STATE OF NEW JERSEY
BOARD OF PUBLIC UTILITIES

I/M/O the Verified Petition of Jersey Central Power & Light Company ("JCP&L") and Mid-Atlantic Interstate Transmission, LLC ("MAIT") for: (1) Approval of the Transfer of JCP&L's Transmission Assets to MAIT Pursuant to N.J.S.A. 48:3-7; (2) Approval of a Lease of JCP&L's Real Property and Real Property Rights Associated with its Transmission Assets to MAIT Pursuant to N.J.S.A. 48:3-7; (3) Approval of a Mutual Assistance Agreement Pursuant to N.J.S.A. 48:3-7.1; and (4) a Declaration that MAIT Will be Deemed a Public Utility for, inter alia, the Purposes of Siting Authority under N.J.S.A. 40:55D-l 9 and Eminent Domain Authority Pursuant to N.J.S.A. 48:3-17.6 et seq., and In the Matter of the Verified Petition of Jersey Central Power & Light Company for Authorization Pursuant to N.J.S.A. 48:3-7.2 for Approval to Participate in the FirstEnergy Corp. Intrasystem Money Pool – Amendment No. 8	)	**BPU Docket Nos. EM15060733 and EF02030185**

DIRECT TESTIMONY OF SCOTT HEMPLING
ON BEHALF OF THE DIVISION OF RATE COUNSEL

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Table of Contents

Direct Testimony of
Scott Hempling

On Behalf of
New Jersey Division of Rate Counsel

I.
Qualifications and Overview

A. Qualifications

Q. State your name, position and business address.

A. My name is Scott Hempling. I am the President of Scott Hempling, Attorney at Law LLC. My business address is 417 St. Lawrence Drive, Silver Spring, Maryland 20901.

Q. Describe your employment background, experience and education.

A. I began my legal career in 1984 as an associate in a private law firm, where I represented municipal power systems and others on transmission access, holding company structures, nuclear power plant construction prudence and producer-pipeline gas contracts. From 1987 to 1990 I was employed by a public interest organization to work on electric utility issues. From 1990 to 2006 I had my own law practice, advising public and private sector clients—primarily state regulatory commissions, and also municipal systems, independent power producers, consumer advocates, public interest organizations and utilities—with an emphasis on electric utility regulation.

From October 2006 through August 2011, I was Executive Director of the National Regulatory Research Institute (NRRI). Founded by the National Association of Regulatory Utility Commissioners, NRRI is a Section 501(c)(3) organization, funded primarily by state utility regulatory commissions. During my tenure, NRRI's mission was to provide research that empowered utility regulators to make decisions of the highest possible quality. As Executive Director, I was responsible for working with commissioners and commission staff at all 51 state-level regulatory agencies to develop and carry out research priorities in electricity, gas, telecommunications and water. In addition to overseeing the planning and publication of over 80 research papers by NRRI's staff experts and outside consultants, I published my own research papers, advised contract clients (including state commissions, regional transmission organizations, private industry and international institutions), and wrote monthly essays on effective regulation.

In September 2011 I returned to private practice, to focus on writing books and research papers, providing expert testimony, and teaching courses and seminars on the law and policy of utility regulation. I am an Adjunct Professor at Georgetown University Law Center in Washington, D.C., where I teach two seminars: "Renewable Energy, Internet, Uber: Bringing Competition to Historically Monopolistic Industries"; and "Regulatory Litigation: Roles, Skills and Strategies." Students study the legal fundamentals in class, then apply that learning, under my supervision, in practicums at state and federal regulatory agencies.

I have represented and advised clients in diverse state commission cases, and in federal proceedings under the Federal Power Act of 1935 and the Public Utility Holding Company Act of 1935. The latter proceedings took place before the Federal Energy Regulatory Commission (FERC), the Securities and Exchange Commission (SEC), and U.S. courts of appeals. As a lawyer, expert witness or commission advisor, I have participated in numerous proceedings relating to corporate restructuring. I have testified many times on electric industry matters before Congressional and state legislative committees.

My book, *Regulating Public Utility Performance: The Law of Market Structure, Pricing and Jurisdiction,* was published by the American Bar Association in 2013. This is the first volume of a two-volume treatise, the second of which will address the law of corporate structure, mergers and acquisitions. My book of essays, *Preside or Lead? The Attributes and Actions of Effective Regulators,* was published by NRRI in 2010. I published a second, expanded edition in 2013. I have written several dozen articles on utility regulation for publication in trade journals, law journals and books; and taught electricity law seminars to thousands of students from all fifty states and all industry sectors. I have frequently spoken at industry conferences or taught seminars to regulatory personnel in most of the U.S. states, and in Australia, Canada, England, Germany, India, Italy, Jamaica, Mexico, New Zealand, Nigeria, Peru and Vanuatu. As a subcontractor to the U.S. Department of State, I advised the six nations of Central America on the regulatory infrastructure necessary to accommodate and encourage cross-national electricity transactions.

I received a B.A. *cum laude* from Yale University in 1978, where I majored in Economics and Political Science and in Music. I received a J.D. *magna cum laude* from Georgetown University Law Center in 1984. I am a member of the Bars of the District of Columbia and Maryland.

My resume is attached to this testimony as Appendix A. More information is available at www.scotthemplinglaw.com.

Q. Have you submitted testimony or expert reports in prior regulatory proceedings?

A. Yes, to the state utility commissions of Hawaii, Connecticut, District of Columbia, Louisiana, Maryland, Mississippi, Illinois, California, Minnesota, New Jersey, Indiana, North Carolina, Wisconsin, Texas and Vermont; and to U.S. District Courts in Florida, Minnesota and Wisconsin. These proceedings are listed on my resume.

Q. On whose behalf are you submitting this testimony?

A. The New Jersey Division of Rate Counsel.

Q. What information did you review in preparing this testimony?

A. I reviewed the Application and accompanying testimony, all data responses submitted by the Applicants, and relevant New Jersey statutes.

Q. Of the issues listed in the amended pre-hearing order dated July 18, 2016, which issues will you address?

A. I will address issues (a) ("whether the proposed transaction, including the transfer of transmission and distribution assets and the associated leases … affects the interests of JCP&L and MAIT ratepayers, and the ability of JCP&L and MAIT to provide safe, adequate, and proper utility service at just and reasonable rates"); and (f) ("whether the proposed transaction is in the public interest and whether it has a negative or positive impact on JCP&L's and MAIT's rates, regulation, competition, service quality, and employees").

B. Overview

Q. Present an overview of your testimony.

A. The Applicants propose to transfer ownership of Jersey Central Power & Light Company's ("JCP&L") transmission facilities to Mid-Atlantic Interstate Transmission, LLC ("MAIT"). MAIT is a newly formed, wholly owned subsidiary of FirstEnergy Transmission, LLC ("FET"), which in turn is a wholly owned subsidiary of FirstEnergy Corp. ("FirstEnergy"). JCP&L will also transfer to MAIT ownership of limited distribution assets necessary to serve five retail customers. Ownership and control of these transmission and distribution assets, whose costs have been borne historically by JCP&L ratepayers, would be transferred from JCP&L—a company with a state law obligation to provide comprehensive, reliable electric service—to a shell company having, other than the acquired transmission and token distribution assets, no employees or assets.

This transaction raises six main concerns:

1. Is FirstEnergy seeking to divert to its shareholders the value of transmission assets whose costs have been borne by JCP&L ratepayers, resulting in a mismatch of risk (borne by ratepayers) and reward (retained by shareholders)?

2. Will the transaction reduce the Board's ability to control or influence the costs of transmission service borne by JCP&L ratepayers?

3. Will the transaction reduce the Board's ability to ensure, throughout JCP&L's service territory, cost-effective, reliable and innovative coordination of the transmission and distribution assets on which JCP&L ratepayers depend?

4. Does the transaction, by shifting transmission ownership to a JCP&L affiliate, preclude more cost-effective opportunities to transfer ownership to a non-affiliate?

5. Was there some problem in the status quo that this transaction is necessary to solve—and if so, has JCP&L identified all possible solutions and chosen the one that is best for its customers?

6. Will public utility status, by which MAIT will have the power of eminent domain and the right to seek Board override of local zoning ordinances, give MAIT an unearned competitive advantage over competing transmission developers and providers of distributed energy resources, to the detriment of New Jersey ratepayers?

While the transaction raises complex questions, the Board should address them by applying a straightforward principle: Where transmission facilities have been supported financially by a utility's ratepayers, those facilities must be owned, operated and financed in a manner that minimizes the cost and maximizes the quality of service to those ratepayers. The entity owning, operating and financing the facilities should have no goals, and should engage in no activities, that conflict with this principle of cost minimization and service quality maximization.

The proposed transaction does not satisfy this principle. In **Part II**, I explain that the transaction brings risks and costs, and causes lost opportunities. Specifically:

1. MAIT's ownership of JCP&L's transmission assets could lead to higher FERC rates.

2. MAIT could divert the transmission assets' market value away from the ratepayers whose payments created that value.

3. The affiliate agreements prevent JCP&L from minimizing its retail revenue requirement.

4. The transaction leaves unclear the Board's ability to ensure coordinated planning of transmission and distribution.

5. The transaction prevents the Board from finding the best transmission-only company to acquire JCP&L's transmission assets.

6. Approving the transaction, along with granting public utility status to MAIT, will give MAIT an unearned competitive advantage to the detriment of New Jersey ratepayers.

In **Part III**, I explain that the transaction brings no certain benefits. There is no reliable evidence of, or binding commitment to, performance efficiencies. There is no reliable evidence of financial savings, while MAIT's claim of 200 jobs "created" is inaccurate.

Part IV examines MAIT's amended proposal: to become a "public utility" by receiving from JCP&L distribution assets and distribution customers—the assets transferred with JCP&L's consent but the customers transferred without their consent. Accepting this proposal would signal that public utilities can be shells, customers can be commodities, and the venerable public utility franchise—the government-granted privilege of providing life-enabling service to loyal customers, free from competition—can be obtained for reasons other than merit. That is not a public interest result.

Given the proposal's mismatch between costs and benefits, I recommend rejection of the Petition. Notwithstanding my recommendation to reject, I believe an expert witness has a duty to give the Board options. Consequently, I attempted in **Part V** to design conditions to prevent risks and costs, and to preserve and create opportunities for cost savings. Such conditions, if they are practical, reliable and enforceable, would:

1. ensure that the Board can protect New Jersey customers from transmission costs that are not just and reasonable (as determined by the Board, not by FERC);

2. preserve the Board's jurisdiction over the quality of transmission service, including but not limited to planning, construction and operation;

3. ensure that the Board and Rate Counsel have full access to all books and records necessary to determining the reasonableness of charges and practices by MAIT;

4. ensure that any cost savings (and no cost increases) arising from the proposal are passed through fully and timely to JCP&L's customers;

5. ensure that alternative providers of transmission (*i.e.*, entities other than JCP&L and its affiliates) have a fair opportunity to compete to provide transmission projects, in a context where FirstEnergy affiliates have no unearned advantage; and

6. ensure that should (a) FirstEnergy or any affiliate sell MAIT (or the JCP&L transmission assets) to a third party at a gain, or (b) MAIT earn profit from sales of services using transmission assets paid for by JCP&L retail ratepayers, JCP&L's retail ratepayers will receive that gain or profit to the extent justified by their historic cost contributions.

My efforts at designing conditions did not succeed. In **Part V** I explain that weaknesses in each condition render them insufficient to protect and promote the public interest. I therefore maintain my recommendation to reject.

II.
The transaction brings risks, costs and lost opportunities

A. MAIT's ownership of JCP&L's transmission assets could lead to higher FERC rates

Q. Is it possible for the transaction to lead to higher rates?

A. Yes. Applicants have stated that they "do not *expect* there to be a change in the rates, terms or conditions of service for JCP&L retail customers, as set forth in JCP&L's tariffs, as a result of the proposed transaction (transfer)."[1] But an expectation is not a commitment. In fact, "MAIT has not yet developed its overall cost of transmission service or the transmission rate that it will file with FERC for approval."[2]

Q. What are the specific sources of rate increase risk?

A. There are at least three ways by which the transfer of JCP&L transmission facilities to MAIT can increase the risk of rate increases to JCP&L customers. I discuss the three risks here. In **Part V** I propose a condition (Condition A-1) that attempts to empower the Board to protect JCP&L ratepayers from these risks, although I also discuss potential weaknesses in that condition.

1. Imprudent transmission costs

Applicants assert that the cost of "increased transmission system capital investments in the [FirstEnergy] Operating Companies' transmission zones could total as much as $2.5 to $3.0 billion over the next five to ten years."[3] With expenditures this large, there is risk to consumers of imprudence: overestimating demand for generation

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[1] Response to RCR-F-28 (emphasis added).

[2] *Id.*

[3] Application at 3.

and transmission service; paying excessively for land, raw materials, equipment and contractors; failing to consider lower-cost, non-transmission alternatives such as distributed generation, storage, energy efficiency and demand response; and operating transmission assets inefficiently. The Board can better protect ratepayers from these excess costs by controlling them directly, rather than by intervening at FERC—a process that is expensive and uncertain.

It is true that even without the transaction (*i.e.*, with JCP&L retaining ownership of its transmission facilities), these costs are FERC-jurisdictional due to JCP&L's membership in PJM Interconnection. Under the Federal Power Act as interpreted by FERC, JCP&L's membership in PJM causes PJM to be the legal provider of transmission service over JCP&L's transmission facilities, thereby making all JCP&L transmission costs FERC-jurisdictional regardless of who owns the facilities. But FERC has allowed state utility commissions to screen a local utility's transmission costs before they enter FERC's exclusive jurisdiction. I will explain this concept in Part V, with respect to my Condition A-1.

