



STOP THE LINES!

Opposition to PSE&G Susquehanna Roseland Powerline Project

PO Box 398, Tranquility NJ 07879

www.stophelines.com

April 21, 2009

Kristi Izzo
Office of the Secretary
Board of Public Utilities
Two Gateway Center
Newark, NJ 07102

RE: Stop the Lines – Response to PSE&G Objections
PSE&G Susquehanna-Roseland Transmission Project
BPU Docket No: EM09010035

Dear Secretary Izzo:

Enclosed please find the Original and ten copies of Stop The Lines Response to PSE&G Objections to Intervention and Escrow Account.

If you require anything further, please let me know.

Sincerely,

David Slaperud
for
Stop the Lines

cc: Service List

**STATE OF NEW JERSEY
BOARD OF PUBLIC UTILITIES**

IN THE MATTER OF THE PETITION OF)	
PUBLIC SERVICE ELECTRIC AND GAS)	BPU DOCKET NO.
EM09010035)	
COMPANY FOR A DETERMINATION)	
PURSUANT TO THE PROVISIONS OF)	
N.J.S.A. 40:55D-19)	
)	
SUSQUEHANNA-ROSELAND PROJECT)	

STOP THE LINES CERTIFICATION OF SERVICE

I, David Slaperud, of full age, certify as follows:

1. I am a Trustee of Stop The Lines, proposed Intervenors in the above-captioned proceeding.
2. On April 21, 2009, on behalf of Stop The Lines, I caused the original and ten copies of the Reply to PSE&G's Opposition to the Motion for Intervention to be filed with the Secretary of the Board of Public Utilities via U.S. Mail, email, and for a copy to be served by first class U.S. mail on the parties included on the attached service list.

April 21, 2009

David Slaperud
for
Stop The Lines

**STATE OF NEW JERSEY
BOARD OF PUBLIC UTILITIES**

IN THE MATTER OF THE PETITION OF)	
PUBLIC SERVICE ELECTRIC AND GAS)	BPU DOCKET NO. EM09010035
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STOP THE LINES RESPONSE TO PSE&G OBJECTION TO INTERVENTION

I. INTRODUCTION

PSE&G has objected to three of fourteen motions to intervene, sorting out the public interest and advocacy groups for its objections. Stop the Lines recognizes that a narrow breadth of intervenor representation and interest does not serve the public interest, and ask that the Board of Public Utilities reject the objections and grant the motion for intervention of Stop the Lines and grant it full party status will full rights, responsibilities and opportunities of participation in this proceeding.

II. STOP THE LINES MEMBERS WILL SUFFER DIRECT IMPACT

Stop the Lines is a community organization that has banded together to raise issues that they would not have the ability to adequately present otherwise as solitary individuals. PSE&G argues that parties must be individually directly affected, but as PSE&G correctly notes:

Parties seeking to intervene in a Board matter must establish that they ‘will be substantially, specifically and directly affected by the outcome of a contested case.’”

N.J.A.C. 1:1-16.1(a). Nothing in the Code suggests that the organization seeking intervention be specifically directly affected. Members of Stop The Lines are individually affected as landowners and community members with an interest.

Individuals that own homes along the proposed route would absolutely be specifically and directly affected by the outcome of this matter. Many Stop The Lines members are property owners with

easements along the route, holding outdated easements that were never re-negotiated with previous upgrades that need to be re-negotiated whether this project is ultimately approved or not. STL members also question the “need” of this line, have concerns of health impact related to EMF’s, property values, safety concerns with tower height, etc. Stop The Lines members are also concerned citizens with various issues regarding the proposed upgrade such as aesthetics of towers more than twice as tall as those present now, towering over our historic and rural areas. As humans living with transmission lines, Stop The Lines members have health concerns with current and potential levels of EMF. They are also concerned with higher taxes in the community resulting from decreased property values and revenue along the route, necessitating across the board increases. Stop the Lines members would suffer a direct physical impact if the lines would be approved because they would be living next to the lines, would suffer impacts of EMF. STL members would also suffer restricted use and enjoyment of our property, a fundamental right.

Individual landowners typically cannot afford to intervene individually, most do not understand how to go about intervening, how to conduct Discovery, or know how to find and utilize experts -- thus the reason for the creation of Stop The Lines and for people to become members of Stop The Lines. By working together, we can raise our spectrum of concerns in a helpful manner to build a record for the Board of Public Utilities.

III. INTERVENORS NEED NOT BE CUSTOMERS OF PSE&G

PSE&G argues that “Stop the Lines” is not a customer of PSE&G and therefore should not be allowed to intervene. Yes, Stop The Lines itself is not a customer of PSE&G, but that is not a hurdle intervenors must jump – not only is there no requirement that any intervenor be a customer of a particular utility, but ratepayer impact is not measured through PSE&G rate impact alone. PSE&G argues that the presence of the New Jersey Division of Rate Counsel to “represent the interests of all PSE&G’s ratepayers” yet, as above, Stop The Lines members are not PSE&G ratepayers. If Board Staff’s “obligation was sufficient to ensure safe, adequate and proper utility service, as well as to develop a full and fair record from which the Board may render an informed decision,” there would be no need for interventions. The Statute and BPU Code provides for public participation.

The impacts of this line, and rate recovery for this line, is not the burden of only PSE&G customers, therefore this argument is misleading. Rate impacts for this project are widely spread, geographically diverse, and conversely to PSE&G's argument, all but a small percentage of the rate impacts for this line are spread across an area other than that of PSE&G, with very little of rate impact falling to PSE&G.

IV. STOP THE LINES INTERESTS ARE SPECIFIC AND NOT DUPLICATIVE

Stop The Lines will add meaningfully to this matter, by utilizing the expertise of an experienced Utility Regulatory Attorney and regulatory experts to the extent Stop The Lines can afford. We have begun to submit Discovery to get the information and are eagerly awaiting answers on our first request for Discovery filed on April 9, 2009 regarding testimony on the alleged "need" for this project. In its first Discovery request, Stop The Lines goes directly to whether "the proposed installation is reasonably necessary for the service, convenience or welfare of the public," and goes far in investigation of whether this project is a private or public purpose. N.J.S.A. 40:55D-19. Other potential intervenors have yet to explore these areas. All the municipalities are unlikely to move in this direction, instead focusing on issues raised in their intervention motions.

