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March 16, 2023

VIA HARD COPY & ELECTRONIC DELIVERY

Hon. Patricia Caliguire, ALJ
Quakerbridge Plaza, Building 9
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**Re: I/M/O the Petition of New Jersey
American Water for a Determination
Concerning the Fenwick Water Tank
Pursuant to N.J.S.A. 40:55D-19
BPU Docket No.: WO22010004
OAL Docket NO.: PUC 00319-22**

Dear ALJ Caliguire:

Please accept for filing this letter brief in lieu of a more formal brief as the response from the Division of Rate Counsel ("Rate Counsel") to Intervenor Savas' Motion in Limine in the above referenced matter. Copies of this letter brief are being filed with each person on the service list by electronic mail only. One copy of the brief will be sent to your office via overnight mail. Thank you very much for your attention to this matter.

Preliminary Statement

The entirety of the testimony of Rate Counsel witness Howard Woods fits within the standard for admissibility of expert testimony. Mr. Woods' testimony is based on facts and data known to him prior to the evidentiary hearing, and is within the scope of

his specialized knowledge and/or training as a water utility engineer. At the Office of Administrative Law, administrative hearings are not bound by the New Jersey Rules of Evidence, and all relevant evidence is admissible, including the testimony of Mr. Woods. Despite Intervenor Paul Savas' claims, Mr. Woods' testimony is neither a net opinion nor a legal opinion. Intervenor's motion to exclude Mr. Woods' testimony should be denied.

Legal Standard

Our Supreme Court has ruled that in an administrative hearing, all relevant evidence is admissible. Delguidice v. New Jersey Racing Commission, 100 N.J. 79 (1985). Under the Uniform Administrative Procedure Rules, "relevant evidence" means "evidence having any tendency in reason to prove any material fact" and "material fact" means a "fact legally consequential to a determination of an issue in the case." N.J.A.C. 1:1-2.1. In the instant proceeding, all the data Mr. Woods reviewed and testified about, is relevant to the Board's consideration of whether the new Fenwick tank is reasonably necessary for the service, convenience or welfare of the public, or whether any alternative site is reasonably available to achieve a public benefit equivalent to that provided by the proposed Fenwick Tank. N.J.S.A. 40:55D-19.

For all proceedings at the Office of Administrative Law, evidence rulings shall be made to "promote fundamental principles of fairness and justice and to aid in the ascertainment of truth." N.J.A.C. 1:1-15.1 (b). More specifically, N.J.A.C. 1:1-15.1 (c) provides:

Parties in contested cases shall not be bound by statutory or common law rules of evidence or any formally adopted in the New Jersey Rules of Evidence except as specifically provided in these rules. *All relevant evidence is admissible except as otherwise provided herein.* A judge may, in his or her discretion, exclude any evidence if its probative value is substantially outweighed by the risk that its admission will either:

1. Necessitate undue consumption of time; or
2. Create substantial danger of undue prejudice or confusion.
(emphasis added).

This regulation shows that the rules of evidence are relaxed in an administrative hearing.

Admission of evidence before the Office of Administrative Law is also governed by N.J.A.C. 1:1-15.9, which states that:

If a witness is testifying as an expert, testimony of that witness in the form of opinions or inferences is admissible if such testimony will assist the judge to understand the evidence or determine a fact in issue and the judge finds the opinions or inferences are:

1. Based on facts and data perceived by or made known to the witness at or before the hearing; and
2. Within the scope of the special knowledge, skill, experience or training possessed by the witness.

N.J.A.C. 1:1-15.9(b).

Our courts have held that “[t]he rules governing an administrative tribunal permit an expert witness to testify if the testimony will assist the ALJ to understand the evidence or determine a fact in issue, and the expert's opinions are based in facts or data.” K.S. v. Bd. of Trustees, 2021 N.J. Super. Unpub. LEXIS 2494 (2021).

