



Agenda Date: 2/24/16
Agenda Item: 2I

STATE OF NEW JERSEY
Board of Public Utilities
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Trenton, New Jersey 08625-0350
www.nj.gov/bpu/

ENERGY

IN THE MATTER OF 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 THE 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-19)
AND EMINENT DOMAIN AUTHORITY PURSUANT TO)
N.J.S.A. 48:3-17.6 ET. SEQ., AND;)

ORDER ADDRESSING RATE)
COUNSEL MOTION TO)
DETERMINE IF MAIT CAN)
BE DESIGNATED A PUBLIC)
UTILITY)

DOCKET NO. EM15060733

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)

DOCKET NO. EF02030185

Parties of Record:

Gregory Eisenstark, Esq., Windels Marx Lane Mittendorf, Jersey Central Power and Light Co.
Stefanie A. Brand, Esq., Director, New Jersey Division of Rate Counsel
Steven Goldenberg, Esq., Fox Rothschild LLP, New Jersey Large Energy Users Coalition
Joseph Accardo, Esq., Public Service Electric and Gas Company

BY THE BOARD:

On June 19, 2015, Jersey Central Power & Light (“JCP&L”) and Mid-Atlantic Interstate Transmission, LLC (“MAIT”) (collectively, “Joint Petitioners”) filed a Petition requesting the Board of Public Utilities (“Board”)¹ issue a decision and order granting:

- 1) Board approval of the transfer of all JCP&L transmission assets to MAIT, a FirstEnergy Transmission company²;
- 2) Approval of a Ground Lease between JCP&L and MAIT;
- 3) A decision that MAIT will be a New Jersey Public Utility subject to the Board’s jurisdiction for certain limited purposes ... and approval that MAIT may maintain its books and records out of state (emphasis added);
- 4) Approval that, for those transmission projects for which the Board granted JCP&L siting authority pursuant to N.J.S.A. 40:55D-19 but which have not yet been placed in service, will be placed in MAIT;
- 5) Approval of the addition of MAIT to the Utility Money Pool pursuant to N.J.S.A. 48:3-7.2;
- 6) Approval of the Mutual Assistance Agreement; and
- 7) Such other and further relief as the Board shall deem just, lawful and proper.

This Order addresses only item number three (3) above, namely, whether MAIT, as described in the Petition, will be a New Jersey “public utility” subject to the Board’s jurisdiction for certain, limited purposes and enjoying the rights and privileges of a public utility.

BACKGROUND

By Order dated August 19, 2015, the Board retained this matter for hearing, and designated President Richard S. Mroz as the Presiding Officer with authority to establish and modify schedules, decide all motions and otherwise control the conduct of this case, subject to Board ratification. President Mroz issued a pre-hearing order in this matter establishing a procedural schedule, and on October 19, 2015, issued an order granting the motions to intervene of Public Service Electric and Gas Company (“PSE&G”) and the New Jersey Large Energy Users Coalition (“NJLEUC”) and the motions to participate of Rockland Electric Company (“RECO”) and Atlantic City Electric Company (“ACE”). On October 26, 2015, the NJLEUC motion seeking admission of Paul Forshay, Esquire *pro hac vice* was granted.

On December 4, 2105, a discovery/settlement conference was held with the parties and interveners present. On December 7, 2015, the Division of Rate Counsel (“Rate Counsel”) filed a motion (“Motion”) asking for a briefing schedule to resolve the legal issue of whether MAIT can be designated a public utility under New Jersey law and requesting the remaining procedural schedule be held in abeyance pending a decision resolving this issue.

¹ On June 19, 2015, JCP&L, MAIT and other FirstEnergy operating companies filed a petition before the Federal Energy Regulatory Commission (“FERC”) pursuant to sections 203(a)(1)(A) and 203(a)(2) of the Federal Power Act (“FPA”), seeking, among other things, authorization to contribute their transmission assets to MAIT. On February 18, 2016, FERC approved the proposed transaction. In so ruling, FERC stated that it’s “approval ... does not affect or preempt any state proceedings under [] New Jersey law,” and that the timing of FERC’s decision has no impact on [New Jersey’s] jurisdiction. Pennsylvania Electric Company, et al. 154 FERC ¶ 61,109 at P 66 (2016).

² MAIT will hold all JCP&L transmission assets and those of Metropolitan Edison Company (“Met-Ed”) and Pennsylvania Electric Company (“Penelec”), utilities in Pennsylvania.

On December 8, 2015, the Joint Petitioners filed a letter response to the Motion arguing that the Motion should be denied because (1) it is untimely; (2) resolving a single issue in isolation will result in undue delay of the proceeding; and (3) while the issue of whether MAIT can be a New Jersey public utility is important, it is not a threshold issue that must be decided in advance of the conclusion of the matter. While opposing the Motion, the Joint Petitioners requested expedited treatment of the issue, if the Motion was to be heard.

On December 9, 2015, President Mroz notified the parties that the procedural schedule established by the October 7, 2015 Prehearing Order was suspended. The parties were directed that any other responses to the Motion should be filed by close of business on December 18, 2015. No additional responses were received.

After reviewing the Motion and Joint Petitioners' response and considering the complexity and critical nature of this issue, and the importance of resolving this issue expeditiously, President Mroz ordered the Parties to file initial briefs on the issue of whether MAIT can qualify as a "public utility" under New Jersey law on or before January 22, 2016, and ordered any reply briefs be filed on or before January 29, 2016.³

President Mroz also ordered that the issue be decided by the Board *en banc* at a regularly scheduled Board Agenda meeting.

