



STATE OF NEW JERSEY
Board of Public Utilities
44 South Clinton Avenue, 1st Floor
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Trenton, New Jersey 08625-0350
www.nj.gov/bpu/

WATER

IN THE MATTER OF THE PETITION OF)	ORDER ON EMERGENCY RELIEF
MIDDLESEX WATER COMPANY FOR APPROVAL)	MOTION FOR INTERIM RATES
TO CHANGE THE LEVELS OF ITS PURCHASED)	
WATER ADJUSTMENT CLAUSE PURSUANT TO)	DOCKET NO. WR22030138
N.J.A.C. 14:9-7.1, ET SEQ.)	OAL DOCKET NO. PUC 02047-2022S

Parties of Record:

Jay L. Kooper Esq., Vice President and General Secretary, Middlesex Water Company
Brian O. Lipman, Esq., Director, New Jersey Division of Rate Counsel
Michael R. Burns, Esq. and Louis Rainone, Esq., Rainone Coughlin Minchello, LLC, on behalf of the Township of Marlboro and the Old Bridge Municipal Utilities Authority

BY THE BOARD:

BACKGROUND AND PROCEDURAL HISTORY

Middlesex Water Company (“Middlesex”, “Company”, “Petitioner”) is a corporation in the State of New Jersey with its principal offices located at 485C Route One South, Suite 400, Iselin, New Jersey, 08830. The Company serves approximately 61,000 retail water customers primarily in the eastern portion of Middlesex County, New Jersey. Middlesex’s retail customers are located in an approximate 55-mile radius in Woodbridge Township, the City of South Amboy, the Boroughs of Metuchen and Carteret, portions of the Township of Edison and the Borough of South Plainfield in Middlesex County, and a portion of the Township of Clark in Union County.

Middlesex also provides wholesale water under contract to the City of Rahway, the Townships of Edison and Marlboro, the Borough of Highland Park and the Old Bridge Municipal Utilities Authority. Middlesex also treats, stores and distributes pumping services to the Township of East Brunswick under contract. Additionally, the Company provides water service to approximately 300 customers in Fortescue, Downe Township, Cumberland County, New Jersey. This is referred to as the Bayview system.

In September 2021, Middlesex received noticed from the New Jersey Department of Environmental Protection (“NJDEP”) that groundwater from its Park Avenue Wellfield exceeded NJDEP’s limit for contamination.¹ On November 9, 2021, Middlesex, with NJDEP’s approval,

¹ NJDEP adopted a maximum contaminate level effective January 1, 2021.

stopped pumping water from the Park Avenue Wellfield and engaged in continuous testing to determine that shutdown was appropriate, until the completion of an enhanced treatment facility at the Park Avenue Wellfield, with enhancement expected to be completed in mid-2023. As a result, Middlesex has developed a plan with New Jersey American Water (“NJAW”) for incremental water purchases from NJAW above Middlesex’s minimum contractual requirement amount set forth in its current water purchase contract with NJAW.

On March 15, 2022, Middlesex filed a petition with the New Jersey Board of Public Utilities (“Board” or “BPU”) seeking to change the level of its Purchased Water Adjustment Clause (“PWAC”) to recover increased purchased water costs, together with deferred costs, PWAC related rate case expenses, and associated gross receipts and franchise taxes.

The matter was transmitted to the Office of Administrative Law (“OAL”) for hearings as a contested case, where it was assigned to Administrative Law Judge (“ALJ”) Jacob S. Gertsman. On April 27, 2022, the Township of Marlboro and the Old Bridge Municipal Utilities Authority (collectively, “Intervenors”) filed motions to intervene in this proceeding. ALJ Gertsman granted the motions on May 17, 2022.

On July 22, 2022, Middlesex filed a Motion for Emergency Relief (“Emergency Relief Motion”), for direct consideration by the Board, pursuant to N.J.S.A. 48:2-21.1 and N.J.A.C. 1:1-12.6. The Company’s motion requested that it be allowed to change the level of its PWAC on an interim basis, during the pendency of this proceeding, until a final Board decision resolving all issues in this proceeding was issued.

On August 1, 2022, the Intervenors filed a response opposing Middlesex’s motion (“Intervenors’ Opposition”).

On August 4, 2022, Middlesex filed its reply to the Intervenors response to its motion (“Middlesex’s Response”).

