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July 12, 2007

VIA HAND DELIVERY
Hon. Kristi Izzo, Secretary
Board of Public Utilities
Two Gateway Center
Newark, New Jersey 07102

RE: 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 Requirement of N.J.A.C. 14:1-5.6(b)
BPU Dkt No. EM07010026

Dear Secretary Izzo:

Kindly accept, in lieu of a more formal brief, an original and ten copies of this letter reply brief on behalf of the Department of the Public Advocate, Division of Rate Counsel ("Rate Counsel") in the above captioned matter. **We are enclosing one extra copy, please date stamp the extra copy as "filed" and return it to our messenger.**

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INTRODUCTION

In its Initial Brief[1], neither Jersey Central Power & Light Company ("JCP&L" or the "Company") nor Board Staff has provided anything which refutes Rate Counsel's recommendation that the Board of Public Utilities (the "BPU" or the "Board") reject the sale of the Forked River Generating Station ("Forked River") as proposed. Rate Counsel discussed at length in its Initial Brief, filed on June 26, 2007, the Company's failure to comply with the mandates of the Electric Discount and Energy Competition Act, *N.J.S.A. 48:3-48 et seq.* ("EDECA") and with the Board's Auction Standards. This argument will not be repeated in this Reply Brief. Rather, Rate Counsel will focus this Reply Brief on the flawed arguments presented by the Company and the Board's Staff in their Initial Briefs.

In their Initial Briefs both JCP&L and Staff dismissively argue that there can be no legitimate issue regarding whether Forked River should be sold or retained. They essentially define away the problem by implicitly arguing that there is no possible set of calculations that could support rejecting the sale of Forked River, regardless of sale price, because the future is uncertain. The Board should find such an intransigent position to be unacceptable and not in the interest of ratepayers.

Rate Counsel's witness Matthew I. Kahal's ratepayer benefit analysis, based on the Company's own market and operational projections, shows a ratepayer benefit from plant retention of $71.86 million. *RC-1, Schedule MIK-1, T76:L4-8.* In rebuttal, Mr. Hyrnick produced four alternative scenarios, three of which showed a benefit to ratepayers associated with JCP&L's retention of the Forked River plant. *JC-1 (Rebuttal)*

[1] Throughout this brief JCP&L's Initial Brief will be cited as PIB, Staff's Initial Brief will be cited as SIB and Rate Counsel's Initial Brief will be cited as RCIB.

Schedule MSH-10, pp.1,2 and 4. At the evidentiary hearing, during cross examination, Mr. Hyrnick refused to state that the assumption made in the only scenario that supported the sale - a 75% reduction in current and future capacity prices – was reasonable. *T23:L16-17*. Incredibly, the Company dismissed the testimony of its own expert witness, and, citing to "inherent uncertainties in any long term market forecast" relies on the facile "bird in the hand" argument to support the sale. *PIB 9, PIB 12*. Similarly, Staff cites to a phantom "guaranteed reduction in the NGC" and the "uncertainty of any projections with respect to the future of the market" as the basis for rejecting Mr. Kahal's ratepayer benefit analysis. *SIB 14*.

Undisputed, indeed virtually ignored, is Mr. Kahal's second analysis showing that the FirstEnergy tolling agreement fixed payment – an actual contractual commitment by JCP&L's unregulated affiliate - produces a nominal ratepayer benefit of $30 million and a present value benefit of $13 million. *RC-1, p. 14*.

Apparently both the Company and Board Staff agree: Mr. Kahal's analyses, Mr. Hyrnick's analyses, indeed any analysis, is irrelevant as long as it is possible to come up with some calculation, however implausible, that supports the sale. This logic should be summarily rejected by the Board.

It is well established that public utility ratemaking is a forward-looking exercise that must rely on forecasts of future events to create reasonable policy, using the facts as we know them, and the most reasonable view of future events. Approving the Forked River sale on the apprehension that no one can predict the future with pinpoint certainty would be a total abrogation of the responsibilities of New Jersey regulators including the Board and Rate Counsel. Instead, the Board should weigh the indicia of reliability of the relevant forecasts as outlined in the testimony of Rate Counsel witness Matthew Kahal, and in our Initial Brief. Rate Counsel does not aver that the forecast of ratepayer benefits will be accurate to the dollar, but that these estimated benefits are based on the most reliable information at hand. The overall weight of the evidence demonstrates that the better policy at this time is to retain Forked River rather than to approve this proposed sale.

