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Please reply to Trenton

July 27, 2022

Via Electronic Mail

The Honorable Mary-Anna Holden
Board of Public Utilities
44 South Clinton Avenue
P.O. Box 350
Trenton, NJ 08625

RE: In the Matter of The Merger of South Jersey Industries, Inc. and Boardwalk Merger Sub, Inc., Docket No. GM22040270, **EDF Reply to Joint Petitioners July 22, 2022 Response to Intervention Motion**

Dear Commissioner Holden:

Please accept this letter in lieu of a more formal pleading as the reply of the Environmental Defense Fund (“EDF”) to Joint Petitioners response, dated July 22, 2022, opposing EDF’s Motion to Intervene and Request for Leave to file out-of-time dated July 15, 2022 (“Motion”). EDF respectfully requests that Your Honor grant EDF’s leave to file the intervention motion one week out of time,¹ address the merits of the motion, and based on the standards for intervention at N.J.A.C. 1:1-16.3, grant EDF intervener status in this proceeding.

The Joint Petitioners seek to characterize EDF’s Motion as an attempt to inappropriately “raise climate targets and issues of social and environmental justice,” while having “little or no interest in matters related to the change in control proceeding.”² This is inconsistent with New Jersey law and Board precedent. EDF has specific interest in ensuring that the proposed transaction at issue in this proceeding will result in service that preserves environmental quality.

The Joint Petitioners inaccurately characterize the legal requirements that govern the Board’s review of the petition at hand. As stated in EDF’s Motion to Intervene, New Jersey law

¹ Your Honor’s July 14, 2022 Order denying EDF a one-week extension to file its intervention motion is pending interlocutory appeal before the Board.

² Response, p. 6.

explicitly includes consideration of environmental issues in utility acquisition of control proceedings.³ N.S.J.A. 48:2-51.1 requires the Board to “evaluate the impact of the acquisition . . . on the provision of safe, adequate and reliable utility service.” N.J.S.A. 48:2-23 defines “safe and adequate service” to require the provision of service “in a manner that tends to conserve and preserve the quality of the environment.”

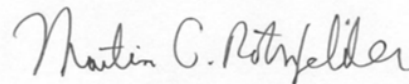
The Board has previously granted intervention status to public interest organizations, including an environmental organization, in other utility acquisition of control proceedings that, like this one, are governed under N.S.J.A. 48:2-51.1. In the matter regarding the proposed change in control of PSE&G, the Board granted the intervention of New Jersey Public Interest Research Group and Natural Resources Defense Council (“NRDC”).⁴ In an order on interlocutory appeal, the Board overturned with the Administrative Law Judge’s conclusion that NRDC had not met the standards for intervention. The Board granted NRDC’s motion to intervene, stating:

One of the very issues in this matter, pursuant to N.J.S.A. 48:2-51.1, is the effect of the proposed acquisition on safe and adequate utility service at just and reasonable rates, issues with regard to which NRDC does have interests as reflected in its motion. An evaluation as to any impacts of the merger on safe and adequate service can include impacts upon the environment, public health and energy policy, areas in which NRDC has interests.⁵

EDF has similarly demonstrated that it has a clear interest in the matter at hand and that it will assist in the development of a comprehensive record. The Board’s previous orders granting interlocutory appeal and intervention indicate the Board’s recognition that organizations such as EDF bring relevant expertise to acquisition of control proceedings.

For the foregoing reasons, and those set forth in its intervention motion, EDF respectfully requests Your Honor grant EDF intervenor status with full rights thereto in this acquisition of control proceeding.

Sincerely,



Martin C. Rothfelder

cc: Service list & Carmen Diaz, Secretary (via e-mail)

³ See *In the Matter of the Merger of South Jersey Industries, Inc. and Boardwalk Merger Sub, Inc.*, Docket No. GM22040270, Motion to Intervene and Request for Leave of Environmental Defense Fund, at ¶ 11 (July 15, 2022).

⁴ *I/M/O the Joint Petition of Public Service Electric and Gas Company and Exelon Corporation for Approval of a Change in Control of Public Service Electric and Gas Company, and Related Authorizations*, Docket EM05020106, PUC 1874-05, Order on Motion of New Jersey Public Interest Group Citizen Lobby, Inc. for Interlocutory Review (June 8, 2005); Order on Motion of Natural Resources Defense Council for Interlocutory Review (August 1, 2005). Both orders are attached hereto.

⁵ *Id.*, Order on Motion of Natural Resources Defense Council for Interlocutory Review, at p. 6 (August 1, 2005).



STATE OF NEW JERSEY

Board of Public Utilities

Two Gateway Center

Newark, NJ 07102

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ENERGY

IN THE MATTER OF THE JOINT PETITION)	ORDER ON MOTION OF NATURAL
OF PUBLIC SERVICE ELECTRIC AND GAS)	RESOURCES DEFENSE COUNCIL
COMPANY AND EXELON CORPORATION)	FOR INTERLOCUTORY REVIEW
FOR APPROVAL OF A CHANGE IN CONTROL)	
OF PUBLIC SERVICE ELECTRIC AND GAS)	
COMPANY, AND RELATED AUTHORIZATIONS)	BPU DOCKET NO. EM05020106
	OAL DOCKET NO. PUC1874-05

(SERVICE LIST ATTACHED)

BY THE BOARD:

This Order memorializes decisions rendered by the Board at its July 6, 2005 and August 1, 2005 agenda meetings regarding a request for interlocutory review, pursuant to N.J.A.C. 1:1-14.10(a) et seq., by Natural Resources Defense Council ("NRDC"). NRDC seeks interlocutory review of an Order of Administrative Law Judge ("ALJ") Richard McGill denying NRDC permission to intervene and instead granting it participant status in the above-captioned matter. NRDC requests that the Board: grant review of ALJ McGill's Order, and overrule ALJ McGill's Order so as to allow NRDC full intervenor status so that it may participate fully in all phases of this proceeding. Public Service Electric and Gas Company ("PSE&G") and Exelon Corporation ("Exelon") (collectively, "Joint Petitioners") oppose the request for interlocutory review.

