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Ironbound Community Corporation,
Plaintiff

vs.

Passaic Valley Sewerage Commission,
Skanska/Railroad SPGF JV,
Defendants

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION, ESSEX COUNTY

Docket No. ESX-L-005271-25

CIVIL ACTION

BRIEF IN SUPPORT OF
MOTION FOR STAY

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PRELIMINARY STATEMENT

Plaintiff Ironbound Community Corporation (“ICC”) submits this brief in support of its Motion for Stay pursuant to Rule 4:69-3.

ICC’s action seeks to reverse the arbitrary decision of Defendant Passaic Valley Sewerage Commission (“PVSC”) to approve a contract awarded to Defendant Skanska/Railroad SPGF JV for construction of what would be the fourth gas-fired power plant to be built in the Ironbound neighborhood of Newark. PVSC’s vote to approve the contract marked the culmination of a years-long process to build an on-site gas plant for use in case PVSC were to lose power from the electrical grid during storms or other emergencies. During that process, Plaintiff ICC, community members, elected officials, and even the New Jersey Department of Environmental Protection (“DEP”) submitted multiple comments, letters, and testimony that raised various issues with PVSC’s proposal.

For example, these commenters questioned PVSC’s insistence that it needs on-site equipment that can provide 34 megawatts (“MW”) of emergency power for two full weeks, even though PVSC’s facility has never experienced a power grid failure close to that duration, nor has it ever operated at a continual 34 MW of electrical load for close to that duration. Commenters noted that PVSC’s overblown design requirement was PVSC’s sole justification for arbitrarily rejecting alternatives to the gas plant proposal that are cheaper, more reliable, and would not add to the pollution burden of what is already the most over-polluted community in the state. At no point did PVSC ever provide a reason to commenters, DEP, or others explaining why it determined that it would need an on-site power source that would provide constant 34MW for two weeks.

With this Motion, ICC seeks a stay on the contract for construction of the gas plant while this court considers the reasonableness of PVSC's decision to build the plant. If PVSC is allowed to build and potentially operate the gas plant while this case is pending, ICC's members and the Ironbound community at large would face significant health risks added to the pollution burden they already disproportionately bear. And if the court were to rule in ICC's favor once the gas plant is partly or completely built, a court remand to PVSC would have a substantially diminished effect since the scales will be tipped in favor of the already-constructed gas plant alternative. This stay is necessary to preserve the status quo ante of the subject matter of this litigation, it is in the public interest, and the Crowe v. De Gioia factors strongly favor granting ICC's motion. For these reasons, ICC asks that this court grant a preliminary stay on construction of the gas plant until this litigation has been resolved.

FACTUAL AND PROCEDURAL HISTORY

Plaintiff ICC serves the Ironbound neighborhood, which is home to approximately 50,000 primarily Black and Brown working-class residents and is flanked by one of the densest industrial corridors in the state. See Declaration of Hazel Applewhite ¶ 20 (July 11, 2025) (Ex. 1 to Complaint). These industrial facilities include the largest waste incinerator in the state, three gas-fired power plants, and the fifth-largest wastewater treatment plant in the country, which is operated by Defendant PVSC. Id. at ¶¶ 8, 15; Declaration of Cynthia Mellon ¶ 7 (July 11, 2025) (Ex. 2 to Complaint). Pollution from PVSC and other facilities emanates from this industrial corridor and adversely affects the health and wellbeing of Ironbound residents and residents of surrounding neighborhoods. See Letter of Concern from Health Professionals to Gov. Murphy & PVSC (Apr. 20, 2022) (Ex. 1 to Certification of Jonathan Smith (Aug. 20, 2025)) [hereinafter Health Professionals Letter]; see also Applewhite Decl. ¶¶ 8, 11-14; Mellon Decl. ¶¶ 6, 8.

PVSC's wastewater treatment plant is permitted to emit over 300 tons per year of health-harming pollution including carbon monoxide and smog-forming nitrogen oxides. DEP, Final Permit, Air Pollution Control Operating Permit Significant Modification for Passaic Valley Sewerage Commission, Permit Activity No. BOP210002, Program Interest No. 07349 at § A (Apr. 2, 2025) (Ex. 2 to Smith Cert.) [hereinafter Final Permit].

In 2012, flooding from Hurricane Sandy impacted PVSC and New Jersey's grid, causing PVSC to lose grid power for approximately two days. See PVSC, AO 2021-25 Compliance Statement at 6-7 (Mar. 30, 2022) (Ex. 3 to Smith Cert.) [hereinafter AO Compliance Statement]. In the years after Sandy, the electric utility that serves PVSC and much of Essex County, Public Service Electric and Gas Company ("PSE&G"), completed billions of dollars worth of grid hardening projects, such as raising substations – like the substations that serve PVSC – above the 500-year flood level to prevent future substation flooding and ensure reliability. See ICC, Comments on PVSC Standby Power Generation Facility AO-25 Compliance Statement at 15-16 (July 1, 2022) (Ex. 4 to Smith Cert.) [hereinafter ICC AO-25 Comments]; see also PSE&G, A Decade after Superstorm Sandy, New Jersey's Infrastructure is Considerably More Prepared for Hurricane Season (June 9, 2022), <https://nj.pseg.com/newsroom/newsrelease303> [<https://perma.cc/PT93-QULV>] (Ex. 5 to Smith Cert.) (detailing PSE&G's \$4.8 billion investment in infrastructure hardening and modernization). Consequently, PVSC did not experience grid service interruptions during Tropical Storm Ida's historic flooding in 2022, nor has it experienced any grid outage longer than 2 hours since PSE&G's completion of the grid hardening projects. Bill Powers, P.E., 2025 Update to 2022 Powers Engineering Letter Report,

“Clean Alternative Emergency Power Supply for PVSC” at 3, 5 (May 13, 2025) (Ex. 6 to Smith Cert.) [hereinafter Powers May 2025 Report].

