

Abigail Dillen*
Hannah Chang*
Earthjustice
156 William Street, Suite 800
New York, New York 10038
Phone: 212-791-1881

William Schulte
Eastern Environmental Law Center
744 Broad Street, Suite 1525
Newark, New Jersey 07102
Phone: 973-424-1166

*Attorneys for Environment New Jersey, The
New Jersey Highlands Coalition, Sierra
Club - New Jersey Chapter, Stop the Lines,
and New Jersey Environmental Federation*

*Motion for admission *pro hac vice* pending

November 1, 2011

Superior Court of New Jersey
Appellate Division
Administrative Office of the Courts
Appellate Division Clerk's Office
25 Market Street, Fifth Floor
Trenton, New Jersey 08611

Re: Appellants' Brief in Support of Motion to Remand to the Board of Public Utilities for Rehearing or for Supplementation of the Record 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), Docket No: A-004536-09T3

Your Honor:

Please accept this letter brief in support of the motion of Environment New Jersey, The New Jersey Highlands Coalition, Sierra Club - New Jersey Chapter, Stop the Lines, and New Jersey Environmental Federation (collectively, "Appellants") to remand the proceedings to the New Jersey Board of Public Utilities ("BPU" or "Board") for a rehearing pursuant to N.J.S.A. 48:2-47, or for supplementation of the record pursuant to R. 2:5-5(b).

New factual developments and changes in circumstance have emerged that are material to this appeal of the Board’s approval of the Susquehanna-Roseland transmission line. Information that was not available at the time of the Board’s Decision now throws into doubt the findings made in that Decision and raises questions about the need for the Project. Crucially, PJM Interconnection, LLC (“PJM”), which is responsible for operating the electric grid in New Jersey and thirteen other states, has revised its projections of future electricity demand significantly downward. In its most recent analyses of infrastructure needs to maintain electric reliability, PJM has further recognized that the vast majority of previously anticipated concerns animating the Board’s approval of the Susquehanna-Roseland line have been resolved. Meanwhile, on the ground, the developers of the line have deferred the line’s in-service date for three years, despite their previous representations to the Board that the line would be needed in 2012. In light of these new factual developments, we respectfully request that this Court remand this case to the Board so that the Board may rehear the matter or, in the alternative, take official notice on the record of new facts and make new, amended, or supplemental findings of fact.

TABLE OF CONTENTS

PROCEDURAL HISTORY3

STATEMENT OF FACTS4

A. Reductions in Peak Load Projections in the 2011 Load Forecast Report....4

B. Diminished Need in the 2010 RTEP.....6

C. Three-Year Delay of the In-Service Date7

D. Increased Demand Response Resources8

ARGUMENT9

A. Facts Have Emerged That Were Not Known at the Time of the Board’s Decision and Are Material to Issues on Appeal.....10

1.	Reductions in Peak Load Forecasts Have Reshaped the Regional Transmission System	11
2.	The 2010 RTEP Identified Only Five Reliability Concerns Justifying a Need for the Susquehanna-Roseland Line	13
3.	Construction of the Project Will Not Begin Before 2013, and the Entire Line Will Not Be in Service Before 2015	14
4.	Demand Response Resources Are Skyrocketing	16
B.	A Remand to the Board for a Rehearing Would Be Equitable, Just, and in the Public Interest	17
C.	A Remand from this Court Would Resolve a Jurisdictional Question and Permit the Board’s Consideration of These New and Material Facts.....	18
	CONCLUSION.....	19

PROCEDURAL HISTORY

Public Service Electric & Gas (“PSE&G”) filed a petition with the Board on January 12, 2009, requesting a determination that construction and operation of the high voltage (500 kV) Susquehanna-Roseland line across 45 miles in New Jersey is reasonably necessary for the service, convenience, or welfare of the public. The Board approved the Susquehanna-Roseland line on February 11, 2010, and issued its written Decision and Order on April 21, 2010. *See* N.J. Bd. of Pub. Utils., Decision and Order, Docket No. EM09010035 (April 21, 2010) (“Decision”) (attached hereto as Exhibit B). In the Decision, the Board found that “reliability violations are . . . projected to occur as early as 2012 and that the Project is reasonably necessary for [sic] address those violations.” Ex. B, Decision at 53. However, the Board also recognized that changed circumstances could result in a new decision. The Board explicitly ordered “that PSE&G notify the Board of the results of the next RTEP and, should there be a substantial delay or change in projected reliability violations, the Board shall take appropriate action.” *Id.*

