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September 23, 2020

**VIA ELECTRONIC DELIVERY**

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**Re: In The Matter of the Verified Petition of Jersey Central Power & Light Company Seeking (a) Approval of the Sale of its Ownership Interest in the Yards Creek Generating Station Pursuant to N.J.S.A. 48:3-7, (b) Waiver of the Advertising Requirement on N.J.A.C. 14:1-5.6(b), (c) a Specific Determination Allowing the Yards Creek Generating Station to Be an Eligible Facility Pursuant to Section 32 of the Public Utility Holding Act of 1935 Under the Public Utility Holding Company Act of 2005. (d) to the extent necessary, a Determination of Compliance with, or the Non-applicability or Waiver of, the Auction Standards under the Board's 1998 Order Adopting Auction Standards under N.J.S.A. 48:3-59(b), and (e) Other related relief. BPU Dkt. No. EM20050343**

Dear Secretary Camacho-Welch:

Please accept the Division of Rate Counsel's ("Rate Counsel") comments regarding the above referenced matter. Thank you for your consideration and attention to this matter. Consistent with the March 19, 2020 Order of the New Jersey Board of Public Utilities ("Board") in I/M/O the New Jersey Board of Public Utilities' Response to the COVID-19 Pandemic for a Temporary Waiver of Requirements for Certain Non-Essential Obligations, BPU Docket No. EO20030254, copies of this comment letter are being filed with the Secretary of the Board and

provided electronically to each person on the service list by electronic mail only. No paper copies will follow. **Please acknowledge receipt of this comment letter.** Thank you for your attention to this matter.

## **BACKGROUND**

On May 6, 2020, Jersey Central Power & Light Company (“JCP&L” or the “Company”) submitted a Verified Petition (“Petition”) to the Board of Public Utilities (“BPU” or the “Board”) requesting the approval of the sale of its ownership share of the Yards Creek Generating Station (“Yards Creek”) to an unaffiliated and unregulated entity, Yards Creek Energy, LLC (“YCE” or the “Buyer”) for a “base” purchase price of \$155 million (subject to potential adjustments at closing).<sup>1</sup> The terms of the transaction are set forth in a confidential Asset Purchase Agreement (“APA”) appended to the Petition. YCE itself is a wholly-owned subsidiary of LS Power Development, LLC (“LS Power”), a major owner and operator of unregulated generation facilities, both in the PJM region and nationally.<sup>2</sup> LS Power and its subsidiaries presently own more than 11,000 MW of generating capacity in the PJM region. Yards Creek is a 420 MW pumped storage hydroelectric power plant located in Warren County, New Jersey which entered commercial service in 1965.<sup>3</sup> JCP&L owns 50 percent of the plant (i.e., 210 MW) and is the plant operator, with the remaining 50 percent owned by PSEG Fossil, an unregulated (indirect) subsidiary of Public Service Enterprise Group (“PSEG”).<sup>4</sup> PSEG Fossil has also entered into an agreement to sell its 50 percent share to YCE, with that transaction expected to close later in 2020. Thus, if the JCP&L sale is approved and closes, YCE will become the owner and operator of the entire 420 MW Yards Creek plant.

Both the JCP&L and PSEG Fossil sales of the Yards Creek capacity are subject to approval by the Federal Energy Regulatory Commission (“FERC”) in Docket Nos. EC20-65-000 (for the JCP&L sale) and EC20-49-000 (for the PSEG Fossil sale). A central issue in the FERC

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<sup>1</sup> Petition, paragraph 2.

<sup>2</sup> Petition, paragraph 7 and 35.

<sup>3</sup> Petition, paragraph 8.

