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May 2, 2011

BY LAWYERS SERVICE

Mr. Joseph H. Orlando
Clerk of the Court
Appellate Division, Superior Court of New Jersey
Hughes Justice Complex
25 West Market Street
P.O. Box 006
Trenton, New Jersey 08625

Re: Environment New Jersey, New Jersey Environmental Federation, New Jersey Highlands Coalition, and Sierra Club - New Jersey v. Board of Public Utilities
Docket Nos. A-004536-09T3 and A-004848-09T3

Dear Mr. Orlando:

Appellants enclose for filing in this matter the original and four copies of Appellants' Reply Brief, Request for Oral Argument and Certification of Service. Appellants also enclose an extra copy of the Reply Brief and Request for Oral Argument and ask that it be stamped with the date and time of receipt and returned in the self-addressed stamped envelope provided. Thank you for your attention to this matter.

Respectfully submitted,

Kevin J. Pflug

Enclosures

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IN THE MATTER OF THE PETITION OF PSE&G FOR A DETERMINATION PURSUANT TO THE PROVISIONS OF N.J.S.A. 40:55D-19 (SUSQUEHANNA-ROSELAND TRANSMISSION LINE)	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION Docket Nos. A-004536-09T3 A-004848-09T3 Civil Action

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PRELIMINARY STATEMENT

In approving the proposal to expand the Susquehanna-Roseland Power Line (the "Proposed Project"), the Board of Public Utilities ("BPU") misconstrued caselaw in granting Public Service Electric and Gas ("PSE&G") a preference in weighing the evidence and reaching a decision in this case.

In addition, the same erroneous standard led the BPU to agree with PSE&G that there are no viable alternatives to the Proposed Project. Although PSE&G and the grid management company, PJM, put forth employees and paid experts to opine that non-transmission alternatives (which do not generally produce profits for PSE&G) are not suitable, such testimony should have been greeted with skepticism by the BPU. Instead, the BPU relied on its misinterpretation of the standard of review and failed to conduct any independent analysis of claims made by PSE&G. Substantial evidence exists in the record to show that alternatives to the Proposed Project do exist. The BPU erred when it failed to investigate the viability and costs associated with alternatives to the Proposed Project, as required by law.

ARGUMENT

I. THE BPU ERRED BY GIVING PSE&G A PREFERENCE IN EVALUATING THE EVIDENCE AND WEIGHING THE INTERESTS IN THIS CASE.

Under New Jersey law, PSE&G is not entitled to a "preference" as the BPU ruled, and as both Respondents claim. BPU Decision and Order, at 48, Aa56a; PSE&G brief at 34; BPU brief at 22. The applicable statute, N.J.S.A. 40:55D-19, does not contain any such language giving the utility a preference in the weighing of the evidence. The cases cited by PSE&G and the BPU – In re Pub. Serv. Electric and Gas Co., 35 N.J. 358 (1961) ("Public Service Electric") and In re Hackensack Water Company, 41 N.J. Super. 408 (App. Div. 1956) ("Hackensack Water") – are inapplicable here. The language that Respondents cling to, that "the utility is entitled to the preference," Public Service Electric, at 377, does not mean that the scales are tipped in PSE&G's favor in weighing the evidence. Rather, it stands for the proposition that the public interest takes precedence over local interests, and does not apply in cases such as the instant one where the intervenors represent the public interest just as much, if not more than the utility does.

In Public Service Electric, the court, in interpreting the predecessor statute to the current N.J.S.A. 40:55D-19 stated:

> The Board's obligation is to weigh all interests and factors in the light of the entire factual picture and adjudicate the existence or non-existence of reasonable necessity therefrom. If the balance is equal, the utility is entitled to the preference, because the legislative intent is clear that the broad public interest to be served is greater than local considerations.

