COZEN O'CONNOR
A Pennsylvania Professional Corporation

July 19, 2022

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VIA E-MAIL (BOARD.SECRETARY@BPU.NJ.GOV)

Ms. Carmen Diaz, Acting Board Secretary
NJ Board of Public Utilities
44 South Clinton Street, 9th Floor
P.O. Box 350
Trenton, New Jersey 08625

Re: JCP&L Sale of Properties- Sea Isle City, Cape May County, NJ
220 40th Street, Block 40.04, Lot 20
BPU Dkt. No. EM22050335

Dear Acting Secretary Diaz:

On behalf of Jersey Central Power & Light Company ("**JCP&L**" or the "**Company**"), enclosed for filing in the above-referenced matter is JCP&L's reply to the comment letter ("**Comment Letter**") submitted by the Division of Rate Counsel ("**Rate Counsel**") to the New Jersey Board of Public Utilities (the "**Board**" or "**BPU**") on June 10, 2022 in the above-referenced proceeding. The matter was initiated by JCP&L's petition for approval (the "**Petition**") of the sale ("**Sale**") of its property at 220 40th Street, Block 40.04, Lot 20 in Sea Isle City, Cape May County, New Jersey (the "**Property**") to the winning bidder Howard F. House, III (the "**Buyer**") for a purchase price of $1,450,000 ("**Purchase Price**") in accordance with the terms and conditions of a certain purchase and sale agreement ("***PSA***").

In the Comment Letter, Rate Counsel does not object to (i) the Company's proposed Sale of the Property, (ii) the form or substance of the PSA, (iii) the Purchase Price, or (iv) the Board's approval of the Sale under N.J.S.A. 48:3-7 and N.J.A.C. 14:4-5.6, as requested by the Petition, subject to certain conditions. While the Company certainly appreciates Rate Counsel's lack of objection to the Sale of the Property as explained in the Comment Letter, the Company has concerns about two of the eight conditions Rate Counsel seeks to have the Board adopt if it

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approves the Sale.[1] JCP&L objects to, and respectfully urges the Board to reject, those two conditions. Although, in the Company's view, they are not necessary conditions to the Board's approval, JCP&L does not object to conditions Nos. 1-3, 5, 6 and 7 of Rate Counsel's Comment Letter. These seem substantially consistent with ¶18 of the Petition.[2] However, the Company believes that Rate Counsel's conditions No. 4 and No. 8 are inapposite and should not be applied

[1] Rate Counsel seeks to have the Board impose the following eight conditions on its approval of the Company's proposed Sale of the Property:

> 1. JCP&L shall notify the Board and Rate Counsel if it anticipates any material changes in the contract for sale of 220 40th Street.
> 2. JCP&L shall flow 100% of the net gain from this sale as a deferred credit to ratepayers in JCP&L's next RAC Filing, base rate case or other appropriate proceeding.
> 3. From the time of closing on the sale of 220 40th Street until JCP&L's next RAC Filing, base rate case or other appropriate proceeding, JCP&L shall credit the proceeds from the sale to its cash account with interest to accrue for the account of ratepayers in the interim.
> 4. JCP&L may no longer seek, either through the RAC or any other rate recovery mechanism, any environmental costs incurred in relation to 220 40th Street.
> 5. JCP&L shall set a date certain by which it will credit to ratepayers the net proceeds from this sale, including any amounts remaining in escrow after the closing.
> 6. Rate Counsel retains all rights to review all costs and proceeds related to the purchase and sale of 220 40th Street in JCP&L's next RAC Filing, base rate case or another appropriate proceeding.
> 7. This Order shall not affect nor in any way limit the exercise of the authority of the Board or of this State, in any future Petition or in any proceeding with respect to rates, franchises, service, financing, accounting, capitalization, depreciation, or any other matter affecting the Petitioner.
> 8. Nothing in this [Comment Letter] shall be construed to affect JCP&L's liability for Natural Resource Damages or other responsibilities or damages arising from its activities at any site or JCP&L's responsibilities or claims in any other matter arising from environmental investigation and remediation of any of its properties.

Comment Letter at pp. 8-9.