Arguments that a particular group should not be allowed to intervene because another group has concerns about the same subject is not credible. Each group raises specific concerns, some of which overlap in subject matter, but that does not mean that the approach or viewpoint is the same, and more likely, they are dissimilar. To the extent that Intervenor do share concerns and perspective, it would be prudent for Intervenor to work with each other to assure that there is little or no overlap when addressing the same issues. For instance, on issues that are indeed duplicated, Stop the Lines will likely work with that Intervenor to build the record, building on the work of the experts that the other plans to use.

Conversely, the subject matter of town specific issues raised by the towns are going to be similar from town to town, but for each town, each has its own intricacies and subtleties based on its own specific area. However, towns are representing only that town, and not representing those outside their jurisdictions or individuals with interests who live within the towns borders. As has happened in other

matters before the BPU, the towns and PSE&G could come to an agreement regarding certain or all issues, those party to the agreement would no longer be participating, and if all others with that subject matter at issue were rejected as intervenors, there would be no other intervenor addressing that issue, leaving a hole in the record and landowner interests not represented. See, e.g. In re: Atlantic City Electric Company 2006 WL 3783851 (N.J. Super.A.D.) Feb. 10, 2006 (attached). Where intervening towns reached an agreement, and town landowner was not a separate intervenor, that landowner lost the opportunity to participate, by not participating, he was not entitled to notice, his position and issues of concern were not in the record, and he had no basis for complaint. All parties with an interest must intervene and raise their concerns. See Id., p. 5, 14-15; see also In re Application of Jersey Cent. Power & Light Co., 130 N.J. Super,394, 400 (App Div. 1974).

If there is ultimately duplication in issues and perspective, limiting duplication in the hearing is a rather simple logistical matter which BPU can adequately handle.

V. INTERESTS RAISED

PSE&G admits that the BPU interprets the Code to require development of a “full and complete record and to ensure the consideration of a diversity of interests,” parties must be allowed to intervene and present these issues and inform the record. See PSE&G Opposition, p. 2, April 15, 2008; see also I/M/O Joint Petition of Public Service Electric and Gas Company and Exelon, BPU Docket No. EM05020106, Order dated May 23, 2006. Many issues are raised by STL and the other potential intervenors, and looking at those issues raised, many issues of concern for Stop the Lines have not been raised by other parties and may not be addressed by other potential Intervenor. Other issues will be addressed from varying perspectives. In its Motion, Stop The Lines has indeed substantiated “an interest that is sufficiently different from that of any other party as to add measurably and constructively to the scope of the case.” See PSE&G Opposition, p. 4. The chart below¹, listing declared interests of the parties, demonstrates that the interests of the parties are “measurably different,” that many (colored green) are unique to Stop the Lines, and that Stop The Lines’ direct interests are not unreasonably duplicative:

¹ This chart was produced after a quick review and may not correctly represent or be all inclusive of issues of parties.

Issues raised	S T L	F Pal	E I	T M	T F	T P T	T A	T B	T E H	M B E	F S D	W L D C	G A	E C
Policy aspects of transmission – NJEMP etc.	X		X											
Public interest issues	X		X											
Merit of investment in recession - spending	X													
Merit of investment in recession – sharply decreased demand	X													
Impact of S-R decision on energy policy	X		X											
Conservation – reduction of demand	X		X											
Efficiency – reduction of demand and peak shifting	X		X											
Inefficiency of transmission – line loss	X													
Electrical market	X													
Forecasting methods	X		X											
Forecasting accuracy	X		X											
Location of sinks	X													
Alternatives to S-R – System Alternatives: local & distributed generation; DSM, conservation awareness, local solar, housing code, RES, SmartGrid	X													
Alternatives to S-R – Route Alternatives	X													
Financing – costs, capital, stimulus funding	X													
Easement use and acquisition	X													
Safety of towers	X	X			X	X	X	X	X	X	X	X		
Safety of lines – EMF impacts, configuration of lines to minimize impact, noise,	X	X				X	X	X	X	X	X	X		
Economic impacts – property values	X					X			X			X		

Cost/Benefit	X													
Environmental impact		X		X	X	X		X						
Env. – wildlife impact			X											
Env – rivers/Streams			X											
Env – Co2 emissions			X											
Project inconsistency with NJ EMP			X											
Env – historical/cultural impact			X											
Aesthetics	X				X	X		X	X	X		X		
Interest in alternates (burying lines)	X													
Utilize road/highway Rights of Way	X													
Easements – old easements must be renegotiated	X													
Interest in re-routing around schools/ neighborhoods					X				X	X	X			
Switching station in East Hanover									X					
Quality of life						X								
Troy Meadows enviro sensitive area						X								
School children & teacher’s safety		X								X	X			
Loss of business												X		
Parsippany specific issues						X								
Montville specific issues				X										
Fredon specific issues					X									
Byram specific issues								X						
E Hanover specific issues									X					
Andover specific issues							X							
Highlands specific concerns			X					X						

Were treatment of issues is similar and in danger of duplication, Stop the Lines can, as noted above, work with others in those areas where perspectives are similar. Stop the Lines should be granted intervention and-party status to help fully inform the record.

VI. CONFLATION OF RAISING ISSUES WITH UTILIZING EXPERTS

PSE&G conflates Stop The Line's admitted need for experts, and funding for experts, with raising the issues as a concern for the purpose of demonstrating its need for party status. It's true that Stop The Lines does not have experience in transmission. Like any organization faced with a transmission line, we need to hire attorney and experts to inform the record, build our case and defend us and protect us from this project. In a contested-case hearing, only expert testimony will suffice. It is, of course, in PSE&G's interests to do what it can to prevent the Intervenors from having funding for experts, but that limitation is not in the public interest, nor in the Board's interest, where having a fully informed and comprehensive record is necessary to support any decision. PSE&G is confusing the issue at hand.

VII. CONCLUSION

It is clear from the issues chart that Stop The Lines has specific issues in its workplan, needing experts to help build the information base in the contested-case, and to the extent that witnesses are not available, to utilize discovery, cross-examination and exhibits, and briefing, all the due process afforded to parties, to make its case. We believe that the Board may be burdened by this proposed project, and we look forward to assisting in assuring that as many material facts as possible surrounding this proposal are brought out and put into the record in this case, so that the Board can make an informed and equitable decision.

