

Agenda Date: 8/19/15 Agenda Item: 6A

STATE OF NEW JERSEY

Board of Public Utilities 44 South Clinton Avenue, 9th Floor Post Office Box 350 Trenton, New Jersey 08625-0350 www.nj.gov/bpu/

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IN THE MATTER OF THE PETITION OF NEW JERSEY)	ORDER REGARDING
NATURAL GAS COMPANY FOR APPROVAL AND)	MOTIONS TO INTERVENE
AUTHORIZATION TO CONSTRUCT AND OPERATE)	OR PARTICIPATE
THE SOUTHERN RELIABILITY LINK PURSUANT TO)	
N.J.A.C. 14:7-1.4)	DOCKET NO. GE15040402

Parties of Record:

John G. Valeri Jr., Esq., Chiesa, Shahinian & Giantomasi, P.C., on behalf of New Jersey Natural Gas Company **Stefanie A. Brand, Esq., Director**, New Jersey Division of Rate Counsel

BY THE BOARD:

On April 2, 2015, amended June 5, 2015, New Jersey Natural Gas ("NJNG" or "Company"), a New Jersey public utility engaged in the business of purchasing, distributing, transporting, and selling natural gas to approximately five-hundred and ten-thousand (510,000) customers in Monmouth, Ocean, Morris, Middlesex and Burlington Counties, filed a petition with the New Jersey Board of Public Utilities ("Board") pursuant to N.J.A.C. 14:7-1.4. The Company seeks authorization and approval from the Board to construct and operate its proposed Southern Reliability Link project ("Project"), which the Company represents will connect the existing natural gas system in Ocean, Monmouth and Burlington Counties to a new supply point with the Transcontinental Pipe Line Company ("Transco") in Chesterfield, New Jersey, adjacent to the New Jersey Turnpike.

According to the petition as amended, the total length of the Project will be approximately thirty (30) miles, and will consist of a thirty (30) inch natural gas transmission pipeline operating at a maximum allowable operating pressure of seven-hundred twenty-two (722) pounds per square inch gauge ("psig"). The petition also indicates that the proposed route for the Project will commence in Chesterfield with an alignment that runs through the municipalities of North Hanover, Upper Freehold, Plumsted, Jackson and Manchester. A portion of the proposed route will also traverse areas located within and along the Joint Base McGuire-Dix-Lakehurst. NJNG requests permission to construct and operate the proposed pipeline and approval on an expedited basis to permit it to start construction as soon as possible.

¹ The Company simultaneously filed a second petition with the Board pursuant to <u>N.J.S.A.</u> 40:55D-19 of the New Jersey Municipal Land Use Law ("MLUL") and <u>N.J.S.A.</u> 48:9-25.4 ("MLUL Proceeding"). The Board retained that matter for hearing and designated Commissioner Dianne Solomon as the Presiding Officer.

Pursuant to N.J.A.C. 14:7-1.4, Board approval is required prior to the construction or operation of a natural gas pipeline that is intended to be operated in excess of two-hundred fifty (250) psig and is located within one-hundred (100) feet of any building intended for human occupancy, and further requires that the pipeline satisfy the requirements of 49 C.F.R. 192 and other provisions of N.J.A.C. 14:7. According to the amended petition, the proposed Project alignment includes one-hundred forty one (141) structures intended for human occupancy within one-hundred (100) feet of the pipeline, of which one-hundred thirty (130) are residential and eleven (11) are commercial. The Company asserts that the proposed Project will create a new redundant major feed, and accordingly will support safe, reliable and resilient delivery of natural gas to its customers in Ocean, Burlington and Monmouth Counties.²

After appropriate notice in newspapers in general circulation within the Company's service territory, two (2) joint public hearings occurred on July 28, 2015 in Manchester Township, New Jersey in this proceeding and the MLUL Proceeding. An additional public hearing is scheduled for August 26, 2015, in Mount Laurel Township, New Jersey.

