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November 18, 2015

**VIA OVERNIGHT DELIVERY**

Irene K. Asbury, Secretary
Board of Public Utilities
44 South Clinton Avenue, 9th Floor
Trenton, NJ 08625-0350

Re: In the Matter of the Petition of **Jersey Central Power & Light Company** Pursuant to *N.J.S.A.* 40:55D-19 for a Determination that the Montville-Whippany 230 kV Transmission Project is Reasonably Necessary for the Service, Convenience or Welfare of the Public

**BPU Dkt. No. EO15030383**
**OAL Dkt. No. PUC 08235-2015N**

Dear Secretary Asbury:

Please accept this reply letter brief on behalf of Jersey Central Power & Light Company ("JCP&L" or the "Company") in response to the Township of Montville's ("Montville") Motion for Reconsideration ("Motion") dated November 9, 2015 in the above-referenced matter. Montville had previously filed a motion with presiding Administrative Law Judge ("ALJ") Leland McGee seeking an order requiring JCP&L to establish and fund an escrow account to subsidize Montville's expert fees related to its intervention in this proceeding (the "OAL Motion"). JCP&L opposed Montville's OAL Motion, and, after considering the papers, ALJ McGee issued an order dated September 8, 2015 denying Montville's Motion. Montville then sought interlocutory review of ALJ McGee's September 8, 2015 order ("Interlocutory Request"). By its Order dated October 15, 2015, the Board of Public Utilities ("Board" or "BPU") granted

Case Mgrt
A. Moreau
B. Rocque-Romano
C. McIntosh
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interlocutory review and then affirmed ALJ McGee's September 8, 2015, denying Montville's request that JCP&L be forced to fund an escrow account to pay for Montville's expert witness costs for this matter ("October 15 Order").

## Introduction

Montville's Motion raises no new legal or factual arguments; rather it is largely a recitation of the same flawed, unsupported allegations that both ALJ McGee and the Board have previously considered and rejected. Montville's only "new" argument is a procedural one that completely misconstrues the applicable regulations governing interlocutory reviews by the Board. In its Motion, as in its prior filings on this issue, Montville has again failed to identify a single legal authority for requiring a utility to fund the professional expenses of an intervenor in any proceeding before the Board. Moreover, Montville's Motion fails to satisfy the high threshold for the Board to grant reconsideration of its October 15, 2015 Order. For all these reasons, as discussed in detail in this reply letter brief, JCP&L respectfully requests that the Board deny Montville's Motion for Reconsideration.

## Discussion

### I. Montville has Failed Satisfy the Standards for Reconsideration of a BPU Order.

A motion for reconsideration requires the moving party to state "the alleged errors of law or fact" that were relied upon by the Board in rendering its decision. *I/M/O the Petition of Fiber Technologies Networks, L.L.C., For an Order Finding Unreasonable the Make-Ready Costs Imposed by Verizon New Jersey Inc. on Fiber Technologies, L.L.C., Requiring Refunds, and Establishing Reasonable Make-Ready Rates, Terms, and Conditions*, BPU Docket No.

TO12080722, 2012 N.J. PUC LEXIS 297, *12, Opinion and Order (October 23, 2012) (*citing N.J.A.C.* 14:1-8.6(a)(1)). However, reconsideration is not warranted based merely on a party's dissatisfaction with a decision. *Id.* at *17 (*citing D'Atria v. D'Atria*, 242 N.J.Super. 392, 401 (App. Div. 1996)). Reconsideration is specifically reserved for those cases where "(1) the decision is based upon a 'palpably incorrect or irrational basis' or (2) it is obvious that the finder of fact did not consider, or failed to appreciate, the significance of probative, competent evidence." *I/M/O the Petition of Fiber Technologies Networks*, 2012 N.J. PUC LEXIS 297 at *12-13 (*citing Cummings v. Bahr*, 295 N.J.Super. 374, 384 (App. Div. 1996)). The burden is on the moving party to show that the Board's action was arbitrary, capricious, or unreasonable. *Id.*

Here, Montville has clearly not shown that the Board's decision was based on a "palpably incorrect or irrational basis", nor has Montville even argued, let alone established, that the Board's action was "arbitrary, capricious or unreasonable." All Montville has done in its Motion is: (1) repeat a legal argument it raised below that is without merit; (2) raise alleged procedural issues that are based on selective and incorrect interpretation of the applicable regulations; and (3) provide certifications detailing how much the municipality plans to spend on expert witnesses and legal fees in this matter. *See Montville Motion letter brief* at pp. 2-3. None of the factors provide any basis for the Board to grant reconsideration.