PVSC, meanwhile, applied for federal funding soon after Hurricane Sandy for an on-site resiliency project to address potential impacts from future storms. See Fed. Emergency Mgmt. Agency (“FEMA”) Region II Mem. re PVSC, FEMA-4086-DR-NJ, Project Worksheet: 4701, UHBAJ37, Substations and Cables Change Request – Hazard Mitigation Cost Alignment, Log ID# 17039 (July 1, 2021) (Ex. 7 to Smith Cert.). The project included the installation of flood walls and flood water pumps, the reconfiguration of facility drainage systems, and installation of an on-site source of electrical power, which PVSC named the standby power generating facility (“SPGF”). Id. at 1-2; see also AO Compliance Statement at 12 (Smith Cert., Ex. 3). PVSC’s application proposed that the SPGF would consist of an on-site gas-fired power plant. AO Compliance Statement at 12, 14 (Smith Cert., Ex. 3).

At the time of PVSC’s decision to build a gas plant for emergency power, PVSC was operating under a state of emergency declared by an executive order of Governor Christie. Exec. Order No. 55 (Jan. 25, 2011), 43 N.J.R. 333(c) (Feb. 22, 2011). The executive order recognized that “the statutes and regulations governing the PVSC and its operations vest nearly all operational authority in its board of commissioners and do not expressly empower the Executive Director to take necessary actions to ensure the continued operation of the facilities of the PVSC,” but nevertheless allowed the PVSC Executive Director to assume the responsibilities of the PVSC Board of Commissioners after six of the seven commissioners were suspended and ultimately resigned. Ibid.; see also N.J.S.A. 58:14-2. Governor Christie’s stated reason for the suspension of the six commissioners was “the emergence of facts and allegations regarding unethical, self-serving conduct” such as “rampant nepotism and cronyism found at the PVSC.”

Press Release, Gov. Chris Christie, Governor Christie Marks New Era Of Reform At Passaic Valley Sewerage Commission (Nov. 9, 2015),

[https://dspace.njstatelib.org/server/api/core/bitstreams/40add600-9deb-4954-be02-](https://dspace.njstatelib.org/server/api/core/bitstreams/40add600-9deb-4954-be02-916179f53c54/content)

[916179f53c54/content \[https://perma.cc/3LT2-GR6T\]](https://perma.cc/3LT2-GR6T) (Ex. 8 to Smith Cert.). Two commissioners were ultimately convicted of official misconduct and theft. Ibid.

On July 10, 2019, PVSC entered into a contract with Siemens Energy, Inc., to purchase three methane gas-burning turbines with a collective power capacity of 84 MW for use in the SPGF. AO Compliance Statement at 15-16, 22 (Smith Cert., Ex. 3). PVSC contracted with Siemens Energy, Inc. to purchase these turbines at a cost of \$50 million and several months before applying to DEP for the permit required to operate the SPGF. Id. at 15.

PVSC first applied to DEP for a modification of its Clean Air Act permit that would allow for the operation of the SPGF on January 27, 2020, then subsequently revised and resubmitted modified applications on January 14, 2021, and again on July 2, 2021. Id. at 22-24. In the January 14, 2021, application, PVSC sought approval to operate the gas plant not only for emergency and maintenance purposes, but also to allow PVSC to financially benefit by using the 84 MW gas plant during periods unrelated to storm or emergency events: to both sell electricity to the broader power grid during periods of peak demand and to use the gas plant for demand response purposes. Id. at 23. In the subsequent July 2, 2021, application, PVSC backtracked on the peak demand operating scenario after discussions with DEP and community pushback, but retained the request to use the gas plant in non-emergency scenarios for demand response. Id. at 42.

On or about March 30, 2022, PVSC published its AO-25 Compliance Statement concerning the permit modification application for the proposed gas plant. See generally id. The

AO-25 Compliance Statement was issued in response to a December 15, 2021, letter from DEP notifying PVSC that DEP determined the application was subject to the requirements of Administrative Order No. 2021-25 (“AO-25”), which DEP issued to implement portions of the 2020 Environmental Justice Law, N.J.S.A. 13:1D-157 to -161 (“EJ Law”), during the pendency of the rulemaking process for the EJ Law’s implementing rules. DEP, Letter to PVSC re AO-25 Compliance Statement (Dec. 15, 2021) (Ex. 9 to Smith Cert.). In the AO-25 Compliance Statement, PVSC noted that its wastewater treatment plant had lost grid power during Hurricane Sandy for approximately two days, but then indicated that a design requirement for the SPGF was that it must provide 34 MW of electric power – the wastewater treatment plant’s expected maximum power load – for two weeks. AO Compliance Statement at 6-7, 14 (Smith Cert., Ex. 3). The AO-25 Compliance Statement explained that PVSC rejected non-polluting, renewable alternatives to the gas plant on the basis of these design criteria. Id. at 33-34. The AO-25 Compliance Statement provides no explanation as to why PVSC chose to require a full two weeks’ worth of the forecasted peak power demand as a mandatory criterion for the SPGF.

