address reliability issues that have been identified by JCP&L and PJM Interconnection, LLC ("PJM"), id., the federally regulated operator of the electric grid for all of part of 13 states in the northeastern United States, including New Jersey. [Ia41, ¶2; Ia48-49, ¶¶18-19] PJM and JCP&L have established the in-service date for the Project at June 1, 2017, allowing sufficient time to obtain all necessary approvals and complete construction. [Ia49-50, ¶¶20-23] The evidentiary hearing in

this matter before the Hon. Leland S. McGee, ALJ, is scheduled for late May 2016. [Ia3]

ARGUMENT

I. The Township has offered no reason for the Court to grant leave to appeal, which is exercised only sparingly for very important reasons.

"[P]arties do not have a right to appeal an interlocutory order." Brundage v. Estate of Carambio, 195 N.J. 575, 598-99 (2008). Leave to appeal an interlocutory order is permitted only "in the interest of justice." R. 2:2-4; Brundage, 195 N.J. at 599. Granting this relief is "highly discretionary," State v. Reldan, 100 N.J. 187, 205 (1985), and appellate courts do so only sparingly. Brundage, 195 N.J. at 600; Janicky v. Point Bay Fuel, Inc., 396 N.J. Super. 545, 550 (App. Div. 2007). The courts set a stringent standard for granting leave to review, based on the "general policy against piecemeal review of trial-level proceedings." Brundage, 195 N.J. at 599, citing Reldan, 100 N.J. at 205.

A. Interlocutory review is not necessary here to ensure the interest of justice.

Interlocutory review has been granted "in the interest of justice." See Edwards v. McBreen, 369 N.J. Super. 415, 420 (App. Div. 2004). Since this matter presents no compelling public concern, such review is not necessary here. The issue at hand is only whether JCP&L, and hence its ratepayers, must pay the Township's expert fees in this matter.

> [A]n interlocutory appeal is not appropriate to "correct minor injustices…." Romano v. Maglio, 41 N.J. Super. 561, 567 (App. Div.), certif. denied, 22 N.J. 574 (1956), cert. denied, 353 U.S. 923 (1957). Rather, when leave is granted, it is because there is the possibility of "some grave damage or injustice" resulting from the trial court's order. Id. at 568. Brundage, 195 N.J. at 599.

The Township will not suffer irreparable harm, or "some grave damage or injustice" if the court denies leave to appeal. See Brundage, 195 N.J. at 599. Denial of leave to appeal will not prejudice the Township's right to review any of the issues before the Board of Public Utilities ("BPU" or "Board"), including its litigation fees and costs, if it wishes, on appeal from the final decision of the BPU in this matter. "[O]rdinarily a final order of disposition adverse to a party renders appealable as of right all interlocutory orders previously entered which are also adverse to that litigant." See Daly v. High Bridge Teachers' Ass'n, 242 N.J. Super. 12, 15 (App. Div.), certif. den., 122 N.J. 356 (1990); comment 2.3.2 on R. 2:2-3. The Township does not point to a single action by the BPU or the Administrative Law Judge that would prevent it from retaining experts, or impair any of its rights to appeal. In any event, the Township already has appropriated funds for this purpose and has submitted direct testimony of those experts. Moreover, the Township has fully participated in discovery on JCP&L's filing and testimony. [Sept. 4, 2015 JCP&L brief in opposition to Township cross-motion to establish an escrow, p.12 & Attachment A, Ia183 & Ia190-202; Ia227-Ia236] Accordingly, the interest of justice does not support granting the Township leave to appeal.

B. Granting leave to appeal here will not conserve judicial resources.

Granting leave to appeal here will not conserve judicial resources. It will not "terminate the litigation" or "very substantially conserve the time and expense of the litigants and the courts." See Brundage, 195 N.J. at 599 (internal cite omitted).

Instead, an appeal at this point will demand further judicial resources, since the Township (or JCP&L) may appeal the final decision of the BPU anyway. An appeal now also would delay this proceeding.