THE MOTION RECORD

MIDDLESEX

In its Emergency Relief Motion, Middlesex argued that implementing the PWAC effective in September satisfies all the requirements for an entity to receive emergency relief from the Board. Emergency Relief Motion at 9-10. Specifically, Middlesex argued that implementation of the PWAC would ensure that Middlesex’s customer base would avoid the irreparable harm that would occur if the implementation of the PWAC were delayed. Id. at 10-12. Middlesex further argued that the legal right for the Company to recover its water supply costs is settled law pursuant to the Board’s PWAC regulations and any changes to those regulations, by law, should happen in a rulemaking and not in a contested case. Id. at 12-13. Middlesex further stated that it was likely to succeed on the merits of the underlying claim in this PWAC proceeding, since there is no dispute as to the numbers underlying the costs, which the PWAC is intended to recover. Id. at 14-17. Finally, Middlesex argued that any party opposing the interim implementation of its PWAC would not suffer irreparable harm (or any harm other than possible timing) because they would be eligible to obtain a refund of any increased PWAC adopted here should they later successfully challenge this increased PWAC in an appropriate forum. Id. at 17-18.

As noted above, Middlesex argued that delaying the effective date of the PWAC would result in a significantly higher PWAC for both General Water Service customers and contact customers. Id.

at 11. By way of example, the Company stated that delaying the effective date of the PWAC from September 1, 2022 to November 1, 2022 would result in a significantly higher PWAC under Rate Schedule No. 1 from \$2.0455 to \$3.0556 per thousand cubic feet and an increase for contract customers under Rate Schedule No. 5 (including the Intervenor) from \$91.04 to \$136 per million gallons. Id. Middlesex believes that these significant increases would result in irreparable harm to its customers and that there can be no after-the-fact remedy in law or in equity; or where monetary damages cannot adequately restore a lost experience. Id. Middlesex noted that the PWAC, once effective, cannot be given retroactive effect. Id.; See, e.g. Toms River Water Co. v. N.J. Bd. Of Pub. Util. Commr's, 82 N.J. 201, 214 (1980). Middlesex thus contends that if the PWAC at issue here is not rendered effective September 1, 2022, the opportunity to implement a PWAC at the stipulated amount is lost forever, with no after-the-fact remedy to restore a PWAC from the far higher levels of a later effective date. Emergency Relief Motion at 11-12. Middlesex stated that this constitutes an example of irreparable harm as established by the New Jersey Supreme Court. Id.

INTERVENORS' OPPOSITION

The Intervenor argued that Middlesex has not made it clear that it is entitled to the relief sought and urged the Board to deny Middlesex's Emergency Relief Motion. Intervenor's Opposition at 3. The Intervenor argues that Middlesex has refused to provide any information with respect to the calculations underlying the proposed PWAC and has taken the position that none of the information sought by the Intervenor is relevant to a PWAC case. Id. at 2. The Intervenor further argued that Middlesex conveniently chooses to ignore the fact that if the PWAC is intended to act as a recovery mechanism for unexpected cost increases, that the total amount recoverable by Middlesex is a fixed amount. Id. at 8-10. The Intervenor argued that whether the amount must be recovered over the course of 4 months, 3 months or 2 months, it does not increase the total amount recovered by Middlesex to offset costs. Id. at 7-8. The Intervenor also argued that all parties have acknowledged that we are in unfamiliar and uncharted territory when it comes to the legal issues at play in this proceeding and that far from being a settled legal right, this is a case of first impression upon which a full hearing needs to take place before the Board can take any action. Id. at 2; 8-11. The Intervenor contended that while Middlesex has advanced the idea that there is no dispute as to the numbers underlying the costs, which the PWAC is intended to recover, Middlesex has also made it clear that they oppose any of the discovery requested by the Intervenor to challenge those numbers. Id. at 11-12. The Intervenor asserted that Middlesex is denying their ability to independently analyze their calculations or submit any information to an expert that can correlate the relationship between Middlesex's increased costs and the costs attributed to the Intervenor in the underlying base rate case. Id. at 12-13.