At its July 6, 2005 agenda meeting, the Board granted interlocutory review. Recognizing that NRDC filed the motion with the Board on June 23, 2005 and that, pursuant to N.J.A.C. 1:1-14.10(e), the Board's time period for review and rendering of a final disposition on the interlocutory review was set to expire on July 13, 2005, the Board also requested a twenty day extension of time to render its final disposition on the interlocutory review pursuant to N.J.A.C. 1:1-14.10(e). By Secretary's letter and Order of Extension, the Board notified the Director of the Office of Administrative Law ("OAL") and the parties of the extension request and the grant of interlocutory review. A further opportunity required by N.J.A.C. 1:1-14.10(d) for those objecting to interlocutory review to submit arguments in favor of the ALJ's ruling was provided. However, no further comments were submitted. Thereafter, the matter was returned to the Board's August 1, 2005 agenda for a ruling on the merits of the underlying motion to intervene by NRDC and the ALJ's ruling thereon.

BACKGROUND/ PROCEDURAL HISTORY RELEVANT TO MOTION

The Joint Petition of Public Service Electric and Gas Company and Exelon Corporation, filed with the Board on February 4, 2005, and thereafter supplemented by letters dated February 7, 9, and 28, 2005, requests that the Board issue an Order: 1) approving the acquisition of control of PSE&G as contemplated by an Agreement and Plan of Merger between Exelon Corporation and Public Service Enterprise Group Incorporated, dated as of December 20, 2004 (Exhibit JP-1C); 2) authorizing Exelon's subsidiary Exelon Energy Delivery to acquire control of PSE&G, pursuant to N.J.S.A. 48:2-51.1 and N.J.S.A. 48:3-10; 3) authorizing the recording of a regulatory asset to offset the purchase accounting adjustments resulting in an increase in the balance sheet liabilities for PSE&G's pension plans and other retirement benefits; 4) approving a General Services Agreement and Mutual Services Agreement (Exhibits JP-1E and 1F) pursuant to N.J.S.A. 48:3-7.1; 5) approving PSE&G's execution of and action in accordance with the Exelon Utility Money Pool Agreement (Exhibit JP-1G) pursuant to N.J.S.A. 3-7.2; and 6) including determinations pursuant to the Public Utility Holding Company Act of 1935.

ALJ's Order

By Order dated June 7, 2005, the ALJ denied a May 11, 2005 motion by NRDC for intervention and instead allowed it to participate with all of the rights set forth in N.J.A.C. 1:1-16.6(c), i.e., the rights to argue orally, file a statement or brief, and file exceptions to the initial decision with the agency head. The ALJ considered the standards for intervention in N.J.A.C. 1:1-16.3, which are discussed below, and in considering one such factor, the nature and extent of the movant's interest in the outcome of the case, he also considered the factors set forth in N.J.S.A. 48:2-51.1 for approval to acquire control of a public utility, including the impact of the acquisition on employees, competition, rates and service. He ruled that NRDC is mainly concerned about environmental and sustainable energy policy and, although its interests "are different from those of other parties," they are not directly related to the considerations in this case" and "[i]nclusion of a party without a real stake in the outcome of the proceeding presents a danger of confusion or undue delay." He found that NRDC does not meet the standards for intervention but that it had "demonstrated that it has a significant interest in the outcome of this proceeding," and therefore, should be allowed to participate.

NRDC'S Motion for Interlocutory Review

As previously indicated, NRDC filed its motion for interlocutory review on June 23, 2005. By its motion, NRDC requests that it be permitted to intervene with full procedural and substantive rights.

NRDC states that it is a "national not-for-profit environmental organization with more than 600,000 members, including more than 21,000 members in New Jersey," whose interest is to "reduce[e] the environmental and public health impacts of electric generation and ensur[e] safe and reliable energy services to all members." It further states that it seeks full intervention in this matter "to ensure that these proceedings result in the delivery of safe and reliable energy services to all members, as well as environmentally sound and sustainable energy services including substantial support for energy efficiency and clean energy technologies." It objects to ALJ McGill's statement that its interests are not directly related to the considerations in this case and contends that "[e]valuating the impacts upon statutorily required factors such as the provision of safe and adequate utility service will necessitate careful consideration of the environmental and public health impacts of the proposed merger." NRDC further alleges that the merger could have adverse impacts upon established energy policies and programs in the

state, and upon environmental performance of electric generating facilities in the State, reducing the safety and adequacy with which these facilities perform.