The evidentiary hearing in this matter before the Hon. Leland S. McGee, ALJ, is already scheduled for late May. [Ia3] The issue before Judge McGee is the reasonable necessity and prudency of the transmission Project. It will involve development of an administrative record including pre-filed testimony, discovery and cross-examination, which Judge McGee will review to prepare an initial decision. The Township will have the right to take exception to that initial decision. See N.J.A.C. 1:1-18.4. The Board will then review the initial decision and prepare its final decision. See N.J.S.A. 52:14F-7(a). The Township will have the right to appeal that final decision to this court. See R. 2:2-3(a)(2). The responsibility for the fees of the Township as an intervenor party is at most an ancillary matter in this proceeding. An appeal at this point will not save judicial resources and may further delay adjudication of JCP&L's transmission reliability improvement project. Accordingly, judicial economy does not support granting leave to appeal.

C. This motion does not present any novel question of law.

The interpretation of the statutes governing the Township's motion do not present a novel question, so this presents no basis for granting leave to appeal. See Brundage, 195 N.J. at 600. The statutory language is clear, and the BPU has previously and consistently applied them in cases just like this one.

The legislature has delegated to the BPU authority to review utility projects that run through several municipalities:

> [The Municipal Land Use Law, N.J.S.A. 40:55D-1 et seq.,] or any ordinance or regulation made under authority thereof, shall not apply to a development proposed by a public utility for installation in more than one municipality for the furnishing of service, if upon a petition of the public utility, the Board of Public Utilities shall after hearing, of which any municipalities affected shall have notice, decide the proposed installation of the development in question is reasonably necessary for the service, convenience or welfare of the public.
>
> N.J.S.A. 40:55D-19; I/M/O the Petition of Public Service Electric and Gas Company for a Determination Pursuant to the Provisions of N.J.S.A. 40:55D-19 (Susquehanna-Roseland Transmission Line), 2013 N.J. Super. Unpub. LEXIS 304 (unpublished) (App. Div. Feb. 11, 2013), at *23; see also Petition of Monmouth Consol. Water Co., 47 N.J. at 262.

The BPU thus preempts municipal authority to review the land use issues with such projects. Accordingly, the BPU and not the municipality has the authority and expertise to regulate such utility projects.

The Township quotes a provision of N.J.S.A. 40:55D-19, whereby a regulated public utility may appeal to the BPU if it is "aggrieved by the action of a municipal agency." [Twp. Brief, p. 7, quoting N.J.S.A. 40:55D-19.] That provision is inapplicable to this matter. Instead, the subsequent paragraph of the cited statute governs review of an "installation in more than one municipality for the furnishing of service," such as JCP&L's Project. N.J.S.A. 40:55D-19. For projects such as this, the Municipal Land Use Law and "any ordinance or regulation made under authority thereof" does not apply. Id. In other words, JCP&L is not "aggrieved" by any Township land use rule,

since none of them apply to the Project. The Township simply has no jurisdiction to regulate in this matter.

The statute that allows the Township to intervene in this matter as a party also does not permit the municipality to recover its associated costs from the public utility. N.J.S.A. 48:2-32.2 allows an interested municipality to intervene in matters before the BPU and to hire attorneys and experts to represent their interests. The statute further permits an intervening municipality to, "by emergency resolution raise and appropriate the funds necessary" to compensate its attorneys and experts. N.J.S.A. 48:2-32.2(a). Neither JCP&L nor its ratepayers have any responsibility to pay for the litigation costs of any of the municipal parties to a proceeding where a proposed public utility project will be installed.

In fact, the BPU has previously applied these statutes together, N.J.S.A. 40:55D-19 and N.J.S.A. 48:2-32.2, and reached the same conclusion as in this matter. In each, the BPU denied the motion of an interested municipality to require the utility company to establish an escrow account to pay for the municipality's experts and consultants to participate in the proceeding. 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, and for Approval of other Proposed Tariff Revisions in Connection therewith; and for Approval of an Accelerated Reliability Enhancement Program ("JCP&L 2012 Base Rate Filing"), BPU Docket No. ER12111052, Order on Interlocutory Appeal, June 21, 2013, pp. 4-8 [Ia212-Ia219]; I/M/O the Petition of Public

Service Electric and Gas Company for a Determination Pursuant to the Provisions of N.J.S.A. 40:55D-19 ("Susquehanna-Roseland"), BPU Docket No. EM09010035, Order Denying Motions to Require PSE&G to Place Funds in an Escrow Account (May 29, 2009), p. 4 [Ia204-Ia207].