Joint Petitioners' Initial Brief

Joint Petitioners assert that it is the "function of transmission of electricity" and not the "corporate structure housing that function" which obligates the Board to invoke jurisdiction. Joint Petitioners' January 22, 2016 Brief at 2 ("Joint Petitioners' Initial Brief"). Joint Petitioners assert that the transaction essentially amounts to a corporate restructuring where JCP&L will transfer a portion of its public utility function to MAIT. *Id.* at 3-4. Joint Petitioners argue that the statutory framework supports a finding by the Board that MAIT is a public utility. *Id.* at 3. Joint Petitioners assert that MAIT will be operating its "equipment for public use" and its assets will be for an "electricity distribution system" since all parts of the electric grid, including both those assets classified as distribution and those classified as transmission for ratemaking purposes, are necessary to provide electric service to customers. *Id.* at 5-6. Joint Petitioners acknowledge that the transmission assets come under the jurisdiction of the Federal Energy Regulatory Commission FERC for ratemaking purposes. *Id.* at 3, fn. 1.

Joint Petitioners further contend that the interpretation of "electricity distribution system" is supported by N.J.S.A. 48:2-13(d), which provides that "all services necessary for the transmission and distribution of electricity ... shall remain in the jurisdiction of the Board of Public Utilities." *Id.* at 6. The inclusion of "transmission and distribution of electricity" under the Board's jurisdiction strongly supports the interpretation that "electricity distribution" as used in N.J.S.A. 48:2-13(a) encompasses both distribution and transmission services (and the facilities or functions necessary to provide such service), and therefore the Board has jurisdiction to regulate MAIT as a public utility. *Ibid.*

³ On February 22, 2016, Joint Petitioner's filed a letter attaching the February 18, 2016 FERC Order and indicating that the Pennsylvania Public Utility Commission's MAIT proceeding is moving towards a conclusion.

Joint Petitioners state that the Legislature included the transmission function in the definition of “electric public utility” in N.J.S.A. 48:3-51 as part of the Electric Discount and Energy Competition Act of 1999, N.J.S.A. 48:3-49 to -107 (“EDECA”). The language defining “electric public utility” as a “public utility . . . that transmits and distributes electricity to end users within the State” plainly supports the conclusion that MAIT must be considered a New Jersey public utility. Joint Petitioners’ Initial Brief at 7.

Joint Petitioners further rely on New Jersey case law on statutory construction to support their interpretation of the phrase “that transmits and distributes electricity” in N.J.S.A. 48:3-51. Joint Petitioners state that the courts have held that the words “or” and “and” are [often] used interchangeably, and the determination of whether the word “and” as used in a statute should be read in the conjunctive or disjunctive depends primarily upon the legislative intent.” Id. at 8 (citations omitted). Joint Petitioners argue that the word “and” within that phrase in N.J.S.A. 48:3-51 must be read in the disjunctive to preserve the legislature’s intent with respect to the broad scope of the Board’s jurisdiction over electric service. Joint Petitioners’ Initial Brief at 9. Joint Petitioners further rely on the Board’s broad authority to argue that MAIT should be declared a public utility. Id. at 13.

Joint Petitioners contend that regulatory and public policy considerations also strongly favor declaring MAIT a public utility. Id. at 14. Allowing this relief will permit the Board to retain the jurisdiction it currently has with respect to the former JCP&L transmission assets. If the transaction were to proceed without MAIT as a New Jersey public utility, the Board would relinquish authority, which is inconsistent with the Board’s regulatory authority to ensure the provision of safe, adequate, and reliable electric utility service. Ibid.

Joint Petitioners also state that MAIT is a “public utility” under New Jersey law because MAIT will be operating a system for “public use.” Id. at 15. In this regard, MAIT asserts it is distinguishable from existing merchant transmission companies that own facilities in New Jersey. Unlike these companies, MAIT will be fully integrated with the JCP&L distribution system to form an electric grid that provides, among other things, service to end-use customers. Id. at 18. In support of this position, that MAIT will be operating a system for “public use,” the Joint Petitioners rely on established criteria, included but not limited to, the following: (1) whether a significant number of retail customers are being served; (2) whether there is a potential for expansion; (3) whether the facilities are located in public streets and/or whether other public resources are utilized; (4) whether the company is holding itself out to serve the general public; (5) whether the company provides meters and/or charges separately for its service; and (6) whether and to what extent is there an economic impact on the regulated market. The Joint Petitioners argue that of the six criteria outlined, MAIT satisfies five of them and the remaining factor is not relevant due to the different facts and circumstances. Id. at 19. Therefore, the Board should find MAIT to be a “public utility” subject to the jurisdiction of the Board.

Rate Counsel Initial Brief

Rate Counsel filed an Initial Brief on January 22, 2016 (“Rate Counsel Initial Brief”) requesting the BPU determine under N.J.S.A. 52:14b-8 that MAIT is not a New Jersey “public utility.” Rate Counsel argues that whether MAIT may be a “public utility” under New Jersey law is a threshold issue because this determination directly impacts the other issues in the case. Rate Counsel provides an analysis of the extent of regulatory oversight the Board will have over MAIT if granted the requests in this petition. Rate Counsel identifies the rights and benefits that MAIT is seeking as a New Jersey public utility:

- a. Petitions filed pursuant to N.J.S.A. 40:55D-19 relating to siting and construction of transportation projects;
- b. Petitions filed pursuant to N.J.S.A. 48:3-16 and 48:3-17 regarding exercising the power of eminent domain; and
- c. Compliance with the Board's transmission vegetation management regulations as currently set forth at N.J.A.C. 14:5-9.1 et seq.