35 N.J. at 377. PSE&G, and other state utilities, have seized upon this language to argue that it forms the basis for a legal standard that is not set forth in the statute. PSE&G brief at 33-34. See e.g., I/M/O the Amended Petition of Atlantic City Elec. Co. for a Determination Pursuant to the Provisions of N.J.S.A. 40:55D-19 etc., Docket No. EE02080521 (N.J. Bd. Pub. Util., June 15, 2004), Ra128. The BPU reiterated this standard in its opinion, and based its decision on this standard. BPU Decision and Order at 48, Aa56a.

In actuality, what the court was merely stating in Public Service Electric was that the public interest must have preference over private or local considerations. In fact, the court stated that it was only "recapitulating" the criteria laid down in Hackensack Water. 35 N.J. at

376. Although Hackensack Water used the same preference language, it was clear that what the court was balancing was the interest of "the larger public" or the "general good" against private or local concerns:

> Moreover, our courts have always held, in interpreting the other analogous statutes previously cited, that the criterion of necessity for the public welfare, however expressed, must not be restricted to the necessities of a circumscribed territorial locality or the immediate local public affected, but shall encompass those of the larger public without regard to territorial limitations.

41 N.J. Super. at 424. What the court is giving preference to is the larger public interest, which may, in some cases, be represented by the utility, but Hackensack Water and Public Service Electric did not intend to confer any preferential treatment to a corporate entity. There is nothing in these cases to suggest that the court believed that PSE&G or any other utility should be entitled to deference.

Another important distinction between the cases relied upon by Respondents and the instant case is that both Hackensack Water and Public Service Electric involved a conflict between a utility and a municipality. In Hackensack Water, the water company wanted to place an elevated water tank in an area zoned by the Borough of

Carlstadt for residential use. 41 N.J. Super. at 414-15. Similarly, in Public Service Electric, there was a conflict between the utility and a local zoning ordinance. In that case, the Borough of Roselle passed a zoning ordinance that stated that all electric power lines carrying more than 33 kilovolts had to be installed underground. 35 N.J. at 363. Both of these cases involved the interests of a local community against the larger interests of the public at large. In such cases, the court held that the municipality's interest had to give way to the welfare of the public. This particular rule is derived from the statute, which calls for the consideration of whether the requested use is "necessary for service, convenience and *welfare of the public.*" N.J.S.A. 40:55D-19 (emphasis added). However, the statute does not give a "preference" to utilities in all cases.

Similarly, the two BPU cases relied upon by PSE&G in its brief, In re Atlantic City Elec. Co., Docket No. EE04111374 (N.J. Bd. Pub. Util., Apr. 21, 2005), Ra114, and I/M/O the Amended Petition of Atlantic City Elec., Ra128, are inapplicable here. First, these two cases are BPU Orders that are not controlling in this Court. Second, these two cases again are cases involving a conflict

between a utility and a municipality and its zoning ordinances.

In the instant case, the Appellants are not a local municipality attempting to enforce a zoning ordinance that was enacted for the benefit of a localized minority. In contrast, the Appellants are a coalition of citizens' groups and environmentalists. This coalition represents a wide cross-section of individuals throughout the state of New Jersey. The interests of the Appellants reflect the public interest as much, if not more, than the interests of PSE&G. It is well-established in many other contexts that environmental groups represent the public interest. They may bring lawsuits against government agencies for failure to perform nondiscretionary duties. E.g., Sierra Club v. Ruckelshaus, 602 F.Supp. 892 (N.D. Cal. 1984) (suit to require EPA to issue final standards for radionuclide emissions under the Clean Air Act); Citizens for a Better Environment v. Costle, 515 F. Supp. 264 (N.D. Ill 1981) (suit to require EPA to promulgate regulations under the Clean Air Act). Environmental groups may also act as private attorneys generals and bring actions under various state and federal law. See, e.g., Hudson River Fishermen's Ass'n v. Westchester County, 686 F. Supp. 1044, 1045 (S.D.N.Y. 1988) (suit under the Federal Clean Water Act

seeking damages and injunctive relief). More analogous to the case here, environmental groups have been permitted to intervene in disputes between governmental entities and private parties. See Mausolf v. Babbitt, 85 F.3d 1295 (8th Cir. 1996) (allowing intervention of conservation groups in action to enjoin enforcement of snowmobile restrictions in national park); Sagebrush Rebellion, Inc. v. Watt, 713 F.2d 525 (9th Cir. 1983) (allowing intervention of environmental organizations in action challenging legality of bird preserve).