NRDC further asserts that its entry as a full intervenor would “measurably and constructively” advance this proceeding in accordance with N.J.A.C. 1:1-16.3(a) because of its long-standing expertise and involvement in energy policy within New Jersey, and its commitment to reducing the environmental and public health impacts of electric generation and ensuring safe and reliable energy services to all customers. It notes that it has previously intervened in proceedings before the Board and asserts that it has added constructively to the discussion and resolution of those proceedings. Additionally, NRDC represents that, notwithstanding its unique interests, where possible and practical, it will endeavor to work cooperatively with other parties. It maintains that for these reasons and because the cost and quality of electricity service to its members will be directly and substantially affected by the issues to be determined in this proceeding, it has a direct and immediate interest in the outcome that cannot be adequately represented by any other party. Accordingly, NRDC requests that it be permitted to intervene in the above proceeding.

Other Parties’ Positions

By letter dated June 24, 2005, the Joint Petitioners submitted opposition to NRDC’s request for interlocutory review, which they maintain should be denied. The Joint Petitioners assert that NRDC has failed to establish either to the ALJ or the Board that its expertise and full involvement as a party would meaningfully assist the Office of Administrative Law or the Board in performing their duty to evaluate the impact of the proposed transaction on competition, rates, employees, and the provision of safe and adequate utility service at just and reasonable rates. They contend that inclusion of NRDC as a full party intervenor presents the “prospect of confusion [and] delay,” as evidenced by the numerous representations in NRDC’s interlocutory appeal that are wholly unsupported, as well as wholly out of place at this stage of the proceeding.” In particular, the Joint Petitioners dispute NRDC’s “conclusory assertions” that the merger will have adverse impacts on energy policies and programs in the State, and upon the environmental performance of electric generating facilities in the State as they maintain these claims are inconsistent with representations by the Joint Petitioners in testimony supporting the Joint Petition. Accordingly, the Joint Petitioners request that the motion for interlocutory review be denied. However, recognizing the Board’s decision in its Order dated June 8, 2005 granting intervenor status to the New Jersey Public Interest Research Group Citizen Lobby, Inc. (“NJPIRG”) presented similar issues to the NRDC motion, the Joint Petitioners also request that if, despite their position that the motion should be denied, the Board grants NRDC’s request, that the Board simultaneously direct NRDC to consult with and work cooperatively with NJPIRG, as well as with the Division of the Ratepayer Advocate (“RPA”), in order to avoid undue delay and repetition. In particular, the Joint Petitioners request that NRDC be directed to review discovery already propounded by Board Staff and the RPA so as to avoid duplicative interrogatories, and with NJPIRG conduct joint discovery to the extent any further discovery is necessary, conduct joint cross-examination, and file joint testimony and briefs.

On June 30, 2005, Board Staff filed a letter renewing its support for granting NRDC full intervention status, consistent with the position it filed with the ALJ.

APPLICABLE LEGAL STANDARDS

With certain exceptions not relevant herein, an order or ruling of an ALJ may be reviewed interlocutorily by an agency head at the request of a party. N.J.A.C. 1:1-14.10(a). Pursuant to

N.J.A.C. 1:1-14.10(b), any request for interlocutory review shall be made to the agency head, with a copy served on all parties, no later than five working days from the receipt of the written order or oral ruling, whichever is rendered first. Within three days of receipt of a request for interlocutory review, an opposing party may submit an objection to the request. N.J.A.C. 1:1-14.10(b). Pursuant to N.J.A.C. 1:1-14.10(c), within ten days of the request for interlocutory review, the agency head must decide if the order or ruling will be reviewed. With regard to the Board, pursuant to N.J.A.C. 1:14-14.4, the Board is to determine at its next regularly scheduled meeting whether the order or ruling will be reviewed. If the agency determines to grant and conduct an interlocutory review, a party opposed to the grant of interlocutory review may, within three days of receiving notice that review was granted, submit to the agency head arguments in favor of the order or ruling being reviewed. N.J.A.C. 1:1-14.10(d). The agency head is to decide the review no later than twenty days from receiving the request for review but the time period for disposition may be extended for good cause for an additional twenty days if both the agency head and the OAL Director concur. N.J.A.C. 1:1-14.10(e). "Where the interests of justice require, the agency head shall conduct an interlocutory review on an expedited basis." Ibid. The OAL's regulations thus provide for a two-step process for ruling on requests for interlocutory review: 1) a ruling on whether or not to grant interlocutory review and 2) if review is granted, a ruling on whether or not to reverse or otherwise modify the ruling at issue.

The legal standard for accepting a matter for interlocutory review is set forth in In re Uniform Administrative Procedure Rules, 90 N.J. 85 (1982). In that case, the Court concluded that the agency has the right to review ALJ orders on an interlocutory basis "to determine whether they are reasonably likely to interfere with the decisional process or have a substantial effect upon the ultimate outcome of the proceeding." Id. at 98. The Court indicated that the agency head has broad discretion to determine which ALJ orders are subject to review on an interlocutory basis. However, it noted that the power of the agency head to review ALJ orders on an interlocutory basis is not itself totally unlimited, and that interlocutory review of ALJ orders should be exercised sparingly. In this regard, the Court noted:

In this respect, the analogy to the courts is appropriate. In general, interlocutory review by courts is rarely granted because of the strong policy against piecemeal adjudications. See Hudson v. Hudson, 36 N.J. 549 (1962); Pennsylvania Railroad, 20 N.J. 398. Considerations of efficiency and economy also have pertinency in the field of administrative law. See Hackensack v. Winner, 82 N.J. at 31-33; Hinfey v. Matawan Reg. Bd. of Ed., 77 N.J. 514 (1978). See infra at 102, n.6. Our State has long favored uninterrupted proceedings at the trial level, with a single and complete review, so as to avoid the possible inconvenience, expense and delay of a fragmented adjudication. Thus, "leave is granted only in the exceptional case where, on a balance of interests, justice suggests the need for review of the interlocutory order in advance of final judgment." Sullivan, "Interlocutory Appeals," 92 N.J.L.J. 162 (1969). These same principles should apply to an administrative tribunal.