Appellants, who had intervened in the matter before the Board, timely filed two Notices of Appeal on June 4, 2010, that were subsequently consolidated by this Court. On February 3, 2011, in light of changed circumstances and new factual developments, Appellants filed a motion to reopen the proceeding before the Board. *See* Motion to Reopen Proceedings by Environment New Jersey, the New Jersey Highlands Coalition, Sierra Club – New Jersey, Stop the Lines, and New Jersey Environmental Federation (Feb. 3, 2011) (attached hereto as Exhibit C). PSE&G responded to the motion on February 11, 2011, taking the position that “the Board does not at his [sic] time have jurisdiction even to entertain the Motion to Reopen.” Letter from Marc B. Lasky, Counsel for PSE&G, to Kristi Izzo, Secretary, Bd. of Pub. Utils. 2 (Feb. 11, 2011) (attached hereto as Exhibit D). The Board has not acted on the Motion to Reopen or otherwise resolved the outstanding jurisdictional question.

**STATEMENT OF FACTS
(INCLUDING FACTS NOT CONSIDERED BELOW)**

Changed circumstances since the Board’s Decision raise serious questions about the factual premise underlying the Board’s February 2010 approval of the Susquehanna-Roseland line and the need for this major transmission project.

A. Reductions in Peak Load Projections in the 2011 Load Forecast Report

Since the Board’s Decision, PJM has recognized a significantly diminishing need for the delivery of electricity into the area that the Susquehanna-Roseland line is intended to serve. On January 14, 2011, PJM released the 2011 Load Forecast Report, in which it presented markedly lower electric demand forecasts than had previously been used as the bases for transmission planning. *See 2011 PJM Load Forecast Report*, PJM Res. Adequacy Planning Dep’t, 1 (Jan. 2011) (“2011 Load Forecast Report”), <http://pjm.com/~media/documents/reports/2011-pjm-load-report.ashx> (attached hereto as Exhibit E) (“A downward revision to the economic outlook

for the PJM area has resulted in lower peak and energy forecasts in this year's report, compared to the same year in last year's report.”). The impacts of these lower peak and energy forecasts have been noteworthy and are only “beginning to unfold in the 2011 [Regional Transmission Expansion Plan (“RTEP”)] cycle of analyses.” *PJM 2010 Regional Transmission Expansion Plan*, PJM, 12 (Feb. 28, 2011) (“2010 RTEP”), <http://www.pjm.com/documents/reports/~//media/documents/reports/2010-rtep/2010-rtep-report.ashx> (attached hereto as Exhibit F).

So far, updated analyses based on the 2011 peak load forecasts have resulted in PJM's decision to suspend two major transmission lines, both of which PJM approved in 2007, along with the Susquehanna-Roseland line, to address reliability violations as early as 2012. The Potomac-Appalachian Transmission Highline (“PATH”), a project designed to increase transfer capacity between western and eastern PJM as the Susquehanna-Roseland is intended to do, originally was identified in PJM's 2007 RTEP with a required in-service date of 2012. *See PJM 2009 Regional Transmission Expansion Plan*, PJM, 6 (2010) (“2009 RTEP”), <http://pjm.com/documents/reports/rtep-report/~//media/documents/reports/2009-rtep/2009-rtep-report.ashx> (attached hereto as Exhibit G). The 2008 RTEP delayed the in-service date to 2013, and the 2009 RTEP again deferred the project until 2014. *Id.* at 6-7. Assessments based on the 2011 peak load forecasts now have compelled PJM to suspend the PATH project indefinitely. *See* Press Release, PJM, PJM Board Directs Delay in PATH Transmission Line (Feb. 28, 2011), <http://pjm.com/~//media/about-pjm/newsroom/2011-releases/20110228-RTEP-announcement.ashx> (attached hereto as Exhibit H); Ex. F, 2010 RTEP at 12 (“Based on [the 2011 Load Forecast] and initial power flow assessments of the earliest need for PATH, the PJM Board announced on February 28, 2011 its decision to suspend the PATH project . . .”).

