



Agenda Date: 1/27/16
Agenda Item: 2Q

STATE OF NEW JERSEY
Board of Public Utilities
44 South Clinton Avenue, 3rd Floor, Suite 314
Post Office Box 350
Trenton, New Jersey 08625-0350
www.nj.gov/bpu/

ENERGY

I IN THE MATTER OF THE PETITION OF JERSEY) CENTRAL POWER & LIGHT COMPANY PURSUANT) TO N.J.S.A. 40:55D-19 FOR A DETERMINATION THAT) THE MONTVILLE-WHIPpany 230 KV TRANSMISSION) PROJECT IS REASONABLY NECESSARY FOR THE) SERVICE, CONVENIENCE OR WELFARE OF THE) PUBLIC)	ORDER ON REQUEST FOR RECONSIDERATION BPU DOCKET NO. EO15030383 PUC DOCKET NO. 08235-2015N
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Parties of Record:

Stefanie A. Brand, Esq., Director, New Jersey Division of Rate Counsel
Gregory Eisenstark, Esq., Windels Marx, Jersey Central Power and Light Company
Fred Semrau, Esq., Dorsey & Semrau, the Township of Montville
Stephen J. Edelstein, Esq., Montville Board of Education

BY THE BOARD¹:

On or about March 27, 2015, Jersey Central Power & Light Company (“JCP&L” or “Company”) filed a petition with the New Jersey Board of Public Utilities (“Board” or “BPU”) pursuant to N.J.S.A. 40:55D-19 seeking a determination that the Montville-Whippany 230 kV Transmission project (“Project”) is reasonably necessary for the service, convenience or welfare of the public, and therefore the Company is entitled to relief from complying with the zoning, site plan review and other municipal land use ordinances or rules passed by municipalities along the proposed Project route under authority of Title 40, the Municipal Land Use Law (“MLUL”). The matter was transmitted to the Office of Administrative Law (“OAL”) for hearing as a contested matter, and subsequently assigned to the Honorable Leland McGee, ALJ (“ALJ McGee”).

On May 1, 2015, the Township of Montville (“Montville”), a municipality located within JCP&L’s service territory along the proposed route of the Project, moved to intervene as a party in the proceeding. ALJ McGee granted Montville’s motion to intervene pursuant to N.J.S.A. 48:2-32.2 on June 17, 2015. The Montville Board of Education (“Montville BOE”) filed a motion to intervene on August 19, 2015, which ALJ McGee granted on September 8, 2015.

¹ Commissioner Upendra J. Chivukula recused himself as he did not vote on the original matter which is now the subject of reconsideration.

After prehearing conferences, JCP&L filed a Motion to Establish a Procedural Schedule on August 21, 2015. On September 2, 2015, Montville filed opposition to the motion and also filed a cross-motion requesting that JCP&L be directed to establish an escrow account to fund its expert and professional fees “to properly assess this project, its impact on the Township, and possible alternatives.” (“Montville Cross Motion”). JCP&L and Rate Counsel opposed the Montville Cross Motion.

By Pre-Hearing Order dated September 8, 2015, ALJ McGee established a procedural schedule and denied the Montville Cross Motion.²

On September 15, 2015, Montville filed a request with the Board for an interlocutory review of ALJ McGee’s order the Montville Cross-Motion. Opposition was filed by JCP&L on September 17, 2015. Rate Counsel also filed a letter brief opposing interlocutory review and the escrow account.

On October 15, 2015, at its next regularly scheduled Board Agenda Meeting, the Board issued an order granting Montville’s motion for interlocutory review, and after evaluating the motion on the merits found no basis to compel JCP&L to establish an escrow fund for Montville’s costs and expenses. The Order affirmed the decision of ALJ McGee denying the Montville Cross-Motion.³

On November 6, 2015, Montville filed a letter brief with certifications in support of its request for reconsideration (“Reconsideration Request”) of the Board’s October 15, 2015 Order. JCP&L filed a letter brief in response on November 18, 2015, and on November 19, 2015, Rate Counsel filed its letter brief in opposition to the Reconsideration Request.