These design criteria are the same as those in PVSC’s February 2022 Request for Proposals for a Renewable Energy Power Generation System (“the RFP”), which sought proposals from engineering firms for systems to provide PVSC’s emergency power needs partly or entirely through renewable, non-polluting energy systems, instead of solely from the gas plant. See PVSC, Request For Proposals For a Renewable Energy Power Generation System at 5 (Feb. 2022) (Ex. 10 to Smith Cert.). The main requirement of the RFP was that the power system must be able to provide 34 MW of electricity for a minimum of two weeks. Ibid. As a result, most of the proposals that PVSC received through the RFP assumed that the gas plant would need to be constructed in order to meet PVSC’s stated need of 34 MW of continuous power for two weeks.

On July 1, 2022, ICC submitted written comments to PVSC on its AO-25 Compliance Statement, attaching an expert report by Bill Powers, a registered professional engineer with expertise in energy and environmental engineering, air emissions control, and regional energy planning. Bill Powers, P.E., Clean Alternative Emergency Power Supply for PVSC (July 1, 2022) (Ex. 11 to Smith Cert.) [hereinafter Powers July 2022 Report]. The 2022 expert report demonstrated that cheaper, more resilient, and less polluting alternatives like battery storage were the superior method to supply PVSC's emergency power needs, and that PVSC's rejection of these superior alternatives by setting a design requirement of 34 MW for two weeks was arbitrary and unnecessarily overestimated both the amount and duration of power that PVSC would need in the event of another emergency. Id. at 9-12; see also B.11. Secondary Power Source, FEMA, <https://perma.cc/8YAH-B849> (last updated Mar. 7, 2024, archived Oct. 28, 2024) (Ex. 12 to Smith Cert.) (listing solar and battery storage as eligible projects). PVSC's September 9, 2022, response to these and other public comments received during the AO-25 process recognized the comments of ICC and Bill Powers, but none of PVSC's responses recognized, let alone attempted to justify, PVSC's decision to require two weeks of maximum power as a minimum requirement. See, e.g., PVSC, Response to Public Comments on AO-25 Compliance Statement at 37-38 (Sept 9, 2022), <https://dep.nj.gov/wp-content/uploads/ej/pvsc-response-to-comments.pdf> (Ex. 13 to Smith Cert.) [hereinafter PVSC Response to Comments].

DEP also questioned PVSC's rigid design criteria. In a December 22, 2022, letter, DEP asked PVSC to "clarify the basis for PVSC's requirement for two (2) weeks of backup power capacity in its assessment of the feasibility of renewable energy alternatives. Similarly, clarify the basis for the need for thirty-four (34) megawatts (MWs) for maintenance of operations." DEP, Letter Response to PVSC's Response to Public Comments at 1 (Dec. 22, 2022) (Ex. 14 to

Smith Cert.) [hereinafter DEP Dec. 2022 Letter]. PVSC's January 11, 2023, response to DEP notes that "Sandy led to PVSC losing power for over 48 hours" but provides no justification for its requirement that the power source run for two weeks. See PVSC, Response to NJDEP Comments Dated December 22, 2022 at 7 (Jan. 11, 2023) (Ex. 15 to Smith Cert.) [hereinafter PVSC Jan. 2023 Letter]. In response to DEP's question regarding the 34 MW requirement, PVSC notes that "[t]he need for power is greatest during inclement weather, when sewerage flow through PVSC must be maintained to the maximum extent possible[.]" but PVSC does not explain why it would need to operate at maximum capacity for a full two weeks. Id. at 8.

In the years after the 2022 AO-25 Compliance Statement, elected representatives, faith leaders, ICC, and other community members submitted additional comments and letters that continued to question and oppose PVSC's choice to build an 84 MW gas plant despite its overblown capacity and the availability of cheaper, more resilient, and less polluting options. See, e.g., Health Professionals Letter (Smith Cert., Ex. 1); Letter of Opposition from Newark Mayor Ras Baraka et al. to Gov. Murphy (Feb. 23, 2023) (Ex. 16 to Smith Cert.); Letter of Sen. M. Teresa Ruiz et al. to PVSC (July 19, 2024) (Ex. 17 to Smith Cert.); Letter of Charlene Walker, Faith in N.J. et al. to PVSC (Sept. 18, 2024) (Ex. 18 to Smith Cert.); ICC, Comments on PVSC Significant Modification Title V Draft Permit (Oct. 29, 2024) (Ex. 19 to Smith Cert.) [hereinafter ICC Draft Permit Comments]. PVSC nevertheless continued to seek approval from DEP to construct and operate the gas plant. DEP ultimately finalized the permit modification on April 2, 2025, allowing PVSC to increase its emissions of harmful air pollution like nitrogen oxides, carbon monoxide, sulfur dioxide, volatile organic compounds, particulate matter, acrolein, ethylene dibromide, formaldehyde, ammonia, and other hazardous air pollutants. Final Permit at § A (Smith Cert., Ex. 2). These increases in pollution are all due exclusively to PVSC's decision

to construct and operate a gas-fired power plant instead of a non-polluting alternative like battery storage for its emergency power needs. See id. at Reason for Application (pdf. p. 13).