The Petition also states "the Board will have the same jurisdiction over MAIT as a New Jersey public utility as the Board currently has with respect to JCP&L's transmission assets." Rate Counsel Initial Brief at 3 (citing Petition at 11).

Initially, Rate Counsel asserts that the Board has the authority to decide this issue at this time, as administrative agencies may make a declaratory ruling regarding the applicability of any proposed action. N.J.S.A. 52:14B-8. Rate Counsel argues that the unprecedented level of complexity and the large value of the assets at issue require clarity as to the legal status the company receiving these utility owned assets will have, and the level of regulatory oversight that will exist. Rate Counsel argues that this decision should be made at the outset of the proceeding so the parties may preserve resources by narrowing then issues. Rate Counsel Initial Brief at 4.

Rate Counsel argues that MAIT cannot be a public utility under New Jersey law because the legislature redefined the term "public utility" in EDECA and limited the term to apply only to the owners of distribution assets. That definition is found at N.J.S.A. 48:2-13(a):

. . . every individual, copartnership, association, corporation or joint stock company ... that or hereafter may own, operate, manage or control within this State any ... pipeline, gas, **electricity distribution**, water, oil, sewer, solid waste collection, solid waste disposal, telephone or telegraph system, plant or equipment for public use, under privileges granted or hereinafter to be granted by this State or by any political subdivision thereof.

[Rate Counsel Initial Brief at 5 (emphasis in original).]

Rate Counsel contends that since MAIT was formed to own solely transmission assets, and not electric distribution assets, MAIT does not fit into the definition of "public utility" in EDECA. Ibid. Rate Counsel acknowledges that the Board maintains limited jurisdiction over necessary services for transmission and distribution including safety, reliability, metering, meter reading and billing for the transmission and electric distribution of electricity and gas. N.J.S.A. 48:2-13(d). Rate Counsel notes that the Board's jurisdiction over transmission is for a specific purpose, vegetation management. N.J.A.C. 14:5-7.1. Rate Counsel Initial Brief at 5-6.

Rate Counsel asserts that MAIT cannot be a public utility because under the plain language of EDECA, and the statutory regulatory scheme, the Board cannot exercise full jurisdiction over a transmission-only company. Id. at 6. The regulatory scheme provides benefits as well as burdens while the Board retains strict control over the public utility. Ibid. Rate Counsel points out that the Joint Petitioners seek the benefits of siting authority, under N.J.S.A. 40:55D-19, and eminent domain authority, under N.J.S.A. 48:3-16 -17, but since MAIT is proposed to be a

transmission-only company, it will not be subject to the burden of key regulations, specifically rate regulation and control over the provision of service. Rate Counsel Initial Brief at 6. Rate Counsel cites the Board's rate regulation authority N.J.S.A. 48:2-21(a) to highlight that the Board can set JCP&L's distribution rates, but will not have the authority to set MAIT's transmission rates since the Board and New Jersey's authority is pre-empted by FERC. 16 U.S.C.A. § 824. Rate Counsel then identifies several additional integral regulatory powers including the "...authority to require public utilities to serve customers within a franchise territory, N.J.S.A. 48:3-3(a), and the authority to require a public utility to open its accounts for examination, N.J.S.A. 48:2-16.1." Rate Counsel submits that public utilities must meet these regulatory obligations to obtain the benefits that come with the designation as a "public utility" in New Jersey. Rate Counsel Initial Brief at 7. Rate Counsel concludes that without these key components of regulatory authority, the balance of benefits and burdens would not be preserved to justify granting MAIT, a transmission-only company, public utility status. Id. at 8.

Joint Petitioners' Reply Brief

Joint Petitioners take the position that Rate Counsel's statutory analysis of EDECA is incomplete and incorrect. Joint Petitioners assert that the overarching purpose of EDECA was to deregulate electric generation and unbundle electric distribution, transmission, and generation charges, citing N.J.S.A. 48:3-50(b)(2)-(7) and (c)(1)-(5). Joint Petitioners' January 29, 2016 Reply Brief at 3 ("Joint Petitioners' Reply Brief"). Contrary to Rate Counsel's suggestion, Joint Petitioners state that there is nothing in EDECA that altered (or reflects any legislative intent to alter) the Board's jurisdiction with respect to the electric transmission function. Ibid. There are references within Title 48 and its legislative history that confirm that the Board retains jurisdiction over various aspects of electric transmission. Ibid.

Joint Petitioners argue that Rate Counsel's analysis with respect to N.J.S.A. 48:2-13(a) is wrong because the statute does not limit the definition of public utility to "the owners of distribution assets." Ibid. Rather, N.J.S.A. 48:2-13(a) provides that, to qualify as a "public utility" under this definition, MAIT needs to "own, operate, manage, or control within this State any . . . electricity distribution . . . system, plant, or equipment for public use, under privileges granted or hereafter to be granted by this State or by any political subdivision thereof." For the reasons set for in Petitioners' initial brief, MAIT satisfies all the statutory criteria. Joint Petitioners' Reply Brief at 3.

Joint Petitioners further argue that Rate Counsel's analysis fails to recognize that N.J.S.A. 48:2-13(d) states that "all services necessary for the transmission and distribution of electricity... shall remain in the jurisdiction of the Board of Public Utilities." Ibid. Rate Counsel provides no citation to either a statute or case law to support its contention that jurisdiction over transmission is limited to regulations governing vegetation management, nor does Rate Counsel analyze N.J.S.A. 48:3-51. Joint Petitioners' Reply Brief at 4. Joint Petitioners further reject as unsupported Rate Counsel's contention that regulating MAIT as a public utility would be improper because there would be no balance between the benefits and burdens of public utilities. Id. at 5.

