



STATE OF NEW JERSEY
Board of Public Utilities
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ENERGY

IN THE MATTER OF THE MERGER OF SOUTH
JERSEY INDUSTRIES, INC. AND BOARDWALK
MERGER SUB, INC.

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DECISION ON EDF MOTION
FOR RECONSIDERATION
AND MOTION TO
INTERVENE

DOCKET NO. GM22040270

Parties of Record:

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BY COMMISSIONER MARY-ANNA HOLDEN

I. BACKGROUND

On April 25, 2022, IIF US Holding 2 LP ("IIF US 2"), NJ Boardwalk Holdings LLC ("Boardwalk"), Boardwalk Merger Sub, Inc. ("Merger Sub"), South Jersey Industries, Inc. ("SJI"), SJI Utilities, Inc. ("SJIU"), Elizabethtown Gas Company ("ETG"), and South Jersey Gas Company ("SJG") (collectively, "Joint Petitioners"), filed a petition with the New Jersey Board of Public Utilities ("Board") seeking authority for approval of an indirect change of control of ETG and SJG ("Joint Petition"). The proposed transaction would be effectuated by a merger of SJI and Merger Sub, a wholly-owned subsidiary of Boardwalk, which is in turn a wholly-owned, indirect subsidiary of IIF US 2 ("Proposed Transaction").¹

¹ See Joint Petition at pp. 1-2.

ETG serves approximately 306,000 customers in all or portions of Hunterdon, Mercer, Middlesex, Morris, Sussex, Union and Warren counties. SJG serves approximately 413,000 customers in all or portions of Atlantic, Burlington, Camden, Cape May, Cumberland, Gloucester and Salem counties. Both gas utilities are wholly owned subsidiaries of SJIU, which in turn is a wholly owned subsidiary of SJL.

According to the Joint Petition, the Infrastructure Investments Fund ("IIF") is a private investment vehicle managing retirement funds of more than 60 million families with a \$20 billion net asset value and gross asset value of approximately \$40 billion mainly invested in critical infrastructure assets. IIF consists of two (2) master partnerships, IIF US 2, the proposed owner in the instant petition, and IIF Int'l Holding L.P., both advised by J.P. Morgan Investment Management Inc. IIF's 18 controlled portfolio companies are located primarily in the United States, Europe, and Australia, and include six utility companies with 10,000 employees serving more than 10 million customers.

II. PROCEDURAL HISTORY

On June 8, 2022, the Board retained the Joint Petition for hearing pursuant to N.J.S.A. 48:2-32, and designated myself as the Presiding Commissioner authorized to rule on all motions that arise during the pendency of these proceedings, as well as to modify any schedules that may be set as necessary to secure a just and expeditious determination of the issues.² Further, the Board directed that any entity seeking to intervene or participate in this matter file the appropriate application with the Board by July 8, 2022, and any party wishing to file a motion for admission of counsel, *pro hac vice*, should do so concurrently with any motion to intervene or participate.³

On July 8, 2022, Counsel for the Environmental Defense Fund ("EDF") filed correspondence requesting a "One Week Extension to File Intervention."⁴ EDF's reason for the request was, "[d]ue to the holiday week and the other press of business, EDF was unable to complete its process of considering this intervention by July 8." EDF also stated that, "[it] is possible that EDF will choose not to intervene."

On July 14, 2022, I issued an Order denying EDF's Motion.⁵ I explained that, notwithstanding the nature of EDF's Motion, EDF's request was for additional time to evaluate the prudence of filing a motion to intervene, and not additional time to file an actual motion. Therefore, by its own writing, EDF requested an extension of time to think about filing a motion, something that may or may not occur in the future. Additionally, I explained that EDF was afforded a month to make this determination, and under the Rules governing motion practice, a decision maker must consider the prospect for confusion and delay.⁶

² In re the Merger of South Jersey Industries Inc. and Boardwalk Merger Sub, Inc., Order Designating Commissioner, Setting Manner of Service and Bar Date, BPU Docket No. GM22040270, June 8, 2022 ("June 2022 Order").

