



STATE OF NEW JERSEY
Board of Public Utilities
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ENERGY

PENNSVILLE TRAVEL CENTER , INC.)	ORDER ON REQUEST FOR
PETITIONER,)	INTERLOCUTORY REVIEW
)	
v.)	
)	
ATLANTIC CITY ELECTRIC COMPANY,)	BPU Docket No. EC10030233
RESPONDENT)	OAL Docket No. PUC 4364-10

David L. Braverman, Esq., Braverman Kaskey P.C. for Pennsville Travel Center, Inc.
Diana G. Caiafa, Esq., Cooper Levenson, for Atlantic City Electric Company
Stefanie A. Brand, Director, New Jersey Division of Rate Counsel

BY THE BOARD:

This matter is before the New Jersey Board of Public Utilities ("Board") for its decision on whether to grant the request of Pennsville Travel Center, Inc. ("PTCI") to conduct an interlocutory review of that portion of Administrative Law Judge ("ALJ") W. Todd Miller's Order dated May 23, 2011 (and of his June 21, 2011 ruling denying a request for clarification of that ruling), granting partial summary decision to Atlantic City Electric Company ("ACE") in a dispute over the costs and allocation of the costs of relocating certain utility facilities requested by PTCI.

BACKGROUND

On March 23, 2010, PTCI filed a letter petition with the Board requesting a "formal hearing" and a finding that ACE should be required to absorb some or all of the cost of relocating six utility poles on property near the base of the Delaware Memorial Bridge. PTCI is a non-governmental, private entity that plans to build a travel/welcome center on the property which already contains a hotel and two restaurants. Based on the design for the welcome center, utility poles on the property will need to be relocated from their current location on an ACE easement to the rear of the property. PTCI maintains that the estimate given by ACE for the work is unreasonable as is ACE's refusal to waive all or some of the costs.

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

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

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

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

By Order dated May 23, 2011, ALJ Miller found that the Board has jurisdiction over this matter, and that PTCI is financially responsible for the cost of relocating the six poles. He refused to find that ACE's cost estimate was reasonable as a matter of law. He denied PTCI's cross motion asserting that ACE is fully responsible for the relocation costs, and set August 15 and 16, 2011 as the dates for evidentiary hearings on the actual scope of the relocation work needed, and on the reasonableness of the cost estimates presented by ACE and PTCI¹.

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

Motion for Interlocutory Review

On or about June 29, 2011, the Board received a request from PTCI for interlocutory review of ALJ Miller's "May 23 and June 21, 2011 Orders" partially granting ACE's motion for summary decision. Petition at 1. PTCI maintains that ALJ Miller erred in finding that New Jersey common law requires it as a non-governmental entity to pay the full cost of relocating the utility poles and that a "public interest" exception did not apply. According to the petition, the only question for review is "Whether the ALJ erred in ruling that PTCI is financially responsible for the cost of

¹ The Board has been notified that the hearings have been adjourned pending settlement discussions.

relocating six utility poles solely under New Jersey common law." PTCI cites only to the June 21, 2011 Order.

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

DISCUSSION AND FINDING

Pursuant to N.J.A.C. 1:14-14.4(a)², the Board has to determine whether to accept PTCI's request, and conduct an interlocutory review of ALJ Miller's Order(s). It must be noted that the Board did not adhere to the timeframes in the regulation which require that the Board make a determination as to whether to accept the request and conduct an interlocutory review by the later of 1) ten days after receiving the request for interlocutory review or 2) the Board's next regularly scheduled open meeting after expiration of the 10-day period from receipt of the request for interlocutory review. In this case, the reply papers were not received sufficiently in advance of the time items were due for the July agenda for adequate review prior to the meeting. The Board has relaxed the procedural rules to prevent unfairness or injustice pursuant to N.J.A.C. 1:1-1.3(b) and 1:1-14.10(g), so as to extend the time in which to decide whether to conduct an interlocutory review. See, In re Petition of Elizabethtown Water Company, WR03070510 (Order dated 12/10/2003). By Secretary's letter dated July 26, 2011, the parties were notified that the matter would be considered at the August 18, 2011 agenda meeting, and were advised that pursuant to N.J.A.C. 1:1-14.10, the evidentiary hearings should proceed as scheduled.