Joint Petitioners take the position that there is no requirement under New Jersey law that the Board "exercise full jurisdiction" with respect to every aspect of a public utility's activities. Therefore, the Board is not required to "exercise full jurisdiction" with respect to any public utility, including MAIT. Ibid.

Joint Petitioners further assert that the fact that the Board would not have jurisdiction over MAIT's transmission rates is no different than the *status quo* with respect to JCP&L and the

State's other electric utilities. Currently, FERC has jurisdiction over certain aspects of New Jersey's public utilities pursuant to federal law, and the Board has jurisdiction over certain other areas under state law. Id. at 6. If the Petition in this case is granted, MAIT will be subject to the same multi-jurisdictional regulation as the State's other electric utilities. Ibid. Petitioners have consistently maintained that MAIT will be subject to all aspects of the Board's jurisdiction over transmission service and assets that the Board currently has with respect to JCP&L and the State's other electric public utilities. Id. at 7. Therefore, there is no merit to Rate Counsel's suggestion that the Board's power would be "severely weakened." Ibid. To the contrary, the Board will preserve its jurisdiction and ensure the continued provision of safe and adequate electric service to customers by affirming MAIT's status as a New Jersey public utility.

Rate Counsel Reply Brief

On January 29, 2016, Rate Counsel filed a reply brief ("Rate Counsel Reply Brief") arguing that a plain reading of applicable New Jersey law dictates that MAIT is not a New Jersey "public utility." Rate Counsel argues that the Joint Petitioners' use of N.J.S.A. 48:2-13 to support the conclusion that MAIT can be a "public utility" is contrary to the plain language of the statute. Rate Counsel interprets the jurisdictional legislative intent of N.J.S.A. 48:2-13(a) to provide the Board with "general supervision and regulation of and jurisdiction and control over" electricity distribution companies as public utilities, with the more limited jurisdictional intent of N.J.S.A. 48:2-13(d) to provide safety and reliability over transmission and "production" of electricity. Rate Counsel Reply Brief at 3.

Rate Counsel argues that principles of statutory construction call for considering first the statutory language, for "if the statute is clear and ambiguous on its face and admits of only one interpretation, we need delve no deeper than the act's literal terms to divine the Legislature's intent." Rate Counsel Reply Brief at 3-4 (citations omitted). Rate Counsel continues that "where the Legislature has carefully employed a term in one place and excluded it in another, it should not be implied where excluded. Rate Counsel Reply Brief at 4 (citations omitted). Therefore, Rate Counsel argues, Joint Petitioners' claim that the statutory language as used in N.J.S.A. 48:2-13(a) "was meant to encompass both distribution and transmission goes against the plain language of the statute." Rate Counsel Reply Brief at 4. Rate Counsel states "that if the legislature wanted to include transmission in the earlier provision, it would have done so." Ibid.

Rate Counsel also argues that the Joint Petitioners' misinterpretation of the definition of electric public utility in EDECA should be rejected, because in EDECA an electric public utility is defined "as that term is defined in R.S. 48:2-13 that transmits and distributes electricity to end users within the state," citing N.J.S.A. 48:3-51. Rate Counsel Reply Brief at 4. Since N.J.S.A. 48:2-13 excludes solely transmission owning entities from the definition of public utility, a clear reading of the definition in EDECA is that a company must first meet the definition of N.J.S.A. 48:2-13 and then an entity must also transmit and deliver electricity to end users under N.J.S.A. 48:3-51. Rate Counsel further argues that "to reconcile these statutory provisions, one must interpret the word "transmit" in EDECA to have its generic meaning, *i.e.*, to convey electricity from one place to another." Rate Counsel Reply Brief at 4-5 (citation omitted).

Rate Counsel then argues that N.J.S.A. 48:2-13 and N.J.S.A. 48:3-51 must be harmonized. The Joint Petitioners' argument that MAIT would transmit electricity to end users, after passing over the distribution system of JCP&L, Joint Petitioners Initial Brief at 8, clearly concedes that MAIT will not directly deliver electricity to end users. Therefore, MAIT does not fit the definition of an electric public utility under EDECA. Rate Counsel Reply Brief at 5. Rate Counsel further argues that distinguishing between transmission and distribution entities is consistent with the

overall structure of the regulatory scheme. Id. at 7. Rate Counsel further argues that while JCP&L will own a majority interest in MAIT, it will have no operational decision making authority. Ibid.

Rate Counsel then re-addresses the integral distinction between the regulation of transmission and distribution to the overall regulatory scheme, concluding that

. . . JCP&L will have little control over the day to day operation of the transmission assets. Without the ability to set MAIT's rates, or to exercise its broad authority to require MAIT to serve customers within the utility's franchise territory, N.J.S.A. 48:3-3(a), or open its accounts for examination, N.J.S.A. 48:2-16.1, the Board's ability to regulate MAIT would be severely limited. Thus, the requested declaration that MAIT be deemed a public utility is inconsistent with the regulatory scheme and the division of jurisdiction between state and federal regulators.

[Rate Counsel Reply Brief at 8.]