Respectfully submitted:

STOP THE LINES

By _____
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IN THE MATTER OF THE PETITION OF)	
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STOP THE LINES RESPONSE TO PSE&G OBJECTION TO ESCROW REQUEST

Escrow funds were established as a matter of equity, with recognition that those directly affected by infrastructure proposals can easily identify issues of importance, areas of impact, but that they do not have expertise to address the issues raised in a legally recognized manner – to be credible in a legal proceeding, expert testimony is required. This project is the first large transmission project in New Jersey in a very long time, and procedurally, logistically, and financially, intervenors are in need of assistance to meaningfully participate in this process.

The \$200,000 that Stop the Lines requests, is a very small percentage of the budget for this project, and is small when compared to the tens of millions, or more, of ratepayer dollars that PSE&G has already spent moving this project to this stage of development. PSE&G argues that it “must not be responsible for funding any of the consultants or firms that Intervenor wish to hire to support their participation in the process.” PSE&G Opposition to Escrow, p. 2. PSE&G’s responsibility for this cost is misrepresented here. PSE&G is NOT the only party responsible for these costs, it will be the ratepayers, and cost would be spread among a large base, of which PSE&G ratepayers are but a small fraction.

The cases cited by PSE&G are off point, in that these are cases of developer application to municipalities, and assessing expenses to the developer. See 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). PSE&G notes that an applicant cannot be forced to bear intervener expenses. But this is not analogous to the situation here because, again, it’s ratepayer expense, not applicant/developer expense.

PSE&G also complains that “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.” PSE&G Opposition to Escrow, p. 5. Again, how is PSE&G penalized if PSE&G is not paying these costs, which are to be born by ratepayers? At \$750 million for only the 45 mile stretch of the project in New Jersey, this \$200,000.00 escrow is slightly less than only 0.027% of the estimated project cost in New Jersey.

Anticipated PSE&G expenses include their engineering and design, forecasting experts, and even copying and postage, all financed by ratepayers, and not just PSE&G ratepayers, but the larger base of ratepayers as apportioned by FERC. Intervenors, as a matter of equity, should have that same ability to present their case. It is a very small percentage of this project’s large expense that will be paid by PSE&G ratepayers. For the ratepayers who will bear this cost, 0.027% is a reasonable investment.

FERC has guaranteed that PSE&G will be reimbursed for its expenses whether or not this project is ultimately approved. This has led to economic recklessness exhibited by PSE&G, which includes the speculative purchase, ultimately at ratepayer expense, of the oldest stick built house in Fredon, an historic landmark, at more than \$500,000. This purchase was made before the application was even filed with the BPU. PSE&G continues to negotiate with homeowners that are vehemently opposed to this project, and easement costs are mounting daily. PSE&G continues to spend ratepayer money to clearcut areas beneath the lines in the proposed corridor, all while the BPU’s review process has barely even begun.

Compared to PSE&G’s expenses thus far, Intervenors’ requests are, at \$200,000.00, or 0.027% of the project cost, very reasonable, perhaps too modest. This project deserves and requires serious scrutiny by qualified experts. This scrutiny will only occur with establishment of an Escrow Account.

STOP THE LINES

April 21, 2009

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Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Superior Court of New Jersey, Appellate Division.

In the Matter of the Petition of ATLANTIC CITY ELECTRIC COMPANY for the Right to Exercise the Power of Eminent Domain Pursuant to N.J.S.A. 48:3-17.6 Affecting Land of the 3 Companies, Inc. and Barnegat Building Associates, LLC, any of its Successors in Right, Title and Interest, Situate in the Township of Barnegat, County of Ocean, State of New Jersey.

In the Matter of the Amended Petition of Atlantic City Electric Company for a Determination Pursuant to the Provisions of N.J.S.A. 40:55D-19 that the Use of Certain Lands Within the Township of Egg Harbor, Township of Galloway, and City of Port Republic Within the County of Atlantic; and Within the Township of Bass River Within the County of Burlington and Within the Township of Little Egg Harbor, Township of Eagleswood, Township of Stafford, Township of Barnegat, Township of Ocean, Township of Lacey Within the County of Ocean, All In the State of New Jersey, are Reasonably Necessary for the Service, Convenience or Welfare of the Public; and that the Zoning and Land Use Ordinances of those Municipalities and Counties Shall Have no Application Thereto.

Submitted Jan. 25, 2006.

Decided Feb. 10, 2006.

On appeal from the New Jersey State Board of Public Utilities, BPU Docket Numbers EE02080521 and EM04060404.

Flaster/Greenberg, attorneys for appellants Kushner Companies, Inc. and Barnegat Building Associates, LLC ([David R. Oberlander](#) and [Morgan J. Zucker](#), of counsel and on the brief).

[Nancy Kaplen](#), Acting Attorney General, attorney for respondent New Jersey Board of Public Utilities ([Andrea M. Silkowitz](#), Assistant Attorney General, of counsel; [Kenneth J. Sheehan](#), Deputy Attorney General, on the brief).

Youngblood, Corcoran, Lafferty, Hyberg and Waldman, attorneys for respondent Atlantic City Electric Company ([John Aleli](#) and [Enid L. Hyberg](#), on the brief).

Before Judges [CONLEY](#), [WEISSBARD](#) and [WINKELSTEIN](#).

PER CURIAM.

*1 Kushner Companies, Inc., and its affiliated company, Barnegat Building Associates, LLC (hereinafter collectively referred to as Kushner), appeal from a June 23, 2004, decision and order of the Board of Public Utilities (BPU) that granted Atlantic City Electric Company (ACE) permission, under [N.J.S.A. 48:3-17.6](#) and [48:3-17.7](#), to exercise the right of eminent domain in order to obtain an easement over certain property owned by Kushner. Kushner also appeals from an earlier decision and order issued by the BPU, dated April 20, 2004, in which the BPU concluded among other things, that: (1) enormous growth and development in the southern part of the state had caused an increase in electric demand that could not be accommodated with the ACE's existing transmission infrastructure; (2) a transmission line running from Cardiff to Oyster Creek was reasonably necessary for the service, convenience, and welfare of the public; (3) for the part of that route at issue here, the Northern Route, "there was no reasonable, practicable, permanent and reliable alternative ... which would have any less adverse impact upon the environment or upon the Zoning and Land Use Ordinances of the affected municipalities or counties" within that route; and (4) therefore, pursuant to [N.J.S.A. 40:55D-19](#), municipal land use ordinances adopted by the affected counties and municipalities would not apply to the "routing, construction, use and operation" of the transmission lines.