MIDDLESEX'S RESPONSE

Middlesex argued that it has demonstrated, by way of its Emergency Relief Motion and its accompanying certification, that the Company's customers will suffer irreparable harm if the PWAC increase is delayed. Middlesex's Response at 5-6. Middlesex further argued that the PWAC permits utilities to recover in rates – on a dollar for dollar basis – any increase or decrease in the cost of their purchased water above the base costs already allowed in rates by the Board. Id. at 6-9. Middlesex stated that since the actual purchased water costs for a particular period are not known until that period has ended, the PWAC rate is implemented based upon projected purchased water costs that must be trued up at the end of the chosen period. Id. Middlesex stated that this is precisely what happened here and that the Company incurred purchased water cost fluctuations as a result of both fully transparent and prudent actions. Id. Middlesex stated that the costs for the particular period were not known, until after the period had ended, because

the increased purchased water costs resulting from the temporary shutdown of the Park Avenue Wellfield were not known until after the conclusion of the base rate case and that the Park Avenue Wellfield was prudently taken out of service to address the NJDEP's concerns about water quality. Id. Middlesex further stated that the outcome of New Jersey American Water Company's PWAC were similarly not known at the conclusion of Middlesex' base rate case. Id. Middlesex stated that there are no exceptions in PWAC regulations that prohibit the recovery in a PWAC of fluctuations in the cost of purchased water as a result of a shutdown or a wellfield or other temporary period of alternative business operations. Id. at 8. Finally, Middlesex argued that seeking to change the PWAC regulations to suit the Intervenor's' position in the middle of contested case is improper and should be rejected. Id. at 14-16.

DISCUSSION AND FINDINGS

The Board has carefully considered Middlesex's Emergency Relief Motion, Intervenor's Opposition, and Middlesex's Response. The Board, pursuant to N.J.S.A. 48:2-21.1, "may, during the pendency of any hearing instituted by. . . [a] petition, in which the approval or fixing of just and reasonable . . . [rates] is in issue, or at any other time, negotiate and agree with any public utility for an adjustment [to the rates]." . These adjustment to the rates "may be for, or without, a specified limit of time. In no event shall any such adjustment be regarded as contractual. Such adjustment shall at all times be subject to change through the proceedings . . ." Id. Therefore, the Board may allow Middlesex to implement its proposed PWAC rates if it finds that Middlesex has established a basis to implement the rates, such as emergency relief.

Emergency relief can be granted by an agency when it is "authorized by law and where irreparable harm will result without an expedited decision granting or prohibiting some action or relief connected with a contested case, emergency relief pending a final decision on the whole contested case may be ordered upon the application of a party." N.J.A.C. 1:1-12.6. The Board has described emergency relief as being analogous to that of seeking injunctive relief², as set forth by the Supreme Court of New Jersey in Crowe v. DeGioia 102 N.J. 50 (1986), which states as follows:

- (1) the movant will suffer immediate and irreparable harm if the emergency relief is not granted;
- (2) the legal right underlying the movant's claim is well-settled;
- (3) there is a reasonable probability that the moving party will succeed on the merits; and
- (4) the balance of the equities in granting or denying relief weighs in the movant's favor.

The moving party must satisfy all the criteria to be granted emergency relief. The Board will discuss each prong in turn.

On the first prong, the Board **FINDS** that Middlesex's customer base will suffer irreparable harm if emergency relief is not granted. As Middlesex detailed in its pleading, the PWAC as a tariff cannot be retroactive and thus associated increase in costs will be compressed into a smaller timeframe which will result in a significantly higher cost paid by its customers. While Intervenor's

² In re the Petition of Public Service Electric & Gas Company for Approval of An Increase in Gas Rates and For Changes in the Tariff for Gas Rates and for Changes in the Service, N.J.B.P.U. No. 12, Gas Pursuant to N.J.S.A. 48:2-21 and 2-21.1, BPU Docket No. GR01050328, Order dated October 4, 2001.

claim that Middlesex will still recover the same amount no matter the timeframe, the Intervenor do not consider the effects of this compression of rates. Every month the PWAC is not in effect will lead to a significant increase of costs of the PWAC charged to Middlesex's customers due to the shortened recovery period. The fact that the PWAC is compressed into a shorter time frame also creates concerns of rate shock, a quick and large increase in rates. The Board has long taken into account the issue of rate shock and has had rates phased in over time to prevent large one-off increases.³ The Board **HEREBY DETERMINES** that Middlesex has satisfied the first prong to receive emergency relief.

The Board **FINDS** that Middlesex has also satisfied the second prong and that it is a well settled right that Middlesex is able to recover the costs it seeks under N.J.A.C. 14:9-7.1, et. seq. The PWAC was established to allow a recovery in rates, on a dollar for dollar basis, any increase or decrease in the cost of purchased water above the base cost already allowed in rates by the Board.⁴ In this regard, the Board essentially allows recovery of all prudently purchased water costs incurred by the Company. Pursuant to N.J.A.C. 14:9-7.1(a) "[a] PWAC ... allows a utility to include in the rates the costs of fluctuations of purchased water or purchased wastewater treatment, without the necessity of a full base rate case." The PWAC regulations do not contemplate a prohibition in recovery of fluctuations in the cost of purchased water as a result of the shutdown of a wellfield. See N.J.A.C. 14:9-7.1, et. seq. Any concerns over how Middlesex business operations is best addressed in its next rate case and any change to the PWAC regulations should take place in a rulemaking. The Board **HEREBY DETERMINES** that Middlesex has satisfied the second prong to receive emergency relief.

