



Agenda Date: 9/18/13
Agenda Item: 2L

STATE OF NEW JERSEY
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ENERGY

IN THE MATTER OF THE PETITION OF PUBLIC)
SERVICE ELECTRIC AND GAS COMPANY FOR)
APPROVAL OF THE ENERGY STRONG PROGRAM)
)
) BPU Docket Nos: EO13020155
) GO13020156

Parties of Record:

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BY THE BOARD:

On January 23, 2013, the New Jersey Board of Public Utilities (“Board” or “BPU”) issued an Order¹ (“January 23 Order”) addressing five categories of potential improvements to be undertaken by New Jersey’s electric distribution companies (“EDCs”) in response to large scale weather events. These categories include: 1) Preparedness Efforts; 2) Communications; 3) Restoration and Response; 4) Post Event; and 5) Underlying Infrastructure Issues.

In the January 23, 2013 Order, among other actions, the Board directed the EDCs to take specific actions to improve their preparedness for major storms. As part of this response, the Board required the EDCs to provide detailed cost benefit analysis associated with a variety of utility infrastructure upgrades. The Board further required the EDCs to “carefully examine their infrastructure and use data available to determine how substations can be better protected from flooding, how vegetation management is impacting electric systems, and how Distribution Automation can be incorporated to improve reliability.” January 23 Order at 56.

¹ In re the Board’s Review of the Utilities Response to Hurricane Irene, Order Accepting Consultants’ Report and Additional Staff Recommendations and Requiring Electric Utilities to Implement Recommendations, BPU Docket No. EO11090543, January 23, 2013.

On February 20, 2013, Public Service Electric and Gas Company (“PSE&G”) petitioned the Board for approval of a program and the recovery of costs to bolster its “electric and gas infrastructure to make them less susceptible to damage from wind, flying debris and water damage in anticipation” of future Major Storm Events (hereafter “Energy Strong”). PSE&G requested approval of approximately \$2.5 billion in infrastructure upgrades, the cost of which is to be collected from ratepayers over a period of five years though the implementation of an “Energy Strong Adjustment Mechanism.” PSE&G further requested that the Board approve this expenditure and recovery mechanism by July 1, 2013.

On March 20, 2013, the Board opened a generic proceeding (hereinafter “Storm Mitigation Proceeding”) to investigate possible avenues to support and protect New Jersey’s utility infrastructure so that it may be better able to withstand the effects of Major Storm Events² and focused on category 5 of the January 23, 2013 Order- Underlying Infrastructure Issues for all utility companies, not exclusively the EDCs. It also invited all regulated utilities to submit detailed proposals for infrastructure upgrades designed to protect the State’s utility infrastructure from future Major Storm Events, pursuant to the terms and at the level of detail requested in the January 23 Order. Additionally, the Board found that the PSE&G Energy Strong petition, and all future petitions within the Storm Mitigation Proceeding, should be retained by the Board for review and hearing as authorized by N.J.S.A. 52:14F-8.

By Order dated June 21, 2013, the Board authorized PSE&G to implement certain Board Staff recommendations related to the Energy Strong Station Flood and Storm Surge Mitigation sub-program. That Order also designated Commissioner Joseph Fiordaliso as the presiding commissioner for the Energy Strong petition with authority to rule on all motions that arise within the proceeding, and to modify any schedules that may be set as necessary to secure a just and expeditious determination of the issues.

On July 2, 2103, Commissioner Fiordaliso granted the motions of the New Jersey Large Energy Users Coalition (“NJLEUC”) and AARP to enter the pending matter as intervenors, and granted the motion of the Unions to participate in the matter.

On August 2, 2013, Commissioner Fiordaliso denied the motion of the Sierra Club and the New Jersey Environmental Federation (hereinafter “Proposed Environmental Intervenors”) to intervene in this proceeding and granted them participant status under N.J.A.C. 1:1-16.6 limited to the providing of statements or briefs (“August 2 Order”). Commissioner Fiordaliso found that while the Proposed Environmental Intervenors could provide a prospective on proposals to increase the resiliency of PSE&G’s infrastructure and the reliability of its electric and gas delivery services that is different from the other parties to this proceeding, they had not shown that the interest that they represent will be directly affected by the outcome of the case, and that as participants they could share their expertise on issues within the scope of the case.

