



Agenda Date: 5/22/18  
Agenda Item: 2N

**STATE OF NEW JERSEY**  
**Board of Public Utilities**  
44 South Clinton Avenue, 3<sup>rd</sup> Floor, Suite 314  
Post Office Box 350  
Trenton, New Jersey 08625-0350  
[www.nj.gov/bpu/](http://www.nj.gov/bpu/)

ENERGY

REQUEST FOR INVESTIGATION INTO COMPLIANCE )  
WITH THE BOARD ORDER IN DOCKET NO. )  
EM00110870 BY FIRSTENERGY CORP. AND JERSEY )  
CENTRAL POWER AND LIGHT ) ORDER  
DOCKET NO. EO17080870

**Parties of Record:**

**John A. Hoffman, Esq.**, Wilentz Goldman & Spitzer, P.A. for Petitioners, John Graham and Michael B. Roche  
**Gregory Eisenstark, Esq.**, Windels, Marx & Mittendorf, LLP for Respondent JCP&L

**BY THE BOARD:**

On August 8, 2000, First Energy Corp. ("FE") and GPU, Inc. ("GPU") the then-parent company of Jersey Central Power and Light Company ("JCP&L" or "the Company") entered into an agreement and plan of merger. FE was to acquire a one-hundred percent (100%) ownership interest in JCP&L's common stock, and thereby, JCP&L would become a wholly owned subsidiary of FE. After extensive settlement negotiations, FE and JCP&L, Staff of the New Jersey Board of Public Utilities ("BPU" or "Board"), the New Jersey Division of Rate Counsel ("Rate Counsel") and several intervenors executed a proposed stipulation of Settlement ("Merger Stipulation"). On October 9, 2001, the Board issued an Order approving the Merger and the Merger Stipulation.<sup>1</sup> Among other things, the Merger Order requires that JCP&L honor all JCP&L pre-merger contracts and agreements in existence at the time of the Merger, including those with current or former JCP&L employees.

Effective December 31, 2104, FE, as plan administrator, stopped paying health subsidies to certain GPU retirees. On August 7, 2017, two retired GPU employees, Graham and Roche ("Petitioners"), filed a petition ("Petition") with the Board alleging that all former JCP&L employees who were employees of GPU at the time of the Merger are entitled to receive the same benefits as JCP&L employees. In their Petition, Graham and Roche allege that FE improperly terminated subsidies for healthcare costs on some retirees of JCP&L, thus violating the Merger Stipulation and Merger Order. The Petition requests that the Board investigate this alleged violation and direct FE to comply with the Merger Order, specifically with respect to FE's

<sup>1</sup> I/M/O the Verified Petition of First Energy and Jersey Central Power & Light Co., et al., BPU Dkt. No. EM00110870 (October 9, 2001) ("Merger Order").

post-employment medical benefits (referred to as "Other Post-Employment Benefits" or "OPEBs") for non-bargaining unit retirees.<sup>2</sup>

On August 28, 2017, JCP&L filed an Answer to the Petition ("Answer") denying the Petition allegations, denying it failed to comply with the OPEBs and raising affirmative defenses.

On the same day it filed its Answer with the Board, FE and JCP&L ("Plaintiffs") filed a Complaint in the United States District Court for the District of New Jersey ("Federal Petition")<sup>3</sup> seeking declaratory judgment against the BPU, the Board's Commissioners and its Secretary in their official capacities, as well as Graham and Roche. The Federal Petition repeated the allegations contained in their Answer filed with the Board. The Federal Petition named and sought to enjoin the Board, each of its Commissioners, and the Secretary in their official capacity as defendants in the Federal Court action from acting on the Petition. The Plaintiffs argue that Graham and Roche's allegations regarding compliance with the Merger Order related to Plaintiff's rights and obligations with respect to an employee welfare benefit plan and necessarily require a determination of rights created by the federal program the Employee Retirement Income Security Act ("ERISA"). The Plaintiffs further contend that at the time of the merger, the employee welfare benefits plans expressly reserved the right to modify or terminate certain benefits as to GPU employees. Accordingly, Plaintiffs argue that they maintain that right and the Merger Order only creates obligations with respect to pension benefits. Additionally, JCP&L lawfully terminated the company-provided subsidies toward the cost of health care benefits to Roche and Graham. The parties have jointly sought multiple extensions relating to the Federal Petition and no party has filed an Answer to the Federal Petition.

On September 7, 2017, Petitioners filed a Reply to the Answer with the Board.