³ Id.

⁴ Notwithstanding that EDF filed a letter and not a motion, counsel for EDF represented that it was their "intent" to file a motion, and as such, and for the purposes of a clean and concise record, this request was treated as a formal motion.

⁵ In re the Merger of South Jersey Industries Inc. and Boardwalk Merger Sub, Inc., Order on Motion Requesting Extension of Time, BPU Docket No. GM22040270, July 14, 2022 ("July 14, 2022 Order").

⁶ See N.J.A.C. 1:1-16.3(a).

On July 15, 2022, EDF filed a “Request for Interlocutory Appeal of Environmental Defense Fund and Interlocutory Appeal from July 14, 2022 Order Denying Extension Request.”⁷ Concurrently, on July 15, 2022, EDF also filed a Motion to Intervene (“EDF Motion to Intervene”).

On July 22, 2022, both the Joint Petitioners and the New Jersey Division of Rate Counsel (“Rate Counsel”) filed correspondence in response to EDF’s Motions. On July 27, 2022, EDF filed a Reply to the Joint Petitioners’ Opposition to its Motion for Reconsideration and Motion to Intervene.

III. EDF’s MOTION FOR RECONSIDERATION AND MOTION TO INTERVENE

1. EDF’s Motion for Reconsideration of the July 14, 2022 Order

a. EDF’s Motion

EDF argued, *inter alia*, that the July 14, 2022 Order inaccurately characterizes EDF’s extension request as only “time to think about filing a motion,” and “does not accurately describe the basis stated in the extension request.”⁸ Instead, according to its Motion, EDF explained it was, “transparent, candid, and respectful” because this proceeding “will significantly impact two of New Jersey’s local gas distribution companies.”⁹ As such, EDF claimed it “sought an additional week to complete its careful assessment of the proceeding and to complete and file its motion to intervene.”¹⁰

EDF also argued that a one-week extension would not delay the proceeding nor create confusion, particularly since a procedural schedule was not yet established.¹¹ EDF further noted that granting its Motion for Reconsideration “will ensure that EDF has an opportunity to seek intervenor status and demonstrate that its intervention in the SJL merger proceeding will contribute to the development of a complete record” because “[n]o other entity has sought intervention in this proceeding to address environmental concerns.”¹²

b. Joint Petitioners’ Objection and EDF’s Reply

On July 22, 2022, the Joint Petitioners filed an Opposition to EDF’s Motion for Interlocutory Appeal. The Joint Petitioners argued that there is no legal or factual

⁷ Notwithstanding that this was a Motion for Interlocutory Appeal, EDF notes it “also would welcome Commissioner Holden reconsidering the Order.” As such, I will treat this as a Motion for Reconsideration. See EDF’s July 15, 2022 Interlocutory Appeal (“EDF’s Motion for Reconsideration”) at p. 1, FN. 1.

⁸ See EDF’s Motion for Reconsideration at p. 4.

⁹ Id.

¹⁰ Id.

¹¹ Id.

¹² Id. at 5.

basis to grant EDF's appeal because there is no substantive difference between "thinking" about filing a Motion and "carefully assessing" whether to file a Motion. The Joint Petitioners further stated that EDF's late filings create confusion and delay because the parties are conducting discovery, and a Pre-Hearing conference is scheduled. The Joint Petitioners argued that EDF's purported expertise in environmental, scientific, and technical matters is irrelevant to an extension request.

On July 27, 2022, EDF filed a Reply to Petitioners' Opposition, arguing, in part, that it has a specific interest in ensuring that the proposed transaction in this proceeding will result in service that preserves environmental quality.

2. EDF's Motion to Intervene

a. EDF's Motion

According to EDF's July 15, 2022 Motion to Intervene, EDF is a nonprofit organization with over 105,000 members in New Jersey, including members in the service territories of SJG and ETG.¹³ In seeking intervention, EDF argues that it has a clear interest in this matter, and its interest is separate and distinct from other parties.