The Mid-Atlantic Power Pathway (“MAPP”), another west-to-east transmission project approved by PJM in 2007, originally was deemed necessary by 2013 to address reliability violations. *See* Ex. G, 2009 RTEP at 7, 83. The 2009 RTEP deferred the project until 2014. *Id.* at 83. Now, in light of the 2011 load forecasts, PJM “has decided to hold the MAPP project in abeyance” with a 2019 to 2021 in-service date. *See* Letter from Michael J. Kormos, Senior Vice Pres., PJM, to David M. Velazquez, Exec. Vice President, Pepco Holdings, Inc. (Aug. 18, 2011), <http://www.pjm.com/~media/documents/reports/mapp-letter-to-phi.ashx> (attached hereto as Exhibit I). In short, in the span of the last six months, the lower projections in the 2011 Load Forecast Report have led PJM to push back in-service dates by at least five years and to suspend construction of two other major west-to-east transmission projects that have been part of the RTEP process since 2007.¹

B. Diminished Need in the 2010 RTEP

The consistently diminishing need for the PATH and MAPP lines with each passing year – a trend that ultimately resulted in the suspension of those projects in light of the 2011 load forecast – is paralleled in the case of the Susquehanna-Roseland line. PJM first found the Susquehanna-Roseland line necessary in 2007 to address reliability issues beginning in 2012. Ex. B, Decision at 51. As the Board noted in its Decision, the 2008 RTEP projected 2 Category A, 21 Category B, and 27 Category C contingences that the line was ostensibly intended to address. *See id.* Later, in its March 2009 Retool analysis, which the Board also considered in

¹ In October 2011, PJM determined that yet another previously-approved transmission line was no longer needed to maintain the reliability of the transmission system. Atlantic City Electric announced its plans to cancel the Minotola-to-Lincoln 138 kV transmission line in southern New Jersey after PJM’s determination. *See* Press Release, Atlantic City Electric, Atlantic City Electric Cancels Plans for Vineland-Area Line (Oct. 6, 2011), <http://www.atlanticcityelectric.com/welcome/news/releases/archives/2011/article.aspx?cid=1874>

the Decision below, PJM projected only thirteen Category B and ten Category C contingencies. *See id.* At that time, the Board predicted that “[d]espite the changing nature of [these] violations,” it was “highly unlikely that the 2009 RTEP or 2010 RTEP will show a reduction in reliability violations or a significant delayed projected date for the reliability violations” *Id.* at 52-53.

In fact, the 2010 RTEP released on February 28, 2011, showed a dramatic reduction in reliability violations – from the 23 identified in the March 2009 Retool to only 5 Category C contingencies, all on 230 kV lines. Ex. F, 2010 RTEP at 217. Category C contingencies, also known as “double circuit tower line contingencies” reflect a test of the electric system that is highly unlikely to play out in reality. *See* Ex. B, Decision at 49-50. In short, the Board approved the Project on grounds that it would be needed to address 23 reliability issues and that future projections would not reduce the number of these reliability issues. As present circumstances stand, however, this \$750 million transmission line will be constructed to address five reliability concerns that are alleged to occur under double contingency scenarios and only on lower-voltage transmission lines, which are likely amenable to lower cost fixes.

C. Three-Year Delay of the In-Service Date

The reality of PSE&G’s current construction schedule belies PSE&G’s representations to the Board about the Susquehanna-Roseland line’s necessary in-service date and underscores the importance of determining when, if ever, the line actually will be necessary. The Board’s approval of the Project was premised on a finding that it was needed by 2012 to retain reliability of the regional transmission grid. *See* Ex. B, Decision at 51-53, 75. Since the Board’s approval of the line, however, PSE&G has delayed the line’s in-service date in order to obtain required approvals from state and federal agencies, and under the current construction schedule, the entire

line will not be in service before 2015. *See Susquehanna-Roseland*, PJM, <http://www.pjm.com/planning/rtep-upgrades-status/backbone-status/susquehanna-roseland.aspx> (last visited Oct. 27, 2011) (attached hereto as Exhibit J).