On or about April 17, 2025, PVSC published on its website an Update to SPGF Alternatives Analysis, in response to a request from the PVSC Board of Commissioners for an updated analysis of alternatives to the gas plant project. PVSC, Update to SPGF Alternatives Analysis (Apr. 17, 2025) (Ex. 20 to Smith Cert.) [hereinafter PVSC 2025 Alternatives Analysis]. While that document explained how PVSC calculated its 34 MW maximum power need during the peak of a storm, the document did not explain why PVSC assumed a two-week grid outage, nor did it explain why PVSC assumed it would operate at its maximum 34 MW load for the full two weeks. See id. at 2-3.

On May 13, 2025, and June 11, 2025, ICC submitted to PVSC updated and supplementary expert reports by Bill Powers, which further reinforced that solar and battery storage alternatives were superior, since they had become even more affordable relative to the construction of a gas plant since the 2022 report. Powers May 2025 Report (Smith Cert., Ex. 6); Bill Powers, P.E., Powers Engineering Supplemental Comments on the PVSC April 17, 2025 “Update to SPGF Alternatives Analysis” (June 11, 2025) (Ex. 21 to Smith Cert.) [hereinafter Powers June 2025 Report]. These reports reiterated that the proximate cause of the 2-day grid outage during Sandy – substation flooding – was since solved by PSE&G’s substation raising project. Powers May 2025 Report at 2-5 (Smith Cert., Ex. 6); Powers June 2025 Report at 2 (Smith Cert., Ex. 21). The June report also noted that, based on an analysis of newly received PVSC grid usage data, the longest duration grid outage to occur at PVSC in the last three decades outside of Sandy was the 11-hour outage during the 2003 Great Northeastern Blackout, the longest blackout in U.S. history. Powers June 2025 Report at 2 (Smith Cert., Ex. 21). These

2025 reports, in addition to the 2022 report, concluded that battery storage could easily meet the 11-hour power need more cheaply, resiliently, and cleanly than the gas plant. Powers May 2025 Report at 5-6 (Smith Cert., Ex. 6); Powers June 2025 Report at 1-2 (Smith Cert., Ex. 21); see also Powers July 2022 Report (Smith Cert., Ex. 11).

On June 12, 2025, PVSC held a public meeting which included an agenda item to vote to approve Contract B040 for the construction of the gas plant. PVSC, Public Meeting Agenda at Item A-4 (June 12, 2025), <https://www.nj.gov/pvsc/home/public/agenda/pdf/20250612.pdf> [<https://perma.cc/7XRJ-GR6Y>] (Ex. 22 to Smith Cert.). ICC, elected representatives, and concerned citizens across the state gave approximately five hours of public comments, the vast majority of which opposed the construction of the plant. Transcript of June 12, 2025, PVSC Public Meeting (June 12, 2025) (Ex. 23 to Smith Cert.). Those comments emphasized yet again the viability of renewable alternatives, the incorrect assumptions PVSC used to justify the gas plant, the grid hardening investments that made power loss at the plant very unlikely, and the environmental injustice that the plant would exacerbate. See, e.g., id. at 11-15, 32-35, 39-42, 49-52, 61-64, 99-101, 114-19. Commenters also questioned why PVSC chose to overbuild the gas plant to be 84 MW when its stated need was only 34 MW, why PVSC continued to insist on this overbuild when expert analysis revealed the actual need to be much lower than the stated 34 MW, why it was still claiming it needed two weeks of emergency power, and whether PVSC intended to seek future approval to use the gas plant to provide electricity to the grid, as PVSC's prior permit applications had requested. See, e.g., id. at 61-64, 114-23. Ultimately, PVSC disregarded the multiple expert reports, hours of testimony, and nearly five years of community advocacy against this gas plant, with all but two PVSC Commissioners voting to award Contract

B040 to Skanska/Railroad SPGF JV, at a cost of \$232.7 million, finalizing PVSC's decision to move forward with the gas plant. Id. at 202, 244-45.

With the Contract awarded, construction is expected to begin at any moment. A recent compliance filing submitted by PVSC and required by the DEP air permit suggests that preliminary submittals regarding construction of the gas plant “are expected to start being submitted on or before August 31, 2025.” PVSC, Letter to DEP re Semi-Annual Env't Justice Compliance Report at 3 (July 31, 2025), <https://web.pvsc.com/bnews/Semi-Annual%20Environmental%20Justice%20Compliance%20Report112025.pdf> [<https://perma.cc/DC67-63AT>] (Ex. 24 to Smith Cert.).

