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DIVISION OF RATE COUNSEL
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PUBLIC UTILITIES
NEWARK, N.J.

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October 30, 2009

Via Hand Delivery

Honorable Kristi Izzo, Secretary
Board of Public Utilities
Two Gateway Center
Newark, New Jersey 07102

**RE: In the Matter of the Petition of Atlantic City Electric Company for the Approval of the Sale of Certain Land and Premises Situate in the Township of Maurice River, in Part, and the city of Millville, in Part, County of Cumberland and State of New Jersey to R.W.V. Land & C.M. Livestock, L.L.C. Pursuant to N.J.S.A. 48:3-7
BPU Docket No. EM02050313**

Dear Secretary Izzo:

The New Jersey Department of the Public Advocate, Division of Rate Counsel ("Rate Counsel") submits this Letter Brief to the New Jersey Board of Public Utilities ("BPU" or "the Board") in the referenced matter. Enclosed please find an original and ten copies of Rate Counsel's Letter Brief. We are enclosing one additional copy of the materials transmitted. Please stamp and date the copy as "filed" and return it to our courier.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

Atlantic City Electric Company (“ACE”) filed a Petition¹ with the New Jersey Board of Public Utilities (“BPU” or “Board”) seeking approval, pursuant to N.J.S.A. 48: 3-7, to sell a parcel of land in Millville, New Jersey to R.W.V. Land & C.M. Livestock, L.L.C. for \$4 million (Rec. #5)² Prior to the Petition, by letter from the New Jersey Department of Environmental Protection (“NJDEP”) dated August 23, 1999, the State of New Jersey had offered to purchase this parcel in an effort to meet Governor Whitman’s then stated million acre goal of open space and farmland preservation. The State, in conjunction with private conservation organizations, wanted to extend an existing greenway by purchasing the property and for other beneficial purposes as noted in the offer letter. (Rec. # 3) Most recently, on March 23, 2009, the NJDEP reaffirmed its interest in the property by offering to purchase the parcel for \$3,500,000.00 in an immediate cash payment. (Rec. #126)

Initially, Rate Counsel, in comments filed with the Board on March 12, 2003, did not object to the proposed sale of the property to the developer, based largely upon the representations contained in the Petition. (Rec. #13) Subsequently, Rate Counsel became aware of the environmental benefits to ratepayers and citizens of New Jersey that were represented by the NJDEP offer to purchase the property. As

¹ / *In the Matter of the Petition of Atlantic City Electric Company for Approval of the Sale of Certain Land and Premises Situate in the Township of Maurice River, in part, and the City of Millville, in part, County of Cumberland and the State of New Jersey to R.W.V. Land & C.M. Livestock, L.L.C. pursuant to N.J.S.A. 48:3-7, (“Petition”), BPU Docket No. EM02050313, filed May 22, 2002.*

² / By agreement of the Parties a “Statement of Items Comprising the Record” dated September 23, 2009 was established identifying 140 separate documents in chronological order by sequential number. Reference to these items will be noted as “Rec. #_” in this brief.

a result, Rate Counsel filed additional comments with the Board on January 15, 2004, reflecting the new information and changing its position from not objecting to the sale as proposed in the Petition to supporting a sale to the NJDEP through the Green Acres program. (Rec. # 50) Rate Counsel's current position is unchanged from the amended filing dated January 15, 2004 supporting the sale of the parcel to the NJDEP.

As set forth in the Petition, the parcel was advertised for sale on July 19 and 26, 2001, and January 16 and 23, 2002, at a sale price of \$4,200,000.00. Six bids were received and the offer before the Board for approval was accepted by ACE, pending Board approval. (Rec. # 5, para. 9) ACE agreed to sell the parcel to R.W.V. Land & C. M. Livestock, L.L.C., a New Jersey Limited Liability Company (and Millville 1350, L.L.C., the entity created to act as the developer, collectively, "Millville 1350" as the buyers) for a total of \$4,000,000 upon certain conditions and contingencies as more fully set forth in the Purchase Agreement ("Purchase Agreement").