At the same time, PJM has acknowledged that any reliability issues will be adequately addressed without the line until at least 2015. In the 2010 RTEP, PJM concluded that “extending the Reliability Must Run (RMR) status for Hudson Unit #1 into 2012” and “implementing demand resources” could stand in the stead of the Susquehanna-Roseland line in the 2012–2015 time frame. *See* Ex. F, 2010 RTEP at 8-9. Even more recently, at a Transmission Expansion Advisory Committee meeting on August 4, 2012, PJM reported its conclusion based on updated analysis that “sufficient [demand response] exists to control the loadings on the constrained facilities for 2012 through 2014 even without Hudson 1.” *Transmission Expansion Advisory Committee*, PJM, 36 (Aug. 4, 2011), <http://www.pjm.com/~media/committees-groups/committees/teac/20110804/20110804-reliability-analysis-update.ashx> (attached hereto as Exhibit K). As a result, PJM is permitting retirement of the Hudson Unit # 1. *See id.* Thus, PSE&G’s representations regarding an imminent need for the line by 2012 have proven incorrect. As PJM has concluded, demand response resources *alone* are sufficient to address the need for the Susquehanna-Roseland line for at least the next three years.

D. Increased Demand Response Resources

Increased availability of demand response resources is another key factor that the Board did not consider in approving the Susquehanna-Roseland line. The 2011 Load Forecast Report has now projected significant increases in demand response resources, noting that “[a]ssumptions for future Load Management (LM) have increased significantly from the 2010 Load Report (from approximately 6,800 MW to 9,000 MW).” Ex. E, 2011 Load Forecast Report at 2. The

results of the latest Reliability Pricing Model (“RPM”) auction, which were not incorporated into the 2010 RTEP, confirm this increase in demand resources. The 2014/2015 RPM Base Residual Auction, which opened on May 2, 2011, procured 14,118 MW of demand response, a 52 percent increase over the amount of demand resources cleared in the previous year’s auction. See Press Release, PJM, Demand Resources and Energy Efficiency Continue to Grow in PJM’s RPM Auction (May 13, 2011), <http://pjm.com/~media/about-pjm/newsroom/2011-releases/20110513-rpm-results-news-release.ashx> (attached hereto as Exhibit L). This new information reflecting the significant demand resources available to the regional transmission grid further calls into question whether the costly construction of the Susquehanna-Roseland line is reasonably necessary.

ARGUMENT

In New Jersey, administrative hearings “may be opened for good and sufficient cause ‘to serve the ends of essential justice and the policy of the law.’” *In re Gastman*, 147 N.J. Super. 101, 114 (N.J. Super. Ct. App. Div. 1977) (quoting *Handlon v. Town of Belleville*, 4 N.J. 99, 107 (1950)). “If, with respect to any order brought under review it shall appear equitable and just that a rehearing should be had before the board,” this Court has the authority to “order that a rehearing be had before the board upon such terms and conditions as are reasonable.” N.J.S.A. 48:2-47. “The board shall thereupon proceed to a rehearing on the evidence upon which the order under review was based, and upon such additional evidence, if any, as may be produced.” *Id.*; see also *Central R.R. Co. v. Dep’t of Pub. Utils.*, 7 N.J. 247, 265-66 (1951) (directing a rehearing by the Board of Public Utility Commissioners); *Hudson & Manhattan R.R. Co. v. Bd. of Pub. Util. Comm’rs*, 16 N.J. Super. 396, 402 (1951) (same).

Additionally, “[a]t any time during the pendency of an appeal from a state administrative agency,” this Court has the authority to order “that the record on appeal be supplemented by the taking of additional evidence and the making of findings of fact thereon by the agency below” whenever “it appears that evidence unadduced in the proceedings below may be material to the issues on appeal.” R. 2:5-5(b). Where, as here, the information that is presented for inclusion in the record was not available at the time of the Board’s decision and may well have affected the result reached by the Board, supplementation is appropriate. *See* Sylvia B. Pressler & Peter G. Verniero, *Rules Governing the Courts of the State of New Jersey*, comment 2 to R. 2:5-5 at 604 (Gann 2011 ed.) (citing *In re Gastman*, 147 N.J. Super. 101, 114 (N.J. Super. Ct. App. Div. 1977), and *Ocean Medical Imaging v. N.Y. Dept. of Health and Senior Servs.*, 396 N.J. Super. 477, 480 (N.J. Super. Ct. App. Div. 2007)).