In denying the municipal motions to direct PSE&G to pay for their experts and consultants to participate in the Susquehanna-Roseland Proceeding, the Board found that:

> To date, based upon research and review, the Board has not required a petitioner to establish an escrow account for intervenors in a case involving an application pursuant to N.J.S.A. 40:55D-19. The Board is under no statutory requirement to require that a petitioner establish an escrow account for intervenors, and at this time, the Board does not find any compelling reason to do so. Therefore, the Board HEREBY DENIES, without prejudice, the motions for the establishment of an escrow account to be funded by PSE&G so that intervenors could use those funds to pay for experts in this proceeding. In making this determination, the Board takes note that PSE&G has offered to establish an escrow account for use by the municipal intervenors.
>
> Id., p. 4 [Ia207].

Therefore, in the Susquehanna-Roseland proceeding the BPU clearly stated that there is no statutory requirement that a public utility set up an escrow account to pay for experts and consultants in a land use dispute before the BPU filed pursuant to N.J.S.A. 40:55D-19.

Similarly, in JCP&L's 2012 base rate case, the Board relied on N.J.S.A. 48:2-32.2 to affirm the decision of the Hon. Richard McGill, ALJ, denying a motion asking the Board to direct JCP&L to establish an escrow account to fund municipal expert and legal fees. JCP&L 2012 Base Rate Filing, Order on Interlocutory Appeal, June 21, 2013, pp. 4-8 [Ia215-Ia219]. Several municipalities intervened in JCP&L's 2012

Base Rate Filing. One of them, the Township of Marlboro, moved for an order directing JCP&L to establish an escrow account to be used by Marlboro and other municipal intervenors to pay their expert and professional fees in the 2012 Base Rate Filing. By order dated May 22, 2013, ALJ McGill denied Marlboro's motion to compel JCP&L to establish an escrow fund. On interlocutory review, by order dated June 21, 2013, the Board affirmed, recognizing that it "is obligated to follow the terms and objectives of the statute." JCP&L 2012 Base Rate Filing, Order on Interlocutory Appeal, June 21, 2013, p. 7 [Ia218].

> As previously discussed, N.J.S.A. 48:2-32.2 provides a municipality with a means to raise the funds needed to pay for the assistance of professionals that it determines it needs to effectively represent the interests of its residents in a Board proceeding. The Board is not persuaded that Marlboro has provided any reason for the Board to override the legislative intent as expressed in the statute that the municipality must fund its own expenses, and instead shift those expenses to all of JCP&L's ratepayers. Therefore, the Board FINDS no basis to compel JCP&L to establish an escrow fund for the municipal interveners' costs and expenses as a matter of equity. Id.

In JCP&L's 2012 Base Rate Filing, the Board found no legal requirement that a utility must establish an escrow account to pay for a municipality's professionals in a matter before the Board, and also found that by statute the municipality must fund its own expenses.

The BPU's exercise of its statutorily delegated responsibilities is entitled to a presumption of reasonableness, see Newark v. Natural Res. Council Dep't Envtl. Prot., 82 N.J. 530, 539, cert. denied, 449 U.S. 983 (1980); In re Freshwater Wetlands Prot. Act Rules, 180 N.J. 478, 489 (2004). If the Township wishes to challenge that presumption

or present any other argument it may do so on appeal of the final BPU decision in this matter. See R. 2:2-3(a)(2).

Read together, the language of N.J.S.A. 40:55D-19 and N.J.S.A. 48:2-32.2 is clear. The BPU, not the Township, has jurisdiction to review this matter. The Township may intervene as a party, but JCP&L and its ratepayers need not pay the Township's fees and costs of intervention. Accordingly, neither statute provides a basis to grant the Township leave to appeal.

II. The Municipal Land Use Law escrow provision has no bearing on this matter.

The Township seems to misunderstand that the legislature requires professional fees to be treated differently in a review by the BPU under N.J.S.A. 40:55D-19 from a review by a municipality under N.J.S.A. 40:55D-53.2. When the municipality reviews an application, the Municipal Land Use Law ("MLUL") allows a municipality to require an applicant to establish an escrow fund to pay the costs for the municipality to retain professionals to review the application. N.J.S.A. 40:55D-53.2; see Flama Constr. Corp. v. Township of Franklin, 201 N.J. Super. 498, 504-505 (App. Div. 1985).