As a result of these rulings, AEC commenced a condemnation action against Kushner in the Superior Court. As part of the condemnation proceedings, ACE filed an order to show cause to gain immediate entry onto the properties needed for the construction, including Kushner's property. By order entered June 30, 2004, the Law Division granted ACE's request for immediate interim relief, giving ACE full and complete access to the subject properties, including Kushner's property, so as to construct the Northern Route. The Law Division ordered ACE to deposit monies with the court in order to obtain this interim relief. With respect to the Kushner properties, ACE was required to deposit \$738,000. As a result of this order, the transmission line has been constructed.

On appeal, Kushner contends:

I. THE BOARD OF PUBLIC UTILITIES' JUNE 23, 2004 ORDER WAS ARBITRARY, CAPRICIOUS AND NOT REASONABLY SUPPORTED BY THE EVIDENCE.

II. APPELLANT HAS BEEN DEPRIVED OF PROPERTY WITHOUT DUE PROCESS OF LAW.

A. APPELLANT WAS DENIED A MEANINGFUL OPPORTUNITY TO BE HEARD AT A MEANINGFUL TIME WITH REGARD TO THE JUNE 23, 2004 ORDER.

B. APPELLANT WAS DENIED NOTICE OF THE ROUTE PLANNING PROCEEDING ON WHICH THE APRIL 20, 2004 ORDER WAS BASED.

III. THIS MATTER IS NOT MOOT, BECAUSE THERE IS A PRESENT AND CONTINUING CONTROVERSY AS TO THE EASEMENT AND POWER LINE AND A REMEDY IS NOT BEYOND THE REACH OF THE LAW.

IV. APPELLANT HAS STANDING TO APPEAL FROM BOARD OF PUBLIC UTILITIES' APRIL 20, 2004 ORDER.

*2 We do not tarry with the standing and mootness issues as we are satisfied that both orders are amply supported by the evidence presented during the proceedings corresponding to each order. Although we have some concern with the due process contentions, in the end, we are satisfied the proceeding before the BPU that resulted in the June 23, 2004, order afforded Kushner ample opportunity to be heard on the aspect of the deliberative process he challenges, *i.e.*, ACE's need to take an easement across his property. We, therefore, affirm.

ACE is not a public entity and has no constitutional rights to condemn private property. It is, however, a public utility subject to regulation by the BPU. BPU is empowered by statute to authorize a public utility to condemn private property provided certain procedural and substantive requirements are satisfied. Where, as here, a utility seeks to construct a project along a route which traverses a number of municipalities and which would, ordinarily, be burdened by compliance with the requirements of the Municipal Land Use Law, the process is two-fold. First, [N.J.S.A. 40:55D-19](#) permits a utility to obtain from the BPU an order allowing its project to trump local zoning provisions. In this respect, [N.J.S.A. 40:55D-19](#) provides in pertinent part that:

This act or any ordinance or regulation made under authority thereof, shall not apply to a development proposed by a public utility for installation in more than one municipality for the furnishing of service, *if upon a petition of the public utility, the Board of Public Utilities shall after hearing, of which any municipalities affected shall have notice, decide the proposed installation of the development in question is reasonably necessary for the service, convenience or welfare of the public.*

[Emphasis added.]

Second, as to the particular properties the **utility** deems are needed for its project, [N.J.S.A. 48:3-17.6](#) permits a taking, "subject to the restrictions as provided hereinafter." In this respect, [N.J.S.A. 48:3-17.7](#) provides:

The power of condemnation shall not be used or enforced by any such public **utility** unless the necessary land or other property or any interest therein as stated in this chapter, cannot be acquired from the owner by reason of disagreement as to the price ... or for any other reason....[T]he power of condemnation shall not be used or enforced by any public **utility** until and unless such **utility** shall have applied to the Board of Public **Utility** Commissioners upon the petition of such **utility** and the board, after due notice, including notice to the owner or owners of the land or other property or interest therein to be condemned, ... and public hearing, shall have found that the land or other property or interest therein desired is reasonably necessary for the service, accommodation, convenience or safety of the public, and that the taking of such land or other property or interest therein is not

Not Reported in A.2d, 2006 WL 3783851 (N.J.Super.A.D.)

(Cite as: 2006 WL 3783851 (N.J.Super.A.D.))

incompatible with the public interest and would not unduly injure the owners of private property. The board is hereby authorized and empowered to determine the necessity as aforesaid for the use of the land or other property or interest therein so sought to be condemned and to make and establish such reasonable rules and regulations governing the form and method of such application and the time and manner of the notice of such public hearing as it may deem proper, and the board shall have full power and authority to enforce the provisions of this section.

*3 [Emphasis added.]

See also [In re Pub. Serv. Elec. & Gas Co., 100 N.J.Super. 1, 18 \(App.Div.1968\)](#) (affirming BPU order granting PSE & G right to condemn certain lands for a **right-of-way** necessary for construction of transmission line).

And so, ACE initially sought an order from BPU exempting it from all municipal land use ordinances or regulations of the municipalities and counties through which its proposed line would run. As required by the statute, copies of the petition were served only upon the affected municipalities and counties. Many of the municipalities and counties thereafter engaged in the proceedings, along with other entities, including PJM Interconnection, LLC (PJM), [FNI](#) Commonwealth Shore Power, LLC (Commonwealth), and Mignatti Companies a/k/a Heritage Point, LP, and the Heritage Point Homeowners Association, Inc. (Heritage Point).

[FNI](#). PJM is the Regional Transmission Operator and has the responsibility to ensure that the regional transmission system is reliable.

The BPU accepted data and pre-filed testimony, and held a public hearing on February 10, 2004. Written notice of the public hearing was served upon the affected municipalities and counties. On January 25, 2004, a notice regarding the public hearing was also published in the Asbury Park Press and the Press of Atlantic City.

At the public hearing, presentations were made to explain the proposed transmission line. In addition, numerous politicians and citizens voiced concerns about the proposed line, particularly relating to its siting in relation to existing residential neighborhoods, and the potential effects of that siting upon health, safety, and property values.

After the public hearing, the record was kept open until February 24, 2004, in order to accept written comments from any member of the public who was unable to attend the public hearing or who preferred to submit comments in a written format. An additional evidentiary hearing was held on March 15 and 16, 2004. Written notice of the evidentiary hearing was served upon the affected municipalities and the County of Ocean.

At the evidentiary hearing, William Whitehead, from PJM, testified regarding the need for the transmission line in order to relieve reliability problems. He also testified regarding the lack of available alternatives for resolving those problems. William H. Bailey, Ph.D., testified regarding safety concerns relating to electromagnetic fields. And several witnesses who had submitted pre-filed testimony were made available for cross-examination.