As a result of settlement discussions, JCP&L and the Petitioners ("Settling Parties") have executed a Settlement Agreement whereby JCP&L agreed to certain changes in how it calculates its OPEBs. (A copy of the Settlement is attached hereto). The Settlement explicitly states that it is between JCP&L and the Petitioners, however JCP&L commits to applying certain changes to any eligible retiree. The Settlement seeks to resolve the pending Petition before the Board, but also involves JCP&L withdrawing the Federal Petition. The Settling Parties seek the Board's approval of the Settlement.

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<sup>2</sup> The Board received some letter inquiries regarding this Petition. In response, the Board Secretary sent a letter advising that any person interested in participating in this proceeding would have to file a Motion under the Board's rules to Participate or Intervene. No motion was received by the Board.

<sup>3</sup> First Energy Service Company, in its capacity as Plan Administrator of the First Energy Health Care Plan, First Energy Corp., and Jersey Central Power and Light, Plaintiffs v. New Jersey Board of Public Utilities, Richard Mroz, President of the New Jersey Board of Public Utilities, Joseph L. Fiordaliso, Commissioner of the New Jersey Board of Public Utilities, Mary-Anna Holden, Commissioner of the New Jersey Board of Public Utilities, Dianne Solomon, Commissioner of the New Jersey Board of Public Utilities, Upendra Chivukula, Commissioner of the Board of Public Utilities, Irene Kim Asbury, Secretary of the New Jersey Board of Public Utilities, in their official capacities, John Graham and Michael B. Roche, Defendants at Docket No. 3:17-cv-6481.

The relevant terms of the Settlement Agreement are as follows:<sup>45</sup>

1. With respect to its obligations under Paragraph 26 of the Merger Order and Stipulation, JCP&L will expand the eligibility criteria used to determine which non-bargaining retirees will be deemed eligible retired JCP&L employees that will receive a healthcare subsidy to also include any non-bargaining retiree that meets all of the following criteria: (i) was classified as a JCP&L employee for a minimum of ten years throughout their career; (ii) worked within the GPU System to 55 years of age or older; (iii) would otherwise be eligible for a post-employment health care subsidy; and (iv) retired prior to the FE/GPU Merger ("Additional Deemed Eligible JCP&L Retirees").
2. The healthcare subsidy for the Additional Deemed Eligible JCP&L Retirees will be reinstated retroactive to January 1, 2015 (December 31, 2104 was the last date for which the healthcare subsidy was provided to these retirees). The subsidy shall be deposited to an eligible retiree's Health Reimbursement Account. The subsidy shall be provided in accordance with the terms and conditions of the applicable First Energy Health Care Plan.
5. The expansion of the eligibility criteria for the healthcare subsidy, as described in Paragraphs 1 and 2 of the Settlement, shall commence upon and be subject to BPU approval for recovery of the incremental OPEB costs related to the expansion of the eligibility criteria retroactive to January 1, 2015, which approval shall include deferred accounting with respect to the recovery of the incremental OPEB expense resulting from the expansion of the eligibility criteria for the healthcare subsidy from January 1, 2015 through the date on which new rates are implemented pursuant to the final order in JCP&L's next distribution base rate proceeding.
6. JCP&L, along with the Plan Sponsor, possess certain rights under its Plan Documents and the Employee Retirement Income Security Act of 1974 ("ERISA") to terminate or modify the healthcare subsidy for retirees receiving a healthcare subsidy. However, JCP&L and the Plan Sponsor shall forgo exercising those rights as they relate to the Additional Deemed Eligible JCP&L Retirees, provided JCP&L receives BPU approval for timely and reasonable cost recovery and, as necessary, deferred accounting as described in Paragraph 5 of the Settlement, for its post-employment healthcare subsidy costs, using the delayed recognition accounting method (see JCP&L 2016 Base Rate Proceeding), in any future distribution base rate proceedings, unless otherwise requested by the Company and approved by the Board.

The Settling Parties further agreed that the Petitioners entered into the Settlement Agreement solely on their behalf, but asserted that the Settlement Agreement shall serve as the basis for resolution of future challenges to Paragraph 26 of the Merger Order and Stipulation. They further expressed that the eligibility criteria fully satisfied JCP&L's commitments under Paragraph 26 of the Merger Agreement and Order.

JCP&L further agreed to withdraw the Federal Petition upon receipt of a final non-appealable Board Order adopting the Settlement Agreement.