[Id. at 100]

The Court held that in the administrative arena, as in a court case, interlocutory review may be granted "only in the interest of justice or for good cause shown." Id. The Court found that an agency has the right to review orders of an ALJ on an interlocutory basis pursuant to N.J.A.C. 1:1-14.10:

whenever in the sound discretion of the agency head, there is a likelihood that such an interlocutory order will have an impact upon the status of the parties, the number and nature of the claims or defenses, the nature or scope of issues, the presentation of evidence, the decisional process or the outcome of the case.

[Ibid.]

If the Board determines to review the ALJ's ruling on an interlocutory basis, in next determining whether to grant a motion for intervention, N.J.A.C. 1:1-16.3(a) requires that the decision-maker take into consideration the following:

- 1) the nature and extent of the movant's interest in the outcome of the case;
- 2) whether that interest is sufficiently different from that of any other party so as to add measurably and constructively to the scope of the case;
- 3) the prospect for confusion and delay arising from the movant's inclusion; and
- 4) other appropriate matters

N.J.A.C. 1:1-16.3(b) provides that in cases where one of the parties is a State agency authorized by law to represent the public interest in a case, no movant shall be denied intervention solely because the movant's interest may be represented in part by said State agency.

If the standard for intervention is not met, N.J.A.C. 1:1-16.6 provides for a more limited form of participation in a proceeding, called "participant" status where, in the discretion of the trier of fact, the participant's interest "is likely to add constructively to the case without causing undue delay or confusion." Pursuant to N.J.A.C. 1:1-16.6(c), the trier of fact shall determine the nature and extent of participation in any case, and participation is limited to:

- 1) the right to argue orally; or
- 2) the right to file a statement or brief; or
- 3) the right to file exceptions to the initial decision with the agency head; or
- 4) all of the above.

As the Board has stated in the context of previous proceedings, these standards involve an implicit balancing test, in that the Board must balance the need and desire to allow for the development of a full and complete record and to ensure the consideration of a diversity of interests, with the requirements of the New Jersey Administrative Code, which recognizes the need for prompt and expeditious administrative proceedings by requiring that an intervenor's interest be specific, direct and different from that of the other parties so as to add measurably and constructively to the scope of the case. See, e.g., Order on Motions to Intervene/ Participate and for Pro Hoc Vice Admission, In the Matter of the Petition of Atlantic City Electric Co., et al., BPU Docket Nos. EX94120585Y, EO97070457, EO97070460, EO97070463, and EO97070466 (September 15, 1997), at 10.

DISCUSSION

First, as to the threshold matter regarding whether or not to grant interlocutory review, because the matter at issue herein clearly affects the status of a potential party, the Board HEREBY GRANTS interlocutory review of the ALJ's decision.

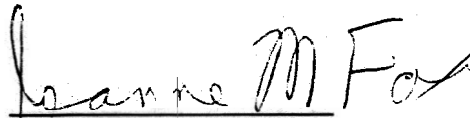
With respect to the merits of the NRDC motion, the Board agrees with the ALJ's findings that "NRDC's interests are different from those of other parties" and that "NRDC has demonstrated that it has significant interest in the outcome of this proceeding." The Board disagrees, however, with the ALJ's conclusions that NRDC's interests are "not directly related to the considerations under N.J.S.A. 48:2-51.1" and "NRDC does not meet the standards for intervention." One of the very issues in this matter, pursuant to N.J.S.A. 48:2-51.1, is the effect of the proposed acquisition on safe and adequate utility service at just and reasonable rates, issues with regard to which NRDC does have interests as reflected in its motion. An evaluation as to any impacts of the merger on safe and adequate service can include impacts upon the environment, public health and energy policy, areas in which NRDC has interests. Furthermore, consistent with the Board's findings in its Order granting intervention to NJPIRG, the specific nature of this proceeding and its impact on the ratepayers of New Jersey requires a comprehensive record and full intervention by NRDC will assist in the development of a comprehensive record.

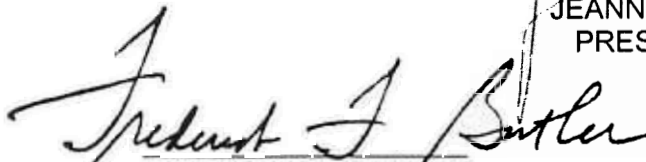
Accordingly, the Board, on interlocutory review, HEREBY GRANTS NRDC'S motion for intervenor status, subject to NRDC complying with the existing schedules and any other directives of the ALJ governing the proceedings in this matter. The Board thus reverses the ALJ's Order to the extent that it denied intervention to NRDC. However, in order to facilitate the efficient conduct of this case, NRDC is HEREBY DIRECTED to consult with and work cooperatively with the Division of the Ratepayer Advocate and NJPIRG, to the greatest extent possible and consistent with its interests, so as to avoid any undue delay and repetition. With regard to Joint Petitioners' request that NRDC and NJPIRG be directed to conduct joint discovery and file joint testimony and briefs, the Board does not find it necessary to impose such a requirement in this matter given the requirements previously set forth.

