BEFORE THE STATE OF NEW JERSEY
BOARD OF PUBLIC UTILITIES

I/M/O THE PETITION OF JERSEY CENTRAL POWER AND LIGHT COMPANY SEEKING APPROVAL OF THE SALE OF THE FORKED RIVER GENERATING STATION PURSUANT TO N.J.S.A 48:3-7 AND A WAIVER OF THE ADVERTISING REQUIREMENTS OF N.J.A.C 14:1-5.6(b)	BPU DOCKET NO. EM07010026

INITIAL BRIEF OF THE DEPARTMENT OF THE PUBLIC ADVOCATE DIVISION OF RATE COUNSEL

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PROCEDURAL HISTORY

On January 17, 2007, Jersey Central Power and Light Company ("JCP&L," or the "Company") filed a petition with the Board of Public Utilities ("Board" or "BPU") seeking approval for the sale of the Forked River Generating Station ("Forked River") and a waiver of the Board's advertising requirements.

On March 23, 2007, representatives of JCP&L, Board Staff, the Office of the Attorney General and the Department of the Public Advocate, Division of Rate Counsel ("Rate Counsel") met during an informal scheduling conference. At that time, the Company agreed to file testimony in support of its Petition on April 13, 2007. The Company filed the Direct Testimonies and exhibits of Susan D. Marano, a Staff Business Analyst for FirstEnergy Service Company and of Michael S. Hyrnick, Director, Business Development, with FirstEnergy Service Company.

Rate Counsel filed the Direct Testimony of its expert witness, Matthew I. Kahal on May 25, 2007. The Company filed the Rebuttal Testimonies of Mr. Hyrnick and Ms. Marano on June 6, 2007.

An evidentiary hearing was held on June 12, 2007 before Commissioner Joseph L. Fiordaliso.

STATEMENT OF FACTS

Forked River is an 86 MW gas-fired combustion turbine power plant located in Lacey Township and Ocean Township, New Jersey. *Petition, p.2.*

On January 17, 2007, JCP&L filed a petition with the BPU seeking approval for the sale of the Forked River facility to Forked River Power, LLC ("FRP"), a Delaware limited liability company indirectly owned by Maxim Power (USA) ("Maxim"). At the same time, the Company requested a waiver of the Board's advertising requirements. JCP&L claimed that the granting of a waiver in this instance would not adversely affect the public interest, that there was no relationship between the Company and FRP other than buyer and seller, and that the purchase price to be paid by FRP represents the fair market value of the utility. *Petition, para. 17.*

JCP&L has advised the Board that FRP will pay JCP&L $20 million for the facility. *Petition, para. 8.* This includes the power plant, step-up transformer equipment, inventories and approximately 43 acres of land. *Petition, para. 10, Purchase and Sale Agreement ("PSA"), Appendix 1, T63:L1-2.* JCP&L has retained responsibility for any pre-closing environmental liabilities associated with the Forked River facility. *Id.* In conjunction with the sale, JCP&L and FRP have entered into an agreement whereby JCP&L will provide operation and maintenance services for the plant. *Petition, para. 11.* In addition, JCP&L's unregulated corporate affiliate, FirstEnergy Solutions, has entered into a tolling agreement with FRP. *Petition, para. 12.* This is a ten-year agreement whereby FirstEnergy Solutions provides fuel for the unit and makes fixed and variable payments to FRP for an entitlement to the output from the plant. *Id.*

In support of its case, the Company filed the testimony and exhibits of Susan D. Marano and Michael S. Hyrnick on April 12, 2007. Ms. Marano, a Staff Business Analyst for FirstEnergy Service Company, testified on the calculation of and the accounting for the estimated net sales proceeds to be recovered from ratepayers through the non-utility generation clause ("NGC"). *JC-2, p. 2*. Ms. Marano estimated that the net loss charged to customers from the sale of Forked River would be $1,931,777. *JC-2, Schedule SDM-1.* Ms. Marano also testified regarding the ratemaking treatment for the environmental cost recovery and related accounting. *JC-2, p. 6.*

Mr. Hyrnick, Director of Business Development at FirstEnergy Service Company, testified regarding the prior attempts to sell the facility and the process that resulted in the current proposal. *JC-1, pp. 6-10.* Mr. Hyrnick stated his opinion as to the fair market value of the plant and testified regarding the "black start" service obligation associated with Forked River and the negative impact this agreement had on the market value of the plant. *JC-1, p. 4.* Additional testimony was offered by Mr. Hyrnick regarding the tolling agreement between FirstEnergy and FRP. *JC-1, pp. 10-11.*