ARGUMENT

A. The Company Has Failed to Demonstrate That The Proposed Sale Of Forked River Benefits Ratepayers.

As set forth in detail below, JCP&L and Staff have provided nothing in their Initial Briefs which seriously refutes Rate Counsel's recommendation that the Board reject the sale of Forked River as proposed for failure to comply with EDECA and with the Board's Auction Standards. The Company claims that the proposed sale provides "substantial benefits" to JCP&L customers but fails to quantify those "substantial benefits." The Company merely contends that the price received "is reasonable and represents fair market value for the plant." The Company claims this is true "simply by virtue of the fact that $20 million purchase price represented the only viable transaction to come out of the extensive and exhaustive sales solicitation process." The Company cannot meet its burden of proof by making conclusory statements, without evidence to support this contention. Staff argues that the sale will benefit ratepayers and that the sale does not violate New Jersey law. As fully discussed below, JCP&L and Staff's unsubstantiated assertions must be rejected by the Board.

1. The Company Disregarded the Auction Standards Which Were Created By The Board To Protect Both The Company's Need For Flexibility and Confidentiality and The Public's Interest In Maximizing The Sales Price Through a Competitive Bidding Process.

Preliminarily, Rate Counsel rejects the Company's assertion in its Initial Brief that Rate Counsel witness Matthew Kahal "in fact, appears to endorse the validity of JCP&L's sales process." *PIB 7*. This is a gross mischaracterization of Mr. Kahal's testimony. In fact, Mr. Kahal testified that the DCF analysis performed by Mr. Hyrnick "is consistent with and does validate the price that they received." *T63:L9-11*. The fact that Mr. Kahal recognized that the Company's analysis validates the Company's position is hardly surprising and certainly does not constitute "endorsement" of the Company's sales process. The cited discussion references the Company's DCF analysis validation of the price, not the process.

Furthermore, and as discussed previously, the Company's unsupported assertion that the price received for Forked River represents the full market value of the facility does not provide a legal basis upon which the Board can approve this sale. "The Board's review of the proposed sale of the Company's non-nuclear generation assets is based on whether the auction process was conducted in accordance with the Board's Auction Standards, and whether the Company has met the provisions set forth in [*N.J.S.A. 48:3-59*]."[2] The "extensive and exhaustive" Forked River sale process, in which JCP&L "talked to about fifteen different companies," *T35:L16,* does not conform to the Board's

[2] *I/M/O the Verified Petition of Jersey Central Power & Light Company, Doing Business as GPU Energy, Seeking Approval of the Sale of Its Non-Nuclear Generation Assets and Certain Additional Real and Personal Property*, BPU Docket No. EM99020067, Decision and Order, p.6, November 4, 1999. (hereinafter the "1999 non-nuclear asset sale")

Auction Standards and falls woefully short of the process approved by the Board in the 1999 non-nuclear asset sale.

The Auction Standards were established by the Board in 1997 in reaction, in part, to JCP&L's announcement that it intended to auction off its non-nuclear generation assets.[3] In setting out the standards to be used by JCP&L in divesting its nuclear assets, the Board acknowledged that pre-approval of specific divestiture plans was not appropriate but, in recognizing and sharing the concerns expressed by Rate Counsel and New Jersey Citizen Action, the Board found "it critically important that the final results of the auction process, including the proposed sale, be subject to Board review and approval."[4] The Board reasoned that through Board review "to ascertain compliance with applicable law and regulations as well as the auction standards adopted herein, we believe that the public interest can be fully protected."[5]

In the 1999 non-nuclear asset sale, the Company conducted a three-stage sales process that stands in sharp contrast to the Forked River sales process at issue in this proceeding. In the 1999 sale, the Company "sent interest letters to over 300 potential bidders," with subsequent requests for qualifications to over 100 parties which resulted in an Offering Memorandum being sent to 64 qualified bidders.[6] At the next stage, qualified bidders sent in 50 Indicative bids with the Company then short listing 17 bidders. Then, at the Final Bid Stage, in addition to allowing short listed bidders to submit final bids for assets for which they had been short listed, Final Bidders were also

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[3] *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 Docket Nos. EX9412058Y, EO97070457, EO97070460, EO97070463, EO97070466, Order Adopting Auction Standards, June 16, 1998.
[4] *Id. page 3.*
[5] *Id.*
[6] *1999 Non-Nuclear Asset Sale, p.7.*

permitted to submit bids on assets that did not conform to bid packages identified by the Company. Ultimately, the bidder that offered the highest price for all the assets was selected. The Board approved the sale finding that the auction process "has maximized the sale price for the assets, has fostered a truly competitive bidding process by providing opportunities for many bidders to participate . . . ." [7]

The Board can make no such finding based on the process used by JCP&L to divest the Forked River facility. Company witness Mr. Hyrnick summarized the Forked River sales process at the evidentiary hearing:

> Q. Now, obviously we know that eventually the Company, that is JCP&L, said, Okay, we will take twenty million. When JCP&L first started these negotiations how high did it start?
>
> A. As I think I mentioned in my first testimony, we talked to about fifteen different companies and got only a few indications of interest, one of which involved a combination of this asset with a new combined cycle facility that put it into a whole different regime. So we thought this was a reasonable starting point, it was an offer that we received and we believed it was an offer that we should act on.
>
> Q. With respect to Maxim certainly JCP&L did not start at zero, isn't that right?
>
> A. Maxim's initial offer was twenty million, which we have since worked with through the tolling agreement to try to evaluate and substantiate so they could proceed with the purchase of the asset.
>
> Q. Did JCP&L make a higher counter-offer?
>
> A. No.
>
> Q. Why not?
>
> A. We believed it was not in the best interest of negotiations to do that. We made compromises going forward which had the effect of supporting that purchase price by agreeing to change the initial discussions we had with regard to the value of the tolling agreement, . . .