In a matter before the BPU, however, the municipality is a party not the regulator. The BPU does not "stand in the place of the local land use board," [see Twp. Brief, pp.7-9]; instead, the BPU authority preempts the role of local land use review bodies. When a municipality intervenes, under N.J.S.A. 48:2-32.2, it is a party and must pay its own fees and costs.

Even if one were to consider the Township's analogy of N.J.S.A. 48:2-32.2 to N.J.S.A. 40:55D-53.2, as suggested in its brief [pp.7-9],

placing the BPU "in the place of the local land use board," then JCP&L as the party seeking review of its project would need to establish an escrow to pay the fees and costs of the BPU to review JCP&L's application. This logic too does not support the Township's motion.

Similarly, the Township's reliance on Flama Construction Corp. v. Twp of Franklin, 201 N.J.Super. 498 (App. Div. 1985) for the proposition that a court may appoint an independent expert is misplaced. It has been found appropriate for a court to appoint an independent expert where a "large disparity" in expert opinions "suggesting undue partisanship, provided ample basis, for the action taken." Wayne Twp. v. Cassatly, 137 N.J. Super. 464, 469 (App. Div. 1975), certif. denied, 70 N.J. 137 (1976) (over $1 million disparity between condemnation valuation experts); Wayne Twp. v. Kosoff, 136 N.J. Super. 53, 56-57 (App. Div. 1975), rev'd on other grounds, 73 N.J. 8 (1977). That expert, however, advises the Court, not the litigant. Here, this matter is before an Administrative Law Judge assigned by the Office of Administrative Law, not a Township land use review board. The ALJ in this matter has not indicated he needs an expert to assist him in the analysis of this matter. Accordingly, the escrow provision in the MLUL provides no basis to grant leave to appeal.

A. JCP&L's ratepayers should not pay the Township's litigation costs.

It is clear from the Township's request for interlocutory review that its primary interest is protecting its residents and taxpayers. Protecting constituent interests is an appropriate response for any municipal governing body. What is of concern as a policy matter,

however, is to allow a single municipality to charge all of JCP&L's ratepayers for its professional fees incurred to represent that municipality's own particular interests. In its August 31, 2015 brief the Township asked Judge McGee to order JCP&L to establish an escrow account to pay the Township's professional experts to assess the Project, [Ia150-Ia 154], referencing its request to JCP&L in the amount of $500,000, [Ia151]. The escrow account would be dedicated solely to costs incurred by the Township for its residents, with no requirement that the costs be reasonable or prudent. The Montville Board of Education also has intervened in this matter. [Ia5]

If each of these intervenors received an escrow of $500,000, the expense to pay the litigation costs of intervenors from this one municipality may potentially increase to $1 million for this case alone. This would set a precedent that could allow every municipality notified of a hearing, investigation or other matter before the Board to intervene and recover its professional fees from the utility company's ratepayers as a whole. Moreover, if the Board grants the Township's requested relief, JCP&L's ratepayers could be required to pay large sums of money for largely redundant efforts both between the two intervenors, Rate Counsel and the Board. To avoid such a scenario, the legislature has entrusted Rate Counsel with the task of protecting ratepayer interests, including municipalities served by public utilities. N.J.S.A. 52:27EE-46 et seq. The municipal intervenors have clearly stated in their filings their intention to advocate for their own interests and not for JCP&L customers as a whole. The statute allowing municipalities to intervene in matters

before the Board dictates that the taxpayers of those municipalities, and not JCP&L ratepayers, pay for such representation. N.J.S.A. 48:2-32.2(a).

JCP&L's ratepayers should not pay for costs to protect the parochial interests of one municipality, which is only one small portion of JCP&L's customer base. If the BPU were to grant the relief requested by the Township, those costs would fall on JCP&L's ratepayers. Ratepayers, not JCP&L itself or its parent First Energy, would pay the cost of the Township's attorneys and experts. Thus, the Township's references to the revenue of either corporation are not relevant to the issue at hand. This is another reason to deny leave to appeal.

CONCLUSION

For all the foregoing reasons, the New Jersey Division of Rate Counsel respectfully requests that the Court deny the Township of Montville's motion for leave to appeal the Board of Public Utilities' Interlocutory Order in this matter.

Respectfully submitted,

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