On the second day of the evidentiary hearing, March 16, 2004, a partial settlement was reached between ACE and the Townships of Barnegat and Ocean and the County of Ocean, providing for a revised route through the two municipalities. Kushner's property is located in Barnegat. The BPU accepted the partial settlement into evidence.

Thereafter, an open public meeting was held on April 14, 2004. At the meeting, the siting of the transmission line was discussed in great detail, including modifications that had been made to the siting based upon objections made by several of the affected municipalities.

*4 By decision and order dated April 20, 2004, the BPU granted ACE's application to construct its line through the affected municipalities and counties despite noncompliance with otherwise applicable local land use regulations. The approval encompassed the Northern Route, which traverses through a portion of Kushner's property. The BPU's decision is extensive, but critical to Kushner's appeal is the recitation of the following evidence presented during the hearings and which BPU obviously accepted:

Frank Sobonya, Team Lead Engineer with the Company's Transmission Civil Engineering Department, testified,

at length, regarding the route for the proposed line. Mr. Sobonya provided extensive testimony regarding the process by which the Petitioner identified the proposed route, which is the subject of this proceeding. Mr. Sobonya stated that following the results of the need analysis, which concluded that a 230kV transmission line was needed from Cardiff to Cedar Substation and from Cedar to Oyster Creek Substations by Summer 2005, Petitioner evaluated several options. The original petition to rebuild the existing # 1 line from the Lewis Substation to Cedar Substation, and the existing 69kV line from Cedar Substation to Sands Point Substation was filed on September 28, 2001. The first two public meetings that were held after the petition was filed were in Galloway Township and the City of Port Republic. Opposition to the proposed route came from the general public and the county and local governmental officials as well as from published newspaper articles and editorials. As a result of the opposition to the proposed route, Petitioner withdrew the petition.

Subsequently, the Company investigated whether the 230 kV line could be built on private **right-of-way** along the Garden State Parkway through the Galloway Township and Port Republic portion of the line. In its evaluation, the portion of line from Cardiff to the Parkway in **Right-of-way** # 106 remained the best alternative. From this point, Mr. Sobonya testified that the line could be built on either side of the Parkway. However the western side of the Parkway had only about one-third the amount of properties as the eastern side of the Parkway. In order to minimize the impact on existing residential properties, the Petitioner decided that private **right-of-way** along the western side of the Parkway would be the best route for the new 230 kV line. Petitioner filed the Petition which sited the transmission line along the Garden State Parkway, and which is the subject of this Order, on August 9, 2002.

Once the "Parkway" route was chosen through Galloway Township and the City of Port Republic up to the Mullica River, the existing transmission corridor remained the best route for the new line. After this route crossed the Garden State Parkway at Stage Road, the line was to be on private **right-of-way**, adjacent to the eastern side of the Parkway toward the Cedar Substation. As the private **right-of-way** route investigation continued, it became apparent that the route could not be completely located on private **right-of-way** because in several locations residences very close the Parkway prevented the line from being built. The route was modified slightly by moving the centerline 50 feet onto the Parkway from private **right-of-way**. When it appeared that the route set forth in the petition might not be available, Petitioner filed the Amended Petition that sets forth the route described herein.

*5 For the portion of the line from Cedar Substation to the Oyster Creek Substation, several routes were evaluated. The first section of that line which was evaluated was from the Cedar Substation to the Garden State Parkway. The existing **Right-of-way** # 311 did not appear to be a feasible route because of the very close proximity of homes to the line. The route chosen follows McKinley Avenue and the East Connector Road to Route 72, through commercial corridors. The original plan was to replace the existing distribution poles on the north side of Route 72 to the Parkway. Upon further research, it was discovered that New Jersey **Department of Transportation** has potential plans to widen the northern portion of Route 72. The line was moved to the south side of Route 72 to avoid conflict with this future highway project.

Once at the Parkway, the line followed the Parkway to Bay Avenue, along the southern side of Bay Avenue to **Right-of-way** # 311. The remainder of the 230 kV line would replace the existing 69 kV line in this **right-of-way** to the Oyster Creek Substation.

Consideration then had to be given to the type of construction to be used. Several alternatives were considered which included direct buried steel poles, steel poles with vibratory caisson foundations, wood poles in large H-class and laminated wood structures. Due to the limited width of **right-of-way** that is available, vertical or delta configurations on single shaft poles were the only options considered.

The use of steel rather than wood poles was deemed to be most appropriate from an engineering standpoint due to the span lengths involved. Wood poles were only technically possible for some of the short span construction. However due to the greater deflections of a wood pole, wood poles were removed from further consideration. Over the life of the line, steel poles will require less maintenance, protect against potential woodpecker damage and provide better support for the 230 kV conductors. Steel poles are also far superior to wood poles for any longitudinal loading, which could be imposed, on the structure. Longitudinal loads can be imposed on the

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structure by various means such as broken conductors, ice imbalance, and the like. Petitioner lowered most of the proposed pole heights along the transmission corridors to match the height of the existing poles.

....

Mr. Sobonya testified regarding other alternatives considered by the Petitioner. Only two 69kV lines connect Lewis and Cedar Substations and only one 69kV line connects Cedar and Sands Point Substations. While Petitioner examined rebuilding each of these lines for 230kV the witness noted that very few viable options exist for a line of this type with the exception of some portions of the existing corridors on the Parkway. The alternative selected by Petitioner demonstrates that it is the most appropriate route since it uses existing impacted **right-of-ways** for 48% of the line and private easements, or lands of the Garden State Parkway for the remainder of the line. Mr. Sobonya further testified that in most areas of the line, the pole heights would be approximately 55 feet above ground. Along Route 72 in Stafford Township, Ocean County, the pole heights will be 75 to 80 feet above ground. The two steel poles at the Mullica River crossing will be approximately 170 feet in height to satisfy United States Army Corps of Engineers clearance requirements. Those poles that are 55 feet in height with compressed conductor separations will result in a minimum ground clearance of 25 feet, which exceeds the minimum ground clearance required by the National Electric Safety Code ("NESC").