According to its Motion, EDF will bring "expertise regarding gas utility decarbonization pathways that will add measurably and constructively to the scope of the case."¹⁴ EDF wants to ensure that: 1) gas utilities are reducing greenhouse gas emissions; 2) utility customers are not harmed by rate impacts from stranded assets and other developments; and 3) decarbonization is achieved "in an equitable, transparent manner that does not negatively impact overburdened and environmental justice communities."¹⁵ Additionally, EDF claimed that, "[t]he 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."¹⁶ EDF further explained that gas utility investments and operations "must be consistent with climate targets established by state and local governments and utilities themselves, and that careful regulatory oversight is needed to ensure the shift to decarbonization is underway."¹⁷ EDF noted that it presented comments and recommendations regarding decarbonization for the Energy Master Plan, and provided insight regarding the Board's analysis of New Jersey's natural gas capacity. EDF also explained that it "engaged in a focused set of scientific, technical, and policy- oriented projects to develop, demonstrate, and foster commercialization of advanced leak detection

¹³ EDF Motion to Intervene at p. 1.

¹⁴ Id. at 8.

¹⁵ Id. at 3-4.

¹⁶ Id. at 7.

¹⁷ Id. at 4.

technology and data analytics methods for use by local gas distribution utilities.”¹⁸

Based upon the above, EDF argued that any other party will not adequately represent its interests, and inclusion in this matter will bring “environmental, technical, and economic perspectives and expertise . . . that will assist the Board in developing a full and complete record.”¹⁹ EDF further argued that its intervention would not cause undue delay or confusion.

b. Joint Petitioners’ Objection and EDF’s Reply

In their July 22, 2022 correspondence, the Joint Petitioners argued that EDF does not meet the legal standard for intervention. The Joint Petitioners claimed that EDF’s interest is generic, and its Motion attempts to transform this proceeding from a merger to an examination of environmental policy frameworks, climate objectives, and the decarbonization of natural gas distribution systems. The Joint Petitioners argue that to the extent the proceedings would affect EDF’s members, Board Staff and Rate Counsel adequately represent such interests. The Joint Petitioners further argued that granting EDF intervenor status would likely cause future delay and confusion because the Motion was filed late, and EDF will raise environmental policy issues beyond the scope of this proceeding.

EDF responded, arguing that the Board previously granted intervention status to public interest organizations in other utility acquisition of control proceedings due to their interest in the potential impacts on the environment, public health, and energy policy.

c. Rate Counsel

In its July 22, 2022 correspondence, Rate Counsel had no objection to EDF’s Motion to Intervene, explaining that EDF’s members are customers of ETG and SJG with a direct interest in the outcome of this proceeding, as well as EDF’s interest in advancing New Jersey’s climate and decarbonization goals.

IV. DISCUSSION AND FINDINGS

1. EDF’s Motion for Reconsideration

N.J.S.A. 48:2-40 expressly provides that the Board at any time may revoke or modify an order made by it. See Twp. of Deptford v. Woodbury Terrace Sewerage Corp., 54 N.J. 418, 428 (1969); see also N.J.A.C. 14:1-8.6(b). N.J.A.C. 14:1-8.6 requires that a request for rehearing or reconsideration be done by a motion that enumerates the alleged “errors of law or fact” that the Board relied upon in rendering its decision. Additionally, where an opportunity is sought to introduce additional evidence, that evidence shall be stated briefly with the reasons for failing to provide it previously.

¹⁸ Id. at 5.

¹⁹ Id. at 8.