2. FERC transmission "incentives"

FERC's Order No. 679 offers various "incentives" to transmission owners. Besides return on equity "adders" for transmission-only companies and for special technologies, Order No. 679 allows transmission owners to seek hypothetical capital structures, accelerated depreciation, construction work in progress, pre-commercial expenses, recovery of the prudent costs of abandoned facilities, and deferred cost recovery of certain transmission expenditures.[4] Each of these "incentives" can raise the price of transmission service to JCP&L ratepayers.

MAIT has reserved the option of asking FERC for any or all of these price-raising "incentives." MAIT says it "will be free to seek FERC incentives for newly constructed facilities without JCP&L's permission," because "JCP&L will not have operating control and management authority over MAIT." And if MAIT were to receive FERC incentives, "JCP&L could pay transmission charges that include the incentives in MAIT's FERC-approved rates, to the extent JCP&L takes transmission service through MAIT's transmission facilities."[5] So JCP&L's ratepayers will bear the cost of the incentives, while JCP&L will receive the resulting profit: "JCP&L would benefit from the incentives through dividends MAIT will pay at regular intervals to JCP&L, Pennsylvania Electric Company, Metropolitan Edison Company and FirstEnergy Transmission, LLC, in proportion to each of their contributed capital. The dividends that JCP&L receives will be available for all of its corporate purposes, including investment in distribution plant."[6]

In other words, if MAIT seeks and receives FERC "incentives," JCP&L ratepayers would pay higher rates. Those higher rates would increase JCP&L's profit. JCP&L would keep that profit (or dividend it to FirstEnergy) rather than share it with its customers. That is not a public interest result. (Any JCP&L "investment in distribution

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[4] *See Promoting Transmission Investment through Pricing Reform*, FERC Order No. 679, 116 FERC ¶ 61,057 (2006); *Policy Statement*, 141 FERC ¶ 61,129 (2012).

[5] Response to RCR-P-21.

[6] Response to RCR-P-21.

plant" would not be a gift to ratepayers, I assume. "Investment" means investment for profit. It means that the dollars spent on distribution plant would go into JCP&L's retail rate base, thereby obligating the Board to raise retail rates to allow for recovery of and return on the funds. If distribution investment is necessary, the Board can approve a rate increase to finance it. We don't need an extra retail rate increase, caused by FERC transmission "incentives," to fund distribution investment.)

Among the available FERC incentives is a special "adder" to the authorized return on equity for the rate bases of transmission-only companies. (These transmission-only companies are sometimes called "Transcos.") This particular adder warrants emphasis here. It is available even if the transmission-only company is affiliated with companies that own generation (and even if those generation companies, or their affiliates, are "active" owners of the affiliated Transco).[7] This adder is not available to JCP&L, however, because JCP&L is not a standalone transmission company. MAIT has declined to commit not to seek this adder.[8] This means that MAIT's ownership of the

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[7] *See* FERC Order No. 679, *supra*, at ¶¶ 201-203 (2006). There FERC states, among other things:

> 202. The definition [of Transco] we adopt here does not exclude affiliated Transcos with active ownership by market participants, or stand-alone transmission companies that own transmission and distribution facilities....
>
> 203. ... [W]e will not establish specific limits on Transcos regarding, for example, business investments in other industries, sources of equity, or levels of active and passive ownership.

[8] *See* Response to RCR-F-30 ("Petitioners have not determined the specific projects that MAIT will undertake at any time in the future and thus cannot commit that MAIT will not seek or request such an ROE incentive adder."). It is unclear whether this FERC "Transco" adder will be available to MAIT if it owns distribution assets and provides distribution service. If MAIT learns that the adder is not available, the Board

transmission assets creates a distinct risk of rate increase that would not be possible under JCP&L ownership.

3. Formula rates

Once the transaction is completed, MAIT "will file with FERC a formula rate template, which subject to FERC approval will be utilized by MAIT to establish and annually update its transmission revenue requirement and resulting rates."[9]

There are crucial differences between a "formula rate" and JCP&L's current method of adjusting its transmission rates—which, as I understand it, does not rely on a formula rate. Today, when JCP&L wants to raise its transmission rates it must initiate a formal rate case at FERC. In that rate case, JCP&L must demonstrate with testimony, in a formal adjudicatory hearing in which the Board can intervene, that its new rate satisfies the Federal Power Act's standards; specifically, that the rate is just and reasonable and not unduly discriminatory. That is, the existing rate cannot rise until FERC accepts or authorizes a new rate (although under certain circumstances a proposed rate increase can go into effect subject to refund). Under formula rates, the procedure for raising

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may face a situation where MAIT retains its distribution assets but, to preserve the Transco incentive, transfers the JCP&L transmission to some other FirstEnergy affiliate, one that owns only transmission.

[9] Response to RCR-P-8(c). MAIT has stated (Response to RCR-F-40) that it will—

> file an application under FPA Section 205 for FERC authorization of a formula rate structure for transmission service, including [Network Integration Transmission Service ("NITS"), over both the existing transmission assets (*i.e.*, the transmission assets that MAIT acquires from the [operating companies] under the proposed transfer) as well as the transmission assets that MAIT develops and owns in the future.

transmission rates is different—and easier. As MAIT acknowledges, its formula rate "will differ from [JCP&L's] current fixed (stated) rate because MAIT will annually update its transmission revenue requirement and resulting rate."[10] A formula rate covers a stated number of years, and allows for periodic increases (or decreases) in charges based on increases (or decreases) in cost. With a formula rate, a transmission owner can raise its charges each year as its reported costs rise, without seeking and obtaining formal FERC approval for the increase. Legally speaking, the "formula"—in effect an empty spreadsheet containing the transmission owner's cost categories—is the official "rate" that FERC already has approved. So to increase the charges to the customers, the transmission owner does not change the formula "rate," but rather "populates" the formula with new costs. The "formula" (meaning, the spreadsheet) then calculates the new charge that the customers must pay. No FERC action is necessary for the charge to rise or fall.

These rate increases or decreases thus occur without a formal rate case. There are procedures by which customers can contest the charges, but the effectiveness of those procedures has itself been contested. FERC thus has recognized that formula rates can be problematic.[11] MAIT has offered no information on the procedures it will use to

[10] Response to RCR-F-40. MAIT adds that "[t]he final determination of MAIT's rate formula is subject to FERC proceeding and approval." *Id.* Notice that in this sentence MAIT refers to the "rate formula" rather than the arithmetic rate. As I discuss next in the text, the difference matters.

[11] In 2013, FERC found that formula rate protocols used by the Midwest Independent System Operator (MISO), and the formulas of each MISO transmission owner, were unlawful. FERC made three main findings. First, transmission owners were excluding some parties from participating in the review of input costs. Second, the protocols did not provide all the information necessary to ensure the accuracy of the inputs or the prudence of the costs. Third, there were not clear procedures by which

"update" charges under its to-be-designed formula rate plan. All we know is that by replacing fixed rates with formula rates, MAIT can more easily implement rate increases, while creating procedural uncertainty over whether we can protect ratepayers from those increases.

By approving MAIT's application to acquire JCP&L's transmission assets, the Board would be endorsing implicitly MAIT's explicit intent to seek formula rates. Given the risks to consumers, the Board should not do so. It is true that JCP&L could itself seek FERC permission to use formula rates. But JCP&L has not done so. If and when such request occurs, the Board can deal with it. What is pending here is MAIT's proposal.

Q. Concerning these three risks—excess costs, FERC "incentives" and formula rates—is there a solution?

A. Yes. The solution to all three of these risks—excess costs, FERC "incentives" and formula rates—is to require Board approval of any costs that will affect JCP&L's rates, *before* those costs enter the FERC jurisdiction. My Condition A-1, presented in Part V (and defended there in terms of its legality) achieves this objective—although not without legal uncertainty, as I will explain there. With Condition A-1, the Board would have to be satisfied with any transmission costs before they enter FERC's domain—a better solution that being merely a supplicant at FERC after the costs enter FERC's domain. This local accountability is especially necessary because as discussed next, MAIT's

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intervenors could challenge costs. Because of these infirmities, FERC ordered MISO and each transmission owner to submit, by July 16, 2013, compliance filings revising their protocols. *Midwest Independent Transmission System Operator, et al.*, "Order on the Investigation Of Formula Rate Protocols," Docket No. EL12-35-000, 143 FERC ¶ 61,149 (May 16, 2013). It will be necessary for the Board to investigate whether PJM's formula rate protocols avoid these concerns.

acquisition of JCP&L's transmission assets will eliminate the natural tension between transmission buyer and transmission seller.

Q. Will JCP&L oppose rate increases sought by MAIT at FERC?

A. No. JCP&L and MAIT are jointly controlled by FirstEnergy. When a seller and buyer are not affiliates, a proposed rate increase stimulates a natural tension: seller proposes, buyer opposes. That tension helps the decisionmaker find the truth. A strong, well-resourced buyer can help protect the ultimate ratepayers. But when the buyer and seller are jointly controlled (as JCP&L and MAIT are jointly controlled by FirstEnergy), that natural tension disappears. JCP&L-as-buyer will not oppose rate increases sought by MAIT-as-seller—as MAIT concedes.[12] This fact leaves JCP&L's ratepayers vulnerable to FERC-authorized rate increases.

B. MAIT could divert the transmission assets' market value away from the ratepayers whose payments created that value

Q. Describe the value potential in transmission assets.

A. Transmission assets have strategic value. That value comes from at least four sources: (a) their natural monopoly characteristic, (b) their indispensability to expanding regional markets (in which generation sellers are willing to buy transmission service to get their products to buyers), (c) the prospect of transmission and generation shortages (which increase the value of existing transmission facilities that carry generation output), and (d) FERC's policies for increasing transmission profit levels above the levels allowed by state commissions (such as the transmission "incentives" discussed in Part II.A above, along with so-called "congestion pricing"). This value exists only because JCP&L

[12] Response to RCR-P-35.

ratepayers, as captive customers of JCP&L, have had no choice but to pay the rates that made these assets possible.

Q. How might MAIT exploit the strategic value of JCP&L's transmission assets?

A. Once MAIT owns the assets, its natural inclination will be to maximize their value for MAIT's ultimate shareholder, FirstEnergy. This inclination applies not only to the existing transmission assets, but also to any future transmission facilities MAIT might build—using real property it controls due to the ground lease (whose rental price is based on book cost, rather than the market value price that a nonaffiliated entity would have to pay).[13]

MAIT's financial incentive will be to divert this value to FirstEnergy rather than channel it to the JCP&L ratepayers—ratepayers whose history of rate payments made the value possible. MAIT can do so in at least three ways. First, MAIT could resell or rent it to other transmission providers. Second, it could sell transmission service to generation owners seeking to transmit their product to wholesale customers or direct retail buyers. Third, it could "bundle" the JCP&L transmission capacity with FirstEnergy's affiliated generation to enhance the market value of that generation. Each of these actions—which can occur with existing or future transmission facilities—exploits the transmission's market value while making use of a ground lease priced only at book value.

Besides depriving JCP&L ratepayers of value they created, these efforts give MAIT an unearned competitive advantage—an advantage not attributable to merit. That advantage arises from this fact: The book cost of the JCP&L transmission assets will be

[13] The ground lease is discussed in more detail by Rate Counsel witness Kevin O'Donnell.

lower than the cost of new assets prospective competitors will need to develop to compete with MAIT. Book value is the utility's old original cost less accumulated depreciation. In a world of rising costs, book value will necessarily be lower than a new competitor's new original cost without any depreciation. This competitive advantage is unearned because its real source is not MAIT's skill but JCP&L's ratepayers. To eliminate this unearned advantage, the Board should condition this transaction to require MAIT to pay fair market value for JCP&L's assets (including fair market rent under the Ground Lease), or pay over to JCP&L ratepayers the profit that is attributable to their historic financial support. Absent this condition, MAIT can still seek and receive from FERC a higher return on equity, plus "adders," plus FERC formula rates, and still price below its competitors if the difference between its assets' book value and its competitors costs is high enough.

My testimony should not be construed as opposition to profit. In markets subject to effective competition—markets in which competitors use resources and merits of their own creation—the goal of profit maximization is natural and unremarkable. But in this transaction the market at issue is not subject to effective competition. The capital supporting MAIT's to-be-purchased transmission assets, while technically coming from private investors, has its ultimate source in payments made by JCP&L's captive retail customers. Those ratepayer payments were made available to JCP&L due to government decisions: decisions that restricted competition and set rates to satisfy statutory and constitutional standards.

For these reasons, the Board should prevent MAIT from exploiting assets whose value MAIT did not create. JCP&L's ratepayers must share in MAIT's gain and profit to the extent their history of payments made possible that gain and profit. That is a simple application of the "benefits follow burdens" principle established long ago as a foundation of just and reasonable ratemaking.[14]

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[14] *See, e.g.*, *Democratic Central Comm. of the District of Columbia v. Washington Metropolitan Area Transit Comm'n,* 485 F.2d 786, 808–11, 822 (D.C. Cir. 1973). The court there stated:

> Ratepayers bear the expense of depreciation, including obsolescence and depletion, on operating utility assets through expense allowances to the utilities they patronize. It is well settled that utility investors are entitled to recoup from consumers the full amount of their investment in depreciable assets devoted to public service. This entitlement extends, not only to reductions in investment attributable to physical wear and tear (ordinary depreciation) but also to those occasioned by functional deterioration (obsolescence) and by exhaustion (depletion). . . .[Since customers] have shouldered these burdens, . . . it is eminently just that consumers, whose payments for service reimburse investors for the ravages of wear and waste occurring in service, should benefit in instances where gain eventuates—to the full extent of the gain.