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<sup>4</sup>Although described at some length in this Order, should there be any conflict between this summary and the Settlement Agreement, the terms of the Settlement Agreement are controlling, subject to the findings and conclusion in this Order.

<sup>5</sup> Each paragraph is numbered to coincide with the paragraphs in the Settlement.

## **DISCUSSION AND FINDING**

The Board is reviewing the Settlement Agreement as a resolution of the pending Petition before this Board, filed by Graham and Roche. As noted in the Settlement Agreement, notwithstanding the fact that JCP&L has agreed to generally expand its eligibility criteria for certain benefits and the Settling Parties agree that this criteria satisfies Paragraph 26 of the Merger Order and Stipulation, this Settlement is between the Settling Parties to resolve Graham and Roche's Petition.

JCP&L has agreed that it will withdraw its Complaint for a Declaratory Judgment in federal court, without prejudice. JCP&L has represented to staff that the Complaint will be dismissed against all parties, including the Board, the Commissioners and the Board Secretary. The Company has agreed to not recommence the action so long as the eligibility criteria agreed upon in the Settlement Agreement continue to be applicable.

Paragraphs 5 and 6 of the Settlement Agreement addresses deferred accounting of and recovery by JCP&L of the incremental costs of the expanded eligibility criteria retroactive to January 1, 2015 outlined in the Settlement Agreement. Specifically, the Settlement Agreement provides that payment of the expanded subsidies shall "commence upon and be subject to BPU approval for recovery." However, this is not a rate proceeding, therefore it is not appropriate for the Board to address the potential recoverability of any costs of this Settlement Agreement between the Settling Parties. The Parties acknowledge as such in seeking deferred accounting of the incremental costs until JCP&L's next distribution rate proceeding.

The Board believes that a modification is necessary. First, the Board believes that, under the circumstances of this case, it is appropriate to permit JCP&L to create a deferred asset to preserve for an appropriate future proceeding, the rights of any party to argue the appropriateness or inappropriateness of the recoverability of the costs of this Settlement Agreement. However, inherent in deferral of these costs and consistent with general rate making principles is the requirement that the expenses would have occurred prior to the next rate proceeding. As such, the expanded criteria agreed to by JCP&L were intended to be implemented upon the approval of this settlement and receipt of a final non-appealable order, not after a future base rate proceeding.

The Board has reviewed the record to date in this proceeding, including the Petition, and the attached Settlement Agreement. The Board believes that the above modification regarding the implementation of the Settlement Agreement upon the Board's issuance of this Order is appropriate. The Company acknowledged that implementation of the expanded eligibility criteria would occur following the adoption of Settlement Agreement. The Company has further acknowledged that the Settlement Agreement requires that the Company withdraw the Federal Petition against all parties and not recommence the action so long as the eligibility criteria agreed upon in the Settlement Agreement remains in effect.

Therefore, the Board **FINDS** the Settlement Agreement, as modified in this Order, is reasonable, in the public interest, and in accordance with the law. Accordingly, the Board **HEREBY APPROVES** the Settlement Agreement as modified in this Order, subject to the following conditions:

1. This Order shall not be construed as directly or indirectly fixing for any purpose whatsoever, any value of the tangible or intangible assets now owned or hereafter to be owned by JCP&L.
2. This Order shall not affect or in any way limit the exercise of the authority of this Board or this State in any pending or future petition or in any proceeding with respect to rates, franchises, services, financing, accounting, capitalization, depreciation or any other matters affecting JCP&L.

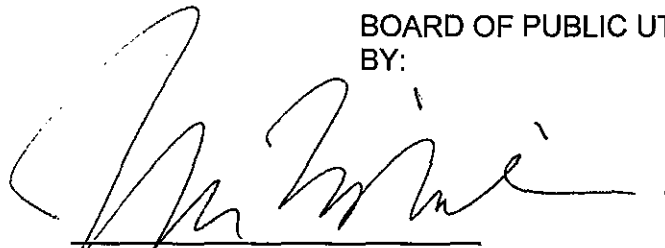
The Board **HEREBY ORDERS** JCP&L to file a letter acknowledging the implementation of the Additional Deemed Eligible JCP&L Retirees as required by the Settlement Agreement is implemented no later than August 31, 2018.

The Company's costs will remain subject to audit by the Board. This Decision and Order shall not preclude nor prohibit the Board from taking any actions determined to be appropriate as a result of any such audit.

The effective date of this Order is May 31, 2018.