The legal standard for accepting a matter for interlocutory review is stated in In re Uniform Administrative Procedure Rules, 90 N.J. 85 (1982). In that case, the Court concluded that the agency has the right to review ALJ orders on an interlocutory basis "to determine whether they are reasonably likely to interfere with the decisional process or have a substantial effect upon the ultimate outcome of the proceeding." Id. at 97. The Court indicated that the agency head has broad discretion to determine which ALJ orders are subject to review on an interlocutory basis. However, it noted that the power of the agency head to review ALJ orders on an interlocutory basis is not itself totally unlimited, and that interlocutory review of ALJ orders should be exercised sparingly. In this regard, the Court noted:

In this respect, the analogy to the courts is appropriate. In general, interlocutory review by courts is rarely granted because of the strong policy against piecemeal adjudications. See Hudson v. Hudson, 36 N.J. 549 (1962); Pennsylvania

² As a rule of special applicability, N.J.A.C. 1:14-14.4 supplements the general rule on interlocutory appeals, N.J.A.C. 1:1-14.10.

Railroad, 20 N.J. 398. Considerations of efficiency and economy also have pertinency in the field of Administrative law. See *Hackensack v. Winner*, 82 N.J. at 31-33; *Hinfey v. Matawan Reg. Bd. Of Ed.*, 77 N.J. 514 (1978). See *infra* at 102, n.6. Our State has long favored uninterrupted proceedings at the trial level, with a single and complete review, so as to avoid the possible inconvenience, expense and delay of a fragmented adjudication. Thus, "leave is granted only in the exceptional case where, on a balance of interests, Justice suggests the need for review of the interlocutory order in advance of final Judgment." Sullivan, "Interlocutory Appeals," 92 N.J.L.J. 162 (1969). These same principles should apply to an administrative tribunal.

[Id. at 100]

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

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

[ibid.]

As stated above, the decision of whether or not to grant review is committed to the discretion of the Board.

As maintained by ACE, the Board is persuaded that PTCI seeks review not of the ALJ's June 21, 2010 denial of its request for clarification, but of his conclusion in the May 23, 2011 Order that PTCI is responsible for any relocation costs. Therefore, the Board could find that the request for interlocutory review is untimely.

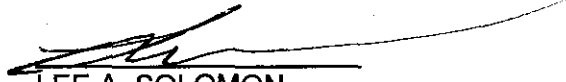
However, even if the Board liberally applies the rules and finds the request timely, questions remain concerning the actual scope of work that needs to be performed and the cost of that work. These issues were scheduled for evidentiary hearings prior to this Board meeting. Under N.J.A.C. 1:1-14.10, absent a stay, the pendency of a request for interlocutory review does not delay the scheduling or conduct of hearings. As noted, the hearings have been adjourned pending settlement discussions. Should the hearings go forward, they will provide information that the Board will want to have when it is reviewing the case after the ALJ renders his Initial Decision. Therefore, neither efficiency nor economy supports piecemeal review of the case prior to final decision. See, DEP v. Engineered Precision Casting Co., 1992 N.J. ENV LEXIS 5 (9/17/1992). Accordingly, the Board FINDS that PTCI has failed to show good cause for review of the ALJ's decision at this time, before a final decision on the actual scope of the work and the cost of that work.

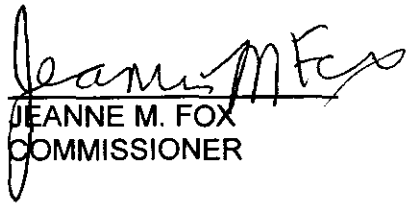
Therefore, the Board HEREBY DENIES the request for interlocutory review of ALJ Miller's May 23, 2011 and June 21, 2011 orders. It should be noted that N.J.A.C. 1:1-14.10(j)(2) in relevant part provides that "any order or ruling reviewable interlocutorily is subject to review by the agency head after the judge renders the initial decision in the contested case, even if an

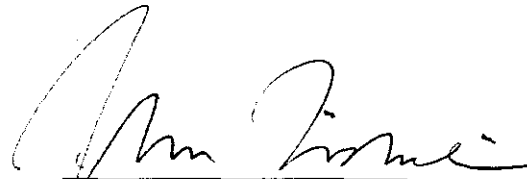
application for interlocutory review... [w]as made but the agency head declined to review the order or ruling."

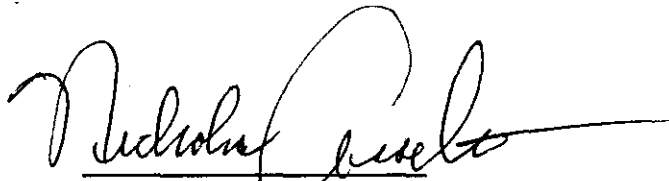
DATED: 8/18/11

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JEANNE M. FOX
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CARMEN DIAZ
ACTING SECRETARY

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