In Mausolf v. Babbit, the court allowed the intervention of the Sierra Club as well as other environmental groups even as it acknowledged that the government had the obligation to represent the "broad public interest." 85 F.3d at 1303-4. The intervention was allowed because the environmental groups also represent the public interest, which, while different from the governmental public interest, still represents a broad and important public interest. 85 F.3d at 1304. Likewise in this case, the Appellants represent a broad public interest, not just an interest that is limited in locality or scope.

Although PSE&G may also represent the public interest in this matter, it is not the only public interest. PSE&G

also represents itself—the corporation and its shareholders—in addition to the rate-paying public, and the BPU must consider that in weighing the competing public interests. The court in Public Service Electric stated:

> It [the BPU] has an inherent obligation of a primary and fundamental nature to protect the public interest in the matter of service by utilities, *not only in relation to the customer*, but also from the standpoint of the impact of the method of service on *other segments of the public as well*, and it must always be affirmatively alert to discharge that responsibility.

35 N.J. at 381 (emphasis added). PSE&G is a corporation in a regulated industry. It is not a governmental agency or quasi-governmental entity. Under the circumstances of this case, it is not entitled to the kind of deference suggested in Public Service Electric. Where the conflict is between PSE&G and a broad-based citizens' or environmental group, PSE&G is not entitled to a preference, and the BPU's obligation is to make its decisions based on all the evidence without deference to PSE&G.

In giving PSE&G a preference in this case, the BPU applied the wrong standard. On this legal question of what standard is to be applied, the Court need not defer to the BPU. Mayflower Securities Co., Inc. v. Bureau of Securities, 64 N.J. 85, 93 (1973). This case should be

remanded to the BPU for reconsideration, using the proper standard.

II. THE BPU NEGLECTED ITS DUTY TO INVESTIGATE ALTERNATIVE METHODS AND THE COSTS OF THOSE ALTERNATIVES

The BPU erred when it failed to evaluate non-transmission alternatives to the Proposed Project and instead merely accepted PSE&G's and PJM's conclusions that alternatives do not exist. Before the BPU can approve a proposed project, "[a]lternative sites or methods and their comparative advantages and disadvantages to all interests involved, including costs, must be considered in determining such reasonable necessity." In re Pub. Serv. Elec. & Gas. Co., 35 N.J. 358, 376-77 (1961). Furthermore, the BPU has the power to "investigate upon its own initiative or upon complaint in writing any matter concerning any public utility." N.J.S.A. 48:2-19; see also In re Pub. Serv. Elec. & Gas. Co., 35 N.J. 358, 362 (1961). The BPU has used this power in the past to investigate the feasibility and costs of alternatives to power line projects. In re Pub. Serv. Elec. & Gas. Co., 35 N.J. 358, 378-79 (1961). In addition, "[t]he BPU's authority over utilities, like that of regulatory agencies generally, extends beyond powers expressly granted by statute to include incidental powers that the agency needs to fulfill

its statutory mandate." In re Public Service Elec. and Gas Rate Unbundling, 167 N.J. 377, 384 (2001) quoting Matter of Valley Rd. Sewerage Co., 154 N.J. 224, 235 (1998). The BPU's duty to fully investigate viable alternatives and to compare the costs of different options is consistent with the BPU's inherent obligation, described above, to protect the public interest. Id. at 381.