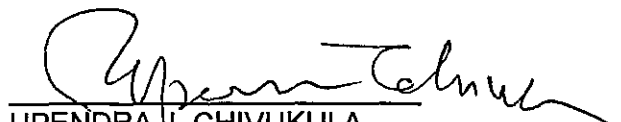
DATED: 5/22/18

BOARD OF PUBLIC UTILITIES  
BY:

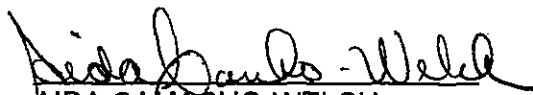
  
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PRESIDENT

  
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MARY-ANNA HOLDEN  
COMMISSIONER

  
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ROBERT M. GORDON  
COMMISSIONER

ATTEST:   
\_\_\_\_\_  
AIDA CAMACHO-WELCH  
SECRETARY

I HEREBY CERTIFY that the within document is a true copy of the original in the files of the Board of Public Utilities.

**IN THE MATTER OF THE REQUEST FOR INVESTIGATION INTO COMPLIANCE WITH THE  
BOARD ORDER IN DOCKET NUMBER EM00110870 BY FIRSTENERGY CORP. AND  
JERSEY CENTRAL POWER AND LIGHT - DOCKET NO. EO17080870**

**SERVICE LIST**

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STATE OF NEW JERSEY  
BOARD OF PUBLIC UTILITIES

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IN THE MATTER OF THE REQUEST FOR  
INVESTIGATION INTO COMPLIANCE  
WITH THE BOARD ORDER IN DOCKET  
NO. EM00110870 BY FIRSTENERGY  
CORP. AND JERSEY CENTRAL POWER  
& LIGHT COMPANY

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SETTLEMENT AGREEMENT

BPU Docket No. EO17080870

TO THE HONORABLE BOARD OF PUBLIC UTILITIES:

APPEARANCES:

**John A. Hoffman, Esq.** (Wilentz, Goldman & Spitzer, P.A.) for Petitioners, John Graham and Michael B. Roche

**Gregory Eisenstark, Esq.** (Windels Marx Lane & Mittendorf, LLP) for the Respondent, Jersey Central Power & Light Company

This Settlement Agreement is hereby made and executed as of the dates indicated below, by and among the Petitioners, John Graham and Michael B. Roche ("Petitioners" or "Graham and Roche") and Jersey Central Power & Light Company ("JCP&L" or the "Company") (collectively, the "Parties"). The Parties do hereby join in recommending that the New Jersey Board of Public Utilities ("Board" or "BPU") issue an Order approving this Settlement Agreement, based upon the following terms:

**Background**

Under a cover letter dated August 7, 2017, Petitioners filed a Petition requesting that the Board investigate whether JCP&L has complied with certain provisions of the Board's

October 9, 2001 Order approving the merger between FirstEnergy Corp. (“FE”), and GPU, Inc. (“GPU”) the then-parent holding company of JCP&L.<sup>1</sup> Among other things, the Petition alleged that JCP&L and/or FE has not complied with certain aspects of the Merger Order and Stipulation in regard to post-employment medical benefits (referred to as “Other Post- Employment Benefits” or “OPEBs”) for non-bargaining unit retirees.

On August 28, 2017, JCP&L filed a Verified Answer to the Petition. In the Verified Answer, JCP&L denied the allegations in the Petition, denied that it has failed to comply with any aspect of the Merger Order, and also raised certain affirmative defenses. On or about September 7, 2018, Petitioners filed a Reply to Answer with the Board.

Following the filing of the Petition and Answer, the Parties engaged in settlement discussions and meetings. Based thereon, the Parties have determined to resolve this matter in accordance with the terms set forth below.

#### **Stipulated Settlement Terms**

1. With respect to its obligations under Paragraph 26 of the Merger Order and Stipulation, JCP&L will expand the eligibility criteria used to determine which non-bargaining retirees will be deemed eligible retired JCP&L employees that will receive a healthcare subsidy to also include any non-bargaining retiree that meets all of the following criteria: (i) was classified as a JCP&L employee for a minimum of ten years of service throughout their career; (ii) worked within the GPU System to 55 years of age or older; (iii) would otherwise be

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<sup>1</sup> *I/M/O the Verified Petition of FirstEnergy Corp. and Jersey Central Power & Light Co., et al.*, BPU Dkt. No. EM00110870, Order dated October 9, 2001 (hereinafter referred to as the “Merger Order and Stipulation”).



eligible for a post-employment health care subsidy; and (iv) retired prior to the FE/GPU merger (“Additional Deemed Eligible JCP&L Retirees”).