LEGAL ARGUMENT

A stay is necessary to protect ICC's interests and the interests of Ironbound and Newark residents who will be harmed by the construction and operation of the PVSC gas plant. Rule 4:69-3 provides that the plaintiff in an action in lieu of prerogative writs “may . . . apply for ad interim relief by way of stay, restraint or otherwise as the interest of justice requires, which relief may be granted by the court with or without terms.” R. 4:69-3. The test for granting a stay is the same as the test for granting a preliminary injunction set forth in Crowe v. De Gioia, 90 N.J. 126, 133 (1982). See Garden State Equal. v. Dow, 216 N.J. 314, 320 (2013) (“Applications for a stay pending appeal are governed by the familiar standard outlined in Crowe.”).

Under Crowe, a stay or injunction is appropriate where: “(1) relief is needed to prevent irreparable harm; (2) the applicant's claim rests on settled law and has a reasonable probability of succeeding on the merits; and (3) balancing the ‘relative hardships to the parties reveals that greater harm would occur if a stay is not granted than if it were.’” Garden State Equal., 216 N.J.

at 320 (quoting McNeil v. Legis. Apportionment Comm’n, 176 N.J. 484, 486 (2003) (LaVecchia, J., dissenting)).

In addition, “[w]hen a case presents an issue of ‘significant public importance,’ a court must consider the public interest in addition to the traditional Crowe factors.” Garden State Equal., 216 N.J. at 321. Courts “may, and frequently do, go much further” than the Crowe factors if their decision on preliminary relief would be “in furtherance of the public interest.” Waste Mgmt. of N.J., Inc. v. Union Cnty. Utils. Auth., 399 N.J. Super. 508, 520-21 (App. Div. 2008) (quoting Yakus v. United States, 321 U.S. 414 (1944)).

Further, when “acting only to preserve the status quo, the court may ‘place less emphasis on a particular Crowe factor if another greatly requires the issuance of the remedy.’” Garden State Equal., 216 N.J. at 320 (quoting Brown v. City of Paterson, 424 N.J. Super. 176, 183 (App. Div. 2012)). In such cases, the Crowe factors “are not to be looked upon as hard and fast” but instead as “but factors, among others, which must be weighed, one with another.” Waste Mgmt. of N.J., Inc., 399 N.J. Super. at 534 (quoting General Elec. Co. v. Gem Vacuum Stores, Inc., 36 N.J. Super. 234, 236–37 (App. Div. 1955)).

Here, ICC’s Motion for Stay seeks to protect the public interest by preventing PVSC from building the challenged gas plant and potentially exposing residents of the Ironbound to needless, additional pollution while the court reviews the reasonableness of PVSC’s decision. Further, it would preserve the status quo (by leaving the plant unbuilt during the pendency of this litigation) and so the court can grant the stay even if all the Crowe factors are not met. Nevertheless, all three Crowe factors are satisfied here: ICC is likely to succeed on its claims, which are based on settled legal rights, and any hardship to PVSC by a slight delay in the

construction of a gas plant that has been in the works for over a decade does not outweigh ICC's irreparable harm from a new pollution source in the most over-polluted community in the state.

1. The Public Interest Favors Granting ICC's Motion for Stay.

The public interest would be served by granting the instant Motion and ensuring that the New Jersey community most overburdened by pollution need not suffer from additional pollution from the construction of a fourth gas-fired power plant in their midst.

As noted above, courts "may, and frequently do" consider the public interest as the predominant factor in their decisions on preliminary injunctions. Waste Mgmt. of N.J., Inc., 399 N.J. Super. at 520-21. Even if ICC satisfied only two of the Crowe factors, that alone "does not necessarily preclude the granting of an interlocutory injunction," especially where, as here, the public interest "should play a significant role in the judge's determination." Id. at 521, 536. The evaluation of the public interest considers the magnitude of the impacts a stay would have and the population that would be affected. See generally Garden State Equal., 216 N.J. 314 (finding that public interest favored denying a statewide stay that would have prevented same-sex couples from entering into civil marriage); see also PENPAC, Inc. v. Morris Cnty. Mun. Utils. Auth., 299 N.J. Super. 288, 293 (App. Div. 1997) (granting stay on court order that would have paused county-wide contract for waste transfer station services "due to the public interest involved"). Here, the magnitude of the harm is clear and the impact on the already overburdened population of the Ironbound and Newark as a whole would be significant if the stay were denied.

The construction and operation of a gas plant in the Ironbound will harm public health. PVSC's gas plant will result in multiple tons per year of additional facility emissions of pollutants like particulate matter, smog-forming nitrogen oxides, sulfur dioxide, carbon monoxide, and hazardous air pollutants like acrolein, ethylene dibromide, formaldehyde, and

ammonia. Final Permit at Reason for Application (pdf p. 13) (Smith Cert., Ex. 2). These pollutants are known to cause and aggravate health conditions like asthma, chronic bronchitis, emphysema, and chronic obstructive pulmonary disease. ICC Draft Permit Comments at 3-4 (Smith Cert., Ex. 19).