The Proposed Environmental Intervenors’ Request for Interlocutory Review

On August 12, 2013, the Proposed Environmental Intervenors filed a Request for Interlocutory Review of Commissioner Fiordaliso’s order denying their motion to intervene and granting them participant status. The Proposed Environmental Intervenors request that the Board accept interlocutory review of Commissioner Fiordaliso’s August 2 Order, overturn the denial of their

² “Major Storm Event” is defined as sustained impact on or interruption of utility service resulting from conditions beyond the control of the utility that affect at least 10 percent of the customers in an operating area.

motion to intervene, and grant them full intervenor status so they can contribute to the record. They argue that acceptance of interlocutory review is needed because as participants their ability to present evidence and participate in discovery and cross-examination of witnesses is restricted, and that restriction will likely affect the level of attention given to grid efficiency and the role of efficiency.³

According to the Proposed Environmental Intervenors, they are a "significant voice in any discussion about the changes and improvements that must be made to New Jersey's underlying energy infrastructure to mitigate the dangers from further Major Storm Events".⁴ They argue that their interests, which focus on incorporating energy efficiency measures to improve grid resiliency to reduce and eliminate energy waste into the Energy Strong Proceeding, are within the scope of this matter.

In addition, the Proposed Environmental Intervenors argue that their ratepayer members are directly affected by the ramifications of the petition as all customers lose money through inefficient transmission and distribution systems due to line losses and increased prices due to congestion. Aggressive energy efficiency and demand side management can reduce line losses and congestion and improve reliability. Broader investments in energy efficiency that reduce energy demand can avoid the need for further investments in transmission and development. Additionally, this proceeding directly implicates the Proposed Environmental Intervenors' demonstrated interests in supporting the use and development of energy efficiency, distributed generation and smart grid networks to promote resiliency and reliability of energy systems in Major Storm Events.⁵

The Proposed Environmental Intervenors maintain that they will comply with all case management deadlines and therefore there is no prospect for confusion or delay. Additionally, having directly affected ratepayer members should by itself be sufficient to establish a substantial, specific and direct stake in the proceeding, and Commissioner Fiordaliso acknowledged that the interest represented is distinct from others already in the case.⁶

In response, by letter brief dated August 15, 2013, PSE&G argues that Commissioner Fiordaliso properly granted the Proposed Environmental Intervenors participant status as they will not directly be affected by the outcome of the Energy Strong Proceeding in a manner supporting their intervention as a full party. PSE&G argues that the Proposed Environmental Intervenors' argument that their members are ratepayers who will be affected by the proceeding is not sufficient to satisfy the standard for intervention as their interest is not a unique ratepayer perspective, nor do they have any special standing as ratepayers. PSE&G argues that the Proposed Environmental Intervenors' further arguments concerning the impact of transmission and distribution losses and the impact of congestion on electricity on electricity prices in New Jersey, is irrelevant to the relief requested by this petition, including the means of cost recovery. Adding such issues to this proceeding will lead to the prospect of confusion and undue delay that are grounds for denial of intervention status under N.J.A.C. 1:1-16.1.⁷

PSE&G argues that the Proposed Environmental Intervenors' interests are indirect. As their papers demonstrate, their interest is primarily in implementation of energy efficiency measures

³ Request for Interlocutory Review at 7.

⁴ Id. at 2.

⁵ Id. at 10.

⁶ Id. at 14-15.

⁷ PSE&G letter brief dated August 15, 2013 2-3.

and efficiency investment, and while PSE&G is a supporter of energy efficiency programs, that is not the focus of this proceeding.⁸ Reversing Commissioner Fiordaliso's decision to limit their role to participant status and granting them full intervenor status will unduly delay and unnecessarily complicate the proceeding. Accordingly, PSE&G requests that interlocutory review and the request for reversal of Commissioner Fiordaliso's decision be denied.

DISCUSSION AND FINDINGS

An order or ruling of an individual Commissioner designated as a hearing officer for a particular matter, like an order of an ALJ, may be reviewed interlocutorily by the full Board at the request of a party. N.J.A.C. 1:1-14.10(a). Pursuant to N.J.A.C. 1:14-14.4(a), a rule of special applicability that supplements N.J.A.C. 1:1-14.10, the Board shall determine whether to accept the request and conduct an interlocutory review by the later of (i) ten days after receiving the request for interlocutory review or (ii) the Board's next regularly scheduled open meeting after expiration of the 10-day period from receipt of the request for interlocutory review. In addition, under N.J.A.C. 1:14-14.4(b), if the Board determines to conduct an interlocutory review, it shall issue a decision, order, or other disposition of the review within 20 days of that determination. Under N.J.A.C. 1:14-14.4(c), if the Board does not issue an order within the timeframe set out in N.J.A.C. 1:14-14.4(b), the ruling shall be considered conditionally affirmed.