Rate Counsel filed the testimony of its expert witness, Matthew I. Kahal on May 25, 2007. Mr. Kahal testified that his expertise was in the areas of "electric utility integrated planning, plant licensing, environmental issues, mergers and financial issues," with a recent focus on "electric utility restructuring and competition." *RC-1, p. 1.* Mr. Kahal testified that ratepayers would likely obtain greater benefit from the retention of the plant. *RC-1, p. 6.* Mr. Kahal testified that his calculations, based on the data provided by JCP&L, showed a net present value benefit to ratepayers from continued ownership of the facility of about $31.0 million and a nominal benefit of about $72.0

million. Mr. Kahal noted that this estimate of ratepayer benefit could be understated as the data did not include the “very high” Eastern PJM Reliability Pricing Model (“RPM”) capacity prices announced in April. *Id.* Mr. Kahal also recommended that the Board should direct the Company to seek to renegotiate the Oyster Creek Station Blackout Agreement if it continues ownership of the Forked River facility.

The Company filed the Rebuttal Testimonies of Mr. Hyrnick and Ms. Marano on June 6, 2007. In her Rebuttal Testimony, Ms. Marano recommended that any post-2006 Forked River operating losses that the Company, had agreed, by stipulation, to absorb, should be charged to customers. *JC-2 (Rebuttal), p. 3.* Mr. Hyrnick, in his rebuttal testimony, produced a “revised set of DCF analyses” that, starting with the year 2008, assumed a 50% reduction in capacity prices, with an additional 25% reduction taking place after 5 years. *JC-1 (Rebuttal) pp. 6-7.*

An evidentiary hearing was held at the Board before Commissioner Fiordaliso on June 12, 2007.

ARGUMENT

I. The Proposed Sale Of Forked River Is Not In The Best Interest Of JCP&L's Ratepayers And Should Be Rejected By The Board

With the enactment of the Electric Discount and Energy Competition Act, *N.J.S.A. 48:3-48 et seq.* ("EDECA"), the New Jersey Legislature established requirements for the sale of generation assets after retail choice. The Legislature directed that before a utility can divest a generation asset eligible for stranded cost recovery, the utility must seek Board approval for the sale. *N.J.S.A. 48:3-59c.* The Legislature further directed that the Board should approve this sale if the Board can find that the sale meets certain specified conditions. Thus, in reviewing this Petition, the Board must determine that the Company has demonstrated that the sale of the generation asset complies with the provisions set forth in section 11 of the statute, including showing ratepayer benefit.[1]

Despite its assertion to the contrary, the Company has failed to demonstrate compliance with the statutory provisions. Indeed, while selling Forked River will result in a net cost to ratepayers of approximately $2.0 million, a conservative analysis of ratepayer benefits performed by Rate Counsel's expert witness Mr. Kahal showed an estimated ratepayer benefit associated with continued ownership of Forked River of

[1] The Company claims that *N.J.S.A. 48:3-59* does not apply to this asset but assures the Board "that the various criteria set forth *in N.J.S.A. 48:3-59.c* have been met." The exact legal basis for the Company's contention is unclear but Rate Counsel notes that the Board relied on *N.J.S.A. 48:3-59* and used this standard of review in the recent approval of Atlantic City Electric's sale of its Keystone and Conemaugh assets which translated into net proceeds for ratepayers of $134.2 million. JCP&L estimates a $2.0 million loss charged to ratepayers for the sale of the Forked River asset.

$31.0 million. Accordingly, the Board should not approve the sale of Forked River at this time.

1. JCP&L has failed to demonstrate that the $20.0 million sale price reflects the full market value of the asset.

Prior to Board approval of the proposed sale of a utility generation asset, the Board must make a finding that the sale reflects the full market value of the asset. *N.J.S.A. 48:3-59c.(1).*

In recent sales, the Board has been able to make such a determination based on a review of the sales process, the solicitation process and the number of participants in the various stages of the process. For example, the Board's decision to approve the sale of Atlantic City Electric's interest in the Keystone and Conemaugh stations was based in part on the fact that the sale was the result of a publicly announced auction managed by an independent third party.[2] Offering Memorandum and associated documents for the assets were sent to potential bidders, indicative bids and final bids were sought and received. Additional information was provided to the four highest bidders and best and final offers were submitted. The highest bidder was selected.

