Agenda Date: 8/21/13
Agenda Item: 2G

STATE OF NEW JERSEY

Board of Public Utilities
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ENERGY

PENNSVILLE TRAVEL CENTER, INC. Petitioner	)	ORDER ON INITIAL DECISION
v.	)	
ATLANTIC CITY ELECTRIC COMPANY, Respondent	)	BPU DOCKET NO. EC10030233 OAL DOCKET NO. PUC 434-10

Parties of Record:

David L. Braverman, Esq., Braverman Kaskey, P.C. for Pennsville Travel Center, Inc.
Diana G. Caiafa, Esq., Cooper Levenson, for Atlantic City Electric Company

BY THE BOARD:

This matter is before the New Jersey Board of Public Utilities ("Board") for its decision on whether to adopt, reject, or modify Administrative Law Judge ("ALJ") W. Todd Miller's Initial Decision dated May 20, 2013, dismissing the action brought by Pennsville Travel Center, Inc. ("PTCI") against Atlantic City Electric Company ("ACE"). For the reasons stated below, the Board adopts the Initial Decision.

BACKGROUND[1]

On March 23, 2010, PTCI filed a letter petition with the Board requesting a "formal hearing" and a finding that ACE should be required to absorb some or all of the cost of relocating six utility poles on property near the base of the Delaware Memorial Bridge. PTCI is a non-governmental, private entity that plans to build a travel/welcome center ("Welcome Center") on the property, which already contains a hotel and two restaurants. Initial Decision at 5. PTCI and Pennsville Commercial Land, Inc. own the property, and the Welcome Center will be leased to a public or quasi-public entity. Prehearing Order at IA. Based on the design for the Welcome Center, utility poles on the property will need to be relocated from their current location on an ACE easement

[1] The facts as stated are based on information provided in connection with the motion for interlocutory review as well as in the Initial Decision.

to an area at the rear of the property. PTCI maintains that the estimate given by ACE for the work is unreasonable, as is ACE's refusal to waive all or some of the costs.

By letter dated April 28, 2010, ACE requested that the Board dismiss the petition for failure to state a claim. ACE maintained that PTCI's dissatisfaction with the estimate provided by ACE for relocating utility poles and distribution facilities did not present a controversy for the Board to decide. The Board transmitted this matter to the Office of Administrative Law ("OAL") for hearing and initial disposition as a contested case, pursuant to N.J.S.A. 52:14-B-1 et seq., and N.J.S.A. 52:14F-1 et seq. on May 6, 2010.

The matter was assigned to ALJ Miller who held a telephone prehearing conference on July 19, 2010, and issued a prehearing order dated July 20, 2010, setting November 4 and December 13, 2010 as dates for hearings on the following issues:

> Is petitioner financially responsible for the removal and relocation of the utility poles estimated at $481,700?
> Is the ACE estimate fair and reasonable?
>
> [Prehearing Order at 2B.]

On January 17, 2011, ACE moved for summary decision asking the ALJ to find that PTCI is responsible for all costs of relocation, that the Board does not have jurisdiction to hear the controversy, and that, in any event, the case is not ripe for determination. Additionally, ACE asked the ALJ to find that its cost estimate is reasonable and that the petitioner does not have standing to contest it. On March 28, 2011, PTCI filed opposition to ACE's motion and a cross-motion for summary disposition, maintaining that ACE must bear the cost of moving the poles. Oral argument on the motions was held on April 15, 2011.

By Order dated May 23, 2011, ALJ Miller found that the Board has jurisdiction over this matter, and that PTCI is financially responsible as a matter of law ("Summary Decision Order"). He denied PTCI's cross motion, which asserted that ACE is fully responsible for the relocation costs, as well as ACE's motion that its cost estimates are reasonable as a matter of law, and set August 15 and 16, 2011 as the dates for evidentiary hearings on the actual scope of the relocation work needed, and on the reasonableness of the cost estimates presented by ACE and PTCI.[2]

On or about June 1, 2011, PTCI moved for clarification of the May 23, 2011 Order. ACE filed opposition on June 10, 2011. By letter order dated June 21, 2011, ALJ Miller denied the request for clarification finding that the May Order was clear, and set hearings on the only open issue: the reasonableness of the cost estimates. The letter order directed that evidence could include testimony from contractors who perform comparable service, and could present "a direct contest to the nature, extent, and scope of the work proposed to be performed by ACE." Letter Order at 2.

On or about June 29, 2011, the Board received a request from PTCI for interlocutory review of ALJ Miller's "May 23 and June 21, 2011 Orders," which partially granted ACE's motion for summary decision. Petition at 1. PTCI maintained that ALJ Miller erred in finding that New Jersey common law requires it, as a non-governmental entity, to pay the full cost of relocating

[2] The Board had been notified that the hearings were adjourned pending settlement discussions.

the utility poles and that a "public interest" exception did not apply. According to the petition, the only question for review was "Whether the ALJ erred in ruling that PTCI is financially responsible for the cost of relocating six utility poles solely under New Jersey common law." PTCI cited only to the June 21, 2011 Order.

On or about July 1, 2011, ACE submitted its opposition to the request for interlocutory review. ACE maintained that the request for interlocutory review was untimely, since it actually sought review of ALJ Miller's May 23 Order finding that PTCI is responsible for any relocation costs, and not of the June 21 Letter Order denying clarification. According to ACE, PTCI chose not to seek timely interlocutory review of the May 23 Order and instead, sought clarification which is not authorized under the Uniform Administrative Procedure Rules, and should not be permitted interlocutory relief. Additionally, interlocutory relief was inappropriate at the time, since hearings were already set that would have disposed of PTCI's entire claim, by determining the reasonableness of the cost estimate previously proposed by ACE. ACE also argued that PTCI's motion failed to satisfy the "stringent standard" for grant of the extraordinary relief of an interlocutory appeal, which is to be exercised only sparingly in the interest of justice. ACE Opposition at 5.

By Order dated August 18, 2011, the Board denied PTCI's request for interlocutory review of ALJ Miller's May 23, 2011 and June 21, 2011 orders because PTCI failed to show good cause for reviewing the ALJ's decision at the time. The Board cited to In re Uniform Administrative Procedure Rules, 90 N.J. 85 (1982), where the court concluded that agencies maintain broad discretion in hearing interlocutory reviews to determine whether an ALJ order would interfere with the decisional process but that, "interlocutory review by courts is rarely granted because of the strong policy against piecemeal adjudications." Id. at 100. The Board found that too many questions remained regarding the scope and cost of work left to be performed that would be developed at the evidentiary hearings.

The plenary hearings, scheduled for August 15 and 16, 2011, where both parties would present evidence regarding the scope of the work specifically attributable to the project, the reasonableness of the cost estimates, and whether the rates ACE proposed were approved by its Tariff, were converted to a settlement conference. Each of the ensuing trial dates, set for October 4 and 5, 2011, and March 20 and 31, 2012, were similarly adjourned due to settlement meetings or discovery. Many informal meetings and correspondence, formal conferences, and settlement conferences took place on August 16, 2011, September 14, 2011, September 28, 2011, October 28, 2011, March 19, 2012, March 28, 2012, April 16, 2012, September 10, 2012, and October 10, 2012. According to the parties, progress toward settlement was interrupted by Superstorm Sandy, and while it appeared significant progress was made, PTCI's expert/contractor was still seeking to be prequalified, competitive bids still needed to be submitted, and major disputes arose regarding bid confidentiality requirements.