T35:L10-36:L13.

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[7] *Id. page 11.*

As testified to by Mr. Hyrnick, and, as discussed at length in Rate Counsel's Initial Brief, the Forked River sales process did not conform to the Board's Auction Standards. The Company, without Board authorization and without Staff participation, engaged in a very narrow solicitation process and apparently limited negotiations with the proposed buyer to modification of the First Energy Solutions tolling agreement. The $20.0 million first offer of Maxim was accepted without counter.

The Auction Standards were established by the Board to protect the interests of JCP&L's ratepayers. These interests were not protected by the secretive process the Company used in this transaction and ratepayers are the big losers in this proposed sale. The Company's attempt to reach its goal of divestiture of this generation asset by forcing ratepayers to accept the sale of the asset at a $2.0 million loss to ratepayers should be rejected by the Board.

2. Rate Counsel's Ratepayer Benefit Determination Is Different Than A Market Value Calculation.

The Company next asserts in its Initial Brief that if customers stand to benefit from JCP&L's continued ownership of the plant as shown in Mr. Kahal's testimony, then it must logically follow that the market value of the plant is in excess of the offered purchase price. The Company then argues that because the price offered by Maxim was only $20.0 million, not the $72 million identified in Mr. Kahal's Schedule MIK-1, market participants do not agree with Mr. Kahal's position. As discussed above, there is no way for the Board to properly determine, based on the limited solicitation and narrow analysis performed by the Company, that the $20.0 million offered by Maxim for the Forked River plant is the full market value.

Moreover, the Company's logic further fails in that it equates ratepayer value for the plant with the market value for the plant. Even the most superficial review establishes that a ratepayer has a different valuation perspective than the valuation a merchant facility would place on the plant. JCP&L ratepayers have a different cost of capital associated with the Forked River facility, different tax implications and different risk assessments than a merchant buyer. Furthermore, JCP&L has agreed in a Board approved stipulation to protect ratepayers from operating losses associated with the facility. Thus, despite the Company's contention to the contrary, the market's valuation of Forked River does not directly correspond to the value of the facility to JCP&L's ratepayers.

As Mr. Kahal testified at the hearing, JCP&L's ratepayers have:

(1) a different cost of capital than a merchant facility:

> I am trying to look at this from a consumer point of view, I am not criticizing what the Company did, but what the Company did in their DCF analysis they did as a merchant reflecting the merchant's costs of capital, how should a merchant plant discount the stream of cash flow embedded in that DCF analysis to come up with a market, so there is a difference between a merchant cost of capital and a customer cost of capital.

T85:L20-86:L4.

(2) a different risk assessment:

> The problem is that we can't protect ratepayers from risk associated with the capacity market. Ratepayers will be exposed to risk from the capacity market over the next five, ten, twenty years through the BGS auction or competitive power prices. Whatever those RPM auction prices turn out to be, that's what ratepayers are going to end up paying.
>
> So, ratepayers already are exposed to risk. In fact what retaining the plant does is mitigates risk because if it turns out that capacity prices are high . . . . that means that holding onto this asset, and you can think of it as a financial asset, will provide a large stream of revenue that will benefit customers may mitigate only by a little bit, but every little bit helps, it will mitigate the high capacity prices that customers pay in the BGS auction.
>
> If capacity prices turn out to be low, ... if that means that the revenue stream from the Forked River plant is low that's okay because we are paying low BGS prices, so you can think of holding onto this asset being unsure of what the capacity market is going to produce exactly as being kind of a ratepayer hedge against BGS.

T87:L5-88:L11

and (3) different tax treatment.

> . . . to the extent there is a surplus that surplus would flow back dollar for dollar to ratepayers which means a revenue reduction in effect for JCP&L, so there then would be no tax effect on that surplus because it is being returned to ratepayers.

T96:L18-21.

Further, as described in Mr. Kahal's testimony, after netting out the Company's net investment, certain expenses and claimed income tax effects, the Company estimates that the sale will result in a net payment by ratepayers to JCP&L of about $2.0 million. *RC-1, p.5*. While these stranded costs may not affect a merchant facility's market valuation of the plant, they certainly must be considered in deciding whether the sale of the asset benefits ratepayers, a very different calculation.