In this case, the Board cannot rely on a competitive bidding process to ensure that Forked River is sold at full market value because the generation asset at issue here was not made available through a public auction or even advertisement but rather was offered for sale privately to a select group, determined by FirstEnergy. JCP&L expects the Board to rely upon the testimony of Mr. Hyrnick, an employee of FirstEnergy, who not only accepted without question the initial $20.0 million offer by Maxim but also, at the same

[2] *I/M/O the Petition of Atlantic City Electric Company for Approval of the Sale of its Keystone and Conemaugh Generation Station Assets*, BPU Docket No. EM05121058, Decision and Order, July 21, 2006.

time, negotiated a separate deal with Maxim that gave exclusive right to the capacity of Forked River to FirstEnergy, which presumably benefits the unregulated subsidiary. In a roundabout way, the output from Forked River would be transferred from JCP&L, for the next ten years, to its unregulated affiliate, First Energy Solutions, at a loss of $2.0 million to the customers of the regulated utility. On its face, this process seems less than fair to JCP&L ratepayers.

In support of its contention that the $20 million sale price reflects current market value, JCP&L relies on the belief of Mr. Hyrnick "that the $20 million purchase price can reasonably be deemed to be the fair market value of Forked River." *JC-1, p. 9.* Mr. Hyrnick cites to four factors upon which he bases this belief. *JC-1, p. 9-10*. Mr. Hyrnick relies primarily on the fact that "the proposed transaction is the best deal (indeed, the only viable deal) to come out of the extensive and exhaustive sales solicitation process described above . . . ." In essence, what the Company is saying is, "we asked the owners of Oyster Creek and they didn't want it," so we asked some other entities that we thought might be interested and this is the only "appropriate" offer we got. *Petition, para 10*. Thus, despite receiving only one viable offer, Mr. Hyrnick concludes that the $20 million sale price constitutes a "fair market price" for the plant.

Indeed, upon receiving the offer from Maxim, the Company did not even bother to make a counter offer to try and obtain a better price for JCP&L ratepayers. *T36:L1-6.* Rather, what the Company did negotiate was the tolling agreement which gives FirstEnergy Solutions the "exclusive right to the capacity of Forked River and the right to provide fuel in exchange for Forked River's energy, ..." *Petition, para 12, T36:L1-19.*

Mr. Hyrnick then cites to the $15.0 million reduction from the overall purchase price for the JCP&L non-nuclear fossil assets in 1999 when the buyer of the non-nuclear assets removed the Forked River facility from the agreed upon purchased assets. Notably, in the recent Board approval of the Keystone/Conemaugh sale, the sales price received in 2006 was almost twice the price offered by NRG in 2000.[3] While cognizant of the fact that Keystone/Conemaugh are very different facilities than Forked River, Rate Counsel submits that this fact would certainly undermine the Company's reliance on a 1999 price as an indicator of current market value.

Thirdly, Mr. Hyrnick relies upon "an independent technical assessment" based on FirstEnergy's market price projections. *JC-1, Schedule MSH-6, page 1of 3.* This is the confidential DCF analysis performed by the Company and provided in response to Rate Counsel discovery request RCR-1. As noted by Mr. Hyrnick, this analysis was "prepared in advance of the time that JCP&L and Maxim agreed on the price that Maxim would pay for Forked River, in early spring of 2006, and was performed to assess the value of the plant from a merchant buyer's perspective so as to evaluate the appropriateness of the proposed $20 million purchase price." *JC-1 (Rebuttal), p. 3.* The Company recognized that "it would not be prudent to rely on a single set of assumptions about capacity prices (or any other inputs into RCR-1), in a comprehensive evaluation of the benefits of the sale," *Id.* However, this seems to be precisely what the Company did in establishing the facility's market value. Only one such study with one set of assumptions was provided as an "independent analysis."

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[3] *I/M/O the Petition of Atlantic City Electric Company For Approval of the Sale Of Its Keystone and Conemaugh Generation Station Assets*, BPU Dkt No.EM05121058, p.7, Decision and Order, July 21, 2006.

Finally, Mr. Hyrnick relies upon a review of the relatively recent, comparable sales across the United States for peaking (i.e., simple cycle combustion turbine) generation plants. As noted by Rate Counsel witness Mr. Kahal, most of these recently sold units are located in regions lacking formal capacity markets that automatically provide a stream of capacity revenue. Importantly, none of the peaking plant sales in Mr. Hyrnick's survey are in the Eastern PJM market where the PJM reliability pricing model has produced the highest capacity prices designed to encourage capacity development. *RC-1, p.15.* Sales of plants outside the Eastern PJM area are not an accurate indication of market valuation of generation capacity in the Eastern PJM region.

Thus, in support of its contention that the $20.0 million sale price reflects the full market value of the Forked River facility, JCP&L relies upon the fact that it received one viable offer. The Company provided one DCF analysis, performed by FirstEnergy, that relies on one single set of assumptions. JCP&L provided a listing of "comparable sales" that are not really comparable and cites to a 1999 reduction associated with Forked River in a previous sale of non-nuclear assets. Rate Counsel respectfully submits that the Company has failed to provide this Board with sufficient evidence upon which to base a finding that JCP&L's ratepayers will receive the full market value of the Forked River asset.