2. The healthcare subsidy for the Additional Deemed Eligible JCP&L Retirees will be reinstated retroactive to January 1, 2015 (December 31, 2014 was the last date for which the healthcare subsidy was provided to these retirees). The subsidy shall be deposited to an eligible retiree's Health Reimbursement Account. The subsidy shall be provided in accordance with the terms and conditions of the applicable First Energy Health Care Plan.

3. The application of the expanded eligibility criteria set forth in Paragraph 1 hereof shall fully satisfy the commitment under Paragraph 26 of the Merger Order and Stipulation to determine eligibility for the healthcare subsidy.

4. The Parties agree that Graham and Roche are entering into this Settlement Agreement solely on their behalf. However, this Settlement Agreement shall serve as the basis for resolution of future challenges, if any, regarding JCP&L's obligations under Paragraph 26 of the Merger Order and Stipulation. The Parties further agree that neither Graham nor Roche will qualify for the healthcare subsidy described in Paragraphs 1 and 2 hereof.

5. The expansion of the eligibility criteria for the healthcare subsidy, as described in Paragraphs 1 and 2 hereof, shall commence upon and be subject to BPU approval for recovery of the incremental OPEB costs related to the expansion of the eligibility criteria retroactive to January 1, 2015, which approval shall include deferred accounting with respect to the recovery of the incremental OPEB expense resulting from the expansion of the eligibility criteria for the healthcare subsidy from January 1, 2015 through the date on which new rates are implemented pursuant to the final order in JCP&L's next distribution base rate proceeding.

6. JCP&L, along with the Plan Sponsor, possesses certain rights under its Plan Documents<sup>2</sup> and the Employee Retirement Income Security Act of 1974 (“ERISA”) to terminate or modify the healthcare subsidy for retirees receiving a healthcare subsidy. However, JCP&L and the Plan Sponsor shall forgo exercising those rights as they relate to the Additional Deemed Eligible JCP&L Retirees, provided JCP&L receives BPU approval for timely and reasonable cost recovery and, as necessary, deferred accounting as described in Paragraph 5 hereof, for its post-employment healthcare subsidy costs, using the delayed recognition accounting method (see JCP&L 2016 Base Rate Proceeding<sup>3</sup>), in any future distribution base rate proceedings, unless otherwise requested by the Company and approved by the Board.

7. Graham and Roche and John A. Hoffman, Esq., agree not to file any further complaints, petitions, applications, or any other types of legal documents or participate in an adversarial manner before any legal body such as a state regulatory agency, federal regulatory agency, or court of law, in whole or in part, disputing the eligibility criteria used by JCP&L to determine eligibility for the healthcare subsidy, so long as JCP&L complies with this Settlement Agreement.

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<sup>2</sup> The FirstEnergy and former GPU Plan documents that govern this issue are the following: GPU Companies Health Care Plan for Non-bargaining Employees, GPU Service, Inc. Health Care Plan for Non-bargaining Retirees, The GPU Nuclear, Inc. Health Care Plan for Non-bargaining Employees, Health Care Plan Summary Plan Description for GPU Non-bargaining Retirees (Retiring On or After January 1, 1996), Health Care Plan Summary Plan Description for GPU Non-bargaining Retirees (Retiring Before January 1, 1996), FirstEnergy Corp. Welfare Plan, First Restatement, Summary Plan Description for the FirstEnergy Health Care Plan, Summary Plan Description for the FirstEnergy Prescription Drug Plan, and Trust Agreement for GPU Companies Health Care Plan for Non-bargaining Retirees.

<sup>3</sup> *I/M/O the Verified Petition of Jersey Central Power & Light Company for Review and Approval Increases in, and Other Adjustments to, Its Rates and Charges for Electric Service, and for Approval of Other Proposed Tariff Revisions in Connection Therewith* at BPU Docket No. ER16040383 (“2016 Base Rate Proceeding”).

8. The Parties also agree that this Settlement Agreement is a comprehensive agreement among the Parties that fully resolves any and all issues pertaining to the eligibility criteria used by JCP&L in determining eligibility for the healthcare subsidy under Paragraph 26 of the Merger Order and Stipulation.