Montville’s Request for Reconsideration

In the Reconsideration Request, Montville states the Board did not properly inform the parties that it was considering its request for interlocutory review in accordance with N.J.A.C. 1:1-14.10, and therefore, Montville was not afforded the opportunity to provide a copy of the record to the BPU, nor afforded the opportunity to provide additional supporting documents.⁴ Montville alleges these are errors of fact or law which warrant the Board to reconsider its prior decision.

Montville then argues the Board rendered a decision without consideration of the record and the additional information now being submitted which was not available at the time of the original request for interlocutory review. Montville proceeds to argue that the Board misinterpreted the municipal emergency funding mechanism provided for in N.J.S.A. 48:2-32.2, and that the establishment of that mechanism does not compel a legal conclusion that the statute affects or conflicts with the Board’s authority to order that a public utility establish an escrow account to fund the expenses incurred by a municipality.⁵

Montville argues that the Board erred by not fully considering its prior argument that Montville would have been entitled to escrow funds to hire experts if the matter were pending before a local planning board pursuant to N.J.S.A. 40:55D-8(b). Montville cites Flama Const. Corp. v Franklin Twp., 201 N.J. Super. 498 (App. Div. 1985), upholding a municipal ordinance which held that it is appropriate and necessary for escrow accounts to cover the costs incurred in

² ALJ Leland McGee, Prehearing Order dated September 8, 2015, at 5.

³ October 15 Order, at 8 & 9.

⁴ Montville Brief at 2.

⁵ Id. at 3.

reviewing development applications before a local municipal planning board. Montville asserts that the Board denied Montville its statutory right to an escrow account by exercising jurisdiction over this N.J.S.A. 40:55D-19 petition.⁶

Montville outlines the expenses that it has incurred and expects to incur in protecting the interests of its residents, expenses that have necessitated and will necessitate increases in taxes. Montville argues it is patently unfair for its residents to have to pay significant sums of money to represent its own interests in response to a project that it did not request and that benefits other municipalities, and JCP&L should bear the full brunt of the costs of Montville's professional experts.⁷

According to Montville, various cases have held that the Board has broad discretion and the "...courts have consistently held that the Legislature in Title 48 intended to delegate the widest range of regulatory power over public utilities to the [BPU]."⁸ Therefore, Montville urges the Board to exercise its broad discretion "in the interest of justice," and order JCP&L to establish an escrow fund to pay for Montville's professional experts.⁹

JCP&L Reply Brief

JCP&L argues that Montville raises no new legal or factual arguments to warrant granting the Reconsideration Request but rather recites the same "flawed, unsupported allegations that both ALJ McGee and the Board have previously considered and rejected."¹⁰ JCP&L states that the procedural argument made by Montville "misconstrues" the pertinent applicable regulations governing the Board's handling of interlocutory reviews. Additionally, JCP&L alleges Montville's request fails to satisfy the high threshold required for the Board to grant reconsideration of its October 15, 2015 Order. JCP&L requests that the Board deny the Reconsideration Request.¹¹

JCP&L outlines the requirements for the Board to consider granting a motion for reconsideration of one of its orders. Specifically, New Jersey case law requires that the moving party must state the alleged errors of law or fact upon which the Board relied to render its decision¹² and that reconsideration is reserved for cases where "(1) the decision is based upon a 'palpably incorrect or irrational basis' or (2) it is obvious that the finder of fact did not consider, or failed to appreciate, the significance of probative, competent evidence, and the burden is on the movant to show the Board's action was arbitrary and capricious, or unreasonable."¹³

JCP&L argues that Montville has not shown the Board's decision was based on a "palpably incorrect or irrational basis," and it has therefore not established that the decision was "arbitrary, capricious or unreasonable." JCP&L asserts that Montville in its Reconsideration Request: 1) repeats a legal argument previously raised that is without merit; 2) raises procedural issues that selectively and incorrectly interpret the applicable regulations; and 3) provides certifications that do not provide any new evidence but simply identify the amount of funds Montville plans to spend on its expert witness and legal fees to pursue this litigation. JCP&L maintains that

⁶ Id. at 3.

⁷ Id. at 6-8.

⁸ Id. at 8-9 (internal citations omitted).

⁹ Id. at 9.

¹⁰ JCP&L Brief at 2.

¹¹ Ibid.

¹² Ibid. (internal citations omitted).