## II. Montville's Interpretation of the Regulations Governing Interlocutory Review is Selective and Incorrect.

Although Montville is correct that *N.J.A.C.* 1:1-14.10 governs interlocutory appeals from the OAL to a state agency, Montville's interpretation of that regulation is incomplete and incorrect. First, Montville argues that *N.J.A.C.* 1:1-14.10(c) required that the BPU provide notice within ten days whether it would review the ALJ's decision. However, the regulation provides that a lack of such notice within ten (10) days means the request for review is denied. *N.J.A.C.* 1:1-14.10(c). Moreover, the Board has a more specific regulation that governs its procedures for processing interlocutory review requests, *N.J.A.C.* 1:14-14.4, which provides:

> (a) When a party requests interlocutory review, the BPU shall make a determination as to whether to accept the request and conduct an interlocutory review by the later of the following:
>
> 1. Ten days after receiving the request for interlocutory review; or
>
> 2. The BPU's next regularly scheduled open meeting after expiration of the 10-day period from receipt of the request for interlocutory review.
>
> (b) If the BPU determines to conduct an interlocutory review, the BPU shall issue a decision, order, or other disposition of the review no later than the next scheduled Board meeting on or after the 20th day following that determination.
>
> (c) Where the BPU does not issue an order within the timeframe set out in (b) above, the judge's ruling shall be considered conditionally affirmed. The time period for disposition may be extended for good cause for an additional 20 days if both the Board and the Director of the Office of Administrative Law concur.

Based on a reading of *N.J.A.C.* 1:14-14.4, it is apparent that the Board followed its established procedures for considering Montville's request for interlocutory review. Moreover, the fact that the BPU did not notify the parties that it would grant interlocutory review until it

issued its October 15 Order did not cause any harm to Montville. The purpose of that notice is to provide the party in opposition to the grant of interlocutory review (in this case, JCP&L) the opportunity to submit "in writing, arguments in favor of the order or ruling being reviewed." *N.J.A.C.* 1:1-14.10(d) (*and see, e.g. I/M/O the Petition of Fiber Technologies Networks, LLC, for an Order Finding Unreasonable the Make-Ready Costs Imposed by Verizon New Jersey Inc. on Fiber Technologies, LLC, Requiring Refunds, and Establishing Reasonable Make-Ready Rates, Terms, and Conditions*, BPU Docket No. TO09121004, OAL Docket No. PUC 00784-2012, 2012 N.J. PUC LEXIS 235, *28, Opinion and Order (August 2, 2012)). There is no provision in the applicable regulations that would have permitted Montville to file another brief or other pleading even if the notice had been issued within a ten day period. In other words, the alleged lack of notice in this matter did not prejudice Montville – it prejudiced JCP&L. Therefore, the fact that the BPU did not provide notice that it was granting interlocutory review until its October 15 Order provides no support for Montville's Motion.

Montville also relies on *N.J.A.C.* 1:1-14.10(f) in support of its Motion, arguing that under the regulation, it should have been, but was not, provided the opportunity to present "a copy of the record to the BPU, nor was the Township afforded the opportunity to provide additional supporting documents and information which became available following JCP&L's service of discovery responses." (*Montville Motion* at p. 2). However, Montville misrepresents *N.J.A.C.* 1:1-14.10(f) when it provides only half of the complete regulation in support of its argument. The first sentence of *N.J.A.C.* 1:1-14.10(f), which Montville fails to quote, provides that "[w]here the proceeding generating the request for interlocutory review has been sound recorded

and the agency head requests the verbatim record, the Clerk shall furnish the original sound recording or a certified copy within one day of request." Therefore, the rule actually provides that in instances where there has been a sound recording and the agency head has requested the verbatim record, *then* "[t]he party requesting the interlocutory review shall provide the agency head with all other papers, materials, transcripts or parts of the record which pertain to the request for interlocutory review." *N.J.A.C.* 1:1-14.10(f). In the instant matter, there has been no sound recording of any proceeding (and no request from the Board for the verbatim record), and as such, Montville does not, and did not, have a second opportunity to present additional information to the Board in conjunction with its request for interlocutory review. Montville's reliance on this regulation is misplaced, and its argument should be disregarded.

## III. Montville's Motion Contains No New Evidence or Information Warranting Reconsideration of the Board's October 15, 2015 Order.

Montville also argues that "new evidence" not available when the Board issued its October 15 Order warrants reconsideration. *Montville Motion*, at p. 3. Montville is incorrect that is has provided "new evidence" and it is likewise incorrect that the additional information it did provide warrants reconsideration.

First, the allegations regarding how much Montville plans to spend on expert and attorney fees (Canning Certification) and the issues its consultant may explore (Bishop Certification) hardly constitute "evidence." There has been no evidentiary hearing held in this matter, nor have the certifications been admitted into evidence. Moreover, the question of whether the Board can and/or should have granted Montville's request to force JCP&L to fund

its expert fees is largely an issue of law. Neither the amount Montville may spend, nor the number of issues it may have its expert review, are at all relevant to the legal issue the Board has already ruled on.[1] Accordingly, neither of the Certifications Montville filed contain any information that requires the Board reconsider its October 15 Order.

## IV. Montville's Argument that the Board Misconstrued *N.J.S.A.* 48:2-32.2 is Flawed; Similarly, its Argument that the Procedures for Matters that Come Before a Municipal Planning Board Should Apply Here is Simply Wrong as a Matter of Law.