[2] The Company notes that Rate Counsel concurred "with JCP&L's proposal to return the entire net proceeds from the sale of [the Property] to ratepayers," Comment Letter at p. 8, and recommended that "the accounting for the [Sale], as well as the costs of its environmental remediation, be fully reviewed in JCP&L's next Remediation Adjustment Clause filing ("**RAC Filing**"), base rate case or other appropriate proceeding," while retaining Rate Counsel's rights to fully review in any such proceeding. Id. These recommendations appear to be encompassed by the numbered conditions Nos. 2, 3, and 6). Rate Counsel also concurred in the Company's proposal regarding the disposition of "net proceeds," id., at p. 8, while condition No. 2 refers to "net gain." The term "net proceeds" from the Sale of the Property is consistent with the Petition. The Property is not reflected on the books of the Company as, and has never been, a part of JCP&L's rate base. Rate Counsel also refers (in conditions Nos. 2, 3, and 6) to the "next RAC Filing," which would require JCP&L to address the Sale in the Company's 2021 RAC Filing, which is expected to be filed in 2022, rather than in the 2022 RAC Filing, which, as discussed herein, is expected to be filed in 2023, which JCP&L suggests is the most appropriate filing proceeding from a historical and substantive perspective.

to the Board's approval of the proposed Sale. As discussed below, JCP&L contends that condition No. 4 is contrary to law, condition No. 8, if imposed by the Board as a condition of sale, may be beyond the Board's jurisdiction, and both conditions are not germane to this proceeding - a sale of property proceeding, which does not establish or adjust JCP&L rates.

Specifically, condition No. 4 would completely foreclose JCP&L's future ability not only to recover, but even to seek to recover, any costs incurred post-Sale for environmental remediation of the Property. This condition is contrary to the Electric Discount and Energy Competition Act, P.L. 1999. ch. 23, N.J.S.A. 48:3-49 et seq., as amended ("**EDECA**"); specifically at N.J.S.A. 48:3-60, which provides for recovery. Procedurally, challenges to the recovery of post-Sale and remediation-related costs prudently and reasonably incurred should not give rise to a condition imposed on the Sale of the Property in this proceeding but, procedurally and substantively, should be addressed and disposed of in the Remediation Adjustment Clause filing ("**RAC Filing**") context.

To the extent Rate Counsel's condition No. 8 can be broadly interpreted to request the Board to condition its approval on the bases that the Board's approval and/or the Sale, itself, do not "affect" the Company's "liability for Natural Resource Damages ("NRD") or other responsibilities or damages,… at any site or … any other matter arising from environmental investigation and remediation of any of [the Company's] properties," Comment Letter at 9, JCP&L respectfully urges the Board to reject the misplaced condition. The Board does not have jurisdiction to determine the Company's legal environmental liabilities (as distinguished from the recovery of costs associated with meeting such liabilities) and this proceeding does not, and is not the proper forum in which to, address cost recovery.

The Board should disregard Rate Counsel's requests to impose these two conditions on its approval of the Sale in this proceeding.

Rate Counsel Recommended Condition No. 4

As a matter of background, in 1997, the NJBPU approved JCP&L's request to implement a Remediation Adjustment Clause for the recovery of all prudently incurred costs and expenses, including associated transaction and carrying costs, and net of insurance and other third-party recoveries, related to the environmental remediation of various former MGP sites (BPU Docket No. ER95120634), Order dated July 30, 1997 (referring to the Board's Order dated December 16, 1994 in BPU Docket No. ER91121820J)). The Board's Final Decision and Order dated March 7, 2001, in BPU Docket Nos. EO97070458, EO97070459, EO97070460 (the "**Restructuring Order**"), which concluded JCP&L's rate unbundling, stranded costs and restructuring filings, established a new Tariff Rider designated as the Societal Benefits Charge ("**SBC**"). The SBC, as approved by the Board, is designed to include, among other things, Rider RAC for the recovery of costs related to MGP site remediation as required by the EDECA; specifically at N.J.S.A. 48:3-60, which, among other things, provides that:

> "(a) …the [Board] shall permit each electric public utility and gas public utility to recover some or all of the following costs through a societal benefits charge that shall be collected as a non-bypassable charge imposed on all electric public utility customers and gas public utility customers, as appropriate:
>
> …
>
> (4) Manufactured gas plant remediation costs, which shall be determined initially in a manner consistent with mechanisms in the remediation adjustment clauses for the electric public utility and gas public utility adopted by the [Board];
>
> …."

N.J.S.A. 48:3-60(a)(4).

Rate Counsel condition No. 4, if adopted by the Board, would be contrary to the above-cited provisions of EDECA and would likely result in an immediate appeal, the delay associated with an appeal, and the possible, if not likely, loss of the Sale.