2. JCP&L has failed to demonstrate that the sale is in the best interest of the electric public utility's ratepayers.

In its rush to have the Board approve the proposed sale of Forked River, JCP&L has shown little consideration of whether the sale is in the best interest of JCP&L's ratepayers. The Company's testimony is without meaningful discussion regarding any ratepayer benefit from the sale of the Forked River facility. Indeed, Ms. Marano's testimony focuses our attention more on the negative aspects of the sale than on any benefit to ratepayers. Ms. Marano calculates a $19 million book value for the plant, which reduces net sale proceeds to $473,642. *JC-2, Schedule SDM-1.* Then, after she calculates estimated transaction costs, turbine repair cost, and taxes, the net sale proceeds become a $2.0 million loss for ratepayers. *Id.*

Ms. Marano testifies that the $2.0 million loss on the sale will be charged to ratepayers as will any environmental remediation costs. *JC-1, pp. 4-6*. Ms. Marano also proposes to charge ratepayers for any 2007 Forked River operating losses, losses that JCP&L had agreed to absorb in a stipulation signed less than six months prior to the filing of her testimony. *JC-1 (Rebuttal), p. 3*. Finally, in an attempt to identify ratepayer benefit, Ms. Marano notes that upon consummation of the sale, ratepayers will no longer be responsible for the approximately $2.5 million annual carrying costs charged to ratepayers for the Forked River asset through the NGC. *JC-1, pp. 4-6*. Ms. Marano acknowledges that any "annual savings from the operations of Forked River" are credited to the NGC, but, unfortunately, does not quantify the revenues producing those savings, savings that presumably would be used to offset the annual carrying charge calculation in any ratepayer benefit analysis. *JC-1, p.6, Schedule SDM-2.* Thus, the only claimed

ratepayer benefit from the sale of Forked River, the elimination of the $2.5 million annual carrying charge, is devoid of any meaningful analysis.

On the other hand, the testimony of Rate Counsel's expert witness Matthew Kahal describes in detail the benefit to ratepayers based on JCP&L's continued ownership of the Forked River asset. Mr. Kahal testified that, in his opinion, ratepayers would likely obtain greater benefit from JCP&L retaining the plant and selling the output into the wholesale market. *RC-1, p. 6.* Using data from the Company's valuation model, Mr. Kahal estimated a net present value benefit to JCP&L customers from continued ownership of Forked River of about $31.0 million and a nominal benefit of about $72.0 million. *Id. Schedule MIK-1; T75:L22-T77:L23.* Mr. Kahal noted that even these large continued ownership benefits may understate "full value" as the PJM Reliability Pricing Model (RPM) New Jersey capacity prices were not available when the DCF valuation study was prepared. *RC-1, p.6.* Those prices were announced in April of this year and are very high for Eastern PJM where Forked River is located. *Id.* Indeed, as acknowledged at the hearing by JCP&L witness Mr. Hyrnick, if Mr. Kahal had used actual RPM capacity prices for the early years of his DCF analysis, ratepayer benefits would have been even greater than the $72.0 million shown in Schedule MIK-1. *T16:L21 – T17:L13.*

In addition, Mr. Kahal, recognizing that long term market projections are inherently uncertain, conducted a second analysis of ratepayer benefits from plant retention. In his second "very conservative" analysis, Mr. Kahal compared the projected fixed costs of plant ownership (fixed O&M, property taxes, overheads, capital additions and Ms. Marano's capital revenue requirements) with the fixed charge payment that

FirstEnergy Solutions is willing to provide to Maxim under the negotiated tolling agreement. *RC-1, p. 13.* The tolling agreement fixed payment analysis produces a nominal ratepayer benefit of $30.0 million and a present value benefit of $13.0 million. *RC-1, Schedule MIK-2.* While this is much smaller than the benefit discussed above, this is nonetheless a favorable outcome, especially when compared to an estimated ratepayer cost of $2.0 million if the plant is sold.

In his rebuttal testimony, Mr. Hyrnick provides the Board with four variations of the ratepayer benefit analysis provided by Mr. Kahal. In the first of his revised set of DCF analyses, Mr. Hyrnick reproduced, with minor corrections, the ratepayer benefit analysis introduced by Mr. Kahal. *JC-1 (Rebuttal) Schedule MSH-10, page 1 of 8.* When asked if this analysis showed ratepayer benefit with retention of the plant, Mr. Hyrnick was reluctant to concede the point.