DISCUSSION AND FINDINGS

1. Background of Electric Transmission and Distribution Regulation

New Jersey public utilities have been regulated by the State since the early 1900s. In 1935, Congress enacted the Federal Power Act of 1935 ("FPA"), 16 U.S.C.A. § 791 et seq., which defines the jurisdiction of FERC as including "the transmission of electric energy in interstate commerce" and the "sale of electric energy at wholesale in interstate commerce," including both wholesale electricity rates and any rule or practice "affecting" such rates. 16 U.S.C.A. §§ 824(b)(1), 824e(a). The FPA "places beyond FERC's power, and leaves to the states alone, the regulation of "any other sale—most notably, any retail sale—of electricity" and the control over "facilities used in local distribution." FERC v. Electric Power Supply Association, 577 U.S. ___, 136 S.Ct. 760, 193 L. Ed. 2d 661, 667 (2016); see also, 16 U.S.C.A. § 824(b)(1).

"Since the FPA's passage, electricity has increasingly become a competitive interstate business, and FERC's role has evolved accordingly." Electric Power, supra, 577 U.S. at ___, 136 S.Ct. 760, 193 L. Ed. 2d 661, 669 (2016). When New Jersey regulation began and when the FPA was enacted, the electric power industry was composed of vertically-integrated public utility companies owning the power generation plants, transmission lines, distribution lines, and customer service facilities. The charges for all of these services were "bundled" and billed at a single price. The electricity industry began shifting to competitive markets in the late 1970s.

On March 29, 1995, FERC embarked on a rulemaking proceeding "to encourage lower electricity rates by structuring an orderly transition to competitive bulk power markets." New York v. FERC, 535 U.S. 1, 7 (2002) (quoting Notice of Proposed Rulemaking, 60 Fed. Reg. 17,662 (1995)). On April 24, 1996, FERC issued its Final Rule, Order No. 888. 61 Fed. Reg. 21,540. To remedy rate discrimination in the "bulk power markets," Order No. 888 directed each public utility to "functionally unbundle" wholesale generation and transmission services. New York, supra, at 535 U.S. at 11. Functional unbundling would be achieved by requiring public utilities to state separate rates for wholesale generation, transmission, and ancillary services and to also apply "a single general tariff applicable equally to itself and to others." Ibid.

In addition, FERC asserted jurisdiction over retail transmission services in interstate commerce, stating that “if a State requires unbundled retail access, the affected retail customer must obtain its unbundled transmission service under a non-discriminatory transmission tariff.” Id. at 11-12 (quoting 61 Fed. Reg. 21,571). As FERC explained, “when a bundled retail sale is unbundled[,] and becomes separate transmission and power sales transactions, the resulting transmission transaction falls within the Federal sphere of regulation.” Id. at 12 (quoting 61 Fed. Reg. 31,781). For unbundled retail transmission, FERC stated that the circumstances of a specific case (using the “Seven Factor Test”) will determine whether the facilities used are subject to FERC or state jurisdiction. Upon review, the Supreme Court of the United States ultimately found that, although FERC’s jurisdiction over the sale of power was limited to the wholesale market, FERC’s jurisdiction over electricity transmissions in interstate commerce was not so limited. New York, supra, at 535 U.S. at 20. Thus, FERC has jurisdiction over interstate transmission notwithstanding the manner of sale of the electricity.

New Jersey’s restructuring of the public utility industry took place concurrent with these federal actions. In March 1995, the New Jersey Energy Master Plan (“EMP”) Committee released the New Jersey EMP Phase I Report, which provided a policy framework including several short-term measures to prepare for the transition to competition. By Order of June 1, 1995, the BPU initiated Phase II proceedings to investigate and develop a long-term policy for implementing a competitive marketplace for electricity. By Order dated April 30, 1997, the BPU adopted and issued its final recommendations in “Restructuring the Electric Power Industry in New Jersey: Findings and Recommendations (Final Report).” Restructuring the Electric Power Industry in New Jersey, Findings and Recommendations and Order Adopting and Releasing Final Report, April 30, 1997, Docket No. EX94120585Y.

Relevant to this discussion, the BPU’s Final Report concluded that the cost for electricity services should be unbundled for retail electric customers in New Jersey. Final Report at 5. The Final Report describes the BPU’s vision for retail market structure and discusses the steps necessary for achieving that vision. Id. at 43-85. The Final Report includes a thorough analysis of federal regulatory developments, actions of other state commissions, and possible jurisdictional issues. Id. at 24-39 and 83-85. The BPU concluded with the statement of its intention to “work with the State’s legislators during 1997 to provide the legislative foundation and necessary legal authority” for restructuring in New Jersey. Id. at 13.

By September 1998, a draft of the restructuring bill was introduced in the New Jersey Legislature. The final draft bill was introduced in both the Assembly and Senate on January 25, 1999 as Assembly Bill A-16 and Senate Bill S-7, and was passed on January 28, 1999. In a Legislative Statement, the bill is described as establishing the framework and time schedules for deregulation and restructuring of electric and gas utilities in New Jersey. Statement attached to Assembly Bill A-16 at 110 (“Assembly Statement”); Statement attached to Senate Bill S-7 at 110 (collectively “Assembly and Senate Statements”). Having passed both Houses, the bill came before Governor Whitman, who signed it into law on February 9, 1999. The bill immediately took effect as EDECA, L. 1999, c.23 (1999), codified as N.J.S.A. 48:3-49 to -107. The changes made by EDECA are central to the issue presented.