The Company's Petition makes clear that, under the PSA, JCP&L maintains certain responsibilities with respect to environmental remediation of the Property, which was originally

acquired by JCP&L in connection with a former manufactured gas plant ("**MGP**") site, as detailed in the Petition at ¶3. As the Rider to the PSA states: "The MGP site has been, and remains, under remediation before [the New Jersey Department of Environmental Protection (hereinafter "**NJDEP**")] as supervised by JCP&L's Licensed Site Remediation Professional ('LSRP')." App'x B to the Petition at p. 9. JCP&L retains continuing obligations for future environmental remediation of the Property. See generally App'x B to the Petition at p. 20 (Post-Closing Obligations Agreement and Release); *id.,* at p. 40 (describing continuing obligations JCP&L has with respect to future environmental remediation). Notwithstanding these disclosures, the Comment Letter would deny JCP&L its due process opportunity to seek to recover from ratepayers any of the future costs associated with this continuing environmental monitoring and remediation of the Property after the closing on the Sale. Comment Letter at p. 8 (condition No. 4).

Rate Counsel proposes condition No. 4, which is contrary to EDECA, even though it separately acknowledges that JCP&L "will continue to manage environmental concerns on the [Property]" (Comment Letter at p. 2). Rate Counsel also makes the recommendation even though it requests a full review of "all costs and proceeds related to the purchase and sale of [the Property]," and of "the gain on [the Sale], along with the costs of acquisition, management and remediation, in JCP&L's next RAC Filing, base rate case or another appropriate proceeding." Comment Letter at pp. 8-9. Interestingly, in the latter request, Rate Counsel would apparently and improperly seek to reopen the Board's prior review and approval of the purchase and remediation costs for the Property, through 2019, as last evidenced in BPU Docket No. ER20100628 (Order dated February 17, 2021) or as will be determined in the currently pending 2020 RAC Filing, or subsequent 2021 RAC Filing, proceedings.[3] Nonetheless, without citation to any precedent or other authority, Rate Counsel also requests the Board to procedurally, substantively and

[3] I/M/O the Verified Petition of JCP&L for the Review and Approval of Costs Incurred for Environmental Remediation of MGP Sites pursuant to the Remediation Adjustment Clause of Its Filed Tariff ("2020 RAC Filing"), BPU Docket No. ER21101155.

unlawfully preclude JCP&L from even seeking to recover from ratepayers under the RAC or any other mechanism, and from recovering, the post-Sale prospective environmental remediation and related costs associated with the Property.

From a substantive perspective, condition no. 4 is not only contrary to EDECA, as discussed above - it is also patently unreasonable. Insofar as can be determined, the proposed Sale of the Property (together with the accompanying sales of all 14 parcels in Sea Isle City) represents one of the first and more substantial sales in New Jersey of a remediated property associated with an MGP site in the State of New Jersey. JCP&L's proposal represents a creative, prudent and very opportune change (from a market value perspective, which solely benefits ratepayers) in the ownership status of the Property.

Nowhere in the Petition does JCP&L, which effectively stands in the position of a caretaker of the Property for ratepayers, state that it has agreed to sell the Property for the sole benefit of ratepayers, while voluntarily absorbing for its own account the costs of any ongoing monitoring or remediation requirements associated with the Property without any further recourse to recovery from ratepayers through the RAC (or any other mechanism). It would be illogical for JCP&L to propose to sell the Property for the sole benefit of ratepayers if the price for doing so was to unreasonably incur the risk (which it currently does not bear) of all additional future costs (some of which are currently anticipated, but some of which, while possible, remain speculative), without recourse to the long-standing cost recovery mechanisms afforded to the MGP site under the RAC and in accordance with EDECA.[4] Despite the inclusion of protective contract provisions in the PSA, there remains a legally unavoidable risk to JCP&L that, in conveying title to the Buyer, JCP&L will be required to address and incur costs for any future MGP site-related environmental

[4] The net proceeds of sale are returned to ratepayers (as Rate Counsel acknowledges) and, to the degree of increased administrative efficiency and reduced carrying costs, such additional benefits, are also passed on to ratepayers in the form of lower costs to be recovered in subsequent RAC Filings.

remediation of, and about, the Property. JCP&L carefully negotiated and structured the provisions of the PSA to achieve a fair balance of the risks to protect and serve the best interests of ratepayers, JCP&L, and the Buyer with respect to future environmental costs in the light of market realities. The Sale proposed by the Company achieves this balance, while Rate Counsel's suggested condition requiring JCP&L to forego any potential future recovery for environmental remediation disrupts this balance and imposes considerable and unacceptable risks on JCP&L without any measurable or commensurate gain. The condition, if imposed, would effectively, fundamentally, impermissibly and unacceptably change the very nature of the Company's proposed transaction.