Thus, the Company's argument that "if there is benefit for customers, then there must be corresponding benefit for a new owner" is flawed. *PIB 8.* The ratepayer benefit analysis is not a market value analysis and the legislature has mandated that in addition to finding that the "sale reflects the full market value of the assets," the Board must find that "the sale is otherwise in the best interest of the electric public utility's ratepayers." *N.J.S.A. 48:3-59c*. The Company's flawed "market value equals ratepayer benefit" approach can not support such a finding.

Finally, other than a possible disagreement over the most appropriate discount rate, JCP&L's expert Mr. Hyrnick used precisely the same calculation procedures as Mr. Kahal to obtain his estimate of the ratepayer plant retention benefits. He did so using the same data as Mr. Kahal along with three low capacity price sensitivity cases. There is not a dispute over how to calculate the ratepayer plant retention benefits – just hand wringing over uncertainty of market prices.

3. The Board Should Reject The Company's Attempt To Nullify the Only Protection Granted To Ratepayers Throughout this Entire Proceeding.

In footnote 12 of its Initial Brief, the Company argues that because the Company entered into "good faith negotiations," the Board cannot set this sale agreement aside based on perceptions as to subsequent changes in market conditions. Rate Counsel notes that Mr. Kahal used the Company's projected capacity prices in his analysis, not the recently announced capacity auction price. Thus, the ratepayer benefit from retention of Forked River demonstrated in Mr. Kahal's analysis is not based on "subsequent changes in market conditions" but on conditions relied on by the Company during its negotiation process.

Further, the Company appears to argue that the Board's review of this proposed sale is without teeth and that any agreement entered into by the Company cannot be rejected by the Board without jeopardizing the utility's ability to enter into future agreements. Rate Counsel disagrees. The Board's review of this proposed sale agreement is the only protection allowed to JCP&L's ratepayers throughout this entire process. The Auction Standards were ignored and compliance with *N.J.S.A. 48:3-59* rejected. Indeed, even the requested waiver of advertising requirements was done after the fact. *Petition, para. 17.* The Company's attempt to circumvent any regulatory review of this process and the Company's argument that its "good faith negotiations" preclude Board disapproval of the transaction must be rejected.

4. Staff's Flawed Calculation of Ratepayer Benefits Cannot Properly Be Used To Support Board Approval of The Proposed Sale.

Staff asserts in its Initial Brief that the sale of Forked River "will benefit JCP&L's ratepayers, is in the public interest, and does not violate New Jersey Law." *SIB 8*.

In finding a benefit to JCP&L ratepayers, Staff calculates that the Company's projected stream of the return of and on the investment in the Forked River plant over the next ten years to be $25.5 million. Then Staff subtracts the $1.5 million ratepayers will lose today if the sale is approved and concludes that ratepayers are about $24 million better off with the proposed sale. SIB 8-9.

Rate Counsel submits that Staff is mistaken in its calculation of ratepayer benefit associated with the sale. Staff performed the calculations for one only side of the problem, i.e., the continued ownership revenue requirements. Staff excluded from its calculation of ratepayer benefit any cash flow associated with the plant over the next eleven years which would offset the projected stream of costs associated with the facility. This flawed procedure implicitly assigns a price to installed capacity of zero, which no one believes is reasonable. Thus, looking at Mr. Kahal's Schedule MIK-1, in the years 2008 – 2019, projected cash flows of $48.7 million will more than offset projected revenue requirement for those years of $23.04 million. This results in a net benefit, on a nominal basis of $25.7 million, without considering any post 2019 cash flows. While Staff may dispute the accuracy of these projected cash flows, they cannot properly ignore them all together.

Further, in stating that the sale "does not violate New Jersey Law," Staff, in a footnote, cites two Board Orders: the sale of Oyster Creek Summary Order and the sale of Three Mile Island Summary Order. Staff's reliance on these two previous asset sales to support its contention that the sale does not violate New Jersey law is misplaced.

The Oyster Creek Generating Station was competitively bid and the sale was reviewed under EDECA and the Board's Auction standards.[8] In fact, in that proceeding the Board found that "the Company's sales process has substantially complied with the Auction Standards" and that "the provisions of N.J.S.A. 48:3-59(c) have been met in their entirety."[9] The second sale cited by Staff was the sale of the Three Mile Island Nuclear Generation Station to AmerGen. [10] In that proceeding, the Company initiated the bid solicitation process in 1997, and had reached a letter of intent with AmerGen in July 1998, approximately seven months before EDECA was signed into law. Nevertheless, the Board found that in assessing the reasonableness of the proposed sale the Board should consider "whether the auction process was conducted in general accordance with the Board's Order Adopting Auctions Standards, and, whether the proposed sale meets the substantive requirements set forth in [*N.J.S.A. 48:3-59*.]"[11]

Thus, Staff's contention that the proposed sale does not violate New Jersey law is in error. In both of the proceedings relied on by Staff to support this contention the Board evaluated the sale of the generation assets under the standards set forth in EDECA and the Auction Standards. The Board's Final Orders in those proceedings in no way

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[8] *I/M/O the Verified Petition of Jersey Central Power & Light Company Doing Business as GPU Energy, Seeking Approval of the Sale of the Oyster Creek Nuclear Generating Station Pursuant to N.J.S.A. 48:3-7*, EM99120912, Final Decision and Order, November 21, 2003.