See also id. at 808 ("[I]f the land no longer useful in utility operations is sold at a profit, those who shouldered the risk of loss are entitled to benefit from the gain."). *Accord, Separation of Costs of Regulated Telephone Service from Costs of Nonregulated Activities*, 2 FCC Rcd. 6283, 6295 ¶¶ 113–14 (Sept. 17, 1987) (order on reconsideration) (observing that "[t]he equitable principles identified in [*Democratic Central Committee*] have direct application to a transfer of assets out of regulation that produces gains to be distributed," and requiring "that ratepayers receive the gains on assets when the market value of the assets exceeds net book cost"); *N.Y. Water Serv. Corp. v. Pub. Serv. Comm'n of N.Y.*, 12 A.D.2d 122, 129 (N.Y. App. Div. 1960) (allocating gain on sale to ratepayers when ratepayers bore the risk of a loss in value of the assets); *N.Y. State Elec. & Gas,* Case No. 96-M-0375, 1996 N.Y. PUC LEXIS 671, at *8 (N.Y. Pub. Serv. Comm'n 1996) (memorandum opinion) (reserving the net gains on the sale of land for ratepayers is "equitable and reasonable"); *N.Y. Tel. Co. v. N.Y. Pub. Serv. Comm'n,* 530 N.E.2d 843 (N.Y. 1988) (holding ratepayers entitled to benefits on sale of yellow pages advertisements); *Application of Connecticut Natural Gas Corp. for a Rate Increase—Phase 1—Gain on Condemnation,* Docket No. 99-09-03RE02 (Mar. 14, 2001) (referring to "the Department's clear and consistent treatment of gains or losses on disposed rate base property supported by revenue requirements").

But see Bd. of Pub. Util. Comm'rs v. N.Y. Tel. Co., 271 U.S. 23 (1926) ("Customers pay for service, not for the property used to render it. Their payments are not

On this point, it is necessary to underscore the crucial difference between the ratepayer's entitlement to MAIT's gains and profits (as a matter of ratemaking) and JCP&L's entitlement to dividends (as a matter of corporate finance). The Applicants have stated that MAIT's gains and profits will be paid to JCP&L (and MAIT's other shareholders) in the form of dividends. Those dividends are JCP&L's to keep; they are recorded "below the line." The phrase "below the line" means that the company keeps the money represented by the dividends. [15] That is the appropriate "booking" of these monies—from an accounting standpoint. But ratemaking does not have to follow accounting. In ratemaking, we must honor the principle that benefits follow burdens. Otherwise, MAIT will have diverted economic value from ratepayers merely because of corporate form rather than performance merits.

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contributions to depreciation or other operating expenses or to capital of the company. By paying bills for service they do not acquire any interest, legal or equitable, in the property used for the convenience or in the funds of the company.").

[15] See Response to RCR-V-24: "As described in the Direct Testimony of K. Jon Taylor (Exhibit P-4), JCP&L will account for its investment in MAIT using the equity method of accounting. Under this method, JCP&L will recognize its share of earnings (or losses) in Account 418.1, *Equity in Earnings of Subsidiary Companies*, with a corresponding offset to Account 123.1, *Investment in Subsidiary Companies*. Account 418.1, *Equity in Earnings of Subsidiary Companies*, is reported in 'Other Income and Deductions' on the FERC Form 1 and is a 'below-the-line' account."

C. The affiliate agreements prevent JCP&L from satisfying its obligation to minimize its cost to ratepayers

Q. What concerns are raised by the interaffiliate transactions between JCP&L and MAIT?

A. As a public utility, JCP&L's obligation is to minimize costs to its customers.[16] One way to minimize costs is to buy products and services from the lowest-cost sellers (assuming reasonable quality). But the interaffiliate agreements to which JCP&L will be a party (specifically, the Service Agreement and the Mutual Assistance Agreement) preclude this prudent activity. According to the Applicants, "[t]o the extent that JCP&L requires goods and services that it cannot provide for itself, *which are not available under the [Service Agreement] and/or the [Mutual Assistance Agreement]*, it may follow FirstEnergy's procurement processes and acquire those goods and services from non-affiliate vendors and suppliers."[17] In other words, JCP&L can shop with non-affiliate suppliers only if the services needed are "not available under the SA and/or MAA." JCP&L must transact with FirstEnergy affiliates, even if transacting with non-affiliated parties would save

[16] *See El Paso Natural Gas Co. v. Federal Power Commission*, 281 F.2d 567, 573 (5th Cir. 1960) (holding that a utility must "operate with all reasonable economies"); *Potomac Elec. Power Co. v. Pub. Serv. Comm'n of the District of Columbia*, 661 A.2d 131, 137 (D.C. 1995) (holding that a utility has an obligation to serve at "lowest feasible cost"); *Midwestern Gas Transmission Co. v. E. Tenn. Natural Gas Co.*, 36 FPC 61, (1966), *aff'd sub nom. Midwestern Gas Transmission Co. v. Federal Power Commission*, 388 F.2d 444 (7th Cir. 1968) (holding that a utility must use "all available cost savings opportunities...as well as general economies of management").

[17] Response to RCR-SC-27(d) (emphasis added). According to the Applicants, the Service Agreement governs services provided by FirstEnergy Service Company to the operating companies (including JCP&L and MAIT); while the Mutual Assistance Agreement governs services provided (a) between the operating companies and (b) between the operating companies and MAIT. See Response to RCR-SC-27.

money for JCP&L (and thus its retail customers).[18] The Board should not approve agreements that undermine JCP&L's obligation to minimize its retail revenue requirement.

Q. Does the transaction raise any other concerns about affiliate relations?

A. Yes. A separate affiliate concern relates to the price MAIT will pay for using JCP&L employees. (MAIT will have no employees; it will use personnel from JCP&L and from the FirstEnergy service company.) Historically, the costs of JCP&L's employees (*e.g.*, their recruitment, training, professional development, pension contributions) have been borne by JCP&L ratepayers. When MAIT needs work done by JCP&L employees, charging MAIT a price equal to their cost makes sense, as long as their work is performed for the benefit of JCP&L ratepayers. But if the JCP&L employees work on projects that MAIT will then market to others for a profit, the situation is different. In

[18] There is some confusion on this issue, which the Applicants can readily resolve. Here is the dialogue from RCR-SC-30:

> [Question] Will MAIT be obligated to buy services from the Service Company if it requires such services or can MAIT choose to obtain such services from a non-affiliate? Please explain.
>
> Response: MAIT will not be obligated to buy services from the Service Company. However, to the extent services required by MAIT are offered by the Service Company, it is expected that MAIT will purchase those services from Service Company, so long as the purchase of such services complies with all applicable BPU regulations governing a utility's acquisition of services under a service agreement.

But the passage quoted in the text above stated that MAIT would have an obligation to buy from the affiliates unless the service needed by MAIT was not available from the affiliates. With a discovery response varying from contractual language, it is not clear whether, and under what circumstances, MAIT will be obligated to buy services from the affiliated Service Company. Note also that JCP&L may terminate the Service Agreement and the Mutual Assistance Agreement on 60 days' notice and after completing any performance contracted for. Response to RCR-SC-27.

this situation, MAIT should pay for the employee's time based on fair market value if it is higher than actual cost. That is the typical approach in interaffiliate relations—a sale from the regulated utility to an entrepreneurial affiliate should be at the higher of cost or market. Otherwise there is a mismatch of burden and benefit—JCP&L ratepayers would bear the burden of the JCP&L employees' historic and current costs, while MAIT and FirstEnergy would keep the profit from their labor. Besides burdening ratepayers directly, this mismatch harms them indirectly, by distorting competition. MAIT will have access to employees at cost, while MAIT's unaffiliated competitors will have to buy their employees' (or contractors') time at market value. Lower cost competitors will have difficulty succeeding despite their merits. This weakening of competitive forces deprives customers of the benefits of competition by making it easier for MAIT to keep prices above competitive levels.

D. The transaction leaves unclear the Board's ability to ensure coordinated planning of transmission and distribution

Q. Might this transaction's separation of transmission ownership from distribution ownership affect adversely the Board's ability to oversee the coordination between transmission service and distribution service?

A. Yes. Today, JCP&L owns both transmission and distribution facilities. After the transaction, JCP&L will own distribution but MAIT will own transmission (and some token distribution, acquired by MAIT solely to gain "public utility" status). The cost-effectiveness and reliability of each type of service depends on the other. The Board therefore will need conditions ensuring that (a) the planning, design, construction and operation of distribution service occurs seamlessly with that of transmission service, and (b) all these activities remain within the Board's control.

The importance of maintaining Board control over transmission-distribution coordination is especially important due to the emerging opportunities for "distributed energy resources": storage, demand response, energy efficiency, microgrids and locally-based solar. Because these activities affect demand on the bulk electric system, they affect the design and cost of transmission. Conversely, the design and operation of the bulk transmission system and bulk power markets affect the ability of distribution-level resources to access those markets.[19] Unless the Board can regulate transmission-distribution coordination, its efforts to encourage these resources will be constrained.

On this point, it is a distinct concern that the individuals running JCP&L's transmission system will not necessarily be JCP&L employees. They will be people appointed (and, presumably, removed) by FirstEnergy Transmission (which is controlled by FirstEnergy). See Staub Testimony at 9: "FET, due to its Class A ownership interest, will appoint the Board of Managers who will control the day-to-day operation and management of MAIT."

E. The transaction prevents the Board from finding the best transmission-only company to acquire JCP&L's transmission assets

Q. Comment on whether JCP&L's decision to sell its assets to an affiliate is consistent with its obligation to provide the most cost-effective service to its customers.

A. The Applicants base their application on this premise: JCP&L's customers are better off if JCP&L's transmission is owned by a transmission-only company. The main benefit to ratepayers, Applicants argue, comes from investors' perceptions that a transmission-only

[19] As explained in detail in the New York Public Service Commission's order on "Reforming the Energy Vision. See *Order Adopting Regulatory Policy Framework and Implementation Plan*, Case 14-M-0101 (N.Y. Pub. Serv. Comm. Apr. 24, 2014).

company involves lower risks. (This is the basis for Applicants' claim of $135 million in savings.)

If what matters is ownership by a transmission-only company, that transmission-only company need not be a FirstEnergy affiliate. If this transaction's sole, unconflicted purpose is truly to benefit JCP&L customers, and if the real customer benefit comes from ownership by a transmission-only utility, then a prudent, cost-minimizing JCP&L should be searching for the transmission-only company that will perform for customers most cost-effectively. A prudent, cost-minimizing JCP&L should have sought bids to see which among many interested companies will offer the most to JCP&L's ratepayers for the chance to own these assets.

Instead of taking this prudent, cost-minimizing action, JCP&L is simply handing the assets over to MAIT—a corporate shell controlled by JCP&L's holding company owner. This is the corporate equivalent of a CEO hiring her sibling. By excluding all possible aspirants other than its own affiliate, JCP&L has made it impossible for the Board to find that this transaction satisfies JCP&L's obligation to minimize costs for its customers. Were JCP&L buying basic generation service, or any other service, the Board would never tolerate JCP&L foregoing a competitive procurement process in favor of buying from its affiliate. The same logic applies here.

This concern applies not only to the transfer of the transmission assets, but also to the ground lease. Awarding the lease to an affiliate at a book value, below-market price is not consistent with minimizing the revenue requirement for JCP&L ratepayers—unless we have ensured (as discussed in Part II.B above) that the gains and profits earned by MAIT from having the below-market lease are passed through to ratepayers.

The Applicants may respond that FirstEnergy has unique characteristics that make continued affiliation beneficial to JCP&L's ratepayers. But there is no reason to assume that other transmission-owning entities cannot offer the same, or greater (and more certain) benefits. A competing applicant might even be willing to guarantee financial savings—in contrast to Applicants, who cite $135 million but do not commit to it. But because JCP&L has selected its sibling, we will never know.

In short, the only reason to restrict the universe of prospective acquirers of JCP&L's transmission facilities to a FirstEnergy affiliate is because FirstEnergy framed the case that way. The Board should not. If FirstEnergy has confidence in its cost-lowering prediction, it should welcome the chance to prove it competitively.

F. MAIT's "public utility" status will give it an unearned competitive advantage, to the detriment of New Jersey ratepayers

Q. What effects will MAIT's "public utility" status have on competition in the market to develop new transmission facilities?

A. Transmission may be a natural monopoly facility and a natural monopoly service, but there can be competition for the opportunity to build that monopoly facility and provide that monopoly service. To tilt competition in the incumbent's favor is to treat ratepayers with disfavor. As with any monopoly service, ratepayers are at risk of transmission cost increases due to overbuilding, unnecessary building, cost overruns and gold-plating. The FERC rate "adders" add more risk. Ratepayer protection requires that we subject MAIT's transmission activities to the maximum efficient competition.

But we will not have effective competition in transmission markets if MAIT has the advantages of "public utility" status while unaffiliated developers do not. Under New Jersey law, public utility status brings MAIT two cost-reducing advantages: the power of eminent domain, and the right to seek Board override of local zoning decisions.[20] Each of these items allows MAIT to expedite transmission projects, reduce their costs, or both. If its competitors lack these tools, MAIT will again have an unearned competitive advantage. Competition-on-the-merits will be distorted. I discuss possible solutions to this problem in in Part V, specifically Condition E-1.

