

July 22, 2022

**VIA ELECTRONIC MAIL**

Honorable Mary-Anna Holden, Commissioner  
Honorable Carmen D. Diaz, Acting Secretary  
New Jersey Board of Public Utilities  
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Re: In the Matter of the Merger of South Jersey Industries, Inc.  
and Boardwalk Merger Sub, Inc.  
BPU Docket No. GM22040270

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Dear Commissioner Holden and Secretary Diaz:

On behalf of IIF US Holding 2 LP (“IIF US 2”), NJ Boardwalk Holdings LLC (“Boardwalk”), Boardwalk Merger Sub, Inc., South Jersey Industries, Inc. (“SJI”), SJI Utilities, Inc. (“SJIU”), Elizabethtown Gas Company (“ETG”) and South Jersey Gas Company (“SJG”) (together, the “Joint Petitioners”),<sup>1</sup> please accept this letter in lieu of a more formal filing Opposing the Environmental Defense Fund’s (“EDF”) Motion to Intervene and Request for Leave (the “Intervention”) and Request for Interlocutory Appeal (the “Appeal”), both filed on July 15, 2022. Please note that the Joint Petitioners acknowledge that the Appeal is pending before the New Jersey Board of Public Utilities (the “Board”), while the Intervention is pending before Presiding Commissioner Holden. The two filings, however, are closely linked and in the interests of efficiency, the Joint Petitioners make this single filing to address both matters.

**Introduction**

Having acted with a cavalier disregard for the reasonable deadline set by the Board, EDF now imposes on the Board’s limited resources with a late filed Intervention and an ill-considered Appeal. Both matters fail to provide any cognizable legal or factual support for the relief sought.

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<sup>1</sup> Counsel for SJI, SJIU, ETG and SJG has reviewed this response and consented to its filing.

Therefore, both requests should be promptly denied by the Board. Deadlines matter and EDF's failure to comply with the Board's clear and reasonable deadlines must have consequences.

### **Background**

Following a public announcement of the proposed transaction in late February 2022, Joint Petitioners initiated the instant proceeding in April 2022. Copies of the Joint Petition were posted on the Board's website and were made publicly available on the webpages of ETG and SJG. In addition, there was considerable media attention regarding the proposed transaction beginning in February 2022. Thus, interested parties—including EDF—have had ample notice and several months in which to identify and consider the extent to which their interests might be implicated in this matter. Yet, EDF asserts that this protracted time period was somehow insufficient to consider “carefully” its interests in this matter. The facts, however, tell a different story.

On February 24, 2022, SJI and IIF US 2 publicly announced the proposed transaction. It was widely covered in the general media and utility and financial trade press.<sup>2</sup>

Two months later, on April 25, 2022, the Joint Petitioners filed the instant proceeding with the Board.

On June 8, 2022, the Board issued an Order setting July 8, 2022 as the date by which interested parties must file motions to intervene or participate, and designating Commissioner Holden as the Presiding Commissioner.<sup>3</sup> By the time the July 8th deadline for motions came around, the transaction was public knowledge for over four months, and had been pending at the Board for ten weeks. And, yet, the Board is to believe that these extended periods were somehow insufficient for EDF to “carefully assess” its interests in the matter and to decide whether it wished to seek to intervene or participate in this matter.

Tellingly, no other entities have come forward to assert the need for additional time to identify their interests in the matter. To the contrary, multiple entities have filed timely motions with the Board seeking to intervene and/or participate. On June 28, 2022, the New Jersey Large Energy Users Coalition (“NJLEUC”) filed a Motion to Intervene. On July 7, 2022, Atlantic City Electric Company (“ACE”) filed a Motion to Participate. On July 8, 2022, Public Service Electric and Gas Company (“PSE&G”) filed a Motion to Participate, and the New Jersey Laborers Employers Cooperation and Education Trust (“NJLECET”) filed a Motion to Intervene. The NJLEUC, ACE, PSE&G and NJLECET motions were all timely filed, and the Joint Petitioners

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<sup>2</sup> See e.g., <https://njbmagazine.com/njb-news-now/south-jersey-industries-to-be-acquired-by-infrastructure-investments-fund/>; <https://www.globenewswire.com/en/news-release/2022/02/24/2391259/0/en/South-Jersey-Industries-Inc-Enters-into-Agreement-to-be-Acquired-by-the-Infrastructure-Investments-Fund.html>; **Error! Hyperlink reference not valid..**

<sup>3</sup> See *I/M/O the Merger of South Jersey Industries, Inc. and Boardwalk Merger Sub, Inc.*, BPU Dkt. No. GM22040270, Order Designating Commissioner, Setting Manner of Service and Bar Date (June 8, 2022).

have separately advised the Board and the Presiding Commissioner that they do not object to the granting of the respective motions filed by these entities.