By letter dated March 22, 2013, after two years of settlement appeared to have stalled, ALJ Miller notified the parties that a plenary hearing would be conducted on May 20, 2013, where "[a]ll parties [were] expected to appear and be prepared to proceed with the hearing at that time." Initial Decision at 4. According to ALJ Miller, the July 20, 2010 Prehearing Order placed the burden of proof on PTCI and discovery was ordered to be completed ten days before the first hearing date. Initial Decision at 6. At the May 20, 2013 hearing, PTCI's counsel appeared but did not present any witnesses or expert witnesses to testify. PTCI made several oral motions during the hearing. First, PTCI moved for adjournment based on a denial of due process, as it had not yet received ACE's competitive bid package. Initial Decision at 6. PTCI

asserted that the bid package was discoverable, and was essential to its case, while ACE maintained that the bid package was irrelevant. Ibid. PTCI's second motion was for a refund of the deposit it had previously paid to ACE for engineering work. Id. at 7. Third, PTCI moved to enforce a settlement agreement, allegedly memorialized in an email sent by PTCI to ACE. Id. at 8. Finally, PTCI moved for attorneys' fees asserting that ACE acted in bad faith evidenced by the disparity and fluctuation of the relocation cost estimates ACE provided. Ibid.

SUMMARY DECISION ORDER, MAY 20, 2013 HEARING AND INITIAL DECISION

In the Summary Decision Order, ALJ Miller found that the Board has jurisdiction to determine who bears the costs of relocation of utility infrastructure, and that the matter is ripe for decision as a contested case. Summary Decision Order at 4. He additionally found that public utilities are required to file tariffs that clearly identify the services offered by a utility as well as the terms and conditions regarding those services, and as the Board supervises activities under those tariffs, including relocation of utility poles, the matter lies within the jurisdiction of the Board. Id. at 5.

ALJ Miller looked at the tariff provisions cited by both ACE and PTCI, ACE Tariff sections 9.6 and 9.7, as the relevant sections which allocate responsibility for the costs of relocation of facilities. ALJ Miller determined that while section 9.6 dealing with the undergrounding of facilities clearly applies whenever there is a request to do so by either a governmental entity or non-governmental entity (like PTCI), Section 9.7 dealing with overhead facilities seems to be triggered only when a governmental entity makes the relocation request. While ACE asserted that both 9.6 and 9.7 must be read together, ALJ Miller found that there was some conflict within the tariff that made the applicability of the tariff unclear (depending on whether 9.6 or 9.7 applied) but that the tariff provisions were possibly moot in light of the common law. Id. at 5-7.

According to ALJ Miller, under common law principles, unless a public interest exception applies, when private property and private interests are involved, the party benefitting from the relocation bears the costs. The ALJ looked to Pine Belt Chevrolet, Inc. v. Jersey Central Power and Light Co., 132 N.J. 564 (1973) ("Pine Belt") as the seminal case. In Pine Belt, utility poles had to be moved to accommodate a road widening project. The private property owners, the public utility, and the Department of Transportation ("DOT") disagreed as to who was required to bear the costs. Relying on the underlying statute, the Appellate Division held that if DOT mandated the relocation of the poles and the relocation benefited the public by improved traffic flow and safety, then DOT was required to fund the costs. The Supreme Court disagreed and found that when the poles are located within the public right of way, the utility company's interest is subordinated to the public's enjoyment of the easement, and relocation of the poles benefitted the public at large due to the improved traffic flow from wider and safer highways. Initial Decision at 7-8.

The ALJ then found that the current situation differs from Pine Belt as a dispute between two private entities with the easements on private property and not within the public right of way. Additionally, the requested pole relocation is not compelled by any government actions, and the Welcome Center is a private development by a private developer, undertaken with the support of the township but which only carries some incidental "public benefit" if the Welcome Center is completed. Concluding that the project is a for profit private matter without the type of benefit to the public contemplated by Pine Belt, the cost of relocating utility poles for a private project should not be shifted to utility ratepayers absent other controlling authority. Initial Decision at 9.

Turning to PTCI's claim that ACE's estimate for the work is unreasonable and exceeds the rates permitted under ACE's tariff, the ALJ agreed that there are no construction and engineering rates for pole relocation within the tariff. After describing the proposed work, he concluded that the Board has jurisdiction to fix fees to be paid by a consumer for any product or service of a public utility, and that the construction rates to be charged for the pole relocation request could be reviewed by the Board after hearing to determine whether the proposed estimate is reasonable. Initial Decision at 10-11.

Building on the determinations made in the Summary Decision, in the Initial Decision dated May 30, 2013[3], ALJ Miller denied all of PTCI's motions and dismissed the action filed by PTCI, concluding that PTCI failed to meet its burden of proof. Initial Decision at 9. ALJ Miller summarized his oral rulings during the May 20, 2013 hearing. First, he denied PTCI's request for adjournment for additional time to receive the bid package. Id. at 6. The ALJ found the bid package to have been developed during contentious settlement negotiations, after the OAL received the contested case. Id. at 6. ACE argued that PTCI filed the petition for the action against ACE "long before" the bid package was introduced. Tr. 18:19-23. However, PTCI averred that without the bid package available, the playing field was tilted towards ACE. Tr. 22:18-21. According to ALJ Miller, instead of introducing evidence supporting its claim that the estimate for relocation was unreasonable, PTCI requested that ACE provide additional evidence to support the reasonableness of its estimate. When replying to PTCI at the hearing, the ALJ stated, "Today's the trial date. You had the burden of proof." Tr. 49:19-20. The ALJ found that it was PTCI's burden to demonstrate unreasonableness of the cost estimates, not ACE's burden to prove their reasonableness, so the ALJ concluded that PTCI failed to satisfy its burden of proof. Initial Decision at 9. Although the ALJ specifically stated that the burden of proof was not on ACE, to complete the record, ALJ Miller requested that ACE provide two documents: a transmission, and a distribution engineering report, to support its cost estimate of $315,313.87. May 20, 2013 Hearing Tr. 32:13-15, 68:15-17.

Further, the ALJ stated that the bid package, if it existed, was only considered to be an estimate that was subject to changing conditions, and that the adjournment request was only a delay tactic. According to ALJ Miller, PTCI's representative appeared at the May 20, 2013 hearing, but was unprepared and did not produce any witnesses or expert witnesses. Initial Decision at 7. The ALJ explained that "ACE remained steadfast and was prepared to put forth testimony" provided by three qualified engineers, but PTCI "was obviously not prepared to try its case on May 20, 2013, leaving it no choice but to employ further delay maneuvers." Initial Decision at 7. Despite PTCI's claim that the bid package was necessary, the ALJ stated that it was not, and only experts were needed to testify as to PTCI's proposed relocation costs. Tr. 40:18-25[4]. ALJ Miller found that PTCI also had failed to timely file a motion compelling additional discovery, notwithstanding that the parties were given sixty days' notice of the hearing and were expected to appear prepared to try the case. Tr. 28: 22-24. Therefore, the ALJ denied the motion for adjournment.