[9] *Id*. p. 15.

[10] I/M/O the Verified Petition of JCP&L Seeking approval of the Sale of the Company's Interest in the Three Mile Island Unit 1 Nuclear Generating Facility, BPU Docket No. EM98121409, p.8, Final Decision and Order, March 4, 2003.

[11] *Id.*

support Staff's contention that the proposed sale of Forked River does not violate New Jersey law. In fact, quite the opposite.

5. The Company's and Staff's Fear of Market Uncertainty by Itself Should Not Sway The Board's Decision Regarding The Future of Forked River.

Finally, in an attempt to obtain Board approval of the sale, the Company and Staff have provided a list of possible negative outcomes, no matter how remote, to bolster a decision to "take a bird in the hand" and accept Maxim's less than desirable offer. The Company and Staff question the predictability of future market capacity prices and the necessity of capital investment in the future for continued operations or to comply with environmental regulations. Staff expresses its concern about "forced ownership" and argues that the sale of Forked River "will remove all future risks from ratepayers." *SIB 14-17.* As is fully discussed below, all of these factors were considered in making Rate Counsel's recommendation to keep this plant.

a. Capacity Concerns

The Company tells us that despite Company witness Hyrnick's cautious optimism "there is no escaping the inherent uncertainties in any long-term market forecast . . . ." *PIB 9.* Staff expressed similar concerns arguing that while it is possible that capacity prices will continue to rise over the next 20 years, it is more likely that with conservation efforts and added investment in transmission and generation, capacity prices will eventually decline. *SIB 14.*

Rate Counsel notes first of all that while there is some support in the record for a decline in capacity prices from the current auction price, there is no support for a return to pre-RPM capacity prices. Mr. Kahal testified that "[a]s a result of the recently-implemented PJM RPM framework, the capacity revenue will increase dramatically for Forked River compared to recent historic amounts." *RC-1, p.11*. In fact, the Company's witness is "cautiously optimistic" that prices will remain around the $72.15 level for the next five years, *T46:L19-23,* and the Company's projected capacity prices were "more likely to be a little higher in view of the recent RPM auction." *T47:L9-10.*

In pre-filed rebuttal testimony, Mr. Hyrnick ran four scenarios, only one of which supported the Company's position to sell the plant. The only scenario to support the sale used an outlandish 90% reduction in the near term RPM capacity price. Indeed, on cross examination, Mr. Hyrnick was unwilling to state for the record that he believes capacity prices will reach the 90% price reduction he used in his analysis. *T23:L16-17.* Thus, the only analysis out of the four that showed a ratepayer benefit from the sale of Forked River was discredited by the Company's own witness at the hearing. While anything is possible, the Company's extreme 75% price reduction case is not plausible, and there is no testimony that supports it as being a reasonable basis for decision-making.

Further, Staff's assertion that "higher capacity prices will lead to new infrastructure that can reduce congestion and thereby lower capacity prices in the future," *SIB 13,* is also not supported by the record. The Company's witness testified that his capacity projections explicitly factored in the expected marketplace reaction to higher capacity prices. *T44:L1-14*. These are the same projections used by Mr. Kahal. Moreover, as was discussed at the evidentiary hearing, even with expedited permitting and acquisitions of land, new transmission projects will not be providing power into a congested area for at least five years. *T22:L21-23.* In addition, concerns about falling capacity prices fail to consider tighter area supplies in the face of load growth, generation retirements and lack of new generation construction. There is nothing in this record beyond speculation that capacity prices will fall drastically or to pre-RPM levels and the Board cannot properly base a reasoned decision on such implausible speculation.

b. Capital Additions and New Environmental Controls

Company witness Hyrnick testified at the hearing that capital additions "to the extent they were identified by us and are believed to be reasonable at this time" were included by the Company in the cash flow analysis used by Mr. Kahal in his determination of ratepayer benefit. *T13:L11-18*. Thus, the Company (and Mr. Kahal) has already included a reasonable projection of capital additions in its analysis. Anything beyond that is pure speculation.