¹³ Ibid. (internal citations omitted).

Montville has not provided any justification for the Board to grant reconsideration of this matter.¹⁴

JCP&L asserts that Montville's procedural argument fails to accurately interpret Board practice under the rule of special applicability, N.J.A.C. 1:14-14.4. Any possible failure to provide notice of an intent to grant interlocutory review, assuming that it is actually required, only affected those opposing the motion such as JCP&L. Montville was not entitled to supplement the record as necessary evidence should have been provided with the motion. JCP&L argues that Montville improperly presents N.J.A.C. 1:1-14.10(f) in support of its request by quoting only a portion of the regulation. JCP&L alleges Montville failed to include the first sentence qualifier which states "[w]here the proceeding generating the request for interlocutory review has been sound recorded and the agency head requests the verbatim record... then, "[t]he party requesting the interlocutory review shall provide the agency head with all other papers, materials, transcripts or parts of the record which pertain to the request for interlocutory review." JCP&L stresses that in this matter, there was no sound recording of any proceeding and no request by the Board for the verbatim record. Therefore, the regulation does not provide Montville with a second opportunity to present additional information to the Board with its request for interlocutory review.¹⁵

JCP&L argues that Montville's submission of certifications containing information of additional funding allocations and anticipated funding allocations does not constitute new evidence warranting reconsideration of the Board's October 15, 2015 Board order.¹⁶

According to JCP&L, Montville's allegation that the Board misconstrued N.J.S.A. 48:2-32.2 is flawed. Montville's allegation that the procedures proper before a municipal land use board should apply before the Board is simply wrong as a matter of law. JCP&L states that a plain reading of the Board's October 15, 2015 Board Order reveals that the Board did properly interpret N.J.S.A. 48:2-32.2. JCP&L reiterates that there are no New Jersey statutes, regulations or Board orders which require the BPU to order a public utility to fund a municipality's expert fees.¹⁷

Finally, JCP&L argues that the Board properly interpreted the applicable law and reached a correct decision in its October 15, 2015 Board Order, and should not use its broad discretion to grant Montville's Reconsideration Request. JCP&L asserts that doing so would be in direct opposition to past Board precedent, and compelling JCP&L to establish and fund an escrow fund for Montville's professional fees would increase costs to all JCP&L ratepayers, and would establish a dangerous precedent for future Board proceedings. JCP&L concludes that such a result is legally unsupportable, contrary to sound public policy and would significantly increase regulatory costs and ratepayer expenses.¹⁸

¹⁴ Id. at 3.

¹⁵ Id. at 5 and 6.

¹⁶ Id. at 6.

¹⁷ Ibid.

¹⁸ Id. at 10.

Rate Counsel Brief

On November 19, 2015, Rate Counsel filed a letter brief ("RC Brief") in opposition to Montville's Reconsideration Request. Rate Counsel agrees with JCP&L that Montville's request does not identify any material errors of law or fact relied upon in the Board's October 15, 2015 Order that constitute an injustice. Rate Counsel agrees with the Board's Order, which affirmed Judge McGee's ruling denying Montville a JCP&L-funded escrow account for payment of Montville's professional experts and attorney fees, and it believes would be unduly burdensome to JCP&L's ratepayers by imposing additional costs on the Company that would be passed on to the Company's ratepayers.¹⁹

In addition, in its Brief, Rate Counsel stated that it would rely on its briefs below to support its position. Rate Counsel argues Montville has provided no legal or factual reason for the Board to grant reconsideration of its prior denial to order JCP&L to establish an escrow account to pay Montville's costs to pursue its intervention. Rate Counsel also cites D'Atria v D'Atria, 242 N.J. Super. 392, 401 (Ch. Div. 1990) to emphasize that Montville is not entitled to reconsideration because it is dissatisfied with the decision to deny its escrow account request.²⁰ Rate Counsel argues that Montville has not shown that the Board's decision is based upon "palpably incorrect or irrational basis" thereby not meeting this additional factor for reconsideration.²¹

