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PSEG
Services Corporation

April 15, 2009

VIA ELECTRONIC, HAND-DELIVERY & REGULAR MAIL

Honorable Kristi Izzo, Secretary
New Jersey Board of Public Utilities
Two Gateway Center, 8th Floor
Newark, NJ 07102

Re: **IN THE MATTER OF 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. EM09010035

Dear Secretary Izzo:

In accordance with the Board of Public Utilities' ("Board") March 12, 2009 prehearing order in the above-referenced matter, please accept this reply on behalf of Public Service Electric and Gas Company ("PSE&G" or the "Company") in response to the motions of the following interveners requesting that PSE&G place funds in escrow for their use in this proceeding: (1) Fredon Board of Education; (2) Willow Lake Day Camp; (3) Township of Byram; (4) Township of Montville; (5) Township of East Hanover; (6) Township of Parsippany-Troy Hills; (7) Township of Fredon; (8) Township of Andover; (9) Stop the Lines; and (10) the Proposed Environmental Intervenors[1] (hereinafter the "Interveners"). PSE&G opposes these requests on the grounds that they

[1] The Proposed Environmental Intervenors consist of the following groups: Environment New Jersey, New Jersey Highlands Coalition, Sierra Club – New Jersey and New Jersey Environmental Federation.

are wholly without legal support, either in the form of an authorizing New Jersey statute or New Jersey regulations, and are contradicted by relevant New Jersey case law. In fact, PSE&G is not aware of a single instance where a utility applicant in a Board proceeding has been required to fund intervener expenses.

Both the language and intent of N.J.S.A. 40:55D, the Municipal Land Use Law, make clear that the applicant in a proceeding under this statute shall only be required to fund the expenses of the **decision-maker.** If Interveners' request were to be granted, the result would be to shift costs to the remainder of PSE&G's ratepayers, who already help to fund the operations and expenses of the Board – the decision-maker. The ratepayers would then be required to additionally fund the expenses of particular towns or organizations that have voluntarily elected to participate in this proceeding. Such a request is inequitable, would establish harmful precedent for all future Board proceedings and should be denied by the Board.

DISCUSSION

PSE&G must not be responsible for funding any of the consultants or firms that the Interveners wish to hire to support their participation in the process. Requiring a regulated utility to fund experts and professionals of voluntary interveners in an administrative proceeding is unprecedented in the State of New Jersey, without legal support and contrary to public policy concerns. Thus, the Board should deny Interveners' requests for PSE&G to establish an escrow fund to pay their professional fees.[2]

[2] It is not even clear how the escrow would be used or what amount of funding would be necessary. The Fredon Board of Education has asked for "in excess of $200,000" while the Township of Byram has requested $10,000 per municipality. Motion of Fredon Board of Education and Willow Lake Day School, Docket No. EM09010035, April 1, 2009, page 3; Township of Bryam Motion for Escrow Fees, Docket No., EM09010035, March 31, 2009, Proposed Order Imposing Escrow Fees Upon PSE&G. Furthermore, Interveners have not clearly identified how this escrow would be used or administered. For example, the

A. The Request By Interveners Is Contrary To Existing New Jersey Law

The Municipal Land Use Law does not allow for or permit monies to be escrowed for use by Interveners. The clear language of N.J.S.A. 40:55D-53.2[3] limits the establishment of escrow accounts for professional charges in a municipal land use hearing to those expenses related to the needs of the approving authority rather than the needs/objectives of third party interveners. N.J.S.A. 40:55D-53.2(e) states, in pertinent part:

> Review fees shall be charged only in connection with an application for development presently pending before the approving authority or upon review of compliance with conditions of approval, or review of requests for modification or amendment made by the applicant. A professional shall not review items which are subject to approval by any State governmental agency and not under municipal jurisdiction except to the extent consultation with a State agency is necessary due to the effect of State approvals in the subdivision or site plan.