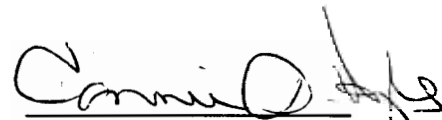
This Order is subject to such further directions by the ALJ or Board as may be appropriate should intervention be granted to other entities representing citizens who are residential customers of PSE&G or which otherwise have interests which overlap with those of NRDC.

DATED: 8/1/05

BOARD OF PUBLIC UTILITIES
BY:


JEANNE M. FOX
PRESIDENT


FREDERICK F. BUTLER
COMMISSIONER

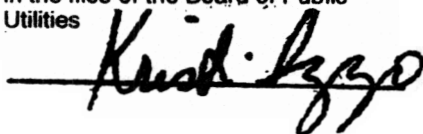

CONNIE O. HUGHES
COMMISSIONER


JACK ALTER
COMMISSIONER

ATTEST:


KRISTI IZZO
SECRETARY

I HEREBY CERTIFY that the within
document is a true copy of the original
in the files of the Board of Public
Utilities



Agenda Date: 5/25/05 & 6/8/05/05
Agenda Item: 2B



STATE OF NEW JERSEY
Board of Public Utilities
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ENERGY

IN THE MATTER OF THE JOINT PETITION)	ORDER ON MOTION OF NEW
OF PUBLIC SERVICE ELECTRIC AND GAS)	JERSEY PUBLIC INTEREST
COMPANY AND EXELON CORPORATION)	GROUP CITIZEN LOBBY, INC.
FOR APPROVAL OF A CHANGE IN CONTROL)	FOR INTERLOCUTORY REVIEW
OF PUBLIC SERVICE ELECTRIC AND GAS)	
COMPANY, AND RELATED AUTHORIZATIONS)	BPU DOCKET NO. EM05020106
		OAL DOCKET NO. PUC1874-05

(SERVICE LIST ATTACHED)

BY THE BOARD:

This Order memorializes decisions rendered by the Board at its May 25, 2005 special agenda meeting and its June 8, 2005 regularly scheduled agenda meeting regarding a request for interlocutory review, pursuant to N.J.A.C. 1:1-14.10(a) et seq., by New Jersey Public Interest Group Citizen Lobby, Inc. ("NJPIRG"). NJPIRG seeks interlocutory review of an Order of Administrative Law Judge ("ALJ") Richard McGill denying NJPIRG permission to intervene and instead granting it participant status in the above-captioned matter. NJPIRG requests that the Board: grant leave to file its request for interlocutory review out of time, grant review of ALJ's McGill's Order, and overrule ALJ McGill's Order so as to allow NJPIRG to intervene. Public Service Electric and Gas Company ("PSE&G") and Exelon Corporation ("Exelon") (collectively, "Joint Petitioners") oppose the request for interlocutory review. Board Staff supports intervenor status for NJPIRG.

At its special agenda meeting of May 25, 2005, the Board granted the extension of time and granted interlocutory review. Although a hard copy of the request for interlocutory review was not received by and filed with the Board until May 24, 2005, the Board, assuming that the twenty day period under N.J.A.C. 1:1-14.10(e) for review and rendering of a final disposition on the interlocutory review is to be measured from the next business day following the email sent on May 13, 2005, i.e., from May 16, 2005, and that the Board's time period for review and rendering of a final disposition on the interlocutory review is set to expire on June 5, 2005, requested a twenty day extension of time to render its final disposition on the interlocutory review pursuant to N.J.A.C. 1:1-14.10(e). By Acting Secretary's letter and Order of Extension, the Board notified the Director of the Office of Administrative Law ("OAL") and the parties of the extension request and the grant of interlocutory review. A further opportunity required by N.J.A.C. 1:1-14.10(d) for those objecting to interlocutory review to submit arguments in favor of the ALJ's ruling was provided. However, no further comments were submitted. Thereafter, the

matter was returned to the Board's June 8, 2005 agenda for a ruling on the merits of the underlying motion to intervene by NJPIRG and the ALJ's ruling thereon.

BACKGROUND/ PROCEDURAL HISTORY RELEVANT TO MOTION

The Joint Petition of Public Service Electric and Gas Company and Exelon Corporation, filed with the Board on February 4, 2005, and thereafter supplemented by letters dated February 7, 9, and 28, 2005, requests that the Board issue an Order: 1) approving the acquisition of control of PSE&G as contemplated by an Agreement and Plan of Merger between Exelon Corporation and Public Service Enterprise Group Incorporated, dated as of December 20, 2004 (Exhibit JP-1C); 2) authorizing Exelon's subsidiary Exelon Energy Delivery to acquire control of PSE&G, pursuant to N.J.S.A. 48:2-51.1 and N.J.S.A. 48:3-10; 3) authorizing the recording of a regulatory asset to offset the purchase accounting adjustments resulting in an increase in the balance sheet liabilities for PSE&G's pension plans and other retirement benefits; 4) approving a General Services Agreement and Mutual Services Agreement (Exhibits JP-1E and 1F) pursuant to N.J.S.A. 48:3-7.1; 5) approving PSE&G's execution of and action in accordance with the Exelon Utility Money Pool Agreement (Exhibit JP-1G) pursuant to N.J.S.A. 3-7.2; and 6) including determinations pursuant to the Public Utility Holding Company Act of 1935.