<sup>4</sup> JCP&L originally entered into a joint ownership agreement with the utility Public Service Electric & Gas Company (“PSE&G”) in 1964, approved by the Board in 1965. However, in 1999 as part of its competitive restructuring, PSE&G transferred ownership of its 50 percent share of Yards Creek to its unregulated affiliate, PSEG Fossil. See Petition, page 4, footnote 1.

dockets is whether the transactions will result in increased market power in the relevant wholesale power supply markets. The PJM Independent Market Monitor (“IMM”) submitted a report and comments in those dockets identifying market power concerns associated with the YCE purchase and ownership of the capacity. The IMM recommended certain behavioral conditions (i.e., constraints on price bids) to accompany FERC approval of the capacity purchases. On September 1, 2020, the FERC issued a decision in the PSEG Fossil sale docket approving the sale to YCE and finding that the transaction did not trigger a market power finding under its standards and review methodology. It therefore declined to require the IMM’s mitigation recommendations as conditions of approval. As of this writing, the FERC has not yet issued a decision in the JCP&L sale docket.

JCP&L in this docket is requesting several rulings by the Board. First and foremost, the Company requests approval to sell its 50 percent share of Yards Creek to YCE for \$155 million, subject to the terms of the APA attached to the Petition.<sup>5</sup> Second, the Company seeks a waiver for this asset sale of the Board’s advertising requirement under N.J.A.C. 14:1-5(b).<sup>6</sup> Third, the Company requests a finding by the Board that post sale Yards Creek will an “eligible facility” (i.e., an Exempt Wholesale Generator) under the Public Utility Holding Company Act of 2005.<sup>7</sup> Fourth, the Company seeks a Board finding that the sale is not subject to the Board’s Auction Standards established in 1998, or absent that finding, that in this case those standards should be waived. Fifth, with both PSEG Fossil and JCP&L selling their ownership shares to YCE, the Company requests Board approval to terminate the original 1964 joint ownership agreement.<sup>8</sup>

In addition to these specific Board approvals in this docket, the Petition presents a proposal for what JCP&L believes is the appropriate disposition of the net proceeds from the sale (i.e., net of Company’s book value investment in Yards Creek and any transactions costs). The Company estimates that the sales net proceeds will total approximately \$109.5 million (absent any pricing adjustments at closing).<sup>9</sup> It then proposes to use the \$109.5 million of net sales

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<sup>5</sup> Petition, paragraph 2.

<sup>6</sup> Petition, paragraph 3.

<sup>7</sup> Petition, paragraphs 4 and 61. Specifically, this requires a finding that the transaction is beneficial to customers, in the public interest and does not violate state law. The Buyer must also obtain such approval from the FERC.

<sup>8</sup> Petition, paragraph 6.

<sup>9</sup> In paragraph 53 of the Petition, JCP&L estimates net proceeds at \$111 million based on gross sales proceeds of \$155 and plant net book value of \$44 million. In response to RCR-17, this is further modified by netting out a “not to exceed” \$1.5 million in transactions costs. JCP&L has not provided detailed information on the transaction

proceeds as a partial offset to a storm damage-related regulatory asset that it presently seeks to recover in its pending base rate case in BPU Docket No. ER20020146. The regulatory asset balance at March 31, 2020 is about \$305 million, and the Company asserts that applying the Yards Creek net proceeds to that asset would reduce the base rate increase request by about \$37 million.<sup>10</sup> The response to RCR-23 indicates that this proposed ratepayer benefit of approximately \$37 million per year would remain in effect for three years.

### **SUMMARY OF ISSUES**

The Company's various requests in this case are somewhat unusual because it decided to sell a major and very valuable asset that has been highly beneficial to its customers through a sole source negotiation rather than the use of some sort of competitive process such as an auction or RFP. The past experience with Yards Creek demonstrates that it is a highly valuable asset. During the past 17 years (July 2003 – March 2020), JCP&L's 50 percent entitlement has been providing customers with rate credits through the Non-Utility Generation Charge ("NGC") totaling \$185 million – about \$11 million per year.<sup>11</sup> The NGC credits of course end with the sale to YCE. As a result of using a sole source negotiated sale, the Company must seek a waiver of the Board's rule on advertising of the sale and a waiver (or finding of non-applicability) of the Board's 1998 Auction Standards. The Petition does attempt to provide an explanation for its method of selling Yards Creek. The Company was unable to do so earlier because its ownership agreement with PSE&G (and later PSEG Fossil) provided that in the event of a sale the co-owner would have a right of first refusal to purchase the 50 percent interest at net book value. As a practical matter this made the sale impossible because net book value was judged to be far below market value. Earlier this year, JCP&L and PSEG Fossil reached a Stipulation of Settlement ("SOS"), approved by the Board on March 27, 2020, that removed this impediment to selling this asset at market. Moreover, on February 28, 2020, PSEG Fossil announced its sale with YCE for its 50 percent share of the plant. Shortly thereafter JCP&L decided also to sell its 50 percent

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expenses (see S-JCP&L-ACC-9). However, the response to RCR-25 indicates that such costs to date are about \$0.8 million, with the vast majority being legal fees.