And this pollution adds to the cumulative pollution burden that the surrounding community already faces. The two zip codes that make up the Ironbound already collectively have more polluting facilities covered by the New Jersey Environmental Justice Law than any other area in the state – a total of 44 facilities. Applewhite Decl. ¶ 11. And as of 2024, the Ironbound was in the 93rd percentile statewide for nitrogen dioxide and 87th percentile statewide for small particulate matter. U.S. Env't Prot. Agency, EJScreen Community Report for the Ironbound at 3 (EJScreen Environmental and Socioeconomic Indicators Data table) (retrieved Oct. 7, 2024) (Ex. 25 to Smith Cert.). And the pollution from the proposed gas plant would not only affect the 50,000 residents of the Ironbound, but will also waft into other areas of Newark and northern New Jersey.

Allowing PVSC to construct and operate a gas plant while this case proceeds would result in increased pollution into the most over-polluted community of the state before the court rules on whether the decision to build that gas plant was permissible in the first instance. And if this court were to agree with ICC on the merits and order PVSC to reconsider alternatives for its emergency power needs, PVSC's subsequent reconsideration of alternatives would be unfairly tilted towards operating the gas plant if that plant were already constructed by that time. On the other hand, were the court to grant the stay but ultimately rule in PVSC's favor on the merits, the stay would have resulted in only a comparatively short delay to the construction of a gas plant

that PVSC has been planning for over a decade. Clearly, the public interest favors staying construction.

2. All Three Crowe Factors Favor Issuing a Stay and Preserving the Status Quo.

a. Because ICC’s Motion Seeks to Preserve the Status Quo, the Crowe Factors Should Be Treated as Part of a Balancing Test that Also Weighs the Public Interest.

As noted above, courts may exercise significant judicial discretion in weighing the Crowe factors where a litigant’s motion would preserve the status quo. Waste Mgmt. of N.J., Inc., 399 N.J. Super. at 534. For example, “a claim with only ‘some’ factual merit or based on uncertain or novel legal principles may nevertheless support an interlocutory injunction, limited to preserving the status quo, so long as the harm confronting the movant is great and irreparable, and the hardship imposed on the opponent is not terribly significant[.]” Id. at 536; see also id. at 535 (“So long as there is some merit to the claim, a court may consider the extent to which the movant would be irreparably injured in the absence of pendente lite relief, and compare that potential harm to the relative hardship to be suffered by the opponent if an injunction preserving the status quo were to be entered.”). “[M]ere doubt as to the validity of the claim is not an adequate basis for refusing to maintain the status quo.” Crowe v. De Gioia, 90 N.J. 126, 133–34 (1982) (citing Naylor v. Harkins, 11 N.J. 435 (1953); Haines v. Burlington Cnty. Bridge Comm’n, 1 N.J. Super. 163, 175 (App. Div. 1949)).

Here, the stay that ICC requests would preserve the status quo that no gas plant is either under construction or completed at the PVSC site. Upon information and belief, PVSC has not yet begun construction of the gas plant and an order granting the instant Motion would keep it that way during the pendency of this litigation. If the stay is not granted, PVSC could construct and potentially even operate the gas plant before the lawfulness of PVSC’s decision is ever

decided. This is clearly a case where granting a stay would preserve the status quo, and thus the court's doubts about any one Crowe factor should not prevent the court from granting the requested stay.

b. All Three Crowe Factors Strongly Favor Issuing a Stay.

While, as explained above, the court need not find that all of the Crowe factors are met in order to grant the stay, here, all three Crowe factors do indeed favor granting a stay.

i. There Is a Settled Legal Right Underlying ICC's Claim and ICC Is Likely to Succeed on the Merits.

As part of the Crowe test, a plaintiff must demonstrate that its claim rests on a well-established legal basis and that there is a likelihood of success on the merits. Waste Mgmt. of N.J., Inc. v. Morris Cnty. Mun. Utils. Auth., 433 N.J. Super. 445, 452 (App. Div. 2013) (holding that the principle that a bidder should not be awarded a contract when their bid did not meet the material bid requirements was a well-established basis for a legal claim). New Jersey courts have repeatedly invalidated actions where an administrative agency has acted arbitrarily or capriciously. See, e.g., Delaware Riverkeeper Network v. N.J. Dep't of Env't Prot., 463 N.J. Super. 96, 112 (App. Div. 2020); In re Stallworth, 208 N.J. 182, 194 (2011). And New Jersey courts routinely grant motions for preliminary injunctions in actions in lieu of prerogative writs. See, e.g., News Printing Co. v. Borough of Totowa, 211 N.J. Super. 121, 129–30 (Law. Div. 1986); Clinton Twp. Citizen's Comm., Inc. v. Mayor & Council of Clinton Twp., 185 N.J. Super. 343 (Law. Div. 1982); Bailes v. Twp. of E. Brunswick, 380 N.J. Super. 336 (App. Div. 2005). ICC's claim falls squarely in these established bodies of law, arguing that PVSC has acted arbitrarily and capriciously in taking a final action and that this action cannot be allowed to stand. Thus, ICC clearly has a settled legal right underlying its claim.