Recently, the New Jersey Appellate Division specifically confirmed the limits on escrow fees imposed on applicants pursuant to this statutory language. In Cerebral Palsy Center v. Borough of Fair Lawn, 374 N.J. Super. 437, 446-448 (App. Div. 2005), cert. denied, 183 N.J. 586 (2005), a municipality attempted to require an applicant to pay for a public advocate to review and comment upon an application for development. Id. at 440. The Appellate Division found that, in reviewing N.J.S.A. 40:55D-53.2, "the statute by its term is clearly limited to professional fees for services 'rendered to the municipality or an approving authority.'" Id. Furthermore, the Court stated that "nothing within the statute's explicit language can be read to contain an express power to require an applicant

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Township of Byram has made a broad request to establish an escrow "for municipal professional services in connection with reviews, reports and testimony regarding this matter," merely referencing that it would have collected escrow fees if PSE&G had applied directly to the municipality. Id.

[3] This statute, which requires escrows for the approving authority, applies to the instant matter before the Board since the proposed utility infrastructure crosses through more than one municipality. N.J.S.A. 40:55D-19.

to pay for the services of a public advocate to review and comment upon an application." Id. The Court added that requiring any further escrows "runs counter to the legislative goals of N.J.S.A. 40:55D-53.2" and "can only serve to increase the cost of applying for land use approvals within the municipality while the purpose behind the statute was to limit and control these expenses." Id. at 448.

The Cerebral Palsy decision makes clear that (1) the Municipal Land Use Law makes no provision for an applicant's escrow account to pay for more than the professional services required by the approving authority; and (2) an applicant under any provision of the Municipal Land Use Law, including N.J.S.A. 40:55D-19, cannot be forced to bear intervener expenses. The factual situation in Cerebral Palsy is analogous to the situation here.

In the present case, since the municipalities and other interveners are **not** the approving authority in this proceeding, it is clear that Interveners are not legally entitled to an escrow fund for the professional service charges they may incur. Nevertheless, the Interveners are requesting that this Board require PSE&G, as the applicant, to pay to help them review and comment upon PSE&G's Petition pending before the Board. In Cerebral Palsy, the Appellate Division resolved this issue and specifically ruled that N.J.S.A. 40:55D-53.2 does not allow escrow burdens to be imposed on applicants for intervener expenses, even the expenses of a municipally sanctioned "public advocate" intervener. In this context, it is important to note that the "public advocate" in Cerebral Palsy was not voluntarily participating in the land use process, but was instead required to do so by municipal ordinance. Notwithstanding, the Appellate Division still properly found that the Municipal Land Use Law did not allow for imposition of the "public

advocate's" costs on the applicant. Here, the factual circumstances are even clearer, and the legal and policy arguments even stronger. Interveners have voluntarily decided to seek intervention status with respect to PSE&G's Petition to the Board. There is no basis in either law or fact for the establishment of a PSE&G-funded escrow to pay the costs associated with these voluntary decisions.

Certain interveners have argued that, since PSE&G would have had to create an escrow with a municipal land use board (i.e. a planning or zoning board of a municipality) pursuant to N.J.S.A. 40:55D-53.2, PSE&G should be required to provide a similar escrow for interveners in the Board's proceeding. This argument is misplaced for several reasons. First, PSE&G has a legal right pursuant to N.J.S.A. 40:55D-19 to file an application directly with the Board and cannot be penalized for exercising those rights. Second, the comparison between an escrow for the interveners and an escrow for a municipal land use board is inapposite. Municipal land use boards are the approving authority in the municipal land use process, whereas here that is not the case. The Board in this instance is the approving authority; Interveners are instead entities who are voluntarily seeking to participate in the evidentiary process. Some of the Interveners are not even municipal agencies; rather, they are outspoken opponents of the Project with no apparent or official connection to the municipalities. It is indisputable that interveners in Board proceedings have always paid their own expenses. The municipal process under the municipal land use law is no different. Members of the public who attend municipal land use hearings to oppose or support a particular application pay their own expenses.