*6 The testimony of William E. Pyle, Jr., Supervisor of **Right-of-Way** within the Company's Transmission and Distribution Engineering Department, which was graphically illustrated by the aerial photograph, demonstrated that the area along the proposed approximately 47 mile line varies greatly. At the southern end of the line within Egg Harbor Township, the first four miles passes through a residential/commercial area along existing **right-of-way** # 106. The next 11.3 mile section of line in the Townships of Egg and Galloway and the City of Port Republic is intended to be built along a portion of the Garden State Parkway that is mostly forest. There are some residential properties in Galloway Township along Ash Avenue and in the City of Port Republic that will require new easements for the line. The next 7.0 miles of line in Bass River Township is intended to be built on an existing **right-of-way** through the forested property of Bass River State Park with a small portion built along an existing roadway. Moving north, the next 6.8 miles of line in the Townships of Bass River, Little Egg Harbor and Eagleswood will be built on Parkway property on the west side of the Parkway and along an unimproved road known as Province Road. This section is through forested land with no nearby residences. The next 4.5 miles into Petitioner's Cedar Substation will be built on existing **right-of-way** through Eagleswood and Stafford Townships and is mostly wooded with some nearby individual residences. Leaving Cedar Substation 7.0 miles of line in Stafford Township and Barnegat Township will travel along State Route 72 along which are various commercial properties, along the east and west sides of the Garden State Parkway through forested lands, and south of Bay Avenue in Barnegat Township through mostly forested lands and an existing gravel pit area.

The remainder of the line will be built through the Townships of Barnegat, Ocean and Lacey on existing **rights-of-way** through mostly forested areas.

Mr. Pyle testified that the proposed **right-of-way** will utilize new **rights-of-way** from the Garden State Parkway and other governmental agencies as well as private **rights-of-way** adjacent to the Parkway in Galloway Township and the City of Port Republic in Atlantic County and private **rights-of-way** south of Bay Avenue in Barnegat Township in Ocean County. While much of the **right-of-way** is to be constructed with already impacted **rights-of-way**, some of the proposed route does pass through the Pinelands Preservation Area. Within its approximately 50-mile length, the proposed line parallels and existing state highway and various local and county roads are crossed at several locations. There are waterway crossings over the Mullica River and the Bass River.

There are no commercial or residential structures within the proposed **right-of-way** to be removed except for existing facilities owned by the petitioner that will be replaced by this proposed project. There are a few residential and commercial structures within 50 feet of the edge of the existing **right-of-way** # 106 within the Township of Egg Harbor. Through Galloway Township and the City of Port Republic, there are approximately ten residences that will be within 50 feet of the edge of the proposed new **right-of-way**. Through Bass River Township the edge of the existing **right-of-way** # 153 passes within 50 feet of five residences. There are no

structures within 50 feet of the edge of the proposed **right-of-way** in Little Egg Harbor Township. In Eagleswood and Stafford Townships there are approximately six existing residential structures within the edge of the existing **right-of-way** # 217 and a few commercial structures along Route 72. In Barnegat Township, there are no structures located within 50 feet of the edge of the **right-of-way**, nor are there any in Ocean and Lacey Township. Within the proposed **right-of-way**, there are no schools, hospitals, nursing homes or other public buildings.

*7 Although the local land use and zoning ordinances and master plans of the respective municipalities and counties through which the existing and proposed **right-of-way** passes do not, in each instance, expressly provide for electric transmission lines, or in some instances, even prohibit same, the proposed transmission line is a land use which qualifies as an inherently beneficial use. Furthermore, Mr. Pyle noted that there is no practicable alternative which would lessen the impact of the line; and credible evidence supports the conclusion that the proposed transmission line can be constructed without substantially impairing the intent of the local zoning plan or zoning ordinances without an adverse impact upon local land use patterns, whether existing or proposed. More particularly, the proposed project involves the use of poles with heights which will now be approximately 55 feet above ground. In some locations, along Route 52 in Stafford Township, Ocean County, the pole heights will be 75 to 80 feet above ground. The two steel poles at the Mullica River crossing will be approximately 170 feet in height to satisfy Army Corps of Engineers clearance requirements. Those poles that are 55 feet in height with compressed conductor separations will result in 25 feet minimum ground clearance which exceeds the minimum ground clearance required by the National Electrical Safety Code. The use of poles which heights that are consistent with existing pole heights within the **rights-of-way** will lessen any visual impact upon the surrounding areas.

It was recognized that in addition to the zoning and land use ordinances, the proposed transmission line will deviate from other requirements of the land use and zoning ordinances and of the master plans of the respective municipalities and counties, and the rules and regulations promulgated thereunder particularly with respect to lot, width and size and possible front side and rear yard setback requirements. Site plan approval and/or construction permits or other permits or licenses might otherwise also be required by certain of the land use ordinances or other ordinances or regulations promulgated under the authority of the Land Use Act of the State of New Jersey. Petitioner has filed this application to seek relief there from and to obtain a determination that said ordinances, rules and regulations shall have no applicability to the proposed transmission lines, and that Petitioner shall have no obligation to conform thereto or comply therewith.

Testimony was presented by John J. Mallon, P.E., Engineer for Eagleswood Township regarding an alternative route that would site the transmission line within Eagleswood Township along the west side of the Garden State Parkway. In support of this alternative, Mr. Mallon stated that there is very little development on the west side of the Parkway and that by relocating the line in this area, it would be within the "clear zone" of a proposed expansion of the Eagles Nest Airport. On cross-examination, Mr. Mallon acknowledged that the proposed route is located within an already impacted 69kV **right-of-way** in Eagleswood Township. He further acknowledged that the route which Eagleswood Township has suggested would site the line within the Pinelands Preservation Area and that to his knowledge no permits have been issued by the Pinelands Commission for electrical facilities within the Preservation Area.

*8 Testimony was also presented by the Honorable T. Richard Bethea, Mayor of Bass River Township, identifying two alternative routes for the proposed transmission line. On cross-examination, Mayor Bethea acknowledged that Option 1, as proposed by the Respondent, Bass River Township, would site the line through wetlands. He further noted that Option 2 would also site the line through wetlands as well as public lands, for which Petitioner does not have the power to condemn.

Based upon this evidence, BPU concluded:

Taking into consideration the testimony presented by the Petitioner and the Respondents, Eagleswood Township and Bass River Township, Petitioner has established, through the introduction of credible and competent evidence, that the route of the transmission line, as proposed, is the most appropriate and that there is no reasonable practicable alternative which would have less adverse impact upon the environment or upon the land use and zoning ordinances of the respective counties and municipalities; or which would permit Petitioner to

provide adequate and reliable service in a timely manner. The evidence presented with regard to the alternatives which were capable of being considered, and the reasons for rejecting each of those alternatives as inappropriate or impracticable, was credible and is deemed sufficient to support Petitioner's decisions. Likewise, the approval by the affected municipalities of the Stipulate route through Barnegat Township, Ocean Township and Ocean County provides support for the determination that the route, as amended, is appropriate, especially in terms of the impact upon the land use and zoning ordinances of the individual municipalities and county.