III.
The transaction brings no certain benefits

A. MAIT offers no reliable evidence of, or commitment to, performance efficiencies

Q. Do the Applicants provide any reliable statement, or make any commitment, that the transaction will lead to performance improvement?

A. No. This transaction shuffles assets; it does not reorganize business processes. Because MAIT has no employees, nothing about the transaction changes the work and workers supplied by JCP&L and FirstEnergy's Service Company today.[21]

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[20] *See* N.J.S.A. 48:3-17.6 and 48:3-17.7 (eminent domain); N.J.S.A. 40:55D-19 (zoning).

[21] See this excerpt from the response to RCR-P-1 (citing other sources):

> JCP&L will provide support to MAIT under the MAA with respect to providing JCP&L transmission line employees and related technical support personnel to perform the field operation and maintenance of the transferred transmission assets as requested by MAIT to assist MAIT in the performance of its operations as a stand-alone transmission asset owner within the FirstEnergy holding company system.

See also this excerpt from the response to RCR-P-17 (quoting other sources):

> a. Today, JCP&L employees perform transmission line operations, maintenance and other technical services with respect to JCP&L's transmission assets and FESC employees provide and may provide any or

Nor will there be any change in the PJM transmission planning process that vets and selects transmission projects. The Board can expect that the same projects that would be proposed and selected without the transaction will be proposed and selected with the transaction:

> Currently, PJM, in conjunction with JCP&L and as coordinated through FirstEnergy Service Company ("FESC"), operates these transmission facilities under the terms of the PJM Open Access Transmission Tariff. ... After the transaction, when JCP&L's transmission facilities have been transferred to MAIT, PJM, in conjunction with MAIT and as coordinated through FESC, will continue to operate the transferred transmission facilities.[22]

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all of the services listed in Exhibit A to the Service Agreement ("SA") (Exhibit KJT-2), related to the transmission assets as requested by JCP&L.

b. [After the transaction,] "the employees of the Operating Companies, including JCP&L, will perform work on the transmission assets after the assets are transferred to MAIT, and on new transmission assets that MAIT will own...."[T]his would include "the provision of transmission line workers and related technical support services and workers, including those from JCP&L, to assist MAIT in the performance of its operations as a stand-alone transmission asset owner within the FirstEnergy holding company system." JCP&L employees will do so under the MAA (Exhibit KJT-3) as requested by MAIT, which does not and will not have any employees.

In addition, FESC employees may provide any or all of the services listed in Exhibit A to the SA (Exhibit KJT-2), related to the transmission assets and as requested by MAIT.

Also, JCP&L employees may provide any or all of the other services listed in Attachment I to the MAA (Exhibit KJT-3), related to the transmission assets and as requested by MAIT.

[22] Response to RCR-P-1.

Q. The Applicants argue that "[t]he separation of the transmission and distribution business will allow each company (*i.e.*, JCP&L and MAIT) to better focus on the challenges of each function."[23] What is your comment?

A. Since MAIT has no employees, I do not see how it is physically or logically possible for MAIT to "focus on the challenges of [its] function." There is no human being at MAIT to do the "focusing." Employees from JCP&L and FirstEnergy's Service Company, overseen by their respective managers and executives, will have the same obligation after the transaction as before. A mere change in the corporate boundaries encasing the transmission assets is not going to cause anyone to "better focus on the challenges of [MAIT's] function." It is true that there will be some kind of planning committee, consisting of employees outside of MAIT, to oversee transmission activities. But that same oversight could occur without MAIT.

Q. What about the claims of financial flexibility?

A. The Applicants argue that the "separation of the transmission and distribution business...should provide each company with greater financial flexibility to address its individual capital needs."[24] The phrase "should provide" is only an aspiration; it is neither fact nor commitment. And as Rate Counsel Witness Kahal explains, there has been no showing that JCP&L has lacked sufficient "financial flexibility" to "address its individual capital needs."

Applicants also say that "increased financial flexibility allows for greater operational flexibility by limiting potential investment compromises between business

[23] Response to S-JCP&L-MAIT-21.

[24] *Id.*

unit heads."[25] But again, there is no evidence that there are, or ever were, "investment compromises between business unit heads." This history and logic of cost-based ratemaking is that when rates are set appropriately to allow recovery of and return on prudent investment, sufficient capital flows to the utility.

Q. What about the argument that the transaction will enable FirstEnergy to accelerate completion of JCP&L transmission projects?[26]

A. Spending money on projects earlier means that ratepayers will be charged for those projects earlier. That means they will lose the benefits of holding on to their money longer. There is no showing that having access to benefits earlier outweighs the opportunity cost of parting with one's money earlier—or that, if acceleration is economically worthwhile, that JCP&L could not itself obtain the rate treatment that would allow acceleration.

Applicants also argue that the "increased and accelerated levels of investment [due to MAIT's ownership] will provide for more projects of the same type being undertaken more often resulting in increased efficiency of work."[27] But when asked for internal documents supporting this statement, specifically the vague phrases "more projects," "more often" and "increased efficiency," Applicants said there were none.[28]

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[25] *Id.*

[26] Mader Testimony at 9.

[27] Response to RCR-P-10.

[28] Response to RCR-P-32.

The quoted statement is therefore aspirational only.[29] It represents no more than a:

> reasonable business expectation that better access to capital should be an outcome of the approval of the Transaction described in the Petition. This outcome, in turn, is anticipated to facilitate a proactive strategy that leverages the synergies of a more specifically focused team that will be able to complete more projects by garnering the efficiencies of a heightened focus in terms of design, construction, and repetitive engineering approaches to projects.[30]

Such vague, aspirational, self-supportive language has no persuasion value. When asked, the Applicants could provide no comparison of actual schedules for these projects with and without the transaction.[31] Such comparison might have shown—and led to a commitment concerning—true acceleration and actual benefits from that acceleration. But no comparison was made, so no commitment was made. All we have are words.

B. There is no reliable evidence of financial savings

Q. What are your comments on the claims of financial savings?

A. Applicants assert that the transaction can produce $135 million in financial savings. This assertion has three problems. First, when allocated to JCP&L, timed realistically and spread over 30 years, the number is very small, as explained by Rate Counsel witness Kahal. Second, the $135 million claim comes with no commitment: "None of the

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[29] See this portion of the response to RCR-P-32: "The schedule for JCP&L completing this work under a no-transaction scenario depends on JCP&L's access to capital and the outcome of FirstEnergy's capital budgeting and allocation process, which involves thorough technical analysis and multiple levels of peer-management and executive-review to ensure the JCP&L projects are selected, designed, and completed in a cost-effective manner. The project funding and construction schedule are also derived from this, as is the capital budgeting and capital allocation process."

[30] *Id.*

[31] *Id.*

estimated $135 million is guaranteed."[32] These savings are aspirational, not factual. To treat estimates as evidence is to substitute guesswork for accountability.

Third, even if the savings do occur (and Rate Counsel witness Kahal explains why they might not occur), there is no guarantee that these savings in transmission cost will not be offset by increases in distribution cost (as well as increases in transmission rates, for the reasons discussed in Part II.A). Applicants assume that when low-risk transmission investment lies within JCP&L, its capital cost is higher than necessary because it is mixed in with higher-risk investment in distribution and retail sales. But there is no clear reason why JCP&L's distribution and retail sales business is higher risk than a standalone transmission business. Even assuming a risk differential, the Applicants ignore half the picture: If JCP&L's cost of capital reflects a mix of lower- and higher-risk activities, removing the lower-risk activity leaves behind the higher-risk activity—which can translate into a higher cost of capital for the entity engaged in that activity---JCP&L. Applicants have not shown that removing transmission from JCP&L somehow reduces the total risk of the whole. They have treated the financial savings as a free lunch, but there is no evidence to support that treatment. Rate Counsel Witness Kahal explains this concern in more detail.

Q. Do Applicants disagree that post-transaction JCP&L's credit rating could decline?

A. Yes. They argue as follows:

> Presently, the credit ratings of JCP&L are more heavily weighted on the distribution business, as the transmission business only represents approximately 20% of the total net book value of JCP&Ls assets, on which it earns. Therefore, the disassociation of the transmission business necessarily does not have an equal and opposite effect on the credit ratings

[32] Response to RCR-F-29.

> of the distribution business. JCP&L has structured this transaction to avoid an impact to its credit ratings and borrowing costs. JCP&L does not expect this transaction to have any impact on JCP&L's credit ratings. (See page 16 of the Direct Testimony of Steven R. Staub, Exhibit P-3.) It is noteworthy that upon announcement of this transaction, there was no credit action taken by any rating agency with respect to JCP&L, including changes to its outlook. (See the response to RCR-F-18.)[33]

Missing from this argument is a commitment—that should cost of capital for post-transaction JCP&L rise, the Applicants will absorb that cost rather than impose it on ratepayers. A similar weakness afflicts the argument that by relieving JCP&L of its transmission facilities, the transaction will "preserve [JCP&L's] capacity to fund investments in its distribution system."[34] There is no evidence that JCP&L was having any difficulty preserving its financing capacity without the transaction. Again, words without commitment are not a foundation for a defensible regulatory decision.

C. The claim of 200 jobs "created" is inaccurate

Q. Discuss Applicants' claim of the transaction will "create" jobs.

A. Mr. Mader claims that the benefits from forming MAIT include "the projected creation of over 200 highly-skilled jobs."[35] If by using the term "creation" he means that transaction will bring into being jobs that would not have existed without the transaction, he speaks inaccurately. The record indicates that the same projects will be planned and completed with or without the transaction. It is reasonable to assume, therefore, that the same number of worker-hours will be required with or without the transaction. The only

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33 Response to RCR-P-33.

34 Application at 4.

35 Mader Direct Testimony at 8.

possible difference, according to the evidence, is that with the transaction some projects will be completed more quickly. Applicants stated:

> [T]he expansion of EtF and the acceleration of the completion of projects will enable the creation of the projected highly-skilled jobs. Lastly, should the transfer not be approved, the Reliability Enhancement Process projects will be constructed over a longer period of time and likely could be accomplished without a need for additional resources (jobs).[36]

Applicants seem to be using this logic:

1. Under either the transaction scenario or the no-transaction scenario, the same projects will be completed.

2. Therefore total worker-hours will be the same under both scenarios.

3. But because in the transaction scenario the same work will be completed within a shorter time period, there will need to be a higher number of workers during that shorter period than would be required in a longer period.

If that is the case, the claim that the mere transfer of JCP&L transmission assets to MAIT will create an additional "200 jobs" is deceptive advertising.

And that is the case. Applicants acknowledge that the same "projects would be accomplished under either the transaction or the no-transaction scenario." They also state that "[i]n this context, jobs refers to the initial estimates of the full time equivalents needed to directly perform the additional engineering, material management, project management and construction services associated with the expanded EtF program." Then they state that under the no-transaction scenario, "JCP&L does not currently expect to be able to accomplish all of the Reliability Enhancement projects described in the Direct Testimony of Jeffrey J. Mackauer (Exhibit P-5) in the *same amount of time* as would be the case if undertaken on an accelerated basis by MAIT. MAIT's more specific focus is

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[36] Response to RCR-P-16.

anticipated to allow for more projects *to be undertaken concurrently* and more comprehensively, *creating the need for added workers*."[37]

And so my point is correct. The transaction not lead to the "creation" of 200 jobs that would not exist without the transaction.

IV.
Granting MAIT's shell corporation "public utility" status degrades the concept of "public utility"

Q. Under the amended proposal, MAIT would (a) acquire from JCP&L specific distribution assets necessary to serve five retail customers, and thereby (b) become a "public utility" under state law by providing distribution service to those customers. What are your comments?

A. The threshold question is a legal one: Does the Board have discretion to award public utility status to a company literally unable to provide utility service? I will leave that question to the New Jersey lawyers. But if the Board has that discretion, it should deny MAIT's request. Otherwise, future applicants will consider themselves entitled to imitate MAIT: by converting a public service organization into a lawyer's device, and by treating customers as commodities to be transferred without their consent. Granting MAIT's request degrades the concept of "public utility."

Q. Explain why you reason that granting MAIT's request degrades the concept of "public utility."

A. Awarding public utility status to MAIT would invite each of the following situations—with each subsequent applicant citing MAIT's approval as precedent.

1. Public utility status and powers can be awarded to a near-shell—an entity with no employees, no experience, no financing, and no assets other than token

[37] Response to RCR-P-34 (emphasis added).

distribution facilities. Instead of a company committed to the unique mission of utility service—organizing assets, employees and expertise to provide life-sustaining, cost-effective and innovative service to the public—we would have a paper corporation created by paper-shuffling lawyers. The public utility franchise—"one of the most important agencies of civilization, for the promotion of the public convenience and public safety"[38]—will have become a strategic device, used by holding company executives to serve purposes so unclear that they cannot commit (and need not commit, if the Board grants MAIT's request) to a single dollar of benefit.

2. A customer can be transferred, involuntarily, from an incumbent utility to an affiliate, where the transfer, in and of itself, has neither the purpose nor the effect of promoting the public interest. It is one thing for a customer served by a franchised monopoly to have no choice but to take service from that monopoly. At least the customer chooses that monopoly when choosing to locate in that service territory. But then to have that location decision overridden, through an involuntary transfer to a second company, is to be converted from customer into commodity.

3. A valuable right—a utility's government-created, ratepayer-financed right to provide distribution service, without competition and for profit—can be acquired by a utility's affiliate for free. The immense value of the franchise—value that exists largely because the state government excluded competition and set rates that ratepayers have no choice but to pay—can be transferred without any compensation paid to those who created the value.

[38] *New Orleans Gas Co. v. Louisiana. Light Co*., 115 U.S. 650, 669 (1885).