As was the case with its Motion before ALJ McGee and its Interlocutory Request, Montville fails to identify a single New Jersey statute, regulation, or Board order that either requires or allows the Board to order a public utility to fund the expert fees of a municipal intervenor in a BPU proceeding. There is a simple explanation for this fatal flaw in Montville's filing – no such authority exists. In fact, Montville in its prior Interlocutory Request, Montville admitted that there is no legal basis for its request. *See Montville Interlocutory Request*, at p. 4.

In its Motion, Montville offers no new legal arguments in support of its request for reconsideration. Instead, it argues that the Board misinterpreted *N.J.S.A.* 48:2-32.2. A plain reading of the Board's October 15 Order reveals that the Board in fact properly interpreted that statute as providing a mechanism for a municipality to raise funds for its participation in BPU cases. *October 15 Order* at p. 9. Furthermore, that statute was only one of the factors the Board relied upon in reaching its decision. *Id.* at pp. 8-9.

[1] In addition, all of the issues Montville claims are "new" (*see Motion*, at p. 5) were contemplated in the Company's petition, which was filed on March 27, 2015.

In addition, as JCP&L explained in its prior briefs in this matter, by enacting *N.J.S.A.* 48:2-32.2, the New Jersey legislature specifically contemplated that municipalities may: (a) want to intervene Board proceedings and should be permitted to do so; (b) want to employ counsel, experts and assistants to protect the municipal interest in such proceedings and should be permitted to do so; and (c) want or need to raise municipal funds to pay for such experts and should be permitted to do so. Had the legislature contemplated that intervenors such as Montville should be entitled to have their expenses for employing counsel or experts paid for or subsidized by New Jersey public utilities or their ratepayers, the legislature could have provided for it, just as it did in the context of land use proceedings before municipal boards under certain circumstances.[2]

Finally, Montville recycles an argument that it made in its OAL Motion – namely, that if this case was an application before the Montville Planning Board, Montville could require JCP&L to fund expert fees. *See Montville Motion*, at p. 3.

As JCP&L explained in its reply brief in response to Montville's OAL Motion, the statutory provisions applicable to matters before municipal planning or zoning boards are simply inapposite to cases pending before the BPU. In fact, the Legislature enacted *N.J.S.A.* 40:55D-19 so that public utilities could avoid piecemeal review when trying to site a transmission project that will be located in more than one municipality. Accordingly, the Board should deny Montville Motion.

[2] *See N.J.S.A.* 40:55D-53.

**V. Montville's Request is at Odds With Board Precedent and Policy, Would Result in an Increase in Costs that would be Recoverable from all JCP&L Customers, and Would Establish an Inappropriate and Dangerous Precedent for Future Board Proceedings.**

Finally, Montville argues that based on its broad discretion, the Board should grant reconsideration and order JCP&L to fund Montville's expert fees in this matter. *Motion*, at pp. 8-9. While it is clear that the Board's October 15 Order properly interpreted the applicable law and reached the correct decision, even if the Board's discretion was broad enough to allow it to grant the request Montville seeks, the Board should nonetheless deny Montville's Motion. As JCP&L and the Division of Rate Counsel each established in prior briefs, granting Montville's Motion would establish an inappropriate and dangerous precedent for future Board proceedings. It is therefore important for the Board to affirm its prior Orders denying similar requests for utility funding of intervenors' experts.

Through annual utility assessments, which are reflected in utility rates, utility customers in New Jersey already fund the Board, Board Staff and Rate Counsel, thus ensuring that appropriate expertise is brought to bear in fully reviewing utility matters and protecting the interests of ratepayers and the public. Thus, if JCP&L were required to set up an escrow fund for Montville in this proceeding, JCP&L and/or its ratepayers would be paying not only for this comprehensive agency review and Rate Counsel review, but also, unfairly, for a review by Montville's own experts and advisers. Indeed, such a precedent would turn legislative intent on its head by changing a statutory grant of the right for a municipality (at its own expense) to choose to intervene in Board proceedings into an absolute right to intervene (at the utility's

expense) similar to that of Rate Counsel. Rather, as the Board has ruled, a municipality like Montville that is seeking to protect its parochial interests should fund its own litigation efforts.

Establishing an escrow for Montville's use here would also create a dangerous precedent in New Jersey that could be applicable to all Board proceedings, which are often contentious and cost-intensive. A decision requiring a utility to fund the expenses of one municipal intervenor would invariably lead to funding the expenses of each and every municipal party that voluntarily participates in any matter before the Board involving any of the regulated utilities. Such a result is legally unsupportable, contrary to sound public policy, and would increase regulatory costs and ratepayer expenses significantly. Accordingly, the Board should deny Montville's Motion.

## Conclusion

For all the foregoing reasons, JCP&L respectfully requests that the Board deny Montville's Motion for Reconsideration.

Respectfully submitted,

Gregory Eisenstark

c: Hon. Richard S. Mroz, President, BPU
Hon. Joseph L. Fiordaliso, Commissioner, BPU
Hon. Mary-Anna Holden, Commissioner, BPU
Hon. Dianne Solomon, Commissioner, BPU
Hon. Upendra J. Chivukula, Commissioner, BPU
Hon. Leland McGee, ALJ (via regular mail)
Clerk, OAL (via regular mail)
Service List (via email only)