<sup>10</sup> Petition, paragraphs 58 and 59.

<sup>11</sup> Petition, paragraph 46. The credit is calculated each month as the revenue from selling the Yards Creek capacity and energy into the PJM wholesale markets and subtracting from that the facility's revenue requirement.

share to YCE, with the APA completed and executed on April 6, 2020, rather than conduct a competitive process for a portion of the plant.<sup>12</sup>

The circumstances described in the Petition and in response to RCR-24 do not necessarily require that JCP&L dispose of Yards Creek through a sole source negotiation. With the approval of the SOS, the Company could have canvassed the market and solicited competitive bids before transacting with YCE. It chose not to do so because it judged the negotiated price to reflect the full market value. Since the sales proceeds are to be used to reduce the size of a rate increase related to storm damage recovery (or through some other crediting means), it would be imprudent for JCP&L to fail to obtain full market value for this asset. Hence, the central issue here is whether the Company can persuasively demonstrate that its sale to YCE under the terms of the APA fully reflects the market value of Yards Creek at this time. The Company has provided its analysis and evidence on this threshold question in discovery. If indeed, there is persuasive evidence that the APA does reflect full market value, then it is reasonable to grant the waivers that the Company requests in its Petition and approve the sale.

Rata Counsel recognizes that there is another set of issues relating to this transaction concerning the suitability of the Buyer (in effect LS Power) to ensure that the capacity will continue to provide reliable service for the wholesale market and that the transaction does not trigger significant market power concerns. As the Company has pointed out, and we concur, LS Power is a capable and experienced operator of generating capacity, and Yards Creek, post transaction will continue to serve the PJM wholesale market. As noted earlier, the market power concerns are presently being addressed by FERC which has not yet ruled on the JCP&L sale.

Once the threshold issue of approval of the transaction (and the associated waiver requests and determination of eligible facility) is determined, the next issue is to determine the best way of crediting ratepayers with the sale's net proceeds. At paragraph 57 of the Petition, the Company initially argues that shareholders are entitled to a share in the net proceeds, but it subsequently agrees to flow through 100 percent of net proceeds as an offset to its storm damage regulatory asset. While Rate Counsel strongly disagrees with the contention that shareholders

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<sup>12</sup> Petition, paragraph 43. The Company's response to RCR-24 explain why JCP&L believe that under the circumstances it is more appropriate to sell its share of Yards Creek in a negotiated sole source sale rather than a competitive process.

should receive any of the net proceeds, the issue appears to be moot. At issue is whether the Company's proposal is the most appropriate method of flowing through to customers that benefit.

### **ANALYSIS**

As explained below, Rate Counsel 1) does not object to JCP&L's request for waiver of the advertising requirement pursuant to N.J.A.C. 14:1-5(b) and the Board's Auction Standard; 2) Does not object to the request that the plant be deemed an Eligible Facility; and 3) Agrees that the Yards Creek sale price represents market price.

#### **1. Waiver of Advertising and Board's 1998 Auction Standard**

Under the Board's regulation there are certain conditions that must be met by a public utility prior to the sale of property valued over \$500,000. One such condition is the requirement that the property to be sold be advertised for sale, presumably to obtain the best price possible. N.J.A.C. 14:1-5.6(b)

Waiver of the advertisement requirement is permitted only for specific circumstances pursuant to the Board regulation. Pursuant to N.J.A.C. 14:1-5.6(i):

(i) Upon written request by a utility and in accordance with the general purposes and intent of this section, the Board shall grant said utility a waiver to the advertising requirement set out in (b) above if:

1. The waiver shall not adversely affect the public interest;
2. The subject property is no longer used or useful for utility purposes;
3. There is no prospective use of the property for utility purposes or no other likely prospective purchaser;
4. The sale of the property shall not affect the ability of the utility to render safe, adequate and proper service;
5. The selling price represents the fair market value of the property to be sold based on a current independent appraisal;
6. There is no relationship between the parties other than that of transferor and transferee, or lessor and lessee; and

7. The request states the reasons of the utility in seeking the waiver which may include, but are not limited, to the following:
- i. The subject property is unique and requires an unusual sales contract or represents an unusual transaction;
  - ii. The advertising and bidding shall not result in a higher sales price;
  - iii. The advertising and bidding shall be detrimental to the sale of the property;
  - iv. The unlikelihood of the existence of other bona fide purchasers who could meet the requirements of the proposed sales contract;
  - v. The development of the property for private use will require extensive environmental permitting due to an existing contamination condition; and
  - vi. The inability of any other bidder to obtain the necessary permitting authorization to develop the property.

In support of the Company's request to waive the advertising requirement, the Company states that advertising would not yield a better price and could possible risk the transaction at issue in this petition.<sup>13</sup> However, the Petition did not address requirements number 2 and 3 above, whether the subject property is no longer used or useful for utility purposes; and whether there is no prospective use of the property for utility purposes or no other likely prospective purchaser. As described earlier, within the past 17 years, JCP&L's 50 percent ownership of the Property has produced \$185 million which was credited to the NGC.<sup>14</sup> Therefore the Property was used and useful for utility purposes with arguably a prospective use of the Property for the foreseeable future.

Pursuant to N.J.A.C. 14:1-1.2(b)1, the Board has the authority to relax or permit deviation from the Board regulation for good cause shown.

When relaxing the application for such rules:

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<sup>13</sup>.Petition page 27 paragraph 71.

<sup>14</sup> Petition, paragraph 46. The credit is calculated each month as the revenue from selling the Yards Creek capacity and energy into the PJM wholesale markets and subtracting from that the facility's revenue requirement.

1. The Board shall, in accordance with the general purposes and intent of its rules, waive section(s) of its rules if full compliance with the rule(s) would adversely affect the ratepayers of a utility or other regulated entity, the ability of said utility or other regulated entity to continue to render safe, adequate and proper service, or the interests of the general public;

Although the subject property is used and useful for utility purposes, Rate Counsel also recognizes the unique nature of this transaction where a regulated entity (JCP&L) and an unregulated co-owner of the property wish to sell their respective shares to a third entity. Due to the unique ownership structure of the Property, advertising JCP&L's 50% share may not yield a higher price and the attempt to obtain multiple bids may indeed be detrimental to the transaction with YCE, therefore ultimately harming ratepayers. Furthermore as discussed herein, the sales price for the property is reasonable and represents market price. Therefore Rate Counsel does not object to the waiver of the advertising requirement.

Similarly, with respect to the Board's 1998 Auction Standard as enumerated in BPU Docket No. EX 94120585Y, EO97070457, EO97070460 EO97070463, EO97070466 Order, although Rate Counsel does not agree that the standards do not apply in this case, the Board can nevertheless waive its applicability in the present proceeding. The Auction Standard was set in place to insure that the utility assets that were sold subsequent to the enactment of EDECA obtained the best price possible through a vigorous competitive process.

The ten specific requirements set forth in the Auction Standard were geared towards achieving the following:

The Auction Standards and Review Criteria (Auction Standards) adopted herein emphasize key public policy considerations, which we believe to be responsive to and consistent with, the concerns expressed by commenters. These considerations include the principles of maximizing the sales price for assets consistent with public policy concerns, the fostering of a truly competitive



bidding process by providing opportunities for many bidders to participate, continued environmental stewardship through, and subsequent to, the transfer of ownership of the generation assets, the mitigation of impacts on the incumbent generation workforces of the companies, and the maintenance of electric system reliability. At the same time, we have crafted the Auction Standards to not be overly prescriptive, in order to provide the utilities with a degree of flexibility in conducting the auctions in a manner they deem reasonable, necessary and appropriate, subject to BPU review, to achieve a successful outcome consistent with the public policy considerations addressed herein.