> A. What I am trying to say is that this simplistic analysis consisting of a paltry set of numbers does not adequately reflect the value proposition for the customers with respect to the retention of this facility.

T19:L6-10

Notably, this "paltry set of numbers" is the same "set of numbers" relied upon by the Company to establish that the $20.0 million sales price is reflective of fair market value for the asset. At the hearing, Mr. Hyrnick testified:

> Q. And this DCF study that we have been discussing, does this roughly validate the twenty million dollar sales price?
>
> A. It does.
>
> Q. Is it your position that the negotiated twenty million dollar price is a fair market value?
>
> A. It is.

Q. So if the DCF model value validates a twenty million dollar valuation and if twenty million is a fair market price doesn't it follow that your DCF study is generally reasonable and reflective of the market's outlook?

A. We believe it is.

T13:L19-T14:L10.

So, apparently, it is the Company's position that the same set of reasonable numbers that provide the basis for the Board to determine fair market value of the asset do not adequately reflect value for the purpose of establishing the ratepayer benefit from retaining the asset. This is an indefensible contradiction by the witness. The Board should reject this belated attack by JCP&L on its own analysis since it was clearly concocted for purely tactical reasons in this proceeding.

Mr. Hyrnick's second schedule showed the same DCF analysis but with his own projected capacity prices cut by half. *JC-1, Schedule MSH-10, page 2 of 8.* This analysis showed a nominal ratepayer benefit from retention of the plant of $12.76 million, with a net present value benefit of $600,000 calculated at a discount rate of 7%.[4] It is only with the use of an 11% discount rate that the calculation of the net present value of the ratepayer benefits become negative. Even this projected negative outcome of $2.54 million dollars stretched out over twenty years compares favorably with the immediate $2.0 million assured ratepayer loss offered by the Company with the sale of this asset. Moreover, Mr. Hyrnick's analysis shows negative ratepayer benefits in the early years of

[4] The discount rate used by JCP&L to determine ratepayer benefit in recent NUG restructuring filings is 6.75%. See, e.g., *I/M/O the Application of Jersey Central Power & Light Company for the Approval of the Termination of the Power Purchase Agreement Currently Existing Between it and Prime Energy Limited partnership and the Execution of a New Power Purchase Agreement with Prime Power Sales I, LLC*, BPU Docket No. EM05040314, p.2, Order of Approval, May 25, 2005. As noted by Mr. Hyrnick at the hearing, the 11% discount rate is from the perspective of a merchant facility.

his analysis, which, as Mr. Hyrnick conceded, at least for the first half of 2008, would be unlikely. *T19:L17-T20:L7.*

Mr. Hyrnick's third schedule, and the only permutation to show a negative NPV when a 7% discount rate is used, relied on capacity prices that were 75% lower than the prices used in his own DCF study. *JC-1 (Rebuttal) Schedule MSH-10, page 3 of 8*. This study assumed that the current RPM auction price of $72.15 per kilowatt year fell by more than 90% in 2008.

When asked at the hearing to explain how a 90% decline in capacity prices could occur before next year, Mr. Hyrnick stated that the "lofty value assigned to capacity" would "incent construction of transmission and new generation lines" and cited PSE&G's recent announcement regarding "serious plans" to build additional transmission lines into the state. *T22:L7-14.* When pressed, Mr. Hyrnick acknowledged that even with expedited permitting and acquisition of land, these projects would take at least 5 years to complete. *T22:L18-23*. He further testified that with new transmission and construction coming into the state:

> A. . . . . If you look at those things correlating it is quite reasonable that we could see at the time that equilibrium was reached that prices are a third of what they were at the first auction.
>
> Q. Not ninety percent?
>
> A. No.

T23:L12-17.

Thus, even the Company's witness testified that the near term 90% reduction in capacity prices is an implausible assumption.

In sum, in his Rebuttal testimony, Mr. Hyrnick provided four scenarios, one being equivalent to Mr. Kahal's, and three with drastically weaker market capacity prices than

the Company was willing to use in its DCF study to assess the sales price. Of these four scenarios, only one demonstrates that ratepayers are better off with the sale. And, despite the fact that Mr. Hyrnick admitted at the hearing that his original capacity estimates were "conservative" and prices would "more likely be a little higher," he has provided the Board with three scenarios in which capacity prices are significantly lower. *T47:L3-10.*

Thus, Mr. Hyrnick has provided the Board with three admittedly unrealistic DCF analyses of ratepayer benefit from the sale of Forked River. These unreasonable submissions fail to demonstrate that ratepayers would benefit from the sale of the generation asset. At best, even Mr. Hyrnick's unreliable assumptions can not eliminate the ratepayer benefits of rejecting the Forked River sale on these proposed terms. Mr. Hyrnick's variations on Mr. Kahal's analysis are not convincing and cannot properly be used by the Board to find that the proposed sale of Forked River will benefit JCP&L's customers.