Further, ICC's claim has a strong likelihood of success on the merits. When evaluating whether a final agency action is arbitrary or capricious, New Jersey courts ask "whether the decision conforms with relevant law, whether there is substantial credible evidence in the record as a whole to support the agency's decision, and whether in applying the relevant law to the facts, the agency clearly erred in reaching its conclusion." In re Request to Modify Prison Sentences, 242 N.J. 357, 390 (2020) (quoting In re State & Sch. Emps.' Health Benefits Cmm'ns' Implementation of I/M/O Yucht, 233 N.J. 267, 280 (2018)). Agencies must "articulate the standards and principles that govern their discretionary decisions in as much detail as possible." In re Vey, 124 N.J. 534, 544 (1991) (quoting Van Holten Grp. v. Elizabethtown Water Co., 121 N.J. 48, 67 (1990)). Relatedly, an action that is "plainly at odds with [an agency's] enabling statutory authority must be set aside." In re Agric., Aquacultural, & Horticultural Water Usage Certification Rules, 410 N.J. Super. 209, 223–24 (App. Div. 2009).

Here, PVSC acted arbitrarily and capriciously in deciding to move forward with the gas plant because its sole justification for selecting this gas plant and rejecting non-polluting alternatives – the design requirement that the facility must provide 34 megawatts of backup power for two weeks straight – was never explained and was based upon unreasonable assumptions. First, as ICC and other commenters repeatedly explained, in the last three decades, the power grid serving PVSC has never been down for any duration close to two full weeks. ICC AO-25 Comments at 15-17 (Smith Cert., Ex. 4); ICC Draft Permit Comments at 12-13 (Smith Cert., Ex. 19); Powers June 2025 Report at 2 (Smith Cert., Ex. 21). The longest outage in recent history was the 2-day grid outage during Hurricane Sandy, whose proximate cause – substation flooding – has been resolved now that PSE&G has raised power substations to be one foot higher than the highest flooding levels experienced during Sandy. Powers July 2022 Report at 1 (Smith

Cert., Ex. 11). Aside from Hurricane Sandy, the longest PVSC has lost grid power was the 11-hour outage during the Northeastern blackout of 2003, the longest blackout in U.S. history. Powers June 2025 Report at 2 (Smith Cert., Ex. 21). A more reasonable design requirement would thus be approximately 12 hours of backup power, just 4% of the duration of PVSC's two-week requirement.

Second, PVSC's electricity demand ranges from some 11 MW to its stated maximum load of 34 MW, ICC AO-25 Comments at 18 (Smith Cert., Ex. 4), and PVSC explained that during storms it must operate closer to 34 MW to handle all of the stormwater that flows into its facility. PVSC Response to Comments at 7 (Smith Cert., Ex. 13). But even if PVSC must operate at 34 MW at the height of a storm, when stormwater inflows are largest, no storm unremittingly rains down upon a single area for two weeks straight. So even assuming that PVSC is disconnected from the grid for two weeks – which, as explained above, is an arbitrary assumption – it was equally as arbitrary for PVSC to assume that it must operate at full capacity for the entirety of those two weeks. It is much more likely that during those two weeks, PVSC's electricity demand will fall back down closer to the 11 MW once it stops raining and its system is no longer overrun by stormwater.

Both DEP and commenters like ICC repeatedly questioned the reasonableness of PVSC's justification for the gas plant, but PVSC never explained why it needed a facility that would operate at 34 MW straight for two weeks. As part of the AO-25 process, DEP asked PVSC to “clarify the basis for PVSC's requirement for two (2) weeks of backup power capacity in its assessment of the feasibility of renewable energy alternatives [and] clarify the basis for the need for thirty-four (34) megawatts (MWs) for maintenance of operations.” DEP Dec. 2022 Letter at 1 (Smith Cert., Ex. 14). In responses, PVSC merely noted that during Sandy its facility lost grid

power “for over 48 hours” but did not explain why it therefore concluded that it needed two weeks of backup power. PVSC Jan. 2023 Letter at 7-8 (Smith Cert., Ex. 15). PVSC’s response also noted that, during Hurricane Ida – in which rain fell on the PVSC site for approximately 24 hours, PVSC 2025 Alternatives Analysis at 3 (Smith Cert., Ex. 20) – the facility’s peak power demand was 31 MW, but PVSC did not explain why it therefore concluded that it would need 34 MW for a full two weeks. PVSC Jan. 2023 Letter at 8 (Smith Cert., Ex. 15). Similarly, PVSC’s written responses to public comments recognized that ICC and others had questioned PVSC’s excessive two-week design requirement, but none of PVSC’s responses recognized, let alone attempted to justify, PVSC’s decision to require two weeks of power as a minimum requirement. PVSC Response to Comments at 2-4, 42-43 (Smith Cert., Ex. 13). While ICC and others continued to raise these issues in comments in the following years, PVSC never provided a justification of its design requirement in any subsequent public hearing or report. See, e.g., PVSC 2025 Alternatives Analysis (Smith Cert., Ex. 20).

Accordingly, ICC can readily clear the low bar of demonstrating a likelihood of success on the merits of its claim that PVSC has acted arbitrarily and capriciously in moving forward with the construction of a gas-fired power plant. See In re Request to Modify Prison Sentences, 242 N.J. 357, 390 (2020) (agency action is arbitrary where there is no “substantial credible evidence in the record as a whole to support the agency’s decision” and “the agency clearly erred in reaching its conclusion.”); see also Crowe, 90 N.J. at 133–34 (“[M]ere doubt as to the validity of the claim is not an adequate basis for refusing to maintain the status quo.”).

ii. Relief Is Necessary to Prevent Irreparable Harm.