On the third prong, the Board **FINDS** that Middlesex has demonstrated that it will likely succeed on the merits of its case. The Intervenor have not raised any genuine or relevant issues of fact opposing the PWAC. Rather, the Intervenor claim whether Middlesex has acted prudently and whether the Intervenor should be allocated a portion of the PWAC. These claims are at best questions of prudence and rate design and are best resolved in a rate case and not a proceeding of limited scope. The Board **HEREBY DETERMINES** that Middlesex has satisfied the third prong to receive emergency relief.

On the fourth and last prong, the Board **FINDS** that the balance of equities favors Middlesex. As discussed in prong one above, implementing the PWAC sooner than later means the costs of the PWAC are recovered within a larger timeframe which means the amount charged is a significantly smaller amount. The Board also disagrees with the notion that not allowing the PWAC to go into effect is preserving the status quo because the PWAC, as discussed above, is supposed to recover on a dollar for dollar basis the costs incurred by Middlesex proposed in its Emergency Relief Motion. Additionally, if the Intervenor prevail in the docket, they can be refunded the difference paid with interest, but because rates cannot be retroactive, Toms River Water, 82 N.J. at 214, the compression of the time frame in which the rates can be recovered only becomes shorter. The Board **HEREBY DETERMINES** that Middlesex has satisfied the fourth prong to receive emergency relief.

³ See In The Matter Of The Petition Of Suez Water Arlington Hills Inc. For Approval of an Increase in Rate for Wastewater Service and Other Tariff Changes, BPU Docket No: WR16060510 (Nov. 13 2017) (describing the phasing in of rates as a countermeasure to rate shock).

⁴ In re the Petition of Middlesex Water Co., Docket No. WR96040307 1997 WL 40666, Order dated January 23, 1997.

Therefore, after a thorough review of Middlesex's Emergency Relief Motion, the Intervenor's opposition, and Middlesex's response, the Board **HEREBY FINDS** the following:

1. Middlesex and its customer base will suffer immediate and irreparable harm if the emergency relief is not granted;
2. The legal right underlying the Middlesex's claim is well-settled;
3. There is a reasonable probability that the Middlesex will succeed on the merits; and
4. The balance of the equities in granting or denying relief weighs in Middlesex's favor.

Based on the foregoing, the Board **HEREBY GRANTS** Middlesex's Emergency Relief Motion to increase its PWAC, on an interim basis, subject to refund, with interest, effective October 1, 2022. The Board **FURTHER ORDERS** that Middlesex track the temporary increase in the PWAC in a separate account until this matter is fully resolved.

The Board **HEREBY ORDERS** the Company to submit complete revised tariffs conforming to the terms and conditions of this Order prior to September 30, 2022.

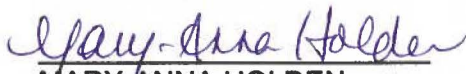
This Order shall be effective on September 29, 2022.

DATED: September 28, 2022

BOARD OF PUBLIC UTILITIES
BY:



JOSEPH L. FIORDALISO
PRESIDENT



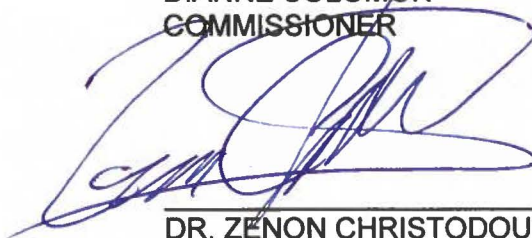
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COMMISSIONER



DIANNE SOLOMON
COMMISSIONER



ROBERT M. GORDON
COMMISSIONER



DR. ZENON CHRISTODOULOU
COMMISSIONER

ATTEST:



ROBERT M. GORDON
COMMISSIONER



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 PETITION OF MIDDLESEX WATER COMPANY FOR APPROVAL
TO CHANGE THE LEVELS OF ITS PURCHASED WATER ADJUSTMENT CLAUSE
PURSUANT TO N.J.A.C. 14:9-7.1, ET SEQ.

BPU DOCKET NO. WR22030138
OAL DOCKET NO. PUC 02047-2022S

SERVICE LIST

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