The Company notes that the particular Property in this proceeding is also subject to a Deed Notice, which will be recorded specifying the restrictions on the use of the Property that will transfer with the Property unless or until certain contamination is remediated by JCP&L. The Deed Notice puts the public on notice that JCP&L is expressly obligated to the NJDEP and to the Buyer for all prospective remediation, about which it is certain that future remediation will be required. Petition, at ¶7. The Deed Notice and associated remedial action permit, and the Post-Closing Obligations Agreement associated with the sale, impose ongoing obligations on JCP&L (consistent with existing obligations) by reason of which periodic costs will be incurred to meet those obligations.

Rate Counsel's condition No. 4 essentially, and unreasonably, asserts that any ongoing, or new future remediation costs, both certain (as to this Deed Notice Property and with respect to ground water related costs at the thirteen other properties for which companion petitions were filed) and uncertain will be solely for JCP&L's account and will not be subject to any future cost recovery under the RAC or any other mechanism**.** This untenable Rate Counsel condition appears to have been recommended solely because of the change in property ownership, even though property ownership is no longer necessary for JCP&L to carry out its responsibilities with respect

to the MGP site as to which the Property will remain a part. The condition would outright unlawfully deny JCP&L the opportunity in any rate-related proceeding, whether a RAC filing or a base rate proceeding, to demonstrate that such costs and expenses were reasonably and prudently incurred and, therefore, subject to rate recovery.

There is no logical or compelling reason, and no authority cited by Rate Counsel, for precluding JCP&L from the opportunity to recover the costs for continued environmental remediation, relative to obligations, which were not practically, or legally, transferable or marketable. Even if they were transferable or marketable, it can reasonably be expected that such transfer would only occur at a materially lesser purchase price. Just because JCP&L has transferred ownership (for the substantial consideration of fair market value), it cannot be foreclosed from any future recovery of what could become burdensome and costly remediation requirements (depending on future standards, then applicable law, and guidance from the NJDEP as it maintains purview over the entirety of the former MGP site, including the Property). Clearly, such costs would also have been incurred, and would have been recoverable, if JCP&L continued to own the Property. The proposed Sale yielded a very attractive fair market value price during the marketing period for the Property, without the transfer of certain environmental liabilities, and the net proceeds of the Sale are entirely for the benefit of ratepayers. It would be unreasonable, arbitrary, capricious and contrary to public policy to foreclose the opportunity for recovery of post-Sale ongoing and future environmental costs in this proceeding or, for that matter, in a RAC proceeding, base rate proceeding or any other rate-related proceeding, where legal cost responsibility prudently incurred (as opposed to property ownership) is the *sine qua non* standard for cost recovery from ratepayers.[5]

[5] For additional supportive information related to the environmental issues, the Company attaches the Affidavit of Frank Lawson, of FirstEnergy Service Company, the Supervisor for Environmental and Site Remediation for, and on behalf of, JCP&L.

While ownership of the Property initially facilitated remediation, continued ownership (and the expense associated with it) is no longer necessary given the current state of the Company's monitoring and remediation responsibilities. To remove any potential for future cost recovery as a condition of the Board's approval of the Sale is, certainly, a disincentive to JCP&L's selling the Property, which the Petition maintains is in the best interests of ratepayers, JCP&L, the Buyer, neighboring property owners and Sea Isle City. Rate Counsel's condition No. 4 would effectively eliminate any incentive for JCP&L to sell the Property for the benefit of ratepayers, now or in the future, prior to final and absolute completion of all remediation and until after the NJDEP audit period has expired. However, under such approach, ratepayers would also forego the benefits of an opportune and lucrative sale such as has occurred in this case.

Indeed, under the circumstances, were the Board to agree with Rate Counsel, then, rather than approve the proposed Sale with such a condition, the Company assumes the Board would deny the Petition as incompatible with the Board's expectations for such sales. Indeed, as a result of Rate Counsel's recommendation of condition No. 4, JCP&L is compelled to make clear that it would view Board approval with condition No. 4 as in direct conflict with the proposed terms and conditions of the proposed Sale in that such approval would fundamentally upset the careful and delicate balance of the risk and value propositions designed into the proposed Sale transaction. Under such circumstances, without recourse for recovery, the Company would not be able to proceed with the Sale and would continue to hold the property as per the heretofore typical practice, and continue to recover its costs, including ownership carrying costs, through the annual RAC Filings until such point in the future when the NJDEP audit period has expired.