ALJ Miller also denied PTCI's motion for a refund of its deposit paid to ACE. In response to this motion, the ALJ stated about the motion, "[t]hat is not before me at this point, nor has it been briefed. . . . The only thing I have jurisdiction over is what the Board of Public Utilities sends me." Tr. 50:8-12. The ALJ also explained that ACE would have been deprived of fair notice

[3] The Initial Decision was received by the Board on June 6, 2013.
[4] All transcript references are to the hearing held on May 20, 2013.

because this issue was not part of the contested case transmitted to the OAL. Initial Decision at 7. Further, ALJ Miller found that the escrow agreement or deposit terms were unknown, the claim was not mentioned in the pleadings, and the terms of work performed by ACE were unknown. Id. at 8.

The ALJ also denied PTCI's motion for enforcement of a settlement agreement. Although PTCI claimed that the parties reached an agreement during an October 10, 2012 conference before the ALJ, and memorialized the agreement in an email, the ALJ determined that the alleged agreement was only a schedule of events that could eventually help lead to settlement. Initial Decision at 8. During the hearing, the ALJ stated that if there was actually a settlement, a stipulation of the settlement would have been circulated. Ibid. Instead, the agreement was not documented, both parties did not sign the email, and there was no explicit listing of the settlement terms. Ibid. Therefore, the ALJ found that there was no settlement that could be enforced.

The ALJ also denied PTCI's motion for attorneys' fees based on a claim that ACE acted in bad faith. Initial Decision at 8. Although PTCI argued that the fluctuation and disparity of the relocation cost estimates proves bad faith, the ALJ found that "the disparity in the ACE estimate is not ipso facto proof of bad faith." Ibid. ALJ Miller reiterated that throughout the case PTCI attempted to shift the burden of proof to ACE, and failed to produce any evidence that ACE's estimates were unreasonable or resulted from bad faith. Ibid. As a result, ALJ Miller denied all four motions and dismissed PTCI's action against ACE concluding that PTCI failed to meet its burden of proof. Initial Decision at 9.

EXCEPTIONS AND REPLY EXCEPTIONS TO THE SUMMARY DECISION ORDER AND INITIAL DECISION[5]

PTCI'S EXCEPTIONS

In its exceptions dated June 11, 2013, PTCI asserts that the ALJ erred by improperly assuming the applicability of ACE's Tariff. PTCI asserts that the Tariff is inapplicable because PTCI is not a "governmental entity", the Welcome Center serves a public purpose, ACE's Tariff is devoid of any rates, and ACE's charges are excessive, punitive, and retaliatory.

First, PTCI claims ACE's Tariff does not apply because PTCI is not a governmental entity. Section 9.7 of ACE's Tariff states, "Wherever, for any reason the Company shall be requested by a Federal, State, County or local government entity ("Governmental Entity") to relocate currently existing overhead facilities[,] . . . the total cost attributable to such relocation/redesign and installation shall be the responsibility of the requesting Governmental Entity or Non-Governmental Entity, as the case may be." ACE Tariff 9.7. According to PTCI, it is not a governmental entity responsible for relocation costs, and the Tariff's language is ambiguous and incomprehensible, so the Tariff does not apply. PTCI Exceptions at 7-8.

Further, PTCI avers that the Tariff does not apply because the Welcome Center serves a public purpose, which, under Pine Belt Chevrolet, Inc. v. Jersey Central Power and Light, 132 N.J. 564(1993), necessitates that the utility bears the cost of relocation. PTCI asserts that Bevin

[5] Because the Board denied PTCI's petition for interlocutory appeal, under N.J.A.C. 1:1-14.10(j)(2), the Summary Decision Order remains reviewable in connection with the review of the Initial Decision.

Construction v. Jersey Central Power and Light Company, 2003 N.J. Agen. Lexis 683 (OAL 2003) applies and that utility companies must pay relocation costs, when the relocation is "performed by a private entity acting in the public interest" even when located on private property. PTCI Exceptions at 9. PTCI further asserts that New Jersey common law governs instead of ACE's Tariff, and does not require PTCI to fund the pole relocation. PTCI maintains that in Bevin Construction, the OAL did not apply the tariff because the public interest in relocation was paramount to the utility company's interest when the Ocean County planning board required the relocation. PTCI Exceptions at 9. Stating that the development of the Welcome Center clearly serves a public purpose, PTCI cites to the partnership between PTCI and Pennsville Township, and the ALJ's Order, where the ALJ stated, "there is a little bit of public interest here . . . and there is some jobs." PTCI Exceptions at 10. PTCI states that the Travel Center includes the Welcome Center as part of the complex, and this distinguishes the current matter from Pennsville Commercial Land, Inc. v. Conectiv, Inc., 2003 N.J. PUC LEXIS 415 as the construction in that case served an "unambiguously private purpose." PTCI Exceptions at 12. Moreover, PTCI claims that "the ALJ took an unnecessary and unwarranted leap" by shifting the burden back to PTCI when the ALJ applied Pine Belt Chevrolet, Inc., supra, 132 N.J. 564 to hold that the public interest exception does not apply to the present case and makes PTCI responsible for the relocation costs. PTCI Exceptions at 17.

Next, PTCI states that ACE's Tariff is devoid of any rates, which according to N.J.A.C. 14:3-1.3(b), should be included. PTCI Exceptions at 14. Because there are no rates included in ACE's Tariff, PTCI asserts it cannot be bound. Ibid. PTCI reiterates that the Tariff is not applicable and the estimated charges for relocation are excessive, punitive, and retaliatory because ACE's estimate is a "moving target" and ACE does not include any rates in its Tariff. Id. at 14. TPTCI asserts that the ALJ erred and the burden of proof should be on ACE. PTCI cites to In re New Jersey Power & Light Co., 9 N.J. 498, (1952) to provide that the burden of proof should be on the public utility to show the increase, change, or alteration in existing rates is reasonable. PTCI Exceptions at 18. PTCI averred that the ALJ erred in holding the bid package to be related to settlement negotiations and in denying the adjournment request. Id. at 19. PTCI asserts that the bid package is essential and would provide a complete analysis, and that ACE was ordered to produce the bid package, and did not comply. PTCI Exceptions at 19. Further, PTCI avers that it did not receive due process because the ALJ denied its request for the bid package, denied PTCI's request for a refund of the fees paid for the bid package, and denied the enforcement of a settlement agreement. PTCI also maintains the ALJ's calculation of the total estimated cost of pole removal and relocation was wrong because the ALJ erroneously included the cost for distribution, so that the costs should total $238,902.73, instead of $315,313.87. PTCI Exceptions at 21.