When the Appellants sought to bring new information to the Board’s attention in their February 3, 2011 motion to reopen the proceedings, *see* Ex. C, PSE&G claimed that the Board had been “deprive[d]” of jurisdiction to act “unless directed to do so by the Appellate Division.” Ex. D at 2. We now request that this Court provide clarity on the question of jurisdiction by remanding the matter to the Board. The significance of the changed circumstances bearing upon the Board’s determination of need for this multi-million dollar Project makes it equitable, just, and in the public interest that a rehearing be had before the Board. *See* N.J.S.A. 48:2-47. Even if this Court does not order a rehearing, the facts described above were not known at the time of the Board’s consideration of the Susquehanna-Roseland line and are material to the issues in the present appeal, warranting a remand for supplementation of the record. *See* R. 2:5-5(b).

A. Facts Have Emerged That Were Not Known at the Time of the Board’s Decision and Are Material to Issues on Appeal

A series of new and significant changes in circumstance have dramatically reshaped the factual basis underlying the Board's Decision. The 2011 Load Forecast Report's lower load projections altered a central premise of PJM's regional transmission planning in early 2011, and as a result, PJM has already suspended two other major west-to-east transmission line projects. *See infra* Section A.1. Meanwhile, the 2010 RTEP, which the Board explicitly retained discretion to address upon release, concludes that the vast majority of alleged reliability issues cited to justify the need for the Project have disappeared. *See infra* Section A.2. Although PSE&G had persuaded the Board that the line was critically needed by 2012 to maintain reliability, PJM has since found that demand resources alone preclude need for the line until 2015 at least. *See infra* Section A.3. What is more, current trends point to increasing availability of demand resources in the future. *See infra* Section A.4. Construction of the line will not commence for at least another two years, and the entire transmission line will not be in service before 2015. *See infra* Section A.3. This leaves ample time for a prudent reconsideration of the Susquehanna-Roseland line.

As set forth in Section B below, the unique confluence of these new facts and changed circumstances call for a rehearing by the Board. *See* N.J.S.A. 48:2-47. Each of these new circumstances, described further in the sub-sections below, were not known at the time of the Board's Decision and are material to the issues before this Court in the instant appeal. If this Court does not order a rehearing, we urge that it at least remand the proceeding to the Board for supplementation of the record. *See* R. 2:5-5(b).

1. Reductions in Peak Load Forecasts Have Reshaped the Regional Transmission System

As evidenced by PJM's recent suspensions of the PATH and MAPP projects, the 2011 peak load forecasts are a game-changer. Peak load forecasts are a major driver in determining

transmission needs and assessing the potential for and timing of reliability criteria violations. *See* Ex. B, Decision at 39. It was reduction in peak load forecasts that contributed to the significant decrease in the number and nature of reliability issues as between the 2008 RTEP and the March 2009 Retool. *See id.* at 51-53.

In its Decision, the Board rejected incorporation of updated load forecasts, concluding that “the modeling of the Project with an updated load forecast projection . . . would not change the results of the analysis,” because PJM already “accounted for the effects of the economic recession that began in 2008 in their 2009 Load Forecast Report.” *Id.* at 54. However, it has now become clear that the recession has had a sustained impact since 2010. The 2011 Load Forecast Report explicitly notes that “[a] downward revision to the economic outlook for the PJM area has resulted in lower peak and energy forecasts in this year’s report, compared to the same year in last year’s report.” Ex. E at 1. These lower projections have led PJM to suspend two multi-million dollar west-to-east transmission projects that had been part of the regional transmission planning process since 2007, and the implications of these projections for the Susquehanna-Roseland line remain to be seen.²

The lower load forecasts and their significant effects on regional transmission were not known to the Board at the time of the Decision. Given the Board’s assumption – incorrect in retrospect – that future load forecasts would not have a meaningful impact on PJM’s analysis, this information is material to issues raised on appeal and should be considered by the Board.