PENDING MOTIONS:

The Burlington County Board of Chosen Freeholders ("Burlington County"), Township of North Hanover ("North Hanover") and Township of Chesterfield ("Chesterfield") filed motions to intervene in this proceeding and in the MLUL Proceeding. The Township of Plumsted ("Plumsted") filed a motion to participate in both proceedings, and the Pinelands Preservation Alliance ("PPA") filed a motion to intervene or in the alternative to participate in this proceeding and in the MLUL Proceeding.

By this Order, the Board addresses the motions to intervene or participate filed by Burlington County, North Hanover, Chesterfield, Plumsted and PPA in the instant proceeding concerning the construction and operation of the Project pursuant to N.J.A.C. 14:7-1.4.

Public Entities

As to this proceeding, Burlington County, Chesterfield and North Hanover sought to intervene and Plumsted (collectively, "Public Entities") sought participant status as a matter of right, pursuant to N.J.S.A. 48:2-32.2(a). In each case, the Public Entities asserted that the Project will significantly impact the entity and/or its residents. They further asserted that intervention will not cause confusion or delay. Specifically, Burlington County asserted that the Project will have a severe impact on County roads and travel. Chesterfield asserted that the route would proceed through its busiest roads and be in close proximity to its municipal complex. It further asserted that the proposed route would affect its ability to lay water lines. North Hanover asserted that the Project will negatively impact the Brigadier General William C. Doyle Cemetery and the

² Burlington County Board of Chosen Freeholders ("Burlington County"), Township of North Hanover ("North Hanover") and Township of Chesterfield ("Chesterfield") filed motions to intervene in the MLUL Proceeding. The Township of Plumsted ("Plumsted") filed a motion to participate, and the Pinelands Preservation Alliance ("PPA") filed a motion to intervene or in the alternative to participate in MLUL Proceeding. By Order dated July 21, 2015, Commissioner Solomon granted the motions to intervene or participate that were filed by Burlington County, North Hanover, Chesterfield and Plumsted, and granted PPA participant status. <a href="https://link.pursuant.org/link.pursuan

³ This Order only addresses Motions filed in this proceeding, Docket No. GE15040402.

Arneytown Historic District. Finally, Plumsted indicated that the proposed route would be in close proximity to residential dwellings and roadways within its municipal borders.

PPA

According to its motion to intervene or alternatively participate, PPA is a private, nonprofit organization dedicated to the preservation and conservation of the Pinelands of New Jersey ("Pinelands"). PPA states that it has a significant interest in the outcome of this matter because it has spent over twenty-five (25) years preserving the New Jersey Pinelands and defending the integrity of the Pinelands Comprehensive Management Plan ("CMP"), and the Project will have both a direct and indirect impact on natural resources and wildlife in the protected area of the Pinelands

RESPONSES:

<u>NJNG</u>

The Company opposes the motions to intervene or participate on the grounds that this matter is an uncontested case. The Company asserts that the treatment of utility filings pursuant to N.J.A.C. 14:7-1.4 has traditionally been as uncontested cases. The Company states that the rules regarding intervention only apply in contested cases and, accordingly, the motions for intervention or participation should be denied.

Burlington County and North Hanover

Burlington County filed a response to the Company's opposition. By separate correspondence, North Hanover and Chesterfield joined in Burlington County's response. Burlington County states that most of the structures that are within one-hundred (100) feet of the Project are in Burlington County and it has significant concerns with regard to the safety of the adjacent residents. It also states that it has an interest in the construction and installation of the Project, and as a body politic has a responsibility to help ensure the safety of its residents.

Burlington County also asserts that it has a statutory right to intervene pursuant to <u>N.J.S.A.</u> 48:2-32.2(a) and (b), as this matter involves facilities affecting Burlington County, the public and residents within Burlington County.

Additionally, Burlington County claims that the Board encourages full participation in proceedings that have the potential to affect large groups of interested parties to ensure that a full record is created. According to Burlington County, this matter will affect large groups of its residents, which demands intervention.