4. Merit, even fitness, is no longer a prerequisite for public utility status. Any entity—even a shell company—can acquire an exclusive distribution franchise. One need merely persuade the incumbent utility to transfer a few distribution customers without their consent. Indeed, each incumbent utility would now see a new profit center—auctioning off its customers to the highest bidder. Utilities would be like dentists approaching retirement—selling off their patients to whoever pays the most. Except: In dentistry, the patients are free to go elsewhere. In electric distribution service they are stuck.

MAIT might respond that its precedent applies only to transfers to the incumbent's affiliate. If so, a different problem arises: If to enter the distribution service market so easily one must be an affiliate of an incumbent, the precedent is discriminatory. Each service territory should be served and controlled by the entity most qualified—not the one who pays the most to the departing company and certainly not the boss's offspring.

5. Two public utilities can occupy the same service territory. See Mader Supp. Testimony at 7 (stating that "MAIT's service territory in New Jersey will be co-terminus with that of JCP&L"). If I understand this concept, the transferee of a few customers in another utility's service territory somehow has the power of eminent domain and zoning override throughout that entire territory. As discussed in Part II.F above, the result is to allow an incumbent to grant discriminatory favors to its affiliate, which affiliate then has unearned competitive advantages over all other market entrants.

6. Any company can become a public utility, and create its own service territory, merely by buying or building a distribution asset, then connecting that asset

to a customer. The customer's willingness is irrelevant. Economics and engineering are irrelevant. Service territory boundaries would be based not on economies of scale, but on opportunistic decisionmaking. (There is no evidence that MAIT's five customers were chosen based on facts relating to economies of scale or any other public interest factor.)

V.
Conditions are necessary, but not sufficient, to reduce risks, prevent costs and preserve opportunities

Q. What is your recommendation to the Board?

A. Because this transaction brings risks and costs but no certain benefits, I recommend rejection. As an expert witness, however, I believe it my duty to assist the Board by providing options. I have tried to do so here, by designing conditions that aim to reduce each risk and cost while producing benefits.

My attempt has fallen short. Conditions can work when a transaction is fundamentally sound, is grounded in a clear public interest motivation, and merely needs some adjustments to smooth its rough edges. But a transaction that lacks a clear public interest purpose, one whose risks are integral to its design, cannot be fixed reliably with conditions. As I will explain below, that is the case here.

My conditions seek to support eight goals:

a. protect JCP&L ratepayers from excess transmission cost of service,

b. preserve Board's jurisdiction over all transmission activities,

c. preserve for JCP&L ratepayers an appropriate allocation of MAIT or FirstEnergy gains and profits made possible by JCP&L's ratepayer-funded investments,

d. protect JCP&L ratepayers from abusive interaffiliate relations,

e. prevent MAIT from gaining unfair advantage in the emerging competition to build new transmission facilities,

f. prevent MAIT from taking business risks harmful to JCP&L ratepayers,

g. prevent MAIT from selling off former JCP&L transmission assets without Board permission, and

h. preserve New Jersey's voice in regional decision-making.

After addressing these eight goals and the associated conditions, I propose several miscellaneous conditions necessary to the enforceability of the other conditions.

For each of the following ensuing subsections, I explain each condition and, where necessary, explain why Applicants objections are unfounded. But I also describe how inherent uncertainties in the conditions leave customers at risk. Even with these conditions, MAIT's proposal deserves rejection.

A. Protect JCP&L ratepayers from excess transmission cost of service

Condition A-1: *For any portion of MAIT's FERC-jurisdictional revenue requirement that is to be allocated to JCP&L for recovery from New Jersey retail ratepayers, MAIT shall propose to FERC only those amounts approved in advance by the Board under appropriate evidentiary procedures.*

Comment: This provision prevents FirstEnergy from seeking FERC approval for costs that the Board determines, in advance, are inappropriate.

Q. How have Applicants responded to this condition?

A. In discovery responses, Applicants have challenged this condition based on two arguments: (1) a state cannot prevent retail rate recovery of costs incurred by a utility under a FERC-approved rate; and (2) a state cannot order a utility to submit a particular proposal to FERC. As I discuss next, each argument is based on a misunderstanding and misapplication of the preemptive relationship between FERC and states under the Federal Power Act.

Q. Discuss Applicants' first argument, relating to the authority of states to disallow from retail rates costs incurred by a utility purchasing service under FERC-approved wholesale rates.

A. Applicants argue that "the BPU has no authority to disallow recovery of FERC approved transmission costs in retail transmission rates, irrespective of whether the proposed transfer occurs." Response to RCR-P-17. As a response to my condition, this statement is a *non sequitur*. Under my condition the Board would not be disallowing costs *after* those costs were approved by FERC—which, as explained below, is what happened in *Mississippi Power & Light* and in *Nantahala* (the cases cited by Applicants).[39] Rather, the Board would be finding that the MAIT transaction is not in the public interest unless Applicants agree to accept Board review of MAIT's transmission costs *before* MAIT files a rate at FERC. The Board can certainly reject a transaction that subjects JCP&L ratepayers to the risk of excess costs over which the Board has no control. If the Board can reject the transaction based on that risk, then the Board can invite the Applicants to remove that risk—by having the costs approved by the Board before they are submitted to FERC.

Since MAIT and JCP&L would be agreeing to this procedure, there could be no Board disapproval of FERC-approved costs, since the only costs FERC would approve would be costs that the Board has approved. The *Mississippi* and *Nantahala* precedents cited by Applicants would not apply.

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[39] *Mississippi Power & Light Co. v. Mississippi ex rel. Moore*, 487 U.S. 354, 374 (1988); *Nantahala Power & Light Co. v. Thornburg*, 476 U.S. 953, 966 (1986).

Second, even if we viewed the situation as the Board disapproving a FERC-approved rate (which it is not, as just explained above), numerous authorities, including FERC, state courts, and the U.S. Court of Appeals for the Third Circuit, have held that a state commission has non-preempted authority to disallow from retail rates costs incurred under a FERC-authorized rate. These decisions reason that FERC and the state are regulating different activities: FERC is regulating the actions of the wholesale (or transmission service) *seller*, while the state is regulating the actions of the wholesale (or transmission service) *buyer*.[40]

Applicants misrepresent *Nantahala* and *Mississippi* as standing for a general rule—a rule forbidding all state disallowance at retail of costs incurred under a FERC-authorized wholesale rate. It is the Third Circuit's decision in *Kentucky West Virginia*, along with the other cases cited in note 40 (and many other cases), that establishes the

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[40] *See, e.g.*, *Kentucky West Virginia Gas Co. v. Pennsylvania Public Utilities Comm'n*, 837 F.2d 600 (3d Cir. 1988) ("Since the question here of whether the retailer acted with economic prudence in purchasing from one wholesaler rather than another is never before FERC, the PUC is not regulating the same activity."); *Pike County Light & Power Co. v. Pennsylvania Public Utility Comm'n*, 465 A.2d 735, 737-38 (Pa. Commw. Ct. 1983) (same); *Central Vermont Public Service Corp.*, 84 FERC ¶ 61,194 (1998) (clarifying that FERC's approval of a wholesale rate schedule does not preclude the New Hampshire Commission from determining whether Connecticut Valley [the wholesale buyer and retail utility] acted imprudently by purchasing from CVPS rather than using available lower-priced power).

Furthermore, the U.S. Supreme Court has suggested (although not found conclusively) that the Federal Power Act does not preempt a state commission from excluding from retail rates a utility's costs incurred under a FERC-approved rate, if the reason for the disallowance is not that the FERC-set rate is wrong, but that the utility bought a *quantity* of FERC-jurisdictional service that exceeded a prudent amount. *See Nantahala Power & Light v. Thornburg*, 476 U.S. 953, 972 (1986) ("Without deciding this issue, we may assume that a particular quantity of power procured by a utility from a particular source could be deemed unreasonably excessive if lower cost power is available elsewhere, even though the higher cost power actually purchased is obtained at a FERC approved, and therefore reasonable, price.").

general rule: States may disallow a *buyer's costs* as imprudent even when FERC has approved the *seller's rate* that the buyer has paid in incurring those costs. *Nantahala* and *Mississippi* had unique facts that make them exceptions to *Kentucky West Virginia*'s general rule. They are exceptions because in both situations, unlike the MAIT situation, *FERC had issued orders that limited the retail utility's discretion.*[41] In both those situations, the state would be treating the retail utility as having had discretion to purchase amounts that differed from the amounts ordered by FERC. Such treatment by the state would have penalized the utility for doing what it had no choice to do—comply with the FERC-set limits. *That is not our situation here, because there is no FERC order requiring JCP&L to do anything*. The difference between the two Supreme Court decisions and the MAIT situation is fundamental.

Even if the Applicants' preemption argument were accurate, it does not apply here because the Board is establishing a condition necessary to protect customers from a

[41] In *Nantahala*, FERC had ruled that Nantahala had access to only 22.5 percent of the low-cost hydroelectric power available from the affiliated seller. Ignoring that FERC-ordered limitation, the North Carolina Commission set retail rates as if Nantahala had the discretion to buy 24.5 percent. North Carolina was preempted.

In *Mississippi Power & Light*, FERC had, in the Court's words, "ordered" the Mississippi retail utility to accept a particular percentage of high-cost nuclear power from an affiliated wholesale seller: "But if the integrity of FERC regulation is to be preserved, it obviously cannot be unreasonable for MP&L to procure the particular quantity of high-priced Grand Gulf power *that FERC has ordered it to pay for*." *Mississippi Power & Light*, 487 U.S. at 374 (emphasis added). Ignoring that limitation, the Mississippi Supreme Court directed the Mississippi Commission to determine whether to disallow a portion of the FERC-ordered cost as imprudent. Mississippi was preempted.

For a more detailed discussion of the *Mississippi-Nantahala* line and its implications, along with its distinction from the *Kentucky West Virginia* line, see Scott Hempling, *Regulating Public Utility Performance: The Law of Market Structure, Pricing and Jurisdiction* (American Bar Association 2013) at chapter 12.B.2.c.ii.

transaction that the Applicants have proposed. The Applicants have no legal right to a transaction that places JCP&L ratepayers at risk of higher rates. This transaction is voluntary; it is not ordered by FERC. My recommended condition is only a condition. The Applicants can volunteer to accept it or not. If they volunteer to accept it, there is no state order in conflict with a FERC rate—such state order being the very fact that led to preemption in *Nantahala* and *Mississippi*. They are free not to accept the condition—in which case the Board should deny the Application for all of the reasons I and other Rate Counsel witnesses have provided.

Q. Has FERC allowed situations in which a state has controlled the numbers a utility puts into its FERC-jurisdictional transmission revenue requirement?

A. Yes, on three occasions. FERC has (1) allowed a transmission company's FERC-jurisdictional equity cost to be fixed by a state commission until FERC authorizes a change,[42] (2) prohibited changes in particular ratios used to compute a utility's FERC-jurisdictional annual revenue requirement unless a state commission has approved the change (along with FERC approving the change),[43] and (3) approved a FERC-jurisdictional transmission tariff provision allowing "the approved margins for interest (MFI) ratio and debt service coverage (DSC) ratio," and the inputs to those ratios, to be established by a state commission, while prohibiting the utility from changing those

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[42] Southwest Power Pool Open Access Transmission Tariff, Attachment H, Addendum 14, Note F (relating to Midwest Energy, Inc.'s Transmission Formula Rate).

[43] Southwest Power Pool Open Access Transmission Tariff, Attachment H, Part F.3 (relating to Sunflower Electric Cooperative's Formula Rate Implementation Protocols).

ratios without the approval of the state commission—again with the final rate subject to FERC's approval.[44]

These examples demonstrate how a state can direct a utility to file at FERC a revenue requirement that reflects state decisions. Provided that FERC remains free to do as it wishes with the filing, there is no preemption problem. That is all that I am recommending here. *Nantahala* and *Mississippi* have no application.

Q. Still addressing your Condition A-1 (aimed at protecting JCP&L ratepayers from excess transmission cost): Discuss Applicants' second argument, that a state commission may not order a utility to make a filing at FERC.

A. Responding to my proposal that the Board first determine the transmission costs that MAIT would include in its transmission charges to JCP&L, Applicants state (Response to RCR-P-20): "It is well established that state commissions may not order utilities to submit filings at FERC. For this proposition, they cite *Massachusetts Dep't of Pub. Utils. v. United States*, 729 F.2d 886 (1st Cir. 1984).

As with their treatment of *Nantahala* and *Mississippi*, Applicants misunderstand and misapply the *Massachusetts* case. Western Massachusetts Electric Company (WMECO), a retail utility, was a party to a power supply agreement among the three utility subsidiaries of Northeast Utilities. The Massachusetts Department, dissatisfied with the share of power costs the state (through WMECO) bore under the agreement, directed WMECO to file a rate change at FERC under FPA Section 205. The First Circuit found that the Federal Power Act preempted the state's directive because the

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[44] *Southwest Power Pool, Inc.*, 143 F.E.R.C. ¶ 61,025 (2013).

Federal Power Act envisioned that FERC-jurisdictional rate filings would be made voluntarily.[45]

The *Massachusetts* facts bear no resemblance to my condition; therefore the court's reasoning does not apply. My condition does not require a party to a contract to seek a change in the contract; it establishes a condition under which MAIT *volunteers* to include in its FERC-filed cost of service only those amounts the Board has approved. If MAIT accepts the condition, the action it will take at FERC will be voluntary. Unlike the *Massachusetts* case, the Board would not be directing MAIT to file anything at FERC. MAIT's filing would be voluntary—if it wanted the Board's approval of its acquisition of JCP&L's transmission.