² Indeed, there is indication that consumer demand is declining, regardless of the state of the economy. *See* Kristen Wright, *As Consumers Cut Spending, Utilities Go Back to Drawing Board*, Electric Light & Power, <http://www.elp.com/index/display/article-display/9901926159/articles/electric-light-power/volume-89/issue-5/features/as-consumers-cut-spending-utilities-go-back-to-drawing-board.html> (“Electric Power Research Institute data shows that residential power demand grew about 2.5 percent annually from 1980 to 2000. During the following 10 years, it grew 2 percent a year. EPRI expects residential demand to decline about 0.5 percent annually until 2020.”).

2. The 2010 RTEP Identified Only Five Reliability Concerns Justifying a Need for the Susquehanna-Roseland Line

In its Decision, the Board indicated a desire to be kept apprised of changing assessments of reliability concerns and stated a willingness to reopen the matter if projections indicated a change in the number of reliability issues. *See* Ex. B, Decision at 53, 79. The 2010 RTEP in fact shows dramatic reductions in projected reliability concerns. This information was not known to the Board when it approved the Project; it is material to issues on appeal; and it should be considered by the Board.

Over the course of four years, the justification for the Susquehanna-Roseland line has diminished from addressing 50 projected reliability issues to 5 projected reliability issues. The 2008 RTEP, which PSE&G relied upon in its petition to the BPU for a need determination, identified 50 issues, including 2 Category A, 21 Category B, and 27 Category C contingencies. At the time of the Board's Decision, the most recent analysis from PJM, the March 2009 Retool, projected 23 reliability concerns, including 13 Category B and 10 Category C contingencies. The number and nature of these issues were such that the Board found it "difficult to conjure up [the] combination of reduced load or increased supply [that] could reasonably be estimated to avoid an overload." Ex. B, Decision at 55. Nevertheless, the Board acknowledged the concern raised by Appellants, then Intervenors, about the Project's continuously diminishing need assessment:

[T]he Board understands the intervenors' concerns. Therefore, the Board **HEREBY ORDERS** that PSE&G notify the Board of the results of the next RTEP and, should there be a substantial delay or change in projected reliability violations, the Board shall take appropriate action.

Id. at 53; *see also id.* at 79 (“[The Board orders that] PSE&G report to the Board the findings of PJM’s next completed RTEP. If that RTEP deems that this Project may no longer appear to be necessary, or can be delayed significantly, the Board’s authority to reopen this matter remains.”).

The next completed RTEP – the 2010 RTEP – in fact identifies “fewer and less severe reliability criteria violations” in northern New Jersey, the area to be served by the Susquehanna-Roseland line. Ex. F, 2010 RTEP at 171. Specifically, the 2010 RTEP downgrades the projected reliability concerns for the Susquehanna-Roseland line – from the 23 issues relied upon by the Board to 5 Category C contingencies on 250 kV lines. Decreasing demand in conjunction with increasing availability of demand response resources, have conspired to allow PJM to do what was unimaginable to the Board at the time of the Decision – that is, “conjure up [a] combination of reduced load or increased supply” to avoid unsustainable overloads in the system by 2012. Ex. B, Decision at 55. Indeed, PJM’s most recent conclusion is that demand resources alone will be sufficient to replace the Susquehanna-Roseland line until 2015 at least. *See* Ex. K at 36.

Category C contingencies, moreover, occur only under double contingency circumstances and are the least likely of the three categories of contingencies to occur under real-world conditions. *See* Ex. B, Decision at 49-50 (explaining Category A, Category B, and Category C contingencies). The fact that PJM now projects the occurrence of only five double-contingency overloads on lower-voltage transmission lines raises serious questions about whether a \$750 million 500 kV transmission line is reasonably necessary to address these violations.

3. Construction of the Project Will Not Begin Before 2013, and the Entire Line Will Not Be in Service Before 2015

The Board explicitly premised its Decision on a finding that the Project was necessary by 2012.

PSE&G has proven . . . that through each RTEP there continues to be reliability violations identified as early as 2012. . . . PJM has now performed three transmission planning analyses and each of them identified violations as early as 2012. The results of these violations and the associated potential system overloads could have significant negative impact on the public welfare of the citizens of this State in the form of significant damage to infrastructure, brownouts, or blackouts. Therefore, the Board HEREBY FINDS that, despite the changing nature of the violations, there has been competent evidence that reliability violations are still projected to occur as early as 2012 and that the Project is reasonably necessary for [sic] address those violations.