Rather than comply with the Board's deadline, EDF took a different path. On July 8, 2022, EDF filed a letter with the Board and Presiding Commissioner Holden requesting a one week extension of the Board's July 8th motion deadline (the "Extension Request").<sup>4</sup> EDF's Extension Request is notable in two respects. First, it supports the requested extension with the following representation:

Due to the holiday week and the other press of business, EDF was unable to complete its process of considering this intervention by July 8.<sup>5</sup>

EDF does not address the fact that it had notice of this matter weeks, if not months, prior to the July 8th deadline. Moreover, EDF offers no explanation for why it was not able to comply with the Board's deadline once it was set on June 8th. While Joint Petitioners acknowledge that motions were due at the close of a shortened holiday work week, Joint Petitioners also note that this was the conclusion of a **30-day notice period**. EDF, along with other interested entities, was free to file prior to the July 8th deadline, and indeed NJLEUC and ACE made such filings. Thus, Joint Petitioners must ask how EDF justifies its failure to act in the weeks prior to that time? In short, they do not.

EDF's Extension Request is remarkable in a second respect: it requests additional time to "consider" whether or not it will seek to intervene in this proceeding. Thus, EDF states:

EDF is carefully assessing this proceeding and, **if EDF deems it appropriate**, it will seek intervention by July 15. **It is possible that EDF will choose not to intervene.**<sup>6</sup>

In other words, even though the matter had been on file with the Board for ten weeks, on July 8th EDF still needed more time to evaluate its interests and determine whether those interests were sufficient to warrant intervention. Perhaps EDF's assessment was so protracted because its interests in the matter are so minimal? As will be discussed below, a review of EDF's late-filed Intervention demonstrates those interests were insufficient on July 8th and remain so today.

On July 14, 2022, Presiding Commissioner Holden issued an Order denying EDF's Extension Request ("Extension Order").<sup>7</sup> In that Extension Order, Commissioner Holden correctly observed that EDF had not sought an extension of time to file a motion.<sup>8</sup> Rather, EDF

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<sup>4</sup> See EDF Request for One Week Extension to File Intervention, dated July 8, 2022 ("Extension Request").

<sup>5</sup> See *id.*

<sup>6</sup> See *id.* (emphasis added).

<sup>7</sup> See *I/M/O the Merger of South Jersey Industries, Inc. and Boardwalk Merger Sub, Inc.*, BPU Dkt. No. GM22040270, Order on Motion Requesting Extension of Time (dated July 14, 2022) ("Extension Order").

<sup>8</sup> See *id.* at 2.

requested “an extension of time to think about filing a motion.”<sup>9</sup> In denying EDF’s request, Commissioner Holden noted that EDF “was afforded a month to make this determination and file the appropriate motion, if any, with the Board. Instead, EDF remained silent until after the close of business, on the day all motions were due, to request an extension to ‘consider’ filing a motion.”<sup>10</sup> In sum, Commissioner Holden recognized that EDF had ample time to consider and file its motion by July 8th, that EDF had not provided a legally cognizable explanation for its failure to meet the Board’s deadline, and that EDF’s actions raised the spectre of confusion and delay. Ultimately, Commissioner Holden succinctly, and correctly, found that EDF “failed to satisfy the legal requirements necessary to grant its motion.”

On July 15, 2022, EDF concurrently filed its Intervention and its Appeal. For the reasons discussed below, the Board should deny both requests.

## **ARGUMENT**

### **I. There is no legal or factual basis to grant EDF’s Appeal.**

It is well-settled law that the Board has the discretion to grant interlocutory review, but it is a power to be used sparingly to avoid piecemeal adjudication.<sup>11</sup> Indeed, the Board has held that interlocutory review is limited and “may be granted if it is in the interest of justice or for good cause shown.”<sup>12</sup> Here, EDF can make no such showing and the Board should deny EDF’s request for interlocutory review.

EDF’s Appeal seems to rest on three points: that its Extension Request was inaccurately characterized by Commissioner Holden; that the Board’s offices close at 5:00 p.m.; and, that its Extension Request “did not seek to create any confusion or delay.” Joint Petitioners will address each point in turn.