The Purchase Agreement provides Millville 1350's payment of \$4,000,000 to be made over time, the terms of which are as follows: \$300,000 to be paid upon execution of the Agreement; \$100,000 upon completion of a six (6) month inspection period; and, the balance of the purchase price (\$3,600,000) to be held by ACE as a First Purchase Money Note and Mortgage. The Purchase Agreement provides that the First Purchase Money Note and Mortgage shall be held by ACE

for a period of 4 years, without interest, \$100,000 payable in each of the first 3 years and a fourth year payment of \$3,300,000. (Rec. #5, para. 3)

Millville 1350 has a right to inspection of the property to “ascertain if the Land can be feasibly developed for Buyer’s proposed use” and allows investigation to include; 1) economic feasibility; 2) feasibility of obtaining land use approvals; 3) evaluating the environmental issues; and, 4) obtaining a survey and title search. (Rec. #5, para. 4)

Paragraph 13 of the Purchase Agreement, “Contingencies” provides that “Seller” (ACE) obtain approval to reduce the required minimum lot size for the leased generating station from 500 acres to 140 acres; that “Seller” obtain final subdivision approval from the City of Millville and County of Cumberland; the “Seller” obtain BPU approval; that the “Seller” obtain a release from its mortgagee; and, “Seller” obtain necessary and specified NJDEP approvals, including: a) a non-applicability letter; b) a De Minimis quantity exemption; c) approval of Seller’s negative declaration; d) and approval of Seller’s remedial action work plan pursuant to the Industrial Site Remediation Act, *N.J.S.A. 13:1K-6 et. seq.*. (Rec. #5, para. 13)

Three Interveners: Millville 1350 (the buyers); the New Jersey Audubon Society, New Jersey Conservation Foundation and the Association of New Jersey Environmental Commissions (collectively, the “Environmental Interveners”); and, the NJDEP were granted intervention in the proceeding initiated by ACE to approve the sale of the property. (Rec. #55, 62, and 72)

A pre-hearing conference was held by the Board on January 23, 2008 when it was agreed by the parties that additional discovery was needed along with new property appraisals. New appraisals were conducted by the NJDEP (Rec. # 116 and 117) finding a monetary value range of between \$3.50 million and \$4.15 million for the parcel.

The economic benefit or monetary value of the competing offers between Millville 1350 and the NJDEP became a central issue among the parties. Three separate economic benefit reports were introduced into evidence at an evidentiary hearing conducted on September 23, 2009 in an effort to determine the best monetary value to ACE from the sale of the property.

The first of economic benefit report, offered by the NJDEP, was a report authored by Gold Gocial Gerstein, LLC. This report concluded that the economic benefit to ACE from a sale to Millville 1350 is \$2,638,377 and the economic benefit to ACE from a sale to the NJDEP is \$3,408,202. (Rec. #138)

The second economic benefit report, offered by the Environmental Interveners, was authored by Gabel Associates. Gabel Associates prepared two separate reports, the first dated December 1, 2003 was based upon the earlier August 23, 1999 NJDEP offer of \$2,553,000. Gabel Associates concluded that the net present value of the Millville 1350 offer was \$1,850,000, or approximately \$700,000 less than the then existing NJDEP offer. (Rec. # 32) Gable Associates filed a Supplemental Economic Analysis dated May 1, 2009 and that concluded that the current offer for

LEGAL ARGUMENT

THE NJDEP OFFER REPRESENTS THE HIGHEST VALUE TO ATLANTIC CITY ELECTRIC

On the basis of economic value alone there is agreement among the evidence offered by the parties that the current offer by the NJDEP represents the greatest present monetary value to ACE. Three parties, Millville 1350, the NJDEP and the Environmental Intervenors retained consultants to offer their opinions to assist the Board in understanding the evidence of economic value represented by the competing offers. Each offered their opinion comparing the economic benefit of the offers. "Economic benefit is defined as the actual monetary benefit accruing to Atlantic City Electric from the Contract [Purchase Agreement] and the Offer [the NJDEP offer]. The best price obtainable is the price that represents the greater economic benefit accruing to ACE." Gold Gocial Gerstein, L.L.C. (Rec. #138, p. 5)

Under cross examination, John Guastella (the expert offered by Millville 1350) testified that the current offer by the NJDEP was between \$100,000 and \$600,000 more than that offered by Millville 1350. (T27-28)³ The economic value was determined by discounting the contract price or market value, as determined by Mr. Guastella, by five and ten percent, to determine the "present value" of the future payment under the contract. The economic value in the reports offered by the other

³ / Transcript of evidentiary hearing, September 23, 2009 before the BPU President Fox. ("Tr. pp. ")

two parties supported that conclusion; with the differences of opinion (with Guastella) only increasing the economic value of the NJDEP offer to ACE.