Assuming <u>arguendo</u> that Burlington County is not permitted to intervene in this matter, it nonetheless argues that the application as well as the manner in which these applications have been historically treated fits within the statutory definition of a contested case. Burlington County cites to various petitions involving the construction of pipelines pursuant to N.J.A.C. 14:7-1.4 in support of its position that testimony and evidence is presented at public hearings. Burlington County states that in all the referenced applications, the public hearings were designed to result in an adjudication concerning the rights, duties, obligations, privileges, benefits or other legal relations of specific parties over which there exists disputed questions of fact, law or disposition relating to the proposed activities or interests, thereby indicating that each application was treated as a contested case.

Chesterfield:

Chesterfield also filed a response to the Company's opposition by correspondence dated August 7, 2015. In its response, Chesterfield states that it "recently 'heard' from other counsel that it is expected that the Board will deny the motions to Intervene and treat this petition as 'uncontested'⁴". Chesterfield argues that the Board should treat this petition as a contested matter and allow the intervention of those parties who have moved for the same. In support of its position, it states that this petition is "far from typical" and the Company is seeking permission to "deviate from the 100-foot setback requirements of N.J.A.C. 14:7-1.4 to allow the installation of a [thirty] 30-inch, [seven-hundred twenty-two] 722 psig pipeline through the center of the Township of Chesterfield, along with main arteries through other municipalities.

Chesterfield further alleges that there has not been "any other pipeline operated by NJNG of such dimensions" and that "NJNG bears a substantial burden to prove that it has the experience, the 'track record,' and the wherewithal to safely construct and operate such a significant conduit; and that despite the several notices issued to it related to 'One Call' violations in the past year alone, and its having consented to penalties for at least [forty-nine] 49 of those violations, members of the public, public entities and parties who stand to be impacted the most by the installation of the pipeline should be permitted to question and test NJNG as to its capabilities with regard to this particular high transmission pipeline." It argues that "given the negative prior experiences of NJNG with small pipelines and gas mains, the public's well-documented fear of having this significant piece of infrastructure located less than [one-hundred] 100 feet from their front doors, is of a far greater public interest than might otherwise be the case."

NJNG:

The Company filed a sur-reply to Chesterfield's response on August 12, 2015. In its sur-reply, the Company states that Chesterfield "mischaracterized" its petition as a "waiver of a 100-foot setback requirement." The Company argues that "N.J.A.C. 14:7-1.4 merely requires prior Board approval of pipelines proposed within [one-hundred] 100 feet of a building intended for human occupancy and with a maximum operating pressure in excess of 250 psig. The Southern Reliability Link ("SRL") meets those criteria and NJNG has therefore requested Board approval pursuant to the regulation."

The Company also states that it "operates approximately [nineteen] 19 miles of transmission lines with dimensions equal to the proposed SRL." The Company further states that "those transmission lines are the backbone of NJNG's transmission system and the majority of those lines have been in operation for more than [twenty] 20 years" and "NJNG's safety record on its transmission lines is spotless."

In addition, the Company argues that "Chesterfield is wrong about NJNG's record of One Call violations" and that it has "never had a One Call violation pertaining to any of its natural gas transmission lines." It states that "with regard to its distribution lines, in 2014, NJNG completed approximately 99.98% of over 153,000 One Call mark-out requests without any notice of violation" and "these facts are indisputable."

⁴ While at most Chesterfield may have "heard" from other counsel with regard to Board Staff's recommendation, Chesterfield could not have heard about any decision by the Board on the merits of the motions prior to a vote of the Board at an open public meeting pursuant to the Open Public Meetings Act, N.J.S.A. 10:4-6, et seq. N.J.S.A. 52:14F-7(a) requires that the agency head, the Board, make the determination as to whether a matter is a contested case.