Similarly, alleged concerns about new environmental controls such as carbon constraints ring hollow. Mr. Hyrnick makes the specious argument that the potential for future CO2 regulation creates an additional risk associated with continued ownership. He offers no quantification nor does he explain why JCP&L did not study this issue or perform a CO2 sensitivity case, if he believes this to be a significant factor. While this issue may have some validity if the sale of a coal plant was at issue[12], it make no sense at all for a gas fired combustion peaking plant that will operate at an extremely low capacity factor. *See*, *MSH-6*, *Attachment RCR-1* (confidential). It is inconceivable that a gas-fired

[12] For example, Rate Counsel considered just such a risk when recommending the sale of the minority ownership shares of the Keystone and Conemaugh generation plants by Atlantic City Electric Company.

peaking plant that operates at a very low capacity factor will install CO2 controls. And, even if Forked River must pay CO2 taxes or purchase CO2 allowances for that small amount of generation, this cost will be offset by correspondingly higher spot market energy prices. If there is any effect at all on from CO2 regulation, it will be to keep energy and possibly even capacity prices high, with minimal effect on Forked River's costs and cash flows.

c. "Forced" Continued Ownership

Staff's concern about "forcing JCP&L to retain ownership of a plant that it does not want to operate," is unfair to JCP&L's ratepayers and is irrelevant to the Board's decision in this case. *SIB 14.*

Staff argues that since JCP&L does not want to operate Forked River for the benefit of ratepayers, the Company should be relieved of that "obligation and their potential losses." *SIB 15.* Rate Counsel objects to Staff's misplaced sympathy. First, it must be noted that prior to 2006, JCP&L did not lose a penny on the Forked River facility. The entire revenue requirement, including a return of and on the investment, was charged to ratepayers, either in base rates or, post-restructuring, through the NGC. It is only pursuant to a voluntary settlement agreement between Staff, Rate Counsel and JCP&L, that the Company agreed to absorb operating losses associated with the plant.[13] Ratepayers continue to pay through the NGC net operating costs (to the extent that annual

[13] *I/M/O the Verified Petition of Jersey Central Power & Light Company ("JCP&L") for The Review and Approval of an Adjustment of the Non-Utility Generation Charge Clause of its Filed Tariff ("2005 NGC Filing")*, p.4, Order Adopting Stipulation, Docket No. ER05121018, Dec. 6, 2006 (hereinafter the "NGC stipulation").

operating costs net of market revenues do not result in a loss) and a return to JCP&L of and on its investment in the plant.

In addition, it was the Company's negotiations with the owner of Oyster Creek that created the Station Blackout Agreement and the subsidy that causes these losses. Ratepayers were not a party to these negotiations and the Station Blackout Agreement was never approved by the Board. For years, ratepayers have been picking up the cost of JCP&L's failure to negotiate a reasonable deal for the operation of the Forked River facility. Perhaps the threat of potential losses will encourage JCP&L to engage in a more aggressive re-negotiation strategy.

Moreover, the Company has admitted that the Station Blackout Agreement is the basis for the diminished market value of the Forked River facility. *T8:L5-10.* Thus, while Staff sees the lack of Forked River's marketability as "another risk for the Board to consider," Rate Counsel sees the lack of Forked River's marketability as another reason for the Board to "force JCP&L to retain ownership of a plant that it does not want to operate." If the Company, crippled by the Station Blackout Agreement, is unable to obtain an adequate price for the facility, then the Company should continue to operate the facility for the benefit of ratepayers. If Forked River cannot be sold, even at full market value, without harming ratepayers, then the Board should direct the Company to retain ownership of the plant and continue to operate the plant, to the best of its ability, for the benefit of ratepayers.

d. Who Should Bear the Risk of Market Prices Going Forward.

Staff argues that one of the benefits to JCP&L's customers from the sale of Forked River is that "all risk is removed from ratepayers." *SIB 9.* While it may be true that ratepayers will no longer be exposed to the uncertainties and volatility in the capacity and energy market for Forked River, the sale of this facility leaves ratepayers even more exposed to uncertainties and volatility in the capacity and energy market overall. It is the total price of electricity that matters to JCP&L's ratepayers, not the price for a given rate element in isolation, such as the NGC. In fact, as testified to by Mr. Kahal, retaining Forked River mitigates the risk of the uncertainty in the capacity market.

> The problem is that we can't protect ratepayers from risk associated with the capacity market. Ratepayers will be exposed to risk from the capacity market over the next five, ten, twenty years through the BGS auction or competitive power prices. Whatever those RPM auction prices turn out to be, that's what ratepayers are going to end up paying.
>
> So, ratepayers already are exposed to risk. In fact what retaining the plant does is mitigates risk because if it turns out that capacity prices are high . . . . that means that holding onto this asset, and you can think of it as a financial asset, will provide a large stream of revenue that will benefit customers [It] may mitigate only by a little bit, but every little bit helps, it will mitigate the high capacity prices that customers pay in the BGS auction.
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> If capacity prices turn out to be low, ... if that means that the revenue stream from the Forked River plant is low that's okay because we are paying low BGS prices, so you can think of holding onto this asset being unsure of what the capacity market is going to produce exactly as being kind of a ratepayer hedge against BGS.