As previously stated, the request was filed on or about August 12, 2013 which was less than ten days before the next Board agenda meeting held on August 21, 2013. Therefore, the Board is addressing this request at its next regularly scheduled open meeting. Since the only response received was from PSE&G and it dealt with the issues raised by the request, the Board shall address both whether to grant review and review of the merits of the request in this Order.

The legal standard for accepting a matter for interlocutory review, is stated in In re Uniform Administrative Procedure Rules, 90 N.J. 85 (1982). In that case, the Court concluded that an 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 97-98. The Court also held 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 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.

[90 N.J. at 100].

⁸ Ibid.

The Court held that interlocutory review may be granted "only in the interest of justice or for good cause shown." Ibid. In defining "good cause," the Court stated:

In the administrative arena, good cause will exist 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 claims or defenses, the identity and scope of issues, the presentation of evidence, the decisional process, or the outcome of the case.

[Ibid.]

As stated above, the decision to grant interlocutory review is committed to the sound discretion of the Board, and is to be exercised sparingly to avoid piecemeal adjudication. Given that the August 2 Order affects the status of the Proposed Environmental Intervenors, the Board **FINDS** that interlocutory review is warranted here. Accordingly, the Board **HEREBY GRANTS** the Proposed Environmental Intervenors' request for interlocutory review of Commissioner Fiordaliso's August 2, 2013 Order.

Turning to the merits of the Proposed Environmental Intervenors request that the Commissioner's order be overturned and that they be granted intervenor status rather than participant status, the Proposed Environmental Intervenors argue that their organizations will be substantially, specifically and directly affected by the outcome of this contested case, and as such have sought leave to intervene. They argue that their New Jersey ratepayer members, the number of which who live in PSE&G territory has not been identified, will be directly affected by increased rates if the Energy Strong program does not analyze the available energy efficiency technologies and integrate energy efficiency measures into the Energy Strong initiatives under the auspices of this proposed infrastructure hardening program. Additionally, they argue that through full intervention status they "seek to ensure that investments going forward capitalize on opportunities to reduce energy demand through energy efficiency and other demand side efforts" because these are ways to "improve and protect the underlying energy infrastructure, avoid storm related costs and protect and save our resources".⁹

In its reply brief PSE&G makes several arguments to support its contention that the Proposed Environmental Intervenors have not demonstrated that they meet the standard for full intervention. First, PSE&G argues that the Proposed Environmental Intervenors' status as ratepayers is not sufficient to satisfy the standard for intervention as their organizations do not bring any unique ratepayer prospective to the merits of this case nor do they have any special status as ratepayers.¹⁰

Second, PSE&G points out that the Proposed Environmental Intervenors generalized assertions regarding the effect of the "cost implications" of this proceeding on their members is irrelevant to their request for intervenor status. The interests of ratepayers are already represented and the rate – related information cited by the proposed intervenors is irrelevant to the cost recovery issues in this proceeding.

⁹ Request for Interlocutory Review, paragraphs 6-7.

¹⁰ PSE&G Reply Brief at 2.

Third, PSE&G argues that although it recognizes and supports the Proposed Environmental Intervenors' concerns, those concerns are not what this docketed matter is about. PSE&G has filed and received approval of multiple energy efficiency programs over the past several years. However, "[t]he Energy Strong proceeding addresses hardening and making more resilient the infrastructure to deliver electricity and gas to customers in extreme storm conditions." Neither the Storm Mitigation Proceeding nor this petition addresses the environmental issues raised by the Proposed Environmental Intervenors. Since these generic Storm Mitigation proceedings do not address the environmental concerns of the Environmental Intervenors, they will not be substantially, specifically and directly affected by the outcome of the generic Storm Mitigation cases, including Energy Strong, intervention should be denied.¹¹

Commissioner Fiordaliso's August 2, 2013 Order clearly outlines the standard of review in ruling on a motion to intervene. N.J.A.C. 1:1-16 (a) requires the decision-maker considers 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 the 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, or file a statement of brief, or file exceptions, or all of these as determined by the trier of fact.