Q. You have described your Condition A-1, aimed at protecting JCP&L ratepayers from excess transmission cost of service, and you have responded to Applicants' critique. What are your concerns with this condition?

A. While I am confident in my legal analysis, no legal analysis is without risk. If the Board is concerned about excess transmission cost, but approves this proposal because it thinks my condition protects against that cost, and then Applicants persuade a court to invalidate the condition, the Board's approval will have placed customers at risk. And even if the appellate courts act consistently with my analysis (which the U.S. courts of appeals already have, with regard to the first example), Congress could change the Federal Power Act.

To protect against such results, the Board could require, as a further condition, that if this condition fails in court then the transaction must be unwound. Unwinding

[45] *See* 729 F.2d at 887 ("To accept Massachusetts' claim that Section 205 includes regulator-compelled utility-proposed changes would prevent the utility from choosing among reasonable rate practice alternatives.").

should not be impractical, because the MAIT transaction is mere paper-shuffling—ownership transferred from one affiliate to another. But at that point in time there could be a different Board membership that rejects unwinding. That is a distinct reason for the present Board to reject Applicants' proposal.

B. Preserve Board's jurisdiction over all transmission activities

Condition B-1: *MAIT, and all future owners of the transferred assets, shall submit to the Board's jurisdiction over all activities relating to the quality of transmission service, including but not limited to siting, eminent domain, planning, construction and operation.*

This condition is necessary to prevent MAIT from later arguing that the transfer diminished the Board's jurisdiction. The mere movement of assets from one affiliate to another should make no difference in the protection ratepayers receive from the Board.

Q. What is your concern with condition B-1?

A. As with Condition A-1, there still is risk of preemption. The "filed rate doctrine" (which is a basis for preemption in the FERC-state context) applies not only to rates, but to other terms and conditions of service.[46] It is possible for a Board directive relating to quality of service, construction or operation to conflict with (or be deemed to enter the field occupied by) PJM's FERC-jurisdictional practices. There is no guarantee against such occurrence.

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[46] *See, e.g., Northern Natural Gas Co. v. Kansas Corp. Comm'n*, 372 U.S. 84, 90–91 (1963) (quantity of natural gas production); *Chicago & N.W. Transportation Co. v. Kalo Brick & Tile Co*., 450 U.S. 311, 324–26 (1981) (abandonment of rail service); *AT&T v. Central Office Tel., Inc*., 524 U.S. 214, 223–24, 226 (1998) (contract claims relating to brochure's assurances of "faster provisioning, the allocation of charges through multilocation billing, and various matters relating to deposits, calling cards, and service support").

C. Preserve for JCP&L ratepayers an appropriate allocation of MAIT and FirstEnergy net income made possible by JCP&L's ratepayer-funded investments

Condition C-1: *Where MAIT earns, or should have earned (based on prudent utility practice), net income from sales of transmission service to customers other than JCP&L, whether such service relies on the transferred JCP&L facilities or future facilities, the Board shall reflect such net income as a credit against JCP&L's retail revenue requirement, to the extent such net income is attributable to then-current or past financial support provided by JCP&L's ratepayers.*

Comment: Applicants have stated that JCP&L will receive dividends from MAIT. Those dividends will reflect not only net income from the sale of transmission service over JCP&L assets, but also net income from other MAIT activities.[47] To the extent this net income was made possible by JCP&L ratepayers' history of cost support for the facilities providing such service, the ratepayers should receive that net income as a revenue credit. Otherwise there would be a mismatch between benefit and burden—ratepayers bearing the burden of the historic costs, but shareholders receiving the net income made possible by those costs.

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[47] See Response to RCR-P-22 (relating to Staub Direct Testimony (at 16) that "JCP&L will be receiving a dividend for its investment that will be equivalent to the earnings that it would have realized prior to the transfer of transmission assets"):

> Q. Do you agree that Staub's statement applies only to that portion of MAIT's facilities that JCP&L contributed; it does not apply to the other facilities that MAIT acquires in the future. If you disagree, please explain.
>
> Response: "Petitioners do not agree. JCP&L will realize dividends from MAIT investments, based on its fractional ownership in MAIT."

See also response to RCR-F-16: "MAIT's profits and losses shall be allocated to the Members (*i.e.*, FET and the three contributing utilities) from time to time pro rata in accordance with each Member's capital account balance. Specifically, MAIT will distribute all of its earnings to FET and the three contributing utilities...."

Condition C-2: *JCP&L or MAIT shall obtain Board approval before entering into any arrangement by which a third party gains any rights to property underlying the Ground Lease.*

Condition C-3: *To the extent JCP&L receives from MAIT, or from any subsequent purchaser of MAIT, or of the JCP&L facilities that were transferred to MAIT, any "fair market value" payments for rights to any property underlying the Ground Lease, JCP&L shall treat such payments as revenue credits against its retail revenue requirement.*

Comment: Section 5.3 of the Ground Lease provides in relevant part: "Prior to making any Addition/Alteration on Leased Property or undertaking work on the Premises with respect to New Facilities, MAIT shall pay to Lessor [*i.e.*, JCP&L] a lump sum equal to the fair market value of the property rights required therefor." Section 7.3 of the Ground Lease provides, in relevant part, that MAIT "shall pay to Lessor [*i.e.*, JCP&L] a lump sum equal to the fair market value of the property rights reserved or used for MAIT's additional transmission lines if the same result in an additional burden on the Premises." While these provisions ensure fair market payments to JCP&L, they do not ensure the passthrough of those payments to JCP&L's ratepayers.

This Condition C-2 ensures that passthrough. There are two justifications. First, since JCP&L ratepayers have borne the economic cost and risk of the property subject to the Ground Lease, they should receive any associated economic value, such as the value derived from a payment by MAIT of fair market value. Otherwise there is a mismatch of risk and reward, with ratepayers taking the risk (of their payments attributable to the property exceeding the value to them of the property) and FirstEnergy shareholders receiving the reward. Second, the condition ensures that MAIT, JCP&L and any third party do not gain an unearned advantage against competitors who do not have access to property at rental rates reflecting fair market value.

Condition C-4: *Section 10.1 of the Ground Lease, granting MAIT a "right of first offering," shall be deleted. Should JCP&L determine to sell any Leased Property (as defined by the Ground Lease), JCP&L must sell to the buyer offering the highest price, which buyer may or may not be MAIT. Such sale shall not be consummated unless and until the Board finds that it is consistent with the public interest.*

Comment: By granting MAIT a right of first offering, Section 10.1 potentially lowers the price that JCP&L could obtain for a sale. Prospective non-MAIT bidders for the property, *i.e.*, competitors of MAIT who do not have access to the property at a rental rate reflecting book value, will lack an incentive to offer a high price because MAIT can win the bid by matching that price and exercising its "right of first offering."

Condition C-5: *Neither MAIT nor any transmission facilities owned by MAIT shall be sold to any other person, whether or not affiliated with FirstEnergy, without Board approval. In any such sale, any acquisition premium (excess of purchase price over book value) shall be credited against JCP&L's revenue requirement, to the extent such premium is attributable to JCP&L customers' historic cost support of MAIT's transmission assets.*

Comment: This condition, like the others in this "C" series, aligns benefits and burdens by ensuring that the market value made possible by JCP&L ratepayers' history of cost support is returned to them.

Q. What are your concerns with the conditions in this "C" series?

A. These five conditions are supported by two well-established principles. First, there should be symmetry of risk and reward; benefits should follow burdens. Where ratepayers have borne economic responsibility for an asset, paying its book value regardless of its market value, they should receive the associated gains when the asset is capable of producing those gains. Second, a public utility has a duty to minimize its customers' costs by lawfully exploiting all opportunities to produce those gains.

While these principles are clear, their implementation can be difficult. There can be disputes about market value, and about whether a utility's actions were sufficient and its inactions justified. The monitoring of affiliate relations, moreover, takes extra regulatory effort, requiring resources which the Board may not have (and which MAIT has made no offer to supplement). So this transaction creates risks of asymmetry of risk and reward that my words alone will not necessarily prevent.

D. Protect JCP&L ratepayers from inappropriate interaffiliate relations

Condition D-1: *MAIT and JCP&L agree that the Service Agreement and the Mutual Assistance Agreement shall be amended to the extent necessary to make clear that neither MAIT nor JCP&L has any obligation to buy services from, or sell services to, other FirstEnergy affiliates. MAIT and JCP&L agree that the Board will set JCP&L's retail rates as if MAIT and JCP&L have transacted for services (as buyer or seller) with whatever party, and under whatever arrangement, minimizes JCP&L's retail revenue requirement.*

Condition D-2: *MAIT and JCP&L agree that all affiliates of FirstEnergy shall grant the Board and Rate Counsel full and timely access to all books and records found by the Board to be necessary to its determination of the reasonableness of charges and practices affecting transmission costs to JCP&L customers.*

Comment: This condition prohibits affiliate abuse, such as when a utility affiliate purchases a product or service from another affiliate at a price exceeding market price, or sells a product or service to another affiliate at a price below market price. It makes clear that the utility affiliate has an obligation to minimize its utility revenue requirement, and must face no internal constraints preventing it from doing so.

Q. What are your concerns with the conditions in this "D" series?

A. The concerns are the ones explained in the "C" series. A risk of affiliate abuse exists when complicated corporate structures combine with limited regulatory resources.

Ratemaking depends on auditing. Auditing is not like a trip to the dentist, who checks every tooth. Auditing is sampling. It cannot promise 100% coverage—especially with limited regulatory resources.

E. Prevent unearned advantage in the competition to build new transmission facilities

Condition E-1: *MAIT agrees not to seek PJM approval for projects whose cost will affect New Jersey ratepayers, without first obtaining approval from the Board. MAIT shall take all actions the Board deems necessary to ensure that non-affiliated entities otherwise qualified to provide transmission service have a reasonable opportunity to compete to build transmission facilities and provide transmission service affecting JCP&L customers, on terms comparable to those available to MAIT and JCP&L. Such MAIT and JCP&L actions shall include, but not be limited to, exercising on behalf of non-affiliated entities the power of eminent domain and the right to seek Board override of local zoning laws, to the extent that power and right not be available to such non-affiliated entities.*

Comment: Competition for the opportunity to own transmission assets necessary to serve JCP&L ratepayers will protect ratepayers from excess costs—including unnecessary FERC "incentives." Furthermore, such competition has been endorsed, and made more likely, by FERC's Order No. 1000.[48] Order No. 1000 removed incumbent transmission owners' "right of first refusal" for regional transmission projects. It also mandated an orderly process by which non-incumbent transmission developers could

[48] *Transmission Planning and Cost Allocation by Transmission Owning and Operating Pub. Utils.*, Order No. 1000, FERC Stats. & Regs. ¶ 31,323, 76 Fed. Reg. 49,842 (2011), *upheld in South Carolina Public Service Authority v. FERC*, No. 12-1232 (D.C. Cir. Aug. 15, 2014).

compete with incumbent transmission owners for the opportunity to build new transmission projects.[49]

The Board should make clear that the sale of JCP&L's transmission assets to MAIT is not an opportunity for FirstEnergy to block or discriminate against competitors seeking to bring to transmission markets new ways to reduce cost and improve service for JCP&L customers. MAIT also should not be able to enjoy a competitive advantage arising solely from its "public utility" status. To prevent such unearned advantage, the Board has these options: (a) Deny the eminent domain powers and local zoning override rights to MAIT, (b) make these same powers and rights available to all competing transmission providers including MAIT (if the Board has the statutory power to do so),[50] or (c) grant those powers and rights to MAIT, but only on condition that MAIT exercise those powers on behalf of any competing transmission provider designated by the Board.[51]

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[49] Order No. 1000 conditioned the removal of each right of first refusal on a finding that the right was not protected by the *Mobile-Sierra* doctrine—an issue I will discuss briefly in the text.

[50] Consider this example from Mass. Gen. Laws ch. 164 sec. 69R:

> Any electric or gas company, generation company, or wholesale generation company may petition the department for the right to exercise the power of eminent domain with respect to the facility or facilities specified and contained in a petition . . . or a bulk power supply substation if such [electric or gas] company is unable to reach agreement with the owners of land for the acquisition of any necessary estate or interest in land.

[51] An analogy to this treatment appears in FERC's Order No. 2003. That Order required transmission owners to provide "interconnection service" on the same non-discriminatory basis as transmission access under Order No. 888. FERC recognized that a state might make eminent domain authority available to the traditional incumbent utility but not to merchant generators. Given this fact, if a utility was competing with the new

Q. What are your concerns with Condition E-1?

A. In this effort to prevent unearned competitive advantage, it is not clear that Applicants will be willing partners. Responding to a question on whether they will insist on a right of first refusal to build regional transmission projects (notwithstanding Order No. 1000's prohibition of that right of first refusal and the D.C. Circuit's upholding of that Order—albeit subject to *Mobile-Sierra* review), they said: "MAIT plans to conduct transmission planning and construction within the full scope of its rights as such rights are described in the PJM Open Access Transmission Tariff, the PJM Consolidated Transmission Owners Agreement, the PJM Operating Agreement, relevant orders of the Federal Energy Regulatory Commission (FERC), and applicable court rulings."[52] Meanwhile their affiliates and other utilities argued the U.S. Court of appeals that they still have a right of first refusal.[53]

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merchant companies to build generation it could exercise its eminent domain power discriminatorily, favoring its own interconnection over its competitors'. FERC's rule forbade favoritism: The utility must either offer to use its eminent domain power for its competitors, or not use it for itself. *Standardization of Generator Interconnection Agreements and Procedures*, Order No. 2003, 104 FERC para. 61,103 (2003), *upheld in Nat'l Ass'n of Regulatory Util. Comm'rs v. FERC*, 475 F.3d 1277 (D.C. Cir. 2007).