First, EDF is highly critical of Commissioner Holden’s characterization of its Extension Request as merely “time to think about filing a motion.” Instead, EDF asserts that its Extension Request was not “only” a request for additional time to consider filing a motion, but rather time “to complete its careful assessment of the proceeding and to complete and file its motion to intervene.”<sup>13</sup> While EDF may discern a distinction between “thinking” about filing a motion and “carefully assessing” filing a motion, this is little more than semantic hair-splitting and cannot form the basis for interlocutory review. What is even more curious about EDF’s representation in its Appeal, however, is that EDF asserts it sought time “to complete and file its motion to

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<sup>9</sup> See id.

<sup>10</sup> See id. at 3.

<sup>11</sup> See In re Middlesex Water Co., BPU Dkt. No. WR17101049, Order Granting Interlocutory Review (dated January 31, 2018), at 5.

<sup>12</sup> See id.

<sup>13</sup> See Appeal, at ¶ 10.

intervene” as if a decision had been made on intervention. This is inconsistent with both EDF’s representations about “carefully assessing this proceeding,” and the plain wording of its Extension Request which stated: “It is possible that EDF will choose not to intervene.” That sentence does not describe the preparation of a motion, and clearly demonstrates that EDF was simply stalling for time. While EDF may tell a different story now, Commissioner Holden clearly understood the Extension Request, accurately characterized it, and appropriately denied it.

Second, EDF stoops to quibbling about the hour at which the Board’s offices close and asserts that Commissioner Holden was wrong to conclude the Extension Request was filed “after the close of business.” What this argument fails to recognize is that Commissioner Holden denied EDF’s Extension Request on the merits, not on the basis of when it was filed. Nothing further needs to be said on this point.

Third, EDF states it “did not seek to create any confusion or delay.”<sup>14</sup> Nonetheless, it has done precisely that. Indeed, when confronted with the first procedural deadline in this matter, EDF elected not to comply with that requirement due to “the holiday week and the other press of business.”<sup>15</sup> As a result, the Joint Petitioners and the Board must expend resources addressing EDF’s various late filings, creating confusion as to the parties in this matter. Further, should the Board grant interlocutory review, there will be additional delay as that process is conducted pursuant to administrative regulations. In addition, the Board is certainly aware that discovery is well underway and a pre-hearing conference has been scheduled. In short, the proceeding is moving forward and granting EDF interlocutory review will only serve to delay and confuse matters, and create opportunities for EDF to further disrupt these proceedings.

Lastly, EDF asserts there is “good cause” for the Board to grant its Appeal and points to its interest in environmental issues and scientific and technical resources.<sup>16</sup> This argument, however, misses the point. Commissioner Holden did not consider the merits of EDF’s Intervention because that motion was not before her. Instead, Commissioner Holden exercised her discretion as the Presiding Commissioner when EDF sought to deviate from the filing deadline set by the Board. EDF has not provided good cause for why it could not meet that deadline, and so has failed to establish either a legal or factual basis for granting its Appeal. Therefore, the Board should deny EDF’s Appeal.

## **II. EDF does not meet the standards for intervention or participation in this change of control proceeding.**

Apart from the fact that EDF’s Intervention could (and should be) denied on procedural grounds, as it was both untimely filed and filed in contravention of Commissioner Holden’s

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<sup>14</sup> See Appeal, at ¶ 11.

<sup>15</sup> See Extension Request.

<sup>16</sup> See Appeal, at ¶¶ 12-13.

Extension Order, the Intervention should be denied on the merits. This proceeding involves the acquisition of SJI, the ultimate parent company of ETG and SJG, by IIF US 2. As such the standards applicable to this change of control matter are clear and unambiguous: Joint Petitioners must demonstrate that positive benefits will flow to customers and the State of New Jersey and, at a minimum, that there are no adverse impacts to competition, rates, employees or the provision of safe and adequate **utility service** at just and reasonable rates.<sup>17</sup> Joint Petitioners initiated this proceeding seeking the Board's authorization to complete the proposed change of control. As such, that request determines the scope of the proceeding and the questions and issues that are relevant to it and will need to be considered by the Board.