ACE'S EXCEPTIONS

Although ACE generally agreed with the Initial Decision, it filed exceptions, stating:

> (1) ACE's Tariff requires PTCI to pay for ACE's electrical facilities; (2) The common law requires PTCI to pay for relocation of ACE's electrical facilities; (3) PTCI has not presented a "contested case" ripe for adjudication; (4) PTCI failed to produce any expert to challenge ACE's estimate; and (5) PTCI failed to file any discovery motion to compel the production of the bid package.
> [ACE Exceptions at 1-2.]

Based on the plain language of ACE's Tariff, ACE avers that sections 9.6 and 9.7, when read together, compel a "requesting Non-Governmental entity to bear financial responsibility for the relocation of company owned overhead facilities." ACE Exceptions at 4. According to ACE, Section 9.7 of the Tariff provides, "the total cost attributable to such relocation/redesign and installation shall be the responsibility of the requesting . . . Non-Governmental Entity." Ibid. Section 9.6 repeats the section 9.7 language and adds, "this [total cost] is intended to include, but not be limited to, the cost of engineering, construction, permits, design, right-of-way acquisition, materials and labor." Ibid. Further, ACE relies on Pennsville Commercial Land, Inc. v. Conectiv, Inc., 2003 N.J. AGEN LEXIS 378 to support its claim that the Tariff, as well as the common law, requires the non-governmental beneficiary to bear the "total cost" of relocation. ACE Exceptions at 5. Lastly, ACE claims that the primary beneficiary of the Welcome Center is PTCI, a private developer. Id. at 7.

Notwithstanding ACE's exception to the ALJ's disavowal of the Tariff's applicability, ACE still notes that it does not take exception to ALJ Miller's holding that common law requires PTCI to bear the cost of pole relocation. ACE references ALJ Miller's decision, where the ALJ states, "the Pennsville project is purely a for profit private matter" with only an "incidental public benefit" and no governmental action requiring the poles to be relocated. May 23, 2011 Decision at 9. Again citing to Pennsville Commercial Land, Inc., supra, 2003 N.J. AGEN LEXIS 378, ACE points out that in that case the judge held that "[i]t is clear that when the primary beneficiary of a project is a private property owner, the common law assigns the utility-relocation costs to the beneficiary." ACE Exceptions at 7. Further, ACE asserts that several cases Pennsville relies on are distinguishable as Pine Belt Chevrolet, Inc., Fellowship Bank, and Bevin Construction all involved the "widening of a road at the request of a municipality," requiring utility pole relocation on a public right of way. Ibid.

Regardless of whether ACE's Tariff, or common law, places the cost of relocation on PTCI, ACE takes exception to the ALJ's holding that this action is a contested case ripe for adjudication. ACE believes that this action is not ripe because no contract for work between ACE and PTCI existed, so PTCI's claims are "premature." ACE Exceptions at 8. Further, ACE posits that this proceeding is not a contested case because there is "neither a constitutional nor statutory right to compel ACE to comply," as there is no relocation right under its Tariff and that PTCI cannot challenge the relocation costs based on an estimate that is subject to changing conditions. ACE Exceptions at 9.

ACE supports ALJ Miller's ruling that PTCI disregarded the requirement to produce expert witnesses to testify at the May 20, 2013 hearing. ACE described its prepared expert witnesses during the May 20, 2013 hearing. Lastly, ACE appeared to support the ALJ's Initial Decision, stating that its argument was "repeatedly echoed by Judge Miller during the May 20, 2013 hearing." ACE Exceptions at 12. ACE raised the contention that PTCI failed to file a motion to compel the bid package in discovery and that the bid package was not necessary or essential for PTCI, as PTCI did not request the bid package at the outset and was able to calculate an estimate for relocation costs without the bid package on hand. Id. at 11. Thus, ACE asserts that PTCI's motion to compel the bid package was a "meritless tactic." Id. at 12.

Therefore, ACE only excepts to the ALJ's ruling that the Tariff was not applicable and that this action was ripe for adjudication. ACE supports the ALJ's ruling that the common law places the relocation costs on PTCI, that PTCI failed to produce expert witnesses, and that PTCI failed to properly compel production of the bid package.

PTCI'S REPLY TO ACE'S EXCEPTIONS

In its reply, PTCI asserts that ACE's exceptions are "procedurally deficient" and should be "wholly rejected" because ACE failed "to specify the findings of fact, conclusions of law or dispositions to which exception is taken," and even supported the Initial Decision. PTCI Reply to ACE Exceptions at 2. Further, PTCI counters ACE's claim that this case is not ripe for adjudication, and asserts that a contested case includes one where there is "hardship to the parties if judicial review is withheld at this time" and according to the N.J.A.C. 1:2-2.1, a hearing is required when "adjudication concern[s] . . . disputed questions of fact, law or disposition relating to past, current or proposed activities or interests." PTCI Reply to ACE Exceptions at 3.

PTCI claims that its harm is "concrete" and the development of the Welcome Center has been and will continue to be delayed until this matter is resolved, resulting in "substantial expense, lost revenues, time impacts, and delay damages." PTCI Reply to ACE Exceptions at 4. Moreover, PTCI avers that ACE's exception, that PTCI disregarded the ALJ's requirement to produce expert witnesses, should be wholly rejected, but supports its own previous exception that it does not bear the burden of proof. Id. at 2. Lastly, PTCI believes that ACE's assertion, that PTCI failed to compel the bid package in discovery, should be rejected, as it is not an exception. Ibid. PTCI claims that the court previously ordered ACE to produce the bid package and ACE did not comply, so it was not necessary to compel the discovery. Id. at 6.

DISCUSSION AND FINDINGS

Pursuant to N.J.S.A. 52:14B-10, the ALJ's decision must contain "recommended findings of fact and conclusions of law . . . which shall be based upon sufficient, competent, and credible evidence." "Upon a review of the record submitted by the administrative law judge," the Board "shall adopt, reject or modify the recommended report and decision no later than 45 days after receipt of such recommendations." Ibid. The agency "may reject or modify findings of fact, conclusions of law or interpretations of agency policy in the decision, but shall state clearly the reasons for doing so." Ibid. If the Board does not adopt, modify, or reject the Initial Decision within 45 days, unless the time limit is extended, the Initial Decision shall become final. Ibid. In this case, the Board requested a 45-day extension prior to the expiration of the 45-day statutory period of review, so it could adequately review the record, including the exceptions to the Initial Decision filed by each party. Pursuant to N.J.S.A. 52:14B-10(c) and N.J.A.C. 1:1-18.8, the time for the Board to render a Final Decision was extended to September 5, 2013[6].

The Board must decide whether ALJ Miller's ultimate decision dismissing PTCI's petition for failure to meet its burden of proof, incorporating his decisions on the various motions and within the Summary Decision Order, is reasonable and adequately supported by the record developed at the OAL. N.J.A.C. 1:1-14.6 describes the powers of the ALJ in conducting hearings, and controlling the conduct of a case which includes the right to "render any ruling or order necessary to decide any matter presented...which is within the jurisdiction of the transmitting agency." N.J.A.C. 1:1-14.6(h) Additionally, an ALJ has the power to dimiss an application for unreasonable failure to comply with orders or with any requirements of the rules governing administrative hearings. N.J.A.C. 1:1-14.14.