Through extensive discovery and careful analysis of this transaction, Rate Counsel agrees that the sales price appears to represent market price and may be the best offer that JCP&L can reasonably expect. An attempt to obtain multiple bids as required by the Auction Standard may negatively affect the current offer by YCE because of the unavoidable delay inherent in obtaining multiple bids, and therefore detrimental to the ratepayers. One requirement, however in the Auction Standard that should be applied is in requirement 1: “The Auction should be structured to maximize the sale price while reasonably managing costs, administrative or otherwise.” Rate Counsel therefore respectfully request that the Board permit Rate Counsel and Staff to review the final accounting of the sale and the calculation of the net proceeds in order to insure that the fees and costs netted from the sales price is reasonably managed. This review will include but not limited to review of transactions costs, any adjustments for income taxes, adjustments to price at closing.

With this assurance, Rate Counsel does not object to the waiver of the 1998 Auction Standard.

## **2. Request to be Deemed an Eligible Facility**

The Company filed the above captioned Petition seeking a determination by the Board that the Property is eligible for “exempt wholesale generator” (“EWG”) status pursuant to

Section 32 of the Public Utilities Holding Company Act of 1935 (“PUHCA”). An EWG is exempt from most provisions of PUHCA. An EWG means any person “engaged, directly or indirectly” and “exclusively” in the business of operating an eligible facility. PUHCA requires that before a facility can be considered an “eligible facility” each state commission having jurisdiction over any affiliate of a registered holding company must make a specific determination that the granting of EWG status (1) will benefit consumers, (2) is in the public interest, and (3) does not violate State law. *15 U.S.C.A. § 79z-5a*.

In support of their request, the Company states that designation of the Property as an eligible facility “will not adversely affect either the availability or reliability of electric supply to JCP&L customers or any other electric customer within PJM” and “will add to the availability of competitive alternative electric suppliers for the Company’s customers and other electricity customers within PJM.” Moreover, the Company assures the Board that the eligible facility designation “does not violate any New Jersey statute or Board regulation.”<sup>15</sup>. Because of the reasonableness of the sales price and in light of the exceptional challenges ratepayers face during this Covid-19 pandemic, Rate Counsel believes it is in the public interest to utilize the proceeds to offset any base rate increase. Therefore Rate Counsel does not object to the Board granting eligible facility status to the Property.

**3. Evidence on the Market Value of Yards Creek**

[PLEASE NOTE THAT THIS SECTION IS BASED ON CONFIDENTIAL INFORMATION PROVIDED IN DISCOVERY]

[REDACTED]

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[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

#### **4. Disposition of the Sale Net Proceeds**

Rate Counsel does not object to utilizing the net proceeds of this transaction to offset the storm-related regulatory balance and recommends that the disposition of the proceeds be addressed in the JCP&L Base Rate Case currently before the Board in Docket No. ER20020146.

#### **CONCLUSION**

1. Rate Counsel does not object to the waiver of advertising requirement.
2. Rate Counsel does not object to the waiver of the 1998 Auction Standard except for the requirement that the administrative and other fees netted from the proceeds of the sale be deemed reasonable by the Board.
3. Rate Counsel does not object to the Board granting eligible facility status to the Property.
4. Rate Counsel respectfully requests that the Board permit Rate Counsel and Staff to review the final accounting of the sale and the calculation of the net proceeds in order to ensure that the fees, net plant and costs netted from the sales price are reasonably managed. This review will include but not limited to review of transactions costs, any adjustments for income taxes, adjustments to price at closing.
5. Rate Counsel agrees that the sale price of the Property is reasonable. The disposition of the proceeds of the sale of the Property should be determined in the JCP&L Base Rate Case now before the Board.

Respectfully Submitted,

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By: /s/ Ami Morita  
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AM/dl

c: Service list (*via electronic mail*)

**I/M/O the Verified Petition of Jersey Central  
Power & Light Company Seeking Approval of  
the Sale of Its Ownership Interest in the  
Yards Creek Generating Station Pursuant to  
N.J.S.A 48:3-7  
BPU Docket No. EM20050343**

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