2. Legal Issue Presented in this Motion

With this background, the Board now turns to the legal issue presented: whether the Board may declare “that MAIT will be a New Jersey public utility” under the definitions found in Title 48. See Petition at 22. Joint Petitioners seek approval for JCP&L to contribute all of its claimed transmission assets to MAIT, with Met-Ed and Penelec doing likewise, to form one interstate

transmission company. If the Board were to ultimately approve the transaction as stated in the Petition, the Joint Petitioners claim that "JCP&L will no longer own any FERC-jurisdictional transmission facilities, but will continue to own and operate distribution facilities and provide retail electric distribution service and basic generation service ("BGS") just as it does currently." Id. at 5. The Petition proposes that JCP&L will become a distribution-only company and MAIT will become a "stand-alone transmission company." Id. at 2. Applying these facts to Joint Petitioners' request, the legal issue becomes one of first impression for the Board. Never before has a "stand-alone transmission company," described as exclusively owning "FERC-jurisdictional transmission facilities," sought declaration as a "public utility" under New Jersey law.

3. Principles of Statutory Construction

The Board's analysis of New Jersey law is guided by the principles of statutory construction, the goal of which is to effectuate legislative intent in light of the language used and the object sought to be achieved. McCann v. Clerk of Jersey City, 167 N.J. 311, 320 (2001). In discerning legislative intent, the courts first look to the plain terms of the statute. N.J. Div. of Youth & Family Servs. v. T.B., 207 N.J. 294, 301 (2011); State v. Hupka, 203 N.J. 222, 231 (2010); Nobrega v. Edison Glen Assocs., 167 N.J. 520, 536 (2001). An act's language is, in most instances, the "surest indicator" of the Legislature's intent. McCann, *supra*, 167 N.J. at 320. When construing a statute, "words and phrases shall be read and construed with their context, and shall, unless inconsistent with the manifest intent of the legislature or unless another or different meaning is expressly indicated, be given their generally accepted meaning . . ." N.J.S.A. 1:1-1. "To that end, 'statutes must be read in their entirety; each part or section should be construed in connection with every other part or section to provide a harmonious whole.'" Burnett v. Cnty. of Bergen, 198 N.J. 408, 421 (2009)(quoting Bedford v. Riello, 195 N.J. 210, 224 (2008)).

If a statute "is clear and unambiguous on its face and admits of only one interpretation," effect should be given to the statute's plain meaning. Thomsen v. Mercer-Charles, 187 N.J. 197, 206 (2006) (quoting State v. Butler, 89 N.J. 220, 226 (1982)). Words will be given their "ordinary and well understood meaning." In re Barnet Memorial Hospital Rates, 92 N.J. 31, 40 (1983). Where literal words give rise to an unclear or ambiguous statutory meaning, with more than one plausible interpretation, courts look to extrinsic evidence, including legislative history and contemporaneous construction to guide interpretation. Burnett, *supra*, 198 N.J. at 421; Clymer v. Summit Bancorp., 171 N.J. 57, 66 (2002); Aponte-Correa v. Allstate Ins. Co., 162 N.J. 318, 323 (2000). Extrinsic evidence also may be resorted to if a plain reading leads to an absurd result. Burnett, *supra*, 198 N.J. at 421.

Additionally, "[s]tatutes that deal with the same matter or subject should be read in *pari materia* and construed together as a unitary and harmonious whole. The legislature's intent is to be derived from considering entire statute and reading all sections together as a unified whole." Marino v. Marino, 200 N.J. 315, 330 (2009)(internal citations omitted). Jurisprudence regarding similar statutes is informative in determining legislative intent. See Kyle v. Green Acres at Verona, Inc., 44 N.J. 100 (1965); N.J. Div. of Youth & Family Services v. J.L., 400 N.J. Super. 454 (App. Div. 2008); State v. Shabazz, 263 N.J. Super. 246 (App. Div. 1993); Cooperstein v. State, Div. of Taxation, 13 N.J. Tax 68 (Tax Ct. 1993).

4. Distribution Element in Definition of “Public Utility”

As Rate Counsel and the Joint Petitioners recognize, the Legislature has defined the term “public utility” in Title 48. Pursuant to N.J.S.A. 48:2-13(a), as amended by EDECA, a public utility is an entity “that now or hereafter may own, operate, manage or control within this State any . . . electricity distribution . . . system, plant or equipment for public use, under privileges granted or hereafter to be granted by this State or by any political subdivision thereof.” (emphasis added). Prior to EDECA, to be a public utility, an entity needed to “own, operate, manage or control” within the State of New Jersey “electric light, heat or power . . . system, plant or equipment.” EDECA amended the prior definition by replacing the words “electric light, heat or power” with “electricity distribution.” L. 1999, c. 23, s. 52. Therefore, as modified by EDECA, any “electricity distribution system, plant or equipment” now qualifies an entity for public utility status. Accordingly, the language is far less broad. Thus, it appears that EDECA’s amendment to N.J.S.A. 48:2-13(a) narrows the meaning of “public utility” under New Jersey law.

Joint Petitioners read the language “electricity distribution” in the New Jersey statute as broadly as possible. Joint Petitioners’ Initial Brief at 6. Although they correctly state that “electricity distribution” is not otherwise defined, the Board disagrees with Joint Petitioners’ claim that “the only reasonable interpretation is that the legislature intended the terms . . . to apply to all assets necessary for delivering electricity to customers, including distribution and transmission assets.” Ibid. The Board finds that this conclusion is not consistent with the principles of statutory construction.