[6] The Order of Extension incorrectly stated the BPU docket number as ER10030233 instead of EC10030233, but included the correct OAL docket number, PUC 434-10.

ALJ Miller found that PTCI had the burden to prove that ACE's cost estimate was unreasonable. Initial Decision at 7. "It is unquestionable that in proceedings before the Board, the petitioner . . has the burden of proof to show the validity of its position." In re Jersey Central Power & Light Co. v. Rae, 2003 N.J. PUC LEXIS 358. Generally, the ALJ can dismiss a petitioner's complaint if the petitioner does not sustain the burden of proof. Palmer-Carri v. Public Service Electric and Gas Co., 2011 N.J. PUC LEXIS 252, 2. The burden of proof is "the obligation of a party to meet the requirements of a rule of law that a fact be proved by a preponderance of the evidence or by clear and convincing evidence." N.J.A.C. 1:1-2.1.

PTCI takes exception to the ALJ's finding and disclaims the burden of proof based on its belief that ACE's Tariff does not apply and that the law puts the burden of proof on the utility to show that its rates and charges are reasonable. The Board agrees that when a utility seeks to increase, change or alter its rates, the burden is on the utility to prove that the request is just and reasonable. N.J.S.A. 48:2-21(d). However, in this case, PTCI is challenging the cost estimate provided by ACE for the relocation of utility infrastructure located within an easement on the private property where the Welcome Center will be built. ACE has provided more than one estimate, including one produced at the request of ALJ Miller. PTCI only produced the original cost estimate of $75,000 back in 2010, and was unprepared to present any evidence at the hearing on May 20, 2013 to support that (or any other) estimate. Initial Decision at 7.

PTCI claims that it is not responsible for relocation costs because the language in ACE's Tariff does not apply and the Welcome Center serves a public purpose, and therefore, presumably, PTCI does not have the burden of proof. PTCI relies on Pine Belt, supra., for the proposition that the utility pays the relocation costs when the relocation is performed by a private company that serves a public purpose and a tariff is not applied when the public interest is paramount to the private one.

However, the Board agrees with ALJ Miller that the Pine Belt case differs from the current one. There, Pine Belt, sought to have JCP&L or the Department of Transportation ("DOT") pay for utility pole relocation costs, where the DOT compelled the relocation of the utility poles as part of the widening of a road adjacent to Pine Belt's property. The Court placed the burden of utility-relocation costs on the DOT only when it was responsible for the highway project components and costs, and both administers and contracts highway projects. Otherwise, the Court determined that according to common law, the utility bears the relocation costs and must pay for the privileges of owning utility poles within a public right of way when relocation serves a public interest. Because DOT mandated the pole relocation and the utility poles were located on a public right-of-way, not on private property, the property owners were relieved of the relocation costs.

In Bevin Construction v. JCP&L, 2003 N.J. Agen. Lexis 683, Bevin Construction, sought to have JCP&L bear financial responsibility for moving a utility pole, within the public right of way, six inches, so a curb could be installed near the pole. The ALJ ruled that the public interest in the pole relocation was paramount to the utility's interest, so the utility's tariff did not apply and the utility was responsible for the cost of relocation. The current case involves two private parties with a utility easement on that private property and not within a public right of way. Therefore, these cases are circumstantially different from the present one.

As described above, in the Summary Decision Order, ALJ Miller found that ACE's tariff was ambiguous and that there was therefore a need to look to the common law to determine whether ACE's other ratepayers or PTCI should bear the costs of the relocation of the utility infrastructure. The Board **HEREBY DIRECTS** Staff to review the applicable provisions of ACE's tariff to determine if there is any ambiguity about whether section 9.7 is triggered when a non-governmental entity makes a relocation request and, if so, to work with ACE to clarify its tariff. In any event, the Board concurs with the ALJ's analysis of the common law to determine who should bear the relocation costs[7].

Stating that the development of the Welcome Center clearly serves a public purpose, PTCI cites to the "partnership" between PTCI and Pennsville Township and the Summary Decision Order, where the ALJ stated that "only some public interest" attached to the project. Tr. 34:16-18. As noted by the ALJ in that order, according to PTCI000000127, attached to PTCI's Exceptions, the Township "partnered" with PTCI "to redevelop the area in question," not to build the Welcome Center alone. To accept PTCI's position, then everything within the complex would be affected with a public interest, including commercial operations such as the hotels and restaurants within the complex. Although PTCI discounts ACE's reliance on Pennsville Commercial Land, Inc. V. Conectiv, Inc., 2003 N.J. PUC LEXIS 415 by claiming the construction in that case served an "unambiguously private purpose," the ALJ, in that case, noted that common law generally assigns relocation costs to the beneficiary when the beneficiary is a private property owner. In that case, the utility, ACE, attempted to pass tax costs associated with utility pole relocation when developers Pennsville Commercial Land, Inc. and Delco, LLC requested the relocation. The Board adopted the Initial Decision, where the ALJ found that the utility could require the developers to pay the tax costs associated with the pole relocations requested by them, basing this ruling on the utility's tariff, common law principles of fairness, and Board policy.

Here, the development project that will include the Welcome Center, already includes a 100 room Super 8 Motel adjoining the already existing Hampton Inn Motel, Cracker Barrel and Applebee's restaurants. Initial Decision at 5. The Welcome Center to be owned by PTCI is proposed to contain a Delaware River Bay Authority IMAX theatre, highlighting New Jersey tourist attractions (the New Jersey Adventure Aquarium, Science Center, universities, Jersey Shore, and Atlantic City casinos) and is expected to be staffed with State personnel to inform the traveling public. PTCI's Response to ACE's First Set of Interrogatories at 8. Though the Welcome Center will provide the public with information about New Jersey, it also will provide tourist information referring to privately owned businesses. The evidence presented does not appear to satisfy the requirement that the public interest be "paramount." See Jersey Central Power and Light Co. v. Lakewood, 174 N.J.Super. 394 (Law Div. 1980), aff'd 178 N.J. Super. 610 (App.Div. 1981). Many other establishments, including restaurants and attractions, will benefit from the Welcome Center, not primarily the public at large, and although it does not serve solely a private purpose, the Board agrees with the determination of ALJ Miller that the public interest is not paramount to the private one. Therefore, the Board **ADOPTS** ALJ Miller's finding that PTCI has not shown that the Welcome Center satisfies the common law public

[7] The Board notes that PTCI also challenged sections 9.6 and 9.7 for failing to include specific rates. However, these sections are contained within Section II of ACE's tariff, the "Terms and Conditions of Service," in contrast to Section IV, "Service Classifications and Riders" which does contain rates for service.

interest exception which would shift the responsibility for relocation costs to ACE's other ratepayers, presumably along with the burden of proof.