9. When the Company receives a final non-appealable BPU order approving this Settlement Agreement without material modification, the Company will then withdraw (without prejudice) its Complaint For Declaratory Judgement, Docket No. 3:17-cv-6481, which was filed on August 28, 2017 before the United States District Court for the District of New Jersey.<sup>4</sup>

### **Conclusion**

10. The Parties agree that this Settlement Agreement contains mutual balancing and interdependent clauses and is intended to be accepted and approved in its entirety. In the event any particular provision of this Settlement Agreement is not accepted and approved in its entirety by the Board, or is modified by a court of competent jurisdiction, then any Party aggrieved thereby shall not be bound to proceed with this Settlement Agreement and shall have the right, upon written notice to be provided to all other Parties within ten (10) days after receipt of any such adverse decision, to litigate all issues addressed herein to a conclusion. More particularly, in the event this Settlement Agreement is not adopted in its entirety, without modification, by the

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<sup>4</sup> FIRSTENERGY SERVICE COMPANY, *in its capacity as Plan Administrator the FirstEnergy Corp. Welfare Plan and FirstEnergy Health Care Plan*, FIRSTENERGY CORP., and JERSEY CENTRAL POWER & LIGHT COMPANY, Plaintiffs v. NEW JERSEY BOARD OF PUBLIC UTILITIES, RICHARD MROZ, PRESIDENT OF THE NEW JERSEY BOARD OF PUBLIC UTILITIES, JOSEPH L. FIORDALISO, COMMISSIONER OF THE NEW JERSEY BOARD OF PUBLIC UTILITIES, MARY-ANNA HOLDEN, COMMISSIONER OF THE NEW JERSEY BOARD OF PUBLIC UTILITIES, DIANNE SOLOMON, COMMISSIONER OF THE NEW JERSEY BOARD OF PUBLIC UTILITIES, UPENDRA CHIVUKULA, COMMISSIONER OF THE NEW JERSEY BOARD OF PUBLIC UTILITIES, IRENE KIM ASBURY, SECRETARY OF THE NEW JERSEY BOARD OF PUBLIC UTILITIES, *in their official capacities*, JOHN G. GRAHAM, and MICHAEL B. ROCHÉ, Defendants at Docket No. 3:17-cv-6481.

Board in an appropriate Order, or is modified by a court of competent jurisdiction, then any Party hereto is free, upon the timely provision of such written notice, to pursue its then available legal remedies with respect to all issues addressed in this Settlement Agreement, as though this Settlement Agreement had not been signed.

11. The Parties agree that this Settlement Agreement shall be binding on them for all purposes herein.

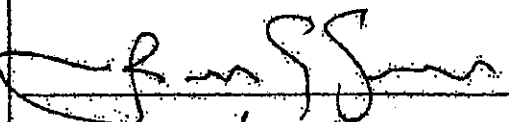
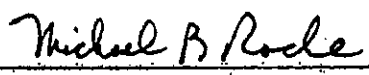


12. It is specifically understood and agreed that this Settlement Agreement represents a negotiated agreement and, except as otherwise expressly provided for herein:

- a. By executing this Settlement Agreement, no Party waives any rights it possesses under any prior stipulation or settlement agreement, except where the terms of this Settlement Agreement supersede such prior stipulation or settlement agreement.
- b. The contents of this Settlement Agreement shall not in any way be considered, cited or used by any of the undersigned Parties as an indication of any Party's position on any related or other issue litigated in any other proceeding or forum, except as specifically provided for herein or to enforce the terms of this Settlement Agreement.

13. This Settlement Agreement may be executed in any number of counterparts, each of which shall be considered one and the same agreement, and shall become effective when one or more counterparts have been signed by each of the Parties.

WHEREFORE, the Parties hereto have duly executed and do respectfully submit this Settlement Agreement to the Board, and recommend that the Board issue a Final Decision and Order adopting and approving this Settlement Agreement in its entirety, without

modification, in accordance with the terms hereof. The Parties further acknowledge that a Board Order approving this Settlement Agreement will become effective upon the service of said Board Order, or upon such date after the service thereof as the Board may specify, in accordance with N.J.S.A. 48:2-40.

<b>John Graham</b>  Dated: <u>04/06/18</u>	<b>Michael B. Roche</b>  Dated: <u>4/6/2018</u>
<b>John A. Hoffman,</b> By:  John A. Hoffman Wilentz, Goldman & Spitzer, P.A. Attorneys for Graham and Roche Dated: <u>04/06/18</u>	<b>Jersey Central Power &amp; Light Company</b> By:  Gregory Eisenstark, Esq. Windels Marx Lane & Mittendorf, LLP Attorneys for JCP&L Dated: <u>4/6/18</u>