ALJ's Order

By Order dated May 2, 2005, ALJ McGill denied a March 28, 2005 motion by NJPIRG for intervention and instead allowed it to participate with all of the rights set forth in N.J.A.C. 1:1-16.6(c), i.e., the rights to argue orally, file a statement or brief, and file exceptions to the initial decision with the agency head. The ALJ considered the standards for intervention in N.J.A.C. 1:1-16.3, which are discussed below, and in considering one such factor, the nature and extent of the movant's interest in the outcome of the case, he also considered the factors set forth in N.J.S.A. 48:2-51.1 for approval to acquire control of a public utility, including the impact of the acquisition on rates and service. He ruled that NJPIRG represents consumer and environmental interests, that "[t]he proposed acquisition is not likely to have a substantial effect on the rates or service of residential gas and/or electric customers," that NJPIRG has not demonstrated that residential gas and/or electric customers will be impacted differently from other customers, and that "[i]nclusion of a party without a real stake in the outcome of the proceeding presents a danger of confusion or undue delay." He found that NJPIRG does not meet the standards for intervention but that it had "demonstrated that it has a significant interest in the outcome of this proceeding," and therefore, should be allowed to participate.

NJPIRG'S Motion for Interlocutory Review

By email sent after the close of business on May 13, 2005, NJPIRG sent the Board and Service List an "interlocutory appeal" of ALJ McGill's denial of its motion for intervention, along with a supporting certification of Dena Mottola, its executive director. A hard copy of the motion was received by and filed with the Board on May 24, 2005. By its motion, NJPIRG requests that it be permitted to intervene with full procedural and substantive rights. The certification, in addition to supporting intervention, requests leave to file the interlocutory review request out of time, by its calculation, by one or two business days, because the executive director had not been in the office when the ALJ's Order arrived and thereafter, NJPIRG's counsel became "pre-occupied" because her husband was in a car accident on May 6, 2005 and she did not return to work until May 11, 2005.

In support of its motion for interlocutory review, NJPIRG represents that it is a statewide, non-profit and non-partisan organization with a thirty-three year history of representing both environmental and consumer interests, whose interest is to protect its members who are currently residential ratepayers in the PSE&G service area while ensuring that all ratepayers have access to reliable, clean and affordable energy. It states that it has 25,000 citizen members and it lists various BPU dockets in which it intervened or was otherwise actively involved. It objects to ALJ McGill's statement that "the proposed acquisition is not likely to have a substantial effect on the rates or service of residential gas and/or electric customers" and believes that the merger will affect both rates and service through the concentration of market power. It also objects to ALJ McGill's ruling that NJPIRG had not shown that residential gas and/or electric customers will be impacted differently from other customers and that therefore, NJPIRG had not shown its interest is sufficiently different from that of any other party so as to add measurably and constructively to the case. It further objects to the ALJ's finding in denying intervention to NJPIRG that inclusion of a party "without a real stake in the outcome of the proceeding presents a danger of confusion or undue delay" and then notes that in contrast to his denial of intervention, in granting NJPIRG participant status, the ALJ found that NJPIRG has a "significant interest in the outcome of the proceeding."

NJPIRG further asserts that it has concerns on behalf of its members and other ratepayers as well as broader interests about the ability of Exelon to provide safe and reliable service; concerns that progress that has been made in New Jersey toward energy conservation, efficiency and renewable resources, "in part due to NJPIRG's efforts," will diminish if the merger is approved; questions about Exelon's ability to provide reliable service, safely, from its power plants; and concerns about the concentration of market power that the merger will effect and the impact on rates. NJPIRG further claims that "because it is a statewide organization representing broad as well as narrow interests, which include but are not limited to consumer and environmental interests, it has a unique perspective on these matters that would be measurably and constructively helpful to the Board in assessing the impact of this merger and determining whether to approve it."

NJPIRG maintains that all factors for intervention set forth in N.J.A.C. 1:1-16.3(a) have been met and weigh in favor of granting its motion to intervene and overruling the ALJ's decision. It contends that its entry as a party would measurably and constructively advance the proceeding because of the unique status of its members as PSE&G residential ratepayers and would promote an informed and balanced presentation of the issues. It represents that, notwithstanding its unique interests, where possible and practical, it will endeavor to work cooperatively with other parties. It maintains that for these reasons and because the cost and quality of electricity service to its members will be directly and substantially affected by the issues to be determined in this proceeding, it has a direct and immediate interest in the outcome that cannot be adequately represented by any other party. Accordingly, NJPIRG requests that it be permitted to intervene in the above proceeding.