The Board now turns to the motions denied by ALJ Miller at the May 20, 2013 hearing. PTCI maintains that it was denied due process because ALJ Miller failed to grant its request for an adjournment so that PTCI could obtain the bid package from ACE. Adjournments are granted only for good cause, N.J.A.C. 1:1-9.6, including to streamline the hearings and enhance the likelihood of settlement. N.J.A.C. 1:1-10.1(a). The parties in this case have spent more than two years attempting to settle. According to ALJ Miller, during the May 20, 2013 hearing, PTCI's attorney appeared to be unprepared and did not produce any witnesses or expert witnesses, Initial Decision at 7, while ACE had prepared expert testimony from three qualified engineers. PTCI requested an adjournment for ACE to produce its bid package; however, PTCI did not move to compel additional discovery in the 60 days before the May 20, 2013 hearing, and the ALJ determined that the bid package was only part of the settlement process. Additionally, the ALJ determined that while notice was unambiguously provided on March 22, 2013 and PTCI had time to prepare for the hearing, PTCI still failed to file a motion to compel any outstanding discovery, including the bid package if that was necessary for trial preparation. The Board agrees with the ALJ that PTCI had sufficient information to prepare its own cost estimate for presentation at the hearing without the ACE bid package. PTCI had a description of the work to be done as prepared by ACE in response to ENR-4, included as part of Exhibit F to PTCI's Exceptions, and must have had some idea of the work required to prepare the estimate submitted with the petition. Therefore, the Board **FINDS** that the ALJ properly denied PTCI's motion for adjournment.

The ALJ also denied PTCI's request for a deposit refund and determined that the claim was not brought in any pleadings,[8] so it was not a properly contested issue transmitted to the OAL. During the hearing, ALJ Miller determined that PTCI waived its opportunity to request an amendment to its pleadings, where PTCI could have taken action to incorporate its claim to obtain the paid deposit amount prior to the hearing. Accordingly, the Board **FINDS** that the ALJ properly denied PTCI's request for the deposit refund brought for the first time at the May 20, 2013 hearing.

The ALJ denied PTCI's motion to enforce a settlement finding that the alleged agreement was only represented through an email and was only a schedule of anticipated events which could lead to a settlement. A settlement is an agreement made between parties which resolves disputes and can end all or part of a case. N.J.A.C. 1:1-2.1. Offers of settlement or proposed stipulations, however, are not considered to be admissions and are not admissible as evidence. N.J.A.C. 1:1-15.10. Overall, the State of New Jersey strongly favors settlements over litigation, Watkins v. New Jersey American Water Company, 2009 N.J. PUC LEXIS 94, and New Jersey courts will "strain to give effect to the terms of a settlement wherever possible." Id. at 3. Even though New Jersey strongly supports settlements, the alleged agreement, memorialized in an email sent from PTCI to ACE, does not appear to be a settlement that can be upheld. ACE neither signed the settlement, nor sent ACE any stipulation, and instead, the ALJ considered the email to be akin to a schedule of events that could help forge a settlement. Pursuant to N.J.A.C. 1:1-15.10, a proposed stipulation or offer of settlement should not be admissible, so the email should not be considered admissible as a settlement agreement. ALJ Miller marked the document for identification only. Given no evidence of a valid agreement between the two

[8] "Pleadings may be freely amended" at the judge's discretion and the judge "may permit a brief continuance to allow . . . additional preparation time." N.J.A.C. 1:1-6.2.

parties, the Board **FINDS** that the ALJ properly denied PTCI's motion to enforce a purported settlement.

The ALJ denied PTCI's motion for attorneys' fees and denied its claim that ACE acted in bad faith. Courts are authorized to award reasonable attorney fees to a prevailing party where the "complaint, counterclaim, cross-claim or defense was commenced, used or continued in bad faith, solely for the purpose of harassment, delay or malicious injury." N.J.S.A. 2A:15-59.1b(1). The purpose of the attorney fees award is "to protect the innocent party from unnecessary costs and to punish the guilty party." Yueh v. Yueh, 329 N.J. Super. 447, 461 (App. Div. 2000). Under N.J.A.C. 1:1-14.14, an ALJ can order costs or reasonable expenses for "unreasonable failure to comply with any order of a judge or with any requirements of" the rules governing administrative hearings. PTCI has not proven that ACE acted unreasonably or in bad faith or unreasonably failed to comply with an order of the ALJ. Additionally, such sanctions can be imposed only after notice and hearing and proof of out of pocket costs and expenses. See In re Timofai Sanitation Co., Inc., 252 N.J.Super. 495 (App. Div 1991). Further, although the ALJ only wanted ACE to provide an estimate to establish a record, ACE has provided support for its estimated relocation costs of $315,313.87.[9] While ACE's estimates fluctuated between 2010 and 2013, none of the estimates may represent the actual final costs, as they are simply estimates. Lastly, PTCI has not provided any evidence, aside from the initial claim that its private contractor can perform the relocation at a less costly rate, to prove that ACE's estimates are so unreasonable as to be in bad faith. As previously stated, PTCI failed to bring expert witnesses to the May 20, 2013 hearing who were prepared to present testimony. Accordingly, the Board **FINDS** that the ALJ properly rejected PTCI's motion for attorney fees.

[9] The Board is somewhat confused by PTCI's insistence that the estimate should not include costs for relocation of distribution infrastructure in addition to the costs for relocation of transmission infrastructure based on the description of the scope of work. Should no such work be required, PTCI would clearly be entitled to a refund at the time of the expected true up.

Therefore, after a careful review of the record in this proceeding, including the Summary Decision Order, the Initial Decision, PTCI's exceptions, ACE's exceptions, and PTCI's reply to ACE's exceptions, the Board **HEREBY ADOPTS** the May 20, 2013 Initial Decision. PTCI failed to satisfy its burden of proof and was not prepared when it had 60 days' notice of the hearing to prepare, and over two years of failed settlement discussions. Based on the record, the ALJ properly denied PTCI's four motions at the May 20, 2013 hearing and properly dismissed PTCI's petition.

DATED: 8/26/13

BOARD OF PUBLIC UTILITIES
BY:

ROBERT M. HANNA
PRESIDENT

JEANNE M. FOX
COMMISSIONER

JOSEPH L. FIORDALISO
COMMISSIONER

MARY-ANNA HOLDEN
COMMISSIONER

DIANNE SOLOMON
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

IN THE MATTER OF PENNSVILLE TRAVEL WELCOME CENTER, PETITIONER V. ATLANTIC CITY ELECTRIC COMPANY, RESPONDENT

BPU DOCKET NO. EC10030233
OAL DOCKET NO. PUC4364-10

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State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. PUC 4364-10
AGENCY REF. NO. EC10030233

PENNSVILLE TRAVEL CENTER, INC.,
Petitioner,
v.
ATLANTIC CITY ELECTRIC COMPANY,
Respondent.