Rate Counsel believes the Board correctly and rationally relied upon Board precedent in applying the statute governing this matter, N.J.S.A. 40:55D-19, "which 'authorizes the Board to exempt a public utility's development that spans multiple municipalities, from local zoning ordinances and regulations if the Board deems the development 'reasonably necessary for the service, convenience of the public.'"²² Additionally, Rate Counsel agrees that the Board accurately relied upon its prior decisions denying a motion by a municipality to order a utility to establish and fund an escrow account to pay the municipality's litigation costs and fees. Rate Counsel maintains that Montville has not distinguished those Board decisions from this matter or shown that the Board's reliance on its past decisions is incorrect or irrational.²³

Rate Counsel then argues that Montville's legal argument, that the Board denied Montville its right to a utility funded professional expert escrow account as provided under the MLUL, is undermined by the language of N.J.S.A. 40:55D-19 because the Board, not Montville, is the trier of fact in this matter. Montville is an intervener in this Board matter, and the statutes that govern this proceeding do not require the Board to direct JCP&L to pay the expert fees, technical and legal, of an interested municipality, a fact which Montville has previously acknowledged. Rate Counsel points out that the Board correctly took notice of the legislature's specific action to provide municipalities with an emergency resolution mechanism to raise the funds to pay for legal and expert fees when the municipality decides to participate in a Board proceeding, and Montville has failed to show that this was an error of law.²⁴

¹⁹ RC Brief at 2.

²⁰ Id. at 3.

²¹ Id. at 4 (internal citations omitted).

²² Ibid. (internal citations omitted).

²³ Id. at 4 and 5.

²⁴ Id. at 5.

Rate Counsel argues that Montville's offer of further evidence of its anticipated increasing litigation costs by detailing the issues in the matter does not show that ALJ McGee or the Board failed to consider or appreciate the evidence of record. Both the Judge and the Board considered that Montville had and was continuing to allocate funding toward these costs but determined that there is no legal basis for JCP&L or its ratepayers to pay these costs, regardless of the amount. The legislature clearly considered the issue when it enacted a statute allowing municipalities to intervene in Board matters with taxpayers, and not the utility's ratepayers paying for that representation.²⁵

Rate Counsel concludes that the Reconsideration Request should be denied as Montville has provided no legal or factual reason for the Board to reconsider its denial of the Township's escrow request.

DISCUSSION AND FINDINGS

Following extensive review, the Board **FINDS** that nothing in Montville's request requires the Board to modify or otherwise reconsider its decision. Generally, a party should not seek reconsideration merely based upon dissatisfaction with a decision. D'Atria v. D'Atria, 242 N.J. Super. 392, 401 (Ch. Div. 1990). Rather, reconsideration is reserved for those cases where (1) the decision is based upon a "palpably incorrect or irrational basis;" or (2) it is obvious that the finder of fact did not consider, or failed to appreciate, the significance of probative, competent evidence. E.g., Cummings v. Bahr, 295 N.J. Super. 374, 384 (App. Div. 1996). The moving party must show that the action was arbitrary, capricious or unreasonable. D'Atria, supra, 242 N.J. Super. at 401.

Montville's argument that the Board's failure to notify Montville within 10 days that it was considering the Request for Interlocutory Review, in compliance with N.J.A.C. 1:1-14.10, is not error of fact or law which justifies Reconsideration of the Board's October 15, 2015. N.J.A.C. 1:14-14.4 contains specific procedures for interlocutory review at the Board which do not include a 10 day requirement to notify the movant that the Board will be considering the review. Section 1:14-14.4 states:

Interlocutory Review

- (a) When a party requests interlocutory review, the BPU shall make a determination as to whether to accept the request and conduct an interlocutory review by the later of the following:
1. Ten days after receiving the request for interlocutory review; or
 2. The BPU's next regularly scheduled open meeting after expiration of the 10-day period from receipt of the request for interlocutory review;
- (b) If the BPU determines to conduct an interlocutory review, the BPU shall issue a decision, order or other disposition of the review no later than the next scheduled Board meeting on or after the 20th day following that determination.

²⁵ Id. at 5 and 6.

- (c) Where the BPU does not issue an order within the timeframe set out in (b) above, the judge's ruling shall be considered conditionally confirmed. The time period for disposition may be extended for good cause for an additional 20 days if both the Board and the Director of the Office of Administrative Law concur.