T87:L5-88:L11

Thus, Staff's argument that the sale of Forked River will relieve ratepayers of market risks is both narrow and inaccurate. Ratepayers inevitably are exposed to that risk through the BGS auction or through competitive power prices. Market risk cannot be eliminated altogether, but JCP&L's retention of Forked River can help mitigate the risk associated with uncertain future capacity market prices.

e. Conclusion

Rate Counsel fully acknowledges that the future trends for capacity markets are uncertain. But Rate Counsel argues that the Board cannot allow the fear of uncertainty by itself to be the basis for its action. The Board's decision must be based on evidence in the record, not on unsupported speculation and not on trepidation. The record evidence in this proceeding clearly demonstrates that the proposed sale of Forked River would harm rather than benefit ratepayers. Accordingly, Rate Counsel respectfully requests that the Board not approve the sale of Forked River as proposed.

B. <u>The Company's Proposal to Pass on to Ratepayers All Costs Associated with Forked River Through the NGC is Unfair to Ratepayers and Should be Rejected by the Board.</u>

1. Forked River Losses.

The Company has requested that its obligation to absorb operating losses at Forked River cease, commencing 90 days after the filing of the Petition, and the Company be allowed to pass these operating losses onto ratepayers through the NGC. *PIB 16.* The Company argues that it "worked diligently to negotiate and bring this sale transaction to the Board for approval,." and claims that because this was Rate Counsel and Board Staff's preference, "the Company should be relieved of its obligation to continue absorbing those operating losses." *PIB 17.* Rate Counsel in its Initial Brief objected to this request and noted that this request was particularly unfair and inappropriate because the Company's own estimates show that the sale imposes a net $1.5 million cost to ratepayers. *RCIB 22-24*. That argument will not be repeated here. Staff agrees with Rate Counsel that the Board should "disregard the Company's request regardless of its decision on the merits of the proposed sale." *SIB 21*.

Rate Counsel finds it ironic however that on page 8, in a footnote, the Company mischaracterizes Rate Counsel's recommendation for retention of Forked River as being based on the premise "that, if markets change after a transaction has been appropriately negotiated and entered into then the BPU should as a matter of course toss out legitimate and otherwise binding agreements for no reason other than market changes subsequent to the time the deal was struck." JCP&L argues that such an approach by the BPU "would greatly jeopardize the ability of New Jersey utilities to engage in fruitful, good faith negotiations with third parties that might benefit customers" as "third parties may well become reluctant to invest the significant time, effort and money in good faith negotiations necessary to produce a fair agreement if they become concerned that the BPU may thereafter cavalierly set aside the deal based on perceptions as to subsequent changes in market conditions."

Rate Counsel points out that, in fact, this language is more appropriately applied to the Company's premise for the Company's request to be relieved of its obligation under the stipulation of settlement signed in November, 2006. Rate Counsel's recommendation is not based on changing market conditions. Rather, the projections used to estimate ratepayer benefit were those used by the Company during its negotiations with Maxim. On the other hand, the Company is asking the Board to toss out a settlement agreement "appropriately negotiated and entered into" and "for no reason other than" the Company negotiated a deal to sell Forked River "subsequent to the time the deal was struck."

The NGC stipulation was a balanced agreement of all the parties' interests. JCP&L has offered no counter balancing benefit to ratepayers in exchange for amending the stipulation. The Company's proposed amendment to the stipulation is completely one-sided. It is highly inconsistent and completely indefensible for JCP&L to argue out of one side of its mouth for the sanctity of the Forked River sale agreement and to argue for a violation of the NGC stipulation out of the other side of its mouth. Rate Counsel's arguments suffer from no such inconsistency.

2. Transaction and Closing Cost recovery

The parties all agree, if the Board should approve this transaction, only reasonable, incremental and verifiable costs should be recovered from ratepayers. *PIB 16, SIB 18, RC-1, page 18*. Staff and Rate Counsel also agree that the review and verification of these costs should take place in the context of the Company's next NGC filing. *RC-1, p.9, SIB p.18*. JCP&L prefers "to address the issue promptly after JCP&L submits a net proceeds statement following closing of the sale." *PIB 17.*

Rate Counsel notes that pursuant to the stipulation entered into in November 2006, the Company agreed to make annual NGC filings in the last quarter of each year.

If the Board approves the sale, presumably the closing will be sometime in September. The annual NGC filing can be made October 1, 2007. The Company's "preference" is no reason to impose the additional drain on Staff and Rate Counsel's resources that would be necessary to review these charges outside of the annual NGC filing.