In the electric power industry, the words “transmission” and “distribution” have well-understood meanings, even if the line between the two has not always been a bright one. In 1935, Congress passed the FPA, which uses the terms “transmission” and “distribution” to distinguish FERC jurisdiction from state jurisdiction. 16 U.S.C.A. § 824(b)(1). In Order No. 888, FERC established a Seven-Factor Test for determining what facilities are “transmission,” subject to FERC’s exclusive jurisdiction, and what facilities are “local distribution,” subject to the exclusive jurisdiction of the Board. Joint Petitioners are aware of this test and the dividing line, because they have submitted testimony and a study analyzing the seven factors. In simple terms, the Board’s Final Report defined “transmission service” as the “movement of power from the point(s) of generation to the distribution system.” Final Report at 51. “Transmission service, because it generally moves electrons in interstate commerce, is thereby subject to federal jurisdiction.” Id. at 52. Similarly, the Board defined “[d]istribution service,” as “the movement of electrons from the transmission system to the meter.” Id. at 53. For definitional purposes, EDECA merged the two terms and defined a “[t]ransmission and distribution system” in terms of an “electric public utility” that is inclusive of “any facility or equipment that is used for the transmission, distribution, or delivery of electricity to the customers of the electric public utility.” N.J.S.A. 48:3-51 (emphasis added). A “electric public utility” in N.J.S.A. 48:3-51 means a “public utility” as that term is defined in N.J.S.A. 48:2-13. Thus, all definitions lead back to N.J.S.A. 48:2-13, which requires an “electricity distribution . . . system, plant or equipment” to be a public utility in New Jersey.

Joint Petitioners’ position would read the words “electricity distribution” in N.J.S.A. 48:2-13(a) to have the same, or substantially similar, meaning as “transmission and distribution system” under N.J.S.A. 48:3-51. As Rate Counsel correctly states, where the Legislature has carefully employed a term in one place and excluded it in another, it should not be implied where excluded. See, e.g., Brodsky v. Grinnell Haulers, Inc., 181 N.J. 102, 112 (courts traditionally apply the principle “*expressio unius est exclusio alterius*” as a canon of statutory construction to

mean that when items are listed, anything not explicitly stated is assumed not to be included). A Legislative Statement from the Assembly and Senate reveals that the Legislature deliberately modified N.J.S.A. 48:2-13(a) to “electricity distribution,” despite elsewhere providing a unified definition of “transmission and distribution system.” Assembly and Senate Statements at 122 (recognizing that the “bill changes the definition of public utility by removing companies which provide electric light, heat or power and substituting electricity distribution.”) Joint Petitioners’ reading would expand the definition of “electricity distribution” to subsume “transmission,” resulting in a discordant reading of EDECA. This would lead to inconsistent results.

The Board reads the language of N.J.S.A. 48:2-13(a) in harmony with other definitions under EDECA. While the language states that a “public utility” is any “electricity distribution system, plant or equipment,” under N.J.S.A. 48:3-51, enacted as part of EDECA, an electric public utility is clarified as “a public utility, as that term is defined in N.J.S.A. 48:2-13, that transmits and distributes electricity to end users within this State.” Critically, the EDECA definition twice relates back to the distribution requirement: first, by reference to the language of N.J.S.A. 48:2-13, and, second, in its requirement that the utility “transmits and distributes electricity.” N.J.S.A. 48:3-51 (emphasis added). By referencing N.J.S.A. 48:2-13 in the introductory phrase, the Legislature established that definition as the starting point. The distribution system, plant or equipment triggers the public utility status, but EDECA clarifies that the electric public utility “transmits and distributes electricity.” N.J.S.A. 48:3-51 (emphasis added). In other words, an entity’s retention of its transmission system, plant or equipment, in addition to its distribution system, plant or equipment, following restructuring will not result in loss of the public utility status. The Board arrives at this understanding by reading the word “and” to join the words “transmits and distributes” together such that one cannot be read without the other. This reading puts the definitions found at N.J.S.A. 48:2-13(a) and N.J.S.A. 48:3-51 into harmony with the definition of “transmission and distribution system” in EDECA. Under this reading, an electric distribution-only company or a combined electric transmission-distribution company could comply with the public utility definitions found in N.J.S.A. 48:2-13(a) and N.J.S.A. 48:3-51.

This reading is supported by the legislative history. The Legislative Statement accompanying the bills leading to EDECA explains that “while this bill would end the monopoly control of electricity generation by the state’s electric utilities, the transmission and distribution functions of the electric utility (the wires, poles, and other physical infrastructure and the obligation to maintain them) will remain as a monopoly regulated by the BPU.” Assembly and Senate Statements at 110 (emphasis added). The Legislature’s reference to the “electric utility” relates to the EDECA definition of an “electric public utility,” which (as discussed above) includes the “transmits **and** distributes” language paralleled in the Legislative Statement. Again, if a company chose to retain its transmission system along with its distribution system after restructuring, it would still qualify as a public utility subject to the regulation of the Board. At present day, all four of the state’s electric public utilities are combined electric transmission and distribution companies that submit to the BPU’s regulatory authority. Thus, the Board **HEREBY CONCLUDES** that to be a “public utility” in New Jersey, an “electricity distribution” system, plant or equipment is required. The Board **FURTHER CONCLUDES** that transmission system, plant or equipment may be added to the distribution system, plant or equipment without loss of public utility status.

Since restructuring, the link to distribution ensures the Board has the strongest claim to regulatory authority over electric utilities. In 1996, FERC asserted in Order No. 888 that it had exclusive authority over unbundled transmission regardless of the manner of sale. The Board, and other state commissions, challenged FERC’s assertion of authority through the courts. The Court did not uphold FERC’s claim to that authority over unbundled interstate transmission,

regardless of the manner of sale, until 2002. New York, *supra*, 535 U.S. at 20. In those intervening years, progress toward restructuring the energy industry in New Jersey continued. Before the Court ruled in 2002, the BPU issued its Final Report, the Legislature passed the restructuring bills, and Governor Whitman signed EDECA into law. Despite a thorough analysis, Joint Petitioners did not provide citation to any New Jersey statute that defines or refines the role of an electric public utility without some reference to distribution.