[52] Response to RCR-P-26.

[53] In the U.S. Court of Appeals for the D.C. Circuit, FirstEnergy and certain other incumbent transmission owners argued that FERC's elimination (in Order No. 1000) of the right of first refusal should not apply to certain of their contracts. They asserted that the provisions creating that right are protected by the *Mobile-Sierra* doctrine—a doctrine, established by the Supreme Court as an interpretation of the Federal Power Act, that limits FERC's authority to modify FERC-jurisdictional contracts without the contracting parties' consent. The case was *American Transmission Systems, Inc., et al. v. Federal Energy Regulatory Commission*, Nos. 14-1085 and 14-1136. American Transmission Systems is a subsidiary of FirstEnergy Transmission and therefore an affiliate of MAIT. On July 1, 2016, the Court of Appeals dismissed the petitions for review for lack of jurisdiction, finding that the petitioners had failed to preserve their arguments before FERC.

Applicants also seek to limit the Board's authority in this area, stating:

> Petitioners are unaware that the Board has the authority to limit MAIT's transmission rights and obligations to construct transmission projects that are mandated under the PJM Regional Transmission Expansion Plan (RTEP) process. PJM's RTEP process for the JCP&L footprint will be regulated in all respects by FERC, just as it is regulated today.[54]

Still, the Board has authority to reject this transaction if it finds that a result will be diminution in competition to provide transmission service to New Jersey ratepayers. And if the Board can reject the transaction based on a harm, it can condition any approval with limitations designed to prevent that harm.

F. Prevent MAIT from taking business risks harmful to JCP&L ratepayers

Condition F-1: *Without the Board's permission, neither MAIT nor any subsidiary thereof may engage in any businesses other than ownership and operation of transmission assets necessary to serve the customers of FirstEnergy operating companies as they exist today.*

Comment: Asked whether MAIT would commit to being "purely a regulated transmission company, *i.e.*, own no unregulated operations," MAIT responded that it "will own and operate only transmission assets."[55] By itself, this answer is aspirational only; it does not legally preclude MAIT from engaging in ventures involving risks that

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In a separate case, one not involving FirstEnergy affiliates, the same Court of Appeals upheld FERC's determination that the *Mobile-Sierra* doctrine does not prevent FERC from eliminating the right of first refusal, because the doctrine cannot be used to protect provisions that "rather than promote competition, … create disincentives for nonincumbents to identify and commit resources to cost-effective solutions to transmission needs." *Oklahoma Gas & Electric Co. v. FERC*, No. 14-1281 (D.C. Cir. July 1, 2016), slip opinion at 10 (noting that the "Seventh Circuit has gone so far as to describe such self-protective and anti-competitive agreements as cartel-like"), *citing MISO Transmission Owners v. FERC*, 819 F.3d 329, 335 (7th Cir. 2016).

[54] Response to RCR-P-26.

[55] Response to RCR-F-21.

could adversely affect JCP&L ratepayers. Such ventures could include acquiring non-transmission assets or non-transmission businesses, acquiring transmission assets to serve customers other than customers of current FirstEnergy operating companies, or acting as a "merchant" transmission company (*i.e.*, making transmission investments without a guaranteed customer and revenue stream)—all ventures whose business risks could be higher than if MAIT confined itself to serving the existing FirstEnergy operating companies. MAIT claims that savings will arise from being a "pure" transmission company. This condition holds MAIT to its word.

Q. What is your concern with Condition F-1?

A. This condition, if MAIT accepts it, maintains MAIT as a "pure" transmission company. The premise is that "pure" means lower risk and therefore customer savings. But risks arise not only from business mix but also from business conduct. This condition does not prevent MAIT from financing its operations with excess debt, competing in more markets than it can handle competently, or under-funding its staff such that it is unprepared for changes in technology or other business conditions. JCP&L's assets will become part of a business entity whose activities will be outside the Commission's control. "Pure" does not mean "low risk" or "high quality."

G. Prevent MAIT from selling off former JCP&L transmission assets without Board permission

Condition G-1: *Without Board permission, MAIT shall not sell, or otherwise transfer control, to any other entity, whether or not affiliated with FirstEnergy, any transmission assets located within JCP&L's service territory or relied on by JCP&L for service to its retail ratepayers.*

Comment: The Applicants already have agreed to this, I think: "FirstEnergy has no plans or expectations to spin-off or sell MAIT. As Petitioners stated in the response to

S-JCP&L-MAIT-3, if the Board grants the relief requested in the Petition, MAIT will be a New Jersey public utility and Board approval would be required prior to a MAIT spin-off, third party sale, or merger."[56]

Q. What are your concerns with Condition G-1?

A. I am not concerned with the condition; I am concerned with MAIT's response. MAIT's response avoids the condition's specifics. That is, the response addresses only the sale of the corporation ("spin-off, third party sale, or merger"), leaving open the possibility of selling some or all of the underlying transmission assets. Furthermore, the response talks only of "plans" and "expectations;" it does not make commitments. My proposed condition covers sales of the assets as well as of the corporation, and converts the absence of "plans" and "expectations" into a legal commitment not to act without Board permission. Any resistance to this condition should cause the Board to question MAIT's commitment.

Condition G-2: *If MAIT sells, or otherwise transfers control, to any other entity, any transmission assets whose cost of service has been borne by New Jersey ratepayers, the acquisition premium (that portion of the purchase price exceeding book value of the sold or transferred assets) shall be reflected in JCP&L's retail revenue requirement as an above-the-line credit, to the extent that such premium is attributable to the JCP&L ratepayers' historic cost support.*

[56] Response to RCR-F-35. See also response to S-JCP&L-MAIT-3 ("If the Board approves Petitioners' request that MAIT be deemed a New Jersey public utility, the assets transferred to MAIT can be sold or transferred at a later time upon the approval of the N.J. Board of Public Utilities. At this time FirstEnergy has no plans to sell any of the assets owned by MAIT.").

Comment: This condition, like many of the others, applies the "benefits follow burdens" principle to situations where MAIT sells control of the JCP&L transmission assets for a premium.

H. Preserve New Jersey's voice in regional decision-making

Condition H-1: *MAIT shall not exit PJM without BPU approval.*

Comment: According to Applicants' response to RCR-F-36, this condition is "consistent with the NJBPU's order in the FirstEnergy-GPU merger case (BPU Order in Docket No. EM00110870, dated October 9, 2001)...."

I. Ensure enforcement of the conditions

Condition I-1: *The Board reserves the power to take all lawful actions as necessary to protect the public interest should MAIT or JCP&L violate any condition established in this proceeding or any order of the Board. Such actions include, without limitation, fines, revocation of public utility status, termination or amendment of the Ground Lease, or withdrawal of the approval granted in this proceeding or in any other proceeding relating to the transferred transmission assets.*

Condition I-2: *Each of these conditions shall be binding on all future owners of the transferred assets. MAIT and its owners therefore shall include in any contract to sell itself, or any of the transferred assets, a provision notifying the buyer of all conditions and making such buyer subject to such conditions.*

Condition I-3: *The Applicants shall revise all agreements associated with this transaction as necessary to reflect these conditions.*

Comment: These three conditions assist the enforceability of all the other conditions. The Applicants should know in advance that violations of the conditions or of Board orders will have consequences proportionate to the violations. The ultimate consequence is a return to the status quo of JCP&L ownership. Because MAIT is largely a shell company with no employees, this transaction is largely a paper transaction, involving lawyers preparing and executive signing documents that transfer title of the transmission assets from JCP&L to MAIT. It is not a merger in which personnel, assets, business operations and management are meshed. An egg is being transferred from the right hand to the left hand; two eggs are not being broken and scrambled. Returning to the status quo should not be impractical.

But if the Board (or MAIT or JCP&L) does view returning to the status quo as impractical, that is another reason to reject this transaction. Just as one does not enter a highway without knowing how one will exit, the Board should not approve a transaction in which appropriate consequences for misbehavior are impractical. This reasoning is especially applicable to conditions that FirstEnergy argues are preempted by the Federal Power Act (arguments that I have addressed in Part V.A above). If the Board is concerned that a condition necessary to the public interest is not sustainable legally, then the solution is not to drop the condition but to disapprove the transaction. So when Applicants oppose a condition on grounds of "preemption," they either are demonstrating their willingness to forego the transaction, or are insisting on having their cake and eating it too—having the transaction and retaining the ability erase a condition that protects against unnecessary rate increases.

Q. Provide final comments about your conditions.

A. I recommend the Board reject this transaction, for the reasons I gave in Parts II (risks, costs and lost opportunities), III (no certain benefits) and IV (adverse effects of allowing a near-shell to become a "public utility"). In this Part V I sought to design conditions to eliminate the problems that compelled my recommendation to reject. I then explained that weaknesses in these make then insufficient to rescue this transaction—even if it remained in its original form.

But this transaction has not remained in its original form. MAIT now seeks to designate its shell company a "public utility" under New Jersey law, by having JCP&L transfer distribution facilities and distribution customers to MAIT. As I explained in Part IV, that proposal adds new problems—none of which can be fixed by my conditions.

Conclusion

Q. Does this conclude your Direct Testimony?

A. Yes.

Appendix A

Scott Hempling, Attorney at Law

Scott Hempling is an attorney, expert witness and teacher. As an attorney, he has assisted clients from all industry sectors—regulators, utilities, consumer organizations, independent competitors and environmental organizations. As an expert witness, he has testified numerous times before state commissions and before committees of the United States Congress and the legislatures of Arkansas, California, Maryland, Minnesota, Nevada, North Carolina, South Carolina, Vermont, and Virginia. As a teacher and seminar presenter, he has taught public utility law and policy to a generation of regulators and practitioners, appearing throughout the United States and in Australia, Canada, Central America, Germany, India, Italy, Jamaica, Mexico, New Zealand, Nigeria, Peru and Vanuatu.

The first volume of his legal treatise, *Regulating Public Utility Performance: The Law of Market Structure, Pricing and Jurisdiction*, was published by the American Bar Association in 2013. It has been described as a "comprehensive regulatory treatise [that] warrants comparison with Kahn and Phillips." The second volume will address the law of corporate structure, mergers and acquisitions. His book of essays, *Preside or Lead? The Attributes and Actions of Effective Regulators*, has been described as "matchless" and "timeless"; a Spanish translation has been circulated throughout Latin America, through the auspices of the Asociación Iberoamericana de Entidades Reguladoras de la Energía and REGULATEL (an association of telecommunications regulators from Europe and Latin America). The essays continue monthly at www.scotthemplinglaw.com.

His articles have appeared in the *Energy Bar Journal*, *Electricity Journal, Energy Regulation Quarterly, Public Utilities Fortnightly, ElectricityPolicy.com*, publications of the American Bar Association, and other professional publications. These articles cover such topics as mergers and acquisitions, the introduction of competition into formerly monopolistic markets, corporate restructuring, ratemaking, utility investments in nonutility businesses, transmission planning, renewable energy and state–federal jurisdictional issues. From 2006 to 2011, he was the Executive Director of the National Regulatory Research Institute.

Hempling is an adjunct professor at the Georgetown University Law Center, where he teaches courses on public utility law and regulatory litigation. He received a B.A. *cum laude* in (1) Economics and Political Science and (2) Music from Yale University, where he was awarded a Continental Grain Fellowship and a Patterson research grant. He received a J.D. *magna cum laude* from Georgetown University Law Center, where he was the recipient of an *American Jurisprudence* award for Constitutional Law. Hempling is a member of the U.S. Department of Energy's Future Electric Utility Regulation Advisory Group. More detail is available at www.scotthemplinglaw.com.

Education

B.A. *cum laude*, Yale University (majors: Economics and Political Science, Music), 1978. Recipient of a Continental Grain Fellowship and a Patterson Research grant.

J.D. *magna cum laude*, Georgetown University Law Center, 1984. Recipient of *American Jurisprudence* award for Constitutional Law; editor of *Law and Policy in International Business*; instructor, legal research and writing.

Professional Legal Experience

President, Scott Hempling, Attorney at Law LLC (2011–present)

Adjunct Professor, Georgetown University Law Center (2011–present)

Executive Director, National Regulatory Research Institute (2006–2011)

Founder and President, Law Offices of Scott Hempling, P.C. (1990–2006)

Attorney, Environmental Action Foundation (1987–1990)

Attorney, Spiegel and McDiarmid (1984–1987)

Past Clients

Independent Power Producers and Marketers

California Wind Energy Association, Cannon Power Company, Electric Power Supply Association, EnerTran Technology Company, National Independent Power Producers, SmartEnergy.com, U.S. Wind Force.

Investor-Owned Utilities

Madison Gas & Electric, Oklahoma Gas & Electric.

Legislative Bodies

Vermont Legislature, South Carolina Senate.

Municipalities and Counties

American Public Power Association; Connecticut Municipal Electric Energy Cooperative; Iowa Association of Municipal Utilities; City of Jacksonville, Florida; Montgomery County, Maryland; City of Winter Park, Florida.

Public Interest Organizations

Alliance for Affordable Energy, American Association of Retired Persons, Consumer Federation of America, Energy Foundation, Environmental Action Foundation, GRID2.0 (Washington, D.C.), Illinois Citizens Utility Board, Union of Concerned Scientists.