Id. at 53. In deciding to approve the Project, the Board emphasized its concerns about the immediacy of projected reliability issues in the 2012 to 2015 timeframe, noting that the March 2009 Retool projected Category B violations “on two bulk power lines by 2012 with an additional three lines exceeding NERC Category B criteria over the following three years (2013-2015)” as well as Category C violations “on five bulk power lines by 2012 with an additional four lines in violation of [sic] over the next three years (2013-2015).” *Id.* at 51; *see also id.* at 53 (“[T]he most updated analysis, the March 2009 Retool, shows two Category B and five Category C projected violations in 2012 with the Project not in service.”).

These allegedly imminent reliability issues gave rise to a sense of urgency that animated the Board’s decision to approve the line before cost determinations and agency reviews were completed. *See id.* at 73 (“The Board is cognizant that, with a Project of this scope with an estimated two year construction period, and potential reliability violations occurring in 2012, that it would not be prudent for the Board to wait to make a decision until every detail of Project routing and construction were finalized by [PSE&G] and the other regulatory agencies.”); *id.* at 75 (“With PJM’s assertion that reliability violations are set to begin in New Jersey in 2012, and PSE&G’s lengthy construction schedule, the Board must make a decision in this matter without an absolutely [sic] certainty with respect to cost allocation to New Jersey ratepayers.”); *id.* (“[T]he Board is faced with a decision that is time-sensitive, considering the construction

schedule and Petitioner's and PJM's assertion that the Project must be in service by 2012 to forestall reliability violations.").

Contrary to the Board's findings, however, the Project does not need to be in service in 2012, or even in 2013 or 2014. PJM has determined that alternative solutions – originally, the operation of Hudson Unit #1 together with implementation of demand response resources, and more recently, the implementation of demand resources alone – will sustain the reliability of the transmission system until at least 2014 in the absence of the line. These changed circumstances upend many of the findings underlying the Board's approval. In light of the Board's concern about the immediacy of reliability violations when approving the Project, the Board should have an opportunity to consider this material new information.

4. Demand Response Resources Are Skyrocketing

Recent developments demonstrating the increased availability of demand response resources were not known to the Board and are material to issues on appeal. The most recent RPM auctions procured a 52 percent increase over the amount of demand resources cleared in the previous year's auction. This increase follows a trend identified by PJM of increasing demand resources. *See Ex. F, 2010 RTEP at 12* ("Reliability Pricing Model (RPM) auction results have yielded an increase in Load Management (LM) from approximately 6,800 MW as accounted-for in the 2010 forecast to 9,000 MW as accounted-for in the 2011 forecast.").

In the Decision, the Board dismissed the argument of Appellants, then Intervenors, that the results of the May 2009 RPM Auction should be considered in assessing need for the Project, noting that "[a]t most, any delay [as a result of demand response capacity] of the Category B violations projected to occur in 2012 would only be one or two years. However, the Category C violations are also projected to occur in 2012 and . . . these violations cannot be resolved with

demand response.” Ex. B, Decision at 56. In fact, increased demand resources have helped to eliminate *all* Category B contingencies, as indicated in the 2010 RTEP. Even more recently, PJM has determined that demand resources alone will suffice to tide the transmission system over without the Project in service, until at least 2015. The Board’s mistaken finding that demand response capacity would have little or no meaningful impact on projected reliability violations suggests that the Board should have an opportunity to consider new evidence in a rehearing, including PJM’s announced conclusions regarding the increasing significance of demand resources.

B. A Remand to the Board for a Rehearing Would Be Equitable, Just, and in the Public Interest

It is now apparent that the Project is no longer needed on the originally anticipated timeline. It is also possible, based on recent developments, that the Project is no longer needed at all. In 2010, the Board, concluding that the Project was needed by 2012 and perceiving an urgent situation in light of the Project’s two-year construction schedule, approved the Project in haste, before cost determinations and agency reviews were completed. Now that construction of the line has been delayed until 2013 and the entire line will not be in service before 2015, it is equitable, just, and in the public interest for the Board to rehear PSE&G’s petition in light of significant changes in circumstance.