The Board has the responsibility to insure the public is protected by making certain the highest value is obtained for property sold by a utility.

The jurisdiction of the Board was expressly acknowledged by the parties to the contract pending before the Board. The sale of the parcel by ACE to Millville 1350 is specifically conditioned upon Board approval of the Purchase Agreement "Contingencies"; wherein it states, "Seller [ACE] has advised Buyer [Millville 1350] that in order to consummate this transaction, Seller must first obtain the approval of the New Jersey Board of Public Utilities ("BPU")." The Purchase Agreement further states, at paragraph 13 1. (c); "If Seller is unable to obtain BPU approval, and then Seller shall have the right to terminate this Agreement, in which event all deposits paid by buyer shall be returned to Buyer and there shall be no further rights or liabilities by or between the parties." (Rec. 5, Exhibit B)

It is without question that the Board has the authority and regulatory power to consider the evidence and dispose of the sale of the parcel contained in the Petition. In, *Marlboro v. Village Water Co.* 72 N.J. 99 (1976) at page 107, the Court stated; "On numerous occasions we have acknowledged 'that the Legislature in Title 48 intended to delegate the widest range of regulatory power over public utilities' to the Board." (citations omitted). Based upon the evidence in the record the highest monetary value to ratepayers can only be obtained by ACE accepting the NJDEP's bid for the parcel.

In addition to the economic value of the NJDEP offer to ACE and its ratepayers, the Board should consider the additional lasting environmental benefits to the ratepayers and all citizens of New Jersey. “Unlike other corporations, however, utilities are subject to a special obligation to serve the public interest...the Legislature has entrusted the BPU with the responsibility of assuring that utilities fulfill that obligation.” *Board of Pub. Utils. v. Valley Rd. Sewerage Co.* 1543 N.J. 224, 240 (1998). The public interest, as has been determined by the State, is expressed by the NJDEP in its 1999 offer; “the State of New Jersey, in partnership with private conservation organizations, have created a continuous greenway which now includes NJDEP’s Menantico Ponds and Peaslee Wildlife Management Areas, as well as The Nature Conservancy’s Menantico Creek and Manumuskin River Preserves.” The NJDEP offer concludes; “Lastly, this offer also represents an opportunity to demonstrate a balance of economic and environmental interests by using the Brian Parent Conference Center as a showcase for the natural resources of the region, and by making the Center a magnet for both environmental education and ecotourism.” (Rec. #2)

The NJDEP reinforced the environmental importance of this parcel to the State with its most recent, increased monetary offer, when it stated; “This purchase would result in the permanent preservation of the property and would help achieve a number of Department priorities including the protection of critical wildlife habitat and water resources, and providing lands for public use and enjoyment.” (Rec. # 126)

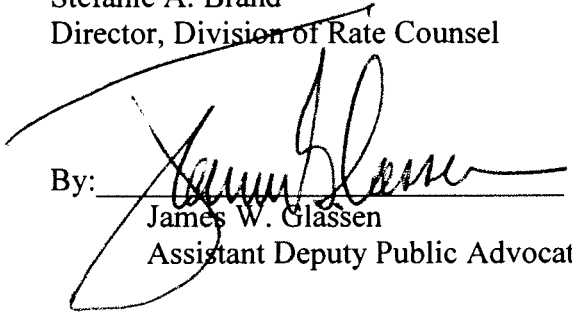
CONCLUSION

Rate Counsel believes the evidence before the Board demonstrates that the highest monetary value that can be obtained by the utility for the property is the offer by the NJDEP. In addition to the monetary value, the offer by the NJDEP represents additional value to the ratepayers resulting from the environmental benefits in adding to the existing greenway. Therefore, Rate Counsel requests that the Board reject the offer contained in the Petition and order the sale to the NJDEP on the terms outlined in its most recent offer.

Respectfully yours,

RONALD K. CHEN
PUBLIC ADVOCATE

Stefanie A. Brand
Director, Division of Rate Counsel

By: 
James W. Glassen
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- Commissioner Frederick F. Butler, (via hand delivery)
- Commissioner Joseph L. Fiordaliso, (via hand delivery)
- Commissioner Nicholas V. Asselta, (via hand delivery)
- Commissioner Elizabeth Randall, (via hand delivery)
- Service List (via electronic and U.S. Regular Mail)

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