Here, the BPU failed to consider non-transmission alternatives because neither PSE&G nor PJM have the ability or the financial interest to propose and study alternative methods. It should have been no surprise to the BPU that neither PSE&G nor PJM offered non-transmission alternatives to the Proposed Project, because, as the BPU and PSE&G state in their briefs, PSE&G and PJM do not have the authority to construct any of the possible alternatives pointed out by the Appellants. BPU Brief at 28; PSE&G Brief at 51. By failing to investigate PSE&G's and PJM's self-serving claims that non-transmission alternatives do not exist, the BPU abrogated its duty to consider alternative methods and their costs.

The BPU's argument that "for purposes of planning, it can only recognize those measures that have effectively cleared the PJM auction" misses the point. BPU Brief at 27. Generation, demand response, and efficiency measures

that have already cleared the PJM auction are measures that are currently in place. The BPU has a duty to determine if any new measures could serve as substitutes to the Proposed Project and study the costs of such alternatives as they compare to the costs of the Proposed Project before making a decision. Simply put, the BPU did not consider non-transmission alternatives and evaluate their costs. Rather, it merely noted that PSE&G and PJM do not have the authority to implement non-transmission alternatives and from that premise made the leap of logic that there are no alternatives to the Proposed Project. There is, however, ample evidence in the record to suggest that non-transmission alternatives are viable options, but were not reviewed in any depth by PSE&G, PJM, or the BPU. For example, Dr. Benjaman Sovacool testified that:

> Sadly, despite the clear economic benefits of energy efficiency to both PSEG and the public, PSEG and PJM have practically ignored the value of utilizing demand-side management to displace the need for the Project. By their own admission, PSEG has stated that 'voluntary curtailment of customer load … typically results in very small amounts of load reduction and is not a reliable means to resolve violations of reliability criteria,' and later that 'there is no documentation to assert that demand reduction will be implemented when called-upon.' That is a very disturbing statement, as mechanistic demand reduction is a 'flick of the switch' matter, and generalized demand reduction is New Jersey policy. Also, PJM admits that its professionals have 'not analyzed' the potential for

> smart/interval metering which is being used on distribution systems in other areas of the country for peak shaving, load shifting and peak demand reduction."

Aa616a-617a. Dr Sovacool went on to add that:

> PJM's reliability criteria tests, which discount the ability of planned generation to alleviate reliability concerns, coupled with its transmission planning process, which is biased toward identifying transmission solutions to reliability concerns, results in the overbuilding of transmission infrastructure in ways that cost New Jersey ratepayers and actually may reduce reliability.

Aa622a.

It is not surprising that PSE&G was quick to reject non-transmission alternatives – they have no financial incentive to support projects that will lead to the consumption of less electricity. Here, the BPU should have conducted its own analysis on the feasibility and costs associated with non-transmission alternatives, but the BPU failed to do so. They merely accepted PSE&G's claims that the expansion of the Susquehanna-Roseland power line is the only solution to the alleged reliability problems suggested by PJM. In sum, the BPU erred when it failed to investigate the viability of alternatives. Furthermore, the BPU erred when it failed to compare the costs of those alternatives to the project proposed by PSE&G.

CONCLUSION

For the foregoing reasons, the Appellants ask the Court to overturn the BPU decision.

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Request for Oral Argument

PLEASE TAKE NOTICE that in accordance with Rule 2:11-1, Appellants by their counsel, Kevin J. Pflug, hereby request oral argument in this case.

Kevin J. Pflug, Esq.

Dated: May 2, 2011

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Certification of Service

I, Karen Hughes, of full age, certify as follows:

1. I am a paralegal at Eastern Environmental Law Center, attorneys for the Appellants in the above-captioned matter.

2. On May 2, 2011, I caused two copies of the enclosed Appellants' Reply Brief, Request for Oral Argument and this Certificate of Service to be served via U.S. Mail on the persons listed below:

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I certify that the foregoing statements are true to the best of my knowledge. I am aware that if any of the foregoing statements are willfully false, I am subject to punishment.

Karen Hughes
Paralegal

Dated: May 2, 2011