In fact, the Interveners have not provided any legal support in the State of New Jersey to support their position. Although Stop the Lines cites statutes from Wisconsin

and Minnesota which expressly permit the state commission to permit escrow for interveners,[4] New Jersey law clearly limits escrows to use by the "approving authority" only. Moreover, the Appellate Division in Cerebral Palsy found that requiring any further escrows "runs counter to the legislative goals of N.J.S.A. 40:55D-53.2." Cerebral Palsy at 447. The court stated that "the fee-shifting technique adopted by Fair Lawn in this ordinance (and requested by the interveners in this process) can only serve to increase the cost of applying for land use approvals within the municipality while the purpose behind the statute was to limit and control these expenses." Id. at 448. Thus, the escrow request by Interveners is fundamentally at odds with the applicable New Jersey statute, which was drafted in such a way as to implement the policy of the State of New Jersey on this issue.[5]

Since New Jersey law expressly declines to permit compensation to an intervener in land use proceedings, this Board must deny the motion by the Interveners seeking to require PSE&G to establish an escrow account for that purpose. Failure to do so would be to re-write the law in New Jersey and to act in a manner contrary to established precedent.

B. The Request By Interveners Is Contrary To Well-Established Board Policy And Would Unjustly And Unreasonably Result In Inequitable Cost Shifting To PSE&G Ratepayers.

As explained, there is no legal support in New Jersey for establishing an escrow account for interveners. In addition, well-established Board policy runs counter to the establishment of such an account. One of the policies underlying the Board's governing

[4] Motion by Stop the Lines! For Escrow for Intervener Expert Expenses Docket No. EM09010035, April 1, 2009, page 2.

[5] Furthermore, many states do not have such an escrow requirement. Interveners appeared to have cherry-picked only those jurisdictions that require some sort of compensation to be paid to interveners; however, states such as Pennsylvania do not have any such requirement.

statute[6] is that the utility and its customers should not have to assume the expenditures associated with an individual party's pursuit of its interests. See e.g., Van Holten Group v. Elizabethtown Water Company, 121 N.J. 48, 61-62 (1990) (affirming Board's determination that a developer should pay the upfront costs associated with extending water utility service to a proposed development and not the utility or its ratepayers). It is for this reason that, although municipalities and other interested parties frequently intervene in complicated and contentious Board proceedings, these interveners pay their own way. See e.g. In the Matter of the Petition of Public Service Electric and Gas Company for an Approval for an Increase in Gas Rates, BPU Docket No. GRO5100845, OAL Docket No. PUC-1747-06 (In an "extremely contentious" Board proceeding, each of the interveners paid their own professional and consulting fees despite the fact that motions for interventions and participation were filed by several entities, including the Township of Hamilton; the hearings lasted seven (7) days and over 600 discovery requests were propounded by the interveners).

The Motions for Escrow filed by Fredon Township, Fredon Township School District, Willow Lake Day Camp and Stop the Lines indicate that the subject matter of this proceeding is beyond the expertise of the local officials or other interested parties.[7] That is exactly why N.J.S.A. 40:55D-19 permits a utility to directly seek State approval on this type of project. The Legislature understood that this type of project, which typically crosses municipal boundaries, is of State-wide interest with implications that

[6] N.J.S.A. 48:1.1 et seq.

[7] In its motion, Stop the Lines states that "none of the members of Stop the Lines are experts in transmission, we do not have training or education in many of the issues presented by PSE&G's proposal for this transmission line." Motion of Stop the Lines! for Escrow for Intervener Expert Expenses, Docket No. EM09010035, page 1. Similarly, in their Motion, the Fredon Board of Education and Willow Lake Day School state that "certainly the proposal is beyond the expertise of the Interveners, who are laypersons." Motion of Fredon Board of Education and Willow Lake Day School, Docket No. EM09010035, April 1, 2009, page 2.

reach beyond municipal boundaries. The Legislature presumably determined that the Board, with its expertise in utility infrastructure, would be the best agency to determine whether a project spanning multiple municipalities is "reasonably necessary for the service, convenience or welfare of the public." N.J.S.A. 40:55D-19. See also, Petition of Monmouth Consolidated Water Company, 47 N.J. 251, 258 (1966). Interveners have the right and the option of relying upon the Board to conduct a thorough and appropriate analysis in this matter, just as interested parties in a municipal land use hearing rely upon the municipal land use boards to conduct an appropriate analysis. If, however, Interveners believe that they can add value to the Board's analysis, they have the right to intervene, but must do so at their own cost and expense pursuant to State law.