This Court’s remand to the Board will not prejudice PSE&G or jeopardize the public interest in maintaining electric reliability given that construction of the line will not begin before 2013 at the earliest. On the contrary, the Board’s failure to consider these new facts could result in the construction of a project that would saddle ratepayers with substantial, unwarranted costs. The Board approved the Susquehanna-Roseland line with the understanding that it provided the most “robust” solution to “resolve all of the projected reliability criteria violations” that were

projected at the time of the Decision. Ex. B, Decision at 57; *see also id.* at 64 (“PSE&G and PJM have shown that the Project is a reasonable solution to resolve all of the projected NERC transmission planning criteria violations and submitted testimony that smaller ‘band-aid’ solutions will not provide a robust enough solution.”); *id.* at 77 (“[I]n light of the reliability issues identified in this proceeding, there is no reasonable, practical, and permanent alternative to the construction and operation of the Project that would have any less adverse impact . . .”). But now, nearly all of the reliability concerns that the line was intended to address have disappeared.

Whether more cost-effective and efficient alternatives could be implemented to address the remaining reliability concerns is a question of pressing importance that the Board should have an opportunity to decide in the first instance. What might have been a “robust solution” under previous circumstances now may be overkill. The Board is in the best position to determine whether other solutions – perhaps construction of new generation in load pockets³ or the addition of strategically placed capacitors or the rebuild of an existing line – could provide a well-tailored, cost-effective solution to address the remaining reliability issues.

C. A Remand from this Court Would Resolve a Jurisdictional Question and Permit the Board’s Consideration of These New and Material Facts

The Board has the authority to order a rehearing and to revoke or modify any order it has issued “at any time.” N.J.S.A. 48:2-40(e); *see also* N.J. Admin. Code §§ 14:1-8.5(a); 14:1-8.6(b); *Burlington Cty. Evergreen Park Mental Hosp.*, 56 N.J. at 600 (“[A]dministrative agencies have the inherent power to reopen or to modify and to rehear orders that have been entered.”). Indeed, the Board made clear in the Decision that it “retain[ed] the authority to reopen this

³ Earlier this year, New Jersey enacted a law to encourage construction of natural gas-powered generation in the state. *See* 2011 N.J. Sess. Law. Serv. Ch. 9 (West).

proceeding” if “the next RTEP or retool shows that the Project is not necessary or can be delayed significantly.” Ex. B, Decision at 58; *see also id.* at 79 (“If that RTEP deems that this Project may no longer appear to be necessary, or can be delayed significantly, the Board’s authority to reopen this matter remains.”). However, it appears that the Board is uncertain of its jurisdiction to reinstate proceedings in light of this pending appeal. According to news reports, “[t]he board’s public relations director Greg Reinert raised the possibility that since the board’s order was before the Appellate Division, jurisdiction may be in the court’s hands and not the board’s.” Bruce A. Scruton, *Power Line Foes to State: Rethink Approval*, N.J. Herald, Feb. 5, 2011, <http://www.njherald.com/story/news/04POWERLINE->. A remand of the proceedings to the Board for a rehearing or, in the alternative, for supplementation of the record would resolve the question of jurisdiction.

As set forth above, the new and material facts that have developed since the Decision, and even since the Appellants’ motion to reopen, raise questions about the premise underlying the Board’s approval of the Project and are material to issues raised on appeal. Even more significantly, these new facts and changed circumstances raise questions about whether the Project is needed at all. Equity, justice, and the public interest weigh strongly in favor of affording a full opportunity to vet these questions.

CONCLUSION

For all the foregoing reasons, we request that this Court remand the above-captioned proceeding to the BPU pursuant to N.J.S.A. § 48:2-47 for rehearing, or pursuant to R. 2:5-5 so that the record may be supplemented by the taking of additional evidence and further findings of fact.

Respectfully submitted,

Abigail Dillen*
Hannah Chang*
Earthjustice
156 William Street, Suite 800
New York, NY 10038
Phone: 212-791-1881
Fax: 212-918-1556
adillen@earthjustice.org

William Schulte
Eastern Environmental Law Center
744 Broad Street, Suite 1525
Newark, NJ 07102
Phone: 973-424-1166
Fax: 973-710-4653

Attorneys for Environment New Jersey, The New Jersey Highlands Coalition, Sierra Club - New Jersey Chapter, Stop the Lines, and New Jersey Environmental Federation

*Motion for admission *pro hac vice* pending