DISCUSSION AND FINDINGS:

The general standards for intervention are set out in <u>N.J.A.C.</u> 1:1-16.1(a), which provides that it is applicable in contested matters. Specifically, the rule limits intervention to any person or entity "who will be substantially, specifically and directly affected by the outcome of a *contested* case..." (emphasis added). A "contested case" is defined at <u>N.J.A.C.</u> 1:1-2.1 as follows:

"Contested case" means an adversary proceeding, including any licensing proceeding, in which the legal rights, duties, obligations, privileges, benefits or other legal relations of specific parties are required by constitutional right or by statute to be determined by an agency by decisions, determinations, or orders, addressed to them or disposing of their interests, after opportunity for an agency hearing. N.J.S.A. 52:14B-2. The required hearing must be designed to result in an adjudication concerning the rights, duties, obligations, privileges, benefits or other legal relations of specific parties over which there exist disputed questions of fact, law or disposition relating to past, current or proposed activities or interests. Contested cases are not informational nor intended to provide a forum for the expression of public sentiment on proposed agency action or broad policy issues affecting entire industries or large, undefined classes of people.

A contested case does not merely refer to whether sufficient adversity exists between the parties. Camden County v. Board of Trustees of PERS, 97 N.J.A.R.2d (TYP) 105 at 22-23. Instead, in determining whether a matter is a contested case, there are three (3) factors to consider: (1) whether a hearing is required by statute or constitutional provisions; (2) whether the hearing will result in an adjudication concerning rights, duties, obligations, privileges, benefits or other legal relations; and (3) whether the hearing involves specific parties rather than a large segment of the public. Camden County v. Board of Trustees of PERS, 97 N.J.A.R.2d (TYP) 105 at 23 (citing New Jersey Practice, Volume 37, Administrative Law and Practice, Lefelt, 1988).

Turning to the matter at hand, which was filed under N.J.A.C. 14:7-1.4, there is no statutory or constitutional requirement that the Board provide an adjudicatory hearing prior to making a final administrative agency determination concerning the Project. The rule only requires Board approval prior to the installation and/or operation of a pipeline in excess of two-hundred fifty (250) psig if the proposed pipeline alignment is planned to pass within one-hundred (100) feet of any building intended for human occupancy, and does not require the Board to conduct an evidentiary hearing. Therefore, the Board's review of the petition is narrow in scope, and it is only tasked with determining whether the Project is in conformity with state and federal natural gas pipeline regulations and ensuring that the number of habitable dwellings within one-hundred (100) feet of the Project is minimized. The Board is not tasked with making any findings of fact or a determination as to whether the Project is necessary.

An "uncontested case," by contrast, is a proceeding designed to afford interested parties the opportunity to present their views and includes rule-making and investigative hearings. N.J.S.A. 52:14F-5(o). See also, N.J.A.C. 1:1-21.1 to 21.5. An uncontested case is further defined as "any hearing offered by an agency for reasons not requiring a contested case proceeding under the statutory definition of a contested case." N.J.A.C. 1:1-2.1.

None of the entities seeking intervener or participant status have cited to any authority supporting a determination that an evidentiary hearing is required with regard to this petition. Burlington County makes reference to numerous petitions filed pursuant to N.J.A.C. 14:7-1.4,

where it indicates hearings were conducted and evidence was presented. The hearings in these matters were public hearings which afford any person an opportunity to present oral and written comments, arguments, data and views. See N.J.A.C. 1:14-2.1-2. Public hearings were likewise conducted in connection with this matter at which time Burlington County, Chesterfield, North Hanover, Plumsted and PPA were afforded the opportunity to voice their concerns with the Project. An additional public hearing is scheduled on August 26, 2015.

"Administrative agencies have the discretion to decide whether a case is to be classified as 'contested,' whether to reopen a hearing to admit further evidence before the entry of a final decision, and whether to look beyond the four corners of the record in making a final determination." In re Public Service Elec. and Gas Company's Rate Unbundling, Stranded Costs and Restructuring Filings, 330 N.J. Super. 65, 106 (App. Div. 2000) aff'd 167 N.J. 377 (2001). As the Supreme Court has underscored, the New Jersey Administrative Procedure Act does not create a substantive right to an administrative hearing. In re Fanelli, 174 N.J. 165, 172 (2002). Additionally, as explained above, no statutory provision applicable in this matter creates a right to an evidentiary hearing. Moreover, no suggestion has been made – nor could it – that an evidentiary hearing is required as a matter of constitutional right. See Cedar Grove v. Sheridan, 209 N.J. Super. 267, 275 (App. Div. 1986).