This is especially true in light of the complexity of the unresolved issues surrounding the amount of the net proceeds associated with the sale. For example, despite a footnote to the contrary the Company has not convincingly explained why there is a ratepayer tax obligation on a sale that results in a loss to ratepayers. Also, transaction costs need to be carefully reviewed to ensure these costs are reasonable, incremental and properly recovered from New Jersey ratepayers. The Company has provided no reason to review these claimed expenditures on an accelerated basis. Reserving such cost review for an NGC proceeding does not harm the Company nor would it prejudice its claim for cost recovery in any way. Accordingly, Rate Counsel respectfully requests that the Board direct the Company to include review of the Forked River transaction costs in the Company's 2007 NGC filing.

3. Environmental Remediation Costs

JCP&L has proposed to collect through the NGC all environmental remediation costs associated with Forked River. These environmental costs include all pre-closing environmental liabilities associated with the Forked River facility, including environmental remediation under the New Jersey Industrial Site Recovery Act, *N.J.S.A. 13:1-K-6 et seq.* and Hazardous Discharge Site Remediation Act, *N.J.S.A. 58:10B-1 et seq.* and indemnification obligations for breach of representations and warranties under the Purchase and Sale Agreement ("PSA"). Rate Counsel objects to the Company's proposal to use the NGC as a never- ending catchall charge for cost recovery without the scrutiny of a base rate case.

The Market Transition Charge[14] ("MTC") was established as a "limited duration non-bypassable charge" for stranded cost recovery. *N.J.S.A. 48:3-61*. Indeed, EDECA provides that the market transition charge for each utility "shall be limited to a term not to exceed eight years." *N.J.S.A. 48:3-61(i).* The Board has the discretion to extend the MTC to recover stranded costs associated with long term NUG power purchase contracts, "to recover costs associated with a particular generating asset, the costs of which represent at least 20 percent of the utility's stranded costs" and to achieve mandatory rate reductions. *Id.* The Company's environmental costs associated with Forked River do not qualify for recovery under the MTC/NGC. The Company's proposal to use the NGC to collect these environmental costs is prohibited under EDECA and should not be condoned by the Board. The Company may seek to recover its prudently incurred and reasonable costs as part of a base rate proceeding.

[14] After the transition period, JCP&L changed the name of this clause charge from "MTC" (Market Transition Charge) to the "NGC" (Non-utility Generation Charge) which more accurately reflects the costs properly recovered through this charge. *JCP&L Base Rates and Deferred Balances Order*, BPU Docket No. ER02080506. et al., p.135-36.

C. **<u>The Company's After The Fact Request For a Waiver of Advertising Requirements Should be Rejected by the Board.</u>**

The Company has requested that the Board waive the advertising requirement set forth in *N.J.A.C. 14:1-5.6(b)*. It is Rate Counsel's position that this sale must be reviewed under the standard set in EDECA and in compliance with the Board's Auction Standards. There is no waiver for statutory compliance.

Moreover, since the Company has presented the Board with a *fait accompli,* the request seems disingenuous at best. If the need for such a waiver is as clear cut as the Company argues, it is hard to understand why the Company did not make such a request earlier in the sale process. Apparently, JCP&L did not want to take the chance the Board would direct the Company to advertise the property and so took that decision away from the Board and unilaterally decided to ignore that regulation as well as EDECA. Why such a request was not made prior to the signing of the PSA becomes more clear when viewed in light of the penalty provision of the PSA in which JCP&L would be obliged to pay a termination fee of $750,000 if advertising the property led to the sale of Forked River to another party. *Petition, para 18*. Apparently Maxim felt that advertising the property could lead to a better offer for JCP&L's ratepayers and included this penalty clause as protection against this eventuality. Unfortunately, JCP&L customers were not similarly protected.

CONCLUSION

For all of the reasons set forth above and in its Initial Brief and the testimony of its witness, Rate Counsel requests that:

> The Board reject the sale and direct the Company to focus on continued operation and maintenance of the Forked River facility to the benefit of ratepayers and to help pay down some of the $320 million stranded costs associated with the Oyster Creek Nuclear Station.
>
> The Board direct the Company seek to renegotiate the Station Blackout Agreement to obtain more equitable and compensatory payments from the Oyster Creek plant owner, Exelon and to mitigate the subsidy provided by JCP&L ratepayers.
>
> The Board direct the Company to abide by the terms of the NGC stipulation and absorb operating losses, if any, associated with the Forked River facility.
>
> If the Board should approve this transaction, only reasonable, incremental and verifiable costs should be recovered from ratepayers. The Board should direct that the review and verification of these costs should take place in the context of the Company's next NGC filing and that the Company should seek recovery for reasonable and prudently-incurred environmental remediation costs associated with Forked River in their next base rate case.

Respectfully submitted,

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Enclosures
c: Service List