Furthermore, one of the Board's statutory obligations is to ensure that "just and reasonable" rates are paid by the utility's ratepayers. N.J.S.A. 48:2-21. It is unreasonable for ratepayers to subsidize the interests of specific parties to a Board proceeding. PSE&G's ratepayers, through an annual assessment, pay their proportionate share of the costs for the Board of Public Utilities, as well as for the Division of Rate Counsel. This ensures that a State agency with the appropriate expertise is able to fully review utility matters, such as rate cases and N.J.S.A. 40:55D-19 petitions, to protect the interests of the utility ratepayers and the public. Thus, if PSE&G were required to set up escrows for Interveners in this proceeding, PSE&G's ratepayers would be paying for a comprehensive state agency review – conducted by the Board and by the Division of Rate Counsel[8] – and again for a review by Interveners' professionals. Stated another way, if PSE&G were to establish an escrow account for any or all of the interveners in this

[8] The Division of Rate Counsel is the statutory representative of ratepayers in New Jersey. See Executive Order 001-1994, N.J.S.A. 13D-1 (1994) and N.J.S.A. 52:27E-50 *et seq*.

proceeding,[9] its ratepayers as a whole would unjustly and unreasonably be paying for a review for which it is already paying two state agencies.

Establishing an escrow for the Interveners' use here would set harmful precedent in New Jersey for every Board proceeding going forward, particularly rate cases, which are often contentious and cost intensive. Requiring utilities to not only fund the professional services of the Board and the Division of Rate Counsel, but also the expenses of each and every party that voluntarily participates in the Board's administrative process, is both legally unsupportable and contrary to Board policy, and would significantly impact regulatory costs and, by extension, ratepayer expenses.[10] Accordingly, the Board must deny the Interveners' motions to establish an escrow account.

[9] It should be noted that only 6 of the affected 16 municipalities have actually sought intervener status (and requested the establishment of an escrow fund) in this proceeding. Thus, PSE&G ratepayers in the remainder of the municipalities, as well as the rest of PSE&G's ratepayers across the State, are being asked to fund the expenses of a handful of interveners representing their own interests.

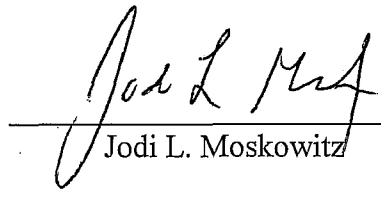
[10] Three of the Interveners (Fredon Board of Education, Willow Lake Day Camp and Stop the Lines!) have in fact requested the establishment of an escrow fund of "at least" $200,000. Motion by Fredon Board of Eduction and Willow Lake Day Camp, Docket No. EM09010035, April 1, 2009, page 1; Motion by Stop the Lines! For Escrow for Intervener Expert Expenses, Docket No. EM09010035, April 1, 2009, page 3.

CONCLUSION

For all the foregoing reasons, PSE&G respectfully requests that the Board deny the requests of (1) Fredon Board of Education, (2) Willow Lake Day Camp, (3) Township of Byram, (4) Township of Montville, (5) Township of East Hanover, (6) Township of Parsippany-Troy Hills, (7) Township of Fredon, (8) Township of Andover, (9) Stop the Lines and (10) Proposed Environmental Intervenors for an order requiring PSE&G to establish an escrow account to pay intervener expenses in this proceeding.

Respectfully submitted,

PUBLIC SERVICE ELECTRIC AND GAS COMPANY

By: 
Jodi L. Moskowitz

Dated: April 15, 2009
cc: Service List