Regulatory Commissions and Consumer Agencies

Arkansas Public Service Commission, Arizona Corporation Commission, Connecticut Department of Public Utility Control, Connecticut Office of Consumer Counsel, Delaware Public Service Commission, Hawaii Public Utilities Commission, State of Hawaii Office of Planning, Indiana Utility Regulatory Commission, Kansas Corporation Commission, State of Maryland, Maryland Energy Administration, Maryland Attorney General, Maryland Office of People's Counsel, Massachusetts Attorney General, Massachusetts Department of Public Utilities, Mexico's Comisión Reguladora de Energía, Minnesota Public Utilities Commission, Mississippi Public Service Commission, Mississippi Public Utilities Staff, Missouri Public Service Commission, Montana Public Service Commission, National Association of Regulatory Utility Commissioners, Nevada Consumer Advocate, Nevada Public Service Commission, New Hampshire Public Utilities Commission, New Jersey Division of Ratepayer Advocate, North Carolina Utilities Commission, Ohio Public Utilities Commission, Oklahoma Corporation Commission, Pennsylvania Office of Consumer Advocate, Puerto Rico Energy Commission, South Carolina Public Service Commission, Texas Office of Public Utility Counsel, Vermont Department of Public Service, Virginia State Corporation Commission, Wisconsin Attorney General.

Testimony Before Legislative Bodies

United States Senate

Committee on Energy and Natural Resources, May 2008 (addressing the adequacy of state and federal regulation of electric utility holding company structures).

Committee on Energy and Natural Resources, Feb. 2002 (analyzing bill to amend the Public Utility Holding Company Act) (PUHCA).

Committee on Energy and Natural Resources, May 1993 (analyzing bill to transfer PUHCA functions from SEC to FERC).

Committee on Banking and Urban Affairs, Sept. 1991 (analyzing proposed amendment to PUHCA).

Committee on Energy and Natural Resources, March 1991 (analyzing proposed amendment to PUHCA).

Committee on Energy and Natural Resources, Nov. 1989 (analyzing proposed amendment to PUHCA).

United States House of Representatives

Subcommittees on Energy and Power and Telecommunications and Finance, Commerce Committee, Oct. 1995 (regulation of public utility holding companies).

Subcommittee on Energy and Power, Energy and Commerce Committee, July 1994 (analyzing future of the electric industry).

Subcommittee on Energy and Power, Energy and Commerce Committee, May 1991 (analyzing proposed amendment to PUHCA).

Subcommittee on Environment, Energy and Natural Resources, Government Operations Committee, Oct. 1990 (assessing electric utility policies of FERC).

Appropriations Subcommittee on Commerce, Justice, State and the Judiciary, Apr. 1989 (discussing proposals to increase staff administering PUHCA).

Subcommittee on Energy and Power, Sept. 1988 (discussing "independent power producers" and PUHCA).

State Legislatures

Judiciary Committee, South Carolina Senate (2000) (discussing options for introducing retail electricity competition).

Commerce Committee, Arkansas General Assembly (1999) (discussing legislation to introduce retail electricity competition).

Health Access Oversight Committee, Vermont General Assembly (1999) (discussing options for state regulation of prescription drug pricing).

Electricity Restructuring Task Force, Virginia General Assembly (1999) (discussing options for introducing retail electricity competition).

Study Committee, North Carolina Legislature (1999) (discussing legislation to introduce retail electricity competition).

Committees on General Affairs, Finance, Vermont Senate (February-March 1997) (discussing options for structuring the electric industry).

Task Force to Study Retail Electric Competition, Maryland General Assembly (1997) (discussing options for introducing retail electricity competition).

Interim Committee on Electric Restructuring, Nevada Legislature (1995-97) (discussing options for structuring the electric industry).

Committee on Energy and Public Utilities, California Senate (December 1989) (discussing relationships between electric utilities and their non-regulated affiliates).

Testimony before Commissions, Courts and Arbitration Panels

U.S. District Court for Middle District of Florida: Effect of disaffiliation, mandated by Public Utility Holding Company Act, on corporation's liability under the Comprehensive Environmental Response, Compensation, and Liability Act (2016).

New Jersey Board of Public Utilities: Transfer of utility transmission assets to holding company affiliate (2015-2016).

Hawaii Public Utilities Commission: Holding company acquisition of utility holding company (2015-2016).

Louisiana Public Service Commission: Holding company acquisition of utility holding company (2015).

Connecticut Public Utilities Regulatory Authority: Holding company acquisition of utility holding company (2015).

District of Columbia Public Service Commission: Holding company acquisition of utility holding company (2014-15).

Maryland Public Service Commission: Holding company acquisition of utility holding company (2014-15).

Mississippi Public Service Commission: Utility holding company's divestiture of its utility subsidiaries' transmission assets to an independent transmission company (2013).

U.S. District Court for Minnesota: Effects of Minnesota statute limiting reliance on fossil fuels (2013).

Tobacco Arbitration Panel: Principles for regulating cigarette manufacturers (on behalf of State of Maryland) (2012).

Illinois Commerce Commission: Performance-based ratemaking (2012).

Maryland Public Service Commission: Holding company acquisition of utility holding company (2011).

California Public Utilities Commission: Performance-based ratemaking (2011).

Superior Court of Justice, Ontario, Canada: Renewable energy contractual relations under the Public Utility Regulatory Policies Act (2007).

Florida arbitration panel: Financial responsibility for stranded investment arising from municipalization (2003).

Minnesota Public Utilities Commission: Transmission expansion for renewable power producers (2002).

U.S. District Court for Wisconsin: State corporate structure regulation in relation to the Commerce Clause of the U.S. Constitution (2002).

New Jersey Board of Public Utilities: Conditions for provider of last resort service (2001).

Indiana Utility Regulatory Commission: Risks of overcharging ratepayers using "fair value" rate base (2001).

North Carolina Utilities Commission: Effect of merger on state regulatory powers (2000).

Wisconsin Public Service Commission: Effect of merger on state regulatory powers (2000).

New Jersey Board of Public Utilities: Affiliate relations in telecommunications sector (1999).

Illinois Commerce Commission: Affiliate relations and mixing of utility and non-utility businesses (1998).

Texas Public Utilities Commission: "Incentive" ratemaking, introduction of competition (1996).

Vermont Public Service Board: Cost allocation and interaffiliate pricing between service company and utility affiliates (1990).

Publications

Books

Regulating Public Utility Performance: The Law of Market Structure, Pricing and Jurisdiction (American Bar Association 2013).

Preside or Lead? The Attributes and Actions of Effective Regulators (2d edition 2013).

Articles, Papers and Book Chapters

"Certifying Regulatory Professionals: Why Not?", *ElectricityPolicy.com* (June 2015).

"Litigation Adversaries and Public Interest Partners: Practice Principles for New Regulatory Lawyers," *Energy Law Journal* (Spring 2015), available at http://www.felj.org/sites/default/files/docs/elj361/14-1-Hempling-Final-4.27.pdf.

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"When Technology Gives Customers Choices, What Happens to Traditional Monopolies?" *Trends* (American Bar Association, Section of Environment, Energy and Resources July/August 2014).

"Democratizing Demand and Diversifying Supply: Legal and Economic Principles for the Microgrid Era," *ElectricityPolicy.com* (March 2014).

"Non-Transmission Alternatives: FERC's 'Comparable Consideration' Needs Correction," *ElectricityPolicy.com* (June 2013).

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"Riders, Trackers, Surcharges, Pre-Approvals, and Decoupling: How Do They Affect the Cost of Equity?" *ElectricityPolicy.com* (March 2012).

"Regulatory Support for Renewable Energy and Carbon Reduction: Can We Resolve the Tensions Among Our Overlapping Policies and Roles?" (National Regulatory Research Institute 2011).

"Infrastructure, Market Structure, and Utility Performance: Is the Law of Regulation Ready?" (National Regulatory Research Institute 2011).

"Cost-Effective Demand Response Requires Coordinated State-Federal Actions" (National Regulatory Research Institute 2011).

"Effective Regulation: Do Today's Regulators Have What It Takes?" in Kaiser and Heggie, *Energy Law and Policy* (Carswell 2011).

Renewable Energy Prices in State-Level Feed-in Tariffs: Federal Law Constraints and Possible Solutions (lead author, with C. Elefant, K. Cory, and K. Porter), Technical Report NREL//TP-6A2-47408 (January 2010).

Pre-Approval Commitments: When And Under What Conditions Should Regulators Commit Ratepayer Dollars to Utility-Proposed Capital Projects? (National Regulatory Research Institute 2008) (with Scott Strauss).

"Joint Demonstration Projects: Options for Regulatory Treatment," *The Electricity Journal* (June 2008).

"Corporate Structure Events Involving Regulated Utilities: The Need for a Multidisciplinary, Multijurisdictional Approach," *The Electricity Journal* (Aug./Sept. 2006).

"Reassessing Retail Competition: A Chance to Modify the Mix" *The Electricity Journal* (Jan./Feb. 2002).

The Renewables Portfolio Standard: A Practical Guide (National Association of Regulatory Utility Commissioners, Feb. 2001 (with N. Rader).

Promoting Competitive Electricity Markets Through Community Purchasing: The Role of Municipal Aggregation (American Public Power Association, Jan. 2000 (with N. Rader).

"Electric Utility Holding Companies: The New Regulatory Challenges," *Land Economics*, Vol. 71, No. 3 (Aug. 1995).

Is Competition Here? An Evaluation of Defects in the Market for Generation (National Independent Energy Producers 1995) (co-author).

The Regulatory Treatment of Embedded Costs Exceeding Market Prices: Transition to a Competitive Electric Generation Market (1994) (with Ken Rose and Robert Burns).

"Depolarizing the Debate: Can Retail Wheeling Coexist with Integrated Resource Planning?" *The Electricity Journal* (Apr. 1994).

Reducing Ratepayer Risk: State Regulation of Electric Utility Expansion. (American Association of Retired Persons 1993).

"'Incentives' for Purchased Power: Compensation for Risk or Reward for Inefficiency?" *The Electricity Journal* (Sept. 1993).

"Making Competition Work," *The Electricity Journal* (June 1993).

"Confusing 'Competitors' With 'Competition.'" *Public Utilities Fortnightly* (March 15, 1991).

"The Retail Ratepayer's Stake in Wholesale Transmission Access," *Public Utilities Fortnightly* (July 19, 1990).

"Preserving Fair Competition: The Case for the Public Utility Holding Company Act," *The Electricity Journal* (Jan./Feb. 1990).

"Opportunity Cost Pricing." *Wheeling and Transmission Monthly* (Oct. 1989).

"Corporate Restructuring and Consumer Risk: Is the SEC Enforcing the Public Utility Holding Company Act?" *The Electricity Journal* (July 1988).

"The Legal Standard of 'Prudent Utility Practices' in the Context of Joint Construction Projects," *NRECA/APPA Newsletter Legal Reporting Service* (Dec. 1984/Jan. 1985) (co-author).

Speaker and Lecturer

United States: American Antitrust Institute; American Association of Retired Persons; American Bar Association; American Power Conference; American Public Power Association; American Wind Energy Association; Chicago Bar Association (Energy Section); Columbia University Institute for Tele-Information; Electric Cooperatives of South Carolina; Electric Power Research Institute; *Electric Utility Week;* Electricity Consumers Resource Council; *Energy Daily;* Executive Enterprises; Exnet; Federal Energy Bar Association; Federal Energy Bar Association; Harvard Electricity Policy Group; Infocast; Louisiana Energy Bar; Management Exchange; Maryland Resiliency Through Microgrids Task Force; MIT Energy Initiative; Mid-America Association of Regulatory Commissioners; MidAtlantic Demand Resources Initiative; Mid-Atlantic Conference of Regulatory Utility Commissioners; National

Association of Regulatory Utility Commissioners; National Association of State Utility Consumer Advocates; National Conference of Regulatory Attorneys; National Governors Association; National Independent Energy Producers; New England Conference of Public Utility Commissioners; New England Public Power Association; New York Bar Association (Energy Section); North Carolina Electric Membership Corporation; Pennsylvania Bar Institute; Puerto Rico Energy Policies Forum; Regulatory Studies programs at Michigan State University, New Mexico State University and University of Idaho; Society of American Military Engineers; Society of Utility and Regulatory Financial Analysts; Southeastern Association of Regulatory Utility Commissioners; U.S. Department of Energy Forum on Electricity Issues; U.S. Environmental Protection Agency; World Regulatory Forum; Yale Alumni in Energy.

International: Australian Competition and Consumer Commission; Australian Energy Regulator; Canadian Association of Members of Utility Tribunals; Canadian Energy Law Forum; Central Electric Regulatory Commission (India); Comisión Reguladora de Energía (Mexico); Independent Power Producers Association of India; India Institute of Technology at Kanpur; Ludwig-Maximilians-Universitat (Munich, Germany); Management Development Institute at Gurgaon, India; National Association of Water Utility Regulators (Italy); New Zealand Electricity Authority; New Zealand Commerce Commission; Nigeria Electric Regulatory Commission; Office of Utility Regulation of Jamaica; OSIPTEL (the Peruvian Telecom Regulator) Training Program on Regulation for University Students; Petroleum and Natural Gas Regulatory Board (India); Regulatel (an international forum of telecommunications regulators); Regulatory Policy Institute (Cambridge, England); The Energy and Resources Institute (India); Utilities Regulatory Authority of Vanuatu.

Community Activities

Member, PEPCO Work Group, appointed by County Executive of Montgomery County, Maryland (2010–2011).

Sunday School Teacher, Temple Emanuel, Kensington, Maryland (2002–2006, 2008).

Board of Trustees, Temple Emanuel (2005–2006).

Musical performer (cello), Riderwood Village Retirement Community (2003–present).