These findings and conclusions are well supported by the evidence presented during the [N.J.S.A. 40:55D-19](#) proceedings. They are also well within the scope of BPU's legislatively-delegated authority and expertise. See [In re Monmouth Consol. Water Co., 47 N.J. 251, 258-62 \(1966\)](#); [In re Pub. Serv. Elec. & Gas Co., 35 N.J. 358, 370-80 \(1961\)](#); [In re Pub. Serv. Elec. & Gas Co., supra, 100 N.J.Super. at 11-17](#); [In re Application of Hackensack Water Co., 41 N.J.Super. 408, 419-28 \(App.Div.1956\)](#). As our Supreme Court long ago recognized:

In passing upon the application the board has ample authority as well as the duty to study the suitability of the locus chosen for the **utility** structure, the physical character of the uses in the neighborhood, the proximity of the site to residential development, the effect on abutting owners, its relative advantages and disadvantages from the standpoint of public convenience and welfare, whether other equally serviceable sites are reasonably available by purchase or condemnation which would have less impact on the local zoning scheme, and last, but by no means least, whether any resulting injury to abutting or neighboring owners can be minimized by reasonable requirements relating to the physical appearance of the structure, adequate lot size, front and rear set back lines as well as appropriate side lines regulating the positioning of the structure on the lot, and by proper screening of the facility by trees, evergreens, or other suitable means. The board should weigh all of these factors and while no controlling weight should be given to purely local considerations, they should not be ignored.

*9 [[In re Monmouth Consol. Water Co., supra, 47 N.J. at 259-60.](#)]

Following the April 20, 2004, order, ACE negotiated with property owners along the Northern Route, including but not limited to Kushner, regarding the price to be paid to secure easements over the affected properties. With respect to Kushner's property in particular, an appraiser concluded that the necessary easement had a value of \$138,000. AEC offered that amount to Kushner. It was rejected because Kushner had preliminary site plan approval for 260 residential units on its property. According to Kushner, the presence of ACE's transmission line would have a significant negative effect upon the value of its proposed development because, as a result of the transmission line, a wooded buffer would be eliminated and certain lots within the development would now have an unobstructed view of the Garden State Parkway.

Upon the failure of negotiations with six landowners, including Kushner, ACE pursued the second step of the process by filing petitions with the BPU, pursuant to [N.J.S.A. 48:3-17.6](#) and [48:3-17.7](#), seeking permission to exercise the power of eminent domain over these properties. With respect to Kushner's property in particular, ACE sought:

[T]o acquire a right-of-way on a portion of Block 92.112, Lot 42 .01 as designated on the Tax Map of the Township of Barnegat, consisting of approximately 2.1 acres, and the width of the right-of-way is forty (40) feet. The total acreage of the subject Property is 104 acres.... [A]pproximately 11 poles are planned to be located on the Property, which is zoned RL/AC and is ... wooded and unimproved. The height of the poles will be 56 feet in order that they will not exceed the height of the surrounding trees.... [W]hile the necessary width of the right-of-way for the double circuit poles that are proposed to be installed on the Property is 60 feet, a width of 40 feet is required as [ACE] negotiated the use of 20 feet of the contiguous Garden State Parkway right-of-way in an attempt to lessen the impact on the subject Property.

All property owners and all known persons claiming an interest in the six affected properties were served with a copy of ACE's petition. Service was effectuated upon Kushner by certified mail. Kushner filed an answer. The BPU held a hearing on ACE's eminent domain application. At the hearing, William E. Pyle, supervisor of Right of Way for PHI Services Company, a parent company to ACE, testified regarding the transmission line as a whole, the portion of the line that would traverse Kushner's property in particular, the attempts to minimize the effects of the transmission line on Kushner's undeveloped property as well as the existing residential neighborhoods in the area,

and the unsuccessful negotiations with Kushner. His testimony included the following:

Q. What I would like you to do, Mr. Pyle, and if you want to make reference to the drawings-in particular, the aerial, P2-I want you to indicate ... based upon the entire route, which has been approved by the Board, why this particular segment of the subject property is necessary in order to complete that route?

*10 A. This-again, we're going from north to south to our Cedar Substation. And this particular lot is in Barnegat Township, south of West Bay Avenue, and it's directly in the path of stipulated settlement with the Town of Barnegat and moving south to where we cross the Parkway, to the east side of the Parkway. We chose to locate the line on the portion of the lot that we thought was least obtrusive to anyone involved, which would be paralleling the Parkway, right adjacent to the Parkway right-of-way.

Q. Would it be fair to say that in order to complete the route as previously approved by the board, it would be necessary at some point to obtain an easement across the subject property?

A. Yes. Again, taking into account all factors involved.

Q. Right. And, again, I think you've just addressed this, but with particular reference to this property, it was, I take it, the intention of the company to create the least amount of impact on the property in question?

A. Yes, on the property in question. That's correct.

Q. And I think you've already touched upon it, but I want to be clear, how did the company go about doing that?

A. Again, by trying to locate it in what would be considered set-back areas of the lot, right adjacent to an established Parkway corridor. And then we further agreed to obtain some of the easement from the Parkway to lessen the impact.

Q. Again, just briefly touching upon areas that have been previously addressed, looking at the drawing which we have marked as P-2, would you describe the buffering that the company intends to utilize with regard to the line?

A. Well, the line itself would be buffered from the Parkway, which would be the Parkway's concern, and then by reducing the width of the easement that should maintain a buffer from the proposed housing to the line also, and then further the 56-foot height of the poles will hide that in the trees as much as possible.

Q. And why was that height chosen, Mr. Pyle?

A. [To] hide it in the trees.

Q. Okay.

A. Again, as much as possible to keep it down as low as possible.

Pyle concluded that “[t]here is no reasonable alternatives to build the approved route.”

Kushner's attorney had full opportunity to cross-examine Pyle. Before us, Kushner asserts that he was “astonished” that Pyle:

- could not specify why the specific route involving the Property was chosen;
- was not aware that [there was] preliminary approval for a 260-unit subdivision on the Property;
- could not discuss whether it was feasible to place the line underground;

- testified that the 56 foot height of the poles was designed to conceal them in tree cover, but did not know the height of the tree cover on the Property;
- could not state the reasons why the route selected could not cross from the west side to the east side of the Parkway to the north, rather than to the south of the Property, thus eliminating the need for the taking of any portion of the Property.