Generally, a party should not seek reconsideration merely based upon dissatisfaction with a decision. D'Atria v. D'Atria, 242 N.J. Super. 392, 401 (Ch. Div. 1990). Rather, reconsideration is reserved for those cases where (1) the decision is based upon a "palpably incorrect or irrational basis" or (2) it is obvious that the finder of fact did not consider, or failed to appreciate, the significance of probative, competent evidence. *Ibid.* See Cummings v. Bahr, 295 N.J. Super. 374, 384 (App. Div. 1996). The moving party must show that the action was arbitrary, capricious, or unreasonable. D'Atria, 242 N.J. Super. at 401. The Board "will not modify an Order in the absence of a showing that the Board's action constituted an injustice or that the Board failed to take notice of a significant element of fact or law". In the Matter of the Implementation of L. 2012, c. 24 the Solar Act of 2012, Docket No. EO12090832 (July 19, 2013) at 5; In the Matter of Michael Manis and Manis Lighting, LLC - New Jersey Clean Energy Program Renewable Energy Incentive Program, Docket No. QS14040316 (April 15, 2015).

EDF's July 8, 2022 Motion for an Extension of Time provided no law or facts on the merits. Instead, EDF filed, contrary to EDF's argument otherwise, a motion to consider filing a motion. EDF claimed it needed an additional week because "[d]ue to the holiday week and the other press of business, EDF was unable to complete its process of considering this intervention by July 8" (emphasis added).

This is no longer the case. EDF is no longer considering filing a Motion for Intervention, but rather, EDF filed a Motion for Intervention. This is significant because EDF's Motion for Intervention contains both law and facts supporting its position. I think it is critical that I review this newly submitted "significant evidence" and determine if EDF should be granted intervenor status in this matter. See D'Atria v. D'Atria, 242 N.J. Super. at 401; Cummings v. Bahr, 295 N.J. Super. at 384 (App. Div. 1996).

Therefore, I **HEREBY GRANT** EDF's Motion for Reconsideration, and as such, I will **HEREBY CONSIDER** EDF's Motion for Intervention notwithstanding that it was filed out of time.

2. EDF's Motion to Intervene

In ruling on a motion to intervene, N.J.A.C. 1:1-16.3(a) requires that the decision-maker consider the following factors:

1. The nature and extent of the moving party'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 inclusion of the party; and
4. Other appropriate matters.

If the standard for intervention is not met, N.J.A.C. 1:1-16.5 provides for a more limited form of involvement in the proceeding as a "participant," if, in the discretion of the trier of fact, the addition of the moving party is likely to add constructively to the case without causing undue delay or confusion. Under N.J.A.C. 1:1-16.6(c), such participation is limited to the right to argue orally, file a statement or brief, file exceptions, or all of these as determined by the trier of fact.

As the Board stated in previous proceedings, application of these standards involves an implicit balancing test. The need and desire for development of a full and complete record, which involves

consideration of a diversity of interests, must be weighed against 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 In the Matter of the Joint Petition of Public Service Electric and Gas Company and Exelon Corporation for Approval of a Change in Control, BPU Docket No. EM05020106, Order dated June 8, 2005.

With regard to EDF's Motion to Intervene, EDF demonstrated it has a significant interest in this matter, and that no other party will represent the interests or insights of EDF. Specifically, the goals of the Energy Master Plan, including New Jersey's climate and decarbonization goals, are areas upon which EDF can offer insight and advice. As such, I agree that EDF's inclusion in this matter will bring environmental, technical, and economic perspectives that could assist the Board in rendering its decision. Additionally, EDF's members are customers of ETG and SJG with a direct interest in the outcome of this matter, and as the Pre-Hearing Conference has not yet occurred, EDF's inclusion will not cause undue delay or confusion.

Therefore, I **HEREBY FIND**, pursuant to N.J.A.C. 1:1-16.3, that EDF satisfies the standards for intervention, and as such, I **HEREBY GRANT** EDF's Motion for Intervention.

I **HEREBY DIRECT** that this Order be posted on the Board's website.

This provisional ruling is subject to ratification or other alteration by the Board as it deems appropriate during the proceedings in this matter.

DATED: 8/10/2022



MARY-ANNA HOLDEN
COMMISSIONER

IN THE MATTER OF THE MERGER OF SOUTH JERSEY INDUSTRIES, INC. AND BOARDWALK
MERGER SUB, INC.

DOCKET NO. GM22040270

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