With its late-filed Intervention, EDF attempts to transform this matter into something radically different: an examination of environmental policy frameworks, climate objectives, and the decarbonization of natural gas distribution systems.<sup>18</sup> Put another way, EDF has little or no interest in matters related to the change of control proceeding. Instead, EDF seeks to raise climate targets and issues of social and environmental justice. While these are important issues to address in the appropriate forum, they are not appropriate issues in this proceeding. To the extent that these matters reflect EDF's interest, they do not translate into a stake in this change of control proceeding nor do they make EDF uniquely qualified to address issues raised in this matter. Consequently, as set forth below, EDF fails to satisfy the standards for intervention and the Intervention must be denied.

**A. The standards for intervention and participation.**

The standard for intervention is straightforward. N.J.A.C. 1:1-16.1(a) states that “any person or entity not initially a party, who has a statutory right to intervene or who will be substantially, specifically and directly affected by the outcome” of a matter may seek leave to intervene. The decision-maker—here Commissioner Holden and ultimately the Board—shall

take into consideration the nature and extent of the movant's interest in the outcome of the case, whether or not the movant's interest is sufficiently different from that of any party so as to add measurably and constructively to the scope of the case, the prospect of confusion or undue delay arising from the movant's inclusion, and other appropriate matters.<sup>19</sup>

Consideration of a motion to intervene implicitly involves a balancing test. Thus, the Board must consider the need for development of a full record weighed against the need for expeditious administrative proceedings, and so requires that an “intervener’s interest be specific, direct and

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<sup>17</sup> See N.J.A.C. 14:1-5.14(c) and N.J.S.A. 48:2-51.1.

<sup>18</sup> Intervention at ¶¶ 5, 6.

<sup>19</sup> See N.J.A.C. 1:1-16.3(a).

different from that of other parties so as to add measurably and constructively to the scope of the case.”<sup>20</sup>

In addition, under N.J.A.C. 1:1-16.5, every motion for leave to intervene shall be treated in the alternative as a motion for permission to participate. Under N.J.A.C. 1:1-16.6, a "participant" must have a significant interest in the outcome of a case and, in ruling on a request to participate, the trier of fact is required to determine whether the participant's interest "is likely to add constructively to the case without causing undue delay or confusion." Under N.J.A.C. 1:1-16(c), participation is limited to (i) the right to argue orally, (ii) the right to file a statement or brief, (iii) the right to file exceptions to the initial decision with the agency head, or (iv) all of the above. EDF has failed to meet the standards applicable to either intervenor or participant status in this proceeding and the Intervention must be denied.

**B. EDF is not an appropriate intervenor or participant in this matter.**

In an effort to support its Intervention, EDF states that its “mission is to preserve the natural systems on which all life depends,” and asserts that it “seeks practical and lasting solutions to resolve the most serious environmental problems—including addressing the urgent climate crisis.”<sup>21</sup> EDF claims it “uses the power of markets to achieve beneficial environmental outcomes and, consistent with its organizational purpose, is engaged in activities to facilitate cost-effective and efficient energy market designs and regulatory frameworks that encourage investment to modernize and decarbonize energy systems.”<sup>22</sup>

While lofty, these statements are completely unrelated to the proposed merger and do not describe an EDF interest in this proceeding that is sufficiently specific, direct, or different to support EDF’s Intervention here. Indeed, EDF’s stated interest is decidedly generic, with no showing of how the outcome of the instant matter will have any impact on EDF or its purported members living in the ETG and SJG service territories. In fact, approval of the change of control petition will have no impact on EDF as it is not served by ETG or SJG. To the extent that EDF members may benefit from the rate credits and other benefits offered by the Joint Petitioners, EDF has no special expertise in such areas and customers are already ably represented by Board Staff and the Division of Rate Counsel.<sup>23</sup>

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<sup>20</sup> See I/M/O the Petition of Elizabethtown Gas Company to Review its Periodic Basic Gas Supply Service Rate, BPU Docket No. GR19050678, Decision and Order Approving Stipulation Regarding Provisional BGSS Rate (dated September 11, 2019) at 5.

<sup>21</sup> Intervention at ¶ 1.

<sup>22</sup> Id.

<sup>23</sup> See, e.g., In re Petition of Public Service Electric and Gas Co. for Approval of the Energy Strong Program, BPU Dkt. No. EO13020155 (dated August 2, 2014) (denying environmental groups intervenor status where the movant’s only directly affected interest was a ratepayer).