Nonetheless, the rule cited by Montville provides that the Board's failure to act shall be considered a denial of the motion. N.J.A.C. 1:1-14.10(C). Additionally, reviewing the 'evidence' Montville indicated that it would have submitted, namely the information contained in the Certifications of James Bishop and Victor Canning, this information goes to the extent of Montville's costs and the issues it believes need to be addressed. As the basis of the Board's determination in its October 15, 2015 Order was a conclusion that there is "no legal authority to support Montville's request to compel JCP&L to establish an escrow,"²⁶ evidence relating to additional specific costs would not have altered the Board's conclusion.

Montville further argues that the Board misinterpreted N.J.S.A. 48:2-32.2 regarding the mechanism provided to municipalities to raise funds by emergency resolution. Montville states that were this matter before its local planning board, it would have been entitled to an escrow fund pursuant to N.J.S.A. 40:55D-8(b). Specifically, Montville argues that the Board "denied the Township of its statutory right to the escrow." These arguments are not new, and were raised by Montville to various degrees below. As noted in the Board's Order, the Board fully considered all issues before it. A request for reconsideration is not a redo, and a party cannot seek reconsideration simply because it is dissatisfied with the Board's decision. D'Atria, supra, 242 N.J. Super. at 401. Here, the Board fully considered the request on Interlocutory review and determined that there was no statutory authority to order JCP&L to establish an escrow.

The applicable statute detailing the Board's jurisdiction is N.J.S.A. 40:55D-19. The legislature specifically enacted N.J.S.A. 40:55D-19 so that public utilities with projects spanning multiple municipalities could avoid multiple, piecemeal review of their projects when trying to site large projects including transmission projects. As stated in the Board's October 15, 2015 Order, the Board is obligated to follow the terms and objectives of the statute. See T.H. v. Division of Developmental Disabilities, 189 N.J. 478, 491 (2007) (an administrative agency may not "alter the terms of a legislative enactment or frustrate the policy embodied in the statute").

This Board will not modify an Order in the absence of a showing that the Board's action constituted an injustice or that the Board misunderstood or failed to take note of a significant element of fact or law. The Board **FINDS** that nothing in Montville's Reconsideration Request challenges the facts relied on by the Board or changes the conclusions reached. Montville has not established any grounds for reconsideration of the October 15, 2015 Board Order. Montville's arguments have already been considered by the Board, and rejected. Therefore, for the reasons stated above, the Board **HEREBY DENIES** Montville's request for reconsideration of the Board's October 15, 2015 Board Order.

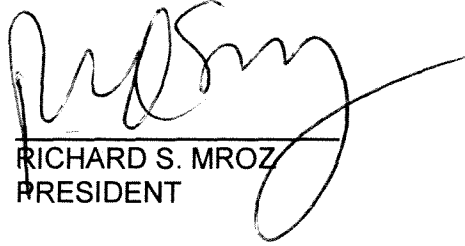
²⁶ October 15, 2015 Order at 8.

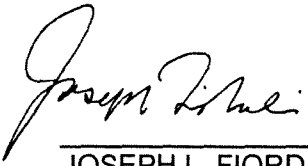
This Order shall be Effective on February 6, 2016.

DATED:

Jan 28, 2016

BOARD OF PUBLIC UTILITIES
BY:

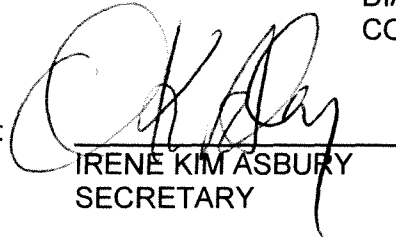

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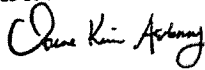

MARY-ANNA HOLDEN
COMMISSIONER


DIANE SOLOMON
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



**IN THE MATTER OF THE PETITION OF JERSEY CENTRAL POWER & LIGHT COMPANY
PURSUANT TO N.J.S.A. 40:55D-19 FOR A DETERMINATION THAT THE MONTVILLE-
WHIPPANY 230 KV TRANSMISSION PROJECT IS REASONABLY NECESSARY FOR THE
SERVICE, CONVENIENCE OR WELFARE OF THE PUBLIC
BPU DOCKET NO. ER15030383
OAL DOCKET NO. PUC 08235-2015N**

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