David L. Braverman, Esq., for petitioner (Braverman Kaskey, attorneys)

William S. Donio, Esq., for respondent (Cooper Levenson, attorneys)

Record Closed: May 20, 2013 Decided: May 30, 2013

BEFORE **W. TODD MILLER**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

On March 23, 2010, Pennsville Travel Center, Inc. (Pennsville) filed a petition requesting a hearing before the Board of Public Utilities (BPU). The petition was extraordinarily vague. The prayer for relief was stated as:

> In these troubled economic times, we find it unconscionable that Atlantic City Electric would not agree to absorb some if not all of these costs. The Travel/Welcome Center project

> would provide meaningful employment to hundreds in a depressed area of our State.
>
> (P-1).

Pennsville asserts that it needs six utility poles relocated before it can build a travel/welcome center near the base of the Delaware Memorial Bridge. Pennsville asserts that Atlantic City Electric Company (ACE) is "charging an outrageous sum" ($426,000) to relocate the poles because it is a monopoly (P-1). Pennsville wants ACE to absorb some or all of the cost of relocating the six utility poles. Pennsville claims that its expert/contractor (Carr & Duff) could perform the same task for $72,000 (P-3).

On April 28, 2010, ACE filed its answer (P-2). Therein, ACE avers that Pennsville failed to state a justiciable claim; that its original estimate was increased to $481,700; and that actual cost of relocating the utility poles would be "trued up" after the relocation was completed.

A telephone prehearing conference was held on July 19, 2010. The nature of proceeding was articulated as:

> Petitioner asserts that it is a non-governmental entity that is developing a welcome center at the foot of the Delaware Memorial Bridge. The center will be leased to a public or quasi-public entity. Petitioner appeals an estimate of the $481,700 involved in the removal and relocation of utility poles by respondent, Atlantic City Electric (ACE), in conjunction with the development of the proposed center. Petitioner asserts, among other things, that the relocation charges are not permitted pursuant to ACE's tariff.

The issues to be resolved were articulated as:

> Is petitioner financially responsible for the removal and relocation of the utility poles estimated at $481,700? Is the ACE estimate fair and reasonable?

On February 18, 2011, ACE filed a motion for summary disposition asserting: 1) Pennsville is financially responsible for the relocation of the poles pursuant to the ACE Tariff and the common law; 2) the BPU does not have jurisdiction to hear the controversy and/or the case is not ripe for determination; and 3) ACE's cost estimate of $481,700 is reasonable because its tariff was approved by the BPU and Rate counsel.

On March 28, 2011, Pennsville filed opposition and a cross-motion for summary disposition asserting that ACE must bear the cost of relocating the six poles. Oral argument was held on April 15, 2011.

The May 23, 2011, ruling on the cross-motions was as follows:

1. ACE's motion asserting the BPU lacks jurisdiction and that the case must be dismissed as unripe, was **DENIED**;

2. ACE's motion that Pennsville is financially responsible for the cost of relocating the six poles was **GRANTED**;

3. ACE motion that the cost estimate of $481,700 was is reasonable as a matter of fact and law was **DENIED**; and

4. Pennsville's cross-motion asserting that ACE is fully responsible for the cost of relocating the six utility poles was **DENIED**.

(See Order on Motion for Summary Decision, Dated May 23, 2011.)

A plenary hearing was scheduled for August 15 and 16, 2011. The parties were directed to be prepared to present testimony and evidence on the scope of work (relocation of six poles) specifically attributable to the Pennsville project, reasonableness of the cost estimates presented by ACE and Pennsville, and whether the rates proposed by ACE were approved in its Tariff or approved by the BPU or

Ratepayer advocate. These were the only issues that remained for trial. The August trial dates were converted to a settlement conference.

New trial dates were set for October 4 and 5, 2011, March 31 and 20, 2012; and May 20, 2013. Each of these dates was adjourned at the request of the parties due to ongoing settlement meetings or discovery. Formal conferences and settlement conferences ensued on August 16, 2011, September 14, 2011, September 28, 2011, October 28, 2011, March 19, 2012, March 28, 2012, April 16, 2012, September 10, 2012 and October 10, 2012. There were also numerous informal meetings and contacts between the parties. During these conferences it was represented that the parties were making settlement progress.

The parties represented that they made significant progress during 2012-13. Some of this progress was interrupted by the 2012 storm (Sandy). Pennsville's expert/contractor (Carr & Duff) was seeking to be prequalified as the contractor to relocate the six utility poles. According to ACE's practice and policy, the project still had to be submitted for competitive bids. It was Pennsville's hope that Carr & Duff would win the bid. Major disputes arose over bid confidentially requirements sought by ACE. This dispute was not resolve and a settlement was not reached.

On March 22, 2013, after it became obvious that two years of settlement had stalled, the undersigned forwarded correspondence to the parties. The March 22, 2013, correspondence specifically provided:

> ...I will conduct a plenary hearing in this case on **Monday, May 20, 2013, at 9:30 a.m.** in the Atlantic City Office of Administrative Law, 1601 Atlantic Avenue, Suite 601, Atlantic City, New Jersey. All parties are expected to appear and **be prepared to proceed with the hearing at that time.**
>
> [Emphasis added.]

FACTUAL BACKGROUND[1]

Pennsville Travel Center, Inc. is the owner or has a beneficial interest in property located at the base of the Delaware Memorial Bridge in Salem County, New Jersey. Pennsville proposes to develop a travel/welcome center at this location. The welcome center will cross a portion of an ACE easement[2].

ACE is a public utility that owns, operates and maintains electrical facilities. ACE owns a sixty foot private right-of-way (easement) on Pennsville's property, which houses ACE's critical electrical facilities, including a 69kv transmission line and an under-billed 12.5kv distribution facility. ACE was the grantee of the easements in question since approximately December 1956.

The construction of the travel/welcome center requires the relocation of six utility poles. Pennsville, through its engineer, Bohler Engineering, requested that six utility poles be relocated to the rear access drive of Pennsville's property to make way for the welcome center. Pennsville received a $481,700 estimate from ACE for the relocation of the six poles. (See Certification of Diana G. Caiafa, Esq., Exhibits M and Q.) The easement documents do not contain any provisions related to allocation of costs of relocating utility poles. (See Certification of Diana G. Caiafa, Esq., Exhibit E.)

Pennsville asserts that it has all the necessary permits from the Department of Environmental Protection (DEP) and the Department of Transportation (DOT) as well as local Planning Board approval. The project will consist of the development of a

[1] The exhibit references are to documents submitted in connection with the earlier cross-motions for summary decision.

[2] PTCI explained that: "[t]here are two easements currently located onsite, which have been labeled Easement A and Easement B on the attached plan ... Easement B contains wooden poles holding a 69 kv [sic] transmission and 12 kv [sic] distribution line spaced at 200' on center, which runs north to south through the site. [T]he project does request a relocation of Easement B to place the proposed poles along the rear access drive of the proposed development." (Certification of Diana G. Caiafa, Esquire, Exhibit G, PTCI's Answers to discovery, document bates number PTCI 000000007-0000000012, referenced portion of the April 14, 2008 letter from Bohler Engineering, documents bates number PTCI00000007) (Emphasis added).

welcome center, along with a 100 room Super 8 Motel adjoining the already existing Hampton Inn Motel, Cracker Barrel and Applebee's restaurants.