Other Parties' Positions

By letter dated May 19, 2005, the Joint Petitioners submitted opposition to NJPIRG's request for interlocutory review, which they maintain should be denied. The Joint Petitioners assert that NJPIRG has failed to establish either to the ALJ or the Board that its expertise and full involvement as a party would meaningfully assist the Office of Administrative Law or the Board in performing their duty to evaluate the impact of the proposed transaction on competition, rates, employees, and the provision of safe and adequate utility service at just and reasonable rates. They contend that "NJPIRG vaguely asserts that it has a general interest in virtually every

aspect of this matter, without establishing how its experience and expertise will translate into measurable or constructive contributions with regard to any of those aspects in the context of the proposed transaction.” The Joint Petitioners further assert that there is no explanation as to how NJPIRG’s members’ interests in competition, reasonable rates and the provision of safe and adequate service will be furthered by its intervention, particularly in light of the numerous public and private entities already granted intervention, including energy utilities and their competitive affiliates, independent power producers, PSE&G customers and customer groups, and several labor unions. The Joint Petitioners claim that while NJPIRG has referenced various issues in the proceeding, it does not explain how it will add measurably and constructively to the proceeding with regard to these issues. Accordingly, the Joint Petitioners request that the motion for interlocutory review be denied.

By letter dated May 23, 2005, Board Staff supported full intervenor status for NJPIRG. Board Staff maintains that the nature of this proceeding and its impact on ratepayers in New Jersey requires a comprehensive record and that full intervention by NJPIRG will assist in the development of a comprehensive record.

APPLICABLE LEGAL STANDARDS

With certain exceptions not relevant herein, an order or ruling of an ALJ may be reviewed interlocutorily by an agency head at the request of a party. N.J.A.C. 1:1-14.10(a). Pursuant to N.J.A.C. 1:1-14.10(b), any request for interlocutory review shall be made to the agency head, with a copy served on all parties, no later than five working days from the receipt of the written order or oral ruling, whichever is rendered first. Within three days of receipt of a request for interlocutory review, an opposing party may submit an objection to the request. N.J.A.C. 1:1-14.10(b). Pursuant to N.J.A.C. 1:1-14.10(c), within ten days of the request for interlocutory review, the agency head must decide if the order or ruling will be reviewed. With regard to the Board, pursuant to N.J.A.C. 1:14-14.4, the Board is to determine at its next regularly scheduled meeting whether the order or ruling will be reviewed. If the agency determines to grant and conduct an interlocutory review, a party opposed to the grant of interlocutory review may, within three days of receiving notice that review was granted, submit to the agency head arguments in favor of the order or ruling being reviewed. N.J.A.C. 1:1-14.10(d). The agency head is to decide the review no later than twenty days from receiving the request for review but the time period for disposition may be extended for good cause for an additional twenty days if both the agency head and the OAL Director concur. N.J.A.C. 1:1-14.10(e). “Where the interests of justice require, the agency head shall conduct an interlocutory review on an expedited basis.” Ibid. The OAL’s regulations thus provide for a two-step process for ruling on requests for interlocutory review: 1) a ruling on whether or not to grant interlocutory review and 2) if review is granted, a ruling on whether or not to reverse or otherwise modify the ruling at issue.

The legal standard for accepting a matter for interlocutory review is set forth in In re Uniform Administrative Procedure Rules, 90 N.J. 85 (1982). In that case, the Court concluded that the agency has the right to review ALJ orders on an interlocutory basis “to determine whether they are reasonably likely to interfere with the decisional process or have a substantial effect upon the ultimate outcome of the proceeding.” Id. at 98. The Court indicated that the agency head has broad discretion to determine which ALJ orders are subject to review on an interlocutory basis. However, it noted that the power of the agency head to review ALJ orders on an interlocutory basis is not itself totally unlimited, and that interlocutory review of ALJ orders should be exercised sparingly. In this regard, the Court noted:

In this respect, the analogy to the courts is appropriate. In general, interlocutory review by courts is rarely granted because of the strong policy against piecemeal adjudications. See Hudson v. Hudson, 36 N.J. 549 (1962); Pennsylvania Railroad, 20 N.J. 398. Considerations of efficiency and economy also have pertinency in the field of administrative law. See Hackensack v. Winner, 82 N.J. at 31-33; Hinfey v. Matawan Reg. Bd. of Ed., 77 N.J. 514 (1978). See *infra* at 102, n.6. Our State has long favored uninterrupted proceedings at the trial level, with a single and complete review, so as to avoid the possible inconvenience, expense and delay of a fragmented adjudication. Thus, "leave is granted only in the exceptional case where, on a balance of interests, justice suggests the need for review of the interlocutory order in advance of final judgment." Sullivan, "Interlocutory Appeals," 92 N.J.L.J. 162 (1969). These same principles should apply to an administrative tribunal.

[*Id.* at 100]

The Court held that in the administrative arena, as in a court case, interlocutory review may be granted "only in the interest of justice or for good cause shown." *Id.* The Court found that an agency has the right to review orders of an ALJ on an interlocutory basis pursuant to N.J.A.C. 1:1-14.10:

whenever in the sound discretion of the agency head, there is a likelihood that such an interlocutory order will have an impact upon the status of the parties, the number and nature of the claims or defenses, the nature or scope of issues, the presentation of evidence, the decisional process or the outcome of the case.