The Board notes that Burlington County, Chesterfield, North Hanover, Plumsted and PPA would have no additional rights were they permitted to intervene in this proceeding. As indicated above, all persons or entities may participate in the Board's public hearing or submit public comments. They can present relevant information and make arguments which will be part of the record the Board will consider in this proceeding.

The Board has further reviewed N.J.S.A. 48:2-32.2, which was cited by the Governmental Entities as a basis for their right to intervene. The legislative history of the amendments notes that the cited provision is intended to be limited to matters involving "rate adjustments, the discontinuance, curtailment or abandonment of utility services, or the fixing of standards for measuring the quality and quantity of utility products or services, and any hearing involving utility surcharge collections." See Senate County and Municipal Government Committee, Statement of Senate Bill No. 2040 at 1 (October 18, 1984).

The Board further notes that the movants are already either interveners or participants in the MLUL Proceeding. The MLUL Proceeding is the more appropriate forum for these entities to address concerns beyond this limited proceeding. The MLUL Proceeding permits the Board to consider additional factors with regard to the necessity of the Project. N.J.S.A. 40:55D-19 mandates that the Board find, after a hearing on notice to affected municipalities, that "the proposed installation of the development in question is reasonably necessary for the service, convenience or welfare of the public." In determining whether the proposed utility project is "reasonably necessary for the service, convenience or welfare of the public," case law directs the Board to look at the following factors:

- 1. The benefits to the whole public served by the utility and not the limited group that benefits from the local zoning ordinances;
- 2. The locations must be found to be "reasonably necessary" and so the Board must consider the community zoning plan, the physical characteristics of the site, and the surrounding neighborhoods; and
- 3. Alternative sites and their comparative advantages and disadvantages, including cost, must be considered.

In re Pub. Serv. Elec. & Gas Co., 35 N.J. 358 (1961).

Not only does the MLUL mandate an evidentiary hearing, but also it requires the Board to weigh the aforementioned factors - a determination which involves issues of material fact and will require the presentation of evidence and cross-examination. Burlington County, Chesterfield and North Hanover will be permitted to participate in this adjudicatory process, since they have been afforded intervener status⁵.

Accordingly, the Board deems it unnecessary to address the other two (2) factors with regard to its determination as to whether this matter constitutes a contested case. The Board HEREBY FINDS that this matter is an uncontested case. In light of the above, the Board HEREBY **DENIES** the motions to intervene or participate that were filed by Burlington County, Chesterfield, North Hanover, Plumsted and PPA.

The effective date of this Order is August 29, 2015.

8/19/15 DATED:

BOARD OF PUBLIC UTILITIES

BY:

RICHARD S. MROZ PRESIDENT

JÓSÉPH L. FIORDALISO

COMMISSIONER

COMMISSIONER

DIANNE SOLOMON

COMMISSIONER

UPENDRA J. CHIVUKULA

COMMISSIONER

ATTEST

IRENE KIM ASBURY **SECRETARY**

I HEREBY CERTIFY that the wit document is a true copy of the in the flies of the Board of

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See I/M/O the Petition of New Jersey Natural Gas Company for a Determination Concerning the Southern Reliability Link Pursuant to N.J.S.A. 40:55D-19 and N.J.S.A. 48:9-25.4, Docket No. GO15040403 (Order dated July 21, 2015).

IN THE MATTER OF THE PETITION OF NEW JERSEY NATURAL GAS COMPANY FOR APPROVAL AND AUTHORIZATION TO CONSTRUCT AND OPERATE THE SOUTHERN RELIABILITY LINK PURSUANT TO N.J.A.C. 14:7-1.4

BPU DOCKET NO. GE15040402

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