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November 11, 2009

VIA EMAIL
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Re: I/M/O THE PETITION OF PUBLIC SERVICE ELECTRIC AND GAS COMPANY FOR A DETERMINATION PURSUANT TO THE PROVISIONS OF N.J.S.A. 40:55D-19 (SUSQUEHANNA-ROSELAND) BPU DOCKET NO. EM 09010035

MOTION OF INTERVENING MUNICIPALITIES TO DISMISS PETITION

Dear Ms. Izzo, Mr. Sheehan and Ms. Moskowitz:

On behalf of the Environmental Intervenors, Stop the Lines! and the Municipal Intervenors (the "Intervenors") we write to clarify an issue raised in the pre-hearing conference call regarding the Intervenors' Motion to Dismiss.

The Intervenors' Motion is not a Motion for Summary Judgment. It does not seek a judgment on the Petition; the relief requested is described succinctly by the Intervenors in the motion:

> [T]hat the Board dismiss the Petition, without prejudice, until such time as PSE&G can present a complete application, sufficient to substantiate this Project, or, perhaps, a revised project. Alternatively, if PSE&G is willing to

> voluntarily waive its right to invoke FERC "backstop authority" if this Petition is not acted on within a one-year time frame, the Board should hold it in abeyance until a current study, incorporating new peak load projections, the results of the RPM auction and the peak load reductions expected to occur through statutory and policy initiatives in Pennsylvania and New Jersey, is produced for consideration.

Intervenors' Brief at 1. In addition, and most importantly, the decision of the Seventh Circuit Court of Appeals in *Illinois Commerce Commission v. F.E.R.C*, 576 F.3d 470 (7th Cir. 2009) (Posner, J.), *rehearing and rehearing en banc denied* (Oct 20, 2009) renders the Petition incomplete and not ripe for hearing and decision at this time. This threshold issue must be considered and adjudicated before the hearings can commence.

1. The Petition Cannot Proceed At This Time Because It Is Based Upon A Cost Apportionment Scheme That Has Been Declared Null and Void.

The Intervenors have asked the Board to either dismiss the Petition, or alternatively, delay the hearing because the Petition is based on outdated and insufficient evidence, underpinned by a cost apportionment plan that has been held null and void by a federal Court of Appeals in *Illinois Commerce Commission v. F.E.R.C*, 576 F.3d 470 (7th Cir. 2009) (Posner, J.), *rehearing and rehearing en banc denied* (Oct 20, 2009). Interestingly, PJM, PSE&G, PSEG, and the BPU all intervened in *Illinois Commerce* in support of the cost apportionment scheme the Seventh Circuit discredited. Yet, at no time during these instant proceedings did the any of these entities advise the Intervenors of its participation in the case or reveal that the cost apportionment scheme it rallied behind was declared void. [1] Indeed, in introducing the pre-filed testimony of its witness Esam A.F. Khadr, PSE&G advised that Mr. Khadr will explain how costs will be allocated under that now defunct scheme. Mr. Khadr testified as follows:

> Under current FERC rules set forth in FERC Order No. 494, *PJM Interconnection, L.L.C.*, 119 FERC Para. 61,063 (2007), the costs of all regional transmission facilities at a voltage of 500 kV and above are regionalized to all PJM transmission customers on a load ratio share basis. Specifically, costs for these projects are allocated among the PJM transmission zones in proportion to their load ratio share at the time of each

[1] PSE&G has admitted that the rates and cost recovery mechanisms for the Project are within the exclusive jurisdiction of FERC, and are not a subject of the pending hearing before the Board. *See* PSE&G Response to Division of Rate Counsel Request RC-1, attached hereto as Exhibit A. However, the very tariff that PSE&G cites in the referenced discovery response as its basis for cost recovery is the tariff that was voided by the Seventh Circuit in *Illinois Commerce Commission* and remanded for further analysis. It cannot be more clear that the foundation on the which the Petition is built has crumbled.

> zone's annual peak of the previous year ending October 31st. Under this methodology, PSE&G's customers will pay approximately 7.5% of the costs of this Project, and all customers in New Jersey will pay approximately 14% of the costs of the Project.

Khadr Direct Pre-filed Testimony at 29.

In *Illinois Commerce Commission*, the Court remanded to FERC with the instruction that FERC undertake an honest, complete comparison of the costs and benefits of the project to all the affected utilities:

> If [FERC] cannot quantify the benefits to the midwestern utilities from new 500kV lines in the East, even though it does so for 345kV lines, but it has an articulable and plausible reason to believe that the benefits are at least roughly commensurate with those utilities' share of total electricity sales in PJM's region, then fine; . . . the Commission can approve PJM's proposed pricing scheme on that basis. For that matter it can presume that new transmission lines benefit the entire network by reducing the likelihood or severity of outages. **But it cannot use the presumption to avoid the duty of "comparing the costs assessed against a party to the burdens imposed or benefits drawn by that party."**

Id. at 477 (emphasis added) (internal citations omitted). The Court scoffed at FERC's contention that the costing scheme it approved was appropriate because it derived from FERC's experience with issues of reliability and network needs. FERC claimed that its knowledge of these issues should convince the Court to take the soundness of its cost apportionment scheme "on faith." Noting the lack of substantial evidence on the record in support of FERC's approval of the scheme, the Court declined the offer. *Id.* (citations omitted).