The testimony of Mr. Woods is clearly admissible based on the standard for admissibility in an administrative hearing. Mr. Woods testified based on facts known to him before the hearing. His testimony was entirely within the scope of his specialized water utility engineering knowledge. Mr. Woods has worked as a water utility engineer for more than forty years, more than twenty of which have been in a role as a consultant. His testimony is relevant to whether Petitioner should be given approval under N.J.S.A. 40:55D-19. Barring confusion or undue consumption of time, all relevant evidence such as Mr. Woods’ testimony should be admitted. Mr. Woods’ testimony created no

confusion or undue consumption of time, is certainly relevant to the standards set forth by N.J.S.A. 40:55D-19, and is therefore admissible. N.J.A.C. 1:1-15.1 (c). Under the standards set forth by our courts and by regulation, the entirety of Mr. Woods' direct and rebuttal testimony is admissible.

Argument

Intervenor's Argument That Mr. Woods' Testimony Is Flawed Simply Because it is Similar to Mr. Shields' Testimony Has No Basis in The Law.

Without saying why this is a problem, Intervenor Savas makes the irrelevant assertion that Mr. Woods' testimony "parrots" the testimony of New Jersey American Water Company's ("NJAWC") witness Donald Shields ("Mr. Woods' engineering testimony merely echoes that of Mr. Shields in virtually all material respects. He parrots Mr. Shields' testimony that the existing tank is too low in elevation to maintain even minimum service pressures for routing water service and public fire protection for customers in the service area that includes Mendham Borough, Mendham Township and Bernardsville." (Savas Motion in Limine 7-8)). There is no basis for criticizing Mr. Woods' testimony simply because he reached the same conclusion on certain topics as Mr. Shields. Intervenor would surely not criticize Mr. Woods' testimony if Mr. Woods agreed with Intervenor's expert witnesses. Intervenor only makes these characterizations because Mr. Woods disagrees with Intervenor's expert witnesses. Furthermore, Intervenor makes the absurd assertion that simply because one witness agrees with the testimony of a second witness, the first witness's testimony should be thrown out. Clearly that cannot be the case, and such an argument should be rejected.

Mr. Woods' Testimony is Not a Net Opinion.

Intervenor attempts to discredit Mr. Woods' testimony by claiming that portions of his testimony constitute a net opinion. This is a baseless argument that should be rejected. Mr. Woods offered his opinion based on a review of a number of documents and based on his experience of over forty years in the water utility field.

“An expert may not provide an opinion at trial that constitutes ‘mere net opinion.’” I/M/O Civil Commitment of A.Y., 458 N.J. Super. 147, 169 (App. Div. 2019), quoting Davis v. Brickman Landscaping, Ltd., 219 N.J. 395, 410 (2014). The net opinion rule “bars admission ‘of an expert’s conclusions that are not supported by factual evidence or other data.’” Id., quoting Townsend v. Pierre, 221 N.J. 69, 53-54 (2015). A net opinion is “a bare conclusion unsupported by factual evidence.” Ehrlich v. Sorokin, 451 N.J. Super. 119, 134 (App. Div. 2017) (quoting Creanga v. Jardal, 185 N.J. 346, 360 (2005)). “To avoid a net opinion, the expert must “‘give the why and wherefore’ that supports the opinion.” Id., quoting Townsend, supra, 221 N.J. at 54. Nevertheless, the net opinion rule “does not require experts to organize or support their opinions in a specific manner ‘that opposing counsel deems preferable.’” I/M/O Civil Commitment of A.Y., supra, 458 N.J. Super. at 169, quoting Townsend, supra, 221 N.J. at 54. Accordingly, “[a]n expert’s failure ‘to give weight to a factor thought important by an adverse party does not reduce his testimony to inadmissible net opinion if he otherwise offers sufficient reasons which logically support his opinion.’” Id., quoting Townsend, supra, 221 N.J. at 54.