EDF also argues that intervention is appropriate because the “management, investments, and operations of ETG and SJG have the potential to contribute to, or detract from, the achievement of New Jersey’s climate objectives, and urges the Board to further explore these issues in this proceeding.”<sup>24</sup> The Board should decline EDF’s suggestion as the concerns raised regarding New Jersey’s climate objectives and utility decarbonization are not appropriate for resolution in a single company case and should instead be addressed in a manner that permits all entities interested in those topics to participate—that is not this case. This is yet another example of EDF attempting to expand the scope of this proceeding by interjecting broad public policy matters: it does not justify intervention.

EDF also asserts that its intervention will not cause confusion or delay.<sup>25</sup> The mere presence of this filing illustrates that EDF’s statement lacks credibility. EDF has failed to comply with the first deadline set in this proceeding based on the July 4th holiday and “the press of other business,” and by its own admission has required in excess of ten weeks to determine if it has an interest in this case. Given this track record, it seems likely that EDF will be the source of further delay if permitted to intervene. This is in addition to the fact that EDF has placed the Board, and the parties, on notice of its interest in raising a panoply of environmental policy issues. These concerns, however, are inappropriate for consideration in a single-company case if EDF’s goal is to make binding and broadly applicable policy.<sup>26</sup> Thus, EDF’s intervention is likely to cause confusion over the scope of this proceeding and delay in its timely processing.

Finally, EDF refers to other proceedings in New Jersey (and elsewhere) in which it participated and asserts that its “interventions and active participation have made positive contributions in these proceedings for the benefit of its members and the public.”<sup>27</sup> This argument completely misses the mark, however, as it fails to acknowledge that intervention must be considered in each matter and for each party. The granting of intervener or participant status in one matter is not precedential and it is not a justification or support for intervention in another unrelated matter. Thus, references to other proceedings are simply not relevant and do not justify either intervener or participant status here. That said, just as EDF has pointed to matters where its intervention has been granted (presumably having been timely filed and potentially unopposed), SJG and ETG can also point to utility proceedings where the Board has denied EDF’s request to intervene. For example, EDF attempted to intervene and raise several environmental issues (e.g., New Jersey climate policies, pipeline investments and ETG’s gas supply purchasing strategies in

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<sup>24</sup> Intervention at ¶ 12.

<sup>25</sup> *Id.* at ¶ 13.

<sup>26</sup> See *Metromedia, Inc. v. Div. of Taxation*, 97 N.J. 313, 331-32 (1984), in which the Court set guidelines for when administrative agencies, including the Board, must adhere to rulemaking requirements when setting policies of general applicability.

<sup>27</sup> *Id.* at ¶ 10.

light of the draft Energy Master Plan) in ETG's 2019 Basic Gas Supply cost recovery proceeding.<sup>28</sup> In denying EDF's request, the Board found that the issues raised by EDF "would be best addressed in other proceedings such as EMP proceedings and the Generic Capacity Proceedings as these issues are outside the scope of this proceeding."<sup>29</sup> The Board also noted: "Regarding EDF's interest with respect to environmental issues, as noted above, the Board believes there are other appropriate proceedings in which these issues should be addressed."<sup>30</sup> The Board should make a similar finding in this proceeding.


For the reasons outlined above, EDF has failed to establish any relevant or legitimate basis to support its intervention in this proceeding and its motion should be denied, and participate status should also be denied.

### **III. Conclusion**

As stated herein, EDF's Appeal is without merit and is not supported in law or fact. Thus, the Board should deny EDF's request for review of Commissioner Holden's well-reasoned Extension Order denying EDF's Extension Request. EDF's Intervention is also appropriately denied on both procedural and legal grounds—having been untimely filed, filed in direct contravention of Commissioner Holden's Extension Order, and lacking any basis upon which to allege unique and relevant interests in this change of control proceeding.

Wherefore, Joint Petitioners respectfully request that the Board deny the Appeal and that Commissioner Holden deny the Intervention.

Respectfully submitted,



Colleen A. Foley

cc: Attached Service List  
Martin C. Rothfelder, Esq. (via email only)  
Erin Murphy (via email only)

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<sup>28</sup> See I/M/O the Petition of Elizabethtown Gas Company to Review its Periodic Basic Gas Supply Service Rate, BPU Dkt. No. GR19050678, Decision and Order (dated September 11, 2019), at 6.

<sup>29</sup> Id.

<sup>30</sup> Id.

**I/M/O THE MERGER OF SOUTH JERSEY INDUSTRIES, INC. AND BOARDWALK MERGER SUB, INC.  
BPU DOCKET NO. GM22040270**

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