An updated and corrected cost apportionment plan will require another "retooling" by PJM, which means that PJM must make a significant effort to compile cost/benefit information and analysis, rework the tariff for this Project, and submit it to FERC for approval. Until this occurs, this Board and the parties cannot know who will pay how much for the Project, nor will the Board be able to determine whether the Project is necessary because at the very least, the evidence in the record is misleading. And, certainly the Board cannot rule on the Petition contingent upon PJM's retooling and FERC's approval of a new tariff at some later date.

Given the involvement of the Board and PSE&G in the *Illinois Commerce Commission* matter, and their knowledge that the decision rendered by the Seventh Circuit Court of Appeals dismantles the cost apportionment scheme for this Project, a grave injustice would be done to the parties and the ratepayers if this Board were to proceed with the Hearing as scheduled. Of course, the Intervenors can raise the issues of arbitrariness and capriciousness on appeal in the

event the Board hears and approves the Petition in its current form. The point, however, is to avoid the waste of resources and finances that will occur if the hearings go forward now. If there should be any question concerning the Board's complete objectivity regarding the Petition, the Board may refer the matter to an Administrative Law Judge for disposition.

2. The Intervenors Request Emergent Relief

Pursuant to N.J.A.C. 1:1-12.6 the Board may consider the Intervenors' motion a request for emergent relief. Such requests may be made in instances in "which irreparable harm will result without an expedited decision granting or prohibiting some action or relief connected with a contested case. .. . " *See* N.J.A.C. 1:1-12.6(a). The Intervenors' motion is akin to a stay, which this Board may order on an emergent basis to prevent irreparable harm and injustice.

The hearings and this entire process should be stayed pending the PJM "retooling" and FERC's approval of the new tariff for the Project. Anything less than a stay would cause irreparable harm to the parties and the rate payers. It would be a seriously inefficient use of resources for the Board and all the parties, experts, and witnesses to dedicate no less than six days and significant monetary resources to evidentiary hearings in a matter that is, bluntly speaking, not ripe for hearing. Moreover, as stated, *supra,* the Board cannot proceed with evidentiary hearings on a petition for which the must fundamental evidence is lacking. The folly of proceeding under such circumstances is only too apparent.

3. Even If The Motion Were A Motion for Summary Judgment, It May Nonetheless Be Heard on an Expedited Schedule.

Assuming, arguendo, that N.J.A.C. 1:1-12.5 applies, and the Board determines that the Intervenors' motion is one for summary judgment, the Intervenors point out that all discovery issues were not resolved within 30 days preceding the hearing date. In fact, PSE&G was the cause of the delay because it did not submit all requested discovery until October 28, 2009. This last production was made to resolve the Intervenors' motion to compel discovery. The Intervenors' instant motion was filed as soon as possible after the close of discovery. Accordingly, strict application of the filing requirement of N.J.A.C. 1:1-12.5 should not be used against the Intervenors to reject their motion outright. In addition, the Motion – and the Hearing – deal with important public concerns, and the interests of justice demand that the Board take a lenient approach to any time limitations that might otherwise be applicable.

The Intervenors respectfully submit that that the efficacy of the Petition, and all the issues, including the ripeness issue raised by the nullification of the Project's cost apportionment scheme, must be heard and decided prior to the commencement of the Hearing.

Very truly yours,

Eastern Environmental Law Center
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By: _____
Catherine E. Tamasik

cc: Governor John Corzine
Governor-elect Christopher J. Christie
Transition Team of Governor-elect Christopher J. Christie
Tamara L. Linde, Esq., V.P. Regulatory, PSEG Services Corporation (via email)
All Parties Designated on the Attached Service List (by e-mail or regular mail as necessary)

RESPONSE TO DIVISION OF RATE COUNSEL
REQUEST: RC-1
WITNESS(S):
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SUSQUEHANNA-ROSELAND

PUBLIC SERVICE ELECTRIC AND GAS COMPANY

RATES

QUESTION:
Reference the June 18, 2009 advertisement in the *Star-Ledger* entitled "The Highlands Challenge". In the copy, there is the statement: "So we established a formula that puts a fair price on land values, and attempts to assess the impact to eco-tourism in the region. We agreed to contribute that sum, just over $18 million, to the Highlands Council so it can preserve more open space at this critical moment." Please state whether PSE&G intends to recover this sum from ratepayers. If so, please explain how and where the Company expects to recover this sum.

ANSWER:
PSE&G objects to this question as outside the discovery timeframe established by the Board's Prehearing Order. In addition, PSE&G objects to this question as it is not within the scope of this proceeding. The scope of this proceeding does not include the review of the rates or recovery mechanisms for the Susquehanna Roseland transmission line. Such matters are within the exclusive jurisdiction of the Federal Energy Regulatory Commission (FERC) pursuant to the Federal Power Act. Without waiving the stated objections, PSE&G does intend to recover these Project related costs in its transmission rates.
See PJM Open Access Transmission Tariff at Attachment H-10 http://www.pjm.com/documents/agreements/~/media/documents/agreements/tariff.ashx. Transmission customers in the PSE&G transmission zone will be responsible for a share of these costs, in accordance with PJM's tariff which currently assigns cost responsibility for 500 kV and higher transmission projects approved in PJM's RTEP on a PJM wide basis. Based upon 2008 load ratio share, the PSE&G zone would be allocated 7.61% of these costs. See also the testimony of Esam A.F. Khadr at page 29 lines 12-20.

EXHIBIT A