Relief is necessary here to prevent the irreparable harm of PVSC building the gas plant, polluting the Ironbound and Newark during the pendency of this action, and tipping the scales in favor of the gas plant alternative after the conclusion of this case.

A harm is considered irreparable if it cannot adequately be redressed with money damages. Crowe, 90 N.J. at 132-33. The inadequacy of money damages can be determined by examining the nature of the injury, like the destruction of a building, the loss of a home, or award of a public contract for construction. Ajamian v. N. Bergen Twp., 103 N.J. Super. 61, 82 (Law. Div. 1968), aff'd, 107 N.J. Super. 175 (App. Div. 1969) (“In those cases where complete destruction of the building is ordered or absolute prohibition of future use is ordered there results irreparable harm against which equity would grant an injunction.”); Crowe, 90 N.J. at 132-33 (finding that plaintiff would suffer irreparable harm if she lost her home because money damages would not undo her eviction); Brahma Const. Corp. v. E. Brunswick Pub. Schs., A-2724-14T3, 2015 WL 1880089, at *4 (N.J. Super. Ct. App. Div. Apr. 27, 2015) (holding that, because damages are unavailable in public bidding cases even where a contract is erroneously awarded, plaintiff faced irreparable harm in its challenge to a school construction contract award).

Here, constructing and operating the gas plant would expose community members to multiple additional tons per year of pollutants like particulate matter, nitrogen oxides, and sulfur dioxide that can cause and aggravate chronic obstructive pulmonary disease, emphysema, chronic bronchitis, and asthma. Final Permit at Reason for Application (pdf p. 13) (Smith Cert., Ex. 2). Further, the gas plant would increase emissions of known hazardous air pollutants like acrolein, ammonia, ethylene dibromide, and formaldehyde. Ibid. And these emissions would be adding to the already disproportionate pollution burden that Ironbound and Newark residents

already face. Clearly, ICC cannot recover money damages for the health and environmental harms caused by pollution if PVSC were to construct and operate the gas plant during the pendency of this action. This fact alone satisfies this Crowe factor.

If PVSC is permitted to build and operate the plant, then it would pollute the air of the Ironbound during the pendency of this case and irreparably change the calculus that PVSC would use to evaluate the alternatives in the event that the court remands the decision back to PVSC. Even if ICC's rights are eventually vindicated by the court, it would be too late to correct for the harm done if the stay does not issue. PVSC's willingness to take substantial steps in completing its gas plant project prior to the conclusion of the legal processes involved, like buying the turbines years before obtaining proper permits, AO Compliance Statement at 15-16, 22 (Smith Cert., Ex. 3), underscores the need for ICC's request for a stay or other temporary relief on construction.

iii. The Balance of Relative Hardships Strongly Favors ICC.

New Jersey courts favor granting a stay when the stay spares the movant a hardship that is greater than any hardships on the enjoined party. See Crowe, 90 N.J. at 134 (holding that hardship of former romantic partner's potential eviction exceeded wealthy defendant's hardship in providing temporary financial support). This is especially true where the harm would be widespread or significant to the movant or public, relative to the potential inconvenience an enjoined party may suffer. St. John's Evangelical Lutheran Church v. City of Hoboken, 195 N.J. Super. 414, 420–21 (Law. Div. 1983) (holding that inconvenience to city from church's continued operation of homeless shelter did not outweigh hardship to shelter occupants who would be forced onto the streets in the middle of winter); Sheppard v. Twp. of Frankford, 261 N.J. Super. 5, 10-11 (App. Div. 1992) (finding that inconvenience to Township of remedying

flooding due to new stormwater runoff system did not outweigh hardship plaintiffs faced in managing consistent flooding of their property).

As noted above, ICC will suffer significant harm if its community members and Newark residents are exposed to needless pollution because of PVSC's arbitrary decision to build a gas plant on-site. Any potential harm to PVSC from a stay of the construction of that gas plant during this litigation is limited, and does not exceed the potential harm to ICC. Hurricane Sandy – the event that ostensibly caused PVSC to seek to build the on-site gas plant – occurred in 2012. PVSC waited 8 years after that event to submit its first application for an air permit for the gas plant, and waited 13 years to finalize a construction contract for that gas plant. Any slight delay in construction from a stay during the pendency of this litigation is minor compared to the 13 years that PVSC has waited so far to build its preferred gas plant. And any potential inconvenience to PVSC from this slight delay is minor compared to the severe health harms that may come from PVSC building the plant while its lawfulness is under consideration. The balance of the hardships thus strongly favors granting the stay.

CONCLUSION

For the reasons stated above, the court should grant the instant Motion for Stay and prohibit Defendants PVSC and Skanska/Railroad SPGF JV from beginning construction of the gas plant during the pendency of this litigation. The requested stay would preserve the status quo and protect the public interest, and the Crowe factors all strongly favor granting the stay.

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Respectfully submitted,



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