The cost of relocation for the six utility poles is governed, in part, by ACE's Tariff. (See Certification of Diana G. Caiafa, Esq., Exhibit A.). ACE argues that its estimate of $481,700 was completed in accordance with its Tariff. Pennsville argues that a private contractor can perform all necessary relocations for a cost of $77,000 (P-3).

Hearing Scheduled for May 20, 2013

Counsel for Pennsville appeared alone on May 20, 2013. No witnesses or expert witnesses were present or testified. The burden of proof rests with Pennsville as outlined in the prehearing Order dated July 20, 2010. Discovery was to be completed ten days before the first hearing date, which was substantially enlarged due the numerous postponements and settlement conferences.

Pennsville made several oral motions. First Pennsville moved for an adjournment on the basis of a denial of due process because it had not received ACE's competitive bid package that apparently came into existence during the settlement process. Pennsville avers that the bid package was discoverable and is now essential to its case. ACE asserted that the bid package is irrelevant to its cost estimate related to this project. Pennsville's refusal to sign the confidentiality agreement, which is an ACE standard operating procedure, negated its right to production of the bid package.

This motion was **DENIED**. In the opinion of the undersigned the bid package was not part of the case. The bid package was related to the settlement negotiations. It was developed well after the contested case was received by the OAL. The contested issue was whether ACE's estimate for the utility pole relocation was reasonable as outlined in Pennsville's pleadings filed on March 23, 2010. And there was no bid package in existence at that time.

The bid package was developed in 2012-2013, if it existed at all. As ACE explained, Pennsville was challenging ACE's estimate, not the bid package. As in all contractual cases, the estimate is just that – an estimate. If the actual bids and construction were greater or less than the original estimate, reconciliation and verification process ensues ("trued up") at the end of the project. Either a refund or further charges follow.

It was Pennsville's burden of proof to demonstrate that the ACE estimate was unreasonable. It was not ACE'S burden to demonstrate that the estimate was reasonable. Pennsville represented that it had retained Carr & Duff for this task. Pennsville submitted a Carr & Duff estimate of $75,000 back in 2010. The ACE estimate was $481,700 at that time. The gap between these two figures was so large that fact and/or expert testimony was needed to determine why. ACE remained steadfast and was prepared to put forth testimony to justify its calculations. But only after Pennsville (the petitioner) presented its case. Pennsville was not prepared to present any evidence on May 20, 2013.

Indeed, Pennsville failed to file a motion seeking to compel any outstanding discovery. Therefore, Pennsville sat on its rights if it had any lingering discovery issues it needed resolved before May 20, 2013. The notice dated March 22, 2013, was clear and unambiguous. Come prepared to try the case on May 20, 2013.

I **CONCLDUE** that Pennsville's motion for an adjournment was merely a delay tactic on top of the many other delays in this matter. Pennsville produced no witnesses or expert witnesses on May 20, 2013, which was a firm trial date. Pennsville was obviously not prepared to try its case on May 20, 2013, leaving it no choice but to employ further delay maneuvers.

Pennsville's second motion was for refund of its deposit paid to ACE. This motion was **DENIED**. A refund claim was not a contested issue transmitted to the OAL. Therefore, the undersigned had no jurisdiction to resolve a contest over a deposit. The

terms of the escrow agreement or deposit terms were not known, the amount of actual work performed by ACE related to this project was not known and this claim was not set forth in any pleadings, thus depriving ACE of fair notice.

Pennsville's third motion was for enforcement of a settlement agreement Pennsville perceived it reached with ACE. This motion was **DENIED**. The settlement is allegedly memorialized in an email sent by Pennsville to ACE. There was nothing signed by ACE, no stipulation of settlement circulated following the email, no summary of the settlement was ever placed on the record, and there was no correspondence directly stating this case is settled and under what terms. The emailed cited by Pennsville was, in the opinion of the undersigned, a schedule of events anticipated to take place that may eventually help forge a settlement. And a schedule of meeting and events is not a settlement.

The fourth motion made by Pennsville was for attorney fees. This motion was **DENIED**. Pennsville argues that ACE acted in bad faith by submitting an inflated estimate of $426,000 up to $481,700 in 2010 down to $279,000 in 2012. Pennsville claims the disparity in these estimates is competent evidence of bad faith and entitles it to attorney's fees. The disparity in the ACE estimate is not ipso facto proof of bad faith. Merely because Pennsville raised the argument or assertion does not make it fact. Pennsville failed to submit any evidence or proof that ACE's estimates were a product of bad faith.

Throughout the entire period that this case was pending a pattern developed wherein Pennsville sought to place the burden of proof upon ACE. Pennsville failed to recognize that it had the burden of proof – not ACE. Pennsville took the position that it could make an accusation against ACE and thereafter the burden of going forward with evidence and the burden of proof would shift to ACE. For example, in its motion for attorney's fees, Pennsville complained about ACE's varying estimates over years and suggested ACE now had to justify these differences or be subject to a claim for attorney's fees. Likewise, Pennsville wanted ACE to prove its rates, fees, and

estimates were reasonable rather than Pennsville prove they were unreasonable. This was another delay tactic employed by Pennsville – which is why trial was firmly set for May 20, 2013.

At the May 20, 2013, hearing, and at the request of the undersigned, the latest estimates for the relocation of the six poles were submitted into evidence (C-1). This was done for totality of circumstances and completeness. The more recent estimates are as follows:

Transmission Cost	$238,902.73
Distribution Cost	$ 76,411.14
Total	**$315,313.87**

CONCLUSION AND ORDER

Based upon the foregoing, I **CONCLUDE** that Pennsville failed to meet its burden of proof. It is **ORDERED** the action filed by Pennsville is **DISMISSED**.

I hereby **FILE** my initial decision with the **BOARD OF PUBLIC UTILITIES** for consideration.

This recommended decision may be adopted, modified or rejected by the **BOARD OF PUBLIC UTILITIES,** which by law is authorized to make a final decision in this matter. If the Board of Public Utilities does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **SECRETARY OF THE BOARD OF PUBLIC UTILITIES, 44 South Clinton Avenue, P.O. Box 350, Trenton, NJ 08625-0350,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

May 30, 2013
DATE

W. TODD MILLER, ALJ

Date Received at Agency: 5/30/13

Date Mailed to Parties: 5/30/13

/sd

WITNESSES AND DOCUMENTS IN EVIDENCE

WITNESSES

For Petitioner:

None

For Respondent:

None

EXHIBITS

For Petitioner:

P-1 Petitioner's Letter to NJ Board of Public Utilities, March 23, 2010

P-2 Respondent's Letter to NJ Board of Public Utilities, April 28, 2010

P-3 Petitioner's Letter to NJ Board of Public Utilities, May 3, 2010

P-4 Respondent's Letter to Petitioner, June 9, 2010

P-5 Michelle Walker, Esquire letter to Diana G. Caiafa, Esquire, June 28, 2012

For Respondent:

None

By the Court:

C-1 Estimates (for the relocation of the six poles)