3. **The sale process used by JCP&L did not comply with the Board's auction standards**

EDECA requires that the Board establish standards for the conduct of a sale of utility generation assets. *N.J.S.A. 48:3-59b*. The statute provides:

> Such standards shall include provisions for the board to monitor the progress of the bid process to ensure that the process is conducted by parties acting in their own best interest and in a manner designed to ensure a fair market value determination and does not unreasonably preclude participation by prospective purchasers.

Id.

Despite the Company's assertion to the contrary, the sales process conducted by the Company in this instance did not comply with the Board's Auction Standards.[5] JCP&L unilaterally decided that because the Forked River facility has limited value as a merchant facility, "it was probable that a general auction would not be successful." *Petition, para 9*. So, the Company, concerned that a failed sale "might quell the market for the facility," conducted a "targeted search of potential buyers." *Id*. JCP&L chose a secretive, selective procedure where the Company determined, without outside interference, which entities to approach, which offers to decline and which one to accept. *Id.*

The auction standards are clear; the process must be competitive and structured to maximize the price received for the asset. As noted by the Board in adopting these standards:

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[5] *I/M/O the Electric Restructuring Plans Filed by Atlantic City Electric Company, Jersey Central Power & Light Company, d/b/a GPU Energy, Public Service Electric and Gas Company, and Rockland Electric Company – General Auction Standards and Review Criteria*, BPU Dkt Nos. EX94120585Y, EO97070457, EO97070460, EO97070463, EO97070466, Order Adopting Auction Standards, June 16, 1998 (hereinafter the "Order Adopting Auction Standards").

> The Auction Standards and Review Criteria (Auction Standards) adopted herein emphasize key public policy considerations, which we believe to be responsive to, and consistent with, the concerns expressed by the Commentators. These considerations include the principles of maximizing the sales price for assets consistent with public policy concerns, the fostering of a truly competitive bidding process by providing opportunities for many bidders to participate, continued environmental stewardship through, and subsequent to, the transfer of ownership of the generating assets, the mitigation of impacts on the incumbent generation workforces of the companies, and the maintenance of electric system reliability. At the same time, we have crafted the Auction Standards to not be overly prescriptive, in order to provide the utilities with a degree of flexibility in conducting the auctions in a manner they deem reasonable, necessary and appropriate, subject to BPU review, to achieve a successful outcome consistent with the public policy considerations addressed herein.

Order Adopting Auction Standards, pp.5-6.

As a review of the Auction Standards makes clear, the Board cannot properly find that JCP&L's process complied with these standards.

> Auction Standard No. 1: The auction process must be designed to foster competition among bidders, ensure maximum sales price, thereby minimizing stranded costs, and encourage bidder flexibility. The process must be designed in a way to maintain necessary confidentiality in order to restrict the possibility of gaming and to maintain an optimal situation for the development of a comprehensive energy supply market for competition. The process must also consider the costs incurred. The auction should be structured to maximize the sale price while reasonably managing costs, administrative and otherwise. The auction process should permit sufficient flexibility so that bidders may bid on a number of generating site combinations, unless the company can demonstrate justification for a packaged bidding structure for certain plants. Any grouping of assets for sale should balance such considerations as market demand from prospective buyers, asset characteristics, projected price, stranded costs considerations, and market power issues. In the case where packaging is permitted, bidders must still have had the ability to bid on any generation site or site.

There was no competition among bidders, apparently FirstEnergy selected the potential bidders and approached each "target" individually.

> Auction Standard No. 2: Bidder qualifications should be reasonable and not unduly restrictive. Qualifications may include such criteria as financial capability; regulatory or other legal requirements, experience in ownership and/or operation of electric generating facilities; labor and industrial relations experience; and relevant environmental and community involvement track records. Prospective bidders must be required to indicate the intended use of the facilities.

Indeed, the qualifications used by FirstEnergy were extremely restrictive. Only "certain niche buyers," selected by FirstEnergy were given an opportunity to bid on the asset in order to "increase the probability of success." *Petition, para 9.* Apparently this selection process was flawed in that no "appropriate" offers were received in FirstEnergy's first attempt and only one viable offer was received from all the second group of specially selected potential buyers. The $20.0 million purchase price with its attendant $2.0 million ratepayer loss is the result of the Company's restrictive procedures. It is hard to see how the "probability of success" could have been less.

> Auction Standard No. 3: Any "short list" or final bidding group must include enough participants to provide assurance that there is sufficient competition for any particular bundle or individual plant.