In asserting that Mr. Woods' testimony is net opinion, Intervenor makes several claims that are either irrelevant or untrue. For one, Intervenor claims that Mr. Woods'

testimony is based exclusively on the expert testimony of Mr. Shields. This is simply untrue. Mr. Woods specifically testified as follows, that in performing his expert role:

I reviewed the Company's initial filing and responses to discovery requests in this matter. I also reviewed the Company's supplemental testimony provided after the initial filing. In addition, I also reviewed N.J.S.A. 40:55D-19 and various New Jersey Department of Environmental Protection and New Jersey Board of Public Utilities rules applicable to the design and construction of water supply facilities needed to provide safe, adequate and proper service. (Woods Direct p. 3-4).

Mr. Woods' direct testimony disproves Intervenor's erroneous claim that Mr. Wood's testimony is based exclusively on the testimony of Mr. Shields. Clearly Mr. Woods reviewed a number of other documents in forming his expert opinion. Intervenor's specious argument to the contrary should be disregarded.

Intervenor further asserts that Mr. Woods "performed no modeling or any independent analysis" in forming his expert opinion. (Motion in limine p.21). This is also untrue, given that Mr. Woods' direct and rebuttal testimonies are replete with his expert, independent analysis. In his direct testimony, Mr. Woods testified on such topics as the existing tank and land use, the proposed tank and land use, and alternative tank sites. In his rebuttal testimony, Mr. Woods testified on the source of supply, and available storage. Clearly Mr. Woods performed an independent analysis on a wide variety of topics, all with the goal of evaluating the petition under the criteria delineated in N.J.S.A. 40:55D-19. As our courts have stated, "[a]n expert's failure 'to give weight to a factor thought important by an adverse party does not reduce his testimony to inadmissible net opinion if he otherwise offers sufficient reasons which logically support his opinion.'" Id., quoting Townsend, supra, 221 N.J. at 54. Although "modeling" appears to be important to Intervenor, our courts have held that a lack thereof does not transform Mr. Woods' opinion into a net opinion.

Mr. Woods' Testimony is Not a Legal Opinion.

Intervenor further attempts to discredit Mr. Woods' testimony by claiming that portions of his testimony constitute a legal opinion. This is a meritless argument designed to attack testimony with which Intervenor does not agree. Mr. Woods' testimony is admissible because experts are permitted to render opinions on the ultimate issues in a case and because any relevant evidence is admissible at the OAL.

The New Jersey Rules of Evidence explicitly state that, "[t]estimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact." N.J.R.E. 704. Mr. Woods' testimony is not objectionable because it analyzes issues to be decided by the ALJ, namely whether the new tank is reasonably necessary for the service, convenience or welfare of the public, or whether any alternative site is reasonably available to achieve a public benefit equivalent to that provided by the proposed Fenwick Tank. N.J.S.A. 40:55D-19. These are the ultimate issues to be decided by the ALJ, and in fact Mr. Woods' testimony identifies them as the specific topics he was engaged to analyze. (HJW 3.)

The Rules further explain that, "[i]f scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise." N.J.R.E. 702. Mr. Woods' education and lengthy career as a civil engineer specializing in water systems qualifies him as an expert. He is therefore permitted to testify in the form of an opinion as to scientific, technical, or other specialized knowledge that will assist the ALJ in understanding evidence or determining an issue. Rather than rendering a legal opinion,

Mr. Woods' testimony does just this. Mr. Woods forms opinions regarding scientific, technical, and specialized knowledge, and offers those opinions to assist the ALJ in understanding evidence and in determining the ultimate issues. For example, he states, "It is my opinion that the proposed use of the land is necessary to maintain reliable service for the general public." (HJW 5). Mr. Woods further explains that, "It is my opinion that these [flow equalization and pressure moderation] are fundamental characteristics of safe, adequate, and proper water service." (HJW 9). Mr. Woods' opinions on the relation of flow equalization and pressure moderation to safe and adequate service are opinions regarding scientific, technical, and specialized knowledge and will assist the ALJ in understanding evidence and making determinations on the issues. The fact that the ultimate issues in this case are drawn from a statute does not automatically render Mr. Woods' opinions "legal opinions." Additionally, it is inappropriate to remove portions of Mr. Woods' testimony that relate his scientific and technical knowledge to the ultimate issues.