Procedurally, this proceeding under N.J.S.A. 48:3-7 and N.J.A.C. 14:4-5.6, is not the appropriate forum for addressing Rate Counsel's rate-related issues. Rate Counsel suffers no prejudice or adverse consequence in awaiting the opportunity to make its arguments regarding the recovery of these costs in an appropriate future RAC filing. The simple fact is that this

proceeding is not a rates proceeding. The rate-related issues raised by condition No. 4 have no place here.

Rate Counsel Recommended Condition No. 8

JCP&L also objects to Rate Counsel's condition No. 8, which, on its face, merely specifies how Rate Counsel's Comment Letter should be construed. According to Rate Counsel, its Comment Letter should not be construed "to affect JCP&L's liability for [NRD] or other responsibilities or damages arising from its activities at any site or JCP&L's responsibilities or claims in any other matter arising from environmental investigation and remediation of any of its properties." Comment Letter at p. 9. Although not necessary and not something the Company supports, the Company takes no position relative to the Board accepting or rejecting Rate Counsel's qualifying of its own Comment Letter. However, out of an abundance of caution, the Company wishes to clarify that such an unduly broad and ambiguous condition, itself, is not appropriate or necessary as a condition to be imposed by the Board on the Company's proposed Sale of the Property.

Indeed, the instant proceeding, seeking a Board order approving the sale of the Property under N.J.S.A. 48:3-7 and N.J.A.C. 14:4-5.6 upon the terms and conditions of the PSA, does not require, and the Company does not seek any Board finding or order with respect to the disposition of its liability for NRD (which has been settled with NJDEP but which remains open as to potential federal exposure) or other environmental conditions. As explained above, the Sale of the Property would not bring to an end any ongoing or future remediation obligations as set forth in the PSA, and as required or determined by law.

The Company no longer needs to own the Property to meet the ongoing remediation needs and obligation of the MGP site with which the Property is associated, and of which it

remains a part. Logic suggests that eliminating the unnecessary effort and expense associated with Property ownership on reasonable terms is prudent and reasonable.

The Sale of the Property prudently takes advantage of market conditions for the sale of the Property at fair market value and flows the net proceeds back to ratepayers from the Sale. The Sale eliminates the ongoing costs of owning the Property but, as described in the PSA and the Petition, does not eliminate the Company's ongoing MGP site remediation responsibilities or costs, or its ability to seek recovery through the RAC clause. In this context, condition No. 8 serves no purpose in this proceeding and is inconsistent with the Company's request in this proceeding and the disposition of costs related to NRD in prior RAC Filings. When coupled with the other condition (No. 4) to which JCP&L also objects, condition No. 8 takes on an even darker hue, by adding an unnecessary condition about the impact of the Board's order on the nature and extent of JCP&L's NRD and environmental liability with respect to the Property, as to which, it appears, Rate Counsel would also foreclose any opportunity for cost recovery.

This proceeding and the Board's order in this proceeding have nothing to do with substantive determinations about JCP&L's NRD or other environmental liability, and whether or not the Board's order affects such liability is a matter beyond the scope of the Board's jurisdiction. See In re Centex Homes, LLC, 411 N.J. Super. 244, 985 A.2d 649 (App.Div.2009).

Further, as alluded to above, the recovery of NRD by the Company has been addressed in the stipulations of settlement approved by the Board in the historical RAC Filings, where it has been agreed that JCP&L would continue to defer NRD-related and associated incentive compensation costs, but would not recover (and has not yet recovered) such NRD-related costs, including interest, until there was a final resolution of the issue concerning the appropriateness of recovery of these costs within the scope of the Board's RAC recovery mechanism. Nothing in the instant proceeding changes (and nothing in this proceeding should be deemed, or found, to

change) the long-standing Board-approved disposition of the treatment of NRD in the unrelated and separate RAC Filing proceedings, and, therefore, for this reason also, Rate Counsel's condition No. 8 should be rejected.

Conclusion

Accordingly, for the foregoing reasons, the Company respectfully requests that the Board not adopt, but reject, Rate Counsel's recommended conditions No. 4 and No. 8 as such conditions are substantively wrong, unlawful, unnecessary, overbroad, and misplaced in this proceeding as discussed herein.

No paper copies will follow and we would appreciate if the Board Secretary's office would please acknowledge receipt of this submission.

Thank you for your anticipated courtesy and cooperation.

Sincerely,

COZEN O'CONNOR

By: Michael J. Connolly

MJC:wl