The "short list" in this process is the first entity that made a viable offer.

> Auction Standard No. 4: The divesting company must ensure that access to all relevant information is provided to all prospective bidders (this may include but will not necessarily be limited to plant and site data; transmission and fuel supply infrastructure; interim buyback requirements, if any; State and federal regulatory requirements; relevant market information,, environmental and other liabilities; labor responsibilities; industry and market analysis and treatment of emission credits). Bidders should be provided with appropriate access to relevant documentation and key personnel to perform necessary due diligence investigations. The bidders should also be informed about regulatory

> and commercial terms of sale in order to make informed decisions and correctly analyze the value of the assets being offered.

JCP&L has provided this Board with no information regarding compliance with Auction Standard No. 4.

> Auction Standard No. 5: The divesting company, upon completion of the auction, and as part of its request for approval, will be required to submit a market power analysis for regulatory review. The divesting company must demonstrate that the sale of any generating facility will not create or enhance market power in the relevant market, and should take into account the effect of any identified load pockets. The board will give particular attention to any buyer, which currently owns or controls electric generation assets in the State of New Jersey.

While JCP&L has provided no market power analysis for this transaction, under the tolling agreement that is a part of this transaction, FirstEnergy Solutions has exclusive right to the capacity of Forked River and the right to provide fuel in exchange for Forked River's energy. *Petition, para 12*. Rate Counsel submits that this tolling agreement should be further reviewed under the affiliate relations standards. That the same FirstEnergy employee negotiated both the JCP&L and the FirstEnergy sides of this transaction is troubling. *T27:L20-T28:L1*. Any value to FirstEnergy through the execution of the tolling agreement rightfully belongs to New Jersey ratepayers.

> Auction Standard No. 7: Absent a showing by the divesting company that retention of such liabilities provides a substantial risk-adjusted benefit to ratepayers, all on-site environmental liabilities associated with the auctioned property shall be assumed by the purchaser unless otherwise required by applicable local, State and federal laws. The buyer(s) shall comply with all environmental standards as embodied in existing State and federal statutes and regulations and associated permits, and as subsequently modified through legislative or regulatory actions.

In fact, quite the opposite is the case for the proposed Forked River sale. Without any showing of ratepayer benefit, all pre-closing environmental liabilities are the continued obligation of New Jersey ratepayers. The agreement requires JCP&L, at its expense, to comply with remediation obligations under the New Jersey Industrial Site Recovery Act, *N.J.S.A. 13:1K-6 et seq*., and the Hazardous Discharge Site Remediation Act *N.J.S.A. 58:10B-1 et seq*. *Petition, para 12*.

> Auction Standard No. 8: All bidders on the short list, or in the final bidding group, shall be required to submit to the divesting utility, on a confidential basis, a disclosure of all formal notices of violation of local, State and federal environmental permits applicable to the ownership or operation of electric generating facilities for the past five year period. The environmental performance record for the proposed buyer(s) shall be submitted and made public as part of the petition by the divesting company for approval of the sale.

No such information has been provided.

> Auction Standard No. 9: The divestiture petition must include a reasonable transition plan, plus a system of reporting such plans, for the incumbent generation workforce, including, but not limited to, assurances that existing pension and other post-retirement benefits and entitlements accrued through the date of sale are protected, and also must include requirements that the buyer assume any existing collective bargaining agreements covering union employees associated with these facilities. In addition, the divesting company is expected to assist employees (both union and non-union) in obtaining positions with the buyer(s).

The PSA includes a provision for the protection of the union employees. *Petition, para 11*. It also provides that JCP&L and FRP will enter into a services agreement pursuant to which JCP&L will provide certain operation and

maintenance services for Forked River in order to implement certain provisions of a stipulation of settlement dated November 9, 2006 with the Union.

> Auction Standard No. 10: Upon completion of the auction process, and with its petition for approval of the sale, the divesting company shall be required to submit a complete and accurate summary of the auction proceedings and outcome. The divesting company must be prepared to provide to the Board in writing the rationale behind the exclusion of any prospective bidder at each stage of the auction process.

JCP&L provided a confidential narrative of why certain entities were chosen and broadly described the results of these contacts.

In conclusion, JCP&L decided, without Board authorization, to ignore the auction standards established by the Board. JCP&L relied on a targeted solicitation that failed. One viable offer resulted from FirstEnergy's second attempt at the selective solicitation process and the Company jumped at it, at the same time negotiating a deal for an unregulated affiliate for the exclusive right to the capacity of Forked River. Because the Company failed to comply with the Auction standards, there is no assurance that this is the best deal for ratepayers; there is only JCP&L's assertion that the price received reflects the full market value of the plant. This is not a sufficient basis upon which the Board can approve this transaction.