Lastly, Mr. Woods' testimony is admissible in its entirety under the relaxed OAL practices of evidence. In contested cases like this one, all relevant evidence is admissible except when, in a judge's discretion, he or she determines that the probative value of that evidence is *substantially* outweighed by the risk that it will either require an excessive amount of time or create a *substantial* danger of undue prejudice or confusion. N.J.A.C. 1:1-15.1 (c) (emphasis added). There is nothing in Mr. Woods' testimony that would require an excessive amount of time, particularly because Mr. Woods reaches similar conclusions as other experts. For the same reason, there is also no danger of prejudice or confusion, let alone a substantial risk of either.

Responses to Specific objections to Mr. Woods' direct testimony

Question 6 – N.J.R.E. 704 allows an expert witness to render an opinion on the ultimate issues of a case. *Jacobson v. St. Peter's*, 128 NJ 475, 497 (1992); *State v. Perez*, 218 N.J. Super. 478, 483 (1987).

Question 7-9 – Intervenor's claim without any support that Mr. Woods did not review or consider the record before the Board of Adjustment or the Board of Adjustment decision is incorrect. Mr. Woods reviewed the transcripts from the Board of Adjustment and its decision.

Question 10- The response has a proper foundation, as Mr. Woods explains his reasoning for almost a page. It is not a net opinion, but instead has significant reasoning behind it. Furthermore, N.J.R.E. 704 allows an expert witness to opine on the ultimate issues of a case.

Question 16 – Mr. Woods gives his reasoning in the answer and therefore his response is not net opinion. There is a proper foundation because Mr. Woods has an extensive CV in the field of water utility engineering.

Question 20 – Mr. Woods can testify to his opinion of what an NJAC section requires. It is not a legal opinion but rather an expert engineering opinion.

Question 21 – The question concerns pressure requirements. Mr. Woods has been dealing with the design of water distribution systems for over forty years, and there his response has a clear foundation. Mr. Woods is testifying based on his professional experience in engineering and does not constitute a legal opinion.

Question 22 – Mr. Woods has over forty years of experience designing water distribution systems, and therefore this question and answer have a proper foundation. This answer sets forth Mr. Woods' opinion on what this section of the administrative code says, based on his expert engineering opinion. There is no "impermissible legal opinion."

Question 23 – This question is within the purview of Mr. Woods' expert experience in designing water distribution systems, and therefore has a proper foundation. Furthermore, Mr. Woods cites to two sources to support his answer, one being the Borough of Bernardsville Board of Adjustment hearing of April 5, 2021. There is no net opinion here, but rather an answer based on Mr. Woods' experience and the cited sources.

Question 24 – The question and answer have proper foundation because they are based on Mr. Woods' expertise in water utility engineering. For this same reason, the question and answer do not constitute a net opinion.

Question 26 – This is not a net opinion. In fact Mr. Woods cites to the factual data in the Direct Testimony of Mr. Shields in forming his opinion.

Question 29 – The question and answer have proper foundation because they are based on Mr. Woods’ expertise in water utility engineering. As set forth above, an expert witness is permitted to testify on the ultimate issues of a case, as Mr. Woods does here. Mr. Woods’ testimony explains his reasoning for the conclusion he reaches, and therefore is not net opinion. Furthermore, Mr. Woods is testifying based on his role as an expert engineering witness and never claims to be an attorney offering legal testimony.

Question 30 – Mr. Woods is testifying based on his understanding of the search for alternate tank sites. Mr. Woods is testifying based on his experience over forty years of conducting similar searches. Therefore there is no lack of foundation, or improper legal or net opinion being given.