Commissioner Fiordaliso considered the parties' motion for intervention and determined that the Proposed Environmental Intervenors did not show that they will be directly affected by the outcome of the Energy Strong proceeding other than as ratepayers, an interest already represented in the matter. He then stated that the Proposed Environmental Intervenors could provide a different perspective on the proposals to increase resiliency of PSE&G's infrastructure and the reliability of its delivery services under extreme weather conditions and therefore found they should be granted participant status so they will have the opportunity to raise their issues of concern, to the extent that they are relevant to these proceedings. See Order, In re Atlantic City Electric Company, BPU Docket No. ER02080510 (January 15, 2003).

As described above, this proceeding is focused on actions that can be taken to improve the resiliency of PSE&G's infrastructure in the face of Major Storm Events, including such measures as flood and storm surge protection for substations. The January 23 Order included very specific, and relatively short-term, actions to be taken with respect to underlying infrastructure issues¹². The March 20, 2013¹³ Order specifically directs the utilities to address infrastructure upgrades designed to better withstand severe weather. As such, this proceeding is unlike a petition for approval of a merger which asks that the Board review the total benefits of a proposed business combination -- a broad spectrum of issues. See Order, In re the Joint

¹¹ Id. at 4-5.

¹² January 23 Order at 56-59.

¹³ In the Matter of the Board's Establishment of a Generic Proceeding to Review Costs, Benefits, and Reliability Impacts of Major Storm Event Mitigation Efforts -- Docket No. AX13030197

Petition of PSE&G and Exelon Corp. for Approval of a Change in Control, EM05020106 (Nov. 17, 2005) (finding that the NJDEP had a role to play in the evaluation of the effect of a change in control on the safety of nuclear generation which can have a direct impact on the safe and adequate provision of utility distribution and basic generation services).

In this case, the Board has directed narrowly focused proposals to increase the resiliency of utility infrastructure and its ability to withstand severe weather events. The March 20, 2013 Order directed Staff to evaluate the measure proposed by PSE&G for Major Storm Event mitigation to determine whether those measures satisfy the requirements of the January 23 Order and to distinguish storm hardening and mitigation efforts from normal operation and maintenance, reliability projects and programs necessary to maintain safe, adequate and proper service.¹⁴ The Board's priority in these Storm Mitigation proceedings is to implement the recommendations of the January 23 Order. While the Board has supported distributed generation, and energy efficiency and demand response programs and will continue to do so, the Board is concerned that adding those issues to the current proceeding may veer from this primary focus and may unduly confuse and delay this matter, notwithstanding the Proposed Environmental Intervenors' commitment to adhere to the adopted schedule. As Commissioner Fiordaliso noted, the need and desire for the development of a full and complete record must be weighed against the need for prompt and expeditious administrative proceedings. While the Board agrees that the Proposed Environmental Intervenors can provide a perspective that is different from other parties to the case, it is concerned that those interests lie beyond the scope of this proceeding. While the Board is concerned with ensuring that any infrastructure upgrades proposed are efficient and cost effective, it is also concerned with ensuring that upgrades found to satisfy those criteria are done within a reasonable period of time. Therefore, the Board **HEREBY FINDS** that the August 2 Order granting participant status provides the appropriate avenue for the Proposed Environmental Intervenors to share their expertise to the extent that it is relevant to the issues raised by the Energy Strong petition.

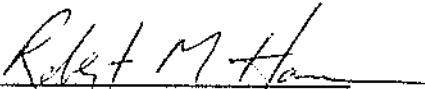
Accordingly, after reviewing the submissions of the Proposed Environmental Intervenors and PSE&G, and after due consideration of the arguments and the law, the Board **HEREBY AFFIRMS** the decision of Commissioner Joseph Fiordaliso denying the Proposed Environmental Intervenors' motion to intervene and granting them participant status in this proceeding with the following modification. As authorized under N.J.A.C. 1:1-16.6, the Board grants the Proposed Environmental Intervenors the right to argue orally in addition to the rights granted under the August 2 Order.

¹⁴ March 20, 2013 Order at 4-5.


The Board encourages the Proposed Environmental Intervenors to work cooperatively to the fullest extent possible with the other parties to this proceeding.

DATED: 9/18/13

BOARD OF PUBLIC UTILITIES
BY:


ROBERT M. HANNA
PRESIDENT


JEANNE M. FOX
COMMISSIONER

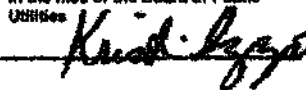

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I HEREBY CERTIFY that the within document is a true copy of the original in the files of the Board of Public Utilities


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