[*Ibid.*]

If the Board determines to review the ALJ's ruling on an interlocutory basis, the Board must next determine whether to grant intervention. Pursuant to N.J.A.C. 1:1-16.1(a) an application to intervene may be made by any person or entity which has a statutory right to intervene or which will be substantially, specifically and directly affected by the outcome of the case. In ruling upon a motion to intervene, N.J.A.C. 1:1-16.3(a) requires that the decision-maker take into consideration the following:

- 1) the nature and extent of the movant's interest in the outcome of the case;
- 2) whether that interest is sufficiently different from that of any other party so as to add measurably and constructively to the scope of the case;
- 3) the prospect for confusion and delay arising from the movant's inclusion; and
- 4) other appropriate matters.

N.J.A.C. 1:1-16.3(b) provides that in cases where one of the parties is a State agency authorized by law to represent the public interest in a case, no movant shall be denied intervention solely because the movant's interest may be represented in part by said State agency.

If the standard for intervention is not met, N.J.A.C. 1:1-16.6 provides for a more limited form of participation in a proceeding, called "participant" status where, in the discretion of the trier of

fact, the participant's interest "is likely to add constructively to the case without causing undue delay or confusion." Pursuant to N.J.A.C. 1:1-16.6(c), the trier of fact shall determine the nature and extent of participation in any case, and participation is limited to:

- 1) the right to argue orally; or
- 2) the right to file a statement or brief; or
- 3) the right to file exceptions to the initial decision with the agency head; or
- 4) all of the above.

As the Board has stated in the context of previous proceedings, these standards involve an implicit balancing test, in that the Board must balance the need and desire to allow for the development of a full and complete record and to ensure the consideration of a diversity of interests, with the requirements of the New Jersey Administrative Code, which recognizes the need for prompt and expeditious administrative proceedings by requiring that an intervenor's interest be specific, direct and different from that of the other parties so as to add measurably and constructively to the scope of the case. See, e.g., Order on Motions to Intervene/ Participate and for Pro Hoc Vice Admission, In the Matter of the Petition of Atlantic City Electric Co., et al., BPU Docket Nos. EX94120585Y, EO97070457, EO97070460, EO97070463, and EO97070466 (September 15, 1997), at 10.

DISCUSSION

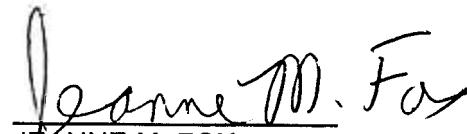
First, as to the threshold matter regarding the timing of NJPIRG's motion itself, pursuant to N.J.A.C. 1:1-14.10(b), the motion for interlocutory review should have been filed within five working days of receipt of the ALJ's Order. Even if the time to file is measured from the time the Order was received in NJPIRG's executive director's office on May 5, 2005, notwithstanding that she was not in her office to review the Order until May 9, 2005, the motion would have been due on May 12, 2005 and given the email was, in effect, received at the Board on May 16, 2005, the extension is only for two business days. It appears from the certification of Dena Mottola, the executive director, that there were some extenuating circumstances during the time frame involved, including that she had been out of the office and had been requested not to answer email or telephone calls, and thereafter, the husband of NJPIRG's counsel was in a car accident. Additionally, the Joint Petitioners have not objected to the requested extension. The Board is satisfied that good cause exists for the grant of the requested extension of time for the filing of the motion for interlocutory review, and accordingly, HEREBY GRANTS the requested extension of time.

As to whether or not to grant interlocutory review, because the matter at issue herein clearly affects the status of a potential party, the Board HEREBY GRANTS interlocutory review of the ALJ's decision. Furthermore, it appears that NJPIRG will be directly, substantially and materially affected by the outcome of this matter. The Board does not agree with the ALJ's findings that the proposed acquisition is not likely to have a substantial effect on the rates or service of residential gas and/or electric customers and that NJPIRG has not demonstrated that residential gas and/or electric customers will be impacted differently from other customers so as to warrant a denial of intervention. The very issues in this matter, pursuant to N.J.S.A. 48:2-51.1, include the effect of the proposed acquisition on rates of ratepayers affected by the acquisition and on the provision of safe and adequate utility service, and there have been no findings to date on these issues. Thus, at this juncture, it is premature for such findings to be

made. Furthermore, the Board concurs with its Staff that the nature of this proceeding and its impact on ratepayers in New Jersey requires a comprehensive record and that full intervention by NJPIRG should assist in the development of a comprehensive record. Accordingly, the Board, on interlocutory review, HEREBY GRANTS NJPIRG'S motion for intervenor status, subject to NJPIRG complying with the existing schedule and any other directives of the ALJ governing the proceedings in this matter. The Board thus reverses the ALJ's Order to the extent that it denied intervention to NJPIRG. However, in order to facilitate the efficient conduct of this case and avoid undue repetition, NJPIRG is HEREBY DIRECTED to consult with and work cooperatively with the Division of the Ratepayer Advocate to the greatest extent possible and consistent with its interests. This Order also is subject to such further directions by the ALJ or Board as may be appropriate should intervention be granted to other entities representing citizens who are residential customers of PSE&G or which otherwise have interests which overlap with those of NJPIRG.

DATED: 6/8/05

BOARD OF PUBLIC UTILITIES
BY:


JEANNE M. FOX
PRESIDENT


FREDERICK F. BUTLER
COMMISSIONER


CONNIE O. HUGHES
COMMISSIONER


JACK ALTER
COMMISSIONER

ATTEST:


KRISTI IZZO
SECRETARY

I HEREBY CERTIFY that the within
document is a true copy of the original
in the files of the Board of Public
Utilities