*11 These contentions are not entirely accurate. As to the siting and size of the easement across Kushner's property the following exchanges occurred:

Q. My Pyle, I am looking at Exhibit P-1 which is the route map?

A. Yes.

Q. And I see that the route crosses over from the west side to the east side at Garden State Parkway at some point; is that correct?

A. Yes.

Q. And that is to the south of the subject property?

A. Yes, it is.

Q. Is there any reason why the route couldn't cross over to the north of the subject property to your knowledge?

A. Can't remember offhand, sir, what is on the east side of the Parkway at that point. *The route was chosen to minimize impact on existing homes.* And that's all I can say about that.

Q. You don't know the details, you just know the general philosophy. Is that a fair summary?

A. Yes. I don't know the details of that particular area you're talking about without refreshing my memory.

Q. *And planned homes would not weigh as heavily in this calculation as existing homes?*

A. *That's correct.*

Q. You had indicated, I believe, that the original plans called for 60 feet to be taken from the subject property?

A. Yes.

Q. But in response to concerns by the property owner, *you essentially moved 20 feet of that onto the Garden State Parkway property?*

A. *That's correct.*

Q. *Is there any possibility to move it farther on the Garden State Parkway property?*

A. *They are interested in keeping a buffer of trees between the lines and the travel lanes of the Parkway also.*

Q. Meaning, *you think the Garden State Parkway would not agree to that?*

A. *Yes.*

Q. Are you going to be clearing—so you have a 60-foot right-of-way of which 40 feet is on the subject property and 20 feet is on the Garden State Parkway property?

A. Yes. That's what we are trying to obtain, yes.

Q. Is it your intention to clear-cut that entire 60-foot right-of-way?

A. Yes, it is.

....

Q...*Is there any reason why you need to clear-cut 60 feet to make room for a 13 1/2 foot structure?*

A. *The reason is to keep the trees away from contact with the conductors.*

Q. But if you did 10 feet or 15 feet on either side, that wouldn't be sufficient?

A. You're getting a little out of my realm of knowledge, but *there are rules and regulations to keep the line in operation in regards to trees*, and that's all I can say.

[Emphasis added.]

Although Pyle did not know whether an underground transmission line was feasible, or the actual height of the trees in the area, he explained that the fifty-six-foot height of the poles “is absolutely the smallest that we have ever used for a transmission line like this.” Further, Kushner presented no evidence to suggest the height of the poles was unreasonable or that underground lines would, in fact, be feasible. And, while Pyle was not aware of the specifics of Kushner's development plans for the property, he was aware there were such plans and had seen them.

*12 As we have said, Kushner presented no contrary expert evidence. By decision and order dated June 23, 2004, the BPU authorized ACE to exercise the power of eminent domain. Along with the other necessary statutory findings, BPU found that the easement sought was reasonably necessary for the service, accommodation, convenience, or safety of the public, in order that ACE may provide its customers with safe, adequate, reliable, and proper service and that there were no reasonable alternatives.

Our review of these findings and conclusions is limited. [N.J.S.A. 48:2-46](#); [In re Taylor, 158 N.J. 644, 656-57 \(1999\)](#). If “in reviewing an agency decision an appellate court finds sufficient credible evidence in the record to support the agency's conclusions, that court must uphold those findings even if the court believes that it would have reached a different result.” [Id. at 657](#). We will reverse an agency's decision “ ‘only if it is arbitrary, capricious or unreasonable or it is not supported by substantial credible evidence in the record as a whole.’ ” [Ibid.](#) (quoting [Henry v. Rahway State Prison, 81 N.J. 571, 579-80 \(1980\)](#)).

There is no question that, coupled with its findings as to the necessity of the Northern Route in the prior proceeding, BPU's conclusions in the eminent domain proceeding are unassailable. The dilemma for Kushner is that he did not participate in the prior proceeding, having not been entitled, statutorily, to direct notice thereof. See [In re Application of Jersey Cent. Power & Light Co., 130 N.J.Super. 394, 399-400 \(App.Div.1974\)](#). In this respect, we do not necessarily ascribe to BPU's suggestion that notice by way of publication would suffice had we thought Kushner had a viable due process complaint. *But see, e.g., Tenn. Gas Pipeline Co. v. Mass. Bay Transp. Auth., 2 F.Supp.2d 106, 109 (D. Mass 1998)* (under federal law, notice of application to construct a natural gas pipeline through multiple states, including a request for condemnation rights with respect to affected properties, was effected by publication in the Federal Register with copies mailed to the affected states; personal notice to the affected landowners was not required as a matter of due process); [Tenn. Gas Pipeline Co. v. 104 Acres of Land, 749 F.Supp. 427, 429-31 \(D.R.I.1990\)](#) (accord). See also [15 U.S.C. § 717f\(c\)\(1\)\(B\)](#) and (d); [18 C.F.R. § 157.9](#); [Moreau v. Federal Energy Regulatory Comm'n, 982 F.2d 556, 568-69 \(D.C.Cir.1993\)](#) (“[a]ssuming without deciding that the Due Process Clause ordinarily requires [the Federal Energy Regulatory Commission (FERC)] to give personal notice to neighboring landowners, FERC's failure to do so in this case did not violate due process” because the petitioners had actual notice of the FERC proceedings).

The minimum requirements of due process are notice and an opportunity to be heard. [Doe v. Poritz, 142 N.J. 1, 106 \(1995\)](#). We are convinced Kushner had a full and fair opportunity to oppose ACE's eminent domain action as to his property. The simple fact is, ACE supported its application and Kushner provided nothing to the contrary. We do not think Kushner was deprived of due process because the BPU incorporated its findings from the prior proceeding. Kushner has never asserted a lack of knowledge of those findings. He could have challenged them in the eminent domain proceeding but was content to rely upon cross-examination of Mr. Pyle. He cannot now be heard to complain. Cf. [In re Application of Jersey Cent. Power & Light Co., supra, 130 N.J.Super. at 400](#) (property owners could not be heard to complain of a denial of their application to reopen BPU proceeding where they asked to make a proffer of proofs but "saw fit not to do so").

***13** Affirmed.

N.J.Super.A.D.,2006.
In re Atlantic City Elec. Co.
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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
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