II. The Board Should Not Allow JCP&L to Renege on Its Agreement To Absorb Forked River Operating Losses.

"Because JCP&L has worked diligently to negotiate the pending sale of Forked River," the Company has asked the Board to relieve the Company of its obligation to absorb operating losses incurred at the Forked River facility. *Petition, para 20*. Rate Counsel objects to this proposal. JCP&L is absorbing operating losses at Forked River pursuant to a stipulation which reflects a balancing of interests and trade-offs of issues among the parties. JCP&L's proposal to reverse the settlement in this case is particularly unfair and inappropriate because the Company's own estimates show that the sale imposes a net $2.0 million cost to ratepayers, whereas retaining the plant provides a ratepayer benefit.

The Company, in November 2006, competently represented by counsel, signed a stipulation with Board Staff and Rate Counsel in which JCP&L agreed to absorb net operating losses associated with the Forked River facility. Specifically, the parties agreed that:

> 6. JCP&L will absorb, and will not include in its deferred balance for future recovery from customers, net annual operating losses (i.e., netting monthly gains against monthly losses over the course of a calendar year) associated with the Forked River generating station ("Forked River") from and after January 1, 2006; provided, however, that the Company shall continue to be entitled to recover its allowed return of and on its investment in Forked River.

There is no mention in the stipulation that the sale or attempted sale of Forked River would have any effect on the agreement, although, at the time, JCP&L was fully aware of the on-going negotiations to sell the facility. *T64:L23-25*.

Rate Counsel objects to this change in settlement terms after the agreement has been approved by the Board. The stipulation allows the recovery of Forked River capital revenue requirements as stranded costs, but does not allow recovery of operating losses from ratepayers. This provision is part of a comprehensive settlement of the case and reflects a balancing of interests and trade-offs of issues among the parties. It is not reasonable to selectively reverse one provision in a settlement absent the concurrence of the settling parties.

Indeed, the stipulation expressly provides:

> 10. The Parties agree that this Stipulation contains mutual balancing and interdependent clauses and is intended to be accepted and approved in its entirety. In the event any particular provision of this Stipulation is not accepted and approved in its entirety by the Board, or is modified by a court of competent jurisdiction, then any Party aggrieved thereby shall not be bound to proceed with this Stipulation and shall have the right, upon written notice to be provided to all other Parties within ten (10) days after receipt of any such adverse decision, to litigate all issues addressed herein to a conclusion. More particularly, in the event this Stipulation is not adopted in its entirety by the Board in an appropriate Order, or is modified by a court of competent jurisdiction, then any Party hereto is free, upon the timely provision of such written notice, to pursue its then available legal remedies with respect to all issues addressed in this Stipulation, as though this Stipulation had not been signed.

Thus, any revocation by the Board of its approval to the stipulation could re-open this entire stipulation for further litigation of all the issues resolved through the revoked stipulation.

Moreover, presumably the losses incurred at the Forked River facility are due, at least in part, to the Oyster Creek Station Blackout Agreement. Under that Agreement, JCP&L receives only minimal revenue (only about $140,000 per year) for providing this service. It is clear that the Agreement increases costs associated with the plant and reduces its value, although no quantification of such losses has been provided by the Company. *T8:L4–T10:L9*. The Blackout Agreement, negotiated by JCP&L, was never approved by the Board and should not be used as a vehicle for subsidizing the Oyster Creek plant at the expense of JCP&L ratepayers.

In conclusion, JCP&L has asked the Board to select one provision from a stipulation that was the product of a time consuming settlement process that entailed give and take on the part of the various parties. The fact that JCP&L could so quickly seek to renege on a promise signed less than six months ago is troubling. What would be even more troubling would be if the Board allowed it to do so.

CONCLUSION

In conclusion, Rate Counsel respectfully requests that the Board reject JCP&L's proposal to sell Forked River and to charge ratepayers for the loss associated with the sale. Firstly, the Company has failed to demonstrate that the $20.0 million sales price was the full market value of the asset, especially in light of the side agreement negotiated between FirstEnergy Solutions and Maxim(USA). Secondly, JCP&L has failed to demonstrate that JCP&L ratepayers would benefit from the sale. In fact, as testified to by Rate Counsel witness Matthew Kahal, ratepayers would likely see greater benefit from JCP&L's retaining the plant and selling the output into the wholesale market. Thirdly, the Company did not comply with the Board's auction standards but rather, without Board authorization, offered the facility only to a select group of potential buyers. Accordingly, Rate Counsel respectfully requests that the Board reject JCP&L's proposal to sell Forked River to Maxim (USA).

Respectfully submitted,

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