Question 31 – Mr. Woods is testifying based on his forty years of experience in water utility engineering. Therefore there is a proper foundation to the question and answer. His answer is also based on his over twenty years of experience working for a water utility and acquiring land for building water tanks and other structures. Mr. Woods’ testimony is neither a net opinion nor a legal opinion.

Question 32 – Mr. Woods is permitted to offer testimony on the ultimate issues of the case, N.J.R.E. 704, Jacober, supra, 128 at 497. This is not impermissible “legal” testimony. This question and answer does not lack foundation given Mr. Woods’ extensive experience with this subject matter, nor does it constitute net opinion.

Question 33 - Mr. Woods is permitted to offer testimony on the ultimate issues of the case, N.J.R.E. 704, Jacober, supra, 128 at 497. This testimony is also not net opinion. It is based on the previous seventeen pages of testimony.

Specific Objections to Mr. Woods’ rebuttal testimony.

Question 5 – Already stricken from the record by Judge Caliguire’s order dated December 14, 2022, subject to Board’s review of the Initial Decision.

Question 6-9 – Already stricken from the record by Judge Caliguire’s order dated December 14, 2022, subject to the Board’s review of the Initial Decision.

Question 13 - Mr. Woods answered the question on the basis of his more than forty year career working as a water utility engineer including working with the NJDEP for all of those years. The testimony is not speculative, but is rather based on his expert opinion. Expert witness testimony under N.J.R.E. 702 is very broad.

Question 15. The response does not lack foundation or constitute a net opinion. N.J.R.E. 702 provides that an individual qualified as an expert by knowledge, skill, experience, training or education may testify as an opinion expert. Mr. Woods qualifies as expert based on every single one of these criteria. This question involves the issue of water pressure, which is within his wheelhouse. His testimony is not a net opinion.

Question 17-20. This response does not lack foundation or constitute net opinion. Mr. Woods qualifies as an expert. N.J.R.E. 702 provides that an individual qualified as an expert by knowledge, skill, experience, training or education may testify as an opinion expert. Mr. Woods qualifies as expert based on every single one of these criteria. These questions involve the issue of water storage, which is within his wheelhouse. His testimony is not a net opinion.

Question 21. For the reasons stated in previous questions, this testimony has a proper foundation and does constitute net opinion. Mr. Woods is an expert witness familiar with most if not all aspects of water utility engineering. This particular question describes water service to a small area in the Bernardsville/Mendham area. Mr. Woods' testimony is expert opinion testimony. Mr. Woods is qualified to testify as a witness on this topic.

Question 22. Just like expert witnesses disagree with one another frequently, they are also free to agree with each other, which is what Mr. Woods does here. There is nothing wrong with expert witnesses agreeing with each other.

Question 23. Mr. Woods is certainly qualified to calculate and testify about the useful storage volume of a water tank. This is within his area of expertise as a water utility engineer. There is no lack of a proper foundation or net opinion. N.J.R.E. 702 is very liberal, and Mr. Woods' testimony is certainly admissible under the rule.

Question 24. This response does not lack proper foundation or qualify as a net opinion. Mr. Woods has been a water utility engineer for more than forty years, and is qualified to testify to the efficiency of water flows, which is the topic of this question.

Question 25. The ultimate question in this case – and what this question involves – is whether the Petitioner should be afforded relief pursuant to N.J.S.A. 40:55D-19. Mr. Woods is permitted to answer this question, not as a legal expert but as a water utility engineering expert. See N.J.R.E. 704 and Jacobson, *supra*, 128 NJ at 497.

Conclusion

For all of the reasons stated above, Intervenor Savas' motion in limine should be denied.

Respectfully submitted,

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By: 

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NEW JERSEY AMERICAN WATER
FOR A DETERMINATION
CONCERNING THE FENWICK
WATER TANK PURSUANT TO
N.J.S.A. 40:55D-19

BPU DOCKET NO.: WO22010004

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