The statutory statement of the Board's jurisdiction in N.J.S.A. 48:2-13(d) does not alter this result. Added as part of EDECA, subsection (d) expressly provides that "all services necessary for the transmission and distribution of electricity and gas, including but not limited to safety, reliability, metering, meter reading and billing, shall remain the jurisdiction of the Board of Public Utilities." N.J.S.A. 48:2-13(d) (emphasis added). The same statute, N.J.S.A. 48:2-13(a), omits from the definition of "public utility" the operation, management or control of "electrical transmission", signifying that the Legislature did not intend to include the operation, management or control of electrical transmission as activities that would qualify an entity to be a public utility. As stated above, when "the Legislature has carefully employed a term in one place and excluded it in another, it should not be implied where excluded." GE Solid State, *supra*, 132 N.J. at 308. As such, while the Legislature subjected services necessary for the transmission of electricity to Board jurisdiction at least to some extent, it did not make a transmission-only entity a public utility under N.J.S.A. 48:2-13(d).

Moreover, the Legislative Statement accompanying the bills that became EDECA explains that "services necessary for production, transmission, and distribution of electricity and gas, including but not limited to safety, reliability, metering, meter reading and billing, shall remain the jurisdiction of the BPU." Assembly and Senate Statements at 122. Thus, the plain language of subsection (d), as well as the accompanying legislative history, reflect intent to define the jurisdiction of the Board and not an intent to alter the meaning of "public utility" addressed in subsection (a).

Joint Petitioners' state that the facilities owned, operated, managed, or controlled by MAIT are FERC-jurisdictional transmission assets. See Petition at 6, paragraph 9; see Joint Petitioners' Initial Brief at 3, fn.1. Accepting Joint Petitioners' assertion that MAIT will not own any state-jurisdictional local distribution system, plant or equipment, consistent with the Board's findings above, the Board **HEREBY CONCLUDES** that MAIT will not satisfy the "electricity distribution" element necessary for "public utility" status. As MAIT will not own any electric distribution assets in New Jersey, the Board need not continue an analysis as to whether MAIT meets the remaining criteria of a public utility.

Finally, the Board addresses the procedural status of this case. The request for a determination as to public utility status was first identified by the Joint Petitioners in their filed Petition. As stated above, President Mroz included the issue in the procedural order, which also established the schedule in this matter. Rate Counsel's Motion requested additional briefing of this legal issue that was viewed as a threshold matter, and requested disposition prior to the filing of testimony in this docket. The Motion also requested suspension of the procedural schedule in this matter. President Mroz granted the Motion to suspend and ordered that additional briefs be filed on this legal issue. President Mroz also deferred the motion to the full board for resolution.

The Board **HEREBY ADOPTS**, in their entirety, all preliminary Orders previously issued by President Mroz during the pendency of this matter to date.

The Board **FINDS** that under the facts and circumstances presented that MAIT, holding only transmission assets, would not fall within the current statutory definition of a "public utility,"

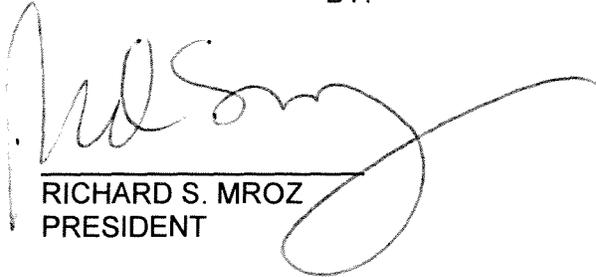
under N.J.S.A. 48:2-13, nor does any other statute provide a basis to conclude that the legislature intended to convey authority for an entity, outside of N.J.S.A. 48:2-13(a), to operate as a "public utility" under the jurisdiction of the Board.

Therefore, for the reasons stated above, the Board **HEREBY ORDERS** that this matter shall proceed in accordance with this Order and President Mroz continue to preside over this proceeding consistent with the Board's August 19, 2015 Order. The Board **FURTHER DIRECTS** the matter to proceed in accordance with a procedural schedule set by Presiding Commissioner President Mroz with such modifications as he deems appropriate.

This Order shall be Effective on March 5, 2016.

DATED: 2/24/16

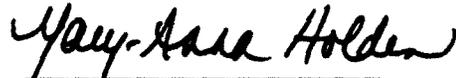
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PRESIDENT



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COMMISSIONER



MARY-ANNA HOLDEN
COMMISSIONER

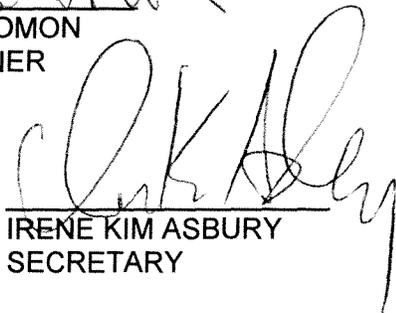


DIANNE SOLOMON
COMMISSIONER



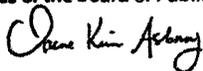
UPENDRA J. CHIVUKULA
COMMISSIONER

ATTEST:



IRENE KIM ASBURY
SECRETARY

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



Docket No. EM15060733 – In the Matter of 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 the 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-19 and Eminent Domain Authority Pursuant to N.J.S.A. 48:3-17.6 et. seq., and;

Docket No. EF02030185 – 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

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